McGeorge Law Review

Volume 4 | Issue 1 Article 22

1-1-1973

Civil Procedure Review of Selected 1972 California Legislation

University of the Pacific; McGeorge School of Law

Civil Procedure

Civil Procedure; claim and delivery

Code of Civil Procedure Chapter 2 (commencing with §509) (repealed); Chapter 2 (commencing with §509) (new).
AB 1623 (Warren); STATS 1972, Ch 855
(Effective August 14, 1972)
AB 2294 (Warren); STATS 1972, Ch 1324
(Effective December 22, 1972)

In *Blair v. Pitchess* [5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971) (hereinafter cited as *Blair*)] the California Supreme Court held the then existing statutory procedure for claim and delivery unconstitutional on the grounds that (1) it violated procedural due process by allowing a taking of property without prior notice or opportunity to be heard, and (2) the official intrusions authorized were unreasonable searches and seizures unless made with probable cause (referring to probable cause to believe both that the plaintiff's claim to the property is valid and that the property to be seized was in a certain place).

Chapter 855 operates as a substantive revision of California's claim and delivery law, in response to the decision rendered in *Blair* [CAL. STATS. 1972, c. 855, §3].

Section 509, as enacted by Chapter 855, provides that the plaintiff, in an action to recover the possession of personal property, may, at the time of issuance of summons, or at any time before *trial* claim the delivery of such property to him. Former §509, repealed by Chapter 855, provided that the plaintiff could claim such delivery at any time before *answer*.

When a delivery is claimed, §510(a) provides that plaintiff must file an affidavit, verified complaint, or declaration, under penalty of perjury, which must show: (1) plaintiff is the owner of the property claimed or is entitled to the possession thereof, the source of such title or right, and, if plaintiff's interest in such property is based upon a written instrument, a copy thereof shall be attached; (2) that the property is wrongfully detained by the defendant, the means by which the

defendant came into possession thereof, and the cause of such detention according to his best knowledge, information and belief; (3) a particular description of the property, a statement of its actual value, and a statement to his best knowledge, information and belief concerning the location of the property and of the residence and business address, if any, of the defendant; and (4) that the property has not been taken for a tax assessment, or fine, pursuant to a statute, or seized under an execution against the property of the plaintiff, or, if so seized, that it is by statute exempt from such seizure. Prior to Chapter 855, §510 did not require the plaintiff to make such allegations under penalty of perjury, and only required that the affidavit contain general allegations that the plaintiff was the owner of the property or had right to possession to such property; that defendant was wrongfully detaining the property; the cause of such detention; the value of the property detained; and that the property had not been taken for a tax assessment, or fine, pursuant to statute, or seized under an execution or an attachment against the property of the plaintiff, or, if so seized, that it was by statute exempt from such seizure.

Section 510(b) requires that upon receipt of the affidavit, verified complaint, or declaration prescribed by §510(a), the court shall, without delay, issue an order directed to the defendant to show cause why the property should not be taken from him and delivered to the plaintiff. The order to show cause shall fix the date and time for the hearing thereon, which shall be no sooner than 10 days from the issuance thereof and shall direct the time within which service thereof shall be made upon the defendant. Such order shall inform the defendant that he may file affidavits on his behalf with the court and may appear and present testimony on his behalf at the time of such hearing, or that he may, at or prior to such hearing, file with the court a written undertaking to stay the delivery of the property, in accordance with the provisions of §514 (discussed *infra*), and that if he fails to appear, plaintiff will apply to the court for a writ of possession. The order shall also fix the manner in which service thereof shall be made; which shall be by personal service, or in accordance with the provisions of §1011 of the Code of Civil Procedure, or in such manner as the judge may determine to be reasonably calculated to afford notice thereof to the defendant under the circumstances appearing from the verified complaint, affidavit, or declaration. Under prior law (former §511), upon endorsement in writing upon the affidavit, the plaintiff could *immediately* acquire a writ of possession requiring the sheriff, constable, or marshal to forthwith seize the property claimed *without notice or hear-*

ing on the matter. It is noteworthy that this entire process occurred outside the judicial system, i.e., a clerk was empowered to issue writs of possession.

Section 510(c) specifies the narrowly defined instances in which the court is authorized to issue a summary writ of possession prior to a noticed hearing. The summary writ may issue if probable cause appears that any of the following exist:

(1) the defendant gained possession of the property by theft, as defined by any section of Title 13 (commencing with §447) of the Penal Code;

(2) the property consists of one or more negotiable instruments or credit cards;

(3) by reason of specific, competent evidence shown, by testimony within the personal knowledge of an affiant or witness, the property is perishable, and will perish before any noticed hearing can be had, or is in immediate danger of destruction, serious harm, concealment, or removal from this state, or of sale to an innocent purchaser; *and* that the holder of such property threatens to destroy, harm, conceal, remove it from the state, or sell it to an innocent purchaser.

However, when a writ of possession has been issued prior to hearing under the provisions of §510(c), the defendant or other person from whom possession of such property has been taken may apply to the court for an order shortening the time for hearing on the order to show cause, and the court may, upon such application, shorten the time for such hearing, and direct that the matter be heard on not less than 48 hours notice to the plaintiff.

Section 510(d) authorizes the court, in any case, to exercise its discretion by issuing a temporary restraining order in addition to the order to show cause. If the court so elects, the temporary restraining order, directed to the defendant, may prohibit such acts with respect to the property as may appear to be necessary for the preservation of the rights of the parties and the status of the property.

Section 510(e) directs the court, upon the hearing on the order to show cause, to consider the showing made by the parties appearing, and to make a preliminary determination as to which party, with reasonable probability, is entitled to the possession, use, and disposition of the property pending final adjustment of the claims of the parties. Should the court, consistent with the above described determination, find that the action is one in which a prejudgment writ of possession would be proper, the court shall issue such writ.

Section 511 imposes two specific limitations upon issuance of the writ of possession: (1) a writ of possession shall not issue to enter the private premises of any person for the purpose of seizure of property unless the court shall determine from competent evidence that there is probable cause to believe that the property or some part thereof is located therein; and (2) a writ of possession shall not issue until plaintiff has filed with the court a written undertaking executed by two or more sufficient sureties, approved by the court, to the effect that they are bound to the defendant in double the value of the property, as determined by the court, for the return of the property to the defendant, if return thereof be ordered, and for the payment to him of any sum as may from any cause be recovered against the plaintiff.

It should be noted that the requirement of an undertaking prior to the issuance of a writ of possession is essentially identical to the requirement under previous law [CAL. CODE CIV. PROC. §512, *repealed*, CAL. STATS. 1972, c. 855, §1].

Section 512(a), as enacted by Chapter 855, provides that a writ of possession issued by the court must describe the specific property to be seized and must specify the location or locations where, as determined by the court from all the evidence, there is probable cause to believe the property or some part thereof will be found. Attached to the writ, there must be a copy of the undertaking filed by the plaintiff, and the writ must inform the defendant that he has the right to except to the sureties upon such undertaking or to file a written undertaking for the *redelivery* of such property pursuant to §514 (discussed *infra*). The writ shall be directed to the sheriff, constable, or marshal, within whose jurisdiction the property is located, and shall direct the levying officer to seize the property if it is found, and to retain it in his custody. Section 512(b) authorizes the court to endorse, without further notice, a writ of possession directing the levying officer to search for the property at another location or locations and to seize the property if found, provided that the plaintiff, or someone on his behalf files an affidavit or declaration with the court showing probable cause for such additional search or searches. It is significant that under prior law, there was no express statutory basis for the court to authorize additional searches for the subject property by ancillary writ of possession as is now provided for by §512(b). Furthermore, prior to the enactment of Chapter 855, the writ of possession was not required to include notice to the defendant of his rights to except to the sureties upon the undertaking.

Section 513 prescribes the manner in which the levying officer is required to execute the writ of possession. The manner of execution provided by §513 is essentially the same as that required under former §512. However, §513, as added by Chapter 855, specifically sets forth the manner of execution when the property to be seized under the writ is located *within a building or enclosure*. In such a case, the levying officer shall demand its delivery, announcing his identity, purpose, and the authority under which he acts. If the property is not voluntarily delivered, he shall cause the building or enclosure to be broken open in such manner as he reasonably believes will cause the least damage to the building or enclosure, and take the property into his possession. The levying officer may call upon the power of the county to aid and protect him, but if he reasonably believes that entry and seizure of the property will involve a substantial risk of death or serious bodily harm to any person, he shall refrain from seizure of the property and shall forthwith make a return before the court from which the writ issued, setting forth the reasons for his belief that such risk exists. The court shall then make such orders and decrees as may be appropriate. In comparison to §513, Section 1174 of the Code of Civil Procedure, which outlines the process for enforcement of an unlawful detainer judgment, requires that if the tenant does not voluntarily vacate the premises the sheriff shall take physical possession of the property by force, but does not provide, as does §513, for instructions to the sheriff in the event that physical force would create a substantial risk of death or serious bodily harm. The provisions of previous law regarding the manner of execution of the writ of possession when the property subject to the writ is a dwelling, such as a house trailer, mobilehome or boat are retained by Chapter 855. Also carried over by Chapter 855 are essentially the same notice requirements as were provided for by former §512. That is, the levying officer shall, without delay, serve upon the defendant a copy of the writ of possession and written undertaking, the verified complaint, affidavit or declaration, by delivering the same to him personally, if he can be found, or to his agent from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either with some person of suitable age and discretion; or, if neither have any known place of abode, by mailing them to their last known address.

Section 514 provides for return of the subject property, if such property has already been levied upon, or termination of the hearing on the order to show cause, if the defendant files a written undertaking, executed by two or more sufficient sureties approved by the court. Prior

law provided for return of the property upon defendant's undertaking in a similar fashion [CAL. CODE CIV. PROC. §514, *repealed*, CAL. STATS. 1972, c. 855, §1].

Chapter 855 further specifies, all in accordance with prior law, the manner whereby any sureties filed pursuant to the above discussed provisions may be qualified or objected to (§515); the conditions precedent to the delivery of the property to the entitled party by the levying officer (§516); the procedure to be adopted in the event that third party claims are required to be litigated (§517); and the time period (20 days) within which the writ of possession shall be returned (§518).

Chapter 855 makes two additional changes in the previous claim and delivery legislation: (1) §519 provides that after the property has been delivered to a party or the value thereof secured by an undertaking as provided by §514, the court shall, by appropriate order, protect the party in the possession of such property until final determination of the action; and (2) §520 specifies that in all proceedings brought to recover the possession of personal property, all courts in which such actions are pending, shall upon request of any party thereto, give such actions precedence over all other civil actions (except actions to which special precedence is otherwise given by law) in the matter of setting such actions for hearing or trial, and in hearing or trial thereof, to the end that all such actions shall be quickly heard and determined.

Section 521 states that the provisions of Chapter 855 shall be operative only until December 31, 1975, and on and after that date shall have no force or effect. Presumably, the California Law Revision Commission will draft and submit a proposal for further revision of California claim and delivery law sometime prior to that date [*See* CALIFORNIA LAW REVISION COMMISSION, *Tentative Recommendation Relating to the Claim and Delivery Statute* (Sept. 1972) (hereinafter cited as COMMISSION)].

Chapter 855 was adopted as an urgency measure [CAL. STATS. 1972, c. 855, §3].

COMMENT

Chapter 855 comprises the initial legislative response to *Blair v. Pitchess* (*supra*). In *Blair*, plaintiffs, Los Angeles residents and taxpayers, brought a taxpayers suit under Code of Civil Procedure §526a, to enjoin the illegal expenditure of public funds. Defendants named were the county and civil enforcement officers (sheriff, marshal, and

constable) executing the claim and delivery law [CAL. CODE CIV. PROC. §509 *et seq., repealed,* CAL. STATS. 1972, c. 855, §1]. The constitutional challenge was based on the 4th, 5th and 14th Amendments to the Federal Constitution, and the California Constitution, article I, §§13 and 19. The lower court granted plaintiffs' motion for summary judgment and issued an injunction restraining defendants from taking personal property without a prior hearing on the merits of the case, and from entering a private place to search for and seize personal property without prior probable cause being established before a magistrate. The California Supreme Court affirmed, holding that the existing law relating to claim and delivery was unconstitutional.

Under the prior law, a plaintiff seeking to invoke the provisional remedy of claim and delivery to secure immediate possession of the property, simply filed his action, and, after having summons issued, provided a *levying officer* with an affidavit, notice, and an undertaking, together with copies of the complaint and summons. If such documents were in order, the levying officer issued a writ of possession and immediately proceeded to take custody of the property for eventual delivery to the plaintiff. To accomplish this, the levying officer was authorized to use force and break into any building or enclosure in order to effect seizure of the property. Thus, no court order nor prior judicial review by a judical officer of either the merits of the claim or the general availability of the remedy to the plaintiff was required.

In holding the above statutory claim and delivery procedure unconstitutional, the *Blair* decision was the logical extension of *Sniadach v. Family Finance Corp.* [395 U.S. 337 (1969)], in which the United States Supreme Court declared that Wisconsin's statutory scheme permitting prejudgment garnishment of wages was unconstitutional because it authorized a "taking" of property without procedural due process as mandated by the Fourteenth Amendment. This extension was confirmed in 1972 by the Supreme Court in *Fuentes v. Shevin* [407 U.S. 67 (1972) (hereinafter cited as *Fuentes*)] which invalidated the claim and delivery laws of Florida and Pennsylvania authorizing the summary seizure of property without an opportunity for a pre-seizure hearing.

