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Witkin Summary of California Law, Tenth Edition
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CHAPTER XVII - Real Property

Witkin Summary of California Law
I. IN GENERAL
A. Restatement and Texts.

12 Witkin Sum. Cal. Law Real Property § 1

[§ 1] Restatement and Texts.

(1) *Restatement.* The Restatement's treatment of real property topics is dispersed among the First, Second, and Third Restatements of Property as follows:

- (a) Introductory matters and freehold interests. (Rest., Property, Volume I.)
- (b) Future interests. (Rest., Property, Volumes II and III, superseded in part by Rest.2d, Property (Donative Transfers).)
- (c) Perpetuities and restraints on alienation. (Rest., Property, Volume IV, superseded in part by Rest.2d, Property (Donative Transfers).)
- (d) Landlord and tenant. (Rest.2d, Property (Landlord and Tenant).)
- (e) Easements, licenses, covenants, and equitable servitudes. (Rest.3d, Property (Servitudes).)
- (f) Mortgages. (Rest.3d, Property (Mortgages); see 4 *Summary* (10th), *Security Transactions in Real Property*, §3.)

(2) *Texts and Practice Works.* A major treatise in this field, Powell, *The Law of Real Property*, is cited extensively in this chapter. Useful practice works include Miller & Starr, *California Real Estate* 3d; Miller & Starr, *California Real Estate Forms*; Cal. Civil Practice, *Real Property Litigation*; Cal. Civil Practice, *Environmental Litigation*; Rutter, *Landlord-Tenant*; Rutter, *Real Property Transactions*.

C.E.B. provides extensive coverage of real property topics in the following works: *Condemnation Practice* 2d; *Advising California Common Interest Communities*; *Construction Contracts and Disputes* 3d; *Eviction Defense Manual* 2d; *Forming California Common Interest Developments*; *Ground Lease Practice*; *Landlord-Tenant Practice* 2d; *Mechanics' Liens* 3d; *Office Leasing: Drafting and Negotiating the Lease*; *Real Property Exchanges* 3d; *Real Property Financing*; *Real Property Practice Forms Manual*; *Real Property Remedies and Damages* 2d; *Real Property Sales Transactions* 3d; *Title Insurance Practice* 2d; *Zoning Practice*.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Texts and Practice Works.* See C.E.B., *Condemnation Practice* 3d; C.E.B., *Real Property Sales Transactions* 4th.

C.E.B., California Zoning Practice has been superseded by C.E.B., Land Use Practice; C.E.B., Construction Contracts and Disputes 3d has been superseded by C.E.B., Construction Contracts, Defects, and Litigation.



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CHAPTER XVII - Real Property

Witkin Summary of California Law
I. IN GENERAL
B. Uniform Laws and Model Acts.

12 Witkin Sum. Cal. Law Real Property § 2

[§ 2] Uniform Laws and Model Acts.

The Commissioners on Uniform State Laws have approved the following uniform laws pertaining to real property:

- (1) Common Interest Ownership Act. (See 7 (Part I) U.L.A. (Master Ed.), p. 471.)
- (2) Condominium Act. (See 7 (Part II) U.L.A. (Master Ed.), p. 450.)
- (3) Federal Lien Registration Act. (See 7A (Part I) U.L.A. (Master Ed.), p. 328; *C.C.P. 2100* et seq.; 4 *Summary* (10th), *Security Transactions in Real Property*, §65.)
- (4) Fraudulent Transfer Act. (See 7A (Part II) U.L.A. (Master Ed.), p. 266; *C.C. 3439* et seq.; 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §460 et seq.)
- (5) Land Sales Practices Act. (See 7A (Part II) U.L.A. (Master Ed.), p. 366.)
- (6) Planned Community Act. (See 7B U.L.A. (Master Ed.), p. 1.)
- (7) Real Estate Cooperative Act. (See 7B U.L.A. (Master Ed.), p. 312.)
- (8) Real Estate Time-Share Act. (See 7B U.L.A. (Master Ed.), p. 435.)
- (9) Residential Landlord and Tenant Act. (See 7B U.L.A. (Master Ed.), p. 527.)
- (10) Conservation Easement Act. (See 12 U.L.A. (Master Ed.), p. 163.)
- (11) Land Transactions Act. (See 13 (Part II) U.L.A. (Master Ed.), p. 160.)
- (12) Simplification of Land Transfers Act. (See 14 U.L.A. (Master Ed.), p. 249.)
- (13) Vendor and Purchaser Risk Act. (See 14 U.L.A. (Master Ed.), p. 469; *C.C. 1662*; 13 *Summary* (10th), *Equity*, §175.)
- (14) Statutory Rule Against Perpetuities. (See 8B U.L.A. (Master Ed.), p. 223; *infra*, §175 et seq.)

The Model Land Development Code, adopted by the American Law Institute in 1975, deals with local and state land development regulation, acquisition and disposition of land, planning, and land banking.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Common Interest Ownership Act*. Volume 7 (Part I) of the Uniform Laws Annotated was revised in 2006. The Common Interest Ownership Act is now at 7 (Part I) U.L.A. (Master Ed.), p. 835. (4) *Fraudulent Transfer Act*. Volume 7A (Part II) of the Uniform Laws Annotated was revised in 2006. The Fraudulent Transfer Act is now at 7A (Part II) U.L.A. (Master Ed.), p. 2.

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §488 et seq.

(5) *Land Sales Practices Act*. Volume 7A (Part II) of the Uniform Laws Annotated was revised in 2006. The Land Sales Practices Act is now at 7A (Part II) U.L.A. (Master Ed.), p. 205.

(6) *Planned Community Act*. Volume 7B of the Uniform Laws Annotated was revised in 2006. The Planned Community Act is now at 7A (Part II) U.L.A. (Master Ed.), p. 233.

(7) *Real Estate Cooperative Act*. Volume 7B of the Uniform Laws Annotated was revised in 2006. The Real Estate Cooperative Act is now at 7B U.L.A. (Master Ed.), p. 49.

(8) *Real Estate Time-Share Act*. Volume 7B of the Uniform Laws Annotated was revised in 2006. The Real Estate Time-Share Act is now at 7B U.L.A. (Master Ed.), p. 175.

(9) *Residential Landlord and Tenant Act*. Volume 7B of the Uniform Laws Annotated was revised in 2006. The Residential Landlord and Tenant Act is now at 7B U.L.A. (Master Ed.), p. 285.

(10) *Conservation Easement Act*. Volume 12 of the Uniform Laws Annotated was revised in 2008. The Conservation Easement Act is now at 12 U.L.A. (Master Ed.), p. 165.

(12) *Simplification of Land Transfers Act*. Volume 14 of the Uniform Laws Annotated was revised in 2005. The Simplification of Land Transfers Act is now at 14 U.L.A. (Master Ed.), p. 343.

(13) *Vendor and Purchaser Risk Act*. Volume 14 of the Uniform Laws Annotated was revised in 2005. The Vendor and Purchaser Risk Act is now at 14 U.L.A. (Master Ed.), p. 689.



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CHAPTER XVII - Real Property

Witkin Summary of California Law
I. IN GENERAL
C. Definitions.

12 Witkin Sum. Cal. Law Real Property § 3

[§ 3] Definitions.

Chapter I of Volume I of the First Restatement defines a number of important terms:

(1) *Property*, as used in the Restatement, denotes the "legal relations between persons with respect to a thing," tangible or intangible. The word is not used to denote the thing itself (p. 3). (See *Estate of Mitchell* (1999) 76 C.A.4th 1378, 1392, 91 C.R.2d 192, infra, §63 [right of survivorship is not "property"; it is one incident of joint tenancy interest in property, but by itself, it is mere expectancy]; 43 U.C.L.A. L. Rev. 711 [real property viewed as "bundle of rights"].)

(2) A *power* is "an ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act"; e.g., a power of sale or power of appointment. (§3.) The right of reentry for breach of condition subsequent is called a "power of termination." (§24.)

(3) The term "interest" includes any one or various aggregates of "rights, privileges, powers and immunities." (§5.) The totality of these rights, privileges, powers, and immunities that it is legally possible for a person to have constitutes "complete property" in a thing. (§5, Comment e.) And a person who has them all is the *owner* of the thing; but the terms "owner" and "ownership" are also applied to the person who has one or more interests. (§10.) (On meaning of "title," see p. 27.)

(4) *Legal interests* in land are distinguished from *equitable interests* in their historical origin (p. 12), procedure of enforcement (p. 14), methods of creation (p. 15), difference in kind (p. 16), relations of owners to third persons (p. 17), and methods of destruction (p. 17). (§6, and Comments a, b.)

(5) A *possessory interest* in land, usually involving physical contact and an intent to exclude others from occupation, is distinguished from other or nonpossessory interests; e.g., future interests. (§7.)

In *Hubbard v. Brown* (1990) 50 C.3d 189, 266 C.R. 491, 785 P.2d 1183, the issue was whether a federal livestock grazing permit was an "interest in real property" within the provision of C.C. 846 immunizing the owner from liability arising from recreational use of the property (see 6 Summary (10th), Torts, §1103 et seq.). The court pointed out that, although the permit holder has no compensable property rights for the purpose of eminent domain proceedings, the Legislature's intent in its 1980 amendment of C.C. 846 was to expand the immunity to the holder of an interest in real property, irrespective of the holder's right to exclude the public. (50 C.3d 195, 197.)

(6) *Real property* includes all "freehold interests," together with such things closely associated with land as fixtures, growing crops, and water. (§8.)

Ordinarily, the terms "land" and "real property" have the same meaning. "The use of the word 'land' as synonymous with real property has become its historical, ordinary and accepted meaning in connection with title, ownership, conveyance or transfer by deed or inheritance, with the exercise of the right of eminent domain, with execution sales and redemption, with dower, and similar evidences of ownership or modes of transfer." (*Krouser v. San Bernardino* (1947) 29 C.2d 766, 770, 178 P.2d 441.)

When the *Krouser* case was decided, C.C. 659 defined "land" as the "solid material of the earth." The 1963 Legislature amended the section in two respects: (1) The word "solid" was deleted from the definition. (See *Enyeart v. Board of Supervisors* (1967) 66 C.2d 728, 734, 58 C.R. 733, 427 P.2d 509 [this removes any doubt as to classification of oil and gas interests as land].) (2) The definition now includes "airspace." (See *California v. Superior Court (Natomas Co.)* (1962) 208 C.A.2d 659, 664, 665, 25 C.R. 363 [dredger tailings from gold mining, deposited in same place from which they were dredged, treated as land by owner; held to be land for purposes of condemnation].)

(7) The term "estate" is used only to designate interests in land, and is not applied to those in personal property. (§9.)

(8) "Conveyance" means "an act by which it is intended to create one or more property interests" in real or personal property, whether it is effective or not; it applies to testamentary dispositions as well as *inter vivos* transactions, and hence includes a *devise*, which term likewise applies to real or personal property. (§§11, 12.) "Conveyance" is distinguished from "transfer," which means the actual extinguishment of interests in one person and their creation in another; i.e., an effective conveyance. (§13.) (See *Estate of Mitchell, supra*, 76 C.A.4th 1389 [severance of joint tenancy is not "transfer" of "property"].)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XVII - Real Property

Witkin Summary of California Law
I. IN GENERAL
D. Conflict of Laws.
1. In General.

12 Witkin Sum. Cal. Law Real Property § 4

[§ 4] In General.

The Second Restatement of Conflict of Laws distinguishes between interests in "immovables" (§223 et seq.) and interests in "movables" (§244 et seq.), and defines "immovables" as land and things attached or otherwise related to the land so as legally to be regarded a part of it. (See 2 Rest.2d, Conflict of Laws, Int. Note, p. 7; Scoles & Hay 3d, Chap. 19; 16 *Am.Jur.2d* (1998 ed.), *Conflict of Laws* §33 et seq.; for conflict of laws rules on property in general and "movables," see 13 *Summary* (10th), *Personal Property*, §110 et seq.; on nature of conflict rules, see 1 *Summary* (10th), *Contracts*, §59 et seq.)

"[I]t is a firmly established principle that questions involving interests in immovables are governed by the law of the situs," which includes its choice of law rules and not merely its local law. So, the forum must arrive at the same result as the situs would have reached upon the facts of the case. (See 2 Rest.2d, Conflict of Laws, Int. Note, p. 7 et seq.)

The Second Restatement gives separate treatment to the following: conveyances (see *infra*, §§5, 6); equitable conversion (see 13 *Summary* (10th), *Equity*, §174 et seq.); transfers by operation of law (see *infra*, §7); encumbrances (see 4 *Summary* (10th), *Security Transactions in Real Property*, §33); powers (see *infra*, §8); marital property (see 11 *Summary* (10th), *Community Property*, §35); equitable interests (see 13 *Summary* (10th), *Trusts*, §12); and succession on death (see 14 *Summary* (10th), *Wills and Probate*, §74 et seq.).

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CHAPTER XVII - Real Property

Witkin Summary of California Law

I. IN GENERAL

D. Conflict of Laws.

2. Conveyances.

a. Validity and Effect.

12 Witkin Sum. Cal. Law Real Property § 5

[§ 5] Validity and Effect.

(1) *Approach of First Restatement.* Under the First Restatement, the transfer of title to or an interest in real property by deed, mortgage, or contract was always governed by the law of the state where the land was situated. (See *Estate of Loyd* (1917) 175 C. 699, 705, 167 P. 157 [equitable conversion]; *Platner v. Vincent* (1921) 187 C. 443, 448, 202 P. 655 [whether covenant runs with the land]; *Losson v. Bledgett* (1934) 1 C.A.2d 13, 17, 36 P.2d 147 [validity of contract to convey]; *Leflar* 4th, §§168, 169; *Scoles & Hay* 3d, §19.2; 20 *Stanf. L. Rev.* 1 [criticisms of traditional rule]; 16 *Am.Jur.2d* (1998 ed.), *Conflict of Laws* §38 et seq.)

(2) *Approach of Second Restatement.* Under the Second Restatement, the following issues are usually governed by the law of the state where the land is situated:

(a) Capacities of transferor and transferee. (See *Rest.2d, Conflict of Laws* §223, Comments c, d.)

(b) Formalities of conveyance (e.g., necessity of a writing, seal, witnesses, acknowledgment) where there is no statute. (See *Rest.2d, Conflict of Laws* §223, Comment e.)

(c) Other questions of validity, such as illegality, the rule against perpetuities, and fraud. (See *Rest.2d, Conflict of Laws* §223, Comment f.)

(d) Effect of conveyance, such as whether equities and unrecorded titles are cut off or whether a legal or equitable estate was created. (See *Rest.2d, Conflict of Laws* §223, Comment g.)

(e) Effect of failure to record. (See *Rest.2d, Conflict of Laws* §223, Comment l.)

(f) Questions relating to the creation, transfer or termination of nonpossessory interests in land, such as easements, profits, licenses, and covenants running with the land. (See *Rest.2d, Conflict of Laws* §223, Comment h.)

There are circumstances, however, under which the law of a different state might be applied:

(a) Where the concern of the other state in the decision of the particular issue is so great as to outweigh the values

of certainty and convenience which would be served by application of the law of the situs. (See *Rest.2d, Conflict of Laws* §223, Comments b, c, d, h.)

(b) Where the rule of the situs applies only to local domiciliaries and to domestic corporations and does not affect foreign transferors or transferees. (See *Rest.2d, Conflict of Laws* §223, Comments b, c, d, h.)

(c) Where the questions are incidental or collateral to the conveyance. (See *Rest.2d, Conflict of Laws* §223, Comment i.)

(d) When dealing with aspects of validity other than capacity and formalities, e.g., illegality or the rule against perpetuities, and the land is to be sold and the proceeds transmitted to another state. (See *Rest.2d, Conflict of Laws* §223, Comment f.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Approach of First Restatement.* See McDougal, *American Conflicts Law* 5th, §§156, 157.



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CHAPTER XVII - Real Property

Witkin Summary of California Law

I. IN GENERAL

D. Conflict of Laws.

2. Conveyances.

b. Interpretation and Construction.

12 Witkin Sum. Cal. Law Real Property § 6

[§ 6] Interpretation and Construction.

(1) *Interpretation.* Where an instrument's words are not given a prescribed legal effect, the forum looks to the law of the situs to determine the intentions of the parties involved. In ascertaining intentions, the forum considers the ordinary meaning of the words used, the context in which the words appear in the instrument, and the circumstances under which the instrument was drafted. It will look to the person who drafted the instrument and to whether the drafter was using the language of the drafter's domicile, the place of execution, or the situs of the land. However, the forum applies its own rules in determining the admissibility of evidence, and uses its own judgment to draw conclusions from the evidence. (See *Rest.2d, Conflict of Laws* §224, Comment c; *Leflar* 4th, §169; *Scoles & Hay* 3d, §19.4.)

(2) *Construction.* Where the forum has no satisfactory basis to determine the parties' intentions, it employs a rule of law to fill the resulting gap in the instrument. (See *Rest.2d, Conflict of Laws* §224, Comment d.)

The forum will apply the rules of construction of another state where (a) the parties expressly designate the law of a particular state as applicable, or (b) the instrument's language or circumstances indicate the parties' desires that the local law of another state govern. If an express designation is made, it is not material that the other state has no substantial connection with the parties or the land. (See *Rest.2d, Conflict of Laws* §224, Comment e.)

In the absence of an express designation, and when the desires of the parties are not otherwise apparent, the forum construes the instrument according to the rules of construction applicable in the situs. The question then is whether the situs would apply its own rules or the rules of some other state. (See *Rest.2d, Conflict of Laws* §224, Comment f.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Interpretation.* See *McDougal, American Conflicts Law* 5th, §157.



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CHAPTER XVII - Real Property

Witkin Summary of California Law

I. IN GENERAL

D. Conflict of Laws.

3. Transfer by Operation of Law.

12 Witkin Sum. Cal. Law Real Property § 7

[§ 7] Transfer by Operation of Law.

In determining whether an interest has been transferred by operation of law and the nature of the interest transferred, the forum applies the law of the situs, which usually applies its own local laws. However, if "the courts of the situs would give effect to a transfer by operation of some foreign law, the forum will do likewise." (See *Rest.2d, Conflict of Laws* §226, Comment a; *Leflar* 4th, §173; *Scoles & Hay* 3d, §18.23.) These rules apply to the following situations:

- (1) A transfer by an equity court to a person entitled to the land. (*Rest.2d, Conflict of Laws* §226, Comment b.)
- (2) An enlargement or diminution of interests, such as by partition, foreclosure, or redemption. (*Rest.2d, Conflict of Laws* §226, Comment b.)
- (3) Terminations of interests by forfeiture, escheat, or eminent domain. (*Rest.2d, Conflict of Laws* §226, Comment c.)
- (4) Acquisition of an interest by adverse possession or by prescription. (*Rest. 2d, Conflict of Laws* §227.)

Federal law determines the effect of transfers of interests in land as a result of federal as opposed to state law, e.g., transfers under the federal Bankruptcy Act or pursuant to federal eminent domain. (*Rest.2d, Conflict of Laws* §226, Comment d.)

Where the extent of a grant is in question, if the title is derived from a United States patent, the federal law governs, but where the title comes from a Mexican grant, even though it was confirmed by a federal patent, the state law governs. (*Carpenter v. Santa Monica* (1944) 63 C.A.2d 772, 783, 147 P.2d 964.)

SUPPLEMENT: [This section is current through the latest supplement]
 See McDougal, *American Conflicts Law* 5th, §161.



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CHAPTER XVII - Real Property

Witkin Summary of California Law

I. IN GENERAL

D. Conflict of Laws.

4. Powers.

12 Witkin Sum. Cal. Law Real Property § 8

[§ 8] Powers.

(1) *Exercise of Powers Created by Operation of Law.* Questions relating to the exercise of powers of executors, administrators, guardians, receivers, sheriffs, and other administrative officers, to transfer an interest in land and the nature of the interest transferred, are determined by the law that would be applied by the situs, and the situs usually applies its own local laws. However, if the situs "would give effect to a power created by some foreign law, the forum will do likewise." (See *Rest.2d, Conflict of Laws* §231, Comments a, b; 62 *Am.Jur.2d* (2005 ed.), *Powers of Appointment and Alienation* §29; on powers of appointment, see *Rest.2d, Conflict of Laws* §281; Leflar 4th, §§190, 200.)

(2) *Exercise of Powers of Attorney.* The forum applies the law of the situs to questions relating to "the capacity to give a valid power of attorney to transfer interests in the land, the requisite formalities for giving and for exercising the power and the nature of the interest transferred by the exercise of the power." (See *Rest.2d, Conflict of Laws* §232, Comment a.) The situs usually applies its own local laws, but the forum will decide the questions by reference to the local laws of some other state if the situs would do so. (See *Rest.2d, Conflict of Laws* §232, Comment b.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Exercise of Powers Created by Operation of Law.* See McDougal, *American Conflicts Law* 5th, §§177, 187.



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CHAPTER XVII - Real Property

Witkin Summary of California Law

II. ESTATES

A. In General.

1. Nature of Estates in Real Property.

12 Witkin Sum. Cal. Law Real Property § 9

[§ 9] Nature of Estates in Real Property.

An estate in real property is the interest a person has in the property. (C.C. 701; see *Rest., Property* §§5, 9; 1 Powell §12.01; 3 Miller & Starr 3d §9:1; 28 *Am.Jur.2d* (2000 ed.), *Estates* §1.)

Proprietary rights in land under California law, as at common law, consist of estates in the land. The holder or owner of the estate is known as the *tenant*. But the common law relationship of *tenure*, under which every transfer of land created privity of estate between transferor and transferee, never existed in California, and there is no reversion in the grantor after an ordinary grant in fee simple absolute. (See *Los Angeles Terminal Land Co. v. Muir* (1902) 136 C. 36, 41, 68 *P.* 308; for analysis and criticism of common law system, see 85 *Harv. L. Rev.* 729.)

There may be equitable as well as legal estates in land. (See *Gray v. Union Trust Co.* (1915) 171 C. 637, 640, 154 *P.* 306; *Rest., Property* §§6, 63; *infra*, §36.) There may be separate estates in the surface and in the underlying minerals of the same parcel of land. (See *infra*, §17.)

West's Key Number Digest, Estates in Property k.1 et seq.

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CHAPTER XVII - Real Property

Witkin Summary of California Law
II. ESTATES
A. In General.
2. Classification of Estates.

12 Witkin Sum. Cal. Law Real Property § 10

[§ 10] Classification of Estates.

Estates are frequently classified according to the following characteristics:

- (1) Quantum or duration.
- (2) Quality of interest.
- (3) Time of enjoyment (*infra*, §127).
- (4) Number of tenants (*infra*, §32).

Freehold estates have a duration that is not fixed or ascertained, and include estates of inheritance and life estates. (C.C. 765; see *Rest., Property* §8, and Introductory Note, p. 37; 1 Powell §12.01 et seq.; 3 Miller & Starr 3d §9:2; 28 *Am.Jur.2d* (2000 ed.), *Estates* §11 et seq.)

Thus, as to quantum or duration, and quality of interest, estates are further classified as follows:

(1) *Estates of inheritance*. These include estates in fee simple absolute and fee simple defeasible. The Property Restatement (§§16, 23, 24) uses the latter designation broadly to include any fee simple that may be terminated by expiration or divestment, such as determinable fees or fees subject to condition subsequent. It avoids the following terms as confusing and uncertain in meaning: "base fee," "conditional fee," "qualified fee," "conditional limitation." (*Rest., Property*, p. 120.) (See 1 Powell §13.01 et seq.; 28 *Am.Jur.2d* (2000 ed.), *Estates* §§12 et seq., 26 et seq.)

(2) *Life estates*. These are estates of freehold although not of inheritance. At common law, they are of two kinds: (a) legal life estates, created by operation of law, and (b) conventional life estates, created by deed or will of the parties. The latter may be either for the life of the tenant or for the life of a third person. (See C.C. 765, 766; *Rest., Property* §18; *infra*, §§22, 23.) The legal life estates of *dower* and *curtesy* were abolished in California, their place being taken by state community property rules. (*Prob.C.* 6412; see 11 *Summary* (10th), *Community Property*, §1.)

(3) *Estates less than freehold (leasehold estates)*. These include (a) estates for years, (b) estates at will, (c) estates from period to period, and (d) estates at sufferance. (See *Rest., Property* §§19, 20, 21, 22; *infra*, §504 et seq.)

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CHAPTER XVII - Real Property

Witkin Summary of California Law

II. ESTATES

A. In General.

3. Rule in Shelley's Case Abolished.

12 Witkin Sum. Cal. Law Real Property § 11

[§ 11] Rule in Shelley's Case Abolished.

(1) *Nature of Rule.* Under the Rule in *Shelley's Case* (1579) 76 Eng. Rep. R. 206, where an estate was conveyed or devised "to A for life, remainder to his heirs" or "to A for life, remainder to the heirs of his body," the ancestor (A) received either a *fee simple* or *fee tail*, and could transfer the estate and defeat the expectancy of his heirs. The object of the rule was to secure the incidents of descent to the feudal lords. It was not a rule of interpretation, for it could operate to defeat the plain intention of the testator or grantor. (See *Gordon v. Cadwalader* (1913) 164 C. 509, 510, 130 P. 18; *Rest., Property* §§31, 312; 4 Powell §31.07 et seq.; 28 *Am.Jur.2d* (2000 ed.), *Estates* §114 et seq.)

A preliminary question of interpretation did arise, as follows: If the grantor or testator used the words "heirs" or "heirs of the body" in the ordinary general sense, intending that they should have a remainder, the rule applied and defeated his intent. But if, construing the instrument as a whole, it appeared that he used the terms to designate *children* or other definite individuals, they took as *donees* (by "purchase"), the rule being inapplicable. In *Gordon v. Cadwalader*, *supra*, a deed contained the recital: "The said land being conveyed to ... John Gordon for ... life, for the final use, benefit and behoof of the children or other lawful heirs of his body, who may survive him." (164 C. 512.) *Held*, the intent of the grantor was to give a remainder to the particular children or grandchildren surviving at the death of the grantee, and the Rule in *Shelley's Case* did not apply. (164 C. 515.) (See *Akley v. Bassett* (1922) 189 C. 625, 635, 209 P. 576.)

(2) *Abolition of Rule.* The Rule has been abrogated or modified in a majority of states. (See *Rest., Property* §313; 99 *A.L.R.2d* 1161.) It was abolished in California in 1873 by the enactment of C.C. 779: "When a remainder is limited to the heirs, or heirs of the body, of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the successors or heirs of the body of the owner for life, are entitled to take by virtue of the remainder so limited to them, and not as mere successors of the owner for life." (See *Barnett v. Barnett* (1894) 104 C. 298, 299, 37 P. 1049, *infra*, §22.)

The change in California was prospective in its effect; i.e., grants and wills made prior to the enactment of C.C. 779 remained subject to the rule. (See *Gordon v. Cadwalader*, *supra*, 164 C. 511.)

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SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XVII - Real Property

Witkin Summary of California Law

II. ESTATES

A. In General.

4. Doctrine of Worthier Title Abolished.

12 Witkin Sum. Cal. Law Real Property § 12

[§ 12] Doctrine of Worthier Title Abolished.

(1) *Nature of Doctrine.* The common law doctrine of worthier title had an effect, similar to the Rule in *Shelley's Case* (supra, §11), of defeating a purported remainder to heirs. The Rule in *Shelley's Case* involved a limitation to the heirs of the *grantee*--the life tenant, and the result was that the grantee took the fee and his heirs did not get a remainder interest. If the limitation was to the heirs of the *grantor himself*, under one aspect of the doctrine of worthier title, the title by descent was superior to or "worthier than" title by purchase, the grantor kept the reversionary interest, and the heirs received no remainder but took, if at all, by succession. (See 6 *U.C.L.A. L. Rev.* 371 [exhaustive discussion]; 4 Powell §31.08.) Although the Rule in *Shelley's Case* was formerly in force in California (see supra, §11), it was not clear whether the doctrine of worthier title or any policy derived from it was ever in effect.

(2) *Former California Law.* In *Bixby v. California Trust Co.* (1949) 33 C.2d 495, 202 P.2d 1018, plaintiff trustor created an irrevocable spendthrift trust in his own favor, with the provision that, on his death, the trust estate should go to his "heirs at law" in accordance with the California laws of succession "then in effect." In this action to terminate the trust, the trial court denied relief. *Held*, termination should be ordered. If plaintiff was the sole beneficiary and not under disability, he was entitled to terminate; and he was the sole beneficiary because the provision that the property should go to the heirs did not create a remainder, and he had a reversionary interest in the corpus. The court did not rest its decision on the strict doctrine of worthier title, but held that as a *rule of construction*, to carry out the general policy in favor of *free alienability of property*, it will be presumed (in the absence of a contrary showing) that the trustor *did not intend* to create remainder interests in his own heirs. "It is said that where a person creates a life estate in himself with a gift over to his heirs he ordinarily intends the same thing as if he had given the property to his estate; that he does not intend to make a gift to any particular person but indicates only that upon his death the residue of the trust property shall be distributed according to the general laws governing succession; and that he does not intend to create in any persons an interest which would prevent him from exercising control over the beneficial interest." (33 C.2d 498.) The court distinguished *Gray v. Union Trust Co.* (1915) 171 C. 637, 154 P. 306, and *Bixby v. Hotchkis* (1943) 58 C.A.2d 445, 136 P.2d 597, on the ground that a special or artificial class of heirs was mentioned in each case (persons designated as "heirs" ascertainable as of a particular time and therefore not necessarily the ultimate heirs who would take property by succession at death of the decedent).

The opinion left unsettled a serious question: What kind or quantum of evidence would be deemed appropriate or sufficient to show the contrary intent of the trustor? In the present case, the instrument itself--an expressly irrevocable

spendthrift trust drafted by a lawyer--seemed to evidence that intent. If, however, extrinsic evidence is admissible and necessary to show that the trustor intended to create an interest in his heirs, and the question is one of fact for the trial court, grave uncertainty as to the nature of the interest created might exist in most cases. (See generally 37 *Cal. L. Rev.* 283; 6 *U.C.L.A. L. Rev.* 371, 394.)

(3) *Abolition of Doctrine.* The doctrine has been widely criticized, and is abolished by statutes in many jurisdictions (see 6 *U.C.L.A. L. Rev.* 371, 397). In 1959, pursuant to a recommendation of the California Law Revision Commission, it was abolished. (Former C.C. 1073.) California law does not include (a) the common law rule of worthier title that a transferor cannot devise an interest to the transferor's own heirs or (b) a presumption or rule of interpretation that a transferor does not intend, by a transfer to his or her own heirs or next of kin, to transfer an interest to them. The meaning of a transfer of a legal or equitable interest to a transferor's own heirs or next of kin, however designated, must be determined by the general rules applicable to the interpretation of instruments. (*Prob.C. 21108.*) (See 14 *Summary* (10th), *Wills and Probate*, §234.)

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A. In General.

5. Interpretation of Conveyances.

a. Contract Rules Apply.

12 Witkin Sum. Cal. Law Real Property § 13

[§ 13] Contract Rules Apply.

Subject to a few exceptions, grants are construed in the same manner as contracts. (C.C. 1066; see *Palos Verdes Corp. v. Housing Authority* (1962) 202 C.A.2d 827, 836, 21 C.R. 225 [parol evidence is inadmissible where there is no ambiguity or mistake]; *Cochran v. Union Lumber Co.* (1972) 26 C.A.3d 423, 429, 102 C.R. 632 [certain and unambiguous deed prevails over inconsistent contract pursuant to which deed was executed]; *Murphy Slough Assn. v. Avila* (1972) 27 C.A.3d 649, 655, 104 C.R. 136 [extrinsic evidence is admissible to determine grantor's intent where language is susceptible of more than one interpretation]; *Fidelity Nat. Title Ins. Co. v. Miller* (1989) 215 C.A.3d 1163, 1173, 264 C.R. 17 [where there is no ambiguity in grant deed's language, there is no reason to examine extrinsic evidence]; *Concord & Bay Point Land Co. v. Concord* (1991) 229 C.A.3d 289, 294, 280 C.R. 623 [interpret deed to give effect to parties' intent]; *San Francisco v. Union Pac. R. Co.* (1996) 50 C.A.4th 987, 994, 58 C.R.2d 1 [look to language in deed, rather than extrinsic evidence]; *Severns v. Union Pac. R. Co.* (2002) 101 C.A.4th 1209, 1214, 125 C.R.2d 100 [because language of deed unambiguously conveyed fee simple subject to condition subsequent, use of extrinsic evidence that it conveyed easement was improper]; 23 *Am.Jur.2d* (2002 ed.), *Deeds* §221 et seq.; 37 *A.L.R.2d* 820 [written matter as controlling printed matter in construction of deed]; 71 *A.L.R.2d* 1273 [interpretation of grant to "husband," "wife," or "widow"]; 38 *A.L.R.3d* 1419 [interpretation of grant of "dwelling," "dwelling house," or "house"]; 12 *A.L.R.4th* 795 [conflicting descriptions of fractional quantity of interest intended to be conveyed]; 51 *A.L.R.4th* 1263 [conveyance as including mature but unharvested crops]; 65 *Cal. L. Rev.* 897 [use of extrinsic evidence to interpret conveyances]; 1 *Summary* (10th), *Contracts*, §741 et seq.; on interpretation of wills, see 14 *Summary* (10th), *Wills and Probate*, §183 et seq.)

Under a long-recognized rule of construction, however, a grant is interpreted in favor of the grantee, except where it is made by a public officer or body, as such, to a private party; in the latter case, it is interpreted in favor of the public grantor. Moreover, a reservation is interpreted in the grantor's favor. (C.C. 1069; *Los Angeles v. San Pedro, Los Angeles & Salt Lake R. Co.* (1920) 182 C. 652, 655, 189 P. 449; *Board of Port Commrs. of the City of Oakland v. Williams* (1937) 9 C.2d 381, 396, 70 P.2d 918; *Machado v. Southern Pac. Trans. Co.* (1991) 233 C.A.3d 347, 361, 284 C.R. 560.)

In *Szabo v. Superior Court* (1978) 84 C.A.3d 839, 148 C.R. 837, a contract of sale contained warranties by the seller that the property conformed with zoning ordinances, but the grant deed contained no warranties and stated that the improvements were transferred "as is." In plaintiff buyer's action for breach of the contract warranty, the trial judge,

applying the "merger" or "integration" doctrine, concluded that parol evidence could not vary the terms of the deed, and granted summary judgment for defendant seller. *Held*, order for summary judgment vacated. The merger doctrine does not preclude evidence to interpret the deed, and whether the parties intended to supersede the warranties was a question of fact. (84 C.A.3d 843, 845.)

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5. Interpretation of Conveyances.

b. Interest Passing.

12 Witkin Sum. Cal. Law Real Property § 14

[§ 14] Interest Passing.

(1) *In General.* When created by deed or will, the interest intended is to be determined from an examination of the whole instrument, and exact or appropriate words are not required to create a particular estate. (*Burnett v. Piercy* (1906) 149 C. 178, 189, 86 P. 603; *Estate of Morse* (1970) 9 C.A.3d 411, 416, 88 C.R. 52 [life estate was created even though will did not include usual words].) This is true even of a fee simple estate. Words of inheritance or succession are not necessary to transfer or devise a fee in real property. (C.C. 1072; see *Rest., Property* §39.)

"A fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended." (C.C. 1105; see *Develop-Amatic Engineering v. Republic Mortg. Co.* (1970) 12 C.A.3d 143, 148, 91 C.R. 193; *Manhattan Beach v. Superior Court* (1996) 13 C.4th 232, 242, 52 C.R.2d 82, 914 P.2d 160; *San Francisco v. Union Pac. R. Co.* (1996) 50 C.A.4th 987, 994, 995, 58 C.R.2d 1 [language stating that grantors "hereby grant to [grantee] the following described real property" and that grantee's use of the land was subject to certain covenants conveyed the land in fee simple with reservation of rights for grantor]; 43 *Cal. L. Rev.* 128; 21 *A.L.R.3d* 778 [admissibility of extrinsic evidence to determine whether will gave fee or lesser estate]; on grant of easement, see *infra*, §389.)

An estate is said to be limited to commence at some period, and to endure for some period or perpetually; i.e., words of limitation state the limits of the estate--its commencement and duration. Words of purchase or donation indicate the persons who are to take the estate so limited. (See *Rest., Property*, pp. 56, 88.) Because the term "heirs" and similar words of inheritance are frequently used, as at common law, to create an estate of inheritance, a question of interpretation is presented, for they may be words of limitation or of purchase. (See *Dickey v. Walrond* (1927) 200 C. 335, 342, 253 P. 706; *Prob.C.* 21114, 14 *Summary* (10th), *Wills and Probate*, §233; 89 *A.L.R.2d* 1222 [estate created by deed to "blood heirs"].)

(2) *Granting and Habendum Clauses.* At common law, if the habendum or other subsequent clause in a deed was repugnant to the granting clause, the granting clause would override the other provision. Thus, if the granting clause was to the grantee and the grantee's heirs, and the habendum to the grantee for life, the habendum was void.

This strict doctrine does not apply in California. If the habendum or other subsequent clause is wholly

irreconcilable with the granting clause, the granting clause controls; but where the habendum merely enlarges or qualifies the granting clause, it may be reconciled and given effect. (*Boyer v. Murphy* (1927) 202 C. 23, 29, 259 P. 38; see *Hart v. Nagasawa* (1933) 218 C. 685, 689, 24 P.2d 815; *Marshall v. Standard Oil Co.* (1936) 17 C.A.2d 19, 23, 61 P.2d 520; *Carlsbad Mut. Water Co. v. San Luis Rey Dev. Co.* (1947) 78 C.A.2d 900, 909, 178 P.2d 844 [grant of riparian rights in grantor's land, reserving to grantor right to take waters for irrigation, domestic, and other purposes; upheld as a valid reservation or exception]; *Los Angeles v. Savage* (1958) 165 C.A.2d 1, 5, 331 P.2d 211 [grant of fee of strip of land to power company, reserving to grantor use of surface for any purpose not inconsistent with grantee's use for wires and cables]; 58 A.L.R.2d 1374 [conflict between granting and habendum clauses as to estate conveyed]; on conveyance of surface with reservation of mineral rights, see *Bambauer v. Menjoulet* (1963) 214 C.A.2d 871, 872, 29 C.R. 874; 95 A.L.R.2d 843 [clay, seed, or gravel as "minerals" within deed, lease, or license].)

In *Concord & Bay Point Land Co. v. Concord* (1991) 229 C.A.3d 289, 280 C.R. 623, the issue was whether a deed created a fee on a condition subsequent (infra, §18 et seq.) or an easement (infra, §388 et seq.). Plaintiff contended that the deed created an easement, based on the use of the words "right-of-way for an electric railroad" in the habendum clause to describe the purpose to which the land was to be put. *Held*, the deed created a fee on a condition subsequent.

(a) The habendum clause of a deed may limit or define the grant; if it appears from the entire instrument that this was intended, the limitation will prevail over the broader language in the granting clause. Here the condition in the habendum clause modifies the grant, making it a fee simple subject to condition subsequent rather than a fee simple absolute. (229 C.A.3d 295.)

(b) Use of the term "right-of-way" does not convert the intended estate from a fee to an easement; use as a right-of-way is expressly stated to be a "condition" of the otherwise unrestricted conveyance of land, and the term appears to be used in the physical sense, as the location of a railway roadbed. (229 C.A.3d 296.) (See *Severns v. Union Pac. R. Co.* (2002) 101 C.A.4th 1209, 1214, 125 C.R.2d 100 [deed was "essentially identical" to deed in *Concord & Bay Point Land Co.* and granted fee simple to railroad, subject to condition subsequent (property would return to grantors or their successors if railroad ceased to use property as right-of-way); successor forfeited right to exercise power of termination to reclaim property by failing to record intent to preserve interest as required by C.C. 880.370 (infra, §349)].)

(3) *Reservation to Third Person.* At common law, a technical distinction was drawn between an exception and a reservation. The exception prevents a part of the grantor's interest from passing to the grantee; the reservation allows the whole interest to pass but reverts a newly created interest in the grantor. An even more technical conclusion was that a reservation could not be made in favor of a stranger to the title.

California formerly followed this rule. (See *Eldridge v. See Yup Co.* (1860) 17 C. 44.) But in *Willard v. First Church of Christ, Scientist* (1972) 7 C.3d 473, 102 C.R. 739, 498 P.2d 987, the court took note of the criticism of commentators and the refusal of modern courts to apply the rule where it would defeat the grantor's intent, and abolished it. (7 C.3d 478.) (See 24 *Hastings L. J.* 469; 13 *Santa Clara Lawyer* 344; 88 A.L.R.2d 1199 [reservation or exception in deed in favor of stranger]; 52 A.L.R.3d 753 [reservation in favor of grantor's spouse].)

The court in *Willard, supra*, was concerned with the possible adverse effect of a change of a rule of property on grants made prior to the decision, and laid down the following test: (a) Where there is evidence of reliance on the old common law rule, the balancing of competing interests may warrant application of that rule to existing deeds; (b) where, as here, there is no evidence of reliance, the old rule will not govern. (7 C.3d 479.)

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5. Interpretation of Conveyances.

c. Operative Words of Conveyance.

12 Witkin Sum. Cal. Law Real Property § 15

[§ 15] Operative Words of Conveyance.

One of the most important rules in connection with the creation of estates is that the grant or devise must contain *operative words of conveyance*.

In *Estate of Case* (1938) 28 C.A.2d 264, 82 P.2d 499, the testator left a holographic will reciting "I have deeded my property" to a sister, and adding "the deed must be placed on record." An acknowledged but undelivered deed was found after her death. *Held*, this was not an effective devise by will. Although no particular form of expression is necessary, and liberal construction is the rule, the mere recital of a conveyance not made, or directions to deliver a deed, cannot constitute a devise. (28 C.A.2d 265.) (See 14 Summary (10th), *Wills and Probate*, §228.)

In *McGarrigle v. Roman Catholic Orphan Asylum* (1905) 145 C. 694, 79 P. 447, a deed conveyed a life estate to a grantee, and then stated that it was "the purpose" of the grantor that after the grantee's death, the land should become the property of defendant. *Held*, this language did not amount to a disposition of property, no remainder was created, and a reversion was left in the grantor. (145 C. 696.) (See *Litten v. Warren* (1936) 11 C.A.2d 635, 636, 54 P.2d 39; 24 Cal. L. Rev. 468 [criticism].)

But a more liberal spirit was displayed in *Estate of Wallace* (1938) 11 C.2d 338, 79 P.2d 1094, where a testamentary trust provided that on its termination, "said trustee shall distribute" the balance to daughters of the decedent. *Held*, the words could reasonably be interpreted to mean delivery of possession to persons who already had a vested remainder. (11 C.2d 340.) (See *Leala v. Carroll* (1929) 207 C. 542, 543, 279 P. 443.)

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II. ESTATES

B. Freehold Estates.

1. Estates of Inheritance.

a. In General.

12 Witkin Sum. Cal. Law Real Property § 16

[§ 16] In General.

(1) *Nature of Estates of Inheritance.* Estates of inheritance, or perpetual estates, have a duration equal to that of the property, and pass to the heirs of the tenant on the tenant's death. (C.C. 691, 761.) Every estate of inheritance that is not defeasible or conditional is a fee simple or absolute fee. (C.C. 762, 763; see *Rest., Property* §§14, 15, 39 et seq.; 28 *Am.Jur.2d* (2000 ed.), *Estates* §12 et seq.)

(2) *Estates of Inheritance Under California Law.* The estates of inheritance now recognized are fee simple absolute (see *infra*, §17) and fee subject to condition subsequent (see *infra*, §18 et seq.).

(3) *Fees Tail Abolished.* At common law, fees tail were estates of inheritance, but only lineal heirs, or heirs of the body, succeeded to the property. (See *Rest., Property* §59 et seq.; 2 *Powell* §14.02 et seq.; 28 *Am.Jur.2d* (2000 ed.), *Estates* §48 et seq.) They were abolished when the California Codes were adopted in 1872. Thus, "every estate which would be at common law adjudged to be a fee tail is a fee simple." (C.C. 763; see *Barnett v. Barnett* (1894) 104 C. 298, 302, 37 P. 1049, *infra*, §22.)

(4) *Fee Simple Determinable: Common Law.* A qualified or determinable fee, called a fee simple determinable in the Restatement (*Rest., Property* §44), results from language of "special limitation," causing the estate to expire automatically on the occurrence of a stated event. (*Rest., Property* §§23, 44.) In other words, a fee on condition subsequent does not expire but must be divested at the election of the person entitled to take advantage of the breach of condition (*infra*, §20), while a fee simple determinable expires in accordance with its own terms. (See *Rest., Property* §§23, 24, 44, 56, and pp. 54, 117; *Henck v. Lake Hemet Water Co.* (1937) 9 C.2d 136, 140, 69 P.2d 849; 28 *Am.Jur.2d* (2000 ed.), *Estates* §26 et seq.) The "possibility of reverter" or reversionary interest in the grantor may be extinguished by release or impossibility of occurrence of the event, in which case the defeasibility is eliminated, and the owner has an estate in fee simple absolute. (*Rest., Property* §58.)

In *Dabney v. Edwards* (1935) 5 C.2d 1, 11, 53 P.2d 962, the court held that an oil and gas lease that was not restricted to a specified term of years, but provided that it was to continue "so long thereafter" as oil or gas was produced in paying quantities, created a determinable fee. (See *infra*, §792.) But the preferred construction was in favor of an estate subject to a condition subsequent (requiring an act to terminate). (See *Henck v. Lake Hemet Water Co.*,

supra; *Kirker v. Shell Oil Co.* (1951) 104 C.A.2d 497, 498, 502, 231 P.2d 905; *People v. Fresno* (1962) 210 C.A.2d 500, 504, 26 C.R. 853; *McDougall v. Palo Alto Unified School Dist.* (1963) 212 C.A.2d 422, 431, 433, 28 C.R. 37; *Cherokee Valley Farms v. Summerville Elementary School Dist.* (1973) 30 C.A.3d 579, 588, 106 C.R. 467.)

(5) *Fee Simple Determinable Abolished.* "Fees simple determinable and possibilities of reverter are abolished. Every estate that would be at common law a fee simple determinable is deemed to be a fee simple subject to a restriction in the form of a condition subsequent. Every interest that would be at common law a possibility of reverter is deemed to be and is enforceable as a power of termination." (C.C. 885.020.) (On validity of statute nullifying or limiting enforcement of possibility of reverter, see 87 A.L.R.3d 1011.)

(6) *No Reverter on Dissolution of Charity.* At common law, when a charitable corporation was dissolved, real property previously conveyed to it without an expressly stated charitable purpose reverted to the donor or the donor's heirs. This rule found little support in America, and was rejected in California in a definitive holding that a successor trustee will be appointed to carry out the charitable intent. (See *In re Los Angeles County Pioneer Soc.* (1953) 40 C.2d 852, 865, 257 P.2d 1; 1 U.C.L.A. L. Rev. 117 [*Los Angeles County Pioneer Soc.*]; *McCarthy v. Poulsen* (1985) 173 C.A.3d 1212, 1218, 219 C.R. 375 [right of reverter in trustor will not be favored with respect to charitable trust].)

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B. Freehold Estates.

1. Estates of Inheritance.

b. Fee Simple Absolute.

12 Witkin Sum. Cal. Law Real Property § 17

[§ 17] Fee Simple Absolute.

(1) *Extent of Ownership.* The fee owner "has the right to the surface and to everything permanently situated beneath or above it." (C.C. 829.) However, there may be a fee simple ownership of minerals in land, and at the same time, a fee simple ownership of the land itself by another person. (*In re Waltz* (1925) 197 C. 263, 267, 240 P. 19.) (See 59 A.L.R.3d 1146 [grant, lease, exception, or reservation of oil, gas, or other minerals].)

In *Geothermal Kinetics v. Union Oil Co.* (1977) 75 C.A.3d 56, 141 C.R. 879, a 1951 deed conveyed "all minerals in, on or under" certain property. Plaintiff, lessee under a mineral lease, drilled a geothermal well; defendant, lessee of the surface estate, claimed the right to all geothermal resources. *Held*, the general grant of minerals included the geothermal resources.

(a) The parties to the 1951 deed intended to convey the commercially valuable underground physical resources of the property; and, in the absence of any expressed specific intent to the contrary, the geothermal resources should follow the mineral estate. (75 C.A.3d 59, 60.)

(b) Several cases have held that the grant or reservation of a mineral estate does not include rights to surface or subsurface water. These cases are not controlling: (1) The water and steam components of geothermal resources are part of a separate system cut off from surface and subsurface waters by a thick mineral cap. (75 C.A.3d 62, 63.) (2) Subsurface waters are usually necessary for the enjoyment of the surface estate; this is not true of geothermal waters. (75 C.A.3d 63.) (See *Pariani v. California* (1980) 105 C.A.3d 923, 931, 164 C.R. 683 [following *Geothermal Kinetics* view that "minerals" include geothermal resources, and holding that state patent reserving "all other mineral deposits" reserved geothermal resources to state].)

(2) *Notice by Owner of Mineral Rights to Owner of Real Property.* An owner of mineral rights, as defined in C.C. 883.110, has a right to enter the property and take the minerals. (See *infra*, §387.) But C.C. 848 requires notice of an excavation to the owner of the real property and to a public utility as follows:

(a) The owner of mineral rights must give written notice to the property owner, if different from the mineral rights owner, or to the owner's representative. The property owner for this purpose is the person who is listed as the assessee

on the current local assessment roll or lessee.

(b) If a utility interest is to be excavated, notice must also be given to any public utility that has a recorded interest in the property, before the first entry on the property to prospect for, mine, or extract any mineral.

(c) The notice must be given by certified mail or acknowledged personal delivery to the owner, the owner's representative, or a lessee, and must inform the owner, the owner's representative, or the lessee, and the public utility, of the extent and location of the prospecting, mining, or extracting operation, and the approximate time of entry and exit.

(d) If the mineral rights owner has not complied with the notice requirement, the property owner or the public utility may seek an injunction against the prospecting, mining, or extracting operation until compliance.

(e) The absence of a known owner on the assessment roll or any public utility that has a recorded interest relieves the mineral rights owner of the obligation to give the notice.

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B. Freehold Estates.

1. Estates of Inheritance.

c. Fee Subject to Condition Subsequent.

1. Nature of Estate.

12 Witkin Sum. Cal. Law Real Property § 18

[§ 18] Nature of Estate.

An estate in fee may be granted subject to termination upon the happening of a condition subsequent. In the Restatement, this is called an "estate subject to a condition subsequent" or an "estate subject to a power of termination." (See *Rest., Property* §§24, 45, 155; *Parry v. Berkeley Hall School Foundation* (1937) 10 C.2d 422, 426, 74 P.2d 738; *Schultz v. Beers* (1952) 111 C.A.2d 820, 823, 245 P.2d 334; 1 Powell §13.05; 28 Am.Jur.2d (2000 ed.), *Estates* §157 et seq.; *infra*, §129; see also *Thornton v. Middletown Educational Corp.* (1937) 21 C.A.2d 707, 710, 70 P.2d 234 [grantor's right after breach of condition may be enforced by action to quiet title].) The power of termination may be extinguished by release or impossibility of occurrence of the condition, in which case the estate becomes a fee simple absolute. (*Rest., Property* §58.)

The following are illustrations of conditions in grants of estates on condition subsequent:

(1) Building restrictions limiting the character of structures to be erected on the granted land or the type of business to be carried on there. (On character of structures, see *Strong v. Shatto* (1919) 45 C.A. 29, 31, 187 P. 159; *Childs v. Newfield* (1934) 136 C.A. 217, 218, 28 P.2d 924; *Aller v. Berkeley Hall School Foundation* (1940) 40 C.A.2d 31, 33, 103 P.2d 1052; on type of business, see *Los Angeles Land & Water Co. v. Kane* (1929) 96 C.A. 418, 419, 274 P. 380; *Boughton v. Socony Mobil Oil Co.* (1964) 231 C.A.2d 188, 193, 41 C.R. 714, *infra*, §199.)

(2) Condition against sale of intoxicating liquor on premises. (*Wedum-Aldahl Co. v. Miller* (1937) 18 C.A.2d 745, 747, 64 P.2d 762.)

(3) Condition that buildings be constructed and then operated as a military academy. (*Thornton v. Middletown Educational Corp.*, *supra*, 21 C.A.2d 708.)

(4) Condition that a strip of land be used for railroad purposes. (*Romero v. Department of Public Works* (1941) 17 C.2d 189, 191, 109 P.2d 662; *Faus v. Pacific Elec. Ry. Co.* (1956) 146 C.A.2d 370, 371, 303 P.2d 814; *Concord & Bay Point Land Co. v. Concord* (1991) 229 C.A.3d 289, 294, 280 C.R. 623, *supra*, §14 [habendum clause stating that land "is to be used for a right-of-way for an electric railroad"]; *Severns v. Union Pac. R. Co.* (2002) 101 C.A.4th 1209, 1214,

125 C.R.2d 100 [deed was "essentially identical" to deed in *Concord & Bay Point Land Co.*.])

(5) Condition that grantee use land for irrigation system for 5 years. (*Mitchell v. Cheney Slough Irr. Co.* (1943) 57 C.A.2d 138, 141, 134 P.2d 34.)

(6) Condition that grantee use land perpetually as a private park for persons of certain national origins. (*Biescar v. Czechoslovak-Patronat* (1956) 145 C.A.2d 133, 137, 302 P.2d 104, *infra*, §19.)

(7) Conditions that grantee use land exclusively as a public park and that grantor's name be retained by the grantee for the park. (*People v. Los Angeles* (1960) 179 C.A.2d 558, 570, 4 C.R. 531.)

(8) Condition that properties be used as a library. (*Walton v. Red Bluff* (1991) 2 C.A.4th 117, 123, 3 C.R.2d 275.)

There is no need to set forth either a right of reentry or a power of termination; it is enough that the condition subsequent is clearly stated. (See *Taylor v. Continental Southern Corp.* (1955) 131 C.A.2d 267, 273, 280 P.2d 514; but see 7 *Hastings L. J.* 101 [policy of construction against forfeitures (*infra*, §19) makes enforcement doubtful without reentry or power clause].)

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[§ 19] Construction To Avoid Forfeiture.

(1) *Rule of Strict Construction Applied.* Because its breach may result in a forfeiture of the estate, the condition subsequent is not favored, and a rule of strict construction is applied against the grantor; i.e., the words will, if possible, be interpreted as a mere declaration of purpose or a personal covenant by the grantee. (C.C. 1442; see *Hawley v. Kafitz* (1905) 148 C. 393, 394, 83 P. 248; *Streicher v. Heimburge* (1928) 205 C. 675, 683, 272 P. 290; *Gramer v. Sacramento* (1935) 2 C.2d 432, 437, 41 P.2d 543; *Hasman v. The Elk Grove Union High School* (1926) 76 C.A. 629, 632, 245 P. 464; *Lowe v. Ruhlman* (1945) 67 C.A.2d 828, 832, 155 P.2d 671; *Savanna School Dist. v. McLeod* (1955) 137 C.A.2d 491, 494, 290 P.2d 593; *Sanders v. East Bay Mun. Util. Dist.* (1993) 16 C.A.4th 125, 130, 132, 20 C.R.2d 1 ["provided that" language created personal covenant, not condition subsequent; ambiguous language in second deed was construed narrowly to provide only one opportunity to exercise power of termination]; *Rest., Property* §45, Comment i et seq.; 7 *Hastings L. J.* 101; 28 *Am.Jur.2d* (2000 ed.), *Estates* §159; on application of rule to oil and gas leases, see 29 *Cal. L. Rev.* 386, and *infra*, §805.)

In *Fitzgerald v. Modoc* (1913) 164 C. 493, 129 P. 794, plaintiff made a deed of land to the county, with the clause: "To be used as and for a county high school ground and premises." The county conveyed the property to a third party, and plaintiff sought to declare a forfeiture. *Held*, the language was a mere declaration of purpose, or at most a covenant; it did not create a condition subsequent. (164 C. 497.) (See *Beran v. Harris* (1949) 91 C.A.2d 562, 565, 205 P.2d 107 [recital in grant deed: "Property to be used for residence and service station purposes only" held not a condition subsequent]; *Santa Monica v. Jones* (1951) 104 C.A.2d 463, 468, 232 P.2d 55 ["condition" that railway construct and maintain suitable depot held a mere covenant]; *Alamo School Dist. v. Jones* (1960) 182 C.A.2d 180, 186, 6 C.R. 272, *infra*, §169 [purported condition construed as contingent option to repurchase, personal to grantor and nonsurvivable].)

In *Springmeyer v. South Lake Tahoe* (1982) 132 C.A.3d 375, 183 C.R. 43, the grantor made a deed of land to defendant city, with a habendum clause containing two conditions of automatic reversion: (a) if the city fails to construct one or more office buildings for "basic municipal government departments" by a specified date; (b) if after compliance with the first condition, the property ceases to be used for "government office purposes." The city thereafter allowed buildings to be constructed on the property for use by the County of El Dorado. Plaintiff grantor brought this action to quiet title on the theory of automatic reversion, alleging that the conditions required defendant to use the

property solely for *municipal* government purposes. *Held*, judgment for defendant on demurrer affirmed.

(a) The contention that a demurrer is inappropriate because it precludes introduction of extrinsic evidence of the grantor's intent is unsound. Where a forfeiture is sought for breach of a restriction on use of real property, the law requires a clear expression of intent. (132 C.A.3d 380.) The same requirement should apply to the issue presented in this case, where the grantor's intent to create the remedy of reversion is clear, but the conditions to which the remedy applies are not. "The policies directing clarity of expression apply with as much force to the terms of a reversion condition as to the existence of the remedy. It follows that the precise event which triggers the reversion must be plainly expressed in the deed." (132 C.A.3d 381.)

(b) The first reversion condition unmistakably contemplates construction of buildings for city governmental purposes; the second--involved here--refers only to "government office purposes." The deed is therefore susceptible of the construction given by the trial court, that "government" was used in the broader sense of any government. If the language will bear a reasonable construction that avoids a reversion, that construction must be adopted. (132 C.A.3d 382.)

(2) *Condition Enforced*. If the condition is so clearly stated as to leave no room for construction, or the instrument taken as a whole in the light of the surrounding circumstances clearly shows the intent to impose a condition, it may be enforced even though this results in a forfeiture. (See *Firth v. Marovich* (1911) 160 C. 257, 260, 116 P. 729; *Johnston v. Los Angeles* (1917) 176 C. 479, 486, 168 P. 1047; *Rosecrans v. Pacific Elec. Ry. Co.* (1943) 21 C.2d 602, 605, 134 P.2d 245; *Aller v. Berkeley Hall School Foundation* (1940) 40 C.A.2d 31, 37, 103 P.2d 1052; *Mitchell v. Cheney Slough Irr. Co.* (1943) 57 C.A.2d 138, 143, 134 P.2d 34; *Boughton v. Socony Mobil Oil Co.* (1964) 231 C.A.2d 188, 194, 41 C.R. 714, *infra*, §199; *Walton v. Red Bluff* (1991) 2 C.A.4th 117, 125, 134, 135, 136, 3 C.R.2d 275; *Palm Springs v. Living Desert Reserve* (1999) 70 C.A.4th 613, 622, 82 C.R.2d 859 [deed containing express condition that grantee and its successors would forever use conveyed land as desert preserve and equestrian center for exposition of desert fauna and flora granted fee simple subject to condition subsequent; if grantee breached condition, it would forfeit its interest in favor of third party].)

In *Biescar v. Czechoslovak-Patronat* (1956) 145 C.A.2d 133, 302 P.2d 104, the grantor executed a grant deed in fee simple to defendant nonprofit corporation without consideration. But a contemporary agreement drafted by the grantee's attorney and signed by the grantor and grantee's representative stated that the purpose was to "perpetuate" the property as a private park for Czechoslovak people and that the grant was accepted on this condition. Subsequent changes in the neighborhood and restrictive zoning made it impracticable to continue this use, and defendant grantee sought to sell the land. *Held*, plaintiffs, heirs of the grantor, were entitled to quiet title. "The circumstance that the Patronat paid nothing for the property, coupled with the frequent use of language connoting condition, together with the donors' manifest intent that the property constitute a permanent memorial of their benefaction to the Czechoslovak public, fully justified the court's finding ... that the estate was devised upon condition that it be used perpetually as a park or meeting ground." (145 C.A.2d 144.)

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[§ 20] Breach, Termination, and Waiver.

An estate on condition subsequent does not terminate automatically on breach or happening of the condition. Formerly, one entitled to enforce the condition had to elect to terminate and exercise the power of termination *within a reasonable time* after breach. (*Santa Monica v. Jones* (1951) 104 C.A.2d 463, 470, 473, 232 P.2d 55; *Kirker v. Shell Oil Co.* (1951) 104 C.A.2d 497, 502, 231 P.2d 905; see *Rest., Property* §§24, 45; 28 *Am.Jur.2d* (2000 ed.), *Estates* §182 et seq.) Thus, former law was not clear regarding the limitations period applicable to a power of termination. (Law Rev. Com. Comment to C.C. 885.050.)

Now, a power of termination must be exercised within 5 years after breach of the restriction to which the fee simple estate is subject. (C.C. 885.050, *infra*, §342.) "Although Section 885.050 prescribes the limitation period for exercise of a power of termination to enforce breach of a restriction, it does not otherwise effect the existence or continued vitality of the power of termination as to other breaches. Nor does Section 885.050 preclude earlier termination of a power of termination through waiver or estoppel." (Law Rev. Com. Comment.)

Minor breaches, particularly when disregarded for a long period, do not justify a forfeiture. In *Santa Monica v. Jones*, *supra*, the original deed contained a condition that the land should "revert" to the grantors if not used for railway purposes or if nonrailway structures were placed there. The railway company allowed a signboard company to install signboards removable on 24 hours' notice, and a bus company to park buses on a month-to-month lease. Plaintiff city sought to condemn part of the land, and defendant, heir of the original grantor, demanded a share of the condemnation award on the theory that revesting of title had occurred or was imminent. "We decline, as did the trial court, to raise this type of an alleged breach to the dignity of a breach giving rise to a forfeiture. ... Moreover, as there is no showing by the heirs that they or their predecessors ever objected to the use of the property to park busses or place signboards thereon we see no occasion to grant any relief, whether they knew or did not know of the alleged violations. If they were not interested enough to check the property for violations, the violations must be regarded as altogether too minor to warrant forfeiture of a fee property, where, as here, it does not appear that any harm or benefit could accrue to the heirs." (104 C.A.2d 470.) (See 7 *Hastings L. J.* 101 [extension of judicial bias against forfeiture].)

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[§ 21] Rights of Owner.

The owner of an estate in fee subject to a condition subsequent has practically the same rights and privileges as an owner in fee simple absolute. The grantee takes the entire estate of the grantor, and unless the grantee breaches the conditions, he or she is in the same position as an owner in fee simple absolute. (*Parry v. Berkeley Hall School Foundation* (1937) 10 C.2d 422, 426, 74 P.2d 738, *infra*, §129; *Santa Monica v. Jones* (1951) 104 C.A.2d 463, 475, 232 P.2d 55 [grantee receives entire condemnation award; successors of grantor are not entitled to share]; *People v. Fresno* (1962) 210 C.A.2d 500, 515, 26 C.R. 853 [same]; *Taylor v. Continental Southern Corp.* (1955) 131 C.A.2d 267, 277, 280 P.2d 514 [public agency, grantee of land on condition of use for park purposes, takes mineral rights]; 81 A.L.R.2d 568 [rights in condemnation award]; 28 Am.Jur.2d (2000 ed.), *Estates* §30.)

The grantee may use the land to the same extent as an owner in fee simple, except that the grantee must not commit waste. (*Rest., Property* §49; but see *C.C.P.* 732, *infra*, §370 [owner of fee subject to condition subsequent is not listed among those against whom action for waste may be brought].) The grantee has the same power to transfer the land or create interests in it, but these are subject to the defeasibility of the estate. (*Rest., Property* §50; see *Parry v. Berkeley Hall School Foundation, supra*.) The grantee's interest likewise passes on intestacy in the same manner, subject to defeasibility. (*Rest., Property* §55.) If the grantee is a joint tenant or tenant in common, the grantee has the same right to partition. (*Rest., Property* §51.) The grantee's estate is subject to the same liability to creditors (*Rest., Property* §52) and to condemnation proceedings (*Rest., Property* §53).

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a. Creation of Life Estates.

1. By Deed.

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[§ 22] By Deed.

(1) *Grant or Reservation.* A life estate may be granted or reserved by deed. (See *Rest., Property* §107 et seq.; 28 *Am.Jur.2d* (2000 ed.), *Estates* §75 et seq.; 12 *Am.Jur. Legal Forms 2d* (1999 ed.), *Life Tenants and Remaindermen* §166:9 et seq.)

In *Barnett v. Barnett* (1894) 104 C. 298, 37 P. 1049, the granting clause of a deed gave the property to the grantee "and to his heirs." The habendum clause read: "for and during his natural life, and to the issue and heirs of the body" of said grantee. *Held*, the grantee took only a life estate, with remainder in the issue and heirs of the body. At common law, application of the Rule in *Shelley's Case* (supra, §11) would have given the grantee a fee tail. C.C. 779 abrogates the rule, and, under C.C. 763, an estate that would have been a fee tail at common law becomes a fee simple in California. However, this does not mean that every instrument that would have created a fee tail at common law creates a fee simple. Here, the grantor's intention was not to create a fee tail but to give a life estate with remainder over; and, with the abrogation of the Rule in *Shelley's Case*, that intention could be given effect. (104 C. 301.)

In *Jacobs v. All Persons* (1909) 12 C.A. 163, 106 P. 896, the granting clause gave the property to the grantor's wife "and to her heirs and assigns forever." The habendum clause read: "To the said party ... during the remainder of her natural life, and upon ... her death the title to all of said property shall pass to and be vested in" certain children of the grantor. The qualifying language was written; the other language was part of the printed form. *Held*, the deed, construed as a whole, and giving effect to the qualifying habendum clause, granted only a life estate to the wife. (12 C.A. 168.)

In *Boyer v. Murphy* (1927) 202 C. 23, 259 P. 38, defendant's wife conveyed her separate property to plaintiffs in fee, reserving a life estate for herself and defendant husband. After her death, plaintiffs sought to quiet title on the ground that a grantor cannot reserve a life estate to a stranger to the deed or grant. The court recognized the rule, but gave effect to the manifest intention of the wife by viewing the husband's life estate not as a reservation, but as an exception to the estate granted the plaintiffs. (202 C. 33.) It has been suggested that a more reasonable method would have been to construe the reservation as a grant of a life estate to defendant. (See 1 *So. Cal. L. Rev.* 81.)

In *Green v. Brown* (1951) 37 C.2d 391, 232 P.2d 487, plaintiff and his wife, joint tenants of their home, conveyed

the fee to defendants "Reserving and Excepting, however, a Life Estate in the Grantors" with the right to use and receive rents, etc., "during the term of their natural lives." In this action for declaratory relief after the death of plaintiff's wife, the trial judge held that the reserved life estate was only a tenancy in common and that plaintiff had only a half interest. *Held*, reversed; plaintiff had a life estate in the whole as surviving joint tenant. The reservation was to both grantors in all of the property during their lives, and this was equivalent to the phrases "joint tenancy" or "to the survivor of them." (37 C.2d 395.)

(2) *Delivery of Deed on Condition of Death*. In California, a legal life estate is reserved to the grantor by implication where the grant is in fee simple, but the deed is delivered to a third party to be given to the grantee on the death of the grantor. (See *Wilhoit v. Salmon* (1905) 146 C. 444, 447, 80 P. 705; 43 Cal. L. Rev. 124; *infra*, §299.)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Grant or Reservation*. See 12 Am.Jur. Legal Forms 2d (2008 ed.), Life Tenants and Remaindermen §166:7 et seq.



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a. Creation of Life Estates.

2. By Will.

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[§ 23] By Will.

A life estate may also be created by will. (See *King v. Hawley* (1952) 113 C.A.2d 534, 537, 248 P.2d 491, *infra*, §29; *Estate of Bernatas* (1958) 162 C.A.2d 693, 699, 328 P.2d 539; *Estate of Mulholland* (1971) 20 C.A.3d 392, 396, 97 C.R. 617; 28 Am.Jur.2d (2000 ed.), *Estates* §81 et seq.; 12 Am.Jur. Legal Forms 2d (1999 ed.), *Life Tenants and Remaindermen* §166:19 et seq.)

An unusual theory was developed in *Estate of Rath* (1937) 10 C.2d 399, 75 P.2d 509. A wife, owning separate real property, entered into a written contract with her husband, by which she agreed to devise the property to him for support, and he agreed to devise any unconsumed portion to her nephews. Both wills were executed in conformity with the agreement. She died and, before distribution to him, he died. The property was distributed to the nephews, and the state sought to tax the interests as coming from the estate of the husband. The nephews claimed that they took remainders from the wife's will (which, under the particular circumstances, would result in a lower tax). *Held*, the husband took legal title in fee simple, but by virtue of the contract, his beneficial or equitable estate was limited to his life. Under the contract, he was a trustee for the nephews; he could use the property, but not transfer it to strangers. For the purpose of the inheritance tax, measured by beneficial succession, he took only a life estate with power to consume the corpus. (10 C.2d 404.) (See *infra*, §29.)

In *Estate of Smythe* (1955) 132 C.A.2d 343, 282 P.2d 141, the testator's will gave his property to "Ruth Smyth for her during her life time, as she may need or see fit to use"; on her death, any remaining property was to go equally "through her will" to two named charities. The probate court held that Ruth received the fee, and that the attempted disposition to the charities was in derogation of the fee and void. *Held*, reversed; the will created a life estate with remainder to the charities. (a) The intent was clearly stated in express language. (b) A life estate is valid even though the life tenant is given power to consume the corpus (here, by the provision for use "as she may need or see fit"). (See *infra*, §29.) (c) The grantee was not given the absolute power of disposition, but merely a mandatory special power of appointment to exercise in favor of the charities. (See *infra*, §158.)

SUPPLEMENT: [This section is current through the latest supplement]

See 12 Am.Jur. Legal Forms 2d (2008 ed.), *Life Tenants and Remaindermen* §166:17 et seq.



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b. Rights and Powers of Life Tenant.

1. Possession, Use, and Actions.

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[§ 24] Possession, Use, and Actions.

(1) *Possession*. The life tenant has the same right of possession as an owner in fee simple, subject to the remainder holder's privilege to protect his or her rights; e.g., to enter to see if waste is being committed. (*Rest., Property §117*; C.C. 818; see 2 Powell §15.03; 51 *Am.Jur.2d* (2000 ed.), *Life Tenants and Remaindermen* §§32, 33.)

(2) *Reasonable Use*. The life tenant is also entitled to make reasonable use of the land, and to receive the issues and profits. (*Rest., Property §119*; see *Sallee v. Daneri* (1942) 49 C.A.2d 324, 327, 121 P.2d 781 [life tenant could cut and sell wood, thus clearing land for farming]; *Estate of Steiner* (1966) 240 C.A.2d 78, 81, 49 C.R. 352 [ordinary life tenant can use, but not consume, property]; 51 *Am.Jur.2d* (2000 ed.), *Life Tenants and Remaindermen* §§122 et seq., 151 et seq., 156 et seq.; 12 *Am.Jur. Legal Forms 2d* (1999 ed.), *Life Tenants and Remaindermen* §166:87 et seq.; and see *infra*, §29.)

(3) *Actions*. If a stranger causes injury to the property, the life tenant may sue alone, but can only recover the difference between the value of the life estate before and after the injury, and not damages to the remainder holder's interest. (*Rest., Property §118*; see 49 *A.L.R.2d* 1117 [life tenant's right of action for injury or damage to property].)

In *Bliss v. Security-First Nat. Bank* (1947) 81 C.A.2d 50, 183 P.2d 312, a note and deed of trust were bequeathed to W for life, with remainder to E. After the trustee's sale, the former owner (debtor) sought to set it aside on the ground that W alone had given notice of default and election to sell. *Held*, it was both the right and the duty of the life tenant to protect the corpus of the estate, and therefore to take such action "as an implied trustee" with respect to security in default. (81 C.A.2d 54.)

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(2) *Reasonable Use*. See 12 *Am.Jur. Legal Forms 2d* (2008 ed.), *Life Tenants and Remaindermen* §166:81 et seq.



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2. Crops.

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[§ 25] Crops.

If the life estate terminates without the fault of the life tenant, the life tenant or the tenant's executor or administrator is entitled to emblements, i.e., the privilege of cultivation and harvesting of annual crops planted before the estate's termination. (*Rest., Property §121*; see *Lloyd v. First Nat. Trust & Savings Bank* (1951) 101 C.A.2d 579, 582, 225 P.2d 962; 21A Am.Jur.2d (1998 ed.), Crops §31 et seq.; 47 A.L.R.3d 784 [rights of life tenant and remainder holder as to crops].)

The emblements doctrine at common law did not apply to the product of perennials, such as fruit and nut trees or vines requiring only one planting and thereafter in theory bearing crops naturally (*fructus naturales*) rather than by regular labor (*fructus industriales*). There is some modern authority recognizing the necessity of regular cultivation and care of orchard crops and applying the emblements doctrine to them. However, if the fruit has not even set at the time of termination, the right to emblements may be denied. (See *Lloyd v. First Nat. Trust & Savings Bank*, *supra* [alternative ground of decision]; 24 So. Cal. L. Rev. 509 [criticizing *Lloyd*].)

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SUPPLEMENT: [This section is current through the latest supplement]
On doctrine of emblements, see 21A Am.Jur.2d (2008 ed.), Crops §26 et seq.



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3. Insurance and Condemnation Award.

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[§ 26] Insurance and Condemnation Award.

(1) *Insurance*. Although, by special agreement, a policy of insurance may be taken to protect the interests of both the life tenant and the remainder holder, if the life tenant insures only his or her own interest and the property is destroyed, the life tenant may keep the insurance money. The life tenant is not under a duty to insure for the benefit of the remainder holder. (See *Corder v. McDougall* (1932) 216 C. 773, 774, 16 P.2d 740; *Rest., Property §123*; 51 *Am.Jur.2d* (2000 ed.), *Life Tenants and Remaindermen §182*.)

(2) *Condemnation Award*. Under *C.C.P. 1265.420*, when property subject to a life tenancy is taken in eminent domain, the court may, on petition of a person having an interest in the property, order any of the following:

(a) That the award be apportioned and distributed between the life tenant and the remainder interest holder.

(b) That the compensation be used to purchase comparable property to be held subject to the life tenancy.

(c) That the compensation be held in trust and the income (and, to the extent authorized, the principal) be distributed to the life tenant.

(d) Any other arrangement "equitable under the circumstances." (See 8 *Summary* (10th), *Constitutional Law*, §1253; *Estate of Giacometti* (1961) 192 C.A.2d 244, 246, 13 C.R. 245, *infra*, §28; 91 *A.L.R.2d* 963 [distribution of proceeds of condemnation between life tenant and remainder holder]; *Rest., Property §148*.)

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4. Compensation for Permanent Improvements.

12 Witkin Sum. Cal. Law Real Property § 27

[§ 27] Compensation for Permanent Improvements.

As a general rule, a life tenant has no duty to make permanent improvements. Therefore, the life tenant cannot claim reimbursement from the remainder holder if he or she does make improvements. Exceptions have been recognized, e.g., where the improvements are made under compulsion of a statute or ordinance or are necessitated by changed conditions to ensure reasonable income from unproductive or low-income property. A basic assumption is that the improvement will benefit the future estate as well as the life estate, and that it does not violate the terms of the conveyance. (*Eastman v. Peterson* (1968) 268 C.A.2d 169, 173, 73 C.R. 803.)

This approach supported an exception in *Eastman*. In 1955, the original grantors conveyed Los Angeles property to defendant, reserving a life estate, and conveyed the life estate to plaintiff. Plaintiff went into possession and remained there until the death of the grantors. The property consisted of three residential units. In 1957, the Los Angeles Department of Building and Safety sent a notice of many serious violations of the building code, correction of which was necessary for certificates of occupancy. Plaintiff had the work done at a cost of \$ 10,000. When the life estate terminated, plaintiff sued the remainderman to recover for these permanent improvements. Judgment went for defendant on the ground that plaintiff acted officiously without any obligation. *Held*, reversed. "[P]laintiff ... had such a definite, legal and bona fide concern as to what should be done about the property when the peremptory notification was received from the city that his actions cannot be said to have been officious." (268 C.A.2d 174.) However, the parties did not offer evidence on the cost and effect of razing the structures rather than improving them, and the record was also unclear on the expectancy of the life that measured the life tenancy. These issues must be resolved on the retrial to determine whether plaintiff is entitled to reimbursement, and whether there should be an equitable apportionment on the basis of the respective benefits to the life estate and the remainder. (268 C.A.2d 175.)

West's Key Number Digest, Life Estates k.17

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5. Conveyance and Partition.

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[§ 28] Conveyance and Partition.

In the absence of statute, a life tenant cannot transfer or create any greater estate than the tenant has, either by voluntary conveyance or by a judicial proceeding in partition. (See *Rest., Property* §§124 et seq., 172; 2 Powell §15.03; 59A *Am.Jur.2d* (1987 ed.), *Partition* §32 et seq.; 51 *Am.Jur.2d* (2000 ed.), *Life Tenants and Remaindermen* §84 et seq.) (On partition by life tenant, see *Rest., Property* §172, Comment; 12 *Am.Jur. Legal Forms 2d* (1999 ed.), *Life Tenants and Remaindermen* §166:120 et seq. [voluntary transfer or termination]; on partition under revised statutes, see *infra*, §65 et seq.)

The practical problems involved in partition were considered in *Estate of Giacomelos* (1961) 192 C.A.2d 244, 13 C.R. 245, a condemnation case. Decedent's real property was distributed, pursuant to his will, as a life estate to his widow and the remainder in trust for his children. The land was thereafter taken by eminent domain for \$ 42,500, and the probate court awarded the widow \$ 14,129.27 as the value of her life estate, giving the balance to the trustee. *Held*, reversed; the widow was entitled to all the money as a substitute for the property, to be invested for her benefit for her life.

(a) The partition statutes generally provide for a division of the proceeds of a sale of real property. However, under former C.C.P. 781 (now C.C.P. 873.840(c)), the court may direct the payment to a trustee for investment for the life tenant. (192 C.A.2d 246.)

(b) The policy underlying the statute should be equally applicable to compulsory sale under eminent domain. And in the present case, this would carry out the unmistakable intention of the testator to give his wife the income produced by the property devised. (192 C.A.2d 247.)

In *Forrest v. Elam* (1979) 88 C.A.3d 164, 151 C.R. 591, plaintiff was devised a life estate in real property for as long as he lived on it; on his removal or death, it was to be distributed equally to the children of the testator, including plaintiff. He filed a partition action seeking a sale and deduction of the value of his life estate before division of the balance among himself and the other three children. *Held*, the proceeds should be equally divided. By bringing the partition suit and seeking a sale, he violated the condition of his life estate, and it had no value. (88 C.A.3d 170, 172.)

West's Key Number Digest, Life Estates k.23

SUPPLEMENT: [This section is current through the latest supplement]

See 12 Am.Jur. Legal Forms 2d (2008 ed.), Life Tenants and Remaindermen §166:112 et seq.



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6. Power To Consume Corpus.

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[§ 29] Power To Consume Corpus.

(1) *Nature of Provision.* The life tenant ordinarily has no power to consume the estate, and is liable to the holder of the remainder for waste. (See *infra*, §30.) It is possible, however, by express language, to create a life estate with power to enjoy and consume the corpus, so that only the unconsumed portion passes to the remainderman after death of the life tenant. (See *Hardy v. Mayhew* (1910) 158 C. 95, 99, 110 P. 113; *Colburn v. Burlingame* (1923) 190 C. 697, 700, 214 P. 226; *Estate of Rath* (1937) 10 C.2d 399, 404, 75 P.2d 509; *Lord v. Atchison* (1939) 12 C.2d 681, 686, 87 P.2d 346; *Estate of Smythe* (1955) 132 C.A.2d 343, 346, 282 P.2d 141; *Estate of Morse* (1970) 9 C.A.3d 411, 416, 88 C.R. 52, citing the text; *Estate of McKenna* (1981) 118 C.A.3d 66, 76, 174 C.R. 84; 51 Am.Jur.2d (2000 ed.), *Life Tenants and Remaindermen* §49 et seq.; on implied right to entrench on or dispose of corpus, see 31 A.L.R.3d 6, 31 A.L.R.3d 169, and 31 A.L.R.3d 309; on right of life tenant to dispose of principal by inter vivos gift, see 83 A.L.R.3d 135.)

(2) *Exercise in Good Faith.* Where the power to consume is given in limited terms, it must be exercised within the limits and in good faith. Thus, a power to use for the life tenant's "support or maintenance" authorizes consumption for reasonable support, and a power to use for "benefit or comfort" authorizes consumption only for the life tenant's enjoyment. (See *King v. Hawley* (1952) 113 C.A.2d 534, 540, 248 P.2d 491.)

In *King*, a testator's will read: "I devise and bequeath all my property to my sister [G] and request ... that she may settle the estate in her own way and sell any or all of the real or personal estate at public or private sale as she may think best, and that she may use all the proceeds of my estate for her comfort and support; but that whatever may be left of my estate at her death shall go to [K] and to his heirs." G disposed of almost the whole of the property before her death, and the evidence showed that she did not use any considerable part for her own comfort and support, but engaged in a concerted plan with others to prevent the remainderman, plaintiff K, from getting it. *Held*, the fraud of G and others was established, and K was properly decreed the owner of the proceeds of the property wrongfully transferred. "Although she had a broad right to adapt the property to the purposes for which she received it, the right was not unlimited and she was charged in respect of her handling of the property with an affirmative duty to exercise her undoubted broad rights of use and consumption with due regard for the rights of the respondent, the remainderman, a duty which may be said to have been in the nature of a trust." (113 C.A.2d 538.)

In *Hill v. Thomas* (1955) 135 C.A.2d 672, 288 P.2d 157, a husband and wife made a joint will providing that on death of the survivor, six-sevenths of the property should go to his relatives and one-seventh to her son, but that nothing in the will should limit the right of the survivor to "the full use and enjoyment by the survivor of us of the entire estate." After the husband's death, the surviving wife made gifts of the bulk of the property to her son. *Held*, "giving the estate away was not for her benefit and was not permissible under the right to use and enjoy the estate." (135 C.A.2d 677.)

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1. In General.

12 Witkin Sum. Cal. Law Real Property § 30

[§ 30] In General.

The life tenant must pay taxes and other current charges and "a just proportion of extraordinary assessments benefiting the whole inheritance." (C.C. 840; see *Rest., Property §129* et seq.) The life tenant must also contribute to payment of an encumbrance. (*Rest., Property §132.*) (See 2 Powell §15.03; *10 A.L.R.3d 1309* [duty as between life tenant and remainderman to pay improvement assessments]; *43 A.L.R.4th 1012* [duty as between life tenant and remainderman to pay for improvements or repairs required by governmental authorities]; for forms specifying duties, see 12 Am.Jur. Legal Forms 2d (1999 ed.), Life Tenants and Remaindermen §166:109 et seq.; on liability of life estate to claims of tenant's creditors, see *Rest., Property §147.*)

West's Key Number Digest, Life Estates k.22 et seq.

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See 12 Am.Jur. Legal Forms 2d (2008 ed.), Life Tenants and Remaindermen §166:101 et seq.



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2. Waste and Permissible Use.

12 Witkin Sum. Cal. Law Real Property § 31

[§ 31] Waste and Permissible Use.

The life tenant must do "no act to the injury of the inheritance" (C.C. 818) and must "keep the buildings and fences in repair from ordinary waste" (C.C. 840). (On action for waste, and recovery of treble damages, see *C.C.P.* 732; C.C. 826; *16 A.L.R.3d 1344* [forfeiture of life estate for waste]; 16B Am.Jur. P.P. Forms (2000 ed.), Life Tenants and Remaindermen §5 et seq.; on right of remainderman to enter land to view waste, see *Rest.2d, Torts §186*; on what constitutes waste, see *infra*, §371.)

The Restatement sets forth in great detail the duty of a life tenant to refrain from committing waste, permitting deterioration of land or structures, making changes in the premises, or doing an act that diminishes the market value of subsequent interests (*Rest., Property §138* et seq.), with the following exceptions:

(1) Where the instrument provides otherwise, e.g., "to B for life without impeachment of waste." (*Rest., Property §141.*)

(2) Where the life tenant's act is required by a valid police power regulation. (*Rest., Property §142.*)

(3) Where the life tenant has the privilege to cut necessary timber for repairs to structures or fences, or for firewood. (*Rest., Property §143.*)

(4) Where the land was previously used for extracting and selling minerals, sand, clay, or for cutting and selling timber; the life tenant may continue the use. (*Rest., Property §144.*)

(5) Where the income is insufficient for the preservation or management of the property; the life tenant may, e.g., cut timber to pay necessary costs. (*Rest., Property §145.*)

(6) Where damages to the premises are caused, without negligence on the part of the life tenant, by accident, extraordinary force of nature, or act of a stranger. (*Rest., Property §146.*)

The common law rule that neither the life tenant nor the remainder holder can take minerals from the land without

the other's consent has a limiting effect on the development of oil lands. An exception has been recognized: if the owner previously used the land for extracting and selling minerals, the life tenant may continue the use. (See *Rest., Property* §§138, 144; 3 *U.C.L.A. L. Rev.* 601 [open mine doctrine]; 18 *A.L.R.2d* 98, 106.) However, the opening and operation of mines or wells after the inception of the life estate constitutes waste in the absence of a contrary intention manifested by the instrument creating the estate. (*Haskell v. Wood* (1967) 256 *C.A.2d* 799, 804, 64 *C.R.* 459.)

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1. In General.

12 Witkin Sum. Cal. Law Real Property § 32

[§ 32] In General.

Under C.C. 682, the ownership of property by several persons is either:

- (1) Of joint interests. (See *infra*, §33 et seq.)
- (2) Of partnership interests.
- (3) Of interests in common. (See *infra*, §39 et seq.)
- (4) Of community interest of husband and wife.

Property acquired by a partnership is property of the partnership and not of the partners individually. (*Corp.C. 16203*; see 9 *Summary* (10th), *Partnership*, §27.)

The interests of husband and wife in community property during the continuance of the marriage relation are "present, existing, and equal." (*Family C. 751*; see 11 *Summary* (10th), *Community Property*, §130.) (On estate created by deed to persons as husband and wife who are not legally married, see 9 *A.L.R.4th* 1189; on estate by the entirety, recognized in other jurisdictions, see 41 *Am.Jur.2d* (1995 ed.), *Husband and Wife* §28 et seq.; 32 *A.L.R.3d* 570; 18 *A.L.R.5th* 230 [spouse's conveyance to other spouse of property held as estate by entirety].) Property cannot be held by husband and wife both as community property and in either a joint tenancy or tenancy in common at the same time. (*Estate of Mitchell* (1999) 76 *C.A.4th* 1378, 1385, 91 *C.R.2d* 192.)

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On estate by the entirety, see 41 *Am.Jur.2d* (2005 ed.), *Husband and Wife* §18 et seq.



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2. Joint Tenancy.

a. Nature of Joint Tenancy.

1. In General.

12 Witkin Sum. Cal. Law Real Property § 33

[§ 33] In General.

"A joint interest is one owned by two or more persons in equal shares, by a title created by a single will or transfer." (C.C. 683(a); see *Hart v. Nagasawa* (1933) 218 C. 685, 688, 24 P.2d 815; *Tenhet v. Boswell* (1976) 18 C.3d 150, 155, 133 C.R. 10, 554 P.2d 330, *infra*, §51; 7 Powell §51.01 et seq.; 20 *Am.Jur.2d* (2005 ed.), *Cotenancy and Joint Ownership* §4 et seq.; on joint tenancies in personal property, see 13 *Summary* (10th), *Personal Property*, §30; on joint tenancies in community property, see 11 *Summary* (10th), *Community Property*, §218 et seq.; on tax consequences, see 7 Powell §51.05.)

The proceeds of property held in joint tenancy retain that character, i.e., they are also regarded as joint tenancy property. (*Fish v. Security-First Nat. Bank* (1948) 31 C.2d 378, 387, 189 P.2d 10 [payments on notes held in joint tenancy deposited by one joint tenant in sole personal account]; *Estate of Castiglioni* (1995) 40 C.A.4th 367, 385, footnote 22, 47 C.R.2d 288 [citing rule from *Fish*]; see *Estate of Zaring* (1949) 93 C.A.2d 577, 580, 209 P.2d 642 [condemnation award for joint tenancy land taken in eminent domain proceeding]; *Ferk v. Lake* (1988) 205 C.A.3d 268, 275, 252 C.R. 196 [cause of action for injunctive relief and for damages to real property was joint tenancy asset that passed to surviving joint tenant on death of other].) An obvious practical exception is found in the rule that a joint tenant in sole possession may keep all the profits. (See *Black v. Black* (1949) 91 C.A.2d 328, 332, 204 P.2d 950, *infra*, §49.)

At common law, corporations could not hold property as joint tenants. (*De Witt v. San Francisco* (1852) 2 C. 289, 297.) Whether they may do so in California is undecided. (See *American Bible Soc. v. Mortgage Guarantee Co.* (1932) 217 C. 9, 13, 17 P.2d 105; 5 *Miller & Starr* 3d §12:22.)

West's Key Number Digest, Joint Tenancy k.1 et seq.

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2. Joint Tenancy.

a. Nature of Joint Tenancy.

2. Right of Survivorship.

12 Witkin Sum. Cal. Law Real Property § 34

[§ 34] Right of Survivorship.

(1) *General Rule.* The distinguishing feature of joint tenancy is the right of survivorship. The title of each tenant extends to the whole estate. Hence, when one tenant dies, the entire estate survives to the others, to the exclusion of the heirs of the decedent. (*Swan v. Walden* (1909) 156 C. 195, 196, 103 P. 931; *Estate of Gurnsey* (1918) 177 C. 211, 215, 170 P. 402; *Cole v. Cole* (1956) 139 C.A.2d 691, 695, 294 P.2d 494; *Tenhet v. Boswell* (1976) 18 C.3d 150, 155, 133 C.R. 10, 554 P.2d 330, *infra*, §51; *Estate of Mitchell* (1999) 76 C.A.4th 1378, 1385, 91 C.R.2d 192.) And, although a creditor of one joint tenant may, by levy of execution and purchase at the sale, sever the joint tenancy and become a tenant in common (see *infra*, §55), a mere judgment lien against the interest of one joint tenant terminates on his or her death, and the surviving joint tenant takes the property free of the lien. (*Zeigler v. Bonnell* (1942) 52 C.A.2d 217, 220, 126 P.2d 118.)

In *McDonald v. Morley* (1940) 15 C.2d 409, 101 P.2d 690, a husband and wife who held property in joint tenancy agreed that when either died, the property would go to their daughter. Because of the right of survivorship, the agreement was inconsistent with and terminated the estate in joint tenancy, making the parties tenants in common. (15 C.2d 412.)

(2) *Right Denied to Killer.* A joint tenant who feloniously and intentionally kills the other joint tenant is not entitled to the decedent's interest by right of survivorship. (See *Prob.C. 251*; *Abbey v. Lord* (1959) 168 C.A.2d 499, 506, 336 P.2d 226; *Whitfield v. Flaherty* (1964) 228 C.A.2d 753, 762, 39 C.R. 857; *Saltares v. Kristovich* (1970) 6 C.A.3d 504, 516, 85 C.R. 866; *New York Life Ins. Co. v. Cawthorne* (1975) 48 C.A.3d 651, 654, 121 C.R. 808; *Rest., Restitution* §188, Comment b; 27 A.L.R.3d 794; 42 A.L.R.3d 1116; 20 *Am.Jur.2d* (2005 ed.), *Cotenancy and Joint Ownership* §10; 13 *Summary* (10th), *Trusts*, §321; 14 *Summary* (10th), *Wills and Probate*, §293 et seq.)

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b. Creation of Joint Tenancy.

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[§ 35] Creation of Joint Tenancy.

The sole technical requisite for creating a joint tenancy is an express declaration of joint tenancy in the instrument. (See C.C. 683, 686; *Gonzales v. Gonzales* (1968) 267 C.A.2d 428, 435, 73 C.R. 83, citing the text; *Estate of Layton* (1996) 44 C.A.4th 1337, 1342, 52 C.R.2d 251, quoting the text; C.E.B., 2 Real Property Sales Transactions 3d, §9.30; 7 Powell §51.02; 20 Am.Jur.2d (2005 ed.), *Cotenancy and Joint Ownership* §11 et seq.; 7 Am.Jur. Legal Forms 2d (1998 ed.), *Cotenancy and Joint Ownership* §75:7 et seq.) A joint tenancy in realty cannot be created by oral agreement. (*Donovan v. Donovan* (1963) 223 C.A.2d 691, 697, 36 C.R. 225; *Estate of Seibert* (1990) 226 C.A.3d 338, 342, 343, 276 C.R. 508 [equitable estoppel is not available to enforce oral agreement]; *Byrne v. Laura* (1997) 52 C.A.4th 1054, 1067, 60 C.R.2d 908 [disagreeing with *Estate of Seibert*; although joint tenancy arrangements are subject to statute of frauds in C.C. 683, and there was no written agreement between decedent and plaintiff to put all of decedent's property in plaintiff's name, plaintiff could assert equitable estoppel on remand].)

Joint tenants must share unity of time, title, interest, and possession. (*Grothe v. Cortlandt Corp.* (1992) 11 C.A.4th 1313, 1317, 15 C.R.2d 38.) The statutory requirement of an express declaration "does not abrogate the common law rule that four unities are essential to an estate in joint tenancy." (*Tenhet v. Boswell* (1976) 18 C.3d 150, 155, 133 C.R. 10, 554 P.2d 330, *infra*, §51.) However, the use of an intermediate conveyance through a dummy to achieve unity of title is unnecessary. (See C.C. 683.)

C.C. 683(a) specifies the following methods of creation:

(1) Express declaration in a *will or transfer* that the interest is a joint tenancy. Thus, a joint tenancy is effectively created by an instrument conveying property to grantees "as joint tenants," or "in joint tenancy," etc. It is unnecessary to add the words "with the right of survivorship" or any other declaration to that effect, because survivorship is an incident of the tenancy. The addition of the phrase "not as tenants in common" is equally unnecessary. (*Estate of Davis* (1948) 88 C.A.2d 704, 705, 199 P.2d 755.) (See 46 A.L.R.2d 523 [what constitutes devise or bequest in joint tenancy despite statute that raises presumption against joint tenancy]; 69 A.L.R.2d 1058 [construction of devise to persons as joint tenants and expressly to survivors of them or to them with right of survivorship].)

An instrument described as a "bill of sale," although attempting to create rights on survival, does not create a joint

tenancy; it lacks the express declaration required by C.C. 683. (*Bill Froelich Motor Co. v. Estate of Kohler* (1966) 240 C.A.2d 897, 901, 50 C.R. 200.) However, in *Green v. Brown* (1951) 37 C.2d 391, 232 P.2d 487, *supra*, §22, joint tenants granted the fee subject to a reserved life estate, with the right to use, possession, etc., "during the term of their natural lives." *Held*, this language was the equivalent of words of survivorship and the reserved life estate was in joint tenancy. (37 C.2d 395.)

(2) Express declaration of joint tenancy in a transfer "from a *sole owner* to himself or herself and others." (See *Lowenthal v. Kunz* (1951) 104 C.A.2d 181, 231 P.2d 62, *infra*, §36.)

(3) Express declaration of joint tenancy in a transfer "from tenants in common or joint tenants to themselves or some of them, or to themselves or any of them and others." (See *Blevins v. Palmer* (1959) 172 C.A.2d 324, 326, 342 P.2d 356.)

(4) Express declaration of joint tenancy in a transfer "from a husband and wife, when holding title as community property or otherwise to themselves or to themselves and others or to one of them and to another or others." (See *Blevins v. Palmer*, *supra*, 172 C.A.2d 326.)

(5) A grant or devise to executors or trustees "as joint tenants."

West's Key Number Digest, Joint Tenancy k.3

SUPPLEMENT: [This section is current through the latest supplement]

See C.E.B., 2 Real Property Sales Transactions 4th, §10.31; 7 Am.Jur. Legal Forms 2d (2006 ed.), Cotenancy and Joint Ownership §75:5 et seq.



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c. Nature of Interest Held in Joint Tenancy.

1. Equitable Interest.

12 Witkin Sum. Cal. Law Real Property § 36

[§ 36] Equitable Interest.

A joint tenancy, like any other estate (*supra*, §9), may be created in an equitable as well as a legal interest. In *Lowenthal v. Kunz* (1951) 104 C.A.2d 181, 231 P.2d 62, partners A and P owned real property as tenants in common. P conveyed her interest to A, without consideration, on an oral agreement of A to hold it in trust for P. Later A, at P's request, executed a joint tenancy deed naming both as grantees. After P's death, A claimed as surviving joint tenant. P's administrator challenged the validity of the deed on the ground that A, holding only half the legal title in his own right and half in trust for P, was not "a sole owner" under C.C. 683 (*supra*, §35). *Held*, the joint tenancy was validly created. The operation of the statute is not restricted to a sole owner of the land or the entire legal title; it applies to anything as to which there may be sole ownership. Thus, after a conveyance to A in trust for X, A is the sole owner of the legal estate and X of the equitable estate, and each could make a conveyance. "[I]f there is only one owner of record of a legal estate or title, he is the sole owner thereof even if the ownership is only of the naked legal estate or title." "Joint interest" in C.C. 683 "may be of a legal estate, an equitable estate, or any other type of estate recognized by the law." (104 C.A.2d 183.)

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c. Nature of Interest Held in Joint Tenancy.

2. Undivided Interest.

12 Witkin Sum. Cal. Law Real Property § 37

[§ 37] Undivided Interest.

Because the interests of joint tenants are undivided, a complication can arise under the rule that there may be a joint tenancy in an undivided interest, with one joint tenant owning a distinct, individual interest in the same property. (See *Estate of Galletto* (1946) 75 C.A.2d 580, 585, 171 P.2d 152; *Gonzales v. Gonzales* (1968) 267 C.A.2d 428, 435, 73 C.R. 83.)

In *Estate of Galletto*, decedent wife acquired, by separate deeds in one transaction, an undivided one-half interest in land as her separate property. She and her husband acquired the remaining undivided one-half interest as joint tenants. On her death, her children challenged the husband's right as surviving joint tenant, contending that the conveyance was void as a violation of the unity of title rule, because it gave the wife a three-fourths interest, and the husband only a one-fourth interest. *Held*, the conveyances were valid. (a) By the first deed, the wife obtained a separate undivided one-half interest, not in joint tenancy. (b) By the second deed, a joint tenancy was created in the remaining undivided one-half interest, and the husband and wife obtained that interest as joint tenants. The required unities were present, for each had an equal share in that interest. (75 C.A.2d 586.)

As to the unity of title requirement, the court said: "But this rule does not prohibit one joint tenant from also owning a different and distinct interest in the property. Once it is conceded that a joint tenancy may exist as to an undivided interest in property, and that rule is perfectly clear, the balance of the undivided interest may lawfully be held by one of the joint tenants as well as by a stranger. The equality of interest requirement simply means that the interests of the joint tenants in the subject or interest involved in the joint tenancy must be equal. The subject of the tenancy involved herein is an undivided one-half interest in the property. In that interest the respondent and wife owned equal and identical interests." (75 C.A.2d 587.)

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CHAPTER XVII - Real Property

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II. ESTATES

C. Ownership by Several Persons.

2. Joint Tenancy.

c. Nature of Interest Held in Joint Tenancy.

3. Life Estate in Joint Tenancy.

12 Witkin Sum. Cal. Law Real Property § 38

[§ 38] Life Estate in Joint Tenancy.

In *Riley v. Turpin* (1956) 47 C.2d 152, 301 P.2d 834, B and T made a written agreement that B's home should be "the joint property of the parties hereto with the right of survivorship," except that if R (B's nephew) survived both, it should vest in him in fee simple, but that if R died before both, the survivor (of B and T) should take in fee simple. B died first; T lived in the home, but allowed it to be sold for tax delinquency; R paid the taxes and brought suit for partition and sale and recovery of the amounts paid. In affirming judgment for plaintiff, the court held that B and T had a *life estate* in joint tenancy, with contingent remainders, dependent on survival, in B, T and R. R, a contingent remainderman, had an interest sufficient to entitle him to pay the taxes and be subrogated to the state's lien; hence, he was entitled to seek partition. (47 C.2d 155.) (For another example of life estate in joint tenancy, see *Green v. Brown* (1951) 37 C.2d 391, 395, 232 P.2d 487, supra, §22.)

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3. Tenancy in Common.

a. In General.

12 Witkin Sum. Cal. Law Real Property § 39

[§ 39] In General.

A tenancy in common, which is a cotenancy without the right of survivorship, exists where several persons own property not as joint tenants or partners. (C.C. 685.) An interest created in favor of several persons is *presumed* to be a tenancy in common, unless it was acquired in partnership for partnership purposes or as community property, or expressly declared to be in joint tenancy. (C.C. 686; see *Bakanauskas v. Urdan* (1988) 206 C.A.3d 621, 629, 253 C.R.2d 764 [grant deeds executed in favor of two individuals conveyed undivided one-half interest in rental property to each, creating tenancy in common]; 7 Powell §50.01 et seq.; 20 Am.Jur.2d (2005 ed.), *Cotenancy and Joint Ownership* §32 et seq.; 7 Am.Jur. Legal Forms 2d (1998 ed.), *Cotenancy and Joint Ownership* §75:30 et seq.; on tax considerations in group ownership and tenancies in common, see 11 West L.A. L. Rev. 1.)

The following are illustrations of the creation of tenancies in common:

(1) A lessor's assignment of oil interests. (See *Schiffman v. Richfield Oil Co.* (1937) 8 C.2d 211, 224, 64 P.2d 1081; *infra*, §807.)

(2) A lease to several colessees, who become tenants in common of the leasehold interest. (See *Schmitt v. Felix* (1958) 157 C.A.2d 642, 646, 321 P.2d 473, *infra*, §504.)

(3) The failure of the court in a proceeding for dissolution of marriage to decree a division of the community property. (See *Brown v. Brown* (1915) 170 C. 1, 4, 147 P. 1168; 11 *Summary* (10th), *Community Property*, §244.)

(4) The separate acquisition by two persons of valid titles to property at tax sales. (*Zaslow v. Kroenert* (1946) 29 C.2d 541, 547, 176 P.2d 1 [plaintiff purchased on foreclosure of street bond, defendant at sale for delinquent property taxes]; *Milkes v. Smith* (1949) 91 C.A.2d 79, 81, 204 P.2d 419 [same; each also had lien against entire property for amount paid].)

(5) The maintenance of a hedge or line of trees by adjoining landowners; they become tenants in common in the trees. (*Anderson v. Weiland* (1936) 12 C.A.2d 730, 731, 55 P.2d 1242.)

West's Key Number Digest, Tenancy in Common k.1

SUPPLEMENT: [This section is current through the latest supplement]
See 7 Am.Jur. Legal Forms 2d (2006 ed.), Cotenancy and Joint Ownership §75:27 et seq.



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b. Failure of Joint Tenancy.

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[§ 40] Failure of Joint Tenancy.

If the attempted creation of a joint tenancy fails, and the parties are neither husband and wife nor partners, the estate will in most cases be considered a tenancy in common. (See C.C. 686, *supra*, §39.) In *Yeoman v. Sawyer* (1950) 99 C.A.2d 43, 221 P.2d 225, decedent, while married to an insane inmate of a Missouri institution, lived with defendant. They bought real property, each contributing half the price (decedent from his earnings, she from her own funds), and took a joint tenancy deed. *Held*, defendant could not take as surviving joint tenant, and plaintiff, administrator of decedent, could quiet title to half the property. Decedent's earnings were community property, in which he and his wife each had a one-fourth interest; hence, there could be no joint tenancy since the interests were unequal (decedent one-fourth, defendant one-half). Thus, the cotenancy created by the deed could only be a tenancy in common. The court generalized its holding as follows: "[W]here a husband contributes community funds toward the purchase of property, to which title is taken under a joint tenancy deed designating the husband and a person other than his wife as joint tenants, the interest thereby created is not that of joint tenants but rather of tenants in common." (99 C.A.2d 45.)

The foregoing case cannot, however, be extended further to establish the proposition that every ineffective joint tenancy is a tenancy in common. *Estate of Horn* (1951) 102 C.A.2d 635, 228 P.2d 99, involved personal property that had mainly been the husband's separate property. On the wife's death, he testified (in support of his claim as survivor) that the parties had orally agreed that all their property should be held in joint tenancy. Petitioners, heirs of the wife, seized on this testimony to argue that, because no joint tenancy resulted (oral agreement void; see 13 *Summary* (10th), *Personal Property*, §30), the parties were tenants in common and the heirs were entitled to the wife's half. *Held*, the husband took all as survivor. Under C.C. 686, if an estate is conveyed or transferred without an express declaration of joint tenancy, it will be held by the grantees or transferees as tenants in common. But in this case, there was no transfer of any kind. The oral agreement purporting to create a joint tenancy was a nullity and the separate property of the husband remained his property on the wife's death. "Title did not pass from one to the other. ... The intention was to create a tenancy with survivorship. A tenancy in common was expressly negated. To construe the purported agreement as conveying or transferring to tenants in common would be a judicial conveyance or transfer of the individual property of the parties in legal effect contrary to their expressed intention." (102 C.A.2d 639.)

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4. Rights, Powers, and Obligations of Cotenants.

a. Possession and Use.

1. In General.

12 Witkin Sum. Cal. Law Real Property § 41

[§ 41] In General.

The property rights of cotenants, whether joint tenants or tenants in common, are substantially the same, except for the right of survivorship (*supra*, §34). Thus:

(1) Each cotenant is equally entitled to share in the possession of the entire property, and neither can exclude the other from any part of it. (*Swartzbaugh v. Sampson* (1936) 11 C.A.2d 451, 454, 54 P.2d 73; see *Munkdale v. Giannini* (1995) 35 C.A.4th 1104, 1114, 41 C.R.2d 805; *Dabney v. Dabney* (2002) 104 C.A.4th 379, 382, 127 C.R.2d 917 [absent action for partition, one cotenant cannot force another to change boundaries of possessory interest]; *Kapner v. Meadowlark Ranch Assn.* (2004) 116 C.A.4th 1182, 1189, 11 C.R.3d 138; 7 Powell §50.03; 20 Am.Jur.2d (2005 ed.), *Cotenancy and Joint Ownership* §41 et seq.)

(2) One who is ousted by another may, after demand for entry and refusal, recover possession and damages, the damages ordinarily consisting of the ousted tenant's share of the value of the use and occupation from the time of the ouster. (*Zaslow v. Kroenert* (1946) 29 C.2d 541, 548, 176 P.2d 1 [acts of ouster consisted of denying plaintiff's title, changing locks on doors, posting "no trespassing" signs, and refusing permission to enter]; see *Estate of Hughes* (1992) 5 C.A.4th 1607, 1612, 7 C.R.2d 742, *infra*, §44 [citing *Zaslow*].) (On adverse possession by cotenant, see *infra*, §219 et seq.; on procedure to establish ouster, see *infra*, §43.)

(3) One cotenant can restrain or recover for waste by another. (*Fuller v. Montafi* (1921) 55 C.A. 314, 320, 203 P. 406; see C.C.P. 732; 20 Am.Jur.2d (2005 ed.), *Cotenancy and Joint Ownership* §45; *infra*, §§370, 371.)

West's Key Number Digest, Tenancy in Common k.10 et seq.

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2. Establishing Ouster.

aa. Law Revision Commission Recommendation.

12 Witkin Sum. Cal. Law Real Property § 42

[§ 42] Law Revision Commission Recommendation.

In response to a recommendation by the California Law Revision Commission (17 Cal. Law Rev. Com. Reports, p. 1023), the 1984 Legislature created a statutory procedure for establishing ouster where real property is owned concurrently by two or more persons. (C.C. 843, *infra*, §43; see 17 *Pacific L. J.* 703.) The following excerpts from the Commission's Report explained the purpose of the proposed legislation:

(1) "One difficulty with existing law is that, although a cotenant in possession is required to account to a cotenant out of possession in case of an ouster, it is not always clear when an ouster has occurred. ... If one cotenant exclusively occupies property and refuses a request by another cotenant to share occupancy, is this an ouster? California law is that in order for the cotenant in possession to be held to account for a proportionate share of the use value of the property, the cotenant must forcibly exclude or prevent use by the cotenant out of possession." (17 Cal. Law Rev. Com. Reports, p. 1028.)

(2) The Commission recommended a procedure for establishing ouster by a written demand to share possession, not unconditionally accepted within 60 days, and listed the following advantages of the new remedy: "It would enable a cotenant out of possession to assert his or her rights by means of a demand, rather than by attempting to take physical possession, with the resultant confrontation and possible violence. It would help clarify the acts that amount to an ouster and give assurance that the ouster could be determined with some certainty; this would also be economically efficient in that it would reduce litigation over whether an ouster has occurred. It would put the cotenant in possession on notice that either a sharing agreement must be reached by the cotenants or liability will be imposed, thereby encouraging private agreement between the cotenants; it provides a formal opening of negotiations. It is fair to require the cotenant in possession to account for the value of the possession thereafter if the cotenant refuses to share possession or to reach an agreement such as payment of rent to the cotenant out of possession. By providing interim relief for the tenant out of possession, the proposed remedy may help avoid a premature action for partition or possession of the property." (17 Cal. Law Rev. Com. Reports, p. 1029.)

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bb. Statutory Procedure.

12 Witkin Sum. Cal. Law Real Property § 43

[§ 43] Statutory Procedure.

(1) *Written Demand.* A tenant out of possession may serve a tenant in possession with a written demand for concurrent possession, referring to C.C. 843 and the time limit it imposes. The demand must be served in the same manner as a summons in a civil action. If the tenant in possession does not provide "unconditional concurrent possession" within 60 days after service is complete, an ouster is established. (C.C. 843(b).) The demand procedure "supplements and does not limit any other means by which an ouster may be established." (C.C. 843(a).)

(2) *Claim for Damages.* Subject to any applicable statute of limitations, a claim for damages for an ouster established under C.C. 843 may be asserted in an independent action, an action for possession or partition, or another appropriate action or proceeding. (C.C. 843(c).)

(3) *Other Remedies.* Nothing in C.C. 843 precludes the cotenants, at any time before or after a demand is served, from seeking partition of the property or from making an agreement concerning the rights of possession among the cotenants, the payment of reasonable rental value in lieu of possession, or any other appropriate terms. (C.C. 843(d).)

(4) *When Statute Does Not Apply.* C.C. 843 does not apply if the tenant out of possession is not entitled to possession or if an alternative remedy is provided under the terms of an agreement between the cotenants, the instrument creating the cotenancy, or another written instrument that indicates the possessory rights or remedies of the cotenants. (C.C. 843(a).)

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cc. Conduct of Cotenant in Possession.

12 Witkin Sum. Cal. Law Real Property § 44

[§ 44] Conduct of Cotenant in Possession.

In *Estate of Hughes* (1992) 5 C.A.4th 1607, 7 C.R.2d 742, the issue was whether the conduct of a cotenant in possession constituted an ouster of his cotenants, where the statutory procedure provided in C.C. 843 (supra, §43) was not used. K's will left her separate property residence to her children, V and C, but her husband G acquired a one-third interest in the property as an omitted spouse (see 14 *Summary* (10th), *Wills and Probate*, §273 et seq.). He continued to live in the residence, paying the installments on the note secured by the property but no rent. After some years, he filed a petition alleging that the residence had been community property, and another petition to determine heirship, claiming that the residence was his alone as the surviving spouse. Four years later he died, and his second wife lived in the house rent-free for another year and a half until the probate court ordered her to pay rent. After the administrator of K's estate was replaced, the new administrator filed an action to determine whether his predecessor was liable for failing to obtain a reasonable rental for the property. The probate court ruled that she was not liable, based on a referee's report finding that G's conduct in seeking to obtain sole ownership of the property did not constitute an ouster of his cotenants, V and C, so as to render him liable to them for rent. *Held*, reversed and remanded for further proceedings.

(a) "An ouster, in the law of tenancy in common, is the wrongful dispossession or exclusion by one tenant of his cotenant or cotenants from the common property of which they are entitled to possession." (5 C.A.4th 1612, quoting *Zaslow v. Kroenert* (1946) 29 C.2d 541, 176 P.2d 1, supra, §41.)

(b) The legislative history of C.C. 843 (see supra, §42), resulting in the adoption of a statutory procedure for establishing an ouster (supra, §43), indicates the difficulties of determining when an ouster has occurred. Where the conduct of a cotenant in possession for a substantial period consists solely of residing in the property, manifesting neither the intent to share possession nor the intent to deprive other cotenants from sharing possession, the cotenants out of possession cannot meet their burden of establishing an ouster. (5 C.A.4th 1613.)

(c) In this case, however, the referee and the trial court incorrectly analyzed the effect of G's petitions alleging that the residence had been community property and that he, as the surviving spouse, was its sole owner. "[T]he petitions were the functional equivalent of changing locks or posting 'no trespassing' signs telling a cotenant out of possession

that he or she may not enter the premises. It is one thing for the cotenant in possession to remain silent, but quite another for the cotenant to seek legal redress claiming entitlement to all the property to the exclusion of other claimants." (5 C.A.4th 1615.)

(d) Finding an ouster in these circumstances did not unfairly penalize G for seeking judicial resolution of his claim. He was represented by counsel and should suffer the detriments as well as receive the potential benefits of his action. While the ouster triggered the obligation to pay rent, it also gave him a significant reciprocal benefit by starting the time in which he held the property adversely, opening the way to a claim of title by adverse possession (see *infra*, §221). (5 C.A.4th 1615.) The potential for that claim, or for the establishment of an equitable estoppel or waiver based on the failure of V and C to seek a partition of the property during a period when its value substantially increased, might be considered on remand. (5 C.A.4th 1616.)

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b. Insurance.

12 Witkin Sum. Cal. Law Real Property § 45

[§ 45] Insurance.

There is no obligation on the part of a cotenant to insure the other cotenant against loss of the latter's interest. Moreover, because a fire insurance policy does not insure the property but indemnifies the particular insured for damage to the insured's interest, a noninsuring cotenant is not entitled to any part of the proceeds paid to the insuring cotenant. (*Russell v. Williams* (1962) 58 C.2d 487, 491, 492, 24 C.R. 859, 374 P.2d 827 [pointing out that same rule applies as between life tenant and remainderman, lessor and lessee, mortgagor and mortgagee, and vendor and purchaser]; see 20 *Am.Jur.2d* (2005 ed.), *Cotenancy and Joint Ownership* §41.)

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c. Protection Against Third Persons.

12 Witkin Sum. Cal. Law Real Property § 46

[§ 46] Protection Against Third Persons.

One cotenant can bring or defend an action against third persons for enforcement or protection of rights in the property. (See *Woodson v. Torgerson* (1930) 108 C.A. 386, 394, 291 P. 663 [ejectment may be brought, but doubt as to action to quiet title]; for modern rules of joinder in action, see 4 *Cal. Proc.* (4th), *Pleading*, §§163, 175.) But if the cotenant sues alone for damages resulting from injury to the property, he or she can only recover for his or her proportionate interest, not for the entire amount of damage. (*Razzano v. Kent* (1947) 78 C.A.2d 254, 258, 177 P.2d 612 [stating this rule but holding that entire amount was properly awarded where it could be concluded from pleadings that plaintiff had become, by assignment, sole owner]; *Ferk v. Lake* (1988) 205 C.A.3d 268, 275, 252 P.2d 196.)

The principle is much broader than the right to litigate. "One cotenant can at any time protect the entire estate from injury or loss without calling to his aid the assistance of the other cotenants, and his act will inure to their benefit. He can resist an intruder, or evict a trespasser, remove an encumbrance, or redeem from a burden, and since his acts in this behalf are in the interest of and for the benefit of his cotenants, their authority therefor, if necessary, will be presumed." (*Los Angeles Lighting Co. v. Los Angeles* (1895) 106 C. 156, 160, 39 P. 535 [one cotenant could sign protest against proposed street improvement]; see *Morin v. City Council of San Jose* (1952) 109 C.A.2d 268, 271, 240 P.2d 688 [some, not all, cotenants were entitled to sign protests against resolution to annex territory, where annexation would subject property to burden of municipal taxation]; *Perkins v. Chad Dev. Corp.* (1979) 95 C.A.3d 645, 651, 157 C.R. 201 [citing *Los Angeles Lighting Co.*; cotenant in beneficial trust under note and trust deed was entitled to protect common beneficial interest by foreclosing security].)

SUPPLEMENT: [This section is current through the latest supplement]
Cross-Reference: 4 *Cal. Proc.* (5th), *Pleading*, §§180, 194.



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d. Contribution.

12 Witkin Sum. Cal. Law Real Property § 47

[§ 47] Contribution.

(1) *Rule Against Assertion of Adverse Interest.* Cotenants stand in a confidential relationship. Thus, one cotenant cannot buy an adverse outstanding title or lien to assert it against the others; the cotenant will be regarded as holding it in trust for the benefit of all, and can only claim proportionate contribution from them. (*Stewart v. Shearman (1937) 22 C.A.2d 198, 203, 70 P.2d 702.*)

A distinction is made, however, when the cotenancy interests were acquired at different times by different instruments. In *Wilson v. S.L. Rey (1993) 17 C.A.4th 234, 21 C.R.2d 552*, defendant partnership acquired its interest in a tenancy in common by foreclosing on the interest of an original cotenant. After discovering that notes on the property were in arrears, taxes were delinquent, and royalty payments on a sand and gravel lease were unaccounted for, defendant requested payment of the debts and an accounting from the other cotenants, but was refused. When the holder of one note threatened foreclosure, an individual defendant (a member of defendant partnership) purchased the note, and pursued proceedings for a trustee's sale. After further disputes between the cotenants, plaintiff cotenants sued defendants, one of their claims being that defendant could not notice a foreclosure against his cotenants to force them to pay a share of a common encumbrance. The trial court granted defendants' motion for judgment under *C.C.P. 631.8* (see *7 Cal. Proc. (4th), Trial, §440*). *Held*, affirmed.

(a) As a general rule, cotenants stand in fiduciary relationship to each other, and when a cotenant acquires an adverse outstanding title or encumbrance, he or she does so as trustee for the benefit of the cotenants. (*17 C.A.4th 242.*)

(b) However, courts in other jurisdictions have held that the reason for this rule is absent when cotenants acquire their interests at different times by different instruments, so that in such cases there is no fiduciary relationship. "While this is a question of first impression in California, it is not a difficult one. It would be an elevation of form over substance to hold that a fiduciary relationship exists between strangers merely because they have acquired interest in the same piece of property. ... [W]here, as here, cotenants acquire their interests at different times through different instruments, and no relationship of trust and confidence exists between them, then no fiduciary relationship can be found to exist." (*17 C.A.4th 243.*)

(2) *Taxes and Other Charges.* One cotenant who pays taxes, interest, or other charges against the property is

entitled to contribution from the others. (*Jamison v. Cotton* (1933) 136 C.A. 127, 130, 28 P.2d 39; see *Southern Adjustment Bureau v. Nelson* (1964) 230 C.A.2d 539, 541, 41 C.R. 148 [on sale of property under court order, advancing cotenant is entitled to repayment of entire advance before remainder is divided]; *Marsh v. Edelstein* (1970) 9 C.A.3d 132, 141, 88 C.R. 26 [if heir paid more than his share of taxes to protect entire property, he will be entitled to judgment against cotenants and to lien on property in amount equal to cotenants' proportionate share of taxes paid]; *Milian v. De Leon* (1986) 181 C.A.3d 1185, 1194, 1195, 226 C.R. 831 [citing the text; contribution rule did not apply in action for partition by nonmarital cohabitants who had agreed to own and divide property equally irrespective of dollar amounts contributed by each]; *Rest.*, *Restitution* §105; 5 Miller & Starr 3d §12:10; 7 Powell §50.04; 76 A.L.R.2d 1004 [right of surviving spouse to contribution, exoneration, or other reimbursement out of decedent's estate respecting liens on estate by entireties or joint tenancy]; 20 Am.Jur.2d (2005 ed.), *Cotenancy and Joint Ownership* §65 et seq.; on notice of expenditures, see 7 Am.Jur. Legal Forms 2d (1998 ed.), *Cotenancy and Joint Ownership* §75:45.)

(3) *Repair of Easement*. One cotenant who pays for repair of an easement is entitled to contribution from the others. (C.C. 845; see *infra*, §418.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Rule Against Assertion of Adverse Interest*. C.C.P. 631.8:

Cross-Reference: 7 Cal. Proc. (5th), *Trial*, §430.

(2) *Taxes and Other Charges*. See 7 Am.Jur. Legal Forms 2d (2006 ed.), *Cotenancy and Joint Ownership* §75:49.



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e. Compensation.

12 Witkin Sum. Cal. Law Real Property § 48

[§ 48] Compensation.

In the absence of an agreement, a cotenant, like a partner, is ordinarily not entitled to compensation for services rendered in care and management of the property, e.g., leasing it, collecting rentals, supervising repairs, or making minor repairs. However, a cotenant who makes repairs or improvements, or furnishes other services or materials, with the acquiescence of the other cotenants, may become entitled to compensation by implied contract. (*Combs v. Ritter* (1950) 100 C.A.2d 315, 317, 320, 223 P.2d 505; see 7 Powell §50.04; 20 Am.Jur.2d (2005 ed.), *Cotenancy and Joint Ownership* §46.)

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f. Accounting for Rents and Profits.

12 Witkin Sum. Cal. Law Real Property § 49

[§ 49] Accounting for Rents and Profits.

(1) *When Accounting Is Available.* If one tenant in common or joint tenant is in sole possession of the property, the other tenant cannot recover rent for the first tenant's occupancy or profits derived from the property by the occupant's own labor; nor can the other tenant have an accounting of those profits. (*Black v. Black* (1949) 91 C.A.2d 328, 332, 204 P.2d 950; see 20 Am.Jur.2d (2005 ed.), *Cotenancy and Joint Ownership* §48 et seq.)

However, if the tenant in possession leases the property to a third person, a suit by the other tenant against the lessor, requiring the lessor to account for rents collected from the third person, is proper. (*McWhorter v. McWhorter* (1929) 99 C.A. 293, 296, 278 P. 454; see *Rest., Restitution* §125; 5 Miller & Starr 3d §12:3; 7 Powell §50.04; 51 A.L.R.2d 388 [accountability of cotenants for rent and profits or use and occupancy]; 20 Am.Jur.2d 2005 ed., *Cotenancy and Joint Ownership* §§47, 86; 7B Am.Jur. P.P. Forms (1994 ed.), *Cotenancy and Joint Ownership* §9 et seq.) If the occupying cotenant seeks reimbursement for payment of interest, taxes, and insurance, the tenant out of possession is entitled to offset the reimbursement by the reasonable value of the occupant's use. (*Hunter v. Schultz* (1966) 240 C.A.2d 24, 31, 49 C.R. 315.)

(2) *Oil or Mineral Rights.* A special rule applies to tenancies in common in oil or mineral rights in land. One cotenant may extract ore or produce oil and cannot be prohibited or held liable for waste. Because of the possibility of exhausting the minerals, however, equity holds the producing cotenant liable to the others for their share of the profits. (*Dabney-Johnston Oil Corp. v. Walden* (1935) 4 C.2d 637, 656, 52 P.2d 237.) (See 5 A.L.R.2d 1368 [basis of computation of cotenant's accountability for minerals and timber removed from property].)

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g. Agreements and Transfers.

1. In General.

12 Witkin Sum. Cal. Law Real Property § 50

[§ 50] In General.

One joint tenant or tenant in common cannot ordinarily bind the other by an agreement relating to the property. (*Directors of Fallbrook Irr. Dist. v. Abila* (1895) 106 C. 355, 360, 39 P. 794 [petition to organize irrigation district]; *Oberwise v. Poulos* (1932) 124 C.A. 247, 251, 12 P.2d 156; *Axis Petroleum Co. v. Taylor* (1941) 42 C.A.2d 389, 396, 108 P.2d 978 [several lessors, tenants in common of leased oil land; notice of termination for breach by lessee was ineffective where not joined in by all joint lessors]; *King v. Oakmore Homes Assn.* (1987) 195 C.A.3d 779, 783, 241 C.R. 140; *Lindsay-Field v. Friendly* (1995) 36 C.A.4th 1728, 1734, 1735, 43 C.R.2d 71; see 7 Powell §50.08; 20 *Am.Jur.2d* (2005 ed.), *Cotenancy and Joint Ownership* §93 et seq.; on effect of mortgage or deed of trust by joint tenant, see *People v. Nogarr* (1958) 164 C.A.2d 591, 593, 330 P.2d 858; *Hamel v. Gootkin* (1962) 202 C.A.2d 27, 29, 20 C.R. 372; 67 A.L.R.2d 999 [mortgage executed by one of joint tenants as enforceable after tenant's death]; 4 *Summary* (10th), *Security Transactions in Real Property*, §§3, 6; on cotenant's attempt to devise or bequeath specific portion of property held in common, see 97 A.L.R.2d 739.)

A peculiar situation was presented in *Most v. Passman* (1937) 21 C.A.2d 729, 70 P.2d 271. Plaintiff owned an undivided one-half interest in property; B and another person owned the other half in joint tenancy. B and P as copartners rented the premises on a month-to-month tenancy, paying plaintiff half the rent. After some time plaintiff gave statutory notice raising the rent. Defendant partners refused to pay the increased amount, contending that, because plaintiff acted by herself without authority of her cotenants, the notices were ineffectual. *Held*, plaintiff could recover for her one-half of the rental at the increased rate. The partnership, treated as an entity, was a stranger to the title, despite the one-fourth interest in the premises owned by one partner. Although plaintiff could not bind her cotenants by any contract, she could without their consent contract for an increased rental as to her half of the premises. (21 C.A.2d 732.)

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2. Lease.

12 Witkin Sum. Cal. Law Real Property § 51

[§ 51] Lease.

One joint tenant may lease part of the property, even against the other's objection, provided that the other's rights are not prejudiced; i.e., the other joint owner cannot obtain cancellation of the instrument, but is entitled to share possession with the lessee. (*Swartzbaugh v. Sampson* (1936) 11 C.A.2d 451, 461, 54 P.2d 73; *Verdier v. Verdier* (1957) 152 C.A.2d 348, 352, 313 P.2d 123; see 20 Am.Jur.2d (2005 ed.), *Cotenancy and Joint Ownership* §101; 49 A.L.R.2d 797 [effect of lease given by fewer than all cotenants]; on effect of conveyance as termination of joint tenancy, see *infra*, §55.)

A cotenant may also execute a binding oil lease, being subject to an accounting for the other's share of the proceeds. (See *Tide Water Associated Oil Co. v. Curtin* (1940) 41 C.A.2d 884, 894, 107 P.2d 945.)

The right of a joint tenant to give a lease to a third party, and the limited effect of the lease, were definitively stated in *Tenhet v. Boswell* (1976) 18 C.3d 150, 133 C.R. 10, 554 P.2d 330. J and plaintiff T owned property as joint tenants. J, without plaintiff's knowledge, leased it to defendant for 10 years at a rental of \$ 150 per year and with an option to purchase. The lease did not disclose the fact of the joint tenancy and implied that the lessor had a fee simple. Three months later J died, and plaintiff sued to establish her sole right of possession as surviving joint tenant. *Held*, her claim was good.

(a) *Nature of joint tenancy.* C.C. 683 (supra, §35) does not abrogate the common law rule that four unities are essential. That requirement "reflects the basic concept that there is but one estate which is taken jointly." If an essential unity is destroyed the joint tenancy is severed and a tenancy in common results. (18 C.3d 155.) The right of survivorship is an expectancy that arises only if the unity of the estate has not been destroyed by voluntary conveyance, partition, involuntary alienation under an execution, or by any other action that operates to sever the joint tenancy. (18 C.3d 156.)

(b) *Conflicting theories on effect of lease.* There has been much dispute over this issue. (1) Some authorities take the position that a lease effects a complete severance, destroying the unities of interest and possession, because the leasing joint tenant transfers his present possessory interest and retains a mere reversion, and the possibility that the term may continue beyond the lessor's lifetime is inconsistent with a right of survivorship. (18 C.3d 156.) (2) Others

treat the lease as effecting a temporary severance during its term. If the lessor dies while it is in force, the existence of the lease at the moment when survivorship would otherwise take effect operates as a severance, extinguishing the joint tenancy; if the term of the lease ends before the lessor's death, the joint tenancy is undisturbed. (18 C.3d 157.)

(c) *Lease does not sever joint tenancy.* A lease does not create a severance, either temporary or permanent. (1) The statute requires an express declaration in the creating instrument to create a joint tenancy; in many cases that will be the intent of the joint tenants themselves. (2) A severance should not result where the circumstances do not clearly establish that either of the joint tenants desired to terminate the estate. (3) They might have done so in various ways; e.g., written agreement, joint conveyance, unilateral act, or action to partition. "Because a joint tenancy may be created only by express intent, and because there are alternative and unambiguous means of altering the nature of that estate, we hold that the lease here in issue did not operate to sever the joint tenancy." (18 C.3d 158.)

(d) *Surviving joint tenant takes free from lease.* *Swartzbaugh v. Sampson*, *supra*, is distinguishable. The suit to cancel the lease there was brought during the lifetime of both tenants, and the opinion declared that the lease was valid "in so far as the interest of the lessor in the joint property is concerned." Because the joint tenancy interest of the lessor is extinguished on his death, "it follows that the lease of the joint tenancy property also expires when the lessor dies." (18 C.3d 159.) This conclusion is supported by the decisions involving liens and mortgages: "[W]hen such a joint tenant dies his interest dies with him, and any encumbrances placed by him on the property become unenforceable against the surviving joint tenant. For the reasons stated a lease falls within this rule." (18 C.3d 159; see 4 *Summary* (10th), *Security Transactions in Real Property*, §3.)

(e) *Policy considerations.* (1) A lessee in good faith may be unaware of the lessor's limited interest; and, although a prudent lessee would conduct a title search, this may be economically burdensome to one who leases a residence or a modest parcel of property. But a lessee who innocently rents from the holder of a life estate faces similar risks. (2) To allow the lease to continue after the joint tenant lessor's death would defeat the justifiable expectations of the surviving joint tenant; e.g., the survivor might take a title encumbered by a long-term lease for a small rental, with the right to use the property and its market value substantially impaired. (18 C.3d 160.) (See 66 *Cal. L. Rev.* 69.)

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3. Easement or License.

12 Witkin Sum. Cal. Law Real Property § 52

[§ 52] Easement or License.

One cotenant cannot give an easement good against the others. (*East Shore Co. v. Richmond Belt Ry.* (1916) 172 C. 174, 178, 155 P. 999; *King v. Oakmore Homes Assn.* (1987) 195 C.A.3d 779, 783, 241 C.R. 140; see 20 *Am.Jur.2d* (2005 ed.), *Cotenancy and Joint Ownership* §103.) A cotenant may, however, give a license to another to enter on the land, and this license may, under proper circumstances and where there is no objection by the other tenant, become irrevocable. (*Dinsmore v. Renfro* (1924) 66 C.A. 207, 214, 225 P. 886; see *Verdier v. Verdier* (1957) 152 C.A.2d 348, 352, 313 P.2d 123 [cotenant may confer right of possession and use by either lease or license].)

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4. Homestead.

12 Witkin Sum. Cal. Law Real Property § 53

[§ 53] Homestead.

(1) *Former Law.* It was originally the rule that if one spouse and a third person owned property as tenants in common, neither a declared nor a probate homestead could be created out of the undivided interest of the spouse. In 1929, former C.C. 1238 authorized the creation of a declared homestead out of property in which the claimant's right to possession was immediate although not exclusive. It was accordingly held that the court could award a probate homestead out of the property held in common by the decedent and a third person; that the other tenant could not complain, for he or she retained the same rights of occupancy, but no greater rights than before; and that the other tenant could seek a partition of the property. (*Estate of Kachigian* (1942) 20 C.2d 787, 790, 128 P.2d 865; see *Priddel v. Shankie* (1945) 69 C.A.2d 319, 325, 159 P.2d 438 [partition allowed]; *Estate of Alba* (1965) 238 C.A.2d 618, 48 C.R. 100, 14 Summary (10th), *Wills and Probate*, §790 [property held by husband and wife as tenants in common]; *Strangman v. Duke* (1956) 140 C.A.2d 185, 187, 295 P.2d 12 [husband's declaration of homestead on jointly owned property extended to interests of both spouses]; *Schoenfeld v. Norberg* (1970) 11 C.A.3d 755, 90 C.R. 47 [same].)

(2) *Present Law: Declared Homestead.* Any dwelling in which the owner or his spouse resides may, to the extent of his or their interest (with minor exceptions), be declared a homestead. (C.C.P. 704.910, 704.920; see 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §224 et seq.) The Legislative Committee Comment to C.C.P. 704.910 states: "If a husband and wife are both owners of an interest in a homestead (as where the property is community property or where the spouses hold the property in joint tenancy or as tenants in common), they both may be named as declared homestead owners in the same homestead declaration. ... Where unmarried persons hold interests in the same dwelling in which they both reside, they must record separate homestead declarations if each desires to have a declared homestead."

(3) *Present Law: Probate Homestead.* A probate homestead may not be created out of property in which a third person has a vested right of possession, without that person's consent. "Third person" is defined as a person whose right to possession existed or came into existence at the death of the decedent and was not created by testate or intestate succession from the decedent. (*Prob.C.* 6522(b); see 14 *Summary* (10th), *Wills and Probate*, §767 et seq.)

(4) *Right To Partition.* In *Young v. Hessler* (1945) 72 C.A.2d 67, 164 P.2d 65, defendants, husband and wife, owned property as joint tenants. Plaintiff, a judgment creditor of the husband, filed an abstract of judgment creating a

lien on the husband's interest in July 1941. In March 1942, the wife filed a declaration of homestead. Thereafter, an execution sale was held and plaintiff purchased. *Held*, plaintiff, who became a tenant in common with the wife, was entitled to partition notwithstanding the validity of the declared homestead. A cotenant may declare a homestead on his or her undivided interest, and a cotenant out of possession may nevertheless maintain an action for partition. (72 C.A.2d 69, citing *Estate of Kachigian, supra*; see *Squibb v. Squibb* (1961) 190 C.A.2d 766, 769, 12 C.R. 346.) But where the husband and wife are joint tenants and the wife declares a homestead, the husband cannot obtain a partition. (*Walton v. Walton* (1943) 59 C.A.2d 26, 30, 138 P.2d 54; see 17 So. Cal. L. Rev. 182.)

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(2) *Present Law: Declared Homestead.*

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §229 et seq.



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5. Termination of Cotenancy.

a. Severance by Joint Tenant.

1. Agreement With Other Joint Tenant.

12 Witkin Sum. Cal. Law Real Property § 54

[§ 54] Agreement With Other Joint Tenant.

A joint tenancy is terminated where one of two joint tenants transfers his or her interest to the other. (*Hiltbrand v. Hiltbrand* (1936) 13 C.A.2d 330, 333, 56 P.2d 1292; *Smith v. Morton* (1972) 29 C.A.3d 616, 621, 106 C.R. 52 [contract of sale]; *Estate of Baumann* (1988) 201 C.A.3d 927, 936, 247 C.R. 532, citing the text; see 8 *Hastings L. J.* 290; 64 A.L.R.2d 918 [acts by joint tenant that will sever tenancy]; 7 Am.Jur. Legal Forms 2d (1998 ed.), Cotenancy and Joint Ownership §75:25.) Joint tenants may also, by a simple contract without any conveyance, agree to eliminate the right of survivorship; the effect will be to terminate the joint tenancy and create a tenancy in common. (See *California Trust Co. v. Anderson* (1949) 91 C.A.2d 832, 836, 205 P.2d 1127 [joint tenancy in shares of stock]; *Estate of Asvitt* (1979) 92 C.A.3d 348, 351, 154 C.R. 713 [property settlement agreement on dissolution of marriage]; *Estate of Gebert* (1979) 95 C.A.3d 370, 377, 157 C.R. 46 [agreement to sell property and divide proceeds]; *Estate of Seibert* (1990) 226 C.A.3d 338, 341, 276 C.R. 508 [joint tenancy was terminated by stipulated order in marital dissolution proceeding providing for sale of property and division of proceeds]; see also *Miranda v. Miranda* (1947) 81 C.A.2d 61, 65, 183 P.2d 61 [agreement modifying right to partition]; 20 Am.Jur.2d (2005 ed.), Cotenancy and Joint Ownership §29; 7 Am.Jur. Legal Forms 2d (1998 ed.), Cotenancy and Joint Ownership §75:26.)

There is, of course, no termination where a conveyance is induced by fraud of the grantee joint tenant; the voidable deed may be set aside and the joint tenancy relationship restored. (*Estate of Casella* (1967) 256 C.A.2d 312, 323, 64 C.R. 259; see *Estate of Baumann, supra*, 201 C.A.3d 936 [distinguishing *Estate of Casella*; fraud committed by grantor to protect asset from creditor; joint tenancy terminated].)

A property settlement agreement under which the joint tenant wife merely gave the joint tenant husband possession for life did not terminate the joint tenancy, and she took the whole on his death. (*Cole v. Cole* (1956) 139 C.A.2d 691, 695, 294 P.2d 494.) And an agreement to continue the trial of a partition suit does not sever a joint tenancy. (*Teutenberg v. Schiller* (1955) 138 C.A.2d 18, 22, 291 P.2d 53.)

A joint tenancy between the decedent and the decedent's former spouse, created before or during the marriage, is severed as to the decedent's interest if, at the time of the decedent's death, the former spouse is not the decedent's surviving spouse, as a result of dissolution or annulment of the marriage. (*Prob.C. 5601(a)*, reversing rule of *Estate of*

Layton (1996) 44 C.A.4th 1337, 1342, 1344, 52 C.R.2d 251 [status-only marital dissolution judgment that merely reserved jurisdiction over property issues did not manifest sufficient words or conduct to sever joint tenancy; family law court reserved jurisdiction to divide community property, but neither party invoked that jurisdiction or took steps to sever joint tenancy unilaterally].) However, *Prob.C. 5601(a)* does not sever a joint tenancy if the joint tenancy is not subject to severance by the decedent at the time of the decedent's death (*Prob.C. 5601(b)(1)*) or if there is clear and convincing evidence that the decedent intended to preserve the joint tenancy in favor of the former spouse (*Prob.C. 5601(b)(2)*). (See 14 Summary (10th), *Wills and Probate*, §319.)

The strict requirements of the four unities, and the theory that joint tenancies are disfavored were virtually abandoned in *Hammond v. McArthur* (1947) 30 C.2d 512, 183 P.2d 1. R and M were joint tenants. M conveyed a life estate to R, with the right to all rents and profits, and thereafter, R died. *Held*, on termination of R's life estate, the joint tenancy *revived*, and M took the whole by right of survivorship, to the exclusion of the estate of R. The court reviewed the conflicting authorities concerning the effect on joint tenancies of various types of transfers, and took the view that the conveyance of the life estate was similar to the making of a lease to a stranger or a contract between the joint tenants themselves. (30 C.2d 516.) Although the opinion takes a practical approach to a problem that is usually obscured by technical common law notions, the court does not explain how the joint tenancy could *exist* despite the destruction of an essential unity (e.g., R had exclusive possession and right to all income), nor how the joint tenancy could *revive* on the death of R, when M was the only tenant left.

West's Key Number Digest, Tenancy in Common k.5 et seq.

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See 7 Am.Jur. Legal Forms 2d (2006 ed.), Cotenancy and Joint Ownership §§75:23, 75:24.



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2. Conveyance to Third Person.

aa. Tenancy in Common With Third Person.

12 Witkin Sum. Cal. Law Real Property § 55

[§ 55] Tenancy in Common With Third Person.

(1) *General Rule.* If one joint tenant conveys his or her interest to a third party, unity of title is destroyed and the grantee becomes a tenant in common with the other joint tenant. (*Tilden v. Tilden* (1927) 81 C.A. 535, 542, 254 P. 310; see *Green v. Skinner* (1921) 185 C. 435, 438, 197 P. 60, *infra*, §314 [conveyance and acceptance by grantee must take place before death of grantor or surviving tenant will take the whole]; 7 Powell §51.04; 64 A.L.R.2d 918 [acts by joint tenant that will sever tenancy]; 39 A.L.R.4th 1068 [contract of sale or granting of option to purchase, to third party, by both or all joint tenants, as severing or terminating tenancy]; 20 Am.Jur.2d (2005 ed.), *Cotenancy and Joint Ownership* §22 et seq.)

In *Handy v. Shiells* (1987) 190 C.A.3d 512, 235 C.R. 543, Mr. and Mrs. H owned a residence in joint tenancy. They defaulted on the secured note, and a trustee's sale was scheduled. S and A then approached Mrs. H with a proposal that she cure the default by deeding the property to them or their nominee, following which they would deed it back on certain conditions. One hour before the sale was to begin, Mrs. H accepted the offer; and, because Mr. H was unavailable, the three agreed that she would sign both her name and her husband's name on the deed. In this quiet title action by Mr. H, the court held that the deed, though a nullity as to plaintiff, nevertheless did sever the joint tenancy. (a) One joint tenant can transfer his or her share in the property without the consent of the other; and if the transferring joint tenant undertakes to convey the whole title, the conveyance is not void but merely operates to transfer the joint tenant's interest. (190 C.A.3d 517.) (b) Hence, Mrs. H's forgery of plaintiff's signature did not affect his title, but her signature did operate as a transfer of her interest. (c) All subsequent conveyances affected only that one-half share of the property. (190 C.A.3d 518.)

In *Reiss v. Reiss* (1941) 45 C.A.2d 740, 114 P.2d 718, a wife, for the express purpose of severing a joint tenancy with her husband, deeded the property to her son, who executed a written statement that he held it in trust for her and would reconvey at her request. Observing that California law does not favor joint tenancy, the court held that the joint tenancy relationship was terminated, and that the husband and wife became tenants in common. (45 C.A.2d 746.)

(2) *Involuntary Conveyance.* An involuntary conveyance has the same effect as an ordinary grant; e.g., where a

judgment creditor of one joint tenant levied execution on his interest and purchased it at the execution sale, the creditor became a tenant in common with the other joint tenant. (*Young v. Hessler* (1945) 72 C.A.2d 67, 69, 164 P.2d 65; *Russell v. Lescalet* (1967) 248 C.A.2d 310, 312, 56 C.R. 399; see 51 A.L.R.4th 906 [levy of execution on one joint tenant's share or interest as severing joint tenancy]; 20 Am.Jur.2d (2005 ed.), *Cotenancy and Joint Ownership* §31.)

(3) *Transactions Not Constituting Conveyances.* A judgment lien is not a conveyance and does not have the effect of severing the joint tenancy. (*Zeigler v. Bonnell* (1942) 52 C.A.2d 217, 220, 126 P.2d 118; see 8 *Hastings L. J.* 295; 51 A.L.R.4th 906 [judgment lien on one joint tenant's share or interest as severing joint tenancy].) The same is true of a mortgage prior to foreclosure. (*People v. Nogarr* (1958) 164 C.A.2d 591, 594, 330 P.2d 858, 4 *Summary* (10th), *Security Transactions in Real Property*, §3; see 67 A.L.R.2d 999 [real estate mortgage executed by one joint tenant as enforceable after his death].) A levy recorded by a judgment debtor that has not yet resulted in an execution sale does not sever a joint tenancy. (*Grothe v. Cortlandt Corp.* (1992) 11 C.A.4th 1313, 1318, 15 C.R.2d 38.)

A contract by the joint tenants to sell property to a stranger on installments, under which title remains in the grantors, does not destroy unity of title and does not terminate the joint tenancy. (*Fresno v. Kahn* (1962) 207 C.A.2d 213, 217, 24 C.R. 394.)

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bb. Joint Tenancy With Other Tenants.

12 Witkin Sum. Cal. Law Real Property § 56

[§ 56] Joint Tenancy With Other Tenants.

If there are three joint tenants, a conveyance by one makes the person to whom the conveyance was made a tenant in common with the others as to a one-third interest (see *supra*, §55), but the remaining two-thirds interest is held by the other two joint tenants in joint tenancy. (See *Estate of Galletto (1946) 75 C.A.2d 580, 587, 171 P.2d 152*; *Shelton v. Vance (1951) 106 C.A.2d 194, 196, 234 P.2d 1012*.) The same principle would apply when there are more than three joint tenants.

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3. Rescission of Decedent's Conveyance.

12 Witkin Sum. Cal. Law Real Property § 57

[§ 57] Rescission of Decedent's Conveyance.

A refusal to countenance fraud led to the announcement of a peculiar rule in *Reina v. Erassarret* (1949) 90 C.A.2d 418, 203 P.2d 72. Plaintiff alleged that he and decedent wife owned property in joint tenancy; that by fraud and undue influence of two (R and F) of their five children, the wife was induced to convey her half-interest to the children as a gift; that on discovery of the fraud the wife demanded reconveyances, accepted quitclaim deeds from three and sued R and F to set aside the gift deed as to them; that she then died testate, her will leaving all her property to the five children; and that her executor dismissed her action. In this new action plaintiff sought judgment setting aside her deed. *Held*, a cause of action was stated, for, although one joint tenant may terminate the relationship by a voluntary conveyance, the other joint tenant has a sufficient interest (his right of survivorship) to maintain an action for rescission of a conveyance that was not voluntary. (90 C.A.2d 423.) (See 7 A.L.R.2d 1317 [capacity of cotenant to maintain action to set aside conveyance of interest of another cotenant because of fraud, undue influence, or incompetency].)

No authority in point was found to support the holding, and a more correct analysis would appear to be that the wife's deed, merely voidable and not void, effectively terminated the joint tenancy unless rescinded; that during the wife's lifetime she alone had the right to sue for rescission; that after her death this right could only be exercised by those interested in her estate (her devisees and the executor); and that plaintiff, a former joint tenant and a stranger to her estate, had no standing to sue. (See, however, *Gillette v. Nicolls* (1953) 121 C.A.2d 185, 188, 262 P.2d 856 [following *Reina*].)

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a. Severance by Joint Tenant.

4. Joint Tenant's Conveyance to Self.

12 Witkin Sum. Cal. Law Real Property § 58

[§ 58] Joint Tenant's Conveyance to Self.

(1) *Former Rule: Conveyance Ineffective.* In *Clark v. Carter* (1968) 265 C.A.2d 291, 70 C.R. 923, a husband and wife held land as joint tenants. The day before her death, the wife executed a quitclaim deed of an undivided interest from herself as grantor joint tenant to herself as grantee and tenant in common. After her death the husband sued her special administrator to quiet title as surviving joint tenant. *Held*, judgment for plaintiff affirmed; the deed was ineffective to terminate the joint tenancy. The wife's theory was that, because a joint tenancy may now be created by a transfer by a single owner to herself and another, without an intermediary, there is no need for an intermediary to terminate. But a transfer of property requires a grantor and a grantee; a purported grant by one person to herself, as here, was a nullity. (265 C.A.2d 295.)

(2) *Repudiation of Rule.* In *Riddle v. Harmon* (1980) 102 C.A.3d 524, 162 C.R. 530, Mr. and Mrs. R owned land in joint tenancy. Mrs. R, desiring to dispose of her interest by will, made a grant deed of her undivided interest to herself for the purpose of terminating the joint tenancy and creating a tenancy in common. She then made her will and died. *Held*, the joint tenancy had been terminated, and the devisee, not the surviving husband, was entitled to her interest.

(a) California, by statute, follows the modern view that an owner of property, in creating a joint tenancy, need not use a dummy or strawman. The conveyance may be made by a sole owner to himself or herself and others. (102 C.A.3d 527; see *supra*, §35.)

(b) The same policy justifies repudiation of the rule that a conveyance without a dummy is ineffective to terminate a joint tenancy. "We discard the archaic rule that one cannot enfeoff oneself which, if applied, would defeat the clear intention of the grantor. There is no question but that the decedent here could have accomplished her objective--termination of the joint tenancy--by one of a variety of circuitous processes. We reject the rationale of the *Clark* case because it rests on a common law notion whose reason for existence vanished about the time that grant deeds and title companies replaced colorful dirt clod ceremonies as the way to transfer title to real property. One joint tenant may unilaterally sever the joint tenancy without the use of an intermediary device." (102 C.A.3d 531.) (See *Estate of Grigsby* (1982) 134 C.A.3d 611, 617, 184 C.R. 886, *infra*, §59 [the "ritualistic requirement of a fictional reciprocal transfer was abandoned by a more pragmatic court" in *Riddle*]; *Estate of Carpenter* (1983) 140 C.A.3d 709, 712, 189

C.R. 651 [following *Riddle*]; 7 *A.L.R.4th* 1268 [conveyance or termination of joint tenancy by conveyance of divided interest directly to self].)

The *Riddle* rule was codified in 1984. (See C.C. 683.2, *infra*, §60.)

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12 Witkin Sum. Cal. Law Real Property § 59

[§ 59] Unilateral Termination of Homesteaded Property.

In *Estate of Grigsby* (1982) 134 C.A.3d 611, 184 C.R. 886, Mr. and Mrs. G held property in joint tenancy and recorded a declaration of homestead on it. Subsequently, Mrs. G decided to sever the joint tenancy so as to devise her interest to her sister. She used the "deed to a strawman" method (see *supra*, §58), and then, believing that she and her husband were tenants in common, made a will in favor of her sister. On her death, Mr. G contended that one spouse cannot unilaterally sever a joint tenancy on homesteaded property. *Held*, the termination was valid.

(a) The rule relied on by the husband was designed to protect the survivorship of declared homesteads. But the 1980 revision of the homestead laws (see 14 *Summary* (10th), *Wills and Probate*, §767) abolished survivorship, and the reason for the rule therefore ceased. (134 C.A.3d 615, 616.)

(b) The action of Mrs. G in terminating the joint tenancy did not destroy the homestead; the homestead persisted until, at her death, it was terminated by operation of law under the statute abolishing survivorship. (134 C.A.3d 616.)

(c) The choice by Mrs. G of the archaic method of exchanging deeds with a strawman, rather than the newly approved method of executing a deed to herself as tenant in common, did not constitute an improper unilateral conveyance of homesteaded property. "We hold that the decedent did not intend to and did not injure, destroy, terminate, or encumber the homestead by exchanging deeds with the strawman. We hold that she did not intend to and did not 'transfer' her title to the property, but rather that she intended to and did convert a joint tenancy to a tenancy in common. We further hold that cotenants of property that has been homesteaded retain their rights to change the manner in which they hold title to the property, either jointly or unilaterally, and that the exercise of such rights, either jointly or independently, does not in any manner affect the homestead." (134 C.A.3d 618.)

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6. Recorded Conveyance or Declaration.

aa. Nature and Purpose of Statute.

12 Witkin Sum. Cal. Law Real Property § 60

[§ 60] Nature and Purpose of Statute.

(1) *Law Revision Commission Report*. In its Recommendation Relating to Severance of Joint Tenancy (17 Cal. Law Rev. Com. Reports, p. 941), the Law Revision Commission said: "The strawman conveyance is a legal fiction designed to satisfy feudal technicalities that have no contemporary application. It requires the use of two documents where one will suffice. In the case of a real property joint tenancy it may trigger a property tax reassessment." (17 Cal. Law Rev. Com. Reports, p. 945.)

Accordingly, the Commission proposed to codify the holding in *Riddle v. Harmon* (1980) 102 C.A.3d 524, 162 C.R. 530, *supra*, §58, allowing severance of a joint tenancy by written declaration, but also recommended that the severance be recorded in order to be effective. (17 Cal. Law Rev. Com. Reports, p. 945.) The 1984 Legislature enacted C.C. 683.2 in accordance with the Recommendation but without providing for recordation. (See 16 *Pacific L. J.* 701.) The 1985 Legislature added the recording requirement. (See C.C. 683.2(c), *infra*, §62; 17 *Pacific L. J.* 774.)

(2) *Effect of Joint Tenancy Agreement*. Nothing in C.C. 683.2 authorizes severance of a joint tenancy contrary to a written agreement of the joint tenants. However, a severance contrary to an agreement "does not defeat the rights of a purchaser or encumbrancer for value in good faith and without knowledge of the written agreement." (C.C. 683.2(b).) In this context, knowledge "includes both actual knowledge and constructive knowledge through recordation of the agreement." (Legislative Com. Comment.)

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bb. Methods of Severance.

12 Witkin Sum. Cal. Law Real Property § 61

[§ 61] Methods of Severance.

A joint tenant may, without the joinder or consent of other joint tenants, sever his or her interest in a joint tenancy in real property by any of the following means:

(1) Execution and delivery of a *deed* conveying legal title to the joint tenant's interest to a third person (whether or not under an agreement requiring the third person to reconvey legal title to the joint tenant). (C.C. 683.2(a)(1).)

(2) Execution of a *written instrument* evidencing the intent to sever the joint tenancy (including a deed that names the joint tenant as transferee). (C.C. 683.2(a)(2).)

(3) Execution of a *written declaration* that the joint tenancy is severed as to the joint tenant's interest. (C.C. 683.2(a)(2).)

These means of severance are in addition to any other methods by which a joint tenancy may be severed. (C.C. 683.2(a).)

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cc. Recordation.

12 Witkin Sum. Cal. Law Real Property § 62

[§ 62] Recordation.

(1) *Statutory Requirements.* Severance of a joint tenancy of record by deed, written declaration, or other written instrument under C.C. 683.2(a) does not terminate the right of survivorship of the other joint tenants in the severing joint tenant's interest unless one of the following requirements is satisfied:

(a) The instrument effecting the severance is recorded in the county where the real property is located before the death of the severing joint tenant. (C.C. 683.2(c)(1).)

(b) The instrument effecting the severance was executed and acknowledged before a notary by the severing joint tenant not earlier than 3 days before the death of the severing joint tenant, and is recorded in the county where the real property is located not later than 7 days after the death of the severing joint tenant. (C.C. 683.2(c)(2).)

Thus, until a conveyance by a joint tenant is recorded, the transferee holds the interest conveyed as a tenant in common, subject to a right of survivorship in the remaining joint tenants, effectively taking a contingent or defeasible interest subject to divestment if nonsevering joint tenants survive the severing joint tenant. "If the severing joint tenant is first to die, the nonsevering joint tenant takes the interest of the transferee because the nonsevering joint tenant's right of survivorship continues, the severing instrument not having been recorded as required. If the nonsevering joint tenant is first to die, the nonsevering joint tenant's right of survivorship thereupon fails, the nonsevering joint tenant's heirs or devisees take the share of the nonsevering joint tenant, and the transferee's ownership of the interest conveyed to the transferee becomes absolute. If the transferee is first to die, the survivorship right of the nonsevering joint tenant continues, and the heirs or devisees of the transferee take the property subject to the survivorship right in the nonsevering joint tenant--the survivorship issue is resolved only upon the death of the nonsevering or severing joint tenant." (Legislative Com. Comment.)

In *Estate of England (1991) 233 C.A.3d 1, 284 C.R. 361*, one joint tenant attempted to sever the joint tenancy by an unrecorded holographic will. *Held*, the attempted severance was ineffective. (a) The recording requirement of C.C. 683.2(c) is designed to prevent fraud by precluding the destruction of a secret instrument severing the joint tenancy in

the event the nonsevering joint tenant is the first to die. (233 C.A.3d 6, citing the Law Rev. Com. Recommendation relating to C.C. 683.2(c).) (b) The reference in C.C. 683.2(a) (supra, §61) to "other means" of severing a joint tenancy may not be read to include a document that has not been recorded as required by C.C. 683.2(c). (233 C.A.3d 7.) (See *Dorn v. Solomon* (1997) 57 C.A.4th 650, 653, 67 C.R.2d 311 [deed that was not recorded until a month after joint tenant died was ineffective to sever joint tenancy].)

(2) *Exception for Agreement Among Joint Tenants.* Nothing in C.C. 683.2(c) limits the manner or effect of a deed from one joint tenant to another or a written instrument or agreement of severance by all the joint tenants. (C.C. 683.2(d).) This provision allows joint tenants "to agree among themselves concerning the manner or effect of a severance, to join in the severance, or to make a deed from one to another, without being subject to the requirements of subdivision (c)." (Legislative Com. Comment.)

In *Re v. Re* (1995) 39 C.A.4th 91, 46 C.R.2d 62, a brother, a sister, and their mother acquired real property as joint tenants. Subsequently, the mother and sister executed grant deeds to each other that provided they were joint tenants as to an undivided two-thirds' interest in the property. The mother later died, and the sister recorded the deeds the day after the mother's death. In the brother's action for partition of the property, the trial judge determined that he was entitled to one-third of the proceeds from sale of the property and his sister was entitled to two-thirds. *Held*, affirmed. Although C.C. 683.2(c) provides that a joint tenant's right of survivorship cannot be defeated by an unrecorded deed, C.C. 683.2(d)(3) provides that nothing in C.C. 683.2(c) limits the manner or effect of a deed between joint tenants. Thus, C.C. 683.2(c) has no application here. (39 C.A.4th 98.) When the mother and sister executed deeds to each other, the joint tenancy among the mother, sister, and brother was severed. The severance was an exception to the recording requirement in C.C. 683.2(c). (39 C.A.4th 98, 99.) Furthermore, nothing in C.C. 683.2(d)(3) limits its application to the two severing joint tenants. (39 C.A.4th 99.) (See *Estate of Powell* (2000) 83 C.A.4th 1434, 1441, 100 C.R.2d 501 [residence that married couple held in joint tenancy did not maintain that character when couple executed marital trust listing residence in schedule of property, even though there was no recorded deed transferring property to trust; under C.C. 683.2(d), recordation was unnecessary because trust was executed by both wife and husband].)

(3) *Effective Dates of Statutory Provision.* The recording requirement of C.C. 683.2(c) and 683.2(d) applies to severances made on or after January 1, 1986. (C.C. 683.2(e).)

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dd. Severance Under Statute Is Not Transfer of Property.

12 Witkin Sum. Cal. Law Real Property § 63

[§ 63] Severance Under Statute Is Not Transfer of Property.

In *Estate of Mitchell* (1999) 76 C.A.4th 1378, 91 C.R.2d 192, the widow of a man who died while the couple's dissolution proceeding was pending sought to determine title to properties the couple had acquired during their marriage. The couple had taken title as joint tenants, but about a month before he died, the husband had executed and recorded a declaration of severance of joint tenancy under C.C. 683.2(a)(2) as to each of the properties. The probate court found that the husband's attempt to sever the joint tenancies was ineffective because it violated a preliminary injunction, which had gone into effect when the dissolution proceeding was filed, that prohibited both parties from "transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate." *Held*, reversed.

The severance of a joint tenancy by recording a declaration of severance is not a "transfer" or "disposition" of "property." Hence, the severance does not violate either the automatic temporary restraining order in a dissolution proceeding under *Family C. 2040(a)* (see 11 *Summary* (10th), *Husband and Wife*, §88) or a similarly worded court-ordered temporary restraining order or preliminary injunction. (76 C.A.4th 1382.) Here, no right, title, or interest in the property moved from one person to another. There was no change in the control or possession of the property. (76 C.A.4th 1390.) Even assuming there was a "disposition" and not a "transfer," the right of survivorship is not "property." By itself, it is a mere expectancy. (76 C.A.4th 1392.) "Much like changing the legatee under a will or the beneficiary under an insurance policy, the effect of a severance is to change who is to receive property upon the contingency of death" and thus affects only an expectancy. (76 C.A.4th 1393.)

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b. Death of Joint Tenant.

12 Witkin Sum. Cal. Law Real Property § 64

[§ 64] Death of Joint Tenant.

Because the basic characteristic of joint tenancy is the right of survivorship, death of one joint tenant terminates the tenancy. However, the difficulty of proving title by evidence outside the record led to the enactment in 1931 of legislation providing for a proceeding in court, by the surviving joint tenant, to establish the fact of death of the other joint tenant. As originally enacted, the statute was mandatory, but the proceeding is now permissive. (See *Prob.C. 200* et seq.; 14 *Summary* (10th), *Wills and Probate*, §14.)

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c. Partition by Cotenants.

1. Nature of Partition.

12 Witkin Sum. Cal. Law Real Property § 65

[§ 65] Nature of Partition.

Partition does not create a new title, but divides up the existing interests. (*Rancho Santa Margarita v. Vail* (1938) 11 C.2d 501, 539, 81 P.2d 533; 14859 Moorpark Homeowner's Assn. v. VRT Corp. (1998) 63 C.A.4th 1396, 1405, 74 C.R.2d 712; see C.E.B., Real Property Remedies and Damages 2d, §§8.1, 8.8; 20 Am.Jur.2d (2005 ed.), Cotenancy and Joint Ownership §30; 59A Am.Jur.2d (1987 ed.), Partition §1 et seq.)

Partition is usually accomplished by an action (see *infra*, §67 et seq.), but it may also be made by the parties. Even if by parol, it is valid when fully executed. (*Tuffree v. Polhemus* (1895) 108 C. 670, 677, 41 P. 806; 14859 Moorpark Homeowner's Assn. v. VRT Corp., *supra*, 63 C.A.4th 1405.) (See C.E.B., Real Property Remedies and Damages 2d, §§8.1, 8.8; 59A Am.Jur.2d (1987 ed.), Partition §67 et seq.; 14 Am.Jur. Legal Forms 2d (2000 ed.), Partition §193:3 et seq.)

Partition is ordinarily available as a matter of right (see *infra*, §72), but the right may be waived (see *infra*, §73). (See *Rest.2d, Property (Donative Transfers) §4.5* [reasonable restraint on power of cotenant to compel partition is valid].)

West's Key Number Digest, Partition k.1 et seq.

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2. General Provisions.

12 Witkin Sum. Cal. Law Real Property § 66

[§ 66] General Provisions.

(1) *Former Law.* The equitable action for partition was originally covered in detail by former C.C.P. 752 et seq. The Law Revision Commission, after a study of the statute, concluded that changes should be made to modernize the procedure. (See 13 Cal. Law Rev. Com. Reports, p. 411.) In 1976, pursuant to the Commission's recommendation, the Legislature added C.C.P. 872.010 et seq. (See C.E.B., Real Property Remedies §8.2; 8 Pacific L. J. 447.)

(2) *Scope of Statute.* The statute governs the partition of real property and, unless "not applicable," the partition of personal property. (C.C.P. 872.020.) The law does not apply in "cases specifically governed by other statutes." (Legislative Com. Comment.)

(3) *General Rules of Practice Apply.* Practice rules applicable to civil actions generally apply to partition actions unless they are inconsistent with the partition statute. (C.C.P. 872.030.)

(4) *General Property Laws Apply.* Nothing in the partition statute excuses compliance with other laws regulating real property transactions. (C.C.P. 872.040.) (For example of evasive schemes precluded by this provision, see *infra*, §822; Legislative Com. Comment.)

(5) *Jurisdiction and Venue.* Partition actions must be brought in the superior court. (C.C.P. 872.110(a).) The proper place for trial is the county in which any of the subject real property is located (C.C.P. 872.110(b)(1)), or, if the subject matter is wholly personal property, the county in which a defendant resides or the property is principally located when the action is commenced (C.C.P. 872.110(b)(2)).

(6) *Powers of Court.* The court may hear and determine all motions, reports, and accounts, and may make any decrees or other orders necessary or incidental to carrying out the purposes of C.C.P. 872.010 et seq. and to effectuating the court's decrees and orders. (C.C.P. 872.120.) This provision is intended to give "the broadest possible statutory authority" for the court's jurisdiction in partition actions. (Law Rev. Com. Comment.) The court may issue temporary restraining orders and injunctions, with or without bond, to prevent waste, protect the property or the title, or restrain unlawful interference with partition. (C.C.P. 872.130.)

The court may "order allowance, accounting, contribution, or other compensatory adjustment among the parties according to the principles of equity." (*C.C.P. 872.140*.) This provision is directed to such items as common improvements and unaccounted rents and profits. (Law Rev. Com. Comment.) Compensatory adjustment differs from owelty, which compensates for inequality in a physical division of the property. (On owelty, see *C.C.P. 873.250*, *infra*, §78.)

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aa. Parties.

12 *Witkin Sum. Cal. Law Real Property* § 67

[§ 67] Parties.

(1) *Persons Authorized To Bring Action.* If real property is owned concurrently or in successive estates, any owner of an estate of inheritance or an estate for life or for years may sue to partition. (*C.C.P. 872.210(a)(2)*.) This provision includes remaindermen but excludes lienholders as potential plaintiffs. Any coowner of personal property may bring a partition action (*C.C.P. 872.210(a)(1)*), including owners of successive estates (*C.C.P. 872.020, 872.710(c)*). (See *C.E.B., Real Property Remedies and Damages* 2d, §8.24 et seq.; *59A Am.Jur.2d* (1987 ed.), *Partition* §86 et seq.; on lack of final settlement of intestate's estate as affecting heir's right to partition of realty, see *92 A.L.R.3d* 473.) (On partition by joint tenant whose interest has been sold on execution but who retains right of redemption, see *Powers v. Powers* (1963) 221 *C.A.2d* 746, 750, 34 *C.R.* 835.)

Actions by spouses or putative spouses for division of community, quasi-community, or quasi-marital property are expressly excluded from the partition statute. (*C.C.P. 872.210(b)*.)

(2) *Joinder of Defendants: General Rule.* Persons having or claiming interests "in the estate as to which partition is sought" must be joined as defendants if the interest is of record, is actually known to the plaintiff, or is reasonably apparent from inspection of the property. (*C.C.P. 872.510*.) "Interests" includes liens, and joinder of additional parties may be necessary under *C.C.P. 389*. (Legislative Com. Comment; see 4 *Cal. Proc.* (4th), *Pleading*, §163 et seq.) However, holders of interests in oil or gas leases or similar pooling arrangements may be omitted as parties and thus left unaffected by the judgment. (See *C.C.P. 872.540*.)

(3) *Defendant Unknown or Interest Uncertain.* If partition of all interests is sought, the plaintiff may join "all persons unknown claiming any interest in the property." (*C.C.P. 872.550*.) This joinder is required if the name of a defendant is unknown to the plaintiff. (*C.C.P. 872.520(a)*.) If the nature of a defendant's interest is uncertain or contingent, the complaint must so state and must further allege the name, address, and legal disability of the owner of any contingent interest so far as known to the plaintiff. (*C.C.P. 872.520(b)*.) The court must order joinder of additional parties and appoint guardians ad litem as required by *C.C.P. 372* et seq. (*C.C.P. 872.520(c)*; see 4 *Cal. Proc.* (4th), *Pleading*, §60 et seq.)

(4) *Deceased Defendant*. If a person who should be joined is known to be dead, the plaintiff must join the decedent's known personal representative as a defendant. (C.C.P. 872.530(a).) If none is known, the plaintiff must so state in an affidavit and join the decedent's testate and intestate successors and all persons claiming by, through, or under the decedent. (C.C.P. 872.530(b)(1), (b)(2).) A similar procedure is required if the putative defendant is simply believed by plaintiff to be dead. (C.C.P. 872.530(b)(3).) These provisions are derived from C.C.P. 1250.220(b), which governs eminent domain. (Legislative Com. Comment; see 8 *Summary* (10th), *Constitutional Law*, §1205.)

West's Key Number Digest, Partition k.10 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Joinder of Defendants: General Rule*.

Cross-Reference: 4 *Cal. Proc.* (5th), *Pleading*, §180 et seq.(3) *Defendant Unknown or Interest Uncertain*.

Cross-Reference: 4 *Cal. Proc.* (5th), *Pleading*, §70 et seq.



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bb. Complaint and Lis Pendens.

12 Witkin Sum. Cal. Law Real Property § 68

[§ 68] Complaint and Lis Pendens.

(1) *Complaint*. The complaint must set forth the following:

(a) A description of the property. Both the legal description and the street address or common designation must be given for real property. For tangible personalty, its usual location must be stated. (*C.C.P. 872.230(a)*; see *C.C.P. 872.240* [permitting partition of real and personal property in one action].)

(b) The plaintiff's interests as owner and lienholder. (*C.C.P. 872.230(b)*.)

(c) All interests of record or known to the plaintiff that the plaintiff reasonably believes will be materially affected by the action. (*C.C.P. 872.230(c)*.) Interests of record in *personal* property include security interests filed under the Commercial Code. (Legislative Com. Comment.)

(d) The estate to be partitioned and a prayer for partition. (*C.C.P. 872.230(d)*; see Legislative Com. Comment [pointing out that partition of less than all of the interests in the property can be obtained].)

(e) If a sale of the property is sought, facts justifying the sale. (*C.C.P. 872.230(e)*.)

The complaint must also state the existence and location of any title report procured by the plaintiff (*C.C.P. 872.220(a)*) and the court may order procurement of a title report by any party (*C.C.P. 872.220(b)*). (For definition of "title report," see *C.C.P. 872.010(e)*.) (On pleading in partition actions, see 5 *Cal. Proc.* (4th), *Pleading*, §638 et seq.; C.E.B., Real Property Remedies and Damages 2d, §8.35 et seq.)

(2) *Lis Pendens*. Notice of the pendency of an action to partition real property must be recorded by the plaintiff in all counties in which the property is located (*C.C.P. 872.250(a)*), and a supplemental notice must be recorded for additional property added to the action (*C.C.P. 872.250(b)*). If the notice is not recorded, the court must order recordation and stay the action until this is done. (*C.C.P. 872.250(c)*; see *C.C.P. 872.320(b)* [notice is prerequisite to order for service of summons by publication].) (See C.E.B., Real Property Remedies and Damages 2d, §8.53.)

The requirement of recording the notice of lis pendens is not jurisdictional, but failure to do so may dispel the binding effect of the judgment on property interests recorded after the notice should have been recorded and before recordation of the judgment. (Law Rev. Com. Comment; on effect of judgment, see *infra*, §84; on lis pendens, see 3 *Cal. Proc.* (4th), *Actions*, §344 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Complaint*.

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §679 et seq.(2) *Lis Pendens*.

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §371 et seq.



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cc. Summons.

12 Witkin Sum. Cal. Law Real Property § 69

[§ 69] Summons.

Although the form, content, and service of summons are governed generally by *C.C.P. 412.20* et seq. (*C.C.P. 872.310(a)*; see 3 *Cal. Proc. (4th), Actions*, §896 et seq.), the partition statute supplements the general provisions on service by publication. Such service is required for unknown defendants and for defendants served as successors to a person known or believed to be dead and not known to have a personal representative. (*C.C.P. 872.310(b)*; see *supra*, §67.) The order for service by publication must require a copy of the summons and complaint to be posted on the subject real property within 10 days. (*C.C.P. 872.320(a)*.) The publication must include a description of the property by street address or common designation, but faulty compliance with this requirement is not fatal if the legal description is given. (*C.C.P. 872.320(c)*; Law Rev. Com. Comment.) (See C.E.B., *Real Property Remedies and Damages* 2d, §8.52.)

The published summons may name only the defendants being served by publication and describe only the property in which they have or claim interests. (*C.C.P. 872.330(a)*.) This provision is derived from *C.C.P. 1250.125* (eminent domain). (Legislative Com. Comment; see 8 *Summary* (10th), *Constitutional Law*, §1207.)

The statute does not require a property description in a summons that is *not* served by publication, because the description appears in the accompanying complaint. (Legislative Com. Comment to *C.C.P. 872.310*.)

SUPPLEMENT: [This section is current through the latest supplement]
Cross-Reference: 3 *Cal. Proc. (5th), Actions*, §981 et seq.



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dd. Answer.

12 Witkin Sum. Cal. Law Real Property § 70

[§ 70] Answer.

The answer must set forth the interests that the defendant claims in the property, including any liens. (*C.C.P. 872.410(a)*.) Liens must be described by date, character, and amount due. (*C.C.P. 872.420*.) Additional expenses related to the lien may be alleged, but it is no longer necessary to disclose additional security. (Law Rev. Com. Comment.)

The answer must state facts tending to controvert the allegations of the complaint not admitted by the defendant. (*C.C.P. 872.410(b)*.) It may also set forth the defendant's affirmative claims for contribution or other compensatory adjustment. (*C.C.P. 872.430*.) If the defendant seeks a sale, the answer must justify it by allegations of fact. (*C.C.P. 872.410(c)*.) These provisions avoid the need for the filing of a cross-complaint. (Legislative Com. Comment to *C.C.P. 872.430*.) (See C.E.B., Real Property Remedies and Damages 2d, §8.55 et seq.)

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4. Trial.

aa. Determination of Interests.

12 Witkin Sum. Cal. Law Real Property § 71

[§ 71] Determination of Interests.

(1) *Parties' Interests.* Any interest of a party in the property may be put in issue, tried, and determined. (*C.C.P.* 872.610.) In addition, the court must resolve any other issue necessary to ascertain the state of the title for the purpose of granting relief. (*C.C.P.* 872.620.) However, interests of unknown parties may be considered together and not as between each other. (*C.C.P.* 872.640.) (See *C.E.B.*, Real Property Remedies and Damages 2d, §8.67.)

(2) *Liens.* The court must make any necessary determination of the status and priority of liens on the property. (*C.C.P.* 872.630(a).) A referee may be appointed to take evidence on the issue, ascertain the facts, and report to the court. (*C.C.P.* 872.630(b); on referees, see *infra*, §76.)

West's Key Number Digest, Partition k.34 et seq.

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bb. Determination of Right To Partition.

12 Witkin Sum. Cal. Law Real Property § 72

[§ 72] Determination of Right To Partition.

(1) *Ownership of Sufficient Interest.* The right to partition depends on the plaintiff's owning a sufficient interest in the property (see *C.C.P. 872.210*; supra, §67) and on the existence of any prerequisites to partition of the particular type of property interests involved. (Legislative Com. Comment on *C.C.P. 872.710*.)

It is the decree and not the mere filing of the action in partition that severs a joint tenancy. (*Clark v. Carter (1968) 265 C.A.2d 291, 295, 70 C.R. 923.*) Hence, where plaintiff sued, then died before the trial, the property vested in the surviving joint tenant, and there was nothing left to partition. (*Dando v. Dando (1941) 37 C.A.2d 371, 372, 99 P.2d 561*; see *Teutenberg v. Schiller (1955) 138 C.A.2d 18, 22, 291 P.2d 53* [partition trial continued for 1 year; decedent died before trial could be resumed]; 5 Miller & Starr 3d, §12:30.)

(2) *Concurrent and Successive Interests.* Partition of concurrent interests is a matter of right, unless barred by waiver. (*C.C.P. 872.710(b).*) Partition of successive estates is allowed only if in the best interest of all parties. In deciding this issue, the court must consider such factors as burdensome expenses, changes in circumstances since creation of the estates, the creator's intent, and the needs and interests of the successive owners. (*C.C.P. 872.710(c).*)

(3) *Partnership Property.* Partition of partnership property may be permitted if rights of unsecured partnership creditors will not be prejudiced; alternatively, the partition procedure may be applied in a partnership accounting and dissolution proceeding. (*C.C.P. 872.730.*) (On right to partition condominium property, see *C.C. 1359, infra, §113.*)

(4) *Unqualified Right.* In *De Roulet v. Mitchel (1945) 70 C.A.2d 120, 160 P.2d 574*, plaintiff and defendant owned, as tenants in common, a valuable industrial building leased at a good rental. In plaintiff's partition suit seeking sale and division of the proceeds, defendant objected that the interests of the parties would not be promoted by a sale, and the trial court dismissed the action. *Held*, plaintiff was entitled to judgment. The court has discretion to protect the interests of the parties by ordering a sale and division of the proceeds, rather than a physical separation of the property. But this discretion as to choice of *methods* of partition does not extend to denial of the *right* on considerations of economic disadvantage. (*70 C.A.2d 124.*) (See *Priddel v. Shankie (1945) 69 C.A.2d 319, 324, 159 P.2d 438* [cotenant's absolute

right].)

In *Lazzarevich v. Lazzarevich* (1952) 39 C.2d 48, 244 P.2d 1, where plaintiff brought the action against his former putative wife, the trial court held the action barred because he had not paid a money judgment she held against him. *Held*, this was error; in the absence of waiver, a joint tenant is entitled to partition as a matter of right. The wife's judgment, if a lien, would be protected in settlement of rights in the property; if not a lien, it did not differ from any other personal claim. (39 C.2d 50.)

However, this supposedly "absolute right" is subject to an exemption where the title of the plaintiff joint tenant is not absolute. Thus, in *Rowland v. Clark* (1949) 91 C.A.2d 880, 206 P.2d 59, partition was denied where the court found that defendant, the other joint tenant, paid the entire consideration for the property, and that the circumstances justified the imposition of a resulting trust in the latter's favor. (91 C.A.2d 883; see 18 *Stanf. L. Rev.* 1428 [equitable and contractual defenses].)

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[§ 73] Waiver of Right.

The right to partition may be waived by agreement. (See *Schwartz v. Shapiro* (1964) 229 C.A.2d 238, 253, 40 C.R. 189 [agreement between copurchasers that neither should sell his half-interest without first offering it to the other at original purchase price]; *Pine v. Tiedt* (1965) 232 C.A.2d 733, 738, 43 C.R. 184 [waiver by implication where cotenants commit property to specific use and purpose of commitment would be frustrated by partition]; *Harrison v. Domergue* (1969) 274 C.A.2d 19, 21, 78 C.R. 797 [agreement among tenants giving right of first refusal to others before any could sell his or her interest; implied agreement not to seek partition in lieu of sale]; *Penasquitos v. Holladay* (1972) 27 C.A.3d 356, 358, 103 C.R. 717 [implied waiver by lease and option to third person]; *American Med. Int. v. Feller* (1976) 59 C.A.3d 1008, 1014, 1016, 131 C.R. 270 [implied waiver]; 59A Am.Jur.2d (1987 ed.), *Partition* §58 et seq.; on effect of declaration of homestead, see *Young v. Hessler* (1945) 72 C.A.2d 67, 69, 164 P.2d 65, supra, §53; *Squibb v. Squibb* (1961) 190 C.A.2d 766, 769, 12 C.R. 346.)

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dd. Determination of Manner of Partition.

12 Witkin Sum. Cal. Law Real Property § 74

[§ 74] Determination of Manner of Partition.

(1) *Physical Division or Sale.* Partition is by physical division unless the parties agree on a sale or the court determines that partition by sale would be "more equitable." (*C.C.P. 872.810, 872.820.*) (See *C.E.B., Real Property Remedies and Damages* 2d, §8.68; *32 A.L.R.4th* 909 [judicial partition by lot or chance]; *59A Am.Jur.2d* (1987 ed.), *Partition* §189 et seq.) Thus, "great prejudice" from physical division (former *C.C.P. 752* et seq.) is no longer a prerequisite to sale. (Law Rev. Com. Comment on *C.C.P. 872.820*; see *Butte Creek Island Ranch v. Crim* (1982) 136 *C.A.3d* 360, 365, 186 *C.R. 252* [although "great prejudice" need not be shown before sale, presumption in favor of physical division over sale still controls].) A sale may be more equitable if, for example, the value of the whole would exceed that of the divided parcels, or zoning restrictions make physical division impracticable. (See 13 Cal. Law Rev. Com. Reports, p. 414.)

The court may order part of the property partitioned by sale and the remainder by physical division, if that would be more equitable than division of the whole property. (*C.C.P. 872.830.*) The court may appoint a referee to assist its determination whether to order a physical division or a sale. (*C.C.P. 872.820(b)*; on appointment and authority of referee, see *infra*, §§76, 77.) Partition of property subject to an express trust may be by sale simply in the court's discretion. (*C.C.P. 872.840(a).*)

(2) *Illustrations of Court's Discretion.* A number of cases decided under the former law dealt with the discretion to order sale. (See *Williams v. Wells Fargo Bank* (1943) 56 *C.A.2d* 645, 657, 133 *P.2d* 73; *Priddel v. Shankie* (1945) 69 *C.A.2d* 319, 326, 159 *P.2d* 438; *De Roulet v. Mitchel* (1945) 70 *C.A.2d* 120, 123, 160 *P.2d* 574.)

In *Formosa Corp. v. Rogers* (1951) 108 *C.A.2d* 397, 239 *P.2d* 88, plaintiffs and defendants owned, as tenants in common, a 17-acre movie studio with numerous improvements useful for movie-making purposes. Plaintiffs sought partition by sale, and the trial judge ordered sale. *Held*, affirmed. The order of sale was a proper exercise of discretion; there was evidence that the aggregate value of the separate parcels after a division in kind would be less than the value of the property as a whole. (108 *C.A.2d* 411.)

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4. Trial.

ee. Interlocutory Judgment.

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[§ 75] Interlocutory Judgment.

If the court finds that the plaintiff is entitled to partition, it makes an interlocutory judgment determining the interests of the parties and ordering partition. The judgment may, but need not, determine the manner of partition. (*C.C.P.* 872.720(a); see *C.E.B.*, Real Property Remedies and Damages 2d, §§8.71, 8.72.) If it is "impracticable or highly inconvenient" to determine the interests of all the parties in a single interlocutory judgment, the court may render an interlocutory judgment on the interests of the original concurrent or successive owners "as if such persons were the sole parties in interest and the only parties to the action." Thereafter, the court may separately adjudge the issues between those owners and persons claiming under them or may allow the interests to remain without further partition, if the parties so desire. (*C.C.P.* 872.720(b).)

The interlocutory judgment is appealable. (*C.C.P.* 904.1(a)(9); see Law Rev. Com. Comment to *C.C.P.* 872.720(b); 7 *Cal. Proc.* (4th), *Judgment*, §21.)

SUPPLEMENT: [This section is current through the latest supplement]
Interlocutory judgment is appealable:

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §21.



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5. Referees.

aa. Appointment.

12 Witkin Sum. Cal. Law Real Property § 76

[§ 76] Appointment.

(1) *Number and Selection.* The court must appoint a referee to divide or sell the property. (*C.C.P. 873.010(a)*.) If both division and sale are ordered, separate referees may be appointed for each function, or the same referee for both. (*C.C.P. 873.020*.) With the parties' consent, the court may appoint three referees in place of a single referee. (*C.C.P. 873.030*.) The court must appoint any person to whom all parties consent (*C.C.P. 873.040(a)*), and a conservator or guardian may give consent (*C.C.P. 873.040(b)*).

(2) *Persons Disqualified.* *C.C.P. 873.050* disqualifies from appointment as referee (a) a clerk or deputy clerk of the court; (b) a former or present partner or employee of the judge; (c) the judge's spouse or relative within the third degree, or the relative's spouse; or (d) an owner of any interest in the subject property.

(3) *Powers of Court.* The court's powers concerning referees include the following:

(a) Require a referee's bond and fix its amount. (*C.C.P. 873.010(b)(1)*.)

(b) Instruct the referee. (*C.C.P. 873.010(b)(2)*); on petition for instruction, see *C.C.P. 873.070*; *infra*, §77.)

(c) Fix the referee's compensation and provide for expenses. (*C.C.P. 873.010(b)(3)*); on including costs in judgment, see *C.C.P. 874.010*; *infra*, §83.)

(d) Establish the commencement of the referee's lien for fee and expenses. (*C.C.P. 873.010(b)(4)*.) This power "protects the referee in case of later settlement and dismissal of the action." (Legislative Com. Comment; on lien priority, see *C.C.P. 874.120*; *infra*, §83.)

(e) Require and settle the referee's interim and final accounts, and discharge the referee. (*C.C.P. 873.010(b)(5)*.) This power "applies particularly in, but is not limited to, sales transactions." (See Legislative Com. Comment.)

(f) Remove the referee. (*C.C.P. 873.010(b)(6)*.)

(g) Appoint a new referee. (*C.C.P. 873.010(b)(7)*.) Occasions that may call for a new referee include the determination of lienholders' interests (*C.C.P. 872.630*, *supra*, §71), a new report on division (*C.C.P. 873.290(b)*, *infra*, §78), or a new sale (*C.C.P. 873.730(c)*, *873.740*, *infra*, §80). (Legislative Com. Comment to *C.C.P. 873.010*.)

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5. Referees.

bb. Authority of Referee.

12 Witkin Sum. Cal. Law Real Property § 77

[§ 77] Authority of Referee.

(1) *In General.* The referee may perform any act necessary to exercise the authority conferred by the statute or the court. (C.C.P. 873.060.) The referee or a party may, on noticed motion, petition the court for instructions concerning the referee's duties. (C.C.P. 873.070.) This petition procedure is designed to expedite resolution of administrative problems. (Law Rev. Com. Comment.)

(2) *Designation of Roads.* In carrying out a sale or division, the referee may designate part of the property as a public or private road and recommend that other roads on the property be closed. (C.C.P. 873.080(a).) This designation and recommendation must be reported to the court (C.C.P. 873.080(b)), and, if the report is confirmed, takes effect "subject to any necessary action by the appropriate public entities" (C.C.P. 873.080(c)).

(3) *Contracts for Services.* The court may authorize or approve the referee's employment of surveyors, engineers, appraisers, attorneys, real estate brokers, auctioneers, and others (C.C.P. 873.110(a)), allow or reject claims for payment under the employment contracts (C.C.P. 873.110(b)), and establish the commencement of liens for those services (C.C.P. 873.110(c)). The referee may not act on these matters without the court's supervision, and it is the court's duty to provide adequate lien protection for persons rendering services. (Law Rev. Com. Comment.) Contracts may provide for interest at the legal rate on amounts not paid within 3 months after becoming due. (C.C.P. 873.150.)

The court may approve the employment of an attorney for the referee only on written application stating the attorney's name and the necessity for the employment. (C.C.P. 873.120(a), (b).) The referee's attorney may not represent a party or be associated with a party's attorney, unless all parties consent to that arrangement in writing. (C.C.P. 873.120(c).) An attorney's claim for compensation must detail the services performed. (C.C.P. 873.120(d).)

(4) *No Personal Liability.* The referee is not personally liable on contracts for the services of third persons unless liability is expressly assumed. (C.C.P. 873.160.)

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6. Division of Property.

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[§ 78] Division of Property.

(1) *Rules for Division.* In a physical division, the referee must "divide the property and allot the several portions to the parties, quality and quantity relatively considered, according to their interests in the property as determined in the interlocutory judgment." (*C.C.P. 873.210.*) (See *C.C.P. 872.810* [order for division]; *C.C.P. 872.840(b)* [division of trust property]; on interlocutory judgments, see *C.C.P. 872.720*, *supra*, §75; on apportionment of easement on partition of dominant tenement, see *C.C. 807*; and see *C.E.B., Real Property Remedies and Damages 2d*, §§8.75, 8.78.)

As far as possible without material injury to the parties' rights:

(a) Improvements made by a party or the party's predecessor must be allotted to that party. The value of these improvements is excluded in calculating the division and allotment. (*C.C.P. 873.220.*)

(b) If a party's deed, executed before the partition action, purported to convey part of the property to a purchaser, that part must be allotted to the purchaser or the purchaser's heirs or assigns in accordance with the deed. (*C.C.P. 873.230*; see *Law Rev. Com. Comment.*)

(c) If the property includes distinct lots or parcels, they must be left intact. (*C.C.P. 873.240.*) To facilitate division by lots, the parties may join additional property by complaint or cross-complaint. (*Law Rev. Com. Comment.*)

A lien on a party's undivided interest becomes a lien on that party's allotted share. (*C.C.P. 873.260.*) (On subordination of that lien to liens for partition costs, see *C.C.P. 874.120*; *infra*, §83.)

No division is made among unknown parties' interests that have been determined only in combined form by the interlocutory judgment. (*C.C.P. 873.270.*) (On combined determination of unknown parties' interests, see *C.C.P. 872.640*; *supra*, §71.) "If during the action an unknown party becomes known, his interest may be determined and his portion of the undivided property may be allocated to him." (*Law Rev. Com. Comment.*)

(2) *Owely.* If the division is necessarily unequal, owely, i.e., compensation to correct the inequality, may be required from one party to another. (*C.C.P. 873.250(a).*) Owely cannot be required from unknown parties or from

minors, except for a minor who has sufficient personal property and an interest that "will be promoted thereby." (*C.C.P.* 873.250(b).) Owelty should be distinguished from compensatory adjustments under *C.C.P.* 872.140 (*supra*, §66). (See *Gonzales v. Gonzales* (1917) 174 C. 588, 595, 163 P. 993; 59A Am.Jur.2d (1987 ed.), Partition §253 et seq.)

(3) *Referee's Report of Division*. The referee must file a report, giving notice to each party who has appeared. (*C.C.P.* 873.280(a).) The report must do the following:

- (a) State how the referee has executed the referee's trust. (*C.C.P.* 873.280(b)(1).)
- (b) Describe the property divided and each allotted share. (*C.C.P.* 873.280(b)(2).) The description must be complete and precise. (Law Rev. Com. Comment.)
- (c) State any recommendations on owelty. (*C.C.P.* 873.280(b)(2).)
- (d) State any recommendations on opening or closing roads. (*C.C.P.* 873.280(b)(3); see *C.C.P.* 873.080, *supra*, §77.)

On motion of any party, with notice to parties who have appeared, the court may either (a) confirm the report as filed or as modified and enter judgment accordingly, or (b) set aside the report, order a new report, and, if necessary, appoint a new referee. (*C.C.P.* 873.290(a), 873.290(b); on notice of motion, see Law Rev. Com. Comment; *C.C.P.* 1005, 1010; 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §8 et seq.)

On entry of the judgment, the division is effective and title vests accordingly. (*C.C.P.* 873.290(c).)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Referee's Report of Decision*.

Notice of motion:

Cross-Reference: 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §9 et seq.



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7. Sale of Property.

aa. Procedure.

12 Witkin Sum. Cal. Law Real Property § 79

[§ 79] Procedure.

(1) *Public or Private Sale.* Property to be partitioned by sale is sold by the referee appointed for that purpose (*C.C.P. 873.510*), either at public auction or by private sale, as determined by the court. For assistance in this determination, the court may order a report from the referee. (*C.C.P. 873.520*.) Alternatively, part of the property may be sold at public auction and part at private sale, if it appears that to do so will be more beneficial to the parties. (*C.C.P. 873.530*.) Any preference for public over private sale implied by former *C.C.P. 775* has been eliminated. (Law Rev. Com. Comment to *C.C.P. 873.520*.) (See *C.E.B.*, Real Property Remedies and Damages 2d, §§8.76, 8.79.)

(2) *Procedure Agreed to by Parties.* The court must order sale by any methods and terms expressly agreed to by all parties to the action. (*C.C.P. 873.600*.) This includes parties who have either appeared or been served. The consent of unknown owners can be given only by a guardian ad litem appointed for them. (Law Rev. Com. Comment.)

(3) *Procedure Prescribed by Court.* At or after the trial (*supra*, §71 et seq.), the court may prescribe any manner, terms, and conditions of sale not inconsistent with the partition statute. (*C.C.P. 873.610(a)*.) Before doing so, the court may ask the referee for a recommendation which, however, can be approved only on noticed motion. (*C.C.P. 873.610(b)*.) This supervisory power of the court extends not only to the aspects of sales that the partition statute expressly entrusts to court supervision (see *C.C.P. 873.620* et seq.), but also to such matters as minimum bids, prior charges and liens to which the property will remain subject, escrow and title insurance expenses, and agents' commissions. (Law Rev. Com. Comment.)

The court may order real and personal property sold as a unit. (*C.C.P. 873.620(b)*.) However, distinct lots or parcels of real property must be sold separately unless to do so would materially prejudice the parties' interests. (*C.C.P. 873.620(a)*.)

The court may direct a sale on credit, prescribing the credit terms, the security, and the relationship of the security to the parties' interests. (*C.C.P. 873.630*.) The court may order securities listed on an established stock or bond exchange, and personal property that is perishable, that will depreciate in value if not promptly disposed of, or that will

incur loss or expense by being kept, to be sold on appropriate notice and under appropriate conditions. (*C.C.P.* 873.660(a).) Unless otherwise ordered by the court, title to such property passes without court confirmation. The referee is responsible for the actual value of the property until, after return and proper showing, the court approves the sale. (*C.C.P.* 873.660(b).)

(4) *Notice of Sale.* Notice of a sale must be given as required for the sale of like property on execution, and must include notice to the parties who have appeared and the persons who have asked the referee in writing for special notice. (*C.C.P.* 873.640(a); on notice of execution sales, see *C.C.P.* 701.540; 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §138.) However, notice of a combined sale of real and personal property need only fulfill the requirements for real property sales. (*C.C.P.* 873.640(b).) The court may order additional notice (*C.C.P.* 873.640(c)), such as a display or classified advertisement (Law Rev. Com. Comment). The notice of sale must include a description of the property and of the time and place of sale, and must state either the principal terms of sale or an available means of ascertaining the terms from documents. (*C.C.P.* 873.650(a); but see *C.C.P.* 873.730(b), *infra*, §80 [permitting variance from stated terms].) A notice of private sale must state a place for receiving bids (normally the referee's office) and the day on or after which the sale will be made. (*C.C.P.* 873.650(b).)

(5) *Conduct of Public Sale.* Unless the court orders otherwise, a sale at public auction to the highest bidder must be held in the county where the action is pending, and any subject personal property must be present at the sale. (*C.C.P.* 873.670(a), 873.670(b).) The referee may publicly declare a postponement. (*C.C.P.* 873.670(c).) These provisions generally follow execution sale procedure. (Law Rev. Com. Comment; see *C.C.P.* 701.570; 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §142.)

(6) *Conduct of Private Sale.* A private sale can be made no earlier than the date stated in the notice and must be made within 1 year thereafter. (*C.C.P.* 873.680(a).) Bids must be in writing and delivered after the first publication or posting of notice. (*C.C.P.* 873.680(b).) These provisions generally incorporate requirements for private sale of real property of decedent's estates. (Law Rev. Com. Comment; see *Prob.C.* 10306(a), 10306(b), 14 *Summary* (10th), *Wills and Probate*, §§693.)

(7) *Persons Ineligible To Purchase.* The property may not be sold directly or indirectly to the referee, a party's attorney, or a party's guardian or conservator (unless for the benefit of the ward or conservatee). (*C.C.P.* 873.690(a).) This prohibition applies only to partition sales, not to sales to enforce liens for costs under *C.C.P.* 874.120, 874.130 (see *infra*, §83). (Law Rev. Com. Comment.) Nor does it restrict terms of sale agreed to by all the parties under *C.C.P.* 873.600. The prohibited sales are void, but subsequent sales to bona fide purchasers are not disturbed. (*C.C.P.* 873.690(b).)

West's Key Number Digest, Partition k.77 et seq., 99 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Notice of Sale.*

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §147.(5) *Conduct of Public Sale.*

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §151.



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bb. Consummation of Sale.

12 Witkin Sum. Cal. Law Real Property § 80

[§ 80] Consummation of Sale.

(1) *Referee's Report of Sale.* The referee must make a report to the court that includes, at least, a description of the property sold to each purchaser, the purchaser's name, the sale price, the terms and conditions of sale, any security taken, any amounts payable to lienholders, arrangements for agents' commissions, and recommendations for opening or closing roads. (*C.C.P. 873.710.*)

(2) *Motion To Confirm or Set Aside.* A purchaser, the referee, or a party may move to confirm or to set aside the sale (*C.C.P. 873.720(a)*), giving at least 10 days' notice to all parties and to the purchaser (if not the moving party) (*C.C.P. 873.720(b)*). At the hearing, the sale may be vacated if the court makes any of the following findings:

(a) The sale proceedings were unfair. (*C.C.P. 873.730(c)(1).*)

(b) Notice of sale was not properly given. (*C.C.P. 873.730(c)(1).*)

(c) The sale price is disproportionate to the property's value. (*C.C.P. 873.730(c)(2).*)

(d) A new sale would yield a net increase of at least 10% over the first \$ 10,000 of the sale price and 5% over any excess. (*C.C.P. 873.730(c)(3).*)

A variance from previously ordered terms of sale does not prevent confirmation of a sale the court finds to be beneficial to the parties and not prejudicial to interested persons. (*C.C.P. 873.730(b).*) Confirmation of a sale on credit requires a determination that the credit bidder is responsible. (Law Rev. Com. Comment.) Agents' commissions on a sale are fixed and divided or limited as in probate sales of real property. (*C.C.P. 873.745*; Law Rev. Com. Comment; see *Prob.C. 10160* et seq., 14 *Summary* (10th), *Wills and Probate*, §680 et seq.; *Melikian v. Aquila, Ltd.* (1998) 63 *C.A.4th* 1364, 1369, 74 *C.R.2d* 739 [under *C.C.P. 873.745* and *Prob.C. 10165*, broker for successful overbid must share commission with broker for original bid].)

(3) *Effect of Overbid.* If at the hearing a "responsible bidder" makes an increased offer of at least 10% over the first

\$ 10,000 of the sale price and 5% over any excess, the court must vacate the original sale and either confirm the sale to the new offeror or direct a new sale. (C.C.P. 873.740(a).) The excess of the offer over the original price is treated as including agents' commissions unless a previous court order or agreement of the parties provided for the exclusion of commissions. (C.C.P. 873.740(b), (c); see Law Rev. Com. Comment.)

A new sale is subject to the same notice requirements as the original sale. (C.C.P. 873.640(c).) (On notice, see *supra*, §79.)

(4) *Order To Collect Proceeds and Transfer Property*. When it confirms the sale, the court must order the referee to execute a conveyance, collect the proceeds, take security, and otherwise consummate the sale. (C.C.P. 873.750(a).) The order may also include directions on disposition or safekeeping of sale proceeds (see *infra*, §81) and of funds held on deposit pending a sale. (C.C.P. 873.750(b).) If the purchaser is a party or lienholder, the referee may simply take a receipt for the part of the sale proceeds to which the purchaser is entitled (C.C.P. 873.770(a)) and take security for the purchaser's share of the costs (C.C.P. 873.770(b)).

If a purchaser fails to pay the price after the sale is confirmed, a party or the referee may on notice move the court to order either of the following:

(a) Resale of the property. The sale must be on notice (see *supra*, §79), and the defaulting purchaser is liable for any loss, plus expenses and attorneys' fees. (C.C.P. 873.760(a).)

(b) Action by the referee against the purchaser for the sale price plus attorneys' fees. (C.C.P. 873.760(b).)

(5) *Orders Relating to Closing*. The court may make orders concerning escrow and other closing arrangements. It may also order "adjustments varying the terms of sale based on after-discovered defects" if the referee and the purchaser agree and the court finds on noticed motion that the parties will not be substantially prejudiced. (C.C.P. 873.780.)

(6) *Conveyance*. The referee must execute a conveyance or other instrument transferring the property to the purchaser. (C.C.P. 873.790(a).) The conveyance has the binding effect of a judgment. (C.C.P. 874.240.) A conveyance of real property and the order authorizing it must be recorded in each county in which the property is located. (C.C.P. 873.790(b).) (On recordation, see *infra*, §316 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Motion To Confirm or Set Aside Agents' commissions on sale*: See *Sullivan v. Dorsa* (2005) 128 C.A.4th 947, 956, 27 C.R.3d 547 [C.C.P. 873.745, which incorporates prohibition from *Prob.C. 10160*, precludes award of brokerage commission on unconsummated sale].



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cc. Disposition of Proceeds.

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[§ 81] Disposition of Proceeds.

(1) *Court Order.* The court must order that all the sale proceeds and any security be either transferred to the interested persons or held for their benefit. The proceeds may be held by being deposited in court, placed in trust, invested in California or federal Government bonds, or deposited in a savings account in a federally insured institution. (*C.C.P.* 873.810.) Holding proceeds may be appropriate, for example, pending resolution of a dispute over payment of a lien. (Legislative Com. Comment to *C.C.P.* 873.820.) (See *C.E.B.*, Real Property Remedies and Damages 2d, §8.81 et seq.)

(2) *Application of Proceeds.* *C.C.P.* 873.820 requires that the proceeds of sale be applied in the following order:

(a) Expenses of sale.

(b) Other costs of partition, including a reserve for costs later allowed.

(c) Liens in order of priority. This includes liens held by nonparties as well as parties, but excludes liens that remain on the property under the terms of sale. (Legislative Com. Comment.)

(d) Distribution of the parties' shares of the residue.

The proceeds of the sale must be allocated according to the interests determined in the interlocutory judgment (*supra*, §75). (*C.C.P.* 872.820.) Proceeds from the sale of trust property are turned over to the trustee. (*C.C.P.* 872.840(b).)

(3) *Where Successive Estates Are Involved.* A right to proceeds based on an estate for life or for years may be wholly or partially satisfied by an equitable setoff in a part of the property not sold. (*C.C.P.* 873.830.) Otherwise, a tenant for life or for years is entitled to a proportionate share of the proceeds as determined by the court. (*C.C.P.* 873.840(a).) The court must also determine the proportional value of each vested or contingent future interest. (*C.C.P.* 873.840(b).)

The shares of owners of successive estates may be either distributed to them or held for their benefit. (*C.C.P. 873.840(a)(b)*.) Alternatively, the court may appoint a trustee to receive the entire proceeds and to administer them in trust in accordance with the parties' respective interests under the supervision of the court. (*C.C.P. 873.840(c)*.) A trust may be established only if shown to be practical and desirable. (Law Rev. Com. Comment.) This provision for creation of a trust by the court must be distinguished from the provision for distribution to the trustee of an express trust to which the property was subject before partition. (*C.C.P. 872.840*; see *supra*, §74.)

(4) *Claims to Unallocated Proceeds*. When sale proceeds have not been allocated among certain parties, the action may be continued for adjudication of their claims. The court may require additional pleadings and may take further testimony or have it taken by a referee. (*C.C.P. 873.850*.)

(5) *Credit for Improvements*. The right of a cotenant to compensation for improvements made by a predecessor in interest (see *C.C.P. 873.220*, *supra*, §78) applies not only where the property is divided, but also where it is sold under *C.C.P. 872.820*. (*Wallace v. Daley* (1990) 220 C.A.3d 1028, 1038, 270 C.R. 85.)

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8. Partition by Appraisal.

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[§ 82] Partition by Appraisal.

(1) *Agreement and Court Approval.* An alternative to a division or sale of the property is an agreed partition by appraisal, under which one or more parties acquires the interests of the others at their appraised value. The advantages of this method include saving the expense of a sale and the possible avoidance of taxable gain on the part of the continuing owner. (See *C.C.P. 873.910*; Law Rev. Com. Comment; 13 Cal. Law Rev. Com. Reports, p. 414; C.E.B., Real Property Remedies and Damages 2d, §§8.77, 8.80.)

The parties must make a written agreement, filed with the court, describing the property and naming the parties and their interests, the acquiring parties, the date for appraisal, and the persons acceptable as referees. The agreement may also set out various terms of purchase and may condition the partition on the appraisal not exceeding a stated figure. (*C.C.P. 873.920.*) Contingent interests may participate in the agreement through a guardian ad litem. (Law Rev. Com. Comment to *C.C.P. 873.910.*)

On motion of a party, the court must approve the agreement and stay any pending division or sale, if it determines that the agreement contains the required provisions and that its terms and conditions are equitable. (*C.C.P. 873.930.*) The agreement binds the parties and their successors and is specifically enforceable. (*C.C.P. 873.970.*) However, if a partition by appraisal fails, the parties may pursue another form of partition. (*C.C.P. 873.980.*)

(2) *Referees To Appraise.* The court appoints one or more referees, as provided in the agreement, to appraise the property and report to the court. (*C.C.P. 873.940.*) Confirmation or modification of the report requires a motion of the referee or a party on 10 days' notice. (*C.C.P. 873.950.*) If the court determines that the proceedings have been regularly conducted, that transfer of title to the interests may regularly be made, and that no facts appear that would make the transfer inequitable, it must confirm the report and order the interests transferred to the acquiring parties in proportion to their respective interests, or in whatever proportion is set out in the agreement. Confirmation must be conditioned on payment of the purchase price and compliance with the other terms. On a subsequent motion on 10 days' notice, the court must enter judgment confirming the transfer if it finds the conditions have been fulfilled; otherwise, it must terminate the proceeding. (*C.C.P. 873.960.*)

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9. Costs of Partition.

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[§ 83] Costs of Partition.

(1) *Allowable Costs.* The costs allowable in a partition action consist of all expenses determined to have been incurred "for the common benefit." (*C.C.P. 874.010(e)*; see *Finney v. Gomez* (2003) 111 *C.A.4th* 527, 548, 3 *C.R.3d* 604 [trial court abused discretion in awarding 100% of fees that plaintiff incurred in consulting bankruptcy attorney; there was no evidence that bankruptcy fees were for common benefit]; Law Rev. Com. Comment; C.E.B., Real Property Remedies and Damages 2d, §8.83 et seq.) These include the following items:

(a) Reasonable attorneys' fees incurred by a party. (*C.C.P. 874.010(a)*; see 94 *A.L.R.2d* 575; on attorneys' fees under former law, see *Riley v. Turpin* (1960) 53 *C.2d* 598, 602, 2 *C.R. 457*, 394 *P.2d* 63.)

(b) The referee's fee and expenses. (*C.C.P. 874.010(b)*.) A reasonable fee must be fixed under *C.C.P. 1023*. (See Law Rev. Com. Comment; 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §71; on court's authority over referee's fee and expenses, see *C.C.P. 873.010(b)*, *supra*, §76.)

(c) Compensation for the services of a surveyor, attorney, or other person employed by the referee. (*C.C.P. 874.010(c)*.) (On court's authority over referee's employment of third persons, see *C.C.P. 873.110* et seq., *supra*, §77.)

(d) Reasonable costs of a title report procured under *C.C.P. 872.220* (*supra*, §68). (*C.C.P. 874.010(d)*.)

(e) Attorneys' fees and other expenses incurred by a party in prosecuting or defending other proceedings to perfect the title, set boundaries, or make a survey. (*C.C.P. 874.020*.)

(f) Interest on disbursements made by a party under the direction of the court. (*C.C.P. 874.030*.) Interest is also allowed on title report costs (*C.C.P. 874.010(d)*) and costs of related litigation (*C.C.P. 874.020*).

(2) *Apportionment of Costs.* Costs are normally apportioned among the parties in proportion to their interests. However, the court may make a different equitable arrangement, where, for example, costs are allowed for related litigation affecting the interests of less than all the parties. (*C.C.P. 874.040*; see *Stutz v. Davis* (1981) 122 *C.A.3d* 1, 4, 6, 175 *C.R. 701* [apportionment contrary to common benefit test held inequitable and judgment reversed with directions to

recompute]; *Finney v. Gomez, supra*, 111 C.A.4th 547 [trial court abused discretion in awarding 100% of costs to plaintiff, rather than dividing costs in proportion to parties' ownership interest in property; there was no evidence that benefits of partition accrued to only one party or that parties had dissimilar interest in property].) Costs apportioned to a future interest may be ordered paid by other parties or by the future interest's presumptive owners. (C.C.P. 874.050(a).) Persons paying the share are entitled to reimbursement with interest, secured by a charge on the future interest. (C.C.P. 874.050(b).) The future interest's share of costs is discounted to the future interest's present value. (See Law Rev. Com. Comment.)

(3) *Payment*. Apportioned costs may be ordered paid in whole or in part before judgment. (C.C.P. 874.110(a).) The court may order payment by the parties or from the proceeds of a sale (see C.C.P. 873.820; *supra*, §81). The judgment need list only the costs that then remain unpaid. (C.C.P. 874.110(b).)

(4) *Lien for Costs*. Costs are a lien, prior to all other kinds of liens, on the share of the party specified. (C.C.P. 874.120.) (On lien for amounts owing to referee and referee's employees, see C.C.P. 873.010(b), 873.110(c); *supra*, §§76, 77.) When a person entitled to a lien for costs applies and makes a showing of good cause, the court may order a sale of all or a portion of the property before or after judgment for the benefit of all lien claimants without priority among them. (C.C.P. 874.130.)

(5) *Execution To Enforce Payment*. A judgment for unpaid costs may be enforced in the same manner as a money judgment against any property of the indebted party. (C.C.P. 874.140.) The remedies of execution and lien sale (C.C.P. 874.130) are cumulative. (Law Rev. Com. Comment.)

West's Key Number Digest, Partition k.114 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Allowable Costs*.

(b) *Referee's fees and expenses*. See *Sullivan v. Dorsa* (2005) 128 C.A.4th 947, 963, 27 C.R.3d 547 [fee award to referee's attorneys was proper, despite landowners' objection that one attorney had preexisting relationship with prospective purchaser, where owners failed to show that alleged conflict of interest was so incompatible with attorneys' duties that disallowance of fees would be required; owners' objection that other attorney had not performed services for common benefit also lacked factual basis].

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §77.



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10. Judgment.

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[§ 84] Judgment.

(1) *Persons Bound*. *C.C.P. 874.210* et seq., stating who is bound by the trial court's final judgment, also govern the binding effect of a *conveyance* pursuant to a partition sale (*C.C.P. 873.750, 873.790*, supra, §80) or a partition by appraisal (*C.C.P. 873.960*, supra, §82). (See *C.C.P. 874.240*.) (See *C.E.B.*, Real Property Remedies and Damages 2d, §§8.88, 8.89.) The judgment binds the following persons:

(a) Parties to the action who have or claim an interest in the property. (*C.C.P. 874.210(a)*.) This includes such parties as "persons unknown" (*C.C.P. 872.550*) and heirs of decedents (*C.C.P. 872.530*). (See Legislative Com. Comment on *C.C.P. 874.210*; supra, §67.) But it appears not to include persons who, although named as parties, were not served and have not appeared. (Law Rev. Com. Comment on *C.C.P. 873.600*.)

(b) Owners of remainder or contingent interests who are not in being or cannot be ascertained. The judge must provide for the protection of these interests. (*C.C.P. 874.210(b)*.)

(c) Subject to the limited exception of *C.C.P. 874.225* (infra, this section), nonparties claiming interests that were not recorded when the lis pendens was filed or, if none was filed, at the time the judgment was recorded. (*C.C.P. 874.210(c)*.) (On lis pendens, see supra, §68.)

(2) *Claims Not Affected by Judgment*. Except to the extent provided in *C.C.P. 1908* (conclusive effect of judgments in various cases), the judgment in a partition action does not affect a claim in the property or proceeds of sale allocated to the plaintiff of *any person who is not a party* if either of the following conditions is satisfied:

(a) "The claim was of record at the time the lis pendens was filed or, if none was filed, at the time the judgment was recorded." (*C.C.P. 874.225(a)*.)

(b) "The claim was actually known to the plaintiff or would have been reasonably apparent from an inspection of the property at the time the lis pendens was filed or, if none was filed, at the time the judgment was entered." (*C.C.P. 874.225(b)*.)

C.C.P. 874.225 does not impair the rights of a bona fide purchaser or encumbrancer for value dealing with the plaintiff or the plaintiff's successors in interest. (*C.C.P. 874.225*.)

SUPPLEMENT: [This section is current through the latest supplement]



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6. Common Interest Developments.

a. Nature and Regulation.

1. Common Interest Development Act.

12 Witkin Sum. Cal. Law Real Property § 85

[§ 85] Common Interest Development Act.

(1) *Former Law.* Condominiums were first regulated in 1963 by the enactment of the Condominium Act (former C.C. 1350 et seq.). The statute clarified and to some extent standardized the procedures governing condominium developments and provided important protections for the individual owners, but many details concerning the rights of the parties were left to private agreement. A significant aspect of the legislation was its voluntary character. The statute applied only if a condominium plan was recorded. (See *14 Hastings L. J.* 189 [background and effect of legislation]; 6 *Southwestern U. L. Rev.* 487 [extensive review of California condominium law in 1974]; 10 *Cal. Western L. Rev.* 359 [suggested legislative changes].)

(2) *Common Interest Development Act.* The statutes governing condominiums were substantially revised and expanded in 1985. Former C.C. 1350 et seq. were replaced by the Davis-Stirling Common Interest Development Act (C.C. 1350 et seq.). (See C.E.B., *Forming California Common Interest Developments*, §§1.23, 1.24; C.E.B., *Advising California Common Interest Communities* 2d, §1.3 et seq.; *17 Pacific L. J.* 761; *38 Santa Clara L. Rev.* 1009 [comparison of Act and Uniform Common Interest Ownership Act].) The statutory law governing common interest developments was consolidated in the Act, and overlapping statutes in the Civil Code and the Business and Professions Code were repealed. The Act governs stock cooperatives, community projects, and planned developments, as well as condominium projects. (For definitions, see *infra*, §88 et seq.) However, some of its provisions apply only to condominiums. (See C.C. 1359 [partition of common areas; *infra*, §113]; C.C. 1360 [modifications to facilitate access for handicapped persons; *infra*, §118]; C.C. 1369 [lien for labor and materials; *infra*, §126].)

(3) *Application of Act.* A common interest development subject to C.C. 1350 et seq. is created when a separate interest (see *infra*, §93) coupled with an interest in the common area (see *infra*, §93) or membership in the governing association (see *infra*, §97 et seq.) "is, or has been, conveyed," and the following documents are recorded: (a) A declaration (see *infra*, §95), (b) any existing condominium plan (see *infra*, §89), and (c) any final or parcel map required by *Govt.C.* 66410 et seq. (see *infra*, §811 et seq.). (C.C. 1352; see *Mount Olympus Property Owners Assn. v. Shpirt* (1997) 59 *C.A.4th* 885, 895, 69 *C.R.2d* 521 [tract in which plaintiff's property was located was not common interest development; owners association was purely voluntary association of homeowners with no power to charge or collect assessments, and did not convey to plaintiff "separate interest coupled with an interest in the common area or

membership in the association"].)

The Act may not be construed to apply to a development lacking a common area. (C.C. 1374; *Committee to Save the Beverly Highlands Homes Assn. v. Beverly Highlands Home Assn.* (2001) 92 C.A.4th 1247, 1270, 112 C.R.2d 732 [Act did not govern dissolution of nonprofit mutual benefit corporation whose members were owners of buildable lots located within same area; area had no common area].) Moreover, a time-share plan registered under B. & P.C. 11210 et seq. (infra, §86) to which the Act might otherwise apply is exempt from the Act, except for specified sections. (B. & P.C. 11211.7(a).)

A common interest development that is limited, by zoning or by a recorded declaration of covenants, conditions, and restrictions, to commercial or industrial uses is excluded from the requirements of C.C. 1356, 1357.100 et seq., 1363(b), 1365, 1365.5, 1366(b), 1366.1, 1368, and 1378 (see infra, §95 et seq.). (C.C. 1373(a).)

West's Key Number Digest, Condominium k.2

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Application of Act.* See *Golden Rain Foundation v. Franz* (2008) 163 C.A.4th 1141, 1150, 78 C.R.3d 226 [housing cooperatives owned by mutual corporations were common interest developments under C.C. 1352; residents were conveyed separate interest coupled with membership in association, and declaration of trust, recorded in 1962 and binding on mutual corporations, met minimal requirements of C.C. 1353 (text, §95) for pre-1986 declaration].



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a. Nature and Regulation.

2. Other Statutes.

12 Witkin Sum. Cal. Law Real Property § 86

[§ 86] Other Statutes.

(1) *In General.* A number of other statutes deal with common interest developments:

(a) C.C. 783 [condominium as estate in real property; see *infra*, §89].

(b) C.C. 783.1 [interest in stock cooperative as interest in real property; see *infra*, §91].

(c) C.C. 1134 [disclosure to prospective purchaser of unit in residential dwelling converted to condominium, cooperative apartment, or stock cooperative; see *infra*, §687].

(d) *C.C.P. 704.710(a), 704.910(c)* [homestead dwelling may include interest in condominium project, planned development, stock cooperative, or community apartment project].

(e) *Health & Saf.C. 50775 et seq.* [state assistance to renters for purchase of units being converted to condominium, planned development, or stock cooperative ownership].

Only individual units as defined by C.C. 1351(f) (*infra*, §89), and not the jointly owned structure of a project, are subject to *Ins.C. 10081*, which requires insurers to offer earthquake insurance. (*Marina Green Homeowners Assn. v. State Farm Fire & Cas. Co. (1994) 25 C.A.4th 200, 204, 30 C.R.2d 364*; see 1 *Summary* (10th), *Contracts*, §1012.)

(2) *Subdivisions.* Most common interest developments are subject to these statutes:

(a) The Subdivided Lands Act (*B. & P.C. 11000 et seq.*, *infra*, §820), which incorporates the definitions used in the Civil Code. (See *B. & P.C. 11003* [planned development], *B. & P.C. 11003.2* [stock cooperative], *B. & P.C. 11003.4* [limited-equity housing cooperative], *B. & P.C. 11004* [community apartment project].) Developments subject to the Act are under the jurisdiction of the Real Estate Commissioner. (See *B. & P.C. 11001, 11004.5*; on former uncertainty concerning jurisdiction of Real Estate Commissioner and Commissioner of Corporations, see 14 *Hastings L. J.* 222; 14 *Hastings L. J.* 241; 37 *So. Cal. L. Rev.* 82, 108; 11 *U.C.L.A. L. Rev.* 1, 7.)

(b) The Subdivision Map Act (*Govt.C. 66410 et seq.*, *infra*, §809). (See *Govt.C. 66411* [each local agency, by ordinance, must regulate and control initial design and improvement of common interest developments for which tentative and final or parcel map is required]; *Govt.C. 66424* [subdivision includes condominium project, community apartment project, and conversion of five or more units into a stock cooperative]; *Govt.C. 66426* [subject to exceptions, tentative and final map are required for five or more condominiums, community apartment project containing five or more parcels, and conversion of dwelling to stock cooperative containing five or more units]; *Govt.C. 66427* [approval of condominium, cooperative apartment project, or stock cooperative may not be refused on account of design or location of buildings not violative of local ordinances or on account of manner in which airspace is to be divided in conveying condominium].) (On extension of Act to stock cooperative conversions, see *11 Pacific L. J. 617*; on conversion restrictions, see *infra*, §687.)

(3) *Time-share Interests*. The Vacation Ownership and Time-share Act of 2004 (*B. & P.C. 11210 et seq.*) governs the creation, sale, and regulation of time-share plans in California. (See *B. & P.C. 11225 et seq.* [registration and sales requirements]; *B. & P.C. 11250* [plan requirements]; *B. & P.C. 11265 et seq.* [management and governance]; *B. & P.C. 11280 et seq.* [enforcement of Time-share Act by Real Estate Commissioner].)

(4) *Taxation*. Taxation of condominiums is covered by *Rev.C. 2188.3, 2188.5 et seq.* (See *9 Summary* (10th), *Taxation*, §168.) (On time-share interests in real property, see *B. & P.C. 11212* [definitions], *B. & P.C. 11213* [time-share estate as separate interest for tax purposes]; *Rev.C. 2188.8, 2188.9* [tax assessment]; *6 A.L.R.4th 1288* [regulation of time-share ownership interest]; *C.E.B., Forming California Common Interest Developments*, Chap. 5; *C.E.B., Advising California Common Interest Communities 2d*, Chap. 3; *Hanna, Common Interest Developments*, Chap. 23.)

(5) *Construction of Zoning Ordinances*. Unless a contrary intent is clearly expressed, zoning ordinances are to be construed "to treat like structures, lots, parcels, areas, or spaces in like manner regardless of whether the common interest development is a community apartment project, condominium project, planned development, or stock cooperative." (*C.C. 1372*.) (See *C.E.B., Forming California Common Interest Developments*, §4.24; *71 A.L.R.3d 866* [zoning or building regulations as applied to condominiums].)

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- 3. Commentary and Uniform Acts.

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[§ 87] Commentary and Uniform Acts.

(1) *Texts and Commentary.* Condominiums and other forms of common interest developments have been the subject of extensive commentary. (See 7 Powell, Chap. 54; Hanna, Common Interest Developments; 9 Miller & Starr 3d, §25:53 et seq.; C.E.B., Forming California Common Interest Developments; C.E.B., Advising California Common Interest Communities 2d; Cal. Civil Practice, 1 Real Property Litigation, Chap. 8 [disputes involving common interest developers]; 50 *Cal. L. Rev.* 299 [Community Apartments: Condominium or Stock Cooperative?]; 94 *Harv. L. Rev.* 647 [judicial review of condominium rulemaking]; 18 *Hastings L. J.* 585 [preemptive options]; 21 *Hastings L. J.* 243 [desirability for low-income families]; 37 *So. Cal. L. Rev.* 82 [fee in condominium]; 17 *Stanf. L. Rev.* 842 [Condominium Housing: A Purchaser's Perspective]; 51 *U.C.L.A. L. Rev.* 1437 [access for solicitors in common interest communities]; 6 West L.A. L. Rev. 121 [Community Living Condominium Style]; 73 *A.L.R.3d* 613 [self-dealing by developers as affecting contracts or leases with condominium association]; 15A *Am.Jur.2d* (2000 ed.), *Condominiums and Cooperative Apartments* §1 et seq.)

(2) *Uniform Acts.* The following uniform acts applicable to common ownership of real estate developments have been approved by the Commissioners on Uniform State Laws:

- (a) Uniform Common Interest Ownership Act. (See 7 (Part I) U.L.A. (Master Ed.), p. 471.)
- (b) Uniform Condominium Act. (See 7 (Part II) U.L.A. (Master Ed.), p. 450.)
- (c) Uniform Planned Community Act. (See 7B U.L.A. (Master Ed.), p. 1.)
- (d) Model Real Estate Cooperative Act. (See 7B U.L.A. (Master Ed.), p. 312.)
- (e) Model Real Estate Time-Share Act. (See 7B U.L.A. (Master Ed.), p. 435.)

West's Key Number Digest, Condominium k.1

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(2) *Uniform Acts.*

(a) *Uniform Common Interest Ownership Act.* Volume 7 (Part I) of the Uniform Laws Annotated was revised in 2006. The Common Interest Ownership Act is now at 7 (Part I) U.L.A. (Master Ed.), p. 835. (c) *Uniform Planned Community Act.* Volume 7B of the Uniform Laws Annotated was revised in 2006. The Planned Community Act is now at 7A (Part II) U.L.A. (Master Ed.), p. 233.

(d) *Model Real Estate Cooperative Act.* Volume 7B of the Uniform Laws Annotated was revised in 2006. The Real Estate Cooperative Act is now at 7B U.L.A. (Master Ed.), p. 49.

(e) *Model Real Estate Time-Share Act.* Volume 7B of the Uniform Laws Annotated was revised in 2006. The Real Estate Time-Share Act is now at 7B U.L.A. (Master Ed.), p. 175.



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1. Common Interest Development.

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[§ 88] Common Interest Development.

C.C. 1351(c) defines a "common interest development" as any of the following:

- (1) A community apartment project (see *infra*, §90).
- (2) A condominium project (see *infra*, §89).
- (3) A planned development (see *infra*, §92).
- (4) A stock cooperative (see *infra*, §91).

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2. Condominium, Condominium Plan, and Condominium Project.

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[§ 89] Condominium, Condominium Plan, and Condominium Project.

(1) *Condominium*. "A condominium consists of an undivided interest in common in a portion of real property coupled with a separate interest in space called a unit, the boundaries of which are described on a recorded final map, parcel map, or condominium plan in sufficient detail to locate all boundaries thereof." The description may refer to boundaries described in the recorded documents, to physical boundaries such as walls, floors, and ceilings, to an entire structure containing one or more units, or to a combination of the foregoing. (C.C. 1351(f); see C.E.B., *Forming California Common Interest Developments*, §1.14; Hanna, *Common Interest Developments*, §§1:14, 2:7, 3:1; *15A Am.Jur.2d* (2000 ed.), *Condominiums and Cooperative Apartments* §1 et seq.)

The condominium draws elements from both tenancy in common and separate ownership: "[T]he condominium owners are tenants in common of the common areas and the personal property held by the management association, and they are owners in fee of separate units, which are not separate in fact. ... [I]n its legal structure the condominium first combines elements from several concepts--unincorporated association, separate property, and tenancy in common--and then seeks to delineate separate privileges and responsibilities on the one hand from common privileges and responsibilities on the other." (*White v. Cox* (1971) 17 C.A.3d 824, 829, 95 C.R. 259.) (See C.E.B., *Forming California Common Interest Developments*, §1.47 et seq.)

A condominium is an estate in real property and, with respect to duration of enjoyment, may be an estate of inheritance or a perpetual estate, a life estate, an estate for years (such as a leasehold or a subleasehold), or any combination of the foregoing. (C.C. 783.) (See *Arnett v. Peterson* (1971) 15 C.A.3d 170, 174, 92 C.R. 913 [estate for years]; C.E.B., *Forming California Common Interest Developments*, §1.47.)

The common interest portion of a condominium may be all of the real property except for the separate interests or may consist of a particular three-dimensional portion, the boundaries of which are described in a recorded final map, parcel map, or condominium plan. (C.C. 1351(f).)

The area within the boundaries of a condominium may consist of air, earth, or water, or any combination, and need not be physically attached to land except by easements for access and, if necessary, support. The same is true of a

three-dimensional parcel owned in common. (C.C. 1351(f).)

(2) *Condominium Project*. A condominium project is a development consisting of condominiums. An individual condominium within a condominium project may include a separate interest in other portions of the real property. (C.C. 1351(f).) The individual unit is deemed a "separate interest." (C.C. 1351(l)(2).)

(3) *Condominium Plan*. Under C.C. 1351(e), a condominium plan consists of three elements:

(a) A description or survey map of a condominium project that refers to or shows "monumentation" on the ground.

(b) A three-dimensional description of a condominium project sufficiently detailed to identify the common areas and each separate interest. One or more dimensions may extend for an infinite distance upward or downward.

(c) A certificate consenting to the recordation of the condominium plan signed and acknowledged by the record owner of fee title to the property included in the condominium project. If the condominium project will terminate with an estate for years, the certificate must be signed and acknowledged by all lessors and lessees. If the project is subject to a life estate, the certificate must be signed and acknowledged by all life tenants and remainder interest holders. If the property is encumbered, the certificate must be signed and acknowledged by the trustee or the beneficiary of each recorded deed of trust and the mortgagee of each recorded mortgage. The signatures of the owners of mineral rights, easements, rights of way, and other nonpossessory interests are not required. If a conversion to condominiums of a community apartment project or stock cooperative has been approved by the required number of owners, trustees, beneficiaries, and mortgagees under *Govt.C. 66452.10* (infra, §687), the certificate need only be signed by the owners, trustees, beneficiaries, and mortgagees who approved the conversion. (See C.E.B., *Forming California Common Interest Developments*, §1.15; Hanna, *Common Interest Developments*, §3:39 et seq.)

A condominium plan may be amended or revoked by a subsequently acknowledged recorded instrument executed by all the persons whose signatures would be required by C.C. 1351(e). (C.C. 1351(e).)

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(1) *Condominium*. See *Bear Creek Master Assn. v. Edwards* (2005) 130 C.A.4th 1470, 1477, 31 C.R.3d 337

[homeowners' association lawfully charged assessments and dues for unbuilt condominiums within planned and partially built development; "condominium," as defined in C.C. 1351(f), means separate interest in space, within described boundaries, and does not require existence of structure or building].



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3. Community Apartment Project.

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[§ 90] Community Apartment Project.

A community apartment project is a development in which an undivided interest in land is coupled with the right of exclusive occupancy of an apartment located on the land. (C.C. 1351(d); see *B. & P.C. 11004* [adopting this definition for purposes of subdivided lands statutes].) The exclusive right of occupancy is deemed a "separate interest." (C.C. 1351(l)(1).) (See 9 Miller & Starr 3d, §25:13; C.E.B., *Forming California Common Interest Developments*, §1.13; Hanna, *Common Interest Developments*, §§1:17, 8:14; *15A Am.Jur.2d* (2000 ed.), *Condominiums and Cooperative Apartments* §62 et seq.)

A community apartment project may not be created by oral agreement between cotenants; a deed reflecting a right of exclusive occupancy is required. (*Adler v. Elphick* (1986) 184 C.A.3d 642, 648, 649, 229 C.R. 254; *Bakanauskas v. Urdan* (1988) 206 C.A.3d 621, 630, 253 C.R. 764 [following *Adler*].)

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4. Stock Cooperative.

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[§ 91] Stock Cooperative.

(1) *In General.* A stock cooperative is a development in which a corporation is formed or availed of primarily for the purpose of holding title to improved real property, either in fee simple or for a term of years, and all or substantially all of the shareholders of the corporation receive a right of exclusive occupancy in a portion of the real property, title to which is held by the corporation. (C.C. 1351(m); see *B. & P.C. 11003.2* [adopting definition for purposes of subdivided lands statutes].) The exclusive right of occupancy is deemed a "separate interest." (C.C. 1351(l)(4).) "Stock cooperative" includes a limited equity housing cooperative that is a stock cooperative meeting the criteria of *Health & Saf.C. 33007.5*. (C.C. 1351(m).)

(2) *Character of Owner's Interest.* An owner's interest in a stock cooperative, whether evidenced by a share of stock, a certificate of membership, or otherwise, is deemed an interest in a common interest development. For purposes of *Corp.C. 25100(f)* (exempting interests in real estate developments from restrictions applicable to securities sellers), the interest is also deemed an interest in a real estate development. (C.C. 1351(m).)

Both the separate interest (the exclusive right to occupy a portion of the property) and the correlative interest in the corporation are interests in real property. (C.C. 783.1.)

(3) *Corporation and Shareholders Are Distinct Entities.* A cooperative and its member-shareholders are distinct entities. Hence, the corporation has the usual remedies of a landlord against a tenant, and may bring an unlawful detainer action against a member after termination of the tenancy for a violation of the rules. (*Sun Terrace Manor v. Municipal Court* (1973) 33 C.A.3d 739, 743, 108 C.R. 307.)

(4) *Commentary.* Cooperatives have been the subject of extensive commentary. (See 9 Miller & Starr 3d, §25:14; C.E.B., *Forming California Common Interest Developments*, §§1.22, 1.77; Hanna, *Common Interest Developments*, Chap. 5; 50 *Cal. L. Rev.* 299 [community apartment as stock cooperative]; 2 *Cal. Western L. Rev.* 70 [treatment of casualty losses, insurance, and project termination]; 13 *Hastings L. J.* 357; 6 *Southwestern U. L. Rev.* 487, 488 [contrasting condominium and cooperative]; 18 *Stanf. L. Rev.* 1323 [approval of residential controls and enforcement procedures for cooperative housing]; 19 *Stanf. L. Rev.* 978 [evaluation of project offerings and representation of

purchasers for cooperative apartment transfers]; 99 *A.L.R.2d* 236 [transfer of stock and voting rights]; 15A *Am.Jur.2d* (2000 ed.), *Condominiums and Cooperative Apartments* §62 et seq.)

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5. Planned Development.

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[§ 92] Planned Development.

A planned development is a development (other than a community apartment project, a condominium project, or a stock cooperative) that has one or both of the following features:

(1) The common area is owned either by an association or in common by the owners of the separate interests who possess appurtenant rights to the beneficial use and enjoyment of the common area. (C.C. 1351(k)(1).)

(2) The association has the power to enforce an obligation of an owner of a separate interest with respect to the beneficial use and enjoyment of the common area by means of an assessment that may become a lien on the separate interests in accordance with C.C. 1367 and 1367.1 (infra, §112). (C.C. 1351(k)(2).)

B. & P.C. 11003 adopts this definition for purposes of the subdivided lands statutes. In a planned development "separate interest" means "a separately owned lot, parcel, area, or space." (C.C. 1351(l)(3).) (On planned developments generally, see 9 Miller & Starr 3d, §25:15; C.E.B., *Forming California Common Interest Developments*, §1.73 et seq.; Hanna, *Common Interest Developments*, §1:15, Chap. 4.)

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6. Separate, Common, and Exclusive Areas.

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[§ 93] Separate, Common, and Exclusive Areas.

(1) *Separate Interest.* Separate interest means an individual unit in a condominium project, a separately owned lot, parcel, area, or space in a planned development, the exclusive right to occupy an apartment in a community apartment project, or the exclusive right to occupy a portion of the real property in a stock cooperative. (C.C. 1351(l).)

Unless the governing documents provide otherwise, "if walls, floors, or ceilings are designated as boundaries of a separate interest, the interior surfaces of the perimeter walls, floors, ceilings, windows, doors, and outlets located within the separate interest are part of the separate interest and any other portions of the walls, floors, or ceilings are part of the common areas." (C.C. 1351(l).)

(2) *Common Area.* Any portion of a common interest development that is not a separate interest is part of the common area. The estate in the common area may be a fee, a life estate, an estate for years, or a combination of those. The common area for a planned development (C.C. 1351(k)(2), *supra*, §92) "may consist of mutual or reciprocal easement rights appurtenant to the separate interests." (C.C. 1351(b); see *Committee to Save the Beverly Highlands Homes Assn. v. Beverly Highlands Homes Assn.* (2001) 92 C.A.4th 1247, 1270, 112 C.R.2d 732 [development that included numerous buildable and several nonbuildable lots had no common area as defined by C.C. 1351(b); association's declaration created covenants running with the land or equitable servitudes as to nonbuildable lots and restricted their use, but did not give owners of other lots interest in nonbuildable lots or right to use them for their own enjoyment]; 15A Am.Jur.2d (2000 ed.), *Condominiums and Cooperative Apartments* §29 et seq.)

(3) *Exclusive Use Common Area.* That portion of the common area appurtenant to a separate interest and designated for exclusive use by less than all the owners of the separate interests is deemed "exclusive use common area." Unless otherwise provided, fixtures designed to serve a single separate interest but located outside the boundaries of the separate interest (e.g., shutters, awnings, balconies, patios, screens, and external and internal telephone wiring) are exclusive use common areas allocated exclusively to that separate interest. (C.C. 1351(i).) (See Hanna, Common Interest Developments, §3:15.)

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(3) *Exclusive Use Common Area*. In general, unless the association's governing documents specify a different percentage, the affirmative vote of members owning at least 67% of the separate interests in a common interest development is required before the directors may grant a member the exclusive use of a common area. (C.C. 1363.07(a), added in 2005; for exceptions, see C.C. 1363.07(a)(1)-(a)(3), added in 2005.)



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c. Governing Documents.

1. In General.

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[§ 94] In General.

(1) *Types of Documents.* The governing documents are the declaration (see *infra*, §95) and any other documents governing the operation of the development or its governing association (see *infra*, §96 et seq.), including bylaws, operating rules, articles of incorporation, and articles of association. (C.C. 1351(j); see 9 Miller & Starr 3d, §25:65 et seq.; Hanna, Common Interest Developments, §3:43 et seq.; 15A Am.Jur.2d (2000 ed.), *Condominiums and Cooperative Apartments* §5 et seq.; for forms, see C.E.B., Forming California Common Interest Developments, Appendix D [articles of incorporation], Appendix E [bylaws]; 5A Am.Jur. Legal Forms 2d (2004 ed.), *Condominiums* §64:36 et seq.; 5A Am.Jur. Legal Forms 2d (2004 ed.), *Cooperative Apartments* §70:8 et seq.; on requirements for valid operating rules and procedures for changing rules, see *infra*, §96.)

(2) *Construction.* A declaration, deed, or condominium plan for a common interest development is to be liberally construed to facilitate the operation of the development, and its provisions are presumed to be independent and severable. Nothing in the statutes governing restraints on alienation (*infra*, §173 et seq.) invalidates any provision of the governing documents. (C.C. 1370.)

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c. Governing Documents.

2. Declaration.

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[§ 95] Declaration.

(1) *Definition.* A declaration is the document, however denominated, containing the information required by C.C. 1353. (C.C. 1351(h).) The declarant is the person or persons so designated in the declaration or, in the absence of a designation, the person or persons signing the declaration or his or their successors in interest. (C.C. 1351(g).)

(2) *Contents of Declaration.* A declaration recorded on or after January 1, 1986, must contain a legal description of the development and state that it is a community apartment project, condominium project, planned development, stock cooperative, or some combination of those. The declaration must include the name of the governing association (see *infra*, §97) and any restrictions on the use or enjoyment of any portion of the development intended to be enforceable equitable servitudes. (C.C. 1353(a); on enforcement of equitable servitudes, see *infra*, §114 et seq.)

If the property is located within an airport influence area, a declaration, recorded after January 1, 2004, must contain the following statement: "This property is presently located in the vicinity of an airport, within what is known as an airport influence area. For that reason, the property may be subject to some of the annoyances or inconveniences associated with proximity to airport operations (for example: noise, vibration, or odors). Individual sensitivities to those annoyances can vary from person to person. You may wish to consider what airport annoyances, if any, are associated with the property before you complete your purchase and determine whether they are acceptable to you." (C.C. 1353(a)(1).) An "airport influence area," also known as an "airport referral area," is the area in which current or future airport-related noise, overflight, safety, or airspace protection factors may significantly affect land uses or necessitate restrictions on those uses as determined by an airport land use commission. (C.C. 1353(a)(2).)

If the property is within the jurisdiction of the San Francisco Bay Conservation and Development Commission, a declaration recorded on or after January 1, 2006, must contain the following notice: "This property is located within the jurisdiction of the San Francisco Bay Conservation and Development Commission. Use and development of property within the commission's jurisdiction may be subject to special regulations, restrictions, and permit requirements. You may wish to investigate and determine whether they are acceptable to you and your intended use of the property before you complete your transaction." (C.C. 1353(a)(3).)

The statement in a declaration acknowledging that a property is located in an airport influence area or within the jurisdiction of the San Francisco Bay Conservation and Development Commission does not constitute a title defect, lien, or encumbrance. (C.C. 1353(a)(4).)

The declaration may also contain other matter considered appropriate by the original signator or the owners. (C.C. 1353(b).) (For forms, see C.E.B., *Forming California Common Interest Developments*, Chap. 7; Hanna, *Common Interest Developments*, §24:1; 5 Am.Jur. Legal Forms 2d (2004 ed.), *Condominiums* §64:7 et seq.)

(3) *Restrictive Covenant Prohibited.* A declaration or other governing document may not include a restrictive covenant in violation of *Govt.C. 12955*, which sets forth unlawful acts and practices relating to housing discrimination. (C.C. 1352.5(a); on *Govt.C. 12955*, see 8 *Summary* (10th), *Constitutional Law*, §947.) An association's board of directors must restate a declaration or other governing document to remove a prohibited restrictive covenant. (C.C. 1352.5(b).) C.C. 1352.2(a) may be enforced by the Department of Fair Employment and Housing, a city or county in which a common interest development is located, or any person. (C.C. 1352.5(c).) Moreover, a county recorder, title insurance company, escrow company, real estate broker, real estate agent, or association that provides someone with a copy of a declaration or governing document containing a prohibited restriction must notify that person that the restriction is void and may be removed. (*Govt.C. 12956.1(b)*; see 31 *McGeorge L. Rev.* 211 [analysis of C.C. 1352.5 and *Govt.C. 12956.1*].)

(4) *Amendment of Declaration.* The declaration may be amended pursuant to the governing documents or under the Common Interest Development Act. Except as provided by C.C. 1356 (infra, this section), an amendment is effective after the percentage of owners required by the governing documents has approved it and a written instrument certifying approval executed and acknowledged by a designated official or the president of the association has been recorded in each county where a portion of the development is located. (C.C. 1355(a).) A declaration that fails to include provisions permitting amendment may be amended at any time in the manner specified in C.C. 1355(b). (C.C. 1355(b); see *Villa De Las Palmas Homeowners Assn. v. Terifaj* (2004) 33 C.4th 73, 82, 14 C.R.3d 67, 90 P.3d 1223 [use restriction contained in amended declaration was enforceable against homeowner who acquired separate interest before amendment was adopted and recorded].) (On amendment of governing documents to delete provisions intended to facilitate completion or marketing of development, after construction and developer's marketing activities are finished, see C.C. 1355.5; 24 *Pacific L. J.* 981.)

(5) *Court Proceeding To Reduce Percentage of Votes Necessary for Amendment.* If a declaration requires owners having more than 50% of the votes in an association to approve an amendment, the association or a separate interest owner may petition the superior court in the county in which the development is located to reduce the percentage of affirmative votes necessary for a particular amendment. (C.C. 1356(a).) (On content of petition and attached exhibits, see C.C. 1356(a); on notice, see C.C. 1356(b); on form of order, see C.C. 1356(d).) The petition may be granted if the court finds that (a) the amendment is reasonable, (b) interested parties have been properly notified, and (c) owners having more than 50% of the votes approved the amendment in properly conducted balloting. (C.C. 1356(c).) The court must not approve an amendment that would (a) change class voting requirements without the approval of voters in that class, (b) eliminate rights or privileges belonging to the declarant without the declarant's consent, or (c) impair security interests without the approval of secured parties if their approval is required by the declaration. (C.C. 1356(e).)

An amendment based on a court order has the same force and effect as an amendment adopted in compliance with the governing documents and is effective when the amendment and the order are recorded in every county in which a portion of the development is located. (C.C. 1356(f).) The amendment and a notice of recordation must be mailed to the association members within "a reasonable time." (C.C. 1356(g).)

A petition brought under C.C. 1356 is not an adversarial proceeding. Objectors who oppose the petition are not enforcing the governing documents and are not entitled to costs and attorneys' fees when the petition is denied. (*Blue Lagoon Community Assn. v. Mitchell* (1997) 55 C.A.4th 472, 477, 64 C.R.2d 81, 7 Cal. Proc. (4th), *Judgment*, Supp., §90.)

(6) *Extension of Term of Declaration.* A declaration that contains a termination date but does not provide for an extension of that date may be extended by approval of owners having more than 50% of the votes in the association, or by a greater percentage specified for an amendment in the declaration. If the approval of more than 50% of the votes is required to amend the declaration, the term may be extended under C.C. 1356. (C.C. 1357(b); on legislative findings supporting extension procedure, see C.C. 1357(a).) Successive extensions are authorized, but no single extension may exceed the lesser of 20 years or the initial term of the declaration. (C.C. 1357(d).) An extension becomes effective when the amendment is recorded under C.C. 1355. (C.C. 1357(c).)

In *La Jolla Mesa Vista Imp. Assn. v. La Jolla Mesa Vista Homeowners Assn.* (1990) 220 C.A.3d 1187, 269 C.R. 825, the issue was whether homeowners who assented in writing to an extension and modification of the declaration of conditions and restrictions governing their residential development had the power to revoke their consent. Although the record did not disclose that the development was a common interest development, the court found the statutory and administrative provisions of C.C. 1350 et seq. (supra, §85) "helpful" and concluded that, in the absence of written procedures giving a homeowner the right to withdraw consent, that right would not be implied. "[A] person who has given his assent to the extension is bound for a reasonable period of time by the assents previously obtained and by assents which are later obtained." (220 C.A.3d 1196, 1197.)

West's Key Number Digest, Condominium k.6 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(5) *Court Proceeding To Reduce Percentage of Votes Necessary for Amendment.* See *Peak Inv. v. South Peak Homeowners Assn.* (2006) 140 C.A.4th 1363, 1366, 44 C.R.3d 892 [trial court erred in granting petition under C.C. 1356(c), where proposed amendment received affirmative votes from majority of owners who attended meeting, but not from majority of all owners]; *Fourth La Costa Condominium Owners Assn. v. Seith* (2008) 159 C.A.4th 563, 569, 71 C.R.3d 299 [trial court properly reduced percentage of votes necessary for amendment of declaration, where association used mail ballots to collect votes on amendment issue, obtained consent of lenders, made reasonably diligent effort to obtain votes from all owners, and met burden of proving reasonableness of proposed amendments; C.C. 1356 is not unconstitutional impairment of contract obligations]; *Mission Shores Assn. v. Pheil* (2008) 166 C.A.4th 789, 795, 83 C.R.3d 108 [trial court properly reduced percentage of votes necessary to amend CC&Rs to limit rental of homes; amendment was reasonable way to prevent homes from being used as hotels, balloting conformed with CC&Rs, and amendment did not impair security interest of mortgagees]. *Blue Lagoon Community Assn. case:*

Cross-Reference: 7 Cal. Proc. (5th), Judgment, §89.



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c. Governing Documents.

3. Operating Rules.

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[§ 96] Operating Rules.

(1) *Definition.* An "operating rule" is a regulation adopted by the association's board of directors that applies generally to the management and operation of the common interest development or the conduct of the association's business and affairs. (C.C. 1357.100.)

(2) *Requirements for Valid Rules.* To be valid and enforceable, an operating rule must satisfy all of the following requirements:

(a) The rule must be in writing. (C.C. 1357.110(a).)

(b) The rule must be within the authority of the association's board of directors conferred by law or by the association's declaration, articles of incorporation or association, or bylaws. (C.C. 1357.110(b).)

(c) The rule must be consistent with governing law and the association's declaration, articles of incorporation or association, and bylaws. (C.C. 1357.110(c).)

(d) The rule must be adopted, amended, or repealed in good faith and in substantial compliance with the requirements of C.C. 1357.100 et seq. (C.C. 1357.110(d).)

(e) The rule must be reasonable. (C.C. 1357.110(e).)

(3) *Procedures for Changing Rules.* The board of directors must provide written notice of a proposed rule change to the members at least 30 days before making the rule change. The notice must include the text of the proposed rule change and a description of its purpose and effect. Notice is not required if the board of directors determines that an immediate rule change is necessary to address an imminent threat to public health or safety or imminent risk of substantial economic loss to the association. (C.C. 1357.130(a).)

The board of directors must decide on a proposed rule change at a board meeting, after considering members' comments. (C.C. 1357.130(b).) Not more than 15 days after making the rule change, or sooner if possible, the board of

directors must deliver notice of the rule change to every association member. If the rule change was an emergency rule change, the notice must include the text of the rule change, a description of its purpose and effect, and its expiration date. (C.C. 1357.130(c).) An emergency rule change is effective for 120 days, unless the change provides for a shorter effective period. (C.C. 1357.130(d).) A notice required by C.C. 1357.130 is subject to C.C. 1350.7 (delivery of documents). (C.C. 1357.130(e).) (On special meeting to reverse rule change, see C.C. 1357.140.)

(4) *Applicability of Statutes Governing Rule Changes.* C.C. 1357.130 and 1357.140 only apply to an operating rule that relates to one or more of the following subjects:

- (a) Use of the common area or of an exclusive use common area. (C.C. 1357.120(a)(1).)
- (b) Use of a separate interest, including an aesthetic or architectural standard that governs alteration of a separate interest. (C.C. 1357.120(a)(2).)
- (c) Member discipline, including a schedule of monetary penalties for violation of the governing documents and procedures for the imposition of penalties. (C.C. 1357.120(a)(3).)
- (d) Standards for delinquent assessment payment plans. (C.C. 1357.120(a)(4).)
- (e) Procedures adopted by the association for resolution of disputes. (C.C. 1357.120(a)(5).)
- (f) Procedures for reviewing a proposed physical change to a member's separate interest or to the common area. (C.C. 1357.120(a)(6); see *infra*, §118.)

C.C. 1357.130 and 1357.140 do not apply to the following actions:

- (a) A decision regarding maintenance of the common area. (C.C. 1351.120(b)(1).)
- (b) A decision on a specific matter that is not intended to apply generally. (C.C. 1351.120(b)(2).)
- (c) A decision setting the amount of a regular or special assessment. (C.C. 1351.120(b)(3).)
- (d) A rule change that is required by law, if the board of directors has no discretion about the substantive effect of the rule change. (C.C. 1351.120(b)(4).)
- (e) Issuance of a document that merely repeats existing law or the governing documents. (C.C. 1351.120(b)(5).)

C.C. 1357.100 et seq. apply to a rule change commenced on or after January 1, 2004. (C.C. 1357.150(a).) Nothing in C.C. 1357.100 et seq. affects the validity of a rule change commenced before January 1, 2004. (C.C. 1357.150(b).) A rule change is commenced when the board of directors takes its first official action leading to adoption of the rule change. (C.C. 1357.150(c).)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Requirements for Valid Rules.* See *Cebular v. Cooper Arms Homeowners Assn.* (2006) 142 C.A.4th 106, 124, 47 C.R.3d 666 [association's method of allocating voting rights and assessments for common areas did not violate C.C. 1357.110, even though allocation resulted in some unit owners paying more and having greater voting rights than others and did not reflect size, location, or desirability of individual units].

(4) *Applicability of Statutes Governing Rule Changes.*(g) *(New) Procedures for election:* C.C. 1357.130 and C.C. 1357.140 also apply to operating rules that relate to election procedures. (C.C. 1357.120(a)(7), added in 2005; see Supp., *infra*, §101A.) *Correction:* Page 148, beginning with line 17, the citations to C.C. 1351.120(b), in paragraphs (a) through (e), should be to C.C. 1357.120(b).



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1. Creation and Status.

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[§ 97] Creation and Status.

A common interest development must be managed by an association, either a nonprofit corporation or an unincorporated association, created for that purpose. (C.C. 1351(a), 1363(a).) Unless the governing documents provide otherwise, the association, whether incorporated or unincorporated, may exercise the powers of a mutual benefit corporation specified in *Corp.C. 7140*, except that an unincorporated association may not adopt or use a corporate seal or issue membership certificates. Regardless of the governing documents, the association may exercise the powers granted in the Common Interest Development Act (C.C. 1350 et seq.). (C.C. 1363(c); see *25 Pacific L. J. 456*.) (See generally C.E.B., *Advising California Common Interest Communities* 2d, Chap. 2; Hanna, *Common Interest Developments*, §18:1 et seq.; *99 Harv. L. Rev. 472* [regulatory powers of managing association]; *13 A.L.R.4th 598* [construction of contractual or regulatory provisions governing formation, composition, and powers of managing association]; *15A Am.Jur.2d (2000 ed.), Condominiums and Cooperative Apartments* §24 et seq.; on judicial review of condominium rulemaking, see *94 Harv. L. Rev. 647*; on homeowners association's scope of authority as limited by declaration of covenants, conditions, and restrictions, see *MaJor v. Miraverde Homeowners Assn. (1992) 7 C.A.4th 618, 9 C.R.2d 237*, infra, §117; on information identifying common interest development association that must be included in articles of incorporation, see C.C. 1363.5; on information identifying common interest development association, whether incorporated or unincorporated, that must be submitted to Secretary of State, see C.C. 1363.6.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Golden Rain Foundation v. Franz (2008) 163 C.A.4th 1141, 1148, 78 C.R.3d 226* [nonprofit corporation that provided services to housing cooperatives was association for purposes of C.C. 1351(a); nonprofit's governing documents, management agreements with mutual corporations that owned cooperatives, and management duties all showed that nonprofit was created to manage cooperatives' residential buildings and common areas and nonprofit's own common facilities].



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2. Financial Statements.

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[§ 98] Financial Statements.

(1) *Pro Forma Budget*. Unless the declaration imposes more stringent standards, the association must prepare and distribute a pro forma operating budget that includes the following:

(a) The estimated revenue and expenses on an accrual basis. (C.C. 1365(a)(1).)

(b) A summary of the association's reserves based on the most recent review or study conducted under C.C. 1365.5, and based only on assets held in cash or cash equivalents. (C.C. 1365(a)(2).) The summary must include the current estimated replacement cost, estimated remaining life, and estimated useful life of each major component (C.C. 1365(a)(2)(A)), the estimated amount of reserves needed to repair, replace, restore, or maintain the major components and the amount that has actually been set aside to do so (C.C. 1365(a)(2)(B)(i), (a)(2)(B)(ii)), and any funds received as compensatory damages or a settlement for injuries arising out of construction or design defects, and the expenditure or disposition of those funds (C.C. 1365(a)(2)(B)(iii)). The summary is inadmissible to show improper financial management of the association. (C.C. 1365(a); on use of reserve accounts, see C.C. 1365.5(c); on transactions involving association's reserve for repair or replacement of major components, see C.C. 1365.5(b), (c).)

(c) A statement whether the board of directors has determined or anticipates the need for special assessments to repair, replace, restore, or maintain major components, and if so, the estimated amount, commencement date, and duration of the assessment. (C.C. 1365(a)(3)(A).)

(d) A statement of the mechanism by which the board of directors will fund reserves to repair or replace major components, including assessments, borrowing, use of other assets, deferral of selected replacement or repairs, or alternative mechanisms. (C.C. 1365(a)(3)(B).)

(e) A statement addressing the procedures used for the calculation and establishment of reserves to defray the future repair, replacement, or additions to those major components that the association is obligated to maintain. (C.C. 1365(a)(4).)

The budget must be distributed to members not fewer than 30 days nor more than 90 days before the association's fiscal year begins. (C.C. 1365(a).) The directors of the association may elect to distribute a summary of the budget, in lieu of the entire budget, along with written notice describing where the entire budget is available and stating that copies will be provided on request, at the association's expense. (C.C. 1365(c).) (For form summarizing required disclosures, see C.C. 1365.2.5(a); C.C. 1365.2.5(b)(3) [form must accompany each pro forma operating budget or summary of budget delivered under C.C. 1365 et seq.].)

(2) *Review of Financial Statement.* Unless the declaration imposes more stringent standards, the association must distribute a review of the association's financial statement prepared by a licensed accountant in accord with "generally accepted accounting principles," for any fiscal year in which the association's gross income exceeds \$ 75,000. The review must be distributed to members within 120 days after the close of the fiscal year. (C.C. 1365(b).)

(3) *Directors' Duty To Review.* The directors of the association are required to review the association's financial status at least quarterly, including reconciliations of the association's operating accounts and reserve accounts, a comparison of actual reserves revenues and expenses with the budget, and income and expense statements for operating and reserve accounts. (C.C. 1365.5(a); see *Kovich v. Paseo Del Mar Homeowners' Assn.* (1996) 41 C.A.4th 863, 867, 48 C.R.2d 758 [C.C. 1365, 1365.5, and 1368 do not impose duty on homeowners' association to disclose construction defects to prospective purchasers]; 23 *Pacific L. J.* 531.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Pro Forma Budget.*

(b) *Summary of reserves:* The summary must include the percentage that the amount determined for purposes of C.C. 1365(a)(2)(B)(ii) equals the amount determined for purposes of C.C. 1365(a)(2)(B)(i) (C.C. 1365(a)(2)(C)) and the current deficiency in reserve funding expressed on a per unit basis (C.C. 1365(a)(2)(D), added in 2006).(b-1) *(New) Decision not to repair:* A statement whether the directors have determined to defer or not undertake repairs or replacement of a major component with a remaining life of 30 years or less, including a justification for the deferral or decision not to undertake the repairs or replacement. (C.C. 1365(a)(3)(A), added in 2006.)

(c) *Need for special assessment:* C.C. 1365(a)(3)(A) was relettered C.C. 1365(a)(3)(B) in 2006.

(d) *Mechanism for funding repairs:* C.C. 1365(a)(3)(B) was relettered C.C. 1365(a)(3)(C) in 2006.

(d-1) *(New) Outstanding loans:* A statement whether the association has any outstanding loans with an original term of more than 1 year, including the payee, interest rate, amount outstanding, annual payment, and when the loan is scheduled to be retired. (C.C. 1365(a)(3)(D), added in 2006.)

Distribution of summary of budget: C.C. 1365(c) was relettered C.C. 1365(d) in 2006.

(2) *Review of Financial Statement.* C.C. 1365(b) was relettered C.C. 1365(c) in 2006.

(2a) *(New) Summary of Reserve Funding Plan.* Beginning January 1, 2009, unless the governing documents impose more stringent standards, the association must prepare and distribute a summary of the reserve funding plan adopted by the directors under C.C. 1365.5(e)(5). The summary must include notice to members that the full reserve study plan is available on request, and the association must provide the full reserve plan to any member on request. (C.C. 1365(b), added in 2006.)



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[§ 99] Insurance Summary.

(1) *Required Information.* Unless governing documents impose more stringent standards, not fewer than 30 days nor more than 90 days before its fiscal year begins, the association must distribute a summary of its property, general liability, earthquake, flood, and fidelity insurance policies. The summary must state, for each policy, the name of the insurer, the type of insurance, the policy limits, and the policy deductible. (C.C. 1365(e)(1).) If the insurance policy declaration page for any of these policies specifies the required summary information, the association may meet its requirements by copying and distributing that page. (C.C. 1365(e)(3).) (See *Ostayan v. Nordhoff Townhouses Homeowners Assn.* (2003) 110 C.A.4th 120, 127, 129, 1 C.R.3d 528 [association had no statutory or fiduciary duty to notify members that it had filed lawsuit against insurer; even if duty existed, association satisfied it by notifying members of ongoing dispute with insurer before filing action].)

(2) *Statutory Warning.* The summary must contain the following warning in at least 10-point boldface type: "This summary of the association's policies of insurance provides only certain information, as required by subdivision (e) of *Section 1365 of the Civil Code*, and should not be considered a substitute for the complete policy terms and conditions contained in the actual policies of insurance. Any association member may, upon request and provision of reasonable notice, review the association's insurance policies and, upon request and payment of reasonable duplication charges, obtain copies of those policies. Although the association maintains the policies of insurance specified in this summary, the association's policies of insurance may not cover your property, including personal property or, real property improvements to or around your dwelling, or personal injuries or other losses that occur within or around your dwelling. Even if a loss is covered, you may nevertheless be responsible for paying all or a portion of any deductible that applies. Association members should consult with their individual insurance broker or agent for appropriate additional coverage." (C.C. 1365(e)(4).)

(3) *Notice of Changes.* The association must notify its members "as soon as reasonably practicable" by first class mail (a) if any of its policies has lapsed or been canceled and is not immediately renewed or replaced, or (b) if there is a significant change for any policy. A significant change includes a reduction in coverage or limits or an increase in the deductible amount. The association must immediately notify its members if it receives notice of nonrenewal for a policy and if replacement coverage will not be in effect by the date the existing coverage will lapse. (C.C. 1365(e)(2).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Required Information*. C.C. 1365(e)(1) was relettered C.C. 1365(f)(1) in 2006. C.C. 1365(e)(3) was relettered C.C. 1365(f)(3) in 2006.

(2) *Statutory Warning*. C.C. 1365(e)(4) was relettered C.C. 1365(f)(4) in 2006. The reference to "subdivision (e) of *Section 1365 of the Civil Code*," quoted in the text, was changed to "subdivision (f) of *Section 1365 of the Civil Code*."

(3) *Notice of Changes*. C.C. 1365(e)(2) was relettered C.C. 1365(f)(2) in 2006.



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4. Managing Agent.

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[§ 100] Managing Agent.

(1) *Statement of Information About Managing Agent.* A "managing agent" is a person or entity who, for compensation or in expectation of compensation, exercises control over the assets of a common interest development. The agent cannot be a full-time employee of the association, or a regulated financial institution operating within the normal course of its regulated business practice. (C.C. 1363.1(b), 1363.2(f).) A prospective managing agent must provide a written statement to the board of directors of the association of a common interest development "as soon as practicable," but not more than 90 days before entering into a management agreement. The statement must contain specified information about the managing agent, including which of specified licenses and professional certifications or designations are currently held by any of the owners or general partners of the managing agent, and if a corporation, the licenses and professional certifications or designations currently held by the directors, officers, or shareholders who hold more than 10% of the shares. (C.C. 1363.1(a).) (On requirements for common interest development manager, see *B. & P.C. 11500* et seq., *infra*, §102.)

(2) *Management of Funds.* When a managing agent receives funds belonging to a common interest development association, the managing agent must deposit the funds, except those placed in an escrow account, into a federally insured trust fund account in a bank, savings association, or credit union in California, and the funds must be maintained there until disbursed in accordance with written instructions from the association. (C.C. 1363.2(a).) At the written request of the board of directors of the association, the managing agent must deposit the funds into an interest-bearing account meeting specified requirements. (C.C. 1363.2(b).) The managing agent must maintain a separate record of the receipt and disposition of funds, including interest. (C.C. 1363.2(c).) The agent must not commingle the funds unless specified conditions are met. (C.C. 1363.2(d).)

SUPPLEMENT: [This section is current through the latest supplement]



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5. Association Meetings and Records.

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[§ 101] Association Meetings and Records.

(1) *General Meetings.* Meetings of the association's membership must be conducted in accordance with parliamentary procedures. (C.C. 1363(d).) Notice of meetings of the members must specify matters the board intends to present for action at the meeting, although other proper matters may be presented. (C.C. 1363(e).) The board of directors must allow members to speak at any meeting of the association or the board of directors, except those held in executive session. The board must establish a reasonable time limit for speaking. (C.C. 1363.05(i).)

(2) *Board Meetings.* Meetings of the board of directors are open to members, except when the board adjourns to executive session to consider litigation, matters that relate to the formation of contracts with third parties, member discipline, or personnel matters, or to meet with a member, at the member's request, regarding the member's payment of assessments. (C.C. 1363.05(b).) Members must be given at least 4 days' notice of the time and place of the open meeting, unless the time and place are fixed by the bylaws, or unless the bylaws provide for a longer period of notice. Notice must be posted in a prominent place within the common area and mailed to an owner who had requested notification of board meetings by mail, at the address requested by the owner. Notice may also be mailed or delivered to each unit or given by newsletter or a similar means. (C.C. 1363.05(g).) Matters discussed in executive session must be generally noted in the minutes of the immediately following meeting that is open to the entire membership. (C.C. 1363.05(c).)

When the board of directors is to meet to consider or impose discipline on a member, the board must notify the member in writing, by either personal delivery or first class mail, at least 15 days before the meeting. The notification must contain, at a minimum, the date, time, and place of the meeting, the nature of the alleged violation for which the member may be disciplined, and a statement that the member has a right to attend and may address the board at the meeting. The board must meet in executive session if requested to do so by the member being disciplined. (C.C. 1363(h), 1363.05(b).) The member is entitled to attend the executive session. (C.C. 1363.05(b).)

If the board imposes discipline on a member, the board must provide notification of the disciplinary action by either personal delivery or first class mail within 10 days following the action. A disciplinary action is not effective against a member unless the board fulfills the requirements of C.C. 1363(h). (C.C. 1363(h).)

(3) *Emergency Meetings*. The board may call an emergency meeting if circumstances exist that (a) could not have been reasonably foreseen; (b) require immediate attention and possible action; and (c) make notice impracticable. (C.C. 1363.05(h).)

(4) *Joint Association Meetings*. Members of associations that have consolidated functions in a joint neighborhood association or a similar organization are entitled to attend and participate in all meetings of the joint association other than executive sessions, and are entitled to the same access to the joint association's records as they are to the participating association's records. (C.C. 1363(i).)

(5) *Minutes and Records*. Minutes, proposed minutes, and summary minutes must be available to members of the association within 30 days of the meeting, and must be distributed to members on request and reimbursement of the association's distribution costs. (C.C. 1363.05(d); on members' right to inspect and copy minutes, see C.C. 1365.2.) When the pro forma budget is distributed or at the time of any general mailing to the entire association, members must be notified in writing of their right to have copies of the board's minutes and how and where those minutes may be obtained. (C.C. 1363.05(e).)

Members have a right of access to association records, including accounting books and records and membership lists in accordance with *Corp.C. 8330 et seq.*, and to the association's operating rules. (C.C. 1363(f); see 9 *Summary* (10th), *Corporations*, §378 et seq.; on members' right to inspect and copy accounting books and records, see C.C. 1365.2; on operating rules, see *supra*, §96.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Meetings*. C.C. 1363.05(i) was relettered C.C. 1363.05(h) in 2007. (2) *Board Meetings*. C.C. 1363.05(g) was relettered C.C. 1363.05(f) and amended in 2007. The prescribed notice must include the agenda for the meeting. (See *infra*, this section.)

As used in C.C. 1363.05, "meeting" includes any congregation of a majority of the members of the board at the same time and place to hear, discuss, or deliberate on any item of business scheduled to be heard by the board, except those matters that may be discussed in executive session. (C.C. 1363.05(j), added in 2007.)

(3) *Emergency Meetings*. C.C. 1363.05(h) was relettered C.C. 1363.05(g) in 2007. (6) *(New) Agenda Requirements*. The board of directors may not discuss or take action on an item at a nonemergency meeting unless the item was placed on the agenda included in the notice that was posted and distributed under C.C. 1363.05(f). A resident who is not a member of the board may, however, speak on issues not on the agenda. (C.C. 1363.05(i)(1), added in 2007.) C.C. 1363.05(i)(4), added in 2007, provides exceptions for emergency items and those requiring immediate action. (For other exceptions, see C.C. 1363.05(i)(2) and 1363.05(i)(3), added in 2007.)



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5a. (New) Association Elections.

12 Witkin Sum. Cal. Law Real Property § 101A

[§ 101A] (New) Association Elections.

C.C. 1363.03, 1363.04, and 1363.09, added in 2005 and operative on July 1, 2006, govern association elections.

(1) *Rules for Elections*. An association must adopt rules, in accordance with the procedures prescribed by C.C. 1357.100 et seq. (text, §96) that do all of the following:

- (a) Ensure equal media access to all candidates in an association election. (C.C. 1363.03(a)(1).)
- (b) Ensure access to the common area meeting space for all candidates. (C.C. 1363.03(a)(2).)
- (c) Specify the qualifications for candidates for the board of directors and other elected positions, and procedures for the nomination of candidates, consistent with the governing documents. (C.C. 1363.03(a)(3), as amended in 2006.)
- (d) Specify the qualifications for voting, the voting power of each membership, the authenticity, validity, and effect of proxies, and the voting period for elections, including the times at which polls will open and close, consistent with the governing documents. (C.C. 1363.03(a)(4), as amended in 2006.)
- (e) Specify a method of selecting one or three independent third parties as election inspectors, utilizing one of the statutorily prescribed methods. (C.C. 1363.03(a)(5); on qualifications and duties of inspectors, see C.C. 1363.03(c).)
- (f) Allow the inspectors to appoint and oversee additional persons to verify signatures and to count and tabulate votes as the inspectors deem appropriate, provided that the persons are independent third parties. (C.C. 1363.03(a)(6), added in 2006.)

The rules adopted under C.C. 1363.03 may provide for the nomination of candidates from the floor of membership meetings or nomination by another manner. The rules may permit write-in candidates. (C.C. 1363.03(j), added in 2006.)

(2) *Elections by Secret Ballot*. Notwithstanding another law or a provision of the governing documents, the following must be held by secret ballot: (a) elections regarding assessments legally requiring a vote, (b) election and

removal of the board of directors, (c) amendments to the governing documents, and (d) the grant of exclusive use of common area property under C.C. 1363.07 (Supp., supra, §93). (C.C. 1363.03(b), as amended in 2006; on voting by proxy, see C.C. 1363.03(d); on procedures for ensuring confidentiality, see C.C. 1363.03(e).) Except for the meeting to count the votes required in C.C. 1363.03(f) (infra, this section), an election may be conducted entirely by mail unless otherwise specified in the governing documents. (C.C. 1363.03(k), added in 2006.)

(3) *Counting Votes.* All votes must be counted and tabulated by the election inspectors or their designees in public at a properly noticed open meeting of the board of directors or the members. A candidate or other member of the association may witness the counting and tabulation of the votes. No person, including a member of the association or an employee of the management company, may open or otherwise review a ballot in advance. The inspectors or their designees may verify the member's information and signature on the outer envelope before the meeting at which ballots are tabulated. Once a secret ballot is received by an inspector, it is irrevocable. (C.C. 1363.03(f), as amended in 2006.) The tabulated election results must be reported promptly to the association's board, recorded in the minutes of the next board meeting, and made available for review by association members. Within 15 days of the election, the board must publicize the tabulated results to all members. (C.C. 1363.03(g), as amended in 2006.) (On custody and storage of ballots, see C.C. 1363.03(h) and (i).) (See *Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 C.A.4th 863, 872, 63 C.R.3d 514 [amendment to CC&Rs giving association discretion to allow encroachments in common area was lawfully passed; association's manager personally counted votes, more than 60% of homeowners approved amendment, and manager reported that outcome to association's board].)

(4) *Use of Association Funds.* Association funds must not be used for campaign purposes in connection with an association board election. Association funds must not be used for campaign purposes in connection with other association elections, except as necessary to comply with duties imposed by law. (C.C. 1363.04(a); for definition of "campaign purposes," see C.C. 1363.04(b).)

(5) *Remedies for Violation.* An association member may bring a civil action for declaratory or equitable relief for a violation of these election provisions within 1 year of the date the cause of action accrues. If the proper election procedures were not followed, the court may void the election results. (C.C. 1363.09(a).) A member who prevails in a civil action to enforce his or her rights will be entitled to reasonable attorneys' fees and court costs, and the court may impose a civil penalty of up to \$ 500 for each violation, except that each identical violation will be subject to only one penalty if the violation affects each member of the association equally. A prevailing association may not recover its costs, unless the court finds the action to be frivolous, unreasonable, or without foundation. (C.C. 1363.09(b).) A cause of action under C.C. 1363.03 regarding (a) access to association resources by a candidate or member advocating a point of view, (b) the receipt of a ballot by a member, (c) the counting, tabulation, or reporting of ballots, or (d) access to ballots for inspection and review after tabulation may be brought in small claims court if the amount of the demand does not exceed the court's jurisdiction. (C.C. 1363.09(c).)

SUPPLEMENT: [This section is current through the latest supplement]



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6. Common Interest Development Manager.

12 Witkin Sum. Cal. Law Real Property § 102

[§ 102] Common Interest Development Manager.

B. & P.C. 11500 et seq. establish and regulate certified common interest development managers. A common interest development manager is an individual who provides management or financial services to a community association for compensation. (*B. & P.C. 11501(a)*.) *B. & P.C. 11501* does not require a community association to hire a common interest development manager, unless the association is required to do so by its governing documents. (*B. & P.C. 11501*.)

In order to be called a "certified common interest development manager," a person must have, within the previous 5 years, either passed an examination or achieved certification designated by a professional association for community association managers. (*B. & P.C. 11502(a)*.) In addition, the person must satisfy numerous specified educational requirements (*B. & P.C. 11502(a)*), including instruction in California law relating to the topics covered in the Common Interest Development Act, personnel issues, risk management as it pertains to common interest development, property protection, the business affairs of community associations, and basic understanding of governing documents, codes, and regulations relating to the activities and affairs of community associations and common interest developments (*B. & P.C. 11502(b)(1)*).

A common interest development manager must annually disclose to the community association's board of directors (1) whether or not the manager has met the requirements of *B. & P.C. 11502* so that the manager may be called a certified common interest development manager, (2) the name, address, and telephone number of the professional association that certified the manager, the date the manager was certified, and the status of the certification, (3) the location of the manager's primary office, and (4) the possession of an active real estate license, if applicable. Before entering into or renewing a contract with a community association, the common interest development manager, whether certified or not, must disclose to the community association's governing board whether the fidelity insurance of the manager or his or her employer covers the operating and reserve funds of the community association. (*B. & P.C. 11504*.) Failure to make these disclosures is an unfair business practice, as is holding oneself out as or using the title of "certified common interest development manager" or a similar term without meeting the requirements of *B. & P.C. 11502*. (*B. & P.C. 11505(a), 11504(d)*.)

B. & P.C. 11500 et seq. will remain in effect until January 1, 2008. (*B. & P.C. 11506.*)

SUPPLEMENT: [This section is current through the latest supplement]



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12 Witkin Sum. Cal. Law Real Property § 103

[§ 103] Association's Responsibility.

Unless the declaration provides otherwise, the association is responsible for maintaining common areas, and the owner of each separate interest is responsible for maintaining that interest and appurtenant exclusive use common areas. (C.C. 1364(a).) (See C.E.B., *Forming California Common Interest Developments*, §1.43; *15A Am.Jur.2d (2000 ed.)*, *Condominiums and Cooperative Apartments* §33 et seq.; on right of managing association to inspect individual units, see *41 A.L.R.4th* 730; on tort liability of association and directors for injuries to separate owner, see *infra*, §107.)

The association is responsible for the maintenance and repair of damage from wood-destroying pests or organisms in the common area in community apartments, condominium projects, or stock cooperatives. (C.C. 1364(b)(1).) In a planned development, unless a different maintenance scheme is provided in the declaration, each owner of a separate interest is responsible for the repair and maintenance of that separate interest with regard to termite damage. If the majority of all members of the association approve, the repair and maintenance responsibility may be delegated to the association, which will be entitled to recover the costs as a special assessment. (C.C. 1364(b)(2).) The owner of the affected separate interest must bear the costs of temporary relocation during the repair and maintenance of the areas within the association's responsibility. (C.C. 1364(c).) After specified notice, the association may cause the temporary, summary removal of an occupant as necessary for prompt, effective treatment of wood-destroying pests or organisms. (C.C. 1364(d)(1); see C.C. 1364(e) [definition of occupant].)

An owner of a separate interest is entitled to reasonable access to common areas for the purpose of maintaining telephone wiring. Access is subject to the association's consent, which may not be unreasonably withheld. (C.C. 1364(f).)

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7. Maintenance of Development.

bb. Standard of Review of Association's Maintenance and Development Decisions.

12 Witkin Sum. Cal. Law Real Property § 104

[§ 104] Standard of Review of Association's Maintenance and Development Decisions.

In *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 C.4th 249, 87 C.R.2d 237, 980 P.2d 940, plaintiff, the owner of a unit in a condominium development that suffered from termite infestation, sued the community association, alleging that the decision by the association board of directors to treat the infestation locally rather than to fumigate diminished the value of her unit. The trial court, applying what it called a "business judgment test," found that the directors had a rational basis for rejecting fumigation and rendered judgment for defendant. The Court of Appeal reversed, concluding that the trial court should have analyzed defendant's actions under an objective standard of reasonableness, which would have resulted in an outcome more favorable to plaintiff. *Held*, reversed. The trial court properly deferred to defendant's decision.

(a) *Inapplicable standards of review.* In light of C.C. 1364(b) and the development's declaration, defendant is responsible for the repair and maintenance of the development's common areas occasioned by the presence of termites. The parties differ only about whether defendant's performance in discharging this obligation should be judged under a deferential "business judgment" standard or a more intrusive standard of "objective reasonableness." (21 C.4th 257.)

(1) The business judgment rule of deference to corporate decisionmaking (see 9 *Summary* (10th), *Corporations*, §102 et seq.) does not directly apply here. First, the statutory versions of the rule, *Corp.C.* 309 and 7231, which immunize directors of nonprofit corporations from personal liability, do not apply because no individual directors are defendants here. (21 C.4th 258.) Second, neither the statutes nor the common law business judgment rule protects noncorporate entities, and defendant here is not incorporated. (21 C.4th 259.)

(2) The holding in *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 C.4th 361, 33 C.R.2d 63, 878 P.2d 1275, *infra*, §114, that a common interest development's recorded use restrictions should be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden that far outweighs any benefit, does not govern here. *Nahrstedt* established the standard for judicial review of recorded use restrictions that satisfy the requirements of covenants running with the land or equitable servitudes, not the standard for judicial review of economic decisions made by the governing boards of community associations. (21 C.4th 264.)

(3) The "landlord-like" common law duty of reasonable care imposed on condominium associations under *Frances T. v. Village Green Owners Assn.* (1986) 42 C.3d 490, 229 C.R. 456, 723 P.2d 573, 5 Summary (10th), Torts, §39, is not implicated here either. *Frances T.* involved a common interest development resident who suffered physical injury, not pecuniary harm. Plaintiff here alleges simply that defendant's failure to effect necessary pest control and repairs has caused her pecuniary damages. (21 C.4th 267.)

(b) *Applicable standard of review.* "[W]here a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise." (21 C.4th 265.) Judicial deference to defendant's decision here does not mean, as plaintiff contends, that every community association will be free to do as little or as much as it pleases in satisfying its obligations to its members (21 C.4th 267); community association governance provisions may more narrowly circumscribe association or board discretion than the declaration here does (21 C.4th 268). Moreover, a rule of judicial deference will not insulate community association boards' decisions from judicial review. (21 C.4th 269.) The standard adopted here does not eviscerate the long-established duty to guard against unreasonable risks to residents' personal safety, nor does it modify the enforceability of a common interest development's covenants, conditions, and restrictions. (21 C.4th 270.) (See *Dolan-King v. Rancho Santa Fe Assn.* (2000) 81 C.A.4th 965, 978, 97 C.R.2d 280 [association's rejection of homeowner's proposed plans for room additions and perimeter fence was within authority granted by covenant, and was pursuant to reasonable investigation, in best interests of community, and not arbitrary; citing *Lamden*]; *Rancho Santa Fe Assn. v. Dolan-King* (2004) 115 C.A.4th 28, 40, 8 C.R.3d 614 [condominium association had power to adopt reasonable "regulatory code" provisions that further defined "major" and "minor" construction, terms that were used in protective covenant governing development of separate interests; citing *Dolan-King I* and *Lamden*].)

SUPPLEMENT: [This section is current through the latest supplement]

See *James F. O'Toole Co. v. Los Angeles Kingsbury Court Owners Assn.* (2005) 126 C.A.4th 549, 560, 23 C.R.3d 894 [association's refusal to impose special emergency assessment needed to pay valid judgment was not entitled to judicial deference]; *Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 C.A.4th 863, 872, 63 C.R.3d 514 [amendment to CC&Rs giving association discretion to allow encroachments in common area, and association's order that existing encroachments should be removed, were reasonable responses to homeowner's complaint that CC&Rs were being violated]; *Harvey v. The Landing Homeowners Assn.* (2008) 162 C.A.4th 809, 819, 76 C.R.3d 41 [association's decision to allow upper floor homeowners to use common area attic space for storage was entitled to judicial deference; CC&Rs gave association discretion to allow use under specified conditions, which were met, and association thoroughly investigated impact of use]; *Ritter & Ritter Pension & Profit Plan v. The Churchill Condominium Assn.* (2008) 166 C.A.4th 103, 124, 125, 82 C.R.3d 389 [trial court was not required to defer to association's decision not to undertake building improvement project; rule of deference set forth in *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 C.4th 249, 87 C.R.2d 237, 980 P.2d 940, text, p. 156, does not automatically provide "cover" to homeowners association, as opposed to individual directors].



