

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

Annual Report

December 1975

CALIFORNIA LAW REVISION COMMISSION  
Stanford Law School  
Stanford, California 94305

# THE CALIFORNIA LAW REVISION COMMISSION

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## NOTE

This pamphlet begins on page 2001. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 13 of the Commission's *Reports, Recommendations, and Studies*.

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# **CALIFORNIA LAW REVISION COMMISSION**

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## SUMMARY OF WORK OF COMMISSION

During 1975, the Law Revision Commission was engaged in two principal tasks:

- (1) Presentation of its legislative program to the Legislature.
- (2) Work on various assignments given to the Commission by the Legislature.

At the 1975 session, two resolutions and 21 bills were introduced upon recommendation of the Commission. Both of the resolutions were adopted; 17 of the bills were enacted; one bill was held over to the 1976 session; and three bills were held in committee. The 17 bills enacted in 1975 (which added, amended, or repealed approximately 750 sections) dealt with a wide variety of subjects: A new comprehensive eminent domain law was enacted. Also enacted were bills relating to evidence; modification of contracts; escheat of amounts payable on travelers checks, money orders, and similar instruments; payment of judgments by local public entities; and out-of-court views by judge or jury.

The Commission plans to submit 10 recommendations to the 1976 session. These recommendations deal with partition of real and personal property, attachment, turnover orders under the claim and delivery law, relocation assistance by private condemnors, condemnation for byroads and utility easements, admissibility of duplicates in evidence, transfer of out-of-state trusts to California, undertakings for costs, liquidated damages, and oral modification of contracts.

During 1976, the Commission plans to devote the major portion of its time and resources to the study of nonprofit corporation law. Other topics that will be under active study during 1976 include creditors' remedies; condemnation law and procedure; evidence; and child custody, adoption, guardianship, and related matters.

During 1975, the Commission was engaged in a continuing study, required by Section 10331 of the Government Code, to determine whether any statutes of the state have been held by the Supreme Court of the United States or by the Supreme Court of California to be unconstitutional or to have been impliedly repealed.

During 1975, the Commission held nine separate meetings, consisting of 21 days of working sessions.



**CALIFORNIA LAW REVISION COMMISSION**

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

MARC SANDSTROM  
*Chairman*

JOHN N. McLAURIN  
*Vice Chairman*

SENATOR ROBERT S. STEVENS  
ASSEMBLYMAN ALISTER McALISTER  
JOHN J. BALLUFF  
JOHN D. MILLER  
THOMAS E. STANTON, JR.  
HOWARD R. WILLIAMS  
GEORGE H. MURPHY  
*Ex Officio*

December 1, 1975

*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 1975.

I am pleased to report that 17 bills and two concurrent resolutions were enacted to implement the Commission's recommendations during the 1975 legislative session. Eleven of the bills represented the Commission's recommendations to revise, reform, and improve the law of eminent domain, thereby culminating several years of intensive effort on the part of the Commission.

I would also like to give special recognition to Assemblyman Alister McAlister who carried the enabling eminent domain legislation and other bills recommended by the Commission and to Senator Robert S. Stevens and Senator Alfred H. Song who carried bills implementing other Commission recommendations.

Respectfully submitted,  
MARC SANDSTROM  
Chairman



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# ANNUAL REPORT FOR THE YEAR 1975

## INTRODUCTION

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

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

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

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

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

The Commission may study only topics that the Legislature by concurrent resolution authorizes it to study. The Commission now has an agenda of 22 topics, including five new topics added by the Legislature at the 1975 session.

Commission recommendations have resulted in the enactment of legislation affecting 4,057 sections of the California statutes: 1,615 sections have been added, 853 sections amended, and 1,589 sections repealed.

## LEGISLATIVE HISTORY OF RECOMMENDATIONS SUBMITTED TO 1975 LEGISLATIVE SESSION

Twenty-one bills and two concurrent resolutions were introduced to effectuate the Commission's recommendations during 1975.<sup>1</sup> The concurrent resolutions were adopted, 17 of the bills were enacted, one bill was held over for hearing in 1976, and three bills were not enacted.

### Eminent Domain

Eleven bills—Assembly Bills 11, 124, 125, 126, 127, 128, 129, 130, 131, 266, and 278—were introduced by Assemblyman Alister McAlister to effectuate the Commission's recommendations on this subject. See *Recommendation Proposing the Eminent Domain Law*, 12 Cal. L. Revision Comm'n Reports 1601 (1974). A number of substantive, technical, and clarifying amendments were made before the bills were enacted. The Assembly Judiciary Committee and the Senate Judiciary Committee adopted special reports revising the official Comments. See *Report of Assembly Committee on Judiciary on Assembly Bills 11, 124, 125, 126, 127, 128, 129, 130, 131, 266, and 278*, Assembly J. (May 19, 1975) at 5183; *Report of Senate Committee on Judiciary on Assembly Bills 11, 124, 125, 126, 127, 128, 129, 130, 131, 266, and 278*, Senate J. (Aug. 14, 1975) at 6537.

Assembly Bill 11, which proposed the enactment of a new, comprehensive eminent domain statute, was enacted as Chapter 1275 of the Statutes of 1975. For reasons of economy, the amendments to the bill are not detailed here; the Commission plans to publish, in cooperation with the California Continuing Education of the Bar, a pamphlet containing the statute as enacted with the official Comments.

Assembly Bills 266 (state agency condemnation) and 278 (conforming amendments to codified sections) were enacted as Chapters 1239 and 1240 of the Statutes of 1975. A number of substantive, technical, and clarifying amendments were made to the bills before they were enacted. These amendments likewise are not detailed here because they will be included in the

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<sup>1</sup> The Commission had planned to submit recommendations to the 1975 Legislature relating to inverse condemnation (claims presentation requirement), liquidated damages, prejudgment attachment, and wage garnishment procedure. See Annual Report (December 1974), 12 Cal. L. Revision Comm'n Reports at 512-513 (1974). However, the Commission was unable to prepare these recommendations in time to permit their submission in 1975. The Commission plans to submit two of the recommendations to the 1976 Legislature. See "1976 Legislative Program" *infra*.

pamphlet containing the statute as enacted with official Comments.

Assembly Bills 124, 125, 126, 127, 128, 129, 130, and 131, making conforming changes in special district statutes, were enacted as Chapters 584, 581, 585, 1176, 582, 586, 587, and 1276, respectively, of the Statutes of 1975. A few technical amendments were made before the bills were enacted. For revisions made in the Comments to various sections of these bills, see the extract from the Assembly and Senate Committee Reports set out as Appendix IV and Appendix V to this Report.

### **Oral Modification of Written Contracts**

Two bills were introduced by Assemblyman McAlister at the 1975 session to effectuate the recommendation of the Commission on this subject. See *Recommendation and Study Relating to Oral Modification of Written Contracts*, 13 Cal. L. Revision Comm'n Reports 301 (1976).

Assembly Bill 74, which became Chapter 7 of the Statutes of 1975, was introduced to effectuate the Commission's recommendation concerning Section 2209 of the Commercial Code. The bill was enacted as introduced.

Assembly Bill 75 was introduced to effectuate the Commission's recommendations concerning Section 1698 of the Civil Code. The bill was not enacted; it was held in the Assembly Judiciary Committee. The Commission plans to submit a revised recommendation on this subject to the 1976 Legislature. See *Recommendation Relating to Oral Modification of Contracts* (November 1975), published as Appendix XIII to this Report.

### **Payment of Judgments Against Local Public Entities**

Senate Bill 607, which became Chapter 285 of the Statutes of 1975, was introduced by Senator Alfred H. Song to effectuate the recommendation of the Commission on this subject. See *Recommendation Relating to Payment of Judgments Against Local Public Entities*, 12 Cal. L. Revision Comm'n Reports 575 (1974). The bill was enacted as introduced.

### **View by Trier of Fact in a Civil Case**

Senate Bill 294, which became Chapter 301 of the Statutes of 1975, was introduced by Senator Robert S. Stevens to effectuate the recommendation of the Commission on this subject. See *Recommendation Relating to View by Trier of Fact in a Civil Case*, 12 Cal. L. Revision Comm'n Reports 587 (1974); *Report of Senate Committee on Judiciary on Senate Bill 294*, Senate J. (March 13, 1975) at 1852, reprinted as Appendix VI to this Report. Assembly Bill 294 was amended before enactment to

revise the language of subdivision (b) of proposed Section 651 of the Code of Civil Procedure.

### **Evidence**

Two bills relating to evidence were introduced in 1975.

**Good cause exception to physician-patient privilege.** Assembly Bill 73, which became Chapter 318 of the Statutes of 1975, was introduced by Assemblyman McAlister to effectuate the recommendation of the Commission on this subject. See *Recommendation Relating to the Good Cause Exception to the Physician-Patient Privilege*, 12 Cal. L. Revision Comm'n Reports 601 (1974); *Report of Assembly Committee on Judiciary on Assembly Bill 73*, Assembly J. (Feb. 27, 1975) at 1352, reprinted as Appendix VII to this Report. Before enactment, Assembly Bill 73 was amended to revise Section 999 of the Evidence Code to read: "There is no privilege under this article as to a communication relevant to an issue concerning the condition of the patient in a proceeding to recover damages on account of the conduct of the patient if good cause for disclosure of the communication is shown."

**Admissibility of copies of business records in evidence.** Assembly Bill 974 was introduced by Assemblyman McAlister to effectuate the recommendation of the Commission on this subject. See *Recommendation Relating to Admissibility of Copies of Business Records in Evidence* (January 1975), published as Appendix III to this Report. The bill was not enacted; it was held in the Assembly Judiciary Committee.

### **Escheat—Travelers Checks, Money Orders, and Similar Instruments**

Assembly Bill 192, which became Chapter 25 of the Statutes of 1975, was introduced by Assemblyman McAlister to effectuate the recommendation of the Commission on this subject. See *Recommendation Relating to Escheat of Amounts Payable on Travelers Checks, Money Orders, and Similar Instruments*, 12 Cal. L. Revision Comm'n Reports 609 (1974). Assembly Bill 192 was amended before enactment to delete the recommended amendments to Code of Civil Procedure Sections 1530 and 1532. Other technical amendments were made.

### **Creditors' Remedies**

Two bills were introduced on this subject in 1975.

**Wage garnishment exemptions.** Assembly Bill 90 was introduced by Assemblyman McAlister to effectuate the

Commission's recommendation concerning this subject. See *Recommendation Relating to Wage Garnishment Exemptions*, 12 Cal. L. Revision Comm'n Reports 901 (1974). The bill was not enacted. It passed the Assembly but was held in the Senate Judiciary Committee.

**Prejudgment attachment.** Assembly Bill 919, which was introduced by Assemblyman McAlister, was amended to delay the operative date of the new attachment law (Chapter 1516 of the Statutes of 1974) from January 1, 1976, to January 1, 1977, and to continue the operative effect of Chapter 550 of the Statutes of 1972 (which revises the attachment law) from December 31, 1975, to December 31, 1976.

Assembly Bill 919, which became Chapter 200 of the Statutes of 1975, was recommended by the Law Revision Commission. The Commission plans to submit a number of amendments—mostly technical—to the new attachment law for enactment by the 1976 Legislature. If the operative date of the new attachment law had not been delayed, lawyers and others would have had to study and become familiar with the new law in 1976 and then to study a substantial number of changes one year later. Also, the delayed operative date avoided the cost of reprinting revised forms to reflect the amendments that will be proposed at the 1976 session. For the recommendation on this subject to be submitted to the 1976 Legislature, see *Recommendation Relating to Revision of the Attachment Law* (November 1975), to be reprinted in 13 Cal. L. Revision Comm'n Reports 801 (1976).

### **Partition of Real and Personal Property**

Assembly Bill 1671 was introduced by Assemblyman McAlister to effectuate the recommendation of the Commission on this subject. See *Recommendation Relating to Partition of Real and Personal Property*, 13 Cal. L. Revision Comm'n Reports 401 (1976). The bill was pending in the Assembly when the Legislature recessed in September 1975. It will be set for hearing by the Assembly Judiciary Committee when the Legislature meets in 1976.

### **Resolutions Approving Topics for Study**

Assembly Concurrent Resolution No. 17, introduced by Assemblyman McAlister and adopted as Resolution Chapter 15 of the Statutes of 1975, authorizes the Commission to continue its study of topics previously authorized for study and to study five new topics (out-of-state trusts, class actions, offers of compromise, discovery in civil actions, and possibilities of

reverter and powers of termination). The resolution also approved the removal of one topic (right of nonresident aliens to inherit) from the Commission's calendar of topics.

Assembly Concurrent Resolution No. 86, introduced by Assemblyman McAlister and adopted as Resolution Chapter 82 of the Statutes of 1975, authorizes the Commission to study a new topic and related matters—whether a Marketable Title Act should be enacted in California and the related topics 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.

## 1976 LEGISLATIVE PROGRAM

The Commission plans to submit the following recommendations to the 1976 Legislature:

(1) *Recommendation Relating to Partition of Real and Personal Property* (January 1975), to be reprinted in 13 Cal. L. Revision Comm'n Reports 401 (1976). Assembly Bill 1671 was introduced at the 1975-76 Regular Session to effectuate this recommendation.

(2) *Recommendation Relating to Revision of the Attachment Law* (November 1975), to be reprinted in 13 Cal. L. Revision Comm'n Reports 801 (1976).

(3) *Recommendation Relating to Turnover Orders Under the Claim and Delivery Law* (June 1975), published as Appendix VIII to this Report.

(4) *Recommendation Relating to Relocation Assistance by Private Condemnors* (October 1975), published as Appendix IX to this Report.

(5) *Recommendation Relating to Condemnation for Byroads and Utility Easements* (October 1975), published as Appendix X to this Report.

(6) *Recommendation Relating to Transfer of Out-of-State Trusts to California* (October 1975), published as Appendix XI to this Report.

(7) *Recommendation Relating to Admissibility of Duplicates in Evidence* (November 1975), published as Appendix XII to this Report.

(8) *Recommendation Relating to Oral Modification of Contracts* (November 1975), published as Appendix XIII to this Report.

(9) *Recommendation Relating to Liquidated Damages* (November 1975), published as Appendix XIV to this Report.

(10) *Recommendation Relating to Undertakings for Costs* (November 1975), to be reprinted in 13 Cal. L. Revision Comm'n Reports 901 (1976).

## REPORT ON STATUTES REPEALED BY IMPLICATION OR HELD UNCONSTITUTIONAL

Section 10331 of the Government Code provides:

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

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

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

(2) One decision of the Supreme Court of California indicates that a statute of this state has been repealed by implication.<sup>3</sup> *Gould v. Grubb*,<sup>4</sup> in holding unconstitutional a charter provision of the City of Santa Monica giving preferential ballot position to incumbents seeking reelection, noted that "the state statutes providing preferential ballot position to incumbents have been repealed" by Government Code Section 89000,<sup>5</sup> which forbids such preference.<sup>6</sup> Preferential ballot position has been afforded to incumbents by Elections Code Sections 10202 (state, district, or county elections) and 22870 (municipal elections). Since these

<sup>1</sup> This study has been carried through 95 S. Ct. 2683 (Aug. 1, 1975) and 15 Cal.3d 418 (Nov. 13, 1975).

<sup>2</sup> *Faretta v. California*, 422 U.S. 806 (1975), reversed a California grand theft conviction in which the trial court had refused the defendant's request to represent himself. The Court held that there was a constitutional right of self-representation. California by statute denies the right of self-representation in capital cases. See Penal Code §§ 686(2), 686.1, 859, 987. See also Cal. Const., Art. I, § 13 (empowering clause). *Faretta*, a noncapital case, did not hold these sections unconstitutional, but that is the clear import of the decision.

<sup>3</sup> Repeal by implication occurs when a statutory enactment, although making no express reference to a prior statute on the same subject, is clearly inconsistent with the prior statute and cannot be reconciled with it. See 45 Cal. Jur.2d, *Statutes* §§ 77-79, at 595-598 (1958).

<sup>4</sup> 14 Cal.3d 661, 536 P.2d 1337, 122 Cal. Rptr. 377 (1975).

<sup>5</sup> *Gould v. Grubb*, 14 Cal.3d 661, 667 n.5, 536 P.2d 1337, 1340 n.5, 122 Cal. Rptr. 377, 380 n.5 (1975).

<sup>6</sup> Government Code Section 89000 provides: "Any provision of law to the contrary notwithstanding, the order of names of candidates on the ballot in every election shall be determined without regard to whether the candidate is an incumbent." This section was enacted as part of the "Political Reform Act of 1974." See Govt. Code § 81000, a statewide initiative measure (Proposition 9) approved at the June 4, 1974, primary election, effective January 7, 1975.

sections are inconsistent with Government Code Section 89000, they are repealed by implication.<sup>7</sup>

(3) Eight decisions of the Supreme Court of California held statutes of this state unconstitutional.<sup>8</sup> *Santa Barbara School District v. Superior Court*,<sup>9</sup> held Education Code Section 1009.6, which provides that “[n]o public school student shall, because of his race, creed, or color, be assigned to or be required to attend a particular school,”<sup>10</sup> unconstitutional as applied to school districts manifesting either de jure or de facto racial segregation.

*In re Lisa R.*<sup>11</sup> held Evidence Code Section 661, which creates a presumption that the child of a married woman is a legitimate child of that marriage and allows the presumption to be disputed by a class of persons which does not include the natural father who is not the husband, an unconstitutional denial of the natural father’s right under the due process clause to show that he was the parent of the child.<sup>12</sup>

In the companion cases of *People v. Feagley*<sup>13</sup> and *People v. Bonneville*,<sup>14</sup> the California Supreme Court held unconstitutional

<sup>7</sup> Although Proposition 9 did not expressly repeal Sections 10202 and 22870, these sections have since been expressly repealed by Chapter 1158 of the Statutes of 1975.

<sup>8</sup> Four other California Supreme Court decisions imposed constitutional qualifications on the application or administration of state statutes without specifically invalidating any statute: *Murguia v. Municipal Court*, 15 Cal.3d 286, 540 P.2d 44, 124 Cal. Rptr. 204 (1975) (criminal defendant has constitutional right to raise defense of intentional selective enforcement of penal statutes); *United Farm Workers of America v. Superior Court*, 14 Cal.3d 902, 537 P.2d 1237, 122 Cal. Rptr. 877 (1975) (temporary restraining order affecting substantial free speech interests may not issue ex parte under Code of Civil Procedure Section 527 unless applicant shows reasonable, good faith effort to afford opposing party or counsel notice and opportunity to be heard); *In re Shapiro*, 14 Cal.3d 711, 537 P.2d 888, 122 Cal. Rptr. 768 (1975) (due process requires prompt disposition of parole revocation proceedings where California parolee is convicted and imprisoned in another jurisdiction for crime committed while on parole); *In re Rodriguez*, 14 Cal.3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975) (although life-maximum penalty provision of Penal Code Section 288 was not unconstitutional on its face, its administration by Adult Authority under Indeterminate Sentence Law resulting in 22 years’ imprisonment in this case constituted cruel and unusual punishment within the meaning of Article I, Section 17, of the California Constitution).

<sup>9</sup> 13 Cal.3d 315, 530 P.2d 605, 118 Cal. Rptr. 637 (1975).

<sup>10</sup> Education Code Section 1009.6 was added as an initiative measure approved at the general election of November 7, 1972. Cal. Stats. 1972, at A-188. Any legislative repeal or amendment, therefore, must be resubmitted to the voters. Cal. Const., Art. IV, § 24(c).

<sup>11</sup> 13 Cal.3d 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975).

<sup>12</sup> Evidence Code Section 661 was repealed by Chapter 1244, Section 14, of the Statutes of 1975. This chapter also enacted the Uniform Parentage Act (Civil Code §§ 7000-7018). New Civil Code Section 7006 broadens the class of persons permitted to establish paternity to include the person claiming to be the natural father in *In re Lisa R.*, 13 Cal.3d 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975).

<sup>13</sup> 14 Cal.3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975).

<sup>14</sup> 14 Cal.3d 384, 535 P.2d 404, 121 Cal. Rptr. 540 (1975).

the provisions of Welfare and Institutions Code Section 6321, authorizing involuntary civil commitment of a mentally disordered sex offender upon a three-fourths verdict of the jury, as being in conflict with the equal protection clauses of the United States and California Constitutions and the due process clause and the implied requirement of the California Constitution of a unanimous jury verdict for a criminal conviction.<sup>15</sup> The *Feagley* case further held that the portions of Welfare and Institutions Code Sections 6316 and 6326 authorizing indefinite confinement in a prison setting of a mentally disordered sex offender are unconstitutional under the cruel and unusual punishment clauses of the United States and California Constitutions.<sup>16</sup>

*Beaudreau v. Superior Court*<sup>17</sup> held unconstitutional Government Code Sections 947 and 951, the provisions of the California Tort Claims Act which require the filing of an undertaking for costs by the plaintiff upon demand in an action against a public entity (Section 947) or a public employee or former public employee (Section 951). The court held that the absence of a statutory provision for a prior hearing on the merits of the plaintiff's claim or on the reasonableness of the amount of the undertaking results in a taking of the plaintiff's property

<sup>15</sup> In a third companion case, *People v. Burnick*, 14 Cal.3d 306, 535 P.2d 352, 121 Cal. Rptr. 488 (1975), the court held that, in mentally disordered sex offender proceedings, the criminal standard of proof (beyond a reasonable doubt) was constitutionally compelled by the due process clauses of the United States and California Constitutions. *Accord*, *People v. Jetter*, 15 Cal.3d 407, 540 P.2d 1217, 124 Cal. Rptr. 633 (1975); *People v. Bonneville*, 14 Cal.3d 384, 386, 535 P.2d 404, 405, 121 Cal. Rptr. 540, 541 (1975). The court noted that, in such proceedings, Welfare and Institutions Code Section 6321 (“[t]he trial shall be had as provided by law for the trial for civil causes”) and Evidence Code Section 115 (“[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence”) allow for a burden of proof heavier than the civil standard to be established by judicial decision. By such construction, the court in *Burnick* was able to sustain the constitutionality of these two sections. See *People v. Burnick*, 14 Cal.3d at 314, 535 P.2d at 357, 121 Cal. Rptr. at 493.

<sup>16</sup> In *People v. Feagley*, 14 Cal.3d 338, 347-348, 535 P.2d 373, 378-379, 121 Cal. Rptr. 509, 514-515 (1975), the court in dictum cast doubt on the constitutionality of other provisions of the Welfare and Institutions Code which afford various procedural safeguards to a mentally disordered sex offender found amenable to treatment and placed in a state hospital but which deny them to those found not amenable to treatment and placed in an “institutional unit” in a prison. The court observed that “the most glaring example of legislative discrimination” was in the selective denial of a jury trial, under Section 6318, to those found not amenable to treatment, and that the unconstitutionality of such discrimination is “obvious.” 14 Cal.3d at 348, 535 P.2d at 378-379, 121 Cal. Rptr. at 514-515. The court noted that “[t]here are other examples” of such discrimination in Welfare and Institutions Code Sections 6317 (periodic progress reports) and 6327 (hearing to review factual justification for continued confinement). 14 Cal.3d at 348 n.7, 535 P.2d at 378-379 n.7, 121 Cal. Rptr. at 514-515 n.7.

<sup>17</sup> 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975).

without due process of law.<sup>18</sup>

*In re Edgar M.*<sup>19</sup> held that the portion of Welfare and Institutions Code Section 558, which provides that a minor's application for a rehearing after proceedings before a juvenile court referee under the Juvenile Court Law shall be "deemed denied" if not acted upon by a judge within the statutory time period, is unconstitutional under Article VI, Section 22, of the California Constitution, which restricts juvenile court referees to the performance of subordinate judicial duties.<sup>20</sup>

*Dupuy v. Superior Court*<sup>21</sup> carved out an exception to the unqualified California constitutional provision prohibiting issuance of the court's process against the state to prevent collection of any tax,<sup>22</sup> holding that the taxpayer has a federal constitutional right to enjoin a tax sale of his property pending an administrative hearing.

*Skelly v. State Personnel Board*<sup>23</sup> held that the provisions of the State Civil Service Act concerning punitive action against a permanent civil service employee,<sup>24</sup> particularly Government Code Section 19574, violate the due process clauses of the United States and California Constitutions since they allow the state to take punitive action by simply "notifying" the employee and afford him no other prior procedural protections to "minimize the risk of error in the initial removal decision."<sup>25</sup>

<sup>18</sup> The Law Revision Commission plans to submit a recommendation to the 1976 Legislature to provide a procedure for undertakings for costs that will satisfy constitutional requirements. See *Recommendation Relating to Undertakings for Costs*, 13 Cal. L. Revision Comm'n Reports 901 (1976).

<sup>19</sup> 14 Cal.3d 727, 537 P.2d 406, 122 Cal. Rptr. 574 (1975).

<sup>20</sup> The court construed Welfare and Institutions Code Section 558 to require that "applications which would be 'deemed denied' under the section's literal wording be instead granted as of right . . ." 14 Cal.3d at 737, 537 P.2d at 413, 122 Cal. Rptr. at 581. However, the effect of the decision is to render the literal wording of the statute invalid.

<sup>21</sup> 15 Cal.3d 410, 541 P.2d 540, 124 Cal. Rptr. 900 (1975).

<sup>22</sup> Cal. Const., Art. XIII, § 32, *formerly* Art. XIII, § 15. See *Dupuy v. Superior Court*, 15 Cal.3d 410, 413 n.5, 541 P.2d 540, 542 n.5, 124 Cal. Rptr. 900, 902 n.5 (1975).

