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Civil Procedure

University of the Pacific; McGeorge School of Law

Civil Procedure

Civil Procedure; administrative hearings—quorums

Government Code §11512 (amended).
AB 397 (Z'berg); STATS 1973, Ch 231
Support: State Bar of California

Chapter 231 has amended Section 11512 of the Government Code to codify existing case law on the procedure to be followed in an administrative hearing when a quorum ceases to exist [See Cooper v. State Board of Medical Examiners, 35 Cal. 2d 242, 217 P.2d 630 (1950); Feist v. Rowe, 3 Cal. App. 3d 404, 415-20, 83 Cal. Rptr. 465, 472-75 (1970)]. Section 11512(e) has been added to provide that after an agency has commenced to hear a case with a hearing officer presiding and a quorum no longer exists, the hearing officer shall complete the hearing as if sitting alone and is to render a proposed decision in accordance with subdivision (b) of Section 11517 of the Government Code (which provides that the agency may adopt or reject the decision in its entirety, or may reduce the proposed penalty and adopt the balance of the proposed decision).

See Generally:
1) STATE BAR OF CALIFORNIA, 1972 CONFERENCE RESOLUTION 9-15.

Civil Procedure; admissibility of medical foundation's records

Evidence Code §1157.5 (new).
AB 2478 (Murphy); STATS 1973, Ch 848

Section 1157 of the Evidence Code provides that neither the proceedings nor the records of either organized committees of medical staffs in hospitals having the responsibility of evaluation and improvement of the quality of care rendered in the hospital or medical review committees of local medical societies shall be subject to discovery. Any person attending a meeting of such committee cannot be required to testify about the meeting. The prohibition concerning discovery and testimony does not apply to: (1) a statement made by any person in attendance at such a meeting who is a party to an action or proceeding the subject matter of which was reviewed at the meeting; (2)

any person requesting hospital staff privileges; (3) any action against an insurance carrier alleging bad faith by the carrier in refusing to accept a settlement offer within the policy limits; (4) medical society committees containing more than ten percent of the members of the medical society; or (5) any committee in which the conduct or practice of a person serving on the committee is being reviewed.

Section 1157.5 has been added to extend the protection offered by Section 1157 to the organized committee of any nonprofit medical care foundation which meets the following two conditions: (1) the foundation is a component or subsidiary of a medical society; and (2) it is organized in a manner which makes available professional competence to review health care services with respect to medical necessity, quality of care, or economic justification of charges or level of care. This protection is not available in actions where the provider of health care services is seeking to recover payment for such services.

Civil Procedure; attachment—notice of hearing

Code of Civil Procedure §538.2 (amended).
SB 216 (Deukmejian); STATS 1973, Ch 8
(Effective March 14, 1973)
Support: Los Angeles County Municipal Court Judges' Association

Prior to amendment, Section 538.2 of the Code of Civil Procedure [S.B. 1048, CAL. STATS. 1972, c. 550, §10] required that the hearing on whether a writ of attachment shall issue was to be held seven business days after the service of notice upon the defendant or upon the first regular date law and motion matters were heard thereafter, whichever occurred later. Since the date of service could not be determined when the court issued the notice of hearing, the court could not set the date for the hearing at that time. Chapter 8 remedies this problem by requiring that: (1) the notice of hearing specify the date of the hearing; (2) the notice specify a hearing date not less than 10 days nor more than 30 days from the date of its issuance; and (3) the notice of hearing be served on the defendant at least 10 days prior to the date of the hearing except as otherwise ordered by the court for good cause.

See Generally:

1) 2 WITKIN, CALIFORNIA PROCEDURE, *Provisional Remedies* §§24-38 (2d ed. 1971); §24a (Supp. 1972).
2) Jackson, *Attachment in California—What Now?*, 3 PAC. L.J. 1 (1972).
3) Comment, *Attachment in California: Senate Bill 1048, the Interim Response to Randone*, 4 PAC. L.J. 146 (1973).
4) 4 PAC. L.J., REVIEW OF SELECTED 1972 CALIFORNIA LEGISLATION 281, 292 (1973).

Civil Procedure; attachment and execution—housetrailer exemption

Code of Civil Procedure §690.3 (amended).

AB 778 (Wilson); STATS 1973, Ch 787

Section 690.3 of the Code of Civil Procedure has been amended to increase the exemption from attachment and execution (as provided in §690 *et seq.*) 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 $9,500 to a value not exceeding $15,000 over and above all liens and encumbrances on that housetrailer or mobilehome. The exemption is not allowed if the debtor or the spouse of the debtor has an existing homestead as provided by Title 5 (commencing with §1237) of the Civil Code.

COMMENT

The purpose of increasing the exemption provided mobilehome owners from $9,500 to $15,000 is to provide such owners the same protection from attachment and execution as conventional homeowners are provided by the homestead law. A homeowner claiming a homestead is allowed an exemption not exceeding $20,000 above all liens and encumbrances [CAL. CIV. CODE §1260]. Owners of mobilehomes and housetrailers usually did not qualify for the homestead exemption because they did not own the land on which they lived as required by Section 1237 of the Civil Code. This resulted in most mobilehome owners being inadequately protected by the $9,500 exemption since eighty percent of mobilehomes cost between $17,000 and $30,000 [Assemblyman Bob Wilson, Press Release, May 2, 1973].

See Generally:

1) 5 WITKIN, CALIFORNIA PROCEDURE, *Enforcement of Judgment* §55 (2d ed. 1971).
2) CONTINUING EDUCATION OF THE BAR, CALIFORNIA DEBT COLLECTION PRACTICE §§19.1-19.44 (1968).
3) 2 PAC. L.J., REVIEW OF SELECTED 1970 CALIFORNIA LEGISLATION 320, 326, 328 (1971).
4) 4 PAC. L.J., REVIEW OF SELECTED 1972 CALIFORNIA LEGISLATION 297 (1973).

Civil Procedure; civil arrest

Code of Civil Procedure §§477, 1168, Chapter 1 (commencing with §478), Chapter 3 (commencing with §1143) (repealed); Chapter 1 (commencing with §477) (new); §§340, 515, 539, 667, 682, 684, 804, 1014 (amended); Government Code §§26681,

26682, 26683, 26684, 26686 (repealed); §§202, 27823, 71265 (amended).
SB 81 (Song); STATS 1973, Ch 20
Support: California Law Revision Commission

Prohibits civil arrest in civil action for debt or tort; repeals provisions for civil arrest and bail; deletes provisions for execution against person of judgment debtor; repeals provisions for discharge of persons imprisoned on civil process; eliminates liability of sheriff, constable, marshal, or other officer who allows a prisoner arrested or imprisoned on civil process to escape.

Section 478 of the Code of Civil Procedure has been added by Chapter 20 to provide that a person may not be imprisoned, before or after judgment, in a civil action for a debt or tort. It also provides that nothing in the section affects any power a court may have to imprison a person who violates a court order (*i.e.*, a person may still be jailed for civil contempt). Section 202 of the Government Code has been amended to delete the provision that the state could imprison or confine an individual for the purpose of enforcing civil remedies. Chapter 1 (commencing with §478) of the Code of Civil Procedure, which specified the provisions for civil arrest and bail, has been repealed.

Sections 667, 682, and 684 of the Code of Civil Procedure have been amended to reflect the fact that a writ of execution may not issue against the person of a judgment debtor after an execution against his property is returned unsatisfied. Section 1168, which provided for arrest of the defendant in an unlawful detainer proceeding, has been repealed, and Section 804 has been amended to delete the provision authorizing pretrial arrest in a quo warranto proceeding for usurpation of any public office, civil or military, or a franchise. Sections 1143-1154, which provided for discharge of persons imprisoned on civil process, have also been repealed. Persons imprisoned for civil contempt may still obtain their release upon a subsequent inability to comply with a court order by a writ of habeas corpus [CAL. PEN. CODE §§1485, 1487(2)].

