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Civil Procedure

University of the Pacific; McGeorge School of Law

Civil Procedure

Civil Procedure; arbitration

Code of Civil Procedure Chapter 2.5 (commencing with §1141.10) (new).
SB 983 (Moscone); STATS 1975, Ch 1006
(Effective July 1, 1976)

Chapter 2.5 (commencing with §1141.10) has been added to the Code of Civil Procedure by Chapter 1006 to mandate the implementation of a uniform system of arbitration in certain civil cases, to become effective July 1, 1976. This procedure will provide an alternative method of adjudicating claims filed in *superior court.* Specifically, Section 1141.10 permits claims to be submitted to arbitration in those instances where either all parties *voluntarily* agree to submit the claim to arbitration or where the *plaintiff* files an election and stipulates that the amount of the award will not exceed $7,500, thus triggering a form of *mandatory* arbitration. In addition, Section 1141.10 further authorizes the Judicial Council to establish the rules governing such an arbitration scheme. Finally, Section 1141.20 has been added to the Code of Civil Procedure by Chapter 1006 to permit the arbitrators to recover reasonable compensation for their services.

COMMENT

The judicial system has faced an ever increasing problem of court congestion occasioned by the dramatic growth of claims filed (especially in superior court) during the 1960's [JUDICIAL COUNCIL OF CALIFORNIA, A STUDY OF THE ROLE OF ARBITRATION IN THE JUDICIAL PROCESS 27, 37 (1973)]. A system of both voluntary and mandatory arbitration was adopted by the Pennsylvania Legislature [PA. STAT. ANN. tit. 5, Chapter 1 (commencing with §1), Chapter 2 (commencing with §21) (Purdon 1963)] as one method of alleviating this problem, and this system has apparently been effective in permanently removing minor claims from the court calendars of that state [Comment, *Compulsory Arbitration to Relieve Trial Calendar Congestion,* 8 STAN. L. REV. 410, 418 (1956)]. Chapter 1006 has been enacted by the California Legislature to provide for both the *voluntary* and *mandatory* arbitration of claims filed in superior courts. The mandatory arbitration provision, however, may be

subject to constitutional challenge under Article 1, Section 16 of the California Constitution, which contains a provision guaranteeing the right to a jury trial in civil litigation. Thus, the enactment of a statute designating mandatory arbitration as the *final* procedure for the adjudication of a claim would probably be unconstitutional [*Id.* at 413]. The Pennsylvania Supreme Court, in *Application of Smith* [381 Pa. 223, 112 A.2d 625 (1955)], considered the constitutionality of their mandatory arbitration statute in light of the right to a jury trial in civil litigation guaranteed by the Pennsylvania Constitution [PA. CONST. ANN. art. 1, §6 (Purdon, Supp. 1974)] and held that there was no denial of the right to trial by jury if the statute preserves such right on an appeal from an arbitration board's decision [381 Pa. 223, 230, 112 A.2d 625, 629]. Thus, the California mandatory arbitration scheme enacted by Chapter 1006 could apparently also withstand constitutional challenge if the right to a jury trial is retained on an appeal from an arbitration board's decision.

Civil Procedure; jury instructions

Code of Civil Procedure §612.5 (new).
AB 439 (McAlister); STATS 1975, Ch 461
Support: California Law Revision Commission

Section 612 of the Code of Civil Procedure allows the jury in a civil case to take all papers, evidence, and exhibits (other than depositions) into the jury room if the court feels such documents will properly aid the jury in its deliberations. However, the practice of taking written jury instructions into the jury room had been deemed improper by the courts, and was held to provide grounds for reversal [Granone v. County of Los Angeles, 231 Cal. App. 2d 629, 658, 42 Cal. Rptr. 34, 53 (1965)]. Section 612.5 has been added by Chapter 461 to allow the jury, in the discretion of the court, to take a copy of the written instructions into the jury room.

Penal Code Section 1137 allows written instructions to be used by the jury during deliberations and thus a major distinction had existed between criminal and civil trials. A study conducted by the California Law Revision Commission found no rational basis for this distinction and recommended that the jury in a civil case also be provided a copy of the instructions for use during deliberations [*Recommendation and Study Relating to Taking Instructions to the Jury Room,* 1 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS AND STUDIES C-1, C-13 (1955-57)]. The instructions given to the jury are intended to

guide their deliberation, and giving the jury a copy of the instructions for reference would seem to promote greater understanding and consistency in application of the law [Cunningham, *Should Instructions Go Into the Jury Room?*, 33 CAL. S.B.J. 278, 289 (1958)].

In 1971, Section 612.5 was enacted [CAL. STATS. 1971, c. 1571, §§1, 2, at 3150] to adopt the California Law Revision Commission's recommendations; however, a provision was included in the section that resulted in its automatic repeal on December 31, 1974. Section 612.5 has been added by Chapter 461 to again allow the jury, at the discretion of the court, to take written instructions into the jury room for use during deliberations in civil trials. Since the court is not required to give the jury a copy of the instructions, the impact of this section is questionable, although giving a written copy of the instructions to the jury no longer constitutes grounds for reversal.

Civil Procedure; out of court views

Code of Civil Procedure §610 (repealed); §651 (new); §632 (amended).
SB 294 (Stevens); STATS 1975, Ch 301
Support: California Law Revision Commission; State Bar of California

Section 651 has been added to the Code of Civil Procedure to formalize the procedure for out-of-court views of relevant evidence made by the trier of fact which cannot conveniently be brought to the courtroom. Formerly Section 610 provided the basis for such views by delineating a very general guideline for their use during trial. The object of a view was narrowly limited to the property which constituted the subject of the litigation or the place where any material fact occurred. Section 610 did not expressly provide for the judge, as the trier of fact, to participate in out-of-court views, nor did it expressly require the judge to accompany the jury to the site of the view, although Section 610 had been interpreted to allow an out-of-court view by the judge, as the trier of fact [Noble v. Kertz & Sons etc. Co., 72 Cal. App. 2d 153, 158, 164 P.2d 257, 260 (1945)]. Consent to an out-of-court view by all parties was required, however, before the knowledge of facts gained by the judge at the view could be considered as independent evidence on which a finding could be made and sustained [Noble v. Kertz & Sons etc. Co., 72 Cal. App. 2d 153, 159, 164 P.2d 257, 260 (1945)]. Although knowledge of facts gained by a jury from an out-of-court view consti-

tuted independent evidence, the absence of the judge was usually not considered reversible error unless there was a clear showing of prejudice [Rau v. Redwood City Woman's Club, 111 Cal. App. 2d 546, 245 P.2d 12 (1952)]. Furthermore, Section 610 did not require a record to be made of the view. In absence of such a record, the knowledge of facts gained at the view was presumed on appeal to be in support of the findings, provided there was not substantial evidence to the contrary [Peckwith v. Lavezzola, 50 Cal. App. 2d 211, 122 P.2d 678 (1942)].

Section 651 now codifies the judicial interpretation of Section 610 and standardizes the procedure for implementation of out-of-court views. The court, on its own motion or motion of a party, may determine that a view is proper and order one to be made, with knowledge of any facts gained at a view constituting independent evidence even without the consent of all the parties. The presence of the entire court, including judge, jury, court reporter, and any necessary officers, is required at the view, and a record of the proceeding is to be made to the same extent as would be made in the courtroom. Testimony of witnesses is now expressly allowed. Section 651 also expands the proper object of an out-of-court view to include, in addition to the place where any material fact occurred and the property constituting the subject of the litigation, relevant objects, demonstrations, and experiments which cannot conveniently be viewed in the courtroom.

Section 632, as amended, requires a statement by the court as to which findings are supported primarily by evidence gained at the view, either in its announcement of intended decision or in its findings (if findings are requested). Additionally, the court must state which observations at the view support the indicated findings. On appeal, the court then has a record of the proceeding and can determine for itself whether the evidence gained at the view supports the decision or findings.