<sup>23</sup> 15 Cal.3d 194, 539 P.2d 774, 124 Cal. Rptr. 14 (1975).

<sup>24</sup> Govt. Code §§ 19570-19588.

<sup>25</sup> 15 Cal.3d at 215, 539 P.2d at 789, 124 Cal. Rptr. at 29.

# CALENDAR OF TOPICS FOR STUDY

## Topics Authorized for Study

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

### Topics Under Active Consideration

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

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

The Commission is now engaged in drafting a new comprehensive statute relating to nonprofit corporations. G. Gervaise Davis III has been retained as a consultant to the Commission. A special Subcommittee on Revision of Nonprofit Corporations Law of the California State Bar Committee on Corporations is working with the Commission on this project. Members of the special subcommittee are Carl A. Leonard, San Francisco, chairman; James R. Andrews, Beverly Hills; William Holden, Sacramento; Denis T. Rice, San Francisco; Henry L. Stern, Los Angeles; and Brian R. Van Camp, Sacramento.

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

The Commission, working with a State Bar committee, is now engaged in drafting a comprehensive statute governing

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

<sup>2</sup> Section 10335 of the Government Code provides that the Commission shall study, in addition to those topics which it recommends and which are approved by the Legislature, any topic which the Legislature by concurrent resolution refers to it for such study.

enforcement of judgments. Professor Stefan A. Riesenfeld, Boalt Hall Law School, University of California at Berkeley, and Dean William D. Warren, UCLA Law School, are serving as consultants to the Commission. The Commission plans to submit recommendations relating to attachment and the claim and delivery statute to the 1976 Legislature. See *Recommendation Relating to Revision of the Attachment Law* (November 1975), to be reprinted in 13 Cal. L. Revision Comm'n Reports 801 (1976); *Recommendation Relating to Turnover Orders Under the Claim and Delivery Law* (June 1975), published as Appendix VIII to this Report. To a large extent, these recommendations propose technical and clarifying changes, but the attachment recommendation also proposes some significant substantive revisions.

**Condemnation law and procedure.** Whether the law and procedure relating to condemnation should be revised with a view to recommending a comprehensive statute that will safeguard the rights of all parties to such proceedings.

A new, comprehensive eminent domain statute—the Eminent Domain Law—was enacted by the 1975 Legislature upon Commission recommendation. The Commission plans to submit recommendations concerning several aspects of eminent domain law to the 1976 Legislature. See *Recommendation Relating to Relocation Assistance by Private Condemnors* (October 1975), published as Appendix IX to this Report; *Recommendation Relating to Condemnation for Byroads and Utility Easements* (October 1975), published as Appendix X to this Report. The Commission also plans to study the provisions of the Evidence Code relating to evidence in eminent domain and inverse condemnation actions and is making a study to determine whether any additional changes in other statutes are needed to conform to the new Eminent Domain Law.

**Evidence.** Whether the Evidence Code should be revised.

The Commission plans to submit a recommendation relating to the Evidence Code to the 1976 Legislature. See *Recommendation Relating to Admissibility of Duplicates in Evidence* (November 1975), published as Appendix XII to this Report. The Commission has also undertaken a study of the differences between the newly adopted Federal Rules of Evidence and the California Evidence Code. Professor Jack Friedenthal of the Stanford Law School is the Commission's consultant on this study.

**Partition procedures.** Whether the various sections of the Code of Civil Procedure relating to partition should be revised and whether the provisions of the Code of Civil Procedure relating to the confirmation of partition sales and the provisions of the Probate Code relating to the confirmation of sales of real property of estates of deceased persons should be made uniform and, if not, whether there is need for clarification as to which of them governs confirmation of private judicial partition sales.

A recommendation relating to this topic was published in January 1975, and Assembly Bill 1671 was introduced at the 1975-76 Regular Session to effectuate the recommendation. See *Recommendation Relating to Partition of Real and Personal Property* (January 1975), to be reprinted in 13 Cal. L. Revision Comm'n Reports 401 (1976). The bill will be considered by the 1976 session of the Legislature. The Commission has reviewed various comments it has received concerning the recommendation and will propose a number of revisions in the proposed legislation at the 1976 session. Garrett H. Elmore is serving as the Commission's consultant.

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

A recommendation relating to liquidated damages was submitted to the 1974 legislative session but was not enacted. The Commission has reviewed its prior recommendation and plans to submit a new recommendation to the 1976 Legislature. See *Recommendation Relating to Liquidated Damages* (November 1975), published as Appendix XIV to this Report.

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

A recommendation relating to modification of contracts was submitted to the 1975 Legislature. See *Recommendation and Study Relating to Oral Modification of Written Contracts* (January 1975), to be reprinted in 13 Cal. L. Revision Comm'n Reports 301 (1976). Two bills were introduced to effectuate the Commission's recommendation. One bill—relating to Commercial Code Section 2209—was enacted as Chapter 7 of the Statutes of 1975. The other bill—relating to Civil Code Section 1698—was not enacted. The Commission has reviewed its prior recommendation and plans to submit a new recommendation relating to Civil Code Section 1698 to the 1976 Legislature. See *Recommendation Relating to Oral Modification of Contracts* (November 1975), published as Appendix XIII to this Report.

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

The Commission plans to submit a recommendation on this topic to the 1976 Legislature. See *Recommendation Relating to Transfer of Out-of-State Trusts to California* (October 1975), published as Appendix XI to this Report.

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

In *Beaudreau v. Superior Court*, 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975), the California Supreme Court held unconstitutional the cost bond provisions of the California Tort Claims Act. This decision also casts doubt on other cost bond statutes. The Commission has reviewed the various statutory cost bond provisions that might be affected by the *Beaudreau* decision and plans to submit a recommendation to the 1976 Legislature. See *Recommendation Relating to Undertakings for Costs* (November 1975), to be reprinted in 13 Cal. L. Revision Comm'n Reports 901 (1976).

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

The Commission plans to commence work on this new, major study during 1976. Professor Brigitte M. Bodenheimer, Law School, University of California at Davis, has been retained as a consultant. She has prepared two background studies—one relating to child custody and the other to adoption. See Bodenheimer, *The Multiplicity of Child Custody Proceedings—Problems of California Law*, 23 Stan. L. Rev. 703 (1971); *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 So. Cal. L. Rev. 10 (1975). The background studies do not necessarily represent the views of the Commission; the Commission's action will be reflected in its own recommendation.

### **Other Topics Authorized for Study**

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

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

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

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

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

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

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

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

### **Topics Continued on Calendar for Further Study**

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

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

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

**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.

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

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

### **Topics for Future Consideration**

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

## FUNCTION AND PROCEDURE OF COMMISSION

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

The principal duties of the Law Revision Commission are to:

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

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

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

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.<sup>3</sup>

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

The research study includes a discussion of the existing law and the defects therein and suggests possible methods of

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<sup>1</sup> See CAL. GOVT. CODE §§ 10300–10340.

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

<sup>3</sup> See CAL. GOVT. CODE § 10335.

eliminating those defects. The study is given careful consideration by the Commission and, after making its preliminary decisions on the subject, the Commission distributes a tentative recommendation to the State Bar and to numerous other interested persons. Comments on the tentative recommendation are considered by the Commission in determining what report and recommendation it will make to the Legislature. When the Commission has reached a conclusion on the matter, its recommendation to the Legislature, including a draft of any legislation necessary to effectuate its recommendation, is published in a printed pamphlet.<sup>4</sup> If the research study has not been previously published,<sup>5</sup> it usually is published in the pamphlet containing the recommendation.

The Commission ordinarily prepares a Comment explaining each section it recommends. These Comments are included in the Commission's report and are frequently revised by legislative committee reports<sup>6</sup> to reflect amendments<sup>7</sup> made after the recommended legislation has been introduced in the Legislature. The Comment often indicates the derivation of the section and explains its purpose, its relation to other sections, and potential problems in its meaning or application. The Comments are written as if the legislation were enacted since their primary purpose is to explain the statute to those who will have occasion to use it after it is in effect. They are entitled to substantial weight in construing the statutory provisions.<sup>8</sup>

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<sup>4</sup> 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.

<sup>5</sup> For a listing of background studies published in law reviews, see 10 CAL. L. REVISION COMM'N REPORTS 1108 n.5 (1971) and 11 CAL. L. REVISION COMM'N REPORTS 1008 n.5 & 1108 n.5 (1973).

<sup>6</sup> Special reports are adopted by legislative committees that consider bills recommended by the Commission. These reports, which are printed in the legislative journal, state that the Comments to the various sections of the bill contained in the Commission's recommendation reflect the intent of the committee in approving the bill except to the extent that new or revised Comments are set out in the committee report itself. For a description of the legislative committee reports adopted in connection with the bill that became the Evidence Code, see *Arellano v. Moreno*, 33 Cal. App.3d 877, 884, 109 Cal. Rptr. 421, 426 (1973). For examples of such reports, see 10 CAL. L. REVISION COMM'N REPORTS 1132-1146 (1971).

<sup>7</sup> 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.

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

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.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> Thus, a large and representative number of interested persons are given an opportunity to study and comment upon the Commission's work before it is submitted to the Legislature.<sup>12</sup> The annual reports and the recommendations and studies of the Commission are bound in a set of volumes that is both a permanent record of the Commission's work and, it is believed, a valuable contribution to the legal literature of the state.

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<sup>9</sup> See, e.g., *Arellano v. Moreno*, 33 Cal. App.3d 877, 109 Cal. Rptr. 421 (1973).

<sup>10</sup> The commission does not concur in the *Kaplan* approach to statutory construction. See *Kaplan v. Superior Court*, 6 Cal.3d 150, 158-159, 491 P.2d 1, 5-6, 98 Cal. Rptr. 649, 653-654 (1971). For a reaction to the problem created by the *Kaplan* approach, see *Recommendation Relating to Erroneously Ordered Disclosure of Privileged Information*, 11 CAL. L. REVISION COMM'N REPORTS 1163 (1973). See also Cal. Stats. 1974, Ch. 227.

<sup>11</sup> See CAL. GOVT. CODE § 10333.

<sup>12</sup> For a step by step description of the procedure followed by the Commission in preparing the 1963 governmental liability statute, see DeMouly, *Fact Finding for Legislation: A Case Study*, 50 A.B.A.J. 285 (1964). The procedure followed in preparing the Evidence Code is described in 7 CAL. L. REVISION COMM'N REPORTS 3 (1965).

## PERSONNEL OF COMMISSION

As of December 1, 1975, the membership of the Law Revision Commission is:

	<i>Term expires</i>
Marc Sandstrom, San Diego, <i>Chairman</i> .....	October 1, 1975
John N. McLaurin, Los Angeles, <i>Vice Chairman</i> .....	October 1, 1975
Hon. Robert S. Stevens, Los Angeles, <i>Senate Member</i> .....	*
Hon. Alister McAlister, San Jose, <i>Assembly Member</i> .....	*
John J. Balluff, Palos Verdes Estates, <i>Member</i> .....	October 1, 1975
John D. Miller, Long Beach, <i>Member</i> .....	October 1, 1977
Thomas E. Stanton, Jr., San Francisco, <i>Member</i> .....	October 1, 1977
Howard R. Williams, Stanford, <i>Member</i> .....	October 1, 1977
Vacancy .....	October 1, 1979
George H. Murphy, Sacramento, <i>ex officio Member</i> .....	†

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

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

In February 1975, Noble K. Gregory resigned from the Commission.

In October 1975, John N. McLaurin was elected Chairman, and Howard R. Williams was elected Vice Chairman of the Commission. Their terms commence on December 31, 1975.

As of December 1, 1975, the staff of the Commission is:

### *Legal*

John H. DeMouly, *Executive Secretary*  
 Nathaniel Sterling, *Assistant Executive Secretary*  
 Stan G. Ulrich, *Staff Counsel*  
 Robert J. Murphy III, *Legal Counsel*

### *Administrative-Secretarial*

Anne Johnston, *Administrative Assistant*  
 Violet S. Harju, *Clerk-Typist*  
 Kristine A. Powers, *Clerk-Typist*  
 Christine K. Taylor, *Clerk-Typist*

JoAnne Friedenthal, who has served as a part-time member of the Commission's legal staff since May 1966, worked full time from September 1974 to June 1975; at that time, she decided to continue on the staff on a part-time basis only. Robert J. Murphy III was appointed in June 1975 to the full-time position.

## RECOMMENDATIONS

The Law Revision Commission respectfully recommends that the Legislature authorize the Commission to complete its study of the topics previously authorized for study (see “Calendar of Topics for Study” *supra*).

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

# APPENDIX I

## CURRENT TOPICS—PRIOR PUBLICATIONS AND LEGISLATIVE ACTION

### Arbitration

Authorized by Cal. Stats. 1968, Res. Ch. 110, at 3103; see also 8 Cal. L. Revision Comm'n Reports 1325 (1967).

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

### Child Custody and Related Matters

Authorized by Cal. Stats. 1972, Res. Ch. 27, at 3227. See 10 Cal. L. Revision Comm'n Reports 1122 (1971). See also Cal. Stats. 1956, Res. Ch. 42, at 263; 1 Cal. L. Revision Comm'n Reports, "1956 Report" at 29 (1957).

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

### Condemnation Law and Procedure

Authorized by Cal. Stats. 1965, Res. Ch. 130, at 5289; see also Cal. Stats. 1956, Res. Ch. 42, at 263; 4 Cal. L. Revision Comm'n Reports 115 (1963).

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

See also *Recommendation and Study Relating to Condemnation Law and Procedure: Number 4—Discovery in Eminent Domain Proceedings*, 4 Cal. L. Revision Comm'n Reports 701 (1963). For a legislative history of this recommendation, see 4 Cal. L. Revision Comm'n Reports 213 (1963). See also *Recommendation Relating to Discovery in Eminent Domain Proceedings*, 8 Cal. L. Revision Comm'n Reports 19 (1967). For a legislative history of this recommendation, see 8 Cal. L. Revision Comm'n Reports 1318 (1967). The recommended legislation was enacted. See Cal. Stats. 1967, Ch. 1104 (exchange of valuation data).

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

See also *Recommendation Relating to Arbitration of Just Compensation*, 9 Cal. L. Revision Comm'n Reports 123 (1969). For a legislative history of this recommendation, see 10 Cal. L. Revision Comm'n Reports 1018 (1971). The recommended legislation was enacted. See Cal. Stats. 1970, Ch. 417.

See also *Recommendation Relating to Condemnation Law and Procedure: Conforming Changes in Improvement Acts*, 12 Cal. L. Revision Comm'n Reports 1001 (1974). For a legislative history of this recommendation, see 12 Cal. L. Revision Comm'n Reports 534 (1974). The recommended legislation was enacted. See Cal. Stats. 1974, Ch. 426.

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

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

The Commission plans to submit two recommendations to the 1976 Legislature. See *Recommendation Relating to Relocation Assistance by Private Condemnors* (October 1975), published as Appendix IX to this Report; *Recommendation Relating to Condemnation for Byroads and Utility Easements* (October 1975), published as Appendix X to this Report.

## Creditors' Remedies

Authorized by Cal. Stats. 1972, Res. Ch. 27, at 3227. See also Cal. Stats. 1957, Res. Ch. 202, at 4589; see also 1 Cal. L. Revision Comm'n Reports, "1957 Report" at 15 (1957).

See *Recommendation Relating to Attachment, Garnishment, and Exemptions From Execution: Discharge From Employment*, 10 Cal. L. Revision Comm'n Reports 1147 (1971). For a legislative history of this recommendation, see 10 Cal. L. Revision Comm'n Reports 1126-1127 (1971). The recommended legislation was enacted. See Cal. Stats. 1971, Ch. 1607.

See also *Recommendation Relating to Attachment, Garnishment, and Exemptions From Execution: Employees' Earnings Protection Law*, 10 Cal. L. Revision Comm'n Reports 701 (1971). For a legislative history of this recommendation, see 11 Cal. L. Revision Comm'n Reports 1024 (1973). The recommended legislation was not enacted. The Commission submitted a revised recommendation to the 1973 Legislature. See *Recommendation Relating to Wage Garnishment and Related Matters*, 11 Cal. L. Revision Comm'n Reports 101 (1973). For a legislative history of this recommendation, see 11 Cal. L. Revision Comm'n Reports 1123 (1973); 12 Cal. L. Revision Comm'n Reports 530 n.1 (1974). The recommended legislation was not enacted. The Commission submitted a revised recommendation to the 1975 Legislature. See *Recommendation Relating to Wage Garnishment Exemptions*, 12 Cal. L. Revision Comm'n Reports 901 (1974). For a legislative history of this recommendation, see this Report *supra*. The recommended legislation was not enacted. See also *Recommendation Relating to Wage Garnishment Procedure* (April 1975), to be reprinted in 13 Cal. L. Revision Comm'n Reports 601 (1976).

See also *Recommendation and Study Relating to Civil Arrest*, 11 Cal. L. Revision Comm'n Reports 1 (1973). For a legislative history of this recommendation, see 11 Cal. L. Revision Comm'n Reports 1123 (1973). The recommended legislation was enacted. See Cal. Stats. 1973, Ch. 20.

See also *Recommendation Relating to the Claim and Delivery Statute*, 11 Cal. L. Revision Comm'n Reports 301 (1973). For a legislative history of this recommendation, see 11 Cal. L. Revision Comm'n Reports 1124 (1973). The recommended legislation was enacted. See Cal. Stats. 1973, Ch. 526. The Commission plans to submit a follow-up recommendation to the 1976 Legislature. See *Recommendation Relating to Turnover Orders Under the Claim and Delivery Law* (June 1975), published as Appendix VIII to this Report.

See also *Recommendation Relating to Prejudgment Attachment*, 11 Cal. L. Revision Comm'n Reports 701 (1973). For a legislative history of this recommendation, see 12 Cal. L. Revision Comm'n Reports 530 (1974). The recommended legislation was enacted. See Cal. Stats. 1974, Ch. 1516. The Commission plans to submit a recommendation for technical revisions in the attachment law to the 1976 Legislature. See *Recommendation Relating to Revision of the Attachment Law* (November 1975), to be reprinted in 13 Cal. L. Revision Comm'n Reports 801 (1976).

See also *Recommendation Relating to Enforcement of Sister State Money Judgments*, 11 Cal. L. Revision Comm'n Reports 451 (1973). For a legislative history of this recommendation, see 12 Cal. L. Revision Comm'n Reports 534 (1974). The recommended legislation was enacted. See Cal. Stats. 1974, Ch. 211.

### Escheat; Unclaimed Property

Authorized by Cal. Stats. 1967, Res. Ch. 81, at 4592; see also Cal. Stats. 1956, Res. Ch. 42, at 263.

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

See also *Recommendation Relating to Unclaimed Property*, 11 Cal. L. Revision Comm'n Reports 401 (1973). For a legislative history of this recommendation, see this Report *infra*. The recommended legislation was not enacted.

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

### Evidence

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

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

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

See also *Recommendation Relating to the Evidence Code: Number 4—Revision of the Privileges Article*, 9 Cal. L. Revision Comm'n Reports 501 (1969). For a legislative history of this recommendation, see 9 Cal. L. Revision Comm'n Reports 98 (1969).

See also *Recommendation Relating to the Evidence Code: Number 5—Revisions of the Evidence Code*, 9 Cal. L. Revision Comm'n Reports 137 (1969). For a legislative history of this recommendation, see 10 Cal. L. Revision Comm'n Reports 1018 (1971). Some of the recommended legislation was enacted. See Cal. Stats. 1970, Ch. 69 (res ipsa loquitur), Ch. 1397 (psychotherapist-patient privilege).

See also report concerning *Proof of Foreign Official Records*, 10 Cal. L. Revision Comm'n Reports 1022 (1971), and Cal. Stats. 1970, Ch. 41.

See also *Recommendation Relating to Erroneously Ordered Disclosure of Privileged Information*, 11 Cal. L. Revision Comm'n Reports 1163 (1973). For a legislative history of this recommendation, see 12 Cal. L. Revision Comm'n Reports 535 (1974). The recommended legislation was enacted. See Cal. Stats. 1974, Ch. 227.

See also *Recommendation Relating to Evidence Code Section 999—The "Criminal Conduct" Exception to the Physician-Patient Privilege*, 11 Cal. L. Revision Comm'n Reports 1147 (1973). For a legislative history of this recommendation, see 12 Cal. L. Revision Comm'n Reports 535 (1974). The recommended legislation was not enacted. A revised recommendation was submitted to the 1975 Legislature. See *Recommendation Relating to the Good Cause Exception to the Physician-Patient Privilege*, 12 Cal. L. Revision Comm'n Reports 601 (1974). For a legislative history of this recommendation, see this Report *supra*. The recommended legislation was enacted. See Cal. Stats. 1975, Ch. 318.

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

See also *Recommendation Relating to Admissibility of Copies of Business Records in Evidence* (January 1975), published as Appendix III to this Report. For a legislative history of this recommendation, see this Report *supra*. The recommended legislation was not enacted.

The Commission plans to submit a recommendation to the 1976 Legislature. See *Recommendation Relating to Admissibility of Duplicates in Evidence* (November 1975), published as Appendix XII to this Report.

This topic is under continuing study to determine whether any substantive, technical, or clarifying changes are needed in the Evidence Code and whether changes are needed in other codes to conform them to the Evidence Code. See 10 Cal. L. Revision Comm'n Reports 1015 (1971). See also Cal. Stats. 1972, Ch. 764 (judicial notice—technical amendment).

## Governmental Liability

Authorized by Cal. Stats. 1957, Res. Ch. 202, at 4589.

See *Recommendations Relating to Sovereign Immunity: Number 1—Tort Liability of Public Entities and Public Employees; Number 2—Claims, Actions and Judgments Against Public Entities and Public Employees; Number 3—Insurance Coverage for Public Entities and Public Employees; Number 4—Defense of Public Employees; Number 5—Liability of Public Entities for Ownership and Operation of Motor Vehicles; Number 6—Workmen's Compensation Benefits for Persons Assisting Law Enforcement or Fire Control Officers; Number 7—Amendments and Repeals of Inconsistent Special Statutes*, 4 Cal. L. Revision Comm'n Reports 801, 1001, 1201, 1301, 1401, 1501, and 1601 (1963). For a legislative history of these recommendations, see 4 Cal. L. Revision Comm'n Reports 211-213 (1963). See also *A Study Relating to Sovereign Immunity*, 5 Cal. L. Revision Comm'n Reports 1 (1963). See also Cal. Stats. 1963, Ch. 1681 (tort liability of public entities and public employees), Ch. 1715 (claims, actions and judgments against public entities and public employees), Ch. 1682 (insurance coverage for public entities and public employees), Ch. 1683 (defense of public employees), Ch. 1684 (workmen's compensation benefits for persons assisting law enforcement or fire control officers), Ch. 1685 (amendments and repeals of inconsistent special statutes), Ch. 1686 (amendments and repeals of inconsistent special statutes), Ch. 2029 (amendments and repeals of inconsistent special statutes).

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

See also *Recommendation Relating to Sovereign Immunity: Number 9—Statute of Limitations in Actions Against Public Entities and Public Employees*, 9 Cal. L. Revision Comm'n Reports 49 (1969). For a legislative history of this recommendation, see 9 Cal. L. Revision Comm'n Reports 98 (1969). See also *Proposed Legislation Relating to Statute of Limitations in Actions Against Public Entities and Public Employees*, 9 Cal. L. Revision Comm'n Reports 175 (1969). For a legislative history of this recommendation, see 10 Cal. L. Revision Comm'n Reports 1021 (1971). The recommended legislation was enacted. See Cal. Stats. 1970, Ch. 104.

See also *Recommendation Relating to Sovereign Immunity: Number 10—Revisions of the Governmental Liability Act*, 9 Cal. L. Revision Comm'n Reports 801 (1969). For a legislative history of this recommendation, see 10 Cal. L. Revision Comm'n Reports 1020 (1971). Most of the recommended legislation was enacted. See Cal. Stats. 1970, Ch. 662 (entry to make tests) and Ch. 1099 (liability for use of pesticides, liability for damages from tests).

See also *Recommendation Relating to Payment of Judgments Against Local Public Entities*, 12 Cal. L. Revision Comm'n Reports 575 (1974). The recommended legislation was enacted. See Cal. Stats. 1975, Ch. 285.

See also *Recommendation Relating to Undertakings for Costs* (November 1975), to be reprinted in 13 Cal. L. Revision Comm'n Reports 901 (1976). This recommendation will be submitted to the 1976 Legislature.

### **Inverse Condemnation**

Authorized by Cal. Stats. 1970, Res. Ch. 46, at 3541; see also Cal. Stats. 1965, Res. Ch. 130, at 5289.

See *Recommendation Relating to Inverse Condemnation: Insurance Coverage*, 10 Cal. L. Revision Comm'n Reports 1031 (1971). For a legislative history of this recommendation, see 10 Cal. L. Revision Comm'n Reports 1126 (1971). The recommended legislation was enacted. See Cal. Stats. 1971, Ch. 140.

See also *Recommendation Relating to Sovereign Immunity: Number 10—Revisions of the Governmental Liability Act*, 9 Cal. L. Revision Comm'n Reports 801 (1969). For a legislative history of this recommendation, see 10 Cal. L. Revision Comm'n Reports 1020 (1971). Most of the recommended legislation was enacted. See Cal. Stats. 1970, Ch. 662 (entry to make tests) and Ch. 1099 (liability for use of pesticides, liability for damages from tests). See also *Proposed Legislation Relating to Statute of Limitations in Actions Against Public Entities and Public Employees*, 9 Cal. L. Revision Comm'n Reports 175 (1969). For a legislative history of this recommendation, see 10 Cal. L. Revision Comm'n Reports 1021 (1971). The recommended legislation was enacted. See Cal. Stats. 1970, Ch. 104.