Sections 26681, 26682, 26683, 26684, and 26686 of the Government Code, which dealt with the liabilities and rights of a sheriff who allowed a prisoner arrested or imprisoned on civil process to escape, have been repealed.

COMMENT

Prior to repeal by this chapter, Section 479 of the Code of Civil

Procedure authorized use of the provisional remedy of civil arrest and bail in only five classes of cases based on fraud. These were: (1) an action for the recovery of money on a contract when the defendant was about to leave the state to defraud his creditors; (2) an action against a public officer or any other person in a fiduciary capacity for fine, penalty, embezzlement, misconduct or neglect in office or in professional employment, or willful violation of duty; (3) an action to recover unjustly detained personal property if it had been concealed, removed, or disposed of to prevent its taking; (4) when the defendant fraudulently incurred the obligation on which the action was brought; and (5) when the defendant had or was about to remove or dispose of his property with intent to defraud his creditors. Section 804 provided for a pretrial arrest in a quo warranto proceeding for usurpation of any public office or a franchise, and Section 1168 provided for arrest of the defendant in an unlawful detainer proceeding. An arrest was executed on *ex parte* application prior to judgment, and the person jailed was not released until he either posted bail, made a cash deposit to cover a possible future judgment, or demonstrated that the arrest was improper [CAL. CODE CIV. PROC. §§486, 503, 504, 505(b), prior to repeal by CAL. STATS. 1973, c. 20]. After judgment a creditor could also get an execution against the body of a debtor in those cases where arrest was available. The debtor was imprisoned until either the creditor consented to his release, the creditor failed to continue advancing money to the jailer to cover the expense of keeping the debtor in jail, or until the debtor took the pauper's oath [CAL. CODE CIV. PROC. §§1148-1149, prior to repeal by, CAL. STATS. 1973, c. 20]. Civil arrest on execution following judgment was not expressly provided for by statute but it was implied by Sections 667, 682(3), 684, and 1143 through 1154 of the Code of Civil Procedure which have been repealed by this chapter.

The prejudgment remedy of arrest and bail was designed to bring the defendant within the reach of the court's final process [See Carradine v. Carradine, 75 Cal. App. 2d 775, 171 P.2d 911 (1946)] and to assure satisfaction of judgment [See *In re* Harris, 69 Cal. 2d 486, 489 n.3, 446 P.2d 148, 150 n.3, 72 Cal. Rptr. 340, 342 n.3 (1968)]. But, the modern procedures of service of process and the use of default judgments [See CAL. CODE CIV. PROC. §§585, 594] have made civil arrest and bail obsolete as a process to obtain jurisdiction; and attachment of property [See CAL. CODE CIV. PROC. §§537-561] or a temporary restraining order and injunction to prohibit disposition of assets [See CAL. CODE CIV. PROC. §§525-535] have made civil

arrest and bail obsolete as a process to assure security for the prospective judgment.

Arrest on execution was used to enforce judgment but postjudgment incarceration only prevented the debtor from working to improve his ability to settle the debt and was worthless if the debtor were released by taking the pauper's oath [See CAL. CODE CIV. PROC. §§1148-1149, prior to repeal by CAL. STATS. 1973, c. 20]. Thus this did little to assure satisfaction of judgment. Also, arrest on execution was used to reach concealed property the creditor could not reach. This procedure, however, sometimes had the harsh effect of requiring the debtor to give up exempt property to obtain release from jail. Examination of the debtor in supplementary proceedings (pursuant to CAL. CODE CIV. PROC. §§714-723) did not have this harsh effect and consequently was more acceptable than civil arrest. Since this process, in addition to being ineffectual, was costly for the creditor [See CAL. CODE CIV. PROC. §1154, prior to repeal by CAL. STATS. 1973, c. 20 (creditor must pay cost of debtor's imprisonment)], it would seem that the primary purpose for arrest on execution in debt collection process was its nuisance value.

Civil arrest may also have violated procedural due process of law as developed in some recent cases. *Morrissey v. Brewer* [408 U.S. 471 (1972)] provided that a person's parole cannot be revoked without a notice and a hearing thereby affording the defendant an opportunity to be heard. The Court stated that parole revocation constituted a deprivation of liberty and that the due process clause of the fourteenth amendment which protects a person's liberty was not satisfied in such a case without notice and a hearing. Analogizing to this decision, the system of arrest and bail eliminated by Chapter 20 probably violated due process protections in that the defendant was not afforded prior notice and an opportunity to be heard. *Sniadach v. Family Finance Corporation* [395 U.S. 337 (1969) (prejudgment garnishment of wages)] and *Randone v. Appellate Department* [5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971) (prejudgment attachment of property)] also lend support to this proposition. Under these decisions, the property of a defendant generally could not be seized absent prior notice and an opportunity for a hearing, nor could a defendant's necessities of life be seized absent a judicial determination of the actual validity of the plaintiff's claim. While arrest does not amount to deprivation of a substantial property right, the due process clause applies with even greater force to deprivations of liberty than to deprivations of property [See Lynch v. Household Finance

Corp., 405 U.S. 538 (1972) (protection in civil rights statutes against prejudgment garnishment)].

Imprisonment on execution may also be attacked on due process grounds. Although many arguments center around the concept that imprisonment for debt offended fundamental social values [Rogge, *A Technique for Change*, 11 U.C.L.A. L. REV. 481 (1964)], perhaps the most commonly expressed concern is that civil arrest imposes harsh and burdensome penalties in cases in which the judgment might well have been taken in default or in which the debtor had had none of the safeguards of a criminal trial, such as burden of proof beyond a reasonable doubt [Freedman, *Imprisonment for Debt*, 2 TEMPLE L.Q. 330 (1928); Comment, *Due Process—Pretrial Civil Arrest*, 58 CAL. L. REV. 178 (1970)].

Apparently in logical sequence to the above-mentioned court decisions, which exposed the constitutional infirmities of civil arrest and bail, and in response to the concerns of the many legal scholars who have written on the subject, the legislature has finally eliminated this ineffective, occasionally abused, and rarely used means of securing payment of a debt.

See Generally:

1) 2 WITKIN, CALIFORNIA PROCEDURE, *Provisional Remedies* §§1-7 (1970).
2) 5 WITKIN, CALIFORNIA PROCEDURE, *Enforcement of Judgment* §§177-178 (1971).
3) 3 CAL PRACTICE, *Arrest* §§17:1-17:51 (1968).
4) 7 CAL PRACTICE, *Enforcement of Judgment* §§56:215-56:219 (1968).
5) Jackson, *Attachment In California—What Now?*, 3 PAC. L.J. 1, 11 (1972).
6) Sterling, *Study Relating to Civil Arrest in California*, 11 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS AND STUDIES 27-37 (1972).
7) CALIFORNIA LAW REVISION COMMISSION, *Recommendation Relating to Civil Arrest*, 11 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS AND STUDIES 11 (1972).

Civil Procedure; claim and delivery

Code of Civil Procedure Chapter 2 (commencing with §509) (repealed); Chapter 2 (commencing with §511.010) (new).