COMMENT

Section 651 allows the judge to make an out-of-court view without the consent of all parties and to have the knowledge of facts gained considered as independent evidence. Furthermore, Section 651 does not expressly require the presence of the parties or their counsel at the view. In *Noble v. Kerz & Sons etc. Co.* [72 Cal. App. 2d 153, 164 P.2d 257 (1945)], the court ruled that to allow a trial judge to take evidence outside of court without both the presence and consent of the parties amounts to a denial of due process as well as a denial of a fair and impartial trial to the litigants. Therefore it would seem that either legisla-

tive clarification or judicial interpretation will be required to save these new provisions from possible constitutional infirmity.

See Generally:
1) WITKIN, CALIFORNIA EVIDENCE, *Demonstrative, Experimental and Scientific Evidence* §§643-645 (2d ed. 1966) (view of the scene).
2) *Recommendation Relating to View by Trier of Fact in a Civil Case*, 12 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS AND STUDIES 588-98 (1974).
3) Leavitt, *The Jury at Work*, 13 HASTINGS L.J. 415, 425, 428 (1961-62).

Civil Procedure; jury service

Code of Civil Procedure §§200, 201, 202 (repealed); §200 (new); §§199, 201a, 601, 602 (amended); Penal Code §§1070, 1070.5 (amended).
AB 681 (Siegler); STATS 1975, Ch 593
Support: California Trial Lawyers Association; California District Attorneys' Association; League of Women Voters
Opposition: Judicial Council
AB 1184 (Chel); STATS 1975, Ch 469
Support: State Bar of California

Under prior law, Section 200 of the Code of Civil Procedure exempted persons engaged in various occupations (including, *inter alia*, doctors, attorneys, teachers, and firemen) from jury service [CAL. STATS. 1972, c. 1337, §1, at 198]. Chapter 593 has been enacted to completely rewrite the permissible exemption. Chapter 593 has repealed and added Section 200 to eliminate the previous *professional* exemptions and to now permit an exemption from jury service only where such service is shown to create undue hardship on that person or on the public. Furthermore, Section 199 of the Code of Civil Procedure has been amended to eliminate the previous exemptions for persons who have served on a jury for a total of 20 days within the preceding two years, and for persons excused from jury service pursuant to Section 200 within the preceeding year. Therefore, a person may now be excused from jury service when (1) the person does not possess the qualifications prescribed by Section 198, (2) the person has been convicted of malfeasance in office or any felony, (3) the person is serving as a grand juror in any court of the state, or (4) such service would create undue hardship on that person or the public.

In addition, Section 601 of the Code of Civil Procedure has been amended by Chapter 593 to increase the number of peremptory challenges allowed in a civil trial from six to eight where two parties are involved; and from eight to ten where more than two parties are in-

volved. Furthermore, Section 1070 of the Penal Code has been amended by Chapter 593 to increase the number of peremptory challenges allowed in a criminal trial involving one defendant from 20 to 26 where the offense charged is punishable by life imprisonment and from ten to thirteen where a lesser penalty is involved. Where two or more defendants are jointly tried, Section 1070.5 of the Penal Code requires peremptory challenges to be exercised jointly. Under prior law, five additional challenges were allotted to each defendant to be exercised separately [CAL. STATS. 1949, c. 1312, §3, at 2300]. Section 1070.5, as amended by Chapter 593, increases the number of such challenges to seven.

Section 602 of the Code of Civil Procedure delineates grounds for the exercise of a challenge for cause during a civil trial. One ground allows disqualification of a prospective juror where such juror stands in privity (i.e. guardian and ward, master and servant, or any relationship for which the outcome of the pending action could have affect) with a party to the action. Formerly, however, a prospective juror who was the parent, spouse, or child of a *disqualified juror* could not be similarly challenged for cause even though the outcome of the action could affect such person to the same degree as a disqualified juror [STATE BAR OF CALIFORNIA, 1974 CONFERENCE RESOLUTION 12-2]. Section 602, as amended by Chapter 469, now permits such prospective jurors to be challenged for cause.

See Generally:

1) WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Trial* §§405, 423 (1963) (procedure in ordinary trial).
2) 4 WITKIN, CALIFORNIA PROCEDURE, *Trial* §§107, 118 (2d ed. 1971) (selection of trial jury).
3) CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL PROCEDURE DURING TRIAL §§5.33-5.56 (1960) (examination and challenge of jurors).
4) STATE BAR OF CALIFORNIA, 1973 CONFERENCE RESOLUTION 12-3 (increase of peremptory challenges).

Civil Procedure; interpleader

Code of Civil Procedure §386 (amended).
SB 842 (Grunsky); STATS 1975, Ch 670

Interpleader is a device which permits a stakeholder, who does not know to which of several claimants he or she is or may be liable, to bring those claimants into a single action and require them to litigate their respective claims. Prior to the enactment of Chapter 670, Section 386(a) of the Code of Civil Procedure permitted interpleader in only very narrowly defined circumstances. First, a stakeholder could *initiate*

an action by filing a complaint in interpleader when two or more persons had or may have had adverse claims regarding *specific personal property* held or the *performance of an obligation* owed by the stakeholder. In this instance, the plaintiff-stakeholder, upon an order for substitution and the deposit of the subject matter in controversy into court, was discharged from further liability. Thus, in order for a stakeholder to initiate an action in interpleader as a plaintiff, he or she apparently could not claim an interest in the property or obligation [*But see* Note, *Pleading: Interpleader: 1951 Amendment to California Code of Civil Procedure Section 386*, 39 CAL. L. REV. 591 (1951) for a discussion regarding the possible interpretation that a plaintiff-stakeholder could retain an interest in the subject matter of the interpleader proceeding]. Second, a defendant-stakeholder who had been notified of adverse claims to the *specific personal property or contract* that was the subject matter of the pending action against him or her, could interplead an adverse claimant *not already a party*; or such defendant-stakeholder could file a verified cross-complaint against a *party to the action* admitting liability as to all or any portion of the contract or personal property. As to the liability admitted, the defendant-stakeholder was no longer involved in the proceeding. Thus, a defendant-stakeholder could utilize the device of interpleader even though he or she retained an interest in the subject matter of the action.

Section 386 has been amended by Chapter 670 to more closely conform the California interpleader statute to Rule 22 of the Federal Rules of Civil Procedure. First, in addition to the instances where interpleader is authorized by Section 386(a) discussed above, Section 386(b) significantly broadens the instances where interpleader is available to both plaintiff and defendant stakeholders. Now any person, firm, corporation, association, or other entity may initiate an action in interpleader when claimants have or may have conflicting claims that could expose such person or entity to double or multiple liability. Thus, the availability of interpleader is no longer limited to suits involving a contract, specific personal property, or the performance of an obligation. Where the stakeholder is the *defendant* in a pending action, he or she may, in addition to filing a verified cross-complaint in interpleader, now institute a separate action where the claimants will be required to interplead and litigate their respective claims.

In addition, Section 386(b) now permits any interpleading party or applicant to deny liability *in whole or in part* as to the subject matter of the conflicting claims, thus permitting plaintiff, as well as defendant, stakeholders to retain an interest in the subject of the interpleader action.

Furthermore, the action of interpleader may be maintained although the claims do not have a common origin, the claims are unliquidated and liability has not yet attached to the party who has instituted the action or filed the cross-complaint, or are not identical but rather are adverse and independent of each other.

In addition, pursuant to Section 386(b), a stakeholder may join any party, against whom claims have been made by one of the *claimants*, as a defendant, or such other party may interplead by cross-complaint, provided that the claims arose out of the same transaction or occurrence. For example, assume X negligently causes an automobile accident injuring A and B. A has a $75,000 claim and B has a $50,000 claim against X for personal injury. X is insured by Y insurance company for $100,000. Y company institutes an action in interpleader to compel A and B to come into court and litigate their respective claims to the $100,000. A and B also have a claim against X for the amount in excess of the insurance policy. Thus, Y company, the stakeholder, may join X as a defendant since A and B (claimants) have a claim against X which arose out of the same transaction or occurrence; or X may interplead into the action by filing a cross-complaint.