The *Fuentes* case was in accord with *Blair* in establishing that as a primary constitutional prerequisite, any statutory scheme for claim and delivery must provide for a notice hearing prior to levy of the writ of possession in the majority of cases:

> The primary question in the present cases is whether these state

> statutes are constitutionally defective in failing to provide for hearings "at a meaningful time." The Florida replevin process guarantees an opportunity for a hearing after the seizure of goods, and the Pennsylvania process allows a post-seizure hearing if the aggrieved party shoulders the burden of initiating one. But neither the Florida nor Pennsylvania statutes provides for notice or an opportunity to be heard *before* the seizure. The issue is whether procedural due process in the context of these cases requires an opportunity for a hearing *before* the state authorizes its agents to seize property in the possession of a person upon the application of another . . . We hold that the Florida and Pennsylvania prejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor. Our holding, however, is a narrow one. We do not question the power of a state to seize goods before a final judgment in order to protect the security interests of creditors so long as those creditors have tested their claim to the goods through the process of a fair prior hearing [*Fuentes* at 80, 96].

Chapter 855 seems to meet the general requirements of procedural due process mandated by *Blair* and *Fuentes*. However, §510(c), as added by Chapter 855 sanctions the issuance of *summary* writs of possession in specified instances. Both *Blair*, and later *Fuentes*, have recognized certain situations wherein summary seizure of property might be constitutionally justified:

> We recognize that in some instances a very real danger may exist that the debtor may abscond with the property or that the property will be destroyed. In such situations a summary procedure may be consonant with the constitutional principles [*Blair* at 278, 486 P.2d at 1257, 96 Cal. Rptr. at 57].
>
> There are "extraordinary situations" that justify postponing notice and opportunity for a hearing . . . These situations, however, must be *truly unusual.* Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been *directly necessary to secure an important governmental or general public interest.* Second, there has been *a special need for very prompt action.* Third, the state has kept strict control over its monopoly of legitimate force: *the person initiating the seizure has been a governmental official,* responsible for determining under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United

> States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food (emphasis added) [*Fuentes* at 90-92].

Does §510(c) conform to the statutory tailoring prescribed above by *Blair* and *Fuentes*? The section would appear to meet the "extraordinary circumstances" test set forth in *Blair* for valid summary issuance of a writ of possession. It is questionable, however, whether §510(c) satisfies the stricter "extraordinary situations" test outlined by the United States Supreme Court in *Fuentes*. This is because the availability of the summary writ under §510(c) is not, by its language, confined to situations where the seizure is "directly necessary to secure an important governmental or general public interest," *i.e.*, it is questionable whether a creditor department store's interest in recovering property sold under a conditional sales contract to a defaulting purchaser who has threatened to abscond with or destroy the chattel amounts to a "general public interest." Apparently, under §510(c), a summary writ would be available to the department store in such a case [*See* COMMISSION at 5].

Perhaps further erosion of the constitutional footing of §510(c) may have been supplied by the California Supreme Court in *Randone v. Appellate Department* [5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971) (hereinafter cited as *Randone*)], a decision rendered two months after *Blair*, in which the court held California's prejudgment attachment scheme, as authorized by the then existing §537(1), unconstitutional on procedural due process grounds because no noticed hearing prior to attachment was provided [for an analysis of the new attachment legislation prompted by *Randone, see* Comment, *Attachment in California: Senate Bill 1048, the Interim Response to Randone,* this volume at 146]. In *Randone,* the court, in part, concluded that with respect to attachment "a creditor's interest, even in these 'special circumstances' [the court had just quoted the passage from *Blair* delineating the "extraordinary circumstances" necessary for issuance of summary writs of possession in claim and delivery actions] is not sufficient to justify depriving a debtor of 'necessities of life' prior to a hearing on the merits of the creditor's claim" [*Randone* at 556 n.19, 488 P.2d at 27 n.19, 96 Cal. Rptr. at 723 n.19]. Therefore, to the extent that claim and delivery is analogous to attachment on the procedural due process issue, §510(c) could conceivably be unconstitutional under the *Randone* reasoning when applied to a case where a summary

writ of possession is issued to seize a "necessity of life," even where the debtor has threatened to abscond with or destroy such property [*See* COMMISSION at 5-7].

The court in *Blair* was not content to strike down the claim and delivery law on procedural due process grounds alone—Fourth Amendment violations were equally relied upon as an alternative ground. The *Blair* court found that the official intrusions authorized by former §517 [*repealed*, CAL. STATS. 1972, c. 855, §1] amounted to unreasonable searches and seizures. However, the court intimated that a statute which was tailored to require *probable cause* for the intrusion in order to gain custody of personalty under a valid writ of possession would not violate the Fourth Amendment. Specifically, the court stated:

> Obviously, the affidavits customarily required of those initiating claim and delivery procedures do not satisfy the probable cause standard. Such affidavits need allege only that the plaintiff owns property which the defendant is wrongfully detaining. The affiants are not obliged to set forth facts showing probable cause to believe such allegations to be true, nor must they show probable cause to believe that the property is at the location specified in the process. Finally, such affidavits fail to comply with the probable cause standard because they are not passed upon by a magistrate, but are examined only by the clerical staff of the sheriff's or marshal's department, and then merely for their regularity in form [*Blair* at 273-74, 486 P.2d at 1253, 96 Cal. Rptr. at 53].

It would seem from this statement that, in order to satisfy the Fourth Amendment, the plaintiff must show both probable cause to believe his claim to the property is a valid one as well as probable cause to believe that the property is at the location specified in the verified complaint, affidavit, or declaration [COMMISSION at 8].

Although the *Fuentes* decision did not rest on Fourth Amendment grounds, the opinion did state that "once a prior hearing is required, at which the applicant for a writ must establish the probable validity of his claim for repossession, the Fourth Amendment problem may well be obviated" [*Fuentes* at 96 n.32].

Chapter 855 would appear to satisfy the two-prong probable cause dictates of *Blair*. Section 511(a) specifies that no writ of possession to enter the private premises of any person for the purpose of seizure of property will issue *unless the court shall determine from competent evidence that there is probable cause to believe that the property or some part thereof is located therein.* Additionally, §§510(a) (affi-

davit requirements) and 510(c) (elements requisite to issuance of an *ex parte* writ of possession) both demand that plaintiff fashion his allegations in a manner to assert the probable validity of his claim to the right of possession.

In conclusion, it would clearly appear that Chapter 855 is generally responsive to the guidelines established by *Blair* and *Fuentes* for constitutional claim and delivery legislation. Chapter 855 removes the issuance of writs of possession from the levying officer and places such authority within the judicial forum. It insures, at least in the majority of cases, that no writ of possession will issue without a prior hearing on the merits of the plaintiff's claim.

However, as discussed above, the strongest constitutional challenge to the new legislation will be whether the allowance for the issuance of *ex parte* writs, as provided by §510(c), falls within the exceptions circumscribed by the United States Supreme Court in *Fuentes*. If the *Randone* prohibition of *ex parte* writs of attachment where "necessities of life" are involved applies with equal force to the claim and delivery situation, the legislation will be even more vulnerable to constitutional attack [COMMISSION at 5].

The California Law Revision Commission, in its tentative recommendations for revision, has outlined a possible solution to the arguable constitutional deficiencies of §510(c)—strike the section entirely, leaving no statutory authority for *ex parte* issuance of writs of possession. The Commission reasons that the creditor's interest is sufficiently protected by the avaliability of a temporary restraining order even in cases where the debtor has threatened to destroy or abscond with the property. Apparently the protection arises because of the court's power to enforce the temporary restraining order by contempt proceedings [COMMISSION at 11-14].

Finally, as a collateral matter, it should be noted that the constitutionality of self-help repossession (without resort to judicial process, as in claim and delivery) is currently suspect. In *Adams v. Egley* [338 F. Supp. 614 (S.D. Cal. 1972)], the United States District Court, Southern District of California, held that *private repossession* of personal property sold on installment contracts was violative of Fourteenth Amendment procedural due process. The court found that the authority of California Commercial Code §§9503 and 9504, which is traditionally asserted by creditors in chattel finance contracts for private repossession in the event of purchaser default, amounted to sufficient state action for a 14th Amendment violation. However, shortly after

Adams, a flatly contrary decision was rendered by the District Court, Northern District of California [Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972)].

See Generally:

1) 2 WITKIN, CALIFORNIA PROCEDURE, *Provisional Remedies* §§24-38 (2d ed. 1971); §24A (Supp. 1972).
2) CONTINUING EDUCATION OF THE BAR, CALIFORNIA DEBT COLLECTION PRACTICE §§10.01-10.35 (1968); §§10.01, 10.10 (Supp. 1972).
3) CALIFORNIA LAW REVISION COMMISSION, *Tentative Recommendation Relating to the Claim and Delivery Statute* (Sept. 1972).
4) Jackson, *Attachment In California—What Now?*, 3 PAC. L.J. 1 (1972).
5) Comment, *Attachment in California: Senate Bill 1048, the Interim Response to Randone*, this volume at 146.

Civil Procedure; prejudgment attachment

Code of Civil Procedure §§537, 537.1, 537.2, 537.3, 538, 538.1, 538.2, 538.3, 538.4, 538.5, 541, 542.1, 542.2, 542.3, 542.4, 524b, 542c (new); §§537.5, 539 (amended); §§537, 538, 541, 542b (repealed); Corporations Code §§126.1, 15006.1, 15501.1 (new); Government Code §7203 (amended).
SB 1048 (Zenovich); STATS 1972, Ch 550

Provides for and limits the availability of prejudgment attachment as a provisional remedy to specified defendants and property; establishes revised prejudgment attachment procedure.

Prior to the enactment of Chapter 550, the Code of Civil Procedure [§537 *et seq.*] provided for prejudgment attachment in cases of unsecured debts without requiring a procedure for affording notice and a hearing to the defendant before levy of attachment. The only major limitation upon a creditor's prejudgment remedy was the exemption from attachment of earnings of the defendant as provided for by §690.6(a) of the Code of Civil Procedure [CAL. CODE CIV. PROC. §537, *as amended*, CAL. STATS. 1970, c. 1523, §2, at 3058]. Summary attachment was available as against all classes of defendants and was not limited as to the type or class of property subject to the writ.

Chapter 550 completely revises applicable portions of the Code of Civil Procedure relating to the writ of attachment to limit the general availability of the writ, and establishes procedures requisite to the obtaining of a writ of attachment designed to give notice to the defendant and to insure him of the opportunity to have a hearing on whether the writ shall issue.

For a full discussion of the new attachment procedure pursuant to Chapter 550, and an analysis of whether this legislation meets the con-

stitutional requirements mandated by the California Supreme Court in *Randone v. Appellate Department* [5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971)], *see* Comment, *Attachment in California: Senate Bill 1048, The Interim Response to Randone,* this volume at 146.

Civil Procedure; wage garnishment

Code of Civil Procedure §§682.3, 690.6, 690.50 (amended).
AB 685 (Cullen); STATS 1972, Ch 43
(Effective April 6, 1972)
AB 2354 (Warren); STATS 1972, Ch 649
(Effective August 9, 1972)

Chapter 43 amends §690.6(c) of the Code of Civil Procedure to provide that all earnings of a judgment debtor received for personal services rendered at any time within 30 days next preceding the *date of withholding by the employer under §682.3 infra,* which are necessary for the support of the debtor's family residing in this state and supported in whole or in part by the debtor, are exempt from execution unless the debts are: (1) incurred for personal services rendered by an employee or former employee of the debtor; or (2) incurred by the debtor, his wife, or his family for "common necessaries" of life [*See* Ratzlaff v. Portino, 14 Cal. App. 3d 1013, 1015, 92 Cal. Rptr. 722, 723 (1971); *see also,* Seid, *Necessaries—Common or Otherwise,* 14 HAST. L.J. 28 (1962)].

Prior to its amendment by Chapter 43, §690.6(c) exempted only those earnings received for personal services rendered at any time within 30 days next preceding the *levy of execution.*

Section 682.3 requires an employer served with a writ of execution to withhold the amount specified in the writ from earnings then or thereafter due to the judgment debtor and not exempt under Section 690.6. Prior to amendment, this section also provided that if the judgment debtor wished to claim a full exemption of all his earnings in accordance with the provisions of §690.6 discussed above, and §690.50 *infra,* he was required to claim the exemption within 10 days of the date of the *levy of execution.* This requirement has been deleted by Chapter 649. The debtor may now claim a full exemption in accordance with §690.6 and §690.50.

Section 690.50 (procedure for claiming exemption) requires that the judgment debtor make his claim of exemption from execution within

10 days from the date upon which the property was levied. However, this section has been amended by Chapter 649 to provide that for the purposes of this section, if the property levied upon consists of the earnings of a judgment debtor, each date that earnings are *withheld* from the judgment debtor shall be deemed to be the date such earnings were levied upon. Section 690.50 has also been amended to provide that a judgment debtor shall have the right to file a separate claim of exemption each time that a withholding of earnings occurs, provided that if a prior claim of exemption has been adjudicated under the same levy, each separate claim of exemption must thereafter be supported by a statement under oath alleging the changed circumstances which support the new claim of exemption. If a claim of exemption is allowed, the *judgment creditor* shall have the right, at any time during the effective period of the claim of exemption, to move the court for consideration of the claim previously granted on the grounds of a material change of circumstances affecting the debtor's exemption rights. When the judgment creditor does make such a motion, he must support his motion by a statement under oath alleging the changed circumstances which support his motion for consideration.

COMMENT

Chapter 43 and Chapter 649 have both been enacted to clarify and to correct inconsistencies among §§682.3, 690.6, and 690.50 which arose as a result of the 1971 enactment of §682.3 and amendment of §690.6 [CAL. STATS. 1971, c. 1684, §2, at 3612, §5, at 3614; *see* 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 221 (1972)].