AB 103 (Warren); STATS 1973, Ch 526

Support: California Law Revision Commission

Enacts permanent claim and delivery procedure initiated by written application executed under oath and containing specified information; requires notice and hearing before a writ of possession may be issued except under specified conditions; specifies the information which must be contained in the writ of possession; allows plaintiff to apply for a temporary restraining order pending the hearing; provides for ex parte *writ of possession in limited situa-*

tions; provides procedures for levying writs of possession by the sheriff; specifies requirements and procedures for filing and excepting to undertakings; provides that a court commissioner may perform all functions required by this chapter; provisions of this act are severable; act will not become operative until July 1, 1974.

Chapter 526 has been enacted to provide a permanent statutory claim and delivery remedy in California, thus repealing Chapter 2 (commencing with §509) of the Code of Civil Procedure [CAL. STATS. 1972, c. 855, at 480] which constituted temporary claim and delivery legislation terminating by its own terms on December 31, 1975. Chapter 526 implements several changes in the claim and delivery procedure enacted last year under which creditors could apply for and, after appropriate hearing, obtain interim possession of personal property pending final outcome of a lawsuit regarding that property.

Writ of Possession

To initiate the claim and delivery process, written application for a writ of possession must be filed. Section 512.010 provides that this application may be filed at the time of filing of the complaint or at any time thereafter with the court in which the action is brought. The application for writ of possession must be executed under oath and must include all of the following: (1) a showing of the basis of the plaintiff's claim and that the plaintiff is entitled to possession of the property claimed (prior to Chapter 526, only ownership without an independent showing of a right to possession needed to be claimed); (2) a showing that the property is wrongfully detained by the defendant, the manner in which the defendant came into possession of the property, and the reason for the detention to the plaintiff's best knowledge and belief; (3) a particular description of the property and a statement of its value; (4) a statement of the location of the property and, if the property or some part of it is within a private place which may have to be entered to take possession, a showing that there is probable cause to believe that such property is located there; and (5) a statement 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.

Section 512.020 requires that, after the application has been filed, a hearing on a notice motion must be held prior to issuance of the writ of possession, except in those enumerated cases where an *ex parte* writ may be issued. Section 512.030 requires that *prior* to the hearing

the defendant must be served with (1) a copy of the summons and complaint, (2) a "Notice of Application and Hearing," and (3) a copy of the application and any affidavit in support thereof. Section 512.040 requires that the "Notice of Application and Hearing" inform the defendant: (1) that a hearing will be held at a time and place to be specified on the plaintiff's application for the writ of possession; (2) that the court will issue the writ if it is found that the plaintiff's claim is probably valid, but that the determination of actual validity of the claim will be made at subsequent proceedings in the action and will not be affected by the decision at the hearing; (3) that the defendant may oppose the issuance of the writ of possession by filing with the court an affidavit providing evidence sufficient to defeat the plaintiff's right to issuance of the writ or by filing an undertaking to stay the delivery of the property in accordance with Section 515.020; and (4) the notice shall contain a specified statement to the effect that the defendant should consult an attorney to assist at the hearing if he believes that the plaintiff is not entitled to possession of the claimed property.

Section 512.050 requires that each party shall file with the court and serve upon the other party any affidavits and points and authorities intended to be relied upon at the hearing. At the hearing, the court shall make its determinations upon the basis of the pleadings and other papers in the record; but if good cause is shown, the court may consider additional evidence produced at the hearing or may continue the hearing so that additional evidence may be produced.

Section 512.060 provides that the writ of possession shall issue at the hearing if the probable validity (defined in §511.090) of the plaintiff's claim is established and the plaintiff has provided an undertaking as required by Section 515.010 (*infra*). No writ may be issued directing the levying officer to enter a private place to take possession of any property unless probable cause has been established by the plaintiff that the property is located there. Once the writ of possession is issued it must meet all of the following requirements provided in Section 512.080: (1) be directed to the levying officer within whose jurisdiction the property is located; (2) describe the specific property to be seized; (3) specify any private place that may be entered to take possession of the property or some part of it; (4) direct the levying officer to levy on the property and to retain it in his custody until released or sold; and (5) inform the defendant that he has the right to except to the sureties upon the plaintiff's undertaking, a copy of which shall be attached to the writ, or to obtain redelivery of the

property by filing an undertaking as prescribed by Section 515.020 (*infra*).

Section 512.070 provides that if the writ is issued, the court may also order the defendant to transfer possession to the plaintiff, and such order shall contain notice to the defendant that he may be subject to contempt of court or arrest if he does not comply. Sections 512.100 and 512.110 provide that at trial neither the court's final determination nor the parties' rights shall be affected by the determinations of the court at the hearing on issuance of the writ of possession; nor shall the determinations of the court be used in evidence in the trial. In addition, Section 512.20 now requires that if the plaintiff fails to recover judgment in the action, he shall redeliver the property to the defendant and be liable for all damages sustained by the defendant which are proximately caused by operation of either a temporary restraining order and preliminary injunction (if any), the writ of possession, the loss of possession of the property, and any penalties levied from prior failures to turn over the property.

Temporary Restraining Order

Section 513.010 provides the plaintiff additional protection for his property in the period after he has applied for a writ of possession, and during the time the hearing is pending, by authorizing the plaintiff to apply for a temporary restraining order by setting forth in the application a statement of grounds justifying the issuance of such order. Section 513.020 provides that in the discretion of the court, the temporary restraining order may prohibit the defendant from doing any or all of the following: (1) transferring any interest in the property by sale, pledge, or grant of security interest, or otherwise disposing of, or encumbering the property; but if the property is farm products held for sale or lease or is inventory, the order may not prohibit the defendant from transferring the property in the ordinary course of business, although it may impose approriate restrictions on the disposition of the proceeds from such transfer; (2) concealing or otherwise removing the property in such a manner as to make it less available to seizure by the levy officer; and (3) impairing the value of the property either by acts of destruction or by failure to care for the property in a reasonable manner.

Section 513.010 provides that a temporary restraining order may be issued *ex parte* if the plaintiff has established the probable validity of the claim, has provided an undertaking, and has established the probability that there is an immediate danger that the property claimed

may become unavailable to levy by reason of being transferred, concealed, or removed or may become substantially impaired in value. The section further provides that the court shall dissolve any temporary restraining order if at the hearing on issuance of the writ of possession the court determines that the plaintiff is not entitled to a writ of possession; otherwise, the court may issue a preliminary injunction to remain in effect until the property claimed is seized pursuant to the writ of possession.

Ex Parte Writ of Possession

Section 512.020(b) provides that a writ of possession may be issued *ex parte* if probable cause appears that any of the following conditions exist: (1) where defendant gained possession by feloniously taking the property from plaintiff, but not including taking by embezzlement or false pretenses; (2) where the property is a credit card; or (3) where the defendant acquired possession of the property in the ordinary course of his trade or business for commercial purposes, and the following three tests are satisfied: (a) the property is not necessary for the support of the defendant or his family; (b) there is an immediate danger that the property will become unavailable to levy by reason of being transferred, concealed, or removed from the state, or will become substantially impaired in value by acts of destruction or failure to take care of the property in a reasonable manner; and (c) the *ex parte* issuance of a writ of possession is necessary to protect the property. An *ex parte* writ of possession must be accompanied by: (1) a copy of the summons and complaint; (2) a copy of the application and any supporting affidavits; (3) notice to defendant that if he believes plaintiff may not be entitled to possession of the property claimed, he may wish to promptly seek the advice of an attorney; and (4) notice informing defendant of his rights under this subdivision. Section 512.020 also provides that the defendant may make application to have the *ex parte* writ quashed, and have any property levied on pursuant to the writ released. Such application is to be made by a noticed motion and hearing set. Pending that hearing on defendant's application, the court may order that delivery of property previously levied on be stayed. If the court determines that plaintiff is not entitled to a writ of possession, the court shall quash the writ and order the release and redelivery of any property previously levied upon. The court shall also award the defendant any damages sustained by him which were proximately caused by the application of the writ of possession.