Section 386 previously contained no express provision authorizing a court to issue restraining orders prohibiting parties from instituting further proceedings that involve the rights or obligations presented by the pending action in interpleader. However, where the court of equity first obtains jurisdiction over the suit, the court has the inherent power to enjoin the initiation and prosecution of additional suits involving the same issues [Dennis v. Overholtzer, 149 Cal. App. 2d 101, 105, 307 P.2d 1012, 1015 (1957)] and, in addition, Section 526 of the Code of Civil Procedure authorizes the issuance of injunctions to prevent a multiplicity of litigation. Section 386 has been further amended by Chapter 670 to now expressly authorize a court, after a complaint or cross complaint in interpleader has been filed, to enter a restraining order prohibiting any action affecting the rights and obligations of the parties to the interpleader action to be instituted until further order by the court.

COMMENT

Chapter 670 has significantly enlarged the instances where interpleader may be utilized by broadening the type of claims subject to this remedy and also by removing the "disinterested stakeholder" requirement as to plaintiffs initiating an action in interpleader. However, with the broadening of the availability of interpleader by Section 386(b), the

viability of Section 386(a) is questionable. Although Subdivision (b) of Section 386 apparently supersedes Subdivision (a) in virtually every instance, it should be noted that Subdivision (a) permits the defendant-stakeholder the *additional* option of applying to the court for an order of substitution, discharging the stakeholder from further liability. It would appear, however, that this remedy is available only to those defendant-stakeholders who come within the narrow definition of Subdivision (a) of Section 386 which permits interpleader only when a *contract or specific personal property* is involved.

See Generally:

1) 3 WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§216-232 (2d ed. 1971) (interpleader).
2) CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL PROCEDURE BEFORE TRIAL, *Interpleader in California*, §§1-6, 12-33 (1957) (interpleader).
3) Alexander, *Abuse and Remedy: Claims in Interpleader*, 44 CAL. S.B.J. 210 (1969).
4) Darling, *Pleadings of Defendants in Interpleader Actions*, 10 L.A. BAR BULL. 125 (1935).
5) Hazard & Moskovitz, *An Historical and Critical Analysis of Interpleader*, 52 CAL. L. REV. 706, 749-763 (1964).
6) Comment, *Interpleader*, 6 STAN. L. REV. 146 (1954).
7) STATE BAR OF CALIFORNIA, 1972 CONFERENCE RESOLUTION 9-9.

Civil Procedure; vexatious litigants—motions

Code of Civil Procedure §§391.1, 391.6 (amended).
SB 1236 (Moscone); STATS 1975, Ch 381
Support: Bar Association of San Francisco

Pursuant to Section 391.1 of the Code of Civil Procedure, a defendant was previously permitted to make a motion, within 30 days after receipt of summons, requesting a court order requiring the plaintiff to furnish security on the grounds that the plaintiff was a vexatious litigant [CAL. CIV. CODE §391] and that there was no reasonable probability that the plaintiff would prevail in the action. Section 391.1, as amended by Chapter 381, now permits such motion to be made at *any time* prior to the entry of final judgment. In addition, Section 391.6, as amended by Chapter 381, now provides that where a motion pursuant to Section 391.1 is filed *prior to trial*, the defendant is not required to plead until ten days after the motion is denied or the required security is furnished by the plaintiff. However, where such motion is made *at trial or prior to final judgment*, the proceedings will be suspended after the motion is denied or the security is furnished, for such time as the court deems proper. Further, the amendments enacted by Chapter 381 will apply to any proceeding commenced prior to or after January 1, 1976.

See Generally:
1) 2 WITKIN, CALIFORNIA PROCEDURE, *Actions* §§204, 205 (2d ed. 1971) (vexatious litigants).
2) 38 JOURNAL OF THE STATE BAR OF CALIFORNIA, SELECTED 1963 LEGISLATION 660, 664 (1963).

Civil Procedure; injunctions and restraining orders

Code of Civil Procedure §527.3 (new).
SB 743 (Moscone); STATS 1975, Ch 1156
Opposition: California Conference of Employer Associations; California Manufacturers Association

Section 527.3 has been added to the Code of Civil Procedure by Chapter 1156 for the purpose of promoting the rights of workers and preventing unnecessary interference by the courts in labor disputes by delineating various activities as *legal* and therefore not within a court's jurisdiction to issue either a temporary restraining order or preliminary or permanent injunction. However, this section is to be strictly construed in accordance with the existing law governing labor disputes. The activities now declared legal are similar to those contained in Section 194(e) of Title 29 of the United States Code and include publicizing, obtaining, or communicating information of existing facts involving a labor dispute (including, *inter alia*, advertising, speaking, patrolling, or any means not employing fraud, violence, or breach of the peace), and peaceful assemblage to institute such acts. In addition, Chapter 1156 has incorporated the Norris-La Guardia Act's [29 U.S.C. §§101-115 (1970)] definition of "labor dispute" within Section 527.3 such that a "labor dispute" now includes any controversy (except jurisdictional strikes [CAL. LABOR CODE §1118]) between persons involved in the same industry or occupation (employers or employees or association of employers or employees) concerning the terms or conditions of employment, or the representation of persons in regulating, fixing, maintaining, or changing the conditions of employment. Further, as to any conflict between this section and the Agricultural Labor Relations Act of 1975 [CAL. LABOR CODE Part 3.5 (commencing with §1140); *see* REVIEW OF SELECTED 1975 CALIFORNIA LEGISLATION this volume at 444 (Employment Practices; agricultural labor—collective bargaining)] the Agricultural Labor Relations Act will control. Additionally, this section is not intended to alter either the legal rights of public employees or their employers, or parties to collective bargaining agreements [CAL. LABOR CODE §1126]. Finally, this section is not intended to authorize any unlawful conduct (including, *inter alia*, breach of the peace, disorderly conduct, unlawful blocking of access and egress).

COMMENT

In enacting Chapter 1156, the legislature recognized that the issuance of a temporary restraining order or preliminary injunction only upon affidavit of an interested party and without notifying or giving the opposing party an opportunity to be heard prior to its issuance, was subject to abuse [CAL. STATS. 1975, c. 1156, §1, at]. Furthermore, in *United Farm Workers v. Superior Court* [Cal. 3d , 537 P.2d 1237, 122 Cal. Rptr. 877 (1975)], the California Supreme Court recently declared that the issuance of a temporary restraining order in matters where substantial free speech interests are at stake without requiring reasonable attempts to notify the opposing party is unconstitutional [*Id.* at , 537 P.2d at 1244, 122 Cal. Rptr. at 884]. The court found that the absence of a notice requirement resulted in a lack of facts and law supporting the opposing position and a naturally biased presentation by the moving party which deprives the court of the diversity of perspective essential to a just and proper decision [*Id.* at , 537 P.2d at 1241, 122 Cal. Rptr. at 881]. Thus, the legislature has determined that, as to certain lawful conduct, the equity jurisdiction of the courts of California should be restricted for the purpose of allowing workers full freedom of association, self-organization, and the right to engage in activities which promote or protect their interests [CAL. STATS. 1975, c. 1156, §1, at].

See Generally:
1) 2 WITKIN, CALIFORNIA PROCEDURE, *Provisional Remedies* §§46-51 (2nd ed. 1971) (injunctions and restraining orders).

Civil Procedure; judgment by confession

Code of Civil Procedure §1132 (amended).
SB 380 (Petris); STATS 1975, Ch 304
Support: Western Center on Law and Poverty
Opposition: California Association of Collectors

Section 1132 of the Code of Civil Procedure permits the employment of a confession of judgment, which consists of a written statement by a debtor authorizing the entry of a judgment for a debt or contingent liability without court action and in advance of any legal controversy. Section 1133 of the Code of Civil Procedure requires that the confession contain a verified statement by the defendant authorizing the entry of a judgment for a specific sum and a concise statement of the facts out of which the obligation arose. Section 1132 has been amended by Chapter 304 to additionally require that an attorney representing the defendant sign a certificate stating that he or she has examined the con-

fession, has advised the defendant regarding the waiver of notice and hearing, and recommended that the defendant utilize the confessed judgment procedure in order for a confessed judgment to become final where liability arises from goods purchased or services rendered primarily for personal, family, or household purposes, or where credit has been extended to purchase such goods or obtain such services. This certificate and the verified statement executed by the defendant pursuant to Section 1133 must be filed with the clerk of the court where judgment is to be entered.