The 1971 enactment of §682.3 provided that a levy of execution upon wages would remain effective for 90 days, eliminating the prior requirement of serving a separate writ of execution to effect each wage withholding [5 WITKIN, CALIFORNIA PROCEDURE, *Enforcement of Judgment* §66A (Supp. 1972)]. However, the requirement that the judgment debtor file his claim of exemption within 10 days of the date of levy of execution [CAL. CODE CIV. PROC. §690.50] remained unchanged, and the amendment to §690.6, which grants an exemption for all earnings that are "necessaries," stated that such earnings were only subject to exemption if they were earned within 30 days next preceding the levy of execution. Therefore, these sections could have been construed to preclude the judgment debtor from effectively exempting any of his wages due during the entire 90 day period of the writ.

Chapter 43 is intended to conform the provisions of §690.6 to the legislative purpose for enacting §682.3. Section 682.3(b) states that exemptions claimed pursuant to §§690.6 and 690.50 "shall extend to any wages withheld whether or not withheld after the claim of exemption is filed." The purpose of this provision was to permit a judgment debtor's claim of exemption to apply to all withholding done by an employer over the 90-day period of the writ of execution [A.B. 685, CAL. STATS. 1972, c. 43, §3]. By providing that earnings may be exempted from execution if for services rendered 30 days preceding the date of withholding by the employer, rather than 30 days preceding the levy of execution, this legislative purpose should be fulfilled.

The net effect of the enactment of these two chapters may be summarized briefly as follows: (1) the judgment debtor now clearly has the right to claim an exemption of all of his earnings over the entire 90-day period of the writ of execution; (2) if a judgment debtor cannot qualify for an exemption of all of his earnings at the beginning of the 90-day period and subsequent circumstances have arisen whereby an exemption would be proper, he is now able to secure such an exemption; (3) if an exemption claim has previously been adjudicated and denied, upon a subsequent exemption claim the judgment debtor must allege changes in circumstances which would give rise to an exemption; and (4) if a continuing exemption has been allowed, the judgment creditor may seek to terminate the exemption by alleging sufficient changed circumstances.

It should be noted that the above discussion of the exemption of *all* earnings from levy of execution under specified conditions provided by §690.6(c) is to be distinguished from the automatic exemption of all earnings from *levy of attachment* [CAL. CODE CIV. PROC. §690.6 (a)] and from the automatic exemption of *one-half* of the judgment debtor's earnings from levy of execution [CAL. CODE CIV. PROC. §690.6(b)]. These two exemptions are termed "automatic" because the earnings are exempt without the filing of a claim of exemption pursuant to §690.50.

See Generally:

1) Brunn, *Wage Garnishment in California: A Study and Recommendations*, 53 CALIF. L. REV. 1214 (1965).
2) 5 WITKIN, CALIFORNIA PROCEDURE, *Enforcement of Judgment* §§25, 60-70 (2d ed. 1971), (Supp. 1972).
3) 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 221 (1972).
4) 2 PAC. L.J., REVIEW OF SELECTED 1970 CALIFORNIA LEGISLATION 325 (1971).
5) STATE BAR OF CALIFORNIA, 1971 CONFERENCE RESOLUTION 12-2.
6) CONTINUING EDUCATION OF THE BAR, CALIFORNIA DEBT COLLECTION PRACTICE §§17.73-17.81 (Supp. 1972).

Civil Procedure; attachment and execution—motor vehicle exemption

Code of Civil Procedure §690.2 (amended).
AB 1394 (Murphy); STATS 1972, Ch 744

In 1970, §690.24, exempting from attachment or execution of judgment a motor vehicle of specified value, was repealed and §690.2 was added to provide for the exemption [CAL. STATS. 1970, c. 1523, §§12, 47, at 3071, 3077; *see* 2 PAC. L.J., REVIEW OF SELECTED 1970 CALIFORNIA LEGISLATION 320 (1971)].

Chapter 744 amends §690.2 to increase to $500 the maximum value of a motor vehicle, over and above all liens and encumbrances, which is exempt from attachment or execution. Previously, the maximum value exempt under §690.2 was $350.

Since, under present law, the motor vehicle exemption can only be claimed where the total value of the vehicle does not exceed $1000, §690.2 has been further amended by Chapter 744 to provide that the value of the motor vehicle shall be the value of the particular vehicle as set forth in established used car price guides customarily used by California automobile dealers, or, if not listed in such guides, the value shall be fair market value.

Additionally, §690.2 has been amended to specify an order of priority for the disposition of proceeds in the event of an execution sale of the motor vehicle (a case where the total value of the motor vehicle sought to be exempted exceeds $1000, *or* where the value, over and above liens and encumbrances, exceeds $500). Chapter 744 provides that the proceeds of the sale must be applied in the following order of priority: *first,* to the seller or mortgagee of the motor vehicle; *second,* to the exemption claimant up to the amount of the allowable motor vehicle exemption ($500); and *third,* the balance, if any, in like manner as the proceeds of sale are applied in other cases. Further, Chapter 744 provides that any money paid to the claimant pursuant to the above disposition scheme, is exempt from attachment or execution for a period of three months.

COMMENT

Chapter 744 was enacted to remedy several problems which had arisen with regard to the application of §690.2. Apparently, it was believed that due to inflationary pressures of the past few years the $350 maximum equity allowance, established in 1969, was inadequate.

Thus, Chapter 744 increases that maximum to $500, an amount purportedly more representative of investment in a modest automobile in light of current market realities.

Chapter 744 specifies the mode by which value of the motor vehicle in question shall be determined. Previously, there being no method of valuation prescribed by §690.2, many valuation disputes had arisen.

Prior to the enactment of Chapter 744, in the event of an execution sale, the exemption claimant lost *all* of his equity in the automobile. With the loss of his equity exemption, the claimant was often unable to purchase a modest replacement vehicle for employment or family transportation. The apparent effect of Chapter 744 is to allow an equity exemption of up to $500 even in the event of an execution sale, while at the same time not permitting the retention of any type of luxury vehicle. The provision exempting the proceeds from the execution sale, which have been returned to the claimant, for a period of three months seems to be designed to allow the claimant adequate time to purchase a replacement vehicle.

It should be noted that a motor vehicle exemption, as provided by §690.2, cannot be claimed as against a judgment recovered for the vehicle's price [CAL. CODE CIV. PROC. §690.52]. Also, it would appear that according to *In re* Rauer's Collection Company [87 Cal. App. 2d 248, 196 P.2d 803 (1948)] the new and increased exemptions provided for by §690.2, as amended, apply only as against obligations which were incurred after the effective date of Chapter 744.

See Generally:

1) 3 WITKIN, CALIFORNIA PROCEDURE, *Enforcement of Judgment* §17 (1971).
2) 2 PAC. L.J., REVIEW OF SELECTED 1970 CALIFORNIA LEGISLATION 320 (1971).

Civil Procedure; attachment and execution—housetrailer exemption

Code of Civil Procedure §690.3 (amended).
AB 324 (Vasconcellos); STATS 1972, Ch 418

Section 690.3 of the Code of Civil Procedure has been amended to increase the exemption from attachment and execution (as provided by Code of Civil Procedure Section 690) for a housetrailer or mobilehome in which the debtor, or family of such debtor, actually resides. The exemption has been increased from a value not exceeding $5000 to a value not exceeding $9,500 over and above all liens and encumbrances on that housetrailer or mobilehome, provided neither such

debtor nor the spouse of such debtor has an existing homestead as provided by Title 5 (commencing with Section 1237) of the Civil Code.

See Generally:

1) CONTINUING EDUCATION OF THE BAR, CALIFORNIA DEBT COLLECTION PRACTICE §§19.1-19.44 (1968).
2) 21 CAL. JUR. 2d *Exemptions* §1, *et seq.* (1955).
3) 25 CAL. JUR. 2d *Homesteads* §1, *et seq.* (1955).
4) 2 PAC. L.J., REVIEW OF SELECTED 1970 CALIFORNIA LEGISLATION 320, 326, 328 (1971).

Civil Procedure; exemption from execution—eminent domain awards and relocation assistance payments

Government Code §7268 (repealed); Code of Civil Procedure §690.8 (new).
AB 987 (Brathwaite); STATS 1972, Ch 822
AB 2024 (Lanterman); STATS 1972, Ch 861

Chapter 822 adds §690.8 to the Code of Civil Procedure to provide that compensation received from a public entity which acquires for public use a dwelling actually owned and occupied by the debtor; and the proceeds received from a public entity for relocation assistance upon displacement from a dwelling pursuant to Chapter 16 (commencing with §7260) of the Government Code, or Article 4.5 (commencing with §170) of the Streets and Highways Code shall be exempt from execution and attachment for a period of six months from the date of receipt. Such compensation and proceeds shall be exempt in the amount, over and above all liens and encumbrances, provided by Section 1260 of the Civil Code ($20,000 Homestead exemption).

Chapter 861 also adds §690.8 to the Code of Civil Procedure to provide that proceeds received from a public entity as relocation payments pursuant to Chapter 16 (commencing with §7260) of the Government Code for displacement from a dwelling shall be exempt from execution and attachment for a period of six months from the date of receipt.

Prior to the addition of §690.8, there were no provisions for an exemption from execution and attachment of proceeds received from property acquisition by eminent domain, although prior to the acquisition the debtor may have been entitled to a homestead exemption pursuant to Civil Code §1237 *et seq.* Thus a person displaced by eminent domain was deprived of an exemption during the time that he had not reinvested the proceeds derived from the acquisition of his property in another residence. The addition of §690.8 provides a six month period in which such proceeds are exempt, to allow a reasonable time for relocation.

Chapter 861 also repeals §7268 of the Government Code as a redundant section, since the same provisions are contained in §7267.8 which is part of the Uniform Relocation Assistance and Property Acquisition Act [CAL. STATS. 1969, c. 1489]. This section authorizes the adoption of rules and regulations by state and local agencies to implement the Act.

COMMENT

When two laws are enacted on the same subject, if reasonably possible, they will be construed to keep both in effect. However, to the extent that the laws are in conflict, the later chapter will prevail as a more recent expression of legislative intent [*See* CAL. GOV'T CODE §9605; 45 CAL. JUR. 2d, *Statutes* §§79-81 (1958)].

How the courts will construe these two chapters is a matter of conjecture. Chapter 861 will prevail over Chapter 822 to the extent that these two chapters are inconsistent. In this regard, it should be noted that Chapter 861 departs from the provisions of Chapter 822 in that Chapter 861 does not exempt relocation assistance when persons are displaced by highway construction pursuant to Article 4.5 (commencing with §170) of the Streets and Highways Code, does not exempt compensation received from a public entity which acquires for a public use a dwelling owned and occupied by the debtor, nor does Chapter 861 limit the exemption to the $20,000 amount specified in Civil Code §1260.

See Generally:

1) Comment, *Relocation Assistance in California: Legislative Response to the Federal Program*, 3 PAC. L.J. 114 (1972).

Civil Procedure; justice courts—jurisdiction

Code of Civil Procedure §112 (amended).
SB 1045 (Grunsky); STATS 1972, Ch 219

Section 112 of the Code of Civil Procedure pertains to civil cases and proceedings within the original jurisdiction of justice courts. Section 112(b) has been amended to provide that justice courts shall have original jurisdiction in all proceedings in forcible entry, or forcible or unlawful detainer where the rental value is *three hundred dollars or less* per month, and where the whole amount of damages claimed is one thousand dollars or less. Prior to amendment the rental value limit was $125 or less.

See Generally:
1) 1 WITKIN, CALIFORNIA PROCEDURE, *Courts* §184 (2d ed. 1971); *Jurisdiction* §28 (2d ed. 1971).

Civil Procedure; justice courts—city sessions

Government Code §71341 (amended).
AB 362 (Ketchum); STATS 1972, Ch 260

By authority of the 1950 amendment to article VI, §11 of the California Constitution, each county in the state is divided in order to provide for judicial districts and for municipal and/or justice courts therein. Justice courts are presently required in all judicial districts of 40,000 residents or less, whereas judicial districts having a population of more than 40,000 persons are required to have municipal courts. Government Code §71341 has been amended to delete the requirement that each county board of supervisors provide for justice court sessions in *every city* not included within a judicial district in which there is a municipal court.

COMMENT

The 1950 amendment to article VI, §11, was intended to reduce the number of inferior courts in the state [Savage v. Sox, 118 Cal. App. 2d 479, 488, 258 P.2d 80, 85 (1953)]. As amended, Government Code §71341 will consolidate judicial process in less populous judicial districts; *in effect requiring only one justice court location per judicial district with less than 40,000 residents.* Chapter 260 is representative of a continuing effort to decrease the number of justice courts. Between 1953 and 1971 the number of justice courts in California decreased from 349 to 231 [*See* B. COOK, THE JUDICIAL PROCESS IN CALIFORNIA 67 (1967); Hennessy, *Qualification of California Justice Court Judges: A Dual System,* 3 PAC. L.J. 439, 444, n.36 (1972)]. "Many counties have studied the possibility of further consolidation which would either eliminate the justice court or convert it into a branch of the municipal court" [B. COOK, *supra,* at 67]. A potential drawback resulting from fewer court locations could be an increased burden on the public due to remoteness of court locations and possible overcrowding. The counties which could possibly be most seriously affected are Fresno, Imperial, Kern, Mendocino, Merced, Riverside, San Bernardino, Shasta, and Siskiyou; each relying heavily on justice courts.

See Generally:
1) B. COOK, THE JUDICIAL PROCESS IN CALIFORNIA (1967).

2) Hennessy, *Qualification of California Justice Court Judges: A Dual System*, 3 PAC. L.J. 439 (1972).