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8. Actions by and Against Association.

aa. Standing To Sue.

12 Witkin Sum. Cal. Law Real Property § 105

[§ 105] Standing To Sue.

In *Friendly Village Community Assn. v. Silva & Hill Const. Co.* (1973) 31 C.A.3d 220, 225, 107 C.R. 123, the court held that a nonprofit corporation organized to administer and maintain the common areas of a condominium was neither an owner nor a possessor, and therefore had no standing to sue a third person for negligently causing injuries to common areas. The rule has now been changed by statute. An owner's association established to manage a common interest development has standing to engage in litigation, mediation, arbitration, or administrative proceedings as the real party in interest, without joining individual owners, in proceedings pertaining to the following matters:

(1) Enforcement of the governing documents. (C.C. 1368.3(a); see C.C. 1354(b), *infra*, §122 [association and homeowner may enforce governing documents against each other].)

(2) Damage to the common areas. (C.C. 1368.3(b); see *Windham at Carmel Mountain Ranch Assn. v. Superior Court* (2003) 109 C.A.4th 1162, 1170, 135 C.R.2d 834 [former C.C.P. 383 (now C.C. 1368.3) gives associations standing to sue as real parties in interest in all types of actions for damage to common areas, including breach of warranty actions; statute provides associations with privity of contract with condominium builders].)

(3) Damage to separate interests that the association is obligated to maintain or repair. (C.C. 1368.3(c).)

(4) Damage to other separate interests that arise out of, or are integrally related to, the damages specified in C.C. 1368.3(b) and 1368.3(c). (C.C. 1368.3(d); on requirement of meeting with association members before filing civil action for damages specified in C.C. 1368.3(b), (c), and (d), see C.C. 1368.5.) (On common interest development association as real party in interest, see 4 *Cal. Proc.* (4th), *Pleading*, §133; see also 69 *A.L.R.3d* 1148 [proper party plaintiff in action for injury to common areas]; 8 *A.L.R.4th* 1087 [standing of owners association to challenge zoning board decision]; 74 *A.L.R.4th* 165 [standing to bring action related to real property of condominium]; 15A *Am.Jur.2d* (2000 ed.), *Condominiums and Cooperative Apartments* §60; 29 *Am.Jur.* Trials 157 [representing the community association in condominium construction litigation].)

Standing under the statute may not be conferred on an association created to manage a development lacking a common area. (C.C. 1374.)

SUPPLEMENT: [This section is current through the latest supplement]

Real party in interest:

Cross-Reference: 4 Cal. Proc. (5th), Pleading, §152.



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8. Actions by and Against Association.

bb. Property Damage.

12 Witkin Sum. Cal. Law Real Property § 106

[§ 106] Property Damage.

In an action by a managing association to recover for damage to common areas or separate interests under C.C. 1368.3(b), (c), or (d) (see *supra*, §105), the amount of damages recovered by the association must be reduced by the amount of damages allocated to the association or its managing agents in direct proportion to their percentage of fault based on principles of comparative fault. If the only damage was sustained by the association or its members, the comparative fault of the association or its managing agents may be raised as a defense, but may not be the basis for a cross-action or separate action against the association or its managing agents for contribution or implied indemnity. (C.C. 1368.4(a).) The comparative fault of the association or its managing agents may be alleged and proved as a setoff to the defendant's liability, even if the association is not a party to the litigation or has settled or been dismissed from the action. (C.C. 1368.4(b); on comparative fault, see 6 *Summary* (10th), *Torts*, §1327 et seq.)

These rules of recovery do not affect any person's joint liability under C.C. 1431 (see 5 *Summary* (10th), *Torts*, §52 et seq.), or the liability of the association or its managing agent for acts or omissions that cause damage to another. (C.C. 1368.4(d).)

SUPPLEMENT: [This section is current through the latest supplement]



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8. Actions by and Against Association.

cc. Tort Liability.

12 Witkin Sum. Cal. Law Real Property § 107

[§ 107] Tort Liability.

The tort liability of a condominium and its directors and members has been the subject of several decisions, fully discussed in 5 *Summary* (10th), *Torts*, §38 et seq., establishing the following rules:

(1) A unit owner may sue the condominium association for damages for injuries resulting from negligent maintenance of the common areas. (*White v. Cox* (1971) 17 C.A.3d 824, 830, 95 C.R. 259.)

(2) A unit owner may sue the association and the individual members of its board of directors for damages for injuries resulting from third-party criminal conduct. (*Frances T. v. Village Green Owners Assn.* (1986) 42 C.3d 490, 503, 505, 510, 229 C.R. 456, 723 P.2d 573; on immunity from tort liability of volunteer officer or director of nonprofit corporation or association managing common interest development, see C.C. 1365.7, 5 *Summary* (10th), *Torts*, §41; on actions against condominium associations or individual members of association, see Hanna, Common Interest Developments, Chap. 21 [liability and litigation issues for owner's associations]; 15A *Am.Jur.2d* (2000 ed.), *Condominiums and Cooperative Apartments* §56 et seq.)

(3) A third party may sue individual unit owners for damages for injuries resulting from negligent maintenance of common areas. (*Davert v. Larson* (1985) 163 C.A.3d 407, 412, 209 C.R. 445.) However, a cause of action in tort arising solely by reason of an ownership interest as a tenant in common in the common area of a common interest development must be brought against the association and not against individual owners, if the association meets specified insurance coverage requirements. (C.C. 1365.9.)

West's Key Number Digest, Condominium k.14

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Action for negligent maintenance:* See *Ritter & Ritter Pension & Profit Plan v. The Churchill Condominium Assn.* (2008) 166 C.A.4th 103, 122, 82 C.R.3d 389 [jury could find association liable for negligence in maintaining common areas, while finding individual directors not liable].



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e. Assessments.

1. Authority.

12 Witkin Sum. Cal. Law Real Property § 108

[§ 108] Authority.

Except as provided in C.C. 1366, an association must levy regular and special assessments "sufficient to perform its obligations under the governing documents" and under the Common Interest Development Act. However, annual increases in regular assessments for any fiscal year, as authorized by C.C. 1366(b), cannot be imposed unless the board has complied with C.C. 1365(a) (*supra*, §98) for the fiscal year, or has obtained the approval of owners, constituting a quorum, casting a majority of the votes at a meeting or election conducted in accordance with *Corp.C. 7510 et seq.* and 7613. For this purpose, a quorum is more than 50% of the association's owners. (C.C. 1366(a).) (See generally 9 Miller & Starr 3d, §25:108 et seq.; C.E.B., *Advising California Common Interest Communities* 2d, Chap. 5; 77 *A.L.R.3d* 1290 [expenses for which condominium association may assess owners]; 39 *A.L.R.4th* 114 [liability for assessment levied against and unpaid by prior owner]; 39 *A.L.R.4th* 129 [owner's covenant to pay dues or fees to sports or recreational facility]; 15A *Am.Jur.2d* (2000 ed.), *Condominiums and Cooperative Apartments* §35.)

An assessment or fee may not exceed the amount necessary for the purpose for which it is levied. (C.C. 1366.1; see *Foothills Townhome Assn. v. Christiansen* (1998) 65 *C.A.4th* 688, 693, 76 *C.R.2d* 516 [assessment levied to replenish association's reserve fund after money was used to pay for storm damage complied with C.C. 1366.1, even though storm costs could have been recouped incrementally, rather than in one assessment].) (On assessment of penalties, see C.C. 1363(g) and 1363(j), *infra*, §110.)

An association may not impose an assessment or fee in connection with the marketing of an owner's separate interest in an amount that exceeds the association's actual or direct costs. An excessive assessment or fee would violate C.C. 1366.1. (C.C. 1368.1(b)(1).)

To facilitate the collection of assessments, an association's board of directors may record a statement identifying the association's name, its managing agent, treasurer, or other individual who is authorized to receive assessments, a list of separate interests subject to assessment by the association, and the association's covenants, conditions, and restrictions. (C.C. 1366.2(a).)

Assessments are an obligation of the record owner, and the mere act of vacating a condominium unit, without

recording a document clearly evidencing intent to abandon all rights of ownership, does not release the owner from liability for subsequent assessments. (*Cerro de Alcala Homeowners Assn. v. Burns* (1985) 169 C.A.3d Supp. 1, 4, 216 C.R. 84 [owner vacated unit and stopped paying assessments when holder of first trust deed note gave notice that it would commence foreclosure].)

SUPPLEMENT: [This section is current through the latest supplement]

See *James F. O'Toole Co. v. Los Angeles Kingsbury Court Owners Assn.* (2005) 126 C.A.4th 549, 554, 23 C.R.3d 894 [under C.C. 1366, association was authorized to levy special emergency assessment to satisfy judgment and trial court properly compelled association to do so; C.C. 1366(c), which exempts assessments from execution by judgment creditor to extent necessary for association to perform essential services, applies only to regular assessments, not to special or emergency assessments].

Assessment may not exceed necessary amount: See *Brown v. Professional Community Management* (2005) 127 C.A.4th 532, 537, 25 C.R.3d 617 [association's property manager could legally charge association fees for collection services, even if association then passed these expenses along to delinquent homeowners; prohibition against profit-making in C.C. 1366.1 applies to association, not to its vendors, and C.C. 1366(e) (text, §111) allows association to recover costs incurred in collecting delinquent assessments]; *Cebular v. Cooper Arms Homeowners Assn.* (2006) 142 C.A.4th 106, 124, 47 C.R.3d 666 [association's method of allocating voting rights and assessments for common areas did not violate C.C. 1366.1, even though allocation resulted in some unit owners paying more and having greater voting rights than others and did not reflect size, location, or desirability of individual units]; *Berryman v. Merit Property Management* (2007) 152 C.A.4th 1544, 1550, 62 C.R.3d 177 [association's property management company could legally charge homeowners document and transfer fees on purchase or sale of residences; C.C. 1368(c)(1), which limits assessments or fees for transfer of title to actual cost of changing records, applies to association, not to its vendors; citing *Brown*].



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2. Increases.

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[§ 109] Increases.

(1) *Restrictions on Amount.* The board of directors may not impose a regular assessment that is more than 20% greater than the regular assessment for the association's preceding fiscal year, or impose special assessments that in the aggregate exceed 5% of the budgeted gross expenses of the association for the preceding fiscal year, without the approval of owners casting a majority of the votes at an association meeting or election. The meeting or election must be conducted in accordance with *Corp.C. 7510* and *7613* and must be attended by a quorum, which is more than 50% of an association's owners. (C.C. 1366(b).)

(2) *Emergency Increases.* C.C. 1366(b) does not limit assessment increases necessary for any of the following emergency situations:

(a) An extraordinary expense required by a court order. (C.C. 1366(b)(1).)

(b) An extraordinary expense necessary to repair or maintain the common interest development, or a part of it for which the association is responsible, where a threat to personal safety on the property is discovered. (C.C. 1366(b)(2).)

(c) An extraordinary expense necessary to repair or maintain the common interest development, or a part of it for which the association is responsible, that the board could not have reasonably foreseen in preparing and distributing the pro forma operating budget under C.C. 1365 (*supra*, §98). However, before imposing or collecting an assessment for this reason, the board must pass a resolution containing written findings as to the necessity of the extraordinary expense involved and why the expense was not or could not have been reasonably foreseen in the budgeting process. The resolution must be distributed to the members with the notice of assessment. (C.C. 1366(b)(3).)

(3) *Notice.* The association must provide notice of an assessment increase by first class mail to the owners of the separate interests 30 to 60 days before the increased assessment becomes due. (C.C. 1366(d).)

SUPPLEMENT: [This section is current through the latest supplement]



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[§ 110] Penalties.

If an association has a policy imposing monetary penalties on members for violations of the association's governing documents or rules, the members must be given a schedule of the penalties that may be assessed. The penalties must be consistent with the authorization for member discipline contained in the governing documents. (C.C. 1363(g).) Nothing in C.C. 1363 creates, expands, or reduces the authority of an association's board of directors to impose monetary penalties on a member who violates the association's governing documents or rules. (C.C. 1363(j); see *24 Pacific L. J.* 983.)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Delinquent Assessments.

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[§ 111] Delinquent Assessments.

Assessments are delinquent 15 days after they are due, unless the declaration provides a longer time period. In collecting delinquent assessments, an association may recover (1) reasonable collection costs, including reasonable attorneys' fees, (2) a late charge not exceeding the greater of \$ 10 or 10% of the assessment, unless the declaration specifies a smaller late charge, and (3) interest not to exceed an annual rate of 12%, commencing 30 days after the assessment is due. The interest applies to the delinquent assessment, collection costs and fees, and reasonable attorneys' fees. (C.C. 1366(e).) The declaration may specify interest at a rate less than 12%. (C.C. 1366(e)(3).) Associations are exempt from the interest rate limitations imposed by Cal. Const., Art. XV, §1. (C.C. 1366(f); on constitutional limitations, see 7 *Cal. Proc. (4th), Judgment*, §273.) (On use of alternative dispute resolution to resolve disputes over delinquent assessments, see C.C. 1366.3, *infra*, §125.)

SUPPLEMENT: [This section is current through the latest supplement]

C.C. 1366.3 was repealed in 2005. The use of alternative dispute resolution to resolve disputes over delinquent assessments is now governed by C.C. 1367.1(c)(1)(A) (Supp., *infra*, §112) and C.C. 1367.4 (Supp., *infra*, §§112A, 112B).

Cross-Reference: 7 *Cal. Proc. (5th), Judgment*, §327.

(New) Small claims action: The owner of a separate interest who disputes a charge or sum levied by the association, including an assessment, fine, penalty, late fee, collection cost, or monetary penalty imposed as a disciplinary measure, may pay the disputed amount, including all levied fees and costs, under protest and then commence an action in small claims court. The amount in dispute must be within the jurisdictional limits of the court. This alternative is in addition to pursuing dispute resolution under C.C. 1363.810 et seq. (text, §125). (C.C. 1367.6(a), added in 2008.) Nothing in C.C. 1367.6 impedes an association's ability to collect delinquent assessments under C.C. 1367.1 and 1367.4. (C.C. 1367.6(b), added in 2008.)



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5. Liens.

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[§ 112] Liens.

(1) *Notice to Owner of Impending Lien.* Assessments, late charges, reasonable fees and costs of collection, reasonable attorneys' fees, and interest, assessed under C.C. 1366, are a debt of the owner of the separate interest at the time they are levied. (C.C. 1367.1(a).) At least 30 days before recording an assessment lien under C.C. 1367.1(a), the association must notify the owner in writing by certified mail of the following:

(a) A general description of the association's collection and lien enforcement procedures and the method of calculating the amount. (C.C. 1367.1(a)(1).)

(b) A statement that the owner has the right to inspect the association records, under *Corp.C. 8333*. (C.C. 1367.1(a)(1).)

(c) The following statement in 14-point boldface type, if printed, or in capital letters, if typed: "Important notice: If your separate interest is placed in foreclosure because you are behind in your assessments, it may be sold without court action." (C.C. 1367.1(a)(1).)

(d) An itemized statement of the charges owed by the owner, including items on the statement that indicate the amount of delinquent assessments, fees and reasonable costs of collection, reasonable attorneys' fees, late charges, and interest. (C.C. 1367.1(a)(2).)

(e) A statement that the owner will not be liable to pay the charges, interest, and costs of collection, if it is determined that the assessment was paid on time to the association. (C.C. 1367.1(a)(3).)

(f) The right to request a meeting with the board under C.C. 1367.1(c). (C.C. 1367.1(a)(4).)

(2) *Payments Applied to Debt.* Payments made by the owner must be applied first to the assessments owed, until they are paid in full. After that, the payments may be applied to the fees and costs of collection, attorneys' fees, late charges, or interest. (C.C. 1367.1(b).)

(3) *Right To Dispute Debt.* An owner may dispute the debt in writing to the board, and the board must respond in writing. (C.C. 1367.1(c)(1).) An owner, other than an owner of an interest described in *B. & P.C. 11212* (time-share estates), may submit a written request to meet with the board to discuss a payment plan for the debt. (C.C. 1367.1(c)(2).)

(4) *Lien From Date of Recordation.* The amount of the assessment, plus any costs of collection, late charges, and interest, will be a lien on the owner's interest in the common interest development from the time the association records a notice of delinquent assessment in the county in which the separate interest is located. The notice must state the amount of the assessment and other sums imposed under C.C. 1366, a legal description of the owner's interest in the common interest development, and the record owner's name. In order for the lien to be enforced by nonjudicial foreclosure under C.C. 1367.1(g), the notice must state the name and address of the trustee authorized by the association to enforce the lien by sale. (C.C. 1367.1(d).) The lien will be prior to all other liens recorded subsequent to the notice of assessment, although the declaration may provide for the subordination of the lien to other liens and encumbrances. (C.C. 1367.1(f); see *Thaler v. Household Finance Corp.* (2000) 80 C.A.4th 1093, 1099, 95 C.R.2d 779 [assessment lien did not have priority over second trust deed recorded before notice of delinquent assessment; even though covenants, conditions, and restrictions, which provided for present lien with power of sale to secure payment of assessments, were recorded before second trust deed, lien being enforced was assessment lien, which was perfected on recording of notice of delinquent assessment].)

(5) *Lien Release.* Within 21 days of the payment of the sums specified in the notice of delinquent assessment, the association must record a lien release or notice of rescission and provide the owner with a copy of the lien release or notice that the delinquent assessment has been satisfied. (C.C. 1367.1(d).) If a lien was previously recorded against the separate interest in error, the party who recorded the lien must, within 21 calendar days, record a lien release or notice of rescission and provide the owner with a declaration that the lien filing or recording was in error and a copy of the lien release or notice of rescission. (C.C. 1367.1(i).)

(6) *Enforcement.* An association may not voluntarily assign or pledge the association's right to collect payments or assessments, or to enforce or foreclose a lien, to a third party, except when the assignment or pledge is made to a licensed financial institution or lender, as security for a loan. An association may, however, assign a former member's unpaid obligations to a third party for collection purposes. Subject to these limitations, 30 days following recording, the lien may be enforced in any manner permitted by law, including sale by the court, sale by the trustee designated in the notice of delinquent assessment, or sale by a trustee substituted under C.C. 2934a. A sale by the trustee must be conducted in accordance with C.C. 2924, 2924b, and 2924c. (C.C. 1367.1(g).) (See C.E.B., *Advising California Common Interest Communities* 2d, §5.36 et seq.; Hanna, *Common Interest Developments*, §19:46 et seq.; 15A *Am.Jur.2d* (2000 ed.), *Condominiums and Cooperative Apartments* §§37, 38; 7 *Am.Jur. P.P. Forms* (1994 ed.), *Condominiums and Cooperative Apartments*, §27 et seq.)

Unless the declaration imposes more stringent standards, the association must prepare a statement describing policies and procedures for enforcing liens or other remedies for default in payment of members' assessments. The statement must be distributed to members not fewer than 30 days nor more than 90 days immediately before the fiscal year begins. (C.C. 1365(d).)

(7) *Failure To Comply.* An association that fails to comply with the procedures set forth in C.C. 1367.1 must, before recording a lien, recommence the required notice process (C.C. 1367.1(j)(1)) and must bear the costs of doing so (C.C. 1367.1(j)(2)).

(8) *Applicability of Statute.* C.C. 1367.1 applies to liens recorded on or after January 1, 2003. (C.C. 1367.1(k).) Liens recorded before January 1, 2003, are governed by C.C. 1367. (C.C. 1367(g).)

(9) *Annual Notice to Members About Assessment Liens.* During the 60-day period immediately preceding the association's fiscal year, the association must distribute a specified written notice to each member, outlining the rights

and responsibilities of owners of property in common interest developments, particularly with regard to assessments, assessment liens, and foreclosure. The notice must be printed in at least 12-point type. (C.C. 1365.1(a); for wording of notice, which summarizes and cites C.C. 1366 and 1367.1, see C.C. 1365.1(b).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Notice to Owner of Impending Lien.* See *Bear Creek Master Assn. v. Edwards* (2005) 130 C.A.4th 1470, 1483, 31 C.R.3d 337 [association complied with notice requirements by sending notice by certified mail to address of owner's attorney, which was address consistently used by owner and attorney; notice was not defeated by attorney's wilful failure to accept certified mail].

On need to send notice to owner's secondary address, see C.C. 1367.1(k), added in 2005.(g) *(New) Informal dispute resolution:* The association must notify the owner of the right to dispute the assessment debt by submitting a written request for dispute resolution to the association pursuant to the association's "meet and confer" program required by C.C. 1363.810 et seq. (text, §125). (C.C. 1367.1(a)(5), added in 2005.)

(h) *(New) Dispute resolution with neutral third party:* The association must notify the owner of the right to request alternative dispute resolution with a neutral third party under C.C. 1369.510 et seq. (text, §125) before the association may initiate foreclosure against the owner's separate interest, except that binding arbitration will not be available if the association intends to initiate a judicial foreclosure. (C.C. 1367.1(a)(6), added in 2005.)

(3) *Right To Dispute Debt.* C.C. 1367.1(c) was extensively amended in 2005. C.C. 1367.1(c)(1) no longer authorizes an owner to dispute the debt in writing to the board. Instead, before recording a lien for delinquent assessments, an association must offer the owner the opportunity to participate in dispute resolution under the association's "meet and confer" program required by C.C. 1363.810 et seq. (text, §125). (C.C. 1367.1(c)(1)(A).) The provision allowing the owner to submit a written request to meet with the board to discuss a payment plan is now in C.C. 1367.1(c)(3), renumbered in 2005.

(3a) *(New) Decision To Record Lien.* For liens recorded on or after January 1, 2006, the decision to record a lien for delinquent assessments must be made only by the association's board of directors and may not be delegated to an agent. The board must approve the decision by a majority vote in an open meeting and must record the vote in the minutes of that meeting. (C.C. 1367.1(c)(2), added in 2005.)

(4) *Lien From Date of Recordation.* C.C. 1367.1(d) was amended in 2005 to specify that the lien is on the owner's separate interest in the common interest development and to add two requirements. First, the itemized statement of the charges described in C.C. 1367.1(a)(2) (text, p. 163) must be recorded together with the notice of delinquent assessment. Second, a copy of the recorded notice of delinquent assessment must be mailed by certified mail to every person whose name is shown as an owner of the separate interest in the association's records, and the notice must be mailed no later than 10 calendar days after recordation.

On need to send notice to owner's secondary address, see C.C. 1367.1(k), added in 2005.(5) *Lien Release.* On need to send notice to owner's secondary address, see C.C. 1367.1(k), added in 2005.

(6) *Enforcement.* In addition to the requirements of C.C. 2924 (text, p. 164), a notice of default must be served by the association on the owner's legal representative in accordance with the manner of service of summons in C.C.P. 415.10 et seq. The owner's legal representative is the person whose name is shown as the owner of a separate interest in the association's records, unless another person has been previously designated by the owner as his or her legal representative in a writing mailed to the association in a manner that indicates that the association has received it. (C.C. 1367.1(j), added in 2005 and amended in 2006; on need to send notice to owner's secondary address, see C.C. 1367.1(k), added in 2005.)

Statement describing lien enforcement procedures: C.C. 1365(d) was relettered C.C. 1365(e) in 2006.

On collection of debts for assessments that arise on or after January 1, 2006, see Supp., *infra*, §§112A, 112B.

(New) Alternative dispute resolution required before foreclosure: Before initiating a foreclosure for delinquent assessments, an association must offer the owner the opportunity to participate in dispute resolution under the association's "meet and confer" program required by C.C. 1363.810 et seq. (text, §125) or in alternative dispute resolution with a neutral third party under C.C. 1369.510 et seq. (text, §125). The choice to pursue dispute resolution or a particular type of alternative dispute resolution must be the owner's, except that binding arbitration will not be available if the association intends to initiate a judicial foreclosure. (C.C. 1367.1(c)(1)(B), added in 2005.)

If it is determined through either of the dispute resolution programs that an association has recorded a lien for a delinquent assessment in error, the association must promptly reverse all late charges, fees, interest, attorneys' fees, costs of collection, costs imposed for the notice prescribed in C.C. 1367.1(a), and costs of recordation and release of the lien authorized under C.C. 1367.4(b), and pay all costs related to the dispute resolution program. (C.C. 1367.5, added in 2005.)

(New) Right of redemption following foreclosure: The sale of a separate interest in a common interest development is subject to the right of redemption within 90 days after the sale if the sale arises from a foreclosure under C.C. 1367.1(g), subject to the conditions of C.C. 1367.4 (Supp., *infra*, §§112A, 112B). (C.C.P. 729.035, added in 2005.)(7) *Failure To Comply.* C.C. 1367.1(j)(1) was relettered C.C. 1367.1(l)(1) in 2005. C.C. 1367.1(j)(2) was relettered C.C. 1367.1(l)(2) in 2005.

(8) *Applicability of Statute.* C.C. 1367.1(k) was relettered C.C. 1367.1(m) in 2005.

C.C. 1367.1 is subordinate to, and must be interpreted in conformity with, C.C. 1367.4 (Supp., *infra*, §§112A, 112B). (C.C. 1367.1(n), added in 2005.)

(9) *Annual Notice to Members About Assessment Liens.* The notice set forth in C.C. 1365.1(b) was amended in 2005 to reflect amendments to C.C. 1367.1 and the addition of C.C. 1367.4 (Supp., *infra*, §§112A, 112B).



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6. (New) Collection of Debts for Assessments After January 1, 2006.

aa. (New) Lower Value and Shorter Delinquency.

12 Witkin Sum. Cal. Law Real Property § 112A

[§ 112A] (New) Lower Value and Shorter Delinquency.

(1) *Applicability of Statute.* C.C. 1367.4, added in 2005 and amended in 2006, applies to debts for assessments that arise on and after January 1, 2006, notwithstanding contrary law or governing documents. (C.C. 1367.4(a).)

(2) *No Foreclosure Option.* An association that seeks to collect delinquent regular or special assessments of less than \$ 1,800, not including accelerated assessments, late charges, fees and costs of collection, attorneys' fees, and interest, may not collect that debt through judicial or nonjudicial foreclosure. (C.C. 1367.4(b).) The association may attempt to collect or secure the debt by a small claims action (C.C. 1367.4(b)(1)), by recording a lien (C.C. 1367.4(b)(2)), or by any other manner provided by law, except for judicial or nonjudicial foreclosure (C.C. 1367.4(b)(3)). The prohibition does not apply to assessments owed by owners of separate interests in timeshare estates, as defined in *B. & P.C. 11212(x)*, or to assessments owed by developers. (C.C. 1367.4(d).) (C.C. 1367.4(d) incorrectly refers to *B. & P.C. 11212(x)* as *B. & P.C. 11112(x)*.) (On foreclosure of any assessment delinquent for more than 12 months, see C.C. 1367.4(c), Supp., *infra*, §112B.)

(3) *Small Claims Action.* The association may attempt to collect or secure the debt by a civil action in small claims court under *C.C.P. 116.110* et seq. If the association prevails, it may enforce the judgment as permitted under *C.C.P. 116.810* et seq. (C.C. 1367.4(b)(1).) The amount that may be recovered in small claims court to collect on a debt for delinquent assessments may not exceed the court's jurisdictional limits and must be the sum of the following:

(a) The amount owed as of the date the complaint is filed in the small claims court. (C.C. 1367.4(b)(1)(A).)

(b) In the discretion of the court, an additional amount equal to the amount owed for the period from the date the complaint is filed until satisfaction of the judgment. This total amount may include accruing unpaid assessments and reasonable late charges, fees and costs of collection, attorneys' fees, and interest, up to the jurisdictional limits of the small claims court. (C.C. 1367.4(b)(1)(B).)

(4) *Recording a Lien.* The association may attempt to collect or secure the debt by recording a lien on the owner's

separate interest. The association may not foreclose on the lien until the amount of the delinquent assessments secured by the lien, exclusive of accelerated assessments, late charges, fees and costs of collection, attorneys' fees, and interest, equals or exceeds \$ 1,800 or the assessments secured by the lien are more than 12 months delinquent. Before recording the lien under these provisions, the association must offer the owner the opportunity to participate in dispute resolution under C.C. 1363.810 (text, §125). (C.C. 1367.4(b)(2).)

If it is determined through either of the dispute resolution programs (the association's "meet and confer" program required by C.C. 1363.810 et seq. or alternative dispute resolution with a neutral third party under C.C. 1369.510 et seq.) that an association has recorded a lien for a delinquent assessment in error, the association must promptly reverse all late charges, fees, interest, attorneys' fees, costs of collection, costs imposed for the notice prescribed in C.C. 1367.1(a), and costs of recordation and release of the lien authorized under C.C. 1367.4(b), and pay all costs related to the dispute resolution program. (C.C. 1367.5, added in 2005.)

SUPPLEMENT: [This section is current through the latest supplement]



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bb. (New) Higher Value or Longer Delinquency.

12 Witkin Sum. Cal. Law Real Property § 112B

[§ 112B] (New) Higher Value or Longer Delinquency.

(1) *Applicability of Statute.* C.C. 1367.4, added in 2005 and amended in 2006, applies to debts for assessments that arise on and after January 1, 2006, notwithstanding contrary law or governing documents. (C.C. 1367.4(a).)

(2) *Foreclosure Is Authorized.* An association that seeks to collect delinquent regular or special assessments of \$ 1,800 or more, not including accelerated assessments, late charges, fees and costs of collection, attorneys' fees, or interest, or assessments secured by the lien that are more than 12 months delinquent, may use judicial or nonjudicial foreclosure. (C.C. 1367.4(c).)

(3) *Alternative Dispute Resolution.* Before initiating a foreclosure on an owner's separate interest, an association seeking to collect delinquent assessments must offer the owner the opportunity to participate in dispute resolution under the association's "meet and confer" program required by C.C. 1363.810 et seq. (text, §125) or alternative dispute resolution under C.C. 1369.510 et seq. (text, §125). The choice to pursue dispute resolution or a particular type of alternative dispute resolution must be the owner's, except that binding arbitration is not available if the association intends to initiate judicial foreclosure. (C.C. 1367.4(c)(1).)

If it is determined through either of the dispute resolution programs that an association has recorded a lien for a delinquent assessment in error, the association must promptly reverse all late charges, fees, interest, attorneys' fees, costs of collection, costs imposed for the notice prescribed in C.C. 1367.1(a), and costs of recordation and release of the lien authorized under C.C. 1367.4(b), and pay all costs related to the dispute resolution program. (C.C. 1367.5, added in 2005.)

(4) *Board's Decision To Foreclose Lien.* The decision to initiate foreclosure of a lien for delinquent assessments that has been validly recorded must be made only by the board of directors and may not be delegated to an agent. The board must approve the decision by a majority vote in an executive session. The board must record the vote in the minutes of the next board meeting that is open to all members. The board must maintain the confidentiality of the owner of the separate interest by identifying the matter in the minutes by the parcel number of the property, rather than by the

owner's name. A board vote to approve foreclosure of a lien must take place at least 30 days before a public sale. (C.C. 1367.4(c)(2).)

(5) *Notice to Owner.* If the board votes to foreclose on the separate interest, it must provide notice by personal service, in accordance with the manner of service of summons in *C.C.P. 415.10* et seq., to an owner who occupies the separate interest or to the owner's legal representative. The board must provide written notice to an owner of a separate interest who does not occupy the separate interest by first-class mail, postage prepaid, at the most current address shown on the association's books. In the absence of written notification by the owner to the association, the address of the owner's separate interest may be treated as the owner's mailing address. (C.C. 1367.4(c)(3).)

(6) *Redemption Rights.* A nonjudicial foreclosure by an association to collect on a debt for delinquent assessments is subject to a right of redemption. The redemption period within which the separate interest may be redeemed from the foreclosure sale ends 90 days after the sale. In addition to the requirements of C.C. 2924f, a notice of sale in connection with an association's foreclosure of a separate interest in a common interest development must include a statement that the property is being sold subject to the right of redemption created in C.C. 1367.4(c)(4). (C.C. 1367.4(c)(4).)

SUPPLEMENT: [This section is current through the latest supplement]



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f. Partition.

12 Witkin Sum. Cal. Law Real Property § 113

[§ 113] Partition.

Ordinarily, the common areas of a condominium project must remain undivided, and judicial partition is authorized only as provided by C.C. 1359. (C.C. 1358(b), 1359(a).) (See *14859 Moorpark Homeowner's Assn. v. VRT Corp. (1998)* 63 C.A.4th 1396, 1406, 1410, 74 C.R.2d 712 [cotenants' agreement to sell condominium complex to single developer and to share proceeds amounted to voluntary partition, which is prohibited by C.C. 1358 and 1359; CC&Rs for complex cannot be construed to allow voluntary partition either]; see generally Hanna, *Common Interest Developments*, §§2:25, 3:12; *15A Am.Jur.2d (2000 ed.)*, *Condominiums and Cooperative Apartments* §51 et seq.; 7 Am.Jur. P.P. Forms (1994 ed.), *Condominiums and Cooperative Apartments*, §36 et seq.)

A separate interest owner may maintain a partition action "as to the entire project as if the owners of all of the separate interests in the project were tenants in common in the entire project in the same proportion as their interests in the common areas." The court may order partition only by sale of the entire project. (C.C. 1359(b).) Partition is authorized only on a showing of one of the following:

- (1) The project has been damaged or destroyed so that a material part is rendered unfit for its prior use and has not been substantially restored to its prior state for more than 3 years. (C.C. 1359(b)(1).)
- (2) At least three-fourths of the project is destroyed or substantially damaged and owners of separate interests holding in the aggregate more than 50% interest in the common areas oppose repair or restoration. (C.C. 1359(b)(2).)
- (3) The project is over 50 years old, obsolete and uneconomic, and owners of separate interests holding in the aggregate more than 50% interest in the common areas oppose repair or restoration. (C.C. 1359(b)(3).)
- (4) Conditions for the sale of the project, set forth in the declaration, have been met. (C.C. 1359(b)(4).)

Nothing in C.C. 1359 prohibits partition of a separate interest held by cotenants. (C.C. 1359(a).)

SUPPLEMENT: [This section is current through the latest supplement]



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6. Common Interest Developments.

g. Owners' Compliance With Covenants and Restrictions.

1. Requirement of Reasonableness.

12 Witkin Sum. Cal. Law Real Property § 114

[§ 114] Requirement of Reasonableness.

Covenants, conditions, and restrictions (CC&Rs) in the declaration governing a common interest development, unless unreasonable, may be enforced as equitable servitudes; they benefit and bind the owners of all separate interests in the project. (C.C. 1354(a); see *Ward v. Superior Court* (1997) 55 C.A.4th 60, 63, footnote 1, 64, 63 C.R.2d 731 [compliance with CC&Rs cannot be coerced by recording document asserting that homeowner is in violation]; C.E.B., *Forming California Common Interest Developments*, §1.46; 99 *Harv. L. Rev.* 472 [whether court should enforce condominium covenants and restrictions that would violate civil and constitutional rights if imposed by government]; 15A *Am.Jur.2d* (2000 ed.), *Condominiums and Cooperative Apartments* §§40, 41; 31 *Am.Jur.* Trials 193 [litigation between association members for breach of covenants regarding noise]; on invalidity of restriction prohibiting owner from displaying United States flag, see C.C. 1353.5(c); on invalidity of restriction prohibiting posting or displaying noncommercial signs, posters, flags, or banners, see C.C. 1353.6(a).)

"Because a stable and predictable living environment is crucial to the success of condominiums and other common interest residential developments, and because recorded use restrictions are a primary means of ensuring this stability and predictability, the Legislature in section 1354 has afforded such restrictions a presumption of validity and has required of challengers that they demonstrate the restriction's 'unreasonableness' by the deferential standard applicable to equitable servitudes. Under this standard established by the Legislature, enforcement of a restriction does not depend upon the conduct of a particular condominium owner. Rather, the restriction must be uniformly enforced in the condominium development to which it was intended to apply unless the plaintiff owner can show that the burdens it imposes on affected properties so substantially outweigh the benefits of the restriction that it should not be enforced against any owner." (*Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 C.4th 361, 368, 33 C.R.2d 63, 878 P.2d 1275.)

Plaintiff in *Nahrstedt* sued her homeowners association to prevent enforcement of a prohibition in the association's recorded CC&Rs against keeping pets. Plaintiff claimed she was unaware of the restriction when she moved into her condominium with three cats, which were kept indoors and "created no nuisance." She sought to invalidate fines assessed against her by the association, to recover damages for emotional distress and for violation of privacy when the association "peered" into her unit, and to declare the pet restriction "unreasonable" as applied to indoor cats. The trial

judge sustained the association's demurrer and dismissed the complaint. The Court of Appeal reversed, reasoning that plaintiff would be entitled to declaratory relief if application of the pet restriction would be unreasonable in her case. *Held*, Court of Appeal judgment reversed.

(a) *General principles governing common interest real property ownership.* Common interest developments have become a widely accepted form of real property ownership, in which the owner enjoys many traditional advantages of ownership but also acquires an interest in common with others in the development's amenities and facilities. (8 C.4th 370.) Use restrictions are inherent in any common interest development; the viability of shared ownership of improved real property rests on the existence of extensive reciprocal servitudes, and the ability of each co-owner to prevent the property's partition. (8 C.4th 372, 373.) Commonly, use restrictions preclude alteration of building exteriors, limit the occupancy of each unit, and limit or prohibit pets. Anyone who buys a unit in a common interest development with knowledge of its owners association's discretionary power to enforce use restrictions or enact new rules accepts the risk that this power may be used in a way that benefits the commonality but harms the individual. (8 C.4th 373.) "[S]ubordination of individual property rights to the collective judgment of the owners association together with restrictions on the use of real property comprise the chief attributes of owning property in a common interest development." (8 C.4th 374.) Generally, courts will uphold an owners association's decisions so long as they represent good faith efforts to further the development's purposes, are consistent with its governing documents, and comply with public policy. (8 C.4th 374.) Giving deference to use restrictions in the originating documents protects condominium owners' expectation that restrictions in place when they purchased their units will be enforceable. It also encourages buyers who prefer a stable, planned environment, and protects those who paid a premium in reliance on a particular restrictive scheme. (8 C.4th 377.)

(b) *Enforcement of CC&Rs as equitable servitudes.* C.C. 1354 states that the recorded covenants and restrictions of a common interest development "shall be enforceable equitable servitudes, unless unreasonable." Under general rules governing equitable servitudes, a subsequent purchaser must have actual notice of restrictions on the use of land, but actual notice is not required to enforce recorded use restrictions under C.C. 1354 against a subsequent purchaser. Recordation of the CC&Rs provides sufficient notice for their enforcement as equitable servitudes. The idea underlying equitable servitudes is that a landowner's promise to refrain from particular conduct creates an equitable interest in the land of the promisor that the beneficiary may enforce against the promisor's successors. (8 C.4th 379, citing *Rest. Property*, §539, among other authorities; see *infra*, §§440, 441.) In choosing equitable servitude law as the standard for enforcing CC&Rs in common interest developments, the Legislature has manifested a preference in favor of their enforcement. By using the phrase "unless unreasonable," the Legislature "cloaked use restrictions contained in a condominium development's recorded declaration with a presumption of reasonableness by shifting the burden of proving otherwise to the party challenging the use restriction." (8 C.4th 380.) To satisfy that burden, the challenger must show that a restriction either (1) violates public policy; (2) bears no rational relationship to the protection, preservation, operation, or purpose of the affected land; or (3) otherwise imposes burdens so disproportionate to its beneficial effects that it should not be enforced. (8 C.4th 382.)

(c) *Benefits of deferential standards.* According a presumption of validity to recorded CC&Rs, and applying the deferential standards of equitable servitude law, will discourage lawsuits by individual owners seeking personal exemptions. This allows prospective condominium purchasers to rely with confidence on the promises in the CC&Rs, protects all owners from unanticipated increases in association fees to fund the defense of legal challenges, and permits associations to enforce reasonable restrictive covenants without fear of becoming embroiled in costly legal proceedings. The judicial system also benefits from the application of rules that are clear, simple, and not subject to exceptions based on the peculiar circumstances of individual residents; fewer actions challenging CC&Rs will be brought, and those brought may be disposed of more expeditiously. (8 C.4th 383.) "[A] common interest development creates a community of property owners living in close proximity to each other, typically much closer than if each owned his or her separate plot of land. This proximity is feasible, and units in a common interest development are marketable, largely because the recorded declaration of CC&R's assures owners of a stable and predictable environment. Refusing to enforce the CC&R's contained in a recorded declaration, or enforcing them only after protracted litigation that would require

justification of their application on a case-by-case basis, would impose great strain on the social fabric of the common interest development." (8 C.4th 384.)

(d) *Contrary view disapproved.* In the present case, the Court of Appeal held that plaintiff's factual allegations were sufficient for the trial court to decide whether enforcement of the pet restriction against her would be reasonable. This conclusion was based on two decisions refusing to enforce recorded use restrictions: *Bernardo Villas Management Corp. Number Two v. Black* (1987) 190 C.A.3d 153, 155, 235 C.R. 509, holding a restriction against keeping any "truck, camper, trailer, boat ... or other form of recreational vehicle" in condominium carports unreasonable as applied to a clean new pickup truck with camper shell used for personal transportation, and *Portola Hills Community Assn. v. James* (1992) 4 C.A.4th 289, 293, 5 C.R.2d 580, holding a restriction against satellite dishes in a planned community unreasonable as applied to a dish invisible to other residents and the public. (8 C.4th 385.) Although purporting to evaluate the restrictions under C.C. 1354, these decisions failed to apply the deferential standards of equitable servitude law required by the statute, and they are disapproved. In determining whether a restriction is "unreasonable" under C.C. 1354, the focus is on the restriction's effect on the project as a whole, not on the individual homeowner. (8 C.4th 386.)

(e) *Plaintiff's complaint was insufficient to obtain declaratory relief.* Plaintiff failed to adequately allege any of the three grounds of unreasonableness necessary to prevent enforcement of the pet restriction.

(1) *The restriction was not arbitrary.* As a matter of law, the pet restriction prohibiting cats or dogs but allowing some other pets was not arbitrary, but was rationally related to health, sanitation, and noise concerns legitimately held by residents of a high-density condominium project that included 530 units in 12 separate three-story buildings. (8 C.4th 386.)

(2) *The restriction was not substantially more burdensome than beneficial.* The complaint alleged no facts to support a finding that the burden of the pet restriction on the affected property was so disproportionate to its benefit that the restriction was unreasonable. (8 C.4th 386.) The allegations centered on plaintiff and her cats without any reference to the effect on the condominium development as a whole, and hence were legally insufficient to overcome the presumed validity of the restriction. (8 C.4th 387.)

(3) *The restriction did not violate fundamental public policy.* Plaintiff alleged that the pet restriction violated her right to privacy under Cal. Const., Art. I, §1. (8 C.4th 387.) However, no fundamental public policy favors keeping pets in a condominium project. Neither federal or state Constitution nor any California statute confers a general right to keep household pets in common interest developments; nothing in the ballot arguments relating to the privacy provision in the state Constitution supports such a right; and case law does not recognize a privacy right to keep pets--courts that have considered condominium pet restrictions have uniformly upheld them. (8 C.4th 388, citing sister state cases.)

A spirited dissent by one justice argued that the pet restriction was patently arbitrary and unreasonable: "Given the substantial benefits derived from pet ownership, the undue burden on the use of property imposed on condominium owners who can maintain pets within the confines of their units without creating a nuisance or disturbing the quiet enjoyment of others substantially outweighs whatever meager utility the restriction may serve in the abstract." (8 C.4th 390.) (See 22 *Pepperdine L. Rev.* 1692; 23 *Pepperdine L. Rev.* 1; 36 *Santa Clara L. Rev.* 793; 42 *U.C.L.A. L. Rev.* 837; on legislative response to *Nahrstedt*, see *infra*, §115.)

In *Villa De Las Palmas Homeowners Assn. v. Terifaj* (2004) 33 C.4th 73, 14 C.R.3d 67, 90 P.3d 1223, the *Nahrstedt* rule that restrictions in a declaration are presumed to be reasonable was applied to restrictions enacted after a homeowner has purchased a unit. Defendant homeowner purchased a unit in a condominium development governed by plaintiff homeowners association. At the time of purchase, plaintiff had an unrecorded rule prohibiting pets, and defendant was aware of the rule. She nevertheless occupied the unit, where she lived seasonally, with her dogs. In January 2000, plaintiff adopted and recorded an amended declaration of covenants, conditions, and restrictions, which added a no-pet restriction. On the basis of the amended declaration, plaintiff sought to enforce the restriction against defendant under C.C. 1354(a). The trial court enjoined defendant's violation of the no-pet restriction and found the

violation to be a nuisance. The Court of Appeal affirmed. *Held*, affirmed.

(a) An amendment duly adopted under C.C. 1355(b) (*supra*, §95) is effective against all homeowners, regardless of when the owner acquired title to the separate interest or whether the homeowner voted for the amendment. (33 C.4th 83, 84.) Neither C.C. 1355(b) nor any other provision in the Davis-Stirling Act exempts homeowners who purchased their individual units before the amendment. "To allow a declaration to be amended but limit its applicability to subsequent purchasers would make little sense." (33 C.4th 84.) It would undermine the requirement that covenants, conditions, and restrictions be uniformly applied and burden or benefit all interests, it would delay the benefit of the restriction or the amelioration of the harm addressed by the restriction until every current homeowner opposed to the restriction sold his or her interest, and it would essentially render meaningless the simple majority vote required for amendments to take effect under C.C. 1355(b). (33 C.4th 84.) Moreover, the legislative history of C.C. 1335(b) indicates that the Legislature was aware that amendments could affect settled expectations of some homeowners, but it did not limit the language of C.C. 1355(b) to exempt those homeowners from its operation. (33 C.4th 86.)

(b) C.C. 1354(a) governs enforcement of an amendment to a declaration. It does not distinguish between an original and an amended declaration. (33 C.4th 87, 88.) The Legislature, by using expansive language in C.C. 1354(a), intended all covenants and restrictions in the declaration to be enforceable against all homeowners. Only if the covenant or restriction in question is unreasonable will it be unenforceable under C.C. 1354(a). (33 C.4th 88.)

(c) "Subsequently promulgated and recorded use restrictions are entitled to the same judicial deference accorded covenants and restrictions in original declarations, that is, they are presumptively valid, and the burden of proving otherwise rests upon the challenging homeowner." (33 C.4th 91.) If the Legislature had intended a different standard to apply to subsequent restrictions than to those in the original declaration, it would have so provided in C.C. 1354(a). (33 C.4th 92.)

(d) Here, as in *Nahrstedt*, the recorded restriction prohibiting pets is not unreasonable as a matter of law. This conclusion is unchanged by C.C. 1360.5 (*infra*, §115), enacted in response to *Nahrstedt*, which prohibits governing documents from forbidding the owner of a separate interest from keeping at least one pet. C.C. 1360.5 clearly provides that it applies to governing documents entered into, amended, or otherwise modified on or after January 1, 2001, and the declaration here was amended and recorded in January 2000. (33 C.4th 93.)

SUPPLEMENT: [This section is current through the latest supplement]

Invalid restrictions: Restrictions that prohibit the use of low water-using plants are invalid. (C.C. 1353.8, added in 2006.)

See *Cebular v. Cooper Arms Homeowners Assn.* (2006) 142 C.A.4th 106, 120, 47 C.R.3d 666 [association's method of allocating assessments for common areas was not unreasonable, even though allocation resulted in some unit owners paying more and did not reflect size, location, or desirability of individual units; owners who paid more also had greater voting rights, and changing method, which was clearly set forth in declaration, could disrupt expectations of other owners]; *Colony Hill v. Ghamaty* (2006) 143 C.A.4th 1156, 1163, 50 C.R.3d 247 [restriction limiting condominium's use to single-family dwelling purposes was reasonable; homeowner violated restriction by serially renting rooms in condominium to nonfamily members who did not function together as integrated economic unit].



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aa. Pets.

12 Witkin Sum. Cal. Law Real Property § 115

[§ 115] Pets.

After *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 C.4th 361, 368, 33 C.R.2d 63, 878 P.2d 1275, supra, §114, the 2000 Legislature limited the ability of common interest developments to prohibit pets. Governing documents entered into, amended, or modified on or after January 1, 2001, may not prohibit the owner of a separate interest within a common interest development from keeping at least one pet, subject to reasonable rules and regulations of the association. (C.C. 1360.5(a), 1360.5(e); see *Villa De Las Palmas Homeowners Assn. v. Terifaj* (2004) 33 C.4th 73, 93, 14 C.R.3d 67, 90 P.3d 1223 [C.C. 1360.5 did not undermine holding in *Nahrstedt* that no-pet restriction may be reasonable; prohibition against pets in declaration that was amended and recorded in January 2000, was not unreasonable as matter of law].) A pet is defined as a domesticated bird, cat, dog, aquatic animal kept within an aquarium, or other animal agreed to by the association and the homeowner. (C.C. 1360.5(b).) Governing documents include the covenants, conditions, and restrictions of the development and the bylaws, rules, and regulations of the association. (C.C. 1360.5(d).) If the association implements a rule or regulation restricting the number of pets an owner may keep, the new rule or regulation will not apply to prohibit an owner from continuing to keep a current pet, if the pet otherwise conforms with the previous rules or regulations governing pets. (C.C. 1360.5(c).) (See 93 Am.Jur. Trials 193 [enforcement of restrictive covenant limiting keeping of pets on residential property].)

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2. Particular Restrictions.

bb. Age.

12 Witkin Sum. Cal. Law Real Property § 116

[§ 116] Age.

(1) *Invalid Exclusion of Children.* In *Ritchey v. Villa Nueva Condominium Assn.* (1978) 81 C.A.3d 688, 146 C.R. 695, defendant association adopted a bylaw amendment limiting occupancy in its high-rise units to persons 18 years of age or older. The court held that the provision was a reasonable and therefore valid restraint on alienation and occupancy. But in *Marina Point, Ltd. v. Wolfson* (1982) 30 C.3d 721, 180 C.R. 496, 640 P.2d 115, the court held that such a restriction imposed by a landlord in the leasing of units of a private apartment complex was a violation of the Unruh Civil Rights Act (C.C. 51 et seq.; see *infra*, §683). And in *O'Connor v. Village Green Owners Assn.* (1983) 33 C.3d 790, 191 C.R. 320, 662 P.2d 427, the *Marina Point* holding was extended to condominiums.

Village Green is a housing complex of 629 units, built in 1942 as an apartment complex, and converted in 1973 to a condominium development. The recorded declaration of covenants, conditions, and restrictions limited residency to persons over 18. Plaintiffs bought a unit in 1975, and in 1979, when their son was born, the Village Green Owners Association (a nonprofit organization of all owners of units) notified them of this violation of the restrictions and directed them to discontinue having their son live there. Plaintiffs filed an action to have the age restriction declared invalid, and appealed from an adverse decision on demurrer. The association filed an action to enjoin them from living in the condominium with their son, a preliminary injunction was granted, and plaintiffs appealed. *Held*, both judgments reversed.

(a) *Marina Point holding that landlord's exclusion of children is invalid.* In *Marina Point* it was clear that the apartment complex in which units were rented by a landlord was a "business establishment" within the meaning of C.C. 51. The determinative question was whether the Act, which did not expressly refer to discrimination against children, nevertheless encompassed that discrimination; and this court held that it did. (33 C.3d 794.)

(b) *Condominium association as a business establishment.* The owners association of this condominium is also a business establishment. The language of the statute, referring to "business establishments of every kind whatsoever," indicates that the Legislature deemed specific references unnecessary. And, although decisions so far have all dealt with profit-making entities, nothing in the language or history of C.C. 51 calls for exclusion of an organization simply

because it is nonprofit. (33 C.3d 796.) The Village Green Owners Association has sufficient businesslike attributes to fall within the statute's broad scope. Through its board of directors, the association is charged with employing a professional property management firm, with obtaining insurance for the benefit of all owners, with maintaining and repairing all common areas and facilities, with establishing and collecting assessments from owners to pay for its undertakings, and with adopting and enforcing rules and regulations for the common good. "In brief, the association performs all the customary business functions which in the traditional landlord-tenant relationship rest on the landlord's shoulders." (33 C.3d 796.)

(c) *Association's remedies against nuisance caused by child.* The association argues that it has no effective means of dealing with a disruptive child, because it is not a landlord and cannot bring unlawful detainer. However, it may adopt department regulations and rely on its normal procedures to enforce them as it enforces other use and conduct regulations. Also, the restrictive covenant against children is already invalid under *Marina Point* as to condominium units held as income property and rented out by their owners (see *Swann v. Burkett* (1962) 209 C.A.2d 685, 26 C.R. 286); hence, the association is already faced with the burden of planning for the presence of children. (33 C.3d 797.)

One justice concurred, but, in a lengthy analysis and discussion, expressed the view that the holding should also rest on C.C. 53, with the result that the discriminatory restriction would be void and unenforceable by any party, regardless of whether that party was a "business establishment" under C.C. 51. (33 C.3d 797.) Two justices joined in a dissent, mainly contending that an association of homeowners, whether their homes are separate premises or part of one structure as in a condominium apartment, cannot be held to constitute a business. (33 C.3d 800, 803.) (See 20 Cal. Western L. Rev. 109 [O'Connor]; 54 So. Cal. L. Rev. 1397 [enforceability of age restrictive covenants]; 18 U.S.F. L. Rev. 371 [O'Connor]; 100 A.L.R.3d 241 [enforceability of bylaw or other rule of condominium or cooperative association restricting occupancy by children].)

(2) *Valid Restrictions.* In *Sunrise Country Club Assn. v. Proud* (1987) 190 C.A.3d 377, 235 C.R. 404, the condominium development consisted of 746 units, divided into "Adult" and "Family" regions, each equipped with a number of swimming pools. The Association rules provided that condominiums in "Adult" areas could not be sold or rented to persons with children under 16, but that children could be permitted to reside there for brief periods, provided that they used only the family and clubhouse pools. Defendants purchased a unit in the "Adult" region, and brought 2 children under 16 to live with them and use the adult pools. *Held*, plaintiff association as managing body was entitled to an injunction against violation of the rules. The Unruh Act prohibits only unreasonable, arbitrary, or invidious discrimination; and here the trial judge properly determined that there was none. (a) There was no blanket exclusion of children; 415 units were designated for families with children. (b) Those families had the use of at least 11 swimming pools, as compared with 10 for adults only. (c) The adult areas were largely populated by retired or semiretired adults. (190 C.A.3d 382.) The court added, however, that the prohibition against sale to an owner with children was invalid; ownership has no necessary relationship to use, for persons may own a condominium unit for investment purposes. (190 C.A.3d 382.)

(3) *Age Restrictions in Senior Citizen Housing.* In order "to establish and preserve specially designed accessible housing for senior citizens," C.C. 51.3 authorizes age restrictions in senior citizen housing. The statute applies to condominiums, cooperatives, planned developments and multifamily residential real property developed or rehabilitated for senior citizen housing. (C.C. 51.3(g).)

The restrictions may be no more proscriptive than to require one resident in a dwelling unit to be at least 62 years old (or 55 years old if a resident in a senior citizens housing development) (C.C. 51.3(b)(1), (c)) and each other resident in that unit to be a qualified permanent resident, a permitted health care resident, or a person under 55 years old who had the right to reside in the unit on January 1, 1985 (C.C. 51.3(c)). A qualified permanent resident is someone who was residing with the senior citizen before the senior citizen died, was hospitalized, was absent for a prolonged period of time, or was divorced from the qualified permanent resident. In addition, to be a qualified permanent resident, a person must be at least 45 years old or be the spouse or primary provider of physical or economic support for the senior citizen. (C.C. 51.3(b)(2).) A qualified permanent resident also includes a disabled person or person with a disabling illness or

injury who is a child or grandchild of the senior citizen or a qualified permanent resident and who needs to live with the senior citizen or qualified permanent resident because of the disabling condition, illness, or injury. (C.C. 51.3(b), (c).) If the disabling condition ends, the formerly disabled resident can be required to cease residing in the development on receipt of 6 months' written notice or may be allowed to remain a resident for up to 1 year after the disabling condition ends. (C.C. 51.3(b)(3)(A).) The disabled person also may be prohibited from occupancy based on credible and objective evidence that the person is likely to pose a significant threat to the health or safety of others that cannot be ameliorated by means of a reasonable accommodation. An action to prohibit or terminate occupancy on this basis, however, may be taken only after notice and hearing as prescribed by statute. (C.C. 51.3(b)(3)(B).)

A permitted health care resident is someone who is hired to provide live-in, long-term, or terminal health care to a senior citizen, or a family member providing that care. (C.C. 51.3(b)(7).)

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cc. Common Areas.

12 Witkin Sum. Cal. Law Real Property § 117

[§ 117] Common Areas.

(1) *Ownership of Common Areas.* "Unless the declaration otherwise provides, in a condominium project, or in a planned development in which the common areas are owned by the owners of the separate interests, the common areas are owned as tenants in common, in equal shares, one for each unit or lot." (C.C. 1362.) (For definition of "common area," see C.C. 1351(b), *supra*, §93.) Ordinarily, common areas must remain undivided, and partition is authorized only in exceptional circumstances. (C.C. 1359, *supra*, §113.) (See generally C.E.B., *Forming California Common Interest Developments*, §§1.33 et seq.; Hanna, *Common Interest Developments*, §3:5; 72 *A.L.R.3d* 308 [condominium association's regulations governing members' use of common facilities]; 76 *A.L.R.4th* 295 [validity and construction of condominium bylaws or regulations placing special regulations, burdens, or restrictions on nonresident unit owners]; 15A *Am.Jur.2d* (2000 ed.), *Condominiums and Cooperative Apartments* §32.)

In *MaJor v. Miraverde Homeowners Assn.* (1992) 7 *C.A.4th* 618, 9 *C.R.2d* 237, the owners of a condominium sought a preliminary injunction to restrain the homeowners association from enforcing newly adopted rules that barred nonresident homeowners who were not guests of an authorized resident from using the common areas, including recreational facilities that plaintiffs had continued to use after they moved out of their condominium. The trial court denied relief, finding that the challenged rules were reasonable. *Held*, reversed.

(a) The project's declaration of covenants, conditions, and restrictions (CC&Rs) stated that "every member shall have a right and easement of enjoyment in and to the common area," subject to uniform rules and regulations. The rules classifying members into categories according to residence were not uniform as to all members. Furthermore, the rules excluded plaintiffs from the common areas even though they paid a fee for the common areas' use and improvement. In return for the fee plaintiffs received nothing, and the agreement was illusory and unenforceable. (7 *C.A.4th* 626.)

(b) In *Sunrise Country Club Assn. v. Proud* (1987) 190 *C.A.3d* 377, 235 *C.R.* 404, *supra*, §116, it was said that ownership of a condominium has no necessary relationship to its use. The statement was made in the context of an "adults only" restriction that could be complied with by buyers with children because the children need not live in the unit. The present case is distinguishable because there was a specific connection between ownership and use. Plaintiffs'

right to use the common areas came from being condominium owners. (7 C.A.4th 627.)

(c) "[A]n association may not exceed the authority granted to it by the CC&R's. Where the association exceeds its scope of authority, any rule or decision resulting from such an ultra vires act is invalid whether or not it is a 'reasonable' response to a particular circumstance. Where a circumstance arises which is not adequately covered by the CC&R's, the remedy is to amend the CC&R's." (7 C.A.4th 628.)

MaJor was distinguished in *Liebler v. Point Loma Tennis Club* (1995) 40 C.A.4th 1600, 47 C.R.2d 783. Plaintiff, a nonresident condominium owner who had leased his condominium to tenants and had never lived in it himself, sued defendant condominium corporation, challenging defendant's rule excluding nonresident owners from using common area recreational facilities. Plaintiff asserted the right to use the common areas as a "cotenant" with his tenants. *Held*, judgment for defendant affirmed.

(a) *The rule is permitted by defendant's CC&Rs.* Unlike *MaJor*, where the rule against nonresident owners was held ultra vires to the homeowner association's authority, the rule here is simply a clear statement of the effect of two of defendant's CC&Rs read together. One covenant prohibits severance and separate conveyance of an owner's interests in the private and common use areas and another declares that members may delegate their rights to enjoy the common areas to their tenants. Together, these provisions clearly indicate the intent of the CC&Rs to have one set of users per unit: either the owner or tenant, but not both. (40 C.A.4th 1608, 1609.)

(b) *The rule is reasonable.* There are valid reasons why members of a tennis-oriented condominium corporation might choose to restrict access to their private tennis courts, e.g., maintaining a low density so that the courts will be available to residents, families, and guests. No public policy interest is implicated by doing so. Moreover, owners may reside on the premises and have complete access to the facilities if they choose. Finally, the burden to any individual owner is not disproportionate to the benefit to the whole development. (40 C.A.4th 1611.)

(c) *The rule was fairly applied.* When the corporation received complaints that nonresident owners were using the facilities, it reasonably and evenly enforced the restriction against all who were not in compliance. Plaintiff was alone among nonresident owners in refusing to comply with the restriction after receiving notice from defendant. No evidence supports his assertion that defendant singled him out for exclusion in some sort of personal vendetta. (40 C.A.4th 1612.)

(2) *Ingress, Egress, and Support.* Unless the declaration provides otherwise, the separate interests in community apartment projects, condominium projects, and planned developments with common areas owned in common by the owners of the separate interests have appurtenant, nonexclusive rights of ingress, egress, and support to which the common areas are subject. (C.C. 1361(a).)

Unless the declaration provides otherwise, the separate interests in stock cooperatives and in planned developments with common areas owned by the association have appurtenant easements for ingress, egress, and support to which the common areas are subject. (C.C. 1361(b).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Ownership of Common Areas.* See *Cebular v. Cooper Arms Homeowners Assn.* (2006) 142 C.A.4th 106, 120, 47 C.R.3d 666 [association's method of allocating voting rights and assessments for common areas did not violate C.C. 1362, even though allocation resulted in some unit owners paying more and having greater voting rights than others and did not reflect size, location, or desirability of individual units].



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[§ 118] Improvements and Modifications.

(1) *In General.* Subject to the governing documents and applicable laws, the owner of a separate interest within a building may make improvements or alterations within the boundaries of that interest "that do not impair the structural integrity or mechanical systems or lessen the support of any portions of the common interest development." (C.C. 1360(a)(1).) A change in the exterior appearance of a separate interest must be in accord with the governing documents and applicable law. (C.C. 1360(b).) (See *Dolan-King v. Rancho Santa Fe Assn. (2000) 81 C.A.4th 965, 975, 97 C.R.2d 280* [covenant granting broad authority and discretion to association's "art jury" to approve or reject homeowner's plans for home additions and perimeter fence was enforceable equitable servitude and was fairly applied]; *Rancho Santa Fe Assn. v. Dolan-King (2004) 115 C.A.4th 28, 40, 43, 8 C.R.3d 614* [association's "regulatory code" provisions that defined "major" and "minor" construction for purposes of protective covenant were valid and reasonable; provisions were reasonably applied to homeowner who was given notice and opportunity to be heard regarding application of provisions to fence that she built without association approval]; *25 A.L.R.4th 1059* [guidelines governing association's approval of individual owner's improvements or decoration]; *38 Santa Clara L. Rev. 1081* [owners' vested expectations and changed situations in common interest communities].)

(2) *Modification for Handicapped Persons.* Subject to the governing documents and applicable laws, the owner of a condominium unit within a building may make modifications in the unit at the owner's expense "to facilitate access for persons who are blind, visually handicapped, deaf, or physically disabled, or to alter conditions which could be hazardous to these persons." If the unit is on the ground floor or accessible by an existing ramp or elevator, the owner may also modify the route from the public way to the door of the unit. (C.C. 1360(a)(2).) Modifications are subject to the following conditions:

(a) They must be consistent with existing building codes and applicable provisions of the governing documents pertaining to safety and aesthetics. (C.C. 1360(a)(2)(A), (a)(2)(B).)

(b) External modifications must not prevent reasonable passage by other residents, and must be removed by the owner when the unit is no longer occupied by handicapped or disabled persons. (C.C. 1360(a)(2)(C).)

(c) Plans and specifications for intended modifications must be submitted to the condominium association for review, but approval may not be denied "without good cause." (C.C. 1360(a)(2)(D).) (See Hanna, Common Interest Developments, §3:18.)

(3) *Procedure for Reviewing Proposed Physical Changes.* If an association's governing documents require association approval before an owner of a separate interest may make a physical change to the owner's separate interest or to the common area, C.C. 1378 applies. (C.C. 1378(a).) In reviewing and approving or disapproving a proposed change, the association must provide, in its governing documents, a fair, reasonable, and expeditious procedure, including prompt deadlines, for making its decision. The procedure must state the maximum time for response to an application or a request for reconsideration by the board of directors. (C.C. 1378(a)(1).) An association must annually provide its members with notice of the requirements for association approval of physical changes to property. The notice must describe the types of changes that require association approval and must include a copy of the procedure used to review and approve or disapprove a proposed change. (C.C. 1378(c).)

A decision on a proposed change must be made in good faith, may not be unreasonable, arbitrary, or capricious, and must be consistent with governing law, including the Fair Employment and Housing Act (*Govt.C. 12900 et seq.*). (C.C. 1378(a)(2), (a)(3).) The decision must be in writing. If the proposed change is disapproved, the written decision must include both an explanation of why the proposed change is disapproved and a description of the procedure for reconsideration. (C.C. 1378(a)(4).) Reconsideration by the board, which must be available following a disapproval, does not constitute dispute resolution within the meaning of C.C. 1363.820 (*infra*, §125). (C.C. 1378(a)(5).)

Nothing in C.C. 1378 authorizes a physical change to the common area in a manner that is inconsistent with an association's governing documents or governing law. (C.C. 1378(b).)

(4) *Solar Energy Systems.* Notwithstanding the protections granted to the installation and use of solar energy systems by C.C. 714 (see *infra*, §444), an association managing a common interest development may impose reasonable provisions that do the following:

(a) Restrict the installation of solar energy systems in common areas to systems approved by the association. (C.C. 714.1(a).)

(b) Require the owner of a separate interest to obtain the association's approval for the installation of a solar energy system in a separate interest owned by another. (C.C. 714.1(b).)

(c) Provide for the maintenance, repair, or replacement of roofs or other building components. (C.C. 714.1(c).)

(d) Require the installers of solar energy systems to pay the association or its members for loss or damage caused by the system's installation, maintenance, or use. (C.C. 714.1(d).)

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SUPPLEMENT: [This section is current through the latest supplement]

(3) *Procedure for Reviewing Proposed Physical Changes.* Decision must be consistent with governing law: C.C. 1378(a)(3) was amended in 2005 to include building codes and other applicable laws governing land use or public safety among the governing laws with which decisions must be consistent.

C.C. 1378(b) was amended in 2005 to provide that nothing in C.C. 1378 authorizes a physical change to the common area in a manner that is inconsistent with an association's governing documents, unless the change is required by law.

See *Pacific Hills Homeowners Assn. v. Prun* (2008) 160 C.A.4th 1557, 1565, 73 C.R.3d 653 [homeowners association did not waive right to enforce architectural guidelines for installation of fence and gate; association sent

letters to homeowners demanding compliance, invited them to meet with board, imposed fines, and then filed action; association also sufficiently addressed alleged violation by homeowners' neighbors].



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ee. Voting Rights.

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[§ 119] Voting Rights.

In *King v. Oakmore Homes Assn.* (1987) 195 C.A.3d 779, 241 C.R. 140, two members of a homeowner's association sought declaratory relief, contending that extensions of restrictions were invalid because they failed to achieve the necessary 65% of all of the members' votes. Under the association's bylaws, rights of membership (including voting) had to be exercised by the "joint action" of all property owners; and the members contended that the votes of the owners of a particular lot could not be applied toward fulfilling the 65% requirement where the votes of the cotenants of those owners were not reported. The trial judge found that the extensions were valid, and the members appealed. *Held*, judgment reversed.

(a) "The most reasonable interpretation of the joint action requirement is that for a vote to be valid, it must reflect the joint action of all cotenants of the property, and joint action means that each and every lot owner's position must be reflected, either by that person's actual vote or by authorization of a cotenant to vote as his or her representative. If there is division among the cotenants, the vote is not valid." (195 C.A.3d 782.)

(b) "In this case, there was no evidence that cotenants who cast votes were acting jointly with their nonvoting cotenants." The association had the burden to prove joint action because it inserted the joint action requirement in its bylaws. (195 C.A.3d 783.)

SUPPLEMENT: [This section is current through the latest supplement]



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ff. Transfer Rights.

12 Witkin Sum. Cal. Law Real Property § 120

[§ 120] Transfer Rights.

(1) *Scope of Transfer.* Any conveyance, judicial sale, or other voluntary or involuntary transfer of a separate interest in a common interest development includes (a) the undivided interest in a community apartment project, (b) the undivided interest in the common areas of a condominium project or planned development, or (c) the ownership interest in a stock cooperative corporation, however evidenced. Any transfer of an owner's entire estate also includes the owner's membership interest in the association. (C.C. 1358; see *Countrywide Home Loans v. Tutungi* (1998) 66 C.A.4th 727, 731, 78 C.R.2d 203 [as successor owner of borrowers' unit, lender also succeeded to borrowers' membership in association under CC&Rs, bylaws, and C.C. 1358(b); thus, lender was entitled to association's distribution of insurance proceeds to its members].)

An exclusive use area may be transferred independent of any other interest if separate transfer is expressly authorized in the declaration and the transfer occurs in accord with the terms of the declaration. (C.C. 1358.)

(2) *Restrictions on Transfer.* Restrictions on severability of the component interests in real property contained in a declaration may not be deemed repugnant to those interests for purposes of C.C. 711 (repugnant conditions void as restraints on alienation; see *infra*, §190). However, these restrictions may not last longer than the period during which partition of a project is suspended under C.C. 1359 (*supra*, §113). (C.C. 1358.) (See Hanna, Common Interest Developments, §22:21; 17 A.L.R.4th 1247 [validity, construction, and application of statutes or governing documents restricting transfer, sale, or lease of condominium units]; 39 A.L.R.4th 88 [validity, construction, and application of statutes or governing documents restricting number of units that may be owned by a single individual or entity]; 15A Am.Jur.2d (2000 ed.), *Condominiums and Cooperative Apartments* §42; on transfer of membership in limited equity housing cooperative, see *Corp.C. 5320(c)*, 9 *Summary* (10th), *Corporations*, §305; *Corp.C. 5410*, 9 *Summary* (10th), *Corporations*, §289.)

An association's rule or regulation that arbitrarily or unreasonably restricts an owner's ability to market the owner's interest is void. (C.C. 1368.1(a).) An association may not establish an exclusive relationship with a real estate broker through which the sale or marketing of owners' interests must occur, although the association may sell and market

common areas or separate interests that it owns through an exclusive relationship. (C.C. 1368.1(b)(2).)

(3) *Approval of Transfer Unreasonably Withheld.* In *Laguna Royale Owners Assn. v. Darger* (1981) 119 C.A.3d 670, 174 C.R. 136, the court upheld the right to impose reasonable restrictions on transfer without approval, but concluded that approval was unreasonably withheld. The occupancy agreement provided that the purchaser "shall not assign or otherwise transfer this agreement ... without the consent of and approval of" the association. Defendant owners assigned three one-quarter undivided interests to three other couples without approval, and plaintiff Association sued to obtain a declaration of invalidity of the assignment. *Held*, judgment for plaintiff reversed.

(a) *Validity of reasonable restrictions.* "[I]t is essential to successful condominium living and the maintenance of the value of these increasingly significant property interests that the owners as a group have the authority to regulate reasonably the use and alienation of the condominiums." (119 C.A.3d 682.) Reasonable restrictions on alienation are consistent with C.C. 711; only unreasonable restraints are invalid. (119 C.A.3d 682.) Nor does the condition of Association approval of the assignment of ownership interests violate the constitutional right of association. (119 C.A.3d 683.)

(b) *Determination of reasonableness.* The criteria for testing the reasonableness of an exercise of power to disapprove a transfer are: (1) whether the reason for withholding approval is rationally related to the protection, preservation, or proper operation of the property and the purposes of the association; (2) whether the power was exercised in a fair and nondiscriminatory manner. Another consideration might be the nature and severity of the consequences of application of the restriction. (119 C.A.3d 683, 684.)

(c) *Unreasonableness of Association's refusal.* (1) The board's objection to multiple ownership was unreasonable, for multiple ownership has no necessary connection to intensive use. (119 C.A.3d 684, 685.) (2) The objection that the proposed use would be greatly in excess of the normal use and inconsistent with the quiet enjoyment by other occupants is rationally related to the purposes of the Association. (119 C.A.3d 686.) But there was no evidence offered as to the intensity or nature of the proposed use. "We may take judicial notice as a matter of common knowledge that the use of a single apartment by four families for thirteen weeks each during the year would create some problems not presented by the use of a single, permanent resident family. ... However, we are not prepared to take judicial notice that the consecutive use of unit 41 by these four families, one at a time, would be so intense or disruptive as to interfere substantially with the peaceful enjoyment of the premises by the other occupants or the maintenance of building security." (119 C.A.3d 687.) (3) The association's bylaws prohibit rentals of the units for periods of less than 90 days; thus, defendants could effect the same use of the property by leasing to each couple for a period of 90 days each year. (119 C.A.3d 687.)

(4) *Distinction: Publicly Subsidized Project.* In *Oceanside v. McKenna* (1989) 215 C.A.3d 1420, 264 C.R. 275, plaintiff city created a condominium as part of its redevelopment project, requiring owner occupancy and prohibiting lease or rental of any unit. The covenants (CC&Rs) set forth the purpose of the restriction: "[T]o achieve a stabilized community of owner-occupied dwelling units, to avoid artificial inflation of prices caused by resales by speculators and to prevent scarcity caused by vacant homes awaiting resale by speculators." *Held*, the provision was a reasonable and therefore valid restraint on alienation. *Laguna Royale Owners Assn. v. Darger*, *supra*, involved a private project, and even under the test articulated in that case, the restriction involved in the present case would be reasonable. "Here, the City and the Commission subsidized the construction of Sea Village at a cost of more than \$ 1 million in public funds to provide affordable housing to low and moderate income persons and to foster an owner-occupied community in the redevelopment area. The restriction on leasing and the requirement imposed on owners to occupy their units are rationally related to the purposes set forth in the CC&Rs." (215 C.A.3d 1429.)

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SUPPLEMENT: [This section is current through the latest supplement]

(2) *Restrictions on Transfer.* *Restriction on ability to market owner's interest:* See *Cebular v. Cooper Arms Homeowners*

Assn. (2006) 142 C.A.4th 106, 124, 47 C.R.3d 666 [association's method of allocating voting rights and assessments for common areas did not violate C.C. 1368.1(a), even though allocation resulted in some unit owners paying more and having greater voting rights than others and did not reflect size, location, or desirability of individual units].



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[§ 121] Other Restrictions.

Numerous cases and commentators have discussed the enforceability of particular covenants and restrictions. (See, e.g., *Franklin v. Marie Antoinette Condominium Owners Assn.* (1993) 19 C.A.4th 824, 833, 23 C.R.2d 744 [CC&R provision immunizing homeowners' association from liability for property damage in absence of negligence was reasonable and fair, and barred plaintiff from recovering for damage caused by plumbing leak]; *Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67 C.A.4th 743, 754, 79 C.R.2d 248 [jury properly found that association acted unreasonably when it forced homeowner to dispose of clothing and "nonstandard" reading material; although CC&Rs required owners to maintain their units in clean, sanitary, and attractive condition and granted association entry into units to perform necessary maintenance, they could not reasonably be read to allow association to dictate amount of clutter in unit]; *Villa Milano Homeowners Assn. v. Il Davorge* (2000) 84 C.A.4th 819, 833, 102 C.R.2d 1 [CC&R provision compelling binding arbitration of construction and design defects claims against developer who drafted, signed, and recorded CC&Rs was not enforceable as equitable servitude; provision violated public policy]; C.E.B., *Advising California Common Interest Communities* 2d, Chap. 7; 60 A.L.R.5th 647 [reasonableness of parking restrictions]; on restrictive covenants that violate statutes against housing discrimination, see C.C. 1352.5, *supra*, §95.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Parties to Enforcement.

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[§ 122] Parties to Enforcement.

Unless the declaration provides otherwise, servitudes may be enforced by any owner of a separate interest, by the association, or by both. (C.C. 1354(a); see *Posey v. Leavitt* (1991) 229 C.A.3d 1236, 1247, 280 C.R. 568 [condominium owner, as well as homeowners association, has cause of action against another owner for encroachment on common area in violation of restrictions].) A governing document other than the declaration may be enforced by the association against an owner of a separate interest or by an owner of a separate interest against the association. (C.C. 1354(b).)

Duffey v. Superior Court (1992) 3 C.A.4th 425, 4 C.R.2d 334, involved an unusual alignment of parties in a dispute over the enforcement of a development's CC&Rs, and raised a wide range of issues regarding participation in enforcement actions, including the relationship between the standing provisions of C.C. 1354 and former C.C.P. 374 (now C.C. 1368.3).

A homeowners association filed an action for declaratory relief to determine whether a proposed patio cover would violate the CC&Rs. The association joined as defendants not only the proponents of the construction but also the neighbors on either side, whose complaints had prompted the association to file the suit. The neighbors moved for judgment on the pleadings on the grounds that they had no controversy with the association and no relief was sought against them. The trial court denied the motion, and the neighbors petitioned for mandamus to compel their extrication from the case. *Held*, petition granted.

(a) *Procedural principles*. "It is fundamental that a person should not be compelled to defend himself in a lawsuit when no relief is sought against him." (3 C.A.4th 429, quoting *Weisman v. Odell* (1970) 3 C.A.3d 494, 83 C.R. 563, 4 Cal. Proc. (4th), Pleading, §191.) Furthermore, the only parties needed for a complete determination of the CC&Rs' application to the proposed construction were the proponents and the association. (3 C.A.4th 430, citing *Leonard Corp. v. San Diego* (1962) 210 C.A.2d 547, 26 C.R. 730.)

(b) *Association's independent enforcement duty*. The association's duty to enforce the CC&Rs existed independently of the neighbors' complaints. If the proposed construction violated the CC&Rs, the association would be responsible for trying to prevent it even if it was favored by the neighbors. (3 C.A.4th 431.)

(c) *Relationship between C.C. 1354 and C.C.P. 374.* The argument that the neighbors had to remain parties to prevent them from suing the association if they were unhappy with the outcome was unpersuasive. They had the right under C.C. 1354 to join the litigation if they so desired. Former C.C.P. 374 (now C.C. 1368.3(a)) authorizes an association to file a declaratory relief action to obtain an authoritative interpretation of the governing documents, while specifically relieving it from the need to join individual owners. (3 C.A.4th 432.) Reading the two statutes together, in a good faith dispute over the interpretation of CC&Rs a homeowners association need not advocate any particular interpretation. It may litigate matters relating to the enforcement of the CC&Rs, which entails joining the parties *against whom* they are to be enforced, without joining neighboring owners, who may either press their own interpretations by joining in the action under C.C. 1354, or stay on the sidelines. However, if the association were to allow the case to be disposed of on procedural grounds without a decision on the merits, the neighbors should be able to sue it for failing to enforce the CC&Rs. (3 C.A.4th 433.)

(d) *Binding effect of litigation.* Although the neighbors did not have to be made parties, there was no question as to the litigation's binding effect on them. (3 C.A.4th 433.) The policy behind the declaratory relief statute requires that judgments in cases brought under the statute be res judicata and binding on individual owners, including those who do not participate in the litigation. (3 C.A.4th 434.)

(e) *Policy considerations.* Given the increasingly important role played by homeowners associations in the daily lives of Californians, it would be incongruous if an expression of opinion to an association by one neighbor about another's proposed construction were cause to name the objecting neighbor in a lawsuit. "If every neighbor who demands enforcement of the CC&R's winds up in court, no one will demand enforcement, and landscape and construction standards will effectively cease to exist." (3 C.A.4th 434.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Farber v. Bay View Terrace Homeowners Assn.* (2006) 141 C.A.4th 1007, 1011, 46 C.R.3d 425 [seller of condominium did not have standing to enforce obligations owed to buyer by association under CC[Rs] seller could not enforce CC&Rs when she no longer owned unit]. *Weisman case*:

Cross-Reference: 4 Cal. Proc. (5th), Pleading, §210.



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4. Statute of Limitations.

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[§ 123] Statute of Limitations.

The statute of limitations to enforce duties included in a declaration of CC&Rs is *C.C.P.* 337, governing actions arising from a written instrument. The limitations period is 4 years and it commences when a demand for performance is made. (*Cutujian v. Benedict Hills Estates Assn.* (1996) 41 *C.A.4th* 1379, 1385, 1387, 49 *C.R.2d* 166; see 3 *Cal. Proc.* (4th), *Actions*, §§474, 487.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Pacific Hills Homeowners Assn. v. Prun* (2008) 160 *C.A.4th* 1557, 1563, 73 *C.R.3d* 653 [5-year statute of limitations in *C.C.P.* 336(b), rather than 4-year period in *C.C.P.* 337, applied to action to enforce violation of architectural guidelines; *C.C.P.* 336(b) governs actions for violations of recorded and unrecorded restrictions].

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §§508, 522.



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5. Attorneys' Fees.

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[§ 124] Attorneys' Fees.

The prevailing party in an action to enforce the governing documents must be awarded reasonable attorneys' fees and costs. (C.C. 1354(c); see *Salawy v. Ocean Towers Housing Corp.* (2004) 121 C.A.4th 664, 670, 17 C.R.3d 427 [defendant who successfully invoked governing documents as defense to plaintiffs' action was not entitled to fees; gist of plaintiffs' action was not to enforce governing documents but rather to enforce alleged promise unrelated to governing documents].) The court, in determining the amount of the award, may consider a party's refusal to participate in alternative dispute resolution before the action was filed. (C.C. 1369.580; see *Heather Farms Homeowners Assn. v. Robinson* (1994) 21 C.A.4th 1568, 1574, 26 C.R.2d 758, 7 Cal. Proc. (4th), Judgment, §200; on alternative dispute resolution, see *infra*, §125.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Farber v. Bay View Terrace Homeowners Assn.* (2006) 141 C.A.4th 1007, 1014, 46 C.R.3d 425 [association was entitled to fees as prevailing party in action by seller of condominium to enforce obligations under CC&Rs].

Heather Farms Homeowners Assn. case:

Cross-Reference: 7 Cal. Proc. (5th), Judgment, §221.



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6. Alternative Dispute Resolution.

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[§ 125] Alternative Dispute Resolution.

(1) *Purpose of Statutes.* C.C. 1363.810 et seq. and C.C. 1369.510 et seq. encourage the parties to disputes involving enforcement of the governing documents of a common interest development to attempt alternative dispute resolution. (See *Villa Milano Homeowners Assn. v. Il Davorge* (2000) 84 C.A.4th 819, 835, 102 C.R.2d 1 [former statute encouraged alternative dispute resolution only with respect to specified, limited kinds of disputes, and did not make it mandatory; statute did not support developer's assertion that mandatory arbitration of construction and design defects claims was favored for dispute that was not of statutorily specified type]; 25 *Pacific L. J.* 771; 23 Thomas Jefferson L. Rev. 227 [analysis of statute and criticism of use of alternative dispute resolution in lawsuits involving common interest developments].)

(2) *Internal Dispute Resolution Process.* C.C. 1363.810 et seq. provide a simple and efficient intra-association dispute resolution procedure at no cost to the parties. It is distinct from the alternative dispute resolution process required by C.C. 1369.510 et seq. (infra, this section) as a prerequisite to litigation. (Law Rev. Com. Comment to C.C. 1363.810; see C.C. 1363.810(b) [C.C. 1363.810 et seq. supplement, but do not replace, C.C. 1369.510 et seq.].) An association must provide a "fair, reasonable, and expeditious" procedure for resolving a dispute between the association and a member involving their rights, duties, or liabilities under the Common Interest Development Act, the Nonprofit Mutual Benefit Corporation Law (*Corp.C. 7110* et seq.) or under the association's governing documents. (C.C. 1363.820(a), 1363.810(a); on minimum requirements for "fair, reasonable, and expeditious" dispute resolution procedure, see C.C. 1363.830.) If an association does not provide a fair, reasonable, and expeditious dispute resolution procedure, the procedure provided in C.C. 1363.840 applies and satisfies the requirements of C.C. 1363.820(a). (C.C. 1363.820(c).)

(3) *Prerequisite to Enforcement Action.* Before filing an enforcement action seeking declaratory, injunctive, or writ relief, either alone or in conjunction with a claim for damages of \$ 5,000 or less, the parties must attempt alternative dispute resolution. (C.C. 1369.520(a), (b); for definition of "enforcement action," see C.C. 1369.510(b).) This requirement does not apply to the filing of a cross-complaint (C.C. 1369.510(b)), to a small claims action (C.C. 1369.520(c)), or to an assessment dispute, unless otherwise provided by law (C.C. 1369.520(d)). The form of alternative dispute resolution must involve a neutral party in the decisionmaking process. It may be either binding or nonbinding,

with the voluntary consent of the parties. (C.C. 1369.510(a).) The parties must bear the costs of the proceeding. (C.C. 1369.540(c).)

(4) *Request for Resolution.* The initiating party must serve a Request for Resolution, containing (a) a brief description of the dispute; (b) a request for alternative dispute resolution; and (c) a notice that a response is required within 30 days, or the request will be deemed rejected. (C.C. 1369.530(a).) Requests sent to an owner of a separate interest must also include a copy of C.C. 1369.510 et seq. (C.C. 1369.530(a)(4).) Service of the request must be by personal delivery, first class mail, express mail, facsimile transmission, or other means reasonably calculated to provide the party on whom the request is served actual notice of the request. (C.C. 1369.530(b); see *Cabrini Villas Homeowners Assn. v. Haghverdian* (2003) 111 C.A.4th 683, 692, 4 C.R.3d 192 [under predecessor statute, request could be served by any form of mail requiring return receipt; service was not complete until party being served signs return receipt].) If the request is accepted, the alternative dispute resolution must be completed within 90 days from the initiating party's receipt of the acceptance, unless the parties stipulate otherwise. (C.C. 1369.540(a).)

(5) *Tolling of Statute of Limitations.* If a request is served before the end of the applicable time limitation for commencing an enforcement action, the time limitation is tolled during the following periods:

(a) The 30-day period provided in C.C. 1369.530 for response to a request. (C.C. 1369.550(a).)

(b) If the request is accepted, the period provided by C.C. 1369.540 for completion of alternative dispute resolution, including a stipulated extension of time. (C.C. 1369.550(b).)

(6) *Certificate of Compliance.* A party commencing an enforcement action must file with the initial pleading a certificate stating that one or more of the following conditions is satisfied:

(a) Alternative dispute resolution has been completed in compliance with C.C. 1369.510 et seq. (C.C. 1369.560(a)(1).)

(b) One of the other parties to the dispute did not accept the terms offered for alternative dispute resolution. (C.C. 1369.560(a)(2).)

(c) Preliminary or temporary injunctive relief is necessary. (C.C. 1369.560(a)(3).)

Failure to file a certificate under C.C. 1369.560(a) is grounds for a demurrer or a motion to strike unless the court finds that dismissal of the action for failure to comply with C.C. 1369.510 et seq. would result in substantial prejudice to one of the parties. (C.C. 1369.560(b).)

(7) *Stipulated Submission During Action.* An enforcement action may be stayed and referred to alternative dispute resolution, on the parties' written stipulation. During the referral, the delay reduction provisions of Govt.C. 68603(c) (see 2 Cal. Proc. (4th), Courts, §444) do not apply. (C.C. 1369.570(a).) The parties must bear the costs of the proceeding. (C.C. 1369.570(b).)

(8) *Evidentiary Protections.* Ev.C. 1115 et seq. (mediation confidentiality) apply to any form of alternative dispute resolution initiated by a Request for Resolution under C.C. 1369.510 et seq., other than arbitration. (C.C. 1369.540(b); on Ev.C. 1115 et seq., see 1 Cal. Evidence (4th), Circumstantial Evidence, §§152, 153.)

(9) *Summary of Statute.* Members of the association must be given a summary of C.C. 1369.510 et seq. annually, with a specified warning that failure to comply with the prefiling requirements may result in loss of the right to sue to enforce the governing documents or applicable law. (C.C. 1369.590(a).) The summary must include a description of the association's internal dispute resolution process. (C.C. 1363.850, 1369.590(b).)

(10) *Use in Assessment Disputes.* Disputes involving association assessments may be resolved through the

alternative dispute resolution process set forth in C.C. 1369.510 et seq. if the owner of the separate interest (a) pays the amount of the assessment, late charges, interest, and all reasonable fees and costs associated with preparing and filing a notice of delinquent assessment, and (b) notifies the association in writing that the amount is paid under protest. The notice of protest must be sent by certified mail not more than 30 days after the notice of delinquent assessment is recorded. (C.C. 1366.3(a).) An owner may not use alternative dispute resolution under C.C. 1366.3 more than twice in a calendar year or more than three times within any 5 calendar years, unless the owner and the association mutually agree to exceed these limits. (C.C. 1366.3(b).)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Prerequisite to Enforcement Action.* C.C. 1369.520(b) was amended in 2006 to change the relevant amount of damages from "\$ 5,000 or less" to an amount within the jurisdictional limits of the small claims court under *C.C.P. 116.220* and *116.221* (\$ 2,500 to \$ 7,500, in specified circumstances; see *2 Cal. Proc. (5th), Courts*, §281).(7) *Stipulated Submission During Action.*

Cross-Reference: *2 Cal. Proc. (5th), Courts*, §263.(10) *Use in Assessment Disputes.* C.C. 1366.3 was repealed in 2005. The use of alternative dispute resolution to resolve disputes over delinquent assessments is now governed by C.C. 1367.1(c)(1)(A) (Supp., supra, §112) and C.C. 1367.4 (Supp., supra, §§112A, 112B).



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6. Common Interest Developments.

h. Liens for Labor and Materials.

12 Witkin Sum. Cal. Law Real Property § 126

[§ 126] Liens for Labor and Materials.

The owner of a separate interest in a condominium project is protected against liens for labor, services, or materials furnished with the consent or at the request of another owner, unless the owner has expressly consented to or requested the labor, services, or materials. However, express consent is deemed to have been given for (1) emergency repairs to the owner's unit and (2) labor, services or materials provided for common areas when duly authorized by the association. (C.C. 1369; see *ECC Const. v. Ganson* (2000) 82 C.A.4th 572, 577, 98 C.R.2d 292 [although "blanket" mechanics' liens that do not allocate amount of lien per homeowner are permitted, C.C. 1369 requires contractor to notify each owner of fraction of total sum secured by lien that is attributable to owner's condominium; contractor who failed to do so lost ability to enforce lien against individual owners].)

Where a lien attaches to two or more condominiums, a separate owner may remove the lien from the owners' interest by paying the lienholder the fraction of the total sum secured attributable to that interest. (C.C. 1369.) (On similar provision under predecessor statute, see *E.D. McGillicuddy Const. Co. v. Knoll Recreation Assn.* (1973) 31 C.A.3d 891, 899, 107 C.R. 899; 6 Southwestern U. L. Rev. 524; see generally 9 Miller & Starr 3d, §25:12; Hanna, Common Interest Developments, §3:54; 15A Am.Jur.2d (2000 ed.), *Condominiums and Cooperative Apartments* §47.)

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D. Future Interests.

1. In General.

12 Witkin Sum. Cal. Law Real Property § 127

[§ 127] In General.

(1) *Nature of Interest.* A present interest entitles the owner to the immediate possession of the property. (C.C. 689.) A future interest entitles the owner to the possession of the property only at a future period. (C.C. 690.) (See *Rest., Property* §153 [future interest excludes postponed right to enjoyment of such rights in land of another as easements, profits, or rent]; on historical development of future interests, see 2 *Rest., Property*, p. 505 et seq.; on constructional problems involved in contingent and class gifts, etc., see 14 *Summary* (10th), *Wills and Probate*, §§210 et seq., 221 et seq., and see generally 3 *Powell* §§19.01 et seq., 28.01 et seq.; 28 *Am.Jur.2d* (2000 ed.), *Estates* §§197 et seq., 217 et seq., 381 et seq.)

(2) *Recognized Interests.* The following kinds of future interests are recognized in California:

(a) Reversionary interests. (See *infra*, §128 et seq.)

(b) Remainders. (See *infra*, §131 et seq.)

(c) Powers of appointment. (See *infra*, §145 et seq.)

(3) *Definition Exclusive.* C.C. 703 provides: "No future interest in property is recognized by the law," except those defined in C.C. 654 et seq. Although C.C. 703 may prevent the creation of unique forms of future interests, the courts have disregarded it when ordinary forms are involved, such as powers of appointment (*infra*, §146), and future interests in personal property (13 *Summary* (10th), *Personal Property*, §28). And while executory interests are classified in the Civil Code as remainders, the opinions occasionally use the old terminology. (See *infra*, §132.)

Nevertheless, the original Code Commissioners' note to C.C. 741, quoted in part in *Estate of Zuber* (1956) 146 C.A.2d 584, 591, 304 P.2d 247, is worth repeating: "Much nice learning has been thrown around the subject of contingent remainders, and many nice distinctions and refinements have accumulated, but in many of the States, and by this Code, future interests include all estates in expectancy, vested, and contingent, and all future interests are descendible, devisable, and alienable in the same manner as estates in possession, so that a thorough examination of the common law rules concerning remainders, and the delicate questions springing therefrom, must be esteemed as of more interest in showing the learning and scholarly attainments of the early law writers rather than as of any practical utility."

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2. Reversionary Interests.

a. Reversion.

12 Witkin Sum. Cal. Law Real Property § 128

[§ 128] Reversion.

"A reversion is the residue of an estate left by operation of law in the grantor or his successors, or in the successors of a testator, commencing in possession on the determination of a particular estate granted or devised." (C.C. 768.) The grant of a life estate, or of a term of years, leaves a reversion or right to have the estate revert back to the grantor or the grantor's successors when the particular estate terminates. (See *Rest., Property §154*; 3 Powell §20.02; 28 *Am.Jur.2d* (2000 ed.), *Estates §197* et seq.; on problem presented by purported remainder to grantor's heirs, and abrogation of common law doctrine of worthier title, see *supra*, §12.)

West's Key Number Digest, Perpetuities k.4(4)

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D. Future Interests.

2. Reversionary Interests.

b. Power of Termination.

1. Terminology.

12 Witkin Sum. Cal. Law Real Property § 129

[§ 129] Terminology.

(1) *Restatement*. When an estate is granted on a condition subsequent, the grantor or the grantor's successor is said to have a "right of reentry" for breach of the condition, which has generally been viewed as a reversionary interest. (See *Strong v. Shatto* (1919) 45 C.A. 29, 35, 187 P. 159.) The Restatement describes this future interest as a power of termination, pointing out that the person in whose favor the condition exists has a power rather than a right, and that an actual entry is no longer necessary to terminate the estate. The Restatement also excludes the power of termination from the classification of reversionary interests, on the ground that the power is not an interest left in the transferor or the transferor's successor, but is created in the transferor or the transferor's successor. (See *Rest., Property* §§24, 45; §154, Comment a; §155, Comment c; 3 Powell §20.03; 13 *Hastings L. J.* 293 [restricting land use by rights of reentry and possibilities of reverter]; 28 *Am.Jur.2d* (2000 ed.), *Estates* §212 et seq.)

The Restatement analysis was employed in *Parry v. Berkeley Hall School Foundation* (1937) 10 C.2d 422, 74 P.2d 738. Deeds by successive grantors contained various conditions subsequent, and plaintiff, a grantee in possession, sought to quiet title against his grantor's right of reentry for breach of a condition restricting the sale of liquor. Plaintiff's theory was that the right was a reversionary estate, that the original grantor had already reserved the identical estate, and that consequently it was impossible for a subsequent owner-grantor to have that estate. *Held*, defendant could enforce the restrictions; conditions may be imposed by successive grantors, and, as pointed out in the Restatement, there is, strictly speaking, no residue of the estate left in any grantor. "In each instance the grantee takes the whole fee, with the same rights as a grantee in fee simple absolute, as long as the conditions are obeyed. Each grantor has the right or power to terminate the estate which *he* granted, upon breach of any condition or conditions imposed by *him*. Whatever be the correct term to describe the interest of the grantor,--'right,' 'power,' 'estate' or 'reversion,' that interest is unaffected by the form or content of the conditions imposed on the granted estate." (10 C.2d 426.) The original grantor was apparently indifferent in this case, and the question as to which of the successive grantors has the superior right to declare a forfeiture for breach of the condition was not determined by the decision.

In *Santa Monica v. Jones* (1951) 104 C.A.2d 463, 473, 232 P.2d 55, *supra*, §20, the court (quoting 1 Simes, *Law of Future Interests* §159, pp. 281, 282) said: " 'Strictly speaking, the owner of a right of entry for breach of condition has a privilege and a power, but not a right; for by a right, in the strict sense, is meant a claim which may be enforced by legal

machinery of some sort, and until an election to forfeit for breach, there is no such right in the one for whose benefit the condition exists. ... By reason of the analysis just stated, there is a tendency to call the right of entry for breach of condition a power of termination.' "

(2) *California Statute*. This modern concept was codified in 1982 by the enactment of C.C. 885.010. A power of termination is "the power to terminate a fee simple estate in real property to enforce a restriction in the form of a condition subsequent to which the fee simple is subject, whether the power is characterized in the instrument that creates or evidences it as a power of termination, right of entry or reentry, right of possession or repossession, reserved power of revocation, or otherwise." A power of termination includes a possibility of reverter that is enforceable as a power of termination under C.C. 885.020. (C.C. 885.010(a)(1).) A power of termination is an interest in the real property. (C.C. 885.010(b).) (See *Concord & Bay Point Land Co. v. Concord* (1991) 229 C.A.3d 289, 294, 280 C.R. 623, *infra*, §343, citing the text [deed conveying interest of inheritance in land, unrestricted except for future condition, on failure of which property conveyed reverts to grantor, conveys fee simple subject to condition subsequent, and reversionary interest held by grantor is power of termination]; on executory interests as included in definition of power of termination, see C.C. 885.010(a)(2), *infra*, §340.)

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b. Power of Termination.

2. Enforcement of Building Restrictions.

12 Witkin Sum. Cal. Law Real Property § 130

[§ 130] Enforcement of Building Restrictions.

Building restrictions are commonly enforced in actions by other lot owners in a tract, where the requisites of an equitable servitude are shown. (See *infra*, §440 et seq.) In *Shields v. Bank of America* (1964) 225 C.A.2d 330, 37 C.R. 360, these requisites were not shown (no provision that restrictions were for benefit of lot owners; *infra*, §449), hence, no equitable servitude was created. But each deed restricted use to a single-family dwelling, by a condition subsequent and right of reentry in favor of the grantor personally and his successors (also phrased as a possibility of reverter). After all lots had been sold, plaintiff lot owner sought to break the restriction by a quiet title action against defendant bank, successor to the grantor. Defendant transferred its reversionary right to the other lot owners, and they intervened as successors of the grantor. *Held*, they were entitled to enforce the restrictions against plaintiff. The bank's ownership of public utility easements and the right of reentry gave it sufficient interest in the land to defend the suit, and its transferees could therefore do so. (225 C.A.2d 338.) The court distinguished *Kent v. Koch* (1958) 166 C.A.2d 579, 333 P.2d 411, in which the grantor, owning no lots, sought to enforce covenants for the benefit of lot owners, rather than conditions in his own favor. (225 C.A.2d 334.) (See *Arrowhead Mut. Service Co. v. Faust* (1968) 260 C.A.2d 567, 578, 67 C.R. 325 [following *Shields*].)

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D. Future Interests.

3. Remainders.

a. Nature of Remainder.

12 Witkin Sum. Cal. Law Real Property § 131

[§ 131] Nature of Remainder.

A remainder is a future estate created to take effect in possession on the determination of the precedent or particular estate, in favor of someone other than the grantor or testator. (See C.C. 769; see *Rest., Property §156* ["a remainder is any future interest limited in favor of a transferee in such manner that it can become a present interest upon the expiration of all prior interests simultaneously created, and cannot divest any interest except an interest left in the transferor"].) When the particular estate terminates, the residue, instead of reverting to the original owner, remains in a third person, sometimes called the remainderperson. (See generally 3 Powell §20.04; *28 Am.Jur.2d (2000 ed.), Estates §217 et seq.*)

A remainder can be created only by act of the parties; and, in a deed, e.g., it is necessary that there be operative words of grant. (See *supra*, §15.)

West's Key Number Digest, Perpetuities k.4(5) et seq.

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3. Remainders.

b. Executory Interests.

12 Witkin Sum. Cal. Law Real Property § 132

[§ 132] Executory Interests.

(1) *Common Law*. At common law a remainder had to take effect in possession, if at all, on the expiration of the precedent estate; it could not be made to commence at some future time without an intervening precedent estate. Also, because a remainder had to follow the expiration of the particular estate, it could not be made "in derogation" of that estate, i.e., to abridge or terminate the particular estate. Such limitations could be made, but were known as executory interests. (See *Rest., Property* §§25, 158; 3 *Powell* §20.05; 28 *Am.Jur.2d* (2000 ed.), *Estates* §381 et seq.)

(2) *Statutes*. The Civil Code does not use the term "executory interest," but instead removes these common law restrictions on the creation of remainders, and classifies all executory limitations together with remainders. "When a future estate, other than a reversion, is dependent on a precedent estate, it may be called a remainder, and may be created and transferred by that name." (C.C. 769.) A future estate may be limited to commence in possession at a future date, without an intervening precedent estate. (C.C. 767, 773; see *Wilhoit v. Salmon* (1905) 146 C. 444, 447, 80 P. 705; *Lowe v. Ruhlman* (1945) 67 C.A.2d 828, 834, 155 P.2d 671; 5 *Hastings L. J.* 254.) A fee may be limited on a fee, on a contingency. (C.C. 773; see *Jewell v. Pierce* (1898) 120 C. 79, 84, 52 P. 132.) A remainder may be limited on a contingency that will operate to abridge or determine the precedent estate, and "every such remainder is to be deemed a conditional limitation." (C.C. 778; see *Taylor v. McCowen* (1908) 154 C. 798, 803, 99 P. 351.)

Nevertheless, occasional California decisions, in conformity with general usage elsewhere, speak of these limitations as "executory interests." (See *Estate of Micheletti* (1944) 24 C.2d 904, 908, 151 P.2d 833; *Estate of Zuber* (1956) 146 C.A.2d 584, 589, 592, 593, 304 P.2d 247 [executory devise, to take effect in the event beneficiaries survive distribution].)

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3. Remainders.

c. Vested Remainders.

1. What Constitutes Vested Remainder.

12 Witkin Sum. Cal. Law Real Property § 133

[§ 133] What Constitutes Vested Remainder.

(1) *Common Law Rule.* The traditional test appears in the early California cases: If there is (a) an *ascertained person in being*, and (b) *no condition precedent* to the taking of the estate on termination of the particular estate, the remainder is vested, even though it may never take effect in possession. (See *In re De Vries* (1911) 17 C.A. 184, 202, 119 P. 109; *Miller v. Oliver* (1921) 54 C.A. 495, 500, 202 P. 168; 28 Am.Jur.2d (2000 ed.), Estates §§250, 251.)

(2) *Restatement Classification.* The Property Restatement (§157) rejects the familiar terms "vested" and "contingent" remainder and states four classes of remainders: (a) *indefeasibly vested*; (b) *vested subject to open*; (c) *vested subject to complete defeasance*; (d) *subject to a condition precedent*. The first three would commonly be regarded as vested remainders and the last as a contingent remainder. (See 3 Powell §20.04.)

(3) *California Law.* The Civil Code originally stated the distinction between vested and contingent interests as follows: "A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest." (Former C.C. 694.) "A future interest is contingent, whilst the person in whom, or the event on which, it is limited to take effect remains uncertain." (Former C.C. 695.) These definitions were neither clear nor mutually exclusive, and the cases tended to state the common law rules and apply the Restatement classification. (See *infra*, §134 et seq.)

In 1963, former C.C. 694 and 695 were repealed as inconsistent with the new and extremely broad definition of vesting in former C.C. 715.8, enacted in the same year. In 1970, former C.C. 715.8 was repealed, thus leaving applicable the common law tests of vesting set forth above. (See Law Rev. Com. Comment to former C.C. 715.8; on former C.C. 715.8, see *infra*, §173.)

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2. Remainder Indefeasibly Vested.

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[§ 134] Remainder Indefeasibly Vested.

The first type of vested remainder is one in which the remainder is certain ultimately to become a present interest in the remainderperson or his or her successors, and the interest, when acquired, can never be divested. (*Rest., Property §157*, Comment f et seq.; see 3 Powell §20.04.)

In *Miller v. Oliver* (1921) 54 C.A. 495, 202 P. 168, the testator left property to Lydia Sperry, his widow, for life, "and upon her death the remainder to Frank Sperry and Harriet A. Miller ... to be held ... from the time of the death of the said Lydia J. Sperry." Harriet died during the widow's lifetime. *Held*, the remainder was vested, and subject to administration as part of her estate. The remainderpersons were in being and there was no condition precedent to their taking. (54 C.A. 500.)

In *re De Vries* (1911) 17 C.A. 184, 119 P. 109, reached the same result, construing a will that gave a life estate to the testator's widow, and provided: "Upon the termination of the life estate ... I give and devise unto my son" the remainder. *Held*, these words of futurity referred merely to the time of enjoyment or possession, and the remainder was vested. (17 C.A. 201.) (See *Estate of Ritzman* (1921) 186 C. 567, 569, 199 P. 783; *Bochte v. Chess* (1954) 124 C.A.2d 321, 325, 268 P.2d 493; *Estate of Newman* (1956) 146 C.A.2d 780, 781, 304 P.2d 748; *Rest., Property §157*, Comment j; *infra*, §142.)

In *Estate of Newman* (1964) 230 C.A.2d 158, 40 C.R. 785, a testamentary trust provided that "[u]pon the death" of the decedent's widow (life tenant), the principal and accumulations "shall be distributed" to named remainderpersons, and the trust was to "terminate upon distribution" of the assets. It was further provided that, in the event that any remainderperson was "not living at the time of said distribution," his or her share should be added to the others. The life tenant died September 25, 1962. Remainderman N died April 1, 1963, before the trustees had delivered any of the assets. *Held*, N's remainder vested on the widow's death, and went to his estate. The word "distribution" did not call for the meaning of actual physical distribution, which would subject the interest to fortuitous and extraneous circumstances beyond the control of both the remainderman and trustee. (230 C.A.2d 163.) (See *Estate of Steiner* (1966) 240 C.A.2d 78, 82, 49 C.R. 352.)

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3. Remainder Vested Subject to Open.

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[§ 135] Remainder Vested Subject to Open.

When a remainder is created in favor of a class of persons, such as "children," or "issue" of a living person who has one or more children, all persons then within the class ordinarily take vested remainders. If other children are subsequently born, the class "opens up" and each additional member, at birth, takes a remainder, cutting down the share of the others. Thus, the remainderperson (a child) or the person's successor is certain to acquire a present interest that can never be divested, but the extent of that interest is subject to possible decrease. (See *Gray v. Union Trust Co.* (1915) 171 C. 637, 643, 154 P. 306; *Estate of Stanford* (1957) 49 C.2d 120, 125, 315 P.2d 681; *Estate of Norris* (1947) 78 C.A.2d 152, 161, 177 P.2d 299; *Rest., Property* §157, Comment 1 et seq.; 3 Powell §20.04; 9 *Hastings L. J.* 319; on class gifts generally, see 3 Powell §30.01 et seq.; 28 *Am.Jur.2d* (2000 ed.), *Estates* §332 et seq.; on right of posthumous children to take interest, see C.C. 698.)

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12 Witkin Sum. Cal. Law Real Property § 136

[§ 136] Remainder Vested Subject to Complete Defeasance.

There may be a limitation in favor of a definite remainderperson who would take, but under which it is uncertain whether the remainderperson will acquire or retain a present interest. Thus, the remainderperson's interest may expire before the prior estate ends, or it may be divested or cut short after being acquired as a result of exercise of a power of appointment or power of termination. The remainder is vested, but is subject to divestment or defeasance. (See C.C. 781; *Gray v. Union Trust Co.* (1915) 171 C. 637, 643, 154 P. 306; *Estate of Murphy* (1920) 182 C. 740, 743, 190 P. 46; *Estate of Ferry* (1961) 55 C.2d 776, 783, 13 C.R. 180, 361 P.2d 900; *Rest., Property §157*, Comment o et seq.; 3 Powell §20.04; cf. *Estate of Baird* (1955) 135 C.A.2d 333, 336, 287 P.2d 365 [remainder in default of appointment]; 43 Cal. L. Rev. 910; but see *Rhoda v. Alameda* (1933) 134 C.A. 726, 732, 26 P.2d 691, *infra*, §140.)

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1. Nature of Contingent Interest.

12 Witkin Sum. Cal. Law Real Property § 137

[§ 137] Nature of Contingent Interest.

The Property Restatement §157, Comment u, refers to the last class of remainders as "subject to a condition precedent." ("Contingent remainder," the established term describing this type of interest, is not used in the Restatement, assertedly because of its looseness and uncertainty.) Here, it is not possible to point to a person who would take if prior interests ended. There may, however, be an identified remainderperson but a condition precedent--some event that must occur before the remainderperson can take, e.g., survivorship or reaching a certain age. (See *Estate of Ferry* (1961) 55 C.2d 776, 784, 13 C.R. 180, 361 P.2d 900 [alternative contingent remainders]; 3 Powell §20.04; 29 Cal. L. Rev. 290; 90 A.L.R.2d 312 [where will names two or more remainderpersons to take under different contingencies, must one whose contingency occurs survive other to make his or her interest transmissible]; 28 Am.Jur.2d (2000 ed.), Estates §252 et seq.; infra, §§140, 141.)

A remainder originally contingent becomes vested when the condition happens. (*Buttram v. Finley* (1940) 37 C.A.2d 459, 467, 99 P.2d 1093; Rest., Property §157, Comment d.)

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2. Doctrine of Destructibility Abolished.

12 Witkin Sum. Cal. Law Real Property § 138

[§ 138] Doctrine of Destructibility Abolished.

At common law, a remainder (as distinguished from an executory interest) could take effect only at the termination of the prior interest. If the prior interest terminated before the condition precedent happened, the remainder could not vest at that time and was extinguished. Under this doctrine, a life tenant could prematurely terminate the life estate, and destroy the contingent remainder, by a conveyance to a third person, by forfeiture, or by merger of the life tenancy with the reversion.

This doctrine was repudiated by the Property Restatement §240, and has been abolished in many states, including California. (See C.C. 741, 742; *Estate of Lefranc* (1952) 38 C.2d 289, 297, 239 P.2d 617 [holder of equitable life estate--income from trust--forfeited interest by contesting will; contingent remainders were unaffected]; *Briggs v. Briggs* (1954) 122 C.A.2d 766, 769, 265 P.2d 587 [holder of equitable life estate conveyed to stranger; same result]; 28 Am.Jur.2d (2000 ed.), *Estates* §378 et seq.)

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3. Acceleration.

12 Witkin Sum. Cal. Law Real Property § 139

[§ 139] Acceleration.

A prior interest such as a life tenancy may fail or terminate prematurely by invalidity, lapse, or renunciation. Whether the remainder may be accelerated, i.e., take effect at once, is an extremely technical question. (See *Rest., Property* §231 et seq.; 7 *A.L.R.4th* 1084 [relinquishment of interest by life beneficiary in possession]; 28 *Am.Jur.2d* (2000 ed.), *Estates* §365 et seq.; see also C.C. 780 [usually regarded as precluding acceleration].)

Insofar as trust income is concerned, the situation is governed by C.C. 733, stating that where "no valid direction for its accumulation is given, such income belongs to the persons presumptively entitled to the next eventual interest." In *Estate of Lefranc* (1952) 38 C.2d 289, 239 P.2d 617, A, the beneficiary, was given income for life, but forfeited her equitable life estate by contesting the will. *Held*, the income should go to N, the contingent remainderperson presumptively entitled to the next eventual interest. (38 C.2d 301.) (See *Estate of Robinson* (1968) 262 C.A.2d 32, 40, 68 C.R. 420 [following *Lefranc*].)

The doctrine was applied in *Estate of McNeill* (1964) 230 C.A.2d 449, 41 C.R. 139, where an admittedly void trust (for care of pets) was followed by a vested remainder to a charitable beneficiary. The charitable beneficiary took the interest. (230 C.A.2d 452.)

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4. Condition Precedent Though Remainderperson Ascertained.

12 Witkin Sum. Cal. Law Real Property § 140

[§ 140] Condition Precedent Though Remainderperson Ascertained.

A typical example of a condition precedent that prevents an ascertained remainderperson from taking is a remainder to R provided that he *survive* L, the life tenant. In *Estate of Washburn* (1910) 11 C.A. 735, 106 P. 415, the testator created a trust in favor of his wife and daughter or the survivor, with the provision that, on the death of the survivor, the trust should terminate and the property vest in H and C, the children of the daughter, "and such other children as may be born to her, or in such of them as shall then be living." *Held*, the remainders were contingent because of the uncertainty of any of the remainderpersons surviving the life tenant. (11 C.A. 742.) (See *Estate of Lefranc* (1952) 38 C.2d 289, 297, 239 P.2d 617; *Estate of Callnon* (1969) 70 C.2d 150, 158, 74 C.R. 250, 449 P.2d 186, citing the text; *Estate of Jameson* (1949) 93 C.A.2d 35, 38, 208 P.2d 54; *Estate of Haney* (1959) 174 C.A.2d 1, 8, 344 P.2d 16, *infra*, §142; 3 Powell §27.01 et seq.; 49 Cal. L. Rev. 297, 431; 28 Am.Jur.2d (2000 ed.), *Estates* §318 et seq.; 14 *Summary* (10th), *Wills and Probate*, §213.)

In *San Diego Trust & Savings Bank v. Heustis* (1932) 121 C.A. 675, 10 P.2d 158, a trust was created, the beneficiary to receive the income for 10 years and the corpus thereafter, unless he died during that period, in which case it was to go to others. *Held*, his interest in the corpus was a contingent remainder. (121 C.A. 694.) (See *Anglo Calif. Nat. Bank v. Kidd* (1943) 58 C.A.2d 651, 654, 137 P.2d 460.)

Difficulty is encountered, however, in distinguishing between conditions precedent and subsequent. In *Rhoda v. Alameda* (1933) 134 C.A. 726, 26 P.2d 691, the testator granted a life estate in trust to his wife, with the provision that upon her death it should vest in certain named children of F and A; and, in the event of death of any of the children before the wife's death, it should go to the survivors or issue of the deceased child by right of representation. The court held the remainders contingent because of the uncertainty of any of the children surviving the life tenant. (134 C.A. 732.) (See *Estate of Blake* (1910) 157 C. 448, 460, 108 P. 287.) It would seem more reasonable to hold them vested, subject to defeasance (see *supra*, §136), and this construction would follow the presumption in favor of vesting. (See 22 Cal. L. Rev. 704; 47 A.L.R.2d 900 [vested or contingent remainder created when will provides for children of remainderperson to take share of remainderperson who dies before expiration of precedent estate]; *infra*, §142.)

In *Estate of Zuber* (1956) 146 C.A.2d 584, 304 P.2d 247, *infra*, §169, title and the right to sell were in a

trustee-executor, the beneficiaries to receive the proceeds if they survived distribution. The court observed that, in the absence of a sale during administration, the right of the beneficiaries to ultimate distribution was fixed, and not subject to a condition precedent. Hence, "[t]he possibility of an executor's sale constitutes a conditional limitation upon the fee or a condition subsequent which defeats it." (146 C.A.2d 590.)

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5. Unascertained Remainderperson.

12 Witkin Sum. Cal. Law Real Property § 141

[§ 141] Unascertained Remainderperson.

A remainder to the child or children of a life tenant who has no children is contingent until the birth of a child. (See *Estate of Lefranc* (1952) 38 C.2d 289, 296, 239 P.2d 617; 57 A.L.R.2d 103.) And a remainder to the children of the life tenant living at the life tenant's death, or who survive the life tenant, is likewise contingent, because until the life tenant's death, the remainderpersons (those children who survive) cannot be ascertained. (See *Estate of Washburn* (1910) 11 C.A. 735, 742, 106 P. 415; 57 A.L.R.2d 197 [character of remainder limited to surviving children of life tenant].)

At common law, a remainder to the "heirs" or "heirs of the body" of a living person was contingent, because a living person had no heirs. (See 3 Powell §§31.01, 31.02.) This rule is applied in a number of California cases. (See *In re Shoemaker* (1931) 211 C. 457, 460, 295 P. 830; *Los Angeles v. Winans* (1910) 13 C.A. 234, 242, 109 P. 640; *Hall v. Wright* (1911) 17 C.A. 502, 506, 120 P. 429; cf. *Leonardini v. Wells Fargo Bank* (1955) 131 C.A.2d 9, 15, 280 P.2d 81.)

In *Gray v. Union Trust Co.* (1915) 171 C. 637, 154 P. 306, the trustor conveyed property in trust for her lifetime, with the provision that on her death it should "vest in her heirs at law according to the laws of succession of the State of California as such laws now exist." The court was of the opinion that this language identified the class that was to take, and that vested remainders were created. (171 C. 642.) The special language of the instrument perhaps distinguishes the case from the decisions cited above, but *Gray* has been criticized on this point. (See *Miller v. Oliver* (1921) 54 C.A. 495, 501, 202 P. 168; 21 Cal. L. Rev. 4, note 19.)

In *Briggs v. Briggs* (1954) 122 C.A.2d 766, 265 P.2d 587, a trust gave the life income and right to consume the corpus to B, with a general power to appoint by will, but, in default of appointment, a remainder to her heirs. *Held*, the heirs took a contingent remainder, and their interests could be defeated either by exercise of the power of appointment or by consumption of the assets, but not by a conveyance to a stranger (*supra*, §138). (122 C.A.2d 769.)

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e. Presumption of Vested Remainder.

12 Witkin Sum. Cal. Law Real Property § 142

[§ 142] Presumption of Vested Remainder.

The law favors the vesting of interests, and a court will construe the remainder to be vested, whenever possible. Hence, a condition will be construed as *subsequent* (divesting a vested remainder), rather than *precedent* (creating a contingent remainder); and statements of future time (e.g., "shall go to" or "shall vest in") will be construed as relating to possession rather than vesting. (See *Estate of Stanford* (1957) 49 C.2d 120, 124, 127, 315 P.2d 681; *In re De Vries* (1911) 17 C.A. 184, 189, 119 P. 109; *Miller v. Oliver* (1921) 54 C.A. 495, 498, 202 P. 168; *Estate of Norris* (1947) 78 C.A.2d 152, 167, 177 P.2d 299; *Bochte v. Chess* (1954) 124 C.A.2d 321, 325, 268 P.2d 493; *Estate of Newman* (1956) 146 C.A.2d 780, 781, 304 P.2d 748; but see *Rhoda v. Alameda* (1933) 134 C.A. 726, 732, 26 P.2d 691, *supra*, §140; and see *Estate of Easter* (1944) 24 C.2d 191, 195, 148 P.2d 601 [future language in decree of distribution, "shall go to and vest in," held to postpone vesting]; 32 Cal. L. Rev. 320 [Easter]; 9 Hastings L. J. 319 [Stanford]; 30 A.L.R.2d 127 [gift or grant to one upon marriage, if married, payable at marriage, or the like, as vested or contingent]; 28 Am.Jur.2d (2000 ed.), *Estates* §280 et seq.; for explanation and distinction of *Rhoda* and *Easter* cases, see *Estate of Newman*, *supra*, 146 C.A.2d 784, and *Estate of Stanford*, *supra*, 49 C.2d 130.)

Another illustration of this theory of interpretation is found in cases where a will or decree of distribution gives title to land subject to an obligation on the part of the devisee. It will, if possible, be construed to create an equitable charge or lien rather than a condition precedent to vesting of the estate. (*Buttram v. Finley* (1940) 37 C.A.2d 459, 468, 99 P.2d 1093.)

However, in *Estate of Haney* (1959) 174 C.A.2d 1, 344 P.2d 16, the court held that, notwithstanding the presumption, the use of the term "vest" in an *attorney-drawn will* makes clear the intention to impose the condition of survival. (174 C.A.2d 11.) Moreover, the present value of the presumption was doubted. "This asserted preference for a vested remainder is in part at least the vestigial remains of the rules of a past era of the law. It arose 'at an early period in English law' when contingent remainders were destructible and inalienable. ... The testatrix's intent should not be subordinate to a legalistic preference for vested interests. Here, the will and the decrees indicate that they were prepared by attorneys; most of those in the legal profession probably regard 'vest' as meaning 'vest in interest.' While it is true that if we were to accept respondents' theory of early vesting, future interests which otherwise would violate the rule against perpetuities could be saved, we question whether attorneys, and consequently their clients, who have not attempted to postpone vesting for longer than lives in being, plus 21 years, should be penalized in order to protect those who violate

this rule." (174 C.A.2d 11.)

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f. Rights of Remainderperson.

1. Against Life Tenant.

12 Witkin Sum. Cal. Law Real Property § 143

[§ 143] Against Life Tenant.

The remainderperson is entitled to enforce the duties and liabilities of the life tenant with respect to maintaining and protecting the property, refraining from waste, etc. (See *Rest., Property §187*; supra, §§30, 31; 56 *A.L.R.3d* 677 [action for waste by contingent remainder interest holder].) The holder of the remainder interest may enter on the property to see if waste is being committed (*Rest., Property §117*) and may sue for an injury to the inheritance even if he or she transfers the estate after commission of the act and has no interest in the property at the commencement of the action. (C.C. 826.) (See 47 *A.L.R.3d* 784 [rights with respect to crops]; for other problems involving life tenant and remainderperson, see 13 *Summary* (10th), *Trusts*, §166 et seq.)

A life tenant cannot defeat the future interest by attempted alienation or otherwise. (C.C. 741; *Rest., Property §187*; see *Dieterich Int. Truck Sales v. J. S. & J. Services* (1992) 3 *C.A.4th* 1601, 1610, 5 *C.R.2d* 388, *infra*, §403 [C.C. 741 prevented prescriptive easement from ripening against owner of future estate]; *infra*, §222 [no adverse possession]; supra, §138 [no destruction of contingent remainder].)

If the real property is sold by either involuntary or voluntary sale, the parties retain the same interests in the proceeds that they formerly had in the land and the usual apportionment must be made. Income goes to the life tenant and the principal to the remainderperson. If the life tenant transfers funds constituting the principal to a third party, the transferee takes only what the transferor had--a life interest--and the remainderperson is entitled to receive it back when the life tenant dies. (*Holman v. Holman* (1938) 25 *C.A.2d* 445, 455, 77 *P.2d* 515.)

The remainderperson may also maintain an action for partition. (C.C.P. 872.210; see supra, §67.)

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f. Rights of Remainderperson.

2. Against Third Parties.

12 Witkin Sum. Cal. Law Real Property § 144

[§ 144] Against Third Parties.

The remainderperson may maintain an action for damages or for an injunction against a third person whose acts threaten substantial injury to the remainderperson's interest. (*Rest., Property §211 et seq.*; see C.C. 826.) But during the life tenancy, the remainderperson cannot maintain a *possessory action* against an intruder; hence, the statute of limitations does not begin to run against the remainderperson until the life tenant dies. (See *Thompson v. Pacific Elec. Ry. Co.* (1928) 203 C. 578, 580, 265 P. 220; *Rhoda v. Alameda* (1933) 134 C.A. 726, 734, 26 P.2d 691; *Dieterich Int. Truck Sales v. J. S. & J. Services* (1992) 3 C.A.4th 1601, 1610, 5 C.R.2d 388, *infra*, §403 [citing *Thompson v. Pacific Elec. Ry. Co.*; actions under C.C. 826 are limited to cases of transitory, physical injury to land itself and do not include action by nonpossessory reversioner to prevent prescriptive easement]; *infra*, §222.) (On use and enforcement of easement by owner of future interest in dominant tenement, see C.C. 808, 809.)

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4. Powers of Appointment.

a. Nature of Powers.

12 Witkin Sum. Cal. Law Real Property § 145

[§ 145] Nature of Powers.

A power of appointment is a power given by the donor of property to the donee, which enables the donee to designate the persons (appointees) who are to take the property at some future time. (*Rest.2d, Property (Donative Transfers) §§11.1, 11.2, 12.1* [intent]; *Estate of Kuttler (1958) 160 C.A.2d 332, 337, 325 P.2d 624*; see *10 U.C.L.A. L. Rev. 241* [effect of indefiniteness on validity of powers of appointment]; C.E.B., 1 Will Drafting 3d, §§11.1 et seq., 16.1 et seq.; C.E.B., Estate Planning, Chap. 9; 3 Powell §33.01 et seq.; *62 Am.Jur.2d (2005 ed.), Powers of Appointment and Alienation §1* et seq.; 20 Am.Jur. P.P. Forms (1998 ed.), Powers, §3 et seq.)

In its 1980 Recommendation relating to Revision of the Powers of Appointment Statute, the California Law Revision Commission made the following Comments on the nature, purpose, and widespread use of powers of appointment (15 Cal. Law Rev. Com. Reports, p. 1673):

(1) "Powers of appointment have been aptly described as one of the most useful and versatile devices available in estate planning. ... A power of appointment is frequently included in an inter vivos or testamentary trust. In the typical situation, the creator of the trust transfers property in trust for the benefit of a designated person during that person's lifetime with a provision that, upon the death of the life beneficiary, the remaining property shall be distributed in accordance with an 'appointment' made by the life beneficiary or, occasionally, by the trustee or another person." (15 Cal. Law Rev. Com. Reports, p. 1673.)

(2) "Use of a power of appointment makes possible a disposition reaching into the future but with a flexibility that can be achieved in no other way. When a husband leaves his property in trust for the benefit of his wife during her lifetime and, upon her death, to such of their children and in such proportions as his wife may appoint, he makes it possible for the ultimate distribution to be made in accordance with changes that occur between the time of his death and the time of his wife's death. He has limited the benefits of his property to the objects of his bounty, but he has also permitted future distributions of principal and income to take account of changes in the needs of beneficiaries which he could not possibly have foreseen. Births, deaths, financial successes and failures, varying capacities of individuals, and fluctuations in income and property values can all be taken into account at the time of appointment. Moreover, the limitations imposed by the donor on the manner of exercising the power and the persons to whom appointments can be made give him substantial control of the property after he has transferred the power. He can make the power exercisable

during the lifetime of the donee (a power that is 'presently exercisable' or one that is 'postponed' until a stated event during the lifetime of the donee), or he can make the power exercisable only by will ('testamentary power'). He may permit the donee to appoint only among a specified group of persons, such as their children ('special power'), or he may create a broad power permitting the donee to appoint without limitation as to permissible appointees or to a group that includes the donee, her estate, her creditors, or creditors of her estate ('general power')." (15 Cal. Law Rev. Com. Reports, p. 1673.)

(3) "The most common use of powers today is in connection with the so-called marital deduction trust. Under this arrangement, the husband, for example, leaves his wife a sufficient portion of his estate to obtain full benefit of the marital deduction. She is given a life interest in such portion together with an unrestricted power to appoint the remainder, with a further provision in case she does not exercise the power. The transfer takes advantage of the marital deduction and yet, where the power of appointment may be exercised only by will, insures that the property will be kept intact during the wife's lifetime." (15 Cal. Law Rev. Com. Reports, p. 1674.)

(4) "If, on the other hand, the husband does not want to permit the wife to appoint the property to herself or her estate, he may give her a life estate with a power to appoint among only a small group of persons such as their children. In this case, the transfer is not eligible for the marital deduction but the husband has been able to direct the future disposition of the property; it must be kept intact during the wife's lifetime and, at her death, her right to dispose of the property is restricted to the appointees designated by the husband. Ownership of the special power of appointment does not subject the appointive property to taxation in the donee's estate." (15 Cal. Law Rev. Com. Reports, p. 1674.)

(5) "A power of appointment also may be used to accomplish other objectives. One common use of the power in modern times is to give the surviving spouse some degree of control over the conduct of the children after the death of the other spouse. For instance, the Commission is advised that a common provision in wills drafted by neighborhood law offices gives the surviving spouse a life estate in the dwelling house and gives the children the remainder, subject to a general power in the surviving spouse to appoint or consume as the surviving spouse sees fit. This provides the surviving spouse with protection against unexpected illness and debts, permits the property to pass to the children if they give care and attention to the surviving spouse, and permits the surviving spouse to exercise the power to cut off some or all of the children if so inclined. Such a provision is included in a will on the belief that, with this provision, the children will be solicitous of the surviving spouse, and without it, the surviving spouse will be neglected by the children." (15 Cal. Law Rev. Com. Reports, p. 1675.)

SUPPLEMENT: [This section is current through the latest supplement]
See 20 Am.Jur. P.P. Forms (2007 ed.), Powers §2 et seq.



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4. Powers of Appointment.

b. Powers of Appointment Act.

1. Statutory Development.

12 Witkin Sum. Cal. Law Real Property § 146

[§ 146] Statutory Development.

(1) *Original California Law.* The Civil Code originally contained detailed sections on powers, which were repealed in 1874. Nevertheless, statutes and decisions continued to recognize certain kinds; e.g., power of revocation in deed (C.C. 1229; *Tennant v. John Tennant Memorial Home* (1914) 167 C. 570, 572, 140 P. 242), and power of sale in mortgage or will (C.C. 2924; former Prob.C. 757). A power in trust, by which the donee of the power is directed to exercise it in a certain manner, was held subject to the same rules as trusts. (*Estate of Fair* (1901) 132 C. 523, 537, 60 P. 442, 64 P. 1000.)

In view of the repeal of the Civil Code sections, however, the existence of discretionary powers of appointment was for many years in doubt. (See 13 Cal. L. Rev. 1; 16 Cal. L. Rev. 1; 21 Cal. L. Rev. 1, 35.) Their validity was eventually established by several decisions. (See *Estate of Sloan* (1935) 7 C.A.2d 319, 322, 46 P.2d 1007; *Estate of Davis* (1936) 13 C.A.2d 64, 69, 56 P.2d 584; *Estate of Elston* (1939) 32 C.A.2d 652, 659, 90 P.2d 608; *Estate of Smythe* (1955) 132 C.A.2d 343, 351, 282 P.2d 141; *Estate of Kuttler* (1958) 160 C.A.2d 332, 338, 325 P.2d 624.) But, in the absence of a comprehensive statute or adequate body of case law, tedious research into the common law was necessary to solve the complex problems in this subject. (See 19 *Hastings L. J.* 1281, 1287.)

(2) *Adoption of Statute.* In 1968, the California Law Revision Commission recommended the adoption of a statute, similar to those that had been recently enacted in New York, Minnesota, Wisconsin, and Michigan. The proposed statute was enacted in 1969 as former C.C. 1380.1 et seq. (See 19 *Hastings L. J.* 1281 [summarizing scope and effect of statute].)

(3) *Relocation of Statute to Probate Code.* Former C.C. 1380.1 et seq. were repealed in 1992 and replaced by substantially similar provisions in Prob.C. 600 et seq. (See 21 Cal. Law Rev. Com. Reports, p. 95 [giving reasons for statute's relocation].)

(4) *Effective Date and Retroactivity.* The Powers of Appointment Act became operative on July 1, 1970, and it applies to the exercise or release of a power, or the assertion of a right under the Act (e.g., of the donee's creditor), after that date, even though the power was created before that time. However, a valid power created before the effective date

of the Act is unaffected by the statutory provisions. (*Prob.C. 601.*) And the revised procedure for releasing a power (see *infra*, §§162, 163) does not impair the validity of a release made before the effective date of the Act. (*Prob.C. 661(e).*)

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b. Powers of Appointment Act.

2. Definitions.

12 Witkin Sum. Cal. Law Real Property § 147

[§ 147] Definitions.

(1) "Donor" means the person who creates or reserves a power of appointment. (*Prob.C. 610(e).*)

(2) "Donee" means the person to whom a power of appointment is given or in whose favor a power is reserved. (*Prob.C. 610(d).*)

(3) "Appointee" means the person in whose favor a power of appointment is exercised. (*Prob.C. 610(a).*)

(4) "Permissible appointee" means a person in whose favor a power of appointment can be exercised. (*Prob.C. 610(f).*)

(5) "Appointive property" means the property or interest in property that is the subject of the power of appointment. (*Prob.C. 610(b).*)

(6) "Creating instrument" means the deed, will, trust agreement, or other writing or document that created or reserved the power of appointment. (*Prob.C. 610(c).*)

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b. Powers of Appointment Act.

3. Common Law Preserved.

12 Witkin Sum. Cal. Law Real Property § 148

[§ 148] Common Law Preserved.

The Powers of Appointment Act "does not codify all of the law relating to powers of appointment. Its provisions deal with the problems most likely to arise and afford positive statutory rules to govern these problems. Many minor matters are not covered by this title or other statutes; these are left to court decisions under the common law which remains in effect." (Law Rev. Com. Introductory Comments to *Prob.C. 600* et seq.)

Accordingly, except to the extent that the common law rules governing powers of appointment are modified by statute, the common law as to powers of appointment is the law of California. (*Prob.C. 600*; see *Estate of Rosecrans* (1971) 4 C.3d 34, 39, 92 C.R. 680, 480 P.2d 296, citing the text.) The "common law" does not refer to the common law as it existed in 1850; "rather, the reference is to the contemporary and evolving rules of decisions developed by the courts in exercise of their power to adapt the law to new situations and to changing conditions." (Law Rev. Com. Comment to *Prob.C. 600*; see 9 *Cal. Proc.* (4th), *Appeal*, §920.)

The principal source of the modern common law on this subject is *Rest.2d, Property (Donative Transfers) §11.1* et seq. (See 19 *Hastings L. J.* 1281, 1286.) Relevant sections of the Restatement are cited in many of the Law Revision Commission's Comments on the statutory provisions. In addition, the similarity of provisions in the laws of other states (see *supra*, §146) makes decisions of the higher courts of those states highly persuasive. (See 9 *Cal. Proc.* (4th), *Appeal*, §940.) The Commission's Comments frequently cite these similar statutes.

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Rule of decision:

Cross-Reference: 9 *Cal. Proc.* (5th), *Appeal*, §484.

Decisions of other states:

Cross-Reference: 9 *Cal. Proc.* (5th), *Appeal*, §504.



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4. Powers of Appointment.

c. Classification.

1. General and Special Powers.

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[§ 149] General and Special Powers.

(1) *General Power.* A power is general when it is exercisable in favor of the donee, the donee's estate, the donee's creditors, or creditors of the donee's estate. (*Prob.C. 611(a)*; see *Rest.2d, Property (Donative Transfers) §11.4*; *Estate of Rosecrans (1971) 4 C.3d 34, 40, 92 C.R. 680, 480 P.2d 296*, citing the text; *Estate of Kuttler (1958) 160 C.A.2d 332, 338, 325 P.2d 624*; C.E.B., 1 Will Drafting 3d, §16.11 et seq.; C.E.B., Estate Planning, §9.6 et seq.) A power is general if the donee can appoint to any one of these appointees; it does not have to give the donee a choice among all of them. (Law Rev. Com. Comment to *Prob.C. 611*.)

The Act expressly excludes from the category of general powers the following:

(a) A power "to consume, invade, or appropriate property" in discharge of the donee's obligation to support a person, when that obligation is limited "by an ascertainable standard" relating to the health, education, support, or maintenance of that person. (*Prob.C. 611(b)*.)

(b) A power exercisable by the donee "only in conjunction with a person having a substantial interest in the appointive property that is adverse" to the exercise in favor of the donee, the donee's estate, the donee's creditors, or creditors of the donee's estate. (*Prob.C. 611(c)*.)

(2) *Special Power.* All powers that are not general are special; i.e., a special power is one that permits the donee to appoint to a class that does not include the donee, the donee's estate, the donee's creditors, or the creditors of the donee's estate. (*Prob.C. 611(d)*, and Law Rev. Com. Comment; see *Rest.2d, Property (Donative Transfers) §11.4*; *Estate of Smythe (1955) 132 C.A.2d 343, 351, 282 P.2d 141*.)

(3) *Mixed Powers.* A power may be general as to part of the appointive property and special as to the rest. (*Prob.C. 611(e)*.)

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4. Powers of Appointment.

c. Classification.

2. Testamentary and Presently Exercisable Powers.

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[§ 150] Testamentary and Presently Exercisable Powers.

(1) *Testamentary Power.* A testamentary power is one that is exercisable only by a will; if it can be exercised by either will or inter vivos instrument, it is not a testamentary power. (*Prob.C. 612(a)*; *Estate of Parker (1950) 98 C.A.2d 393, 394, 220 P.2d 580*; *Estate of Baird (1955) 135 C.A.2d 333, 336, 287 P.2d 365*; *Estate of Kuttler (1958) 160 C.A.2d 332, 339, 325 P.2d 624.*)

The subject matter of a general testamentary power is not the property of the donee during the donee's lifetime for purposes of inheritance from the donee. (*Estate of Sevegney (1975) 44 C.A.3d 467, 472, 118 C.R. 728.*)

(2) *Presently Exercisable Power.* A power is "presently exercisable" if at the time in question an irrevocable appointment can be made. (*Prob.C. 612(b).*)

Under these definitions a power may not be testamentary, but still may not be presently exercisable, if it is "postponed"; i.e., if it may be exercised only after an act or event occurs or a condition is met, or if its exercise is revocable until an act or event occurs or a condition is met. (*Prob.C. 612(c)*, and Law Rev. Com. Comment; see *Rest.2d, Property (Donative Transfers) §11.5.*)

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3. Imperative and Discretionary Powers.

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[§ 151] Imperative and Discretionary Powers.

A power is imperative when the creating instrument manifests an intent that "the permissible appointees be benefited even if the donee fails to exercise the power." If the donee does not exercise it during the donee's lifetime, the court will divide the property among the potential appointees. (*Prob.C. 613.*) The power may be imperative even though the donee may select some and exclude others of the permissible appointees. (*Prob.C. 613.*)

All other powers are discretionary; the donee is privileged to exercise or not to exercise the power. (*Prob.C. 613.*) If the donee fails to exercise it, the property will pass to the takers in default or to the donor's estate. (Law Rev. Com. Comment; *Prob.C. 672*, *infra*, §165.)

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4. Powers of Appointment.

d. Creation of Powers.

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[§ 152] Creation of Powers.

(1) *Capacity of Donor.* The donor must have "the capacity to transfer the interest in property to which the power relates." (*Prob.C.* 620; see *infra*, §259.)

(2) *Rule Against Perpetuities.* The Statutory Rule Against Perpetuities (*Prob.C.* 21200 et seq., *infra*, §175) applies to powers of appointment. (*Prob.C.* 690.)

(3) *Irrevocable Unless Power Is Reserved.* Ordinarily, the creation of a power is irrevocable. The two exceptions are: (a) where a power of revocation is reserved in the instrument; (b) where the power is created in connection with a trust, and the trust is revocable under *Prob.C.* 15400. (*Prob.C.* 695(a).) (See *Rest.2d, Property (Donative Transfers) §15.1.*) Under *Prob.C.* 15400, a trust is revocable unless expressly made irrevocable by the instrument creating it (see 13 *Summary* (10th), *Trusts*, §195); hence, a power of appointment in connection with a trust is also revocable unless the trust is expressly made irrevocable. (Law Rev. Com. Comment to *Prob.C.* 695.) (For comprehensive discussion of Restatement of Property rule on revocation and case law, applicable to instruments made before enactment of California statute, see *Estate of Wood* (1973) 32 *C.A.3d* 862, 869, 108 *C.R.* 522; 14 *Santa Clara Lawyer* 429 [*Wood*]; 60 *A.L.R.3d* 143 [revocation or amendment of exercise of power to appoint future interest, after exercise by inter vivos instrument].)

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e. Exercise of Powers.

1. Donee's Capacity.

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[§ 153] Donee's Capacity.

A power of appointment can be exercised only by a donee having the capacity to transfer the interest in property to which the power relates. (*Prob.C. 625(a)*; see *Rest.2d, Property (Donative Transfers) §18.1*; 1 C.E.B., Will Drafting 3d, §11.13 et seq.; 19 *A.L.R.4th* 1002 [validity of testamentary exercise of power by donee sane when will was executed but insane thereafter].) Unless the instrument creating the power provides otherwise, "a donee who is a minor may not exercise a power of appointment during minority." (*Prob.C. 625(b)*.)

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2. Donee's Authority.

12 Witkin Sum. Cal. Law Real Property § 154

[§ 154] Donee's Authority.

(1) *Requirements of Instrument Are Binding.* With some exceptions, the donee must comply with any requirements laid down in the creating instrument "as to the manner, time, and conditions" of exercise of the power. (*Prob.C.* 630(a); see *Rest.2d, Property (Donative Transfers)* §§12.2, 18.2; 3 *Powell* §33.15.)

Will forms may contain "blanket" clauses exercising all the testator's powers of appointment, and this may cause unfavorable tax consequences or appointment to unintended beneficiaries. To protect against this result, the donor may require that the donee, in exercising the power, specifically refer to the power or to the creating instrument. (*Prob.C.* 632, and see *Law Rev. Com. Comment.*) (See *15 A.L.R.4th* 810 [sufficiency of exercise of power specifying that it can be exercised only by specific or direct reference thereto].)

(2) *Exception: Power Exercisable Inter Vivos.* Even if the donor directs that the power be exercised by an inter vivos instrument, the objective of the power may be accomplished just as well by a will. Accordingly, "a power stated to be exercisable by an inter vivos instrument is also exercisable by a written will," unless the donor expressly prohibits testamentary exercise. (*Prob.C.* 630(b).)

(3) *Exception: Judicial Relief From Requirements of Instrument.* Where an appointment fails to satisfy the formal requirements laid down in the creating instrument, the court may excuse the noncompliance and hold the appointment effective, if (a) "[t]he appointment approximates the manner of appointment prescribed by the donor," and (b) the noncompliance "does not defeat the accomplishment of a significant purpose of the donor." (*Prob.C.* 631(a).)

The Law Revision Commission explains that this provision was drawn from *Rest.2d., Property (Donative Transfers)* §18.3, but is not limited to the favored class of appointees described in the Restatement (see *infra*, §164). It is also consistent with the holding in *Estate of Wood* (1973) 32 *C.A.3d* 862, 881, 108 *C.R.* 522 [defective exercise of power of appointment upheld on grounds of substantial compliance and no harm to donor's presumed purpose]. The formal requisites from which equitable relief may be obtained under the statute include those that are significant as well as those of minor significance, but *Prob.C.* 631(b) provides that a court may not excuse compliance with a specific reference requirement under *Prob.C.* 632. (*Law Rev. Com. Comment to Prob.C.* 631.)

Prob.C. 631 only applies to donor-imposed requirements that exceed the requirements imposed by law for the appointment instrument. (*Catch v. Phillips* (1999) 73 C.A.4th 648, 653, 86 C.R.2d 584 [citing *Estate of Wood* and Law Revision Commission Comments; trustor's exercise of general testamentary power of appointment over trust was not valid, where it was not exercised by will or codicil as required by trust's terms; appointing document, which was not witnessed, did not satisfy legal prerequisites for will or codicil].)

(4) *Requirement of Consent.* If the creating instrument requires the consent of the donor or another person to exercise the power, the required consent must be contained in the instrument of exercise or in a separate written instrument, both signed by the consenting person. (*Prob.C. 633(a).*) The consent may be given before or after the exercise of the power. (*Prob.C. 633(b)(3).*)

Unless the donor expressly prohibits it: (a) The required consent is excused if the person whose consent is required dies. (*Prob.C. 633(b)(1).*) (b) If the person becomes legally incapable of consenting, the person's guardian or conservator may consent to an exercise of the power. (*Prob.C. 633(b)(2).*)

(5) *Two or More Donees.* If the power is created in favor of two or more donees, all must unite in its exercise. (C.C. 1385.4.) However, unless the donor expressly prohibits it, the power may be exercised by the others, if one donee dies or becomes legally incapable of exercising the power or releases it. (*Prob.C. 634.*)

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3. Donee's Intent.

aa. In General.

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[§ 155] In General.

The donee must manifest an intent to exercise the power. (*Prob.C. 640(a)*; see *Rest.2d, Property (Donative Transfers) §17.1.*) The Act lists typical methods, but the list is illustrative, not exclusive. (*Prob.C. 640(c)*.) The intent is manifested where:

(1) The donee declares, in substance, that the donee exercises the specific power or all powers that the donee has. (*Prob.C. 640(b)(1)*; see *Rest.2d, Property (Donative Transfers) §17.2*; 3 Powell §33.14.)

(2) The donee "purports to transfer an interest in the appointive property that the donee would have no power to transfer except by virtue of the power." (*Prob.C. 640(b)(2)*.)

(3) The donee makes a disposition that, when considered with reference to the property the donee owned and the circumstances existing at the time of the disposition, manifests the donee's understanding that he or she was disposing of the appointive property. (*Prob.C. 640(b)(3)*.) (See *Childs v. Gross (1940) 41 C.A.2d 680, 689, 107 P.2d 424*; *Rest.2d, Property (Donative Transfers) §§17.4, 17.5*; 3 Powell §33.14; 16 A.L.R.3d 951 [nontestamentary transaction, pecuniary bequest, or specific devise or bequest]; 62 *Am.Jur.2d (2005 ed.)*, *Powers of Appointment and Alienation*, §143 et seq.)

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3. Donee's Intent.

bb. Residuary Clause or General Language.

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[§ 156] Residuary Clause or General Language.

(1) *Former Case Law and Original Act.* A devise or bequest in general terms of all of the testator's property is not a "manifestation of the donee's intent to exercise the power," as required by *Prob.C. 640(a)* (*supra*, §155). But California courts held that general language would constitute an exercise of the power, even though the testator did not intend to do so. (See *Childs v. Gross* (1940) 41 C.A.2d 680, 687, 107 P.2d 424; *California Trust Co. v. Ott* (1943) 59 C.A.2d 715, 717, 140 P.2d 79; *United Calif. Bank v. Bottler* (1971) 16 C.A.3d 610, 615, 94 C.R. 227 [applying rule to special power]; 14 *Summary* (10th), *Wills and Probate*, §247.)

Former C.C. 1386.2 also gave the general language the effect of exercising a general power unless (a) the donor had required that the donee make specific reference to the power or to the instrument that created it, or (b) the donee manifested an intent, either expressly or by necessary inference, not to exercise the power. (See *Estate of Eddy* (1982) 134 C.A.3d 292, 299, 184 C.R. 521; 19 *Hastings L. J.* 1281, 1291.) The rule was subjected to much criticism, and the Law Revision Commission recommended adoption of the contrary Uniform Probate Code provisions. (15 Cal. Law Rev. Com. Reports, p. 1675 et seq.) The 1981 Legislature followed the Commission's recommendation.

(2) *Current Statute.* A general residuary clause in a will, or a will making general disposition of all of the testator's property, does not exercise a power of appointment held by the testator unless specific reference is made to the power or there is some other indication of intention to exercise the power. (*Prob.C. 641(a)*.)

Under *Prob.C. 641*, "a general disposition of property in the donee's will may exercise a power of appointment if there is some other indication of intent to include the appointive assets in the disposition made. Such other indication of intent to exercise the power may be found in the will or in other evidence apart from the will. ... An exercise of a power of appointment may be found if a preponderance of the evidence indicates that the donee intended to exercise the power." However, *Prob.C. 641* does not apply "where the donor has conditioned the exercise of the power on a specific reference to the power or to the instrument that created the power or has specified a specific method of exercise of the power." (15 Cal. Law Rev. Com. Reports, pp. 1686, 1687.) (See *Rest.2d, Property (Donative Transfers)* §17.3; 3 *Powell* §33.14; 15 *A.L.R.3d* 346 [disposition of all or residue of testator's property as sufficient exercise of power--in absence of

statutes]; 16 *A.L.R.3d* 911 [disposition of all or residue of testator's property as sufficient exercise of power--effect of statutes]; 62 *Am.Jur.2d* (2005 ed.), *Powers of Appointment and Alienation* §§121 et seq., 131 et seq.; 10 Proof of Facts 2d 669 [testator's intent to exercise power of appointment].)

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cc. Will Executed Before Power Is Created.

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[§ 157] Will Executed Before Power Is Created.

The fact that the donee's will was made before the power was created normally does not prevent the will from operating as an effective exercise of the power. (*Prob.C. 642*; see *California Trust Co. v. Ott* (1943) 59 C.A.2d 715, 717, 140 P.2d 79; *Estate of Cox* (1970) 8 C.A.3d 168, 194, 87 C.R. 55; *Rest.2d, Property (Donative Transfers) §17.6*.) However, the previously executed will does not constitute an exercise of the power if (1) the donor has manifested the intent that the power may not be exercised by a previously executed will, or (2) the donee's will manifests an intent not to exercise a power subsequently acquired. (*Prob.C. 642(a), (b)*.) (See 62 Am.Jur.2d (2005 ed.), *Powers of Appointment and Alienation* §101 et seq.)

The following distinction should be noted: A donor executes a will creating a testamentary power, the donee executes a will exercising the power, and then the donee predeceases the donor. The power is not validly exercised, for it must be one "existing at the donee's death" (*Prob.C. 642*), and it is not, for the donor can change his or her will at any time before the donee dies. (Law Rev. Com. Comment to *Prob.C. 642*.)

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4. Types of Appointments.

aa. General and Special Powers.

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[§ 158] General and Special Powers.

(1) *General Power.* The donee of a general power has the same freedom of disposition that the donee has over his or her own property. (Law Rev. Com. Comment to *Prob.C. 650*; see *supra*, §149.) *Prob.C. 650(a)* lists the usual kinds: all the property at one time, or at different times, present or future interests, subject to conditions or charges, subject to lawful restraints on alienation, in trust, or creating a new power of appointment. The list is illustrative and nonexclusive. (*Prob.C. 650(b)*.) (For decisions before Act, see *Estate of Rosecrans* (1971) 4 C.3d 34, 40, 92 C.R. 680, 480 P.2d 296; *Estate of Kuttler* (1958) 160 C.A.2d 332, 338, 325 P.2d 624; and see *Keville v. Hollister Co.* (1972) 29 C.A.3d 203, 207, 105 C.R. 238; *Rest.2d, Property (Donative Transfers)* §§19.1, 19.2; 22 So. Cal. L. Rev. 270 [general powers of appointment; ineffective appointments]; 94 A.L.R.3d 895 [power to appoint realty in fee or personalty absolutely as including power to appoint lesser estate or interest].)

(2) *Special Power.* The donee of a special power does not have the same freedom of disposition; the donee must observe the limitations in the creating instrument. (See *supra*, §149.) However, subject to those limitations, the donee may make any of the types of appointment that the donee of a general power may make. (*Prob.C. 651*; *Estate of Berdrow* (1992) 5 C.A.4th 637, 643, 7 C.R.2d 37 [donee of testamentary special power could make appointment conditional on appointee's survival of donee].) Thus, the donee may give a permissible appointee a new special power to appoint instead of appointing the property outright to the appointee. But creation of a new power or appointment of a future interest may subject the appointment to a method of computing the period of the rule against perpetuities different from that applicable to a general power. (Law Rev. Com. Comment to *Prob.C. 651*.) (For decisions before Act, see *Estate of Elston* (1939) 32 C.A.2d 652, 659, 90 P.2d 608; *Estate of Smythe* (1955) 132 C.A.2d 343, 351, 282 P.2d 141; and see *Rest.2d, Property (Donative Transfers)* §§19.3, 19.4, 20.2 et seq.; *Estate of Dailey* (1982) 130 C.A.3d 993, 998, 182 C.R. 95, *infra*, §159.)

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4. Types of Appointments.

bb. Exclusive and Nonexclusive Powers.

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[§ 159] Exclusive and Nonexclusive Powers.

(1) *Exclusive*. Where the donee is authorized to appoint one or more of the permissible appointees and exclude others, the power is "exclusive." (*Prob.C. 652(a)*.) This is clearly the case, e.g., where the instrument provides that the property shall go to "such children of B as B shall by will appoint." (See *Rest.2d, Property (Donative Transfers) §21.1*.)

In *Estate of Dailey (1982) 130 C.A.3d 993, 182 C.R. 95*, the testator's will gave general legacies of \$ 5,000 "to each of the individuals who have rendered personal services to me on a steady and faithful basis during the six months preceding my death. My executor, in its absolute discretion, shall determine which individuals so qualify." (*130 C.A.3d 996*.) *Held*, this was a special power of appointment; and, while the donee was directed as to the amount, he did have the sole power to determine which persons qualified. (*130 C.A.3d 998, 999*.)

(2) *Nonexclusive*. Where the donor "specifies either a minimum or maximum share or amount" to be appointed to one or more of the permissible appointees, this direction must of course be followed; i.e., the power is nonexclusive. (*Prob.C. 652(b)*); see *Rest.2d, Property (Donative Transfers) §21.2*; 3 *Powell* §33.15; 19 *Hastings L. J.* 1281, 1296; 69 *A.L.R.2d* 1285 [modern view of powers of appointment as exclusive or nonexclusive]; 62 *Am.Jur.2d (2005 ed.)*, *Powers of Appointment and Alienation* §157 et seq.)

(3) *Constructional Preference for Exclusive Powers*. If the donor does not so specify, how should the instrument be construed? Under the former California rule, the preferred construction was for a nonexclusive power. (See *Estate of Sloan (1935) 7 C.A.2d 319, 321, 339, 46 P.2d 1007* [on death of donee son, property to go "to the heirs of said [donee] as per his last will and testament"; son's will, leaving all to one aunt and excluding other heirs, held improper].) The Act changed the rule to conform to the Restatement (see *Rest.2d, Property (Donative Transfers) §21.1*), and established a constructional preference for exclusive powers: Except as the donor may specify minimum or maximum shares, the donee may appoint the whole or any part of the property "to any one or more of the permissible appointees" and exclude others. (*Prob.C. 652(a)*); see *Estate of Berdrow (1992) 5 C.A.4th 637, 643, 7 C.R.2d 37* [exclusive exercise of special power of appointment that did not specify appointees' shares]; 19 *Hastings L. J.* 1288.)

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5. Revocability.

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[§ 160] Revocability.

The donee should ordinarily be permitted to modify or revoke the exercise of the power until the assets have been effectively transferred. Accordingly, unless the donor in the creating instrument expressly makes the exercise irrevocable, or the donee expressly so states in the instrument of exercise, the exercise is revocable "so long as the interest in the appointive property, whether present or future, has not been transferred or become distributable pursuant to the appointment." (*Prob.C. 695(b)*; see 8 Cal. Western L. Rev. 439 [revocability of powers of appointment in California]; *Rest.2d, Property (Donative Transfers) §15.2*.)

Revocability may also result when the donee exercises the power by creating a trust for the benefit of permissible appointees. Under *Prob.C. 15400*, the trust is revocable, and so is the power, unless the trust is expressly made irrevocable. (*Prob.C. 695(b)*; see 13 *Summary* (10th), *Trusts*, §195.)

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f. Contract To Appoint.

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[§ 161] Contract To Appoint.

(1) *Power Presently Exercisable.* If the donee of either a general or special power can make an immediate appointment, the donee can make a valid contract to appoint to the same extent. (*Prob.C. 660(a)*; see *Rest.2d, Property (Donative Transfers) §16.1.*)

(2) *Power Not Presently Exercisable.* Where the power is testamentary or postponed (see *supra*, §150), a contract to appoint would indirectly defeat the donor's intent that the appointment should not be effective until the donee's death or at the other time specified. Hence, the donee "cannot contract to make an appointment while the power of appointment is not presently exercisable." (*Prob.C. 660(b).*) An agreement that has this effect is prohibited; e.g., where a will makes an appointment in favor of a person, a contract with the person under which the testator agrees not to revoke the will is in substance a promise to appoint. (Law Rev. Com. Comment.) The promisee of a prohibited promise cannot obtain specific performance or damages for breach, but may have restitution. (*Prob.C. 660(b)*; see *Rest.2d, Property (Donative Transfers) §16.2.*)

The broad language of *Prob.C. 660(b)* is inappropriate where the donor and the donee are the same person. Hence, the donee may contract in that situation; i.e., unless the instrument expressly provides that the donee may not contract, *Prob.C. 660(b)* does not apply. "In this case, the donee can contract to make an appointment to the same extent that the donee could make an effective appointment if the power of appointment were presently exercisable." (*Prob.C. 660(c)*; see *10 Pacific L. J. 259.*)

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g. Release of Power.

1. Authority and Limitations.

12 Witkin Sum. Cal. Law Real Property § 162

[§ 162] Authority and Limitations.

(1) *Authority.* Ordinarily, in the absence of an express restriction by the donor, a discretionary power may be released. This is so whether the power is general or special, testamentary or otherwise. (*Prob.C. 661(a)*; see *Rest.2d, Property (Donative Transfers) §14.1* et seq.; 3 Powell §§33.09, 33.10; 19 *Hastings L. J.* 1281, 1289.) The release may be of the whole or any part of the property, or it may reduce or limit the permissible appointees. But "[n]o partial release of a power shall be deemed to make imperative the remaining power that was not imperative before the release" unless the release expressly so provides. (*Prob.C. 661(b)*.)

(2) *Limitations.* If the power is testamentary, it cannot be exercised by an inter vivos act. (See *supra*, §150.) A release to all except a designated person would have the same effect as an inter vivos appointment to that person, and thus would defeat the donor's intent. Hence, the Act originally prohibited any release of a power not presently exercisable. This absolute prohibition was criticized by the Law Revision Commission as inconsistent with the right to disclaim a power for the purpose of avoiding undesired tax consequences, and the Commission proposed the substitution of the New York rule permitting release under proper circumstances. (15 Cal. Law Rev. Com. Reports, pp. 1678, 1679, 1689.) Accordingly, the prohibition was removed in 1981. "No release of a power that is not presently exercisable is permissible where the donor designated persons or a class to take in default of the donee's exercise of the power unless the release serves to benefit all persons designated as provided by the donor." (*Prob.C. 661(b)*.)

(3) *Irrevocability.* Unless the power to revoke is reserved in the release, it is irrevocable. (*Prob.C. 695(c)*.)

(4) *Release by Guardian.* A release on behalf of a minor donee must be made by the guardian of the minor's estate under a court order obtained under *Prob.C. 662*. (*Prob.C. 662(a)*; on procedure, see *infra*, §163.)

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g. Release of Power.

2. Procedure.

12 Witkin Sum. Cal. Law Real Property § 163

[§ 163] Procedure.

(1) *Delivery of Written Instrument.* The release may be made with or without consideration, but must be a written instrument signed by the donee and delivered as provided in *Prob.C. 661(c)*. (*Prob.C. 661(a)*.) The procedure is as follows:

(a) If the creating instrument specifies a person to whom it is to be delivered, the release must be delivered to that person, unless the person cannot with due diligence be found. (*Prob.C. 661(c)(1)*.)

(b) If the property is held by a trustee, the release must be delivered to the trustee. (*Prob.C. 661(c)(2)*.)

(c) In other cases, the release may be delivered to (1) any person, other than the donee, who could be adversely affected by the exercise of the power, or (2) the county recorder of the county in which the donee resides or in which the creating instrument is filed. (*Prob.C. 661(c)(3)*.)

Prob.C. 661(c) deals only with delivery of a release, and does not preclude recording a release delivered in accordance with *Prob.C. 661(c)(1)*, (c)(2), or (c)(3). (Law Rev. Com. Comment.)

(2) *Recordation of Release Affecting Real Property.* The release of a power of appointment that affects real property or obligations secured by real property must be acknowledged and proved, and may be certified and recorded, just as grants of real property are. All statutory provisions relating to the recordation or nonrecordation of conveyances of real property and to the effect of recordation apply to a release, regardless of when the release was delivered, if at all, under *Prob.C. 661(c)*. Failure to deliver a release that is recorded under *Prob.C. 661(d)* does not affect the validity of any transaction with respect to the real property or obligation secured thereby, and the general laws of California on recording and its effect govern the transaction. (*Prob.C. 661(d)*.)

Prob.C. 661(d) makes clear that a subsequent purchaser or encumbrancer, in good faith and for a valuable consideration, who first records is protected. The unrecorded instrument is valid as between the parties and those who have notice if the instrument is otherwise effective. (Law Rev. Com. Comment.)

(3) *Release by Guardian*. The procedure for release by a guardian is comparable to that set forth in the Guardianship-Conservatorship Law (*Prob.C. 2580 et seq.*, 14 *Summary* (10th), *Wills and Probate*, §1025 et seq.). (See Law Rev. Com. Comment to *Prob.C. 662*.)

(a) *Petition*. The guardian "or other interested person" may file a petition with the court in which the guardianship of the estate proceeding is pending, for an order authorizing or requiring the guardian to release the ward's powers as a donee in whole or in part. (*Prob.C. 662(b)*.)

(b) *Notice of hearing*. Notice must be given as provided in *Prob.C. 1460 et seq.* (see 14 *Summary* (10th), *Wills and Probate*, §910 et seq.) to (1) the persons required to be given notice under *Prob.C. 1460 et seq.*; (2) the donor of the power, if alive; (3) the trustee, if the property is held by a trustee; (4) other persons as ordered by the court. (*Prob.C. 662(c)*.)

(c) *Order*. The court in its discretion may make an order authorizing or requiring the guardian to release any general or special power as permitted by *Prob.C. 661* "if the court determines, taking into consideration all the relevant circumstances, that the ward as a prudent person would make the release of the power of appointment if the ward had the capacity to do so." (*Prob.C. 662(d)*.)

(d) *No duty to petition*. Nothing in *Prob.C. 662* imposes a duty on the guardian to file a petition, and the guardian is not liable for failure to file a petition. (*Prob.C. 662(e)*.)

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4. Powers of Appointment.

h. Ineffective or No Appointment.

1. In General.

12 Witkin Sum. Cal. Law Real Property § 164

[§ 164] In General.

(1) *Partly Unauthorized Appointment.* The exercise of a power partly in favor of an unauthorized person, or an appointment of an excessive amount in favor of a permissible appointee, is void only as to the unauthorized part. It is "valid to the extent that the exercise was permissible under the terms of the power." (*Prob.C. 670*; see *Rest.2d, Property (Donative Transfers) §20.1*, 23.1; 3 *Powell §33.18*; *C.E.B.*, 1 *Will Drafting 3d*, §11.7 et seq.; 62 *Am.Jur.2d (2005 ed.)*, *Powers of Appointment and Alienation §182* et seq.)

(2) *Nonexercise of Imperative Power.* If the donee dies without having exercised an imperative power, either wholly or in part, the persons designated as permissible appointees "take equally of the property not already appointed." And where the donor establishes a minimum distribution requirement that is not satisfied by an equal division of the property not already appointed, appointees who have received a partial appointment must "return a pro rata portion of the property they would otherwise be entitled to receive" in an amount sufficient to meet the minimum. (*Prob.C. 671(a)*.) These rules, however, do not apply where the creating instrument, or the donee in writing, manifests a contrary intent. (*Prob.C. 671(a)*.) (See 3 *Powell §33.19*; 62 *Am.Jur.2d (2005 ed.)*, *Powers of Appointment and Alienation §196* et seq.; for similar result before Act on failure to appoint under special power, see *Estate of Smythe (1955) 132 C.A.2d 343, 351, 282 P.2d 141*; *Rest.2d, Property (Donative Transfers) §24.2*.)

If the living donee fails to exercise an imperative power in favor of a person with a right to it, that person, or the person's assigns, creditors, guardian, or conservator, can compel its exercise. (*Prob.C. 671(c)*.)

(3) *Defective Exercise of Imperative Power.* If the donee fails to observe proper formalities in exercising the power, in whole or in part, a court may nevertheless give the appointment its intended effect in favor of the person to be benefited. (*Prob.C. 671(b)*, 635; *Rest.2d, Property (Donative Transfers) §18.3* [equity will give effect to defective exercise of power in favor of wife, child, etc.]; on *Prob.C. 631*, which authorizes judicial relief from defective compliance with formalities specified in instrument creating power of appointment (discretionary or imperative), see *supra*, §154.)

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h. Ineffective or No Appointment.

2. Failure To Make Effective Appointment.

12 Witkin Sum. Cal. Law Real Property § 165

[§ 165] Failure To Make Effective Appointment.

If the donee of a discretionary power fails to exercise it, or releases it, or makes an ineffective appointment, the property passes to the person named by the donor as taker in default or, if there is none, reverts to the donor. (*Prob.C. 672(a)*; see *Rest.2d, Property (Donative Transfers) §24.1*; on taker in default as appointee, see *Rest.2d, Property (Donative Transfers) §§24.3, 24.4*; for same result before Act on failure to appoint under general power, see *Estate of Baird (1953) 120 C.A.2d 219, 226, 260 P.2d 1052*; *Briggs v. Briggs (1954) 122 C.A.2d 766, 769, 265 P.2d 587*; 43 *Cal. L. Rev. 910*; 22 *So. Cal. L. Rev. 270*.)

If the donee of a general power of appointment makes an ineffective appointment, an implied alternative appointment to the donee's estate may be found if the donee has manifested an intent that the appointive property be disposed of as property of the donee rather than as in default of appointment. (See *Prob.C. 672(b)*; see *Law Rev. Com. Comment [Prob.C. 672 adopts substance of common law doctrine of capture or implied alternative appointment to donee's estate]*; 3 *Powell §33.17*; 15 *Cal. Law Rev. Com. Reports*, pp. 1681, 1682, 1692; *Rest.2d, Property (Donative Transfers) §23.2*.)

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h. Ineffective or No Appointment.

3. Death of Appointee Before Appointment.

12 Witkin Sum. Cal. Law Real Property § 166

[§ 166] Death of Appointee Before Appointment.

(1) *Surviving Issue of Appointee.* The original antilapse provision in former C.C. 1389.4 was limited (by incorporating the antilapse provision of the Probate Code) to "kindred" of a deceased appointee. The Law Revision Commission pointed out that this limitation was more likely to defeat the donee's intent than to carry it out, and recommended its abolition. (15 Cal. Law Rev. Com. Reports, pp. 1682 et seq., 1693.) The statute was therefore amended to adopt the general rule of representation in the revised Probate Code.

"[I]f an appointment by will or by instrument effective only at the death of the donee is ineffective because of the death of an appointee before the appointment becomes effective and the appointee leaves issue surviving the donee, the surviving issue of the appointee take the appointed property in the same manner as the appointee would have taken had the appointee survived the donee, except that the property passes only to persons who are permissible appointees," including appointees permitted under *Prob.C. 674*. If the surviving issue are all of the same degree of kinship to the deceased appointee, they take equally, but if of unequal degree, then those of more remote degree take in the manner provided in *Prob.C. 240*. (*Prob.C. 673(a)*.)

Prob.C. 673 does not apply if either the donor or donee manifests an intent that some other disposition of the appointive property must be made. (*Prob.C. 673(b)*; see *Rest.2d, Property (Donative Transfers) §§18.5, 18.6*.)

In *Estate of Berdrow* (1992) 5 C.A.4th 637, 7 C.R.2d 37, the heirs of a deceased appointee argued that former C.C. 1389.4 entitled them to receive the share that had been apportioned to him in the donee's will, contingent on his survival of the donee. *Held*, the reliance on former C.C. 1389.4 was misplaced.

(a) The statute does not apply when apportionment of a share of the estate is expressly contingent on the appointee's survival or some other fact. (5 C.A.4th 643.)

(b) Even if the donee in this case had unconditionally appointed a share to the deceased appointee, the statute would defeat his heirs' claim, because the donee manifested an intent to make a different disposition in a residuary clause directing that failed or lapsed gifts pass to another beneficiary. (5 C.A.4th 644.)

(2) *Surviving Issue of Permissible Appointee.* "Unless the creating instrument expressly provides otherwise, if a permissible appointee dies before the exercise of a special power of appointment, the donee has the power to appoint to the issue of the deceased permissible appointee, whether or not the issue was included within the description of the permissible appointees, if the deceased permissible appointee was alive at the time of the execution of the creating instrument or was born thereafter." (*Prob.C. 674(a).*) *Prob.C. 674* applies whether the special power of appointment is exercisable by inter vivos instrument, by will, or otherwise. (*Prob.C. 674(b).*)

A special power of appointment is usually designed to permit flexibility in the ultimate disposition of the property by permitting the donee to take into account changing family circumstances. Permitting the donee to select not only among the primary class members but also among the issue of those who are deceased is necessary to permit effectuation of the donor's purpose. *Prob.C. 674* applies the principle of the antilapse statute to this situation without regard to whether the substitute takers are included within the permissible appointees. (Law Rev. Com. Comment.)

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4. Powers of Appointment.

i. Rights of Creditors Under General Power.

1. Creditors of Donee.

12 Witkin Sum. Cal. Law Real Property § 167

[§ 167] Creditors of Donee.

Property covered by a special power is not subject to claims of creditors of the donee or the donee's estate, or to expenses of administration of the donee's estate. (*Prob.C. 681.*) (See *Rest.2d, Property (Donative Transfers) §13.1.*)

Where the power is general, and in consequence the donee has the equivalent of ownership, the creditors are entitled to reach the property, after exhausting the rest of the donee's assets, whether or not the power has been exercised. (*Prob.C. 682*; see *Rest.2d, Property (Donative Transfers) §13.2* et seq. [creditors permitted to treat exercise as fraudulent conveyance]; *Rest.2d, Property (Donative Transfers) §13.6* [trustee in bankruptcy given authority by federal statute to take and exercise presently exercisable general power]; 3 Powell §§33.05, 33.06; C.E.B., 1 Will Drafting 3d, §16.31 et seq.; 19 *Hastings L. J.* 1281, 1294; 62 *Am.Jur.2d* (2005 ed.), *Powers of Appointment and Alienation* §§215, 219 et seq.)

Property that is subject to a general power that is presently exercisable is subject to creditors' claims "to the same extent that it would be subject to the claims if the property were owned by the donee." (*Prob.C. 682(a).*) Property that is subject to a general testamentary power or general power that was presently exercisable at the time of the donee's death is likewise subject to creditors' claims and to expenses of administration to the same extent as if it had been owned by the donee. (*Prob.C. 682(b).*) *Prob.C. 682* applies whether or not the power has been exercised. (*Prob.C. 682(c).*)

These rights cannot be nullified by the donor in the creating instrument. (*Prob.C. 680.*)

For purposes of *Prob.C. 682*, a person to whom the donee owes an obligation of support will be considered a creditor of the donee to the extent that a legal obligation exists for the donee to provide support. (*Prob.C. 684.*)

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2. Creditors of Donor.

12 Witkin Sum. Cal. Law Real Property § 168

[§ 168] Creditors of Donor.

If the donor creates a power of appointment in the donor's own favor as donee, the donor's creditors can reach the property, even if the power is not presently exercisable. (*Prob.C. 683.*) And where the donor is the donee, the rights of creditors cannot be nullified by a provision in the creating instrument. (*Prob.C. 680, supra, §167.*)

For purposes of *Prob.C. 683*, "a person to whom the donee owes an obligation of support shall be considered a creditor of the donee to the extent that a legal obligation exists for the donee to provide the support." (*Prob.C. 684.*) *Prob.C. 684* makes clear that the donee's support obligations can be enforced against property subject to a general power of appointment that is presently exercisable and property subject to an unexercised power of appointment created in the donor's own favor, whether or not presently exercisable. (Law Rev. Com. Comment.)

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5. Transferability of Future Interests.

12 Witkin Sum. Cal. Law Real Property § 169

[§ 169] Transferability of Future Interests.

(1) *In General.* "Future interests pass by succession, will, and transfer, in the same manner as present interests." (C.C. 699; see *Rest., Property* §159 et seq. [transfer inter vivos]; §§164, 165 [succession and testamentary disposition]; §166 et seq. [subjection to claims of creditors]; §170 et seq. [partition]; 3 Powell §22.01 et seq.)

(2) *Power of Termination.* Under the Property Restatement (§160), a power of termination (or right of reentry) is not strictly a reversionary interest (see supra, §129) and is not transferable, and an attempt to transfer it destroys the power. However, in California a power of appointment is expressly made transferable. (See C.C. 1046; *Johnston v. Los Angeles* (1917) 176 C. 479, 485, 168 P. 1047; *Childs v. Newfield* (1934) 136 C.A. 217, 221, 28 P.2d 924; *Thornton v. Middletown Educational Corp.* (1937) 21 C.A.2d 707, 709, 70 P.2d 234; *Shields v. Bank of America* (1964) 225 C.A.2d 330, 338, 37 C.R. 360, supra, §130; 3 Powell §§22.03, 22.05; 53 A.L.R.2d 224 [validity and effect of transfer of possibility of reverter or right of reentry following conveyance of determinable fee or fee subject to condition subsequent]; 28 *Am.Jur.2d* (2000 ed.), *Estates* §212 et seq.)

(3) *Remainders.* There is no distinction between vested and contingent remainders so far as alienability and descendibility are concerned: both are transferable. (*Gray v. Union Trust Co. of San Francisco* (1915) 171 C. 637, 642, 154 P. 306; *Sinclair v. Crabtree* (1931) 211 C. 524, 528, 296 P. 79; *Estate of Ferry* (1961) 55 C.2d 776, 785, 13 C.R. 180, 361 P.2d 900; *Caldwell v. Rosenberg* (1941) 47 C.A.2d 143, 146, 117 P.2d 366; *Anglo Calif. Nat. Bank v. Kidd* (1943) 58 C.A.2d 651, 655, 137 P.2d 460 [contingent remainder transferable by sale, etc., but not subject to execution by creditors]; see 3 Powell §§22.04, 22.05; 28 *Am.Jur.2d* (2000 ed.), *Estates* §374 et seq.)

In *Estate of Zuber* (1956) 146 C.A.2d 584, 304 P.2d 247, decedent left property in trust to G, trustee. The beneficiaries, German nationals, were to receive their bequests and the proceeds of an executor's sale only in the event that they survived distribution. The Alien Property Custodian (succeeded by the Attorney General) made a vesting order under statutory authority to seize "any property or interest." *Held*, the seizure of the estate assets was lawful, and distribution should be made to the Attorney General. Assuming that the condition was precedent and that the interests were therefore contingent remainders (or, in the old terminology, executory devises), they were nevertheless not mere expectancies but future estates in property and transferable under C.C. 699. This being so, they were subject to seizure, despite the California rule that a contingent future interest is not subject to execution. The immunity from execution is not based upon the theory that there is a mere expectancy and no property interest, but rather upon the policy of

protecting the judgment debtor from a forced sale of the contingent interest at a grossly inadequate price. (146 C.A.2d 596.)

(4) *Contingent Option To Repurchase.* In *Alamo School Dist. v. Jones* (1960) 182 C.A.2d 180, 6 C.R. 272, the grantor in 1878 conveyed land to the trustees of plaintiff school district, "[s]ubject however to the right of party of first part to purchase said land herein described. Should same ever be abandoned for School purposes, for same consideration herein mentioned." (182 C.A.2d 183.) Held, defendants, the grantor's successors, had no interest. Invoking the rule of construction against forfeitures (see supra, §19), the court pointed out that there was no express condition of continued use for school purposes, and that the language was that customarily used in an option. (182 C.A.2d 186.) The interest, therefore, was a contingent option to repurchase. And it was personal to the grantor, because (a) policy favors a construction of nonassignable personal covenant rather than condition subsequent (182 C.A.2d 190; see supra, §19), and (b) if not so construed the interest would be void under the rule against perpetuities (182 C.A.2d 191; see infra, §187).

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6. Principal and Income Law.

12 Witkin Sum. Cal. Law Real Property § 170

[§ 170] Principal and Income Law.

(1) *Nature of Act.* In 1941 California adopted the Uniform Principal and Income Act (former C.C. 730 et seq.), governing the allocation of receipts and expenditures between income and principal. The original Act applied to both trusts and legal estates. It was repealed in 1967 and replaced by the Revised Uniform Principal and Income Act (former Prob.C. 16300 et seq.). In 1999, the Revised Uniform Principal and Income Act was repealed and replaced by the Uniform Principal and Income Act (*Prob.C. 16320 et seq.*, 13 *Summary* (10th), *Trusts*, §167). The Uniform Principal and Income Act applies to trusts and decedent's estates. Similar problems of life tenants and remainderpersons of legal estates are covered by the Legal Estates Principal and Income Law of 1968 (C.C. 731 et seq.), essentially a reenactment of the original Uniform Act. (See *51 Am.Jur.2d* (2000 ed.), *Life Tenants and Remaindermen* §122 et seq.)

The Legal Estates Law became operative July 1, 1968, and applies to "all transactions by which a principal was established without the interposition of a trust on or after September 13, 1941." (C.C. 731.02.)

(2) *Direction of Manner of Ascertainment.* The person establishing the principal may direct the manner of ascertainment of income and principal and the apportionment of receipts and expenses or grant discretion to the tenant or other person to do so. (C.C. 731.04.)

(3) *Termination of Tenant's Right to Income.* If the life tenant dies or otherwise loses the right to the income, all amounts previously paid to the tenant belong to the tenant or the tenant's personal representative; all income received after termination goes to the person next entitled to income by the terms of the transaction by which the principal was established. (C.C. 731.06; on distribution of income after termination of income interest, see *Prob.C. 16340*, 13 *Summary* (10th), *Trusts*, §§174, 175.)

(4) *Bonds.* The increase in value of bonds or securities is ordinarily regarded as part of the principal. However, where bonds bear no stated interest but are redeemable at maturity or some future date for an amount in excess of their issue price, the accretion, when realized, is income. (C.C. 731.08; on allocation of accretion of bonds, see *Prob.C. 16357*, 13 *Summary* (10th), *Trusts*, §181.)

(5) *Stocks.* All cash dividends and dividends in securities of other corporations are income. Dividends of stock in the declaring corporation, of the same kind and rank as that on which the dividend is paid, are principal; and, regardless

of the kind and rank, to the extent that they represent capitalization of surplus not derived from earnings, they are principal. (C.C. 731.07(a).) Specific rules deal with purchase rights, dividends on liquidation of corporate assets, mergers, consolidations, and reorganization. (C.C. 731.07; on allocation of stock dividends in trust property, see *Prob.C. 16350*, 13 *Summary* (10th), *Trusts*, §178.)

(6) *Proceeds of Delayed Sale of Unproductive Property*. Where principal has not produced an average net income of at least one percent for more than a year, and the tenant is under a duty to change the form of investment, the proceeds from a delayed sale are apportioned between principal and income. (C.C. 731.13(a); see C.C. 731.13(b) [formula for apportionment]; for rules applicable to sale of unproductive trust property, see *Prob.C. 16365*, 13 *Summary* (10th), *Trusts*, §185.)

(7) *Apportionment of Expenses*. The rules on apportionment of expenses are contained in C.C. 731.15. As with the other provisions of C.C. 731 et seq., the general rules on allocation of expenses may be modified by the person who establishes the principal. (See C.C. 731.04; on allocation of disbursements from property held in trust, see *Prob.C. 16370* et seq., 13 *Summary* (10th), *Trusts*, §§189, 190.)

(8) *Other Rules*. The Legal Estates Principal and Income Law also provides for apportionment where the tenant is permitted to use the principal in continuance of a business (C.C. 731.09); where part of the principal consists of animals (C.C. 731.10); where part consists of lands with timber, oil, minerals, or other natural resources (C.C. 731.11); where part consists of property subject to depletion (C.C. 731.12); and where the tenant acquires property by reason of the enforcement of a mortgage or other hypothecation securing obligations that were part of the principal (C.C. 731.14). (See *Haskell v. Wood* (1967) 256 C.A.2d 799, 804, 64 C.R. 459 [former Uniform Act not cited; royalties from oil and gas lease, where no producing well was in existence at time estate was created, were principal, and interest on royalties was income].)

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1. Common Law.

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[§ 171] Common Law.

At common law, the general policy in favor of alienation of property and against tying up interests for undue periods led to the establishment of the *rule against perpetuities*, sometimes termed the *rule against remoteness of vesting*. A majority of American states followed the common law rule. The rule against suspension of the absolute power of alienation, originating in the New York code, was also established by statute in a number of states, including California. (On history of rules, see Rest.2d, Property (Donative Transfers), p. 5 et seq.; 10 Powell, Chap. 71 et seq.; 37 Cal. L. Rev. 1; 9 Hastings L. J. 262.)

The common law rule against perpetuities is most often stated in Professor Gray's formulation: "No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest." (See 20 Cal. Law Rev. Com. Reports, p. 2511.) At common law and under early California statutes, the interest was tested for validity as of the time of its creation, and the likelihood or high probability that it would vest in time was immaterial. The mere possibility that some events could occur that could result in the postponement of vesting beyond the period rendered the interest void. (See *Estate of Campbell* (1938) 28 C.A.2d 102, 105, 82 P.2d 22; *Haggerty v. Oakland* (1958) 161 C.A.2d 407, 418, 326 P.2d 957.)

The origin and purpose of the rule were described in *Wong v. Di Grazia* (1963) 60 C.2d 525, 533, 35 C.R. 241, 386 P.2d 817, as follows: "The rule against perpetuities originated as a rule of property law during the mercantilistic period of English history. ... The social order of 1682 demanded as to its property transactions certainty in title and fixation of ownership; the idea of titles which had not vested or ownership which remained inchoate was necessarily anathema. Indeed, the basic purpose of the rule was to limit family dispositions, and in that context the period of lives in being plus 21 years served as a proper measurement. Only later by an overextension of nineteenth century concepts did the courts apply the rule to commercial transactions." (See 61 Am.Jur.2d (2002 ed.), *Perpetuities and Restraints on Alienation* §6; for statutory and judicial development of rule, see 74 Cal. L. Rev. 1867; 78 Harv. L. Rev. 973; 20 San Diego L. Rev. 733; 61 Am.Jur.2d (2002 ed.), *Perpetuities and Restraints on Alienation* §11 et seq.)

Because the rule against remoteness of vesting is one of public policy, its operation is not waived by failure to raise the point in the trial court; it will be considered even though it is being raised for the first time on appeal. (*United Calif. Bank v. Bottler* (1971) 16 C.A.3d 610, 616, 94 C.R. 227.)

The rule against suspension of alienation was abolished in California in 1959. A distinguishable statutory rule with a somewhat similar purpose is directed against accumulations for longer than an allowable period. Its main application is in the field of trusts. (See 13 *Summary* (10th), *Trusts*, §37.)

West's Key Number Digest, Perpetuities k.1 et seq.

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2. Restatement.

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[§ 172] Restatement.

Volume 1 of Restatement Second, Property (Donative Transfers) deals with the rule against perpetuities and other restraints on donative transfers. The subject was chosen because of its importance in family estate planning, and the approach, scope, and nature of the treatment are discussed in the Foreword, the Introduction, and the Introductory Note to Division I. (See pp. VII et seq., 1 et seq., 3 et seq.)

(1) *Scope*. "It is concerned with the body of law that in the interest of some overriding social policy limits the nature of the property interests a donor can create or the restraints he can effectively impose. It deals, therefore, with the rule against perpetuities and related limitations on the power to postpone or inhibit alienations; with the validity of various restraints on personal conduct, such as marriage, separation and divorce, religious practice and affiliation, education, occupation, or habitual activity; and with restraints upon a donee's interference with or challenge to the donor's plan of disposition." (Foreword, p. VII.)

(2) *Substance*. The American Law Institute, after considerable debate, adopted the "wait-and-see" approach to vesting (see *infra*, §174), which at the time was the law in a small minority of jurisdictions. "The episode is a useful reminder that the Institute in its restatement work does not deem itself to be constrained by a count of jurisdictions, but rather undertakes to weigh all of the considerations relevant to the development of common law that our policy calls on the highest courts to weigh in their deliberations." (Foreword, p. VIII.)

(3) *Organization*. Division I, entitled "Social Restrictions Imposed Upon The Creation Of Property Interests By Donative Transfers," is in four parts, additionally divided into chapters, as follows:

Part I. The Rule Against Perpetuities And Related Rules As Applied To Donative Transfers.

Chapter One. The Rule Against Perpetuities as Applied to Donative Transfers. (§§1.1-1.6.)

Chapter Two. The Period of the Rule Against Perpetuities Used in Donative Transfers for Purposes Other Than Controlling the Time of Vesting. (§§2.1, 2.2.)

Part II. Direct Restraints On Alienation In Donative Transfers.

Chapter Three. Definitions. (§§3.1-3.4.)

Chapter Four. Validity of Restraints on Alienation. (§§4.1-4.5.)

Part III. Provisions In Restraint Of Personal Conduct.

Chapter Five. General Rules. (§§5.1, 5.2.)

Chapter Six. Restraints on Marriage. (§§6.1-6.3.)

Chapter Seven. Provisions Relating to Family Relationships. (§§7.1, 7.2.)

Chapter Eight. Provisions Relating to Religion, Personal Habits, and Education or Occupation. (§§8.1-8.3.)

Part IV. Restraints On Interference With Transferor's Dispositive Plan.

Chapter Nine. Restraints on Contests and Restraints on Attacking Fiduciaries. (§§9.1, 9.2.)

Chapter Ten. Restraints on Enforcing Obligations of the Transferor or of the Transferor's Estate and Restraints on Asserting Any Right to Other Property Owned or Disposed of by the Transferor. (§§10.1, 10.2.)

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3. Development of California Law.

a. Constitution and Early Statutes.

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[§ 173] Constitution and Early Statutes.

(1) *Constitution.* The California Constitution originally provided that "[n]o perpetuities shall be allowed except for eleemosynary purposes." (Former Cal. Const., Art. XX, §9.) This statement was regarded as embodying merely a general declaration of policy, rather than a specific rule; however, it was later declared to embody the technical common law rule against perpetuities. (See *Estate of McCray* (1928) 204 C. 399, 404, 268 P. 647; *Estate of Sahlender* (1948) 89 C.A.2d 329, 346, 201 P.2d 69 [California had both rule against restraints on alienation and rule against remoteness of vesting]; 21 Cal. L. Rev. 1, 14; 37 Cal. L. Rev. 510; 14 So. Cal. L. Rev. 483.) The constitutional provision was repealed in 1970 and restated without change in former C.C. 715.

(2) *Former Civil Code Provisions.* Former California Civil Code provisions, largely derived from the New York statutory system, were mainly directed against *suspension of the absolute power of alienation*, by either present or future interests. One version of former C.C. 715 (enacted in 1872 and repealed in 1951) provided that the absolute power of alienation could not be suspended for longer than lives in being or for more than 25 years, and former C.C. 716 made the prohibited future interest void in its creation. Other sections also made certain types of future interests void because of remoteness of vesting. (See former C.C. 773 [fee may be limited on fee, on contingency]; former C.C. 776 [contingent remainder after term of years]; former C.C. 774 [successive estates for life, those to unborn persons void]; former C.C. 777 [remainder for life to unborn person, after term of years]; 9 *Hastings L. J.* 262 [suspension rule and other California statutory restrictions on trusts and future interests].)

(3) *Statutory Revisions.* Criticism of the former California rules was mainly directed at the differing periods of allowable suspension and vesting, which created the danger of invalidity under one rule despite careful compliance with the other. (See *Estate of Sahlender*, *supra*, 89 C.A.2d 346.) The principal statutory solution was the repeal in 1951 of former C.C. 715 and the enactment of former C.C. 715.1 and 715.2. The new sections restated both rules in clear and comprehensive form, and adopted the same period (the common law lives in being plus 21 years). (On 1951 legislation generally, see *Victory Oil Co. v. Hancock Oil Co.* (1954) 125 C.A.2d 222, 227, 230, 270 P.2d 604; *Haggerty v. Oakland* (1958) 161 C.A.2d 407, 417, 326 P.2d 957; 4 *Hastings L. J.* 101; 9 *Hastings L. J.* 262, 263.) Further revision occurred in 1959. (See 48 Cal. L. Rev. 134; 18 *Hastings L. J.* 247.) Far-reaching changes were made in 1963:

(a) Enactment of a provision for reformation of the interest (*cy pres* doctrine). (Former C.C. 715.5; on present

provisions for reformation, see *infra*, §186.)

(b) Allowance of an alternative 60-year period for vesting. (Former C.C. 715.6; on present 90-year period, see *infra*, §178 et seq.)

(c) Provision for unborn spouse as life in being. (Former C.C. 715.7; on provision, see *infra*, §180.)

(d) Enactment of an alternative liberal definition of "vesting" of future interests. (Former C.C. 715.8.)

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b. Reform Proposals.

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[§ 174] Reform Proposals.

The rule against perpetuities was under constant attack by legal scholars, and reforms were adopted in a number of jurisdictions. (See *Wong v. Di Grazia* (1963) 60 C.2d 525, 530, footnotes 3, 4, 35 C.R. 241, 386 P.2d 817; 65 Harv. L. Rev. 721 [criticisms and proposals]; 67 Harv. L. Rev. 1349 [legislative developments]; 70 Harv. L. Rev. 1411 [English proposals]; 15 U.C.L.A. L. Rev. 420 [proposed reforms in light of scientific advancements].)

One of the most significant changes was the adoption of the "wait and see" doctrine, which permits the court, when passing on the validity of an interest, to take cognizance of events that have occurred after the creation of the interest. (See 6 U.C.L.A. L. Rev. 165, 167; for opposing view, see 8 Stanf. L. Rev. 765, 766; 20 Stanf. L. Rev. 459 [recommending rule of "discrete invalidity," validating or invalidating interest for each possible sequence of events].)

The Restatement adopted the wait-and-see doctrine (see *Rest.2d, Property (Donative Transfers) §1.4*; 74 Cal. L. Rev. 1867, 1880; 19 Santa Clara L. Rev. 1063), as did the Uniform Statutory Rule Against Perpetuities (see *Prob.C. 21205(b)*, *infra*, §178).

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c. Adoption of Uniform Statutory Rule Against Perpetuities.

1. In General.

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[§ 175] In General.

(1) *Approval by Commissioners.* The Uniform Statutory Rule Against Perpetuities ("Uniform Statute") was approved by the National Conference of Commissioners on Uniform State Laws in 1986. The text of the Uniform Statute, the Prefatory Note, and the Official Comments are in 8B U.L.A. (Master Ed.), p. 223 et seq. The provisions of the Uniform Statute have also been incorporated into the Uniform Probate Code. (See 8 (Part 1) U.L.A. (Master Ed.), p. 223 et seq.) (For criticism of Uniform Statute, see 34 *U.C.L.A. L. Rev.* 1023.) The elaborate Prefatory Note contains a detailed treatment of the background law and the nature, purpose, and effect of the Uniform Statute's provisions.

(2) *California Adoption.* By 1989 the Uniform Statute had been adopted in 11 states. The California Law Revision Commission recommended adoption in California in 1990. (20 *Cal. Law Rev. Com. Reports*, p. 2501; see *infra*, §176.) In 1991, California became the 12th state to adopt the Uniform Statute. As of 2004, 25 states and the District of Columbia had adopted it. (8B U.L.A. (Master Ed.), p. 223.)

(3) *Statutory Provisions.* The 1991 Legislature added Part 2 to Division 11 of the Probate Code, entitled "Perpetuities." Chapter 1 (*Prob.C. 21200* et seq.) enacts the Uniform Statutory Rule Against Perpetuities, and Chapter 2 (*Prob.C. 21230, 21231*) deals with related provisions. (See generally C.E.B., 3 *Will Drafting* 3d, §34.1 et seq.) Chapter 1 is known and may be cited as the Uniform Statutory Rule Against Perpetuities. (*Prob.C. 21200*.)

(4) *Retroactive Application of Part 2.* *Prob.C. 21200* et seq. apply to nonvested property interests and unexercised powers of appointment regardless of whether they were created before, on, or after January 1, 1992. (*Prob.C. 21202(a)*.) They do not apply, however, to "any property interest or power of appointment the validity of which has been determined in a judicial proceeding or by a settlement among interested persons." (*Prob.C. 21202(b)*.) The Uniform Statute differs: Its application is prospective.

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2. Law Revision Commission Recommendation.

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[§ 176] Law Revision Commission Recommendation.

(1) *Background.* The California Law Revision Commission noted that the common law rule against perpetuities, expressed in Gray's formulation (see *supra*, §171), can operate harshly, because the rule invalidates a disposition if there is any conceivable possibility that it will violate the rule, regardless of whether it is likely to do so, and regardless of how reasonable the disposition appears. (20 Cal. Law Rev. Com. Reports, p. 2511.) The Commission also noted that the history of the rule in California is "convoluted and confusing." It has developed through decades of judicial interpretation, reassessment, and refinement, and periodic legislative attempts at classification. (20 Cal. Law Rev. Com. Reports, p. 2511.) "The harshness of judging the validity of nonvested interests at the time of their creation is mitigated by a *cy pres* provision permitting reform of instruments to avoid violation of the rule. Knowledgeable lawyers will also insert a perpetuity saving clause as appropriate to avoid violating the rule against perpetuities." (20 Cal. Law Rev. Com. Reports, p. 2512.) The Commission felt that the Uniform Statute "provides a simple, easily administered rule" and "offers the best hope for achieving uniformity among the states." (20 Cal. Law Rev. Com. Reports, p. 2513.)

(2) *Summary of Uniform Statute.* "The Uniform Statute adopts a 90-year wait-and-see period during which nonvested interests have the opportunity to work out, without the need to engage in speculation on possibilities required under the common law rule against perpetuities. The Uniform Statute accomplishes this by retaining the common law rule as a validating rule, but suspends its operation as an invalidating rule for the 90-year wait-and-see period running from the creation of the interest. The 90-year waiting period was chosen by the drafters of the Uniform Statute as an approximation of (or proxy for) the common law period of lives in being plus 21 years." (20 Cal. Law Rev. Com. Reports, p. 2513.) "On petition of an interested person, a court may exercise a *cy pres* power to reform the disposition to approximate the donative transferor's manifested plan of distribution. The right of reformation does not arise until it is necessary. Generally, a disposition that violates the common law rule is not in need of reformation until the 90-year period expires or, in the case of a class gift, when a member of a class is entitled to enjoyment of a share before the expiration of the 90-year period." (20 Cal. Law Rev. Com. Reports, p. 2514.)

(3) *Statement of the Rule.* The Uniform Statute provides a simplified form of the rule stated in former C.C. 715.2: A "nonvested property interest is invalid" unless when it is created "it is certain to vest or terminate no later than 21 years after the death of an individual then alive" or it "vests or terminates within 90 years after its creation." (20 Cal. Law

Rev. Com. Reports, p. 2514.) "Thus, the common law rule against perpetuities continues as a validating principle, but the invalidating side of the rule is postponed in operation during the 90-year waiting period." (20 Cal. Law Rev. Com. Reports, pp. 2514, 2515.)

(4) *Cy Pres Doctrine*. California enacted a *cy pres* rule in 1963 (former C.C. 715.5), but its reliance on judicial remedies was inefficient and potentially expensive. (20 Cal. Law Rev. Com. Reports, p. 2515.) The Uniform Statute provides a *cy pres* rule, but makes resort to it unlikely because the 90-year waiting period should solve most problems. "Since the common law rule does not act to invalidate a disposition until the 90-year period has expired, the right of reformation under the Uniform Statute does not generally arise until it becomes useful, i.e., at the end of the waiting period. However, in the case of a class gift, where a member of a class is entitled to enjoyment of a share before that time, the disposition may be reformed on petition of an interested person. The *cy pres* standard under the Uniform Statute differs from the California standard, providing for reformation in the manner that 'most closely approximates the transferor's manifested plan of distribution.'" (20 Cal. Law Rev. Com. Reports, p. 2515.)

(5) *Application to Existing Interests*. The proposed law adopting the Uniform Statute applied to all interests, whether created before or after the operative date of January 1, 1992. "The 90-year wait-and-see period would afford nonvested interests under existing instruments the chance to work out in the normal course of events without any need to seek reformation. In other words, retroactive application of the proposed law would not have the effect of invalidating any vested interests. Instruments would not have to be reviewed or redrafted even though they were executed before the operative date of the new law. Perpetuity saving clauses used under existing law would continue to be valid and useful under the proposed law, and there would be no advantage in redrafting in an effort to employ the 90-year period in a perpetuity saving clause." (20 Cal. Law Rev. Com. Reports, p. 2519.) "Applying one rule to all nonvested interests, regardless of their date of creation, has a number of advantages over a dual system. It avoids the need to determine which law applies in a particular case and the expense and trouble resulting from the incorrect determination. It makes unnecessary any republication or reexecution of pre-operative date instruments to come under the new law." (20 Cal. Law Rev. Com. Reports, p. 2519.)

(6) *Illustration of Operation of Common Law, California Rule, and Uniform Statute*. "Suppose that A gives property in a testamentary trust to his daughter D for life, and the remainder to D's children who reach 25. Assume that D is alive at A's death." (20 Cal. Law Rev. Com. Reports, p. 2520.)

Under the *common law rule*, this disposition would fail because the remainder interest could fail to vest within 21 years after D's death. Under *California law* [before the adoption of the Uniform Statute], the interest could be saved by a petition to reform under [former] C.C. 715.5; the court could reduce the required age of D's children from 25 to 21 years, or in appropriate circumstances the will might be construed to provide that the remainder beneficiaries included only A's grandchildren alive at A's death. In addition, legal scholars have urged that courts consider inserting an appropriate perpetuity saving clause in the course of reformation to preserve the 25-year contingency where possible. "Under the Uniform Statute, we would wait up to 90 years following A's death to see if the rule has been violated. In a normal case, this will be more than enough time and the property will pass as directed. If the rule is violated at the end of the waiting period, such as where a grandchild was born after A's death and will not reach age 25 before the 90th anniversary of A's death, reformation would be appropriate under the Uniform Statute." (20 Cal. Law Rev. Com. Reports, p. 2520.)

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c. Adoption of Uniform Statutory Rule Against Perpetuities.

3. Common Law Superseded.

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[§ 177] Common Law Superseded.

(1) *General Rule.* *Prob.C. 21200* et seq. supersede the common law rule against perpetuities. (*Prob.C. 21201.*) However, California and most other states follow Rest., Property §375, in holding that, if an instrument is ambiguous, a construction favoring validity is preferred. And "it is expected that the courts will incline toward the construction that validates the disposition. ... The constructional preference for validity is not superseded ... , but its role is likely to be different" under *Prob.C. 21200* et seq. The preference now will be to construe an instrument so that it will be initially valid under the validating provisions of the new statute (*Prob.C. 21205(a), 21206(a), 21207(a)*; see infra, §178 et seq.), rather than eventually valid under the "wait-and-see" provisions (*Prob.C. 21205(b), 21206(b), 21207(b)*; see infra, §178 et seq.). (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2544.)

(2) *Specific Common Law Provisions.* The California Law Revision Commission Report discusses the effect of *Prob.C. 21200* et seq. on the following specific common law provisions:

(a) *Conclusive presumption of lifetime fertility.* At common law, a woman was conclusively presumed, for the purpose of determining the possibility of remote vesting, to be capable of bearing children as long as she lived. This was so even if the woman, by reason of age or other incapacity, could not in fact have children. This presumption was justified on the practical ground that the age limit and other factors of sterility cannot be precisely drawn, and that to allow the inquiry would produce undesirable litigation. (See *Rest.2d, Property (Donative Transfers) §1.4*, Comment h; for other discussion and criticism of rule, see 74 *Cal. L. Rev.* 1867, 1876; 98 *A.L.R.2d* 1285 [modern status of presumption].)

This principle is not superseded by *Prob.C. 21200* et seq. Because of "the widely accepted rule of construction that adopted children are presumptively included in class gifts, the conclusive presumption of lifetime fertility is not unrealistic. Since even elderly individuals probably cannot be excluded from adopting children based on their ages alone, the possibility of having children by adoption is seldom extinct." (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2544.)

(b) *Doctrine of infectious invalidity.* At common law, the invalidity of an interest could be held to invalidate one or

more otherwise valid interests, depending on whether the general dispositive scheme of the transferor would be better carried out by eliminating only the invalid interest or by eliminating other interests as well. The doctrine is superseded by *Prob.C. 21220* (infra, §186), under which the court is required to reform the disposition to approximate as closely as possible the transferor's manifested plan of distribution. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2545.)

(c) *Separability*. "The common law's separability doctrine is that when an interest is expressly subject to alternative contingencies, the situation is treated as if two interests were created in the same person or class. Each interest is judged separately; the invalidity of one of the interests does not necessarily cause the other one to be invalid. ... Under this doctrine, if property is devised 'to B if X-event or Y-event happens,' B in effect has two interests, one contingent on X-event happening and the other contingent on Y-event happening. If the interest contingent on X-event but not the one contingent on Y-event is invalid, the consequence of separating B's interest into two is that only one of them, the one contingent on X-event, is invalid. B still has a valid interest--the one contingent on the occurrence of Y-event." (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2545.)

The separability principle is not superseded by *Prob.C. 21200* et seq. Invoking the principle will usually result in one of the interests being initially validated by *Prob.C. 21205(a)* and the validity of the other interest being governed by *Prob.C. 21205(b)*. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2545; see infra, §178.)

(d) *"All-or-nothing" rule with respect to class gifts*. At common law, if the interest of any potential class member might vest too remotely, the entire class gift violated the rule. Although *Prob.C. 21200* et seq. do not supersede "the basic idea of the much-maligned 'all-or-nothing' rule, the evils sometimes attributed to it are substantially if not entirely eliminated by the wait-and-see feature of the statutory rule and by the availability of reformation" under *Prob.C. 21220*, especially in the circumstances described in *Prob.C. 21220(b)* and (c). (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2547; see infra, §186.)

(e) *Specific sum doctrine*. At common law, if a specified sum of money was to be paid to each member of a class, the interest of each class member was entitled to separate treatment and was valid or invalid under the rule on its own. The specific sum doctrine is not superseded by *Prob.C. 21200* et seq. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2547 [setting forth example of operation of doctrine].)

(f) *Subclass doctrine*. At common law, if the ultimate takers were not described as a single class but rather as a group of subclasses, and if the share to which each separate subclass was entitled would finally be determined within the period of the rule, the gifts to the different subclasses were separable for the purposes of the rule. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2548.) The subclass doctrine is not superseded by *Prob.C. 21200* et seq. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2548 [setting forth example of operation of doctrine].)

(g) *Duration of indestructible trusts*. The widely accepted view in American law is that the beneficiaries of a private trust can compel its premature termination by consent, if termination is not expressly or impliedly restrained by the settlor. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2550; see 13 *Summary* (10th), *Trusts*, §§203, 204.) If the trust is indestructible, its duration is limited to the applicable perpetuity period. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2550; see *Prob.C. 15413* and *15414*, continuing substance of former C.C. 716.5; 13 *Summary* (10th), *Trusts*, §193.)

Nothing in *Prob.C. 21200* et seq. supersedes this principle, although, as to trusts that contain a nonvested property interest or power of appointment whose validity is governed by the "wait-and-see" element adopted in *Prob.C. 21205(b)*, *21206(b)*, or *21207(b)*, "the courts can be expected to determine that the applicable perpetuity period is 90 years." (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2550; on "wait-and-see" element, see infra, §§178, 179; on reformation by court, see infra, §186.)

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4. Compliance With Statutory Rule Against Perpetuities.

a. Validity of Nonvested Interests.

12 Witkin Sum. Cal. Law Real Property § 178

[§ 178] Validity of Nonvested Interests.

(1) *Statutory Rule.* A nonvested property interest is invalid unless: (a) when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive (*Prob.C. 21205(a)*), or (b) the interest either vests or terminates within 90 years after its creation (*Prob.C. 21205(b)*). "The essential difference between the common law rule and its statutory replacement is that the statutory rule preserves the common law rule's overall policy of preventing property from being tied up in unreasonably long or even perpetual family trusts or other property arrangements, while eliminating the harsh potential of the common law rule." (Appendix to 20 Law Cal. Rev. Com. Reports, p. 2551.)

(2) *Initial Validation.* *Prob.C. 21205(a)* codifies the validating side of the common law rule. It provides that a nonvested property interest that is valid under the common law rule is valid under the statutory rule and can be declared so at its inception. "In such a case, nothing would be gained and much would be lost by invoking a waiting period during which the validity of the interest or power is in abeyance." (Law Rev. Com. Comment to *Prob.C. 21205*; on selection of lives in being and determination of validating lives, see *infra*, §180.)

(3) *"Wait-and-See" Validation.* *Prob.C. 21205(b)* establishes the "wait-and-see" rule. It provides that an interest or a power of appointment that is not validated by *Prob.C. 21205(a)*, and hence would have been invalid under the common law rule, is nevertheless valid if it does not actually remain nonvested when the 90-year period expires. (Law Rev. Com. Comment to *Prob.C. 21205*.) "[T]he 90-year period represents a reasonable approximation of--a proxy for--the period of time that would, on average, be produced through the use of an actual set of measuring lives identified by statute and then adding the traditional 21-year tack-on period after the death of the survivor." (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2560.) The "wait-and-see" rule is designed to relieve against technical violations of the common law rule, such as the fertile octogenarian, the administrative contingency, and the unborn widow. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2561, giving three examples of how *Prob.C. 21205(b)* affects these categories.)

(4) *Interest Must Vest or Fail.* It is a common mistake to assume that an interest is void in its creation because it may never vest within the period. The very nature of a contingent interest is that the contingency may or may not occur, and the interest may or may not vest. The common law rule against perpetuities and former C.C. 715.2 merely required that "it must vest, if at all," within the period. Thus the interest was validly created where, if it vested at all, it would

vest within the period, *even though it may not have vested but wholly failed*. (See *Estate of Micheletti* (1944) 24 C.2d 904, 908, 151 P.2d 833; *Wong v. Di Grazia* (1963) 60 C.2d 525, 538, 35 C.R. 241, 386 P.2d 817 [lease of building to commence "upon completion of said building"; agreement called for expeditious construction and imposed obligation to complete it within reasonable time, less than 21 years].)

This principle continues in *Prob.C. 21205*, which requires the interest to "vest or terminate" within the specified time. An interest "terminates" when vesting becomes impossible. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2553.)

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4. Compliance With Statutory Rule Against Perpetuities.

b. Validity of Powers of Appointment.

12 Witkin Sum. Cal. Law Real Property § 179

[§ 179] Validity of Powers of Appointment.

(1) *General Power of Appointment Not Presently Exercisable.* A general power of appointment not presently exercisable because of a condition precedent is invalid unless: (a) when the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then alive (*Prob.C. 21206(a)*), or (b) the condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation (*Prob.C. 21206(b)*).

Prob.C. 21206(a) codifies the validating side of the common law rule. It provides that a power of appointment that is valid under the common law rule is valid under the statutory rule and can be declared so at its inception. "In such a case, nothing would be gained and much would be lost by invoking a waiting period during which the validity of the interest or power is in abeyance." (Law Rev. Com. Comment to *Prob.C. 21206*.) *Prob.C. 21206(b)* also establishes the "wait-and-see" rule. It provides that an interest or a power of appointment that is not validated by *Prob.C. 21206(a)*, and hence would have been invalid under the common law rule, is nevertheless valid if the power ceases to be subject to a condition precedent or is no longer exercisable when the allowable 90-year waiting period expires. (Law Rev. Com. Comment to *Prob.C. 21206*.)

(2) *Nongeneral Power of Appointment or General Testamentary Power of Appointment.* A nongeneral power of appointment or a general testamentary power of appointment is invalid unless: (a) when the power is created, it is certain to be irrevocably exercised or otherwise to terminate not later than 21 years after the death of an individual then alive (*Prob.C. 21207(a)*), or (b) the power is irrevocably exercised or otherwise terminates within 90 years after its creation (*Prob.C. 21207(b)*).

(3) *Initial Validation.* The principle of *Prob.C. 21206(a)* and *21207(a)* is that a power of appointment that satisfies the common law rule against perpetuities is also valid under the statutory rule against perpetuities, and consequently it can be validly exercised, without being subjected to a waiting period during which the power's validity is in abeyance. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2565.) Initial validity depends on the existence of a validating life, and the procedure for determining it is essentially the same as that pertaining to nonvested property interests (*infra*, §180). (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2565, giving three examples.)

(4) *"Wait-and-See" Validation*. By adopting the wait-and-see method of perpetuity reform, *Prob.C. 21206(b)* and *21207(b)* "shift the ground of invalidity from possible to actual post-creation events. Under these subdivisions, a power of appointment that would have violated the common law rule, and therefore fails the tests in Section 21206(a) or 21207(a) for initial validity, is nevertheless not invalid as of the time of its creation. Instead, its validity is in abeyance. A general power not presently exercisable because of a condition precedent is invalid only if in actuality the condition neither is satisfied nor becomes impossible to satisfy within the allowable 90-year waiting period. A nongeneral power or a general testamentary power is invalid only if in actuality it does not terminate (by irrevocable exercise or otherwise) within the allowable 90-year waiting period." (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2566, giving three examples.)

A fiduciary power of appointment is one held by a fiduciary and exercisable by the fiduciary in a fiduciary capacity. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2565.) Purely administrative fiduciary powers are excluded from the statutory rule, and the discretionary power of a trustee to distribute principal to a beneficiary having an indefeasibly vested interest is likewise excluded (see *Prob.C. 21225*, *infra*, §188). Otherwise, distributive fiduciary powers are subject to the statutory rule. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2568, giving example.)

(5) *Validity of Donee's Exercise of Valid Power*. The fact that a power of appointment is valid does not mean that any exercise the donee decides to make is valid. "A key factor" in deciding the validity of appointed interests or appointed powers is determining when they were created for purposes of *Prob.C. 21200* et seq. Under *Prob.C. 21211* and *21212*, "the time of creation is when the power was exercised if it was a presently exercisable general power; and if it was a nongeneral power or a general testamentary power, the time of creation is when the power was created." (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2569, giving two examples; on determining time of creation, see *infra*, §183 et seq.)

The common law recognizes a "so-called doctrine of second-look," under which the facts existing on the date of the exercise are taken into account. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2572, citing *Estate of Bird (1964)* 225 C.A.2d 196, 37 C.R. 288.) "The common law's second-look doctrine in effect constitutes a limited wait-and-see doctrine, and is therefore subsumed under but not totally superseded by" *Prob.C. 21200* et seq. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2572, giving example.)

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c. Relevant and Validating Lives.

12 Witkin Sum. Cal. Law Real Property § 180

[§ 180] Relevant and Validating Lives.

(1) *Selection of Lives in Being.* The lives of individuals selected to govern the time of vesting under *Prob.C. 21205* et seq. may not be so numerous or situated that evidence of their deaths is likely to be unreasonably difficult to obtain. (*Prob.C. 21230.*)

(2) *Individual Described as Spouse of Individual Alive.* In determining the validity of a nonvested property interest under *Prob.C. 21205* et seq., an individual described as the spouse of an individual alive at the beginning of the perpetuities period will be deemed to be an individual alive when the interest is created, whether or not the described individual was alive then. (*Prob.C. 21231.*)

(3) *Determining Whether There Is a Validating Life.* "[O]nly individuals who are connected in some way to the transaction need to be considered, for they are the only ones who have a chance of supplying the requisite causal connection. Such individuals vary from situation to situation, but typically include the beneficiaries of the disposition, including the taker or takers of the nonvested property interest, and individuals related to them by blood or adoption, especially in the ascending and descending lines. There is no point in even considering the life of an individual unconnected to the transaction. ... No such individual can be a validating life because there will be an invalidating chain of possible events as to every unconnected individual who might be proposed: Any such individual can immediately die after the creation of the nonvested property interest without causing any acceleration of the interest's vesting or termination." (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2554.)

(4) *Recipients as Their Own Validating Lives.* In appropriate cases, the recipient of an interest can be his or her own validating life. "Given the right circumstances, this principle can validate interests that are contingent on the recipient's reaching an age in excess of 21, or are contingent on the recipient's surviving a particular point in time that is or might turn out to be in excess of 21 years after the interest was created or after the death of a person in being at the date of creation." (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2555.)

(5) *Validating Life Can Be Survivor of Group.* In appropriate cases, the validating life can initially (i.e., when the interest was created) be the unidentified survivor of a group of individuals. "It is common in such cases to say that the members of the group are the validating lives, but the true meaning of the statement is that the validating life is the

member of the group who turns out to live the longest." (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2556, setting forth example.)

(6) *Using Different Validating Lives.* When the disposition of property creates more than one nonvested property interest, the validity of each interest is treated individually. "A validating life that validates one interest might or might not validate the other interests. Since it is not necessary that the same validating life be used for all interests created by a disposition, the search for a validating life for each of the other interests must be undertaken separately." (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2558.)

(7) *Perpetuity Saving Clauses and Similar Provisions.* Saving clauses contain two components, the first of which is the perpetuity-period component. This typically requires the trust or other arrangement to terminate no later than 21 years after the death of the last survivor of a group of designated individuals by name or class. The second is the gift-over component, which creates a gift-over that is guaranteed to vest at the termination of the period set forth in the perpetuity-period component, but only if the trust or other arrangement has not terminated earlier in accordance with its other terms. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2558.)

The surviving member of the group is not necessarily the individual who would be the validating life for the nonvested property interest or power of appointment in the absence of the saving clause. Without the saving clause, one or more interests or powers may in fact fail to satisfy the requirement of *Prob.C. 21205(a), 21206(a), or 21207(a)* for initial validity. "By being designated in the saving clause, however, the survivor of the group becomes the validating life for all interests and powers in the trust or other arrangement: The saving clause confers on the last surviving member of the designated group the requisite causal connection between his or her death and the impossibility of any interest or power in the trust or other arrangement remaining in existence beyond the 21-year period following such individual's death." (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2558, setting forth example.)

If the instrument designates a group of individuals that would cause it to be impracticable to determine the death of the survivor, the common law courts developed the doctrine that the validity of the nonvested property interest or power of appointment is determined as if the provision in the instrument did not exist. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2559, setting forth examples.) The common law doctrine is not superseded and remains in full force. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2559.)

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d. Disregarding Possibility of Birth of Child.

12 Witkin Sum. Cal. Law Real Property § 181

[§ 181] Disregarding Possibility of Birth of Child.

(1) *Possibility Disregarded.* In determining whether a nonvested property interest or a power of appointment is valid under *Prob.C. 21205* et seq., the possibility that a child will be born to an individual after the individual's death is disregarded. (*Prob.C. 21208.*) *Prob.C. 21208* applies only for purposes of determining the validity of the interest; it does not apply to questions whether a child born after an individual's death qualifies as a taker of a beneficial interest. No provision of *Prob.C. 21200* et seq. supersedes the common law principle that a child in gestation who is later born alive is regarded as alive at the commencement of gestation. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2573.)

(2) *Purpose of Rule.* The limited purpose of *Prob.C. 21208* is to solve a perpetuity problem caused by advances in medical science. The common law perpetuity period had three components: (a) a life in being (b) plus 21 years (c) plus a period of gestation, when needed. Because of "advances in medical science unanticipated when the common law rule was in its developmental stages" (such as sperm banks and frozen embryos, and the possibility of artificially maintaining the body functions of deceased pregnant women long enough to develop viable fetuses), having a pregnant wife at death is no longer the only way of having children after death. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2574.) *Prob.C. 21208* subsumes not only the case of children conceived after death, but also the more conventional case of children in gestation at death. Because of *Prob.C. 21208*, "the third component of the common law perpetuity period is unnecessary and has been jettisoned." The perpetuity period recognized in *Prob.C. 21205(a)* (supra, §178), *Prob.C. 21206(a)* (supra, §179), or *Prob.C. 21207(a)* (supra, §179) has only two components: (a) life in being (b) plus 21 years. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2574.)

The legal status of conceived-after-death children has not yet been resolved. "Without trying to predict how that matter will be settled in the future, the best way to handle the problem from the perpetuity perspective" is a rule requiring the possibility of post-death children to be disregarded. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2574.)

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5. Construction of "Later of" Language in Perpetuity Saving Clause.

12 Witkin Sum. Cal. Law Real Property § 182

[§ 182] Construction of "Later of" Language in Perpetuity Saving Clause.

(1) *Statutory Rule.* If, in measuring a period from the creation of a trust or other property arrangement, language in a governing instrument (a) seeks to disallow the vesting or termination of any interest or trust beyond, (b) seeks to postpone the vesting or termination of any interest or trust until, or (c) seeks to operate in effect in a similar fashion on, the later of (1) the expiration of a period of time not exceeding 21 years after the death of the survivor of specified lives in being at the creation of the trust or other property arrangement, or (2) the expiration of a period of time that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement, that language is inoperative to the extent it produces a period that exceeds 21 years after the death of the survivor of the specified lives. (*Prob.C. 21209(a).*)

(2) *Purpose of Rule.* *Prob.C. 21209(a)* is intended to invalidate a two-pronged perpetuity saving clause "to the extent that it attempts to employ a period of time extending beyond the traditional perpetuities period of lives in being plus 21 years. The effect of this rule is that there is no advantage to be gained by inserting such a 'later of' clause in an instrument." (Law Rev. Com. Comment to *Prob.C. 21209*.) A standard perpetuity saving clause in use before enactment of the Uniform Statute continues to be appropriate. "Consequently, instruments should not be redrafted in an attempt to apply a 'later of' 90 years or lives-in-being-plus-21-years test." (Law Rev. Com. Comment to *Prob.C. 21209*.) *Prob.C. 21209* also prevents the loss of grandfathered status under the federal generation-skipping transfer tax involving exercise of a nongeneral power of appointment under a pre-1986 irrevocable trust. (Law Rev. Com. Comment to *Prob.C. 21209*.) (On effect of certain "later of" type language, see Appendix to 20 Cal. Law Rev. Com. Reports, p. 2575; on coordination of federal generation-skipping transfer tax with Uniform Statute, see Appendix to 20 Cal. Law Rev. Com. Reports, p. 2577.)

(3) *Rule Applies Prospectively Only.* *Prob.C. 21209(b)*, which is not in the Uniform Statute, makes *Prob.C. 21209* prospective in operation: Notwithstanding *Prob.C. 21202* (supra, §175), *Prob.C. 21209* applies only to governing instruments, including instruments exercising powers of appointment, executed on or after January 1, 1992.

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6. Time of Creation of Interest.

a. General Rule.

12 Witkin Sum. Cal. Law Real Property § 183

[§ 183] General Rule.

The time of creation of a nonvested property interest or power of appointment is determined by other applicable statutes or, if none, under general principles of property law. (*Prob.C. 21210.*) Because a will becomes effective on the decedent's death, not on the execution of the will (see 14 *Summary* (10th), *Wills and Probate*, §103), general principles of property law determine that a nonvested property interest or power of appointment created by will is created at the decedent's death. A nonvested interest or power of appointment created by inter vivos transfer is created when the transfer becomes effective, normally the date of delivery of the deed. With respect to a nonvested interest or power of appointment created by a testamentary or inter vivos exercise of a power of appointment, the "relation back" doctrine applies. If the exercised power was a nongeneral power or a general testamentary power, the appointed interest or power is created when the power was created, not when it was exercised. If the power was a general power presently exercisable, the relation back doctrine is not followed; the time of creation of the appointed property interests or appointed powers is the time when the power was irrevocably exercised. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2580.)

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6. Time of Creation of Interest.

b. Postponement.

12 Witkin Sum. Cal. Law Real Property § 184

[§ 184] Postponement.

(1) *General Rule.* If there is someone who alone can exercise a power created by a governing instrument to become the unqualified beneficial owner of either a nonvested property interest or a property interest subject to a power of appointment described in *Prob.C. 21206* or *21207* (supra, §179), the nonvested property interest or power of appointment is created when the power to become the unqualified beneficial owner terminates. (*Prob.C. 21211(a).*) A joint power with respect to community property held by individuals married to each other is a power exercisable by one person alone. (*Prob.C. 21211(b).*)

Prob.C. 21211 provides, in accord with existing common law, that the time of creation of the nonvested property interest or the power of appointment is postponed until the power to become the unqualified beneficial owner ceases to exist. (Law Rev. Com. Comment to *Prob.C. 21211.*) In certain cases, all beneficial rights in a property interest (including an interest subject to a power of appointment) remain under the unilateral control of one person, even after the delivery of the deed or even after the decedent's death. In those cases, the interest or power is created, for purposes of *Prob.C. 21200* et seq., when no person, acting alone, has a power presently exercisable to become the unqualified beneficial owner of the property interest (or the property interest subject to the power of appointment). (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2580, giving example.)

(2) *Prerequisites for Postponement.* For the date of creation to be postponed under *Prob.C. 21211*, the power need not be a power to revoke, and it need not be held by the settlor or transferor. All that is needed is a presently exercisable power held by any person acting alone to make himself or herself the unqualified beneficial owner of the nonvested property interest or the property interest subject to a power of appointment. If that power exists, the time when the interest or power is created is postponed until the termination of the power (by irrevocable exercise, release, contract to exercise or not to exercise, expiration at the donee's death, or otherwise). An example of a power that might not be held by the settlor or transferor is one, held by any person who can act alone, to invade fully a trust's corpus. Because *Prob.C. 21211* does not require that the settlor hold the power, postponement is possible even in cases of testamentary transfers. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2581, giving example.)

For the date of creation to be postponed under *Prob.C. 21211*, the power must be presently exercisable. A testamentary power does not qualify. A power not presently exercisable because of a condition precedent does not

qualify. If the condition precedent later becomes satisfied, however, so that the power becomes presently exercisable, the interests or powers subject to the condition are not created, for purposes of *Prob.C. 21201* et seq., until the termination of the power. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2583, giving example.) If the subject of the transfer was an undivided interest, such as a one-third tenancy in common, the power qualifies even though it relates only to the undivided one-third interest in the tenancy in common; it need not relate to the whole property. "A power to become the unqualified beneficial owner of only part of the nonvested property interest or the property interest subject to a power of appointment, however, does not postpone the time of creation of the interests or powers subject thereto, unless the power is actually exercised." (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2584, giving example.)

The fact that the donee of a power lacks the capacity to exercise it, by reason of minority, mental incompetency, or another reason, does not prevent postponement under *Prob.C. 21211*, unless the governing instrument extinguishes the power (or prevents it from coming into existence) for that reason. The power must be exercisable by one person alone. A joint power does not qualify, except that, under *Prob.C. 21211(b)*, a joint power over community property is treated as a power exercisable by one person acting alone. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2585.)

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c. When Interest Arises From Transfer to Trust or Other Arrangement.

12 Witkin Sum. Cal. Law Real Property § 185

[§ 185] When Interest Arises From Transfer to Trust or Other Arrangement.

For purposes of *Prob.C. 21200* et seq., a nonvested property interest or a power of appointment arising from a transfer of property to a previously funded trust or other existing property arrangement is created when the nonvested property interest or power of appointment in the original contribution was created. (*Prob.C. 21212*.)

Prob.C. 21212 in effect treats a transfer of property to a previously funded trust or other existing property arrangement as having been made when the nonvested property interest or power of appointment in the original contribution was created. This avoids the administrative difficulties that would otherwise result where subsequent transfers are made to an existing irrevocable trust. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2585.) "Arguably, at common law, each transfer starts the period of the rule running anew as to that transfer." (Law Rev. Com. Comment to *Prob.C. 21212*.) Without *Prob.C. 21212*, the allowable period under the statutory rule would be marked off in such cases from different times with respect to different portions of the same trust. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2585, giving examples.)

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7. Reformation.

12 Witkin Sum. Cal. Law Real Property § 186

[§ 186] Reformation.

(1) *Authority for Reformation.* Under certain circumstances, on petition of an interested person, a court must reform a disposition in the manner that most clearly approximates the transferor's manifested plan of distribution and is within the 90 years allowed by the applicable provision in *Prob.C. 21205* et seq. (see *supra*, §178 et seq.). (*Prob.C. 21220.*) The circumstances for reformation are:

(a) A nonvested property interest or a power of appointment becomes invalid under *Prob.C. 21205* et seq. (*Prob.C. 21220(a)*; see Appendix to 20 Cal. Law Rev. Com. Reports, p. 2588, giving example.)

(b) A class gift is not, but might become, invalid under *Prob.C. 21205* et seq., and the time has arrived when the share of any class member is to take effect in possession or enjoyment. (*Prob.C. 21220(b)*; see Appendix to 20 Cal. Law Rev. Com. Reports, p. 2590, giving example.)

(c) A nonvested property interest that is not validated by *Prob.C. 21205(a)* can vest, but not within 90 years after its creation. (*Prob.C. 21220(c)*; see Appendix to 20 Cal. Law Rev. Com. Reports, p. 2592, giving example.)

It is anticipated that these circumstances will "rarely" arise, and consequently that *Prob.C. 21220* will seldom need to be applied. (Law Rev. Com. Comment to *Prob.C. 21220.*)

(2) *Guidelines for Reformation.* If one of the three conditions arises, the court is authorized to alter existing interests or powers and to create new interests or powers by implication or construction based on the transferor's manifested plan of distribution as a whole. The reforming court is urged not to invalidate any vested interest retroactively (the doctrine of infectious invalidity having been superseded by *Prob.C. 21200* et seq.) and not to reduce an age contingency in excess of 21 unless it is absolutely necessary. Even if the court deems reduction of an age contingency to be necessary, it should not reduce the age contingency automatically to 21, but instead should make it no lower than absolutely necessary. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2587; on doctrine of infectious invalidity, see *supra*, §177.)

(3) *Other Remedies.* *Prob.C. 21220* does not prevent an earlier application of other remedies. "In particular, in the case of interests in land not in trust, the principle, codified in many states, is widely recognized that there is judicial

authority, under specified circumstances, to order a sale of land in which there are future interests. ... Nothing in Section 21220 should be taken as precluding this type of remedy, if appropriate, before the expiration of the allowable 90-year waiting period." (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2587.)

(4) *Trust Beneficiaries' Right to Termination After 90 Years.* Under *Prob.C. 21200* et seq., the 90-year period of the rule against perpetuities is applicable to a trust the validity of which is governed by the "wait-and-see" element of *Prob.C. 21205(b)*, *21206(b)*, or *21207(b)*. The result of reformation under *Prob.C. 21220* is that all nonvested property interests in the trust will vest in interest (or terminate) no later than the 90th anniversary of their creation. In the case of trusts containing a nonvested property interest or a power of appointment the validity of which is governed by *Prob.C. 21205(b)*, *21206(b)*, or *21207(b)*, "courts can therefore be expected to adopt the rule that no purpose of the settlor, expressed in or implied from the governing instrument, can prevent the beneficiaries of a trust other than a charitable trust from compelling its termination after 90 years after every nonvested property interest and power of appointment in the trust was created." (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2588.)

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E. Perpetuities.

8. Exclusions From Statutory Rule Against Perpetuities.

a. Nondonative Transfers.

12 Witkin Sum. Cal. Law Real Property § 187

[§ 187] Nondonative Transfers.

(1) *General Rule and Exceptions.* *Prob.C. 21205 et seq. do not apply* to a nonvested property interest or a power of appointment arising out of a nondonative transfer. (*Prob.C. 21225(a)*.) The statutory rule against perpetuities does, however, apply to a nonvested property interest or a power of appointment arising out of (a) a premarital or postmarital agreement, (b) a separation or divorce settlement, (c) a spouse's election, (d) a similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties, (e) a contract to make or not to revoke a will or trust, (f) a contract to exercise or not to exercise a power of appointment, (g) a transfer in satisfaction of a duty of support, or (h) a reciprocal transfer. (*Prob.C. 21225(a)*; see *Shaver v. Clanton* (1994) 26 C.A.4th 568, 575, 31 C.R.2d 595 [commercial lease amendment was exempt under *Prob.C. 21225(a)*; although terms were favorable to lessees, there was no evidence of detriment to lessor or of donative intent].)

(2) *Departure From Common Law.* In line with long-standing scholarly commentary, *Prob.C. 21225(a)* excludes nondonative transfers from the statutory rule against perpetuities. "The rule against perpetuities is an inappropriate instrument of social policy to use as a control on such arrangements. The period of the rule--a life in being plus 21 years--is suitable for donative transfers only." (Law Rev. Com. Comment to *Prob.C. 21225*.) Because it excludes nondonative transfers, *Prob.C. 21225(a)* is contrary to existing common law, and is therefore inconsistent with decisions holding the common law rule applicable to interests or arrangements created in a nondonative commercial-type transaction. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2595; see *Shaver v. Clanton*, *supra*, 26 C.A.4th 574 [California common law was altered by Uniform Statute's explicit exclusion of commercial transactions].)

(3) *Determining Whether Transfer Is Donative.* A transfer can be supported by consideration and still be donative in character, in which case it is not excluded from the statutory rule against perpetuities. "A transaction that is essentially gratuitous in nature, accompanied by donative intent on the part of at least one party to the transaction, is not to be regarded as nondonative simply because it is for consideration. Thus, for example, the exclusion would not apply if a parent purchases a parcel of land for full and adequate consideration, and directs the seller to make out the deed in favor of the purchaser's daughter for life, remainder to such of the daughter's children as reach 25. The nonvested property interest of the daughter's children is subject to the statutory rule." (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2595.)

"Some commercial transactions respecting land or mineral interests, such as options in gross (including rights of first refusal), leases to commence in the future, nonvested easements, and top leases and top deeds in commercial use in the oil and gas industry, directly or indirectly restrain the alienability of property or provide a disincentive to improve the property. Although controlling the duration of such interests is desirable, they are excluded by [*Prob.C. 21225(a)*] from the statutory rule because ... the period of life in being plus 21 years--actual or by the 90-year-proxy--is inappropriate for them; that period is appropriate for family-oriented, donative transfers." (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2596; on other statutes that limit duration of nondonative transfers, see *infra*, §189.)

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b. Other Exclusions.

12 Witkin Sum. Cal. Law Real Property § 188

[§ 188] Other Exclusions.

The statutory rule against perpetuities preserves all the exclusions from the common law rule against perpetuities recognized at common law and by former California statutes. (Law Rev. Com. Comment to *Prob.C. 21225*.) In addition to nondonative transfers (*supra*, §187), the following interests or powers are not subject to *Prob.C. 21205* et seq.:

(1) A fiduciary's power relating to the administration or management of assets, including the power to sell, lease, or mortgage property, and the power to determine principal and income. (*Prob.C. 21225(b)*.)

(2) A power to appoint a fiduciary. (*Prob.C. 21225(c)*.)

(3) A trustee's discretionary power to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal. (*Prob.C. 21225(d)*.) Purely administrative fiduciary powers are excluded by *Prob.C. 21225(b)* and *21225(c)*, but the only distributive fiduciary power excluded is the one described in *Prob.C. 21225(d)*. (Appendix to 20 Cal. Law Rev. Com. Reports, pp. 2596, 2597.)

(4) A nonvested property interest held by a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision. (*Prob.C. 21225(e)*.) *Prob.C. 21225(e)* codifies a common law principle. If the nonvested property interest held by a charity is preceded by a property interest held by a noncharity, the exclusion does not apply. (Appendix to 20 Cal. Law Rev. Com. Reports, pp. 2597, 2598.)

(5) A nonvested property interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral, or other current or deferred benefit plan for one or more employees, independent contractors, or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income, or principal in the trust or other property arrangement. (*Prob.C. 21225(f)*.) Thus, *Prob.C. 21225(f)* "excludes from the statutory rule against perpetuities nonvested property interests and powers of appointment with respect to a trust or other property arrangement, whether part of a 'qualified' or 'unqualified' plan under the federal income tax law, forming part of a bona fide benefit plan for employees (including owner-employees), independent

contractors, or their beneficiaries or spouses." (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2598.) This exclusion does not apply to a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse. (*Prob.C. 21225(f)*.)

(6) A property interest, power of appointment, or arrangement that was not subject to the common law rule against perpetuities or is excluded by another California statute. (*Prob.C. 21225(g)*.) Thus, for example, possibilities of reverter and powers of termination, which are regarded as remaining in the grantor and hence always vested, are excluded. (Appendix to 20 Cal. Law Rev. Com. Reports, p. 2599.)

(7) A trust created for the purpose of providing for its beneficiaries under hospital service contracts, group life insurance, group disability insurance, group annuities, or a combination of insurance, as defined in the Insurance Code. (*Prob.C. 21225(h)*.)

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c. Other Limitations on Excluded Transactions.

12 Witkin Sum. Cal. Law Real Property § 189

[§ 189] Other Limitations on Excluded Transactions.

Some transactions that are not subject to the statutory rule against perpetuities are nevertheless limited by other statutes. These statutes include C.C. 715 (leases to commence in future), C.C. 883.110 et seq. (mineral rights), C.C. 884.010 et seq. (unexercised options), C.C. 885.010 et seq. (powers of termination), and C.C. 887.010 et seq. (abandoned easements). (Law Rev. Com. Comment to *Prob.C. 21225*; see *Shaver v. Clanton* (1994) 26 C.A.4th 568, 576, 31 C.R.2d 595 [commercial, nondonative transactions such as options to renew, rights of first refusal, and commercial leases are exempt under *Prob.C. 21225(a)*, but leases of town or city lots are limited to 99 years by C.C. 718 (*infra*, §525)].)

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1. Conditions and Covenants Restraining Alienation.

a. Rule Against Restraints.

12 Witkin Sum. Cal. Law Real Property § 190

[§ 190] Rule Against Restraints.

(1) *General Rule.* Sometimes a grantor or testator conveys property in fee, but with a provision added that seeks to prevent the grantee or devisee from transferring it. The Code states the common law rule that "[c]onditions restraining alienation, when repugnant to the interest created, are void." (C.C. 711.) The result in these cases is that the interest conveyed is valid, but the condition is void, and the grantee will take the property free from it. (*Bonnell v. McLaughlin* (1916) 173 C. 213, 215, 159 P. 590; *Title Guarantee & Trust Co. v. Garrott* (1919) 42 C.A. 152, 155, 183 P. 470; *Wharton v. Mollinet* (1951) 103 C.A.2d 710, 713, 229 P.2d 861; *Hart v. Gould* (1953) 119 C.A.2d 231, 236, 259 P.2d 49 [condition in original Mexican land grant with mortmain restriction against devise to corporate body or for charitable, religious, or public purposes]; *Taormina Theosophical Community v. Silver* (1983) 140 C.A.3d 964, 973, 190 C.R. 38, *infra*, §202; see Rest.2d, Property (Donative Transfers), p. 142 et seq.; 10 Powell §77.01 et seq.; 4 *Hastings L. J.* 101; 9 *Hastings L. J.* 262, 268; 17 *Stanf. L. Rev.* 532 [contract restraining alienation of land void as against public policy]; 61 *Am.Jur.2d* (2002 ed.), *Perpetuities and Restraints on Alienation* §90 et seq.)

(2) *Distinctions.* The rule is directed against provisions in contracts or conveyances. It has no application to disabling restraints established by express statute or by the operation of rules of law; e.g., the incapacity of a minor or insane person to transfer land, or restrictions on the power of a trustee. Moreover, the typical no-contest clause in a will, providing for forfeiture of the interest devised or bequeathed if the will is contested, is valid. (See Rest.2d, Property (Donative Transfers) §9.1; 10 Powell §78.03; 14 *Summary* (10th), *Wills and Probate*, §560 et seq.) The typical disabling restraint that prevents the beneficiary of a spendthrift trust from alienating his or her interest is upheld as a matter of policy. (See Rest.2d, Trusts §149 et seq.; 13 *Summary* (10th), *Trusts*, §157.) Exceptions are also recognized for life estates and estates for years (*infra*, §194), for preemptive rights and repurchase options (*infra*, §195), and for other reasonable restraints (*infra*, §196). (On validity of partial restraints, see *infra*, §193.)

Generally, different terminology is used to describe the rule against suspension of the absolute power of alienation and the rule against conditions restraining alienation. The rule against suspension of the absolute power of alienation normally dealt with indirect restraints. The testator or trustor was prohibited from creating present or future interests that had the incidental effect of preventing, for an unduly long period, an effective conveyance of the fee. (See *supra*, §171.) But a condition in a deed or grant merely providing for a power of termination of the estate if alienation was attempted (forfeiture restraint; *infra*, §192) would not have been invalidated by the suspension rule, because the power

could be released and a good title transferred. Thus, the old rule against suspension of alienation was neither necessary nor adequate for the control of restraints on alienation of property granted or devised, and the validity of such conditions could properly be challenged by invoking C.C. 711 alone. (But see *Bay Shore Motors v. Baker* (1949) 90 C.A.2d Supp. 895, 896, 202 P.2d 865 [rules not clearly distinguished].)

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(2) *Distinctions*. See *Rest.3d, Trusts* §57 et seq.



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b. Restatement.

12 Witkin Sum. Cal. Law Real Property § 191

[§ 191] Restatement.

Part II of the Restatement Second, Property (Donative Transfers) is entitled "Direct Restraints on Alienation in Donative Transfers." The Introductory Note gives the history of the rule (p. 142), and makes the following points:

"The policy in favor of freedom of alienation has always conflicted somewhat with the contrasting policy that one who owns property should be able to transfer it, subject to such qualifications as he may desire to impose." (p. 143.)

"In the case of indirect restraints on alienation, the principal device which modern law uses to resolve this tension is the rule against perpetuities. ... Where, however, a person either by the terms of a transfer or by contract seeks to eliminate the power of successors or of present owners to transfer property or to lessen the likelihood of their exercise of this power by stating adverse consequences of an attempt later to transfer, the rules stated in this Part come into play. Such types of interference are designated in this Restatement as direct restraints on alienation." (p. 143.)

"Although the primary focus of this Part II is on restraints on alienation in donative transfers, the rules developed in this Part II, to the extent that they permit restraints on alienation, are equally permissive in regard to non-donative transfers. ... Restraints on alienation are frequently imposed in connection with sales of residential property, particularly those involving condominium and cooperative arrangements, and on the transfer of shares of corporate stock." (p. 144.)

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c. Types of Invalid Restraints.

12 Witkin Sum. Cal. Law Real Property § 192

[§ 192] Types of Invalid Restraints.

(1) *Disabling Restraint.* A disabling restraint is an absolute *prohibition*, i.e., a provision that the grantee or devisee must not transfer, or that any transfer will be void. (See *Rest.2d, Property (Donative Transfers)* §§3.1, 4.1; *Bonnell v. McLaughlin* (1916) 173 C. 213, 215, 159 P. 590; *Hart v. Gould* (1953) 119 C.A.2d 231, 236, 259 P.2d 49; 5 *Hastings L. J.* 92; 17 *Stanf. L. Rev.* 532.) A disabling restraint would also have violated the former rule against suspension of the absolute power of alienation. (See 9 *Hastings L. J.* 262, 269.)

(2) *Forfeiture Restraint.* A forfeiture restraint is a *condition* providing that, if a transfer is attempted, the interest or estate will terminate automatically (special limitation) or will be subject to termination by the exercise of a right of entry or power of termination (condition subsequent). (See C.C. 782, *infra*, §201; *Rest.2d, Property (Donative Transfers)* §§3.2, 4.2; *Title Guarantee & Trust Co. v. Garrott* (1919) 42 C.A. 152, 154, 183 P. 470.)

(3) *Promissory Restraint.* A promissory restraint is a *covenant* by a grantee not to alienate, thus purportedly making the grantee liable for breach of contract if he or she transfers. (See *Rest.2d, Property (Donative Transfers)* §§3.3, 4.3; 17 *Stanf. L. Rev.* 532.)

(4) *Effect of Restraints.* Under the general law and the express terms of C.C. 711 (*supra*, §190), all three types of restraints are, with certain exceptions (*infra*, §194 *et seq.*), illegal and void. "The right to own property in fee simple, but with a restricted right to sell it, cannot be created either by deed or by agreement. Any such restriction of the right of alienation in an instrument conveying a title in fee simple is void, and the void provision is separable from the title created. ... Such a limitation on a fee simple estate can no more be created by a will than by a deed." (*Wharton v. Mollinet* (1951) 103 C.A.2d 710, 713, 229 P.2d 861; *Reagh v. Kelley* (1970) 10 C.A.3d 1082, 1099, 89 C.R. 425 [citing *Wharton*].)

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d. Partial Restraints.

12 Witkin Sum. Cal. Law Real Property § 193

[§ 193] Partial Restraints.

There is a conflict of authority concerning the validity of partial restraints; e.g., provisions that prohibit alienation to particular persons or to a particular class, or that are operative only for a limited time. The Restatement takes the position that these provisions may be enforced if they are reasonable, e.g., if the excluded class is small or so situated as not to include likely purchasers. (See *Rest.2d, Property (Donative Transfers)* §§4.2, 4.3, 4.5; 10 Powell §77.03 et seq.; 61 *Am.Jur.2d* (2002 ed.), *Perpetuities and Restraints on Alienation* §98 et seq.; 15 *Am.Jur. Legal Forms 2d* (2000 ed.), *Perpetuities and Restraints on Alienation* §201:21 et seq.)

In California, however, all restraints on alienation, total and partial, whether unlimited or limited in time, are equally void under C.C. 711. (*Title Guarantee & Trust Co. v. Garrott* (1919) 42 C.A. 152, 158, 183 P. 470 [deed with condition subsequent prohibiting sale to persons "of African, Chinese or Japanese descent," for period of 14 years (note that judicial enforcement of any racial restriction is no longer possible, *infra*, §§200, 201)]; *Wharton v. Mollinet* (1951) 103 C.A.2d 710, 713, 229 P.2d 861 [devise with prohibition against sale for 20 years after testator's death]; *Hart v. Gould* (1953) 119 C.A.2d 231, 236, 259 P.2d 49 [grant with prohibition against devise for charitable, religious, or public purposes]; *Taormina Theosophical Community v. Silver* (1983) 140 C.A.3d 964, 973, 190 C.R. 38, *infra*, §202 [covenant restricting ownership and occupancy to members of Theosophical Society who were 50 years old or older].) (On valid, reasonable restraints, see *infra*, §196.)

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e. Exceptions.

1. Life Estate or Estate for Years.

12 Witkin Sum. Cal. Law Real Property § 194

[§ 194] Life Estate or Estate for Years.

A promissory or forfeiture restraint on the alienation of a life estate or estate for years (leasehold) is valid. The theory is that the grantor or lessor, holder of the reversion, has an interest in protecting the property from an undesirable tenant, and there is no undue interference with alienability of property. (See *Carma Developers (Calif.) v. Marathon Dev. Calif.* (1992) 2 C.4th 342, 359, 6 C.R.2d 467, 826 P.2d 710, *infra*, §556 [forfeiture restraints are generally viewed more favorably than comparable disabling restraints and have gained widespread acceptance; citing the text]; *Rest.2d, Property (Donative Transfers) §§4.2, 4.3*; 10 Powell §77.06; 61 *Am.Jur.2d* (2002 ed.), *Perpetuities and Restraints on Alienation* §§103, 104; 15 *Am.Jur. Legal Forms 2d* (2000 ed.), *Perpetuities and Restraints on Alienation* §201.28 et seq.; on condition against assignment of lease, see *infra*, §546.)

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2. Preemptive Provision or Repurchase Option.

12 Witkin Sum. Cal. Law Real Property § 195

[§ 195] Preemptive Provision or Repurchase Option.

A condition that a grantee will not sell the estate without first offering it to the grantor or some other designated person is valid. This type of promissory restraint does not unreasonably inhibit alienation. (See *Rest.2d, Property (Donative Transfers) §4.4*; *Bay Shore Motors v. Baker (1949) 90 C.A.2d Supp. 895, 896, 202 P.2d 865* [sale of automobile with repurchase option]; *Schwartz v. Shapiro (1964) 229 C.A.2d 238, 255, 40 C.R. 189* [describing language of preemption: "first opportunity," "first right," "first privilege," "first refusal"]; *Mercer v. Lemmens (1964) 230 C.A.2d 167, 170, 40 C.R. 803, 1 Summary (10th), Contracts, §178*, citing the text; *Gregory v. San Juan Capistrano (1983) 142 C.A.3d 72, 89, 191 C.R. 47* [preemptive right is valuable property right that may be enforced in court]; *31 Hastings L. J. 617* [fixed price preemptive rights in California]; *61 Am.Jur.2d (2002 ed.), Perpetuities and Restraints on Alienation §108 et seq.*; *15 Am.Jur. Legal Forms 2d (2000 ed.), Perpetuities and Restraints on Alienation §201:19*; *40 A.L.R.3d 920* [preemptive rights]; *66 A.L.R.3d 1294* [independent option to purchase]; but see *Maynard v. Polhemus (1887) 74 C. 141, 143, 15 P. 451* [condition setting price, which might be lower than that elsewhere obtainable, was invalid].)

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3. Other Reasonable Restraints.

12 Witkin Sum. Cal. Law Real Property § 196

[§ 196] Other Reasonable Restraints.

(1) *"Due on Sale" or "Due on Encumbrance" Clause in Mortgage or Deed of Trust.* "Due on sale" and "due on encumbrance" clauses were originally held reasonable and not violative of the rule against restraints on alienation, but subsequent cases invalidated these clauses as a violation of the rule. (See 4 *Summary* (10th), *Security Transactions in Real Property*, §§88, 89, 91.) In 1982, state law was preempted by federal legislation making the clauses enforceable. (See 4 *Summary* (10th), *Security Transactions in Real Property*, §§90, 91.)

(2) *Limitation on Sale of Membership in Housing Project.* In *Martin v. Villa Roma* (1982) 131 C.A.3d 632, 182 C.R. 382, a corporation formed to offer housing under the National Housing Act had a bylaw providing that a terminated membership could be sold only to persons meeting specified eligibility requirements and at a price not over that established by a formula. *Held*, the restraint was lawful. The provisions "are clearly and directly related to the purposes for which the corporation was formed, they support rather than offend the policies of this state, and they are imposed pursuant to federal requirements which, in any event, would take precedence over state law." (131 C.A.3d 635.)

(3) *Prepayment of All-Inclusive Promissory Note.* In *Gutzi Associates v. Switzer* (1989) 215 C.A.3d 1636, 264 C.R. 538, an agreement for purchase of commercial property and a resulting all-inclusive promissory note (see 4 *Summary* (10th), *Security Transactions in Real Property*, §39) contained a typewritten prohibition against prepayment of the note. *Held*, the provision was not an unreasonable restraint on alienation. Within the factual setting of a particular case, such a provision might violate C.C. 711 (*supra*, §190). However, this prepayment prohibition was clearly set forth, was part of the bargained-for exchange between the parties to an arm's-length commercial transaction, and was likely the pivotal factor in plaintiff's assent to the other terms of the agreement. (215 C.A.3d 1645.)

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2. Restraints on Marriage.

a. Void Condition Against Marriage.

12 Witkin Sum. Cal. Law Real Property § 197

[§ 197] Void Condition Against Marriage.

Conditions imposing restraints on marriage, except on the marriage of a minor, are void. (C.C. 710.) The Restatement declares the same rule (*Rest.2d, Property (Donative Transfers) §§6.1, 6.2*), but the validity of reasonable restraints on remarriage, as distinguished from first marriage, is recognized (*Rest.2d, Property (Donative Transfers) §6.3*). In California, however, all restraints on marriage or remarriage are void. (See *Estate of Alexander* (1906) 149 C. 146, 151, 85 P. 308; *Estate of Scott* (1915) 170 C. 65, 66, 148 P. 221; *Estate of Guidotti* (2001) 90 C.A.4th 1403, 1406, 109 C.R.2d 674 [clause in deceased husband's will that gave wife net income from husband's testamentary trust, but only as long as she did not remarry or live with a man as though they were husband and wife, was void under C.C. 710; declaration from attorney who drafted will indicated that deceased husband was jealous of wife and intended to restrict her from remarrying or living with another man]; see 10 Powell §78.02.)

There is some authority elsewhere upholding the validity of a partial restraint forbidding marriage except to a person of a particular religious faith. (See 50 A.L.R.2d 740.) But if, as California holds, there is a constitutional right to marry the person of one's choice (see 8 *Summary* (10th), *Constitutional Law*, §747), the doctrine of *Shelley v. Kraemer* (1948) 334 U.S. 1, 68 S.Ct. 836, 845, 92 L.Ed. 1161, 1184, *infra*, §200, may prevent judicial enforcement of a forfeiture for violation of the condition. (See 6 *Hastings L. J.* 351.)

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2. Restraints on Marriage.

b. Valid Limitation Until Marriage.

12 Witkin Sum. Cal. Law Real Property § 198

[§ 198] Valid Limitation Until Marriage.

C.C. 710 (supra, §197) states that its prohibition "does not affect limitations where the intent was not to forbid marriage, but only to give the use until marriage." (See *Rest.2d, Property (Donative Transfers)* §6.1.) The form of the provision, i.e., condition subsequent or special limitation, gives some indication of the purpose of the grantor or testator, but the court will sometimes consider other circumstances in determining its validity. (See *Rest.2d, Property (Donative Transfers)* §6.1, Comment e.)

Thus, in *Estate of Alexander* (1906) 149 C. 146, 85 P. 308, the testator left his property to his daughter "if" she remained unmarried. *Held*, in the absence of evidence suggesting a different interpretation, the term imported a condition that was void. The court observed that a valid limitation may ordinarily be made by such words as "while she remains unmarried," "so long as she remains unmarried," or "until she marries." (149 C. 149.) (See *Estate of Guidotti* (2001) 90 C.A.4th 1403, 1407, 109 C.R.2d 674 [review of will's wording and of evidence surrounding its execution showed that decedent husband intended to restrain marriage, not to provide for wife until she formed another relationship].)

But in *Estate of Fitzgerald* (1911) 161 C. 319, 119 P. 96, the testator gave a life estate in all of his property to his widow, with remainder to his son, "except as hereinafter qualified," then provided that "in the event ... that my said wife shall marry again" she and the son should each take one-third in fee simple, and finally provided that if the son died without issue, the whole should go to the wife "absolutely and without condition." *Held*, a valid limitation was created. The intention was, the court held, merely to cut down the widow's estate upon her remarriage, from which she would presumably receive a new source of support, and not to prevent remarriage, because if the son died first, she was to take the whole estate even if she married again. (161 C. 322.) (See *Estate of Horgan* (1949) 91 C.A.2d 618, 621, 205 P.2d 706 [devise by decedent wife to surviving husband for life "or until he shall remarry" was valid limitation and not condition in restraint of marriage].)

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3. Restraints on Use.

a. Valid Restraints Against Particular Uses.

12 Witkin Sum. Cal. Law Real Property § 199

[§ 199] Valid Restraints Against Particular Uses.

If alienation is not restricted, and the condition is simply that the property not be used for certain purposes, e.g., the sale of liquor, or business purposes in a residential tract, the restraint is valid. (See *Rest.2d, Property (Donative Transfers) §3.4*; *20 Am.Jur.2d (2005 ed.)*, *Covenants, Conditions, and Restrictions §164* et seq.; *infra*, §440 et seq.)

In *Boughton v. Socony Mobil Oil Co. (1964) 231 C.A.2d 188, 41 C.R. 714*, defendant's predecessor conveyed land in 1959 to plaintiffs' predecessors, subject to the condition: "Should the property be used for service station purposes prior to November 1, 1979," title should revert to the grantor. Plaintiffs sued to declare the restriction void as a *restraint on trade* under *B. & P.C. 16600*. (See *1 Summary (10th)*, *Contracts, §579*.) *Held*, the condition was valid; it was not a restraint of an entire business, but merely on the use of a particular parcel of land for a limited purpose, and plaintiffs could operate a service station elsewhere and in competition with defendant. (*231 C.A.2d 190*.)

A covenant preventing a competitive use will be enforced where limited in scope and not tending to create a monopoly. In *Doo v. Packwood (1968) 265 C.A.2d 752, 71 C.R. 477*, plaintiffs owned real property on which they operated a grocery business. They built a larger market on the same street, and listed the old place for sale with full information that it was not to be used for a competing grocery business. When sold, the deed carried out this objective by the covenant, "The ... property ... shall not, at any time, be used for the retail sale of groceries." Soon afterwards, defendant purchasers leased to defendant S, who began to operate such a business. In this action for an injunction and damages, *held*, the covenant was valid, despite its apparently unlimited duration. Its purpose was to protect plaintiffs' family business from local competition. It would not be allowed to persist any longer than the situation; i.e., if plaintiffs discontinued the family partnership business in the location, equity would permit disregard of the restriction (or it could be cancelled by release from the grantors); and change in the neighborhood might make it inequitable to enforce it. (*265 C.A.2d 757*; see *infra*, §451 et seq.)

In *Mountain Brow Lodge No. 82 v. Toscano (1967) 257 C.A.2d 22, 64 C.R. 816*, decedent, an active member of plaintiff Odd Fellows Lodge No. 82, made a gift deed of land to the Lodge, with this habendum clause: "Said property is restricted for the use and benefit of the second party, only; and in the event the same fails to be used by the second party or in the event of sale or transfer by the second party of all or any part of said lot, the same is to revert to the first parties herein, their successors, heirs or assigns." *Held*, the condition against sale or transfer was void, but the condition

restricting use was valid and severable. (257 C.A.2d 25.) A dissenting opinion took sharp issue with this conclusion, arguing that a condition restricting use to a particular person prevents alienation as effectively as a condition against sale or transfer. (257 C.A.2d 28, citing the text.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Restraints on Use.

b. Restraints Against Persons.

1. Judicial Rule.

12 Witkin Sum. Cal. Law Real Property § 200

[§ 200] Judicial Rule.

The principal restraints on use were formerly found in deeds of residential property or contracts by lot owners in a tract that restricted occupancy by African Americans or other non-Caucasians. It was formerly held that, although a conveyance to an African American gave him a good title, he could be enjoined from occupying the property. (See *Los Angeles Inv. Co. v. Gary* (1919) 181 C. 680, 682, 186 P. 596; *Janss Inv. Co. v. Walden* (1925) 196 C. 753, 754, 239 P. 34; *Burkhardt v. Lofton* (1944) 63 C.A.2d 230, 233, 146 P.2d 720; *Stone v. Jones* (1944) 66 C.A.2d 264, 268, 152 P.2d 19.)

However, under *Shelley v. Kraemer* (1948) 334 U.S. 1, 68 S.Ct. 836, 845, 92 L.Ed. 1161, 1184, restrictions in deeds or contracts against use or occupancy of property by groups specified by race are unenforceable by the courts. (See 8 *Summary* (10th), *Constitutional Law*, §746.) Accordingly, an injunction is no longer obtainable (*Cumings v. Hokr* (1948) 31 C.2d 844, 845, 193 P.2d 742); a person held in contempt for violating such an injunction is entitled to release on habeas corpus (*In re Laws* (1948) 31 C.2d 846, 847, 193 P.2d 744); and no action for damages will lie for breach of the covenant (*Barrows v. Jackson* (1953) 346 U.S. 249, 73 S.Ct. 1031, 1033, 97 L.Ed. 1586, 1594). (See *Rest.2d, Property (Donative Transfers)* §§5.1, 5.2; 67 *Harv. L. Rev.* 105 [damages for breach of restrictive covenants]; 3 *A.L.R.2d* 466 [restrictive covenants, conditions, or agreements discriminating against persons on account of race, color, or religion]; 36 *A.L.R.2d* 1437 [validity of will or conveyance limiting alienation to certain individuals or those of limited class]; 8 *Summary* (10th), *Constitutional Law*, §746.)

The *Shelley* case, however, declared that the agreements alone were not objectionable. "So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated." (68 S.Ct. 842, 92 L.Ed. 1180.) (On probable ineffectiveness of various devices involving "voluntary adherence," designed for purpose of circumventing *Shelley*, see 37 *Cal. L. Rev.* 493.)

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See 95 *Cal. L. Rev.* 451 [reconceptualizing *Shelley v. Kraemer* as Thirteenth Amendment decision].



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b. Restraints Against Persons.

2. California Statute.

12 Witkin Sum. Cal. Law Real Property § 201

[§ 201] California Statute.

(1) *Deeds and Other Instruments.* Far-reaching legislation has extended the rule of *Shelley v. Kraemer (1948)* 334 U.S. 1, 68 S.Ct. 836, 845, 92 L.Ed. 1161, 1184, supra, §200.

(a) A deed provision that purports to restrict a person's right to sell, lease, rent, use, or occupy real property to persons of a particular racial, national, or ethnic group, by providing for payment of a penalty, forfeiture, reverter, or otherwise, is void. (C.C. 782.) C.C. 782 is retroactive, but applies only to deeds.

(b) C.C. 53, which is more comprehensive in scope and more specific in coverage than C.C. 782, but not expressly retroactive, provides that every provision in a written instrument relating to real property that purports to forbid or restrict the conveyance, encumbrance, leasing, or mortgaging of the property to someone of a specified sex, race, color, religion, ancestry, national origin, or disability is void. Also, every restriction or prohibition as to the use or occupation of real property because of the user's or occupier's sex, race, color, religion, ancestry, national origin, or disability is void. (C.C. 53(a).) Moreover, every restriction or prohibition, whether by way of a covenant or a condition on use, occupation, or transfer of title, that directly or indirectly limits the acquisition, use, or occupation of real property because of the acquirer's, user's, or occupier's sex, race, color, religion, ancestry, national origin, or disability is void. (C.C. 53(b).) (See C.C. 53(c) [judicial notice of recorded instrument containing restrictions].)

(2) *Instrument With Void Provision Is Deemed Revised.* If a deed or other written instrument that relates to title to real property, or a written covenant, condition, or restriction that is part of such a deed or instrument, purports to forbid, restrict, or condition a person's right to sell, buy, lease, rent, use, or occupy the property because of the person's race or color, the instrument will be deemed to be revised to omit that provision. (C.C. 782.5(a).) C.C. 782.5 does not limit or expand a court's powers to reform a deed or other written instrument. (C.C. 782.5(b); on procedure for requesting removal of unlawful restrictive covenant from deed, see *Govt.C. 12956.1(c)*; on procedure for recording modified document striking out unlawfully restrictive covenant, see *Govt.C. 12956.1(g)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Deeds and Other Instruments.*

(a) *C.C. 782*: C.C. 782 was amended and subdivided in 2006. Rather than listing the groups against whom discrimination is prohibited, C.C. 782(a) now prohibits discrimination based on the same characteristics as in the Fair Employment and Housing Act (*Govt.C. 12955(a)*, (d), 8 *Summary* (10th), *Constitutional Law*, §947). C.C. 782(a) does not apply to housing for older persons, as defined in *Govt.C. 12955.9*. (C.C. 782(b), added in 2006.) (b) C.C. 53: C.C. 53(a) and (b) were rewritten in 2005. Instead of listing the characteristics that are protected from the discriminatory actions specified in the text, the statute refers to the characteristics listed or defined in C.C. 51(b) and (e). Those characteristics are sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, and sexual orientation.

(2) *Instrument With Void Provision Is Deemed Revised*. C.C. 782.5(a) was amended in 2006. Rather than listing the groups against whom discrimination is prohibited, C.C. 782.5(a) now prohibits discrimination based on the same characteristics as in the Fair Employment and Housing Act (*Govt.C. 12955(a)*, (d), 8 *Summary* (10th), *Constitutional Law*, §947). C.C. 782.5(a) does not apply to housing for older persons, as defined in *Govt.C. 12955.9*. (C.C. 782.5(b), added in 2006.) C.C. 782.5(b) was relettered C.C. 782.5(c) in 2006.

Govt.C. 12956.1 was amended in 2005 and the provision governing removal of an unlawful restrictive covenant from a deed was deleted. The procedure for recording a modified document striking out an unlawfully restrictive covenant is now in *Govt.C. 12956.2*, added in 2005.



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3. Expanded Scope of Rule.

12 Witkin Sum. Cal. Law Real Property § 202

[§ 202] Expanded Scope of Rule.

C.C. 53 (*supra*, §201) was given an expanded construction in *Taormina Theosophical Community v. Silver* (1983) 140 C.A.3d 964, 190 C.R. 38. Plaintiff was a nonprofit California corporation organized to establish a retirement community for members of the Theosophical Society in America. It acquired two tracts of land and recorded covenants, conditions, and restrictions that limited ownership and occupancy to members of the society who were 50 years of age or over. Defendants Esther and Robert Silver acquired a lot from a previous owner, with actual knowledge of the restrictions, and Robert was under 50. Plaintiff sought declaratory relief and an injunction against violation of the restrictions. The trial judge determined that the Society was not a religion and that the restrictions did not constitute illegal discrimination, and gave judgment for plaintiff. *Held*, reversed.

(a) *Restraint on alienation.*

(1) Under the modern view, only unreasonable restraints on alienation are invalid; and in determining whether a restraint is unreasonable, the court must balance the justification for the restriction against the quantum of the restraint. Factors to be considered include the number of people excluded and the effect of exclusion of that particular group. (140 C.A.3d 973.)

(2) The provision restricting ownership of land to Theosophists older than 50 is unreasonable. "Southern California is a highly desirable place to live and people from all over the country seek to buy property here. In contrast to a vast potential market, the number of Theosophists in the United States is exceptionally small." (140 C.A.3d 973, noting that Society had only 6,000 members nationwide.) The community was developed as a retirement community for people who share interests in the study of comparative religions and "the latent powers of men," but, while the gathering together of like-minded people may be a laudable goal, this purpose is not sufficient to sustain the heavy burden on alienability. (140 C.A.3d 974.)

(b) *Restraint on occupancy.*

(1) *Trend toward extension of protection against discrimination.* "There has been a steady trend, both in the

Legislature and in the courts, to extend the protections afforded against discrimination based on *irrelevant criteria*. These extensions have covered both new areas where discrimination can take place (e.g., the granting of franchises) and the new classes of people (e.g., families with children)." (140 C.A.3d 975, citing C.C. 51.8, and *Marina Point, Ltd. v. Wolfson* (1982) 30 C.3d 721, 180 C.R. 496, 640 P.2d 115, *infra*, §683.) "The broadest of the recent protections is found in the Unruh Act, which has been construed to prohibit all arbitrary discrimination by business enterprises." (140 C.A.3d 975, citing *In re Cox* (1970) 3 C.3d 205, 90 C.R. 24, 474 P.2d 992, 8 *Summary* (10th), *Constitutional Law*, §899.)

(2) *Property owner's rights are not absolute*. Although historically owners have been given latitude in the control and use of land, private property rights "have always been limited by the imperatives of the public good." (140 C.A.3d 975, citing zoning case of *Village of Euclid, Ohio v. Ambler Realty Co.* (1926) 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, 8 *Summary* (10th), *Constitutional Law*, §1005.) "We therefore need not resist the trend towards expanding protections against arbitrary discrimination simply because we are dealing with land." (140 C.A.3d 975.)

(3) *C.C. 53 must be broadly construed*. Although not part of the Unruh Act, C.C. 53 "clearly was enacted to effectuate the same general goals as part of the same trend." (140 C.A.3d 975; on scope of Unruh Act, see 8 *Summary* (10th), *Constitutional Law*, §898.) "The scope of *Civil Code* section 53 is both broad and comprehensive. It interdicts discrimination in leasing and mortgaging as well as in conveyancing. Indirect as well as direct restraints are forbidden. The overlapping provisions of subdivisions (a) and (b) evidence a legislative desire to insure that no gaps in coverage exists. Restrictive reading of the prohibited bases of discrimination would be at odds with the all-inclusive scope of its coverage." (140 C.A.3d 975.)

(4) *Broadly construed, C.C. 53(b) applies*. "In accordance with the spirit of the statute, we interpret *Civil Code* section 53 subdivision (b) as prohibiting all covenants on land that would discriminate on bases similar to those listed." (140 C.A.3d 975.) Theosophy, like a religion, is concerned with spiritual matters; and, though it has no dogma or creed, its membership is united by a common belief. "The apparent function of the occupancy restriction is to exclude those not sharing that attitude. The restriction on use by nontheosophists therefore, operates like a religious restriction in that both discriminate based on a person's sympathy to a set of ideas which are spiritual in nature. By including the word religion in *Civil Code* section 53, the Legislature indicated that it considered the manner in which a person approaches spiritual matters an improper and irrelevant criterion for denying access to land. Because the restriction here is based on just that sort of criterion, it violates the purpose of the statute and will not be enforced by a court of equity." (140 C.A.3d 976.)

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c. Restriction Against For Sale Sign on Property.

12 Witkin Sum. Cal. Law Real Property § 203

[§ 203] Restriction Against For Sale Sign on Property.

(1) *Sign of Reasonable Dimensions and Design: Invalid Restraint.* A provision contained in or otherwise affecting a grant of a fee in, or a purchase money security instrument on, real property, that purports to prohibit or restrict the right of the property owner or his or her agent to display specified signs on the real property, or on real property owned by others with their consent, is void as an unreasonable restraint upon the power of alienation. The signs that cannot be lawfully prohibited are those that advertise the property for sale, lease, or exchange, or advertise directions to the property, that are reasonably located, in plain view of the public, and of reasonable dimensions and design, and that do not adversely affect public safety, including traffic safety. (C.C. 712(a).) C.C. 712 operates retrospectively. (C.C. 712(b).)

(2) *Ordinance Determining Reasonable Dimensions and Design.* Regardless of local ordinance, an owner of real property or his or her agent may display or have displayed on the owner's real property, and on real property owned by others with their consent, signs that are reasonably located, in plain view of the public, and of reasonable dimensions and design, and that do not adversely affect public safety, including traffic safety, as determined by the local governmental entity, advertising the following: (a) that the property is for sale, lease, or exchange by the owner or his or her agent; (b) directions to the property; (c) the owner's or agent's name; and (d) the owner's or agent's address and telephone number. (C.C. 713(a).) Nothing in C.C. 713 limits the authority that a person or local governmental entity may have to regulate the display or placement of a sign on a private or public right-of-way. (C.C. 713(b).)

A sign that conforms to an ordinance adopted in conformity with C.C. 713 is deemed to be of reasonable dimension and design under C.C. 712. (C.C. 712(c).)

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III. TITLES

A. In General.

1. Origin of California Land Titles.

12 Witkin Sum. Cal. Law Real Property § 204

[§ 204] Origin of California Land Titles.

All public lands belonging to the Mexican government became public lands of the United States when the Treaty of Guadalupe Hidalgo was signed on February 2, 1848. (*Lux v. Haggin* (1886) 69 C. 255, 335, 4 P. 919, 10 P. 674.) But existing private titles were recognized, and so were the rights of pueblos (Spanish and Mexican towns). (*Hart v. Burnett* (1860) 15 C. 530, 562; *Hart v. Gould* (1953) 119 C.A.2d 231, 236, 259 P.2d 49; see 27 So. Cal. L. Rev. 338 [*Hart v. Gould*].) Thus, cities that were founded on the sites of former pueblos succeeded to the pueblos' property rights. In *San Diego v. Cuyamaca Water Co.* (1930) 209 C. 105, 116, 287 P. 475, plaintiff, successor to the pueblo of San Diego, was held to be entitled to priority in the waters of the San Diego River over a private water company, because priority had been granted to the pueblo by the Spanish and Mexican governments. (See *Olmstead v. San Diego* (1932) 124 C.A. 14, 16, 12 P.2d 22 [city had authority to set aside pueblo lands as park]; *Dunlop v. O'Donnell* (1935) 6 C.A.2d 1, 9, 43 P.2d 873 [some pueblo lands could be conveyed to individuals to be held in private ownership]; 18 Cal. L. Rev. 572 [*San Diego v. Cuyamaca Water Co.*].)

The Act of Congress of March 3, 1851 (9 Stats. 631) required persons claiming right or title in lands from the Spanish or Mexican governments to present their claims to a commission for settlement, and the commissioners' judgment determined title to these grants. (See *Botiller v. Dominguez* (1889) 130 U.S. 238, 9 S.Ct. 525, 525, 32 L.Ed. 926, 927 [requirement applied to all claims]; *Hart v. Gould*, *supra*, 119 C.A.2d 233; 1 Powell §4.50; 26 *Santa Clara L. Rev.* 127 [19th century San Francisco land disputes]; 33 *U.C.L.A. L. Rev.* 1364 [Spanish and Mexican land grants and public trust doctrine].)

Title to Native American lands and reservations, and state and local jurisdiction over them, have been the subject of some case law and commentary. (See *Oneida County v. Oneida Indian Nation* (1985) 470 U.S. 226, 105 S.Ct. 1245, 1251, 84 L.Ed.2d 169, 178 [federal common law action for violation of Indians' possessory rights to land]; *In re Wilson* (1981) 30 C.3d 21, 25, 30, 35, 177 C.R. 336, 634 P.2d 363 [extinguishment of tribe's aboriginal right to occupy land also extinguished tribe's aboriginal hunting rights]; *Mattz v. Superior Court* (1988) 46 C.3d 355, 362, 250 C.R. 278, 758 P.2d 606 [Native American reservations]; 99 *Harv. L. Rev.* 254 [*Oneida County*]; 25 *Hastings L. J.* 1451 [extension of county jurisdiction over Native American reservations in California]; 31 *Hastings L. J.* 1215 [confiscation of Native Americans' aboriginal lands as requiring compensation; aboriginal title as property right]; 17 *Pacific L. J.* 391 [aboriginal title]; 23 *Southwestern U. L. Rev.* 331 [Indian land claims and illusion of effective legal redress]; 22 *U.C.L.A. L. Rev.* 535 [limits of state jurisdiction over reservations]; 19 *U.S.F. L. Rev.* 27 [Indian water rights].)

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III. TITLES

A. In General.

2. Methods of Acquisition.

12 Witkin Sum. Cal. Law Real Property § 205

[§ 205] Methods of Acquisition.

There are four primary methods of acquiring title to land in California:

- (1) Adverse possession (infra, §212 et seq.).
- (2) Accretion (infra, §236 et seq.).
- (3) Dedication (infra, §239 et seq.).
- (4) Deed (infra, §254 et seq.).

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III. TITLES

A. In General.

3. Capacity To Acquire and Transfer Land.

12 Witkin Sum. Cal. Law Real Property § 206

[§ 206] Capacity To Acquire and Transfer Land.

(1) *Citizen or Alien.* Anyone, whether a citizen or an alien, may take, hold, and dispose of real or personal property within California. (C.C. 671.) Formerly, the Alien Land Law prohibited aliens who were ineligible for citizenship from acquiring a beneficial interest in real property, except to the extent guaranteed by treaty. After a long period of operation (1913-1952), it was declared unconstitutional in *Sei Fujii v. California* (1952) 38 C.2d 718, 738, 242 P.2d 617. (See 8 *Summary* (10th), *Constitutional Law*, §722.) In 1955, it was repealed. Meanwhile, in 1953, a statutory procedure provided ineligible aliens whose property had escheated with a means of obtaining compensation. (See 1 Powell §6.01; 27 *So. Cal. L. Rev.* 75.)

(2) *Minors and Insane Persons.* Minors and insane persons lack capacity to make contracts or conveyances of real property, and their transactions must be made through guardians or conservators. (See 1 Powell §§6.03, 6.04; 3 *U.C.L.A. L. Rev.* 474 [oil leases]; 1 *Summary* (10th), *Contracts*, §§28 et seq., 52 et seq.; 14 *Summary* (10th), *Wills and Probate*, §120 et seq.)

Although the age of majority was lowered to 18 years in 1971 (see 1 *Summary* (10th), *Contracts*, §26), a veteran under 21 is deemed to be the age of majority when contracting to purchase a home or farm from the Department of Veterans Affairs. (*Mil. & Vet.C.* 986.10.)

(3) *Prisoners.* Formerly, a person sentenced to imprisonment in state prison was deemed civilly dead and lacked capacity to deal with property. Now, however, prisoners retain most civil rights (P.C. 2600), including the right to "inherit, own, sell, or convey" property (P.C. 2601(a)). Their rights may be deprived insofar as is reasonably related to legitimate penological interests. (See 1 Powell §6.05; 1 *Summary* (10th), *Contracts*, §58.)

(4) *Married Women.* Married women have full capacity to contract and transfer property. (See *Family C.* 721; 1 Powell §6.02; 11 *Summary* (10th), *Husband and Wife*, §39.)

(5) *Corporations.* A corporation is a legal entity and, unless its powers have been suspended or forfeited, may hold and transfer title to property. (See *Corp.C.* 207; 1 Powell §8.01 et seq.; 9 *Summary* (10th), *Corporations*, §112.)

(6) *Unincorporated Associations and Partnerships.* At common law, an unincorporated association, not being an

entity, could not hold or transfer title to property. This is no longer true in California; a partnership or other unincorporated association may take title as grantee and transfer title as grantor. (See 1 Powell §7.01 et seq.; infra, §267.)

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III. TITLES

A. In General.

4. Proof of Title by Nonpossessor.

12 Witkin Sum. Cal. Law Real Property § 207

[§ 207] Proof of Title by Nonpossessor.

A person not in possession of property, who seeks to establish title and the right to possession, by an action for ejectment or to quiet title, must establish a record or paper title in himself or herself. This may be done by tracing title back to the original government patent. (*Kilfoil v. Warden* (1920) 46 C.A. 502, 503, 189 P. 303; see 25 *Am.Jur.2d* (2004 ed.), *Ejectment* §8.) However, if both parties claim under a common grantor, the plaintiff need not prove title in the grantor; i.e., the plaintiff need not trace title back to the paramount source. (*Phillips v. Menotti* (1914) 167 C. 328, 330, 139 P. 796; *Syme v. Warden* (1931) 114 C.A. 707, 712, 300 P. 863; see 5 *A.L.R.3d* 375 [common source of title doctrine]; 25 *Am.Jur.2d* (2000 ed.), *Ejectment* §15.) Moreover, proof that the plaintiff's grantor previously procured a judicial decree of ownership against the defendant makes further tracing unnecessary. (*San Diego Imp. Co. v. Brodie* (1932) 215 C. 97, 100, 8 P.2d 1027; see *Scott v. Warden* (1931) 111 C.A. 587, 593, 296 P. 95 [proof by plaintiff of decree of specific performance sufficient to quiet title, although no deed was ever executed pursuant to decree].)

A decree of distribution in favor of the plaintiff is not sufficient proof against a defendant claiming from another source (as under a tax deed), for the decree only determines the succession to the title that the decedent may have had, and is conclusive only as to rights of heirs, and devisees claiming in those capacities. It does not determine that the decedent had any title, and it is not binding on third persons with claims adverse to the decedent. (*Rockey v. Vieux* (1919) 179 C. 681, 682, 178 P. 712; see 14 *Summary* (10th), *Wills and Probate*, §726.)

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III. TITLES

A. In General.

5. Possession as Evidence of Title.

12 Witkin Sum. Cal. Law Real Property § 208

[§ 208] Possession as Evidence of Title.

Possession for a prescriptive period will, under certain conditions, create a title by adverse possession. (See *infra*, §212.) Possession for less than this period does not give good title, but does give the possessor a substantial right. Occupancy for any period confers a title sufficient against everyone except the state and those who have title by prescription, accession, transfer, will, or succession. (C.C. 1006.) In other words, the prior possessor may protect his or her possession against others having no lawful right to the property, and even though the prior possessor has no title, he or she may maintain ejectment against an intruder. (*Hart v. Cox* (1915) 171 C. 364, 367, 153 P. 391; see *Kunza v. Gaskell* (1979) 91 C.A.3d 201, 208, 154 C.R. 101, citing the text [ejectment action; plaintiff's possession of property in question conferred on him title sufficient against all who were unable to establish superior claim and gave rise to presumption of ownership that must prevail in absence of other evidence of title].)

Mere occupancy is not, however, a sufficient interest in real property to enable the possessor to commence or maintain an action to quiet title. (C.C. 1006.) Hence, the presumption arising from possession will not itself be a *prima facie* case in actions to quiet title; but doubtless it will still be sufficient in other actions, and even in a quiet title suit, it will constitute some evidence of ownership. Thus, the plaintiff does make out a *prima facie* case if he or she proves a valid conveyance of title from a former record owner, followed by occupancy with acts of ownership such as construction of improvements. (*Canal Oil Co. v. National Oil Co.* (1937) 19 C.A.2d 524, 530, 66 P.2d 197; see *Lowe v. Penn* (1930) 105 C.A. 366, 367, 287 P. 509 [court, overlooking C.C. 1006, upheld quiet title judgment based solely on proof of occupancy].)

Moreover, possession or exercise of acts of ownership over property gives rise to a disputable presumption of ownership (*Ev.C.* 637, 638; see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §§74, 75), and proof as against a stranger to the title makes a *prima facie* case for the plaintiff, which is sufficient if not overcome by other evidence. (*Syme v. Warden* (1931) 114 C.A. 707, 711, 300 P. 863; see *Davis v. Crump* (1912) 162 C. 513, 518, 123 P. 294 [as against entire stranger to title, actual possession of land has uniformly been held, both in ejectment and actions to quiet title, to establish *prima facie* case, sufficient to sustain conclusion of ownership]; *Bond v. Aickley* (1914) 168 C. 161, 163, 141 P. 1188 [in absence of anything to show better or prior title, individual's possession, taken in 1892, established his ownership of premises at that time; his subsequent quitclaim deed transferred whatever title he then had, and transferee's subsequent deed vested title in plaintiff].)