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

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

### **Lease Law**

Authorized by Cal. Stats. 1965, Res. Ch. 130, at 5289; see also Cal. Stats. 1957, Res. Ch. 202, at 4589.

See *Recommendation and Study Relating to Abandonment or Termination of a Lease*, 8 Cal. L. Revision Comm'n Reports 701 (1967). For a legislative history of this recommendation, see 8 Cal. L. Revision Comm'n Reports 1319 (1967).

See also *Recommendation Relating to Real Property Leases*, 9 Cal. L. Revision Comm'n Reports 401 (1969). For a legislative history of this recommendation, see 9 Cal. L. Revision Comm'n Reports 98 (1969).

See also *Recommendation Relating to Real Property Leases*, 9 Cal. L. Revision Comm'n Reports 153 (1969). For a legislative history of this recommendation, see 10 Cal. L. Revision Comm'n Reports 1018 (1971). The recommended legislation was enacted. See Cal. Stats. 1970, Ch. 89.

See also *Recommendations Relating to Landlord-Tenant Relations*, 11 Cal. L. Revision Comm'n Reports 951 (1973). This report contains two recommendations: *Abandonment of Leased Real Property* and *Personal Property Left on Premises Vacated by Tenant*. For a legislative history of these recommendations, see 12 Cal. L. Revision Comm'n Reports 536 (1974). The recommended legislation was enacted. See Cal. Stats. 1974, Chs. 331, 332.

### **Liquidated Damages**

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

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

See also *Recommendation Relating to Liquidated Damages* (November 1975), published as Appendix XIV to this Report. This recommendation will be submitted to the 1976 Legislature.

## Modification of Contracts

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

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

The Commission plans to submit a revised recommendation to the 1976 Legislature. See *Recommendation Relating to Oral Modification of Contracts* (November 1975), published as Appendix XIII to this Report.

## Nonprofit Corporations

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

## Parol Evidence Rule

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

## Partition Procedures

Authorized by Cal. Stats. 1959, Res. Ch. 218, at 5792; see also Cal. Stats. 1956, Res. Ch. 42, at 263; 1 Cal. L. Revision Comm'n Reports, "1956 Report" at 21 (1957).

See *Recommendation Relating to Partition Procedure* (January 1975), to be reprinted in 13 Cal. L. Revision Comm'n Reports 401 (1976). For a legislative history of this recommendation, see this Report *supra*. The recommended legislation will be considered by the 1976 Legislature.

## Prejudgment Interest

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

## Unincorporated Associations

Authorized by Cal. Stats. 1966, Res. Ch. 9, at 241; see also Cal. Stats. 1957, Res. Ch. 202, at 4589.

See *Recommendation and Study Relating to Suit by or Against an Unincorporated Association*, 8 Cal. L. Revision Comm'n Reports 901 (1967). For a legislative history of this recommendation, see 8 Cal. L. Revision Comm'n Reports 1317 (1967). The recommended legislation was enacted. See Cal. Stats. 1967, Ch. 1324.

See also *Recommendation Relating to Service of Process on Unincorporated Associations*, 8 Cal. L. Revision Comm'n Reports 1403 (1967). For a legislative history of this recommendation, see 9 Cal. L. Revision Comm'n Reports 18-19 (1969). The recommended legislation was enacted. See Cal. Stats. 1968, Ch. 132.

## APPENDIX II

### LEGISLATIVE ACTION ON COMMISSION RECOMMENDATIONS (Cumulative)

Recommendation	Action by Legislature
1. <i>Partial Revision of Education Code</i> , 1 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1954 at 12 (1957)	Enacted. Cal. Stats. 1955, Chs. 799, 877
2. <i>Summary Distribution of Small Estates Under Probate Code Sections 640 to 646</i> , 1 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1954 at 50 (1957)	Enacted. Cal. Stats. 1955, Ch. 1183
3. <i>Fish and Game Code</i> , 1 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1957 at 13 (1957); 1 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1956 at 13 (1957)	Enacted. Cal. Stats. 1957, Ch. 456
4. <i>Maximum Period of Confinement in a County Jail</i> , 1 CAL. L. REVISION COMM'N REPORTS at A-1 (1957)	Enacted. Cal. Stats. 1957, Ch. 139
5. <i>Notice of Application for Attorney's Fees and Costs in Domestic Relations Actions</i> , 1 CAL. L. REVISION COMM'N REPORTS at B-1 (1957)	Enacted. Cal. Stats. 1957, Ch. 540
6. <i>Taking Instructions to Jury Room</i> , 1 CAL. L. REVISION COMM'N REPORTS at C-1 (1957)	Not enacted. But see Cal. Stats. 1975, Ch. 461, enacting substance of this recommendation.

7. *The Dead Man Statute*, 1 CAL. L. REVISION COMM'N REPORTS at D-1 (1957) Not enacted. But recommendation accomplished in enactment of Evidence Code. See Comment to EVID. CODE § 1261.
8. *Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere*, 1 CAL. L. REVISION COMM'N REPORTS at E-1 (1957) Enacted. Cal. Stats. 1957, Ch. 490
9. *The Marital "For and Against" Testimonial Privilege*, 1 CAL. L. REVISION COMM'N REPORTS at F-1 (1957) Not enacted. But recommendation accomplished in enactment of Evidence Code. See Comment to EVID. CODE § 970.
10. *Suspension of the Absolute Power of Alienation*, 1 CAL. L. REVISION COMM'N REPORTS at G-1 (1957); 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 14 (1959) Enacted. Cal. Stats. 1959, Ch. 470
11. *Elimination of Obsolete Provisions in Penal Code Sections 1377 and 1378*, 1 CAL. L. REVISION COMM'N REPORTS at H-1 (1957) Enacted. Cal. Stats. 1957, Ch. 102
12. *Judicial Notice of the Law of Foreign Countries*, 1 CAL. L. REVISION COMM'N REPORTS at I-1 (1957) Enacted. Cal. Stats. 1957, Ch. 249

13. *Choice of Law Governing Survival of Actions*, 1 CAL. L. REVISION COMM'N REPORTS at J-1 (1957) No legislation recommended.
14. *Effective Date of Order Ruling on a Motion for New Trial*, 1 CAL. L. REVISION COMM'N REPORTS at K-1 (1957); 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 16 (1959) Enacted. Cal. Stats. 1959, Ch. 468
15. *Retention of Venue for Convenience of Witnesses*, 1 CAL. L. REVISION COMM'N REPORTS at L-1 (1957) Not enacted.
16. *Bringing New Parties Into Civil Actions*, 1 CAL. L. REVISION COMM'N REPORTS at M-1 (1957) Enacted. Cal. Stats. 1957, Ch. 1498
17. *Grand Juries*, 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 20 (1959) Enacted. Cal. Stats. 1959, Ch. 501
18. *Procedure for Appointing Guardians*, 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 21 (1959) Enacted. Cal. Stats. 1959, Ch. 500
19. *Appointment of Administrator in Quiet Title Action*, 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 29 (1959) No legislation recommended.

20. *Presentation of Claims Against Public Entities*, 2 CAL. L. REVISION COMM'N REPORTS at A-1 (1959) Enacted. Cal. Stats. 1959, Chs. 1715, 1724, 1725, 1726, 1727, 1728; CAL. CONST., Art. XI, § 10 (1960)
21. *Right of Nonresident Aliens to Inherit*, 2 CAL. L. REVISION COMM'N REPORTS at B-1 (1959); 11 CAL. L. REVISION COMM'N REPORTS 421 (1973) Enacted. Cal. Stats. 1974, Ch. 425
22. *Mortgages to Secure Future Advances*, 2 CAL. L. REVISION COMM'N REPORTS at C-1 (1959) Enacted. Cal. Stats. 1959, Ch. 528
23. *Doctrine of Worthier Title*, 2 CAL. L. REVISION COMM'N REPORTS at D-1 (1959) Enacted. Cal. Stats. 1959, Ch. 122
24. *Overlapping Provisions of Penal and Vehicle Codes Relating to Taking of Vehicles and Drunk Driving*, 2 CAL. L. REVISION COMM'N REPORTS at E-1 (1959) Not enacted. But see Cal. Stats. 1972, Ch. 92, enacting substance of a portion of recommendation relating to drunk driving.
25. *Time Within Which Motion for New Trial May Be Made*, 2 CAL. L. REVISION COMM'N REPORTS at F-1 (1959) Enacted. Cal. Stats. 1959, Ch. 469
26. *Notice to Shareholders of Sale of Corporate Assets*, 2 CAL. L. REVISION COMM'N REPORTS at G-1 (1959) Not enacted. But see CORP. CODE §§ 1001, 1002 (effective January 1, 1977) enacting substance of recommendation.

27. *Evidence in Eminent Domain Proceedings*, 3 CAL. L. REVISION COMM'N REPORTS at A-1 (1961) Not enacted. But see EVID. CODE § 810 *et seq.* enacting substance of recommendation.
28. *Taking Possession and Passage of Title in Eminent Domain Proceedings*, 3 CAL. L. REVISION COMM'N REPORTS at B-1 (1961) Enacted. Cal. Stats. 1961, Chs. 1612, 1613
29. *Reimbursement for Moving Expenses When Property Is Acquired for Public Use*, 3 CAL. L. REVISION COMM'N REPORTS at C-1 (1961) Not enacted. But see GOVT. CODE § 7260 *et seq.* enacting substance of recommendation.
30. *Rescission of Contracts*, 3 CAL. L. REVISION COMM'N REPORTS at D-1 (1961) Enacted. Cal. Stats. 1961, Ch. 589
31. *Right to Counsel and Separation of Delinquent From Nondelinquent Minor In Juvenile Court Proceedings*, 3 CAL. L. REVISION COMM'N REPORTS at E-1 (1961) Enacted. Cal. Stats. 1961, Ch. 1616
32. *Survival of Actions*, 3 CAL. L. REVISION COMM'N REPORTS at F-1 (1961) Enacted. Cal. Stats. 1961, Ch. 657
33. *Arbitration*, 3 CAL. L. REVISION COMM'N REPORTS at G-1 (1961) Enacted. Cal. Stats. 1961, Ch. 461
34. *Presentation of Claims Against Public Officers and Employees*, 3 CAL. L. REVISION COMM'N REPORTS at H-1 (1961) Not enacted 1961. See recommendation to 1963 session (item 39 *infra*) which was enacted.

35. *Inter Vivos Marital Property Rights in Property Acquired While Domiciled Elsewhere*, 3 CAL. L. REVISION COMM'N REPORTS at I-1 (1961) Enacted. Cal. Stats. 1961, Ch. 636
36. *Notice of Alibi in Criminal Actions*, 3 CAL. L. REVISION COMM'N REPORTS at J-1 (1961) Not enacted.
37. *Discovery in Eminent Domain Proceedings*, 4 CAL. L. REVISION COMM'N REPORTS 701 (1963); 8 CAL. L. REVISION COMM'N REPORTS 19 (1967) Enacted. Cal. Stats. 1967, Ch. 1104
38. *Tort Liability of Public Entities and Public Employees*, 4 CAL. L. REVISION COMM'N REPORTS 801 (1963) Enacted. Cal. Stats. 1963, Ch. 1681
39. *Claims, Actions and Judgments Against Public Entities and Public Employees*, 4 CAL. L. REVISION COMM'N REPORTS 1001 (1963) Enacted. Cal. Stats. 1963, Ch. 1715
40. *Insurance Coverage for Public Entities and Public Employees*, 4 CAL. L. REVISION COMM'N REPORTS 1201 (1963) Enacted. Cal. Stats. 1963, Ch. 1682
41. *Defense of Public Employees*, 4 CAL. L. REVISION COMM'N REPORTS 1301 (1963) Enacted. Cal. Stats. 1963, Ch. 1683

42. *Liability of Public Entities for Ownership and Operation of Motor Vehicles*, 4 CAL. L. REVISION COMM'N REPORTS 1401 (1963); 7 CAL. L. REVISION COMM'N REPORTS 401 (1965) Enacted. Cal. Stats. 1965, Ch. 1527
43. *Workmen's Compensation Benefits for Persons Assisting Law Enforcement or Fire Control Officer*, 4 CAL. L. REVISION COMM'N REPORTS 1501 (1963) Enacted. Cal. Stats. 1963, Ch. 1684
44. *Sovereign Immunity—Amendments and Repeals of Inconsistent Statutes*, 4 CAL. L. REVISION COMM'N REPORTS 1601 (1963) Enacted. Cal. Stats. 1963, Chs. 1685, 1686, 2029
45. *Evidence Code*, 7 CAL. L. REVISION COMM'N REPORTS 1 (1965) Enacted. Cal. Stats. 1965, Ch. 299
46. *Claims and Actions Against Public Entities and Public Employees*, 7 CAL. L. REVISION COMM'N REPORTS 401 (1965) Enacted. Cal. Stats. 1965, Ch. 653
47. *Evidence Code Revisions*, 8 CAL. L. REVISION COMM'N REPORTS 101 (1967) Enacted in part: Cal. Stats. 1967, Ch. 650; balance enacted: Cal. Stats. 1970, Ch. 69
48. *Evidence—Agricultural Code Revisions*, 8 CAL. L. REVISION COMM'N REPORTS 201 (1967) Enacted. Cal. Stats. 1967, Ch. 262

49. *Evidence—Commercial Code Revisions*, 8 CAL. L. REVISION COMM'N REPORTS 301 (1967) Enacted. Cal. Stats. 1967, Ch. 703
50. *Whether Damage for Personal Injury to a Married Person Should Be Separate or Community Property*, 8 CAL. L. REVISION COMM'N REPORTS 401 (1967); 8 CAL. L. REVISION COMM'N REPORTS 1385 (1967) Enacted. Cal. Stats. 1968, Chs. 457, 458
51. *Vehicle Code Section 17150 and Related Sections*, 8 CAL. L. REVISION COMM'N REPORTS 501 (1967) Enacted. Cal. Stats. 1967, Ch. 702
52. *Additur*, 8 CAL. L. REVISION COMM'N REPORTS 601 (1967) Enacted. Cal. Stats. 1967, Ch. 72
53. *Abandonment or Termination of a Lease*, 8 CAL. L. REVISION COMM'N REPORTS 701 (1967); 9 CAL. L. REVISION COMM'N REPORTS 401 (1969); 9 CAL. L. REVISION COMM'N REPORTS 153 (1969) Enacted. Cal. Stats. 1970, Ch. 89
54. *Good Faith Improver of Land Owned by Another*, 8 CAL. L. REVISION COMM'N REPORTS 801 (1967); 8 CAL. L. REVISION COMM'N REPORTS 1373 (1967) Enacted. Cal. Stats. 1968, Ch. 150

55. *Suit By or Against an Unincorporated Association*, 8 CAL. L. REVISION COMM'N REPORTS 901 (1967) Enacted. Cal. Stats. 1967, Ch. 1324
56. *Escheat*, 8 CAL. L. REVISION COMM'N REPORTS 1001 (1967) Enacted. Cal. Stats. 1968, Chs. 247, 356
57. *Recovery of Condemnee's Expenses on Abandonment of an Eminent Domain Proceeding*, 8 CAL. L. REVISION COMM'N REPORTS 1361 (1967) Enacted. Cal. Stats. 1968, Ch. 133
58. *Service of Process on Unincorporated Associations*, 8 CAL. L. REVISION COMM'N REPORTS 1403 (1967) Enacted. Cal. Stats. 1968, Ch. 132
59. *Sovereign Immunity—Statute of Limitations*, 9 CAL. L. REVISION COMM'N REPORTS 49 (1969); 9 CAL. L. REVISION COMM'N REPORTS 175 (1969) Vetoed 1969. Enacted: Cal. Stats. 1970, Ch. 104
60. *Additur and Remittitur*, 9 CAL. L. REVISION COMM'N REPORTS 63 (1969) Enacted. Cal. Stats. 1969, Ch. 115
61. *Fictitious Business Names*, 9 CAL. L. REVISION COMM'N REPORTS 71 (1969) Enacted. Cal. Stats. 1969, Ch. 114
62. *Quasi-Community Property*, 9 CAL. L. REVISION COMM'N REPORTS 113 (1969) Enacted. Cal. Stats. 1970, Ch. 312

63. *Arbitration of Just Compensation*, 9 CAL. L. REVISION COMM'N REPORTS 123 (1969) Enacted. Cal. Stats. 1970, Ch. 417
64. *Revisions of Evidence Code*, 9 CAL. L. REVISION COMM'N REPORTS 137 (1969) Enacted in part: Cal. Stats. 1970, Ch. 69; see also Cal. Stats. 1970, Chs. 1396, 1397
65. *Mutuality of Remedies in Suits for Specific Performance*, 9 CAL. L. REVISION COMM'N REPORTS 201 (1969) Enacted. Cal. Stats. 1969, Ch. 156
66. *Powers of Appointment*, 9 CAL. L. REVISION COMM'N REPORTS 301 (1969) Enacted. Cal. Stats. 1969, Chs. 113, 155
67. *Evidence Code—Revisions of Privileges Article*, 9 CAL. L. REVISION COMM'N REPORTS 501 (1969) Vetoed. But see Cal. Stats. 1970, Chs. 1396, 1397
68. *Fictitious Business Names*, 9 CAL. L. REVISION COMM'N REPORTS 601 (1969) Enacted. Cal. Stats. 1970, Ch. 618
69. *Representations as to the Credit of Third Persons and the Statute of Frauds*, 9 CAL. L. REVISION COMM'N REPORTS 701 (1969) Enacted. Cal. Stats. 1970, Ch. 720
70. *Revisions of Governmental Liability Act*, 9 CAL. L. REVISION COMM'N REPORTS 801 (1969) Enacted in part: Cal. Stats. 1970, Chs. 662, 1099

71. *“Vesting” of Interests Under Rule Against Perpetuities*, 9 CAL. L. REVISION COMM’N REPORTS 901 (1969)      Enacted. Cal. Stats. 1970, Ch. 45
72. *Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions*, 10 CAL. L. REVISION COMM’N REPORTS 501 (1971)      Enacted. Cal. Stats. 1971, Chs. 244, 950; see also Cal. Stats. 1973, Ch. 828
73. *Wage Garnishment and Related Matters*, 10 CAL. L. REVISION COMM’N REPORTS 701 (1971); 11 CAL. L. REVISION COMM’N REPORTS 101 (1973); 12 CAL. L. REVISION COMM’N REPORTS 901 (1974); 13 CAL. L. REVISION COMM’N REPORTS 601 (1976)      Not enacted.
74. *Proof of Foreign Official Records*, 10 CAL. L. REVISION COMM’N REPORTS 1022 (1971)      Enacted. Cal. Stats. 1970, Ch. 41
75. *Inverse Condemnation—Insurance Coverage*, 10 CAL. L. REVISION COMM’N REPORTS 1051 (1971)      Enacted. Cal. Stats. 1971, Ch. 140
76. *Discharge From Employment Because of Wage Garnishment*, 10 CAL. L. REVISION COMM’N REPORTS 1147 (1971)      Enacted. Cal. Stats. 1971, Ch. 1607
77. *Civil Arrest*, 11 CAL. L. REVISION COMM’N REPORTS 1 (1973)      Enacted. Cal. Stats. 1973, Ch. 20

78. *Claim and Delivery Statute*, 11 CAL. L. REVISION COMM'N REPORTS 301 (1973)      Enacted. Cal. Stats. 1973, Ch. 526
79. *Unclaimed Property*, 11 CAL. L. REVISION COMM'N REPORTS 401 (1973); 12 CAL. L. REVISION COMM'N REPORTS 609 (1974)      Proposed resolution enacted. Cal. Stats. 1973, Res. Ch. 76. Legislation enacted. Cal. Stats. 1975, Ch. 25.
80. *Enforcement of Sister State Money Judgments*, 11 CAL. L. REVISION COMM'N REPORTS 451 (1973)      Enacted. Cal. Stats. 1974, Ch. 211
81. *Prejudgment Attachment*, 11 CAL. L. REVISION COMM'N REPORTS 701 (1973)      Enacted. Cal. Stats. 1974, Ch. 1516. See also Cal. Stats. 1975, Ch. 200.
82. *Landlord-Tenant Relations*, 11 CAL. L. REVISION COMM'N REPORTS 951 (1973)      Enacted. Cal. Stats. 1974, Chs. 331, 332
83. *Pleading* (technical change), 11 CAL. L. REVISION COMM'N REPORTS 1024 (1973)      Enacted. Cal. Stats. 1972, Ch. 73
84. *Evidence—Judicial Notice* (technical change), 11 CAL. L. REVISION COMM'N REPORTS 1025 (1973)      Enacted. Cal. Stats. 1972, Ch. 764
85. *Evidence—“Criminal Conduct” Exception*, 11 CAL. L. REVISION COMM'N REPORTS 1147 (1973)      Not enacted 1974. See recommendation to 1975 session (item 90 *infra*) which was enacted.

86. *Erroneously Compelled Disclosure of Privileged Information*, 11 CAL. L. REVISION COMM'N REPORTS 1163 (1973) Enacted. Cal. Stats. 1974, Ch. 227
87. *Liquidated Damages*, 11 CAL. L. REVISION COMM'N REPORTS 1201 (1973) Not enacted. But new recommendation will be submitted to 1976 session.
88. *Payment of Judgments Against Local Public Entities*, 12 CAL. L. REVISION COMM'N REPORTS 575 (1974) Enacted. Cal. Stats. 1975, Ch. 285
89. *View by Trier of Fact in a Civil Case*, 12 CAL. L. REVISION COMM'N REPORTS 587 (1974) Enacted. Cal. Stats. 1975, Ch. 301
90. *Good Cause Exception to the Physician-Patient Privilege*, 12 CAL. L. REVISION COMM'N REPORTS 601 (1974) Enacted. Cal. Stats. 1975, Ch. 318
91. *Improvement Acts*, 12 CAL. L. REVISION COMM'N REPORTS 1001 (1974) Enacted. Cal. Stats. 1974, Ch. 426
92. *The Eminent Domain Law*, 12 CAL. L. REVISION COMM'N REPORTS 1601 (1974) Enacted. Cal. Stats. 1975, Chs. 1239, 1240, 1275

93. *Eminent Domain—Conforming Changes in Special District Statutes*, 12 CAL. L. REVISION COMM'N REPORTS 1101 (1974); 12 CAL. L. REVISION COMM'N REPORTS 2004 (1974)
- Enacted. Cal. Stats. 1975, Chs. 581, 582, 584, 585, 586, 587, 1176, 1276
94. *Oral Modification of Written Contracts*, 13 CAL. L. REVISION COMM'N REPORTS 301 (1976)
- Enacted in part. Cal. Stats. 1975, Ch. 7. A new recommendation will be submitted to the 1976 session.

APPENDIX III

STATE OF CALIFORNIA

**CALIFORNIA LAW  
REVISION COMMISSION**

RECOMMENDATION

*relating to*

Admissibility of Copies of Business  
Records in Evidence

January 1975

CALIFORNIA LAW REVISION COMMISSION  
Stanford Law School  
Stanford, California 94305



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**CALIFORNIA LAW REVISION COMMISSION**

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

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*Ex Officio*

January 31, 1975

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

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

This recommendation is submitted as a result of this continuing review. It deals with the admissibility of copies of business records in evidence.

Respectfully submitted,  
MARC SANDSTROM  
*Chairman*



# RECOMMENDATION

*relating to*

## ADMISSIBILITY OF COPIES OF BUSINESS RECORDS IN EVIDENCE

Before a business record may be admitted into evidence several requirements must be satisfied. First, as is true of any document, the record must be authenticated.<sup>1</sup> Second, either the original record must be produced or a copy must be shown to fall within an exception to the best evidence rule.<sup>2</sup> Third, if the record is offered to prove the truth of statements which it contains, the statements must be shown to fall within one of the exceptions to the hearsay rule<sup>3</sup>—normally the business records exception.<sup>4</sup>

The requirement of authentication can be met by calling the custodian of the record as a witness. However, in the vast majority of situations, and in light of the perfunctory

<sup>1</sup> Evidence Code Sections 1400 and 1401 provide:

1400. Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law.

1401. (a) Authentication of a writing is required before it may be received in evidence.

(b) Authentication of a writing is required before secondary evidence of its content may be received in evidence.

<sup>2</sup> The best evidence is defined by Evidence Code Section 1500 as follows:

1500. Except as otherwise provided by statute, no evidence other than the writing itself is admissible to prove the content of a writing. This section shall be known and may be cited as the best evidence rule.

<sup>3</sup> Evidence Code Section 1200 contains the definition of hearsay as follows:

1200. (a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.

(b) Except as provided by law, hearsay evidence is inadmissible.

(c) This section shall be known and may be cited as the hearsay rule.

<sup>4</sup> Evidence Code Section 1271 provides:

1271. Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

(a) The writing was made in the regular course of a business;

(b) The writing was made at or near the time of the act, condition, or event;

(c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and

(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

nature of the testimony to be elicited, the cost of calling such a witness to trial, or of taking his deposition,<sup>5</sup> is wasteful and burdensome on persons, such as custodians of hospital records, whose normal duties are to care for such records. Similarly, strict adherence to the requirements of the best evidence rule with respect to business records normally serves little useful purpose. There seems little reason to demand production of an original record if a copy is certified by the custodian to be identical to the original.