Civil Procedure; small claims court

Code of Civil Procedure §§117a, 117b, 117c, 117d, 117h, 117p (amended).
SB 119 (Harmer); STATS 1972, Ch 527

While Code of Civil Procedure §117j allows the defendant in a small claims action to appeal an adverse judgment, the plaintiff has no such right; the judgment being conclusive upon him (save in the case of a cross-complaint by the defendant against the plaintiff). [*See* Skaff v. Small Claims Court, 68 Cal. 2d 76, 78, 435 P.2d 825, 826, 65 Cal. Rptr. 65, 66 (1968)]. Section 117b sets forth the forms to be used to commence actions in small claims court. This section has been amended to add to such forms a statement by the claimant affirming "that this claimant understands that the judgment on his claim will be conclusive without right of appeal by him."

Section 117a, which provides that a small claims action shall be commenced upon the execution of an affidavit by the plaintiff, is amended to substitute "claim under oath" for the term "affidavit". Sections 117b, 117c, 117d, 117h, and 117p are similarly amended—substituting "claim" for "affidavit"; "claims" for "affidavits"; and "claimant" for "affiant"—where appropriate.

COMMENT

An unsworn statement *under penalty of perjury*, pursuant to Code of Civil Procedure §2015.5 has been acceptable in place of an affidavit to commence a small claims action [34 OPS. ATT'Y GEN. 60, 63 (1959)]. The language of §2015.5 broadly indicates that *any matter* required by law to be supported by oath may be certified pursuant to that section. Therefore such a statement should continue to be acceptable in lieu of a "claim under oath."

Civil Procedure; venue

Code of Civil Procedure §§117, 395 (amended).
SB 267 (Gregorio); STATS 1972, Ch 1119

Makes venue provisions respecting municipal and justice courts applicable to small claims court actions; modifies venue in municipal and justice courts with respect to contract actions; provides

that agreements to waive venue provisions in §395 are void and unenforceable.

Chapter 1119 amends Sections 117 (jurisdiction and venue in small claims actions) and 395 (proper court in which to bring actions) of the Code of Civil Procedure. Subdivisions (1), (2), and (3) of Section 117, which formerly specified the proper venue in a small claims action, have been deleted. Section 117 now states that venue in such actions shall be the same as for civil actions filed in justice or municipal court [*See* CAL. CODE CIV. PROC. §395].

Chapter 1119 amends Section 395(b) to provide that (subject to the power of the court to transfer actions or proceedings as provided in Sections 397, 397.5, 398, and 399 of the Code of Civil Procedure) in an action founded upon an obligation of the defendant for goods, services, loans or extensions of credit intended primarily for personal, family, or household use, other than an obligation within the purview of either the Unruh Act (*See* CAL. CIV. CODE §1812.10—venue and jurisdiction in retail installment contracts for goods or services) or the Rees-Levering Motor Vehicle Sales and Finance Act (*See* CAL. CIV. CODE §2984.4—venue in conditional sales contracts for motor vehicles), the proper *county* for trial is: (1) the county in which the defendant in fact signed the contract; or (2) the county in which the defendant resided at the time the contract was *entered into*; or (3) the county in which the defendant resided at the time of the commencement of the action. Prior to amendment, Section 395(b) included the county in which the defendant resided at the time the contract was *signed,* rather than entered into.

Section 395(c) is amended in conformity with Section 395(b) by substituting the judicial district in which the defendant resided at the time the contract was *entered into,* instead of *signed,* as a proper court for trial.

Chapter 1119 adds Section 395(d) to state that any provision of an obligation described in subdivision (b) or (c), waiving the provisions of those subdivisions, is void and unenforceable.

COMMENT

Section 395 of the Code of Civil Procedure was amended in 1971 [CAL. STATS. 1971, c. 1640, §1, at 350] to modify general venue provisions with respect to consumer contract actions. Prior to amendment by Chapter 1640, Section 395 specified that the proper county for trial was the county in which the obligation was to be performed,

the county in which the contract in fact was entered into, or the county in which the defendant resided at the commencement of action. It was possible for a company, such as a mail order company, to bring an action against a consumer in the county or judicial district in which the company was located, rather than the county or judicial district in which the consumer resided. Such consumers were therefore forced to litigate outside their county of residency, even though they had few or no contacts with the county or judicial district in which the action was initiated. Chapter 1640 was enacted as a consumer protection measure to prevent abuses of the prior venue provisions, by specifying that the proper county for trial was the county in which the defendant in fact signed the contract, the county in which the defendant resided at the time the contract was signed, or the county in which the defendant resided at the commencement of the action [Interview with William Kircher, Administrative Aide to Senator Gregorio, Sacramento, California, October 18, 1972 (hereinafter cited as *Kircher*)].

Subsequent to enactment, questions arose as to whether the provisions of Chapter 1640 were applicable to small claims courts due to the separate venue provisions of Section 117. Chapter 1119 has therefore been enacted to bring small claims courts into conformity with the general venue provisions of Section 395. Chapter 1119 also amends Section 395 to extend the venue provisions of Chapter 1640 to oral as well as written contracts by providing that a proper county for trial is the county in which the defendant resides at the time the contract was *entered into* rather than signed. Prior to amendment, for actions concerning oral contracts, venue was proper only in the county in which the defendant resided at the commencement of the action [*Kircher*].

See Generally:

1) 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 240 (1972).

Civil Procedure; jury duty

Code of Civil Procedure §§200, 202, 205 (amended); §239 (new); Penal Code §1046.5 (new).
SB 924 (Lagomarsino); STATS 1972, Ch 1028
SB 918 (Lagomarsino); STATS 1972, Ch 1337

Chapter 1028 has amended §202 of the Code of Civil Procedure to provide that in cases where a person is not exempted from jury duty pursuant to any one or more of the exemptions listed in §200, such person shall only be excused from jury duty in the case of extreme, serious hardship and then only if recommended by an official designated

by the presiding judge and if approved by the presiding judge or any other judge designated by him.

Section 205 of the Code of Civil Procedure has also been amended by Chapter 1028 to specify that the selection and listings of jurors in each county shall be made *at random.* Previously, there had been no affirmative language in the section requiring the selection of jurors to be made by a random selection process.

Chapter 1028 has added §239 to the Code of Civil Procedure to establish that any juror summoned shall be entitled to volunteer to be available on one-hour notice by telephone. In such cases the juror so volunteering would not be obligated to appear in court until notified.

Additionally, Chapter 1028 has added §1046.5 to the Penal Code to provide that jurors for criminal actions shall be entitled to at least the same rights and privileges as are provided for jurors in civil cases, including, but not limited to, such rights or privileges granted by §239 of the Code of Civil Procedure.

It is interesting to note that Chapter 1028 would have amended §200 of the Code of Civil Procedure to add to the list of specific exemptions from jury duty a person who, within the last three years preceding his selection, has served as a juror either for the completion of one trial or has made four appearances for purposes of serving as a juror, and who has requested an exemption pursuant to §202. The exemption was not to apply in counties having less than 5,000 population [CAL. CODE CIV. PROC. §200, *as amended*, CAL. STATS. 1972, c. 1028, §1.7]. However, the Legislature specifically deleted this amendment to §200 by enacting Chapter 1337 [S.B. 918, CAL. STATS. 1972, c. 1337, §1].

See Generally:

1) 4 WITKIN, CALIFORNIA PROCEDURE, *Trial* §§92-100 (2d ed. 1971), (Supp. 1972).

Civil Procedure; jury duty exemptions

Code of Civil Procedure §200 (amended).
AB 519 (Hayden); STATS 1972, Ch 390
SB 1285 (Beilenson); STATS 1972, Ch 617

Section 200 of the Code of Civil Procedure has been amended by Chapter 390 to include within the list of specific exemptions from jury duty: (1) a city mayor; (2) a member of a city council; or (3) a person holding a position equivalent to a president or member of a legislative body of a city.

Chapter 617 amends Section 200 to exempt practicing registered pharmacists. Previously, an exemption was granted to a druggist actually engaged in the business of dispensing medicines. The term pharmacist is the more precise term used in the licensing statutes [CAL. BUS. & PROF. CODE §4080 *et seq.*].

COMMENT

Prior to amendment, §200(2) provided an exemption from jury duty for a person holding a county, city and county, city, town, or township *office of profit.* Although *office of profit* has not been judicially or statutorily defined in California, resort to the decisions of other jurisdictions [Romney v. Barlow, 24 Utah 2d 226, 469 P.2d 497, 499 (1970); Moser v. Board of County Comm'rs of Howard County, 235 Md. 279, 201 A.2d 365, 367 (1964)] indicates that the term implies a right, authority and duty which: (1) is invested by appointment or election; (2) involves the exercise of some function of the sovereign power; and (3) is for *some compensation in excess of mere expenses.* Therefore §200(2) apparently would not, for example have exempted from jury duty a city councilman serving without compensation. As amended, §200 will provide such persons with an exemption.

See Generally:

1) 4 WITKIN, CALIFORNIA PROCEDURE, *Trial* §93 (2d ed. 1971).
2) CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL PROCEDURE DURING TRIAL §5.27 (1960).

Civil Procedure; civil process

Code of Civil Procedure §§410.30, 415.50, 1013a (amended).
SB 573 (Grunsky); STATS 1972, Ch 601
Support: State Bar of California

Section 410.30 of the Code of Civil Procedure provides that when a court, upon motion of a party or its own motion, finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just [*See* CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1969 CODE LEGISLATION 67]. Chapter 601 amends §410.30 to state that the provisions of §418.10 of the Code of Civil Procedure do not apply to a motion to stay or dismiss the action by a defendant *who has made a general appearance.* Section 418.10 [CAL. STATS. 1969, c. 1610, §3, at 3363; *see* CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1969 CODE

LEGISLATION 77-78] establishes the procedure for a motion to quash service of summons on the ground of lack of jurisdiction of the court or to stay or dismiss an action on the ground of inconvenient forum. The practical effect of Chapter 601 appears to be that the motion to stay or dismiss, if made by a defendant who has made a general appearance, may be made at *any time* rather than "before the last day of his time to plead or within such further time as the court may for good cause allow" [CAL. CODE CIV. PROC. §418.10(a)]. It should be particularly noted that §418.10 also affords defendant the right to petition an appropriate reviewing court for a writ of mandate upon denial of the motion to stay or dismiss on the ground of inconvenient forum [CAL. CODE CIV. PROC. §418.10(c)], and provides for protection against default [CAL. CODE CIV. PROC. §418.10(d)]. Since Chapter 601 amends §410.30 to render inapplicable §418.10 in cases where the motion to stay or dismiss on the ground of inconvenient forum is made by a defendant who has made a general appearance, it would appear that such a defendant would not have any specific statutory authority available to him for seeking an immediate remedy by a writ of mandate nor would he be specially protected against the entering of a default judgment should the motion to stay or dismiss be denied by the trial court [*See* 1 WITKIN, CALIFORNIA PROCEDURE, *Jurisdiction* §134 (2d ed. 1970)].

Chapter 601 also amends §415.50 of the Code of Civil Procedure (establishing procedure for service by publication) to correct an inconsistency between that section and §6064 of the Government Code. As enacted in 1969 [CAL. STATS. 1969, c. 1610, §3, at 3363; *see* CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1969 CODE LEGISLATION 73-74] §415.50 requires that publication of summons be made in accordance with Government Code §6064 [CAL. CODE CIV. PROC. §415.50(b)], but further states that "service of a summons [by publication] is deemed complete on the last day of publication" [CAL. CODE CIV. PROC. §415.50(c)]. On the other hand, §6064 of the Government Code establishes that the period of notice by publication thereunder terminates at the end of the 28th day after the initial publication. The specific provisions of §415.50(c) should control over the general provisions of Government Code §6064 [45 CAL. JUR. 2d, *Statutes* §§74-81 (1958)]. Thus, when the summons was published once weekly for the required four weeks, with publication on the same day each week, service was complete on the day of the fourth publication, i.e. the 21st day. To correct this conflict between §415.50 of the Code of Civil Procedure and §6064 of the Government Code, Chapter 601

has amended §415.50 (c) to specify that service of summons by publication shall be deemed complete as provided in §6064 of the Government Code. It should be noted that Chapter 601 specifically provides that the above described revision of §415.50 shall apply only to actions or proceedings in which the order for the publication of summons is made on or after the effective date of the chapter [CAL. STATS. 1972, c. 601, §4].

Additionally, Chapter 601 amends §1013a of the Code of Civil Procedure relating to proof of service by mail to require that pleadings, notices, and other documents served by mail bear a notation of the date and place of its mailing or be accompanied by an unsigned copy of the affidavit [CAL. CODE CIV. PROC. §1013a(1)] or certificate of mailing [CAL. CODE CIV. PROC. §1013a(2), (3)]. Prior to its amendment by Chapter 601, §1013a included no provision specifically requiring that the party served by mail be informed of the effective date of mailing. Thus, often the only way for the party served by mail to determine the effective date of mailing was to examine the envelope for postmark. Since envelopes are habitually discarded, the party served by mail was not infrequently confused as to the effective date of mailing, the determination of which is necessary to render a timely response. The amendment to §1013a by Chapter 601 appears to resolve this problem by requiring the party availing himself of service by mail to either make a notation on the document served of the date and place of its mailing, or to accompany the document with an unsigned copy of the affidavit or certificate of mailing. The apparent reason why such affidavit or certificate is not required to be signed is that it could not, in all honesty, be signed prior to its sealing in the envelope and posting in the mails.