SUPPLEMENT: [This section is current through the latest supplement]



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III. TITLES

A. In General.

6. Governmental Ownership of Tidelands.

a. Federal Rights.

12 Witkin Sum. Cal. Law Real Property § 209

[§ 209] Federal Rights.

(1) *Before 1953.* The theory that the coastal states, rather than the federal government, own the tidelands within the "3-mile limit" was rejected in *United States v. California* (1947) 332 U.S. 19, 67 S.Ct. 1658, 68 S.Ct. 20, 91 L.Ed. 1889, 92 L.Ed. 382. The Court pointed out that, at the time the original 13 states entered the union, there was no established doctrine of governmental ownership of this strip, and therefore neither the original 13 states nor the states admitted later gained title. The holding is thus stated in a supplementary order: "The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals, and other things underlying the Pacific Ocean lying seaward of the ordinary low-water mark on the coast of California, and outside of the inland waters, extending seaward three nautical miles and bounded on the north and south, respectively, by the northern and southern boundaries of the State of California. The State of California has no title thereto or property interest therein." (68 S.Ct. 21, 92 L.Ed. 383.) (See 21 So. Cal. L. Rev. 207 [*United States v. California*]; 35 Cal. L. Rev. 605 [conflicting federal and state claims to title in submerged lands]; *United States v. Louisiana* (1950) 339 U.S. 699, 70 S.Ct. 914, 917, 94 L.Ed. 1216, 1219 [relying on *United States v. California*; coastal waters and oil underneath are within United States' domain]; *United States v. Texas* (1950) 339 U.S. 707, 70 S.Ct. 918, 923, 94 L.Ed. 1221, 1227 [same]; 3 *Stanf. L. Rev.* 193 [*California, Louisiana, and Texas*]; 60 So. Cal. L. Rev. 851 [state and federal jurisdiction over continental shelf]; *infra*, §879.)

(2) *1953 and After.* In the Submerged Lands Act of 1953 (43 U.S.C., §1301 et seq.), the United States relinquished property rights to the coastal states. The purpose of the Act was to undo the effect of *United States v. California*. Congress established in the states title and ownership of the land beneath the navigable waters within the states' boundaries, and the natural resources within that land and water. (43 U.S.C., §1311.) The states' "boundaries" terminate three nautical miles seaward from the coastline. (43 U.S.C., §1301(b).) (See *Alabama v. Texas* (1954) 347 U.S. 272, 74 S.Ct. 481, 482, 98 L.Ed. 689, 693 [Act is constitutional]; 5 Cal. Western L. Rev. 299 [mineral rights on ocean floor]; 21 Cal. Western L. Rev. 1 [claims to jurisdiction over environment of continental shelf]; 8 *San Diego L. Rev.* 584 [federal and state interest in offshore submerged lands]; 23 *San Diego L. Rev.* 763 [doctrine of historic bays]; 28 *Stanf. L. Rev.* 1107 [federalism and development of outer continental shelf mineral resources]; 29 *Stanf. L. Rev.* 1135 [international law applicable to deep seabed mining claims]; 5 *U.C.L.A. L. Rev.* 428 [state tidelands leasing in California].)

The following cases discuss the Act and the three-mile limit:

United States v. Louisiana (1960) 363 U.S. 1, 80 S.Ct. 961, 965, 4 L.Ed.2d 1025, 1031 [submerged lands in Gulf of Mexico].

United States v. California (1965) 381 U.S. 139, 85 S.Ct. 1401, 1407, 14 L.Ed.2d 296, 303 [submerged lands are those shoreward of line that is three geographical miles from seaward limit of "inland waters"].

United States v. Louisiana (1967) 389 U.S. 155, 88 S.Ct. 367, 368, 19 L.Ed.2d 383, 385 [state's claim must be measured on basis of boundaries that existed when state was admitted to Union and not from artificial jetties that were constructed later].

United States v. Louisiana (1969) 394 U.S. 1, 89 S.Ct. 768, 769, 22 L.Ed.2d 36, 39 [coastline means modern, ambulatory coastline, which may have been modified by erosion and accretion since state was admitted to Union].

United States v. Louisiana (1969) 394 U.S. 11, 89 S.Ct. 773, 778, 22 L.Ed.2d 44, 59 [demarcating "inland waters" boundary].

United States v. Maine (1975) 420 U.S. 515, 95 S.Ct. 1155, 1158, 43 L.Ed.2d 363, 367 [federal rights extend to continental shelf of Atlantic states that were original colonies; colonies did not themselves acquire ownership].

United States v. Alaska (1975) 422 U.S. 184, 95 S.Ct. 2240, 2244, 45 L.Ed.2d 109, 114 [federal rights include Cook Inlet in Alaska; inlet does not constitute "historic bay" subject to state ownership].

United States v. California (1978) 436 U.S. 32, 98 S.Ct. 1662, 1663, 56 L.Ed.2d 94, 96 [California has dominion over submerged lands and water within Channel Islands National Monument, which is within 3-mile margin].

United States v. California (1980) 447 U.S. 1, 100 S.Ct. 1994, 1996, 64 L.Ed.2d 681, 685 [California coastline follows mean low-water line along natural shore, not seaward edge of offshore oil facilities and piers].

California v. United States (1982) 457 U.S. 273, 102 S.Ct. 2432, 2436, 73 L.Ed.2d 1, 7 [federal law governs ownership of oceanfront land created through accretion on land owned by United States on California coast].

United States v. Maine (1985) 469 U.S. 504, 105 S.Ct. 992, 994, 83 L.Ed.2d 998, 1001 [determination of coastline in area of Long Island Sound and Block Island Sound].

United States v. Louisiana (1985) 470 U.S. 93, 105 S.Ct. 1074, 1076, 84 L.Ed.2d 73, 76 [Mississippi Sound constitutes historic bay and thus "inland waters" owned by Alabama and Mississippi].

United States v. Maine (1986) 475 U.S. 89, 106 S.Ct. 951, 952, 89 L.Ed.2d 68, 73 [Massachusetts did not have valid claim to Nantucket Sound as inland waters under "ancient title" doctrine]. (See 24 *San Diego L. Rev.* 769 [*United States v. Maine*].)

People v. Weeren (1980) 26 C.3d 654, 666, 163 C.R. 255, 607 P.2d 1279 [Santa Barbara Channel is outside California boundary for purposes of federal law].

Tidewater Marine Western v. Bradshaw (1996) 14 C.4th 557, 564, 59 C.R.2d 186, 927 P.2d 296 [state's authority to regulate conduct outside federally set boundaries].

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6. Governmental Ownership of Tidelands.

b. State Rights.

12 Witkin Sum. Cal. Law Real Property § 210

[§ 210] State Rights.

As between the state and private persons, the state holds title to submerged land on the seacoast up to the high-water mark in trust for the public. (*Boone v. Kingsbury* (1928) 206 C. 148, 180, 273 P. 797; *Marks v. Whitney* (1971) 6 C.3d 251, 257, 98 C.R. 790, 491 P.2d 374; see *Phillips Petroleum Co. v. Mississippi* (1988) 484 U.S. 469, 108 S.Ct. 791, 98 L.Ed.2d 877 [state ownership of nonnavigable tidelands is subject to public trust]; 16 *Ecology L. Q.* 967 [Phillips; need to rethink public trust doctrine]; 22 *Hastings L. J.* 759 [broadening scope of public interest to include environmental considerations]; 31 *Hastings L. J.* 329 [extent of state ownership of submerged lands in California]; 6 *Loyola L.A. L. Rev.* 485 [scope of public purpose for which state holds tidelands in trust]; 22 *Loyola L.A. L. Rev.* 1319 [Phillips]; 24 *U.S.F. L. Rev.* 471 [Phillips]; on determining boundaries of tidelands, see *infra*, §275.)

A littoral owner has no proprietary rights in these lands, and, even though the owner's land may be riparian to navigable waters, as against the state or a city to which the lands have been granted by the state, the littoral owner has no right of access to the water over intervening tidelands. (*Henry Dalton & Sons Co. v. Oakland* (1914) 168 C. 463, 466, 143 P. 721; *Koyer v. Miner* (1916) 172 C. 448, 452, 156 P. 1023; *Oakland v. E.K. Wood Lumber Co.* (1930) 211 C. 16, 22, 292 P. 1076; see *Oakland v. Hogan* (1940) 41 C.A.2d 333, 350, 106 P.2d 987 [if littoral owner builds wharf without franchise or other governmental permission, city grantee may maintain quo warranto proceedings on theory that owner is usurping public franchise or permission]; *Marin v. Roberts* (1970) 4 C.A.3d 480, 488, 84 C.R. 425 [county grantee of tidelands may maintain action in ejectment for unlawful encroachment by defendant owner of sunken dry docks in area].)

Pub.Res.C. 6463 and 6464 allow suits (1) to quiet title against the state by persons claiming tidelands under a state patent, and (2) to determine boundaries against the state by persons claiming land adjoining tidelands under a state or federal patent. (For other rights of littoral owner, see *Marks v. Whitney*, *supra*, 6 C.3d 262.)

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A. In General.

6. Governmental Ownership of Tidelands.

c. Grant of Tidelands to Municipality.

12 Witkin Sum. Cal. Law Real Property § 211

[§ 211] Grant of Tidelands to Municipality.

(1) *Public Trust.* Under the California Constitution (Cal. Const., Art. X, §3) and *Pub.Res.C. 7991*, the state cannot grant tidelands, within two miles of an incorporated city or town and fronting on navigable waters, to private parties. It may, however, grant them to municipal corporations, subject to the public trust for navigation and commerce. Furthermore, despite the constitutional and statutory prohibition, tidelands patented by private persons before the enactment of *Pub.Res.C. 7991* are valid, although the patentee and his or her successors take the land subject to the public trust. (*Newcomb v. Newport Beach* (1936) 7 C.2d 393, 399, 60 P.2d 825.)

The nature and effect of tideland grants to a city were determined in *Long Beach v. Marshall* (1938) 11 C.2d 609, 82 P.2d 362, where the state granted tidelands and submerged lands to the city, and later contended that the mineral rights belonged to the state and that the city could not take oil from the lands. *Held*, the typical grants (reviewing many of the statutes) were intended to convey not merely an easement but the fee simple title to the city, subject to certain conditions and on certain trusts. (11 C.2d 613.) (See *Atwood v. Hammond* (1935) 4 C.2d 31, 38, 48 P.2d 20 [title granted to San Diego]; *Coronado v. San Diego Unified Port Dist.* (1964) 227 C.A.2d 455, 474, 38 C.R. 834 [Legislature may change terms of grant in public interest]; *Orange v. Heim* (1973) 30 C.A.3d 694, 709, 727, 106 C.R. 825 [legislation permitting exchange of tidelands for privately owned uplands was invalid].) (On construction of statute granting tidelands to county, see *California v. Orange* (1982) 134 C.A.3d 20, 26, 184 C.R. 423; on economic and legal considerations involved in administration of state tidelands trusts, see 21 U.C.L.A. L. Rev. 826.)

It was originally held that the statutory trust created by the grant embraced not only the physical land but any income derived from it. Hence, if a city obtained revenue from oil wells drilled on the tidelands, it had to devote the revenue to harbor improvement, and was without power to use the funds for general municipal purposes. (*Long Beach v. Morse* (1947) 31 C.2d 254, 257, 188 P.2d 17; *Trickey v. Long Beach* (1951) 101 C.A.2d 871, 879, 226 P.2d 694.) By statute in 1951, the Legislature sought to release 50% of the revenue to the City of Long Beach, free of the trust, but the Supreme Court decided that the city held the funds as trustee for the state. (*Mallon v. Long Beach* (1955) 44 C.2d 199, 205, 282 P.2d 481; see *People v. Long Beach* (1959) 51 C.2d 875, 880, 338 P.2d 177 [lease of building at nominal rental to Armed Forces Y.M.C.A. was consistent with trust purpose]; *Western Oil & Gas Assn. v. State Lands Com.* (1980) 105 C.A.3d 554, 563, 164 C.R. 468 [because state was not obligated under trust to lease tidelands at all, it was not precluded from devising alternative means of determining rental rates in public interest]; 7 *Hastings L. J.* 115 [

Mallon]; 5 U.C.L.A. L. Rev. 427 [state tidelands leasing].)

(2) *Land Freed From Trust*. "[T]he state in its proper administration of the trust may find it necessary or advisable to cut off certain tidelands from water access and render them useless for trust purposes. In such a case the state through the Legislature may find and determine that such lands are no longer useful for trust purposes and free them from the trust. When tidelands have been so freed from the trust ... they may be irrevocably conveyed into absolute private ownership." (*Long Beach v. Mansell* (1970) 3 C.3d 462, 482, 91 C.R. 23, 476 P.2d 423.) (See *Berkeley v. Superior Court* (1980) 26 C.3d 515, 534, 162 C.R. 327, 606 P.2d 362 ["the interests of the public are paramount in property that is still physically adaptable for trust uses, whereas the interests of the grantees and their successors should prevail insofar as the tidelands have been rendered substantially valueless for those purposes"]; *Orange v. Heim, supra*, 30 C.A.3d 710, 723 [*Mansell* test of "relatively small parcel" of tidelands was not met]; 13 Southwestern L. Rev. 1 [same; elaborate discussion and criticism of tidelands trust doctrine in California]; 14 U.C. Davis L. Rev. 399 [*Berkeley*]; 13 U.S.F. L. Rev. 39 [loss of public tidelands to private parties through unconstitutional land trades]; *infra*, §920.)

In *Los Angeles v. Venice Peninsula Properties* (1982) 31 C.3d 288, 182 C.R. 599, 644 P.2d 792, the public trust doctrine was extended to tidelands originally acquired by private persons from the Mexican government and later patented to the owners by the federal Government. But in *Summa Corp. v. California* (1984) 466 U.S. 198, 104 S.Ct. 1751, 80 L.Ed.2d 237, the United States Supreme Court reversed the decision. The Court held that "California cannot at this late date assert its public trust easement over petitioner's property, when petitioner's predecessors-in-interest had their interest confirmed without any mention of such an easement in proceedings taken pursuant to the Act of 1851 (see *supra*, §204). This interest claimed by California is one of such substantial magnitude that regardless of the fact that the claim is asserted by the State in its sovereign capacity, this interest ... must have been presented in the patent proceeding or be barred." (104 S.Ct. 1758, 80 L.Ed.2d 246.) (See *Los Angeles v. Venice Peninsula Properties* (1988) 205 C.A.3d 1522, 1530, 253 C.R. 331 [on remand after *Summa Corp.*; neither city nor state had right to public trust easement over tidelands at issue]; 22 Cal. Western L. Rev. 385 [implications of *Summa Corp.* on property rights of Native Americans].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Public Trust*. See *Zack's v. Sausalito* (2008) 165 C.A.4th 1163, 1179, 81 C.R.3d 797 [city could lawfully lease strip of public trust tidelands to private party for boat storage, even though strip had been dedicated as public street]. *Revenue from oil wells*: See *California v. Long Beach* (2005) 125 C.A.4th 767, 776, 23 C.R.3d 126 [city could retain portion of revenue from oil wells for future use in plugging and abandoning wells and removing facilities].



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III. TITLES

B. Adverse Possession.

1. In General.

12 Witkin Sum. Cal. Law Real Property § 212

[§ 212] In General.

Adverse possession is a means of acquiring title to property, after lapse of time, by continued possession. (See C.C. 1007; *Silacci v. Abramson* (1996) 45 C.A.4th 558, 562, 53 C.R.2d 37, citing the text; 16 Powell §91.01 et seq.; 6 Miller & Starr 3d §16:1 et seq.; Cal. Civil Practice, 2 Real Property Litigation, Chap. 13; 18 A.L.R.3d 678 [adverse possession by government]; 3 Am.Jur.2d (2002 ed.), *Adverse Possession* §2; 39 Proof of Facts 2d 261; on application of rules of adverse possession to *future interests*, see *Rest., Property*, §220 et seq.; *infra*, §§222, 234; on action to quiet title, see 5 Cal. Proc. (4th), *Pleading*, §616 et seq.; for forms, see 1B Am.Jur. P.P. Forms (1995 ed.), *Adverse Possession* §4 et seq.; 1A Am.Jur. Legal Forms 2d (1999 ed.), *Adverse Possession* §11:1 et seq.)

Title acquired by adverse possession is absolute. (C.C. 1007.) It is a new title, founded on the disseizin, and not the old estate of the former owner, although it is of the same nature and extent. (*Williams v. Sutton* (1872) 43 C. 65, 73; *Tobin v. Stevens* (1988) 204 C.A.3d 945, 952, 251 C.R. 587.) But it is not a marketable title, because it is not deducible from the record. Hence, in the ordinary contract for the sale of real estate, the vendor cannot get specific performance by furnishing only a title gained by adverse possession. (*Benson v. Shotwell* (1890) 87 C. 49, 56, 25 P. 249, 681; *Gwin v. Calegaris* (1903) 139 C. 384, 387, 73 P. 851.)

Adverse possession differs from prescription, which consists of acquiring a right (such as an easement) after lapse of time, by use. (See *Thomas v. England* (1886) 71 C. 456, 458, 12 P. 491; *Cleary v. Trimble* (1964) 229 C.A.2d 1, 6, 39 C.R. 776, citing the text; 16 Powell §91.01; *infra*, §401.) The *Restatement of Property* §221 uses the term "statutory period" to mean the time stated for the acquisition of an estate in land by adverse possession, and "period of prescription" as the time for acquiring easements and profits by prescription.

SUPPLEMENT: [This section is current through the latest supplement]
See 1A Am.Jur. Legal Forms 2d (2007 ed.), *Adverse Possession* §11:1 et seq.

Action to quiet title:

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §657 et seq.



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B. Adverse Possession.

2. Property Not Subject to Adverse Possession.

a. Public Property.

12 Witkin Sum. Cal. Law Real Property § 213

[§ 213] Public Property.

(1) *General Rule.* Ordinarily, there can be no adverse possession of public property. (See *Patton v. Los Angeles* (1915) 169 C. 521, 527, 147 P. 141; *People v. Chambers* (1951) 37 C.2d 552, 557, 233 P.2d 557 [property deeded to state for park purposes and included in state park system]; *Sacramento v. Lauszus* (1945) 70 C.A.2d 639, 651, 161 P.2d 460; *Arques v. Sausalito* (1954) 126 C.A.2d 403, 405, 272 P.2d 58 [street and wharf on tideland]; 6 Miller & Starr 3d §16:2 et seq.; 7 *Loyola L.A. L. Rev.* 30 [adverse possession of abandoned urban housing]; 49 *U.C.L.A. L. Rev.* 447 [reconsidering sovereign immunity from adverse possession]; 55 *A.L.R.2d* 554 [adverse possession of public property held by government other than for streets, alleys, parks, or common]; 3 *Am.Jur.2d* (2002 ed.), *Adverse Possession* §268 et seq.) Thus, for example, a city has a paramount right to use the subsurface of a street for public purposes, and a private owner who extends a basement under it cannot gain a prescriptive title. (*Berkeley v. Gordon* (1968) 264 C.A.2d 461, 464, 70 C.R. 716, 13 *Summary* (10th), *Equity*, §137.)

(2) *Land Not Devoted to Public Use.* It was formerly the rule that land owned by the state or municipalities in a proprietary capacity, and not devoted to public use, was subject to adverse possession. (See *People v. Banning Co.* (1914) 167 C. 643, 649, 140 P. 587 [state swamp lands]; *Henry Cowell Lime & Cement Co. v. State* (1941) 18 C.2d 169, 172, 114 P.2d 331 [strip of land adjacent to street]; *Richert v. San Diego* (1930) 109 C.A. 548, 554, 293 P. 673 [certain types of pueblo lands].)

In 1935, C.C. 1007 was amended to prohibit the acquisition of title by adverse possession against specified governmental entities. (See *Los Angeles v. San Fernando* (1975) 14 C.3d 199, 270, 123 C.R. 1, 537 P.2d 1250; *California Water Service Co. v. Edward Sidebotham & Son* (1964) 224 C.A.2d 715, 726, footnotes 4, 5, 37 C.R. 1; *Wright v. Goleta Water Dist.* (1985) 174 C.A.3d 74, 90, 91, 219 C.R. 740.) However, the section did not expressly refer to the state, and it was unclear whether adverse possession could still be gained against state lands that were not devoted to public use. (See *Los Angeles v. Coffey* (1966) 243 C.A.2d 121, 124, 52 C.R. 218.)

This uncertainty was eliminated by a 1968 amendment to C.C. 1007, which provides that there can be no adverse possession of property dedicated to or owned by the state or any public entity. (See *Los Angeles v. Coffey*, *supra*, 243 C.A.2d 125 [on transfer to exempt entity, occupier's possessory rights "automatically die on the vine"].)

West's Key Number Digest, Adverse Possession k.5 et seq.

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B. Adverse Possession.

2. Property Not Subject to Adverse Possession.

b. Property Dedicated to Public Use.

12 Witkin Sum. Cal. Law Real Property § 214

[§ 214] Property Dedicated to Public Use.

The case law applied the rule of immunity of public property (*supra*, §213) to property held by a public service corporation and dedicated to public use, such as a railroad right-of-way. (*Southern Pac. Co. v. Hyatt* (1901) 132 C. 240, 241, 64 P. 272; see 3 *Am.Jur.2d* (2002 ed.), *Adverse Possession* §272 et seq.) The rule was codified in 1968: Property dedicated to a public use by a public utility is immune from adverse possession. (C.C. 1007.)

Property held under a charitable trust may have the same immunity as property held for public use. (See *Mosk v. Summerland Spiritualist Assn.* (1964) 225 C.A.2d 376, 381, 37 C.R. 366 [dictum; finding of adverse possession was not supported by evidence].)

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B. Adverse Possession.

3. Elements of Adverse Possession.

a. Actual, Open, and Notorious Occupation.

12 Witkin Sum. Cal. Law Real Property § 215

[§ 215] Actual, Open, and Notorious Occupation.

The claimant must actually occupy the property, and the possession must be enough to constitute reasonable notice to the owner. Actual possession "is established not alone by the assertion of title, but it must be coupled with acts of ownership which proclaim to the world, and bring notice to the owner, that a right is claimed in the land over which the claimant is seeking to exercise dominion." (*West v. Evans* (1946) 29 C.2d 414, 417, 175 P.2d 219; see *Klein v. Caswell* (1948) 88 C.A.2d 774, 778, 199 P.2d 689, *infra*, §224; *Sevenman v. Long Bell Lumber Co.* (1954) 129 C.A.2d 528, 532, 277 P.2d 510 [acts of occupancy by claimant's employees were insufficient]; *Wareham v. Randolph* (1960) 184 C.A.2d 218, 224, 7 C.R. 483 [few visits to land was not sufficient]; *Weller v. Chavarria* (1965) 233 C.A.2d 234, 241, 43 C.R. 364 [burden on claimant]; 16 Powell §91.02 et seq.; 6 Miller & Starr 3d §16:5; 43 A.L.R.2d 6, 27 [adverse possession under parol gift of land]; 2 A.L.R.3d 1005 [encroachment of building or other structure]; 3 *Am.Jur.2d* (2002 ed.), *Adverse Possession* §16 et seq.;.)

Thus, in *Madson v. Cohn* (1932) 122 C.A. 704, 10 P.2d 531, plaintiff claimed possession of an unfenced city lot, and proved that he had visited it four to six times a year, and during 1 year had planted a few bushes and trees and cleaned out weeds. *Held*, the occupancy was insufficient. (122 C.A. 705.)

The possession must be exclusive. In *Miller v. Doheny* (1921) 50 C.A. 413, 195 P. 745, there was an adverse possessor of certain land. The true owner also owned an adjoining lot and a house with eaves projecting over the land adversely claimed. *Held*, the adverse possessor did not acquire title to the strip over which the eaves projected; the true owner was never out of possession of that part. (50 C.A. 418.) (See *Raab v. Casper* (1975) 51 C.A.3d 866, 877, 124 C.R. 590, citing the text [findings that do not recite exclusivity of use will not support judgment of adverse possession]; 56 A.L.R.3d 1182 [use of property by public as affecting acquisition of title by adverse possession]; 39 A.L.R.4th 1148 [grazing of livestock, gathering of crops, or cutting of timber by record owner as defeating exclusiveness or continuity of adverse claimant's possession]; 3 *Am.Jur.2d* (2002 ed.), *Adverse Possession* §67 et seq.)

However, possession by a tenant of the adverse possessor is enough; the adverse possessor's personal occupation is not required. (*Weyse v. Biedebach* (1927) 86 C.A. 712, 721, 261 P. 1086; *Kellogg v. Huffman* (1934) 137 C.A. 278, 284, 30 P.2d 593; see 3 *Am.Jur.2d* (2002 ed.), *Adverse Possession* §§23, 24.)

West's Key Number Digest, Adverse Possession k.14 et seq.

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III. TITLES

B. Adverse Possession.

3. Elements of Adverse Possession.

b. Hostile or Adverse Claim.

1. In General.

12 Witkin Sum. Cal. Law Real Property § 216

[§ 216] In General.

(1) *Permissive Use*. The claim must be adverse to that of the true owner. If the owner permits the person to use the land, the possession is not adverse. (*Southern Pac. Co. v. San Francisco* (1964) 62 C.2d 50, 56, 41 C.R. 79, 396 P.2d 383 [where use in inception is permissive, there cannot be adverse possession without clear actual notice to owner of adverse nature of subsequent possession]; *Grimmesey v. Kirtlan* (1928) 93 C.A. 658, 665, 270 P. 243; *Madden v. Alpha Hardware & Supply Co.* (1954) 128 C.A.2d 72, 75, 274 P.2d 705; *Smith v. McDaniel* (1964) 228 C.A.2d 275, 278, 39 C.R. 544, citing the text; *California Maryland Funding v. Lowe* (1995) 37 C.A.4th 1798, 1806, 44 C.R.2d 784, *infra*, §227 [finding hostile possession]; see 6 Miller & Starr 3d §16:13 et seq.; 73 A.L.R.2d 1097 [possession by personal representative ordinarily is not adverse to heirs or devisees]; 3 Am.Jur.2d (2002 ed.), *Adverse Possession* §§41 et seq., 310; 68 Proof of Facts 3d 239 [permissive possession or use of land as defeating claim of adverse possession]; 1B Am.Jur. P.P. Forms (1995 ed.), *Adverse Possession* §63 et seq.; for forms of notice of adverse claim, see 1A Am.Jur. Legal Forms 2d (1998 ed.), *Adverse Possession* §11:8 et seq.)

(2) *Exception: Invalid Oral Gift*. The Restatement notes that, following an invalid oral gift of a complete ownership interest in land, possession by the donee for the statutory period is adverse, because the donee's claim of ownership in this situation is in effect a repudiation of any tenancy at will that was initially created. (*Rest.2d, Property (Donative Transfers)* §31.4, Comment e.)

(3) *Possession Following Decree Awarding Property to Another*. Where the plaintiff in a quiet title action gets judgment, but the defendant nevertheless remains in possession or goes into possession, the defendant's possession is presumed to be in subordination to the true owner (the successful plaintiff), and it cannot become adverse without notice brought home to the owner. (*Jaffray v. Mies* (1947) 80 C.A.2d 291, 293, 181 P.2d 672.)

In *Buic v. Buic* (1992) 5 C.A.4th 1600, 7 C.R.2d 738, a dissolution judgment had awarded J a residence, which he had earlier quitclaimed to his wife, B. But the record title was never changed, and B continued to live in the house, making the mortgage and tax payments. When she attempted to sell the property, J filed a constructive trust and fraud action seeking a conveyance to him. B claimed title by adverse possession, and the trial judge granted her motion for summary judgment. *Held*, reversed.

(a) B's continued possession of the property after the dissolution judgment was not adverse. "When a possessor of property remains in possession following a judicial decree awarding the property to another, the possessor's occupation is deemed subordinate to the true owner until express notice is given to the owner of the possessor's adverse claim." (5 C.A.4th 1605, citing *Jaffray*.)

(b) B could establish adverse possession only under a claim of right (see *infra*, §225), and therefore had to make a strong showing of proof on each of the required elements. (5 C.A.4th 1604.) Given the presumption arising from the dissolution decree, and J's declaration that he and B had agreed that she would stay in the house and make mortgage and tax payments in lieu of rent, there was a triable issue of material fact whether her occupancy was adverse and hostile to J's ownership. (5 C.A.4th 1606.)

Of course, if the holder recognizes or admits the title of another, the other's claim is subordinate and not hostile. (*Mills v. Laing* (1918) 38 C.A. 776, 779, 177 P. 493.)

(4) *Title to Minerals*. If the owner of land severs the title to minerals from the title to the surface (by a grant reserving mineral rights), possession of the surface is not adverse to the owner of the minerals. Hence, the possessor gains no title to the minerals. (*Foss v. Central Pac. R. Co.* (1935) 9 C.A.2d 117, 120, 49 P.2d 292; see *Gerhard v. Stephens* (1968) 68 C.2d 864, 900, 69 C.R. 612, 442 P.2d 692 ["mere possession and ownership of the surface, in the absence of visible activity sufficient to impart to the true owner notice of an adverse claim, does not give rise to *adverse* title to rights in the underlying minerals"]; 3 *Am.Jur.2d* (2002 ed.), *Adverse Possession* §284 et seq.)

(5) *Agreed Boundary Distinguished*. The settlement of a disputed boundary by agreement (*infra*, §278) differs from adverse possession in that it is based on consent. Hence, a finding of both agreed boundary and adverse possession is erroneous. (*Janes v. LeDeit* (1964) 228 C.A.2d 474, 488, 39 C.R. 559; *Zachery v. McWilliams* (1972) 28 C.A.3d 57, 62, 104 C.R. 293; see 9 Santa Clara Lawyer 244, 259.)

West's Key Number Digest, *Adverse Possession* k.58 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Permissive Use*. See *Estate of Seifert* (2005) 128 C.A.4th 64, 67, 26 C.R.3d 560 [executor's possession of real property that was asset of estate could not be adverse to beneficiary of estate; executor did not acquire title to property by adverse possession]; 1A *Am.Jur. Legal Forms* 2d (2007 ed.), *Adverse Possession* §11:6 et seq.



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2. Mortgagor and Mortgagee.

12 Witkin Sum. Cal. Law Real Property § 217

[§ 217] Mortgagor and Mortgagee.

A mortgage does not give the mortgagee the right of possession in the absence of special agreement; the mortgagee has no such right until after a foreclosure sale, expiration of the period of redemption, and delivery of the deed. (See 4 *Summary* (10th), *Security Transactions in Real Property*, §§95, 170.) Hence, where a mortgagor stays in possession, the statute does not begin to run in favor of the mortgagor or his or her transferee and against the mortgagee until delivery of the deed. (*Comstock v. Finn* (1936) 13 C.A.2d 151, 157, 56 P.2d 957; see 6 Miller & Starr 3d §16:29; 3 *Am.Jur.2d* (2002 ed.), *Adverse Possession* §224 et seq.)

This is true also where the adverse claimant is a grantee of the mortgagor. In *Dobbins v. Economic Gas Co.* (1920) 182 C. 616, 189 P. 1073, there was an action to foreclose a mortgage. During the pendency of the action, the mortgagor sold to a purchaser who knew of the action, but went into possession. *Held*, adverse possession did not commence during the action; the purchaser's possession was merely that of the mortgagor, to whose interest he had succeeded, and the mortgagor's interest was not adverse to the mortgagee. (182 C. 633.) (See *Laubisch v. Roberdo* (1954) 43 C.2d 702, 706, 277 P.2d 9 [same rule applied to foreclosure of mechanic's lien]; 3 *Am.Jur.2d* (2002 ed.), *Adverse Possession* §224 et seq.)

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12 Witkin Sum. Cal. Law Real Property § 218

[§ 218] Vendor and Purchaser, Grantor and Grantee.

The purchaser under an executory contract does not hold adversely to the vendor. Hence, no adverse possession can be initiated without an open repudiation of the vendor's title, and notice of the repudiation brought home to the vendor. (*Gioscio v. Lautenschlager* (1937) 23 C.A.2d 616, 618, 73 P.2d 1230; *Beagle v. Hanks* (1954) 125 C.A.2d 298, 300, 270 P.2d 113; 6 Miller & Starr 3d §§16:27, 16:28; 3 Am.Jur.2d (2002 ed.), *Adverse Possession* §189.)

Ordinarily, when a grantor remains in possession of granted land, the possession will be deemed permissive. (See C.C.P. 321; 39 A.L.R.2d 353, 356 [grantor's possession as adverse to grantee].) The same is true of a vendor under an installment contract that is still executory. (*Perry v. Bedford* (1965) 238 C.A.2d 6, 14, 47 C.R. 461.) This rule does not apply, however, if the land possessed is not the identical parcel that was granted. Thus, in *Harvey v. Berry* (1927) 201 C. 74, 255 P. 509, a certain piece of land was granted, the grantor held over, and his successor in interest later received a conveyance of a large piece of land that included the formerly granted portion. *Held*, title by adverse possession could be gained against the first grantee. (201 C. 78.) (See 3 Am.Jur.2d (2002 ed.), *Adverse Possession* §193 et seq.)

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aa. Possession Is Normally Not Adverse.

12 Witkin Sum. Cal. Law Real Property § 219

[§ 219] Possession Is Normally Not Adverse.

The possession of one tenant in common cannot ordinarily be adverse to another, even though the latter is out of possession. Exclusive occupancy by one cotenant is deemed permissive, unless the others have notice of the hostile claim. (*Nelson v. Sweitzer* (1937) 22 C.A.2d 382, 386, 71 P.2d 85; see *Dimmick v. Dimmick* (1962) 58 C.2d 417, 422, 24 C.R. 856, 374 P.2d 824 [burden of proving ouster was not met]; *Wilkerson v. Thomas* (1953) 121 C.A.2d 479, 488, 263 P.2d 678 ["the occupying tenant must bring home or impart notice to the tenant out of possession, by acts of ownership of the most open, notorious and unequivocal character, that he intends to oust the latter of his interest in the common property"]; *Sevenman v. Long Bell Lumber Co.* (1954) 129 C.A.2d 528, 535, 277 P.2d 510 [acts of occupancy by claimant through its employees scarcely added up to 1 day per year]; *Andreotti v. Andreotti* (1964) 224 C.A.2d 533, 541, 36 C.R. 709 [following *Dimmick*]; *Weller v. Chavarria* (1965) 233 C.A.2d 234, 242, 43 C.R. 364 [burden on claimant was not met]; *Hunter v. Schultz* (1966) 240 C.A.2d 24, 28, 49 C.R. 315 [same]; *Russell v. Lescalet* (1967) 248 C.A.2d 310, 313, 56 C.R. 399; see 6 Miller & Starr 3d §§16:32, 16:33; 82 A.L.R.2d 5; 27 A.L.R.4th 420 [adverse possession between cotenants who are unaware of cotenancy]; 3 Am.Jur.2d (2002 ed.), *Adverse Possession* §§201, 202, 297.) (For forms of notice of adverse claim, see 1A Am.Jur. Legal Forms 2d (1999 ed.), *Adverse Possession* §11:11 et seq.; on ouster, see *infra*, §221.)

This rule, however, has no application when the adverse claimant commences possession as the grantee of the entire fee, with no cotenants in existence at the time. (See *Zolezzi v. Michelis* (1948) 86 C.A.2d 827, 831, 195 P.2d 835.)

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See *Preciado v. Wilde* (2006) 139 C.A.4th 321, 325, 42 C.R.3d 792 [cotenants failed to establish their intention to oust other cotenant; they did not exclude her from property, restrict her access, or inform her that they were challenging her ownership, and they attempted to buy her interest in property, thus admitting that she held legal title]; 1A Am.Jur. Legal Forms 2d (2007 ed.), *Adverse Possession* §11:6 et seq.



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bb. Claim Under Invalid Deed.

12 Witkin Sum. Cal. Law Real Property § 220

[§ 220] Claim Under Invalid Deed.

One cotenant in possession may gain title if the cotenant's claim is based on an invalid deed purporting to convey the property to the cotenant. Recordation of the deed may constitute sufficient notice to the other cotenants. (See *Johns v. Scobie* (1939) 12 C.2d 618, 624, 86 P.2d 820; *Pease v. Gibson* (1940) 37 C.A.2d 353, 354, 99 P.2d 353; *Kraemer v. Kraemer* (1959) 167 C.A.2d 291, 307, 334 P.2d 675; 3 Am.Jur.2d (2002 ed.), *Adverse Possession* §210.)

But the deed merely establishes the hostile character of the claim; the other elements of adverse possession must be proved. Thus, in *West v. Evans* (1946) 29 C.2d 414, 175 P.2d 219, a widow had a three-fourths interest in her home; the other cotenants, with a one-fourth interest, were children of the marriage. She made a deed of the entire fee to her adopted son. He recorded the deed, moved in, and paid taxes for the requisite period. *Held*, adverse possession against the other children was not established, because he never took actual, exclusive possession; his mother (a cotenant) continued to live there with him, and there was no indication to the public or the other cotenants of any change of possession. (29 C.2d 417.)

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cc. Ouster of Other Tenant.

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[§ 221] Ouster of Other Tenant.

If one cotenant actually ousts another, or by acts or declarations gives notice of a hostile claim, adverse possession is possible. (See *Akley v. Bassett* (1922) 189 C. 625, 641, 209 P. 576; *Estate of Hughes* (1992) 5 C.A.4th 1607, 1615, 7 C.R.2d 742, supra, §44 [ouster as triggering potential claim of adverse possession]; 3 *Am.Jur.2d* (2002 ed.), *Adverse Possession* §203 et seq.)

Thus, where one cotenant purports to convey the entire property to a stranger who enters and makes improvements, the possession of the stranger is notice to the other cotenant. (*Unger v. Mooney* (1883) 63 C. 586, 591; see 32 *A.L.R.2d* 1214 [possession by stranger claiming under conveyance by cotenant as adverse to other cotenant].) Moreover, an act of a cotenant in sole possession that manifests an intention to hold exclusively for the possessing cotenant may be equivalent to an actual ouster. (*Schipper v. Penkalski* (1941) 46 C.A.2d 28, 33, 115 P.2d 231.)

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5. Life Tenant and Remainderperson.

12 Witkin Sum. Cal. Law Real Property § 222

[§ 222] Life Tenant and Remainderperson.

The owner of a present interest (e.g., a life tenant) cannot get adverse possession against the owner of a future interest (e.g., a remainderperson), until the future interest becomes a present interest, i.e., until the prior estate terminates and the remainder ripens into a possessory estate. It is immaterial that the owner of the present interest has color of title to, or informs the future owner that the present owner claims, a fee simple estate. (*Rest., Property §222*, Comment f; see 6 Miller & Starr 3d §16:38; 16 Powell §91.12; 58 *A.L.R.2d* 299 [what act, claim, circumstance, instrument, color of title, judgment, or thing of record will grant adverse possession in life tenant as against remainder holders or reversioners]; 3 *Am.Jur.2d* (2002 ed.), *Adverse Possession* §232 et seq.; for exception where statute has begun to run against creator of future interest, see *infra*, §234.)

In *Women's Home & Foreign Missionary Soc. v. Bank of America* (1936) 15 *C.A.2d* 682, 59 *P.2d* 1060, the grantor conveyed her home to plaintiff, reserving a life estate, and deposited the deed in escrow for delivery to the grantee on her death. Later, she notified the grantee and escrow holder that she cancelled the deed for mistake and claimed absolute ownership, continuing in occupation and paying taxes until her death. Her residuary devisee contended that she had regained title by adverse possession, not as life tenant, but as grantor. The court held, however, that although this would be true in the case of an ordinary grant, here, the grantor's possession was under the reserved life estate in conformity with the deed, and hence was the possession of a life tenant. (15 *C.A.2d* 685.)

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c. Color of Title or Claim of Right.

1. Color of Title.

aa. What Constitutes Color of Title.

12 Witkin Sum. Cal. Law Real Property § 223

[§ 223] What Constitutes Color of Title.

The possessor must claim the property as his or her own, either under a mere "claim of right" without any apparent title (see *infra*, §225) or under "color of title." Adverse possession of the "color of title" type is founded on a written instrument, judgment, or decree that purports to convey the land, but is for some reason defective. The possessor has what appears to be title, and a possessor in good faith is protected. This is so even though the instrument is void on its face. (*Packard v. Moss* (1885) 68 C. 123, 126, 8 P. 818; *Buic v. Buic* (1992) 5 C.A.4th 1600, 1604, 7 C.R.2d 738; see *Estate of Williams* (1977) 73 C.A.3d 141, 147, 140 C.R. 593, quoting the text [instrument executed by heir when administration of estate had been delayed by administrator's negligence]; 16 Powell §91.08; 38 A.L.R.2d 986 [void tax deeds or tax sale certificates]; 43 A.L.R.2d 6 [adverse possession under parol gift of land]; 68 A.L.R.2d 452 [forged deed or bond]; 71 A.L.R.2d 404 [judgment or decree] 3 *Am.Jur.2d* (2002 ed.), *Adverse Possession* §130 et seq.)

Color of title is received in evidence for the purpose of showing that the title is adverse and it therefore dispenses with other proof of hostile or adverse claim. (*Wilson v. Atkinson* (1888) 77 C. 485, 491, 20 P. 66; *Buic v. Buic*, *supra*, 5 C.A.4th 1604.) Constructive notice of defects in the title would not affect the claimant, for it might be entirely consistent with good faith. (See *Wilson v. Atkinson*, *supra*, 77 C. 492.) But actual knowledge of invalidity of the instrument would eliminate the essential element of good faith. (*Nutting v. Herman Timber Co.* (1963) 214 C.A.2d 650, 658, 29 C.R. 754, citing the text; see *Buic v. Buic*, *supra*, 5 C.A.4th 1604 [defendant could not claim good faith belief, where quitclaim deed to her from husband was followed by dissolution judgment awarding property to him].) Thus, if the instrument relied on is a quitclaim deed, and the claimant knows that the person who executed it had no title to convey, it is ineffectual as evidence of a hostile claim. (*Yuba River Sand Co. v. Marysville* (1947) 78 C.A.2d 421, 430, 177 P.2d 642; *Madden v. Alpha Hardware & Supply Co.* (1954) 128 C.A.2d 72, 76, 274 P.2d 705.)

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1. Color of Title.

bb. Sufficiency of Possession.

12 Witkin Sum. Cal. Law Real Property § 224

[§ 224] Sufficiency of Possession.

The statutory requirements for possession under color of title are set forth in *C.C.P.* 322 and 323. The land must be (1) actually occupied, (2) usually cultivated or improved, (3) protected by a substantial enclosure, or (4) although not enclosed, used for supply of fuel, timber, or pasturage. If the only basis is an enclosure, such as a fence, it must appear that it was substantial, and that it was kept in good repair. If it is allowed to deteriorate, and other persons pass through it freely, there is no longer a hostile and exclusive occupation. (*Ross v. Burkhard Inv. Co.* (1928) 90 C.A. 201, 209, 265 P. 982; see 6 Miller & Starr 3d §§16:11, 16:12.)

C.C.P. 323(3) permits a showing of adverse possession where the land, although not enclosed, has been used "for the ordinary use of the occupant." In *Klein v. Caswell* (1948) 88 C.A.2d 774, 199 P.2d 689, plaintiff sought to establish adverse possession, under color of title, to a vacation cabin site, by proving nothing more than many weekend and holiday visits, picnics, and an occasional camping trip there. *Held*, this was insufficient; the "ordinary use" of the land was for building cabins, and a claimant's inability to make more than slight use, due to illness, distance, or business, is not an excuse for lack of fulfillment of the requirement. (88 C.A.2d 779.)

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2. Claim of Right.

aa. What Constitutes Claim of Right.

12 Witkin Sum. Cal. Law Real Property § 225

[§ 225] What Constitutes Claim of Right.

Adverse possession under a claim of right is not founded on a written instrument, judgment, or decree. The claimant enters as an intruder and remains one against the true owner, without any bona fide belief in his or her title. (*Kimball v. Lohmas* (1866) 31 C. 154, 159; see *People v. Lapcheske* (1999) 73 C.A.4th 571, 575, 86 C.R.2d 565 [quoting *Kimball*; adverse possessor under claim of right is established by physical occupation of property possessed as "naked trespasser"]; 3 *Am.Jur.2d* (2002 ed.), *Adverse Possession* §117.)

Some courts hold that one who occupies in the mistaken belief that he or she is the owner cannot gain adverse possession because the claim lacks hostility. (See 16 *Powell* §91.09; 3 *Am.Jur.2d* (2002 ed.), *Adverse Possession* §53 et seq.) But California follows the majority rule that the claim is sufficient, whether it is deliberately wrongful or based on mistake. (*Woodward v. Faris* (1895) 109 C. 12, 17, 41 P. 781; *Park v. Powers* (1935) 2 C.2d 590, 597, 42 P.2d 75; *Winchell v. Lambert* (1956) 146 C.A.2d 575, 581, 304 P.2d 149; *Newman v. Cornelius* (1970) 3 C.A.3d 279, 289, 83 C.R. 435 [belief of possessor that United States-owned land was not bar to holding adversely to others]; see 39 *A.L.R.2d* 353, 374 [grantor possession as adverse against grantee]; 80 *A.L.R.2d* 1171 [adverse possession involving ignorance or mistake as to boundary].)

Sorensen v. Costa (1948) 32 C.2d 453, 196 P.2d 900, emphasizes the following distinction: (1) If there is confusion as to the boundary of land, and the occupancy under mistake is without intention to claim another's land, the intention being to claim only to the true line wherever it may be, the holding is not adverse. (2) But if the possessor intends to claim the area occupied as the possessor's own, the holding is adverse despite the fact that the claim is based on mistake. It is immaterial that the true owner is unaware of his or her own rights; the claimant's occupation simply must be enough to constitute reasonable notice to the true owner that the possessor claims the property as his or her own. (See *Gilardi v. Hallam* (1981) 30 C.3d 317, 322, 326, 178 C.R. 624, 636 P.2d 588, citing the text [occupancy under mistake; following *Sorensen* and disapproving contrary implication in *Berry v. Sbragia* (1978) 76 C.A.3d 876, 880, 143 C.R. 318]; *Lobro v. Watson* (1974) 42 C.A.3d 180, 187, 116 C.R. 533, citing the text [owner unaware of his own rights; following *Sorensen*]; *Mesnick v. Caton* (1986) 183 C.A.3d 1248, 1259, 228 C.R. 779 [discussing *Sorensen* and *Gilardi* distinctions and sustaining trial judge's finding that possessor did not intend to claim land if record title was in another].)

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2. Claim of Right.

bb. Sufficiency of Possession.

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[§ 226] Sufficiency of Possession.

The requirements of possession under a claim of right are more stringent than those specified in color of title cases (*supra*, §224). The land must be (1) actually occupied, (2) substantially enclosed, or (3) usually cultivated or improved. (*C.C.P.* 324, 325; see *Mattes v. Hall* (1913) 21 *C.A.* 552, 560, 132 *P.* 295; *Brown v. Berman* (1962) 203 *C.A.2d* 327, 329, 21 *C.R.* 401, citing the text; 6 *Miller & Starr* 3d §16:7; 3 *Am.Jur.2d* (2002 *ed.*), *Adverse Possession* §116 *et seq.*; on claim of right as affected by presumption that continued possession of property awarded to another by judicial decree is subordinate to other's rights, see *Buic v. Buic* (1992) 5 *C.A.4th* 1600, 1604, 7 *C.R.2d* 738, *supra*, §216.)

However, the improvements need only be of the character usual in the case of similar property. (*Gray v. Walker* (1910) 157 *C.* 381, 385, 108 *P.* 278.) Buildings or other structures are therefore not essential. (*Allen v. McKay & Co.* (1898) 120 *C.* 332, 338, 52 *P.* 828.)

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CHAPTER XVII - Real Property

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III. TITLES

B. Adverse Possession.

3. Elements of Adverse Possession.

d. Continuous and Uninterrupted Possession for 5 Years.

1. Continuous Possession.

12 Witkin Sum. Cal. Law Real Property § 227

[§ 227] Continuous Possession.

(1) *Uninterrupted, But Not Constant, Possession Required.* Intermittent periods of occupancy are not sufficient; the claimant's possession must be uninterrupted for 5 years. (*C.C.P.* 318, 319, 321, 322, 325; see *Akley v. Bassett* (1922) 189 C. 625, 640, 209 P. 576; 16 *Powell* §§91.07, 91.10; 6 *Miller & Starr* 3d §16:17 et seq.; 43 *A.L.R.2d* 6, 52 [adverse possession under parol gift of land]; 76 *A.L.R.3d* 1202 [owner's surveying of land as entry tolling statute]; 39 *A.L.R.4th* 1148 [grazing of livestock, gathering of crops, or cutting of timber by record owner as defeating exclusiveness or continuity of adverse claimant's possession]; 3 *Am.Jur.2d* (2002 ed.), *Adverse Possession* §73 et seq.)

But constant use of the property is not required; the ordinary use of the occupant is sufficient, and the occupant's temporary absence will not interrupt the possession. (*Montgomery Mullen Lumber Co. v. Quimby* (1912) 164 C. 250, 253, 128 P. 402.) Pasturing during the ordinary grazing season in the locality is enough if the claimant has color of title. (*Kellogg v. Huffman* (1934) 137 C.A. 278, 284, 30 P.2d 593; *Webber v. Clarke* (1887) 74 C. 11, 15, 15 P. 431; see 24 *A.L.R.2d* 632 [seasonal possession other than for agriculture or logging]; 48 *A.L.R.3d* 818 [grazing of livestock or gathering of natural crop].)

(2) *Effect of Commencement of Action.* The mere commencement of an action by the true owner is not itself an interruption of the adverse possession; if the action is unsuccessful, or is compromised or dismissed, the rights of the adverse possessor are unaffected. (*Len v. Lee* (1935) 7 C.A.2d 194, 196, 45 P.2d 827; see *Yorba v. Anaheim Union Water Co.* (1953) 41 C.2d 265, 270, 259 P.2d 2 [claim of prescriptive right; same rule].)

In *California Maryland Funding v. Lowe* (1995) 37 C.A.4th 1798, 44 C.R.2d 784, defendant moved into her husband's home in 1973, when they married. Her husband died in 1981, but defendant continued living in the home, despite the repeated requests of the husband's sons from a previous marriage that defendant move out of the home. The sons asserted that their father had deeded the property to them in 1978. In 1981, defendant filed an action to set aside the 1978 conveyance to the sons, and the sons cross-complained to quiet title and for ejectment. Seven years later, the action was dismissed for lack of prosecution. In 1987, the sons purported to sell the property to plaintiff. After defendant successfully contested several unlawful detainer actions, plaintiff brought the present action for ejectment. Defendant cross-complained against plaintiff and the sons, claiming title to the property by adverse possession. The trial

judge awarded the property to plaintiff. *Held*, reversed.

(a) *Defendant's possession of the property was continuous and uninterrupted for over 5 years.* Defendant's 1981 action to set aside the conveyance to the sons did not toll the 5-year statutory period for adverse possession. An unsuccessful action that does not lead to a change in possession, including one that is dismissed for want of prosecution, does not arrest the running of the statute. (37 C.A.4th 1804, citing *Len* and *Yorba*.) To preserve their rights to the property, the sons could have prosecuted their cross-complaint in that action, or they could have filed a separate action in ejectment at any time before 1986, when the 5-year period ended. (37 C.A.4th 1805.)

(b) *Defendant's possession was hostile.* There was "abundant" evidence of hostile and adverse use. Defendant maintained and improved the property and repeatedly refused to surrender it. She threw away for-sale signs posted by the sons when they were attempting to sell the property. She filed the 1981 lawsuit to set aside the conveyance to the sons and vigorously contested the unlawful detainer actions. (37 C.A.4th 1806, 1807.)

(3) *Effect of Claimant's State of Mind.* An acknowledgment by the claimant that title is in another does not suspend the running of the statute; i.e., the mere fact that the claimant thinks the property belongs to another is irrelevant, for the claimant's possession is not under color of title but under claim of right--hostile to the true owner. (*Lobro v. Watson* (1974) 42 C.A.3d 180, 188, 116 C.R. 533.)

West's Key Number Digest, Adverse Possession k.39 et seq.

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2. Tacking.

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[§ 228] Tacking.

Separate possessions of different parties who succeed each other may sometimes be tacked together, to make up the full period of the statute of limitations, giving the final possessor the title. The evidence must show a continuous and uninterrupted possession by these successive holders. (See *San Francisco v. Fulde* (1869) 37 C. 349, 351; 16 Powell §91.10; 3 *Am.Jur.2d* (2002 ed.), *Adverse Possession* §76 et seq.; 43 *A.L.R.2d* 1061 [adverse possession of executor or administrator or vendee as continuous with that of ancestors and heirs].) There can be no tacking if the particular land claimed adversely was not included in the conveyance from the prior holder. (*Von Neindorff v. Schallock* (1937) 21 *C.A.2d* 44, 48, 68 *P.2d* 278; see 17 *A.L.R.2d* 1128 [area not within description of deed or contract].)

There must be some privity of estate between the successive holders, as by will, intestate succession, or grant. (*Allen v. McKay & Co.* (1898) 120 C. 332, 339, 52 *P.* 828.) But the narrow view that privity can only result from a conveyance, which would practically restrict tacking to color of title cases, was rejected in *Sorensen v. Costa* (1948) 32 *C.2d* 453, 462, 196 *P.2d* 900. The court first quoted Ballantine on the governing theory: "The several occupancies must be so connected that each occupant can go back to the original entry or holding as a source of title. The successive occupants must claim through and under their predecessors and not independently to make a continuous holding united into one ground of action." (32 *C.2d* 463.) Then, on a review of the authorities, the court concluded that the transfer of actual possession by one possessor to another, without a conveyance or written agreement, is sufficient. (32 *C.2d* 464.)

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3. Laches Does Not Bar Claim of Adverse Possession.

12 Witkin Sum. Cal. Law Real Property § 229

[§ 229] Laches Does Not Bar Claim of Adverse Possession.

In *Marriage v. Keener* (1994) 26 C.A.4th 186, 31 C.R.2d 511, plaintiff sued to quiet title to four parcels of real property, alleging that she had acquired title by adverse possession on dates ranging from 1966 to 1979. Defendants contended that her claim was barred by laches, and the trial court dismissed the claim on that basis. *Held*, reversed.

(a) "Although the doctrine of laches is often asserted in cases involving adverse possession, typically the facts involve a defendant adverse possessor asserting laches as an additional defense against a plaintiff record owner's action to recover the property." (26 C.A.4th 190.) "Defendants cite no cases holding laches to bar a claim of adverse possession, and apparently no published California opinion so holds. Other jurisdictions addressing this issue have reached the opposite conclusion." (26 C.A.4th 191, citing sister state cases.)

(b) "California law does not require a plaintiff to bring an action to perfect his or her claim of adverse possession. Rather, it is the record owner--not the intruder--who must bring an action within five years after adverse possession commences in order to recover the property." (26 C.A.4th 191, citing *C.C.P.* 318, *infra*, §233.) Hence, plaintiff was under no obligation to bring an action to perfect her adverse possession claim. It was irrelevant that she allegedly acquired her title many years ago, and that she had not asserted the claim in an earlier action she filed involving the same parcels. (26 C.A.4th 192.)

(c) Defendants asserted prejudice due to the intervening deaths of three likely witnesses. But all presumptions favor the record owner of the property, and all doubts are resolved against the adverse possessor, so that any prejudice caused by the loss of these witnesses' testimony would work against plaintiff, not defendants. (26 C.A.4th 192, 193.)

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e. Payment of Taxes.

1. In General.

12 Witkin Sum. Cal. Law Real Property § 230

[§ 230] In General.

(1) *Statutory Requirement.* California and a few other states require that the adverse possessor pay all of the taxes levied and assessed on the property during the period. (*C.C.P.* 325; see *Williams v. Stillwell* (1933) 217 C. 487, 492, 19 P.2d 773; *Philp v. Hobart* (1951) 103 C.A.2d 446, 449, 229 P.2d 783 [absence of payment is fatal to claim]; *Tobin v. Stevens* (1988) 204 C.A.3d 945, 947, 953, 251 C.R. 587 [defendant admitted failure to pay taxes, thus foreclosing ability to prove adverse possession]; 6 *Miller & Starr* 3d §16:23 et seq.; 22 *Cal. L. Rev.* 111 [sufficiency of evidence of payment]; 32 *So. Cal. L. Rev.* 90 [effect of agreed boundary on tax requirement]; 9 *Santa Clara Lawyer* 244 [criticizing requirement]; 43 *A.L.R.2d* 6, 62 [adverse possession under parol gift of land]; 3 *Am.Jur.2d* (2002 ed.), *Adverse Possession* §146 et seq.)

In *Sorensen v. Costa* (1948) 32 C.2d 453, 196 P.2d 900, in which the adverse possession resulted from a mistaken description in deeds, the tax assessment rolls and tax receipts also contained a mistaken description. Adverse possession was gained because the claimant and his predecessors intended to pay, and did pay, taxes actually assessed against the land occupied. (32 C.2d 465.) (See *Winchell v. Lambert* (1956) 146 C.A.2d 575, 582, 304 P.2d 149 [landowners, who claimed title by adverse possession to part of lot on which their improvements encroached, established payment of taxes by evidence that certificate of assessment showed adjoining lot to be unimproved, whereas value of encroaching improvements was assessed to claimants' lot and paid by them].)

In *Walner v. Turlock* (1964) 230 C.A.2d 399, 41 C.R. 29, plaintiff claimed adverse possession of a narrow strip of land as a result of an error in description discovered after a survey. *Held*, citing the text, plaintiff's adverse use did not ripen into a title because the taxes were assessed to and paid by defendant's predecessors. (230 C.A.2d 409.)

Except where there is an error in description on the assessment roll, when adjoining lots are assessed by lot number, the claimant of the disputed portion cannot establish payment of taxes and hence cannot acquire adverse possession. (*Gilardi v. Hallam* (1981) 30 C.3d 317, 326, 178 C.R. 624, 636 P.2d 588.)

(2) *Where No Taxes Are Assessed.* If no taxes are assessed, no payment is necessary; but the adverse claimant carries the burden of showing that there was no levy or assessment. (*Burlingame v. Norberg* (1930) 210 C. 105, 108,

290 P. 587; *Raab v. Casper* (1975) 51 C.A.3d 866, 878, 124 C.R. 590; *Mesnick v. Caton* (1986) 183 C.A.3d 1248, 1260, 228 C.R. 779; see *Mings v. Compton City School Dist.* (1933) 129 C.A. 413, 417, 18 P.2d 967 [C.C.P. 325 is not applicable to school district, because school property is exempt from taxation]; *Redemeyer v. Carroll* (1937) 21 C.A.2d 217, 220, 68 P.2d 739 [stating rule as to prescriptive easements]; 36 A.L.R.4th 843 [presumptions and evidence respecting identification of property].)

(3) *Delinquent Taxes*. If the land has been sold for delinquent taxes, the adverse claimant may redeem during the period of his or her possession and still comply with the statute. (*Owsley v. Matson* (1909) 156 C. 401, 405, 104 P. 983; *Devlin v. Powell* (1924) 67 C.A. 165, 173, 227 P. 231.) If, however, the true owner files an action while taxes for a year during the period are delinquent, the statute is not satisfied. (*Myran v. Smith* (1931) 117 C.A. 355, 361, 4 P.2d 219.)

(4) *Double Payment*. The fact that the true owner also pays the taxes does not affect the claim of the adverse possessor. (*Cummings v. Laughlin* (1916) 173 C. 561, 565, 160 P. 833; *Pereira Farms Corp. v. Simas* (1924) 69 C.A. 159, 163, 230 P. 976.) A distinction has been suggested, however, between cases of double assessment and double payment, coming within the rule, and cases of single assessment and double payment. (See 3 *Am.Jur.2d* (2002 ed.), *Adverse Possession* §150.)

West's Key Number Digest, Adverse Possession k.86 et seq.

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12 Witkin Sum. Cal. Law Real Property § 231

[§ 231] Continuous Payment for 5 Years.

In *Glowner v. De Alvarez* (1909) 10 C.A. 194, 101 P. 432, the adverse claimant paid taxes from 1902 to 1905, and taxes were assessed to her in 1906, but the tax collector refused her offer because they had already been paid by the owner. *Held*, the break in this year prevented acquisition of title; the claimant must pay for a continuous period of 5 years. (10 C.A. 195.)

Nevertheless, it is possible to establish adverse possession by payment of less than 5 years' taxes. In *Ortiz v. Pacific States Properties* (1950) 96 C.A.2d 34, 215 P.2d 514, plaintiff claimant and his grantor possessed for 5 years and paid taxes for 4 fiscal years. The action was commenced in March 1948, at which time the taxes for the year 1948-1949 had not been levied. *Held*, title by adverse possession was gained despite nonpayment of those taxes. "The commencement of adverse possession is not required to coincide with the beginning or end of a fiscal year. ... There is nothing in the statute stating directly for how many years taxes shall be paid, the only requirement being that taxes be paid which have been 'levied and assessed' during the statutory period. ... An adverse claimant to real property will not be denied acquisition of title by adverse possession for nonpayment of taxes when taxes have not been both levied and assessed for one or more years during his occupancy." (96 C.A.2d 39.)

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4. Constructive Adverse Possession.

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[§ 232] Constructive Adverse Possession.

Under the doctrine of constructive adverse possession, actual occupation of a *part* of the property may be sufficient to gain title to the whole. (*C.C.P.* 322; *Devlin v. Powell* (1924) 67 C.A. 165, 172, 227 P. 231.) There must be color of title to the whole and a claim of the whole in good faith. (*Owsley v. Matson* (1909) 156 C. 401, 403, 104 P. 983; *Park v. Powers* (1935) 2 C.2d 590, 597, 42 P.2d 75; 3 *Am.Jur.2d* (2002 ed.), *Adverse Possession* §256 et seq.) However, if the land is a tract divided into lots, possession of one lot is not constructive possession of another lot. (*C.C.P.* 322; see 3 *Am.Jur.2d* (2002 ed.), *Adverse Possession* §259.)

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5. Action by True Owner for Recovery.

a. Showing of Seisin or Possession.

12 Witkin Sum. Cal. Law Real Property § 233

[§ 233] Showing of Seisin or Possession.

The true owner may bring an action at any time within 5 years after the commencement of the adverse possession. (*C.C.P. 318*; see *C.C.P. 315* [state has 10 years to sue]; 3 *Cal. Proc.* (4th), *Actions*, §452.) To maintain the action, the plaintiff must show that the plaintiff, or the plaintiff's ancestor, predecessor, or grantor, was "seized or possessed" of the property within 5 years before the commencement of the action. (*C.C.P. 318*; see *Haney v. Kinevan* (1946) 73 *C.A.2d* 343, 344, 166 *P.2d* 361 [burden of proof on plaintiff in quiet title action]; *Safwenberg v. Marquez* (1975) 50 *C.A.3d* 301, 311, 123 *C.R.* 405 [plaintiff failed to carry burden of proof].)

In *Cocking v. Fulwider* (1928) 95 *C.A.* 745, 747, 273 *P.* 142, the legal owner was denied a decree quieting title when the defendant proved actual possession for 30 years, although the defendant was unable to establish title by adverse possession because of his failure to pay taxes. (See 17 *Cal. L. Rev.* 390 [criticizing *Cocking*].)

The correct rule appears to be that "seisin," or the right of possession, is in the owner while an adverse claimant is actually occupying the land; i.e., that showing of legal title is enough. (See *Clark v. Stotts* (1954) 127 *C.A.2d* 589, 592, 274 *P.2d* 172 ["where a party relies upon an absolute conveyance of real property," *C.C.P. 318* does not apply]; *Balestrieri v. Sullivan* (1956) 142 *C.A.2d* 332, 340, 298 *P.2d* 688; *Schoenfeld v. Pritzker* (1967) 257 *C.A.2d* 117, 121, 64 *C.R.* 592, quoting the text; *Tobin v. Stevens* (1988) 204 *C.A.3d* 945, 949, 251 *C.R.* 587 [possession of legal title is sufficient to show seisin; distinguishing *Cocking* on its facts, but arguing that criticism of *Cocking* was unwarranted]; 9 *Santa Clara Lawyer* 244, 255.)

An executor or administrator does not, of course, have to show his or her own title or possession; the executor's right to sue is based on the seisin or possession of the decedent's heirs. Hence, a special administrator can bring the action immediately on appointment. (*Graybiel v. Burke* (1954) 124 *C.A.2d* 255, 261, 268 *P.2d* 551.)

If the owner's action is successful, the owner is entitled to unsevered crops, but if the crops are already harvested, the owner can get only the rental value of the land. (*Johnston v. Fish* (1895) 105 *C.* 420, 423, 38 *P.* 979; *Rector v. Lewis* (1920) 46 *C.A.* 168, 170, 188 *P.* 1018.)

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Cross-Reference: 3 Cal. Proc. (5th), Actions, §485.



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5. Action by True Owner for Recovery.

b. Commencement of Limitations Period.

12 Witkin Sum. Cal. Law Real Property § 234

[§ 234] Commencement of Limitations Period.

(1) *General Rule.* The statute of limitations does not commence to run until the cause of action has accrued. (*Comstock v. Finn* (1936) 13 C.A.2d 151, 157, 56 P.2d 957; see 3 Am.Jur.2d (2002 ed.), *Adverse Possession* §§15, 42.)

(2) *Future Interests.* The statute does not run against the owner of a future interest such as the holder of a remainder, until the holder's estate becomes a present interest, e.g., until the life tenant's death. (*Thompson v. Pacific Elec. Ry. Co.* (1928) 203 C. 578, 579, 265 P. 220; see *Rest., Property* §222.) This rule is subject to an exception when the statute has already commenced to run against the owner of a present interest (e.g., O, an owner in fee), and the owner thereafter creates a future interest (e.g., O grants to L for life, remainder in fee to R). The statutory period is not interrupted, but continues to run as if there had been no transfer (hence R may be barred before he or she gets possession). The reason is that, when the adverse claimant commences possession, no subsequent dealing with the paper title should increase the length of the period. (See *Rest., Property* §226.)

(3) *Execution Sale.* In *Lawrence v. Maloof* (1967) 256 C.A.2d 600, 64 C.R. 233, a judgment debtor's property was sold under execution to plaintiff in 1955. The debtor had previously conveyed his interest to defendant, who had fulfilled the requisites of adverse possession for the 5-year period. When plaintiff (the true owner) brought his action to quiet title in 1965, he contended that the statute had not run because he did not get his marshal's deed until 1964. *Held*, the action was barred. Title passes to the purchaser at the time of the execution sale; the sheriff's or marshal's certificate is merely evidence that the title has become absolute. Hence, plaintiff's cause of action to oust defendant arose either in 1955 or at the end of the 1-year redemption period. (256 C.A.2d 603.)

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B. Adverse Possession.

5. Action by True Owner for Recovery.

c. Disabilities.

12 Witkin Sum. Cal. Law Real Property § 235

[§ 235] Disabilities.

(1) *Minority and Insanity.* The statute of limitations does not run against an owner who is under a disability at the time the cause of action accrues, but the statute can be thus suspended for only 20 years, and the action must be brought within 5 years after the disability ceases, or after the death of the person under the disability. The disabilities are minority and insanity. (*C.C.P.* 328; see 16 Powell §91.10; 3 *Am.Jur.2d* (2002 ed.), *Adverse Possession* §171 et seq.)

Minority, however, is not always protected. If the minor is the beneficiary of a trust, adverse possession can nevertheless be gained against the trustee, because the latter has the legal title. (*Patchett v. Pacific Coast Ry. Co.* (1893) 100 C. 505, 509, 35 P. 73.) The statute will run against an administrator and bar the minor heirs because the administrator is entitled to possession, in spite of the fact that, under *Prob.C. 300*, the administrator does not hold the legal title. (*Webb v. Winter* (1902) 135 C. 455, 457, 67 P. 691.)

The statute will run against a trustee and bar the beneficiary even though the latter may only have a future interest. And if the period of the statute has already commenced to run, a transfer by the trustee to the beneficiary does not interrupt it. (See *Rest., Property* §225, and p. 911.)

(2) *Prisoners.* Prisoners who are imprisoned for a term less than life are given only a 2-year suspension of the statute of limitations. The action to recover real property may be commenced within 5 years after imprisonment ceases or after the prisoner's death if the prisoner dies in prison. (*C.C.P.* 328.5.) The enacting legislation for this section noted the increasing number of civil lawsuits being filed by prisoners, and stated the Legislature's intent to limit prisoners' ability to sue where the facts are old and difficult to prove or disprove. (Stats. 1994, Chap. 1083, §1.)

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C. Accretion.

1. In General.

12 Witkin Sum. Cal. Law Real Property § 236

[§ 236] In General.

(1) *Definition.* Accretion is the gradual addition to land of particles deposited by imperceptible degrees, and alluvion is the result of this process. The increase belongs to the owner of the land, and the same is true when water recedes from the land. (C.C. 1014; see C.C. 1017, 1018 [islands formed in stream]; 9 Powell §66.01 et seq.; 54 A.L.R.2d 643 [accretion and reliction; title to island or bar in navigable stream]; 91 A.L.R.2d 857 [rights to land created by filling or dredging]; 61 A.L.R.3d 1173 [adjoining landowners, accretion not contiguous]; 78 Am.Jur.2d (2002 ed.), *Waters* §311 et seq.; 73 Proof of Facts 3d 167 [proof of accretion or avulsion].)

Title is acquired by accretion only if the changes are gradual and imperceptible. Annual changes, making a beach 80 feet wider in summer than in winter, were held not to meet the test. (*People v. William Kent Estate Co.* (1966) 242 C.A.2d 156, 160, 51 C.R. 215.)

(2) *Applicability to Ocean Property.* C.C. 1014 refers only to rivers and streams, but common law doctrine, making the same disposition of the property, applies to land bordering on the ocean. (*Strand Imp. Co. v. Long Beach* (1916) 173 C. 765, 773, 161 P. 975; on apportionment of increase among various owners fronting on shore, see *Fraser's Million Dollar Pier Co. v. Ocean Park Pier Co.* (1921) 185 C. 464, 472, 197 P. 328, 198 P. 212; *Swarzwald v. Cooley* (1934) 220 C. 438, 443, 31 P.2d 381; *People v. William Kent Estate Co.*, *supra.*) (For comparison of federal and California rules of coastline accretion, see 48 So. Cal. L. Rev. 1457.)

(3) *Passage of Title.* Whether title to accreted land passes with a grant of the land to which it is attached depends on the parties' intent, and only slight evidence is required to show intention to separate the two. (*Lynch v. Kupfer* (1933) 134 C.A. 652, 656, 26 P.2d 33.)

State law, not federal common law, governs the effect of a river's movement on title to the riverbed, even though the state's original title to riverbed land was acquired under federal law. (*Oregon v. Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363, 97 S.Ct. 582, 592, 50 L.Ed.2d 550, 565, overruling *Bonelli Cattle Co. v. Arizona* (1973) 414 U.S. 313, 94 S.Ct. 517, 38 L.Ed.2d 526.)

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C. Accretion.

2. Avulsion.

12 Witkin Sum. Cal. Law Real Property § 237

[§ 237] Avulsion.

If a river or stream carries away, by sudden violence, a considerable and distinguishable part of a bank, and bears it to the opposite bank, or to another part of the same bank, the owner of the part carried away may reclaim it within a year after the owner of the land to which it has been united takes possession of it. This is the case whether or not the river is navigable. (C.C. 1015.)

C.C. 1015, part of the original 1872 Code, states the common law doctrine of *avulsion*. (See *Bohn v. Albertson* (1951) 107 C.A.2d 738, 748, 238 P.2d 128, *infra*, §919; 9 Powell §§66.01, 66.02; 78 Am.Jur.2d (2002 ed.), *Waters* §311 et seq.) It was given its first construction in *Beach Colony II v. California Coastal Com.* (1984) 151 C.A.3d 1107, 199 C.R. 195: "Today we hold owners of dry lands, which border on environmentally sensitive bodies of water (or wetlands) within the California Coastal Zone, may restore their property to its original contours after its lands have been violently torn or washed away. Further, that encroaching waters, which overflow and cover that previously dry land solely because of the physical damage caused by the violent event, do not automatically transform the lands encroached upon into a protected marine resource, 'wetland,' as defined in the California Coastal Act of 1976." (151 C.A.3d 1109.) The common law right of property owners to reclaim lands eroded through avulsion has not been preempted by statute, and is not inconsistent with the policies underlying the Coastal Act, although the California Coastal Commission may impose reasonable mitigating conditions on reclamation activities that adversely impact protected environmentally sensitive areas. (151 C.A.3d 1110.)

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3. State's Right.

12 Witkin Sum. Cal. Law Real Property § 238

[§ 238] State's Right.

(1) *Artificial Accretions.* When accretion is caused by an artificial structure such as a breakwater, erected below the line of ordinary high water, the increase does not go to the landowner. Instead, the alluvion belongs to the state. (*Patton v. Los Angeles* (1915) 169 C. 521, 525, 147 P. 141; *Los Angeles v. Anderson* (1929) 206 C. 662, 667, 275 P. 789; see *People v. Hecker* (1960) 179 C.A.2d 823, 837, 840, 4 C.R. 334 [littoral owner's claim of vested right of access to sea rejected; whatever right he originally had was extinguished when shoreline was artificially built up through piers and breakwaters]; 91 A.L.R.2d 857 [land created by filling or dredging]; 63 A.L.R.3d 249 [rights to new land created by artificial condition not produced by owner].)

This rule was reaffirmed in *California v. Superior Court (Lovelace)* (1995) 11 C.4th 50, 44 C.R.2d 399, 900 P.2d 648, a quiet title action against the state brought by private landowners who owned property along the Sacramento River. The parties disputed ownership of a 12-acre parcel between the river and the landowners' property. The state alleged that the parcel, which had once been part of the riverbed, was the result of accretion caused by artificial means, including the deposit of debris from hydraulic mining, the construction of wing dams and levees, and dredging. The trial judge determined that, to the extent the parcel consisted of mining sediments, it was the result of natural causes, and under C.C. 1014 belonged to the landowners. *Held*, affirmed.

(a) *The artificial accretion rule is reaffirmed.* As between state and private upland owners, land along tidelands and navigable rivers that accretes by artificial means remains in state ownership. (11 C.4th 56, 78.) Land that accretes by natural causes belongs to the upland owner under C.C. 1014. (11 C.4th 64, 73, 78.)

(b) *The artificial accretion rule is narrow in scope.* The rule is an exception to the general common law rule that accretion goes to the upland owner. The exception must not swallow the rule. "Over the years, numerous human activities have indirectly as well as directly caused a change in water flow and the accumulation of sediment in virtually every river and tideland in the state. To view all of this as artificial accretion would effectively eviscerate the general rule." (11 C.4th 78.)

(c) *If the 12-acre parcel was created by the mining deposits, it is not the result of artificial accretion.* Accretion is artificial if directly caused by human activities that occurred in the immediate vicinity of the accreted land. (11 C.4th 79, 80.) Hence, if dredging, wing dams, and levees caused the accretion here, it is artificial and ownership would remain

in the state. (11 C.4th 76.) However, accretion is not artificial merely because human activities far away contributed to it. The dividing line between what is and is not in the immediate vicinity must be decided on a case-by-case basis, keeping in mind that the artificial activity must have been the direct cause of the accretion before it can be deemed artificial. It is undisputed that the 12-acre parcel is many miles from the hydraulic mining areas. Therefore, the trial judge properly granted summary adjudication for the landowners on this issue. (11 C.4th 80.) (See 24 *Pepperdine L. Rev.* 364 [Lovelace].)

(2) *Islands in Navigable Streams.* Islands and accumulations of land, formed in the beds of navigable streams, belong to the state. (See C.C. 1016.) In *People v. Ward Redwood Co.* (1964) 225 C.A.2d 385, 37 C.R. 397, defendant was an upland owner on a navigable stream. Invoking C.C. 1014 (supra, §236), he contended that an underwater sand-bar became attached to his land and belonged to him, even though it was afterwards severed and became an island. But the trial judge found, on sufficient evidence, that the sand-bar first became an island, and therefore belonged to the state under C.C. 1016, even though it afterwards adhered to the owner's bank. (225 C.A.2d 395.)

SUPPLEMENT: [This section is current through the latest supplement]



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1. In General.

a. Nature of Dedication.

12 Witkin Sum. Cal. Law Real Property § 239

[§ 239] Nature of Dedication.

A common law dedication is a "grant and a gift" of land or an interest in land to the public for a public use, e.g., for a highway or park. It requires an intention to dedicate by the owner, and acceptance by the public. (*Union Trans. Co. v. Sacramento* (1954) 42 C.2d 235, 240, 267 P.2d 10 ["Essential to such a dedication are an offer by the owner of the land, clearly and unequivocally indicated by his words or acts, to dedicate the land to a public use and an acceptance by the public of the offer"]; see *Palos Verdes Corp. v. Housing Authority* (1962) 202 C.A.2d 827, 835, 21 C.R. 225 [intent must be unequivocally manifested]; *Hanshaw v. Long Valley Road Assn.* (2004) 116 C.A.4th 471, 477, 11 C.R.3d 357 [citing the text]; 14 Powell §84.01; 10 Miller & Starr 3d §26:1 et seq.; 53 Cal. L. Rev. 559 [comprehensive treatment of California law]; 75 Harv. L. Rev. 1406 [public ownership of land through dedication]; 77 Proof of Facts 3d 1 [dedication of land to public use]; 7A Am.Jur. Legal Forms 2d (1998 ed.), Dedication §86:8 et seq.; 8A Am.Jur. P.P. Forms (2004 ed.), Dedication §4 et seq.; 14 Am.Jur.2d (2000 ed.), *Cemeteries* §19 et seq. [dedication and use of land for cemetery purposes]; 23 Am.Jur.2d (2002 ed.), *Dedication* §1 et seq.; *infra*, §§249, 250 [adverse use by public].)

After acceptance, the dedicator cannot revoke. (*Archer v. Salinas* (1892) 93 C. 43, 51, 28 P. 839; see 23 Am.Jur.2d (2002 ed.), *Dedication* §§57, 58; 86 A.L.R.2d 860, 877 [revocation by dedicator's successors in interest].) Nevertheless, it has been said that the dedication operates by estoppel. (*Schmitt v. San Francisco* (1893) 100 C. 302, 307, 34 P. 961; see 23 Am.Jur.2d (2002 ed.), *Dedication* §53.) Hence, although the public authorities may not transfer the dedicated property to individuals (see *Gurnsey v. Northern Calif. Power Co.* (1911) 160 C. 699, 705, 117 P. 906), the dedicator may transfer it to a bona fide purchaser, and, if the dedication is unrecorded and the purchaser has no other notice of it, the purchaser will take the property free from the dedication (*Phillips v. Laguna Beach Co.* (1922) 190 C. 180, 184, 211 P. 225). (On abandonment of dedicated county parks, see *Govt.C.* 25580 et seq.)

West's Key Number Digest, Dedication k.1 et seq.

SUPPLEMENT: [This section is current through the latest supplement]
See 7A Am.Jur. Legal Forms 2d (2007 ed.), Dedication §86:7 et seq.



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1. In General.

b. Distinctions.

12 Witkin Sum. Cal. Law Real Property § 240

[§ 240] Distinctions.

(1) *Easement*. A public easement may be gained by adverse use in much the same manner as a private easement by prescription (*infra*, §401), but the theory is implied dedication, not prescription (*People v. Sayig* (1951) 101 C.A.2d 890, 896, 226 P.2d 702 ["A public easement arises only by dedication"].)

In *Manhattan Beach v. Cortelyou* (1938) 10 C.2d 653, 76 P.2d 483, evidence of representations by a subdivider and its salesmen to prospective purchasers that certain areas were dedicated as streets was held insufficient to establish a dedication. The court pointed out that the purchasers may have rights to private easements without the city necessarily gaining title by dedication, and suggested that much of the confusion in the reported cases is due to the failure to distinguish the situations. (10 C.2d 666.)

(2) *Property Devoted to Public Use*. Dedication in the proper sense involves a gift to the public. A different principle is involved when property is devoted to public use by a railroad or other utility, with the owner's consent or acquiescence; the owner cannot bring ejectment or otherwise interfere with the utility's possession while it continues to serve the public, but is restricted to an action for damages. This so-called dedication to public use is distinct from common law dedication. (*People v. Ocean Shore R.* (1948) 32 C.2d 406, 420, 196 P.2d 570.)

(3) *Trust*. The grant of land to the public for restricted purposes is sometimes loosely characterized as the creation of a "public trust." The correct view, however, is that the public grantee has no trust duties and is merely bound to use the property in a certain way. "[S]uch a public trust is no more a true charitable trust than was Grover Cleveland's in his expression 'a public office is a public trust.' " (*Hermosa Beach v. Superior Court* (1964) 231 C.A.2d 295, 299, 41 C.R. 796, 4 Cal. Proc. (4th), *Pleading*, §138.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Trust*.

Hermosa Beach case:

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §156.



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1. Offer.

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[§ 241] Offer.

The intention to dedicate may be manifested by an offer made in writing or orally or by the owner's conduct. (See *Union Trans. Co. v. Sacramento* (1954) 42 C.2d 235, 240, 267 P.2d 10 ["[A]n offer to dedicate land may be inferred from the owner's long acquiescence in a public use of the property under circumstances which negative the idea that the use was under a license"]; *Kitzman v. Newman* (1964) 230 C.A.2d 715, 722, 41 C.R. 182 [owner of land fronting on street constructed building and concrete sidewalk in front of it; public used it as part of general route taken by pedestrians]; *Cherokee Valley Farms v. Summerville Elementary School Dist.* (1973) 30 C.A.3d 579, 584, 106 C.R. 467 [dedication implied in fact from acquiescence by owner for 78 years]; *Hays v. Vanek* (1989) 217 C.A.3d 271, 281, 266 C.R. 856 [implied-in-fact dedication]; *Western Aggregates v. Yuba* (2002) 101 C.A.4th 278, 292, 294, 298, 122 C.R.2d 648 [Congress made amorphous, but sufficient, offer of dedication in 1866 by enacting statute that provided: "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted"]; 14 Powell §84.01; 10 Miller & Starr 3d §21:4 et seq.; 23 Am.Jur.2d (2002 ed.), *Dedication* §18 et seq.; on distinguishable doctrine of dedication implied by law from adverse use by public, see *infra*, §249.)

West's Key Number Digest, Dedication k.16 et seq.

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2. Formal Acceptance or Use.

12 Witkin Sum. Cal. Law Real Property § 242

[§ 242] Formal Acceptance or Use.

(1) *In General.* The offer to dedicate must be accepted by the public. Acceptance may be formal, as by resolution or ordinance, or by use. (The term "user" is also employed.) (See *Washington Boulevard Beach Co. v. Los Angeles* (1940) 38 C.A.2d 135, 137, 100 P.2d 828; *Ball v. Stephens* (1945) 68 C.A.2d 843, 846, 158 P.2d 207; *Morse v. E.A. Robey & Co.* (1963) 214 C.A.2d 464, 468, 29 C.R. 734; see *People v. Rio Nido Co.* (1938) 29 C.A.2d 486, 493, 85 P.2d 461 [casual or intermittent use held insufficient]; *Santa Clara v. Ivancovich* (1941) 47 C.A.2d 502, 511, 118 P.2d 303 [acceptance must be within reasonable time]; *Baldwin v. Los Angeles* (1999) 70 C.A.4th 819, 838, 83 C.R.2d 178 [ordinance did not constitute unconditional acceptance by city of dedication of property where ordinance's unambiguous language contemplated that city could acquire property only by assuming various obligations, which were never undertaken; without required executed contract between city and entity that offered dedication, there was no acceptance of offer]; *Western Aggregates v. Yuba* (2002) 101 C.A.4th 278, 292, 298, 122 C.R.2d 648 [public use of road after 1866, when Congress made statutory offer of dedication, along with public repair and depiction of road on official maps, constituted acceptance; because road became public through dedication, not prescription, later period of purported abandonment was irrelevant]; *Hanshaw v. Long Valley Road Assn.* (2004) 116 C.A.4th 471, 481, 11 C.R.3d 357 [common law dedication of road occurred where association of landowners along road offered to dedicate to county, county rejected offer, and then acceptance occurred by public use]; 14 Powell §84.01; 10 Miller & Starr 3d §26:19 et seq.; 23 Am.Jur.2d (2002 ed.), *Dedication* §38 et seq.; 77 Proof of Facts 3d 1 [proof of offer and acceptance of dedication]; 7A Am.Jur. Legal Forms 2d (1998 ed.), *Dedication* §86:52 et seq.)

(2) *Exception: Public Dedication.* In *Arques v. Sausalito* (1954) 126 C.A.2d 403, 272 P.2d 58, the state Tide Land Commissioners laid out a street on a duly authorized and recorded map. *Held*, its dedication as a public street was complete. When a formal dedication of a street is made by the state or a municipality, no acceptance is necessary. (126 C.A.2d 406.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Wright v. Morro Bay* (2006) 144 C.A.4th 767, 770, 50 C.R.3d 719 [common law dedication was made in 1888 by filing of subdivision map and was accepted by city resolution in 1935; title remained in city even

though street had never been used after offer of dedication was made]; 7A Am.Jur. Legal Forms 2d (2007 ed.), Dedication §86:52 et seq.



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3. Formal Acceptance Required for Public Liability.

12 Witkin Sum. Cal. Law Real Property § 243

[§ 243] Formal Acceptance Required for Public Liability.

Union Trans. Co. v. Sacramento (1954) 42 C.2d 235, 267 P.2d 10, made a sharp distinction between acceptance for purposes of the public right to use the road, which may be by use alone (supra, §242), and acceptance that imposes a duty of maintenance and liability for dangerous or defective conditions under the Tort Claims Act (see 5 *Summary* (10th), *Torts*, §216 et seq.). A bridge with rotting timbers was originally part of a private road. Plaintiffs' truck was damaged when the bridge collapsed, and they sued the County of El Dorado. The court rejected the theory that acceptance by use alone would impose liability. "[A]lthough elected officials are merely agents of the public, they are the only means by which the public may act, and to permit a small segment of the public by use of a private way to impose the burden of maintaining it upon the general public would be in dereliction of the powers of the elected officials, and permit the establishment of public roads in undesirable places." (42 C.2d 244.) Although official action is required, it need not be a formal act. So, where the county's superintendent of roads dispatched equipment to the road to make repairs, this action in assuming control of the road supported an inference that the county impliedly had accepted the dedication. (42 C.2d 244; see 28 *So. Cal. L. Rev.* 100.)

This holding was nullified by *Sts. & H.C. 941* and *1806*. (See *Benitez v. San Francisco* (1978) 77 C.A.3d 918, 921, 144 C.R. 15, citing the text [*Union* holding nullified by statute]; 53 *Cal. L. Rev.* 559, 562, 564.) No county or city will be held liable for failure to maintain a road unless and until it has been accepted into the county road system by action of the board of supervisors or into the city street system by resolution of the city's governing body. (*Sts. & H.C. 941(b)*, *1806(a)*, *1806(b)*; *Hanshaw v. Long Valley Road Assn.* (2004) 116 C.A.4th 471, 479, 11 C.R.3d 357 [common law dedication of road, which was accepted through public use, did not create liability for county to maintain road; county had rejected statutory dedication of road].) A county board of supervisors may designate a county officer to accept a road into the county road system, with the county officer reporting acceptances to the board at the end of each fiscal year, or at more frequent intervals, as determined by the board. (*Sts. & H.C. 941(d)*.) Similarly, a city may designate a city officer to accept streets or roads into the city system, as an alternative to acceptance by resolution of the governing body. (*Sts. & H.C. 1806(c)*; see *Copeland v. Oakland* (1993) 19 C.A.4th 717, 722, 23 C.R.2d 719 [when city formally dedicates its own land for street, "acceptance" in precise terms of *Sts. & H.C. 1806* is unnecessary]; *Re-Open Rambla v. Board of Supervisors* (1995) 39 C.A.4th 1499, 1505, 46 C.R.2d 822 [under *Sts. & H.C. 989* and *1806*, county's interest

in portion of road lying within city boundaries automatically vested in city on its incorporation, despite city's specific rejection of road].)

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b. Dedication Under Subdivision Map Act.

1. In General.

12 Witkin Sum. Cal. Law Real Property § 244

[§ 244] In General.

(1) *Scope of Act.* The Subdivision Map Act (*Govt.C. 66410 et seq.*; see *infra*, §809) regulates the planning and development of subdivisions and authorizes ordinances requiring dedication of land (or fees in lieu of dedication) for public uses including elementary schools (*Govt.C. 66478*), parks and recreation (*Govt.C. 66477*), local transit facilities (*Govt.C. 66475.2*), streets and utilities (*Govt.C. 66475*), and bicycle paths (*Govt.C. 66475.1*). Local ordinances may also require the dedication of sunlight easements for solar energy systems. (*Govt.C. 66475.3*.) In addition, the Act prohibits subdivisions that do not provide reasonable access to public resources, such as lakes, rivers, reservoirs, and coastlines. (*Govt.C. 66478.1 et seq.*; see *infra*, §816.) (On regulation of subdivision development under Act, see *infra*, §809 et seq.; on dedication under Act, see 10 *Miller & Starr 3d* §26:22 et seq.; 53 *Cal. L. Rev.* 559, 570; 27 *Stanf. L. Rev.* 419 [objectives of and objections to subdivision land dedication].)

(2) *Recording Maps.* The Act requires a subdivider to file tentative and final maps. (*Govt.C. 66452 et seq.*, 66456 et seq.) Once approved, the maps are recorded. (*Govt.C. 66464 et seq.*) A dedication of or offer to dedicate an interest in real property may be certified on the final subdivision map or in a separate recorded instrument. (*Govt.C. 66439, 66447*; see *Manhattan Beach v. Cortelyou* (1938) 10 *C.2d* 653, 660, 76 *P.2d* 483 [intention of offeror must be clearly and unequivocally manifested].) (On procedure and distinction between dedication and acceptance of improved street for purposes of tort liability, see *Hoover v. Kern* (1953) 118 *C.A.2d* 139, 143, 257 *P.2d* 492; on constitutionality of required dedication, see *Associated Home Builders of the Greater East Bay v. Walnut Creek* (1971) 4 *C.3d* 633, 637, 94 *C.R.* 630, 484 *P.2d* 606, *infra*, §819; on dedication statutes generally, see 12 *Powell* §79D.04; 23 *Am.Jur.2d* (2002 *ed.*), *Dedication* §35 et seq.)

(3) *Acceptance of Proposed Dedication.* The governing body may accept or reject the proposed dedication. (*Govt.C. 66440, 66477.1*.) Acceptance may be by an official designated under *Govt.C. 66458*. (*Govt.C. 66477.1*.) An offer made under the Act may be accepted not only by formal official action, but by the official exercise of dominion over the property, e.g., by maintenance and repair work, or by public use. (*Tischauser v. Newport Beach* (1964) 225 *C.A.2d* 138, 145, 37 *C.R.* 141; see *Miller v. Fowle* (1949) 92 *C.A.2d* 409, 411, 206 *P.2d* 1106 [after Oakland accepted map and Berkeley rejected it, no dedication of streets resulted as to Berkeley land; there was no intention to offer dedication to Oakland, nor did that city have power to accept dedication of land beyond its boundaries]; *Scott v. Del*

Mar (1997) 58 C.A.4th 1296, 1302, 68 C.R.2d 317 [beachfront property was public land that had been dedicated to public in 1912 under map act then in force; county had accepted and recorded former landowner's dedication of land for sidewalk]; *DiMartino v. Orinda* (2000) 80 C.A.4th 329, 341, 95 C.R.2d 16 [merely recording and filing subdivision map containing words of dedication did not accomplish acceptance of storm drainage pipe by county; nothing in language of Act at time of recordation equated silence by governing body with acceptance of offer of dedication]; *Hanshaw v. Long Valley Road Assn.* (2004) 116 C.A.4th 471, 477, 11 C.R.3d 357 [incomplete or defective statutory dedication does not negate possibility of common law dedication; county's acceptance of part of road under Govt.C. 66477.1 and rejection of rest did not preclude common law dedication of entire road].)

Acceptance of an offer of dedication is effective when the final map or a legislative resolution of acceptance is filed with the county recorder. (Govt.C. 66477.3.)

(4) *Dedication of Land for Public Purposes.* Govt.C. 66477.5, applicable only to property required to be dedicated on or after January 1, 1990, provides as follows:

(a) The local agency to which property is dedicated for certain specified public purposes must record a certificate, with specified information, with the county recorder.

(b) The subdivider may request the local agency to make the determination that the same public purpose for which the dedication was required still exists; and the local agency must reconvey the dedicated land if the same public purpose does not exist, except with respect to a portion of the land still required for the public purpose or for public utilities.

(c) The local agency must give a specified notice to the subdivider if the local agency decides to vacate, lease, sell, or otherwise dispose of the dedicated property for a use other than the use for which it was dedicated.

West's Key Number Digest, Dedication k.19 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Acceptance of Proposed Dedication.*

Implied acceptance by public use: See *Biagini v. Beckham* (2008) 163 C.A.4th 1000, 1009, 78 C.R.3d 171 [no implied acceptance by public occurred where scope of use was within amount that was permissible under express private easements held by neighboring landowners].



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2. Nature of Public Title.

12 Witkin Sum. Cal. Law Real Property § 245

[§ 245] Nature of Public Title.

The nature and extent of the public title resulting from a dedication were considered in *Airways Water Co. v. Los Angeles* (1951) 106 C.A.2d 787, 236 P.2d 199. Property owners granted an easement to plaintiff for water mains in an avenue, and pipes were installed under a parkway in the manner appropriate for a secondary highway. Then the owners dedicated by filing subdivision maps, and later the county made the avenue a primary highway, requiring paving of the parkway and relocation of some of the water mains. Plaintiff, at the county's request, relocated at a cost of \$ 5,598.34, but was denied reimbursement. "While the county's right of way is an easement, neither the owners of adjoining land nor the plaintiff may use the highway for any purpose inconsistent with the right of the public to its full and free enjoyment as such. Such rights as plaintiff and adjoining landowners may have are subordinate to, and must yield to the public use. ... With changing conditions of travel, a city has the right to adapt and appropriate its highways from time to time to such uses as in its judgment will be most conducive to the public good. ... The effect of the dedication was to make these purposes superior and paramount to the prior rights of plaintiff and the other landowners." (106 C.A.2d 790.) (See *Maywood Mut. Water Co. v. Maywood* (1972) 23 C.A.3d 266, 273, 100 C.R. 174 [distinguishing *Airways Water Co.*; plaintiff did not have to bear expense of relocating portions of water distribution system in connection with street improvements; streets were dedicated after subdivider conveyed water system to plaintiff and plaintiff did not join in subdivider's dedication and did not bear sufficient relationship to subdivider to be bound by its acts]; 53 Cal. L. Rev. 559, 583 [interest acquired by public]; 23 Am.Jur.2d (2002 ed.), Dedication §55.)

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3. Rejection and Revocation.

12 Witkin Sum. Cal. Law Real Property § 246

[§ 246] Rejection and Revocation.

(1) *General Rule: Offer Remains Open.* It was formerly the rule that, if the offer of dedication was rejected, the subdivider or owner could revoke it, either expressly or impliedly (by conveyance without a reservation). The Act provides, however, that the offer of dedication remains open despite rejection and the legislative body may "by resolution at any later date, and without further action by the subdivider, rescind its action and accept." (*Govt.C. 66477.2(a)*; see *53 Cal. L. Rev. 559, 585* [problems of rejection and revocation].)

In *Stump v. Cornell Const. Co. (1946) 29 C.2d 448, 175 P.2d 510*, the subdivider filed a map with the Los Angeles City Council, which showed, among other dedications, a strip for a "future alley." In August 1941, the council, by a resolution approving the map, accepted all dedicated land except the strip. In December 1941, the subdivider sold the land to plaintiffs' predecessors, the deed making no specific reference to the strip. In 1944, the council adopted a resolution accepting the strip. *Held*, plaintiffs were bound by the accepted dedication; i.e., although the city must either expressly accept or reject the offer at the time of approval of the map, a rejection is not final and the offer remains open for acceptance at a later date. (*29 C.2d 451.*)

In *Orange v. Cole (1950) 96 C.A.2d 163, 215 P.2d 41*, a map was filed with a dedication of a street, the board of supervisors rejected it, and, 7 years later, the dedicators recorded a formal revocation. *Held*, nevertheless, the supervisors could still accept the offer. (*96 C.A.2d 170.*)

(2) *Limits on Acceptance of Dedicated Public Access.* In certain circumstances, a proposed dedication of public access is not subject to unlimited acceptance. For subdivisions fronting on ocean coastline, bay shoreline, or public waterways, rivers, or streams, acceptance must be made within 3 years after approval of the final map. For subdivisions fronting on publicly owned lakes or reservoirs, acceptance must be made within 5 years after approval. (*Govt.C. 66477.2(b).*) Offers of dedication that are not accepted within the time limits are deemed abandoned. (*Govt.C. 66477.2(d).*)

(3) *Termination of Offer.* The offer may be effectively terminated by filing "a resubdivision or reversion to acreage of the tract" and approval of the map (*Govt.C. 66477.2(e)*), or by proceedings in the manner provided for abandonment

of streets (*Sts. & H.C. 8300 et seq.*) (*Govt.C. 66477.2(c)*). Where an offer is terminated by filing for resubdivision or reversion to acreage, the map must contain a notation identifying the terminated offer. (*Govt.C. 66477.2(e)*.)

(4) *Presumption of Nonacceptance*. Under *C.C.P. 771.010*, a proposed dedication is conclusively presumed not to have been accepted if all of the following are true:

- (a) The dedication was made by filing a map only.
- (b) There has been no recorded acceptance within 25 years since the map was filed.
- (c) The property has not been used for the dedicated purpose within that time.
- (4) The property has been sold and used as if free of the dedication.

If the presumption exists, *C.C.P. 771.020(a)* authorizes an action to clear title against the public entity to which the property was dedicated. (On predecessor statute, see *Paris v. Santa Clara* (1969) 270 C.A.2d 691, 699, 76 C.R. 66 [conclusive presumption can be invoked even though plaintiff sues in inverse condemnation rather than to quiet title]; *Ratchford v. Sonoma* (1972) 22 C.A.3d 1056, 1071, 99 C.R. 887, 8 Cal. Proc. (4th), *Extraordinary Writs*, §36; see 36 A.L.R.4th 625 [private improvement of land dedicated but not used as street as estopping public rights].)

(5) *Qualified Acceptance*. In *Mikels v. Rager* (1991) 232 C.A.3d 334, 351, 284 C.R. 87, a parcel map contained an offer to dedicate a street, and the surveyor's acceptance on behalf of the city was "subject to their improvement in accordance with the county standards." *Held*, the city's qualified acceptance did not result in a completed dedication of a public easement. Under basic principles of contract, an offer of dedication that is accepted on the condition that the property be improved does not result in a completed dedication. "A qualified acceptance results in an outstanding offer of dedication, which has not been revoked by operation of law and which the public entity may accept upon its conditions of acceptance being met. Until the offer of dedication is unconditionally accepted, no public interest is created." (232 C.A.3d 354.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Limits on Acceptance of Dedicated Public Access*. A statutory offer of dedication may be revoked as to the public at large, so that it may no longer be accepted by public use, although it must remain open for formal acceptance by the public entity to which the offer was made. *Govt.C. 66477.2(a)* requires the offer to remain open only for the "legislative body" to accept at a later date. (*Biagini v. Beckham* (2008) 163 C.A.4th 1000, 1016, 78 C.R.3d 171.)

(4) *Presumption of Nonacceptance*. See *Wright v. Morro Bay* (2006) 144 C.A.4th 767, 770, 50 C.R.3d 719 [*C.C.P. 771.010* did not apply retroactively and could not be used to divest city of title to street that was dedicated in 1888 and accepted in 1935]. *Ratchford* case:

Cross-Reference: 8 Cal. Proc. (5th), *Extraordinary Writs*, §38.



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b. Dedication Under Subdivision Map Act.

4. Reversion to Acreage.

12 Witkin Sum. Cal. Law Real Property § 247

[§ 247] Reversion to Acreage.

Subdivided property may be returned to acreage in a proceeding for reversion if (1) no lots are sold within 5 years from the date the subdivision map is recorded, (2) no required improvements are made within 2 years or a later time allowed by agreement, or (3) all owners of interest have consented to reversion. (*Govt.C. 66499.16(b)*.) The dedication or offer of dedication to be abandoned by reversion must be unnecessary for present or prospective public purposes. (*Govt.C. 66499.16(a)*.) A proceeding for reversion to acreage may be initiated by the legislative body of the city or county or by petition of all owners of record of the real property within the subdivision. (*Govt.C. 66499.12*.) When a parcel map for purposes of reversion is filed, the separate parcels are merged and all dedications and offers of dedication not shown are "of no further force or effect." (*Govt.C. 66499.18, 66499.201/2*.)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Dedication Under Other Statutes.

12 Witkin Sum. Cal. Law Real Property § 248

[§ 248] Dedication Under Other Statutes.

(1) *Irrevocable Offer of Dedication for Public Purposes.* An irrevocable offer of dedication for any public purpose may be executed, acknowledged, and recorded in the same manner as a conveyance of real property. It may be accepted at any time by the city council or county board of supervisors, and may be terminated, and the right to accept abandoned, in the manner prescribed for abandonment or vacation of streets or highways (*Sts. & H.C. 8300 et seq.*). (*Govt.C. 7050.*)

(2) *Open Space Easement.* An owner may grant "open-space easement on privately owned lands" to a city or county that has adopted a general plan. (*Govt.C. 51080.*) In so doing, the owner relinquishes to the public, either in perpetuity or for a term of not less than 10 years, the right to construct improvements, except as expressly reserved. (*Govt.C. 51081, 51075(d)*; on open space easements granted before 1975, see *Govt.C. 51050 et seq.*)

(3) *School Facilities.* As a condition of approving residential developments, cities and counties may require dedication, fees in lieu of dedication, or a combination of dedication and fees, to provide financing for interim school facilities. (*Govt.C. 65974*; see *Trent Meredith v. Oxnard* (1981) 114 C.A.3d 317, 322, 326, 170 C.R. 685 [statute constitutional]; *Canyon North Co. v. Conejo Valley Unified School Dist.* (1993) 19 C.A.4th 243, 248, 23 C.R.2d 495 [project did not qualify for exemption from fees under *Govt.C. 65995(c)(2)*]; *Loyola Marymount University v. Los Angeles Unified School Dist.* (1996) 45 C.A.4th 1256, 1267, 53 C.R.2d 424 [school facilities fees under *Govt.C. 65970 et seq.* are not ad valorem property taxes and thus may be imposed on nonprofit educational institution, despite institution's exemption from taxation under Cal. Const., Art. XIII, §3(e)].)

Educ.C. 17620(a) permits a school district to levy a fee against construction within the district for funding the construction or reconstruction of school facilities, subject to the limitations of *Govt.C. 65995*. (See *Warmington Old Town Associates v. Tustin Unified School Dist.* (2002) 101 C.A.4th 840, 850, 124 C.R.2d 744 [*Educ.C. 17620(a)* authorized imposition of fees on redevelopment project in which residential construction was demolished and replaced with new residential construction; however, district failed to show, as required by *Govt.C. 66001(a)* (Mitigation Fee Act; see *infra*, §818), nexus between amount of fee imposed and burden created by redevelopment construction, as opposed to new construction that does not displace existing housing].)

(4) *Veterans' Memorial Facilities*. When a county provides or maintains a building, memorial hall, meeting place, memorial park, or recreation center for the use or benefit of one or more veterans' associations, under *Mil. & Vet.C. 1262*, provision of the facility and its acceptance by the veterans' association constitute a dedication of the property to a public purpose. The county may not revoke the dedication, as long as the veterans' association has not violated the dedication's terms and conditions, unless it dedicates substitute facilities or unless the veterans' organization either consents to the proposed county action or abandons its use of the facilities. (*Mil. & Vet.C. 1266* [codifying holding in *Captain Charles V. Gridley Camp No. 104, United Spanish War Veterans v. Board of Supervisors of Butte* (1929) 98 C.A. 585, 277 P. 500].)

When a city elects to purchase a dedicated veterans' building, it assumes a mandatory duty to maintain, repair, or replace the building, or in the alternative, to dedicate a substitute facility under *Govt.C. 37461*. (*Veterans of Foreign Wars v. El Paso de Robles* (1998) 62 C.A.4th 1077, 1082, 73 C.R.2d 171 [*Govt.C. 37461* should be construed like *Mil. & Vet.C. 1262*; citing *Gridley Camp*].)

SUPPLEMENT: [This section is current through the latest supplement]



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d. Adverse Use by Public.

1. Judicial Rule of Implied Dedication.

12 Witkin Sum. Cal. Law Real Property § 249

[§ 249] Judicial Rule of Implied Dedication.

(1) "*Gion*" Dedication. A dedication may occur as a result of the owner's acquiescence in a public use, on the theory of an offer implied in fact. This type of dedication is based on the owner's intent. (See *supra*, §241.) A distinct type of dedication takes place when there is a public use for more than 5 years. The owner's intent is not involved; the crucial factor is the public use without objection. This subject was explored in the innovative decision in *Gion v. Santa Cruz* (1970) 2 C.3d 29, 84 C.R. 162, 465 P.2d 50, which consolidated appeals in *Gion v. Santa Cruz* and *Dietz v. King*.

In *Gion*, plaintiffs were the private owners of a road, parking area, and beach strip, which members of the public had used regularly for fishing, swimming, and other recreational purposes over a period of many years. None of the private owners had made any serious objections, and the city had improved the area by paving, erecting guardrails, installing trash receptacles, and other acts. The superior court held that plaintiffs' fee was subject to an easement in defendant city, on behalf of the public, to use the area for recreational purposes.

In *Dietz*, the situation was similar. The public had used the beach and road for a century without objection, and in recent years occasional efforts to obstruct passage were ineffective. In this case, the superior court held for defendants, on the ground that widespread public use does not lead to an implied dedication.

The Supreme Court affirmed the judgment in *Gion* and reversed the judgment in *Dietz* on a determination of three issues:

First, what adverse use is necessary to raise the conclusive presumption of dedication, i.e., dedication implied in law? The analogy of adverse possession of land and easement by prescription is misleading, for the claimant there seeks to gain a private property right in himself by proof of use adverse to the true owner. In dedication, a public right is claimed, and the only showing required is that persons used the property believing that there was a public right to do so, without objection or interference, for more than 5 years; there is no need to show a use otherwise adverse to the interests of the owner. Evidence that the users looked to a governmental agency for maintenance of the land is significant. (2 C.3d 39.)

Second, must the user prove that the owner did not grant a license to the public? Some cases have held that there is a presumption that public use is under license of the owner. But this view was rejected for easements by prescription in *O'Banion v. Borba* (1948) 32 C.2d 145, 153, 195 P.2d 10, *infra*, §402, and there is no reason to apply it to implied dedication. Hence, the owner must controvert the finding of intent based on use by affirmative proof of a public license or a bona fide attempt to prevent public use. "If the owner has not attempted to halt public use in any significant way, however, it will be held as a matter of law that he intended to dedicate the property or an easement therein to the public, and evidence that the public used the property for the prescriptive period is sufficient to establish dedication." (2 C.3d 41.)

Third, does the rule governing shoreline property differ from that governing other property, such as roads? Although most of the prior case law involved roads, the strong constitutional and statutory policy favoring public use of shoreline recreational areas calls for the same rule of implied dedication. (2 C.3d 43.)

Applying these principles, the court found implied dedication in both *Gion* and *Dietz*: (a) In *Gion*, the government took an active part in maintenance. (b) In *Dietz*, although there was no governmental activity, the public had used the land for over 100 years. (c) The rare instances of permission granted to a few persons, and occasional obstruction or objection, were not significant. (2 C.3d 44.) The court, however, rejected the contention that a fee interest had been dedicated (as in the usual dedication of land for park purposes); the trial judge's determination in *Gion* that only an easement had been established was affirmed. (2 C.3d 44, footnote 3.)

Law review comment on the case was mostly critical. (See 59 Cal. L. Rev. 236; 7 Cal. Western L. Rev. 259; 8 Cal. Western L. Rev. 75; 4 Loyola L.A. L. Rev. 438; 11 Santa Clara Lawyer 327; 44 So. Cal. L. Rev. 1092; 5 Southwestern L. Rev. 48; 18 U.C.L.A. L. Rev. 795; 28 U.C.L.A. L. Rev. 169.) Legislative repudiation, although prospective only, was immediately forthcoming. (See *infra*, §250.)

(2) *Gion Limited to Roads, Beaches, and Shorelines*. In *Richmond Ramblers Motorcycle Club v. Western Title Guaranty Co.* (1975) 47 C.A.3d 747, 121 C.R. 308, plaintiff motorcycle club claimed easements by prescription and implied dedication in 77 acres of inland land used extensively for motorcycle riding and other public recreational purposes for over 10 years. Defendant owners showed that they paid taxes and intended to develop the land, and that the recreational use was permissive and not adverse. *Held*, judgment for defendant owners affirmed. *Gion* stressed the policy of encouraging public use of shoreline areas, and the opinion did not suggest that its holding should be applied to property other than "open beach lands." (47 C.A.3d 756, 757.) "We accordingly hold that the rules and rationale of *Gion* extend no further than to roads, beaches and shoreline areas, and that they are inapposite to the open fields and hillsides of the inland areas of the defendants in the case at bench." (47 C.A.3d 758.) (See 24 A.L.R.4th 294 [implied acceptance, by public use, of dedication of beach or shoreline adjoining public waters].)

(3) *Illustrations*. In *Orange v. Chandler-Sherman Corp.* (1976) 54 C.A.3d 561, 126 C.R. 765, the trial court rejected a county's claim of implied dedication of a 2,000-foot strip of beach, based on sporadic public use between 1920 and 1956 by no more than 15 people at a time. The beach was secluded; there was no governmental maintenance; and the owners had taken significant although ineffective measures to exclude the public. *Held*, affirmed. The evidence supported the conclusion that use of the property was not substantial enough to constitute use as a public recreation area so as to imply dedication under the *Gion* rule. (54 C.A.3d 566.)

Other decisions applying or distinguishing *Gion* include the following:

Los Angeles v. Berk (1980) 26 C.3d 201, 213, 214, 161 C.R. 742, 605 P.2d 381 [*Gion-Dietz* did not make major change in law but merely restated and clarified well-established former law; hence, rule was properly applied where dedicating events occurred before decision].

Long Beach v. Daugherty (1977) 75 C.A.3d 972, 977, 142 C.R. 593 [following *Gion*].

Brumbaugh v. Imperial (1982) 134 C.A.3d 556, 562, 184 C.R. 11 [following *Gion*].

Aptos Seascape Corp. v. Santa Cruz (1982) 138 C.A.3d 484, 501, 188 C.R. 191, and footnote 7, citing the text [upholding trial judge's finding that public use was not sufficiently substantial to negate idea of mere license].

Bess v. Humboldt (1992) 3 C.A.4th 1544, 1550, 5 C.R.2d 399 [public dedication of road leading to river was established by long-standing public use without objection and county's routine maintenance of road; citing *Gion*].

Redwood Empire v. Gombos (2000) 82 C.A.4th 352, 361, 98 C.R.2d 119 [scope of public easement that has arisen through implied dedication should be determined by type of use that gave rise to easement; trial court properly found that adverse public use of road for more than 5 years before 1972 gave rise to implied dedication of public easement to use road, but it must determine on remand whether logging operations were within scope of easement].

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 306, 2nd full paragraph, "*Redwood Empire v. Gombos*" should be "*Burch v. Gombos*".



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2. Statutory Limitations.

12 Witkin Sum. Cal. Law Real Property § 250

[§ 250] Statutory Limitations.

(1) *Nature and Purpose of Legislation.* In 1971, the Legislature abrogated the rule of *Gion v. Santa Cruz* (1970) 2 C.3d 29, 84 C.R. 162, 465 P.2d 50, supra, §249, and specified procedures for an owner to permit public use without making an implied dedication. (See C.C. 1009, 813; on recording notice under C.C. 813, see infra, §404.) The Legislature found that:

(a) "It is in the best interests of the state to encourage owners of private real property to continue to make their lands available for public recreational use to supplement opportunities available on tax-supported publicly owned facilities." (C.C. 1009(a)(1).)

(b) "Owners of private real property are confronted with the threat of loss of rights in their property if they allow or continue to allow members of the public to use, enjoy or pass over their property for recreational purposes." (C.C. 1009(a)(2).)

(c) "The stability and marketability of record titles is clouded by such public use, thereby compelling the owner to exclude the public from his property." (C.C. 1009(a)(3).)

(2) *Prospective Application.* Both C.C. 1009 and 813 are expressly prospective in effect. The enacting statute states: "[N]or shall this act be construed to affect, diminish or extinguish any right or rights vested as of the effective date hereof by reason of express or implied dedication, or otherwise." (Stats. 1971, Chap. 941, §3.) The effective date was March 4, 1972. (See *Friends of the Trails v. Blasius* (2000) 78 C.A.4th 810, 823, 93 C.R.2d 193 [public acquired public easement for use of road alongside canal under criteria of *Gion*, before March 4, 1972; easement was not extinguished or otherwise affected by enactment of C.C. 1009].)

(3) *No Implied Dedication.* Regardless of whether a private owner of real property has recorded a notice of consent to use the property under C.C. 813 or whether signs are posted under C.C. 1008 (see infra, §404), "no use of such property by the public after [March 4, 1972] shall ever ripen to confer upon the public or any governmental body or unit a vested right to continue to make such use permanently, in the absence of an express written irrevocable offer of

dedication of such property to such use." (C.C. 1009(b); see *Bustillos v. Murphy* (2002) 96 C.A.4th 1277, 1279, 117 C.R.2d 895 [C.C. 1009(b) barred individual from obtaining prescriptive easement to trails on undeveloped property; fact that individual was seeking "private" easement was immaterial, because individual was member of public that had used property for recreational purposes for many years, and his interest in property was indistinguishable from general public's interest].)

C.C. 1009 involves the inability to establish a public road by *public recreational uses* of private property. Nothing in the statute suggests a purpose to prevent all nonstatutory dedications of property, including those outside the recreational use context. (*Hanshaw v. Long Valley Road Assn.* (2004) 116 C.A.4th 471, 484, 485, 11 C.R.3d 357 [C.C. 1009 did not prevent common law dedication of road used by public for nonrecreational purposes].)

(4) *Exception for Expenditure of Public Funds.* If a governmental entity uses private lands by expending public funds on visible improvements on or across the lands or on cleaning or maintenance related to the public use of the lands, and does so in a way that the owner knows or should know that the public is making use of the land, the government use, including the public use reasonably related to the purposes of the improvement, will after 5 years ripen into a vested right to continue the use. If, however, during that time, the owner has expressly permitted the governmental entity to continue the use or has taken reasonable steps to enjoin, remove, or prohibit the use, no vested right will be created. (C.C. 1009(d).)

(5) *Exception for Coastal Property.* C.C. 1009(b) does not apply to coastal property that lies within 1,000 yards inland of the mean high tide line of the Pacific Ocean, and its harbors, estuaries, bays and inlets, "but not including any property lying inland of the Carquinez Straits bridge, or between the mean high tide line and the nearest public road or highway, whichever distance is less." (C.C. 1009(e).)

(6) *Owner's Steps To Avoid Dedication of Coastal Property.* No public use of coastal property (see C.C. 1009(e)), subsequent to March 4, 1972, will be evidence of implied dedication if the owner does any of the following:

(a) Posts signs as provided in C.C. 1008, and renews them if they are removed, at least once a year, or publishes annually, as provided in *Govt.C. 6066*, a statement of right to pass by permission, citing C.C. 1008. (C.C. 1009(f)(1).)

(b) Records a notice as provided in C.C. 813. (C.C. 1009(f)(2).)

(c) Enters into a written agreement with a federal, state, or local agency providing for public use of the land. (C.C. 1009(f)(3).)

After taking any of these actions, and during the time the action is effective, the owner must not prevent a public use that is appropriate under the permission granted, by physical obstruction, notice, or otherwise. (C.C. 1009(f).) The permission granted may be conditioned on reasonable restrictions on the time, place, and manner of the public use, and no use in violation of the restrictions will be considered public use for purposes of a finding of implied dedication. (C.C. 1009(g).)

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3. Use Must Conform to Purpose.

a. Private Dedication to Public Entity.

1. Improper Use.

12 Witkin Sum. Cal. Law Real Property § 251

[§ 251] Improper Use.

The use must be consistent with the purpose of the dedication. So where land is dedicated for use as a park, neither the public entity nor the Legislature can turn a large part of it into a highway. (*Hall v. Fairchild-Gilmore-Wilton Co. (1924) 66 C.A. 615, 620, 227 P. 649*; see *Marshall v. Standard Oil Co. (1936) 17 C.A.2d 19, 26, 61 P.2d 520* [city had no power to use or lease strip of land, which had been dedicated to city for street purposes, for oil well drilling]; 10 Miller & Starr 3d §26:27; 60 A.L.R.3d 581 [construction of highway through park]; 23 Am.Jur.2d (2002 ed.), Dedication §63; 8A Am.Jur. P.P. Forms (2004 ed.), Dedication §§4, 5.)

In *Roberts v. Palos Verdes Estates (1949) 93 C.A.2d 545, 209 P.2d 7*, limitations in a grant were strictly applied to prevent defendant city from installing, in a park, two buildings to store vehicles and equipment used in maintenance of park lands and other city property. The trial judge's injunction permitted the storage of equipment used exclusively for the city's park lands, but even this limited use was declared improper by the appellate court, which held that the buildings could not be used unless they directly contributed to the purposes of the particular park. (93 C.A.2d 547.)

Pub.Res.C. 5003.5 gives the state Department of Parks and Recreation discretion to grant a permit for a right-of-way across a park to an owner whose property is separated from a highway or road by the park. In *Big Sur Properties v. Mott (1976) 62 C.A.3d 99, 132 C.R. 835*, plaintiff owner sought mandamus to compel the director of the department to consider its application for a permit. *Held*, defendant's refusal was proper.

(a) The deed to the state was exclusively for public park purposes and uses incidental to those purposes; hence, the property cannot be used for other purposes without violating the public trust. And a right-of-way for private access to private property outside the park is not an incidental use. (62 C.A.3d 103, 104.)

(b) *Pub.Res.C. 5003.5* must be construed consistently with the public trust. It may be applied to dedications by the public (see *infra*, §253), but not to dedications by private donors. (62 C.A.3d 105.) (See *Save the Welwood Murray Memorial Library Com. v. City Council (1989) 215 C.A.3d 1003, 1012, 263 C.R. 896* [discussing *Roberts* and *Big Sur Properties*].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Solano v. Handlery* (2007) 155 C.A.4th 566, 570, 574, 66 C.R.3d 201 [deed granting property to county "only for a county fair or exposition ... and purposes incident thereto" and prohibiting county from transferring property precluded county from unilaterally casting aside use restrictions on property; citing *Big Sur Properties v. Mott* (1976) 62 C.A.3d 99, 132 C.R. 835, text, p. 309, and *Save the Welwood Murray Memorial Library Com. v. City Council* (1989) 215 C.A.3d 1003, 263 C.R. 896, text, p. 309.]



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[§ 252] Proper Use.

Hotels, restaurants, museums, art galleries, libraries, zoological and botanical gardens, conservatories, monuments and memorials, etc., are consistent with a dedication for park purposes. (*Slavich v. Hamilton* (1927) 201 C. 299, 306, 257 P. 60; *Vale v. San Bernardino* (1930) 109 C.A. 102, 106, 292 P. 689.)

Wattson v. Eldridge (1929) 207 C. 314, 278 P. 236, is even more liberal. A corporation reclaimed marsh land and built a town with intercommunicating canals for purposes of transportation. The canals were conveyed to the city by an instrument providing that they should be used solely "for permanent waterways." Later, this use became impractical, and the city attempted to fill the waterways up and turn them into streets. The court held that this was a proper interpretation of the intent of the dedicator, because the streets, like the canals, were public highways. (207 C. 320.) (See *Wills v. Los Angeles* (1930) 209 C. 448, 451, 287 P. 962 [dedicator conveyed land to city for street purposes; prohibition in deed against use of land for street railway traffic was void as repugnant to grant].)

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3. Use Must Conform to Purpose.

b. Public Entity's Dedication of Its Own Property.

12 Witkin Sum. Cal. Law Real Property § 253

[§ 253] Public Entity's Dedication of Its Own Property.

Modern cases draw a distinction between the situations discussed in the preceding sections (*supra*, §§251, 252) and those in which a public entity, having previously by ordinance dedicated its own property to some public use, later seeks to change the dedication to a different public use. A less strict rule is followed, and the public entity is permitted to meet changing conditions, e.g., by permitting a street to cross a park. (*Spinks v. Los Angeles* (1934) 220 C. 366, 368, 31 P.2d 193; *Ritzman v. Los Angeles* (1940) 38 C.A.2d 470, 474, 101 P.2d 541; see *Pub.Res.C. 5160* [county supervisors may use portion of county park for county highway purposes]; *C.C.P. 1240.680* [appropriation of property for public use as park establishes rebuttable presumption that property has been put to "the best and most necessary public use"]; 23 *Hastings L. J.* 949 [C.C.P. 1241.7; protecting public parks from highway intrusion]; 60 *A.L.R.3d* 581 [construction of highway through park].)

San Francisco v. Linares (1940) 16 C.2d 441, 444, 106 P.2d 369, held that the city could lease to private owners the subsurface space under a park for a public garage and parking station, where the interference with the use of the park would be only for the period of construction, and the park would be completely restored afterward. And *Pub.Res.C. 7057* allows a municipality to give an oil or gas lease covering park or highway property, provided that oil is taken by slant drilling so as not to interfere with the ordinary use. (See *Griffith v. Los Angeles* (1947) 78 C.A.2d 796, 800, 178 P.2d 793 [use of park for temporary veterans' housing during emergency upheld].)

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E. Deeds.

1. Requisites of Deed.

12 Witkin Sum. Cal. Law Real Property § 254

[§ 254] Requisites of Deed.

(1) *Transaction Subject to Deed.* Deeds are used when the owner of an interest (the grantor) transfers, sells, or gives the interest to another (the grantee) by executing a writing document (the deed) that satisfies statutory requirements. (See C.E.B., 2 Real Property Sales Transactions 3d, §9.6; 1 Miller & Starr Forms §1:53 et seq.; 23 *Am.Jur.2d* (2002 ed.), *Deeds* §87 et seq.; 8A *Am.Jur. P.P. Forms* (2004 ed.), *Deeds* §5 et seq.; 7A *Am.Jur. Legal Forms* 2d (1998 ed.), *Deeds* §§87:5 et seq., 87:50 et seq.; on operative words of conveyance and interpretation of grants, see *supra*, §13 et seq.)

(2) *Essential Matters.* The essential requisites of an effective deed are:

- (a) Grantor (*infra*, §259).
- (b) Grantee (*infra*, §266).
- (c) Writing and subscription (*infra*, §268).
- (d) Delivery (*infra*, §291).
- (e) Acceptance (*infra*, §314).

(3) *Nonessential Matters.* A seal is not required. (C.C. 1629; C.C.P. 1932.) Witnesses are unnecessary. (*Schuur v. Rodenback* (1901) 133 C. 85, 88, 65 P. 298.) Acknowledgment is not essential to validity, but it is a prerequisite to recordation (*infra*, §283), and permits introduction of the instrument into evidence without further proof of genuineness. (*Gordon v. San Diego* (1895) 108 C. 264, 267, 41 P. 301; *Kimbro v. Kimbro* (1926) 199 C. 344, 349, 249 P. 180.) Finally, recordation is likewise unnecessary; its effect is to give constructive notice and to determine priorities. (C.C. 1217; *Warnock v. Harlow* (1892) 96 C. 298, 305, 31 P. 166; see *infra*, §325.)

Federal documentary tax stamps are no longer required, but local transfer taxes are authorized by Rev.C. 11901 et seq. (see 9 *Summary* (10th), *Taxation*, §320).

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Transaction Subject to Deed*. See C.E.B., 2 Real Property Sales Transactions 4th, §10.6; 7A Am.Jur. Legal Forms 2d (2007 ed.), Deeds §§87:3 et seq., 87:49 et seq.



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2. Principal Types of Deeds.

a. Quitclaim Deed.

12 Witkin Sum. Cal. Law Real Property § 255

[§ 255] Quitclaim Deed.

An instrument in which one does "remise, release and quitclaim" or in which one transfers one's right, title and interest in land is a quitclaim deed, and is a recognized method of conveying interests in real property. (See *Manhattan Beach v. Superior Court* (1996) 13 C.4th 232, 239, 52 C.R.2d 82, 914 P.2d 160, *infra*, §390 [use of quitclaim deed form, with its established legal import, substantially reflects intention to convey title in its entirety]; *In re Marriage of Broderick* (1989) 209 C.A.3d 489, 496, 503, 257 C.R. 397 [quitclaim deed creates presumption that title is held as shown in the instrument]; 14 Powell §81.03; C.E.B., 2 Real Property Sales Transactions 3d, §9.4; 1 Miller & Starr Forms §1:55; 23 *Am.Jur.2d* (2002 ed.), *Deeds* §15.) Thus, the grantee receives the protection of the recording laws. (*Dunn v. Carroll* (1929) 101 C.A. 209, 212, 281 P. 506; see *Casey v. Gray* (1993) 13 C.A.4th 611, 614, 16 C.R.2d 538 [quitclaim deed that is executed and delivered, but not recorded, conveys title free and clear of subsequently recorded abstract of judgment]; *infra*, §328.) An action to quiet title may be based on a quitclaim deed. (*Thornton v. Middletown Educational Corp.* (1937) 21 C.A.2d 707, 709, 70 P.2d 234.)

Because the deed passes whatever interest the grantor possesses, legal or equitable, it transfers the equitable interest of a purchaser under an executory contract to buy land. (*Rosenthal v. Landau* (1949) 90 C.A.2d 310, 313, 202 P.2d 810; see *Klamath Land & Cattle Co. v. Roemer* (1970) 12 C.A.3d 613, 618, 91 C.R. 112, citing the text; 14 Powell §81.03; 23 *Am.Jur.2d* (2002 ed.), *Deeds* §§223 et seq., 275 et seq.)

On the other hand, the grantee takes subject to all equities that could have been asserted against the grantor. (*Allison v. Thomas* (1887) 72 C. 562, 564, 14 P. 309; see *Veterans of Foreign Wars v. El Paso de Robles* (1998) 62 C.A.4th 1077, 1080, 73 C.R.2d 171, citing the text [city that took ownership of veterans' hall through quitclaim deed from county also acquired county's obligation to maintain building].) Because the quitclaim deed transfers only the interest that the transferor has at the time, it does not pass an after-acquired title. (*McDonald v. Edmonds* (1872) 44 C. 328, 330; *Taylor v. Coachella Valley County Water Dist.* (1952) 108 C.A.2d 743, 745, 239 P.2d 454; see *Osswald v. Anderson* (1996) 49 C.A.4th 812, 820, 57 C.R.2d 23, citing the text [quitclaim deed transfers only whatever interest grantors possess at time of conveyance]; *In re Marriage of Gioia* (2004) 119 C.A.4th 272, 280, 14 C.R.2d 362, citing the text [bankruptcy trustee's quitclaim deed conveyed no title to or interest in residence, where bankruptcy estate had abandoned any interest in residence]; 14 Powell §81.03; 23 *Am.Jur.2d* (2002 ed.), *Deeds* §286.) However, the deed will transfer an inchoate right that later ripens into a title. (*Soares v. Steidtmann* (1955) 130 C.A.2d 401, 404, 278 P.2d 953.)

SUPPLEMENT: [This section is current through the latest supplement]
See C.E.B., 2 Real Property Sales Transactions 4th, §10.4.



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b. Grant Deed.

1. Nature of Grant.

12 Witkin Sum. Cal. Law Real Property § 256

[§ 256] Nature of Grant.

The term "grant" broadly includes every sort of conveyance or transfer of real property, including those by operation of law. (C.C. 1053; see *Klamath Land & Cattle Co. v. Roemer* (1970) 12 C.A.3d 613, 618, 91 C.R. 112 ["Reservation Agreement" granting severed mineral and oil rights was grant deed that transferred after-acquired title]; C.E.B., 2 Real Property Sales Transactions 3d, §§9.2, 9.3; 1 Miller & Starr Forms §1:53; 23 Am.Jur.2d (2002 ed.), Deeds §13 et seq.; 7A Am.Jur. Legal Forms 2d (1998 ed.), Deeds §§87:19 et seq., 87:50 et seq.)

Use of the word "grant" is sufficient to convey a fee simple title to real property. (C.C. 1105; *Northwestern Pac. R. Co. v. Humboldt Milling Co.* (1921) 186 C. 599, 602, 200 P. 9; *Long Beach v. Marshall* (1938) 11 C.2d 609, 613, 82 P.2d 362; on document of transfer relating to land, see *Rest.2d, Property (Donative Transfers)* §32.3.) However, no particular language is necessary; the words "gift of deed" have been held to be operative words of transfer. (*Brusseau v. Hill* (1927) 201 C. 225, 228, 256 P. 419.)

No merger of separate parcels occurs by reason of conveyance in a single instrument. Unless specifically stated otherwise, the consolidation of separate and distinct legal descriptions of real property contained in separate instruments of conveyance or security documents into a subsequent single instrument, whether by individual listing of the legal descriptions or by a consolidated legal description, "does not operate in any manner to alter or affect the separate and distinct nature of the real property so described in the subsequent single instrument." (C.C. 1093.)

SUPPLEMENT: [This section is current through the latest supplement]

See C.E.B., 2 Real Property Sales Transactions 4th, §§10.2, 10.3; 7A Am.Jur. Legal Forms 2d (2007 ed.), Deeds §§87:18 et seq., 87:49 et seq.



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2. Implied Covenants.

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[§ 257] Implied Covenants.

(1) *Nature of Warranty.* A conveyance of an estate of inheritance or fee simple that uses the word "grant" carries with it the following two implied covenants by the grantor and the grantor's heirs, to the grantee and the grantee's heirs and assigns, unless expressly provided to the contrary:

(a) Previous to the time of the execution of the conveyance, the grantor has not conveyed the same estate, or a right, title, or interest in it, to anyone other than the grantee.

(b) The estate is at the time of the execution of the conveyance free from encumbrances done, made, or suffered by the grantor, or a person claiming under the grantor.

These covenants may be sued on in the same manner as if they had been expressly inserted in the conveyance. (C.C. 1113; see *Fidelity Nat. Title Ins. Co. v. Miller* (1989) 215 C.A.3d 1163, 1171, 264 C.R. 17 [buyer's prior knowledge of encumbrance does not bar action for breach of covenant]; 14 Powell §§81A.03, 81A.04; C.E.B., 2 Real Property Sales Transactions 3d, §11.5 et seq.; Cal. Civil Practice, 1 Real Property Litigation, §5:13 et seq.; 49 Cal. L. Rev. 931 [covenants of title running with the land in California]; 20 Am.Jur.2d (2005 ed.), *Covenants, Conditions, and Restrictions* §§82 et seq., 87 et seq.)

(2) *Scope of Warranty.* These implied covenants warrant only against acts of the grantor or persons claiming under the grantor, and do not cover defects or failure of title for other reasons. (*Bryan v. Swain* (1886) 56 C. 616, 618; see *Block v. Citizens Trust & Savings Bank* (1922) 57 C.A. 518, 522, 207 P. 510 [interpreting express covenants in contract to sell land].) But where the parties mistakenly believe that the title is good, although there is no suit on the covenants, the grantee may recover the purchase price in quasi-contract. (*Mitchell v. California-Pac. Title Ins. Co.* (1926) 79 C.A. 45, 51, 248 P. 1035.) And a similar result is reached where there is an executory contract to sell real property without exceptions, reservations, or reference to encumbrances. There is an implied condition that the vendor will convey a good title. (*Zlozower v. Lindenbaum* (1929) 100 C.A. 766, 773, 281 P. 102.)

(3) *Personal Nature of Covenant Against Encumbrances.* In *Babb v. Weemer* (1964) 225 C.A.2d 546, 37 C.R. 533,

defendant granted to R, and R granted to plaintiffs. There was a deed of trust on the land, R's deed referred to encumbrances of record, and plaintiffs searched the title and had both actual and constructive notice of that deed of trust. But defendant's original deed to R did not refer to the encumbrance. So plaintiffs sued defendant for the amount of the trust deed obligation, on the theory that the implied covenant ran with the land and defendant was liable to a remote purchaser. *Held*, judgment for defendant affirmed; the covenant against encumbrances, whether express or implied under C.C. 1113, is personal and does not run with the land or pass to an assignee. (225 C.A.2d 550.)

(4) *Damages for Breach of Covenant Against Encumbrances*. In *Evans v. Faught* (1965) 231 C.A.2d 698, 42 C.R. 133, defendants made an unrecorded lease of a portion of their ranch to Sonoma County, to construct and maintain a powder magazine, at a \$ 100 yearly rental, for a 25-year period with a similar renewal period. Then defendants granted to plaintiff, who saw the powder magazine but had no knowledge of the lease. Two years later, plaintiff paid the county \$ 5,500 for a release of all its claims and an agreement to vacate, and then brought this action against defendants to recover that sum as damages for breach of the implied covenant. *Held*, plaintiff was entitled to partial recovery.

(a) Although the term "encumbrances" broadly includes any burden, a physical burden on land, permanent in character and visible, is not an encumbrance under C.C. 1113. The reason is that the grantor and grantee are deemed to deal with the land subject to visible easements, and the grantee takes and pays for the land as visibly encumbered. (231 C.A.2d 708.) Hence, recovery could not be based on the powder magazine and road leading to it.

(b) However, knowledge of the county's use put plaintiff on inquiry as to its rights under the unrecorded lease, and the lease was binding on him. (See *infra*, §332.) The lease was therefore an encumbrance affecting title, and defendants were liable for breach of the implied covenant. (231 C.A.2d 711.) Because the obligation is personal, the several grantors were jointly and severally liable. (231 C.A.2d 712.)

(c) The correct measure of damages was not the sum paid to extinguish the lease, but the amount by which the lease's existence reduced the market value of the land at the time of the conveyance. (231 C.A.2d 713.) (See *Fidelity Nat. Title Ins. Co. v. Miller* (1989) 215 C.A.3d 1163, 1171, 264 C.R. 17 [following *Evans*; buyer's prior knowledge of encumbrance does not bar action for breach; buyer is entitled to rely on covenant in deed made after his knowledge was acquired].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature of Warranty*. See C.E.B., 2 Real Property Sales Transactions 4th, §12.5 et seq.



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c. Warranty Deed.

12 Witkin Sum. Cal. Law Real Property § 258

[§ 258] Warranty Deed.

A warranty deed follows from an agreement on the part of the vendor to give the "usual covenants." The deed contains warranties of title and quiet possession, and the grantor thus agrees to defend the premises against the lawful claims of third persons. On total breach, the grantee may recover the purchase price with interest, and expenses properly incurred in defending the grantee's possession. (C.C. 3304; see *McCormick v. Marcy* (1913) 165 C. 386, 389, 132 P. 449; *Barberi v. Rothchild* (1936) 7 C.2d 537, 540, 61 P.2d 760; C.E.B., 2 Real Property Sales Transactions 3d, §9.5; 98 A.L.R.5th 665 [defects in title encompassed by warranty of special warranty deed]; on covenants of title, see 14 Powell §81A.05; C.E.B., 2 Real Property Sales Transactions 3d, §11.4 et seq.; 49 Cal. L. Rev. 931; 20 Am.Jur.2d (2005 ed.), *Covenants, Conditions, and Restrictions* §54 et seq.; 7A Am.Jur. Legal Forms 2d (1998 ed.), Deeds §§87:8 et seq., 87:53; 79 Proof of Facts 3d 109 [proof that grantor intended warranty deed as mortgage].)

The modern practice of securing title insurance has virtually eliminated the warranty deed from California practice. (See C.E.B., 2 Real Property Sales Transactions 3d, §§9.5, 11.3 [importance of understanding covenants of title despite title insurance]; *infra*, §352 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]
See C.E.B., 2 Real Property Sales Transactions 4th, §§10.5, 12.3.



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a. Capacity.

12 Witkin Sum. Cal. Law Real Property § 259

[§ 259] Capacity.

The grantor must have capacity to contract. (See 1 *Summary* (10th), *Contracts*, §25 et seq.; supra, §206; C.E.B., 1 Real Property Sales Transactions 3d, §4.14 et seq.; 23 *Am.Jur.2d* (2002 ed.), *Deeds* §23; on conveyance of interest by state, see *Govt.C. 11005.2* [grant must have approval of Director of General Services unless Legislature makes exception]; for specialized grantor clauses, see C.E.B., 2 Real Property Sales Transactions 3d, §9.14 et seq.)

A deed made by a person after being judicially declared incompetent and placed under conservatorship is void, for the adjudication is notice to the world of the person's incapacity. (*Gibson v. Westoby* (1953) 115 C.A.2d 273, 276, 251 P.2d 1003 [no title passes to innocent purchaser for value].) In other cases, incompetency may be established by proof, and the deed set aside. (*Anderson v. Torrey* (1951) 105 C.A.2d 671, 673, 234 P.2d 142; *Philbrook v. Howard* (1958) 157 C.A.2d 210, 214, 320 P.2d 609; *Rieger v. Rich* (1958) 163 C.A.2d 651, 663, 329 P.2d 770; see 18 A.L.R.2d 906 [grantor's commitment to institution for insane as grounds for setting aside conveyance in consideration of support].)

In *Goldman v. Goldman* (1953) 116 C.A.2d 227, 233, 253 P.2d 474, the court, citing cases on competency to make a will, reversed the trial judge's finding of incompetency and set forth a similar test of capacity to make a gift deed: "Even though a donor suffers physical and mental debility, he is not thereby necessarily rendered incompetent to make a gift of his property so long as he has sufficient mental power to grasp and comprehend the nature of his act, the character of his property and his relation to the natural objects of his bounty." (See 14 *Summary* (10th), *Wills and Probate*, §120 et seq.)

West's Key Number Digest, Deeds k.10 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

See C.E.B., 1 Real Property Sales Transactions 4th, §4.14 et seq.; C.E.B., 2 Real Property Sales Transactions 4th, §10.14 et seq.



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3. Grantor.

b. Undue Influence.

12 Witkin Sum. Cal. Law Real Property § 260

[§ 260] Undue Influence.

Like a contract or will, a deed that has been procured by undue influence may be set aside. (See *Szekeres v. Reed* (1950) 96 C.A.2d 348, 356, 215 P.2d 522; *Anderson v. Torrey* (1951) 105 C.A.2d 671, 677, 234 P.2d 142; *Estate of Kreher* (1951) 107 C.A.2d 831, 839, 238 P.2d 150 [undue influence not shown]; *Camperi v. Chiechi* (1955) 134 C.A.2d 485, 504, 286 P.2d 399 [same]; *Rieger v. Rich* (1958) 163 C.A.2d 651, 664, 329 P.2d 770; 14 A.L.R.2d 649 [gift to clergyman, spiritual adviser, or church]; 23 Am.Jur.2d (2002 ed.), Deeds §176 et seq.; 1 Summary (10th), Contracts, §316 et seq.; 14 Summary (10th), Wills and Probate, §130 et seq.; 4 Cal. Proc. (4th), Pleading, §508.)

"[I]t appears to be the rule that in cases of gifts *inter vivos* the natural influence which obtains in close intimate relations, as of a father and son who are in business together, is an undue influence and that gifts made by virtue of such influence will be set aside unless the party benefited can show affirmatively that the donor was placed in a position that would enable him to form an absolutely free and unfettered judgment." (*Goldman v. Goldman* (1953) 116 C.A.2d 227, 237, 253 P.2d 474.) However, the judgment in *Goldman*, based on a finding of undue influence, was reversed where there was no showing of activity in procuring the conveyance, and no evidence that the grantor was prevented from exercising his own free will. (See *Azevedo v. Leavitt* (1946) 76 C.A.2d 321, 325, 172 P.2d 704.)

A deed procured by undue influence is merely voidable, and, until declared void, is fully operative. Thus, intervening bona fide encumbrancers for value without notice from the original grantee take priority over a subsequent grantee. (*Fallon v. Triangle Management Services* (1985) 169 C.A.3d 1103, 1106, 215 C.R. 748.)

SUPPLEMENT: [This section is current through the latest supplement]
Cross-Reference: 4 Cal. Proc. (5th), Pleading, §547.



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c. Mistake or Fraud.

12 Witkin Sum. Cal. Law Real Property § 261

[§ 261] Mistake or Fraud.

A deed, like a contract, may be set aside if its execution was induced by material mistake or fraud. (*Rogers v. Warden* (1942) 20 C.2d 286, 289, 125 P.2d 7; *Steiner v. Steiner* (1958) 160 C.A.2d 665, 668, 325 P.2d 109; see C.E.B., 2 Real Property Sales Transactions 3d, §9.76; 6 A.L.R.2d 812 [cancellation of deed because of concealment, misrepresentation, or mistake about identity of person for whom property is purchased]; 23 Am.Jur.2d (2002 ed.), *Deeds* §§167 et seq., 184 et seq.; 65 Proof of Facts 3d 217 [reformation of voluntary deed following grantor's mistake about amount of land or nature of interest conveyed]; 4 Cal. Proc. (4th), *Pleading*, §505 et seq.; 1 Summary (10th), *Contracts*, §§257 et seq., 285 et seq.)

If the mistake or fraud is in the inception (or "factum" or "execution"), i.e., if the grantor does not know the kind of instrument he or she is purportedly executing, the deed is wholly void, and does not pass title to a bona fide purchaser. (*Bland v. Kelley* (1945) 69 C.A.2d 116, 118, 158 P.2d 206 [mistake]; *Erickson v. Bohne* (1955) 130 C.A.2d 553, 555, 279 P.2d 619 [fraud]; see 1 Summary (10th), *Contracts*, §299.) If, however, the mistake is in the expression of intent, the deed may be reformed. (See *Tyler v. Larson* (1951) 106 C.A.2d 317, 319, 235 P.2d 39; 1 Summary (10th), *Contracts*, §276 et seq.) And if a deed of a city or county by error of description conveys less than intended, or a deed to a city or county conveys more than was intended, a corrective deed may be executed. (*Govt.C.* 25209, 37114.)

SUPPLEMENT: [This section is current through the latest supplement]
See C.E.B., 2 Real Property Sales Transactions 4th, §10.76.

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §544 et seq.



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3. Grantor.

d. Consideration.

12 Witkin Sum. Cal. Law Real Property § 262

[§ 262] Consideration.

(1) *General Rule Against Rescission for Failure of Consideration.* Consideration is not necessary to constitute a valid deed. (C.C. 1040; *Odone v. Marzocchi* (1949) 34 C.2d 431, 436, 211 P.2d 297, 212 P.2d 233; *Estate of Claussenius* (1950) 96 C.A.2d 600, 605, 216 P.2d 485; see *Greeninger v. Ruelle* (1954) 124 C.A.2d 8, 9, 268 P.2d 39 [grant deed containing no reference to consideration does not justify inference of promise to pay reasonable value of property conveyed]; 14 Powell §81.05; 23 Am.Jur.2d (2002 ed.), *Deeds* §72 et seq.) Despite the fact that a deed is in some respects a contract, the provisions of the Civil Code dealing with rescission of contracts do not apply to deeds. Accordingly, failure of consideration is not a ground for rescinding a deed unless the performance by the grantee (i.e., the consideration) was made a condition subsequent. (*Lavelly v. Nonemaker* (1931) 212 C. 380, 383, 298 P. 976; see *Masero v. Bessolo* (1927) 87 C.A. 262, 265, 262 P. 61 [damages recoverable]; *Williams v. Reich* (1932) 123 C.A. 128, 131, 10 P.2d 1030; *Conley v. Sharpe* (1943) 58 C.A.2d 145, 151, 136 P.2d 376; *Ampuero v. Luce* (1945) 68 C.A.2d 811, 815, 157 P.2d 899; *Norby v. Pister* (1952) 114 C.A.2d 510, 511, 250 P.2d 633; *Estate of Claussenius*, *supra*, 96 C.A.2d 605 [dictum, consideration illegal]; 32 Cal. L. Rev. 191 [failure of consideration to support as ground for rescission of conveyance].)

(2) *Exception for Condition.* An exception is recognized when the deed contains a condition subsequent, or is delivered on condition of the grantee's promise to support the grantor, and the grantee fails to perform the condition. In these cases, rescission is allowed. (*Teel v. Bank of Eureka* (1941) 42 C.A.2d 807, 809, 110 P.2d 78 [deposit in escrow for delivery to grantee after death of grantor if grantee performed agreement]; see *Johnson v. Clark* (1936) 7 C.2d 529, 533, 61 P.2d 767 [stating exception and reasons for it].) Another basis for relief is a showing of mistake or fraud in the inception, i.e., that the grantor did not know the nature of the instrument. (See *Bland v. Kelley* (1945) 69 C.A.2d 116, 118, 158 P.2d 206; *supra*, §261; *Engle v. Farrell* (1946) 75 C.A.2d 612, 617, 171 P.2d 588, 1 Summary (10th), *Contracts*, §933 [rescission of executed contract of sale after deed received].)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Grantor.

e. Name.

12 Witkin Sum. Cal. Law Real Property § 263

[§ 263] Name.

(1) *Natural Person.* A natural person may assume any name in which to receive and transfer title. (*Emery v. Kipp* (1908) 154 C. 83, 86, 97 P. 17; *Overton v. Harband* (1935) 6 C.A.2d 455, 465, 44 P.2d 484; see 14 Powell §81.05; C.E.B., 2 Real Property Sales Transactions 3d, §9.14 et seq.; 23 Am.Jur.2d (2002 ed.), Deeds §25 et seq.; 7A Am.Jur. Legal Forms 2d (1998 ed.), Deeds §87:172 et seq.)

(2) *Partnership.* Partnership property may be transferred as follows:

(a) Subject to the effect of a statement of partnership authority under *Corp.C. 16303*, partnership property held in the name of the partnership may be transferred by an instrument of transfer executed by a partner in the partnership name. (*Corp.C. 16302(a)(1).*)

(b) Partnership property held in the name of one or more partners with an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, but without an indication of the name of the partnership, may be transferred by an instrument of transfer executed by the persons in whose name the property is held. (*Corp.C. 16302(a)(2).*)

(c) Partnership property held in the name of one or more persons other than the partnership, without an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, may be transferred by an instrument of transfer executed by the persons in whose name the property is held. (*Corp.C. 16302(a)(3).*) (On partnership property generally, see 9 *Summary* (10th), *Partnership*, §15 et seq.)

(3) *Unincorporated Association.* The acquisition, transfer, or encumbrance of an interest in real property by an unincorporated association must be executed by its president and secretary or other comparable officers, or by a person specifically designated by a resolution adopted by the association, or by a committee or other body or person authorized to act by the governing principles of the association. (*Corp.C. 18115*; see C.E.B., 2 Real Property Sales Transactions 3d, §9.16.)

(4) *Persons Not Named in Body of Instrument.* Under the common law rule, a deed signed and acknowledged by a

number of persons, not all of whom are named in the body of the instrument as grantors, was not considered the deed of those whose identity as grantors does not appear from the instrument. (*Cordano v. Wright* (1911) 159 C. 610, 617, 115 P. 227.) This rule was, however, substantially modified in *Strong v. Strong* (1943) 22 C.2d 540, 542, 140 P.2d 386, where a deed of community property, signed by both husband and wife, was sufficient to convey the title, although the husband alone was named as a grantor.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Natural Person*. See C.E.B., 2 Real Property Sales Transactions 4th, §10.14 et seq.; 7A Am.Jur. Legal Forms 2d (2007 ed.), Deeds §87:174 et seq.(3) *Unincorporated Association*. See C.E.B., 2 Real Property Sales Transactions 4th, §10.16.



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f. Conveyance in Different Name.

12 Witkin Sum. Cal. Law Real Property § 264

[§ 264] Conveyance in Different Name.

If title is taken in one name and transferred in another name, the grantor must set forth in the conveyance the name in which the grantor derived title to the property. (C.C. 1096.) *Puccetti v. Girola* (1942) 20 C.2d 574, 577, 128 P.2d 13, held that failure to comply with C.C. 1096 renders the deed wholly void, and not merely inferior to rights or subsequent bona fide purchasers. (See 31 Cal. L. Rev. 100 [deeds: conveyance of real estate when name of grantor has been changed].)

This rule was changed in 1947 by the following amendment to C.C. 1096: "Any conveyance, though recorded as provided by law, which does not comply with the foregoing provision shall not impart constructive notice of the contents thereof to subsequent purchasers and encumbrancers, but such conveyance is valid as between the parties thereto and those who have notice thereof."

SUPPLEMENT: [This section is current through the latest supplement]



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3. Grantor.

g. Adjudication of Identity.

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[§ 265] Adjudication of Identity.

(1) *Scope of Statute.* The practical difficulty confronting the successor in interest of a person who acquired property in one name and transferred it (or left it on death) in another is met by *C.C.P. 770.010 et seq.*, establishing a proceeding for adjudication of the identity of the transferor or decedent. The proceeding is authorized when property is acquired or stands of record in the name of a person who transfers the property under another name. (*C.C.P. 770.020.*) The statute applies to any right, title, or interest in or lien on real property that is received or taken by conveyance, judgment, decree, or otherwise. (*C.C.P. 770.010(a), 770.010(b).*) "Transfer" means a voluntary or involuntary transfer and includes (a) a conveyance or reconveyance, (b) satisfaction of a lien, (c) divestment by judgment, decree, or otherwise, and (d) probate of the estate of a decedent and entry of a decree of distribution. (*C.C.P. 770.010(d).*)

(2) *Parties.* The proceeding is brought by a subsequent owner of the property. (*C.C.P. 770.040(a).*) A "subsequent owner" is a person to whom property is transferred whether as owner, part owner, or otherwise, or a successor in interest of the person, and includes a person to whom property of a decedent is distributed. (*C.C.P. 770.010(c).*) As many persons as appear of record in the chain of title to the property may be joined in one petition or proceeding. (*C.C.P. 770.050(c).*)

(3) *Procedure.* The subsequent owner files a verified petition in the superior court of the county in which the property or a part of the property is located. (*C.C.P. 770.030, 770.040(a), 770.050(a).*) The petition states the petitioner's interest in the property, describes the property with particularity, states the name or names of the person or persons sought to be identified, with reference to the record of the transactions under which the property was acquired and transferred, and contains a prayer that the identity of these persons be established. (*C.C.P. 770.050(b).*)

The petition is heard on 10 days' posted notice substantially in the form specified in the statute. (*C.C.P. 770.060.*) Anytime before the hearing date, any person interested in the property may answer the petition, and deny any of the matters it contains. (*C.C.P. 770.040(b).*) The court renders a decree from which any aggrieved party may appeal. (*C.C.P. 770.070.*) A certified copy of the decree must be recorded in every county in which any part of the property is situated. (*C.C.P. 770.080(b).*)

(4) *Effect of Decree.* The decree, when final, constitutes prima facie evidence of the matters determined. It is

presumed that the identity of the person described in the decree is as stated in the decree. (*C.C.P. 770.080(a)*.)

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4. Grantee.

a. In General.

12 Witkin Sum. Cal. Law Real Property § 266

[§ 266] In General.

A definite grantee is essential to a valid deed. A deed to a dead person is a nullity. (*Hunter v. Watson* (1859) 12 C. 363, 376.) (See 23 *Am.Jur.2d* (2002 ed.), *Deeds* §24.)

The grantee's name need not appear in the granting clause if it appears elsewhere and is clearly intended to designate the grantee as grantee. (*Tasker v. Nieto* (1930) 108 C.A. 135, 142, 291 P. 688.) And "[i]t is not necessary that a grantee in a deed be mentioned by name. If the designation or description is sufficient to identify the person or persons intended, the deed is effectual." (*Carlson v. Lindauer* (1953) 119 C.A.2d 292, 306, 259 P.2d 925 [quitclaim deed to "Owner, its heirs, successors and assigns," was sufficient to pass title to then owner of estate]; *Whitson v. Goudeseune* (1955) 137 C.A.2d 445, 447, 290 P.2d 590 [easement deed to "present owners of said lot 3" and their successors].)

At common law, a grant in the disjunctive (e.g., to "J.S. or W.S.") was void for uncertainty. But in *Schade v. Stewart* (1928) 205 C. 658, 663, 272 P. 567, a deed to "the heirs or devisees of Jennie C. Hurd, deceased" was held to be valid, because the grantee would become certain on the termination of a contest of the decedent's will. (On problems involved in naming grantees, see C.E.B., 2 Real Property Sales Transactions 3d, §9.23 et seq.; 23 *Am.Jur.2d* (2002 ed.), *Deeds* §27 et seq.)

West's Key Number Digest, Deeds k.10 et seq.

SUPPLEMENT: [This section is current through the latest supplement]
See C.E.B., 2 Real Property Sales Transactions 4th, §10.24 et seq.



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4. Grantee.

b. Unincorporated Association.

12 Witkin Sum. Cal. Law Real Property § 267

[§ 267] Unincorporated Association.

(1) *Association May Take Title.* At common law, an unincorporated association could not take title, and a conveyance to an association, not naming its members or board of trustees, passed no title. (*Rixford v. Zeigler* (1907) 150 C. 435, 437, 88 P. 1092.) By statutes and judicial decisions, this harsh doctrine has become virtually obsolete. The following are the principal illustrations of the modern rule:

(a) *Partnerships.* Property acquired by a partnership is property of the partnership and not of the partners individually. (*Corp.C. 16203.*) Property is partnership property if acquired in the name of the partnership (*Corp.C. 16204(a)(1)*), or in the name of one or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership but without an indication of the name of the partnership (*Corp.C. 16204(a)(2)*). Property is acquired in the name of the partnership by a transfer to either the partnership in its name (*Corp.C. 16204(b)(1)*) or one or more partners in their capacity as partners in the partnership, if the name of the partnership is indicated in the instrument transferring title to the property (*Corp.C. 16204(b)(2)*). (On partnership property generally, see 9 *Summary* (10th), *Partnership*, §27 et seq.)

(b) *Specified associations.* By statute, certain kinds of associations are authorized to hold land. (See *Corp.C. 18105* [unincorporated associations]; *Corp.C. 21200* [certain medical associations].)

(c) *Other associations.* A number of courts reject the common law rule and permit the association to hold land. Others accomplish the same result by construction of the deed, vesting ownership in the individual members jointly, or designating a trustee for the group. (See 1 *Powell* §7.01; 6 *Am.Jur.2d* (1999 ed.), *Associations and Clubs* §13.)

(2) *Title Vests in Members.* The view that title vests in the members was adopted in *Trinity v. Rourke* (1969) 275 C.A.2d 628, 79 C.R. 902. R, grantor, conveyed land to grantee H Improvement Association, which had been organized to acquire land for a local airport. H later incorporated, and conveyed the property to plaintiff county. *Held*, plaintiff county acquired title, and the decree quieting its title against heirs of the grantor R was affirmed.

Rixford, supra, was distinguished. In *Rixford*, a church grantee had never taken possession or asserted any claim for 45 years. The *Rixford* court referred to the "general rule" and said that there was nothing to bring the case within an

exception. Thus, the purported "general rule" laid down was "a quite narrow rule, restricted to a situation where the grantee is a noncharitable association and its individual members do not appear for the purpose of asserting their rights as individuals." (275 C.A.2d 630.) Here, however, the "deed to the unincorporated association was adequate to vest ownership in the association's members. ... When the association was incorporated ... , the former was ipso facto dissolved and the property held by it became the property of the corporation." (275 C.A.2d 630.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Association May Take Title.*(c) *Other associations.* See 6 Am.Jur.2d (2008 ed.), *Associations and Clubs* §12.



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5. Execution.

a. Writing and Subscription.

12 Witkin Sum. Cal. Law Real Property § 268

[§ 268] Writing and Subscription.

(1) *Written Instrument.* An estate in real property, other than an estate at will or for a term not exceeding 1 year, can be transferred only by operation of law or by a written instrument. The writing must be subscribed by the party disposing of the property, or by the party's authorized agent. (C.C. 1091; see *Estate of Stephens* (2002) 28 C.4th 665, 672, 122 C.R.2d 358, 49 P.3d 1093, 1 Summary (10th), *Contracts*, §389 [daughter did not have written authority to sign deed, conveying her father's house to father and daughter as joint tenants, as father's agent]; *Rest.2d, Property (Donative Transfers)* §32.3; 23 *Am.Jur.2d* (2002 ed.), *Deeds* §87 et seq.)

A deed may incorporate by reference the terms of another writing. (*Edwards v. Lewis* (1938) 25 C.A.2d 168, 172, 76 P.2d 720.) (For form of deed, see C.E.B., 2 Real Property Sales Transactions 3d, §9.7; 7A *Am.Jur. Legal Forms* 2d (1998 ed.), *Deeds* §87:50 et seq.)

(2) *Signature.* If an agent signs in the presence and by the direction of the principal, this is sufficient. (*Knaugh v. Baender* (1927) 84 C.A. 142, 148, 257 P. 606.) But where the agent relies on a power of attorney, the agent must subscribe the principal's name and the agent's own name as attorney in fact. (C.C. 1095.) A deed signed "Harry M. Curry, Atty. in fact for Susie J. Haviland" is merely in the name of the agent, and is ineffective to pass the title. (*Mitchell v. Benjamin Franklin Bond & Indem. Corp.* (1936) 13 C.A.2d 447, 448, 57 P.2d 185.) (On signatures, see C.E.B., 2 Real Property Sales Transactions 3d, §9.52 et seq.; 23 *Am.Jur.2d* (2002 ed.), *Deeds* §92 et seq.)

In *Osterberg v. Osterberg* (1945) 68 C.A.2d 254, 156 P.2d 46, after the signing and acknowledgment of a deed, it was altered by consent of both parties at the grantor's request, in order to insert a clause reserving a life interest in the property. Then it was delivered and recorded. *Held*, the alteration was valid; parties, by consent, may make changes before final delivery. (68 C.A.2d 261.)

West's Key Number Digest, *Deeds* k.44 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Written Instrument.* See C.E.B., 2 Real Property Sales Transactions 4th, §10.7; 7A *Am.Jur. Legal Forms* 2d (2007 ed.), *Deeds* §87:49 et seq. (2) *Signature.* See C.E.B., 2 Real Property Sales Transactions 4th, §10.53 et seq.



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5. Execution.

b. Blank Deed.

12 Witkin Sum. Cal. Law Real Property § 269

[§ 269] Blank Deed.

(1) *Rule Against Blank Deeds.* A deed must be completed before delivery; it cannot be signed in blank, to be filled in later with the names of the parties and the description of the property, by one without written authority as agent of the grantor. A blank deed is void and cannot form the basis of a good title, even where it comes to a bona fide purchase, unless the grantor is guilty of such negligence as to give rise to an estoppel. (*Trout v. Taylor* (1934) 220 C. 652, 655, 32 P.2d 968; *Jones v. Coulter* (1925) 75 C.A. 540, 547, 243 P. 487; see 23 Am.Jur.2d (2002 ed.), Deeds §§32 et seq., 39, 163; but see *Phillips v. Clifford F. Reid* (1934) 3 C.A.2d 304, 309, 39 P.2d 512 [discussing contrary rule as to notes secured by mortgage or trust deed].)

(2) *Possibility of Estoppel.* In *Bryce v. O'Brien* (1936) 5 C.2d 615, 55 P.2d 488, plaintiff, an elderly widow, was induced by R to execute a blank deed of her property, on his agreement to arrange its exchange for certain bonds. Instead, he inserted the name of his partner as grantee, and this grantee then made a deed to defendants, bona fide purchasers. *Held*, plaintiff could quiet title. Relying on *Trout*, supra, the court declared that the record did not establish an estoppel, but merely indicated "that plaintiff was very gullible and careless in delivering a blank deed" to R. (5 C.2d 616.) Although the California courts recognize that the grantor's negligence may raise an estoppel in these situations, they are extremely reluctant to find negligence. (See *Green v. MacAdam* (1959) 175 C.A.2d 481, 486, 346 P.2d 474 [widow's attorney fraudulently procured her signature on representation that deed would be used to make sale; he sold and collected price himself; no estoppel found]; 25 Cal. L. Rev. 106.)

(3) *Blank Deed to Escrow Holder.* A deed delivered to an escrow holder under instructions expressly authorizing insertion of the grantee's name is not void. A grantee who accepts the deed in blank form is entitled to have his or her name inserted, and takes a good title. (*Tumansky v. Woodruff* (1936) 14 C.A.2d 279, 283, 57 P.2d 1372; on escrow holders, see *infra*, §302 et seq.)

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c. Forged Deed.

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[§ 270] Forged Deed.

A forged deed is, of course, a nullity, unless the purported grantor adopts and ratifies the unauthorized signature, or by his or her conduct becomes estopped to deny the authority. (*Knaugh v. Baender* (1927) 84 C.A. 142, 149, 257 P. 606; *Gioscio v. Lautenschlager* (1937) 23 C.A.2d 616, 619, 73 P.2d 1230; see *Merry v. Garibaldi* (1941) 48 C.A.2d 397, 402, 119 P.2d 768 [grantor held estopped]; *Crittenden v. McCloud* (1951) 106 C.A.2d 42, 50, 234 P.2d 642 [ratification by grantor; estoppel against his successor]; 23 *Am.Jur.2d* (2002 ed.), *Deeds* §164; on alteration of deed, see 4 *Am.Jur.2d* (1995 ed.), *Alteration of Instruments* §31; 30 *A.L.R.3d* 571 [presumptions and burden of proof as to time of alteration].)

In *Handy v. Shiells* (1987) 190 C.A.3d 512, 235 C.R. 543, defendant wife forged plaintiff husband's name in selling their home, which they held in joint tenancy. *Held*, although the forged deed did nothing to affect the husband's title to the house, it brought about a valid transfer of the wife's interest and severed the joint tenancy. (190 C.A.3d 517, 518; see *supra*, §55.)

SUPPLEMENT: [This section is current through the latest supplement]
On alteration of deed, see 4 *Am.Jur.2d* (2007 ed.), *Alteration of Instruments* §27.



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6. Description of Property.

a. Methods of Description.

12 Witkin Sum. Cal. Law Real Property § 271

[§ 271] Methods of Description.

The deed should describe the property with reasonable certainty, and various methods have been approved. (See 14 Powell §81A.05; C.E.B., 2 Real Property Sales Transactions 3d, §10.1 et seq.; 70 A.L.R.3d 1220 [boundary description as relating to magnetic or true meridian]; 12 Am.Jur.2d (1997 ed.), *Boundaries* §43 et seq.; 23 Am.Jur.2d (2002 ed.), *Deeds* §38 et seq.; 7A Am.Jur. Legal Forms 2d (1998 ed.), *Deeds* §87:180 et seq.; and see Rev.C. 321 et seq. [listing methods of describing property for assessment purposes]; on resolving uncertainties, see *infra*, §277; on land survey monument preservation, see *Govt.C. 27584, 27585*.) Thus, the following methods are all satisfactory:

(1) Referring to a previous instrument. (See *Marcone v. Dowell* (1918) 178 C. 396, 402, 173 P. 465; *Kapner v. Meadowlark Ranch Assn.* (2004) 116 C.A.4th 1182, 1187, 11 C.R.3d 138.)

(2) Describing property by its common name. (C.C. 1092.)

(3) Referring to adjoining property. (See *Orena v. Newlove* (1908) 153 C. 136, 140, 94 P. 628.)

(4) Describing property by metes and bounds or by government surveys. (See *California Real Estate Co. v. Walkup* (1915) 27 C.A. 441, 448, 150 P. 385; *McDonald v. Mason* (1938) 25 C.A.2d 17, 23, 76 P.2d 212.)

(5) Describing property by reference to a recorded map. (See *McCullough v. Olds* (1895) 108 C. 529, 532, 41 P. 420.)

West's Key Number Digest, Deeds k.37 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

See C.E.B., 2 Real Property Sales Transactions 4th, §1.1 et seq.; 7A Am.Jur. Legal Forms 2d (2007 ed.), *Deeds* §87:180 et seq.



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6. Description of Property.

b. Presumption of Ownership to Center Line.

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[§ 272] Presumption of Ownership to Center Line.

In the absence of a qualifying term, the designation in a conveyance of a physical object or monument as a boundary implies the middle or central point of that boundary. For example, if the designated boundary is a road, highway, or stream, the thread of the road or stream is the intended boundary; if it is a rock, a heap of stones, or a tree, the central point of rock, heap of stones, or tree is intended. (*Faus v. Nelson* (1966) 241 C.A.2d 320, 323, 50 C.R. 483 [railroad right-of-way delineated on subdivision map]; see *Murray v. Title Ins. & Trust Co.* (1967) 250 C.A. 2d 248, 253, 58 C.R. 273, *infra*, §360 [recognizing principle]; 61 A.L.R.5th 739 [conveyance with reference to tree or similar monument as giving title to center of monument].) This common law principle, applicable whether the boundary is a road or street, a highway, a road or unnavigable stream, or a railroad right-of-way has been partially codified in C.C. 831 (*infra*, §273), C.C. 1112 (*infra*, §§273, 274), and C.C.P. 2077(4) (*infra*, §275).

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6. Description of Property.

c. Land Bounded by Highway.

1. General Rule.

12 Witkin Sum. Cal. Law Real Property § 273

[§ 273] General Rule.

A transfer of land bounded by a highway passes the grantor's title to the center line of the highway, unless a contrary intention appears in the grant; the owner of bounded land is presumed to own to the center line, subject to the public easement. (C.C. 1112 [highway], C.C. 831 [road or street]; *Allan v. San Francisco* (1936) 7 C.2d 642, 646, 61 P.2d 1175; *Machado v. Title Guaranty & Trust Co.* (1940) 15 C.2d 180, 183, 99 P.2d 245; see *Neff v. Ernst* (1957) 48 C.2d 628, 635, 311 P.2d 849 [parol evidence is inadmissible where deed is unambiguous]; *Fallon v. San Francisco* (1941) 44 C.A.2d 404, 405, 112 P.2d 718 [right of abutting owner to use subsurface area is subordinate to public easement, and where an ordinance reduced width of sidewalk, owner could be compelled to move his basement back to conform to new curb]; *Pinsky v. Sloat* (1955) 130 C.A.2d 579, 582, 279 P.2d 584 [same]; *Safwenberg v. Marquez* (1975) 50 C.A.3d 301, 308, 123 C.R. 405 [presumption applied; deeds described conveyed property only by lot and block number according to recorded map, and there were no ambiguities in deeds or in map]; *Baker v. Ramirez* (1987) 190 C.A.3d 1123, 1132, 235 C.R. 857 [when roadway lying between two parcels was abandoned by county, north half of street to centerline became part of northern parcel, while south half of street to centerline became part of southern parcel]; *Besneatte v. Gourdin* (1993) 16 C.A.4th 1277, 21 C.R.2d 82, *infra*, §274 [presumption of C.C. 1112 and 831 did not apply]; Cal. Civil Practice, 2 Real Property Litigation, §11:6; 49 A.L.R.2d 982 [description with reference to highway as conveying title to center or side of highway]; 80 A.L.R.2d 1208 [measurement in horizontal line or along surface or contour]; 12 *Am.Jur.2d* (1997 ed.), *Boundaries* §34 et seq.)

In *Main v. Legnitto* (1964) 230 C.A.2d 667, 41 C.R. 223, the court pointed out that application of C.C. 1112 does not depend on actual existence or use of designated areas as streets at the time of conveyance: i.e., a street is created as between grantor and grantee, regardless of whether there is an existing dedication to the public. (230 C.A.2d 674.) Furthermore, C.C. 1112 applies despite express rejection by the public authorities of the offer of dedication. The controlling fact is that the subdivider intended to designate the area as a street or highway. (230 C.A.2d 674.)

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2. Distinctions.

12 Witkin Sum. Cal. Law Real Property § 274

[§ 274] Distinctions.

(1) *Specified Distance From Street or Road.* When land is granted by describing its boundaries as running a specified distance from a street or road, it will be presumed that the grant conveys the given number of feet of land that is in private occupancy, i.e., the boundary will run from the edge and not the center of the road. A similar interpretation is made in other cases to carry out the customary intention of the parties. (See *Earl v. Dutour* (1919) 181 C. 58, 60, 183 P. 438; *Thorpe v. Los Angeles Gas & Elec. Corp.* (1931) 115 C.A. 201, 204, 1 P.2d 37; *Hunter v. Roman Catholic Bishop* (1932) 128 C.A. 90, 93, 16 P.2d 1048; *Peake v. Azusa Valley Savings Bank* (1940) 37 C.A.2d 296, 301, 99 P.2d 382.)

(2) *Metes and Bounds Description.* In *Redlands v. Nickerson* (1961) 188 C.A.2d 118, 10 C.R. 431, the deed's description was by metes and bounds. Hence, on its face it conveyed property unrelated to the street, and it was only by extrinsic evidence that it appeared that one boundary was a street. *Held:*

(a) C.C. 1112, providing that a transfer of land bounded by a highway passes title to the center unless a different intent appears from the grant, was not controlling. It applies only when the deed contains a description, or refers to a map, showing land so bounded; i.e., when the deed either directly or indirectly refers to the street as a boundary. (188 C.A.2d 124.)

(b) C.C. 831, providing that an owner of land bounded by a road or street is presumed to own to the center, did apply, but did not compel the conclusion of ownership to the center, for the presumption is rebuttable. "In substance, the law writes into every deed of property conveyed by a metes and bounds description, but actually bounded by a street, a presumed intention that such description includes the underlying fee to the center of that street, but authorizes a showing that the parties thereto did not so intend. To this extent such a deed is the subject of interpretation. The issue presented is equivalent to that presented by a deed which is ambiguous on its face." (188 C.A.2d 125.)

(c) The trial judge, considering the use of a metes and bounds description along with other facts, could reasonably conclude, as he did, that the presumption was rebutted, i.e., that the intention was to limit the conveyance to the property actually described. (188 C.A.2d 126.) (See *Speer v. Blasker* (1961) 195 C.A.2d 155, 158, 15 C.R. 528; *Hixson v. Jones* (1967) 253 C.A.2d 860, 864, 61 C.R. 883 [following *Redlands*].)

In *Besneatte v. Gourdin* (1993) 16 C.A.4th 1277, 21 C.R.2d 82, the parties' properties lay on opposite sides of an abandoned alley. The alley had been dedicated to the county by defendants' predecessor, who retained fee title subject to the public easement, and subsequently transferred lots by deeds containing metes and bounds descriptions adopting the edge of the alley as a boundary. Plaintiffs' predecessor obtained a vacation of the easement as a condition to development of its tract. Purchasers on plaintiffs' side of the alley were informed that they had no interest in the alley; defendants paid property taxes on the alley property. When defendants constructed improvements extending into the alley, plaintiffs filed suit to quiet title, arguing that the owners of all lots abutting the alley held title to it as tenants in common. The trial judge granted summary judgment to defendants. *Held*, affirmed.

(a) Because defendants' grantor had used a metes and bounds description to convey the property, the presumptions established by C.C. 831 and 1112 did not apply. But the metes and bounds description was not determinative of the grantor's intent; there was no evidence that it had intended to reserve an ownership interest in the alley. On the other hand, nothing in plaintiffs' chain of title suggested any ownership rights in the alley. (16 C.A.4th 1281.) Under the principles of common law dedication (*supra*, §241 et seq.), title to the underlying fee in the alley had remained in the original owner and passed to its successors. (16 C.A.4th 1282, citing *Safwenberg v. Marquez* (1975) 50 C.A.3d 301, 123 C.R. 405.)

(b) The trial judge's ruling was also supported by the "doctrine of marginal streets," which provides that the grant of land adjoining a street or highway that has been wholly made from, and on the margin of, the grantor's land comprehends the fee in the whole of the street. (16 C.A.4th 1282, citing *Everett v. Bosch* (1966) 241 C.A.2d 648, 655, footnote 3, 50 C.R. 813.) Defendants' grantor had created the alley entirely from its property, and did not specifically except or reserve an interest in the strip when it conveyed the property. (16 C.A.4th 1282.)

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6. Description of Property.

d. Land Bordering on Waters.

1. General Rule.

12 Witkin Sum. Cal. Law Real Property § 275

[§ 275] General Rule.

(1) *Determining Boundary.* Except when the grant of land indicates a different intent, the owner of upland that borders on tidewater takes to the ordinary high-water mark. If the land borders on a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark. If the land borders on any other water, the owner takes to the middle of the lake or stream. (C.C. 830; see *White v. California* (1971) 21 C.A.3d 738, 752, 99 C.R. 58 [state grant of tidelands]; C.E.B., 2 Real Property Sales Transactions 3d, §10.72 et seq.; Cal. Civil Practice, 2 Real Property Litigation, §11:7 et seq.; 31 *Hastings L. J.* 329 [extent of state ownership of submerged lands in California]; 9 *Pacific L. J.* 1011 [C.C. 830 and tidal waterways]; 78 A.L.R.3d 604 [reference to river or stream as carrying to center or bank]; 12 *Am.Jur.2d* (1997 ed.), *Boundaries* §11 et seq.; on meander lines, see 12 *Am.Jur.2d* (1997 ed.), *Boundaries* §28 et seq.; on state's burden of proof in boundary dispute as to historic location of river, stream, or other body of water, see *Ev.C.* 523, *infra*, §277.)

The high-water mark, to which the upland owner has title, is the line of high water determined by the course of the tides; i.e., the average height of the high waters at a particular place determined over a long period of time, and ascertainable from the data of the U.S. Coast and Geodetic Survey. (*People v. William Kent Estate Co.* (1966) 242 C.A.2d 156, 159, 51 C.R. 215; see *Aptos Seascape Corp. v. Santa Cruz* (1982) 138 C.A.3d 484, 503, 188 C.R. 191 [following *William Kent Estate Co.*; mean high-tide line]; 6 *San Diego L. Rev.* 447 [unresolved problems of fluctuating shorelines and coastlines].)

(2) *Measuring Low-Water Mark.* In *Bishel v. Faria* (1959) 53 C.2d 254, 1 C.R. 153, 347 P.2d 289, plaintiffs' property was on the north side of a nonnavigable river, and defendant's was on the south side. The river, their common boundary line, was coterminous with the boundary line of Fresno and Madera counties at this point. An island with a sand and gravel bed was located in the river. During 8 or 9 dry months of the year, the bed was affixed to plaintiffs' land and appeared to be part of it, but during the spring months of high water the bed was sometimes covered. *Held*, the island was part of plaintiffs' land.

(a) Under C.C. 830 and C.C.P. 2077(4), abutting owners on a nonnavigable, nontidal stream are deemed to own "to the middle of the stream" or "the thread of the stream." (53 C.2d 258.)

(b) What constitutes the thread of the stream is the subject of some conflict, but the rule here adopted rejects the high-water mark and the normal flow, and ascertains it "from the measurement of the water at its lowest stage." (53 C.2d 261.) Here, at its lowest stage, the gravel bed was clearly a part of plaintiffs' land, and defendants had no interest in it. (53 C.2d 261.)

In *Lake v. Smith* (1991) 228 C.A.3d 214, 278 C.R. 809, the issue was how the low-water mark of Clear Lake, a nontidal, navigable lake, should be determined under C.C. 830 for purposes of establishing the common boundary line separating privately owned from state-owned real property. Defendant private landowner contended that low-water mark should be the lowest lake level recorded during the 1977 drought. The trial judge concluded that the boundary should be at Zero Rumsey, the approximate minimum elevation of the water level under normal conditions on the Rumsey Gauge measuring device placed in the lake in 1873. *Held*, affirmed.

(a) Persuasive authority and common sense support the conclusion that the low-water mark is not some extraordinary "lowest" level reached during a severe drought but a regular or ordinary level that property owners could use for practical purposes in setting a realistic boundary. (228 C.A.3d 227.)

(b) Because an unappealed court decree in 1920 approximated the low level of Clear Lake under normal conditions at Zero Rumsey, successive courts have either endorsed this figure or assumed it to be the low-water mark. More importantly, landowners around the lake and the state have relied on this figure as setting the boundary under C.C. 830. (228 C.A.3d 235, 237.)

(3) *Boundary Line May Fluctuate*. The boundary line created by the points at which the plane of the average high tide meets the land may vary to the extent that the land itself moves through erosion and accretion. (*Lechuza Villas West v. California Coastal Com.* (1997) 60 C.A.4th 218, 235, 70 C.R.2d 399 [boundary between developer's beachfront property and state's property was ambulatory, not fixed, line where plane of ordinary or mean high tide meets shifting sand from time to time; citing *William Kent Estate Co.*].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Determining Boundary*. See C.E.B., 2 Real Property Sales Transactions 4th, §11.81 et seq.



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d. Land Bordering on Waters.

2. Land Subject to Public Trust.

12 Witkin Sum. Cal. Law Real Property § 276

[§ 276] Land Subject to Public Trust.

California v. Superior Court (Lyon) (1981) 29 C.3d 210, 172 C.R. 696, 625 P.2d 239, applied the tidelands public trust doctrine (see *Berkeley v. Superior Court (1980) 26 C.3d 515, 162 C.R. 327, 606 P.2d 362*) to land between high and low water in navigable lakes and streams. The court noted that California acquired sovereign ownership of these lands--to the high-water mark--on its admission to the union. (*29 C.3d 217, 222.*) The enactment of C.C. 830 was a grant of such lands to the riparian owners. (*29 C.3d 222, 225, 226.*) However, under *Illinois Central R. Co. v. Illinois (1892) 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018*, discussed in *Berkeley*, the public trust doctrine applies not only to tidelands but to nontidal navigable bodies of water as well. (*29 C.3d 227, 229.*) This is not a deprivation of use of the lands between low and high water. The riparian owner may utilize them in any manner not incompatible with the public's interest in the property. (*29 C.3d 232.*)

Two justices dissented, asserting that the title to millions of acres of reclaimed land was clouded by the decision, and contending that the public interest should be protected by compensation, not confiscation. (*29 C.3d 243, 244.*) (See *California v. Superior Court (Fogerty) (1981) 29 C.3d 240, 244, 172 C.R. 713, 625 P.2d 256* [rejecting contention that state was estopped to assert trust]; *Lyon v. Western Title Ins. Co. (1986) 178 C.A.3d 1191, 1194, 1200, 1203, 224 C.R. 385* [lengthy criticism of Supreme Court decision in *Lyon*, similar to dissenting opinion in that case, but decision necessarily followed as law of the case]; *Fogerty v. California (1986) 187 C.A.3d 224, 229, 233, 234, 231 C.R. 810* [reviewing *Lyon* and *Fogerty* and following their holdings]; *Bess v. Humboldt (1992) 3 C.A.4th 1544, 1549, 5 C.R.2d 399* [portion of navigable river between high- and low-water marks is subject to public trust for such purposes as navigation, fishing, and recreation; citing *Lyon*]; *70 Cal. L. Rev. 1138 [Lyon and Fogerty]*; *11 Ecology L. Q. 21 [Lyon]*; *12 Hastings Const. L. Q. 421 [Lyon and Fogerty]*; *22 Santa Clara L. Rev. 559 [Lyon]*; *22 Santa Clara L. Rev. 63* [public trust doctrine in water rights context as wrong environmental remedy]; *23 Santa Clara L. Rev. 211* [proposed balancing test for public trust doctrine expansion and integrations]; *16 U.C. Davis L. Rev. 631 [Lyon and Fogerty]*.)

SUPPLEMENT: [This section is current through the latest supplement]



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6. Description of Property.

e. Resolving Uncertainties.

12 Witkin Sum. Cal. Law Real Property § 277

[§ 277] Resolving Uncertainties.

(1) *Reformation of Defective Description.* It is not essential that the description be in any of the approved methods (see *supra*, §271); if the description is insufficient or even wholly omitted by mistake, parol evidence may be admitted and the deed reformed to cure the defect. (See *Brusseau v. Hill* (1927) 201 C. 225, 230, 256 P. 419; *Oatman v. Niemeyer* (1929) 207 C. 424, 278 P. 1043; on reformation, see 1 *Summary*, (10th), *Contracts*, §279; on admissibility of parol or extrinsic evidence, see 12 *Am.Jur.2d* (1997 ed.), *Boundaries* §109 et seq.)

(2) *Aids to Interpretation.* If the description is uncertain, a statement of the acreage conveyed may be used as an aid to interpretation. (*Matteson v. McCarthy* (1929) 98 C.A. 45, 48, 276 P. 414.) If references are made to natural objects or monuments, these prevail over courses, distances, lines and angles, in the event of inconsistency. (*C.C.P.* 2077(2); *Devlin v. Powell* (1924) 67 C.A. 165, 171, 227 P. 231; *Rodgers v. Roseville Gold Dredging Co.* (1955) 135 C.A.2d 6, 9, 286 P.2d 536; *Verdi Dev. Co. v. Dono-Han Mining Co.* (1956) 141 C.A.2d 149, 153, 296 P.2d 429; see 12 *Am.Jur.2d* (1997 ed.), *Boundaries* §60 et seq.)

(3) *Government Surveys and Patents.* The government survey that was the basis of a patent under which the original grantee took the land is binding, whether correct or not. (*Churchill Co. v. Beal* (1929) 99 C.A. 482, 489, 278 P. 894; *Phelps v. Pacific Gas & Elec. Co.* (1948) 84 C.A.2d 243, 247, 190 P.2d 209 ["A survey of public lands does not ascertain boundaries; it creates them"]; *Verdi Dev. Co. v. Dono-Han Mining Co.*, *supra*, 141 C.A.2d 152 ["The original government surveys, whether they are mathematically correct or grossly erroneous, control the location and length of boundaries of sections and parts thereof and the shape and size of tracts granted to patentees"]; see 12 *Am.Jur.2d* (1997 ed.), *Boundaries* §117.)

In an action disputing the boundary of land patented or otherwise granted by the state, or the validity of a state patent or grant dated before 1950, the parties must disclose to opposing parties all nonprivileged relevant written evidence that is known and available, including evidence against interest. (*C.C.P.* 2031.510(a).) The disclosure must be made within 120 days after proof of service on all named defendants is filed, and the duty of disclosure is continuing. (*C.C.P.* 2031.510(b).) If the state is a party to the action, the state has the burden of proof as to the historic locations of rivers, streams, and other bodies of water, and as to the state's authority in issuing the patent or grant. (*Ev.C.* 523.)

(4) *Expert Testimony*. Expert testimony is admissible on the proper method of surveying a line. "The testimony is not accepted for the purpose of varying or contradicting the terms of the deed, but to aid the trial court in its difficult task of translating the words of the deed into monuments on the surface of the earth, in accord with accepted surveying practices." (*Richfield Oil Corp. v. Crawford* (1952) 39 C.2d 729, 741, 249 P.2d 600.)

If monuments are lost or cannot be discovered, expert testimony is admissible to locate them. (*Verdi Dev. Co. v. Dono-Han Mining Co.*, *supra*, 141 C.A.2d 153; see *California v. Thompson* (1971) 22 C.A.3d 368, 378, 99 C.R. 594 [proportionate measurement method should be last resort to relocate "lost" corner; method is inappropriate where obliterated corner can be located by evidence, such as original surveyor's field notes].)

(5) *Practical Construction*. Uncertainty may be resolved by practical construction, i.e., by the conduct of the parties acting under it. (*People v. Ocean Shore R.* (1948) 32 C.2d 406, 414, 196 P.2d 570; see *Hellweg v. Cassidy* (1998) 61 C.A.4th 806, 810, 71 C.R.2d 798 [seller could not equitably claim ownership of land she had legally added to property; before sale, seller had specifically represented to buyers that land included addition; after sale, seller had watched buyers improve added portion without objecting, and she did not claim title until much later when tax bill was inadvertently sent to her]; see 12 Am.Jur.2d (1997 ed.), *Boundaries* §88.)

(6) *Post-Earthquake Boundaries*. The Cullen Earthquake Act (C.C.P. 751.50 et seq.) specifies procedures for the reestablishment of boundaries changed by earthquakes and other disasters. (See 4 *Pacific L. J.* 600 [discussing statute]; 6 *U.S.F. L. Rev.* 386 [suggesting such legislation].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Aids to Interpretation*. See *Claudino v. Pereira* (2008) 165 C.A.4th 1282, 1286, 82 C.R.3d 464 [trial court properly used field notes to determine that gully, a natural monument, formed boundary of lots, rather than relying solely on plat, which showed straight line; where there is conflict, field notes are superior authority].

(3) *Government Surveys and Patents*. See *Fripp v. Walters* (2005) 132 C.A.4th 656, 660, 33 C.R.3d 794 [erroneous boundary created by parcel map, and not by official government survey, was subject to challenge; parcel map was not created to convey public lands to private parties and did not include government survey within meaning of *Phelps v. Pacific Gas & Elec. Co.* (1948) 84 C.A.2d 243, 190 P.2d 209, text, p. 331].



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7. Oral Agreement Settling Boundary.

a. Agreement and Acquiescence.

1. General Rule.

12 Witkin Sum. Cal. Law Real Property § 278

[§ 278] General Rule.

It sometimes happens that neither an accurate description in a written instrument of title nor a proper survey is available, and parties may settle their boundary disputes by informal agreement. It is well established that when the boundary is uncertain (see *infra*, §281), it may be located by an oral agreement together with acquiescence for the period of the statute of limitations. (*Silva v. Azevedo* (1918) 178 C. 495, 497, 173 P. 929; *Moniz v. Peterman* (1934) 220 C. 429, 435, 31 P.2d 353; *Martin v. Lopes* (1946) 28 C.2d 618, 622, 170 P.2d 881; *Swartzbaugh v. Sargent* (1939) 30 C.A.2d 467, 475, 86 P.2d 895; *Carr v. Schomberg* (1951) 104 C.A.2d 850, 856, 232 P.2d 597; *Caballero v. Balamotis* (1956) 144 C.A.2d 58, 62, 300 P.2d 363; see *Muchenberger v. Santa Monica* (1929) 206 C. 635, 642, 275 P. 803 [municipal corporation may by this method determine boundaries of its tidelands]; *Draper v. Griffin* (1943) 61 C.A.2d 281, 284, 142 P.2d 772 [acquiescence must be at least for period of statute of limitations]; *Janes v. LeDeit* (1964) 228 C.A.2d 474, 481, 39 C.R. 559 [binding on successors of parties by subsequent conveyances]; *Kraemer v. Superior Oil Co.* (1966) 240 C.A.2d 642, 648, 652, 49 C.R. 869; *Aborigine Lumber Co. v. Hyman* (1966) 245 C.A.2d 938, 941, 54 C.R. 371 [doubting whether actual occupancy up to the line is required]; *Duncan v. Peterson* (1970) 3 C.A.3d 607, 611, 83 C.R. 744; *Zachery v. McWilliams* (1972) 28 C.A.3d 57, 60, 104 C.R. 293; *Humphrey v. Futter* (1985) 169 C.A.3d 333, 339, 215 C.R. 178 [successor in interest is bound by grantor's agreed boundary with adjoining landowner].) (See C.E.B., 2 Real Property Sales Transactions 3d, §10.69; Cal. Civil Practice, 2 Real Property Litigation, §§11:15 et seq., 11:49; 9 *Loyola L.A. L. Rev.* 637 [agreed boundary and boundary by acquiescence; need for straight line from courts]; 11 *Stanf. L. Rev.* 722 [boundary litigation in California]; 12 *Am.Jur.2d* (1997 ed.), *Boundaries* §§77 et seq., 83 et seq.; 34 *Proof of Facts* 2d 317 [agreement of adjoining landowners fixing common boundary]; *infra*, §§281, 282.)

A "lot line adjustment," approved by the appropriate local agency, is not subject to the Subdivision Map Act (*infra*, §810). (*Govt.C.* 66412(d).)

In *Joaquin v. Shiloh Orchards* (1978) 84 C.A.3d 192, 148 C.R. 495, the evidence established the elements of an agreed boundary, but the monument fixing the line (a fence) had been removed without any marking to identify its precise location. The trial judge erroneously concluded that the doctrine did not apply. *Held*, judgment reversed; the judge could have entered a conditional interlocutory judgment locating the line subject to a survey and introduction of any other evidence to determine it. (84 C.A.3d 198, 199.)

SUPPLEMENT: [This section is current through the latest supplement]

See C.E.B., 2 Real Property Sales Transactions 4th, §11.78; 82 Proof of Facts 3d 227 [boundary established by parol agreement or by acquiescence of adjoining landowners; superseding 34 Proof of Facts 2d 317, text, p. 333].



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a. Agreement and Acquiescence.

2. Implied Agreement.

12 Witkin Sum. Cal. Law Real Property § 279

[§ 279] Implied Agreement.

(1) *Inference of Agreement From Acquiescence.* The agreement need not be express; acquiescence for a long period of time will raise a presumption or inference of a valid agreement. (*Vowinckel v. N. Clark & Sons* (1933) 217 C. 258, 260, 18 P.2d 58; *Mello v. Weaver* (1950) 36 C.2d 456, 460, 224 P.2d 691; *Ernie v. Trinity Lutheran Church* (1959) 51 C.2d 702, 708, 336 P.2d 525; *Raney v. Merritt* (1925) 73 C.A. 244, 250, 238 P. 767; *Todd v. Wallace* (1938) 25 C.A.2d 459, 464, 77 P.2d 877; *Rahlves & Rahlves v. Ambort* (1953) 118 C.A. 2d 465, 477, 258 P.2d 18; *Dooley's Hardware Mart v. Trigg* (1969) 270 C.A.2d 337, 339, 75 C.R. 745 [evidence was insufficient to support inference]; *Duncan v. Peterson* (1970) 3 C.A.3d 607, 611, 83 C.R. 744 [evidence sufficient--42 years]; *Zachery v. McWilliams* (1972) 28 C.A.3d 57, 61, 104 C.R. 293 [same--35 years]; *Fogerty v. California* (1986) 187 C.A.3d 224, 236, 231 C.R. 810 [no controversy, doctrine inapplicable]; see 12 Am.Jur.2d (1997 ed.), *Boundaries* §87.)

(2) *Clarity of Agreed Line.* Although there should be some actual designation of the agreed line, there is no rigid requirement of a physical mark on the ground. The test is whether the parties have agreed on a dividing line that is clear to them, and that can be made clear to others. (*Carr v. Schomberg* (1951) 104 C.A.2d 850, 859, 232 P.2d 597 [sycamore tree fixing point on dividing line between two parcels, boundary running north and south from the point along line where parcels were contiguous].) But a fence is not necessarily indicative of an agreed boundary. (See *Chandler v. Hibberd* (1958) 165 C.A.2d 39, 48, 332 P.2d 133 [fence considered and understood to be only cattle barrier]; 12 Am.Jur.2d (1997 ed.), *Boundaries* §§89, 90; 7 A.L.R.4th 53 [fence as factor in fixing location of boundary line].)

In *Roman v. Ries* (1968) 259 C.A.2d 65, 66 C.R. 120, the trial judge found an agreement and defendants' reliance on it in making improvements, but awarded defendants a portion of plaintiff's land that bore no relation to defendants' reliance. *Held*, reversed with directions to determine the portion of land that should be given defendants to prevent substantial loss to them. (259 C.A.2d 70.)

(3) *Acquiescence on Both Sides Required.* In *Armitage v. Decker* (1990) 218 C.A.3d 887, 267 C.R. 399, plaintiff contended that he owned the property lying between the true deed line that separated his property from defendants' and an old picket fence that had been in existence since before 1906. Plaintiff relied primarily on evidence that the prior owners on his side of the fence assumed that the fence followed the line described by their deeds. *Held*, this evidence

was insufficient to establish the elements of the doctrine of agreed boundaries.

(a) Plaintiff offered no direct proof that the fence had been built to resolve adjoining owners' uncertainty as to the boundary between their lands; he depended on the jury inferring uncertainty and agreement from long-standing acquiescence in the picket fence as the boundary. (218 C.A.3d 887.)

(b) Plaintiff failed to establish that the landowners on the other side of the fence accepted it as a boundary, and defendants presented evidence that they did not. "Absent proof of acceptance of the fence as a boundary by owners on both sides, there was no basis for an inference of uncertainty and agreement." (218 C.A.3d 901.)

SUPPLEMENT: [This section is current through the latest supplement]



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a. Agreement and Acquiescence.

3. Where Property Is Not Solely Owned.

12 Witkin Sum. Cal. Law Real Property § 280

[§ 280] Where Property Is Not Solely Owned.

Janes v. LeDeit (1964) 228 C.A.2d 474, 39 C.R. 559, presents an odd variation of the usual situation. G entered into a boundary agreement with defendants. Plaintiffs, successors to G and presumably bound by the agreement, challenged its validity, pointing out that the G land had concededly been owned in joint tenancy by G and his wife and that the record failed to show the wife's consent or acquiescence. Their argument was based on the settled rule that one cotenant ordinarily cannot bind another by a contract relating to the common property. (See *supra*, §50.) The court, however, upheld the agreement on two questionable alternative theories:

First, it could be inferred from the barren record that G owned the land as his separate property. This conclusion was reached despite the fact that the joint tenancy ownership was conceded in the briefs of both parties. The court described this as a "cavalier concession" with nothing in the record to sustain it, and expressed mystification as to how the parties and the trial judge could have misread the probate file introduced below, which did not relate to this property. (228 C.A.2d 486.)

Second, assuming that the inference of community property could be drawn, the same conclusion would follow because the husband, having control (see 11 *Summary* (10th), *Community Property*, §131 et seq.), could agree to the settlement without his wife's consent. (228 C.A.2d 487.)

The trouble with the opinion is that a concession in the briefs is binding on the parties and the court (see 9 *Cal. Proc.* (4th), *Appeal*, §597), and a contrary inference of fact cannot properly be drawn on appeal unless the concession is overcome. Counsel could have sought relief from it; or, if the appellate court felt that counsel had failed to protect his client and that its own intervention was needed, it could have ordered augmentation of the record (see 9 *Cal. Proc.* (4th), *Appeal*, §577 et seq.) or taken evidence and made findings on appeal (see 9 *Cal. Proc.* (4th), *Appeal*, §789 et seq.). Instead, without a determination of the true facts, the case was decided on an unsupportable assumption of fact.

SUPPLEMENT: [This section is current through the latest supplement]
Concession in brief is binding:

Cross-Reference:

9 Cal. Proc. (5th), *Appeal*, §704.

Augmentation of record:

Cross-Reference:

9 Cal. Proc. (5th), *Appeal*, §683 et seq.

Finding on appeal:

Cross-Reference:

9 Cal. Proc. (5th), *Appeal*, §309 et seq.



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b. Uncertainty and Mistake.

1. Uncertainty Is Sufficient.

12 Witkin Sum. Cal. Law Real Property § 281

[§ 281] Uncertainty Is Sufficient.

Some jurisdictions appear to require an actual dispute or controversy before applying the agreed boundary doctrine. But in California no dispute in the sense of a quarrel is necessary; uncertainty is enough. (*Moniz v. Peterman* (1934) 220 C. 429, 435, 31 P.2d 353; *Martin v. Lopes* (1946) 28 C.2d 618, 623, 170 P.2d 881; *Link v. Cole Inv. Co.* (1962) 199 C.A.2d 180, 187, 18 C.R. 441; *Kirkegaard v. McLain* (1962) 199 C.A.2d 484, 492, 18 C.R. 641; *Janes v. LeDeit* (1964) 228 C.A.2d 474, 483, 39 C.R. 559; see *Kraemer v. Superior Oil Co.* (1966) 240 C.A.2d 642, 648, 652, 49 C.R. 869 [fence located for 60 years with no direct evidence on why it was placed there; held that both uncertainty and agreement could be inferred]; *Aborigine Lumber Co. v. Hyman* (1966) 245 C.A.2d 938, 943, 54 C.R. 371 [immaterial that accurate survey could and did establish true line, i.e., not a requisite that true location be unascertainable]; *Vella v. Ratto* (1971) 17 C.A.3d 737, 741, 95 C.R. 72 [uncertainty inferred from circumstantial evidence of long acquiescence]; *Kunza v. Gaskell* (1979) 91 C.A.3d 201, 209, 154 C.R. 101; see 72 A.L.R.4th 132 [sufficient showing of uncertainty or dispute]; 12 Am.Jur.2d (1997 ed.), *Boundaries* §§77, 78.)

It is not necessary that the uncertainty appear from the deed or that an accurate survey be impossible. (*Mello v. Weaver* (1950) 36 C.2d 456, 460, 224 P.2d 691.)

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b. Uncertainty and Mistake.

2. Where No Uncertainty Existed.

12 Witkin Sum. Cal. Law Real Property § 282

[§ 282] Where No Uncertainty Existed.

(1) *Effect of Mistake Without Uncertainty.* If there is no uncertainty, the oral agreement is invalid; in such a case the agreement would not be the settlement of a boundary but a transfer of land, invalid under the statute of frauds. This is true, e.g., where the parties are mistaken as to the true boundary and merely acquiesce in the wrong boundary. (See *Lewis v. Ogram* (1906) 149 C. 505, 508, 87 P. 60; *Clapp v. Churchill* (1913) 164 C. 741, 745, 130 P. 1061; *Huddart v. McGirk* (1921) 186 C. 386, 389, 199 P. 494; *Pedersen v. Reynolds* (1939) 31 C.A.2d 18, 22, 87 P.2d 51; *Rast v. Fischer* (1951) 107 C.A.2d 129, 132, 236 P.2d 393; *Pra v. Bradshaw* (1953) 121 C.A.2d 267, 269, 263 P.2d 52 ["There had been only a mistaken acquiescence in what was believed to be the true boundary ... [;] such acquiescence by respondents in a wrong boundary is considered in both law and equity as a mistake and either party is free to claim the true line"]; *Meacci v. Kochergen* (1956) 141 C.A.2d 207, 211, 296 P.2d 573; *Steele v. Shuler* (1963) 211 C.A.2d 698, 705, 27 C.R. 569; *Kraus v. Griswold* (1965) 232 C.A.2d 698, 706, 43 C.R. 139; *Allen v. McMillion* (1978) 82 C.A.3d 211, 215, 147 C.R. 77 [doctrine was inapplicable where there was no uncertainty and no agreement except to locate fence conveniently]; *Otay Water Dist. v. Beckwith* (1991) 1 C.A.4th 1041, 1047, 3 C.R.2d 223 [agreed boundary doctrine did not apply to occupancy of land by mistake, without apparent confusion about boundary line].)

(2) *Distinction: Mistake With Uncertainty.* *Clapp v. Churchill* and similar cases were distinguished in *Martin v. Lopes* (1946) 28 C.2d 618, 170 P.2d 881, as follows: (a) If the parties, or one of them, knows that the agreed line is not the true line, there is no uncertainty, and the agreement is void. (b) If neither party knows where the true line is, the essential element of uncertainty is present and the agreement locating the boundary is binding, even though the parties mistakenly believe they have placed it on the true line and do not intend to claim except in accordance with the true line. Hence, the boundary was held to have been settled where the parties jointly employed a surveyor and assisted him in locating the line, and thereafter treated that line as the boundary. (28 C.2d 625.) (See *Kirkegaard v. McLain* (1962) 199 C.A.2d 484, 493, 18 C.R. 641, quoting the text; *Minson Co. v. Aviation Finance* (1974) 38 C.A.3d 489, 490, 113 C.R. 223 [following *Martin*; agreed boundary found]; 11 *Stanf. L. Rev.* 722, 725 [*Clapp*].)

(3) *Effect of Consistent Deed Descriptions.* In *Armitage v. Decker* (1990) 218 C.A.3d 887, 267 C.R. 399, the court first held that plaintiff's failure to prove acquiescence by owners on both sides of the claimed boundary precluded application of the doctrine of agreed boundaries (see *supra*, §279). The court then made the following observations on

the effect of evidence that the deeds for the properties described a consistent line as the boundary and that surveys since the 1950s had established the same line:

(a) "The doctrine of agreed boundaries arose as a means to settle disputes over boundaries at a time when surveys were notoriously inaccurate and the monuments and landmarks they described often could not be found in later years. ... The doctrine is based on a policy of giving stability to agreements adjusting a disputed boundary 'as a method adopted in good faith by the parties themselves to settle the controversy, and because it is the most satisfactory way whereby a true boundary line may be determined, and tends to prevent litigation.' " (218 C.A.3d 903.)

(b) "In more recent times, however, accurate surveys are possible and verifiable recorded deeds are the rule. ... [T]o allow the doctrine of agreed boundaries to supercede recorded legal descriptions of the property where, as here, they are fully consistent, would not only destroy the significance of recorded instruments but would foster litigation rather than preventing it. ... While the doctrine of agreed boundaries has never been intended to be a means of divesting an unconsenting landowner of his property ... , this is precisely its effect when used to overcome long-standing accurate legal descriptions of property." (218 C.A.3d 903.)

Bryant v. Blevins (1994) 9 C.4th 47, 36 C.R.2d 86, 884 P.2d 1034, approved the "sound logic" and reasoning of *Armitage*. In *Bryant*, coterminous landowners disputed the true location of their common boundary. The parties contested the ownership of a strip of land that was bordered on one side by a fence that defendants' predecessors had constructed and on the other side by the boundary as fixed by a survey and the deed description. The trial judge awarded ownership of the strip to defendants under the agreed-boundary doctrine. *Held*, reversed.

(a) Defendants, who had the burden of proving each element of the doctrine, presented no evidence that the fence had been erected to resolve uncertainty about the boundary location. The record is silent about when, or why, the fence was built. Although the presence of the fence since at least 1977 suggests a lengthy acquiescence to its existence, that is not enough to nullify the other requirements of the doctrine: uncertainty about the location of the true boundary when the fence was erected, and an agreement between the neighbors to allow the fence to establish the boundary. (9 C.4th 58.)

(b) There is no justification for inferring satisfaction of the requirements of uncertainty and agreement, when, as here, existing legal documents provide a basis for fixing the boundary. (9 C.4th 58.) The agreed-boundary doctrine is a narrow theory that, absent compliance with all of its requirements, may not be used to supersede legal descriptions in deeds. Coterminous landowners should "resolve their disputes not by erecting imperfect barriers, 'drawing lines in the sand,' or hauling neighbors into court, but by resorting to title searches, deed descriptions, and other objectively certain methods that afford the parties a superior opportunity to reach an amicable, nonlitigious resolution of their disputes." (9 C.4th 60.)

Two dissenters argued that uncertainty and agreement should be inferred from the parties' long-term acquiescence in the fence's location. (9 C.4th 67.) (See *Mehdizadeh v. Mincer* (1996) 46 C.A.4th 1296, 1304, 54 C.R.2d 284 [agreed-boundary doctrine did not apply where there was no evidence that neighbors had any uncertainty about location of boundary between their properties when fence was built; following *Bryant*]; 22 *Pepperdine L. Rev.* 1680 [Bryant].)

SUPPLEMENT: [This section is current through the latest supplement]



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8. Acknowledgment.

a. Nature of Requirement.

12 Witkin Sum. Cal. Law Real Property § 283

[§ 283] Nature of Requirement.

(1) *General Rule.* An acknowledgment is the act of a person who has executed an instrument declaring before a competent officer or court that it is the person's act or deed. (*De Wolfskill v. Smith* (1907) 5 C.A. 175, 184, 89 P. 1001; on evidentiary effect of acknowledgment, see *Ev.C. 1451*, 2 *Cal. Evidence* (4th), *Documentary Evidence*, §22.)

Acknowledgment is usually a prerequisite to the recordation of instruments affecting title to or possession of real property. (See *Govt.C. 27287*, *27288*; C.E.B., 2 *Real Property Sales Transactions* 3d, §9.66 [acknowledgment generally]; §9.69 [proof of unacknowledged documents]; 5 *Miller & Starr* 3d §11:25; on effect of failure to comply with requirement, see 2 *U.C.L.A. L. Rev.* 83; 59 *A.L.R.2d* 1299 [record of instrument without sufficient acknowledgment as notice].)

(2) *Instruments Recordable Without Acknowledgment.* Instruments that may be recorded without acknowledgment include:

(a) A judgment. (*Govt.C. 27282(a)(1).*)

(b) A notice of support judgment, an interstate lien, a release of lien, or any other document completed and recorded by a local child support agency or a state agency under 42 *U.S.C.*, §651 et seq. (*Govt.C. 27282(a)(2).*)

(c) A notice of the location of a mining claim. (*Govt.C. 27282(a)(3).*)

(d) Certificates of amounts of taxes, interest, and penalties due, notices of state tax liens and lien extensions, and releases and subordinations of tax liens executed under specified sections of the Revenue and Taxation and Unemployment Insurance Codes. (*Govt.C. 27282(a)(4).*)

(e) A notice of a tax lien for postponed property taxes and a release, discharge, or subordination of the lien. (*Govt.C. 27282(a)(5)*, (a)(6).)

(f) A fixture filing, as defined by *U.C.C. 9102(a)(40)*. (*Govt.C. 27282(a)(7).*)

- (g) Letters patent. (*Govt.C. 27285(a).*)
- (h) The federal Government's mineral leases. (*Govt.C. 27285(b).*)
- (i) Certain interdepartmental communications of the Department of Interior relating to the assignment, surrender, or cancellation of mineral leases. (*Govt.C. 27285(c).*)
- (j) Copies of certain documents filed with the General Land Office relating to the conveyance, assignment, etc. of mineral leases. (*Govt.C. 27285(d).*)
- (k) A fictitious oil and gas lease. (*C.C. 1219.*)
- (l) A fictitious mortgage or deed of trust. (*C.C. 2952; see 4 Summary (10th), Security Transactions in Real Property, §46.*)
- (m) Notices of federal tax liens, certificates of release, discharge, subordination or nonattachment of these liens, and certificates of redemption. (*Govt.C. 27330.*)
- (n) A court order affecting title to or possession of real property when the Attorney General brings an action and requests a court-appointed receiver. (*Govt.C. 27282(a)(8).*)
- (o) A court certified copy of a satisfaction of judgment. (*Govt.C. 27282(a)(9).*)
- (p) A certificate of correction filed under *Govt.C. 66470* or *66472.1*. (*Govt.C. 27282(a)(10).*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Rule.* See C.E.B., 2 Real Property Sales Transactions 4th, §§10.67, 10.70; 91 Proof of Facts 3d 345 [acknowledgment of real property instruments].



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b. Formal Requisites.

1. Form of Acknowledgment.

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[§ 284] Form of Acknowledgment.

Until 1990, various forms of acknowledgment were prescribed by statute. (See former C.C. 1190, 1190.1 [by corporation]; former C.C. 1191 [by public corporation, agency, or political subdivision]; former C.C. 1190a [by partnership]; former C.C. 1192 [by attorney in fact]; former C.C. 1193 [signatures and seals].) C.C. 1189 now provides one form for general use. An acknowledgment provided before January 1, 1993, that conforms to one of the former statutes has the same force and effect as if those sections had not been repealed. (C.C. 1189(d).) (See C.E.B., 2 Real Property Sales Transactions 3d, §9.66; 5 Miller & Starr 3d §11:25.)

A certificate of acknowledgment executed on behalf of an incorporated or unincorporated entity by a duly authorized person in the form specified in C.C. 1189 is prima facie evidence that the instrument is the duly authorized act of the entity named in the instrument. It is conclusive evidence of that fact in favor of a good faith purchaser, lessee, or encumbrancer. The president, vice-president, secretary, and assistant secretary of corporations are duly authorized persons. (C.C. 1190.)

A defective acknowledgment cures itself by recordation, after 1 year. (C.C. 1207; *Thomas v. Speck (1941)* 47 C.A.2d 512, 517, 118 P.2d 365.)

SUPPLEMENT: [This section is current through the latest supplement]
See C.E.B., 2 Real Property Sales Transactions 4th, §10.67.



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2. Knowledge of Officer.

12 Witkin Sum. Cal. Law Real Property § 285

[§ 285] Knowledge of Officer.

(1) *Requirement.* An acknowledgment must not be taken unless the officer taking it personally knows, or has satisfactory evidence, that the person making the acknowledgment is the individual who is described in and who executed the instrument. (C.C. 1185(a).) "Personally knows" requires an acquaintance sufficient to establish the individual's identity with at least reasonable certainty. (C.C. 1185(b).)

(2) *Satisfactory Evidence.* "Satisfactory evidence" means the absence of evidence reasonably leading to the conclusion that the acknowledger is not the person he or she claims to be, as well as the oath or affirmation of a credible witness personally known to the officer that the person making the acknowledgment is personally known to the witness and that *each of the following are true*: (a) the acknowledger is the person named in the document; (b) the acknowledger is personally known by the witness; (c) the witness reasonably believes that the acknowledger's circumstances make it very difficult or impossible to obtain another form of identification; (d) the acknowledger does not possess any of the identification documents that constitute satisfactory evidence of identity; and (e) the witness has no financial interest in the document being acknowledged and is not named in the document. (C.C. 1185(c)(1).) A person convicted of perjury under C.C. 1185 forfeits any financial interest in the document. (C.C. 1185(f).)

"Satisfactory evidence" may also be established by an oath or affirmation under penalty of perjury by two credible witnesses whose identities are proven to the officer upon the presentation of satisfactory evidence that each of the statements listed above is true. (C.C. 1185(c)(2).) If the identity of the person making the acknowledgment is established by this method, the notary's sequential journal must include specified information concerning the identifying documents. (*Govt.C. 8206(a)(2)(D).*)

The officer's reasonable reliance on an identification card or driver's license issued by the California Department of Motor Vehicles or a United States passport also constitutes "satisfactory evidence," if the document is current or has been issued within 5 years. (C.C. 1185(c)(3).) Specified documents issued by other states and countries, the United States Armed Forces, and the Department of Corrections also qualify, as long as the documents are either current or have been issued within 5 years and contain a photograph and a description and signature of the person named on it. These documents must bear a serial or other identifying number, and, in the case of a foreign passport, must have been

stamped by the United States Immigration and Naturalization Service. (C.C. 1185(c)(4).)

(3) *Presumption in Favor of Officer.* An officer complying with C.C. 1185 is presumed to have operated in accordance with the law (C.C. 1185(d)), and a party claiming that the officer failed to properly identify the acknowledger has the burden of proof in establishing the officer's negligence or misconduct (C.C. 1185(e)). (See *Transamerica Title Ins. Co. v. Green* (1970) 11 C.A.3d 693, 699, 89 C.R. 915, 1 Cal. Evidence (4th), *Circumstantial Evidence*, §111 [attorney-notary's reliance on representations of his law partner did not meet personal knowledge test]; *McDonald v. Plumb* (1970) 12 C.A.3d 374, 377, 90 C.R. 822; *Allstate Savings & Loan Assn. v. Lotito* (1981) 116 C.A.3d 998, 1003, 172 C.R. 535.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Requirement.* C.C. 1185 was amended in 2007. The officer taking the acknowledgment must receive satisfactory evidence that the person making the acknowledgment is the individual who is described in and who executed the instrument. The officer's personal knowledge of the acknowledger is no longer sufficient. (C.C. 1185(a), as amended in 2007.) As a result, the definition of "personally knows" previously found in C.C. 1185(b) has been deleted.

(2) *Satisfactory Evidence.*

Oath of one credible witness: C.C. 1185(c)(1) was relettered C.C. 1185(b)(1)(A) in 2007. The credible witness making the oath must prove his or her identity to the officer by presenting one of the documents described in C.C. 1185(b)(3) or 1185(b)(4). (C.C. 1185(b)(1)(A), as amended in 2007.)

A notary public who violates C.C. 1185 by failing to obtain the satisfactory evidence required by C.C. 1185(b)(1)(A) is subject to a civil penalty up to \$ 10,000. An action to impose the civil penalty may be brought by the Secretary of State in an administrative proceeding or by any public prosecutor in superior court. The penalty is enforced as a civil judgment. A public prosecutor must inform the Secretary of any civil penalty imposed in this way. (C.C. 1185(b)(1)(B), added in 2007.)

Forfeit of financial interest: C.C. 1185(f) was relettered C.C. 1185(e) in 2007.

Oath of two credible witnesses: C.C. 1185(c)(2) was relettered C.C. 1185(b)(2) in 2007. The credible witnesses making the oath must prove their identities to the officer by presenting one of the documents described in C.C. 1185(b)(3) or 1185(b)(4). (C.C. 1185(b)(2), as amended in 2007.) *Documentary evidence:* C.C. 1185(c)(3) was relettered C.C. 1185(b)(3) in 2007. C.C. 1185(c)(4) was relettered C.C. 1185(b)(4) in 2007. The statute now refers to the Department of Corrections and Rehabilitation.

(3) *Presumption in Favor of Officer.* C.C. 1185(d) was relettered C.C. 1185(c) in 2007. C.C. 1185(e) was relettered C.C. 1185(c) in 2007.



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3. Multiple Acknowledgments.

12 Witkin Sum. Cal. Law Real Property § 286

[§ 286] Multiple Acknowledgments.

When there are several grantors, each must acknowledge. (*Du Ross v. Trainor* (1932) 122 C.A. 732, 737, 10 P.2d 763.) In the case of contracts to sell real property, or option agreements, which are governed by the same rules, the acknowledgment by the purchaser or optionee alone is not sufficient; the vendor, or optioner, whose land is affected, must acknowledge. (*Keese v. Beardsley* (1932) 190 C. 465, 472, 213 P. 500.)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Thumbprint Requirement.

12 Witkin Sum. Cal. Law Real Property § 287

[§ 287] Thumbprint Requirement.

When notarizing a deed, quitclaim deed, or deed of trust affecting real property, the notary public must require the party signing the document to place his or her right thumb-print in the notary's journal of official acts. If the right thumbprint is not available, the left thumb or another finger may be used. If the party signing the document is physically unable to provide a thumbprint or fingerprint, the notary must so indicate and provide an explanation in the journal. The thumbprint requirement is inapplicable to deeds of reconveyance and trustee's deeds resulting from foreclosure decrees. (*Govt.C. 8206(a)(2)(G)*; see 27 *Pacific L. J.* 451.)

SUPPLEMENT: [This section is current through the latest supplement]

Govt.C. 8206(a)(2) was amended in 2007 to add a power of attorney document to the list of documents requiring a thumbprint.



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c. Officers Who May Acknowledge.

1. In General.

12 Witkin Sum. Cal. Law Real Property § 288

[§ 288] In General.

(1) *Acknowledgment Depending on Location.* The statutes provide for acknowledgments before judges, clerks, notaries, and others, as follows:

(a) *At any place within California:* The acknowledgment may be before a justice, retired justice, or clerk of the Supreme Court or the Court of Appeal, a judge or retired judge of the superior court, the Secretary of the Senate, the Chief Clerk of the Assembly (C.C. 1180), or a notary public (C.C. 1181). (See *C.C.P.* 179.)

(b) *At any place within the officer's county of election or appointment:* The acknowledgment may be before a clerk of a superior court, a county clerk, a court commissioner, a retired judge of a municipal or justice court, a district attorney, a clerk of a board of supervisors, a city clerk, a county counsel, a city attorney, the Secretary of the Senate, or the Chief Clerk of the Assembly. (C.C. 1181; see *C.C.P.* 179.)

(c) *Outside California but within the United States, and within the officer's jurisdiction:* The acknowledgment may be made before a justice, judge, or clerk of a federal or state court of record, a commissioner appointed by the Governor or the Secretary of State for that purpose, a notary public, or any other authorized person. (C.C. 1182.)

(d) *Outside the United States:* The acknowledgment may be made before a diplomatic or consular officer of the United States, a judge of a court of record of the country where the acknowledgment is made, commissioners appointed by the Governor or Secretary of State for that purpose, or a notary public. If the acknowledgment is made before a notary public, the notary's signature must be proved or acknowledged (1) before a judge of a court of record of the country where the acknowledgment is made, (2) by a diplomatic officer or consular agent of the United States, or (3) by a certification ("apostille") affixed to the instrument under the terms of The Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents. (C.C. 1183.)

(e) *For members of the Armed Forces and their spouses, within or outside California, and for persons employed by or accompanying Armed Forces, outside the United States, and for persons eligible for legal assistance under United States laws and regulations:* The acknowledgment may be before an officer on active duty or performing inactive-duty

training in the Armed Forces who has the general powers of a notary public under *10 U.S.C.*, §936 or *10 U.S.C.*, §1044a and any successor statutes. (C.C. 1183.5.)

(2) *Acknowledgment by Deputy.* A deputy may act for a principal under C.C. 1180, 1181, 1182, and 1183. (C.C. 1184.) The officer must be disinterested, however; an acknowledgment before a notary public who is beneficially interested in the instrument is void. (*Lee v. Murphy* (1897) 119 C. 364, 369, 51 P. 549, 955; see *Overton v. Harband* (1935) 6 C.A.2d 455, 465, 44 P.2d 484 [party to instrument is disqualified to take acknowledgments]; 21 A.L.R.3d 483 [disqualification of attorney to take acknowledgment from client].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Acknowledgment Depending on Location.* The superior court fee for acknowledgment of a deed or other instrument is \$ 15. (Govt.C. 70626(a)(6), added in 2005.)



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c. Officers Who May Acknowledge.

2. Appointment and Authority of Notaries.

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[§ 289] Appointment and Authority of Notaries.

(1) *Statewide Authority.* Notaries are appointed by the Secretary of State, and they may act as notaries in any part of California. (*Govt.C. 8200*; see *C.C. 1181*; *58 Am.Jur.2d (1989 ed.)*, *Notaries Public §1 et seq.*)

(2) *Bond.* A notary public must give an official bond. (*Govt.C. 8212.*)

(3) *Denial, Suspension, or Revocation of License.* A notary's commission may be denied, revoked, or suspended for conviction of a felony or other specified misconduct. (*Govt.C. 8214.1, 8219.5(d).*) (On suspension for negligent performance of duties, see *Bernd v. Eu (1979) 100 C.A.3d 511, 516, 161 C.R. 58.*)

(4) *Regulation of Advertising in Languages Other Than English.* A notary who is not an attorney and who advertises in a language other than English is required to post with the advertisement a notice, in English and that other language, specifying the statutory fees that a notary public may charge and including the statement "I am not an attorney and, therefore, cannot give legal advice about immigration or any other legal matters." (*Govt.C. 8219.5(a).*) In addition, literal translation of the phrase "notary public" into Spanish is prohibited. (*Govt.C. 8219.5(c).*) Failure to comply with the statute requires suspension of the notary's commission for not less than 1 year or revocation of the commission, and two violations require permanent revocation. (*Govt.C. 8219.5(d).*)

This enactment is designed to prevent abuses resulting from the fact that in Mexico, a *notario publico* may render legal advice. (See *Govt.C. 8223(a)* [notaries who purport to be immigration specialists may not advertise themselves as notaries]; *6 Pacific L. J. 182.*)

(5) *Enforcement Powers of Secretary of State.* The statutes authorize the Secretary of State to adopt regulations (*Govt.C. 8220*), to require that notaries furnish copies of their sequential journals (*Govt.C. 8206*) and other information of their notarial acts (*Govt.C. 8205(b)*), and to apply to the courts for injunctive relief (*Govt.C. 8222*). (See *35 U.S.F. L. Rev. 159* [notarial records and preservation of expectation of privacy].)

(6) *Employment by Private Employer.* If a notary public is employed by a private employer and has entered into an

agreement with the employer whereby the employer agrees to pay the premiums on a bond and the cost of supplies required by the employee's notarial duties (see *Govt.C. 8202.7*), the employer may require the employee to limit the notarial services solely to transactions directly associated with the employer's business purposes. (*Govt.C. 8202.8*.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Liability of Notary and Sureties.

12 Witkin Sum. Cal. Law Real Property § 290

[§ 290] Liability of Notary and Sureties.

(1) *In General.* A notary and the notary's surety are liable in damages to one who is injured by the notary's official misconduct or neglect. (*Govt.C. 8214*; see *Anderson v. Aronsohn* (1919) 181 C. 294, 297, 184 P. 12; *Luttrell v. Columbia Cas. Co.* (1934) 136 C.A. 513, 515, 28 P.2d 1067; *Bank of America v. Dowdy* (1960) 186 C.A.2d 690, 693, 9 C.R. 779 [liability of surety]; *Lewis v. Agricultural Ins. Co.* (1969) 2 C.A.3d 285, 292, 82 C.R. 509 [same]; *Transamerica Title Ins. Co. v. Green* (1970) 11 C.A.3d 693, 699, 89 C.R. 915, 1 Cal. Evidence (4th), *Circumstantial Evidence*, §111; *McDonald v. Plumb* (1970) 12 C.A.3d 374, 377, 90 C.R. 822 [procuring of title insurance policy by purchasers did not indicate lack of reliance on acknowledgment so as to break chain of causation]; *Common Wealth Ins. Systems v. Kersten* (1974) 40 C.A.3d 1014, 1032, 115 C.R. 653; *Allstate Savings & Loan Assn. v. Lotito* (1981) 116 C.A.3d 998, 1003, 1004, 1005, 172 C.R. 535 [C.C. 1185, requiring knowledge of individual whose acknowledgment is taken (see *supra*, §284 et seq.), has not been nullified by *Govt.C. 8230*, on notary's requirement of identification as condition to executing jurat (certificate that affidavit was properly made before duly authorized officer)]; but see *Burck v. Buchen* (1941) 46 C.A.2d 741, 746, 116 P.2d 958 [contributory negligence of plaintiff was bar].) (See generally 5 Miller & Starr 3d §11:28 et seq.; 13 A.L.R.3d 1039 [damages for notary's false certificate]; 44 A.L.R.3d 555 [liability of notary public on bond for negligence in performance of duties]; 44 A.L.R.3d 1243 [liability of notary public on bond for wilful or deliberate misconduct in performance of duties]; 58 Am.Jur.2d (1989 ed.), *Notaries Public* §§58 et seq., 74 et seq.; for forms, see 18B Am.Jur. P.P. Forms (1997 ed.), *Notaries* §14 et seq.; on tort liability of notary for negligently and illegally drawing defective will, see *Biakanja v. Irving* (1958) 49 C.2d 647, 320 P.2d 16, 6 Summary (10th), *Torts*, §1179.)

A notary's duties are ministerial only. Hence, the beneficiary under an invalid will was denied recovery against a notary who failed to advise a testator that an acknowledgment would not create a valid will (two signatures of witnesses are necessary). For the notary to give advice of this kind would constitute illegal practice of law. (*Vanderhoof v. Prudential Savings & Loan Assn.* (1975) 46 C.A.3d 507, 511, 120 C.R. 207.)

A notary commits a felony by wilfully performing, with intent to defraud, a notarial act related to a deed of trust on single-family residential property of four units or less "with knowledge that the deed of trust contains any false statements or is forged in whole or in part." (*Govt.C. 8214.2*.)

(2) *Surety's Application for Release.* A notary's surety may bring a proceeding in the superior court of the county in which the notary's principal place of business is located to obtain release from future liability under C.C.P. 996.110 et seq. (Govt.C. 8216.)

(3) *Damages and Causation.* In *Iselin-Jefferson Financial Co. v. United Calif. Bank* (1976) 16 C.3d 886, 129 C.R. 670, 549 P.2d 142, plaintiff finance company agreed to buy accounts receivable from R. The money was owed R by S Corp., and one of the conditions of the purchase agreement was that plaintiff would receive signed and acknowledged guarantees from all the principals of S Corp. Plaintiff received the guarantees, but later discovered that one of the principals, D, had refused to sign, that her signature was forged, and that defendant M, a notary, had negligently acknowledged the signature. On default of S Corp. plaintiff sued the guarantors, M, and defendant bank as M's employer. *Held*, judgment for plaintiff affirmed.

(a) M and the bank contended that a judgment against D would have been worthless because she had no assets. However, the judgment could be enforced for a substantial number of years, and she might during that time acquire money or property; hence, the guarantee had some future value. (16 C.3d 890.)

(b) These defendants also invoked the theory of early cases, that the notary's negligence was not the proximate cause of the loss because plaintiff would have been in no worse position had the instrument been genuine. This theory could not, however, control the result here: (1) Plaintiff would not have entered into the transaction without receiving what it bargained for--the acknowledged signatures of all of the guarantors. (2) The notary's negligence enabled the other parties to deceive plaintiff into believing that D had signed. (16 C.3d 891.)

(c) Two cases furnish the proper basis for distinguishing the earlier decisions: In *Hemet Home Builders Assn. v. Wells* (1934) 3 C.A.2d 65, 39 P.2d 233, the notary forged the names of fictitious persons to deeds of trust and then notarized the purported signatures. The court held that, even though the deeds of trust were worthless, the defendant's false acknowledgment was a proximate cause of the plaintiff's loss because the plaintiff would not have paid out money on the security of the deeds of trust but for the certificate of acknowledgment. In *Tutelman v. Agricultural Ins. Co.* (1972) 25 C.A.3d 914, 102 C.R. 296, the notary's false acknowledgment of deeds of trust permitted their recordation and induced their purchase by the plaintiffs; again the court held that the notary's acts were a proximate cause even though the deeds of trust were worthless. (16 C.3d 891, 892.)

(d) The *Hemet* and *Tutelman* rationale leads to "a more responsible and enlightened result" than that of the earlier cases: "Here, [M's] negligent act, in concurrence with the possible criminal conduct of other parties, resulted directly and foreseeably in plaintiff's injuries. It is irrelevant to this causal nexus that [D] lacked financial resources with which to satisfy any judgment against her. The possibility that plaintiff would have incurred the same injuries even without [M's] negligence because of [D's] financial situation, cannot be permitted to obscure the fact that but for [M's] negligence plaintiff would not have entered into the transaction from which it suffered loss." (16 C.3d 892.) (See *Kirk Corp. v. First Amer. Title Co.* (1990) 220 C.A.3d 785, 811, 270 C.R. 24 [notary not liable; failure to complete acknowledgment at time she signed and sealed document and failure to keep journal were not proximate causes of any damage].)

(4) *Statutory Penalties.* A notary is subject to a civil penalty of up to \$ 1,500 for specified misconduct involving dishonesty, fraud, or deceit, overcharging, false advertising, failure to administer the oath, or failure to complete the acknowledgment. (Govt.C. 8214.15.) Before the penalty is imposed, the notary has the right to a hearing on the matter. (Govt.C. 8214.3.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* If a commissioned notary public is convicted of a felony, an offense listed in Govt.C. 8200 et seq., or a violation of Govt.C. 6203 (false certificate), the court must revoke the commission, and must require the notary to surrender his or her seal. The court must forward the seal, together with a certified copy of the judgment of conviction, to the Secretary of State. (Govt.C. 8214.8, added in 2005.)

A notary public who wilfully fails to perform a duty required under *Govt.C. 8206*, who wilfully fails to keep the seal under his or her direct and exclusive control, or who surrenders the seal to an unauthorized person is guilty of a misdemeanor. (*Govt.C. 8228.1(a)*, added in 2005.)

See 18B Am.Jur. P.P. Forms (2006 ed.), Notaries §11 et seq.(4) *Statutory Penalties*. A notary public who willfully fails to provide access to the sequential journal of notarial acts when requested by a peace officer is subject to a civil penalty of up to \$ 2,500. (*Govt.C. 8214.21*, added in 2007.) The same penalty applies to a notary public who fails to obtain a thumbprint, as required by *Govt.C. 8206*, from a party signing a document. (*Govt.C. 8214.23(a)*, added in 2007.)



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9. Delivery.

a. In General.

12 Witkin Sum. Cal. Law Real Property § 291

[§ 291] In General.

(1) *Intent To Pass Title*. A deed takes effect only when delivered. (C.C. 1054; see *Miller v. Jansen* (1943) 21 C.2d 473, 477, 132 P.2d 801.) Delivery depends on the intention that title will pass irrevocably even though the right of possession and enjoyment may be postponed to a future time. It is a question of fact, and evidence of the circumstances (infra, §293) and of the acts and declarations of the grantor (infra, §294) may be offered on the issue. (*Williams v. Kidd* (1915) 170 C. 631, 642, 151 P. 1; *Knudson v. Adams* (1934) 137 C.A. 261, 267, 30 P.2d 608; see C.E.B., 2 Real Property Sales Transactions 3d, §9.70; 23 Am.Jur.2d (2002 ed.), *Deeds* §102 et seq.; 4 Proof of Facts 2d 41 [grantor's intent that grantee hold realty in trust]; 46 Proof of Facts 2d 695 [intent of parties to ambiguous deed].)

The grantor may testify as to the grantor's own intent, and the court may find from the testimony that no delivery took place. (*Howell v. Mays* (1930) 107 C.A. 751, 754, 290 P. 898; see *Kimbrow v. Kimbro* (1926) 199 C. 344, 349, 249 P. 180; 1 Cal. Evidence (4th), *Opinion Evidence*, §8.) A contemporaneous affidavit of the grantor, referred to in the deed, and setting forth the grantor's motive for making the grant, is admissible in evidence on the issue of intent to pass title. (*Mecchi v. Picchi* (1966) 245 C.A.2d 470, 477, 54 C.R. 1.)

(2) *Actual or Constructive*. Delivery may be actual or constructive. A deed is deemed constructively delivered to the grantee: (a) When by agreement of the parties it is understood to be delivered and the grantee is entitled to immediate delivery; (b) when it is delivered by the grantor to a stranger for the benefit of the grantee, and the grantee's assent is shown or may be presumed. (C.C. 1059; see *Hahn v. Hahn* (1954) 123 C.A.2d 97, 101, 266 P.2d 519 [delivery by agent, of duplicate original, was valid].) Delivery to a third person, in order to be a valid constructive delivery, must be with the grantor's intent to give up all control. The delivery may be absolute, passing title at once, or conditional. (See infra, §§299, 300.)

If an effective legal delivery has taken place, a subsequent manual redelivery to the grantor does not affect the prior passage of title. (C.C. 1058; *Sylvester v. Kirkpatrick* (1947) 79 C.A.2d 443, 450, 180 P.2d 36; *Chaffee v. Sorensen* (1951) 107 C.A.2d 284, 289, 236 P.2d 851, infra, §296; see 87 A.L.R.2d 787 [sufficiency of delivery of deed where grantor retains or recovers physical property].)

West's Key Number Digest, Deeds k.54 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Intent To Pass Title*. See C.E.B., 2 Real Property Sales Transactions 4th, §10.71.



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b. Intention To Pass Title.

1. Manual Tradition (Physical Delivery).

12 Witkin Sum. Cal. Law Real Property § 292

[§ 292] Manual Tradition (Physical Delivery).

Usually, the deed is handed to the grantee. Although manual tradition is evidence of intention to deliver, it is not essential, provided that the grantor does some act indicating an intention to relinquish all control. "The crude conception of a manual delivery of the instrument as the only means of making it legally effective ... has been superseded by the more enlightened view that whether an instrument has been delivered is a question of intention merely, there being a sufficient delivery if an intention appears that it shall be legally operative, however this intention may be indicated. ... The fact that the grantor retains possession of the instrument is immaterial. ... A declaration to such third person of an intention that the deed shall take effect would seem to be quite as effective as a manual transfer to him." (*Drummond v. Drummond* (1940) 39 C.A.2d 418, 423, 103 P.2d 217; see *Moore v. Trott* (1912) 162 C. 268, 274, 122 P. 462; *Woodson v. Torgerson* (1930) 108 C.A. 386, 393, 291 P. 663.)

Manual tradition alone may not amount to a delivery; it may be shown that the deed was deposited for some other purpose than to pass a present title. (*Black v. Sharkey* (1894) 104 C. 279, 280, 37 P. 939; *Belser v. American Trust Co.* (1932) 125 C.A. 344, 350, 13 P.2d 951; *Counter v. Counter* (1951) 104 C.A.2d 786, 789, 232 P.2d 551; *Henneberry v. Henneberry* (1958) 164 C.A.2d 125, 129, 330 P.2d 250.) Nor is there a delivery if the grantee gets the deed without permission. In that case, a bona fide purchaser from the grantee takes nothing, for the grantee has no title. (*Gould v. Wise* (1898) 97 C. 532, 535, 32 P. 576, 33 P. 323.) Similarly, the mere entrustment of a deed in the grantee's name by the grantor to an agent gives the agent no power to pass title to the grantee contrary to the grantor's instructions. (*Ernst v. Searle* (1933) 218 C. 233, 236, 22 P.2d 715, 3 Summary (10th), *Agency and Employment*, §147.) However, if the grantor knows that the grantee has obtained the deed, and neglects to take steps to recover it, the grantor may be estopped as against a bona fide purchaser. (*Baillarge v. Clark* (1904) 145 C. 589, 593, 79 P. 268.) (See 23 Am.Jur.2d (2002 ed.), *Deeds* §§107, 109.)

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b. Intention To Pass Title.

2. Circumstances of Transaction.

12 Witkin Sum. Cal. Law Real Property § 293

[§ 293] Circumstances of Transaction.

The importance of intention in establishing delivery, and the loose manner in which it may be proved, are illustrated in *San Filippo v. Vita* (1947) 82 C.A.2d 290, 186 P.2d 163. First, the grantor made a deed to his son, and left it with a realtor friend, in an envelope with written instructions: "This envelope contains papers which are to be delivered to me on demand or in the event of my death then to be delivered to my son." (82 C.A.2d 291.) This was obviously insufficient because the grantor expressly reserved the right to recall the deed at any time. (See *infra*, §299.) Later, the grantor remarried, having made a prenuptial oral agreement with his wife that his property should belong to his son. In subsequent years, the grantor made declarations to his son and to others that the property "belongs to" his son, and that the latter "could collect the rent if he wanted to." (82 C.A.2d 293.) The trial judge concluded that the grantor, after the ineffectual first conditional delivery, subsequently formed the intent to renounce his right to recall the deeds and to make the delivery unconditional. *Held*, trial judge's conclusion was justified.

The court felt that it was bound by *Moore v. Trott* (1912) 162 C. 268, 276, 122 P. 462, decided on somewhat similar facts. The court, however, called attention to the complications that would develop if the grantor, after making the declarations indicating a change of intent, should demand the deed back from the third party. Apparently, the latter would be relieved of the duty to return the deed, although in fact (as was apparently the situation here) he might not even know of the circumstances that changed the conditional delivery into an absolute delivery and thereby nullified his written instructions. (82 C.A.2d 295.) (For other cases discussing effect of evidence of surrounding circumstances, see *Shaver v. Canfield* (1937) 21 C.A.2d 734, 738, 70 P.2d 507, *infra*, §294; *Chaffee v. Sorensen* (1951) 107 C.A.2d 284, 289, 236 P.2d 851, *infra*, §296; *Kelly v. Bank of America* (1952) 112 C.A.2d 388, 396, 246 P.2d 92, *infra*, §296.)

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3. Subsequent Acts and Declarations of Grantor.

12 Witkin Sum. Cal. Law Real Property § 294

[§ 294] Subsequent Acts and Declarations of Grantor.

(1) *General Rule of Admissibility.* When the circumstances surrounding the alleged delivery are ambiguous or equivocal on the matter of intention, the grantor's subsequent acts and declarations may be examined to determine whether the grantor still regarded the property as his or her own. Thus, in *Gaschlin v. Sierra* (1920) 48 C.A. 53, 191 P. 550, the grantor handed deeds to the grantee, gave him the key to the box in which they were kept, and later told the grantee to record them when he died. It developed at the trial that the grantor had subsequently destroyed the deeds. *Held*, there was no delivery. (48 C.A. 55.)

In *Williams v. Kidd* (1915) 170 C. 631, 151 P. 1, the grantor, after the alleged delivery, negotiated for the sale of the property. *Held*, evidence of this fact was admissible on that issue and supported the finding of no delivery. While acts and declarations of a grantor after parting with title, and in disparagement of it, are not admissible, here the very issue was whether the grantor had parted with title, and on that issue of delivery, such acts and declarations were admissible. (170 C. 648.) (See *Szekeres v. Reed* (1950) 96 C.A.2d 348, 353, 215 P.2d 522; *Henneberry v. Henneberry* (1958) 164 C.A.2d 125, 129, 330 P.2d 250; 23 Am.Jur.2d (2002 ed.), *Deeds* §144 et seq.; 1 Cal. Evidence (4th), *Hearsay*, §212.)

In *Hill v. Hill* (1949) 91 C.A.2d 592, 205 P.2d 676, decedent, after his divorce, paid for a conveyance to his daughter. Later, she made a deed in his favor, which was acknowledged but not recorded until some 9 years afterwards, and was found in his possession when he died. An action was brought by his administrator against the daughter (grantor). (a) The administrator relied on the presumptions of delivery from possession and recordation of the deed (infra, §295), as well as on subsequent acts of ownership by decedent grantee, such as occupation of the premises, payment of taxes and insurance, and collection of rents. (b) The daughter testified that she did not intend to deliver, and she relied on inferences from the long delay in recordation, her own acts of ownership such as mortgaging the property for money that she retained and insuring it in her favor, and on decedent's affidavit and testimony, in a proceeding for nonsupport brought by his divorced wife, that he had no property. With the evidence thus balanced, the trial court's finding of no delivery was upheld. (91 C.A.2d 597.)

(2) *When Evidence Is Inadmissible.* If, at the time of physical delivery, the grantor's words and acts are plain, and

clearly show the intention to pass title, evidence of subsequent acts or declarations is not admissible. Thus, none of the following acts of the grantor will vitiate a prior effective delivery: collecting and using rents; mortgaging the property; attempting to grant the property; paying taxes; making repairs and improvements; making returns to the assessor as legal owner; or appearing as owner in an action involving title to the property. (*Longley v. Brooks* (1939) 13 C.2d 754, 762, 92 P.2d 394.)

In *Shaver v. Canfield* (1937) 21 C.A.2d 734, 70 P.2d 507, decedent grantor and plaintiff grantee, his daughter, owned joint interests in real property left by her mother. Plaintiff conveyed her one-half interest to her father, and he executed deeds that he handed to her, saying, "I promised you I would give them to you when you signed the assignment of the property over to me, and you know it was your mother's wish and mine, too, that this property should be yours." (21 C.A.2d 739.) At his suggestion, they were placed in a tin box containing property of both of them, and to which both had access. Later, he moved away, taking the deeds with him. On his death, defendant administrator offered evidence that decedent had told his attorney at the time of execution that he did not intend to deliver the deeds but would retain them to avoid probate; that he later discussed with his attorney the making of a will covering the same houses; and that he told a tenant in one that he owned the property. *Held*, there was a good delivery, and the evidence was not admissible. If the deed is actually delivered, the mere fact that the grantee allows it to remain in custody of the grantor will not invalidate it. It may be returned, e.g., to prevent recordation, without affecting delivery. (21 C.A.2d 737.) (See 26 Cal. L. Rev. 631 [*Shaver*].)

Evidence of subsequent acts and declarations may be similarly excluded if the grantor's instructions about delivery are in writing, and the effect of the transaction is to be determined by construction of the writing. (See *Osborn v. Osborn* (1954) 42 C.2d 358, 364, 267 P.2d 333.)

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4. Presumptions and Inferences.

12 Witkin Sum. Cal. Law Real Property § 295

[§ 295] Presumptions and Inferences.

(1) *Due Execution*. A grant duly executed is presumed to have been delivered at its date. (C.C. 1055.) Although there was formerly some conflict in the decisions whether C.C. 1055 refers to the *fact* of delivery or merely the *time* of delivery after the fact has been proved (see *Lample v. McDougall* (1930) 103 C.A. 779, 781, 285 P. 328), it is now settled that the presumption is only as to the time, and that the fact of delivery must be independently proved. (*Miller v. Jansen* (1943) 21 C.2d 473, 476, 132 P.2d 801; *Blackburn v. Drake* (1963) 211 C.A.2d 806, 812, 27 C.R. 651; see 23 *Am.Jur.2d* (2002 ed.), *Deeds* §131 et seq.)

(2) *Possession of Grantee*. If the deed is found in the grantee's possession, there is a presumption of delivery. (*Stewart v. Silva* (1923) 192 C. 405, 409, 221 P. 191; *Rich v. Ervin* (1948) 86 C.A.2d 386, 394, 194 P.2d 809; *Hennelly v. Bank of America* (1951) 102 C.A.2d 754, 757, 758, 228 P.2d 79; *California Trust Co. v. Hughes* (1952) 111 C.A.2d 717, 719, 721, 245 P.2d 374 [failure to record does not overcome presumption]; *Belli v. Bonavia* (1959) 167 C.A.2d 275, 279, 334 P.2d 196; *Estate of Pieper* (1964) 224 C.A.2d 670, 685, 37 C.R. 46; see *Estate of Galvin* (1952) 114 C.A.2d 354, 360, 250 P.2d 333 [circumstances and contradictory evidence dispelled presumption]; 23 *Am.Jur.2d* (2002 ed.), *Deeds* §136; 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §113.)

(3) *Possession of Grantor*. Finding the deed in the grantor's possession raises a presumption against delivery. (*Donahue v. Sweeney* (1915) 171 C. 388, 390, 153 P. 708; *Miller v. Jansen*, *supra*; *Condencia v. Nelson* (1960) 187 C.A.2d 300, 303, 9 C.R. 759, citing the text.) (See 87 *A.L.R.2d* 787 [sufficiency of delivery of deed where grantor retains or recovers physical property]; 23 *Am.Jur.2d* (2002 ed.), *Deeds* §137.)

(4) *Recordation*. Recordation is *prima facie* evidence of delivery. (*Ev.C.* 1600; see *McGorray v. Robinson* (1902) 135 C. 312, 314, 67 P. 279; 2 *Cal. Evidence* (4th), *Documentary Evidence*, §57.) This presumption is strong enough to support a finding of delivery without any manual delivery. (See *Butler v. Butler* (1961) 188 C.A.2d 228, 233, 10 C.R. 382, citing the text [grantor recorded deed, then put it in his own safe deposit box].) But the presumption can be overcome. (See *Owens v. Ring* (1953) 117 C.A.2d 672, 677, 256 P.2d 1040 [presumption was dispelled by proof that grantee found deed in grantor's home after grantor's death, removed it, and recorded it].) Recordation coupled with manual delivery raises a strong presumption, which can be overthrown only by very clear proof. (*Hitch v. Hitch* (1938)

24 C.A.2d 291, 293, 74 P.2d 1098; *Hill v. Hill* (1949) 91 C.A.2d 592, 597, 205 P.2d 676.) (See generally 23 Am.Jur.2d (2002 ed.), Deeds §§141, 142; 1 Cal. Evidence (4th), *Burden of Proof and Presumptions*, §113.)

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5. Appellate Review of Determination.

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[§ 296] Appellate Review of Determination.

If the evidence is conflicting, delivery is almost conclusively determined in the trial court; as in other controversies of a predominantly factual character, the reviewing court will not weigh the evidence, and will affirm the judgment although the preponderance appears to favor the appellant. Delivery "is a question of fact to be determined by the surrounding circumstances of the transaction and where there is substantial evidence or where an inference or presumption may be drawn from the evidence to sustain the court's finding of delivery such finding will not be interfered with on appeal." (*Chaffee v. Sorensen* (1951) 107 C.A.2d 284, 288, 236 P.2d 851; see *Blackburn v. Drake* (1963) 211 C.A.2d 806, 811, 27 C.R. 651; *Brovelli v. Brovelli* (1963) 213 C.A.2d 16, 17, 28 C.R. 422; 9 Cal. Proc. (4th), Appeal, §359 et seq.)

Chaffee is an apt illustration. Decedent husband, having marital difficulties with plaintiff wife, was taken by his daughter A to her own attorney. Decedent declared that he wanted his property to go to A and not his wife, and the attorney prepared a deed that decedent signed, saying "There." It was then acknowledged and placed in the attorney's file where it was found and recorded by A after decedent's death. In affirming the trial judge's conclusion that title passed to A, the appellate court set forth both the strong evidence of nondelivery and the slight evidence of delivery on which the judgment rested:

(a) The grantee A never had possession of the deed, and the attorney, at the grantor's request, later returned the papers, but there was testimony that the attorney's secretary did this inadvertently. (107 C.A.2d 289.)

(b) In a subsequent separate maintenance suit by plaintiff wife, decedent alleged and testified that he owned the property, and A, present in court, was silent, but decedent was approaching incompetency, and A was not a party to the action and not obliged to rise in court and proclaim her title. (107 C.A.2d 290.)

(c) The grantor continued to occupy the property and paid taxes, insurance, and repairs, but these circumstances merely raised a conflict with the testimony of A and her attorney. (107 C.A.2d 291.)

(d) Decedent was subsequently adjudged incompetent and A, his guardian, paid for repairs and took a credit for the

cost in her guardianship account, but this circumstance again merely raised a conflict with her testimony and that of her attorney. (107 C.A.2d 291.)

Kelly v. Bank of America (1952) 112 C.A.2d 388, 246 P.2d 92, illustrates the same approach to a different result. Here, despite strong evidence of delivery, the trial judge's finding of nondelivery was sustained. The grantor, conferring with his attorney about a gift deed to his son E, was advised that he must deliver without conditions or secret understandings, and that a request not to record would not be binding. The grantor then executed the instrument and handed it to his son, stating, "Here is the deed to the home property which I am giving to you without any strings attached. The only request I want to make is that you do not record the deed until after my death." (112 C.A.2d 391.) The grantee kept the deed from 1943 to 1947, when the grantor asked to see it. The grantee brought it back and the grantor gave it to his attorney (then drawing a will involving the property) saying, "Here it is. You can destroy it." (112 C.A.2d 392.) The attorney had by now been advised by the grantor that the 1943 gift was in anticipation of an operation and was intended to be conditioned on survival.

The foregoing facts clearly established an unequivocal delivery despite the undisclosed intent, particularly in view of the attorney's explicit advice; hence, evidence of the secret condition or of subsequent acts would seem to be incompetent. Nevertheless, to justify admission of the evidence, the appellate court gave controlling significance to the request not to record. "A condition was thereby attached to the delivery, which opened the door to a determination of the significance of that request. No explanation was sought or given as to the intent of the grantor when such request was made." (112 C.A.2d 397.) With the door thus opened to extrinsic evidence of contemporaneous circumstances and subsequent acts, the finding of nondelivery was supported by (a) the circumstance of the anticipated operation (inference of delivery on condition of survival); (b) the grantor's continued possession, payment of expenses, and exercise of rights of ownership; and (c) the grantee's failure to seek possession and his return of the deed with no attempt to get it back. (112 C.A.2d 397.)

SUPPLEMENT: [This section is current through the latest supplement]

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §365 et seq.



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10. Conditional Delivery.

a. Attempted Conditional Delivery to Grantee.

1. No Delivery.

12 Witkin Sum. Cal. Law Real Property § 297

[§ 297] No Delivery.

A deed cannot be delivered to the grantee conditionally. (C.C. 1056.) The grant will be either *void* (no delivery) or *absolute* (unconditional delivery; *infra*, §298).

Although the deed is itself complete and absolute, if the grantor appears not to have intended to part with control over the instrument and make a present transfer, there is no delivery. Thus, in *Kimbrow v. Kimbro* (1926) 199 C. 344, 249 P. 180, the grantor's wife requested that he sign the deed. He did, saying, "Well, I will sign it, but it won't benefit you any for it is not acknowledged." (199 C. 350.) *Held*, there was no delivery. Acknowledgment is not essential to delivery, but the grantor, believing it necessary, did not consider the deed valid, and hence lacked the intent to make an absolute transfer. (199 C. 348.)

Similarly, in *Hotaling v. Hotaling* (1924) 193 C. 368, 224 P. 455, the deed was handed to the grantee, but under the belief that it would not be effective until recorded, and the grantee promised not to record except on a specified contingency. *Held*, title did not pass. (193 C. 382.) (See *Estate of Pieper* (1964) 224 C.A.2d 670, 687, 37 C.R. 46 [both parties believed deed would be of no effect until recorded]; *Kelly v. Bank of America* (1952) 112 C.A.2d 388, 246 P.2d 92, *supra*, §296 [finding of nondelivery upheld; significance of grantor's request that grantee not record deed].)

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2. Unconditional Delivery.

12 Witkin Sum. Cal. Law Real Property § 298

[§ 298] Unconditional Delivery.

If the grantor makes a deed, intending to divest himself or herself completely, but delivers it to the grantee with the understanding that it is not to take effect until the grantee performs some condition, the complete divestment is inconsistent with the annexed condition, and the grantee takes absolutely, free from the condition. (C.C. 1056; see *Blackledge v. McIntosh* (1927) 85 C.A. 475, 482, 259 P. 770; *Security-First Nat. Bank v. Leatart* (1946) 75 C.A.2d 211, 214, 170 P.2d 687; *Ivancovich v. Sullivan* (1957) 149 C.A.2d 160, 164, 307 P.2d 989.)

In *Hodoian v. Garabedian* (1926) 79 C.A. 762, 251 P. 227, a formal delivery was made under the direction of the grantor's attorney. At the grantor's request, the grantee then executed an agreement to reconvey if the grantor recovered from his illness. The grantor died. *Held*, the delivery was valid and complete. (79 C.A. 769.)

If the grantor intends a present transfer, the fact that the grantor wants the deed to remain unrecorded or actually requests the grantee not to record does not prevent passage of title. (*Stewart v. Silva* (1923) 192 C. 405, 410, 221 P. 191; *Knudson v. Adams* (1934) 137 C.A. 261, 268, 30 P.2d 608; but see *Kelly v. Bank of America* (1952) 112 C.A.2d 388, 246 P.2d 92, *supra*, §296 [nondelivery following request not to record].) Hence, if the grantor wishes to transfer property only after performance of some condition or on the happening of some event, the grantor should deliver it to a third party and not to the grantee. (See *infra*, §299 et seq.)

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b. Conditional Delivery to Third Person.

1. Death of Grantor as Condition.

12 Witkin Sum. Cal. Law Real Property § 299

[§ 299] Death of Grantor as Condition.

(1) *Intent To Postpone Delivery.* An attempted testamentary disposition by deed is invalid. (See *Tennant v. John Tennant Memorial Home* (1914) 167 C. 570, 577, 140 P. 242, 14 Summary (10th), *Wills and Probate*, §105.) Hence, a deposit with a third person, on condition that delivery not be made to the grantee until the grantor's death, will not be a valid escrow; i.e., the passage of title will not be postponed until death. In California, the intended result is substantially achieved by a fiction: *Title passes at once to the grantee subject to a life estate in the grantor.* (*Bury v. Young* (1893) 98 C. 446, 449, 33 P. 338; see *Merritt v. Rey* (1930) 104 C.A. 700, 706, 286 P. 510; 43 Cal. L. Rev. 124 [effect of grantor's reserved power of revocation on transfer from depository to grantee at grantor's death].)

(2) *Distinction: No Intent To Pass Title.* This situation must be carefully distinguished from that in which there is no real intent to pass title, and the problem of delivery in these cases is the same as that arising where deeds are handed directly to the grantee. The grantor, in handing the deed to the third person, must intend to relinquish all control. (See *Northern Calif. Conference Assn. v. Smith* (1930) 209 C. 26, 32, 285 P. 314; *Manwell v. Board of Home Missions & Church Extension* (1932) 122 C.A. 599, 607, 10 P.2d 787; 18 Cal. L. Rev. 709.)

In *Hutchinson v. Colvin* (1937) 9 C.2d 91, 69 P.2d 416, the grantor made a deed to defendant and another deed of other property to D, a stranger. He placed both in an envelope on which he wrote that they were to be held until his death, then delivered the sealed envelope to the cashier of a bank in which he was a director. Later, he wrote requesting the D deed, and the cashier opened the envelope and sent it. When the grantor died, the cashier sent defendant grantee his deed. Plaintiffs, administrators, sued to quiet title, contending that both deeds were delivered to the cashier under identical instructions, and, because the grantor retained power to recall the D deed, it necessarily followed that he had the same power over defendant's deed. *Held*, the trial court was justified in finding a valid delivery. The recall of the D deed could give rise to the inference that no delivery was intended, but would also be consistent with an intention to make immediate delivery to the grantee, or it might have been a wrongful or idle act; and the trial court's choice among these conflicting inferences was upheld. (9 C.2d 94.)

In *Osborn v. Osborn* (1954) 42 C.2d 358, 267 P.2d 333, T made a deed to M, grantee, and delivered it to trustees. The trust agreement not only provided for delivery postponed until death of T, but also reserved to T a right to revoke in

the event of wrongful acts of *M. Held*, title passed. A right to recall the deed would disclose an intent that no interest should pass until death and therefore that no delivery took place, but a right to revoke the granted estate was consistent with a complete delivery and vesting of title in the grantee, subject, of course, to divestment on the happening of a condition subsequent (exercise of the power of revocation). (42 C.2d 364.)

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b. Conditional Delivery to Third Person.

2. Survivorship as Condition.

12 Witkin Sum. Cal. Law Real Property § 300

[§ 300] Survivorship as Condition.

If the condition is death of the grantor, the event is certain to happen, and the grantor therefore intends an irrevocable transfer of title. But if the deed is to be delivered to the grantee only if the grantee survives the grantor, the grantor's intention is to retain title and possession until death, and consequently there is no valid delivery. (*Stone v. Daily* (1919) 181 C. 571, 574, 185 P. 665; see *Estate of Sweitzer* (1932) 215 C. 489, 492, 11 P.2d 633 [grantor during last illness made deeds to wife, handed them to friend with instructions to deliver in event of his death, but to be returned if he recovered]; *Rothney v. Rothney* (1940) 41 C.A.2d 566, 571, 107 P.2d 294 [father and son, tenants in common, executed deeds to each other and left them with attorney with instructions to deliver one of them to the survivor, on death of the other].)

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1. Nature of Escrow.

12 Witkin Sum. Cal. Law Real Property § 301

[§ 301] Nature of Escrow.

The term "escrow" was used at common law, before the development of modern procedures for transfer of title, to mean simply a grant, deposited with a third person, to be delivered to the grantee by the depository on performance of a condition; i.e., the undelivered deed in the third person's possession is an escrow. (C.C. 1057; see *King v. Stanley* (1948) 32 C.2d 584, 590, 197 P.2d 321; *Sousa v. First Calif. Co.* (1950) 101 C.A.2d 533, 538, 225 P.2d 955 [sale of corporate stock].)

The thought is more elaborately expressed in a later statutory definition: "Escrow" means a "transaction in which one person, for the purpose of effecting the sale, transfer, encumbering, or leasing of real or personal property to another person, delivers any written instrument, money, evidence of title to real or personal property, or other thing of value to a third person to be held by that third person until the happening of a specified event or the performance of a prescribed condition, when it is then to be delivered by that third person to a grantee, grantor, promisee, promisor, obligee, obligor, bailee, bailor, or any agent or employee of any of the latter." (*Fin.C. 17003(a)*.)

With regard to Internet escrow companies, "escrow" also includes a "transaction in which one person, for the purpose of effecting the sale or transfer of personal property or services to another person, delivers money, or its Internet-authorized equivalent, to a third person to be held by that third person until the happening of a specified event or the performance of a prescribed condition, when it is then to be delivered by that third person to a grantee, grantor, promisee, promisor, obligee, obligor, bailee, bailor, or any agent or employee of any of the latter." (*Fin.C. 17003(b)*.) (See *Todd v. Vestermark* (1956) 145 C.A.2d 374, 377, 302 P.2d 347 [escrow with agent and subescrow with title company to obtain title insurance]; *Kelly v. Steinberg* (1957) 148 C.A.2d 211, 217, 306 P.2d 955 [informal arrangement with attorney as escrow holder]; *Pasternak v. Boutris* (2002) 99 C.A.4th 907, 918, 121 C.R.2d 493 [transaction in which lenders, for purpose of transferring their money to one company, delivered it to escrow company, to be held until first company deposited specified documents with escrow company and then to be disbursed to first company, qualified as escrow under *Fin.C. 17003*, even though companies were conducting fraudulent scheme]; C.E.B., 2 Real Property Sales Transactions 3d, §13.1 et seq.; Cal. Civil Practice, 1 Real Property Litigation, Chap. 3; 3 Miller & Starr 3d §6:1 et seq.; 28 *Am.Jur.2d* (2000 ed.), *Escrow* §1 et seq.; for discussions of broader practical modern concept of escrow as "title closing mechanism," see *Majewsky v. Empire Const. Co., Ltd.* (1970) 2 C.3d 478, 486, 85 C.R. 819, 467 P.2d 547, *infra*,

§304.)

West's Key Number Digest, Deposits and Escrows k.11 et seq.

SUPPLEMENT: [This section is current through the latest supplement]
See C.E.B., 2 Real Property Sales Transactions 4th, §15.1 et seq.



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2. Escrow Agents.

12 Witkin Sum. Cal. Law Real Property § 302

[§ 302] Escrow Agents.

(1) *In General.* Escrow agents, i.e., those who act as escrow holders for compensation, must, with certain exceptions, be licensed by the Commissioner of Corporations, and are subject to strict regulations under the "Escrow Law" (*Fin.C. 17000 et seq.*). (*Fin.C. 17200, 17400 et seq.*; see *Escrow Institute of Calif. v. Pierno* (1972) 24 C.A.3d 361, 365, 100 C.R. 880; 3 Miller & Starr 3d §§6:2, 6:3; Cal. Civil Practice, 1 Real Property Litigation, §3:3 et seq.; 38 So. Cal. L. Rev. 289 [analysis of California escrow law]; 28 Am.Jur.2d (2000 ed.), *Escrow* §19 et seq.; on exemptions from Escrow Law, see *Peterson Dev. Co. v. Torrey Pines Bank* (1991) 233 C.A.3d 103, 117, 284 C.R. 367 [exemption for lending institutions; *Fin.C. 17006*]; on practices of escrow holders, see C.E.B., 2 Real Property Sales Transactions 3d, §13.11; on duties and liabilities of escrow holder, see *infra*, §303 et seq.) For example, escrow agents must, on request, exhibit and allow the Commissioner of Corporations to inspect and copy books and records. (*Fin.C. 17405.*)

An Internet escrow agent is a person engaged in the business of receiving escrows for deposit or delivery over the Internet. (*Fin.C. 17004.5.*) "Joint control agents" are persons engaging in the business of receiving money or other property for disbursement or use in payment of the cost of labor, materials, services, permits, fees, or other items of expense incurred in the construction of improvements on real property. (*Fin.C. 17005.1*; on joint control industry, see 16 *Hastings L. J.* 229.)

(2) *Prohibited Activities.* The Commissioner of Corporations may issue a desist-and-refrain order to prohibit an unlicensed escrow agent from issuing, circulating, or publishing an advertisement indicating that the person is in the escrow business. (*Fin.C. 17403.*) A request for a hearing on the order must be made within 30 days. (*Fin.C. 17416.*)

An escrow agent or a "person acting as an escrow agent" is prohibited from (a) paying a referral fee to a person soliciting escrow customers, and (b) entering into an arrangement to pay a fee, which is contingent on performance of escrow conditions, before its actual closing and completion. (C.C. 1057.5; *Fin.C. 17420.*) However, when C.C. 1057.5 conflicts with *Ins.C. 12404* (permissible escrow commissions and advancements), the latter prevails. (C.C. 1057.5.)

Agents are prohibited from knowingly or recklessly (a) disbursing escrow funds other than in accordance with escrow instructions; (b) participating in acts constituting theft or fraud in connection with an escrow; or (c) making

material misstatements or omissions of material facts in connection with specified escrow affairs. (*Fin.C. 17414(a)*.) A director, officer, stockholder, trustee, employee, or agent of an escrow agent who abstracts or willfully misappropriates money, funds, trust obligations, or property deposited with an escrow agent is guilty of a felony. (*Fin.C. 17414(b)*); see *Fin.C. 17414(c)* [duty to report abstraction or misappropriation].)

A real estate developer is prohibited from requiring, as a condition precedent to the transfer of real property containing a single-family dwelling, that the escrow entity be one in which the developer has a financial interest. (C.C. 2995.) (See *MacManus v. A.E. Realty Partners* (1983) 146 C.A.3d 275, 283, 194 C.R. 567 [cause of action provided by C.C. 2995 accrues on date escrow closes, not date escrow agreement is signed, and is subject to 3-year statute of limitations].)

(3) *Disciplinary Action by Commissioner.* The Commissioner of Corporations may censure, suspend, or bar from employment or management of escrow agents persons (a) who have committed or caused a violation of *Fin.C. 17000* et seq., or of a rule or order of the commissioner, when the violation was known or should have been known by the person committing or causing it, or the violation has caused material damage to either the escrow agent or the public (*Fin.C. 17423(a)(1)*); or (b) who have been convicted or pleaded nolo contendere to a crime or have been held liable in a civil or administrative action involving specified offenses, or "any other offense reasonably related to the qualifications, functions, or duties" of an escrow agent (*Fin.C. 17423(a)(2)*). (See *Fin.C. 17423(f)* [retroactive application to acts and violations occurring at any time]; *Fin.C. 17414.1* [mandatory bar for criminal conviction within past 10 years, or civil or administrative judgment within past 7 years; applicable to agents commencing duties on or after January 1, 1992]; *Fin.C. 17423.1* [after taking disciplinary action under *Fin.C. 17423*, Commissioner of Corporations must notify Real Estate Commissioner and Insurance Commissioner].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See C.E.B., 2 Real Property Sales Transactions 4th, §15.16.



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aa. Agent for Parties.

12 Witkin Sum. Cal. Law Real Property § 303

[§ 303] Agent for Parties.

The escrow holder in a sale of property is at first the agent of *both* parties. When the condition is performed, it becomes the agent of *each*, i.e., of the grantee to deliver the deed, and of the grantor to pay over the purchase money. (See *Shreeves v. Pearson* (1924) 194 C. 699, 707, 230 P. 448; *Greenzweight v. Title Guarantee & Trust Co.* (1934) 1 C.2d 577, 582, 36 P.2d 186; *Newport Bay Dredging Co. v. Helm* (1932) 120 C.A. 127, 133, 7 P.2d 1039; *Thompson v. Stoakes* (1941) 46 C.A.2d 285, 292, 115 P.2d 830; *Hastings v. Bank of America* (1947) 79 C.A.2d 627, 629, 180 P.2d 358; *Todd v. Vestermark* (1956) 145 C.A.2d 374, 377, 302 P.2d 347; *Borgonovo v. Henderson* (1960) 182 C.A.2d 220, 226, 6 C.R. 236; *Spaziani v. Millar* (1963) 215 C.A.2d 667, 682, 30 C.R. 658; *Lee v. Title Ins. & Trust Co.* (1968) 264 C.A.2d 160, 162, 70 C.R. 378, *infra*, §304; C.E.B., 2 Real Property Sales Transactions 3d, §§13.11, 13.17; 28 *Am.Jur.2d* (2000 ed.), *Escrow* §19 et seq.; on practice of keeping instructions confidential, see *Majewsky v. Empire Const. Co., Ltd.* (1970) 2 C.3d 478, 483, 85 C.R. 819, 467 P.2d 547, *infra*, §304.)

An escrow holder must comply with the instructions in paying out money, and an attempt by a principal to modify the instructions after close of the escrow is ineffective. (*Ogdahl v. Title Ins. & Trust Co.* (1977) 72 C.A.3d Supp. 41, 44, 140 C.R. 148; see *Contemporary Inv. v. Safeco Title Ins. Co.* (1983) 145 C.A.3d 999, 1003, 1004, 1005, 193 C.R. 822 [criticizing language of *Ogdahl* and "unwarranted significance" placed by court on closing of escrow].)

SUPPLEMENT: [This section is current through the latest supplement]

See C.E.B., 2 Real Property Sales Transactions 4th, §15.18.



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bb. Limited Agency.

12 Witkin Sum. Cal. Law Real Property § 304

[§ 304] Limited Agency.

The courts have refused to carry out the full implications of the characterization of the escrow holder as an "agent," and have limited the normal agency rules in several important respects:

(1) The only obligations assumed by the escrow holder are those set forth in the instructions, and it owes a party no general duty of disclosure of facts connected with the transaction. (*Blackburn v. McCoy* (1934) 1 C.A.2d 648, 654, 37 P.2d 153; see *Rice v. Taylor* (1934) 220 C. 629, 637, 32 P.2d 381; *Hannon v. Western Title Ins. Co.* (1989) 211 C.A.3d 1122, 1128, 260 C.R. 21, *infra*, §305; *Vournas v. Fidelity Nat. Title Ins. Co.* (1999) 73 C.A.4th 668, 674, 86 C.R.2d 490 [escrow agent had no duty to inform escrow parties that trust required trustee to obtain beneficiaries' consent before selling trust property]; C.E.B., 2 Real Property Sales Transactions 3d, §13.11; 17 *Pacific L. J.* 309 [escrow agent's duty to disclose known fraud]; 28 *Am.Jur.2d* (2000 ed.), *Escrow* §24 et seq.)

In *Lee v. Title Ins. & Trust Co.* (1968) 264 C.A.2d 160, 70 C.R. 378, the purchaser sued on the theory that the escrow holder had failed to disclose a suspicious circumstance (\$ 135,000 trust deed securing loan of actually only \$ 100,000, hinting at usury). *Held*, judgment for defendants affirmed. The court observed that under plaintiff's view, the escrow holder would be forced to decide whether to believe the information and disclose it or disbelieve and conceal it, in either case risking suit by some party. This would discourage escrow holders and defeat the purpose for which escrow originated. (264 C.A.2d 163.)

(2) In the event of controversies between the parties as to performance or breach, the escrow holder need not determine the issues and its consequent obligations to one or the other, but may interplead the conflicting claimants, on the theory that it is a mere stakeholder. (*Security Trust & Savings Bank v. Carlsen* (1928) 205 C. 309, 316, 271 P. 100; see 4 *Cal. Proc.* (4th), *Pleading*, §§221, 222; 28 *Am.Jur.2d* (2000 ed.), *Escrow* §48.)

(3) In a "middleman" escrow, in which two escrows are closed together to implement a sale of property, the escrows are technically separate and the instructions are confidential in each. (See *LaMancha Dev. Corp. v. Sheegog* (1978) 78 C.A.3d 9, 16, 144 C.R. 59.) In *Majewsky v. Empire Const. Co.* (1970) 2 C.3d 478, 85 C.R. 819, 467 P.2d 547,

8 Cal. Proc. (4th), *Enforcement of Judgment*, §57, the court described the situation as follows: "A, as seller, and B, as purchaser, give separate instructions to X, escrow holder, for the sale and purchase of Blackacre for \$ 10,000. B, as seller, and C, as purchaser, give separate instructions to X, escrow holder, for the sale of Blackacre for \$ 15,000. B, of course, is acquiring the land from A and reselling it to C at a \$ 5,000 profit." (2 C.3d 483.) But, despite the fact that the same escrow holder handles both, his duty of disclosure does not go beyond each separate escrow:

"A is entitled to see B's instructions relative to the purchase from A, but he is not entitled to information as to the instructions between B and C."

"B is entitled to see the instructions of either A or C."

"C is entitled to see only the instructions of B concerning the sale from B to C."

"X, the escrow holder, is under no legal duty--in fact, it would be a breach of confidence--to inform A or C as to the terms or existence of the escrow to which either is not a party, assuming that the instructions do not expressly demand such information." (2 C.3d 483, footnote 8.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Obligations limited to instructions:* See C.E.B., 2 Real Property Sales Transactions 4th, §15.18.

(2) *Interpleading conflicting claimants:*

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §§242, 243.

(3) *Middleman escrow:*

Cross-Reference: *Majewsky v. Empire Const. Co.* is not cited in 8 Cal. Proc. (5th), *Enforcement of Judgment*.



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cc. Liabilities.

12 Witkin Sum. Cal. Law Real Property § 305

[§ 305] Liabilities.

(1) *In General.* The escrow holder, like any agent, is liable to either principal (vendor or purchaser) for negligent performance or violation of instructions. (*Amen v. Merced County Title Co.* (1962) 58 C.2d 528, 531, 25 C.R. 65, 375 P.2d 33; *Kelly v. Steinberg* (1957) 148 C.A.2d 211, 217, 306 P.2d 955 [judgment for plaintiff purchasers for misappropriation of purchase money after termination of transaction on vendor's inability to perform]; *Akin v. Business Title Corp.* (1968) 264 C.A.2d 153, 159, 70 C.R. 287, 1 Summary (10th), *Contracts*, §665 [recordation of chattel mortgage in wrong county, causing seller to lose security]; *Ruth v. Lytton Savings & Loan Assn.* (1968) 266 C.A.2d 831, 844, 72 C.R. 521 [violation of instructions in paying out money from construction loan as advance for downpayment of purchase price]; *Garton v. Title Ins. & Trust Co.* (1980) 106 C.A.3d 365, 381, 165 C.R. 449; *Kirby v. Palos Verdes Escrow Co.* (1986) 183 C.A.3d 57, 65, 66, 227 C.R. 785 [constructive notice of assignment was equivalent to new instructions regarding proper payee; escrow holder, liable for improper payment, should have delayed payment until conflict with earlier oral instructions was resolved]; but see *Rianda v. San Benito Title Guarantee Co.* (1950) 35 C.2d 170, 173, 217 P.2d 25 [no breach of duty found]; *Capell Associates v. Central Valley Sec. Co.* (1968) 260 C.A.2d 773, 780, 67 C.R. 463 [nominal damages only where there was no showing of causal connection between omission and injury sustained]; *Claussen v. First Amer. Title Guaranty Co.* (1986) 186 C.A.3d 429, 437, 230 C.R. 749 [following *Rianda*; inquiry whether downpayment passed through escrow did not amount to instruction that receipt of payment was condition for closing]; and see Cal. Civil Practice, 1 Real Property Litigation, §3:33 [complaint form]; 17 *Pacific L. J.* 309 [escrow agent's duty to disclose known fraud]; 28 *Am.Jur.2d* (2000 ed.), *Escrow* §30; 9A *Am.Jur.* P.P. Forms (1996 ed.), *Escrow*, §11 et seq.; 54 *Proof of Facts* 3d 177 [liability of escrow agent for attorney absconding with escrow funds].)

In *Hannon v. Western Title Ins. Co.* (1989) 211 C.A.3d 1122, 260 C.R. 21, plaintiff sued defendant title company for breach of fiduciary duty in handling funds deposited in escrow. The alleged negligence consisted of failure to deposit them in an interest-bearing account. *Held*, judgment for defendant on demurrer affirmed. The escrow holder has no duty to deposit funds in such an account unless its instructions require it. (211 C.A.3d 1128.) (See *Siegel v. Fidelity Nat. Title Ins. Co.* (1996) 46 C.A.4th 1181, 1194, 54 C.R.2d 84, *infra*, §363 [agency and fiduciary responsibilities of

subescrow agent were limited to terms of instructions from escrow agent; citing *Hannon*].)

(2) *Attorneys' Fees as Damages*. In *Prentice v. North Amer. Title Guaranty Corp.* (1963) 59 C.2d 618, 30 C.R. 821, 381 P.2d 645, the vendor had to bring a quiet title action against a third person. *Held*, he could recover his attorneys' fees from the escrow holder as damages. (59 C.2d 621; see *Ruth v. Lytton Savings & Loan Assn.*, *supra*, 266 C.A.2d 844 [following *Prentice*].) It is improper to award attorneys' fees as damages for the prosecution of a separate tort unrelated to the defendant's negligent conduct. (*Flyer's Body Shop Profit Sharing Plan v. Ticor Title Ins. Co.* (1986) 185 C.A.3d 1149, 1152, 1155, 230 C.R. 276 [distinguishing *Prentice*].)

(3) *Punitive Damages*. In *Flyer's Body Shop Profit Sharing Plan*, plaintiff, alleging breach of fiduciary duty in permitting a loan transaction to be completed, sought punitive damages on the theory that defendant acted recklessly in failing to follow established escrow procedures. In reversing the part of the judgment awarding punitive damages, the court cited a number of cases on the rule that breach of fiduciary duty alone, without malice, fraud, or oppression, does not justify the award (see 6 *Summary* (10th), *Torts*, §1572). "[I]t is not sufficient to show only that the defendant's conduct was negligent, grossly negligent or even reckless. ... There must be evidence that defendant acted with knowledge of the probable dangerous consequences to plaintiff's interests and deliberately failed to avoid these consequences." (185 C.A.3d 1155.)

(4) *Exculpatory Clause Is Invalid*. The escrow holder furnishes an important public service and has superior bargaining power. Hence, a clause exempting it from liability for ordinary negligence is a "standardized adhesion contract," now considered illegal. (*Akin v. Business Title Corp.*, *supra*, 264 C.A.2d 157; see *Diaz v. United Calif. Bank* (1977) 71 C.A.3d 161, 171, 139 C.R. 314.)

(5) *Violation of Oral Instructions*. Escrow instructions must be in writing, and escrow agents may not solicit or accept instructions with blanks to be filled in after signing, unless changes are also signed. (*Fin.C.* 17403.2, 17403.3; for similar restriction on Internet escrow agents, see *Fin.C.* 17403.2(b).) In *Zang v. Northwestern Title Co.* (1982) 135 C.A.3d 159, 185 C.R. 176, defendant escrow agent contended that these sections precluded imposition of liability for violation of unwritten instructions. The court said: "We cannot find a sound basis for concluding that the Financial Code sections were intended to abrogate the principles of contract and agency law which allow for binding oral agreements." (135 C.A.3d 168.)

(6) *Liability to Third Party*. In *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 C.4th 705, 117 C.R.2d 541, 41 P.3d 548, the maker of a promissory note secured by a deed of trust on real property obtained a new loan from a new lender, a portion of the proceeds of which was to pay the earlier note in full. In accordance with the escrow instructions, defendant, the provider of escrow services for the refinance transaction, paid the note by issuing a check to the original payee on the note, even though that payee had assigned its rights in the note and the deed of trust to plaintiff. Neither the original payee nor plaintiff was a party to the escrow. Plaintiff sued defendant for negligence, contending that defendant should have paid plaintiff because defendant knew about the assignment. The trial court awarded judgment for plaintiff, but the Court of Appeal reversed, holding that defendant did not owe a duty of care to plaintiff. *Held*, judgment of the Court of Appeal affirmed.

(a) The trial court relied on *Kirby*, which held that an escrow holder can be liable to strangers to the escrow for injuries allegedly caused by the escrow holder following its principals' instructions. The analysis in *Kirby* for its "novel" legal conclusion is not convincing. (27 C.4th 713.) *Kirby* misread an earlier case, *Builders' Control Service of Northern Calif. v. North Amer. Title Guaranty Co.* (1962) 205 C.A.2d 68, 22 C.R. 712, which held that an agent's knowledge of an assignment by its principal obligates the agent to honor the principal's assignment. *Kirby* "transformed that obligation, which is founded in the law of agency, into a duty owed to honor contracts made by creditors of the principal even though the escrow holder had no agency relationship with the creditor." (27 C.4th 714.)

(b) There is no reason to depart from the general rule that an escrow holder incurs no liability for failing to do something not required by the terms of the escrow or for a loss caused by following the escrow instructions. First, the

transaction defendant undertook was not intended to affect or benefit plaintiff; any impact the refinancing transaction may have had on plaintiff was collateral to the escrow's primary purpose. Second, there is no suggestion that defendant could have foreseen that the original payee would default on its obligation to disburse the funds to plaintiff. (27 C.4th 715.) Defendant's compliance with its fiduciary duty to follow the escrow instructions was not blameworthy and is, instead, a policy consideration that militates against concluding that defendant had a tort duty. Finally, there is not a sufficiently close connection between the payment and plaintiff's injury to warrant imposition of a duty of care; plaintiff's injury was caused by the original payee's breach of its contractual obligation to plaintiff. "We decline to adopt a rule that would, by subjecting an escrow holder to conflicting obligations, undermine a valuable business procedure." (27 C.4th 716.)

A concurring justice emphasized that the majority properly did not determine whether an escrow holder might breach its fiduciary duty to a *party* to the escrow by paying off, pursuant to instructions, an original lender who had assigned and transferred the note and deed of trust to another. (27 C.4th 716.) (See *Money Store Inv. Corp. v. Southern Calif. Bank* (2002) 98 C.A.4th 722, 730, 120 C.R.2d 58 [distinguishing *Summit* in dicta; creditor of party to escrow had contractual relationship with escrow holder, escrow holder could have complied with both contract provisions and escrow instructions, and harm to creditor was foreseeable and closely connected to escrow holder's actions].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Virtanen v. O'Connell* (2006) 140 C.A.4th 688, 697, 44 C.R.3d 702 [attorney for purchaser of stock, who acted as escrow holder and closed transaction despite seller's prior instruction to rescind it, was liable for breach of duty as escrow holder; closing transaction with expectation that seller would promptly sue to halt it was not "functional equivalent" of filing interpleader action]; Cal. Civil Practice, 1 Real Property Litigation, §3:34 [complaint form].(6)
Liability to Third Party. See *Markowitz v. Fidelity Nat. Title Co.* (2006) 142 C.A.4th 508, 525, 48 C.R.3d 217 [sub-escrow holder did not owe fiduciary duty to property owner who was not party to escrow; sub-escrow holder received instructions from bank that was extending line of credit to property owner, not from property owner himself, and its failure to record reconveyance of prior deed of trust was breach of duty to bank, not to property owner].



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4. Contract Is Necessary for Irrevocable Deposit.

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[§ 306] Contract Is Necessary for Irrevocable Deposit.