Evidence Code Sections 1560-1566, applicable to copies of business records,<sup>6</sup> provide clear exceptions to the normal requirements of authentication and to the best evidence rule. These sections apply only in an action in which the business is neither a party nor the place where the cause of action is alleged to have arisen and permit compliance with a subpoena duces tecum for business records by sending a copy of the subpoenaed business record to the court in a sealed envelope accompanied by the affidavit of the custodian or other qualified witness, pursuant to Section 1561, certifying in substance each of the following:

(1) The affiant is the duly authorized custodian of the records or other qualified witness and has authority to certify the records.

(2) The copy is a true copy of all the records described in the subpoena.

(3) The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event.

<sup>5</sup> In civil matters in which the custodian's residence is beyond the scope of a subpoena, his deposition may be taken and introduced in lieu of his testimony. Code Civ. Proc. §§ 2019(b), 2020, and 2016(d)(3). In criminal matters, Penal Code Section 1330 provides a procedure by which a witness, who resides within the state but beyond the normal distance for a subpoena, may nevertheless be subpoenaed if a judge finds his attendance at the examination, trial, or hearing is material and necessary. Penal Code Section 1334.3, a reciprocal statute, provides a procedure whereby a witness may be brought from another state if the court finds that he is material and necessary. In addition, Penal Code Sections 1335-1345 provide a means of taking pretrial testimony of a material witness who is about to leave the state or who is too sick or infirm to attend the trial. Penal Code Sections 1349-1362 provide the defendant—but not the prosecution—with a method of taking a deposition of a material witness who resides out of the state; the deposition may be read in evidence upon a court finding that the witness is unavailable within the meaning of Evidence Code Section 240.

<sup>6</sup> The legislation was originally enacted as Code of Civil Procedure Sections 1998-1998.5 and as such applied exclusively to hospital records. In 1965, the provisions were recodified as Evidence Code Sections 1560-1566 without substantive change. The sections were amended in 1969 to make the provisions applicable to "every kind of business described in [Evidence Code] Section 1270." Cal. Stats. 1969, Ch. 199, §§ 1-4.

Evidence Code Section 1562 provides in part as follows:

1562. The copy of the records is admissible in evidence to the same extent as though the original thereof were offered and the custodian had been present and testified to the matters stated in the affidavit. The affidavit is admissible as evidence of the matters stated therein pursuant to Section 1561 and the matters so stated are presumed true. . . .

Thus, under this procedure, a copy of a business record is admissible without the necessity of satisfying the requirements of the best evidence rule or the rules of authentication; the fact that the document offered is a copy rather than the original is disregarded, and the matters stated in the affidavit are given the same force as if the custodian had appeared and testified. This procedure serves a most useful purpose in a case where the content of the business record will not be challenged for the truth of statements therein.

It has been brought to the attention of the Commission, however, that some attorneys and judges take the view that an affidavit complying with Section 1561 is sufficient to assure the admission in evidence of a copy of a business record notwithstanding a hearsay objection, possibly on the theory that Sections 1561 and 1562, in effect, provide an exception to the requirements of Section 1271.<sup>7</sup>

<sup>7</sup> Judge Herbert S. Herlands, Judge of Superior Court, Orange County, reports the situation in a letter to the Law Revision Commission, dated July 8, 1974, as follows:

I have been discussing, with some of my colleagues, the problem about which I wrote to you some time ago involving Sections 1271 and 1561 of the Evidence Code.

Judge Robert A. Banyard of the Orange County Superior Court has made the point that, prior to the 1969 amendments to the Evidence Code, attorneys specializing in personal injury defense work believed that Sections 1560, 1561, and 1562 constituted an exception to the requirements of Section 1271, in that they allowed *hospital* records to go in with less of a foundation than that required for the records of other businesses. Apparently, it was believed, before 1969, that the attorneys for plaintiffs and defendants in personal injury cases both wanted hospital records to be admitted on the basis of the affidavit described in Section 1561, in the belief that the very nature of hospital work and hospital record-keeping established sufficient authenticity to warrant admission of the records into evidence. Judge Banyard has further suggested that, while there may have been a good factual reason for differentiating between hospital records and the records of all other businesses, the amendments in 1969 eliminated whatever exception existed for hospital records and created an apparent inconsistency between Sections 1560, 1561, and 1562, on the one hand, and Section 1271, on the other.

The argument that the requirements of the hearsay exception are satisfied by following the procedure under Sections 1560-1566 is based upon two considerations. First, Section 1562 provides that the statements in the affidavit accompanying the record are presumed true, without denoting any specific evidentiary purpose. Second, the required statements in the affidavit under Section 1561 in some respects parallel the required showing needed for the application of the business records exception to the hearsay rule under Section 1271. However, Section 1271 includes requirements not satisfied by an affidavit submitted pursuant to Section 1561.<sup>8</sup> The business records exception to the hearsay rule provided for in Section 1271 applies only if:

- (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
- (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

Moreover, there is an important difference between a rule involving a showing of authenticity or specially providing for admission of a copy into evidence and one which admits

I still adhere to the view that, on their face, Sections 1560, 1561, and 1562 are not in conflict with Section 1271, and that documents which comply with Sections 1560, 1561, and 1562 do not qualify for admission into evidence unless the requirements of Section 1271 are also met. I believe that it is unreasonable to say that the Legislature would require less of a foundation when the authenticating witness is represented only by his declaration made under Section 1561 than when he is present in court for oral examination under Section 1271. . . .

Of course, in most cases, both sides want the records in evidence and, therefore, do not object, or counsel on both sides assume that the affidavit under Section 1561 constitutes an adequate foundation. Yet, only last week in my own court, an objection was voiced, and the proponent had to bring in the authenticating witness to lay the necessary foundation under Section 1271. The problem, therefore, is still with us in a sporadic sort of way.

The uncertainty as to the scope of these sections as reported by Judge Herlands is not new. In 1959, when the legislation was first adopted (limited to hospital records), the State Bar Journal discussed the new provisions as if they could satisfy the business records exception as well as the best evidence rule. The Journal comment stated, however, that the trial judge could refuse to admit copies of the records sent to the court, pursuant to the statute, if upon examination the court determined that the admission was not "justified," citing Code of Civil Procedure Section 1953f, which at the time contained the business records exception to the hearsay rule, now codified as Evidence Code Section 1271. 34 Cal. S.B.J. 668-669 (1959).

<sup>8</sup> Note that the Comment to Section 1562 by the Assembly Committee on Judiciary states that the presumption created by Section 1562 "relates only to the truthfulness of the matters required by Section 1561 to be stated in the affidavit."

records for the truth of the statements contained therein based upon a showing of trustworthiness in sources and preparation. A document can be an authentic original and nevertheless contain unreliable or untrue information. Thus, greater safeguards are needed to satisfy a hearsay exception than are needed for the best evidence rule or the rules regarding authentication. This is particularly true in criminal actions where a defendant, as a matter of policy, is afforded the right to confront witnesses whose testimony is material even when not constitutionally required.<sup>9</sup>

## RECOMMENDATIONS

The uncertainty regarding the relationship between Sections 1560-1566, on the one hand, and Section 1271, on the other, could be clarified in several different ways. Section 1562 could be amended to provide that the affidavit submitted under Section 1561 also satisfies the requirements of Section 1271. This solution would be indefensible from a logical standpoint since it would make copies of business records admissible without any showing as to the trustworthiness of the records—a showing that would be required if the original of the records were offered in evidence. Alternatively, the requirements specified in Section 1561 for the affidavit accompanying a copy of subpoenaed business records could be expanded to include the additional matters which must be shown under Section 1271 to satisfy the business records exception to the hearsay rule—*i.e.*, the statute could provide that, if the affidavit shows that the mode of preparation of the records and the sources of information and method and time of preparation were such as to indicate its trustworthiness, the record be admitted without further requirements. The Commission believes that this solution would be undesirable, however, since it would place the burden upon the opposing party to subpoena the custodian-affiant in

<sup>9</sup> In several cases, the United States Supreme Court has held that the admission of evidence under one of the exceptions to the hearsay rule did not violate the defendant's constitutional right of confrontation. See *California v. Green*, 399 U.S. 149 (1970) (prior inconsistent statement made exception to hearsay rule by Cal. Evid. Code § 1235); *Dutton v. Evans*, 400 U.S. 74 (1970) (declaration of co-conspirator during pendency of criminal project made exception to hearsay rule by Ga. Code Ann. § 38-306 (1954 rev.)); see also Read, *The New Confrontation—Hearsay Dilemma*, 45 So. Cal. L. Rev. 1 (1972).

order to exercise his right of cross-examination. Additionally, the drafting of such an affidavit often would be extremely difficult since the information required varies with each case, and neither the custodian nor the proponent of the evidence could be certain what information would be satisfactory to the court. Another alternative would be to provide expressly that Sections 1560-1566 do not satisfy the business records exception to the hearsay rule. However, the Commission believes that this solution is too drastic.

The salutary purposes of Sections 1560-1566—to minimize the demands of time and expense imposed upon third persons by the trial process and to save the time of courts and litigants in establishing matters which many times are not contested—would be served by providing a procedure which would allow copies of business records to be admitted into evidence despite the requirements of Section 1271 unless an opposing party notifies the subpoenaing party of his hearsay objection to the records at a time sufficiently before trial so that the custodian may be produced at the trial to testify as to the additional matters required under subdivisions (c) and (d) of Section 1271. To make such a provision operate effectively, it is necessary to insure that the opposing party will not automatically demand the presence of the custodian in every case. Thus, whenever such a demand is made, it should be supported by an affidavit setting forth specific facts showing the necessity for requiring the custodian to be produced at trial. Appropriate sanctions should be available in the event that the court finds that such an affidavit is made without substantial justification.

In order for an adverse party to have a realistic opportunity to determine whether or not to demand the presence of the custodian of the records, he should be supplied with a copy of the records or he should have access to a copy if supplying a copy to him would constitute a substantial burden on the party offering the copy in evidence. In the ordinary case, providing copies of the records to the other parties would not be a substantial burden on the party who seeks to introduce the copy in evidence since he will normally have obtained a copy of the

records through usual investigation. Custodians would have a strong incentive to cooperate in providing copies of records in order to avoid the inconvenience of being required to attend trial in actions in which they are not parties and have no interest.<sup>10</sup> In the event that the custodian resists voluntary disclosure in a civil case, copies of such records may be obtained through the process of pretrial discovery.<sup>11</sup>

Specifically, the Commission recommends that legislation be enacted to provide:

(1) If a copy of business records subpoenaed under Sections 1560-1566 is to be offered as evidence at trial or other hearing without producing a witness to testify concerning the additional matters provided in Section 1271, the party who intends to offer the copy must give notice to the other parties of that intention, accompanied by a copy of the records, not less than 20 days before trial.

(2) In those cases where numerous parties are involved, or where the records are voluminous, it may not be practical to require the party seeking to introduce the evidence to serve on each party a copy of the records to be offered in evidence.<sup>12</sup> In such a case, the court would be authorized to permit the offering party to deposit a copy of the records with the clerk of the court to be available for examination and copying by the other parties under such terms and conditions as the court deems appropriate.<sup>13</sup>

<sup>10</sup> It was the California Hospital Association which initially sponsored the legislation allowing the custodian to supply a copy of the records in lieu of personal appearance. 34 Cal. S.B.J. 668 (1959). Sections 1560-1566 apply only "in an action in which the business is neither a party nor the place where any cause of action is alleged to have arisen." See Section 1560.

<sup>11</sup> *E.g.*, Code Civ. Proc. § 1985.

<sup>12</sup> In the case of voluminous records, Evidence Code Section 1509 provides a procedure for offering a written or oral summary of the records. However, this section only overcomes the best evidence rule. If the original records are hearsay or not properly authenticated, the summary is not admissible. *People v. Doble*, 203 Cal. 510, 265 P. 184 (1928). See B. Witkin, *California Evidence* § 698 (2d ed. 1966). Additionally, Section 1509 permits the court to require production of the original records for inspection by the adverse party. See *Exclusive Florists v. Kahn*, 17 Cal. App.3d 711, 95 Cal. Rptr. 325 (1971).

<sup>13</sup> This recommendation is in accord with the observation of the California Supreme Court in *Vasquez v. Superior Court*, 4 Cal.3d 800, 820, 484 P.2d 964, 977, 94 Cal. Rptr. 796, 809 (1971), with regard to adoption of procedures for class actions: "pragmatic procedural devices will be required to simplify the potentially complex litigation while at the same time protecting the rights of all the parties." Compare the procedure for establishment of central depositories for inspection and copying of documents in federal multidistrict litigation. *Manual for Complex and Multidistrict Litigation* § 2.5 (1970).

(3) If no party objects within 10 days after receiving notice, the copy of business records would be admissible, notwithstanding the requirements of the hearsay rule.

(4) If a party, within 10 days after receiving notice, serves on the party seeking to introduce the copy of the records into evidence a written demand that the requirements of subdivisions (c) and (d) of Section 1271 be satisfied, together with a supporting affidavit, then the party who offers the copy of the business records as evidence must produce the custodian or other qualified witness in order to satisfy the requirements of Section 1271(d). In his supporting affidavit, the adverse party must state that he has good reason to believe that the requirements of Section 1271 cannot be satisfied and must set forth the precise facts on which this belief is based.

(5) Upon a showing of good cause, the court would be authorized to make an *ex parte* order shortening the time for service of the required notices.

(6) In a case where a party has demanded that the requirements of Section 1271 be satisfied and has served the required affidavit, and where thereafter the evidence has been admitted on the testimony of the custodian or other qualified witness, the court may—if it finds that the party who opposed the introduction of the copy of the records did not have substantial justification for believing that the records did not satisfy the requirement for admissibility of Section 1271—require the party who opposed the introduction of the copy to pay the party offering the copy as evidence the expenses of obtaining the testimony of the custodian or other qualified witness, including reasonable attorney's fees.

(7) In a criminal action for failure to support under Penal Code Sections 270, 270a, or 270c or in a civil proceeding under the Uniform Civil Liability for Support Act (Civil Code § 241 *et seq.*), a copy of the business records of an employer dealing with the employment and earnings of an employee would not be made inadmissible by the hearsay rule if the affidavit of the custodian or other qualified witness satisfies the requirements of Evidence Code Section 1561 and if a notice of the intention to introduce the records together with a copy of the records is served on the

parties not less than 10 days prior to trial. This hearsay exception is justified by the large volume of support cases, a significant number of which concern distant or out-of-state employers, by the routine and normally accurate nature of the records involved, and by the ability of the employee to prove any inaccuracy in the record by his own testimony and other sources of evidence.

(8) The recommended new provisions would affect only the manner in which a copy of business records is admitted in evidence. They would not affect the weight to be given to the record as evidence of the act, condition, or event recorded, nor would they foreclose a party from presenting evidence to disprove such act, condition, or event.

### PROPOSED LEGISLATION

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

An act to add Section 250.5 to the Civil Code, to add Sections 1562.3, 1562.4, 1562.5, 1562.6, and 1562.7 to the Evidence Code, and to add Section 270i to the Penal Code, relating to the admissibility of business records in evidence.

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

#### **Civil Code § 250.5 (new)**

SECTION 1. Section 250.5 is added to the Civil Code, to read:

250.5. (a) In any proceeding to enforce a duty of support under this title, evidence of the employment and earnings of an employee in the form of a copy of the business records of his employer subpoenaed pursuant to subdivision (b) of Section 1560, and Sections 1561 and 1562, of the Evidence Code is not made inadmissible by the hearsay rule when offered at the trial or other hearing to prove such employment or earnings, or both, if all of the following are established by the party offering the copy as evidence:

(1) The affidavit accompanying the copy contains the statements required by subdivision (a) of Section 1561 of the Evidence Code.

(2) The subpoena duces tecum served upon the custodian of records or other qualified witness for the production of the copy did not contain the clause set forth in Section 1564 of the Evidence Code requiring personal attendance of the custodian or other qualified witness and the production of the original records.

(3) The party offering the copy as evidence has served on each party, not less than 10 days prior to the date of the trial or other hearing, both of the following:

(i) A notice that a copy of the business records has been subpoenaed for trial or other hearing in accordance with the procedure authorized pursuant to subdivision (b) of Section 1560, and Sections 1561 and 1562, of the Evidence Code and will be offered in evidence pursuant to Section 250.5 of the Civil Code.

(ii) A copy of the business records to be offered in evidence.

(b) The admission into evidence of a copy of a business record pursuant to this section shall not affect the right of a party to offer evidence to disprove the employment or earnings recorded in such record.

**Comment.** Section 250.5 creates an exception to the hearsay rule (Evid. Code § 1200) for a copy of business records subpoenaed pursuant to Evidence Code Sections 1560-1566 if the requirements of Section 250.5 are satisfied. It should be noted that Section 1562 of the Evidence Code creates an exception to the best evidence rule (Evid. Code § 1500) and provides the necessary preliminary showing of authenticity of both the copy and the original record (Evid. Code § 1401).

Section 250.5 is similar to Section 1562.3 of the Evidence Code which creates a general hearsay exception for copies of business records subpoenaed pursuant to Evidence Code Sections 1560-1566 if the requirements of Section 1562.3 are satisfied. However, Section 250.5 does not include a provision similar to subdivision (d) of Section 1562.3, which permits a party to demand that the custodian or other qualified witness be produced at the trial or other hearing. The hearsay exception provided by Section 250.5 is justified by the large volume of failure to support cases, a significant number of which concern distant or out-of-state employers, by the routine and normally accurate nature of the records involved, and by the ability of the employee to prove any inaccuracy in the record by his own testimony and other sources of evidence.

Subdivision (b) makes clear that Section 250.5 does not preclude any party from offering evidence at the trial or other hearing to prove that the records are not accurate. For a comparable provision, see Evid. Code § 1562.7.

Section 250.5 applies in an action under the Uniform Civil Liability for Support Act. For a comparable provision applicable to criminal actions for failure to support, see Penal Code § 270i.

### **Evidence Code § 1562.3 (new)**

SEC. 2. Section 1562.3 is added to the Evidence Code, to read:

1562.3. A copy of the business records subpoenaed pursuant to subdivision (b) of Section 1560, and Sections 1561 and 1562, is not made inadmissible by the hearsay rule when offered at the trial or other hearing to prove an act, condition, or event recorded if all of the following are established by the party offering the copy as evidence:

(a) The affidavit accompanying the copy contains the statements required by subdivision (a) of Section 1561.

(b) The subpoena duces tecum served upon the custodian of records or other qualified witness for the production of the copy did not contain the clause set forth in Section 1564 requiring personal attendance of the custodian or other qualified witness and the production of the original records.

(c) The party offering the copy as evidence has served on each party, not less than 20 days prior to the date of trial or other hearing, both of the following:

(1) A notice that a copy of the business records has been subpoenaed for trial or other hearing in accordance with the procedure authorized pursuant to subdivision (b) of Section 1560, and Sections 1561 and 1562, of the Evidence Code and will be offered in evidence pursuant to Section 1562.3 of the Evidence Code.

(2) A copy of the business records to be offered in evidence or a notice that a copy of the business records has been deposited with the clerk of the court in accordance with Section 1562.4.

(d) No party has, within 10 days after being served with the notice referred to in subdivision (c), served on the party seeking to introduce the record both of the following:

(1) A written demand that the requirements of subdivisions (c) and (d) of Section 1271 be satisfied before the copy of the record is admitted in evidence.

(2) An affidavit of such party stating that he has good reason to believe that the copy of the business records, or a specific portion thereof, served on him, or in the custody of the clerk, does not satisfy the requirement of subdivision (d) of Section 1271 and setting forth the precise facts upon which this belief is based.

**Comment.** Section 1562.3 creates an exception to the hearsay rule (Section 1200) for a copy of business records subpoenaed pursuant to Sections 1560-1566 if the requirements of Section 1562.3 are satisfied. Section 1562 creates an exception to the best evidence rule (Section 1500) and provides the necessary preliminary showing of authenticity of both the copy and the original record (Section 1401). However, the affidavit of the custodian of records or other qualified witness under Section 1561 does not satisfy the requirements of the hearsay exception provided by Section 1271—the business records exception to the hearsay rule—because the affidavit does not contain statements sufficient to satisfy the requirements of subdivision (d) of Section 1271 (“The sources of information and method and time of preparation were such as to indicate its trustworthiness.”). See *Recommendation Relating to Admissibility of Copies of Business Records in Evidence* (January 1975).

Subdivision (d) provides the method by which the adverse party may demand testimony by the custodian of the records or other qualified witness before the copy of the records can be admitted into evidence. Subdivision (d) (2) is designed to assure that a party will not make such a demand automatically and without substantial justification. Under subdivision (d), the party who opposes the introduction of the record, or a portion thereof, must not only state under oath that he has good reason to believe that the copy of the record, or a portion thereof, is inadmissible because the requirements of subdivision (d) of Section 1271 cannot be satisfied, but he must also state specific facts upon which the belief is based. This places a burden on the party who opposes the introduction of the copy of the records to investigate a situation in which he lacks knowledge of the facts sought to be proved. In such a case, the party may support his statement of belief with facts showing that the record is in fact inaccurate or that the sources of information or method of preparation of the records are such as to render the records untrustworthy. Failure

to object does not preclude a party from offering evidence at trial to show that the records are in fact incorrect. See Section 1562.7.

### **Evidence Code § 1562.4 (new)**

**SEC. 3.** Section 1562.4 is added to the Evidence Code, to read:

**1562.4.** In an action in which there are numerous parties or a party seeks to have a copy of a voluminous business record admitted into evidence under the provisions of Section 1562.3, the court may make an ex parte order permitting the party, in lieu of serving the copy of the record on all parties as required by subdivision (c) of Section 1562.3, to deposit a copy of the business records with the clerk of the court for examination and copying by the other parties under such terms and conditions as the court deems appropriate. A copy of the order of the court shall be served together with the notices required by Section 1562.3.

**Comment.** Section 1562.4 authorizes the court to issue an ex parte order permitting deposit of a copy of business records with the clerk of the court in an action in which there are numerous parties or in which a party seeks to have a copy of a voluminous business record admitted into evidence. This avoids the need to serve a copy of the records on each party and offers a practical solution to the procedural problems, raised by complex multiparty litigation or voluminous records, where the cost of reproduction would be a substantial burden on the party offering the copy of the record as evidence.

### **Evidence Code § 1562.5 (new)**

**SEC. 4.** Section 1562.5 is added to the Evidence Code, to read:

**1562.5.** A party who seeks to introduce a copy of business records pursuant to Section 1562.3 may, upon a showing of good cause therefor and in the discretion of the court, obtain an ex parte order shortening the time for service of the notices required by subdivisions (c) and (d) of Section 1562.3.

**Comment.** Section 1562.5 provides flexibility in those circumstances where a party wishes to use the procedure provided by Section 1562.3 but where the time limitations otherwise would preclude use of the procedure. The court is given discretion so that such an order will not be granted where

it would be prejudicial to the other parties to the action. Primarily, the provision is intended to aid in the use of this procedure in criminal actions which are required to be brought to trial within strict time limits.

### **Evidence Code § 1562.6 (new)**

**SEC. 5.** Section 1562.6 is added to the Evidence Code, to read:

**1562.6.** If a party serves a demand and supporting affidavit as provided in subdivision (d) of Section 1562.3 and if the party offering the copy of the business records as evidence satisfies the requirements of Section 1271 and the copy of the record is admitted into evidence, the latter party may apply to the court in the same action for an order requiring the party who served the demand to pay him the expenses of satisfying the requirements of Section 1271, including the cost of obtaining the testimony of the custodian or other qualified witness and reasonable attorney's fees. The court in its discretion may enter such order upon a finding that the party serving the demand had no substantial justification for believing that the business record was not admissible under Section 1271.

**Comment.** Section 1562.6 provides a means by which the court can protect against unjustified demands under Section 1562.3(d) for compliance with the requirements of Section 1271. The section gives the court discretion to order the party who requires the testimony of the custodian or other qualified witness under the procedure set out in Section 1562.3 to pay the expenses of obtaining such testimony including reasonable attorney's fees if the court finds that the demand was made without substantial justification.

### **Evidence Code § 1562.7 (new)**

**SEC. 6.** Section 1562.7 is added to the Evidence Code, to read:

**1562.7.** The admission into evidence of a copy of a business record pursuant to Section 1562.3 shall not affect the right of a party to offer evidence to disprove an act, condition, or event recorded in such record.

**Comment.** Section 1562.7 makes clear that a copy of a business record admitted into evidence under the procedure specified in Section 1562.3 is not conclusive evidence of the facts

sought to be proved. The adverse party has the right to offer evidence to disprove any act, condition, or event recorded.

**Penal Code § 270i (new)**

SEC. 7. Section 270i is added to the Penal Code, to read:

270i. (a) In any prosecution for failure to support brought under Section 270, 270a, or 270c, evidence of the employment and earnings of an employee in the form of a copy of the business records of his employer subpoenaed pursuant to subdivision (b) of Section 1560, and Sections 1561 and 1562, of the Evidence Code is not made inadmissible by the hearsay rule when offered at the trial or other hearing to prove such employment or earnings, or both, if all of the following are established by the party offering the copy as evidence:

(1) The affidavit accompanying the copy contains the statements required by subdivision (a) of Section 1561 of the Evidence Code.

(2) The subpoena duces tecum served upon the custodian of records or other qualified witness for the production of the copy did not contain the clause set forth in Section 1564 of the Evidence Code requiring personal attendance of the custodian or other qualified witness and the production of the original records.

(3) The party offering the copy as evidence has served on each party, not less than 10 days prior to the date of the trial or other hearing, both of the following:

(i) A notice that a copy of the business records has been subpoenaed for trial or other hearing in accordance with the procedure authorized pursuant to subdivision (b) of Section 1560, and Sections 1561 and 1562, of the Evidence Code and will be introduced in evidence pursuant to Section 270i of the Penal Code.