See Generally:

1) 1 WITKIN, CALIFORNIA PROCEDURE, *Jurisdiction* §§132-34, 260 (2d ed. 1970).
2) Ryan and Berger, *Forum Non Conveniens in California*, 1 PAC. L.J. 532 (1970).
3) CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1969 CODE LEGISLATION 67-79.
4) STATE BAR OF CALIFORNIA, 1971 CONFERENCE RESOLUTION 12-13.

Civil Procedure; service of process—court records

Code of Civil Procedure §1013a (amended); §1052.5 (new).
AB 1922 (Hayes); STATS 1972, Ch 1083

Chapter 1083 amends Section 1013a of the Code of Civil Procedure to eliminate the requirement that an affidavit of service by mail be executed by a person who is a citizen of the United States.

Section 1052.5 has been added to the Code of Civil Procedure to provide that in lieu of maintaining a register of actions as described in Section 1052, the clerk of the municipal court may maintain a register of actions by means of photographing, microphotographing, or mechanically or electronically storing the whole content of all papers and records or any portion thereof, as will constitute a memorandum, necessary to the keeping of a register of actions so long as the completeness and chronological sequence of the register are not disturbed.

All such reproduction shall be placed in convenient, accessible files, and provision shall be made for preserving, examining, and using them.

Any photograph, microphotograph, or photocopy which is made pursuant to this section shall be made in such manner and on such paper as will comply with the minimum standards of quality approved therefor by the National Bureau of Standards.

Civil Procedure; service of summons in unlawful detainer action

Code of Civil Procedure §§417.10, 417.20 (amended); §415.45 (new).
AB 202 (Dunlap); STATS 1972, Ch 719

Section 415.45 of the Code of Civil Procedure has been added to provide for posting of summons in specified circumstances in unlawful detainer actions involving commercial property, as an alternative to the usual procedures authorized for service of summons.

Specifically, §415.45 provides that a summons in an action for unlawful detainer of real property *primarily used for commercial purposes* may be served by *posting* if, upon affidavit, it appears to the satisfaction of the court in which the action is pending that the party to be served cannot with reasonable diligence be served by employing any of the usual methods of service authorized by article 3 (commencing with §415.10) of the Code of Civil Procedure, other than by publication.

Once it is determined by the court that service of summons by posting would be proper, §415.45 provides that the court shall order the summons to be posted on the premises in a manner most likely to give actual notice to the party to be served. Additionally, the court will direct that a copy of the summons and complaint be forthwith mailed to such party should his address be ascertained before expiration of the time prescribed for posting of summons.

Section 415.45 further specifies that service of summons in this manner is deemed complete on the 10th day after posting.

Notwithstanding an order for posting of the summons, pursuant to §415.45, a summons may be served in any other authorized manner except publication, in which event such service shall supersede any posted summons.

Chapter 719 also amends §§417.10 and 417.20 of the Code of Civil Procedure, to conform those sections (relating to proof that service of summons was made inside or outside of this state) to the provisions of §415.45.

COMMENT

Apparently, Chapter 719 was enacted to extend relief to lessors and landlords heretofore placed in a difficult position when a tenant unexplainedly leaves the premises. The need for such relief arises almost exclusively in cases where a commercial tenant unexplainedly leaves the premises and fails to remove all of his property. In the majority of such cases, there would seem to be no abandonment technically, so the lessor or landlord cannot, with impunity, assume possession of the property. The presence of the tenant's remaining property further clouds the rights of the parties.

Prior to the enactment of Chapter 719, the only available authorized means of effecting service of summons in such cases was publication [as authorized by CAL. CODE CIV. PROC. §415.50, *enacted,* CAL. STATS. 1969, c. 1610, §3, at 3363]. Publication pursuant to §415.50 was required to conform with §6064 of the Government Code (once a week for four weeks) unless the court, in its discretion, orders publication for a longer period [CAL. CODE CIV. PROC. §415.50(c),(d)]. Thus a timely resolution of the matter was precluded. Section 415.45, as added by Chapter 719, is designed to afford the plaintiff in an unlawful detainer action an opportunity, through service by posting, to quickly litigate the dispute.

See Generally:

1) 2 WITKIN, CALIFORNIA PROCEDURE, *Actions* §647 (2d ed. 1971).
2) CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1969 CODE LEGISLATION 67.

Civil Procedure; amended pleadings—time to respond

Code of Civil Procedure §471.5 (repealed); §471.5 (new); §472 (amended).

AB 106 (Moorhead); STATS 1972, Ch 73
(Effective July 1, 1972)

Chapter 73 replaces prior §471.5 with a new version and amends §472 in order to conform time periods provided by the Code of Civil Procedure for responsive pleading. Section 471.5 now provides that if the *complaint* is amended, a copy of the amendments shall be filed, or the court may, in its discretion, require the complaint as amended to be filed, and a copy of the amendments or amended complaint must be served upon the defendants affected thereby. The defendant shall answer the amendments, or the complaint as amended, within *30 days* after service thereof, or such other time as the court may direct, and judgment by default may be entered upon failure to answer, as in other cases. For the purposes of this section, "complaint" includes a cross-complaint, and "defendant" includes a person against whom a cross-complaint is filed. Section 471.5 further provides that if the *answer* is amended, the adverse party has *10 days* after service thereof, or such other time as the court may direct, in which to demur to the amended answer.

Additionally, Chapter 73 amends §472 by deleting the language of §472 which conflicted with the 30 day period for answering an amended complaint as provided by §471.5.

COMMENT

In 1969, the period of time in which to respond to all services of *notice of complaint* was extended from 10 to 30 days [CAL. CODE CIV. PROC. §412.20, CAL. STATS. 1969, c. 1610, §3, at 3363]. Following the enactment of §412.20, it was noted by the Code Commissioner that "it has been the universal practice in this state to require an answer to an *amended* complaint within the same period of time in which an original complaint must be answered" [CAL. CODE CIV. PROC. §432, Code Comm'rs' Notes (West 1954)]. Therefore, §432 (amended complaint; filing; answer) was repealed and §471.5 (amended complaint; filing; answer) was added [CAL. STATS. 1971, c. 244, at 372], extending the time to file an answer to an amended complaint from 10 days to 30 days following service of notice of such amended complaint [3 PAC.. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 258 (1972)]. Section 471.5 was to become effective on July 1, 1972. However, §472 (amendment once of course; time to answer or demur) of the Code of Civil Procedure, which provided that an adverse party shall have 10 days to answer or demur to *any* plead-

ing amended of course, was not revised to conform to the time period specified in §471.5 and would have been in direct conflict with §471.5 when it became effective [CAL. STATS. 1972, c. 73, §5].

Therefore, Chapter 73 has been added to the Code of Civil Procedure as an urgency measure to avoid judicial confusion resulting from the inconsistency between §471.5 and §472 as noted, *supra.* This chapter is an apparent response to a California Law Revision Commission Report designed to conform periods of responsive pleading [10 CAL. LAW REVISION COMM'N REPORTS, RECOMMENDATIONS AND STUDIES, 501 (1971)]. It should be noted that the enacted version of §471.5 provides only for 10 days in which to demur to an amended *answer.* This is the same period of time allowed pursuant to §472 prior to the enactment of Chapter 73.

See Generally:

1) 10 CAL. LAW REVISION COMM'N REPORTS, RECOMMENDATIONS AND STUDIES, 501 (1971).
2) 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 258 (1972).

Civil Procedure; stay of enforcement of judgment on appeal

Code of Civil Procedure §§917.1, 917.2, 917.5, 917.9 (amended).
SB 908 (Lagomarsino); STATS 1972, Ch 546
Support: State Bar of California

Amends provisions of the Code of Civil Procedure relating to staying of enforcement of judgments or orders by the perfection of an appeal; requires an undertaking to be given in specified instances; limits the liability of sureties in designated instances.

Chapter 546 amends four sections of the Code of Civil Procedure (917.1, 917.2, 917.5 and 917.9) pertaining to staying the enforcement of a judgment or order of the court pending appeal.

Section 917.1 applies to a judgment for money or an order directing the payment of money and provides that the perfecting of an appeal shall not stay the enforcement of the judgment or order of the trial court unless an undertaking is given on condition that if the judgment or order, or any part of it is affirmed or the appeal is withdrawn or dismissed the party ordered to pay shall pay the amount of the judgment or order, or the part of it as to which the judgment or order is affirmed. As amended by Chapter 546, §917.1 provides that the party shall pay the amount of the judgment or order, or the part of it as to which the judgment or order is affirmed, *as entered after the receipt of the remittitur, together with any interest which may have accrued pending the appeal and entry of the remittitur, and costs which may*

awarded against the appellant on appeal. Apparently, the addition of this language to the section states the obligation in a more precise fashion [Interview with Harold Bradford, Legislative Representative, State Bar of California, Sacramento, California, Nov. 24, 1972 (hereinafter cited as *Bradford*)].

Prior to its amendment by Chapter 546, §917.1 stated that the appellants liability shall not exceed the amount of the undertaking given. Section 917.1 has been amended to clarify that it is only the *surety's* liability which is limited by the amount of the undertaking.

Section 917.2 relates to the undertaking to be given to stay the enforcement of a judgment or order directing the assignment or delivery of personal property, or the sale of personal property upon the foreclosure of a mortgage or other lien. Prior to its amendment, §917.2 specified that if the property was placed in the custody of an officer designated by the trial court to abide the order of the reviewing court, that the prefecting of an appeal would stay the enforcement of the judgment or order of the trial court without the necessity of posting bond. Chapter 546 amends §917.2 to eliminate this alternative to the posting of an undertaking in order to stay enforcement after perfecting an appeal. Section 917.2, as amended, however, does permit the court to consider the fact that the property has been placed in such custody when fixing the amount of the bond to be required. Section 917.2 is further amended by Chapter 546 to provide that the undertaking be given on condition that the appellant or party ordered to assign or deliver the property will obey *and satisfy* the order of the reviewing court and will not commit or suffer to be committed any damage to the property, and that if the judgment or order appealed from is affirmed, or the appeal is withdrawn or dismissed, the appellant shall pay the damage suffered to such property and the value of the use of such property for the period of the delay caused by the appeal. Prior to amendment, §917.2 provided only that the undertaking be conditioned upon the appellant's agreement to *obey* the reviewing court's judgment and there was no provision relating to the appellant's duty not to commit or suffer to be committed any damage to the property. By requiring that the appellant agree to *satisfy* as well as obey the judgment of the reviewing court, that portion of §917.2 is clarified in that it now specifically indicates that if the reviewing court enters a money judgment, appellant shall satisfy such money judgment. Section 917.2 now clearly indicates that the appellant will be liable for any damages to the property pending appeal and that should the reviewing court af-

firm the judgment or order of the trial court, the appellant shall be liable for the deprivation of use of the property pending appeal. Additionally, §917.2 is amended to provide that if the judgment or order appealed from directs the sale of perishable property, the trial court may order such property to be sold and the proceeds thereof to be deposited with the clerk of the trial court to abide the order of the reviewing court and *such deposit shall be considered by the court in fixing the amount of the undertaking.* Previous to its amendment, there was no language indicating that such facts were to be considered in assessing the amount of the bond, thereby rendering §917.2 susceptible to a construction which would allow the sale and delivery of the proceeds to the clerk of the trial court to obviate the necessity of posting any bond whatsoever in order to stay enforcement pending appeal.

Section 917.5 concerns the staying of the enforcement of the judgment or order in the trial court appointing a receiver. Prior to amendment §917.5 stated that an undertaking was required to be given on condition that if the judgment or order was affirmed or the appeal was withdrawn or dismissed, the appellant will pay all damages which the respondent may sustain by reason of such stay. Chapter 546 makes a minor and clarifying amendment to specify that appellant will pay all damages which the respondent may sustain by reason of such stay *in the enforcement of the judgment.*

Section 917.9 pertains to cases not covered by §§917.1 through 917.8 and specifies that the perfecting of an appeal in such cases shall not stay the enforcement of a judgment or order of the trial court if the court, in its discretion, requires an undertaking and such undertaking is not given. Chapter 546 amends §917.9 to provide that any undertaking required by the court in such cases be conditioned upon the performance of the judgment or order appealed from if the same is affirmed or the appeal is withdrawn or dismissed. Additionally, §917.9 has been amended to provide that the appellant is liable for all damages which the respondent may sustain *by reason of such stay in the enforcement of the judgment.* As amended, §917.9 defines such "damages" as *reasonable compensation for the loss of the use of the money or property.* Previously, §917.9 specified that appellant was liable to respondent for all damages (undefined) he may sustain *by the taking of such appeal.* Finally, Chapter 546 amends §917.9 to clarify that it is only the surety's liability which is to be limited by the amount of the undertaking. This revision will make it clear that the liability of the surety's principle (the appellant) is not limited by the amount of the undertaking.

COMMENT

In 1968, Title 13 (commencing with §901) of Part 2 of the Code of Civil Procedure, relating to appeals and stays on appeal, was substantially revised by legislation proposed by the State Bar of California [See CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1968 CODE LEGISLATION 70; *Bradford*]. The revision consisted principally of simplification of the statutes and the elimination of overlapping sections; some substantive changes were made [See 43 CAL. S.B.J. 742 (1968); 42 CAL. S.B.J. 709 (1967); 41 CAL. S.B.J. 739 (1966); *Bradford*].

Problems of interpretation and application appear to have arisen by reason of certain language changes in the 1968 revision of Chapter 2 (commencing with §916), which relates to stays on appeal. Section 917.9, based on former §949 (applicable to superior court), stated that the perfecting of an appeal shall not stay enforcement of the judgment or order of the court in cases not provided for in §§917.1 through 917.8, if the trial court, in its discretion, requires an undertaking and such undertaking is not given. The language of §917.9 substantially conformed to the pertinent wording of former §949, but did not include the phrase in former §949 that the undertaking is to "be conditioned upon the performance of the judgment or order appealed from." In addition, §917.9 specified that the undertaking must provide for payment of "all damages which the respondent may sustain by the taking of such appeal."