(1) *General Rule.* It has been argued that, as in the gift cases (*supra*, §296), the grantor's delivery in escrow, with the intent to pass title on performance of the conditions, should be irrevocable and unaffected by the grantor's death or incapacity before performance by the grantee. (See *10 Cal. L. Rev. 360*; *1 So. Cal. L. Rev. 36, 41.*)

The prevailing rule, however, is that the grantor and grantee must enter into a valid and binding contract in order to make an irrevocable deposit. If there is no such contract, the grantor can recover the deed from the escrow holder at any time before the condition is performed, and the grantor's death or incapacity will revoke the transfer by operation of law. The theory is that, if the grantor is bound, the grantee should likewise be bound; and, if the grantee's obligation to buy is not enforceable by the grantor, because of a failure of consideration, or because of the statute of frauds, the grantor is considered not to have intended an irrevocable delivery of the deed. (See *Fitch v. Bunch* (1866) 30 C. 208, 212; *Cannon v. Handley* (1887) 72 C. 133, 140, 13 P. 315; *Holland v. McCarthy* (1916) 173 C. 597, 602, 160 P. 1069; *Osborn v. Osborn* (1954) 42 C.2d 358, 363, 267 P.2d 333; 28 Am.Jur.2d (2000 ed.), *Escrow* §10.)

(2) *Types of Contracts.* The typical contract is one between the vendor-grantor and purchaser-grantee for sale or exchange. Escrow instructions, whether on a single form or executed separately by the vendor and purchaser, may constitute a binding contract. (See *Tuso v. Green* (1924) 194 C. 574, 581, 229 P. 327; *Todd v. Vestermark* (1956) 145 C.A.2d 374, 377, 302 P.2d 347; for forms of escrow agreement and instructions, see C.E.B., 2 Real Property Sales Transactions 3d, §§13.50 et seq., 13:74 et seq.; 8 Am.Jur. Legal Forms 2d (1998 ed.), §§100:6 et seq., 100:31 et seq.)

But the contract need not necessarily obligate the grantee to purchase; hence, a specifically enforceable option will be sufficient. (See *Feisthamel v. Campbell* (1921) 55 C.A. 774, 779, 205 P. 25.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Types of Contracts.* See C.E.B., 2 Real Property Sales Transactions 4th, §15.31 et seq.; 8 Am.Jur. Legal Forms 2d (2007 ed.), *Escrow* §§100:5 et seq., 100:48 et seq.



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[§ 307] Performance by Grantee.

The escrow holder ordinarily has no authority to deliver the deed to the grantee until strict performance of all of the conditions. (See *Los Angeles City High School Dist. v. Quinn* (1925) 195 C. 377, 383, 234 P. 313; *Love v. White* (1961) 56 C.2d 192, 194, 14 C.R. 442, 363 P.2d 482 ["The doctrine of substantial performance does not apply"]; *Watts v. Mohr* (1948) 86 C.A.2d 256, 262, 194 P.2d 758; *Todd v. Vestermark* (1956) 145 C.A.2d 374, 377, 302 P.2d 347; 28 *Am.Jur.2d* (2000 ed.), *Escrow* §§32, 33; *infra*, §313.)

But the usual principle of waiver applies; e.g., the vendor may waive the time limit by an oral extension or failure to object to late performance. (See *Chan v. Title Ins. & Trust Co.* (1952) 39 C.2d 253, 258, 246 P.2d 632; *Wilson v. Bidwell* (1948) 88 C.A.2d 832, 837, 199 P.2d 439; *Security-First Nat. Bank v. Clark* (1935) 8 C.A.2d 709, 713, 48 P.2d 167 [waiver of other conditions]; 28 *Am.Jur.2d* (2000 ed.), *Escrow* §34; 1 *Summary* (10th), *Contracts*, §823 et seq.) The doctrine of relief against forfeiture also applies. (See *Freedman v. The Rector, Wardens & Vestrymen of St. Matthias Parish of Los Angeles* (1951) 37 C.2d 16, 20, 230 P.2d 629; 13 *Summary* (10th), *Equity*, §63.)

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bb. Performance by Grantor.

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[§ 308] Performance by Grantor.

On the grantee's performance of the conditions, no further act of performance by the grantor personally is necessary. A deed handed to an escrow holder under binding instructions is validly delivered, and the grantor relinquishes all right to control or recall it, despite the fact that title does not pass to the grantee until the conditions happen or are performed. (*Deming v. Smith* (1937) 19 C.A.2d 683, 686, 66 P.2d 454; see *Osborn v. Osborn* (1954) 42 C.2d 358, 363, 267 P.2d 333; *Holman v. Toten* (1942) 54 C.A.2d 309, 313, 128 P.2d 808 [title passes on performance of conditions although deed is not actually delivered].)

The grantee may waive the grantor's failure to perform a condition. (*Jolin v. Spira* (1949) 94 C.A.2d 356, 360, 210 P.2d 704 [termite clearance]; on waiver generally, see 1 *Summary* (10th), *Contracts*, §823 et seq.)

In *Kellogg v. Curry* (1951) 101 C.A.2d 856, 226 P.2d 381, defendant purchasers deposited \$ 1,100 in escrow on signing instructions, agreeing to pay a \$ 5,000 balance, and then repudiated. At the end of the escrow term (30 days), plaintiff vendor sold to others, and brought this action to quiet title to the \$ 1,100 deposit. *Held*, vendor was not entitled to the deposit. Payment and delivery of the deed are dependent conditions, and failure of performance on the part of one party to an escrow does not accomplish a transfer of title. Hence, title to the money remained in the buyers even though they might be liable in damages for failure to complete performance. "A buyer's agreement that his money shall be paid to the seller for a deed is not, of course, an agreement that it shall be paid to the seller in case of the buyer's default." (101 C.A.2d 859.)

But in *Norris v. San Mateo County Title Co.* (1951) 37 C.2d 269, 231 P.2d 493, the purchaser made the initial deposit to the vendors' agent, outside the escrow, pursuant to the deposit receipt (contract of sale). Hence, at the time the escrow was opened, title to the money was in the vendors, and it remained in them when the purchasers defaulted. (37 C.2d 273.)

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[§ 309] Remedies for Default.

Under ordinary rules of contract, usually incorporated in escrow instructions, one party may cancel the escrow for the other's default, by giving notice of revocation or cancellation. (See *Weaver v. Casad* (1948) 86 C.A.2d 593, 595, 195 P.2d 81 [written notice to escrow holder alone, pursuant to instructions, was sufficient].) The party may, however, seek specific performance of the agreement. (See *Bennett v. Steinman* (1948) 84 C.A.2d 494, 499, 190 P.2d 987; on specific performance to buyer, with financial adjustments to relate performance back to contract date, see *Stratton v. Tejani* (1982) 139 C.A.3d 204, 212, 187 C.R. 231, 13 Summary (10th), Equity, §27.) (For discussion of remedies for breach, see 1 Summary (10th), Contracts, §898 et seq.; 28 Am.Jur.2d (2000 ed.), Escrow §45 et seq.; on specific performance, see 13 Summary (10th), Equity, §24 et seq.)

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dd. Liability for Refusal To Effect Release of Funds.

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[§ 310] Liability for Refusal To Effect Release of Funds.

(1) *Buyer and Seller.* It is "the obligation of a buyer and seller who enter into a contract to purchase and sell real property to ensure that all funds deposited into an escrow account are returned to the person who deposited the funds or who is otherwise entitled to the funds under the contract, if the purchase of the property is not completed by the date set forth in the contract for the close of escrow or any duly executed extension thereof." (C.C. 1057.3(a).) The scope of C.C. 1057.3(a) is limited by its definition of "property" as meaning "real property containing one to four residential units at least one of which at the time the escrow is created is to be occupied by the buyer," with the "buyer's statement as to his or her intention to occupy one of the units" being "conclusive." (C.C. 1057.3(f)(3).) (On definition of "close of escrow," see C.C. 1057.3(f)(1).)

(2) *Amount of Liability.* A buyer or seller who fails to execute a document required by the escrow holder to release escrowed funds within 30 days following a written demand by the other party for the return of the funds is liable for all of the following: (a) the amount "not held in good faith to resolve a good faith dispute," (b) damages of treble the amount wrongfully held, but not less than \$ 100 nor more than \$ 1,000, and (c) reasonable attorneys' fees. (C.C. 1057.3(b).)

(3) *No Liability if Good Faith Dispute Exists.* There is no cause of action under C.C. 1057.3 and no party can be held liable "for failure to return funds deposited in an escrow account by a buyer or seller, if the funds are withheld in order to resolve a good faith dispute between a buyer and seller." The party seeking damages under C.C. 1057.3 must prove "that there was no good faith dispute as to the right to the funds on deposit." (C.C. 1057.3(c).) The existence of a good faith dispute is determined by the trier of fact and requires that the party refusing to return the deposited funds have a "reasonable belief" of "legal entitlement to withhold the deposited funds." (C.C. 1057.3(f)(2).)

(4) *Deposit of Funds.* On the filing of an action under C.C. 1057, the escrow holder must "deposit the sum in dispute, less any cancellation fee and charges incurred, with the court in which the action is filed and be discharged of further responsibility for the funds." (C.C. 1057.3(d).)

(5) *Limited Effect of Release.* A document that the escrow holder requires to release funds deposited in an escrow account will not cancel or terminate the underlying sales contract, unless cancellation is specifically provided for in the document. The same rule applies to the acceptance of funds released from escrow by any principal to the escrow transaction. If the escrow instructions constitute the only contract between the buyer and seller, a document required by the escrow holder to release funds does not abrogate a cause of action for breach of a contractual obligation to purchase or sell real property, unless the cancellation is specifically stated in the document. (C.C. 1057.3(e).)

(6) *Interpleader by Escrow Agent.* C.C. 1057.3 does not prohibit an escrow holder from filing an interpleader action if there is a dispute about the proper distribution of escrowed funds. (C.C. 1057.3(g).)

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aa. Grantor's Title During Escrow.

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[§ 311] Grantor's Title During Escrow.

The grantor retains legal title and the right of possession until the conditions are performed, unless the contract calls for prior possession by the grantee. (See *Los Angeles City High School Dist. v. Quinn* (1925) 195 C. 377, 383, 234 P. 313; *Vierneisel v. Rhode Island Ins. Co.* (1946) 77 C.A.2d 229, 231, 175 P.2d 63, *infra*, §312; C.E.B., 2 Real Property Sales Transactions 3d, §13.18; 28 *Am.Jur.2d* (2000 ed.), *Escrow* §39.)

Hence, the risk of loss or destruction of the property falls on the vendor-grantor in possession. (C.C. 1662 [Uniform Vendor and Purchaser Risk Act]; 13 *Summary* (10th), *Equity*, §175.) If the grantor, in disregard of the prior delivery in escrow, conveys the property to a bona fide purchaser, and the latter takes the legal title and records before notice of the rights of the prior grantee in escrow, the bona fide purchaser should prevail. (See 1 *So. Cal. L. Rev.* 32, 36.)

SUPPLEMENT: [This section is current through the latest supplement]
See C.E.B., 2 Real Property Sales Transactions 4th, §15.27.



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[§ 312] Relation Back of Grantee's Title.

Although title does not pass until the grantee's performance, as between the parties title relates back to the time when the grantor delivered the deed to the escrow holder. (*McDonald v. Huff* (1888) 77 C. 279, 283, 19 P. 499; *Deming v. Smith* (1937) 19 C.A.2d 683, 686, 66 P.2d 454; *Brunoni v. Brunoni* (1949) 93 C.A.2d 215, 219, 208 P.2d 1028 [subsequent death of grantor].) Hence, the grantee must pay taxes that become due after the delivery in escrow. (*Miller & Lux v. Sparkman* (1932) 128 C.A. 449, 454, 17 P.2d 772.) (See 28 Am.Jur.2d (2000 ed.), *Escrow* §40 et seq.)

But the relation back doctrine is a legal fiction that is not allowed to work a hardship. Thus, in *Vierneisel v. Rhode Island Ins. Co.* (1946) 77 C.A.2d 229, 175 P.2d 63, F, the vendor, deposited his deed and his insurance policy in escrow and, the next day, before plaintiff purchaser's performance, the property was destroyed. Plaintiff performed, F assigned to him the cause of action for the loss, and plaintiff brought this action against the insurance company. The company set up the defense that, under the relation back theory, title had passed from F, the insured, before the loss occurred, in violation of the "sole and unconditional ownership" clause of the policy. *Held*, F was still the owner at the time of the loss and the company was liable. (77 C.A.2d 231.) (See *Blumenthal v. Liebman* (1952) 109 C.A.2d 374, 380, 240 P.2d 699 [relation back doctrine will not be applied where inappropriate].)

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cc. Unauthorized Delivery to Grantee.

12 Witkin Sum. Cal. Law Real Property § 313

[§ 313] Unauthorized Delivery to Grantee.

(1) *Grantee Bears Loss.* An attempted delivery by the escrow holder to the grantee before performance of the conditions is beyond the holder's powers. (*Los Angeles City High School Dist. v. Quinn* (1925) 195 C. 377, 383, 234 P. 313; *Promis v. Duke* (1929) 208 C. 420, 425, 281 P. 613.) The same is true where the escrow holder embezzles the purchase money before performance of the conditions by the vendor. The loss falls on the purchaser, and no title passes to the purchaser on a subsequent unauthorized delivery of the deed. (*Hildebrand v. Beck* (1925) 196 C. 141, 145, 236 P. 301; *Pagan v. Spencer* (1951) 104 C.A.2d 588, 590, 232 P.2d 323; *Todd v. Vestermark* (1956) 145 C.A.2d 374, 377, 379, 302 P.2d 347; see *Majors v. Butler* (1950) 99 C.A.2d 370, 374, 221 P.2d 994 [exception where vendor's negligent delay in furnishing proof of title caused loss by bankruptcy of title company]; 15 A.L.R.2d 870 [who must bear loss resulting from default or embezzlement of escrow holder]; 28 Am.Jur.2d (2000 ed.), *Escrow* §35 et seq.)

In *Montgomery v. Bank of America* (1948) 85 C.A.2d 559, 193 P.2d 475, defendant's escrow officer altered the deed by changing the description of the property so as to convey a larger piece, and the escrow was completed. Plaintiff grantor, upon discovering the state of the record title, sued defendant for damages equal to the value of the excess conveyed. *Held*, this measure of damages was improper. The instrument, altered without authority of the grantor, was void, and its purported delivery was ineffective. (85 C.A.2d 563.) Plaintiff's chief remedy, therefore, was against the grantee, to quiet title or rescind and recover the property; thereafter defendant would be liable to plaintiff only for the expense incurred in reestablishing his title. (85 C.A.2d 564.)

(2) *Distinction: Direct Delivery to Grantee.* These situations should be carefully distinguished from those in which a grantor delivers a deed directly to the grantee for a consideration that afterwards fails; in that case the title nevertheless passes and no rescission is possible. (See *supra*, §262.) Where there is an escrow, and the grantee has not performed, the escrow holder cannot make a valid delivery, and no title passes, not because the consideration has failed but because the deed has not been properly delivered. (See *Promis v. Duke*, *supra*, 208 C. 425; *Phelps v. American Mortg. Co.* (1940) 40 C.A.2d 361, 368, 104 P.2d 880 [different rule applies to notes secured by mortgage or trust deed].)

Here again, a question arises as to rights of third parties: If the grantee after unauthorized delivery conveys to a bona fide purchaser, is the latter protected? Ordinarily the purchaser would not be, anymore than would the bona fide purchaser from one who obtained a blank or forged deed. (See *supra*, §§269, 270.) But subsequent acts or neglect of the grantor, after learning of the unauthorized delivery, may possibly give rise to an estoppel against the grantor and in favor of the bona fide purchaser. (See *1 So. Cal. L. Rev.* 32, 37.)

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a. Requirement of Acceptance.

12 Witkin Sum. Cal. Law Real Property § 314

[§ 314] Requirement of Acceptance.

(1) *Rule and Criticism.* Early cases established the rule that a deed cannot ordinarily be given effect unless it is accepted by the grantee. (*Hibberd v. Smith* (1885) 67 C. 547, 556, 4 P. 473.) The unfortunate results are illustrated by *Green v. Skinner* (1921) 185 C. 435, 197 P. 60. A and B were joint tenants. A made a deed to his grandson, to be delivered by A's son to the grantee on A's death. The grandson knew nothing about it until A died, at which time the son delivered the deed. *Held*, the grantee was not entitled to the property. He did not accept the grant until after A's death, and then it was too late, for at A's death B, the other joint tenant, became entitled to the whole property by right of survivorship. As between the grantor and the grantee, the acceptance would relate back to the date when the deed was given to the custodian. But the court refused to apply the doctrine of relation back to the prejudice of the other joint tenant's rights. (185 C. 439.) This case was strongly criticized, and similar criticism has been leveled at the doctrine of acceptance itself. (See *Estate of Kalt* (1940) 16 C.2d 807, 813, 108 P.2d 401 [legatee could not renounce interest in estate to put it beyond creditors]; 9 Cal. L. Rev. 459, 499; 29 Cal. L. Rev. 531 [discussing *Kalt*; questioning whether donee of property could reject property to put it beyond creditors]; 74 A.L.R.2d 992 [what constitutes acceptance of deed by grantee]; 23 Am.Jur.2d (2002 ed.), *Deeds* §149 et seq.; for exceptions to requirement, see *infra*, §315.)

(2) *Acceptance by Corporation.* If the grantee is a corporation, it is not necessary to show a formal acceptance by written contract or resolution. It may be established by words or conduct showing intention to accept; e.g., the grantee's retention of the deed or assertion of title, conveyance or mortgage of the property, bringing suit on the deed, or acts of ownership generally. (*Canal Oil Co. v. National Oil Co.* (1937) 19 C.A.2d 524, 536, 66 P.2d 197.) But where the grant is of an interest or easement to "a political corporation or governmental agency" for public purposes, a resolution of acceptance or a certificate of acceptance by an authorized officer is required as a condition of recordation. (*Govt. C.* 27281.)

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b. Exceptions.

12 Witkin Sum. Cal. Law Real Property § 315

[§ 315] Exceptions.

Two exceptions to the acceptance requirement have eliminated most of its harsh effects:

(1) *Incapacity*. If the grantee is an infant, acceptance of a beneficial grant will be presumed. (*Turner v. Turner* (1916) 173 C. 782, 786, 161 P. 980.)

(2) *Knowledge of beneficial grant*. If the grant is beneficial, and the grantee has knowledge of it, acceptance will be presumed. (C.C. 1059; see *Boye v. Boerner* (1940) 38 C.A.2d 567, 571, 101 P.2d 757 [prior oral agreement to make conveyance justified presumption of consent; distinguishing *Hibberd v. Smith* (1885) 67 C. 547, 4 P. 473, and *Green v. Skinner* (1921) 185 C. 435, 197 P. 60, supra, §314, on ground that there was no agreement or other obligation to make grant]; *Rest.2d, Property (Donative Transfers)* §32.3(2).) This knowledge may be gained after the grantor's death, provided no vested rights of third persons intervene. (*Wilkerson v. Seib* (1942) 20 C.2d 556, 560, 127 P.2d 904.)

In *Herman v. Mortensen* (1945) 72 C.A.2d 413, 164 P.2d 551, the grantor made a deed to the grantee and deposited it with her attorney for delivery when she died. On the grantor's death, it was discovered that the grantee had died 5 years before, and the personal representatives of the grantor and the grantee each claimed the property. *Held*, the deed of gift of valuable property was beneficial, and therefore its acceptance would be presumed. The requirement of knowledge by the grantee was minimized, the court pointing out that the record was silent as to whether the grantee did or did not know of it. Thus, in effect, knowledge as well as acceptance is presumed unless lack of knowledge is affirmatively shown. (72 C.A.2d 418.) (See *Steitz v. Irwin* (1949) 94 C.A.2d 871, 875, 211 P.2d 919 [following *Herman*]; *Marshall v. Marshall* (1956) 140 C.A.2d 475, 479, 295 P.2d 131 [deed of gift to five granddaughters in joint tenancy; two learned of it and acceptance of other three was presumed].)

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12. Recordation.

a. Instruments That May Be Recorded.

1. Instruments Affecting Title or Possession.

12 Witkin Sum. Cal. Law Real Property § 316

[§ 316] Instruments Affecting Title or Possession.

(1) *Significance of Recordation.* Although not essential to the validity of a deed (*supra*, §254), recordation gives rise to a presumption of delivery (*supra*, §295), and imparts constructive notice of the instrument (*infra*, §325).

(2) *General Test.* Any instrument or judgment affecting the title to or possession of real property may be recorded. (*Govt.C. 27280(a)*; see *Dreifus v. Marx* (1940) 40 C.A.2d 461, 466, 104 P.2d 1080; *Ward v. Superior Court* (1997) 55 C.A.4th 60, 64, 63 C.R.2d 731 [homeowners association could not record document asserting that homeowner was in violation of association's covenants, conditions, and restrictions]; C.E.B., 2 Real Property Sales Transactions 3d, §13.99; 5 Miller & Starr 3d §§11:4, 11:6; 66 *Am.Jur.2d* (2001 ed.), *Records and Recording Laws* §45 et seq.; on instruments that may be recorded without acknowledgment, see *supra*, §283.) Instruments not affecting title to or possession of real property do not, when recorded, give constructive notice of their contents to persons dealing with the real property. Hence, in applying the rule of prior recordation (*infra*, §327), it is first necessary to determine whether a particular instrument is one that affects title to or possession of real property.

"Instrument," in conjunction with the recording of interests in real property (*Govt.C. 27200* et seq.), "means a written paper signed by a person or persons transferring the title to, or giving a lien on real property, or giving a right to a debt or duty." (*Govt.C. 27279(a)*.) In lieu of a "written paper," a county recorder may accept digitized versions of recordable instruments under prescribed circumstances. (*Govt.C. 27279(b)*.) *Govt.C. 27279* "is declaratory of existing law and is not intended to expand or diminish the scope of documents presently found by recorders to be eligible for recordation." (Stats. 1988, Chap. 400, §2; see 20 *Pacific L. J.* 698.)

(3) *Conveyance Requirement.* Instruments that may be recorded so as to give constructive notice are those by which a conveyance is made; it is the instrument itself that is the operative element of the transaction. A vendor's lien is merely an equitable right, implied by law, to rely on the property to satisfy the purchase obligation; hence a notice of a vendor's lien, which does not create the lien, is not an instrument entitled to recordation. (*Brown v. Johnson* (1979) 98 C.A.3d 844, 849, 851, 159 C.R. 675.)

(4) *Agreements for Sale, Lease, or Option.* *Govt.C. 27288* refers to agreements for sale or lease, option agreements,

deposit receipts, and similar instruments that claim or affect an interest in real property. If a vendor assigns an interest in such a contract to one assignee and then to another, the case is governed by the recordation rules, and not the notice requirement applicable to successive assignments of choses in action (see 1 *Summary* (10th), *Contracts*, §738). If the interest of the first assignee is first recorded, the first assignee will prevail, even if he or she gives no notice to the debtor (purchaser). (*Central Const. Co. v. Hartman* (1935) 7 C.A.2d 703, 707, 47 P.2d 484.)

(5) *Prerequisite to Enforcement Action*. No person or entity may maintain an action to enforce the terms of (a) a real property sales contract (as defined in C.C. 2985) or (b) a conditional sales contract on a mobilehome subject to local property taxation and to the Mobilehomes--Manufactured Housing Act (*Health & Saf.C. 18000* et seq.) until the agreement is recorded or a change of ownership statement is filed with the county recorder. This requirement applies to agreements entered into after January 1, 1986. (C.C.P. 1062.10; on change of ownership statement, see Rev.C. 480, 9 *Summary* (10th), *Taxation*, §229; on taxation of mobilehomes, see 9 *Summary* (10th), *Taxation*, §171.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *General Test*. See C.E.B., 2 Real Property Sales Transactions 4th, §15.88.(5) *Prerequisite to Enforcement Action*. The Mobilehomes--Manufactured Housing Act was renamed the Manufactured Housing Act in 2007. (*Health & Saf.C. 18000(a)*, amended in 2007.)



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2. Documents Requiring Prescribed Information.

12 Witkin Sum. Cal. Law Real Property § 317

[§ 317] Documents Requiring Prescribed Information.

(1) *Types of Documents.* Certain documents may not be recorded unless, in addition to the information required by the law pertaining to the particular document, they also contain statutorily prescribed information. (See *Govt.C. 27288.1.*) Documents that effect or evidence a transfer or encumbrance of an interest in real property must contain the name or names in which the interest appears of record, or for certain notices of assessment and certain notices of contract awards, "the name or names of the assessed owners as they appear on the latest secured assessment roll." (*Govt.C. 27288.1(a).*) Documents that release or terminate an interest, right, or encumbrance must include all of the names of those persons and entities owning the title or interest being relieved or the names of the owners as they appeared at the time and in the document creating the title or interest. (*Govt.C. 27288.1(b).*) *Govt.C. 27288.1* does not apply to the vacation or abandonment by a public agency of a public highway or road. Information in tax deeds complies with the requirements of *Govt.C. 27288.1.* (*Govt.C. 27288.1(c).*)

If a municipal or governmental entity imposes a restriction on the conveyance of private property or a proprietary leasehold interest in private property, the restriction must be set forth or referenced in a recorded document. (*Govt.C. 27281.5(a).*) The restriction is valid and enforceable only if the recording requirement is satisfied. (*Govt.C. 27281.5(b).*)

(2) *Reliance on Documents.* The recorder may rely on the information contained in or appended to the document offered for record, and a document's failure to contain all the names required does not affect the constructive notice that would otherwise be afforded by recording the document. (*Govt.C. 27288.1.*)

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3. Unusual Instruments.

12 Witkin Sum. Cal. Law Real Property § 318

[§ 318] Unusual Instruments.

It is not necessary that the instrument be in the conventional form of one of those listed in *Govt.C. 27288* (supra, §316). If, in fact, it does affect the title to or possession of real property, it is entitled to recordation and the record will carry constructive notice of its contents. Thus, an instrument that apparently deals with personal property may be properly recorded under *Govt.C. 27280* if the property becomes a fixture. This is true of a conditional sales contract or a lease of machinery or equipment. (See *Western Machinery Co. v. Graetz* (1940) 42 C.A.2d 296, 299, 108 P.2d 711 [lease of mining machinery]; 4 *Summary* (10th), *Security Transactions in Real Property*, §67.)

In *Dreifus v. Marx* (1940) 40 C.A.2d 461, 104 P.2d 1080, plaintiff had been fraudulently induced to convey property. She made, acknowledged, and served a notice of rescission on the grantee, and then recorded it. *Held*, defendant, who claimed under the grantee, had constructive notice of the defect in the grantee's title. The notice asserted title to the property, and therefore affected it within the meaning of *Govt.C. 27280*. (40 C.A.2d 466.)

Other instruments subject to recordation include:

- (1) Contract for sale of standing timber. (C.C. 1220.)
- (2) Certificate claiming lien for costs of abating nuisance on real property. (*Govt.C. 27297*.)
- (3) Authorization to convey real property of unincorporated associations. (*Corp.C. 18120(a)*.)
- (4) Notice of action to declare building uninhabitable. (C.C.P. 405.7.)
- (5) Notice of action to abate public nuisance; notice of final disposition of action. (*Health & Saf.C. 17985*.)
- (6) Transfer of cemetery plot. (*Health & Saf.C. 8331*.)

(7) County's lien for payment of expenses of patient in county hospital. (*Health & Saf.C. 1473*; *Welf.C. 17109*; see *Del Carlo v. Sonoma* (1966) 245 C.A.2d 36, 39, 53 C.R. 771, *infra*, §329.)

(8) Federal liens. (See *C.C.P. 2100* et seq. [Uniform Federal Lien Registration Act]; 4 *Summary* (10th), *Security Transactions in Real Property*, §65.)

(9) English translation of instrument in foreign language. (See *Govt.C. 27293*.)

(10) Affidavit of change of trustee, if the change affects title to an interest in real property. (*Prob.C. 18105*.)

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b. General Requirements.

12 Witkin Sum. Cal. Law Real Property § 319

[§ 319] General Requirements.

(1) *Place of Recordation.* Instruments entitled to be recorded must be recorded by the county recorder of the county in which the effected real property is situated. (C.C. 1169.) (On system of recordation under Improvement Act of 1911, see *Talbot v. Wake* (1977) 74 C.A.3d 428, 435, 141 C.R. 463.)

(2) *Legibility.* The recorder may require a person to substitute or attach a legible document for one that will not reproduce a readable photographic record. The copy must be certified under penalty of perjury as "a true copy of the original." (Govt.C. 27361.7; see Govt.C. 27280.5 [requirement of legible signing, typing, or printing of names of parties on instruments offered for recordation; failure to comply does not affect notice otherwise imparted by recording]; Govt.C. 27361.6, 27201(a) [paper should reproduce legibly when photographed].)

(3) *Titling of Documents.* Each instrument, paper, or notice presented for recordation must have a title indicating the kind of documents contained in the instrument. (Govt.C. 27324; see 24 *Pacific L. J.* 1003.)

(4) *Additional Information for Mailing Purposes.* Before acceptance for recording, documents conveying or encumbering real property must include specified information to facilitate their return or the mailing of tax statements and notices of default or sale. However, the failure to include, or an error in noting, this information affects neither the validity of the instrument nor the notice otherwise imparted by recording. (Govt.C. 27321.5; on electronic delivery and return of documents for recording, see Govt.C. 27390 et seq. [Electronic Recording Delivery Act of 2004].)

(5) *Recorder's Duties.* The recorder must record without delay any instrument authorized by law to be recorded, and must note on the record the instrument's filing number, the exact time of its reception, and the name of the person at whose request the instrument is recorded. (Govt.C. 27320.) The recorder must also indorse on each instrument the proper filing number, the time of reception, the amount of fees for recording, and the book and page in which the instrument is recorded. (Govt.C. 27320, 27321; see *infra*, §§321, 322.)

After recordation, the instrument is mailed or delivered to the person named in the instrument or to the party leaving it for recording. (Govt.C. 27321.) Govt.C. 27297.5 prescribes the duties of the county recorder with respect to the recording of involuntary lien and the notification of the persons against whom the lien is recorded.

(6) *Liability of Recorder.* A recorder who neglects to record within a reasonable time, or does so improperly, or neglects to perform various other required duties is liable to a party suffering damages thereby. (*Govt.C. 27203.*) If the wrongful act or neglect is wilful and malicious, or if the recorder derives personal benefit from it, treble damages may be recovered. (*Govt.C. 27203.5.*)

(7) *Destruction of Records.* A county board of supervisors, at the request of the county recorder, may authorize the destruction of the filed handwritten, typed, or printed papers or records in the recorder's official custody if the record is reproduced and stored as prescribed. (*Govt.C. 26205.5*; see *Govt.C. 26205.7* [notice to Secretary of State of intended destruction of handwritten records].) Similar provisions are made for the destruction of records not expressly required by law to be filed (*Govt.C. 26205*) and nonjudicial public records (*Govt.C. 26205.1*). (On destruction of Torrens records, see *infra*, §369.)

An original document left for recordation that is undeliverable by mail and has not been requested for 10 years after the date of recording may be destroyed. If the document has been recorded by permanent photographic means, it may be destroyed after only 2 years. (*Govt.C. 26205.6.*)

West's Key Number Digest, Deeds k.79 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(8) *(New) Truncation of Social Security Numbers.* The Social Security Number Truncation Program (*Govt.C. 27300 et seq.*) was added in 2007. The county recorder of each county must establish a Social Security number truncation program in order to create a "public record" version of each "official record." (See *Govt.C. 27301.*) An "official record" is the permanent archival record of all instruments, papers, and notices as accepted for recording by a county recorder. (*Govt.C. 27300(a).*) A "public record" is a record in an electronic format that is an exact copy of an official record except that any Social Security number contained in the copied record is truncated. The public record has the same legal force and effect as the official record. (*Govt.C. 27300(a).*) A "truncated social security number" is one that displays only the last four digits of the number. (*Govt.C. 27300(d).*) When a county recorder receives a request for inspection, copying, or another public disclosure of an official record that is not exempt from disclosure, the county recorder may make available only the public record version of that record. (*Govt.C. 27303(a).*) A county recorder may publicly disclose an official record only in response to a subpoena or court order. (*Govt.C. 27303(b).*)



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12 Witkin Sum. Cal. Law Real Property § 320

[§ 320] Fees.

The recorder must charge and collect the prescribed statutory fees. (*Govt.C. 27360* et seq.; see *C.C.P. 2104* [federal liens]; *Carpenters Health & Welfare Trust Fund v. Shafer* (1983) 146 C.A.3d 504, 507, 194 C.R. 266 [fee, intended to reimburse cost of notice, payable only when lien claim is required to contain property owner's address]; 4 *Summary* (10th), *Security Transactions in Real Property*, §65.) These fees include the following:

(1) *Govt.C. 27361* (recording and indexing fee).

(2) *Govt.C. 27361.3* (fee for recording release of lien, encumbrance, or notice executed by state or local government, where original was recorded without fee).

(3) *Govt.C. 27361.4* (additional fee for defraying cost of converting recorder's document storage system to micrographics; additional fees where recorder's office is required to be open every business day, and where filing is required to be indexed within 2 business days).

(4) *Govt.C. 27361.8* (additional fee for recording document requiring indexing of more than 10 names).

(5) *Govt.C. 27364* (fees for certificates under seal must be set to recover costs of providing service).

(6) *Govt.C. 27366* (fees for copying of documents by recorder must be set to recover costs of providing service).

(7) *Govt.C. 27387* (additional fee for recording claim of involuntary lien affecting title to real property).

For the purpose of computing fees, *Govt.C. 27360.5* defines "folio" to mean 100 words, and each figure, character, symbol, and initial (excluding punctuation marks) is regarded as a word.

No charge is made for services to the state, a municipality, a county or other political subdivision, except for making a copy of a paper or record. (*Govt.C. 27383, 6103*; but see *Govt.C. 6103.8* [fee exemptions are inapplicable to releases recorded under specified statutes].)

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d. Recording Methods.

12 Witkin Sum. Cal. Law Real Property § 321

[§ 321] Recording Methods.

(1) *Separate Books.* The statutes still authorize the original practice of segregating, in separate books, sheets, or rolls of film, grants, mortgages, leases, attachments, transcripts of judgment, and other types of instruments, with separate indexes for each. (*Govt.C. 27323* [books], 27232 et seq. [indexes]; see C.E.B., 2 Real Property Sales Transactions 3d, §13.104.)

(2) *Official Records.* The method in more common use employs one general series of books or film called "official records," in which all transfers are entered. (*Govt.C. 27323*.) There are either: (a) two general indexes, one of grantors and one of grantees (*Govt.C. 27257(a)*); or (b) a single, alphabetized grantor-grantee index in which the grantors are distinguished from the grantees "by an easily recognizable mark or symbol" (*Govt.C. 27257(b)*). (See generally *Rice v. Taylor* (1934) 220 C. 629, 632, 32 P.2d 381, infra, §324.)

The general index of grantors lists the names of grantors, defendants, and "first parties" such as mortgagors, lessors, judgment debtors, persons against whom attachments are issued, etc.; i.e., those persons who have granted some interest or suffered some loss of estate or defect of title. The general index of grantees lists the names of grantees, plaintiffs, and "second parties" such as mortgagees and others who claim some interest in the property. (*Govt.C. 27257(a)*.)

(3) *Additional Names.* Regardless of which method is used, the name of a sheriff or marshal who executes a conveyance of real property must be inserted in the index with the name of the party charged in the execution. The name of any executor, administrator, or trustee must be inserted with the name of the testator, intestate, or party for whom the trust is held. An exception is made for the trustee in a deed of trust or deed of reconveyance. (*Govt.C. 27263*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Separate Books.* See C.E.B., 2 Real Property Sales Transactions 4th, §15.91.



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e. Copying and Indexing.

1. Statutory Provisions.

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[§ 322] Statutory Provisions.

(1) *Authorized Recording.* Recording consists of copying the instrument in the record book and indexing it under the names of the parties. (See *Govt.C. 27257, 27322 et seq.*) Two general types of recording are authorized:

(a) Handwriting, typewriting, or photographic reproduction in well-bound books. (*Govt.C. 27322.*)

(b) Microphotography, optical disk, or reproduction by another technique that does not permit additions, deletions, or changes to the original document, with a "true copy" of the document kept in a safe place and a "true copy" available for public inspection. (*Govt.C. 27322.2*; on designation of microfilmed records, as "book," "film," or "reel," and "page" or "image," etc., see *Govt.C. 27323.*)

(2) *Indexing by Title.* All recorded documents must be titled so as to indicate their nature (see *supra*, §319). The recorder must index only the title or titles captioned on the first page of a document immediately below the space reserved for the recorder. Additional titles may be identified and indexed at the recorder's discretion. (*Govt.C. 27324.*) Once copied, the document may be recorded again without recopying, by being indexed again. (*Govt.C. 27328.*) (On recording of instrument when record is lost or destroyed, see *Govt.C. 27329.*)

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2. Necessity of Actual Copying.

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[§ 323] Necessity of Actual Copying.

An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the recorder's office, with the proper officer, for recording. (C.C. 1170.) However, every conveyance of real property or an estate for years, acknowledged or proved and certified and recorded as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the instrument's contents to subsequent purchasers and mortgagees. (C.C. 1213.) Hence, if the purpose is (as usual) to give constructive notice of its contents, the mere deposit of the instrument with the recorder is not the equivalent of recordation, i.e., actual copying of the instrument into the proper book. (*Dougery v. Bettencourt* (1931) 214 C. 455, 463, 6 P.2d 499.)

If there is a mistake in the description of the property, there can be no constructive notice. (*Davis v. Ward* (1895) 109 C. 186, 188, 41 P. 1010.) But, in spite of improper recordation, if the instrument is actually seen, the party who reads it has actual notice, which has the same effect. (*Parkside Realty Co. v. MacDonald* (1913) 166 C. 426, 431, 137 P. 21.)

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3. Necessity of Correct Indexing.

12 Witkin Sum. Cal. Law Real Property § 324

[§ 324] Necessity of Correct Indexing.

The recorder acts as the agent of the party procuring the recordation, and the party is responsible for errors in copying or indexing, with the result that third persons have notice only of what appears on the record. (*Cady v. Purser* (1901) 131 C. 552, 556, 63 P. 844.) However, if the instrument is properly indexed, it gives constructive notice even though it is originally entered in the wrong book. (*Govt.C. 27327; Central Pac. Ry. Co. v. Droge* (1915) 171 C. 32, 37, 151 P. 663.) Thus, California has an "index system of recording," and correct indexing is essential to proper recordation. (*Hochstein v. Romero* (1990) 219 C.A.3d 447, 452, 268 C.R. 202, quoting the text [incorrectly indexed abstract of judgment did not impart constructive notice].)

In *Rice v. Taylor* (1934) 220 C. 629, 32 P.2d 381, the owners of property borrowed money and executed an instrument promising to pay and stating "As security ... we pledge our equity in property." (220 C. 631.) The description of the land appeared in the instrument, but the recorder indexed it as "note and pledge as security." (220 C. 632.) *Held*, this was not constructive notice to a subsequent holder of a deed of trust, for the index indicated that a transaction concerning only personal property (pledge) was involved. The court declared that the index "must give some direct reference to the true nature of the instrument." (220 C. 634.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Dyer v. Martinez* (2007) 147 C.A.4th 1240, 1243, 54 C.R.3d 907 [lis pendens that had been recorded but not indexed did not provide constructive notice].



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f. Effect of Proper Recordation.

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[§ 325] Effect of Proper Recordation.

(1) *Identifying Owner of Property.* The statutory provisions dealing with the *method* of recording (supra, §321) must be read in connection with those dealing with the *effect* of recordation. Proper recordation, by actual copying and correct indexing (supra, §§323, 324) in the chain of title (infra, §326) imparts constructive notice of the contents of the instrument, which is the equivalent of actual knowledge; i.e., knowledge of its contents is conclusively presumed. (*Anderson v. Willson* (1920) 48 C.A. 289, 293, 191 P. 1016; *Alhambra Redevelopment Agency v. Transamerica Financial Services* (1989) 212 C.A.3d 1370, 1377, 261 C.R. 248, citing the text.) Normally, the holder of the record title is the owner of the land; a purchaser may rely on the record and purchase from the holder of the record title, and is not protected if he or she buys from another.

But the record is far from being a guarantee of ownership, for there are a good many elements that make the title void or voidable and that are not deducible from the record. Examples are a grantor's incapacity to contract, fraud in procuring a transfer, forgery, or lack of delivery. Moreover, an adverse possessor who has fulfilled the necessary requirements will prevail over a bona fide purchaser from the holder of the record title. (See *Bothin v. California Title Ins. & Trust Co.* (1908) 153 C. 718, 723, 96 P. 500.) Because of these and numerous other uncertainties in the record title, the practice of securing policies of title insurance before purchasing property has become almost universal. (See infra, §352; 16 Powell §92.01 et seq.; C.E.B., 2 Real Property Sales Transactions 3d, §13.105; C.E.B., Title Insurance Practice 2d, §1.1; 3 Miller & Starr 3d §7:1; 66 Am.Jur.2d (2001 ed.), *Records and Recording Laws* §§82 et seq., 86 et seq.)

In re Marriage of Cloney (2001) 91 C.A.4th 429, 110 C.R.2d 615, involved a plaintiff who recorded a dissolution judgment that ordered her former husband, identified as "James Michael Cloney," to pay her spousal and child support. Several years later, the husband and his second wife sold a parcel of property to defendant. The title to the property listed the husband's name as "Mike Cloney." Before close of escrow, the husband met with the escrow agent to sign papers and, at the agent's request, produced his driver's license, which identified him as "James Michael Cloney." The agent did not inform the title company or defendant of the discrepancy between the name on the title and the name on the driver's license. Escrow closed without plaintiff being paid anything on the judgment lien. When plaintiff discovered that the property had been sold without her lien being paid, she applied for a writ of execution and an order of sale. The trial court issued an order quashing the levy and denying the application for order of sale. *Held*, reversed.

A purchaser of real property must be charged with constructive notice of a valid judgment lien recorded against the seller, where the purchaser's escrow agent obtains actual notice that the seller has used more than one name, and the name of the seller appearing on the instruments of title is different than that appearing on the seller's identification. (91 C.A.4th 436.) A title insurer's knowledge cannot be imputed to its insured, but an escrow agent's knowledge may be imputed to the purchaser, if it was acquired within the course and scope of the agency. (91 C.A.4th 439.) The fact that the husband's actual full name was different from that appearing on the deed and other ownership documents was clearly important information highly material to the escrow. Because the escrow agent acquired this knowledge in the context of the escrow itself and in the performance of her duties as escrow agent, defendant had a right to this information, and she had a duty to give it to him. Knowledge of this material information must be imputed to defendant as a matter of law. (91 C.A.4th 443.) Defendant therefore had constructive notice of plaintiff's recorded judgment against the husband. (91 C.A.4th 444.)

(2) *Options To Purchase.* A recorded option that on its face has expired may have been extended by an unrecorded instrument, and perhaps a purchaser is under a duty of inquiry as to this possibility. But C.C. 884.010 places a limit on the duty. Where a recorded instrument gives constructive notice of an option to purchase real property, the option expires of record (a) if an instrument giving notice of the exercise or extension of the option is not recorded within 6 months after the option expires according to its terms, or (b) 6 months after recordation of the instrument creating or giving constructive notice, if the option provides no expiration date. (See *infra*, §339.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Identifying Owner of Property.* See C.E.B., 2 Real Property Sales Transactions 4th, §15.85.



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[§ 326] Recordation Outside Chain of Title.

(1) *No Constructive Notice.* The record of a conveyance outside the chain of title does not constitute constructive notice. The purchaser must search the record for the successive owners from a common grantor down to the present record owner, but is not charged with knowledge of conveyances by strangers to that chain of title. (See 66 *Am.Jur.2d* (2001 ed.), *Records and Recording Laws* §98 et seq.)

In *Bothin v. California Title Ins.& Trust Co.* (1908) 153 C. 718, 96 P. 500, defendant insured the title to plaintiff's property against defects shown by the record. An adjoining owner was in adverse possession of a 14-foot strip of insured land, and he had given a deed of trust on his property, the description covering the strip. Plaintiff sued on the policy, on the theory that, while adverse possession did not appear on the record, the recorded deed of trust did show this defect. *Held*, defendant was not liable. The adjoining owner was a stranger to the chain through which plaintiff's title was derived, and consequently his conveyance created no defect in that title. "One who is not connected by any conveyance whatever with the record title to a piece of property and makes a conveyance thereof, does not thereby create any defect in the record title of another when such title is deducible by intermediate effective conveyances from the original owners to that other. ... Such a deed would not even be constructive notice." (153 C. 723; see *Far West Savings & Loan Assn. v. McLaughlin* (1988) 201 C.A.3d 67, 73, 246 C.R. 872, quoting *Bothin* and citing the text.)

In *Duncan v. Ledig* (1949) 90 C.A.2d 7, 202 P.2d 107, plaintiff gave W and S a deed intended as a mortgage but duly recorded as an absolute deed. Plaintiff subsequently became a bankrupt, and this property was listed among his assets. His trustee in bankruptcy later resold the property to plaintiff, giving him a deed, which was recorded; but no reconveyance from W and S or instrument of defeasance (see C.C. 2950) was ever recorded. Defendant, a bona fide purchaser, claimed title through successive conveyances from W and S. In this quiet title suit by plaintiff, the court held that defendant's title was protected by the record. He was not charged with knowledge of the deed of the trustee in bankruptcy to plaintiff, for that was outside the chain of title under the original absolute deed from plaintiff. (90 C.A.2d 12.)

(2) *Conveyance Before Acquisition of Title.* The same rule applies to a conveyance by a person who is in the chain of title, if the conveyance is made before the person's acquisition of title. The conveyance, at the time it is made, is that of a stranger to the title; and, although the person afterwards gains title and makes another conveyance, the second

grantee is not bound, in a search of the record, to determine whether any of the grantors in the chain made a conveyance before the second grantee became a part of the chain.

Thus, in *Ludy v. Zumwalt* (1927) 85 C.A. 119, 259 P. 52, plaintiff gave Z an option to purchase her land. Z contracted with a water company to irrigate it, the contract giving the water company a prior lien on the land for charges. This lien was recorded. Later, Z exercised his option and plaintiff conveyed to him, taking a note and purchase money mortgage for the price. Z defaulted both in payment of the water charges and the note, and the water company claimed its prior lien on the land. *Held*, plaintiff should prevail. The record of the prior lien was not notice to her because, at the time it was recorded, Z had no title and an encumbrance given by him was outside the chain. (85 C.A. 125.)

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[§ 327] Rule of Prior Recordation.

(1) *Types of Recording Statutes.* There are two basic types of recording statutes:

(a) Those that make an unrecorded conveyance void against subsequent purchasers without notice. Under this type of act, the bona fide purchaser who relies on the record will prevail, whether the purchaser records or not. (See *14 Cal. L. Rev.* 480.)

(b) The California type, which protects the bona fide purchaser only if he or she records first. "An unrecorded instrument is valid as between the parties thereto and those who have notice thereof." (C.C. 1217; see C.E.B., 2 Real Property Sales Transactions 3d, §13.106; *66 Am.Jur.2d* (2001 ed.), *Records and Recording Laws* §136 et seq.)

(2) *California Rule.* Every conveyance of real property, except a lease for not over a year, is void (a) as against a subsequent purchaser or mortgagee of the property or a part of the property, in good faith, and for valuable consideration, whose conveyance is first duly recorded, and (b) as against a judgment affecting the title, unless the conveyance is recorded before a lis pendens (notice of action) is recorded. (C.C. 1214; see *Moore v. Schneider* (1925) 196 C. 380, 389, 238 P. 81; *March v. Pantaleo* (1935) 4 C.2d 242, 244, 48 P.2d 29; *Evarts v. Jones* (1954) 127 C.A.2d 623, 625, 274 P.2d 185 [judgment]; *Del Carlo v. Sonoma* (1966) 245 C.A.2d 36, 39, 53 C.R. 771, *infra*, §329; C.E.B., 2 Real Property Sales Transactions 3d, §13.106; on lis pendens, see 3 *Cal. Proc.* (4th), *Actions*, §344 et seq.) In other words, priority of recordation will usually determine the rights of the parties; mere delay itself has no effect. (*Knox v. Kearney* (1919) 40 C.A. 290, 291, 180 P. 661.)

A lease is a "conveyance," and a judgment for specific performance is a "judgment affecting the title," within the meaning of C.C. 1214. Hence, defendants' 5-year lease of a commercial building was void as against plaintiffs' specific performance judgment for the purchase of the same property, where the lease was executed after plaintiffs had recorded a lis pendens giving constructive notice of the commencement of their action. (*Goldstein v. Ray* (1981) 118 C.A.3d 571, 575, 173 C.R. 550.)

However, in order to claim the benefit of the recording laws, the claimant must be a bona fide purchaser or

mortgagee, or a judgment creditor without notice, and the burden of proving bona fide purchase is on the purchaser. (*Bell v. Pleasant* (1904) 145 C. 410, 413, 78 P. 957; *Chapman v. Ostergard* (1925) 73 C.A. 539, 545, 238 P. 1081; *Rabbit v. Atkinson* (1941) 44 C.A.2d 752, 757, 113 P.2d 14; see *infra*, §328 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Types of Recording Statutes.*

(b) *California type:* See C.E.B., 2 Real Property Sales Transactions 4th, §§15.85, 15.86.

(2) *California Rule.* See C.E.B., 2 Real Property Sales Transactions 4th, §§15.85, 15.86.

Cross-Reference: 3 Cal. Proc. (5th), Actions, §371 et seq.



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[§ 328] What Constitutes Bona Fide Purchase.

The elements of a bona fide purchase are payment of value, in good faith, and without actual or constructive notice of another's rights. (*Gates Rubber Co. v. Ulman* (1989) 214 C.A.3d 356, 364, 262 C.R. 630, *infra*, §332, quoting the text; *Hochstein v. Romero* (1990) 219 C.A.3d 447, 451, 268 C.R. 202, citing the text; see 13 *Summary* (10th), *Trusts*, §251 et seq.; 77 *Am.Jur.2d* (1997 ed.), *Vendor and Purchaser* §425 et seq.) A grantee who takes under a quitclaim deed may nevertheless be a bona fide purchaser and entitled to the protection of the recording laws. (*Barton v. Ludy* (1938) 11 C.2d 1, 4, 76 P.2d 654; *Dunn v. Carroll* (1929) 101 C.A. 209, 212, 281 P. 506; on quitclaim deeds, see *supra*, §255.)

Although a judgment creditor in an action affecting the title is expressly protected against prior unrecorded interests (see *infra*, §333), an ordinary attachment or execution creditor is not a bona fide purchaser or encumbrancer for value within the meaning of C.C. 1214. Consequently, a deed or mortgage prior in time will prevail over the subsequent attachment or execution lien, even though the prior instrument was not recorded. (*Boye v. Boerner* (1940) 38 C.A.2d 567, 569, 101 P.2d 757.)

A statute may give the status of a bona fide purchaser to one with constructive notice from the record. Thus, C.C. 2911 provides that an improvement bond lien is presumed extinguished after a certain time (ordinarily 4 years from its due date), and that the presumption "shall be conclusive in favor of a bona fide purchaser for value of said property after such dates." Accordingly, defendants, who bought tax-sold property for value and in reliance on the presumptions, without actual knowledge of plaintiff's recorded improvement bond lien, were bona fide purchasers. (*Scheas v. Robertson* (1951) 38 C.2d 119, 125, 238 P.2d 982.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Melendrez v. D & I Inv.* (2005) 127 C.A.4th 1238, 1250, 26 C.R.3d 413 [elements for determining bona fide purchase, i.e., value and no actual or constructive notice of another's rights, applied to purchase at nonjudicial foreclosure sale]; 77 *Am.Jur.2d* (2006 ed.), *Vendor and Purchaser* §368 et seq.



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[§ 329] Bona Fide Encumbrancer.

In *Del Carlo v. Sonoma* (1966) 245 C.A.2d 36, 53 C.R. 771, plaintiff husband, after a divorce, granted real property to his wife. She reconveyed it to him by grant deed recorded July 26, 1957. But in 1956 and 1957, she was treated at the county hospital, and as security for payment of the expense she executed a lien on the property to defendant county, pursuant to *Health & Saf.C. 1473* and *Welf.C. 17109*. This lien was recorded May 24, 1957, without knowledge of the then unrecorded grant deed. In plaintiff's action to quiet title, judgment for defendant was affirmed.

(a) Under C.C. 2924, the wife's instrument, given to secure payment for valuable consideration (services rendered), created an equitable lien or mortgage. (245 C.A.2d 39; see 4 *Summary* (10th), *Security Transactions in Real Property*, §14 et seq.)

(b) This lien came within the definition of "conveyance" in C.C. 1215. Consequently, the county was a bona fide encumbrancer or mortgagee under C.C. 1214, with an instrument first of record, and entitled to priority over the later recorded grant deed. (245 C.A.2d 39.)

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[§ 330] Transferee From Bona Fide Purchaser.

A bona fide purchaser not only acquires a good title, cutting off prior equities, but may clothe his or her transferee with good title, unless the transferee was a former owner with notice. Thus, in *Jones v. Independent Title Co. (1944) 23 C.2d 859, 147 P.2d 542*, the owner made one trust deed to defendant, which was not recorded, then another to C, who took and recorded without knowledge of the prior deed. C then granted to plaintiff, but by that time the first deed was recorded. *Held*, plaintiff prevailed, regardless of whether he gave consideration, and even though he had notice of defendant's deed, because plaintiff was the transferee from a bona fide purchaser. (*23 C.2d 861.*) (See *March v. Pantaleo (1935) 4 C.2d 242, 244, 48 P.2d 29*; *Los Angeles Inv. Co. v. Torchia (1930) 106 C.A. 21, 27, 288 P. 810*; *Rose v. Knapp (1957) 153 C.A.2d 379, 386, 314 P.2d 812*; *Rest.2d, Trusts §316 et seq.*; for similar rule, see *4 Summary (9th), Negotiable Instruments, §21.*)

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 386, last line, "4 Summary (9th), *Negotiable Instruments*, §21" should be "4 Summary (10th), *Negotiable Instruments*, §21".



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[§ 331] Notice.

(1) *Duty To Investigate*. Even when a prior instrument is unrecorded, and there is therefore no constructive notice from the record, a subsequent purchaser may nevertheless have actual knowledge or constructive notice of it and, if so will not be a bona fide purchaser. Facts that should put a reasonable person on inquiry, such as possession by a prior grantee, may amount to constructive notice. (See *Whitney v. Sherman* (1918) 178 C. 435, 439, 173 P. 931; *J.R. Garrett Co. v. States* (1935) 3 C.2d 379, 380, 44 P.2d 538; *Manig v. Bachman* (1954) 127 C.A.2d 216, 222, 273 P.2d 596 ["where a person who is a stranger to the record title of the vendor is in possession, the purchaser is under a duty to make inquiry of such stranger's rights, and failure to do so deprives him of the status of bona fide purchaser"]; *Powell v. Goldsmith* (1984) 152 C.A.3d 746, 751, 199 C.R. 554 [agent's fraud in delaying recordation of senior deed of trust was imputed to principal, holder of junior deed of trust, and negated any right to priority based on claim of being bona fide purchaser]; *Gates Rubber Co. v. Ulman* (1989) 214 C.A.3d 356, 365, 366, 262 C.R. 630, *infra*, §332, quoting the text; *First Fidelity Thrift & Loan Assn. v. Alliance Bank* (1998) 60 C.A.4th 1433, 1441, 71 C.R.2d 295 [plaintiff's deed of trust, which was recorded, mistakenly reconveyed, then rerecorded after error was discovered, appeared second of record relative to defendant's deed of trust, which was recorded during period of mistaken reconveyance; plaintiff's deed of trust was thus second in priority; defendant had no duty to investigate whether reconveyance was in error]; 1 *A.L.R.2d* 322 [tenant's continued possession as constructive notice of unrecorded transfer of lessor's title]; 2 *A.L.R.2d* 857 [occupancy of premises by both record owner and another was notice of title or interest in latter]; 37 *A.L.R.2d* 1112 [tenant's possession of real property as charging another purchaser with notice of tenant's agreement with owner/landlord to purchase property]; 42 *A.L.R.2d* 1088 [knowledge or notice of inadequacy of consideration for conveyance in chain of title as affecting purchaser's bona fide status]; 58 *Am.Jur.2d* (1989 ed.), *Notice* §13 et seq.)

In *Rabbit v. Atkinson* (1941) 44 C.A.2d 752, 113 P.2d 14, an execution creditor, apparently without inquiry, bought property at an execution sale valued at \$ 35,000, in satisfaction of a judgment for \$ 184.74. The record title was not in the judgment debtor. *Held*, the creditor was not a bona fide purchaser. Although mere inadequacy of consideration is not conclusive, a grossly disproportionate price is strong evidence of a defective title, and this, coupled with the state of the record, placed him on inquiry as to the existence of some conflicting right or title. (44 C.A.2d 757.)

In *Asisten v. Underwood* (1960) 183 C.A.2d 304, 7 C.R. 84, plaintiff was the owner and in possession of a duplex dwelling in one unit of which he resided. He was induced by fraud of J and W to give a quitclaim deed to J. The property was then sold to defendant C, the alleged bona fide purchaser, first going through his agents as nominees. *Held*, judgment quieting plaintiff's title affirmed. The trial judge's finding that defendant was not a bona fide purchaser was sustained by the following evidence: Plaintiff was in actual possession at the time of his deed to J; the escrow was completed with unusual haste, and the escrow file was labeled "rush"; defendant paid \$ 6,000 for property admittedly worth \$ 14,000; the W family was indebted to defendant, and the family's notes were cancelled as part of the transaction. (183 C.A.2d 310.)

In *Buehler v. Oregon-Washington Plywood Corp.* (1976) 17 C.3d 520, 131 C.R. 394, 551 P.2d 1226, a recorded instrument described easements as "in gross." The court nevertheless held that extrinsic evidence was admissible to interpret it as subject to territorial restrictions, and a triable issue of fact arose whether the purchaser should have investigated a competing claim. (17 C.3d 527, 529.) A dissenting justice deplored the result as casting doubt on the meaning of recorded interests in real property. (17 C.3d 532.)

(2) *Where Record Refers to Other Documents.* The theory underlying the duty to investigate where another is in possession may reasonably be extended to the situation where a recorded instrument refers to other documents. (*American Med. Int. v. Feller* (1976) 59 C.A.3d 1008, 1020, 131 C.R. 270 [deeds referring to application for permit to sell shares, which contained a waiver of statutory right to partition]; see 89 A.L.R.3d 901 [recorded real property instrument as charging third party with constructive notice of provision of extrinsic instrument referred to in recorded instrument].) However, the duty to investigate does not apply when apparent possession is consistent with the title appearing of record. (See *Kane v. Huntley Financial* (1983) 146 C.A.3d 1092, 1096, 194 C.R. 880 [former husband's secured creditor, unaware of marital dissolution, was entitled to rely on record title showing joint tenancy in husband and wife and was under no duty to inquire about actual possession; to protect her interest pending property settlement, former wife should have filed lis pendens].)

(3) *Whether Recordation Must Also Be Without Notice.* If the purchase is in good faith, but before recording the purchaser learns of the prior grant, should the purchaser be protected? In *Chapman v. Ostergard* (1925) 73 C.A. 539, 238 P. 1081, there was an intimation that the recordation as well as the purchase must be without notice. (73 C.A. 546.) This seems questionable, because it would defeat the rights of those whom the statute is designed to protect.

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[§ 332] Knowledge of Lease.

Ordinarily, possession or an interest consistent with the record title does not call for any further inquiry regarding the title. (See *Smith v. Yule* (1866) 31 C. 180, 184.) But a lease may contain special provisions, or the lessee may have special rights, under a separate agreement with the owner-lessor. Hence, (1) actual knowledge of an outstanding lease made by the vendor puts the purchaser on inquiry even though the lessee is not in possession, and (2) the purchaser must inquire not only as to rights under the lease but as to any other rights of the tenant, including those under a collateral agreement. (*Basch v. Tidewater Associated Oil Co.* (1942) 49 C.A.2d Supp. 743, 748, 121 P.2d 545 [supplemental agreement that rent would be reduced if certain condition happened]; *Gates Rubber Co. v. Ulman* (1989) 214 C.A.3d 356, 368, 262 C.R. 630, quoting the text; see 17 A.L.R.2d 331 [what constitutes notice, to subsequent purchaser of real property, of option to purchase contained in unrecorded lease].)

In *Three Sixty Five Club v. Shostak* (1951) 104 C.A.2d 735, 232 P.2d 546, the lessor B executed a lease of three floors of a building for a nightclub to plaintiff lessee, but, by a recapture clause, reserved an option to obtain a lease of the second floor to himself. Later, B orally waived the right and plaintiff lessee thereupon improved the second floor and recorded the lease. Defendant purchased the building, relying on the terms of the recorded lease and an inspection of the premises, but he made no inquiry of the lessee or the lessor's agent and therefore did not learn of the waiver of the recapture option. *Held*, he was bound by the waiver and was not entitled to exercise the option. The substantial improvements on the second floor, of recent installation and peculiarly adapted to night club use, would have been most unlikely if at any time the lessor could have demanded a lease of the floor for a specified modest rental. Hence, a reading of the option clause placed a duty on defendant to inquire as to its exercise or waiver. (104 C.A.2d 738.)

In *Gates*, the court observed that "[t]he great majority of the cases defining possession inconsistent with recorded title are concerned with the purchaser's notice of the tenant's rights pursuant to an unrecorded lease, easement, or deed, which rights are to some degree obvious and visible due to the nature of the tenant's possession, and not with any unapparent rights the tenant might possess apart from those provided in a recorded lease." (214 C.A.3d 367.)

In *Gates*, plaintiff tenant's unrecorded short-form lease did not refer to plaintiff's unrecorded option-to-purchase

agreement, and there was nothing apparent from plaintiff's possession that would give notice of the option. (214 C.A.3d 370.) "We have determined that appellant's act of selectively and incompletely recording the documents evidencing its rights, especially where appellant acquired those rights simultaneously with other unrecorded rights, had the effect of lulling subsequent purchasers into the false impression they had been given notice of all of appellant's rights. ... We decline to impose upon an intending purchaser a duty to inquire, of a tenant in possession of the property, as to all possible recorded and unrecorded rights which the tenant possesses in the property, where the tenant's possession is consistent with the documents of record." (214 C.A.3d 370.)

Where the lease is unrecorded, facts of possession and use by a third person put a prospective purchaser on inquiry as to the third person's rights, and the lease is binding on the purchaser. (*Evans v. Faught* (1965) 231 C.A.2d 698, 705, 42 C.R. 133, supra, §257.)

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[§ 333] Judgment Creditor in Action Affecting Title.

The other person protected against a prior unrecorded conveyance is a judgment creditor without notice who has brought an action involving the title. The conveyance is void unless recorded before the creditor records a lis pendens in the action, i.e., priority of the judgment dates back to the commencement of the action if the lis pendens is recorded then. (C.C. 1214; see *Moore v. Schneider* (1925) 196 C. 380, 390, 238 P. 81; *Evarts v. Jones* (1954) 127 C.A.2d 623, 625, 274 P.2d 185; but see *Garcia v. Pinhero* (1937) 22 C.A.2d 194, 196, 70 P.2d 675 [lis pendens gives constructive notice only during pendency of action, and is ineffective after final determination of action]; see 14 Powell §82.01; 66 *Am.Jur.2d* (2001 ed.), *Records and Recording Laws* §147; 3 *Cal. Proc.* (4th), *Actions*, §344.)

Several problems are suggested by this portion of C.C. 1214. (1) Suppose a prior grantee fails to record; plaintiff, claiming title, brings an action against the record owner and records a lis pendens, but does not join the prior grantee because plaintiff has no knowledge of the prior grantee. The grantee's prior secret interest might prevail on the theory that he or she cannot be affected by a judgment in an action to which the grantee is not a party. But a statute such as C.C. 1214, carrying out the general policy of the recording system, cuts off the prior unrecorded secret interest, and the judgment prevails. (2) However, if the plaintiff at the time he or she files the action and records the lis pendens has actual knowledge of the prior unrecorded deed, there is no secret interest, and it is generally held that the prior grantee is not bound by the judgment unless the plaintiff joins the prior grantee as a party. (3) But suppose the plaintiff files the action and records the lis pendens without knowledge, and before judgment the plaintiff acquires knowledge. The plaintiff could amend and join the prior grantee, but if he or she does not, there is conflict as to whether the grantee is bound by the judgment.

In *Taylor v. Chapman* (1936) 17 C.A.2d 31, 61 P.2d 476, plaintiff bought two lots from Mission Beach Company in 1929 and 1930. She paid taxes but failed to record her deeds. Defendant, a professional searcher of tax records, discovered two small unpaid assessments against the lots, and assertedly bought them at a tax sale. In 1934, defendant, without knowledge of plaintiff's title, commenced a quiet title suit against Mission Beach Company, plaintiff's grantor, and recorded a lis pendens. Shortly afterwards defendant discovered plaintiff's interest and offered to sell her the lots, but she filed the present action to quiet title. Defendant then secured a consent judgment in his action against plaintiff's grantor, and set up this judgment as a bar to her suit. *Held*, the judgment was not a bar. The opinion seems to be based

on three factors: (a) Defendant did not originally claim an interest derived from plaintiff's grantor, but merely a tax title; (b) plaintiff was not made a party to defendant's action, even after he knew of her interest; (c) defendant's substantial rights were not injured by plaintiff's failure to record. Considerable emphasis was placed upon the fact that defendant quickly secured a consent judgment after learning of plaintiff's interest, and made no attempt to establish the validity of his tax deeds. (17 C.A.2d 34.) The court also declared that to interpret the statute to apply to these facts would be an unconstitutional deprivation of property without notice or hearing. (17 C.A.2d 36.) This last objection does not, however, seem sound, for recordation statutes generally have the effect of defeating prior unrecorded interests in favor of bona fide purchasers, without notice or hearing. (See 25 Cal. L. Rev. 480.)

In *Torrez v. Gough* (1955) 137 C.A.2d 62, 289 P.2d 840, plaintiff grantors conveyed to G and S, grantees, who conveyed to P, a bona fide purchaser. Plaintiffs then brought suit for reformation for fraud of G and S, joining G, S, and P. The deed to P was delivered before the lis pendens was filed, but was not recorded until afterwards. *Held*, P prevailed. The court reviewed *Moore*, *Evarts*, and *Taylor*, and gave the following interpretation of C.C. 1214:

"This means no more than that such unrecorded conveyance will be subordinate to a judgment affecting, i.e., cutting down or voiding, the title which the grantor in the unrecorded conveyance purported to convey. It has no application to a judgment which creates a new title in the judgment holder which before judgment he did not have; or which merely adjudicates good a title which he got after the unrecorded conveyance." Here plaintiffs had no title to the land but merely a right to compel reconveyance, and the "title as such reconveyance would give them could not stand against or affect the title which the defendant had conveyed out because they would take by it only what defendant then had--nothing. ... Under the facts here the only relief they could get by their action was by way of damages against their alleged fraudulent grantees." (137 C.A.2d 71.)

SUPPLEMENT: [This section is current through the latest supplement]

Cross-Reference: 3 Cal. Proc. (5th), Actions, §371.



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E. Deeds.

13. Estoppel by Deed.

a. In General.

12 Witkin Sum. Cal. Law Real Property § 334

[§ 334] In General.

(1) *Possession of After-Acquired Title*. A contract by which a vendor agrees to sell land that the vendor does not own is valid, and is enforceable if the vendor has title at the time of performance. (*Anderson v. Willson* (1920) 48 C.A. 289, 294, 191 P. 1016.)

A deed of property that the grantor does not own conveys nothing. But "[w]here a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title, or claim of title thereto, the same passes by operation of law to the grantee, or his successors." (C.C. 1106.) The theory of passage of after-acquired title by estoppel is that the grantor, having purported to convey title, will afterwards be estopped to deny that he or she had it. (See *Cecil v. Gray* (1915) 170 C. 137, 139, 148 P. 935; *Maxwell v. Carlon* (1939) 30 C.A.2d 356, 361, 86 P.2d 666; 14 Powell §84.02; 3 Miller & Starr 3d §8:51.)

In *Schwenn v. Kaye* (1984) 155 C.A.3d 949, 202 C.R. 374, plaintiff, owner of real property generating oil and gas royalties, conveyed the royalties to her daughter and son-in-law by a grant deed; then she sold the property to defendants without mention of the royalties. Later, in anticipation of litigation but unaware of its effect, she obtained a reconveyance of the royalties from her daughter. *Held*, defendants were entitled to the royalties. Plaintiff granted them fee simple title, which included any oil and gas rights. The fact that she had previously deeded away those rights did not invalidate her subsequent grant deed; and when she subsequently acquired title to the rights, that title passed to defendants by operation of law. (155 C.A.3d 952.)

The doctrine applies not only to grants but to mortgages and deeds of trust. (C.C. 2930; *Barberi v. Rothchild* (1936) 7 C.2d 537, 539, 61 P.2d 760; *California Bank v. Bell* (1940) 38 C.A.2d 533, 537, 101 P.2d 724; see 4 *Summary* (10th), *Security Transactions in Real Property*, §34.) In the case of a grant, however, it applies only when the conveyance is in fee simple. (C.C. 1106.)

(2) *Exception: Quitclaim Deed*. A quitclaim deed will not pass the after-acquired title, for by that deed, the grantor merely transfers the grantor's interest and does not purport to convey the fee. (*McDonald v. Edmonds* (1872) 44 C. 328, 330; *Taylor v. Coachella Valley County Water Dist.* (1952) 108 C.A.2d 743, 745, 239 P.2d 454; see *supra*, §255.)

(3) *Exception: Title Acquired After Judicial Sale.* The doctrine has also been held inapplicable where the property is sold at a judicial sale and a new title is afterwards acquired by the grantor. In *McCune v. McCune* (1937) 23 C.A.2d 295, 72 P.2d 883, the grantor made a deed to his mother, which she recorded; she gave back a reconveyance, subject to a life estate, which he failed to record. She mortgaged the property. Thereafter, her judgment creditor, whose judgment was prior to the mortgage, held an execution sale, bought it, and sold it for value to an agent of the original grantor. *Held*, the purchaser at the execution sale (the creditor) obtained a good title which he could transfer to any purchaser for value, and the grantor took this independent title free of the interest of the grantee (the mother), and unencumbered by the mortgage lien. (23 C.A.2d 297.)

(4) *Doctrine Applied to Easements.* C.C. 1106 is limited to grants in fee simple, but the common law rule, based on equitable estoppel, survives, and is broader. It applies to the transfer of any estate when the grantee initially receives an interest less than the grantee was induced to believe that he or she received. (*Noronha v. Stewart* (1988) 199 C.A.3d 485, 490, 245 C.R. 94 [defendant received permission to build wall on adjoining property from person who was not yet legal owner of that property, but had contract right to ownership and eventually acquired title].)

SUPPLEMENT: [This section is current through the latest supplement]



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b. Effect of Recording Statute.

12 Witkin Sum. Cal. Law Real Property § 335

[§ 335] Effect of Recording Statute.

A grantor will sometimes convey before the grantor has title, and after acquiring title may make another grant to someone else. Under the ordinary rule of estoppel by deed, the title acquired by the grantor would inure to the benefit of the first grantee immediately. But a second grantee who purchases for value and records first should prevail by reason of the recording statute. The second grantee has no constructive notice of the deed to the first grantee, for the record of the deed, made before the grantor had title, is not in the chain of title. (See *Ludy v. Zumwalt* (1927) 85 C.A. 119, 129, 259 P. 52, supra, §326.) However, if the first grantee records his or her deed again, after title has come to the grantor, and before the second purchaser gives value, it would come into the chain of title, and it would then seem proper that the first grantee should prevail. (*Far West Savings & Loan Assn. v. McLaughlin* (1988) 201 C.A.3d 67, 74, 246 C.R. 872, citing the text.)

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F. Marketable Record Title.

1. Law Revision Commission Report.

12 Witkin Sum. Cal. Law Real Property § 336

[§ 336] Law Revision Commission Report.

In 1981, the California Law Revision Commission addressed the problem of loss of marketability of title caused by recorded interests that have become obsolete. (16 Cal. Law Rev. Com. Reports, p. 407.) As a possible solution, the Commission considered Marketable Title Acts under which all interests recorded before a specified date (usually 30 or 40 years ago) are automatically extinguished unless they have been rerecorded. This solution was rejected: "Of critical importance ... is the possibility that under such an act a person who is unaware of the rerecording requirement may lose a valid and substantial property interest simply by the passage of time. The Marketable Title Acts are overly broad and can affect property interests that should not be affected, such as the fee or long-term less than fee interests." (Report, p. 408.)

Instead, the Commission recommended provisions designed to cure specific problems associated with the following interests: ancient mortgages and deeds of trust (see *infra*, §338); unexercised options (see *infra*, §339); rights of entry and possibilities of reverter (see *infra*, §340 et seq.); and unperformed contracts for the sale of real property (see *infra*, §344). (Report, pp. 403, 408.) The Commission made further recommendations related to dormant mineral interests (see *infra*, §345) in 1984 and abandoned easements (see *infra*, §347) in 1985. (See 17 Cal. Law Rev. Com. Reports, p. 957 [mineral rights]; 18 Cal. Law Rev. Com. Reports, p. 257 [easements].)

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2. Enactment of Marketable Record Title Statute.

12 Witkin Sum. Cal. Law Real Property § 337

[§ 337] Enactment of Marketable Record Title Statute.

(1) *Recommendation Adopted.* C.C. 880.020 et seq., enacted in 1982 in accordance with the Law Revision Commission's recommendation (supra, §336), enhance marketability by fixing a specific expiration date for each interest covered (see *infra*, §338 et seq.), while also establishing a procedure allowing the interests to be preserved (see *infra*, §349 et seq.). (See *14 Pacific L. J.* 679.) The statute was later expanded to cover executory interests (*infra*, §340), dormant mineral interests (*infra*, §345), and abandoned easements (*infra*, §347). (See *Walton v. Red Bluff* (1991) 2 C.A.4th 117, 127, 3 C.R.2d 275 [overview of statute]; on marketable title statutes generally, see *31 A.L.R.4th* 11.)

(2) *Declaration of Policy and Purpose.* C.C. 880.020 contains the following declarations of public policy: (a) Real property is a basic resource that should be freely alienable and marketable to encourage full use and development of both surface and subsurface interests; (b) interests in real property and defects in titles created at remote times often constitute unreasonable restraints on alienation and marketability because the interests are invalid, have been abandoned, or have otherwise become obsolete; (c) these interests and defects produce litigation to clear and quiet titles, delay title transactions, and hinder marketability; (d) real property title transactions should be economical and expedient, and determining the status and security of recorded real property titles should require no more than an examination of recent records. (C.C. 880.020(a).)

Hence, the purpose of C.C. 880.020 et seq. is to simplify and facilitate real property title transactions by enabling persons to rely on record title with respect to specified property interests, subject only to express limitations and "notwithstanding any provision or implication to the contrary in any other statute or in the common law." The statute is to be liberally construed to effect this purpose. (C.C. 880.020(b).)

(3) *Scope of Statute.* The interests covered by C.C. 880.020 et seq. are ancient mortgages and deeds of trust, unexercised options, powers of termination, unperformed contracts for the sale of real property, dormant mineral interests, and abandoned easements. (See *infra*, §338 et seq.)

The following real property interests are not covered:

(a) The interest of a person in possession and the interest of a person under whom a person in possession claims, to the extent that reasonable inspection or inquiry would have revealed the possession. (C.C. 880.240(a).)

(b) An interest of the United States, or one under federal law, that has neither terminated under federal law nor been subjected by federal law to state recording requirements. (C.C. 880.240(b).)

(c) An interest of the state or a local public entity. (C.C. 880.240(c).)

(d) A conservation easement (see C.C. 815 et seq.). (C.C. 880.240(d).)

(4) *Validity of Statute*. The statute does not violate due process or the contract clauses of either the California or the United States Constitution. It furthers a legitimate state interest, imposes only a minor burden on the holder of a future interest, and gives a reasonable period in which to comply. (*Severns v. Union Pac. R. Co.* (2002) 101 C.A.4th 1209, 1226, 1228, 125 C.R.2d 100.)

(5) *Construction*. C.C. 880.020 et seq. may not be construed to limit application of equitable principles such as waiver, estoppel, and laches or, except as specifically provided in the statute, to affect a statute governing the effect of recording or failure to record. (C.C. 880.030.)

(6) *Effect of Action and Lis Pendens*. A real property interest does not expire or expire of record if, before the prescribed expiration time, an action (including a special proceeding and arbitration proceeding) affecting the interest is commenced and a notice of lis pendens is recorded. (C.C. 880.260.) Hence, the timely filing of a lis pendens precludes expiration of a real property interest by operation of law. (Law Rev. Com. Comment.)

(7) *No Tolling or Waiver of Time Periods*. The time periods prescribed by C.C. 880.020 et seq. are absolute. They apply notwithstanding (a) a disability or lack of knowledge, (b) a provision for tolling a statute of limitation, and (c) a longer time prescribed by a statute of limitation. (C.C. 880.250(a).) Hence, off-record waivers, extensions, or tolling cannot extend the duration or enforceability of an interest beyond the prescribed time. (Law Rev. Com. Comment.)

Nothing in C.C. 880.020 et seq. "extends the period for enforcement, for bringing an action, or for doing any other required act, or revives an interest in real property that expires and is unenforceable, pursuant to any applicable statute of limitation." (C.C. 880.250(b).)

West's Key Number Digest, Vendor and Purchaser k.130 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(6) *Effect of Action and Lis Pendens*. C.C. 880.260 does not provide a time limit once an action has been filed and a lis pendens has been recorded. "However, if no limit were applied when a lis pendens is filed, a lawsuit not brought to judgment could cloud title indefinitely, despite the statutory purpose to limit such uncertainty. Such a result does not appear to serve the statutory scheme and is inconsistent with the choice to limit to 10 years the extension of a recorded interest where a fixed date appears on the record." Therefore, under C.C. 880.260, when an action is commenced and a lis pendens is filed, the running of the limitations period under the Marketable Record Title Act is reset. A 10-year limitations period commences on the date the lis pendens is recorded. After the recommended 10-year period expires, the power of sale in the trust deed expires. (*Slintak v. Buckeye Retirement Co., L.L.C., Ltd.* (2006) 139 C.A.4th 575, 587, 43 C.R.3d 131 [filing of two lis pendens in separate, but related, litigation reset time limits; 10-year limitations period began to run on filing date of last lis pendens].)



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3. Interests Covered by Statute.

a. Ancient Mortgages and Deeds of Trust.

12 Witkin Sum. Cal. Law Real Property § 338

[§ 338] Ancient Mortgages and Deeds of Trust.

(1) *Date of Expiration.* Unless already expired, the lien of a mortgage, deed of trust, or other security instrument expires, and is unenforceable by any means, after the later of the following times:

(a) If the final maturity date or the last date for payment or performance is ascertainable from the record--10 years after that date. (C.C. 882.020(a)(1).)

(b) If these dates are unascertainable or nonexistent--60 years after the date the instrument was recorded. (C.C. 882.020(a)(2).)

(c) If a notice of intent to preserve the security interest (see *infra*, §349) has been recorded within the aforementioned periods--10 years after the date of recordation. (C.C. 882.020(a)(3).)

The expiration dates may be extended to the same extent as a waiver under *C.C.P. 360.5* (for 4 years at a time), but to be effective, the instrument creating the extension must be recorded before the expiration date. (C.C. 882.020(c).)

For the purpose of C.C. 882.020, a power of sale is deemed exercised on recordation of the deed executed pursuant to that power. (C.C. 882.020(b).)

(2) *Effect of Expiration.* The effect of C.C. 882.020 is to bar enforcement of a mortgage or deed of trust after the prescribed expiration date even though, due to tolling, partial payment, or waiver, the general statutes of limitations have not run. Furthermore, by limiting the time for exercise of a power of sale under a deed of trust, it reverses the rule that such a power "never outlaws" (see 4 *Summary* (10th), *Security Transactions in Real Property*, §122). C.C. 882.020 does not, however, extend the general statutes of limitations applicable to enforcement of a mortgage or other lien. (Legislative Com. Comment.)

Expiration of the lien of a mortgage, deed of trust, or other security interest renders the lien unenforceable and is equivalent to a certificate of satisfaction, reconveyance, release, or other discharge of the security interest. Execution and recordation of such papers are not necessary, but may be done. (C.C. 882.030.) This provision reverses the rule allowing a mortgage or deed of trust barred by the statute of limitations to be equitably enforced. (Legislative Com.

Comment.)

(3) *Applicability of Expiration Provisions.* Subject to two grace periods, C.C. 882.020 and 882.030 became effective on January 1, 1983, and apply to all instruments creating a security interest in real property, regardless of when executed or recorded. (C.C. 882.040(a).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Date of Expiration.*

(a) *Ascertainable date:* See *Ung v. Koehler* (2005) 135 C.A.4th 186, 200, 37 C.R.3d 311 [construing "from the record" to exclude notice of default]; *Slintak v. Buckeye Retirement Co., L.L.C., Ltd.* (2006) 139 C.A.4th 575, 585, 43 C.R.3d 131 [construing "from the record" to mean any recorded document that contains due date of note secured by trust deed in question; because recorded notice of default contained due date of promissory note, 10-year limitations period of C.C. 882.020(a)(1) applied].

C.C. 882.020(a)(1) was amended in 2006, apparently in response to *Ung* and *Slintak*, to provide that the 10-year expiration date applies when the final maturity date or the last date for payment or performance is ascertainable "from the recorded evidence of indebtedness," rather than "from the record." (2) *Effect of Expiration.* In *Ung v. Koehler*, *supra*, plaintiff borrowed money from defendant in 1991 and gave him a promissory note secured by a deed of trust to two properties. The recorded deed of trust did not attach a copy of the underlying promissory note or otherwise indicate the maturity date of the obligation. The note matured on December 31, 1992. On April 12, 2004, defendant recorded a notice of default against one of the two properties. The trial court granted summary adjudication for plaintiff, concluding that C.C. 882.030, in concert with C.C. 2911 (3 Cal. Proc. (5th), Actions, §430), established a 4-year statute of limitations within which defendant had to seek judicial foreclosure or a nonjudicial sale of plaintiff's property. *Held*, reversed.

(a) It is undisputed that a lien created by the right of *judicial* foreclosure under a deed of trust is extinguished under C.C. 2911 on the expiration of the statute of limitations. Plaintiff argues that C.C. 882.030 precludes *nonjudicial* enforcement after expiration of the lien as well. (135 C.A.4th 194.) This argument is untenable for two reasons. First, California law has treated the "lien" created by a deed of trust, as that term is used in C.C. 2911, as including only the security interest enforceable through judicial foreclosure, while excluding the power of sale. (135 C.A.4th 195.) Given this long-standing judicial understanding of the term "lien," C.C. 882.030 must be construed as making unenforceable only the right of judicial enforcement under C.C.P. 725a, the only interest that is extinguished by C.C. 2911. (135 C.A.4th 196.)

(b) Second, plaintiff's interpretation would render C.C. 882.020(a) "virtual surplusage." (135 C.A.4th 197.) The statute was intended to end the unrestricted enforceability of a power of sale in deeds of trust by placing a time limit of either 10 or 60 years on the power's enforcement. Under plaintiff's reading, the power of sale would become unenforceable at the same time that the right of judicial foreclosure is extinguished by C.C. 2911, usually 4 years after the debt matures. The 10-year and 60-year time limits would become irrelevant in nearly all cases. "The Legislature is unlikely to have intended to grant holders of a power of sale an enforcement period of either 10 or 60 years in one section, only to snatch it back with the next." (135 C.A.4th 198.)

(c) The 60-year limitations period of C.C. 882.020(a)(2), rather than the 10-year limitations period of C.C. 882.020(a)(1), applies here. The recorded deed of trust did not indicate the maturity date of the promissory note. Defendant's notice of default, recorded more than 11 years after the maturity date of the promissory note, was the first recorded document to do so. (135 C.A.4th 200.) The notice of default does not constitute a part of the "record" for purposes of C.C. 882.020(a). To hold otherwise would create a serious dilemma for a beneficiary attempting nonjudicial foreclosure after more than 10 years have elapsed from maturity of the underlying debt. "Unless the beneficiary is willing to run a risk of insufficiency of notice, the notice of default will state the final maturity date in its description of the nature of the breach." (135 C.A.4th 203.) But as soon as the beneficiary records the notice, it will be possible to

ascertain the final maturity date "from the record," the applicable 10-year period will have already elapsed, and the beneficiary will be deprived of the remedy of nonjudicial foreclosure. (135 C.A.4th 203.) "Statutes should be construed to avoid 'the absurdity of creating [a] catch-22.'" (135 C.A.4th 204.)



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b. Unexercised Options.

12 Witkin Sum. Cal. Law Real Property § 339

[§ 339] Unexercised Options.

(1) *Expiration Dates.* When a recorded instrument creates or gives constructive notice of an option to purchase real property, the option expires unless an instrument giving notice of exercise or extending the option is recorded within (a) 6 months after the option expires according to its terms, or (b) if there is no expiration date, 6 months after the instrument's recordation date. (C.C. 884.010.) This provision modifies the rule that an option with no expiration date may be exercised within a reasonable time after it is executed (see 1 *Summary* (10th), *Contracts*, §175). (Law Rev. Com. Comment.)

(2) *Effect of Expiration.* Once the option expires, the recorded instrument creating or giving constructive notice of it ceases to be notice to third persons of the exercise or existence of the option or of any writing executed pursuant to the option. (C.C. 884.020.) However, the recorded instrument may still affect the parties to the option. (Law Rev. Com. Comment.)

(3) *Operative Dates of Provisions.* Subject to transitional rules, these provisions cover all applicable recorded instruments, whether executed or recorded before, on, or after January 1, 1983. (C.C. 884.030(a).)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Powers of Termination.

1. Definitions.

12 Witkin Sum. Cal. Law Real Property § 340

[§ 340] Definitions.

(1) *Power of Termination.* A "power of termination" is the power to terminate a fee simple estate in real property in order to enforce a restriction in the form of a condition subsequent to which the estate is subject, regardless of the manner in which the power is characterized, e.g., "right of entry or reentry," "right of possession or repossession," "reserved power of revocation," etc. The term includes a possibility of reverter deemed to be and enforceable as a power of termination (see *infra*, this section). (C.C. 885.010(a)(1).) Such terms as "right of reentry," "right of repossession for breach of condition subsequent," and comparable terms used in other statutes mean "power of termination" as defined in C.C. 885.010. (C.C. 885.010(c).)

A power of termination is an interest in real property. (C.C. 885.010(b).) Hence, it is subject to provisions governing property interests, and is transferable whether it would be classified at common law as a right of entry or possibility of reverter. (Law Rev. Com. Comment.) (For Restatement coverage and prior California law, see *supra*, §129.)

(2) *Executory Interests.* Power of termination includes the power created in a transferee to terminate a fee simple estate in real property to enforce a restriction on the use of the real property in the form of a limitation or condition subsequent to which the fee simple estate is subject. This is true whether the power is characterized in the instrument that creates or evidences it as an executory interest, executory limitation, or otherwise. Power of termination includes the interest known at common law as an executory interest preceded by a fee simple determinable. (C.C. 885.010(a)(2).)

Traditionally the term "power of termination" referred to rights of entry and related interests retained by the grantor of real property. C.C. 885.010(a)(2) extends the definition to include an executory interest created in a transferee. (Law Rev. Com. Comment.)

(3) *Reasons for Including Executory Interests.* The definition of power of termination was extended to include executory interests in 1991, in accordance with the California Law Revision Commission's recommendation. The recommendation made the following points:

(a) Executory interests are subject to the rule against perpetuities, and under the statutory rule against perpetuities (see *supra*, §175 et seq.), such an interest could last for 90 years and act as an undesirable cloud on title. Powers of termination are not subject to the rule against perpetuities, but expire within 30 years if notice of intent to preserve the interest is not recorded under the marketable record title statute (see *infra*, §341). (21 Cal. Law Rev. Com. Reports, pp. 58, 59.)

(b) "The power of termination and the executory interest restricting the use of real property are functionally equivalent. These interests operate in the same fashion on the preceding fee simple, the distinguishing characteristic being the person in whom the interest is originally created. But since both types of interest are transferable, the nature of the interest's origin does not restrict the class of persons who may ultimately hold the interest." (21 Cal. Law Rev. Com. Reports, p. 59.) These functional equivalents should be treated alike and should both be subject to the marketable record title statute. (21 Cal. Law Rev. Com. Reports, p. 60.)

(4) *Exclusions*. The provisions governing powers of termination do not apply to (a) powers of termination conditioned on the continued production or removal of oil or gas or other minerals, or (b) powers of termination in separately owned improvements or fixtures conditioned on the continued leasehold or possessory interest in the underlying land. (C.C. 885.015; see Legislative Com. Comment [C.C. 885.015 clarifies that power of termination provisions apply only to classical possibilities of reverter and rights of entry].)

Fees simple determinable and possibilities of reverter (see *supra*, §16) were abolished in 1982. Every estate that would be a common law fee simple determinable is now a fee simple subject to a restriction in the form of a condition subsequent, and every interest that would be a common law possibility of reverter is now a power of termination, and is enforceable as such. (C.C. 885.020; see *Walton v. Red Bluff* (1991) 2 C.A.4th 117, 126, 3 C.R.2d 275 [trial court correctly treated interest granted as power of termination].) Because C.C. 885.020 applies only to fee simple estates, it does not affect determinable life estates or determinable terms for years. (Law Rev. Com. Comment.)

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c. Powers of Termination.

2. Expiration.

12 Witkin Sum. Cal. Law Real Property § 341

[§ 341] Expiration.

(1) *Dates.* A recorded power of termination expires at the later of the following dates:

(a) 30 years after the date the instrument evidencing the power is recorded. (C.C. 885.030(a)(1).)

(b) 30 years after the date a notice of intent to preserve the power is recorded (see *infra*, §349), if the notice is recorded within 30 years after the recordation date of the instrument evidencing the power. (C.C. 885.030(a)(2).)

(c) 30 years after the date an instrument evidencing the power or a notice of intent to preserve the power is recorded, if the instrument or notice is recorded within 30 years after the last recordation of such an instrument or notice. (C.C. 885.030(a)(3).)

These statutory time periods are applicable regardless of a contrary provision in the evidencing instrument or another recorded document, unless the instrument or document provides an earlier expiration date. (C.C. 885.030(b).)

(2) *Expiration by Obsolescence.* A power of termination expires if it becomes obsolete. (C.C. 885.040(a).) This rule is applicable even if the 30-year statutory duration of the power has not elapsed or a notice of intent to preserve the power has been filed. (Law Rev. Com. Comment.)

A power of termination is obsolete if (a) the restriction to which the fee simple estate is subject is of no actual or substantial benefit to the holder; (b) enforcement of the power would not effectuate the purpose of the restriction; or (c) because of changed conditions, it would be inequitable to enforce the power. (C.C. 885.040(b).)

A power of termination may not expire due to obsolescence during the grantor's life if it arises from a grant by a natural person without consideration to a public entity or to a tax-exempt organization. (C.C. 885.040(c).)

(3) *Effect of Expiration.* Expiration of a power of termination makes it unenforceable and is equivalent for all purposes to a termination of the power of record and a quitclaim of the power to the owner of the estate. Actual execution and recording of a termination and quitclaim are not necessary. (C.C. 885.060(a).) Expiration also terminates

the restriction to which the estate is subject and renders it unenforceable by other means, including injunction and damages. (C.C. 885.060(b).)

C.C. 885.060(b) does not apply to a restriction for which a power of termination has expired under C.C. 885.010 et seq. if the restriction is also an equitable servitude alternatively enforceable by injunction. The equitable servitude must "remain enforceable by injunction and any other available remedies" but must "not be enforceable by a power of termination." (C.C. 885.060(c).) (On equitable servitudes, see *infra*, §440 et seq.) C.C. 885.060(c) is declaratory of existing law, and is not to be construed to make enforceable any restriction prohibited or made unenforceable by other provisions of the law, including C.C. 53 (see *supra*, §201). (C.C. 885.060(c).)

(4) *Effect of Rule Against Perpetuities.* By providing for expiration of a power of termination 30 years after recordation of the evidencing instrument, C.C. 885.030 supplements the rule against perpetuities, which is inapplicable to reversionary powers of termination (see *supra*, §188). (Law Rev. Com. Comment to C.C. 885.030.)

Executory interests remain subject to the limitations provided in the statutory rule against perpetuities (see *supra*, §175 et seq.). An executory interest that becomes invalid under the statutory rule against perpetuities may not be renewed under C.C. 885.010 et seq., and if an executory interest terminates under C.C. 885.010 et seq., it is fully terminated and does not continue for purposes of the statutory rule against perpetuities. (Law Rev. Com. Comment to C.C. 885.010.)

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3. Exercise.

12 Witkin Sum. Cal. Law Real Property § 342

[§ 342] Exercise.

(1) *Method of Exercise.* A power of termination may be exercised only by notice or by civil action and, if the power of termination is of record, the exercise must be of record. (C.C. 885.050.) Hence, even if the power is phrased in terms of a right of entry, it may be exercised only by notice or by civil action. (Law Rev. Com. Comment.)

(2) *Statute of Limitations.* The notice must be given, and any action commenced, within 5 years after breach of the restriction to which the estate is subject. However, the parties may agree to a longer period by a waiver or extension recorded before expiration of the 5-year period. (C.C. 885.050; see Law Rev. Com. Comment [former law was unclear as to limitation period applicable to power of termination].)

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4. Operative Date of Provisions.

12 Witkin Sum. Cal. Law Real Property § 343

[§ 343] Operative Date of Provisions.

Subject to the 5-year grace period for recording a notice of intent to preserve (see C.C. 880.370, *infra*, §349), the provisions governing the powers of termination apply as of the operative date of C.C. 885.010 et seq., to all such powers, regardless of when executed or recorded. (C.C. 885.070(a).) If the breach of the restriction to which the estate is subject occurred before the operative date, and the power of termination was not exercised by that date, it must be exercised, or in the case of a power of termination of record, exercised of record, within the earlier of (1) the time allowed by the law in effect immediately before the operative date, or (2) 5 years after the operative date. (C.C. 885.070(b).)

As used in C.C. 885.070, "operative date" means the operative date of C.C. 885.010 et seq. as enacted (January 1, 1983). However, with respect to an amendment to C.C. 885.010 et seq., it is the operative date of the amendment. (C.C. 885.070(c).)

In *Concord & Bay Point Land Co. v. Concord* (1991) 229 C.A.3d 289, 280 C.R. 623, defendant's fee in a parcel was subject to a condition subsequent in favor of plaintiff limiting use of the property to a "right-of-way for an electric railroad." The condition was breached in 1975 when railway tracks were removed. Plaintiff, in 1987, sought to exercise its power of termination based on the breach. *Held*, the action was untimely.

(a) Under C.C. 885.070(b), a power of termination must be exercised within the earlier of 5 years after January 1, 1983 (the operative date of C.C. 885.010 et seq.), or the time allowed by the law in effect before that date. Because plaintiff exercised its power within 5 years after January 1, 1983, the question is whether prior law establishes an earlier limitation date. (229 C.A.3d 299.)

(b) The interest held by the grantor of a fee subject to a condition subsequent has commonly been referred to as a right of reentry, as well as a power of termination. (229 C.A.3d 300, citing the text; see *supra*, §129.) Thus, the applicable period under prior law is provided by C.C.P. 320, which bars a right of entry more than 5 years from the time the right accrues. Here, the right accrued in 1975 when the condition was breached and the period expired in 1980. (229 C.A.3d 299, 301.) (See *Sanders v. East Bay Mun. Util. Dist.* (1993) 16 C.A.4th 125, 133, 20 C.R.2d 1 [following

Concord & Bay Point Land Co.].)

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d. Unperformed Contracts for Sale of Real Property.

12 Witkin Sum. Cal. Law Real Property § 344

[§ 344] Unperformed Contracts for Sale of Real Property.

(1) *Definitions.* "Contract for sale of real property" means an agreement to convey title, within 1 year from the date of the contract, on satisfaction of specified contractual conditions. This definition applies regardless of the designation set forth in the agreement, e.g., land sale contract, deposit receipt, etc. (C.C. 886.010(a).) However, installment land contracts not performable within 1 year are not within this definition. (Law Rev. Com. Comment.)

"Recorded contract for sale of real property" includes the entire terms of a contract recorded in its entirety or evidenced by a recorded memorandum or short form. (C.C. 886.010(b).)

(2) *Expiration Dates.* A recorded contract for sale of real property expires of record at the later of (a) 5 years after the contractual date for conveyance of title or, if no date is provided, 5 years after the last contractual date for satisfaction of the contractual conditions, or (b) if there is a recorded extension of the contract within the aforementioned 5-year period, 5 years after the conveyance date provided in the extension or, if no date is provided, 5 years after the last date provided in the extension for satisfaction of the contractual conditions. (C.C. 886.030(a).) The effect of C.C. 886.030(a), for marketability of title purposes, is to prescribe a maximum life for real property sales contracts based exclusively on the record. C.C. 886.030(a) operates to clear record title of the contract after the prescribed time periods even though the general statute of limitations has not run. (Law Rev. Com. Comment.)

The prescribed time periods may be waived or extended, but only by an instrument recorded before expiration of the periods. (C.C. 886.030(b).)

(3) *Effect of Expiration.* A contract that has expired has no effect, and is not an encumbrance or a cloud on the title to the real property as against third persons. (C.C. 886.040.)

(4) *Release of Contract.* If the purchaser fails to satisfy the contractual conditions and does not seek performance or restitution of the amounts paid, the purchaser must, on demand, execute a duly acknowledged release of the contract to the seller. (C.C. 886.020.) This provision is intended to enhance marketability of title without the need to bring a quiet title action or to await the lapse of the 5-year period (see *supra*). (Law Rev. Com. Comment.) Nothing in C.C. 886.020 makes a release or demand for a release a condition precedent to an action to clear title to the property. (C.C. 886.020.)

A buyer who wilfully violates C.C. 886.020 is liable for the seller's damages, including court costs and reasonable attorneys' fees in an action to clear title. (C.C. 886.020.)

(5) *Operative Dates of Provisions.* The provisions regarding contracts for the sale of real property apply as of January 1, 1983, to all recorded contracts for sale of real property, regardless of when recorded (C.C. 886.050(a)), subject to a 2-year grace period (C.C. 886.050(b)).

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3. Interests Covered by Statute.

e. Dormant Mineral Rights.

1. Need for Legislation.

12 Witkin Sum. Cal. Law Real Property § 345

[§ 345] Need for Legislation.

The California Law Revision Commission in 1984 explained the need for legislation relating to dormant mineral rights:

(1) "It is a common occurrence in California conveyancing that a grantor of real property reserves mineral rights from the grant, even though there may be no reasonably foreseeable possibility that the rights will ever be exploited. The pattern of large-scale reservation of mineral rights on a speculative basis leaves many titles unnecessarily clouded and substantially impairs the marketability of otherwise useful real property." (17 Cal. Law Rev. Com. Report, p. 961.)

(2) Because severed mineral rights can take the form of a fee interest, this situation can persist indefinitely. "Even a grant of minerals following a typical reservation of mineral rights that by its terms is limited in duration may violate the Rule Against Perpetuities, so that what appears to be a limited mineral right is in fact a perpetual mineral right." (Report, p. 961.)

(3) "The impairment of marketability caused by dormant mineral rights affects both surface and subsurface interests. A conveyance of subsurface mineral rights includes the right of access over the surface and restricts the use of the surface. ... Old mineral rights created in the 19th century can adversely affect the development of the surface in the 20th century despite changed conditions that have made development of the surface of greater importance to society as a whole than the undeveloped mineral rights and that have made the value of the undeveloped mineral rights insignificant in comparison with the value of the surface." (Report, p. 962.)

(4) "Dormant mineral rights also impede development of the subsurface minerals. The existence of a dormant mineral interest discourages drilling and other mineral exploration efforts by increasing the risks associated with such operations: the owners of the interests are often difficult to identify and locate, and mineral exploiters face the possibility of severe penalties if they drill without obtaining the consent of all the mineral-rights owners, for example, by a requirement of accounting to nonconsenting owners (who run no risk) for a share of production. The impediment of dormant mineral rights on both surface and subsurface interests can make the real property practically unmarketable." (Report, p. 962.)

(5) *Gerhard v. Stephens* (1968) 68 C.2d 864, 69 C.R. 612, 442 P.2d 692, holding that mineral interests are subject to abandonment (see *infra*, §793), does not offer a completely satisfactory solution, for it requires a judicial determination of intent to abandon, and applies only to mineral rights in fugacious minerals that are incorporeal hereditaments. (Report, pp. 963. 964.) "Presumably mineral rights in nonfugacious minerals, which may take the form of a severed fee, are not subject to abandonment." (Report, p. 964.)

(6) Statutes of other states have approached this problem in different ways. (Report, p. 965.) The Commission chose a statute that protects the mineral rights owner while still enabling termination of dormant mineral rights. "Under this statute, an action could be brought to terminate mineral rights that have been dormant for 20 years, provided the record also evidences no activity involving the minerals during that period, the holder of the mineral rights fails to record a notice of intent to preserve the mineral rights within that period, and no taxes are paid on the mineral rights within that period. ... To protect the interests of a person who through inadvertence fails to record, the statute provides that where the mineral right has substantial value, the court has discretion to permit late recording or to award compensation for the value of the right taken, on an equitable basis. This provision will be inapplicable in most cases, since the value of most dormant mineral rights is nominal or zero." (Report, p. 966.)

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e. Dormant Mineral Rights.

2. Statutory Provisions.

12 Witkin Sum. Cal. Law Real Property § 346

[§ 346] Statutory Provisions.

(1) *Mineral Rights Covered.* "Mineral right" means "an interest in minerals, regardless of character, whether fugacious or nonfugacious, organic or inorganic, that is created by grant or reservation, regardless of form, whether a fee or lesser interest, mineral, royalty, or leasehold, absolute or fractional, corporeal or incorporeal, and includes express or implied appurtenant service rights." (C.C. 883.110.) However, C.C.P. 883.110 et seq. do not apply to mineral rights of the United States, California, or local public entities, or to the mineral rights of others, to the extent provided by C.C. 880.240 (supra, §337). (C.C. 883.120.)

(2) *Abandonment or Termination of Mineral Lease.* If a mineral lease has expired or been abandoned, the lessor (or the lessor's successor in interest) may demand either a deed quitclaiming interest in the mineral right, or, if appropriate, an instrument surrendering or terminating the interest that has expired or has been abandoned. (C.C. 883.140(a), 883.140(b).) A lessee (or the lessee's successor in interest) who fails to execute, acknowledge, and deliver or record the instrument is liable for \$ 150 in addition to all damages sustained as a result of the lessee's failure to do so, including, but not limited to, court costs and reasonable attorneys' fees in an action to clear title. (C.C. 883.140(a), 883.140(c).) Neither such an instrument nor a demand for one is a condition precedent to an action to clear title to the lessor's interest. (C.C. 883.140(d).)

(3) *Notice of Intent To Preserve Right.* The owner of a mineral right may record a notice of intent to preserve the right at any time. (C.C. 883.230(a).) In lieu of the specific statements required by C.C. 880.330(b)(2), 880.330(b)(3) (infra, §350), and notwithstanding C.C. 880.340 (infra, §350), the notice "may refer generally and without specificity to any or all mineral rights claimed by claimant in any real property situated in the county." (C.C. 883.230(b).) Recordation is conclusive evidence of nondormancy for purposes of C.C. 883.010 et seq., and creates a presumption affecting the burden of proof that the mineral right has not been abandoned for purposes of an abandonment determination under common law. (Law Rev. Com. Comment.)

(4) *Action To Terminate Interest.* The owner of real property subject to a dormant mineral right (see infra, this section) may bring an action to terminate the right. (C.C. 883.210.) The action is brought in the superior court of the county in which the real property is located (C.C. 883.240(a)) in the same manner and subject to the same procedure as

an action to quiet title (C.C. 883.240(b)).

(5) *Dismissal Where Notice Is Recorded.* The court must permit the owner of the mineral right to record a notice of intent to preserve the right as a condition of dismissal of the action, on payment of the property owner's litigation expenses, including reasonable costs and attorneys' fees, attributable to the mineral right. (C.C. 883.250.)

(6) *When Mineral Right Is Dormant.* A mineral right is dormant if all of the following conditions exist for 20 years immediately before an action to terminate the right is commenced:

(a) There is no exploration, drilling, mining, development, production, or other operation that affects the minerals, either on or below the surface of the real property or on other property, whether or not unitized or pooled with the real property. (C.C. 883.220(a).)

(b) The mineral right is not separately assessed for property tax, or if so assessed, no taxes are paid on the assessment. (C.C. 883.220(b).)

(c) No instrument creating, reserving, transferring, or evidencing the mineral right is recorded. (C.C. 883.220(c).)

A mineral right is not dormant if a notice to preserve the right is recorded within the 20-year period (C.C. 883.230(c)(1)) or, under C.C. 883.250, after the action to terminate is commenced (C.C. 883.230(c)(2)).

(7) *Effect of Termination.* A terminated interest is unenforceable and is deemed to have expired. The termination order "is equivalent for all purposes to a conveyance of the mineral right to the owner of the real property." (C.C. 883.260.)

(8) *Other Remedies Available.* Nothing in C.C. 883.110 et seq. limits or affects the common law governing abandonment of a mineral right or other statutory procedure for clearing an abandoned mineral right from the title to real property. (C.C. 883.130.)

(9) *Operative Dates of Provisions.* Subject to the 5-year grace period for recording notice of intent to preserve an interest in real property (see *infra*, §349), the provisions governing the termination of dormant mineral rights apply as of January 1, 1985, to all mineral rights, regardless of when executed or recorded. (C.C. 883.270.)

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f. Abandoned Easements.

1. Need for Legislation.

12 Witkin Sum. Cal. Law Real Property § 347

[§ 347] Need for Legislation.

The California Law Revision Commission in 1985 explained the need for legislation relating to abandoned easements:

(1) "Almost all improved land and much unimproved land is either benefitted or burdened by easements. Easements tend to make the land and the improvements thereon more usable or beneficial. Thus the mere existence of the burden of an easement may not indicate that the title is unmarketable; it may only mean that when these interests become obsolete, they constitute an unreasonable encumbrance." (18 Law Rev. Com. Reports, p. 261.)

(2) "If an easement acquired by prescription becomes obsolete, it can be extinguished through nonuse. If an easement acquired by grant becomes obsolete, nonuse alone is not sufficient to extinguish the easement; the intent to abandon the easement must also be shown." (Report, p. 261.)

(3) Clearing record title of an obsolete easement created by grant thus requires a judicial proceeding and proof of intent to abandon. "The fact that an easement has not been used for a long period of time is not itself sufficient to infer an abandonment. Similarly, the mere fact that the holder of an easement fails to maintain and repair it, or selects an alternate route, is insufficient to infer an abandonment." (Report, p. 261.)

(4) The Law Revision Commission recommended that "an easement be deemed abandoned if it has been unused for at least 20 years continuously, without payment of taxes or any other record transaction relating to the easement." To accommodate cases where the easement holder's nonuse is merely temporary or where the easement is held for future use, the Commission further recommended that the easement holder be permitted to extend the easement's duration for 20 years at a time by recording a notice of intent to preserve the easement. In the case of large easement holders, such as public utilities, where the burden of recording as to multiple easements could be substantial, a single recording should suffice for all easements in a county. "This will provide a relatively simple but effective means of ensuring preservation of the easement through periods of nonuse." (Report, p. 262.)

(5) "This scheme for clearing abandoned easements from record title would not apply to public entity easement holders. A public entity can always be located. An agreement with the public entity may be negotiated if the easement is

no longer necessary for public use." (Report, p. 262.)

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f. Abandoned Easements.

2. Statutory Provisions.

12 Witkin Sum. Cal. Law Real Property § 348

[§ 348] Statutory Provisions.

(1) *Easement.* As the term is used in C.C. 887.010 et seq., "easement" means "a burden or servitude upon land, whether or not attached to other land as an incident or appurtenance, that allows the holder of the burden or servitude to do acts upon the land." (C.C. 887.010.) However, C.C. 887.010 et seq. do not apply to an easement that is part of a unified or reciprocal system for the mutual benefit of multiple parties (e.g., planned developments such as condominiums) (C.C. 887.020; Law Rev. Com. Comment) or to negative easements (Law Rev. Com. Comment to C.C. 887.010).

(2) *Notice of Intent To Preserve Easement.* The owner of an easement may record a notice of intent to preserve the easement at any time. (C.C. 887.060(a).) In lieu of the specific statements required by C.C. 880.330(b)(2) and (b)(3) (infra, §350), and notwithstanding C.C. 880.340 (infra, §350), the notice "may refer generally and without specificity to any or all easements claimed by the claimant in any real property situated in the county." (C.C. 887.060(b).) Recordation of the notice does not necessarily preclude abandonment under the general principles governing abandonment for nonuse on a showing of intent to abandon (Law Rev. Com. Comment to C.C. 887.050), but it does create a presumption affecting the burden of proof that the easement has not been abandoned (Law Rev. Com. Comment to C.C. 887.060).

(3) *Action To Establish Abandonment.* The owner of real property subject to an easement may bring an action to establish abandonment of the easement and to clear record title. (C.C. 887.040(a).) The action is brought in the superior court in the county where the real property subject to the easement is located (C.C. 887.040(b)) in the same manner and subject to the same procedure as an action to quiet title (C.C. 887.040(c)).

(4) *Dismissal Where Notice Is Recorded.* The court must permit the owner of the easement to record a notice of intent to preserve the easement as a condition of dismissal of the action, on payment of the property owner's litigation expenses, including reasonable costs and attorneys' fees, attributable to the easement. (C.C. 887.070.)

In *Worthington v. Alcala* (1992) 10 C.A.4th 1404, 13 C.R.2d 374, plaintiffs sued to terminate an easement on their property, alleging in one cause of action that the easement had been extinguished by abandonment under C.C. 887.050

(*infra*, this section), and in another cause of action that it had been extinguished by prescription (see *infra*, §425). After trial, defendants informed the judge that they had recorded a late notice of intent to preserve their easement under C.C. 887.070. The judge ruled that, although defendants had not fully complied with C.C. 887.070, because they had neither obtained permission from the court to record the notice nor paid plaintiff's litigation expenses into court, the parties should not be denied "the benefit of the substance of the section." (10 C.A.4th 1407.) Accordingly, the judge dismissed the cause of action based on abandonment and awarded plaintiffs their litigation expenses. However, plaintiffs prevailed on their cause of action based on prescription. *Held*, it was error to assess litigation costs under C.C. 887.070.

(a) The primary purpose of C.C. 887.070 is not the payment of litigation costs, but to enable "the owner of an easement to preserve the easement, after commencement of an action to establish its abandonment." (10 C.A.4th 1411, quoting Law Rev. Com. Comment to C.C. 887.070.)

(b) Litigation costs may be imposed under C.C. 887.070 only where the sole theory of extinguishment of the easement is statutory abandonment, or where "other theories are voluntarily dismissed" so that the application of the statute will result in preservation of the easement. (10 C.A.4th 1411.)

(5) *When Easement Is Abandoned*. An easement is abandoned if all of the following conditions exist for 20 years immediately before an action to establish abandonment is commenced:

(a) The easement is not in use at any time. (C.C. 887.050(a)(1).)

(b) The easement is not separately assessed for property tax purposes, or, if so assessed, no taxes are paid on the assessment. (C.C. 887.050(a)(2).)

(c) No instrument creating, reserving, transferring, or evidencing the easement is recorded. (C.C. 887.050(a)(3).)

C.C. 887.050 applies notwithstanding a contrary provision in the instrument creating, reserving, transferring, or otherwise evidencing the easement or in another recorded document, unless the instrument or document provides an earlier expiration date. (C.C. 887.050(b).) Thus, contrary to former case law, an easement obtained by grant may be lost by mere nonuse. (Law Rev. Com. Comment.)

An easement is not abandoned if a notice to preserve it is recorded within the 20-year period or, pursuant to C.C. 887.070, after an action to establish abandonment is commenced. (C.C.P. 887.060(c).)

(6) *Effect of Abandonment*. An abandoned easement is unenforceable and is deemed to have expired. The order establishing abandonment "is equivalent for all purposes to a conveyance of the easement to the owner of the real property." (C.C. 887.080.)

(7) *Other Remedies Available*. Nothing in C.C. 887.010 et seq. limits or affects the common law governing the abandonment of easements or any procedure for clearing an abandoned easement from the title to real property. (C.C. 887.030.) (On termination of easements, see *infra*, §421 et seq.)

(8) *Operative Dates of Provisions*. Subject to the 5-year grace period for recording notice of intent to preserve an interest in real property (see *infra*, §349), and to the exclusion provided by C.C. 887.020, C.C. 887.010 et seq. applied as of January 1, 1986, to all easements, regardless of when executed or recorded. (C.C. 887.090.)

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CHAPTER XVII - Real Property

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III. TITLES

F. Marketable Record Title.

4. Preservation of Interest by Notice.

a. Recordation of Notice.

12 Witkin Sum. Cal. Law Real Property § 349

[§ 349] Recordation of Notice.

(1) *Requirement.* If the expiration date for an interest in real property depends on recordation of a notice of intent to preserve the interest, a person may preserve the interest by recording the notice before the expiration date. Recordation after expiration of the interest does not preserve it. (C.C. 880.310(a).) As long as the interest has not expired, preservation in perpetuity is possible. (Law Rev. Com. Comment.)

(2) *Effect.* Recordation of notice neither precludes a court from determining that an interest has been abandoned or is otherwise unenforceable, whether before or after recordation, nor validates or renders enforceable a claim or interest that is otherwise invalid or unenforceable. However, recordation does create a presumption affecting the burden of proof that the person claiming the interest has not abandoned it and does not intend to do so. (C.C. 880.310(b); see *Walton v. Red Bluff* (1991) 2 C.A.4th 117, 130, 131, 132, 134, 3 C.R.2d 275 [compliance with recording requirement is not element of cause of action; lack of compliance is affirmative defense].)

(3) *Who May Record.* The notice may be recorded by (a) a person claiming the interest, or (b) a person acting on behalf of the claimant if authorized to do so or if the claimant is one of a class whose identity cannot be established or is uncertain at the time of recordation. (C.C. 880.320.)

(4) *Procedure.* The notice must be recorded in the county in which the real property is located. (C.C. 880.350(a).) The county recorder must index the notice in the index of grantors and grantees. The claimant under the notice is deemed to be the grantor, and the index entry must be for the grantor. If the notice is recorded by or on behalf of more than one claimant, each claimant is deemed to be a grantor requiring a separate index entry. (C.C. 880.350(b).)

(5) *Grace Period.* If the period during which the notice must be recorded expired before, on, or within 5 years after January 1, 1983, the period was extended until January 1, 1988. (C.C. 880.370; see *Severns v. Union Pac. R. Co.* (2002) 101 C.A.4th 1209, 1220, 125 C.R.2d 100 [because deed conveying fee simple subject to condition subsequent and creating power of termination was recorded in 1901, grantor's successors in interest had until January 1, 1988, to record notice of intent to preserve interest; power of termination expired when they did not do so].)

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4. Preservation of Interest by Notice.

b. Content and Form of Notice.

12 Witkin Sum. Cal. Law Real Property § 350

[§ 350] Content and Form of Notice.

A notice of intent to preserve an interest in real property must be in writing and signed and verified by or on behalf of the claimant. If made on behalf of a claimant, the notice must include a statement of the authority of the person making it. (C.C. 880.330(a).)

The notice must contain all of the following:

(1) Each claimant's name and mailing address. (C.C. 880.330(b)(1).)

(2) A statement of the character of the interest, including a reference by record location to the recorded document creating or evidencing the interest. (C.C. 880.330(b)(2).)

(3) A legal description of the property in which the interest is claimed, which may be the same as that contained in the recorded document creating or evidencing the interest. (C.C. 880.330(b)(3).)

In addition to these requirements, the notice is subject to all statutory requirements for recorded documents. (C.C. 880.330; see *supra*, §316 et seq.)

C.C. 880.340 prescribes the form of the notice and makes it subject to all other statutory requirements for recorded documents. In addition to the information required by C.C. 880.330, the form contains statements that the notice is not recorded for the purpose of slandering title (see *infra*, §351) and that the claimant believes the information contained in the notice to be true. (C.C. 880.340; for form of notice, see Cal. Civil Practice, 1 Real Property Litigation, §5:67.)

SUPPLEMENT: [This section is current through the latest supplement]
See Cal. Civil Practice, 1 Real Property Litigation, §5:70 [form of notice].



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4. Preservation of Interest by Notice.

c. Slander of Title by Recording.

12 Witkin Sum. Cal. Law Real Property § 351

[§ 351] Slander of Title by Recording.

No one may record a notice of intent to preserve an interest in real property for the purpose of slandering title to the property. If the court in an action to establish or quiet title determines that a notice was recorded for this purpose, it must impose on the person who recorded it the cost of the action (including reasonable attorneys' fees) and damages caused by the recording. (C.C. 880.360; see Law Rev. Com. Comment [C.C. 880.360 makes clear that recordation of notice is not privileged].)

SUPPLEMENT: [This section is current through the latest supplement]



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G. Title Insurance.

1. Nature and Distinctions.

12 Witkin Sum. Cal. Law Real Property § 352

[§ 352] Nature and Distinctions.

(1) *Abstract of Title.* Title searching consists of examining the records and preparing an abstract or certificate of title for a particular transaction. (See *J.H. Trisdale v. Shasta County Title Co.* (1956) 146 C.A.2d 831, 837, 304 P.2d 832 [title company's preliminary report is similar to abstract of title]; *Southland Title Corp. v. Superior Court* (1991) 231 C.A.3d 530, 536, 282 C.R. 425, *infra*, §363 [distinguishing preliminary title report from abstract of title]; 1119 *Delaware v. Continental Land Title Co.* (1993) 16 C.A.4th 992, 999, 20 C.R.2d 438, *infra*, §359 [liability of abstractor for failing to report recorded conditional use permit]; *Siegel v. Fidelity Nat. Title Ins. Co.* (1996) 46 C.A.4th 1181, 1190, 1192, 54 C.R.2d 84, *infra*, §363 [distinguishing preliminary title report from abstract of title; citing *Southland*]; 50 *A.L.R.4th* 314 [abstractor's liability]; 1 *Am.Jur.2d* (1994 ed.), *Abstracts of Title* §1 et seq.; 1 *Am.Jur.* P.P. Forms (2003 ed.), *Abstracts of Title* §5 et seq.; 1 *Am.Jur.* Legal Forms 2d (1999 ed.), *Abstracts of Title* §3:31 et seq.)

(2) *Title Insurance.* Modern title insurance practice differs from title searching in several important respects:

(a) *Title information.* The title insurance corporations (usually called "title companies") have already searched the records of title to all of the property in a particular area in which they operate, and have posted the results on their own maps and "lot books." (See C.E.B., *Title Insurance Practice* 2d, §4.10 et seq.; 3 *Miller & Starr* 3d §7:7 et seq.; 39 *Cal. L. Rev.* 235, 236, 244 [overview of title insurance in California]; 38 *A.L.R.4th* 968 [title company's rights in title information].)

(b) *Insured risks.* The title insurance policy, unlike the abstract or certificate of title, is not confined to risks disclosed by the record, but protects against some off-record risks. (See 3 *Miller & Starr* 3d §7:26; 39 *Cal. L. Rev.* 236, 238; 3 *U.C.L.A. L. Rev.* 523 [insurance of oil and gas leases].)

(c) *Contract to indemnify.* The title insurance policy insures the title in a specified sum against loss from any of the risks covered. A title policy is a "written instrument or contract by means of which title insurance liability is assumed." (*Ins.C.* 12340.2.) Title insurance means insuring, guaranteeing, or indemnifying against loss or damage suffered by reason of (1) defects in the title to real or personal property, (2) errors in title searches relating to the title to real or personal property, or (3) liens or encumbrances on or the invalidity or unenforceability of liens or encumbrances on real or personal property. (*Ins.C.* 104, 12340.1; see *King v. Stanley* (1948) 32 C.2d 584, 590, 197 P.2d 321 ["Title insurance is a contract to indemnify against loss through defects in the title or against liens or encumbrances that may affect the

title at the time when the policy is issued"]; *Hocking v. Title Ins. & Trust Co.* (1951) 37 C.2d 644, 234 P.2d 625, *infra*, §360; *Overholtzer v. Northern Counties Title Ins. Co.* (1953) 116 C.A.2d 113, 253 P.2d 116, *infra*, §§359, 361; 16 Powell §92.01; Cal. Civil Practice, 1 Real Property Litigation, §5:39 et seq.; 39 Cal. L. Rev. 235.)

A title insurance policy is only a contract to indemnify. Hence, assuming that a purchaser insured by a standard coverage policy is entitled to rely on representations made to its lender, the policy is not a representation that the contingency insured against will not occur. (*Walters v. Marler* (1978) 83 C.A.3d 1, 18, 147 C.R. 655; see *Lawrence v. Chicago Title Ins. Co.* (1987) 192 C.A.3d 70, 74, 237 C.R. 264 [where insured lien of deed of trust was junior to undisclosed lien, loss was limited by policy terms to amount necessary to recover secured indebtedness; citing *Walters*]; *Cale v. Transamerica Title Ins.* (1990) 225 C.A.3d 422, 427, 428, 275 C.R. 107 [title insurance indemnifies lender only against loss with respect to secured indebtedness, not diminution of potential profits from resale; following *Lawrence*]; *Karl v. Commonwealth Land Title Ins. Co.* (1993) 20 C.A.4th 972, 978, 24 C.R.2d 912 [secured lender suffers indemnifiable loss under title policy only if lender fails to recoup debt because of insured-against senior lien; following *Lawrence* and *Cale*]; C.E.B., Title Insurance Practice 2d, §6.1, 6.2.)

(d) *Significance*. Title insurance is now so well established in California that it is virtually impossible to transfer land or obtain realty loans without a policy. (See 3 Miller & Starr 3d §7:1; 39 Cal. L. Rev. 244; 6 Santa Clara Lawyer 10.) Hence, in an escrow transaction for the purchase or exchange of real property, if a policy of title insurance will not be issued, the buyer or the parties to the exchange must receive, sign, and acknowledge a specified notice regarding the advisability of obtaining title insurance. (C.C. 1057.6.)

West's Key Number Digest, Insurance k.2610 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Abstract of Title*. See 1 Am.Jur.2d (2005 ed.), *Abstracts of Title* §1 et seq.; 1 Am.Jur. Legal Forms 2d (2007 ed.), *Abstracts of Title* §3:29 et seq.

(2) *Title Insurance*. See *Radian Guaranty v. Garamendi* (2005) 127 C.A.4th 1280, 1284, 1288, 26 C.R.3d 464 [policy protecting lender from borrower's default for "loss due to undisclosed liens" constituted title insurance, not mortgage guaranty insurance].



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G. Title Insurance.

2. Title Companies.

12 Witkin Sum. Cal. Law Real Property § 353

[§ 353] Title Companies.

(1) *Regulation.* California title insurers are subject to a variety of statutory regulations. (See *Ins.C. 12340* et seq.) An applicant for a title insurance license must demonstrate to the Insurance Commissioner (a) its intention to compete actively in the title insurance market in each county in which it intends to do business, and (b) that no more than 50% of its title orders will be derived from "controlled business sources." (*Ins.C. 12396* et seq.; see *21 Pacific L. J. 509* [statutes codified existing case law and Department of Insurance bulletin]; *Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 C.4th 26, 43, 77 C.R.2d 709, 960 P.2d 513, 13 Summary (10th), Equity, §112* [unfair competition law applies to title insurers; *Ins.C. 12414.26* and *12414.29* did not preclude action by prospective sellers of tax-defaulted property alleging conspiracy among title insurers to deny issuance of title insurance to property acquired at tax sale].)

Title insurers must maintain financial stability (*Ins.C. 12350* et seq., *12370* et seq., *12380* et seq.) and must furnish quarterly financial statements to the Insurance Commissioner (*Ins.C. 12389.4*). Rates and commissions are regulated (*Ins.C. 12401* et seq., *12404* et seq.), and rebates and discounts are prohibited (*Ins.C. 12405*). Rate schedules must be filed with the Insurance Commissioner, posted in the insurer's place of business, and made available to the public. (*Ins.C. 12401.9*.) Insurers are also subject to the disciplinary authority of the commissioner. (*Ins.C. 12410, 12411*.) (See *Ins.C. 12413.1* [disbursement of funds from escrow account]; *Ins.C. 12413.2* [deposit or collection of items connected with escrow]; *Ins.C. 12413.5* [interest on escrow fund deposits]; *Ins.C. 12414.13* et seq. [complaints by aggrieved parties, hearing procedure, and judicial review]; *Ins.C. 12414.20* et seq. [examination by commissioner]; *Ins.C. 12402* et seq. [regulation of advisory organizations]; *Overholtzer v. Northern Counties Title Ins. Co. (1953) 116 C.A.2d 113, 122, 253 P.2d 116; Hirsch v. Bank of America (2003) 107 C.A.4th 708, 716, 132 C.R.2d 220* [property owners were not entitled to interest that banks illegally paid to escrow companies that had deposited substantial escrow funds with banks; even though under *Ins.C. 12413.5*, escrow companies should not have retained interest, property owners were not deprived of any money to which they were entitled given that banks should not have extended interest in first place]; C.E.B., Title Insurance Practice 2d, §1.8 et seq.; 3 Miller & Starr 3d §7:2 et seq.; 39 *Cal. L. Rev.* 235, 246; on preparation of documents as illegal practice of law, see 1 *Cal. Proc. (4th), Attorneys, §409*.)

(2) *Special Services.* Title companies offer additional services, including a preliminary report, a litigation guarantee, a chain of title report, a property search report, a complete title report, and handling of the escrow (see *supra*, §301). (See C.E.B., Title Insurance Practice 2d, §12.56, Chaps. 5 & 9; 3 Miller & Starr 3d §7:152 et seq.)

(3) *Underwritten Title Company*. A title insurer performs search and abstract functions and issues a policy; an underwritten title company only searches and prepares abstracts on which the insurer writes policies. (See *Ins.C.* 12340.5 [definition]; *Ins.C.* 12389 et seq. [regulations]; *Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 C.2d 305, 314, 70 C.R. 849, 444 P.2d 481; *Quackenbush v. Superior Court* (1997) 57 C.A.4th 660, 663, 67 C.R.2d 300 [*Ins.C.* 12389 does not impose mandatory duty on Insurance Commissioner to prohibit underwritten title company that has violated law from doing business or to warn public]; C.E.B., Title Insurance Practice 2d, §1.5.)

(4) *Insurer of Title Insurer*. A title insurance company may also obtain insurance to protect against liability for errors or omissions in the performance of its duties. (See *Northwestern Title Sec. Co. v. Flack* (1970) 6 C.A.3d 134, 146, 85 C.R. 693, *infra*, §365.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Regulation*. On regulation of title insurance marketing representatives, see *Ins.C.* 12418 et seq., added in 2008.

Preparation of documents as illegal practice of law:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §382.



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3. Construction of Title Policy.

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[§ 354] Construction of Title Policy.

Title policies should be interpreted in the same manner as other insurance policies, in favor of the insured and against the insurer. (See *Paramount Properties Co. v. Transamerica Title Ins. Co.* (1970) 1 C.3d 562, 568, 83 C.R. 394, 463 P.2d 746; *Coast Mut. Bldg.-Loan Assn. v. Security Title Ins. & Guarantee Co.* (1936) 14 C.A.2d 225, 229, 57 P.2d 1392; *National Holding Co. v. Title Ins. & Trust Co.* (1941) 45 C.A.2d 215, 220, 113 P.2d 906; *Overholtzer v. Northern Counties Title Ins. Co.* (1953) 116 C.A.2d 113, 122, 253 P.2d 116 [stressing that business is "practically" unregulated in that no state control is exercised over policy terms or rates]; *Walters v. Marler* (1978) 83 C.A.3d 1, 33, 147 C.R. 655; C.E.B., Title Insurance Practice 2d, §6.41; 3 Miller & Starr 3d §7:13.)

In *Manneck v. Lawyers Title Ins. Corp.* (1994) 28 C.A.4th 1294, 33 C.R.2d 771, plaintiffs sought declaratory relief as to defendant title insurer's duty to take legal action against a neighboring property owner, after plaintiffs discovered that improvements in their backyard encroached on the neighboring property. Defendant had advised plaintiffs that there was no coverage under their title insurance policy until they were "forced to remove" an encroaching structure. The trial judge found that there was no coverage. *Held*, affirmed.

(a) "Although insurance contract provisions relating to exclusions or exceptions from the performance of the basic, underlying obligations are construed strictly against the insurer and liberally in favor of the insured, courts may not put a strained or unnatural construction on the terms of a policy to manufacture an uncertainty or ambiguity where none reasonably exists." (28 C.A.4th 1302.)

(b) The policy terms on forced removal were clear and explicit, and the policy specifically excluded loss caused by matters that a correct survey would have disclosed and that were not shown by public record. Policy language pertaining to claims against the insured title was irrelevant because there were no such claims. (28 C.A.4th 1302, 1303.)

(c) Coverage could not be established by estoppel or waiver, and to require defendant to act under an implied covenant of good faith would improperly add a new obligation to the title insurance policy. (28 C.A.4th 1303, 1304.) (See *Golden Sec. Thrift & Loan Assn. v. First Amer. Title Ins. Co.* (1997) 53 C.A.4th 250, 255, 61 C.R.2d 442 [policy that insured lender against loss in event that "dimensions" of land were not accurately stated did not thereby insure for loss in event that total "area" of land was inaccurately stated]; *Magna Enterprises v. Fidelity Nat. Title Ins. Co.* (2002) 104 C.A.4th 122, 125, 127 C.R.2d 681 [policy that covered "[l]ack of a right to access to and from" insured's land did

not guarantee physical or practical access; although circumstances may have rendered access to insured's property difficult or impractical, insured did have right to access property].)

In *White v. Western Title Ins. Co.* (1985) 40 C.3d 870, 221 C.R. 509, 710 P.2d 309, plaintiffs purchased land bordering on a river. The vendors had previously given a mutual water corporation an easement for a water pipeline and for taking water from wells on the property. Although the easement was recorded, defendant company's preliminary report and title insurance policy made no mention of it. The water corporation filed a suit to enforce the easement and later dismissed it. Plaintiffs then filed the present action against defendant, seeking damages for the loss in value of the land due to the potential loss of groundwater. Defendant relied on a policy clause excluding coverage of "water rights, claims or title to water." (40 C.3d 878.) Held, the clause was not a defense.

(a) The policy must be construed against the insurer to protect the reasonable expectations of the insured. (40 C.3d 881, citing *Jarchow v. Transamerica Title Ins. Co.* (1975) 48 C.A.3d 917, 938, 939, 122 C.R. 470.)

(b) Accordingly, it should be interpreted as providing coverage for water rights of record within the scope of an ordinary title search (40 C.3d 882); and "a purchaser of a title policy could reasonably expect protection against recorded water rights even if they were not connected to an easement for wells or pipes" (40 C.3d 883).

The court also held that defendant was liable for negligence in failing to list the recorded easement in its preliminary title report. (40 C.3d 884.) The opinion took note of the 1982 enactment of *Ins.C. 12340.11*, providing that a preliminary report is not a representation as to the condition of title, but held that the statute was nonretroactive and inapplicable to this case. (40 C.3d 884.) (On preliminary title report, see *Ins.C. 12414.30* [preliminary report must incorporate specified statement advising perusal of exceptions and exclusions and warning that report is not representation as to condition of title]; *Lawrence v. Chicago Title Ins. Co.* (1987) 192 C.A.3d 70, 76, 77, 237 C.R. 264 [*White v. Western Title Ins. Co.*]; *Fidelity Nat. Title Ins. Co. v. Miller* (1989) 215 C.A.3d 1163, 1175, 264 C.R. 17 [*Ins.C. 12340.11*]; *Southland Title Corp. v. Superior Court* (1991) 231 C.A.3d 530, 536, 282 C.R. 425, *infra*, §363; C.E.B., Title Insurance Practice 2d, Chap. 5; 3 Miller & Starr 3d §7:173 et seq.)

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G. Title Insurance.

4. Coverage of Standard Policy.

12 Witkin Sum. Cal. Law Real Property § 355

[§ 355] Coverage of Standard Policy.

(1) *Defects Shown by Record.* The "California Land Title Association Standard Coverage Policy Form" is in general use in California. (For detailed discussion of its provisions, see C.E.B., Title Insurance Practice 2d, §6.5 et seq.; 3 Miller & Starr 3d §7:18 et seq.) Basically, the policy insures against loss or damage resulting from (a) title not being vested in the insured, at a specified date, (b) title not being marketable, and (c) defects, liens, or encumbrances. (See *Hocking v. Title Ins. & Trust Co.* (1951) 37 C.2d 644, 646, 234 P.2d 625; 87 A.L.R.3d 764 [what constitutes charge, encumbrance, or lien]; 8 A.L.R.4th 1246 [defects in, or conditions of, adjacent land as within coverage of policy]; on additional coverage provided by American Land Title Association owner's policy, see 3 Miller & Starr 3d §§7:15, 7:55.)

In *Barczewski v. Commonwealth Land Title Ins. Co.* (1989) 210 C.A.3d 406, 258 C.R. 386, plaintiff insured sought a declaration that defendant title insurer had a duty to defend her in a lawsuit involving transactions not on the public record. Affirming a summary judgment for defendant, the court said: "It is axiomatic that matters outside the public record are outside the chain of title which a title insurer must examine before issuing a standard [CLTA] policy, the type of policy which was issued in this case. This type of insurance cannot include matters involving personal dealings between individuals even though those dealings may involve the development of real property when those dealings are not part of the public record. If we were to accept [plaintiff's] blanket assertion of coverage in this case, we would dramatically change the function and purpose of title insurance with enormous social and financial repercussions." (210 C.A.3d 410.) (See *Lick Mill Creek Apartments v. Chicago Title Ins. Co.* (1991) 231 C.A.3d 1654, 1658, 283 C.R. 231, *infra*, §360; 1119 *Delaware v. Continental Land Title Co.* (1993) 16 C.A.4th 992, 999, 20 C.R.2d 438, *infra*, §359.)

(2) *Off-Record Defects.* Standard title policies insure some of the off-record risks that affect title to property; e.g., identity of a party (protection against forgery or change of name); competency of a party (protection against minority, insanity); status of a party (marital, bankruptcy, etc.). (See 39 *Cal. L. Rev.* 235, 239.)

The title insurance company also undertakes to protect the title by bringing or defending actions involving matters covered by the insurance provisions. (See 16 *Powell* §92.16; 3 Miller & Starr 3d §7:112 et seq.; 39 *Cal. L. Rev.* 240; *infra*, §365.)

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G. Title Insurance.

5. Excluded Risks of Standard Policy.

a. In General.

12 Witkin Sum. Cal. Law Real Property § 356

[§ 356] In General.

The standard policy contains a number of exclusions, such as (1) off-record defects known to the insured at the date of the policy and not communicated to the company (disclosure should be made); (2) defects, liens, etc., created or suffered by the insured (see *infra*, §357); (3) tax or assessment liens not of record; (4) off-record easements and liens (visual inspection is necessary); (5) off-record rights of persons in possession of land, or other interests that would be disclosed by inspection, survey, or inquiry; (6) government regulations restricting the use of land, such as zoning ordinances (because of complexity and continual change). (See *Hocking v. Title Ins. & Trust Co.* (1951) 37 C.2d 644, 646, 234 P.2d 625; *Hansen v. Western Title Ins. Co.* (1963) 220 C.A.2d 531, 534, 33 C.R. 668, *infra*, §357; *Contini v. Western Title Ins. Co.* (1974) 40 C.A.3d 536, 543, 115 C.R. 257 ["The insured is not protected from matters dependent upon a survey or a critical inspection of the property"]; *1119 Delaware v. Continental Land Title Co.* (1993) 16 C.A.4th 992, 1004, 20 C.R.2d 438, *infra*, §359 [distinguishing conditional use permits from zoning restrictions]; *Manneck v. Lawyers Title Ins. Corp.* (1994) 28 C.A.4th 1294, 1302, 33 C.R.2d 771, *supra*, §354 [off-record interests]; C.E.B., *Title Insurance Practice* 2d, §6.34 et seq.; 3 Miller & Starr 3d §7:29 et seq.; 39 Cal. L. Rev. 235, 240; on exclusion of defects resulting from rights of parties in possession, see 94 A.L.R.3d 1188; on exclusion of liability for defects, liens, or encumbrances created, suffered, assumed, or agreed by the insured, see 87 A.L.R.3d 515; on defects in or condition of adjacent land or way, see 8 A.L.R.4th 1246; on misrepresentation or concealment of defect by insured or agent as avoiding liability of insurer, see 17 A.L.R.4th 1077.)

In *Stearns v. Title Ins. & Trust Co.* (1971) 18 C.A.3d 162, 95 C.R. 682, S bought Lot 11, and later obtained a standard coverage title policy from defendant Title Co. For 7 years prior to issuance of the policy, S was aware of uncertainty in the boundary between his land and Lot 12 owned by C, arising from conflicting government surveys. C sued S, alleging encroachment on Lot 12 by a road, fences, and structures. S notified defendant, which refused to defend, and S then cross-complained against defendant for indemnity in the event of a judgment against S. Trial of the main action resulted in a judgment in favor of S. On the cross-complaint, the court held that Title Co. was not required to defend. On S's appeal from the latter judgment, *held*, affirmed.

(a) The policy excluded defects known to the insured, or that a correct survey would disclose, where they are not shown by the public records. (18 C.A.3d 168.) Although government surveys are recorded and are public records in one sense, the policy defined "public records" as those that impart constructive notice; and there is no statute that gives

recorded surveys such an effect. (18 C.A.3d 169.)

(b) S could have purchased a policy affording extended coverage insuring against risks such as these, which would have necessitated obtaining a correct survey, with the boundary dispute in all likelihood then becoming known to the insurer. (18 C.A.3d 170.) (See 12 *Pacific L. J.* 1099 [title insurance and railroad rights-of-way; *Stearns*].)

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G. Title Insurance.

5. Excluded Risks of Standard Policy.

b. Risks Unintentionally Created by Insured.

12 Witkin Sum. Cal. Law Real Property § 357

[§ 357] Risks Unintentionally Created by Insured.

In *Hansen v. Western Title Ins. Co.* (1963) 220 C.A.2d 531, 33 C.R. 668, the policy excluded coverage of defects, liens, encumbrances, or other matters "created or suffered by the insured." The particular defect was the result of an inadvertent blunder in an option agreement drafted by a lawyer not representing the insured. In this case of first impression, the court, construing the policy against the insurer, held that the term "created" means conscious, deliberate causation, and that the exclusion did not apply. (220 C.A.2d 535.) But a note of caution was added:

"Although we would be inclined to make an outright restriction of the word 'created,' as used in the policy, to an intentional doing by the insured, nevertheless, because of our unwillingness to decide more than we must in a case so lacking in precedent, we limit our ruling to a case in which the insured did not intentionally produce the claim and in which the insurer itself had opportunity to know of the defect. It is conceivable that a case could arise where the insured's inadvertence or mistake would produce a defect which it would be outside the power of the insurer reasonably to find; but such a case is far removed from this." (220 C.A.2d 536.) (See 87 A.L.R.3d 515 [liability for defects created by insured].)

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[§ 358] Special Indorsements and Extended Coverage.

Special indorsements or riders are sometimes available to protect against risks normally excluded, e.g., on encroachment or violation of a building restriction where a good defense exists and no action is likely. (See C.E.B., Title Insurance Practice 2d, §§7.64 et seq., 8.50 et seq.; 3 Miller & Starr 2d, §7:71 et seq.) More important, however, is the "Extended Coverage Policy." For a premium of about double the usual sum, the company makes a survey and inspection, and the policy covers a great many of the off-record defects that would thereby be discovered. (See *Contini v. Western Title Ins. Co. (1974) 40 C.A.3d 536, 543, 115 C.R. 257*, quoting the text; 3 Miller & Starr 2d, §7:71.)

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7. Liability for Breach.

a. What Constitutes Title Defect.

1. Illustrations.

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[§ 359] Illustrations.

In *Overholtzer v. Northern Counties Title Ins. Co.* (1953) 116 C.A.2d 113, 253 P.2d 116, the policy did not list a recorded pipeline easement of the adjoining owner. The court declared that it was not necessary to plead and prove actual physical interference with the use of the land. "The mere existence of the easement created a cloud on the title. If that cloud resulted in diminution of the market value of the property then recoverable damage resulted." (116 C.A.2d 127.)

In *J.H. Trisdale v. Shasta County Title Co.* (1956) 146 C.A.2d 831, 304 P.2d 832, the policy referred to an easement of record in Book 217 at page 105 as belonging to Pacific Telephone and Telegraph Company (indicating low-voltage telephone line), whereas the easement was actually owned by Pacific Gas and Electric Company for a high-voltage power transmission line. *Held*, although a policy reference merely to an easement would not have been a breach, the voluntary designation of its owner involved the risk of correct statement, and the misdescription was actionable. (146 C.A.2d 835.)

In *1119 Delaware v. Continental Land Title Co.* (1993) 16 C.A.4th 992, 20 C.R.2d 438, plaintiff purchaser of an apartment building sued a title company for failing to note on an abstract of title that a conditional use permit (CUP) had been recorded against the property. Plaintiff also sued its title insurer for rejecting its claim under a policy of title insurance. The CUP, a product of negotiation between the city and a previous owner of the property, required a minimum of one occupant of each dwelling unit to be at least 62 years old or physically handicapped. The trial court sustained a demurrer to the complaint without leave to amend, and dismissed the action. *Held*, reversed as to plaintiff's causes of action for negligence against the title company, and for breach of contract against the title insurer.

(a) *Necessity of including the CUP on the abstract of title.* Under *Ins.C. 12340.10*, an abstract of title is a listing of all recorded documents that impart constructive notice as to the chain of title. (16 C.A.4th 998.) *Govt.C. 27281.5* (supra, §317) requires that in order to be valid, a restriction imposed by a governmental entity on the ability of an owner to convey real property must be recorded to provide constructive notice. In the present case, the occupancy requirements of the CUP, which ran with the land to bind any successors, amounted to a restriction on the owner's ability to convey the property within the meaning of *Govt.C. 27281.5*. Because it limited the right of the owner to use the land freely in

any lawful way, it constituted an encumbrance on title. (16 C.A.4th 999.)

(b) *Distinction between the CUP and zoning restrictions.* The title company, noting that the CUP was authorized by the municipal code in the chapter dealing with zoning, argued that it had no duty to report the CUP because restrictions on land use resulting from government laws, ordinances, or regulations are not encumbrances on title. This argument is unsound because the CUP extended solely to the subject property and was not a law of general applicability. Due to the presumption that each person knows the governing law, a zoning ordinance of general application imparts constructive notice of its terms to the public, and need not be recorded. However, a CUP is *not* a law of general application, but represents a bargain between a public entity and a permittee with respect to particular real property. Hence, a prospective buyer is entitled to resort to an abstract of title to learn of the existence of a recorded CUP. (16 C.A.4th 1002.)

(c) *Liability for breach of the title insurance contract.* The affirmative insuring clauses of plaintiff's policy stated that coverage was provided for any encumbrance on title. Because the CUP constituted an encumbrance on title, it came within these clauses. (16 C.A.4th 1003.) Nor was the CUP specifically excluded from coverage. The title insurer relied on an exclusion for any law, ordinance, or governmental regulation. However, the CUP did not fall within this category; it was not transformed into a zoning ordinance merely because it was authorized by the municipal code. (16 C.A.4th 1003, 1004.) (See 38 Proof of Facts 3d 389 [proving elements of claim under title insurance policy]; 18 A.L.R.4th 1311 [defects affecting marketability of title within meaning of title insurance policy].)

Other illustrations include the following:

Paramount Properties Co. v. Transamerica Title Ins. Co. (1970) 1 C.3d 562, 567, 83 C.R. 394, 463 P.2d 746 [policy guaranteed validity of invalid trust deed].

Hall v. San Jose Abstract & Title Ins. Co. (1959) 172 C.A.2d 421, 429, 342 P.2d 362, *infra*, §367 [policy stated that property was held in joint tenancy; deed showed tenancy in common].

Lagomarsino v. San Jose Abstract & Title Ins. Co. (1960) 178 C.A.2d 455, 463, 3 C.R. 80, *infra*, §367 [policy incorrectly described extent of right-of-way].

Viotti v. Giomi (1964) 230 C.A.2d 730, 739, 41 C.R. 345 [failure to report existence of homestead].

Northwestern Title Sec. Co. v. Flack (1970) 6 C.A.3d 134, 146, 85 C.R. 693, *infra*, §365 [failure of preliminary title report to show limitation of easement].

Jarchow v. Transamerica Title Ins. Co. (1975) 48 C.A.3d 917, 938, 939, 122 C.R. 470 [recorded instrument giving adjacent landowners easement for ingress and egress].

Mellinger v. Ticor Title Ins. Co. of Calif. (2001) 93 C.A.4th 691, 694, 113 C.R.2d 357 [whether 20-foot encroachment of city street on plaintiffs' property rendered title unmarketable was question of fact for jury; it could not be said as matter of law that encroachment was insignificant, or that city would have had no right to assert continued use or even ownership of portion of plaintiffs' property; distinguishing *Lick Mill Creek Apartments v. Chicago Title Ins. Co.* (1991) 231 C.A.3d 1654, 283 C.R. 231, *infra*, §360].

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a. What Constitutes Title Defect.

2. Distinctions.

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[§ 360] Distinctions.

(1) *Title Good But Land Unsalable*. In *Hocking v. Title Ins. & Trust Co.* (1951) 37 C.2d 644, 234 P.2d 625, plaintiff bought two unimproved subdivision lots for \$ 13,550, and received the usual title policy. She sued the insurer alleging that, in violation of law, the subdivider's map was approved without a bond-supported agreement to grade and pave the streets, and that the city refused to issue building permits unless the owner made these expensive improvements. *Held*, no cause of action was stated. If she relied on false representations of the vendors, her remedy was against them; there was no breach of the policy because her title was good. "It is defendants' position that plaintiff confuses title with physical condition of the property she purchased and of the adjacent streets, and that 'One can hold perfect title to land that is valueless; one can have marketable title to land while the land itself is unmarketable.' The truth of this proposition would appear elementary. It appears to be the condition of her *land* in respect to improvements related thereto (graded and paved streets), rather than the condition of her *title* to the land, which is different from what she expected to get." (37 C.2d 651.) (See *Wilson v. Pacific Coast Title Ins. Co.* (1951) 106 C.A.2d 599, 602, 235 P.2d 431 [where title was marketable in fact, no breach occurred although another title company refused to insure it and sale fell through]; *Hawkins v. Oakland Title Ins. & Guaranty Co.* (1958) 165 C.A.2d 116, 122, 331 P.2d 742 [complaint failed to allege reduction of market value of land or other pecuniary loss]; *Nishiyama v. Safeco Title Ins. Co.* (1978) 85 C.A.3d Supp. 1, 5, 149 C.R. 355 [discussing *Hocking*; violation of Subdivision Map Act does not make it unlawful for innocent purchaser to resell property, and hence that title was marketable].)

(2) *Lot Bounded by Abandoned Street*. In *Murray v. Title Ins. & Trust Co.* (1967) 250 C.A.2d 248, 58 C.R. 273, plaintiffs purchased a corner lot described as bounded by O Avenue on the west and R Street on the south. Subsequently, they discovered that the record showed an abandonment of R Street, and that they had no access to the south. They sued defendant title company for breach of contract and negligent misrepresentation, on the theory that the description in the title report and policy led them to believe in the existence of a road. *Held*, no cause of action was stated.

(a) *Where record does not show abandonment*. If a grantee is entitled to presume ownership to the center of a street under C.C. 831 (supra, §273), he or she is entitled to title insurance coverage coextensive with that ownership; and blanket exclusions purporting to restrict coverage to the lot itself would be ineffective. (250 C.A.2d 253.) This may be

so even though the street shown of record was in fact abandoned. (250 C.A.2d 253.)

(b) *Where record shows abandonment: grantor and grantee.* If the grantor owned both the lot and the abandoned street, it may still be presumed, as between grantor and grantee, that the grantor conveyed land to the center of the street. (250 C.A.2d 254, citing *Neff v. Ernst* (1957) 48 C.2d 628, 311 P.2d 849.) But if ownership of the lot and abandoned street has been severed, there is no longer any presumption that the grantor has conveyed to the center of the lot (which he or she does not own), and consequently there is no reasonable expectation of ownership by the grantee. (250 C.A.2d 255, 256.)

(c) *Where record shows abandonment: title insurer.* Thus, even though, as against the grantor, a grantee may sometimes acquire ownership to the center of an abandoned street, the grantee is also placed on notice, by the record, that he or she may not. And if not, the grantee cannot claim this as a defect in title covered by the policy. (250 C.A.2d 257.)

(d) *No misrepresentation.* The map attached to the policy clearly described the street as "abandoned," and presumptions of ownership from the legal description of the lot were negated by this specific information. (250 C.A.2d 257.)

(3) *Presence of Hazardous Substances.* In *Lick Mill Creek Apartments v. Chicago Title Ins. Co.* (1991) 231 C.A.3d 1654, 283 C.R. 231, plaintiff sought to recover under American Land Title Association (ALTA) title insurance policies for the cost of removing hazardous substances from its property. Plaintiff contended that the presence of the hazardous substances impaired marketability and constituted an encumbrance on title. *Held*, no cause of action was stated.

(a) *Nature of title insurance.* Under both the traditional concept and the statutory definition of *Ins.C. 12340.1*, title insurance covers matters affecting title. (231 C.A.3d 1659.) California Land Title Association (CLTA) standard policies insure primarily against defects in title that are discoverable through an examination of the public record. ALTA policies provide greater coverage, and, because they cover many off-record defects in title, the insurer will typically survey the property to be insured. (231 C.A.3d 1659.)

(b) *Marketability of title.* California courts have not adopted a definition of marketable title that encompasses the property's market value. *Mertens v. Berendsen* (1931) 213 C. 111, 1 P.2d 440, referred to market value in the definition of marketable title only in the context of an alleged defect in title, and "does not stand for the proposition that a defect in the physical condition of the land itself renders the title unmarketable." (231 C.A.3d 1661.) *Hocking* also noted the distinction between marketability of title and marketability. Like those in *Hocking*, plaintiffs here pleaded facts relating to marketability of the land rather than marketability of title. (231 C.A.3d 1661.)

(c) *Encumbrance on title.* Although encumbrances are defined in C.C. 1114 as including all liens, and a lien may be imposed to enforce a subsequent owner's responsibility to clean up contamination by hazardous substances (42 U.S.C., §9607(l); *Health & Saf.C. 25323.5*, 25363), a title insurer is not liable for hazardous substances if there is no recorded lien when the policy is issued. (213 C.A.3d 1663.)

(4) *Title Good but Value of Land Impaired.* Impaired value is not the same as a defect in title. (*Mortgage Associates v. Fidelity & Deposit Co. of Maryland* (2002) 105 C.A.4th 28, 37, 129 C.R.2d 365 [title insurance did not cover losses incurred by lender who made numerous loans for more than true value of properties; losses were caused by fraud perpetrated by lender's employee, not by defects in title, and lender held valid, unconditional title to all properties following foreclosure; citing *Hocking*]; see *Elysian Inv. Group v. Stewart Title Guaranty Co.* (2002) 105 C.A.4th 315, 320, 129 C.R.2d 372 [recorded notice of buildings, structures, or premises classified as either hazardous, substandard or a nuisance did not constitute defect in or lien or encumbrance on property or unmarketable title; fact that buyer was required to bring property up to code did not cast doubt on who owned property].)

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b. Measure of Recovery.

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[§ 361] Measure of Recovery.

In *Overholtzer v. Northern Counties Title Ins. Co.* (1953) 116 C.A.2d 113, 253 P.2d 116, defendant insurance company contended that any damage award should be limited to the diminution in the property's market value at the time of purchase in the light of its then use. The court, although reversing judgment for a retrial of the damage issue, rejected this theory in a strong dictum: "When a purchaser buys property and buys title insurance, he is buying protection against defects in title to the property. He is trying to protect himself then and for the future against loss if the title is defective. ... The insured, when he purchases the policy, does not then know that the title is defective. But later, after he has improved the property, he discovers the defect. Obviously, up to the face amount of the policy, he should be reimbursed for the loss he suffered in reliance on the policy, and that includes the diminution in value of the property as it then exists, in this case with improvements. Any other rule would not give the insured the protection for which he bargained and for which he paid." (116 C.A.2d 130.) (See *Viotti v. Giomi* (1964) 230 C.A.2d 730, 739, 41 C.R. 345 [failure to report existence of homestead; amount that appraised value of homesteaded property exceeded liens and exemption, plus costs of execution sale and attorneys' fees]; *Northwestern Title Sec. Co. v. Flack* (1970) 6 C.A.3d 134, 146, 85 C.R. 693, *infra*, §365 [damages for abstractor's negligence, whether action in contract or tort, is measured by actual loss suffered]; *Jarchow v. Transamerica Title Ins. Co.* (1975) 48 C.A.3d 917, 938, 122 C.R. 470.)

Overholtzer was distinguished in *Karl v. Commonwealth Land Title Ins. Co.* (1993) 20 C.A.4th 972, 24 C.R.2d 912 (*Karl I*), on the ground that a different measure of recovery applies when the insured is a secured lender instead of the owner of the subject property. When an insured lender forecloses on the security, any indemnifiable loss occurs on the date of foreclosure, and consists of the amount by which the value received on the note falls short of the amount owed; if the lender obtains the property, the relevant value is its fair market value at the time of foreclosure, not the price realized at a later sale. (20 C.A.4th 983, 984, disagreeing with *Cale v. Transamerica Title Ins.* (1990) 225 C.A.3d 422, 427, 428, 275 C.R. 107, which held that loss would not occur until resale.) (See *Karl v. Commonwealth Land Title Ins. Co.* (1997) 60 C.A.4th 858, 870, 70 C.R.2d 374 (*Karl II*) [reaffirming *Karl I* and adding that fair market value at time of foreclosure should not be reduced by reasonable potential cost of selling property].)

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c. Tort Liability for Negligence.

1. In General.

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[§ 362] In General.

(1) *Nature of Cause of Action.* In addition to the contract liabilities on the policy, a title company, like an abstractor, may be liable for negligence in searching the record and furnishing false information about the state of the title. A different and usually more favorable measure of damages applies, and, in a proper case, the plaintiff may elect either the contract or the tort cause of action. (See *Hawkins v. Oakland Title Ins. & Guaranty Co.* (1958) 165 C.A.2d 116, 123, 331 P.2d 742; *Viotti v. Giomi* (1964) 230 C.A.2d 730, 739, 41 C.R. 345; *Banville v. Schmidt* (1974) 37 C.A.3d 92, 104, 112 C.R. 126; *Contini v. Western Title Ins. Co.* (1974) 40 C.A.3d 536, 545, 115 C.R. 257; *Jarchow v. Transamerica Title Ins. Co.* (1975) 48 C.A.3d 917, 932, 938, 122 C.R. 470 [damages for emotional distress]; C.E.B., Title Insurance Practice 2d, §11.38 et seq.; 3 Miller & Starr 3d §7:175 et seq.; 12 Cal. Western L. Rev. 591 [same]; 7 Santa Clara Lawyer 257 [liability to third persons]; 8 Southwestern L. Rev. 203 [Jarchow]; 8 Southwestern L. Rev. 655 [same]; 50 A.L.R.4th 314 [liability of abstractor]; 15 Am.Jur. Trials 467 [handling title insurance claims]; 19 A.L.R.5th 786 [insurer's negligent failure to discover and disclose defect as basis for liability in tort].) (See *Seeley v. Seymour* (1987) 190 C.A.3d 844, 860, 237 C.R. 282, 5 Summary (10th), Torts, §644 [liability of title company not acting as escrow agent, for negligent recordation of nonrecordable document constituting slander of title]; *Vournas v. Fidelity Nat. Title Ins. Co.* (1999) 73 C.A.4th 668, 675, 86 C.R.2d 490 [title insurer had no duty to inform escrow parties that trust required trustee to obtain beneficiaries' consent before selling trust property; distinguishing *Seeley*].)

Title insurance is a contract for indemnity, not a representation that the contingency insured against will not occur. Hence, if the contingency does occur, an action for negligence or negligent misrepresentation against the insurer is not available based on the insurance policy alone. (*Golden Sec. Thrift & Loan Assn. v. First Amer. Title Ins. Co.* (1997) 53 C.A.4th 250, 258, 61 C.R.2d 442.)

(2) *Necessity of Reliance on False Information.* In *Stagen v. Stewart-West Coast Title Co.* (1983) 149 C.A.3d 114, 196 C.R. 732, plaintiff sought specific performance of a land sale contract, which had been breached by the seller. After plaintiff recorded a notice of lis pendens, the seller sold and conveyed to third-party purchasers. Defendant title company's report to these purchasers failed to disclose the existence of the lis pendens, and plaintiff then joined the company as a defendant, alleging a negligence cause of action. *Held*, judgment for defendant affirmed.

(a) A professional supplier of information for the guidance of others may be liable in tort for negligence in supplying that information. (149 C.A.3d 119, citing *Hawkins*.) However, plaintiff neither received the information from defendant nor relied on it; the information was supplied to the purchasers: "the only parties whose reliance on the information was intended and which was justified." (149 C.A.3d 122.)

(b) Moreover, plaintiff was not harmed by any asserted negligence of defendant; his rights were fixed when the lis pendens was recorded. If a judgment of specific performance had been recovered, it would have been enforceable against the purchasers. (149 C.A.3d 123.) (See *Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 C.A.3d 625, 631, 223 C.R. 339 [following *Stagen*].)

(3) *Damages*. In *Barthels v. Santa Barbara Title Co.* (1994) 28 C.A.4th 674, 33 C.R.2d 579, plaintiff sued his title company for abstractor's negligence in determining that he had a 15-foot-wide easement when, as plaintiff discovered 13 years later, the easement was actually only half that wide. Defendant had tendered the purchase price of the property, increased by the policy's inflation endorsement. The trial judge rejected plaintiff's claim for loss of the property's economic value, and awarded him the amount tendered by defendant, plus costs expended before discovery of the title defect and compensation for plaintiff's time spent on development of the property (but not at his billable rate as a dentist). *Held*, affirmed. Damages for negligence require proximate cause, and here nothing defendant did or did not do caused the property to lack an easement sufficient for access--a sufficient easement simply never existed. (28 C.A.4th 678.) Plaintiff's reliance on *Overholtzer v. Northern Counties Title Ins. Co.* (1953) 116 C.A.2d 113, 253 P.2d 116, *supra*, §361, was misplaced; the Overholtzers' action was based on the title insurance contract, not on negligence. (28 C.A.4th 679.)

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c. Tort Liability for Negligence.

2. Distinction: Preparation of Preliminary Title Report.

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[§ 363] Distinction: Preparation of Preliminary Title Report.

In *Southland Title Corp. v. Superior Court* (1991) 231 C.A.3d 530, 282 C.R. 425, plaintiff homeowners alleged that defendant title insurer negligently prepared a preliminary title report upon which plaintiffs relied in deciding to purchase their home. *Held*, no cause of action was stated.

(a) Although prior case law characterized preliminary title reports as abstracts of title, the 1981 Legislature restricted a cause of action for negligence in the preparation of a preliminary title report by enacting *Ins.C. 12340.10* and *12340.11*. (231 C.A.3d 535, 536.)

(b) Under *Ins.C. 12340.10*, one who contracts for an "abstract of title" receives all rights associated with that written representation. If the abstract is negligently prepared, the abstractor is liable for professional malpractice. (231 C.A.3d 536.)

(c) *Ins.C. 12340.11* makes it clear that a preliminary title report is not an abstract but merely an offer to issue a title policy. Under *Ins.C. 12340.11*, a preliminary report does not constitute a representation by the title insurance company of the condition of the title of the property. (231 C.A.3d 537.)

(d) *Ins.C. 12340.11* effectively carries out the actual intent of the parties. By issuing a preliminary report, the title insurer intends to provide only a representation that a policy of title insurance will be issued insuring the title in the condition described in the report. The insurer expressly does not intend to induce a buyer or lender to consummate a transaction in reliance on the preliminary report. The prospective insured reasonably concludes a transaction in reliance on the anticipated policy of title insurance, not on the preliminary report. "The issuer of a preliminary report merely intends to induce the prospective insured to purchase a policy of title insurance and to declare in advance of such purchase precisely the risk which it will agree to assume." (231 C.A.3d 538.)

In *Siegel v. Fidelity Nat. Title Ins. Co.* (1996) 46 C.A.4th 1181, 54 C.R.2d 84, plaintiffs sued defendant title insurance company for negligence in issuing a preliminary title report that did not disclose the existence of a judgment lien. *Held*, judgment for plaintiffs reversed.

(a) As a title insurer who had not undertaken to perform as an abstractor, defendant owed no duty to disclose recorded liens or other clouds on title. (46 C.A.4th 1190.) A title insurer prepares a preliminary report to limit its own risk and not on behalf of any party to a real estate transaction. *Ins.C. 12340.10* and *12340.11* "leave no room for the existence of a duty of care based on the title company's search of records and issuance of a preliminary report and title insurance policy." (46 C.A.4th 1193, citing *Southland Title Corp.*) Although a title insurer may contract to undertake a thorough record search and to provide complete disclosure of all title impediments, the evidence here does not support a finding that defendant did so. (46 C.A.4th 1195.)

(b) Defendant did not become subject to liability for an inadequate search simply because it was also acting as an escrow agent with regard to parts of the transaction. Defendant had been engaged by plaintiffs' primary escrow agent to perform "the most rudimentary of functions": paying out the loan proceeds and ensuring that the deeds were recorded. "We decline to hold that a third party so engaged thereby becomes the fiduciary of the purchasers for purposes of searching the records or transmitting information regarding title." (46 C.A.4th 1194.)

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d. Conditions and Defenses.

1. In General.

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[§ 364] In General.

The policies contain a number of stipulations setting forth conditions and limitations on liability, apportionment of payments where the policy insures both the owner and a mortgagee, and subrogation of the rights of the insured against others. (See C.E.B., Title Insurance Practice 2d, §11.59 et seq.)

A typical notice of claim clause requires a written notice to the insurance company within 60 days after the loss is discovered, and shortens the statute of limitations so as to require the action to be brought within 12 months after the insurer's receipt of notice. (See *Wilson v. Pacific Coast Title Ins. Co. (1951) 106 C.A.2d 599, 603, 235 P.2d 431* [failure to comply with notice of claim clause was bar to recovery]; *Tabachnick v. Ticor Title Ins. Co. (1994) 24 C.A.4th 70, 73, 29 C.R.2d 59, 3 Cal. Proc. (4th), Actions, §490* [2-year limitations period provided in C.C. 339(1) does not commence until insured discovers loss that may be incurred if title is not as represented]; *Herbert A. Crocker & Co. v. Transamerica Title Ins. Co. (1994) 27 C.A.4th 1722, 1729, 33 C.R.2d 313* [discovery of loss commencing 2-year limitations period for abstractor negligence under C.C. 339(1) occurs when insured suffers "appreciable harm"; this standard was met when insured discovered public trust easement not reported in preliminary title report]; on validity of notice of claim clauses generally, see 1 *Summary* (10th), *Contracts*, §679; on provisions shortening statute of limitations, see 1 *Summary* (10th), *Contracts*, §679; 3 *Cal. Proc. (4th), Actions*, §437.)

In *Overholtzer v. Northern Counties Title Ins. Co. (1953) 116 C.A.2d 113, 253 P.2d 116*, supra, §359, plaintiff owners, on discovery of an adjoining owner's pipeline not listed in the policy as an easement, cut the pipe, and were held liable in the ensuing litigation. Defendant insurer contended that this action was in violation of the policy condition calling for prompt notice of any adverse claim. The court rejected this argument, pointing out that plaintiffs were entitled to rely on the policy in pursuing this remedy of self-help, and that that reasonable reliance did not violate the condition. (116 C.A.2d 125.)

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Tabachnick case:

Cross-Reference: 3 *Cal. Proc. (5th), Actions*, §525. *Provisions shortening statute of limitations:*

Cross-Reference: 3 Cal. Proc. (5th), Actions, §469.



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III. TITLES

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7. Liability for Breach.

d. Conditions and Defenses.

2. Cooperation and Duty To Defend.

12 Witkin Sum. Cal. Law Real Property § 365

[§ 365] Cooperation and Duty To Defend.

(1) *Insurer's Duty To Defend.* In *Overholtzer v. Northern Counties Title Ins. Co.* (1953) 116 C.A.2d 113, 253 P.2d 116, plaintiffs notified defendant insurer of impending litigation by an easement owner, but defendant did nothing and plaintiffs appeared by their own counsel and lost. In this action, in part to recover court costs, defendant relied on a clause that provided for reimbursement of the insured only if the litigation was carried on with the written authorization of the company. *Held*, this was no defense. Under another clause, defendant had a duty to defend the insured on notification, and any conflict between the two clauses should be resolved in favor of the insured. And even if the first clause alone were involved, compliance with its terms was waived when defendant's president, after notification, did not either offer to defend the action or instruct plaintiffs' lawyer not to defend. (116 C.A.2d 123.) (See *Stalberg v. Western Title Ins. Co.* (1991) 230 C.A.3d 1223, 1232, 282 C.R. 43 [breach of contractual duty to defend and covenant of good faith and fair dealing; insurer refused tender of appeal by insureds and failed to adequately investigate claims]; *Rosen v. Nations Title Ins. Co.* (1997) 56 C.A.4th 1489, 1498, 66 C.R.2d 714 [insurer had no duty to defend insureds in action by bank that claimed insureds acted negligently in monitoring use of funds by developer who owed money to both bank and insureds; coverage was limited to defects that existed when policy became effective and alleged negligence occurred later]; on nature of duty to defend, see *Native Sun Inv. Group v. Ticor Title Ins. Co.* (1987) 189 C.A.3d 1265, 1276, 235 C.R. 34; on liability of insurer for expenses of defense of title suit when it refuses to defend, see *Paramount Properties Co. v. Transamerica Title Ins. Co.* (1970) 1 C.3d 562, 570, 83 C.R. 394, 463 P.2d 746; on statute of limitations for breach of duty to defend, see *Lambert v. Commonwealth Land Title Ins. Co.* (1991) 53 C.3d 1072, 1080, 282 C.R. 445, 811 P.2d 737, 3 Cal. Proc. (4th), Actions, §489 [limitations period accrues when insurer refuses insured's tender of defense, but is tolled until underlying claim is resolved]; *Israelsky v. Title Ins. Co. of Minnesota* (1989) 212 C.A.3d 611, 261 C.R. 72, 3 Cal. Proc. (4th), Actions, §488; 19 *Pepperdine L. Rev.* 836 [Lambert].)

A title company may properly refuse to defend an action against the insured for intentionally tortious conduct; such an action relates not to the insured's title but to the manner in which it was acquired. (*Safeco Title Ins. Co. v. Moskopoulos* (1981) 116 C.A.3d 658, 665, 172 C.R. 248; see *Havstad v. Fidelity Nat. Title Ins. Co.* (1997) 58 C.A.4th 654, 660, 68 C.R.2d 487 [insurer had no duty to defend insureds in action for trespass; alleged trespass occurred on property used by insureds as access to their property and thus did not involve title to land described and insured under

policy].)

(2) *Insured's Duty To Notify and To Cooperate*. The policies provide that the insured must promptly notify the company of any litigation that it must defend, and that the insured must cooperate in the defense. (See C.E.B., Title Insurance Practice 2d, §§12.5, 12.40 et seq.)

In *Northwestern Title Sec. Co. v. Flack* (1970) 6 C.A.3d 134, 85 C.R. 693, Mr. and Mrs. A bought a parcel of land from G, intending to build a number of homes on it. Plaintiff issued a preliminary title report showing an easement of access, but the report erroneously failed to state that it was limited to ingress and egress for one dwelling. Negotiations with G proved unsuccessful, and plaintiff brought a declaratory relief action against G, which did not proceed to trial. In August 1965, Mr. and Mrs. A sued plaintiff for damages suffered by reason of the title report. In December 1965, 13 months after becoming aware of the claim, plaintiff gave notice to defendant, representative of Lloyds of London, which had issued plaintiff a professional errors and omissions insurance policy. Plaintiff advised defendant that the case of Mr. and Mrs. A could be settled for between \$ 3,000 and \$ 5,000, which defendant's representative thought reasonable. The settlement was for \$ 5,500, but defendant refused to pay, asserting that the delay in notification was a breach of the cooperation clause. In this action, judgment went for plaintiff in the sum of \$ 8,613.55, the amount of the settlement, with interest and costs. *Held*, affirmed.

Defendant's contention, that the 13-month delay was prejudicial as a matter of law, was rejected on the authority of the tort liability insurance cases holding that breach of the cooperation or notice clause cannot be asserted by an insurer unless he is substantially prejudiced, and that the burden of proving prejudice is on the insurer. (6 C.A.3d 141; see 2 Summary (10th), Insurance, §§313, 318 et seq.) On a lengthy review of the facts, the court found an insufficient showing of prejudice to overturn the trial judge's determination. (6 C.A.3d 142.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Insurer's Duty To Defend*.

Lambert case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §524. *Israelsky case:*

Cross-Reference: 3 Cal. Proc. (5th), Actions, §523.



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[§ 366] Contributory Fault.

The policies expressly exclude liability for defects actually known to the insured and not disclosed at the time of issuance. (See *supra*, §356.) But, because the duty of the insurer is contractual, neither its own due care nor the owner's contributory negligence can be set up as defenses. (*J.H. Trisdale v. Shasta County Title Co. (1956) 146 C.A.2d 831, 836, 837, 304 P.2d 832, supra*, §359.)

In *J.H. Trisdale*, the policy gave an erroneous description of the kind of easement in the property, but referred to the correct record book in both its preliminary report and policy. Defendant contended that the correct reference gave rise to a duty to inquire and that failure to inspect the record was a bar to recovery. "[I]t would be strange, indeed, if prospective purchasers of real property could not rely upon title reports for which they are required to pay, but must search the records themselves. If such be the law a large part of the value of title companies would disappear." (*146 C.A.2d 839.*)

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4. Waiver of Conditions.

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[§ 367] Waiver of Conditions.

In *Hall v. San Jose Abstract & Title Ins. Co.* (1959) 172 C.A.2d 421, 342 P.2d 362, a husband and wife bought property. Defendant acted as escrow agent and title abstractor, and issued a title policy reciting that the property was held in joint tenancy. After the husband's death, the deed, which all this time had been in the possession of defendant, showed a tenancy in common. The result was that plaintiff widow did not receive the entire estate as surviving joint tenant--one-half went under the husband's will. *Held*, defendant was liable in damages for breach.

The company relied principally on the notice of claim clause (written statement within 60 days after discovery). Here, however, oral notice was given shortly after discovery, and defendant did not inform plaintiff that it was unsatisfactory. Nor did it take any steps to correct the error, its practice being to do nothing unless requested by the insured "because most of those are cured by time." (172 C.A.2d 428.) Thus, in rejecting the defense, the court followed the automobile liability insurance cases holding that failure to give the required written notice is not a bar to recovery where no actual prejudice resulted (see 2 *Summary* (10th), *Insurance*, §318 et seq.).

Technical defenses were again rejected in *Lagomarsino v. San Jose Abstract & Title Ins. Co.* (1960) 178 C.A.2d 455, 3 C.R. 80. Defendant insured plaintiff's title to a lot with an adjoining railroad right-of-way. In 1950, the railroad placed its markers 20 feet inside plaintiff's property line, as it was described in the policy. Plaintiff consulted defendant's representative, but obtained no definite statement until 1954, when defendant wrote him stating that the railroad's monument lines prevailed over the distances in the description, thus reducing plaintiff's area by about one-half. *Held*, judgment for defendant reversed.

(a) Noncompliance with the requirement of written notice of claim within 60 days was waived by the company's failure to object to oral notice until the time of trial (5 years later), and by the company's denial of all liability. (178 C.A.2d 459, 460.)

(b) The 12 months' limitation on the action, dating from the time of receipt of written notice of claim, became inoperative when the written notice was waived. (178 C.A.2d 460.) And a policy provision against waiver cannot bar a waiver of notice and proof of loss. (178 C.A.2d 460.)

(c) The policy referred to both the railroad right-of-way and the distances between iron pipes. Defendant argued that, under *C.C.P. 2077(2)*, monuments prevail over courses and distances, hence it guaranteed the title only to the land actually bordered by the right-of-way. As to this, the opinion states that the function of a title company is to give the insured the protection for which he pays, and "the courts must be sensitive to any attempted self-abrogation by the title company of the function it performs and the relationship to the insured which it assumes." (*178 C.A.2d 464.*) Moreover, an insurance policy is construed against the insurer that prepared it. "We do not believe the title company may now relieve itself from the effect of the policy description by taking refuge in an interpretation based upon one monument rather than another. It cannot place a selective construction upon the description, or an ambiguity in it, which will defeat its own obligation." (*178 C.A.2d 463.*)

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e. Subrogation.

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[§ 368] Subrogation.

American Title Co. v. Anderson (1975) 52 C.A.3d 255, 125 C.R. 24, upheld the right of plaintiff title insurer to be subrogated to the rights of its insured purchasers against the defendant vendors. The trial court granted summary judgment to plaintiff on an undisputed declaration of the following facts: Mr. and Mrs. A conveyed the property to defendants by grant deed in 1965, but in 1968, filed a quiet title action against defendants, seeking to have the deed declared a mortgage; in addition, they recorded a lis pendens. In 1969, defendants conveyed by grant deed to the purchasers, whose title plaintiff insured without discovering the quiet title action. In 1971, title was quieted in Mr. and Mrs. A, and thereafter plaintiff paid the purchasers \$ 13,500 in settlement of their claim under the policy. *Held*, reversed solely on the issue of damages.

(a) *Purchasers' rights against vendors.* The purchasers "could have proceeded directly against defendants on the theory of a failure of consideration or breach of agreement to convey," or else could have sought rescission based on mistake as to defendants' title. (52 C.A.3d 259.)

(b) *Insurer's right of subrogation.* Although plaintiff contributed to the purchasers' loss by failing to discover the prior action, the loss was primarily caused by defendants' attempt to sell something they did not own while concealing the pending attack on their title. Furthermore, defendants' retention of the consideration would amount to unjust enrichment. Hence, the balance of equities favors subrogation. (52 C.A.3d 260.)

(c) *Damages.* Plaintiffs' damages could not exceed (1) the amount of plaintiff's liability to the purchasers, limited to the value of the property up to the policy limits, or (2) the amount recoverable by the purchasers had they sued defendants directly. Damages were not proved because plaintiff failed to establish either the value of the property or the consideration paid by the purchasers to defendants. (52 C.A.3d 261.) (See C.E.B., Title Insurance Practice 2d, §11.123 et seq.)

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H. Repeal of Torrens (Title Registration) Law.

12 Witkin Sum. Cal. Law Real Property § 369

[§ 369] Repeal of Torrens (Title Registration) Law.

The Torrens system of title registration was formerly available in California as a means of eliminating uncertainty in titles and preventing adverse possession. The Torrens Act or Land Title Law provided for a judicial proceeding culminating in a decree finally establishing the title, and for an assurance fund created by fees to reimburse a person losing an interest in land through the operation of the statute. (See *66 Am.Jur.2d (2001 ed.), Registration of Land Titles §1 et seq.*) In practice, the act fell short of its aim, for the decree was held subject to attack on various grounds. (See *Petition of Furness (1923) 62 C.A. 753, 757, 218 P. 61* [misdescription of property]; *Swartzbaugh v. Sargent (1939) 30 C.A.2d 467, 469, 86 P.2d 895* [failure to serve defendant with required notice]; *Warden v. Wyandotte Savings Bank (1941) 47 C.A.2d 352, 355, 117 P.2d 910* [grantee who registers title but is not bona fide purchaser will not prevail over holder of prior unregistered deed of which he has notice]; *39 Cal. L. Rev. 235*, note 6.) These defects, coupled with opposition from organizations using conventional recordation and title insurance, led to the repeal of the measure in 1955.

At the request of the county recorder, the board of supervisors of a county may authorize the destruction of Torrens records, on compliance with *Govt.C. 26205.5* (microfilming, etc., and accessibility of reproductions). (*Govt.C. 27207.*) (For proposed system of title registration, see *29 U.C.L.A. L. Rev. 661.*)

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A. Waste.
1. Prohibition and Remedies.

12 Witkin Sum. Cal. Law Real Property § 370

[§ 370] Prohibition and Remedies.

An individual owner in fee simple absolute may use property in any lawful way the owner desires, but the owner of a lesser estate, or any other legal possessor of land, must use it in such a manner as to avoid waste. (See Rest., Property, p. 753 et seq.; 8 Powell §56.01 et seq.; Cal. Civil Practice, 3 Real Property Litigation, Chap. 23; 78 *Am.Jur.2d* (2002 ed.), Waste §§1 et seq., 27 et seq.; 47 Proof of Facts 3d 399 [establishing claim for relief for waste]; supra, §31.)

If a guardian, conservator, tenant for life or years, joint tenant, or tenant in common commits waste, the injured party may bring an action and may, in the discretion of the court, recover treble damages. (*C.C.P.* 732; see *Richards v. Silveria* (1929) 97 C.A. 166, 169, 275 P. 478; *Smith v. Cap Concrete* (1982) 133 C.A.3d 769, 775, 184 C.R. 308, *infra*, §372; *Old Republic Ins. Co. v. Superior Court* (1998) 66 C.A.4th 128, 150, 77 C.R.2d 642 [action for waste depends on lease for creation of duty and thus may be considered claim on contract; insurer was not required to provide defense for breach of contract action].) (For forms, see Cal. Civil Practice, 3 Real Property Litigation, §23:8 et seq.; 24B *Am.Jur.* P.P. Forms (1999 ed.), Waste, §32 et seq.)

Waste may also be enjoined. (*Pavkovich v. Southern Pac. R. Co.* (1906) 150 C. 39, 87 P. 1097; see 5 *Cal. Proc.* (4th), Pleading, §784; 6 *Cal. Proc.* (4th), Provisional Remedies, §302.)

West's Key Number Digest, Waste k.14 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

Cross-References: 5 *Cal. Proc.* (5th), Pleading, §828; 6 *Cal. Proc.* (5th), Provisional Remedies, §299.



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2. What Constitutes Waste.

12 Witkin Sum. Cal. Law Real Property § 371

[§ 371] What Constitutes Waste.

To constitute waste, there must be an injury to the inheritance (C.C. 818), substantially depreciating the market value of the property. (*Dieterich Int. Truck Sales v. J.S. & J. Services* (1992) 3 C.A.4th 1601, 1609, 5 C.R.2d 388, *infra*, §403 [action for waste is limited to cases of physical injury to land].) Use or consumption that is actually beneficial to land, or that increases its value, is not actionable. (See *Smith v. Cap Concrete* (1982) 133 C.A.3d 769, 775, 184 C.R. 308, *infra*, §372; 78 Am.Jur.2d (2002 ed.), *Waste* §§7, 16 et seq.)

In *Sallee v. Daneri* (1942) 49 C.A.2d 324, 121 P.2d 781, a life tenant cut and sold wood, and failed to repair some buildings. The lower court found that cutting the timber actually increased the market value of the land, by making woodland into arable soil. *Held*, the tenant was not liable for waste. (49 C.A.2d 327.) (See *Rest., Property* §140, Comment b.)

West's Key Number Digest, Waste k.6 et seq.

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Witkin Summary of California Law IV. RIGHTS INCIDENTAL TO POSSESSION A. Waste. 3. Trespass Distinguished.

12 Witkin Sum. Cal. Law Real Property § 372

[§ 372] Trespass Distinguished.

In *Smith v. Cap Concrete* (1982) 133 C.A.3d 769, 184 C.R. 308, plaintiffs, owners of real property, leased it by oral agreement to I. I, without plaintiffs' knowledge, sublet it to G, for operation of his used lumber business. G asked defendant's agent to deliver broken concrete material to the property for use as fill, telling him that the owner had given permission for the fill. Defendant then delivered 60 to 70 loads. When plaintiffs discovered the delivery, they sued for damages. The trial judge concluded that plaintiffs, who were in neither actual nor constructive possession of the property at the time of the alleged tortious acts, could not sue for trespass, and gave judgment for defendants. *Held*, reversed.

(a) *Traditional cause of action for trespass.* The action is designed to protect *possessory* interests, and the proper plaintiff is the person in actual possession. (133 C.A.3d 774, and footnote 4, citing the text.) Hence, plaintiffs, who were not in possession, could not sue for technical trespass. (133 C.A.3d 774.)

(b) *Cause of action for damage to ownership interest.* An out-of-possession property owner may recover for injury to the land by a trespasser that damages the ownership interest. (133 C.A.3d 774.) "In our view, the inquiry in a case involving unlawful intrusion on property rights should focus upon the nature of the injury and the damages sought: If the right to possession has been abridged and possessory rights damaged, the possessor may complain by way of an action for trespass; if, on the other hand, an intruder harms real property in a manner which damages the ownership interest, the property owner may seek recovery whether the cause of action be technically labeled trespass or some other form of action, such as waste." (133 C.A.3d 775.)

(c) *Nature of cause of action for waste.* The action for waste protects the ownership interest. "Waste evolved and broadened from a cause of action designed to protect owners of succeeding estates against the improper conduct of the person in possession which harmed and affected the inheritance, to a legal means by which any concurrent nonpossessory holders of interest in the land are enabled to prevent or restrain harm to the land committed by persons in possession." (133 C.A.3d 775.)

(d) *Action against stranger for waste.* The statutes and common law envision waste primarily as an action by an out-of-possession owner against an offending party in possession. (133 C.A.3d 776, citing the text.) But neither the case law nor C.C. 826, which provides a person who has an estate in fee, in remainder or reversion, with an action for injury

done to the inheritance, limits the action to defendants in possession. A person who enters with consent of the possessor may be sued. (133 C.A.3d 776.)

(e) *Injury to inheritance shown.* Waste will be found only when the market value of property is permanently diminished or depreciated. (133 C.A.3d 777.) Here, the broken concrete debris rendered the land less attractive and usable, and thus substantially and permanently devalued plaintiffs' ownership interest. (133 C.A.3d 777.) Thus, whether viewed as an action for trespass or waste, defendants' unauthorized interference with plaintiffs' ownership rights requires redress in the form of damages for loss of market value or cost of removal. (133 C.A.3d 778.)

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12 Witkin Sum. Cal. Law Real Property § 373

[§ 373] In General.

The principal liabilities of an adjoining landowner arise from encroachments of trees or structures (see *infra*, §374 et seq.), but other wrongful acts causing injury may be the basis of an action for damages or an injunction. (See *Kennedy v. Rosecrans Gardens* (1952) 114 C.A.2d 87, 90, 249 P.2d 593 [one owner raised grade of his lot causing earth and debris to be deposited on other's lot]; 1 Am.Jur.2d (1994 ed.), *Adjoining Landowners* §1 et seq.; 37 Proof of Facts 3d 439 [recovery of damages for injury to landowner's property caused by environmental condition on neighboring property]; on rights, duties, and liabilities relating to party walls, see 6 Miller & Starr 3d, §14:36 et seq.; 9 Powell §61.01 et seq.; 59A Am.Jur.2d (1987 ed.), *Party Walls* §§21, 22; 19A Am.Jur. P.P. Forms (1997 ed.), *Party Walls*, §13 et seq.; 14B Am.Jur. Legal Forms 2d (2000 ed.), *Party Walls*, §195:45 et seq.; on trespass, see 5 *Summary* (10th), *Torts*, §693 et seq.; on duty to maintain boundaries, monuments, and fences, see C.C. 841.)

In a narrow group of situations, an owner may be liable in tort for an act done, with malicious intent, on the owner's land without trespass. Thus, a spite fence, i.e., one over 10 feet high, and maliciously erected or maintained for the purpose of annoying the owner or occupant of adjoining property, is deemed a private nuisance and may be abated. (C.C. 841.4; see *Wilson v. Handley* (2002) 97 C.A.4th 1301, 1305, 119 C.R.2d 263 [row of trees planted along or near property line between adjoining parcels to separate or mark boundary between parcels is "structure in the nature of a fence" and may be spite fence under C.C. 841.4 if other elements (unnecessary height above 10 feet and dominant purpose of annoying neighbor) are met]; *Rest.2d, Torts* §829; 9 Powell §62.05; Cal. Civil Practice, 2 Real Property Litigation, §11:45; 1 Am.Jur.2d (1994 ed.), *Adjoining Landowners* §106 et seq.; 1A Am.Jur. P.P. Forms (2003 ed.), *Adjoining Landowners*, §53 et seq.; 73 Proof of Facts 3d 1 [proof of malicious or unreasonable construction of fence].)

SUPPLEMENT: [This section is current through the latest supplement]

See 1 Am.Jur.2d (2005 ed.), *Adjoining Landowners* §1 et seq.; 19A Am.Jur. P.P. Forms (2007 ed.), *Party Walls* §4 et seq. *Spite fences*: See 1 Am.Jur.2d (2005 ed.), *Adjoining Landowners* §108 et seq.



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B. Adjoining Landowners.

2. Encroachment of Tree.

a. In General.

12 Witkin Sum. Cal. Law Real Property § 374

[§ 374] In General.

Where the branches of a tree overhang, or its roots enter the land of another, what are the remedies of the aggrieved owner? The owner cannot take overhanging fruit. Nor can the owner enter on the other's land and cut down the tree, without being liable for trespass. (*Fick v. Nilson* (1950) 98 C.A.2d 683, 685, 220 P.2d 752; see Cal. Civil Practice, 2 Real Property Litigation, §11:40 et seq.; 65 A.L.R.4th 603 [encroachment of trees, shrubbery, or other vegetation across boundary line].) Under certain conditions, the owner may obtain a mandatory injunction or damages. (See *infra*, §375.) Alternatively, the aggrieved owner may employ self-help and cut off the offending branches or roots at the boundary. This appears to be the normal remedy, recognized mainly by dicta in cases dealing with actions for an injunction or damages. (See *Stevens v. Moon* (1921) 54 C.A. 737, 740, 202 P. 961; *Crance v. Hems* (1936) 17 C.A.2d 450, 451, 62 P.2d 395; *Bonde v. Bishop* (1952) 112 C.A.2d 1, 5, 245 P.2d 617; 1 Am.Jur.2d (1994 ed.), *Adjoining Landowners* §§22 et seq., 128.)

A special rule applies, however, where adjoining landowners maintain a hedge or line of trees on their boundary as a shelter or windbreak. They are tenants in common of the trees (C.C. 834), and one who attempts to cut down the trees or remove their overhanging limbs, depriving the other of their shelter, may be enjoined. (*Anderson v. Weiland* (1936) 12 C.A.2d 730, 55 P.2d 1242; see 26 A.L.R.3d 1372 [rights and liabilities of adjoining landowners as to trees, shrubbery, or similar plants growing on boundary line].)

Moreover, self-help is constrained by the duty to act reasonably. In *Booska v. Patel* (1994) 24 C.A.4th 1786, 30 C.R.2d 241, plaintiffs sued their neighbors for negligence, destruction of timber, and nuisance, alleging that defendants negligently excavated along their property line, severing the roots of a large tree growing in plaintiffs' yard and weakening it to the point that plaintiffs had to remove the tree at their own expense. Defendants moved for summary judgment, claiming an absolute right to sever the roots on their property without regard to injuries inflicted on plaintiffs' land. Plaintiffs' expert stated that the minimal damage done by the roots to defendants' property could have been avoided by appropriate pruning. The trial judge granted summary judgment for defendants, finding that their claim of absolute right was supported by *Bonde v. Bishop*, *supra*, 112 C.A.2d 5. *Held*, reversed. "[T]he basic policy of this state ... is that everyone is responsible for any injury caused to another by his want of ordinary care or skill in the management of his property. ... The proper test to be applied to the liability of the possessor of land ... is whether in the management of his property he has acted as a reasonable [person] in view of the probability of injury to others." (24

C.A.4th 1791, quoting *Sprecher v. Adamson Cos. (1981) 30 C.3d 358, 371, 178 C.R. 783, 636 P.2d 1121, 6 Summary (10th), Torts, §1089.*) Hence, defendants' rights in the management of their own land were tempered by their duty to act reasonably. No authority supported their claim to an absolute right to cause harm to a neighbor. (*24 C.A.4th 1791, 1792.*)

SUPPLEMENT: [This section is current through the latest supplement]
See *1 Am.Jur.2d (2005 ed.), Adjoining Landowners §§25, 26, 129.*



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B. Adjoining Landowners.

2. Encroachment of Tree.

b. Injunction and Damages.

12 Witkin Sum. Cal. Law Real Property § 375

[§ 375] Injunction and Damages.

(1) *Injunction*. Only if the encroachment amounts to a nuisance (see 13 *Summary* (10th), *Equity*, §138) is the aggrieved owner entitled to an injunction to compel the removal of the offending branches or roots. "[T]he landowner, merely because he does not desire a neighbor's tree to overhang his premises, can, in a sense, take the law in his own hands and cut off the encroachment, but to act in what is probably a more orderly manner and apply to the court for an injunction restraining the tree owner from allowing the tree to so encroach, he apparently has to prove that the encroachment constitutes a nuisance." (*Bonde v. Bishop* (1952) 112 C.A.2d 1, 6, 245 P.2d 617; see *Stevens v. Moon* (1921) 54 C.A. 737, 742, 202 P. 961 [nuisance was sufficiently alleged and proved]; *Crance v. Hems* (1936) 17 C.A.2d 450, 451, 62 P.2d 395 [nuisance was sufficiently alleged]; *Mattos v. Mattos* (1958) 162 C.A.2d 41, 42, 328 P.2d 269 [fallen trees extending into plaintiff's land constituted nuisance]; 1 *Am.Jur.2d* (1994 ed.), *Adjoining Landowners* §§21, 129 et seq.; 65 *A.L.R.4th* 603 [encroachment of trees, shrubbery, or other vegetation across boundary line].)

(2) *Damages*. In view of the remedy of self-help (supra, §374), some doubt has been expressed about the right to recover substantial damages for a mere encroachment. In *Bonde*, a large oak tree had limbs that overhung 25 feet, and the broken branches clogged gutters and drain spouts and constituted some danger to children. *Held*, the trial judge's order of abatement by removal of overhanging limbs was proper, but an award of \$ 200 damages was reversed for failure to allege special damages. In other words, the overhang alone did not justify a damage award. (112 C.A.2d 6; see *Stevens v. Moon*, supra, 54 C.A. 742 [eucalyptus roots; pleading and proof were sufficient for damage award]; 1 *Am.Jur.2d* (1994 ed.), *Adjoining Landowners* §20.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Injunction*. See 1 *Am.Jur.2d* (2005 ed.), *Adjoining Landowners* §§24, 130 et seq.

(2) *Damages*. See 1 *Am.Jur.2d* (2005 ed.), *Adjoining Landowners* §23.



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CHAPTER XVII - Real Property

Witkin Summary of California Law IV. RIGHTS INCIDENTAL TO POSSESSION B. Adjoining Landowners. 3. Encroachment of Building.

12 Witkin Sum. Cal. Law Real Property § 376

[§ 376] Encroachment of Building.

If a building overlaps or encroaches on adjoining land, there is a continuing trespass or nuisance, which may give a right of action for damages or for a mandatory injunction to compel removal. (See *Kafka v. Bozio* (1923) 191 C. 746, 751, 218 P. 753; *Case v. Sisich* (1929) 97 C.A. 106, 110, 275 P. 492; *Harland v. Noto* (1951) 105 C.A.2d 740, 743, 233 P.2d 575 [eaves 2.3 feet, bay window at head height 1.77 feet, sewer line under plaintiff's property; injunction granted]; *Pacific Gas & Elec. Co. v. Minnette* (1953) 115 C.A.2d 698, 708, 252 P.2d 642 [defendants built concrete block structure underneath and in dangerous proximity to plaintiff's electric transmission wires, in violation of plaintiff's easements]; *Dunsmuir v. Silva* (1957) 154 C.A.2d 825, 827, 317 P.2d 653 [injunction was granted where construction of garage reduced plaintiff's usable easement from 12 feet to 9 1/2 feet]; 1 *Am.Jur.2d* (1994 ed.), *Adjoining Landowners* §119 et seq.; 1A *Am.Jur. P.P. Forms* (2003 ed.), *Adjoining Landowners*, §65 et seq.)

If, however, the encroachment is slight, or the cost of removal is great, the equitable doctrine of relative hardships is often applied and injunctive relief is denied. (See *McKean v. Alliance Land Co.* (1927) 200 C. 396, 399, 253 P. 134; *Mertens v. Berendsen* (1931) 213 C. 111, 115, 1 P.2d 440; *Ukhtomski v. Tioga Mut. Water Co.* (1936) 12 C.A.2d 726, 728, 55 P.2d 1251; *Nebel v. Guyer* (1950) 99 C.A.2d 30, 33, 221 P.2d 337 [unintentional encroachment because of mistaken boundary, on strip used only for flowers]; *Christensen v. Tucker* (1952) 114 C.A.2d 554, 562, 250 P.2d 660 [cement curb and driveway encroached from inches to several feet]; *Pearson v. Baldwin* (1954) 125 C.A.2d 670, 673, 270 P.2d 866 [same result where, although no encroachment, defendant built wall up to property line in violation of ordinance requiring 3-foot setback]; 13 *Summary* (10th), *Equity*, §172; 6 *Cal. Proc.* (4th), *Provisional Remedies*, §346 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]
See 1 *Am.Jur.2d* (2005 ed.), *Adjoining Landowners* §120 et seq.

Cross-Reference: 6 *Cal. Proc.* (5th), *Provisional Remedies*, §345 et seq.



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Witkin Summary of California Law IV. RIGHTS INCIDENTAL TO POSSESSION B. Adjoining Landowners. 4. Support for Land.

12 Witkin Sum. Cal. Law Real Property § 377

[§ 377] Support for Land.

(1) *Common Law*. At common law, a landowner had a right to have the land in its natural state supported by the adjoining land, although the right was not considered to be an easement or other interest in the adjoining land, but rather a right in the supported land. An adjoining owner who excavated was absolutely liable for collapse or other damage to the land, regardless of due care, because the liability was not for negligent acts but for invasion of the damaged owner's property right. Hence, the excavator had to provide substitute support at the excavator's peril. (See *Wharam v. Investment Underwriters* (1943) 58 C.A.2d 346, 349, 136 P.2d 363; *Rest.2d, Torts* §817; 9 Powell §63.01 et seq.; 1 *Am.Jur.2d* (1994 ed.), *Adjoining Landowners* §40 et seq.)

(2) *Statutory Modification*. C.C. 832 modified the common law rule by eliminating absolute liability. An adjoining owner may excavate for purposes of construction or improvement. With respect to support for land alone, the excavator must give reasonable notice to the other owner stating the time the excavation is to commence, and the intended depth of the excavation. In making the excavation, ordinary care and skill must be used, and reasonable precautions must be taken to sustain the adjoining land "as such" (i.e., without regard to buildings or other structures). (C.C. 832; see *Charles F. Harper Co. v. DeWitt Mortg. & Realty Co.* (1931) 115 C.A. 15, 19, 300 P. 839 [court mistakenly observed in passing that common law rule was not changed by C.C. 832]; *Wharam v. Investment Underwriters*, *supra*, 58 C.A.2d 349; 9 Powell §63.05; 1 *Am.Jur.2d* (1994 ed.), *Adjoining Landowners* §47 et seq.; on notice of excavation, see 1A *Am.Jur. Legal Forms* 2d (1999 ed.), *Adjoining Landowners*, §8:18 et seq.; on action for removal of lateral support, see *Cal. Civil Practice*, 2 *Real Property Litigation*, §§11:22 et seq., 11:53 et seq.; 1A *Am.Jur. P.P. Forms* (2003 ed.), *Adjoining Landowners*, §6 et seq.)

The modification of the common law rule in C.C. 832 applies between coterminous owners. In *Puckett v. Sullivan* (1961) 190 C.A.2d 489, 12 C.R. 55, defendants made major excavations into a hill, causing slides. But their excavation was separated from plaintiff's land by an intervening parcel; hence, they were not coterminous owners with the statutory duty to support. However, they were held liable on ordinary principles of negligence; i.e., the trial judge's finding that the excavation was negligent, and was the proximate cause of the damage to plaintiff's noncontiguous property, was supported by the evidence. (190 C.A.2d 495.) (See 87 A.L.R.2d 710 [liability of excavators for damages to noncoterminous tract from removal of lateral support].)

In an inverse condemnation action by an owner against a public entity for "taking of an interest in real property,"

the constitutional law of eminent domain, rather than C.C. 832, applies. (*Holtz v. San Francisco Bay Area Rapid Transit Dist.* (1976) 17 C.3d 648, 653, 131 C.R. 646, 552 P.2d 430.)

(3) *Illustrations.* In *Daniels v. McPhail* (1949) 93 C.A.2d 479, 209 P.2d 19, defendants, owners of hillside land, excavated to create a level lot bounded by a steep bank. They sold the level lot to plaintiffs, who later sued for damage to their property from the sliding of the bank. *Held*, C.C. 832 did not apply, for (a) at the time of excavating, defendants owned all the land and were not required to give notice to anyone, and (b) their excavating was done without negligence. (93 C.A.2d 483.) The peculiarity of the case is that the physical situation is the converse of the usual one: The excavators (defendants) left their own remaining land (the steep bank) without lateral support, and plaintiffs' complaint was not that defendants should have supported plaintiff's land, but rather that defendants should have supported their own land.

In an action against an excavator for negligence, it is necessary to show that the negligent excavating was the proximate cause of the falling of the plaintiff's land. However, heavy rainfall and saturation of soil may be a reasonably foreseeable hazard, against which the defendant excavator, in the exercise of ordinary care, should take due precautions. (*Conlin v. Coyne* (1937) 19 C.A.2d 78, 86, 64 P.2d 1123.) Even if the excavation is carefully made and substituted support (e.g., a bulkhead) is furnished, if the land slides as a result of negligence in permitting the substituted support to weaken, the excavator is liable in the same manner as if the original support had been withdrawn. (*Sager v. O'Connell* (1944) 67 C.A.2d 27, 32, 153 P.2d 569.)

An early case held that, where an independent contractor is guilty of negligence in excavating, the owner of the land on which the excavation is made is relieved from liability (*Aston v. Nolan* (1883) 63 C. 269, 274), but this decision is opposed to both principle and authority, and has since been disapproved. (*Green v. Berge* (1894) 105 C. 52, 58, 38 P. 539; *Wharam v. Investment Underwriters*, *supra*, 58 C.A.2d 351; see 33 A.L.R.2d 111 [liability of employer for injury to adjoining realty resulting from excavation work by independent contractor on his premises]; 62 A.L.R.3d 526 [damage to adjacent land or building caused by dredging].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Common Law.* See 1 Am.Jur.2d (2005 ed.), *Adjoining Landowners* §44 et seq.

(2) *Statutory Modification.* See 1 Am.Jur.2d (2005 ed.), *Adjoining Landowners* §53 et seq.; 1A Am.Jur. Legal Forms 2d (2007 ed.), *Adjoining Landowners* §8:15 et seq.



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CHAPTER XVII - Real Property

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IV. RIGHTS INCIDENTAL TO POSSESSION

B. Adjoining Landowners.

5. Support for Buildings.

a. In General.

12 Witkin Sum. Cal. Law Real Property § 378

[§ 378] In General.

(1) *Liability for Negligence.* The common law rule governing support for land (*supra*, §377) did not extend to support for buildings. Hence, the excavator was not liable for damage to the building unless he or she was negligent, in which case ordinary tort liability would exist. (See *Rest.2d, Torts* §819; 9 Powell §63.03; 1 *Am.Jur.2d* (1994 ed.), *Adjoining Landowners* §53 et seq.) Dictum in *Sargent v. Jaegling* (1927) 83 C.A. 485, 487, 256 P. 1116, suggests that a right to the support of buildings may be acquired by prescription, but this seems erroneous, for the erection of a building does not invade a right of the adjoining owner, and there is consequently no cause of action to be barred. (See *Sullivan v. Zeiner* (1893) 98 C. 346, 350, 33 P. 209; on rights acquired by prescription, see *infra*, §401 et seq.)

In California, liability exists under general tort principles for negligence in excavation, and possibly the requirement of notice specified in C.C. 832 (*supra*, §377) is applicable so that the excavator would also be liable for failure to give notice. In these respects, the rule on damage to buildings would be the same as that governing damage to the land itself. (For notice forms, see 1A *Am.Jur. P.P. Forms* (2003 ed.), *Adjoining Landowners*, §85, 18 et seq.)

(2) *No Liability for Removal of Support by Previous Owner.* In *Lee v. Takao Bldg. Dev. Co.* (1985) 175 C.A.3d 565, 220 C.R. 782, a building on property adjoining plaintiffs' land was damaged by fire. The owner, pursuant to an order of the city building department, demolished the building. The demolition resulted in removal of lateral support for plaintiffs' building, and plaintiffs were required to reinforce the foundation of their building at a cost of \$ 87,000. Defendant became the owner of the adjoining property 2 months after the demolition. *Held*, defendant was not liable for the acts of the previous owner. Liability exists for negligent removal of lateral support. A subsequent purchaser of the land, who did not participate in any act resulting in the loss of support, is not liable for negligence. (175 C.A.3d 569.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Liability for Negligence.* See 1 *Am.Jur.2d* (2005 ed.), *Adjoining Landowners* §58 et seq.



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5. Support for Buildings.

b. Deep Excavations.

12 Witkin Sum. Cal. Law Real Property § 379

[§ 379] Deep Excavations.

If the excavation is to go deeper than the walls or foundations of the adjoining building, and is to be close enough to endanger it, the excavator must give the owner of the building at least 30 days to protect it, and must for that purpose permit the owner to go on the land that is being excavated. If the excavation is to go to or deeper than the standard depth of foundations, defined as nine feet below curb level, and the foundations of the adjoining structure go to the same depth, then the excavator must support the land and building or other structure, without cost to the owner. The excavator is apparently made absolutely liable for any damage, except "minor settlement cracks," if he or she fails to do so. (C.C. 832; see 6 *Stanf. L. Rev.* 104, 112 [local building regulations that may be more detailed than, and not entirely consistent with, C.C. 832].)

The excavator's failure to give notice is not excused by the fact that the other landowner has actual knowledge that the excavation is occurring. The owner is entitled to information as to the depth and extent of the excavation so that he or she may protect the property. (*McIvor v. Mercer-Fraser Co.* (1946) 76 C.A.2d 247, 252, 172 P.2d 758.)

SUPPLEMENT: [This section is current through the latest supplement]



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- B. Adjoining Landowners.
- 5. Support for Buildings.
- c. Excavator's Protective Efforts.

12 Witkin Sum. Cal. Law Real Property § 380

[§ 380] Excavator's Protective Efforts.

The purpose of C.C. 832 is "to enable the excavator to relieve himself from liability, not to create any liability in his favor." (*Carty v. Blauth* (1915) 169 C. 713, 716, 147 P. 949.) Thus, in *Cornet Stores v. Security Trust & Savings Bank of San Diego* (1953) 120 C.A.2d 852, 262 P.2d 77, plaintiff, planning to excavate more than the standard depth below the adjacent curb level on its property, gave notice to defendant, who did nothing. Plaintiff excavated and built a concrete wall on the property line, and then sought to recover the cost (\$ 4,153) from defendant. *Held*, plaintiff was not entitled to recover the cost. Nothing in C.C. 832 gave the excavator any right to compel the other owner to protect his property or any authority to protect it at his expense. (120 C.A.2d 853, following *First Nat. Bank v. Villegra* (1891) 92 C. 96, 28 P. 97, and *Carty*.)

SUPPLEMENT: [This section is current through the latest supplement]



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12 Witkin Sum. Cal. Law Real Property § 381

[§ 381] Subjacent Support.

(1) *Absolute Right To Support. Marin Mun. Water Dist. v. Northwestern Pac. R. Co.* (1967) 253 C.A.2d 83, 61 C.R. 520, was the first California case on subjacent support. The complaint alleged that defendant railroad, subsurface owner of a hill, excavated an underground tunnel. Thereafter, plaintiff district installed water mains on the surface. The tunnel collapsed, the surface subsided, and the mains were injured. Plaintiff sued for damages caused by deprivation of subjacent support. *Held*, plaintiff stated a cause of action.

(a) At common law the owner of the surface was entitled to have it remain in its natural condition without subsidence. The right of subjacent support, like that of lateral support, was absolute. (253 C.A.2d 89.)

(b) C.C. 832 (supra, §377) relaxed the common law absolute duty of lateral support, relieving the excavating owner who gives notice and exercises ordinary care, but this change is inapplicable to subjacent support. C.C. 832 applies only as between coterminous surface land owners, and only to their mutual obligation of lateral support. C.C. 832 does not apply between a surface owner and a subsurface owner, and it does not change the common law duty of subjacent support owed to the surface by the subsurface. (253 C.A.2d 91.)

(c) Defendant's contention that the right applies only to surface land in its natural condition (i.e., without the water mains) is rejected. The common law right is not lost by adding structures, unless their downward pressure by artificial weight contributes to subsidence, and there was no indication of that in the complaint. (253 C.A.2d 97.) (See *Rest.2d, Torts* §§820, 821; 9 Powell §63.06; 5 A.L.R.4th 614 [liability of landowner withdrawing groundwater from own land for subsidence of adjoining owner's land]; 1 *Am.Jur.2d* (1994 ed.), *Adjoining Landowners* §80 et seq.)

(2) *Liability After Transfer of Land to Third Person. Platts v. Sacramento Northern Ry.* (1988) 205 C.A.3d 1025, 253 C.R. 269, addressed whether a party who removed subjacent support is free from liability once the property is sold.

(a) *Preston v. Goldman* (1986) 42 C.3d 108, 227 C.R. 817, 720 P.2d 476, held that the duty to take affirmative action to protect individuals from defective conditions on the premises is based on possession and right to control and manage the premises; hence, a property owner who has sold his or her land is not liable for injuries caused by defective conditions that existed at the time of the sale. (205 C.A.3d 1029: see 6 *Summary* (10th), *Torts*, §§1158, 1159.)

(b) This analysis, based on foreseeability, due care, and negligence, has no application to the absolute right of the surface owner to subjacent support. (205 C.A.3d 1031, citing *Marin Mun. Water Dist. v. Northwestern Pac. R. Co.*, *supra*.) "That duty is not altered by the use to which the surface owner puts his land or whom he allows upon it. In a strict sense, the damage to the surface land from the removal of subjacent support occurs at the time of the excavation, although the cause of action does not accrue until subsidence. ... This differs markedly from the negligence analysis employed in *Preston*. There, the duty is to use reasonable care to protect visitors from injury due to patently defective conditions. The defective pond in *Preston* was just as noticeable to the present owner as to the person who constructed it. ... By transferring the property, the grantor has relinquished all control over it, and cannot dictate who would be permitted on the premises nor can he enter the premises to effect repairs even if he wanted to. ... These factors are not present in cases of removal of support for the surface land." (205 C.A.3d 1031.) Hence, the party who removes the subjacent support remains absolutely liable for damages caused by subsidence, notwithstanding transfer of the property. (205 C.A.3d 1031.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Absolute Right To Support*. See 1 *Am.Jur.2d* (2005 ed.), *Adjoining Landowners* §82 et seq.



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V. RIGHTS IN THE LAND OF ANOTHER
A. Easements and Profits.
1. Nature of Easement.
a. Definition and Distinctions.

12 Witkin Sum. Cal. Law Real Property § 382

[§ 382] Definition and Distinctions.

(1) *Definition.* An easement is an interest in the land of another, which entitles the owner of the easement to a limited use or enjoyment of the other's land. (See *Eastman v. Piper* (1924) 68 C.A. 554, 560, 229 P. 1002; *Zlozower v. Lindenbaum* (1929) 100 C.A. 766, 770, 281 P. 102; *Hayward v. Mohr* (1958) 160 C.A.2d 427, 431, 325 P.2d 209; *Goble v. Dotson* (1962) 203 C.A.2d 272, 277, 21 C.R. 769, quoting the text; *Moylan v. Dykes* (1986) 181 C.A.3d 561, 568, 226 C.R. 673; *Wolford v. Thomas* (1987) 190 C.A.3d 347, 354, 235 C.R. 422, quoting the text [letter from property owner that neither gave right to do acts on property nor limited acts that owner might do on property did not create easement]; 4 Powell §34.02 et seq.; 6 Miller & Starr 3d, §§15:1, 15:5; Cal. Civil Practice, 2 Real Property Litigation, Chap. 12; 25 *Am.Jur.2d* (2004 ed.), *Easements and Licenses* §1; 9 *Am.Jur.* P.P. Forms (1996 ed.), *Easements and Licenses*, §13 et seq.; 62 *Proof of Facts* 3d 1 [grantor's intent to create reciprocal negative easement by common development scheme of subdivision].)

An easement creates a nonpossessory right to enter and use land in another's possession and obligates the possessor not to interfere with the uses authorized by the easement. (1 *Rest.3d, Property (Servitudes)*, §1.2(1).) (On use and enforcement of easement by owner of future interest in dominant tenement, see C.C. 808, 809.)

Because an easement is an interest in the land of another, it is not an estate in land. (*Darr v. Lone Star Industries* (1979) 94 C.A.3d 895, 901, 157 C.R. 90, citing the text; see *Golden West Baseball Co. v. Anaheim* (1994) 25 C.A.4th 11, 35, 31 C.R.2d 378, *infra*, §517, citing the text [lease vests exclusive possession in lessee, whereas holder of easement merely has right to use property].)

(2) *Characteristics.* An easement may be affirmative, allowing the doing of acts, or negative, preventing the doing of acts. (*Wolford v. Thomas*, *supra*, 190 C.A.3d 354; see 1 *Rest.3d, Property (Servitudes)* §1.2(4), Comments b, h [treating negative easement as restrictive covenant, from which it is "indistinguishable"].) It may be appurtenant to land or in gross. (See *infra*, §383.) It may be a perpetual right in fee, or one of lesser duration. Thus, a way may be granted until a street is opened, or until a driveway is cleared. (*Irvin v. Petitfils* (1941) 44 C.A.2d 496, 500, 112 P.2d 688; see *Callahan v. Martin* (1935) 3 C.2d 110, 120, 43 P.2d 788; *Highland Realty Co. v. San Rafael* (1956) 46 C.2d 669, 677, footnote 1, 298 P.2d 15; *Ocean Shore R. Co. v. Doelger* (1954) 127 C.A.2d 392, 399, 274 P.2d 23; 1 *Rest.3d, Property (Servitudes)* §4.3 [duration of servitudes].)

(3) *Distinctions*. An easement differs from a license in that, although a license may give a similar right to use another's land, it is terminable at will, and for this reason is sometimes considered a mere personal privilege. (See *Guerra v. Packard* (1965) 236 C.A.2d 272, 285, 46 C.R. 25 [agreement for right of way, referring to "license," was only a license]; 1 Rest.3d, *Property (Servitudes)* §1.2, Comment g, §2.2, Comment h; infra, §429.)

An easement differs from a covenant running with the land and from an equitable servitude, in that these are created by promises concerning the land, which may be enforceable by or binding upon successors to the estate of either party, while an easement is an interest in the land, created by grant or prescription. (See *Elliott v. McCombs* (1941) 17 C.2d 23, 30, 109 P.2d 329; *Pacific Gas & Elec. Co. v. Minnette* (1953) 115 C.A.2d 698, 707, 252 P.2d 642; *Porto v. Vosti* (1955) 136 C.A.2d 395, 397, 288 P.2d 618 ["covenants" between adjoining owners for payment of costs and use of wells on boundary created easements]; *Marin County Hosp. Dist. v. Cicurel* (1957) 154 C.A.2d 294, 298, 316 P.2d 32 [affirmative promise was covenant, not easement]; 1 Rest.3d, *Property (Servitudes)* §1.3 [covenant running with land], §1.4 [term "equitable servitude" has been dropped from Third Restatement]; 55 So. Cal. L. Rev. 1177 [evaluation of law of servitudes, with proposals for unifying easements, real covenants, and servitudes into single entity]; infra, §§431, 440.)

West's Key Number Digest, Easements k.1 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Definition*. See C.E.B., Easements and Boundaries §1.1.



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A. Easements and Profits.

1. Nature of Easement.

b. Appurtenant and in Gross.

12 Witkin Sum. Cal. Law Real Property § 383

[§ 383] Appurtenant and in Gross.

(1) *Definitions.* Easements may be *appurtenant* or *in gross*. An easement is appurtenant when it is attached to the land of the owner of the easement, and benefits him or her as the owner or possessor of that land. (C.C. 801; 1 *Rest.3d, Property (Servitudes)* §§1.2(3), 1.5, 4.5.) The land to which it is attached is called the dominant tenement, and the land that bears the burden, i.e., the land of another that is used or enjoyed, is called the servient tenement. (C.C. 803; 1 *Rest.3d, Property (Servitudes)* §§2.5, 2.6.) (See *Roth v. Cottrell* (1952) 112 C.A.2d 621, 623, 246 P.2d 958; *Porto v. Vosti* (1955) 136 C.A.2d 395, 397, 288 P.2d 618; *Cushman v. Davis* (1978) 80 C.A.3d 731, 735, 145 C.R. 791, citing the text; *Anaheim v. Metropolitan Water Dist. of Southern Calif.* (1978) 82 C.A.3d 763, 767, 147 C.R. 336, quoting the text; 4 Powell §34.15; 6 Miller & Starr 3d, §15:6; 24 *Santa Clara L. Rev.* 649 [use of appurtenant easement to service nondominant tenement]; 25 *Am.Jur.2d* (2004 ed.), *Easements and Licenses* §8; *infra*, §384.)

An easement in gross is not attached to any particular land as dominant tenement, but belongs to a person individually. (C.C. 802; *LeDeit v. Ehlert* (1962) 205 C.A.2d 154, 165, 22 C.R. 747; see 4 Powell §34.16; 25 *Am.Jur.2d* (2004 ed.), *Easements and Licenses* §9; *infra*, §384.) Although the easement in gross is a personal right as to its owner and thus involves no dominant tenement, it is an interest in the other party's land, the servient tenement, and therefore is as much an interest in real property as an appurtenant easement. (See *Balestra v. Button* (1942) 54 C.A.2d 192, 197, 128 P.2d 816.)

(2) *Presumption of Appurtenance.* Because of the difficulties involved in identification of the successor to an easement in gross, an easement is presumed appurtenant to land of the owner. (*Balestra v. Button*, *supra*, 54 C.A.2d 198 [right of plaintiff's predecessor to connect up with local telephone line on another's land was appurtenant to plaintiff's land]; see *Elliott v. McCombs* (1941) 17 C.2d 23, 29, 109 P.2d 329; *Continental Baking Co. v. Katz* (1968) 68 C.2d 512, 522, 67 C.R. 761, 439 P.2d 889 [extrinsic evidence was admissible]; *Buehler v. Oregon-Washington Plywood Corp.* (1976) 17 C.3d 520, 526, 527, 131 C.R. 394, 551 P.2d 1126, citing the text [extrinsic evidence that is directly relevant to scope and extent of permitted use is admissible]; *St. Louis v. DeBon* (1962) 204 C.A.2d 464, 466, 22 C.R. 443 [evidence outside instrument may also be considered to determine intention where language is uncertain]; *Leggio v. Haggerty* (1965) 231 C.A.2d 873, 878, 42 C.R. 400; *Cushman v. Davis*, *supra*, 80 C.A.3d 735; *Moylan v. Dykes* (1986) 181 C.A.3d 561, 569, 226 C.R. 673; 25 *Am.Jur.2d* (2004 ed.), *Easements and Licenses* §10; on drafting clause, see 38 *Cal. L. Rev.* 426, 439.)

A road easement reserved in a deed may be construed as appurtenant to a parcel of real property even though the easement does not touch that property. (*Moylan v. Dykes, supra*, 181 C.A.3d 573, 576.)

West's Key Number Digest, Easements k.3

SUPPLEMENT: [This section is current through the latest supplement]



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1. Nature of Easement.
c. Typical Easements.

12 Witkin Sum. Cal. Law Real Property § 384

[§ 384] Typical Easements.

The Civil Code lists the following examples of appurtenant easements: pasture, fishing, taking game, right-of-way, taking water, wood, or minerals, transacting business, conducting lawful sports, receiving air, light or heat, receiving or discharging water, flooding land, having water flow without diminution or disturbance, party wall, receiving more than natural support from adjacent land, maintaining whole of division fence, having public conveyances stopped, seat in church, burial, and receiving sunlight. (C.C. 801.) (On solar easement, see C.C. 801.5, *infra*, §385.)

The following may be easements in gross: Pasture, fishing, taking game, seat in church, burial, rents and tolls, right-of-way, and taking water, wood, or minerals. (C.C. 802.)

These lists are not exclusive, and the Code does not purport to state all the possible easements. (*Jersey Farm Co. v. Atlanta Realty Co.* (1912) 164 C. 412, 415, 129 P. 593.) "The novelty of the incident is no bar to its recognition as an easement if its creation violates no principle of public policy." (*Wright v. Best* (1942) 19 C.2d 368, 382, 121 P.2d 702 [right to pollute watercourse with mine tailings]; *Goble v. Dotson* (1962) 203 C.A.2d 272, 277, 21 C.R. 769; on grant of pipeline right-of-way, see 61 *Am.Jur.2d* (2002 ed.), *Pipelines* §21 et seq.)

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d. Solar Easement.

12 Witkin Sum. Cal. Law Real Property § 385

[§ 385] Solar Easement.

(1) *Legislative Findings.* The California Solar Rights Act of 1978 (Stats. 1978, Chap. 1154) contains the following legislative findings:

(a) "Solar energy is a renewable, nonpolluting energy source."

(b) "The use of solar energy systems will reduce the state's dependence on nonrenewable fossil fuels, supplement existing energy sources, and decrease the air and water pollution which results from the use of conventional energy sources. It is, therefore, the policy of the state to encourage the use of solar energy systems. In order to insure uniform application of this policy in all parts of California, the provisions of this act shall be applicable to charter cities."

(c) "The purpose of this act is to promote and encourage the widespread use of solar energy systems and to protect and facilitate adequate access to the sunlight which is necessary to operate solar energy systems."

(2) *Statutory Definitions.* A solar easement is the right to receive sunlight across real property of another for a solar energy system. (C.C. 801.5(a), 801(18).) A solar energy system is a solar collector, other solar energy device, or structural design feature of a building, the primary purpose of which is to provide for the collection, storage, and distribution of solar energy for space heating or cooling, for water heating, or for electricity generation. (C.C. 801.5(a).)

(3) *Required Provisions in Instrument Creating Easement.* An instrument creating a solar easement must include, at a minimum, all of the following:

(a) A description of the dimensions of the easement expressed in measurable terms, such as vertical or horizontal angles measured in degrees, or the hours of the day on specified dates during which direct sunlight to a specified surface of a solar collector, device, or structural design feature may not be obstructed, or a combination of these descriptions. (C.C. 801.5(b)(1).)

(b) The restrictions placed on vegetation, structures, and other objects that would impair or obstruct the passage of sunlight through the easement. (C.C. 801.5(b)(2).)

(c) The terms or conditions, if any, under which the easement may be revised or terminated. (C.C. 801.5(b)(3).)

(4) *Other Statutory Requirements and Prohibitions.* Covenants, conditions, or zoning ordinances that unreasonably restrict solar easements are prohibited. (C.C. 714(a), *infra*, §444; *Govt.C.* 65850.5, 8 *Summary* (10th), *Constitutional Law*, §1009; see 67 *Cal. L. Rev.* 350 [conflict between solar energy and restrictive covenants].) (On requirements for subdivisions, see *infra*, §817; see generally 10 *Pacific L. J.* 478.)

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e. Conservation Easement.

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[§ 386] Conservation Easement.

(1) *Legislative Findings.* "[T]he preservation of land in its natural, scenic, agricultural, historical, forested, or open-space condition is among the most important environmental assets of California." It is therefore in the public interest "to encourage the voluntary conveyance of conservation easements to qualified nonprofit organizations." (C.C. 815.) C.C. 815 et seq. are to be liberally construed (C.C. 816), but not to impair or conflict with a political subdivision's right to hold interests comparable to conservation easements (C.C. 815.9 [listing statutes that confer that right]). (See *11 Pacific L. J. 608.*)

(2) *Definition.* A conservation easement is "any limitation in a deed, will, or other instrument in the form of an easement, restriction, covenant, or condition, which is or has been executed by or on behalf of the owner of the land subject to such easement and is binding upon successive owners of such land, and the purpose of which is to retain land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition." (C.C. 815.1.) A conservation easement is an interest in real property voluntarily created and freely transferable for the purposes stated in C.C. 815.1. (C.C. 815.2(a).) It is perpetual in duration. (C.C. 815.2(b).) It is an interest in real property notwithstanding the fact that it may be negative in character. (C.C. 815.2(c).) Its particular characteristics are those granted or specified in the instrument creating or transferring it. (C.C. 815.2(d).) (See *40 Hastings L. J. 1187* [conservation easements and doctrine of changed conditions].)

A conservation easement is an enforceable restriction for purposes of real property tax assessment under Rev.C. 402.1. (C.C. 815.10; see *9 Summary* (10th), *Taxation*, §228 et seq.)

(3) *Who May Acquire and Hold Easement.* The easement may be acquired and held by a tax-exempt nonprofit organization, qualified to do business in California, that has as its primary purpose the preservation, protection, or enhancement of land in the condition described in C.C. 815.1. (C.C. 815.3(a).)

State and local governmental entities authorized to acquire and hold title to real property may also acquire and hold conservation easements that are voluntarily conveyed. But local entities may not condition "the issuance of an entitlement for use" on a grant of the easement. (C.C. 815.3(b); see *San Mateo County Coastal Landowners' Assn. v. San Mateo* (1995) *38 C.A.4th* 523, 551, *45 C.R.2d* 117 [C.C. 815.3(b) does not restrict local government's ability to

require dedication of easement under other provisions of law; open space and agricultural easements required by amendment to county's local coastal program as condition for land division did not violate statute]; on special condemnation procedures required when governmental agency condemns wildlife conservation easement that has been acquired by state agency, see *Fish & Game C. 1348.3*.)

California Native American tribes may acquire and hold voluntarily conveyed conservation easements to protect California Native American prehistoric, archaeological, cultural, spiritual, or ceremonial places. (C.C. 815.3(c).)

(4) *Creation and Transfer*. The easement may be created by a deed, will, or other instrument. (C.C. 815.1.) An instrument creating or transferring it must be recorded in the county where the land is situated. (C.C. 815.5.) All interests not conveyed by the creating instrument remain in the grantor, including the right to all legal uses not affected by the easement. (C.C. 815.4.) Conservation easements recorded on or after January 1, 2002, must be included in a conservation easement index, to be developed and maintained by each county recorder. (*Govt.C. 27255(a)*.)

(5) *Enforcement*. No conservation easement will be unenforceable because of lack of privity of contract or lack of benefit to particular land or because it is not expressed in the instrument creating it as running with the land. (C.C. 815.7(a).) Either the grantor or the owner of the easement may have injunctive relief against actual or threatened injury or violation of its terms. (C.C. 815.7(b).) The holder may also recover money damages for injury or violation of its terms, and, in assessing damages, the court may take into account, in addition to the usual elements, "the loss of scenic, aesthetic, or environmental value to the real property subject to the easement." (C.C. 815.7(c).) The prevailing party may recover costs and reasonable attorneys' fees. (C.C. 815.7(d).)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Who May Acquire and Hold Easement*. *Pub.Res.C. 5011.7*, added in 2008, authorizes the Department of Parks and Recreation to acquire conservation easements on real property when necessary to protect the state park system from an incompatible use or to preserve and enhance the natural resource, cultural, or historic value of the state park system.

(4) *Creation and Transfer*. See *34 Ecology L. Q. 673* [perpetual conservation easement as charitable trust].



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f. Profits.

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[§ 387] Profits.

A *profit a prendre* is a right to take something from the land of another, either a part of the soil or its products. Familiar examples are rights to take minerals and timber from land. (See *Callahan v. Martin* (1935) 3 C.2d 110, 121, 43 P.2d 788; *Kennecott Corp. v. Union Oil Co.* (1987) 196 C.A.3d 1179, 1186, 242 C.R. 403, citing the text; 1 *Rest.3d, Property (Servitudes)* §1.2(2); 6 *Ecology L. Q.* 250, 481 [property rights to geothermal resources]; 2 *Loyola L.A. L. Rev.* 136 [oil and gas profits]; 70 *A.L.R.3d* 383 [implied inclusion of surface mining rights in grant, reservation, or lease of mineral rights]; 25 *Am.Jur.2d* (2004 ed.), *Easements and Licenses* §3; *infra*, §792 [oil and gas lease as profit].)

Although the cases usually distinguish between profits (right to take something from land) and easements (right merely to use land), the Civil Code sections on easements make no distinction between them, and cover the typical kinds of profits. (See C.C. 801, 802, *supra*, §384.) The First Restatement of Property dropped the term "profit" in favor of the term "easement," reasoning that the same rules applied to each. Nevertheless, the term "profit" remained in common use, without causing confusion, to describe a distinctive subset of servitudes. Therefore, the Third Restatement of Property uses the term. (1 *Rest.3d, Property (Servitudes)* §1.2, Comment e.)

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2. Creation of Easements.

a. Express Grant or Reservation.

1. In General.

12 Witkin Sum. Cal. Law Real Property § 388

[§ 388] In General.

Where an easement is created by express words, either of grant or reservation, its extent, and whether it is appurtenant or in gross, are questions of interpretation. (C.C. 806; see 1 *Rest.3d, Property (Servitudes)* §§2.2, 4.1; *Continental Baking Co. v. Katz* (1968) 68 C.2d 512, 521, 67 C.R. 761, 439 P.2d 889 [extrinsic evidence was admitted to show that easement was intended to be appurtenant to granted parcel and to another parcel owned by grantee]; *Masseti v. Madera Canal & Irr. Co.* (1937) 20 C.A.2d 708, 716, 68 P.2d 260 [purported reservation reading "for reservoir purposes all land which at high water is covered with water" was too indefinite to constitute easement to flood particular parcel of land]; *Pacific Gas & Elec. Co. v. Minnette* (1953) 115 C.A.2d 698, 703, 252 P.2d 642; *Whitson v. Goudeseune* (1955) 137 C.A.2d 445, 447, 290 P.2d 590 ["easement for driveway purposes" was appurtenant to "adjacent lot" although owner of lot was not named]; *McManus v. Sequoyah Land Associates* (1966) 240 C.A.2d 348, 353, 49 C.R. 592, *infra*, §419 [instrument was ambiguous; extrinsic evidence was admissible to determine meaning]; *Los Angeles v. Howard* (1966) 244 C.A.2d 538, 541, 53 C.R. 274, *infra*, §412, citing the text; *Renden v. Geneva Dev. Corp.* (1967) 253 C.A.2d 578, 582, 61 C.R. 463 [easement in lease]; *Lincoln v. Narom Dev. Co.* (1970) 10 C.A.3d 619, 623, 89 C.R. 128 [grant of nonexclusive easement on condition subsequent (construction and maintenance of road meeting certain specifications) with right of reentry for breach]; *Glass v. Gulf Oil Corp.* (1970) 12 C.A.3d 412, 428, 96 C.R. 902, citing the text; *Maywood Mut. Water Co. No. 2 v. Maywood* (1972) 23 C.A.3d 266, 270, 100 C.R. 174 [absence of word "easement" from conveyance cannot defeat clear implication of grant]; 4 *Powell* §34.04; 6 *Miller & Starr* 3d, §15:14 *et seq.*; 25 *Am.Jur.2d* (2004 *ed.*), *Easements and Licenses* §15; on drafting easements, see C.E.B., 2 *Real Property Sales Transactions* 3d, §§10.6, 10.96 *et seq.*; 38 *Cal. L. Rev.* 426; 7A *Am.Jur. Legal Forms* 2d (1998 *ed.*), *Easements and Licenses in Real Property*, §§94:14 *et seq.*, 94:24 *et seq.*, 94:38 *et seq.*)

Although an easement of light and air cannot be created by implication (see *infra*, §396), it may be created by express grant or reservation. (*Petersen v. Friedman* (1958) 162 C.A.2d 245, 247, 328 P.2d 264 [reservation of "perpetual easement of right to receive light, air and unobstructed view over that portion of the real property hereinabove described"].)

A more fundamental question is whether the particular language creates an easement or a complete title in fee. This issue is raised frequently when the granting clause of the deed is broad enough to suggest a fee, but the habendum

clause contains qualifying words. Whether these words merely declare the purpose of the grant (consistent with fee) or limit the estate conveyed is a question of intent, and the strict common law rule that the granting clause prevails over the habendum clause is no longer followed. "The cardinal requirement in the construction of deeds now, as in the construction of other instruments, is that the intention of the parties as gathered from the whole instrument must govern. ... Thus if it should appear from such consideration that the grantor intended by the habendum clause to restrict or limit or enlarge the estate named in the granting clause, the habendum may prevail." (*Basin Oil Co. of Calif. v. Inglewood* (1954) 125 C.A.2d 661, 663, 271 P.2d 73; see *Manhattan Beach v. Superior Court* (1996) 13 C.4th 232, 239, 52 C.R.2d 82, 914 P.2d 160, *infra*, §390 [language of deed was ambiguous as to whether instrument conveyed fee simple or merely easement; extrinsic evidence used to determine meaning]; *infra*, §§389, 390.)

West's Key Number Digest, Easements k.12 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

The law that has developed around the merger doctrine, addressing termination of existing easements (text, §421), applies to the creation of easements. This includes C.C. 811, which provides that a servitude is extinguished by the vesting of the right to servitude and the right to the servient tenement in the same person, and C.C. 805, which prevents a landowner from holding an easement on his or her own land. "The same policy is at issue whether an easement is created or extinguished: ownership of the underlying parcel makes the easement unnecessary." (*Beyer v. Tahoe Sands Resort* (2005) 129 C.A.4th 1458, 1474, 29 C.R.3d 561.) However, "owner" under C.C. 805 means the owner of the full fee title, both legal and equitable. Property owners who own less than full title may validly create easements in their own favor on their own land. (*Beyer v. Tahoe Sands Resort*, *supra*, 129 C.A.4th 1473 [landowners who conveyed legal title of parcels to bank in connection with time-share project did not have full fee title of servient tenement and validly created access easements in their own favor].)

See C.E.B., 2 Real Property Sales Transactions 4th, §§11.6, 11.97; C.E.B., Easements and Boundaries §1.20 et seq.; 7A Am.Jur. Legal Forms 2d (2007 ed.), Deeds §§94:14 et seq., 94:24 et seq., 94:40 et seq.



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2. Instruments Construed To Create Easements.

12 Witkin Sum. Cal. Law Real Property § 389

[§ 389] Instruments Construed To Create Easements.

In *Parks v. Gates* (1921) 186 C. 151, 199 P. 40, there was a grant of "a right of way for a road." *Held*, only an easement was granted. The court observed that there was a difference between the grant and one of "land to be used for a road," which could well be a conveyance of the fee. (186 C. 155.) (See *Coon v. Sonoma Magnesite Co.* (1920) 182 C. 597, 599, 189 P. 271 [grantor conveyed land, reserving a strip "for a road to be built at some future time"]; *Marlin v. Robinson* (1932) 123 C.A. 373, 376, 11 P.2d 70; *Moakley v. Los Angeles Pac. Ry. Co.* (1934) 139 C.A. 421, 423, 34 P.2d 218; *Los Angeles v. Pacific Elec. Ry. Co.* (1959) 168 C.A.2d 224, 228, 335 P.2d 1042; *Noronha v. Stewart* (1988) 199 C.A.3d 485, 490, 245 C.R. 94, *supra*, §334 [easement acquired by oral agreement with person who did not acquire title to servient tenement until after easement was granted]; 89 A.L.R.3d 767 [conveyance of "right of way," in connection with conveyance of another tract, as passing fee or easement].)

Although earlier cases held that a deed of a strip for street purposes conveyed the fee to the public (see, e.g., *Las Posas Water Co. v. Ventura* (1929) 97 C.A. 296, 301, 275 P. 817), the Supreme Court later decided that that type of deed to the state conveys only an easement. (*People v. Thompson* (1954) 43 C.2d 13, 20, 271 P.2d 507 [disapproving of *Las Posas Water Co.*].)

In interpreting a deed to a railroad company for railroad purposes, an important factor is the amount and nature of the consideration for the deed. If a substantial amount is paid by the grantee, approaching the value of the land, the intent is probably to convey the fee, but if the consideration is relatively small or only nominal, the intent is probably to convey only an easement. (See *Tamalpais Land & Water Co. v. Northwestern Pac. R. Co.* (1946) 73 C.A.2d 917, 928, 167 P.2d 825 [discussing but not deciding issue where grantor actually paid grantees substantial sum to help defray cost of railroad construction]; *Warren v. Atchison, Topeka & Santa Fe Ry. Co.* (1971) 19 C.A.3d 24, 35, 96 C.R. 317.) A deed for a railroad right-of-way was usually interpreted in older cases as granting only an easement, even though the words might otherwise be sufficient to convey the fee. (*Highland Realty Co. v. San Rafael* (1956) 46 C.2d 669, 678, 298 P.2d 15; *Ocean Shore R. Co. v. Doelger* (1954) 127 C.A.2d 392, 399, 274 P.2d 23; *Glendora v. Faus* (1957) 148 C.A.2d 920, 925, 307 P.2d 976; *Johnson v. Ocean Shore R. Co.* (1971) 16 C.A.3d 429, 433, 94 C.R. 68; 6 A.L.R.3d 973 [deed to railroad company].) More recent cases have reached the opposite conclusion. (See *Machado v. Southern Pac. Trans. Co.* (1991) 233 C.A.3d 347, 356, 284 C.R. 560, *infra*, §390 [disagreeing with *Johnson*]; *Manhattan Beach v.*

Superior Court (1996) 13 C.4th 232, 245, 52 C.R.2d 82, 914 P.2d 160, infra, §390 [although \$ 1 consideration suggested conveyance of easement, deed conveyed fee].)

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[§ 390] Instruments Construed as Grants of Fee.

In *Cooper v. Selig* (1920) 48 C.A. 228, 191 P. 983, an absolute grant was followed by a later clause reciting that the land was "for the purposes of a public road." The court followed the rule of interpreting a grant in favor of the grantee and held that the fee was conveyed. (48 C.A. 237.) (See *Elliott v. McCombs* (1941) 17 C.2d 23, 28, 109 P.2d 329.)

This rule of interpretation in favor of the grantee (C.C. 1069, *supra*, §13), and the statutory presumption that a fee simple passes (C.C. 1105, *supra*, §14), are influential factors in upholding a clear granting clause against qualifying words in the habendum. (See *Basin Oil Co. of Calif. v. Inglewood* (1954) 125 C.A.2d 661, 271 P.2d 73 [city owned fee under deed where granting clause read "do hereby grant ... those certain parcels of land" for named consideration, and habendum clause read "for public street or right-of-way" and to form portion of public street].) Thus, it would appear that if the intention is merely to create an easement, the casual use of standard forms of grant deed is unsafe, and the easement provision should be carefully drafted.

In *Machado v. Southern Pac. Trans. Co.* (1991) 233 C.A.3d 347, 284 C.R. 560, plaintiffs, descendants of the grantor of an interest in real property, brought a quiet title action against the grantee's successor in interest. Plaintiffs contended that the deed conveyed an easement for a railroad right-of-way, not a fee simple title to the underlying property, and that the easement terminated when the railway was abandoned. *Held*, the deed conveyed a fee simple.

(a) The assertion in *Johnson v. Ocean Shore R. Co.* (1971) 16 C.A.3d 429, 433, 94 C.R. 68, that a deed for a railroad right-of-way is usually construed to give a mere right-of-way even though the terms of the deed would be otherwise apt to convey a fee, is unsupported. On the contrary, the cardinal rule of interpretation is to effectuate the intent of the parties, and there is no preference for construing a grant to a railroad as an easement instead of a fee. Likewise, the suggestion in *Johnson* that reference to the right-of-way in the granting clause will limit the grant, but a reference in the habendum clause will not, "is not an accurate statement of California law." In determining whether a limitation or description was intended, the words themselves are of primary importance, not their location. (233 C.A.3d 356.)

(b) The language of the deed here ("does grant ... that certain strip or parcel of land for a right of way for a standard

gauge railroad") creates a fee interest. By placing the description of the purpose after the grant of land, the deed emphasizes the grant of land. In addition, the deed does not limit the land to railway use and does not create conditions subsequent or rights of reverter in the event the grantee departs from railway use. Furthermore, no other language in the deed shows an intent to convey only an easement. (233 C.A.3d 357, 358.)

In *Manhattan Beach v. Superior Court* (1996) 13 C.4th 232, 52 C.R.2d 82, 914 P.2d 160, plaintiffs were heirs and successors in interest to a land development company that had conveyed, by quitclaim deed, a strip of land to defendant railroad's predecessor, also a railroad, in 1888. Defendant railroad sold the land to defendant city in 1986, several years after ceasing railway operations on the land. The city used the strip as a transportation corridor, with a median park and jogging path lying between two major thoroughfares. In plaintiffs' action to quiet title and for inverse condemnation, the trial judge concluded that the quitclaim deed had conveyed only an easement, which terminated when the railroad ceased operations, rather than a fee simple that the railroad could convey to others for nonrailroad uses. *Held*, reversed.

(a) *The terms of the deed do not establish whether the parties intended the railroad to take the property in fee simple or to acquire only an easement.*

(1) The deed contains conflicting material provisions. On the one hand, the granting clause states that the grantors (the land development company and a mortgage holder) "remit, release and quit-claim" the property to the railroad. This phrase is inconsistent with an intent to convey only an easement; the grantors held the property in fee simple and the choice of the quitclaim deed form "substantially reflects" an intent to convey title in its entirety. (13 C.4th 239.) On the other hand, the deed contains multiple references to "right of way," language that has usually been construed as limiting a conveyance to an easement. (13 C.4th 240, citing *Highland Realty Co. v. San Rafael* (1956) 46 C.2d 669, 298 P.2d 15.)

(2) The deed recites that it is "for the construction, maintenance and operation of a steam railroad," but not that it is "only" for that purpose. A statement of purpose, if it is prescriptive and restricted, evidences an easement, but if it is merely descriptive and unrestricted, is consistent with a fee. (13 C.4th 243.) Here the statement "tends as much to obscure as to clarify the parties' intent." (13 C.4th 244.)

(3) The deed further recites that the railroad is to operate "upon, over and along" and "over and through" the land. This language of appurtenance appears to limit the railroad to a right of passage. However, the deed later refers to "a strip of land" and gives a detailed legal description of that land, generally indicating an intent to transfer the entire estate. (13 C.4th 244.)

(4) The nominal consideration for the conveyance (\$ 1) would ordinarily indicate transfer of an easement, but here it may simply reflect that the grantors had more interest in the relative benefits to be derived from the railroad's presence. (13 C.4th 245.)

(5) The deed does not refer to an easement or to a fee. Instead it refers to a "right of way" while taking the form of a quitclaim. (13 C.4th 245.)

(6) Other indicia of intent to convey a fee include: (a) the grantors' reservation of space for a warehouse, which would be inconsistent with retaining a larger interest in the property; (b) the listing of conditions that would cause the right-of-way to "revert" to the grantors, which is inconsistent with granting an easement because easements are simply extinguished and do not revert; and (c) both grantors, the mortgage holder, and a representative of the land company signed the deed, suggesting that a complete and unqualified transfer was intended. (13 C.4th 245.) Nevertheless, these indicia are not enough to clarify the parties' intent. (13 C.4th 245, 246.)

(b) *Extrinsic evidence establishes that the land development company intended to transfer the property in fee simple.*

(1) In 1897, the land development company, the railroad, and another party entered into an indenture that stated that

the 1888 deed would remain a "grant," suggesting that the company considered full title to have passed by grant. (13 C.4th 246.)

(2) Numerous documents that the land development company used to divest its holdings after the 1888 conveyance "excepted" the right-of-way granted to the railroad. Had the company conveyed only an easement to the railroad in 1888, that interest would simply have passed as an appurtenance with any subsequent transfer and no exception would have been necessary or appropriate. (13 C.4th 246.)

(3) The land development company expressly excepted the railroad's property from the area at issue in a quiet title action in 1901. If the company had conveyed only an easement to the railroad, it most likely would have needed to settle ownership of the underlying fee in the quiet title action. Moreover, the complaint in the action referred to the "land" conveyed to the railroad in 1888 and did not identify the railroad's holding as a right-of-way. The judgment incorporated these representations, which offer "virtually incontrovertible" evidence that the land development company intended to convey the property in fee simple. (13 C.4th 247.)

(4) When the land development company dissolved as a corporation in 1903, the decree of dissolution stated that all of its property had been disposed of. The company had not otherwise divested itself of the railroad property in question here but by the 1888 deed, since all other divestitures had "excepted" the property. Therefore, the company must have believed that the 1888 deed had conveyed full title. (13 C.4th 247.)

(5) The land development company's business was to sell property in the Manhattan Beach area, which at the time was considered "quite inaccessible" from Los Angeles. Granting the railroad full title rather than a limited interest would have been consistent with the company's business goal. (13 C.4th 247.)

Three justices dissented, arguing that the deed, through use of the term "right of way" without reference to a conveyance of land or title, unambiguously conveyed an easement and that there is no need to consider extrinsic evidence. (13 C.4th 253, 255, 267.) (See *Severns v. Union Pac. R. Co.* (2002) 101 C.A.4th 1209, 1214, 125 C.R.2d 100 [deed granted fee simple to railroad, subject to condition subsequent (property would return to grantors or their successors if railroad ceased to use property as right-of-way)]; 31 *Loyola L.A. L. Rev.* 557 [same]; 24 *Pepperdine L. Rev.* 1429 [Manhattan Beach].)

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a. Express Grant or Reservation.

4. Instrument Construed as Invalid Exculpatory Agreement.

12 Witkin Sum. Cal. Law Real Property § 391

[§ 391] Instrument Construed as Invalid Exculpatory Agreement.

In *Salton Bay Marina v. Imperial Irr. Dist.* (1985) 172 C.A.3d 914, 218 C.R. 839, owners of property adjoining the Salton Sea had been required by ordinance to execute flooding easements in favor of the county irrigation district, as a condition of obtaining building permits. Plaintiff property owners had executed easements that purported to be for the sole purpose of absolving the county and defendant irrigation district from future liability for damage to property or improvements arising out of "changes in the level of the Salton Sea." As a result of changes in defendant's water conservation and waste water management activities, the water level rose and plaintiffs' property was flooded. *Held*, the purported easements were exculpatory agreements and void as against public policy.

(a) There was no clear intent to create interests in land. The express intention of the instruments, to limit liability, and the subsequent activities of the parties in encouraging and allowing development of the property, are inconsistent with the intent to create flooding easements. (172 C.A.3d 936.)

(b) The ordinance did not choose means reasonably related to a proper governmental objective and thus did not create valid dedications under the county's police power. The county's requirement that a landowner dedicate all or part of the owner's property to defendant for flooding purposes "fails to further the goal of protecting people and property from loss due to flooding. Indeed, the 'dedication' requirement, tied to the issuance of a building permit, has just the opposite effect. It encourages economic loss by permitting development of property with a use incompatible with the dedication requirement. The 'dedication requirement' here does not reduce the threat of loss but merely shifts the burden of it. An ordinance whose function is to shift liability for loss away from a negligent party is not an ordinance justified by the health, safety or general welfare of the public." (172 C.A.3d 937.)

(c) Contracts affecting the public interest that are designed to exempt anyone from responsibility for his or her own negligence or injury to the person or property of another are against public policy. (172 C.A.3d 938, citing *Tunkl v. Regents of Univ. of Calif.* (1963) 60 C.2d 92, 32 C.R. 33, 383 P.2d 441, 1 Summary (10th), *Contracts*, §662.) Here, the agreements involved public entities performing vital public services in areas that are extensively regulated. The standardized agreements were not bargained for, and no compensation was paid for their execution. Because plaintiffs' property could not be developed without execution of the agreements, and the property was put at risk of being

completely submerged as a result of defendant's negligence, the agreements were void. (172 C.A.3d 939, 940.)

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b. Implied Grant.

1. Kinds of Transfers.

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[§ 392] Kinds of Transfers.

(1) *In General.* A transfer of real property passes all easements attached to the property, and creates an easement in favor of the property to use other real property of the person whose estate is transferred. The use must be "in the same manner and to the same extent" as the property was obviously and permanently used by the person whose estate is transferred, for the benefit of the property, at the time of the transfer. (C.C. 1104.)

C.C. 1104 states the established principle that, when an owner of two adjoining pieces of land sells one of them, or the owner of a piece of land sells a part of it, the purchaser takes the portion sold with all the benefits that appear at the time of the sale to belong to it, as between it and the property that the vendor retains. Before the transfer, and while all the land is owned by the grantor, there is no true easement (right in the land of another), but a "quasi-easement." (See *Fristoe v. Drapeau* (1950) 35 C.2d 5, 8, 215 P.2d 729, *infra*, §414; *Owsley v. Hamner* (1951) 36 C.2d 710, 717, 227 P.2d 263, *infra*, §395; *Navarro v. Paulley* (1944) 66 C.A.2d 827, 829, 153 P.2d 397; *Kytasty v. Godwin* (1980) 102 C.A.3d 762, 768, 162 C.R. 556; *George v. Goshgarian* (1983) 139 C.A.3d 856, 860, footnote 3, 189 C.R. 94, quoting the text and Powell; 1 Rest.3d, *Property (Servitudes)* §§2.11, 2.12; 4 Powell §34.08; 6 Miller & Starr 3d, §15:19 et seq.; 25 Am.Jur.2d (2004 ed.), *Easements and Licenses* §19 et seq.; 94 A.L.R.3d 502 [what constitutes unity of title or ownership for creation of easement by implication or way of necessity].)

However, an easement will not be implied contrary to the intent expressed by the parties in their agreement. (*Warfield v. Basich* (1958) 161 C.A.2d 493, 499, 326 P.2d 942 [trial judge's finding against intent to create easement was supported by substantial evidence].)

In most cases, the easement arises on a separation from common ownership of adjoining and contiguous parcels, but this is not a limiting rule. An implied easement may arise in a grant of noncontiguous lands. (*Piazza v. Schaefer* (1967) 255 C.A.2d 328, 333, 63 C.R. 246 [road separating lots from lake to which pipeline easement for domestic water was claimed].)

(2) *Testamentary Disposition.* Easements by implication may also result when, by a will, the testator leaves parts of land to different parties. (*Cheda v. Bodkin* (1916) 173 C. 7, 15, 158 P. 1025.)

(3) *Disposition by Intestate Succession.* In *Larsson v. Grabach* (2004) 121 C.A.4th 1147, 18 C.R.3d 136, the owner of three parcels of land, one of which was bordered by a public road, died intestate. The parcels were distributed by a probate court decree to his heirs, who eventually conveyed them to other parties. At the time of the probate court decree, an unpaved road crossed all three parcels, giving two of them access to the public road that bordered the third. Over 50 years later, defendants, the owners of the parcel bordering the public road, attempted to block use of the unpaved road through their property. Plaintiffs, the owners of the neighboring interior parcel, brought a quiet title action. The trial court found that plaintiffs held an easement by implication in the unpaved road across defendants' property. *Held*, affirmed.

(a) The probate court distributed the property pursuant to an instrument written by the heirs "for the purpose of effecting a partition of their interests." (121 C.A.4th 1152.) The unpaved road existed at that time and was the only access that the interior parcels had to the public road. Thus, unless the heirs and the probate court intended for the heir who received what is now plaintiffs' parcel to have no access to a public road, they must have intended for her to use the unpaved road to reach her property. (121 C.A.4th 1153.)

(b) The fact that, at the time of the probate decree, there may not yet have been a cabin on the parcel that is now owned by plaintiffs does not matter. The heirs and the probate court could reasonably have expected that the heir who received that parcel might build a cabin and that she would use the unpaved road to reach it. (121 C.A.4th 1153.)

(c) Nor does it matter that there is no evidence that the original owner of the parcels intended to create an easement. He never actually conveyed the property to his heirs. "He simply died, and the laws of intestacy determined who would inherit his property." (121 C.A.4th 1153.) C.C. 1104 does not expressly require that there be a living grantor or that the intent of an owner whose property transfers ownership on his or her death must have been expressed in a duly executed will. (121 C.A.4th 1154.)

(4) *Deed of Trust.* A deed of trust may carry with it easements by implication, so that the purchaser of the dominant tenement at the sale acquires them. (*A. Hamburger & Sons v. Lemboeck* (1937) 20 C.A.2d 565, 568, 67 P.2d 380.) If the servient tenement is sold under foreclosure, the purchasers at the sale take subject to the easements, if they have actual or constructive notice of them. (20 C.A.2d 570.)

(5) *Deed Referring to Map.* When a deed describes a lot with reference to a map, and the map shows streets and alleys, the grantee has an easement in the use of those passageways, regardless of whether they have been dedicated to the public. (*Danielson v. Sykes* (1910) 157 C. 686, 689, 109 P. 87; see *Syers v. Dodd* (1932) 120 C.A. 444, 446, 8 P.2d 157 [same rule, where map was not recorded, but purchaser of servient tenement knew of it]; *Day v. Robison* (1955) 131 C.A.2d 622, 624, 281 P.2d 13; *Norcross v. Adams* (1968) 263 C.A.2d 362, 365, 69 C.R. 429 [no implied grant where abutting street is not part of recorded subdivision]; *Tract Dev. Services v. Kepler* (1988) 199 C.A.3d 1374, 1382, 246 C.R. 469 [initial deeds from subdivision's creator had referred to subdivision map; absence of reference to subdivision map in subsequent deeds did not defeat right to easement]; 25 Am.Jur.2d (2004 ed.), *Easements and Licenses* §21.)

West's Key Number Digest, Easements k.15 et seq.

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 - aa. Obvious and Permanent Use.

12 Witkin Sum. Cal. Law Real Property § 393

[§ 393] Obvious and Permanent Use.

An easement is not implied unless it is apparent and continuous, or "obviously and permanently" used by the grantor. (C.C. 1104.) This means that there must be something on the servient estate that is either visible or "in the nature of a permanent artificial structure." (*Swarzwald v. Cooley* (1940) 39 C.A.2d 306, 325, 103 P.2d 580; see *People v. Bowers* (1964) 226 C.A.2d 463, 466, 38 C.R. 238, citing the text; *Moore v. Walsh* (1995) 38 C.A.4th 1046, 1049, 45 C.R.2d 389 [plaintiffs did not have easement by implication over defendant's property; they failed to show that, before property was divided between plaintiffs' and defendant's predecessors, there was existing and obvious use of easement over defendant's property]; 25 Am.Jur.2d (2004 ed.), *Easements and Licenses* §26 et seq.)

In *Jersey Farm Co. v. Atlanta Realty Co.* (1912) 164 C. 412, 129 P. 593, the owner of land covered with water constructed a drainage system consisting of a levee and canals, and erected a pumping plant to discharge the water. Then he sold to plaintiff's predecessors all of the reclaimed land, except the 50 acres that included the pumping plant. Later he sold the 50 acres to defendant's predecessors. *Held*, plaintiff had a right to the maintenance of the drainage system and plant. (164 C. 416.) (See *Tusher v. Gabrielsen* (1998) 68 C.A.4th 131, 141, 80 C.R.2d 126 [plaintiffs did not acquire implied easement to maintain and use pond that was located almost entirely on defendants' land; when defendants subdivided land and sold portion to plaintiffs' predecessors, they reconfigured pond to remove it from portion being sold and to ensure full possession and control of pond on portion being retained].)

An easement may also be implied to encroach on the retained land. In *Dixon v. Eastown Realty Co.* (1951) 105 C.A.2d 260, 233 P.2d 138, D owned an apartment building on Lot 19 and a two-story garage on Lot 23 and six feet of Lot 21. The buildings were separated by a 47-inch walk. Plaintiffs acquired the apartment building and sued defendant, D's successor to the garage, proving an encroachment of a stucco wall (0.35 feet at one corner and 0.15 feet at another) and a tower encroaching 13.5 inches about 12.5 feet above the ground. The trial court found no nuisance or damage. *Held*, no recovery; when D sold the garage, the purchaser took the part sold with all benefits, including its encroaching wall. (105 C.A.2d 264.)

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 - bb. Reasonable Necessity.

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[§ 394] Reasonable Necessity.

The early view limited the implication of an easement to cases of strict necessity, but now it is sufficient to show that the easement is reasonably necessary for the beneficial enjoyment of the land. (See *Fristoe v. Drapeau* (1950) 35 C.2d 5, 8, 215 P.2d 729; *Owsley v. Hamner* (1951) 36 C.2d 710, 718, 227 P.2d 263; *Fischer v. Hendler* (1942) 49 C.A.2d 319, 322, 121 P.2d 792 [easement implied to allow surface waters to continue draining onto lower lot]; *Navarro v. Paulley* (1944) 66 C.A.2d 827, 829, 153 P.2d 397 [garage encroaching five feet over boundary line was easily movable, so no easement was implied]; *Kaynor v. Fisch* (1957) 103 C.A.2d 832, 839, 230 P.2d 418; *Leonard v. Haydon* (1980) 110 C.A.3d 263, 268, 270, 273, 167 C.R. 789 [no necessity where alternative means of access were available at reasonable cost; following *Navarro*]; *Dubin v. Robert Newhall Chesebrough Trust* (2002) 96 C.A.4th 465, 472, 116 C.R.2d 872 [lessee of premises used as auto repair shop adequately pleaded existence of implied appurtenant access easement that permitted large vehicles access to his business; relying on *Owsley*]; 25 Am.Jur.2d (2004 ed.), *Easements and Licenses* §29.)

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[§ 395] Representations Accompanying Sale.

An easement by implication may arise from representations by salespersons or in advertising matter. (See *Bradley v. Frazier Park Playgrounds* (1952) 110 C.A.2d 436, 439, 441, 242 P.2d 958 [prospective lot purchasers were told that ownership would carry right to use existing lakes and playground area]; *Gagnon v. Adamson* (1953) 122 C.A.2d 253, 255, 264 P.2d 620 [real estate salesman told purchasers that they would have use of certain well-traveled road]; *Day v. Robison* (1955) 131 C.A.2d 622, 624, 281 P.2d 13 [real estate broker showed purchasers map with roadway and assured them that it would be available to them].)

Because the easement is normally implied from the prior existence of an obvious quasi-easement (see *supra*, §392), it has been contended that mere representations cannot be the basis for creation of an easement for a new use, except by estoppel. (See 25 So. Cal. L. Rev. 376.) But in *Owsley v. Hamner* (1951) 36 C.2d 710, 227 P.2d 263, the owner-lessor of a building under construction exhibited blueprints to defendant-lessee of a store in the building. These showed a patio, display windows, and entrances from the street. *Held*, plaintiff, the owner's successor, had no right to close the passageways and patio.

Plaintiff argued that there is no implied easement for light and air, and that the store premises would not be rendered untenable by the changes. Light and air were not, however, the significant factors. (36 C.2d 721.) Access to the street and use of the patio for display of merchandise were contemplated by the parties when the lease was made, and, although not strictly necessary, were "reasonably necessary for the full enjoyment of the leased premises." (36 C.2d 720.) Hence, they could be regarded as appurtenances. (See 25 So. Cal. L. Rev. 376 [criticizing theory of *Owsley*]; on prohibition against easement for light and air, see *infra*, §396.)

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[§ 396] No Implied Easement of Light and Air.

The early English common law recognized an implied easement for light and air when a building was sold with windows opening on land retained by the grantor. The majority American rule is to the contrary. Hence, the grantor may build on his or her adjoining land, even if building cuts off light and air from the grantee's windows. (*Kennedy v. Burnap* (1898) 120 C. 488, 490, 52 P. 843; *Clark v. Mountain States Life Ins. Co.* (1934) 1 C.A.2d 301, 304, 36 P.2d 848; *Taliaferro v. Salyer* (1958) 162 C.A.2d 685, 690, 328 P.2d 799; *Pacifica Homeowners' Assn. v. Wesley Palms Retirement Community* (1986) 178 C.A.3d 1147, 1152, 224 C.R. 380, citing the text; see 1 *Am.Jur.2d* (1994 ed.), *Adjoining Landowners* §93 et seq.)

A qualified rule applies between landlord and tenant, where the easement is "an appurtenance or incident" of the leased premises, or if the premises are untenable without it. But if the premises are still usable and merely less enjoyable, no easement is implied. (*Clark v. Mountain States Life Ins. Co.*, *supra*, 1 C.A.2d 304; see *Owsley v. Hamner* (1951) 36 C.2d 710, 721, 227 P.2d 263, *supra*, §395.)

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See 1 *Am.Jur.2d* (2005 ed.), *Adjoining Landowners* §97 et seq.



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[§ 397] Implied Reservation.

Although C.C. 1104 (*supra*, §392) refers only to implied grants, California also recognizes easements by implied reservation. The result is that a purchaser may take not only the obvious benefits, but the obvious burdens as well. (*Rosebrook v. Utz* (1941) 45 C.A.2d 726, 729, 114 P.2d 715; *Horowitz v. Noble* (1978) 79 C.A.3d 120, 133, 144 C.R. 710, quoting the text; see 1 *Rest.3d, Property (Servitudes)* §2.12; 4 *U.C.L.A. L. Rev.* 300 [creation of easement by implied reservation].)

In *Palvutjian v. Terkanian* (1920) 47 C.A. 47, 190 P. 503, the owner of land that contained irrigation ditches sold the part of the land from which the water came. The purchaser plowed up the ditches, obstructing the flow. *Held*, the grantor had reserved an easement to have the water flow through the ditches to his land. (47 C.A. 52.)

An easement is, however, less readily implied in favor of the grantor than in favor of the grantee. Thus, in *Orr v. Kirk* (1950) 100 C.A.2d 678, 224 P.2d 71, the original grantors sold half of their land to defendants' predecessors. They retained the part now owned by plaintiff, who claimed the right to use a driveway located in part on defendants' land. *Held*, plaintiff was not entitled to the easement. Each parcel had other means of ingress and egress, and the original grantors did not, at the time of severance of the tract, intend the easement. (100 C.A.2d 681.) (See *Jordan v. Henck* (1958) 166 C.A.2d 321, 325, 333 P.2d 117; *Mikels v. Rager* (1991) 232 C.A.3d 334, 360, 284 C.R. 87 [no evidence of preexisting use of disputed roadway]; 1 *Rest.3d, Property (Servitudes)* §2.12, Comment a [if grantor should have known of need to expressly reserve easement to continue prior use, court may refuse to imply one].)

In *Metzger v. Bose* (1960) 183 C.A.2d 13, 6 C.R. 337, plaintiff conveyed land to defendants, without express reservation of an easement in the existing county road that gave him convenient access to his own land. After the county abandoned the road, plaintiff claimed that by using a recorded land survey in the description, which showed the county road, he had reserved an easement by implication. *Held*, the survey was not a subdivision map, and did not purport to make a representation regarding private easements. (183 C.A.2d 19.)

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d. Way of Necessity.

1. Right to Easement.

12 Witkin Sum. Cal. Law Real Property § 398

[§ 398] Right to Easement.

(1) *Creation.* A way of necessity is not based on a previous obvious and permanent use by the grantor, but arises by necessity when a grantor conveys land shut off from access to a road by the grantor's remaining land, or partly by the grantor's land and partly by that of a stranger, or as a result of a partition, either voluntary or by court order. (See *Mesmer v. Uharriet* (1916) 174 C. 110, 112, 162 P. 104; *Tarr v. Watkins* (1960) 180 C.A.2d 362, 367, 4 C.R. 293 [cause of action stated]; *Reese v. Borghi* (1963) 216 C.A.2d 324, 330, 30 C.R. 868, citing the text [distinguishing easement by implication; way of necessity found]; *Pipkin v. Der Torosian* (1973) 35 C.A.3d 722, 729, 111 C.R. 46, *infra*, §416; 1 *Rest.3d, Property (Servitudes)* §2.15; 4 Powell §§34.07, 34.13; 6 Miller & Starr 3d, §§15:27, 15:28; 94 A.L.R.3d 502 [unity of title or ownership sufficient for creation of way of necessity]; 36 A.L.R.4th 769 [locating easement of necessity]; 25 *Am.Jur.2d* (2004 ed.), *Easements and Licenses* §§30 et seq., 80; 11 *Proof of Facts* 3d 601 [proof of existence of way of necessity].)

The dominant and servient tenements must be under the same ownership at the time of the conveyance giving rise to the necessity, but a purchaser of the dominant parcel under an installment land contract acquires an equitable title, and that satisfies the requirement. (*Roemer v. Pappas* (1988) 203 C.A.3d 201, 205, 206, 249 C.R. 743.) The required common owner may be the federal Government. Neither the public policy nor the rationale underlying easements by necessity, which are the promotion of productive use of land and the presumption that grantors intend to grant an easement that benefits a landlocked parcel, is served by the creation of a categorical exception for the federal Government. (*Kellogg v. Garcia* (2002) 102 C.A.4th 796, 804, 125 C.R.2d 817 [also finding strict necessity for easement].)

(2) *Duration.* A way of necessity may exist for a time and then cease when the necessity ends, e.g., when the grantor dedicates another road to the grantee. (*Irvin v. Petitfils* (1941) 44 C.A.2d 496, 499, 112 P.2d 688; see *Martinelli v. Luis* (1931) 213 C. 183, 185, 1 P.2d 980 [injunction granted against interference with way of necessity, but court observed: "When the necessity ceases the injunction should terminate"]; *Daywalt v. Walker* (1963) 217 C.A.2d 669, 676, 31 C.R. 899 [dictum]; 4 Powell §34.19.)

An easement of necessity may be asserted by remote grantees in the chain of title long after the easement was

created by the original common grantor, despite the failure of a prior grantee to exercise the right. The 5-year statute of limitations on quiet title actions (*C.C.P.* 318) does not apply. (*Lichty v. Sickels* (1983) 149 C.A.3d 696, 700, 197 C.R. 137.) "Given the characteristics of easements by necessity featuring instantaneous creation by operation of law at the time of the remote grant and continued existence of the easement through successive grants so long as the necessity continues, all founded on salutary public policy against permitting land to remain in perpetual idleness, it is not appropriate to fix a limitations period on actions to establish easements by necessity in the nature of quiet title actions such as this. There is inconsistency between on the one hand applying the limitations period and on the other hand giving effect to the rule that the easement terminates only when the necessity ceases. It is apparent application of the limitations period eliminates the possibility of carrying out the sound public policy basis for the easement by necessity. The policy of avoiding stale claims foundational to limitations statutes ... does not outweigh the policy of freeing up land for beneficial use." (149 C.A.3d 703.)

West's Key Number Digest, Easements k.18 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



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2. Creation of Easements.

d. Way of Necessity.

2. Limitations on Doctrine.

12 Witkin Sum. Cal. Law Real Property § 399

[§ 399] Limitations on Doctrine.

(1) *Other Method of Access.* The right-of-way by necessity exists only in cases of strict necessity, and not when the grantee has another method of access, even if the other method is inconvenient. (*Smith v. Skrbek* (1945) 71 C.A.2d 351, 360, 162 P.2d 674; *Marin County Hosp. Dist. v. Cicurel* (1957) 154 C.A.2d 294, 302, 316 P.2d 32; *Hewitt v. Meaney* (1986) 181 C.A.3d 361, 370, 226 C.R. 349; *Dubin v. Robert Newhall Chesebrough Trust* (2002) 96 C.A.4th 465, 477, 116 C.R.2d 872 [lessee did not adequately plead existence of easement by necessity; he did not allege that he had no other means of access to property]; 9 A.L.R.3d 600 [property accessible by navigable water]; 10 A.L.R.3d 960 [use of right-of-way where property is or will be divided]; 10 A.L.R.4th 447 [way of necessity where access exists, but may be inadequate, inconvenient, difficult, or costly]; 10 A.L.R.4th 500 [way of necessity where only part of land is inaccessible].)

"Reasonable necessity" may be sufficient to create an easement by implication, but not a way of necessity. (*Pipkin v. Der Torosian* (1973) 35 C.A.3d 722, 730, 111 C.R. 46 [no way of necessity over property of T where plaintiffs had access under prescriptive easement over property of B]; see *supra*, §394.)

(2) *Knowledge of Circumstances.* A way of necessity arises from the presumed intent of the parties, and will not be recognized where the claimant had full knowledge of the circumstances and did not contemplate the right-of-way. (*Daywalt v. Walker* (1963) 217 C.A.2d 669, 675, 31 C.R. 899; see *Lincoln Savings & Loan Assn. v. Riviera Estates Assn.* (1970) 7 C.A.3d 449, 459, 87 C.R. 150, *infra*, §447; *Hewitt v. Meaney*, *supra*, 181 C.A.3d 366, 369.)

(3) *Entity That Has Power of Eminent Domain.* The easement by necessity doctrine is not available to an entity that has the power of eminent domain, which is an alternative way to effect the same result. In *Moore v. Walsh* (1995) 38 C.A.4th 1046, 45 C.R.2d 389, plaintiffs claimed that they had an easement by necessity over defendant's adjoining property. Defendant's and plaintiffs' parcels were originally owned by the federal Government. In 1873, the federal Government granted plaintiffs' parcel to the state, leaving the parcel landlocked on all sides by federally owned land. The state conveyed the property to private owners in 1978, and in 1993, plaintiffs purchased the parcel. Defendant's property consisted of what was once six parcels conveyed by the federal Government to private owners between 1874 and 1881. *Held*, judgment for defendant affirmed. Plaintiffs did not have an easement by necessity. When defendant's

parcel was transferred to private owners by the federal Government, any easement by way of necessity was extinguished, because the state, as owner of the adjoining property, could then have exercised its power of eminent domain. Hence, when plaintiffs subsequently purchased their property from private owners, they did not acquire an easement over defendant's parcel; the private owners had no easement to convey. (38 C.A.4th 1049.) (On creation of easement through condemnation, see *infra*, §400.)

SUPPLEMENT: [This section is current through the latest supplement]



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12 Witkin Sum. Cal. Law Real Property § 400

[§ 400] Condemnation or Judgment for Damages.

A public utility or other agency with the power of eminent domain may condemn an easement. (See 6 Miller & Starr 3d, §15:44; 8 *Summary* (10th), *Constitutional Law*, §1182; 4 Powell §34.23.) A right in the nature of an easement also may be created when a plaintiff brings an action to recover for a continuing injury to property and is given a judgment for present and prospective damages. The defendant tortfeasor, having paid in full for any injury from future interference with the plaintiff's property, doubtless acquires a permanent right to continue the activity. (See *Slater v. Shell Oil Co.* (1943) 58 C.A.2d 864, 869, 137 P.2d 713; *Salton Bay Marina v. Imperial Irr. Dist.* (1985) 172 C.A.3d 914, 964, footnote 16, 218 C.R. 839, supra, §391 [to extent that property owners in inverse condemnation action received full market value of flooded land and improvements, defendant irrigation district acquired flooding easement that precluded development inconsistent with flooding]; *Rest.2d, Torts* §930, Comment c [plaintiff may recover for past and future tortious invasion if future invasion would not be enjoined because defendant's enterprise is in public interest]; 3 *Cal. Proc.* (4th), *Actions*, §180.)

In *Donnell v. Bisso Bros.* (1970) 10 C.A.3d 38, 88 C.R. 645, the court created an easement in favor of an innocent trespasser by applying the doctrine of relative hardships (see 13 *Summary* (10th), *Equity*, §169 et seq.; 6 *Cal. Proc.* (4th), *Provisional Remedies*, §§346, 347). Plaintiff, in great need of a right-of-way to his ranch and quarry, built a small connecting road about 41 feet long. Unknown to him and defendant, it was an encroachment on defendant's land. The parties became involved in a controversy. Defendant had a survey made, discovered the encroachment, and bulldozed the road, making it unusable. Plaintiff sued for damages and an injunction. The trial judge found that (a) plaintiff acted in good faith; (b) the trespass was minor and technical, and on land of no value; and (c) to remove the encroachment and build a new road would cost \$ 8,500, a sum greatly disproportionate to defendant's injury. Accordingly, the trial court gave defendant only nominal damages of \$ 1, and awarded an easement to plaintiff. *Held*, this was a proper application of the doctrine of relative hardships, despite the objection that under certain circumstances, this type of judgment gives a private person the equivalent of the right of eminent domain. (10 C.A.3d 46.)

SUPPLEMENT: [This section is current through the latest supplement]

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §185. *Doctrine of relative hardships:*

Cross-Reference: 6 *Cal. Proc.* (5th), *Provisional Remedies*, §345 et seq.



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2. Creation of Easements.

f. Prescription.

1. Elements of Prescriptive Right.

12 Witkin Sum. Cal. Law Real Property § 401

[§ 401] Elements of Prescriptive Right.

(1) *Requirements.* An easement by prescription may be acquired by adverse use for 5 years. The usual elements must be shown: open and notorious use, that is continuous and uninterrupted, hostile to the true owner, exclusive, and under claim of right. If taxes are separately assessed against the easement, these must be paid. (See *Gilardi v. Hallam* (1981) 30 C.3d 317, 327, 178 C.R. 624, 636 P.2d 588 [if no taxes are separately assessed, prescriptive easement may be gained without tax payment]; *Zumino v. Gabriel* (1960) 182 C.A.2d 613, 617, 6 C.R. 514 [all elements found]; *LeDeit v. Ehlert* (1962) 205 C.A.2d 154, 163, 22 C.R. 747 [roadway used for hunting for 35 years]; *Sylva v. Kuck* (1966) 240 C.A.2d 127, 134, 49 C.R. 512; *Reinsch v. Los Angeles* (1966) 243 C.A.2d 737, 744, 52 C.R. 613 [drainage pipe; municipal corporation may acquire prescriptive easement in usual manner]; *Zimmer v. Dykstra* (1974) 39 C.A.3d 422, 430, 114 C.R. 380, citing the text [all elements found]; *Twin Peaks Land Co. v. Briggs* (1982) 130 C.A.3d 587, 593, 181 C.R. 25 [all elements found]; *Dubin v. Robert Newhall Chesebrough Trust* (2002) 96 C.A.4th 465, 476, 116 C.R.2d 872 [lessee did not adequately plead existence of prescriptive easement; facts alleged could not establish hostile use for 5 years]; *Felgenhauer v. Soni* (2004) 121 C.A.4th 445, 449, 17 C.R.3d 135 [claim of right does not require belief or claim that use is legally justified, but rather it requires property to be used without permission of landowner]; 1 *Rest.3d, Property (Servitudes)*, §2.17; 4 *Powell* §34.10; 72 *A.L.R.3d* 648 [tacking together successive uses to make up prescriptive period]; 25 *Am.Jur.2d* (2004 ed.), *Easements and Licenses* §48 et seq.)

The claim of a right-of-way must show a definite and certain line of travel. Use of different paths or a material deviation will break the continuity of use. (*Dooling v. Dabel* (1947) 82 C.A.2d 417, 424, 186 P.2d 183.)

(2) *Adverse Possession Distinguished.* An easement by prescription differs from adverse possession, which creates a change in title or ownership. A prescriptive easement deals with the use of land, while adverse possession deals with possession. Although the elements of each are similar, the requirements of proof are materially different. (*Raab v. Casper* (1975) 51 C.A.3d 866, 876, 124 C.R. 590; see *Cleary v. Trimble* (1964) 229 C.A.2d 1, 6, 39 C.R. 776, citing the text [distinguishing adverse possession]; *Thomson v. Dypvik* (1985) 174 C.A.3d 329, 338, 339, 220 C.R. 46, *infra*, §415 [distinguishing adverse possession]; *Kapner v. Meadowlark Ranch Assn.* (2004) 116 C.A.4th 1182, 1186, 11 C.R.3d 138 [property owner who enclosed and possessed parcel that he held in common with cotenants could not claim prescriptive easement; parties who have possessed land may not avoid tax requirement of adverse possession by instead claiming

prescriptive easement]; supra, §212 et seq.)

(3) *Tolling of Statute of Limitations.* The adverse claim of an easement, like that of adverse possession, may be interrupted by filing an action, and the statute of limitations will be tolled while the action is actively pending. (*Welsher v. Glickman* (1969) 272 C.A.2d 134, 137, 77 C.R. 141, citing the text.) A dismissed or abandoned action, however, does not stop the running of the prescriptive period (see *Yorba v. Anaheim Union Water Co.* (1953) 41 C.2d 265, 270, 259 P.2d 2; supra, §227), and mere oral protests will not interrupt the prescriptive use (*Lord v. Sanchez* (1955) 136 C.A.2d 704, 706, 289 P.2d 41). (On recorded notice, see infra, §404.)

(4) *Public Property Exception.* Prescriptive rights cannot be gained against property "dedicated to a public use by a public utility, or dedicated to or owned by the state or any public entity." (C.C. 1007; see *Bartholomew v. Staheli* (1948) 86 C.A.2d 844, 857, 195 P.2d 824; on similar prohibition against adverse possession, see supra, §§213, 214.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Requirements.* See C.E.B., Easements and Boundaries §1.32 et seq.



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2. Issues and Proof.

12 Witkin Sum. Cal. Law Real Property § 402

[§ 402] Issues and Proof.

(1) *Issues of Fact.* Whether the elements of prescription are established is a question of fact for the trial court or jury. (See *O'Banion v. Borba* (1948) 32 C.2d 145, 153, 195 P.2d 10; *Warsaw v. Chicago Metallic Ceilings* (1984) 35 C.3d 564, 570, 199 C.R. 773, 676 P.2d 584; *Adams v. Estate of Smith* (1948) 88 C.A.2d 910, 913, 199 P.2d 730; *Van Amersfoort v. Young* (1951) 105 C.A.2d 22, 25, 232 P.2d 569.)

(2) *Burden of Proof.* Ordinarily, the burden of proof is on the claimant. (*Hahn v. Curtis* (1946) 73 C.A.2d 382, 389, 166 P.2d 611 [easement to drain waters on adjoining land was not established where evidence did not show continuous discharge of waters for prescriptive period]; *Cleary v. Trimble* (1964) 229 C.A.2d 1, 8, 39 C.R. 776; *Zimmer v. Dykstra* (1974) 39 C.A.3d 422, 431, 114 C.R. 380.)

The rule concerning taxes differs from that governing adverse possession of land. Because easements are seldom taxed separately from land itself, the burden of showing that taxes were assessed is on the person who contests the prescriptive right, and not the claimant. (*Redemeyer v. Carroll* (1937) 21 C.A.2d 217, 220, 68 P.2d 739; see *Glatts v. Henson* (1948) 31 C.2d 368, 371, 188 P.2d 745; *Cleary v. Trimble*, *supra*, 229 C.A.2d 11.)

(3) *Quantum and Type of Evidence.* The distinction between adverse possession to establish title and prescription to establish right to use is significant in connection with the proof. Evidence that establishes adverse use may differ greatly from that required to prove adverse possession. "In other words, the elements are the same but the proof of the elements can be materially different." (*Cleary v. Trimble*, *supra*, 229 C.A.2d 6; see *Raab v. Casper* (1975) 51 C.A.3d 866, 876, 124 C.R. 590.) Thus, C.C.P. 325 (*supra*, §226), requiring land to be protected by a substantial enclosure and usually cultivated or improved, probably has no application to road easements. "No greater maintenance is required than that which keeps the road in condition for customary use." (*Cleary v. Trimble*, *supra*, 229 C.A.2d 10.)

(4) *Presumption of Existence of Easement.* Some early cases suggested that where the claimant shows open and uninterrupted use of the easement for the requisite period, without protest or interference, a *prima facie* case is established, and if the landowner relies on the defense that the use was permissive, the burden shifts to the landowner on that issue. (*Hails v. Martz* (1946) 28 C.2d 775, 778, 172 P.2d 52; *Wallace v. Whitmore* (1941) 47 C.A.2d 369, 372, 117

P.2d 926; Chapman v. Sky L'Onda Mut. Water Co. (1945) 69 C.A.2d 667, 678, 159 P.2d 988; Board of Directors of Turlock Irr. Dist. v. Ceres (1953) 116 C.A.2d 824, 829, 254 P.2d 907.)