Undertakings

Section 515.010 provides that the court shall not issue a temporary restraining order or a writ of possession until the plaintiff has filed a written undertaking. The undertaking shall provide that the sureties are bound to the defendant in the amount of the undertaking for the return of the property to the defendant, if return is ordered, and for the payment of any sum the defendant may recover against plaintiff. There must be two or more sureties in an amount not less than twice the value of the property as determined by the court.

Section 515.030(a) provides that the defendant may except to the plaintiff's sureties not later than ten days after levy of the writ of possession by filing with the court in which the action was brought a notice of exception to sureties and mailing a copy of the notice to the levying officer and to the plaintiff. An affidavit stating that such copies have been mailed shall be filed with the court at the time the notice is filed. If the defendant does not except to the plaintiff's sureties as provided in this section, he waives all objection to them.

This section also states that sureties shall justify in the manner provided in Chapter 7 (commencing with §830) of the Code of Civil Procedure before the court in which the action was brought at a time specified by the excepting party. If the plaintiff's sureties fail to justify at the time and place appointed or do not qualify, the court shall vacate the temporary restraining order or preliminary injunction, if any, and the writ of possession and, if levy has occurred, order the levying officer or the plaintiff to return the property to the defendant. If the plaintiff's sureties do qualify, the court shall order the levying officer to deliver the property to the plaintiff.

Section 515.020 also establishes that the defendant may prevent the plaintiff from taking possession of property pursuant to a writ of possession, or regain possession of property so taken, by filing with the court in which the action was brought a written undertaking executed by two or more sufficient sureties in an amount equal to the amount of plaintiff's undertaking or, if there has been no judicial determination of the value of the property, then in an amount equal to the value of the property stated in the plaintiff's application for the writ of possession. The undertaking shall state that if the defendant loses in the original action, he shall pay all costs awarded to the plaintiff and all plaintiff's damages which are proximately caused by the plaintiff's failure to gain or retain possession, not exceeding the amount of the undertaking. It shall also state the address to which a copy

of the notice of exception to sureties may be sent. The defendant's undertaking may be filed at any time before or after levy of the writ of possession. A copy of the undertaking shall be mailed to the levying officer and to the plaintiff. An affidavit stating that such copies have been mailed shall be filed with the court at the time the undertaking is filed.

As provided by Section 515.030(b), the plaintiff may except to the defendant's sureties not later than ten days after the defendant's undertaking is filed by filing with the court in which the action was brought a notice of exception to sureties and mailing a copy of the notice to the levying officer and to the defendant at the address set out in his undertaking. An affidavit stating that such copies have been mailed shall be filed with the court at the time the notice is filed. If the plaintiff does not except to the sureties of the defendant as provided in this section, he waives all objection to them. If the defendant's sureties fail to justify or do not qualify, the court shall order the levying officer to deliver the property to the plaintiff, or if the plaintiff has previously been given possession of the property, he shall retain such possession. If the defendant's sureties do qualify, the court shall order the levying officer or the plaintiff to deliver the property to the defendant. Also, as provided by Section 515.020(d), if an undertaking for redelivery is filed and defendant's sureties are not excepted to, the levying officer shall deliver the property to the defendant, or if the plaintiff has previously been given possession of the property, the plaintiff shall deliver such property to the defendant.

Levy and Custody

Section 514.010 provides that, upon receipt of the writ of possession, the levying officer shall search for and take custody of the specified property by removing it to a place of safekeeping by installing a keeper. If the specified property is used as a dwelling, such as a mobilehome or boat, levy shall be made by placing a keeper in charge of the property for two days, at the plaintiff's expense, after which period the levying officer shall remove the occupants and any contents not specified in the writ and shall take exclusive possession of the property. If the specified property or any part of it is in a private place, the levying officer shall at the time he demands possession of the property announce his identity, purpose, and authority. If the property is not voluntarily delivered, he may break into the enclosure or building where the property may be located in such a way as to

cause the least damage and may call upon the power of the county to help him. If the levying officer reasonably believes the entry and seizure of the property will involve substantial risk of death or serious bodily harm to any person, he shall refrain from seizing the property and shall promptly make a return to the court setting forth the reasons for his belief that the risk exists. The court shall then make such orders as may be appropriate. Nothing in this section authorizes the levying officer to enter or search any private place not specified in the writ of possession or other order of the court; but pursuant to Section 512.090, the plaintiff may apply *ex parte* in writing to the court in which the action was brought for an endorsement on the writ directing the levying officer to seize the property at a private place not specified in the writ. The court shall make the endorsement if the plaintiff establishes by affidavit that there is probable cause to believe that the property or some part of it may be found at that place.

Section 514.020 requires that at the time of levy, the levying officer shall deliver to the person in possession of the property a copy of the writ of possession with a copy of the plaintiff's undertaking attached. If no one is in possession of the property at the time of levy, the writ and attached undertaking shall be subsequently served on the defendant as provided by either Section 1010 or 415.10 of the Code of Civil Procedure.

After the levying officer takes possession pursuant to a writ of possession, he shall keep the property in a secure place. Section 514.030 provides that if notice of a filing of an undertaking for redelivery or notice of exception to the plaintiff's sureties is not received by the levying officer within ten days after levy of the writ of possession, the levying officer shall deliver the property to the plaintiff upon receiving his fees and expenses for taking and keeping the property. If notice of the filing of an undertaking for redelivery is received by the levying officer within the ten-day limit and defendant's sureties are not excepted to, the levying officer shall redeliver the property to defendant upon expiration of the time to so except and after receiving necessary fees and expenses not already paid or advanced by plaintiff. If notice of exception to the plaintiff's sureties or notice of the filing of an undertaking for redelivery is received within ten days after levy of the writ of possession and defendant's sureties are excepted to, the levying officer shall not deliver or redeliver the property until the procedures for review of such exception, as defined in Section

515.030, are complete. Section 514.030 also provides that where not otherwise provided by contract and where an undertaking for redelivery has not been filed, and upon a showing that the property is perishable or will greatly deteriorate or depreciate in value or for some other reason that the interests of the parties will be best served thereby, the court may order that the property be sold and the proceeds deposited in the court to abide the judgment in the action.

Section 514.040 requires the levying officer to return the writ of possession, with his proceedings thereon, to the court in which the action is pending within 30 days after levy but in no event more than 60 days after the writ is issued. Section 514.050 provides that where the property taken is claimed by one other than the defendant or his agent, the rules and proceedings applicable in cases of third-party claims after levy under execution shall apply.

Miscellaneous

Section 516.030 specifies that the facts stated in each affidavit filed pursuant to this chapter shall be set forth with particularity. Except where matters are specifically permitted by this chapter to be shown by information and belief, each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated therein. The affiant may be any person, whether or not a party to the action, who has knowledge of the facts. A verified complaint that satisfies the requirements of this section may be used in lieu of or in addition to an ordinary affidavit.

Section 516.040 has been enacted to explicitly provide that the judicial duties to be performed under Chapter 2 (commencing with §511.010) of the Code of Civil Procedure are "subordinate judicial duties" within the meaning of Article VI, Section 22 of the California Constitution and may be performed by appointed officers such as court commissioners. Section 516.050 specifies that nothing in Chapter 526 shall preclude the granting of injunctive relief pursuant to Chapter 3 (commencing with §525) of the Code of Civil Procedure. Sections 511.010 through 511.100 define significant words and phrases used throughout this chapter, *e.g.*, complaint, farm products, inventory, and probable validity.