COMMENT

The social utility and value of confessed judgments has been questioned by many states [Comment, *Cognovit Revisited: Due Process and Confession of Judgment*, 24 HAST. L. REV. 1045, 1046 (1973)]. The basic controversy concerns the harshness of permitting a judgment to be entered against a debtor without notice that proceedings have been initiated [*Id.*]. In *D.H. Overmyer Co. v. Frick Co.* [405 U.S. 174 (1972)], the Supreme Court considered the preliminary question of whether or not confessed judgments were in violation of the due process requirements of the fourteenth amendment. The Court held that procedural due process can be waived and that confessed judgments do not violate due process if the debtor *knowingly, intelligently, and voluntarily* waives his or her right to notice and court hearing. Thus, the present legislation is apparently intended to provide a means of informing a consumer of the effect of a confessed judgment and to thereby insure that an individual's right to due process is not violated.

Civil Procedure; judgments—effect upon nonparties

Code of Civil Procedure §1908 (amended).
AB 940 (Brown); STATS 1975, Ch 225

Section 1908 of the Code of Civil Procedure provides that parties to an action and their successors in interest are bound by a judgment as to those matters directly litigated. The court in *Stafford v. Russell* [117 Cal. App. 2d 319, 320, 255 P.2d 872, 873 (1953)] held, using the language contained in Section 84 of the Restatement of Judgments, that a nonparty who *controls* the proceeding (individually or as a member of a group) and has a proprietary or financial interest in the judgment or in the determination of a question of fact or law is bound by a judgment to the same extent as a party to the action. In addition, a party to the action with notice of a nonparty's participation is equally bound

[Dillard v. McKnight, 34 Cal. 2d 209, 216, 209 P.2d 387, 393 (1949)]. Section 1908, as amended by Chapter 225, codifies these judicial holdings.

Finally, Chapter 225 establishes a procedure for determining whether a nonparty is bound by a judgment pursuant to this section by authorizing a party or a nonparty to file a noticed motion before the judgment becomes final, or by bringing a separate action after judgment becomes final.

See Generally:
1) 4 WITKIN, CALIFORNIA PROCEDURE, *Judgment* §§226-234 (2d ed. 1971) (effect on parties, privies and strangers).
2) RESTATEMENT OF THE LAW OF JUDGMENTS §84 (1942).

Civil Procedure; prejudgment attachment

AB 919 (McAlister); STATS 1975, Ch 200

Support: California Law Revision Commission

Chapter 550 of the Statutes of 1972 [CAL. CODE CIV. PROC. Chapter 4 (commencing with §537)] was enacted in response to the supreme court's ruling in *Randone v. Appellate Dep't* [5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971)] declaring California's prejudgment attachment procedure unconstitutional [Comment, *Attachment in California: Senate Bill 1048, The Interim Response to Randone*, 4 PAC. L. J. 146 (1973)]. This interim legislation was to expire on December 31, 1975, and Chapter 1516 of the Statutes of 1974, the permanent prejudgment attachment legislation, was to become operative on January 1, 1976. The permanent legislation affects many changes in the area of prejudgment attachment including: (1) the restriction of instances in which prejudgment attachment is authorized to only those claims based on an unsecured contract that arise from a commercial transaction, (2) the requirement that notice of attachment inform the defendant of his or her rights and duties under the attachment procedure, and (3) the restriction of temporary restraining orders to only those instances where great or irreparable injury will result if the order is not issued [For additional changes see 6 PAC. L.J., REVIEW OF SELECTED 1974 CALIFORNIA LEGISLATION 195 (1975)]. Chapter 200 has been enacted to postpone the expiration date of the interim legislation to December 31, 1976 and the operative date of the permanent legislation to January 1, 1977.

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1) JOURNAL OF THE CALIFORNIA ASSEMBLY 13010 (1974-75 Reg. Sess.).
2) *Recommendation Relating to Prejudgment Attachment*, 11 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS AND STUDIES 701-905 (1973).

3) 4 PAC. L.J., REVIEW OF SELECTED 1972 CALIFORNIA LEGISLATION 292 (1973) (prejudgment attachment).
4) Comment, *Attachment in California: Senate Bill 1048, The Interim Response to Randone*, 4 PAC. L.J. 146 (1973).

Civil Procedure; exemptions from execution

Civil Code §4701 (amended);
Code of Civil Procedure §690.18 (amended).
AB 593 (McAlister); STATS 1975, Ch 509
Support: California District Attorneys' Association; California Peace Officers' Association
Opposition: California Rural Legal Assistance

Section 4701 of the Civil Code authorizes a court to order the parent of a minor child to assign his or her wages to the person or agency designated by the court, as payment for such child's support, maintenance, or education. Wages paid to federal government employees, however, were formerly exempt from such court-ordered assignments on the basis of a court opinion which held that such an assignment involved the federal government in litigation to which it has not consented, in violation of the government's sovereign immunity [Applegate v. Applegate, 39 F. Supp. 887, 889-90 (E.D. Virginia) (1941)]. In addition, Section 690.18 of the Code of Civil Procedure formerly exempted from execution all pensions, credits, and benefits (including annuity, retirement, disability, and death benefits) received from a federal, state or private source.

In response to recommendations by state officials, the United States Congress enacted the Social Services Amendment of 1974 [Pub. L. No. 93-647 (Jan. 4, 1974)] effective January 1, 1975, to specifically consent to the assignment of federal government employee's wages as well as attachment of any pension, credit, or benefit for child or spousal support [4 U.S. Code Cong. & Ad. News 8133, 8157 (93rd Cong., 2d Sess. 1974)]. Section 4701 of the Civil Code, as amended by Chapter 509, now authorizes the assignment of employees' wages, benefits, or return of contributions received from a federal, state, or public source as payment for child support. In addition, Section 4701(h) delineates the procedure for making such moneys available for child support payments. This procedure, however, does not apply to the United States Government. An employer served with an order of assignment must send the employee's contributions to the clerk of the court where the order issued. Upon receipt of such moneys, the clerk is required to send written notice to the employee, the person entitled to receive the child support pay-

ments, and the agency which ordered that such payments be made, that the money is available to satisfy an order for *child support*. If proceedings have not been initiated within 30 days, the clerk may release the money to the employee upon his or her request. Finally, Section 690.18 of the Code of Civil Procedure has been amended to allow payments for child or spousal support to be satisfied from any pension, benefit, or credit received from a federal, state, or public source.

Civil Procedure; garageman lien sales

Civil Code §3071.3 (new); §§3071, 3073 (amended); Vehicle Code §22705 (amended).
AB 2044 (MacDonald); STATS 1975, Ch 1036
(Effective September 24, 1975)

A garageman holding a lien on a vehicle may conduct a lien sale if he or she has authorization from the Department of Motor Vehicles, a judgment on the claim out of which the lien arose, or a signed release for the sale from the registered owners and all others known by the garageman to have an interest in the vehicle. Prior to the enactment of Chapter 1036, no distinction based on the value of the vehicle was drawn in the procedure to be followed in conducting a lien sale. Section 3071.3 of the Civil Code, as added by this chapter, now delineates a different procedure to be followed in the event the garageman certifies, under penalty of perjury, that the vehicle is worth less than $200. Instead of requesting departmental approval for the lien sale, the lienholder must, in the absence of a judgment or release, now notify all registered owners, legal owners, and interested parties that a lien sale *may* be conducted by sending, via certified mail, return receipt requested, a certificate of lien (§3071.3(c)) and a form through which the registered owner or interested party may declare opposition to the sale (§3071.3(d)). This declaration of opposition is to be sent by the owner to the Department of Motor Vehicles, and if the Department receives it within 20 days from the date of mailing by the lienholder, it must notify the lienholder within ten days of receipt that no sale may take place unless a judgment or release, as provided for in Section 3071.3(a), has been obtained. Section 3071.3 still permits a lien sale without departmental approval where a judgment on the claim out of which the lien arose has been obtained, or where the lienholder has obtained a release of any interest in the vehicle from the registered owner. If the lienholder fails to receive notice of the owner's objection from the Department within 36 days of mailing the certificate of lien, he or she

may proceed with the sale. The lien is extinguished, however, if the lienholder fails to institute judicial action within 20 days of notice of receipt of the declaration of opposition from the Department, has failed to notify the Department of the lien within ten days after it has arisen (it arises when a written statement of charges is furnished the registered owner), or, where the provisions of Section 3071.3 are not utilized, if no action has been initiated in court within 30 days after the lien has arisen. Mobilehomes required to be moved by permit [CAL. VEHICLE CODE §35790] are expressly excepted from the provisions of Section 3071.3, and therefore mobilehomes lienholders must still follow the procedure set forth in Section 3071, regardless of its value.