(ii) A copy of the business records to be offered in evidence.

(b) The admission into evidence of a copy of a business record pursuant to this section shall not affect the right of a party to offer evidence to disprove the employment or earnings recorded in such record.

**Comment.** Section 270i creates an exception to the hearsay rule (Evid. Code § 1200) for a copy of business records

subpoenaed pursuant to Evidence Code Sections 1560-1566 if the requirements of Section 270i are satisfied. It should be noted that Section 1562 of the Evidence Code creates an exception to the best evidence rule (Evid. Code § 1500) and provides the necessary preliminary showing of authenticity of both the copy and the original record (Evid. Code § 1401).

Section 270i is similar to Section 1562.3 of the Evidence Code which creates a general hearsay exception for copies of business records subpoenaed pursuant to Evidence Code Sections 1560-1566 if the requirements of Section 1562.3 are satisfied. However, Section 270i does not include a provision similar to subdivision (d) of Section 1562.3, which permits a party to demand that the custodian or other qualified witness be produced at the trial or other hearing. The hearsay exception provided by Section 270i is justified by the large volume of failure to support cases, a significant number of which concern distant or out-of-state employers, by the routine and normally accurate nature of the records involved, and by the ability of the employee to prove an inaccuracy in the record by his own testimony and other sources of evidence.

Subdivision (b) makes clear that Section 270i does not preclude any party from offering evidence at the trial or other hearing to prove that the records are not accurate. For a comparable provision, see Evid. Code § 1562.7.

Section 270i applies in a criminal action for support. For a comparable provision applicable to actions for failure to support under the Uniform Civil Liability for Support Act, see Civil Code § 250.5.

# APPENDIX IV

## EXTRACT FROM REPORT OF ASSEMBLY COMMITTEE ON JUDICIARY ON ASSEMBLY BILLS

11, 124, 125, 126, 127, 128, 129, 130, 131, 266, and 278

[Extract from Assembly Journal for May 19, 1975 (1975-76 Regular Session).]

[The revised Comment to an uncodified section is set out below. Revised or new Comments to codified sections have been omitted. The Commission plans to publish, in cooperation with the Continuing Education of the Bar, a pamphlet containing the codified sections with the official Comments.]

### ASSEMBLY BILL 129

#### **Desert Water Agency Law, § 15 (Stats. 1961, Ch. 1069) (amended)**

**Comment.** The deleted portions of the first part of subdivision 9 of Section 15 are superseded by the Eminent Domain Law. See Code Civ. Proc. §§ 1230.020 (uniform procedure), 1240.610 *et seq.* (more necessary public use). The next to last sentence of subdivision 9 of Section 15 is deleted because it is obsolete. Former subdivision 16 was unnecessary. See CODE CIV. PROC. § 1250.210 and Comment thereto.



# APPENDIX V

## EXTRACT FROM REPORT OF SENATE COMMITTEE ON JUDICIARY ON ASSEMBLY BILLS

11, 124, 125, 126, 127, 128, 129, 130, 131, 266, and 278

[Extract from Senate Journal for August 14, 1975 (1975-76 Regular Session).]

[Only revised Comments to uncodified sections are set out below. Revised or new Comments to codified sections have been omitted. The Commission plans to publish, in cooperation with the Continuing Education of the Bar, a pamphlet containing the codified sections with the official Comments.]

### ASSEMBLY BILL 130

#### **Sacramento River West Side Levee District Act, § 5 (Stats. 1915, Ch. 361)**

**Comment.** The deleted portions of Section 5 are superseded by provisions of the Eminent Domain Law. See Code Civ. Proc. §§ 1230.-020 (uniform procedure), 1240.610 *et seq.* (more necessary public use), 1240.110 (right to acquire any property or any interest or right in property). See also Code Civ. Proc. §§ 1235.170 (“property” defined), 1240.130 (acquisition by means other than condemnation); *cf.* Code Civ. Proc. § 1230.030.

### ASSEMBLY BILL 131

#### **Orange County Flood Control Act (Stats. 1927, Ch. 723), § 16.1 (added Stats. 1957, Ch. 1036, § 1) (repealed)**

**Comment.** Section 16.1 is superseded by Code of Civil Procedure Sections 1240.350 and 1240.410 *et seq.*

#### **Riverside County Flood Control and Water Conservation District Act (Stats. 1945, Ch. 1122), § 9.2 (added Stats. 1967, Ch. 1112, § 5) (repealed)**

**Comment.** Section 9.2 is superseded by Code of Civil Procedure Sections 1240.350 and 1240.410 *et seq.*



# APPENDIX VI

## EXTRACT FROM REPORT OF SENATE COMMITTEE

### ON JUDICIARY ON SENATE BILL 294

[Extract from Senate Journal for March 13, 1975 (1975-76 Regular Session).]

## REPORT OF SENATE COMMITTEE ON JUDICIARY ON SENATE BILL 294

In order to indicate more fully its intent with respect to Senate Bill 294, the Senate Committee on Judiciary makes the following report.

Except for the revised comments set out below, the comments contained under the various sections of Senate Bill 294 as set out in *Recommendation of the California Law Revision Commission Relating to View by Trier of Fact in a Civil Case* (October 1974) reflect the intent of the Senate Committee on Judiciary in approving the various provisions of Senate Bill 294.

The following revised comments also reflect the intent of the Senate Committee on Judiciary in approving Senate Bill 294.

### **Code of Civil Procedure § 632**

[The revised Comment to Section 632 has been omitted. The Comment was revised to reflect the Senate amendment to this section. However, action by the Assembly restored the language originally proposed by the Commission. Hence, the original Comment to Section 632 did not need to be revised.]

### **Code of Civil Procedure § 651**

*Comment.* Section 651 provides a procedure whereby the trier of fact—whether judge or jury—may leave the courtroom to receive evidence. Former Section 610 provided only for a view by a jury. Views by a judge were governed by case law. See, e.g., *Gates v. McKinnon*, 18 Cal.2d 179, 114 P.2d 576 (1941); *Noble v. Kertz & Sons Feed & Fuel Co.*, 72 Cal. App.2d 153, 164 P.2d 257 (1945). Where a view is ordered, or is conducted, in violation of this section, the view is not independent evidence sufficient to support a finding.

Subdivision (a) provides the standard for determining whether the trier of fact should view evidence outside the courtroom. The court has discretion whether to order a view. In making the determination, the court should weigh the need for the view against such considerations as whether the view would necessitate undue consumption of time or create a danger of misleading the trier of fact because of changed conditions. The nature of evidence which may be viewed outside the courtroom has been expanded to include objects, demonstrations, and experiments. Former Section 610 provided only for a “view of the property which is the subject of litigation, or of the place in which any material fact occurred.” The courts have held, however, that they have inherent authority to order a view of other forms of evidence. See, e.g., *Newman v. Los Angeles Transit Lines*, 120 Cal. App.2d 685, 262 P.2d 95 (1953) (operation of streetcar door).

Under former law, in a court-tried case, all the parties had to consent to a view by the judge in order for the information there obtained to be considered independent evidence. See *Noble v. Kertz & Sons Feed & Fuel Co.*, *supra*. The requirement of consent by all the parties has not been continued. It should be noted, further, that the court is not required to follow the procedure of Section 651 where it is proper to take judicial notice of facts obtainable at a view. See Evid. Code §§ 450-460 (procedure where judicial notice is to be taken).

Subdivision (b) makes clear that the view by the trier of fact is a session of court, essentially the same as a session inside the courtroom. Hence, subdivision (b) requires the presence of the judge, jury (if any), and any necessary court officials, including the court reporter (if proceedings inside the courtroom are being recorded). It is anticipated that ordinarily the jury will go to and return from the view in a body under the charge of an officer. However, this is a matter left to the court's discretion, and the court may direct that the jury be permitted to assemble at the view and leave separately. The third sentence of subdivision (b) makes clear that the judge has discretion to permit the testimony of witnesses and examination of witnesses by counsel while the court is in session outside the courtroom. See also Evid. Code § 765 (court control over interrogation). Thus, where appropriate, the court should provide the parties with the opportunity to examine witnesses (direct and cross-examination) at the view and to note crucial aspects of the view for the record. Yet there may be occasions where it will be inconvenient or unnecessary to permit testimony outside the courtroom. Former Section 610 allowed only the person appointed by the court to speak to the jurors and made no provision for the presence of witnesses or counsel for the parties. The decisions concerning a view by the judge admonish, however, that counsel for the parties should be present. See *Noble v. Kertz & Sons Feed & Fuel Co.*, *supra*. The power of the judge to control the proceedings remains intact while the court is in session outside the courtroom. See Code Civ. Proc. § 128 (general authority of court to control proceedings). Hence, for example, the court may appoint a person to show the premises to the trier of fact and may allow or refuse to allow the jurors to question witnesses at the view (see Evid. Code § 765). As to when in a court-tried case the observation of the judge at the view must be made a part of the record, see Section 632 of the Code of Civil Procedure.

# APPENDIX VII

## REPORT OF ASSEMBLY COMMITTEE ON JUDICIARY ON ASSEMBLY BILL 73

[Extract from Assembly Journal for February 27, 1975 (1975-76 Regular Session).]

## REPORT OF ASSEMBLY COMMITTEE ON JUDICIARY ON ASSEMBLY BILL 73

In order to indicate more fully its intent with respect to Assembly Bill 73, the Assembly Committee on Judiciary makes the following report.

Assembly Bill 73 was introduced to effectuate the *Recommendation of the California Law Revision Commission Relating to the Good Cause Exception to the Physician-Patient Privilege* (October 1974). Assembly Bill 73 was amended after its introduction, and the following revised comment to Section 999 of the Evidence Code has been prepared to reflect the intent of the Assembly Committee on Judiciary in approving Assembly Bill 73.

*Comment.* Section 999 is amended to provide an exception to the physician-patient privilege where good cause is shown for the disclosure of a relevant communication concerning the condition of a patient in a proceeding to recover damages on account of the conduct of the patient. Section 999 permits the disclosure of communications between patient and physician (See Section 992 broadly defining communication) where a need for such evidence is shown while at the same time protecting from disclosure the communications of persons whose conduct is not involved in the action for damages.

Section 999 permits disclosure not only in a case where the patient is a party to the action but also in a case where a party's liability is based on the conduct of the patient. An example of the latter situation is a personal injury action brought against an employer based on the negligent conduct of his employee who was killed in the accident. On the other hand, the section does not affect the privilege of nonparty patients in malpractice actions. See, *e.g.*, *Marcus v. Superior Court*, 18 Cal. App.3d 22, 95 Cal. Rptr. 545 (1971). However, even in such malpractice actions, it sometimes may be possible to provide the necessary information without violating the privilege. See *Rudnick v. Superior Court*, 11 Cal.3d 924, 933 n.13, 523 P.2d 643, 650-651 n.13, 114 Cal. Rptr. 603, 610-611 n.13 (1974).

The requirement that good cause be shown for the disclosure permits the court to protect the defendant against a "fishing expedition" into his medical records. Compare Evid. Code § 996 (patient-litigant exception). It should be noted that the exception provided by Section 999, like the other exceptions in this article, does not apply to the psychotherapist-patient privilege. That privilege is a separate and dis-

tinct privilege, and the exceptions to that privilege are much more narrowly drawn. See Evid. Code §§ 1010–1028.

Formerly, Section 999 provided an exception only in a proceeding to recover damages arising out of the criminal conduct of the patient. This “criminal conduct” exception has been eliminated as unnecessary in view of the “good cause” exception now provided by Section 999. Moreover, the “criminal conduct” exception was burdensome, difficult to administer, and ill designed to achieve the purpose of making needed evidence available. See *Recommendation Relating to Evidence Code Section 999— The “Criminal Conduct” Exception to the Physician-Patient Privilege*, 11 Cal. L. Revision Comm’n Reports 1147 (1973).

APPENDIX VIII

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

*relating to*

Turnover Orders Under The  
Claim and Delivery Law

June 1975

CALIFORNIA LAW REVISION COMMISSION  
Stanford Law School  
Stanford, California 94305



**CALIFORNIA LAW REVISION COMMISSION**

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

MARC SANDSTROM  
*Chairman*

JOHN N. McLAURIN  
*Vice Chairman*

SENATOR ROBERT S. STEVENS  
ASSEMBLYMAN ALISTER McALISTER  
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HOWARD R. WILLIAMS  
GEORGE H. MURPHY  
*Ex Officio*

June 27, 1975

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

The California claim and delivery statute (Code of Civil Procedure Sections 511.010–516.050) was enacted in 1973 upon recommendation of the California Law Revision Commission. See *Recommendation Relating to the Claim and Delivery Statute*, 11 CAL. L. REVISION COMM'N REPORTS 301 (1973).

The Commission was directed by Resolution Chapter 45 of the Statutes of 1974 to study all aspects of the law relating to creditors' remedies. Pursuant to this directive, the Commission submits this recommendation proposing technical corrections in the claim and delivery statute.

Respectfully submitted,  
MARC SANDSTROM  
*Chairman*



# RECOMMENDATION

*relating to*

## TURNOVER ORDERS UNDER THE CLAIM AND DELIVERY LAW

The claim and delivery statute<sup>1</sup> includes a provision—Code of Civil Procedure Section 512.070—permitting the court to issue an order directing the defendant to transfer possession of the property described in the writ of possession to the plaintiff. Although the turnover order is directed only to the defendant, Section 512.070 requires that the order include a notice stating that failure to turn over possession of the property to the plaintiff may subject the defendant or *person in possession* to being held in contempt of court or arrest.<sup>2</sup> A person in possession of the property who is not a defendant in the action should not be subject to being held in contempt for failure to obey an order that is not directed to him. Accordingly, the Commission recommends that Section 512.070 be amended to delete the reference to the other person in possession.

In addition, the Commission recommends that the words “or arrest” be deleted from Section 512.070 to avoid the implication that the defendant may be subject to arrest independent of contempt proceedings.

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

An act to amend Section 512.070 of the Code of Civil Procedure, relating to claim and delivery.

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

**SECTION 1.** Section 512.070 of the Code of Civil Procedure is amended to read:

<sup>1</sup> Code Civ. Proc. §§ 511.010-516.050. These sections were enacted by the Legislature in 1973 (Cal. Stats. 1973, Ch. 526) on recommendation of the Law Revision Commission. See 11 Cal. L. Revision Comm’n Reports 301 (1973).

<sup>2</sup> The notice provision was added by an amendment in the Assembly. See Assembly Bill 103 (1973 Reg. Sess.), as amended April 23, 1973.

512.070. If a writ of possession is issued, the court may also issue an order directing the defendant to transfer possession of the property to the plaintiff. Such order shall contain a notice to the defendant ~~or the party in possession of such property~~; that failure to turn over possession of such property to plaintiff may subject the defendant ; ~~or person in possession of such property~~; to being held in contempt of court ~~or arrest~~ .

**Comment.** Section 512.070 is amended to delete the reference to the party or person in possession in the provision requiring the order to state that failure to comply may subject such person to contempt of court. Since the order is directed only to the defendant, it would be inappropriate to hold some other person in contempt for failure to obey it.

Section 512.070 is also amended to delete the words “or arrest” from the last sentence. This amendment makes clear that the defendant is not subject to arrest independent of contempt proceedings. See Code Civ. Proc. § 501 (civil arrest abolished). A person may still be arrested in the course of contempt proceedings. See Code Civ. Proc. §§ 1212, 1214, 1220.

APPENDIX IX

STATE OF CALIFORNIA

**CALIFORNIA LAW  
REVISION COMMISSION**

RECOMMENDATION

*relating to*

Relocation Assistance by  
Private Condemnors

October 1975

CALIFORNIA LAW REVISION COMMISSION  
Stanford Law School  
Stanford, California 94305



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**CALIFORNIA LAW REVISION COMMISSION**

STANFORD LAW SCHOOL  
STANFORD, CALIFORNIA 94305

(415) 497-1731

MARC SANDSTROM

*Chairman*

JOHN N. McLAURIN

*Vice Chairman*

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JOHN J. BALLUFF

JOHN D. MILLER

THOMAS E. STANTON, JR.

HOWARD R. WILLIAMS

GEORGE H. MURPHY

*Ex Officio*

October 11, 1975

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

The California Law Revision Commission was directed by Resolution Chapter 130 of the Statutes of 1965 to study and make recommendations relating to condemnation law and procedure. The Commission has previously submitted recommendations concerning various aspects of condemnation law and procedure, including the recently enacted Eminent Domain Law (Cal. Stats. 1975, Ch. 1275). The Commission submits herewith a recommendation dealing with another aspect of its study—relocation assistance by private condemners.

Respectfully submitted,  
MARC SANDSTROM  
*Chairman*



# RECOMMENDATION

*relating to*

## RELOCATION ASSISTANCE BY PRIVATE CONDEMNORS

California's general relocation assistance statute<sup>1</sup> was enacted primarily to implement the requirements imposed on the state by the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970<sup>2</sup> and to more adequately compensate persons whose property is taken for public use. One major purpose of the statute was to assure a uniform policy of relocation assistance to all persons in the state regardless of the acquiring entity.<sup>3</sup>

By its terms, the relocation assistance statute applies only to acquisitions by public entities. But, in California, private persons also may exercise the power of eminent domain to acquire private property for public use.<sup>4</sup>

Of the private condemners, only privately owned public utilities acquiring real property by eminent domain must comply with relocation assistance provisions applicable to public entities.<sup>5</sup> Such private condemners as nonprofit hospitals, nonprofit colleges, nonprofit cemeteries, nonprofit housing corporations, and mutual water companies are not required to comply with the relocation assistance provisions.

The Law Revision Commission recommends that all private condemners be required to comply with the relocation assistance provisions imposed on public entities. This will assure that every person in the state whose property is acquired by eminent domain will be treated

<sup>1</sup> Govt. Code §§ 7260-7275.

<sup>2</sup> 42 U.S.C. §§ 4601-4655 (1971).

<sup>3</sup> Comment, *Relocation Assistance in California: Legislative Response to the Federal Program*, 3 Pac. L.J. 114, 118 (1972).

<sup>4</sup> See, e.g., Pub. Util. Code §§ 610-624 (Cal. Stats. 1975, Ch. 1240, § 65) (public utilities); Health & Saf. Code § 1260 (Cal. Stats. 1975, Ch. 1240, § 43) (nonprofit hospitals); Educ. Code § 30051 (Cal. Stats. 1975, Ch. 1240, § 14) (nonprofit colleges); Health & Saf. Code §§ 8501 (Cal. Stats. 1975, Ch. 1240, § 45) (nonprofit cemeteries), 34874 (limited dividend housing corporations), 35167 (Cal. Stats. 1975, Ch. 1240, § 55) (land chest corporations); Pub. Util. Code § 2729 (Cal. Stats. 1975, Ch. 1240, § 68) (mutual water companies).

<sup>5</sup> Pub. Util. Code § 600.

fairly and equally and that the burdens of compensation accompany the right of condemnation.

---

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

An act to add Section 7276 to the Government Code, relating to eminent domain relocation assistance.

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

**SECTION 1.** Section 7276 is added to the Government Code, to read:

**7276.** A person acquiring real property by eminent domain shall provide relocation advisory assistance and shall make any of the payments required to be made by public entities pursuant to the provisions of this chapter.

This section does not apply to public utilities which are subject to the provisions of Article 6 (commencing with Section 600) of Chapter 3 of Part 1 of Division 1 of the Public Utilities Code or to public entities which are subject to the provisions of this chapter.

**Comment.** Section 7276 is new. The relocation assistance provisions of Sections 7260-7275 are applicable by their terms only to public entities. Section 7276 extends their application to eminent domain acquisitions by private condemners other than public utilities. Public utilities are covered by Public Utilities Code Section 600. Private condemners that would be covered by Section 7276 include nonprofit hospitals (Health & Saf. Code § 1260), nonprofit colleges (Educ. Code § 30051), nonprofit cemeteries (Health & Saf. Code § 8501), limited dividend housing corporations (Health & Saf. Code § 34874), land chest corporations (Health & Saf. Code § 35167), and mutual water companies (Pub. Util. Code § 2729).

APPENDIX X

STATE OF CALIFORNIA

**CALIFORNIA LAW  
REVISION COMMISSION**

RECOMMENDATION

*relating to*

Condemnation for Byroads and  
Utility Easements

October 1975

CALIFORNIA LAW REVISION COMMISSION  
Stanford Law School  
Stanford, California 94305



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## CALIFORNIA LAW REVISION COMMISSION

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

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*Chairman*

JOHN N. McLAURIN  
*Vice Chairman*

SENATOR ROBERT S. STEVENS  
ASSEMBLYMAN ALISTER McALISTER

JOHN J. BALLUFF

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THOMAS E. STANTON, JR.

HOWARD R. WILLIAMS

GEORGE H. MURPHY  
*Ex Officio*

October 11, 1975

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

The California Law Revision Commission was directed by Resolution Chapter 130 of the Statutes of 1965 to study and make recommendations relating to condemnation law and procedure. The Commission has previously submitted recommendations concerning various aspects of condemnation law and procedure, including the recently enacted Eminent Domain Law (Cal. Stats. 1975, Ch. 1275). The Commission submits herewith a recommendation dealing with another aspect of its study—condemnation for byroads and utility easements.

Respectfully submitted,  
MARC SANDSTROM  
*Chairman*



# RECOMMENDATION

*relating to*

## CONDEMNATION FOR BYROADS AND UTILITY EASEMENTS

The 1975 Legislature, on recommendation of the California Law Revision Commission,<sup>1</sup> abolished private condemnation authority<sup>2</sup> except for condemnation by public utilities<sup>3</sup> and five types of quasi-public entities—nonprofit hospitals,<sup>4</sup> nonprofit educational institutions of collegiate grade,<sup>5</sup> nonprofit cemeteries,<sup>6</sup> certain nonprofit housing corporations,<sup>7</sup> and mutual water companies.<sup>8</sup>

This recommendation is concerned with private condemnation to provide appurtenant easements necessary for access or utility service to property of the condemnor. Prior to 1975, the law permitted private persons to condemn appurtenant easements for access and utility service purposes.<sup>9</sup> This authority served the function

<sup>1</sup> *Recommendation Proposing the Eminent Domain Law*, reprinted in 12 Cal. L. Revision Comm'n Reports at 1635-1636 (1974).

<sup>2</sup> Former Civil Code Section 1001, which authorized condemnation by private persons, was repealed by Cal. Stats. 1975, Ch. 1240, § 1. It provided:

1001. Any person may, without further legislative action, acquire private property for any use specified in Section 1238 of the Code of Civil Procedure either by consent of the owner or by proceedings had under the provisions of Title VII, Part III, of the Code of Civil Procedure; and any person seeking to acquire property for any of the uses mentioned in such Title is "an agent of the State," or a "person in charge of such use," within the meaning of those terms as used in such Title. This section shall be in force from and after the fourth day of April, eighteen hundred and seventy-two.

<sup>3</sup> Pub. Util. Code §§ 610-624 (Cal. Stats. 1975, Ch. 1240, § 65).

<sup>4</sup> Health & Saf. Code § 1260 (Cal. Stats. 1975, Ch. 1240, § 43).

<sup>5</sup> Educ. Code § 30051 (Cal. Stats. 1975, Ch. 1240, § 14).

<sup>6</sup> Health & Saf. Code § 8501 (Cal. Stats. 1975, Ch. 1240, § 45).

<sup>7</sup> Health & Saf. Code §§ 35167 (Cal. Stats. 1975, Ch. 1240, § 55), 34874.

<sup>8</sup> Pub. Util. Code § 2729 (Cal. Stats. 1975, Ch. 1240, § 68).

<sup>9</sup> Condemnation for byroads was authorized by Civil Code Section 1001 and Code of Civil Procedure Section 1238(4), (6). See also *Sherman v. Buick*, 32 Cal. 241 (1867) (taking for byroad proper where road was open to public). Condemnation for utility connections was authorized by Civil Code Section 1001 and Code of Civil Procedure Section 1238, subdivisions 3-4 (water and drainage), 7 (telephone), 8 (sewerage), 12-13 (electricity), 17 (gas). See *Linggi v. Garovotti*, 45 Cal.2d 20, 286 P.2d 15 (1955) (apartment owner may condemn appurtenant sewerage easement under authority of Civil Code Section 1001 and Code of Civil Procedure Section 1238(8)).

The authorizing statutes were repealed in 1975. Cal. Stats. 1975, Ch. 1240, § 1; Cal. Stats. 1975, Ch. 1275, § 1.

of opening what would otherwise be landlocked property to enable its most beneficial use. As a practical matter, land to which utility service cannot be extended or that is cut off from access to public roads cannot be developed.<sup>10</sup>

The need for private condemnation for byroads and utility easements is unrelieved by the ability of public entities to condemn for such easements on behalf of private persons. Many local public entities and public utilities are reluctant or unwilling to institute such proceedings even though the benefited person offers and is willing to bear the cost of acquiring and maintaining the easement.

For these reasons, the Law Revision Commission recommends that private persons be authorized to condemn appurtenant easements for byroads and utility service, subject to the following limitations designed to prevent abuse of the condemnation power:

(1) The law prior to 1975 limited the interest in property that a private condemnor could take to an easement;<sup>11</sup> this limitation should be perpetuated.

(2) The private condemnor should be required to show a "great necessity" for the taking of the easement by eminent domain. This standard is consistent with the holding of *Linggi v. Garovott*<sup>12</sup> requiring a stronger showing of necessity for condemnation by a private person than if the condemnor were a public or quasi-public entity.