The legislature has declared that if any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect any other provision or application of this act which can be given effect without the invalid provision or

application, and to this end the provisions of this act are severable [A.B. 103, CAL. STATS. 1973, c. 526, §2]. The legislature has also declared that this act will not become operative until July 1, 1974 [A.B. 103, CAL. STATS. 1973, c. 526, §3].

COMMENT

Chapter 526 is the second California legislative response to *Blair v. Pitchess* [5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971)] which 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). The first response to *Blair* was last year's bill [A.B. 1623, CAL. STATS. 1972, c. 855, §3] which attempted to remedy the above constitutional infirmities. It constituted a substantive revision of California's claim and delivery law, but was only interim legislation. This year's bill has enacted several more significant changes and now becomes a permanent part of the statutes.

One change was instituted in the hearing procedures. Prior to Chapter 526, the plaintiff was required to first submit his application for writ of possession along with supporting material at which time the court reviewed them. If the application met the specified requirements, the court issued an order directed to the defendant to show cause why the property should not be transferred to the plaintiff. The order fixed the place and time of the hearing which was to be no sooner than ten days from the issuance of the order. The order informed the defendant that he could file affidavits and appear in person to oppose the issuance of the writ of possession and informed him that he could file an undertaking with the court to stay the delivery. Chapter 526 has established a single hearing procedure where the plaintiff simply files the complaint and then the application with the court of record, gives notice to the defendant [the defendant is served with: (1) a copy of the summons and complaint; (2) a notice of application and hearing (Section 512.040); and (3) a copy of the application and any supporting affidavit(s)], and makes his motion for the writ of possession at the subsequent hearing. It is significant to note that prior to Chapter 526 the defendant was served with

neither a copy of the complaint, a copy of the application, nor any supporting affidavit(s). Also, the defendant *is* now informed in the Notice of Application and Hearing that the writ of possession will be issued if the plaintiff's claim is probably valid and the other requirements for issuing the writ are established. The defendant is informed that the actual validity of the claim will not be decided until subsequent proceedings in the action occur (judgment is reached) and that the issuance of the writ will have no bearing on the subsequent judgment. The defendant is additionally informed in the Notice of Application and Hearing that if he believes that he should have possession of the property and he intends to defend against the plaintiff's claim, he should promptly consult an attorney.

Another major change is the limiting of *ex parte* writs of possession even further than was the case in last year's bill. The *ex parte* writ has been limited to cases involving credit cards, property that has been feloniously taken, excluding property taken by false pretenses and embezzlement, and property acquired by defendant in the ordinary course of his trade or business for commercial purposes where the following factors are present: (1) the property is *not* necessary for the support of defendant or his property; (2) there is immediate danger the property will become unavailable or substantially impaired; and (3) the *ex parte* issuance of a writ of possession is necessary to protect the property.

California's claim and delivery statute is still suspect of violating constitutional guarantees of procedural due process (fourteenth amendment). The key sequence of cases bearing on this point are: (1) *Sniadach v. Family Finance Corporation* [395 U.S. 337 (1969)], a wage garnishment case which held a Wisconsin statute unconstitutional because it authorized a taking of property without procedural due process; (2) *Blair v. Pitchess* [5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971)], which declared California's previous claim and delivery statute unconstitutional by relying strongly on *Sniadach* but saying that there might be extraordinary exceptions which, *if narrowly drawn in the statute*, would justify an *ex parte* writ; (3) *Randone v. Appellate Department* [5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971)], wherein California's attachment statutes were struck, again strongly relying upon *Sniadach,* and adding the concept that any *ex parte* procedure which deprived a person of the necessities of life would be invalid regardless of how extraordinary the situation; and (4) *Fuentes v. Shevin* [407 U.S. 67 (1972)], in which the Court declared replevin statutes of Florida and Pennsylvania unconsti-

tutional on the basis of depriving a person of property without a hearing (due process), and stated that although there may be extraordinary situations which justify an exception, they must be "truly unusual." *Fuentes* spelled out three criteria which have been present in those few cases to date where the Court allowed outright seizure without a hearing: (1) where the seizure was directly necessary to secure an important governmental or general public interest; (2) where there has been a special need for prompt action; and (3) where the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance (*i.e.*, the state has kept strict control over its monopoly of legitimate force). In dicta the *Fuentes* Court did, however, refuse to consider any distinctions based on "necessities of life" since the root principle of procedural due process applies to property generally [See 407 U.S. at 89]. Thus the three exception areas of the new statute allowing *ex parte* writs of possession will have to be constitutionally measured against both the California court's *Randone* decision and the three test criteria of *Fuentes*. With regard to the former, situations in which allegedly stolen goods or a credit card are "necessities" are difficult to imagine, but at least possible. For example, if a legitimate controversy existed as to whether an indigent had really stolen food, a car, or a refrigerator, a court could, without any hearing, issue a writ of possession and thus arguably come in direct conflict with *Randone*. The *Fuentes*' tests would possibly allow the new statute's stolen goods exception, but should raise serious question as to whether credit cards can be excepted from the Court's "rule" that *ex parte* writs violate due process. Hence, both *Randone* and *Fuentes* may be a basis for attack on the new statute in certain fact situations. The third *ex parte* exception in the new statute, possession of property acquired for "commercial" purposes, has not really been considered in the cases thus far. The wording of Section 512.20(b)(2) appears aimed at giving some protection to the rights of the individual who owns his own small business via a "necessities of life" provision, and it also tries to meet the *Fuentes* requirement of a need for prompt action; but the totality of the three criteria given in *Fuentes*, as well as its overall emphasis on the due process protection of property rights in general, makes this section of the new statute appear quite vulnerable. That is, there would seem to be no appropriate reason why the taking of "commercial" property would not be just as much a violation of due process as the equivalent taking of non-commercial property.

Another change has been the declaration in Section 516.040 that the judicial duties to be performed under Chapter 526 are subordinate judicial duties within the meaning of Article VI, Section 22 of the California Constitution and may be performed by appointed officers such as court commissioners [*See* CAL. CODE CIV. PROC. §259 (powers and duties of court commissioners)]. This power is consistent with the "in chambers" duties delegable by the court [See CAL. CONST. art. VI, §§14, 22] and is also consistent with procedures presently used in having commissioners issue search warrants in many California districts as well as the federal court system [*See* FED. R. CRIM. P. 41(a)]. It will accomplish a welcome shift in the workload in judicial districts like Los Angeles which use a large number of commissioners to help the courts with the administrative workload. Naturally, the commissioner, as an officer of the court, must establish probable cause for issuance of the writ in each case so as not to violate fourth amendment search and seizure rights; but adherence to the procedures detailed in the new act should adequately prevent the issuance of writs from slipping back into the purely clerical function which was a factor in having the prior statute declared unconstitutional under *Blair*.

In conclusion, it would appear that Chapter 526 is a good sequel to A.B. 1623 [CAL. STATS. 1972, c. 855], in that it is generally responsive to the guidelines established by *Blair* for constitutional claim and delivery legislation. What remains to be seen is how the continued implementation of *ex parte* writs of possession in limited situations in claim and delivery proceedings will fare. The possibility of court tests on whether or not the new statute's rules for granting *ex parte* writs is sufficiently narrow and sufficiently protective of individual property rights as spelled out in *Randone* and *Fuentes* would seem more than likely at some future time. Fortunately, the legislature provided that the sections of the act are severable in the event of any adverse court ruling; so the worst case result would likely be that the sections of the new code which allow issuance of an *ex parte* writ of possession would simply be invalidated.