If the lienholder is permitted to conduct a lien sale, Section 3073 as amended requires notice of the sale to be posted at his or her place of business *and* where the vehicle is stored. Previously, notice was posted only where the vehicle was stored. Section 3073 also previously required notice of the time and place of sale to be given to the registered owner ten days prior to the sale where the vehicle was worth less than $200, although the lienholder had an option of giving notice by registered mail, certified mail, or United States Post Office certificate of mailing. The option of notifying by registered mail has been eliminated by Chapter 1036, along with the requirement of notifying at least ten days prior to the sale. Therefore it would appear that notification of the time and place of sale can be given any time prior to the sale.

COMMENT

It is unclear whether the notice and hearing requirements of procedural due process, as delineated in *Adams v. Department of Motor Vehicles* [11 Cal. 3d 146, 520 P.2d 961, 113 Cal. Rptr. 145 (1974)], are met by this legislation. Although the lienholder must send the certificate of lien and the declaration of opposition by certified mail, it is arguable that this is inadequate notice. Since the 20 day period begins when the certificate of lien is mailed as opposed to when received, it is conceivable that the owners would not actually receive notice until the 20 day period had elapsed. If so, it would appear that the registered owner would have no adequate method of preventing the sale if he or she wishes to contest the lien. For example, if the owner were on vacation when the notice was mailed, it is possible that the sale could occur prior to actual receipt of such notice by the owner. Furthermore, it would seem that a potential problem might develop if the Department fails to notify the lienholder within ten days of receiving a declaration of opposition. If for some reason there is a delay, so that no notice

is received from the Department by the lienholder within 36 days, the lienholder will be permitted to proceed with the sale, despite compliance with the provisions of this chapter by the person wishing to contest the lien. Thus despite a request for a hearing, the sale could occur, apparently in violation of the constitutional due process provisions as they relate to the requirement of a hearing [CAL. CONST. art. 1, §15].

See Generally:
1) Comment, *California Garagemen's Liens—Impact and Aftermath of Adams v. Department of Motor Vehicles*, 6 PAC. L.J. 98 (1975).
2) 6 PAC. L.J., REVIEW OF SELECTED 1974 CALIFORNIA LEGISLATION 228 (1975) (garageman liens).

Civil Procedure; preliminary 20-day notice

Civil Code §3097.1 (new); §§3097, 3114 (amended).
AB 390 (Bannai); STATS 1975, Ch 46
Support: Contractors State License Board; Registrar of Contractors; California State Builders Exchange

Civil Code Section 3097 requires that a lien claimant file a written preliminary 20-day notice prior to the recording of a mechanic's lien or stop notice. Section 3097(f) has been amended by Chapter 46 to revise the methods by which a preliminary 20-day notice may be served. Previously this section authorized notice to be served by personal delivery, or by either leaving a copy of the notice at or mailing a copy to the residence or place of business of the person to be served. Where the address of the person to be notified was not known, Section 3097(f) additionally permitted service to be completed by sending a preliminary 20-day notice to the jobsite by either first-class, registered, or certified mail. Section 3097(f), as amended by Chapter 46, no longer allows service of a preliminary 20-day notice by mailing a copy to the jobsite. The other methods, as enumerated above, remain as the only authorized means by which notice may be given.

Previously, Section 3097(f) contained no provision for service of a preliminary 20-day notice on a nonresident. As amended by Chapter 46, Section 3097(f) now permits a nonresident to be served by any method permitted for service of a resident; and if that person cannot be served by those methods, then notice may additionally be given by first-class, certified, or registered mail, addressed to the construction lender or to the original contractor. Furthermore, Section 3097(1) has been added by Chapter 46 to require every written contract between a property owner and an original contractor to provide a space

for the owner to enter his or her name, address, and place of business. Copies of the contract containing the owner's name and address must be kept available by the contractor for use by any person seeking to serve a preliminary 20-day notice in compliance with Section 3097(f).

Chapter 46 has also added Section 3097.1 to the Civil Code to require proof that the preliminary 20-day notice has been served, where previously there was no such requirement. Proof of service may be obtained by having the person to be notified sign and return an acknowledgment form. If the acknowledgment form is not returned within 30 days of its receipt, the person making the service may complete an affidavit showing time, place, manner of service, and any additional facts which show service was made in accordance with Section 3097. Section 3114 has been amended to provide that enforcement of a lien is expressly dependent upon compliance with the requirement for service of notice and proper proof of service. The additions and changes made by Chapter 46 were apparently intended to insure that actual notice be received by an owner of real property. Having received notice, a property owner is then in a position to take any necessary steps to protect himself or herself from having to pay twice for the same work.

See Generally:
1) CONTINUING EDUCATION OF THE BAR, CALIFORNIA MECHANICS' LIENS AND OTHER REMEDIES §§3.8, 4.1 (1972).

Civil Procedure; banker's liens

Civil Code §3054 (amended); Financial Code §§864, 7609.5 (new). AB 711 (Sieroty); STATS 1975, Ch 948

Under prior law, debts incurred by a customer in the course of doing business with a bank or savings and loan association could be offset, without court regulation or sanction, against such customer's deposit accounts (including, *inter alia*, checking and savings accounts) maintained with the bank by invoking the right of equitable setoff [Note, *Banker's Lien and Equitable Setoff: Constitutional and Policy Considerations for Protecting Bank Customers*, 27 STAN. L. REV. 1149, 1153 (1975)]. In *Kruger v. Wells Fargo Bank* [11 Cal. 3d 352, 521 P.2d 441, 113 Cal. Rptr. 449 (1974)] the court recognized, however, that the assertion of the right of setoff often resulted in inequities and damage that could not be totally redressed [*Id.* at 358, 521 P.2d at 443, 113 Cal. Rptr. at 451]. Chapter 948 has added Sections 864 and 7609.5 to the Financial Code to provide that the right to any setoff cannot be invoked to reduce the *total* balance of all deposit accounts, maintained by that

customer at that bank or savings and loan association, or any branch of that bank or savings and loan association, to below $1,000 as shown by its records. Additionally, notice of the setoff must now be given to the customer, either by personal delivery or first class mail, within one day after its exercise. Such notice must contain (1) the customer's account number, (2) the balance of that account before and after the setoff, (3) the identity of the debt claimed to be owed to the bank or savings and loan association, and (4) the balance of that debt before and after the setoff. Further, the bank or savings and loan association is required to inform the customer that if he or she claims that the debt has been paid, is not now owing, or the funds contained in the deposit account are exempt pursuant to Chapter 1 (commencing with §681) of the Code of Civil Procedure (except Code of Civil Procedure Section 690.6) or Civil Code Section 1257 the customer may so indicate on the response form provided with the notice. Upon the receipt of the response form by the bank or savings and loan association, the setoff must be reversed and the customer's account credited. The limitations imposed by these sections, as discussed above, do not apply to a deposit account (other than a demand deposit account) where, pursuant to a written contract, the bank has retained a security interest in the account as collateral for the debt, or where the customer has given written authorization that the account may be periodically debited as a method of the debts repayment. Further, this section applies only to debts which mature on or after July 1, 1976.