Because of these and other changes in Chapter 2, it was concluded in *Estate of Murphy* [16 Cal. App. 3d 564, 94 Cal. Rptr. 141 (1971)] that the 1968 amendments reflected a legislative intent to broaden the trial court's authority to require an undertaking as a condition for a stay on appeal; an interpretation not intended nor contemplated by the State Bar of California in sponsoring the 1968 legislation [*Bradford*]. In *Estate of Murphy* the trial court, in a proceeding involving distribution of the corpus of a $2 million trust, had ordered appellants to file an undertaking of $175,000 as a condition of a stay pending appeal. Though it does not appear from the Appellate Court's decision, it is understood that the amount of the required undertaking was fixed in large part upon the estimated trustee's fees and attorney's fees to be incurred in connection with the appeal [*Bradford*]. In a supersedeas proceeding the appellate court held that the trial court had properly interpreted its authority under §917.9, and that the amount of the undertaking was not unreasonable considering the value

of the trust property. However, after balancing all considerations, the appellate court determined that the writ of supersedeas should issue.

Therefore, the amendments to §917.9 are in response to the interpretation given that section by the court in *Estate of Murphy,* and are designed to re-insert the language of former §949 which was deleted in the 1968 adoption of §917.9. The practical effect of adding the requirement that the undertaking be "conditioned upon the performance of the judgment or order appealed from . . ." is to narrow the scope of §917.9 and to restore its intended recodification of former §949 [*Bradford*]. It is hoped that the courts will now interpret §917.9 in a similar manner as former §949 [*Bradford*]. For example, decisions under former §949 declared the section inapplicable to various types of appeals in probate proceedings [*i.e.,* Estate of Dabney, 37 Cal. 2d 402, 232 P.2d 481 (1951)]. Similarly, property held by the sheriff in *custodia legis,* pending a third party claim proceeding, was held not subject to former §949 [Jensen v. Hugh B. Evans & Co., 13 Cal. 2d 401, 90 P.2d 72 (1939)].

Section 917.9, as amended by Chapter 546, provides that the appellant will pay all damages which the respondent may sustain *by reason of such stay in the enforcement of the judgment.* This change is intended to make it clear that the "damages" that may be awarded are damages for the loss of the use of the property pending appeal. In the case of money, the damages would be in the form of interest; in the case of property, the value of the use could be awarded. The word "damages" thus is to be narrowly construed and is not, for example, intended to include attorneys' fees on appeal or damages from inability to dispose of the property pending appeal [*Bradford*].

See Generally:

1) 6 WITKIN, CALIFORNIA PROCEDURE, *Appeal* §§147-208 (2d ed. 1971).
2) CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1968 CODE LEGISLATION 70.
3) CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL APPELLATE PRACTICE §§8.1-8.73 (1966).
4) Rosendahl, *The Hidden Persuader,* 44 CAL. S.B.J. 848 (1969).

Civil Procedure; dismissal of actions

Code of Civil Procedure §583 (amended).
AB 1154 (McAllister); STATS 1972, Ch 1014
Support: State Bar of California

Section 583 of the Code of Civil Procedure deals with mandatory and discretionary dismissal of actions [*See* 3 PAC. L.J., REVIEW OF

SELECTED 1971 CALIFORNIA LEGISLATION 259 (1972); 2 PAC. L.J., REVIEW OF SELECTED 1970 LEGISLATION 313 (1971)]. Section 583 provides for *discretionary* dismissal of an action by the court where the action is not brought to trial within *two years* after filing; *mandatory* dismissal of an action where the action is not brought to trial within *five years* after filing (except where the parties have filed a stipulation in writing that the time may be extended); *mandatory* dismissal of an action where it is not brought to trial within *three years* after an order granting a new trial (except where the parties have filed a stipulation in writing that the time may be extended); and *mandatory* dismissal of an action where it is not brought to trial within *three years* from the filing of remittitur after reversal on appeal.

Chapter 1014 amends §583 to specify that the three year limitation placed upon bringing an action to trial in cases of an order granting a new trial and filing of remittitur after reversal on appeal, *shall not be construed to require the dismissal of an action prior to the expiration of the overall five year* period from the date of the original filing of the action.

Additionally, Chapter 1014 amends §583 to provide that when in any action a trial has commenced but no judgment has been entered therein because of a mistrial or because a jury is unable to reach a decision, *mandatory* dismissal is required unless the action is brought to trial within *three years* after entry of an order by the court declaring the mistrial or disagreement by the jury (except where the parties have filed a stipulation in writing that the time may be extended).

COMMENT

It would appear that Chapter 1014 was enacted to preclude the possibility that a plaintiff could be penalized for his diligence. For example, suppose plaintiff brings his case to trial within 1 1/2 years after filing. Prior to the enactment of Chapter 1014, if the case was decided adversely to the plaintiff, and plaintiff's motion for a new trial was granted, plaintiff would be subject to mandatory dismissal of his action should he fail to bring the case to trial within three years after the granting of the motion for new trial.. Thus plaintiff would have 1/2 year less time to bring the action to trial than if he had not been diligent in bringing the action to trial the first time. Section 583, as amended by Chapter 1014, eliminates this inequity by providing that the three year limitation in such cases does not supersede the overall five year limitation.

See Generally:
1) 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 259 (1972).
2) 2 PAC. L.J., REVIEW OF SELECTED 1970 CALIFORNIA LEGISLATION 317 (1971).

Civil Procedure; libel and slander—continuous publication

Code of Civil Procedure §460.5 (new); §461 (amended).
SB 224 (Deukmejian); STATS 1972, Ch 594
Opposition: California Judicial Council

Section 460.5 has been added to the Code of Civil Procedure to provide that a court may order that the time to respond to a complaint in a libel or slander action is 20 days after the service of summons on the defendant. To secure this order, the plaintiff must file an *ex parte* application to show good cause. The application must be supported by an affidavit stating facts showing, among other things, that the alleged defamatory matter has been continuously published and that there is a reasonable likelihood that the publication will continue. The order shall direct the clerk to endorse the summons to show that the time to respond has been shortened pursuant to this section, and a copy of the application, affidavit, and order shall be served with the summons. Formerly, the defendant had the normal 30 days to file a responsive pleading [CAL. CODE CIV. PROC. §412.20].

This section also provides that in an action for libel or slander the defendant shall not have more than 10 days to answer an amended complaint, to answer a complaint after his demurrer has been overruled, or to amend an answer when the plaintiff's demurrer to the answer is sustained [CAL. CODE CIV. PROC. §586].

The court is also required by this section to give any such action precedence over all other civil actions, except actions to which special preference is given by law. Additionally, the court shall not grant a continuance in excess of 10 days (except for good cause shown) without consent of the adverse party.

"Continuously published" is defined by this section to mean three or more publications within 15 days.

Section 461, which allows the defendant, in his answer, to allege both the truth of the matter charged as defamatory and any mitigating circumstances, has been amended to make this section applicable to an action within §460.5.

Civil Procedure; verified general denial

Code of Civil Procedure §431.40 (amended).
AB 701 (Warren); STATS 1972, Ch 562

Section 431.40 of the Code of Civil Procedure has been amended to provide that in any action in which the demand, exclusive of interest, or the value of the property in controversy does not exceed seven hundred fifty dollars ($750), the defendant at his option, in lieu of demurrer or other answer, may file a general written denial verified by his own oath and a brief statement, similarly verified, of any new matter constituting a defense.

The maximum amount wherein defendant had the option of filing a verified general denial was previously $550.

See Generally:
1) 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 257 (1972).

Civil Procedure; age of majority—pre-existing orders and instruments

Chapter 1748 of the Statutes of 1971 §§73, 75, 76 (repealed).
AB 587 (Priolo); STATS 1972, Ch 38
(Effective March 28, 1972)
Support: California Banker's Association; State Bar of California; Superior Court of Los Angeles County

Repeals portions of Chapter 1748 [CAL. STATS. 1971, c. 1748, at 3736] *pertaining to: (1) accumulation; and (2) other ages of majority; provides that all instruments executed prior to the effective date of that Chapter shall be construed by the standard of majority operative when the instruments were executed; authorizes possible amendment of those instruments to conform to the revised age of majority where allowed by law.*

Chapter 1748 of the Statutes of 1971 provided that henceforth the age of majority in California would be 18 years of age. Section 73 of Chapter 1748 provided that in any order or direction of a court entered before the operative date of that Chapter (March 4, 1972) except: (1) orders or directions of a court affecting child support; and (2) where an intention to the contrary was indicated; a reference to either the *age of majority*, 19 years of age, 20 years of age, or 21 years of age, shall be deemed to be a reference to 18 years of age. Chapter 38 repeals §73 of Chapter 1748 and provides that the Legislature intends that any use of, or reference to the words "age of majority," "age of minority,"

"adult," "minor," or words of similar intent in any instrument, order, transfer, or governmental communication whatsoever made in this state: (a) *before* the effective date of Chapter 1748 shall make reference to persons older or younger than 21 years of age; and (b) *on or after* the effective date of Chapter 1748 shall make reference to persons older or younger than 18 years of age.

Chapter 38 also provides that neither Chapter 38 nor Chapter 1748 shall prevent the amendment of any court order, will, trust, contract, transfer, or instrument to refer to the new 18 year-old age of majority where such court order, will, trust, contract, transfer, or instrument is: (1) in existence on the effective date of Chapter 1748; and (2) subject to amendment by law and where amendment is allowable or not prohibited by the terms thereof; and (3) otherwise subject to the laws of this state.

Sections 75 (pertaining to periods of accumulation), and 76 (pertaining to ages of majority other than those established by Chapter 1748) of Chapter 1748 have been deleted.

COMMENT

After the enactment of Chapter 1748, §73 was a source of some confusion in that it became unclear whether "age of majority" should be construed as meaning 18 or 21 years of age in previously existing court orders. Chapter 38 indicates [CAL. STATS. 1972, c. 38, §3] that it is necessary to inform both the judiciary and the citizens of California that outstanding court orders as of the effective date of Chapter 1748 remain unamended and unaffected by that Act although amendment of such court orders is permissible where amendment is proper in the discretion of the courts under California law or by the terms of the court orders themselves. Furthermore, any instrument outstanding on the effective date of Chapter 1748 may be amended to reflect the new age of majority if otherwise permissible or not prohibited by law or by the terms of the instrument.

Civil Procedure; interest on interpleader funds

Code of Civil Procedure §386.1 (new).
SB 1158 (Roberti); STATS 1972, Ch 553
Support: State Bar of California

Section 386.1 has been added to the Code of Civil Procedure to provide that where a deposit has been made in an action of interpleader, pursuant to Section 386, the court may order such deposit to be invested in

an insured, interest bearing account. Interest on such amount shall be allocated to the parties in the same proportion as the original funds are allocated.

COMMENT

Prior to the enactment of Section 386.1, it was unclear whether interpleader funds deposited in court pursuant to Section 386 would draw interest. Section 386 provided that any interest on amounts deposited in court in an interpleader action and any right to damages for detention of property so delivered, or its value, shall cease to accrue after the date of such deposit or delivery. However, it had been argued that §386, in terminating the accrual of interest and any right to damages for detention of property in an interpleader proceeding, deals only with the potential liability between the parties who held the property themselves and that it does not interfere with the right of the person, ultimately determined to be entitled to the deposited funds, to interest earned by such funds when deposited by the county clerk pursuant to Government Code §§53679 and 68084 [Ostly v. Saper, 147 Cal. App. 2d 671, 675, 305 P.2d 946, 949 (1957); STATE BAR OF CALIFORNIA, 1971 COUNTER-ARGUMENT TO CONFERENCE RESOLUTION 12-23]. Chapter 553 is apparently designed to clarify this uncertainty.

See Generally:

1) STATE BAR OF CALIFORNIA, 1971 CONFERENCE RESOLUTION 12-23.
2) Annot., 15 A.L.R. 2d 473 (1951).

Civil Procedure; subpoena of medical records

Evidence Code §1563 (amended).
AB 1049 (Warren); STATS 1972, Ch 396

Section 1563 of the Evidence Code has been amended to provide that when the business records described in a subpoena issued pursuant to §1560 are *patient records* of a public or licensed hospital or of a physician and surgeon, osteopath, or dentist licensed to practice in this state, or a group of such practitioners, and the personal attendance of the custodian of such records or other qualified witness is not required, the *sole fee* for compliance with such subpoena is $12.

Additionally, §1563 has been amended to provide that when the *personal attendance* of the custodian of a record or other qualified witness is required pursuant to §1564, he shall be entitled to 20¢ a mile for mileage actually traveled, one way only, and to $12 for each day of actual attendance.

Chapter 396 also makes what appears to be a clarifying change in the language of §1563. Previously, §1563 specified that article 4 (commencing with §1560) of the Evidence Code shall not be interpreted to require the tender or payment of more than *one witness and mileage fee* or other charge unless there is an agreement to the contrary. As amended by Chapter 396, that portion of §1563 now reads: ". . . *of more than one witness and one mileage fee or other charge.* . . ."