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) 4 PAC. L.J., REVIEW OF SELECTED 1972 CALIFORNIA LEGISLATION 281 (1973).
4) *Recommendation Relating to Claim and Delivery*, 11 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS AND STUDIES 301 (1972).
5) Jackson, *Attachment In California—What Now?*, 3 PAC. L.J. 1 (1972).
6) Comment, *Attachment in California: Senate Bill 1048, the Interim Response to Randone*, 4 PAC. L.J. 146 (1973).

Civil Procedure; court costs in municipal or justice courts

Code of Civil Procedure §1031 (amended).
AB 1592 (Cullen); STATS 1973, Ch 818
Support: California Association of Collectors

Section 1031 of the Code of Civil Procedure specifies when a prevailing party in a municipal or justice court action may recover his costs and necessary disbursements. Prior to the enactment of Chapter 818, Section 1031 provided that if the prevailing party recovered less than the jurisdictional amount of the small claims court, the court had the discretion to allow or deny costs, or to allow costs in part as it deemed proper. Chapter 818 has amended Section 1031 to provide that the court may now exercise such discretion only if the action could have been brought in the small claims court and the prevailing party is either the plaintiff or cross-complainant. The defendant against whom the action is dismissed may always recover his costs and necessary disbursements. If the action could not have been brought in small claims court, the prevailing plaintiff or cross-complainant shall recover the actual costs of filing and service of process only if the court is satisfied that prior to commencing the action he notified the defendant in writing that he intended to commence action and that it could result in a judgment against the defendant which would include costs and necessary disbursements.

Prior to enactment of Chapter 818, Section 1031 also required the court, in specified actions for the recovery of wages, to add as part of the costs in any judgment recovered by the plaintiff an attorney's fee not exceeding twenty percent of the amount recovered. Chapter 818 has amended Section 1031 to apply this provision to a prevailing cross-complainant as well as to a prevailing plaintiff.

See Generally:
1) 1 WITKIN, CALIFORNIA PROCEDURE, *Courts* §§187-205 (2d ed. 1970).
2) CAL. CODE CIV. PROC. §117 *et seq.* (small claims court regulations).

Civil Procedure; default judgments—attorneys' fees

Code of Civil Procedure §585 (amended).
SB 932 (Holmdahl); STATS 1973, Ch 312
Support: State Bar of California; California Judicial Council

Section 585(1) of the Code of Civil Procedure provides that in an action arising upon contract or upon a judgment of a court of

this state for the recovery of money or damages only, the clerk may enter a default judgment against the defendant if such defendant has been served a summons and has not responded. The clerk may include an attorney's fee in the default judgment if the contract upon which the action is brought provides that a fee be allowed and if the court has adopted a schedule of attorneys' fees. Section 585(1) has been amended to also allow the clerk to include an attorney's fee in the default judgment if the action is one in which the plaintiff is entitled by statute to recover an attorney's fee in addition to money or damages, and the court has adopted a schedule of attorneys' fees.

COMMENT

Where actions are based on certain statutes such as the Unruh Act [CAL. CIV. CODE §1801 *et seq.*], the prevailing party may be entitled to recover a reasonable attorney's fee by virtue of provisions in these statutes which allow for such recovery. Some courts have permitted the clerk in actions based on these statutes to include such a fee when there is a default judgment and a schedule of attorneys' fees has been adopted [See STATE BAR OF CALIFORNIA, 1972 CONFERENCE RESOLUTION 9-10]; but prior to this chapter the authority for such practice was questionable.

See Generally:

1) 4 WITKIN, CALIFORNIA PROCEDURE, *Proceedings Without Trial* §§140-142 (2d ed. 1971).

Civil Procedure; judgments—recordation

Code of Civil Procedure §668 (amended); Government Code §72050.7 (new).
SB 146 (Nejedly); STATS 1973, Ch 185
Support: Association of Municipal Court Clerks of California

Section 668 of the Code of Civil Procedure has been amended to delete the requirement that the clerk of a municipal court enter civil judgments in a minute book, and now provides that the clerk must instead keep a judgment book in which judgments are entered. This conforms to the requirement that superior courts maintain a judgment book (§668).

Chapter 185 has also added Government Code Section 72050.7 to eliminate the requirement that a clerk of a municipal court keep a minute book in those counties where it is required by court order

or rule that individual civil minute orders be placed in the court's file of actions. The requirement, however, that the clerk keep minutes is retained. Section 72050.7 does not eliminate the requirement for a judgment book where civil judgments and decrees are required to be entered.

COMMENT

The amendment to Section 668 of the Code of Civil Procedure and the addition of Section 72050.7 of the Government Code provide uniformity in record-keeping activities in superior and municipal courts. Municipal courts will no longer be required to maintain separate minute books, but rather will be permitted to file minutes chronologically in the case folders and enter judgments in the judgment books. This practice, followed by the superior courts, will decrease the accumulation of needless records in municipal courts.

See Generally:

1) 4 WITKIN, CALIFORNIA PROCEDURE, *Judgment* §§52, 53, 56, 57 (2d ed. 1971).

Civil Procedure; pleading causes of action

Code of Civil Procedure §425.20 (repealed); §430.10 (amended).
AB 1683 (McAlister); STATS 1973, Ch 828

Chapter 828 has repealed Section 425.20 of the Code of Civil Procedure, which required causes of action to be separately stated. The repeal of this section allows causes of action to be either stated separately or stated together as is allowed in federal courts [FED. R. CIV. P. 10(b)]. Chapter 828 has also amended Section 430.10 to provide that failure to separately state causes of action will not constitute grounds for demurrer to a complaint or cross-complaint. Existing case law, however, would allow a demurrer on the grounds of uncertainty and unintelligibility when causes have not been separately stated and the facts are complex and more clarity is needed [See Craig v. Los Angeles, 44 Cal. App. 2d 71, 111 P.2d 977 (1941)].

COMMENT

The change in the statutes, eliminating the requirement of separate pleadings, has been justified on grounds of simplification. The new procedure should save the lawyer's preparation time, and should also reduce time and effort in all phases of litigating claims with multiple causes of action. Proponents of this approach point to California's past working experience in being able to join causes of action for

injury to person and to property arising out of the same tort as indicative of the savings of paperwork, time, and energy possible when it is not mandatory to separately state each cause of action. Further, since defense attorneys may have been tempted to use the lack of separately stated causes as an excuse to delay or stall final proceedings, the new enactment should help speed up the progress of litigation [See Assemblyman Alister McAlister, Press Release, Apr. 25, 1973]. Those who have been critical of the bill point to the fact that the present system of separate statements is not only working well, but has the advantage of sharply presenting the issues for demurrer and any orders or motion for partial summary judgment [Interview with Harold Bradford, Legislative Representative, State Bar of California, Sacramento, Calif., Sept. 24, 1973]. Accordingly, the practicing attorney may still want to list his causes of action separately in several important situations: (1) where statutes of limitation are different for different causes of action; (2) where the facts of the case are complex, and either the court or the opposing party would find a "lumped" cause of action approach ambiguous or unintelligible; or (3) where initially it is not clear what theory of liability he wants to pursue most vigorously. Since most attorneys have developed techniques for fully organizing the facts in the first cause of action, and then incorporating them by reference in subsequent causes, none of the above "problem" areas will represent any serious change in their present approach. Naturally, the attorney whose work is something less than well organized, and who now tries to group several causes of action into one pleading, may find himself faced with an opposing demurrer on grounds of uncertainty. It remains to be seen whether this change in the statutes also represents a first step toward adoption by California of the comparatively loose and informal federal "notice pleading" procedures.