Section 3054 of the Civil Code permits a banker to obtain a general lien on all of a customer's property in such banker's possession, for the balance of a debt incurred by the customer's dealing with the bank. Section 3054 has been amended by Chapter 948 to subject the exercise of such lien with respect to a deposit account to the limitations contained in Section 864 of the Financial Code (discussed *supra*). However, the significance of this amendment is questionable since, by judicial decision, deposit accounts cannot *technically* be subjected to a lien since the bank takes title to the funds deposited in the account and by definition it is not possible to have the title to and a lien in property reposed in the same person [Gonsalves v. Bank of America, 16 Cal. 2d 169, 173, 105 P.2d 113, 121 (1940)]. Funds contained in a deposit account are more properly the subject of an equitable setoff [*Id.*].

See Generally:

1) Burke, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 47 S. CAL. L. REV. 1, 33-41 (1974).
2) *Comment on Recent Cases*, 7 CAL. L. REV. 341 (1916) (nature of banker's liens).
3) *Comment on Cases*, 11 CAL. L. REV. 111 (1923) (setoff of general deposits).

Civil Procedure; court appearances by corporations

Code of Civil Procedure §90 (new).
AB 1514 (Arnett); STATS 1975, Ch 633

Prior to the enactment of Chapter 633, an appearance by a corporation in any court other than a small claims court had to be made through an attorney [Paradise v. Nowlin, 86 Cal. App. 2d 897, 898, 195 P.2d 867 (1948)]. The court in *Paradise v. Nowlin* observed that a corporation "is an artificial entity created by law and as such can neither practice law nor appear or act in person" [*Id.*]. Section 90 has been added to the Code of Civil Procedure by Chapter 633 to now provide that an officer, director, or an employee of a corporation, whether or not he or she is an attorney, may appear for a corporation in *municipal* court, as well as in small claims court. Since a municipal court has original jurisdiction over any case in which the demand or value of the property in controversy is $5,000 *or less* [CAL. CODE CIV. PROC. §89], requiring a corporation to retain the services of an attorney to defend an action in municipal court could easily result in attorney's fees in excess of the amount of the claim. Therefore, by making such an appearance in municipal court through an officer, director, or an employee, a corporation may now avoid costly attorney's fees, and may thereby afford to defend such cases.

Civil Procedure; small claims court

Code of Civil Procedure §§117*l*, 117*ll* (repealed); §§117b, 117g, 117ha, 117j, 916 (amended).
AB 488 (Chappie); STATS 1975, Ch 1228
SB 212 (Mills); STATS 1975, Ch 266
SB 1072 (Cusanovich); STATS 1975, Ch 990

Prior to the enactment of Chapter 1228, the subject matter of a claim filed in small claims court did not have to be disclosed in the complaint. Section 117b of the Code of Civil Procedure, as amended by Chapter 1228, now requires such disclosure. In addition, Section 117g previously did not require the person either instituting or defending an action in small claims court (either as the plaintiff, defendant, or an employee or officer appearing for a plaintiff or defendant corporation) to disclose the fact that he or she is an attorney. Section 117g, as amended by Chapter 1228, now requires the person *instituting* an action in small claims court to disclose, in the claim filed, the fact that he or she is an attorney and that the defendant, if not an attorney, has the right to make an *ex parte* motion, either in person or by mail, requesting that the case

be transferred to the justice or municipal court with jurisdiction. In addition, Section 117g has also been amended to require a person *defending* an action in small claims court to disclose to the court, in writing not later than 48 hours before the time scheduled for the hearing, that he or she is an attorney. Failure to give such notice will bar the party who is an attorney from defending the action and thus, where the *defendant* is an attorney and fails to give such notice, the plaintiff will necessarily receive judgment by default since such defendant is precluded from being represented by another in the action [CAL. CODE CIV. PROC. §117g]. However, where the defendant is a corporation being defended by an attorney, the corporation is not precluded from obtaining another officer, employee, or agent to defend the action. Either prior to or at the hearing, the plaintiff is to be informed by the court that the defendant is an attorney, and that if the plaintiff is not an attorney but wishes to be represented by counsel, he or she has the right to request that the case be transferred to the court with jurisdiction.

Under prior law, if the defendant appealed an adverse decision rendered in small claims court, the plaintiff corporation was *required* to then be represented by an attorney [Paradise v. Nowlin, 86 Cal. App. 2d 897, 898, 195 P.2d 867 (1948)]. Section 117j of the Code of Civil Procedure, as amended by Chapter 990, now permits an *agent* to represent the plaintiff corporation in superior court should the defendant appeal the decision. Furthermore, Section 117j of the Code of Civil Procedure previously required any *defendant* wishing to appeal an adverse decision rendered in small claims court to post bond in the amount of the judgment rendered, interest on that judgment, and such additional costs as may be awarded to the plaintiff if the decision is affirmed. In *Brooks v. Small Claims Court* [8 CAL. 3d 661, 504 P.2d 1249, 105 Cal Rptr. 785 (1973)], the court declared that requiring a defendant to post bond as a condition to the filing of an appeal constituted a "taking" (even though temporary), in violation of the due process clause of the fourteenth amendment [*Id.* at 667-671, 504 P.2d at 1253-56, 105 Cal. Rptr. at 789-92]. Section 117j of the Code of Civil Procedure has been amended by Chapter 266 to delete the provision requiring a bond as a condition to an appeal. In addition, Section 117ha of the Code of Civil Procedure has been amended to provide that enforcement of the judgment will be automatically stayed until the time for filing an appeal has expired, or if an appeal has been filed, until a decision is rendered by the superior court. These sections, as amended by Chapter 266, therefore are now in conformity with the court's holding in *Brooks*.

See Generally:
1) Adams, *Defendant's Right to Counsel in Small Claims—Real or Fictional? [The Bond that Backfired]*, 45 CAL. S.B.J. 226 (1970).

Civil Procedure; declarations under penalty of perjury

Code of Civil Procedure §2015.5 (amended).
SB 724 (Holmdahl); STATS 1975, Ch 666
(Effective January 1, 1977)
Support: State Bar of California
Opposition: Judicial Council

Section 2015.5 of the Code of Civil Procedure provides that a declaration under penalty of perjury may be utilized in those instances where a sworn statement would be allowed to support, establish, evidence, or prove a matter. Previously, however, this section permitted such declarations to be so used only if they were executed pursuant to the law of California. Section 2015.5 has been amended by Chapter 666 to now permit the use of declarations under penalty of perjury executed pursuant to the law of *any* state. Thus, this elimination of the previous limitation on the execution of a declaration under penalty of perjury is in keeping with reciprocity and the advance in the expeditious handling of documents [STATE BAR OF CALIFORNIA, 1974 CONFERENCE RESOLUTION 11-25].

See Generally:
1) 3 WITKIN, CALIFORNIA PROCEDURE, *Pleading* §350 (2d ed. 1971) (declarations under penalty of perjury).
2) CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL PROCEDURE BEFORE TRIAL MOTIONS, *Declarations and Affidavits, and Orders* §§31, 34 (1957) (use of declarations under penalty of perjury in place of affidavits).

Civil Procedure; dissolution of marriage

Civil Code §4509 (amended).
AB 460 (Maddy); STATS 1975, Ch 35
Support: State Bar of California

Section 4509 of the Civil Code has been amended by Chapter 35 to provide that evidence of specific acts of misconduct is improper and inadmissible in a proceeding for legal separation or dissolution of marriage. Section 4509 previously recognized two instances where specific acts of misconduct were allowed into evidence: where child custody was at issue or where the court determined that it was "necessary" to establish the existence of irreconcilable differences. Section 4509, as amended by Chapter 35, no longer permits evidence of misconduct to

establish irreconcilable differences, although such evidence is still permitted where child custody is in issue.