In *O'Banion v. Borba (1948) 32 C.2d 145, 149, 150, 195 P.2d 10*, the court suggested that there is no need to invoke this presumption or to distinguish between enclosed or cultivated land and unenclosed and uncultivated land. In *LeDeit v. Ehlert (1962) 205 C.A.2d 154, 22 C.R. 747*, the suggestion was expanded to a full scale attack. Although giving an instruction on the presumption was held not prejudicial, its propriety was disapproved: "[W]e have concluded that the presumption is unfortunate. ... The wisdom of *O'Banion* in uprooting at least one such presumption is further confirmed by the continuing conflict in other jurisdictions in announcing completely contradictory presumptions as to the effect of open and continuous use. ... Finally, as the semiurbanization of the countryside blurs the old lines between city and country, the differences between 'open' and 'enclosed' land become harder to ascertain, and presumptions as to 'open,' as opposed to 'enclosed' land, harder to apply. Thus, even though we conclude here that the instruction on the presumption did not inflict prejudice, we opine that the future role of the presumption must be a narrow and vanishing one." (*205 C.A.2d 170.*)

Nevertheless, in *MacDonald Properties v. Bel-Air Country Club (1977) 72 C.A.3d 693, 140 C.R. 367*, the court, noting the conflict in decisions on the point, followed the *Wallace* view that "continuous use of an easement over a long period of time without the landowner's interference is presumptive evidence of its existence." (*72 C.A.3d 701, 702*; see *Applegate v. Ota (1983) 146 C.A.3d 702, 709, 194 C.R. 331* [agreeing with *MacDonald*].)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Presumption of Existence of Easement.* See *Grant v. Ratliff (2008) 164 C.A.4th 1304, 1308, 79 C.R.3d 902* [sons' use of road dividing father's parcel and mother's parcel, while they lived on mother's parcel, was matter of family accommodation and was not adverse to father's title; no presumption of adverse use, which would have shifted burden to father's successors in interest to show that use was permissive, arose from sons' use; following *O'Banion v. Borba (1948) 32 C.2d 145, 195 P.2d 10*, text, p. 471, and disagreeing with *MacDonald Properties v. Bel-Air Country Club (1977) 72 C.A.3d 693, 140 C.R. 367*, text, p. 472].



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- 3. Hostile or Adverse Use.

12 Witkin Sum. Cal. Law Real Property § 403

[§ 403] Hostile or Adverse Use.

(1) *Requirement.* There can be no prescriptive right unless the use is wrongful, and the property owner has a cause of action. Hence, as in the case of adverse possession of land, an easement by prescription cannot ordinarily be gained against a future interest. The statute does not commence to run until it becomes a present interest. (1 *Rest.3d, Property (Servitudes)*, §2.17, Comment f; see *supra*, §222.) In *Dieterich Int. Truck Sales v. J.S. & J. Services* (1992) 3 C.A.4th 1601, 5 C.R.2d 388, plaintiff, who operated a truck sales and repair business, successfully sued the tenant and the landlord of neighboring property to quiet title to a prescriptive easement for access. *Held*, reversed as to the landlord.

(a) A prescriptive easement cannot be obtained against a landlord's reversionary interest. (3 C.A.4th 1608.) The interest threatened by plaintiff's use of the property was essentially possessory, and to protect it the landlord would have had to bring an action in trespass or ejectment, which he could not do without a present possessory interest. Nor could he protect his ownership interest by bringing an action for waste under C.C. 826 (see *supra*, §§143, 144), which has been applied only to actions for physical injury to the land. (3 C.A.4th 1610, quoting *Smith v. Cap Concrete* (1982) 133 C.A.3d 769, 184 C.R. 308, *supra*, §372, on distinction between possessory and ownership interests.)

(b) Because the landlord could not bring an action to prevent plaintiff from gaining the easement by prescription, C.C. 741, which protects a future estate from harm during the pendency of the intervening estate (see *supra*, §143), prevented the prescriptive easement from ripening against the landlord. (3 C.A.4th 1611.)

The requirement that the property owner must have a cause of action before a prescriptive right can be acquired against the owner means that a prescriptive right cannot result from use of a way of necessity. A way of necessity arises by implied grant, and its use is by right and not adverse. Hence, the statute of limitations will not commence to run until the necessity ceases. (*Martinelli v. Luis* (1931) 213 C. 183, 185, 1 P.2d 980; *Smith v. Skrbek* (1945) 71 C.A.2d 351, 360, 162 P.2d 674; *Moots v. Kasten* (1949) 90 C.A.2d 734, 737, 203 P.2d 537; *supra*, §398.) Furthermore, one cannot acquire an easement of light and air by use for any period, because there is no right of action to be barred. (*Western Granite & Marble Co. v. Knickerbocker* (1894) 103 C. 111, 113, 37 P. 192; see *supra*, §396.)

(2) *Use That Is Not Hostile to All Persons.* On the other hand, the adverse claim need not be hostile to all persons;

i.e., a prescriptive right can be gained against less than all persons having interests in the land. (See 1 *Rest.3d, Property (Servitudes)*, §2.16, Comment f; *Cleary v. Trimble* (1964) 229 C.A.2d 1, 7, 8, 39 C.R. 776, citing the text.) Even though a right-of-way is used by the public as well as by the adverse claimant, a prescriptive right may be gained where the claim is adverse rather than of a use in common with the public. (*O'Banion v. Borba* (1948) 32 C.2d 145, 151, 195 P.2d 10; see *Marangi v. Domenici* (1958) 161 C.A.2d 552, 556, 326 P.2d 527 ["exclusiveness of user is not essential to acquisition of a prescriptive easement"]; *Applegate v. Ota* (1983) 146 C.A.3d 702, 710, 194 C.R. 331 [claim based on individual use, rather than use as member of public].)

(3) *Illustrations.* In *Jones v. Harmon* (1959) 175 C.A.2d 869, 1 C.R. 192, plaintiffs were small landowners who irrigated their land by water from a distant well through an underground pipeline. Defendant bought land between the well and plaintiffs' land, with no knowledge of the pipeline and no mention of an easement in his deed or title policy. *Held*, nevertheless, plaintiffs had an easement by prescription as a result of use for the period. Ordinarily, a buried pipe that is not physically apparent throughout the prescriptive period does not give sufficient notoriety of use, but if there are plainly apparent accessory installations on the surface, the easement may be gained. Here, immediately adjacent to defendant's land, plaintiffs had a standpipe and a "weir-box"; and the question whether these were sufficient to charge defendant with constructive notice was one of fact for the trial court, which was resolved against defendant. (175 C.A.2d 875.) (See *Otay Water Dist. v. Beckwith* (1991) 1 C.A.4th 1041, 1046, 3 C.R.2d 223 [element of hostile use was established by water district's use of land for reservoir under mistaken claim of right, without true owner's permission; citing *Gilardi v. Hallam* (1981) 30 C.3d 317, 178 C.R. 624, 636 P.2d 588]; 55 A.L.R.2d 1169 [easement by prescription in artificial drains, pipes, or sewers].)

In *Drennen v. Ventura* (1974) 38 C.A.3d 84, 112 C.R. 907, F owned land in Ventura County that he used for many years as a public airport for small private planes. In 1969, defendant county took over operation of the airport. Because of terrain and prevailing winds, there was only one zone of approach, over unoccupied and unused land of plaintiffs held as a speculative investment. Plaintiffs sued in inverse condemnation, and the trial judge decided in favor of the county, concluding that F, its predecessor, had gained an avigation easement by prescription to the conical corridor of airspace used in its approach. *Held*, defendant county was entitled to judgment, but not on the trial judge's theory.

(a) *Avigation easement by prescription.* Without deciding the point, there is no reason why an avigation easement may not be acquired by prescription: Whatever may be acquired by eminent domain or inverse condemnation, should likewise be subject to acquisition by prescription. (38 C.A.3d 86, footnote 2.)

(b) *Privileged flight.* Ownership of the airspace above land is subject to the statutory right of overflight. This right includes the right of safe access to public airports, through the zone of approach. (38 C.A.3d 87, citing *Pub.Util.C.* 21402 and 21403(c) and C.C. 659.)

(c) *No actionable trespass.* A prescriptive easement is acquired only by an actionable invasion of the rights of the landowner. (38 C.A.3d 87, citing the text.) Flight may be a trespass, and an actionable invasion, if it is an entry into the immediate reaches of the airspace next to the land, and interferes substantially with the owner's actual use and enjoyment. Here, however, there was a trespass to only part of plaintiffs' land, and no actual interference with its use during the alleged prescriptive period. (38 C.A.3d 88.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Requirement.* See *Aaron v. Dunham* (2006) 137 C.A.4th 1244, 1252, 41 C.R.3d 32 [use of road for more than 5 years without express permission was adverse].



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12 Witkin Sum. Cal. Law Real Property § 404

[§ 404] Permissive Use.

(1) *In General.* Prescription cannot be gained if the use is permissive. (*Lyons v. Schwartz* (1940) 40 C.A.2d 60, 66, 104 P.2d 383; *Irvin v. Petitfils* (1941) 44 C.A.2d 496, 501, 112 P.2d 688; *Los Angeles Brick & Clay Products Co. v. Los Angeles* (1943) 60 C.A.2d 478, 489, 141 P.2d 46; *Dooling v. Dabel* (1947) 82 C.A.2d 417, 423, 186 P.2d 183; *Smith v. Skrbek* (1945) 71 C.A.2d 351, 359, 162 P.2d 674; *Clark v. Redlich* (1957) 147 C.A.2d 500, 504, 305 P.2d 239; *Finley v. Botto* (1958) 161 C.A.2d 614, 619, 327 P.2d 55; 68 Proof of Facts 3d 239 [permissive possession or use of land as defeating claim of prescriptive easement].)

In *Jones v. Tierney-Sinclair* (1945) 71 C.A.2d 366, 162 P.2d 669, the owner had posted signs reading: "Private Property. Permission to pass over revocable at any time." *Held*, these signs imported permission, and a neighbor who actually laid out, maintained, and repaired a road over the land did not gain a prescriptive right. (71 C.A.2d 371.)

But in *Redemeyer v. Carroll* (1937) 21 C.A.2d 217, 68 P.2d 739, plaintiff's predecessor used a road to haul tanbark by permission of defendant's predecessor. Later, plaintiff used it for other purposes, openly and without any request for permission of the owner. *Held*, plaintiff could acquire an easement by prescription, despite the fact that he was a successor to one who originally had a grant of the use. (21 C.A.2d 219.)

(2) *Recorded Notice as Evidence.* The holder of record title may record a description of the land and a notice substantially as follows: "The right of the public or any person to make any use whatsoever of the above described land or any portion thereof (other than any use expressly allowed by a written or recorded map, agreement, deed or dedication) is by permission, and subject to control, of owner: *Section 813, Civil Code.*" (If the use is by other than the general public, notice must be served on the user by registered mail.) (C.C. 813.) The recorded notice is conclusive evidence in a judicial proceeding, on the issue of dedication or prescription, that subsequent use by the public or by any user for any purpose (other than allowed by map, etc.) "is permissive and with consent." However, rights vested at the time of recording are not affected. (C.C. 813; on dedication, see *supra*, §250.)

After recording the notice, the owner must not prevent appropriate public use by physical destruction, notice, or otherwise. The permission given may be conditioned on reasonable restrictions on the time, place, and manner of public

use. No use in violation of the restrictions will be considered public use for purposes of a finding of implied dedication. The notice may be revoked by recording a notice of revocation. (C.C. 813.)

(3) *Posting Notice To Prevent Prescription*. C.C. 1008 supplements and strengthens C.C. 813 by establishing a rule of law rather than a rule of evidence to protect landowners. "No use by any person or persons, no matter how long continued, of any land, shall ever ripen into an easement by prescription," if the owner posts, at each entrance to the property or at intervals of not more than 200 feet along the boundary, a sign, reading substantially "Right to pass by permission, and subject to control, of owner: *Section 1008, Civil Code*." (C.C. 1008.) It should be noted that, although the introductory language is directed at any kind of easement, the sign refers only to a surface right-of-way.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Posting Notice To Prevent Prescription*. See *Aaron v. Dunham* (2006) 137 C.A.4th 1244, 1249, 41 C.R.3d 32 [C.C. 1008 did not prevent prescriptive easement where sign was posted by lessee, rather than owner, of property; there was no evidence that lessee was owner's authorized agent or that lessee had duty under lease to post sign].



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12 Witkin Sum. Cal. Law Real Property § 405

[§ 405] No Duty To Compensate Owner of Property.

In *Warsaw v. Chicago Metallic Ceilings (1984) 35 C.3d 564, 199 C.R. 773, 676 P.2d 584*, plaintiffs and defendant purchased adjoining parcels from a common owner. Plaintiffs operated a commercial warehouse using a 40-foot-wide driveway along the common boundary. For 7 years, trucks used an additional strip of defendant's property to reach plaintiffs' loading docks. Defendant subsequently began to erect a building on the portion of its property that had been used for access to plaintiffs' facilities, and plaintiffs sought declaratory and injunctive relief, alleging a prescriptive easement. The trial court ordered defendant to remove the encroachment. *Held*, affirmed.

(a) *Prescriptive easement.* Plaintiffs acquired a 25-foot-wide prescriptive easement over the adjoining portion of defendant's property, by open, notorious, continuous, and adverse use for over 5 years. (35 C.3d 570.) Plaintiffs' continued use of defendant's property without express consent, despite unsuccessful attempts to negotiate an express easement, was evidence that no permission was given or contemplated. (35 C.3d 572.) The easement was neither by implication, because an easement over defendant's property was considered and rejected when plaintiffs purchased the property, nor by necessity, because plaintiffs' property did include a driveway. (35 C.3d 570.)

(b) *No compensation for value of easement.* Plaintiffs' title by prescription is "sufficient against all," including defendant. (35 C.3d 574, quoting C.C. 1007, *supra*, §212.) "That being so, there is no basis in law or equity for requiring them to compensate defendant for the fair market value of the easement so acquired. To exact such a charge would entirely defeat the legitimate policies underlying the doctrines of adverse possession and prescription 'to reduce litigation and preserve the peace by protecting a possession that has been maintained for a statutorily deemed sufficient period of time.' " (35 C.3d 574.)

(c) *Cost of relocating encroachment.* A court of equity may, in a proper case, deny an order for removal of an innocent encroachment where the cost of removal greatly exceeds the inconvenience of continuing the encroachment and the owner of the easement is not irreparably injured. There is no compelling reason for denying the court the "lesser power" of granting the order on condition that the owner of the easement "pay a reasonable portion of the cost of relocation." Here, however, that relief is not appropriate, for defendant's encroachment was erected after plaintiffs' suit was filed. "[I]t would be inequitable to charge plaintiffs, who lawfully perfected an easement by prescription, for the

cost of removing an encroaching structure erected by defendant with prior notice of plaintiffs' claim." (35 C.3d 576.)

One justice dissented, arguing that an order requiring plaintiffs to pay the fair market value of the easement was within the court's equity powers and not inconsistent with the prescription statutes. (35 C.3d 577.) (See 19 *Loyola L.A. L. Rev.* 111 [Warsaw].)

SUPPLEMENT: [This section is current through the latest supplement]



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12 Witkin Sum. Cal. Law Real Property § 406

[§ 406] Recorded Covenant.

(1) *Execution of Covenant.* A city or county may provide by ordinance that certain easements may be created by recorded covenants, without a conveyance. (*Govt.C. 65870 et seq.*; see 6 Miller & Starr 3d, §15:42; 17 *Pacific L. J.* 778.) The owner of real property may execute a covenant to a city or county. (*Govt.C. 65871(a).*) The covenant must describe the property burdened by the easement and the property benefited by it and must identify "the approval, permit, or designation granted which relied upon or required the covenant." (*Govt.C. 65871(c).*) A legal description of the property is required. (*Govt.C. 65873.*)

(2) *Recordation of Covenant.* The covenant must be recorded in the county where all or a portion of the restricted property is located. (*Govt.C. 65873.*) The covenant is effective when recorded (*Govt.C. 65871(b)*) and imports notice "to the extent afforded by the recording laws" (*Govt.C. 65873*).

A recorded covenant is subject to C.C. 801 et seq. (servitudes) and C.C. 1104 (effect of transfer of property), but may not merge into any other interest in the property. (*Govt.C. 65871(b).*) Once recorded, the burdens of the covenant are binding on, and its benefits inure to, the successors in interest to the real property. (*Govt.C. 65873.*)

At the time of recordation, all the real property burdened or benefited by the covenant must be in common ownership. (*Govt.C. 65871(b).*)

(3) *Authorized Easements.* The easement may be for "parking, ingress, egress, emergency access, light and air access, landscaping, or open-space purposes." (*Govt.C. 65871(a).*)

(4) *Enforcement.* The covenant may be enforced by the successors in interest to the benefited property. (*Govt.C. 65871(d).*) However, *Govt.C. 65870 et seq.* do not create standing to enforce or challenge the covenant in any person other than the city or county or the owner of the benefited or burdened property. (*Govt.C. 65875.*)

(5) *Release.* The ordinance must provide a release procedure including a public hearing held at the request of any person. (*Govt.C. 65874(a).*) The city or county records a release if it is determined that the "restriction of the property is no longer necessary to achieve the land use goals of the city or county." (*Govt.C. 65874(b).*) The ordinance may impose

fees to cover the reasonable costs of processing release requests. (*Govt.C. 65874(c).*)

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1. In General.

12 Witkin Sum. Cal. Law Real Property § 407

[§ 407] In General.

(1) *Language of Grant Is Determinative.* The language of the grant determines the scope of the easement. (See *Pacific Gas & Elec. Co. v. Hacienda Mobile Home Park* (1975) 45 C.A.3d 519, 525, 528, 119 C.R. 559; 6 Miller & Starr 3d, §§15:54, 15:56; 4 Powell §34.12; 25 Am.Jur.2d (2004 ed.), *Easements and Licenses* §71; 33 Proof of Facts 2d 669 [extent of easement over servient estate].) Hence, a clear and specific grant for a particular use is decisive. Thus, in *Wilson v. Abrams* (1969) 1 C.A.3d 1030, 82 C.R. 272, plaintiffs granted an easement to defendants to use a parcel of land as an auto parking lot for defendant's shopping center. Plaintiffs then sought to build an auto service station on part of the easement, offering evidence that there would still be ample space for parking of cars, and invoking the rule that the owner of the servient tenement may make any use of the land that does not unreasonably interfere with the easement (infra, §412). *Held*, the evidence was properly rejected. (1 C.A.3d 1034.)

(2) *Unduly Burdensome Use.* Whether a use is unduly burdensome depends on the terms of the grant and the circumstances. Normal future uses are within the reasonable contemplation of the parties and therefore permissible, but unanticipated, abnormal uses, which greatly increase the burden, are not. (See *Wall v. Rudolph* (1961) 198 C.A.2d 684, 692, 694, 697, 18 C.R. 123 [private road used for heavy trucks traveling to oil sump, interfering with cultivation and injuring trees with dust]; *People v. Sweetser* (1977) 72 C.A.3d 278, 284, 140 C.R. 82 [pedestrian's use of easement conveyed to county for "public highway purposes" for access to navigable river was within scope of easement]; *Scruby v. Vintage Grapevine* (1995) 37 C.A.4th 697, 707, 43 C.R.2d 810 [paving of roadway at entrance to easement constituted undue burden on servient tenement, where roadway created unlawful safety hazard and was not necessary to ensure ingress and egress to dominant estate]; 3 A.L.R.3d 1256 [extent and reasonableness of use of private way in exercise of easement granted in general terms].)

On the other hand, a grant of a right-of-way without limitations or restrictions permits any reasonable use. In *Laux v. Freed* (1960) 53 C.2d 512, 2 C.R. 265, 348 P.2d 873, plaintiff and defendant owned, as partners, range land that they used for themselves, their guests, and commercial licensees for deer hunting. After they dissolved the partnership and divided the land equally, plaintiff drafted and gave defendant a grant deed to a right-of-way over a road in plaintiff's northerly parcel that had regularly been used as access to defendant's southerly parcel. After defendant and his lessees used the road for several years, plaintiff obtained a judgment limiting defendant's use of the road to domestic purposes,

and enjoining him and his lessees or invitees from using it for any other purposes. *Held*, reversed. (53 C.2d 521.)

In *Salvaty v. Falcon Cable Television* (1985) 165 C.A.3d 798, 212 C.R. 31, consent of the owner of the servient estate was not required for installation of cable television equipment on existing telephone poles. "Although the cable television industry did not exist at the time the easement was granted, it is part of the natural evolution of communications technology. Installation of the equipment was consistent with the primary goal of the easement, to provide for wire transmission of power and communication." (165 C.A.3d 803, citing *Norris v. California* (1968) 261 C.A.2d 41, 67 C.R. 595, *infra*, §411.)

(3) *No Grant of Rights in Violation of Zoning Ordinance*. Private agreements, including easements, may not supersede zoning restrictions. (*Teachers Ins. & Annuity Assn. v. Furlotti* (1999) 70 C.A.4th 1487, 1497, 83 C.R.2d 455 [to extent that easement purported to grant property owners right to use residentially zoned half of bordering alley for commercial purposes, it improperly granted rights that were prohibited by municipal code; hence, property owners could not rely on easement to use residential half of alley for those purposes].)

West's Key Number Digest, Easements k.38 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Language of Grant Is Determinative*. See *Red Mountain, LLC v. Fallbrook Public Util. Dist.* (2006) 143 C.A.4th 333, 344, 48 C.R.3d 875 [trial court erred in interpreting access easement granted by utility district as being for subdivision use, rather than simply for grantee's personal ingress and egress; because agreement conveying easement was ambiguous, grant should have been interpreted in public grantor's favor under C.C. 1069 (text, §13)]; 81 Proof of Facts 3d 199 [extent of easement of way created by express grant or reservation; superseding 33 Proof of Facts 2d 669, text, p. 478].

(2) *Unduly Burdensome Use*. See *Barnes v. Hussa* (2006) 136 C.A.4th 1358, 1369, 39 C.R.3d 659 [use of same pipeline to convey same amount of water, but to different end location, did not materially increase burden to property over which pipeline passed]. (3) *No Grant of Rights in Violation of Zoning Ordinance*. See *Baccouche v. Blankenship* (2007) 154 C.A.4th 1551, 1554, 65 C.R.3d 659 [easement granting right to keep and enjoy horses on vacant lot was valid, but unenforceable, where zoning ordinance prohibited keeping horses on lot that was not developed for residential use; citing *Teachers Ins. & Annuity Assn. v. Furlotti* (1999) 70 C.A.4th 1487, 83 C.R.2d 455, text, p. 479].



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2. Use Fixing Limits.

12 Witkin Sum. Cal. Law Real Property § 408

[§ 408] Use Fixing Limits.

A special rule governs the situation in which an easement, e.g., a right-of-way across a piece of land, is granted in general terms, without precise specification of its location or the manner of enjoyment. If the owner of the easement makes a particular use with acquiescence of the other party, the use fixes the limits of the right, and it cannot thereafter be changed against objection of the servient tenement's owner. (See *Winslow v. Vallejo* (1906) 148 C. 723, 725, 84 P. 191; *White v. Walsh* (1951) 105 C.A.2d 828, 831, 234 P.2d 276; *Collier v. Oelke* (1962) 202 C.A.2d 843, 847, 21 C.R. 140; *Los Angeles v. Howard* (1966) 244 C.A.2d 538, 541, footnote 1, 53 C.R. 274, *infra*, §412, citing the text; 4 Powell §34.12; 10 A.L.R.3d 960 [rights of owners of parcels into which dominant tenement is divided]; 24 A.L.R.4th 1053 [location of easement of way created by grant that does not specify location]; 25 Am.Jur.2d (2004 ed.), *Easements and Licenses* §§72, 73; for exception where secondary easements are granted, see *infra*, §410.)

In *Snodgrass v. Crane* (1943) 57 C.A.2d 565, 134 P.2d 862, the grantor conveyed land with a right to take water from "springs" on his land, and defendant grantee took water continually from one particular spring. Later, the grantor sold the part of his land on which that spring was located, and plaintiff succeeded to the rest of the grantor's land. *Held*, defendant was not entitled to take water from any of the other springs on plaintiff's land. (57 C.A.2d 567.) (See 31 Cal. L. Rev. 442 [criticism of *Snodgrass*].)

This rule may also operate in favor of the holder of the easement and against the grantor; i.e., the grantor (servient owner) cannot compel the grantee to accept another location or method of use. In *Youngstown Steel Products Co. of Calif. v. Los Angeles* (1952) 38 C.2d 407, 240 P.2d 977, plaintiff granted defendant city an easement to maintain power wires across a strip of land used by plaintiff for storing pipe. The city installed them at a height of 511/2 feet. After 17 years, plaintiff began to use a new type of crane for handling pipe, which reached 61 feet and necessitated raising the wires. *Held*, plaintiff should bear the cost. (38 C.2d 411; see *Tarr v. Watkins* (1960) 180 C.A.2d 362, 365, 4 C.R. 293 [following *Youngstown Steel*].)

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3. Relocation.

12 Witkin Sum. Cal. Law Real Property § 409

[§ 409] Relocation.

(1) *Implied Consent To Relocate.* The parties may relocate an easement by consent implied from use and acquiescence. In *Kosich v. Braz* (1967) 247 C.A.2d 737, 56 C.R. 52, the original owner conveyed one of two adjoining lots to defendants, reserving a 12-foot-wide strip as an easement of access to his own lot. It had an inadequate, right-angle turn, and in using the easement, the original owner had to cut the corner to turn his automobile. He conveyed his lot to plaintiffs, who likewise cut the corner until defendants put up a steel post. *Held*, plaintiffs were entitled to an injunction. The clear intention of the original parties was to create an easement of ingress and egress, and the strict description did not effectuate this intent. The conduct of the parties, although for less than 5 years, was an implied consent to the change for a necessary turn at the corner. The only other approach plaintiffs had was a steep and hazardous incline, leaving no access for fire trucks or utility vehicles except the enlarged easement. (247 C.A.2d 739.) (See 25 Am.Jur.2d (2004 ed.), *Easements and Licenses* §69; 80 A.L.R.2d 743 [relocation of easements other than those originally arising by necessity].)

(2) *Restatement.* The Third Restatement of Property adopts the minority view that a servient owner can change an easement's location at the servient owner's expense, if the change does not significantly lessen the utility of the easement, increase the burden on the holder of the easement, or frustrate the purpose for which the easement was created. (1 Rest.3d, *Property (Servitudes)*, §4.8(3) and Comment f; see 109 Harv. L. Rev. 1693 [right of owners of servient estate to unilaterally relocate easement; proposed modification to Rest.3d, *Property (Servitudes)*, §4.8(3)].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Implied Consent To Relocate.* See *Red Mountain, LLC v. Fallbrook Public Util. Dist.* (2006) 143 C.A.4th 333, 351, 48 C.R.3d 875 [implied consent to change location of easement was shown where, after original road was replaced by new road, grantor gave grantees keys to access new road and grantees used new road for many years without obstruction].



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aa. Repairs and Improvements.

12 Witkin Sum. Cal. Law Real Property § 410

[§ 410] Repairs and Improvements.

Subject to the rule against relocation of the easement without consent (*supra*, §409), the grantee "may make repairs, improvements, or changes that do not affect its substance." (*Burris v. People's Ditch Co.* (1894) 104 C. 248, 252, 37 P. 922 [bringing ditch to uniform grade by removing local inequalities, without widening it or increasing quantity of water conveyed]; 25 *Am.Jur.2d* (2004 ed.), *Easements and Licenses* §82 et seq.)

In *White v. Walsh* (1951) 105 C.A.2d 828, 234 P.2d 276, plaintiffs, owners of agricultural land, granted an easement of right-of-way for a road 16 feet wide, which was used by defendants to haul cement and gravel for their business. Defendants improved the road where water was accumulating, in some places raising it perhaps 6 to 12 inches. *Held*, plaintiffs were not entitled either to an injunction or damages; there was no interference with enjoyment and no undue burden on the land. (105 C.A.2d 832.)

In *Herzog v. Grosso* (1953) 41 C.2d 219, 259 P.2d 429, *infra*, §412, plaintiffs, the owners of an easement for a road adjoining a steep embankment, were entitled to build and maintain a guardrail of the type usual on public highways. (41 C.2d 225.)

In *Haley v. Los Angeles County Flood Control Dist.* (1959) 172 C.A.2d 285, 342 P.2d 476, plaintiff's predecessor granted a perpetual easement to defendant district for flood control purposes across certain land. Plaintiff alleged that after 25 years, a permanent channel 300 feet wide had been built, with a 175-foot-wide freeway, that no other improvements were planned, that the rest of the property was not needed, and that plaintiff's title to the land should be quieted. *Held*, judgment for defendant on demurrer affirmed.

Plaintiff relied on the rule that the grant of a right of passage over an area of specified width should be construed as meaning a right to locate anywhere within that area, in a convenient width, but the location, once made, is fixed (*supra*, §408). This rule, however, does not apply where there is also an express grant of secondary easements essential to its enjoyment. The deed conveyed incidental easements for reconstruction, maintenance, and repair of the channel and the right to pass for deposit of tools and materials, to take earth, rock, etc., to excavate, widen, deepen, or otherwise rectify

the channel, and to do other maintenance and protection work. Because the complaint did not allege that there could not be a future need for these activities, or that defendant intended to abandon the easements, no cause of action was stated. (172 C.A.2d 290.)

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12 Witkin Sum. Cal. Law Real Property § 411

[§ 411] Modernization of Use.

In *Faus v. Los Angeles* (1967) 67 C.2d 350, 62 C.R. 193, 431 P.2d 849, grantors conveyed easements in 1911 to the grantee railroads for public electric railway service. In 1955, under an order of the Public Utilities Commission, the electric railway service was terminated and a bus service was substituted. The city then condemned the rights-of-way without naming heirs of the original grantors. Plaintiff, assignee of those heirs, claimed that the easement was terminated by change of use, and that the heirs therefore were entitled to an award for the taking. *Held*, judgment for plaintiff reversed. The assumption is that an easement will accommodate future needs. Courts consider economic and technological conditions requiring reevaluation of restrictions; and the right to substitute modern mechanisms of transportation for old ones must be viewed in the light of its public effect. (67 C.2d 356.)

In *Norris v. California* (1968) 261 C.A.2d 41, 67 C.R. 595, plaintiff was successor in title to land fronting on Lake Tahoe. His predecessor, for consideration, had granted the state a highway easement across the property. After many years, the state, pursuant to statutory authority and legislative approval of the program, used a portion of the area outside the road and in the shore area as a "vista point" and "roadside rest." Plaintiff sued to enjoin, contending that this was surcharging the easement. *Held*, judgment for defendant affirmed. The grant of an easement, like other grants (supra, §13), is interpreted liberally in favor of the grantee. (261 C.A.2d 46, 47.) The new purposes were a modernization of a legitimate highway use. (261 C.A.2d 48.) Using the property for a camping ground or bathing beach, however, would extend the limits of the public use beyond the roadside rest authorization and would be a compensable taking. (261 C.A.2d 49.)

As a result of the demands of urbanization, public rights-of-way located in developed areas are subject to a wide range of uses beyond surface transportation, including the installation of sewage, water, gas, and communications lines. A proposed use of a public right-of-way should (1) serve as a means of transporting people, commodities, waste products, or information, or serve public safety; (2) serve either the public interest or a private interest of the underlying landowner that does not interfere with the public's use rights; and (3) not unduly endanger or interfere with use of the abutting property. (*Bello v. ABA Energy Corp.* (2004) 121 C.A.4th 301, 308, 315, 16 C.R.3d 818 [property owner's consent was not needed for energy company to install natural gas pipeline in public right-of-way].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Anderson v. Time Warner Telecom of Calif.* (2005) 129 C.A.4th 411, 416, 28 C.R.3d 289 [installation of fiber optic cables beneath public rights-of-way was within scope of easements; when easements were established, their use as public highways included right to construct and maintain telegraph and telephone lines, and fiber optics were natural evolution of that technology].



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aa. Right To Use Property.

12 Witkin Sum. Cal. Law Real Property § 412

[§ 412] Right To Use Property.

"[E]very incident of ownership not inconsistent with the easement and the enjoyment of the same, is reserved to the grantor." (*Dierssen v. McCormack* (1938) 28 C.A.2d 164, 170, 82 P.2d 212; see *Colegrove Water Co. v. Hollywood* (1907) 151 C. 425, 429, 90 P. 1053; *Pasadena v. California-Michigan Land & Water Co.* (1941) 17 C.2d 576, 579, 110 P.2d 983; *Dolske v. Gormley* (1962) 58 C.2d 513, 519, 25 C.R. 270, 375 P.2d 174; *Keeler v. Haky* (1958) 160 C.A.2d 471, 475, 325 P.2d 648; 1 Rest.3d, *Property (Servitudes)* §4.9; 6 A.L.R.2d 205 [correlative rights of dominant and servient owners in right-of-way for electric lines]; 28 A.L.R.2d 626 [correlative rights of dominant and servient owners in right-of-way for pipeline].) (On action for possession by servient owner where servitude exists in favor of public, see C.C. 810.)

Thus, the easement holder must exercise his or her right so as not to impose an unnecessary burden on the servient tenement, and the owner of the servient tenement may make any use of the property that does not unduly interfere with the easement. (*Atchison, Topeka & Santa Fe Ry. Co. v. Abar* (1969) 275 C.A.2d 456, 464, 79 C.R. 807, citing the text; *McCann v. Los Angeles* (1978) 79 C.A.3d 112, 116, 144 C.R. 696; see 25 Am.Jur.2d (2004 ed.), *Easements and Licenses* §82 et seq.)

In *Baker v. Pierce* (1950) 100 C.A.2d 224, 223 P.2d 286, plaintiffs granted defendants an easement over a five-foot strip of land for an underground water pipeline. Valuable trees had been planted on the strip before the grant, and, several years later, defendants cut them down. Defendants' explanation that they wanted to alter the pipeline was refuted by evidence showing that their real purpose was to obtain a better view for a motel sign. *Held*, judgment for \$ 1,650 damages affirmed. (100 C.A.2d 226.) (See *Keeler v. Haky*, *supra* [servient owners were entitled to injunction against interference with their use of private alleyway]; *Scrubby v. Vintage Grapevine* (1995) 37 C.A.4th 697, 706, 43 C.R.2d 810 [servient owner's placement of water tanks and grapevines within easement did not unreasonably interfere with easement holder's right of ingress and egress].)

In *Los Angeles v. Howard* (1966) 244 C.A.2d 538, 53 C.R. 274, plaintiff city granted real property, reserving a 150-foot-wide easement for operating and repairing power lines. *Held*, defendant servient owners were entitled to use

part of the surface area for a parking lot for their restaurant. (244 C.A.2d 545.)

In *Los Angeles v. Ingersoll-Rand Co.* (1976) 57 C.A.3d 889, 129 C.R. 485, defendant's predecessor granted an easement for power lines to plaintiff city, expressly reserving the right to use the servient estate for agricultural purposes. Defendant used the surface for a parking lot and storage of machinery, and plaintiff sued to enjoin this use. *Held*, the use was proper. The general rule, that every incident of ownership not inconsistent with the easement is reserved, applied, because the trial court found that the use did not interfere unreasonably with the easement. The express reservation of the right to a particular use did not make the general rule inapplicable; i.e., the language of the grant, not that of the reservation, controls, and limited words of reservation do not preclude other uses. (57 C.A.3d 894.)

However, the servient owner cannot use the land in a way that obstructs the normal use of the easement. In *Herzog v. Grosso* (1953) 41 C.2d 219, 259 P.2d 429, plaintiffs had an easement for access to their home over defendants' land. Defendants blocked it with a fence, deposited dirt, and plowed it up. *Held*, an injunction and judgment for damages affirmed. Defendants' contention that they wanted the gates and fence to prevent people from treating the easement as a public road was no excuse for the interference. A sign would have achieved that purpose. (41 C.2d 224.) (See 52 A.L.R.3d 9 [gate or fence across right-of-way].)

SUPPLEMENT: [This section is current through the latest supplement]

The following are among the cases construing the extent to which a servient owner retains rights in the dominant tenement:

Van Klompenburg v. Berghold (2005) 126 C.A.4th 345, 349, 350, 23 C.R.3d 799 [owners of servient tenement were properly enjoined from maintaining gates across private roadway easement; specific language of indenture conveying easement, that roadway was to be "kept open" and "wholly unobstructed," prevailed over general rule that servient owner may make use of land in way that does not unreasonably interfere with easement].

Blackmore v. Powell (2007) 150 C.A.4th 1593, 1598, 1599, 59 C.R.3d 527, citing the text [trial court properly interpreted easement for "parking and garage purposes" as authorizing easement's owner to build and exercise exclusive control over garage on servient tenement; distinguishing numerous cases disallowing exclusive easements by prescription (text, §417)].

Gray v. McCormick (2008) 167 C.A.4th 1019, 1024, 1029, 84 C.R.3d 777 [dominant tenement had exclusive easement that precluded any use by owners of servient tenement; easement used language of exclusivity and did not contain reservation of rights by servient tenement; California law does not prohibit exclusive easements].

See 100 Am.Jur. Trials 337 [servient estate owner's wrongful obstruction of right-of-way easement].



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a. Express Grant or Reservation.
5. Rights Retained by Servient Owner.
bb. Grant of Right to Others.

12 Witkin Sum. Cal. Law Real Property § 413

[§ 413] Grant of Right to Others.

The servient owner may transfer to another the right to a use that the owner has retained and could exercise. In *Dierssen v. McCormack* (1938) 28 C.A.2d 164, 82 P.2d 212, landowners by agreement granted an easement to plaintiffs to construct and maintain a ditch, reserving the right to take water on designated days for the irrigation of their lands. *Held*, the landowners were entitled to permit another person to take water on those days. (28 C.A.2d 170.)

In *Pasadena v. California-Michigan Land & Water Co.* (1941) 17 C.2d 576, 110 P.2d 983, the servient owner granted an easement to plaintiff city for water mains over a strip of land, and later granted to defendant water company, a competing service, a similar easement in the same strip. Both easements were described as "being five feet in width." *Held*, the second grant was proper. The rules governing underground pipes are the same as those governing rights-of-way. Plaintiff could locate its pipes in any part of the five-foot strip, and if necessary, could use the whole to the exclusion of another person. But until necessity justified exclusive use, a concurrent use by the servient owner or the owner's grantee, which did not in fact interfere with the first use, was proper. (17 C.2d 579.) (See *Friends of the Trails v. Blasius* (2000) 78 C.A.4th 810, 826, 93 C.R.2d 193 [citing *Pasadena*; public easement for use of road alongside irrigation canal was not incompatible with irrigation district's easement that permitted district to access canal and adjacent facilities for maintenance and repair]; 69 A.L.R.2d 1236 [servient owner's right to dedicate land].)

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[§ 414] Implied Grant.

An implied easement is not confined to the precise use at the time of the transfer. It may have a broader scope than the quasi-easement on which it is based. The test is the intent of the parties concerning the use reasonably contemplated. (*Fristoe v. Drapeau* (1950) 35 C.2d 5, 9, 215 P.2d 729 [C.C. 1104, supra, §392, must be read together with C.C. 806, defining extent of servitudes]; *Wall v. Rudolph* (1961) 198 C.A.2d 684, 692, 18 C.R. 123; see 1 Rest.3d, Property (Servitudes) §§4.10, 4.1, Comment e; 6 Miller & Starr 3d, §15:57; 4 Powell §34.13; 25 Am.Jur.2d (2004 ed.), Easements and Licenses §79.)

In *Fristoe*, supra, the original grantor constructed a road through a tract. He conveyed one parcel to plaintiff in 1930 and a contiguous parcel to defendants in 1946. The road followed the boundary line between the parcels, being partly on plaintiff's and partly on defendants' land. *Held*, plaintiff had an implied easement to use the road not only for the original purpose of servicing an orchard, but also for access to his residence. "[C]onsideration must be given not only to the actual uses being made at the time of the severance, but also to such uses as the facts and circumstances show were within the reasonable contemplation of the parties at the time of the conveyance. Under all of the circumstances existing at the time of severance in the present case, we cannot say as a matter of law that the use of the road for purposes connected with a private residence was not within the contemplation of the parties or that the trial court erred in failing to limit plaintiff's rights in the roadway to use thereof for agricultural purposes." (35 C.2d 10.) (See *Horowitz v. Noble* (1978) 79 C.A.3d 120, 134, 144 C.R. 710, quoting the text; *George v. Goshgarian* (1983) 139 C.A.3d 856, 861, 189 C.R. 94 [following *Fristoe*].)

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c. Prescription.

1. General Rule Limiting Extent to Actual Use.

12 Witkin Sum. Cal. Law Real Property § 415

[§ 415] General Rule Limiting Extent to Actual Use.

The extent of an easement by prescription is ordinarily limited to the actual use under which it is gained. (*O'Banion v. Borba* (1948) 32 C.2d 145, 153, 195 P.2d 10; *Anderson v. Southern Calif. Edison Co.* (1926) 77 C.A. 328, 335, 246 P. 559; *Sylva v. Kuck* (1966) 240 C.A.2d 127, 135, 49 C.R. 512; see 6 Miller & Starr 3d, §15:58; 1 Rest.3d, Property (Servitudes) §4.1, Comment h, §4.10; 79 A.L.R.4th 604 [scope of prescriptive easement for access (easement of way)]; 25 Am.Jur.2d (2004 ed.), Easements and Licenses §81.)

Likewise, the manner of the use is determined by the actual use, and a material change in the use, as from a ditch to a pipeline, although beneficial to the owner of the servient tenement, cannot be made against the owner's wishes. (*Allen v. San Jose Land & Water Co.* (1891) 92 C. 138, 139, 28 P. 215; *Hannah v. Pogue* (1944) 23 C.2d 849, 854, 147 P.2d 572; *Guerra v. Packard* (1965) 236 C.A.2d 272, 283, 46 C.R. 25; *Cushman v. Davis* (1978) 80 C.A.3d 731, 736, 145 C.R. 791 [unreasonable increase in burden resulting from change in dominant tenant's agricultural use to residential use]; *Krieger v. Pacific Gas & Elec. Co.* (1981) 119 C.A.3d 137, 143, 145, 173 C.R. 751 [placing impervious concrete lining on earthen ditch improperly enlarged easement by alteration in mode of operation]; *Connolly v. McDermott* (1984) 162 C.A.3d 973, 977, 978, 208 C.R. 796 [easement for cattle herding operations by men and horses did not authorize use of motor vehicles].)

In *Bartholomew v. Staheli* (1948) 86 C.A.2d 844, 195 P.2d 824, a prescriptive right-of-way to a farmhouse could not be extended for use of a commercial resort established on the premises. "The easement for access to a tranquil home and farm was converted into a turbulent route to reach a hilarious nudist colony. That unauthorized change of burden on the easement was a harmful imposition upon plaintiffs' property rights." (86 C.A.2d 850.)

In *Smith v. Rock Creek Water Corp.* (1949) 93 C.A.2d 49, 208 P.2d 705, defendant, having a prescriptive right to conduct water over a ditch through plaintiffs' land, was enjoined from destroying trees and constructing sluiceways, despite his claim that every easement carries with it a "secondary easement" to do whatever is necessary for the full enjoyment of the easement. "The secondary easement is no more than the right to make repairs and to do such things as are necessary to the exercise of the right and to do them only when necessary and in such reasonable manner as not to increase the burden needlessly on the servient estate or to enlarge it by alteration in the mode of operation." (93 C.A.2d

53.)

In *Thomson v. Dypvik* (1985) 174 C.A.3d 329, 220 C.R. 46, defendants used a dirt road across plaintiffs' adjoining land to reach their property, and asserted an easement of ingress and egress 60 feet wide, based on prescription and grants in deeds outside plaintiffs' chain of title. *Held*, the prescriptive right was limited to actual use (15 feet) during the prescriptive period.

(a) The title obtained by adverse possession focuses on the exclusive possession of the premises, and where the possession rests on a deed that purports to convey the property but is defective, the doctrine of color of title enables an adverse possessor to gain legal title to more land than the possessor actually occupied. The prescriptive right to use property of another, however, is measured by actual use of the property by the claimant. (174 C.A.3d 338, 339.)

(b) Defendants' nonexclusive use of plaintiffs' property was sufficient to acquire only a prescriptive right, and the designation in their deeds of a road 60 feet wide did not operate to expand the extent of their easement. "Clearly the doctrine of color of title has relevance in connection with acquiring title through adverse possession. ... [I]t has no relevance in the prescriptive easement context to extend the area of use." (174 C.A.3d 340.)

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2. Exception for Permissible Changes.

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[§ 416] Exception for Permissible Changes.

A prescriptive easement is not forfeited by an insubstantial change in use. (*Ward v. Monrovia* (1940) 16 C.2d 815, 821, 108 P.2d 425 [replacement of old pipe by new, with slight necessary shift in location]; *Hill v. Allan* (1968) 259 C.A.2d 470, 486, 66 C.R. 676 [addition of many homes on 120-acre parcel was reasonably foreseeable; subdivision of dominant tenement was normal development]; *Jordan v. Worthen* (1977) 68 C.A.3d 310, 324, 137 C.R. 282 [following *Hill*]; *Applegate v. Ota* (1983) 146 C.A.3d 702, 712, 194 C.R. 331 [20-foot easement to accommodate passing on 10-foot roadway was reasonable]; 4 Powell §34.13.)

In *Sylva v. Kuck* (1966) 240 C.A.2d 127, 49 C.R. 512, the trial judge prohibited defendant servient owners from maintaining a gate, thus requiring them to construct a new 600-foot fence to confine animals within a 5-acre area. *Held*, reversed for a proper trial of the issue, with a strong hint that the prohibition was unreasonable, i.e., that plaintiffs would not be unduly burdened by an obligation to open and close the gate. (240 C.A.2d 135.)

A narrow test based solely on the use to which the dominant tenement was being put was rejected in *Pipkin v. Der Torosian* (1973) 35 C.A.3d 722, 111 C.R. 46. Plaintiffs purchased the eastern half of a 20-acre parcel of agricultural land from defendant T. T's western half had the only direct access to a public road, but plaintiffs for more than 5 years used an access road across the southern adjoining land of defendant B to bring in their farm equipment. After a controversy with B, plaintiffs brought an action to establish an easement by prescription over B's property and an easement by implication or of necessity over T's property. The trial judge concluded that plaintiffs had an easement by prescription over B's property only for agricultural uses, and an easement of necessity, not one by implication, over T's property for residential purposes. *Held*, reversed in part. There was no easement of necessity over T's property (see *supra*, §399), but the easement by prescription over B's property was improperly limited to exclude use for residential purposes.

(a) The extent of an easement is determined by and limited to the uses made during the prescriptive period, and no different or greater use can be made, but the particular use to which the dominant tenement is being put during the period (here, plaintiffs' agricultural use) is only one factor in determining the nature, character, and volume of the use made of the easement. Thus, the First Property Restatement (§478) called for a comparison between the newly claimed

use and "the use by which the easement was created" with respect to their physical character, their purpose, and the relative burden caused by them on the servient tenement. The Comment to §478 explained that some variation in use is inevitable, that the problem is to ascertain the limits of permissible variation, and that uses which have characteristics sufficiently resembling those of the adverse use by which the easement was created may be considered the same use. (35 C.A.3d 727; on rule described in Third Restatement, see 1 *Rest.3d, Property (Servitudes)* §§4.1, 4.10.)

(b) This is the reasonable approach. "For example, assuming a home should be built on [plaintiffs'] property, it should be of no moment to [defendant B] whether persons riding in a pickup or automobile over the easement are going to [plaintiffs'] property for the purpose of going to the home or for the purpose of cultivating crops so long as the amount of traffic is not substantially increased. On the contrary, restricting the use of the easement to servicing [plaintiffs'] property for agricultural purposes does not guarantee or prevent a possible radical change in the burden upon the servient estate. Such a change in burden could occur by an increase in the intensity of use, change in the crop pattern or in the method of farming the dominant tenement." (35 C.A.3d 728.)

(c) The easement "should be defined in terms of the right to pass and repass over the same by foot, by automobile, by truck, by tractor and by all types of agricultural equipment, provided that the nature, scope and extent of the use does not substantially increase the burden placed upon the servient tenement as it existed during the period that the prescriptive easement was acquired." (35 C.A.3d 729.)

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3. Propriety of Exclusive Prescriptive Easement.

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[§ 417] Propriety of Exclusive Prescriptive Easement.

In *Otay Water Dist. v. Beckwith* (1991) 1 C.A.4th 1041, 3 C.R.2d 223, a landowner argued that the trial court had erroneously granted a water district an exclusive easement to use land it had enclosed for reservoir purposes, because a prescriptive easement, by definition, cannot be exclusive. *Held*, the ruling was proper.

(a) The only limitation on the future use of a prescriptive easement is imposed by the use made during the statutory period (see *supra*, §415). An exclusive easement is unusual, but where, as here, the use during the statutory period was exclusive, future use of the prescriptive easement may continue to be exclusive. The trial court's ruling in this case was particularly justified, given the uncontested evidence that the landowner's proposed recreational use would interfere with the operation of the reservoir. (1 C.A.4th 1047.)

(b) The landowner correctly noted that where an easement would create the practical equivalent of an estate, the party claiming it must satisfy the elements of adverse possession rather than those of a prescriptive easement; and the water district could not do this, because it failed to pay taxes during the statutory period. However, the easement granted to the water district was significantly less than a fee title, being restricted to use for reservoir purposes without any increased burden on the servient estates. (1 C.A.4th 1048.)

Otay has been limited to "its difficult and peculiar facts," involving a public water company's right to keep drinking water safe from contamination. "The notion of an exclusive prescriptive easement, which as a practical matter completely prohibits the true owner from using his land, has no application to a simple backyard dispute." (*Silacci v. Abramson* (1996) 45 C.A.4th 558, 564, 53 C.R.2d 37 [trial court erred in finding that defendants had exclusive prescriptive easement over fenced-in portion of plaintiffs' property that defendants had been using as backyard]; see *Mehdizadeh v. Mincer* (1996) 46 C.A.4th 1296, 1307, 54 C.R.2d 284 [trial court erred in granting homeowner prescriptive easement that amounted to adverse possession; citing *Silacci* and distinguishing *Otay*]; *Hirshfield v. Schwartz* (2001) 91 C.A.4th 749, 764, 110 C.R.2d 861 [distinguishing *Silacci* and *Mehdizadeh*; trial court properly awarded encroaching neighbors "easement" that gave them exclusive right to use parcels that they had been using; court did not grant exclusive prescriptive easement, but rather used its equitable powers to create protective interest in favor of encroacher]; *Harrison v. Welch* (2004) 116 C.A.4th 1084, 1090, 11 C.R.3d 92 [landowner was not entitled to

prescriptive easement that would allow her to maintain woodshed and landscaping on neighboring parcel, where these uses effectively excluded neighboring owners from using that portion of their property; citing *Silacci* and *Mehdizadeh*; *Kapner v. Meadowlark Ranch Assn.* (2004) 116 C.A.4th 1182, 1187, 11 C.R.3d 138 [declining to follow *Hirshfield* to extent that it allows creation of prescriptive easement over area that claimant possessed].)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Duty To Maintain Property.

a. In General.

12 Witkin Sum. Cal. Law Real Property § 418

[§ 418] In General.

The language of the grant ordinarily determines the duty to maintain and repair the property that is subject to the easement. (See *Rose v. Peters* (1943) 59 C.A.2d 833, 835, 139 P.2d 983; 1 Rest.3d, *Property (Servitudes)* §4.13; 6 Miller & Starr 3d, §15:67; 25 Am.Jur.2d (2004 ed.), *Easements and Licenses* §82 et seq.)

In *Whalen v. Ruiz* (1953) 40 C.2d 294, 253 P.2d 457, defendant railroad company granted an easement over its highway bridge to two counties, and agreed to keep it in repair, in consideration of certain payments. Plaintiff's injury was caused in part by a defective guardrail and curbing, probably adequate at the time of construction (1912), but not at the time of the accident (1947). *Held*, defendant was not liable. It was not required to maintain the easement in safe condition for the public using it at the invitation of the easement holders. Its agreement to operate and repair did not carry any duty to alter the design or make structural changes. The state, through its department of public works, has full control over state highways, and could have authorized the changes. (40 C.2d 299.) (See *Scallly v. Pacific Gas & Elec. Co.* (1972) 23 C.A.3d 806, 817, 100 C.R. 501 [electric company, with only partial control over right-of-way, had no independent duty to maintain rights-of-way in "denuded condition" as fire prevention measure].)

In the absence of express language in the grant, the following rules govern private rights-of-way:

(1) The owner of the easement or the land to which it is attached must maintain and repair it. (C.C. 845(a); on snow removal as maintenance of easement, see C.C. 845(d).)

(2) If there is more than one owner, the cost is shared by agreement, or proportionately to the use by each. (C.C. 845(b), 845(c); for forms of maintenance agreements, see 7A Am.Jur. Legal Forms 2d (1998 ed.), *Easements and Licenses in Real Property*, §94:44 et seq.)

(3) Where an owner refuses or fails to perform under an agreement after a written demand, another owner may bring an action for specific performance or contribution. (C.C. 845(b).)

(4) An owner may apply, before, during, or after performance of the maintenance work, to a court where the right-of-way is located, and that has jurisdiction over the amount in controversy, for appointment of an impartial

arbitrator to apportion the cost. If the award is not accepted by all the owners, the court may determine liability. The judgment may be enforced like a money judgment. (C.C. 845(c).)

These rules do not apply to private rights-of-way used by railroad common carriers. (C.C. 845(e); see *17 Pacific L. J.* 776.)

The procedural and substantive provisions of C.C. 845 were explored in *Healy v. Onstott* (1987) 192 C.A.3d 612, 237 C.R. 540. Plaintiffs and defendant were coowners of a number of lots, with an easement in a private road on which a bridge was located. The bridge was damaged in a storm, and plaintiffs had it replaced at a cost of \$ 30,000. Defendant refused to share in the cost, and nine contributing coowners obtained an order appointing an impartial arbitrator. The arbitrator apportioned liability equally among all coowners and set responsibility for past and future maintenance. Defendant did not comply, and plaintiffs filed a petition to confirm the award. Defendant, who had never used the lot, challenged the decision and requested a trial. The court denied his request and entered judgment on the award. *Held*, reversed.

(a) The voluntary arbitration scheme under C.C.P. 1286.2 and 1286.6, giving nearly conclusive weight to the arbitrator's decision, does not apply to compulsory arbitration under C.C. 845. Compulsory arbitration making the decision of the arbitrator the final determination would be a denial of due process. Therefore C.C. 845 affords "the right to a trial de novo in the event fewer than all co-owners of a private right-of-way accept the arbitrator's award apportioning maintenance costs." (192 C.A.3d 616.)

(b) The right to trial is not a right to a jury trial. C.C. 845 refers to a determination by "the court," and an action for contribution is in equity, with no right to a jury. However, the denial of a trial before the judge is a deprivation of a constitutional right. (192 C.A.3d 616.)

(c) The clause stating that "the cost shall be shared proportionately to the use made of the easement by each owner" has not yet been interpreted in a reported decision, perhaps because the statute has been invoked most frequently in small claims court actions. "That fact is relevant. Liberally construed, 'proportionately to the use made' would require the trier of fact to distinguish between residents having two cars and those owning only one, between easement holders heating their homes with electricity and those being serviced periodically by heavy butane trucks. Given that the amount in controversy will ordinarily be small, no such intention can be attributed to the Legislature. In the interest of speed and economy of proceedings, the arbitrator and judge must be free to paint with a broad brush. Obviously, a property owner may be asked to contribute only to the maintenance of that segment of the right of way lying between his driveway and the public road. Also, a distinction must be made between a parcel having an occupied residence and one which is unimproved, although we are not prepared to say that the owner of the latter should escape all contribution as his property is obviously benefitted by the maintenance of the common easement. But within those general guidelines the trier of fact must be allowed to fashion any reasonable contribution scheme." (192 C.A.3d 617.)

SUPPLEMENT: [This section is current through the latest supplement]
Rules in absence of express language:

(2) *Cost shared by agreement:* See 7A Am.Jur. Legal Forms 2d (2007 ed.), Easements and Licenses in Real Property §94:47 et seq.



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[§ 419] Jointly Owned Easement.

McManus v. Sequoyah Land Associates (1966) 240 C.A.2d 348, 49 C.R. 592, raised a question not answered by C.C. 845 (supra, §418). Plaintiff's predecessors conveyed Parcel A to defendant corporation, with a right to an easement of roadway across Parcel B, owned by plaintiff's predecessors. The grant provided that in the event defendant desired to use it, the cost of improving the road should be borne equally by the parties, and in the event defendant did not want to use it within 3 years, the grant should be void. Within the 3-year period, defendant recorded the grant and a document entitled "Declaration of Election to Use Easement." But when plaintiff proposed to construct and pave the road and notified defendant, the latter replied that it was not ready yet and would not pay its half. *Held*: (a) In the absence of contract, the owner of the easement (defendant) could not be compelled to contribute without its consent to the cost of major improvements such as the construction of this roadway. (240 C.A.2d 356.) (b) However, defendant, by recording its election to use, in which it stated its intention to comply with all conditions of the grant, and in its letters to plaintiff using the words "construction of the easement," agreed to construction of the roadway and to the obligation to pay half the cost. It did this in order to prevent nullification of the grant by its terms. (240 C.A.2d 356, 357.)

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5. Transferability and Succession.

12 Witkin Sum. Cal. Law Real Property § 420

[§ 420] Transferability and Succession.

Easements are property rights, and, where appurtenant to land, are transferable and descendible. (See 2 *Rest.3d, Property (Servitudes)* §5.1 et seq.; 25 *Am.Jur.2d* (2004 ed.), *Easements and Licenses* §91 et seq.; 7 *A.L.R.5th* 187 [effect of tax sale on easement].) Transfers may be express or by implication, as where land is transferred and all appurtenant easements are deemed to go with the grant without express mention. (C.C. 1104; *Shonafelt v. Busath* (1944) 66 *C.A.2d* 5, 14, 151 *P.2d* 873.)

There is some authority opposed to assignment of easements in gross, on the ground that the difficulty of proving ownership or abandonment leads to undesirable clogging of title. (See *St. Louis v. DeBon* (1962) 204 *C.A.2d* 464, 466, 22 *C.R.* 443 ["it might not be assignable"; but easement was construed as appurtenant].) However, under the broad language of California statutes, easements in gross are clearly alienable. (See C.C. 802, 1044; *Fudickar v. East Riverside Irr. Dist.* (1895) 109 *C.* 29, 37, 41 *P.* 1024; *Callahan v. Martin* (1935) 3 *C.2d* 110, 121, 43 *P.2d* 788; *Collier v. Oelke* (1962) 202 *C.A.2d* 843, 845, 846, 21 *C.R.* 140, citing the text; *LeDeit v. Ehlert* (1962) 205 *C.A.2d* 154, 166, 22 *C.R.* 747 ["In California an easement in gross is both assignable and inheritable unless restricted by proper language to certain individuals"]; *Leggio v. Haggerty* (1965) 231 *C.A.2d* 873, 878, 42 *C.R.* 400; 1 *Rest.3d, Property (Servitudes)* §§4.6, 4.7; 2 *Rest.3d, Property (Servitudes)* §5.8; 25 *Am.Jur.2d* (2004 ed.), *Easements and Licenses* §90.)

SUPPLEMENT: [This section is current through the latest supplement]



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A. Easements and Profits.
6. Termination of Easement.
a. Release or Merger.

12 Witkin Sum. Cal. Law Real Property § 421

[§ 421] Release or Merger.

The owner of an easement may formally release or surrender the right, possibly by a quitclaim deed to the owner of the servient tenement. (*Westlake v. Silva* (1942) 49 C.A.2d 476, 478, 121 P.2d 872; *Leggio v. Haggerty* (1965) 231 C.A.2d 873, 881, 42 C.R. 400, citing the text; see 2 Rest.3d, *Property (Servitudes)* §7.3; 6 Miller & Starr 3d, §§15:74, 15:75; 4 Powell §34.20; 25 Am.Jur.2d (2004 ed.), *Easements and Licenses* §101; 7A Am.Jur. Legal Forms 2d (1998 ed.), *Easements and Licenses in Real Property*, §§94:50, 94:51.)

If the person entitled to the easement becomes the owner of the servient tenement, the easement is gone, for one cannot have an easement on one's own property. (C.C. 811(1), 805; see *Highland Realty Co. v. San Rafael* (1956) 46 C.2d 669, 680, 298 P.2d 15; 2 Rest.3d, *Property (Servitudes)* §7.5; 4 Powell §34.22; 25 Am.Jur.2d (2004 ed.), *Easements and Licenses* §100.) In *Crease v. Jarrell* (1924) 65 C.A. 554, 224 P. 762, however, a sale of lots (dominant tenement) abutting on an alley (servient tenement) carried easements to the alley's use. The owner of the alley later acquired one lot. *Held*, there could not be a merger, for he had not acquired the whole of the dominant tenement. (65 C.A. 559.) (See *Signorelli v. Edwards* (1932) 120 C.A. 614, 620, 8 P.2d 194.)

West's Key Number Digest, Easements k.27, 28

SUPPLEMENT: [This section is current through the latest supplement]

See C.E.B., *Easements and Boundaries* §1.65; 7A Am.Jur. Legal Forms 2d (2007 ed.), *Easements and Licenses in Real Property* §§94:53, 94:54.

Easement on one's own property: See *Beyer v. Tahoe Sands Resort* (2005) 129 C.A.4th 1458, 1473, 29 C.R.3d 561, Supp., supra, §388 ["owner" under C.C. 805 means owner of full fee title, both legal and equitable]; *Zanelli v. McGrath* (2008) 166 C.A.4th 615, 624, 82 C.R.3d 835 [view easement was extinguished when title to both dominant and servient tenements vested in same two people, even though title to one was held as tenants in common and title to other was held as joint tenants, and even though one person held his interest as trustee for his revocable living trust].



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6. Termination of Easement.

b. Abandonment.

1. Private Easement.

12 Witkin Sum. Cal. Law Real Property § 422

[§ 422] Private Easement.

(1) *In General.* An easement may be lost by abandonment, i.e., intentional relinquishment, which may be shown by the conduct of its owner. (See *People v. Ocean Shore R. (1948)* 32 C.2d 406, 417, 196 P.2d 570 [evidence that railroad company abandoned right-of-way was that it stopped trains, removed rails, sold equipment, and announced intention to liquidate]; *Gerhard v. Stephens (1968)* 68 C.2d 864, 890, 69 C.R. 612, 442 P.2d 692, *infra*, §793 [abandonment of right to take oil and gas]; *Slater v. Shell Oil Co. (1940)* 39 C.A.2d 535, 549, 103 P.2d 1043 [pipeline easement was terminated when public utility abandoned its public purpose]; *Watson v. Heger (1941)* 48 C.A.2d 417, 420, 120 P.2d 153 [no intention to abandon found]; *Tamalpais Land & Water Co. v. Northwestern Pac. R. Co. (1946)* 73 C.A.2d 917, 929, 167 P.2d 825 [partial extinguishment of easement by partial abandonment]; *Flanagan v. San Marcos Silk Co. (1951)* 106 C.A.2d 458, 464, 235 P.2d 107 [pipeline was not used for 16 years, while easement owner allowed blocking, obtained different source of water, and sold stranger part of property without reservation of easement]; *Ocean Shore R. Co. v. Doelger (1954)* 127 C.A.2d 392, 401, 403, 274 P.2d 23 [following *People v. Ocean Shore R.*]; *Ocean Shore R. Co. v. Doelger (1960)* 179 C.A.2d 222, 231, 3 C.R. 706 [deterioration, failure to repair, rehabilitation after 35 years virtually impossible]; *Lake Merced Golf & Country Club v. Ocean Shore R. Co. (1962)* 206 C.A.2d 421, 436, 437, 23 C.R. 881; *Johnson v. Ocean Shore R. Co. (1971)* 16 C.A.3d 429, 435, 94 C.R. 68 [on abandonment, easement does not "revert"; it is merely extinguished]; *Cash v. Southern Pac. R. (1981)* 123 C.A.3d 974, 978, 177 C.R. 474 [concurrence of nonuse and intent to abandon railroad right-of-way required]; 2 *Rest.3d, Property (Servitudes)* §7.4; 4 *Powell* §34.20; 27 *Ecology L. Q.* 351 [rights of third-party users and adjacent landowners in abandoned railroad easements]; 30 *Southwestern U. L. Rev.* 221 [importance of intent in extinguishment of easements]; 95 *A.L.R.2d* 468 [what constitutes abandonment of railroad right-of-way]; 25 *Am.Jur.2d* (2004 ed.), *Easements and Licenses* §98 et seq.; 53 *Proof of Facts* 3d 519 [proof of intent to abandon easement].)

The owner of real property subject to an easement may bring an action to establish abandonment of the easement and to clear record title. (C.C. 887.010 et seq.; see *supra*, §348.)

(2) *Abandonment Through Subdivision Map Act.* In *Negron v. Dundee (1990)* 221 C.A.3d 1502, 271 C.R. 381, a parcel map of property that previously had been divided into five parcels by various leases was filed to bring the subdivision into compliance with the Subdivision Map Act (*Govt.C. 66410* et seq.; *infra*, §809 et seq.). The parcel map

failed to show an easement for parking, ingress and egress that had been created by one of the leases. The trial judge quieted title in favor of the owner of the burdened property, ruling that filing the parcel map constituted a merger and resubdivision of subdivided lands under Govt.C. 66499.201/2, which provides that all streets and easements not shown on the map are abandoned. *Held*, reversed. The language of Govt.C. 66499.201/2, its placement in the article dealing with reversions to acreage (*Govt.C. 66499.11 et seq.*) "and the general understanding of commentators show this section is intended for abandonment of a previously recorded subdivision map." It does not apply to the parcel map recorded here, which was the first recorded subdivision of the property. (*221 C.A.3d 1502.*)

West's Key Number Digest, Easements k.30 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See C.E.B., Easements and Boundaries §1.65; 98 Am.Jur. Trials 371 [dominant estate owner's abandonment of easement of way].



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2. Public Easement.

12 Witkin Sum. Cal. Law Real Property § 423

[§ 423] Public Easement.

In *Severo v. Pacheco* (1946) 75 C.A.2d 30, 34, 170 P.2d 40, county supervisors formally abandoned a highway, but the court held that the private easement in the highway, arising from sale by reference to a map showing the highway, survived the abandonment. This holding is no longer the law. Vacation of public streets, highways, and service easements is now governed by *Sts. & H.C. 8300* et seq. Public easements in vacated property are extinguished, unless preserved under *Sts. & H.C. 8340* et seq. (*Sts. & H.C. 8350, 8351.*) An easement for vehicular or nonvehicular trail use that the public entity has previously granted to another state or local public agency, however, is not extinguished by the vacation of the servient estate. (*Sts. & H.C. 8351(a).*)

Private easements are ordinarily not affected by the vacation of streets, highways, and service easements. (*Sts. & H.C. 8352.*) However, a private easement (other than an easement of ingress or egress to or from a street or highway), which is claimed by reason of reference to a map or plat showing the street or highway, is extinguished unless, within 2 years after the vacation, the claimant records a verified notice particularly describing the easement. (*Sts. & H.C. 8353.*)

SUPPLEMENT: [This section is current through the latest supplement]

See *Kinney v. Overton* (2007) 153 C.A.4th 482, 491, 63 C.R.3d 136 [even though homeowners in subdivision had initially held private easement rights to lot that could potentially offer ingress and egress, they were divested of those rights when county abandoned lot under predecessor to *Sts. & H.C. 8353*]; *Zack's v. Sausalito* (2008) 165 C.A.4th 1163, 1183, 81 C.R.3d 797 [city could not lawfully lease strip of public trust tidelands, that had been dedicated as public street, to private party for boat storage without first complying with termination procedures under *Sts. & H.C. 8300* et seq.].



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12 Witkin Sum. Cal. Law Real Property § 424

[§ 424] Nonuse.

Nonuse or disuse must be distinguished from intentional abandonment. An easement by prescription is lost by mere nonuse for the same period as that required for its acquisition (the prescriptive period of 5 years). (C.C. 811(4); *People v. Ocean Shore R. (1948)* 32 C.2d 406, 419, 196 P.2d 570.)

Early cases held that an easement obtained by grant cannot be lost by mere nonuse. (*Vallejo v. Scally* (1923) 192 C. 175, 177, 219 P. 63; *Griffin v. Parker* (1932) 124 C.A. 701, 705, 13 P.2d 403; *Whelan v. Zahniser* (1949) 92 C.A.2d 770, 775, 207 P.2d 629; *Clark v. Redlich* (1957) 147 C.A.2d 500, 507, 305 P.2d 239; *Haley v. Los Angeles County Flood Control Dist.* (1959) 172 C.A.2d 285, 290, 342 P.2d 476; *Tarr v. Watkins* (1960) 180 C.A.2d 362, 364, 4 C.R. 293.) Under C.C.P. 887.050 (supra, §348), this is no longer the case. (See 6 Miller & Starr 3d, §15:78; 4 Powell §34.20; 62 A.L.R.5th 219 [loss of private easement by nonuse]; 25 Am.Jur.2d (2004 ed.), *Easements and Licenses* §98.)

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 496, fourth line from end of section, "C.C.P. 887.050" should be "C.C. 887.050".



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d. Prescription.

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[§ 425] Prescription.

An easement obtained by grant may be lost by prescription. An easement is acquired by prescription as a result of use of land in possession of another, whereas an easement is terminated by prescription when the servient owner makes a use of his or her own land in a manner that is adverse to the interest of the easement. The elements of adverse use are, however, the same. (See 2 *Rest.3d, Property (Servitudes)* §7.7.)

In *Glatts v. Henson* (1948) 31 C.2d 368, 188 P.2d 745, the servient owner erected and maintained buildings for 5 years on a part of a road. The court said: "It is well settled that an easement, regardless of whether it was created by grant or use, may be extinguished by the owner of the servient tenement upon which the easement is a burden, by adverse possession thereof by the servient tenement owner for the required statutory period. Perhaps more accurately stated an easement may be extinguished by the user of the servient tenement in a manner adverse to the exercise of the easement, for the period required to give title to land by adverse possession. ... The extinguishment by adverse possession need not be of the entire easement. It may be extinguished in part--to the extent that is embraced in the scope of the adverse possession. ... The nonpermissive erection and maintenance for the statutory period of permanent structures, such as buildings, which obstruct and prevent the use of the easement will operate to extinguish the easement." (31 C.2d 370.)

The court then considered the element of taxes, and concluded that the servient owner, having paid taxes on his fee title, did not have the burden of proving that no taxes were separately assessed on the easement; i.e., in extinguishment of an easement by prescription, the same rule as to burden of proof on the element of taxes applies as in the case of acquiring an easement by prescription. "In the instant case there was a presumption that no taxes were levied upon the easement and hence taxes need not be paid. There was no proof that taxes were assessed." (31 C.2d 372; see *supra*, §402.) (See *Furtado v. Taylor* (1948) 86 C.A.2d 346, 351, 194 P.2d 770 [evidence was insufficient to show hostility of use, hence easement was not destroyed]; *Clark v. Redlich* (1957) 147 C.A.2d 500, 508, 305 P.2d 239 [same]; *Guerra v. Packard* (1965) 236 C.A.2d 272, 294, 46 C.R. 25 [merely locking gate did not obstruct right-of-way and thus did not extinguish easement]; *Masin v. La Marche* (1982) 136 C.A.3d 687, 692, 186 C.R. 619; *Tract Dev. Services v. Kepler* (1988) 199 C.A.3d 1374, 1386, 1387, 246 C.R. 469 [citing the text and discussing *Glatts*; actions were not sufficiently hostile, open, notorious, or under claim of right to constitute prescriptive extinguishment, nor so incompatible with easement's nature or use as to constitute prescriptive extinguishment]; 6 Miller & Starr 3d, §15:85; 4 Powell §34.21; 42

A.L.R.4th 462 [extinguishment by prescription of drainage easement]; *25 Am.Jur.2d* (2004 ed.), *Easements and Licenses* §102.)

In *Sevier v. Locher* (1990) 222 C.A.3d 1082, 272 C.R. 287, the trial judge found that the servient owners' adverse possession of their driveway had extinguished the dominant owners' right-of-way easement. The judge rejected the contention that because the servient owners had not owned the property for 5 years they had not occupied the easement adversely for the required period. *Held*, affirmed. "[A] transfer of title to real property after the prescriptive period for adverse possession of the property has begun does not interrupt or terminate the running of the prescription period. Adverse possession refers to occupation or use of land adverse to legal title, not to a particular holder of legal title." (222 C.A.3d 1084.)

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e. Incompatible Act of Easement's Owner.

12 Witkin Sum. Cal. Law Real Property § 426

[§ 426] Incompatible Act of Easement's Owner.

An easement is extinguished by the performance of an act on either tenement, by the easement's owner or with the owner's assent, incompatible with its nature or exercise. (C.C. 811(3); see *Fletcher v. Stapleton* (1932) 123 C.A. 133, 136, 10 P.2d 1019; *Strother v. Pacific Gas & Elec. Co.* (1949) 94 C.A.2d 525, 529, 211 P.2d 624; 2 Rest.3d, *Property (Servitudes)* §7.10; 6 Miller & Starr 3d, §15:77; 111 A.L.R.5th 313 [what constitutes misuse of easement; remedies for misuse].)

However, in *Silveira v. Smith* (1926) 198 C. 510, 246 P. 58, the owner of the servient tenement built a fence and gate across the right-of-way, but never locked the gate, and the owners of the dominant tenement used it without interruption. *Held*, the assent to the construction of the fence and gate did not destroy the easement. (198 C. 519.) (See *Strosnider v. Pomin* (1942) 52 C.A.2d 745, 748, 126 P.2d 915 [partial obstruction of right-of-way by servient owner was followed later by deed confirming easement; inference was that obstruction was permissive and easement was unaffected].)

Usually, the incompatible act is one that changes the conditions of either the servient or dominant tenement enough to make it impossible to exercise the easement. If there is merely an unauthorized or excessive use of the easement, the normal remedy of the servient owner is an injunction. (See *Reichardt v. Hoffman* (1997) 52 C.A.4th 754, 767, 60 C.R.2d 770 [extinguishment of defendant's nonexclusive easement allowing him access to his property was improper, despite defendant's outrageous acts that prevented plaintiffs from using easement area, because defendant's acts did not prevent defendant from using easement; injunction ordering defendant to accommodate plaintiffs' use of easement area was appropriate remedy].) However, the same kinds of misuse may have the effect of extinguishing the easement. "[W]here the burden of the servient estate is increased through changes in the dominant estate which increase the use and subject it to use of nondominant property, a forfeiture will be justified if the unauthorized use may not be severed and prohibited." (*Crimmins v. Gould* (1957) 149 C.A.2d 383, 391, 308 P.2d 786; see 25 Am.Jur.2d (2004 ed.), *Easements and Licenses* §99.)

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f. Destruction of Servient Tenement.

1. Involuntary Destruction.

12 Witkin Sum. Cal. Law Real Property § 427

[§ 427] Involuntary Destruction.

An easement is an interest in certain property, and cannot exist if there is nothing on which it can operate. Hence, it is extinguished "[b]y the destruction of the servient tenement." (C.C. 811(2).) The problem arises chiefly in connection with easements in a building, and where the destruction is involuntary, the rule is clear.

In *Cohen v. Adolph Kutner Co.* (1918) 177 C. 592, 171 P. 424, the grantee was given a right-of-way over a stairway in defendant's adjoining building. The building burned. Defendant then prepared to rebuild without replacing the stairway. *Held*, the easement was terminated and there was no obligation to rebuild the stairway, regardless of the fact that the easement also ran "to the heirs and assigns forever." (177 C. 594.) (See *Muzio v. Erickson* (1919) 41 C.A. 413, 417, 182 P. 974; *Walner v. Turlock* (1964) 230 C.A.2d 399, 404, 41 C.R. 29, *infra*, §428; 25 *Am.Jur.2d* (2004 ed.), *Easements and Licenses* §103.)

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2. Voluntary Destruction.

12 Witkin Sum. Cal. Law Real Property § 428

[§ 428] Voluntary Destruction.

(1) *Rule Against Termination.* In *Rothschild v. Wolf* (1942) 20 C.2d 17, 123 P.2d 483, decedent owned two lots (numbers 5 and 7) with separate two-story structures connected by a single hallway, the sole access to which was a stairway in the building on Lot 5. The decree of distribution gave Lot 7 to defendants and Lot 5 to plaintiffs, and provided that the stairway should be maintained so long as the building remained. Plaintiff sought a declaratory judgment permitting him to rebuild, contending that the structure was obsolete. *Held*, he was not entitled to relief; the servient owner cannot voluntarily destroy an easement, even though it may be more profitable to do so. (20 C.2d 20.) (See 31 Cal. L. Rev. 102 [criticizing result and arguing that where rebuilding is economically desirable, servient owner should be allowed to rebuild and compensate other party for loss of easement]; 38 Cal. L. Rev. 426, 442 [suggesting proper drafting to provide for this contingency].)

(2) *Obsolescence Equal to Destruction.* In *Rothschild*, *supra*, the majority opinion contained dictum suggesting that obsolescence might be enough to be the equivalent of destruction (20 C.2d 20), and the dissenting opinion took an even stronger position on the right to destroy when sound economic practices call for modernization (20 C.2d 27). *Walner v. Turlock* (1964) 230 C.A.2d 399, 41 C.R. 29, combined the dictum and dissent into a proposed general policy, as follows: "After events have proved the foresightedness of the dissent in *Rothschild*, in that the growth of outlying shopping centers has accentuated the obsolescence and decadence of many downtown buildings, the remodeling or rebuilding of which often has been impeded by easements such as the one before us. The majority opinion, however, even though it denies the servient owner the right to demolish his building solely for his economic advantage, inferentially holds that for practical purposes depreciation and obsolescence can progress to the point of being tantamount to destruction. When this occurs, the destroyed-building, extinguished-easement doctrine becomes applicable." (230 C.A.2d 405.)

The facts of the *Walner* case were particularly appropriate for a reconsideration of the *Rothschild* approach. Defendant's predecessor owned a hotel building. Plaintiff's predecessor had a narrow store building that, by an easement, used a wall of the hotel and rested in part on the hotel foundation. After more than 30 years, defendant city bought the hotel building in order to destroy it as an eyesore and then to sell the land for more attractive construction. Plaintiff sought to enjoin removal of the wall to the extent necessary to support his building and rest rooms. The evidence showed that the building was 50 years old, the electrical wiring was dangerous and a fire hazard, many rooms

were unfit for occupancy because of no outside ventilation or lighting, the interior plaster was full of holes, the floors and roof had settled, and the exterior brick wall mortar was crumbling and lacked ties with the concrete slab foundation. The trial judge refused to make a finding on the issue of economic obsolescence. *Held*, this was reversible error. (230 C.A.2d 406.)

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B. Licenses.
1. Revocable Licenses.

12 Witkin Sum. Cal. Law Real Property § 429

[§ 429] Revocable Licenses.

A license granted by a private person has been defined as a personal, revocable, and nonassignable permission or authority to do an act or acts on land of another. (See *Eastman v. Piper* (1924) 68 C.A. 554, 560, 229 P. 1002; *Von Goerlitz v. Turner* (1944) 65 C.A.2d 425, 429, 150 P.2d 278; 6 Miller & Starr 3d, §15:2; 4 Powell §34.24 et seq.; 25 Am.Jur.2d (2004 ed.), *Easements and Licenses* §117 et seq.; for forms, see 7A Am.Jur. Legal Forms 2d (1998 ed.), *Easements and Licenses in Real Property*, §94:56 et seq.; on actions relating to licenses, see 25 Am.Jur.2d (2004 ed.), *Easements and Licenses* §124 et seq.; 9 Am.Jur. P.P. Forms (1996 ed.), *Easements and Licenses*, §161 et seq.)

The most important characteristic of a license, which clearly distinguishes it from an easement, is that it is revocable at any time at the will of the licensor. (*Shaw v. Caldwell* (1911) 16 C.A. 1, 8, 115 P. 941; *Alameda v. Ross* (1939) 32 C.A.2d 135, 143, 89 P.2d 460; *Kaler v. Brown* (1951) 101 C.A.2d 716, 719, 226 P.2d 66; *El Dorado v. Al Tahoe Inv. Co.* (1959) 175 C.A.2d 407, 410, 346 P.2d 205 [permit granting encroachment on public highway is revocable license; county board has no power to authorize use of highways or streets for private purposes, except where use is temporary]; *Golden West Baseball Co. v. Anaheim* (1994) 25 C.A.4th 11, 36, 31 C.R.2d 378, *infra*, §517 [like easement, license is interest in property less than an estate, but it is normally revocable at will, although irrevocable license has been recognized]; 1 Rest.3d, *Property (Servitudes)* §1.2(4) and Comment g; 74 A.L.R.2d 886 [duration of license granted for specific purpose where no period has been specified].)

A license is not enough of an interest in land to come within the statute of frauds, and may therefore be created orally or by exercise of the privilege with the licensor's acquiescence. (*Eastman v. Piper*, *supra*, 68 C.A. 560; *Zellers v. California* (1955) 134 C.A.2d 270, 273, 285 P.2d 962 [license to deposit excessive fill was implied from owner's acquiescence]; 1 Rest.3d, *Property (Servitudes)* §2.8 et seq.) A revocable license or permit does not create an interest compensable in a proceeding in eminent domain or an inverse condemnation suit. (*Belmont County Water Dist. v. California* (1976) 65 C.A.3d 13, 19, 135 C.R. 163.)

To the extent that a license is a personal privilege, it cannot be deemed assignable. (See 1 Rest.3d, *Property (Servitudes)* §4.6 [all benefits are transferable, unless personal].)

A license may be recorded to prevent the acquisition of an easement by prescription, and may be revoked by recordation. (C.C. 813, *supra*, §404.)

West's Key Number Digest, Licenses k.43 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

See 7A Am.Jur. Legal Forms 2d (2007 ed.), Easements and Licenses in Real Property §94:59 et seq.; 9 Am.Jur. P.P. Forms (2006 ed.), Easements and Licenses §79 et seq.



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Witkin Summary of California Law
V. RIGHTS IN THE LAND OF ANOTHER
B. Licenses.
2. Irrevocable Licenses.

12 Witkin Sum. Cal. Law Real Property § 430

[§ 430] Irrevocable Licenses.

(1) *Executed Parol License*. If a licensee, in reliance on a parol license, has expended money in improvements so that termination of the license would be inequitable, the licensor may be estopped to revoke it. In that event, the license becomes the equivalent of an easement. (See *Stoner v. Zucker* (1906) 148 C. 516, 520, 83 P. 808; *Cooke v. Ramponi* (1952) 38 C.2d 282, 286, 239 P.2d 638; *Gravelly Ford Canal Co. v. Pope & Talbot Land Co.* (1918) 36 C.A. 717, 737, 178 P. 155; 1 Rest.3d, *Property (Servitudes)* §2.10(1) and Comment e; 25 Am.Jur.2d (2004 ed.), *Easements and Licenses* §122.)

In *Stapp v. Williams* (1921) 52 C.A. 237, 198 P. 661, the owner gave an adjoining owner a certain share of the water from his spring, and the licensee constructed a dam, a ditch, and other improvements. *Held*, the license to take water became irrevocable. (52 C.A. 257.) (See *Noronha v. Stewart* (1988) 199 C.A.3d 485, 490, 245 C.R. 94 [property owners who built wall on adjoining property acquired irrevocable license that was good against subsequent owner of adjoining property who demanded that wall be torn down].)

(2) *License Coupled With Interest*. In some situations, the license is irrevocable at the outset because it is coupled with an interest, e.g., where the license is given to remove the licensee's personal property from the land, or where by a specifically enforceable contract the licensee has a right to remove a building from the land. (See *Bomberger v. McKelvey* (1950) 35 C.2d 607, 618, 619, 220 P.2d 729.) Regarding the latter situation, "[t]he same reasoning which justifies the conclusion that defendants could not repudiate the contract because plaintiffs had a right to specific performance supports the conclusion that they could not revoke the implied license to enter, exercise of which was essential to plaintiffs' completion of the agreement. It follows that plaintiffs' license to enter defendants' realty was coupled with an interest and was irrevocable, giving them a reasonable time to remove the old building." (35 C.2d 619.)

In *Lucky Auto Supply v. Turner* (1966) 244 C.A.2d 872, 53 C.R. 628, defendants leased store premises to plaintiff automobile supply company. The lease contained an agreement that plaintiff could use an adjoining parking lot owned by defendants. The lot, used by customers and delivery persons, was a valuable element in plaintiff's business. Defendants nevertheless deprived plaintiff of its use by building a structure on it. *Held*, the provision created a license coupled with an interest. Interference with it was a tort, and damages, including lost profits, were recoverable. (244 C.A.2d 881.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Covenants Running With the Land.

1. In General.

a. Nature of Covenant.

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[§ 431] Nature of Covenant.

(1) *Creation*. A covenant is created by words in a deed or other writing that show an agreement to do or refrain from doing a certain thing. It must be more than a mere recital of fact. (*O'sullivan v. Griffith* (1908) 153 C. 502, 506, 95 P. 873, 96 P. 323; *Citizens for Covenant Compliance v. Anderson* (1995) 12 C.4th 345, 349, 47 C.R.2d 898, 906 P.2d 1314, *infra*, §449 [enforceable covenant can be created by recording common plan for subdivision before sale of property; reference to covenant in deed is not necessary]; *Anthony v. Brea Glenbrook Club* (1976) 58 C.A.3d 506, 510, 130 C.R. 32, *infra*, §435, citing the text.)

The covenantor, however, need not necessarily sign the instrument containing the covenant. A covenant in a lease is binding if it is executed by the lessor-covenantor, delivered, and accepted by the lessee-covenantor. (*Chandler v. Hart* (1911) 161 C. 405, 411, 119 P. 516.) (On lessor's covenants, see C.C. 1469, 1470; *infra*, §660; on unenforceability of covenants that restrict use of real property because of user's sex, race, color, religion, ancestry, national origin, or disability, see *supra*, §201.)

(2) *Parties to Covenant*. The covenant considered in this topic is a promise respecting the use of land. Considered as a promise, it binds only the parties to the promise, the covenantor (promisor) and the covenantee (promisee), except where there is a thirdparty beneficiary, or where one of the parties assigns its rights or obligations to an assignee. These original parties, or assignees to whom the rights are assigned or who assume the obligations, are in privity of contract, and as to them, it is immaterial whether the covenant runs with the land, for their rights and liabilities are determined by their agreement. (See *Werner v. Graham* (1919) 181 C. 174, 179, 183 P. 945; *Realty & Rebuilding Co. v. Rea* (1920) 184 C. 565, 569, 194 P. 1024; *Smith v. Mendonsa* (1952) 108 C.A.2d 540, 542, 238 P.2d 1039.)

(3) *Termination*. A covenant may be extinguished by a number of methods, including expiration of the specified period, release, rescission, estoppel, and merger. (See 2 *Rest.3d, Property (Servitudes)* §7.1 et seq.)

(4) *Commentary*. The nature of covenants, their creation, and their use have been the subjects of much commentary and many practice works. (See 4 Cal. Western L. Rev. 131 [covenant not to compete]; 13 *Hastings L. J.* 310 [land use control through covenants]; 21 *Hastings L. J.* 1319 [comparison of covenants running with land and equitable servitudes]; 29 *Hastings L. J.* 545 [covenants and equitable servitudes in California]; 9 Santa Clara Lawyer 285

[overview of California law of covenants running with land]; 39 *So. Cal. L. Rev.* 409 [zoning and covenants]; 45 *So. Cal. L. Rev.* 335 [same]; 55 *So. Cal. L. Rev.* 1177 [proposals for unifying easements, real covenants, and servitudes into single entity]; 9 Powell §60.01 et seq.; 20 *Am.Jur.2d* (2005 ed.), *Covenants, Conditions, and Restrictions* §1 et seq.; 68 *A.L.R.2d* 1022 [affirmative covenants as running with land]; 7 *A.L.R.3d* 650 [construction of covenant relating to permanent maintenance of location of structure]; 18 *A.L.R.3d* 850 [what constitutes "building" within restrictive covenant]; 21 *A.L.R.3d* 641 [incidental use of dwelling for business or professional purposes as violation of covenant restricting use to residential purposes]; 25 *A.L.R.3d* 897 [covenant restricting use of land, made for purpose of guarding against competition, as running with land]; 43 *A.L.R.4th* 71 [interpretation and application of covenant limiting use to private residence]; 83 *A.L.R.5th* 651 [what constitutes "mobile home," "house trailer," "trailer house," or "trailer" within meaning of restrictive covenant]; 115 *A.L.R.5th* 251 [validity and construction of covenant requiring consent to construction or renovation]; Cal. Civil Practice, 1 Real Property Litigation, §12:48 et seq.; 34 *Proof of Facts* 3d 339 [proving violation of restrictive covenant that runs with land]; 7C *Am.Jur. P.P. Forms* (2002 ed.), *Covenants, Conditions, and Restrictions*, §91 et seq.; for drafting suggestions, see 38 *Cal. L. Rev.* 446; 63 *Harv. L. Rev.* 1400 [lessor's covenant not to compete]; 7 *Am.Jur. Legal Forms* 2d (1998 ed.), *Covenants, Conditions, and Restrictions*, §77:1 et seq.)

West's Key Number Digest, Covenants k.53 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Commentary*. See 1 *A.L.R.6th* 135 [construction and application of "residential purposes only" or similar covenant restriction to incidental use of dwelling for business, professional, or other purposes; superseding 21 *A.L.R.3d* 641, text, p. 504]; 7 *Am.Jur. Legal Forms* 2d (2006 ed.), *Covenants, Conditions, and Restrictions* §77:1 et seq.



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[§ 432] Personal Covenant.

If the promise is nothing more than a personal covenant, i.e., one that does not fulfill the requisites of a covenant running with the land (*infra*, §433), it is enforceable at law only against the original parties to the covenant. (*Los Angeles Terminal Land Co. v. Muir* (1902) 136 C. 36, 42, 68 P. 308; *Berryman v. Hotel Savoy Co.* (1911) 160 C. 559, 573, 117 P. 677; *Pythian Castle Assn. of Sacramento v. Daroux* (1916) 172 C. 510, 511, 157 P. 594; *McCaffrey v. Preston* (1984) 154 C.A.3d 422, 436, 201 C.R. 252 [covenant in deed restricting use of property to single residence did not expressly benefit any particular property and gave only original grantor right of enforcement].) This is so even though the instrument contains a clause binding the "heirs and assigns" of the parties, or a statement that the covenants "shall run with the land." (*California Packing Corp. v. Grove* (1921) 51 C.A. 253, 255, 196 P. 891; *Lisenby v. Newton* (1898) 120 C. 571, 573, 52 P. 813; *Coulter v. Sausalito Bay Water Co.* (1932) 122 C.A. 480, 493, 10 P.2d 780; *Chandler v. Smith* (1959) 170 C.A.2d 118, 338 P.2d 522; *Harrison v. Domergue* (1969) 274 C.A.2d 19, 23, 78 C.R. 797 [covenant among cotenants giving first refusal where one desires to sell was binding on successors at request of still-living original parties, but was not enforceable by successors of original parties].) It is possible, however, for the parties to create a lien on the land as security for the performance of the covenant. Furthermore, even if the contract does not provide for it, the court may, by way of enforcement, decree an equitable lien. (See 2 *Rest.3d, Property (Servitudes)* §8.3.)

A covenant against encumbrances is personal and does not run. (*Babb v. Weemer* (1964) 225 C.A.2d 546, 550, 37 C.R. 533.)

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[§ 433] Running Covenant.

(1) *Nature of Running Covenant.* Under many circumstances, a transferee or successor to the estate of one of the parties may be entitled to the benefits of a covenant or may be bound by its obligations. In that case, the benefits or burdens pass by implication of law and not under principles of contract. The question whether the covenant runs never arises unless there is a transfer of an estate or interest in the land by one of the original parties (covenantor or covenantee) to a third person (the successor to the covenantor or covenantee). "Certain covenants, contained in grants of estates in real property, are appurtenant to such estates, and pass with them, so as to bind the assigns of the covenantor and to vest in the assigns of the covenantee, in the same manner as if they had personally entered into them. Such covenants are said to run with the land." (C.C. 1460; *B.C.E. Dev. v. Smith* (1989) 215 C.A.3d 1142, 1146, 264 C.R. 55, citing the text; see C.C. 1461 [only covenants specified in Code, and those incidental to specified covenants, run]; 1 *Rest.3d, Property (Servitudes)* §1.3 [covenant that runs is "servitude"]; 49 *Cal. L. Rev.* 931 [covenants of title running with land]; 20 *Am.Jur.2d* (2005 ed.), *Covenants, Conditions, and Restrictions* §§18, 19, 47, 49, 50; 81 *A.L.R.2d* 804 [covenant in lease to arbitrate, or to submit to appraisal, as running with the leasehold so as to bind assignee]; *Rest.2d, Property (Landlord and Tenant)* §16.1 et seq.)

(2) *Acquisition or Possession of Land as Prerequisite to Liability Under Covenant.* After the covenantor transfers the land, and his or her successor becomes liable on the covenant, the covenantor is relieved from further obligation unless the parties intended a continuing personal obligation on the covenantor's part. Similarly, if the covenantee transfers land and the covenantee's successor becomes entitled to enforce the covenant, the covenantee is not entitled to do so except in the unusual case where he or she has some duty to see that the promise is performed. (2 *Rest.3d, Property (Servitudes)* §4.4.) "No one, merely by reason of having acquired an estate subject to a covenant running with the land, is liable for a breach of the covenant before he acquired the estate, or after he has parted with it or ceased to enjoy its benefits." (C.C. 1466.)

C.C. 1466 bars an association of real property owners from imposing liability on new members for the unpaid association debts of the new members' predecessors in interest. (*Mountain Home Properties v. Pine Mountain Lake Assn.* (1982) 135 C.A.3d 959, 971, 185 C.R. 623.) "The obvious purpose of section 1466 is one of fairness to a party who acquires property. Since such a party has no connection with the property until he comes into possession, the Legislature has provided that the party should not be liable for the debts of its predecessors in interest. ... To impose

over \$ 40,000 in unpaid assessments on respondent is manifestly unfair in that no benefits have accrued to respondent prior to its purchase." (135 C.A.3d 971.) (See 39 A.L.R.4th 114 [liability of unit owner for assessment in support of common facilities levied against and unpaid by prior owner].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Acquisition or Possession of Land as Prerequisite to Liability Under Covenant*. See *Baychester Shopping Center v. San Francisco Residential Rent Stabilization & Arbitration Bd. of San Francisco* (2008) 165 C.A.4th 1000, 1006, 81 C.R.3d 341 [landlord was liable for unlawful rent increases imposed by former landlord; C.C. 1466 did not apply because landlord's obligations arose under ordinance, not private agreement, and were not implied covenants running with land; distinguishing *Mountain Home Properties v. Pine Mountain Lake Assn.* (1982) 135 C.A.3d 959, 185 C.R. 623, text, p. 506].



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2. Essentials of Running Covenant.
a. Intention That Covenant Run.

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[§ 434] Intention That Covenant Run.

(1) *In General.* The instrument creating the covenant (e.g., a deed) must disclose the intention of the parties that the covenant run. Thus, in *Heimborge v. State Guaranty Corp.* (1931) 116 C.A. 380, 2 P.2d 998, the covenant was that the grantee would leave a light well "in the event of his building" on the property. *Held*, the language created merely a personal covenant. (116 C.A. 383.) (See *Berryman v. Hotel Savoy Co.* (1911) 160 C. 559, 563, 117 P. 677; *Citizens for Covenant Compliance v. Anderson* (1995) 12 C.4th 345, 349, 47 C.R.2d 898, 906 P.2d 1314, *infra*, §449 [enforceable covenant can be created by recording common plan for subdivision that states intent to bind subsequent purchasers before sale of property; reference to intent in deed is not necessary]; *Coulter v. Sausalito Bay Water Co.* (1932) 122 C.A. 480, 494, 10 P.2d 780; *Carlson v. Lindauer* (1953) 119 C.A.2d 292, 304, 259 P.2d 925; 1 *Rest.3d, Property (Servitudes)* §2.2, Comment b [intention to create servitude may arise by inference from circumstances]; 9 Powell §60.04; 20 *Am.Jur.2d* (2005 ed.), *Covenants, Conditions, and Restrictions* §22.)

(2) *Naming Assigns or Successors.* A typical method of indicating intention that the covenant run is to state that the covenant will bind the successors or assigns of the covenantor, or will be enforceable by the assigns of the covenantee. Because this is merely one permissible method, the failure to mention assigns is ordinarily not fatal. (*Sacramento Suburban Fruit Lands Co. v. Whaley* (1920) 50 C.A. 125, 133, 194 P. 1054.) It has, however, been regarded as essential in three situations:

(a) *Spencer's Case* (1583) 77 *Eng. Rep. R.* 72, held that in leases, where the covenant concerns something not in existence, assigns must be expressly named. The rule of this case was codified in California, and was applied to all grants, not merely to leases, in former C.C. 1464, which was repealed in 1998. (See *Marin County Hosp. Dist. v. Cicurel* (1957) 154 C.A.2d 294, 301, 316 P.2d 32.)

(b) C.C. 1468 formerly made the same requirement of express mention of assigns a requisite for the running of covenants between independent owners in fee. (For changes in C.C. 1468, see *infra*, §439.)

(c) C.C. 1469 and 1470 provide for enforcement of certain lessor's covenants against successive owners only if the lease expressly makes them bound.

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b. Relation to Land.

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[§ 435] Relation to Land.

The covenant must affect the parties as owners of particular estates in land, or must relate to the use of land. This is sometimes referred to as the requirement to "touch or concern the land." (See *B.C.E. Dev. v. Smith* (1989) 215 C.A.3d 1142, 1146, 264 C.R. 55, citing the text; 9 Powell §60.06; 20 *Am.Jur.2d* (2005 ed.), *Covenants, Conditions, and Restrictions* §§23, 24.) Although the Third Restatement of Property contends that the touch-or-concern doctrine has been superseded (1 *Rest.3d, Property (Servitudes)* §3.2), the requirement that a running covenant relate to the land has been maintained in California (see C.C. 1468(c), *infra*, §439).

The requirement is not solely of physical effect. A covenant will also run where it relates to the legal interest or estate of the parties, e.g., a covenant by a lessee to pay taxes or keep the property free from liens, or by a lessor to renew the lease or to give the lessee an option to buy. (See *Richardson v. Callahan* (1931) 213 C. 683, 684, 3 P.2d 927; *Chapman v. Great Western Gypsum Co.* (1932) 216 C. 420, 425, 14 P.2d 758; *Greenleaf v. S.A. Camp Ginning Co.* (1957) 150 C.A.2d 385, 389, 309 P.2d 943 [covenant reserving oil royalties]; *Cicinelli v. Iwasaki* (1959) 170 C.A.2d 58, 64, 338 P.2d 1005 [lessor's covenant to renew lease]; *Claremont Terrace Homeowners' Assn. v. United States* (1983) 146 C.A.3d 398, 406, 408, 194 C.R. 216 [option to purchase].)

A covenant in deeds to homeowners in a residential subdivision project, requiring membership in a homeowners association, relates to the use of the land, for the availability of a clubhouse, recreational areas, and swimming pool clearly tends to enhance or increase its value. Hence, the covenant runs with the land. (*Anthony v. Brea Glenbrook Club* (1976) 58 C.A.3d 506, 511, 130 C.R. 32.)

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c. Succession to Interest of Original Party.

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[§ 436] Succession to Interest of Original Party.

A running covenant requires succession. The person bound by the burden of a running covenant is one who succeeds to the estate or interest of the covenantor, and the person entitled to enforce it is one who succeeds to the estate or interest of the covenantee. (See 2 *Rest.3d, Property (Servitudes)* §5.2 ["benefit or burden runs to all subsequent owners and possessors of the benefited and burdened property"]; on limitations of rule, see 2 *Rest.3d, Property (Servitudes)* §5.3 [lessees], §5.4 [life tenants], and §5.5 [adverse possessors].)

It is not necessary that the successor take all the property affected by the covenant; e.g., several transferees in fee may succeed to different parts of the original parcel of land, and the benefits or burdens of the covenant will be apportioned among them. (C.C. 1467; 2 *Rest.3d, Property (Servitudes)* §5.7(3).) The question arises, however, whether the successor must take the identical interest of the original party, or whether any estate or interest is sufficient. In California, the covenant "binds those only who acquire the whole estate of the covenantor in some part of the property." (C.C. 1465.) Hence, the lessee of a lessor-covenantor is not bound, for the lessee does not acquire the entire estate of the covenantor, but only an estate for years. (*Higgins v. Monckton* (1938) 28 *C.A.2d* 723, 728, 83 *P.2d* 516.) However, C.C. 1465 is inapplicable to covenants in grants and between fee owners under C.C. 1468. (See *infra*, §439; 7 *A.L.R.5th* 187 [effect of tax sale on covenant].)

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a. Former Privity Requirement.

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[§ 437] Former Privity Requirement.

"Privity of estate" between the covenantor and covenantee was fundamental to the common law concept of running covenants, and in most jurisdictions, the covenant would not run with the land in the absence of privity.

The general rule, supported by the First *Restatement of Property* §534, was that a grant or other transfer of land was enough to establish privity; e.g., where the covenantor and covenantee were grantor and grantee, there was privity between them, and covenants in the grant would run. The other, stricter view was that privity consisted of simultaneous interests of the parties in the same land, usually a present interest in one and a reversionary interest in the other. Under this theory, there was privity between lessor and lessee, but not between grantor and grantee. (See *Bresee v. Dunn* (1918) 178 C. 96, 100, 172 P. 387; *Heimburge v. State Guaranty Corp.* (1931) 116 C.A. 380, 383, 2 P.2d 998.) Of course, lessor and lessee were not the only relationships that fulfilled the requirements of this limited view of privity. There could be mutual and simultaneous interests in the land where the parties were tenants in common, or where one party had an easement in the other's land. (See *Rest., Property* §534.)

The effect of the requirement was that if the covenant imposed a burden, charge, or obligation on the land (such as a building restriction), it did not run with the land in California. (*Los Angeles Terminal Land Co. v. Muir* (1902) 136 C. 36, 41, 68 P. 308 [covenant by grantee that no liquor business would be conducted on land]; *Marra v. Aetna Const. Co.* (1940) 15 C.2d 375, 378, 101 P.2d 490 [covenant by grantee and successors not to allow anything but one-family residence costing \$ 8,000].)

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b. Abrogation of Privity Requirement.

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[§ 438] Abrogation of Privity Requirement.

(1) *Exception for Covenants in Grants for Benefit of Property.* Although California cases adopted the strict view of privity (see *supra*, §437), California statutes permitted the running of covenants in grants for the benefit of property, despite the absence of privity. "Every covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property, or some part of it then in existence, runs with the land." (C.C. 1462.) Privity of estate, in the California sense, was thus not required, but the only covenant that would run under this statute was one that benefited the physical property or the owner's legal interest in the property.

The Code specifies covenants "of warranty," "for quiet enjoyment," and "further assurance" on the part of a grantor, and for the payment of rent, taxes, or assessments on the part of a grantee. (C.C. 1463; see *Stillwell Hotel Co. v. Anderson* (1935) 4 C.2d 463, 467, 50 P.2d 441; *First Nat. Bank v. Aldridge* (1939) 33 C.A.2d 485, 490, 92 P.2d 674.) But the statutory enumeration is not exclusive. Others have been recognized, including covenants to insure, repair, deliver up possession, renew a lease, release a mortgage, keep land free from liens, exercise an option to purchase, and develop mineral resources on a royalty basis. (See *Standard Oil Co. v. Slye* (1913) 164 C. 435, 442, 129 P. 589; *Richardson v. Callahan* (1931) 213 C. 683, 685, 3 P.2d 927; *Chapman v. Great Western Gypsum Co.* (1932) 216 C. 420, 425, 14 P.2d 758; *Sacramento Suburban Fruit Lands Co. v. Whaley* (1920) 50 C.A. 125, 130, 194 P. 1054; *Andrade v. Casteel* (1947) 81 C.A.2d 729, 731, 185 P.2d 51 [lessee's option to purchase was running covenant, but was also upheld as equitable servitude; see *infra*, §440]; *Carlson v. Lindauer* (1953) 119 C.A.2d 292, 304, 259 P.2d 925 [conveyance of estate in oil and gas to oil company, with covenant by company to quitclaim unproductive land within 5-year period].)

Although privity is present in an estate for years (see *supra*, §437), the California cases generally treat leases as "grants of an estate," thus making C.C. 1462 and 1463 applicable to covenants in leases. (See *Richardson v. Callahan*, *supra*, 213 C. 684 [oil and gas lease]; *Stillwell Hotel Co. v. Anderson*, *supra*, 4 C.2d 463, 467; *Bewick v. Mecham* (1945) 26 C.2d 92, 96, 156 P.2d 757.)

(2) *Exception for Covenants Between Owners in Fee.* Former C.C. 1468, before its amendment in 1968, permitted covenants to run when the original parties were merely adjoining owners or neighbors, without privity existing between them in any sense. Nor was it necessary, as in the case of grants, that the covenant be for the direct benefit of the

property with which it ran. The requirement was that it be for the direct benefit of the land of the covenantee, but the covenantor's land could be burdened, and the covenant would run with both parcels.

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c. Present Law.

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[§ 439] Present Law.

(1) *No Privity Requirement.* C.C. 1468 was revised in 1968 to make the burden of covenants by the grantor run, as well as those between owners in fee (see *supra*, §438). The new provision gave purchaser-grantees the same rights as lessees under C.C. 1469 and 1470. (See 9 Santa Clara Lawyer 285, 291 [overview of law before and after 1968]; 29 *Hastings L. J.* 545 [covenants and equitable servitudes in California]; *Taormina Theosophical Community v. Silver* (1983) 140 C.A.3d 964, 972, footnote 3, 190 C.R. 38 [amendment not retroactive].) The statute was criticized for its failure to cover burdensome covenants of the grantee. (See 9 Santa Clara Lawyer 285, 295, 300.) This omission was corrected in 1969.

Hence, each covenant made by an owner of land with the owner of other land, or made between the grantor and grantee of land, to do or refrain from doing some act on the land, "which doing or refraining is expressed to be for the benefit of the land of the covenantee," runs with both the land owned by or granted to the covenantor and the land owned by or granted to the covenantee. Except as provided by C.C. 1466 (*supra*, §433), or as specifically provided in the instrument creating the covenant, the covenant will benefit or be binding on each such successive owner, during his or her ownership, of any portion of the land affected by the covenant and on each person having an interest in the land derived through any owner of the land. (C.C. 1468.)

(2) *Requirements.* The specific requirements for the covenants described in C.C. 1468 are:

(a) The land of the covenantor to be affected, and the land of the covenantee to be benefited, must be particularly described in the instrument. (C.C. 1468(a).)

(b) Successive owners of the land must be expressly bound. (C.C. 1468(b).)

(c) The covenant must relate to "the use, repair, maintenance or improvement of, or payment of taxes and assessments on," the land "or some part thereof," or, if the land consists of undivided interests, the covenant must relate to suspension of the right of partition or sale in lieu of partition for a reasonable period. (C.C. 1468(c).)

(d) The instrument containing the covenants must be recorded in each county in which the land or a part of it is

situated. (C.C. 1468(d).)

In *Soman Properties v. Rikuo Corp.* (1994) 24 C.A.4th 471, 29 C.R.2d 427, the original owner of commercial property subdivided it and concurrently recorded a declaration establishing mutual covenants, conditions, and restrictions (CC&Rs) on the two parcels under C.C. 1468. He conveyed one parcel by a deed stating that the conveyance was subject to the recorded CC&Rs. This parcel was reconveyed to plaintiff with a similar recital. The original owner then declared bankruptcy; a conveyance of the second parcel was approved by the bankruptcy court, and this parcel changed hands twice more before defendant purchased it under a deed incorporating an exhibit describing the property as subject to all recorded covenants, conditions, restrictions, and easements. In a dispute over enforcement of the CC&Rs, the trial judge granted judgment for defendant. *Held*, reversed. Defendant took title with both constructive and actual notice of the CC&Rs, which were binding if they ran with the land. (24 C.A.4th 481.) The declaration recorded by the original owner met the specific requirements of C.C. 1468, but it was not an instrument between the owners of separate properties, and therefore did not itself create covenants running with the land. The deed to plaintiff's predecessor, however, stating that the conveyance was subject to the previously recorded declaration manifested a mutual intent by grantor and grantee to be bound by the CC&Rs. (24 C.A.4th 483.) This was sufficient to create covenants running with the land under C.C. 1468. (24 C.A.4th 484 [declining to follow dicta in *Russell v. Palos Verdes Properties* (1963) 218 C.A.2d 754, 767, 32 C.R. 488, to effect that "subject to" clause cannot create covenants running with land when none before existed].)

(3) *Apportionment*. If several persons are subject to the burden of a covenant described in C.C. 1468, the burden will be apportioned among them under C.C. 1467 (supra, §436), except that if only a portion of the land is burdened, the apportionment will be only among the several owners of the portion. C.C. 1468 will apply to the mortgagee, trustee, or beneficiary of a mortgage or deed of trust on the land only while he or she, in that capacity, is in possession of the land. (C.C. 1468; see 9 Santa Clara Lawyer 285, 293 et seq. [suggesting that further amendments should be made placing reasonable time restrictions on running of covenants and equitable servitudes].)

(4) *Successor in Interest*. C.C. 1465 (supra, §436) is inapplicable to covenants under C.C. 1468. (C.C. 1468.) Thus, a covenant under C.C. 1468 will bind a person who acquires any estate or interest of the covenantor. (See 9 Santa Clara Lawyer 285, 292.)

(5) *Hazardous Materials Covenant*. Properly drafted covenants designed to protect present or future human health or safety or the environment from the presence of hazardous materials on the covenantor's land run with the land, regardless of whether the covenant benefits the covenantee's land. (C.C. 1471; see 27 *Pacific L. J.* 918.)

(6) *Restatement*. The Third Restatement of Property reflects the abrogation of the privity requirement. "No privity relationship between the parties is necessary to create a servitude." (1 *Rest.3d, Property (Servitudes)* §2.4; see 1 *Rest.3d, Property (Servitudes)* §1.3(1) [covenant that is servitude runs with land].)

SUPPLEMENT: [This section is current through the latest supplement]



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D. Equitable Servitudes.

1. Nature and Effect.

a. California Law.

12 Witkin Sum. Cal. Law Real Property § 440

[§ 440] California Law.

When a covenant does not run with the land because of lack of an essential requirement, or, although enforceable at law, damages would be an inadequate remedy, equity will sometimes enforce the obligation against the successors of the covenantor, by an injunction against breach. The burden of the covenant thus becomes an "equitable easement" or servitude in the land of the covenantor.

Because of the technical aspects of running covenants, the California courts have placed greater emphasis on the equitable remedy. "The marked tendency of our decisions seems to be to disregard the question of whether the covenant does or does not run with the land and to place the conclusion upon the broad ground that the assignee took with knowledge of the covenant and it was of such a nature that when the intention of the parties coupled with the result of a failure to enforce it was considered, equity could not in conscience withhold relief." (*Richardson v. Callahan* (1931) 213 C. 683, 686, 3 P.2d 927; see *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 C.4th 361, 379, 33 C.R.2d 63, 878 P.2d 1275, supra, §114 [reviewing law of equitable servitudes in relation to covenants and restrictions in recorded declaration of common interest development]; *MacDonald Properties v. Bel-Air Country Club* (1977) 72 C.A.3d 693, 700, 140 C.R. 367; *Sain v. Silvestre* (1978) 78 C.A.3d 461, 465, 144 C.R. 478; *Hudson Oil Co. v. Shortstop* (1980) 111 C.A.3d 488, 494, 168 C.R. 801 [although cases usually refer to creation by deed, equitable servitude may be created by lease]; *B.C.E. Dev. v. Smith* (1989) 215 C.A.3d 1142, 1146, 264 C.R. 55, citing the text; *Greater Middleton Assn. v. Holmes Lumber Co.* (1990) 222 C.A.3d 980, 989, 271 C.R. 917 [restrictive covenant limiting land to residential use enforced as mutual equitable servitude to prohibit commercial harvesting of timber]; *Soman Properties v. Rikuo Corp.* (1994) 24 C.A.4th 471, 484, 29 C.R.2d 427 [observing that doctrine of equitable servitudes has been employed as alternative basis for enforcement where requirements of C.C. 1468 (supra, §439) are not met; citing *B.C.E. Dev.*].)

The usual remedy sought is an injunction against violation, but in *Morgan v. Veach* (1943) 59 C.A.2d 682, 139 P.2d 976, where a lot owner with notice deliberately violated a setback line, the court gave an alternative judgment: a mandatory injunction to remove the encroaching portion of the building, or payment of \$ 1,000 damages. (59 C.A.2d 692.)

In *Mullally v. Ojai Hotel Co.* (1968) 266 C.A.2d 9, 71 C.R. 882, defendant, the operator of a resort hotel, acquired lots in an adjoining restricted subdivision. The city gave him a conditional use permit for tennis courts on the lots as part

of the hotel business. *Held*, plaintiffs, owners of other lots in the subdivision, were entitled to enjoin this violation of the covenants.

(a) *C.C.P. 731a* merely precludes nuisance actions where a business is permitted by zoning authorities (see 13 *Summary* (10th), *Equity*, §165). It does not preclude injunctions against violation of restrictive covenants. (266 *C.A.2d* 11.)

(b) Defendant's additional suggestion that the tennis courts should be permitted to operate with limitations on their use (control of lights, sound and sight barriers, etc.) was answered by the observation that this kind of "city planning" should be left to "planning boards and private developers." (266 *C.A.2d* 12.) (See *Oceanside Community Assn. v. Oceanside Land Co.* (1983) 147 *C.A.3d* 166, 175, 176, 195 *C.R.* 14 [in lieu of injunction to maintain property as golf course, court could impose equitable lien against property to compensate adjacent landowners for benefit lost by absence of golf course].)

The nature of equitable servitudes has engendered much commentary. (See 21 *Hastings L. J.* 1319 [whether covenant running with land and equitable servitude are same concept]; 21 *U.C.L.A. L. Rev.* 1655 [evaluation of applicability of zoning principles to law of private land use restrictions]; 10 *Pacific L. J.* 905 [criticism of California law and proposal for legislative change]; 55 *So. Cal. L. Rev.* 1177 [proposals for unifying easements, real covenants, and servitudes into single entity]; 9 *Powell* §60.01 et seq.; *Cal. Civil Practice*, 2 *Real Property Litigation*, §12:52 et seq.; 7 *A.L.R.5th* 187 [effect of tax sale on servitude]; 20 *Am.Jur.2d* (2005 ed.), *Covenants, Conditions, and Restrictions* §148 et seq.; 7 *Am.Jur. Legal Forms 2d* (1998 ed.), *Covenants, Conditions, and Restrictions*, §77:34 et seq.; 7C *Am.Jur. P.P. Forms* (2002 ed.), *Covenants, Conditions, and Restrictions*, §93 et seq.; on equitable servitudes in chattels, see 13 *Summary* (10th), *Personal Property*, §29.)

SUPPLEMENT: [This section is current through the latest supplement]

Commentary: See *Cal. Civil Practice*, 2 *Real Property Litigation*, §12:54 et seq.; 7 *Am.Jur. Legal Forms 2d* (2006 ed.), *Covenants, Conditions, and Restrictions* §77:33 et seq.



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1. Nature and Effect.

b. Restatement.

12 Witkin Sum. Cal. Law Real Property § 441

[§ 441] Restatement.

The Third Restatement of Property (Servitudes) does not use the term "equitable servitude" to describe servitudes in modern law. "Equitable servitude" is encompassed within the term "covenant that runs with the land" in the Third Restatement. (1 *Rest.3d, Property (Servitudes) §1.4.*) "[T]he differences between covenants that historically could be enforced at law and those enforceable in equity, which gave rise to the terminology, have all but disappeared in modern law." (1 *Rest.3d, Property (Servitudes)*, Introductory Note to Chapter 1.) Continued use of the term "equitable servitudes" perpetuates the idea that there is a difference between covenants at law and in equity, which can cause confusion and may lead lawyers and judges "to focus on irrelevant questions or reach erroneous results." (1 *Rest.3d, Property (Servitudes) §1.4*, Comment a.) (See 21 *U.C. Davis L. Rev.* 1213 [design proposal for *Rest.3d, Property (Servitudes)*].)

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D. Equitable Servitudes.
2. Legality and Reasonableness of Restrictions.
a. In General.

12 Witkin Sum. Cal. Law Real Property § 442

[§ 442] In General.

(1) *Illegal Restrictions*. Obviously, an illegal promise to restrict use of land is void. (See 1 Rest., Property (Servitudes) §3.1, Comment c; 20 *Am.Jur.2d* (2005 ed.), *Covenants, Conditions, and Restrictions* §164 et seq.) Racial and religious restrictions, formerly held unenforceable on constitutional grounds (see supra, §200), are now prohibited by statute. (See C.C. 53, 782, supra, §201.)

(2) *Unreasonable Restrictions*. There is also a vague policy, difficult to define and to apply, that condemns novel, capricious, or otherwise unreasonable land burdens, either in the form of easements or covenants. (See *Los Angeles Terminal Land Co. v. Muir* (1902) 136 C. 36, 50, 68 P. 308; *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 C.4th 361, 381, 382, 33 C.R.2d 63, 878 P.2d 1275, supra, §114, citing the text [equitable servitudes are enforceable unless they (a) violate public policy; (b) bear no rational relationship to protection, preservation, operation, or purpose of affected land; or (c) otherwise impose burdens so disproportionate to their benefits that they should not be enforced]; *Doo v. Packwood* (1968) 265 C.A.2d 752, 757, 71 C.R. 477, supra, §199 [covenant preventing competitive use, limited in scope and not tending to create monopoly, was not unreasonable or against public policy]; *Seaton v. Clifford* (1972) 24 C.A.3d 46, 52, 100 C.R. 779 [residential use restriction, applied to prevent use of property as licensed home for mentally retarded persons, was not violation of public policy]; *Taormina Theosophical Community v. Silver* (1983) 140 C.A.3d 964, 973, 190 C.R. 38, supra, §202 [covenant restricting ownership of land to Theosophists older than 50 was unreasonable restraint on alienation]; *Hotz v. Rich* (1992) 4 C.A.4th 1048, 1057, 6 C.R.2d 219, citing the text [identifying factors for determining reasonableness of covenant restricting erection of aerials on residential property]; 13 *Hastings L. J.* 382 [policy limitations on restrictions on land use]; 1 Rest.3d, *Property (Servitudes)* §3.1; 68 A.L.R.3d 1239 [validity of covenant restricting occupancy of premises to persons over or under specified age]; 20 *Am.Jur.2d* (2005 ed.), *Covenants, Conditions, and Restrictions* §164.)

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b. Building Restrictions.

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[§ 443] Building Restrictions.

The typical examples of equitable servitudes are restrictions on the use of land granted in fee. Thus, a tract of land is subdivided, and lots are sold in accordance with a general building plan, whereby the use of each lot is restricted for the benefit of all the others; e.g., to single family dwellings, or against business use. Under proper conditions, the restrictions will be enforceable by one lot owner against another. (See *Weber v. Graner* (1955) 137 C.A.2d 771, 774, 291 P.2d 173; *Russell v. Palos Verdes Properties* (1963) 218 C.A.2d 754, 763, 32 C.R. 488; 9 Powell §60.10; 22 U.C. Davis L. Rev. 951 [single family use covenants]; 84 A.L.R.2d 780 [conveyance "subject to" recorded restrictions]; 41 A.L.R.3d 1290 [covenant restricting material used in construction]; 47 A.L.R.3d 1232 [covenant controlling architectural style of buildings]; 51 A.L.R.3d 556 [who may enforce restrictive covenant]; 99 A.L.R.3d 985 [whether use of property for multiple dwellings violates covenant permitting use for residential purposes only]; 1 A.L.R.4th 1021 [restrictions on height of structures or buildings]; 49 A.L.R.4th 1018 [what is "temporary" building or structure within meaning of restrictive covenant]; 61 A.L.R.4th 1028 [application of restrictive covenants to use of signs]; 76 A.L.R.4th 498 [covenant restricting use, erection, or maintenance of radio or television aerials, antennas, towers, or satellite dishes or discs on residential property]; 20 Am.Jur.2d (2005 ed.), *Covenants, Conditions, and Restrictions* §148 et seq.; 7 Am.Jur. Legal Forms 2d (1998 ed.), *Covenants, Conditions, and Restrictions*, §77:65 et seq.; 7C Am.Jur. P.P. Forms (2002 ed.), *Covenants, Conditions, and Restrictions*, §93 et seq.)

It should be noted that, although equitable servitudes generally have a purpose beneficial to the land owners, they constitute restrictions on the free use of property. Hence, unless contemplated by the parties to a contract of sale, undisclosed restrictions are encumbrances that render the title unmarketable, even though they are similar to those contained in a zoning ordinance, and do not in fact diminish the value of the property. (*George v. Colvin* (1950) 98 C.A.2d 57, 61, 219 P.2d 64 [contract to buy house, undisclosed requirement of setback lines and restriction to single family dwelling of 5,000 square feet].)

SUPPLEMENT: [This section is current through the latest supplement]

See 7 Am.Jur. Legal Forms 2d (2006 ed.), *Covenants, Conditions, and Restrictions* §77:75 et seq.



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2. Legality and Reasonableness of Restrictions.
c. No Prohibition of Solar Energy Systems.

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[§ 444] No Prohibition of Solar Energy Systems.

The California Solar Rights Act of 1978 authorizes the creation of a "solar easement" and specifies the requirements of an instrument creating it. (C.C. 801.5, *supra*, §385.) C.C. 714(a) protects the right by the following provision: "Any covenant, restriction, or condition contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale of, or any interest in, real property that effectively prohibits or restricts the installation or use of a solar energy system is void and unenforceable." (See *10 Pacific L. J.* 478; *9 Ecology L. Q.* 379 [constitutionality of C.C. 714].)

C.C. 714(b) permits "reasonable restrictions," i.e., those "that do not significantly increase the cost of the system or significantly decrease its efficiency or specified performance, or that allow for an alternative system of comparable cost, efficiency, and energy conservation benefits." (See *Palos Verdes Homes Assn. v. Rodman* (1986) 182 C.A.3d 324, 328, 227 C.R. 81 [plaintiff's guidelines that authorized solar units comparable in performance and cost to defendant's unit were reasonable]; for definition of "significantly," see C.C. 714(d)(1).) Solar energy systems must meet applicable state and local health and safety standards. (C.C. 714(c)(1).) Solar energy systems for heating water must be certified by the Solar Rating Certification Corporation. (C.C. 714(c)(2).) Solar energy systems for producing electricity must also meet applicable safety and performance standards and applicable rules of the Public Utilities Commission regarding safety and reliability. (C.C. 714(c).)

A public entity that fails to comply with C.C. 714 may not receive funds from a state-sponsored grant or loan program for solar energy. A public entity must certify its compliance with C.C. 714 when applying for funds from the grant or loan program. (C.C. 714(h)(1).) A local public entity may not exempt residents in its jurisdiction from the requirements of C.C. 714. (C.C. 714(h)(2).)

Applications for approval of the installation or use of a solar energy system must be processed in the same manner as those for other architectural modifications, without wilful delay. (C.C. 714(e).) A \$ 1,000 civil penalty will be imposed on private entities that violate C.C. 714. (C.C. 714(f).) The prevailing party in an action to enforce compliance with C.C. 714 is entitled to reasonable attorneys' fees. (C.C. 714(g).) (On C.C. 714.1, which permits common interest development association to impose certain restrictions and requirements on solar energy systems, see *supra*, §118.)

SUPPLEMENT: [This section is current through the latest supplement]

C.C. 714(a) was amended in 2008. The portion quoted in the text now reads as follows: "Any covenant, restriction, or condition contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale of, or any interest in, real property, and any provision of a governing document, as defined in subdivision (j) of Section 1351, that effectively prohibits or restricts the installation or use of a solar energy system is void and unenforceable." C.C. 714(e) was subdivided and amended in 2008. The portion cited in the text is now in C.C. 714(e)(1). If the approving entity is a homeowners association under C.C. 1351(a), the approval must be in writing. (C.C. 714(e)(2)(A), added in 2008.) If an application is not denied in writing within 60 days from receipt, the application will be deemed approved, unless the delay is the result of a reasonable request for additional information. (C.C. 714(e)(2)(B), added in 2008.)



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d. Affirmative Burdens.

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[§ 445] Affirmative Burdens.

May a covenant imposing an affirmative duty, as distinguished from a restriction on the use of property, be enforced as an equitable servitude? Although there are some objections of policy, in California, equitable enforcement has been granted in the case of affirmative as well as negative covenants.

In *Relovich v. Stuart* (1931) 211 C. 422, 295 P. 819, the grantor sold part of his land to plaintiff, and contracted to furnish water from a system developed on the part retained. *Held*, plaintiff could enforce the right against defendant, a successor to the grantor's remaining land, who had notice of the covenant. (211 C. 427.) (See *Coulter v. Sausalito Bay Water Co.* (1932) 122 C.A. 480, 495, 10 P.2d 780 [recognizing that affirmative covenants may be enforced, but holding rule inapplicable under facts]; 68 A.L.R.2d 1022 [affirmative covenants as running with land]; 20 Am.Jur.2d (2005 ed.), *Covenants, Conditions, and Restrictions* §29.)

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2. Legality and Reasonableness of Restrictions.
e. Approval of Construction Plans.

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[§ 446] Approval of Construction Plans.

The subdividers of residential tracts sometimes include in the deeds or declaration of restrictions accompanying the recorded map a condition or restrictive covenant prohibiting the erection of any structure, unless the subdivider or some committee approves the plans and specifications. These clauses have been upheld as beneficial and promotive of land use. (See *115 A.L.R.5th 251* [validity and construction of covenant requiring consent to construction or renovation]; *20 Am.Jur.2d (2005 ed.)*, *Covenants, Conditions, and Restrictions §164*; *7C Am.Jur. P.P. Forms (2002 ed.)*, *Covenants, Conditions, and Restrictions*, §§77:72, 77:73.)

In *Hannula v. Hacienda Homes (1949) 34 C.2d 442, 211 P.2d 302*, plaintiff became the owner of a portion of an original lot and defendant's directors refused approval on the ground that the area did not constitute an adequate building site. *Held*, the restriction was valid. "Its clear purpose is to assure that proposed structures will accord with the design and development of the subdivision with regard to space, light and air, and will not detract from its appearance. The power to pass on plans for that purpose necessarily includes the authority to determine that a portion of an original lot is not large enough for dwellings of the type found in the tract, for it might be impossible to construct a residence on a portion of a lot which would comport with setback, sidelines and backlines, maintained as to other residences." (*34 C.2d 445*.) The power to disapprove plans must be exercised reasonably and in good faith, however, and judicial relief is available if there is arbitrary action. (*34 C.2d 445*.)

In *Weston v. Foreman (1952) 108 C.A.2d 686, 239 P.2d 513*, the covenants generally were binding until 1966, but the approval clause provided that the committee should serve until 1947, at which time the record owners should designate their own representative to act. The owners failed to appoint, and it was held that the original committee remained in power and that its approval was required. The court observed that the owners should not lose the benefit of the approval covenant merely because of inability to agree on a representative or delay in choosing one. (*108 C.A.2d 693*.)

In *Bramwell v. Kuhle (1960) 183 C.A.2d 767, 6 C.R. 839, R*, a subdivider, developed a tract with a recorded declaration of restrictions. The restrictions required approval of construction plans by a committee, either appointed by the subdivider or, if he did not appoint, elected by a majority of the lot owners. After R sold all the lots, he took no further interest in the area and made himself unavailable to lot owners. Defendants, without seeking approval of plans,

commenced construction of a building completely out of harmony with the contemplated architectural styles. When other lot owners protested, defendants secretly, through R's attorney, obtained his approval, without examination of the property, and with knowledge of the disapproval of the lot owners' committee. Plaintiffs, individual lot owners, sued to enjoin. The trial judge decided that the approval by R was fraudulent and void, and that defendants knowingly attempted to construct without compliance. He ordered that construction be enjoined, to the extent if necessary, of tearing down the framework to comply with the restrictions. *Held*, affirmed.

(a) Several cases have held that, even though the document does not so provide, the right of the original grantor to enforce restrictions exists only so long as the original grantor continues to own some part of the tract. (183 C.A.2d 775; see *infra*, §452.) By analogy to these cases, and in accordance with the trial judge's conclusion based on extrinsic evidence of intent, the grantor here also lost the right to approve plans after disposal of his interests. (183 C.A.2d 776.)

(b) In any case, the grantor must act in good faith. Refusal to approve must not be arbitrary, and the "converse should likewise be true." (183 C.A.2d 779.)

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3. Construction of Restrictions.

12 Witkin Sum. Cal. Law Real Property § 447

[§ 447] Construction of Restrictions.

(1) *Strict Construction.* Restrictive covenants are to be strictly construed against limitations on the free use of property. (*Wing v. Forest Lawn Cemetery Assn. (1940) 15 C.2d 472, 479, 101 P.2d 1099; Kent v. Koch (1958) 166 C.A.2d 579, 585, 333 P.2d 411; see Ezer v. Fuchsloch (1979) 99 C.A.3d 849, 861, 160 C.R. 486* [despite continual statements of strict construction rule, covenant should receive just and fair interpretation]; *Soman Properties v. Rikuo Corp. (1994) 24 C.A.4th 471, 485, 29 C.R.2d 427* [statement that covenant ran "with both the land owned by the covenantor and the land owned by the covenantor" had to be interpreted in context, and was not fatally ambiguous where both parcels were owned by covenantor when document was executed]; 8 *Miller & Starr 3d*, §24:16; 20 *Am.Jur.2d (2005 ed.)*, *Covenants, Conditions, and Restrictions* §168 et seq.; 32 *A.L.R.2d 1207* [covenant requiring erection of dwelling as prohibiting use of property for business or other nonresidential purpose]; 80 *A.L.R.2d 1258* [use of premises for parking place as violation of covenant]; 89 *A.L.R.2d 990* [covenant prohibiting or limiting keeping of animals on property]; 94 *A.L.R.2d 726* [hospital, sanitarium, home for aged, nursing home, etc., as violation of restrictive covenant]; 18 *A.L.R.3d 850* [what constitutes "building" within restrictive covenant]; 21 *A.L.R.3d 641* [incidental use for business or professional purposes as violation of covenant restricting use to residential purposes]; 65 *A.L.R.3d 1212* [erection of condominium as violation of covenant forbidding erection of apartment houses]; 75 *A.L.R.3d 1095* [what constitutes "structure" within restrictive covenant]; 13 *A.L.R.4th 1346* [covenants restricting trees and shrubbery]; 81 *A.L.R.5th 345* [whether use of premises for children's day care violates restrictive covenants]; 40 *Proof of Facts 3d 347* [enforcement of restrictive covenant against obstruction of view]; 42 *Proof of Facts 3d 531* [covenants restricting placement of television satellite dishes and radio antennas on residential property]; 43 *Proof of Facts 3d 473* [covenants restricting use of property to residential purposes].)

Hence, the typical residential tract restriction intended to confine land use to single family dwellings, and to exclude apartments or other multiple residences, must be drafted with care, for the courts tend to construe them strictly in favor of the multiple use. Thus, a restriction to "only one dwelling house" or to "a private residence" would doubtless be adequate. (See *Weber v. Graner (1955) 137 C.A.2d 771, 775, 776, 778, 291 P.2d 173; King v. Kugler (1961) 197 C.A.2d 651, 655, 17 C.R. 504* [restriction of structures to only "one detached single family dwelling not to exceed one story in height" was upheld against claim of uncertainty].) But, a simple restriction to "a dwelling" or to use "for residence purposes only" merely excludes business and commercial use, and does not prevent the erection of an apartment house for residential occupancy. (*Weber v. Graner, supra*, 137 *C.A.2d 776*.)

(2) *Illustrations.* In *Biagini v. Hyde* (1970) 3 C.A.3d 877, 83 C.R. 875, defendant operated a beauty parlor in her home, involving as many as six visits a day, and producing annual revenue of about \$ 5,000. *Held*, the trial judge properly concluded that the use was detrimental to other property owners in appreciably detracting from the residential character of the neighborhood, although defendant did not advertise, no external evidence of her activities could be seen, and the neighbors were not inconvenienced. (3 C.A.3d 880.)

In *Seligman v. Tucker* (1970) 6 C.A.3d 691, 86 C.R. 187, the developer built homes on a slope, located to achieve a pleasing view of the landscape areas. The restriction was that no structure should be erected in such a location or at such height "as to unreasonably obstruct the view from any other lot." *Held*, this was valid in light of the circumstances, and a mandatory injunction was granted to compel lowering or removal of an addition to a home that constituted a 50% obstruction of the view. (6 C.A.3d 697.)

In *Lincoln Savings & Loan Assn. v. Riviera Estates Assn.* (1970) 7 C.A.3d 449, 87 C.R. 150, defendants were an association and homeowners in an expensive single-family residential development of 150 homes. Plaintiff acquired a narrow strip of land in the tract leading to two lots outside the tract. The action was brought to obtain a declaration of its right to improve the tract strip as a driveway to provide access to its outside lots. The reason was that, by various conveyances of its predecessor, plaintiff's two lots had been rendered inaccessible except by construction of an extremely expensive road on the other side. Defendants objected that building the road for outside access would violate the tract restrictions to residential purposes. *Held*, judgment for defendants affirmed.

(a) Plaintiff's argument that the driveway was a way of necessity (*supra*, §398) was unsound; the lots were originally accessible until the conveyances of plaintiff's predecessor, who "landlocked" himself. (7 C.A.3d 459.)

(b) Whether a driveway to a residence is a residential use was a new question for California. But, considering all the restrictions on use, structures, frontage, etc., it was apparent that plaintiff's proposed use would constitute activity that the restrictions were designed to prevent. "Plaintiff is seeking in effect to add residences to the Riviera and take advantage of the subdivision's status without being subject to any of its restrictions or quality controls." If this were permitted, other lot owners in the tract could construct driveways to outside property; and plaintiff, owner of undeveloped property below its two lots, could use the driveway as a passageway to further subdivisions. (7 C.A.3d 463.)

In *Seaton v. Clifford* (1972) 24 C.A.3d 46, 100 C.R. 779, defendant operated a home for mentally retarded men, with no more than six at a time. It was licensed by the state, and housed persons receiving state aid. *Held*, judgment enjoining operation affirmed. A commercial boarding house for mentally retarded persons is a violation of a residential use restriction. (24 C.A.3d 51.) Defendant relies on *Welf.C.* 5115 and 5116, stating that a foster home will be considered "a residential use" of the property "for the purposes of zoning," and argued that, unless the policy underlying these statutes permits the overriding of restrictions, people in residential tracts could by agreement make it impossible for a home for mentally retarded persons to operate in the state. In those circumstances, however, the state could exercise its power of eminent domain. (24 C.A.3d 52.) (See 41 A.L.R.4th 1216 [community residence for mentally disabled persons as violation of restrictive covenant].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Strict Construction.* See 1 A.L.R.6th 135 [construction and application of "residential purposes only" or similar covenant restriction to incidental use of dwelling for business, professional, or other purposes; superseding 21 A.L.R.3d 641, text, p. 519]. (2) *Illustrations.* Other cases construing restrictive covenants include the following:

Zabrocky v. McAdams (2005) 129 C.A.4th 618, 621, 622, 629, 28 C.R.3d 592 [prohibition against erecting "structure" that may obstruct view restricted homeowners' authority to build addition on dwelling, even though prohibition was found in paragraph dealing mostly with landscaping and not in paragraph dealing mostly with dwellings; prohibition could, however, be read to prohibit only those structures that "unreasonably" obstruct view; following *Seligman v. Tucker* (1970) 6 C.A.3d 691, 86 C.R. 187, text, p. 520].

Woodridge Escondido Property Owners Assn. v. Nielsen (2005) 130 C.A.4th 559, 568, 30 C.R.3d 15 [property owner's deck was permanent structure within meaning of covenant prohibiting installation of permanent structures, other than irrigation systems, on appurtenant side yard easements].

Butler v. Palos Verdes Estates (2005) 135 C.A.4th 174, 183, 37 C.R.3d 199 [deed restriction prohibiting keeping of "cattle, hogs, or other animals, rabbits or poultry" on property did not prevent city from counting, trapping, and removing feral peafowl in parklands as part of peafowl management program].

Richeson v. Helal (2007) 158 C.A.4th 268, 277, 70 C.R.3d 18 [neither agreement restricting use nor CC&Rs required closure of market in residential area at expiration of conditional use permit; city could extend permit indefinitely, given intervening changes in city's zoning and permit requirements].



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D. Equitable Servitudes.

4. Requisites for Enforcement.

a. Notice to Grantee.

12 Witkin Sum. Cal. Law Real Property § 448

[§ 448] Notice to Grantee.

The chief requirement for enforcement of an equitable servitude is that the grantee, i.e., the successor of the covenantor, against whom enforcement is sought, must have had notice of the covenant at the time of the grant. (See *Martin v. Holm* (1925) 197 C. 733, 747, 242 P. 718; 20 *Am.Jur.2d* (2005 ed.), *Covenants, Conditions, and Restrictions* §255 et seq.) The notice may be constructive, from the recordation of a deed, contract, map, or other instrument setting forth the restrictions. (See *Wayt v. Patee* (1928) 205 C. 46, 49, 269 P. 660; *Citizens for Covenant Compliance v. Anderson* (1995) 12 C.4th 345, 363, 47 C.R.2d 898, 906 P.2d 1314, *infra*, §449; *Arrowhead Mut. Service Co. v. Faust* (1968) 260 C.A.2d 567, 581, 67 C.R. 325 [original deeds]; *Seaton v. Clifford* (1972) 24 C.A.3d 46, 49, 100 C.R. 779; *Sain v. Silvestre* (1978) 78 C.A.3d 461, 467, 144 C.R. 478 [recordation of declaration of restrictions]; *Soman Properties v. Rikuo Corp.* (1994) 24 C.A.4th 471, 485, 29 C.R.2d 427 [notice was sufficient where deed, although not referring to covenants, did refer to bankruptcy court order approving conveyance subject to stipulation that mentioned covenants and was filed at same time as deed]; *infra*, §449.)

Under modern practice, the restrictions and the general plan may be shown by a recorded instrument, such as a map with a declaration of restrictions. (See *Childs v. Newfield* (1934) 136 C.A. 217, 218, 28 P.2d 924; *Weston v. Foreman* (1952) 108 C.A.2d 686, 688, 239 P.2d 513; *Kent v. Koch* (1958) 166 C.A.2d 579, 582, 333 P.2d 411; *Bramwell v. Kuhle* (1960) 183 C.A.2d 767, 769, 6 C.R. 839; *King v. Kugler* (1961) 197 C.A.2d 651, 654, 17 C.R. 504.) (See 8 *Miller & Starr* 3d, §24:13.)

In *Riley v. Bear Creek Planning Committee* (1976) 17 C.3d 500, 131 C.R. 381, 551 P.2d 1213, the developer of a tract made a grant deed of a lot to plaintiffs. The deed as recorded contained no restrictions, and did not refer to any recorded declaration of restrictions. A declaration was recorded 9 months later, and for some years, plaintiffs conformed to the restrictions, particularly in seeking the planning committee's approval of construction. Then they proceeded to construct a snow tunnel without seeking approval. Defendant planning committee recorded a notice of violation, and plaintiffs sued to quiet title. *Held*, judgment for plaintiffs affirmed. Because plaintiffs' deed was received before the recording of the declaration and contained no restrictions, they were not bound. (See 65 *Cal. L. Rev.* 438 [Riley].)

SUPPLEMENT: [This section is current through the latest supplement]



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b. Express Statement of Common Plan.

12 Witkin Sum. Cal. Law Real Property § 449

[§ 449] Express Statement of Common Plan.

(1) *Former Law Requiring Statement in Original Deed.* An additional requirement applied in California, contrary to the weight of authority. In most jurisdictions, if it appeared that the grantor intended the covenants in the deeds to be available to the grantees among themselves, to carry out the general plan, any lot owner could enforce the restrictions. But in California, the intention that the covenants be for the benefit of individual lot owners ordinarily had to be expressly set forth in the original deeds. (See *Werner v. Graham* (1919) 181 C. 174, 184, 183 P. 945; *McBride v. Freeman* (1923) 191 C. 152, 154, 215 P. 678; *Riley v. Bear Creek Planning Committee* (1976) 17 C.3d 500, 511, 131 C.R. 381, 551 P.2d 1213, supra, §448; *Grant Memorial Park v. Robla School Dist.* (1939) 33 C.A.2d 528, 532, 92 P.2d 499; *Martin v. Ray* (1946) 76 C.A.2d 471, 476, 173 P.2d 573; *Murry v. Lovell* (1955) 132 C.A.2d 30, 32, 281 P.2d 316; *Anderson v. Pacific Avenue Inv. Co.* (1962) 201 C.A.2d 260, 263, 19 C.R. 829; *Girard v. Miller* (1963) 214 C.A.2d 266, 275, 29 C.R. 359; *Ross v. Harootunian* (1967) 257 C.A.2d 292, 295, 64 C.R. 537; *Trahms v. Starrett* (1973) 34 C.A.3d 766, 771, 110 C.R. 239 [declaration of restrictions was recorded by tract developer before any deeds were made, but deeds issued later without restrictions or reference to the declaration did not create equitable servitudes]; *Terry v. James* (1977) 72 C.A.3d 438, 442, 140 C.R. 201; *Fig Garden Park No. 1 Homeowners Assn. v. Assemi Corp.* (1991) 233 C.A.3d 1704, 1709, 285 C.R. 303; 4 A.L.R.2d 1364 [omission from deed of restrictive covenant imposed by general plan of subdivision].)

(2) *Statement in Original Deed No Longer Required.* In *Citizens for Covenant Compliance v. Anderson* (1995) 12 C.4th 345, 47 C.R.2d 898, 906 P.2d 1314, the California Supreme Court, in the interests of clarity and simplicity, adopted a new rule for creating enforceable servitudes or covenants that run with the land. Purchasers are bound by previously recorded covenants, conditions, and restrictions (CC&Rs), even if they are not mentioned in the deed or another document at the time of sale.

In *Anderson*, defendant property owners wanted to plant and harvest grapes, operate a winery, and keep pet llamas on their property. Plaintiff neighbors sued to stop these activities on the ground that the CC&Rs prohibited them. The trial judge granted summary judgment for defendants, ruling that the CC&Rs were not enforceable as covenants running with the land or as equitable servitudes because they were not mentioned in any deed to defendants' property. *Held*, reversed.

(a) *Adoption of new rule: Recorded CC&Rs bind all purchasers.* If a declaration establishing a common plan for the ownership of property in a subdivision and containing restrictions upon the use of the property as part of the common plan is recorded before the execution of the contract of sale, subsequent purchasers who have constructive notice of the recorded declaration are bound by the common plan. The declaration must describe the property it is to govern and state that it is to bind all purchasers and their successors. The restrictions are then enforceable even if they are not additionally cited in a deed or other document at the time of the sale. (12 C.4th 349.) This rule applies equally to covenants that run with the land and to equitable servitudes. (12 C.4th 355.)

(b) *Rationale for new rule.*

(1) A contrary requirement, that the CC&Rs must be mentioned in a deed to the property, creates uncertainties and inconsistencies. The implementation of a developer's plan for a subdivision depends on "the vagaries of the actual deeds." Enforcement of the restrictions can vary depending on which property owner seeks to enforce them and against which property. (12 C.4th 360.) Moreover, this situation "dramatically complicates" title searches. "Instead of simply searching for restrictions of record in order to know exactly what is being purchased, a prospective buyer must search the chain of title of all previously sold property in the tract." (12 C.4th 362.)

(2) By contrast, the rule adopted here "is simplicity itself." One document, recorded for all purchasers to review, establishes the restrictions for all parcels. Moreover, the new rule allows the uniform implementation of a general plan from the outset of development (12 C.4th 363), and having a single set of recorded restrictions that apply to the entire subdivision fulfills the intent and expectations of the parties and the community (12 C.4th 364). Finally, the new rule is fair: all buyers can easily know exactly what they are purchasing. (12 C.4th 364, 365.)

(3) The theory behind the rule requiring the restrictions to be stated in the deeds is that a developer cannot unilaterally make an agreement. The new rule does not violate that theory: the servitudes "spring into existence" only when an actual conveyance subject to them is made. Some of the prior cases have simply assumed that the deed must expressly refer to the restriction to evidence the purchaser's intent and agreement. "On the contrary, it is reasonable to conclude that property conveyed after the restrictions are recorded is subject to those restrictions even without further mention in the deed." (12 C.4th 365.) Inconsistent language and holdings in other cases are disapproved. (12 C.4th 366.)

(c) *Retrospective application of new rule.* There is no reason to deviate from the general rule that Supreme Court decisions operate retrospectively. "Replacing chaos with certainty need not be reserved for the future only." (12 C.4th 367.)

(d) *Application of new rule in present case.* The CC&Rs here were recorded before any of the parcels were sold. Hence, defendants had constructive notice of them. They state an intent to establish a common plan for the subdivision and describe the property they are to govern. Therefore, the fact that the individual deeds do not refer to them is not fatal to their enforceability. (12 C.4th 368.) (See 24 Pepperdine L. Rev. 1083 [Citizens for Covenant Compliance]; 1 Rest.3d, Property (Servitudes) §2.14 [each lot conveyed under general plan is implied beneficiary of all express and implied servitudes imposed to carry out plan]; 2 Rest.3d, Property (Servitudes) §8.1 [anyone who holds benefit of servitude may enforce it]; 119 A.L.R.5th 519 [when tract is subject to general plan of development that subjects all parcels in tract to restrictive covenants included in general plan].)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Designation of Tract.

12 Witkin Sum. Cal. Law Real Property § 450

[§ 450] Designation of Tract.

A further refinement in the California rule was established in *Wing v. Forest Lawn Cemetery Assn.* (1940) 15 C.2d 472, 101 P.2d 1099. The grantor conveyed burial lots, each instrument reciting that it was one of a series of similar deeds, and that the restrictions contained therein were to be enforceable by the grantor and individual grantees. *Held*, plaintiff grantee could not enforce any covenant against defendant grantor. (15 C.2d 481.)

The court quoted *Werner v. Graham* (1919) 181 C. 174, 181, 183 P. 945, to the effect that the equitable servitude cannot be created without "some designation or description of what is an essential factor, namely, the dominant tenement," and held that there must be, by map or other method, a designation of the entire tract involved, i.e., a description of the extent of the land affected by the restrictions. Without the description, the recital of a common plan, and the making of similar deeds, is ineffective, for the grantor has not bound himself to continue to impose the restrictions in any defined parcel of property. (15 C.2d 480.) (See *Kent v. Koch* (1958) 166 C.A.2d 579, 583, 333 P.2d 411 [supporting requirement of identification of dominant tenement]; *Chandler v. Smith* (1959) 170 C.A.2d 118, 120, 338 P.2d 522 [same]; *Soman Properties v. Rikuo Corp.* (1994) 24 C.A.4th 471, 484, 29 C.R.2d 427 [citing *Wing*]; 14 So. Cal. L. Rev. 191 [criticizing *Wing*]; 29 Cal. L. Rev. 85 [pointing out that objection regarding failure to designate tenement should not apply to action by original grantee against original grantor on latter's covenant].)

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5. Denial of Equitable Enforcement.

a. In General.

12 Witkin Sum. Cal. Law Real Property § 451

[§ 451] In General.

The courts exercise a general control over restrictions on use of land and refuse to give the equitable remedy of injunction if the restriction is unreasonable (see *supra*, §442) or if enforcement in the particular case would be inequitable. (See *Fairchild v. Raines* (1944) 24 C.2d 818, 825, 151 P.2d 260 [fact that restrictions are soon to expire may be considered]; *Diederichsen v. Sutch* (1941) 47 C.A.2d 646, 650, 118 P.2d 863 [trial court's mandatory injunction was reversed where restrictions expired pending appeal]; 2 *Rest.3d, Property (Servitudes)* §8.3 [listing factors for determining appropriate remedy]; 8 *Miller & Starr* 3d §24:20 et seq.; 25 *A.L.R.5th* 123 [waiver of right to enforce restrictive covenant by failure to object to other violations]; 25 *A.L.R.5th* 233 [laches as affecting right to enforce restrictive building covenant]; 42 *Proof of Facts* 3d 463 [equitable defenses to action for breach of restrictive covenants]; 20 *Am.Jur.2d* (2005 ed.), *Covenants, Conditions, and Restrictions* §225 et seq.; 7C *Am.Jur. P.P. Forms* (2002 ed.), *Covenants, Conditions, and Restrictions*, §§127 et seq., 177 et seq., 199 et seq.; on 5-year statute of limitations for action for violation of restrictive covenant, see *C.C.P.* 336(b); 3 *Cal. Proc.* (4th), *Actions*, §452.)

In *Friesen v. Glendale* (1930) 209 C. 524, 530, 288 P. 1080, the court took the position that, as against the state or its subdivisions, building restrictions do not give rise to actual property interests compensable under the law of eminent domain. (See *Sackett v. Los Angeles City School Dist. of Los Angeles County* (1931) 118 C.A. 254, 257, 5 P.2d 23 [following *Friesen*; school district was allowed to use restricted land for playground]; *Lombardy v. Peter Kiewit Sons' Co.* (1968) 266 C.A.2d 599, 604, 72 C.R. 240 [following *Friesen*].)

In *Southern Calif. Edison Co. v. Bourgerie* (1973) 9 C.3d 169, 107 C.R. 76, 507 P.2d 964, the *Friesen* doctrine was reexamined and the case was overruled. The court adopted the majority American rule that building restrictions are property rights, and hence are entitled to compensation on taking as easements. (9 C.3d 172; see 8 *Summary* (10th), *Constitutional Law*, §1137; 62 *Cal. L. Rev.* 639 [criticism of *Bourgerie*]; 47 *So. Cal. L. Rev.* 998 [criticism of majority rule and *Bourgerie*; proposing compensation of nuisance damages instead]; 10 *Cal. Western L. Rev.* 628 [effect of *Bourgerie* on compensation for proximity damages]; 4 *A.L.R.3d* 1137 [whether right to enforcement of restrictive covenant is compensable property right in eminent domain proceeding].)

The Third Restatement of Property does not address compensation issues, but does take the position that all servitude benefits are property rights and should be entitled to the protection of the Takings Clause. (See 2 *Rest.3d*,

Property (Servitudes) §7.8, Reporter's Note.)

SUPPLEMENT: [This section is current through the latest supplement]

Five-year statute of limitations:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §485.



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5. Denial of Equitable Enforcement.

b. Plaintiff Without Interest.

12 Witkin Sum. Cal. Law Real Property § 452

[§ 452] Plaintiff Without Interest.

(1) *General Rule.* Restrictions on use of land are unenforceable by a party who does not own any of the property intended to be benefited. (See *Young v. Cramer* (1940) 38 C.A.2d 64, 66, 100 P.2d 523 [transferee of grantor's right of reentry was denied right of forfeiture for violation of condition on ground that he owned no land in the tract and was not injured by violation]; *Wing v. Forest Lawn Cemetery Assn.* (1940) 15 C.2d 472, 483, 101 P.2d 1099 [failure to show probable injury]; *Townsend v. Allen* (1952) 114 C.A.2d 291, 297, 250 P.2d 292 [grantor without interest, waiver, changed conditions]; *Kent v. Koch* (1958) 166 C.A.2d 579, 584, 333 P.2d 411 [unenforceable by grantor after he no longer owns any of the property intended to be benefited]; *Bramwell v. Kuhle* (1960) 183 C.A.2d 767, 775, 6 C.R. 839, supra, §446; *Shields v. Bank of America* (1964) 225 C.A.2d 330, 334, 37 C.R. 360, supra, §130 [distinguishing *Kent*]; 20 *Am.Jur.2d* (2005 ed.), *Covenants, Conditions, and Restrictions* §244.)

(2) *Exception: Enforcement by Successor of Developer.* In *B.C.E. Dev. v. Smith* (1989) 215 C.A.3d 1142, 264 C.R. 55, a developer developed a multi-unit project and recorded covenants, conditions, and restrictions (CC&Rs) including a provision for approval of an owner's construction plans by an architectural committee. Defendant owner obtained approval, but a member of the architectural committee visited the construction site and concluded that the approved plans were not being followed. Plaintiff, the developer's successor in interest, filed suit and obtained a preliminary injunction. Defendant appealed on the sole ground that plaintiff, which owned no property in the tract, had no standing to sue. *Held*, in this equitable action, the developer's successor could seek enforcement of the CC&Rs.

(a) The general rule that restrictions are unenforceable by a party who does not own any of the property intended to be benefited (215 C.A.3d 1145, citing the text and other authorities) is not a rigid requirement, but rests on a determination of the intention of those creating the covenant. There may be cases in which land ownership is not required, e.g., where a homeowners' association brings the suit. (215 C.A.3d 1147.)

(b) "Injunctive relief requires a court action. Typically, the interest in enforcing restrictions will be common to most, if not all, members of the community. Requiring individual landowners to shoulder the burden of enforcement litigation would be unreasonable. The administration of the common areas in the development is typically allocated to a homeowners association, or to some other entity constituted to represent all of the owners. Often at the inception of the development the enforcement entity is created and controlled by the developer of the project. It is highly reasonable in

these circumstances that the representative association or other central agency undertake, on behalf of all homeowners, such litigation as may be required to enforce the CC&Rs. Where the clear intent of the CC&Rs is to vest enforcement powers in an enforcement agency, there is no reason to further condition such enforcement powers upon the retention by the enforcement agency of land ownership in the development." (215 C.A.3d 1149.)

(c) Moreover, there was no showing of unreasonable control by a developer after completion of the subdivision. The homeowners had tolerated plaintiff's administration for many years, although they could have made different arrangements by a plurality vote, and no issue was made of the validity of the CC&Rs. (215 C.A.3d 1149, 1150.)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Omission, Abrogation, or Disregard of Restrictions.

12 Witkin Sum. Cal. Law Real Property § 453

[§ 453] Omission, Abrogation, or Disregard of Restrictions.

(1) *Omission*. In *Hanna v. Rodeo-Vallejo Ferry Co.* (1928) 89 C.A. 462, 265 P. 287, the grantor omitted restrictions from many of the deeds and thus prevented the development of the general plan. *Held*, he thereby waived the right to enforce them against a lot owner. (89 C.A. 467.) (See *Bernstein v. Minney* (1929) 96 C.A. 597, 599, 274 P. 614; *Moe v. Gier* (1931) 116 C.A. 403, 408, 2 P.2d 852; *Wedum-Aldahl Co. v. Miller* (1937) 18 C.A.2d 745, 751, 64 P.2d 762; *Maderis v. Pattavina* (1941) 46 C.A.2d 615, 616, 116 P.2d 495; *Terry v. James* (1977) 72 C.A.3d 438, 444, 140 C.R. 201; 4 A.L.R.2d 1364 [omission from deed of restrictive covenant imposed by general plan of subdivision].)

On the other hand, in *Collani v. White* (1940) 38 C.A.2d 539, 101 P.2d 767, the grantor expressly reserved the right to create or omit conditions in the sale of the various lots. The court held the restrictions enforceable (38 C.A.2d 544), although the basic requirement of the rule of *Werner v. Graham* (1919) 181 C. 174, 183 P. 945, that the grantor's intent to carry out the general plan must be expressly set forth, was lacking. (On abrogation of requirement that deeds contain express statement of intent to carry out common plan through restrictions, see *supra*, §449.)

(2) *Abrogation*. If the deeds provide for express abrogation of the covenants by a stated number of lot owners, the owners may nullify the restrictions. (*Sharp v. Quinn* (1931) 214 C. 194, 197, 4 P.2d 942; see *Childs v. Newfield* (1934) 136 C.A. 217, 219, 28 P.2d 924 [parties in interest may record instrument cancelling restrictions]; *Taormina Theosophical Community v. Silver* (1983) 140 C.A.3d 964, 970, 190 C.R. 38 [specified modification procedure must be followed in order to make valid change]; 4 A.L.R.3d 570 [provisions for future revocation or modification of covenant]; 20 Am.Jur.2d (2005 ed.), *Covenants, Conditions, and Restrictions* §225 et seq.; 7 Am.Jur. Legal Forms 2d (1998 ed.), *Covenants, Conditions, and Restrictions*, §77:139 et seq.) However, the mere reservation by the original owner of power to modify restrictions does not invalidate them. (*Burkhardt v. Lofton* (1944) 63 C.A.2d 230, 233, 146 P.2d 720 [no modification was actually attempted].)

(3) *General Disregard*. The same rule--refusal of enforcement--is followed where there has been a general disregard of the restrictions by the grantor or a number of grantees. (*Bryant v. Whitney* (1918) 178 C. 640, 643, 174 P. 32; *Wedum-Aldahl Co. v. Miller*, *supra*; *Diederichsen v. Sutch* (1941) 47 C.A.2d 646, 649, 118 P.2d 863; see 9 Powell §60.10; 20 Am.Jur.2d (2005 ed.), *Covenants, Conditions, and Restrictions* §228 et seq.; 7C Am.Jur. P.P. Forms (2002 ed.), *Covenants, Conditions, and Restrictions*, §§133, 179, 203.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Abrogation*. See 7 Am.Jur. Legal Forms 2d (2006 ed.), Covenants, Conditions, and Restrictions §77:155 et seq.



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5. Denial of Equitable Enforcement.

d. Changed Conditions.

1. Enforcement Denied.

12 Witkin Sum. Cal. Law Real Property § 454

[§ 454] Enforcement Denied.

If the conditions in the surrounding territory have changed enough to make it impossible to achieve the benefits originally sought by making the restrictions, their enforcement will be denied. "[E]quity courts will not enforce restrictive covenants by injunction in a case where, by reason of a change in the character of the surrounding neighborhood, not resulting from a breach of the covenants, it would be oppressive and inequitable to give the restriction effect, as where the enforcement of the covenant would have no other result than to harass or injure the defendant, without benefiting the plaintiff." (*Hurd v. Albert* (1931) 214 C. 15, 23, 3 P.2d 545; see *Downs v. Kroeger* (1927) 200 C. 743, 747, 254 P. 1101; *Hess v. Country Club Park* (1931) 213 C. 613, 616, 2 P.2d 782; *Fairchild v. Raines* (1944) 24 C.2d 818, 822, 151 P.2d 260; *Wolff v. Fallon* (1955) 44 C.2d 695, 697, 284 P.2d 802; *Letteau v. Ellis* (1932) 122 C.A. 584, 588, 10 P.2d 496; *Wedum-Aldahl Co. v. Miller* (1937) 18 C.A.2d 745, 752, 64 P.2d 762; 2 *Rest.3d, Property (Servitudes)* §7.10; 9 *Powell* §60.10; 7 *Hastings L. J.* 209 [analysis of factors considered by courts in determining whether conditions have substantially changed]; 31 *U.C.L.A. L. Rev.* 226 [expanding remedies for changed conditions]; 2 *A.L.R.2d* 601 [continued value of restrictive covenant in protecting property from competition as basis for enforcement despite changes of neighborhood conditions]; 53 *A.L.R.3d* 492 [change of neighborhood as affecting covenants precluding multiple dwellings]; 76 *A.L.R.5th* 337 [effect of change in neighborhood character on validity or enforceability of restrictive covenant]; 20 *Am.Jur.2d* (2005 ed.), *Covenants, Conditions, and Restrictions* §235 et seq.; 7C *Am.Jur. P.P. Forms* (2002 ed.), *Covenants, Conditions, and Restrictions*, §§199 et seq., 225; 39 *Proof of Facts* 3d 377 [sufficient change in neighborhood character to preclude enforcement of restrictive covenant].)

In *Key v. McCabe* (1960) 54 C.2d 736, 8 C.R. 425, 356 P.2d 169, defendants bought a lot in 1955, with residential restrictions effective until 1969, and commenced construction of a commercial building. *Held*, the trial judge's finding of changed conditions was supported by his view of the scene and by the following evidence: The lot was on a corner of two streets, one of which was a four-lane divided highway with shoulders and traffic lights; experts and others testified that the property was not suitable for single family dwellings; the property had been zoned commercial by the city; and other property owners within the restricted area had departed from the restrictions themselves. (54 C.2d 738.) (See 13 *Hastings L. J.* 394 [Key].)

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2. Insufficient Change.

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[§ 455] Insufficient Change.

The change must be such that the original purpose of the restriction can no longer be realized. If it would merely be more profitable, e.g., for a grantee to use the land for business instead of for residential property, the grantee is not entitled to relief against the restriction. (*Strong v. Hancock* (1927) 201 C. 530, 549, 258 P. 60; *Shideler v. Roberts* (1945) 69 C.A.2d 549, 557, 160 P.2d 67; *Robertson v. Nichols* (1949) 92 C.A.2d 201, 207, 206 P.2d 898; *Atlas Terminals v. Sokol* (1962) 203 C.A.2d 191, 195, 21 C.R. 293, quoting the text [restrictions were still enforceable]; *Butte v. Bach* (1985) 172 C.A.3d 848, 868, 218 C.R. 613.)

In *Bolotin v. Rindge* (1964) 230 C.A.2d 741, 41 C.R. 376, the tract, with restrictions to single family residences, was created in 1923, and the restrictions were to expire in 1970. All lots, except four, had residences on them. Plaintiffs' lot, on the corner of Wilshire Boulevard in Los Angeles, was of little value for a residence, but worth over \$ 200,000 for a commercial building. The trial judge made findings to this effect, and a further finding that removal of the restriction would not have an adverse effect on "the market value" of other lots. *Held*, reversed. The test is whether the purpose of the restrictions has become obsolete so that enforcement will not benefit the other lot owners. Economic consequences alone cannot justify nullification, for the change might still destroy the physical conditions that make the area a desirable neighborhood for the other owners. (230 C.A.2d 744.)

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e. Change in Law and Policy.

12 Witkin Sum. Cal. Law Real Property § 456

[§ 456] Change in Law and Policy.

In *Welsch v. Goswick* (1982) 130 C.A.3d 398, 181 C.R. 703, plaintiffs purchased a home in a subdivision that had a recorded declaration of restrictions, including use "for single family residential purposes only." They prepared to operate the home as a residential care facility, but defendant, heading the subdivision's architectural control committee, sued to enjoin them. In 1977, the parties entered into a stipulated judgment, reciting that operation of such a facility is not a single family residential purpose, and permanently enjoining plaintiffs from carrying on that business. Plaintiffs nevertheless continued to provide the services for six elderly women, and in 1980, filed a declaratory relief suit, seeking to have the stipulated injunction judgment declared invalid because of changed circumstances. The change was the enactment of *Health & Saf.C. 1566.5* (part of the Community Care Facilities Act), providing: "For the purposes of any contract, deed, or covenant for the transfer of real property executed on or after January 1, 1979, a residential facility which serves six or fewer persons shall be considered a residential use of property and a use of property by a single family, notwithstanding any disclaimers to the contrary." *Held*, injunction modified to permit operation of such a facility.

(a) The statute does not directly affect covenants entered into before 1979, but is a strong statement of public policy in favor of a broad interpretation of single family residential use. (130 C.A.3d 407.) And recent cases from other jurisdictions indicate that operation of a residential care facility is no longer inconsistent with single family residential use. (130 C.A.3d 407.)

(b) Recent changes in "the social fabric" lead to the same conclusion. The family unit no longer provides adequate support and care for the elderly, and the Legislature has advocated the development of small community care facilities as a preferable alternative to hospitals and rest homes. Thus, "the covenant may no longer be read to prohibit the operation of a residential care facility serving six or fewer persons." (130 C.A.3d 408.)

A concurring justice argued that judicial enforcement of the judgment violated plaintiffs' rights under the California constitutional right of privacy (Cal. Const., Art. I, §1) as construed in *Santa Barbara v. Adamson* (1980) 27 C.3d 123, 164 C.R. 539, 610 P.2d 436, 8 Summary (10th), *Constitutional Law*, §1032. (130 C.A.3d 409.)

In *Barrett v. Lipscomb* (1987) 194 C.A.3d 1524, 240 C.R. 336, the court refused to follow the holding in *Welsch v.*

Goswick on retroactivity. "We reject as unpersuasive the *Welsch* court's holding that the strong statement of public policy of integrating residential care facilities into single family residential areas justifies overriding the clear legislative intent that as to private agreements relating to property use the statute is prospective only in application. As noted, the statement of public policy in section 1566 et seq. relates to prohibiting counties and cities from barring residential care facilities through the use of zoning and conditional permits. Nowhere in the statutes is there evidence of any legislative intent that a residential care facility be defined as a single family residence for purposes of private agreements, deeds or covenants for the transfer of real property executed prior to January 1, 1979. The intent is expressly stated to be contrariwise." (194 C.A.3d 1531.) To construe the section as prospective only avoids the constitutional challenge of impairment of vested contractual rights. (194 C.A.3d 1532.)

In *Broadmoor San Clemente Homeowners Assn. v. Nelson* (1994) 25 C.A.4th 1, 30 C.R.2d 316, the trial judge granted an injunction against the operation of a residential care facility for elderly adults in a home subject to covenants, conditions, and restrictions (CC&Rs), recorded in 1974, that prohibited business or commercial activities in the development's homes. *Held*, reversed. The trial judge correctly ruled that pre-1979 covenants were not affected by the enactment of *Health & Saf.C. 1569.87*, which imposes the same condition for the specific benefit of residential facilities for the elderly as is generally provided in *Health & Saf.C. 1566.5*, the statute construed in *Barrett* and *Welsch*. (25 C.A.4th 5.) However, 1993 amendments to *Govt.C. 12955* and *12955.6* (see 8 *Summary* (10th), *Constitutional Law*, §§916, 947), enacted while this appeal was pending, invalidated the portion of *Health & Saf.C. 1569.87* that had allowed pre-1979 restrictive covenants to prohibit residential care facilities for the elderly. (25 C.A.4th 9.) (See *Hall v. Butte Home Health* (1997) 60 C.A.4th 308, 318, 70 C.R.2d 246 [retroactive application of *Govt.C. 12955* and *12955.6* to invalidate restrictive covenants that resulted in discrimination against elderly disabled, would not constitute unconstitutional impairment of contract; preexisting rights would be impaired only as necessary to provide suitable housing for disabled, and there was no evidence that neighbors had suffered anything more than minimal alteration of property rights]; *Barrett v. Dawson* (1998) 61 C.A.4th 1048, 1054, 71 C.R.2d 899 [retroactive application of *Health & Saf.C. 1597.40(c)*, which invalidates restrictive covenants limiting family day care homes in residential neighborhoods, was constitutional; because there was no state action, there was no taking; although there was impairment of contractual right, there was also significant and legitimate public purpose behind statute (ensuring adequate and local day care for working parents)].)

SUPPLEMENT: [This section is current through the latest supplement]



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D. Equitable Servitudes.
6. Extent and Kinds of Relief.

12 Witkin Sum. Cal. Law Real Property § 457

[§ 457] Extent and Kinds of Relief.

(1) *Relief Against Conditions Subsequent.* It has been pointed out that the use restriction may be in the form of a condition subsequent, with a power of termination of the estate for breach. (See *supra*, §18.) It also might be contended that in strict theory, the grantor or the grantor's successors should have a better case for enforcement than the ordinary lot owner in the tract. The courts, however, have applied the same tests and the same defenses to restrictions in the form of conditions as to those in the form of covenants. As the court said in *Townsend v. Allen* (1952) 114 C.A.2d 291, 296, 250 P.2d 292, in none of the prior cases reviewed "did the circumstance that the right of reentry or reverter might be considered a conditional interest in real property ... prevent the destruction of that interest when the enforcement of the restriction it was intended to protect had become useless or inequitable."

(2) *Affirmative Relief.* In an action by a lot owner to enforce a covenant by injunction against breach, or by the grantor or the grantor's successors to terminate the estate for breach of a condition subsequent, the court offers the defendant lot owner certain equitable protection. (See *supra*, §451 et seq.) But the cases go further. A lot owner may obtain affirmative relief by an action to quiet title against the restrictions or for declaratory relief, not only against other lot owners, but against the original grantor or the grantor's successors. (See *Hess v. Country Club Park* (1931) 213 C. 613, 616, 2 P.2d 782; *Hurd v. Albert* (1931) 214 C. 15, 19, 3 P.2d 545; *Marra v. Aetna Const. Co.* (1940) 15 C.2d 375, 377, 101 P.2d 490; *Wing v. Forest Lawn Cemetery Assn.* (1940) 15 C.2d 472, 484, 101 P.2d 1099; *Letteau v. Ellis* (1932) 122 C.A. 584, 587, 10 P.2d 496; *Forman v. Hancock* (1934) 3 C.A.2d 291, 296, 39 P.2d 249; *Wedum-Aldahl Co. v. Miller* (1937) 18 C.A.2d 745, 752, 64 P.2d 762; *Townsend v. Allen*, *supra*, 114 C.A.2d 296; Cal. Civil Practice, 2 Real Property Litigation, §§12:61, 12:62, 12:78; 20 *Am.Jur.2d* (2005 ed.), *Covenants, Conditions, and Restrictions* §§268, 276, 277; 7C *Am.Jur.* P.P. Forms (2002 ed.), *Covenants, Conditions, and Restrictions*, §§116 et seq., 197.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Affirmative Relief.* See Cal. Civil Practice, 2 Real Property Litigation, §§12:63, 12:64, 12:80.



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E. Rights of Innocent Improver.
1. In General.

12 Witkin Sum. Cal. Law Real Property § 458

[§ 458] In General.

(1) *Common Law and Statutes of Other Jurisdictions.* At common law, a person who mistakenly affixed property to the land of another had no right to compensation; the fixtures belonged to the owner of the land. (See *Taliaferro v. Colasso* (1956) 139 C.A.2d 903, 905, 294 P.2d 774; 11 Stanf. L. Rev. 456 [rights of trespassing improver].) Many states have modified this harsh rule by the enactment of "betterment statutes," which allow the innocent improver to recover the value of the improvements as a condition to recovery of the land by the owner. (See *Rest., Restitution* §42; 19 *Hastings L. J.* 1039 [comparative study of Anglo-American and foreign laws]; 24 *A.L.R.2d* 11 [measure and items of recovery for improvements mistakenly placed or made on land of another]; 57 *A.L.R.2d* 263 [compensation for improvements made or placed on premises of another by mistake]; 41 *Am.Jur.2d* (1995 ed.), *Improvements* §5 et seq.; 75 *Proof of Facts* 3d 1 [mistaken improver's recovery of compensation for improvements made to another's land].)

(2) *California Statutes.* Before 1968, California did not have a typical betterment act, although two statutes gave substantial protection to the innocent improver. (See *infra*, §462.) In that year, the Legislature, on recommendation of the Law Revision Commission, adopted a betterment act. (*C.C.P.* 871.1 et seq., *infra*, §459 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Common Law and Statutes of Other Jurisdictions.* See 41 *Am.Jur.2d* (2005 ed.), *Improvements* §5 et seq.



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2. Recovery of Value.
a. Nature and Scope of Statute.

12 Witkin Sum. Cal. Law Real Property § 459

[§ 459] Nature and Scope of Statute.

(1) *Enactment.* A statute authorizing the court to give appropriate relief to the good faith improver was adopted in 1968, on recommendation of the Law Revision Commission. (*C.C.P. 871.1 et seq.*; 6 Miller & Starr 3d, §17:44.)

(2) *Improver.* A "good faith improver" is a "person who makes an improvement to land in good faith and under the erroneous belief, because of a mistake of law or fact, that he is the owner of the land." (*C.C.P. 871.1(a)*.) But the person is not a "good faith improver" as to any improvement made after he or she becomes aware of facts that preclude him or her from acting in good faith. (Law Rev. Com. Comment to *C.C.P. 871.1*.) (On test of good faith, see *Raab v. Casper* (1975) 51 C.A.3d 866, 871, 124 C.R. 590, *infra*, §460; see generally 41 Am.Jur.2d (1995 ed.), *Improvements* §11 *et seq.*)

The person entitled to relief may be an unincorporated association (*C.C.P. 871.2*) or the successor in interest of an improver (*C.C.P. 871.1(b)*).

(3) *Right To Sue or Cross-Complain.* An action for relief under *C.C.P. 871.1 et seq.* is treated as an unlimited civil case, regardless of the amount in controversy and regardless of whether a defendant cross-complains for relief under *C.C.P. 871.1 et seq.* Any other case in which a defendant cross-complains for relief under *C.C.P. 871.1 et seq.* is treated as a limited civil case if the cross-complaint is defensive and the case otherwise satisfies the amount in controversy and other requirements of *C.C.P. 85*. (*C.C.P. 871.3(a)*.) The statute of limitations is 1 year, and the period commences to run "from the date upon which the good faith improver discovers that the good faith improver is not the owner of the land." (*C.C.P. 340(e)*.) (See *Okuda v. Superior Court* (1983) 144 C.A.3d 135, 140, 192 C.R. 388, *infra*, §461.)

(4) *Exclusions.* *C.C.P. 871.1 et seq.* do not apply if the improver is a public entity, if the improvement is made to land owned or possessed by a public entity (*C.C.P. 871.7(a)*), or if the owner has appropriated the land to a public use and could have acquired the land for that use through eminent domain (*C.C.P. 871.7(b)*). (See Law Rev. Com. Comment [law relating to eminent domain, inverse condemnation, and encroachments on public lands will be unaffected by *C.C.P. 871.1 et seq.*].)

C.C.P. 871.1 et seq. are also inapplicable where a person constructs an improvement on the person's own land that encroaches on adjoining land. (*C.C.P. 871.6*; see 13 *Summary* (10th), *Equity*, §138.)

(5) *Trial by Court*. Because it would be impossible to sever the legal from the equitable issues (see *infra*, §460), there is no right to a jury trial. (*Southern Pac. Trans. Co. v. Superior Court* (1976) 58 C.A.3d 433, 438, 129 C.R. 912, 7 Cal. Proc. (4th), Trial, §98.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Improver*. See 41 Am.Jur.2d (2005 ed.), *Improvements* §8 et seq.(5) *Trial by Court*.

Southern Pac. Trans. Co. case:

Cross-Reference: 7 Cal. Proc. (5th), Trial, §88.



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2. Recovery of Value.
b. Considerations Determining Relief.

12 Witkin Sum. Cal. Law Real Property § 460

[§ 460] Considerations Determining Relief.

C.C.P. 871.1 et seq. set forth general guidelines to aid the court in reaching a result fair to all parties:

- (1) The burden is on the good faith improver to establish that he or she is entitled to relief. (*C.C.P. 871.3(b)*.)
- (2) Subject to *C.C.P. 871.4* (see *infra*, §462), the court may "effect such an adjustment of the rights, equities, and interests of the good faith improver, the owner of the land, and other interested parties (including, but not limited to, lessees, lienholders, and encumbrancers) as is consistent with substantial justice to the parties." (*C.C.P. 871.5*.) (See *Okuda v. Superior Court* (1983) 144 C.A.3d 135, 140, 192 C.R. 388, *infra*, §461.)
- (3) The relief granted must "protect the owner ... against any pecuniary loss" (e.g., expense and attorneys' fees incurred in the action). But it must, if possible, avoid enriching the owner unjustly at the good faith improver's expense. (*C.C.P. 871.5*; see *Tremper v. Quinones* (2004) 115 C.A.4th 944, 948, 9 C.R.3d 672 [because trial court granted relief to defendant in quiet title action as good faith improver, it should have required defendant to pay plaintiffs' attorneys' fees, even though plaintiffs could not distinguish between fees incurred in prosecuting quiet title action and those incurred in defending against defendant's claim for relief under *C.C.P. 871.3*].)
- (4) In determining the appropriate form of relief, the court must take into consideration any plans the owner has for use or development of the land, and the owner's need for it in the use or development of other property. (*C.C.P. 871.5*.)
- (5) The "degree of negligence" of the improver should be taken into account in determining whether the improver acted in good faith and in determining the relief, if any, that is consistent with substantial justice to the parties. (*C.C.P. 871.3(b)*.) Negligence, however, is only a factor to be taken into account, and does not necessarily preclude relief. (*Powell v. Mayo* (1981) 123 C.A.3d 994, 999, 177 C.R. 66.)

Raab v. Casper (1975) 51 C.A.3d 866, 124 C.R. 590, involved the precise situation described in the Law Revision Commission's Comment to *C.C.P. 871.1* (*supra*, §459). Defendants, without knowledge of the true boundary line, started to build a cabin on plaintiffs' property, and spent \$ 1,956.28 on foundations and other exterior work. Plaintiffs complained, but defendants, without a survey or other investigation, disregarded the warning and spent an additional \$

2,206.85 to complete the cabin. Plaintiffs then obtained a survey at their own expense, and brought this action for an injunction and damages. The trial court found that defendants were "good faith improvers," and awarded them title to the land on which the cabin was located, with monetary compensation to plaintiffs. *Held*, reversed.

(a) "In its traditional sense good faith connotes a moral quality; it is equated with honesty of purpose, freedom from fraudulent intent and faithfulness to duty or obligation." Under *C.C.P. 871.3*, the improver's "degree of negligence" should be taken into account in determining good faith and in shaping the relief. Thus, "good faith becomes an artificial attribute, calling for a measure of care as well as honesty. Lack of care as well as dishonesty may negate or diminish good faith. Moreover, ... the statute invites consideration of varying intensities of negligence." (*51 C.A.3d 872*.)

(b) The Law Revision Commission Comment states that a person who makes additional improvements after he has discovered that he is not the owner would not be entitled to relief. The trial court's findings ignored the material issue of negligence involved in the continued work after a warning of trespass, and this required a reversal of the judgment. (*51 C.A.3d 874*.)

(c) The judgment was also defective in awarding plaintiffs only \$ 500 for the expense of the survey, which actually cost \$ 1,757.20. (*51 C.A.3d 875*.)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Equitable Lien and Lis Pendens.

12 Witkin Sum. Cal. Law Real Property § 461

[§ 461] Equitable Lien and Lis Pendens.

In *Okuda v. Superior Court* (1983) 144 C.A.3d 135, 192 C.R. 388, plaintiffs contracted to purchase a house from defendants, made monthly payments on a deed of trust for a year and a half, added substantial improvements to the property, and then discovered that defendants had not transferred title to them. Plaintiffs then surrendered possession, and brought this action for breach of contract and fraud, and added a count for relief as good faith improvers, praying for an amount equal to the cost and an equitable lien on the property as security for the payment of that amount. At the time of filing the suit, they also recorded a lis pendens. Defendants moved to expunge the lis pendens on the ground that the action did not concern or affect the title to or possession of land as required by the lis pendens statute (see 3 *Cal. Proc.* (4th), *Actions*, §§345, 349). *Held*, recording of the lis pendens was proper.

(a) *Adjustment of equities under C.C.P. 871.5.* The Legislative Committee pointed out that "the court has considerable discretion to select appropriate relief from the full range of equitable and legal remedies." Thus, (1) the court might order that title be quieted in the owner on the condition that he pay for the improvements. (2) The judgment might permit the owner to make installment payments and give the improver an equitable lien as security. (3) If the owner does not desire the land as improved, the court might order that title be quieted in the improver on the condition that he pay the owner the value of the unimproved land, or that a judicial sale be made and the owner paid not less than that amount. (144 C.A.3d 139.)

(b) *Equitable lien is appropriate remedy.* The Legislative Committee Comment quoted above supports the imposition of an equitable lien, and the action therefore affects the title to real property. (144 C.A.3d 139, 140.) Defendants' contention, that express provision for lis pendens in the removal statute (C.C. 1013.5; *infra*, §462) and the absence of any such provision in C.C.P. 871.1 et seq. indicate a legislative intent to preclude lis pendens in actions under the latter statute, is unconvincing. The Legislature may have considered the availability of lis pendens as self-evident. (144 C.A.3d 140.) An equitable lien is a direct charge or encumbrance on the property, and an equitable action may be brought to foreclose it. (144 C.A.3d 141.) Moreover, it has been held that an action to impose a constructive trust on land affects the title or right to possession for purposes of a lis pendens, and constructive trusts and equitable liens are similar in their basic purposes. (144 C.A.3d 141.)

SUPPLEMENT: [This section is current through the latest supplement]

Cross-Reference: 3 Cal. Proc. (5th), Actions, §376.



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CHAPTER XVII - Real Property

Witkin Summary of California Law
V. RIGHTS IN THE LAND OF ANOTHER
E. Rights of Innocent Improver.
3. Other Relief.

12 Witkin Sum. Cal. Law Real Property § 462

[§ 462] Other Relief.

(1) *Removal of Fixtures*. A betterment act in effect forces the owner to pay for unwanted improvements as a condition to recovery of the owner's land. (See *supra*, §458.) A less drastic protection for the innocent improver is afforded by C.C. 1013.5, which allows the improver to remove the improvements, as long as the improver pays the owner any damages proximately resulting from their affixing and removal. (See *Tremper v. Quinones* (2004) 115 C.A.4th 944, 950, 9 C.R.3d 672 [good faith improver who is allowed to remove improvements under C.C. 1013.5 must pay attorneys' fees that owner incurs in suing to quiet title to property, just as if improver had cross-complained under C.C.P. 871.3 (*supra*, §460)]; 6 Miller & Starr 3d, §§17:42, 17:43; 11 *Stanf. L. Rev.* 456, 478; 13 *Summary* (10th), *Personal Property*, §98 et seq.)

(2) *Setoff in Owner's Action*. If the true owner not only seeks recovery of the land, but also damages for withholding it, the good faith improver is entitled to a setoff in the amount by which the improvements enhance the value of the land. (C.C.P. 741(b); on compensation for improvements made by purchaser at tax sale if tax deed is later held void, see Rev.C. 3728, 9 *Summary* (10th), *Taxation*, §289.)

The term "good faith improver" in C.C.P. 741(b) has the same meaning as in C.C.P. 871.1 (see *supra*, §459). (C.C.P. 741(a).)

Two limitations on the scope of C.C.P. 741 should be noted:

(a) It restricts compensation to a setoff, hence it applies only to one who makes improvements by "holding" the land. It does not apply to one who supplies services or money to the owner. (*Jones v. Sacramento Savings & Loan Assn.* (1967) 248 C.A.2d 522, 531, 56 C.R. 741.)

(b) No independent action may be brought by the improver, and no affirmative judgment may be obtained by cross-complaint if no damages are sought or awarded, or in excess of damages awarded. (*Taliaferro v. Colasso* (1956) 139 C.A.2d 903, 906, 294 P.2d 774 [same rule whether plaintiff's action is legal or equitable].)

(3) *Where Setoff or Removal Is Adequate Remedy*. If the court determines that exercise of the right of setoff under C.C.P. 741 or the right to remove fixtures under C.C. 1013.5 would result in substantial justice, it cannot grant relief

under *C.C.P. 871.1* et seq. In determining whether removal would be just, the court must take into consideration the owner's plans for using the land and the owner's need for the land in connection with using other property. (*C.C.P. 871.4*; see *C.C.P. 871.5*, *supra*, §460.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XVII - Real Property

Witkin Summary of California Law VI. SALES AND TRANSFERS OF RESIDENTIAL REAL PROPERTY A. Implied Warranty in Sale. 1. Sellers of New Construction.

12 Witkin Sum. Cal. Law Real Property § 463

[§ 463] Sellers of New Construction.

(1) *Recognition of Warranty.* An implied warranty of quality and fitness in the sale of newly constructed real property was judicially created in *Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 C.3d 374, 115 C.R. 648, 525 P.2d 88. Defendant developers had a contractor construct five apartment buildings. They took possession, rented units, and then sold the buildings to plaintiffs. Plaintiffs took possession in April 1963, and were immediately aware of defects in the buildings, including a buckling ceiling in one apartment, sticking sliding doors, and water remaining on decks after rainfall. The defects were a result of the contractor's negligence and substitution of inferior material at defendants' order. Plaintiffs notified defendants of the defects in January 1967, and brought suit in February 1967. *Held*, judgment for defendants affirmed, but solely on the ground of failure to give prompt notice.

(a) *Common law and modern developments.* Under the common law doctrine of caveat emptor, the buyer assumed the risk of quality, in the absence of express warranty or misrepresentation. (12 C.3d 377.) However, "many of the principles governing chattel transactions have been adopted in the law of real property, and a number of exceptions have developed to the rule imposing the risk of faulty construction on the buyer. Departures from the older rule have occurred in the areas of both tort and contract liability." (12 C.3d 377, citing recent cases on contractor's liability for negligence and strict products liability; see 6 *Summary* (10th), *Torts*, §§1161, 1501, 1503.)

(b) *Developments applied.* It would be anomalous to imply a warranty of quality when construction is pursuant to a contract with the owner, but fail to recognize a similar warranty when the sale follows completion of construction. And a few jurisdictions have held the warranty applicable to the sale of new constructions, in accordance with the view of many commentators. (12 C.3d 379.) "In the setting of the marketplace, the builder or seller of new construction--not unlike the manufacturer or merchandiser of personalty--makes implied representations, ordinarily indispensable to the sale, that the builder has used reasonable skill and judgment in constructing the building. On the other hand, the purchaser does not usually possess the knowledge of the builder and is unable to fully examine a completed house and its components without disturbing the finished product. Further, unlike the purchaser of an older building, he has no opportunity to observe how the building has withstood the passage of time. Thus he generally relies on those in a position to know the quality of the work to be sold, and his reliance is surely evident in the construction industry." (12 C.3d 379.)

(c) *New rule stated.* "[W]e conclude builders and sellers of new construction should be held to what is impliedly

represented--that the completed structure was designed and constructed in a reasonably workmanlike manner." (12 C.3d 380.)

(d) *Requirement of prompt notice of breach.* U.C.C. 2607(3), stating the rule applicable to sales of personal property, requires notice of breach within a reasonable time. (See 4 *Summary* (10th), *Sales*, §201.) With regard to common law warranties, statutory standards should be used where appropriate, and the requirement of notice of breach is based on sound commercial policy. It allows the defendant an opportunity to repair, reduce damages, avoid defective products in the future, or negotiate settlements, and it also protects against stale claims. "These considerations are as applicable to builders and sellers of new construction as to manufacturers and dealers of chattels." (12 C.3d 380.) In the instant case, plaintiffs, aware of the defects and their results in April 1963, did not give notice for nearly 4 years, and the trial judge's determination that the action was barred by unreasonable delay was proper. (12 C.3d 380.) (See 28 *Stanf. L. Rev.* 357 [Home Owners Warranty Program, sponsored by National Association of Home Builders, as private remedy for aggrieved new home buyers]; 32 *Stanf. L. Rev.* 607 [builder's liability for latent defects in used homes]; 20 *Southwestern U. L. Rev.* 219 [builder's liability to new and subsequent purchasers on implied warranty]; 70 *So. Cal. L. Rev.* 1571 [no warranty from seller of *commercial* real estate]; 16 *A.L.R.4th* 1246 [liability of builder or real estate developer who sells new dwelling for failure to provide potable water]; 50 *A.L.R.5th* 417 [builder's breach of warranty in sale and installation of septic or sewage disposal systems]; 101 *A.L.R.5th* 447 [validity, construction, and application of new home warranty acts]; 50 *Proof of Facts* 3d 543 [builder-vendor's liability to purchaser for breach of implied warranty of fitness or habitability].)

(2) *Prelitigation Requirements for Action for Construction Defects.* C.C. 895 et seq. (6 *Summary* (10th), *Torts*, §1163 et seq.) govern the right of a homeowner to bring an action for construction defects, including actionable defects, the damages recoverable, and a detailed prelitigation procedure. A builder must "record on title" a notice of the prelitigation requirements, and a notice that they impact the legal rights of the homeowner. This information must also be included with the original sales documentation and must be initialed and acknowledged by the purchaser and the builder's sales representative. (C.C. 912(f).)

SUPPLEMENT: [This section is current through the latest supplement]



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Witkin Summary of California Law VI. SALES AND TRANSFERS OF RESIDENTIAL REAL PROPERTY A. Implied Warranty in Sale. 2. Warranty for New Construction Only.

12 Witkin Sum. Cal. Law Real Property § 464

[§ 464] Warranty for New Construction Only.

(1) *Resale by Purchaser of Existing Building.* In *East Hilton Drive Homeowners' Assn. v. Western Real Estate Exchange* (1982) 136 C.A.3d 630, 186 C.R. 267, the rule of *Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 C.3d 374, 115 C.R. 648, 525 P.2d 88, supra, §463, was held inapplicable to defendant, which was neither the developer nor the original seller. The developer built condominiums, a bank acquired them on foreclosure, and they were sold to defendant after having been vacant for 4 years. Defendant, after repairing and rehabilitating them, sold them to plaintiffs, the first occupants. In holding that defendant was not liable for breach of warranty, the court pointed out that *Pollard* imposed the liability on sellers of new construction only, and declared that defendant, which had no part in building or financing the building, could not be considered a seller of new construction. (136 C.A.3d 632.) (See *Siders v. Schloo* (1987) 188 C.A.3d 1217, 1221, 233 C.R. 906 [*Pollard* rule is not applicable to sale of residence by owner-builder].)

(2) *Sale of Existing Building "As Is."* In *Shapiro v. Hu* (1986) 188 C.A.3d 324, 233 C.R. 470, plaintiffs, experienced in business and real estate, made an offer to purchase a building for use as a restaurant. Defendant vendor, in a counteroffer, said that the building was to be sold "as is," the escrow instructions so stated, and plaintiffs made their own inspection of the property. But they did not see a large bulge in the basement wall, hidden by stacked paneling. The defect was discovered after the purchase, and plaintiffs served notice of rescission and sued, contending that the "as is" condition precludes warranties only for defects that are visible or observable. *Held*, judgment for defendant vendor notwithstanding the verdict affirmed.

The *Pollard* rule was inapplicable. An "as is" provision in any sale "puts potential buyers on notice that the seller makes no warranties about the quality or condition of the thing sold. In practice, it serves as a kind of 'red flag' warning the buyer that the goods or property to be sold may not be in perfect condition or of ideal quality. As pointed out by the trial court in its decision, appellants were themselves businessmen and real estate agents who could be expected to be aware of the meaning of an 'as is' sale, and who should have taken precautions to check out the building thoroughly before buying it." (188 C.A.3d 333.) (See *Loughrin v. Superior Court* (1993) 15 C.A.4th 1188, 1192, 19 C.R.2d 161, infra, §482, quoting *Shapiro*; 8 A.L.R.5th 312 [construction and effect of provision in contract for sale of realty by which purchaser agrees to take property "as is" or in existing condition].)

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CHAPTER XVII - Real Property

Witkin Summary of California Law VI. SALES AND TRANSFERS OF RESIDENTIAL REAL PROPERTY B. Disclosure Regarding Agency Relationship. 1. Statutory Development.

12 Witkin Sum. Cal. Law Real Property § 465

[§ 465] Statutory Development.

(1) *Enactment.* The 1986 Legislature enacted an article entitled "Agency Relationships in Residential Real Property Transactions" (former C.C. 2373 et seq.). The Act stated the legislative intent to educate consumers on the existence of various types of agency relationships that may occur in residential real property transactions and protect consumers by requiring disclosure of the elements of these relationships in simple, comprehensible, and nontechnical terms. (Stats. 1986, Chap. 785, §3; *18 Pacific L. J.* 705; see *61 So. Cal. L. Rev.* 399 [subagency in residential real estate brokerage].)

In 1995, these provisions were repealed and reenacted as C.C. 2079.13 et seq. without substantive change as part of C.C. 2079 et seq., an article governing the general duties owed by real estate agents to prospective purchasers of residential property. A number of the former and current provisions use the term "article" when limiting or defining the scope of the statutes. (See, e.g., C.C. 2079.22, *infra*, §466 ["Nothing in this article precludes a listing agent from also being a selling agent, and the combination of these functions in one agent does not, of itself, make that agent a dual agent."].) Because the revised statutes no longer comprise a separate article, but now are part of the article containing the general duties owed by real estate agents to prospective purchasers of residential property, the term, under the usual rules of statutory construction (see *7 Summary* (10th), *Constitutional Law*, §115 et seq.), encompasses all of C.C. 2079 et seq.

(2) *Construction.* C.C. 2079 et seq. may not be construed to either diminish the duty of disclosure owed to buyers and sellers by agents and their associate licensees, subagents, and employees or to relieve those persons from liability either for acts governed by those statutes or for any breach of a fiduciary duty or duty of disclosure. (C.C. 2079.24.)

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VI. SALES AND TRANSFERS OF RESIDENTIAL REAL PROPERTY
B. Disclosure Regarding Agency Relationship.
2. Definitions.

12 Witkin Sum. Cal. Law Real Property § 466

[§ 466] Definitions.

(1) *Types of Agents.* For purposes of C.C. 2079.14 et seq., the types of agents that may participate in a residential real property transaction are defined as follows:

(a) "Agent" refers to a licensed real estate broker "under whose license a listing is executed or an offer to purchase is obtained." (C.C. 2079.13(a).)

(b) "Associate licensee" refers to a licensed real estate broker or salesperson who is either licensed under a broker or has entered into a written contract to act as the broker's agent and to function under the broker's supervision. (C.C. 2079.13(b).)

(c) "Listing agent" refers to a person obtaining a listing of real property to act as an agent for compensation. (C.C. 2079.13(f).)

(d) "Selling agent" means (1) a listing agent who acts alone, (2) an agent, acting in cooperation with a listing agent, who sells or finds and obtains a buyer for the property, or (3) an agent who finds property for a buyer or who locates a buyer for a property for which there is no listing and presents an offer to the seller. (C.C. 2079.13(n).)

A selling agent may not act as an agent for the buyer only, when the agent is also acting as the listing agent. (C.C. 2079.18.)

(e) "Dual agent" refers to an agent acting, either directly or through an associate licensee, as the agent for both the buyer and seller. (C.C. 2079.13(d).) Combining the functions of listing agent and selling agent in one agent does not, of itself, make that agent a dual agent. (C.C. 2079.22.)

(f) "Subagent" means a person to whom an agent has delegated power, but does not include an associate licensee acting under an agent's supervision. (C.C. 2079.13(o).)

(2) *Other Terms.* Many other terms are defined for purposes of C.C. 2079.14 et seq., including the following:

(a) "Buyer." (C.C. 2079.13(c).)

- (b) "Listing agreement." (C.C. 2079.13(e).)
- (c) "Listing price." (C.C. 2079.13(g).)
- (d) "Offering price." (C.C. 2079.13(h).)
- (e) "Offer to purchase." (C.C. 2079.13(i).)
- (f) "Real property." (C.C. 2079.13(j).)
- (g) "Real property transaction." (C.C. 2079.13(k).)
- (h) "Sell," "sale," or "sold." (C.C. 2079.13(l).)
- (i) "Seller." (C.C. 2079.13(m).)

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CHAPTER XVII - Real Property

Witkin Summary of California Law VI. SALES AND TRANSFERS OF RESIDENTIAL REAL PROPERTY B. Disclosure Regarding Agency Relationship. 3. Providing Disclosure Form to Buyer and Seller.

12 Witkin Sum. Cal. Law Real Property § 467

[§ 467] Providing Disclosure Form to Buyer and Seller.

(1) *Form to Seller.* The listing agent, if any, must provide the disclosure form specified in C.C. 2079.16 (see *infra*, §468) to the seller before entering into the listing agreement. (C.C. 2079.14(a).) The selling agent must provide the form to the seller as soon as practicable before presenting the seller with a purchase offer, unless, as the listing agent, he or she had previously complied with this requirement. (C.C. 2079.14(b).) Where the selling agent does not deal on a face-to-face basis with the seller, the form prepared by the selling agent may be furnished to the seller by the listing agent, or the selling agent may send it by certified mail to the seller's last known address. (C.C. 2079.14(c).)

(2) *Form to Buyer.* The selling agent must provide the form to the buyer as soon as practicable before execution of the offer to purchase. However, if the selling agent does not prepare the offer, the selling agent must present the disclosure form to the buyer no later than the next business day after the agent receives the offer. (C.C. 2079.14(d).)

(3) *Acknowledgment by Seller and Buyer.* Listing and selling agents must obtain a signed acknowledgment of receipt of the disclosure form from the buyer, and from the seller, unless the selling agent has delivered the form to the seller by certified mail. (C.C. 2079.14.) If the buyer or seller refuses to sign the acknowledgment, the agent, or an associate licensee acting for the agent, must state the facts of the refusal in a signed and dated written declaration. (C.C. 2079.15.)

(4) *Consequences of Noncompliance.* In *Huijers v. DeMarrais* (1992) 11 C.A.4th 676, 14 C.R.2d 232, plaintiff purchaser retained a broker to buy real estate from defendant owners. The broker signed an exclusive listing agreement with defendants without first providing them with the disclosure form required by former C.C. 2374(a) (now C.C. 2079.14(a)), which would have told them that a broker can act as a dual agent. Before plaintiff presented an offer, defendants informed the broker of their desire to increase the listing price. When plaintiff learned this, he presented an offer that met the lower purchase price and other terms of the listing agreement. During subsequent negotiations, plaintiff told defendants that because they had been presented with a conforming offer, they could not increase their asking price, and were obligated to pay the broker's commission whether or not they completed the sale. Defendants then signed the purchase contract. At the time of signing, the broker provided defendants with the disclosure form.

After defendants rescinded the purchase contract, plaintiff sued for damages and specific performance. Defendants cross-complained against plaintiff and the broker for fraud and related tort theories, alleging that the broker's failure to

comply with former C.C. 2374(a) made the listing agreement voidable, and thus their execution of the purchase contract was induced by misrepresentation. Judgment was entered for plaintiff and against defendants on their cross-complaint. *Held*, reversed. The broker's failure to comply with the statute relieved defendants from their obligation to pay her a commission, but did not render their purchase contract with plaintiff voidable.

(a) *No substantial compliance.* The broker failed to substantially comply with former C.C. 2374(a), even though she provided the disclosure form at the time the purchase contract was signed. (11 C.A.4th 681.) The statutory objective is to allow the seller to make a more intelligent decision about whether to sign the listing agreement. The full measure of protection that the Legislature intended cannot be achieved if the listing agent fails to provide the disclosure form before entering into that agreement. (11 C.A.4th 684.) Defendant's reliance on former C.C. 2374(b) was misplaced. "We find nothing in subdivision (b) of section 2374 that relieves a selling agent who is also a listing agent from complying with subdivision (a). Subdivision (b) is merely a recognition that not all agents are listing agents. ... Some selling agents are cooperating brokers, and may not be involved in the transaction until after the listing agreement has been signed." (11 C.A.4th 685.)

(b) *Defendants were not obligated to pay commission.* The broker's failure to comply with former C.C. 2374(a) relieved defendants from the obligation to pay her commission. It made no difference whether defendants were in fact injured, the broker intended no wrong, or plaintiff acted in good faith. An agent must disclose not only the fact of dual representation, but all facts that would reasonably affect the judgment of each party in permitting the dual representation. (11 C.A.4th 685, 686.) Nor did the Legislature intend the remedy to be confined to professional discipline against the broker. A statute providing for discipline would be found in the Business and Professions Code and not, as here, in the *Civil Code*. (11 C.A.4th 686.)

(c) *Defendants were still bound by purchase contract.* The broker's noncompliance with the statute did not in itself relieve defendants from their obligation under the purchase contract, because the disclosure statement was ultimately given before they signed the purchase contract. Although failure to provide a disclosure form will not always result in a voidable listing agreement, there was no evidence that defendants had sufficient knowledge concerning the information contained in the disclosure form before entering into the listing agreement. (11 C.A.4th 686, 687.)

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B. Disclosure Regarding Agency Relationship.
4. Contents of Disclosure Form.

12 Witkin Sum. Cal. Law Real Property § 468

[§ 468] Contents of Disclosure Form.

C.C. 2079.16 requires that the following appear on the front of the disclosure form: "DISCLOSURE REGARDING REAL ESTATE AGENCY RELATIONSHIP (As required by the Civil Code) SELLER'S AGENT

A Seller's agent under a listing agreement with the Seller acts as the agent for the seller only. A Seller's agent or a subagent of that agent has the following affirmative obligations:

To the Seller:

(a) A fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Seller.

To the Buyer and the Seller:

(a) Diligent exercise of reasonable skill and care in performance of the agent's duties.

(b) A duty of honest and fair dealing and good faith.

(c) A duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties.

An agent is not obligated to reveal to either party any confidential information obtained from the other party which does not involve the affirmative duties set forth above. BUYER'S AGENT

A selling agent can, with a Buyer's consent, agree to act as agent for the Buyer only. In these situations, the agent is not the Seller's agent, even if by agreement the agent may receive compensation for services rendered, either in full or in part from the Seller. An agent acting only for a Buyer has the following affirmative obligations:

To the Buyer:

(a) A fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Buyer.

To the Buyer and the Seller:

[same as stated for Seller's agent]

AGENT REPRESENTING BOTH SELLER AND BUYER

A real estate agent, either acting directly or through one or more associate licensees, can legally be the agent of both the Seller and the Buyer in a transaction, but only with the knowledge and consent of both the Seller and the Buyer.

In a dual agency situation, the agent has the following affirmative obligations to both the Seller and the Buyer:

- (a) A fiduciary duty of utmost care, integrity, honesty and loyalty in the dealings with either the Seller or the Buyer.
- (b) Other duties to the Seller and the Buyer as stated above in their respective sections.

In representing both Seller and Buyer, the agent may not, without the express permission of the respective party, disclose to the other party that the Seller will accept a price less than the listing price or that the Buyer will pay a price greater than the price offered.

The above duties of the agent in a real estate transaction do not relieve a Seller or Buyer from the responsibility to protect their own interests. You should carefully read all agreements to assure that they adequately express your understanding of the transaction. A real estate agent is a person qualified to advise about real estate. If legal or tax advice is desired, consult a competent professional.

Throughout your real property transaction you may receive more than one disclosure form, depending upon the number of agents assisting in the transaction. The law requires each agent with whom you have more than a casual relationship to present you with this disclosure form. You should read its contents each time it is presented to you, considering the relationship between you and the real estate agent in your specific transaction.

This disclosure form includes the provisions of *Sections 2079.13 to 2079.24, inclusive, of the Civil Code* set forth on the reverse hereof. Read it carefully."

The text of C.C. 2079.13 et seq., excluding C.C. 2079.16, must be printed on the back of the disclosure form. (C.C. 2079.16.)

Space is provided for the agent, associate licensee, buyer, and seller to sign and date the form.

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12 Witkin Sum. Cal. Law Real Property § 469

[§ 469] Disclosure of Exclusive or Dual Agency.

(1) *Disclosure by Selling Agent.* In addition to the disclosure required by C.C. 2079.14 (see *supra*, §467), the agent must, as soon as practicable, disclose the nature of the agent's relationship, and must confirm that relationship in writing. (C.C. 2079.17.)

The selling agent must disclose to the buyer and seller whether the agent is acting exclusively as the buyer's agent, exclusively as the seller's agent, or as a dual agent representing both parties. Confirmation of the relationship must appear in the contract to purchase and sell, or in a separate writing executed or acknowledged by the buyer, seller, and selling agent before or coincident with execution of that contract by the buyer and seller, respectively. (C.C. 2079.17(a).) (On failure to disclose dual agency to seller in writing before presenting seller with offer as required by C.C. 2079.14(b), see *Brown v. FSR Brokerage (1998)* 62 C.A.4th 766, 777, 72 C.R.2d 828 [written disclosure did not occur until signing of escrow instructions; summary judgment for agent reversed].)

(2) *Disclosure by Listing Agent.* The listing agent must disclose to the seller whether the agent is acting exclusively as the seller's agent, or as a dual agent representing both the buyer and seller. The confirmation must appear in the contract to purchase and sell, or in a separate writing executed or acknowledged by the seller and listing agent before or coincident with the seller's execution of that contract. (C.C. 2079.17(b).) (For form of confirmation, see C.C. 2079.17(c).) (On failure to disclose dual agency to seller before signing listing agreement as required by C.C. 2079.14(a), see *Huijers v. DeMarrais (1992)* 11 C.A.4th 676, 681, 14 C.R.2d 232, *supra*, §467 [construing predecessor statute].)

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12 Witkin Sum. Cal. Law Real Property § 470

[§ 470] Additional Provisions.

(1) *Nondisclosure of Price.* A dual agent may not disclose to the buyer that the seller is willing to sell the property at a price less than the listing price, without the seller's express written consent. A dual agent must not disclose to the seller that the buyer is willing to pay a price greater than the offering price, without the buyer's express written consent. (C.C. 2079.21.) C.C. 2079.21 does not alter a dual agent's duty or responsibility to a principal concerning confidential information other than price. (C.C. 2079.21.)

(2) *Effect of Payment of Compensation.* The buyer's or seller's payment of, or obligation to pay, compensation to an agent is not necessarily determinative of a particular agency relationship. Similarly, an agreement between a listing agent and selling agent to share paid compensation or commission, or a right to paid compensation or commission, does not necessarily determine a particular relationship. (C.C. 2079.19.)

(3) *Other Agency Relationships Are Not Prohibited.* C.C. 2079 et seq. do not prevent an agent from selecting, as a condition of employment, a form of agency relationship that is not specifically prohibited, if the disclosure requirements of C.C. 2079.14 (supra, §467) and C.C. 2079.17 (supra, §469) are satisfied. (C.C. 2079.20.)

(4) *Modification.* Before performance of the act that is the object of the agency, and with the parties' written consent, an agency contract may be modified or altered to change the agency relationship. (C.C. 2079.23.)

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C. Disclosures Regarding Condition of Property.
1. Types of Disclosures.

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[§ 471] Types of Disclosures.

Several California statutes require disclosures in connection with the sale of real property, including the following:

- (1) C.C. 2079 et seq., *infra*, §472 et seq. (real estate broker's duty to inspect and disclose).
- (2) C.C. 1102 et seq., *infra*, §479 et seq. (transferor's and broker's duties to disclose). (On vendor's failure to disclose information regarding real property as fraud, see 5 *Summary* (10th), *Torts*, §796 et seq.)
- (3) C.C. 1099 (disclosure of structural pest control inspection report).
- (4) C.C. 1134, *infra*, §687 (disclosure required on transfer of condominium).

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12 Witkin Sum. Cal. Law Real Property § 472

[§ 472] Creation of Duty.

(1) *Enactment and Legislative Intent.* *Easton v. Strassburger* (1984) 152 C.A.3d 90, 199 C.R. 383, 3 Summary (10th), *Agency and Employment*, §65, created the duty of a real estate broker, representing the seller, "to conduct a reasonably competent and diligent inspection of property he has listed for sale in order to discover defects for the benefit of the buyer." (152 C.A.3d 99.) In response to *Easton*, the 1985 Legislature added an article to the Civil Code (C.C. 2079 et seq.), entitled "Duty to Prospective Purchaser of Residential Property." The Legislature found that "the imprecision of terms" in *Easton* and "the absence of a comprehensive declaration of duties, standards, and exceptions, has caused insurers to modify professional liability coverage of real estate licensees and has caused confusion among real estate licensees as to the manner of performing the duty ascribed to them." (C.C. 2079.12(a)(1).) It was necessary to resolve and make precise these issues in an expeditious manner (C.C. 2079.12(a)(2)), and it was desirable to facilitate the issuance of professional liability insurance as a resource for aggrieved members of the public (C.C. 2079.12(a)(3)). C.C. 2079 et seq. should be construed as a definition of the duty set forth in *Easton* and the manner of its discharge. Those provisions are declarative of common law concerning a real estate licensee's duty of care, but a court's ability to interpret the provisions is not affected. (C.C. 2079.12(a)(4).) (See 17 *Pacific L. J.* 798; 28 *Pacific L. J.* 671 [real estate broker's duty to disclose defects]; 39 *Proof of Facts* 3d 309 [real estate broker's misrepresentation or nondisclosure as to condition of property].)

(2) *Scope of Statute.* C.C. 2079 et seq. apply to the purchase of residential real property comprising one to four dwelling units, including a manufactured home as defined in *Health & Saf.C. 18007*. (C.C. 2079.) The provisions also apply to leases of residential real property of one to four dwelling units that include an option to purchase, ground leases of land on which one to four dwelling units have been constructed, and real property contracts under C.C. 2895 for that property. (C.C. 2079.1.)

C.C. 2079 et seq. do not apply to transfers of subdivided property required to be preceded by giving the prospective transferee a copy of a public report under *B. & P.C. 11018.1*, or to transfers of subdivided property that, under *B. & P.C. 11010.4*, can be made without a public report. However, these exemptions apply only to property that has not been previously occupied. (C.C. 2079.6.)

In *Smith v. Rickard* (1988) 205 C.A.3d 1354, 254 C.R. 633, plaintiff decided to buy a 50-acre property listed by the

owners with defendant, a real estate broker. On the property was a residence and lemon and avocado groves. Prior to the listing, defendant toured the property with one of the owners, and noticed "stressed" avocado trees, which the owner described as suffering from too much water. Defendant asked about possible root rot, and the owner disclaimed any knowledge of this defect. Later, plaintiff inspected the property. The owner made the same explanation to him of the cause of the defects, and neither the owner nor defendant advised plaintiff to obtain a laboratory analysis. After completion of the sale, a laboratory test showed widespread root rot, and chemicals for its control were found in a storage shed. Plaintiff destroyed hundreds of avocado trees, reducing his expected income flow, and eventually suffered foreclosure of the mortgage and bankruptcy. He brought this action against defendant broker under C.C. 2079 for negligent failure to inspect the property and disclose material facts. Defendant argued that C.C. 2079 does not apply because the property was primarily commercial, and the defect concerned only the avocado orchards, not the residence. Plaintiff asserted that the property was listed as residential, that he purchased it as a residence, and that the agricultural income was important only in order to keep up his mortgage payments. Plaintiff received a verdict for damages. *Held*, reversed.

(a) *Easton, supra*, limited its holding to residential property, and C.C. 2079(a) expressly refers to a purchaser of "residential real property comprising one to four dwelling units." Thus the statutory duties apply only to brokers selling those residential properties. (205 C.A.3d 1360.)

(b) Although the Legislature has enacted many statutes protecting buyers of residential property, it has not uniformly defined the protected class; e.g., one statute refers generally to property "improved with" one or more dwelling units, while another applies to property "primarily consisting of" a dwelling. Because C.C. 2079 refers to property "comprising" dwelling units, it does not preclude its application to property that includes nonresidential uses. (205 C.A.3d 1362.) However, "[t]he presence of a residence on the commercial property does not transform the property into residential property. The property here had 25 acres of income-producing fruit trees. Although [plaintiff] lived on the property, he purchased it with the intent to grow and sell avocados. That his reason for purchasing the land was to use the profits from the sale of the avocados to make his payments for the ranch does not alter the nature of the property." (205 C.A.3d 1363.)

(c) An inspection would have disclosed facts only affecting the avocado grove, the commercial portion of the property. The statutory reference to facts affecting "the value or desirability of the property" refers to residential property. It was not meant to apply in a situation where the value of a residence may be indirectly affected by a defect in the commercial portion of the property. (205 C.A.3d 1363.)

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12 Witkin Sum. Cal. Law Real Property § 473

[§ 473] Nature of Duty.

(1) *Duty of Broker to Prospective Purchaser.* It is the duty of a licensed real estate broker or salesperson to a prospective purchaser "to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective purchaser all facts materially affecting the value or desirability of the property that an investigation would reveal, if that broker has a written contract with the seller to find or obtain a buyer or is a broker who acts in cooperation with that broker to find and obtain a buyer." (C.C. 2079(a).) (See *Robinson v. Grossman* (1997) 57 C.A.4th 634, 642, 645, 67 C.R.2d 380 [broker had no duty to purchaser to verify or disclaim accuracy of seller's representations concerning property, or to disclose postescrow communications among parties]; *Pagano v. Krohn* (1997) 60 C.A.4th 1, 10, 70 C.R.2d 1 [broker had no duty to disclose that buyers' condominium had water intrusion problem, where she was unaware of that fact, and had apprised buyers of general intrusion problem at development]; *Furla v. Jon Douglas Co.* (1998) 65 C.A.4th 1069, 1077, 1079, 76 C.R.2d 911 [agents could be held liable for misrepresenting size of residence as 5,500 square feet when it was only about 4,300 square feet, even though sales contract stated that statements about size were only approximations]; *Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 C.A.4th 158, 164, 11 C.R.3d 564 [broker owes inspection and disclosure duties under C.C. 2079(a) to prospective buyers exclusively, and not to other persons who are not parties to real estate transaction; minor son of purchaser could not state cause of action against broker for failing to disclose presence of toxic mold in home]; 51 Proof of Facts 3d 361 [proof that real estate professional engaged in interstate real estate fraud]; on form of standard disclosure statement, see *infra*, §483.)

(2) *Duty To Comply With Statute and Professional Conduct Rules.* A licensed real estate broker or salesperson has a duty to comply with C.C. 2079 and with any regulations imposing standards of professional conduct for which a real estate licensee may be disciplined under *B. & P.C. 10176* and *10177* (see 3 *Summary* (10th), *Agency*, §57 et seq.). (C.C. 2079(b).)

(3) *Broker's Standard of Care and Purchaser's Duty To Protect Himself.* The standard of care owed by a broker under C.C. 2079 et seq. is "the degree of care that a reasonably prudent real estate licensee would exercise and is measured by the degree of knowledge through education, experience, and examination, required to obtain a license." (C.C. 2079.2; see *Padgett v. Phariss* (1997) 54 C.A.4th 1270, 1283, 63 C.R.2d 373 [in action against brokers by buyers of unit in planned development for failure to disclose that homeowners association was suing developer for defects in

common areas, C.C. 2079 standard of care was properly applied to nonstatutory claims of negligence, misrepresentation, breach of fiduciary duty, and constructive fraud[.]) However, nothing in C.C. 2079 et seq. relieves the buyer's duty to exercise reasonable care to protect himself or herself, "including those facts which are known to or within the diligent attention and observation of the buyer or prospective buyer." (C.C. 2079.5; see *Assilzadeh v. California Fed. Bank* (2000) 82 C.A.4th 399, 409, 98 C.R.2d 176 [agent and broker had no duty to disclose to condominium purchaser specific defects alleged in lawsuit against condominium developer, where they had informed purchaser of existence of lawsuit].)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Broker's Standard of Care and Purchaser's Duty To Protect Himself*. See BAJI, No. 6.38 [Duty of Licensed Real Estate Broker].

(4) *(New) Distinction: Negligent Nondisclosure*. C.C. 2079 codifies a negligence standard of care for a broker's obligation to visually inspect property and to disclose the inspection's results to the buyer. A cause of action for negligent nondisclosure, in contrast, rests on a broker's fiduciary duty to disclose material information within its possession. No matter how the fiduciary obtains the information, it has a duty to disclose the information to its principal. The fiduciary duty owed by brokers to their own clients is substantially more extensive than the nonfiduciary duty codified in C.C. 2079. (*Michel v. Moore & Associates* (2007) 156 C.A.4th 756, 763, 67 C.R.3d 797 [trial court erred in dismissing cause of action for negligent nondisclosure, even though jury rejected claim of violation of C.C. 2079]; see BAJI, No. 6.38.1 [Licensed Real Estate Broker's Violation of *Civil Code* §2079; cause of action recognized in *Michel*].)



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12 Witkin Sum. Cal. Law Real Property § 474

[§ 474] Scope of Inspection.

(1) *Accessible Areas Only.* The inspection required by C.C. 2079 et seq. does not include an inspection of areas that are reasonably and normally inaccessible. (C.C. 2079.3; see *Wilson v. Century 21 Great Western Realty* (1993) 15 C.A.4th 298, 307, 18 C.R.2d 779 [broker was not liable for failing to discover that foundation lacked steel reinforcement, which could only be ascertained by X-ray, and "J" bolts, which could only be discovered by using steel bar to explore under house between foundation concrete and concealing wood].)

(2) *Common Interest Developments.* If the property comprises a unit in a planned development under B. & P.C. 11003.1, a condominium under C.C. 783, or a stock cooperative under B. & P.C. 11003.2, the required inspection "does not include an inspection of more than the unit offered for sale," if the seller or the broker complies with the provisions of C.C. 1368 (documents that transferor of separate interest must provide to prospective purchaser). (C.C. 2079.3; see *Assilzadeh v. California Fed. Bank* (2000) 82 C.A.4th 399, 408, 98 C.R.2d 176 [agent and broker owed no duty to condominium purchaser to discover that condominium unit could not support weight of marble floor that purchaser wished to install].)

(3) *Off-Site Areas.* The required inspection does not include "an affirmative inspection of areas off the site of the subject property." (C.C. 2079.3; see *Padgett v. Phariss* (1997) 54 C.A.4th 1270, 1280, 63 C.R.2d 373 [amendments to C.C. 2079.3 regarding off-site areas were declarative of existing law; brokers of buyers and sellers of planned development unit, who were unaware that homeowners association was suing developer for defects in common areas, had no statutory duty to call association to inquire whether problem existed]; 41 A.L.R.5th 157 [vendor's and broker's liability for failure to disclose off-site conditions affecting value of property].)

(4) *Public Records.* The required inspection does not include an "affirmative inspection" of "public records or permits concerning the title or use of the property." (C.C. 2079.3.)

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d. Disclosure of Information in Booklets.

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[§ 475] Disclosure of Information in Booklets.

(1) *Common Environmental Hazards.* If a consumer information booklet on common environmental hazards, as described in *B. & P.C. 10084.1*, is delivered to the transferee in connection with the transfer of real property, including property specified in C.C. 1102 (see *infra*, §480) or manufactured housing (defined in *Health & Saf.C. 18007*), a seller or broker is not required to provide additional information regarding the hazards. (C.C. 2079.7(a).) The information booklet must, among other things, substantially comply with the federal disclosure requirements concerning the safe management of lead and radon gas in housing. (*Health & Saf.C. 25417.1*.)

C.C. 2079.7 neither changes the duties of sellers or brokers nor alters their duty to disclose the existence of known environmental hazards on or affecting the real property. (C.C. 2079.7(b).)

(2) *Geological and Seismic Hazards.* If a *Homeowner's Guide to Earthquake Safety*, as described in *B. & P.C. 10149*, is delivered to the transferee in connection with the transfer of real property, including property specified in C.C. 1102 (see *infra*, §480) or under *Pub.Res.C. 2621* et seq. (see *infra*, §486), a seller or broker is not required to provide additional information regarding geological and seismic hazards. (C.C. 2079.8(a).)

C.C. 2079.8(a) neither changes the duties of sellers or brokers nor alters their duty to disclose the existence of known environmental hazards on or affecting the real property. (C.C. 2079.8(b).)

(3) *Home Energy Rating Program.* *Pub.Res.C. 25402.9* requires the publication of an informational booklet concerning the statewide home energy rating program (*Pub.Res.C. 25942*). If the booklet is delivered to the transferee in connection with the transfer of real property, including property specified in C.C. 1102 (see *infra*, §480), manufactured housing (defined in *Health & Saf.C. 18007*), and under *Pub.Res.C. 2621* et seq. (see *infra*, §486), a seller or broker is not required to provide additional information regarding home energy ratings. (C.C. 2079.10(a).) (On similar provision for delivering booklet about water conservation, see C.C. 2079.10(c) and *Water C. 375.5*.)

C.C. 2079.10(a) neither changes the existing duties of sellers or brokers nor alters their duty to disclose the existence of a home energy rating program affecting the real property. (C.C. 2079.10(b).)

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[§ 476] Statute of Limitations.

A legal action for breach of a duty imposed by C.C. 2079 et seq. must be commenced within 2 years from the date of possession, "which means the date of recordation, the date of close of escrow, or the date of occupancy, whichever occurs first." (C.C. 2079.4; see *West v. Superior Court* (1994) 27 C.A.4th 1625, 1632, 34 C.R.2d 409 [C.C. 2079.4 did not apply to claim against brokers for implied contractual indemnity by sellers who were sued by buyers for failure to disclose defects]; Cal. Civil Practice, 1 Real Property Litigation, §2:53 [broker's affirmative defenses].)

In *Loken v. Century 21-Award Properties* (1995) 36 C.A.4th 263, 42 C.R.2d 683, plaintiff purchased and began residing in a home in late 1987. After discovering cracks in its stucco and foundation in early 1990, he sued defendants--the seller's real estate broker and agent--shortly thereafter on two theories: (a) negligent misrepresentation for failure to inspect and disclose the defects, and (b) failure to make required disclosures on the transfer of residential property under C.C. 1102 et seq. (see *infra*, §480). *Held*, both causes of action were governed by the 2-year limitations period of C.C. 2079.4, and were thus time barred.

(a) *Negligent misrepresentation*. The 3-year limitations period of C.C.P. 338(d) for actions based on fraud (see 3 Cal. Proc. (4th), Actions, §596 et seq.) was not applicable. Although negligent misrepresentation is generally viewed as a species of fraud or deceit, C.C. 2079.4, in plain language, provides a 2-year statute of limitations for actions for breach of the duties imposed by C.C. 2079. C.C. 2079 imposes a two-pronged duty on agents and brokers: first, to conduct a reasonably competent and diligent visual inspection; and, second, to disclose all material facts an inspection would reveal. While the first prong of the obligation embodies traditional negligence concepts, the second prong encompasses actionable conduct associated with both negligence and negligent misrepresentation. Thus, the Legislature intended that both negligence *and* negligent misrepresentation causes brought under the statute be governed by C.C. 2079.4. (36 C.A.4th 268.)

(b) *Failure to disclose*. This cause of action sounded in negligence and also stemmed from the duty imposed on defendants by C.C. 2079. Thus it, too, was governed by C.C. 2079.4. (36 C.A.4th 273.)

The *Loken* decision was distinguished in *Williams v. Wells & Bennett Realtors* (1997) 52 C.A.4th 857, 61 C.R.2d 34, an action by plaintiff home buyers against defendant real estate broker, its agent, and others for breach of contract

and fraud in connection with the purchase of a residence. *Held*, C.C. 2079.4 does not apply to a claim for intentional fraud. The duty imposed by C.C. 2079 is the twofold one of conducting a visual inspection, and of disclosing the facts that the inspection would reveal. The first part of the duty embodies principles of negligence, and the disclosure part of the duty implicates both negligence and negligent misrepresentation. A cause of action, even if it is labeled as negligent misrepresentation, is subject to the 2-year limitation if it is derived from the statutory duty to inspect and disclose. However, intentional torts or actual fraud are subject to different rules of pleading and proof. (52 C.A.4th 861.)

An action for breach of fiduciary duty under C.C. 2079 is not governed by C.C. 2079.4, but by the delayed discovery rule applicable to actions against fiduciaries generally (see 3 Cal. Proc. (4th), Actions, §619). (*Field v. Century 21 Klowden-Forness Realty* (1998) 63 C.A.4th 18, 25, 73 C.R.2d 784.)

SUPPLEMENT: [This section is current through the latest supplement]

See Cal. Civil Practice, 1 Real Property Litigation, §2:56. *Actions based on fraud:*

Cross-Reference: 3 Cal. Proc. (5th), Actions, §653 et seq.

Delayed discovery rule:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §679.



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f. Insurance Coverage.

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[§ 477] Insurance Coverage.

An insurer who provides professional liability insurance for persons licensed under *B. & P.C. 10000* et seq. may not exclude from coverage liability arising from the breach of the licensee's duty under *C.C. 2079* et seq. An insurer may, however, exclude coverage against liability arising out of a dishonest, fraudulent, criminal, or malicious act, error, or omission committed by, at the direction of, or with the knowledge of the insured. Professional liability insurance means insurance against liability for damages caused by an act or omission of a real estate licensee in rendering professional services in California. (*Ins.C. 11589.5.*)

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g. Broker's Action Against Home Inspection Company.

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[§ 478] Broker's Action Against Home Inspection Company.

A real estate broker who is sued for breach of the duty under C.C. 2079 et seq. to disclose property defects to prospective purchasers may seek equitable indemnity against a home inspection company for breach of its duty under *B. & P.C. 7196* to discover and disclose the same defects. (*Leko v. Cornerstone Bldg. Inspection Service (2001) 86 C.A.4th 1109, 1114, 103 C.R.2d 858*; on home inspections, see *infra*, §§496, 497.)

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a. In General.
1. Nature of Requirement.

12 Witkin Sum. Cal. Law Real Property § 479

[§ 479] Nature of Requirement.

C.C. 1102 et seq., entitled "Disclosures Upon Transfer of Residential Property," were enacted in 1985, effective January 1, 1987. The statute requires the transferors of real property and their brokers to make detailed written disclosures to prospective purchasers. (See *Kovich v. Paseo Del Mar Homeowners' Assn.* (1996) 41 C.A.4th 863, 866, 48 C.R.2d 758 [homeowners association has no duty to disclose construction defects to prospective purchaser of condominium]; *Shapiro v. Sutherland* (1998) 64 C.A.4th 1534, 1548, 76 C.R.2d 101 [sellers who sold home to relocation company, which then sold it to plaintiff, owed duty of disclosure to plaintiff, the ultimate purchaser; sellers knew that relocation company would own home only until purchaser could be found and that disclosure statement executed by sellers would be delivered to purchaser]; 26 *Golden Gate L. Rev.* 473 [sellers' duties of disclosure in California real estate transactions]; 17 *Pacific L. J.* 784; 39 Proof of Facts 3d 309 [real estate broker's misrepresentation or nondisclosure as to condition or value of property].)

West's Key Number Digest, Vendor and Purchaser k.36 et seq.

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See 36 *McGeorge L. Rev.* 941 [legislative attempts to clarify California's residential real estate disclosure obligations].



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a. In General.

2. Included Transfers.

12 Witkin Sum. Cal. Law Real Property § 480

[§ 480] Included Transfers.

Under C.C. 1102(a), C.C. 1102 et seq. apply when real property or a residential stock cooperative improved with or consisting of one to four dwelling units is transferred by any of the following means:

- (1) Sale.
- (2) Exchange.
- (3) Installment land sales contract.
- (4) Option to purchase.
- (5) Lease with an option to purchase.
- (6) Ground lease coupled with improvements.

C.C. 1102 et seq. also apply to the resale of a manufactured home or mobilehome that is classified as personal property and intended for use as a residence (C.C. 1102(b)), and to the transfer or sale of a manufactured home or mobilehome in a mobilehome park (C.C. 798.74.4). (On transfer disclosure form for use in sales of manufactured homes or mobilehomes, see *infra*, §490; on definitions of "manufactured home" and "mobilehome," see *Health & Saf.C. 18007* and *18008*; on dealer's duty to inspect and disclose defects in used manufactured home, see *Health & Saf.C. 18046*, *infra*, §761.)

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a. In General.
3. Excluded Transfers.

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[§ 481] Excluded Transfers.

The following are not covered by C.C. 1102 et seq.:

- (1) Transfers under the subdivided lands statutes that require a public report (under *B. & P.C. 11018.1*) or that can be made without a public report (under *B. & P.C. 11010.4*). (C.C. 1102.2(a).)
- (2) Transfers ordered by a probate court in administration of an estate. (C.C. 1102.2(b).)
- (3) Transfers pursuant to a writ of execution. (C.C. 1102.2(b).)
- (4) Transfers by a foreclosure sale. (C.C. 1102.2(b).)
- (5) Transfers by a trustee in bankruptcy. (C.C. 1102.2(b).)
- (6) Transfers by eminent domain. (C.C. 1102.2(b).)
- (7) Transfers resulting from a decree for specific performance. (C.C. 1102.2(b).)
- (8) Other transfers pursuant to court order. (C.C. 1102.2(b).)
- (9) Transfers to a mortgagee by a mortgagor or successor in interest who is in default. (C.C. 1102.2(c).)
- (10) Transfers to a beneficiary of a deed of trust by a trustor or successor in interest who is in default. (C.C. 1102.2(c).)
- (11) Transfers by a foreclosure sale after default in an obligation secured by a mortgage. (C.C. 1102.2(c).)
- (12) Transfers by a sale under a power of sale or a foreclosure sale under a decree of foreclosure after default in an obligation secured by a deed of trust or secured by another instrument containing a power of sale. (C.C. 1102.2(c).)

(13) Transfers by a mortgagee or a beneficiary under a deed of trust who has acquired the real property at a sale conducted under a power of sale in a mortgage or deed of trust or a sale pursuant to a decree of foreclosure or has acquired the real property by a deed in lieu of foreclosure. (C.C. 1102.2(c); see *Assilzadeh v. California Fed. Bank* (2000) 82 C.A.4th 399, 409, 98 C.R.2d 176 [because all parties knew that seller had acquired condominium unit by nonjudicial foreclosure and that seller's statutory duty of disclosure was therefore limited by C.C. 1102.2(c), trial court properly granted summary judgment for seller in buyer's action for rescission and restitution].)

(14) Transfers to the legal owner or lienholder of a manufactured home or mobilehome by a registered owner or successor in interest who is in default, or transfers by reason of a foreclosure of a security interest in a manufactured home or mobilehome. (C.C. 1102.2(c).)

(15) Transfers by a fiduciary in the administration of a decedent's estate, a guardianship, a conservatorship, or a trust. However, this exemption does not apply to a transfer by a trustee who is a natural person, sole trustee of a revocable trust, and a former owner of the property or an occupant in possession of the property within the preceding year. (C.C. 1102.2(d).)

(16) Transfers from one coowner to another coowner. (C.C. 1102.2(e).)

(17) Transfers made to a spouse, or to a person in the lineal line of consanguinity of one or more of the transferors. (C.C. 1102.2(f).)

(18) Transfers between spouses resulting from a judgment of dissolution of marriage or of legal separation or from a property settlement agreement incidental to a judgment. (C.C. 1102.2(g).)

(19) Transfers by the Controller administering the Unclaimed Property Law (*C.C.P. 1500* et seq.). (C.C. 1102.2(h).)

(20) Transfers of tax-deeded property (*Rev.C. 3691* et seq., *3771* et seq.). (C.C. 1102.2(i).)

(21) Transfers or exchanges to or from a governmental entity. (C.C. 1102.2(j).)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Disclosures Regarding Condition of Property.

3. Transferor's and Broker's Duties To Disclose.

a. In General.

4. No Waiver of Disclosure Requirements.

12 Witkin Sum. Cal. Law Real Property § 482

[§ 482] No Waiver of Disclosure Requirements.

(1) *Judicial Recognition of Possibility of Waiver.* In *Loughrin v. Superior Court* (1993) 15 C.A.4th 1188, 19 C.R.2d 161, the trial judge granted summary adjudication to defendant seller on plaintiff buyer's cause of action alleging negligent failure to disclose defects in residential property as required by C.C. 1102 et seq. The trial judge agreed with defendant's argument that the inclusion of a clause in the sales agreement to the effect that the property was purchased "as is" waived any potential liability for failing to comply with the statutory disclosure requirements. *Held*, this was error; writ of mandamus issued directing vacation of order granting summary adjudication.

(a) Under C.C. 3513 (1 *Summary* (10th), *Contracts*, §679), "anyone may waive the advantage of a law intended solely for his own benefit. But a law established for a public reason cannot be contravened by a private agreement." (15 C.A.4th 1193, quoting *Tunkl v. Regents of Univ. of Calif.* (1963) 60 C.2d 92, 32 C.R. 33, 383 P.2d 441, 1 *Summary* (10th), *Contracts*, §662.) The typical private real estate purchase transaction has none of the characteristics cited in *Tunkl* as creating a "public interest," and both the terms and the legislative history of C.C. 1102 et seq. indicate that the purpose of the statute is to facilitate private transactions, not to impose regulations for the general public benefit. (15 C.A.4th 1193, 1194.) Hence, a knowing and explicit waiver of the benefits of the statute *can* be effective. (15 C.A.4th 1195.)

(b) However, "contrary to the apparent assumptions of many people dealing in real estate (including some brokers), a sale 'as is' is not the equivalent of a waiver of potential claims of misrepresentation. ... [T]he 'as is' sale simply means the buyer accepts the property in the condition visible or observable by him. An added provision in the waiver clause, such as contained in this case, indicating the buyer relies on his own inspection of the property, presumably waives any obligation the seller or his broker may otherwise have to inspect the property for defects, and hence may avoid a claim for negligent failure to know of and advise of such defects. Even such an augmented 'as is' clause, however, does not address the issues of: (1) intentional misrepresentation, (2) fraudulent concealment, or even (3) negligent concealment not related to failure to inspect." (15 C.A.4th 1195.) Particularly when the parties actually utilize the disclosure form provided by C.C. 1102.6 (*infra*, §483), the use of an "as is" clause does not insulate the seller from claims based on the disclosure requirements of C.C. 1102 et seq. (15 C.A.4th 1195.)

(2) *Legislative Response*. To the extent that it holds that a knowing and explicit waiver of the benefits of C.C. 1102 et seq. can be effective, *Loughrin v. Superior Court* was overruled in 1994 by the enactment of C.C. 1102(c), which provides that any waiver of the requirements of C.C. 1102 et seq. is void as against public policy. The provision is consistent with the second holding in *Loughrin* that an "as is" sale does not constitute a waiver of the disclosure statement. (See C.C. 1102.1(a) [codifying expression of legislative intent]; *Realmuto v. Gagnard* (2003) 110 C.A.4th 193, 203, 1 C.R.3d 569 [buyers did not waive right to disclosure statement by failing to request one during escrow period]; 59 Proof of Facts 3d 463 [liability of seller in residential real estate transaction for misrepresentation under "as is" contract].)

SUPPLEMENT: [This section is current through the latest supplement]



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12 Witkin Sum. Cal. Law Real Property § 483

[§ 483] Content and Intended Use.

(1) *Statutory Form.* The required disclosures must be made on a statutory form set out in full in C.C. 1102.6. (See Cal. Civil Practice, 1 Real Property Litigation, §2:47.) The form is headed "Real Estate Transfer Disclosure Statement," and recites that it is a disclosure of the condition of the property in compliance with C.C. 1102 as of a specified date, that it is not a warranty by the seller or the agent of any principal, and that it is not a substitute for any inspections or warranties the principal may wish to obtain.

(2) *Coordination With Other Disclosure Forms.* Part I of the form notes that other statutes require disclosures in particular transactions, and provides a space for listing the substituted disclosures intended to satisfy the requirements of C.C. 1102. Part I also states that other disclosures required by law, including the Natural Hazard Disclosure Statement, which may contain airport, earthquake, fire, flood, or special assessment information, have or will be made and are intended to satisfy the disclosure obligations on the form, when the subject matter is the same. (On other statements, see *infra*, §486 et seq.)

(3) *Seller's Information.* Part II of the form states that the seller discloses the information with knowledge that prospective buyers may rely on it, and that the seller authorizes an agent representing a principal to provide a copy to "any person or entity in connection with any actual or anticipated sale of the property." It then lists a large number of items to be checked and questions to be answered, to be followed by the seller's signature and certification that the information is true and correct to the best of the seller's knowledge as of the date signed. However, it states that the representations are not representations of the agent, if any, and that the information "is a disclosure and is not intended to be part of any contract between the buyer and seller." (See *Brasier v. Sparks* (1993) 17 C.A.4th 1756, 1760, 22 C.R.2d 1 [disclosure statement cannot be relied upon as part of purchase contract, under plain language of statutory form].)

One of the items the statutory form requires the seller to disclose is "neighborhood noise problems or other nuisances." (C.C. 1102.6, provision II-C-11.) In *Alexander v. McKnight* (1992) 7 C.A.4th 973, 9 C.R.2d 453, an action to enjoin defendants' alleged nuisances and violations of a declaration of restrictions, the trial judge found that C.C. 1102.6 would require plaintiffs to disclose to potential buyers that defendants were "difficult neighbors," even though

the judgment required defendants to abate various noisy and offensive activities. *Held*, affirmed as to disclosure issue.

(a) "The purpose of section 1102.6 requires that it be liberally interpreted so that a buyer will be fully informed on matters affecting the value of the property to be purchased. This means that in a case like this a seller cannot take a revisionist view of history ignoring what has occurred in the past with its implicit representation to a potential buyer that the neighborhood is--and has been--an oasis of tranquility in our otherwise oppressive urban environment." (7 C.A.4th 977.)

(b) Whether information is sufficiently material to affect the value or desirability of residential property is a fact-specific determination that the trier of fact can make based on expert testimony or personal knowledge and experience. (7 C.A.4th 977.)

(c) In this case, however, the trial judge erroneously awarded plaintiffs damages based on the loss they would sustain in a sale after making the required disclosure, since that loss had been abated by court order. (7 C.A.4th 980; see 6 Summary (10th), Torts, §1737.) (See *Shapiro v. Sutherland* (1998) 64 C.A.4th 1534, 1548, 76 C.R.2d 101 [citing *Alexander*; sellers had common law and statutory duty to disclose noisy disturbances caused by neighbors; summary judgment for sellers was improper because of question whether disturbances were material].)

(4) *Agent's Inspection Disclosure*. Part III is to be completed only if the seller is represented by an agent. It provides a place for the agent to fill out and sign a statement, "based on a reasonably competent and diligent visual inspection of the accessible areas of the property." Part III contains notations dividing the agent's comments into two categories: (a) "Agent notes no items for disclosure" and (b) "Agent notes the following items." Space is provided for listing the noted items.

Part IV, also entitled "Agent's Inspection Disclosure," is to be completed only if the agent who obtained the offer is other than the agent who represented the seller. This agent must sign a statement: "The undersigned, based on a reasonably competent and diligent visual inspection of the accessible areas of the property, states the following:" Notations divide the agent's comments into two categories: (a) "Agent notes no items for disclosure" and (b) "Agent notes the following items." Space is provided for listing the noted items.

(5) *Cautions and Acknowledgment*. Part V provides a place for the parties and their agents to acknowledge receipt of a copy of the statement and gives two cautions:

(a) "Buyer(s) and Seller(s) may wish to obtain professional advice and/or inspections of the property and to provide for appropriate provisions in a contract between Buyer(s) and Seller(s) with respect to any advice/inspections/defects."

(b) "A real estate broker is qualified to advise on real estate. If you desire legal advice, consult your attorney."

Part V also informs the buyer of the right to rescind the purchase contract, if delivery occurs after the signing of an offer to purchase, and notifies the buyer that rescission must occur within a prescribed period. (On amount of prescribed period, see C.C. 1102.3, *infra*, §485.)

(6) *Intended Use*. The real estate transfer disclosure statement is intended to be used by transferors making disclosures required by C.C. 1102 et seq., and by agents making disclosures required by C.C. 2079 et seq. (*supra*, §472) in transfers subject to C.C. 1102 et seq. In transfers not subject to C.C. 1102 et seq., the agents may make their disclosures in a separate writing. The existing obligations of the parties or their agents to disclose any fact materially affecting the value and desirability of the property are not affected. Nothing in C.C. 1102 et seq. may be construed to change a broker's or salesperson's duty under C.C. 2079. (C.C. 1102.1(a).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Form*. See Cal. Civil Practice, 1 Real Property Litigation, §2:48.



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2. Environmental Hazards.

12 Witkin Sum. Cal. Law Real Property § 484

[§ 484] Environmental Hazards.

The real estate transfer disclosure statement requires disclosure of "[s]ubstances, materials, or products which may be an environmental hazard such as, but not limited to, asbestos, formaldehyde, radon gas, lead-based paint, mold, fuel or chemical storage tanks, and contaminated soil or water on the subject property." (C.C. 1102.6; see *12 A.L.R.5th* 630 [vendor's obligation to disclose presence of hazardous substance contamination to purchaser of land]; *41 A.L.R.5th* 157 [vendor's duty to disclose off-site conditions that affect property value]; on duty to disclose presence of mold on commercial or industrial property, see *Health & Saf.C. 26140* et seq.; on federal regulations requiring disclosure of existence of lead-based paints or other lead hazards in residential property, see 24 C.F.R., §35.80 et seq., 40 C.F.R., §745 et seq.)

A seller of residential real property who knows, through receipt of a notice from a law enforcement agency or actual knowledge, that an illegal controlled substance has been released on or beneath the property must give written notice of that condition to the buyer. (C.C. 1102.18(b); for definitions of "illegal controlled substance" and "release," see C.C. 1102.18(a).) C.C. 1102.18 expires on January 1, 2006. (C.C. 1102.18(c).) (On nonresidential real property owner's obligation to notify buyers and lessees about hazardous substance releases on or below the property, and on lessee's obligation to notify owner, see *Health & Saf.C. 25359.7*.)

SUPPLEMENT: [This section is current through the latest supplement]
See *27 A.L.R.6th* 465 [effect of radon gas on real estate contracts and agreements].



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b. Standard Disclosure Statement.
3. Delivery of Statement.

12 Witkin Sum. Cal. Law Real Property § 485

[§ 485] Delivery of Statement.

(1) *Time for Delivery.* In the case of a sale, the transferor must deliver the statement to the prospective transferee "as soon as practicable" before transfer of title. If transfer is by a real property sales contract, as defined in C.C. 2985, by a lease with option to purchase, or by a ground lease coupled with improvements, the transferor must deliver the statement "as soon as practicable" before execution of the contract. "Execution" means the making or acceptance of an offer. (C.C. 1102.3.) (See *Realmuto v. Gagnard (2003) 110 C.A.4th 193, 199, 1 C.R.3d 569* [seller's delivery of disclosure statement is nonwaivable condition precedent to buyer's duty to perform contract].)

If a disclosure, or a material amendment of a disclosure, is delivered after the execution of an offer to purchase, the transferee has 3 days after delivery in person or 5 days after delivery by deposit in the mail to terminate the offer by delivery of a written notice of termination to the transferor or the transferor's agent. (C.C. 1102.3.) The statement informs the transferee of this right in Part V, below the area in which the parties and agents acknowledge receipt. (See *supra*, §483; on delivery of amended statement, see C.C. 1102.9.)

(2) *Manner of Delivery.* Delivery may be by personal delivery or by mail, and delivery to a transferee's spouse is deemed delivery to the transferee, unless provided otherwise by contract. (C.C. 1102.10.)

If more than one licensed real estate broker is acting as an agent, the broker who obtained the offer from the transferee must, except as otherwise provided in C.C. 1102 et seq., deliver the disclosure, unless the transferor has given other written instructions for delivery. (C.C. 1102.12(a).) If the broker cannot obtain the disclosure document and does not have written assurance from the transferee that it has been received, the broker must advise the transferee in writing of the right to the disclosure, and must maintain a record of the action taken to comply. (C.C. 1102.12(b).)

A person or entity, other than a real estate licensee, acting in the capacity of an escrow agent will not be deemed the agent of the transferor or transferee for purposes of the disclosure requirements, unless he or she is empowered to act by an express written agreement. The extent of the agency will be governed by the written agreement. (C.C. 1102.11.)

(3) *Proof of Delivery.* The transferor must indicate compliance either on the receipt for deposit, the real property

sales contract, the lease, an addendum attached to these documents, or on a separate document. (C.C. 1102.3.)

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c. Disclosure of Natural Hazards.
1. Types of Hazards.

12 Witkin Sum. Cal. Law Real Property § 486

[§ 486] Types of Hazards.

(1) *Earthquake Information.* C.C. 1103(c)(4), and *Pub.Res.C. 2621.9(a)*, part of the Alquist-Priolo Earthquake Fault Zoning Act (*Pub.Res.C. 2621 et seq.*), require a real property transferor's agent (or the transferor acting without an agent) to disclose to a prospective transferee whether the property is located within a "delineated earthquake fault zone," designated by the State Geologist because of faults deemed "sufficiently active and well defined as to constitute a potential hazard to structures from surface faulting or fault creep" (*Pub.Res.C. 2622(a)*). The disclosure must be made either on the Local Option Real Estate Transfer Disclosure Statement (C.C. 1102.6a) or the Natural Hazard Disclosure Statement (C.C. 1103.2). (C.C. 1103.2(e); *Pub.Res.C. 2621.9(c)*.) (On statements, see *infra*, §§487, 489.) The disclosure is required when the transferor or the transferor's agent has actual knowledge that the property is in a delineated earthquake zone, or when a map designating the area has been provided to the city or county and a notice identifying the location of the map has been posted at specified county offices. (C.C. 1103(c)(4); *Pub.Res.C. 2621.9(b)*.) If the map is not sufficiently accurate or scaled so that a reasonable person can determine whether the property is within a delineated earthquake hazard zone, the agent (or the transferor, if applicable) must mark "Yes" on the Natural Hazard Disclosure Statement. The agent may mark "No" if the agent attaches a report prepared under C.C. 1103.4(c) verifying that the property is not in the hazard zone. (*Pub.Res.C. 2621.9(d)*.)

Similar disclosure requirements apply to real property located within a "seismic hazard zone." (See C.C. 1103(c)(5); *Pub.Res.C. 2694*.) (On duty to provide *Homeowner's Guide to Earthquake Safety*, see *infra*, §488.)

(2) *Location in Wildland Area.* C.C. 1103(c)(6) and *Pub.Res.C. 4136* provide that a transferor of real property "located within a state responsibility area" must disclose to any prospective transferee the fact that "the property is located within a wildland area that may contain substantial forest fire risks and hazards." The disclosure must be made either on the Local Option Real Estate Transfer Disclosure Statement (C.C. 1102.6a) or the Natural Hazard Disclosure Statement (C.C. 1103.2). (C.C. 1103.2(e); *Pub.Res.C. 4136(d)*.) (On statements, see *infra*, §§487, 489.) Disclosure is required when the transferor or the transferor's agent has actual knowledge that the property is in a wildland fire zone, or when a map designating the area has been provided to the city or county and a notice identifying the location of the map has been posted at specified county offices. (C.C. 1103(c)(6); *Pub.Res.C. 4136(c)*.) If the map is not sufficiently accurate or scaled so that a reasonable person can determine whether the property is within a wildland fire zone, the

agent must mark "Yes" on the Natural Hazard Disclosure Statement. The agent may mark "No" if the agent attaches a report prepared under C.C. 1103.4(c) verifying that the property is not in the hazard zone. (C.C. 1103(c)(6); *Pub.Res.C. 4136(e)*.)

Similar disclosure requirements apply to real property located within a "very high fire hazard severity zone." (See *Govt.C. 51183.5*; C.C. 1103(c)(3).)

(3) *Location in Flood Area.* If real property is located within a "special flood hazard area" designated by the Federal Emergency Management Agency, the transferor's agent (or the transferor acting without an agent) must disclose that fact to a prospective transferee. (*Govt.C. 8589.3(a)*; C.C. 1103(c)(1).) The disclosure must be made either on the Local Option Real Estate Transfer Disclosure Statement (C.C. 1102.6a) or the Natural Hazard Disclosure Statement (C.C. 1103.2). (C.C. 1103.2(e); *Govt.C. 8589.3(c)*.) (On statements, see *infra*, §§487, 489.) The disclosure is required when the transferor or the transferor's agent has actual knowledge that the property is in a special flood hazard area, or when the local jurisdiction has compiled a list of properties that are within the area and notice has been posted at specified local government offices identifying the list's location. (*Govt.C. 8589.3(b)*; C.C. 1103(c)(1).)

Similar disclosure requirements apply to real property located within an area of potential flooding shown on an inundation map. (See *Govt.C. 8589.4*; C.C. 1103(c)(2).)

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12 Witkin Sum. Cal. Law Real Property § 487

[§ 487] Natural Hazard Disclosure Statement.

(1) *Use of Statement.* The disclosures required by C.C. 1103 (supra, §486) for property located in earthquake zones, seismic hazard zones, wildland areas, fire hazard areas, or flood hazard areas may be made on the Natural Hazard Disclosure Statement. (C.C. 1103.2(a); on alternative use of Local Option Real Estate Disclosure Statement, see *infra*, §489.) The statement is set forth in C.C. 1103.2. (On types of transfers for which disclosures are required, see C.C. 1103(a), (b) and C.C. 1102, supra, §480 [listing substantially similar coverage for general real estate transfer disclosure requirements]; on types of transfers excluded from disclosure requirements, see C.C. 1103.1 and C.C. 1102.2, supra, §481 [listing substantially similar exclusions from general real estate disclosure requirements].)

The transferor or the transferor's agent indicates whether the property is in an area subject to the specified natural hazards by marking "Yes" or "No" for each hazard. If a reasonable person would be unable to determine from the available maps and other information whether the property is in a natural hazard area, the transferor or the transferor's agent must mark "Yes." The transferor or the transferor's agent may mark "No" if he or she attaches a report prepared under C.C. 1103.4(c) that verifies that the property is not in the hazard area. (C.C. 1103.2(b).)

(2) *Delivery of Statement.* The delivery requirements for the Natural Hazard Disclosure Statement are set forth in C.C. 1103.3 and are virtually identical to those for the general real estate transfer disclosure statement (see C.C. 1102.3, supra, §485). (C.C. 1103.3; on broker's duty to deliver, see C.C. 1103.12; on transferee's right to terminate offer to purchase if disclosure is delivered after offer was executed, see C.C. 1103.3(c).)

(3) *Further Use of Statement Is Prohibited.* The natural hazard disclosure statement is for the transferee, the transferor, and the transferor's agents, and cannot be used by anyone else, including lenders, insurance companies, or governmental agencies, for any purpose. (C.C. 1103.2(g).)

(4) *Duty of Agent or Broker.* An escrow agent who is not a real estate licensee may not serve as an agent of the transferor or transferee. (C.C. 1103.11.) Special rules apply where more than one licensed real estate broker is acting as an agent (C.C. 1103.12(a)), or where a broker cannot obtain the natural hazard disclosure form and does not have written assurance from the transferee that it has been received (C.C. 1103.12(b)). "Listing agent" and "selling agent" are

specifically defined. (C.C. 1103.14.)

(5) *No Waiver of Requirements.* A waiver of the requirements of C.C. 1103 et seq. is void as against public policy. (C.C. 1103(d).)

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3. Homeowner's Guide to Earthquake Safety.

12 Witkin Sum. Cal. Law Real Property § 488

[§ 488] Homeowner's Guide to Earthquake Safety.

The Seismic Safety Commission is required to publish a *Homeowner's Guide to Earthquake Safety*. Specified transferors of real property are required to deliver a copy of the guide to the transferee as soon as practicable before the transfer. This requirement applies to residential real property of one to four dwelling units built before January 1, 1960, of conventional light-frame construction. (*Govt.C. 8897.1(a)*.)

The transferor must also make an earthquake hazards disclosure of deficiencies within the transferor's actual knowledge as soon as practicable before transfer of title or, where the transfer is by a real property sales contract, before execution of the contract. (*Govt.C. 8897.1(a)*, (b); for specific deficiencies that must be disclosed, see *Govt.C. 8897.2*.) Failure to comply with these requirements does not invalidate the transfer of title. (*Govt.C. 8897.4*.)

Govt.C. 8897.1(c) lists transfers exempt from these requirements, including, among others, transfers between spouses, transfers between cotenants, transfers pursuant to court orders, and certain transfers by fiduciaries.

Delivery of the *Homeowner's Guide to Earthquake Safety* is deemed to be adequate to inform a transferee of real property of the geologic and seismic hazards and of measures to mitigate their effect. If a guide is delivered to a transferee, the seller or broker is not required to provide additional seismic information. (C.C. 2079.8(a); see *Govt.C. 8897.5* [for purposes of *Govt.C. 8897* et seq., duty of real estate broker or agent is limited to providing seller with copy of guide for transferee].) However, compliance does not affect obligations under C.C. 1102 et seq. or *Pub.Res.C. 2621* et seq. (C.C. 2079.8(b); *supra*, §§479, 486.)

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d. Additional Statements.
1. Local Option Statement.

12 Witkin Sum. Cal. Law Real Property § 489

[§ 489] Local Option Statement.

A city or county may elect to require disclosures on a Local Option Real Estate Transfer Disclosure Statement in addition to those required by C.C. 1102.6. (C.C. 1102.6a(a).)

The form is set forth in C.C. 1102.6a(b) and contains the same general information with respect to warranties, buyer's reliance, and the right to obtain professional advice that is found on the form required by C.C. 1102.6 (see *supra*, §483). In addition, space is provided to identify the local ordinance that requires additional disclosures, and to state the information required by the ordinance, e.g., that adjacent land is zoned for timber production and may be subject to harvest. (C.C. 1102.6a(b).)

C.C. 1102.6a does not preclude the use of addenda to facilitate the required disclosures, nor does it preclude a local government from using the required disclosure form for a purpose other than the one specified. (C.C. 1102.6a(c).) Moreover, C.C. 1102.6a does not affect a local government's authority to use a different disclosure form as required by an ordinance adopted before July 1, 1990. (C.C. 1102.6a(a).)

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d. Additional Statements.

2. Manufactured Home Statement.

12 Witkin Sum. Cal. Law Real Property § 490

[§ 490] Manufactured Home Statement.

(1) *Content of Form.* The required disclosures for the resale of a manufactured home or mobilehome as defined in C.C. 1102(b), except one located in a common development governed by C.C. 1351 et seq. (see *supra*, §85 et seq.), are set forth in, and must be made on a copy of the "Manufactured Home and Mobilehome: Transfer Disclosure Statement." (C.C. 1102.6d.) The form is substantially similar to the standard disclosure form set out in C.C.P. 1102.6 (*supra*, §483).

(2) *Proper Use of Form.* The form should be used by transferors making required disclosures under C.C. 1102 et seq. In transfers subject to C.C. 1102 et seq., the form should also be used by real estate agents making disclosures (a) as required by C.C. 2079 (see *supra*, §473) on the agent's portion of the form, and (b) as required by *Health & Saf.C. 18046* (see *infra*, §761) on the dealer's portion of the form. In transfers not subject to C.C. 1102 et seq., agents may make required disclosures in a separate writing. (C.C. 1102.1(b).)

The form should be used by manufactured home and mobilehome dealers and salespersons and by real estate brokers and salespersons. (C.C. 1102.1(c).) It also should be used by sellers of manufactured homes and mobilehomes who are neither manufactured home dealers or salespersons nor real estate brokers or salespersons. (C.C. 1102.1(c).)

(3) *Effect on Other Required Disclosures.* C.C. 1102.6d does not adversely affect the existing obligations of the contracting parties or their agents to disclose any fact, including, but not limited to, the physical conditions of the property and previously received reports of physical inspections noted on the form that materially affect the value and desirability of the property. Moreover, C.C. 1102 et seq. do not change the duty of a real estate broker or salesperson under C.C. 2079 or of a manufactured home or mobilehome dealer or salesperson under *Health & Saf.C. 18046*. (C.C. 1102.1(b).)

(4) *Delivery of Statement.* If the sale or lease with an option to purchase involves an agent, the transferor of the home must deliver the statement to the prospective transferee as soon as practicable, but no later than the close of escrow. (C.C. 1102.3a(a)(1).) If no agent is involved, delivery is required "at the time of execution of any document by the prospective transferee with the transferor for the purchase" of the home. (C.C. 1102.3a(a)(2).)

The transferor must indicate compliance with C.C. 1102 et seq. either on the statement, on an addendum to the statement, or on a separate document. (C.C. 1102.3a(b).) Delivery of a mobilehome transfer disclosure statement may not be waived in an "as is" sale. (C.C. 1102.1(b).)

If a disclosure required by C.C. 1102(b), or a material amendment to it, is delivered after the execution of an offer to purchase, the transferee has 3 days after delivery in person or 5 days after delivery by deposit in the mail to terminate his or her offer by delivering a written notice of termination to the transferor. (C.C. 1102.3a(c); on amendment of statement, see C.C. 1102.9.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Continuing Lien Securing Facilities Tax or Bonds.

12 Witkin Sum. Cal. Law Real Property § 491

[§ 491] Continuing Lien Securing Facilities Tax or Bonds.

If property subject to C.C. 1102 et seq. is also subject to a continuing lien securing the levy of special taxes to finance the development of community facilities (*Govt.C. 53311* et seq.), or to a fixed lien assessment collected in installments to secure bonds issued under the Improvement Bond Act of 1915 (*Sts. & H.C. 8500* et seq.), the seller must do the following:

(1) Make a good faith effort to obtain from the applicable local agency a disclosure notice concerning the tax, as provided for in *Govt.C. 53340.2*, or a disclosure notice concerning the assessment installment, as provided for in *Govt.C. 53754*. (C.C. 1102.6b(a), 1102.6b(b).)

(2) Deliver the notice to the prospective purchaser, as long as it is made available by the local agency. This notice is in addition to the other disclosures required by C.C. 1102 et seq. (C.C. 1102.6b(a), 1102.6b(b).) (On *Govt.C. 53311* et seq., see 9 *Summary* (10th), *Taxation*, §324; on *Sts. & H.C. 8500* et seq., see 9 *Summary* (10th), *Taxation*, §27.)

The seller may satisfy the disclosure requirements of C.C. 1102.6b by delivering a disclosure notice obtained from a nongovernmental source that contains specified information. (C.C. 1102.6b(d).)

C.C. 1102.6b imposes no duty to discover a special tax or assessment installment or the existence of a levying district not actually known to the agents. (C.C. 1102.6b(e).)

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3a. (New) Notice of Supplemental Tax Bill.

12 Witkin Sum. Cal. Law Real Property § 491A

[§ 491A] (New) Notice of Supplemental Tax Bill.

The seller of real property subject to C.C. 1102 et seq. or the seller's agent must deliver to the prospective purchaser a disclosure notice, in at least 12-point type or a contrasting color, that includes the following statement:

"California property tax law requires the Assessor to revalue real property at the time the ownership of the property changes. Because of this law, you may receive one or two supplemental tax bills, depending on when your loan closes."

"The supplemental tax bills are not mailed to your lender. If you have arranged for your property tax payments to be paid through an impound account, the supplemental tax bills will not be paid by your lender. It is your responsibility to pay these supplemental bills directly to the Tax Collector."

"If you have any question concerning this matter, please call your local Tax Collector's Office." (C.C. 1102.6c(a)(1), added in 2005.)

The notice must be titled, in at least 14-point type or a contrasting color: "Notice of Your 'Supplemental' Property Tax Bill." (C.C. 1102.6c(a)(2), added in 2005.)

The disclosure notice requirements of C.C. 1102.6c may be satisfied by delivering a disclosure notice under C.C. 1102.6b (text, §491) that satisfies the requirements of C.C. 1102.6c(a). (C.C. 1102.6c(b), added in 2005.)

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3b. (New) Notice of Transfer Fee.

12 Witkin Sum. Cal. Law Real Property § 491B

[§ 491B] (New) Notice of Transfer Fee.

(1) *Definition of "Transfer Fee."* A "transfer fee" is a fee that must be paid on transfer of real property. It is imposed in a covenant, restriction, or condition contained in a deed, contract, security instrument, or other document affecting the transfer or sale of, or any interest in, real property. (C.C. 1098, added in 2007.) It does not include any of the following:

- (a) Fees or taxes imposed by a governmental entity. (C.C. 1098(a).)
- (b) Fees pursuant to mechanics' liens. (C.C. 1098(b).)
- (c) Fees pursuant to court-ordered transfers, payments, or judgments. (C.C. 1098(c).)
- (d) Fees pursuant to property agreements in connection with a legal separation or dissolution of marriage. (C.C. 1098(d).)
- (e) Fees, charges, or payments in connection with the administration of estates or trusts under *Prob.C. 7000, 13000, or 15000*. (C.C. 1098(e).)
- (f) Fees, charges, or payments imposed by lenders or purchasers of loans, as these entities are described in *B. & P.C. 10232(c)*. (C.C. 1098(f).)
- (g) Assessments, charges, penalties, or fees authorized by the Common Interest Development Act (C.C. 1350 et seq., text, §85). (C.C. 1098(g).)
- (h) Fees, charges, or payments for failing to comply with, or for transferring the real property prior to satisfying, an obligation to construct residential improvements on the real property. (C.C. 1098(h).)
- (i) Fees reflected in a document recorded against the property on or before December 31, 2007, that is separate from any covenants, conditions, and restrictions, and that provides specified notice. (C.C. 1098(i).)

(2) *Disclosure Requirement.* If a property being transferred on or after January 1, 2008, is subject to a transfer fee, the transferor must provide, at the same time as the transfer disclosure statement required by C.C. 1102.6 (text, §483), an additional disclosure statement. (C.C. 1102.6e, added in 2007.) The statement must contain all of the following:

- (a) Notice that payment of a transfer fee is required on transfer of the property. (C.C. 1102.6e(a).)
- (b) The amount of the fee required for the asking price of the real property and a description of how the fee is calculated. (C.C. 1102.6e(b).)
- (c) Notice that the final amount of the fee may be different if the fee is based on a percentage of the final sale price. (C.C. 1102.6e(c).)
- (d) The entity to which funds from the fee will be paid. (C.C. 1102.6e(d).)
- (e) The purposes for which funds from the fee will be used. (C.C. 1102.6e(e).)
- (f) The date or circumstances under which the obligation to pay the transfer fee expires, if any. (C.C. 1102.6e(f).)

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4. Location of Sex Offenders.

12 Witkin Sum. Cal. Law Real Property § 492

[§ 492] Location of Sex Offenders.

Contracts for sale entered into on or after July 1, 1999, must contain a prescribed notice about the existence of a database maintained by law enforcement authorities that gives the locations of registered sex offenders. (C.C. 2079.10a(a), (d); on database, see P.C. 290.4; 3 *Cal. Crim. Law (3d)*, *Punishment*, §189 et seq.) The seller or broker is not required to provide additional information beyond the notice, except as otherwise required by C.C. 1102 et seq., and giving the notice does not subject the disclosing party to a cause of action by the registered sex offender. (C.C. 2079.10a(b).)

SUPPLEMENT: [This section is current through the latest supplement]

C.C. 2079.10a(d), stating the July 1, 1999, applicability date, was deleted in 2005. That date is now stated in C.C. 2079.10a(a).



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5. Military, Industrial, and Airport Influences.

12 Witkin Sum. Cal. Law Real Property § 493

[§ 493] Military, Industrial, and Airport Influences.

(1) *Ordinance Locations.* A seller of residential real property subject to C.C. 1102 et seq. who has actual knowledge of former federal or state ordinance locations within the neighborhood area must give written notice of that knowledge as soon as practicable before transfer of title. (C.C. 1102.15; see C.C. 1940.7(a) [legislative declaration of intent].)

(2) *Zoned for Industrial Use.* If the seller has actual knowledge that the property is adjacent to or zoned to allow an industrial use described in *C.C.P. 731a*, or is affected by a nuisance created by the use, the seller must give written notice of that knowledge as soon as practicable before transfer of title. (C.C. 1102.17.)

(3) *Airport Influence Area.* Beginning January 1, 2004, in responding to a request for a report or opinion prepared by a licensed engineer, land surveyor, geologist, or expert in natural hazard discovery, the expert must determine whether the property is within an airport influence area as defined in *B. & P.C. 11010(b)*. If the property is within an airport influence area, the report must contain the following statement: "This property is presently located in the vicinity of an airport, within what is known as an airport influence area. For that reason, the property may be subject to some of the annoyances or inconveniences associated with proximity to airport operations (for example: noise, vibration, or odors). Individual sensitivities to those annoyances can vary from person to person. You may wish to consider what airport annoyances, if any, are associated with the property before you complete your purchase and determine whether they are acceptable to you." (C.C. 1103.4(c)(1).) (On statement required when expert determines that property is within jurisdiction of San Francisco Bay Conservation and Development Commission, see C.C. 1103.4(c)(2).)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Airport Influence Area.* On statement required when expert determines that property is within one mile of designated farmland area, see C.C. 1103.4(c)(3), added in 2008.



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e. Compliance With Disclosure Requirements.

1. In General.

12 Witkin Sum. Cal. Law Real Property § 494

[§ 494] In General.

(1) *Limited Liability for Insufficient Disclosures.* Neither the transferor nor a listing or selling agent is liable for an error, inaccuracy, or omission if it was not within the personal knowledge of either the transferor or the agent, was based on information provided by public agencies or specified licensed experts, and was obtained and transmitted using ordinary care. (C.C. 1102.4(a); on similar provision for Natural Hazard Disclosure Statement, see C.C. 1103.4(a); for meaning of "listing agent" and "selling agent," see C.C. 1102.14.) However, each disclosure and act in making it must be made in good faith, i.e., "honesty in fact in the conduct of the transaction." (C.C. 1102.7.)

A seller complies with disclosure requirements by disclosing material facts within the seller's knowledge. (See *Pagano v. Krohn* (1997) 60 C.A.4th 1, 10, 70 C.R.2d 1 [apparently applying C.C. 1102 et seq.; seller who informed buyer of general water intrusion problems at condominium complex and of lawsuit concerning those problems did not have to disclose past occurrence of algae and efflorescence at seller's unit; there was no evidence that occurrence, which had been remedied over a year before sale, was related to general problem].)

(2) *No Liability for Nondisclosure of Legal Ramifications of Property's Factual Nature.* In *Sweat v. Hollister* (1995) 37 C.A.4th 603, 43 C.R.2d 399, plaintiffs purchased a house from defendant sellers and obtained the required disclosure statements from the sellers and defendant brokers. The statements revealed that the property was in a designated floodplain and alleged that there existed no "nonconforming use" relative to the property. Plaintiffs later determined that, because the house was located in a floodplain, a local municipal ordinance prevented the house from being altered or enlarged after destruction by fire or another calamity. Plaintiffs sued for negligence and misrepresentation. *Held*, summary judgment for defendants affirmed.

Common law and statutory disclosure requirements mandate that sellers and brokers reveal all factual matters bearing on the property's quality that might be detrimental to value. (37 C.A.4th 608.) "The legal ramifications of the factual nature of realty, however, and a conclusion as to how they may adversely impact value, is not a 'fact' subject to required disclosure. ... It is not the obligation of the seller to research local land-use ordinances and advise a buyer as to their effect on the realty." (37 C.A.4th 609.)

(3) *Reliance on Experts and Public Entities.* The delivery of a report or opinion by a licensed engineer, land surveyor, geologist, structural pest control operator, contractor, or other expert is sufficient compliance, if the information is provided to the prospective transferee pursuant to a written or oral request. The expert may indicate in writing the understanding that the information will be used to comply with C.C. 1102.6 (*supra*, §483) and may indicate the disclosures to which the information is applicable. By doing so, the expert limits his or her responsibility to items of information expressly set forth in the statement. (C.C. 1102.4(c).) The delivery of information required to be disclosed by C.C. 1102 et seq. to the transferee by a public entity or other person relieves the transferor or a listing or selling agent of further duty with respect to that item of information. (C.C. 1102.4(b).) (On similar provisions for Natural Hazard Disclosure Statement, see C.C. 1103.4(b), 1103.4(c).)

(4) *Use of Approximation.* If an item of information was unknown or unavailable to the transferor, and the transferor or the transferor's agent made a reasonable effort to ascertain it, the transferor may use an approximation of the information based on the best information available. (C.C. 1102.5.)

(5) *Effect of Subsequent Inaccuracy in Disclosure.* If information disclosed is subsequently rendered inaccurate by an act, occurrence, or agreement, the resulting inaccuracy is not a violation of C.C. 1102 et seq. (C.C. 1102.5; on similar provision for Natural Hazard Disclosure Statement, see C.C. 1103.5.)

(6) *Other Disclosure Obligations Preserved.* The specification of items for disclosure in C.C. 1102 et seq. "does not limit or abridge an obligation for disclosure created by another provision of law or that may exist in order to avoid fraud, misrepresentation, or deceit in the transfer transaction." (C.C. 1102.8; see *Shapiro v. Sutherland* (1998) 64 C.A.4th 1534, 1545, 76 C.R.2d 101 [common law duty to disclose facts that materially affect value or desirability of property and that are not within reach of buyer's diligent attention and observation]; 5 *Summary* (10th), *Torts*, §796 et seq.; on similar provision for Natural Hazard Disclosure Statement, see C.C. 1103.8.)

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 - 2. Sanctions for Noncompliance.

12 Witkin Sum. Cal. Law Real Property § 495

[§ 495] Sanctions for Noncompliance.

(1) *Liability for Damages.* No transfer subject to C.C. 1102 et seq. will be invalidated solely because a person fails to comply with one of those provisions. However, a person who wilfully or negligently violates or fails to perform a duty prescribed by C.C. 1102 et seq. may be liable for actual damages suffered by a transferee. (C.C. 1102.13; see *Loken v. Century 21-Award Properties* (1995) 36 C.A.4th 263, 273, 42 C.R.2d 683, supra, §476 [action is governed by 2-year limitations period of C.C. 2079.4]; *Realmuto v. Gagnard* (2003) 110 C.A.4th 193, 202, 1 C.R.3d 569 [damages remedy of C.C. 1102.13 applies only if transfer of property has been completed]; Cal. Civil Practice, 1 Real Property Litigation, §2:52 [form of complaint against broker]; 36 Proof of Facts 3d 471 [buyer's remedies arising from seller's failure to disclose environmental condition of property]; 61 Proof of Facts 3d 411 [purchaser's recovery of damages in tort for fraudulent misrepresentation of quantity of land sold]; on similar provision for Natural Hazard Disclosure Statement, see C.C. 1103.13.)

(2) *License Suspension or Revocation.* The Real Estate Commissioner may, on his or her own motion or on receipt of a verified complaint, investigate a licensee's alleged violation of C.C. 1102 et seq. The Commissioner may suspend or revoke a license if the licensee "has willfully or repeatedly violated" any of its provisions. (B. & P.C. 10176.5(a).) License suspension or revocation is the only remedy available for violations of C.C. 1102.6b (supra, §491; failure to disclose special tax or assessment). (B. & P.C. 10176.5(b).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Liability for Damages.* See Cal. Civil Practice, 1 Real Property Litigation, §2:55; 93 Proof of Facts 3d 293 [purchaser's recovery of damages for seller's nondisclosure of dangerous condition of land].



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12 Witkin Sum. Cal. Law Real Property § 496

[§ 496] Regulation of Inspectors.

(1) *Purpose of Statute.* To assure that consumers of home inspection services can rely on the competence of home inspectors, *B. & P.C. 7195* et seq. regulate persons who perform home inspections for a fee. (Stats. 1996, Chap. 338, §1.)

(2) *Definitions.* A "home inspection" is a noninvasive, physical examination, performed for a fee in connection with a transfer of real property, of the mechanical, electrical, or plumbing systems or the structural and essential components of a residential dwelling of one to four units. It is designed to identify material defects in those systems, structures, and components. It also includes a consultation regarding the property that is represented to be a home inspection or any confusingly similar term. (*B. & P.C. 7195(a)(1)*; on definition of "transfer," see *B. & P.C. 7195(e)*.) A home inspection, if requested by the client, may include an inspection of energy efficiency items, including insulation, windows, heating and cooling equipment, water heating systems, major appliances, exhaust and cooling fans, and thermostats. (*B. & P.C. 7195(a)(2)*.)

A "material defect" is a condition, other than one of style or aesthetics, that significantly affects the value, desirability, habitability, or safety of the dwelling. (*B. & P.C. 7195(b)*.)

A "home inspection report" is a written report, prepared for a fee and issued after a home inspection, that describes the inspected items, identifies material defects, and makes appropriate recommendations. (*B. & P.C. 7195(c)*.)

(3) *Duties and Liabilities of Inspector.* A home inspector who is not licensed as a general contractor, structural pest control operator, or architect, or registered as a professional engineer, must conduct a home inspection with the degree of care that a reasonably prudent home inspector would exercise. (*B. & P.C. 7196*; see *Leko v. Cornerstone Bldg. Inspection Service* (2001) 86 C.A.4th 1109, 1114, 103 C.R.2d 858 [real estate broker sued for failure to disclose property defects could seek equitable indemnity from home inspector; both inspector and broker had duty to discover and disclose defects, and if their failure to do so caused injury to purchaser of property, they will be jointly and severally liable]; *Moreno v. Sanchez* (2003) 106 C.A.4th 1415, 1435, 131 C.R.2d 684 [under *B. & P.C. 7196*, home inspector has independent duty to perform inspection competently and may be liable in tort for breach of duty to exercise due care in preparing inspection report].) Contractual provisions that purport to waive this duty, or to limit the liability of the home inspector to the cost of the home inspection report, are contrary to public policy and invalid. (*B. &*

P.C. 7198.)

(4) *Statute of Limitations.* An action for breach of duty arising from a home inspection report must be commenced no later than 4 years from the date of the inspection. (*B. & P.C. 7199.*)

(5) *Effect on Other Provisions.* *B. & P.C. 7195* et seq. do not apply to a registered engineer, a licensed land surveyor, or a licensed architect acting in a professional capacity, nor do the provisions affect the obligations of a real estate licensee or transferor under *C.C. 1102* et seq. (*supra*, §479 et seq.) and *C.C. 2079* et seq. (*supra*, §472 et seq.). (*B. & P.C. 7196.1(b).*)

(6) *Energy Information.* At the time a single family residential dwelling is sold, the home inspector must provide contact information for one or more of the following entities that provide home energy information: (a) a nonprofit organization; (b) a provider to the residential dwelling of electrical service, or gas service, or both; or (c) a governmental agency, including the State Energy Resources Conservation and Development Commission. (*Pub.Res.C. 25401.7.*)

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2. Unfair Business Practices.

12 Witkin Sum. Cal. Law Real Property § 497

[§ 497] Unfair Business Practices.

Under *B. & P.C. 7197(a)*, it is an unfair business practice for a home inspector, a company that employs the inspector, or a company that is controlled by a company that also has a financial interest in a company employing a home inspector, to do any of the following:

(a) Perform or offer to perform, for an additional fee, repairs to a structure on which the inspector, or the inspector's company, has prepared a home inspection report in the past 12 months.

(b) Inspect for a fee property in which the inspector, or the inspector's company, has a financial interest or an interest in the transfer of the property.

(c) Offer or deliver compensation to the property's owner, or to the broker or agent, for referring business to the inspector or the inspector's company.

(d) Agree to make an inspection or to prepare a report in which the employment itself or the fee payable for the inspection is contingent on the conclusions in the report, preestablished findings, or the close of escrow.

A home protection company that is affiliated with or that retains the home inspector does not violate *B. & P.C. 7197* if it performs repairs in response to claims made under the home protection contract. (*B. & P.C. 7197(a)(5)*.) *B. & P.C. 7197* does not affect the ability of a structural pest control operator to perform repairs under *B. & P.C. 8505* as a result of a structural pest control inspection. (*B. & P.C. 7197(b)*.)

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12 Witkin Sum. Cal. Law Real Property § 498

[§ 498] Governing Law.

(1) *Purpose and Scope.* The 1986 Legislature adopted the Lancaster-Montoya Appraisal Act (former C.C. 1922 et seq.) to establish standards for certified appraisals of real property and to impose specified duties on appraisers. (See *18 Pacific L. J.* 711.) The Act was repealed in 1990 and replaced by the Real Estate Appraisers' Licensing and Certification Law (B. & P.C. 11300 et seq.). (See *22 Pacific L. J.* 410.) The Legislature's stated intent was "to implement the policy of the Congress as expressed in the Financial Institutions Reform, Recovery and Enforcement Act of 1989" (FIRREA; see *12 U.S.C.*, §3331 et seq.) "and to establish a state program to license and certify real estate appraisers." (Stats. 1990, Chap. 491, §4.) (See *66 So. Cal. L. Rev.* 2251 [appraiser liability under *Rest.2d, Torts* §552 and FIRREA, and modern methods of valuing income producing property].)

The law does not apply to a probate referee acting pursuant to *Prob.C.* 400 et seq. (see *14 Summary (9th), Wills and Probate*, §594 et seq.), unless the appraised transaction is "federally related." (B. & P.C. 11302(b).)

(2) *Definitions.* An "appraisal" is a "written statement independently and impartially prepared by a qualified appraiser setting forth an opinion in a federally related transaction as to the market value of an adequately described property as of a specific date, supported by the presentation and analysis of relevant market information." The term does not include an opinion given by a real estate licensee or engineer or land surveyor in the ordinary course of his business in connection with a function for which a license is required under B. & P.C. 6700 et seq. (Professional Engineers Act), B. & P.C. 8700 et seq. (Professional Land Surveyors' Act), B. & P.C. 10130 et seq. (real estate brokers and salesmen), or B. & P.C. 10500 et seq. (mineral, oil and gas brokers). These opinions may not be referred to as appraisals. (B. & P.C. 11302(b).)

A "federally related transaction" is a real estate-related financial transaction that a federal financial institutions regulatory agency engages in, contracts for, or regulates, and that requires the services of a state licensed real estate appraiser or state certified real estate appraiser regulated by B. & P.C. 11300 et seq. (B. & P.C. 11302(h).)

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 576, second line, "14 Summary (9th), *Wills and Probate*, §594 et seq." should be "14 Summary (10th), *Wills and Probate*, §594 et seq."



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CHAPTER XVII - Real Property

Witkin Summary of California Law VI. SALES AND TRANSFERS OF RESIDENTIAL REAL PROPERTY E. Appraisals of Real Property. 2. Administration.

12 Witkin Sum. Cal. Law Real Property § 499

[§ 499] Administration.