(3) There should be a requirement that the easement be located in such a manner as to afford the most reasonable service or access to the property of the condemnor consistent with the least damage to the property burdened by the easement. This requirement is comparable to that imposed on public and quasi-public entities that the location of their projects be compatible with the greatest public good and the least private injury.<sup>13</sup>

(4) The condemnation right should be subject to consent of the governing bodies of affected cities and counties in the

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<sup>10</sup> The common law doctrine of "way of necessity" affords only limited relief to the landlocked property owner. See 3 B. Witkin, *Summary of California Law*, Real Property § 363 (8th ed. 1973).

<sup>11</sup> Former Code Civ. Proc. § 1239.

<sup>12</sup> 45 Cal. 2d 20, 286 P.2d 15 (1955).

<sup>13</sup> Code Civ. Proc. § 1240.030(b).

same manner and to the same extent as condemnation by quasi-public condemners.<sup>14</sup>

(5) The consent of the local public entities should not have a conclusive effect in the eminent domain proceeding. The private condemner should be required to prove the propriety of the acquisition if the taking is challenged in court. This continues existing law which places the burden of proof of necessity on the private condemner.<sup>15</sup>

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

An act to add Section 1001 to the Civil Code, and to add Section 1245.325 to the Code of Civil Procedure, relating to eminent domain.

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

**Civil Code § 1001 (added)**

SECTION 1. Section 1001 is added to the Civil Code, to read:

1001. (a) As used in this section, "utility service" means water, gas, electric, drainage, sewer, or telephone service.

(b) Any owner of real property may acquire by eminent domain an appurtenant easement over private property for which there is a great necessity to provide utility service to, or access to a public road from, the owner's property. The easement that may be taken shall afford the most reasonable service or access to the property to which it is appurtenant, consistent with the least damage to the property burdened by the easement.

(c) This section shall not be utilized for the acquisition of a private or farm crossing over a railroad track. The exclusive method of acquiring such a private or farm crossing is that provided in Section 7537 of the Public Utilities Code.

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<sup>14</sup> Code Civ. Proc. §§ 1245.310-1245.390.

<sup>15</sup> Code Civ. Proc. §§ 1240.030 (burden of proof on condemner) and 1245.250 (resolution of public entity conclusive on issues of necessity).

**Comment.** Section 1001 is added to provide the right of eminent domain to private persons for the limited purposes of establishing byroads and making utility connections. Compare Code Civ. Proc. § 1240.350 (substitute condemnation by public entities to provide utility service or access to public road). This restores authority found under former Section 1001 (repealed Cal. Stats. 1975, Ch. 1240, § 1). See also *Sherman v. Buick*, 32 Cal. 241 (1867) (condemnation for byroad proper where road open to public use of persons who may have occasion to travel it). The exercise of eminent domain authority under Section 1001 is subject to consent of the appropriate local public entities under Code of Civil Procedure Sections 1245.310-1245.390 to the same extent as quasi-public condemners. See Code Civ. Proc. § 1245.325.

Condemnation under this section must comply with the provisions of the Eminent Domain Law. See Code Civ. Proc. § 1230.020 (law governing exercise of eminent domain power). Under the Eminent Domain Law, there must be “public necessity” for the acquisition (Code Civ. Proc. § 1240.030), and any necessary interest in property may be acquired (Code Civ. Proc. § 1240.110); under Section 1001, however, there must be “great necessity” for the acquisition and only an easement may be acquired. See also *Linggi v. Garovotti*, 45 Cal.2d 20, 286 P.2d 15 (1955) (condemnation by private person for sewer connection a public use, but a “stronger showing” of necessity required than if plaintiff were a public or quasi-public entity). It should be noted that the condemner must pay compensation for the easement taken and for damage to the property from which it is taken. See Code Civ. Proc. §§ 1263.010-1263.620.

### **Code of Civil Procedure § 1245.325 (added)**

**SEC. 2.** Section 1245.325 is added to the Code of Civil Procedure, to read:

**1245.325.** Where an owner of real property seeks to acquire by eminent domain an appurtenant easement over private property pursuant to Section 1001 of the Civil Code:

(a) The person seeking to exercise the power of eminent domain shall be deemed to be a “quasi-public entity” for the purposes of this article.

(b) In lieu of the requirements of subdivision (c) of Section 1245.340, the resolution required by this article shall contain a declaration that the legislative body has found and determined each of the following:

(1) There is a great necessity for the taking.

(2) The location of the easement affords the most reasonable service or access to the property to which it is appurtenant, consistent with the least damage to the burdened property.

(3) The hardship to the owner of the appurtenant property, if the taking is not permitted, outweighs any hardship to the owner of the burdened property.

**Comment.** Subdivision (a) of Section 1245.325 makes clear that acquisitions pursuant to Civil Code Section 1001 are subject to the requirements of this article. Subdivision (b) replaces the findings required in Section 1245.340(c) with findings necessitated by the special provisions of Civil Code Section 1001(b).



**APPENDIX XI**

**STATE OF CALIFORNIA**

**CALIFORNIA LAW  
REVISION COMMISSION**

**RECOMMENDATION**

*relating to*

**Transfer of Out-of-State  
Trusts to California**

**October 1975**

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



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**CALIFORNIA LAW REVISION COMMISSION**

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

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*Vice Chairman*

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GEORGE H. MURPHY

*Ex Officio*

October 15, 1975

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

The California Law Revision Commission was authorized by Resolution Chapter 15 of the Statutes of 1975 to study whether the law relating to transfer of out-of-state trusts to California should be revised. The Commission herewith submits its recommendation on this topic.

Respectfully submitted,  
MARC SANDSTROM  
*Chairman*



# RECOMMENDATION

*relating to*

## TRANSFER OF OUT-OF-STATE TRUSTS TO CALIFORNIA

The increasing mobility of individuals and the expansion of investment of assets of trusts in different jurisdictions has created some problems with regard to the proper and most convenient place for administration of trusts involving present California residents or property now located in California.

In recognition of the need to change the place of administration in appropriate cases, a number of states have enacted legislation authorizing transfer of a locally administered trust to another state.<sup>1</sup> For example, California, which previously had permitted such transfer only in very limited situations,<sup>2</sup> in 1971 enacted Probate Code Sections 1139-1139.7<sup>3</sup> to give the superior court discretion to order the transfer of a trust or assets of a trust from California to another jurisdiction if, after hearing, it appears to the court that: (1) the transfer will facilitate the economical and convenient administration of the trust and promote the best interests of the trust and those interested therein, (2) the substantial rights of residents of this state will not be materially affected thereby, (3) the transfer will not violate the terms of the trust, and (4) any new trustee, to whom the trust assets are to be transferred, is qualified and able to administer the trust.<sup>4</sup> The legislation in other states usually allows transfer when the beneficiaries reside in the state to which transfer is to be made. Typically, the statutes require that, prior to the transfer, the court in the jurisdiction to which transfer is to be made appoint a

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<sup>1</sup> See, *e.g.*, Mass. Gen. Laws Ann., Ch. 206, § 29 (1969); Mich. Stat. Ann. §§ 27.3178(364)-27.3178(366) (1962); N.C. Gen. Stat. §§ 36-6 through 36-8 (1966); Va. Code Ann. § 26-64 (1973); Wis. Stat. Ann. § 701.23 (1975).

<sup>2</sup> Prob. Code §§ 1132-1136 (Cal. Stats. 1953, Ch. 350) (repealed). This procedure permitted transfer to the domiciliary trustee in another jurisdiction of trusts created by a nonresident decedent when assets of less than \$7,500 capable of transfer remained under the jurisdiction of the California court.

<sup>3</sup> Cal. Stats. 1971, Ch. 958, § 9.

<sup>4</sup> Prob. Code § 1139.4.

qualified trustee with the requisite bond to administer the trust in the transferee state and that the court in the transferor state approve the transfer and the appointment of a trustee.<sup>5</sup>

The problem in California is the lack of legislation providing a specific procedure for the acceptance of a transfer to this state of a trust which has been administered in another jurisdiction. Although there have been some cases in which California probate courts have actually accepted such a transfer, it is not clear what procedures should be used to effectuate such transfers or which court in California is the proper court to approve the transfer.<sup>6</sup> Since California residents are often beneficiaries of trusts originally established and administered elsewhere, it would be appropriate and beneficial for California to adopt a specific procedure to provide for acceptance of transfer of an out-of-state trust when such transfer is in the best interest of the parties.<sup>7</sup>

Accordingly, the Commission recommends the adoption of legislation to provide a specific procedure to facilitate transfer of trusts administered in other jurisdictions to California. The following are the significant features of the recommended legislation.

(1) A trustee or beneficiary of a trust administered in a jurisdiction outside of California may petition the superior court in California<sup>8</sup> for an order accepting transfer of place of administration of the trust or trust assets to California and appointing a trustee<sup>9</sup> to administer the trust in California.

<sup>5</sup> See statutes cited in note 1 *supra*. See generally 5 A. Scott, *The Law of Trusts* § 613 (3d ed. 1967).

<sup>6</sup> 3 N. Condee, *California Practice, Probate Court Practice* § 1850 (2d ed. 1964).

<sup>7</sup> See Condee, *op. cit.*, *supra* note 6. See generally *Restatement (Second) of Conflict of Law* § 271, Comment *g* (1971).

<sup>8</sup> Venue should be determined under the rules stated in Section 1138.3 of the Probate Code ("principal place of administration of the trust") if the proposed trustee is a California resident. If the petition requests that only a nonresident of this state be appointed trustee, venue would be proper in the county where either any beneficiary of the trust resides or where a substantial portion of the trust assets to be transferred are located or will be located.

<sup>9</sup> In most cases where trust administration is transferred from another jurisdiction to California, the trustee or a newly appointed trustee will be a resident of California. One important reason for a transfer is to relieve the trustee in the original jurisdiction from the onerous obligations of administering a trust when the assets or the beneficiaries are located in another state. Except for the restriction on foreign corporations other than national banks serving as trustees in California (Fin. Code

(2) The court may, in its discretion, grant the petition if, after hearing, it appears to the court that: (a) the transfer will facilitate the economical and convenient administration of the trust and promote the best interests of the trust and those interested therein, (b) the transfer will not violate the terms of the trust, (c) the trustee to be appointed to administer the trust in California is qualified, willing, and able to serve, and (d) the proper court in the other jurisdiction has approved the transfer if such approval is necessary under the law in the other jurisdiction.

(3) When appropriate to facilitate transfer from another jurisdiction, the California court may issue a conditional order (prior to approval of the transfer by the court in the other jurisdiction) appointing a trustee to administer the trust in California and indicating that, upon issuance of the order of transfer by the court in the other jurisdiction, the transfer to California will be approved.

(4) Upon transfer to California, the nature of supervision of administration of the trust will depend upon the type of trust involved. If the trust is the type of trust administered under Article 2.5 (commencing with Section 1138) of Chapter 19 of Division 3 of the Probate Code, the trust will be administered under that article. Article 2.5 provides a comprehensive procedure for administration of a variety of written voluntary express trusts which do not fall within the scope of the probate court as ancillary to the administration of a decedent's estate.<sup>10</sup> Under this procedure, a trustee, beneficiary, or remainderman may petition the superior court for a broad array of purposes concerning supervision

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§ 1503), there is no requirement that a trustee be a California resident. See J. Cohan, *Drafting California Irrevocable Inter Vivos Trusts* § 14.31 (Cal. Cont. Ed. Bar 1973); see also 7 B. Witkin, *Summary of California Law, Trusts* § 30 (8th ed. 1974); *Restatement (Second) of Trusts* § 94 (1959). If a trustee appointed in another state is qualified, willing, and able to administer the trust in California, the court should have discretion to permit the trustee to administer the trust in California subject to bonding and other statutory requirements. For example, Section 1018 of the Code of Civil Procedure requires a nonresident fiduciary who incurs liability under the tax law to appoint an agent for service for tax purposes.

<sup>10</sup> Prob. Code §§ 1138-1138.13. The California courts had held that the probate court had no general equity jurisdiction for the administration of trusts which did not come to the probate court as part of the administration of an estate. See *Wells Fargo Bank & Union Trust Co. v. Superior Court*, 32 Cal.2d 1, 193 P.2d 721 (1948); *Gillette v. Gillette*, 122 Cal. App. 640, 10 P.2d 760 (1932). The need for this legislation providing for a procedure for administration of the large number of trusts which do not come within Probate Code Section 1120 was clearly pointed out in *Wile, Judicial Assistance in Administration of California Trusts*, 14 Stan. L. Rev. 231 (1962).

of trust administration.<sup>11</sup> This procedure is well suited for trusts transferred to this state from another jurisdiction. If the trust is not one to be administered under Article 2.5, the trust will be administered in the same manner as a trust of the same type which has been subject to supervision in California from the time of its creation.

(5) Section 1215.1 which limits the requirement for notice in certain future interest cases should be amended to include within its provisions trusts transferred from other jurisdictions pursuant to the recommended legislation.

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

An act to amend Sections 1138 and 1215.1 of, and to add Article 4 (commencing with Section 1139.10) to Chapter 19 of Division 3 of, the Probate Code, relating to trusts.

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

**Probate Code § 1138 (technical amendment)**

SECTION 1. Section 1138 of the Probate Code is amended to read:

1138. (a) As used in this article, "trust" means a written voluntary express trust, with additions thereto, whether created by will or other than by will which is entirely administered or to be entirely administered in this state.

(b) As used in this article, "trust" does not mean a trust subject to court supervision under Article 1 (commencing with Section 1120) of this chapter, a Totten trust, a business trust which is taxed as a partnership or corporation, an investment trust subject to regulation under the laws of this state or any other jurisdiction, a common trust fund, a voting trust, a deed of trust, a transfer in trust for purpose of suit or enforcement of a claim or right, a trust for the primary purpose of paying debts, dividends, interest, salaries, wages, pensions, or employee benefits of any kind, an arrangement under which a person is a nominee or escrow holder for another, a trust subject to supervision of

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<sup>11</sup> Prob. Code § 1138.1.

the Attorney General under Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of Title 2 of the Government Code during the period when no private beneficiary or remainderman has or may claim an interest therein, nor a trust declared exempt from supervision under Section 12583 of the Government Code.

**Comment.** Section 1138 is amended to divide the section into two subdivisions. This permits reference to subdivision (b) of the section in Section 1139.18.

### **Probate Code §§ 1139.10-1139.19 (added)**

**SEC. 2.** Article 4 (commencing with Section 1139.10) is added to Chapter 19 of Division 3 of the Probate Code, to read:

#### **Article 4. Transfer From Another Jurisdiction**

##### **§ 1139.10. Application of article**

1139.10. (a) This article applies to any written voluntary express trust or portion thereof, whether created by will or otherwise, administered in another jurisdiction outside of this state.

(b) This article shall not be construed to prevent transfer of place of administration of a trust or of trust assets to this state from another jurisdiction in any case where judicial approval of the transfer was not required under the law in effect immediately prior to the effective date of this article.

**Comment.** Section 1139.10 makes this article applicable to the transfer to California of the place of administration of trusts or trust assets administered in another jurisdiction outside of California. The article applies to trusts administered in foreign countries as well as those administered in sister states. Subdivision (b) is comparable to subdivision (b) of Section 1139.

##### **§ 1139.11. Transfer of place of administration or assets to California**

1139.11. Subject to the limitations and requirements of this article, an order may be made by the superior court accepting the transfer of the place of administration of a trust ~~from another jurisdiction to~~ this state or the transfer of some or all of the assets of a trust in another jurisdiction to a trustee in this state.

**Comment.** Section 1139.11 is comparable to a portion of Section 1139.1.

**§ 1139.12. Petition for transfer**

1139.12. A petition for an order accepting a transfer may be filed by the trustee or by a beneficiary of the trust.

**Comment.** Section 1139.12 is comparable to the first sentence of Section 1139.2.

**§ 1139.13. Venue**

1139.13. (a) If the petition requests that a resident of this state be appointed trustee, the petition shall be filed in the superior court of the county where the proposed “principal place of administration of the trust” (as defined by Section 1138.3 of the Probate Code) is located.

(b) If the petition requests that only a nonresident of this state be appointed trustee, the petition shall be filed in the superior court of the county where either (1) any beneficiary of the trust resides or (2) a substantial portion of the trust assets to be transferred are located or will be located.

**Comment.** Section 1139.13 provides venue rules. If a California resident is to be appointed trustee by the court, the section adopts the venue provisions of Section 1138.3. If no trustee proposed to administer the trust in this state is a California resident, the section provides that venue is proper in the county either where any beneficiary resides or where a substantial portion of the assets to be transferred are or will be located.

**§ 1139.14. Contents of petition**

1139.14. The petition shall be verified and shall set forth:

(a) The names, ages, and places of residence of:

(1) The trustee administering the trust in the other jurisdiction.

(2) The proposed trustee to whom administration of the trust or such trust assets will be transferred.

(3) All persons who are interested in the trust as beneficiaries as far as known to petitioner.

(b) Whether the trust has been subject to supervision over administration in another jurisdiction outside of

California. If so, whether a petition or appropriate request for transfer of place of administration of the trust or such trust assets to this state has been filed, if necessary, with the court in the other jurisdiction and the status of such petition or request.

(c) Whether the trustee proposed to administer the trust in this state has agreed to accept the trust in this state. If he has, the acceptance shall be attached as an exhibit to the petition or otherwise filed with the court.

(d) A general statement of the qualifications of the trustee proposed to administer the trust in this state and the amount of fiduciary bond to be requested, if any.

(e) A copy of the trust instrument or a statement of the terms of the trust instrument in effect at the time the petition is filed, including all amendments thereto.

(f) A statement of the character, condition, location, and value of the property comprising the assets sought to be transferred.

(g) A statement of the reasons for the transfer.

**Comment.** Section 1139.14 is patterned after Section 1139.2. The information provided will assist the court in making its determination with respect to the petition. See Section 1139.16.

#### § 1139.15. Notice and hearing

1139.15. (a) Upon the filing of the petition, the clerk shall set the petition for hearing and shall give notice of the hearing as provided in Section 1200 at least 30 days before the time set for the hearing. Petitioner, at least 30 days prior to the time set for the hearing, shall cause to be mailed to each of the persons named in the petition, at their respective places of residence therein stated, a copy of the notice of the hearing.

(b) Any person interested in the trust, either as trustee, beneficiary, or otherwise, may appear and file written grounds in opposition to the petition.

**Comment.** Section 1139.15 is based upon Section 1139.3.

#### § 1139.16. Order accepting transfer and appointing trustee

1139.16. The court may, in its discretion, grant the petition and issue an order accepting transfer of place of

administration of the trust or trust assets to this state, appoint a trustee to administer the trust in this state, and require the trustee to post appropriate bond, if necessary, if after hearing it appears to the court that:

(a) The transfer of the trust assets to a trustee in this state, or the transfer of place of administration of the trust to this state, will facilitate the economical and convenient administration of the trust and promote the best interests of the trust and those interested therein.

(b) The transfer will not violate the terms of the trust.

(c) The trustee appointed by the court to administer the trust in this state, to whom the trust assets are to be transferred, is qualified, willing, and able to administer the trust or trust assets upon the same trusts.

(d) The proper court in the other jurisdiction has approved the transfer if such approval is necessary under the law of the other jurisdiction.

**Comment.** Section 1139.16 gives the court discretion to transfer trust assets or the place of administration of a trust from another jurisdiction to this state provided that, if the law in the other jurisdiction so requires, the proper court in the other state has approved the transfer. A foreign corporation, other than a national banking association authorized to conduct trust business in this state, cannot act as trustee in California. Fin. Code § 1503. Section 1139.16 does not require the court to issue formal findings.

### § 1139.17. Conditional order accepting transfer

1139.17. When appropriate to facilitate transfer of the trust assets or the place of administration of a trust to this state, the court may issue a conditional order appointing a trustee to administer the trust in this state and indicating that transfer to this state will be accepted if transfer is approved by the proper court of the other jurisdiction.

**Comment.** Section 1139.17 provides a method whereby the California court can indicate its willingness to accept jurisdiction over a trust presently administered in another jurisdiction where the law of the other jurisdiction requires appointment of a trustee in the proposed new place of administration prior to approving transfer. See, *e.g.*, Mass. Gen. Laws Ann., Ch. 206, § 29 (1969); N.C. Gen. Stat. §§ 36-6 through 36-8 (1966).

**§ 1139.18. Administration of transferred trust**

1139.18. (a) If the trust transferred to this state pursuant to this article is a written voluntary express trust, including additions thereto, whether created by will or other than by will, and is not one excluded by subdivision (b) of Section 1138, the trust shall be administered in this state in accordance with Article 2.5 (commencing with Section 1138) of Chapter 19 of Division 3. Notwithstanding Section 1138.3, any proceedings under that article with respect to the trust transferred to this state shall be commenced in the superior court of the proper county as described in Section 1139.13.

(b) If the trust transferred to this state pursuant to this article is not one covered by subdivision (a), it shall be administered in the same manner as if the trust had been subject to supervision in this state from the time of its creation.

**Comment.** Subdivision (a) of Section 1139.18 provides that a trust of the type administered under Article 2.5 (commencing with Section 1138) is to be administered in accordance with that article. Thus, for example, a testamentary trust which continues after probate of a will in another jurisdiction could be transferred to California to be administered under Article 2.5. Subdivision (b) requires that other types of trusts be administered in the same manner as California trusts of the same type. For example, a charitable trust, during the period when no private beneficiary or remainderman has or may claim an interest, would be subject to the supervision of the Attorney General under Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of Title 2 of the Government Code, and any controversy would be determined by a civil action. See Corp. Code § 9505 for the authority of the Attorney General to institute such actions. See, e.g., *Brown v. Memorial Nat'l Home Foundation*, 162 Cal. App.2d 513, 329 P.2d 118 (1958).

**§ 1139.19. "Beneficiary" defined**

1139.19. For purposes of this article, "beneficiary" means all persons in being who shall or may participate in the corpus or income of the trust.

**Comment.** Section 1139.19 is the same as Section 1139.7. It eliminates the requirement of appointment of a representative for unborn beneficiaries.

**Probate Code § 1215.1 (technical amendment)**

SEC. 3. Section 1215.1 of the Probate Code is amended to read:

1215.1. Subject to other provisions of this article, it is a sufficient compliance with Sections 1120, 1123.5, 1125, 1125.1, 1126, 1138.6, ~~and~~ 1139.7, *and 1139.15*, insofar as they require notice to be given to the beneficiaries of, or persons interested in the trust, or to beneficiaries or remaindermen, including all persons in being who shall or may participate in the corpus or income of the trust, to give notice in the cases hereinafter provided, as follows:

(1) When an interest has been limited on any future contingency to persons who shall compose a certain class upon happening of a certain event without further limitation, notice shall be given to the persons in being who would constitute the class if such event had happened immediately before the commencement of the proceedings.

(2) When an interest has been limited to a living person, and the same interest, or a share therein, has been further limited upon the happening of a future event to the surviving spouse or to persons who are, or may be, the distributees, heirs, issue or other kindred of such living person, notice shall be given to such living person.

(3) Except as otherwise provided in subdivision (2), when an interest has been limited upon the happening of any future event to a person, or a class of persons, or both, and the same interest, or a share of such interest, has been further limited upon the happening of an additional future event to another person, or a class of persons, or both, notice shall be given to the person or persons in being who would take the interest upon the happening of the first such event.

**Comment.** Section 1215.1 is amended to include within its provisions trusts transferred from other jurisdictions pursuant to Article 4 (commencing with Section 1139.10) of Chapter 19 of Division 3.

APPENDIX XII

STATE OF CALIFORNIA

**CALIFORNIA LAW  
REVISION COMMISSION**

RECOMMENDATION

*relating to*

**Admissibility of Duplicates in Evidence**

November 1975

CALIFORNIA LAW REVISION COMMISSION  
Stanford Law School  
Stanford, California 94305



**CALIFORNIA LAW REVISION COMMISSION**

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

MARC SANDSTROM  
*Chairman*

JOHN N. McLAURIN  
*Vice Chairman*

SENATOR ROBERT S. STEVENS  
ASSEMBLYMAN ALISTER McALISTER

JOHN J. BALLUFF

JOHN D. MILLER

THOMAS E. STANTON, JR.

HOWARD R. WILLIAMS

GEORGE H. MURPHY  
*Ex Officio*

November 10, 1975

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

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

This recommendation is submitted as a result of this continuing review. It deals with the admissibility of duplicates in evidence. The enactment of the recommended legislation will improve trial practice and save time and expense by permitting use of a duplicate—rather than the original writing—where the authenticity of the writing is not in dispute.

Respectfully submitted,  
MARC SANDSTROM  
*Chairman*



# RECOMMENDATION

*relating to*

## ADMISSIBILITY OF DUPLICATES IN EVIDENCE

The development of accurate methods of copying documents and writings and the commonplace use of methods of reproduction which produce copies identical to the original have resulted in a reexamination by the courts and evidence authorities of the need for the production of original writings as required by the "best evidence rule."<sup>1</sup> The newly adopted Federal Rules of Evidence,<sup>2</sup> while generally continuing the requirement of the production of the original,<sup>3</sup> contain a provision—Federal Rule of Evidence 1003—permitting admission into evidence of a "duplicate." This rule provides:

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstance it would be unfair to admit the duplicate in lieu of the original.