COMMENT

The Family Law Act [CAL. CIV. CODE §4000 *et seq.*] was designed to restructure the existing divorce laws and eliminate fault as a standard for divorce [*Report of the 1969 Divorce Reform Legislation*, JOURNAL OF THE ASSEMBLY 8054-63 (1969 Reg. Sess.)]. After its enactment, irreconcilable differences became the primary ground for dissolution of the marriage, and a court was precluded by Section 4509 from allowing specific acts of misconduct into evidence; although, as discussed above, two exceptions were retained. The exception that allowed introduction of evidence regarding misconduct to establish irreconcilable differences was intended to apply only in very narrowly defined circumstances [*Id.* at 8059]. However, Section 4509 did not provide any guidelines as to when such evidence was "necessary," and consequently such determinations were left to the discretion of the trial judge. Liberal interpretation of this exception resulted in the continuation of the fault standard and effectively circumvented the stated goals of the Family Law Act [Comment, *The End of Innocence: Elimination of Fault in California Divorce Law*, 17 U.C.L.A. L. REV. 1306, 1322 (1970)]. The present amendment deletes this exception and thus eliminates the primary inconsistency between the goals of the Family Law Act and its application, as the courts may no longer admit evidence of misconduct to determine the existence of irreconcilable differences.

See Generally:
1) CONTINUING EDUCATION OF THE BAR, ATTORNEY'S GUIDE TO FAMILY LAW ACT PRACTICE §§3.23, 3.24 (1972).
2) STATE BAR OF CALIFORNIA, 1971 CONFERENCE RESOLUTION 6-10 (dissolution of marriage).

Civil Procedure; mentally disordered persons

Welfare and Institutions Code §§4014.5, 5152.1, 5152.2, 5358.6, 5369.1, 5370.1, 5371, 5402, 5404 (new); §§5150, 5303.1, 7325 (amended).
AB 1422 (Lanterman); STATS 1975, Ch 960
Opposition: Department of Finance

The Lanterman-Petris-Short Act (hereinafter referred to as LPS Act) [CAL. WELF. & INST. CODE §5000 *et seq.*] provides procedures for the involuntary commitment to mental health facilities of persons who are a danger to themselves or others or who are gravely disabled. It also

provides procedures for the appointment of conservators for such persons. Chapter 960 amends several sections of the LPS Act, changing both pre- and post-commitment procedures.

Prior to the enactment of Chapter 960, Section 5150 provided that any person who was a danger to himself or others as a result of mental disorder, or who was gravely disabled, could be placed in a mental health facility by a peace officer or other designated person upon reasonable cause [CAL. STATS. 1971, c. 1593, §368, at 3337]. Chapter 960 has amended Section 5150 of the Welfare and Institutions Code to require probable, rather than reasonable, cause before such incarceration may be made. This change was not intended to alter the actual standard, but rather was intended only to change the language of the section to replace the more ambiguous term "reasonable cause" with the more familiar term "probable cause." In addition, the requirement that the peace officer or other specified person make his or her decision to detain the disturbed person on the basis of personal observation has been deleted from Section 5150. These changes were made after publication of the results of a widely distributed professional questionnaire, in which 80.7 percent of the law enforcement officials and mental health professionals agreed that peace officers should be allowed to apply the standards of probable cause in determining whether or not to take a person to a 72-hour evaluation facility pursuant to Section 5150 [*Mentally Disordered Criminal Offender Professional Questionnaire, Prepared by the Assembly Select Committee on Mentally Disordered Criminal Offenders, Hon. Frank Lanterman, Chairman, February, 1974* (questionnaire and responses) (hereinafter cited as *Questionnaire*) (on file at the *Pacific Law Journal*)]. If the probable cause for detention is based on the statements of another person, this person may be liable in a civil action if he or she intentionally gives a statement which he or she knows to be false (§5150).

Section 5301 delineates procedures for the detention of an imminently dangerous person for an additional 90-day period after a 14-day period of intensive treatment. The professional person in charge of the facility who is responsible for the disturbed person must petition the court to extend the commitment period of the disturbed person, and a hearing or jury trial must be conducted on this petition. Chapter 960 has amended Section 5303.1 of the Welfare and Institutions Code to provide that the court may appoint a psychiatrist or psychologist with forensic skills to examine the disturbed person prior to any hearing or jury trial on the petition for 90 days' additional inpatient treatment. If such a psychiatrist or psychologist is appointed, he or she is *required* to testify

at the hearing or trial on the petition, and neither the professional person who petitioned for the additional inpatient treatment nor the physicians who provided the intensive treatment are required to be present at the hearing or trial on the petition unless subpoenaed by the person who is the subject of the hearing or trial. The use of these post-certification procedures has been rare, with only 18 petitions for additional treatment having been filed in the 1972-73 fiscal year, while petitions *could have* been filed to commit 6,247 people [Letter from William Mayer, M.D., Director of Health, to Assemblyman Frank Lanterman, June 7, 1974, on file in Assemblyman Lanterman's office]. Apparently, petitioning psychiatrists were reluctant to go to court to testify on such petitions [*Questionnaire, supra,* question 6, at 7], and it would appear that this change to Section 5303.1 will encourage greater use of post-certification procedures by allowing the filing of a petition without the necessity of a court appearance, while ensuring that an examining psychiatrist or psychologist who has personally examined the disturbed person is present at the hearing or trial.

Pursuant to the provisions of Section 5358 of the Welfare and Institutions Code, an LPS conservator may, by court order, be given the right to place his or her conservatee in an inpatient facility for treatment. Section 5358.6 has been added by Chapter 960 to provide that any conservator who has this right may also require the conservatee to undergo outpatient treatment.

Section 5365, which provides that a potential conservatee shall have the public defender or other counsel appointed to represent him or her in proceedings to establish an LPS Act conservatorship, has been interpreted by the California Attorney General to apply only to public conservatorships such that this right to be appointed counsel under Section 5365 does not extend to a proposed private conservator [52 OPS. ATT'Y GEN. 260 (1969)]. Chapter 960 has therefore added Section 5370.1 to the Welfare and Institutions Code to now provide that the court may, at its discretion, appoint the county counsel or a private attorney to represent a private conservator in all proceedings connected with a conservatorship if he or she is unable to afford the services of counsel.

See Generally:
1) CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONSERVATORSHIPS §§8.1-8.63 (Supp. 1974).

Civil Procedure; contempt of court—sentence

Code of Civil Procedure §§128, 1209 (amended).
AB 1170 (Berman); STATS 1975, Ch 836

Support: State Bar of California; American Civil Liberties Union
Opposition: California District Attorneys' Association; California Peace Officers' Association

Prior to the enactment of Chapter 836, an attorney found in contempt of court, based upon conduct committed in the presence of the court, could be summarily sentenced and required to serve a sentence or pay a fine before he or she could challenge the validity of the contempt order [CAL. CODE CIV. PROC. §1211]. The justification for this procedure had been determined to lie with the trial courts' "inherent statutory power to exercise reasonable control over the orderly administration of justice and to maintain the dignity and authority of the court" [People v. Fusaro, 18 Cal. App. 3d 877, 887-88, 96 Cal. Rptr. 368, 374 (1971)]. Code of Civil Procedure Sections 128 and 1209, as amended by Chapter 836, now provide that where an attorney, an attorney's investigator or agent, or someone acting under an attorney's direction is cited for contempt in the preparation or conduct of any *criminal* or *civil* action, the sentence is to be stayed for a period of three judicial days within which time a petition for extraordinary relief testing the lawfulness of the court's order may be filed. Once the petition for extraordinary relief has been filed, it is then within the discretion of the reviewing court whether or not to further stay the execution of the contempt sentence [CAL. CODE CIV. PROC. §1072; CAL. PEN. CODE §1507]. Finally, this section does not stay the sentence when the conduct forming the basis of the contempt order is disrespect toward the court or its judicial officers [CAL. BUS. & PROF. CODE §6068].

See Generally:
1) 4 WITKIN, CALIFORNIA PROCEDURE, *Trial* §§138, 152 (2nd ed. 1970) (contempt during trial).
2) CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL WRITS, *Drafting Petition* §§10.42-10.47, 17.12 (1970) (major use of certiorari: review of contempt proceedings).
3) Note, *Summary Punishment for Contempt: A Suggestion that Due Process Requires Notice and Hearing Before An Independent Tribunal*, 39 S. CAL. L. REV. 463 (1966).