COMMENT

The production of business records may be compelled by the issuance of subpoena *duces tecum* [CAL. CODE CIV. PROC. §§1985, 1987 (c)]. If the custodian of such records or other qualified witness is required to appear and produce original records pursuant to Evidence Code §1564, such person receives a $12 per diem witness fee and a mileage fee [CAL. GOV'T CODE §§68093-68096; CAL. EVID. CODE §1563(c), *as amended*, CAL. STATS. 1972, c. 396, §1]. However, business records may be subpoenaed without requiring the attendance of the custodian of such records or other qualified witness [CAL. EVID. CODE §§1560-1562] and, prior to the enactment of Chapter 396, there was no statutory authority requiring a specified compensation to the custodian or business producing such records for expenses incurred in duplication and delivery. Chapter 396 establishes $12 as the sole fee payable for compliance with a subpoena of *patient records* when the custodian or other qualified witness does not personally appear. This will apparently: (1) assure some compensation to all specified producers of "patient records"; and (2) prevent such producers from demanding an amount for duplication and delivery which is greater than the amount which must be paid for an in-person appearance and disclosure pursuant to Evidence Code §1563(c).

The sheer volume of personal injury litigation has necessitated revision of the law regulating the production of medical records [34 CAL. S.B.J. 667, 669 (1959); WITKIN, CALIFORNIA EVIDENCE, *Documentary Evidence* §710 (2d ed. 1966); CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1969 CODE LEGISLATION 112]. However, in 1969, article 4, *supra,* was revised [CAL. STATS. 1969, c. 199, §2, at 483] to include *all business records* within its general provisions. Therefore, a suitable subject for further amendment of §1563 might be to also include *all business records* within the provisions of that section. Pending such a revision, there will still be no statutory

authority regarding compensation for expenses incurred in the duplication and delivery of business records which are not patient records.

See Generally:
1) WITKIN, CALIFORNIA EVIDENCE, *Documentary Evidence* §710 (2d ed. 1966).
2) CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1969 CODE LEGISLATION 112.
3) 34 CAL. S.B.J. 667 (1969).

Civil Procedure; bank accounts—adverse claimants

Financial Code §952 (repealed); §952 (new).
SB 979 (Song); STATS 1972, Ch 548

Provides that a bank shall, rather than may, disregard notice of an adverse claim to a deposit or personal property held by that bank unless a specified court order or affidavit is delivered to or served on the bank by the adverse claimant; provides that a bank shall not refuse delivery of a deposit or property for more than three court days (including the day of delivery) on the basis of the affidavit of an adverse claimant.

Prior to the enactment of Chapter 548, §952 of the Financial Code provided that a bank *may* disregard notice of an adverse claim to a deposit or personal property held by that bank unless a court order, or bond is served on or delivered to the bank, in which case the bank shall "freeze" such funds and/or such property. Section 952 further provided that upon the adverse claimant's filing of an affidavit, as specified, the bank may "freeze" deposits and/or property until the adverse claim is adjudicated or released.

Chapter 548 has repealed §952 and added a revised §952 to provide that notice to any bank of an adverse claim to a deposit standing on its books to the credit of, or to personal property held for the account of any person *shall be disregarded*, and the bank, notwithstanding such notice, shall honor the checks, notes, or other instruments requiring payment of money by or for the account of the person to whose credit the account stands and on demand shall deliver any such property to, or on the order of, the person for whose account such property is held, without any liability on the part of the bank; subject, however, to the exceptions provided in §952(a) and (b).

Section 952(a) provides that if an adverse claimant delivers to the bank, at the office at which the deposit is carried or at which the property is held, his affidavit stating that of his own knowledge the person to whose credit the deposit stands, or for whose account the property is held, is a fiduciary for the adverse claimant and that *he has rea-*

son to believe such fiduciary is about to misappropriate the deposit or the property, and stating the facts on which such claim of fiduciary relationship and such belief are founded, the bank *shall refuse payment* of the deposit and *shall refuse to deliver* such property for a period of not more than three court days (including the day of delivery) from the date that the bank received the adverse claimant's affidavit, without liability on its part and without liability for the sufficiency or truth of the facts alleged in the affidavit.

Section 952(b) provides that if at any time, either before, after, or in the absence of the filing of an affidavit by the adverse claimant, such adverse claimant procures and serves upon the bank, at the office at which the deposit is carried or at which the property is held, a restraining order, injunction, or other appropriate order against the bank from a court of competent jurisdiction in an action in which the adverse claimant and all persons in whose names such deposit stands or for whose account such property is held are parties, the bank shall comply with such order or injunction, without liability on its part.

Section 952(c) specifies that the provisions of §952 shall be applicable even though the name of the person appearing on the bank's books to whose credit the deposit stands or for whose account the property is held is modified by a qualifying or descriptive term such as "agent," "trustee," or other word or phrase indicating that such person may not be the owner in his own right of the deposit or property.

COMMENT

In addition to stating the bank's duty to disregard specified adverse claims in mandatory terms, Chapter 548 also: (1) eliminates the bonding option previously allowed an adverse claimant under former §952 [*See* CONTINUING EDUCATION OF THE BAR, CALIFORNIA DEBT COLLECTION PRACTICE §10.16 (Supp. 1972)]; and (2) limits to three days the amount of time a bank shall "freeze," without judicial process, the account or property of a depositor who is alleged to be a fiduciary of an adverse claimant.

Prior to the enactment of Chapter 548, a bank was permitted, upon receipt of an affidavit, as specified, to withhold the accounts or property of such a depositor until the adverse claim *was finally adjudicated or released.* However, such a provision was of doubtful constitutionality in light of the recent decisions in *Sniadach v. Family Finance Corp.* [395 U.S. 337 (1969)], *McCallop v. Carberry* [1 Cal. 3d 903, 464

P.2d 122, 83 Cal. Rptr. 666 (1970)], and *Randone v. Appellate Department* [5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971) (hereinafter cited as *Randone*)]. These decisions have held that attachment or garnishment of a person's property prior to notice and a judicial hearing is a violation of procedural due process and therefore unconstitutional except in "extraordinary circumstances" [*Randone*, at 541, 488 P.2d at 15, 96 Cal. Rptr. at 711; *see* STATE BAR OF CALIFORNIA, 1970 CONFERENCE RESOLUTION 9-7; Jackson, *Attachment In California—What Now?*, 3 PAC. L.J. 1, 11, 12 (1972)].

Pursuant to Chapter 548, an adverse claimant who desires to freeze the bank account or property held in the name of his alleged fiduciary for longer than three days will be required to obtain a court order. The three-day freeze based on an affidavit alone was intended to permit the adverse claimant to preserve the status quo for a limited period while filing an action in a court of competent jurisdiction to obtain temporary relief [Interview with Harold Bradford, Legislative Representative, State Bar of California, Sacramento, California, July 26, 1972 (hereinafter cited as *Bradford*)].

The Legislature's choice of a *three-day* period appears to be an attempt to strike a proper constitutional balance between affording the adverse claimant temporary relief in narrowly defined instances and insuring the property owner of procedural due process. The proponents of Chapter 548 maintain that the "minimal" three-day provision, combined with the strict affidavit requirements will not constitute a deprivation of a "significant property interest" [*Randone*, at 541, 464 P.2d at 15, 96 Cal. Rptr. at 711] within the perview of *Randone, Sniadach,* or *McCallop* [*Bradford*]. It should be noted that a deposit or property held in the name of one not alleged to be a fiduciary of the adverse claimant is not subject to the specified affidavit procedure and thus may not be "frozen" pursuant to §952 without resort to the judicial process.

Chapter 548 also permits the adverse claimant who is filing an affidavit with the bank to aver that *he has reason to believe* that the fiduciary is about to misappropriate the deposit or property. Prior to the enactment of Chapter 548, the adverse claimant had to aver that the fiduciary was about to misappropriate the deposit or property.

A significant practical effect of Chapter 548 is the protection afforded a bank from the burden of having to itself determine the merits of conflicting claims, or, in the alternative, to bring an action in interpleader [*Bradford*]. In addition, §952, as adopted by Chapter 548,

grants further statutory relief to banks from any general duty to police fiduciary accounts—a burden which they "could not reasonably be expected to carry out effectively" [Desert Bermuda Properties v. Union Bank, 265 Cal. App. 2d 146, 151, 152, 71 Cal. Rptr. 93, 97 (1968)].

See Generally:

1) Jackson, *Attachment in California—What Now?*, 3 PAC. L.J. 1 (1972).
2) Comment, *Attachment in California: A New Look at an Old Writ*, 22 STAN. L. REV. 1254 (1970).
3) Comment, *Attachment in California: A Solution to the Effect of Sniadach*, 1 PAC. L.J. 304 (1970).
4) Comment, *Some Implications of Snidach*, 70 COLUM. L. REV. 942 (1970).
5) Recent Cases, 5 CREIGHTON L. REV. 176 (1971).

Civil Procedure; confidential communications

Evidence Code §1010 (amended).
SB 402 (Deukmejian); STATS 1972, Ch 888
Support: California State Marriage Counseling Association; Board of Behaviorial Science Examiners; Department of Professional and Vocational Standards

Section 1010 of the Evidence Code has been amended to include licensed marriage, family and child counselors within the definition of a psychotherapist for purposes of the Evidence Code. Confidential communications between a psychotherapist and his patient are privileged [*See* CAL. EVID. CODE §1010 *et seq.*]; however, pursuant to §1028, the marriage, family, and child counselors privilege as a psychotherapist does not apply in criminal proceedings.

It is noteworthy that §1027 declares that the psychotherapist-patient privilege is nonexistent if the patient is a child under the age of sixteen.

Civil Procedure; spouse of judgment debtor—privilege not to testify

Code of Civil Procedure §717 (amended).
SB 1429 (Holmdahl); STATS 1972, Ch 619

Pursuant to §717 of the Code of Civil Procedure, after issuance or return of an execution against property of the judgment debtor, and upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of the judgment debtor, or is indebted to him in an amount exceeding $50, the judge may by order, require such person or corporation to appear and answer concerning the matter.

Chapter 619 amends §717 to provide that the spouse of the judgment debtor cannot be compelled to testify in a post-judgment hearing authorized by §717. The spouse may only invoke the privilege to the extent permitted by §§970 and 971 of the Evidence Code, and the privilege will not apply if there has been a waiver of the provisions of §§970 and 971 in the action giving rise to the judgment.

Section 970 of the Evidence Code states that "except as otherwise provided by statute, a married person has a privilege not to testify against his spouse in *any proceeding*." Section 971 provides that a married person whose spouse is a party to a proceeding has a privilege not to be called as a witness by an adverse party to that proceeding without the prior express consent of the spouse so privileged or unless the party calling the spouse does so in good faith without knowledge of the marital relationship.

COMMENT

Since §§970 and 971 of the Evidence Code extend to a married person a privilege not to testify against his spouse *in any proceeding*, the apparent effect of Chapter 619 is to simply declare that a post-judgment hearing authorized by §717 of the Code of Civil Procedure is a *proceeding* within the meaning of §§970 and 971 of the Evidence Code. However, it should be noted that a waiver of the privilege in the action giving rise to the judgment also constitutes a waiver in the §717 actions.

See Generally:

1) 5 WITKIN, CALIFORNIA PROCEDURE, *Enforcement of Judgment* §§125-26 (2d ed. 1971).
2) WITKIN, CALIFORNIA EVIDENCE, *Witnesses* §§828-36 (2d ed. 1966).
3) McDonough, *California Evidence Code: Privileges*, 18 HAST. L.J. 106 (1966).
4) Leighton, *Supplementary Proceeding and Creditors' Claims under California Procedure*, 14 HAST. L.J. 17 (1962).

Civil Procedure; mechanic's liens—union trust funds

Civil Code §3111.5 (new).
SB 957 (Coombs); STATS 1972, Ch 609

Chapter 609 adds §3111.5 to the Civil Code to require employees' trust funds, established pursuant to a collective bargaining agreement to which payments are required to be made on account of fringe benefits supplemental to a wage agreement for the benefit of a claimant on particular real property [CAL. CIV. CODE §3111], to give a subcontractor upon his demand, the statement described below. Within five

days of receipt of a demand by a subcontractor, the union trust fund shall provide a written statement which contains the following information: (1) the subcontractor's payments to the fund for supplemental fringe benefits during the preceding 12 months; (2) the fact, if such be the case, that the trust fund has no information or belief that the subcontractor is further indebted to the trust fund for those months.

Section 3111.5(b) provides that the statement of the trust fund provided to satisfy any creditor of the subcontractor that he is not further indebted to the trust fund, is made without prejudice to the trust fund.

COMMENT

Existing law grants a lien to union fringe benefit trust funds for the payment of amounts established pursuant to collective bargaining agreements [CAL. CIV. CODE §3109 *et seq.*]. Because of this lien, construction lenders are apparently reluctant to issue progress payments absent a release by the trust fund. This bill enables the subcontractor to provide his contractor with a statement by the trust fund which states his outstanding obligation, if any, to the fund.

See Generally:

1) CONTINUING EDUCATION OF THE BAR, CALIFORNIA MECHANICS LIENS AND OTHER REMEDIES, §§1.13 *et seq.*, 3.9-3.10, 4.11 *et seq.*, 5.3 *et seq.*, 6.5, 7.25, 7.6, 7.8 (1972).

Civil Procedure; destruction of court records

Government Code §§69503.2, 69503.3 (new); 69503.1 (amended).
AB 2349 (Moorhead); STATS 1972, Ch 866
Support: Los Angeles County Clerk

Section 69503.1 of the Government Code provides for the destruction of records, papers, and exhibits in any superior court action or proceeding after 30 years have elapsed since the filing of any paper in the action or proceeding. This section has been amended to include case files within the records which may be destroyed. Chapter 866 also amends this section to provide that case files of civil actions which have been dismissed may be destroyed seven years after dismissal, and case files of civil actions for tortious injury to the person or for wrongful death, which have not been dismissed, may be destroyed 15 years after final judgment, with the exception of those cases which involve a petition filed pursuant to Code of Civil Procedure §372 (actions against insane or incompetent persons), cases in which an action

is pending or under appeal, cases in which the time to enforce the judgfent has been extended, or cases in which there is pending a motion filed pursuant to §685 of the Code of Civil Procedure (execution of judgment after the lapse of 10 years from the date of its entry). This section does not apply to the records of probate, real property, juvenile, criminal, or adoption actions or proceedings.