Federal Rule of Evidence 1001 (4) defines a duplicate as: [A] counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

In a recent California case, *Dugar v. Happy Tiger Records, Inc.*,<sup>4</sup> the court was presented with the question whether photostatic copies of original invoices could be

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<sup>1</sup> See C. McCormick, *Evidence* § 236 (2d ed. 1972); 4 J. Wigmore, *Evidence* § 1191 (Chadbourn rev. 1972); B. Witkin, *California Evidence* § 690 (2d ed. 1966). Indeed, one commentator has suggested that the best evidence rule be eliminated completely as having outlived its usefulness. See Broun, *Authentication and Contents of Writings*, 1969 Law and the Social Order 611.

<sup>2</sup> Pub. L. No. 93-595 (Jan. 2, 1975).

<sup>3</sup> Pub. L. No. 93-595, Rule 1002 (Jan. 2, 1975).

<sup>4</sup> 41 Cal. App.3d 811, 116 Cal. Rptr. 412 (1974).

used as evidence without either producing or accounting for the original where there was no showing that the copies were made and preserved as part of the records of business. The court—while noting that commentators have urged the adoption of the broad federal “duplicate original” rule—stated that photostatic copies such as those offered in that case are secondary evidence which are made inadmissible by the best evidence rule, Evidence Code Section 1500, unless they fall within one of the statutory exceptions.<sup>5</sup>

Under Evidence Code Section 1500,<sup>6</sup> the content of a writing normally must be proved by the original writing itself and not by a copy of the writing or testimony as to its content. The only circumstances under which secondary evidence may be used are specifically set out in the code.<sup>7</sup> Additionally, the case law which provided for priority between types of secondary evidence has been codified; when the original writing is unavailable, a copy is generally preferred to testimonial secondary evidence.<sup>8</sup>

In California, carbon copies produced contemporaneously with the original writing have generally been accepted as duplicate originals and have been introduced without the necessity of showing that the original is unavailable.<sup>9</sup> The courts have relied on the fact that the carbon copy is in fact prepared at the same time as the original as, for example, a carbon of a sales receipt. Thus, the possibility of error arising from subsequent hand copying is eliminated.

<sup>5</sup> *Id.* at 816-817, 116 Cal. Rptr. at 415.

<sup>6</sup> Section 1500 provides:

Except as otherwise provided by statute, no evidence other than the writing itself is admissible to prove the content of a writing. This section shall be known and may be cited as the best evidence rule.

<sup>7</sup> Evid. Code §§ 1501 (lost or destroyed writing), 1502 (unavailable writing), 1503 (writing under control of opponent), 1504 (collateral writing), 1505 (other secondary evidence if proponent does not have copy), 1506 (copy of public writing), 1507 (copy of recorded writing), 1508 (other secondary evidence of public or recorded writing), 1509 (voluminous writings), 1510 (copy of writing produced at hearing), 1530 (writing in official custody), 1532 (official record of a recorded writing), 1550 (photographic copies made as business records), 1551 (photographic copies where original destroyed or lost), 1562 (copy of business records).

<sup>8</sup> See Evid. Code §§ 1505, 1508, and Comments thereto.

<sup>9</sup> *Edmunds v. Atchison, T. & S.F. Ry.*, 174 Cal. 246, 247-248, 162 P. 1038 (1917); *People v. Lockhart*, 200 Cal. App.2d 862, 871-872, 19 Cal. Rptr. 719, 725 (1964). See *Pratt v. Phelps*, 23 Cal. App. 755, 757-758, 139 P. 906, 907 (1914). For a compilation of cases from other states, see Annot., 65 A.L.R.2d 342 (1959).

However, the rule regarding carbon copies was not, either in California or in other states, extended to cover modern photographic or electronic reproduction. In advocating the extension of the rule regarding carbons to copies produced by modern technological copying techniques, McCormick states: <sup>10</sup>

The resulting state of authority, favorable to carbons but unfavorable to at least equally reliable photographic reproductions, appears inexplicable on any basis other than that the courts, having fixed upon simultaneous creation as the characteristic distinguishing of carbons from copies produced by earlier methods have on the whole been insufficiently flexible to modify that concept in the face of newer technological methods which fortuitously do not exhibit that characteristic. Insofar as the primary purpose of the original documents requirements is directed at securing accurate information from the contents of material writings, free of the infirmities of memory and the mistakes of hand-copying, we may well conclude that each of these forms of mechanical copying is sufficient to fulfill the policy. Insistence upon the original, or accounting for it, places costs, burdens of planning and hazards of mistake upon the litigants. These may be worth imposing where the alternative is accepting memory or hand-copies. They are probably not worth imposing when risks of inaccuracy are reduced to a minimum by the offer of a mechanically produced copy.

In 1951, California made a significant advance in the recognition of photographically reproduced copies of writing by enacting the Uniform Photographic Copies of Business and Public Records as Evidence Act.<sup>11</sup> As amended, this provision—which is presently Evidence Code Section 1550—provides:

A photostatic, microfilm, microcard, miniature photographic or other photographic copy or reproduction, or an enlargement thereof, of a writing is as admissible as the writing itself if such copy or

<sup>10</sup> C. McCormick, *Evidence* § 236, at 569 (2d ed. 1972).

<sup>11</sup> Cal. Stats. 1951, Ch. 346, § 1, as amended by Cal. Stats. 1953, Ch. 294, § 1.

reproduction was made and preserved as a part of the records of a business (as defined by Section 1270) in the regular course of such business. The introduction of such copy, reproduction, or enlargement does not preclude admission of the original writing if it is still in existence.

Similar legislation has been adopted in 39 states.<sup>12</sup> The present California provision, by requiring only that the copy be made and preserved in the ordinary course of business, is broader than the Uniform Act itself as it was first enacted in California. Former Code of Civil Procedure Section 1953i required that the original writing be a business record. Under Evidence Code Section 1550, the requirement that the photographic copy be made in the regular course of business is considered sufficient to assure the trustworthiness of the copy. If the original writing is either admissible under any exception to the hearsay rule or as evidence of an ultimate fact in the case (*e.g.*, a will or a contract), a photographic copy made in the regular course of business is as admissible as the original.<sup>13</sup>

In the *Dugar* case,<sup>14</sup> the court stated that Evidence Code Section 1550 did not apply to copies made solely for purposes of litigation and indicated that photostatic copies remain only secondary evidence unless and until the Evidence Code is broadened along the lines of the new federal rule as urged by many prominent commentators.<sup>15</sup>

There are a number of reasons supporting the adoption of a rule similar to new Federal Rule 1003 to permit admission of "duplicates" in California. First, there are many cases in which the ability to introduce a duplicate would save considerable time and expense. For example, if the original writing is in the hands of a third person who is

<sup>12</sup> See 13 Uniform Laws Ann. 453 (West 1975).

<sup>13</sup> See Comment—Law Revision Commission to Evid. Code § 1550 (West 1966).

<sup>14</sup> 41 Cal. App.3d 811, 116 Cal. Rptr. 412 (1974).

<sup>15</sup> *Id.* at 816-817, 116 Cal. Rptr. at 415. In *People v. Marcus*, 31 Cal. App.3d 367, 107 Cal. Rptr. 264 (1973), the court indicated its predilection toward admissibility of reliable copies produced by sophisticated electronic techniques. The court admitted into evidence a rerecording of a taped conversation which made audible an original tape of insufficient quality to be understood. Although the court indicated its inclination to rule that the rerecording was the original made usable, the original tape itself was also placed in evidence, and the court was able to hold the duplicate admissible under Evidence Code Section 1510. The court was thus not required to make a direct holding on the duplicate question.

reluctant to part with it, the party seeking its admission must, under current law, seek to obtain the original by process<sup>16</sup> and have it available for inspection. The third party would rarely be as reluctant merely to permit a duplicate to be made. Second, the best evidence rule often operates as a trap for the unwary attorney who, having obtained a duplicate which is obviously recognized as reliable by all of the parties, nevertheless finds that it is objected to and excluded at trial under the best evidence rule. Third, as previously noted, a copy which meets the standards of the federal "duplicate" rule is highly reliable. It is conceivable that the party in possession of the original document may attempt to perpetrate a deliberate fraud by use of a false photocopy.<sup>17</sup> However, Federal Rule 1003 contains safeguards in that the production of the original is required where there is a genuine question as to its authenticity or when the court has reason to believe that the use of a duplicate would be unfair. Furthermore, it should be obvious that a party bent on deliberate fraud is able, under current rules, to introduce a false copy under one of the exceptions to the rule, for example, merely by destroying or secreting the original and testifying that it cannot be found.<sup>18</sup>

The Commission recommends that the substance of Rule 1003 of the Federal Rules of Evidence be added to the Evidence Code to provide that a duplicate of a writing is admissible to the same extent as the writing itself unless a genuine question is raised as to the authenticity of the writing itself or, in the circumstances, it would be unfair to admit the duplicate in lieu of the writing itself. "Duplicate" should be defined by adopting the substance of the definition provided in Rule 1001 (4) of the Federal Rules of Evidence which requires that the duplicate be a copy produced by a technique which accurately reproduces the writing itself.

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<sup>16</sup> See Evid. Code § 1502.

<sup>17</sup> See C. McCormick, *Evidence* § 236, at 569 (2d ed. 1972).

<sup>18</sup> See Cleary & Strong, *The Best Evidence Rule: An Evaluation in Context*, 51 Iowa L. Rev. 825, 847 (1966).

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

An act to add Article 5 (commencing with Section 1580) to Chapter 2 of Division 11 of the Evidence Code, relating to evidence.

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

SECTION 1. Article 5 (commencing with Section 1580) is added to Chapter 2 of Division 11 of the Evidence Code, to read:

Article 5. Duplicates

**Evidence Code § 1580. Duplicate defined**

1580. For the purposes of this article, a "duplicate" is a counterpart produced by the same impression as the writing itself, or from the same matrix, or by means of photography, including enlargements or miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the writing itself.

**Comment.** Section 1580 defines a "duplicate" in substantially the same terms as does Federal Rule of Evidence 1001(4). The wording has been slightly revised to conform to the terminology used in the California Evidence Code. As defined by Section 1580, a "duplicate" must be produced by a technique which accurately reproduces the writing itself. A counterpart produced by an electrostatic method of reproducing the writing would qualify as a duplicate since it is produced by an "equivalent technique which accurately reproduces the writing itself." On the other hand, a subsequently prepared handwritten or typed copy of a document cannot qualify as a "duplicate." If the original is in color (such as a multicolored document, colored photograph, or color movie), the duplicate must be in the same colors as the original when the coloring of the original is relevant in view of the purpose for which the duplicate is to be received in evidence.

This article, by use of the term "duplicate," in no way alters existing practice which recognizes that more than one document can be admissible as the writing itself—such as the case in which

the parties to a contract or lease execute sufficient copies in order that each may have one for his files or when carbon copies are involved. See C. McCormick, *Evidence* § 235 (2d ed. 1972); 4 J. Wigmore, *Evidence* §§ 1233, 1234 (Chadbourn rev. 1972); B. Witkin, *California Evidence* § 690 (2d ed. 1966). This article goes beyond existing practice to permit admission of "duplicates" where there is no danger that they might be inaccurate and subject to the limitations of Section 1581. Because a "duplicate" is a product of a method which insures accuracy, many authorities have urged the adoption of this rule. See, e.g., C. McCormick, *Evidence* § 236 (2d ed. 1972); 4 J. Wigmore, *Evidence* § 1234 (Chadbourn rev. 1972); B. Witkin, *California Evidence* § 690 (2d ed. 1966). See discussion in *Dugar v. Happy Tiger Records, Inc.*, 41 Cal. App.3d 811, 816-817, 116 Cal. Rptr. 412, 415 (1974).

### **Evidence Code § 1581. Admissibility of duplicates**

1581. A duplicate of a writing is admissible to the same extent as the writing itself unless (1) a genuine question is raised as to the authenticity of the writing itself or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the writing itself.

**Comment.** Section 1581 adopts the substance of Rule 1003 of the Federal Rules of Evidence. The wording has been slightly revised to conform to the terminology used in the California Evidence Code. "Duplicate" is defined in Section 1580. The fact that the duplicate was prepared for litigation does not prevent its admission under this article. Compare *Dugar v. Happy Tiger Records, Inc.*, 41 Cal. App.3d 811, 816-817, 116 Cal. Rptr. 412, 415 (1974).

A duplicate is not admissible in evidence under Section 1581 if either a genuine question is raised as to the authenticity of the writing itself or in the circumstances admission of the duplicate would be unfair. The courts should be liberal in finding that a "genuine question is raised as to the authenticity of the writing itself." See statement to the same effect in the Comment to Federal Rule of Evidence 1003. H.R. Rep. No. 650, 93rd Cong., 1st Sess. 17 (1973). For example, if a party opposing admission of a duplicate makes a good faith claim that the writing from which the duplicate has been made is not authentic and it would be impractical or more difficult to determine the authenticity of the writing itself from the duplicate, the court should require that the writing itself be produced for examination (see Section 1510)

before permitting the duplicate to be introduced in evidence. Additionally, if the unique size, shape, or other physical characteristics of the original make it necessary for the original to be presented in court for a party properly to examine or cross-examine witnesses, it may be unfair in the circumstances to admit the duplicate in lieu of the original writing itself.

If a party opposes introduction of the duplicate on the ground of unfairness, the court should consider the conduct of the parties in determining whether it would be unfair "in the circumstances" to admit the duplicate including, for example, whether the parties have relied on the duplicate in their dealings prior to or during the preliminary stages of litigation, or whether the party opposing introduction reasonably could have demanded production of the original (see Code Civ. Proc. § 2031) or could have used other discovery procedures to obtain the original.

As in all cases involving introduction of a writing, when offering a duplicate, the proponent of the evidence must authenticate it. See Evid. Code §§ 1400-1421. In most cases, such authenticating evidence will also be sufficient to meet any claim that the duplicate should not be admitted under this article. If the proponent of the duplicate is concerned that a challenge to admission cannot be overcome by the evidence on authentication, the proponent may, for example, be able to obtain a stipulation as to admissibility or to use the procedure set out in Code of Civil Procedure Section 2033 to obtain an admission of the genuineness of the original.

If the duplicate is a duplicate of *a copy* of the writing itself, the person offering the duplicate in evidence must make a sufficient preliminary showing of the authenticity of the duplicate, the copy of which it is a counterpart, and the original writing itself. See Section 1401 and Comment thereto. For example, paragraphs (2) and (3) of Section 1530(a) permit the admission of an attested or certified copy of a writing in the custody of a public entity; Section 1581 permits the admission of a duplicate of the attested or certified copy if the requirements of that section are met. The proponent of the evidence can thus avoid the inconvenience and expense of obtaining multiple copies of an official document the authenticity of which is not in dispute.

Nothing in this article relieves the person offering the duplicate in evidence from the burden (see Section 1402) of explaining and justifying any post-occurrence entries, corrections, changes, alterations, or modifications in the writing itself or in the copy of the writing itself from which the duplicate was made.

If the duplicate contains only a portion of the writing itself or is in some respect incomplete, and the opposing party indicates that the entire writing is, or may be, needed for effective cross-examination or fully to explain the portion offered, the court may require that the proponent produce at his option either the entire original or an adequate duplicate of the entire writing. See Evid. Code § 356.



APPENDIX XIII

STATE OF CALIFORNIA

**CALIFORNIA LAW  
REVISION COMMISSION**

RECOMMENDATION

*relating to*

Oral Modification Of Contracts

November 1975

CALIFORNIA LAW REVISION COMMISSION  
Stanford Law School  
Stanford, California 94305



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*Ex Officio*

November 15, 1975

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

The California Law Revision Commission was authorized by Resolution Chapter 45 of the Statutes of 1974 to study whether the law relating to modification of contracts should be revised.

The Commission submitted a recommendation on this subject to the 1975 Legislature. *Recommendation and Study Relating to Oral Modification of Written Contracts* (January 1975), to be reprinted in 13 CAL. L. REVISION COMM'N REPORTS 301 (1976). Two legislative measures were recommended: One proposed revisions of Civil Code Section 1698 and related sections; the other proposed an amendment of Commercial Code Section 2209. The Commercial Code amendment was enacted as Chapter 7 of the Statutes of 1975. The other legislative measure was not enacted.

The Commission has reviewed its earlier recommendation relating to Civil Code Section 1698 and related sections in light of suggestions received concerning the earlier recommendation and submits this new recommendation.

Respectfully submitted,  
MARC SANDSTROM  
*Chairman*



# RECOMMENDATION

*relating to*

## ORAL MODIFICATION OF CONTRACTS

The parties to a written contract frequently find it convenient or necessary to modify the contract by oral agreement to meet unforeseen conditions, to remedy defects, to resolve ambiguities in the contract as written, or for some other reason. In the majority of situations, both parties perform in accordance with the written contract as modified. In some situations, however, a dispute arises concerning the terms of the oral modification, the nature of the performance, or whether there was a modification at all. This recommendation deals with the rules governing oral modification of written contracts under general contract law.<sup>1</sup>

California statutes offer inadequate guidance to the parties who attempt to modify a written contract orally. Since 1874, the rule provided in Civil Code Section 1698 has been that a "contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."<sup>2</sup> As a result of a great amount of litigation, the courts have established exceptions to the application of the rule against oral modification in order to achieve just results in particular cases.<sup>3</sup> These exceptions include the following:

(1) An oral agreement which has been executed by only one of the parties may be enforced by that party, notwithstanding Section 1698.<sup>4</sup>

<sup>1</sup> See Civil Code § 1698. An earlier Commission recommendation dealing with oral modification of contracts under Commercial Code Section 2209 was enacted by the Legislature in 1975. Cal. Stats. 1975, Ch. 7. See *Recommendation and Study Relating to Oral Modification of Written Contracts*, 13 Cal. L. Revision Comm'n Reports 301, 309, 312-313 (1976).

<sup>2</sup> It has been suggested that this provision resulted from an inadequate attempt to state the common law rule that contracts *required* to be in writing can be modified only by a writing. See 2 A. Corbin, *Contracts* § 301 (1950). See also 15 S. Williston, *Contracts* § 1828 (3d ed. 1972).

<sup>3</sup> See cases cited in Timbie, *Modification of Written Contracts in California*, 23 Hastings L.J. 1549 (1972), a background study prepared for the Commission, reprinted in 13 Cal. L. Revision Comm'n Reports at 317 (1976); and 1 B. Witkin, *Summary of California Law*, Contracts §§ 715-719, at 600-604 (8th ed. 1973).

<sup>4</sup> D.L. Godbey & Sons Constr. Co. v. Deane, 39 Cal.2d 429, 246 P.2d 946 (1952).

(2) The parties may extinguish the written contract by an oral novation and substitute a new oral agreement.<sup>5</sup>

(3) The parties may rescind the written contract by an oral agreement, thereby satisfying the terms of Section 1698.<sup>6</sup>

(4) An oral modification may be upheld as a waiver of a provision of the written contract.<sup>7</sup>

(5) A party who has changed his position in reliance on the oral agreement may be protected by the doctrine of equitable estoppel.<sup>8</sup>

(6) An oral agreement may be held to be an independent collateral contract, making Section 1698 inapplicable.<sup>9</sup>

These exceptions have emasculated the rule against oral modification and have made the statutory language misleading. The vagueness and complexity of the rule and its exceptions have invited litigation.

The Commission recommends that Section 1698 be replaced by a new section that would be consistent with the rule adopted by Commercial Code Section 2209,<sup>10</sup> which provides in substance that (1) a written contract may be modified orally unless the contract includes a provision that requires any modification to be in writing, but (2) the requirements of the Statute of Frauds must be satisfied if

<sup>5</sup> See *Pearsall v. Henry*, 153 Cal. 314, 95 P. 159 (1908).

<sup>6</sup> *Treadwell v. Nickel*, 194 Cal. 243, 258-259, 228 P. 25, 32 (1924).

<sup>7</sup> See *Bardeen v. Commander Oil Co.*, 40 Cal. App.2d 341, 104 P.2d 875 (1940).

<sup>8</sup> *Wade v. Markwell & Co.*, 118 Cal. App.2d 410, 420-421, 258 P.2d 497, 502-503 (1953).

<sup>9</sup> See *Lacy Mfg. Co. v. Gold Crown Mining Co.*, 52 Cal. App.2d 568, 577-578, 126 P.2d 644, 649-650 (1942).

<sup>10</sup> Commercial Code Section 2209 provides:

2209. (1) An agreement modifying a contract within this division needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this division (Section 2201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subdivision (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

the contract as modified is within its provisions.<sup>11</sup> Specifically, the new section should provide:

(1) A written contract may be modified by another written contract and, to the extent it is executed by the parties, by an oral agreement. This would codify existing law.

(2) Unless the parties provide in the contract that any modification must be in writing, a written contract may be modified by an oral agreement supported by new consideration so long as the Statute of Frauds<sup>12</sup> is satisfied if the contract as modified is within its provisions. This provision would adopt the substance of the Commercial Code rule.<sup>13</sup> Under this provision, wholly executory oral modifications supported by consideration, now apparently unenforceable,<sup>14</sup> would be enforceable (absent a contract provision requiring that modifications be in writing) provided that the Statute of Frauds is satisfied.

The proposed section would merely describe cases where proof of an oral modification is permitted; the section would not, however, affect in any way the burden of the party claiming that there was an oral modification to produce evidence sufficient to persuade the trier of fact that the parties actually did make an oral modification of the contract. The section would not affect related principles of law. The rules concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a condition of a

<sup>11</sup> For example, where the parties to a written contract for a one-year lease of real property to begin immediately, attempt one month later to extend the terms of the lease for six months by an oral agreement, the Statute of Frauds would require a "note or memorandum thereof . . . in writing and subscribed by the party to be charged or by his agent." Civil Code § 1624. For other examples, see 2 A. Corbin, *Contracts* § 304 (1950); *Restatement (Second) of Contracts* § 223 (Tent. Draft Nos. 1-7, rev. ed. 1973). On the other hand, despite the Statute of Frauds, the contract as orally modified may be enforceable as not "within its provisions," such as where there has been part performance or where the party resisting enforcement is estopped from pleading the statute.

<sup>12</sup> Civil Code § 1624.

<sup>13</sup> The provision for an anti-oral modification clause in the contract is derived from subdivision (2) of Commercial Code Section 2209. However, the proposed section would not require that the clause be separately signed by either party. In contrast to subdivision (1) of Commercial Code Section 2209, the proposed section would retain the requirement of current law that the oral modification must be supported by new consideration. See *D.L. Godbey & Sons Constr. Co. v. Deane*, 39 Cal.2d 429, 246 P.2d 946 (1952).

<sup>14</sup> See *D.L. Godbey & Sons Constr. Co. v. Deane*, 39 Cal.2d 429, 246 P.2d 946 (1952).

written contract, or oral independent collateral contracts would continue to be applicable in appropriate cases.<sup>15</sup>

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

An act to amend Section 1697 of, to amend the heading of Chapter 3 (commencing with Section 1697) of Title 5 of Part 2 of Division 3 of, to add Section 1698 to, and to repeal Section 1698 of, the Civil Code, relating to modification of contracts.

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

**Chapter heading (technical amendment)**

SECTION 1. The heading of Chapter 3 (commencing with Section 1697) of Title 5 of Part 2 of Division 3 of the Civil Code is amended to read:

**CHAPTER III. ~~ALTERATION~~ 3. MODIFICATION  
AND CANCELLATION**

**Civil Code § 1697 (technical amendment)**

SEC. 2. Section 1697 of the Civil Code is amended to read:

1697. A contract not in writing may be ~~altered~~ *modified* in any respect by consent of the parties, in writing, without a new consideration, and is extinguished thereby to the extent of the ~~new alteration~~ *modification*.

**Comment.** Section 1697 is amended to substitute "modified" for "altered" and "modification" for "new alteration" to conform with the terminology used in new Section 1698.

**Civil Code § 1698 (repealed)**

SEC. 3. Section 1698 of the Civil Code is repealed.

~~1698. A contract in writing may be altered by a contract~~

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<sup>15</sup> These principles would also be applicable in appropriate cases to nullify an express provision in the contract that modifications must be in writing. See *MacIsaac & Menke Co. v. Cardox Corp.*, 193 Cal. App.2d 661, 14 Cal. Rptr. 523 (1961); *1st Olympic Corp. v. Hawryluk*, 185 Cal. App.2d 832, 8 Cal. Rptr. 728 (1960); *Frank T. Hickey, Inc. v. Los Angeles Jewish Community Council*, 128 Cal. App.2d 676, 276 P.2d 52 (1955). The "waiver" provisions of subdivisions (4) and (5) of Commercial Code Section 2209 achieve a similar result regarding contracts governed by that section.

~~in writing, or by an executed oral agreement, and not otherwise.~~

**Comment.** Former Section 1698 is superseded by new Section 1698.

### **Civil Code § 1698 (added)**

SEC. 4. Section 1698 is added to the Civil Code, to read:  
1698. (a) A contract in writing may be modified by a contract in writing.

(b) A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties.

(c) Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration. The statute of frauds (Section 1624) is required to be satisfied if the contract as modified is within its provisions.

(d) Nothing in this section precludes in an appropriate case the application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts.

**Comment.** Section 1698 states rules concerning modification of a written contract. Subdivisions (a) and (b) continue the substance of former Section 1698. Subdivision (c) is derived from subdivisions (2) and (3) of Commercial Code Section 2209. The rules provided by subdivisions (b) and (c) merely describe cases where proof of an oral modification is permitted; these rules do not, however, affect in any way the burden of the party claiming that there was an oral modification to produce sufficient evidence to persuade the trier of fact that the parties actually did make an oral modification of the contract.