Civil Procedure; filing fees on appeal

Government Code §68926 (amended).
SB 614 (Song); STATS 1975, Ch 986

An appeal from a decision rendered in a civil proceeding may be instituted by the filing of a *notice of appeal* with the clerk of the superior court [CAL. COURT RULES, Rule 1]. Although Section 68926 of the Government Code requires a $50 filing fee as a prerequisite to such an

appeal, the fee did not previously have to be paid until the record (to be considered on appeal) had been filed. Since this initial step for instituting an appeal did not previously require any financial commitment, an appellant was not deterred from filing a notice of appeal even though he or she had no intention of completing the appeal; and such filing resulted in the depletion of the courts' already limited resources [NATIONAL CENTER FOR STATE COURTS, THE CALIFORNIA COURTS OF APPEAL 40 (1974)]. Section 68926, as amended by Chapter 986, now requires that the $50 filing fee be paid at the time notice of the appeal is filed, apparently to discourage frivolous and unnecessary appeals; and, at the very least, to cover the initial cost of instituting an appeal.

Filing fees as a prerequisite to an appeal, however, may be waived since the California Supreme Court in *Ferguson v. Keays* [4 Cal. 3d 649, 484 P.2d 70, 94 Cal. Rptr. 398 (1971)] extended *in forma pauperis* relief to the *appellate level* on the basis of the court's inherent power to formulate rules not inconsistent with existing statutes [*Id.* at 656, 484 P.2d at 74, 94 Cal. Rptr. at 402]. In addition, the court observed that until the Judicial Council or Legislature address this area, the individual courts could continue to formulate their own standards for granting *in forma pauperis* relief [*Id.*]. Therefore, Section 68926 has been further amended by Chapter 986 to expressly authorize the Judicial Council to adopt rules to govern the time and method of paying the required filing fees as well as to establish standards for excusing an appellant from payment of such fees.

See Generally:

1) 6 WITKIN, CALIFORNIA PROCEDURE, *Appeal* §408 (2d ed. 1971) (transmission of record to reviewing court).
2) *California Supreme Court: Civil Procedure*, 60 CAL. L. REV. 785 (1972).
3) Note, *California's Civil Appeal in Forma Pauperis—An Inherent Power of the Courts*, 23 HAST. L.J. 683 (1972).

Civil Procedure; physician-patient privilege

Evidence Code §999 (amended).
AB 73 (McAlister); STATS 1975, Ch 318
Support: California Law Revision Commission; State Bar of California; California Trial Lawyers Association

The physician-patient privilege permits a patient, whether or not a party to a given proceeding, to prevent the disclosure of any confidential communication between such patient and the physician [CAL. EVIDENCE CODE §994]. One narrow exception to the privilege was formerly recognized by Evidence Code Section 999, which provided that

such confidential communications could be admitted into evidence in a proceeding to recover damages arising out of the "criminal conduct" of a patient who was not necessarily a party to the suit. Chapter 318 has amended Section 999 to eliminate the "criminal conduct exception" and replace it with a "general exception" which allows disclosure of physician-patient communications to be made in any proceeding to recover compensation for damages resulting from the conduct of the patient, whether or not a party to the proceeding, upon a showing of good cause.

COMMENT

The "criminal conduct exception" previously recognized by Section 999 of the Evidence Code had been the target of severe criticism. In *Fontes v. Superior Court* [28 Cal. App. 3d 589, 104 Cal. Rptr. 845 (1972)], the court noted that the exception could result in the invasion of a patient's privacy in litigation not initiated by or on behalf of the patient, as well as in gaining extortionate settlements made to avoid embarrassing disclosures [*Id.* at 595, 104 Cal. Rptr. at 848]. In view of the potential for abuse, the court called for re-evaluation of the exception [*Id.*]. In response to the court's suggestion in *Fontes*, a study was conducted by the California Law Revision Commission to evaluate the "criminal conduct exception". The Commission found the exception to be burdensome, difficult to administer, and ill-designed to make needed evidence available, and therefore recommended that it be repealed [*Recommendation Relating to Evidence Code Section 999—The "Criminal Conduct" Exception to the Physician-Patient Privilege*, 11 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS AND STUDIES 1147-62 (1973)].

The "general exception" now contained in Section 999 allows disclosure of communications between a physician and a patient only where good cause is shown and the disclosure involves the condition of a patient as it relates to his or her conduct. This exception "permits disclosure not only in a case where the patient is a party to the action but also in a case where a party's liability is based on the conduct of the patient" [JOURNAL OF THE CALIFORNIA ASSEMBLY, 1352-53 (1975-76 Reg. Sess.)]. Therefore, such requirements are intended to protect the patient, whether or not a party to the proceeding, from general inquiries into his or her medical records [*Id.*].

See Generally:

1) *Recommendation Relating to the Good Cause Exception to the Physician-Patient Privilege*, 12 CAL. LAW REVISION COMM'N REPORTS, RECOMMENDATIONS AND STUDIES 602-608 (1974).

Civil Procedure; notice of trial

Code of Civil Procedure §594 (amended).
SB 847 (Holmdahl); STATS 1975, Ch 1001

Section 594 of the Code of Civil Procedure permits a party instituting an action in superior or municipal court to proceed with his or her case and receive an appropriate court decision (including, *inter alia*, dismissal of the action, verdict, and judgment) where an adverse party, served with notice, fails to appear. If the issue before the court is one of fact, however, such party must additionally introduce sufficient proof that the adverse party was served with notice in order to proceed with the case. Prior to the enactment of Chapter 1001, Section 594 only required that the adverse party receive notice *five days* prior to the date of trial. This section, however, did not expressly indicate how notice was to be served or how proof of service was to be established. Chapter 1001 has amended Section 594 to require that the clerk serve, *by mail*, all adverse parties with notice at least *20 days* prior to the date set for trial. If, however, the clerk fails to mail such notice, the party instituting the action is then permitted to mail a copy of the notice to the adverse parties at least *15 days* prior to the date set for trial. Section 594 has been further amended to provide that proof of service may be established by a clerk's certificate if notice is served by the clerk [CAL. CODE CIV. PROC. §1013a(3)] or by an affidavit or certificate if service is made by the person instituting the action [CAL. CODE CIV. PROC. §1013a(1), (2)].

See Generally:
1) 3 WITKIN, CALIFORNIA PROCEDURE, *Pleading* §833 (2d ed. 1971) (failure to appear at trial).
2) 4 WITKIN, CALIFORNIA PROCEDURE, *Proceedings Without Trial* §118; *Trial* §50 (2nd ed. 1971) (failure to appear and notice of trial).

Civil Procedure; electronic court reporting

Government Code §72194.5 (new).
SB 629 (Song); STATS 1975, Ch 665
Support: Judicial Council

Prior to the enactment of Chapter 665, a record of the proceedings in justice or municipal court had to be made by an official court reporter. Studies conducted in this area, however, have indicated that the installation of electronic equipment would reduce court costs and increase the accuracy of court transcripts [MCGEORGE SCHOOL OF LAW, UNIVERSITY OF THE PACIFIC, COURT REPORTING STUDY, FEASIBILITY

EXAMINATION OF ALTERNATE METHODS OF PREPARING COURT TRANSCRIPTS, 57, 62 (1973)]. Section 72194.5 has been added to the Government Code by Chapter 665 to expressly authorize the use of electronic recording equipment in a civil action or misdemeanor criminal proceeding in justice or municipal courts when a court reporter is not available. The legislature has determined that the use of such recording equipment is to *supplement* the record-keeping process presently in use by providing an alternate method of recording the proceeding when it is impractical to have an official court reporter continually available [CAL. STATS. 1975, c. 665, §2, at]. The legislature has further suggested that such recording equipment be used in (1) misdemeanor criminal proceedings in which guilty pleas are taken or rights have been waived, (2) misdemeanor trials where official reporters are not presently in use, and (3) civil trials where a settled statement may be required [*Id.*].

See Generally:
1) H. SHORT & ASSOCIATES & MCGEORGE SCHOOL OF LAW, VIDEOTAPE RECORDING IN THE CALIFORNIA CRIMINAL JUSTICE SYSTEM (1975).