See Generally:

1) 5 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, *Pleadings-Motions* §§1322, 1324 (1969).
2) 39 CAL. JUR. 2d, *Pleading* §144 (1952).

Civil Procedure; service of process by mail

Code of Civil Procedure §1013a (amended).
SB 85 (Grunsky); STATS 1973, Ch 302
Support: State Bar of California

Chapter 302 has amended Section 1013a of the Code of Civil Procedure to require that pleadings, notices, and other documents served

by mail bear a notation of the date and place of mailing, or be accompanied by an unsigned copy of either an affidavit or a certificate of mailing which must show among other things the date and place of the mailing. Although service of pleadings, notices, and other documents by mail is complete at the time of deposit in the mail [CAL. CODE CIV. PROC. §1013], Section 1013a, prior to amendment, included no provision specifically requiring that the party served by mail be informed of the effective date of mailing. Thus, often the party served by mail could not determine the effective date of mailing and time in which to respond unless he either examined the envelope for postmark or contacted the court clerk to have the original on file examined.

See Generally:

1) 4 WITKIN, CALIFORNIA PROCEDURE, *Proceedings Without Trial* §20 (2d ed. 1971).
2) 4 PAC. L.J., REVIEW OF SELECTED 1972 CALIFORNIA LEGISLATION 305 (1973).
3) STATE BAR OF CALIFORNIA, 1971 CONFERENCE RESOLUTION 12-13.

Civil Procedure; summary judgments

Code of Civil Procedure §437c (repealed); §437c (new).
SB 651 (Bradley); STATS 1973, Ch 366
Support: State Bar of California; Credit Managers' Association; California State Legislative Committee

Requires a motion for summary judgment be granted if there is no triable issue of a material fact; expands permissible supporting material for a summary judgment motion; allows a summary judgment action to be made starting 60 days after the general appearance of the other party; provides for partial summary judgment by issues as well as parties; provides that expenses of defending party can be assessed on the moving party if a motion for summary judgment is brought as a sham; provides for mandatory denial or postponement of a motion for summary judgment when defending party, for good cause, is unable to answer immediately; requires equal evidentiary quality in both supporting and opposing affidavits.

Chapter 366 has repealed Section 437c of the Code of Civil Procedure relating to summary judgments and has added a new Section 437c broadening the use of summary judgments and significantly changing the standards under which summary judgments may be granted. Previously, a motion for summary judgment could only be granted in superior or municipal courts. Chapter 366 has now extended the use of summary judgment procedures to any civil action or proceeding.

Former Section 437c only expressly provided for the use of affidavits in support of a summary judgment motion. As added, Section 437c permits the motion to be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken. This codifies existing case law [See Newport v. Los Angeles, 184 Cal. App. 2d 229, 7 Cal. Rptr. 497 (1960) (answers to interrogatories); Bennett v. Hibernia Bank, 186 Cal. App. 2d 748, 9 Cal. Rptr. 896 (1960) (admissions); Thomson v. Honer, 179 Cal. App. 2d 197, 3 Cal. Rptr. 791 (1960) (papers and pleadings on file in the same or another action)]. The supporting and opposing material is still required to be made on the basis of personal knowledge and must show that the affiant is competent to testify in court to matters stated therein. However, instead of only requiring detailed facts, both the supporting and opposing material set forth must now be admissible evidence.

A motion for summary judgment may be made any time after 60 days have elapsed from the general appearance in the action or proceeding of each party against whom the motion is directed. This requirement changes the existing case law in California which did not permit a plaintiff to move for summary judgment before a non-defaulting defendant's answer was on file [See Orange County Air Pollution Control Dist. v. Superior Court, 27 Cal. App. 3d 109, 103 Cal. Rptr. 410 (1972)]. A party moving for summary judgment is still required to serve notice of the motion and supporting papers at least 10 days before the time fixed for the hearing. Also, the filing of the motion shall not extend the time within which a party must otherwise file a responsive pleading.

Prior to the new section, a judgment could be entered in the discretion of the court if the affidavits showed there was no triable issue of fact. As amended, Section 437c now makes issuance of summary judgment mandatory if there is no triable issue as to any material fact. This elimination of the court's discretion in effect codifies existing case law which had abrogated any real discretion the court had in granting the motion [See Whitney's at the Beach v. Superior Court, 3 Cal. App. 3d 258, 83 Cal. Rptr. 237 (1970) (preemptory writ of mandate ordering dismissal of complaint issued where the moving party's affidavits were sufficient and summary judgment was not granted)]. In determining whether there is a triable issue as to any material fact, the court is to consider all admissible evidence set forth in the submitted papers and all inferences reasonably deducible

from such evidence, except the court shall not grant summary judgment based on inferences which are contradicted by other evidence or inferences. Section 437c further provides that if a party is otherwise entitled to a summary judgment, the court may not deny the motion on the grounds of credibility or for want of cross examination of witnesses furnishing affidavits or declarations in support of the summary judgment, except where in the discretion of the judge: (1) the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to such fact; or (2) a material fact is an individual's state of mind, or lack thereof, and such fact is sought to be established solely by the individual's affirmation thereof.

A partial summary judgment is still possible. Previously, a partial judgment could be granted where affidavits proved that a good cause of action did not exist as to some part of a plaintiff's total claims; and the cause of action was severed accordingly. As amended, Section 437c requires that if it appears the proof supports the granting of a summary judgment motion as to some but not all the issues involved in the action, or if one or more of the issues raised by the claim is admitted, or if one or more of the issues raised by the defense is conceded, then the court shall specify that such issues are without substantial controversy. As to each individual issue, the standard has also been changed to require a triable issue as to any material fact. Previously, the section stated that no judgment shall be entered prior to the termination of such action. The new section states that where a separate judgment may properly be awarded in the action, the judge may do so. Otherwise, as before, the interim order is to be carried over and entered with the final judgment at the conclusion of the proceedings. The amended statute thus allows the judge to grant a partial summary judgment with respect to causes of action or parties prior to the start of trial, or hold such order (as would be done with issues found to be without controversy) over to the end.

Chapter 366 also provides that the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had, if it appears from the affidavits submitted in opposition that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented.

Additionally, if the court determines at any time that any of the affidavits are presented in bad faith or solely for purposes of delay,

the court shall order the party presenting such affidavits to pay the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party.

Section 437c still provides that summary judgment entered under this section is an appealable judgment.

COMMENT

The primary duty of the court in ruling on a motion for summary judgment is not to decide issues of fact, but to determine whether there are issues of fact to be tried [See Walsh v. Walsh, 18 Cal. 2d 439, 116 P.2d 62 (1941)]. This concept makes the summary judgment a powerful tool in the hands of attorneys and judges to reduce needless litigation and speed the machinery of justice. It also makes it a drastic remedy, in that it not only limits the judge's opportunity to see the facts "come alive" in direct testimony and cross-examination, but also cuts short the plaintiff's day in court. Despite the problem of swollen court calendars and long judicial delays, trial judges appear to have made relatively sparing use of summary judgment to help weed out needless litigation. Their generally conservative approach has not only been based on a desire to be especially careful of both parties' rights, but has also stemmed from the confusion associated with the wording of the earlier versions of Section 437c. For example, of 319 reported appellate decisions from 1933 to 1972 reviewing full summary judgment grants, 44 percent were reversed on appeal [Zack, *California Summary Judgment: The Need for Legislative Reform*, 59 CAL. L. REV. 439, 472 (1971), hereinafter cited as *Zack*]. A reversal ratio of this size has likely tended to make trial judges cautious in their granting of summary judgment. The amended version of Section 437c, by clarifying and expanding the rules for applying summary judgment, should improve the frequency of its use and lessen the probability of reversals. Hopefully, it is thus a major step forward in streamlining the flow of cases through our courts.