(1) *Office of Real Estate Appraisers.* The Office of Real Estate Appraisers is under the supervision and control of the Secretary of the Business, Transportation and Housing Agency. (*B. & P.C. 11301, 11313.*) A director, appointed by the Governor subject to Senate confirmation, must, in consultation with the Secretary, administer the licensing and certification program for real estate appraisers. (*B. & P.C. 11310; see B. & P.C. 11313.*)

(2) *Regulations, Licensing, and Certification.* The director must adopt rules and regulations "reasonably necessary to carry out the purposes" of the law. (*B. & P.C. 11313; see 10 Cal. Code Reg. §3500 et seq.*) The regulations must include "requirements for licensure and discipline of real estate appraisers that ensure protection of the public interest and comply in all respects" with 12 U.S.C., §3331 et seq. The requirements for each level of licensure must meet the criteria established by the Appraiser Qualification Board of the Appraisal Foundation (see *B. & P.C. 11302(c)*). (*B. & P.C. 11314.*) Regulations governing applications for trainee licenses and for temporary practice must also be adopted in conformity with the requirements of the Appraisal Foundation or the Appraisal Subcommittee. (*B. & P.C. 11327, 11352.*)

The director must also adopt regulations, meeting the standards of 12 U.S.C., §3341, that determine the parameters of appraisal work that may be performed by licensed appraisers. (*B. & P.C. 11325.*)

Regulations governing the process of applying for a license must include "necessary experience or education, equivalency, and minimum requirements of the Appraisal Foundation, if any." (*B. & P.C. 11340.*) The regulations are available on the website of the Office of Real Estate Appraisers (www.orea.ca.gov). A holder of a valid real estate broker license is deemed to have completed the necessary experience for a license application experience on proof of 1,000 hours of experience in the valuation of real property. (*B. & P.C. 11340(b).*) Regulations governing the process of applying for licensure must meet, "at a minimum, the requirements and standards established by the Appraisal Foundation, the Resolution Trust Corporation, and the federal financial institutions regulatory agencies acting pursuant to" 12 U.S.C., §3341. (*B. & P.C. 11340(c).*) Applicants must be at least 18 years old. (*B. & P.C. 11340(e).*)

The regulations must require the applicant to provide his or her Social Security number. (*B. & P.C. 11340(c).*) Every applicant for licensure must also submit two fingerprint cards to be used for conducting a criminal record check. (*B. & P.C. 11343(a), 11343(b).*) A temporary license, valid for up to 150 days and subject to one discretionary renewal

by the director, may be issued pending the outcome of the fingerprint or background check. (*B. & P.C. 11344(a).*)

A license is valid for 2 years, unless otherwise extended or limited by the director. (*B. & P.C. 11341.*) The director may also issue a probationary license, either (a) by term, or (b) by "conditions to be observed in the exercise of the privileges granted." (*B. & P.C. 11344(b).*) (On reciprocity, see *B. & P.C. 11350*; on continuing education, see *B. & P.C. 11360, 11361.*)

(3) *Regulation Fund.* The Real Estate Appraisers Regulation Fund (*B. & P.C. 11410*) consists of monies raised by fees and assessments imposed under the law. It is separated into an Administration Account and a Recovery Account. (*B. & P.C. 11411.*) The director must determine the number of complaint cases containing judicial findings of fraud that may be eligible for recovery under future regulations that are closely analogous to those adopted for the Real Estate Recovery Fund (see 3 *Summary* (10th), *Agency and Employment*, §67 et seq.). The director must use this information to determine whether a real estate appraiser Recovery Account is necessary. (*B. & P.C. 11412(a).*) The director must establish regulations for administering the Recovery Account, analogous to those under the Real Estate Recovery Fund. (*B. & P.C. 11412(b).*) The statute of limitations for claims against the fund arising between the effective date of *B. & P.C. 11300* et seq. and the creation of the fund was tolled until the date the fund was created. (*B. & P.C. 11412(c).*)

SUPPLEMENT: [This section is current through the latest supplement]



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12 Witkin Sum. Cal. Law Real Property § 500

[§ 500] Conduct of Appraisal Practice.

(1) *Governing Standards.* The Uniform Standards of Professional Appraisal Practice are the minimum standards of conduct for licensed appraisers. The Uniform Standards are available at www.appraisalfoundation.org. Appraisers certified by the Board of Equalization must also comply with the standards established by the Board of Equalization when performing work related to assessments. (*B. & P.C. 11319.*)

(2) *License Requirement.* No one may engage in "federally related real estate appraisal activity" or assume or use the title, title designation, or abbreviation of a licensed appraiser without first obtaining a license. Violations of this provision may result in imprisonment, a fine, or both. (*B. & P.C. 11320.*) Only a state licensed real estate appraiser may hold himself or herself out as an appraiser or sign an appraisal (*B. & P.C. 11321(a)*), although a licensed trainee may sign an appraisal if it is also signed by a licensed appraiser (*B. & P.C. 11321(b)*). (On use of abbreviations "SLREA" and "SCREA," see *B. & P.C. 11321(c), (d).*)

A person who is not a licensee may assist in the preparation of an appraisal, if acting under the direct supervision of a licensed appraiser who makes the final conclusion as to value. The final appraisal document must be approved and signed, with acceptance of full responsibility, by the licensed supervisor, and must identify the assistant and the scope of work he or she performed. (*B. & P.C. 11324.*)

(3) *Prohibition Against Relating Compensation to Sales Commission.* Licensees may not engage in appraisal activity with respect to the purchase, sale, or transfer of real property if their compensation is affected by a sales commission generated by the transaction. (*B. & P.C. 11323.*)

(4) *Cooperation With Investigation.* If requested to do so by the director, a licensee, applicant, or other person acting in a capacity that requires a license must provide copies of appraisals or other work product addressed by the Uniform Standards, with supporting documentation, to substantiate appraisal experience or facilitate the investigation of illegal or unethical activities. This material is subject to the confidentiality provisions of the Uniform Standards. (*B. & P.C. 11328.*)

(5) *Credit Applicant's Right to Copy of Appraisal.* A lender in a loan transaction secured by real property must notify the loan applicant of the applicant's right to receive a copy of the appraisal, if the applicant has paid for the

appraisal. (*B. & P.C. 11423.*) Time requirements for the notification and for the applicant's request for a copy of the appraisal are specified by *B. & P.C. 11423*.

SUPPLEMENT: [This section is current through the latest supplement]

(6) (*New*) *Improper Influence by Mortgage Lenders or Others.* C.C. 1090.5(a), added in 2007, prohibits anyone with an interest in a real estate transaction involving an appraisal from improperly influencing or attempting to improperly influence, through coercion, extortion, or bribery, the development, reporting, result, or review of a real estate appraisal sought in connection with a mortgage loan. C.C. 1090.5(a) does not prohibit a person with an interest in a real estate transaction from asking an appraiser to do any of the following:

- (a) Consider additional, appropriate property information. (C.C. 1090.5(b)(1), added in 2007.)
- (b) Provide further detail, substantiation, or explanation for the appraiser's value conclusion. (C.C. 1090.5(b)(2), added in 2007.)
- (c) Correct errors in the appraisal report. (C.C. 1090.5(b)(3), added in 2007.)



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Witkin Summary of California Law VI. SALES AND TRANSFERS OF RESIDENTIAL REAL PROPERTY E. Appraisals of Real Property. 4. Sanctions for Violations.

12 Witkin Sum. Cal. Law Real Property § 501

[§ 501] Sanctions for Violations.

(1) *Fines With Citation.* The director may issue a citation requiring a licensee, applicant, or other person who acts in a capacity that requires a license, or a provider of professional appraisal education courses, to pay an administrative fine, of up to \$ 10,000 per incident, for violating the Appraisers' Licensing and Certification Law or related regulations. (*B. & P.C. 11315(a)*, (e).) A citation may be issued without the assessment of a fine, however. (*B. & P.C. 11315(h)*.) If appropriate, the citation may include an order fixing a reasonable time for abatement of the violation. (*B. & P.C. 11315(c)*.)

The citation must include a written specification of the violation, and inform the person cited that, if a hearing is desired to contest the citation, a written request must be submitted within 30 days. (*B. & P.C. 11315(b)*, (f).) Hearings are subject to *Govt.C. 11500* et seq. (procedures required in adjudicatory hearings; see *9 Cal. Proc. (4th)*, *Administrative Proceedings*, §79 et seq.). The citation must also inform the person that failure to respond will result in an order of abatement or administrative fine imposed becoming final, which will constitute an enforceable civil judgment. (*B. & P.C. 11315(f)*.)

Failure to pay a fine, penalty, or required installment payment when due will result in the assessment of interest and a 10% penalty on the amount of the fine or installment payment. (*B. & P.C. 11315(g)(1)*.) Failure to pay within 30 days of the date ordered in the citation, without appealing the citation, will precipitate additional disciplinary action. (*B. & P.C. 11315(g)(2)*.) Unpaid fines imposed by uncontested citations are also added to the renewal fee for the appraiser's license or certificate. (*B. & P.C. 11315(g)(3)*.) The director may order the full amount of the fine to be immediately due and payable if a payment on the fine is not received within 30 days of its due date. (*B. & P.C. 11315(g)(4)*.) A fine that is unpaid 30 days after a final citation or order constitutes a valid and enforceable civil judgment. (*B. & P.C. 11315(g)(5)*.) A certified copy of the final order, or of the citation with certification that a timely request for a hearing was not made, is conclusive proof of the civil judgment. (*B. & P.C. 11315(g)(6)*.) (On settlement of allegation of violation, see *B. & P.C. 11315.5*.)

(2) *Fines Without Citation.* The director may assess a fine without a citation. (*B. & P.C. 11316(a)*.) Failure to make a payment on the fine within 30 days of the assessment will result in a disciplinary action and assessment of interest and a 10% penalty. (*B. & P.C. 11316(b)(1)*.) An unpaid fine will be added to the license renewal fee. (*B. & P.C. 11316(b)(2)*.) The director may order the full amount of the fine to be immediately due and payable if a fine payment is

not received within 30 days of its due date. (*B. & P.C. 11316(b)(3).*) A fine that is not paid within 30 days of a final order constitutes a valid and enforceable civil judgment (*B. & P.C. 11316(b)(4)*) and a certified copy of the final order is conclusive proof of the order's validity (*B. & P.C. 11316(b)(5)*).

(3) *Course Requirements.* If appropriate, a citation may order its recipient to successfully complete additional basic or continuing education courses. (*B. & P.C. 11315(d)(1).*) The citation may specify the course content, the number of hours to be completed, the completion date, and the method by which completion is to be reported to the Office of Real Estate Appraisers. Completion of a course does not apply towards satisfaction of a licensee's continuing education requirements under *B. & P.C. 11360*, and failure to complete a course, or to timely report completion, results in the automatic suspension of the licensee's appraisal license. (*B. & P.C. 11315(d)(2).*)

(4) *Reporting Criminal Convictions.* A licensee, license applicant, course provider, or applicant for course accreditation must notify the Office of Real Estate Appraisers in writing if he or she is convicted of a felony or of a crime related to the qualifications, functions, or duties of a licensee or to activities committed in the course of the licensee's or course provider's practice. (*B. & P.C. 11318(a)(1).*) The licensee or course provider must also report if another regulatory entity cancels, revokes, suspends, or refuses to renew his or her license or authority to practice as an occupational or professional licensee or course provider, or if a governmental body cancels, revokes, or suspends the person's right to practice before it. (*B. & P.C. 11318(a)(2), (a)(3).*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Fines With Citation.*

Adjudicatory hearings:

Cross-Reference: 9 *Cal. Proc.* (5th), *Administrative Proceedings*, §96 et seq.



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F. Arbitration Provision in Real Property Sales Contract.

12 Witkin Sum. Cal. Law Real Property § 502

[§ 502] Arbitration Provision in Real Property Sales Contract.

When a real property sales contract contains a provision for binding arbitration, the contract must clearly title the provision "Arbitration of Disputes." (*C.C.P. 1298(a)*); see *Marcus & Millichap Real Estate Inv. Brokerage Co. v. Hock Inv. Co.* (1998) 68 C.A.4th 83, 91, 80 C.R.2d 147 [trial court properly denied broker's petition to compel arbitration; arbitration clause in purchase agreement clearly contemplated that all parties had to agree to clause in order for it to be effective and sellers here did not initial clause]; but see *Hedges v. Carrigan* (2004) 117 C.A.4th 578, 582, 11 C.R.3d 787 [Federal Arbitration Act (9 U.S.C., §1 et seq.) would preempt statutory requirement or judicial holding that compliance with *C.C.P. 1298* is condition precedent to enforcement of arbitration clause contained in residential purchase agreement, joint escrow instructions, and deposit receipt.] *C.C.P. 1298(c)* requires the following to appear immediately before the line or space for indicating assent or nonassent and immediately following the arbitration provision:

"Notice: By initialling in the space below you are agreeing to have any dispute arising out of the matters included in the 'arbitration of disputes' provision decided by neutral arbitration as provided by California law and you are giving up any rights you might possess to have the dispute litigated in a court or jury trial. By initialling in the space below you are giving up your judicial rights to discovery and appeal, unless those rights are specifically included in the 'arbitration of disputes' provision. If you refuse to submit to arbitration after agreeing to this provision, you may be compelled to arbitrate under the authority of the California Code of Civil Procedure. Your agreement to this arbitration provision is voluntary."

"We have read and understand the foregoing and agree to submit disputes arising out of the matters included in the 'arbitration of disputes' provision to neutral arbitration."

SUPPLEMENT: [This section is current through the latest supplement]

Statutory notice language: See *Villacreses v. Molinari* (2005) 132 C.A.4th 1223, 1229, 1230, 34 C.R.3d 281 [paragraph of escrow agreement stating that "by initialing in the space below, you are agreeing to have neutral arbitration of all disputes to which it applies" did not demonstrate that parties had agreed to arbitrate; language complied with *C.C.P. 1298(c)*, but that language is intended as accompaniment to arbitration provision, and is not intended to be provision].



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CHAPTER XVII - Real Property

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VII. LANDLORD AND TENANT RELATIONSHIP
A. Statutory Framework.

12 Witkin Sum. Cal. Law Real Property § 503

[§ 503] Statutory Framework.

The landlord and tenant relationship is governed, in part, by the following statutes:

- (1) Hiring of real property generally. (C.C. 1940 et seq.; infra, §514.)
- (2) Conditions of landlord's entry into dwelling. (C.C. 1954; infra, §609.)
- (3) Rent control. (C.C. 1947 et seq., 1954.25 et seq., 1954.50 et seq.; infra, §572 et seq.)
- (4) Landlord's right to discontinue renting. (*Govt.C. 7060* et seq.; infra, §598 et seq.)
- (5) Tenant's right to a tenantable dwelling. (C.C. 1941 et seq.; infra, §619 et seq.)
- (6) Termination of tenancy. (C.C. 1930 et seq.; infra, §663 et seq.)
- (7) Remedies following tenant's breach or abandonment. (C.C. 1951.2 et seq.; infra, §694 et seq.)
- (8) Unlawful detainer. (*C.C.P. 1161* et seq.; infra, §703 et seq.)
- (9) Protection against retaliatory eviction. (C.C. 1942.5; infra, §712 et seq.)
- (10) Disposition of tenant's personal property. (C.C. 1965, 1980 et seq.; infra, §749 et seq.)
- (11) Mobilehome Residency Law. (C.C. 798 et seq.; infra, §761 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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VII. LANDLORD AND TENANT RELATIONSHIP

B. Types of Tenancy.

1. Estate for Years.

a. Nature of Estate.

12 Witkin Sum. Cal. Law Real Property § 504

[§ 504] Nature of Estate.

(1) *Chattel Real*. A leasehold or estate for years is a chattel real, governed by the rules applicable to personal property. (C.C. 765; see *Jeffers v. Easton, Eldridge & Co.* (1896) 113 C. 345, 352, 45 P. 680; *J.S. Potts Drug Co. v. Benedict* (1909) 156 C. 322, 327, 104 P. 432 [assignment of lease is treated as sale of personal property]; *Dabney v. Edwards* (1935) 5 C.2d 1, 6, 53 P.2d 962; *Guy v. Brennen* (1923) 60 C.A. 452, 455, 213 P. 265; *Santa Barbara v. Maher* (1938) 25 C.A.2d 325, 327, 77 P.2d 306 [99-year lease]; 2 Powell §16.02; 14 Southwestern U. L. Rev. 1 [changing landlord-tenant relationship in California]; 23 U.C.L.A. L. Rev. 501 [historical conception of lease for years]; 29 U.C.L.A. L. Rev. 747 [review of Schoshinski, American Law of Landlord and Tenant].)

But a leasehold is also an estate in real property. Thus, although a *lis pendens* is ineffective in an action concerning personal property, one may properly be filed in an action involving a leasehold interest in real property. (*Parker v. Superior Court* (1970) 9 C.A.3d 397, 400, 88 C.R. 352; see 3 Cal. Proc. (4th), Actions, §349.)

A judgment lien, which covers real property, formerly did not attach to a leasehold estate. (See *Summerville v. Stockton Milling Co.* (1904) 142 C. 529, 537, 76 P. 243; 8 Cal. Proc. (4th), Enforcement of Judgment, §56.) Under C.C.P. 697.340, however, judgment liens now attach to leasehold estates with unexpired terms of 2 years or more. (See 8 Cal. Proc. (4th), Enforcement of Judgment, §67.)

In *Taylor v. Bouissiere* (1987) 195 C.A.3d 1197, 241 C.R. 253, the court considered a question of first impression. Defendants bought a business from plaintiffs, giving plaintiffs a note secured in part by an assignment of their lease. Defendants defaulted, plaintiffs sued on the note, and defendants contended that, under the "one action" rule of C.C.P. 726, plaintiffs could not recover a personal judgment before realizing on their security (see 4 Summary (10th), Security Transactions in Real Property, §124). *Held*, the action was proper. Although the leasehold is an estate in real property, the tenant's estate is a "chattel real," governed by the rules applicable to personal property. "Therefore, the security assignment of a tenant's leasehold interest is the assignment of a security interest in a chattel real, regarded as personal property; it is not the assignment of a real property security interest within the meaning of section 726." (195 C.A.3d 1200.)

(2) *Colessees as Tenants in Common*. A lease to several persons makes each colessee a tenant in common of the

leasehold interest, and the possession of one is the possession for all. Hence, an option to renew may be exercised by one tenant in possession without the necessity of the others being in possession. A holding over by one tenant in possession will bind the others by a resulting month-to-month tenancy where they do not act to terminate. One may, however, give notice to terminate at the expiration of the term and thus avoid being bound by the holding over of another who stays in possession; i.e., the colessee is not at the mercy of the other colessee and the landlord, but instead may terminate individually. (*Schmitt v. Felix* (1958) 157 C.A.2d 642, 646, 321 P.2d 473.)

(3) *Status of Occupant as "Tenant."* In *DeZerega v. Meggs* (2000) 83 C.A.4th 28, 99 C.R.2d 366, plaintiff landlords brought an action for unlawful detainer against an occupant who remained in an apartment. Plaintiffs claimed that defendant was not their tenant, but occupied the apartment only as a subtenant of a tenant who was voluntarily terminating his tenancy, and thus could be evicted without notice or compliance with the local eviction ordinance. The trial court denied plaintiffs' motion for summary judgment. *Held*, affirmed. The lease defining the estate of the vacating tenant expressly authorized occupancy by "roommates," while flatly prohibiting subletting. The most obvious way to reconcile these two clauses is to view "roommates" as tenants. (83 C.A.4th 36.) The pervasive use of "tenants" to describe all authorized occupants could readily engender a belief by "roommates" that they were in fact tenants. (83 C.A.4th 37.) (See *Pick v. Cohen* (2000) 83 C.A.4th Supp. 6, 8, 100 C.R.2d 839 [general state law does not fully occupy field in defining "tenant"].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Chattel Real.*

Lis pendens:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §376.

Judgment liens:

Cross-References: 8 Cal. Proc. (5th), Enforcement of Judgment, §§65, 74.



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- B. Types of Tenancy.
 - 1. Estate for Years.
 - b. Definite Period Required.

12 Witkin Sum. Cal. Law Real Property § 505

[§ 505] Definite Period Required.

A leasehold estate is for a definite period. Hence, no estate for years is created by a lease in which the term is of uncertain duration. (See *Rest.2d, Property (Landlord and Tenant) §1.4* ["fixed or computable period of time"]; 2 Powell §16.03; 49 *Am.Jur.2d* (1995 ed.), *Landlord and Tenant* §125.)

As long as the period is definite, however, it may be for years, or for a single year (see *Black v. Black* (1926) 77 C.A. 82, 85, 246 P. 90), or for a period shorter than a year, e.g., for months or weeks (see *Guy v. Brennen* (1923) 60 C.A. 452, 456, 213 P. 265).

SUPPLEMENT: [This section is current through the latest supplement]
See 49 *Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §111.



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B. Types of Tenancy.

1. Estate for Years.

c. Lessor's Transfer and Tenant's Attornment.

12 Witkin Sum. Cal. Law Real Property § 506

[§ 506] Lessor's Transfer and Tenant's Attornment.

The landlord may transfer the property, i.e., the landlord's reversion, to a stranger. "Attornment" is the recognition of the transferee by the tenant. (See C.C. 1111 [grant is effectual without attornment, but tenant who pays rent to grantor prior to notice is protected].) The attornment of a tenant to a stranger is void, unless it is made with the landlord's consent or in consequence of a judgment. (C.C. 1948.) A tenant who denies a landlord's title and attorns to one without title becomes a trespasser and may be ousted by a possessory action. (*Hollar v. Saline Products* (1938) 25 C.A.2d 542, 547, 78 P.2d 237; see *Principal Mut. Life Ins. Co. v. Vars, Pave, McCord & Freedman* (1998) 65 C.A.4th 1469, 1478, 77 C.R.2d 479; *C.H.E.G. v. Millennium Bank* (2002) 99 C.A.4th 505, 513, 121 C.R.2d 443 [bank that purchased commercial building in bankruptcy sale, accepted rent from tenant who had been occupying it under lease with bankrupt lessor, and subsequently sold it to tenant, did not become landlord under lease's attornment clause and thus was not obligated under lease to pay sales commission; bank never sought to enforce attornment clause, and without valid attornment, bank's acceptance of rent from tenant created only month-to-month tenancy]; 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §§923, 1052 et seq.)

West's Key Number Digest, Landlord and Tenant k.15

SUPPLEMENT: [This section is current through the latest supplement]
See 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §§772, 897 et seq.



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B. Types of Tenancy.
2. Tenancy at Will.

12 Witkin Sum. Cal. Law Real Property § 507

[§ 507] Tenancy at Will.

A tenancy at will is created by agreement of the parties, but has no fixed term and is terminable at the will of either party. It results from an entry and occupancy by the tenant with the owner's permission, e.g., under an invalid contract or lease. (*Carteri v. Roberts* (1903) 140 C. 164, 167, 73 P. 818; *Tracy v. Donovan* (1918) 37 C.A. 350, 351, 174 P. 113; *Turney v. Collins* (1941) 48 C.A.2d 381, 391, 119 P.2d 954; *Psihozios v. Humberg* (1947) 80 C.A.2d 215, 218, 181 P.2d 699 [agreement for occupancy without fixed term "so long as he continued to pay rent"]; *Rest.2d, Property (Landlord and Tenant) §§1.6, 2.3*; 6 A.L.R.2d 685 [character and duration of tenancy created by entry under invalid or unenforceable lease]; 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §133.)

As the court observed in *Covina Manor v. Hatch* (1955) 133 C.A.2d Supp. 790, 284 P.2d 580, "whether we accept the testimony adduced upon behalf of plaintiff to the effect that defendants were granted oral permission to occupy the premises without specification as to time and absent any agreement for the payment of rent, or whether we accept defendants' version that they entered into possession of the property under a verbal agreement--invalid under the statute of frauds--that the property was to be conveyed to them in consideration of services rendered or to be rendered by defendants, the status of defendants was that of tenants at will." (133 C.A.2d Supp. 793.)

But an entry under a void contract *without* permission does not create a tenancy at will. (*Norton v. Overholtzer* (1923) 63 C.A. 388, 396, 218 P. 637.) And no tenancy will arise, despite occupancy under permission, where the owner refuses to execute a lease because of nonfulfillment of a condition precedent by the purported lessee. Thus, in *Pacific Coast Joint Stock Land Bank of San Francisco v. Jones* (1939) 14 C.2d 8, 92 P.2d 390, defendant company offered to lease land, and placed its agent in possession, who raised a crop, but the owner never signed the lease because of defendant's failure to provide a promised guaranty of rent. Held, there was no tenancy, but a mere license. (14 C.2d 14.)

West's Key Number Digest, Landlord and Tenant k.118

SUPPLEMENT: [This section is current through the latest supplement]
See 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §118.



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B. Types of Tenancy.
3. Periodic Tenancy.

12 Witkin Sum. Cal. Law Real Property § 508

[§ 508] Periodic Tenancy.

Although not expressly mentioned in the Civil Code, periodic tenancies are recognized by the cases as a form of tenancy at will. They are created by the parties to continue for successive periods of the same length, unless sooner terminated by notice at the end of one of the periods. Examples are tenancies from year to year and month to month. "The most important difference between a periodic tenancy and a tenancy for a fixed term--such as six months--is that the latter terminates at the end of such term, without any requirement of notice as in the former." (*Camp v. Matich* (1948) 87 C.A.2d 660, 665, 197 P.2d 345 [oral agreement held to create tenancy for fixed period of 6 months]; see *Rest.2d, Property (Landlord and Tenant) §1.5*; 2 Powell §16.04; 49 *Am.Jur.2d* (1995 ed.), *Landlord and Tenant* §130 et seq.)

An original tenancy at will under an invalid lease, or a lease with an indefinite term, may be construed as a tenancy from year to year or month to month on payment of rent at those periods. (See *Phelan v. Anderson* (1897) 118 C. 504, 505, 50 P. 685; *Tracy v. Donovan* (1918) 37 C.A. 350, 351, 174 P. 113; *Palmer v. Zeis* (1944) 65 C.A.2d Supp. 859, 861, 151 P.2d 323; *Miller & Desatnik Management Co. v. Bullock* (1990) 221 C.A.3d Supp. 13, 17, 270 C.R. 600, *infra*, §663, citing the text; *Rest.2d, Property (Landlord and Tenant) §2.3*.)

SUPPLEMENT: [This section is current through the latest supplement]
See 49 *Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §115 et seq.



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B. Types of Tenancy.

4. Tenancy at Sufferance.

a. Landlord's Election.

12 Witkin Sum. Cal. Law Real Property § 509

[§ 509] Landlord's Election.

(1) *Tenancy Created by Holding Over.* A tenancy at sufferance is not listed in the Civil Code. It arises where the tenant goes into possession lawfully and occupies the land afterward without any title at all, e.g., a tenant holds over after the expiration of the lease. (See *McLeran v. Benton* (1887) 73 C. 329, 339, 14 P. 879; *Gartlan v. C.A. Hooper & Co.* (1918) 177 C. 414, 426, 170 P. 1115; *Colyear v. Tobriner* (1936) 7 C.2d 735, 743, 62 P.2d 741 [tenant at sufferance is liable for reasonable value of use, "or, perhaps, for the rate of rent paid during the term"]; *Vandenbergh v. Davis* (1961) 190 C.A.2d 694, 699, 12 C.R. 222, 1 Summary (10th), *Contracts*, §751 [tenant with right of "first refusal" who held over after failing to exercise option became tenant at sufferance]; *Rest.2d, Property (Landlord and Tenant)* §14.1 et seq. [Restatement uses the longer descriptive term "tenant improperly holding over"]; 2 Powell §16.06; 13 A.L.R.5th 169 [what constitutes tenant's holding over of leased premises]; 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §140; 68 Proof of Facts 3d 1 [landlord's recovery of damages for tenant's wrongful holding over of leased premises].)

(2) *Election To Treat Tenant as Trespasser.* A person holding over is not necessarily a tenant at sufferance. If the tenant's occupation is wrongful, the landlord may elect to treat the tenant as a trespasser. The landlord may then bring an action for possession (see *infra*, §702 et seq.), or sue for the reasonable value of the tenant's use and occupation of the premises. (See *Samuels v. Singer* (1934) 1 C.A.2d 545, 554, 37 P.2d 1050.)

(3) *Consent to Occupancy.* If the holding over is by consent and the landlord treats the person holding over as a tenant, e.g., by accepting rent, the person may become a tenant at sufferance, tenant at will, or periodic tenant. (*Renner v. Huntington-Hawthorne Oil & Gas Co.* (1952) 39 C.2d 93, 102, 244 P.2d 895; *Cowell v. Snyder* (1911) 15 C.A. 634, 640, 115 P. 961.) Where there is consent, the presumption of C.C. 1945 applies: "If a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one month when the rent is payable monthly, nor in any case one year." Hence, although the value of use and occupancy may be greater than the rental formerly specified, only rental may be recovered by the landlord. (See *Shenson v. Shenson* (1954) 124 C.A.2d 747, 753, 269 P.2d 170 [following *Cowell*].)

(4) *No Consent to Occupancy.* Where there is no consent to the holding over, the presumption of C.C. 1945 does

not apply. Thus, in *The City v. Hart* (1985) 175 C.A.3d 92, 220 C.R. 349, defendant was the lessee under a shopping center lease with an expiration date of September 14, 1984. The rent was a monthly payment of a fixed amount plus percentage rent based on gross income, adjusted annually to conform to actual figures for the preceding year. On September 1, 1984, defendant made his usual monthly estimated rent payment which plaintiff lessor accepted, but on September 14, plaintiff gave notice of termination, and, when defendant refused to leave, commenced an unlawful detainer proceeding. *Held*, acceptance of rent before the expiration of the term "cannot be construed as implied consent to a holding over that had not yet occurred"; i.e., rent payments in unknown amounts remained owing, and plaintiff's retention of the rent did not signify consent to defendant's continued possession. Moreover, plaintiff had stated its intention not to extend defendant's lease, and acted promptly on termination to remove defendant from possession. (175 C.A.3d 95.)

(5) *New Express Agreement*. If a new express agreement is made, the occupant is of course no longer a tenant at sufferance. (See *Hull v. Laugharn* (1934) 3 C.A.2d 310, 314, 39 P.2d 478; *Miller v. Stults* (1956) 143 C.A.2d 592, 599, 300 P.2d 312.)

West's Key Number Digest, Landlord and Tenant k.119

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Tenancy Created by Holding Over*. Absent a new agreement, a foreclosed subordinate lessee must pay the fair rental value of the premises from the date of sale until the tenant vacates. (*Aviel v. Ng* (2008) 161 C.A.4th 809, 820, 74 C.R.3d 200 [proper basis for determining rent and utility costs owed by tenants who held over after foreclosure was reasonable value of their use of premises, rather than preexisting lease terms; citing *Colyear v. Tobriner* (1936) 7 C.2d 735, 62 P.2d 741, text, p. 586].)

See 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §124 et seq.



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4. Tenancy at Sufferance.

b. Express Provision in Lease.

12 Witkin Sum. Cal. Law Real Property § 510

[§ 510] Express Provision in Lease.

It is common practice to provide in a lease that a tenant holding over without consent will become a tenant from month to month, at a specified rental. (See *Vucinich v. Gordon* (1942) 51 C.A.2d 434, 437, 124 P.2d 868; *Schmitt v. Felix* (1958) 157 C.A.2d 642, 646, 321 P.2d 473; C.E.B., 1 Landlord-Tenant Practice 2d, §3.64; C.E.B., 1 Office Leasing 2d, §26.3; 11A Am.Jur. Legal Forms 2d (1998 ed.), Leases of Real Property §161:322 et seq.; on lease provision for automatic renewal, see *infra*, §532.)

In *Greenberg v. Koppelow* (1946) 76 C.A.2d 631, 173 P.2d 821, after notice to quit, plaintiff landlord brought unlawful detainer, and defendant lessee contended that the damages were limited to \$ 300 per month (the rent). *Held*, the court properly awarded damages in the amount of \$ 500 per month. By the landlord's election to forfeit, the tenant became a trespasser. The language of the lease must be deemed to refer to a holding over without consent where no notice to quit has been served. (76 C.A.2d 634.)

In *Bettelheim v. Hagstrom Food Stores* (1952) 113 C.A.2d 873, 249 P.2d 301, a percentage lease provided for 5% of the gross receipts as a penalty for holding over, instead of the ordinary rental of 2%. *Held*, the landlord waived this penalty by voluntarily accepting the 2% without objection. (113 C.A.2d 878.)

SUPPLEMENT: [This section is current through the latest supplement]

See 11A Am.Jur. Legal Forms 2d (2006 ed.), Leases of Real Property §161:359 et seq.



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C. Other Relationships Distinguished.
1. Sale of Property.

12 Witkin Sum. Cal. Law Real Property § 511

[§ 511] Sale of Property.

In *Moss v. Williams* (1948) 84 C.A.2d 830, 191 P.2d 804, plaintiff purchased property from defendant and, as part of the consideration, the parties agreed that defendant could remain in possession of one floor for 2 years, paying \$ 75 per month as rent. At the end of the period, he refused to vacate, relying on the wartime rent control regulations. *Held*, the regulations were not applicable. Despite the use of the terms "rent" and "tenancy," there was no landlord-tenant relationship. The agreement was for the sale of property, and occupancy for a limited period was merely one of the terms of the sales contract. (84 C.A.2d 834.) (See *San Francisco v. Boyle* (1925) 195 C. 426, 434, 233 P. 965 [purported lease was contract of sale]; *Mahoney v. San Francisco* (1927) 201 C. 248, 258, 257 P. 49 [same].)

On the other hand, in *Bachenheimer v. Palm Springs Management Corp.* (1953) 116 C.A.2d 580, 254 P.2d 153, defendant subdivided a plot into 38 units 30 feet by 20 feet, and sold a bungalow to plaintiff on conditional sale. Defendant failed to comply with *B. & P.C. 11000* and *11010*, regulating the sale or lease of subdivided lands, contending that the bungalow (personal property) was sold with merely a right to maintain it on a designated parcel of land for 99 years. *Held*, the contract was illegal. Looking through form to substance, its true character was a 99-year lease of real property. A lease of a building or premises, without qualifying words, is a lease of the land on which it stands. (116 C.A.2d 588.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Other Relationships Distinguished.
2. License.

12 Witkin Sum. Cal. Law Real Property § 512

[§ 512] License.

A lease, which gives a right of exclusive possession for a definite period to the lessee, must be distinguished from a license, which is a nonpossessory, revocable right to use. (See *Beckett v. City of Paris Dry Goods Co.* (1939) 14 C.2d 633, 636, 96 P.2d 122, *infra*, §519 [contract for space in department store was lease]; *Shaw v. Caldwell* (1911) 16 C.A. 1, 7, 115 P. 941 [grant to "work and develop mine" was license]; *Eichhorn v. De La Cantera* (1953) 117 C.A.2d 50, 54, 255 P.2d 70 [loose arrangement presented question of fact, and finding of tenancy was upheld]; *A.S. Nahas v. Local 905, Retail Clerks Int. Assn.* (1956) 144 C.A.2d 808, 820, 301 P.2d 932 [department store in shopping center was license]; *Golden West Baseball Co. v. Anaheim* (1994) 25 C.A.4th 11, 36, 31 C.R.2d 378, *infra*, §517 [contract between baseball team owner and city owning stadium was not lease, but might be characterized as creating irrevocable license for term of agreement]; *Qualls v. Lake Berryessa Enterprises* (1999) 76 C.A.4th 1277, 1283, 91 C.R.2d 143 [mobilehome owners were licensees of resort, rather than tenants, where resort's rights to land derived only from its concession agreement with county, and resort could not transfer greater interest than one it possessed under concession agreement; concession agreements generally are construed to create only licenses, and resort's concession agreement did not purport to convey title or possessory interest; citing *Golden West Baseball Co.*; *Rest.2d, Property (Landlord and Tenant) §1.2* [requirement that right to possession be transferred]; 49 *Am.Jur.2d* (1995 ed.), *Landlord and Tenant* §21; on licenses generally, see *supra*, §§429, 430.)

The test is "whether the contract gives exclusive possession of the premises against all the world, including the owner, in which case it is a lease, or whether it merely confers a privilege to occupy under the owner, in which case it is a license." (*Von Goerlitz v. Turner* (1944) 65 C.A.2d 425, 429, 150 P.2d 278 [written agreement by mine owners authorizing others to operate on 10% royalty was license].)

An illustration of the difficulties encountered in characterizing the relationship where parties deliberately seek to avoid a leasehold is furnished by *Schwerdtfeger v. California* (1957) 148 C.A.2d 335, 306 P.2d 960. Under former Harb. & Nav.C. 3061, the Board of State Harbor Commissioners could not "lease" a pier (state property), but could permit it "to be used." The board assigned Pier 39 in San Francisco to Marine Terminals as a "revocable license to use." In determining whether the state had the possessor's duty of care to make the premises safe for invitees, the court made the following observations: (a) The state could not legally lease, and had certain activities on the pier with respect to movement of ships, condition of seawall, etc., and was therefore "not exactly in the position of a landlord out of possession." (148 C.A.2d 344.) (b) Marine Terminals had possession, and the right to exclude the public, for a fixed

rent. "In that sense, the state was in the position of an out-of-possession landlord." (148 C.A.2d 345.) Hence, its liability would depend on whether it had retained and exercised control over the particular part of the premises or instrumentality that caused the injury to plaintiff (see *infra*, §650), and here, it had not. (148 C.A.2d 345.)

SUPPLEMENT: [This section is current through the latest supplement]
See 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §20.



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3. Proprietor and Guest or Lodger.
a. In General.

12 Witkin Sum. Cal. Law Real Property § 513

[§ 513] In General.

At common law, the landlord-tenant relationship is distinguished from the relationship between a hotel or lodging house proprietor and a guest or lodger. (See *Rest.2d, Property (Landlord and Tenant) §1.2* and Reporter's Note.) Right to possession is the basis for the distinction. A tenant has exclusive possession, whereas a lodger has merely the use of the rooms, with the proprietor retaining the exclusive possession. (*Stowe v. Fritzie Hotels (1955) 44 C.2d 416, 421, 282 P.2d 890*; see *Rest.2d, Property (Landlord and Tenant) §1.2* ["[a] landlord-tenant relationship exists only if the landlord transfers the right to possession of the leased property"].) (For statutory rights of guest or lodger, see *infra*, §514.)

Frequently, however, the cases present conflicting factors. In *Roberts v. Casey (1939) 36 C.A.2d Supp. 767, 93 P.2d 654*, plaintiffs, proprietors of an apartment hotel, rented two furnished suites to defendants. Plaintiffs retained the keys and provided complete cleaning and utilities service, which tended to establish a relationship of proprietor and lodger. There were, however, no common kitchens, dining rooms, or bathrooms, and each suite was a unit containing these facilities, the rent being fixed for the suite without regard to the number of occupants. These factors tended to show a tenancy. *Held*, the trial court's finding that defendants were mere lodgers was sufficiently supported by the evidence.

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3. Proprietor and Guest or Lodger.
b. Statutory Rights of Lodger.

12 Witkin Sum. Cal. Law Real Property § 514

[§ 514] Statutory Rights of Lodger.

(1) *In General.* C.C. 1940 gives lodgers all of the statutory rights specified in the Civil Code's chapter on landlord and tenant ("Hiring of Real Property"). (C.C. 1940 et seq.) C.C.P. 1159, on forcible entry (see *infra*, §757), includes a boarder and lodger, as defined in C.C. 1940, within the meaning of a "party in possession." (See C.E.B., 1 Landlord-Tenant Practice 2d, §1.3.)

(2) *Persons Included.* With stated exceptions, C.C. 1940 et seq. apply to all persons who hire dwelling units located within California, including tenants, lessees, boarders, lodgers, and others, however denominated. (C.C. 1940(a).) A "dwelling unit" is a structure used as a home, residence, or sleeping place by one person who maintains a household or by two or more who maintain a common household. (C.C. 1940(c).)

(3) *Persons Excluded.* The term "persons who hire" does not include a person who maintains transient occupancy in a hotel, motel, residence club, or other facility when the occupancy would be subject to tax under Rev.C. 7280. These persons are excluded even if valid payment has not been made for room and related charges. (C.C. 1940(b)(1).) Also excluded are those who maintain occupancy at a hotel or motel where the innkeeper retains a right of access to and control of the dwelling unit, and offers "all of the following services to all of the residents": facilities for safeguarding of personal property pursuant to C.C. 1860; central telephone service; maid, mail, and room services; occupancy for periods of less than 7 days; and food service provided by a food establishment that is located on or adjacent to the premises of the hotel or motel and that is owned or operated by the innkeeper or the innkeeper's lessee or affiliate. (C.C. 1940(b)(2).)

(4) *Requiring Occupants To Move or Check Out and Reregister.* An occupant of a residential hotel cannot be required "to move, or to check out and reregister, before the expiration of 30 days" occupancy if a purpose is to have the occupant maintain transient occupancy status under the exclusion in C.C. 1940(b)(1). (C.C. 1940.1(a).) A violation is punishable by a civil penalty of \$ 500, and the prevailing party is entitled to reasonable attorneys' fees. (C.C. 1940.1(b).)

(5) *Evicting Lodger From Owner-Occupied Building.* A lodger's periodic tenancy may be terminated where the owner personally occupies the dwelling, retains a right of access to all areas of the dwelling unit occupied by the lodger, and has overall control of the dwelling unit (C.C. 1946.5(c)), and if no more than one lodger resides in the dwelling

(C.C. 1946.5(d)). In those circumstances, either party may terminate the periodic tenancy by written notice of intent to terminate given at least as long before the expiration of the term as specified in C.C. 1946 (see *infra*, §680), and served pursuant to *C.C.P. 1162* (see *infra*, §727), or by certified or registered mail with a return receipt requested. (C.C. 1946.5(a).)

After the notice period has expired, the lodger's right to remain in the dwelling "is terminated by operation of law," and the lodger may be removed under P.C. 602.3 or other applicable provisions of law (see *infra*, §702 et seq.). (C.C. 1946.5(b); P.C. 602.3(d).) A tenant who remains after the notice period has expired is guilty of an infraction and may be arrested by the owner and removed by an assisting police officer. (P.C. 602.3(a).) The removal is not a forcible entry under *C.C.P. 1159* (see *infra*, §757 et seq.). (P.C. 602.3(b).) The lodger's personal property must be handled in accordance with C.C. 1980 et seq. (see *infra*, §749 et seq.). (P.C. 602.3(c).)

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4. Farming Contract.

12 Witkin Sum. Cal. Law Real Property § 515

[§ 515] Farming Contract.

A tenancy in farming land must be distinguished from a mere employment, and from a cropping contract, in which no estate in the property passes. (See *Harrelson v. Miller & Lux* (1920) 182 C. 408, 410, 188 P. 800; *Sherwin v. Bogosian* (1931) 112 C.A. 359, 360, 296 P. 641; *Merriman v. Martin* (1931) 113 C.A. 167, 173, 298 P. 95; 95 A.L.R.3d 1013 [farmland cultivation arrangement as creating status of landlord-tenant or landowner-cropper].) The effect of the provisions of the instrument, and not its designation by the parties, will determine its nature. (*Carlson v. Industrial Acc. Com.* (1931) 213 C. 287, 289, 2 P.2d 151.) (See 35 A.L.R.5th 285 [liability for breach of farming lease or contract]; on farm tenancy and sharecropping, see 2 Powell §18.01.)

SUPPLEMENT: [This section is current through the latest supplement]



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5. Tenants as Consumers.

12 Witkin Sum. Cal. Law Real Property § 516

[§ 516] Tenants as Consumers.

(1) *Developments in Case Law.* Modern decisions have given residential tenants important rights not recognized in the common law, e.g., the implied warranty of habitability (see *infra*, §624 et seq.) and the defense of retaliatory eviction (see *infra*, §706 et seq.).

(2) *Statutes.* A number of statutes have had the same objective:

- (a) Landlord's duty to keep a dwelling in tenantable condition. (See *infra*, §619 et seq.)
- (b) Codification of the defense of retaliatory eviction. (See *infra*, §712 et seq.)
- (c) Landlord's liability for interference with occupancy. (See *infra*, §§614, 615.)
- (d) Disclosure requirements where multiunit dwellings are rented. (See *infra*, §521.)
- (e) Invalid waivers of tenants' rights. (See *infra*, §567.)
- (f) Rent control. (See *infra*, §572 et seq.)
- (g) Regulation of mobilehome parks. (See *infra*, §761 et seq.)

(3) *Proposals for Reforms and Tenant Action.* Much has been written on the residential tenant as a consumer of housing services, who should have the benefit of consumer protection laws and of consumers' remedies. (See 53 *Cal. L. Rev.* 304 [rent withholding]; 63 *Cal. L. Rev.* 1098 [analysis of effects of habitability laws on rent]; 8 *Golden Gate L. Rev.* 359 [proposal of lender liability for failure to enforce housing code]; 21 *Hastings L. J.* 287, 298 [rent withholding and rent strikes]; 21 *Hastings L. J.* 317 [housing development]; 21 *Hastings L. J.* 433 [urban renewal]; 12 *Loyola L.A. L. Rev.* 301 [tenant reports as invasion of privacy]; 3 *U.C. Davis L. Rev.* 1 [tenant unions]; 3 *U.C. Davis L. Rev.* 22 [rent withholding and rent strikes]; 3 *U.C. Davis L. Rev.* 101 [class actions]; 3 *U.C. Davis L. Rev.* 191, 211 [use of tax incentives and property tax reform].) (On Uniform Residential Landlord and Tenant Act and California law, see 4 *Pacific L. J.* 788; 21 *Hastings L. J.* 369 [proposed Act]; for Act, adopted in 15 jurisdictions, see 7B U.L.A. (Master Ed.), p. 527.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Proposals for Reforms and Tenant Action*. Volume 7B of the Uniform Laws Annotated was revised in 2006. The Residential Landlord and Tenant Act is now at 7B U.L.A. (Master Ed.), p. 285.



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D. Leases.

1. Nature and Requisites of Lease.

a. Dual Nature.

12 Witkin Sum. Cal. Law Real Property § 517

[§ 517] Dual Nature.

(1) *Traditional View.* A lease is an instrument creating the relationship of landlord and tenant. C.C. 1925, part of the original Civil Code, states that a lease is a contract, but the California courts have followed the traditional view that it has a dual character. It is a conveyance of an estate in the land, and a contract between the lessor (landlord) and lessee (tenant) for the possession and use of the property in consideration of rent. (*Chandler v. Hart* (1911) 161 C. 405, 413, 119 P. 516; *Ellingson v. Walsh, O'Connor & Barneson* (1940) 15 C.2d 673, 675, 104 P.2d 507; *Dean v. Brower* (1931) 119 C.A. 412, 415, 6 P.2d 580; *Parker v. Superior Court* (1970) 9 C.A.3d 397, 400, 88 C.R. 352, citing the text; see 2 Powell §16.02; 54 Cal. L. Rev. 1141 [problems attendant to mixing property concepts and contract doctrine in landlord tenant relationship]; 2 Pacific L. J. 259 [statutory revision to common law relationship]; 86 A.L.R.4th 259 [lease provision stating purpose for which property is to be used as excluding other uses].) (On leases and landlord-tenant practice, see 7 Miller & Starr 3d, §19:19 et seq.; C.E.B., 1 Landlord-Tenant Practice 2d, Chap. 1; C.E.B., 1 Office Leasing 2d, Chaps. 1 and 12 [tax problems]; C.E.B., Ground Lease Practice; Cal. Civil Practice, 3 Real Property Litigation, §16:10 et seq.)

Because of its dual nature, dual obligations are created: "[T]he lease has two sets of rights and obligations--one comprising those growing out of the relation of landlord and tenant, and said to be based on the 'privity of estate,' and the other comprising those growing out of the express stipulations of the lease, and so said to be based on 'privity of contract'." (*Samuels v. Ottinger* (1915) 169 C. 209, 211, 146 P. 638.)

(2) *Modern Contract Approach.* Despite the historical characterization of the lease as a conveyance, there is a modern tendency to construe it and determine its obligations according to the rules for interpretation and performance of contracts generally. (See *Medico-Dental Bldg. Co. of Los Angeles v. Horton & Converse* (1942) 21 C.2d 411, 418, 132 P.2d 457; *Edward Barron Estate Co. v. Waterman* (1916) 32 C.A. 171, 173, 162 P. 410; *Lang v. Pacific Brewing & Malting Co.* (1919) 44 C.A. 618, 621, 187 P. 81; *Kurihara v. City Market of Los Angeles* (1928) 90 C.A. 374, 379, 265 P. 987; *Knox v. Wolfe* (1946) 73 C.A.2d 494, 499, 167 P.2d 3; *Strecker v. Barnard* (1952) 109 C.A.2d 149, 152, 240 P.2d 345; *Bettelheim v. Hagstrom Food Stores* (1952) 113 C.A.2d 873, 878, 249 P.2d 301; *Vandenbergh v. Davis* (1961) 190 C.A.2d 694, 698, 12 C.R. 222, 1 Summary (10th), Contracts, §751; *Eltinge & Graziadio Dev. Co. v. Childs* (1975) 49 C.A.3d 294, 297, 122 C.R. 369; 2 Powell §16.02; 31 Cal. L. Rev. 338; 2 Cal. Western L. Rev. 133 [contractual approach to real property leases].) Contract principles apply when the tenant breaches the lease and

abandons the premises before the end of the term, or when the landlord terminates the tenant's right to possession due to breach of the lease. (C.C. 1951 et seq.; see *infra*, §693 et seq.)

In *Golden West Baseball Co. v. Anaheim* (1994) 25 C.A.4th 11, 31 C.R.2d 378, the court strongly endorsed the modern contract approach. Plaintiff baseball team owner (GWBC) sued defendant city, contending that a development approved by defendant on part of the parking lot surrounding the team's stadium violated an agreement leasing "the use" of the stadium and facilities. *Held*, the trial judge properly ruled that the agreement was breached insofar as the development affected the minimum amount of ground-level stadium parking, but it was error to find that plaintiff had a leasehold interest.

The agreement was not a lease because it did not convey exclusive possession, but only a sporadic use of the premises with shared control by the owner. (25 C.A.4th 33.) Plaintiff's interest might be characterized as an easement or an irrevocable license for the term of the agreement. (25 C.A.4th 35, 36.) But "[u]ltimately, the label given to GWBC's 'interest' is of little importance. Arrangements between landowners and those who conduct commercial operations upon their land are so varied that it is increasingly difficult and correspondingly irrelevant to attempt to pigeonhole these relationships as 'leases,' 'easements,' 'licenses,' 'profits,' or some other obscure interest in land devised by the common law in far simpler times. Little practical purpose is served by attempting to build on this system of classification." (25 C.A.4th 36, citing *Kendall v. Ernest Pestana* (1985) 40 C.3d 488, 220 C.R. 818, 709 P.2d 837, *infra*, §552, and *Eltinge & Graziadio Dev. Co. v. Childs*, *supra*, 49 C.A.3d 297.) "The agreement here granted certain rights and imposed certain duties on the parties. Our task is to determine the scope of these rights and duties. To say we cannot do so without first determining whether the agreement is a lease, an easement, or some other interest in land ignores modern commercial realities. The contractual relationship between the parties must be analyzed based on the evidence and findings without regard to its classification under traditional common law concepts." (25 C.A.4th 36, 37.)

West's Key Number Digest, Landlord and Tenant k.20 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XVII - Real Property

Witkin Summary of California Law VII. LANDLORD AND TENANT RELATIONSHIP

D. Leases.

1. Nature and Requisites of Lease.

b. Legality of Object.

12 Witkin Sum. Cal. Law Real Property § 518

[§ 518] Legality of Object.

A lease, like any other contract, must have a legal object, and may be void for illegality. (See *Rest.2d, Property (Landlord and Tenant) §§9.1 et seq., 12.4, 12.5; 49 Am.Jur.2d (1995 ed.), Landlord and Tenant §39 et seq.; 1 Summary (10th), Contracts, §431 et seq.*)

In *Shephard v. Lerner (1960) 182 C.A.2d 746, 6 C.R. 433*, plaintiffs became lessees of an apartment house by assignment from the original lessees. In a new lease made later, they demanded of defendant lessors an addendum reciting that they were authorized to use the premises in substantially the same manner as the original lessees. The original and continued use was in violation of many safety and health regulations, and eventually the Health Department of San Francisco ordered drastic changes and brought a suit based on violations. While this suit was pending, plaintiffs sought a declaration that the lease was no longer binding. *Held*, judgment declaring lease illegal and not binding affirmed. The lessor argued that the general provisions requiring the lessee to comply with all applicable laws made this merely a legal agreement performed in an unlawful manner. However, the addendum at least created an ambiguity, and the acts of the parties--indicating that the illegal uses were to be authorized and continued--resolved that ambiguity, justifying the trial court's conclusion. (*182 C.A.2d 751.*)

It is possible, however, to make a valid lease that requires some step to be taken before the contemplated object can be legally achieved. Thus, property may be leased for the sale of liquor by one who has as yet no license to engage in the business. (*Grace v. Croninger (1922) 56 C.A. 659, 663, 206 P. 130.*) And a lease for a purpose not allowed by zoning regulations may be valid where it is contemplated that an application for a variance, under permitted procedure, will be made. (*Stockburger v. Dolan (1939) 14 C.2d 313, 316, 94 P.2d 33; see 90 A.L.R.2d 1031* [clause making lease contingent on lessee obtaining use permit from zoning authorities].) Moreover, the contract may be lawful even though the lessee is guilty of a personal violation of the law. (*Keating v. Preston (1940) 42 C.A.2d 110, 116, 108 P.2d 479; see infra, §674.*) (See *Wong v. Di Grazia (1963) 60 C.2d 525, 529, 35 C.R. 241, 386 P.2d 817* [validity of "on completion" leases, formerly held violative of rule against perpetuities].)

In *Hinson v. Delis (1972) 26 C.A.3d 62, 102 C.R. 661*, a number of defects developed in an apartment. All were violations of the local housing code, and, despite notice, defendant landlord failed to repair them. Plaintiff tenant sued for a declaration that she did not have to pay rent until repairs were made, contending that the code violations rendered

the lease unenforceable. Although her defense to eviction was upheld on other grounds (see *infra*, §624), the court rejected the illegal contract argument. *Shephard v. Lerner, supra*, and similar cases involved contracts by landlord and tenant, both in *pari delicto*, to rent premises with existing illegal conditions, and the landlord, seeking to enforce the lease, was denied recovery. Here, the premises were in legal condition when the lease was made, and the tenant sought not to terminate the tenancy, but to remain in possession. (26 C.A.3d 67, 68.)

SUPPLEMENT: [This section is current through the latest supplement]
See 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §38 et seq.



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D. Leases.

1. Nature and Requisites of Lease.

c. Form.

12 Witkin Sum. Cal. Law Real Property § 519

[§ 519] Form.

(1) *In General.* No particular terminology is necessary to create a lease. It is enough that the words used show the intention to lease property, and give the names of the parties, a description of the premises, the amount of rent, and the term. (*Santa Monica Rent Control Bd. v. Bluvshstein* (1991) 230 C.A.3d 308, 316, 281 C.R. 298 [agreement must show intent to create landlord-tenant relationship, and include designation of parties, description of premises, rent to be paid, time and manner of payment, and term of lease]; see *Golden West Baseball Co. v. Anaheim* (1994) 25 C.A.4th 11, 30, 31 C.R.2d 378, supra, §517 [quoting *Santa Monica Rent Control Bd. v. Bluvshstein*]; *Rossetto v. Barross* (2001) 90 C.A.4th Supp. 1, 4, 110 C.R.2d 255 [landlord-tenant relationship existed between three tenants in common, as lessors, and fourth tenant in common, as lessee, based on provisions of tenancy in common agreements; lessee enjoyed exclusive possession of premises and was granted monthly profit or loss from rental of property; although leasehold term was not specified in one agreement, tenancy was month-to-month following termination of original term stated in other agreement]; *Rest.2d, Property (Landlord and Tenant) §1.1* ["space that is intended to have a fixed location"]; 49 *Am.Jur.2d* (1995 ed.), *Landlord and Tenant* §23 et seq.; for forms, see C.E.B., 1 Landlord-Tenant Practice 2d, §1.37 et seq.; C.E.B., 2 Office Leasing 2d, Appendices A and B; C.E.B., Ground Lease Practice, §2.1 et seq.; 83 *Am.Jur. Trials* 385, 414 [how to draft "fool proof" lease]; 11 *Am.Jur. Legal Forms* 2d (1998 ed.), *Leases of Real Property* §161:24 et seq.)

(2) *Description of Premises.* If the lease contains an ambiguous or uncertain description of the particular premises to be occupied, or is silent as to the extent of the premises, extrinsic evidence is admissible to determine what property is leased. Thus, if the lessee actually occupies a particular area and the lessor accepts rent, the uncertainty may be resolved by the parties' conduct. (*Guttman v. Berry* (1948) 83 C.A.2d 507, 510, 189 P.2d 41.) And, because a lease of part of a building passes with it things "appurtenant" to the building (necessary to the use of the demised premises), parol evidence as to the circumstances surrounding the instrument's execution is admissible to determine what the parties intended to include as an appurtenance. (*Von Rohr v. Neely* (1946) 76 C.A.2d 713, 715, 173 P.2d 828; *Owsley v. Whelan Drug Co.* (1948) 83 C.A.2d 454, 457, 189 P.2d 50.) (On rights appurtenant to lease, see *Owsley v. Hamner* (1951) 36 C.2d 710, 716, 227 P.2d 263, supra, §395; 24 *A.L.R.2d* 123 [easements or privileges of tenant of part of building as to other parts not included in lease]; 49 *Am.Jur.2d* (1995 ed.), *Landlord and Tenant* §625 et seq.)

Although normally there is a definite description of specific property, a lease is sufficient where the description is

of a stall, section, or other space to be designated by the lessor, and the lessee later occupies a particular place. Thus, in *Beckett v. City of Paris Dry Goods Co.* (1939) 14 C.2d 633, 96 P.2d 122, defendant store owner contracted to give plaintiff the right to conduct an optical department for 3 years, in space to be designated by defendant at any time, at a consideration of 20% of monthly sales. *Held*, the agreement was a lease and not a mere license. (14 C.2d 638.) (See *Santa Cruz v. MacGregor* (1960) 178 C.A.2d 45, 53, 2 C.R. 727 [original uncertainty may be cured when tenant takes possession, and uncertainty of beginning of term is not fatal where it is to commence on completion of building or improvement]; *Mabee v. Nurseryland Garden Centers* (1978) 84 C.A.3d 968, 972, 149 C.R. 105 [lease of portion of shopping center was valid where approximate boundaries were outlined on plot plan and exact site location was left for later agreement]; 84 A.L.R.2d 920 [estoppel of lessee to assert invalidity of lease because of irregularities in description or defects in execution].)

(3) *Language Translations*. A contract translated into Spanish, Chinese, Tagalog, Vietnamese, or Korean must be furnished on request if one of those languages was used in the negotiations. (C.C. 1632(b); see 1 *Summary* (10th) *Contracts*, §124.) C.C. 1632 covers a "lease, sublease, rental contract or agreement, or other term of tenancy contract or agreement, for a period of longer than one month, covering a dwelling, an apartment, or mobilehome, or other dwelling unit normally occupied as a residence." (C.C. 1632(a)(3).)

West's Key Number Digest, Landlord and Tenant k.24

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See 49 *Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §22 et seq.; 11 *Am.Jur.* Legal Forms 2d (2006 ed.), *Leases of Real Property* §161:25 et seq. (2) *Description of Premises*. See 49 *Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §500 et seq. *Correction:* Page 597, last line, "C.C. 1632(a)(3)" should be "C.C. 1632(b)(3)".



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D. Leases.

1. Nature and Requisites of Lease.

d. Execution and Delivery.

12 Witkin Sum. Cal. Law Real Property § 520

[§ 520] Execution and Delivery.

(1) *Lessor's Signature.* To comply with the statute of frauds, a lease for a longer period than a year must be in writing and signed by the lessor. (C.C. 1091, 1624(a)(3); see *Rest.2d, Property (Landlord and Tenant) §§2.1, 2.2*; C.E.B., 1 Landlord-Tenant Practice 2d, §1.13.) If there is more than one lessor, and the lessee agrees to accept only on condition that all sign, the lessee is not bound unless they do. (*Anthony Macaroni Co. v. Nunziato* (1935) 5 C.A.2d 588, 589, 43 P.2d 315.)

However, where the lessor signed an option to give a lease, the lessee's exercise of the option by deposit of advance rental and a signed instrument in the prescribed form was held to result in a binding lease, although the lessor refused to sign the instrument. (*Gavina v. Smith* (1944) 25 C.2d 501, 503, 154 P.2d 681.) Also, where the lessee wrote and signed the instrument at the lessor's dictation, and the lessor did not sign it but kept it, and accepted rental payments, the lessor was estopped from setting up the statute of frauds. (*Keller v. Richbart* (1933) 130 C.A. 296, 301, 20 P.2d 55.)

(2) *Delivery and Acceptance.* As a conveyance, the lease must be delivered, delivery being part of the execution. (C.C.P. 1933; *Feigenbaum v. Aymard* (1925) 71 C.A. 713, 716, 236 P. 156; see 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §31.) It is not essential that the lessee sign. Delivery to and acceptance by the lessee are sufficient, and the lessee's acceptance may be indicated by taking possession or paying rent. On acceptance, both lessor and lessee become bound under the lease, except that a special covenant, such as one to repair, does not bind a lessee who has not signed. (*Chandler v. Hart* (1911) 161 C. 405, 411, 119 P. 516; *Watkins v. McCartney* (1922) 57 C.A. 643, 644, 207 P. 909; *Munford v. Humphreys* (1924) 68 C.A. 530, 535, 229 P. 860; *Walker v. Dorn* (1966) 240 C.A.2d 118, 121, 49 C.R. 362, quoting the text; 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §§29, 32.)

West's Key Number Digest, Landlord and Tenant k.25

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Delivery and Acceptance.* See 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §30 [delivery]; 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §§28, 31 [signature and acceptance].



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1. Nature and Requisites of Lease. e. Identification of Property Owners or Managers.

12 Witkin Sum. Cal. Law Real Property § 521

[§ 521] Identification of Property Owners or Managers.

(1) *Information Required.* The owner of a "dwelling structure containing one or more units offered to the public for rent or for lease for residential purposes" (C.C. 1961), or a person who acts on the owner's behalf, must disclose in the rental agreement the name, telephone number, and usual street address at which personal service may be made on each owner and authorized manager of the premises. The same information must be given for each person who is authorized to act for the owner for the purpose of service of process and for the purpose of receiving and giving receipts for notices and demands. (C.C. 1962(a)(1).) In addition, the owner or the party signing the rental agreement on behalf of the owner must disclose the name, telephone number, and address of the person or entity to whom rent payments must be made. (C.C. 1962(a)(2).) If rent payments may be made personally, the usual days and hours that the person will be available to receive the payments must also be disclosed. (C.C. 1962(a)(2)(A).) Alternatively, at the owner's option, the rental agreement may disclose either the number of an account in a financial institution located within 5 miles of the rental property into which rent payments may be made, and the name and street address of the institution (C.C. 1962(a)(2)(B)(i)), or the information necessary to establish an electronic funds transfer procedure for paying the rent (C.C. 1962(a)(2)(B)(ii)). The rental agreement must disclose the form or forms in which rent payments are to be made. (C.C. 1962(a)(3).)

If the address provided by the owner does not allow for personal delivery, then it will be conclusively presumed that, when the tenant mails rent or a notice to the owner using the name and address provided, and can show proof of mailing, the notice or rent is deemed receivable by the owner on the date posted. (C.C. 1962(f).)

(2) *Furnishing Information to Tenant.* The owner or party signing for the owner must also provide a copy of the rental agreement or lease to the tenant within 15 days of its execution by the tenant. Once each calendar year thereafter, on the tenant's request, the owner or agent must provide an additional copy to the tenant within 15 days. If the owner or agent does not possess the rental agreement or lease or a copy of it, the owner or agent must instead furnish the tenant with a written statement stating that fact and containing the information required by C.C. 1962(a)(1), (a)(2), and (a)(3). (C.C. 1962(a)(4).) If the rental agreement is oral, the owner, or a person acting on behalf of the owner for the receipt of rent or otherwise, must, within 15 days of the agreement, furnish the tenant with a written statement containing the information required by C.C. 1962(a)(1), (a)(2), and (a)(3). Once each calendar year thereafter, on the tenant's request, the owner or owner's agent must provide an additional copy of the statement to the tenant within 15 days. (C.C.

1962(b).) The information required by C.C. 1962 must be kept current. C.C. 1962 extends to and is enforceable against a successor owner or manager, who must comply with C.C. 1962 within 15 days of succeeding the previous owner or manager. (C.C. 1962(c).)

(3) *Optional Methods of Disclosure.* If the dwelling structure contains an elevator, the information required by C.C. 1962(a)(1) may be disclosed by placing a printed or typewritten notice in each elevator and in one other conspicuous place. (C.C. 1962.5(a)(1).) If the structure does not contain an elevator, a printed or typewritten notice may be placed in at least two conspicuous places. (C.C. 1962.5(a)(2).) Either of these types of posting is allowed for a single unit dwelling structure. (C.C. 1962.5(a)(3).)

(4) *Failure To Comply.* A party who enters into a rental agreement on behalf of the owner and who fails to comply with C.C. 1962 is deemed an agent of each owner for service of process, receiving notices and demands, and issuing receipts for notices and demands (C.C. 1962(d)(1)), for performing the owner's obligations under law and under the rental agreement (C.C. 1962(d)(2)), and for receiving rental payments (C.C. 1962(d)(3)). The rental payments may be made in cash, by check, by money order, or in any form previously accepted by the owner or owner's agent, unless the oral or written agreement specifies the form of payment, or the owner has notified the tenant in writing that a particular form of payment is unacceptable. (C.C. 1962(d)(3).)

If the requirements of C.C. 1961 et seq. are not met, service of process by a tenant (with respect to a dispute arising out of the tenancy) may be made by registered or certified mail, in the manner specified by *C.C.P. 1013*, and sent to the address at which rent is paid. (C.C. 1962.7.)

SUPPLEMENT: [This section is current through the latest supplement]



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1. Nature and Requisites of Lease. f. Agreement To Lease.

12 Witkin Sum. Cal. Law Real Property § 522

[§ 522] Agreement To Lease.

An agreement to lease may create a tenancy if it embodies the essential terms, even though a formal lease is to be prepared and executed later. (See *Cappelmann v. Young* (1946) 73 C.A.2d 49, 53, 165 P.2d 950 [agreement was binding]; but see *Store Properties v. Neal* (1945) 72 C.A.2d 112, 117, 164 P.2d 38 [execution of formal lease was condition precedent]; *Rest.2d, Property (Landlord and Tenant) §2.5* [validity of agreement to lease governed by contract provisions of statute of frauds]; 85 A.L.R.3d 414 [certainty of terms in agreement to lease]; 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §12 et seq.)

The effect of a peculiar, detailed agreement was considered in *Rishwain v. Smith* (1947) 77 C.A.2d 524, 175 P.2d 555. An agreement of sale was made whereby plaintiffs sold their business to defendants for \$ 400,000. Plaintiffs also agreed, as additional consideration, to execute a lease "in the usual standard form of business leases in this area" containing certain specified terms. Defendants took possession and paid rent. Later, plaintiffs submitted a form of lease differing substantially from the agreed terms, and, on defendants' refusal to sign, gave the 30-day notice required for termination of a tenancy at will, and brought unlawful detainer. *Held*, plaintiffs were not entitled to oust defendants.

Assuming that a formal lease was contemplated, the written agreement contained all essential elements of a valid 2-year lease at a fixed monthly rental. Plaintiffs were guilty of a breach of contract in failing to execute the required lease. Defendants were not, therefore, unlawfully withholding possession, and were entitled to set up this equitable defense in the unlawful detainer action, regardless of whether they were entitled to specific performance of the agreement to lease. (77 C.A.2d 528.) The court apparently sought to avoid any express holding on whether the agreement was in fact a lease, and the language of the opinion would seem to suggest the unsatisfactory result that (a) because plaintiffs were in default in failing to execute a proper lease, they could not oust defendants until the end of the term, but (b) because there was no valid lease, defendants were tenants at will who could terminate by proper notice at any time. (See *Pike v. Hayden* (1950) 97 C.A.2d 606, 612, 218 P.2d 578 [written agreement incorporating by reference former lease to different tenant was sufficiently certain for specific performance].)

West's Key Number Digest, Landlord and Tenant k.22 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

See 49 *Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §11 et seq.



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1. Nature and Requisites of Lease.
- g. Particular Leases and Provisions.

12 Witkin Sum. Cal. Law Real Property § 523

[§ 523] Particular Leases and Provisions.

(1) *In General.* A number of practice works, texts, and articles deal with the problems encountered in negotiating and drafting particular types of leases and clauses. (See 2 Powell §17A.01 et seq. [modern commercial leasing practices]; C.E.B., Office Leasing 2d, Volumes 1 and 2; C.E.B., 1 Landlord-Tenant Practice 2d, §1.37 et seq.; C.E.B., Ground Lease Practice; 86 *Harv. L. Rev.* 1201 [antitrust implications of restrictive covenants in shopping center leases]; 21 *Hastings L. J.* 532 [shopping center leases]; 35 *Loyola L.A. L. Rev.* 787 [use of credit enhancement instruments to secure commercial leases to "credit-risky" tenants such as those in high technology industries]; 56 *A.L.R.3d* 596 [construction and operation of parking-space provision in shopping center lease]; 22 *A.L.R.5th* 327 [statute or lease provisions expressly governing rights of lessee upon condemnation of leased property]; 11 Am.Jur. Legal Forms 2d (1998 ed.), Leases of Real Property §161:30 et seq. [residential leases], §161:51 et seq. [ground leases], §161:81 et seq. [building and office space leases]; 11A Am.Jur. Legal Forms 2d (1998 ed.), Leases of Real Property §161:120 et seq. [shopping center and concession leases], §161:146 et seq. [particular provisions]; 11B Am.Jur. Legal Forms 2d (1998 ed.), Leases of Real Property §161:1003 et seq. [subleases]; 77 Proof of Facts 3d 169 [whether mistake in lease warrants reformation or cancellation of lease]; 93 Am.Jur. Trials 193 [enforcement of lease provision limiting keeping of pets on residential property].)

(2) *Oil, Gas, and Mineral Leases.* Oil and gas leases are distinct in nature, purpose, and terms. (See *infra*, §795 et seq.) Mineral leases are also different from ordinary leases because the lessor is primarily concerned with producing minerals, and the lease is executed on the condition, either express or implied, that the land will be developed for that purpose. If the method of mining is not specified, the lessee must mine in a reasonable manner compatible with the most expeditious removal of the minerals. "Further, if the lease does not expressly obligate the lessee to engage in mining activities, and if the only consideration is the share he will obtain in the mineral produced from the payment of a royalty, the law implies an agreement on the lessee's part to proceed with mining operations with reasonable diligence." The implied agreement is a condition, and its violation results in a forfeiture and abandonment of the lease. (*Russell v. Johns Manville Co.* (1971) 20 *C.A.3d* 405, 410, 97 *C.R.* 634, 98 *C.R.* 181; see 53A *Am.Jur.2d* (1996 ed.), *Mines and Minerals* §219 et seq.; 76 *A.L.R.2d* 721 [implied obligation of purchaser or lessee to conduct search for, or to develop or work premises for, minerals other than oil and gas]; for forms, see 12B Am.Jur. Legal Forms 2d (1999 ed.), *Mines and Minerals* §175:100 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 11 Am.Jur. Legal Forms 2d (2006 ed.), Leases of Real Property §161:30 et seq. [residential leases], §161:64 et seq. [ground leases], §161:99 et seq. [building and office space leases]; 11A Am.Jur. Legal Forms 2d (2006 ed.), Leases of Real Property §161:139 et seq. [shopping center and concession leases], §161:176 et seq. [particular provisions], 11B Am.Jur. Legal Forms 2d (2006 ed.), Leases of Real Property §161:1079 et seq. [subleases]. (2) *Oil, Gas, and Mineral Leases.* See 53A Am.Jur.2d (2006 ed.), *Mines and Minerals* §199 et seq.; 12A Am.Jur. Legal Forms 2d (2008 ed.), *Mines and Minerals* §175:97 et seq.



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D. Leases.

2. Term.

a. Specification in Instrument.

12 Witkin Sum. Cal. Law Real Property § 524

[§ 524] Specification in Instrument.

(1) *In General.* The term is the period for which possession is given, and is normally specified in the instrument. (*Lang v. Pacific Brewing & Malting Co. (1919) 44 C.A. 618, 623, 187 P. 81*; see *Rest.2d, Property (Landlord and Tenant) §1.4* [lease for fixed or computable period], §1.7 [tenancy terminable on some event], §1.8 [tenancy not to commence until occurrence of event]; on power of trustee of trust to enter into lease for term within or extending beyond term of trust, see *Prob.C. 16231*; 13 *Summary* (10th), *Trusts*, §103.) It may be some ordinary period such as 1 year or 10 years or, in a long-term lease, 50 or 99 years or longer. (See *Bullock's v. Security-First Nat. Bank of Los Angeles (1958) 160 C.A.2d 277, 279, 325 P.2d 185* [50 years]; 49 *Am.Jur.2d* (1995 ed.), *Landlord and Tenant* §127; on special considerations applicable to long-term leases, see C.E.B., *Ground Lease Practice*, §1.32 et seq.) It is also possible, although unusual, to give a lease for the life of the lessor. (See *Kendall v. Southward (1957) 149 C.A.2d 827, 308 P.2d 915*, infra, §525.) (On uncertainty in term, see supra, §505.)

(2) *Presumptions Where Term Is Not Specified.* If the term of a tenancy is not stated, certain presumptions apply:

(a) The term of a lease for agricultural or grazing purposes is presumed to be for 1 year. (C.C. 1943.)

(b) The term for lodgings and dwelling-houses is presumed to be for the time adopted for estimation of rent; e.g., if there is a monthly rental, the term is 1 month. In the absence of agreement as to the time of estimation of rent, the presumption is that the term is 1 month. (C.C. 1944.)

(c) Other tenancies are presumed to be month-to-month tenancies, unless custom or usage dictates otherwise. (C.C. 1943.)

West's Key Number Digest, Landlord and Tenant k.30

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 49 *Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §113.



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D. Leases.

2. Term.

b. Statutory Restrictions.

12 Witkin Sum. Cal. Law Real Property § 525

[§ 525] Statutory Restrictions.

(1) *Private Property*. Several statutes place limits on the term of particular kinds of private leases: e.g., (a) lease of town or city lots--99 years (C.C. 718); (b) lease for agricultural or horticultural purposes--51 years (C.C. 717); (c) mineral, oil, or gas lease--99 years (C.C. 718f).

C.C. 717 formerly contained a 15-year limitation. A liberal interpretation of the statute sustained the lease in *Kendall v. Southward* (1957) 149 C.A.2d 827, 308 P.2d 915, where the term was the natural life of the lessor. The court followed the theory of out-of-state cases that a lease for the wholly indefinite period of a person's life was not a lease "for a longer period than fifteen years," and therefore was not within the strict prohibition of C.C. 717. The court then laid down the practical rule that the lease was valid for 15 years or until the lessor's death, if she died sooner. (149 C.A.2d 830.) (See *Klepper v. Hoover* (1971) 21 C.A.3d 460, 463, 98 C.R. 482, *infra*, §528; *Shaver v. Clanton* (1994) 26 C.A.4th 568, 576, 31 C.R.2d 595 [commercial leases are exempt from rule against perpetuities under *Prob.C. 21225(a)* (*supra*, §187), but leases of town or city lots are limited to 99 years by C.C. 718]; 17 A.L.R.2d 566 [construction and effect of statutes limiting duration of agricultural leases].)

(2) *Municipal Property*. Leases by municipal corporations are also restricted. The principal limitations are as follows:

(a) Ordinary municipal property--55 years. (C.C. 718; *Govt.C. 37380(a)*; *Govt.C. 37395* [lease of unnecessary city property for commercial development].)

(b) Mineral, oil, or gas lease--35 years. (C.C. 718; *Govt.C. 37383*; *Pub.Res.C. 7057*.)

(c) Tidelands--66 years. (C.C. 718; *Govt.C. 37385*; but see *Govt.C. 37384* [50 years].)

(d) Housing development--50 years. (*Govt.C. 37388*.)

(e) Airport or aircraft purposes--50 years. (*Govt.C. 37389*.)

(f) Fair or exposition--50 years. (*Govt.C. 37391*.)

(g) Off-street parking--50 years. (*Govt.C. 37394.*)

(h) Stadium, park, fair, or exhibition--99 years. (*Govt.C. 37396.*)

Despite the 55-year limit in C.C. 718, leases of municipal property for a term of up to 99 years are permitted, as long as they are (a) subject to periodic review and take into consideration current market conditions (C.C. 719(a); *Govt.C. 37380(b)(1)*); (b) authorized by an ordinance adopted by a legislative body (C.C. 719(b); *Govt.C. 37380(b)(2)*); (c) granted after a noticed public hearing (C.C. 719(c); *Govt.C. 37380(b)(3)*); and (d) awarded to the bidder affording the greatest economic return to the city (C.C. 719(d); *Govt.C. 37380(b)(4)*). The last three conditions are not applicable to charter cities, which may utilize procedures specified by charter or adopted by ordinance. (C.C. 719(e).)

C.C. 719 does not apply to leases of property acquired for park purposes or for the purpose of producing mineral, oil, gas, or other hydrocarbon substances. Nor does it apply to leases of tidelands or submerged lands or improvement on those lands. (C.C. 719(f).)

(3) *Public Grazing or Recreational Lease.* A lease of public land for grazing or recreational purposes is limited to 10 years, unless the recreational use is combined with and is incidental to a residential use, in which case the limit is 50 years. (*Pub.Res.C. 6505.5.*)

(4) *Limitation on Time for Commencement of Possession.* A lease that is to commence at a certain time or on the happening of a future event becomes invalid if the term does not actually commence in possession within 30 years after the lease's execution. (C.C. 715.)

SUPPLEMENT: [This section is current through the latest supplement]



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D. Leases.
3. Changes in Short-Term Leases.

12 Witkin Sum. Cal. Law Real Property § 526

[§ 526] Changes in Short-Term Leases.

(1) *In General.* A landlord who wishes to make changes in the terms of a lease "from week to week, month to month, or other period less than a month" is subject to certain rules. The landlord must give written notice to the tenant in the manner prescribed by *C.C.P. 1162* (providing for personal delivery if possible, and for other methods if not). (*C.C. 827(a)*; see *Colyear v. Tobriner* (1936) 7 C.2d 735, 743, 62 P.2d 741 [service of notice must be personal, but mail may be used to effect personal service]; *Wilcox v. Anderson* (1978) 84 C.A.3d 593, 596, 148 C.R. 773, citing the text; Cal. Civil Practice, 3 Real Property Litigation, §29:5 [form of notice].) The change will take effect on the expiration of "a period at least as long as the term." As to tenancies from month to month, this means at the expiration of not less than 30 days. If the change takes effect within a rental term (e.g., a week or month), the rent between the first day and the date of change is computed at the original rate. The parties may agree in writing that a change may be made by a 7-day notice given before the expiration of a term, to be effective when the term expires. The tenant holding the premises after the notice takes effect is bound by the change. (*C.C. 827(a)*; see *Wilcox v. Anderson* (1978) 84 C.A.3d 593, 596, 148 C.R. 773, citing the text.)

In *Colyear v. Tobriner*, *supra*, the lessee held a 1-year lease at \$ 45 monthly rental, with an option to renew for 2 years at not more than a 20% increase. He attempted but failed to exercise his option properly, and the lessors sent him a 30-day notice that his tenancy "is hereby terminated," and that rental thereafter would be \$ 750 per month if he remained. He continued in possession, believing he had renewed. *Held*, he was not liable for \$ 750 per month. The notice did not purport to change the terms of the existing lease within the meaning of *C.C. 827*, but terminated the tenancy and offered a new month-to-month tenancy at \$ 750 to which the lessee never agreed. "A tenant holding over who does not assent to an increased rental, either expressly or impliedly, is liable therefor only where section 827 is controlling. For example, the section does not apply to a tenancy for a fixed term. A tenant for a fixed term who holds over beyond the term after notice given prior to expiration of the term of increased rental, in the absence of express or implied assent thereto is not liable for the increased rent, but is a tenant at sufferance, who must pay the reasonable value of the use for such time as he holds over." (7 C.2d 742.)

(2) *Special Rules Until January 1, 2006.* Additional rules adopted in 2000 are designed "to respond to tight rental market conditions by providing tenants with longer notice when served with a rent increase of more than 10 percent in a 12-month period and providing owners with an easier method of service for notices of rent increases." (Stats. 2000, Chap. 680, §1.) The landlord may increase the rent provided in a lease or rental agreement by delivering written notice

to the tenant personally or by mail under the procedures prescribed in *C.C.P. 1013*. (C.C. 827(b)(1).) If the proposed rent increase is 10% or less of the rental amount charged to the tenant at any time during the 12 months before the effective date of the increase, either by itself or when combined with other rent increases for that 12-month period, the notice must be delivered at least 30 days before the effective date of the increase. (C.C. 827(b)(2).) For an increase in rent greater than 10%, the minimum notice period is 60 days, although this provision does not apply to a rent increase caused by a change in a tenant's income or family composition as determined by a recertification required by statute or regulation. (C.C. 827(b)(3).) In any case, the notice period is subject to *C.C.P. 1013*, providing additional time if service is by mail. (C.C. 827(b)(2), (b)(3).) The personal service or mailing of the notice must be in accordance with any longer period prescribed by a state or federal statute, state or federal regulation, recorded regulatory agreement, or contract. (C.C. 827(c).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See Cal. Civil Practice, 4 Real Property Litigation, §29:5 [form of notice]. (2) *Special Rules Until January 1, 2006.* C.C. 827 has been extended indefinitely.



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D. Leases.

4. Renewal.

a. Distinction Between Renewal and Extension.

12 Witkin Sum. Cal. Law Real Property § 527

[§ 527] Distinction Between Renewal and Extension.

(1) *In General.* Technically, renewal of a lease involves the execution of a new instrument, whereas extension is a continuation in possession under the old lease, after notice under its provisions. (*Howell v. Hamburg Co.* (1913) 165 C. 172, 177, 131 P. 130; *Robertson v. Drew* (1917) 34 C.A. 143, 144, 166 P. 838; *Smith v. Arthur D. Little* (1969) 276 C.A.2d 391, 399, 81 C.R. 140, citing the text; see 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §148 et seq.)

An extension may also result from holding over with permission of the lessor. In that case the terms of the original lease, including a provision allowing the lessee to remove fixtures on termination, will apply. (*Knox v. Wolfe* (1946) 73 C.A.2d 494, 500, 167 P.2d 3; on effect of extension or renewal on option to purchase, see *infra*, §536.)

(2) *Distinction Disregarded: Lessee's Option.* The technical distinction is not always observed. Exercise of an option to renew, for example, is regarded simply as an extension of the original lease for an additional term. (See *Schmitt v. Felix* (1958) 157 C.A.2d 642, 645, 321 P.2d 473.)

In *Erickson v. Boothe* (1947) 79 C.A.2d 266, 179 P.2d 611, decedent lessor leased property to defendant lessee with an "option to re-lease" on the same terms for an additional 4-year period, on 6 months' written notice. The lessor died and the lessee gave the notice within the time, but plaintiff, the lessor's executor, contended that the clause was one for renewal, calling for the execution of a new lease, and that the attempt to extend the term by notice alone was ineffective. *Held:* (a) Options for renewal are generally considered to be in the nature of a present demise for the entire period (including that covered by the renewal clause). (b) It is immaterial whether the option provides for a renewal or a mere extension. The presumption is against the useless requirement of a new instrument, with its trouble and expense, and a new lease will be required only where the language clearly shows this intention. As to the difference between the two methods of lengthening the tenancy, it is "too refined and theoretical to be real, as a matter of law, in practical affairs. Men of ordinary learning, intelligence, and experience do not universally heed or invoke it in their business transactions. The law is neither just nor practical when it finds decisions of controversies exclusively upon that distinction. The word 'renewal' or the words 'to renew' have not a definite and fixed legal significance to which the parties are bound by the use of them." (79 C.A.2d 273, quoting from New York case.)

(3) *Distinction Disregarded: Lessor's Duty to Invitees.* In *Burroughs v. Ben's Auto Park* (1945) 27 C.2d 449, 164

P.2d 897, the lessor executed a lease of an auto park that had a high rear retaining wall without guard rail or barricade. At the time of the lease the place was equipped with floodlights. Shortly after wartime, dimout regulations had cut off the lights, making it unsafe. The lessor wrote the lessee that the lease was about to expire and that the rent would be changed "and your tenancy be extended on a month to month basis under the same terms and conditions." Then plaintiff, a patron, fell over the wall. He sued both the lessee and lessor, and obtained a judgment against the lessee. The lessee, conceding liability, did not appeal, but the lessor contended that the agreement was merely an extension, that consequently the condition occurred during the lessee's occupation so that the lessor was not responsible for it. *Held*, judgment for lessor reversed.

This was a renewal. It did not stretch out or spread the period under the same terms and conditions, but changed the rental and changed the tenancy (from fixed period to month-to-month). Because a renewal is a new and distinct tenancy, the landlord had the right of possession on expiration of the old tenancy, and was therefore under a duty to inspect and correct dangerous conditions. However, irrespective of whether the agreement was one for an extension or renewal, the tenant here did not have an option, and, at the time of the new agreement, the landlord had a right of reentry and the resulting duty of inspection. The landlord cannot escape this duty by the form of the additional tenancy, i.e., by purportedly keeping the tenant in uninterrupted possession under an agreement of mere extension. "[T]he lessor could not relieve itself of a duty imposed by law by making an agreement with the lessee whereby it waived its right to enter the premises for the purpose of performing that duty." (27 *C.2d* 455.)

West's Key Number Digest, Landlord and Tenant k.811/2 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See 49 *Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §131 et seq.



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D. Leases.

4. Renewal.

b. Lessee's Option To Renew.

1. In General.

12 Witkin Sum. Cal. Law Real Property § 528

[§ 528] In General.

Leases often contain options to renew, but careless language may create difficulties in enforcement. (For drafting suggestions and forms, see C.E.B., *Ground Lease Practice*, §§1.36, 2.10; C.E.B., 1 *Office Leasing* 2d, §10.2; 43 *Cal. L. Rev.* 706; *Cal. Civil Practice*, 3 *Real Property Litigation*, §§25:10 et seq., 29:9 et seq.; 23 *A.L.R.4th* 908 [effect on option of tenant's breach of other covenants or conditions]; 29 *A.L.R.4th* 172 [sufficiency of provision in lease to effect second or perpetual right of renewal]; 39 *A.L.R.4th* 824 [sublessee's right to primary lessee's option to renew lease]; 11B *Am.Jur. Legal Forms* 2d (1998 ed.), *Leases of Real Property* §161:734 et seq.)

An unexercised option does not create a property right until exercise by compliance with its terms. Hence, a change in the law increasing the permissible period of an agricultural lease was applicable to an option, where it occurred after the option was given but before its exercise. (*Klepper v. Hoover* (1971) 21 *C.A.3d* 460, 464, 98 *C.R.* 482.)

In *Bates v. Industrial Property Holding Co.* (1957) 155 *C.A.2d* 697, 318 *P.2d* 741, the lease gave the lessee an option to extend the term as to a portion of the premises. *Held*, this did not prevent the lessor from terminating the entire lease under a general cancellation clause. The cancellation clause took precedence. (155 *C.A.2d* 701.) (See *In re Marriage of Joaquin* (1987) 193 *C.A.3d* 1529, 1534, 239 *C.R.* 175, 11 *Summary* (10th), *Community Property*, §8 [remainder of leasehold interest held by husband was his separate property, rather than community property, where, although husband exercised option to renew while parties were married, he had entered into original lease, which contained option, before parties were married].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Cal. Civil Practice*, 3 *Real Property Litigation*, §25:10 et seq.; *Cal. Civil Practice*, 4 *Real Property Litigation*, §29:9 et seq.; 11B *Am.Jur. Legal Forms* 2d (2006 ed.), *Leases of Real Property* §161:799 et seq.



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4. Renewal.

b. Lessee's Option To Renew.

2. Terms Left for Future Agreement.

12 Witkin Sum. Cal. Law Real Property § 529

[§ 529] Terms Left for Future Agreement.

A provision for renewal on terms "to be mutually agreed upon," although occasionally enforced (see *Chaney v. Schneider* (1949) 92 C.A.2d 88, 92, 206 P.2d 669, 1 Summary (10th) Contracts, §152), is ordinarily held fatally uncertain. (See *Ablett v. Clauson* (1954) 43 C.2d 280, 286, 272 P.2d 753; 1 Summary(10th) Contracts, §§149, 152.)

In *Etco Corp. v. Hauer* (1984) 161 C.A.3d 1154, 208 C.R. 118, a commercial lease gave the tenant an option to extend for an additional 5-year period "under the same terms and conditions except for rent which shall be determined by mutual agreement at that time." *Held*, the provision contained no ascertainable standards for determining rent for the renewal period and was unenforceable.

(a) The authorities are divided on the enforceability of a provision for the renewal of a lease at a rent to be fixed by the parties. The traditional view has been that such a provision is invalid and unenforceable for uncertainty, at least where the provision does not specify any guidelines or method for fixing the rent. "Jurisdictions following this view reason that courts cannot make contracts for parties nor compel parties to agree upon a contract." (161 C.A.3d 1157.)

(b) Some courts have held that provisions specifying guidelines or method for determining future rent (e.g., provisions requiring determination by arbitration or appraisal, or with reference to fair market rents for similar properties at the time of establishment of the future rent) are sufficiently definite to be valid and enforceable. (161 C.A.3d 1157, citing 58 A.L.R.3d 500 [validity and enforceability of provision for renewal of lease at rental to be fixed by subsequent agreement of parties].) "Courts adhering to this view reason that they are not making a new contract for the parties but merely compelling the parties to do what they contemplated at the time they initially contracted." (161 C.A.3d 1157, 1158.)

(c) "A third view is that a renewal provision is valid if the contract shows the parties' mutual consent to meet in the future to negotiate further provisions for rent, even though no method for determining future rent has been set forth. ... Courts adopting this rule reason that the contract implies a mutual agreement to provide for a future 'reasonable' rent, which can be determined by a court under the particular circumstances of the case when the parties fail to agree, and that the rule effectuates the intent of the parties." (161 C.A.3d 1158.)

(d) *Ablett v. Clauson*, *supra*, states the general rule that, if an essential element is reserved for the future agreement of the parties, the promise gives rise to no legal obligation until the future agreement. (161 C.A.3d 1158; see 1 *Summary* (10th), *Contracts*, §147.) Although a right of first refusal for an additional term "at rentals and terms to be agreed upon at that time" was held enforceable in *Chaney v. Schneider*, *supra*, that decision was criticized in *Ablett* and is factually distinguishable. In *Chaney* the lessee stood to lose highly valuable improvements if the lease were terminated, and the lessor had refused to negotiate. (161 C.A.3d 1159, 1160.)

(e) "We conclude that a provision for renewal of a lease at a rent to be determined in the future is enforceable, absent agreement of the parties, only if the lease agreement contains an ascertainable standard for the determination of such rent. We believe that this rule recognizes the reality that fluctuating market conditions will often preclude the determination of an appropriate rent for a renewal period at the time an initial lease is made, yet prevents the courts from being required to engage in the drafting of contracts for parties in the absence of guidelines for an objective determination of such rent." (161 C.A.3d 1161.)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Renewal.

b. Lessee's Option To Renew.

3. First Right of Refusal.

12 Witkin Sum. Cal. Law Real Property § 530

[§ 530] First Right of Refusal.

A clause giving the lessee "the first right and a prior option to secure a lease upon said premises before the same are offered to any other person" merely gives the lessee preference over a stranger. It does not constitute an unqualified option to renew and therefore does not preclude the lessor's retention of the property without further leasing. (See *Ablett v. Clauson* (1954) 43 C.2d 280, 283, 272 P.2d 753; *Nelson v. Reisner* (1958) 51 C.2d 161, 165, 331 P.2d 17.)

In *Mitchell v. Exhibition Foods* (1986) 184 C.A.3d 1033, 229 C.R. 535, defendants leased property from plaintiff to operate a restaurant. The lease contained a right of first refusal "to lease for an additional five years ... on terms and conditions contained in" a bona fide offer received by the lessor. Plaintiff lessor received an offer from a third party who planned to subdivide the property, operate a food market, and sublease to other food-related retailers. This offer contained a right to extend the lease for three additional 5-year terms, and other provisions relating to modifications for the proposed new use of the property. Plaintiff submitted the offer to defendants, but the parties failed to agree on a new lease because of a dispute over whether it would include the renewal provisions of the third-party offer. *Held*, defendants were entitled to specific performance of a new lease.

(a) The rule that "when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made" applies, and supports an interpretation in favor of defendants. (184 C.A.3d 1042; on rule, see C.C.P. 1864; 1 *Summary*(10th) *Contracts*, §744.)

(b) The implied covenant of good faith and fair dealing includes the duty of a commercial landlord to promote the continued use and occupancy by a present tenant. Plaintiff knew or should have known that defendants desired to continue their tenancy. For plaintiff to offer an extended term to the third party but to deny it to defendants was contrary to the covenant. (184 C.A.3d 1043, 1044; on implied covenant, see 1 *Summary* (10th), *Contracts*, §798 et seq.)

(c) The trial judge acted properly in omitting aspects of the third-party offer inconsistent with the continuity of defendants' business. Plaintiff's argument that the offer was an integrated one that defendants and the trial judge were required to accept or reject in its entirety overlooks two salient considerations.

First, the potential for oppression. "We cannot accept that the inevitable consequence of a provision intended for the lessee's protection ... may be to provide a lessor unbridled and unconscionable power to solicit and accept an offer so conspicuously lacking in commercial reasonability that it appears meant to induce a rejection by the lessee as a pretext for eviction." (184 C.A.3d 1045.)

Second, the covenant of good faith and fair dealing. The trial judge innovatively applied this covenant by treating the third-party offer as furnishing the framework for the new lease, adapting its terms in such a way "as not to injure, frustrate, or make impossible defendants' continuing their existing use of the property." (184 C.A.3d 1046.)

Moreover, as plaintiff's proposed lease deleted some provisions of the third-party offer, the judge could do likewise. (184 C.A.3d 1046.)

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4. Renewal.

b. Lessee's Option To Renew.

4. Manner of Exercise.

12 Witkin Sum. Cal. Law Real Property § 531

[§ 531] Manner of Exercise.

(1) *Strict Compliance With Terms.* Like other options, the option to renew must be accepted in strict accordance with its terms. (*Hayward Lumber & Inv. Co. v. Construction Products Corp.* (1953) 117 C.A.2d 221, 227, 255 P.2d 473; *Cicinelli v. Iwasaki* (1959) 170 C.A.2d 58, 67, 338 P.2d 1005 [evidence held sufficient to show exercise]; *Simons v. Young* (1979) 93 C.A.3d 170, 180, 155 C.R. 460, *infra*, §670; see *Wilson v. Gentile* (1992) 8 C.A.4th 759, 10 C.R.2d 713, *infra*, §534 [timeliness under option to renew that must be exercised "within" certain number of days before lease's expiration]; *Gans v. Smull* (2003) 111 C.A.4th 985, 988, 4 C.R.3d 353 [C.C.P. 12a (2 Cal. Proc. (4th), Courts, §48), providing for 1-day extension where last day to do required act falls on holiday, did not extend time in which tenants could exercise option to extend lease; statute does not apply to acts governed solely by contract; distinguishing *Lamanna v. Vognar* (1993) 17 C.A.4th Supp. 4, 22 C.R.2d 501]; 29 A.L.R.4th 903 [sufficiency of oral or written notice to renew]; 29 A.L.R.4th 956 [what constitutes timely acceptance]; 32 A.L.R.4th 452 [waiver or estoppel as to notice requirements]; 34 A.L.R.4th 857 [sufficiency as to parties receiving or giving notice]; 63 Proof of Facts 3d 423 [sufficiency of lessee's notice of exercise of option to renew]; on exercise of options generally, see 1 *Summary* (10th), *Contracts*, §176.)

In *Bekins Moving & Storage Co. v. Prudential Ins. Co.* (1985) 176 C.A.3d 245, 221 C.R. 738, the lease gave plaintiff lessee the right to renew by written notice no less than 6 months before December 31, 1981, the expiration date. Although plaintiff had the name of the street leading to the property changed in 1980 to reflect its name, and corresponded with defendant between February and June 1981 concerning its installation of \$ 60,000 of air conditioning equipment on the property, it failed to give written notice of its intent to renew before June 30, 1981. In September 1981, plaintiff acknowledged its oversight and told defendant that it intended to renew, but defendant said that a new agreement would be required. The parties entered into a new agreement with substantially higher rent, but plaintiff then sought declaratory relief contending that (a) its actions in relation to the property were sufficient notice of its intent to renew, and (b) because its delay was slight and the loss to the lessor was small, it was entitled to relief from forfeiture. *Held*, summary judgment for defendant lessor affirmed.

(a) To exercise an option to renew a lease, a tenant must apprise the lessor "in unequivocal terms" of the unqualified intention to exercise the option within the time, in the manner, and on the terms stated in the lease. (176

C.A.3d 251.) The improvements made by plaintiff to the property were not sufficient to constitute notice, for there was no showing that defendant waived the requirement of written notice. (*176 C.A.3d 251*, citing *Simons v. Young* (1979) 93 *C.A.3d 170*, 155 *C.R. 460*, *infra*, §670.)

(b) C.C. 3275, authorizing relief from forfeitures, applies only where some right or vested interest is involved, and an option is merely an offer. (*176 C.A.3d 253*; see *infra*, §670.)

(2) *Sufficiency of Mailed Notice.* An option is effectively exercised by deposit of a written acceptance in the mail. (*Palo Alto Town & Country Village v. BBTC Co.* (1974) 11 *C.3d 494*, 499, 113 *C.R. 705*, 521 *P.2d 1097*, 1 *Summary* (10th), *Contracts*, §177.) In *Jenkins v. Tuneup Masters* (1987) 190 *C.A.3d 1*, 235 *C.R. 214*, the lease provided that notices should be sent by registered or certified United States mail, return receipt requested, and that a notice mailed in that way "shall be deemed to have been given as of the time said notice is deposited in the United States Mail." (190 *C.A.3d 4.*) The court held that the notice was effective, and the risk of loss was on the addressee, "notwithstanding that the notice was not deposited in an officially designated receptacle." (190 *C.A.3d 1.*)

(3) *Landlord's Waiver of Formalities.* Where a lease contains an option to renew at an increased rental, and the lessee fails to give the prescribed notice but nevertheless remains in possession and pays the higher rent, the landlord's acceptance of the rent will constitute a waiver of the formalities, and the lease will be deemed renewed. (*Tay-Holbrook v. Tutt* (1933) 218 *C. 600*, 604, 24 *P.2d 463*; see *McAulay v. Jones* (1952) 110 *C.A.2d 302*, 306, 242 *P.2d 650* [clause providing for notification of lessors by lessee; renewal effected by lessors' failure to reject]; *Schmitt v. Felix* (1958) 157 *C.A.2d 642*, 645, 321 *P.2d 473.*)

In *ADV Corp. v. Wikman* (1986) 178 *C.A.3d 61*, 223 *C.R. 262*, the lease granted plaintiff tenant an option to renew at a higher rent, but failed to specify how and when the option was to be exercised. On the morning following expiration of the original lease term, defendant landlord notified plaintiff that the lease was terminated. Three days later, plaintiff responded that no notice was required to exercise the option and that rent in the new amount would be tendered shortly, which it was. *Held*, if the lease does not specify a form of notice or require the execution of a new agreement, remaining in possession is sufficient notice of exercise of the option. (178 *C.A.3d 66.*)

A strange contention was rejected in *Kaliterna v. Wright* (1949) 94 *C.A.2d 926*, 212 *P.2d 32*. The tenant had been guilty of minor breaches of the conditions of the lease, all of them waived by the landlord. The landlord argued, however, that although the waiver precluded forfeiture, the tenant could not obtain enforcement of a renewal covenant without proving full performance. The court reached the obviously sound conclusion that the tenant was not in default and was entitled to the benefit of the covenant. (94 *C.A.2d 936.*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Strict Compliance With Terms.*

C.C.P. 12a:

Cross-Reference: 2 *Cal. Proc.* (5th), *Courts*, §50.



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D. Leases.

4. Renewal.

c. Provision for Automatic Renewal.

12 Witkin Sum. Cal. Law Real Property § 532

[§ 532] Provision for Automatic Renewal.

Ordinarily, a tenant who holds over after expiration of the lease and pays rent becomes a periodic tenant. (C.C. 1945; see supra, §509.) A lease may make express provision for the kind of tenancy that results from holding over (see supra, §510), but a provision that automatically renews or extends the lease is drastic. An automatic renewal provision must be brought to the attention of the lessee of a home at the time of execution. (C.C. 1945.5.)

C.C. 1945.5, applicable only to residential real property, deals with a provision for "the automatic renewal or extension of the lease for all or part of the full term of the lease if the lessee remains in possession after the expiration of the lease or fails to give notice of his intent not to renew or extend before the expiration of the lease." The provision is "voidable by the party who did not prepare the lease" unless, in a printed lease, it appears in at least 8-point boldface type, and a recital of its inclusion appears in similar type immediately before the place for signature. If the provision is nullified for noncompliance with this requirement, the presumption of C.C. 1945 applies and renewal is on the same terms and for the same time, monthly if the rent is payable monthly, and in no case more than 1 year. (C.C. 1945.5.) C.C. 1945.5 cannot be waived. (C.C. 1945.5.)

SUPPLEMENT: [This section is current through the latest supplement]



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D. Leases.

5. Lessee's Option To Purchase.

a. Nature and Types of Options.

12 Witkin Sum. Cal. Law Real Property § 533

[§ 533] Nature and Types of Options.

(1) *Nature of Option.* A lease may contain an option to purchase the property. (See *Andrade v. Casteel* (1947) 81 C.A.2d 729, 731, 185 P.2d 51 [covenant running with the land]; *Bell v. Minor* (1948) 88 C.A.2d 879, 881, 199 P.2d 718 [provisions of lease, including agreement to pay rent, are consideration for option]; Cal. Civil Practice, 3 Real Property Litigation, §25:1 et seq.; 12 A.L.R.3d 1128 [effect of landlord's breach of lease or lease agreement on tenant's rights under unexercised option to purchase]; 17 A.L.R.3d 976 [damages for breach by landlord]; 53 A.L.R.3d 435 [effect of lessee's breach or default on option to purchase]; 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §381 et seq.)

(2) *Types of Options.* Careful phrasing of the option is necessary.

(a) Language that gives the privilege or exclusive option to buy creates an absolute right to buy for the specified period. (See *Peebler v. Seawell* (1954) 122 C.A.2d 503, 505, 265 P.2d 109; *Bonk v. Boyajian* (1954) 128 C.A.2d 153, 156, 274 P.2d 948; *Summit Industrial Equipment v. Koll/Wells Bay Area* (1986) 186 C.A.3d 309, 314, 230 C.R. 565.)

(b) Language that gives the first privilege, first opportunity, or first right merely allows the lessee a prior or preferential right to buy. (See *Falkenstein v. Popper* (1947) 81 C.A.2d 131, 133, 183 P.2d 707; *Richfield Oil Corp. v. Security-First Nat. Bank of Los Angeles* (1958) 159 C.A.2d 184, 186, 323 P.2d 834; *Abadjian v. Superior Court* (1985) 168 C.A.3d 363, 371, 214 C.R. 234; *C. Robert Nattress & Associates v. CIDCO* (1986) 184 C.A.3d 55, 63, 229 C.R. 33; *McCulloch v. M & C Beauty Colleges* (1987) 194 C.A.3d 1338, 1345, 1346, 240 C.R. 189; 46 A.L.R.3d 1377 [tenant's rights under provision giving preemptive right to purchase on terms offered by third person, where third person's offer is withdrawn before tenant exercises preemptive right]; 70 A.L.R.3d 203 [what amounts to "sale" of property for purposes of provision giving tenant right of first refusal if landlord desires to sell]; 76 A.L.R.3d 1139 [first privilege option as requiring existence of prior offer from third party]; 74 A.L.R.4th 883 [insurable interest in property of lessee with option to purchase]; 1 *Summary* (10th), *Contracts*, §178; *infra*, §535.)

Both types may be contained in the same agreement. (See *Falkenstein v. Popper*, *supra*; *Green v. Sprague Ranches* (1959) 170 C.A.2d 687, 688, 339 P.2d 607; 22 A.L.R.4th 1293 [construction of instrument incorporating first refusal clause and fixed price option].) (For forms of option clauses, see 11B Am.Jur. Legal Forms 2d (1998 ed.), *Leases of Real Property* §161:770 et seq.)

In *Arden Group v. Burk* (1996) 45 C.A.4th 1409, 53 C.R.2d 492, the court contrasted an option agreement with a right of first refusal. Defendant tenants owned a gas station and leased the real property on which the station was located. Their lease gave them a "right of first refusal" to purchase the property should defendant lessor decide to sell it. Plaintiff, a commercial real estate developer, made a formal offer to buy the property, the terms of which required the lessor to remove underground gas tanks and clean up any soil contamination. After the lessor accepted plaintiff's offer and notified the tenants, the tenants exercised their right of first refusal. The lessor then agreed to sell to the tenants under the same terms that plaintiff had agreed to, except that, in her contract with the tenants, the lessor was not required to remove the tanks or clean up the soil. In plaintiff's action for declaratory relief, the trial judge determined that the lessor was obligated to sell to plaintiff because the terms of the tenants' offer did not exactly match those of plaintiff. *Held*, reversed.

"Resolution of this case begins and ends with an understanding of the difference between an option agreement and a right of first refusal." An option is an agreement to keep a specific offer open for a specified period, and the terms of the exercise of the option must ordinarily be identical to terms of the offer. A right of first refusal, on the other hand, may be exercised without a literal matching of terms. (45 C.A.4th 1414.) "Because the party exercising a right of first refusal is stepping into a contract made by a third party, the court must consider commercial realities and allow modifications consistent with the intent of the parties whose contract created the right of first refusal." (45 C.A.4th 1414, 1415.) Here, the only differences between the tenants' offer and plaintiff's offer are those necessitated by the fact that the tenants are buying the property as tenants in possession who will continue to use the property in the same manner as before. (45 C.A.4th 1415.)

(3) *Lessee's Refusal To Pay*. Problems of good faith and waiver are occasionally presented where the lessee refuses to buy and the lessor later sells to a stranger without further notice to the lessee. Two general situations have been distinguished. (a) If the lessor is not in good faith, e.g., if he or she offers to sell to the lessee at a high price and then sells to another at a substantially lower figure, or if the lessee has indicated a continuing desire to negotiate despite his failure to accept the first offer, it may be that a new communication and quotation of a price to the lessee are required. (b) If, however, the lessor's offer is in good faith, and the lessee's refusal to buy is unequivocal, the lessee's conduct is a waiver of the option, and the lessor is not liable in the event of sale to a third party. (See *O'Connell v. Weitzman* (1959) 168 C.A.2d 400, 401, 336 P.2d 592.)

West's Key Number Digest, Landlord and Tenant k.92 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature of Option*. See 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §294 et seq.

(2) *Types of Options*. See *Bill Signs Trucking, LLC v. Signs, Family Ltd. Partnership* (2007) 157 C.A.4th 1515, 1525, 69 C.R.3d 589 [tenant's preemptive purchase rights under commercial lease were not triggered by conveyance of interest in property between copartners who owned property; option provision would be triggered by sale to third party by all partners]; 11B Am.Jur. Legal Forms 2d (2006 ed.), *Leases of Real Property* §161:835 et seq.



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5. Lessee's Option To Purchase.

b. Exercise.

12 Witkin Sum. Cal. Law Real Property § 534

[§ 534] Exercise.

(1) *Strict Compliance With Terms.* As in the case of other options, strict compliance with the terms of an option to purchase is necessary. (See *Peebler v. Seawell* (1954) 122 C.A.2d 503, 505, 265 P.2d 109; 1 *Summary* (10th), *Contracts*, §176.) And, as with options to renew (*supra*, §528), a provision for purchase on terms "to be agreed upon" is fatally uncertain and unenforceable. (*Bonk v. Boyajian* (1954) 128 C.A.2d 153, 156, 274 P.2d 948.)

The lease may, however, provide for arbitration of the issue of fair market value of the premises. In *Summit Industrial Equipment v. Koll/Wells Bay Area* (1986) 186 C.A.3d 309, 230 C.R. 565, defendant lessor would have suffered adverse tax consequences if it sold the property within 7 years of its acquisition. To avoid this result, it made a lease subject to an option to purchase at the end of the 7th year for the "fair market value of the Leased Premises," with a provision for arbitration. Plaintiff, assignee of the original lessee, exercised the option, the value was submitted to arbitration, and the arbitrators made their award. On plaintiff lessee's appeal from the order confirming the award, the issue was: "[W]hen a tenant exercises its option to purchase the leased property before the end of the lease term for its fair market value, should the property be valued as free of, or encumbered by, the lease?" (186 C.A.3d 315.)

Defendant and the arbitrators agreed that the lease should be treated as terminated or nonexistent due to merger of the lessee's and lessor's estates, and that the fair market value should therefore be determined without reducing it by an amount equal to the capitalization of the value of the remaining portion of the lease. *Held*, this was a proper interpretation of the lease in the light of the evidence. (186 C.A.3d 319.)

(2) *Timeliness of Acceptance.* In *Wilson v. Gentile* (1992) 8 C.A.4th 759, 10 C.R.2d 713, a lessee sought specific performance of a sale under an option to purchase provided in the lease of a residence. The term of the option was the first 6 months of the 20-month lease period, and the lessee was required to exercise it "within thirty (30) days prior to the expiration of this option." The lessee exercised the option 7 days before it expired. The lessor refused to honor the option, contending that the lessee was required to exercise it "no later than" 30 days before its expiration. The trial judge granted the lessee's motion for summary judgment, ruling that the language of the agreement could only mean that the option could be exercised any time within the 30 days immediately before it expired. *Held*, affirmed.

(a) The lessee's exercise of the option to buy was timely under the "natural and logical construction" of the

language in the agreement. (8 C.A.4th 764.)

(b) In *Royal Grocery Co. v. Oliver* (1922) 57 C.A. 278, 207 P. 61, the court struck the word "within" from a clause requiring an *option to renew* to be exercised within 90 days before the expiration of the lease, due to the absurdity of the lessor's position in not knowing whether the option would be exercised until the moment the lease expired. (8 C.A.4th 765.) However, in *Riverside Fence Co. v. Novak* (1969) 273 C.A.2d 656, 78 C.R. 536, the court found no problem in construing similar language in order to allow a lessee to exercise an *option to buy* during the 30 days before the option expired, which were also the last 30 days of a renewed lease. (8 C.A.4th 766.)

(c) The rationale of *Royal Grocery* does not apply for two reasons. First, under *Riverside Fence* an option to buy is interpreted differently from an option to renew, even when the option to buy expires on the last day of the lease. Second, here the lessee's option to buy expired long before the expiration of the lease period itself, thus avoiding the lessor's quandary that was the basis of the holding in *Royal Grocery*. (8 C.A.4th 768.)

(3) *Effect of Exercise of Option*. Once the option has been exercised and becomes a binding contract of sale, the parties cease to be landlord and tenant and become vendor and purchaser. If, however, exercise of the option is conditioned on making partial or total payment, the obligation to pay rent continues until payment or tender of payment is made. (See *Peebler v. Seawell*, *supra*; *Collins v. Kobold* (1956) 146 C.A.2d 868, 871, 304 P.2d 182; *Abadjian v. Superior Court* (1985) 168 C.A.3d 363, 214 C.R. 234, *infra*, §535 [preemptive right]; 7 Miller & Starr 3d, §§19:130, 19:131; on vendor and purchaser, see 13 *Summary* (10th), *Equity*, §§28, 29.)

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5. Lessee's Option To Purchase.

c. Preemptive Rights.

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[§ 535] Preemptive Rights.

(1) *Sufficiency of Lessee's Offer.* Unsubstantial objections to the lessee's offer were rejected in *C. Robert Nattress & Associates v. CIDCO* (1986) 184 C.A.3d 55, 229 C.R. 33. Defendant lessors gave the lessee a right of first refusal exercisable within 30 days after being notified of a bona fide offer. Defendants then contracted to sell to plaintiffs, with a provision that plaintiff N was to receive a real estate commission. The lessee and a third party exercised the right, defendants accepted their offer, and plaintiffs brought this action for specific performance and damages. The trial judge found that the lessee's right had not been effectively exercised, for (a) it was conditioned on reaching a collateral agreement with a third party to purchase as tenants in common; (b) because of the collateral agreement the lessee purchased only half of the property; and (c) the terms of the lessee's offer did not match those of plaintiffs' offer. *Held*, judgment for plaintiffs reversed.

(a) The lessee's conditional acceptance of the offer was not a rejection. "[A] purported exercise of an option which is qualified or made conditional, does not in and of itself terminate the option if there yet remains time during the term of the option in which the unauthorized qualification or condition may be removed and the option exercised absolutely." (184 C.A.3d 67.) In this case, the condition was removed and the lessor had notice of the unqualified exercise within the 30 days provided. (184 C.A.3d 67.)

(b) Nothing in the lease prevented the lessee from assigning a one-half interest in the right of first refusal, and together the lessee and the third party purchased the whole property. (184 C.A.3d 69.)

(c) The facts that the sale substituted debt reduction for cash and the sales price was for an amount that did not include the commission to N did not make the offer ineffective. (1) If defendants were willing to accept debt reduction for cash, plaintiffs had no legitimate complaint. (184 C.A.3d 70, 71.) (2) N could not complain of the loss of a commission, for the contract, which included the provision for the commission, was expressly subject to the right of first refusal. (184 C.A.3d 71, 72.) (See *McCulloch v. M & C Beauty Colleges* (1987) 194 C.A.3d 1338, 1346, 240 C.R. 189 [owner could refuse to sell to holder of preemptive right where both prospective purchaser and holder of preemptive right offered security other than sale property; owner was entitled to ascertain which security offered was acceptable].)

(2) *Lessee's Obligation To Pay Rent.* "[A] lessee holding a preemptive right is not entitled to avoid continued rental obligations in the same manner as a lessee who exercises a purchase option. The latter is subject to a binding contractual obligation to purchase while the former is not. The preemptive purchase right entitles the lessee to compel specific performance of the obligation to tender a sale offer, but does not necessarily bind the lessee to accept the offer." (*Abadjian v. Superior Court* (1985) 168 C.A.3d 363, 372, 214 C.R. 234.) Hence, unless the lease so provides, the lessee is not relieved of the obligation to pay rent until a binding contract of sale is created by the lessee's actual acceptance of the lessor's first refusal offer. But the court, in granting specific performance to the lessee, may create a setoff against the purchase price for rents paid. (*Abadjian v. Superior Court, supra*, 168 C.A.3d 373, 374.)

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5. Lessee's Option To Purchase.

d. Effect of Extension or Renewal of Lease.

12 Witkin Sum. Cal. Law Real Property § 536

[§ 536] Effect of Extension or Renewal of Lease.

If a lease contains an option to buy, and an extension or renewal occurs, either express or implied, a difficult problem arises whether the option to buy is one of the terms and conditions of the original lease that remains in effect when the original period ends.

In *Spaulding v. Yovino-Young* (1947) 30 C.2d 138, 180 P.2d 691, the court left open the question whether the option would survive an express renewal or extension, but held that it did not remain in existence for the benefit of a lessee merely holding over. The lease provided that if the lessee held over, the tenancy should be from month to month only, on the same terms and conditions. This new arrangement was only that of "landlord-tenant" rather than "lessor-lessee." The option was not an essential term or condition of the lease, but was severable. "While a lessor may be content for a fixed time to be restricted to a fixed price for the sale of his property, it is another matter altogether to conclude that an option to purchase is to continue for an indefinite period under authority of a 'hold-over' tenancy unless clear words are used to express that purpose." (30 C.2d 143.) (See *Staudigl v. Harper* (1946) 76 C.A.2d 439, 451, 173 P.2d 343 [even weaker case for lessee, where lease did not state that holding over should be on same terms]; 15 A.L.R.3d 470 [holding over under renewal or extension of lease as extending time for exercise of option to purchase].)

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6. Assignment and Sublease by Tenant.

a. Right To Assign or Sublease.

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[§ 537] Right To Assign or Sublease.

In the absence of a covenant or condition to the contrary, the tenant may make an assignment or sublease. (See *Morris v. Iden* (1913) 23 C.A. 388, 395, 138 P. 120; *Maguire v. Lees* (1946) 74 C.A.2d 697, 705, 169 P.2d 411 [mining lease with express provision for assignment]; *Rest.2d, Property (Landlord and Tenant) §15.1* [interests are transferable unless it is tenancy at will, lease requires significant personal services, and transfer would impair chances of performance, or unless parties validly agree otherwise]; Cal. Civil Practice, 3 Real Property Litigation, Chap. 28; 49 Am.Jur.2d (1995 ed.), Landlord and Tenant §§1076 et seq., 1082 et seq., 1157 et seq.; 11B Am.Jur. Legal Forms 2d (1998 ed.), Leases of Real Property §§161:679 et seq., 161:700 et seq.; on condition or covenant against assignment or sublease, see *infra*, §546 et seq.)

By a valid assignment, the assignee purchases the leasehold interest and becomes a tenant. The assignee's liability to the landlord for payment of rent is based on privity of estate. (*Baker v. J. Maier & Zobelein Brewery* (1903) 140 C. 530, 534, 74 P. 22.) Generally speaking, the lessor has against the assignee the same remedies for breach of the agreement that he or she has against the lessee, and the assignee has the same remedies as the assignor against the lessor. (C.C. 822, 823; see *Standard Livestock Co. v. Pentz* (1928) 204 C. 618, 629, 269 P. 645.)

An assignment is a transfer of the entire leasehold. A sublease is a transfer of less than the leasehold, with a reversion in the sublessor (the tenant). (*Barkhaus v. Producers Fruit Co.* (1923) 192 C. 200, 205, 219 P. 435; *Flynn v. Mikelian* (1962) 208 C.A.2d 305, 310, 25 C.R. 138; *Rest.2d, Property (Landlord and Tenant) §15.1*, Comment i; 17 *Pacific L. J.* 1247 [arguing against recognizing distinction between assignment and sublease]; *infra*, §541 et seq.)

West's Key Number Digest, Landlord and Tenant k.74 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

See Cal. Civil Practice, 4 Real Property Litigation, Chap. 28; 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §§917 et seq., 920 et seq., 977 et seq.; 11B Am.Jur. Legal Forms 2d (2006 ed.), *Leases of Real Property* §§161:744 et seq., 161:765 et seq.



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6. Assignment and Sublease by Tenant.

b. Effect of Assignment.

1. Liability of Original Lessee.

12 Witkin Sum. Cal. Law Real Property § 538

[§ 538] Liability of Original Lessee.

(1) *In General.* The implied obligation of the lessee to pay rent, arising out of the relation of landlord and tenant, comes to an end when the lessor consents to the assignment. But where the lease contains an express covenant on the part of the lessee to pay rent, the lessee cannot escape liability even by assignment with the lessor's consent. The lessee remains in privity of contract with the lessor, and it is usually said that the lessee is liable as a surety if the assignee does not perform. (*Samuels v. Ottinger* (1915) 169 C. 209, 211, 146 P. 638; *Winter v. Knapp* (1928) 90 C.A. 75, 78, 265 P. 527; see *Tsemetzin v. Coast Fed. Savings & Loan Assn.* (1997) 57 C.A.4th 1334, 1345, 67 C.R.2d 726 [repudiation and termination of assignee's sublease by Resolution Trust Corporation did not affect lessee's/assignor's obligation to pay rent under lease; lessee had expressly promised to "remain primarily liable"]; *Rest.2d, Property (Landlord and Tenant) §16.1*; *10 A.L.R.3d 818* [liability after extension or renewal of term]; 49 Am.Jur.2d (1995 ed.), Landlord and Tenant §§1123, 1124.)

But it seems that the lessee is not a true surety with the right to set up suretyship defenses against the lessor. Thus, in *De Hart v. Allen* (1945) 26 C.2d 829, 161 P.2d 453, on breach by the assignee, the lessor gave notice of reletting to the original lessee alone, the assignee having disappeared, but this failure to notify the assignee did not relieve the lessee from liability. "It has sometimes been said that the effect of an assignment is to make the lessee a surety for the assignee. ... This may be true in a limited sense as between the assignee and his assignor, the lessee, but as between the lessor and the lessee the latter remains a primary obligor under his express contract to pay rent." (26 C.2d 832.) (See *Peiser v. Mettler* (1958) 50 C.2d 594, 602, 328 P.2d 953; *Meredith v. Dardarian* (1978) 83 C.A.3d 248, 252, 147 C.R. 761.)

(2) *Where Assignee Renews, Extends, or Holds Over.* If the lease contains an option to renew or extend that is binding on the lessor, and the assignee exercises this option, the lessee remains liable. If the option is not binding on the lessor, the lessee is not liable after renewal by the assignee. (*Meredith v. Dardarian*, *supra*, 83 C.A.3d 254, 255 [applying second rule where assignee held over after expiration of lease; lessee was not liable].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §955.



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b. Effect of Assignment.

2. Liability of Assignee Who Assumes.

12 Witkin Sum. Cal. Law Real Property § 539

[§ 539] Liability of Assignee Who Assumes.

If the assignee expressly assumes the obligation of the lease, the assumption agreement between the assignor (tenant) and the assignee is for the benefit of the landlord, who may sue as a third-party beneficiary. Privity of contract is thus created between the landlord and the assignee. (*Bank of America v. Moore* (1937) 18 C.A.2d 522, 525, 64 P.2d 460 [assignee signed assignment clause stating that he "hereby accepts, assumes and agrees to perform all of the terms" of lease]; *Rosenkranz v. Pellin* (1950) 99 C.A.2d 650, 653, 222 P.2d 249; see *Rest.2d, Property (Landlord and Tenant) §16.1(4)*; 49 Am.Jur.2d (1995 ed.), Landlord and Tenant §§1132, 1135.)

In *Valley Inv., L.P. v. BancAmerica Commercial Corp.* (2001) 88 C.A.4th 816, 106 C.R.2d 689, plaintiff lessor, the owner of a parcel of beach property, entered into a long-term ground lease with a developer. The developer borrowed \$ 7 million from a bank to develop the property and secured the loan with a deed of trust on the ground lease. After the developer defaulted, the bank commenced a nonjudicial foreclosure. At the bank's urging, the developer assigned the lease to defendant, a subsidiary of the bank, which managed the property pending the foreclosure. Under the terms of the assignment, defendant agreed to "faithfully observe, perform and fulfill all of the terms, covenants and conditions and obligations required to be observed, performed and fulfilled by [the developer] as lessee under the Ground Lease." The bank subsequently purchased the lease at the foreclosure sale and eventually sold the lease to another developer. When that developer failed to pay rent due to plaintiff, plaintiff retook possession of the property and sued defendant, seeking a declaratory judgment that defendant was liable as assignee for the rent due for the balance of the lease term. The trial court granted summary judgment for defendant on the ground that the bank's foreclosure of its senior deed of trust terminated defendant's junior interest in the lease and any obligations that defendant had to plaintiff. *Held*, reversed.

(a) If an assignee expressly agrees with the assignor to assume the obligations of the lease, the assumption agreement creates a privity of contract between the landlord and the assignee, enforceable by the landlord as a third-party beneficiary, regardless of whether the landlord was a party to the assumption agreement. As a consequence, the assuming assignee is required to perform all covenants of the lease for the remainder of its term, absent a release by the landlord. Such is the case here. (88 C.A.4th 822.) The operative instrument, in both name and fact, passed the entire leasehold interest to defendant. Even if it had not effected an assignment, but rather a sublease, the outcome would be

the same. A subtenant who expressly assumes the obligations of the prime lease, with the consent of the landlord, comes into privity of contract with the landlord, and the landlord can enforce the assumption agreement as a third-party beneficiary. (88 C.A.4th 823.)

(b) Whether foreclosure of a leasehold mortgage extinguishes the duties owed to the lessor by an assignee who assumes the lease is a question of first impression. (88 C.A.4th 823.) Plaintiff's interest as lessor (technically a reversion) was senior to the leasehold mortgage. Although the foreclosure extinguished defendant's junior assignment, it could not have any impact on plaintiff's senior reversion. Plaintiff's right to enforce defendant's assumption agreement, as a third-party beneficiary, was an incident of the reversion and could not be wiped out by the junior foreclosure. Thus, the foreclosure terminated the privity of estate and privity of contract between defendant and the developer, but it did not reach the privity of contract between defendant and plaintiff. This approach acknowledges both the mortgagee's right to realize on its collateral and the rule that foreclosure does not terminate senior interests. (88 C.A.4th 824.)

(c) *Dover Mobile Estates v. Fiber Form Products* (1990) 220 C.A.3d 1494, 1498, 270 C.R. 183, *infra*, §677, is distinguishable. *Dover* considered the impact of foreclosure of a mortgage on a subordinate lease, and held that the lease was extinguished. In that case, the fee was mortgaged. Foreclosure wiped out the junior lease and, with it, the rights of both the landlord and the tenant under the lease. In the present case, only the leasehold was mortgaged. The landlord's reversion was unencumbered, and its rights could not be affected by the foreclosure. Moreover, unlike *Dover*, "we must consider the consequences of foreclosing a *leasehold mortgage* on an *assuming assignee's duties* to the unaffected *senior interest*. Thus *Dover*, while accurate on its facts, has no persuasive force here." (88 C.A.4th 825.)

SUPPLEMENT: [This section is current through the latest supplement]
See 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §§960, 962.



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 - b. Effect of Assignment.
3. Liability of Assignee Who Does Not Assume.

12 Witkin Sum. Cal. Law Real Property § 540

[§ 540] Liability of Assignee Who Does Not Assume.

If the tenant assigns and the assignee merely comes into possession, without express assumption of the obligations, what is the liability of the assignee? Although there is no contractual relationship between the assignee and the lessor, while the assignee remains in possession, the assignee is subject to all of the obligations incident to the relationship of landlord and tenant, and is therefore liable for rent. (See *Timm v. Brown* (1947) 78 C.A.2d 609, 615, 178 P.2d 10 [oral acceptance of terms; covenants in lease run with the land and bind assignee to pay rent "so long as the assignee remains in possession"].)

A problem arises, however, where the nonassuming assignee comes into possession, pays rent during the period of occupancy, and then, before termination of the lease, abandons the premises. (See 49 Am.Jur.2d (1995 ed.), Landlord and Tenant §1147.) *Treff v. Gulko* (1932) 214 C. 591, 595, 7 P.2d 697, held that the liability of the nonassuming assignee for rent, based only on privity of estate, is limited to the period of his occupancy and does not continue after abandonment, but the soundness of this holding is open to serious question.

First, the relationship of landlord and tenant ("privity of estate"), once created, cannot be terminated by mere abandonment of the premises, without an accepted surrender. (See *infra*, §675; *Bonetti v. Treat* (1891) 91 C. 223, 230, 27 P. 612; *Anheuser-Busch Brewing Assn. v. American Products Co.* (1922) 59 C.A. 718, 721, 211 P. 817; *Shea v. Leonis* (1938) 29 C.A.2d 184, 189, 84 P.2d 277; *Rest.2d, Property (Landlord and Tenant) §16.1*, Reporter's Note, item 6, and §16.3, Reporter's Note, item 4.)

Second, the lessee's agreement to pay rent is generally considered a covenant running with the land, binding upon the assigns of the covenantor (lessee). Express contractual assumption of the obligation of a running covenant is unnecessary. (See *Ellingson v. Walsh, O'Connor & Barneson* (1940) 15 C.2d 673, 676, 104 P.2d 507; *First Nat. Bank v. Aldridge* (1939) 33 C.A.2d 485, 490, 92 P.2d 674.)

Third, the practical effect of the decision is that the landlord who acquiesces in the assignment is bound to observe the rights of the tenant as long as the latter stays in possession, which may be until the end of the term of the lease, but the tenant, by mere abandonment, may terminate his or her obligations when the tenant pleases. In effect, there is an

estate for a fixed term on the landlord's side and a mere tenancy at will on the tenant's side.

In *Kelly v. Tri-Cities Broadcasting* (1983) 147 C.A.3d 666, 195 C.R. 303, the court took note of this criticism (147 C.A.3d 678), but concluded that the holding of *Treff v. Gulko* was controlling and generally regarded as a correct statement of California law (147 C.A.3d 677, 678). The opinion adds that the unfairness to the landlord is easily avoided in commercial leases, which are normally prepared to the landlord's specifications and may contain restrictions on assignment. "It is the contractual oversight, not the law, which imposes whatever hardship the landlord has incurred." (147 C.A.3d 678.) (See *Melchor Inv. Co. v. Rolm Systems* (1992) 3 C.A.4th 587, 592, 4 C.R.2d 343 [quoting *Kelly v. Tri-Cities Broadcasting*, but concluding that, where sublessee remained an occupant, sublessee and lessor were bound to arbitrate by privity of estate].)

SUPPLEMENT: [This section is current through the latest supplement]
See 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §971.



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c. Effect of Sublease.

1. Subordinate to Main Lease.

12 Witkin Sum. Cal. Law Real Property § 541

[§ 541] Subordinate to Main Lease.

The sublease is subordinate to the main lease, and the sublessee is charged with knowledge of its terms. Thus, in *Pedro v. Potter* (1926) 197 C. 751, 242 P. 926, the lease provided that the lessor could terminate it on 60 days' notice. He did so, and the sublessee sued his sublessor (the tenant) to recover advance rent paid to the sublessor. *Held*, the sublessee had notice of the possibility of termination and, in the absence of a covenant for apportionment of the rent, could not recover. (197 C. 761.) (See *Scott v. Mullins* (1962) 211 C.A.2d 51, 56, 27 C.R. 269 [covenants in sublease that were consistent with master lease were enforceable]; 49 Am.Jur.2d (1995 ed.), Landlord and Tenant §1183; *infra*, §570.)

A forfeiture of the lessee's interest will oust the sublessee and deprive the sublessee of growing crops. (*Agoure v. Plummer* (1917) 175 C. 543, 546, 166 P. 311; see *Syufy Enterprises v. Oakland* (2002) 104 C.A.4th 869, 880, 128 C.R.2d 808 [sublessee had no right to possession of premises following its sublessor's deemed rejection of master lease in bankruptcy; sublessee had no contract separate from lease to enforce as third-party beneficiary, and lease did not have nondisturbance provision; distinguishing *Valley Inv., L.P. v. BancAmerica Commercial Corp.* (2001) 88 C.A.4th 816, 106 C.R.2d 689, *supra*, §539, and *Chumash Hill Properties v. Peram* (1995) 39 C.A.4th 1226, 46 C.R.2d 366]; see 49 Am.Jur.2d (1995 ed.), Landlord and Tenant §1185.) A voluntary surrender by the lessee has no such effect; i.e., the lessee cannot, by a voluntary surrender of the estate to the lessor, defeat the sublessee's rights. (*Buttner v. Kasser* (1912) 19 C.A. 755, 758, 127 P. 811; see *Chumash Hill Properties v. Peram* (1995) 39 C.A.4th 1226, 1231, 1232, 46 C.R.2d 366 [subleasehold survived sublessor's rejection of primary lease in bankruptcy; primary lease had nondisturbance agreement expressly protecting nonbreaching sublessee's right to retain possession on termination of primary leasehold]; 49 Am.Jur.2d (1995 ed.), Landlord and Tenant §1186.) However, where a lessee was in default, and the sublessee entered with knowledge of this fact and took the risk of termination, the latter's rights were properly cut off on a forfeiture by the lessor, despite the fact that the lessee ultimately consented to the forfeiture. (*Herman v. Campbell* (1948) 86 C.A.2d 762, 764, 195 P.2d 801.)

A sublease may give the sublessee a right to extend subject to exercise of the same option by the lessee under the main lease. (See *Cicinelli v. Iwasaki* (1959) 170 C.A.2d 58, 65, 338 P.2d 1005; *Gilman v. Nemetz* (1962) 203 C.A.2d 81, 90, 21 C.R. 317 [remedies of sublessee for breach of agreement to exercise option]; 94 A.L.R.2d 1345 [measure and

elements of sublessee's damages recoverable from sublessor for latter's failure to exercise option to renew lease].)

In *Northridge Hosp. Foundation v. Pic 'N' Save No. 9* (1986) 187 C.A.3d 1088, 232 C.R. 329, the master lease provided for two 10-year extensions at the lessee's option. The sublease gave defendant sublessee the option to extend for the additional terms, but also provided that if the master lease "shall terminate for any reason whatsoever, then this lease shall also terminate simultaneously therewith and neither party hereunder shall acquire any right or cause of action against the other by reason of such termination." During the initial term of the lease, plaintiff purchased the property and entered into an agreement with the sublessor, holding it harmless from claims by defendant sublessee, and stating that the master lease was terminated and the sublease not extended. Plaintiff notified defendant that the sublease was terminated, but defendant protested and plaintiff took no legal action to evict defendant. At the end of the initial term, plaintiff sought declaratory relief, contending that defendant had been a tenant at sufferance since the notice that its sublease was terminated. *Held*, judgment for plaintiff reversed. Although the sublessor did not covenant to exercise the option to renew the lease, the duty of good faith and fair dealing enunciated in *Kendall v. Ernest Pestana* (1985) 40 C.3d 488, 220 C.R. 818, 709 P.2d 837, *infra*, §552, applies. The sublessor has a "duty to renew the lease, because to fail to do so would injure the rights of the sublessee and there is an implied contract that the sublessor will not do anything that injures the sublessee." (187 C.A.3d 1101.)

West's Key Number Digest, Landlord and Tenant k.80 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

See 49 *Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §§999, 1000 [sublessee's rights]; 49 *Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §1001 [forfeiture]; 49 *Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §1002 [surrender].



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c. Effect of Sublease.

2. Liability of Sublessee to Lessor.

12 Witkin Sum. Cal. Law Real Property § 542

[§ 542] Liability of Sublessee to Lessor.

The sublessee is normally neither in privity of contract nor privity of estate with the lessor, and the lessor has no action against the sublessee for rent. (*Ericksen v. Rhee* (1919) 181 C. 562, 567, 185 P. 847.) But the rule is different where the sublessee expressly assumes the obligations of the lease. In that case, the lessor may sue as a third-party beneficiary of the assumption agreement between the sublessee and sublessor (lessee). (*Hartman Ranch Co. v. Associated Oil Co.* (1937) 10 C.2d 232, 244, 73 P.2d 1163; *Baldwin v. Kubetz* (1957) 148 C.A.2d 937, 944, 307 P.2d 1005 [suggesting that, in oil lease, lessor's interest in property might be great enough to permit action against sublessee who breaches implied covenant against drainage by drilling on adjoining land, even without assumption; see *infra*, §801].) (See *Rest.2d, Property (Landlord and Tenant) §16.1(4)*; 49 Am.Jur.2d (1995 ed.), Landlord and Tenant §1184.)

SUPPLEMENT: [This section is current through the latest supplement]
See 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §1000.



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3. Liability of Lessor to Sublessee.

12 Witkin Sum. Cal. Law Real Property § 543

[§ 543] Liability of Lessor to Sublessee.

Despite the lack of privity between the lessor and sublessee, if the sublessee assumes the obligations of the lease, the contract principle of third-party beneficiary (see 1 *Summary* (10th), *Contracts*, §697) becomes applicable. Thus, the lessor may sue a sublessee who assumes. (See *supra*, §542.) And if (1) the lessor has expressly agreed to the sublease, and (2) the sublessee assumes, the sublessee may sue the lessor for breach of the implied covenant of quiet enjoyment. (*Marchese v. Standard Realty & Dev. Co. (1977) 74 C.A.3d 142, 147, 141 C.R. 370*; see *Rest.2d, Property (Landlord and Tenant) §16.2(2)* [transferee entitled to benefit of express obligations assigned or that run with transferred interest].)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Sublease for Balance of Term.

12 Witkin Sum. Cal. Law Real Property § 544

[§ 544] Sublease for Balance of Term.

Because a sublease is a transfer of less than the leasehold, some jurisdictions hold that there cannot be a valid sublease of the entire balance of the term, and that the purported sublease is in effect an assignment. California, however, has upheld its validity. In *Backus v. Duffy* (1930) 103 C.A. 775, 284 P. 954, the tenant transferred the balance of the term to another person, but under a different rental, with a reservation of the right to display certain goods on the premises, and with a further reservation of a right to reenter for breach of condition. In an action by the tenant for the rent, the other party contended that the instrument resulted in an assignment, and that therefore only the lessor could sue him. *Held*, the instrument created a valid sublease, for the sublessee took a different estate from that of his sublessor, and the latter, by reserving the right of reentry, had a reversionary interest, and hence did not part with the entire term. (103 C.A. 777.) (See *Barkhaus v. Producers Fruit Co.* (1923) 192 C. 200, 206, 219 P. 435; *Hartman Ranch Co. v. Associated Oil Co.* (1937) 10 C.2d 232, 243, 73 P.2d 1163; *Garner v. Knudsen* (1954) 129 C.A.2d 747, 756, 277 P.2d 890; *Reed v. South Shore Foods* (1964) 229 C.A.2d 705, 709, 710, 40 C.R. 575, *infra*, §545; 49 Am.Jur.2d (1995 ed.), Landlord and Tenant §§1076, 1077.)

SUPPLEMENT: [This section is current through the latest supplement]

See 49 Am.Jur.2d (2006 ed.), Landlord and Tenant §§992, 993.



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- 5. Lease Provisions Are Not Incorporated.

12 Witkin Sum. Cal. Law Real Property § 545

[§ 545] Lease Provisions Are Not Incorporated.

In *Reed v. South Shore Foods* (1964) 229 C.A.2d 705, 40 C.R. 575, the owner-lessors of restaurant property leased it to plaintiff. Plaintiff and others created defendant corporation, plaintiff became a director, and he "assigned" the lease to defendant. Defendant became insolvent and defaulted on rent, taxes, and insurance. The owner-lessors served notice of default and demand for payment on plaintiff. Plaintiff then brought unlawful detainer against defendant. *Held*, judgment for plaintiff affirmed.

(a) Despite the language of assignment, the transfer was a sublease, because it contained an express condition that, on the assignee's decision to surrender, it would advise the assignor in order that he might take over the lease for the remainder of the term. It was immaterial that the subtenant made rental payments directly to the owner-lessors. (229 C.A.2d 709.)

(b) Under *C.C.P. 1161(3)*, the summary remedy of unlawful detainer is available to a sublessor. (229 C.A.2d 711.)

(c) Defendant's theory was that a provision in the main lease giving a grace period of 30 days to make good defaults was impliedly made part of the sublease, because of the provision in the "assignment" that the transfer was "subject to all the conditions, stipulations and agreements" contained in the main lease. But provisions in the master lease for the benefit of the original tenant do not become part of a sublease. (229 C.A.2d 712.)

(d) "The reason for the rule lies in the fact that the master lease and the sublease vest different estates and rest upon different agreements. Benefits conferred and considerations given for such benefits may be entirely different. This is illustrated by the facts of this case. The owner granting the original tenant a 30-day grace period for rental payment and performance of other obligations does so without materially jeopardizing his own interests. But to ascribe such an agreement by implication as a part of the sublease for the benefit of the sublessee would have quite different and serious consequences. It would leave the sublessor, exposed to the danger of divestiture and having to make a substantial cash outlay because of his sublessee's defaults, without any effective immediate remedy against said sublessee to insure reimbursement." (229 C.A.2d 712.)

SUPPLEMENT: [This section is current through the latest supplement]



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12 Witkin Sum. Cal. Law Real Property § 546

[§ 546] Effect of Condition.

The usual lease contains a covenant or condition against assignment or sublease without the consent of the lessor. (See *Rest.2d, Property (Landlord and Tenant) §15.2(2)*; 22 *Loyola L.A. L. Rev.* 405 [exhaustive article on assignment and sublease restrictions]; for form of clause, see C.E.B., 1 Office Leasing 2d, §24.5 et seq.; C.E.B., 1 Landlord-Tenant Practice 2d, §1.54.; 11B Am.Jur. Legal Forms 2d (1998 ed.), Leases of Real Property §161:669 et seq.) In that case, an assignment is not void, but only voidable. The leasehold passes to the assignee, subject only to forfeiture by the lessor. If the lessor accepts payments of rent from the assignee, even under a stipulation reserving the right to declare a forfeiture, the right is waived. (*Buchanan v. Banta* (1928) 204 C. 73, 76, 266 P. 547; *Taylor v. Odell* (1942) 50 C.A.2d 115, 121, 122 P.2d 919; *Martin v. Auerbach* (1949) 94 C.A.2d 222, 225, 210 P.2d 321; *Weisman v. Clark* (1965) 232 C.A.2d 764, 768, 43 C.R. 108; see 21 *Hastings L. J.* 516 [effect of provision requiring consent to assign]; 49 Am.Jur.2d (1995 ed.), Landlord and Tenant §§1103, 1171.)

The lessor accomplishes nothing by merely giving notice to the assignee that the assignment is invalid. Unless the lessor declares a forfeiture and demands surrender of possession, the assignee becomes a tenant, despite the lessor's refusal to accept rental payments. (*People v. Klopstock* (1944) 24 C.2d 897, 901, 151 P.2d 641; *Sexton v. Nelson* (1964) 228 C.A.2d 248, 258, 39 C.R. 407.)

West's Key Number Digest, Landlord and Tenant k.76

SUPPLEMENT: [This section is current through the latest supplement]

See 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §§939, 988; 11B Am.Jur. Legal Forms 2d (2006 ed.), Leases of Real Property §161:732 et seq.; 102 Am.Jur. Trials 277 [landlord's unreasonable refusal of consent to assignment or sublease].



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12 Witkin Sum. Cal. Law Real Property § 547

[§ 547] Distinction: Devise by Lessee.

The lessee's death ordinarily does not terminate the lease. The lessee's estate remains liable on its obligations. Also, the typical lessor's provision that the covenants shall be binding on the heirs, successors, assigns, etc., negates an intention to terminate the tenancy on death. Hence, although the latter provision will keep the covenant against assignment operative and binding on the lessee's heirs or legatees, it will not prevent those heirs or legatees from succeeding to the leasehold.

In *Burns v. McGraw* (1946) 75 C.A.2d 481, 171 P.2d 148, the lease contained detailed provisions against assignment, binding on successors. The lessee died, and his will made a devise of the business and the lease. The lessor conceded that the lease did not terminate by death and passed by operation of law to the heirs of the lessee, but argued that to give effect to the devise to the legatee would require a transfer of the lease by the executor to the legatee in violation of the provisions against assignment. *Held*, the devise was valid. The typical broad condition against assignment does not cover that situation, and "the lessor desiring such protection against the intrusion of strangers, has only to insert in the lease 'very special' language reserving the right to terminate the lease upon a tenant's death, or requiring consent to a bequest of the lease." (75 C.A.2d 488.) (See 49 Am.Jur.2d (1995 ed.), Landlord and Tenant §1102.)

SUPPLEMENT: [This section is current through the latest supplement]
See 49 Am.Jur.2d (2006 ed.), Landlord and Tenant §938.



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6. Assignment and Sublease by Tenant. d. Condition or Covenant Against Assignment or Sublease. 3. Rule in Dumpor's Case.

12 Witkin Sum. Cal. Law Real Property § 548

[§ 548] Rule in Dumpor's Case.

Dumpor's Case (1578) 76 Eng. Rep. R. 1110, held that a condition against assignment, even though expressly applicable to heirs and assigns of the lessee, is entire and cannot be apportioned by act of the parties; i.e., it operates always or not at all. Hence, if the lessor or a successor once waives the condition by consenting to an assignment, the condition is permanently waived or destroyed, and subsequent assignees may assign without the lessor's consent. This arbitrary doctrine has been repudiated by the Restatement and cases. (See *Kendis v. Cohn* (1928) 90 C.A. 41, 52, 265 P. 844; *Crowell v. Riverside* (1938) 26 C.A.2d 566, 571, 80 P.2d 120; *Boston Properties v. Pirelli Tire Corp.* (1982) 134 C.A.3d 985, 993, 185 C.R. 56 [*Kendis v. Cohn* "makes clear that the rule in *Dumpor's* case is not the law in California"]; 22 *Loyola L.A. L. Rev.* 551 [modern status of rule and drafting solutions].) It was abolished by the enactment of C.C. 1995.340 in 1991. (See *infra*, §560.)

SUPPLEMENT: [This section is current through the latest supplement]



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- 4. Construction Against Forfeiture.

12 Witkin Sum. Cal. Law Real Property § 549

[§ 549] Construction Against Forfeiture.

Because a prohibited assignment or sublease may result in a forfeiture, the condition will be construed strictly against the lessor. Thus, a covenant against assignment does not cover a sublease (*Cross v. Bouck* (1917) 175 C. 253, 256, 165 P. 702) or, ordinarily, an assignment by operation of law. And if in terms it covers certain types of assignments, the language will not be extended to cover others. In *Stratford Co. v. Continental Mortg. Co.* (1925) 74 C.A. 551, 241 P. 429, the lease provided that in the event anyone should secure possession "under execution, or by reason of any receivership or proceeding in bankruptcy, or other operation of law, or otherwise," the lessor could reenter and take possession. The lessee died, and his administrator sold the leasehold interest and assigned the lease to the purchaser. *Held*, the sale did not come within the terms of the condition. The court found other instances that might be covered by the general language, and refused to extend it further. (74 C.A. 555.) (See 71 A.L.R.3d 780 [grazing or pasturage agreement as violation of covenant]; 49 Am.Jur.2d (1995 ed.), Landlord and Tenant §§1090, 1096.)

An assignment by one partner to another has been held not to violate the provision against assignment. (*Safeway Stores v. Buhlinger* (1927) 85 C.A. 717, 719, 259 P. 1013; see *Hoops v. Tate* (1951) 104 C.A.2d 486, 487, 231 P.2d 560 [covenant was inapplicable to assignment by one colessee to another]; 49 Am.Jur.2d (1995 ed.), Landlord and Tenant §1093 [contrary rule in other jurisdictions].)

But the court may find a prohibited assignment by looking through form to substance. Thus, in *Weintraub v. Weingart* (1929) 98 C.A. 690, 277 P. 752, the lessee formed a corporation, and made an agreement with that corporation by the terms of which he held the lease in trust for it. *Held*, the covenant against assignment was violated. The trustee held no beneficial interest and the assignee corporation could, at any time, have terminated the trust. (98 C.A. 695.) (See *Sexton v. Nelson* (1964) 228 C.A.2d 248, 258, 259, 39 C.R. 407 [no violation where lessee transferred to corporation wholly owned by him; distinguishing *Weintraub v. Weingart*].)

In *Airport Plaza v. Blanchard* (1987) 188 C.A.3d 1594, 234 C.R. 198, a condition against assignment was construed to prohibit mortgage of a leasehold. (See *infra*, §554.)

SUPPLEMENT: [This section is current through the latest supplement]

See 49 *Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §§927, 934 [construction against forfeiture]; 49 *Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §930 [assignment to partner].



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Witkin Summary of California Law VII. LANDLORD AND TENANT RELATIONSHIP D. Leases.

- 6. Assignment and Sublease by Tenant.
- d. Condition or Covenant Against Assignment or Sublease.
- 5. Assignment or Sublease by Corporate Lessee.

12 Witkin Sum. Cal. Law Real Property § 550

[§ 550] Assignment or Sublease by Corporate Lessee.

The fact that the lessee is a corporation complicates the problem. In *Ser-Bye Corp. v. C.P. & G. Markets* (1947) 78 C.A.2d 915, 179 P.2d 342, plaintiff landlord alleged that defendant corporation, operating informally as the alter ego of defendants P and G, requested consent to assign its lease to H; that plaintiff refused; and that defendants P and G then transferred shares of stock to H, who went into possession. *Held*, the clause was not violated. Plaintiff, in choosing to deal with a corporate lessee, knew that ownership of its shares might change, and it could have made, but did not make, provision for such a transfer. (78 C.A.2d 920.) This case, while stressing the equitable rule against forfeitures, appears to give inadequate consideration to the equally important rule that the court will disregard the corporate entity when it is used to circumvent an obligation. (See 12 A.L.R.2d 179 [conditions accompanying or following dissolution of lessee corporation, as breach of covenant against assignment or sublease]; 39 A.L.R.4th 879 [merger or consolidation of corporate lessee as breach of clause in lease prohibiting, conditioning, or restricting assignment or sublease]; 9 *Summary* (10th), *Corporations*, §12.)

A different view was taken and a questionable result reached in *Standard Fireproof Bldg. Co. v. Carpenter* (1947) 79 C.A.2d 330, 180 P.2d 53. The corpus of a charitable trust consisted solely of the stock of a corporation, which was the lessee of valuable business property in Los Angeles under a 99-year lease made in 1912, and which paid the income to the trustee, after deducting rent and other expenses. This method of earning money for the trust through the medium of the lessee corporation proved expensive, and, to avoid the waste of funds for corporation taxes and other costs, an attempt was made by the lessee corporation to assign the lease to the trustee. *Held*, the assignment could not be enforced, for the lease provided that an assignee must assume the obligation to pay rent, and the trust had no assets which could be used to pay rent in the event that the leased property failed to earn the bare rental. "We are not unmindful of the fact that the present relationship of the lessor and lessee differs in no respect from that which would exist if the assignment were made to the trustee, because the corporation has no assets other than its ownership of the leasehold interest. However, this situation was not the result of judicial decree. Under the facts of this case, the judgment of the trial court assumes a power to impair the obligation of a contract, and may not stand." (79 C.A.2d 332.)

The court's view seems unrealistic. The lessor could only have been benefited, not injured, by the elimination of the wasteful operation through the corporation as conduit, and the possibility of business property in downtown Los

Angeles not earning enough to pay rent under a 1912 lease was too remote to deprive the court of power to recognize the substance rather than the form of the transaction.

In *Airport Plaza v. Blanchard* (1987) 188 C.A.3d 1594, 234 C.R. 198, the lease permitted the lessee to assign the entire leasehold without the lessor's consent if the lessee remained personally liable. *Held*, this condition precluded the corporate lessee from assigning its assets and the leasehold to its shareholders and then dissolving the corporation, for this would involve more than a technical change of ownership. The corporation's assets would become part of the personal assets of the former shareholders and subject to commingling and use for other purposes, impairing the lessor's security. (188 C.A.3d 1603.)

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D. Leases.

7. Restriction on Transfer of Commercial Lease.

a. Development of Law.

1. Majority and Minority Rules.

12 Witkin Sum. Cal. Law Real Property § 551

[§ 551] Majority and Minority Rules.

In *Kendall v. Ernest Pestana* (1985) 40 C.3d 488, 220 C.R. 818, 709 P.2d 837, *infra*, §552, the court summarized the American case law as follows:

The law generally favors free alienability of property, and contractual restraints on leasehold interests are strictly construed against the lessor. (40 C.3d 494 and footnote 7.) Nevertheless, a majority of jurisdictions have long adhered to the rule that the lessor may arbitrarily refuse to approve a proposed assignee no matter how suitable the assignee appears to be and no matter how unreasonable is the lessor's objection, although the rule's harsh consequences have often been avoided by application of waiver and estoppel. (40 C.3d 495.) However, "[a] growing minority of jurisdictions now hold that where a lease provides for assignment only with the prior consent of the lessor, such consent may be withheld *only where the lessor has a commercially reasonable objection to the assignment*, even in the absence of a provision in the lease stating that consent to assignment will not be unreasonably withheld." (40 C.3d 496, citing cases and *Rest.2d, Property (Landlord and Tenant) §15.2(2).*) (See 22 *Loyola L.A. L. Rev.* 433 [California cases before *Kendall*]; 17 *U.S.F. L. Rev.* 681 [advocating adoption of minority rule]; 21 *A.L.R.4th* 188 [when lessor may withhold consent under unqualified provision in lease prohibiting assignment or subletting of leased premises without lessor's consent]; 69 *Proof of Facts* 3d 191 [establishing landlord's unreasonable withholding of consent to assignment or sublease].)

The majority rule was followed in *Richard v. Degen & Brody* (1960) 181 C.A.2d 289, 299, 5 C.R. 263, and *Hamilton v. Dixon* (1985) 168 C.A.3d 1004, 1008, 1010, 214 C.R. 639. However, the *Richard* holding was questioned in *Laguna Royale Owners Assn. v. Darger* (1981) 119 C.A.3d 670, 681, 174 C.R. 136, and rejected in *Cohen v. Ratnoff* (1983) 147 C.A.3d 321, 330, 195 C.R. 84, and *Schweiso v. Williams* (1984) 150 C.A.3d 883, 886, 198 C.R. 238. In 1984, the United States Court of Appeals for the Ninth Circuit, in *Prestin v. Mobil Oil Corp.* (9th Cir. 1984) 741 F.2d 268, took note of these conflicting decisions and declared that the California Supreme Court would approve *Cohen* and adopt the minority rule.

Kendall v. Ernest Pestana, *supra*, approved the minority rule: "We now adopt the rule tentatively ascribed to us by the *Prestin* court, and disapprove the holdings in *Richard v. Degen & Brody* ... and *Hamilton v. Dixon*." (40 C.3d 498.)

(See *infra*, §552.)

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7. Restriction on Transfer of Commercial Lease.

a. Development of Law.

2. Adoption of Minority Rule.

12 Witkin Sum. Cal. Law Real Property § 552

[§ 552] Adoption of Minority Rule.

Kendall v. Ernest Pestana (1985) 40 C.3d 488, 220 C.R. 818, 709 P.2d 837, announced the minority rule that a lessor of a commercial lease with a provision requiring assent to assignment cannot unreasonably withhold assent.

(a) *Policy reasons: Lease as a conveyance.*

(1) The policy against restraints on alienation has become paramount in our increasingly urban society. C.C. 711 forbids unreasonable restraints on alienation, and reasonableness is determined by comparing the justification for the restraint with the quantum of restraint actually imposed. And if the assignment provision "is implemented in such a manner that its underlying purpose is perverted by the arbitrary or unreasonable withholding of consent, an unreasonable restraint on alienation is established." (40 C.3d 499, quoting *Cohen v. Ratinoff (1983) 147 C.A.3d 321, 195 C.R. 84.*)

(2) The *Restatement Second of Property (Landlord and Tenant) §15.2(2)* adopts the minority rule. "A restraint on alienation without the consent of the landlord of a tenant's interest in leased property is valid, *but the landlord's consent to an alienation by the tenant cannot be withheld unreasonably*, unless a freely negotiated provision in the lease gives the landlord an absolute right to withhold consent." (40 C.3d 499.)

(3) The Comment to the Restatement section explains: "The landlord may have an understandable concern about certain personal qualities of a tenant, particularly his reputation for meeting his financial obligations. The preservation of the values that go into the personal selection of the tenant justifies upholding a provision in the lease that curtails the right of the tenant to put anyone else in his place by transferring his interest, but this justification does not go to the point of allowing the landlord arbitrarily and without reason to refuse to allow the tenant to transfer an interest in leased property." The Comment adds that the lessor's interest in the character of his tenant is protected by the right to object on reasonable commercial grounds. And the lessor's interests are also protected by the fact that the original lessee remains liable as a surety even if the lessor consents to the assignment and the assignee expressly assumes the obligations of the lease. (40 C.3d 499, 500.)

(b) *Policy reasons: Lease as a contract.*

(1) There is an implied covenant creating a duty of good faith and fair dealing inherent in every contract. Where a contract confers on one party a discretionary power affecting the rights of the other, the discretion must be exercised in accordance with that duty. (40 C.3d 500.)

(2) Whether the lessor's refusal to consent was reasonable is a question of fact, and some of the factors that may be considered are "financial responsibility of the proposed assignee; suitability of the use for the particular property; legality of the proposed use; need for alteration of the premises; and nature of the occupancy, i.e., office, factory, clinic, etc." (40 C.3d 501, citing *Cohen, supra*, Rest.2d, *Property (Landlord and Tenant)*, §15.2, Reporter's Note 7, and 54 A.L.R.3d 689 [construction and effect of provision in lease that consent to subletting or assignment will not be arbitrarily or unreasonably withheld].)

(3) Denying consent solely on the basis of personal taste, convenience, or sensibility is not commercially reasonable. It is likewise unreasonable to deny consent in order to charge a higher rent. "This is because the lessor's desire for a better bargain than contracted for has nothing to do with the permissible purposes of the restraint on alienation--to protect the lessor's interest in the preservation of the property and the performance of the lease covenants." (40 C.3d 501.)

(c) *Justification for majority rule is not compelling.* The following reasons for retaining the majority rule have been offered:

(1) That a lease is a conveyance and that the lessor, having exercised a personal choice of tenant and provided against a substitute except with consent, is under no obligation to look to anyone but the lessee for the rent. This argument, based on traditional notions of property, has been undermined in California by the rule of C.C. 1951.2 that lessors have a duty to mitigate damages on the lessee's abandonment by seeking a substitute lessee. And the values of personal selection of a lessee are preserved by the right to refuse consent on any commercially reasonable grounds, and by the fact that the original lessee remains a guarantor of performance by the assignee. (40 C.3d 502.)

(2) That an approval clause is an unambiguous reservation of absolute discretion over assignments; i.e., that the lessee could have bargained for a reasonableness clause, and, having failed to do so, the law should not rewrite the contract for him. Many authorities view the standard approval clause as not unambiguous, and take the position that the parties must have contemplated that the lessor would be required to give some reason for withholding consent. (40 C.3d 502, 503.) In the light of these authorities, the assertion that an approval clause clearly grants the lessor absolute discretion is untenable. "It is not a rewriting of a contract, as respondent suggests, to recognize the obligations imposed by the duty of good faith and fair dealing, which duty is implied by law in every contract." (40 C.3d 503.)

(3) That this court should not depart from the common law majority rule because substantial real property rights were created in reliance on it. The answers are that (a) the majority rule is not universally held and has never been adopted by this court, and (b) the minority rule is part of an increasing recognition of the contractual nature of leases. (40 C.3d 504.)

(4) That the lessor has the right to realize the increased value of his property, and therefore that any increase in the market value during the term of a lease properly belongs to the lessor, not the lessee. This argument is answered by a commentator (Miller & Starr) as follows: "[W]hen the lessee executed the lease he acquired the contractual right for the exclusive use of the premises, and all of the benefits and detriment attendant to possession, for the term of the contract. He took the downside risk that he would be paying too much rent if there should be a depression in the rental market. ... Why should he be deprived of the contractual benefits of the lease because of the fortuitous inflation in the marketplace[?] ... The landlord agreed to dispose of possession for the limited term and he could not reasonably anticipate any more than what was given to him by the terms of the lease. His reversionary estate will benefit from the increased value from the inflation in any event, at least upon the expiration of the lease." (40 C.3d 504.) Moreover, the

lessor is free to build periodic rent increases into a lease. (40 C.3d 504.)

(5) That the 1970 Legislature, in adopting C.C. 1951.4 (see *infra*, §744 et seq.), impliedly recognized that in the absence of a "reasonableness clause" a lessor might believe that he had a right to arbitrarily withhold consent and then frustrate the statutory scheme. But implicit recognition in a statute of an existing common law rule that is not the subject of the statute does not constitute a codification of the rule and does not prevent a court from reexamining it. (40 C.3d 506.)

Three footnotes augment the opinion: (a) Although the opinion deals with an assignment, "our holding applies equally to subleases." (40 C.3d 492, footnote 2.) (b) "This case does not present the question of the validity of a clause absolutely prohibiting assignment, or granting absolute discretion over assignment to the lessor. We note that under the Restatement rule such a provision would be valid if freely negotiated." (40 C.3d 499, footnote 14.) (c) "[N]othing bars the parties to commercial lease transactions from making their own arrangements respecting the allocation of appreciated rentals if there is a transfer of the leasehold." (40 C.3d 505, footnote 17.) (See 18 *Pacific L. J.* 327 [Kendall]; 14 *Pepperdine L. Rev.* 81 [same]; 13 *Western State L. Rev.* 171 [same]; 21 *A.L.R.4th* 188 [unqualified provision].)

The rule of *Kendall v. Ernest Pestana* has been codified, but was made expressly nonretroactive. (See *infra*, §555.)

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7. Restriction on Transfer of Commercial Lease.

a. Development of Law.

3. Codification.

12 Witkin Sum. Cal. Law Real Property § 553

[§ 553] Codification.

The decision in *Kendall v. Ernest Pestana* (1985) 40 C.3d 488, 220 C.R. 818, 709 P.2d 837, supra, §552, has been codified. (See C.C. 1995.010 et seq.) The statute allows the parties to a commercial lease to restrict transfer by the lessee (infra, §555) and specifies remedies for violations of the parties' rights (infra, §557 et seq.). (See 21 *Pacific L. J.* 535; *Carma Developers (Calif.) v. Marathon Dev. Calif.* (1992) 2 C.4th 342, 366, 6 C.R.2d 467, 826 P.2d 710, infra, §556; on legislative purpose, see C.C. 1995.270(a); for definitions, see C.C. 1995.020.) Except as provided in C.C. 1995.270 (see infra, §555), C.C. 1995.010 et seq. apply to leases executed before, on, or after January 1, 1990. (C.C. 1995.030.)

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b. Commercially Reasonable Objection.

12 Witkin Sum. Cal. Law Real Property § 554

[§ 554] Commercially Reasonable Objection.

In *John Hogan Enterprises v. Kellog* (1986) 187 C.A.3d 589, 231 C.R. 711, defendant lessor entered into a long-term lease of property to plaintiff lessee for the purpose of operating a women's ready-to-wear shop. The lease provided for a minimum monthly rent of \$ 2,750, plus a percentage of gross sales, and the average monthly rent in recent years had been approximately \$ 4,000. After 21 years of profitable operation, plaintiff notified defendant of its intention to close the store, and thereafter, without defendant's knowledge, assigned the 9-year remainder of the lease to a third party for \$ 150,000, an amount equivalent to the difference between the minimum and actual rents that would have been payable. Defendant later learned that the assignees intended to operate an antique store as a hobby and that the expected gross sales would never generate rent over the specified minimum. Moreover, defendant was never given requested financial information or a plan for the assignees' business. Defendant then refused to consent to the assignment, and plaintiff brought this action for damages. *Held*, defendant was commercially justified in withholding consent.

(a) A lessor's refusal to consent for the purpose of charging a higher rent or receiving part of the consideration paid for the lease is arbitrary, but defendant did not attempt to extract a higher rent than historically received or than plaintiff would have been expected to pay if it had fulfilled the lease terms for its remainder. (187 C.A.3d 593.) Here, the lessor would receive considerably less rent when the property was converted into a hobby antique store, and the lessee would gain at least \$ 1,250 per month above the minimum rent it would have been required to pay the lessor. (187 C.A.3d 594.)

(b) "When a lessor has reasonable commercial objections to a lease assignment, it does not breach the lease by continuing to negotiate or even requiring a new lease be entered into or that the premium paid lessee for the assignment be paid to lessor, at least up to the amount which lessor could expect from continued operation by the assigning lessee, where lessor would be justified in an outright refusal without further negotiations. In this case, it is unreasonable to require Lessor to accept an unsuitable tenant where the present commercial value of the lease premises is at least \$ 4,000 per month, an amount which Lessor was receiving when Lessee decided to assign and an amount assignees were willing to pay. To force Lessor to accept the minimum \$ 2,750 figure of the original lease while Lessee pockets \$ 1,250 per month for providing an assignee who cannot generate more than \$ 2,750 for Lessor is out of touch with commercial reality. Refusing to consent to highway robbery cannot be deemed commercially unjustified." (187 C.A.3d 594.)

In *Airport Plaza v. Blanchard* (1987) 188 C.A.3d 1594, 234 C.R. 198, defendant lessor made a ground lease to plaintiff corporate lessee, and plaintiff sought to mortgage the leasehold. The court pointed out that a ground lease is essentially a financing device for developing unimproved land. The lessor's role is similar to that of a secured lender, and the lessee pays for most of the development. (188 C.A.3d 1600.) Because the terms required by a commercial lender would constitute a substantial variation of the lease, the lessor had commercially reasonable grounds for refusing to consent. (188 C.A.3d 1600, 1601.)

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7. Restriction on Transfer of Commercial Lease.

c. Tenant's Right To Transfer.

1. Authorized Restrictions on Right.

12 Witkin Sum. Cal. Law Real Property § 555

[§ 555] Authorized Restrictions on Right.

(1) *Right To Transfer Unless Restricted.* Unless a lease includes a restriction on transfer, a tenant has the unrestricted right to transfer the tenant's interest in the lease. (C.C. 1995.210(b).) An ambiguity in a restriction on transfer of a tenant's interest in a lease must be construed in favor of transferability. (C.C. 1995.220.)

(2) *Lease May Include Restriction.* Subject to the limitations in C.C. 1995.010 et seq., a lease may include a restriction on transfer of the tenant's interest in the lease. (C.C. 1995.210(a).) This provision, by authorizing all restrictions on transfer of a commercial leasehold except where prohibited by other provisions of C.C. 1995.010 et seq., effectively supersedes the restrictions imposed by C.C. 711 (supra, §190) which would otherwise apply to commercial leases. (*Carma Developers (Calif.) v. Marathon Dev. Calif. (1992) 2 C.4th 342, 367, 6 C.R.2d 467, 826 P.2d 710, infra, §556.*)

(3) *Content of Restriction.* A restriction on transfer of a tenant's interest in a lease may absolutely prohibit transfer. (C.C. 1995.230.) It may provide that the transfer is subject to any express standard or condition, including a provision that the landlord is entitled to consideration that the tenant receives from a transferee in excess of the rent under the lease. (C.C. 1995.240.) However, the consideration authorized by C.C. 1995.240 is only that based on appreciated rent. It does not include consideration for the business itself. (*Ilkhchooyi v. Best (1995) 37 C.A.4th 395, 405, 45 C.R.2d 766* [profit-sharing clause in lease that conditioned transfer on payment of 75% of value of covenant not to compete was unauthorized and unconscionable].)

(4) *Landlord's Consent: Express Standard.* A restriction on transfer may require the landlord's consent for transfer subject to an express standard or condition for giving or withholding consent, including that the landlord's consent may not be unreasonably withheld or that the landlord's consent may be withheld subject to express standards or conditions. (C.C. 1995.250; see 35 *Santa Clara L. Rev.* 845 [C.C. 1995.250 and status of "sole discretion" clauses in California commercial leases].)

(5) *Landlord's Consent: Implied Standard.* If a restriction on transfer of the tenant's interest requires the landlord's consent for transfer, but provides no standard for giving or withholding consent, the restriction on transfer must be

construed to include an implied standard that the landlord's consent may not be unreasonably withheld. Whether the landlord's consent has been unreasonably withheld in a particular case is a question of fact on which the tenant has the burden of proof. The tenant may satisfy the burden of proof by showing that, in response to the tenant's written request for a statement of reasons for withholding consent, the landlord failed, within a reasonable time, to state in writing a reasonable objection to the transfer. (C.C. 1995.260.)

C.C. 1995.260, which codifies the rule of *Kendall v. Ernest Pestana* (1985) 40 C.3d 488, 220 C.R. 818, 709 P.2d 837, supra, §552, applies to restrictions executed on or after September 23, 1983. "If a restriction on transfer executed before September 23, 1983, requires the landlord's consent for the tenant's transfer but provides no standard for giving or withholding consent, the landlord's consent may be unreasonably withheld. For purposes of this subdivision, if the terms of a restriction on transfer are fixed by an option or other agreement, the restriction on transfer is deemed to be executed on the date of execution of the option or other agreement." (C.C. 1995.270(b); see *Kreisher v. Mobil Oil Corp.* (1988) 198 C.A.3d 389, 399, 243 C.R. 662, 9 Cal. Proc. (4th), Appeal, §984 [*Kendall* not retroactive].)

SUPPLEMENT: [This section is current through the latest supplement]

(5) *Landlord's Consent: Implied Standard.Kreisher case:*

Cross-Reference: 9 Cal. Proc. (5th), Appeal, §552.



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 - c. Tenant's Right To Transfer.
2. Illustration of Permissible Restraint on Right.

12 Witkin Sum. Cal. Law Real Property § 556

[§ 556] Illustration of Permissible Restraint on Right.

In *Carma Developers (Calif.) v. Marathon Dev. Calif.* (1992) 2 C.4th 342, 6 C.R.2d 467, 826 P.2d 710, the court upheld, under both prior law and C.C. 1995.010 et seq. (supra, §553), the validity of a commercial lease provision allowing the lessor to terminate the lease and recapture the leasehold on notice by the lessee of intent to assign or sublet.

Both parties were commercial real estate development companies. The lease had two provisions relating to sublease or assignment by the tenant. Paragraph 15(a) prohibited the tenant from assigning or subleasing any part of the premises without the landlord's consent, which could not be unreasonably withheld. Under paragraph 15(b), the tenant was required to provide notice of its intent to assign or sublet any part of the premises. Upon notice, the landlord was given the right to terminate the lease, and enter into a new lease with the intended assignee or sublessee if it so elected; the tenant was entitled to no share of the profit that might be realized by the landlord from termination and reletting. When the tenant decided to relocate its headquarters, it requested permission to sublet about 80% of the premises at a rate substantially exceeding the rent under the lease. The landlord responded with a notice of termination, and unsuccessfully pursued negotiations with the proposed sublessee. The tenant sued for breaches of paragraphs 15(a) and 15(b) of the lease and of the implied covenant of good faith and fair dealing. The trial court read a "reasonableness" standard into the termination and recapture provisions of paragraph 15(b), and ruled on summary adjudication that the landlord's exercise of the clause in order to realize the appreciated rental value breached that standard. The jury awarded damages to the tenant. The Court of Appeal affirmed, holding that paragraph 15(b) was void as an invalid restraint on alienation under the rule expressed in *Kendall v. Ernest Pestana* (1985) 40 C.3d 488, 220 C.R. 818, 709 P.2d 837, supra, §552. *Held*, reversed.

(a) *Paragraph 15(b) was valid under prior law.*

(1) Unless a lease specifically provides otherwise, a tenant's rights are generally considered freely alienable. C.C. 711 (supra, §190) codifies the common law prohibition against unreasonable restraints, and *Kendall* established the rule that a lease provision requiring consent to an assignment or sublease contains an implied covenant that consent shall not be unreasonably withheld. *Kendall* noted that denial of consent so that the landlord may charge a higher rent than originally contracted for is not commercially reasonable. (2 C.4th 355.) However, *Kendall* did not decide the question

presented here: To what extent may the parties *expressly contract* to restrict alienation of the lessee's leasehold interest? (2 C.4th 356.)

(2) A lease is by nature limited in scope and duration. Hence, any restriction on alienation of the tenant's interest is less detrimental to the free flow of property than a comparable restriction on a fee estate. Furthermore, of the three categories of restraints on alienation recognized by the Restatement (disabling, promissory, and forfeiture restraints; see *supra*, §192), forfeiture restraints, a variation of which was adopted by these parties in paragraph 15(b), are viewed the most favorably. (2 C.4th 359, citing the text.) This is because a forfeiture restraint does not bind the lessee to the lease throughout its term, but allows it to extricate itself if a suitable transferee can be found. (2 C.4th 359.)

(3) The *Kendall* opinion, in footnote 17, specifically affirmed the power of parties to a commercial lease to make their own arrangements for allocating appreciated rent on transfer of the leasehold. In the present case, the concern was not with the fair allocation of rental value, but with the effect of the agreed allocation on the power of alienation. Reserving appreciated rental value to the lessor has no practical effect on alienation of the lessee's interest, because a commercial lessee desiring to sublease or assign *solely* to realize appreciated rental value would have to rent alternate space for its operations, which would presumably be priced at the increased market rate. A restraint arises only when the lessee desires to relocate or curtail operations. (2 C.4th 360.) As to relocation, alienation is restrained to the extent the advantages of the move do not exceed the increased cost of space at the new location. As to curtailment of operations, alienation is restrained to the extent the lessee is unwilling to risk losing all rights in the premises and the value of its improvements in order to be free of further obligation for the unwanted space. Hence, the Court of Appeal erred when it characterized the restraint imposed by paragraph 15(b) as "total." (2 C.4th 361.)

(4) The Court of Appeal also erred in ruling that termination of a lease for purposes of appropriating increased rental value is per se unreasonable. It is true that where a lease contains a consent restraint the parties can have no reasonable expectations as to allocation of increased rental value, but this reasoning collapses where the lease manifests other goals and expectations. Termination of the lease in order to claim increased rental value was precisely what was contemplated by paragraph 15(b). The landlord's conduct was entirely consistent with the express terms of this provision, whereas the tenant's insistence on sharing sublease profits was an attempt to get more than it had bargained for. (2 C.4th 362.) Under the facts of this case, the strong public policy favoring freedom of contract in connection with a commercial lease outweighed any marginal restraint on alienation; hence, paragraph 15(b), as written and applied, was a *reasonable* restraint on alienation. (2 C.4th 363.)

(5) The tenant argued that, in order to give effect to the requirement of paragraph 15(a) that consent not be unreasonably withheld, termination under paragraph 15(b) could be permitted only when consent to transfer could reasonably be withheld. However, termination of a lease and consent to a transfer differ both in purpose and effect. A sublease or assignment leaves the lessee liable as a surety while the sublessee or assignee takes primary responsibility for performance of the lease. Termination, on the other hand, releases the lessee from all further obligations and permits the lessor to pursue a new lease. Only an interpretation consistent with the express terms of paragraph 15(b) would give effect to both lease provisions. (2 C.4th 364.)

(b) *Paragraph 15(b) was valid under C.C. 1995.010 et seq.*

(1) C.C. 1995.260, codifying the *Kendall* rule, and C.C. 1995.270, restricting the rule's retroactivity (see *supra*, §553), do not apply to this case. First, C.C. 1995.260 applies only to transfer consent provisions containing no standard for giving or withholding consent, and paragraph 15(a) contained an express reasonableness standard. Second, paragraph 15(b) was not a transfer consent provision, but instead a provision giving the landlord an option to terminate. (2 C.4th 367.)

(2) However, the legislative history demonstrates that other provisions of the new statute were intended to apply to transfer restrictions like that provided in paragraph 15(b). (2 C.4th 370.) Termination in order to realize appreciated rental value is expressly contemplated by C.C. 1995.240, and C.C. 1995.210(a) permits a commercial lease to restrict

transfer of the lessee's interest subject only to other limitations in C.C. 1995.010 et seq. (See *supra*, §555.) Other than the requirement that ambiguous provisions be interpreted in favor of transferability, the new statute contains no limitations on the breadth of transfer limitations. Hence, beyond general contract limitations regarding unconscionable agreements and other general statutory or constitutional prohibitions, none of which applied here, the parties' power to restrict transfer was unlimited, and paragraph 15(b) was lawful under the new legislation. (2 *C.4th* 371.)

(c) *The landlord did not violate the covenant of good faith and fair dealing.* The covenant of good faith and fair dealing does not prohibit a party from doing what is expressly permitted by an agreement (see 1 *Summary* (10th), *Contracts*, §797). (2 *C.4th* 374.) In this case, the landlord's termination of the lease in order to claim for itself appreciated rental value was expressly permitted by the lease and clearly within the parties' reasonable expectations. The trial court found that the landlord's refusal to permit recovery of the tenant's unamortized improvement cost was a further breach of the covenant of good faith. However, under the lease all improvements immediately became the landlord's property, so any interpretation requiring the landlord to pay for those improvements would be contrary to the express terms of the lease. (2 *C.4th* 376.) (See 20 *Pepperdine L. Rev.* 845.)

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D. Leases.

7. Restriction on Transfer of Commercial Lease.

d. Remedies for Breach of Assignment or Sublease Covenant.

1. Adoption of Statute.

12 Witkin Sum. Cal. Law Real Property § 557

[§ 557] Adoption of Statute.

(1) *Law Revision Commission Report.* The California Law Revision Commission in May 1990 made its Recommendation Relating to Commercial Real Property Leases: Remedies for Breach of Assignment or Sublease Covenant. (20 Cal. Law Rev. Com. Reports, p. 2405.) The recommended legislation was enacted in 1991. (C.C. 1995.300 et seq.) (See 23 *Pacific L. J.* 725.)

(2) *Remedies Subject to Lease Provisions and Applicable Defenses.* A remedy provided by law for violation of the rights of the tenant or of the landlord concerning transfer of a tenant's interest in a lease, including a remedy provided in C.C. 1995.300 et seq., is subject to an express provision in the lease that affects the remedy. (C.C. 1995.300(a).) C.C. 1995.300(a) codifies the general rule that the parties to a contract may negotiate the remedies to be applied in case of a breach of the contract, but this rule is subject to general principles limiting freedom of contract. (Law Rev. Com. Comment.)

Furthermore, a remedy is subject to an applicable legal or equitable defense, including waiver and estoppel. (C.C. 1995.300(b).) C.C. 1995.300(b) codifies the general rule that a party may waive the party's remedies for breach either expressly or by conduct. (Law Rev. Com. Comment.)

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- 2. Remedies for Unreasonably Withholding Consent.

12 Witkin Sum. Cal. Law Real Property § 558

[§ 558] Remedies for Unreasonably Withholding Consent.

If a lease requires the landlord's consent for transfer subject to an express or implied standard that the landlord's consent may not be unreasonably withheld, and the landlord unreasonably withholds consent, the tenant has all the remedies provided for breach of contract, including the right to contract damages caused by the landlord's breach. (C.C. 1995.310(a).) The tenant also has the right to terminate the lease, in addition to other remedies provided by law for breach of a lease. (C.C. 1995.310(b).)

C.C. 1995.310 treats a requirement that the landlord be reasonable in withholding consent as a covenant, rather than a condition, violation of which is a breach of the lease. It does not distinguish between breach of an express reasonable consent requirement under C.C. 1995.250 and an implied reasonable consent requirement under C.C. 1995.260 (*supra*, §555). A breach of either entitles the tenant to the normal remedies for breach of contract. (Law Rev. Com. Comment.)

The remedies available for breach of contract include declaratory relief, specific performance or mandatory injunction, termination of the lease, and contract damages. Under C.C. 1995.310, the tenant may seek contract damages or exercise the right to terminate the lease or both. The landlord's wrongful conduct, such as wrongful withholding of consent, may, in addition to a breach of contract, involve a tort (e.g., interference with contract or prospective advantage, or trespass; see 5 *Summary* (10th), *Torts*, §§693 et seq., 730 et seq., 741 et seq.). And there may be statutory remedies. The tenant may also transfer without the landlord's wrongfully withheld consent. (Law Rev. Com. Comment.)

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- 3. Remedies for Transfer in Violation of Restriction.

12 Witkin Sum. Cal. Law Real Property § 559

[§ 559] Remedies for Transfer in Violation of Restriction.

(1) *Remedies Against Tenant.* If a tenant transfers the tenant's interest in violation of a restriction on transfer, the landlord has all the remedies provided for breach of contract, including the right to contract damages caused by the tenant's breach. (C.C. 1995.320(a).) The landlord also has the right to terminate the lease (C.C. 1995.320(b)), in addition to other remedies provided by law for breach of a lease, such as unlawful detainer, declaratory relief, and injunctive relief (C.C. 1995.320).

C.C. 1995.320 treats a restriction on transfer as a covenant, violation of which is a breach of the lease. A transfer in violation of the restriction is voidable, not void, and the landlord may waive the landlord's remedies for breach either expressly or by conduct. This principle applies to a sublease as well as an assignment. The landlord may seek contract damages caused by the wrongful transfer in addition to termination of the lease. This is a specific application of C.C. 1951.2 (damages in connection with lease termination; *infra*, §694). (Law Rev. Com. Comment.)

(2) *Remedies Against Transferee.* An assignee who receives or makes a transfer in violation of a restriction on transfer of a tenant's interest in a lease is jointly and severally liable with the tenant for contract damages under C.C. 1995.320. For this purpose, the provisions of C.C. 1951.2 applicable to a lessee apply to an assignee. (C.C. 1995.330(a).) C.C. 1995.330(a) is an application of the general rule that the landlord and assignee are in privity of estate, and the assignee is liable to the landlord for breaches occurring after transfer. These principles apply to the wrongful transfer itself. An assignee that receives a transfer or makes a subsequent transfer in violation of a transfer restriction is liable to the same extent as a tenant would be. (Law Rev. Com. Comment.)

The landlord's right to terminate a lease under C.C. 1995.320 includes the right to terminate a transfer without terminating the lease. If the landlord terminates a transfer without terminating the lease, the assignee or subtenant in possession is guilty of unlawful detainer, and the landlord may obtain possession from the assignee or subtenant without terminating the tenant's right to possession. The landlord may use the procedure provided in *C.C.P. 1159*, with the changes necessary to make the procedure applicable to C.C. 1995.330. (C.C. 1995.330(b); on C.C. 1159, see *infra*, §703.)

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4. Rule in Dumpor's Case Abolished.

12 Witkin Sum. Cal. Law Real Property § 560

[§ 560] Rule in Dumpor's Case Abolished.

A restriction on transfer of a tenant's interest in a lease applies to a subsequent transfer by a tenant, an assignee, or a subtenant, even if the landlord consented to a prior transfer or waived a standard or condition for a prior transfer. (C.C. 1995.340(a).) However, C.C. 1995.340(a) does not apply if the lease provides expressly that the restriction on transfer is limited to the original tenant (C.C. 1995.340(b)(1)), or if the landlord states expressly in writing that the consent or waiver applies to a subsequent transfer (C.C. 1995.340(b)(2)).

C.C. 1995.340 makes clear that the Rule in Dumpor's Case is not the law in California and probably codifies existing California law. (Law Rev. Com. Comment; see *supra*, §548.)

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8. Restriction on Use of Commercial Property.
a. Nature and Scope of Statute.

12 Witkin Sum. Cal. Law Real Property § 561

[§ 561] Nature and Scope of Statute.

(1) *Law Revision Commission Report.* The California Law Revision Commission in May 1990 made its Recommendation Relating to Commercial Real Property Leases: Use Restrictions. (20 Cal. Law Rev. Com. Reports, p. 2421.) The codification of the holding in *Kendall v. Ernest Pestana* (1985) 40 C.3d 488, 220 C.R. 818, 709 P.2d 837, supra, §552, raised the question whether other lease clauses that require the landlord's consent but fail to express a standard for giving or withholding consent will also be held to require reasonableness. The most common are clauses restricting changes of use. (20 Cal. Law Rev. Com. Reports, p. 2425.) Assignment and sublease restrictions are direct restraints on alienation. A use restriction is not, but it involves the implied covenant of good faith and fair dealing, and public policy mandates that use restrictions be treated statutorily the same as assignment and sublease restrictions. (20 Cal. Law Rev. Com. Reports, p. 2426.)

The recommended legislation was enacted in 1991. (See C.C. 1997.010 et seq.; 23 *Pacific L. J.* 725.) The statute applies to a lease executed before, on, or after January 1, 1992. (C.C. 1997.050.)

(2) *Commercial Leases.* C.C. 1997.010 et seq. apply only to commercial leases of real property. (C.C. 1997.010 [lease "for other than residential purposes"].) Personal property leases and residential leases may involve different public policies and are governed by the common law. (Law Rev. Com. Comment.)

(3) *Definitions.* "Restriction on use" means a provision that restricts the use by a tenant, "whether by limiting use to a specified purpose, mandating use for a specified purpose, prohibiting use for a specified purpose, limiting or prohibiting a change in use, or otherwise." (C.C. 1997.020(c).) "Landlord" includes a sublandlord under a sublease. (C.C. 1997.020(a).) "Tenant" includes a subtenant or assignee. (C.C. 1997.020(d).) "Lease" includes modifications to a lease and other agreements affecting a lease. (C.C. 1997.020(b).)

(4) *Use Restriction for Illegal Purpose.* Nothing in C.C. 1997.010 et seq. authorizes a restriction on use that is otherwise prohibited by law. (C.C. 1997.030.) However, the statute is intended to govern a restriction on use notwithstanding a contrary implication in the law governing unreasonable restraints on alienation or the implied covenant of good faith and fair dealing. (Law Rev. Com. Comment [citing C.C. 1997.210 and its Comment].)

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8. Restriction on Use of Commercial Property.

b. Lease Provision.

12 Witkin Sum. Cal. Law Real Property § 562

[§ 562] Lease Provision.

(1) *Restriction in Lease.* Subject to the limitations in C.C. 1997.010 et seq., a lease may include a restriction on use of leased property by a tenant. (C.C. 1997.210(a).) "Neither the law governing unreasonable restraints on alienation nor the law governing the implied covenant of good faith and fair dealing prevents the enforcement of a restriction on use in accordance with the express terms of the restriction." However, C.C. 1997.210(a) is limited by other provisions of C.C. 1997.010 et seq. (see, e.g., C.C. 1997.030 [use restriction for illegal purpose is not authorized]), and it remains subject to general principles limiting freedom of contract (e.g., adhesion and unconscionable contract doctrines). (Law Rev. Com. Comment.)

(2) *Any Reasonable Use Unless Restricted.* Unless the lease includes a restriction on use, a tenant's rights include any reasonable use of leased property. (C.C. 1997.210(b).) An ambiguity in a restriction on use must be construed in favor of unrestricted use. (C.C. 1997.220.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Restriction in Lease.* See 91 Proof of Facts 3d 205 [proof of lessee's material breach of lease covenant restricting use].



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c. Change in Use.

12 Witkin Sum. Cal. Law Real Property § 563

[§ 563] Change in Use.

(1) *Prohibition of Change in Use.* A restriction on use of leased property by a tenant may absolutely prohibit a change in use. (C.C. 1997.230.) A clause of this type is valid, but is subject to general principles governing freedom of contract, including the adhesion contract doctrine. (Law Rev. Com. Comment.)

(2) *Express Standard or Condition.* A restriction on use may provide that a change in use is subject to an express standard or condition. (C.C. 1997.240.) A restriction on use may require the landlord's consent for a change in use subject to an express standard or condition for giving or withholding consent, including either of the following:

(a) The landlord's consent may not be unreasonably withheld. (C.C. 1997.250(a).)

(b) The landlord's consent may be withheld subject to express standards or conditions. (C.C. 1997.250(b).)

C.C. 1997.250 is a specific application of the broad latitude provided by C.C. 1997.010 et seq. for parties to contract for express restrictions, subject to general principles governing freedom of contract. The meaning of "unreasonably withheld" is determined in each case by applying an objective standard of commercial reasonableness as developed by case law. (Law Rev. Com. Comment.)

(3) *Implied Standard or Condition.* If a restriction on use requires the landlord's consent for a change in use but provides no standard for giving or withholding consent, the restriction will be construed to include an implied standard that the landlord's consent may not be unreasonably withheld. (C.C. 1997.260(a).) Whether the landlord's consent has been unreasonably withheld in a particular case is a question of fact on which the tenant has the burden of proof. The tenant may satisfy the burden of proof by showing that, in response to the tenant's written request for a statement of reasons for withholding consent, the landlord failed, within a reasonable time, to state a reasonable objection in writing. (C.C. 1997.260(b).)

Whether a landlord's consent has been unreasonably withheld may be a question of procedure or substance or both. "A landlord may act unreasonably in responding to a request of the tenant for consent to a change in use (for example by delaying or failing to respond or by requiring excessive investigation charges), or the landlord may not have a

reasonable objection to the change in use. Either of these circumstances may give rise to a determination that the landlord has unreasonably withheld consent." (Law Rev. Com. Comment.) C.C. 1997.260 rejects an absolute approach to the question of commercial reasonableness. This is determined by applying an objective standard as developed by case law. (Law Rev. Com. Comment.)

C.C. 1997.260 applies to a restriction on use executed on or after January 1, 1992. If a restriction on use executed before January 1, 1992, requires the landlord's consent for a change in use, but provides no standard for giving or withholding consent, the landlord has sole and absolute discretion to give or withhold consent. (C.C. 1997.270(a).) If the terms of a restriction on change in use are fixed by an option or other agreement, the restriction on change in use is deemed to be executed on the date of execution of the option or other agreement. (C.C. 1997.270(b).)

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d. Effect of Restriction on Remedies for Breach.

12 Witkin Sum. Cal. Law Real Property § 564

[§ 564] Effect of Restriction on Remedies for Breach.

(1) *Mitigation of Damages.* For purposes of C.C. 1951.2(a) (damages on termination for breach), the amount of rental loss that could have been reasonably avoided is computed by taking into account any reasonable use of the leased property. However, if the lease contains a restriction on use that is enforceable under C.C. 1997.010 et seq., the computation must take into account the restricted use of the property, except to the extent that the tenant proves that, under all the circumstances, enforcement of the restriction would be unreasonable. The circumstances include those involving both the leased property and any building or complex in which it is located. (C.C. 1997.040(a).)

Thus, absent an enforceable use restriction, the tenant is entitled to the benefit of mitigation under C.C. 1951.2 that would be achieved by devoting the leased property to any reasonable use. An enforceable use restriction may not be ignored in determining the extent of the landlord's obligation to mitigate following termination of the lease for the tenant's breach. (Law Rev. Com. Comment.)

(2) *Continuation of Lease.* The remedy described in C.C. 1951.4 (continuation of lease after breach and abandonment) is available even if the lease contains a restriction on use of the leased property. The restriction on use applies under C.C. 1951.4 if it is enforceable under C.C. 1997.010 et seq., except to the extent the tenant proves that, under all the circumstances, enforcement of the restriction would be unreasonable. The circumstances include those involving both the leased property and any building or complex in which it is located. (C.C. 1997.040(b).) Thus, the landlord's use of the remedy under C.C. 1951.4 does not limit enforceability of a use restriction that is otherwise enforceable. (Law Rev. Com. Comment.)

(3) *Reasonableness of Enforcement.* The Law Revision Commission Comment lists some of the circumstances that may be considered in determining the reasonableness of enforcement of a use restriction for purposes of C.C. 1997.040, including:

- (a) The landlord's desire to encourage a "tenant mix" in a shopping center.
- (b) The landlord's intent to preclude residential uses in a commercial building or complex.

(c) The landlord's intent to preclude medical arts uses in an almost exclusively business-use office building (or vice versa).

(d) The fact that a proposed use by a prospective new tenant would require the landlord to grant the right to engage in that use in a building or complex to the exclusion of other parties or would contravene a preexisting right of exclusive use already possessed by, or promised to, another party.

(e) The fact that a proposed use is already prohibited by an outside party (e.g., a mortgagee, ground lessor, or landlord) to whom the landlord is obligated.

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9. Additional Covenants in Lease.

a. Express Covenants.

12 Witkin Sum. Cal. Law Real Property § 565

[§ 565] Express Covenants.

In addition to the fundamental provisions for rent and possession, a well drawn formal lease contains a number of special promises or express covenants by the lessee and the lessor. (See C.E.B., 1 Office Leasing 2d; C.E.B., 1 Landlord-Tenant Practice 2d, §1.52 et seq.; 46 A.L.R.4th 496 [express or implied restrictions on tenant's use of residential property for business purposes]; 114 A.L.R.5th 443 [effect of lease clause restricting keeping of pets]; 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §63 et seq.; supra, §523; on when these covenants run with the land, see supra, §434 et seq.)

Examples of the lessee's express covenants include the covenants to repair (infra, §632), to insure (infra, §655), to pay taxes (infra, §658), not to assign (supra, §546 et seq.), and to build (see *Enos v. Foster* (1957) 155 C.A.2d 152, 154, 317 P.2d 670). Examples of the lessor's express covenants include the covenants to repair (infra, §640), to build (see *Ellis v. Klaff* (1950) 96 C.A.2d 471, 473, 216 P.2d 15), not to allow competing use (infra, §660), and to allow removal of fixtures (infra, §685).

"The appointment of a receiver often entails drastic disruptive consequences to existing business relationships. ... That a lessee's ability to remain solvent and retain the capacity for unimpeded operation constitutes a relevant and legitimate concern of a lessor is too obvious to require belaboring. ... Notwithstanding the lessor's primary concern with the uninterrupted payment of rent, such a provision ensures that the lessor is not forced into an involuntary relationship with a tenant not of his choosing. Even if rent continues to be paid, '[t]enant insolvency presents uncertainty and inconvenience which the lessor is understandably anxious to avoid.' ... California accepts such provisions as valid and enforceable." (*Superior Motels v. Rinn Motor Hotels* (1987) 195 C.A.3d 1032, 1052, 241 C.R. 487.)

SUPPLEMENT: [This section is current through the latest supplement]
See 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §58 et seq.



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9. Additional Covenants in Lease.

b. Implied Covenants.

12 Witkin Sum. Cal. Law Real Property § 566

[§ 566] Implied Covenants.

(1) *In General.* Implied covenants in leases, like those in contracts generally, are recognized only in cases of strict necessity. The important controversies arise where a lessee, obligated to pay a percentage of business profits as rental, removes or discontinues the business, and the lessor seeks to establish an implied covenant to continue. (See *Cousins Inv. Co. v. Hastings Clothing Co.* (1941) 45 C.A.2d 141, 149, 113 P.2d 878; *Masciotra v. Harlow* (1951) 105 C.A.2d 376, 379, 233 P.2d 586; *Ellis v. Chevron, U.S.A.* (1988) 201 C.A.3d 132, 141, footnote 2, 246 C.R. 863; 65 A.L.R.2d 1313 [lessor's implied covenant to furnish water for business needs of tenant]; 40 A.L.R.3d 971 [lease of store as requiring active operation of store]; 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §67 et seq.; 1 *Summary* (10th), *Contracts*, §806; on percentage lease, see *infra*, §569.) (On lessor's implied covenant for quiet enjoyment, see *infra*, §610; on lessor's implied covenant not to compete, see *infra*, §662.)

(2) *Lessee's Implied Covenant To Remain in Business.* In *College Block v. Atlantic Richfield Co.* (1988) 206 C.A.3d 1376, 254 C.R. 179, plaintiff lessor executed a 20-year lease of undeveloped land to defendant lessee, which agreed to build and operate a gas station on the property. The rent was determined by a percentage of the gasoline delivered, with a provision for a minimum of \$ 1,000 per month. After approximately 17 years, defendant ceased operation and paid plaintiff the \$ 1,000 minimum for the remaining months. Plaintiff contended that defendant was bound by an implied covenant to continue operation, and the court so ruled. The parties then stipulated that had the station remained in operation, plaintiff would have received \$ 3,250 per month, and judgment was entered for plaintiff in that amount. *Held*, reversed.

(a) "A percentage lease provides a lessor with a hedge against inflation and automatically adjusts the rents if the location becomes more valuable. ... It is advantageous to the lessee if the 'location proves undesirable or his enterprise proves unsuccessful.' ... Thus, both parties share in the inherent business risk. ... Inherent within all percentage leases is the fundamental idea that the business must continually operate if it is to be successful. To make a commercial lease mutually profitable when the rent is a minimum plus a percentage, or is based totally on a percentage, a covenant to operate in good faith will be implied into the contract if the minimum rent is not substantial." (206 C.A.3d 1380.)

(b) If both parties contemplated continued operation of the business, a covenant of continued operation will be implied when the guaranteed minimum is not substantial or adequate. Whether the minimum specified in this lease was

substantial was a question of fact, and the trial judge erred in ruling that there was an implied covenant without receiving any evidence on this issue. Hence, on retrial, the parties should be given an opportunity to submit evidence as to the circumstances under which the lease was made, to determine if, at the time the contract was entered into, the guaranteed rent was substantial. (206 C.A.3d 1383.)

(3) *Implied Covenant of Good Faith and Fair Dealing.* In *Sachs v. Exxon Co., U.S.A.* (1992) 9 C.A.4th 1491, 12 C.R.2d 237, plaintiffs, lessors of property used for a gas station, sought a declaration of their right to enter the premises in order to inspect for possible subsurface contamination by leaks from the tanks. Defendant lessees had refused to allow additional testing after experts retained by plaintiffs found that contamination might have occurred. The trial court granted defendants' motion for summary judgment and dismissed the action. *Held*, reversed; the lease implied an obligation that plaintiffs be allowed to determine that no environmental laws were being violated.

(a) The lease contained a provision requiring that use of the premises comply with all applicable laws. While this provision did not address the question of plaintiffs' right to investigate, it did address their larger interest in freedom from potential liability under the many statutes regulating disposal and cleanup of toxic wastes (see *supra*, §903 et seq.). (9 C.A.4th 1496.)

(b) The implied covenant of good faith and fair dealing required that neither party do anything that would destroy or injure the other party's right to receive the benefits of the lease (see 1 *Summary* (10th), *Contracts*, §798 et seq.). Good faith and fair dealing regarding the covenant of lawful activity required a reasonable means by which plaintiffs could assure themselves as to the status of environmental hazards that might be caused by defendants' activities. "Such assurance could presumably be provided by tests and reports initiated by the tenant which, from an objective point of view, provide adequate assurance to a landlord. Lacking such tenant action, we would imply a right on the part of the landlord to come upon the premises and conduct testing in a reasonable and nonobstructive manner." (9 C.A.4th 1498.)

(c) In the present case, defendants had provided plaintiffs with data based on their experts' investigation, which defendants believed should have allayed any reasonable fears. Plaintiffs' experts believed that more investigation was required. On remand, the trier of fact would have to resolve this conflict based on an objective standard. In the absence of an express agreement, plaintiffs had no right to insist on a subjective standard of testing. (9 C.A.4th 1499.)

West's Key Number Digest, Landlord and Tenant k.44, 45

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 49 *Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §62 et seq.



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CHAPTER XVII - Real Property

Witkin Summary of California Law
VII. LANDLORD AND TENANT RELATIONSHIP
D. Leases.

10. Restrictions on Waivers of Tenants' Rights.

12 Witkin Sum. Cal. Law Real Property § 567

[§ 567] Restrictions on Waivers of Tenants' Rights.

(1) *Invalid Waivers.* A modification or waiver of the following rights or remedies of the lessee is void:

- (a) Right to tenantable dwelling. (C.C. 1942.1, *infra*, §623.)
- (b) Protection against retaliatory eviction. (C.C. 1942.5, *infra*, §712 et seq.)
- (c) Rights or remedies under C.C. 1950.5 regarding use of lessee's deposit. (C.C. 1953(a)(1); see 1 *Summary* (10th) *Contracts*, §522 et seq.)
- (d) Rights or remedies under C.C. 1954 regarding conditions of landlord's entry. (C.C. 1953(a)(1); see *infra*, §609.)
- (e) Right to assert a cause of action against the lessor that may arise in the future. (C.C. 1953(a)(2).)
- (f) Right to a notice or hearing required by law. (C.C. 1953(a)(3).)
- (g) Procedural rights in litigation in an action involving tenant's rights and obligations. (C.C. 1953(a)(4); see *Jaramillo v. JH Real Estate Partners* (2003) 111 C.A.4th 394, 403, 3 C.R.3d 525 [under C.C. 1953(a)(4), residential tenant cannot validly agree, in residential lease agreement, to binding arbitration to resolve disputes regarding rights and obligations as tenant; nothing in C.C. 1953, however, precludes separate agreement to arbitrate that is entirely independent of lease].)
- (h) Right to have landlord exercise law-imposed duty of care to prevent personal injury or personal property damage. (C.C. 1953(a)(5).)

Henriouille v. Marin Ventures (1978) 20 C.3d 512, 143 C.R. 247, 573 P.2d 465, applying the criteria of *Tunkl v. Regents of Univ. of Calif.* (1963) 60 C.2d 92, 32 C.R. 33, 383 P.2d 441, held that a clause in a residential lease exempting a landlord from liability for negligence was invalid. (20 C.3d 519, 520, 521.) (For full discussion of *Tunkl* and *Henriouille*, see 1 *Summary* (10th) *Contracts*, §§662, 663, 670.) Clauses of that type are now void under C.C. 1953(a)(5). Nothing in the legislative history of C.C. 1953 suggests that the Legislature intended to sanction such clauses in leases executed before January 1, 1976, the effective date of the statute. Hence, they are governed by the

Henrioulle decision. (20 C.3d 520, 521.)

(2) *Advance Notice of Valid Waivers.* A lease provision containing a modification or waiver that is not invalid under C.C. 1953(a), C.C. 1942.1, C.C. 1942.5, or C.C. 1954 (infra, §609) is nevertheless void unless the lease or rental agreement is presented to the lessee before the lessee takes actual possession of the premises. An exception is made, however, for a modification or waiver in a renewal agreement, if the modification or waiver was also contained in the lease being renewed. (C.C. 1953(b).)

(3) *Effective Date.* C.C. 1953 is expressly nonretroactive, applicable only to leases executed on or after January 1, 1976. (C.C. 1953(c).) (See 7 *Pacific L. J.* 519.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XVII - Real Property

Witkin Summary of California Law

VIII. RENT

A. In General.

1. Nature of Obligation.

12 Witkin Sum. Cal. Law Real Property § 568

[§ 568] Nature of Obligation.

Rent is the consideration for the use of property. (*Santa Monica Rent Control Bd. v. Bluvshstein* (1991) 230 C.A.3d 308, 317, 281 C.R. 298, *infra*, §600.) The obligation to pay rent may arise from a lease or from mere occupancy without an express agreement. (*Samuels v. Ottinger* (1915) 169 C. 209, 211, 146 P. 638; *Ellingson v. Walsh, O'Connor & Barneson* (1940) 15 C.2d 673, 675, 104 P.2d 507; see *Rest.2d, Property (Landlord and Tenant) §12.1*, Comment b [if no rent is reserved in lease and no gift is intended, tenant is liable not for rent but for "the reasonable worth of his use and occupation"]; 2 Powell §16A.01; 49 *Am.Jur.2d* (1995 *ed.*), *Landlord and Tenant* §676 *et seq.*; 42 Proof of Facts 3d 413 [defending commercial landlord's action for rent on ground that property cannot lawfully be used for intended purpose].) The tenant may be bound by a covenant to pay rent even though he or she does not enter into possession of the premises. (*Farmers & Merchants' Nat. Bank of Los Angeles v. Bailie* (1934) 138 C.A. 143, 148, 32 P.2d 157.)

Unless there is a usage or contract provision to the contrary, rent is due at the termination of the successive periods of the holding, such as weekly, monthly, quarterly, or yearly. (C.C. 1947.) But the lease may provide for advance payment of rent, e.g., covering the last part of the term. (See 1 *Summary* (10th), *Contracts*, §517; C.E.B., 1 Landlord-Tenant Practice 2d, §§1.22, 4.32; C.E.B., 1 Office Leasing 2d, §11.3.) (On rental security deposits, see 1 *Summary* (10th), *Contracts*, §521 *et seq.*; 10 *A.L.R.3d* 582 [liability of lessee's guarantor beyond original term of lease].)

West's Key Number Digest, Landlord and Tenant k.181

SUPPLEMENT: [This section is current through the latest supplement]
See 49 *Am.Jur.2d* (2006 *ed.*), *Landlord and Tenant* §546 *et seq.*



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VIII. RENT

A. In General.

2. Form and Determination of Payment.

12 Witkin Sum. Cal. Law Real Property § 569

[§ 569] Form and Determination of Payment.

(1) *In General.* Rent may be made payable in money or goods, such as a share of crops. (*Clarke v. Cobb* (1898) 121 C. 595, 597, 54 P. 74; *Silveira v. Ohm* (1949) 33 C.2d 272, 276, 201 P.2d 387; see C.C. 1951(a) [as used in C.C. 1951.2 et seq., "rent" includes "charges equivalent to rent"]; *Holyoke Water Power Co. v. American Writing Paper Co.* (1937) 300 U.S. 324, 57 S.Ct. 485, 489, 81 L.Ed. 678, 682 [clause requiring payment in gold is ineffective under federal legislation; rent may be paid in legal tender].)

A landlord or a landlord's agent may not require cash as the exclusive form of payment of rent or security deposit (C.C. 1947.3(a)(1)), unless the tenant has previously attempted to pay with a check drawn on insufficient funds or has instructed the drawee to stop payment on a check, draft, or money order (C.C. 1947.3(a)(2)). The landlord may require cash for no more than 3 months following the insufficient check or stopped payment and must first give specified notice. (C.C. 1947.3(a)(2).) The provisions of C.C. 1947.3 cannot be lawfully waived. (C.C. 1947.3(c).)

(2) *Rent Adjustments During Term.* Oral agreements to reduce rent have been upheld on theories of executed agreement or estoppel. (See 1 *Summary* (10th), *Contracts*, §243.) And leases sometimes contain provisions for adjustment of the rent. (See *Bartel v. Associated Dental Supply Co.* (1952) 114 C.A.2d 750, 752, 251 P.2d 16 [provision for reduction in event of decline in business]; *Bullock's v. Security-First Nat. Bank of Los Angeles* (1958) 160 C.A.2d 277, 279, 325 P.2d 185 [50-year lease with rent to be redetermined every 10 years]; *Cinnamon Square Shopping Center v. Meadowlark Enterprises* (1994) 24 C.A.4th 1837, 1844, 30 C.R.2d 697 [construing written lease amendment reducing rent]; *Rest.2d, Property (Landlord and Tenant)* §12.1, Comment a; 7 *Miller & Starr* 3d, §19:82; C.E.B., 1 *Office Leasing* 2d, Chap. 12; 87 *A.L.R.3d* 986 [rent adjustment provision based on event or formula outside control of parties]; on rent abatement, rent application, and rent withholding, see *Rest.2d, Property (Landlord and Tenant)*, Chap. 11; on changes in rent terms in short-term lease, see C.C. 827, *supra*, §526.)

(3) *Percentage Leases.* An important modern development in the rental of retail business property is the percentage lease. The rent under the most common type is a percentage of the gross receipts of the lessee's business with a fixed minimum amount. (See *Lawrence Barker v. Briggs* (1952) 39 C.2d 654, 656, 248 P.2d 897; *Cousins Inv. Co. v. Hastings Clothing Co.* (1941) 45 C.A.2d 141, 143, 113 P.2d 878; *Masciotra v. Harlow* (1951) 105 C.A.2d 376, 377, 233 P.2d 586; *Bettelheim v. Hagstrom Food Stores* (1952) 113 C.A.2d 873, 874, 249 P.2d 301; *Carter v. Adler* (1955) 138 C.A.2d 63, 66, 291 P.2d 111, *infra*, §661; *Bullock's v. Security-First Nat. Bank*, *supra*, 160 C.A.2d 279 [rent of

department store, 5% of appraised value of land, with minimum amount]; *Eltinge & Graziadio Dev. Co. v. Childs* (1975) 49 C.A.3d 294, 298, 122 C.R. 369 [following *Bullock's*]; *Humphries Inv. v. Walsh* (1988) 202 C.A.3d 766, 771, 248 C.R. 800; 38 A.L.R.3d 1113 [liability of corporation for contracts of subsidiary]; 58 A.L.R.3d 384 [calculation of rental under commercial percentage lease]; 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §681; 11A Am.Jur. Legal Forms 2d (1998 ed.), *Leases of Real Property* §161:189 et seq.; 1 *Summary* (10th), *Contracts*, §806.)

(4) *Calculation of "Fair Market Rental Value."* In *Wu v. Interstate Consol. Industries* (1991) 226 C.A.3d 1511, 277 C.R. 546, a theatre lease provided for rent increases during option terms that, in the absence of agreement between the parties, were to be set by appraisers at the "fair market rental value." In a declaratory relief action by plaintiff lessee, the trial judge ruled that fair market rental value was to be based upon the particular purpose for which the premises were leased, rather than its highest and best use. *Held*, summary judgment for lessee affirmed.

(a) The only reasonable interpretation of "fair market rental value" is that rent is to be established with reference to the nature of the premises and the purpose for which it is leased. The lease as a whole clearly indicates this intent; it specifically defines the premises as a theater and its appurtenances, and provides that the lessee may only use the premises as a theater, unless the lessor consents to another use. A contrary interpretation would be economically and commercially unreasonable. (226 C.A.3d 1515.)

(b) The option clause benefits plaintiff by ensuring it an opportunity to continue its business and recoup its investment. Interpreting the clause as defendant urges would require plaintiff to abandon its theater business and allow the lease to expire, or to convert the premises to the business considered by defendant to be the highest and best use of the premises. "Such an option is in essence no option, is unreasonable, and could not have been the intent of the parties when they signed the lease." (226 C.A.3d 1515.)

West's Key Number Digest, *Landlord and Tenant* k.212 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Percentage Leases.* See 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §551; 11A Am.Jur. Legal Forms 2d (2006 ed.), *Leases of Real Property* §161:221 et seq.



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CHAPTER XVII - Real Property

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B. Apportionment of Rent.

1. General Rule Against Apportionment.

12 Witkin Sum. Cal. Law Real Property § 570

[§ 570] General Rule Against Apportionment.

At common law, rent is not apportionable; i.e., it is due on a certain date, and belongs to the owner of the reversion at the time. (See *Fahrenbaker v. E. Clemens Horst Co.* (1930) 209 C. 7, 9, 284 P. 905.) This rule was modified by C.C. 1935, which provides: "When the hiring of a thing is terminated before the time originally agreed upon, the hirer must pay the due proportion of the hire for such use as he has actually made of the thing, unless such use is merely nominal, and of no benefit to him."

However, C.C. 1935 does not apply, and ordinarily no apportionment will be made in the absence of special provision in the lease, where rent is payable in advance. In other words, "a surrender or termination during the prepaid period does not entitle the lessee to a proportional rebate. Rent does not accrue from day to day, but accrues on the day it is payable. ... This rule applies where the premises have been destroyed and the lease is thus terminated." (*Friedman v. Isenbruck* (1952) 111 C.A.2d 326, 335, 244 P.2d 718, *infra*, §571; see *Hinden v. Caine* (1951) 104 C.A.2d 238, 241, 231 P.2d 83 [landlord who collects rent in advance for entire term, then conveys property, and refuses to apportion rent for part of term remaining after conveyance, is not unjustly enriched].)

West's Key Number Digest, Landlord and Tenant k.210

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B. Apportionment of Rent.

2. When Apportionment Is Authorized.

12 Witkin Sum. Cal. Law Real Property § 571

[§ 571] When Apportionment Is Authorized.

In *Silveira v. Ohm* (1949) 33 C.2d 272, 201 P.2d 387, a farm lease was made with an option to purchase, the rent consisting of one-third of the crop. The lessees exercised their option before the crop was harvested, and the lessor, after conveying the property, sought to recover the value of the rent for the period of occupancy under the lease. *Held*, an apportionment should be made. (a) C.C. 1935 governs, and applies equally to rent payable in money and in crops. It is immaterial that unforeseen events may destroy the crops without the lessee's fault, for in that case, no rent is due by the terms of the agreement. (b) There is no great practical difficulty in making apportionment, as may be seen by cases applying the statutory rule of apportionment between a mortgagor and a purchaser at a foreclosure sale. (33 C.2d 276.) Although *Fahrenbaker v. E. Clemens Horst Co.* (1930) 209 C. 7, 9, 284 P. 905, was not mentioned in the opinion, it is distinguishable on its facts. There, a conveyance of the property under a power of sale in a trust deed was made subject to the existing lease and the lease did not terminate. Thus, C.C. 1935 was not operative.

In *Friedman v. Isenbruck* (1952) 111 C.A.2d 326, 244 P.2d 718, the lessee paid 6 months' advance rent for a cannery. It was originally in defective condition, and rainstorms so damaged it that public officials declared it unsafe for occupancy and the lessee was forced to vacate possession. *Held*, he was entitled to a refund of rent falling due after the date of tendering possession and vacating.

(a) Although the general rule is against apportionment of rent paid in advance, an exception exists if, after prepayment, the lease is terminated by the fault of the landlord. A constructive eviction takes place and the tenant may recover prepaid rent to prevent unjust enrichment of the landlord and the landlord's profiting by his or her own wrong. Here, e.g., the lessors did not attempt to remedy a condition well known to them in advance. (111 C.A.2d 335.)

(b) Another exception occurs if the covenant to pay advance rent is not unqualified. Here, the lease provided for apportionment of rent in the event of partial destruction, and gave the lessee an election to terminate. "It is broadly, and necessarily, implied" that apportionment will be made where the premises are rendered completely unusable without fault of the lessee. (111 C.A.2d 336.) (See *Scott v. Mullins* (1962) 211 C.A.2d 51, 54, 27 C.R. 269 [recovery of advance rent expressly provided for in lease].)

The Restatement approves apportionment except where the parties agree to the contrary: "If the tenant's obligation to pay rent ceases in the middle of a rent-payment period because the lease is terminated, the rent for that period is

apportioned. ... Thus, if the tenant has paid in advance the rent for the period, he is entitled to recover from the landlord the portion of the rent allocable to the time between the termination of the lease and the period covered by the rent payment. If the rent is payable at the end of the period and the lease is terminated during the period, the tenant's rent liability is for the rent allocable to the time between the beginning of the period and the date on which the lease is terminated. ... An agreement of the parties to the lease that rent is not to be apportioned as to time is valid." (*Rest.2d, Property (Landlord and Tenant) §12.1*, Comment e; see Reporter's Note, Comment 6.)

SUPPLEMENT: [This section is current through the latest supplement]



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VIII. RENT

C. Rent Control.

1. Nature and Scope of Regulations.

12 Witkin Sum. Cal. Law Real Property § 572

[§ 572] Nature and Scope of Regulations.

(1) *Modern Local Rent Control.* Beginning in 1970, a number of American cities adopted rent control ordinances. (See 65 *Cal. L. Rev.* 304 [reasonable rent regulation and economic due process]; 100 *Harv. L. Rev.* 1067 [constitutionality of rent control restrictions on right to control use of one's property]; 101 *Harv. L. Rev.* 1835 [economic impact of rent control in gentrifying housing market]; 28 *Hastings L. J.* 631 [rent control in New Jersey]; 17 *Pacific L. J.* 349 [criticism of municipal low-income housing controls]; 15 *San Diego L. Rev.* 1185 [practical guide for tenant organizations]; 62 *So. Cal. L. Rev.* 321 [good cause eviction requirements]; 34 *U.C.L.A. L. Rev.* 149 [strategies for challenging rent control]; C.E.B., 1 *Landlord-Tenant Practice* 2d, Chap. 7; *Cal. Civil Practice*, 3 *Real Property Litigation*, Chap. 30.)

(2) *California Local Ordinances.* Many California cities have adopted ordinances of two main types: (a) Those subject to vacancy-decontrol provisions permitting owners to set market rents for new tenants; and (b) those without these provisions, which keep all rents from rising at more than a designated rate. (See *Parkmerced Co. v. San Francisco Rent Stabilization & Arbitration Bd.* (1989) 215 *C.A.3d* 490, 495, 263 *C.R.* 617 [ordinance restricting rent increase construed to protect tenant notwithstanding fact that he had not signed formal lease]; *Getz v. West Hollywood* (1991) 233 *C.A.3d* 625, 628, 284 *C.R.* 631 [for purposes of vacancy decontrol provision, rental unit was not vacant at time tenant named in lease terminated tenancy where landlord had been accepting rent from tenant's roommate]; *Givoni v. Santa Monica Rent Control Bd.* (1991) 234 *C.A.3d* 94, 97, 285 *C.R.* 567 [calculation of base rent for condominium first rented after effective date of ordinance]; *Aguirre v. Lee* (1993) 20 *C.A.4th* 1646, 1653, 25 *C.R.2d* 367 [affirming award to tenant under local ordinance for landlord's failure to offer her same unit under same terms after she was displaced during repairs for earthquake damage]; C.E.B., 1 *Landlord-Tenant Practice* 2d, §7.4; on statutory prohibition against ordinances that keep rents from rising after vacancy, see *infra*, §574.)

Most ordinances prohibit the landlord from evicting a tenant except for reasons stated in the ordinance. (See *Gross v. Superior Court* (1985) 171 *C.A.3d* 265, 276, 217 *C.R.* 284; *Danekas v. San Francisco Residential Rent Stabilization & Arbitration Bd.* (2001) 95 *C.A.4th* 638, 644, 115 *C.R.2d* 694 [ordinance gave rent board authority to regulate when landlord could evict tenant who replaced departing cotenant, where lease prohibited sublease and assignment; board was given authority to regulate eviction process, and both ordinance and regulations disallowed prohibitions against subleasing that prevented replacement of departing tenants on one-for-one basis]; C.E.B., 1 *Landlord-Tenant Practice* 2d, §§7.25 et seq., 7.53 et seq.; 34 *U.S.F. L. Rev.* 537 [San Francisco's owner move-in legislation].)

(3) *Construction of Exemptions.* Exemptions from rent control were construed narrowly in *Da Vinci Group v. San Francisco Residential Rent Stabilization & Arbitration Bd.* (1992) 5 C.A.4th 24, 6 C.R.2d 461. The owner of a warehouse that had been illegally converted to live-in work spaces, then rehabilitated and certified for occupancy, claimed an exemption under two provisions of the San Francisco rent control ordinance. One was for units in a structure first certified for occupancy after the effective date of the ordinance, and the other for units in a building that was substantially rehabilitated after the effective date of the ordinance. *Held*, neither exemption applied.

(a) Although the warehouse had been first certified for occupancy after the ordinance took effect, the rent board's regulations interpreted the exemption for new certificates of occupancy as applying only to newly constructed rental units. A board policy had extended the exemption to converted warehouses, but only where there was no prior residential use. (5 C.A.4th 29.) The board's interpretation was worthy of deference, because it comported with the ordinance's major goal of encouraging the creation of residential units where there were none before. Legalizing de facto residential use does not enlarge the housing stock. (5 C.A.4th 30.)

(b) The "substantial rehabilitation" exemption applied to residential units 50 or more years of age that were unsuitable for occupancy; board regulations interpreted it as applying to essentially uninhabitable units. Although the warehouse was old enough to qualify, its residential units were not, and the rehabilitation exemption, like the exemption for new certificates of occupancy, could not be applied to units already in use without contravening the ordinance's explicit mandate to protect tenants from excessive rent increases. The ordinance's goal of encouraging code compliance was accomplished by its pass-through mechanism, of which the owner had taken full advantage to recoup the costs of rehabilitation. (5 C.A.4th 31.)

(4) *Registration and Fees.* Ordinances frequently require landlords to register units and impose registration fees. (See *Pennell v. San Jose* (1986) 42 C.3d 365, 375, 228 C.R. 726, 721 P.2d 1111 [ordinance may impose rental unit fee that does not exceed sum necessary to cover costs of administering prescribed hearing process]; *301 Ocean Avenue Corp. v. Santa Monica Rent Control Bd.* (1991) 228 C.A.3d 1548, 1555, 279 C.R. 636 [registration of amenities for each unit, e.g., parking]; *West Hollywood Concerned Citizens v. West Hollywood* (1991) 232 C.A.3d 486, 489, 283 C.R. 470 [annual unit fee of \$ 96 did not deprive landlord of right to just and reasonable rate of return]; C.E.B., 1 Landlord-Tenant Practice 2d, §§7.44, 7.45.)

In *301 Ocean Avenue Corp. v. Santa Monica Rent Control Bd.* (1985) 175 C.A.3d 149, 157, 221 C.R. 610, the ordinance provided for a registration fee of \$ 72 for each unit and contained an additional provision that where a registration fee was not paid, a penalty of 5% per month would be imposed and the landlord would be prohibited from increasing rent (even under the annual general adjustment) until payment. *Held*, although the registration fee was valid, the penalty provision was in part invalid. The penalty, though harsh, is reasonably related to the purpose of the ordinance. But the prohibition of a rent increase--making the owner wait 3 months before implementing the automatic annual rent increase--serves no legitimate purpose. "To deny these increases to a landlord who has cured his delinquency by paying a 5 percent per month penalty would run counter to the 1984 law's purpose of limiting landlord's income to 'no more than a fair return.' " (175 C.A.3d 158.)

(5) *Ordinance Applicable to Purchaser at Foreclosure Sale.* *Gross v. Superior Court*, *supra*, held that a purchaser of property at a trustee's sale under a deed of trust could not evict a tenant in an unlawful detainer proceeding, except on grounds specified in the ordinance. The ordinance defined "landlord" as the owner, lessor, or sublessor or his "successor." (171 C.A.3d 274.) And prevention of eviction without cause is justifiable. "The eviction provisions in the rent control ordinance are integral to the purpose of the legislation. Nothing in the language of the eviction provisions or in the ordinance as a whole suggests that the board intended to exempt from its provisions units which have changed ownership through foreclosure proceedings." (171 C.A.3d 275.)

(6) *Ordinance Inapplicable to Indian Land.* A municipal rent control ordinance cannot be enforced on Indian land containing a mobilehome park, owned by Indians and leased to non-Indians for rental to non-Indians. (*Zachary v. Wilk* (1985) 173 C.A.3d 754, 755, 761, 219 C.R. 122.)

(7) *Ordinance Inapplicable to Discharged Apartment Manager*. In *Chan v. Antepenko* (1988) 203 C.A.3d Supp. 21, 250 C.R. 851, defendant was the manager of plaintiffs' apartment building, under a contract entitling him to occupy an apartment as an incident to his employment. He was discharged, but refused to vacate the apartment, claiming procedural rights under the rent control ordinance as a tenant at sufferance (see *supra*, §509). *Held*: "Discharged employees are not tenants. Their presence on the premises is not a possession or an occupancy, for these are retained by the owner; they are like guests or lodgers who, when their rights to remain have ceased, may be removed without notice." (203 C.A.3d Supp. 24.)

West's Key Number Digest, Landlord and Tenant k.200.10 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Modern Local Rent Control*. See Cal. Civil Practice, 4 Real Property Litigation, Chap. 30.

(2) *California Local Ordinances. Grounds for eviction stated in ordinance*: See *Bohbot v. Santa Monica Rent Control Bd.* (2005) 133 C.A.4th 456, 463, 34 C.R.3d 827 [ordinance prohibiting owner-occupancy evictions in condominium conversions, unless removal permit had been obtained, prohibited owner-occupancy evictions in illegally converted condominiums only; where condominium was legally converted, ordinance had no effect].

(3) *Construction of Exemptions*. See *Bisno v. Santa Monica Rent Control Bd.* (2005) 130 C.A.4th 816, 820, 30 C.R.3d 441 [regulation permitting landlord to petition for rent increase when tenant is not occupying unit as principal residence was valid; rent control law addressed housing crisis and thus authorized regulations designed to ensure that beneficiaries of law were those who reside principally in rent-controlled units]; *Borten v. Santa Monica Rent Control Bd.* (2006) 141 C.A.4th 1485, 1489, 47 C.R.3d 178 [application of rent control law to nonresident tenants did not violate landlord's substantive due process rights where *Bisno* ensured landlord's fair return on investment]; *Gombiner v. Swartz* (2008) 167 C.A.4th 1365, 1372, 85 C.R.3d 83 [landlord and tenant could not mutually agree to exempt property from rent control ordinance].



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VIII. RENT

C. Rent Control.

2. Preemption of Rent Control Ordinances.

a. By State Law.

1. In General.

12 Witkin Sum. Cal. Law Real Property § 573

[§ 573] In General.

(1) *Community Care Facilities.* In *Ocean House Corp. v. Permanent Rent Control Bd.* (1983) 147 C.A.3d 395, 195 C.R. 147, plaintiff operated property in Santa Monica as a community care facility under the Community Care Facilities Act (*Health & Saf.C. 1500 et seq.*). When the city adopted a rent control charter amendment, defendant board claimed that plaintiff was required to register. *Held*, the state law, providing for extensive regulation of community care facilities, including rate changes, preempted the field, and plaintiff was not subject to the local rent control law. (147 C.A.3d 398.) *Health & Saf.C. 1518*, adopted after the case was submitted to the trial court, anticipated the holding by stating an express exemption from local rent control. (147 C.A.3d 399.)

(2) *Unlawful Detainer.* The general statutes dealing with unlawful detainer do not preempt local rent control ordinances. (See *Birkenfeld v. Berkeley* (1976) 17 C.3d 129, 143, 130 C.R. 465, 550 P.2d 1001, *infra*, §577; *Fisher v. Berkeley* (1984) 37 C.3d 644, 704, 209 C.R. 682, 693 P.2d 261; *Gross v. Superior Court* (1985) 171 C.A.3d 265, 272, 217 C.R. 284 ["[p]assage of such legislation by local government is an exercise of police power which substantively places a limitation on the owner's property rights"].)

(3) *Mobilehome Statutes.* State legislation regulating mobilehomes (see Mobilehome Residency Law and Mobilehome Parks Act, *infra*, §761 et seq.) does not preclude local rent control. (*Gregory v. San Juan Capistrano* (1983) 142 C.A.3d 72, 81, 82, 84, 85, 191 C.R. 47.)

(4) *Rental Increases Following Notice.* C.C. 827 (*supra*, §526) allows landlords to increase rents for month-to-month tenants on not less than 30 days' notice. In *Tri County Apartment Assn. v. Mountain View* (1987) 196 C.A.3d 1283, 242 C.R. 438, a case of first impression, the issue was whether "a municipal ordinance restricting the effective date of proposed rental increases is a valid rent control measure or a prohibited trespass into landlord-tenant areas preempted by state law." (196 C.A.3d 1286.) Defendant's city council adopted an ordinance "relating to the notification process for rental increases," requiring at least 60 days' written notification. A landlord who failed to obey the ordinance was subject to a fine and the failure was a defense in an unlawful detainer action. *Held*, the ordinance was void. Under established tests for state preemption (196 C.A.3d 1296), "the extensive scheduling provided by the Legislature reveals that the timing of landlord-tenant transactions is a matter of statewide concern not amenable to local

variations" (196 C.A.3d 1298). (See *People v. Tannenbaum* (1994) 23 C.A.4th Supp. 6, 9, 10, 29 C.R.2d 534 [rent control ordinance restricting increase in security deposit was not preempted by C.C. 1950.5 (infra, §747) or by C.C. 827 (supra, §526); distinguishing *Tri County Apartment Assn. v. Mountain View*].)

In *Roble Vista Associates v. Bacon* (2002) 97 C.A.4th 335, 118 C.R.2d 295, a municipal ordinance required that a landlord offer new and renewing tenants a written lease with a 1-year minimum term and a rental rate set for the entire term. The ordinance further provided that if a tenant initially rejected a 1-year lease, the landlord had to annually offer a 1-year lease. If the landlord failed to comply with the ordinance, the tenant would have a defense in the landlord's action to recover possession of the rental unit or to collect rent. *Held*, the ordinance was not preempted by state law.

Tri County Apartment Assn. v. Mountain View, supra, is readily distinguishable. The ordinance here addresses the duration of the lease and does not specify the notice that must be given to terminate a tenancy. (97 C.A.4th 340, 341.) The ordinance does not duplicate or contradict a state statute. There is none governing when leases must be offered or what the terms should be. (97 C.A.4th 341.) The Legislature has not expressly manifested its intent to fully occupy the area, nor has it impliedly done so through adoption of the various statutes prescribing specified periods of notice before rent increases or termination of tenancy. The ordinance provides a substantive defense to eviction, but does not interfere with the procedure for bringing an eviction action. (97 C.A.4th 342.)

(5) *Other Areas*. State law preempts various aspects of local rent control:

- (a) New construction. (C.C. 1954.52, infra, §574.)
- (b) Single family dwellings. (C.C. 1954.52, infra, §574.)
- (c) Rent increases following vacancy. (C.C. 1954.52, infra, §574.)
- (d) Commercial property. (C.C. 1954.25 et seq., infra, §575.)
- (e) Establishment of rent levels. (C.C. 1947.8, infra, §581.)
- (f) Administrative sanctions. (C.C. 1947.7, infra, §592.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XVII - Real Property

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VIII. RENT

C. Rent Control.

2. Preemption of Rent Control Ordinances.

a. By State Law.

2. Single Family Dwellings, New Construction, and Vacancy Controls.

12 Witkin Sum. Cal. Law Real Property § 574

[§ 574] Single Family Dwellings, New Construction, and Vacancy Controls.

C.C. 1954.50 et seq. preempt local residential rent control laws in several areas. (See C.E.B., 1 Landlord-Tenant Practice 2d, §7.25 et seq.; 89 *Cal. L. Rev.* 1847 [whether C.C. 1954.50 et seq. prohibit local inclusionary zoning programs].)

(1) *Single Family Dwellings*. Landlords are free to establish initial and subsequent rental rates for single family dwellings, which are dwellings that are alienable separate from the title to any other dwelling unit or subdivided interests in a subdivision. (C.C. 1954.52(a)(3)(A).) However, C.C. 1954.52(a)(3)(A) does not apply to a dwelling or unit where the preceding tenancy has been terminated by the landlord's service of a termination notice or a change in the tenancy's terms (C.C. 1954.52(a)(3)(B)(i)) or to a condominium dwelling or unit that has not been sold separately by the subdivider to a bona fide purchaser for value (C.C. 1954.52(a)(3)(B)(ii)).

In *West Hollywood v. 1112 Inv. Co.* (2003) 105 *C.A.4th* 1134, 130 *C.R.2d* 168, defendants, owners of two apartment buildings, obtained all required state approvals to convert the buildings into condominiums. Shortly thereafter, plaintiff city, in which the buildings were located, incorporated and attempted to impose additional condominium conversion requirements on defendants, including a conditional use permit. The dispute led to *West Hollywood v. Beverly Towers* (1991) 52 *C.3d* 1184, 278 *C.R.* 375, 805 *P.2d* 329, *infra*, §689, which held that plaintiff could not impose additional requirements and that defendants were free to sell units in the buildings. However, defendants continued to maintain the buildings as apartments. Moreover, defendants allowed public reports for each building from the Department of Real Estate (one of the necessary state approvals for conversion) to lapse, although they eventually renewed them. Defendants claimed that the condominium exemption in C.C. 1954.52(a) applied to them, and consequently they charged rents in excess of that authorized by plaintiff's rent control law. Plaintiff filed this action, alleging that when defendants allowed the public report to lapse, they lost their condominium status and thus their exemption from plaintiff's rent control ordinance. The trial court granted summary judgment for defendants, relying on *Beverly Towers*. *Held*, reversed.

(a) The requirement of C.C. 1954.52(a)(3)(B)(ii), that a condominium must have been sold to a bona fide purchaser for value in order for the condominium exemption of C.C. 1954.52(a)(3) to apply, does not apply to this case. C.C.

1954.52(a)(3)(B)(ii) took effect after the trial court granted summary judgment. The provision represented a change in existing law and therefore cannot be applied here. (105 C.A.4th 1143.)

(b) *Beverly Towers* no longer exempts defendants from compliance with plaintiff's rent control ordinance. Whatever rights defendants had based on *Beverly Towers* lapsed when the public reports expired. Plaintiff could therefore impose the new requirement of a conditional use permit to the conversion process. Because defendants have not obtained a conditional use permit, the individual units are not "alienable" within the meaning of the rent control exemption in C.C. 1954.52(a)(3). Defendants' buildings are subject to plaintiff's rent control law. (105 C.A.4th 1134.)

(2) *New Construction*. Landlords are free to establish initial and subsequent rental rates for newly constructed residential units, which include units with a certificate of occupancy after February 1, 1995, and units that were already exempt on that basis under a local rent control ordinance. (C.C. 1954.52(a)(1), (a)(2).)

(3) *Vacancies*. Some rent control ordinances attempt to prohibit raising rents to market levels when a tenant vacates the unit. Local ordinances may impose vacancy rent controls where the vacancy occurs because the tenancy is terminated by the landlord's service of a termination notice or a change in the tenancy's terms. (C.C. 1954.53(a)(1).) Other vacancy controls on multi-unit dwellings, however, are preempted. (C.C. 1954.52(a).) During a 3-year phase-in period, between January 1, 1996, and December 31, 1998, landlords could increase rents a maximum of two times, by either 15% or up to 70% of the prevailing market rate, whichever was greater, when the previous tenant voluntarily vacated, abandoned, or was evicted from, the property. (C.C. 1954.53(c), 1954.52(a)(3)(C).) Beginning January 1, 1999, landlords may increase rents without limitation for new tenancies and for tenancies created on or after January 1, 1996. (C.C. 1954.52(a)(3)(C), 1954.53(a).)

Thus, C.C. 1954.53(a), with several exceptions, permits landlords to impose whatever rent they choose at the commencement of a tenancy. Under C.C. 1954.53(d), a landlord may increase the rent by any amount to the lawful sublessee or assignee of the original occupant when the original occupant no longer resides in the unit permanently and the sublessee or assignee did not reside in the unit before January 1, 1996. (See *Cobb v. San Francisco Residential Rent Stabilization & Arbitration Bd.* (2002) 98 C.A.4th 345, 351, 119 C.R.2d 741 [landlord could not increase rent, beyond what was allowed under local ordinance, for tenant who had begun living in unit as temporary guest of his mother, but who had remained in unit after her departure; tenant's initial occupancy had begun when landlord began dealing directly with him alone, which was before date on which landlord imposed increase, and tenant could not be considered sublessee of his mother because she retained no interest in unit and did not manifest intent to transfer her occupancy rights to tenant].)

C.C. 1954.53(e) provides that C.C. 1954.53 does not affect a public entity's existing authority to regulate or monitor the grounds for eviction. In *Bullard v. San Francisco* (2003) 106 C.A.4th 488, 130 C.R.2d 819, the local ordinance required a landlord who evicts a tenant so that the landlord can move into the tenant's unit to offer the tenant a replacement unit if one exists. The ordinance gave the rent board the authority to set the initial rent for the replacement unit. *Held*, the provision allowing the board to set the initial rent for the replacement unit is not a regulation of the grounds for eviction and is preempted by C.C. 1954.53. (106 C.A.4th 491.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Vacancies*. See *Action Apartment Assn. v. Santa Monica* (2007) 41 C.4th 1232, 1238, 63 C.R.3d 398, 163 P.3d 89 [local ordinance, enacted in response to C.C. 1954.53, that prohibited landlord from maliciously serving notice of eviction or bringing action to recover possession of rental unit without reasonable factual or legal basis was partially preempted by litigation privilege (C.C. 47(b), 5 Summary (10th), Torts, §567 et seq.)].



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2. Preemption of Rent Control Ordinances.

a. By State Law.

3. Commercial Rent Control Prohibited.

12 Witkin Sum. Cal. Law Real Property § 575

[§ 575] Commercial Rent Control Prohibited.

(1) *Purpose of Prohibition.* The Costa-Keene-Seymour Commercial Property Investment Act (C.C. 1954.25 et seq.; see 19 *Pacific L. J.* 668) restricts rent control affecting specified commercial property. The Act is intended to prevent local jurisdictions from imposing "artificial barriers on commercial rents, as well as to define those areas not included within the definition of commercial real property." The Act is based on the Legislature's finding that commercial rent control can result in a "statewide economic drain" by discouraging commercial development, entrepreneurial enterprise, and open competition. The Act does not apply "to local rental controls on residential real property." (C.C. 1954.25.) (See 15 *Ecology L. Q.* 281 [commercial rent regulations as means of preserving diversity of commercial neighborhood].) (For definition of "commercial real property," see C.C. 1954.26(d).)

(2) *Prohibition of Rent Control.* A public entity may not enact or enforce a commercial rental control measure. (C.C. 1954.27(a).) C.C. 1954.27(b) sets forth various rules for the construction of the Act. For example, the Act does not relieve parties to a lease of their obligations. (C.C. 1957.27(b)(1); see *Griffith v. Santa Cruz* (2000) 79 *C.A.4th* 1318, 1322, 94 *C.R.2d* 801 [Act did not prohibit county ordinance that required landlord to reduce rent when he eliminated garbage service; although landlord operated recreational vehicle park, not mobilehome park, he was "unquestionably" residential landlord to those tenants who had been residents for 9 months or more].)

(3) *Power To Require Termination Notice.* A public entity may "establish a requirement for notice relating to the termination of a lease of commercial real property due to the expiration of its term." (C.C. 1954.31.) The enactment may provide for a tenant's negotiation notice, a requirement that the owner deliver an impasse notice after the negotiation notice, and actual damages for a bad faith failure to comply in an action by the owner or the tenant. (C.C. 1954.31(a).) A number of requirements and limitations on the scope of the permitted enactment and its effects are specified. (See C.C. 1954.31(b), (c), (d).)

(4) *Other Local Powers Are Not Affected.* Except as specifically provided, the Act does not grant, augment, or diminish a public entity's authority or power (C.C. 1954.30), nor does it affect a public entity's right to act in a number of specified ways, including the exercise of eminent domain or the abatement of nuisances (C.C. 1954.28). Except for actions taken for the clear or systematic purpose of circumvention, the Act does not grant, enlarge, or diminish an

entity's planning and zoning powers, its power to mitigate the impact caused by the construction, reconstruction, demolition, or alteration of the size of commercial real property, or its authority to require a business license. (C.C. 1954.29.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Preemption of Rent Control Ordinances.

b. By Federal Regulation.

12 Witkin Sum. Cal. Law Real Property § 576

[§ 576] By Federal Regulation.

In *Sea Castle Apartments, Ltd. v. Santa Monica Rent Control Bd.* (1991) 228 C.A.3d 1540, 279 C.R. 672, plaintiff's predecessor in interest owned an apartment complex, which had been rehabilitated in 1973 with a loan insured by the United States Department of Housing and Urban Development (HUD). In 1979, the Santa Monica rent control ordinance went into effect, and in 1980, 1981, and 1983, HUD granted the owner's preemption requests and established maximum rents higher than those authorized by defendant rent control board. In 1986, the owner refinanced the property and extinguished the HUD-insured mortgage. Thereafter, plaintiff brought an action for declaratory relief to determine whether rental rates were to be based on defendant's order that had been preempted in 1983, or, as contended by plaintiff, by the 1983 HUD-preemption rates. The trial judge granted summary judgment for defendant. *Held*, affirmed.

(a) Under Article VI, Clause 2 of the United States Constitution, federal regulations for HUD projects have supremacy over state and local laws. (228 C.A.3d 1545.) HUD regulations permit the preemption of rents set by local rent control boards only if necessary for the owner to maintain and operate the project adequately, which includes "sufficient funds to meet the financial obligations under the mortgage." (228 C.A.3d 1545.) "HUD will not exercise its preemption power unless it perceives a need to protect *itself*, not the owner of the mortgaged property." (228 C.A.3d 1546.)

(b) Because no aspect of HUD preemption acts to review, reverse, or permanently nullify the decision of a local rent control board, the HUD preemption rate is eliminated as a factor in determining rents once the basis for preemption has ceased to exist. (228 C.A.3d 1546.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Rent Control.

3. Validity of Regulations.

a. Due Process and Related Challenges.

12 Witkin Sum. Cal. Law Real Property § 577

[§ 577] Due Process and Related Challenges.

(1) *Birkenfeld Case. Birkenfeld v. Berkeley* (1976) 17 C.3d 129, 130 C.R. 465, 550 P.2d 1001, held that rent control was a proper subject of local regulation, but that the procedural provisions of the particular measure denied due process to landlords. The city of Berkeley adopted an initiative amendment to its charter providing for residential rent control. Plaintiff landlords brought a class suit for declaratory relief and an injunction, and the trial judge declared the amendment void. *Held*, affirmed, but for reasons different from those given by the trial judge.

(a) *Rent regulation without emergency.* The trial judge, relying on early United States Supreme Court decisions (e.g., *Block v. Hirsh* (1921) 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865, 8 Summary (10th), *Constitutional Law*, §978), ruled that rents cannot be controlled in the absence of an emergency. But this view of a limited police power was repudiated in *Nebbia v. New York* (1934) 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 8 Summary (10th), *Constitutional Law*, §1072, and *Olsen v. Nebraska* (1941) 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305, 8 Summary (10th), *Constitutional Law*, §1081. (17 C.3d 156.) "It is now settled California law that legislation regulating prices or otherwise restricting contractual or property rights is within the police power if its operative provisions are reasonably related to the accomplishment of a legitimate governmental purpose ... and that the existence of an emergency is not a prerequisite to such legislation." (17 C.3d 158.) The contention that a more pressing necessity is required for regulation of rents than for regulation of prices, because of the historic preference for real property, is without merit. Restrictions on use of land have long been upheld (e.g., zoning regulations). (17 C.3d 159.) The constitutional facts--the existence of conditions under which residential rent controls are reasonably related to promotion of the public health and welfare--were stated in the measure and were affirmed in the trial judge's findings. (17 C.3d 160 et seq.)

(b) *Conflict with general law.* The amendment is both consistent with and in conflict with state law.

(1) A local rent control measure may be validly adopted. Statutes regulating the landlord-tenant relationship do not show a legislative intent to exclude municipal regulation, and the permitted grounds for eviction under the amendment cover nearly all of those that are available under state law. (17 C.3d 142, 148.) The argument that the municipal police power does not extend to regulation of private civil relationships is untenable. The contrary rule is illustrated by cases upholding regulations of liability insurance of a bus operator, or construing violation of municipal building codes as giving rise to a tort action or the defense of breach of warranty of habitability. "Thus, the mere fact that a city rent

control measure would nullify tenants' liabilities to landlords for rent in excess of stated ceilings does not render the measure invalid." (17 C.3d 143.)

(2) The amendment requires the landlord to obtain a certificate of eviction from the rent control board before bringing unlawful detainer. In this proceeding before the board, with no effective time limit for board action, the landlord has the burden of showing not only grounds for eviction but also that there have been no outstanding Code violations on the premises. These provisions conflict with the unlawful detainer statute (C.C.P. 1159 et seq.; see *infra*, §703), which establishes a summary repossession remedy. "[T]he requirement of a certificate of eviction raises procedural barriers between the landlord and the judicial proceeding. Thus if a tenant were permitted to raise as a defense in a summary proceeding that the landlord had failed to obtain a certificate of eviction, the terms of the charter amendment would not permit the landlord to meet the defense by showing that he could have qualified for the certificate had he applied for it but would preclude him from relief simply because he had never gone through the proper procedures before the rent control board." (17 C.3d 151.)

(c) *Invalid provisions for fixing maximum rents.* As with price control and other proper subjects of regulatory power, arbitrary or discriminatory procedures will render a measure invalid. (17 C.3d 165.) And there are such objectionable provisions in the amendment.

(1) "[T]he charter amendment drastically and unnecessarily restricts the rent control board's power to adjust rents, thereby making inevitable the arbitrary imposition of unreasonably low rent ceilings. It is clear that if the base rent for all controlled units were to remain as the maximum rent for an indefinite period many or most rent ceilings would be or become confiscatory. For such rent ceilings of indefinite duration an adjustment mechanism is constitutionally necessary to provide for changes in circumstances and also provide for the previously mentioned situations in which the base rent cannot reasonably be deemed to reflect general market conditions. The mechanism is sufficient for the required purpose only if it is capable of providing adjustments in maximum rents without a substantially greater incidence and degree of delay than is practically necessary. ... The charter amendment is constitutionally deficient in that it withholds power by which the rent control board could adjust maximum rents without unreasonable delays and instead requires the Board to follow an adjustment procedure which would make such delays inevitable." (17 C.3d 169.)

(2) Specifically, the board has no power to adjust rent ceilings on any one of thousands of units until it has received a separate petition for that unit and considered the petition at an adjustment hearing; a landlord may not file a petition without simultaneously filing a certificate from the city building inspection service that the premises comply with state and city codes based on an inspection made within the preceding 6 months; the public hearing record must include all exhibits and papers required to be filed or placed in evidence, a list of all participants, a summary of all testimony, a statement of all matters officially noticed, all findings of fact, all rulings and orders and decisions, and the reasons for each; and the board is precluded from delegating hearings to a staff person or even a panel of its members, although board members are not compensated as full-time officials--they receive \$ 50 per meeting and a maximum annual compensation of \$ 2,400. (17 C.3d 170.)

(3) "These provisions put the Board in a procedural strait jacket. It cannot order general rental adjustments for all or any class of rental units based on generally applicable factors such as property taxes. It cannot terminate controls over any housing. It cannot consider a landlord's petition that is not accompanied by a current building inspection certificate of code compliance. It cannot dispense with a full-blown hearing on each adjustment petition even though all nonpetitioning parties are given ample notice and none requests to be heard. It cannot accept petitions pertaining to more than one unit or consolidate petitions pertaining to individual units for hearing even in the absence of objection except when the majority of the tenants in a building give written consent to consolidation of the petitions relating to that building. It cannot delegate the holding of hearings to a hearing officer or a member of the Board. In short, it is denied the means of reducing its job to manageable proportions through the formulation and application of general rules, the appropriate delegation of responsibility, and the focusing of the adjudicative process upon issues which cannot fairly be resolved in any other way." (17 C.3d 171.)

(4) The impracticability of individual regulation of many varied transactions has frequently led to use of rules and schedules. Here, however, the imposition of rent ceilings in the form of a rollback to base rents is virtually automatic, and the adjustment of inequitable ceilings cannot be promptly made except for a lucky few. Hence, "under the charter amendment as it now stands the combination of the rollback to base rents and the inexcusably cumbersome rent adjustment procedure is not reasonably related to the amendment's stated purpose of preventing excessive rents and so would deprive the plaintiff landlords of due process of law if permitted to take effect." (17 C.3d 173.)

(d) *Invalid part is not severable.* The constitutional defect cannot be cured simply by excision of the invalid provisions, but only by adding matter beyond the power of the court to provide. (17 C.3d 173.) And the argument to the voters emphasized the provision made for individual handling of each case by the board; "[t]hus it is by no means clear that the electorate would have approved the measure if the Board had been given broader rental adjustment powers." (17 C.3d 174.)

(2) *Later Cases.* The holding in *Birkenfeld v. Berkeley* was followed in *Vega v. West Hollywood* (1990) 223 C.A.3d 1342, 1352, 273 C.R. 243, *infra*, §586, and *Berkeley v. Berkeley Rent Stabilization Bd.* (1994) 27 C.A.4th 951, 969, 983, 33 C.R.2d 317, *infra*, §587. (See *Pick v. Cohen* (2000) 83 C.A.4th Supp. 6, 11, 100 C.R.2d 839 [upholding ordinance providing that surviving close relative or domestic partner of deceased tenant could not be evicted if landlord was notified and additional tenant had resided in premises for more than 1 year; citing *Birkenfeld*]; on requirement that landlords receive fair return on their investment, see *infra*, §582 et seq.)

(3) *Rent Decrease To Effectuate Rent Control Policies.* In *Berman v. West Hollywood Rent Stabilization Dept.* (1988) 197 C.A.3d 837, 243 C.R. 144, defendant rent stabilization department invoked a provision in the city's ordinance authorizing an order to decrease rent based on the landlord's failure to repaint apartment units once every 4 years. Plaintiff landlord contended that, because the apartment was leased on an "as is" basis, application of the ordinance sanction would be a denial of due process. *Held*, the provision was a rational means to implement the valid purpose of effectuating affordable, well-maintained rental house units to the public. Plaintiff was allowed the choice of a rent decrease or painting, and these alternative conditions were proper. (197 C.A.3d 841, 842, citing *Sterling v. Santa Monica Rent Control Bd.* (1985) 168 C.A.3d 176, 214 C.R. 71, *infra*, §588.)

(4) *Board Acting Beyond Its Authority.* In *Ocean Park Associates v. Santa Monica Rent Control Bd.* (2004) 114 C.A.4th 1050, 8 C.R.3d 421, a rent control board filed a rent decrease petition on behalf of all the tenants of a building that was undergoing several construction projects. *Held*, the board exceeded its authority by initiating a petition on behalf of tenants who had not undertaken to file petitions or otherwise raise formal complaints on their own. The board's primary function under the local rent control ordinance is to set rents at a fair level to ensure a fair return to landlords and thereby forestall constitutional challenges to the ordinance. The board must act as a neutral arbiter of what is "fair." (114 C.A.4th 1065.) By exercising the power to initiate petitions, the board transformed itself from an impartial arbiter of rent adjustments into an advocate for individual tenants. (114 C.A.4th 1065.) The board's rent decrease award for individual tenants who had submitted requests on their own, on the other hand, was justified. (114 C.A.4th 1069; see *infra*, §588.)

West's Key Number Digest, Landlord and Tenant k.200.11 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Later Cases.* See *Bohbot v. Santa Monica Rent Control Bd.* (2005) 133 C.A.4th 456, 470, 34 C.R.3d 827 [regulation precluding owner-occupancy eviction within 4 years after voluntary dismissal of prior attempt at owner-occupancy eviction was invalid; regulation conflicted with statutory provisions allowing voluntary dismissal of unlawful detainer action without prejudice]; *Baychester Shopping Center v. San Francisco Residential Rent Stabilization & Arbitration Bd. of San Francisco* (2008) 165 C.A.4th 1000, 1007, 81 C.R.3d 341 [rent ordinance did not violate due process by imposing liability on successor landlord for former landlord's unlawful rent increases; successor landlord was in best position, when purchasing property, to determine whether former landlord had complied with ordinance].



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3. Validity of Regulations.

b. Antitrust Challenges.

12 Witkin Sum. Cal. Law Real Property § 578

[§ 578] Antitrust Challenges.

In *Fisher v. Berkeley* (1984) 37 C.3d 644, 209 C.R. 682, 693 P.2d 261, the court, in an elaborate review of the controlling federal decisions (37 C.3d 655 et seq.), held that the rent control ordinance did not violate the Sherman Antitrust Act. The opinion summarizes its conclusion as follows: "Although price fixing by private business enterprises is clearly illegal per se, we hold that the per se rule of illegality does not apply to the municipal defendants' price-fixing ordinance in this case. Nor can such a municipal regulation be reviewed pursuant to the traditional rule of reason, under which validity would be judged solely by the regulation's effect on competition. Instead, we have determined that when the validity of an ordinance is challenged under the federal antitrust laws, courts must adapt traditional antitrust rules in order to accommodate municipal governments' legitimate interest in enacting economic and social regulations concerning local health, safety and welfare. We conclude that if a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an evenhanded manner, it must be upheld against a claim that it conflicts with section 1 or 2 of the Sherman Act unless the plaintiff demonstrates that the city's purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies. No such means have been proposed. Under the foregoing test the ordinance in question has not been shown to conflict with federal antitrust laws." (37 C.3d 651.)

The United States Supreme Court affirmed the California court's decision. "Because under settled principles of antitrust law, the rent controls established by Berkeley's Ordinance lack the element of concerted action needed before they can be characterized as a *per se* violation of §1 of the Sherman Act, we cannot say that the Ordinance is facially inconsistent with the federal antitrust laws. ... We therefore need not address whether, even if the controls were to mandate §1 violations, they would be exempt under the state-action doctrine from antitrust scrutiny." (*Fisher v. Berkeley* (1986) 475 U.S. 260, 106 S.Ct. 1045, 1051, 89 L.Ed.2d 206, 215.) (See 24 *San Diego L. Rev.* 181 [*Fisher*; misapplication of Sherman Act].)

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3. Validity of Regulations.

c. Contract Clause Challenges.

12 Witkin Sum. Cal. Law Real Property § 579

[§ 579] Contract Clause Challenges.

In *Interstate Marina Dev. Co. v. Los Angeles* (1984) 155 C.A.3d 435, 202 C.R. 377, the county rent control law applied by defendant county as lessor to plaintiff lessee was not a substantial impairment of the contract and hence did not violate the contract clause. It was "tailored to the legislative purpose of safeguarding tenants during a time of low vacancies and soaring rents, while ensuring that landlords are not deprived of a fair return on their investment." (155 C.A.3d 448.)

Berman v. Downing (1986) 184 C.A.3d Supp. 1, 229 C.R. 660, upheld the validity of "rollback" provisions basing future rents on rents in existence at a prior date. Rollbacks have been held constitutional in other jurisdictions (184 C.A.3d Supp. 5), and the provision met the test of *Birkenfeld v. Berkeley* (1976) 17 C.3d 129, 130 C.R. 465, 550 P.2d 1001, supra, §577. "[T]he city council declared a critical shortage of rental housing, the purpose of the moratorium ordinance was to permit the enactment of meaningful permanent legislation, the ordinance was of six months' duration only, rents were fixed at a time less than four months preceding the date of the enactment, rent control benefited all renters within the community, and the business of rental housing had been government controlled for at least five years. No significant impairment of contractual rights appears on this record." (184 C.A.3d Supp. 6.)

SUPPLEMENT: [This section is current through the latest supplement]



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d. Takings Clause Challenges.

12 Witkin Sum. Cal. Law Real Property § 580

[§ 580] Takings Clause Challenges.

(1) *Challenge Rejected.* In *Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 C.4th 952, 81 C.R.2d 93, 968 P.2d 993, the court rejected a challenge to a city's rent control law based on the Takings Clause of the Fifth Amendment of the United States Constitution and the equivalent provision of the California Constitution. Plaintiff contended that the law failed to substantially advance some of the specific objectives stated in its preamble, but did not allege that the law failed to fulfill the broader, legitimate government interest of alleviating the hardship caused by the city's serious housing shortage. "There is simply no authority for the proposition that a piece of legislation that advances legitimate goals, but not precisely those goals specified in its preamble, may be struck down by a court as unconstitutional." (19 C.4th 970.) (See 88 Cal. L. Rev. 1547 [*Santa Monica Beach, Ltd.*]; 17 Ecology L. Q. 179 [California rent control and the Takings Clause]; 21 Southwestern U. L. Rev. 1019 [questioning constitutionality of rent regulation in light of United States Supreme Court's analysis in *Nollan v. California Coastal Com.* (1987) 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677, 8 Summary (10th), *Constitutional Law*, §1157].)

(2) *Challenge Successful.* In *Action Apartment Assn. v. Santa Monica Rent Control Bd.* (2001) 94 C.A.4th 587, 114 C.R.2d 412, a group of landlords challenged the rent control board's requirement that the landlords pay their tenants 3% interest per year on security deposits, which was more than banks paid as interest on deposited funds. *Held*, trial court's grant of defendant's demurrer reversed. The complaint sufficiently pleaded a takings claim. Although defendant could require that tenants receive the amount of interest paid by banks, the 3% interest requirement had an adverse impact on plaintiffs and did not advance a legitimate state interest. (94 C.A.4th 601.) (On denial of fair return on investment as taking, see *infra*, §585.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Challenge Rejected.* See *Small Property Owners of San Francisco v. San Francisco* (2006) 141 C.A.4th 1388, 1395, 47 C.R.3d 121 [municipal ordinance that required residential landlords to pay 5% interest on security deposits during 16-month period when money market funds were paying less than 5% did not effect regulatory taking; landlords failed to show that they experienced economic loss over 16-month period, over time they rented out property, or over 19 years that ordinance was in effect; distinguishing *Action Apartment Assn. v. Santa Monica Rent Control Bd.* (2001) 94 C.A.4th 587, 114 C.R.2d 412, text, p. 672].



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e. (New) Free Speech Challenges.

12 Witkin Sum. Cal. Law Real Property § 580A

[§ 580A] (New) Free Speech Challenges.

In *Baba v. Board of Supervisors of San Francisco (2004) 124 C.A.4th 504, 512, 21 C.R.3d 428*, a local rent stabilization ordinance that prohibited a residential landlord from requesting that a tenant move, unless the landlord intended to recover the housing unit under one of the specified grounds, was unconstitutional. The ordinance suppressed speech that was neither false nor inherently misleading, and there was no evidence that the ordinance directly advanced a substantial governmental interest, or that it was no more extensive than necessary. A second ordinance that restricted residential tenants from waiving their rights under the ordinance unless represented by independent counsel was also unconstitutional. It conflicted with the general right under California law to represent oneself in a civil proceeding and was an unjustified restriction on content-based speech.

SUPPLEMENT: [This section is current through the latest supplement]



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4. Establishing Amount of Rent.

a. Establishing and Certifying Rent Levels.

12 Witkin Sum. Cal. Law Real Property § 581

[§ 581] Establishing and Certifying Rent Levels.

(1) *Statutory Requirement.* A rent control ordinance, regulation, or charter that requires the registration of rents must provide for the establishment and certification of permissible rent levels for the registered rental units, and for later changes to those rent levels, by the local agency responsible for the implementation of the ordinance, charter, or regulation. (C.C. 1947.8(a), 1947.8(h).)

If the ordinance, charter, or regulation was in effect on January 1, 1987, it had to provide for establishment and certification on or before January 1, 1988 (including completion of all administrative proceedings). If it was adopted on or after January 1, 1987, it had to provide for establishment and certification within 1 year after adoption (including completion of all administrative proceedings). (C.C. 1947.8(b).)

The record of permissible rent levels is a public record for purposes of the California Public Records Act (*Govt.C. 6250 et seq.*; see 2 *Cal. Evidence (4th)*, *Witnesses*, §278 et seq.). (C.C. 1947.8(f).)

(2) *Agency's Duty To Issue Certificate.* After the establishment and certification of permissible rent levels under C.C. 1947.8(b), the agency must, on request, provide the landlord and the tenant with "a certificate of the permissible rent levels of the rental unit" within 5 business days from the date of the request. These rent levels are, in the absence of intentional misrepresentation or fraud, binding and conclusive on the local agency, unless the determination of permissible rent levels is being appealed. (C.C. 1947.8(b), 1947.8(c).)

A landlord may request a certificate of permissible rent levels for vacant rental units that have a base rent established and are not exempt from registration. (C.C. 1947.8(b).) The local agency may charge a fee to the person to whom a certificate is issued, in the amount necessary to cover the reasonable costs of issuance. (C.C. 1947.8(d).)

The landlord or the tenant may file an appeal from the determination with the local agency within 15 days from issuance of the certificate, and the agency must give written notice of its decision within 60 days after filing. (C.C. 1947.8(c); see *Sego v. Santa Monica Rent Control Bd.* (1997) 57 C.A.4th 250, 258, 67 C.R.2d 68 [requirements of C.C. 1947.8(c) are mandatory; rent control board abused discretion by refusing to respond to request for certification and by failing to provide required procedures, including administrative appeal rights].)

(3) *Effect of Failure To Certify.* The absence of certification will not "impair, restrict, abridge, or otherwise interfere with" a judicial or administrative hearing, or a matter in connection with a conveyance of an interest in property. (C.C. 1947.8(e).) A local agency may not, however, maintain an action to recover excess rent against a property owner who has registered the unit within the specified time limits, if the initial certification of permissible rent levels affecting that particular property has not been completed, "unless the delay is willfully and intentionally caused by the property owner or is a result of court proceedings or further administrative proceedings ordered by a court." (C.C. 1947.8(b).)

(4) *Notice Specifying Rents.* A notice specifying rents applicable to residential rental units that is given by an owner to a public entity or tenant in compliance with *Govt.C. 7060* et seq. (infra, §598 et seq.) will not be considered a registration of rents for purposes of C.C. 1947.8. (C.C. 1947.8(g).)

(5) *No Effect on Other Powers of Public Entities.* Nothing in C.C. 1947.8 may be construed to grant a public entity a power that it does not independently possess to control rent, nor does C.C. 1947.8 diminish a power that a public entity possesses, except as specifically provided. (C.C. 1947.8(i).)

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4. Establishing Amount of Rent.

b. Fair Return on Investment.

1. Constitutional Requirement.

12 Witkin Sum. Cal. Law Real Property § 582

[§ 582] Constitutional Requirement.

To satisfy the constitutional requirement of due process, a rent control ordinance must provide a fair return to the landlord. This need not, however, be a fair return on value; a fair return on investment is sufficient. (*Fisher v. Berkeley* (1984) 37 C.3d 644, 652, 209 C.R. 682, 693 P.2d 261.)

In *Cotati Alliance for Better Housing v. Cotati* (1983) 148 C.A.3d 280, 195 C.R. 825, plaintiff landlords sought injunctive and declaratory relief against defendant city and its rent control board, alleging that the rent control ordinance was invalid because it used an investment-based standard in determining rent adjustments, instead of a return on value standard. *Held*, the return on investment standard meets the mandate of *Birkenfeld v. Berkeley* (1976) 17 C.3d 129, 130 C.R. 465, 550 P.2d 1001, *supra*, §577, that landlords be afforded "a just and reasonable return on their property."

(a) Courts of other jurisdictions as well as California have uniformly rejected the return on value standard. (148 C.A.3d 287, citing out-of-state cases and *Palos Verdes Shores Mobile Estates, Ltd. v. Los Angeles* (1983) 142 C.A.3d 362, 190 C.R. 866.) "The fatal flaw in the return on value standard is that income property most commonly is valued through capitalization of its income. Thus, the process of making individual rent adjustments on the basis of a return on value standard is meaningless because it is inevitably circular; value is determined by rental income, the amount of which is in turn set according to value. Use of a return on value standard would thoroughly undermine rent control, since the use of uncontrolled income potential to determine value would result in the same rents as those which would be charged in the absence of regulation. Value (and hence rents) would increase in a never-ending spiral. Similarly, as apparently was true in *Cotati*, if there was a housing shortage which caused rents to be artificially high, use of prerent control value as the measure will perpetuate artificially inflated rents. Rent control utilizing this standard is no rent control at all." (148 C.A.3d 287.)

(b) The fair return on investment standard has been uniformly approved. (148 C.A.3d 288, citing cases from other jurisdictions, and disagreeing with contrary expressions in *Gregory v. San Juan Capistrano* (1983) 142 C.A.3d 72, 85, 191 C.R. 47.) Complications will undoubtedly arise in application of this standard where the landlord has not actually made any investment, e.g., where the landlord has inherited the property. However, the ordinance gives the board sufficient flexibility to avoid confiscatory results. "Because 'return on their investment' is not limited to initial or cash

investment, a landlord's personal labor in improving property may be considered an investment meriting a fair rate of return. The landlord who purchased property years ago with preinflation dollars is not limited to a return on the actual dollars invested; the Board may equate the original investment with current dollar values and assure a fair return accordingly." (148 C.A.3d 289.) And the "ordinance does not preclude the Board from devising methods of imputing an investment to landlords who obtained property by gift or inheritance (e.g., use of the transferor's investment, adjusted to reflect the value of preinflation dollars or other pertinent factors)." (148 C.A.3d 289.) Complications resulting from differing financing terms are also surmountable. The board may consider individual financing terms or mortgage payments to principal in determining what constitutes a fair return. (148 C.A.3d 289; see *infra*, §583.)

(c) Plaintiff's contention that the investment standard deprives them of any long-term appreciation in the value of their property is unsound. "It is one of the very sources of long-term appreciation--inflated rents--that rent control measures are intended to restrict." (148 C.A.3d 290; see *infra*, §584.)

(d) Plaintiff's contention that the investment standard denies equal protection in that it will lead to the imposition of different rent ceilings for identical rental units is likewise unsound. It is "at least debatable" that the standard bears a rational relationship to a legitimate public purpose. "The investment-based standard, unlike a value-based standard, ensures that inflationary factors will not be built into a rent control ordinance's rent ceiling adjustment mechanism, and thereby ensures the integrity of the entire rent control scheme. This court must defer to the local governmental determination as to the desirability of any consequential disparate treatment of landlords." (148 C.A.3d 292.)

(e) The *Birkenfeld* due process standard (just and reasonable return) "is the assurance that an efficient landlord may recover all reasonable expenses actually incurred and, in addition, receive a fair profit or return on investment. ... A failure in this regard might well violate prohibitions against the taking of private property for public use without just compensation. ... An unspoken purpose of rent control during inflationary times is to distribute the burdens of inflation fairly between the landlord and tenant. It should be recognized in inflationary periods that the landlord's investment was made with dollars that were worth more at the time of the investment and therefore may deserve a greater present return. If the net operating profit of a landlord continues to be the identical number of dollars, there is in time a real diminution to the landlord which eventually becomes confiscatory." (148 C.A.3d 293.)

(f) In considering relevant factors, the board must weigh the interests of both the renting public and the landlord. "Rent which meets the minimum standards of being fair and reasonable is that amount which will permit the property to generate income sufficient to cover the costs of operation and the servicing of reasonable financing and to ensure the return of a reasonable profit. A rent control ordinance must not only protect tenants against excessive rents, but also ensure a fair rate of return to landlords. No specific formula can or should be developed since the Board, in making general rate adjustments and acting upon petitions for individual increases, must consider a variety of factors, some of which may be personal or individual to a particular landlord or rental property." (148 C.A.3d 294.)

The *Cotati* reasoning and holding were discussed and approved in *Fisher v. Berkeley*, *supra*, 37 C.3d 644, 679, 683, 684, 685, 686, and *Baker v. Santa Monica* (1986) 181 C.A.3d 972, 979, 226 C.R. 755. (See 27 Santa Clara L. Rev. 715 [assessed value as measure of fair return].)

Due process does not require a regulatory agency to grant a rent increase for every capital improvement that a landlord makes. "Instead, due process merely requires that the agency take capital improvements into account when evaluating whether the owner is receiving a fair return on the property as a whole. If the existing rents are sufficient to provide the owner with a fair return on the overall project even after the capital improvement, then due process is satisfied." (*Morgan v. Chino* (2004) 115 C.A.4th 1192, 1200, 9 C.R.3d 784 [landlord who failed to present evidence necessary to calculate her overall rate of return was not entitled to rent increase to compensate her for capital improvement to streets of her mobilehome park].)

A number of other decisions address fair return on investment issues, including the following:

Kirkpatrick v. Oceanside (1991) 232 C.A.3d 267, 283 C.R. 191, *infra*, §770 [allegation that rent control ordinance, as applied, prevented fair return and amounted to taking; judgment for defendant on demurrer reversed].

West Hollywood Concerned Citizens v. West Hollywood (1991) 232 C.A.3d 486, 489, 283 C.R. 470 [annual unit fee of \$ 96 did not deprive landlord of right to just and reasonable rate of return].

Kavanau v. Santa Monica Rent Control Bd. (1993) 19 C.A.4th 730, 735, 23 C.R.2d 724 [12% cap on rent increases denied fair rate of return to landlord who made substantial capital improvements].

Westwinds Mobile Home Park v. Mobilehome Park Rental Review Bd. (1994) 30 C.A.4th 84, 91, 35 C.R.2d 315 [\$ 4-per-month rent increase, calculated using "historical cost" approach, did not provide fair rate of return, where there was no evidence that similar investments produced similar rates of return].

Carson Harbor Village, Ltd. v. Carson Mobilehome Park Rental Review Bd. (1999) 70 C.A.4th 281, 291, 82 C.R.2d 569 [monthly rent increase that was about one-third of amount requested by owner was constitutionally valid and supported by substantial evidence; board properly allocated cost of wetlands remediation project over 3 years, representing period for repayment of loan that was source of project funds; board also properly disallowed legal fees related to wetlands contamination litigation as operating expense, where legal services were not provided in connection with regular mobilehome park operations].

SUPPLEMENT: [This section is current through the latest supplement]

See *TG Oceanside, L.P. v. Oceanside* (2007) 156 C.A.4th 1355, 1376, 68 C.R.3d 320 [mobilehome park owner's alternative formula for calculating fair return appeared to be return on value approach, which has been rejected by courts; owner failed to show that applying ordinance's adjustment formulas would be unjust or unreasonable].



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[§ 583] Effect of Financing Terms.

When the method adopted for calculation of fair return on investment is based on the total purchase price of the property, interest incurred to purchase the property should not be deducted as an expense. (*Palomar Mobilehome Park Assn. v. Mobile Home Rent Review Com.* (1993) 16 C.A.4th 481, 488, 20 C.R.2d 371, *infra*, §584.) However, when the return on investment standard used by the rent control authority requires consideration of "operating expenses, mortgage interest payments, and a percentage of cash investment," it is a fatal error for the authority not to consider the landlord's interest payments. (*Yee v. Mobilehome Park Rental Review Bd.* (1993) 17 C.A.4th 1097, 1107, 23 C.R.2d 1.) (See *Berkeley v. Berkeley Rent Stabilization Bd.* (1994) 27 C.A.4th 951, 970, 33 C.R.2d 317, *infra*, §587.)

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3. Long-Term Appreciation.

12 Witkin Sum. Cal. Law Real Property § 584

[§ 584] Long-Term Appreciation.

In *Palomar Mobilehome Park Assn. v. Mobile Home Rent Review Com.* (1993) 16 C.A.4th 481, 20 C.R.2d 371, the court held that, in determining whether the landlord was receiving a fair return on its investment, defendant city (in its capacity as the Mobile Home Rent Review Commission) had erroneously factored in the appreciated value of the property. "[I]t is not, as the City suggests, merely a matter of calculating the amount of appreciation and dividing by the number of years of ownership to determine the annual yield due to appreciation. Rather, the concept should operate here as it does with regard to stocks such that the potential for appreciation may be shown to affect the rate of return. Thus, an expert testifying as to the rate of return on comparable investments should take into account the potential for appreciation in assessing the sort of investment which is comparable. Presumably, the greater the anticipated appreciation, the lower the rate of return which investors will demand." (16 C.A.4th 489.)

In *Yee v. Mobilehome Park Rental Review Bd.* (1993) 17 C.A.4th 1097, 1107, 23 C.R.2d 1, the approach of *Palomar Mobilehome Park Assn.* was followed and extended to the consideration of potential tax shelter benefits (in a general way, not with regard to a particular landlord). (17 C.A.4th 1110.)

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4. Denial of Fair Return as Taking.

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[§ 585] Denial of Fair Return as Taking.

In *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 C.4th 761, 66 C.R.2d 672, 941 P.2d 851, 8 Summary (10th), *Constitutional Law*, §1155, plaintiff landlord had obtained an appellate ruling that defendant's 12% annual limit on rent increases violated plaintiff's due process rights by depriving him of a just and reasonable return on his investment. (See *Kavanau v. Santa Monica Rent Control Bd.* (1993) 19 C.A.4th 730, 23 C.R.2d 724.) Plaintiff then claimed that he had suffered a taking during the time that the 12% limit applied to his property, and he sought "just compensation" in the form of lost rental income and interest. The trial judge sustained defendant's demurrer. *Held*, affirmed.

(a) Plaintiff's allegations, if true, are not sufficient to establish a taking. Rent control does not generally constitute a physical invasion of property. Plaintiff has not lost all economically beneficial or productive use of his property. Thus, defendant's actions do not fall within either of the two discrete categories of regulatory action that constitute a taking. Furthermore, the economic impact on plaintiff of the 12% limit was not significant when compared to the benefits he continued to receive from the property, nor did the limit significantly interfere with plaintiff's investment-backed expectations. Plaintiff was not denied a previous beneficial use of his property. (16 C.4th 780.) Moreover, defendant did not impose the limit in order to facilitate uniquely public functions or as a condition of granting a permit. Finally, defendant had a legitimate interest in easing the burden of sudden, large rent increases on tenants, and the limit advanced that interest. (16 C.4th 781.)

(b) Plaintiff's continuing right to adjustments of future rents, and defendant's obligation to consider the cost to plaintiff of the previously imposed, confiscatory 12% limit when making those adjustments, provide plaintiff with an adequate remedy for the due process violation and obviate finding a taking. (16 C.4th 782, 783.) Hence, there is no need to determine whether a rent regulation that violates a landlord's right to due process by depriving him of a fair return also necessarily constitutes a taking. (16 C.4th 782.) (See 152 *Valparaiso Associates v. Cotati* (1997) 56 C.A.4th 378, 383, 384, 65 C.R.2d 551 [plaintiffs stated takings claim by alleging that rent control program had actually reduced stock of affordable housing, contrary to program's stated goals, and that rate of return for their capital improvements was zero]; on damages for denial of fair return, see *infra*, §595.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Stardust Mobile Estates, LLC v. San Buenaventura* (2007) 147 C.A.4th 1170, 1186, 55 C.R.3d 218 [trial court correctly dismissed taking claim after concluding that rent increase granted to mobilehome park owner provided it with reasonable rate of return].



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5. Base Date Rents.

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[§ 586] Base Date Rents.

In *Vega v. West Hollywood* (1990) 223 C.A.3d 1342, 273 C.R. 243, defendant city's rent control ordinance, as is "typical," used rents charged on a fixed prior date ("base date rents") as the starting point for fixing maximum rents. A landlord who had for "unusual reasons" suppressed rents on her units during the base year sought to have her base date rents adjusted to be consistent with rents for comparable units during the base year. Although the landlord introduced expert evidence of comparable rents that the city's rent control commission "presumed to be fair and reasonable," the commission refused to make the adjustment. The commission contended that the ordinance permitted the use of comparable rents only on a showing that the landlord's net operating expenses do not provide a fair and reasonable return. *Held*, the landlord's current maximum allowable rents must be computed based on the comparable rents. "[A] property owner must be permitted ... to start rent calculations with a base date rent similar to other comparable properties." (223 C.A.3d 1352, citing *Birkenfeld v. Berkeley* (1976) 17 C.3d 129, 130 C.R. 465, 550 P.2d 1001, supra, §577.) (See *Berkeley v. Berkeley Rent Stabilization Bd.* (1994) 27 C.A.4th 951, 983, 33 C.R.2d 317, infra, §587 [following *Vega*]; *Concord Communities, L.P. v. Concord* (2001) 91 C.A.4th 1407, 1414, 111 C.R.2d 511 [vacating rent board's denial of mobilehome park owners' request for adjustment of base year rents; experts stated that rents were at least 12% to 14% below rents for mobilehome spaces with comparable amenities; moreover, unique and extraordinary circumstances had created low base year rents because previous owner had built parks and paid for them decades before, had not raised rents for many years, had paid pre-Proposition 13 property taxes, and did not want any government involvement]; *MHC Operating Ltd. Partnership v. San Jose* (2003) 106 C.A.4th 204, 220, 130 C.R.2d 564 [evidence supported city's determination that mobilehome park owner was not entitled to extraordinary rent increase; city's ordinance required owner to compute net operating income in base year 1985, owner could have estimated that amount, and city did not have to accept owner's use of different base year].)

In *Apartment Assn. of Greater Los Angeles v. Santa Monica Rent Control Bd.* (1994) 24 C.A.4th 1730, 30 C.R.2d 228, defendant adopted a regulation prohibiting landlords from seeking an adjustment in base rents for property acquired after the inception of rent control. The trial judge permanently enjoined enforcement of the regulation, finding it incompatible with the constitutional standard articulated in *Vega* and *Birkenfeld*. *Held*, affirmed. There is no constitutional entitlement to base date rents adjusted to market levels. Instead, a landlord's *return on investment* may be

considered in determining whether to adjust base rents. (24 C.A.4th 1737.) But the regulation at issue was too broad in prohibiting post-rent control purchasers from petitioning for a base rent increase on any ground. (24 C.A.4th 1738.) "Rent control regulations can have a confiscatory effect if no rent adjustment mechanism is provided, and a regulation may be invalid on its face when its terms will not permit those who administer it to avoid confiscatory results in its application to the complaining parties." (24 C.A.4th 1739, citing *Birkenfeld*.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Los Altos El Granada Investors v. Capitola* (2006) 139 C.A.4th 629, 655, 43 C.R.3d 434 [selection of year in which mobilehome park owner purchased park as base year was not error, even though it was after enactment of rent control ordinance; trial court could presume that park owner had adjusted purchase price to provide it with fair return based on rent levels in effect at that time]; *Stardust Mobile Estates, LLC v. San Buenaventura* (2007) 147 C.A.4th 1170, 1183, 55 C.R.3d 218 [remand to determine need for base year adjustment was necessary; mobilehome park owner could attempt to prove that rents during base year were lower than market value because of owner's concern for elderly tenants].



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6. Expanded Authority To Provide Fair Return.

12 Witkin Sum. Cal. Law Real Property § 587

[§ 587] Expanded Authority To Provide Fair Return.

In *Berkeley v. Berkeley Rent Stabilization Bd.* (1994) 27 C.A.4th 951, 33 C.R.2d 317, plaintiff city challenged regulations enacted by its rent control board granting across-the-board increases in rents. Section 11 of the city rent control ordinance authorized general rent adjustments based on changes in utilities or taxes; section 12 provided for individual rent adjustments based on a landlord's particular circumstances. The contested regulations (a) allowed rents to increase annually by the amount of the Consumer Price Index, minus its shelter component, multiplied by the average percentage of rents estimated to constitute landlords' net operating income (calculated as gross income minus property taxes, capital improvements, and operating expenses including the cost of debt service); (b) permitted increases in rents that were below prevailing market levels for comparable units when rent control took effect; and (c) provided relief for units with "historically low rents"--those below 75% of the HUD fair market rent for the county at the inception of rent control. The "comparable rents" and "historically low rents" regulations required a petition for an individual adjustment, but provided for an automatic rent increase without the necessity of showing an individual impact on a landlord's return on investment.

The trial judge upheld the challenged regulations, but issued a writ precluding their application to property purchased after 1979, when prices presumably accounted for the effects of rent control. *Held*, affirmed in all respects but the exception for post-1979 purchasers, and remanded for entry of judgment denying any relief. "The Board's power to set rents is derived from two sources: the literal provisions of the ordinance and the constitutional requirement implied in section 11 of the ordinance by case precedent. ... The purpose of the ordinance, and the power it invests in the Board, are expanded by the constitutional requirement that the Board provide landlords with a just and reasonable return on investment." (27 C.A.4th 962.)

(a) *Indexing net operating income for inflation.* Plaintiff, conceding that landlords' profits must be allowed to keep up with inflation, argued that the board lacked authority under section 11 of the ordinance to grant general adjustments for the impact of inflation on the debt service component of net operating income. But debt service adjustments were not forbidden by the terms of section 11. (27 C.A.4th 970.) Case law established that the board need not follow any particular formula in calculating general adjustments under section 11, and that it could use a standard designed to protect landlords' net operating income. (27 C.A.4th 971, citing *Fisher v. Berkeley* (1984) 37 C.3d 644, 209 C.R. 682,

693 P.2d 261, and *Baker v. Santa Monica* (1986) 181 C.A.3d 972, 226 C.R. 755.) Sole authority to set and adjust rents in compliance with the constitutional mandate to insure a fair return on investment rested with the board, and its determination that excluding debt service from net operating income would have a confiscatory result was supported by substantial and competent evidence provided by economists hired by the board. (27 C.A.4th 972, 975.) Plaintiff's position that inflation adjustments should be procedurally split, with those attributable to debt service being redressed by individual petition under section 12 instead of by general adjustment under section 11, "would once again simply fit City's landlords into the same type of procedural straitjacket they have been forced to wear for years, which was long ago found constitutionally deficient." (27 C.A.4th 973, citing *Birkenfeld v. Berkeley* (1976) 17 C.3d 129, 130 C.R. 465, 550 P.2d 1001, supra, §577.)