Subdivision (c) retains the requirement of the rule in *D.L. Godbey & Sons Construction Co. v. Deane*, 39 Cal.2d 429, 246 P.2d 946 (1952), that the oral modification be supported by new consideration. Compare Com. Code § 2209(1) (new consideration not required). However, the requirement in *Godbey* that the party seeking enforcement of the oral modification must have executed his part of the agreement is not continued.

Subdivision (c) makes clear that the Statute of Frauds, Section 1624, must be satisfied where the contract as modified is within its provisions. However, the contract is not "within" the provisions of the Statute of Frauds where the contract as modified does not fall into a category described in Section 1624 or where a doctrine such as part performance takes the contract as modified out of the statute. See 1 B. Witkin, *Summary of California Law, Contracts* §§ 214-260, at 192-226 (8th ed. 1973).

The introductory clause of subdivision (c) recognizes that the parties may prevent enforcement of executory oral modifications by providing in the written contract that it may only be modified in writing. See Com. Code § 2209(2) for a comparable requirement. Such a provision would not apply to an oral modification valid under subdivision (b). Also, the principles described in subdivision (d) may be applied to permit oral modification although the written contract expressly provides that modifications must be in writing. See *MacIsaac & Menke Co. v. Cardox Corp.*, 193 Cal. App.2d 661, 14 Cal. Rptr. 523 (1961); *Ist Olympic Corp. v. Hawryluk*, 185 Cal. App.2d 832, 8 Cal. Rptr. 728 (1960); *Frank T. Hickey, Inc. v. Los Angeles Jewish Community Council*, 128 Cal. App.2d 676, 276 P.2d 52 (1955).

Subdivision (d) makes clear that Section 1698 does not affect related principles of law. See *Wade v. Markwell & Co.*, 118 Cal. App.2d 410, 420-421, 258 P.2d 497, 502-503 (1953) (estoppel); *Pearsall v. Henry*, 153 Cal. 314, 95 P. 159 (1908) (oral novation and substitution of a new agreement); *Treadwell v. Nickel*, 194 Cal. 243, 258-259, 228 P. 25, 32 (1924) (rescission of a written contract by an oral agreement); *Bardeen v. Commander Oil Co.*, 40 Cal. App.2d 341, 104 P.2d 875 (1940) (waiver of a provision of a written contract); *Lacy Mfg. Co. v. Gold Crown Mining Co.*, 52 Cal. App.2d 568, 577-578, 126 P.2d 644, 649-650 (1942) (oral independent collateral contract).

APPENDIX XIV

STATE OF CALIFORNIA

**CALIFORNIA LAW  
REVISION COMMISSION**

RECOMMENDATION

*relating to*

**Liquidated Damages**

November 1975

CALIFORNIA LAW REVISION COMMISSION

Stanford Law School  
Stanford, California 94305



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GEORGE H. MURPHY  
*Ex Officio*

November 25, 1975

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

The California Law Revision Commission was authorized by Resolution Chapter 224 of the Statutes of 1969 to study whether the law relating to liquidated damages should be revised.

The Commission submitted a recommendation on this subject to the 1974 legislative session. *Recommendation and Study Relating to Liquidated Damages*, 11 CAL. L. REVISION COMM'N REPORTS 1201 (1973). That recommendation was withdrawn for further study by the Commission. In preparing this new recommendation, the Commission has considered the suggestions made concerning its earlier recommendation.

Respectfully submitted,  
MARC SANDSTROM  
*Chairman*



# RECOMMENDATION

*relating to*

## LIQUIDATED DAMAGES

### Introduction

Existing California law permits the parties to a contract, in some circumstances, to agree on the amount or the manner of computation of damages recoverable for breach.<sup>1</sup> Two requirements must be satisfied. Sections 1670 and 1671 of the Civil Code<sup>2</sup> permit the enforcement of a liquidated damages provision only where the actual damages “would be impracticable or extremely difficult to fix.” In addition, the courts have developed a second requirement that the provision must reflect a “reasonable endeavor” to estimate actual damages.<sup>3</sup> The judicial decisions interpreting and applying these requirements severely limit the use of liquidated damages provisions.<sup>4</sup> In contrast to Civil Code Sections 1670 and 1671, which reflect some bias against liquidated damages provisions, recently enacted statutes such as Section 2718 of the Commercial

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

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

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

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

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

<sup>4</sup> See Background Study, *supra* note 1.

Code<sup>5</sup> encourage the use of such provisions.<sup>6</sup>

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

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

<sup>5</sup> The pertinent portion of Section 2718 provides:

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

<sup>6</sup> For provisions authorizing liquidated damages in marketing contracts, see Corp. Code § 13353; Food & Agri. Code § 54264. For provisions authorizing late payment charges, see Bus. & Prof. Code § 10242.5 (certain real estate loans); Civil Code §§ 1803.6 (retail installment sales), 2954.4 (loan on single-family, owner-occupied dwelling), 2982 (automobile sales finance act); Fin. Code §§ 14852 (credit unions), 18667(a)(5) and 18934 (industrial loan companies), 22480(a)(5) (personal property brokers). See also Govt. Code § 54348 (services of local agency enterprise); Pub. Res. Code § 6224 (failure to pay State Lands Commission); Sts. & Hwys. Code § 6442 (Improvement Act of 1911). For provisions authorizing liquidated damages in certain public construction contracts, see Govt. Code §§ 14376, 53069.85; Sts. & Hwys. Code §§ 5254.5, 10503.1.

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

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

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

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

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

### Recommendations

Having concluded that the existing law does not permit the use of a liquidated damages provision in some cases where such a provision would serve a useful and desirable function, the Commission makes the following recommendations.

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

## **General Principles Governing Liquidated Damages**

Specific statutes governing the validity of liquidated damages provisions that now apply to particular types of contracts—such as Commercial Code Section 2718—should be retained without change. Absent such specific statutes, in order to continue the protection now given to significantly weaker and less experienced contracting parties, the rule expressed in Civil Code Sections 1670 and 1671 should continue to apply where:

(1) The contract is a consumer contract (one for the retail purchase or rental by the consumer of personal property or services, primarily for personal, family, or household purposes, or the lease of residential real property) and the liquidated damages are sought to be recovered from the consumer; or

(2) The party seeking to invalidate the liquidated damages provision establishes that, at the time the contract was made, he was in a substantially inferior bargaining position.

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

## Real Property Leases

The concurrent resolution directing the Law Revision Commission to study liquidated damages referred specifically to the use of liquidated damages provisions in real property leases.<sup>9</sup> The Commission has concluded that no special rules applicable to real property leases are necessary; the general rules recommended above will deal adequately with any liquidated damages problems in connection with such leases. Thus, the existing restrictive provisions of Sections 1670 and 1671 will continue to apply where a liquidated damages provision in a lease is sought to be enforced against a lessee of residential property and where a party seeking to invalidate a liquidated damages provision establishes that, at the time the lease was made, he was in a substantially inferior bargaining position. On the other hand, a liquidated damages provision in a lease made by parties in relatively equal bargaining positions and not involving residential property will be valid unless shown to be unreasonable.

## Land Purchase Contracts

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

**Separate signing or initialing of liquidated damages clause; size of type.** A new section should be enacted to provide that a liquidated damages clause fixing the damages if the buyer fails to complete the purchase of real property is valid only if the provision is separately signed or initialed by each party to the contract.<sup>11</sup> If the liquidated damages provision is included in a

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

<sup>10</sup> See Background Study, *supra* note 1, at 95-100.

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

If Buyer fails to complete said purchase as herein provided by reason of any default of Buyer, Seller shall be released from his obligation to sell the property

printed contract, it should be valid only if set out in at least 10-point type or in contrasting red print in at least eight-point bold type.<sup>12</sup> These requirements will alert the parties to the fact that the liquidated damages clause is included in the contract.

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

**Other types of real property.** Where the contract is for the sale and purchase of real property (other than residential

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

See R. Bernhardt, *California Real Estate Sales Transactions* § 4.67 (Cal. Cont. Ed. Bar Supp. 1974).

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

housing described above), a provision in the contract liquidating the damages should be valid if it satisfies the formal requirements as to signing or initialing and size or color of type and either of the following requirements:

(1) The provision satisfies the general requirements for a valid liquidated damages provision as outlined above. Thus, the substance of the existing restrictive provisions of Sections 1670 and 1671 of the Civil Code would apply where the party seeking to invalidate the liquidated damages provision establishes that, at the time the contract was made, he was in a substantially inferior bargaining position. On the other hand, if the parties are in relatively equal bargaining positions, the liquidated damages provision will be valid under the more liberal general standard recommended above unless shown to be unreasonable under the circumstances existing at the time the contract was made.

(2) Where the parties to the contract for the sale and purchase of the real property provide that all or any part of a payment made by the buyer shall constitute liquidated damages to the seller if the buyer fails to complete the purchase of the property, such amount—to the extent it is actually paid by the buyer—is valid as liquidated damages unless the buyer establishes that the liquidated damages provision was unreasonable under the circumstances existing at the time the contract was made.

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

**Requirement for subsequent payments.** Frequently a payment is made at the time of the agreement to sell and to purchase real property and a second payment is made at the time the escrow is opened. If the parties agree that all or a portion of any payment after the first one may also be retained by the seller as liquidated damages, a signing or initialing of a separate liquidated damages provision should be required for each such subsequent payment.

**Right to obtain specific performance.** The use of a liquidated damages provision makes retention of the buyer's payment the seller's sole right to damages. Theoretically, the seller still has the alternative remedy of specific performance,<sup>13</sup> but in most instances the difficulties in obtaining specific performance make

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

it an unsatisfactory and unused remedy.<sup>14</sup> Nevertheless, a provision is included in the recommended legislation to make clear that a liquidated damages provision does not affect any right a party may have to obtain specific performance.

### **Operative Date**

Because the recommended legislation establishes new requirements for the form of a liquidated damages provision in a printed contract to purchase and sell real property, the operative date of the recommended legislation should be deferred until July 1, 1977. Deferring the operative date six months will provide time within which to develop and print the necessary form contracts.

### **Application to Existing Contracts**

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

### **Technical Revisions**

Additional technical revisions are recommended. These are explained in the Comments which follow the sections of the recommended legislation. One technical revision made by the recommended legislation is to place the liquidated damages sections in a separate title. An outline of revised Title 4 and new Title 4.5 is set out below.<sup>15</sup>

#### **TITLE 4. UNLAWFUL CONTRACTS**

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

#### **TITLE 4.5. LIQUIDATED DAMAGES**

##### **Chapter 1. General Provisions**

- § 1671. General requirements for liquidated damages

##### **Chapter 2. Default on Real Property**

##### **Purchase Contract**

- § 1675. Contracts to purchase residential property

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

<sup>15</sup> It is necessary to renumber existing Civil Code Section 1676 as Section 1669 in order to accommodate new Title 4.5. No change is made in the wording of the existing section.

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

### **Proposed Legislation**

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

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

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

#### **Civil Code § 1669 (technical addition)**

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

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

**Comment.** Section 1669 continues without change former Section 1676.

#### **Civil Code § 1670 (repealed)**

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

~~1670. Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to~~

~~that extent void, except as expressly provided in the next section.~~

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

### **Title and Chapter Headings (added)**

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

#### **TITLE 4.5. LIQUIDATED DAMAGES**

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

#### **CHAPTER 1. GENERAL PROVISIONS**

#### **Civil Code § 1671 (amended). General requirements for liquidated damages**

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

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

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

*(c) The validity of a liquidated damages provision shall be determined under subdivision (d) and not under subdivision (b) in either of the following cases:*

*(1) Where the party from whom the liquidated damages are sought to be recovered establishes that he was in a substantially inferior bargaining position at the time the contract was made.*

*(2) Where liquidated damages are sought to be recovered (i) from a party to a contract for the retail*

*purchase, including rental, by such party of personal property or services, primarily for the party's personal, family, or household purposes, or (ii) from a party to a lease of real property for use as a dwelling by the party.*

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

**Comment.** Section 1671 is amended to provide in subdivision (b) a new general rule favoring the enforcement of liquidated damages provisions except against a party who establishes that he was in a substantially inferior bargaining position at the time the contract was made or against a consumer in a consumer case. In a consumer case or a case where a substantially inferior bargaining position is established, the prior law under former Sections 1670 and 1671, continued in subdivision (d), still applies.

*Subdivision (a).* Subdivision (a) makes clear that Section 1671 does not affect other statutes that govern liquidation of damages for breach of certain types of contracts. *E.g.*, Civil Code §§ 1675-1681 (default on contract to purchase real property); Com. Code § 2718 (sales transactions under the Commercial Code). For late payment charge provisions, see, *e.g.*, Bus. & Prof. Code § 10242.5 (certain real estate loans); Civil Code §§ 1803.6 (retail installment sales), 2954.4 (loan on single-family, owner-occupied dwelling), 2982 (automobile sales finance); Fin. Code §§ 14852 (credit unions), 18667(a) (5) and 18934 (industrial loan companies), 22480(a) (5) (personal property brokers); Govt. Code § 54348 (services of local agency enterprise). These other statutes—not Section 1671—govern the situations to which they apply. Of course, where there are exceptions to the coverage of some provision governing liquidated damages in certain types of contracts, Section 1671 does apply. *E.g.*, Fin. Code §§ 18649 and 18669.2 (exceptions to Section 18667), 22053 (exception to Section 22480). Government Code Sections 14376 (requiring state public works contract to contain a charge for late completion) and 53069.85 (allowing cities, counties, and districts to include in a contract a charge for late completion), and Streets and Highways Code Section 5254.5 (liquidated damages provision in contract under Improvement Act of 1911) remain unaffected by Section 1671. Note that Section 1676, which

provides a rule governing liquidated damages for the buyer's default on a contract for the sale of nonresidential real property, incorporates Section 1671.

*Subdivision (b).* Subdivision (b) provides that a reasonable liquidated damages provision is valid, but subdivision (d) rather than subdivision (b) applies where the party from whom the liquidated damages are sought to be recovered establishes that he was in a substantially inferior bargaining position at the time the contract was made or where liquidated damages are sought to be recovered from the consumer in a consumer case. See subdivision (c).

In the cases where subdivision (b) applies, the burden of proof on the issue of reasonableness is on the party seeking to invalidate the liquidated damages provision. The subdivision limits the circumstances that may be taken into account in the determination of reasonableness to those in existence "at the time the contract was made." The validity of the liquidated damages provision depends upon its reasonableness at the time the contract was made and not as it appears in retrospect. Accordingly, the amount of damages actually suffered has no bearing on the validity of the liquidated damages provision. Contrast Com. Code § 2718.

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

*Subdivision (c).* Subdivision (c) makes the prior law under former Sections 1670 and 1671, continued in subdivision (d), applicable to the two types of cases described in the subdivision. Subdivision (c) (1) makes subdivision (d) applicable where the party from whom the liquidated damages are sought to be recovered establishes that he was in a substantially inferior bargaining position at the time the contract was made. In making this determination, all the circumstances existing at the time of

the making of the contract should be considered, including, but not limited to, whether the party was represented by a lawyer at the time the contract was made. It should be noted that, where the party seeking to avoid the liquidated damages provision is the superior party in the case of substantially unequal bargaining positions, subdivision (b) is applicable.

Subdivision (c)(2) makes subdivision (d) applicable where liquidated damages are sought to be recovered from the consumer in a contract for the purchase or rental of personal property or services, primarily for personal, family, or household purposes, or for the lease of real property to be used as a dwelling. Here again, where the party seeking to avoid the liquidated damages provision is the nonconsumer party, subdivision (b) is applicable.

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

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

### Civil Code § 1676 (technical repeal)

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

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

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

## CHAPTER 2. DEFAULT ON REAL PROPERTY PURCHASE CONTRACT

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

### CHAPTER 2. DEFAULT ON REAL PROPERTY PURCHASE CONTRACT

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

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

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

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

(b) Where the parties to a contract to purchase and sell residential property provide in the contract that all or any part of a payment made by the buyer shall constitute liquidated damages to the seller if the buyer fails to complete the purchase of the property, such amount is valid as liquidated damages to the extent that it is actually paid in the form of cash or check (including a postdated check) and satisfies the requirements of Sections 1677 and 1678 and this section.

(c) To the extent that the amount paid does not exceed five percent of the purchase price, such amount is valid as liquidated damages unless the buyer establishes that such amount was unreasonable as liquidated damages under the circumstances existing at the time the contract was made. To the extent that the amount paid exceeds five percent of the purchase price, such excess amount is valid as liquidated damages only if the seller establishes that such excess amount was reasonable as liquidated damages under the circumstances existing at the time the contract was made.

**Comment.** Section 1675 governs the validity of a provision liquidating the damages for the buyer’s default in a contract to purchase and sell residential property as defined in subdivision (a). The section is an exception to the general provisions of

Section 1671. The liquidated damages provision is valid only if it is separately signed or initialed by the parties as required by Sections 1677 and 1678 and, if the contract is printed, the provision satisfies the type size requirements of Section 1677. The section does not apply to real property sales contracts as defined in Section 2985 (see Section 1681).

Subdivision (b) makes clear that a provision liquidating the damages if the buyer defaults is valid only to the extent that the buyer has actually paid in the form of cash or a check (including a postdated check) the amount of the liquidated damages. Hence, if the liquidated damages provision specifies liquidated damages for the buyer's default in an amount greater than the amount actually paid by the buyer, the provision is valid only to the extent of the amount actually paid; the seller may not enforce the greater amount under Section 1671. Where the amount paid is greater than the amount specified as liquidated damages, only the amount so specified may be retained as liquidated damages for the buyer's default. Section 1675 recognizes that generally the buyer of residential housing, including the buyer who does not read the contract or does not understand it, expects that he will lose his "earnest money" deposit if he does not complete the purchase of the property.

Subdivision (c) is designed to protect the buyer of residential housing from forfeiting an unreasonably large amount as liquidated damages for the failure to complete the purchase of the property. The subdivision provides a five-percent-of-purchase-price standard. If the amount paid is not in excess of five percent, the buyer has the burden of establishing that the liquidated damages provision was unreasonable "under the circumstances existing at the time the contract was made" in order to invalidate the liquidated damages provision. To the extent that the amount paid exceeds five percent of the purchase price, the seller has the burden of establishing that such additional amount was reasonable "under the circumstances existing at the time the contract was made." As to the interpretation of "under the circumstances existing at the time the contract was made," see the discussion in the Comment to Section 1671.

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

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

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

1676. (a) Except as provided in Section 1675, a provision in a contract to purchase and sell real property liquidating the damages to the seller if the buyer fails to purchase the property is valid if it satisfies the requirements of Sections 1677 and 1678 and the requirements of either subdivision (b) or (c) of this section.

(b) The liquidated damages provision is valid if it satisfies the requirements of subdivision (b) or (d) of Section 1671, whichever subdivision is applicable.

(c) Where the parties to the contract provide that all or any part of a payment made by the buyer shall constitute liquidated damages to the seller if the buyer fails to purchase the property, such amount is valid as liquidated damages to the extent that it is actually paid in the form of cash or check (including a postdated check) unless the buyer establishes that the liquidated damages provision was unreasonable under the circumstances existing at the time the contract was made.

**Comment.** Section 1676 provides for the validity of a liquidated damages provision for the buyer's default in a contract for the sale of real property other than residential property as defined in subdivision (a) of Section 1675. The liquidated damages provision is valid only if it is separately signed or initialed by the parties as required by Sections 1677 and 1678 and, if the contract is printed, the provision satisfies the type size requirements of Section 1677. The section does not apply to real property sales contracts as defined in Section 2985 (see Section 1681).

Section 1676 requires that the liquidated damages provision must satisfy the requirements of subdivision (b) or (d) of Section 1671, whichever applies, except to the extent that the buyer has actually paid—in the form of cash or a check (including a postdated check)—the amount of the liquidated damages. With respect to requirements of Section 1671, see that section and the Comment thereto. Note that subdivision (c) gives presumptive validity to a liquidated damages provision to the extent that the buyer has actually paid such amount. The subdivision protects

the buyer from forfeiting an unreasonably large amount as liquidated damages by permitting the buyer to invalidate the liquidated damages provision by establishing that it was “unreasonable under the circumstances existing at the time the contract was made.” As to the interpretation of the quoted phrase, see the discussion in the Comment to Section 1671.

Section 1676 does not apply to contract provisions concerning anything other than liquidated damages for the buyer’s failure to purchase the property (see Section 1679). The section does not, for example, apply to a provision liquidating the damages if the seller fails to perform. Nor does the section affect the seller’s right to obtain specific performance (see Section 1680).

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

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

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

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

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

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

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

**Civil Code § 1678 (added). Separate signing or initialing for subsequent payments**

1678. If more than one payment made by the buyer is to constitute liquidated damages under Section 1675 or subdivision (c) of Section 1676, the amount of any payment after the first payment is valid as liquidated damages only if (1) it satisfies the requirements of Section 1675 or subdivision (c) of Section 1676, whichever applies, and (2) a separate liquidated damages provision satisfying the requirements of Section 1677 is separately signed or initialed by each party to the contract for each such subsequent payment.

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

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

1679. This chapter applies only to a provision for

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

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

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

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

**Comment.** Section 1680 makes clear that this chapter does not affect the rule under existing California law that the right of the seller to obtain specific performance of a contract for the purchase of real property is not affected by the inclusion in the contract of a provision liquidating the damages to the seller if the buyer defaults on his agreement to purchase the property. See Section 3389, *People v. Ocean Shore R.R.*, 90 Cal. App.2d 464, 203 P.2d 579 (1949), and other cases interpreting Section 3389.

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

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

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

### **Civil Code § 1951.5 (technical amendment)**

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

1951.5. ~~Sections 1670 and~~ Section 1671, relating to

liquidated damages, ~~apply~~ *applies* to a lease of real property.

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

### **Civil Code § 3358 (technical amendment)**

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

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

**Comment.** Section 3358 is amended to replace the former listing of specific provisions with a general reference to statutes that constitute an exception to the rule stated. The former listing of specific provisions was incomplete. See the Comment to Section 1671.

### **Government Code § 14376 (technical amendment)**

SEC. 10. Section 14376 of the Government Code is amended to read:

**14376.** Every contract shall contain a provision in regard to the time when the whole or any specified portion of the work contemplated shall be completed, and shall provide that for each day completion is delayed beyond the specified time, the contractor shall forfeit and pay to the state a specified sum of money, to be deducted from any payments due or to become due to the contractor. A contract for a road project may also provide for the payment of extra compensation to the contractor, as a bonus for completion prior to the specified time, such provision, if used, to be included in the specifications and to clearly set forth the basis for such payment. *Section 1671 of the Civil Code does not apply to contract provisions under this section.*

**Comment.** The last sentence is added to Section 14376 to make clear that Civil Code Section 1671 has no effect on liquidated damages provisions under Section 14376.

**Government Code § 53069.85 (technical amendment)**

SEC. 11. Section 53069.85 of the Government Code is amended to read:

53069.85. The legislative body of a city, county or district may include or cause to be included in contracts for public projects a provision establishing the time within which the whole or any specified portion of the work contemplated shall be completed. The legislative body may provide that for each day completion is delayed beyond the specified time, the contractor shall forfeit and pay to such agency involved a specified sum of money, to be deducted from any payments due or to become due to the contractor. A contract for such a project may also provide for the payment of extra compensation to the contractor, as a bonus for completion prior to the specified time. Such provisions, if used, shall be included in the specifications upon which bids are received, which specifications shall clearly set forth the provisions. *Section 1671 of the Civil Code does not apply to contract provisions under this section.*

**Comment.** The last sentence is added to Section 53069.85 to make clear that Civil Code Section 1671 has no effect on liquidated damages provisions under Section 53069.85.

**Streets & Highways Code § 5254.5 (technical amendment)**

SEC. 12. Section 5254.5 of the Streets and Highways Code is amended to read:

5254.5. At any time prior to publication and posting notice inviting bids, the legislative body by resolution, may determine that in the event that the contractor, contracting owners included, does not complete the work within the time limit specified in the contract or within such further time as the legislative body shall have authorized, the contractor or contracting owners, as the case may be, shall pay to the city liquidated damages in the amount fixed by the legislative body in said resolution. If such determination

is made, the plans or specifications and the contract shall contain provisions in accordance therewith.

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

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

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

(3) If a contribution has theretofore been made or ordered by any agency, the legislative body may order a refund to the contributing agency in the proportion which said contribution bears to the total costs and expenses of the work. *Section 1671 of the Civil Code does not apply to liquidated damages provisions under this section.*

**Comment.** The last sentence is added to Section 5254.5 to make clear that Civil Code Section 1671 has no effect on liquidated damages provisions under Section 5254.5.

### **Operative Date**

SEC. 13. This act shall become operative on July 1, 1977.

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

### **Application to existing contracts**

SEC. 14. This act applies only to contracts made on or after July 1, 1977.

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- Number 4—Defense of Public Employees
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- Number 7—Amendments and Repeals of Inconsistent Special Statutes [out of print]

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**VOLUME 6 (1964)**

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- Article VII (Expert and Other Opinion Testimony)
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 Improvements Made in Good Faith Upon Land Owned by Another  
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 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  
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 Additur  
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- Annual Report (December 1969) includes following recommendations:  
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 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

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- The Eminent Domain Law
- Condemnation Authority of State Agencies
- Conforming Changes in Special District Statutes

**VOLUME 13**

[Volume expected to be available in September 1977]

Annual Report (December 1975) includes following recommendations:

- Admissibility of Copies of Business Records in Evidence (January 1975)
- Turnover Orders Under the Claim and Delivery Law (June 1975)
- Relocation Assistance by Private Condemnors (October 1975)
- Condemnation for Byroads and Utility Easements (October 1975)
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