The new section makes nine changes in the existing law, some of which codify existing case law, and others of which are completely new. Roughly in the order in which they appear in the bill, these issues are:

First, summary judgment can now be used in all civil actions, rather than only those in municipal and superior courts. Practically, this may not be as sweeping a change as indicated by the wording, since summary judgment is not likely to be a generally used tool below

the municipal or superior court level. Second, by officially removing the discretionary element in the judge's decision, the new law strengthens the position of the party seeking a summary judgment, provided his affidavits are conclusive compared to the opposition's. However, the legislature's intent notwithstanding, "discretion" may have been cut from the wording of the statute only to have crept in through the back door in other areas. For example, the judge still decides what is "material"; he also can consider "inferences" from a wide variety of legal documents; and he has discretion in accepting or rejecting "sole witness" affidavits. The cautious judge, it would appear, still has a great deal of room to maneuver in denying summary judgment motions.

Third, the wording of the previous statute was vague as to when the motion could be made and granted, and the new version clarifies this area by setting a definite 60-day time period after which the summary judgment motion can be filed and action taken. Fourth, the statute now allows for the use of almost any judicially acceptable supporting materials in addition to the customary affidavits. Further, the trial judge can consider the inferences reasonably deducible from such evidence, thus considerably widening the scope of what an attorney can bring either as movant or in defense of a summary judgment motion. Although "inferences" which are contradicted by other inferences or evidence shall not be the basis of granting the motion, a serious question arises as to whether this provision will really result in trial judges being able to dispose of issues or causes more quickly; or whether it will simply raise more and varied questions as to whether a triable issue of material fact is present, encouraging the judge to pass the issue on to a jury trial. Fifth, with the exception of the "sole witness" and the affiant who is describing his own state of mind, the judge no longer has discretion to challenge an affidavit on the basis of credibility. This provision flows naturally from the new requirement that all supporting and opposing material be of admissible quality. This section would appear to be an important clarification of the "ground rules" under which a judge must now operate.

Sixth, the change in the law requiring admissible evidence of both parties is probably the most significant of all, if the wording of the new statute is interpreted literally by the courts. A respectable line of California cases now holds to the so-called "popular conclusions" doctrine, which states that a movant's affidavits will be considered strictly and the defending affidavits will be construed liberally [See

Zack at 466]. In practice, this has often meant that the opposing party need only file a counter-affidavit which shows facts sufficient to constitute a cause of action or defense, and the averments would be accepted as true for purposes of the motion regardless of whether the "facts" would be admissible in court [See Jack v. Wood, 258 Cal. App. 2d 639, 65 Cal. Rptr. 856 (1968)]. The new statute does not explicitly overrule this case-law doctrine, but nonetheless appears to accomplish just that result by now requiring *both* the supporting and opposing affidavits to be of admissible quality. The major question is how the courts will interpret the new statute with respect to the equality of materials demanded of the two parties. Of note is the fact that the new statute does not change the burden of proof. The movant party must still carry the burden of proving the absence of any material issue of fact before the quality of the opposing party's evidence becomes an issue [See *Zack* at 466; Swaffield v. Universal Esco Corp., 271 Cal. App. 2d 147, 172, 76 Cal. Rptr. 680, 695 (1969)].

Seventh, if it appears from the opposition's affidavits that facts exist which are essential to the opposing case, but which for some good reason are not yet available, the judge can either deny the motion for summary judgment (and thus let the facts surface or not in the trial) or he can grant a continuance of the motion to permit the facts to be gathered. While the legislature's intent appears to be one of preventing injustice in those situations where the access to crucial facts may be extremely difficult for the opposing party, it again raises the question of judicial discretion in granting a summary judgment motion. Provided the attorney opposing the motion gives the court a reasonably credible presentation of both the potential existence of facts critical to his opposition and his difficulty in getting at those facts, a court which has followed the case-law approach of giving the most liberal possible interpretation to the opposing party's affidavits can (as in the past) simply deny the motion. The courts' interpretation and the practicing attorneys' use of this provision will determine whether it has, in effect, opened another "back door" to the legislature's apparent intent to require equality of evidence between the two parties. Perhaps the provision for a "penalty" for filing affidavits in bad faith solely to cause delay will tend to deter any abuse of this procedure.

Eighth, the wording of the prior statute allowed for partial summary judgment with respect to a "cause of action." In an effort to increase the use of partial summary judgments, the wording of the

section in this area has been changed to "issue." Since the length of a trial is directly related to the number of issues which must be argued, any procedure which can get major issues adjudicated in advance of the actual trial should result in saving considerable time and expense. By making judicious use of this new procedure, attorneys can save valuable court time and concentrate their efforts on issues they consider vital.

Lastly, a striking new provision in the statute is the possibility that if either party's affidavits are found to be in bad faith or introduced solely to cause delays, that party can be ordered to pay the amount of reasonable expenses incurred by the other party because of the filing of those affidavits. This provision should instill a measure of caution in those law firms which make a practice of producing a blizzard of paperwork at the turn of an issue; but more importantly, it raises the question of payment for attorneys' fees. California's general practice has been not to allow attorneys' fees as *costs* unless specifically authorized by statute [See CAL. CODE CIV. PROC. §1021]. But the new statute specifies that "reasonable expenses" will be allowed, which raises the possibility that judicial discretion may be used to grant attorneys' fees. Such fees could be considered in the unusual situation where the filing of improper or ineffective affidavits in support of motions for summary judgment was willful and flagrant.

Finally, an open question remains with respect to the relationship between Section 437c and the equivalent federal rules of practice [See FED. R. CIV. P. 56]. The new California statute now moves more closely (but not completely) in line with federal provisions for granting of summary judgment. At issue is whether the federal cases which have been interpreting similar provisions over the past years now become good precedent for California cases. Only time will illuminate the attitude of our courts in accepting federal precedents in this area, although the differences between the statutes are still sufficiently great that there would appear to be good reason to build up a distinct line of California cases in the area of summary judgment.

See Generally:

1) 4 WITKIN, CALIFORNIA PROCEDURE, *Proceedings Without Trial* §§173-198 (2d ed. 1971).
2) CONTINUING EDUCATION OF THE BAR, CALIFORNIA PRETRIAL AND SETTLEMENT SUPPLEMENT §§3.16, 3.20 (1967).
3) Zack, *California Summary Judgment: The Need for Legislative Reform*, 59 CAL. L. REV. 439 (1971).
4) Gellhorn & Robinson, *Summary Judgment in Administrative Adjudication*, 84 HARV. L. REV. 612 (1971).

Civil Procedure; transcription of testimony

Code of Civil Procedure §1051 (repealed).
SB 209 (Deukmejian); STATS 1973, Ch 146
Support: Los Angeles Superior Court

Chapter 146 has repealed Section 1051 of the Code of Civil Procedure, which allowed either party in a civil action to require the court clerk to transcribe the testimony if a court reporter were required to be present, but was absent. Repealing this statute eliminates a potential problem caused by the fact that few court clerks have the requisite skills to adequately function as court reporters. The repeal also avoids possible problems with an appeal based on questionable court transcripts.

See Generally:
1) 1 WITKIN, CALIFORNIA PROCEDURE, *Transcript* §404 *et seq.* (2d ed. 1970).