(b) *Inclusion of post-1979 purchasers.* Plaintiff contended that it was an abuse of discretion to grant general rent increases to post-1979 purchasers, permitting them to reap windfall profits. (27 C.A.4th 979.) But new owners take their property subject to both entitlements and liabilities, and the board's approach was consistent with the city's rent control system, which was property-specific, not owner-specific, and had never made a distinction based on date of acquisition. (27 C.A.4th 980.) Purchasers could reasonably expect that their constitutional rights would be protected through rent adjustments necessary to protect net operating income. (27 C.A.4th 981.) The argument that relief was only available through the individual petition process must again be rejected; the city charter and rent control ordinance, properly construed in light of *Birkenfeld*, *Fisher*, and *Cotati Alliance for Better Housing v. Cotati* (1983) 148 C.A.3d 280, 195 C.R. 825, supra, §582, granted the board plenary power to raise rents by general adjustment in order to remedy constitutional deficiencies. The board's action was also justified by the delay and waste inherent in using the individual hearing process to decide issues of general import to post-1979 purchases. (27 C.A.4th 982.)

(c) *Comparable rents.* The regulation permitting adjustments for rents that were below those of comparable units at the inception of rent control was a proper implementation of the rulings in *Birkenfeld*, finding the plaintiff's prior rent control system unconstitutional because it failed to provide a ready procedure for adjusting below-market rents, and *Vega v. West Hollywood* (1990) 223 C.A.3d 1342, 273 C.R. 243, supra, §586, holding that a landlord is entitled to a rent increase if the base rent for a unit is much lower than rents charged for comparable units. (27 C.A.4th 983.)

(d) *Historically low rents.* The regulation permitting rents to rise to 75% of the level certified as reasonable by the federal Government was within the board's discretion "to strike a balance between the landlords' rights to receive a fair return, and the tenants' legitimate desire for rents which are low, but not so unreasonably low as to lead to undue hardship to landlords, with consequent loss of the incentive to maintain rental property." (27 C.A.4th 984.)

A strong dissent took issue with the majority's holdings on indexing debt service for inflation, comparable rents, and historically low rents, making the following arguments: (a) The power to make general adjustments under section 11 has been expanded by the constitutional requirement of ensuring a fair return, but only insofar as the individual petition process of section 12 is insufficient to address a universal threat to fair return, and finance costs for individual landlords are so variable that they are not similarly affected by inflation (27 C.A.4th 997, 998); and (b) as was recently held in *Apartment Assn. of Greater Los Angeles v. Santa Monica Rent Control Bd.* (1994) 24 C.A.4th 1730, 30 C.R.2d 228, supra, §586, *Birkenfeld* and *Vega* do not require base date rents to be adjusted to market levels, and the "comparable rents" and "historically low rents" regulations violated the ordinance by circumventing the individual petition process and granting adjustments without regard to fair return (27 C.A.4th 1001, 1003). (See *Donohue v. Santa Paula West Mobile Home Park* (1996) 47 C.A.4th 1168, 1178, 55 C.R.2d 282 [rent control initiative that uses "maintenance of net operating income" approach is not facially unconstitutional, even though it excludes land acquisition costs in determining net operating income, where rent review commission has discretion to grant increase if approach deprives owner of fair rate of return].)

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4. Establishing Amount of Rent.

c. Rent Decrease or Denial of Increase.

12 Witkin Sum. Cal. Law Real Property § 588

[§ 588] Rent Decrease or Denial of Increase.

(1) *Factors Considered as Basis for Decrease.* In *Sterling v. Santa Monica Rent Control Bd.* (1985) 168 C.A.3d 176, 214 C.R. 71, tenants sought rent decreases on the ground that the landlord had failed to provide adequate housing services or to maintain the rental units in a habitable condition and a state of reasonable repair (criteria listed in the city charter). The trial court, on the landlord's petition for prohibition, granted the writ. *Held*, reversed. "[T]he superior court erred in concluding that conditions amounting to substantial deterioration (i.e., breach of the implied warranty of habitability) or violations of housing, health and safety codes may not be considered as a basis for rent decreases. These represent nothing more than relevant indicators of the comparative return on investment rather than an attempt at extra-administrative or extrajudicial 'enforcement' of rights. The superior court further erred in excluding from the enumeration of 'proper purposes' for which maximum allowable rents may be decreased 'decreases in operating and maintenance expenses.' Any and all factors indicating a decrease in operating or maintenance expenses, including a reduction in the frequency of painting or the failure to make minor repairs which were made formerly, properly may be considered." (168 C.A.3d 186.) (See *Richman v. Santa Monica Rent Control Bd.* (1992) 7 C.A.4th 1457, 1466, 9 C.R.2d 690 [rent board had authority to determine that parking was amenity subject to rent control after landlord began charging separate parking fee; citing *Sterling*]; *Golden Gateway Center v. San Francisco Residential Rent Stabilization & Arbitration Bd.* (1999) 73 C.A.4th 1204, 1209, 87 C.R.2d 332 [problems caused by landlord's reasonably necessary repair and maintenance to rental units, which did not substantially affect tenants' rights to occupy units, did not constitute "decrease in services" justifying rent reduction under local ordinance]; *Ocean Park Associates v. Santa Monica Rent Control Bd.* (2004) 114 C.A.4th 1050, 1067, 8 C.R.3d 421 [rent decrease was justified where landlord had torn out existing facilities and left them in dilapidated, unsafe, and unusable condition for months or years while no construction whatsoever took place, and landlord presented no construction-related reason for doing so; distinguishing *Golden Gateway Center* and clarifying *Sterling* as holding that there was no reason rent control board could not consider health and safety violations in setting fair rents, rather than that only health and safety violations could be considered].)

(2) *Hardship as Basis for Denying Increase.* In *Pennell v. San Jose* (1986) 42 C.3d 365, 228 C.R. 726, 721 P.2d 1111, the ordinance allowed a rent control hearing officer to disallow a rent increase that would impose an unreasonably severe financial or economic hardship on a particular tenant. Plaintiff landlord contended that the provision was

unconstitutional in denying an otherwise reasonable rent increase under the ordinance's factors merely because the particular landlord had a hardship tenant. *Held*: "[E]qual protection is not denied simply because some landlords may receive rents different (albeit nonconfiscatory) from those received by other landlords with similarly situated apartments *as long as there exists a rational basis for the distinction*." (42 C.3d 373.) This ordinance meets that test, "by differentiating between hardship and nonhardship tenants, through the rational means of distinguishing between their respective landlords." (42 C.3d 374.)

Three justices dissented: "[A]lthough we have repeatedly upheld rent control ordinances that apply to landlords as a class, this measure goes a critical step further by requiring individual landlords to reduce rentals for individual tenants with financial hardship. There is no rational link, either in the benefit gained or the burden created, which would justify imposing that welfare obligation as a one-on-one subsidy, rather than spreading the imposition fairly through the class of landlords generally or taxpayers as a whole." (42 C.3d 377.)

Pennell v. San Jose was affirmed by the United States Supreme Court in *Pennell v. San Jose* (1988) 485 U.S. 1, 108 S.Ct. 849, 858, 859, 99 L.Ed.2d 1, 15, 16, holding that the ordinance on its face violated neither due process nor equal protection.

(3) *Landlord's Failure To Register*. In *Searle v. Berkeley Rent Stabilization Bd.* (1988) 197 C.A.3d 1251, 243 C.R. 449, defendant city's rent control ordinance provided for (a) annual general rent adjustments (AGAs) based on citywide average increases in operating costs, available to all complying landlords; and (b) individual rent adjustments (IRAs) available by a landlord's petition based on a particularized showing of increased operating costs such that the landlord is not receiving a fair return on investment. The ordinance also provided that no AGA will be effective if the landlord has failed to register, and that a landlord who was ineligible for a year should not be eligible to raise rents under that particular AGA in future years. In 1984, plaintiff landlords purchased a previously unregistered apartment building, began the registration process, and sought AGAs for 3 previous years already lost by the noncomplying prior owner. Defendant board denied their claim, and they contended that this was a denial of due process. *Held*, judgment denying mandamus affirmed.

(a) At the time the landlords purchased the building, the AGAs in question had already been permanently lost, and the prior owner could not sell, and presumably the landlords did not pay for, rights the prior owner did not own. (197 C.A.3d 1255.)

(b) Plaintiffs contended that the ordinance's provision against recapture of lost AGAs was a penalty aimed at depressing the sale price of unregistered property. But if this was an unreasonable and oppressive penalty, it would punish sellers, not buyers, and the landlords lacked standing to challenge it. (197 C.A.3d 1256.) And if the effect of prior nonregistration on current legal rents was a factor in negotiating the purchase price, that depressed price was a benefit to the landlords. (197 C.A.3d 1258.) "If, on the other hand, they ignored the fact the building was not registered and paid too much for it, they cannot expect the Rent Board or the courts to remake a bad bargain." (197 C.A.3d 1258.)

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12 Witkin Sum. Cal. Law Real Property § 589

[§ 589] Rent Increase.

In *Cole v. Oakland Residential Rent Arbitration Bd.* (1992) 3 C.A.4th 693, 4 C.R.2d 593, tenants appealed from the denial of their writ petition seeking to overturn a rent board decision allowing their landlord to increase rents 42% to cover the costs of increased debt service. The Oakland rent control ordinance permitted increases for that purpose, and applicable regulations provided for a maximum increase sufficient to achieve a rental income equal to total housing service costs plus allowable debt service costs. The board's policy was to calculate gross rental income as of the date a tenant petitioned for a determination of the allowable increase. The tenants argued that this approach understated the landlord's gross income because it did not account for the rent increases that would be paid by nonpetitioning tenants. *Held*, affirmed; the board's policy was fair and reasonable.

(a) Using "current" income figures as advocated by the tenants would create a problem over which date to use, and could lead to nonpetitioning tenants effectively subsidizing petitioning tenants. For example, if the increases paid by the former were sufficient to restore the landlord's cash balance, the latter would not have to pay any increase. (3 C.A.4th 699.)

(b) The fact that increased rents from both petitioning and nonpetitioning tenants could result in the landlord realizing a net gain did not render the board's policy unreasonable. Landlords are constitutionally entitled to a fair return on their investment (see *supra*, §582), and tenants could limit whatever "windfall" the landlord might potentially reap by filing petitions with the board. (3 C.A.4th 700.) (See *Berkeley v. Berkeley Rent Stabilization Bd.* (1994) 27 C.A.4th 951, 33 C.R.2d 317, *supra*, §587.)

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a. Where Excess Rent Was Charged.

12 Witkin Sum. Cal. Law Real Property § 590

[§ 590] Where Excess Rent Was Charged.

(1) *Refund of Excess Rent.* In a rent-controlled jurisdiction that requires the registration of rents and that has established a certified rent level, an owner who charges rent to a tenant in excess of the certified ceiling must refund the excess rent on demand. (C.C. 1947.11(a).)

Da Vinci Group v. San Francisco Residential Rent Stabilization & Arbitration Bd. (1992) 5 C.A.4th 24, 6 C.R.2d 461, supra, §572, a case arising before C.C. 1947.11 took effect, held that the San Francisco rent board had no authority to award a tenant retroactive rent rebates after the landlord was found to have illegally raised the rent. The ordinance did not provide for rebates in cases of invalid rent increases, but merely permitted the tenant to bring a civil action for money damages. (5 C.A.4th 33.)

(2) *Treble Damages, Fees, and Costs.* If the owner refuses to refund the excess rent, and if a court determines that the owner wilfully or intentionally charged the tenant rent in excess of the certified ceiling, the court must award the tenant the excess amount of rent and may treble that amount. The prevailing party must receive attorneys' fees and court costs. (C.C. 1947.11(a).) (See *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 C.3d 348, 261 C.R. 318, 777 P.2d 91, infra, §593 [rent control board could not be authorized to award treble damages]; *Kelly v. Yee* (1989) 213 C.A.3d 336, 340, 261 C.R. 568 [San Francisco Administrative Code provision for treble damages]; *Beeman v. Burling* (1990) 216 C.A.3d 1586, 1598, 265 C.R. 719 [same]; *Balmoral Hotel Tenants Assn. v. Lee* (1990) 226 C.A.3d 686, 696, 276 C.R. 640, infra, §593 ["actual damages" under San Francisco Administrative Code treble damages provision did not include damages for mental suffering]; C.E.B., Attorney's Guide to Damages 2d, §4.48.)

(3) *Nonexclusive Remedy.* The remedy provided by C.C. 1947.11 does not prohibit other remedies available to the parties. (C.C. 1947.11(b).)

(4) *Statute of Limitations Is Not Tolloed.* C.C. 1947.11(b) does not extend the time within which actions are required to be brought beyond the otherwise applicable limitation set forth in the Code of Civil Procedure. (C.C. 1947.11(c).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Refund of Excess Rent.* See *Baychester Shopping Center v. San Francisco Residential Rent Stabilization &*

Arbitration Bd. of San Francisco (2008) 165 C.A.4th 1000, 1005, 81 C.R.3d 341 [landlord was liable for unlawful rent increases imposed by former landlord; duty to impose only lawful increases arose under ordinance, not private agreement, and landlord was in best position, at time of purchase, to determine whether former landlord had complied with ordinance].



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b. Where Tenant Was Improperly Evicted for Owner Occupancy.

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[§ 591] Where Tenant Was Improperly Evicted for Owner Occupancy.

(1) *Residence Requirement.* In a rent-controlled jurisdiction that requires the registration of rents, if an owner evicts a tenant based on the owner's or the owner's immediate relative's intention to occupy the tenant's unit, the owner or an immediate relative must reside in the unit for at least 6 continuous months. (C.C. 1947.10(a).)

(2) *Treble Damages, Fees, and Costs.* If a court determines that the eviction was based on fraud by the owner or the owner's immediate relative to not fulfill the 6-month requirement, the court may order the owner to pay treble the cost of relocating the tenant from his or her existing unit back into the previous unit and may order the owner to pay treble the amount of an increase in rent that the tenant has paid. If the tenant decides not to relocate back into the previous unit, the court may order the owner to pay treble the amount of 1 month's rent paid by the tenant for the unit from which he or she was evicted and treble the amount of any costs incurred in relocating to a different unit. The prevailing party must be awarded attorneys' fees and court costs. (C.C. 1947.10(a).)

(3) *Nonexclusive Remedy.* The remedy provided by C.C. 1947.10 does not prohibit other remedies available to the parties. (C.C. 1947.10(b).)

(4) *Delayed Discovery of Wrongful Eviction Cause of Action.* In *Sylve v. Riley* (1993) 15 C.A.4th 23, 18 C.R.2d 608, a wrongful eviction action brought under a municipal rent control ordinance and not under C.C. 1947.10, the trial court granted summary judgment to defendant landlords based on expiration of the statute of limitations. Plaintiff alleged that after defendants terminated her tenancy for the stated reason that their son and daughter-in-law were going to move into her apartment, the unit remained vacant for over a year. *Held*, reversed. Under the delayed discovery rule, the question of when plaintiff discovered or should have discovered that defendants' relatives were not occupying the premises, so as to trigger the running of the statute of limitations, was a question of fact precluding summary judgment. (15 C.A.4th 27.)

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c. Landlord's Good Faith Defense.

12 Witkin Sum. Cal. Law Real Property § 592

[§ 592] Landlord's Good Faith Defense.

(1) *Protection of Owners Who Act in Good Faith.* Because the operation of local rent stabilization programs can be complex and disputes often arise with regard to standards of compliance with the regulatory processes of those programs, the Legislature limited the imposition of penalties and sanctions against an owner of residential rental units who has attempted in good faith to fully comply with the regulatory processes. (C.C. 1947.7(a).) An owner of a residential rental unit who is in substantial compliance with a rent control ordinance, regulation, or charter that requires the registration of rents may not be penalized or sanctioned for noncompliance. "Substantial compliance" means that the owner has made a good faith attempt to comply, sufficient to reasonably carry out the intent and purpose of the ordinance, charter, or regulation, and has, after receiving notice of a deficiency from the public agency responsible for implementing the provision, cured the defect in a timely manner. (C.C. 1947.7(b).) (See *Richman v. Santa Monica Rent Control Bd.* (1992) 7 C.A.4th 1457, 1465, 9 C.R.2d 690 [C.C. 1947.7(b) did not authorize relief to landlord from rent board decision disallowing parking fee and instead allowing smaller rent increase, because no penalty or sanction was assessed]; *Village Trailer Park v. Santa Monica Rent Control Bd.* (2002) 101 C.A.4th 1133, 1147, 124 C.R.2d 857, *infra*, §767 [board did not violate C.C. 1947.7(b) by retroactively revoking all annual rent increases; landlord had not shown that it was in substantial compliance with local rent control law]; C.E.B., *Attorney's Guide to Damages* 2d, §4.48.)

An owner is deemed to be in compliance with the ordinance, charter, or regulation if the owner (a) is in substantial compliance with the applicable local rental registration requirements and applicable local and state housing code provisions, (b) has paid all fees and penalties owed to the local agency that have not otherwise been barred by the applicable statute of limitations, and (c) has satisfied all claims for refunds of rental overcharges brought by tenants or by the local rent control board on behalf of tenants of the affected unit. (C.C. 1947.7(e).)

(2) *Restitution and Recovery of Fee.* Restitution to the tenant or recovery of registration and filing fees due to the public agency are the exclusive remedies that may be imposed against an owner who is in substantial compliance. (C.C. 1947.7(b).)

(3) *Prospective Restoration of Annual Rent Adjustments.* Annual rent adjustments that may have been denied during the period of an owner's noncompliance must be restored prospectively once the owner is in compliance. This

provision applies to (a) registered residential units for which a base rent has been listed, (b) residential units for which an owner can show, by a preponderance of the evidence, a good faith attempt to comply with the registration requirements, and (c) residential units that were exempt from registration requirements in a previous version of the ordinance or charter and for which the owner of that residential unit has subsequently been found not to be in compliance. (C.C. 1947.7(c); on former phase-in of adjustments for tenants facing undue financial hardship, see C.C. 1947.7(d).)

(4) *No Effect on Other Powers of Public Entities.* Nothing in C.C. 1947.7 may be construed to grant a public entity a power that it does not independently possess to control rent, nor does C.C. 1947.7 diminish a power that a public entity possesses, except as specifically provided. (C.C. 1947.7(f).)

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- d. Constitutional Limits on Administrative Sanctions.

12 Witkin Sum. Cal. Law Real Property § 593

[§ 593] Constitutional Limits on Administrative Sanctions.

In *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 C.3d 348, 261 C.R. 318, 777 P.2d 91, the Santa Monica rent control ordinance authorized an administrative proceeding by a tenant against a landlord who charged excess rent. The rent control board could determine violations, and the tenant could deduct the excess rent and treble damages from future rent payments. Tenants filed an administrative complaint against their landlord, and the board awarded them restitution of excess rent and treble damages. The landlord petitioned for mandamus, challenging the provision for administrative adjudication as a violation of the Judicial Powers Clause of the California Constitution (Cal. Const., Art. VI, §1). *Held:*

(a) The administrative adjudication and awarding of restitution did not violate the *Judicial Powers Clause*. (49 C.3d 374.)

(b) However, the administrative orders violated the "principle of check" which calls for an adequate opportunity for judicial review of administrative determinations. (49 C.3d 373, 375.) The board's order was immediately enforceable by the tenant's withholding of rent, before the landlord could obtain review by a petition for mandamus with a stay of the order. (49 C.3d 376, 377.)

(c) The imposition of "treble damages" was also improper. "[W]e believe that the power to award treble damages in the present context poses a risk of producing arbitrary, disproportionate results that magnify, beyond acceptable risks, the possibility of arbitrariness inherent in any scheme of administrative adjudication." (49 C.3d 379.) (See 17 *Pepperdine L. Rev.* 1061 [McHugh].)

McHugh was followed in *Floystrup v. Berkeley Rent Stabilization Bd.* (1990) 219 C.A.3d 1309, 268 C.R. 898. Berkeley's rent control ordinance required that the landlord register covered rental units by filing an initial registration statement under penalty of perjury and paying an annual registration fee. The statement called for answers to questions on prior rent charged, and plaintiff landlords refused to provide this information on the ground of possible self-incrimination. After a warning, defendant rent control board filed an action against the landlords seeking a preliminary injunction to compel them to comply with the registration statement provision. The trial court ordered the landlords to pay the registration fees but declined to compel them to submit a registration statement. The parties then

entered into a stipulation under which the landlords agreed to pay the fees without penalty and the board agreed not to seek preliminary relief prior to trial of the action for a permanent injunction. However, instead of seeking a permanent injunction and a court determination of the constitutional claim, the board dismissed its suit, unilaterally determined that the registration requirements were lawful, warned the landlords of the penalties for violation, and notified the tenants of their right under the ordinance to withhold rent.

"On December 21, 1986 (six years after landlords refused to register, five and one-half years after the court order, four and one-half years after the stipulation and three and one-half years after the dismissal of the court action)," two tenants filed a petition with the board seeking authorization to withhold rent. The hearing officer granted the petition, the board rejected the landlords' appeal, and other tenants then filed petitions to withhold rent, which the board granted. Plaintiff landlords sought administrative mandamus; the superior court denied relief and entered judgment in favor of the board. *Held*, reversed.

(a) *Rent withholding provisions are unconstitutional. McHugh* is controlling. (1) The ordinance authorizes either the board or the tenant to withhold rent without court review or approval if the landlord fails to register or demands or receives excessive rent. (2) The ordinance bans an unlawful detainer action based on rent withholding. (3) The ordinance forbids a rent increase while the withholding order is in effect or the landlord is otherwise in violation. (4) The ordinance authorizes a forfeiture of the withheld rents in the discretion of the board without any judicial "check." (219 C.A.3d 1316.)

(b) *Issuance of withholding orders is barred by stipulation.* Under the stipulation the board was obligated to seek a permanent injunction judicially determining the self-incrimination claim before imposing the sanction of rent withholding. (219 C.A.3d 1317, 1318.) Instead the board took upon itself the adjudication of the issue and imposed the sanctions. By doing so, the board breached not only the express terms of the agreement but also the implied covenant of good faith and fair dealing. (219 C.A.3d 1319.) Where, as here, "the party to a stipulation lulls his opponent into a false sense of security and thereafter breaches the agreement, the party aggrieved may invoke the remedy of estoppel precluding the party from proceeding or acting in breach of its promise." (219 C.A.3d 1319.) (See *Village Trailer Park v. Santa Monica Rent Control Bd.* (2002) 101 C.A.4th 1133, 1146, 124 C.R.2d 857, *infra*, §767 [board did not exceed its powers by retroactively revoking all annual rent increases imposed by landlord who had not complied with local rent control law; inclusion of all unauthorized rent increases in calculation of damages is kind of permissible penalty that agencies may impose to induce compliance with regulatory authority; citing *McHugh*].)

In *Balmoral Hotel Tenants Assn. v. Lee* (1990) 226 C.A.3d 686, 691, 276 C.R. 640, plaintiffs' judgment against defendant landlord, including damages for mental anguish, was trebled under the local rent control ordinance. *Held*, judgment reversed. Trebling damages for mental anguish could produce awards in excess of constitutional limitations. (226 C.A.3d 696, citing *Hale v. Morgan* (1978) 22 C.3d 388, 149 C.R. 375, 584 P.2d 512, *infra*, §614.) Here, the judgment was much larger than would be permitted by the remedy of punitive damages, which seldom exceed 10% of the defendant's net worth. The financial impact on defendant would be "catastrophic," exceeding 50% of net worth and the *full* value of the property where the violations occurred. (226 C.A.3d 696.)

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e. Violation as Defense in Unlawful Detainer Action.

12 Witkin Sum. Cal. Law Real Property § 594

[§ 594] Violation as Defense in Unlawful Detainer Action.

(1) *Defense Authorized.* "[T]he statutory remedies for recovery of possession and of unpaid rent ... do not preclude a defense based on municipal rent control legislation enacted pursuant to the police power imposing rent ceilings and limiting the grounds for eviction for the purpose of enforcing those rent ceilings." (*Birkenfeld v. Berkeley* (1976) 17 C.3d 129, 149, 130 C.R. 465, 550 P.2d 1001.)

In *Nourafchan v. Miner* (1985) 169 C.A.3d 746, 215 C.R. 450, the court indicated that the right to offset excess rent is limited to that paid during the 3-year statute of limitations prescribed by C.C.P. 338. In *Minelian v. Manzella* (1989) 215 C.A.3d 457, 464, 263 C.R. 597, the same court that rendered the opinion in *Nourafchan* disapproved of it, holding that although the affirmative defense for excess rent paid is based on a statute, it is a setoff in the nature of an equitable defense. Thus, "as long as respondent's obligation to pay rent exists, her right to claim setoff against appellant, whose wrongful conduct resulted in her overpayment of rent, will continue." (215 C.A.3d 467.)

(2) *Where Tenant's Occupancy Is Illegal.* In *Salazar v. Maradeaga* (1992) 10 C.A.4th Supp. 1, 12 C.R.2d 676, plaintiff landlord brought an unlawful detainer action to evict defendant from an illegal garage unit. Among the defenses raised by defendant was plaintiff's noncompliance with a city rent stabilization ordinance. The trial court found that defendant owed no money to plaintiff, and awarded possession of the premises to plaintiff. *Held*, reversed. Plaintiff was barred from recovering possession because he had not paid defendant the relocation benefits required by the ordinance.

(a) Generally, if the object of a contract is unlawful, the contract is void, and enforcement is not an available remedy. (10 C.A.4th Supp. 4; see 1 *Summary* (10th), *Contracts*, §§420, 431, 440.) However, the clear intent of the rent stabilization ordinance provision allowing a tenant to raise the landlord's nonpayment of relocation benefits as an affirmative defense is to preclude a noncomplying landlord from recovering possession, even if the basis of the eviction is an illegal use. (10 C.A.4th Supp. 5.)

(b) Enforcement of the relocation benefits provision conflicts with enforcement of the city's building and zoning codes where the occupancy is illegal. Nevertheless, the ordinance's legislative history shows that the city council intended to give priority to the rent stabilization ordinance in these circumstances. (10 C.A.4th Supp. 5.)

(c) Deferring vacation of the unit until the landlord pays relocation assistance serves the ordinance's purpose of affording tenants the financial means to find replacement housing before eviction. It places maximum pressure on the landlord to conform with the ordinance as well as building and zoning laws, because he is subject to criminal prosecution for violating all such regulations as long as relocation benefits are withheld. However, if the unit poses an immediate threat to health or safety, the department of building and safety can require the tenant to vacate, or the city can move to abate a public nuisance. (10 C.A.4th Supp. 6.) (See *Gabor v. Cox* (1994) 26 C.A.4th Supp. 16, 19, 31 C.R.2d 925 [downstairs area rented by defendant in plaintiff's single family residence was "dwelling unit" under municipal code, but fell within exception of single family dwellings from rent control; hence, plaintiff was properly awarded possession in unlawful detainer action; concurring judge noted that unit was illegal].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Defense Authorized.* See CACI, No. 4325 [Affirmative Defense--Failure to Comply With Rent Control Ordinance].



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6. Landlord's Remedies for Excessive Rent Control.

a. Damages for Denial of Fair Return.

12 Witkin Sum. Cal. Law Real Property § 595

[§ 595] Damages for Denial of Fair Return.

In *Galland v. Clovis* (2001) 24 C.4th 1003, 103 C.R.2d 711, 16 P.3d 130, the owners of a mobilehome park sued defendant city for inverse condemnation, denial of substantive and procedural due process, and civil rights violations under 42 U.S.C., §1983, after defendant's rent review commission denied plaintiffs' request for a rent increase. Although the commission approved rent increases in later years, plaintiffs contended that defendant's actions had deprived them of a fair return on investment during the time that the rent increases were disallowed. The trial court agreed that defendant had violated plaintiffs' due process rights, but found that the violation did not effect a taking. The trial court awarded plaintiffs \$ 236,806 in damages under 42 U.S.C., §1983 for their loss of a fair return on investment. The Court of Appeal affirmed. *Held*, reversed and remanded.

(a) *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 C.4th 761, 66 C.R.2d 672, 941 P.2d 851, *supra*, §585, established that a landlord may not obtain inverse condemnation damages against a governmental agency for temporarily imposing confiscatory rent ceilings if the landlord is able to obtain an adequate adjustment of prospective rents that compensates for past losses. (24 C.4th 1022.) It would be "incongruous" to conclude that a landlord who receives adequate rent adjustments has not suffered a constitutional injury under the Takings Clause, but has suffered such an injury under the *Due Process Clause*. (24 C.4th 1024.) Furthermore, mobilehome rental property is a long-term capital asset. (24 C.4th 1024.) If an excessively low rate of return is followed by an adequate adjustment of future rents, the landlord can obtain a reasonable average return over the life of the investment and avoid confiscation. (24 C.4th 1025.) Accordingly, to recover damages under 42 U.S.C., §1983 for allegedly confiscatory rent regulation, a landlord must show that a confiscatory rent ceiling or other rent regulation was imposed and that relief via a writ of mandamus and a *Kavanau* adjustment is inadequate. (24 C.4th 1025.)

(b) On remand, the trial court must first determine whether the rent ceilings imposed on plaintiffs were confiscatory. (24 C.4th 1026.) In doing so, it should note that: (1) Comparing the rate of return of rent-controlled mobilehome parks with those of non-rent-controlled parks, as the trial court did, is of "limited utility" in establishing the constitutional minimum rate of return; (2) market forces, rather than rent control, may have been primarily responsible for plaintiffs' low return relative to other parks surveyed; and (3) plaintiffs were able to attract capital in the form of a \$ 3 million refinancing loan during the period of allegedly confiscatory rent ceilings. (24 C.4th 1027.) On the other hand, the substantial legal and administrative costs that plaintiffs were subjected to as part of the rent review process must

also be considered to determine whether defendant's rent regulation was confiscatory and whether remand to defendant for a *Kavanau* adjustment is appropriate. (24 C.4th 1028.)

(c) Assuming that plaintiffs are able to demonstrate that the rent ceilings were confiscatory, defendant must attempt to adjust future rent ceilings to compensate for lost rents, and the trial court must review whether the adjustments are adequate to meet the constitutional standard for a fair return. If, however, a *Kavanau* adjustment proves to be inadequate, plaintiffs would be free to pursue their action under 42 U.S.C., §1983. (24 C.4th 1029.)

One dissenting justice argued that, because a party need not exhaust state administrative remedies before filing an action under 42 U.S.C., §1983 in state court, plaintiffs cannot validly be required to invoke and exhaust a *Kavanau* adjustment before pursuing their claim. (24 C.4th 1043.) Another dissenter argued that the majority extends *Kavanau* far beyond its original "modest" scope, impermissibly supplanting 42 U.S.C., §1983. (24 C.4th 1047.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Hillsboro Properties v. Rohnert Park* (2006) 138 C.A.4th 379, 390, 41 C.R.3d 441 [landlord was not entitled to *Kavanau* adjustment, even though unconstitutional rent control ordinance temporarily prevented it from charging increased rent, where landlord failed to allege that enforcement of ordinance deprived it of fair and reasonable rate of return].



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b. Damages for Overly Burdensome Rent Review Proceedings.

12 Witkin Sum. Cal. Law Real Property § 596

[§ 596] Damages for Overly Burdensome Rent Review Proceedings.

(1) *Standard for Recovery of Expenses.* In *Galland v. Clovis (2001) 24 C.4th 1003, 103 C.R.2d 711, 16 P.3d 130*, the owners of a mobilehome park sued defendant city for inverse condemnation, denial of substantive and procedural due process, and civil rights violations under 42 U.S.C., §1983, after defendant's rent review commission denied plaintiffs' request for a rent increase. Plaintiffs contended that the manner in which defendant conducted its rent control process placed an impermissibly onerous and costly burden on plaintiffs, primarily by requiring them to submit excessive amounts of information supporting their request. The trial court awarded plaintiffs almost \$ 250,000 in damages under 42 U.S.C., §1983 for the expenses and reasonable attorneys' fees incurred as a result of defendant's arbitrary and unreasonable actions. The Court of Appeal affirmed. *Held*, reversed and remanded.

(a) To prevail on a claim that a rent board's demands were so costly, arbitrary, and irrational as to constitute a denial of substantive due process, a landlord must show that the board was guilty of "grave unfairness" in the discharge of its legal responsibilities. "Only a substantial infringement of state law prompted by personal or group animus, or a *deliberate flouting of the law that trammels significant personal or property rights*, qualifies for relief" under 42 U.S.C., §1983. (24 C.4th 1034.) For example, a due process violation could occur if the board's demands for information and other procedural demands were so excessive and irrelevant to the regulatory task at hand that they appeared to have been imposed not to obtain more information or to increase the reliability of the eventual decision, but rather to discourage landlords from obtaining reasonable rent increases. (24 C.4th 1036.)

(b) The trial court did not use the proper standard to determine whether a substantive due process violation occurred. The proceedings that defendant imposed were, "at the very least, inefficient." (24 C.4th 1037.) Nevertheless, "not every government action that fails to measure up to the ideal of a fair and efficient rent control proceeding inflicts a constitutional injury" and the rate setting process is "often hopelessly complex." (24 C.4th 1037, 1038.) Moreover, plaintiffs were not initially forthcoming in providing specific financial information. On remand, the trial court must consider in context, against the overall background of defendant's dealings with plaintiffs, each of the administrative expenses that plaintiffs contend inflicted constitutional injury to determine whether the expenses were imposed in deliberate violation of the law. (24 C.4th 1039.)

(c) Even if defendant's actions do not rise to a deliberate flouting of the law, requiring defendant to pay plaintiffs'

administrative expenses in the form of damages under 42 U.S.C., §1983, plaintiffs are not necessarily without a remedy. Defendant must consider the administrative expenses it has imposed on plaintiffs in calculating whether plaintiffs are receiving a fair return of investment. (24 C.4th 1040; on necessity for defendant to adjust future rent ceilings to compensate for imposing excessively low ceilings in past, see discussion of *Galland v. Clovis*, *supra*, §595.)

A dissenting justice argued that the majority sidesteps the standard, articulated in *Birkenfeld v. Berkeley* (1976) 17 C.3d 129, 130 C.R. 465, 550 P.2d 1001, *supra*, §577, that a rent adjustment mechanism must not be prohibitively burdensome or fraught with "a substantially greater incidence and degree of delay than is practically necessary." (24 C.4th 1052.) According to the dissenter, defendant's "unfair, burdensome, and slow rent adjustment procedure" rendered the rent control scheme confiscatory both by increasing plaintiffs' costs and by preventing or delaying meritorious rent increases, and thus plaintiffs were entitled to recover the high costs they incurred complying with the unfair procedure and the additional amount necessary to give them a fair return on investment. (24 C.4th 1053.)

(2) *Landlord's Duty To Object*. A landlord who believes that a rent board's information request is arbitrary and overly burdensome must register an objection to the request and give some explanation for the objection. The board is then on notice that the request is considered overreaching, and the board has the opportunity to respond. If the board persists in its request, the landlord has the option of either submitting the information under protest or refusing to comply fully. If the board then denies the application for a rent increase, either on the merits or because of inadequate information, the landlord may seek a writ of mandamus overturning the decision, and a court will determine whether the information submitted was in fact sufficient. (*Galland v. Clovis*, *supra*, 24 C.4th 1036 [stating prospective rule].)

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c. Expenses, Fees, and Costs.

12 Witkin Sum. Cal. Law Real Property § 597

[§ 597] Expenses, Fees, and Costs.

(1) *Remedies.* C.C. 1947.15 allows property owners who successfully pursue administrative rent control proceedings to recover the expenses they reasonably incur for professional services. (See 25 *Pacific L. J.* 781.) These expenses include fees and other costs for legal, accounting, appraisal, bookkeeping, consulting, property management, or architectural services. (C.C. 1947.15(b); on determination of "successful," see C.C. 1947.15(g); on amortization, see C.C. 1947.15(d); on factors in determining reasonableness of claimed expenses, see C.C. 1947.15(e).) Moreover, a property owner who successfully obtains a judicial reversal of an adverse administrative decision regarding a petition for an upward adjustment of rents may recover the reasonable fees incurred (C.C. 1947.15(c)), and those fees may not be included in calculating the owner's fair return on investment (C.C. 1947.15(b)). (On recovery of expenses in defending frivolous action, see C.C. 1947.15(h).)

(2) *Suspended Operation of Statutes.* The remedies in C.C. 1947.15 are applicable in jurisdictions *without vacancy decontrol*. (C.C. 1947.15(b).) However, because vacancy decontrol is now required by C.C. 1954.52 and C.C. 1954.53 (*supra*, §574), C.C. 1947.15 is inoperative until C.C. 1954.50 et seq. (*supra*, §574) are repealed. (C.C. 1947.15(k).) Moreover, C.C. 1947.15 does not apply to mobile home rent control proceedings. (C.C. 1947.15(f).)

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a. Compulsion To Rent Is Prohibited (Ellis Act).

12 Witkin Sum. Cal. Law Real Property § 598

[§ 598] Compulsion To Rent Is Prohibited (Ellis Act).

Nash v. Santa Monica (1984) 37 C.3d 97, 100, 109, 207 C.R. 285, 688 P.2d 894, held that a city could require an owner to obtain approval before demolishing rental property. The 1985 Legislature enacted *Govt.C. 7060* et seq., the Ellis Act, to nullify the decision as a precedent. "It is the intent of the Legislature in enacting this chapter ... to permit landlords to go out of business." (*Govt.C. 7060.7*.) (See 17 *Pacific L. J.* 769.) The Ellis Act preempts local action with regard to substantive controls over landlords' withdrawal from the residential housing market, while specifying areas in which local governments may regulate in a manner consistent with state law. (*Santa Monica v. Yarmark* (1988) 203 C.A.3d 153, 167, 249 C.R. 732; *Channing Properties v. Berkeley* (1992) 11 C.A.4th 88, 92, 14 C.R.2d 32, *infra*, §§599, 603.)

A public entity may not, by legislative or administrative action, compel the owner of residential real property to offer, or to continue to offer, accommodations in the property for rent or lease. (*Govt.C. 7060(a)*.) (See *Los Angeles Lincoln Place Investors, Ltd. v. Los Angeles* (1997) 54 C.A.4th 53, 63, 62 C.R.2d 600 [citing *Javidzad v. Santa Monica* (1988) 204 C.A.3d 524, 251 C.R. 350; city ordinance that denied landlords' right to demolish their building unless they agreed to restrict future use of land was preempted by *Govt.C. 7060* et seq.]; *Pick v. Cohen* (2000) 83 C.A.4th Supp. 6, 12, 100 C.R.2d 839 [ordinance providing that surviving close relative or domestic partner of deceased tenant could not be evicted if landlord was notified and additional tenant had resided in premises for more than 1 year was not preempted by *Govt.C. 7060(a)*; statute only applies when landlord is withdrawing units from market or going out of business]; 31 *Golden Gate L. Rev.* 251 [harmonizing tenant's state rights and landlord's right to go out of business under Ellis Act].)

The Ellis Act does not, however, permit an owner to withdraw from rent or lease less than all of the accommodations (*Govt.C. 7060.7(d)*), nor does it override procedural protections designed to prevent abuse of the right to evict tenants (*Govt.C. 7060.7(c)*). Moreover, a local entity may compel an owner of guestrooms or efficiency units within specified types of residential hotels to continue offering those accommodations for rent or lease. (*Govt.C. 7060(a)*.)

"Accommodations" are defined as (1) residential rental units in a detached physical structure containing four or more units, and (2) where the structure contains three or fewer residential rental units, the units in that structure and in any other structure located on the same parcel of land. (*Govt.C. 7060(b)*; see *Valnes v. Santa Monica Rent Control Bd.*

(1990) 221 C.A.3d 1116, 1123, 270 C.R. 636 [Act does not apply to condominium that is one unit in structure containing multiple individually owned units; owner of condominium could not withdraw it from rental].) (See *Los Angeles Lincoln Place Investors, Ltd. v. Los Angeles* (1997) 54 C.A.4th 53, 65, 62 C.R.2d 600 [plaintiffs were entitled to protection of Govt.C. 7060 et seq. even though they sought to demolish only 17 of 795 units; 17-unit structure was "accommodation" within meaning of Govt.C. 7060(b)(1)].)

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b. Other Acts and Powers of Entity Are Not Affected.

12 Witkin Sum. Cal. Law Real Property § 599

[§ 599] Other Acts and Powers of Entity Are Not Affected.

(1) *Enforcement of Lease Obligations or Agreement To Rent.* The Ellis Act does not prevent a public entity from enforcing an agreement by the owner to offer the accommodations for rent or lease in consideration for a direct financial contribution, or, with respect to contracts entered into before July 1, 1986, for any consideration. However, the agreement is not enforceable against a bona fide purchaser or his successor unless (a) the purchaser had actual knowledge of the agreement, or (b) a written memorandum of the agreement, describing the terms and property and identifying the owner, has been recorded before July 1, 1986, or not less than 30 days before transfer of title. (*Govt.C. 7060.1(a).*)

Moreover, nothing in *Govt.C. 7060* et seq. relieves a party to a lease or rental agreement of the duty to perform its obligations. (*Govt.C. 7060.1(e).*)

(2) *Enforcement of Zoning and Land Use Planning.* The Ellis Act does not diminish or enhance (except as provided in *Govt.C. 7060.2*, infra, §600) a public entity's power to grant or deny an entitlement to the use of real property, including planning, zoning, and subdivision map approvals. (*Govt.C. 7060.1(b).*) It does not interfere with local governmental authority over land use, including regulation of the conversion of existing housing to condominiums or other subdivided interests or to other nonresidential use following its withdrawal from rent or lease. (*Govt.C. 7060.7(a).*) It does not preempt local or municipal environmental or land use regulations, procedures, or controls that govern the demolition and redevelopment of residential property. (*Govt.C. 7060.7(b).*) (See *Reidy v. San Francisco* (2004) 123 C.A.4th 580, 591, 19 C.R.3d 894 [Ellis Act preempted city ordinance that made it unlawful for residential hotel owner to eliminate or change use of residential hotel unit without first obtaining permit and that conditioned issuance of permit on owner providing replacement housing; *Govt.C. 7060.7(a)* and *7060.7(b)*, before amendment in 2004 to prohibit certain conversions of residential hotel units, did not allow application of ordinance].)

(3) *Mitigating Adverse Effects of Displacement.* The Ellis Act does not diminish or enhance a public entity's power to mitigate any adverse impact on persons displaced by the withdrawal of any accommodations. (*Govt.C. 7060.1(c)*; see *Channing Properties v. Berkeley* (1992) 11 C.A.4th 88, 99, 14 C.R.2d 32 [city law requiring landlords to pay \$ 4,500 per unit in relocation assistance regardless of financial situation of tenants violated former version of *Govt.C. 7060.1(c)*, which focused on low-income tenants].)

(4) *Unaffected Statutes.* Under *Govt.C. 7060.1(d)*, the Ellis Act does not supersede the following statutes:

(a) *Govt.C. 7260* et seq. (relocation assistance for those displaced by public acquisition of property; see 8 *Summary* (10th), *Constitutional Law*, §1271).

(b) *Govt.C. 12900* et seq. (California Fair Employment and Housing Act; see 8 *Summary* (10th), *Constitutional Law*, §915).

(c) *B. & P.C. 17200* et seq. (unfair competition; see *infra*, §716; 13 *Summary* (10th), *Equity*, §105 et seq.).

(d) *C.C. 43* et seq. (personal rights, including Unruh Civil Rights Act; see 8 *Summary* (10th), *Constitutional Law*, §898 et seq.).

(e) *C.C. 1925* et seq. (hiring, covenant of quiet enjoyment, and duties to preserve and repair; see *infra*, §§610, 619 et seq.).

(f) *C.C. 1940* et seq. (hiring of real property; see *supra*, §514). (See *Drouet v. Superior Court* (2003) 31 *C.4th* 583, 593, 3 *C.R.3d* 205, 73 *P.3d* 1185, *infra*, §717 [harmonizing landlord's right to withdraw from rental market under Ellis Act with tenant's retaliatory eviction defense in *C.C. 1942.5*].)

(g) *C.C. 1980* et seq. (disposition of abandoned personal property; see *infra*, §749 et seq.).

(h) *C.C.P. 1159* et seq. (forcible entry and detainer and unlawful detainer; see *infra*, §§703 et seq., 757 et seq.).

(i) *Health & Saf.C. 33000* (Community Redevelopment Law; see *infra*, §827).

Moreover, the Ellis Act does not alter in any way either *Govt.C. 65863.7* (withdrawal of accommodations in mobilehome park) or *C.C. 798.56* (change of use of mobilehome park). (*Govt.C. 7060.7(f)*; see *Keh v. Walters* (1997) 55 *C.A.4th* 1522, 1533, 65 *C.R.2d* 42 [*Govt.C. 7060.7* did not permit mobilehome park owner to violate *C.C. 798.56* by evicting tenant on basis of "change in use" of park].)

(5) *No Effect on Other Powers of Public Entities.* Nothing in the Ellis Act may be construed to grant a public entity a power that it does not independently possess to control rent, nor does the Ellis Act diminish a power that a public entity possesses, except as specifically provided. (*Govt.C. 7060.7(e)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Enforcement of Zoning and Land Use Planning.* See *Lincoln Place Tenants Assn. v. Los Angeles* (2007) 155 *C.A.4th* 425, 447, 66 *C.R.3d* 120 [developer who sought to evict tenants and demolish units first had to comply fully with relocation mitigation measures imposed by city under CEQA and agreed to by developer in vested tentative tract map; mitigation measures fit within exception expressed in *Govt.C. 7060.1(b)* for local land use and environmental regulation]. (3) *Mitigating Adverse Effects of Displacement.* Under the present version of *Govt.C. 7060.1(c)*, a public entity's power to require relocation assistance is not limited to low-income tenants. (*Pieri v. San Francisco* (2006) 137 *C.A.4th* 886, 890, 894, 40 *C.R.3d* 629 [rule in *Channing Properties v. Berkeley* (1992) 11 *C.A.4th* 88, 14 *C.R.2d* 32, text, p. 699, was changed by amend- ment of *Govt.C. 7060.1(c)*; local ordinance requiring maximum payment of \$ 13,500 per unit was not facially invalid].)



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c. Withdrawn Property Later Offered for Rent.

12 Witkin Sum. Cal. Law Real Property § 600

[§ 600] Withdrawn Property Later Offered for Rent.

(1) *Where Property Is Offered for Rent Within 5 Years.* Notwithstanding any provision of *Govt.C. 7060* et seq., a public entity that operates a rent control system may require that withdrawn accommodations that are put back into the rental market be subject to rent control. (On procedure for adopting regulation, see *Govt.C. 7060.5*, *infra*, §605.) In particular, the entity may require that a tenancy that commences within 5 years after the accommodation was withdrawn must be offered at the lawful rent in effect at the time the notice of intent to withdraw the accommodations was filed with the public entity, plus annual adjustments available under the rent control system. (*Govt.C. 7060.2(a)(1)*, *7060.2(a)(2)(B)*.) The same requirement may be imposed on a new tenancy that commences within the 5-year period after a notice of intent to withdraw the accommodations is filed with the public entity, whether or not the notice of intent is rescinded or the withdrawal of the accommodations is completed pursuant to the notice of intent. (*Govt.C. 7060.2(a)(1)*, *7060.2(a)(2)(A)*.) *Govt.C. 7060.2(a)* prevails over any conflicting provision of law authorizing the landlord to establish the rental rate upon the initial hiring of the accommodations. (*Govt.C. 7060.2(a)(3)*.)

(2) *Where Property Is Offered for Rent Within 2 Years.* If the accommodations are offered again within 2 years of the date the accommodations were withdrawn, the public entity may impose the following requirements:

(a) The owner of the accommodations is liable for actual and exemplary damages to a tenant or lessee who was displaced from the property by the withdrawal. (*Govt.C. 7060.2(b)(1)*.) An action by a tenant or lessee under *Govt.C. 7060.2(b)(1)* must be brought within 3 years of the withdrawal of the accommodations from rent or lease. However, nothing in *Govt.C. 7060.2(b)(1)* precludes a tenant from pursuing an alternative remedy available under the law. (*Govt.C. 7060.2(b)(1)*.)

(b) A public entity that has acted pursuant to *Govt.C. 7060.2* may institute a civil proceeding against an owner who has again offered accommodations for rent or lease subject to *Govt.C. 7060.2(b)*, for exemplary damages for displacement of tenants or lessees. (*Govt.C. 7060.2(b)(2)*.) An action by a public entity under *Govt.C. 7060.2(b)(2)* must be brought within 3 years of the withdrawal of the accommodations from rent or lease. (*Govt.C. 7060.2(b)(2)*.)

(c) An owner who offers accommodations again must first offer the unit to the tenant or lessee displaced from that unit by the withdrawal, if the tenant has advised the owner in writing within 30 days of the displacement of his or her

desire to consider an offer to renew the tenancy and has furnished the owner with an address to which that offer is to be directed. The tenant, lessee, or former tenant or lessee may advise the owner at any time during the eligibility of a change of address to which an offer is to be directed. (*Govt.C. 7060.2(b)(3).*)

(d) If the owner again offers the accommodations for rent or lease pursuant to *Govt.C. 7060.2(b)*, and the tenant or lessee has advised the owner pursuant to *Govt.C. 7060.2(b)* of a desire to consider an offer to renew the tenancy, then the owner must offer to reinstitute a rental agreement or lease on terms permitted by law to that displaced tenant or lessee. (*Govt.C. 7060.2(b).*)

(e) This offer must be deposited in the United States mail, by registered or certified mail with postage prepaid, addressed to the displaced tenant or lessee at the address furnished to the owner as provided in *Govt.C. 7060.2(b)*, and must describe the terms of the offer. The displaced tenant or lessee has 30 days from the deposit of the offer in the mail to accept the offer, which the tenant may do by personal delivery or by registered or certified mail with postage prepaid. (*Govt.C. 7060.2(b).*)

(3) *Where Property Is Offered for Rent Within 10 Years.* A public entity that has acted under *Govt.C. 7060.2* may require an owner who offers accommodations that are subject to *Govt.C. 7060.2(c)* again for rent or lease within 10 years from the date of withdrawal to first offer the unit to the tenant or lessee displaced from that unit by the withdrawal. To be entitled to the offer, the tenant or lessee must have requested the offer in writing within 30 days after the owner notified the public entity of an intention to offer the accommodations again for residential rent or lease pursuant to a requirement adopted by the public entity under *Govt.C. 7060.4(c)*. The owner of the accommodations will be liable to a displaced tenant for failure to comply with *Govt.C. 7060.2(c)*, for punitive damages not to exceed the contract rent for 6 months. (*Govt.C. 7060.2(c).*)

(4) *Applicability of Statute.* The present version of *Govt.C. 7060.2* applies to new tenancies created after December 31, 2002. Prior versions of the statute apply to new tenancies created before January 1, 2003. (See *Govt.C. 7060.2(e)*; Stats. 1999, Ch. 968, §10.)

In *Santa Monica Rent Control Bd. v. Bluvshtein* (1991) 230 C.A.3d 308, 281 C.R. 298, defendants purchased residential property as tenants in common or joint tenants, evicted the existing tenants and occupied the units themselves. They formed a general partnership and orally agreed on a method for making mortgage payments and collecting maintenance fees. Plaintiff rent control board alleged that the agreement created a landlord-tenant relationship, that the property was offered for rent, and that this constituted a reentry into the rental housing market within 1 year (now 2 years), in violation of regulations under *Govt.C. 7060.2* and *7060.5* (*infra*, §605). *Held*, judgment for defendant on demurrer affirmed. The agreement was not a lease and did not evidence intent to form a landlord-tenant relationship. It did not specify the amount or manner of payment of rent; the payments were to be made for mortgage and maintenance, instead of for use and possession, and thus were not for rent. (230 C.A.3d 317.)

SUPPLEMENT: [This section is current through the latest supplement]



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d. Demolished Property Later Replaced and Offered for Rent.

12 Witkin Sum. Cal. Law Real Property § 601

[§ 601] Demolished Property Later Replaced and Offered for Rent.

Govt.C. 7060.2(d) deals with the situation where the accommodations are demolished, and new accommodations are constructed on the same property and offered for rent within 5 years of the date of withdrawal from rent or lease. The newly constructed accommodations are subject to a system of controls that is based on obtaining a fair and reasonable return on the accommodations, even if the system of controls is one that offers an exemption for newly constructed accommodations.

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e. Notices.

1. By Public Entity to Owner's Successor in Interest.

12 Witkin Sum. Cal. Law Real Property § 602

[§ 602] By Public Entity to Owner's Successor in Interest.

If a public entity determines to apply constraints authorized by *Govt.C. 7060.2* (supra, §600) to a successor in interest of an owner who has withdrawn accommodations from rent or lease, it must record a notice with the county recorder, which must be indexed in the grantor-grantee index. A bona fide purchaser of the property after accommodations have been withdrawn will not be deemed a successor in interest unless the notice has been recorded at least 1 day before the transfer of title. (*Govt.C. 7060.3.*)

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e. Notices.

2. By Owner Who Withdraws Property.

12 Witkin Sum. Cal. Law Real Property § 603

[§ 603] By Owner Who Withdraws Property.

(1) *Owner's Notification to Public Entity.* A public entity with a rent control system may, by statute or ordinance, or by regulation adopted pursuant to *Govt.C. 7060.5* (infra, §605), require an owner of rental accommodations to notify the entity of an intention to withdraw the accommodations from rent or lease. The entity may require that the notice contain statements, under penalty of perjury, providing information on the number of accommodations, their address or location, the names of tenants, and the rent applicable to each unit. Information respecting the names of tenants, the rent applicable to any unit, and the total number of accommodations is confidential for purposes of the Information Practices Act. (*Govt.C. 7060.4(a).*) The entity may require the owner to record a memorandum summarizing provisions of the notice (other than the confidential provisions) in a prescribed form and may require a certification with that notice that actions have been initiated as required by law to terminate any existing tenancies. In that situation, the date on which the accommodations are withdrawn from rent or lease for purposes of *Govt.C. 7060* et seq. is 120 days from the delivery in person or by first class mail of that notice to the public entity. (*Govt.C. 7060.4(b).*)

(2) *Withdrawal When Tenant Is Senior Citizen or Disabled.* If the tenant is at least 62 years old or is disabled and has lived in the accommodations for at least 1 year before delivery of the notice required by *Govt.C. 7060.4(a)*, the withdrawal date is extended to 1 year after delivery of the notice, as long as the tenant gives written notice of entitlement to the extension to the owner within 60 days of delivery of the notice. (*Govt.C. 7060.4(b).*) Within 30 days after the tenant notifies the owner of his or her entitlement to an extension, the owner must give written notice of the tenant's claim to the public entity. (*Govt.C. 7060.4(b)(4).*)

The owner may elect to extend the date of withdrawal on any other accommodations for up to 1 year. (*Govt.C. 7060.4(b)(3).*) Within 90 days after the owner notifies the public entity of the owner's intent to withdraw the accommodations, the owner must give written notice to the public entity and the affected tenant of the owner's election to extend and the new withdrawal date. (*Govt.C. 7060.4(b)(5).*)

If extended, the tenancy must be continued on the same terms and conditions, subject to any adjustments otherwise available under the system of control. (*Govt.C. 7060.4(b)(1).*) No party may be relieved of the duty to perform any obligation under the lease or rental agreement. (*Govt.C. 7060.4(b)(2).*)

(3) *Owner's Notification to Displaced Tenant.* The public entity may also require the owner to notify a displaced tenant that the public entity has been notified pursuant to *Govt.C. 7060.4(a)* and that the notice to the public entity specified the name and amount of rent paid by the tenant. The owner may be required to notify the tenant of the amount of rent the owner specified in the notice to the public entity, and to notify the tenant of his or her rights to reoccupy the accommodation (see *Govt.C. 7060.2(b)(3)*, *supra*, §600). The owner may also be required to notify the tenant of the possibility, under *Govt.C. 7060.4(b)*, of extending the tenancy of a person who is at least 62 years old or is disabled. (*Govt.C. 7060.4(c)*.)

Because the notice to displaced tenants necessarily must be given *after* the notice to the public entity, and because the owner had to notify the public entity 60 days (now 120 days) before withdrawal of the accommodations, no more than 60 days' notice to tenants could be required of a landlord. Hence, a city law requiring 6 months' notice to tenants was preempted by *Govt.C. 7060.4*. (*Channing Properties v. Berkeley* (1992) 11 C.A.4th 88, 96, 97, 14 C.R.2d 32.)

(4) *Owner's Notification of Intention To Rerent.* The public entity may also require the owner to notify the public entity in writing of an intention to again offer the accommodations for rent. (*Govt.C. 7060.4(d)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Owner's Notification to Displaced Tenant.* See *Johnson v. San Francisco* (2006) 137 C.A.4th 7, 11, 13, 40 C.R.3d 8 [municipal ordinance requiring landlords to notify tenants about right to relocation payment and "amount of payment which the landlord believes to be due" was preempted by *Govt.C. 7060.4(c)*; complying with ordinance could be overly burdensome and ordinance creates substantive defense in eviction proceedings that was not contemplated by *Govt.C. 7060* et seq.; citing *Channing Properties v. Berkeley* (1992) 11 C.A.4th 88, 14 C.R.2d 32, text, p. 704].



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e. Notices.

3. By Owner Who Demolishes Property.

12 Witkin Sum. Cal. Law Real Property § 604

[§ 604] By Owner Who Demolishes Property.

C.C. 1940.6(a) imposes notification requirements on residential landlords who intend to demolish their units. A residential landlord who applies to a public agency for a permit to demolish the residential dwelling unit must give written notice of that fact to prospective and current tenants. (C.C. 1940.6(a).) The notice must include the earliest possible approximate date on which the owner expects the demolition to occur and the approximate date on which the owner will terminate the tenancy. The demolition may not occur before the earliest possible approximate date given in the notice. (C.C. 1940.6(b).)

A landlord who fails to comply may be liable for the actual damages suffered by a prospective tenant who moved into the dwelling, the tenant's moving expenses, and a civil penalty not to exceed \$ 2,500. (C.C. 1940.6(c)(1).) The landlord may be liable for the actual damages suffered by a current tenant who was not properly informed and a civil penalty not to exceed \$ 2,500. (C.C. 1940.6(c)(2).)

In an action under C.C. 1940.6, the prevailing party is entitled to reasonable attorneys' fees. (C.C. 1940.6(c)(3).) The remedies available under C.C. 1940.6 are cumulative to other legal remedies. (C.C. 1940.6(d).) In addition, C.C. 1940.6 does not preempt other laws regarding landlord obligations or disclosures, including those arising under *Govt.C. 7060 et seq.* (C.C. 1940.6(e).)

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f. Procedure for Adoption of Regulation.

12 Witkin Sum. Cal. Law Real Property § 605

[§ 605] Procedure for Adoption of Regulation.

Govt.C. 7060.5 prescribes the procedure for adoption of a regulation authorizing the actions set forth in *Govt.C. 7060.2* (supra, §§600, 601) and *Govt.C. 7060.4* (supra, §603). The regulation may be adopted after public notice and hearing by a public body of a public entity, if its members have been elected by the voters. The regulation is subject to referendum in the manner prescribed by law for the ordinances of the legislative body of the public entity, except that (1) the decision to repeal the regulation or to submit it to the voters must be made by the public body that adopted it, and (2) the regulation becomes effective on adoption by the public body, and remains in effect until a majority of the voters voting on the issue vote against the regulation (notwithstanding *Elec.C. 9235, 9237, 9241*, or any other law).

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g. Noncompliance as Defense in Unlawful Detainer Action.

12 Witkin Sum. Cal. Law Real Property § 606

[§ 606] Noncompliance as Defense in Unlawful Detainer Action.

If an owner brings an unlawful detainer proceeding to displace a tenant from accommodations withdrawn from rent (*supra*, §600), the tenant may, by answer or demurrer, assert the defense that the owner has not complied with the applicable rent control provisions or statutes, ordinances, or regulations adopted to implement them. (*Govt.C. 7060.6.*)

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A. Possession.

1. Estoppel To Deny Landlord's Title.

12 Witkin Sum. Cal. Law Real Property § 607

[§ 607] Estoppel To Deny Landlord's Title.

(1) *In General.* One of the incidents of the relationship of landlord and tenant is that while the tenant occupies the premises, the tenant is estopped to deny the landlord's title at the time the relation began. (*Ev.C.* 624.) The theory is that the tenant has been entrusted with possession by the landlord, and cannot justly dispute the validity of the landlord's title without first restoring possession to the landlord. (See *Hancock Oil Co. of Calif. v. Hopkins* (1944) 24 C.2d 497, 507, 150 P.2d 463; *Blackman v. Dalton's Auto & Furniture Loans* (1942) 51 C.A.2d 14, 17, 124 P.2d 123; *People v. Rice* (1960) 185 C.A.2d 207, 211, 8 C.R. 76; 87 A.L.R.2d 602 [estoppel of oil and gas lessee to deny lessor's title]; 49 *Am.Jur.2d* (1995 ed.), *Landlord and Tenant* §915 et seq.)

(2) *Exceptions.* The rule of estoppel to deny the landlord's title is inapplicable in a number of situations. The principal ones are as follows:

(a) Where the tenant did not get possession from the landlord; e.g., where the tenant was in possession before the lease was executed. (*Strong v. Baldwin* (1908) 154 C. 150, 161, 97 P. 178.)

(b) Where the tenant was induced to enter into the lease by the landlord's fraudulent misrepresentations or through mistake as to the title. This is because the lease, like any other contract, is voided by fraud or mistake. (See *Kearney Inv. Co. v. Golden Gate Ferry Co.* (1926) 198 C. 560, 563, 246 P. 322; *Bridges v. Cal-Pac. Leasing Co.* (1971) 16 C.A.3d 118, 127, 93 C.R. 796.)

(c) Where the landlord's title has expired. (*Teich v. Arms* (1907) 5 C.A. 475, 478, 90 P. 962.)

(d) Where the landlord puts his or her title in issue; e.g., where the landlord sues for recovery of the premises and also asks for a decree quieting title. In that case, the tenant is not estopped from setting up title in himself, for if he were, his claim would be adversely and finally determined without a hearing. (*Collier v. Johnson* (1926) 79 C.A. 322, 325, 249 P. 217; *San Juan Gold Co. v. San Juan Ridge Mut. Water Assn.* (1939) 34 C.A.2d 159, 168, 93 P.2d 582; *Yuba River Sand Co. v. Marysville* (1947) 78 C.A.2d 421, 425, 177 P.2d 642; see *American Enterprise v. Van Winkle* (1952) 39 C.2d 210, 220, 246 P.2d 935 [lessor's action for declaratory relief]; *Dimond Public Util. Dist. v. Shaffer* (1960) 185 C.A.2d 482, 486, 8 C.R. 372, citing the text; *Greenhut v. Wooden* (1982) 129 C.A.3d 64, 69, 180 C.R. 786, quoting the text.)

(e) Where the tenant purchases the landlord's title at a judicial sale, or by redemption. (See *Tewksbury v. Magraff* (1867) 33 C. 237, 245.)

(f) Where the tenant is evicted by a paramount title. (See *Tewksbury v. Magraff*, supra, 33 C. 245.)

(g) Where the landlord and a third party both assert title and claim the rent. The tenant may use the procedure of C.C.P. 386 to interplead them. (*Hancock Oil Co. of Calif. v. Hopkins* (1944) 24 C.2d 497, 507, 150 P.2d 463, 4 Cal. Proc. (4th), Pleading, §221.)

(h) Where the parties contemplated a challenge; e.g., where a community oil lease contained a condition that every lessor should own land in the area covered. (*Taylor v. Continental Southern Corp.* (1951) 104 C.A.2d 425, 432, 233 P.2d 577.)

West's Key Number Digest, Landlord and Tenant k.61 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §764 et seq. (2) *Exceptions.*

(g) *Where landlord and third party both assert title and claim rent:* *Hancock Oil Co. case:*

Cross-Reference: 4 Cal. Proc. (5th), Pleading, §242.



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2. Delivery of Possession.

12 Witkin Sum. Cal. Law Real Property § 608

[§ 608] Delivery of Possession.

The landlord must put the tenant in possession when the lease is made, and a failure to do so justifies abandonment or termination of the lease by the tenant. (See *Dengler v. Michelssen* (1888) 76 C. 125, 127, 18 P. 138; *Brandt v. Phillippi* (1890) 82 C. 640, 641, 23 P. 122; *Foreman & Clark Corp. v. Fallon* (1971) 3 C.3d 875, 884, 92 C.R. 162, 479 P.2d 362 [damages for failure to deliver possession]; *Rest.2d, Property (Landlord and Tenant) §6.2*; 2 Powell §16B.02; Cal. Civil Practice, 3 Real Property Litigation, §§20:37, 20:65; 88 A.L.R.2d 1024 [measure of damages for lessor's breach of contract to lease or to put lessee into possession]; 96 A.L.R.3d 1155 [implied covenant or obligation to provide lessee with actual possession]; 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §492 et seq.)

The requirement, however, is not of actual delivery of the premises. It is sufficient "if there is no impediment to the tenant's taking possession or if the tenant is given a legal right of entry and enjoyment during the term." (*Reynolds v. McEwen* (1952) 111 C.A.2d 540, 542, 244 P.2d 961.)

West's Key Number Digest, Landlord and Tenant k.128

SUPPLEMENT: [This section is current through the latest supplement]

See Cal. Civil Practice, 3 Real Property Litigation, §§20:35, 20:63; 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §392 et seq.



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12 Witkin Sum. Cal. Law Real Property § 609

[§ 609] Landlord's Entry into Dwelling.

(1) *Situations in Which Entry Is Permitted.* The landlord may enter a dwelling unit only in the following cases:

- (a) In case of emergency. (C.C. 1954(a)(1).)
- (b) To make necessary or agreed repairs, decorations, alterations, or improvements. (C.C. 1954(a)(2).)
- (c) To supply necessary or agreed services. (C.C. 1954(a)(2).)
- (d) To exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workers, or contractors. (C.C. 1954(a)(2).)
- (e) To perform an inspection under C.C. 1950.5 (infra, §747). (C.C. 1954(a)(2).)
- (f) When the tenant has abandoned or surrendered the premises. (C.C. 1954(a)(3).)
- (g) Under a court order. (C.C. 1954(a)(4).) (See 7 *Pacific L. J.* 519.)

(2) *Time of Entry.* Except in cases of emergency, or when the tenant has abandoned or surrendered the premises, entry must be during normal business hours, unless the tenant consents at the time of entry. (C.C. 1954(b).)

(3) *Proper Exercise of Right.* The landlord must not abuse the right of access or use it to harass the tenant. (C.C. 1954(c).)

(4) *Reasonable Notice.* The landlord must give the tenant reasonable notice in writing of the landlord's intent to enter and must enter only during normal business hours. The notice must include the date, approximate time, and purpose of the entry. The notice may be personally delivered to the tenant, left with someone of a suitable age and discretion at the premises, or left on, near, or under the usual entry door of the premises in a manner in which a reasonable person would discover it. Absent evidence to the contrary, 24 hours is presumed to be reasonable notice. The notice may be mailed to the tenant. Mailing the notice at least 6 days before an intended entry is presumed to be reasonable notice, unless there is evidence to the contrary. (C.C. 1954(d)(1).)

(5) *Notice Before Exhibiting Dwelling.* If the purpose of the entry is to exhibit the dwelling unit to prospective or actual purchasers, the notice may be given orally, in person or by telephone, if the landlord or the landlord's agent has notified the tenant in writing within 120 days of the oral notice that the property is for sale and that the landlord or agent may contact the tenant orally. Absent evidence to the contrary, 24 hours is presumed reasonable notice. The notice must include the date, approximate time, and purpose of the entry. At the time of entry, the landlord or agent must leave written evidence of the entry inside the unit. (C.C. 1954(d)(2).)

(6) *Notice by Agreement To Repair.* The tenant and the landlord may agree orally to an entry to make repairs or supply services. The agreement must include the date and approximate time of the entry, which must be within a week of the agreement. In this situation, the landlord is not required to notify the tenant in writing. (C.C. 1954(d)(3).)

(7) *When Notice Is Not Required.* No notice of entry is required under C.C. 1954 in the following situations:

(a) To respond to an emergency. (C.C. 1954(e)(1).)

(b) If the tenant is present and consents to the entry at the time of entry. (C.C. 1954(e)(2).)

(c) After the tenant has abandoned or surrendered the unit. (C.C. 1954(e)(3).)

SUPPLEMENT: [This section is current through the latest supplement]



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12 Witkin Sum. Cal. Law Real Property § 610

[§ 610] Actual Eviction.

In every lease, there is an implied covenant by the lessor of quiet enjoyment and possession during the term. (C.C. 1927; *Baranov v. Scudder* (1918) 177 C. 458, 462, 170 P. 1122; *Standard Livestock Co. v. Pentz* (1928) 204 C. 618, 625, 638, 269 P. 645; *Pierce v. Nash* (1954) 126 C.A.2d 606, 612, 272 P.2d 938; *Petroleum Collections v. Swords* (1975) 48 C.A.3d 841, 846, 122 C.R. 114; see C.E.B., Attorney's Guide to Damages 2d, §4.14 et seq.; 49 *Am.Jur.2d* (1995 ed.), *Landlord and Tenant* §601 et seq.) The covenant is a warranty by the lessor against the lessor's own acts, not against those of strangers. (*Carty v. Blauth* (1915) 169 C. 713, 717, 147 P. 949; *Lost Key Mines v. Hamilton* (1952) 109 C.A.2d 569, 573, 241 P.2d 273.)

Eviction is a breach of the covenant. An actual eviction occurs when the landlord ousts the tenant, or allows the tenant to be ousted by one with paramount title. There may be partial as well as total dispossession. (See *Giraud v. Milovich* (1938) 29 C.A.2d 543, 547, 85 P.2d 182 [landlord's conveyance to state of right of way through property, and entry of state into possession, was partial eviction by landlord]; *Dussin Inv. Co. v. Bloxham* (1979) 96 C.A.3d 308, 317, 157 C.R. 646, *infra*, §756.) But there is no breach unless there is a disturbance of possession. (*Slater v. Conti* (1959) 171 C.A.2d 582, 585, 341 P.2d 395, *infra*, §611; see 41 *A.L.R.2d* 1414 [breach of covenant for quiet enjoyment]; 49 *Am.Jur.2d* (1995 ed.), *Landlord and Tenant* §443 et seq.)

West's Key Number Digest, Landlord and Tenant k.171

SUPPLEMENT: [This section is current through the latest supplement]

Implied covenant of quiet enjoyment and possession: See *Andrews v. Mobile Aire Estates* (2005) 125 C.A.4th 578, 588, 22 C.R.3d 832 [mobilehome park tenants presented triable issues of fact about whether park owner breached duty to preserve tenants' quiet enjoyment by failing to take action against troublesome neighboring tenant]; 49 *Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §477 et seq.

Breach of covenant: See 49 *Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §514 et seq.



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A. Possession.

5. Constructive Eviction.

a. General Principles.

12 Witkin Sum. Cal. Law Real Property § 611

[§ 611] General Principles.

(1) *Interference With Use and Possession Is Required.* Eviction may occur without an actual ouster. Any disturbance of the tenant's possession, whereby the premises are rendered unfit or unsuitable for occupancy in whole or in substantial part for the purposes for which they were leased, or any interference with the beneficial enjoyment of the premises, will amount to a constructive eviction if the tenant vacates within a reasonable time. (See *Mills v. Richards* (1927) 84 C.A. 52, 56, 257 P. 542; *Barkett v. Brucato* (1953) 122 C.A.2d 264, 274, 264 P.2d 978; *Pierce v. Nash* (1954) 126 C.A.2d 606, 612, 272 P.2d 938, *infra*, §612; *Clark v. Spiegel* (1971) 22 C.A.3d 74, 79, 99 C.R. 86 [failure to claim breach within reasonable time precluded claim of constructive eviction; lessor of shopping center closed doors to mall entrance and failed to maintain parking lot lights, but lessee, gambling that his business would prosper, refrained from claiming breach of covenant of quiet enjoyment for over 3 years]; *Petroleum Collections v. Swords* (1975) 48 C.A.3d 841, 847, 122 C.R. 114; *Guntert v. Stockton* (1976) 55 C.A.3d 131, 138, 126 C.R. 690, 127 C.R. 602, *infra*, §612; 2 Powell §16B.03; Cal. Civil Practice, 3 Real Property Litigation, §§17:55, 20:39 *et seq.*, 20:62; 21 *Hastings L. J.* 417 [partial constructive eviction]; 33 *A.L.R.3d* 1356 [constructive eviction based on flooding, dampness, or similar problems]; *infra*, §§612, 613; 49 *Am.Jur.2d* (1995 *ed.*), *Landlord and Tenant* §643 *et seq.*)

On the other hand, if there is no real interference with possession and use, there is no eviction. Thus, a landlord's action is not an eviction until the tenant is ousted. (*Stockton Theatres v. Palermo* (1954) 124 C.A.2d 353, 358, 268 P.2d 799.) And if, after an unlawful detainer judgment, the tenant voluntarily surrenders the premises without issuance of process, there is no eviction even though the judgment is later reversed on appeal and the tenant's possession is restored. (*Bates v. Schubert* (1952) 112 C.A.2d 261, 262, 245 P.2d 1114.)

An attempt to establish an inequitable case of "eviction" by technical argument was rejected in *Ryan v. Huffman* (1948) 88 C.A.2d 728, 199 P.2d 407. Plaintiffs, lessees of a ranch, assigned to defendants, the latter giving promissory notes for \$ 3,500, in consideration of the value of improvements that had been made by plaintiffs. The parties further agreed that, if the lessor failed to consent and defendant assignees were evicted, their notes would be cancelled. Defendant assignees then took possession. The lessor refused to consent and sent notice and demand to vacate to both plaintiffs and defendants, but contemporaneously negotiated with defendants to have them stay on as caretakers, and later executed a new lease to them. In an action on the notes, defendants contended that the notes were cancelled because they had been "evicted." *Held*, there was neither actual nor constructive eviction because defendants at all times

remained in possession. (88 C.A.2d 731.)

(2) *Actions by Third Party.* In *Slater v. Conti* (1959) 171 C.A.2d 582, 341 P.2d 395, defendants leased land for a 5-year term to plaintiffs for a golf driving range, and plaintiffs took possession on September 1, 1953. The city brought an action in ejectment on March 8, 1954, claiming title to a 132-foot strip bisecting the land. Plaintiffs continued to pay rent through August 31, 1954, then claimed they were prevented from operating their business from September 30, 1954. Defendants brought unlawful detainer on October 11, 1954, and received judgment on January 13, 1955. The city received judgment in ejectment on November 29, 1954. In plaintiffs' action for damages, judgment on the pleadings for defendants was affirmed. Plaintiffs failed to assert any remedies for constructive eviction, and remained in possession despite the disturbance of their beneficial enjoyment. The final judgment in unlawful detainer was conclusive on the issue of their possession and lack of constructive eviction (which could have been raised as a defense in that action). (171 C.A.2d 586.) (See *Conterno v. Brown* (1968) 263 C.A.2d 135, 136, 69 C.R. 393 [apartment house tenant, who vacated premises after constant singing and quarreling of tenants in apartment below made sleep impossible, was obligated to pay rent until new tenant was obtained; lease provided that lessor should not be liable for damage arising from acts or neglect of cotenants or occupants of adjacent property, and fact that premises were rendered unfit for lease's purposes did not constitute ouster]; 1 A.L.R.4th 849 [constructive eviction by another tenant's conduct]; 42 Proof of Facts 2d 317 [same].)

(3) *Commercial Lessee May Waive Covenant of Quiet Enjoyment.* In *Lee v. Placer Title Co.* (1994) 28 C.A.4th 503, 33 C.R.2d 572, defendant leased office space in plaintiffs' shopping center. The lease explicitly gave defendant the right to quiet enjoyment of the premises, but limited defendant's remedies to damages and injunctive relief, stating that in no event would defendant have the right to terminate the lease as a result of plaintiffs' default. The year after the lease was extended for an additional 5 years, defendant stopped paying rent and moved its offices to another location. In its answer to plaintiffs' complaint for rent, defendant asserted the defense of constructive eviction, claiming that plaintiffs had allowed a dry cleaning business to operate next door, which resulted in noxious fumes penetrating defendant's premises. On plaintiffs' pretrial motion to exclude evidence as to constructive eviction, the trial judge ruled that the lease terms precluded defendant from vacating the premises and claiming constructive eviction. Defendant stipulated to a judgment in order to appeal the constructive eviction ruling. *Held*, affirmed. The parties to a commercial lease may modify or waive the covenant of quiet enjoyment, unlike the parties to a residential lease, which is subject to the restrictions on modification or waiver provided in C.C. 1953(a) (see *supra*, §567). Here, the parties had modified the covenant by limiting the remedies to which defendant might otherwise have been entitled in the event of a breach by plaintiffs. (28 C.A.4th 513.)

West's Key Number Digest, Landlord and Tenant k.150 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Interference With Use and Possession Is Required.* See Cal. Civil Practice, 3 Real Property Litigation, §§17:55, 20:37 et seq., 20:60; 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §514 et seq.



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IX. OTHER RIGHTS AND LIABILITIES OF LANDLORDS AND TENANTS

A. Possession.

5. Constructive Eviction.

b. Wrongful Notice of Termination.

12 Witkin Sum. Cal. Law Real Property § 612

[§ 612] Wrongful Notice of Termination.

(1) *Where Landlord Acts Without Justification.* If the landlord, purporting to act under a termination clause but without legal justification, gives the tenant a notice of termination of the lease or a notice to vacate the premises, and the tenant abandons the premises to comply, some authorities hold this to be a constructive eviction. (See *Lindenberg v. MacDonald* (1950) 34 C.2d 678, 690, 692, 214 P.2d 5 [dissenting opinions]; 14 A.L.R.2d 1450 [tenant's or subtenant's right to damages for claimed constructive eviction or breach of covenant based on termination notice]; 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §648.) Others treat the tenant's act as a voluntary surrender, and grant relief on the theory that if the notice is fraudulently given and the tenant vacates in the belief that it is good, the tenant has a cause of action against the landlord for fraud and deceit. (See *Davis v. Schweikert* (1900) 130 C. 143, 146, 62 P. 411; *Nyulassie v. Mozer* (1948) 85 C.A.2d Supp. 827, 829, 193 P.2d 167, 5 Summary (10th), *Torts*, §787; on termination of lease generally, see *infra*, §663 et seq.)

(2) *Where Landlord Acts in Good Faith.* Where the landlord acts in good faith, there is clearly no action for fraud, and there is no constructive eviction. In *Lindenberg v. MacDonald*, *supra*, defendants, lessees under the main lease from M, were obligated to tear down the old building and build a new one. In 1942, they subleased to plaintiff for a 3-year term, the sublease expressly stating the sublessors' right to terminate for this purpose on 60 days' notice. In 1944, contemplating razing and construction, and believing in good faith that a War Production Board permit would be granted, defendants gave the notice. After some discussion of remaining on a shorter notice basis, plaintiff vacated. The necessary permit was refused and construction did not commence until August 1945. Plaintiff therefore contended that the notice of termination was premature and wrongful, and sought damages for constructive eviction. *Held*, he could not recover on this or any other theory, for he did not establish bad faith of defendants in giving the notice. "If in truth it was premature then it was legally ineffective and plaintiff could have remained in possession of the premises until a proper and timely notice to vacate was given. ... [B]y voluntarily departing from the premises, having full knowledge of all the facts which he now claims rendered the notice premature, he precluded the raising of any such question as would have arisen if he had chosen to remain in possession and resist a possible unlawful detainer action." (34 C.2d 686.) (See *Asell v. Rodrigues* (1973) 32 C.A.3d 817, 825, 108 C.R. 566; 39 Cal. L. Rev. 285 [*Lindenberg*].)

An attempt to apply the subjective test of good faith to ordinary constructive eviction was rejected in *Pierce v. Nash* (1954) 126 C.A.2d 606, 272 P.2d 938. The landlord's wrongful intent may be inferred from the character of the acts

under the presumption that a person intends their natural and probable consequences. (126 C.A.2d 613.) "There is no suggestion in the *Lindenberg* case of any disposition to modify the well settled principles previously discussed by requiring the tenant to establish bad faith on the lessor's part where constructive eviction is claimed under circumstances in which the lessor's physical acts on the premises have deprived the tenant of the beneficial use and enjoyment of the property leased." (126 C.A.2d 617.)

(3) *Illustrations.* In *Guntert v. Stockton* (1976) 55 C.A.3d 131, 126 C.R. 690, 127 C.R. 602, plaintiff operated a steel construction and machinery business on land leased from defendant city. The lease permitted termination by the lessor on 18 months' written notice if the city decided to accept a bona fide development offer from third parties. The city received an offer and gave notice of termination. Plaintiff sued for an injunction and damages, and the trial was bifurcated. The trial judge found that the city had acted arbitrarily and in breach of its contractual duty to inquire into the bona fides of the offer, that the notice of termination was a nullity, and that an injunction should issue against dispossession of plaintiff. The resulting judgment of injunction was affirmed on appeal. The damage issue was then tried, and plaintiff was awarded damages for past lost profits, out-of-pocket losses, and future lost profits. *Held*, defendant's invalid notice of termination, a breach of its obligations under the lease, was a violation of the implied covenant of quiet enjoyment, for it impaired the lessee's beneficial enjoyment of the premises. Plaintiff's business involved construction of specially designed equipment, some involving years to complete. The termination notice initiated a state of uncertainty that prevented plaintiff from undertaking commitments for future production. (55 C.A.3d 139.) (See *Marchese v. Standard Realty & Dev. Co.* (1977) 74 C.A.3d 142, 148, 141 C.R. 370 [action by sublessee against lessor; following *Guntert*].)

(4) *Remedies.* *Guntert v. Stockton*, *supra*, explores the remedies of the lessee in considerable detail.

(a) *Action by tenant who does not vacate premises.* A number of decisions proceed on the theory that the covenant of quiet enjoyment is not breached until there has been an actual or constructive eviction, and conclude that the tenant may not recover for a nonphysical interference with enjoyment unless he vacates the premises. (55 C.A.3d 140.) This rule is, however, incomplete. The tenant must surrender possession only if he elects to move out and cease payment of rent. If he elects to continue under the lease and sue for damages for wrongful interference with his use, he need not surrender. (55 C.A.3d 139, 140.) In that case, the requirement that the notice of termination be in bad faith to be actionable does not apply, for the action is based on breach of contract. (55 C.A.3d 141.)

(b) *Measure of damages: certainty and detriment likely to result.* The measure of damages for breach of a lease is that established by C.C. 3300 for breach of contract (see 1 *Summary* (10th), *Contracts*, §871), and where an entire business is wrongfully interrupted and injured, lost profits and expenses incurred may be recovered. (55 C.A.3d 142, 143.) "In reviewing a damage award of lost business profits, the appellate court must couple the substantial evidence concept with recognition that evidentiary imponderables are unavoidable. A tenant may recover anticipated profits lost as the natural and direct consequence of the lessor's breach; they need not be established with certainty; it is enough to show as a reasonable probability that the profit would have been earned except for the breach. ... Once the fact of damages is established, the difficulty of ascertainment will not prevent recovery. ... The law will allow reasonably calculated damages even if the result is only an approximation; the wrongdoer cannot complain if his own condition creates a situation in which the court must estimate rather than compute." (55 C.A.3d 143.)

(c) *Proof of lost profits.* Historical data (working experience, past volume, etc.) supply an acceptable basis for ascertaining lost profits of an established business. (55 C.A.3d 143.) But the measure must be the net loss, and fixed or overhead costs are an essential element of the computation. Hence, to award the lessee not only lost profits but also overhead costs--where there was no actual increase in overhead--gives him an improper double recovery. (55 C.A.3d 149, 150.)

(d) *Future damages.* Damages resulting after commencement of the suit or certain to arise in the future are recoverable under C.C. 3283 (see 6 *Summary* (10th), *Torts*, §1552). When the breach of contract is total, the plaintiff recovers all his damages, present and prospective, in a single lawsuit, and the court has no future power to require

performance or award additional damages. When the breach is partial, or the plaintiff elects to treat it as partial, he may recover only damages suffered up to the time of trial. (55 C.A.3d 151.) The award of future damages in the present case was improper:

First, plaintiff lessee elected to remain in possession, continue to pay rent, and sue for a partial breach. This election was confirmed by the injunction obtained, which prevented the lessor from interfering with the lessee's use during the remainder of the tenancy. By giving judgment for future profits--available only to an evicted tenant--the trial judge awarded something akin to double recovery. (55 C.A.3d 151.)

Second, the award also violated the requirement of reasonable certainty in C.C. 3283. The trial judge assumed that the lessee's plant could not be reopened or profitably utilized within the remaining years of the lease. But the decision to close the plant was made by the lessee itself, even though the injunction gave assurance of continued undisturbed occupancy until the end of the term, about 6 years. The prospective damage award was therefore "an unconditional subsidy, supplying a steady rate of profit to an idle manufacturing plant over a five-year period." (55 C.A.3d 152.) A claim for future damage may be maintained despite uncertainty of amount, but not where the uncertainty relates to the occurrence of damage. (55 C.A.3d 153.)

(e) *Lessee's remaining remedies*. Plaintiffs may, within the period of the statute of limitations, seek additional damages in a new suit, or, on retrial after this reversal, may request the trial judge to reserve jurisdiction to award future damages. (55 C.A.3d 153.) But any future application will require a showing of a reasonable effort to minimize damages, and prolonging the plant closure after the date the injunction became final will affect the recovery. (55 C.A.3d 153.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Where Landlord Acts Without Justification*. See 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §519.



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A. Possession.

5. Constructive Eviction.

c. Other Conduct.

12 Witkin Sum. Cal. Law Real Property § 613

[§ 613] Other Conduct.

(1) *Harassment of Tenant.* Constructive eviction may result from insults, interference with the tenant's business or occupancy, assaults, or other acts of harassment. (See *Landon v. Hill* (1934) 136 C.A. 560, 565, 29 P.2d 281 [harassment resulting in eventual taking of keys was actual eviction]; *Sanders v. Allen* (1948) 83 C.A.2d 362, 366, 188 P.2d 760; *Tooke v. Allen* (1948) 85 C.A.2d 230, 236, 192 P.2d 804; *Aaker v. Smith* (1948) 87 C.A.2d 36, 43, 196 P.2d 150.)

(2) *Alterations.* An unreasonable interference with enjoyment may also occur where the landlord enters and makes extensive and unwarranted alterations. (See *Riechhold v. Sommarstrom Inv. Co.* (1927) 83 C.A. 173, 177, 256 P. 592 [meat market; part of walls, ceiling, and floor torn out and rebuilt]; *Barkett v. Brucato* (1953) 122 C.A.2d 264, 274, 264 P.2d 978 [extensive construction including removal of roof of dwelling during rainy season]; *Pierce v. Nash* (1954) 126 C.A.2d 606, 614, 272 P.2d 938 [lease of poolroom; defendant landlord, to brace upper floor, installed uprights that prevented use of some of tenant's pool tables].)

(3) *Failure To Make Necessary Repairs.* If the landlord has a duty to repair (see *infra*, §640), failure to do so may amount to a constructive eviction. (See *Johnson v. Snyder* (1950) 99 C.A.2d 86, 88, 221 P.2d 164 [lease of part of building for restaurant; lessor allowed remaining part under his control to become so unsanitary that restaurant was closed by city health inspector]; *Butt v. Bertola* (1952) 110 C.A.2d 128, 134, 242 P.2d 32 [lease of ground floor restaurant; plumbing system, under lessor's control, leaked and contaminated premises, making operation impossible]; *Buckner v. Azulai* (1967) 251 C.A.2d Supp. 1013, 59 C.R. 806 [vermin infestation]; *Petroleum Collections v. Swords* (1975) 48 C.A.3d 841, 848, 122 C.R. 114 [but for tenant's failure to vacate premises, landlord's failure to repair or replace sign necessary to tenant's successful operation would have supported finding that covenant of quiet enjoyment had been breached]; 27 A.L.R.3d 924 [vermin infestation as constructive eviction, in absence of express covenant of habitability]; 86 A.L.R.3d 352 [landlord's failure to make, or permit tenant to make, repairs or alterations required by public authority as constructive eviction].)

SUPPLEMENT: [This section is current through the latest supplement]



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A. Possession.

6. Landlord's Interference With Occupancy.

a. Original Statute.

12 Witkin Sum. Cal. Law Real Property § 614

[§ 614] Original Statute.

(1) *Penalty Invalid.* C.C. 789.3, as enacted in 1971, made the landlord liable for interrupting utility service with intent to terminate the tenancy, and provided for actual damages, reasonable attorneys' fees, and a \$ 100-a-day penalty for each day of deprivation.

The penalty provision was challenged in *Hale v. Morgan* (1978) 22 C.3d 388, 149 C.R. 375, 584 P.2d 512. Plaintiff, without defendant's knowledge, moved his mobilehome into defendant's mobilehome park. The parties then orally agreed to a \$ 65 monthly rental, but plaintiff failed to pay rent, and in late May, defendant disconnected the water and electrical lines to the trailer. In mid-November, plaintiff moved from the park and subsequently brought this action under C.C. 789.3. The trial judge found that the termination of utility services was "willful," with the intent to evict plaintiff, and that plaintiff had been deprived of the services for 173 days. Accordingly, penalties were assessed at the rate of \$ 100 per day, or a total of \$ 17,300. *Held*, reversed. The equal protection challenge was without substance (22 C.3d 395 et seq.), but the due process attack had merit.

The Legislature may impose reasonable civil penalties to secure obedience to valid statutes, but the penalty provision of this statute did not meet the test of reasonableness for several reasons:

- (a) It is mandatory in amount. (22 C.3d 399.)
- (b) It is unlimited in duration, even though the landlord has done nothing after the initial wrongful act. (22 C.3d 399.)
- (c) The trier of fact has no discretion in fixing the penalty, and the acts prohibited potentially encompass a broad range of culpable activity on the part of the landlord and a widely divergent injury to the tenant. (22 C.3d 399.)
- (d) The penalties imposed are potentially more severe than those for more serious transgressions by the landlord, e.g., forcible entry, retaliatory eviction, and breach of the warranty of habitability. (22 C.3d 400.)
- (e) Mandatory cumulative penalties are disfavored, and C.C. 789.3 requires cumulation. (22 C.3d 402.)

(f) Fourteen other jurisdictions have enacted legislation prohibiting interruption of utility service by a landlord, but none has imposed penalties as severe as these. (22 C.3d 403.)

(g) The statute "permits the occasional experienced and designing tenant to ambush an unknowing landlord converting the single wrongful act of the latter into a veritable financial bonanza. Such a tenant may readily choose to endure the undoubted hardship of no utility service in return for a sure and certain reward accumulating at \$ 3,000 per month." (22 C.3d 403.)

(2) *Penalty Valid.* In *Kinney v. Vaccari* (1980) 27 C.3d 348, 165 C.R. 787, 612 P.2d 877, the court, reviewing the *Hale* opinion, observed that "as applied to the facts of that case," the penalty was invalid. (27 C.3d 353.) But the court also referred to *Hale's* recognition that, in a proper factual context, the penalty formula could withstand constitutional challenge. (27 C.3d 353.) And this result was reached here, on a listing of the many differences in the facts of *Hale* and the present case. Plaintiffs were 16 tenants, including 7 minor children, who occupied 6 rental units under month-to-month tenancies with gas, water, and electricity included in the rent. Defendant landlord, repeatedly stating that he intended to "throw the bums out," failed to use any part of rent received for payment of the gas bill, and the service was cut off, depriving plaintiffs of needed fuel for cooking and heating. Later attempts by plaintiffs to tender rent so that the utility bill could be paid were rejected by defendant. The trial judge concluded that defendant had wilfully and maliciously caused gas service to be terminated for 60 days, and gave judgment for compensatory damages of \$ 7,901, penalties of \$ 36,000, attorneys' fees of \$ 5,600, and punitive damages of \$ 1,750. *Held*, judgment affirmed. The penalties imposed were both proportioned to the landlord's misconduct and necessary to achieve the penalty's deterrent purposes. Hence, they were not unconstitutionally excessive. (27 C.3d 356.) However, plaintiff's contention that the word "tenant" in C.C. 789.3 refers to individuals, so that the penalty should have been \$ 100 a day for 16 tenants, or \$ 96,000 rather than \$ 36,000, is rejected. To avoid unreasonably severe sanctions, the word "tenant" should be construed to refer to all of the occupants of a rental unit. The interests of multiple occupants of a single unit are adequately protected by their individual right to actual damages. (27 C.3d 357, 358.)

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A. Possession.

6. Landlord's Interference With Occupancy.

b. Expanded Statute.

12 Witkin Sum. Cal. Law Real Property § 615

[§ 615] Expanded Statute.

(1) *Interruption of Utility Service.* C.C. 789.3 was expanded in 1979. (See *11 Pacific L. J. 603.*) The landlord must not, with intent to terminate the occupancy of residential property under a lease or other tenancy or estate at will, "willfully cause, directly or indirectly, the interruption or termination of any utility service furnished the tenant, including, but not limited to, water, heat, light, electricity, gas, telephone, elevator, or refrigeration, whether or not the utility service is under the control of the landlord." (C.C. 789.3(a).)

In *Otanez v. Blue Skies Mobile Home Park* (1991) 1 C.A.4th 1521, 3 C.R.2d 210, a mobilehome owner sued her landlord and his property managers under C.C. 789.3 for unlawful interruption of the utility services for the mobilehome park space rented by plaintiff. Plaintiff had moved out of town and put her mobilehome up for sale, but she had continued to make rent and utility payments. Defendant accepted the payments, but shut off plaintiff's utility services before the expiration of the lease term, evidently to prevent a prospective buyer of the mobilehome from taking occupancy. The trial court granted defendants' motion for summary judgment. *Held*, reversed except as to the property managers.

(a) Although the Legislature intended C.C. 789.3 to apply to property used as a residence, nothing in the statute limits its application to a tenant's *permanent* residence, and such an interpretation would defeat the statutory purpose of discouraging landlords from using self-help. Plaintiff's declaration that she had continued to pay rent, lived in the mobilehome when she visited in town, kept furniture and furnishings there, and would have visited more had the utilities been left on was sufficient to support a finding that the mobilehome was a temporary residence. (1 C.A.4th 1525.)

(b) However, the property managers were not liable under C.C. 789.3. The statute prohibits only a "landlord" from terminating utility service. The managers could not be held liable as agents under C.C. 2343(3), because their acts were not "wrongful in their nature" as required by that provision. The acts were wrongful only if proscribed by statute, and C.C. 789.3 does not apply to persons other than landlords. (1 C.A.4th 1526.)

Management must post a notice on the mobilehomes of all affected residents at least 72 hours before an interruption of utility service over which management has control. (C.C. 798.29.5.) C.C. 799.7 imposes the same requirement on

mobilehome subdivisions, cooperatives, and condominiums, and on resident owned mobilehome parks. (On regulations for mobilehomes generally, see *infra*, §761 et seq.)

(2) *Other Prohibited Acts.* The landlord is prohibited from wilfully doing any of the following acts with intent to terminate occupancy: (a) preventing the tenant from gaining reasonable access to the property by changing locks or using a bootlock or similar method or device; (b) removing outside doors or windows; or (c) removing the tenant's personal property, furnishings, or other items without the prior written consent of the tenant, except under the procedure for disposition of abandoned property (see C.C. 1980 et seq., *infra*, §749 et seq.). (C.C. 789.3(b).) However, C.C. 789.3(b) does not apply to lawful eviction by appropriate legal authorities, nor to occupancies by guests or lodgers (C.C. 1940(b), *supra*, §514). (C.C. 789.3(b).)

(3) *Remedies of Tenant.* The tenant may bring a civil action to recover actual damages, statutory penalties, and attorneys' fees, and may seek appropriate injunctive relief to prevent continuing or further violation of the statute during the action. (C.C. 789.3(c), (d); see *Camacho v. Schaefer* (1987) 193 C.A.3d 718, 724, 238 C.R. 609 [attorneys' fees].) Remedies under other laws are not precluded. (C.C. 789.3(d).)

(4) *Penalties.* The landlord is liable for not over \$ 100 for each full or partial day that the landlord remains in violation of the statute. In determining the amount of the award, the court must consider proof of whatever matters justice may require. However, not less than \$ 250 must be awarded for each separate cause of action. Subsequent or repeated violations, not contemporaneous with the initial violation, must be treated as separate causes of action and subjected to separate awards of damages. (C.C. 789.3(c)(2); see *Camacho v. Schaefer*, *supra*, 193 C.A.3d 722 ["tenant" in penalty provision refers to apartment unit rather than individual occupants, and only one penalty can be awarded for a unit; following *Kinney v. Vaccari* (1980) 27 C.3d 348, 165 C.R. 787, 612 P.2d 877, *supra*, §614].)

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A. Possession.

6. Landlord's Interference With Occupancy.
- c. Landlord's Use of Theft, Extortion, or Force.

12 Witkin Sum. Cal. Law Real Property § 616

[§ 616] Landlord's Use of Theft, Extortion, or Force.

(1) *Prohibited Acts.* Under C.C. 1940.2, a landlord may not do any of the following to influence a tenant to vacate a dwelling:

- (a) Engage in conduct that violates P.C. 484(a) (theft; see 2 *Cal. Crim. Law (3d)*, *Crimes Against Property*, §1). (C.C. 1940.2(a)(1).)
- (b) Engage in conduct that violates P.C. 518 (extortion; see 2 *Cal. Crim. Law (3d)*, *Crimes Against Property*, §103). (C.C. 1940.2(a)(2).)
- (c) Use, or threaten to use, force, wilful threats, or menacing conduct that interferes with the tenant's quiet enjoyment of the premises in violation of C.C. 1927 and that would create an apprehension of harm in a reasonable person. (C.C. 1940.2(a)(3).)
- (d) Commit a significant and intentional violation of C.C. 1954 (landlord's entry of dwelling; see *supra*, §609). (C.C. 1940.2(a)(4).)

(2) *Penalty for Violation.* A tenant who prevails in a civil action, including an action in small claims court, to enforce rights under C.C. 1940.2 is entitled to a civil penalty up to \$ 2,000 for each violation. (C.C. 1940.2(b).) Nothing in C.C. 1940.2(a)(3) requires a tenant to be actually or constructively evicted in order to obtain relief. (C.C. 1940.2(a)(3).)

(3) *Exceptions.* A landlord does not violate C.C. 1940.2 by giving, in good faith, an oral or written warning notice, regarding conduct by a tenant, occupant, or guest that violates the applicable rental agreement, rules, regulations, lease, or laws. Furthermore, a landlord may give, in the normal course of business, an oral or written explanation of the rental agreement, rules, regulations, lease, or laws. (C.C. 1940.2(c).)

(4) *Effect on Other Laws.* Nothing in C.C. 1940.2 enlarges or diminishes a landlord's right to terminate a tenancy under existing state or local law. C.C. 1940.2 does not enlarge or diminish a local government's ability to regulate or enforce a prohibition against a landlord's harassment of a tenant. (C.C. 1940.2(d).)

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6. Landlord's Interference With Occupancy.

d. (New) Inquiries Regarding Immigration Status.

12 Witkin Sum. Cal. Law Real Property § 616A

[§ 616A] (New) Inquiries Regarding Immigration Status.

(1) *Prohibition Against Inquiries.* Neither a landlord nor the landlord's agent may inquire about the immigration or citizenship status of a tenant, prospective tenant, occupant, or prospective occupant of residential rental property. (C.C. 1940.3(b)(1), added in 2007.) The landlord and the landlord's agent are also prohibited from requiring that a tenant, prospective tenant, occupant, or prospective occupant make a statement, representation, or certification concerning his or her immigration or citizenship status. (C.C. 1940.3(b)(2), added in 2007; on prohibition against local governments compelling landlords to seek immigration information, see C.C. 1940.3(a), added in 2007.)

(2) *Exceptions.* Nothing in C.C. 1940.3 prohibits a landlord from complying with federal legal obligations (C.C. 1940.3(c)(1), added in 2007), or requesting information to verify a prospective tenant's financial qualifications, or a prospective tenant's or prospective occupant's identity (C.C. 1940.3(c)(2), added in 2007).

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B. Fitness for Use and Repairs.

1. In General.

12 Witkin Sum. Cal. Law Real Property § 617

[§ 617] In General.

(1) *Common Law Rule.* Except with regard to dwellings (see *infra*, §619 et seq.), California follows the common law rule that there is no implied warranty on the part of the landlord that the premises are tenantable, and the landlord ordinarily has no obligation to make repairs to keep them in a condition suitable for the tenant's use. The tenant takes the estate as he or she finds it, and when the premises pass into the tenant's exclusive possession, the duty to keep them in a safe condition rests on the tenant. (*Wall Estate Co. v. Standard Box Co.* (1912) 20 C.A. 311, 313, 128 P. 1020; *Farber v. Greenberg* (1929) 98 C.A. 675, 680, 277 P. 534; *Strecker v. Barnard* (1952) 109 C.A.2d 149, 152, 240 P.2d 345; see 2 Powell §16B.04; 11 Santa Clara Lawyer 298 [describing and criticizing common law rule]; 49 *Am.Jur.2d* (1995 ed.), *Landlord and Tenant* §564 et seq.)

Likewise, there is ordinarily no implied covenant by the lessor that premises are fit for a particular intended use, even though the lessor knows of the use. The theory is that the lessee has an opportunity to inspect the premises and ensure its fitness. But where property is not in existence, and is either to be built or installed subsequent to the lease, there is an implied covenant that it will be reasonably adequate for the intended use. (*Woolford v. Electric Appliances* (1938) 24 C.A.2d 385, 387, 75 P.2d 112 [lease of meat market; refrigerator to be installed].)

(2) *Restatement 2d.* The Restatement departs from the common law approach, pointing out that "the definite judicial trend has been in the direction of increasing the responsibility of the landlord, in the absence of a valid contrary agreement, to provide the tenant with property in a condition suitable for the use contemplated by the parties." (*Rest.2d, Property (Landlord and Tenant)*, Introductory Note to Chap. 5; see *Rest.2d, Property (Landlord and Tenant)* §5.1 et seq.)

(3) *Landlord's Duty To Disclose Neighborhood Conditions.* The landlord of a residential dwelling unit "who has actual knowledge of any former federal or state ordnance locations in the neighborhood area" must give written notice to a prospective tenant of that knowledge before the execution of a rental agreement. (C.C. 1940.7(b).)

Written leases and rental agreements entered into on or after July 1, 1999, must contain a prescribed notice about the existence of a database maintained by law enforcement authorities that gives the locations of registered sex offenders. (C.C. 2079.10a(a), 2079.10a(d), *supra*, §492.) The lessor is not required to provide additional information beyond the notice, and giving the notice does not subject the lessor to a cause of action by a registered sex offender.

(C.C. 2079.10a(b).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Common Law Rule.* See *49 Am.Jur.2d (2006 ed.), Landlord and Tenant §447 et seq.* (3) *Landlord's Duty To Disclose Neighborhood Conditions.* C.C. 2079.10a(d), stating the July 1, 1999, applicability date, was deleted in 2005. That date is now stated in C.C. 2079.10a(a).



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12 Witkin Sum. Cal. Law Real Property § 618

[§ 618] Lessor's Covenant To Repair.

A lessor's covenant to make repairs usually becomes relevant in connection with the lessor's liability for injuries. (See *infra*, §640.) But in *Wal-Noon Corp. v. Hill* (1975) 45 C.A.3d 605, 119 C.R. 646, the issue was liability for the cost of repairs made by the lessee without notice to the lessor.

In 1957, plaintiffs entered into a lease for the construction and occupancy of a building to be used as a market. The lease contained a provision that defendant lessors "agree, at their own cost and expense, to make all repairs to the roof and exterior walls," except those made necessary by the negligence or improper use by the lessees or sublessees. In 1967, the roof started to leak. Plaintiffs had a number of repairs made, and were then advised by roofers that repairs were no longer practicable and that a new roof should be installed. They had the work done in September 1968 and August 1969 at a total cost of \$ 8,800. In 1971, plaintiffs became aware of the lease provision on repairs and requested reimbursement from defendants. Defendants refused and plaintiffs sued. *Held*, they were not entitled to recover.

(a) Plaintiffs could not recover on the express contract (the lease). Although there was no provision that defendants be given notice to repair, the condition was necessarily implied. The parties did not intend that the lessees could unilaterally and conclusively determine the responsibility for repairs (i.e., their own freedom from negligence or improper use) as well as the nature, quality, and cost of repairs. Hence, notice was a condition precedent to the lessors' obligation to repair. (45 C.A.3d 612.) It has also been held that, unless explicitly excluded, performance under a lessor's express covenant to repair is conditioned on notice from the lessee. (45 C.A.3d 612, citing *McNally v. Ward* (1961) 192 C.A.2d 871, 14 C.R. 260, *infra*, §649.)

(b) Plaintiffs could not recover in quasi-contract. As pointed out in the *Restatement of Restitution* §§40, 41 (see 1 *Summary* (10th), *Contracts*, §1029), it would frequently be unfair to require payment for services and materials where the party benefited might reasonably have been unwilling to pay the price and did not have the opportunity to refuse. (45 C.A.3d 613, 614.) (See *Del Taco v. University Real Estate Partnership V* (2003) 111 C.A.4th 16, 26, 3 C.R.3d 311 [lessor's express covenants to maintain and repair common area and to provide sufficient utilities, and implied covenants arising from express covenants, did not obligate lessor to maintain and repair sewer line after lessor transferred ownership of property; sale of property terminated lessor's privity of estate with lessee and covenants did not create ongoing, personal obligations on lessor's part].)

SUPPLEMENT: [This section is current through the latest supplement]



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a. Nature of Duty.

12 Witkin Sum. Cal. Law Real Property § 619

[§ 619] Nature of Duty.

The lessor of a building intended for use as a dwelling must, in the absence of a contrary agreement (see *infra*, §623), put it in fit condition for that use, and must repair all subsequent dilapidations that render it untenable, except those caused by the tenant's negligence. (C.C. 1941; see 2 Powell §16B.04; Cal. Civil Practice, 3 Real Property Litigation, §20:46 et seq.; 49 *Am.Jur.2d* (1995 ed.), *Landlord and Tenant* §570; on duty to install and maintain locks on doors and security or locking devices on windows, see C.C. 1941.3; on duty to install telephone jacks and inside telephone wiring in residential units, see C.C. 1941.4; on duty to notify tenant if landlord does not provide separate gas and electricity for individual units, see C.C. 1940.9.)

SUPPLEMENT: [This section is current through the latest supplement]

See Cal. Civil Practice, 3 Real Property Litigation, §20:44 et seq.; 49 *Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §456.



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b. Tenant's Remedies.

12 Witkin Sum. Cal. Law Real Property § 620

[§ 620] Tenant's Remedies.

(1) *Repair and Deduct or Abandon.* The tenant cannot compel the landlord to make necessary repairs, but under C.C. 1942, the tenant can give notice of dilapidations. If the landlord does not repair them "within a reasonable time," the tenant may elect (a) to make the repairs and deduct the cost from the rent, or (b) to abandon the premises and be discharged from payment of rent or performance of other obligations. (C.C. 1942(a); see *Wall Estate Co. v. Standard Box Co.* (1912) 20 C.A. 311, 313, 128 P. 1020; *Farber v. Greenberg* (1929) 98 C.A. 675, 682, 277 P. 534; C.E.B., Attorney's Guide to Damages 2d, §4.35; Cal. Civil Practice, 3 Real Property Litigation, §20:48; 21 *Hastings L. J.* 287, 290 [repair and deduct remedy].) There are five significant restrictions on the exercise of rights under C.C. 1942:

(a) The condition must not have been caused by the tenant's violation of C.C. 1929, which makes the tenant responsible for repairs necessitated by the lack of ordinary care, or of C.C. 1941.2, which places certain affirmative obligations on the tenant (see *infra*, §622). (C.C. 1942(c).)

(b) Notice is essential. A tenant who moves out without giving notice to repair remains liable for rent. (*Green v. Redding* (1891) 92 C. 548, 551, 28 P. 599.) Notice may be written or oral, and may be given to either the landlord or the landlord's agent. (C.C. 1942(a).)

(c) After notice, the landlord must be given a reasonable time to repair. (C.C. 1942(a).) If the lessee acts to repair and deduct after the 30th day following notice, the lessee is presumed to have acted after a reasonable time. This presumption is rebuttable, and will not be construed to prevent a tenant from repairing and deducting after a shorter notice if circumstances require shorter notice. (C.C. 1942(b); see 3 *U.C. Davis L. Rev.* 154.)

(d) The maximum allowable deduction for repairs made is 1 month's rent. (C.C. 1942(a).)

(e) The remedy of repair and deduct is available only twice in any 12-month period. (C.C. 1942(a).)

The remedy provided by C.C. 1942 is in addition to other remedies provided by C.C. 1940 et seq., the rental agreement, or other applicable statutory or common law. (C.C. 1942(d); see *Barrows v. W. Simpson Const. Co.* (1929) 102 C.A. 254, 258, 283 P. 100 [tenant's qualified right to make repairs does not relieve third parties from liability to him

for damages to the premises caused by them].)

(2) *Rent Abatement*. A landlord of a dwelling may not demand rent, collect rent, issue a notice of a rent increase, or issue a 3-day notice to pay rent or quit under *C.C.P. 1161(2)* if all of the following conditions exist before the landlord's demand or notice:

(a) The dwelling substantially lacks any of the affirmative standard characteristics listed in C.C. 1941.1 or violates *Health & Saf.C. 17920.10*, or is declared substandard as set forth in *Health & Saf.C. 17920.3* because conditions listed in that section exist to an extent that endangers the life, limb, health, property, safety, or welfare of the public or the occupants. (C.C. 1942.4(a)(1).)

(b) A housing official has inspected the premises and notified the landlord or the landlord's agent in writing to abate the nuisance or repair the substandard conditions. (C.C. 1942.4(a)(2).)

(c) The conditions have existed and have not been abated for 35 days beyond the date of service of the notice specified in C.C. 1942.4(a)(2) and the delay is without good cause. Service is complete at the time of deposit in the United States mail. (C.C. 1942.4(a)(3).)

(d) The conditions were not caused by an act or omission of the tenant in violation of C.C. 1929 or 1941.2. (C.C. 1942.4(a)(4).)

A landlord who violates C.C. 1942.4 is liable for the tenant's actual damages and for special damages between \$ 100 and \$ 5,000. (C.C. 1942.4(b)(1); C.E.B., *Attorney's Guide to Damages* 2d, §4.39.) The prevailing party is entitled to reasonable attorneys' fees and costs. (C.C. 1942.4(b)(2).) (See *Galan v. Wolfriver Holding Corp. (2000) 80 C.A.4th 1124, 1128, 96 C.R.2d 112* [determination of which party prevailed in action under C.C. 1942.4, for purpose of receiving attorneys' fees, is left to trial court's discretion; court properly determined that building owner who succeeded original landlord, and against whom action was dismissed after plaintiffs settled with original landlord, was not prevailing party].)

C.C. 1942.4 is inapplicable if the landlord is pursuing the right to go out of business under *Govt.C. 7060* et seq. (see supra, §598 et seq.). (C.C. 1942.4(f).)

(3) *Court-Ordered Remedial Action by Landlord*. If a court awards damages under C.C. 1942.4(a), it may also order the landlord to abate any nuisance and repair any substandard conditions at the rental dwelling, if the health or safety of the occupants is significantly affected. The court retains jurisdiction to ensure compliance. (C.C. 1942.4(c); see *24 Pacific L. J. 1014*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Repair and Deduct or Abandon*. See CACI, No. 4326 [Affirmative Defense--Repair and Deduct]; Cal. Civil Practice, 3 Real Property Litigation, §20:46.(2) *Rent Abatement*. See *McNairy v. C.K. Realty (2007) 150 C.A.4th 1500, 1505, 59 C.R.3d 429* [actual damages under C.C. 1942.4(b)(1) include damages for emotional distress].



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c. When Dwelling Is Deemed Untenantable.

12 Witkin Sum. Cal. Law Real Property § 621

[§ 621] When Dwelling Is Deemed Untenantable.

C.C. 1941.1 specifies the dilapidations that permit a tenant to exercise the remedies provided by C.C. 1941 and 1942 (supra, §§619, 620). A dwelling will be deemed untenantable for purposes of C.C. 1941 if it substantially lacks any of the following affirmative standard characteristics:

- (1) Effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors.
- (2) Plumbing or gas facilities that conformed to applicable law in effect at the time of installation, maintained in good working order.
- (3) A water supply approved under applicable law that is under the tenant's control and capable of producing hot and cold running water, or a system under the landlord's control that produces hot and cold running water, furnished to appropriate fixtures, and connected to a sewage disposal system approved under applicable law.
- (4) Heating facilities that conformed to applicable law at the time of installation, maintained in good working order.
- (5) Electrical lighting, with wiring and electrical equipment that conformed to applicable law at the time of installation, maintained in good working order.
- (6) Building, grounds, and appurtenances at the beginning of the lease or rental agreement that are, in every part, clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin, and all areas under the landlord's control kept that way.
- (7) An adequate number of appropriate receptacles for garbage and rubbish, in clean condition and good repair at the beginning of the lease or rental agreement, with the landlord providing appropriate serviceable receptacles after that, and being responsible for the clean condition and good repair of those receptacles under the landlord's control.
- (8) Floors, stairways, and railings maintained in good repair.

Furthermore, residential units described in *Health & Saf.C. 17920.3* (substandard buildings) or *Health & Saf.C. 17920.10* (buildings containing lead hazards) are untenable for purposes of C.C. 1941. (C.C. 1941.1.)

If appropriate under the facts, a tenant is entitled to instructions based on the standards set forth in C.C. 1941.1. (*Knight v. Hallsthammar* (1981) 29 C.3d 46, 58, and footnote 9, 171 C.R. 707, 623 P.2d 268.) (See 3 U.C. Davis L. Rev. 143 [effect of statutory criteria]; 11 Santa Clara Lawyer 309 [same]; 2 Proof of Facts 2d 823 [uninhabitability of leased premises].)

SUPPLEMENT: [This section is current through the latest supplement]

Affirmative standard characteristics:

(9) (New) *Mail receptacle:* A locking mail receptacle for each residential unit in a residential hotel, as required by *Health & Saf.C. 17958.3*. (C.C. 1941.1(i), added in 2007 and operative July 1, 2008.)



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d. When Tenant's Violation Excuses Duty.

12 Witkin Sum. Cal. Law Real Property § 622

[§ 622] When Tenant's Violation Excuses Duty.

The landlord's duties under C.C. 1941 or 1942 (*supra*, §§619, 620) will not arise if the tenant is in substantial violation of specified affirmative obligations, and if the tenant's violation contributes substantially to the dilapidation or interferes substantially with the landlord's obligation under C.C. 1941 to make the necessary repairs. (C.C. 1941.2(a); see *11 Pacific L. J. 599*.) The tenant's obligations are as follows:

(1) To keep the part of the premises that the tenant occupies and uses as clean and sanitary as the condition of the premises permits. (C.C. 1941.2(a)(1).)

(2) To dispose of all rubbish, garbage, and other waste, in a clean and sanitary manner. (C.C. 1941.2(a)(2).)

(3) To properly use and operate all electrical, gas, and plumbing fixtures and keep them as clean and sanitary as their condition permits. (C.C. 1941.2(a)(3).)

(4) Not to wilfully or wantonly destroy, deface, damage, impair, or remove a part of the structure or dwelling unit or its facilities, equipment, or appurtenances, or to permit anyone to do those things. (C.C. 1941.2(a)(4).)

(5) To occupy the premises as an abode, using for living, sleeping, cooking, or dining purposes only those portions that were respectively designed or intended to be used for those occupancies. (C.C. 1941.2(a)(5).)

The first two obligations (to keep the premises sanitary and to dispose of garbage properly) do not apply if the lessor has expressly agreed in writing to perform them. (C.C. 1941.2(b); see *3 U.C. Davis L. Rev. 148* [effect of C.C. 1941.2].)

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- e. Waiver and Arbitration.

12 Witkin Sum. Cal. Law Real Property § 623

[§ 623] Waiver and Arbitration.

(1) *Waiver*. At one time, a tenant's rights under C.C. 1942 (supra, §620) could be waived by a provision in the lease. (*Arnold v. Krigbaum* (1915) 169 C. 143, 147, 146 P. 423; see *Buckner v. Azulai* (1967) 251 C.A.2d Supp. 1013, 1015, 59 C.R. 806 [waiver strictly construed to extend only to rented apartment, not to vermin infestation coming from rest of building].)

Under the current statute, however, an ordinary waiver of the tenant's rights under C.C. 1941 or 1942 is void as contrary to public policy with respect to a condition that renders the premises untenantable. The statute does authorize an agreement between lessor and lessee that the lessee will undertake to improve, repair, or maintain all or stipulated portions of the dwelling as part of the consideration for rental. (C.C. 1942.1.)

(2) *Arbitration*. The lease may contain a clause, setting forth the provisions of C.C. 1941 to 1942.1 inclusive, under which either party may apply for a submission to arbitration under C.C.P. 1280 et seq. of "any controversy relating to a condition of the premises claimed to make them untenantable." (C.C. 1942.1.)

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B. Fitness for Use and Repairs.

4. Implied Warranty of Habitability.

a. Development of Doctrine.

1. Rejection of Common Law.

12 Witkin Sum. Cal. Law Real Property § 624

[§ 624] Rejection of Common Law.

The common law rule that the lessor of a dwelling has no duty to repair and no liability for untenantability (see *supra*, §617) has been rejected in a number of jurisdictions. In *Hinson v. Delis* (1972) 26 C.A.3d 62, 102 C.R. 661, California joined the progressive states that have recognized an implied warranty of habitability. Plaintiff tenant rented a \$ 90-a-month apartment for herself and two minor children, under a written month-to-month agreement. The apartment was in satisfactory condition at the time. A year later, however, a hole developed in the bathroom floor, and plaintiff and her 10-year-old son suffered several falls. Some months afterward, other defects developed, including a leaky toilet, an ill-fitting glass in the front door, which caused a draft, and kitchen linoleum without a water-repellant surface. Defendant landlord ignored notification of the first defect. Plaintiff, without funds to repair the defects (estimated to cost over \$ 300), and unable to find other housing that she could afford, refused to pay rent and obtained an official inspection confirming the defects as violations of the city housing code. Defendant gave her a 3-day notice to pay rent or quit, and plaintiff sued for an injunction and declaratory relief. The trial judge found that the defects were violations of the city code, but nevertheless ruled that plaintiff had no right to withhold rent, and gave judgment for defendant. *Held*, reversed.

(a) The doctrine of constructive eviction, requiring prompt abandonment of the premises with the risk of being unable to prove sufficient facts, is inadequate protection for a tenant of living quarters. The building and health codes place duties on the landlord in favor of the tenant, making obsolete the old common law rule. Furthermore, contract principles, properly applied to a lease, " 'provide a more rational framework for the apportionment of landlord-tenant responsibilities; they strongly suggest that a warranty of habitability be implied into all contracts for urban dwellings.' " This analysis is supported by the decisions of several other states. (26 C.A.3d 70, quoting a District of Columbia case.)

(b) The implied warranty cases from other states permit "the most equitable remedy, in that the tenant is not absolved from all liability for rent, but remains liable for the reasonable rental value of the premises, as determined by the trial court, for such time as the premises were in violation of the housing codes. In considering the materiality of an alleged breach, both the seriousness of the claimed defect and the length of time for which it persists are relevant factors. Minor housing code violations standing alone which do not affect habitability must be considered *de minimis* and will not entitle the tenant to reduction in rent; and likewise, the violation must be relevant and affect the tenant's

apartment or the common areas which he uses. Moreover, the contract principle that no one may benefit from his own wrong will permit the landlord to defend against damage caused by the tenant's wrongful action. ... The tenant must also give notice of alleged defects to the landlord and allow a reasonable time for repairs to be made." (26 C.A.3d 70.)

(c) The judge may, during pendency of the action, require the tenant to make the specified rental payments into court as they become due, as long as the tenant remains in possession. The proper distribution may be determined at the trial. (26 C.A.3d 71.) (See 24 *Hastings L. J.* 369 [*Hinson*]; 9 Cal. Western L. Rev. 326 [same]; 5 Southwestern U. L. Rev. 179 [tenant's right to a secure dwelling].)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Implied Warranty of Habitability.

a. Development of Doctrine.

2. Doctrine as Defense to Unlawful Detainer Action.

12 Witkin Sum. Cal. Law Real Property § 625

[§ 625] Doctrine as Defense to Unlawful Detainer Action.

(1) *Green Case*. The doctrine adopted in *Hinson v. Delis* (1972) 26 C.A.3d 62, 102 C.R. 661, supra, §624, was restated and held applicable as a defense to unlawful detainer in *Green v. Superior Court* (1974) 10 C.3d 616, 111 C.R. 704, 517 P.2d 1168. A landlord brought unlawful detainer in the small claims court against a residential tenant, seeking possession and \$ 300 in back rent. The tenant admitted nonpayment, but defended on the ground that the landlord had failed to maintain the premises in a habitable condition. The record did not show whether it was in that condition at the time of rental, hence there was no issue of "illegal contract" or tenant's assumption of risk. (10 C.3d 621, footnote 3.) The small claims court gave judgment for the landlord.

On trial de novo in the superior court, the tenant presented uncontradicted evidence (including an inspection report of the Department of Public Works) of serious defects, such as leaks, rodents, cockroaches, lack of heat, and faulty wiring. But the superior court judge held that C.C. 1941 et seq. (supra, §619 et seq.) was the tenant's exclusive remedy, and entered judgment for the landlord. The tenant sought mandamus to require the trial judge to follow *Hinson v. Delis*. *Held*, writ issued to compel vacation of the judgment and a trial of the defense.

(a) *Development of warranty*. At common law, the real estate lease was a conveyance governed by property law, and the landlord owed no duty to make the premises habitable or to repair. This concept arose in the agrarianism of the Middle Ages, when the primary value of the lease was in the land itself and simple structures. The property law crystallized before the development of the contract principle of mutually dependent covenants. (10 C.3d 622.) In recent years, the situation has changed.

First, a growing number of courts have reexamined the common law rules in the light of contemporary conditions, and have "discarded the traditional doctrine as incompatible with contemporary social conditions and modern legal values." (10 C.3d 623.) Thus, the typical city dweller who frequently leases an apartment several stories above the actual plot of land cannot realistically be viewed as acquiring an interest in land; "rather, he has contracted for a place to live." (10 C.3d 623.) As a District of Columbia case put it: "When American city dwellers, both rich and poor, seek 'shelter' today, they seek a well known package of goods and services--a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper

sanitation, and proper maintenance." (10 C.3d 623.)

Second, urbanization has also significantly altered the factual setting directly relevant to the specific duty of maintaining leased premises. (1) Modern apartment buildings are complex and difficult and expensive to repair, and adequate inspection by tenants is a virtual impossibility. (2) The city dweller today has no skill in maintenance work. (3) The expense of repairs will often be outside the reach of tenants. (4) The scarcity of adequate low cost housing has left tenants with little bargaining power to gain express warranties of habitability and has left the few remedies of common law courts inadequate (e.g., constructive eviction is of little help because the tenant must vacate). (10 C.3d 625.)

Third, equally dramatic changes have occurred in the law of commercial transactions in goods. Caveat emptor has given way to the notion that the consumer in an industrial society is entitled to rely on the skill of a supplier, and the reasonable expectations of consumers are protected by implied warranties of fitness and merchantability. (10 C.3d 626.) Hence, "[i]n most significant respects, the modern urban tenant is in the same position as any other normal consumer of goods. ... Through a residential lease, a tenant seeks to purchase 'housing' from his landlord for a specified period of time. The landlord 'sells' housing, enjoying a much greater opportunity, incentive and capacity than a tenant to inspect and maintain the condition of his apartment building. A tenant may reasonably expect that the product he is purchasing is fit for the purpose for which it is obtained, that is, a living unit. Moreover, since a lease contract specifies a designated period of time during which the tenant has a right to inhabit the premises, the tenant may legitimately expect that the premises will be fit for such habitation for the duration of the term of the lease. It is just such reasonable expectations of consumers which the modern 'implied warranty' decisions endow with formal, legal protection." (10 C.3d 627.)

Fourth, the widespread enactment of comprehensive housing codes casts significant light on the issue. These codes "affirm that, under contemporary conditions, public policy compels landlords to bear the primary responsibility for maintaining safe, clean and habitable housing in our state." (10 C.3d 627.)

(b) *New California rule*. The foregoing factual and legal developments "have completely eroded the foundations of the traditional common law rule." Seven states and the District of Columbia Court of Appeals have recognized an implied warranty of habitability in residential leases. Hence, the holding in *Hinson* is correct and is reaffirmed. (10 C.3d 628, 629.)

(c) *Defense in unlawful detainer*. (1) Although *Hinson* involved declaratory relief, the decision was not based on procedural differences, and a number of out-of-state decisions on which *Hinson* relied applied the warranty in unlawful detainer proceedings. (2) The unlawful detainer statute precludes a claim of affirmative relief, but does not prevent the defendant from setting up an affirmative defense. (10 C.3d 632; see 5 Cal. Proc. (4th), *Pleading*, §§1038, 1039.) (3) The judicial limits on unlawful detainer defenses, intended to preserve the summary character of the action, preclude raising issues irrelevant to the right of immediate possession. (10 C.3d 632; see 5 Cal. Proc. (4th), *Pleading*, §1086.) Earlier California cases held that the landlord's warranty of habitability was an independent covenant, not relevant to the question of possession, but in the modern residential lease, governed by contract principles, the tenant's duty to pay rent is "mutually dependent" on the landlord's fulfillment of the implied warranty of habitability. Hence, the landlord's breach may be directly relevant to the issue of possession, for the tenant may be able to prove that no rent is in fact due and owing. (10 C.3d 635.)

(d) *Policy considerations*. The experience in other states shows that the new rule will not undermine the speedy procedure in unlawful detainer, and several model landlord-tenant codes have recognized the defense in summary proceedings. Moreover, the safeguards set forth in *Hinson* permit the trial judge to require the tenant to pay rent into court during pendency of the action. (10 C.3d 636.)

(e) *Scope of warranty*. Under the implied warranty of habitability, a residential landlord covenants that premises leased for living quarters will be maintained in a habitable state throughout the lease term. "This implied warranty of

habitability does not require that a landlord ensure that leased premises are in perfect, aesthetically pleasing condition, but it does mean that 'bare living requirements' must be maintained. In most cases substantial compliance with those applicable building and housing code standards which materially affect health and safety will suffice to meet the landlord's obligations under the common law implied warranty of habitability we now recognize." (10 C.3d 637.)

(f) *Measure of damages.* The ascertainment of damages will be difficult, but no more so than in other tort and contract situations, and courts must do the best they can. Recent decisions have suggested that the measure should be the difference between the fair rental value of the premises if they had been as warranted, and the fair rental value as they were during occupancy in the unsafe or unsanitary condition. (10 C.3d 638.) Another reasonable approach is a percentage reduction of use: reducing the tenant's rental obligation by a percentage corresponding to the relative reduction of use of the leased premises caused by the landlord's breach (here, 25%). (10 C.3d 639, footnote 24.)

(2) *Commentary and Further Application.* The *Green* case received extensive comment in the law reviews, and the doctrine has been frequently applied in later decisions. (See *Knight v. Hallsthammar* (1981) 29 C.3d 46, 51, 171 C.R. 707, 623 P.2d 268, *infra*, §628; *Secretary of Housing & Urban Dev. v. Layfield* (1978) 88 C.A.3d Supp. 28, 30, 152 C.R. 342 [breach of implied warranty by failure to provide security measures to protect tenants against crime]; *De La Vara v. Municipal Court* (1979) 98 C.A.3d 638, 641, 159 C.R. 648 [breach is affirmative defense, which plaintiff landlord need not anticipate]; *Lee v. Vignoli* (1979) 98 C.A.3d Supp. 24, 26, 28, 160 C.R. 79 [right of tenant to abatement of rent and opportunity to pay reduced rent before judgment of possession to landlord]; *Stoiber v. Honeychuck* (1980) 101 C.A.3d 903, 162 C.R. 194, *infra*, §627; *Smith v. David* (1981) 120 C.A.3d 101, 108, 176 C.R. 112 [jury instructions]; *Fairchild v. Park* (2001) 90 C.A.4th 919, 928, 109 C.R.2d 442 [applying rationale of *Green*; implied covenant of habitability is independent of covenant to pay rent]; C.E.B., 1 Landlord-Tenant Practice 2d, §3.16 et seq.; Cal. Civil Practice, 3 Real Property Litigation, §20:51 et seq.; 62 Cal. L. Rev. 1444 [issues raised by *Green*: damages, protective orders, and what constitutes breach]; 63 Cal. L. Rev. 301 [*Green*]; 66 Cal. L. Rev. 37 [California case study on impact of doctrine]; 5 *Golden Gate L. Rev.* 145 [*Green*]; 12 *San Diego L. Rev.* 401 [whether *Green* will lead to imposition of strict liability on commercial lessors of residential property]; 14 Santa Clara Lawyer 356 [*Green*]; 14 Southwestern U. L. Rev. 1 [economic analysis of changing landlord/tenant relationship in California]; 28 *Stanf. L. Rev.* 729 [*Green*]; 20 Thomas Jefferson L. Rev. 277 [development of warranty after *Green*]; 40 A.L.R.3d 646 [modern status of doctrine of implied warranty of habitability or fitness for use of leased premises]; 43 Proof of Facts 3d 329 [landlord's liability for breach of warranty as defense in unlawful detainer action]; 35 Cal. Western L. Rev. 159 [legal and empirical analysis of pilot program to reduce frivolous invocation of habitability defense in unlawful detainer actions].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Green Case. Affirmative defenses allowed:*

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §§1112, 1113.

Issue irrelevant to right of immediate possession precluded:

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §1160.(2) *Commentary and Further Application.* See CACI, No. 4320 [Affirmative Defense--Implied Warranty of Habitability]; CACI, No. VF-4301 [Termination Due to Failure to Pay Rent--Affirmative Defense--Breach of Implied Warranty of Habitability]; 54 U.C.L.A. L. Rev. 971 [using implied warranty of habitability to establish landlord's liability for third-party criminal acts against tenants]; Cal. Civil Practice, 3 Real Property Litigation, §20:49 et seq.



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B. Fitness for Use and Repairs.

4. Implied Warranty of Habitability.

a. Development of Doctrine.

3. Restatement 2d.

12 Witkin Sum. Cal. Law Real Property § 626

[§ 626] Restatement 2d.

The doctrine of implied warranty of habitability in residential tenancies is adopted by Chapter Five of the Second Restatement, Property (Landlord and Tenant). An elaborate Statutory Note (p. 150 et seq.) lists all relevant statutes, and the Introductory Note (p. 150) explains the reason for the position taken:

"The common law placed the risk on the tenant as to whether the condition of the leased property made it unsuitable for the use contemplated by the parties. In recent years, the definite judicial trend has been in the direction of increasing the responsibility of the landlord, in the absence of a valid contrary agreement, to provide the tenant with property in a condition suitable for the use contemplated by the parties. This judicial trend has been supported by the statutes that deal with this problem. This judicial and statutory trend reflects a view that no one should be allowed or forced to live in unsafe and unhealthy housing." (See 27 *Stanf. L. Rev.* 879 [analyzing and criticizing Restatement rules].)

Thus, "[e]xcept to the extent the parties to a lease validly agree otherwise, there is a breach of the landlord's obligations if the parties contemplate that the leased property will be used for residential purposes and on the date the lease is made and continuously thereafter until the date the tenant is entitled to possession, the leased property, without fault of the tenant, is not suitable for residential use." (*Rest.2d, Property (Landlord and Tenant) §5.1.*)

Comment b explains why the common law doctrine of *caveat emptor* is rejected. "That rule, formulated at a time when the economy was primarily agrarian, was based on the premise that the tenant had ample opportunity to inspect the leased property, at least for major defects, and if any hidden defects were later discovered, they were generally reparable by hand by the tenant himself. Thus the tenant was seldom injured by that rule. In a more sophisticated urban society, such a rule is clearly out of place as to many types of residential property. The premises subject to a modern residential lease are often structures on the land or a segment of a structure (e.g., an apartment), not the land itself. The tenant, because of the complexities of construction, particularly the technical sophistication and centralization of vital facilities, is seldom able to conduct an inspection of sufficient depth to discover even major defects. In addition, when hidden defects become known, they are seldom within the ability of the tenant to repair. Thus the modern residential tenant is severely injured by such a rule. The harshness of the *caveat emptor* approach is magnified many times in the

case of the urban residential tenant, who often finds himself with a severe shortage of adequate housing and therefore little or no bargaining power. To postulate that this tenant has an opportunity to bargain with the landlord for repairs is unrealistic. The urban tenant, particularly the indigent, is then faced with the choice of substandard housing or none at all."

SUPPLEMENT: [This section is current through the latest supplement]



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12 Witkin Sum. Cal. Law Real Property § 627

[§ 627] Action for Damages.

(1) *Contract Action and Contract Damages.* In *Quevedo v. Braga* (1977) 72 C.A.3d Supp. 1, 140 C.R. 143, plaintiff tenants alleged that they leased a residence from defendant landlord in April 1974; that the premises were infested with vermin, and certain plumbing facilities were not in proper condition; that defendant knew of these conditions and failed to remedy them despite plaintiffs' repeated requests; that the premises were uninhabitable and plaintiffs moved out in March 1975; and that, as a result of these conditions, the fair rental value was reduced from the stated \$ 160 per month to \$ 80 or less. The prayer was for damages for overpayment of rent ("retroactive rent abatement") and for discomfort and annoyance. *Held*, judgment for defendant on demurrer reversed.

(a) No prior case authority in California supports an action for damages for breach of the warranty of habitability, but other jurisdictions have recognized the cause of action. (72 C.A.3d Supp. 6.) The objection that an action brought after the tenant has given up possession raises serious problems of proof is unconvincing. Problems of proof are present in any action filed after the events have occurred. (72 C.A.3d Supp. 7.)

(b) The requirements of pleading and proof in an action for damages for breach of the implied warranty of habitability should be similar to those in actions for breach of implied warranties of fitness and merchantability (see 3 *Summary* (10th), *Sales*, §69 et seq.). (72 C.A.3d Supp. 7.) Thus, the plaintiff should show the following: (1) There was a materially defective condition affecting habitability. (2) The condition was unknown to the tenant at the time of occupancy. (3) The effect of the condition on habitability was not apparent on a reasonable inspection. (4) Notice was given to the landlord within a reasonable time after the tenant discovered or should have discovered the breach of warranty. (5) The landlord was given a reasonable time to correct the defect while the tenant remained in possession. (72 C.A.3d Supp. 7, 8.)

(c) Damages should be limited to the difference between the rent paid and the rent that would have been reasonable. (72 C.A.3d Supp. 8.) Because the action is in contract, not tort, damages for discomfort and annoyance are not recoverable. (72 C.A.3d Supp. 9.) (See *Cazares v. Ortiz* (1980) 109 C.A.3d Supp. 23, 28, 168 C.R. 108 [elaborate discussion of authorities on five methods of computing tenant's damages, and criticism of *Quevedo* method]; *Fairchild v. Park* (2001) 90 C.A.4th 919, 927, 109 C.R.2d 442, 7 Cal. Proc. (4th), *Judgment*, Supp., §175A [tenants recovered damages on contract claim for breach of implied warranty of habitability, even though they were in arrears in rent];

implied covenant of habitability is independent of covenant to pay rent]; C.E.B., Attorney's Guide to Damages 2d, §§4.40, 4.41; Cal. Civil Practice, 3 Real Property Litigation, §20:63 [complaint]; 7 San Fernando Valley L. Rev. 67 [Quevedo]; 1 A.L.R.4th 1182 [measure of damages for breach of implied warranty of habitability]; 43 Proof of Facts 3d 329 [landlord's liability for breach of warranty as basis for tenant's action for damages].)

(2) *Tort Action and Tort Damages*. In *Stoiber v. Honeychuck* (1980) 101 C.A.3d 903, 162 C.R. 194, the court held that a tort action, seeking both compensatory and punitive damages, would also lie against the landlord and managing agent. (For full discussion of holding on this point and other theories of recovery, see 3 Cal. Proc. (4th), Actions, §146.)

West's Key Number Digest, Landlord and Tenant k.187 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Contract Action and Contract Damages*. See Cal. Civil Practice, 3 Real Property Litigation, §20:61. *Fairchild* case:

Cross-Reference: 7 Cal. Proc. (5th), Judgment, §190.

(2) *Tort Action and Tort Damages*.

Stoiber case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §150.



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c. Occupancy With Knowledge Does Not Waive Warranty.

12 Witkin Sum. Cal. Law Real Property § 628

[§ 628] Occupancy With Knowledge Does Not Waive Warranty.

In *Knight v. Hallsthammar* (1981) 29 C.3d 46, 171 C.R. 707, 623 P.2d 268, plaintiffs bought a 30-unit apartment building from N, and N's managing agent, retained by plaintiffs, notified the tenants of a substantial increase in the rent. An association of tenants advised the agent that the tenants would withhold rent because of the state of disrepair of the building and the new rent increases. Plaintiffs brought unlawful detainer, and defendant tenants set up and proved substantial breaches of the implied warranty of habitability, based on conditions that existed before plaintiffs purchased from N. The jury brought in a verdict for plaintiffs against some but not all of defendants, and both parties appealed from the judgment. In reversing for errors in instructions, the court decided several questions of law.

The tenant does not waive the breach by continuing to live in the uninhabitable premises. C.C. 1942 provides a limited remedy (deduction of rent payments needed to cure conditions) available only twice in any 12-month period (see *supra*, §620), but under C.C. 1942(d) (*supra*, §620), this remedy is in addition to any other provided by statute or common law. (29 C.3d 53.) The trial judge instructed the jury that a tenant could not defend on the implied warranty unless the defective condition was unknown to the tenant at the time of occupancy. This was error. The same reasons that gave rise to the implied warranty (unequal bargaining power, shortage of housing, impracticability of imposing duty of inspection) compel the conclusion that a tenant's lack of knowledge of defects is not essential to the defense. (29 C.3d 54.) (For other points decided in *Knight*, see *infra*, §§629, 630; see also 15 *Loyola L.A. L. Rev.* 353 [*Knight*].)

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d. Landlord Is Not Entitled to Time To Correct Defects.

12 Witkin Sum. Cal. Law Real Property § 629

[§ 629] Landlord Is Not Entitled to Time To Correct Defects.

In *Knight v. Hallsthammar* (1981) 29 C.3d 46, 171 C.R. 707, 623 P.2d 268, supra, §628, the trial judge instructed the jury that breach of the implied warranty would be a defense only if plaintiff landlords had been allowed a reasonable time to correct the defects while the tenant remained in possession. *Held*, this was error. The landlord's breach exists regardless of whether there has been time to correct. Otherwise, the mutual dependence of the landlord's obligation to maintain habitable premises and of a tenant's duty to pay rent would make no sense. (29 C.3d 55, disapproving, to extent inconsistent, *Quevedo v. Braga* (1977) 72 C.A.3d Supp. 1, 140 C.R. 143, supra, §627, and *Hinson v. Delis* (1972) 26 C.A.3d 62, 102 C.R. 661, supra, §624.)

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4. Implied Warranty of Habitability.

e. Defects Existing Under Former Owner.

12 Witkin Sum. Cal. Law Real Property § 630

[§ 630] Defects Existing Under Former Owner.

In *Knight v. Hallsthammar* (1981) 29 C.3d 46, 171 C.R. 707, 623 P.2d 268, supra, §628, the court rejected plaintiff landlords' contention that a successor landlord is not liable for a previous owner's breach of the implied warranty. The change of ownership is an event over which tenants have no control. "Therefore, a tenant may defend an unlawful detainer action against a current owner, at least with respect to rent currently being claimed due, despite the fact that the uninhabitable conditions first existed under a former owner." (29 C.3d 57.)

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12 Witkin Sum. Cal. Law Real Property § 631

[§ 631] Distinction: Commercial Lease.

(1) *Doctrine Is Inapplicable to Commercial Lease.* In *Schulman v. Vera* (1980) 108 C.A.3d 552, 166 C.R. 620, the decision in *Green v. Superior Court* (1974) 10 C.3d 616, 111 C.R. 704, 517 P.2d 1168, supra, §625, was restricted to residential leases.

(a) *Arnold v. Krigbaum* (1915) 169 C. 143, 145, 146 P. 423, held that a tenant could not remain in possession without paying rent and then, in the unlawful detainer action, set up the landlord's breach of covenant as a defense. *Green* did not overrule *Arnold*. (108 C.A.3d 561.)

(b) "In the case at bench if lessees had been permitted to litigate their claim of damages from lessor's breach of covenant to repair, the summary nature of the unlawful detainer procedure would have been destroyed. There would have been injected into the action issues of whether or not lessees properly notified the lessors of the need for repairs, whether the repairs were in fact needed, whether or not lessors failed to repair within a reasonable time, the nature and extent of the damages resulting from the failure to repair, whether or not lessees took proper measures to mitigate damages, the reasonable cost of making the required repairs, and whether or not lessees had the means to have the repairs made themselves. By contrast, no reason appears why lessees' alternative remedies to recover damages for lessors' alleged breach were inadequate." (108 C.A.3d 563.) (See 12 *Pacific L. J.* 1067 [arguing for extension of doctrine to commercial leases]; 76 *A.L.R.4th* 928 [implied warranty of fitness or suitability in commercial leases]; 57 *Proof of Facts* 3d 127 [commercial landlord's liability for breach of implied warranty of fitness or suitability].)

(2) *Restatement.* The Restatement "takes no position at this time" on whether the rule of §5.1 (supra, §626) extends to commercial leases. (*Rest.2d, Property (Landlord and Tenant) §5.1, Caveat, and Comment b.*) The Reporter's Note (p. 176) explains: "The failure to so extend it is not to be taken as any indication that it should or should not be so extended. The present state of the statutory development and judicial development does not warrant taking a position one way or the other as to nonresidential property. In most cases, parties to a commercial lease are free to modify the rule by an arm's length agreement, and in most cases they do in practice. The Reporter is of the opinion that the rule of this section should be extended to nonresidential property. The small commercial tenant particularly needs its protection." The Reporter adds, however, that the modern judicial authority is split on this issue, and that most of the statutes apply to residential leases only.

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B. Fitness for Use and Repairs.

5. Covenant by Tenant To Repair.

a. Nature of Covenant.

12 Witkin Sum. Cal. Law Real Property § 632

[§ 632] Nature of Covenant.

The tenant is normally required only to use ordinary care in maintaining the premises. (C.C. 1928, 1929; see *Connell v. Brownstein-Louis Co. (1927)* 86 C.A. 610, 614, 261 P. 331; *Haupt v. La Brea Heating & Air Conditioning Co. (1955)* 133 C.A.2d Supp. 784, 789, 284 P.2d 985 [tenant's duty "is to restore the premises to the lessor unimpaired beyond ordinary wear and tear"]; *Lynn v. DePue Warehouse Co. (1962)* 198 C.A.2d 742, 747, 17 C.R. 841; 57 Proof of Facts 3d 225 [liability of prospective buyer who moves into seller's property under temporary lease before residential real estate transaction closes]; on obligations of tenant who possesses waterbed, see C.C. 1940.5.)

However, the tenant may, by a covenant in the lease, become obligated to repair, or to surrender the premises in good condition. (See *Bank of America v. Moore (1937)* 18 C.A.2d 522, 528, 65 P.2d 460 [suggesting that in proper case, specific performance of covenant might be had]; *Rose v. Long (1954)* 128 C.A.2d 824, 826, 275 P.2d 925 [lessee's promise, "at his sole cost and expense," to comply with municipal regulations]; *Worthington v. Kaiser Foundation Health Plan (1970)* 8 C.A.3d 435, 442, 87 C.R. 272 [breach of covenant to restore premises to original condition after alteration]; Cal. Civil Practice, 3 Real Property Litigation, §§20:16, 20:25; 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §849 et seq.; for form of provision, see C.E.B., 1 Office Leasing 2d, §§18.5, 18.6; for covenant to alter premises to conform to change in law, see C.E.B., 1 Office Leasing 2d, Chap. 15; 39 So. Cal. L. Rev. 309 [breach of covenant to restore after alteration].)

SUPPLEMENT: [This section is current through the latest supplement]
See 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §699 et seq.



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12 Witkin Sum. Cal. Law Real Property § 633

[§ 633] Measure of Damages.

"The relief to be awarded a prevailing lessor for breach of a covenant to restore the premises may be based upon one of three possible measures: The cost of restoring the premises, the diminution in the market value of the premises, or specific performance of the covenant. ... In the majority of jurisdictions, including California, the restoration principle is employed; i.e., where an action is brought after expiration of a term for breach of a lessee's covenant to keep the premises in repair or to surrender them in good repair or in a specified condition, the measure of damages is the reasonable cost of putting the demised premises into the required state of repair or the condition contemplated by the covenant. ... An allowance may also be made for the loss of rental during the reasonable time required to make such repairs or restoration." (*Iverson v. Spang Industries* (1975) 45 C.A.3d 303, 308, 119 C.R. 399.) (See *Polster v. Swing* (1985) 164 C.A.3d 427, 432, 210 C.R. 567 [quoting *Iverson* and affirming trial court judgment applying *Iverson* measure]; 45 A.L.R.5th 251 [measure and elements of damages for lessee's breach of covenant to repair].)

In *Iverson*, plaintiff lessor contended that he was entitled not only to recover for the cost of restoring the premises, but also damages based on the reduced rental value of the property, computed over the entire 3-year term of the lease. His theory was that by renting the premises at less than market value, he was attempting to mitigate the damages incurred by the lessee's breach. The court declared that to allow the requested damages would be to permit an improper double recovery. (45 C.A.3d 308.)

In *Polster*, defendant tenant covenanted to return the premises in as good condition as when received, reasonable use and wear excepted. The covenant was breached, but instead of repairing, the lessor leased to a new tenant at a reduced rental, and that tenant made the necessary repairs. Thus, the issue was "whether the estimated cost of repair can be used as the measure of the damages which the lessor has sustained because of the lessee's breach of the covenant to restore where, as here, the lessor has not expended money to effect the necessary repairs but has caused the same to be effected by the lessor's agreement with his incoming lessee." (164 C.A.3d 433.) Lacking California authority, the court followed cases from other jurisdictions holding that the tenant's liability is not affected by the fact that the lessor himself does not make the repairs. (164 C.A.3d 433.) Moreover, plaintiff's renting to a successor tenant was a proper attempt to mitigate damages, as in the situation where the tenant abandons before the end of the term. (164 C.A.3d 433, citing the text.)

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5. Covenant by Tenant To Repair.

c. Interpretation Against Undue Burden.

12 Witkin Sum. Cal. Law Real Property § 634

[§ 634] Interpretation Against Undue Burden.

The covenant will be reasonably interpreted to avoid placing an unwarranted burden of improvement of the lessor's premises on the lessee. Thus, in *Haupt v. La Brea Heating & Air Conditioning Co.* (1955) 133 C.A.2d Supp. 784, 284 P.2d 985, defendants leased a dilapidated building for \$ 50 per month for storage purposes, promising to repair any damage that might occur from overloading the floor, and on termination "to repair [the floor] to a usable state." The trial court found that defendants thereby obligated themselves to maintain the building in a reasonable state of repair, and gave judgment for \$ 3,000 for damage caused by failure to repair the leaking roof and other preexisting defects. *Held*, reversed; no such obligations were undertaken. (133 C.A.2d Supp. 788.) (See *Lynn v. DePue Warehouse Co.* (1962) 198 C.A.2d 742, 746, 17 C.R. 841, quoting the text; *Kanner v. Globe Bottling Co.* (1969) 273 C.A.2d 559, 565, 78 C.R. 25, citing the text [covenant to deliver possession at expiration of lease "in like good condition, ordinary use and wear thereof excepted"]; 20 A.L.R.2d 1331 [extent of lessee's obligation under express covenant to repair].)

At common law, an unqualified covenant to repair was held to impose a duty to rebuild property destroyed, even though the lessee was wholly without fault. The modern view, followed in California, is to the contrary. (*Realty & Rebuilding Co. v. Rea* (1920) 184 C. 565, 574, 194 P. 1024; see *Friedman v. Isenbruck* (1952) 111 C.A.2d 326, 334, 244 P.2d 718 [following *Rea* where building was so damaged that it had to be torn down]; *Dicker v. West* (1958) 164 C.A.2d 55, 60, 330 P.2d 106 [applying *Rea* where covenant was to deliver premises in same condition as received, subject to reasonable use and wear and tear]; *Lynn v. DePue Warehouse Co.*, *supra*, 198 C.A.2d 746.)

SUPPLEMENT: [This section is current through the latest supplement]

See *ASP Properties Group v. Fard* (2005) 133 C.A.4th 1257, 1268, 35 C.R.3d 343 [lease provision requiring commercial tenant to maintain premises in good and safe condition did not require tenant to replace roofs that were already dilapidated when tenant took possession].



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6. Changes Ordered by Public Authorities.

a. Factors for Determining Responsibility.

12 Witkin Sum. Cal. Law Real Property § 635

[§ 635] Factors for Determining Responsibility.

Glenn R. Sewell Sheet Metal v. Loverde (1969) 70 C.2d 666, 75 C.R. 889, 451 P.2d 721, elaborately examines the law on the respective duties of the landlord and tenant to make repairs or improvements required by public authorities. P leased premises to the predecessors of L, who covenanted to maintain the premises in good condition. The predecessors assigned to L, who assumed the covenants. At first, the permitted use was for a store or restaurant, then, with permission, for an auto repair business, and finally, for a trailer park. L subleased to S, and S operated the trailer park until difficulties arose with the septic system. The county health department ordered him to connect with public sewer lines or terminate that use. The cost of connection was too large for S, and neither P nor L would pay it. S elected to terminate the use and, 11 months before the expiration of his sublease, abandoned and brought this action to declare it unenforceable. *Held*, judgment for owner P against S affirmed.

(a) *Some party must be liable.* Where preventative or reparative acts are required by laws or orders governing use of premises, "public policy requires that someone at all times be obliged to comply with such laws and orders, and parties to a lease will not be permitted to create a hiatus in their respective duties of compliance. One or more of the parties interested in the property must therefore be obliged to comply with some or all of the laws and orders affecting the premises." (70 C.2d 672.)

(b) *Lessor's obligation.* Because the property owner is initially under a duty to comply with laws and orders, he, as lessor, remains subject to that duty unless it is assumed by the lessee. (70 C.2d 672.)

(c) *Lessee's obligation where use is changed.* A lessee who voluntarily puts the premises to a use different from those existing before creation of the tenancy, and causes the premises to fall within the scope of laws not previously applicable, must bear the burden of conforming the new use to the new legal requirements. If this were not so, the lessee would have the lessor at his mercy; e.g., the lessee could open a roominghouse and make the lessor build fire escapes. (70 C.2d 673.) Hence, when lessee L ceased to use the premises for auto repairs and converted them into a trailer park, it was his duty to make the new use conform to the health laws and orders. (70 C.2d 673.) The question of duty to comply with a new law enacted after the new use, and the rule applicable where the lease restricts the use or where the lessor has a direct interest in a specific use, e.g., where rent is related to profits, are left open. (70 C.2d 672, 673, footnotes 7, 8.)

(d) *Sublessee's obligation where he assumes duty.* Lessee L, with the initial duty to comply, was a lessor as to sublessee S, and S covenanted generally to comply with all applicable laws. This general covenant did not alone amount to an assumption of the duty to take curative steps of a "substantial" nature. (70 C.2d 674, and footnote 10.) But other circumstances established the duty. First, S represented that he took the premises "as is," and that L was relieved of all obligations of repair or maintenance. (70 C.2d 675.) Second, S agreed to indemnify L for all expense and damage caused by S's use. One source of liability would be illegal unsanitary conditions. (70 C.2d 675.) Third, the character of the premises, a trailer park, implied knowledge of the importance of regulatory laws; hence, these were included in the general clause requiring compliance with all applicable laws. (70 C.2d 675.)

(e) *No defense of commercial frustration.* Parties who contracted with reference to the frustrating event, or who contemplated the risks arising from it, cannot invoke the doctrine of commercial frustration to escape their obligations. (70 C.2d 676, and footnote 13; see 1 Summary (10th), *Contracts*, §846.) The same principle applies to C.C. 1932(2), stating the right to terminate on destruction of the premises (infra, §665). Whether the destruction (C.C. 1932(2)) was failure of the septic system or consequent termination of operations pursuant to governmental order, S, by his covenants, assumed the risk of both occurrences. (70 C.2d 677.) (See *Wolfen v. Clinical Data* (1993) 16 C.A.4th 171, 180, 19 C.R.2d 684 [where sublessee put premises to substantially different use, lessee bore financial burden of conforming new use to legal requirements; citing *Glenn R. Sewell Sheet Metal*; 22 A.L.R.3d 521 [whether landlord or tenant must make alterations, improvements, or repairs ordered by public authorities].)

Determinations of liability for government-ordered changes "are usually closely tied, not only to the terms of the lease itself, but to the context in which it is made, assessed in light of a handful of factors designed to elucidate the probable intent of the parties. ... [E]ven though a lease may by its terms require the lessee to be responsible for *all* repairs and alterations, without limitation, the legal and practical scope of that duty may well be less, especially where a *short-term* commercial lease is at issue and the cost of compliance is more than a small fraction of the aggregate rent reserved over the life of the lease." (*Brown v. Green* (1994) 8 C.4th 812, 817, 35 C.R.2d 598, 884 P.2d 55, infra, §636.)

A short-term lease was at issue in *Hadian v. Schwartz* (1994) 8 C.4th 836, 35 C.R.2d 589, 884 P.2d 46, infra, §637, a companion case to *Brown*. While reaching opposite results, in both cases the court factually distinguished *Glenn R. Sewell Sheet Metal*, but considered six factors enumerated in *Sewell* (70 C.2d 674, footnote 10): (1) the relationship between the cost of the curative action and the rent reserved; (2) the term of the lease; (3) the relationship between the benefit to the lessee and that of the reversioner; (4) whether the curative action is structural or nonstructural in nature; (5) the degree to which the lessee's enjoyment of the premises will be interfered with while the curative action is undertaken; and (6) the likelihood that the parties contemplated the application of the particular law or order involved.

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IX. OTHER RIGHTS AND LIABILITIES OF LANDLORDS AND TENANTS

B. Fitness for Use and Repairs.

6. Changes Ordered by Public Authorities.

b. Lessee's Responsibility.

12 Witkin Sum. Cal. Law Real Property § 636

[§ 636] Lessee's Responsibility.

In *Brown v. Green* (1994) 8 C.4th 812, 35 C.R.2d 598, 884 P.2d 55, B leased a large commercial building to the G partnership for 15 years. The lease was on a preprinted form modified by strikeouts, interlineations, and a typewritten addendum. G was required to comply with all laws and orders regulating its use of the property, and to maintain all parts of the premises. B was expressly excused from any duty of maintenance. The initial proposal form provided by B's broker included a prominent warning to consult with experts as to the condition of the property, including the possible presence of asbestos. G testified that he had inspected the building himself and deliberately decided not to retain a professional. After less than 2 years, G's retail furniture store suffered business reverses, and the building was sublet to G's son, who operated another furniture store. Shortly thereafter, a routine building inspection revealed flaking asbestos debris, and the county served the subtenants with an abatement order. The parties could not agree on who was responsible for the cleanup. B sued for accrued rent and the estimated cost of abatement. The trial judge, relying primarily on *Glenn R. Sewell Sheet Metal v. Loverde* (1969) 70 C.2d 666, 75 C.R. 889, 451 P.2d 721, supra, §635, ruled that the lease allocated responsibility for the cleanup to G, and the Court of Appeal affirmed, finding *Sewell* dispositive. *Held*, affirmed, but not on the reasoning applied in *Sewell*.

(a) The compliance with laws provisions at issue here and in *Sewell* were substantially identical, but this case is distinguishable because it was not G's particular use of the property that led to the government's compliance order. The lease did not contemplate a use that was likely to trigger an order to clean up hazardous materials. The cause of the asbestos flaking was activity in the building that would be typical of any occupant. Hence, unlike the lessee in *Sewell*, G could not reasonably be charged with notice from the character of the premises that the compliance with laws provision would include the order at issue. (8 C.4th 824.)

(b) Nevertheless, G did agree to a duty of repair that was virtually global in scope. In combination with other features of the lease, the extent of that obligation strongly suggested an intent to transfer to G substantially all the responsibilities of property ownership, including the duty to comply with the asbestos cleanup order. (8 C.4th 826.) The agreement was expressly designated a "net" lease, meaning that in exchange for a fixed rent the lessee agrees to assume all repair obligations. (8 C.4th 827.) This factor alone was not decisive, but the provisions of the lease as a whole were persuasive, including its relatively long 15-year term, G's agreement to pay property taxes and to assume and insure against the risk of third-party liability, the unqualified nature of the repair clause, B's "negative" covenants as to any

obligation of maintenance or repair, and the elimination of any warranties on *B's part*. (8 C.4th 828.)

(c) Whether the parties actually intended the allocation of responsibilities suggested by the use of unqualified language in a lease is an inquiry not limited to the four corners of the agreement, especially where a "form" lease may favor the interests of one party and produce an unreasonable result, even when the form is interlineated by the parties. The factors identified in *Sewell* for determining whether a compliance or repair obligation requires curative actions of a "substantial" nature are also highly relevant to deciding which of the parties to a commercial lease has assumed the burden of complying with laws requiring the removal and disposal of hazardous building materials. (8 C.4th 829.) Application of the factors in this case supported the conclusion that G was liable.

(1) The absolute cost of the asbestos disposal operation was high, but it was less than 5% of the total rent reserved over the 15-year life of the lease. (8 C.4th 830.) And because the problem was discovered relatively early in the lease term, G had time to amortize the cost. (8 C.4th 831.)

(2) The term of the lease was relatively long, making it more likely that G expected to stand in the shoes of the building owner. (8 C.4th 831, 832.)

(3) The benefit of the mandated work would inure to both parties. (8 C.4th 832.)

(4) The curative action was structural in nature, but the lease expressly shifted responsibility for structural repairs to G. (8 C.4th 832, 833.)

(5) The record was scanty as to the degree of interference with G's use of the premises by the contemplated cleanup, but it did not appear that the interference would be so substantial as to weigh heavily in favor of a finding that B had accepted the compliance responsibility. (8 C.4th 833.)

(6) While neither party had reason to believe that hazardous materials were present in the building when the lease was negotiated and signed, both had notice of the possibility that such a condition might exist. This was especially telling where a lessee with substantial experience in retail leasing conceded that he had read and understood the warning in the lease proposal, but elected not to pursue an investigation. (8 C.4th 833, 834.)

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B. Fitness for Use and Repairs.

6. Changes Ordered by Public Authorities.

c. Lessor's Responsibility.

12 Witkin Sum. Cal. Law Real Property § 637

[§ 637] Lessor's Responsibility.

(1) *Costs of Compliance.* In *Hadian v. Schwartz* (1994) 8 C.4th 836, 35 C.R.2d 589, 884 P.2d 46, S leased an unreinforced masonry building from H for use as a bar and cabaret. The parties used a standard form "net" lease agreement, striking some provisions and adding others. The maintenance and compliance with laws provisions were substantially the same as those in *Brown v. Green* (1994) 8 C.4th 812, 35 C.R.2d 598, 884 P.2d 55, supra, §636, but the term of the lease was 3 years at a fixed rent, with an option to renew for 5 years at an increased rent. S exercised the option to renew. Five months later, and 5 months before the initial 3-year term expired, H received a letter from city officials informing her that a structural survey of the property was required to determine its susceptibility to earthquake damage, and directing her to meet the minimum earthquake standards for masonry construction. S denied any responsibility for the cost of quake-proofing. H authorized and paid for the survey, redesign, and reconstruction of the building, which included completely rebuilding its frame and installing a new roof. H then sued S to recover the cost of the alterations. The trial judge ruled in H's favor, and the Court of Appeal affirmed, reasoning that *Glenn R. Sewell Sheet Metal v. Loverde* (1969) 70 C.2d 666, 75 C.R. 889, 451 P.2d 721, supra, §635, was controlling. *Held*, reversed.

(a) Like *Brown*, this case is distinguishable from *Sewell* in that S's use was not one that provoked the government order at issue. And, like the compliance with laws clause in *Brown*, the compliance clause in this lease was drawn to obligate S to comply with all laws regulating his use of the premises. In agreeing to such a provision, a lessee intending to operate a bar/cabaret is not likely to expect this use to provoke a municipal demand to pay for a virtual reconstruction of the building to strengthen it against the contingency of an earthquake. (8 C.4th 843.)

(b) Because the city's order was outside the literal scope of the compliance with laws clause, it was proper to consider both the overall provisions of the lease and the circumstances in which it was made, using the two-part analysis adopted in *Brown*. (8 C.4th 844.) The analysis must begin with the language of the lease itself; if, as in both this case and *Brown*, the lease appears to place the duty of compliance on the lessee, the second step is to examine the lease in light of the factors listed in *Sewell*. (8 C.4th 845.)

(c) The agreement here, like that in *Brown*, was a "net" lease, but its comparatively short term was a significant difference. Moreover, the parties had agreed in an addendum that H as lessor would continue to own all the "fixtures, operating systems and other improvements" in the building, which undermined the view that the parties intended a true

net lease. (8 C.4th 846.) And applying the factors enumerated in *Sewell* reinforces the conclusion that the parties intended H to be responsible for complying with laws unrelated to S's particular use of the property.

(1) The cost of compliance was almost one and a half times the cost of the entire rent reserved over the 3-year lease term; even adding on the 5-year option, the cost was roughly half the total rent payable by S, a relationship of significant imbalance. (8 C.4th 847.)

(2) The 3-year lease term qualified as "short," even with the addition of the 5-year renewal option. In assessing the life of a lease to determine the parties' intent as to compliance with governmental orders affecting the property, the option term has less weight than the original term. Where the lease term is short, the lessee has little time in which to amortize the cost of repairs, and it is unlikely that the lessee would have expected to assume the cost of substantial alterations. (8 C.4th 847, 848.)

(3) The primary benefit of the seismic work inured to the benefit of H, as the building owner. (8 C.4th 848.)

(4) The seismic retrofit was literally "structural" in nature. (8 C.4th 848, 849.)

(5) The record was silent as to the degree of interference with S's use of the premises, but presumably the substantial reconstruction of the building's structural frame and the addition of a new roof were not *unintrusive*. At least, the application of this factor did not favor H. (8 C.4th 849.)

(6) The record did not clearly indicate the extent to which the parties were aware of a city code program to upgrade unreinforced buildings, although it was common knowledge that the building was in "earthquake country." But it did appear that H had previously been required to make changes in the interest of earthquake safety, and as the owner of an unreinforced masonry building, H was more likely than S to be aware of the city's earthquake hazard reduction program, which was enacted some 3 years before the lease commenced. Perhaps the most that could be said of this factor was that it did not tip decidedly in favor of either party. (8 C.4th 849.)

(d) The material features of the lease and surrounding circumstances in this case and those in *Brown* differ with respect to almost every controlling factor: the amount of the monthly rent, the life of the lease, the cost of compliance alterations as a percentage of the aggregate rent, prior notice of the potential for compliance problems, and the extent of the alterations required. The manifestly unfair result reached by the courts below in this case, which was acknowledged by the Court of Appeal, was based on a misreading of *Sewell*. (8 C.4th 850.) (See *SDC/Pullman Partners v. Tolo* (1997) 60 C.A.4th 37, 41, 53, 70 C.R.2d 62 [toxic cleanup clause was not triggered by presence of de minimis amounts of potentially toxic substances, where lessor faced neither actual liability under environmental laws nor "realistic threat" of it]; 28 *Pacific L. J.* 417 [*Brown* and *Hadian*; determining who is responsible for major structural repairs in commercial lease]; 23 *Pepperdine L. Rev.* 1067 [*Hadian*].)

(2) *Tenant Relocation Following Agency Order*. When a local enforcement agency orders vacation of a residential rental unit because of a violation that endangers the immediate health and safety of the residents, the unit's owner must provide relocation benefits to displaced tenants. (*Health & Saf.C.* 17975.)

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12 Witkin Sum. Cal. Law Real Property § 638

[§ 638] Common Law Rule of Nonliability.

At common law, the landlord was under no general duty to keep the premises in safe condition after transfer of possession (see *supra*, §617), and was ordinarily not liable for injuries to a tenant or the tenant's invitees, or to strangers, resulting from the defective condition of the premises, even though by the exercise of reasonable diligence the landlord might have discovered the defects. (See *Rathbun Co. v. Simmons* (1928) 90 C.A. 692, 696, 266 P. 369; *Nelson v. Myers* (1928) 94 C.A. 66, 75, 270 P. 719; *Ayres v. Wright* (1930) 103 C.A. 610, 616, 284 P. 1077; *Reinhard v. Lawrence Warehouse Co.* (1940) 41 C.A.2d 741, 747, 107 P.2d 501; *Mundt v. Nowlin* (1941) 44 C.A.2d 414, 415, 112 P.2d 782; *Pfingst v. Mayer* (1949) 93 C.A.2d 265, 275, 208 P.2d 1002; *Gustin v. Williams* (1967) 255 C.A.2d Supp. 929, 931, 62 C.R. 838; *Rest.2d, Torts* §§355, 356; *Rest.2d, Property* (Landlord and Tenant), Chap. 17, Introductory Note; 2 Powell §16B.08; *Prosser & Keeton* 5th §63; 5 Harper, James & Gray 3d §27.1; C.E.B., 1 Landlord-Tenant Practice 2d, §3.67 et seq.; 62 *Am.Jur.2d* (2005 ed.), *Premises Liability* §§13, 408.)

Even in the case of a dwelling, failure to perform the statutory duty to repair dilapidations did not make the landlord liable where the tenant stayed on instead of abandoning. (See *Priver v. Young* (1923) 62 C.A. 405, 406, 216 P. 966; *Farber v. Greenberg* (1929) 98 C.A. 675, 680, 277 P. 534; *supra*, §620.)

The general rule of nonliability is, however, subject to a number of established exceptions:

- (1) Where the landlord covenants to repair. (See *infra*, §640.)
- (2) Where the landlord voluntarily undertakes to repair. (See *infra*, §641.)
- (3) Where the landlord has knowledge of defects. (See *infra*, §642.)
- (4) Where there is an existing nuisance on the premises. (See *infra*, §648.)
- (5) Where a safety law has been violated. (See *infra*, §649.)
- (6) Where the injury occurs on a part of the premises retained for common use. (See *infra*, §650.)
- (7) Where the lease is for a semipublic purpose. (See *infra*, §651.)

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12 Witkin Sum. Cal. Law Real Property § 639

[§ 639] Liability Under Foreseeability Test.

(1) *Abrogation of Common Law Rule.* The landmark case of *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, stressing the broad language of C.C. 1714 (now 1714(a)), repudiated the trespasser-licensee-invitee classification of duties of an owner or possessor of land, and substituted the basic approach of foreseeability of injury to others. The *Rowland* case involved an action by a social guest (licensee) against a tenant (possessor); subsequent cases involved actions by other licensees, trespassers, and invitees. (See 6 *Summary* (10th), *Torts*, §1086.) In these cases, the defendant was in possession and exercising control over the property. Does the same principle apply to the landlord-owner who is not in possession and not exercising control, when sued by a tenant who is? If so, the traditional rule of landlord's nonliability subject to narrow exceptions (see *supra*, §638) has been abrogated. (See Cal. Civil Practice, 3 Real Property Litigation, Chap. 26; 3 *Pepperdine L. Rev.* 132 [landlord's tort liability for injuries caused by defects on property]; 26 *Santa Clara L. Rev.* 719 [establishing rational boundaries on landlord's premises liability]; BAJI (9th ed.), No. 8.00 et seq.; on liability for defective appliances in apartment or hotel, see *infra*, §652; on strict products liability for defective appliance, see *infra*, §653; on waiver of landlord's duty of care, see *supra*, §567.)

(2) *Liability Imposed.* In *Minoletti v. Sabini* (1972) 27 C.A.3d 321, 324, 103 C.R. 528, the landlord was held liable for negligent performance after a voluntary undertaking to repair (see *infra*, §641), but the court added, as an alternative basis for its decision, that the *Rowland* doctrine should apply.

In *Brennan v. Cockrell Inv.* (1973) 35 C.A.3d 796, 111 C.R. 122, the court explored the issue more fully and came to the same conclusion. Plaintiff tenant rented a home from defendant landlord. The back stairway had iron railings affixed to iron stanchions in concrete steps. Before plaintiff took possession, defendant noticed that concrete had chipped away from a stanchion, although the railing appeared structurally firm. About a year later, this railing broke and plaintiff fell, suffering injuries. The trial judge instructed the jury on the general rule of nonliability, refused an instruction based on *Rowland v. Christian*, and the verdict and judgment were for defendant. *Held*, reversed.

(a) The contention that a landlord should not be subject to the new theory of liability because he is not in possession and control of the land is unsound. "[I]t is impossible to perceive any legitimate public interest that would be promoted by the creation of a landlord immunity exception to the code provision. That a landlord must act toward his tenant as a reasonable person under all of the circumstances, including the likelihood of injury, the probable seriousness of such injury, the burden of reducing or avoiding the risk, and his degree of control over the risk-creating defect, seems a sound

proposition and one that expresses well the principles of justice and reasonableness upon which the law of torts is based. It is no part of fairness and rationality to transform possession and control from mere factors bearing on negligence into barriers to consideration of that issue." (35 C.A.3d 800.)

(b) The trend of decisions in other jurisdictions is to follow California's lead in applying ordinary rules of negligence to owners and occupiers of land. "If this trend continues, questions of possession and control, answers to which have been prerequisite to even a consideration of the negligence of an owner or occupier of land, will everywhere be relevant only as they bear on such basic tort issues as the foreseeability and unreasonableness of the particular risk of harm. The direction the law is now taking clearly is toward 'imposing on owners and occupiers a single duty of reasonable care in all the circumstances.' " (35 C.A.3d 801.) (See 40 A.L.R.3d 795 [landlord's failure to repair as aggravated negligence]; 64 A.L.R.3d 339 [landlord's liability for injury or death of tenant or third persons caused by dangerous condition of premises].)

A number of decisions have imposed liability under the foreseeability test, including the following:

Becker v. IRM Corp. (1985) 38 C.3d 454, 467, 213 C.R. 213, 698 P.2d 116, *infra*, §653.

Alcaraz v. Vece (1997) 14 C.4th 1149, 1155, 1156, 60 C.R.2d 448, 929 P.2d 1239, 6 Summary (10th), Torts, §1092 [landlord's duty to protect tenant from broken utility meter box embedded in narrow strip of city-owned land between sidewalk and land owned by landlord].

Uccello v. Laudenslayer (1975) 44 C.A.3d 504, 513, 118 C.R. 741, *infra*, §644.

Golden v. Conway (1976) 55 C.A.3d 948, 955, 959, 128 C.R. 69 [following *Brennan*].

Evans v. Thomason (1977) 72 C.A.3d 978, 984, 140 C.R. 525 [following *Rowland* and *Brennan*; landlord liable for injuries and property damage sustained by tenants from fire caused by defective electrical outlet].

Portillo v. Aiassa (1994) 27 C.A.4th 1128, 1135, 32 C.R.2d 755, *infra*, §647 [injury inflicted by guard dog on commercial premises was reasonably foreseeable].

Madhani v. Cooper (2003) 106 C.A.4th 412, 415, 130 C.R.2d 778 [landlords who knew that one tenant had repeatedly assaulted and battered other tenant owed duty of care to protect other tenant from future assaults].

(3) *Liability Denied.* In *Bisetti v. United Refrigeration Corp.* (1985) 174 C.A.3d 643, 220 C.R. 209, plaintiff, a trespasser, used a hole in a fence to gain entry to property owned by defendant landlord and leased to a paint and metal stripping business. To look in some windows, plaintiff climbed on a six-foot vat and stood on plywood covering it. The plywood gave way, and plaintiff fell into the vat and was badly burned by the acid it contained. In affirming judgment for defendant landlord, the court distinguished *Uccello, supra*, pointing out that the landlord had no knowledge of the existence of the vats or of the hole in the fence, and that there was no showing that the vats were any more dangerous than any normal mechanical equipment in industry when used in the proper manner. (174 C.A.3d 648, 649.) And *Rowland v. Christian, supra*, was likewise distinguished: "While under the rubric of 'duty' there are a number of considerations, here only one is at all factual--that is 'foreseeability of harm.' In this case that factor is extremely remote, given the illegal nature of plaintiff's activities. Other factors militate against any liability. There is no close connection at all between this defendant's conduct and the injury suffered. There is no moral blame whatsoever to attach to this defendant's conduct. Future harm would not be prevented by holding this defendant liable under these circumstances. While insurance might be available to cover injuries such as those plaintiff undoubtedly suffered, still, it is a burden to go to the expense of covering against such remote contingencies. ... [T]he lessor should not be exposed to liability." (174 C.A.3d 651, footnote 2, quoting finding of trial court.)

In *Leakes v. Shamoun* (1986) 187 C.A.3d 772, 778, 232 C.R. 171, the court found the important consideration of possession and control of the property lacking. (See *Davis v. Gomez* (1989) 207 C.A.3d 1401, 1406, 255 C.R. 743

[landlord had no duty to control behavior of psychotic tenant who shot and killed another tenant; following *Leakes*]; *Pineda v. Ennabe* (1998) 61 C.A.4th 1403, 1408, 72 C.R.2d 206 [parental negligence caused child to fall through screened second-story window; applying factors of *Rowland v. Christian*]; *Mata v. Mata* (2003) 105 C.A.4th 1121, 1131, 130 C.R.2d 141 [owner of land on which bar was located was not liable for injuries sustained by bar patrons when banned patron fired shots into bar from parking lot; owner had heard of occasional fights at bar, but had no knowledge of dangerous condition of land; moreover, plaintiffs failed to establish that owner had ability to cure dangerous conditions at bar].)

In *Morales v. Fansler* (1989) 209 C.A.3d 1581, 258 C.R. 96, a lease of restaurant premises required the tenant to obtain personal injury liability insurance of \$ 500,000 per injured person. The tenant obtained only \$ 300,000 coverage. Plaintiff, a 4-year-old child, was seriously injured while wandering in the kitchen, and received a \$ 300,000 settlement from the tenant's insurance carrier. Plaintiff then sued the landlord, alleging negligence in failing to make sure that the tenant obtained the \$ 500,000 coverage. *Held*, applying the *Rowland* factors, particularly the lack of moral blame and the extent of the burden, no such duty could be imposed on the landlord. (209 C.A.3d 1586, 1587.)

West's Key Number Digest, Landlord and Tenant k.162 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Liability Denied*. See *Andrews v. Mobile Aire Estates* (2005) 125 C.A.4th 578, 595, 22 C.R.3d 832 [trial court properly granted summary judgment for mobilehome park owner on claim that owner was negligent in failing to take action against troublesome neighboring tenant who battered plaintiffs; plaintiffs failed to show that park owner had notice of tenant's propensity for violence].



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C. Landlord's Liability for Injuries.

3. Exceptions to Rule of Nonliability.

a. Repairs by Landlord.

1. Covenant To Repair.

12 Witkin Sum. Cal. Law Real Property § 640

[§ 640] Covenant To Repair.

A special promise by the landlord to repair, either in the lease or otherwise supported by consideration, may make the landlord liable for injuries to the lessee or the lessee's invitees resulting from the landlord's negligent failure to repair. (*Scholey v. Steele* (1943) 59 C.A.2d 402, 405, 138 P.2d 733 [oral promise made at time of renting, as part of transaction]; *Mariotti v. Berns* (1952) 114 C.A.2d 666, 669, 251 P.2d 72 [covenant in lease]; *Black v. Partridge* (1953) 115 C.A.2d 639, 645, 252 P.2d 760; see *Rest.2d, Property (Landlord and Tenant) §§17.5, 19.1* [negligence of independent contractor hired by landlord]; *Rest.2d, Torts §357*; 28 A.L.R.2d 446 [tenant's rights and remedies on landlord's breach of covenant to repair]; 78 A.L.R.2d 1238 [breach of lessor's agreement as ground of liability for personal injury to tenant]; 62 *Am.Jur.2d* (2005 ed.), *Premises Liability §17*.)

The covenant will make the landlord liable to the tenant's invitee, despite the fact that the tenant has knowledge of the dangerous condition. As the court said in *Singer v. Eastern Columbia* (1945) 72 C.A.2d 402, 164 P.2d 531: "The fact that the tenant has knowledge of a defective condition, although it relieves the landlord of liability where there is no agreement upon his part to repair, does not relieve him where there is such an agreement. This is entirely reasonable, for when the duty rests upon the landlord the tenant will naturally depend upon him to make the repairs and allow conditions to exist which he would otherwise cause to be corrected. Under defendants' theory a landlord having contracted to keep premises in repair would be under no greater liability for injuries to his tenant, or the latter's invitees, than if there had been no such covenant. But the agreement of the landlord to correct a condition which is dangerous places him under a duty which would not exist otherwise, and in order to relieve himself of responsibility he must correct the condition as agreed, and not merely notify the tenant that it exists." (72 C.A.2d 411.) (See *Mariotti v. Berns*, *supra*, 114 C.A.2d 670.)

However, the duty arises only after the landlord has notice of the defect and a reasonable opportunity to repair. (*McNally v. Ward* (1961) 192 C.A.2d 871, 884, 14 C.R. 260, *infra*, §649; see *Rest.2d, Property (Landlord and Tenant) §17.5*.)

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a. Repairs by Landlord.

2. Voluntary Undertaking To Repair.

12 Witkin Sum. Cal. Law Real Property § 641

[§ 641] Voluntary Undertaking To Repair.

(1) *Liability for Negligent Performance.* Even when there is no special promise, and hence no duty, the landlord sometimes voluntarily undertakes to repair a defect. If the work is negligently done or is so incomplete that it gives the premises a deceptive appearance of safety, and injuries result from reliance on that appearance, the landlord may be liable. (*Janofsky v. Garland* (1941) 42 C.A.2d 655, 657, 109 P.2d 750 [landlord removed portions of cracked ceiling and replastered, plaintiff was injured by falling plaster]; *Minoletti v. Sabini* (1972) 27 C.A.3d 321, 324, 103 C.R. 528 [landlord removed broken sash cord from window and failed to replace it or to secure window from falling]; see *Kearns v. Smith* (1942) 55 C.A.2d 532, 535, 131 P.2d 36 [no liability where repairs do not give deceptive appearance of safety]; *Sherrard v. Lidyoff* (1951) 108 C.A.2d 325, 327, 239 P.2d 28 [same; defect patent and known to tenant]; *Rest.2d, Property (Landlord and Tenant) §17.7* [negligent repairs by landlord], §19.3 [by independent contractor hired by landlord]; *Rest.2d, Torts §362*; 26 A.L.R.2d 1044 [landlord's liability for injury to tenant's person or property caused by water overflowing from defective appliances in other premises of landlord].)

In *Bowater v. Tassej* (1947) 81 C.A.2d 651, 184 P.2d 931, the landlord leased a dwelling house, then employed a painter to paint it. The latter removed vines from the side of the building and left them growing on the path, partially covered. Months afterwards, plaintiff invitee caught her foot in a concealed vine and was injured. Defendant's chief contention was that the negligence was not in connection with any repairs. *Held*, painting is a repair, and the removal of the vines came within the same rule imposing a duty of care on the landlord. (81 C.A.2d 654.)

Application of the rule was avoided by a narrow factual distinction in *Daulton v. Williams* (1947) 81 C.A.2d 70, 183 P.2d 325. Plaintiff, lessee of a furnished apartment, was injured by the breaking of a faucet handle that she was turning to stop a leak. Defendant landlord knew, from prior experience, that the porcelain handles were breakable and formed a sharp cutting edge when they broke. He voluntarily undertook to repair some leaky faucets so that they would not leak. *Held*, he was under no duty to inspect or replace the dangerous faucet handles, for "[t]here is no relation between a leaking faucet and its handle." (81 C.A.2d 74.)

(2) *Distinction: Failure To Perform Unenforceable Promise.* If the landlord merely fails to carry out a voluntary and unenforceable undertaking to repair, e.g., an oral promise without consideration, no tort liability arises. (*Dorswitt v.*

Wilson (1942) 51 C.A.2d 623, 625, 125 P.2d 626; see 2 Cal. Western L. Rev. 126 [urging change in rule]; 6 *Summary* (10th), *Torts*, §1065.)

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b. Knowledge of Defects.

1. Liability for Failure To Disclose Defect.

12 Witkin Sum. Cal. Law Real Property § 642

[§ 642] Liability for Failure To Disclose Defect.

(1) *Latent Defects.* If the landlord has actual knowledge of defects that are unknown to the tenant and not apparent, and the landlord fails to disclose them to the tenant, the landlord is liable. (*Hassell v. Denning* (1927) 84 C.A. 479, 481, 258 P. 426; *Stanley v. Lander* (1934) 3 C.A.2d 284, 288, 39 P.2d 225; *Kearns v. Smith* (1942) 55 C.A.2d 532, 534, 131 P.2d 36 [no liability where defect was obvious from ordinary inspection, e.g., open electric light socket]; *Shotwell v. Bloom* (1943) 60 C.A.2d 303, 309, 140 P.2d 728 [damage to property of tenant's employee-invitee]; see *Rest.2d, Property (Landlord and Tenant) §17.1*; 19 A.L.R.5th 405 [liability for lead paint poisoning of child]; 62 *Am.Jur.2d* (2005 ed.), *Premises Liability* §14; 66 *Am.Jur. Trials* 47 [childhood lead-based paint poisoning litigation].)

An unusual application of this rule appears in *Couch v. Pacific Gas & Elec. Co.* (1947) 80 C.A.2d 857, 183 P.2d 91, where defendant power company rented a cottage to an employee, with knowledge that loose uninsulated wires had been left hanging from an old heater installation. *Held*, it was liable for the death by electrocution of the employee's child. The hanging wires were obvious, but the fact that they were energized was not, and thus the presence of electricity in the wire brought the case within the hidden defect rule. In addition, the defendant was the supplier of the electric power. In its dual capacity it was charged with a greater responsibility than it would have had as the mere landlord. (80 C.A.2d 864.) (See 6 *Summary* (10th), *Torts*, §919.)

In *Merrill v. Buck* (1962) 58 C.2d 552, 25 C.R. 456, 375 P.2d 304, defendant realtor and her agent showed plaintiff a dwelling house for the purpose of leasing it from defendant owner. Plaintiff accepted the lease, moved in, and, on opening a door in the central hall, stepped forward and fell down a precipitous flight of stairs into the basement. In this action for personal injuries, verdict and judgment went against all three defendants, the jury impliedly finding that the danger of the basement stairs was a concealed hazard. *Held*, affirmed. Although the basement door was visible, the duty to warn refers to the patency of danger. Here the steep stairs, without a landing or a handrail lying immediately behind the inward-swinging door, constituted a latent, not a patent, defect. (58 C.2d 558.) (For liability of realtor and agent, see 6 *Summary* (10th), *Torts*, §1060.)

In *Anderson v. Shuman* (1967) 257 C.A.2d 272, 64 C.R. 662, defendant partners owned an apartment house with 40 apartments. The manager discovered that several bathroom sinks were loose and that one had become dislodged. She

notified defendant C, the active partner, requesting authority to inspect all of them, but this was not given. Plaintiff tenant was injured when his bathroom sink became dislodged. *Held*, judgment for plaintiff affirmed. From several prior experiences the active partner knew that the method of attaching sinks was defective. Hence, there was "concealment" in failure to warn. (257 C.A.2d 275.)

(2) *Knowledge of Facts That Indicate Danger*. The court in *Anderson* laid the groundwork for an extension of the landlord's duty. *Rest.2d, Torts* §358, following Prosser's view, makes the landlord liable, although without actual knowledge, if the landlord knows of facts from which a reasonable person would conclude that there is danger. The court noted this development, but, lacking prior California authority in point, left the question open. (257 C.A.2d 276; see Prosser & Keeton 5th §63; 88 A.L.R.2d 586 [actual knowledge of latent defect in leased premises as prerequisite to landlord's liability].)

(3) *Knowledge of Defects in Existence at Time of Lease*. A landlord is not liable for injuries to a tenant caused by a condition on the premises that arises after the tenant has taken possession, but may be liable for a condition that exists at the time the property is leased to the tenant. A landlord may be expected to inspect an apartment at the time it is leased to determine whether it is safe, and the landlord will be subject to liability for those matters that a reasonable inspection would have disclosed. (*Becker v. IRM Corp.* (1985) 38 C.3d 454, 468, 469, 213 C.R. 213, 698 P.2d 116, *infra*, §653; see *Peterson v. Superior Court* (1995) 10 C.4th 1185, 1195, 1197, 43 C.R.2d 836, 899 P.2d 905, *infra*, §654; *Brantley v. Pisaro* (1996) 42 C.A.4th 1591, 1605, 1606, 50 C.R.2d 431 [citing *Becker* and *Peterson*].)

(4) *Release of Controlled Substances*. An owner of a residential dwelling unit who knows, through receipt of a notice from a law enforcement agency or actual knowledge, that an illegal controlled substance has been released on or beneath the property must give written notice of that condition to a prospective tenant before the rental agreement is executed. (C.C. 1940.7.5(b)(1); for definitions of "illegal controlled substance" and "release," see C.C. 1940.7.5(a).) Failure to notify subjects the owner to damages and civil penalties. (C.C. 1940.7.5(b)(4).) C.C. 1940.7.5 expires on January 1, 2006. (C.C. 1940.7.5(c).)

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2. Exceptions and Distinctions.

12 Witkin Sum. Cal. Law Real Property § 643

[§ 643] Exceptions and Distinctions.

The landlord's liability for defects actually known and concealed (*supra*, §642) is a limited one. There is no duty to inspect for the purpose of discovering and eliminating latent defects not actually known to the landlord. (*Daulton v. Williams* (1947) 81 C.A.2d 70, 75, 183 P.2d 325 [porcelain handle on hot water faucet].) Furthermore, there is no liability on the part of the landlord, even though he or she actually knows of the defect, if it is patent and obvious to the tenant as well. (*Zavalney v. Donovan* (1945) 70 C.A.2d 182, 184, 160 P.2d 558 [cracked porcelain handle of hot water faucet in bathtub, noticed by tenant at commencement of occupancy]; see *Dorswitt v. Wilson* (1942) 51 C.A.2d 623, 624, 125 P.2d 626 [cracked plaster concealed by landlord but discovered by tenant]; *Neuber v. Royal Realty Co.* (1948) 86 C.A.2d 596, 611, 195 P.2d 501; *Powell v. Stivers* (1951) 108 C.A.2d 72, 73, 238 P.2d 34; *Sherrard v. Lidyoff* (1951) 108 C.A.2d 325, 327, 239 P.2d 28; *Portillo v. Aiassa* (1994) 27 C.A.4th 1128, 32 C.R.2d 755, *infra*, §647 [landlord has duty to conduct reasonable inspection of commercial property]; on duty to inspect residential property, see *Becker v. IRM Corp.* (1985) 38 C.3d 454, 213 C.R. 213, 698 P.2d 116, *supra*, §653; see 6 *Summary* (10th), *Torts*, §1121.)

In *Hanson v. Luft* (1962) 58 C.2d 443, 24 C.R. 681, 374 P.2d 641, plaintiff, tenants' 5-year-old child, was burned when standing in front of an open gas heater. *Held*, no cause of action was stated against defendant landlords. The danger of the open and unguarded heater was as obvious to the parents as to the defendants. Hence, under *Shotwell v. Bloom* (1943) 60 C.A.2d 303, 140 P.2d 728, and similar cases (*supra*, §642), there was no duty to warn the tenants. Nor does special danger to children change the rule. "[W]here premises are let to the parents of children with conditions existing which present a patent and obvious danger of injury to such children the duty of protecting the children from such obvious dangers rests upon the parents who have elected to become tenants of such premises with knowledge of the condition of the danger to their children." (58 C.2d 446.) This was so despite the allegation that, on a previous occasion, a minor child of a tenant of defendants had been similarly burned and the parents of plaintiff were unaware of this occurrence. (58 C.2d 446.)

The liability of the landlord is not for failure to repair but for failure to disclose, and the duty is discharged if the landlord informs the tenant. If, thereafter, an invitee is injured, it is the tenant who is liable for failure to repair or warn. (*Shotwell v. Bloom*, *supra*, 60 C.A.2d 311; see *Dorswitt v. Wilson*, *supra* [tenant himself discovered defect and notified landlord].)

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b. Knowledge of Defects.

3. Knowledge of Dangerous Animal.

12 Witkin Sum. Cal. Law Real Property § 644

[§ 644] Knowledge of Dangerous Animal.

In *Uccello v. Laudenslayer* (1975) 44 C.A.3d 504, 118 C.R. 741, defendant rented a home to a tenant on a month-to-month tenancy agreement. The tenant's family owned a German Shepherd watchdog, which was normally kept penned in the fenced backyard but was sometimes allowed inside the house. The rental agreement gave permission to keep the dog, provided that damage to the premises by the dog be paid for by the tenant. The tenancy was terminable on 2 weeks' notice. Neighborhood children frequently played in the yard, and plaintiff, 5 years old and living across the street, frequently played in the house. On several occasions the dog bit persons. In July 1971, the dog bit plaintiff while plaintiff was playing with the tenant's daughter in the house.

In this action against defendant, plaintiff showed that the vicious propensities of the dog had been demonstrated by attacks on persons both before and after the attack on plaintiff; that the tenant had placed "Beware of Dog" signs on his fences; that meter readers had been warned about a "bad dog"; and that after the July attack neighbors had demanded removal of the dog. The complaint alleged that defendant landlord knew or should have known of the dangerous condition of the premises created by the dog, but nevertheless failed to exercise his control over the premises to remedy the condition. The trial judge granted a nonsuit on the opening statement. *Held*, reversed.

(a) The exceptions to the general rule of a landlord's nonliability have a common element: that the landlord retains or acquires a recognizable degree of control over the dangerous condition with a right and power to obviate it. (44 C.A.3d 511.) Following this approach, "we believe public policy requires that a landlord who has knowledge of a dangerous animal should be held to owe a duty of care only when he has the right to prevent the presence of the animal on the premises." (44 C.A.3d 512.) And, if he has such a degree of control that he can obviate the presence of the dangerous animal, and has knowledge, he has a duty to act. "To permit a landlord in such a situation to sit idly by in the face of the known danger to others must be deemed to be socially and legally unacceptable." (44 C.A.3d 512.)

(b) Support for this rule is furnished by the analogous rule that a landlord who has knowledge that the tenant's use has created a nuisance is liable. (44 C.A.3d 512, citing the text.)

(c) The rule also meets the test of *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, 6 Summary

(10th), *Torts*, §1086. "Assuming respondent's knowledge of the vicious dog, the foreseeability of harm to the appellant was obvious; it was simply a question of time before someone invited onto the premises would be attacked by the dog. The failure of [defendant] to order his tenant to cease harboring the dog under pain of having the tenancy terminated, is closely connected with the injuries suffered; if [the tenant] had not removed the dog and [defendant] had ousted him from possession the danger would have ended. There is a moral blame attached to a landlord's conduct under these circumstances; he cannot be permitted to knowingly stand aside where it is shown that he has the power to remove the animal from the premises without incurring a liability for his failure to act. We find no extensive burden on a landlord in requiring him to act under the circumstances; the risk of the loss of a tenant for his premises must yield to the obvious danger to third parties. Finally, the availability, cost and prevalence of insurance for the risk involved does not preclude the imposition of liability; a landlord readily can obtain insurance to protect himself from liability to third parties for injuries suffered on the premises or he can require, as a condition of renting the premises, that his tenant obtain such insurance." (44 C.A.3d 513.)

(d) No duty of care can be imposed without proof of the landlord's knowledge of the dog and its dangerous propensities. And, because harboring of pets is such an important part of our way of life, and exclusive possession is normally vested in the tenant, "we believe that *actual* knowledge and not mere constructive knowledge is required." The landlord is under no duty to inspect to discover the existence of a tenant's dangerous animal. (44 C.A.3d 514.)

(e) It appeared that, after the attack on plaintiff, the dog attacked the tenant's own daughter, and thereafter was destroyed. These subsequent events, inadmissible on the issue of defendant's knowledge of the dog's vicious nature, "nonetheless forcefully demonstrate that a pet owner often is incapable of objectively evaluating his animal's dangerous propensities. This is a factor which must be considered in deciding whether public policy requires, under carefully limited circumstances, the imposition of a duty of care on someone other than the pet owner, in this case the owner of the premises where the animal is kept, so as to prevent future harm." (44 C.A.3d 509, and footnote 2.) (See *Lundy v. California Realty* (1985) 170 C.A.3d 813, 821, 216 C.R. 575 [landlord was not liable for injuries inflicted by tenant's dog on cable television employee, absent prior knowledge of dog's vicious nature; following *Uccello*]; *Portillo v. Aiassa* (1994) 27 C.A.4th 1128, 1137, 32 C.R.2d 755, *infra*, §647 [landlord was liable for injury inflicted by guard dog on commercial premises, where inspection would have revealed dog's dangerous propensities; distinguishing *Uccello* and *Lundy*]; 87 A.L.R.4th 1004 [landlord's liability to third person injured by tenant's dangerous or vicious animal on premises]; 89 A.L.R.4th 374 [landlord's liability to third person for attack by tenant's dangerous or vicious animal off premises].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Chee v. Amanda Goldt Property Management* (2006) 143 C.A.4th 1360, 1369, 50 C.R.3d 40 [condominium landlord was not liable for injuries inflicted when tenant's dog jumped on neighbor; dog had never jumped on or bitten anyone before and homeowners association had never received complaints about dog]; 85 Proof of Facts 3d 1 [landlord's liability for injury inflicted by tenant's dog].



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4. Knowledge of Dangerous Activity.

12 Witkin Sum. Cal. Law Real Property § 645

[§ 645] Knowledge of Dangerous Activity.

In *Rosales v. Stewart* (1980) 113 C.A.3d 130, 169 C.R. 660, plaintiff neighbors alleged that defendant landlord was aware of his tenant's use of the backyard of the rented property as a firing range, and that plaintiffs' 10-year-old child, standing in plaintiffs' own backyard, was struck by a bullet and killed. *Held*, judgment for defendant on demurrer, reversed. It is not enough to allege that the landlord had knowledge of the tenant's acts and the resulting danger. (113 C.A.3d 134.) A complaint would be sufficient, however, if it alleged that the landlord had both the opportunity and ability to prevent his tenant's continued firing, by persuasion or threats or even steps to terminate the tenancy. (113 C.A.3d 134, 135, citing *Uccello v. Laudenslayer* (1975) 44 C.A.3d 504, 118 C.R. 741, *supra*, §644.)

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5. Foreseeability of Criminal Acts of Strangers.

12 Witkin Sum. Cal. Law Real Property § 646

[§ 646] Foreseeability of Criminal Acts of Strangers.

The liability of a landlord for injuries to a tenant resulting from criminal acts of strangers is considered in 6 *Summary* (10th), *Torts*, §1129 et seq. as a part of the topic of affirmative duties of landowners and possessors. (See 43 *A.L.R.5th* 207 [landlord's duty to protect tenant from criminal acts of third person]; 17 *California Lawyer* 48 (October 1997) [same].) The decisions in cases dealing with varying fact situations may be classified as follows:

(1) Liability has been imposed on the landlord where the landlord should have anticipated the criminal acts and taken measures to protect the tenant. (See *O'Hara v. Western Seven Trees Corp.* (1977) 75 *C.A.3d* 798, 803, 142 *C.R.* 487, 6 *Summary* (10th), *Torts*, §1142; *Kwaitkowski v. Superior Trading Co.* (1981) 123 *C.A.3d* 324, 329, 333, 176 *C.R.* 494, 6 *Summary* (9th), *Torts*, §1142.)

(2) Liability has been denied where the injury resulted from a criminal act that the landlord had no reasonable opportunity to anticipate or prevent. (See *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 *C.4th* 666, 25 *C.R.2d* 137, 863 *P.2d* 207, 6 *Summary* (10th), *Torts*, §1136 [assault and robbery in mall store]; *Sharon P. v. Arman, Ltd.* (1999) 21 *C.4th* 1181, 91 *C.R.2d* 35, 989 *P.2d* 121, 6 *Summary* (10th), *Torts*, §1135 [assault in underground parking garage]; *Saelzler v. Advanced Group 400* (2001) 25 *C.4th* 763, 772, 107 *C.R.2d* 617, 23 *P.3d* 1143, 6 *Summary* (10th), *Torts*, §1138 [assault during delivery of package to apartment building]; *Totten v. More Oakland Residential Housing* (1976) 63 *C.A.3d* 538, 542, 545, 134 *C.R.* 29, 6 *Summary* (10th), *Torts*, §1143; 7735 *Hollywood Boulevard Venture v. Superior Court* (1981) 116 *C.A.3d* 901, 905, 906, 172 *C.R.* 528; *Riley v. Marcus* (1981) 125 *C.A.3d* 103, 109, 177 *C.R.* 827; *Jubert v. Shalom Realty* (1982) 135 *C.A.3d Supp.* 1, 6, 185 *C.R.* 641, 6 *Summary* (10th), *Torts*, §1143; *Royal Neckwear Co. v. Century City* (1988) 205 *C.A.3d* 1146, 1151, 252 *C.R.* 810 [commercial landlord has no duty to safeguard commercial tenant's property from reasonably foreseeable criminal acts of third parties]; *Pamela W. v. Millsom* (1994) 25 *C.A.4th* 950, 30 *C.R.2d* 690, 6 *Summary* (10th), *Torts*, §1143 [assault in condominium unit]; *Leslie G. v. Perry & Associates* (1996) 43 *C.A.4th* 472, 50 *C.R.2d* 785, 6 *Summary* (10th), *Torts*, §1189 [assault in apartment building garage]; *Rosenbaum v. Security Pac. Corp.* (1996) 43 *C.A.4th* 1084, 50 *C.R.2d* 917, 6 *Summary* (10th), *Torts*, §1152 [assault on street across from apartment building]; but see *Isaacs v. Huntington Memorial Hosp.* (1985) 38 *C.3d* 112, 125, 129, 211 *C.R.* 356, 695 *P.2d* 653 [liability of hospital maintaining parking lot; disapproving *Totten*, *Riley*, and *Jubert*]; for full discussion of *Isaacs* and other cases on this aspect of liability of landowners and possessors, see 6

Summary (10th), *Torts*, §1134.)

SUPPLEMENT: [This section is current through the latest supplement]

See 54 *U.C.L.A. L. Rev.* 971 [using implied warranty of habitability to establish landlord's liability for third-party criminal acts against tenants]. *Correction:* Page 757, last line of paragraph (1), "6 *Summary* (9th), *Torts*, §1142" should be "6 *Summary* (10th), *Torts*, §1142".



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5a. (New) Foreseeability of Criminal Acts of Tenants.

12 Witkin Sum. Cal. Law Real Property § 646A

[§ 646A] (New) Foreseeability of Criminal Acts of Tenants.

(1) *Liability Possible*. Several cases have acknowledged the possibility of imposing liability on a landlord for failing to guard against criminal acts by a tenant. (See *Hawkins v. Wilton* (2006) 144 C.A.4th 936, 944, 51 C.R.3d 1 [summary judgment against tenant who was shot by another tenant was improper, where tenant alleged that landlord knew that shooter used illegal drugs, carried loaded firearms, and had pulled gun on other tenants, and landlord did not tender facts to negate this theory of liability]; *Barber v. Chang* (2007) 151 C.A.4th 1456, 1465, 60 C.R.3d 760 [summary judgment against former tenant, who was shot by another tenant while visiting complex, was improper; landlord had received notice of earlier incident in which shooter had brandished weapon at victim's girlfriend and had threatened to harm victim, it was foreseeable that victim would be visiting complex to interact with relatives who remained there, and landlord failed to establish that simple protective measures (like calling police after brandishing incident) were too burdensome].)

(2) *Liability Not Imposed*. In *Castaneda v. Olsher* (2007) 41 C.4th 1205, 63 C.R.3d 99, 162 P.3d 610, a resident of a mobilehome park was shot and injured while witnessing a gang confrontation involving another resident who lived across the street. The injured resident sued the mobilehome park owners, alleging that they breached a duty not to rent to gang members, a duty to evict known gang members, and a duty to provide extra security to protect residents from gang members. The trial court granted defendants' motion for nonsuit. The Court of Appeal reversed. *Held*, judgment of the Court of Appeal reversed; nonsuit was proper.

(a) *Duty not to rent to gang members*. Absent circumstances showing extraordinary foreseeability, there is no duty to avoid renting to gang members. Faced with that duty, landlords would tend to deny rental to anyone who might be a gang member or to families that might include a gang member, which could result in arbitrary discrimination on the basis of race, ethnicity, family composition, dress, appearance, or reputation. (41 C.4th 1216.) Landlords would risk liability no matter which choice they made. Moreover, requiring a landlord to obtain the criminal record of every applicant would be expensive and burdensome to the landlord and could deprive many Californians of housing. (41 C.4th 1217.) There was insufficient evidence of foreseeability here, where plaintiff did not show that defendants knew the other residents were, at the time of their application, violent street gang members. (41 C.4th 1218.)

(b) *Duty to evict gang members.* Because a landlord has more opportunity to judge the behavior of an existing tenant than of a rental applicant, the duty to evict gang member tenants requires a different analysis of burden and foreseeability than the duty not to rent to gang members. Nevertheless, the duty to evict a vicious or dangerous tenant exists only where the tenant's behavior makes violence toward neighbors or others on the premises highly foreseeable. (41 C.4th 1220.) Defendants here were not on notice of facts making a gang shooting involving an occupant of the mobilehome park space across the street from plaintiff highly foreseeable. Although the manager of the mobilehome park had conveyed to defendants her belief that some residents of that space were gang members, and other residents had complained about their behavior, no one had reported that the offending residents had used, displayed, or possessed a gun at the mobilehome park. (41 C.4th 1221.)

(c) *Duty to hire guards and maintain brighter lighting.* To impose a duty to hire security guards, there must have been prior similar incidents on the premises or other sufficiently serious indications of a reasonably foreseeable risk of violent criminal assaults. (41 C.4th 1222.) Here, there was not sufficient evidence that the absence of security guards and inadequate lighting were substantial factors causing plaintiff's injury. Plaintiff was injured in a quickly developing situation involving the neighbor and his guest, who emerged from the neighbor's house to confront a carload of rival gang members. Plaintiff presented no evidence to suggest that having security guards at the park would likely have deterred the neighbor from entertaining a guest inside his home. Similarly, plaintiff's witness testified that the lighting was bright enough for her to be able to recognize the neighbor's guest from across the street and to identify the object in his hand as a gun. Given that the participants were willing to engage in an armed confrontation in lighting that permitted identification, there is no reason to believe that brighter lighting would have deterred the confrontation. (41 C.4th 1223.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Exceptions to Rule of Nonliability.

b. Knowledge of Defects.

6. Commercial Landlord's Duty To Inspect.

12 Witkin Sum. Cal. Law Real Property § 647

[§ 647] Commercial Landlord's Duty To Inspect.

In *Portillo v. Aiassa* (1994) 27 C.A.4th 1128, 32 C.R.2d 755, plaintiff was attacked and severely injured by a guard dog while delivering beer to a liquor store operated by the dog's owner. Defendant owned the building in which the attack occurred, and had renewed the store operator's lease the previous year. Defendant had not inspected the premises at that time, but testified that he visited the store several times a year. He had seen the lessee's children lying next to the dog, which did not appear to be vicious. Customers of the store, however, testified that the dog was dangerous, was always on the premises, and had attacked and injured someone 2 weeks before the lease was renewed. There was a "Beware of Dog" sign in the store warning against petting or teasing the animal. Posted near the door was a copy of a newspaper article discussing the dog's recent attack on an attempted robber, and including a picture of the dog in a threatening posture. The lessee denied that the dog had bitten people. The jury found that defendant had no actual knowledge of the dog's dangerous propensities before renewing the lease, but that the exercise of reasonable care in inspecting the property would have disclosed the danger. Finding defendant negligent for failing to eliminate this dangerous condition, the jury awarded damages. *Held*, affirmed. "We hold that a landlord has a duty to exercise reasonable care in the inspection of his commercial property and to remove a dangerous condition, which includes a dog, from the premises, if he knew, or in the exercise of reasonable care would have known, the dog was dangerous and usually present on the premises." (27 C.A.4th 1132.)

(a) Defendant argued that a landlord owes a duty of care to third parties injured by a tenant's dog only if the landlord has actual knowledge of the dog's dangerous propensities. But a landlord's duty of care to a tenant to provide and maintain safe conditions on leased premises also extends to the general public, and a duty of inspection arises when the lease is renewed. (27 C.A.4th 1134, citing *Burroughs v. Ben's Auto Park* (1945) 27 C.2d 449, 164 P.2d 897, *supra*, §527, and *Becker v. IRM Corp.* (1985) 38 C.3d 454, 213 C.R. 213, 698 P.2d 116, *infra*, §653.) "Where there is a duty to exercise reasonable care in the inspection of premises for dangerous conditions, the lack of awareness of the dangerous condition does not generally preclude liability." (27 C.A.4th 1134, citing *Swanberg v. O'Mectin* (1984) 157 C.A.3d 325, 203 C.R. 701.)

(b) Imposing a duty of care on defendant in this case is appropriate under established general principles (see 6 *Summary* (10th), *Torts*, §833). (1) It is reasonably foreseeable that a guard dog kept in a business open to the public will

injure someone, and by inspecting the liquor store defendant would have discovered the dog's dangerous propensities from the posted warning sign and newspaper article. (2) As demonstrated here, the types of injuries inflicted by guard dogs are often serious. (3) Defendant's failure to require his lessee to remove the animal was closely connected to plaintiff's injury. (4) There was moral blame attached to defendant's conduct. (5) Requiring a landlord to conduct a reasonable inspection for the presence of dangerous dogs on commercial property does not impose a significant burden on the landlord. (6) The risk of harm to the public outweighs the interest in retaining a particular tenant on the premises. (7) If the landlord chooses to retain a tenant under these circumstances, insurance is available to reimburse third parties for injuries suffered on the premises. (27 C.A.4th 1135.)

(c) There was no merit to defendant's claim that a duty to inspect for dangerous animals is overly burdensome. A landlord needs only to do what is reasonable under the circumstances; extraordinary measures or unreasonable expenditures of time and money are not required. (27 C.A.4th 1135, 1136.) For the same reason, the duty does not impose strict liability on the landlord. There is no liability where reasonable care was taken in inspecting the premises but the presence of a dangerous dog was not discovered. (27 C.A.4th 1138.)

(d) Defendant relied on two cases for the proposition that a landlord's duty to third parties injured by a tenant's dog requires actual knowledge of the dog's dangerous propensities: *Uccello v. Laudenslayer* (1975) 44 C.A.3d 504, 118 C.R. 741, supra, §644, and *Lundy v. California Realty* (1985) 170 C.A.3d 813, 216 C.R. 575. These cases are distinguishable in that they involved family pets kept in single-family residences, not a guard dog kept in a store open to the public, which poses a far greater risk of serious injury. Moreover, despite the security reasons for keeping guard dogs, there is no strong public policy in favor of their presence in public places. These animals cannot be classified as "an important part of our way of life," as pets were characterized in *Uccello*. (27 C.A.4th 1137, 1138.) (See *Lopez v. Superior Court* (1996) 45 C.A.4th 705, 714, 52 C.R.2d 821 [citing *Portillo*; summary judgment for defendant landlord was improper where defendant failed to provide sufficient information about condition of floor that caused slip and fall or about scope of defendant's inspections of premises].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Stone v. Center Trust Retail Properties* (2008) 163 C.A.4th 608, 612, 77 C.R.3d 556 [landlord's duty to inspect premises attached on entry of judgment of possession in unlawful detainer action and included reasonable periodic inspections thereafter; landlord with judgment of possession is hybrid between nonpossessory landlord and occupying landowner].



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12 Witkin Sum. Cal. Law Real Property § 648

[§ 648] Existing Nuisance.

If, at the time the lease is made or renewed, the ordinary use of the premises by a tenant creates a nuisance, and the landlord knows or should know of this, the landlord is liable to third persons injured by the use. (*Burroughs v. Ben's Auto Park* (1945) 27 C.2d 449, 453, 164 P.2d 897, supra, §527; *Dennis v. Orange* (1930) 110 C.A. 16, 22, 293 P. 865; *Grant v. Hipsher* (1967) 257 C.A.2d 375, 382, 64 C.R. 892; see *Rest.2d, Torts* §§379, 379A,837; *Rest.2d, Property (Landlord and Tenant)* §18.4.)

But where the nuisance is attributable solely to the tenant's improper acts, the landlord is not liable. (*Lucid v. Citizens Inv. Co.* (1920) 49 C.A. 257, 260, 193 P. 161; *Meloy v. Santa Monica* (1932) 124 C.A. 622, 627, 12 P.2d 1072; see *Resolution Trust Corp. v. Rossmoor Corp.* (1995) 34 C.A.4th 93, 100, 40 C.R.2d 328 [commercial lessors were not liable to adjoining landowners for continuing nuisance or continuing trespass caused by fuel leaks from gas station on lessors' property, where lessors had not actively caused or contributed to fuel contamination].)

In *Neuber v. Royal Realty Co.* (1948) 86 C.A.2d 596, 195 P.2d 501, the tenant conducted a manufacturing business in a highly negligent manner, leaving quantities of inflammable materials on the premises, and obstructing an exit door, in violation of various safety laws. In an action by plaintiff employee, injured during a fire, against defendant lessor, one theory advanced was that defendant had a right to enter and force the lessee to comply with the law on pain of cancellation of the lease. *Held*, because the dangerous condition was a result solely of the tenant's activities, it made no difference whether the allegation was of negligence or nuisance; in either case, the lessor owed no duty to plaintiff. "[W]hen a lessee rents premises that are safe as leased, but are rendered unsafe by his use of them, neither the lessee nor his employees can recover from the lessor for injuries resulting from that condition." (86 C.A.2d 616.)

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d. Violation of Safety Law.

12 Witkin Sum. Cal. Law Real Property § 649

[§ 649] Violation of Safety Law.

In *Finnegan v. Royal Realty Co.* (1950) 35 C.2d 409, 218 P.2d 17, an action by other employees for injuries arising out of the same fire as in *Neuber v. Royal Realty Co.* (1948) 86 C.A.2d 596, 195 P.2d 501, supra, §648, a different theory of liability was successfully advanced. Contrary to the local building code, the exit door opened inward instead of outward. The court held that statutory safety requirements of this type imposed a nondelegable duty on the landlord, which could not be excused by the typical lease provision that the lessee would comply with governmental requirements. (35 C.2d 432.) (See *Rest.2d, Property (Landlord and Tenant) §17.6(2)* [duty to repair condition violating statute or administrative order].)

In *McNally v. Ward* (1961) 192 C.A.2d 871, 14 C.R. 260, defendants' apartment house had a stairway landing for a garbage can that they furnished for plaintiff tenant. The wooden railing was defective, and plaintiff fell from it and suffered injuries. The trial judge ruled that defendants had no duty to inspect and gave judgment for them. *Held*, reversed; liability could be imposed on two theories.

(a) First, a city safety ordinance required maintenance of buildings, including egress facilities, in safe condition. Defendants contended that the duty under the ordinance was owed only to the city, and that the landlord's liability to a tenant is limited by C.C. 1941 (now C.C. 1941(a)) and C.C. 1942 (supra, §§619, 620). Recent out-of-state cases, leading text writers, and *Finnegan* lead to the conclusion that the ordinance imposed a duty on the landlord to repair, which gave rise to a tort liability for failure. "We limit our conclusion, of course, to the facts before us: the defective condition of an exterior railing, a condition as to which the landlords could have obtained knowledge, had they made 'reasonably careful inspections.' The general observations of the foregoing cases and writers proceed beyond our factual situation, and we do not rule here upon such other situations." (192 C.A.2d 880.)

(b) Second, it could have been found as a fact that the landlord retained control over the area designated for deposit and removal of garbage, and a duty arose from this fact. The distinction argued by defendants, that he retained control only over the steps used by garbagemen to reach the landing, and not the steps used by the tenant to get down to it, is rejected as too fine. (192 C.A.2d 881.)

(c) Plaintiff's third theory, that the landlord, at the time of the oral lease, agreed to maintain the premises, and

thereafter made some repairs in the apartment, is insufficient. The duty that arises from an ordinary covenant to repair is to repair within a reasonable time after notice or notification of the dangerous condition, and here there was none. (192 C.A.2d 884.)

(d) "[W]e have concluded that the crowded conditions of urban living, which probably inspired the kind of protective ordinance we consider here, render impractical bisected interpretation of the ordinance; it does not establish a duty to the municipality only but to the tenant as well. If its purpose is to be at all served it must require inspection of exterior porches and railings by the landlord, who is the most likely person to be interested in the permanent safety of the property. Similar considerations forbid a too minute mathematical subdivision of areaways in defining common areas. The landlords' covenant to maintain the premises does not, however, pursuant to the cases, render them liable for repairs in the absence of notice. We think that these are the lines of landlord responsibility which the current considerations and cases draw as to the particular porch and railing here involved." (192 C.A.2d 884.)

In *Grant v. Hipsher* (1967) 257 C.A.2d 375, 382, 64 C.R. 892, both rules, violation of safety law, and nuisance (see *supra*, §648) were applied to the lease of premises with a swimming pool, where an ordinance required fencing, and the tenant did not comply with its terms.

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12 Witkin Sum. Cal. Law Real Property § 650

[§ 650] Common Use Areas.

(1) *General Rule.* Frequently, the landlord lets space in a building to several tenants, and, in order to provide certain facilities for their common use, retains control over areas like hallways, stairs, elevators, or the roof. In that case, the landlord is liable for negligent failure to keep these parts in a safe condition. (*Bock v. Hamilton Square Baptist Church* (1933) 219 C. 284, 287, 26 P.2d 7; *Both v. Harband* (1958) 164 C.A.2d 743, 745, 331 P.2d 140 [exterior walls]; see *Rest.2d, Property (Landlord and Tenant) §§17.3, 17.4; Rest.2d, Torts §§360, 361; 49 A.L.R.3d 387* [liability for injury or death due to ice or snow in common use areas]; *65 A.L.R.3d 14* [liability for defects other than in stairways]; *66 A.L.R.3d 374* [liability for defects in appliances supplied for use of different tenants]; *67 A.L.R.3d 490* [liability for defects in exterior steps or stairs]; *67 A.L.R.3d 587* [liability for defects in interior steps or stairways]; *68 A.L.R.3d 382* [liability for defects in outside walks, drives, or grounds]; *62 Am.Jur.2d (2005 ed.), Premises Liability §16; 62A Am.Jur.2d (2005 ed.), Premises Liability §602 et seq.*)

The following cases illustrate the general rule:

Johnston v. De La Guerra Properties (1946) 28 C.2d 394, 401, 170 P.2d 5 [both landlord and tenant who operated restaurant in landlord's building were liable for injuries to patron who was injured entering restaurant by private passageway through back entrance from parking lot].

Burks v. Blackman (1959) 52 C.2d 715, 718, 344 P.2d 301 [porch connected with stairway].

Di Mare v. Cresci (1962) 58 C.2d 292, 297, 23 C.R. 772, 373 P.2d 860 [outside stairs used by tenants to reach various floors and garbage chute were rotted and insecure].

Foster v. A.P. Jacobs & Associates (1948) 85 C.A.2d 746, 750, 193 P.2d 971 [landlord liable to employee of tenant for injuries from slipping on dangerously slippery waxed linoleum in corridor].

Beeston v. Lampasona (1960) 182 C.A.2d 519, 522, 6 C.R. 531 [common entrance and stairway of apartment building].

Sockett v. Gottlieb (1960) 187 C.A.2d 760, 766, 9 C.R. 831 [apartment lawn leading to driveway and street, without

fences or warning signs, and ending abruptly in retaining wall 32-48 inches high].

McNally v. Ward (1961) 192 C.A.2d 871, 881, 14 C.R. 260, supra, §649 [stairway railing].

Larson v. Santa Clara Valley Water Conservation Dist. (1963) 218 C.A.2d 515, 522, 32 C.R. 875 [water conservation district, which leased reservoir to county for recreational facility but retained full control of water level for conservation purposes, could be liable for injuries to water skier who hit his head on bottom of reservoir after district lowered water level and failed to warn county or recreational users].

Hardin v. Elvitsky (1965) 232 C.A.2d 357, 368, 42 C.R. 748 [duplex with defective stairs].

Amos v. Alpha Property Management (1999) 73 C.A.4th 895, 898, 87 C.R.2d 34 [landlord had duty to adopt reasonable precautions to prevent young children from toppling out of windows in common areas of building; whether defendants breached duty by maintaining low, open, unprotected hallway window on second floor of building, knowing young children were likely to play in area, was triable issue of fact].

The landlord cannot shed the obligation by delegating the duties of maintenance to an independent contractor. (*Brown v. George Pepperdine Foundation* (1943) 23 C.2d 256, 259, 143 P.2d 929; *Rest.2d, Property (Landlord and Tenant)* §19.2; 32 Cal. L. Rev. 196 [Brown]; 6 Summary (10th), Torts, §1250.)

In *Longway v. McCall* (1960) 181 C.A.2d 723, 5 C.R. 818, defendant S, owner of a store building, leased a portion to defendant M, and M subleased a part to plaintiff. M, with permission of S, constructed a freight elevator in violation of industrial safety regulations. After some years of operation it stuck, and plaintiff, assisting in loosening it, was injured when it fell to the bottom of the shaft. *Held*, both M and S were liable. S was not responsible for the negligent maintenance of the elevator by M, but S had knowledge of the negligent structural change that created a dangerous condition in the commonly used premises, and he could not delegate his duty of care in that respect. (181 C.A.2d 731.)

(2) *Distinction: Tenant's Exclusive Control.* Although the landlord cannot directly eliminate liability to third persons by an agreement with the tenant, the lease may indirectly absolve the landlord by giving the tenant exclusive use and control over the particular portion of the premises. (See *Pfingst v. Mayer* (1949) 93 C.A.2d 265, 272, 208 P.2d 1002 [special elevator serving one tenant alone]; *Green v. Del-Camp Inv.* (1961) 193 C.A.2d 479, 481, 14 C.R. 420 [stairway serving lessee alone].)

(3) *Distinction: Ordinary Care Only.* The landlord's duty is of ordinary care. The landlord is not liable if he or she has no knowledge of the defective condition and it is not shown that it was in existence for enough time to allow the landlord a reasonable opportunity to discover and correct it. (*Busby v. Silverman* (1947) 82 C.A.2d 393, 396, 186 P.2d 442; see 44 Proof of Facts 3d 449 [constructive notice to landlord of unsafe condition]; 6 Summary (10th), Torts, §1122.)

(4) *Distinction: Duty To Make Reasonable Inspections.* The landlord has a duty to make reasonable inspections for latent defects, but the tenant does not. The tenant is entitled to rely on the landlord. Hence, a dilapidated condition sufficient to require inspection by the landlord was not sufficient to entitle him to an instruction on contributory negligence. (*Di Mare v. Cresci* (1962) 58 C.2d 292, 300, 23 C.R. 772, 373 P.2d 860.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Rule.* See 88 Proof of Facts 3d 307 [landlord's liability for injury caused by accumulation of snow and ice on common areas of leased premises].



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f. Lease for Semipublic Purpose.

12 Witkin Sum. Cal. Law Real Property § 651

[§ 651] Lease for Semipublic Purpose.

Where the landlord leases a theater, auditorium, amusement park, or other similar property with knowledge that many members of the public will be admitted to the premises, the landlord may be liable to third persons for injuries resulting from unsafe conditions of which the landlord should have known; i.e., the lessor is under a duty to use reasonable care to inspect and repair the property before transferring possession to the lessee. (*Rest.2d, Torts* §359; *Rest.2d, Property (Landlord and Tenant)* §17.2; see *Burroughs v. Ben's Auto Park* (1945) 27 C.2d 449, 453, 164 P.2d 897 [parking lot]; *Boothby v. Yreka City* (1931) 117 C.A. 643, 649, 4 P.2d 589 [engine house used as polling place]; *King v. New Masonic Temple Assn.* (1942) 51 C.A.2d 512, 515, 125 P.2d 559 [auditorium]; *Rau v. Redwood City Woman's Club* (1952) 111 C.A.2d 546, 549, 245 P.2d 12 [auditorium for music recital]; 17 A.L.R.3d 422 [landlord's liability to tenant's business patron injured as a result of defective condition of premises]; 17 A.L.R.3d 873 [what constitutes "public" use]; 62A Am.Jur.2d (2005 ed.), *Premises Liability* §480.)

In *Hayes v. Richfield Oil Corp.* (1952) 38 C.2d 375, 240 P.2d 580, defendant S was the lessee of a service station from defendant oil company. At the time of the lease, a grease pit was open and unguarded; it had sockets for guardrails, and an inventory attached to the lease listed chain guards for the pit, but no guards were furnished. The lessee extended the privilege of free parking to his customers, and plaintiff's wife fell in the pit as they walked across the station after parking the car. *Held*, judgment for plaintiffs affirmed. Although the lease to S required use of premises "primarily" as a gasoline service station, this involves admission of the public, and the purpose would be properly served by use of the lot for free parking for patrons. The lessor should reasonably have anticipated the use, including free overnight parking when the station was not lighted. (38 C.2d 381.) (See *Portillo v. Aiassa* (1994) 27 C.A.4th 1128, 1137, 32 C.R.2d 755, *supra*, §647 [landlord was liable for injury inflicted by guard dog on commercial premises].)

But the defect must be in the building or other structure leased, i.e., a part of the premises which the lessor was under a duty to inspect and repair. In *Goodman v. Harris* (1953) 40 C.2d 254, 253 P.2d 447, defendant corporation leased tourist cabins to H for rental to the public. Plaintiffs sued for death and injuries from asphyxiation caused by an unvented gas heater. *Held*, the heater, a portable piece of equipment resting on the floor, was not a fixture, and hence was not part of the leased premises. The cause was therefore the negligent operation of the lessee's appliance in an otherwise safe structure. (40 C.2d 265.) (See *Schwerdtfeger v. California* (1957) 148 C.A.2d 335, 349, 306 P.2d 960.)

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12 Witkin Sum. Cal. Law Real Property § 652

[§ 652] Defective Appliances in Apartment or Hotel.

The liability of a landlord or hotel keeper who rents a furnished apartment or hotel room has been imposed or denied on several theories, not always clearly defined or distinguishable. (See 91 A.L.R.3d 483 [liability of hotel or motel operator for injury or death resulting from defective furniture in room]; 93 A.L.R.3d 253 [liability of hotel or motel operator for injury or death resulting from condition in plumbing or bathroom].)

(1) *Express Warranty*. In *Shattuck v. St. Francis Hotel & Apartments* (1936) 7 C.2d 358, 60 P.2d 855, the prospective tenant inspected a furnished room, but relied on the manager's assurances that the wall bed was perfectly safe. Recovery was upheld for injuries received when the screws of the bracket broke and the frame fell on the tenant. The manager's assurances were held to amount to an express warranty of fitness for use. (7 C.2d 361.) (See *Stowe v. Fritzie Hotels* (1955) 44 C.2d 416, 423, 282 P.2d 890 [unstable standard lamp near bed; following *Shattuck*].)

(2) *Implied Warranty*. A number of earlier cases proceed, in part at least, on the theory of a landlord's implied warranty that the furniture (personal property, unless affixed to realty) is fit for use, and impose liability for breach of warranty. (See *Fisher v. Pennington* (1931) 116 C.A. 248, 250, 2 P.2d 518 [defective folding bed]; *Charleville v. Metropolitan Trust Co. of Calif.* (1934) 136 C.A. 349, 355, 29 P.2d 241 [same]; *Hunter v. Freeman* (1951) 105 C.A.2d 129, 133, 233 P.2d 65 [exploding gas heater].)

(3) *Tort: Violation of Statutory Duty*. Former Health & Saf.C. 16905, part of the State Housing Act, imposed a duty on landlords to maintain gas appliances in good repair. This was a basis of liability in *Black v. Partridge* (1953) 115 C.A.2d 639, 645, 252 P.2d 760, where decedent was asphyxiated by an unvented gas heater in a room in which he was a lodger. (See 84 A.L.R.2d 1143 [liability for injuries caused by plumbing system]; 84 A.L.R.2d 1190 [water heater]; 86 A.L.R.2d 791 [heating system]; 86 A.L.R.2d 838 [electrical system].)

(4) *Tort: Negligence*. In later cases, the courts appear to view the liability as one in tort, and apply the general rules of negligence and contributory negligence. (See *Colburn v. Shuravlev* (1938) 24 C.A.2d 298, 299, 74 P.2d 1060 [apartment landlord was not liable for injuries sustained when plaintiff tripped on defective rug, where plaintiff had full knowledge of condition].)

One important group, dealing with defective water faucet handles, is perhaps explainable on the assumption that these appliances are fixtures and not personal property. (See *Adams v. Dow Hotel* (1938) 25 C.A.2d 51, 54, 76 P.2d 210 [defendant hotel keeper used due care in inspection]; *Zavalney v. Donovan* (1945) 70 C.A.2d 182, 184, 160 P.2d 558 [no liability where defect was known to tenant]; *Daulton v. Williams* (1947) 81 C.A.2d 70, 73, 183 P.2d 325 [no liability where defect was not known to landlord].)

In *Forrester v. Hoover Hotel & Inv. Co.* (1948) 87 C.A.2d 226, 196 P.2d 825, additional doubt was cast upon the implied warranty theory. Plaintiffs, tenants in an apartment house, were injured 14 months after they moved in by a falling wall bed that had been installed in a defective manner (screws holding the plate attached to the door frame were inadequate). Plaintiffs framed their complaint solely on the theory of negligence and did not even request instructions on the warranty ground. Nevertheless, the court considered this latter issue as follows: (a) To hold the landlord liable on warranty in the absence of knowledge of the condition would be to make him "virtually an insurer of the safety of the tenant." (87 C.A.2d 232.) Thus, the court misconceived the basic theory of warranty, which does not rest upon culpability. (See 3 *Summary* (10th), *Sales*, §55.) (b) In cases such as *Fisher v. Pennington*, *supra*, in which recovery on warranty was upheld, the injury occurred at the beginning of tenancy, and, if there is liability on warranty, "then we hold that such liability ... is confined to the condition of the premises at the beginning of the term and not to conditions which, unknown to the lessor, subsequently arise." (87 C.A.2d 232.) This distinction was, however, untenable in the instant case, for the defect was in the original inadequate installation, and clearly existed, and constituted a breach of warranty, at the beginning of the term. (See *Shanander v. Western Loan & Bldg. Co.* (1951) 103 C.A.2d 507, 511, 229 P.2d 864 [citing *Forrester*; landlord, in absence of negligence, is not liable for damage from water flowing from broken pipe of one apartment into lower apartment]; *Lee v. Giosso* (1965) 237 C.A.2d 246, 248, 46 C.R. 803 [wall bed; following *Forrester*].)

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IX. OTHER RIGHTS AND LIABILITIES OF LANDLORDS AND TENANTS

C. Landlord's Liability for Injuries.

4. Strict Liability.

a. Former Rule Imposing Liability.

12 Witkin Sum. Cal. Law Real Property § 653

[§ 653] Former Rule Imposing Liability.

In *Becker v. IRM Corp.* (1985) 38 C.3d 454, 213 C.R. 213, 698 P.2d 116, plaintiff tenant leased an apartment in a 36-unit complex built in 1962 and purchased by defendant landlord in 1974. Prior to the purchase, two officers of defendant walked through most of the apartments and observed that all of the shower doors were of frosted glass and appeared to be the same. In 1978, plaintiff was seriously injured when he slipped and fell against his shower door. After the accident, defendant's maintenance man examined the doors, found that 31 had dangerous untempered, instead of tempered, glass, but that the only way in which this difference could be discovered was by a "very small mark in the corner of each piece of glass." There were no prior accidents involving shower doors, and defendants' officers did not know until the accident that some of the doors were made of untempered glass. Plaintiff filed a personal injury action asserting causes of action in strict liability and negligence. On these facts, shown by defendant's uncontradicted affidavits, the trial judge granted summary judgment for defendants on the ground that a landlord is not liable to a tenant for a latent defect of the premises unless there was a concealment of a known danger or an express contractual or statutory duty to repair. *Held*, reversed.

(a) *Recovery is possible on the basis of strict liability.* The rationale of earlier cases, establishing the duties of a landlord and the doctrine of strict liability in tort, "requires us to conclude that a landlord engaged in the business of leasing dwellings is strictly liable in tort for injuries resulting from a latent defect in the premises when the defect existed at the time the premises were let to the tenant. It is clear that landlords are part of the 'overall producing and marketing enterprise' that makes housing accommodations available to renters. ... A landlord, like defendant owning numerous units, is not engaged in isolated acts within the enterprise but plays a substantial role. The fact that the enterprise is one involving real estate may not immunize the landlord." (38 C.3d 464.) "The tenant purchasing housing for a limited period is in no position to inspect for latent defects in the increasingly complex modern apartment buildings or to bear the expense of repair whereas the landlord is in a much better position to inspect for and repair latent defects." (38 C.3d 464.) Hence, strict tort liability for latent defects existing at the time of renting must be applied "to insure that the landlord who markets the product bears the cost of injuries" rather than the injured persons who are powerless to protect themselves. (38 C.3d 465.) In addition, landlords are an integral part of the enterprise of producing and marketing rental housing. "The cost of protecting tenants is an appropriate cost of the enterprise." (38 C.3d 466.)

(b) *Recovery is possible for negligence.* Under the criteria of *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97,

443 P.2d 561, supra, §639, "the landlord owes a tenant a duty of reasonable care in providing and maintaining the rented premises in a safe condition." (38 C.3d 467.) Defendant contends that, in the absence of knowledge of the defective condition or of prior accidents, it was not under a duty to inspect for defective shower doors that were installed by the builder and in position at the time defendant purchased the building. But maintenance of rental property in a safe and habitable condition is the primary responsibility of the landlord. (38 C.3d 468.) Cases in which the defect developed after purchase of the building and while the apartment was in possession of the tenant (e.g., *Uccello v. Laudenslayer* (1975) 44 C.A.3d 504, 118 C.R. 741, supra, §644) are distinguishable. Here, the dangerous condition existed at the time of purchase and at the time the property was leased. (38 C.3d 469.)

Two justices strongly dissented on the strict liability holding, noting that almost every other jurisdiction deciding this issue holds that the imposition of strict liability is unwarranted. Law review comment on *Becker* was extensive. (See 21 Cal. Western L. Rev. 524; 16 *Golden Gate L. Rev.* 349; 20 *Loyola L.A. L. Rev.* 323; 17 *Pacific L. J.* 995; 23 *San Diego L. Rev.* 125; 26 *U.C. Davis L. Rev.* 367 [landlord's strict liability for tenant injuries reexamined]; 13 Western State L. Rev. 279.) (See *Muro v. Superior Court* (1986) 184 C.A.3d 1089, 1093, 229 C.R. 383 [*Becker* does not apply to commercial lessors]; *Mora v. Baker Commodities* (1989) 210 C.A.3d 771, 777, 258 C.R. 669 [following *Muro*]; *Vaerst v. Tanzman* (1990) 222 C.A.3d 1535, 1539, 1541, 272 C.R. 503 [trial judge properly refused to instruct jury on strict liability theory where property was defendant's family residence, rented for temporary period to plaintiff's son, and defect was handrail on stairway that ended before last step, which was patent, visible, and easily detectable; *Becker* must be limited to large scale entrepreneurial undertaking by landlord engaged in business of leasing dwelling, and latent defect is not detectable by observer].)

Becker was overruled in *Peterson v. Superior Court* (1995) 10 C.4th 1185, 43 C.R.2d 836, 899 P.2d 905, infra, §654.

SUPPLEMENT: [This section is current through the latest supplement]



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C. Landlord's Liability for Injuries.

4. Strict Liability.

b. Present Rule Rejecting Strict Liability.

12 Witkin Sum. Cal. Law Real Property § 654

[§ 654] Present Rule Rejecting Strict Liability.

In *Peterson v. Superior Court* (1995) 10 C.4th 1185, 43 C.R.2d 836, 899 P.2d 905, the Supreme Court reconsidered whether a landlord is strictly liable for injuries to tenants caused by defects in the premises, and overruled *Becker v. IRM Corp.* (1985) 38 C.3d 454, 213 C.R. 213, 698 P.2d 116, supra, §653. Plaintiff slipped and fell in the bathtub at a hotel. She sued the manufacturer of the bathtub and the owners and operators of the hotel, alleging negligence and strict liability. Defendant manufacturer settled with plaintiff during discovery. The other defendants filed a motion in limine to preclude plaintiff from "introducing any evidence or making any reference" that strict liability applied to the case. The trial judge granted the motion, but the Court of Appeal subsequently directed the trial judge to allow plaintiff to proceed on her strict liability theory. *Held*, reversed.

(a) *Becker's imposition of strict liability on landlords has been extensively criticized. Becker* has received a "chilly reception" in the *California Courts of Appeal*. (10 C.4th 1192, citing *Vaerst v. Tanzman* (1990) 222 C.A.3d 1535, 272 C.R. 503.) Many commentators have criticized the decision, and the Supreme Court of Hawaii, the only other state to discuss *Becker's* holding, adopted the contrary rule. (10 C.4th 1193.) The decision represents a minority view that has not gained acceptance in any other state that has considered the issue. (10 C.4th 1194, 1197, 1198.)

(b) *Becker drastically altered established rules governing a landlord's liability.* The decision went far beyond holding landlords liable for injuries caused by their own fault and imposed liability for injuries caused by defects that the landlord had not created, that would not have been disclosed by a reasonable inspection, and of which the landlord had no knowledge. (10 C.4th 1197.)

(c) *Becker's reasoning is flawed.* The reasons for imposing strict liability on a retailer or manufacturer of a defective product do not apply to landlords or hotel proprietors. (10 C.4th 1199.)

(1) A landlord or hotel proprietor, unlike a retailer, has no continuing business relationship with the manufacturer of the defective product. The landlord cannot exert pressure on the manufacturer to make the product safe and cannot share in the costs of insuring the safety of the tenant. (10 C.4th 1199.) Instead, the landlord is more in the position of a seller of used machinery, who is not strictly liable in tort unless he rebuilds or reconditions the product and thus assumes a manufacturer's functions. (10 C.4th 1200, 1201.)

(2) The court in *Becker* viewed the implied warranty of habitability as constituting an implied representation by the landlord of safety. That view overstates the effect of the implied warranty. (10 C.4th 1203.) The warranty merely gives a tenant a reasonable expectation that the landlord has inspected the premises, has corrected defects disclosed by the inspection that would render the premises uninhabitable, and will maintain the property by repairing conditions of which the landlord has actual or constructive knowledge. (10 C.4th 1205.) In other words, the warranty assigns the landlord a duty to exercise reasonable care, the breach of which gives rise to a negligence action. The tenant cannot, however, reasonably expect that the landlord will have eliminated defects of which the landlord was unaware and which a reasonable inspection would not have disclosed. The same can be said of a hotel guest and a hotel proprietor. Hence, the warranty does not support an action for strict liability against either a landlord or the owner or operator of a hotel. (10 C.4th 1206.)

(3) The court in *Becker* also relied heavily on "loss spreading" as justification for imposing strict liability on landlords. (10 C.4th 1206.) The costs of injuries are shifted from an innocent tenant to an equally innocent landlord because, in theory, the landlord has access to liability insurance and can spread the costs that would financially devastate an individual. In reality, however, liability policies have limits, and the economic consequences to the landlord or to a hotel proprietor can be onerous. (10 C.4th 1207.) In any case, loss spreading is not the sole consideration in determining whether to impose strict liability. (10 C.4th 1208.)

(4) Manufacturers and retailers can be expected to possess expert knowledge about their products, but a landlord or hotel proprietor cannot. Moreover, the manufacturer may defend a products liability action by establishing that the benefits of the product's design outweigh its risks, whereas a landlord or hotel proprietor "frequently is in no position to mount such a defense." (10 C.4th 1209.) The landlord or hotel proprietor may not have access to information or experts who can describe the reasons for the design. (10 C.4th 1210.)

(d) *Liability for negligence.* A landlord or hotel proprietor still may be held liable for negligence if he or she breaches the applicable standard of care. Further, an injured tenant or guest may still pursue a strict liability cause of action against the manufacturer, distributor, or retailer of the product. (10 C.4th 1210.) (See *McCarthy v. Martinson* (1996) 51 C.A.4th 632, 635, 59 C.R.2d 149 [*Peterson* applies retroactively]; 28 *Pacific L. J.* 373 [analyzing *Peterson* and its effect on "paramount policy"]; 24 *Pepperdine L. Rev.* 812 [*Peterson*]; 23 *Western State L. Rev.* 493 [analyzing *Becker* and *Peterson*]; 48 *A.L.R.4th* 638 [strict liability of landlord for injury or death of tenant or third person caused by defect in premises leased for residential use].)

SUPPLEMENT: [This section is current through the latest supplement]



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12 Witkin Sum. Cal. Law Real Property § 655

[§ 655] Insurance.

A policy of insurance on property is a specific agreement of indemnity with the insured insuring against loss or damage that the insured may sustain. Like the mortgagor and mortgagee, the lessor and lessee may have separate insurable interests. In the absence of special provisions in the lease, the lessee is not obliged to procure insurance for the lessor's benefit, and neither party ordinarily has an interest in proceeds of insurance obtained by the other. But if one agrees to procure insurance for the other's benefit, and then takes out a policy payable to himself or herself alone, the other has an equitable lien on the proceeds. (*Alexander v. Security-First Nat. Bank of Los Angeles* (1936) 7 C.2d 718, 724, 62 P.2d 735; see Cal. Civil Practice, 3 Real Property Litigation, §§20:20, 20:29; 8 A.L.R.2d 1445 [right to proceeds where fire insurance policy is issued jointly to lessor and lessee covering damage to building]; 18 A.L.R.2d 1051 [lessee's covenant running with the land]; 53 A.L.R.2d 1383 [lessee's or lessor's right to recover on fire insurance policy for destroyed or damaged property that other has replaced or repaired]; 97 A.L.R.2d 1243 [improvements and betterments insurance]; 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §471 et seq.; for lease provisions, see C.E.B., 1 Office Leasing 2d, §21.33 et seq.)

If the lessor and lessee agree that the lessor will insure the premises for the mutual benefit of the parties, the lessee is not liable to the lessor or to the insurer for losses covered by the agreement even though the losses were caused by the lessee's negligence. (*Fred A. Chapin Lumber Co. v. Lumber Bargains* (1961) 189 C.A.2d 613, 617, 11 C.R. 634; *Gordon v. J.C. Penney Co.* (1970) 7 C.A.3d 280, 285, 86 C.R. 604; see *Sacramento-Yolo Port Dist. v. Cargill of Calif.* (1970) 4 C.A.3d 1004, 1012, 84 C.R. 822 [policy contained express subrogation waiver clause]; *Liberty Mut. Fire Ins. Co. v. Auto Spring Supply Co.* (1976) 59 C.A.3d 860, 864, 131 C.R. 211; *Parsons Mfg. Corp. v. Superior Court* (1984) 156 C.A.3d 1151, 1162, 203 C.R. 419 [lease agreement was "rife with hints" that lessor would procure insurance on premises, and lessee properly expected that insurance would be for benefit of both parties; there was no evidence that parties intended lessee to be responsible for its own negligence or to insure premises for fire damage]; *Fire Ins. Exchange v. Hammond* (2000) 83 C.A.4th 313, 317, 99 C.R.2d 596 [parties to lease had no reasonable expectation that lessees were exculpated from liability for negligently caused fire damage or that lessor's insurance policy was for their mutual benefit; lease stressed lessees' liability for negligent failure to surrender premises in good condition, gave only lessor right to terminate lease following fire caused by lessees' negligence, and did not require lessor to repair fire damage caused by lessees' negligence; distinguishing *Parsons Mfg. Corp.*].)

West's Key Number Digest, Landlord and Tenant k.156

SUPPLEMENT: [This section is current through the latest supplement]
See 49 *Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §374 et seq.



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12 Witkin Sum. Cal. Law Real Property § 656

[§ 656] Condemnation.

(1) *Lessee's Right to Compensation.* Ordinarily, when leased property is taken in an eminent domain proceeding, the condemnor pays a single amount for the value of all the interests in the property, and then, in the same proceeding, the award is apportioned between the lessor and lessee. (See 8 *Summary* (10th), *Constitutional Law*, §1250.)

The lessee's right to share in the award may be specified in the lease. (See *Enos v. Foster* (1957) 155 C.A.2d 152, 154, 317 P.2d 670 [lessee's covenant to build and provision for share of award were not conditional]; 22 A.L.R.5th 327 [validity, construction, and effect of statute or lease provision expressly governing rights and compensation of lessee on condemnation of leased property]; for suggested lease provisions, see C.E.B., 1 Office Leasing 2d, §§23.30, 23.31; C.E.B., Ground Lease Practice, §§1.62 et seq., 1.70 et seq.; 11B Am.Jur. Legal Forms 2d (1998 ed.), Leases of Real Property §161:636 et seq.) In the absence of a provision, the lessee is entitled to compensation for losses. (See *Rest.2d, Property (Landlord and Tenant)* §8.2; C.E.B., 1 Condemnation Practice 2d, §4.56 et seq.; C.E.B., 2 Condemnation Practice 2d, §10.3 et seq.; 21 *Cal. L. Rev.* 281.)

(2) *Compensable Losses.* The lessee's compensable losses include the following:

(a) *Value of the lease's unexpired term.* (See 8 *Summary* (10th), *Constitutional Law*, §1250.)

(b) *Future rental payments.* If the entire premises are condemned, the lease is terminated and the lessee is released from the obligation to pay rent. (See *Rest.2d, Property (Landlord and Tenant)* §8.1; 8 *Summary* (10th), *Constitutional Law*, §1250.) Under former California law, if the premises were only partially taken, the lease was not terminated. The lessee was liable for the full rent for the balance of the term, but was entitled to damages to offset the decreased rental value of the remaining premises. (See *Pasadena v. Porter* (1927) 201 C. 381, 387, 257 P. 526; *Sacramento & San Joaquin Drainage Dist. v. Truslow* (1954) 125 C.A.2d 478, 485, 270 P.2d 928.) Now, however, if the property is only partially taken, the lease is ordinarily terminated as to that part, but remains in force as to the remainder with a pro rata abatement of rent. (C.C.P. 1265.120.) If the part taken was an essential part of the property or the remainder is not suitable for the purposes of the lease, the court may terminate the lease. (C.C.P. 1265.130.) (See *Rest.2d, Property (Landlord and Tenant)* §8.2; 8 *Summary* (10th), *Constitutional Law*, §1250.)

(c) *Fixtures.* If the tenant erects buildings or trade fixtures that belong to the tenant and not to the landlord, and these are destroyed or damaged as a result of the taking of the land, the tenant is entitled to a separate award for the

value of this property. (*People v. Klopstock* (1944) 24 C.2d 897, 902, 151 P.2d 641; *Redevelopment Agency of Stockton v. Diamond Properties* (1969) 271 C.A.2d 315, 319, 76 C.R. 269, 8 Summary (10th), *Constitutional Law*, §1225.) If the fixtures are not removed and belong to the landlord on termination, the tenant is not entitled to an award. (*Beverly Hills v. Albright* (1960) 184 C.A.2d 562, 568, 7 C.R. 706.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Lessee's Right to Compensation*. See 11B Am.Jur. Legal Forms 2d (2006 ed.), Leases of Real Property §161:695 et seq.; C.E.B., 1 Condemnation Practice 3d, §4.57 et seq.; C.E.B., 2 Condemnation Practice 3d, §10.3 et seq.



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F. Taxes.
1. Lessor's Duty To Pay.

12 Witkin Sum. Cal. Law Real Property § 657

[§ 657] Lessor's Duty To Pay.

Ordinarily, where land is leased, both the leasehold and the reversion are assessed together to the owner (lessor), the value of the leasehold being treated as part of the value of the greater interest of the owner of the freehold. (See *Tilden v. Orange* (1949) 89 C.A.2d 586, 587, 201 P.2d 86; for exception where reversion is exempt, see *Hammond Lumber Co. v. Los Angeles* (1936) 12 C.A.2d 277, 279, 55 P.2d 891; 9 *Summary* (10th), *Taxation*, §176.)

Hence, if the lease is silent on the matter, the lessor has the duty to pay the taxes. (See *Pacific Palisades Assn. v. Menninger* (1933) 219 C. 257, 265, 26 P.2d 303; *Pacific Intermountain Express Co. v. Alexander* (1962) 205 C.A.2d 640, 644, 23 C.R. 227 [construction of lease provision requiring lessee to pay additional rent based on tax increases]; 48 A.L.R.3d 287 [construction of lease provision for escalation of rental in event of tax increases]; 49 *Am.Jur.2d* (1995 ed.), *Landlord and Tenant* §446 et seq.)

West's Key Number Digest, Landlord and Tenant k.145 et seq.

SUPPLEMENT: [This section is current through the latest supplement]
See 49 *Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §354 et seq.



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12 Witkin Sum. Cal. Law Real Property § 658

[§ 658] Lessee's Covenant To Pay.

Some leases contain a lessee's covenant to pay taxes or assessments. (See *Fraser's Million Dollar Pier Co. v. Ocean Park Pier Co.* (1921) 185 C. 464, 466, 197 P. 328; *Terminal Inv. Co. v. Pope Estate Co.* (1932) 122 C.A. 281, 282, 10 P.2d 139; *Lindley v. Sale* (1934) 140 C.A. 662, 664, 36 P.2d 130; 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §452; for forms, see C.E.B., 1 Office Leasing 2d, §§1.7, 12.51 et seq.; C.E.B., Ground Lease Practice, §2.40 et seq.; Cal. Civil Practice, 3 Real Property Litigation, §§20:21, 20:30; 11B Am.Jur. Legal Forms 2d (1998 ed.), *Leases of Real Property* §161:587 et seq.)

The usual covenant to pay "taxes" refers to *ad valorem* property taxes. It does not cover special assessments levied by an improvement district, which, strictly speaking, are not taxes. (*Wells v. Union Oil Co. of Calif.* (1938) 25 C.A.2d 165, 167, 76 P.2d 696.) Where the lessee of equipment exercised a purchase option to buy it from the lessor, a covenant to pay taxes "against or upon the equipment" did not obligate the lessee to reimburse the lessor for the retailer's sales tax. (*Livingston Rock & Gravel Co. v. De Salvo* (1955) 136 C.A.2d 156, 163, 288 P.2d 317.)

In *Ellis v. Title Ins. & Trust Co.* (1964) 227 C.A.2d 204, 38 C.R. 605, the lessor leased a shopping center to several lessees, who agreed to pay a "proportionate share of all the costs and expenses of maintaining and operating the parking areas." The lessees contended that the provision did not cover real estate taxes, but the court held to the contrary.

(a) Payment of taxes for the governmental services rendered was essential to continued use of the parking area. It was maintained under the lease provisions as a nonprofit venture for the benefit of all parties, not to make a profit. Default in taxes could result in sale of the property and cessation of the essential parking uses. Hence, taxes were properly classified as an expense of maintaining and operating the area. (227 C.A.2d 206.)

(b) The lease stated that operating and maintenance costs "shall be computed under generally accepted accounting principles." Taxes on business property are regarded as a current expense, not a capital investment. Hence, under accepted accounting principles, the taxes were operating costs. (227 C.A.2d 206.)

SUPPLEMENT: [This section is current through the latest supplement]

See 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §359; 11B Am.Jur. Legal Forms 2d (2006 ed.), *Leases of Real Property* §161:646 et seq.



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F. Taxes.

3. Taxes on Lessee's Improvements.

12 Witkin Sum. Cal. Law Real Property § 659

[§ 659] Taxes on Lessee's Improvements.

In *Lawrence v. F.W. Woolworth Co.* (1965) 63 C.2d 119, 45 C.R. 140, 403 P.2d 396, plaintiff lessors leased unimproved land for a 3-year term with options that could extend the lease for a total of 9 years, at an annual rental of \$ 6,000. Defendant tenant constructed improvements consisting of a steel building, lath house, steel fence, light standards, and signs, costing nearly \$ 50,000. The lease authorized construction of improvements and removal before the end of the term. The property tax attributable to the improvements was \$ 600 per year. *Held*, the tenants were liable for the taxes.

(a) This exception to the general rule of lessor's liability is based on the theory that the tenant who places improvements on the premises for the tenant's own benefit, which can be removed at the end of the term, can thereby control the tax bill, and with this uncertainty the lessor could not be deemed to have considered the tax in setting the rent. (63 C.2d 122.) The exception was adopted for California in this case of first impression, with the qualification that the improvements must be removable by the lessee. (63 C.2d 122.)

(b) Defendant advanced the speculative argument that the improvements were "permanent in nature" and likely to be left on the property. No evidence supported this conclusion. The indications were that they were removable. In any event, the test is one of right to remove. "The tenant should not be able to avoid liability by proving that it is 'unlikely' that he will remove the improvements. If the landlord is to be held subject to the tenant's uncontrolled discretion to increase the tax burden, he should have no less than a legal guaranty in the lease that the improvements will remain on the property when the lease term terminates. Even if it is probable that the tenant will find little or no profit in removing the improvements, he still might use his right to remove them (thereby depriving the landlord of their use) as a bargaining factor in negotiating for a new lease." (63 C.2d 123.) (See 68 A.L.R.2d 1289 [lessor's covenant to pay increase in property taxes occasioned by lessee's improvements].)

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G. Competing Use.

1. Express Covenant Against Competition.

a. Nature and Validity.

12 Witkin Sum. Cal. Law Real Property § 660

[§ 660] Nature and Validity.

(1) *Lessor's Covenant.* In a lease of part of a building for business purposes, the lessor often covenants not to lease other portions of the same or other closely situated premises to a competing business. (See *Shean v. Weeks* (1917) 176 C. 592, 593, 169 P. 231; *Medico-Dental Bldg. Co. of Los Angeles v. Horton & Converse* (1942) 21 C.2d 411, 415, 132 P.2d 457; *Carr v. King* (1914) 24 C.A. 713, 715, 142 P. 131; *Carter v. Adler* (1955) 138 C.A.2d 63, 66, 291 P.2d 111; *Edmond's of Fresno v. MacDonald Group, Ltd.* (1985) 171 C.A.3d 598, 603, 217 C.R. 375, *infra*, §661; *Rest.2d, Property (Landlord and Tenant) §7.2*; 97 A.L.R.2d 4 [validity, construction, and effect of lessor's covenant against use of other property in competition with lessee]; 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §70 et seq.; for forms, see Cal. Civil Practice, 3 Real Property Litigation, §20:66 [form of allegation of breach of covenant]; 11B Am.Jur. Legal Forms 2d (1998 ed.), *Leases of Real Property* §161:965 et seq.)

Although this type of covenant tends, in some degree, to restrain trade, the modern "rule of reason" upholds limited restrictions designed to promote business and the cases interpret them liberally in the tenant's favor. (See *infra*, §661.)

The covenant runs with the land (see *supra*, §433 et seq.) if (a) the other part of the property owned by the lessor is contiguous with the leased premises, (b) the other part is "particularly described in the lease," (c) the lessor's successors are expressly bound by the covenant for the benefit of the leased premises, and (d) the lease is recorded in the same manner as a deed. (C.C. 1470; see C.C. 1469 [similar requirements for running of affirmative covenant]; *Rest.2d, Property (Landlord and Tenant) §§16.1, 16.2.*)

(2) *Tenant's Covenant.* Although much of the case law deals with lessors' noncompetition covenants, tenants may also covenant not to compete with the landlord or another lessee. For example, a lessor who covenants not to lease other portions of the premises to a business that will compete with a tenant may require the lessees of the remaining portions to covenant not to use the premises in a manner that would violate the lessor's covenant. (See *Hildebrand v. Stonecrest Corp.* (1959) 174 C.A.2d 158, 164, 344 P.2d 378, *infra* §661; 1 A.L.R.4th 942 [shopping center lease restrictions on type of business conducted by tenant].)

The Restatement takes the position that "the failure of the tenant to perform a promise contained in the lease that he, or someone holding under him, will not use the leased property in a manner that will compete with a business of the

landlord, or of someone holding under the landlord, on other property" is a default under the lease if the activity is not ceased within a reasonable time following a request by the landlord. (*Rest.2d, Property (Landlord and Tenant) §13.2.*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Lessor's Covenant*. See 49 *Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §65 et seq.; Cal. Civil Practice, 3 Real Property Litigation, §20:64; 95 Proof of Facts 3d 467 [lessee's enforcement of express covenant against competition]; 11B *Am.Jur. Legal Forms 2d* (2006 ed.), *Leases of Real Property* §161:1044 et seq.



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G. Competing Use.

1. Express Covenant Against Competition.

b. Illustrations.

12 Witkin Sum. Cal. Law Real Property § 661

[§ 661] Illustrations.

(1) *Sale of Similar Goods.* In *Hildebrand v. Stonecrest Corp.* (1959) 174 C.A.2d 158, 344 P.2d 378, defendant lessor leased premises in its shopping center to plaintiff lessee for a pharmacy, and covenanted not to lease any other space in the area for a store selling drugs, medicines, or cosmetics. Defendant market, operating under a lease from defendant corporation as a supermarket selling groceries, vegetables, meat, bakery goods, liquor, etc., installed racks for the sale of miscellaneous commodities, including dentifrices, shaving preparations, and miscellaneous nonprescription drugs. *Held*, defendant lessor was liable for permitting this violation of its covenant to plaintiff, and could not escape the obligation by relying on defendant market to adjust its differences with plaintiff. (174 C.A.2d 164.) (See *Medico-Dental Bldg. Co. of Los Angeles v. Horton & Converse* (1942) 21 C.2d 411, 424, 132 P.2d 457 [covenant against leasing to another drugstore was violated when members of medical group, who were tenants in building, obtained license and sold drugs to their own patients]; *Kulawitz v. Pacific Woodenware & Paper Co.* (1944) 25 C.2d 664, 673, 155 P.2d 24 [covenant against competing furniture business was violated by lease to business selling linoleum and similar products]; *Pappadatos v. Market Street Bldg. Corp.* (1933) 130 C.A. 62, 64, 19 P.2d 517 [covenant not to rent another store "for a candy business" prohibited landlord from leasing space for sale of citrus fruit drinks, which, although not candy, are considered by trade to be essential part of candy business].)

(2) *Business Outside of Leased Premises.* The covenant may be violated by a competing business outside the leased premises. In *Carter v. Adler* (1955) 138 C.A.2d 63, 291 P.2d 111, defendant lessees had the exclusive right to operate a grocery and meat business in the lessor's supermarket. The percentage lease allowed the lessor to cancel if the gross business fell below \$ 50,000 monthly for 2 months. The lessors' successors purchased an adjoining parcel, intending to make one supermarket of the entire premises. After unsuccessful negotiations to acquire defendants' lease, they opened and operated a similar business in their adjoining market. The trial judge found, on sufficient evidence, that the purpose was to drive defendants out of business. *Held*, in this action by plaintiff lessors for declaratory relief, the covenant precluded the competing business. Construing the lease (prepared by the lessors) against them, the express covenant implied an obligation not to derogate from its force by any use of the adjoining property.

The court compared the positions of landlord and tenant as follows: "It is the law that when a tenant occupies a store under a lease which fixes the rental at a minimum rental or a definite percentage of the gross receipts from sales, he cannot avoid liability by diverting his business to another store he operates in the same vicinity, when such diversion

is effected for the sole purpose of reducing the amount of the gross sales below a specified sum whereby to lay the basis for a cancellation of the lease. ... A landlord is governed by the same rule. He cannot by any circumlocution or tergiversation avoid the covenant of good faith which attends him in the performance of his obligation to his lessee. Neither lessee nor lessor can avoid liability for damages where they are operating under a percentage rental lease and either conducts a competing business on adjacent premises, causing a reduction of the gross receipts on the demised premises." (138 C.A.2d 72.)

In *Edmond's of Fresno v. MacDonald Group, Ltd.* (1985) 171 C.A.3d 598, 217 C.R. 375, plaintiff obtained a 20-year lease of space in a shopping center being developed by defendant lessor. Thereafter, defendant developed an addition, of which 80% was within the center's original boundaries and 20% was on later acquired adjacent property. The lessor had covenanted that there would be not more than two jewelry stores in the shopping center, one of which was plaintiff's operation, but when construction of the addition began, defendant indicated that it would lease space in that area to other retail jewelers. The trial court granted an injunction, finding that the covenant was applicable to the expanded area. *Held*, affirmed.

(a) The covenant did not explicitly refer to the addition, and no other clause in the lease explicitly stated whether the lease terms would apply to a subsequent expansion of the shopping center. But portions of the agreement included contingencies for expansion, and justified the trial judge's conclusion that the covenant was intended to apply and should be so interpreted. (171 C.A.3d 603, 604.)

(b) The cases holding that restrictive covenants are strictly construed against the party seeking to enforce them deal with land use restrictions, not covenants against competition between original contracting parties. (171 C.A.3d 605.)

(c) Plaintiff's position is also supported by the implied covenant of good faith and fair dealing. (171 C.A.3d 605, 606; on covenant of good faith and fair dealing, see 1 *Summary* (10th), *Contracts*, §798 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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12 Witkin Sum. Cal. Law Real Property § 662

[§ 662] Implied Covenant Against Competition.

The covenant not to compete may be implied from apt language indicating the restrictive intent. Thus, in *Keating v. Preston* (1940) 42 C.A.2d 110, 108 P.2d 479, a hotel owner leased "all the space ... necessary to do the restaurant business" and the instrument provided that the lessee might also serve liquors "*in any part of the hotel.*" No express reservation was made by the owner of space to be rented to others. *Held*, it was proper to conclude that the lessee had an exclusive right to maintain a restaurant in the building. (42 C.A.2d 122.) (See 22 A.L.R.2d 1466 [implied covenant not to compete in lease].)

But covenants are not implied from the circumstances unless the intent of the parties clearly appears from the language used. (See 1 *Summary* (10th), *Contracts*, §794 et seq.) In *Stockton Dry Goods Co. v. Girsh* (1951) 36 C.2d 677, 227 P.2d 1, plaintiff lessor leased a space in his department store to defendant lessee, "to be conducted as a Shoe Department." *Held*, the lessor could open up one or more additional shoe departments; the circumstance that there had always been but one shoe department in the store was not controlling. "This is not language expressive of an exclusive grant and such a grant is not indispensable to effectuate the expressed intention of the parties. Nor does that or any language of the lease indicate that an exclusive grant was so clearly contemplated that it would be unnecessary to express it. Likewise there is no legal necessity for it, and it might just as well be assumed that had the attention of the parties been brought to it, they would not have agreed to it. ... It is a matter of common knowledge that many stores have more than one department to supply similar lines of goods." (36 C.2d 681.)

SUPPLEMENT: [This section is current through the latest supplement]



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12 Witkin Sum. Cal. Law Real Property § 663

[§ 663] In General.

(1) *Grounds for Termination.* The chief causes or grounds for termination are as follows:

- (a) *Expiration of term.* (See *infra*, §664.)
- (b) *Notice.* A tenancy may be terminated on notice given pursuant to the lease or statute. (See *infra*, §678.)
- (c) *Landlord's breach.* The tenant may terminate for breach of the landlord's duty to place the tenant in quiet possession, or to repair, or on eviction. (See *supra*, §§608 et seq., 619 et seq.; *infra*, §755.)
- (d) *Tenant's breach.* The landlord may terminate for breach of a condition by the tenant. (See *infra*, §667 et seq.)
- (e) *Improper or illegal use of premises.* If the lease is for a specified purpose, and the premises are used for another purpose, the unauthorized use may be grounds for termination. (See C.C. 1930; *Rest.2d, Property (Landlord and Tenant)* §9.2 [tenant's rights when intended use becomes illegal]; *infra*, §674.)
- (f) *Destruction of premises or commercial frustration.* Except as otherwise provided in the lease, either party may terminate on destruction of the premises. (See *infra*, §§665, 666.) In a proper case, unforeseen events that destroy the purposes of the tenancy and render the lessee's business valueless may justify termination under the doctrine of commercial frustration. (See 1 *Summary* (10th), *Contracts*, §843 et seq.; *Rest.2d, Property (Landlord and Tenant)* §9.3 [tenant's rights when intended use is frustrated by governmental action]; on effect of federal bankruptcy proceedings, see *Rest.2d, Property (Landlord and Tenant)*, Chaps. 20, 21.)
- (g) *Death of nursing home patient or month-to-month tenant.* Death of the lessee does not terminate the lease in the absence of a covenant so providing. (See C.C. 1934; *Joost v. Castel* (1939) 33 C.A.2d 138, 141, 91 P.2d 172; *Burns v. McGraw* (1946) 75 C.A.2d 481, 486, 171 P.2d 148, *supra*, §547; 42 A.L.R.4th 963 [death of lessee as terminating lease]; 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §129.) However, C.C. 1934.5 states an exception for the hiring of accommodations from month to month in a nursing or convalescent home. The hiring is terminated by the death of the patient, and any advance payment of rent must be returned to the heir, devisee, or personal representative no later than 2 weeks after the death. A provision in the agreement waiving rights under C.C. 1934.5 is void.

Under C.C. 1934, a month-to-month tenancy is terminated by notice of the tenant's death as of the 30th day following the tenant's last payment of rent before the tenant's death. No further notice is required. (*Miller & Desatnik Management Co. v. Bullock* (1990) 221 C.A.3d Supp. 13, 18, 270 C.R. 600.)

(h) *Special provisions.* The lease may specify additional grounds. (See *infra*, §681; on grounds for termination generally, see Cal. Civil Practice, 3 Real Property Litigation, Chap. 21.)

(2) *Restrictions on Termination.* A number of restrictions on termination have been recognized by case law and statute, including:

(a) Illegal discrimination. (See *infra*, §§682, 683.)

(b) Violation of a rent control ordinance. (See *supra*, §572 et seq.)

(c) Breach of the warranty of habitability. (See *supra*, §624 et seq.)

(d) Retaliatory eviction. (See *infra*, §706 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Grounds for Termination.*

(g) *Death of nursing home patient or month-to-month tenant.* See 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §114.



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2. Expiration of Term.

12 Witkin Sum. Cal. Law Real Property § 664

[§ 664] Expiration of Term.

If neither party is guilty of a breach or other act justifying termination by the other (infra, §667 et seq.), and there is no surrender (infra, §675), the tenancy will continue until it expires. If the tenancy is for a fixed term, it expires without any notice or other act, at the end of the term. (C.C. 1933(1); *Ryland v. Appelbaum* (1924) 70 C.A. 268, 270, 233 P. 356; *Black v. Black* (1926) 77 C.A. 82, 85, 246 P. 90; see *Rest.2d, Property (Landlord and Tenant) §1.4*, Comment e; 49 *Am.Jur.2d* (1995 ed.), *Landlord and Tenant* §129; on effect of tenant holding over, see supra, §§509, 510.)

West's Key Number Digest, Landlord and Tenant k.93

SUPPLEMENT: [This section is current through the latest supplement]
See 49 *Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §114.



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H. Termination of Tenancy.

3. Destruction of Premises.

a. In General.

12 Witkin Sum. Cal. Law Real Property § 665

[§ 665] In General.

In the absence of an obligation or covenant to repair (see *supra*, §§619 et seq., 632, 640), either party may terminate if the premises are destroyed. (C.C. 1932(2), 1933(4); *Harvey v. Weisbaum* (1911) 159 C. 265, 267, 113 P. 656; see *Hamer v. Ellis* (1919) 40 C.A. 57, 60, 180 P. 30; *Glenn R. Sewell Sheet Metal v. Loverde* (1969) 70 C.2d 666, 676, 75 C.R. 889, 451 P.2d 721, *supra*, §635 [similarity of excuse of destruction under C.C. 1932(2) and that of commercial frustration; no excuse where lessee assumes risk of destruction or frustration]; 61 A.L.R.2d 1445 [cessation of rent or termination of lease following destruction of or damage to property]; 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §281 et seq.)

The lease may provide for an apportionment of rent, but if it does not, a tenant who has paid rent in advance cannot recover it. (*Harvey v. Weisbaum*, *supra*; *C.M. Staub Shoe Co. v. Byrne* (1915) 169 C. 122, 130, 145 P. 1032; *Pedro v. Potter* (1926) 197 C. 751, 761, 242 P. 926; *supra*, §570.) (For lease clauses governing destruction and lessor's option to repair, see C.E.B., 1 Office Leasing 2d, §22.18, 22.19; 11B Am.Jur. Legal Forms 2d (1998 ed.), *Leases of Real Property*, §161:897 et seq.)

The lease may also give the lessee an election or "option" to terminate or stay while the lessor repairs or rebuilds. In *Alpern v. Mayfair Markets* (1953) 118 C.A.2d 541, 258 P.2d 7, the lease of a market provided that, if the premises were destroyed by fire or other action of the elements, or partially destroyed so as to be wholly unfit for occupancy, or so badly injured that they could not be repaired with reasonable diligence within 180 days, the lessees had the option to terminate as of the date of destruction or injury. The building was destroyed by fire on July 6. Plaintiff lessor wanted to rebuild. The parties negotiated but failed to agree on changes in specifications, and defendant lessees exercised their option on August 29. *Held*, they were entitled to do so. The option clause did not set a time limit. Its exercise within a reasonable time was therefore proper, and any objection to the delay was waived by plaintiff's attempts to induce an agreement on rebuilding. (118 C.A.2d 547.) (See 11382 *Beach Partnership v. Libaw* (1999) 70 C.A.4th 212, 215, 82 C.R.2d 533 [lease provision that allowed either party to cancel lease in event of destruction that could not be rebuilt within 30 days prevailed over provision that gave tenant six successive options to extend lease].)

SUPPLEMENT: [This section is current through the latest supplement]

See 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §228 et seq.; 11B Am.Jur. Legal Forms 2d (2006 ed.), *Leases of*

Real Property §161:965 et seq.



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H. Termination of Tenancy.

3. Destruction of Premises.

b. Lessor's Covenant To Repair.

12 Witkin Sum. Cal. Law Real Property § 666

[§ 666] Lessor's Covenant To Repair.

The lease may contain a lessor's covenant to repair (see *supra*, §640). If it does and the premises are rendered uninhabitable, but the tenant voluntarily stays on while the landlord proceeds to repair, there is no termination, and the tenant remains liable for rent. (*Knoblaugh v. McKinney* (1935) 5 C.A.2d 339, 42 P.2d 332; see *infra*, §756.) (On rent abatement where landlord fails to remedy dilapidation within 60 days without good cause, see *supra*, §620.)

In *Mattal v. American Trust Co.* (1962) 208 C.A.2d 645, 25 C.R. 517, defendant lessor leased a building to plaintiff lessee. The lessor covenanted that if the premises were damaged or destroyed and could not be repaired or restored within 60 days after notice and possession "for the purpose of so restoring" them, the lease should terminate. If, however, the damage could be repaired within 60 days after notice and possession, the lessor must repair. The building was wholly destroyed by fire so that complete rebuilding was necessary. *Held*, summary judgment for defendant reversed. *Realty & Rebuilding Co. v. Rea* (1920) 184 C. 565, 569, 194 P. 1024, and *Friedman v. Isenbruck* (1952) 111 C.A.2d 326, 334, 244 P.2d 718 (see *supra*, §571), dealing with tenants' covenants, merely held that a covenant to repair did not require rebuilding. But the covenant here went far beyond the usual covenant to repair. By the use of the words "destroyed" and "restored" it contemplated rebuilding, and, if this could be done within the 60-day period, the lessor was obligated to do so. (208 C.A.2d 648.)

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12 Witkin Sum. Cal. Law Real Property § 667

[§ 667] In General.

(1) *Breach of Condition.* The tenant's breach of a *condition* of the lease gives the landlord the right to terminate and forfeit the estate. (See *infra*, §668.) This is consistent with the rule applicable to contracts generally. (See 1 *Summary* (10th), *Contracts*, §776 et seq.)

(2) *Breach of Covenant.* The tenant's breach of a *covenant* almost always gives the landlord a right to terminate, but for a different reason. Historically, covenants in leases are independent, and the breach of an independent covenant gives rise only to an action for damages and not a right to terminate the contract. (See *Knight v. Black* (1912) 19 C.A. 518, 522, 126 P. 512; *Exchange Sec. Co. v. Rossini* (1919) 44 C.A. 583, 585, 186 P. 828; 1 *Summary* (10th), *Contracts*, §§778, 810.) The result is that the landlord's breach of covenant normally does not justify termination by the tenant. (See *infra*, §672.)

But most leases are drawn by or on behalf of lessors, and contain an express provision making the lessee's performance of his or her covenants conditional and providing for the lessor's right to terminate for violation of conditions or covenants. The result is that, as a practical matter, the tenant's breach of what would ordinarily be deemed an independent covenant gives the landlord a right of termination or forfeiture of the leasehold. (See *Knight v. Black*, *supra*; *Budaeff v. Huber* (1961) 194 C.A.2d 12, 20, 14 C.R. 729; *Rest. 2d, Property (Landlord and Tenant)* §13.1 [remedies available when tenant fails to perform promise that was significant inducement to landlord to make lease]; for lease provisions, see C.E.B., 2 Office Leasing 2d, §29.6 et seq.; C.E.B., 1 Landlord-Tenant Practice 2d, §8.46 et seq.; 11B Am.Jur. Legal Forms 2d (1998 ed.), Leases of Real Property, §161:817 et seq.) Moreover, assignment, subletting, or waste in violation of the lease, by a tenant, subtenant, or executor or administrator, are grounds for termination. (C.C.P. 1161(4); see *Isom v. Rex Crude Oil Co.* (1905) 147 C. 659, 661, 82 P. 317 [right of rescission under C.C. 1930]; for limitation on commercial lessor's arbitrary withholding of consent to assignment, see *supra*, §552.)

(3) *Waste.* C.C.P. 1161(4) codifies the common law rule on use of leased property to avoid waste, and the plaintiff lessor in an unlawful detainer action must show that the tenant's acts substantially or permanently diminished or depreciated the market value of the property. Thus, in *Rowe v. Wells Fargo Realty Services* (1985) 166 C.A.3d 310, 319, 212 C.R. 374, the complaint alleged that defendant lessee repeatedly tampered with and damaged thermostats, and installed lights without plaintiff's express authorization. *Held*, summary judgment for defendant affirmed. Damage to

the thermostats was only a temporary condition, and installation of light fixtures did not injuriously affect the physical condition of the premises. (166 C.A.3d 320.) (See *Freeze v. Brinson* (1991) 3 C.A.4th Supp. 1, 4, 5 C.R.2d 227 [landlord who proved damage to premises but not substantial or permanent diminution of market value failed to establish waste under C.C. 1161(4); citing *Rowe*].)

West's Key Number Digest, Landlord and Tenant k.102 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Breach of Covenant*. See 11B Am.Jur. Legal Forms 2d (2006 ed.), Leases of Real Property §161:886 et seq.



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H. Termination of Tenancy.

4. Tenant's Breach.

b. Construction of Forfeiture Clause.

12 Witkin Sum. Cal. Law Real Property § 668

[§ 668] Construction of Forfeiture Clause.

(1) *Forfeiture Avoided.* The provision for forfeiture must be clear, and the court will attempt, by construction, to avoid it if enforcement would lead to inequitable results. (*McNeece v. Wood* (1928) 204 C. 280, 283, 267 P. 877; *Streicher v. Heimburge* (1928) 205 C. 675, 683, 272 P. 290; *Sexton v. Nelson* (1964) 228 C.A.2d 248, 256, 39 C.R. 407 [clause in printed lease form with figure for number of days of default not filled in was ineffective]; see 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §289 et seq.; for forms of forfeiture clauses, see 11B Am.Jur. Legal Forms 2d (1998 ed.), *Leases of Real Property* §161:816 et seq.)

In *Nieman v. Peterson* (1978) 86 C.A.3d Supp. 14, 150 C.R. 774, the lessee covenanted against use that would increase the insurance rate. The leased premises consisted of the first floor of a hotel, and the lease purpose was operation of a furniture store. The insurance company cancelled the policy because the combination of a hotel above a furniture store created a "high risk potential." Plaintiff lessor, forced to obtain new high risk insurance at a much higher cost, sought to terminate the lease on the ground that defendant lessee had violated the covenant. *Held*, judgment for lessee affirmed. Properly construed, the covenant applied only in the event the lessee made a different or unauthorized use of the premises, not when his use was expressly authorized by the lease. (86 C.A.3d Supp. 18.)

(2) *Compliance With Terms.* The landlord must strictly comply with the terms of the clause. (*Templar Mining Co. v. Williams* (1937) 23 C.A.2d 45, 47, 72 P.2d 566.) Unless the lease provides otherwise, a demand of performance is necessary. (*Mossi v. Fairbanks* (1912) 19 C.A. 355, 356, 125 P. 1071.) Thus, failure to pay rent does not itself justify a forfeiture. A demand for payment is necessary, and is usually made a part of the 3-day notice to quit. (See *J.B. Hill Co. v. Pinque* (1919) 179 C. 759, 761, 178 P. 952; *Downing v. Cutting Packing Co.* (1920) 183 C. 91, 95, 190 P. 455; *Wickstrom v. McGrath* (1927) 86 C.A. 651, 654, 261 P. 326; on 3-day notice to quit, see *infra*, §723.) However, if the lessee has no power to perform, demand would be useless and is excused. (*Harris v. Bissell* (1921) 54 C.A. 307, 311, 202 P. 453.)

(3) *Landlord's Election.* A forfeiture clause is not self-operative. The provision that, on default by the lessee, the lease "shall thereupon become and be null and void" merely gives an election to the landlord to forfeit, and does not empower the tenant to end the lease at will by failing to perform. (*Bank of America v. Moore* (1937) 18 C.A.2d 522, 526, 64 P.2d 460; see 1 Summary (10th), *Contracts*, §855.) The lessor cannot claim the benefit of the clause without an

affirmative act of election. Thus, in *Igaue v. Howard* (1952) 114 C.A.2d 122, 249 P.2d 558, the lease provided that, in the event of the lessee's default, it should, at the option of the lessors, "at once determine and be at an end." *Held*, this did not have the effect of forfeiting the leasehold, but merely gave the lessor the option to terminate in the manner provided by law. C.C. 791 provides that when a lease gives the lessor a right of reentry, it is made on a 3-day notice pursuant to C.C.P. 1161 and 1162, and this "refers to a provision in a lease for its termination by the lessor on default of the lessee." (114 C.A.2d 125.)

(4) *Substantial Breach Is Required*. To justify forfeiture, the breach of condition must be "material" or "substantial." (See *Medico-Dental Bldg. Co. of Los Angeles v. Horton & Converse* (1942) 21 C.2d 411, 433, 132 P.2d 457, *infra*, §673; *Poundstone v. Gofoor* (1930) 104 C.A. 212, 216, 285 P. 403; *Keating v. Preston* (1940) 42 C.A.2d 110, 118, 108 P.2d 479; 54 A.L.R.4th 595 [application of rule that commercial lease may be canceled only for "material" breach].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Forfeiture Avoided*. See 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §236 et seq.; 11B Am.Jur. Legal Forms 2d (2006 ed.), *Leases of Real Property* §161:885 et seq.



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12 Witkin Sum. Cal. Law Real Property § 669

[§ 669] Waiver.

(1) *Acceptance of Rent.* The right of forfeiture may be waived by accepting rent with knowledge of the complete breach of a single covenant (calling for a single act). (*Kern Sunset Oil Co. v. Good Roads Oil Co.* (1931) 214 C. 435, 440, 6 P.2d 71; *Keating v. Preston* (1940) 42 C.A.2d 110, 120, 108 P.2d 479; *Powell v. Cannon* (1953) 119 C.A.2d 748, 752, 260 P.2d 202; *Soon v. Beckman* (1965) 234 C.A.2d 33, 36, 44 C.R. 190; *EDC Associates, Ltd. v. Gutierrez* (1984) 153 C.A.3d 167, 171, 200 C.R. 333; see 50 A.L.R.2d 1365 [enforcement of forfeiture clause of lease made or held by cotenants as lessors]; 39 A.L.R.4th 1204 [lessor's retention of past-due rental payments as precluding termination of lease and dispossession of lessee for nonpayment of rent]; 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §330 et seq.; 3 Proof of Facts 2d 167 [lessor's waiver of right to declare forfeiture].)