Section 69503.2 has been added to the Government Code to require the county clerk to defer the disposal of the case file of a civil action or proceeding five years beyond the retention period specified in §69503.1, upon the receipt of a written request from a party or his attorney. During such time the clerk, upon request and payment of a fee, shall provide copies of such case file.

Section 69503.3 has been added to the Government Code to provide that documents destroyed pursuant to §69503.1 may be proved by a copy authenticated pursuant to Division 11 (commencing with §1400) of the Evidence Code.

Civil Procedure; witnesses—vehicle inspection specialists

Government Code §68097 (amended).
SB 155 (Lagomarsino); STATS 1972, Ch 256
Support: California Highway Patrol

Section 68097 of the Government Code has been amended to include vehicle inspection specialists of the California Highway Patrol [CAL. VEHICLE CODE §§2251, 34500 *et seq.*] within the definition of the term "member of the California Highway Patrol" for the purposes of this section and Government Code §§68097.1-68097.10. Section 68097 contains provisions for the payment of witnesses' fees and mileage in civil cases, and refers to separate procedures for payment of members of the California Highway Patrol, sheriffs, deputy sheriffs, marshals, deputy marshals, and city policemen, which are contained in §68097.1 *et seq.*

When a member of the California Highway Patrol (*e.g.*, vehicle inspection specialist) is to serve as a witness in a civil case, advance payment of $45 per day (for reimbursement of the public entity) must be made, by the person at whose request the subpoena is issued, to the clerk of the court or with the tribunal prior to the issuance of the subpoena; the witness receives from the California Highway Patrol his normal salary and the actual necessary and reasonable traveling expenses incurred by him in complying with the subpoena [§68097.2]. Prior to amendment of §68097, the California Highway Patrol incurred

the expense when a motor vehicle inspection specialist was subpoened to testify as a witness in a civil case.

Sections 68097.1, 68097.5, 68097.55, 68097.6 and 68097.9 concern subpoena procedures required for the witness to appear and provisions for payment for extra days the witness is needed.

In addition, it is now a misdemeanor to offer a vehicle inspection specialist payment for his testimony in excess of that specified [CAL. GOV'T CODE §68097.7]. It is also a misdemeanor for such witness to ask for or receive money or consideration in excess of that provided by §§68097.2 and 68097.4.

See Generally:

1) CAL. CODE CIV. PROC. §§394, 1989, 2064.
2) CAL. GOV'T CODE §68097.1 *et seq.*
3) CAL. VEHICLE CODE §§2251, 34500 *et seq.*
4) WITKIN, CALIFORNIA EVIDENCE, *Witnesses* §748 *et seq.* (2d ed. 1966), (Supp. 1969).
5) CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL PROCEDURE DURING TRIAL, *Compelling Attendance of Witnesses and Production of Documentary and Real Evidence* §3.2 *et seq.* (1960).

Civil Procedure; reimbursement for appointed counsel

Government Code §27712 (new); §27706 (amended).
SB 647 (Lagomarsino); STATS 1972, Ch 661
Support: County Supervisors Association

Section 27706 of the Government Code prescribes the duties of the public defender as "the representation of any person not financially able to employ counsel" in specified litigation. Chapter 661 amends §27706 to provide that any person represented by the public defender is subject to §987.8 of the Penal Code, which requires the court, at the termination of a *criminal* trial, to determine the present ability of the defendant to pay for all or part of the cost of counsel and to order payment in appropriate cases.

Section 27712 has been added to reiterate the language of Penal Code §987.8 with sufficient changes to make the section applicable in *any case* in which a party is furnished counsel, either through the public defender or private counsel appointed by the court, and with an addition which directs the court to adjudge a standard by which to measure the cost of counsel and requires appointed counsel to provide evidence of services performed, pursuant to such standard.

COMMENT

The enactment of §27712 is an apparent attempt to specify that the

reimbursement provision be extended to *all* cases in which representation is through appointed counsel. It was therefore appropriate that it be included in the Government Code chapter concerning the public defender. However, in light of the addition of §27712, the amendment of §27706, directing the public defender to apply the reimbursement provision of Penal Code §987.8, appears redundant.

Government Code §27706 limits qualification for the services of the public defender to persons not financially able to employ counsel. Thus, a preliminary determination of inability to pay is necessary before a public defender can even accept a case. In most criminal cases, an in-court statement of the party would appear sufficient [*See* CAL. PEN. CODE §987] and this would also appear to be sufficient in appropriate civil cases [*See* CAL. GOV'T CODE §27706(b), (c), (d), (e)]. The preliminary determination is made by the court in which the proceeding is pending [CAL. GOV'T CODE §27707]. Section 27712 specifies *who*, for reimbursement purposes, will determine qualification standards and whether a person meets those standards (the court), and *when* the determination will take place (at the conclusion of proceedings in the trial court). Each recipient of the services of the public defender is thus subject to dual scrutiny to determine financial eligibility [*See* 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 318 (1972)].

The requirement for reimbursement in both Penal Code §987.8 and Government Code §27712 appears vulnerable to attack as unconstitutional on three possible grounds. First, California courts have indicated that a statute which discourages a defendant from accepting the offer of counsel is an unconstitutional "chill" on the right to counsel guaranteed by article 1, §13 of the California Constitution, Sections 858(n) and 859 of the Penal Code, and the Sixth Amendment of the United States Constitution, made obligatory upon the states through the Fourteenth Amendment [*See In re* Ricky H., 2 Cal. 3d 513, 468 P.2d 204, 86 Cal. Rptr. 76 (1970); *In re* Allen, 71 Cal. 2d 388, 455 P.2d 143, 78 Cal. Rptr. 207 (1969)]. Secondly, these sections arguably violate the Equal Protection Clause of the Fourteenth Amendment. A party whose ability to pay is marginal, is more likely to waive counsel than those who clearly can or cannot afford counsel. Thus, a classification is created which discriminates on the basis of wealth, in situations in which substantial rights of the party are at stake.

The final possible ground for unconstitutionality is that the statute may violate the due process provisions of the California and United

States Constitutions. The due process argument is that the lack of specific guidelines for determination of inability to employ counsel and the lack of a provision for a hearing or appeal from the court's determination can deprive a party of a significant property interest without due process of law [*See* Randone v. Superior Court, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971); Sniadach v. Family Finance Corporation, 395 U.S. 337 (1969); *In re* Allen, *supra*].

Civil Procedure; actions against sureties

Civil Code §2845 (amended); Code of Civil Procedure §1058a (new).

AB 605 (Warren); STATS 1972, Ch 391

Authorizes and specifies procedure for notice to and recovery against surety without independent action.

Section 1058a has been added to the Code of Civil Procedure to provide that whenever any security is given in the form of a bond or undertaking, in any action or proceeding, each surety submits himself to the jurisdiction of the court in all matters affecting his liability on the bond or undertaking.

After entry of the final judgment in the action or proceeding for which the bond or undertaking is given and the time for appeal has expired, the liability of the surety or sureties, if any, may be enforced on motion filed in the trial court *without the necessity of an independent action.* Further, §1058a requires that notice of the motion be served on the surety whose liability is sought to be enforced at least 30 days prior to the time set for hearing of the motion. Judgment against the surety may then be entered unless the surety serves and files an affidavit in opposition to the motion showing facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact. If such a showing is made by the surety, the issues to be tried shall be specified by the court and trial thereof shall be set for the earliest date convenient to the court, allowing sufficient time for discovery.

Under the provisions of §1058a the surety cannot obtain a stay of proceedings pending the determination of any third party claims.

It should be noted that §1058a has no application in cases of a bond or undertaking of a public officer or fiduciary.

In addition, Chapter 391 amends §2845 of the Civil Code to make that section subject to the provisions of §1058a of the Code of Civil Procedure, as added by Chapter 391. Section 2845 deals with the right of a surety to require his creditor to proceed against the principal.

COMMENT

Because of the potentiality of abuse of extraordinary remedies and procedures in civil actions, California, by statute, requires the posting of security before the remedies or procedures will issue. For example, security is specifically required for attachment [CAL. CODE CIV. PROC. §539(a), *as amended*, CAL. STATS. 1972, c. 550, §14], claim and delivery [CAL. CODE CIV. PROC. §511(b), *enacted*, CAL. STATS. 1972, c. 855, §2], and injunctive relief [CAL. CODE CIV. PROC. §529].

The bond or undertaking posted as security is designed to operate as a readily available means to compensate the aggrieved party in the event the extraordinary remedy or procedure is inappropriately issued. However, prior to the enactment of Chapter 391, with the exception of §535 of the Code of Civil Procedure (which provides for recovery upon the security without the necessity of an independent action in cases of temporary restraining orders and preliminary injunctions), the aggrieved party had no swift and inexpensive means to reach the security [Bezaire v. Fidelity and Deposit Co., 12 Cal. App. 3d 888, 91 Cal. Rptr. 142 (1970). Independent action against the surety was necessary to recover upon the bond or undertaking for damages sustained as a result of the inappropriate issuance of the remedy.

Section 1058a, as added by Chapter 391, relieves the aggrieved party of the necessity of instituting a new proceeding in order to take advantage of security originally posted for his benefit. That relief is in the form of an ancillary hearing between the aggrieved party and the surety. Section 1058a is patterned after the provisions of §535 of the Code of Civil Procedure [*supra*] and the Federal Judicial Code [FED. R. CIV. P. 65.1 (providing for recovery against surety without independent action in federal courts)].

In addition to lessening the burden of recovery to the aggrieved party, it appears that §1058a will have the practical effect of making sureties more selective of their principals and more interested in the progress of the litigation.

See Generally:

1) CAL. CODE CIV. PROC. §535.
2) FED. R. CIV. P. 65.1, 28 U.S.C. Rule 65.1.
3) Bezaire v. Fidelity and Deposit Co., 12 Cal. App. 3d 888, 91 Cal. Rptr. 142 (1970).

Civil Procedure; interpreters

Government Code §11513 (amended).

AB 1557 (Z'Berg); STATS 1972, Ch 1390
Support: State Bar of California

Government Code §11513, dealing with administrative hearings, has been amended to provide that the proponent of any testimony to be offered by a witness who does not proficiently speak English, shall provide an interpreter, approved by the hearing officer conducting the proceedings. The cost of the interpreter shall be paid by the agency having jurisdiction over the matter if the hearing officer so directs, otherwise by the party providing the interpreter. This section has been further amended to authorize the Office Of Administrative Hearings to compile and publish a list of interpreters, and any person whose name appears on the list shall be deemed to be approved by the hearing officer hearing the case.

See Generally:
1) Molinar, *Administrative Process and Due Process, A Synthesis Updated,* 10 SANTA CLARA LAW. 274 (1970).
2) STATE BAR OF CALIFORNIA, 1972 CONFERENCE RESOLUTION 12-24.

Civil Procedure; coordination of civil actions

Code of Civil Procedure §§404-404.8 (new).
AB 930 (Warren); STATS 1972, Ch 1162
(Effective January 1, 1974)

Provides a method for combining civil actions which are pending in different courts.

Section 404 provides that when civil actions sharing a common question of fact or law are pending in different courts, the presiding judge of any such court (on his own motion or on the motion of any party supported by an affidavit stating facts showing that the actions meet the standards specified in §404.1 *infra*), or all the parties plaintiff or defendant in such action, supported also by the above-mentioned affidavit, may request the Chairman of the Judicial Council to assign a judge to determine whether coordination of the actions is appropriate.

Section 404.1 states that such coordination is appropriate if one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice, taking into account:

(1) Whether the common question of fact or law is predominating and significant to the litigation;

(2) The convenience of parties, witnesses, and counsel;

(3) The relative development of the actions and the work product of counsel;

(4) The efficient utilization of judicial facilities and manpower;

(5) The calendar of the courts;

(6) The disadvantages of duplicative and inconsistent rulings, orders, or judgments; and

(7) The likelihood of settlement of the actions without further litigation should coordination be denied.

Section 404.2 provides that if the assigned judge determines coordination to be appropriate, he shall select the reviewing court having appellate jurisdiction, if the actions to be coordinated are within the jurisdiction of more than one reviewing court. Such determination shall be based on the standards set forth in §404.1.

Section 404.3 empowers the assigned judge to order that the actions be coordinated and provides that the Chairman of the Judicial Council shall assign a judge to hear and determine the actions in the site the assigned judge finds appropriate.

Section 404.4 allows the presiding judge of any court in which there is an action pending which shares a common question of fact or law with an already coordinated action, to request the judge in the coordinated action to issue an order to combine both actions. Such request may be based on the judge's motion or on the motion of any party supported by affidavit. Coordination of such action shall be determined by the standards specified in §404.1.

Pursuant to §404.5, the judge making the coordination determination may stay any action being considered for, or affecting an action being considered for coordination.

Section 404.6 provides that within 10 days after service upon him of notice of entry of an order made pursuant to Chapter 1162, any party may petition the appropriate reviewing court for a writ of mandate to require the court to make such order as the reviewing court finds appropriate.

Section 404.7 provides that the practice and procedure for coordination of civil actions, including provision for giving notice and presenting evidence, are to be established by rule of the Judicial Council. Section 404.8 provides that certain expenses of coordination are to be paid by the state from funds appropriated to the Judicial Council.

See Generally:

1) 3 WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§254-265 (2d ed. 1971).