Federal housing assistance payments, however, do not constitute rent. A landlord's acceptance of those payments on the tenant's behalf with knowledge of the tenant's breach does not waive the landlord's right to terminate the lease. (*Savett v. Davis* (1994) 29 C.A.4th Supp. 13, 20, 34 C.R.2d 550.)

If the violation is of a continuing covenant (calling for continuous acts or maintenance of some condition throughout the lease's term), acceptance of rent does not constitute a waiver as to future breaches. (*Myers v. Herskowitz* (1917) 33 C.A. 581, 584, 165 P. 1031 [covenant to keep passageway free and clear at all times]; *Extension Oil Co. v. Richfield Oil Corp.* (1942) 52 C.A.2d 105, 108, 125 P.2d 895 [covenant in oil lease for continuous drilling; examples of continuing covenants include covenants to pay rent, to keep premises in repair, to keep premises insured, to pay taxes, and to cultivate properly]; *Budaeff v. Huber* (1961) 194 C.A.2d 12, 20, 14 C.R. 729.)

(2) *Failure To Demand Performance.* In *Group Property v. Bruce* (1952) 113 C.A.2d 549, 248 P.2d 761, a lease contained a lessee's covenant to make regular improvements each year at minimum cost, and an option to buy the property at a certain price. When plaintiff lessee notified defendant lessor of his election to buy, defendant gave notice of termination for breach of the covenant to make improvements. *Held*, plaintiff lessee was entitled to specific performance, for defendant had made no demand for performance of the covenant during the years involved. (113 C.A.2d 556.) (See *Salton Community Services Dist. v. Southard* (1967) 256 C.A.2d 526, 533, 64 C.R. 246; 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §328 et seq.)

(3) *Bad Faith*. The landlord may also lose the right of forfeiture by conduct in bad faith, intended to induce a technical breach by the tenant. (*Strom v. Union Oil Co. (1948) 88 C.A.2d 78, 81, 198 P.2d 347* [landlord, transferee from original lessor, gave no directions about place of payment, and refused to accept registered letters].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Acceptance of Rent*. See CACI, No. 4324 [Affirmative Defense--Waiver by Acceptance of Rent]; CACI, No. 4327 [Affirmative Defense--Landlord's Refusal of Rent]; *49 Am.Jur.2d (2006 ed.), Landlord and Tenant §262 et seq.* (2) *Failure To Demand Performance*. See *49 Am.Jur.2d (2006 ed.), Landlord and Tenant §260 et seq.*



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d. Relief From Forfeiture.

12 Witkin Sum. Cal. Law Real Property § 670

[§ 670] Relief From Forfeiture.

(1) *Statutory Proceeding.* The general statutory declaration of the right to relief from forfeiture (C.C. 3275) is supplemented by *C.C.P. 1179*, establishing a special proceeding for the relief of a defaulting tenant. (See *Hignell v. Gebala* (1949) 90 C.A.2d 61, 70, 202 P.2d 378; *Cambridge v. Webb* (1952) 109 C.A.2d Supp. 936, 937, 244 P.2d 505 [relief denied]; *Roth v. Morton's Chefs Services* (1985) 173 C.A.3d 380, 387, 218 C.R. 684 [no equitable relief where tenant's breach of covenant requiring consent to assignment was accompanied by fraudulent concealment]; 31 A.L.R.2d 321 [relief from forfeiture of lease for nonpayment of rent]; 27 A.L.R.4th 266 [circumstances excusing failure to give timely notice of exercise of option to renew or extend lease]; 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §339 et seq.; 13 *Summary* (10th), *Equity*, §20 et seq.) (For procedure and form of application, see C.E.B., 1 Landlord-Tenant Practice 2d, §§13.56, 13.57.)

Both *C.C.P. 1179* and C.C. 3275 vest near plenary discretion in the trial court. "Although no reported decision has expressly so held, there is no reason why the same standard should not also govern review of denials of applications" for relief under *C.C.P. 1179* and C.C. 3275. (*Superior Motels v. Rinn Motor Hotels* (1987) 195 C.A.3d 1032, 1064, 241 C.R. 487.)

In 366-386 *Geary St., L.P. v. Superior Court* (1990) 219 C.A.3d 1186, 1198, 268 C.R. 678, a lessee executed a promissory note secured by the lease. Following the lessee's default, the holders of the note obtained a judgment of foreclosure and order of sale but never foreclosed. After the lessor filed an unlawful detainer action and obtained a bankruptcy court order directing the lessee to surrender the premises, the noteholders filed a petition in their foreclosure action for relief under *C.C.P. 1179*. *Held*, relief under *C.C.P. 1179* was unavailable.

(a) The petitioners, rather than seeking to have the lessee restored to its former leasehold, seek to put themselves in possession based on their former security interest in the lease. Nothing in *C.C.P. 1179* authorizes that relief. (219 C.A.3d 1198, 1199.)

(b) *C.C.P. 1179* relief applies only to unlawful detainer proceedings. No unlawful detainer judgment under *C.C.P. 1174* (see *infra*, §737) was rendered. *C.C.P. 1179* requires that the petition for relief be filed and served on the lessor as part of the lessor's unlawful detainer action; this petition was filed in the foreclosure action to which the lessor was not

even a party. (219 C.A.3d 1199.) (See *Glendale Fed. Bank v. Hadden* (1999) 73 C.A.4th 1150, 1157, 87 C.R.2d 102 [relying on 366-388 *Geary St., L.P. v. Superior Court*; relief under C.C.P. 1179 or C.C. 3275 was not available to lender that was beneficiary on deed of trust secured by lessee's leasehold interest; lender should have obtained agreement from landlord allowing lender to cure default by tenant].)

(2) *Tenant's Failure To Exercise Renewal Option*. In *Simons v. Young* (1979) 93 C.A.3d 170, 155 C.R. 460, the lessee, with an option to renew a 2-year lease, remodeled the premises. The time for exercise of the renewal option expired, but, several weeks afterward, on being notified by the lessors that he must vacate, he made two belated attempts to renew. On rejection of his notices, he brought this action for specific performance. The trial judge found that he would suffer extreme hardship from denial of relief and that the lessors had not suffered any damage from the late notices. *Held*, judgment granting specific performance reversed. Timely exercise of the option was a condition precedent to renewal. (93 C.A.3d 179; see *supra*, §531.) Hence, C.C. 3275 was inapplicable, for the lessee did not suffer a forfeiture; i.e., the option automatically expired by the failure of the lessee to exercise his right. (93 C.A.3d 182, 183, 184.) Cases in other states are divided on whether a lessee in this situation can be given relief under general equitable principles, but the better view is that the court cannot extend the option period in this manner. (93 C.A.3d 186, 189.) (See *Bekins Moving & Storage Co. v. Prudential Ins. Co.* (1985) 176 C.A.3d 245, 221 C.R. 738, *supra*, §531.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Proceeding*. See 49 *Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §269 et seq. *Plenary discretion in trial court*: C.C.P. 1179 gives the trial court authority to relieve a defendant of the burdens of an unlawful detainer judgment. The court has broad equitable discretion to determine the conditions on which relief will be granted so that "exact justice" will be done. (*Gill Petroleum v. Hayer* (2006) 137 C.A.4th 826, 833, 40 C.R.3d 648 [in relieving defendants from forfeiture, trial court properly ordered them to pay only contract amount of rent, as opposed to per diem damages set forth in unlawful detainer judgment].)



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e. Express Clause Against Waiver.

12 Witkin Sum. Cal. Law Real Property § 671

[§ 671] Express Clause Against Waiver.

In *Karbelnig v. Brothwell* (1966) 244 C.A.2d 333, 53 C.R. 335, the lease contained the usual provision prohibiting assignment or sublease without consent, and a clause that the lessor's waiver of a term should not be deemed a waiver of subsequent breach, and that acceptance of a rental payment would not constitute a waiver of breach other than in nonpayment of that rental. Defendant lessees assigned without consent. Plaintiff lessors sued for declaratory and other relief, but continued to accept rent. The trial judge found that the assignment was a breach, but that acceptance of rent was a waiver. *Held*, judgment for defendant lessees reversed. As cases from other jurisdictions have recognized, a no-waiver clause is a relinquishment by lessees and their assignees of any right to assert waiver, and a forfeiture may be declared, unless (a) the lessor expressly waives his right of forfeiture, or (b) the lessor's conduct, other than acceptance of rent, gives rise to an estoppel. (244 C.A.2d 342.)

The clause creates a one-sided agreement. "It has been held that the effect of such an agreement would be that after a default once occurred, the lease would become, in the absence of an estoppel, one terminable at the will of the lessor, and so long as he did not exercise his option to terminate it, it would continue in effect." (244 C.A.2d 342.) (For lease provisions negating waiver, see C.E.B., 2 Office Leasing 2d, §29.14, Chap. 32; C.E.B., 1 Landlord-Tenant Practice 2d, §1.75; 11B Am.Jur. Legal Forms 2d (1998 ed.), Leases of Real Property §161:877 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

See 11B Am.Jur. Legal Forms 2d (2006 ed.), Leases of Real Property §161:946 et seq.



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5. Landlord's Breach.

a. Earlier Doctrine of Independent Covenants.

12 Witkin Sum. Cal. Law Real Property § 672

[§ 672] Earlier Doctrine of Independent Covenants.

For mainly historical reasons, earlier cases held that the promises in the lease are independent unless expressly made conditional. The usual lease made the tenant's covenants conditional, but did not contain a comparable provision as to the lessor's covenants. Hence, when the instrument was executed and delivered, and the relationship was established, failure of the lessor to perform covenants to repair, to make improvements, or to give the lessee an option to purchase, for example, did not justify refusal by the lessee to pay rent; i.e., the obligations were independent covenants, not concurrent conditions. (See *Exchange Sec. Co. v. Rossini* (1919) 44 C.A. 583, 585, 186 P. 828 [landlord's covenant giving tenant preemptive right to purchase property]; 28 A.L.R.2d 446 [tenant's rights and remedies on landlord's breach of covenant to repair]; 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §§84, 729, 773 et seq.)

In *Hosang v. Minor* (1962) 205 C.A.2d 269, 22 C.R. 794, plaintiff lessor of farm property covenanted to make repairs to pumps used to produce irrigation water, but the lease contained no covenant to furnish water, and the duty to maintain the pumps was assumed by defendant lessee. When the pumps were destroyed by a fire of undetermined origin, defendant refused to pay rent. *Held*, judgment for defendant reversed. The argument that the covenant to repair went to the entire consideration and thus was an implied condition to the lessee's liability for rent was untenable, for the lessor's limited covenant was not to furnish water or maintain the equipment but only to pay for repairs from normal use. (205 C.A.2d 273.)

The independent covenant theory, usually invoked by the lessor, may also be applied against the lessor. Thus, in *Ng v. Warren* (1947) 79 C.A.2d 54, 179 P.2d 41, defendant lessor contended that plaintiff lessee, by paying rent in full after knowledge of the lessor's breach, had waived the breach. *Held*, there was no waiver. The lessee may elect either to recoup his damages from the rent, or pay rent and bring a separate action for damages. (79 C.A.2d 60.)

SUPPLEMENT: [This section is current through the latest supplement]

See 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §§594, 627 et seq.



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b. Modern Theory of Dependent Covenants.

12 Witkin Sum. Cal. Law Real Property § 673

[§ 673] Modern Theory of Dependent Covenants.

In *Medico-Dental Bldg. Co. of Los Angeles v. Horton & Converse* (1942) 21 C.2d 411, 132 P.2d 457, the Supreme Court departed from the conventional view and followed the rule applicable to ordinary bilateral contracts for an agreed exchange, that the mutual promises will be construed as dependent, i.e., as concurrent conditions. The landlord violated a covenant against leasing space to a competitor, and the court held that the lessee could terminate. Although the court found some slight evidence tending to show the actual intention of the parties, the opinion mainly rests on the ground that the covenants were dependent because the exclusive right to conduct the business was vital to the lessee's successful operation. (21 C.2d 419.) *Exchange Sec. Co. v. Rossini* (1919) 44 C.A. 583, 585, 186 P. 828, was distinguished on the theory that the covenant there was in its very nature collateral to and independent of the main agreement for lease of the property. (21 C.2d 421.)

In *Kulawitz v. Pacific Woodenware & Paper Co.* (1944) 25 C.2d 664, 669, 155 P.2d 24, the court followed *Medico-Dental Bldg. Co.*, although at the time of the landlord's breach, the tenant was in default in rental payments. (See Law Rev. Com. Comment to C.C. 1951.2, *infra*, §694 et seq. [under C.C. 1951.2, which is not retroactive, lessor is excused from further performance after lease terminates; this changes result in *Kulawitz*].)

The theory of dependent covenants is approved by the Second Restatement: "At old common law the promises made by a landlord in a lease were independent obligations, so that the failure of the landlord to perform them did not give the tenant any right to disregard his obligations under the lease. The emerging judicial sentiment in regard to the landlord's obligation to provide leased property that meets health and safety standards repudiates the independence-of-obligations approach in leases in that area, and this Chapter is based on a logical extension of this doctrine into the area of landlords' promises where the performance of the promise is a significant inducement to the making of the lease by the tenant." (Rest.2d, Property (Landlord and Tenant), Chap. 7, Introductory Note.)

SUPPLEMENT: [This section is current through the latest supplement]



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12 Witkin Sum. Cal. Law Real Property § 674

[§ 674] Illegal Use of Premises.

If the lease itself is valid and does not restrict the lessee to a particular use, an occasional use by the lessee for an illegal purpose is not ground for forfeiture in the absence of express provision. The landlord's remedy is an action for damages or an injunction against the unlawful activity. (*Keating v. Preston* (1940) 42 C.A.2d 110, 116, 108 P.2d 479 [lessee of restaurant sometimes placed racing bets for customers]; see *Shephard v. Lerner* (1960) 182 C.A.2d 746, 6 C.R. 433, supra, §518 [lease of premises that had been converted from hotel to apartment uses before execution of lease in contravention of local ordinances and state statutes was contract for illegal purpose and no enforceable rights or duties arose under it].)

However, *C.C.P. 1161(4)* provides for termination on the tenant's "maintaining, committing, or permitting the maintenance or commission of a nuisance upon the demised premises or using such premises for an unlawful purpose," which includes illegally selling a controlled substance. (See *Rest.2d, Property (Landlord and Tenant) §12.5* [landlord who is not party to illegal use may terminate or hold tenant to lease and seek other relief]; 28 *Pacific L. J.* 663 [using civil remedies to evict tenants engaged in illegal drug activity]; 100 *A.L.R.2d* 465 [forfeiture or termination of lease because of tenant's illegal use of premises]; 49 *Am.Jur.2d* (1995 ed.), *Landlord and Tenant* §§310, 311.)

To justify termination, the illegality must relate to the use of the premises. In *Deutsch v. Phillips Petroleum Co.* (1976) 56 C.A.3d 586, 128 C.R. 497, plaintiffs became the successors of a lessor of a service station leased to Tidewater. Defendant acquired, among other assets of Tidewater, 3,250 service stations, including that leased by plaintiff's predecessor. In a federal antitrust action, defendant was adjudged guilty of violation of the Clayton Act and ordered to divest itself of assets so acquired. Plaintiffs then sought to terminate the lease, invoking a provision that the lessee "shall conduct its business on the said demised premises in conformity with all State or Federal Statutes and Municipal Ordinances applicable thereto." *Held*, the alleged antitrust violation was not a ground for termination.

(a) *C.C.P. 1161(4)* was inapplicable because the section requires a physical use of the premises for an unlawful purpose. (56 C.A.3d 589, footnote 2.)

(b) The express covenant was also inapplicable. Properly construed, it refers to violation of a statute that applies to the premises. The violation involved here was in the conduct of defendant's business and not related to the premises. (56 C.A.3d 590.)

(c) Analysis of the purpose of the covenant leads to the same conclusion. It is designed to limit the functional use of the property. "Such a provision ensures that the lessee will harm neither the physical attributes nor the reputation of the property in question. In addition, it serves as an additional assurance to the lessor that the lessee will utilize the demised premises in a manner conducive to the lessor's interest so as to secure the continued payment of the rental obligations. The asserted antitrust violation does not pertain to any of the aforementioned purposes. Such a violation has certainly failed to physically threaten the well-being of the property. Moreover, such a civil violation is not the type of unlawful criminal activity which attaches a stigma to the premises. Finally, plaintiffs have not alleged any facts demonstrating that this violation has so impaired defendant's use of the premises as to threaten plaintiffs' continued receipt of the monthly rental obligations." (56 C.A.3d 591.) (See *Rowe v. Wells Fargo Realty Services* (1985) 166 C.A.3d 310, 316, 212 C.R. 374 [following *Deutsch*; lessee's violation of federal energy regulation by turning down thermostat was insufficient to justify landlord's attempted lease termination]; 92 A.L.R.3d 967 [lease provisions allowing termination or forfeiture for violations of law].)

SUPPLEMENT: [This section is current through the latest supplement]

C.C.P. 1161(4) was amended in 2008 to provide that if a person commits an act of domestic violence, sexual assault, or stalking against another tenant or subtenant on the premises there is a rebuttable presumption affecting the burden of proof that the person has committed a nuisance on the premises. The presumption does not apply, however, if the victim of the act of domestic violence, sexual assault, or stalking, or a household member of the victim, other than the perpetrator, has not vacated the premises.

See *Cook v. Buena Park* (2005) 126 C.A.4th 1, 5, 23 C.R.3d 700 [ordinance violated procedural due process by requiring landlords to undertake eviction proceedings against all occupants of rental unit when police suspected tenant had engaged in or permitted illegal drug activity, gang-related crime, or drug-related nuisance in or near rental property]; 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §§252, 253.



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12 Witkin Sum. Cal. Law Real Property § 675

[§ 675] Surrender.

(1) *In General.* A tenant may give up the estate to the landlord and terminate the tenant's obligations by a surrender. This may be accomplished by an express agreement of the parties for cancellation or rescission of the lease. (See *Rognier v. Harnett* (1941) 45 C.A.2d 570, 574, 114 P.2d 654; *Kreling v. Walsh* (1947) 77 C.A.2d 821, 832, 176 P.2d 965; 78 A.L.R.2d 933 [oral surrender of written lease]; 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §242 et seq.; 11B Am.Jur. Legal Forms 2d (1998 ed.), *Leases of Real Property* §161:859 et seq.) Surrender usually occurs, however, by operation of law, where the parties do something inconsistent with the continuance of the old estate, and an estoppel results. (See Cal. Civil Practice, 3 Real Property Litigation, §17:53 [affirmative defense of surrender by operation of law]; 18 A.L.R.5th 437 [landlord permitting third party to occupy premises rent free as acceptance of tenant's surrender]; 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §248 et seq.; 26 Proof of Facts 2d 525 [landlord's acceptance of surrender].)

(2) *New Lease.* If the landlord with the tenant's consent gives a new lease of the property, a surrender results, for there cannot be two valid outstanding leases of the same property for the same term. (*Security-First Nat. Bank of Los Angeles v. Marxen* (1938) 28 C.A.2d 446, 453, 82 P.2d 727.) A new lease to the same tenant may have the effect of a surrender and extinguishment of rights under the old lease, unless the court finds a contrary intention. (See 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §§252, 253.)

West's Key Number Digest, Landlord and Tenant k.109

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §§207 et seq., 212 et seq.; 11B Am.Jur. Legal Forms 2d (2006 ed.), *Leases of Real Property* §161:928 et seq.

(2) *New Lease.* See 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §215.



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12 Witkin Sum. Cal. Law Real Property § 676

[§ 676] Abandonment.

Before the enactment of C.C. 1951.2 in 1970 (see *infra*, §692 et seq.), if, after abandonment by the tenant, the landlord reentered and took unqualified possession for the landlord's own benefit, a surrender occurred, and the tenant was released. (See *Welcome v. Hess* (1891) 90 C. 507, 512, 27 P. 369; *Triest & Co. v. Goldstone* (1916) 173 C. 240, 243, 159 P. 715; *Bernard v. Renard* (1917) 175 C. 230, 233, 165 P. 694; *Dorcich v. Time Oil Co.* (1951) 103 C.A.2d 677, 683, 230 P.2d 10 [landlord could avoid surrender by notifying tenant that retaking was on behalf of tenant, and that landlord intended to sublet to mitigate damages]; *Flynn v. Mikelian* (1962) 208 C.A.2d 305, 310, 25 C.R. 138; 35 So. Cal. L. Rev. 34 [landlord's remedies on abandonment (before 1970)]; 84 A.L.R.4th 183 [what constitutes abandonment of residential or commercial lease]; 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §§249, 255 et seq.; 26 Proof of Facts 2d 525 [landlord's acceptance of abandonment or surrender]; 70 Proof of Facts 3d 1 [proof of tenant's abandonment].) C.C. 1951.2 changed the rule to permit the landlord to recover damages or rent after an abandonment. (See *Millikan v. American Spectrum Real Estate Services Calif.* (2004) 117 C.A.4th 1094, 1100, 1101, 12 C.R.3d 459, citing the text; *infra*, §692 et seq.)

A surrender results only where there is an actual abandonment by the tenant and an acceptance of surrender by the lessor. Thus, in *Kassan v. Stout* (1973) 9 C.3d 39, 106 C.R. 783, 507 P.2d 87, plaintiff lessees sublet in violation of their lease. Defendant landlord refused the rent check tendered by the sublessee and by plaintiffs, and evicted the sublessees. Immediately before the eviction, defendant posted a notice outlining claimed breaches of the lease and stating that he was retaking possession of the property without terminating the lease and would relet it as plaintiff's agent. *Held*: (a) There was no abandonment; plaintiffs did not leave the premises vacant and never asserted that they were not bound by the lease. (b) There was no acceptance of surrender; defendant disavowed any intent to terminate the lease. Hence, the eviction was unlawful, and plaintiffs had a cause of action for forcible entry (*infra*, §757). (For statutory test of abandonment, see *infra*, §695.)

West's Key Number Digest, Landlord and Tenant k.110

SUPPLEMENT: [This section is current through the latest supplement]
See 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §§213, 216 et seq.



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12 Witkin Sum. Cal. Law Real Property § 677

[§ 677] Foreclosure of Senior Mortgage.

(1) *Termination of Lease.* "A foreclosure proceeding destroys a lease junior to the deed of trust, as well as the lessee's rights and obligations under the lease." (*Dover Mobile Estates v. Fiber Form Products* (1990) 220 C.A.3d 1494, 1498, 270 C.R. 183 [lease subordinated to subsequent deed of trust was terminated by trustee's sale]; *San Francisco Design Center Associates v. Portman Cos.* (1995) 41 C.A.4th 29, 45, 50 C.R.2d 716 [extinguishment principle stated in *Dover* applies to rights between prospective landlord and tenant, not just to tenants in possession].)

(2) *Effect of Attornment Clause.* *Dover* was distinguished in *Miscione v. Barton Dev. Co.* (1997) 52 C.A.4th 1320, 61 C.R.2d 280. Defendant tenants entered into an office lease that contained an attornment clause, under which defendants agreed that they would accept as a substituted landlord the purchaser at a foreclosure sale, as long as the purchaser acquired and accepted the property subject to the lease. The property was later purchased at a foreclosure sale and subsequently sold to plaintiff. When defendants vacated the premises and refused to pay rent, plaintiff sued for breach of the lease and fraud. The trial judge granted summary judgment for defendants, relying on *Dover*. *Held*, reversed.

Reliance on *Dover* is inappropriate because that case did not discuss or rule on an attornment clause. Here, in contrast, the attornment clause fixed the rights of the parties after the foreclosure. (52 C.A.4th 1329.) Defendants attorned to the new landlord, whoever that may be, when they entered into the lease. The purchaser at the foreclosure sale then "accepted" the property subject to the lease, a condition precedent of the attornment clause, by notifying defendants on the day of acquisition that it was the new owner and that all rental payments should be made to it. (52 C.A.4th 1331.) Plaintiff, as the purchaser's assignee, is thus entitled to the status of landlord and defendants are obligated under the lease. (52 C.A.4th 1332.) (See *Principal Mut. Life Ins. Co. v. Vars, Pave, McCord & Freedman* (1998) 65 C.A.4th 1469, 1483, 77 C.R.2d 479 [discussing *Dover* and *Miscione*; attornment clause here contemplated new lease, after foreclosure, with landlord's successor in interest; first lease was extinguished on foreclosure, but foreclosing lender was entitled to enforce attornment clause as third-party beneficiary and tenant was obligated to enter into new lease with lender]; *Valley Inv., L.P. v. BancAmerica Commercial Corp.* (2001) 88 C.A.4th 816, 825, 106 C.R.2d 689, supra, §539 [distinguishing *Dover*; foreclosure of leasehold mortgage did not extinguish duties of assignee, who had assumed lease, to lessor; leasehold mortgage was junior to lessor's reversionary interest]; *C.H.E.G. v. Millennium Bank* (2002) 99 C.A.4th 505, 514, footnote 4, 121 C.R.2d 443 [citing *Principal Mut. Life Ins. Co.* and applying concept of attornment following bankruptcy, rather than foreclosure].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Termination of Lease*. See *Aviel v. Ng* (2008) 161 C.A.4th 809, 815, 74 C.R.3d 200 [because mortgages and deeds of trust are functionally and legally same, commercial lease that was expressly subordinated to future mortgages was extinguished by sale under power of sale in deed of trust; citing *Dover Mobile Estates v. Fiber Form Products* (1990) 220 C.A.3d 1494, 270 C.R. 183, text, p. 793].



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H. Termination of Tenancy.

10. Termination by Notice.

a. In General.

12 Witkin Sum. Cal. Law Real Property § 678

[§ 678] In General.

A tenancy for a fixed term expires without notice. (See *supra*, §664.) Moreover, a tenant at sufferance is not entitled to notice. (*McLeran v. Benton* (1887) 73 C. 329, 340, 14 P. 879.)

Notice is required, however, to terminate a tenancy at will (*infra*, §679) or a periodic tenancy (*infra*, §680). The parties may, of course, expressly provide in the lease for the kind and period of notice to terminate the tenancy. (See *Watkins v. McCartney* (1922) 57 C.A. 643, 644, 207 P. 909 [tenancy from month to month]; *Devonshire v. Langstaff* (1935) 10 C.A.2d 369, 372, 51 P.2d 902; *Hignell v. Gebala* (1949) 90 C.A.2d 61, 67, 202 P.2d 378; *Fifth & Broadway Partnership v. Kimny* (1980) 102 C.A.3d 195, 200, 162 C.R. 271; *Folberg v. Clara G.R. Kinney Co.* (1980) 104 C.A.3d 136, 140, 163 C.R. 426; Cal. Civil Practice, 3 Real Property Litigation, §21:15 et seq.; 49 *Am.Jur.2d* (1995 ed.), *Landlord and Tenant* §264 et seq.; 11B *Am.Jur. Legal Forms* 2d (1998 ed.), *Leases of Real Property* §§161:910 et seq., 161:1176 et seq.)

West's Key Number Digest, Landlord and Tenant k.94 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

See 49 *Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §218 et seq.; 11B *Am.Jur. Legal Forms* 2d (2006 ed.), *Leases of Real Property* §§161:970 et seq., 161:1252 et seq.



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10. Termination by Notice.
b. Tenancy at Will.

12 Witkin Sum. Cal. Law Real Property § 679

[§ 679] Tenancy at Will.

If the tenancy has no fixed term, it will continue indefinitely until one party chooses to end it. Hence, in tenancies at will, notice of termination is the necessary and normal means of bringing the tenancy to an end. (See *Rest.2d, Property (Landlord and Tenant) §1.6*; *49 Am.Jur.2d (1995 ed.)*, *Landlord and Tenant §82 et seq.*)

In California, a tenancy at will "however created" may be terminated by not less than 30 days' written notice served on the tenant. (*C.C. 789, 790*; *C.C.P. 1161(1), 1162*; see *Carteri v. Roberts (1903) 140 C. 164, 166, 73 P. 818*; *Turney v. Collins (1941) 48 C.A.2d 381, 391, 119 P.2d 954*; *First & C Corp. v. Wencke (1967) 253 C.A.2d 719, 722, 61 C.R. 531*.) The words "however created" in *C.C. 789* mean that termination of every tenancy at will, whether it arises under no agreement at all or under an unenforceable oral lease, requires the same 30-day notice. (*Tracy v. Donovan (1918) 37 C.A. 350, 351, 174 P. 113*; see *Alves v. Rodrigues (1948) 84 C.A.2d 333, 337, 190 P.2d 649 [oral lease]*.)

SUPPLEMENT: [This section is current through the latest supplement]
See *49 Am.Jur.2d (2006 ed.)*, *Landlord and Tenant §121*.



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12 Witkin Sum. Cal. Law Real Property § 680

[§ 680] Periodic Tenancy.

(1) *30-Day Notice.* To terminate a periodic tenancy, notice must be written, and given as prescribed in *C.C.P. 1162* (personal delivery if possible, other methods permissible if not), or by sending a copy by certified or registered mail. In addition, the lessee may send the copy by mail to the agent of the lessor to whom the lessee paid rent, or may deliver a copy to the agent personally. (C.C. 1946.) An electronic record may not be substituted for notice that is required to be sent under *C.C.P. 1162*. (C.C. 1633.3(c).) Notice must be given "at least as long before the expiration thereof as the term," but not exceeding 30 days. (C.C. 1946.) The 30-day notice period of C.C. 1946 is not extended by the service by mail provision of *C.C.P. 1013(a)* (see 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §28). Hence, an unlawful detainer action filed 30 days after service by mail pursuant to *C.C.P. 1162(3)* is not premature. (*Highland Plastics v. Enders* (1980) 109 C.A.3d Supp. 1, 7, 167 C.R. 353; see *Losornio v. Motta* (1998) 67 C.A.4th 110, 115, 78 C.R.2d 799 [service and notice provisions of *C.C.P. 1162* and extension of time provisions of *C.C.P. 1013* are mutually exclusive; *C.C.P. 1013(a)* does not extend 30-day notice period required by C.C. 1946 and *C.C.P. 1162*].)

If the tenancy is "from month to month," 30 days' notice may be given "at any time and rent shall be due and payable to and including the date of termination." (C.C. 1946.) The parties may agree at its creation that 7 days' notice before the expiration of the term will be sufficient. (C.C. 1946; see *Wallace v. Daley* (1990) 220 C.A.3d 1028, 1039, 270 C.R. 85 [month-to-month tenant's acquisition of one-third interest in the property did not terminate tenancy; termination requires 30 days' notice in accordance with C.C. 1946]; 49 *Am.Jur.2d* (1995 ed.), *Landlord and Tenant* §132; on terminating single lodger's tenancy in owner-occupied building, see C.C. 1946.5, *supra*, §514.)

(2) *60-Day Notice Period for Residential Property.* C.C. 1946.1 creates an exception from C.C. 1946 for residential real property. It expires on January 1, 2006. (C.C. 1946.1(g).) A hiring of residential real property for an unspecified term is deemed to be renewed as stated in C.C. 1945 (*supra*, §509) (renewal on same terms for same time) at the end of the term implied by law, unless one of the parties gives written notice to the other of the party's intention to terminate the tenancy. (C.C. 1946.1(a).) An owner of a residential dwelling must give notice at least 60 days before the proposed termination date. A tenant must give notice for a period at least as long as the term of the periodic tenancy before the proposed termination date. (C.C. 1946.1(b).)

The duration of notice required from owners is reduced to 30 days if the tenant has resided in the dwelling for less

than 1 year. (C.C. 1946.1(c).) The time is also reduced to 30 days if all of the following are true: (a) the unit is alienable separate from the title to another unit; (b) the owner has contracted to sell the unit to a bona fide purchaser for value, and has established an escrow with a licensed escrow agent or a licensed real estate broker; (c) the purchaser is a natural person; (d) the notice is given no more than 120 days after the escrow has been established; (e) notice was not previously given to the tenant under C.C. 1946.1(a); and (f) the purchaser in good faith intends to reside in the property for at least 1 full year after the termination of the tenancy. (C.C. 1946.1(d).)

The notices required by C.C. 1946.1 must be given in the manner prescribed in *C.C.P. 1162* (infra, §727) or by sending a copy by certified or registered mail. (C.C. 1946.1(e).) C.C. 1946.1 does not affect the authority of a public entity that regulates or monitors eviction. (C.C. 1946.1(f).) (See 33 *McGeorge L. Rev.* 207 [impact of C.C. 1946.1 and other provisions intended to assist tenants in tight rental market].)

West's Key Number Digest, Landlord and Tenant k.116

SUPPLEMENT: [This section is current through the latest supplement]

(1) *30-Day Notice*. See CACI, No. 4306 [Termination of Month-to-Month Tenancy--Factual Elements]; CACI, No. 4307 [Sufficiency and Service of Notice of Termination of Month-to-Month Tenancy]; 49 *Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §117.

Cross-Reference: 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §30.(2) *60-Day Notice Period for Residential Property*. C.C. 1946.1 was extended in 2006 and will expire on January 1, 2010. (C.C. 1946.1(h).) C.C. 1946.1(e) and (f) were relettered C.C. 1946.1(f) and (g), respectively, in 2006.

See CACI, No. 4306 [Termination of Month-to-Month Tenancy--Factual Elements]; CACI, No. 4307 [Sufficiency and Service of Notice of Termination of Month-to-Month Tenancy].

After an owner has given notice of his or her intention to terminate the tenancy under C.C. 1946.1, a tenant may also give notice of his or her intention to terminate the tenancy under C.C. 1946.1. The tenant's notice must be for a period at least as long as the term of the periodic tenancy and the proposed date of termination must occur before the owner's proposed date of termination. (C.C. 1946.1(e), added in 2006.) (3) *(New) 90-Day Notice for Beneficiaries of Reduced Rent Agreements With Governmental Agencies*. If an owner terminates or fails to renew an agreement with a governmental agency that provides for rent limitations to a qualified tenant, the tenant must be given at least 90 days' written notice of the effective termination date. The tenant is not obligated to pay more than the tenant's portion of the rent under the agreement for 90 days following receipt of the notice. (C.C. 1954.535.) The 90-day notice requirement applies statewide and is not limited to rent-controlled jurisdictions. (*Wasatch Property Management v. Degrate* (2005) 35 *C.4th* 1111, 1117, 29 *C.R.3d* 262, 112 *P.3d* 647 [tenant receiving rent assistance through federal Section 8 program (42 U.S.C., §1437f) should have been given 90 days' notice, rather than standard 30 days' notice under C.C. 1946]; see *Apartment Assn. of Los Angeles County v. Los Angeles* (2006) 136 *C.A.4th* 119, 129, 38 *C.R.3d* 575 [municipal ordinance prohibiting landlord who terminates Section 8 housing contract from charging tenant more than tenant's portion of rent under former contract conflicted with and was preempted by C.C. 1954.535; ordinance protected tenant indefinitely, whereas statute does so for only 90 days].)

(4) *(New) Notice by Victim of Domestic Violence, Sexual Assault, or Stalking*. C.C. 1946.7, added in 2008, provides as follows:

(a) *Victim may terminate tenancy*. A tenant may notify the landlord that the tenant or a household member was a victim of domestic violence, sexual assault, or stalking, and that the tenant intends to terminate the tenancy. (C.C. 1946.7(a); for definition of "household member," see C.C. 1946.7(h).)

(b) *Notice requirements*. A notice to terminate a tenancy under C.C. 1946.7 must be in writing. A copy of a temporary restraining order, emergency protective order, or written report by a peace officer must be attached to the

notice. (C.C. 1946.7(b).) The notice to terminate the tenancy must be given within 60 days of the date that the restraining order or protective order was issued or the written report was made, or within the time period described in C.C. 1946. (C.C. 1946.7(c).)

(c) *Tenant's rent responsibility.* The tenant is responsible for paying rent for 30 days after giving notice, or within the appropriate period as described in C.C. 1946, and thereafter must be released from his or her rent payment obligation without penalty. Existing law governing the security deposit will apply. (C.C. 1946.7(d).) If within the 30 days after giving notice, the tenant quits the premises and the premises are rented to another party, the rent due on the premises for that 30-day period must be prorated. (C.C. 1946.7(e).)

(d) *Continuing obligations of other tenants.* Nothing in C.C. 1946.7 relieves a tenant, other than the tenant who is, or who has a household member who is, a victim of domestic violence, sexual assault, or stalking and members of that tenant's household, from the tenant's obligations under the rental agreement. (C.C. 1946.7(f).)



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12 Witkin Sum. Cal. Law Real Property § 681

[§ 681] Special Lease Provisions.

A lease may contain special provisions like the following:

(1) *Tenant's Bankruptcy or Insolvency.* A clause providing for termination in the event of the tenant's bankruptcy or insolvency. (See *Finn v. Meighan* (1945) 325 U.S. 300, 65 S.Ct. 1147, 89 L.Ed. 1624; *Ilkhchooyi v. Best* (1995) 37 C.A.4th 395, 404, 45 C.R.2d 766 [clause allowed landlord to terminate or continue lease]; *Rest.2d, Property (Landlord and Tenant)* §20.1; 49 So. Cal. L. Rev. 339 [enforceability of forfeiture on bankruptcy claimant; proposing damages as alternative remedy]; C.E.B., 2 Office Leasing 2d, §43.16 [estoppel certificate]; 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §297; 11B Am.Jur. Legal Forms 2d (1998 ed.), Leases of Real Property §161:922 et seq.)

(2) *Sale of Premises.* A lessor's option to terminate in the event of sale of the premises, on making certain payments to the lessee. (See *Upton v. Toth* (1940) 36 C.A.2d 679, 684, 98 P.2d 515 [farm lease, cancellable by purchaser's offer to compensate lessee for work in preparing soil]; *Zumwalt v. Hargrave* (1945) 71 C.A.2d 415, 416, 162 P.2d 957; 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §§220, 223, 227; 11B Am.Jur. Legal Forms 2d (1998 ed.), Leases of Real Property §§161:915, 161:919, 161:920.)

(3) *Condemnation Action.* A lessor's option to terminate if condemnation proceedings are brought. (See *Carlstrom v. Lyon Van & Storage Co.* (1957) 152 C.A.2d 625, 632, 313 P.2d 645 [ordinary change of ownership clause does not cover condemnation]; 11B Am.Jur. Legal Forms 2d (1998 ed.), Leases of Real Property §161:639 et seq.)

(4) *Lessor's Right To Cancel.* An unlimited right in the lessor to cancel. This will, however, be interpreted, if possible, as requiring some generally recognized cause and not as authorizing an arbitrary forfeiture. (*Wagner v. Shapona* (1954) 123 C.A.2d 451, 462, 267 P.2d 378.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Tenant's Bankruptcy or Insolvency.* See 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §243; 11B Am.Jur. Legal Forms 2d (2006 ed.), Leases of Real Property §161:992 et seq.

(2) *Sale of Premises.* See 49 Am.Jur.2d (2006 ed.), *Landlord and Tenant* §196; 11B Am.Jur. Legal Forms 2d (2006 ed.), Leases of Real Property §§161:984, 161:985, 161:991.

(3) *Condemnation Action*. See 11B Am.Jur. Legal Forms 2d (2006 ed.), Leases of Real Property §161:697 et seq.



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H. Termination of Tenancy. 12. Improper Grounds for Termination. a. Racial Discrimination.

12 Witkin Sum. Cal. Law Real Property § 682

[§ 682] Racial Discrimination.

In *Abstract Inv. Co. v. Hutchinson* (1962) 204 C.A.2d 242, 22 C.R. 309, defendant, occupying premises under a month-to-month tenancy, was served by plaintiff landlord with a proper notice to quit, following which plaintiff brought an unlawful detainer proceeding. Defendant answered, raising the affirmative defense that his tenancy was being terminated solely because he was black. The trial court refused to admit evidence on this issue. *Held*, reversed.

(a) Plaintiff was seeking state judicial action to evict defendant because of his race. Under *Shelley v. Kraemer* (1948) 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, 8 Summary (10th), *Constitutional Law*, §746, that action is contrary to the *Fourteenth Amendment*. (204 C.A.2d 245.) Under *Gomillion v. Lightfoot* (1960) 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110, 7 Summary (10th), *Constitutional Law*, §238, the court has the power to look beyond the allegations of the complaint to inquire into the constitutional issue. (204 C.A.2d 247.)

(b) In unlawful detainer proceedings, no challenges to title or cross-complaints are permitted, but equitable defenses have been allowed (see 5 *Cal. Proc.* (4th), *Pleading*, §1038 et seq.), and the defense of unconstitutional discrimination is likewise permissible. (204 C.A.2d 248.) Defendant's defense is "a constitutional defense based upon a broad equitable principle. Certainly the interest in preserving the summary nature of an action cannot outweigh the interest of doing substantial justice." (204 C.A.2d 249.)

(c) Plaintiff contends that the effect of this decision would be that the tenancy would be month to month so far as the tenant was concerned, for he could give notice of termination at any time, with the landlord powerless to terminate and bound by an oral lease that could be of limitless duration. However, "[i]t is not the intention of this court to create a situation where persons of one or another race may be placed in position to discriminate against others. What we seek to do is to afford the opportunity to one claiming discrimination to offer proof of his claim. In doing so we act with the calm assurance that should other discriminatory practice result from this decision the courts can be relied upon to enjoin it." (204 C.A.2d 252.) (See Rest.2d, Property (Landlord and Tenant), Chap. 3; for legislative developments in this field, see 8 Summary (10th), *Constitutional Law*, §814 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]
See CACI, No. 4323 [Affirmative Defense--Discriminatory Eviction (Unruh Act)].

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §1112 et seq.



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H. Termination of Tenancy.

12. Improper Grounds for Termination.

b. Discrimination Against Children.

12 Witkin Sum. Cal. Law Real Property § 683

[§ 683] Discrimination Against Children.

In *Marina Point, Ltd. v. Wolfson* (1982) 30 C.3d 721, 180 C.R. 496, 640 P.2d 115, plaintiff operated a private apartment complex of 846 units on county land in an unincorporated area of Los Angeles under a master lease from the county. Its leases to tenants contained a clause providing that no minors under the age of 18 could reside in the apartments without the landlord's written permission. Defendant tenants had a child during their occupancy under a renewable 1-year lease, and on discovery of the fact, plaintiff's manager notified them that their lease would no longer be renewed. On their refusal to vacate, plaintiff brought an unlawful detainer action, and defendants set up the discrimination against children as a statutory and constitutional defense. The court gave judgment for plaintiff on findings that the exclusion of children proceeds from "a reasonable economic motive to promote a quiet and peaceful environment free from noise and damage caused by children." *Held*, reversed. The landlord's exclusionary practice violated the Unruh Civil Rights Act (C.C. 51 et seq., 8 Summary (10th), *Constitutional Law*, §898 et seq.), and it was unnecessary to consider the constitutional challenges based on the rights of privacy under the federal and state Constitutions.

(a) The trial judge interpreted the Act as protecting only such classes as were set forth in the statute or judicially determined to come within its provisions, and determined that neither the Act nor any prior judicial decision had proscribed discrimination against children. But *In re Cox* (1970) 3 C.3d 205, 90 C.R. 24, 474 P.2d 992, 8 Summary (10th), *Constitutional Law*, §899, held that the identification of particular bases of discrimination (color, race, religion, ancestry, and national origin) "is illustrative rather than restrictive." The Legislature intended to prohibit "all arbitrary discrimination by business establishments." (30 C.3d 732.) And the obscure language of the second sentence of C.C. 51 cannot support a contrary interpretation. (30 C.3d 733, 734, 735.)

(b) The blanket exclusion of families with minor children cannot be justified on the theory that children "as a class" are "noisier, rowdier, more mischievous and more boisterous" than adults. *Flowers v. John Burnham & Co.* (1971) 21 C.A.3d 700, 98 C.R. 644, lends support to this theory, but its reasoning is contrary to *Cox*. (30 C.3d 737, 738.)

(c) "Indeed, the basic rights guaranteed by section 51 would be drastically undermined if, as the landlord contends, a business enterprise could exclude from its premises or services entire classes of the public simply because the owner of the enterprise had some reason to believe that the class, taken as a whole, might present greater problems than other

groups. Under such an approach, for example, members of entire occupations or avocations, e.g., sailors or motorcyclists, might find themselves excluded as a class from some places of public accommodation simply because the proprietors could show that, as a statistical matter, members of their occupation or avocation were more likely than others to be involved in a disturbance. ... Similarly, members of a particular nationality or ethnic group might be excluded from an apartment complex simply because the landlord had found from his experience that members of that nationality or ethnic group were more likely to play loud music or to damage the landlord's property than tenants of other backgrounds." (30 C.3d 739.)

(d) Moreover, if children could be excluded from rental housing on this ground, it would logically follow that they could be excluded from virtually all business enterprises or places of public accommodation, for most businesses can claim a legitimate interest in eliminating excessively noisy, rowdy, or boisterous conduct. Thus, although entrepreneurs may protect their enterprises from improper and disruptive behavior, they must generally exercise this legitimate interest directly by excluding those persons who are in fact disruptive, not by broad status-based exclusionary policies that deprive innocent individuals of the services of the business enterprise to which C.C. 51 grants "all persons" access. (30 C.3d 740; see footnote 9, disapproving conflicting language in *Newby v. Alto Riviera Apartments* (1976) 60 C.A.3d 288, 131 C.R. 547, *infra*, §707.)

(e) The exclusionary practice cannot be sustained on the basis of the nature of the enterprise. The landlord's analogy to bars, adult bookstores and theaters, and senior citizen convalescent homes or housing facilities fails. Nothing in the nature of an ordinary apartment complex is incompatible with the presence of families with children. (30 C.3d 741.) And the exclusionary practice in this case is also distinguishable from the age-limited admission policies of retirement communities or housing complexes reserved for older citizens, with particular appurtenances and exceptional arrangements for their specified purposes. (30 C.3d 742.)

(f) "We have before us a mammoth apartment complex consisting of 846 separate apartments which proposes to engage in wholesale discrimination against children. To permit such discrimination is to approve of widespread, and potentially universal, exclusion of children from housing. Neither statute nor interpretation of statute, however, sanctions the sacrifice of the well-being of children on the altar of a landlord's profit, or possibly some tenants' convenience." (30 C.3d 745.)

Two justices dissented. (30 C.3d 748.)

The exclusion of children from residential housing has been the subject of considerable comment and legislation. (See 71 Cal. L. Rev. 1324 [*Marina Point*]; 15 Cal. Western L. Rev. 219 [discrimination against children in rental housing]; 11 Loyola L.A. L. Rev. 609 [response to lower court decision in *Marina Point*]; 17 San Diego L. Rev. 403 [validity of local ordinances barring discrimination against families with children]; 19 Santa Clara L. Rev. 21 [discrimination against children in rental housing]; 14 Southwestern U. L. Rev. 1, 18 [economic analysis of changing landlord-tenant relationship; anti-age discrimination laws]; 30 A.L.R.4th 1187 [refusal to rent residential premises to persons with children as unlawful discrimination]; for legislative developments in this area, see 8 Summary (10th), *Constitutional Law*, §908.)

SUPPLEMENT: [This section is current through the latest supplement]



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I. Right To Remove Fixtures.

1. In Absence of Covenant.

12 Witkin Sum. Cal. Law Real Property § 684

[§ 684] In Absence of Covenant.

(1) *Ordinary Fixtures.* Fixtures (except "trade fixtures") belong to the landlord at the conclusion of the term, in the absence of a covenant to the contrary. (C.C. 1013, 1019; see *Alden v. Mayfield* (1912) 163 C. 793, 795, 127 P. 44; *Goldberg v. Stanton* (1927) 84 C.A. 665, 667, 258 P. 417; *Beverly Hills v. Albright* (1960) 184 C.A.2d 562, 568, 7 C.R. 706.) Under the removal statute, however, any fixtures installed in good faith by mistake may be removed on payment of damages. (C.C. 1013.5; see 13 *Summary* (10th), *Personal Property*, §§98, 99.)

(2) *Trade Fixtures.* These are treated as personal property and may be removed by the tenant at the end of the term, or even on abandonment, provided that the tenant exercises this right and actually removes them before expiration of the term or abandonment of the premises. (C.C. 1019; see *Wadman v. Burke* (1905) 147 C. 351, 353, 81 P. 1012 [tenant, after expiration, accepted new lease with different terms, that was silent as to fixtures; tenant was not entitled to remove them at end of new term]; *Rinaldi v. Goller* (1957) 48 C.2d 276, 281, 309 P.2d 451 [neither defaulting lessee nor his chattel mortgagee could remove fixtures after lessee's abandonment and lessor's reentry]; *Goldie v. Bauchet Properties* (1975) 15 C.3d 307, 313, 124 C.R. 161, 540 P.2d 1, citing the text; *Randolph Marketing Co. v. Stevenson* (1923) 65 C.A. 1, 7, 222 P. 849 [no right after abandonment; purported transfer to third party was ineffective]; *Weisberg v. Loughridge* (1967) 253 C.A.2d 416, 426, 61 C.R. 563 [chattel mortgagee's right of removal is derivative and thus same as mortgagor-tenant]; *Rest.2d, Property (Landlord and Tenant)* §§12.2, 12.3; 23 A.L.R.2d 655 [lessee's implied duty to remove property, debris, buildings, and improvements at expiration of lease]; 109 A.L.R.5th 421 [time within which tenant's right to remove trade fixtures must be exercised]; 1 Proof of Facts 2d 171 [status of building or structure as trade fixture]; as to effect of removal statute, see 13 *Summary* (10th), *Personal Property*, §98.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Trade Fixtures.* See 82 Proof of Facts 3d 131 [proof that building or structure constitutes trade fixture removable by tenant; superseding 1 Proof of Facts 2d 171, text, p. 801].



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CHAPTER XVII - Real Property

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IX. OTHER RIGHTS AND LIABILITIES OF LANDLORDS AND TENANTS

1. Right To Remove Fixtures.
2. Covenant Governing Removal.

12 Witkin Sum. Cal. Law Real Property § 685

[§ 685] Covenant Governing Removal.

Apart from the tenant's statutory removal rights (see *supra*, §684), the parties may provide for ownership of fixtures and removal rights by a clause in the lease. (See *Rest.2d, Property (Landlord and Tenant) §12.2*; C.E.B., 1 Office Leasing 2d, §§25.5, 25.6; C.E.B., Ground Lease Practice, §2.84 et seq.; 30 *A.L.R.3d* 998 [what constitutes improvements, alterations, or additions within provisions of lease permitting or prohibiting tenant's removal at termination].) Thus, an express covenant may permit the tenant to remove fixtures on termination. This gives the tenant reasonable time after expiration to do so. (*Cone v. Western Trust & Savings Bank* (1937) 21 *C.A.2d* 176, 179, 68 *P.2d* 981; see *Clark v. Talmadge* (1937) 23 *C.A.2d* 703, 707, 74 *P.2d* 825 [covenant applied not only to normal expiration but also to termination for failure to pay rent]; *Knox v. Wolfe* (1946) 73 *C.A.2d* 494, 500, 167 *P.2d* 3 [peculiar provision interpreted as giving lessee right of removal]; *United Pac. Ins. Co. v. Cann* (1954) 129 *C.A.2d* 272, 275, 276 *P.2d* 858 [right of tenant and his chattel mortgagee was lost by failure to remove within reasonable time].)

Conversely, the lease may provide that all fixtures will belong to the landlord on termination, including termination caused by the lessee's breach. (See *Goldie v. Bauchet Properties* (1975) 15 *C.3d* 307, 313, 124 *C.R.* 161, 540 *P.2d* 1, citing the text; *Bridges v. Cal-Pac. Leasing Co.* (1971) 16 *C.A.3d* 118, 128, 93 *C.R.* 796.) A clause stating that all "alterations, repairs, additions or improvements" will remain the lessor's property gives the lessor title to those improvements, regardless of whether they are removable or not. (*Wilmerton v. Morton* (1946) 74 *C.A.2d* 891, 894, 169 *P.2d* 992 [centrally operated refrigeration system for apartment house].)

SUPPLEMENT: [This section is current through the latest supplement]



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Witkin Summary of California Law IX. OTHER RIGHTS AND LIABILITIES OF LANDLORDS AND TENANTS I. Right To Remove Fixtures. 3. Tenant's Refusal To Remove.

12 Witkin Sum. Cal. Law Real Property § 686

[§ 686] Tenant's Refusal To Remove.

In the usual case the tenant wants to remove the fixtures, and the landlord claims them as part of the realty. But in *Cohen v. Superior Court* (1967) 248 C.A.2d 551, 56 C.R. 813, the positions were reversed. Plaintiff lessor leased premises for a dry cleaning business to the predecessor of defendant lessees. Plaintiff later leased to defendants and sold them the equipment and trade fixtures. After some years of occupancy, and breach by defendants, plaintiff served notice to quit. Defendants did not vacate, and plaintiff filed her present complaint for unlawful detainer and damages. Then the lease term ran out, and defendants returned the keys and moved out, taking some of their equipment. But they left a boiler, dryer, counter, shelves and racks, and a tank. Plaintiff filed a motion for advancement on the calendar, which is given to unlawful detainer proceedings. Defendants contended, however, that there was no such proceeding; i.e., that by abandoning possession they had removed the issue from the case and there remained only an action for damages.

Plaintiff alleged that the equipment interfered with her possession. Defendants argued that the items of equipment belonged to plaintiff because they were fixtures, and, under the lease, were forfeited to her on abandonment. Plaintiff answered that she had not elected to take them. *Held*, the unlawful detainer action was proper and plaintiff was entitled to advancement. There was an issue to be resolved as to the title to the property left, and whether it was an interference with the landlord's right of possession. (248 C.A.2d 554.)

The Restatement takes the position that, in the absence of a valid lease provision to the contrary, the tenant has a duty to restore the leased property to its former condition where possible "when requested by the landlord." (*Rest.2d, Property (Landlord and Tenant) §12.2(3).*)

SUPPLEMENT: [This section is current through the latest supplement]



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Witkin Summary of California Law IX. OTHER RIGHTS AND LIABILITIES OF LANDLORDS AND TENANTS J. Conversion of Rental Housing to Condominiums. 1. State Requirements.

12 Witkin Sum. Cal. Law Real Property § 687

[§ 687] State Requirements.

(1) *In General.* Most conversions of existing rental housing to condominiums, community apartments, and stock cooperatives are subject to the Subdivision Map Act (*Govt.C. 66410 et seq.; infra, §809 et seq.*). (*Govt.C. 66424, 66426;* for exceptions, see *Govt.C. 66412(g), 66412(h).*) (See C.E.B., Condominium and Planned Development Practice, §4.1 et seq.; Hanna, Common Interest Developments, Chap. 17; on conversion of mobilehome parks to other uses, see *infra, §790*; on conversion of rental mobilehome parks to resident ownership, see *infra, §790*; on conversion of property located in the coastal zone, see C.E.B., Condominium and Planned Development Practice, §4.32.)

(2) *Approval of Owners of Existing Project.* The owners of a stock cooperative or a community apartment project must approve conversion to a condominium, as must the trustees or beneficiaries of each recorded deed of trust and the mortgagees of each recorded mortgage in the cooperative or project. A majority vote is required, unless the organizational documents specify another number. On approval of the conversion, and in compliance with C.C. 1351(e) (*supra, §89*), all conveyances and other documents necessary to effectuate the conversion must be executed by the number of owners in the cooperative or project specified in the bylaws or other organizational documents, or by a majority, if no number is specified. The executed conveyances and other documents are binding on all parties in the cooperative or project. (*Govt.C. 66452.10.*)

(3) *Action on Tentative Map.* A subdivider filing a tentative map for the conversion of a building into condominiums, community apartments, or cooperative apartments must give notice to tenants and prospective tenants, in a form specified by statute. (*Govt.C. 66452.8, 66452.9; see 12 Pacific L. J. 549;* on tentative maps for subdivisions, see *infra, §811.*) A report or recommendation on the map by the local advisory agency must be in writing and must be served on the subdivider and the tenants at least 3 days before the hearing on the map. (*Govt.C. 66452.3.*) (On administrative appeal by subdivider or tenants from action on tentative map, see *Govt.C. 66452.5.*)

(4) *Action on Final Map.* The final map of a subdivision created from the conversion of residential real property into a condominium project, a community apartment project, or a stock cooperative project may not be approved in the absence of the following findings:

(a) The tenants of the proposed condominium, community apartment project, or stock cooperative project have received, under *Govt.C. 66452.9*, written notice of intent to convert at least 60 days before the tentative map was filed. (

Govt.C. 66427.1(a).)

(b) Each tenant, and each person applying to rent a unit in the property, has, or will have, received all applicable notices and rights required by *Govt.C. 66425 et seq.* and *Govt.C. 66451 et seq.* (*Govt.C. 66427.1(a).*)

(c) Each tenant has received 10 days' written notice that an application for a public report will or has been submitted to the Department of Real Estate. (*Govt.C. 66427.1(a)*; on public reports, see *infra*, §820.)

(d) Each tenant has or will have received written notice within 10 days that a final map for the proposed conversion has been approved. (*Govt.C. 66427.1(b)*; on final maps for subdivisions, see *infra*, §812.)

(e) Each tenant has or will have received written notice of intent to convert 180 days before termination of tenancy because of the conversion. (*Govt.C. 66427.1(c).*)

(f) Each tenant has or will have received notice of an exclusive right, lasting at least 90 days from the date a public report is issued, to contract to purchase the tenant's unit under terms and conditions that are at least as favorable as those applicable to the initial sale of the unit to the public. (*Govt.C. 66427.1(d)*; see C.E.B., *Condominium and Planned Development Practice*, §4.19 *et seq.*)

When a rental property is established as a condominium project at the time it is constructed, rather than converted to one at a later date, a final map may be recorded at the outset. Although it is possible that the developer will thereby avoid having to comply with *Govt.C. 66427.1*, the developer will be subject to the similar requirements of *Govt.C. 66459*. (See C.E.B., *Condominium and Planned Development Practice*, §§2.27, 2.27A.)

(5) *Disclosure to Prospective Buyers Following Conversion.* As soon as practicable before transfer of title for the first sale of a residential unit in a condominium, community apartment, or stock cooperative that has been converted from an existing dwelling, the owner or subdivider must furnish each prospective buyer with a written statement listing all substantial defects or malfunctions in the major systems in the unit and in common areas, or a written statement disclaiming knowledge of any substantial defects or malfunctions. (C.C. 1134(a).) A prospective buyer is someone who makes an offer. (C.C. 1134(c)(3).) Major systems include the roof, walls, floor, heating, air conditioning, plumbing, electrical system, and recreational facilities. (C.C. 1134(c)(1).) The written statement does not abridge or limit other disclosure obligations required by law or to avoid fraud, deceit, or misrepresentation. (C.C. 1134(g).)

If a disclosure is made after the execution of a purchase agreement, the buyer may terminate the agreement in writing within 3 to 5 days, depending on the method used to deliver the disclosure to the buyer. (C.C. 1134(b).) Failure to comply with C.C. 1134 does not necessarily invalidate a transfer of title (C.C. 1134(f)), but one who wilfully fails to carry out the requirements of the statute is liable for actual damages suffered by the buyer (C.C. 1134(d)). The buyer may also pursue other available remedies. (C.C. 1134(e).) (See 13 *Pacific L. J.* 756.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Action on Tentative Map.* *Govt.C. 66452.8* and *66452.9* were renumbered *Govt.C. 66452.17* and *66452.18*, respectively, in 2008. (4) *Action on Final Map.* *Govt.C. 66427.1* was repealed and reenacted in 2007 and amended in 2008. It now provides that a legislative body may not approve a final map for a subdivision to be created from the conversion of residential real property into a condominium project, a community apartment project, or a stock cooperative project, unless it finds the following:

(a) Each tenant, and each person applying to rent a unit, has received or will have received all applicable notices and rights required by *Govt.C. 66425 et seq.* or *Govt.C. 66451 et seq.* (*Govt.C. 66427.1(a)(1).*)

(b) Each tenant has received or will receive written notice, under *Govt.C. 66452.18*, of the intention to convert, provided at least 60 days before the filing of a tentative map under *Govt.C. 66452*. (*Govt.C. 66427.1(a)(2)(A).*) This notice will be deemed satisfied if it complies with the legal requirements for service by mail. (*Govt.C. 66427.1(b).*)

(c) Each tenant has received or will receive 10 days' written notice that an application for a public report will be, or has been, submitted to the Department of Real Estate, that the period for each tenant's right to purchase begins with the issuance of the final public report, and that the report will be available on request. (*Govt.C. 66427.1(a)(2)(B).*) This notice will be deemed satisfied if it complies with the legal requirements for service by mail. (*Govt.C. 66427.1(b).*)

(d) Each tenant has received or will receive written notice that the subdivider has received the public report from the Department of Real Estate. This notice must be provided within 5 days after the subdivider receives the public report from the Department of Real Estate. (*Govt.C. 66427.1(a)(2)(C).*)

(e) Each tenant has received or will receive written notice within 10 days after approval of a final map for the proposed conversion. (*Govt.C. 66427.1(a)(2)(D).*)

(f) Each tenant has received or will receive 180 days' written notice of the intention to convert, provided before termination of the tenancy due to the conversion or proposed conversion under *Govt.C. 66452.19*, but not before the local authority has approved a tentative map for the conversion. This notice does not alter or abridge the rights or obligations of the parties to perform their covenants, including providing services and paying rent, or the obligations imposed by C.C. 1941, 1941.1(a), and 1941.2. (*Govt.C. 66427.1(a)(2)(E).*; for form of notice, see *Govt.C. 66452.19*, added in 2008.)

(g) Each tenant has received or will receive notice of an exclusive right to contract for the purchase of his or her respective unit on the same terms and conditions that the unit will be initially offered to the general public or on terms more favorable to the tenant. The exclusive right to purchase will commence on the date the subdivision public report is issued, as provided in *B. & P.C. 11018.2*, and will run for a period of not less than 90 days, unless the tenant gives prior written notice of his or her intention not to exercise the right. (*Govt.C. 66427.1(a)(2)(F).*; on form of notice, see *Govt.C. 66452.20*, added in 2008.)

If a rental agreement was negotiated in Spanish, Chinese, Tagalog, Vietnamese, or Korean, all required written notices regarding the conversion of residential real property into a condominium project, a community apartment project, or a stock cooperative project must be issued in that language. (*Govt.C. 66427.1(d).*)



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12 Witkin Sum. Cal. Law Real Property § 688

[§ 688] In General.

(1) *Authority To Regulate.* Govt.C. 66427.1 (supra, §687) does not otherwise diminish, limit, or expand the authority of cities and counties to approve or disapprove condominium projects. (Govt.C. 66427.1(e).) (On local regulation generally, see *Bownds v. Glendale* (1980) 113 C.A.3d 875, 884, 170 C.R. 342 [consistency of conversion with local general plan]; *Krater v. Los Angeles* (1982) 130 C.A.3d 839, 844, 181 C.R. 923 [reasonableness of plan for relocating tenants in comparable housing after conversion]; C.E.B., *Condominium and Planned Development Practice*, §4.14; 53 *So. Cal. L. Rev.* 225 [municipal regulation of condominium conversions in California]; 21 *A.L.R.4th* 1083 [conversion of rental housing to condominiums].)

Moreover, as a condition of approving the construction of a new condominium project, a local agency may require that the units be made available for rental housing for at least 10 years. (Govt.C. 66452.50.) (On notice to prospective tenants of subsequent conversion, see Govt.C. 66452.51.)

(2) *Regulations Restricting Removal of Rental Units From Market.* In *Santa Monica Pines, Ltd. v. Rent Control Bd. of Santa Monica* (1984) 35 C.3d 858, 201 C.R. 593, 679 P.2d 27, plaintiff apartment house owner sought to convert a 42-unit building to condominiums. Defendant city, which had approved a tentative subdivision map for the conversion, refused to issue a conversion permit required by defendant's subsequently enacted rent control ordinance for removal of any units from the rental market. *Held*, plaintiff did not acquire a vested right to conversion by spending in reliance on the tentative map.

(a) The amount plaintiff expended between approval of the tentative map and adoption of the rent control ordinance (\$ 1,709) was inadequate to create a vested right. Payment of a condominium license fee (\$ 42,000) after enactment of the rent control ordinance without the permit required by the ordinance was a "calculated risk" on plaintiff's part. (35 C.3d 867.)

(b) The subject of rent control is within a city's police power. The local ordinance, which restricts condominium conversions in order to limit the removal of rental units from the market, is not preempted by the Subdivision Map Act (Govt.C. 66410 et seq.), which is intended to control the design and improvement of subdivisions and to protect the buying public from exploitation. (35 C.3d 868, 869.)

One justice dissented, finding a vested right and noting that the \$ 42,000 condominium fee had not been returned. (See *West Hollywood v. Beverly Towers* (1991) 52 C.3d 1184, 278 C.R. 375, 805 P.2d 329, *infra*, §689 [disapproving *Santa Monica Pines, Ltd.* to extent that it holds that city may impose conditions on conversion after developer has secured all approvals and satisfied state requirements]; *McMullan v. Santa Monica Rent Control Bd.* (1985) 168 C.A.3d 960, 963, 214 C.R. 617 [following *Santa Monica Pines, Ltd.*; Subdivision Map Act does not preempt local rent control ordinance that requires permit for conversion or demolition of rental units, even though permit requirement restricts marketability for property]; *Hock Inv. Co. v. San Francisco* (1989) 215 C.A.3d 438, 447, 449, 263 C.R. 665 [plaintiff could state cause of action based on estoppel; trial court erred in sustaining defendants' demurrer without leave to amend].)

(3) *Regulations Setting Standards for Construction and Conversion.* In *Griffin Dev. Co. v. Oxnard* (1985) 39 C.3d 256, 217 C.R. 1, 703 P.2d 339, defendant city adopted ordinances and resolutions setting standards for construction of condominium projects and for condominium conversions. The standards were more severe than those applicable to apartment structures, and covered parking requirements and units of not less than two separate bedrooms. Plaintiff, owner of a 72-unit apartment complex, was denied a special use permit required as a prerequisite to conversion, and was admittedly unable to comply with some of the standards. He sought mandamus, contending that the city's regulations were preempted by state law, that the city lacked authority to regulate condominium conversions, and that the regulations amounted to a confiscatory taking of property. *Held*, judgment for defendant city affirmed.

(a) The regulations are not preempted by the Subdivision Map Act. The Act recognizes the authority of local governments to adopt nonconflicting condominium conversion regulations, and none involved here conflicts with the policies or provisions of the Act. (39 C.3d 262.)

(b) The regulations do not violate due process. *Birkenfeld v. Berkeley* (1976) 17 C.3d 129, 130 C.R. 465, 550 P.2d 1001, *supra*, §577, states the due process limitations on regulations affecting property interests. (39 C.3d 263.) The vast majority of California cities and counties have adopted comprehensive schemes of land use regulation, and condominium conversion regulation has been consistently held to be a legitimate exercise of police power. (39 C.3d 263.) *Santa Monica Pines, Ltd.* recognized that restrictions on removal of units from the rental housing market through condominium conversion was within the police power. (39 C.3d 264.) Defendant city's regulations have legitimate governmental purposes and are directly and reasonably related to those goals. Hence, they are a valid exercise of the city's police power. (39 C.3d 266.)

(c) The regulations are not a confiscatory taking of property, under the test of *Agins v. Tiburon* (1979) 24 C.3d 266, 157 C.R. 372, 598 P.2d 25 (see 8 *Summary* (10th), *Constitutional Law*, §1058). Plaintiff is free to continue to rent its apartments. The regulations apply only to plaintiff's plans to convert them into condominiums. The takings theory is based only on the claim that the regulations result in a diminution of the value of the property, but, as noted in *Fisher v. Berkeley* (1984) 37 C.3d 644, 209 C.R. 682, 693 P.2d 261, *supra*, §578, most land regulations reduce the value of the regulated properties, and even a significant diminution in value does not amount to a confiscatory taking. (39 C.3d 267.)

A strong dissent of two justices adopted the superseded opinion of the Court of Appeal that the regulations were invalid.

(4) *Regulations Requiring Replacement Units.* In *Terminal Plaza Corp. v. San Francisco* (1986) 177 C.A.3d 892, 223 C.R. 379, defendant city enacted an ordinance conditioning conversion of residential hotels to other uses on construction or rehabilitation of replacement units or payment of an in lieu fee. *Held*, the ordinance was valid.

(a) The ordinance does not violate due process. Plaintiff's contention that an ordinance of this type infringes a property owner's fundamental right to cease doing business was rejected in *Nash v. Santa Monica* (1984) 37 C.3d 97, 100, 109, 207 C.R. 285, 688 P.2d 894, *supra*, §598, and *Griffin Dev. Co.* The ordinance serves a legitimate governmental interest "by means reasonably and directly related to its goals." Plaintiff remains free to withhold rental units from the market as they become vacant, and may rent empty residential units to tourists in season. The ordinance

does not restrict plaintiff's right to sell its property and invest the proceeds in other ventures, or to convert the property to another use by complying with the ordinance's replacement provisions. (177 C.A.3d 910.)

(b) The ordinance does not constitute a confiscatory taking of property. "As a regulatory measure, the ordinance is restrictive, but in our view not to such a degree as to amount to a 'taking' of property." Plaintiff is left with the right to sell or trade its property. Plaintiff also retains the right to use the property in the same manner as before the ordinance, a use for which the property is apparently well suited. Although conversion to another use is limited, it is permitted on compliance with stated replacement provisions. Plaintiff has not shown that the ordinance compromises its investment-backed expectations. Nor has plaintiff offered any evidence that it is not receiving a reasonable rate of return on its investment from operation of the residential hotel on the property. Finally, plaintiff has not established a reduction in market value of the property. (177 C.A.3d 912, citing *Agins.*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Authority To Regulate.* Govt.C. 66427.1 was repealed and reenacted in 2007. The rule prescribed in former Govt.C. 66427.1(e) is now in Govt.C. 66427.1(c).



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J. Conversion of Rental Housing to Condominiums.
2. Local Requirements.
b. Regulations Enacted After Applicant Has Complied With State Law.

12 Witkin Sum. Cal. Law Real Property § 689

[§ 689] Regulations Enacted After Applicant Has Complied With State Law.

In *West Hollywood v. Beverly Towers* (1991) 52 C.3d 1184, 278 C.R. 375, 805 P.2d 329, plaintiff city was incorporated as a separate municipality in November 1984, and 9 months later amended its zoning ordinance to enact comprehensive regulations governing conversion of multiple family rental units into condominiums. However, before the city's incorporation, defendant apartment building owners obtained tentative and final subdivision tract maps from the county to convert their rental units into condominiums, and obtained approval from the Department of Real Estate for sale of the converted units. Before defendants sold any units, plaintiff filed a complaint for declaratory and injunctive relief, seeking to impose its regulations. The trial court denied the requested relief, but the Court of Appeal reversed with directions to grant the preliminary injunction. *Held*, judgment of Court of Appeal reversed.

(a) Under the statutory definition of a condominium (supra, §89), an apartment building is not converted into a condominium project until at least one unit has been conveyed, even if the owner has obtained all the governmental approvals and recorded all necessary documents. Defendants contend that this requirement of sale is purely technical, and this contention is sound. The sale of a unit is only a definitional element of a condominium. "It is not an element that must be satisfied before an owner's right to sell is immune from conditions imposed by a city on the exercise of that right." (52 C.3d 1190.) "We therefore hold that local agencies cannot enforce condominium conversion regulations enacted after a developer secures final subdivision map approval and permission from the Department of Real Estate to sell." (52 C.3d 1191.)

(b) The majority opinion in *Santa Monica Pines, Ltd. v. Rent Control Bd.* (1984) 35 C.3d 858, 201 C.R. 593, 679 P.2d 27, supra, §688, "attributes an inappropriately minor role to the Map Act as it related to condominium conversion." The case "should therefore not be followed insofar as it holds that a city may impose conditions on condominium conversion after a developer has secured all the necessary discretionary approvals and satisfied all the requirements established by state law." (52 C.3d 1192.)

(c) *Griffin Dev. Co. v. Oxnard* (1985) 39 C.3d 256, 217 C.R. 1, 703 P.2d 339, supra, §688, does not compel a different result: There, "unlike defendants, the developer lacked tentative, much less final, subdivision map approval to convert." (52 C.3d 1192.) "We also reject the City's claim that even though defendants have all the discretionary approvals necessary for condominium conversion, they still need, in the absence of vested rights, either a vesting

tentative map or a development agreement in order to proceed free of subsequent local regulation." (52 C.3d 1193.)

Two justices dissented, asserting that "[t]he majority silently erode the vested rights doctrine when they confer what can only be termed a vested right to develop without requiring any showing of detrimental reliance." (52 C.3d 1200.) (See *West Hollywood v. 1112 Inv. Co.* (2003) 105 C.A.4th 1134, 1148, 130 C.R.2d 168, supra, §574 [apartment building owners lost protection of *Beverly Towers* when they allowed approval from Department of Real Estate to lapse]; 19 *Pepperdine L. Rev.* 305 [*Beverly Towers*].)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XVII - Real Property

Witkin Summary of California Law X. LANDLORD AND TENANT REMEDIES

A. Landlord's Remedies.

1. Former Law.

a. Action for Rent or Damages.

12 Witkin Sum. Cal. Law Real Property § 690

[§ 690] Action for Rent or Damages.

(1) *Action Against Tenant in Possession.* Before the nonretroactive legislation of 1970 (see *infra*, §§692, 693), a landlord seeking to recover rent could sue for unpaid rent while the tenant remained in possession. (See *Knight v. Marks* (1920) 183 C. 354, 357, 191 P. 531; *Costello v. Martin Bros.* (1925) 74 C.A. 782, 786, 241 P. 588.) If the tenant died, and the lease bound "heirs, executors, administrators, successors and assigns," the lessor could file claims for rent against the estate. If the lessor failed to do so, the lessor could not hold heirs, devisees, or personal representatives on the lease. (*Lesser v. Pomin* (1934) 3 C.A.2d 117, 120, 39 P.2d 451; see 14 *Summary* (10th), *Wills and Probate*, §619.)

(2) *Periodic Suits After Abandonment.* If the tenant abandoned the premises, the landlord could leave them unoccupied, and sue for each installment of rent when it became due. The statute of limitations began to run on each installment as it fell due. (*Tillson v. Peters* (1940) 41 C.A.2d 671, 674, 107 P.2d 434; cf. *Lee v. DeForest* (1937) 22 C.A.2d 351, 355, 71 P.2d 285.)

But the landlord could not, on a theory of anticipatory breach, recover future installments or the entire balance in advance. If the landlord stood on the lease, and treated it as still in existence, no obligation to pay the rent arose until the installments fell due. (*Bradbury v. Higginson* (1912) 162 C. 602, 604, 123 P. 797; *Oliver v. Loydon* (1912) 163 C. 124, 126, 124 P. 731; *Phillips-Hollman v. Peerless Stages* (1930) 210 C. 253, 258, 291 P. 178; see *Gold Mining & Water Co. v. Swinerton* (1943) 23 C.2d 19, 32, 142 P.2d 22 [mining lease with lessee's covenant to make improvements; damages for anticipatory breach allowed because lessee's obligation is diligent removal of minerals].)

(3) *Reletting and Action for Damages.* On abandonment by the tenant, the landlord could take possession and relet the premises for the tenant's account, and thus mitigate the damages. The landlord was then entitled to recover from the tenant the difference between the amount of rent provided for in the lease and the amount secured by reletting. But in the absence of a special provision in the lease, the landlord could not recover in installments. The landlord was required to bring an action at the expiration of the original term. The theory was that only then could the damages be fully ascertained. (*Phillips-Hollman v. Peerless Stages*, *supra*; *Treff v. Gulko* (1932) 214 C. 591, 593, 7 P.2d 697; *Pacific States Corp. v. Rosenshine* (1931) 113 C.A. 266, 268, 298 P. 155.)

A lessor who relet for the tenant's account could also recover full rent for months during which the premises stood

vacant, and the statute of limitations on the right to recover did not commence to run until the end of the term. (*De Hart v. Allen* (1945) 26 C.2d 829, 833, 161 P.2d 453.)

(4) *Notification of Tenant.* The landlord, in pursuing the remedy of reletting and a suit for damages, was required to notify the tenant of the landlord's intention to relet. If the landlord failed to give the notice, repossession was deemed inconsistent with the lease and resulted in a surrender by operation of law, releasing the tenant. (*Bernard v. Renard* (1917) 175 C. 230, 233, 165 P. 694; *Siller v. Dunn* (1930) 103 C.A. 154, 158, 284 P. 232; *A.H. Busch Co. v. Strauss* (1930) 103 C.A. 647, 649, 284 P. 966; *Dorcich v. Time Oil Co.* (1951) 103 C.A.2d 677, 683, 230 P.2d 10; see *De Hart v. Allen, supra*, 26 C.2d 832 [where assignee of lessee defaulted and disappeared, notice to original lessee was sufficient].)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XVII - Real Property

Witkin Summary of California Law X. LANDLORD AND TENANT REMEDIES

A. Landlord's Remedies.

1. Former Law.

b. Special Lease Provisions.

12 Witkin Sum. Cal. Law Real Property § 691

[§ 691] Special Lease Provisions.

(1) *Suit Before End of Term.* The limited remedies under the law before the nonretroactive 1970 legislation (see *infra*, §§692, 693) were subject to expansion by special provisions in the lease. The landlord could overcome the rule of action at the end of the term (*supra*, §690) by a provision in the lease. (See *Dickinson v. Electric Corp. (1935) 10 C.A.2d 207, 211, 51 P.2d 205.*)

(2) *Unenforceable Acceleration Clause.* The statutory authorization of a right to recover the difference between the total rent and the reasonable rental value (C.C. 3308) must be sharply distinguished from an acceleration clause giving the lessor the right to recover the total rent with no deduction. In *Ricker v. Rombough (1953) 120 C.A.2d Supp. 912, 261 P.2d 328*, the lease was for a 3-year term at a total rent of \$ 2,700 payable at \$ 75 per month. The clause provided that, "in addition to any other remedies," the lessor could give 30 days' notice of default, and unless full compliance by the lessee followed, the entire rent should become due and payable. *Held*, this was an unenforceable penalty, for it allowed the lessor to have both the premises and the rent for the balance of the term. The court emphasized the distinction between an acceleration clause in a note, where the maker-debtor has already received the entire consideration, and in a lease where the tenant has not yet received the benefit of the term. (*120 C.A.2d Supp. 919.*) (See *Puritan Leasing Co. v. August (1976) 16 C.3d 451, 457, 128 C.R. 175, 546 P.2d 679* [expressing no opinion on soundness of holding in *Ricker*].)

(3) *Reentry Provision To Avoid Surrender.* The lessor could avoid a technical surrender (*supra*, §690) by a clause stating that reentry will not be construed as an election to terminate unless written notice to this effect is given to the lessee. (See *Yates v. Reid (1950) 36 C.2d 383, 385, 224 P.2d 8*; *Lawrence Barker v. Briggs (1952) 39 C.2d 654, 664, 248 P.2d 897*; *Security Realty Co. v. Kost (1929) 96 C.A. 626, 629, 274 P. 608*; *Brown v. Lane (1929) 102 C.A. 350, 352, 283 P. 78*; *Narcisi v. Reed (1951) 107 C.A.2d 586, 587, 237 P.2d 558*; *Sinai v. Schiffman (1952) 109 C.A.2d Supp. 925, 927, 240 P.2d 1054*; *Wiese v. Steinauer (1962) 201 C.A.2d 651, 657, 20 C.R. 295.*)

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A. Landlord's Remedies. 2. Legislative Changes in 1970. a. Purpose of Revision.

12 Witkin Sum. Cal. Law Real Property § 692

[§ 692] Purpose of Revision.

The Law Revision Commission, in a 1969 Report, reviewed the law on real property leases, found it unsatisfactory, and made a number of proposals for new legislation, which was adopted in 1970. (See 2 *Pacific L. J.* 259 [development of law]; 2 *Pacific L. J.* 428 [new statutes].) A brief statement of the principal findings and recommendations is helpful in understanding the effect of the changes:

(1) The mixture of contract and property law principles in dealing with leases (see *supra*, §517) has been unsatisfactory and can operate unjustly to either the lessor or the lessee. (9 Cal. Law Rev. Com. Reports, p. 157.)

(2) The rule that, in the absence of a special lease provision, the lessor does not have the usual contractual remedy of an immediate action for damages on the lessee's breach and abandonment, is unsound. "[W]hen a lessee breaches the lease and abandons the property, the lessor should be permitted to sue immediately for all damages--present and future--caused by the breach." This remedy is now available by statute if the parties provide for this remedy in the lease. "Absent such a provision in the lease, the lessor under existing law must defer his damage action until the end of the term and run the risk that the defaulting lessee will be insolvent or unavailable at that time. The availability of a suit for damages would not abrogate the present right to rescind the lease or to sue for specific preventive relief if the lessor has no adequate remedy at law. Rather, an action for damages would provide the lessor with a reasonable choice of remedies comparable to that available to the promisee when the promisor has breached a contract." (9 Cal. Law Rev. Com. Reports, p. 158.)

(3) The rule that the lessee's obligation to pay rent depends on the continued existence of the term is unsound. "[T]he lessor should be permitted to sue for the loss of present and future rentals and other damages at the time the lease is terminated because of a substantial breach by the lessee. This remedy ... would be an alternative to other existing remedies that would continue to be available: (1) the right to treat the breach as partial, regard the lease as continuing in force, and recover damages for the particular default and (2) the right to rescind or cancel the lease, *i.e.*, declare a forfeiture of the lessee's interest." (9 Cal. Law Rev. Com. Reports, p. 159.)

(4) Under existing law, the lessor may relet for the benefit of the lessee and thus minimize the damages, but he is not required to do so, and the technical requirement of notice of reletting exposes him to the risk of a surrender (see

supra, §690). This danger should be removed by eliminating the notice requirement, and a duty to minimize damages should be imposed. (9 Cal. Law Rev. Com. Reports, p. 159.)

(5) "In addition, the lessor should be entitled to recover other damages necessary to compensate him for all the detriment caused by the lessee's breach or which in the ordinary course of things would be likely to result therefrom. This is the rule applicable in contract cases under *Civil Code Section 3300* and would permit the lessor to recover, for example, his expenses in retaking possession of the property, making repairs that the lessee was obligated to make, and in reletting the property." (9 Cal. Law Rev. Com. Reports, p. 160.)

(6) The lessor should be allowed to make special provision in the lease relieving the lessor of the duty to minimize damages, i.e., continuing the obligation of the lessee to pay rent for the entire term, if the lessee is permitted to assign or sublet. "These lease provisions would allow the lessor to guard against the loss of the rentals provided in the lease and, at the same time, permit the lessee to protect his interests by obtaining a new tenant." (9 Cal. Law Rev. Com. Reports, p. 161.)

(7) The lessor, however, should be permitted to impose reasonable restrictions on the right to sublet or assign, to control the types of businesses and persons who will occupy the property. This is necessary to meet the needs of "net lease financing," a practice under which the lease is an instrument for investment and financing property acquisition and construction. Even where a financing arrangement is not involved, the desirability of a particular tenant may significantly influence the rental. (9 Cal. Law Rev. Com. Reports, p. 162.)

The recommendation was described as "an admirable attempt to engraft the contract remedy of loss of bargain onto real property law." (*Sanders Const. Co. v. San Joaquin First Fed. Savings & Loan Assn.* (1982) 136 C.A.3d 387, 398, 186 C.R. 218.)

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- A. Landlord's Remedies.
- 2. Legislative Changes in 1970.
- b. Nature and Scope of Statutes.

12 Witkin Sum. Cal. Law Real Property § 693

[§ 693] Nature and Scope of Statutes.

(1) *Scope of Revision.* The recommendations of the Law Revision Commission (see *supra*, §692) were implemented in C.C. 1951 et seq., dealing with the following:

- (a) Termination of the lease on breach by the lessee, and immediate action for damages. (See *infra*, §694.)
- (b) Measures of damages for lessee's breach. (See *infra*, §696 et seq.)
- (c) Minimizing or mitigating damages. (See *infra*, §699.)
- (d) Liquidated damages. (See *infra*, §701.)
- (e) Continuation of lease on lessee's breach. (See *infra*, §744 et seq.)
- (f) Use of lessee's deposit. (See *infra*, §747.)

(2) *Changes Not Retroactive.* To avoid undesirable complications involving existing leases, the statutes were expressly nonretroactive, and did not apply to leases executed before July 1, 1971. (C.C. 1952.2.)

(3) *Matters Not Affected.* C.C. 1951 et seq. do not apply to or affect the following:

(a) An agreement for exploration or removal of natural resources. For example, an oil and gas lease is excluded from the meaning of "lease." (C.C. 1952.4.) The statutes are intended to deal with ordinary leases for the use of property, not those that contemplate the extraction of valuable resources. (Law Rev. Com. Comment to C.C. 1952.4; see *Kennecott Corp. v. Union Oil Co.* (1987) 196 C.A.3d 1179, 1186, 242 C.R. 403; on oil and gas leases, see *infra*, §792.)

(b) A lease between a public entity and specified nonprofit corporations that issue tax-free bonds for acquiring, constructing, or improving property, unless the lease specifically provides that the statutes are applicable. (C.C. 1952.6(a).)

(c) A lease between two public entities, unless the lease specifically provides that the statutes are applicable. (C.C. 1952.6(a).) Except as provided in C.C. 1952.6(a), a public entity lessee in a contract for a capital lease of real property involving the payment of rents of \$ 1 million or more may elect to waive the remedies provided in C.C. 1951 to 1952.2 and contract instead for another remedy permitted by law. A capital lease is a lease entered into for the purpose of acquiring, constructing, or improving the property, or a building or other facility on the property. (C.C. 1952.6(b).)

(d) The lessor's right to indemnification of liability arising before the termination of the lease, for personal injuries or property damage, if the lease provides for indemnification. (C.C. 1951.2(e).)

(e) The right of the lessor to appropriate equitable relief. (C.C. 1951.8; see Law Rev. Com. Comment [lessor who recovers damages for loss of rent is not precluded from obtaining injunction enforcing lessee's covenant not to compete].)

(f) The Code of Civil Procedure sections on the possessory remedies of unlawful detainer, forcible entry, and forcible detainer (see *infra*, §§703, 757). (C.C. 1952(a).) However, double recovery by the lessor in an action for damages and an unlawful detainer proceeding is prohibited (C.C. 1952(b); see *infra*, §§703, 738), and a lessor who obtains an unlawful detainer judgment for possession cannot elect the remedy of continuation of the lease unless the lessee obtains relief from forfeiture (C.C. 1952(c); see *infra*, §744 et seq.).

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A. Landlord's Remedies. 3. Action for Damages. a. Right of Action.

12 Witkin Sum. Cal. Law Real Property § 694

[§ 694] Right of Action.

C.C. 1951.2 is the most important of the statutes added in 1970. It eliminates the unintended surrender by operation of law (see *supra*, §690), and gives the lessor a right to sue immediately on breach for present and future damages, instead of being limited to periodic suits for installments or an action at the end of the term (see *supra*, §690).

Except as otherwise provided in C.C. 1951.4 (*infra*, §744), if a lessee breaches the lease and abandons the property before the end of the term or if the lessor terminates the lessee's right to possession because of a breach of the lease, the lease terminates. The lessor's right of action arises on termination. (C.C. 1951.2(a).) Four measures of damages are then available to the lessor. (See 2 *Pacific L. J.* 264; Law Rev. Com. Comment to C.C. 1951.2; C.E.B., Attorney's Guide to Damages 2d, §4.79; Cal. Civil Practice, 3 Real Property Litigation, §17:16 et seq.; 86 Am.Jur. Trials 1 [landlord's recovery of rent after abandonment or surrender of leased premises]; *infra*, §696 et seq.; on proof of abandonment, see *infra*, §695.)

In *Desert Plaza Partnership v. Waddell* (1986) 180 C.A.3d 805, 225 C.R. 775, the court pointed out that, notwithstanding C.C. 1951.2, the lessee may be relieved of the obligations under the lease by agreement, estoppel, or waiver.

(a) The lessor's election to forfeit because of default, or a judgment of forfeiture in unlawful detainer, does not relieve the lessee of the obligations, for C.C. 1951.2 brings the contract remedy of loss of bargain into real property law. (180 C.A.3d 812, 813, citing the text; see *supra*, §692.) But the parties may enter into an agreement relieving the lessee of those obligations in exchange for the lessee's voluntarily quitting the premises or other consideration, or the lessor may waive or be estopped to assert the lessor's rights. "It would be unjust, indeed unconscionable to permit a lessor to induce the lessee to change position materially or give up substantial rights by promising to release the lessee from further obligation and then permit the lessor to recover rents for the remainder of the term." (180 C.A.3d 813.)

(b) "Manifestly, the purpose of section 1951.2 was to afford an additional remedy to lessors and at the same time impose upon lessors the duty to mitigate damages by attempting to relet the premises. In imposing the duty to mitigate damages it was necessary to guard against the lessor's *unintentional waiver* of the new remedy simply by engaging in efforts to relet the premises ... , but it was no part of the purpose of the statute to preclude consensual arrangements

between the parties for cancellation of the lease nor generally to make inapplicable well-established principles of waiver or estoppel." (180 C.A.3d 814.)

C.C. 1951.2 abrogated the common law rule that the lessee's obligation to pay rent depends on the continued existence of the term (see *supra*, §690). (*Walt v. Superior Court* (1992) 8 C.A.4th 1667, 1671, 11 C.R.2d 278.) Damages under C.C. 1951.2 are recoverable on termination of the lessee's right of possession following breach, and are not waived if the lessor, in an effort to mitigate damages, allows the lessee to remain in possession. (8 C.A.4th 1678.)

West's Key Number Digest, Landlord and Tenant k.217 et seq.

SUPPLEMENT: [This section is current through the latest supplement]
See Cal. Civil Practice, 3 Real Property Litigation, §17:19 et seq.



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b. Proof of Abandonment.

12 Witkin Sum. Cal. Law Real Property § 695

[§ 695] Proof of Abandonment.

(1) *Notice by Lessor and Lessee's Failure To Give Notice.* The property will be deemed abandoned and the lease will terminate if the lessor gives written notice of the lessor's belief of abandonment and the lessee fails to give written notice, before the termination date specified in the lessor's notice, that the lessee does not intend to abandon. The lessee's notice must state an address for service by certified mail in an action for unlawful detainer. (C.C. 1951.3(a).) (See 6 *Pacific L. J.* 372.)

(2) *Grounds for Lessor's Notice.* The lessor may give notice of belief of abandonment only if the rent has been due and unpaid for at least 14 consecutive days and the lessor reasonably believes that the lessee has abandoned the property. (C.C. 1951.3(b).)

(3) *Content and Form of Notice.* The lessor's notice must specify the date of termination of the lease, which must not be less than 15 days after the notice is served personally or 18 days after it has been deposited in the mail. (C.C. 1951.3(b).) A statutory form is provided. (C.C. 1951.3(d); see Cal. Civil Practice, 3 Real Property Litigation, §§17:44, 27:22.)

(4) *Service of Notice.* The lessor's notice must be personally delivered or sent by first class mail to the lessee's last known address. If there is reason to believe that it will not be received at the last known address, notice must be sent also to any other address known to the lessor, where the lessee "may reasonably be expected" to receive it. (C.C. 1951.3(c).)

(5) *Showing of Nonabandonment by Lessee.* The lessee may overcome the effect of the lessor's notice by showing any of the following: (a) that the rent was not due and unpaid for 14 consecutive days; (b) that the lessor had no reasonable belief in abandonment (but knowledge that the lessee left personal property on the premises does not in itself justify a finding against reasonable belief); (c) that the lessee gave timely written notice of intent not to abandon, stating an address for service; (d) that during the period commencing 14 days before the time the lessor's notice was given and ending on the date the lease would have terminated under the notice, the lessee paid all or a portion of the rent due. (C.C. 1951.3(e).) (See Cal. Civil Practice, 3 Real Property Litigation, §17:52 [affirmative defense], §27:23 [notice of intent not to abandon].)

(6) *Other Options*. Nothing in C.C. 1951.3 precludes the lessor or lessee from otherwise proving abandonment. (C.C. 1951.3(f).) Nothing in C.C. 1951.3 precludes the lessor from serving a notice to pay rent or quit under *C.C.P. 1161* and *1162* (see *infra*, §720 et seq.), or affects the time and manner of giving another notice required or permitted by law. (C.C. 1951.3(g).) Giving notice under C.C. 1951.3 does not satisfy the requirements of *C.C.P. 1161* and *1162*. (C.C. 1951.3(g).)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Content and Form of Notice*. See Cal. Civil Practice, 3 Real Property Litigation, §17:44; Cal. Civil Practice, 4 Real Property Litigation, §27:22.



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c. Types of Damages.

1. Unpaid Rent.

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[§ 696] Unpaid Rent.

(1) *Unpaid Rent Earned at Time of Termination.* The smallest demand the lessor may make is for the "worth at the time of award of the unpaid rent which had been earned at the time of termination." (C.C. 1951.2(a)(1).) This "worth" is computed by adding interest, at a lawful rate specified in the lease, or, if none is specified, at the legal rate. (C.C. 1951.2(b); on legal rate, see 7 *Cal. Proc.* (4th), *Judgment*, §273.) In other words, the interest accrues on unpaid rent from the time each installment becomes due, until the time of "award" (i.e., entry of judgment or determination by a tribunal other than a court). (Law Rev. Com. Comment to C.C. 1951.2.)

(2) *Unpaid Rent Earned at Time of Award.* The lessor may seek a larger recovery, specifically the "worth at the time of award of the amount by which the unpaid rent which would have been earned after termination until the time of award exceeds the amount of such rental loss that the lessee proves could have been reasonably avoided." (C.C. 1951.2(a)(2).) This also is computed by adding interest in the manner described above. (C.C. 1951.2(b).)

This right to recover rent unpaid until the time of judgment or other award is subject to the rule of mitigating damages. The lessee may prove that the lessor could have reasonably avoided a certain amount of rental loss, and this will be deducted from the amount otherwise recoverable. (C.C. 1951.2(a)(2); see *infra*, §699.) Also, the interest is computed only on the net amount recoverable. (Law Rev. Com. Comment to C.C. 1951.2.)

In *California Safety Center v. Jax Car Sales* (1985) 164 C.A.3d 992, 211 C.R. 39, the lessor obtained an unlawful detainer judgment on November 3, 1980, with damages for past rent due. He was unable to relet the property until January 16, 1981, and filed a second action under C.C. 1951.2 for recovery of unpaid rent from October 1, 1980, to January 15, 1981, together with costs and expenses incurred in reletting. The trial judge interpreted the statutory phrase "at the time of award" as referring to the unlawful detainer judgment, and treated the claim for rent during the period before reletting as one for future rent under C.C. 1951.2(c) (see *infra*, §697), and not maintainable because of failure to satisfy the conditions of that provision. *Held*, this interpretation was incorrect, and the unpaid rent was recoverable. The statutory language refers to the time of the award under C.C. 1951.2. (164 C.A.3d 998.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Unpaid Rent Earned at Time of Termination. Legal rate of interest:*

Cross-Reference: 7 Cal. Proc. (5th), Judgment, §327.



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c. Types of Damages.

2. Future Rent.

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[§ 697] Future Rent.

(1) *Amount Recoverable.* The lessor may, subject to certain conditions, recover as damages a lump sum based on future rent for the entire term. Specifically, the lessor may recover "the worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award exceeds the amount of such rental loss that the lessee proves could be reasonably avoided." (C.C. 1951.2(a)(3).) This is computed by discounting the total amount recoverable at the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus one percent. (C.C. 1951.2(b).) As in the case of recovery of unpaid rent up to the time of the award, avoidable loss will be deducted. (C.C. 1951.2(a)(3); see *infra*, §699.)

The landlord may invoke the remedy under C.C. 1951.2(a)(3) in a separate later action after obtaining a judgment for unlawful detainer. (*Danner v. Jarrett* (1983) 144 C.A.3d 164, 166, 167, 192 C.R. 535.)

(2) *Restrictions on Recovery.* The lessor's right to the measure under C.C. 1951.2(a)(3) is subject to the conditions set forth in C.C. 1951.2(c). It is available only under one of the following circumstances:

(a) The lease provides that the damages the lessor may recover include the worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award, or for any shorter period of time specified in the lease, exceeds the amount of the rental loss for the same period that the lessee proves could be reasonably avoided. (C.C. 1951.2(c)(1).)

(b) The lessor relets the property before the time of award and proves that in reletting the property, the lessor acted reasonably and in a good faith effort to mitigate the damages. (C.C. 1951.2(c)(2).) The recovery of damages under this provision is subject to any limitations specified in the lease. (C.C. 1951.2(c)(2); see *infra*, §699.)

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 - 3. Other Losses Caused by Breach.

12 Witkin Sum. Cal. Law Real Property § 698

[§ 698] Other Losses Caused by Breach.

In addition to past and future rent (*supra*, §§696, 697), the lessor may recover an amount necessary to compensate the lessor for all the detriment proximately caused by the lessee's failure to perform obligations under the lease or that in the ordinary course of things would be likely to result from the failure to perform. (C.C. 1951.2(a)(4).) This is the ordinary rule of damages for breach of contract under C.C. 3300. (See 1 *Summary* (10th), *Contracts*, §869.) C.C. 1951.2(a)(4) allows recovery without a special provision in the lease. (Law Rev. Com. Comment to C.C. 1951.2.)

Examples of these damages are the lessor's reasonable expenses in retaking possession of the property, in making repairs that the lessee was obligated to make, in preparing the property for reletting, and in reletting, as well as damages for the lessee's breach of covenants, such as a covenant to maintain or improve the premises, or a covenant to restore them on termination of the lease. (Law Rev. Com. Comment to C.C. 1951.2; see *Wolfen v. Clinical Data* (1993) 16 C.A.4th 171, 178, 179, 19 C.R.2d 684 [landlord properly recovered damages from lessee for cost of bringing improvements made by sublessee up to code, without setoff for value of improvements]; *Old Republic Ins. Co. v. Superior Court* (1998) 66 C.A.4th 128, 148, 77 C.R.2d 642, citing the text; *Millikan v. American Spectrum Real Estate Services Calif.* (2004) 117 C.A.4th 1094, 1100, 12 C.R.3d 459 [landlord who, in order to mitigate rental losses, sold leased property after tenant had abandoned lease was entitled to award of selling expenses, including loan prepayment penalty, sales commission, and closing costs]; C.E.B., *Attorney's Guide to Damages* 2d, §4.79 et seq.)

Because C.C. 1951.2(a)(4) adopts the language of C.C. 3300, it is subject to the rule of C.C. 3358, that no person can recover a greater amount in damages for breach than he or she could have gained by full performance (see 1 *Summary* (10th), *Contracts*, §875). Hence, if the lessor relets the premises, unless the total detriment suffered, whether by loss of rental or consequential damages, exceeds the amount to be received under the new lease, there is in fact no detriment and no damages are recoverable. (*Willis v. Soda Shoppes of Calif.* (1982) 134 C.A.3d 899, 904, 905, 184 C.R. 761; see 50 A.L.R.4th 403 [rights in excess rent when landlord relets at higher rent during lessee's term].)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XVII - Real Property

Witkin Summary of California Law X. LANDLORD AND TENANT REMEDIES

A. Landlord's Remedies.

3. Action for Damages.

d. Mitigating Damages.

12 Witkin Sum. Cal. Law Real Property § 699

[§ 699] Mitigating Damages.

(1) *Lessor's Duty To Mitigate*. Recovery of unpaid rent up to the time of award (C.C. 1951.2(a)(2)) and recovery of rent for the balance of the term (C.C. 1951.2(a)(3)) are subject to the lessee's offset for reasonably avoidable rental loss. (See *supra*, §694 et seq.) Hence, if the lessor demands more than the unpaid rent due at the time of termination, the lessor must make reasonable efforts in good faith to relet the property.

In determining the amount recoverable under C.C. 1951.2(a)(2) and 1951.2(a)(3), "the lessee is entitled to have offset against the unpaid rent not merely all sums the lessor has received or will receive by virtue of a reletting of the property which has actually been accomplished but also all sums that the lessee can *prove* the lessor could have obtained or could obtain by acting reasonably in reletting the property. The duty to mitigate the damages will often require that the property be relet at a rent that is more or less than the rent provided in the original lease. The test in each case is whether the lessor acted reasonably and in good faith in reletting the property." (Law Rev. Com. Comment to C.C. 1951.2; see *Green v. Smith* (1968) 261 C.A.2d 392, 396, 67 C.R. 796, 6 Summary (10th), *Torts*, §1626 [quoted at length in Comment on meaning of "reasonableness" and qualification that injured party need not take measures that are impractical or would involve expenditures disproportionate to loss sought to be avoided or beyond party's financial means]; 75 A.L.R.5th 1 [landlord's duty to mitigate by accepting or procuring another tenant]; 72 Proof of Facts 3d 155 [sufficiency of landlord's efforts to mitigate damages following tenant's abandonment]; 1 Summary (10th), *Contracts*, §916.)

In *Zanker Dev. Co. v. Cogito Systems Corp.* (1989) 215 C.A.3d 1377, 264 C.R. 76, defendant tenant, after being evicted for default, offered to relet the premises. *Held*, "it is not necessary for a plaintiff landlord to renegotiate another lease with a defendant tenant who has repudiated its original lease and whose lease was terminated by an unlawful detainer judgment even though the tenant offers terms that conceivably could result in avoiding loss." (215 C.A.3d 1382 [adopting view of reasonableness stated in *Green v. Smith*].)

(2) *Lessee's Burden of Proof*. C.C. 1951.2(a)(2) and 1951.2(a)(3) both refer to rental loss "that the lessee proves" could be reasonably avoided. Thus, the burden of proof of any offset is placed on the lessee. (Law Rev. Com. Comment to C.C. 1951.2.)

(3) *No Waiver by Lessor's Efforts*. Formerly, a lessor's attempt to mitigate damages by reletting could result in an unintended surrender, defeating recovery of future rentals (see *supra*, §690). C.C. 1951.2(d) expressly nullifies this rule. "Efforts by the lessor to mitigate the damages caused by the lessee's breach of the lease do not waive the lessor's right to recover damages" under C.C. 1951.2. (C.C. 1951.2(d).)

(4) *Notice of Reletting*. A narrowly drafted provision for an informational notice of the initial reletting is stated in C.C. 1951.7(c). It applies (a) where the lessee has made an advance payment of a sum in excess of one month's rent, as prepayment or rent or as a deposit to secure performance (see *infra*, §747), (b) the amount of rent unpaid at the time of termination exceeds the amount of the advance payment, and (c) the lessee has made a written request to the lessor for the notice. (C.C. 1951.7(b).) The notice must state the name and address of the new lessee, the length of the new lease, and the amount of the rent. It must be delivered to the lessee personally or by regular mail, not later than 30 days after the new lessee takes possession. (C.C. 1951.7(c).)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Lessee's Burden of Proof*. See *Lu v. Grewal* (2005) 130 C.A.4th 841, 852, 30 C.R.3d 623, Supp., *infra*, §700 [trial court erred in allocating burden of proof to lessor].



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- A. Landlord's Remedies.
- 3. Action for Damages.
- e. Computation of Damages.

12 Witkin Sum. Cal. Law Real Property § 700

[§ 700] Computation of Damages.

In *Sanders Const. Co. v. San Joaquin First Fed. Savings & Loan Assn.* (1982) 136 C.A.3d 387, 186 C.R. 218, defendant tenant contracted to construct a building on plaintiff landlord's property and lease two-thirds of it for 25 years. Plaintiff agreed to pay \$ 140,000 of the cost of the portion of the building that was to be occupied by defendant and all the cost of that portion of the building that was not to be occupied by defendant. Defendant failed to proceed with the construction, and plaintiff brought suit for breach of the lease. The trial court awarded plaintiff \$ 192,600 general damages, \$ 28,600 for rent liability, and \$ 164,000 (\$ 304,000 estimated cost of the building minus the \$ 140,000 for which plaintiff was responsible) for failure to construct the improvements. *Held*, remanded for recomputation of damages.

(a) Under C.C. 1951.2(a)(2) (*supra*, §696), plaintiff is entitled to the present value of lost rent up to the time of the new hearing, subject to plaintiff's duty to mitigate damages by attempting to re-lease and defendant's right to prove that the loss could have been reasonably avoided. In computing this damage, defendant should be given the benefit of the fact that plaintiff did not have to service the takeout loan for \$ 140,000 to construct the office building; i.e., the rental should be reduced by the amount of interest that plaintiff would have had to pay on its \$ 140,000 loan. If defendant had performed rather than breached, plaintiff would have had to borrow \$ 140,000 to pay its share of the cost of constructing the building, and the interest expense for servicing that loan would have reduced the real income from rent. (136 C.A.3d 400.)

(b) In ascertaining the amount of damages for loss of future rent under C.C. 1951.2(a)(3) (*supra*, §697), an attempt should be made to ascertain the amount of yearly rent that plaintiff and defendant allocated to the bare land, and compare this amount with the rent for the land received under any new lease on the premises. If a lease is on more favorable terms, defendant is entitled to a credit; if on less, plaintiff is entitled to damages. In either event, the amount so computed will be reduced to present value by discounting it at the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus one percent. (136 C.A.3d 400, 401.)

(c) Under C.C. 1951.2(a)(4) (*supra*, §698), plaintiff is entitled to any other damages caused by the breach. These might include costs for cleaning up the property, brokerage and legal fees incurred in seeking a new tenant, permit fees, an evaluation of the security interest under the former lease for payment of rent by virtue of the fact that defendant was

to have a large investment in the building, as against the security for payment on rent in a new lease (any difference in the financial strength of defendant and a substitute lessee is irrelevant), and other special damages incurred as a proximate result of the breach. (136 C.A.3d 401.)

(d) It is difficult to devise a remedy for the loss of the reversionary interest. The building should be valued at the end of the lease and that value should be discounted to present value. For consistency and to carry out the spirit of the law, the discount rate provided in C.C. 1951.2(b) (supra, §697) should be utilized. In the event that plaintiff has a reversionary interest under a substitute lease on the same property, the same process should be undertaken as to it. The difference between the two should be added to the damages to be awarded plaintiff if the value of the reversionary interest of the building in the instant lease exceeds the one in the substitute lease. If the latter is greater, defendant is entitled to a credit. (136 C.A.3d 401.)

(e) Defendant may be entitled to a credit for the cost to plaintiff of the offsite work, because the trial court found that under an oral modification agreement, plaintiff had assumed responsibility for that aspect of the construction. If an award is made, it should be for the two-thirds of the cost that the parties had ascribed to plaintiff. Whether or not a credit should be given depends on the nature of the agreement that plaintiff was able to make with a subsequent tenant. If, in order to secure a tenant for the property, it had to pay for offsite work, there should be no credit. (136 C.A.3d 401, 402.)

(f) It is impossible to be more specific in giving guidance as to computing the proper damages without knowledge of the terms of a subsequent lease and the financing used. "The issue is as much one of economics as it is of law." The trial court must be resourceful in fashioning an award that will give plaintiff the full benefit of its bargain, and no more. (136 C.A.3d 402.)

SUPPLEMENT: [This section is current through the latest supplement]

In *Lu v. Grewal* (2005) 130 C.A.4th 841, 30 C.R.3d 623, defendants, lessees of a gas station, assigned their lease to a tenant who abandoned the property and failed to pay rent. Plaintiff lessor, after discovering that the abandoned property had been vandalized, occupied the property, made necessary repairs, and began operating the gas station herself. After several months, the business began to make a profit. While continuing to operate the business, plaintiff sued defendants for breach of the lease. At trial, defendants admitted that the property had been abandoned and that no rent had been paid for several years. Thus, the only issue was the amount of damages. The trial court determined that any damages resulting from the breach were far less than the profits made by plaintiff after the breach. Plaintiff was denied relief altogether, and judgment was entered for defendants. *Held*, reversed.

(a) Defendants were not entitled to full mitigation credit for the profits plaintiff generated by operating the business. Instead, the correct measure for mitigation credit is the property's fair market rental value. (130 C.A.4th 849.) Plaintiff "restored the property and devoted substantial efforts to running a business there to avoid the wasteful prospect of leaving the property unattended and unproductive. Although she made efforts to re-lease the premises, they were unsuccessful. As a result [plaintiff's] damages are the loss of the bargain represented by the lease [the rental payments agreed on in the lease] plus any consequential damages proved to the court, less any amount in mitigation that [defendants] proved." (130 C.A.4th 850, 851.) Defendants "are not entitled to the benefit of [plaintiff's] hard work and capital in making the property productive; nor should [plaintiff] be punished for bringing the abandoned property back to life." (130 C.A.4th 851.)

(b) On remand, the trial court must consider fair market rental value as the appropriate mitigation measure. Defendants must bear the burden of proving the amount they are entitled to offset against the unpaid rent. (130 C.A.4th 852.)



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A. Landlord's Remedies.

3. Action for Damages.

f. Liquidated Damages.

12 Witkin Sum. Cal. Law Real Property § 701

[§ 701] Liquidated Damages.

The former rule invalidating a lease provision for liquidated damages on the lessee's breach (see 1 *Summary* (10th), *Contracts*, §516) was based on the former law limiting the lessor's remedies to periodic suits for rent as it became due or a suit at the end of the term (see *supra*, §690). The 1970 legislation gives the lessor an immediate right of action for damages for loss of present or future rent (see *supra*, §694 et seq.), and thus removes both the theoretical and practical justification for the rule. The lessor's future damages may often be as difficult to determine as in other cases in which liquidated damage clauses have been upheld.

Accordingly, C.C. 1671, relating to liquidated damages, applies to a lease of real property. (C.C. 1951.5; see Law Rev. Com. Comment; C.E.B., *Attorney's Guide to Damages* 2d, §4.106; 22 *Proof of Facts* 3d 137 [enforceability of liquidated damages clause in commercial real property lease]; on liquidated damages generally, see 1 *Summary* (10th), *Contracts*, §533 et seq.; on deposits to secure performance under C.C. 1950.5 and 1950.7, see 1 *Summary* (10th), *Contracts*, §522 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Ejectment.

12 Witkin Sum. Cal. Law Real Property § 702

[§ 702] Ejectment.

A landlord who seeks to oust a defaulting tenant may bring the common law action of ejectment. (C.C. 793; see *Mossi v. Fairbanks* (1912) 19 C.A. 355, 356, 125 P. 1071; 25 Am.Jur.2d (2004 ed.), *Ejectment* §1 et seq.; 9 Am.Jur. P.P. Forms (1996 ed.), *Ejectment*, §13 et seq.; 5 Cal. Proc. (4th), *Pleading*, §§593, 594.)

SUPPLEMENT: [This section is current through the latest supplement]
Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §634 et seq.



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5. Unlawful Detainer.

a. In General.

1. Nature of Remedy.

12 Witkin Sum. Cal. Law Real Property § 703

[§ 703] Nature of Remedy.

Ejectment (*supra*, §702) is seldom brought. The more common practice is to employ the summary remedy of unlawful detainer. (See C.C. 792; C.C.P. 1159 et seq.; *Arnold v. Krigbaum* (1915) 169 C. 143, 145, 146 P. 423; *Markham v. Fralick* (1934) 2 C.2d 221, 223, 39 P.2d 804; *Samuels v. Singer* (1934) 1 C.A.2d 545, 549, 36 P.2d 1098, 37 P.2d 1050; *Stockton Morris Plan Co. v. Carpenter* (1936) 18 C.A.2d 205, 209, 63 P.2d 859; *Woods-Drury v. Superior Court* (1936) 18 C.A.2d 340, 344, 63 P.2d 1184; *McCarty v. Raso* (1951) 102 C.A.2d 909, 228 P.2d 577; *Cambridge v. Webb* (1952) 109 C.A.2d Supp. 936, 937, 244 P.2d 505; *Provouskivitz v. Snow* (1977) 74 C.A.3d 554, 558, 141 C.R. 531; *Superior Motels v. Rinn Motor Hotels* (1987) 195 C.A.3d 1032, 1055, 241 C.R. 487; *Fragomeno v. Insurance Co. of the West* (1989) 207 C.A.3d 822, 831, 255 C.R. 111, 3 Cal. Proc. (4th), Actions, §137 [action sounds in contract]; *Rest.2d, Property (Landlord and Tenant) §13.1*, Comment k, §14.1, Statutory Note; 7 Miller & Starr 3d, §19:208 et seq.; C.E.B., 2 Landlord-Tenant Practice 2d, Chaps. 9-13; C.E.B., 1 Eviction Defense Manual 2d, Chap. 2 [relationship of unlawful detainer to other actions]; Cal. Civil Practice, 3 Real Property Litigation, Chap. 18; 41 U.C.L.A. L. Rev. 759 [arguing for reform of summary eviction process]; 49 *Am.Jur.2d* (1995 ed.), *Landlord and Tenant* §1003 et seq.; 12 *Am.Jur. P.P. Forms* (1999 ed.), *Forcible Entry and Detainer*, §34 et seq.; 5 *Cal. Proc. (4th), Pleading*, §597.)

The remedy extends beyond the conventional relationship of landlord and tenant. The action may be brought by an owner against an employee or licensee. (C.C.P. 1161(1); see 5 *Cal. Proc. (4th), Pleading*, §606.) It may be brought by a purchaser of property at a judicial sale against a defendant in possession. (C.C.P. 1161a; see 5 *Cal. Proc. (4th), Pleading*, §607.) (See *Marquez-Luque v. Marquez* (1987) 192 C.A.3d 1513, 1518, 238 C.R. 172 [trial court, in proceeding to enjoin harassment under C.C.P. 527.6, lacked jurisdiction to evict defendant from his dwelling; unlawful detainer, with its procedural safeguards, was proper remedy]; on forcible entry and forcible detainer, see *infra*, §757; on reporting of unlawful detainer actions in consumer credit reports under C.C. 1785.13(a)(3), see 4 *Summary* (10th), *Sales*, §299.)

Unlawful detainer is a summary remedy. The time periods for pleading and service of process are shorter than in ordinary civil actions. (See *infra*, §730 et seq.) The period for setting the matter for trial is likewise shorter. (See *infra*, §736 et seq.) The action is entitled to priority on the trial calendar. (See *infra*, §736 et seq.) Expedient enforcement procedures are provided. (See *infra*, §§732, 737 et seq.) Because of its summary nature and its effect of forfeiting the

tenant's right of possession, strict compliance with the statutory requirements is required. (*Horton-Howard v. Payton* (1919) 44 C.A. 108, 112, 186 P. 167; *Feder v. Wreden Packing & Provision Co.* (1928) 89 C.A. 665, 670, 265 P. 386; *Baugh v. Consumers Associates, Ltd.* (1966) 241 C.A.2d 672, 674, 50 C.R. 822; *Lamey v. Masciotra* (1969) 273 C.A.2d 709, 713, 78 C.R. 344.)

In *Smith v. Municipal Court* (1988) 202 C.A.3d 685, 245 C.R. 300, plaintiff entered into a rental agreement with TMI, licensed by the county to rent boat slips in a marina. A dispute arose about charges, and TMI brought unlawful detainer. Plaintiff contended that the proceeding was improper because the rental of a defined space of surface water was not a rental of real property. *Held*, unlawful detainer was an available remedy. (a) Water in its natural state is part of the land and therefore real property. (202 C.A.3d 689, quoting the text.) (b) The contention that the wharf is not real property because it is not affixed to the adjacent land is misdirected. "It is the ownership of the navigable water of the boat slip, not the wharf, which is the key factor in determining availability of unlawful detainer." (202 C.A.3d 690.)

West's Key Number Digest, Landlord and Tenant k.287 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

See *Lincoln Place Tenants Assn. v. Los Angeles* (2007) 155 C.A.4th 425, 451, 66 C.R.3d 120 [unlawful detainer proceeding was inadequate in scope to address issues raised when developer sought to evict tenants and demolish units without fully complying with relocation mitigation measures imposed by city under CEQA; city's joinder would be required, and determination enforceability of mitigation measures would require more than evaluation of landlord-tenant law]; CACI, No. 4300 [Introductory Instruction]; 49 *Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §840; 12 *Am.Jur. P.P. Forms* (2008 ed.), *Forcible Entry and Detainer*, §30 et seq.

Fragomeno case:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §142.

Nature of remedy:

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §638.

Action against employee or licensee:

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §647.

Action against defendant in possession:

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §648.



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a. In General.

2. No Action If Tenant Surrenders.

12 Witkin Sum. Cal. Law Real Property § 704

[§ 704] No Action If Tenant Surrenders.

The purpose of the unlawful detainer action is to recover possession. Hence, if the tenant surrenders the premises before the proceeding commences, there is no unlawful detainer (*Markham v. Fralick* (1934) 2 C.2d 221, 225, 39 P.2d 804), even though the surrender is not within the 3-day notice period (see *infra*, §720).

In *Briggs v. Electronic Memories & Magnetics Corp.* (1975) 53 C.A.3d 900, 126 C.R. 34, defendant tenant subleased, and subsequently defaulted in rental payments. Plaintiff landlord served defendant with a 3-day notice to quit. Defendant did nothing until 8 days later, when his attorney wrote the landlord stating that the tenant was not in possession and surrendered any rights. On the same day, defendant notified its subtenant that it had surrendered and that further leasing arrangements were to be made with the landlord, who had previously accepted rental payments from the subtenant. Plaintiff landlord nevertheless filed a complaint in unlawful detainer. *Held*, the action did not lie. (53 C.A.3d 906.) (On surrender before trial, see *infra*, §§733, 734.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Regulation of Unlawful Detainer Assistants.

12 Witkin Sum. Cal. Law Real Property § 705

[§ 705] Regulation of Unlawful Detainer Assistants.

B. & P.C. 6400 et seq. establish a comprehensive regulatory scheme governing the activities of unlawful detainer assistants, defined as anyone rendering assistance or advice for compensation in an unlawful detainer proceeding. (*B. & P.C. 6400(a)*.) Exempted from the statutory requirements are government employees, members of the State Bar and their employees or independent contractors, employees of nonprofit tax-exempt corporations assisting clients free of charge, and licensed real estate brokers or salespersons who are parties to the unlawful detainer action and who perform any of the acts listed in *B. & P.C. 10131(b)*, which include collecting rent. (*B. & P.C. 6401*.) Unlawful detainer assistants are required to register with the county clerk (*B. & P.C. 6402* et seq.), post a \$ 25,000 bond or deposit cash in the same amount (*B. & P.C. 6405*), and include their registration number on any advertisement or work product (*B. & P.C. 6408*). The statutes specify various other requirements and prohibitions applicable to unlawful detainer assistants. (*B. & P.C. 6409* et seq.)

These regulations were enacted to protect tenants from unscrupulous individuals and associations who have defrauded them of their funds and their legal rights while purporting to offer protection from eviction. This problem has also resulted in the clogging of state and federal courts with frivolous or fraudulent proceedings. The registration requirements are intended to assist law enforcement officials in locating and prosecuting offending parties, and the bond requirement will make funds available to defrauded tenants. (See Stats. 1993, Chap. 1011, §1; 25 *Pacific L. J.* 444.)

The regulatory scheme governing unlawful detainer assistants was extended in 1998 to "legal document assistants." (See 1 *Cal. Proc.* (4th), *Attorneys*, Supp., §400B.)

SUPPLEMENT: [This section is current through the latest supplement]
Cross-Reference: 1 *Cal. Proc.* (5th), *Attorneys*, §382.



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A. Landlord's Remedies.

5. Unlawful Detainer.

b. Tenant's Defense of Retaliatory Eviction.

1. Judicially Declared Doctrine.

aa. Nature of Defense.

12 Witkin Sum. Cal. Law Real Property § 706

[§ 706] Nature of Defense.

A retaliatory eviction occurs when a landlord attempts to terminate a tenancy in an authorized manner, but with the motive of retaliating against a tenant who is not in default but has merely exercised a legal right. The doctrine was originally developed to protect residential tenants seeking compliance with requirements of habitability, but has been extended to other exercise of rights (see *infra*, §707 et seq.), and is recognized as a defense in a number of jurisdictions. (See *Schweiger v. Superior Court* (1970) 3 C.3d 507, 512, 90 C.R. 729, 476 P.2d 97; *Rest.2d, Property (Landlord and Tenant)* §§14.8, 14.9; 18 *Hastings L. J.* 700 [argument for adoption of doctrine]; 46 *So. Cal. L. Rev.* 118 [C.C. 1942.5 as partial solution to need for doctrine]; 22 *U.C.L.A. L. Rev.* 1161 [California's common law doctrine against retaliatory conduct]; 23 *A.L.R.5th* 140 [retaliatory eviction for reporting landlord's violation of law]; 45 *Proof of Facts* 3d 375 [tenant's rights and remedies against retaliatory eviction].)

In *Schweiger v. Superior Court*, *supra*, a tenant made a month-to-month oral agreement for rental of an apartment from a landlord for \$ 60 per month. During a 4-year period, the rent was increased to \$ 75, a normal raise for the apartments. The tenant then requested that the landlord make certain repairs to render the premises fit for occupancy, and the landlord responded with a notification that the rent was increased to \$ 125 per month. The tenant then spent money for repairs, and paid the former rent after deducting the cost of repairs (pursuant to C.C. 1942, *supra*, §620). The landlord promptly served a 3-day notice to quit and brought unlawful detainer. The tenant offered evidence of the sequence of events and the average rental of similar apartments (\$ 70-\$ 75). The trial judge agreed that the rent increase was a retaliation against the tenant for asserting his statutory rights, but rejected the defense as a matter of law. *Held*, the defense was a proper one and should be considered.

(a) *The seemingly conflicting statutes.* C.C. 1942 gives the tenant the right to demand repairs, but C.C. 1946 and C.C.P. 1161 give the landlord power to raise the rent or terminate a month-to-month tenancy and evict a tenant for failure to pay. (3 C.3d 511.)

(b) *Precedent from other jurisdictions.* *Edwards v. Habib* (D.C. Cir. 1968) 397 F.2d 687, recognized the retaliation defense where a tenant in a public housing unit complained of violations of housing and sanitary codes. (3 C.3d 512.)

This case is substantially in point and declares a sound policy applicable to C.C. 1941 and 1942. "If we deny tenants a defense against retaliatory eviction in unlawful detainer actions, we lend the exercise of the judicial process to aid landlords in punishing those tenants with the audacity to exercise their statutory rights." (3 C.3d 513.)

(c) *Analogy of eviction because of race.* *Abstract Inv. Co. v. Hutchinson* (1962) 204 C.A.2d 242, 22 C.R. 309, supra, §682, furnishes additional support for the defense. "[T]he right not to be deprived in court of home and shelter because of the exercise of statutory rights is a 'broad equitable principle' as deserving of protection as the right to equal protection under the law. Thus, the sound reasoning of *Abstract Inv. Co.*, which imposes an equitable limitation on the punitive power of landlords to evict their tenants, applies with persuasive force to the instant action to prohibit eviction in retaliation against the exercise of statutory rights." (3 C.3d 515.)

(d) *California decisions expressing same policy.* California cases holding it improper to discharge an employee because the employee applied for union membership, or because the employee refused to testify falsely before a legislative committee, are likewise persuasive indications that "one may not exercise normally unrestricted power if his reasons for its exercise contravene public policy." (3 C.3d 516.)

(e) *Rule and qualification.* "If a tenant factually establishes the retaliatory motive of his landlord in instituting a rent increase and/or eviction action, such proof should bar eviction." (3 C.3d 517.) However, the proof does not entitle the tenant to remain permanently in possession. The landlord can take action if the illegal purpose "is dissipated." (3 C.3d 517.)

West's Key Number Digest, Landlord and Tenant k.180 et seq., 290 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



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bb. Tenant's Cause of Action.

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[§ 707] Tenant's Cause of Action.

In *Aweeka v. Bonds* (1971) 20 C.A.3d 278, 97 C.R. 650, plaintiff tenants entered into a month-to-month oral rental agreement for an apartment in defendant's apartment house. The rent on January 1, 1969, was \$ 75. Plaintiffs complained to defendant of leaks, falling plaster, and a defective back door, but he repeatedly refused to repair. Plaintiff wrote defendant on July 1, 1969, of their intention to make repairs and deduct the cost pursuant to C.C. 1941 and 1942. On August 2, 1969, defendant served notice of an increase in rent to \$ 145 per month, although the reasonable value of the premises, according to plaintiffs, was \$ 75 per month. Defendant was allegedly aware of plaintiffs' inability to pay the increase. Consequently, plaintiffs contended, the raise constituted an eviction. Plaintiffs sought general damages for the eviction and emotional distress, punitive damages, and a preliminary injunction. The trial judge sustained a demurrer without leave to amend. *Held*, judgment on demurrer reversed.

"We can discern no rational basis for allowing such a substantive defense while denying an affirmative cause of action. It would be unfair and unreasonable to require a tenant, subjected to a retaliatory rent increase by the landlord, to wait and raise the matter as a defense only, after he is confronted with an unlawful detainer action." Accordingly, on the authority of *Schweiger v. Superior Court* (1970) 3 C.3d 507, 90 C.R. 729, 476 P.2d 97, *supra*, §706, the complaint stated a cause of action for retaliatory eviction. (20 C.A.3d 281.)

In *Newby v. Alto Riviera Apartments* (1976) 60 C.A.3d 288, 131 C.R. 547, the court refused to extend the *Aweeka* holding beyond its facts. Plaintiff, a tenant in an apartment complex owned and managed by defendants, organized a group of tenants to petition defendant to discuss contemplated rent increases. Defendants, fearing a rent strike, threatened plaintiff and served a notice to quit, but did not bring an eviction proceeding. *Held*, plaintiff stated a cause of action for intentional infliction of emotional distress (see 5 *Summary* (10th), *Torts*, §449 et seq.), but not for retaliatory eviction.

(a) *Aweeka v. Bonds* did not involve a threatened eviction for exercising constitutional rights, but an actual eviction due to a large rent increase. "No other California decision has drawn from the constitutional language protecting citizens from government oppression a right on the part of a tenant to seek relief from a threatened eviction." (60 C.A.3d 294.)

(b) C.C. 1942.5 (infra, §712) did not apply because the tenant was not demanding that the premises be made habitable, but was opposing a rent increase. C.C. 1942.5 gives no protection from retaliation for that activity. (60 C.A.3d 293.)

(c) Plaintiff did not state a cause of action based on eviction for exercise of her constitutional rights of free speech and assembly, for no state action was involved. *Abstract Inv. Co. v. Hutchinson* (1962) 204 C.A.2d 242, 22 C.R. 309, supra, §682, involved a summary proceeding using the processes of the court. (60 C.A.3d 294.) Other cases support the proposition that state action is involved if the court provides the machinery to a landlord to institute discriminatory action. (60 C.A.3d 295.) But serving a notice to quit, which is not court process, does not constitute state action. (60 C.A.3d 295.)

SUPPLEMENT: [This section is current through the latest supplement]
See 99 Am.Jur. Trials 289 [retaliatory eviction claims].



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cc. Exercise of Federal Right.

12 Witkin Sum. Cal. Law Real Property § 708

[§ 708] Exercise of Federal Right.

In *S.P. Growers Assn. v. Rodriguez* (1976) 17 C.3d 719, 131 C.R. 761, 552 P.2d 721, defendants, farm workers who had been employed by plaintiff labor contractor, called a strike, and later filed suit against plaintiff in the federal district court charging violation of the former Farm Labor Contractor Registration Act (7 U.S.C., §2041), now the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C., §1801 et seq.). Plaintiff immediately served eviction notices and then filed unlawful detainer actions. Defendants raised the defense of retaliatory eviction, which the court rejected. *Held*, reversed.

(a) *Test for retaliatory eviction defense.* The court must engage in a balancing process, to determine "whether the public policies furthered by protecting defendants from eviction outweigh the interests in preserving the summary nature of unlawful detainer proceedings." (17 C.3d 724.) Here, the federal Act requires disclosure of information about prospective employment to each worker, and prohibits discrimination against a worker in retaliation for filing suit under the Act. Thus, the Act relies in large part on the initiation of private litigation, and, if employers are able to evict farm workers from company-controlled housing in retaliation for that litigation, enforcement of the federal Act may rapidly become emasculated. (17 C.3d 725.)

(b) *California line of authority applicable.* Although a federal statute is involved, the state court has concurrent jurisdiction to enforce a right created by federal law (see 2 Cal. Proc. (4th), *Jurisdiction*, §83). Here, the court is merely construing state law so as not to thwart the express purpose of the remedial federal statute. (17 C.3d 726.) Nor is there any merit in the assertion that the statute was enacted to protect persons as employees and not as tenants. "In a retaliatory eviction proceeding, the crucial question is not whether the statute is designed to aid tenants, but whether it depends for its effectiveness on private initiative and would thus be emasculated by allowing punitive eviction. In the present circumstances that question must be answered affirmatively." (17 C.3d 728.)

(c) *Summary nature of unlawful detainer.* *Union Oil Co. v. Chandler* (1970) 4 C.A.3d 716, 84 C.R. 756, rejected the contention of a service station lessee that his lease had been terminated in retaliation for refusal to accede to a price-fixing scheme violating federal antitrust laws. This case is distinguishable in two respects. First, in *Union Oil Co.*,

the trial judge would have had to construe the antitrust laws to determine whether there was a violation, whereas here, no construction of federal law is sought. Second, *Union Oil Co.* involved a commercial lease, and the lessee could file a suit to vindicate his business rights, an alternative that is of small comfort to a residential tenant. (17 C.3d 730.) The present threat to the summary nature of unlawful detainer proceedings is no greater than that in *Schweiger v. Superior Court* (1970) 3 C.3d 507, 90 C.R. 729, 476 P.2d 97, and, as in *Schweiger*, "it must be balanced against the more important interest of vindicating statutory public policy." (17 C.3d 730.) (See *Vargas v. Municipal Court* (1978) 22 C.3d 902, 914, 150 C.R. 918, 587 P.2d 714 [municipal court had jurisdiction to consider defense of tenant farm workers that termination was in retaliation for claim of rights under *Lab.C. 1140* et seq.].)

SUPPLEMENT: [This section is current through the latest supplement]
Concurrent jurisdiction:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §82.



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dd. Report of Landlord's Crime.

12 Witkin Sum. Cal. Law Real Property § 709

[§ 709] Report of Landlord's Crime.

In *Barela v. Superior Court* (1981) 30 C.3d 244, 178 C.R. 618, 636 P.2d 582, petitioner tenant notified the police that her landlord had sexually molested her 9-year-old daughter, and the landlord gave notice of a rent increase from \$ 200 per month to \$ 650 per month. In a subsequent unlawful detainer proceeding, petitioner alleged retaliatory eviction as an affirmative defense. *Held*, the defense was properly raised, under both the statute and the judicially declared doctrine.

(a) C.C. 1942.5(c) (infra, §712) prohibits eviction in retaliation for the lessee's lawful and peaceable exercise of "any rights under the law." It is both a duty and a right of every person to report violations of the criminal laws. (30 C.3d 252.)

(b) The same analysis supports the defense under the judicially declared doctrine. The public interests involved are important and even more compelling than those recognized in *S.P. Growers Assn. v. Rodriguez* (1976) 17 C.3d 719, 131 C.R. 761, 552 P.2d 721, supra, §708. (30 C.3d 254.)

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ee. Commercial Lease.

12 Witkin Sum. Cal. Law Real Property § 710

[§ 710] Commercial Lease.

Custom Parking v. Superior Court (1982) 138 C.A.3d 90, 187 C.R. 674, holds that the defense of retaliatory eviction may be asserted in an unlawful detainer proceeding brought by a commercial landlord. Defendant tenant, on a month-to-month basis, operated a parking lot serving restaurants operated by other tenants of plaintiff landlord. Plaintiff was a party to several lawsuits with his restaurant tenants, and attempted to require defendant's employees to testify falsely in his favor in these lawsuits. On their refusal, he gave notice of termination of the tenancy and brought unlawful detainer. The trial judge rejected the defense of retaliatory eviction and gave judgment for plaintiff. *Held*, mandamus granted to compel vacating of the judgment.

(a) *Background of commercial/residential distinction.* Language in some California decisions suggests that the defense of retaliatory eviction is designed to protect the tenant's fundamental right to a home, and cannot be raised by commercial tenants. (138 C.A.3d 96 et seq.) And in *Schulman v. Vera* (1980) 108 C.A.3d 552, 561, 166 C.R. 620, supra, §631, the court held that the implied warranty of habitability established by *Green v. Superior Court* (1974) 10 C.3d 616, 637, 111 C.R. 704, 517 P.2d 1168, was restricted to residential leases. (138 C.A.3d 99.)

(b) *Distinction not applicable to present retaliatory eviction defense.* In view of the strong public policy against intimidating witnesses from testifying honestly, "the distinction between a commercial and a residential tenancy pales into insignificance." Would *Barela v. Superior Court* (1981) 30 C.3d 244, 178 C.R. 618, 636 P.2d 582, supra, §709, "have been decided differently had the complaining mother rented a store rather than a residence from the man who allegedly assaulted her daughter? We think not. ... Here, to preclude the defense would be to create a class of litigants, commercial landlords, with a legally sanctioned means of punishing tenants who testify honestly but adversely to the landlord in a lawsuit between the landlord and third parties. To countenance such a result would be to put a judicial imprimatur upon attempts to impair the truth-finding process of our legal system." (138 C.A.3d 101.)

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ff. Distinction: Third Party's Coercion.

12 Witkin Sum. Cal. Law Real Property § 711

[§ 711] Distinction: Third Party's Coercion.

In *Mobil Oil Corp. v. Handley* (1978) 76 C.A.3d 956, 143 C.R. 321, plaintiff oil company brought unlawful detainer against defendant service station lessee. Defendant, by cross-complaint, set up the claim of retaliatory eviction, alleging that T.B.A., an independent distribution organization, had brought pressure on him to buy plaintiff's tires, batteries, and other accessories, in violation of *B. & P.C. 21140.2* (prohibiting coercion of franchisees into buying distributors' accessories), and that his lease was terminated because of his refusal to yield. *Held*, the cross-complaint was properly stricken. The conduct complained of was that of an independent third party, not the lessor, and defendant's remedy is an independent action against that third party for damages under *B. & P.C. 21140.2* et seq. (76 C.A.3d 966, 967.)

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 - aa. Retaliatory Acts Prohibited.

12 Witkin Sum. Cal. Law Real Property § 712

[§ 712] Retaliatory Acts Prohibited.

(1) *Applicability of Defense.* If a lessor retaliates against a lessee because the lessee exercises rights under C.C. 1940 et seq. or complains to an appropriate agency about a dwelling's tenantability, the defense of retaliatory eviction arises. (C.C. 1942.5(a).) Language in the original version of the statute limiting the defense to cases in which the lessor had retaliation as a "dominant purpose" was eliminated in 1979.

(2) *Retaliatory Acts.* The lessor may not (a) recover possession of the dwelling in an action or proceeding, (b) cause the lessee to quit voluntarily, (c) increase the rent, or (d) decrease services. (C.C. 1942.5(a).)

(3) *Waiver of Defense Is Invalid.* A waiver by a lessee of the rights under C.C. 1942.5 is void as contrary to public policy. (C.C. 1942.5(d).)

(4) *Organization or Participation in Tenants' Associations.* A landlord may not retaliate against a tenant who "has lawfully organized or participated in a lessees' association or an organization advocating lessees' rights or has lawfully and peaceably exercised any rights under the law." (C.C. 1942.5(c); see *Rich v. Schwab* (1984) 162 C.A.3d 739, 743, 209 C.R. 417 [violation of C.C. 1942.5(c) if landlord raised rent to retaliate against tenants who lobbied for rent control].) During reasonable hours or because of emergency circumstances, an occupant of residential real property may invite a person to enter the property to provide information about tenants' rights or to participate in an association of tenants or lessees or an association that advocates tenants' rights. The invited person cannot be held civilly or criminally liable for trespass. (C.C. 1942.6 [stating that statute is declaratory of existing law].)

(5) *Applicability to Mobilehome Park Tenants.* The protections of C.C. 1942.5 extend to tenants of mobilehome parks who own their own dwellings and merely rent space from their landlord. (*Rich v. Schwab* (1998) 63 C.A.4th 803, 812, 75 C.R.2d 170, *infra*, §715.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Applicability of Defense.* See CACI, No. 4321 [Affirmative Defense--Retaliatory Eviction--Tenant's Complaint].(4)

Organization or Participation in Tenants' Associations. See CACI, No. 4322 [Affirmative Defense--Retaliatory Eviction--Engaging in Legally Protected Activity (*Civ. Code*, § 1942.5(c))].



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bb. Restrictions on Lessee's Defense.

12 Witkin Sum. Cal. Law Real Property § 713

[§ 713] Restrictions on Lessee's Defense.

The lessee's defense is subject to three restrictions:

- (1) The lessee must not be in default in payment of rent. (C.C. 1942.5(a).)
- (2) The lessee may not invoke C.C. 1942.5(a) more than once in a 12-month period. (C.C. 1942.5(b).)
- (3) Under C.C. 1942.5(a), the lessor's retaliatory acts are prohibited only for a period of 180 days after the following events:
 - (a) The lessee has given good faith notice under C.C. 1942, or has made an oral complaint to the lessor (see *Kemp v. Schultz* (1981) 121 C.A.3d Supp. 13, 18, 175 C.R. 412).
 - (b) The lessee has filed a written or oral complaint, registered or otherwise recorded in writing, with an appropriate agency, of which the lessor has notice.
 - (c) The date of inspection or issuance of a citation resulting from a lessee's filed complaint, of which the lessor did not have notice.
 - (d) The filing of appropriate documents commencing a judicial or arbitration proceeding involving the issue of tenantability.
 - (e) Entry of judgment or signing of an arbitration award against the lessor on the issue of tenantability (see *Kriz v. Taylor* (1979) 92 C.A.3d 302, 310, 154 C.R. 824).

There is no 180-day period attached to the prohibition in C.C. 1942.5(c) (*supra*, §712) against retaliating when a tenant participates in a tenant's association.

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12 Witkin Sum. Cal. Law Real Property § 714

[§ 714] Burden of Proof.

In *Western Land Office v. Cervantes* (1985) 175 C.A.3d 724, 220 C.R. 784, the court, on an examination of the judicially developed defense and of C.C. 1942.5, rejected the contention that the statute creates a rebuttable presumption of retaliatory motive, and held that the Legislature did not intend to alter the general rules stated in *Ev.C. 500* and *520*. (175 C.A.3d 740, 742; see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §§6, 14.) Hence, if the defense of retaliatory eviction is asserted under C.C. 1942.5, the tenant has the overall burden of proving the landlord's retaliatory motive by a preponderance of the evidence. (175 C.A.3d 742.) However, if the landlord takes action for a valid ground not listed in the unlawful detainer statutes, the landlord must give notice to the tenant of that ground, and if the tenant controverts it, the landlord has the burden of proving its existence by a preponderance of the evidence. (175 C.A.3d 742.)

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dd. Tenant's Remedies.

12 Witkin Sum. Cal. Law Real Property § 715

[§ 715] Tenant's Remedies.

(1) *Damages and Attorneys' Fees.* A landlord or landlord's agent who violates C.C. 1942.5 is liable for actual damages, and for not less than \$ 100 nor more than \$ 2,000 in punitive damages "for each retaliatory act," if the landlord or agent has been guilty of "fraud, oppression, or malice." (C.C. 1942.5(f).) Attorneys' fees must be awarded to the prevailing party if they are requested when the action is initiated. (C.C. 1942.5(g).)

In *Rich v. Schwab* (1998) 63 C.A.4th 803, 75 C.R.2d 170, a class action by mobilehome park tenants against the owners of the mobilehome park, plaintiffs alleged that defendants had raised rents in retaliation for plaintiffs' efforts to obtain relief from an earlier rent increase. A jury determined that the second rent increase was retaliatory. A second jury determined that 423 tenants had left the park as a result of defendants' conduct, and imposed \$ 1,000 in punitive damages for each of the 653 tenants who had suffered the second rent increase. The trial judge, however, refused to award punitive damages to the 230 tenants who had remained at the park after the second increase, and to award attorneys' fees to any tenants. *Held*, reversed as to punitive damages and attorneys' fees.

(a) *C.C. 1942.5 provides protection to mobilehome park tenants.* C.C. 1942.5(c) and 1942.5(f) give a right of action to any "lessee" who has been subjected to unlawful retaliatory acts. (63 C.A.4th 812.) Moreover, under C.C. 1940 (supra, §514), which is the first section in the chapter that includes C.C. 1942.5, that chapter applies to leases of dwelling units, *and* unless specifically limited to those leases, to all other types of leases as well. (63 C.A.4th 813.) Finally, the Mobilehome Residency Law (C.C. 798 et seq., infra, §761 et seq.) supplements, rather than limits, the rights of mobilehome park tenants, and none of its provisions conflicts with the remedies provided by C.C. 1942.5. (63 C.A.4th 813, 814.)

(b) *All tenants are entitled to the punitive damages imposed by the jury.*

(1) Plaintiffs were not required to present evidence of defendants' financial condition at trial. Although *Adams v. Murakami* (1991) 54 C.3d 105, 284 C.R. 318, 813 P.2d 1348, 6 Summary (10th), *Torts*, §1619, holds that punitive damages under C.C. 3294 cannot be awarded without such evidence, that holding does not apply here, where the

punitive damages were awarded under the specific provisions of C.C. 1942.5. A jury has authority to determine the amount of punitive damages under C.C. 3294, and the holding in *Murakami* reflects the desire to avoid leaving a defendant financially ruined. (63 C.A.4th 815, 816.) Here, by contrast, the maximum amount of punitive damages is set by statute at \$ 1,000. (63 C.A.4th 816.) "Presumably, the Legislature considered the potential impact on landlords in setting the very specific monetary parameters," and the court is in no position to add a general requirement that a tenant also show the landlord's financial condition. (63 C.A.4th 817.)

(2) The trial court erred in awarding punitive damages to only the tenants who moved from the mobilehome park. C.C. 1942.5(f)(2) does not require that a tenant move or be evicted to collect punitive damages. It requires merely that the tenant be the victim of a retaliatory act in violation of C.C. 1942.5. (63 C.A.4th 817.) Each of the nonmoving tenants was subjected to a retaliatory rent increase prohibited by C.C. 1942.5(c), and each was compelled to pay excessive rent. They are entitled to the punitive damages. (63 C.A.4th 818.)

(c) *The tenants who moved because of the rent increase are entitled to recover their attorneys' fees.* C.C. 1942.5(g) permits attorneys' fees in any action brought for "retaliatory eviction." *Aweeka v. Bonds* (1971) 20 C.A.3d 278, 97 C.R. 650, supra, §707, held that a retaliatory eviction cause of action arises at common law whenever a retaliatory rent increase causes a tenant to move. There is no reason to conclude that the Legislature was referring in C.C. 1942.5(g) to a narrower class of cases than previously recognized in *Aweeka*. (63 C.A.4th 818.)

(2) *Statutory Remedies Are Not Exclusive.* The remedies provided by C.C. 1942.5 are in addition to other remedies provided by "statutory or decisional law." (C.C. 1942.5(h).) Hence, "California has two parallel and independent sources for the doctrine of retaliatory eviction." (*Barela v. Superior Court* (1981) 30 C.3d 244, 251, 178 C.R. 618, 636 P.2d 582, supra, §709.)

C.C. 1942.5(h) was the Legislature's response to judicial uncertainty first expressed in *S.P. Growers Assn. v. Rodriguez* (1976) 17 C.3d 719, 131 C.R. 761, 552 P.2d 721, supra, §708, as to the intended scope of the statutory defense. The common law defense is not subject to the time limitations of the statute. (*Glaser v. Meyers* (1982) 137 C.A.3d 770, 776, 187 C.R. 242.) However, according to *Glaser*, legislative clarification of this and other inconsistencies and uncertainties is needed. Despite reenactment of C.C. 1942.5 with amendments, and its judicial construction in *Barela*, ambiguities remain that will ultimately require legislative or judicial resolution. First, the Legislature has expressly provided that the remedies provided by C.C. 1942.5 are in addition to other remedies provided by statutory or decisional law. "However, if the statute's time limitations can be avoided by asserting the common law defense, of what use are those time limits? Second, as construed in *Barela*, section 1942.5 seems internally inconsistent. That court construed subdivision (c) to enable a tenant to defend against an unlawful detainer action by alleging that the eviction was in retaliation for *the lawful exercise of any rights under the law*. As a tenant is apparently protected indefinitely by subdivision (c), can a tenant who has exercised his or her rights to repair and deduct or who has complained to the landlord regarding tenantability, avoid the time limits of subdivision (a) by relying on subdivision (c)?" (137 C.A.3d 776, footnote 4.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Statutory Remedies Are Not Exclusive.* See 99 Am.Jur. Trials 289 [retaliatory eviction claims].



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ee. Retaliatory Eviction as Unfair Business Practice.

12 Witkin Sum. Cal. Law Real Property § 716

[§ 716] Retaliatory Eviction as Unfair Business Practice.

In *Hernandez v. Stabach* (1983) 145 C.A.3d 309, 193 C.R. 350, plaintiff tenants of an apartment complex filed a class action against defendant landlord in the superior court. The complaint alleged that the premises were uninhabitable, and that defendant had instituted unlawful detainer actions in retaliation for their demands that the premises be maintained in a habitable condition. The trial judge granted a preliminary injunction restraining defendant from bringing municipal court actions to evict plaintiffs without a showing of good cause made to the superior court. *Held*, affirmed.

(a) Unfair competition under *B. & P.C. 17200* includes any business practice forbidden by law. (See 13 *Summary* (10th), *Equity*, §105.) Plaintiffs' declaration showed that the defendant rented to families knowing that they would overcrowd the apartment. When the tenants formed an association and asserted their statutory rights in an attempt to end the improper conditions, defendant commenced unlawful detainer actions on the basis of overcrowding. The institution of the proceedings "was an integral part of his unlawful business practice of maintaining substandard, dangerous, unhealthy, unsanitary housing and permitting overcrowded conditions in the apartments." When retaliatory eviction is a business practice within the meaning of *B. & P.C. 17200*, it may be enjoined under *B. & P.C. 17203*. (145 C.A.3d 314.)

(b) The injunction did not prevent defendant from bringing unlawful detainer against a plaintiff for nonpayment of rent. It merely required him to obtain leave of court. (145 C.A.3d 313, 315.) "In view of the record upon which the trial court's preliminary injunction and order were based this result appears to be eminently reasonable to us. If leave to proceed is wrongfully denied, he may seek the appropriate remedy at that time." (145 C.A.3d 317.)

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CHAPTER XVII - Real Property

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A. Landlord's Remedies.
5. Unlawful Detainer.
b. Tenant's Defense of Retaliatory Eviction.
2. Statutory Rule.
ff. Permissible Acts by Lessor.

12 Witkin Sum. Cal. Law Real Property § 717

[§ 717] Permissible Acts by Lessor.

The lessor may recover possession or do any of the other acts specified in C.C. 1942.5(a) and 1942.5(c) (*supra*, §712) "for any lawful cause." (C.C. 1942.5(d).) The lessor may do these acts if the notice of termination, rent increase, or other act, and any pleading or statement of issues in arbitration states the ground on which the lessor, in good faith, seeks to do them. (C.C. 1942.5(e).)

In *Four Seas Inv. Corp. v. International Hotel Tenants' Assn.* (1978) 81 C.A.3d 604, 610, 146 C.R. 531, plaintiff bought an old hotel in dilapidated condition, intending to demolish the building as part of a large contemplated construction project. Defendant tenants refused to vacate after notice of termination, plaintiff brought unlawful detainer, and defendants set up the defense of retaliatory eviction. *Held*, judgment for plaintiff affirmed. The uncontroverted evidence showed that eviction was sought not in reprisal for complaints of building code violations, but rather because of "a preexisting rational, uncontrived and substantial business motive." (81 C.A.3d 610.)

The relationship between a tenant's defense of retaliatory eviction and a landlord's right to withdraw property from the rental market under the Ellis Act (*Govt.C. 7060 et seq.*, *supra*, §598 et seq.) was explored in *Drouet v. Superior Court* (2003) 31 C.4th 583, 3 C.R.3d 205, 73 P.3d 1185. Plaintiff landlord and defendant tenants had had several conflicts during the course of a long tenancy. Several months after defendants requested that plaintiff make various repairs, plaintiff commenced proceedings under the Ellis Act to withdraw his residential units from the rental market. Plaintiff served notice as required by the Act, but defendants failed to quit the premises. Plaintiff filed an unlawful detainer action, to which defendants raised the defense of retaliatory eviction. The trial court denied plaintiff's motion for summary adjudication of that defense, and plaintiff sought a writ of mandamus in the appellate division of the superior court. The writ was granted. The Court of Appeal affirmed, holding that, in unlawful detainer proceedings properly commenced under the Ellis Act, a tenant may not raise an affirmative defense of retaliatory eviction to prevent displacement. *Held*, reversed and remanded.

(a) The plain language of *Govt.C. 7060(d)* provides that nothing in the Ellis Act supersedes C.C. 1942.5. It does not follow, however, that C.C. 1942.5 supersedes the *Ellis Act*. (31 C.4th 593.) The two must be harmonized in such a way

that C.C. 1942.5 is not replaced, set aside, or annulled by the *Ellis Act*. (31 C.4th 594.)

(b) C.C. 1942.5(d) provides an exception to the prohibitions of C.C. 1942.5(a) and 1942.5(c) when a landlord exercises rights under "any law pertaining to the hiring of property." (31 C.4th 594.) The Ellis Act is such a law. "We therefore conclude that a landlord's withdrawal of rental property from the market under the Act constitutes the exercise of a right under a law pertaining to the hiring of property" under C.C. 1942.5(d). (31 C.4th 595.) Nevertheless, under C.C. 1942.5(e), landlords must assert their invocation of the Ellis Act "in good faith." (31 C.4th 595.) This does not mean that a landlord must prove an absence of retaliatory motive. Rather, in response to a retaliatory eviction defense, the landlord must demonstrate a bona fide intent to withdraw the property from the rental market. If the tenant controverts the landlord's good faith, the landlord must establish the existence of the bona fide intent at a trial or hearing by a preponderance of the evidence. "This construction best harmonizes the Act with the text of the retaliatory eviction statute." (31 C.4th 596.)

Three justices concurred in holding that the Ellis Act permits a tenant to raise the retaliatory eviction defense in an unlawful detainer action. They dissented, however, from the holding that a landlord may defeat the defense by demonstrating a bona fide intent to withdraw the property from the rental market, even if the landlord's purpose is to retaliate. (31 C.4th 605.)

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3. Distinction: Termination of Gasoline Dealer's Lease.

12 Witkin Sum. Cal. Law Real Property § 718

[§ 718] Distinction: Termination of Gasoline Dealer's Lease.

In *E.S. Bills v. Tzucanow* (1985) 38 C.3d 824, 215 C.R. 278, 700 P.2d 1280, plaintiff, a petroleum distributor, leased a gasoline service station to defendant dealers. The lease and purchase agreements obligated defendants to buy gasoline from plaintiff at its "applicable Dealer Purchase Price," and these arrangements constituted a franchise under *B. & P.C. 20999.1*. After 21/2 years of performance, defendants, contending that plaintiff was violating the price agreement, began purchasing from another supplier. Plaintiff brought unlawful detainer, and defendants sought to introduce relevant evidence on the issue of good cause under *C.C.P. 1174(a)*. The trial judge excluded the evidence and gave judgment for plaintiff. *Held*, reversed.

(a) *Union Oil Co. v. Chandler* (1970) 4 C.A.3d 716, 84 C.R. 756, held, before the enactment of *B. & P.C. 20999.1* and *C.C.P. 1174(a)*, that a service station operator could not set up the defense of retaliatory eviction in an unlawful detainer action. However, the lack of good cause under *B. & P.C. 20999.1* to terminate a gasoline dealer's franchise "is not simply a defense to be balanced against the policy of preserving the summary nature of unlawful detainer proceedings. Instead, section 1174(a) now includes the existence of such good cause as a prerequisite to an unlawful detainer judgment for restoration of a defendant gasoline dealer's premises to a plaintiff petroleum distributor. Thus, the issue now determinative of plaintiff's right to repossession was joined in the pleadings not by the defendants' retaliatory eviction defense but by the complaint's allegation of good cause for termination, and the denial of that allegation in the answer." (38 C.3d 831.)

(b) The statute contains two safeguards for the distributor: (1) the right to a writ of possession against an absent or inaccessible defendant on filing of an undertaking (*C.C.P. 1166a*), and (2) the court's authority to require rental payments from the tenant pending resolution of the action. "Apart from those two, ... section *C.C.P. 1174(a)* directs that in unlawful detainer proceedings by petroleum distributors against gasoline dealers, the ordinarily summary nature of the unlawful detainer proceeding must give way to the policy of assuring that the petroleum distributor indeed had good cause for terminating the franchise." (38 C.3d 832.)

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[§ 719] Other Defenses of Tenant.

Other defenses that a tenant may assert in a landlord's unlawful detainer action are discussed in particular sections of this topic, and include the following:

(1) Landlord's breach of implied warranty of habitability. (See *supra*, §625.)

(2) Landlord's violation of rent control ordinance. (See *supra*, §§572, 606.)

(3) Discriminatory eviction. (See *supra*, §§682, 683.)

(4) Landlord's waiver of tenant's breach. (See *supra*, §669.) (On tenant's right to stay of eviction proceedings during period of active military service, see *Mil. & Vet.C. 406*.)

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Witkin Summary of California Law X. LANDLORD AND TENANT REMEDIES

A. Landlord's Remedies.

5. Unlawful Detainer.

d. Three-Day Notice.

1. Necessity and Effect of Notice.

12 Witkin Sum. Cal. Law Real Property § 720

[§ 720] Necessity and Effect of Notice.

If a tenant is in default in the payment of rent or has violated some condition of the lease, service of a 3-day notice to perform or quit is required as a basis for forfeiture of the estate. (See *C.C.P. 1161(2), 1161(3), and 1161(4); Horton-Howard v. Payton (1919) 44 C.A. 108, 111, 186 P. 167; Igauye v. Howard (1952) 114 C.A.2d 122, 125, 249 P.2d 558, supra, §668; Haydell v. Silva (1962) 201 C.A.2d 20, 23, 19 C.R. 705; Sexton v. Nelson (1964) 228 C.A.2d 248, 256, 39 C.R. 407; Lamanna v. Vognar (1993) 17 C.A.4th Supp. 4, 8, 22 C.R.2d 501* [unlawful detainer judgment reversed where complaint was served before expiration of 3-day period, which was extended by days of weekend and legal holiday]; 5 *Cal. Proc. (4th), Pleading, §603; C.E.B., 1 Landlord-Tenant Practice 2d, §8.35 et seq.* [bases for termination with 3 days' notice]; *C.E.B., 1 Eviction Defense Manual 2d, Chap. 6; 49 Am.Jur.2d (1995 ed.), Landlord and Tenant §1007.*)

The notice is a basis for forfeiture, but does not itself automatically terminate the lease. If, in the notice, the landlord manifests an intention to reenter or take legal proceedings to recover possession, and the tenant, within the 3-day period, quits the premises or the landlord brings an unlawful detainer suit, a termination of the lease will result. (*Neuhaus v. Norgard (1934) 140 C.A. 735, 736, 35 P.2d 1039* [notice reading "You are hereby required to pay ... within three days ... or the said lessors will institute legal proceedings against you"].) But if, after notice, the tenant does not quit, and the landlord does not bring unlawful detainer but sues for arrears in rent, there is no forfeiture and the tenant is liable for rent under the lease. (See *Grand Cen. Public Market v. Kojima (1936) 11 C.A.2d 712, 717, 54 P.2d 786.*)

If the violation consists of (1) nonpayment of rent or (2) assignment, subletting, waste, nuisance, or unlawful use of the premises, the 3-day notice is an absolute requirement, but if other conditions or covenants are violated, and the conditions and covenants cannot afterward be performed, then no notice need be given to the lessee. (*C.C.P. 1161(3).*) Thus, in *Hignell v. Gebala (1949) 90 C.A.2d 61, 202 P.2d 378*, the tenant, in violation of the terms of a lease exclusively for an apartment house business, conducted a real estate office. *Held*, the breach could not be undone, and no 3-day notice was required. (*90 C.A.2d 69.*)

The effect of the notice will be nullified and the lease will remain in effect, if (1) the tenant performs within 3 days after service, or (2) the breach is waived by the landlord after service. (*C.C.P. 1161.5; see C.E.B., 1 Landlord-Tenant*

Practice 2d, §§8.44, 8.49.)

SUPPLEMENT: [This section is current through the latest supplement]

See CACI, No. 4302 [Termination for Failure to Pay Rent--Essential Factual Elements]; CACI, No. VF-4300 [Termination Due to Failure to Pay Rent]; CACI, No. 4304 [Termination for Violation of Terms of Lease/Agreement--Essential Factual Elements]; CACI, No. VF-4302 [Termination Due to Violation of Terms of Lease/Agreement]; 49 *Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §§845, 846.

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §644.



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- 2. Where No Notice Is Necessary.

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[§ 721] Where No Notice Is Necessary.

(1) *Expiration of Tenancy.* The 3-day notice is required if the tenant is in default in some required performance (infra, §720). If there is no default but the tenancy has expired, and the tenant remains in possession without permission, unlawful detainer may be brought without any notice. (*C.C.P. 1161(1)* ["provided the expiration is of a nondefault nature however brought about"].)

The typical example is a tenancy for a fixed term. (See *Ryland v. Appelbaum* (1924) 70 C.A. 268, 270, 233 P. 356; *Black v. Black* (1926) 77 C.A. 82, 85, 246 P. 90.) But the rule also applies to a tenancy at will, which "expires" when proper notice of termination is given (supra, §678). No additional 3-day notice is required. (*C.C.P. 1161(1)*; C.C. 791; *Palmer v. Zeis* (1944) 65 C.A.2d Supp. 859, 862, 151 P.2d 323; *Hennessy v. Gleason* (1947) 81 C.A.2d 616, 619, 184 P.2d 913; see 5 Cal. Proc. (4th), Pleading, §602; C.E.B., 1 Landlord-Tenant Practice 2d, §8.82.)

(2) *Failure To Quit After Notice.* If the tenant holds over after written notice of termination of tenancy or after giving a written offer to surrender, the tenant may be sued in unlawful detainer without the 3-day notice. (*C.C.P. 1161(5)*; see C.E.B., 1 Landlord-Tenant Practice 2d, §8.81; 5 Cal. Proc. (4th), Pleading, §602.)

(3) *Attornment to Another.* Where a lessee denied the title of the landlord and attorned to another, the lessee became a trespasser and a possessory action could be maintained against him without a notice to quit. (*Hollar v. Saline Products* (1938) 25 C.A.2d 542, 547, 78 P.2d 237.)

(4) *Subsequent Subtenant.* If a defendant has become a subtenant of the premises after service of the notice on the tenant of the premises, the fact that the notice was not served on each subtenant will not constitute a defense to the action. (*C.C.P. 1164*; see C.E.B., 2 Landlord-Tenant Practice 2d, §9.35.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Expiration of Tenancy.* See CACI, No. 4301 [Expiration of Fixed-Term Tenancy--Essential Factual Elements].

Cross-Reference: 5 Cal. Proc. (5th), Pleading, §643.

(2) *Failure To Quit After Notice.*

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §643.



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- 3. Commercial Tenant's Tender of Rent in Response.

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[§ 722] Commercial Tenant's Tender of Rent in Response.

(1) *In General.* *C.C.P. 1161.1* deals with the application of *C.C.P. 1161* "in cases of possession of commercial real property after default in the payment of rent." "Commercial real property" means all real property in California except for rented dwelling units subject to *C.C. 1940 et seq.*, mobilehomes, or recreational vehicles. (*C.C.P. 1161.1(d).*)

(2) *Tenant's Tender of Rent.* If the landlord's notice claims an estimated amount of rent due (see *infra*, §724), a timely tender of rent by the tenant has the following effects:

(a) If "at trial it is determined that the amount of rent then due was the amount tendered by the tenant or a lesser amount," the tenant becomes the "prevailing party for all purposes." (*C.C.P. 1161.1(a).*)

(b) If the court determines that the tendered amount is less than the amount due, but was "reasonably estimated," the tenant can retain the right to possession by paying to the landlord within 5 days of the judgment (1) the amount previously tendered, if it was not accepted, (2) the difference between the amount tendered and the amount determined to be due, and (3) any other sums ordered by the court. (*C.C.P. 1161.1(a).*) There is a presumption affecting the burden of proof that the tendered amount was "reasonably estimated" if it "was no more than 20 percent more or less than the amount determined to be due." If the rent due is contingent on information primarily known by one party, and the other party was not given that information, or was given inaccurate information, the court must consider that fact in determining the reasonableness of the tendered amount. (*C.C.P. 1161.1(e).*)

(3) *Failure To Tender Rent.* The provisions of *C.C.P. 1161.1(a)* on tender of rent are not mandatory, however, and a tenant's failure to make a tender neither forecloses the right to continue in possession nor excuses the landlord from the obligation of making a reasonable estimate of the rent due. (*WDT-Winchester v. Nilsson (1994) 27 C.A.4th 516, 533, 32 C.R.2d 511.*)

(4) *Acceptance of Partial Payment.* The landlord may accept a partial payment of rent without affecting the unlawful detainer remedy, if certain conditions are met:

(a) If partial payment, including the tenant's tender of an estimated amount under *C.C.P. 1161.1(a)*, is accepted after service of the 3-day notice, the landlord may, without further notice to the tenant, commence and pursue an unlawful detainer action to recover the difference between the amount demanded in the notice and the payment received. This must be specified in the complaint. (*C.C.P. 1161.1(b)*.)

(b) A landlord's acceptance of a partial rent payment after filing an unlawful detainer complaint "is evidence only of that payment, without waiver of any rights or defenses of any of the parties," if "the landlord provides actual notice to the tenant that acceptance of the partial rent payment does not constitute a waiver of any rights, including any right the landlord may have to recover possession of the property." (*C.C.P. 1161.1(c)*); see *Woodman Partners v. Sofa U Love* (2001) 94 C.A.4th 766, 771, 114 C.R.2d 566 [lease provision stating that "acceptance of rent hereunder by Lessor shall not be a waiver of any preceding breach by Lessee of any provision hereof, other than the failure of Lessee to pay the particular rent so accepted" constituted actual notice required by *C.C.P. 1161.1(c)* and preserved landlord's unlawful detainer rights following acceptance of partial rent payment; notice mailed by landlord after acceptance of payment did not satisfy *C.C.P. 1161.1(c)*].)

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 - aa. Notice To Perform or Quit.

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[§ 723] Notice To Perform or Quit.

If the default is in the payment of rent, or consists of the failure to perform some covenant or condition that may still be performed, the notice is in the alternative, i.e., to pay rent or quit, or to perform or quit. (*C.C.P. 1161(2)* ["requiring its payment ... or possession of the property"]; *C.C.P. 1161(3)* ["requiring the performance of such conditions or covenants, or the possession of the property"]; see *Schnittger v. Rose* (1903) 139 C. 656, 660, 73 P. 449; *Downing v. Cutting Packing Co.* (1920) 183 C. 91, 94, 190 P. 455 [landlord may withdraw notice within 3-day period]; *Hinman v. Wagon* (1959) 172 C.A.2d 24, 27, 341 P.2d 749; *Gersten Cos. v. Deloney* (1989) 212 C.A.3d 1119, 1127, 1128, 1129, 261 C.R. 431 [origin and nature of statutory grace period of *C.C.P. 1161(2)*, which gives tenants additional time to pay rent without endangering tenancy]; C.E.B., 1 Eviction Defense Manual 2d, §6.17; C.E.B., 1 Landlord-Tenant Practice 2d, §8.36; for forms, see Cal. Civil Practice, 3 Real Property Litigation, §§18:78, 18:79.)

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See CACI, No. 4303 [Sufficiency and Service of Notice of Termination for Failure to Pay Rent]; CACI, No. 4305 [Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement]; Cal. Civil Practice, 3 Real Property Litigation, §§18:82, 18:83.



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bb. Statement of Amount Due.

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[§ 724] Statement of Amount Due.

(1) *General Requirement.* The notice must state "the amount that is due." (*C.C.P. 1161(2)*.) It has been held that this means the precise sum. The tenant is not guilty of unlawful detainer and the suit cannot be maintained where the demand is in excess of the liability. (*Johnson v. Sanches* (1942) 56 C.A.2d 115, 116, 132 P.2d 853 [\$ 750 too high]; see *Baugh v. Consumers Associates, Ltd.* (1966) 241 C.A.2d 672, 674, 675 50 C.R. 822, citing the text [no amount stated]; *Canal-Randolph Anaheim v. Wilkoski* (1978) 78 C.A.3d 477, 488, 144 C.R. 474, and footnote 4 [rule stated but criticized]; *Jayasinghe v. Lee* (1993) 13 C.A.4th Supp. 33, 37, 17 C.R.2d 117 [notice overstating amount of rent due was insufficient to support unlawful detainer action; citing *Johnson v. Sanches*]; *Bevill v. Zoura* (1994) 27 C.A.4th 694, 697, 32 C.R.2d 635 [*C.C.P. 1161(2)* requires 3-day notice to be served within 1 year after rent was due; hence, notice demanding more than 1 year's rent was defective].)

In *Budaeff v. Huber* (1961) 194 C.A.2d 12, 14 C.R. 729, repeated demands were made, the first for the precise sum, and later, as monthly sums accrued on the rent, without that level of specification. *Held*, plaintiff landlord was entitled to terminate. (194 C.A.2d 18.)

In *Valov v. Tank* (1985) 168 C.A.3d 867, 214 C.R. 546, the lease of plaintiff's farmland called for rent equal to 20% of the gross crop, with defendant tenant to provide the figures necessary to calculate the amount. Upon defendant's failure to pay the rent or provide the accounting, plaintiff served a notice demanding "twenty percent (20%) of all crops grown thereon, the exact figure of which only you are aware." (168 C.A.3d 870.) *Held*, the notice satisfied the statutory requirement.

(a) Cases such as *Johnson* "properly stand only for the rule that a notice which contains a demand for rent in excess of the amount provided in the lease is defective." (168 C.A.3d 872.) None of the cases cited by defendant involved a notice based on the measure of the rent specified in the lease when the landlord lacks the information needed to compute the dollar amount. (168 C.A.3d 872.)

(b) The purpose of the notice is to give the tenant the opportunity to pay the rent due and retain possession. (168

C.A.3d 874.) "Even under the strict construction of the unlawful detainer statute ... , it is not reasonable to permit defendant by his own default in failing to furnish plaintiff the amount of the proceeds received from the crops grown on the leased premises to deny plaintiff the right to recover expeditiously either the rent due or possession of the leased premises. ... The reasonable expectations of landlords and tenants will be better served by a rule which disadvantages only the party who fails to comply with commonly imposed leasehold obligations." (*168 C.A.3d 874.*)

(2) *Estimate of Rent Due Under Commercial Lease.* In cases of possession of commercial real property after default in the payment of rent, if the amount stated in the notice provided to the tenant "is clearly identified by the notice as an estimate and the amount claimed is not in fact correct, but it is determined upon the trial or other judicial determination that rent was owing, and the amount claimed in the notice was reasonably estimated, the tenant shall be subject to judgment for possession and the actual amount of rent and other sums found to be due." (*C.C.P. 1161.1(a).*) There is a presumption affecting the burden of proof that the amount claimed is "reasonably estimated" if the amount "was no more than 20 percent more or less than the amount determined to be due." If the rent due is contingent upon information primarily within the knowledge of the one party to the lease and that information has not been furnished to, or has not accurately been furnished to, the other party, the court must consider that fact in determining the reasonableness of the amount of rent claimed. (*C.C.P. 1161.1(e).*) (On effect of commercial tenant's tender of rent in response to notice, see *supra*, §722.)

In *WDT-Winchester v. Nilsson (1994) 27 C.A.4th 516, 32 C.R.2d 511*, the lease of a commercial building called for the lessee to reimburse the lessor for her proportionate share of property taxes within 10 days of receiving an invoice demanding payment. Shortly after the tenant took possession, the landlord served her with a 3-day notice to pay rent or quit the premises. A second 3-day notice served the next month indicated that the total figure demanded was a "reasonable estimate" of the amount owing under the lease. The trial judge ruled that the amount claimed was incorrect, because the tenant owed only half the sum claimed for property taxes, but that the total amount was nevertheless reasonably estimated under *C.C.P. 1161*. In denying the tenant's motions for new trial and to vacate or amend the judgment, the trial judge ruled that even if he accepted her tax computations, which would have reduced the amount owing to a sum less than 20% of the amount claimed, he would still have found the landlord's notice to have been reasonably estimated. *Held*, reversed with directions to enter judgment in favor of the tenant.

(a) The lease required the landlord to first pay the taxes, then seek reimbursement from the tenant. But there was no evidence showing the landlord's payment of any of the taxes owed; only a nonnegotiable, unsigned, uncanceled copy of a check for the first installment was presented at trial. Hence, the claim for reimbursement was completely premature. (*27 C.A.4th 530.*)

(b) The trial judge correctly observed that a demand exceeding the 20% margin specified in *C.C.P. 1161.1(e)* may nevertheless be deemed a reasonable estimate. However, the record in this case did not justify that finding. There was no adequate explanation of the landlord's inclusion of a demand for property taxes contrary to the provisions of the lease, which the landlord itself had prepared. (*27 C.A.4th 531.*)

The impact of *C.C.P. 1161.1* on *C.C.P. 1161(2)* was discussed in *Levitz Furniture Co. of the Pacific v. Wingtip Communications (2001) 86 C.A.4th 1035, 103 C.R.2d 656*. Plaintiff subleased property in a shopping center to defendant. In July 1999, plaintiff served defendant with a 3-day notice to pay rent or quit, in which plaintiff "reasonably estimated" the rent due to be over \$ 99,000. Most of that amount was derived from 12 payments that were due each month from August 1998 through July 1999, but \$ 6,646 was derived from a payment due in December 1997. Defendant did not pay or quit, and plaintiff sued for unlawful detainer. The trial court granted judgment on the pleadings for defendant, holding that plaintiff's inclusion of the December 1997 rent invalidated the 3-day notice and thus precluded the unlawful detainer action. *Held*, reversed.

C.C.P. 1161(2) does not require invalidation of an otherwise proper notice that includes a demand for rent due for more than a year. *Bevill v. Zoura, supra*, does not establish a rule that the mere inclusion of rent due more than a year before a 3-day notice automatically invalidates the notice; the landlord in *Bevill* conceded that point and thus it was not

raised on appeal. *C.C.P. 1161(2)* embodies two separate requirements. One portion requires that a 3-day notice state "the amount which is due." The second permits service of the notice "at any time within one year after the rent becomes due." (86 *C.A.4th* 1040.) *C.C.P. 1161.1* affects only the first of these requirements by allowing a commercial landlord to estimate the sum due. The fact that the landlord may estimate the rent due does not necessarily excuse the landlord from serving the 3-day notice within 1 year of the time that the rent becomes due. However, there is no reason why a 3-day notice that demands payment of rents due within 1 year of the notice is automatically invalidated simply because it also sets out rent due more than 1 year before the notice. Invalidation is not mandated by the policy underlying the second provision of *C.C.P. 1161(2)*, "that is, preventing a landlord from using long overdue rent--but no rent unpaid within one year--to effect an eviction." (86 *C.A.4th* 1041.) However, a landlord who waits more than 1 year to sue for rents due from a tenant may be restricted to collecting those rents in a separate action for breach of contract. (86 *C.A.4th* 1042.)

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- A. Landlord's Remedies.
 - 5. Unlawful Detainer.
 - d. Three-Day Notice.
 - 4. Form of Notice.
- cc. Statement of Payment Options.

12 Witkin Sum. Cal. Law Real Property § 725

[§ 725] Statement of Payment Options.

In addition to stating the amount of rent due, under *C.C.P. 1161(2)*, the notice must state one of the following:

- (1) The name, telephone number, and address of the person to whom the rent payment must be made, and, if payment may be made personally, the usual days and hours that person will be available to receive the payment. If, however, the address does not allow for personal delivery, then it will be conclusively presumed that if the tenant mails rent or notice to the owner using the name and address provided, the notice or rent is deemed received by the owner on the date posted, as long as the tenant can show proof of mailing to the name and address provided by the owner.
- (2) The number of an account in a financial institution, located within 5 miles of the rental property, into which the rental payment may be made, and the name and street address of the institution.
- (3) If an electronic funds transfer procedure has been previously established, that payment may be made pursuant to that procedure.

SUPPLEMENT: [This section is current through the latest supplement]



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4. Form of Notice.

dd. Notice To Quit.

12 Witkin Sum. Cal. Law Real Property § 726

[§ 726] Notice To Quit.

If the tenant has assigned, sublet, or committed waste in violation of a condition or covenant, or has maintained a nuisance or used the premises for an unlawful purpose, the breach is of course final, and the notice is not in the alternative, but is simply to quit. (*C.C.P. 1161(4)*; see *Horton-Howard v. Payton* (1919) 44 C.A. 108, 111, 186 P. 167 [letter to tenant reciting breaches was not sufficiently positive and unequivocal to constitute basis for forfeiture]; *Richard v. Degen & Brody* (1960) 181 C.A.2d 289, 293, 5 C.R. 263 [use of alternative form even where defect cannot be cured is not fatal defect if it does not actually mislead]; C.E.B., 1 Eviction Defense Manual 2d, §6.44; C.E.B., 1 Landlord-Tenant Practice 2d, §8.50; Cal. Civil Practice, 3 Real Property Litigation, §18:80 [form of notice].)

SUPPLEMENT: [This section is current through the latest supplement]
See Cal. Civil Practice, 3 Real Property Litigation, §18:84.



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d. Three-Day Notice.

5. Methods of Service.

12 Witkin Sum. Cal. Law Real Property § 727

[§ 727] Methods of Service.

(1) *In General.* The notice required by *C.C.P. 1161* must be served, and *C.C.P. 1162* specifies the permissible methods: (a) personal service on the tenant, or (b) if the tenant is absent from the residence and the tenant's usual place of business, leaving a copy with some person of "suitable age and discretion" at the residence or business, and sending a copy by mail to the residence, or (c) if the tenant's residence or place of business cannot be ascertained, or a person of suitable age and discretion cannot be found, then posting a copy in a conspicuous place on the property, delivering a copy to any resident who can be found, and also sending a copy by mail addressed to the tenant at the place where the property is situated. (See *Lehr v. Crosby* (1981) 123 C.A.3d Supp. 1, 6, 177 C.R. 96 [trial judge did not abuse discretion in determining that tenant's 16-year-old daughter was person of suitable age and discretion]; *Kwok v. Bergren* (1982) 130 C.A.3d 596, 598, 181 C.R. 795 [showing copy to person on premises mistakenly believed to be manager was insufficient]; C.E.B., 1 Eviction Defense Manual 2d, §§6.28, 6.29, 8.2 et seq.; C.E.B., 1 Landlord-Tenant Practice 2d, §8.62 et seq.)

C.C.P. 1162 does not require a showing of reasonable diligence in attempting personal service; the post and mail procedure is permissible when no suitable person is available. (*Hozz v. Lewis* (1989) 215 C.A.3d 314, 317, 263 C.R. 577.) *C.C.P. 1162* does not authorize service by mail alone. Hence, service by certified mail, absent an admission of receipt, is not equivalent to personal delivery under the statute. (*Liebovich v. Shahrokhkhany* (1997) 56 C.A.4th 511, 516, 65 C.R.2d 457.) (See *Losornio v. Motta* (1998) 67 C.A.4th 110, 115, 78 C.R.2d 799 [service and notice provisions of *C.C.P. 1162* and extension of time provisions of *C.C.P. 1013* are mutually exclusive; *C.C.P. 1013(a)* does not apply to extend notice period when substituted and post and mail methods of service are used].)

An electronic record may not be substituted for notice that is required to be sent under *C.C.P. 1162*. (C.C. 1633.3(c).)

(2) *Commencement of 3-Day Period After Posting and Mailing.* When the landlord uses the post and mail service method, there is some disagreement about when the 3-day period begins. In *Davidson v. Quinn* (1982) 138 C.A.3d Supp. 9, 188 C.R. 421, plaintiff landlord posted and mailed the notice on April 20. Defendant tenant tendered the amount demanded on April 24. The trial judge determined that the tender was 1 day late, and gave summary judgment for the

landlord. *Held*, reversed.

(a) Posting alone does not satisfy due process, but posting with mailing, as required by *C.C.P. 1162*, does meet the constitutional standards set forth in *Greene v. Lindsey* (1982) 456 U.S. 444, 102 S.Ct. 1874, 72 L.Ed.2d 249, 2 Cal. Proc. (4th), *Jurisdiction*, §258. (138 C.A.3d Supp. 13.)

(b) Applying the constitutional requirements of *Greene* to *C.C.P. 1161*, it is clear that posting is not notice, and if mailing is treated as notice, the tenant will not have the 3 days given by the statute to cure a default (see *supra*, §720). Hence, service "must be effected in such a manner as will give a tenant the three days of written notice required by the Legislature in which he may cure his default in the payment of rent." (138 C.A.3d Supp. 14.)

The reasoning in *Davidson* was rejected in *Walters v. Meyers* (1990) 226 C.A.3d Supp. 15, 277 C.R. 316. Defendant tenants failed to pay rent for November 1989, and plaintiff landlord posted a 3-day notice and mailed a copy to defendants on November 13. Defendants mailed a check for the full rent on November 16. Plaintiff received the check and filed an unlawful detainer action on November 17. The trial court dismissed the action as premature. *Held*, reversed.

(a) *C.C.P. 1013(a)*, which extends by 5 days the time to respond to a notice served by mail (see 6 Cal. Proc. (4th), *Proceedings Without Trial*, §28), does not extend the time to respond to a 3-day notice served by posting and mailing. (226 C.A.3d Supp. 18, 19.)

(b) Service of a 3-day notice by posting and mailing under *C.C.P. 1162(3)* is effective on the date the notice is posted and mailed. The reasoning in *Davidson* to the contrary is "unpersuasive." (226 C.A.3d Supp. 19.)

(c) *C.C.P. 1161(2)* provides that a tenant is "guilty" after a 3-day notice is served, but is silent as to when the notice is effective. Were the statute interpreted to mean that the 3-day period did not begin until the tenant is actually served, the provisions for substituted service in *C.C.P. 1162* would be meaningless. "[S]ince mailing and posting is to be employed only when the tenants and all other persons are absent from their residence or place of business, it would not make sense that actual receipt by the tenants is required for the posting and mailing to be effective." (226 C.A.3d Supp. 19.)

(d) *Greene v. Lindsey*, relied on in *Davidson*, does not require a different conclusion. It holds only that posting with mailing, the method employed in this case, is a more reliable method of service than posting alone. (226 C.A.3d Supp. 20.)

West's Key Number Digest, Landlord and Tenant k.291(2)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See CACI, No. 4303 [Sufficiency and Service of Notice of Termination for Failure to Pay Rent]; CACI, No. 4305 [Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement]. (2) *Commencement of 3-Day Period After Posting and Mailing*.

Greene case:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §267. *C.C.P. 1013(a):*

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §30.



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5. Unlawful Detainer.

e. Jurisdiction, Venue, and Process.

12 Witkin Sum. Cal. Law Real Property § 728

[§ 728] Jurisdiction, Venue, and Process.

(1) *Jurisdiction.* Unlawful detainer actions in which the whole amount of damages claimed is \$ 25,000 or less are limited civil cases over which the superior court has jurisdiction. (*C.C.P. 86(a)(4)*; see *C.C.P. 88* [civil action that is not limited civil case is referred to as unlimited civil case]; on limited and unlimited civil cases, see 2 *Cal. Proc. (4th), Courts, Supp., §248A.*) *C.C.P. 116.220* formerly gave small claims courts jurisdiction over an action in unlawful detainer in specified circumstances. The statute was amended to remove unlawful detainer actions from the jurisdiction of small claims courts in 1992.

(2) *Venue.* The county in which the leasehold, or some part of it, is located is the proper county for the trial. (*C.C.P. 392(a)(1)*; see *Childs v. Eltinge (1973) 29 C.A.3d 843, 851, 105 C.R. 864*; 3 *Cal. Proc. (4th), Actions, §716 et seq.*) If the action is filed in a court with jurisdiction but the venue is improper, the defendant's remedy is to seek to have the case transferred. If the defendant fails to do so, the defect is waived. (*C.C.P. 396b*; see 3 *Cal. Proc. (4th), Actions, §701.*)

In the court designated as the proper court in *C.C.P. 392(a)*, the proper court location for an unlawful detainer trial is the location where the court tries that type of proceeding that is nearest or most accessible to the location of the subject real property. Otherwise the trial may be held at any location of the court. The court may specify by local rule the nearest or most accessible court location where the court tries that type of case. (*C.C.P. 392(b).*)

(3) *Service of Process.* Service is made pursuant to the rules applicable to civil actions. (*C.C.P. 413.10 et seq.*; see 3 *Cal. Proc. (4th), Actions, §896 et seq.*; on service by certified mail pursuant to *C.C.P. 415.47* where lessee has given notice of intent not to abandon, see 3 *Cal. Proc. (4th), Actions, §938*; on posting pursuant to *C.C.P. 415.45*, see 3 *Cal. Proc. (4th), Actions, §962.*) Service of process and a prejudgment claim of right of possession (see *infra, §729*) may be made on adult occupants of the premises who are not named in the summons and complaint. (*C.C.P. 415.46*; see 3 *Cal. Proc. (4th), Actions, §962*; *C.E.B., 2 Landlord-Tenant Practice 2d, §9.45 et seq.*)

West's Key Number Digest, Landlord and Tenant k.291(61/2)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Jurisdiction.*

Cross-Reference: 2 *Cal. Proc.* (5th), *Courts*, §241 et seq.

(2) *Venue.*

Cross-References: 3 *Cal. Proc.* (5th), *Actions*, §§793 et seq., 925 et seq.(3) *Service of Process.*

Rules in civil actions:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §981 et seq.

Service following notice of intent not to abandon:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §1022.

Posting and service on adult occupants:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §1045.



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f. Parties.

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[§ 729] Parties.

(1) *Plaintiffs*. The general provisions relating to parties to civil actions (*C.C.P.* 367 et seq.) are applicable to plaintiffs in unlawful detainer actions. (*C.C.P.* 1165; see 4 *Cal. Proc.* (4th), *Pleading*, §57 et seq.)

(2) *Defendants*. The general provisions also apply to defendants (*C.C.P.* 1165; see 4 *Cal. Proc.* (4th), *Pleading*, §57 et seq.), except that only the tenant of the premises and any subtenant in actual occupation of the premises when the complaint is filed need be joined as defendants. Failure to join a person who might have been named a defendant is not grounds for a nonsuit or for abating the proceedings. The action will proceed and judgment will be entered against any parties served or appearing who are found "guilty of the offense charged." All persons who enter the premises under the tenant, after the suit begins, will be bound by the judgment. (*C.C.P.* 1164; see *Markham v. Fralick* (1934) 2 *C.2d* 221, 223, 39 *C.R.* 804; *Arrieta v. Mahon* (1982) 31 *C.3d* 381, 391, 182 *C.R.* 770, 644 *P.2d* 1249; *C.E.B.*, 2 *Landlord-Tenant Practice* 2d, §9.35.)

(3) *Unnamed Occupants*. In addition to service of a summons and complaint in unlawful detainer on a tenant or subtenant, a prejudgment claim of right of possession may be served on "any person who appears to be or who may claim to have occupied the premises at the time of the filing of the action." (*C.C.P.* 415.46(a).) Service of the claim precludes an occupant, whether or not named in the judgment for possession, from objecting to enforcement of the judgment (see *infra*, §741). (*C.C.P.* 415.46(e).) The statute specifies the form of the claim, requires submission to the court by the occupant within 10 days of service, and provides that the occupant's failure to file with the court will result in eviction without further notice. If the form is submitted, the occupant will be added as a defendant in the unlawful detainer action. (*C.C.P.* 415.46(f), 1174.25(b).) The clerk must notify the plaintiff that the occupant has been added as a defendant. After filing the claim, the occupant has 5 days to respond to the summons and complaint. (*C.C.P.* 1174.25(b).)

The Judicial Council has issued a form that satisfies the statutory requirements, but the form is unofficial and its use is optional. (See Judicial Council Form No. CP-10.5 [Prejudgment Claim of Right to Possession].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Plaintiffs*.

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §67 et seq.

(2) *Defendants*.

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §67 et seq.



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g. Pleadings.

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[§ 730] Pleadings.

(1) *Complaint.* The landlord's complaint must:

(a) Be verified and include the typed or printed name of the person verifying the complaint. (*C.C.P. 1166(a)(1)*; see 4 *Cal. Proc. (4th), Pleading*, §420 et seq.)

(b) Set forth the facts on which the landlord seeks to recover. (*C.C.P. 1166(a)(2)*.)

(c) Describe the premises with reasonable certainty. (*C.C.P. 1166(a)(3)*.)

(d) If the action is based on *C.C.P. 1161(2)* (see *supra*, §724), state the amount of rent in default. (*C.C.P. 1166(a)(4)*.)

(e) State specifically the method used to serve the defendant with the notice of termination on which the complaint is based. This requirement may be satisfied by completing all items relating to service of the notice in an appropriate Judicial Council form complaint, or by attaching a proof of service of the notice of termination. (*C.C.P. 1166(a)(5)*.)

The complaint may set forth, and claim damages for, any circumstances of fraud, force, or violence that may have accompanied the alleged forcible entry or forcible or unlawful detainer. (*C.C.P. 1166(b)*.) (For forms of complaint, see Judicial Council Form No. UD-100 [Complaint--Unlawful Detainer]; *Cal. Civil Practice*, 3 Real Property Litigation, §§18:83, 18:84; *C.E.B.*, 2 Landlord-Tenant Practice 2d, §9.37 et seq.)

In cases of possession of commercial real property after default in the payment of rent, the landlord may pursue an unlawful detainer action to recover the difference between the amount demanded in the 3-day notice and the amount received from the tenant in partial payment after service of the notice, but this must be specified in the complaint. (*C.C.P. 1161.1(b)*.) The landlord's acceptance of a partial payment of rent after filing the complaint is evidence only of that payment, without waiver of any rights or defenses of any of the parties. The landlord is entitled to amend the complaint to reflect the partial payment without creating a necessity for the tenant to file an additional answer or other responsive pleading, and without prior leave of court. An amendment will not delay the matter from proceeding. (*C.C.P. 1161.1(c)*.) *C.C.P. 1161.1(c)* applies only if the landlord provides actual notice to the tenant that acceptance of

the partial rent payment does not constitute a waiver of any rights, including a right the landlord may have to recover possession of the property. (*C.C.P. 1161.1(c)*; see 35 Cal. Western L. Rev. 159 [legal and empirical analysis of former pilot program permitting unlawful detainer complaint to include demand for pretrial prospective rent deposit under certain circumstances].)

(2) *Required Attachments*. In an action regarding residential property, the plaintiff must attach to the complaint a copy of the notice of termination served on the defendant on which the complaint is based. (*C.C.P. 1166(c)(1)(A)*.) The plaintiff must also attach a copy of the written lease or rental agreement regarding the premises, if there is one, along with any addenda or attachments to the lease or written agreement that form the basis of the complaint. (*C.C.P. 1166(c)(1)(B)*.) The documents required by *C.C.P. 1166(c)(1)(B)* are not required if the complaint alleges that the lease or rental agreement is oral (*C.C.P. 1166(c)(1)(B)(i)*), that the landlord, or the landlord's agent or employee, does not possess a written lease or rental agreement (*C.C.P. 1166(c)(1)(B)(ii)*), or that the action is based solely on *C.C.P. 1161(2)* (*C.C.P. 1166(c)(1)(B)(iii)*). If the plaintiff fails to attach the documents required by *C.C.P. 1166(c)*, the court must grant leave to amend the complaint for a 5-day period in order to include the required attachments. (*C.C.P. 1166(c)(2)*.)

(3) *Answer*. The tenant has 5 days after the summons is served to answer or demur. (*C.C.P. 1167, 1167.3, 1170*; see C.E.B., 2 Landlord-Tenant Practice 2d, §10.1; 3 Cal. Proc. (4th), *Actions*, §902; for limit on extensions, see *C.C.P. 1167.5*; 4 Cal. Proc. (4th), *Pleading*, §7; on 5-day extension if defendant files motion to quash, see *C.C.P. 1167.4*; 2 Cal. Proc. (4th), *Jurisdiction*, §209 et seq.) The constitutionality of the 5-day response period has been upheld. (See *Lindsey v. Normet* (1972) 405 U.S. 56, 92 S.Ct. 862, 869, 31 L.Ed.2d 36, 45, 7 Summary (10th), *Constitutional Law*, §647 [Oregon statute]; *Deal v. Municipal Court* (1984) 157 C.A.3d 991, 204 C.R. 79 [following *Lindsey*].)

The answer must be verified (*C.C.P. 446*; 4 Cal. Proc. (4th), *Pleading*, §420 et seq.), and, unless the complaint seeks less than \$ 1,000, the answer must be by specific denials. (*C.C.P. 431.40*; see C.E.B., 2 Landlord-Tenant Practice 2d, §10.52; Judicial Council Form No. 982.1(95) [answer]; Cal. Civil Practice, 3 Real Property Litigation, §18:96 [demurrer], §18:91 [answer].)

Affirmative equitable defenses (*supra*, §§706 et seq., 719) may be pleaded. (See *Bevill v. Zoura* (1994) 27 C.A.4th 694, 698, 32 C.R.2d 635 [defendant was not required to plead defective 3-day notice as affirmative defense; denial of complaint's allegation of amount due was sufficient, because plaintiff was required to plead proper service of valid notice]; C.E.B., 2 Landlord-Tenant Practice 2d, §10.53; 5 Cal. Proc. (4th), *Pleading*, §1038.)

(4) *Cross-Complaint*. Unless the tenant surrenders possession (*infra*, §§733, 734), cross-complaints are generally not permitted. (See *Medford v. Superior Court* (1983) 140 C.A.3d 236, 239, 189 C.R. 227, *infra*, §734; C.E.B., 2 Landlord-Tenant Practice 2d, §10.73; 5 Cal. Proc. (4th), *Pleading*, §§1086, 1087.)

West's Key Number Digest, Landlord and Tenant k.291(4) et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Complaint*. See Cal. Civil Practice, 3 Real Property Litigation, §18:88, 18:89.

(a) *Verified*:

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §459 et seq. (3) *Answer*. See Cal. Civil Practice, 3 Real Property Litigation, §18:101 [demurrer], §18:96 [answer].

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §985 et seq.

Limit on extensions:

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §10.

Five-day extension for motion to quash:

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §225 et seq. *Verified answer:*

Cross-Reference: 4 *Cal. Proc.* (5th), *Pleading*, §459 et seq.

Affirmative equitable defenses:

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §1112 et seq.

(4) *Cross-Complaint.*

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §§1160, 1161.



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h. Restricted Access to Files.

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[§ 731] Restricted Access to Files.

C.C.P. 1161.2, enacted in 1991, established a 3-year pilot project in three locations to restrict public access to the files of unlawful detainer proceedings. The goal of the statute was to thwart unscrupulous eviction defense services that review the filings of unlawful detainer actions, solicit the tenants, and file defective or fraudulent pleadings or false bankruptcies. (Stats. 1991, Chap. 1007, §1.) (On regulation of unlawful detainer assistants, see *supra*, §705.)

In 1993, *C.C.P. 1161.2* was extended indefinitely and made applicable to all counties. In an unlawful detainer action that is filed as a limited civil case (amount of damages claimed is \$ 125,000 or less), the court clerk may allow access to the court file, index, register of actions, or other court records to the following persons only:

- (1) A party to the action, or the party's attorney. (*C.C.P. 1161.2(a)(1).*)
- (2) A person who provides the clerk with the names of at least one plaintiff and one defendant and the address of the premises, including the apartment or unit number, if there is one. (*C.C.P. 1161.2(a)(2).*)
- (3) A resident of the premises who provides the clerk with the name of one of the parties or the case number and shows proof of residency. (*C.C.P. 1161.2(a)(3).*)
- (4) Any person by order of the court, which may be granted *ex parte* on a showing of good cause. (*C.C.P. 1161.2(a)(4).*)
- (5) Any person 60 days after the complaint was filed, unless a defendant prevails in the action within that time, in which case the clerk may not allow access, except as provided in *C.C.P. 1161.2(a)(1)*, (a)(2), (a)(3), and (a)(4). (*C.C.P. 1161.2(a)(5).*) (See *U.D. Registry v. Superior Court* (1995) 39 C.A.4th 1241, 1245, 1246, 46 C.R.2d 363 [agency that investigated tenants was not entitled to reinstatement of blanket oral exemption from *C.C.P. 1161.2(a)*]; *U.D. Registry v. Municipal Court* (1996) 50 C.A.4th 671, 674, 675, 57 C.R.2d 788 [*C.C.P. 1161.2* barred blanket request by company that offered tenant screening services to landlords for all unlawful detainer filings in municipal courts; nothing in statute's clear language indicates that it only applies to organizations that represent tenants]; on limited civil cases, see 2 Cal. Proc. (4th), Courts, Supp., §248A.)

The court clerk must notify the named defendants that the action has been filed and that access to the files is restricted. The notice must provide specified information about the availability of legal services for low-income persons in the county in which the action is filed. (See *C.C.P. 1161.2(c)*.) *C.C.P. 1161.2* does not apply to an action that seeks to terminate a mobilehome park tenancy if the complaint's caption clearly indicates that the complaint seeks termination of a mobilehome park tenancy. (*C.C.P. 1161.2(e)*.)

SUPPLEMENT: [This section is current through the latest supplement]

Limited civil cases:

Cross-Reference: 2 *Cal. Proc.* (5th), *Courts*, §241 et seq.



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i. Proceedings Before Trial.

1. Immediate Possession.

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[§ 732] Immediate Possession.

The plaintiff may move for immediate possession before trial by a writ of possession. The motion must indicate that the writ applies to all tenants, subtenants, named claimants, and any other occupants of the premises. The court will grant immediate possession, after notice and a hearing, if it appears from the verified complaint, affidavits, or oral testimony, that the defendant (1) resides out of California, (2) has departed from California, (3) cannot be found within California after due diligence, or (4) conceals himself or herself to avoid service. (*C.C.P. 1166a(a)*, (b); see *Garfinkle v. Montgomery* (1952) 113 C.A.2d 149, 155, 248 P.2d 52 [no compliance with statutory conditions]; C.E.B., 1 Eviction Defense Manual 2d, §1.22; C.E.B., 2 Landlord-Tenant Practice 2d, §9.56; 12 Am.Jur. P.P. Forms (1999 ed.), Forcible Entry and Detainer, §47 et seq.; 16A Am Jur. P.P. Forms (2000 ed.) Landlord and Tenant, §152 et seq.; 5 *Cal. Proc.* (4th), *Pleading*, §605; 11 *So. Cal. L. Rev.* 30 [statute before provision for hearing].)

The plaintiff must file a bond in a sum fixed by the judge, securing the plaintiff's obligation to pay damages that the defendant sustains by reason of dispossession under the writ of possession if the plaintiff fails to recover a judgment for possession or if the suit is dismissed. (*C.C.P. 1166a(c)*.) If, at the hearing, the judge finds for the plaintiff, the judge will enter an order for immediate possession (*C.C.P. 1166a(d)*), which is enforceable under the procedure established in *C.C.P. 712.010* et seq. for the enforcement of nonmoney judgments (see 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §324 et seq.). (*C.C.P. 1166a(e)*, *1166a(f)*.)

SUPPLEMENT: [This section is current through the latest supplement]
See 12 Am.Jur. P.P. Forms (2008 ed.), Forcible Entry and Detainer, §54 et seq.

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §646. *Nonmoney judgments:*

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §326 et seq.



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Witkin Summary of California Law X. LANDLORD AND TENANT REMEDIES

A. Landlord's Remedies.

5. Unlawful Detainer.

i. Proceedings Before Trial.

2. Effect of Abandonment of Premises.

aa. Governing Law.

12 Witkin Sum. Cal. Law Real Property § 733

[§ 733] Governing Law.

(1) *Change to Civil Action.* If the lessor brings an unlawful detainer proceeding, and possession of the property is no longer in issue because the tenant gave up possession before trial or, if there is no trial, before judgment is entered, the case becomes an ordinary civil action. (C.C. 1952.3(a).) (See 9 *Pacific L. J.* 626.)

(2) *Plaintiff Lessor's Relief.* The lessor may obtain any relief to which he or she is entitled, including relief under C.C. 1951.2 (action for damages; supra, §694 et seq.). However, if the lessor seeks to recover damages under C.C. 1951.2(a)(3) or other damages not recoverable in the unlawful detainer proceeding, the lessor must first amend the complaint accordingly and serve a copy of the amended complaint on the defendant in the same manner as the summons and original complaint (see 3 *Cal. Proc.* (4th), *Actions*, §§918 et seq., 938, 962). (C.C. 1952.3(a)(1).)

(3) *Defendant Tenant's Relief.* The tenant may, by appropriate pleadings or amendments, seek affirmative relief and assert all defenses to which the tenant is entitled, whether or not the lessor has amended the complaint. However, *C.C.P.* 426.30 (requirement that defendant allege related causes of action in cross-complaint; see 5 *Cal. Proc.* (4th), *Pleading*, §1103) does not apply unless, after delivery of possession, the defendant (a) files a cross-complaint or (b) files an answer or amended answer to an amended complaint. (C.C. 1952.3(a)(2).) (On tenant's cross-complaint, see supra, §730.)

(4) *Defendant's Time To Answer.* The defendant's time to answer a complaint for unlawful detainer is not affected by delivery of possession. However, if the complaint is amended under C.C. 1952.3(a)(1), the defendant has the same time to answer as in an ordinary civil action. (C.C. 1952.3(b).)

(5) *No Change Where Defendant Defaults.* If the defendant's default is entered on the unlawful detainer complaint, and it has not been opened by an amendment to the complaint or otherwise set aside, the case must proceed as an unlawful detainer proceeding. (C.C. 1952.3(c).)

(6) *Facts Supporting Cause of Action for Unlawful Detainer.* C.C. 1952.3 applies only if the plaintiff has alleged

facts sufficient to state a cause of action for unlawful detainer and can offer prima facie proof in support of it. If the action is fatally defective, the statute cannot be invoked. To permit a landlord with a defective unlawful detainer action to use the procedure would encourage a bogus and fraudulent unlawful detainer filing in order to get a preferred trial setting. (*Karz v. Mecham* (1981) 120 C.A.3d Supp. 1, 5, 174 C.R. 310.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Plaintiff Lessor's Relief.*

Cross-Reference: 3 Cal. Proc. (5th), Actions, §§1000, 1022, 1045.

(3) *Defendant Tenant's Relief.*

Cross-Reference: 5 Cal. Proc. (5th), Pleading, §1177.



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bb. Illustrations.

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[§ 734] Illustrations.

In *Medford v. Superior Court* (1983) 140 C.A.3d 236, 189 C.R. 227, plaintiff landlord filed an unlawful detainer proceeding against defendant tenant. Defendant answered, setting up the affirmative defense that the premises were uninhabitable, and the matter was set for trial on October 7, 1982. On October 2, defendant left the apartment, and when the case was called for trial, she sought a continuance of the trial date and leave to file a cross-complaint. The judge granted the continuance and also granted leave to file the cross-complaint. But on his own motion without taking evidence, the judge imposed the condition that defendant deposit \$ 3,050 "back rent" with the court. *Held*, this condition was unwarranted, and mandamus issued to vacate the order.

(a) When a tenant surrenders possession, the tenant may file a cross-complaint under C.C. 1952.3 (*supra*, §733). And the judge may continue a trial date where filing or responding to the cross-complaint necessitates a continuance. But requiring a deposit of alleged back rent or accrued damages has the same effect as a prejudgment attachment, prohibited by C.C.P. 483.010(c) (see 6 *Cal. Proc.* (4th), *Provisional Remedies*, §§57, 70, 71). (140 C.A.3d 239.)

(b) A deposit cannot be justified on the ground that it protects the landlord from delays that naturally flow from opening the case to a cross-complaint. Once the tenant surrenders possession, unlawful detainer becomes an ordinary civil action (see *supra*, §733), and the landlord is no more entitled to protection from normal legal process than any other civil litigant. As pointed out in *Green v. Superior Court* (1974) 10 C.3d 616, 637, 111 C.R. 704, 517 P.2d 1168, *supra*, §625, the tenant in possession can only be required to pay into court rent that accrues after filing the answer alleging breach of the warranty of habitability. (140 C.A.3d 240.)

(c) C.C.P. 1170.5, although applicable only where the tenant remains in possession (see *infra*, §736), has a public policy basis that is persuasive here. It indicates that the Legislature, as well as the Supreme Court, deems landlords to be sufficiently protected from litigation delays by the deposit of future damages. (140 C.A.3d 241.)

(d) The trial judge's order cannot be justified under C.C.P. 1024, which gives the court the power to impose payment of costs as a condition to a continuance. Costs may include transportation, attorneys' fees, etc., but no case

suggests that a continuance can be conditioned on depositing with the court the damages alleged by the plaintiff. (140 C.A.3d 242.)

In *Fish Const. Co. v. Moselle Coach Works* (1983) 148 C.A.3d 654, 196 C.R. 174, defendant lessees filed an answer admitting that the rent claimed in the 3-day notice was due and had not been paid, and that they were still in possession. However, before commencement of trial, they unsuccessfully sought to have the matter placed off calendar and reset as an ordinary civil case because possession had been restored to plaintiff lessor. At trial, they presented uncontroverted evidence that keys to the premises and a letter relinquishing possession had been delivered to plaintiff's attorney 1 day before trial. The trial judge entered judgment for plaintiff for restitution, forfeiture of the lease, and damages. *Held*, reversed. Defendants had the right under C.C. 1952.3 to establish that possession had been relinquished despite their pleaded admission to the contrary.

In *Lynch & Freytag v. Cooper* (1990) 218 C.A.3d 603, 267 C.R. 189, plaintiff law firm subleased an office in its suite to defendant attorney. Two and a half years later, a dispute arose over calculation of a cost-of-living increase in the monthly rent; the amount in dispute was \$ 7.84 per month. Defendant thereafter refused to pay any further rent, and plaintiff filed an unlawful detainer proceeding. At a pretrial conference, plaintiff was granted permission to convert the proceeding into an ordinary civil action for breach of contract. In that action, defendant filed an answer denying the existence of the sublease, and plaintiff filed a supplemental complaint alleging a cause of action for bad faith denial of the existence of a contract (see 3 Cal. Proc. (4th), Actions, §§165, 166). The trial judge gave judgment for plaintiff for rent due plus costs and attorneys' fees, and against plaintiff on its cause of action for bad faith. Both parties appealed. *Held*, judgment affirmed.

(a) Defendant contended that an unlawful detainer proceeding can be converted to an ordinary civil action only when possession of the property is no longer in issue because it has been delivered to the lessor. This is incorrect. Unlawful detainer can coexist with other causes of action so long as the entire case is treated as an ordinary action. And where the constraints of the summary procedure are removed, the defendant may raise any defenses and is not prejudiced. (218 C.A.3d 609.)

(b) *Karz v. Mecham* (1981) 120 C.A.3d Supp. 1, 5, 174 C.R. 310, does not compel a contrary conclusion. There the unlawful detainer proceeding was fatally defective because of failure to serve the requisite notice; hence, it could not be converted to a civil action under C.C. 1952.3. But the court observed that the trial judge could have removed the case from the trial calendar by granting plaintiff leave to amend his complaint and proceed as in an ordinary civil action. (218 C.A.3d 610.) This is essentially what the trial judge did here (the supplemental complaint was in effect an amended complaint). (218 C.A.3d 610.)

(c) Unlike *Karz*, this is not a case in which the landlord brought a "bogus and fraudulent" unlawful detainer proceeding in order to take advantage of the summary procedure. Nor is the case like *Hudec v. Robertson* (1989) 210 C.A.3d 1156, 258 C.R. 868, in which the landlord, after a jury verdict for the defendant, attempted to convert by a post-trial motion. Here, the action was converted long before trial and defendant was afforded all the procedures available to a litigant in a civil action. (218 C.A.3d 610.)

SUPPLEMENT: [This section is current through the latest supplement]
Prejudgment attachment:

Cross-Reference: 6 Cal. Proc. (5th), Provisional Remedies, §§70, 71. *Bad faith denial of contract:*

Cross-Reference: 3 Cal. Proc. (5th), Actions, §§169, 170.



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12 Witkin Sum. Cal. Law Real Property § 735

[§ 735] Judgment by Default and Summary Judgment.

(1) *Judgment by Default.* If the defendant fails to appear within the allotted time (see *supra*, §730), the plaintiff may obtain an entry of default by submitting a written application to the clerk, together with proof of service of the summons and complaint (*supra*, §728). The application for the default judgment and the default judgment must include a place to indicate that the judgment includes tenants, subtenants, named claimants, and any other occupants of the premises. (C.C.P. 1169.) The clerk immediately enters judgment of restitution and issues a writ of execution (see *infra*, §§737, 741). For the other relief requested in the complaint, including costs, the plaintiff may apply to the court. (C.C.P. 1169; see C.E.B., 2 Landlord-Tenant Practice 2d, §§13.2, 13.4; 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §141.)

(2) *Forms.* The Judicial Council has adopted the following forms for optional use:

(a) Judicial Council Form No. UD-110 [Judgment--Unlawful Detainer (including clerk's judgment under C.C.P. 1169)].

(b) Judicial Council Form No. UD-116 [Declaration for Default Judgment by Court].

(3) *Summary Judgment.* After giving 5 days' notice, a motion for summary judgment may be made at any time after the answer is filed. The judgment must be granted or denied on the same basis as a motion under C.C.P. 437c. (C.C.P. 1170.7; see 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §178 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Judgment by Default.*

Cross-Reference: 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §165.(3) *Summary Judgment.*

Cross-Reference: 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §201 et seq.



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Witkin Summary of California Law X. LANDLORD AND TENANT REMEDIES

A. Landlord's Remedies.

5. Unlawful Detainer.

j. Trial.

12 Witkin Sum. Cal. Law Real Property § 736

[§ 736] Trial.

(1) *Time of Trial and Priority.* The trial must occur not later than the 20th day after the request to set the time of trial is made (*C.C.P. 1170.5(a)*), but if the parties all agree, the trial judge may extend this period (*C.C.P. 1170.5(b)*). (See *14 Pacific L. J. 494*; *Cal. Civil Practice*, 3 Real Property Litigation, §18:49 et seq.; on requesting trial date, see 7 *Cal. Proc.* (4th), *Trial*, §37 et seq.; *C.E.B.*, 2 Landlord-Tenant Practice 2d, §11.41; Judicial Council Form No. UD-150 [request/counterrequest to set case for trial]; on extensions, see 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §356; *C.E.B.*, 2 Landlord-Tenant Practice 2d, §11.44.)

If the trial is not held within the specified period and if the trial judge determines that there is a reasonable probability that the plaintiff will prevail, the judge must order the defendant to pay the damages that the plaintiff suffered as a result of the extension. (*C.C.P. 1170.5(c)*.) If the defendant fails to pay, the trial must be held within 15 days of the date payment was due. (*C.C.P. 1170.5(d)*.) (See *Medford v. Superior Court* (1983) 140 *C.A.3d* 236, 241, 189 *C.R. 227*; *C.E.B.*, 2 Landlord-Tenant Practice 2d, §11.50; *14 Pacific L. J. 494*.)

C.C.P. 1179a gives unlawful detainer actions priority over other civil actions not given precedence by law. (See *Lori, Ltd. v. Superior Court* (1946) 74 *C.A.2d* 442, 443, 168 *P.2d* 982; 7 *Cal. Proc.* (4th), *Trial*, §78.) However, *C.C.P. 1170.5* does not "abrogate or interfere with" the priority given to criminal matters by *P.C. 1050*. (*C.C.P. 1170.5(i)*; see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §330.)

(2) *Discovery.* Some special rules apply to discovery in unlawful detainer proceedings:

(a) *Depositions.* An oral deposition must be scheduled for a date at least 5 days after service of the deposition notice, but not later than 5 days before trial. (*C.C.P. 2025.270(b)*; see 2 *Cal. Evidence* (4th), *Discovery*, §47.)

(b) *Interrogatories.* The plaintiff may propound interrogatories 5 days after service of the summons on or appearance by the defendant. (*C.C.P. 2030.020(b)*.) The responding party must serve responses on the asking party within 5 days of service of interrogatories, unless the court on motion shortens or extends the time. (*C.C.P. 2030.060(a)*; see 2 *Cal. Evidence* (4th), *Discovery*, §97.)

(c) *Inspections.* An inspection demand must specify a reasonable time for the inspection that is at least 5 days after service of the demand, unless the court for good cause shown has granted leave to specify an earlier date. (C.C.P. 2031.030(c)(2); see 2 Cal. Evidence (4th), Discovery, §129.) The responding party must serve a written response on the party demanding an inspection and copies on all other parties who have appeared within 5 days after service of the demand, unless the court on motion shortens or extends the time. (C.C.P. 2031.260; see 2 Cal. Evidence (4th), Discovery, §133.)

(d) *Requests for Admission.* Unless the court, on motion, extends or shortens the time to respond to a request for admission, a response is required within 5 days after the request is served. (C.C.P. 2033.250; see 2 Cal. Evidence (4th), Discovery, §165.)

(3) *Jury Trial.* Fact issues presented in unlawful detainer actions are to be tried by a jury, unless a jury trial is waived. (C.C.P. 1171.) Included among these issues are the breach of the warranty of habitability (supra, §624 et seq.) and the defense of retaliatory eviction (supra, §706 et seq.). (See *Department of Trans. v. Kerrigan* (1984) 153 C.A.3d Supp. 41, 46, 200 C.R. 865; 7 Cal. Proc. (4th), Trial, §96.) (On jury instructions, see C.E.B., 2 Landlord-Tenant Practice 2d, §12.41 et seq.)

(4) *Consolidation and Coordination.* Courts have discretion to consolidate actions, including unlawful detainer actions, that involve a "common question of law or fact" whenever it can be done without prejudice. (C.C.P. 1048; see 4 Cal. Proc. (4th), Pleading, §305 et seq.; C.E.B., 2 Landlord-Tenant Practice 2d, §11.65 et seq.) And if actions have been filed in different courts, e.g., the landlord has filed an unlawful detainer action in one court and the tenant has filed an action for damages or injunctive relief in another, coordination is available under C.C.P. 404 et seq. (See 4 Cal. Proc. (4th), Pleading, §316 et seq.; C.E.B., 2 Landlord-Tenant Practice 2d, §11.69.)

(5) *Presumption of Landlord's Breach of Habitability Requirements.* C.C. 1942.3, applicable to leases or rental agreements entered into or renewed after 1985, creates a rebuttable presumption affecting the burden of producing evidence, that the landlord has breached the habitability requirements of C.C. 1941 (supra, §621 et seq.), if all of the following exist: (a) The dwelling lacks the affirmative standard characteristics of C.C. 1941.1 (supra, §621); (b) the landlord has been given written notice to correct the conditions by a housing-law enforcement official following an inspection; (c) the landlord has failed "without good cause" to abate the conditions within 60 days after the notice; and (d) the conditions were not caused by an act or omission of the tenant in violation of C.C. 1929 or 1941.2 (supra, §622). (C.C. 1942.3(a), (c).) Failure to establish the presumption does not preclude the tenant from defending the unlawful detainer action based on breach of the implied warranty of habitability (supra, §624 et seq.). (C.C. 1942.3(b).) (See 17 Pacific L. J. 767.)

West's Key Number Digest, Landlord and Tenant k.291(16)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Time of Trial and Priority.* See Cal. Civil Practice, 3 Real Property Litigation, §18:50 et seq.

Requesting trial date:

Cross-Reference: 7 Cal. Proc. (5th), Trial, §37 et seq.

Extensions:

Cross-Reference: 6 Cal. Proc. (5th), Proceedings Without Trial, §382 et seq.

Priority:

Cross-Reference: 7 Cal. Proc. (5th), Trial, §68.

(2) *Discovery*.(b) *Interrogatories*. *C.C.P. 2030.020* was amended in 2007. The 5-day period for propounding interrogatories is now prescribed by *C.C.P. 2030.020(c)*.

(c) *Inspections*. *C.C.P. 2031.260* was subdivided and amended in 2007. The portion discussed in the text is now in *C.C.P. 2031.260(b)*.

(d) *Requests for Admission*. *C.C.P. 2033.250* was subdivided and amended in 2007. The portion discussed in the text is now in *C.C.P. 2033.250(b)*.

(e) *(New) Discovery Motion*. A discovery motion may be made at any time in an unlawful detainer action, after giving 5 days' notice. (*C.C.P. 1170.8*, added in 2007.)

(3) *Jury Trial*.

Cross-Reference: 7 *Cal. Proc.* (5th), *Trial*, §86.

(4) *Consolidation and Coordination*.

Consolidation:

Cross-Reference: 4 *Cal. Proc.* (5th), *Pleading*, §341 et seq.

Coordination:

Cross-Reference: 4 *Cal. Proc.* (5th), *Pleading*, §352 et seq.

(5) *Presumption of Landlord's Breach of Habitability Requirements*. *C.C. 1942.3(a)* was amended in 2005 to add two alternatives to the first condition for creating a rebuttable presumption. In addition to dwellings that lack the affirmative standard characteristics of *C.C. 1941.1*, dwellings that are declared substandard under *Health & Saf.C. 17920.3* and those that contain lead hazards as defined in *Health & Saf.C. 17920.10* may trigger the presumption.



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A. Landlord's Remedies.

5. Unlawful Detainer.

k. Judgment.

1. Restoration of Possession.

12 Witkin Sum. Cal. Law Real Property § 737

[§ 737] Restoration of Possession.

(1) *Judgment for Plaintiff Landlord.* A prevailing landlord will receive judgment for restitution. The landlord may also get judgment declaring forfeiture of an unexpired lease if (a) the unlawful detainer was based on neglect, breach of a covenant, or failure to pay rent, and (b) forfeiture was declared in the 3-day notice (*supra*, §720). (*C.C.P. 1174(a)*); see *Pfitzer v. Candeias* (1921) 53 C.A. 737, 740, 200 P. 839; 7 Cal. Proc. (4th), *Judgment*, §33; Cal. Civil Practice, 3 Real Property Litigation, §18:57; for sample form of judgment in simple case, see C.E.B., 2 Landlord-Tenant Practice 2d, §13.34; on enforcement of judgment, see *infra*, §741.)

(2) *Judgment for Defendant Tenant.* If the tenant prevails because the landlord has failed to establish a cause of action (*supra*, §730), or because the tenant has established the defense of retaliatory eviction (*supra*, §706 et seq.), the tenant is entitled to a judgment denying the landlord possession of the premises. (See Cal. Civil Practice, 3 Real Property Litigation, §18:67; C.E.B., 2 Landlord-Tenant Practice 2d, §13.35 et seq.)

(3) *Conditional Judgment.* If the tenant proves a breach of the warranty of habitability (*supra*, §624 et seq.), the landlord may still be entitled to rent, and a conditional judgment is proper, granting judgment to the tenant, but conditioning retention of the premises on payment of reasonable rent within a specified time. (See *Green v. Superior Court* (1974) 10 C.3d 616, 639, 111 C.R. 704, 517 P.2d 1168, *supra*, §625; *Lee v. Vignoli* (1979) 98 C.A.3d Supp. 24, 27, 160 C.R. 79; C.E.B., 2 Landlord-Tenant Practice 2d, §13.41.)

C.C.P. 1174.2 provides a specific procedure for the entry of conditional judgments if, in an unlawful detainer action involving residential premises after default in the payment of rent, the court finds that the landlord has substantially breached the warranty of habitability (*supra*, §624), or any of the affirmative covenants in C.C. 1941 (*supra*, §621). (*C.C.P. 1174.2(a)*.) "Substantial breach" is defined as "the failure of the landlord to comply with applicable building and housing code standards that materially affect health and safety." (*C.C.P. 1174.2(c)*.)

If the court finds a substantial breach, it must (a) determine the reasonable rental value of the premises in its untenable state to the date of trial; (b) deny possession to the landlord and adjudge the tenant to be the prevailing party, conditioned on the payment of the adjusted accrued rent within a reasonable period not to exceed 5 days

(extended under *C.C.P. 1013* if served by mail); and (c) award the tenant costs and attorneys' fees (see *infra*, §739). (*C.C.P. 1174.2(a)*; see C.E.B., 2 Landlord-Tenant Practice 2d, §13.36; 7 *Cal. Proc.* (4th), *Judgment*, §95.) The court may also order the landlord to make repairs and correct the conditions constituting a breach, impose a reasonable rent for the premises, and retain jurisdiction to ensure that the repairs are completed. (*C.C.P. 1174.2(a)*; see 24 *Pacific L. J.* 1014.) If, however, the court finds that there has not been a substantial breach, or if the tenant fails to make the required rent payment, the landlord is entitled to a judgment for possession, and the landlord becomes the prevailing party for an award of costs and fees (*infra*, §739). (*C.C.P. 1174.2(a)*, (b); see 7 *Cal. Proc.* (4th), *Judgment*, §95.) (See *Hyatt v. Tedesco* (2002) 96 C.A.4th Supp. 62, 66, 117 C.R.2d 921 [*C.C.P. 1174.2* applied where premises were not properly waterproofed, roof leaked enough that rain damaged inside walls, windows were not waterproofed, portions of wall were visible in bathroom, and thermostat was inoperative; these conditions affected tenant's health and safety].)

Nothing in *C.C.P. 1174.2* is intended to deny the tenant the right to a jury trial, nor does the statute limit the landlord's right to go out of business under *Govt.C. 7060* et seq. (see *supra*, §598 et seq.). (*C.C.P. 1174.2(d)*.)

(4) *Forms*. The Judicial Council has adopted the following forms for optional use:

- (a) Judicial Council Form No. UD-110 [Judgment--Unlawful Detainer].
- (b) Judicial Council Form No. UD-110S [Judgment--Unlawful Detainer Attachment].
- (c) Judicial Council Form No. UD-115 [Stipulation for Entry of Judgment].
- (d) Judicial Council Form No. UD-116 [Declaration for Default Judgment by Court].

West's Key Number Digest, Landlord and Tenant k.291(17)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Judgment for Plaintiff Landlord*. See Cal. Civil Practice, 3 Real Property Litigation, §18:60.

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §33.

(2) *Judgment for Defendant Tenant*. See Cal. Civil Practice, 3 Real Property Litigation, §18:71.

(3) *Conditional Judgment.Recovery of costs:*

Cross-References: 7 *Cal. Proc.* (5th), *Judgment*, §95.



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5. Unlawful Detainer.

k. Judgment.

2. Rent and Damages.

12 Witkin Sum. Cal. Law Real Property § 738

[§ 738] Rent and Damages.

(1) *Statutory Provision.* A plaintiff who proves unlawful detainer is entitled to a money judgment for damages "occasioned" by the unlawful detainer and rent found due if the alleged default is in the payment of rent. (*C.C.P. 1174(b)*; see *C.E.B.*, 2 Landlord-Tenant Practice 2d, §9.38 et seq.; *C.E.B.*, Attorney's Guide to Damages 2d, §4.86 et seq.; 7 *Cal. Proc.* (4th), *Judgment*, §33.)

(2) *Actual Damages.* The damages that may be recovered in an unlawful detainer action under *C.C.P. 1174(b)* are strictly limited. There can be no damage award if the landlord fails to prove an unlawful detainer. (See *Balassy v. Superior Court* (1986) 181 C.A.3d 1148, 1151, 226 C.R. 817.) Moreover, only damages that "result from the unlawful detention and accrue during that time" are proper. (*Vasey v. California Dance Co.* (1977) 70 C.A.3d 742, 748, 139 C.R. 72; *Hudec v. Robertson* (1989) 210 C.A.3d 1156, 1163, 258 C.R. 868.) The unlawful detainer judgment may not include an award for damages caused by breaches of the lease occurring before the unlawful detainer (*Vasey v. California Dance Co.*, *supra*), or future damages for continued unlawful possession after the unlawful detainer judgment (*Lehr v. Crosby* (1981) 123 C.A.3d Supp. 1, 10, 177 C.R. 96). (See *C.E.B.*, 2 Landlord-Tenant Practice 2d, §9.41; on recovery of these damages in separate action, see *supra*, §694 et seq.) Damages are generally computed as the fair rental value of the property between the time the 3-day notice expires (see *supra*, §720), and the date of judgment. (*Lehr v. Crosby*, *supra*, 123 C.A.3d Supp. 8; *Superior Motels v. Rinn Motor Hotels* (1987) 195 C.A.3d 1032, 1069, 1070, 1073, 241 C.R. 487.)

In *Lehr v. Crosby*, *supra*, plaintiff landlord brought suit for unlawful detainer for nonpayment of rent, and defendant interposed a defense of breach of the implied warranty of habitability. The court found defendant tenant liable for unlawful detainer, and made specific findings that the premises were tenantable and were not uninhabitable. The court awarded rent, based on the agreed monthly rent, up to the date the tenancy was terminated, and damages for the period thereafter until judgment at a rate approximately one-third the agreed rent. *Held*, reversed and remanded to retry the issue of damages.

(a) Defendant's contention that the reduced damage award must be construed as an implied finding in her favor on the uninhabitability defense is precluded by the court's specific finding of habitability and its failure to reduce the award for rent accruing prior to the termination of the tenancy. (123 C.A.3d Supp. 7, 8.)

(b) In awarding a landlord damages for the period of the defendant's unlawful detainer, the agreed rent is evidence of the rental value, or reasonable value of use. The court may, however, find the rental value to be greater or less than the agreed rent. (123 C.A.3d Supp. 9, citing *Harris v. Bissell* (1921) 54 C.A. 307, 202 P.2d 453 [lesser award] and *Haig v. Hogan* (1947) 82 C.A.2d 876, 187 C.R. 426 [award greater than federal rent control ceiling].) In this case, however, reversal and remand are required, because there is no evidence supporting the lesser damage award, and there "appear to have been no differences in the condition of the premises or the circumstance of the occupancy which would establish such a marked reduction in rental value." (123 C.A.3d Supp. 10.)

(3) *Statutory Damages*. C.C.P. 1174 formerly provided that the court had discretion to award treble damages, without a showing of malice, where the tenant intentionally held over. (See *Gwinn v. Goldman* (1943) 57 C.A.2d 393, 399, 134 P.2d 915 [award of rent due, plus special damages, and aggregate trebled]; *Buck v. Morrossis* (1952) 114 C.A.2d 461, 466, 250 P.2d 270.) It later required a showing of malice, and vested the discretion in "the trier of fact." (See *Fifth & Broadway Partnership v. Kimny* (1980) 102 C.A.3d 195, 204, 162 C.R. 271; *Roth v. Morton's Chefs Services* (1985) 173 C.A.3d 380, 388, 218 C.R. 684 ["In practical effect, section 1174 allows punitive damages double the actual damages in addition to actual damages"].)

C.C.P. 1174 was amended in 1993 to eliminate the provision for treble damages, and provide instead for statutory damages up to \$ 600, in addition to actual damages, including rent found due. Malice must be shown. It is for the trier of fact to determine whether to award actual damages, statutory damages, or both. (C.C.P. 1174(b); see 7 A.L.R.4th 589 [what constitutes wilfulness or malice justifying landlord's collection of statutory multiple damages]; C.E.B., 2 Landlord-Tenant Practice 2d, §12.31 et seq.)

(4) *Rent*. The rent that may be awarded under C.C.P. 1174(b) is also strictly limited. As with damages, there can be no award if the landlord fails to prove unlawful detainer. (*Balassy v. Superior Court*, *supra*.) And the landlord's entitlement to rent, as opposed to damages, ends when the lease is terminated. (*Lehr v. Crosby*, *supra*.)

Rent cannot be recovered unless the unlawful detainer is based on nonpayment of rent. In *Castle Park No. 5 v. Katherine* (1979) 91 C.A.3d Supp. 6, 154 C.R. 498, plaintiff landlord terminated a month-to-month tenancy by the required notice (see *supra*, §680), and then brought unlawful detainer without giving a 3-day notice to pay rent or quit (see *supra*, §721). The trial judge denied recovery of rent claimed to have accrued before the termination of the tenancy. *Held*, this was proper. The unlawful detainer statute is strictly construed, and, in a case not founded on default in the payment of rent, the landlord may recover damages for detention of the premises after termination, but not rent. (91 C.A.3d Supp. 12.) (See *Saberi v. Bakhtiari* (1985) 169 C.A.3d 509, 215 C.R. 359.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Provision*.

Cross-Reference: 7 Cal. Proc. (5th), Judgment, §33.

(2) *Actual Damages*. See CACI, No. 4340 [Damages for Reasonable Rental Value]. (3) *Statutory Damages*. See CACI, No. 4341 [Statutory Damages on Showing of Malice (*Code of Civ. Proc.*, § 1174(b))].

(4) *Rent*.

(*New*) *Rent abatement for commercial tenant is not authorized:* C.C.P. 1174(b) addresses the amount of rent due when a landlord is successful in an unlawful detainer action. It does not provide authority for a trial court to order abatement of rent in favor of a prevailing tenant. (*Underwood v. Corsino* (2005) 133 C.A.4th 132, 135, 34 C.R.3d 542 [commercial tenant was not entitled to rent abatement from date of notice to quit].)



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k. Judgment.

3. Costs and Attorneys' Fees.

12 Witkin Sum. Cal. Law Real Property § 739

[§ 739] Costs and Attorneys' Fees.

(1) *Costs.* Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding. (*C.C.P. 1032(b)*; see 7 *Cal. Proc.* (4th), *Judgment*, §89 et seq.; C.E.B., *Attorney's Guide to Damages* 2d, §4.89.)

(2) *Attorneys' Fees.* Attorneys' fees are properly awarded when provided for by statute or the agreement of the parties. (*C.C.P. 1021*; see 7 *Cal. Proc.* (4th), *Judgment*, §145 et seq.; C.E.B., *Attorney's Guide to Damages* 2d, §4.93 et seq.) No statute, however, authorizes awards of attorneys' fees in unlawful detainer actions generally. (*Selma Auto Mall II v. Appellate Dept.* (1996) 44 *C.A.4th* 1672, 1684, 52 *C.R.2d* 599, citing the text.) However, a landlord who institutes an unlawful detainer action based on a tenant's nonpayment of rent, and who is liable for a violation of C.C. 1942.4 (*supra*, §620), is liable to the tenant or lessee for reasonable attorneys' fees and costs of the suit, in an amount to be fixed by the court (*C.C.P. 1174.21*). (See *Beverly Hills Properties v. Marcolino* (1990) 221 *C.A.3d Supp.* 7, 9, 12, 270 *C.R.* 605 [award of attorneys' fees to prevailing tenant, even though he was represented by legal services organization without charge]; 7 *Cal. Proc.* (4th), *Judgment*, Supp., §201; on permitting award to prevailing party in action for damages for retaliatory eviction, see C.C. 1942.5(g), *supra*, §715; on attorneys' fees in proceedings to terminate mobilehome tenancy, see C.C. 798.85, *infra*, §789; for other statutes that might be applicable under certain facts, see C.E.B., 2 *Landlord-Tenant Practice* 2d, §13.25.)

Leases commonly provide for attorneys' fees, and even if the lease provides only for an award to the landlord, C.C. 1717 extends the right to the prevailing party. (See *Artesia Med. Dev. Co. v. Regency Associates, Ltd.* (1989) 214 *C.A.3d* 957, 964, 266 *C.R.* 657 [award of attorneys' fees to lessee's assignee was error where judgment of forfeiture made plaintiff lessor prevailing party on main issue]; 7 *Cal. Proc.* (4th), *Judgment*, §§158, 162 et seq.) If the lease provides for attorneys' fees, the award may include an allowance for services on appeal. (*Richard v. Degen & Brody* (1960) 181 *C.A.2d* 289, 299, 5 *C.R.* 263.)

(3) *Conditional Judgments.* C.C.P. 1174.2 provides for conditional judgments where there has been a substantial breach of the warranty of habitability (*supra*, §737). (See 7 *Cal. Proc.* (4th), *Judgment*, §95.) As to costs, the tenant is the "prevailing party" if (a) a conditional judgment is entered, and (b) the tenant pays the reasonable rental as

determined by the court within the specified time. The tenant is also entitled to attorneys' fees "if provided by, and pursuant to, any statute or contract of the parties." (*C.C.P. 1174.2(a).*)

If, on the other hand, the court determines that there has not been a substantial breach of the warranty of habitability or if the tenant fails to pay all rent accrued to the date of trial, the landlord is the prevailing party for purposes of awarding costs or attorneys' fees under statute or contract. (*C.C.P. 1174.2(b).*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Costs.*

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §88 et seq.

(2) *Attorneys' Fees.*

Statute or agreement:

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §149 et seq.

Violation of C.C. 1942.4:

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §228.

Award to prevailing party:

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §§167, 170 et seq.

(3) *Conditional Judgments.*

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §95.



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4. Res Judicata and Collateral Estoppel.

12 Witkin Sum. Cal. Law Real Property § 740

[§ 740] Res Judicata and Collateral Estoppel.

(1) *Subsequent Action for Damages or Equitable Relief.* Unless possession is delivered and the landlord amends the complaint to seek damages (supra, §733), an unlawful detainer proceeding is not a bar to a subsequent action for damages (see supra, §694 et seq.), or to appropriate equitable relief (C.C. 1951.8), but no damages may be recovered in the subsequent action for which a claim was made and determined on the merits in the previous action. (C.C. 1952(b); see *Vasey v. California Dance Co.* (1977) 70 C.A.3d 742, 748, footnote 2, 139 C.R. 72, citing the text; *Northrop Corp. v. Chaparral Energy* (1985) 168 C.A.3d 725, 214 C.R. 173 [landlord was not required to litigate rental damages in unlawful detainer action]; *Landeros v. Pankey* (1995) 39 C.A.4th 1167, 1174, 46 C.R.2d 165 [tenants' action for breach of warranty of habitability was not barred by stipulated judgment in prior unlawful detainer action, even though breach of warranty had been raised as affirmative defense in that action; judgment did not indicate that parties intended to preclude future litigation of issue]; 7 Cal. Proc. (4th), Judgment, §369.)

(2) *Subsequent Action Based on Lease.* An unlawful detainer judgment for possession (supra, §737) is a bar to the lessor's remedy based on continuation of the lease, unless the lessee obtains relief from forfeiture under C.C.P. 1179. (C.C. 1952(c); see supra, §670.)

(3) *Successive Actions During Appeal.* A new cause of action on the same agreement for the rental of real property will not be barred because of an appeal by a party. (C.C.P. 1176(b); see 5 Cal. Proc. (4th), Pleading, §598.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Subsequent Action for Damages or Equitable Relief.*

Cross-Reference: 7 Cal. Proc. (5th), Judgment, §431.

(3) *Successive Actions During Appeal.*

Cross-Reference: 5 Cal. Proc. (5th), Pleading, §639.



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1. Enforcement of Judgment.

1. In General.

12 Witkin Sum. Cal. Law Real Property § 741

[§ 741] In General.

(1) *Writ of Possession.* The landlord's judgment for possession (supra, §737) may be enforced by a writ of possession as provided in *C.C.P. 712.010* et seq. (*C.C.P. 1174(d)*; see C.E.B., 2 Landlord-Tenant Practice 2d, §13.64 et seq.; Cal. Civil Practice, 3 Real Property Litigation, §18:105 [form of writ]; 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §§318, 324 et seq.) Except as to a money judgment, a writ of possession issued in an unlawful detainer action must be enforced without delay despite receipt of notice that the defendant has filed for bankruptcy. (*C.C.P. 715.050*; see *Lee v. Baca* (1999) 73 *C.A.4th* 1116, 1119, 86 *C.R.2d* 913 [*C.C.P. 715.050* required sheriff to enforce writ of possession obtained before tenants initiated bankruptcy proceeding; because tenant has no legal or equitable interest in rented property once landlord has obtained judgment for possession, bankruptcy provision that stays enforcement against property of debtor's estate did not apply].)

The court may delay the issuance of the writ of possession until 5 days after entry of judgment in the following limited circumstances: (a) The unlawful detainer was for nonpayment of rent; (b) the lease or rental agreement has not expired; and (c) the landlord's 3-day notice (supra, §721 et seq.) did not declare its forfeiture. The court must order the 5-day delay if the lease or agreement is in writing, is for a term of more than 1 year, and does not contain a forfeiture clause. During this period, the tenant, any subtenant, anyone holding a mortgage on the lease, or any other party interested in its continuance may restore the tenant to his estate by paying into court the amount found due for rent, with interest, damages, and costs. (*C.C.P. 1174(c)*.) (See C.E.B., 2 Landlord-Tenant Practice 2d, §13.49 et seq.; 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §324; on stay of enforcement of judgment, see 9 *Cal. Proc.* (4th), *Appeal*, §§227 et seq., 251.)

An occupant not named in the judgment of possession, who occupied the premises on the date the action was filed, may object to enforcement of the judgment by filing a claim of right to possession up to the point of eviction. (*C.C.P. 1174.3*; see C.E.B., 2 Landlord-Tenant Practice 2d, §13.70; 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §§326, 327; for form of claim of right to possession, see Cal. Civil Practice, 3 Real Property Litigation, §18:93.)

(2) *Judgment for Rent and Damages.* The landlord's judgment for rent and damages (supra, §738 et seq.) is enforced in the same manner as other money judgments. (See C.E.B., 2 Landlord-Tenant Practice 2d, §13.74; 8 *Cal.*

Proc. (4th), Enforcement of Judgment, §44 et seq.)

(3) *Landlord's Bad Faith Shown by Acts After Judgment.* In *Zimmerman v. Stotter* (1984) 160 C.A.3d 1067, 207 C.R. 108, a landlord, claiming that a rent-controlled unit was desired for family members, brought an unlawful detainer action against a tenant, and received judgment and a writ of possession. One year later, without any occupation by the landlord's family, the property was rented to strangers at a higher rent. The former tenant then brought an action for wrongful eviction. *Held*, the claim that the landlord acted in bad faith in bringing the unlawful detainer suit was barred by the judgment. There was a rebuttable presumption that the attempt to satisfy the judgment was also in good faith, but this presumption could be rebutted by evidence of subsequent happenings. The wrong alleged in the present action "allegedly resulted when, by the use of the writ of possession, respondent evicted appellant from her apartment not for the purpose of occupying the premises as declared by her earlier, but for an ulterior purpose in circumvention of the applicable rent control regulations." (160 C.A.3d 1076.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Writ of Possession.* See Cal. Civil Practice, 3 Real Property Litigation, §18:110 [form of writ]; Cal. Civil Practice, 3 Real Property Litigation, §18:98 [form of claim of right to possession].

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §§326, 332 et seq.

Five-day delay:

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §332.

Stay of enforcement:

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §§221 et seq., 245.

Claim by unnamed occupant:

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §§334, 335.

(2) *Judgment for Rent and Damages.*

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §53 et seq.



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1. Enforcement of Judgment.

2. Storage of Tenant's Property.

12 Witkin Sum. Cal. Law Real Property § 742

[§ 742] Storage of Tenant's Property.

(1) *Safekeeping of Property.* The landlord in an unlawful detainer action must store personal property remaining on the premises in a place of safekeeping until it is either released under *C.C.P. 1174(h)* or disposed of under *C.C.P. 1174(i)*, *infra*, this section. (*C.C.P. 1174(g)*.) (On storage and disposal of personal property left on leased or rented premises after termination, see *C.C. 1980 et seq.*, *infra*, §750 *et seq.*)

(2) *Notice to Nontenant.* The landlord must give notice under *C.C. 1983* (disposition of abandoned personal property; see *infra*, §750) to any nontenant whom the landlord reasonably believes to be the owner of personal property remaining on the premises unless the alternative procedure for surrender of property under *C.C. 1965* (*infra*, §754) has been initiated or completed. (*C.C.P. 1174(f)*.)

(3) *Release of Property to Tenant or Other Owner.* The landlord must release the personal property to the tenant or, at the landlord's option, to a person reasonably believed by the landlord to be its owner, if the tenant or other person pays the costs of storage under *C.C. 1990*. The tenant must claim the property by the date specified in the writ of possession (see *supra*, §741), and a person other than the tenant must do so by the date specified in the notice. (*C.C.P. 1174(h)*); on alternative release procedure, see *C.C. 1965*, *infra*, §754.)

When a landlord releases personal property to the tenant under *C.C.P. 1174(h)*, the landlord is not liable to any person with respect to that property. (*C.C.P. 1174(j)*.) Where the landlord releases personal property under *C.C.P. 1174(h)* to a nontenant whom the landlord reasonably believes to be the owner, the landlord is not liable to the tenant or to any person to whom notice was given under *C.C.P. 1174(f)*. (*C.C.P. 1174(k)(1)*.) Nor is the landlord liable to any other person, unless that person proves that, before releasing the property, the landlord believed or reasonably should have believed that the person had an interest in the property and also that the landlord knew the person's address, or should have known it on reasonable investigation. (*C.C.P. 1174(k)(2)*.)

(4) *Disposal of Property Not Released.* Personal property not released under *C.C.P. 1174(h)* must be disposed of under *C.C. 1988* (*infra*, §752). (*C.C.P. 1174(i)*.) In that case, the landlord is not liable with respect to that property to the tenant or to any person to whom notice was given under *C.C.P. 1174(f)* (*C.C.P. 1174(l)(1)*), or to any other person,

unless that person proves that, before disposing of the property, the landlord believed or reasonably should have believed that the person had an interest in the property and also that the landlord knew or should have known on reasonable investigation the address of that person (*C.C.P. 1174(l)(2)*). (See 8 *Cal. Proc. (4th), Enforcement of Judgment*, §329.)

(5) *Disposal of Lost Property*. Personal property that the landlord reasonably believes to be lost is disposed of under C.C. 2080 et seq. (see 13 *Summary (10th), Personal Property*, §§119, 120). The landlord is not liable to the owner of any property that is disposed of in this manner. If the appropriate police or sheriff's department refuses to accept the property, it will be deemed not to have been lost for the purposes of *C.C.P. 1174(e)*. (*C.C.P. 1174(e)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Disposal of Property Not Released*.

Cross-Reference: 8 *Cal. Proc. (5th), Enforcement of Judgment*, §337.



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12 *Witkin Sum. Cal. Law Real Property* § 743

[§ 743] Action To Quiet Title.

Another remedy of the landlord is to bring an action to quiet title and remove the cloud of the tenant's interest. (See *Black v. Arnold Best Co.* (1954) 124 C.A.2d 378, 383, 268 P.2d 513; 65 Am.Jur.2d (2001 ed.), *Quieting Title and Determination of Adverse Claims* §46; 20C Am.Jur. P.P. Forms (1998 ed.), *Quieting Title and Determination of Adverse Claims*, §7 et seq.; 5 Cal. Proc. (4th), *Pleading*, §613 et seq.) No notice to quit is required as a basis for the action. (*Paradise Irr. Dist. v. Barry* (1934) 220 C. 748, 750, 32 P.2d 966; *Calhoma Oil Corp. v. Conniff* (1929) 207 C. 648, 651, 279 P. 771; *Andrews v. Russell* (1927) 85 C.A. 149, 154, 259 P. 113; *Reserve Oil & Gas Co. v. Metzenbaum* (1948) 84 C.A.2d 769, 774, 191 P.2d 796; see 1 So. Cal. L. Rev. 193.)

SUPPLEMENT: [This section is current through the latest supplement]
See 20C Am.Jur. P.P. Forms (2008 ed.), *Quieting Title and Determination of Adverse Claims*, §4 et seq.

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §654 et seq.



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12 Witkin Sum. Cal. Law Real Property § 744

[§ 744] Lessor's Conditional Remedy.

(1) *Lessor's Right To Continue Lease.* Even if a lessee of real property breaches the lease and abandons the property, the lease continues in effect as long as the lessor does not terminate the lessee's right to possession. The lessor may enforce all the lessor's rights and remedies under the lease, including the right to recover the rent as it becomes due under the lease. (C.C. 1951.4(b); see C.E.B., *Attorney's Guide to Damages* 2d, §4.80; Cal. Civil Practice, 3 Real Property Litigation, §17:46 [complaint by lessor].) Obviously, the lessor is also required to continue to perform the lessor's own obligations under the lease. (Law Rev. Com. Comment.)

(2) *Lease Must Provide for Remedy.* The remedy described in C.C. 1951.4 is available only if the lease provides for it. (C.C. 1951.4(a).) Although another type of provision may be used, a provision in the lease in substantially the following form satisfies this requirement:

"The lessor has the remedy described in *California Civil Code Section 1951.4* (lessor may continue lease in effect after lessee's breach and abandonment and recover rent as it becomes due, if lessee has right to sublet or assign, subject only to reasonable limitations)."

C.C. 1951.4(a) provides a "safe harbor" of specific language that satisfies the requirement. Whether other language will satisfy the requirement depends on the language used and the understanding of the parties. (Law Rev. Com. Comment.)

(3) *Condition: Lessee's Right To Sublet or Assign.* The lessor's remedy of continuation of the lease is available only if one of the following conditions is satisfied:

(a) The lease permits the lessee, or does not prohibit or otherwise restrict the right of the lessee, to sublet the property, assign the lessee's interest in the lease, or both. (C.C. 1951.4(b)(1).)

(b) The lease permits the lessee to sublet the property, assign the lessee's interest in the lease, or both, subject to express standards or conditions. The standards and conditions must be reasonable at the time the lease is executed and the lessor must not require compliance with a standard or condition that has become unreasonable at the time the lessee

seeks to sublet or assign. (C.C. 1951.4(b)(2).) An express standard or condition is presumed to be reasonable. This presumption is a presumption affecting the burden of proof. (C.C. 1951.4(b)(2).)

(c) The lease permits the lessee to sublet the property, assign the lessee's interest in the lease, or both, with the consent of the lessor, and the lease either provides that the consent will not be unreasonably withheld or includes a standard implied by law that consent will not be unreasonably withheld. (C.C. 1951.4(b)(3).)

(4) *Law Revision Commission Comment.* The Law Revision Commission Comment makes the following points:

(a) C.C. 1951.4(b)(1) recognizes that a lessee may sublet the property or assign the lessee's interest in the lease whether or not the lease permits it, as long as the lease does not prohibit it. However, a lessor may not include a prohibition against subletting or assignment and later take advantage of the remedy of C.C. 1951.4 by waiving the prohibition. The lessee must have a legal right to sublet or assign subject only to reasonable limitations from the outset if the lessor is to have the lease continuation remedy.

(b) Similarly, C.C. 1951.4(b)(2) does not permit the lessor to take advantage of the remedy in C.C. 1951.4 by including a standard or condition that is originally unreasonable and thereafter waive it. The lessee must have a legal right to sublet or assign subject only to reasonable limitations from the outset if the lessor is to have the continuation remedy.

(c) C.C. 1951.4(b)(3) recognizes that the lessor's consent to an assignment or subletting may not unreasonably be withheld, even though the lease does not require reasonableness, if the lease provides no standard for giving or withholding consent. As with the provisions described above, a lessor may not take advantage of the remedy provided in C.C. 1951.4 by including in the lease a clause that subjects the lessor's consent to unreasonable limitations and thereafter waiving the clause. The lessee must have a legal right to sublet or assign subject only to reasonable limitations from the outset if the lessor is to have the lease continuation remedy.

SUPPLEMENT: [This section is current through the latest supplement]



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b. Benefits of Continuation Remedy.

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[§ 745] Benefits of Continuation Remedy.

C.C. 1951.4 allows the lessor to avoid the normal duty, under C.C. 1951.2, of minimizing damages by attempting to relet the property. (See *supra*, §699.) One obvious reason for this provision is that some lessors do not have the desire, facilities, or ability to manage the property and acquire a suitable tenant. (Law Rev. Com. Comment.)

The Law Revision Commission Comment calls attention to two other important objectives of the provision.

(1) "It permits arrangements for financing the purchase or improvement of real property that might otherwise be seriously jeopardized if the lessor's only right upon breach of the lease and abandonment of the property were the right to recover damages under Section 1951.2. For example, because the lessee's obligation to pay rent under a lease could be enforced under former law, leases were utilized by public entities to finance the construction of public improvements. The lessor constructed the improvement to the specifications of the public entity-lessee, leased the property as improved to the public entity, and at the end of the term of the lease all interest in the property and the improvement vested in the public entity. ... Similarly, a lessor could, in reliance on the lessee's rental obligation under a long-term lease, construct an improvement to the specifications of the lessee for the use of the lessee during the lease term. The remedy available under Section 1951.4 retains the substance of the former law and gives the lessor, in effect, security for the repayment of the cost of the improvement in these cases."

(2) It "facilitates assignment by the lessor under a long-term lease of the right to receive the rent under the lease in return for the discounted value of the future rent. The remedy provided by Section 1951.4 makes the right to receive the rental payments an attractive investment since the assignee is assured that the rent will be paid if the tenant is financially responsible."

SUPPLEMENT: [This section is current through the latest supplement]



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c. Termination of Lessee's Right of Possession.

12 Witkin Sum. Cal. Law Real Property § 746

[§ 746] Termination of Lessee's Right of Possession.

The remedy of continuation of the lease exists only "so long as the lessor does not terminate the lessee's right to possession." (C.C. 1951.4(b); see C.C. 1952(c).) If the lessor successfully invokes the possessory remedy and evicts the lessee (see *supra*, §703), the lessor is left with the remedy of damages under C.C. 1951.2 (*supra*, §694 et seq.), unless the lessee obtains relief from forfeiture under *C.C.P. 1179* (*supra*, §670). (C.C. 1952(c).)

Certain protective acts of the lessor do not, however, constitute termination of the lessee's right to possession within the meaning of C.C. 1951.4(b). These include acts of maintenance or preservation or efforts to relet the property, and the appointment of a receiver on the lessor's initiative to protect the lessor's interest under the lease. (C.C. 1951.4(c)(1), 1951.4(c)(2).) "For example, an apartment building may be leased under a 'master lease' to a lessee who then leases the individual apartments to subtenants. The appointment of a receiver may be appropriate if the lessee under the master lease collects the rent from the subtenants but fails to pay the lessor the rent payable under the master lease. The receiver would collect the rent from the subtenants on behalf of the lessee and pay to the lessor the amount he is entitled to receive under the master lease. This form of relief would protect the lessor against the lessee's misappropriation of the rent from subtenants and at the same time would preserve the lessee's obligation to pay the rent provided in the master lease." (Law Rev. Com. Comment.)

Furthermore, withholding consent to a subletting or assignment, or terminating a subletting or assignment, does not constitute termination of the lessee's right to possession, if the withholding or terminating does not violate the lessee's rights under C.C. 1951.4(b) (see *supra*, §744). (C.C. 1951.4(c)(3).) C.C. 1951.4(c)(3) clarifies that the landlord's efforts to preclude or terminate an assignment or sublease that is neither reasonable nor otherwise permitted by the lease do not impair the landlord's rights under C.C. 1951.4. (Law Rev. Com. Comment.)

SUPPLEMENT: [This section is current through the latest supplement]



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12 Witkin Sum. Cal. Law Real Property § 747

[§ 747] Use of Lessee's Deposit.

A lease frequently provides for a money deposit by the lessee as security for performance. If the deposit is subject to forfeiture on breach, it is an unenforceable penalty, but if it is to be used only as a source of payment of actual damages proved, with any balance returned to the lessee, it is valid. (See C.E.B., 1 Landlord-Tenant Practice 2d, §4.26; C.E.B., 2 Eviction Defense Manual 2d, Chap. 31; 22 *Hastings L. J.* 1373 [rental security deposits in California]; *Am. Jur. 2d* (1995 ed.), *Landlord and Tenant* §§18, 119 et seq.; 11A Am.Jur. Legal Forms 2d (1998 ed.), Leases of Real Property, §161:268 et seq.; 16A Am.Jur. P.P. Forms (2000 ed.), Landlord and Tenant, §333 et seq.; 1 *Summary* (10th), *Contracts*, §521.)

C.C. 1950.5 (residential property) and C.C. 1950.7 (nonresidential property) regulate the lessor's use of a deposit, safeguard the tenant's prior claim against the lessor's creditors, subject the lessor or the lessor's successors to punitive damages of not over twice the amount of the security for bad faith retention, and specify the procedure by which the lessor may be relieved of liability on termination of the lessor's interest in the premises. (See C.E.B., Attorney's Guide to Damages 2d, §4.52 et seq.; 34 *McGeorge L. Rev.* 495; 1 *Summary* (10th), *Contracts*, §522 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]
See 11A Am.Jur. Legal Forms 2d (2006 ed.), Leases of Real Property §161:303 et seq.



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[§ 748] Landlord's Lien.

A landlord, as distinguished from an innkeeper (see 13 *Summary* (10th), *Personal Property*, §222), has no lien on the tenant's personal property for unpaid rent. (*Ferguson v. Murphy* (1897) 117 C. 134, 138, 48 P. 1018; *Gruber v. Pacific States Savings & Loan Co.* (1939) 13 C.2d 144, 148, 88 P.2d 137; see 99 A.L.R.3d 1100 [common law lien recognized in some jurisdictions].) But the landlord may obtain a contractual or equitable lien by special provision in the lease. (See 49 *Am.Jur.2d* (1995 ed.), *Landlord and Tenant* §944 et seq.; 11A *Am.Jur. Legal Forms 2d* (1998 ed.), *Leases of Real Property*, §161:290; 16A *Am.Jur. P.P. Forms* (2000 ed.), *Landlord and Tenant*, §107 et seq.) Thus, where a lease provides that crops or fixtures will be treated as appurtenant to the land or the property of the landlord until rent is paid, the effect is to give the landlord a lien to secure rental.

Division 9 of the Uniform Commercial Code does not apply to a landlord's lien, other than an agricultural lien. (U.C.C. 9109(d)(1); see 4 *Summary* (10th), *Secured Transactions in Personal Property*, §24.)

West's Key Number Digest, Landlord and Tenant k.239 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

See 49 *Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §792 et seq.; 11A *Am.Jur. Legal Forms 2d* (2006 ed.), *Leases of Real Property* §161:327.



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a. Nature of Statute.

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[§ 749] Nature of Statute.

(1) *Law Revision Commission Recommendation.* The Commission, in a report made in December 1973, called attention to the uncertainty and inconsistency in the existing statutes dealing with the disposition of personal property left on the premises by a departed tenant. The Commission recommended the adoption of a uniform procedure to govern the disposition of personal property left on leased or rented premises, whether the premises are furnished or unfurnished, residential or commercial. (11 Cal. Law Rev. Com. Reports, p. 963.)

(2) *Enactment of Statute.* Pursuant to the Commission's recommendation, the 1974 Legislature enacted a new Chapter of the Civil Code entitled "Disposition of Personal Property Remaining on Premises at Termination of Tenancy" (C.C. 1980 et seq.). Former C.C. 1862 was repealed, and C.C.P. 1174 (see *supra*, §742) was amended to conform. (See 6 *Pacific L. J.* 374.)

(3) *Scope of Statute.* "Landlord" is defined as "any operator, keeper, lessor, or sublessor of any furnished or unfurnished premises for hire, or his agent or successor in interest." (C.C. 1980(a).) "Tenant" is similarly defined to include "any paying guest, lessee, or sublessee of any premises for hire." (C.C. 1980(e).) (See Cal. Civil Practice, 3 Real Property Litigation, §27:1 et seq.)

Under C.C. 1981(b), C.C. 1980 et seq. do not apply where the following statutes apply: C.C. 1862.5 (property left in licensed hospital); C.C. 2080.8 (unclaimed property in possession of University of California); C.C. 2080.9 (unclaimed property in possession of California State Colleges); C.C. 2081 et seq. (unclaimed property in hands of carrier, commission merchant, innkeeper, or warehouseman).

C.C. 1981(b) further excludes property that exists for the purpose of providing utility services and is owned by a public utility, whether or not the property is actually in operation to provide utility services. C.C. 1981(c) excludes manufactured homes, mobilehomes, and commercial coaches. C.C. 1981(d)(1) excludes animals governed by *Food & Ag.C. 17001* et seq. (6 *Summary* (10th), *Torts*, §1406). Those animals must be disposed of in accordance with those provisions. (C.C. 1981(d).)

Personal property that the landlord reasonably believes to have been lost must be disposed of under C.C. 2080 et

seq. (see 13 *Summary* (10th), *Personal Property*, §119), and the landlord is not liable to the owner if the landlord does so. However, if the police or sheriff's department refuses to accept the property, the landlord may dispose of it under C.C. 1980 et seq. (C.C. 1982; for definition of "reasonable belief," see C.C. 1980(d).)

(4) *Statute Optional*. C.C. 1980 et seq. provide an optional procedure for disposing of personal property that remains on the premises after a tenancy is terminated and the premises have been vacated by the tenant. (C.C. 1981(a).) If the requirements of C.C. 1980 et seq. are not satisfied, the rights and liabilities of the landlord, former tenant, and other persons are unaffected. (C.C. 1981(e).)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Scope of Statute*. See Cal. Civil Practice, 4 Real Property Litigation, §27:1 et seq.

C.C. 1981(d) was amended in 2008 to also exclude animals governed by C.C. 1815(d) (13 *Summary* (10th), *Personal Property*, §156).

C.C. 1980 et seq. do not apply to commercial real property, except for C.C. 1982 (text, p. 875), C.C. 1987 (text, §751), and C.C. 1990 (text, §751). (C.C. 1980.5, 1993.01, added in 2008; on procedure for commercial real property, see Supp., *infra*, §754A et seq.)



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b. Notice To Claim Property.

12 Witkin Sum. Cal. Law Real Property § 750

[§ 750] Notice To Claim Property.

(1) *Notice to Tenant or Other Person.* The procedure commences with a written notice to the tenant or "any other person the landlord reasonably believes to be the owner of the property." It is given after the tenancy has terminated and the premises have been vacated. (C.C. 1983(a); for definition of "reasonable belief," see C.C. 1980(d); see Cal. Civil Practice, 3 Real Property Litigation, §27:14 [notice to former tenant], §27:15 [notice to other person].)

The prerequisite that the tenancy has terminated is subject to an exception. The notice under C.C. 1983 may be given at the same time that a notice of belief of abandonment is given to a defaulting tenant (see C.C. 1951.3, *supra*, §695), and the two notices may, at the landlord's election, be combined in one notice that contains all the information required by both sections. (C.C. 1991.)

(2) *Content and Form of Notice.* C.C. 1983(b) requires the notice to contain the following:

(a) A description of the property "in a manner reasonably adequate to permit the owner of the property to identify it." A trunk, valise, box, or other container that is locked, fastened, or tied in a manner that deters immediate access to its contents may be described in that way, without describing its contents.

(b) A statement that reasonable costs of storage may be charged.

(c) The location where the property may be claimed.

(d) The date before which the claim must be made, which must be not less than 15 days after personal delivery of the notice or 18 days after its deposit in the mail.

Statutory forms are provided for notice to a former tenant (C.C. 1984) and to a person other than a former tenant (C.C. 1985).

(3) *Service of Notice.* The notice must either be (a) personally delivered, or (b) sent by first class mail to the person's last known address or the address, if known, where the person may reasonably be expected to receive it. (C.C. 1983(c).) If the notice to the former tenant is sent by mail, a copy must be sent to the vacated premises. (C.C. 1983(c).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Notice to Tenant or Other Person.* See Cal. Civil Practice, 4 Real Property Litigation, §27:14 [notice to former tenant], §27:15 [notice to other person].



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12 Witkin Sum. Cal. Law Real Property § 751

[§ 751] Storage of Property.

(1) *Duty of Landlord.* The property must either be left on the premises, or stored by the landlord in a place of safekeeping until released under C.C. 1987 or disposed of under C.C. 1988 (see *infra*, §752). The landlord must exercise reasonable care in storing the property, but the landlord is not liable to the tenant or another owner for a loss not caused by the landlord's deliberate or negligent act. (C.C. 1986.)

(2) *Release of Property on Payment of Costs.* The landlord must release the property to the former tenant, or, at the landlord's option, to a person reasonably believed to be the owner, if the former tenant or other person pays the reasonable cost of storage and takes possession "not later than the date specified in the notice for taking possession." (C.C. 1987(a).) Even if the property is not claimed within the specified time, and the notice stated that it would be sold at a public sale (C.C. 1988, *infra*, §752), the landlord must nevertheless release it to the former tenant if the tenant claims it before it is sold and pays the reasonable cost of storage, advertising, and sale incurred before it is withdrawn from sale. (C.C. 1987(b).)

(3) *Assessment and Allocation of Costs.* The former tenant is primarily responsible for all of the costs, and another owner is responsible only for those involved in that owner's property. Specifically, a former tenant who claims property under C.C. 1987 may be required to pay the reasonable storage costs for all of the personal property remaining on the premises at the termination of the tenancy that are unpaid at the time the claim is made. (C.C. 1990(a)(1).) Where another owner claims, that owner may be required to pay the reasonable storage costs for only the property in which the other owner claims an interest. (C.C. 1990(a)(2).) The landlord cannot charge more than one person for the same costs. (C.C. 1990(b).) If the landlord stores the property on the premises, the cost is the fair rental value of the space reasonably required for the term of the storage. (C.C. 1990(c).)

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[§ 752] Sale or Other Disposition.

(1) *Requirement of Public Sale.* If the personal property is not released under C.C. 1987 (supra, §751), it must be sold at public sale by competitive bidding. Nothing in C.C. 1988 precludes the landlord or tenant from bidding on the property at the public sale. (C.C. 1988(a).)

(2) *Notice of Sale.* Notice of the time and place of the sale must be given by publication pursuant to Govt.C. 6066. No publication may be made before the last date specified in the notice under C.C. 1983 (supra, §750), and the last publication must be not less than 5 days before the sale. (C.C. 1988(b).) The notice must describe the property in a manner that permits identification by the owner. (C.C. 1988(b) [similar to C.C. 1983(b) (supra, §750)].)

(3) *Proceeds of Sale.* After deducting the costs of storage, advertising, and sale, any balance not claimed by the former tenant or another owner must be paid into the county treasury not later than 30 days after the date of sale. The former tenant or other owner may claim the balance within 1 year from the date of payment to the county, by applying to the treasurer or other designated official. If the county pays to a claimant, neither the county nor an officer or employee is liable to another claimant as to the amount paid. (C.C. 1988(c).)

(4) *Exception to Sale Requirement.* If the landlord reasonably believes that the total resale value of the property is less than \$ 300, the landlord may retain and use the property or dispose of it in any manner. (C.C. 1988(a).)

(5) *Vessels Excluded.* Vessels left in boat slips following the entry of unlawful detainer judgments are not personal property subject to disposal under C.C. 1988. *Harb. & Nav.C. 500* et seq. (Boaters Lien Law) provide the exclusive means of enforcing possessory vessel liens. (*Mariners Bay Co. v. Department of Motor Vehicles* (1991) 229 C.A.3d 808, 280 C.R. 292.)

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[§ 753] Limitation of Landlord's Liability.

(1) *Release to Former Tenant.* A landlord who releases property to a former tenant is not liable to another person; i.e., the landlord does not have to determine who is the rightful owner. (C.C. 1989(a).)

(2) *Release to Other Person.* If the landlord releases to another person reasonably believed to be the owner (C.C. 1987, supra, §751), the landlord is not liable to any person to whom notice was given under C.C. 1983 (supra, §750). Even as to a person to whom notice was not given, the landlord is not liable unless that person proves that (a) the landlord believed or reasonably should have believed that the person had an interest, and (b) the landlord knew or should have known the person's address. (C.C. 1989(b); for definition of "reasonable belief," see C.C. 1980(d).)

(3) *Public Sale.* The landlord has the same immunity after a public sale under C.C. 1988 (supra, §752) that the landlord has after a release under C.C. 1987; i.e., the landlord is not liable to a person to whom notice was given, nor to one who had no notice unless the one without notice proves the landlord's knowledge or belief in the person's interest and that the landlord knew or should have known the claimant's address. (C.C. 1989(c).)

If, however, the notice to the tenant under C.C. 1983 or the notice of sale under C.C. 1988 fails to describe property in an adequate manner, the limitation of liability does not extend to the property. (C.C. 1983(b), 1988(b).)

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f. Alternative Procedure on Tenant's Request.

12 Witkin Sum. Cal. Law Real Property § 754

[§ 754] Alternative Procedure on Tenant's Request.

(1) *In General.* C.C. 1965 provides an alternative procedure for the surrender of personal property held by a residential landlord on the written request of a former tenant. (C.C. 1965; for conforming amendments to *C.C.P. 1174(f)* and (h), see *supra*, §742.)

(2) *Conditions for Surrender.* A residential landlord must surrender, to a residential tenant or to a tenant's authorized representative, any personal property not owned by the landlord that has been left on the premises after the tenant has vacated and the return of which has been requested by the tenant or by the representative. (C.C. 1965(a).) However, all of the following must occur:

(a) The tenant must request, in writing, within 18 days of vacating the premises, the surrender of the personal property. The request must include a description of the personal property held by the landlord and must specify the tenant's mailing address. (C.C. 1965(a)(1); see *Cal. Civil Practice*, 3 Real Property Litigation, §27:16 [request].)

(b) The landlord or the landlord's agent must have control or possession of the tenant's personal property at the time the request is received. (C.C. 1965(a)(2).)

(c) The tenant, before the surrender of the personal property and on written demand by the landlord, must tender payment of all reasonable costs associated with the landlord's removal and storage of the personal property. The landlord's demand for payment of reasonable costs associated with the removal and storage of personal property must be in writing and must either be mailed to the tenant at the address provided by the tenant or be personally presented to the tenant or to the tenant's authorized representative, within 5 days after the actual receipt of the tenant's request for surrender of the personal property, unless the property is returned first. The demand must itemize all charges, specifying the nature and amount of each item. (C.C. 1965(a)(3).)

(d) The tenant must agree to claim and remove the personal property at a reasonable time that the landlord and the tenant mutually agreed on. The time cannot be later than 72 hours after the tender provided for under C.C. 1965(a)(3). (C.C. 1965(a)(4).)

(3) *Reasonable Costs.* For purposes of C.C. 1965, reasonable costs associated with the landlord's removal and storage of the personal property include but are not limited to (a) reasonable costs actually incurred, or the reasonable value of labor actually provided, in removing the personal property from its original location to the storage place, including disassembly and transportation, and (b) reasonable storage costs actually incurred, which must not exceed the fair rental value of the space that is reasonably required for the storage. (C.C. 1965(b).)

(4) *Scope of Statute.* C.C. 1965 does not apply when disposition of the personal property has been initiated or completed pursuant to the procedure set forth in C.C. 1980 et seq. (see supra, §749 et seq.) or the occupancy is one defined by C.C. 1940(b) (see supra, §514). (C.C. 1965(c).)

(5) *Limitation of Landlord's Liability.* A landlord who complies with C.C. 1965 is not liable to a person with respect to that person's personal property that is given to another person. In the event of conflicting demands, the first timely request for surrender of personal property received by the landlord prevails. (C.C. 1965(d).)

(6) *Recovery of Damages, Fees, and Costs.* A landlord who retains personal property in violation of C.C. 1965 is liable to the tenant in a civil action for actual damages not to exceed the value of the personal property, if the personal property is not surrendered by the later of either of the following: (a) within a reasonable time after the tenant's request for surrender of the personal property, or (b) if the landlord has demanded payment of reasonable costs associated with removal and storage and the tenant has complied with the requirements set forth in C.C. 1965(a)(3) and (a)(4). Three days is presumed to be a reasonable time in the absence of evidence to the contrary. (C.C. 1965(e)(1).)

Moreover, the landlord is liable for up to \$ 250 for each bad faith violation of C.C. 1965. In determining the amount of the award, the court must consider proof of whatever matters justice may require. (C.C. 1965(e)(2).) Finally, the court may award reasonable attorneys' fees and costs to the prevailing party. (C.C. 1965(e)(3).) (See Cal. Civil Practice, 3 Real Property Litigation, §27:17 [complaint].)

(7) *Nonexclusive Remedy.* The remedy provided by C.C. 1965 is not exclusive and does not preclude either the landlord or the tenant from pursuing another remedy provided by law. (C.C. 1965(f).)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Conditions for Surrender.*

(a) *Tenant's request:* See Cal. Civil Practice, 4 Real Property Litigation, §27:16.(6) *Recovery of Damages, Fees, and Costs.* See Cal. Civil Practice, 4 Real Property Litigation, §27:17.



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a. (New) Scope of Statute.

12 Witkin Sum. Cal. Law Real Property § 754A

[§ 754A] (New) Scope of Statute.

(1) *Optional Procedure.* A new chapter, C.C. 1993 et seq., was added to the Civil Code in 2008. The chapter provides an optional procedure for the disposition of property that remains on the premises after a tenancy of commercial real property has terminated and the tenant has vacated the premises. (C.C. 1993.02(a).) If the requirements of C.C. 1993 et seq. are not satisfied, the rights and liabilities of the landlord, former tenant, or another person are not affected. (C.C. 1993.02(f).)

(2) *Exclusions.* C.C. 1993 et seq. do not apply to residential property or self-storage units. (C.C. 1993.02(e).) In addition, like C.C. 1980 et seq. (text, §749 et seq.), C.C. 1993 et seq. do not apply in the following circumstances:

(a) If C.C. 1862.5, 2080.8, 2080.9, or 2081 et seq. apply. (C.C. 1993.02(b).)

(b) To property that exists for the purpose of providing utility services and is owned by a public utility, whether or not that property is actually in operation to provide utility services. (C.C. 1993.02(b).)

(c) To manufactured homes, mobilehomes, or commercial coaches. (C.C. 1993.02(c).)

(d) To the disposition of animals governed by *Food & Ag.C. 17001* et seq. (C.C. 1993.02(d).)

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b. (New) Notice.

12 Witkin Sum. Cal. Law Real Property § 754B

[§ 754B] (New) Notice.

(1) *Notice to Tenant and Others.* If property remains on the premises after a tenancy has terminated and the tenant has vacated the premises, the landlord must give written notice to the tenant and to any other person the landlord reasonably believes to be the owner of the property. (C.C. 1993.03(a).)

(2) *Content and Form of Notice.* The notice must describe the property in a manner that permits the owner of the property to identify it. The notice may describe all or a portion of the property, but the limitation of liability provided by C.C. 1993.08 (Supp., infra, §754E) does not protect the landlord from liability arising from the disposition of property not described in the notice. A trunk, valise, box, safe, vault, or other container that is locked, fastened, or tied in a manner that deters immediate access to its contents may be described without describing its contents. The notice must advise that reasonable costs of storage may be charged before the property is returned, where the property may be claimed, and the date before which the claim must be made. The date specified in the notice must be a date not less than 15 days after the notice is personally delivered or, if mailed, not less than 18 days after the notice is deposited in the mail. (C.C. 1993.03(b).)

(3) *Delivery of Notice.* The notice must be personally delivered or sent by first-class mail, postage prepaid, to the person to be notified at his or her last known address. If there is reason to believe that the notice sent to that address will not be received by that person, the notice must be sent also to another address known to the landlord where the person may reasonably be expected to receive it. If the notice is sent by mail to the former tenant, one copy must be sent to the vacated premises. (C.C. 1993.03(c).)

(4) *Acceptable Statutory Notices.* C.C. 1993.04 and 1993.05 set forth forms of notice that satisfy the requirements of C.C. 1993.03.

(5) *Relationship to Notice of Belief of Abandonment.* If a notice of belief of abandonment is given to a lessee under C.C. 1951.3 (text, §695), the notice to the former tenant under C.C. 1993.03 may, but need not, be given at the same time as the notice of belief of abandonment, even though the tenancy is not terminated until the end of the period specified in the notice of belief of abandonment. If the notices are given at the same time, the notices may, but need not, be combined in one notice that contains all the required information. (C.C. 1993.09.)

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c. (New) Storage of Property.

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[§ 754C] (New) Storage of Property.

The personal property described in the notice must either be left on the vacated premises or be stored by the landlord in a safe place until the landlord either releases the property under C.C. 1987 (text, §751) or disposes of the property under C.C. 1993.07 (Supp., infra, §754D). The landlord must exercise reasonable care in storing the property, but he or she is not liable to the tenant or another owner for a loss not caused by the landlord's deliberate or negligent act. (C.C. 1993.06.)

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 - d. (New) Sale or Other Disposition of Property.

12 Witkin Sum. Cal. Law Real Property § 754D

[§ 754D] (New) Sale or Other Disposition of Property.

(1) *Requirement of Public Sale.* If the property described in the notice is not released under C.C. 1987 (text, §751), it must be sold at public sale by competitive bidding. However, if the landlord reasonably believes that the total resale value of the unreleased property is less than \$ 750, or \$ 1 per square foot of the premises occupied by the tenant, the landlord may retain the property for his or her own use or dispose of it in another way. Nothing in C.C. 1993.07 may be construed to preclude the landlord or tenant from bidding on the property at the public sale. (C.C. 1993.07(a).)

(2) *Notice of Sale.* Notice of the time and place of the public sale must be given by publication under *Govt.C. 6066* in a newspaper of general circulation published in the county where the sale is to be held. The last publication must be not less than 5 days before the sale is to be held. The notice of the sale must not be published before the last of the dates specified for taking possession of the property in the notice given under C.C. 1993.03 (Supp., supra, §754B). (C.C. 1993.07(b).)

The notice of the sale must describe the property to be sold in a manner that permits the owner of the property to identify it. The notice may describe all or a portion of the property, but the limitation of liability provided by C.C. 1993.08 (Supp., infra, §754E) does not protect the landlord from liability arising from the disposition of property not described in the notice. A trunk, valise, box, safe, vault, or other container that is locked, fastened, or tied in a manner that deters immediate access to its contents may be described without describing its contents. (C.C. 1993.07(b).)

(3) *Proceeds of Sale.* After deducting the costs of storage, advertising, and sale, the balance of the sale proceeds that is not claimed by the former tenant or an owner other than the tenant must be paid into the treasury of the county in which the sale took place, not later than 30 days after the date of sale. The former tenant or other owner may claim the balance within 1 year from the date of payment to the county by applying to the county treasurer or other designated official. If the county pays the balance or a part of it to a claimant, neither the county nor an officer or employee is liable to another claimant as to the amount paid. (C.C. 1993.07(c).)

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A. Landlord's Remedies.

11. (New) Disposition of Personal Property Remaining on Commercial Real Property.
 - e. (New) Limitation of Landlord's Liability.

12 Witkin Sum. Cal. Law Real Property § 754E

[§ 754E] (New) Limitation of Landlord's Liability.

(1) *Release to Former Tenant.* A landlord who releases to a former tenant property that remains on the premises after the tenancy is terminated is not liable with respect to that property to any person. (C.C. 1993.08(a).)

(2) *Release to Other Person.* If the landlord releases property under C.C. 1987 (text, §751) to a person, other than the former tenant, who is reasonably believed by the landlord to be the owner of the property, the landlord is not liable with respect to that property to a person to whom notice was given under C.C. 1993.03 (Supp., supra, §754B). (C.C. 1993.08(b)(1).) The landlord is not liable to a person to whom notice was not given under C.C. 1993.03, unless the person proves that, before releasing the property, the landlord believed or reasonably should have believed that the person had an interest in the property and also that the landlord knew or should have known upon reasonable investigation the person's address. (C.C. 1993.08(b)(2).)

(3) *Public Sale.* C.C. 1993.08(c) extends the same immunity from liability to landlords who dispose of property through a public sale under C.C. 1993.07 (Supp., supra, §754D). The landlord is not liable to a person to whom notice was given under C.C. 1993.03 (C.C. 1993.08(c)(1)), or to a person to whom notice was not given, unless the person proves that, before releasing the property, the landlord believed or reasonably should have believed that the person had an interest in the property and also that the landlord knew or should have known on reasonable investigation the person's address. (C.C. 1993.08(b)(2).)

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12 Witkin Sum. Cal. Law Real Property § 755

[§ 755] In General.

Although residential tenants are rapidly achieving the status and protection of consumers (see Rest.2d, Property (Landlord and Tenant), Chaps. 10, 11; supra, §516), the traditional approach to tenants' remedies is based on the common law right to peaceful possession of the premises. (See *49 Am.Jur.2d* (1995 ed.), *Landlord and Tenant* §601 et seq.; supra, §608 et seq. and infra, §756 et seq.)

The measure of damages for a lessor's failure to deliver possession of leased premises is the difference between the agreed rent and the rental value of the premises during the term of the lease. The restrictive measure of C.C. 3306, dealing with breach of an agreement to convey an estate in real property (see 1 *Summary* (10th), *Contracts*, §898 et seq.), does not apply to leases. (*Foreman & Clark Corp. v. Fallon* (1971) 3 C.3d 875, 884, 92 C.R. 162, 479 P.2d 362.) (See Rest.2d, Property (Landlord and Tenant) §10.2; C.E.B., Attorney's Guide to Damages 2d, §§4.10, 4.11; Cal. Civil Practice, 3 Real Property Litigation, §20:62 et seq. [complaints and allegations involving landlord's breach of covenants]; 88 A.L.R.2d 1024 [measure of damages for lessor's breach of contract to lease or to put lessee into possession]; 92 A.L.R.3d 1286 [recovery of expected profits lost by lessor's breach preventing or delaying operation of new business]; 6 A.L.R.4th 528 [tenant's recovery for emotional distress under the Uniform Residential Landlord & Tenant Act]; 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §91 et seq.)

A provision in the lease may subject a tenant's right of action to a shortened statute of limitations. (See *Capehart v. Heady* (1962) 206 C.A.2d 386, 388, 23 C.R. 851 [3-month period upheld]; 3 Cal. Proc. (4th), *Actions*, §437.)

SUPPLEMENT: [This section is current through the latest supplement]

See *49 Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §477 et seq. [covenant of quiet enjoyment]; Cal. Civil Practice, 3 Real Property Litigation, §20:60 et seq. [complaints and allegations involving landlord's breach of covenants]; *49 Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §84 et seq. [remedies following breach of covenant not to compete].

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §469.



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2. Abandonment of Premises.

12 Witkin Sum. Cal. Law Real Property § 756

[§ 756] Abandonment of Premises.

If there is an actual or constructive eviction, the tenant may abandon the premises and pay no further rent. (See *Mills v. Richards* (1927) 84 C.A. 52, 57, 257 P. 542.) But ordinarily, the tenant must surrender possession. If the tenant stays on, there is no eviction, and the tenant cannot escape the obligation to pay rent. (*Veysey v. Moriyama* (1921) 184 C. 802, 805, 195 P. 662; see 91 A.L.R.2d 638 [time within which tenant must abandon].)

A distinction has been made, however, in the case of partial eviction. In *Giraud v. Milovich* (1938) 29 C.A.2d 543, 85 P.2d 182, the lessor leased a lot to defendant for a gas station, then conveyed a right-of-way to the state, leaving insufficient space for the lessee's operations. *Held*, the lessee could not be ousted and was not liable for rent. The theory is that the landlord "cannot apportion his own wrong" by requiring the tenant to pay a proportion of the rent. The right to rent is suspended during continuance of the partial eviction. (29 C.A.2d 548, 549.)

"[T]he courts have evinced some difficulty in marginal factual circumstances in determining whether a claimed eviction should be treated as a partial, actual eviction or a constructive eviction." (*Dussin Inv. Co. v. Bloxham* (1979) 96 C.A.3d 308, 317, 157 C.R. 646.) However, the test for determining that the tenant is entirely relieved of the obligation to pay rent is whether he has been actually evicted from a substantial portion of the premises. In *Dussin*, only 165 square feet were taken out of 14,000 square feet leased, and the tenant's use of the premises did not materially change. Hence, the trial judge properly found that there was no eviction, and the tenant's recovery was limited to the amount of diminution in rental value. (96 C.A.3d 313, 314, 318, 319.)

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a. In General.

12 Witkin Sum. Cal. Law Real Property § 757

[§ 757] In General.

C.C.P. 1159 et seq. provide a summary remedy to obtain restoration of possession where the ouster is accompanied by force, threats, or similar misconduct. (See *Pickens v. Johnson* (1951) 107 C.A.2d 778, 785, 238 P.2d 40; *Karp v. Margolis* (1958) 159 C.A.2d 69, 72, 323 P.2d 557; C.E.B., Attorney's Guide to Damages 2d, §4.22 et seq.; Cal. Civil Practice, 3 Real Property Litigation, Chap. 19; 21 Proof of Facts 2d 607 [proof of requisite force]; 25 U.C.L.A. L. Rev. 1067 [criticism of forcible entry and detainer law]; 5 Cal. Proc. (4th), Pleading, §608 et seq.; for tort action based on forcible entry, see *infra*, §758.)

The tenant's abandonment is a good defense to an action under *C.C.P. 1159* et seq. and presents a fact question of intent. (See *Pickens v. Johnson*, *supra* [no intent found]; *Martin v. Cassidy* (1957) 149 C.A.2d 106, 110, 307 P.2d 981 [lessee's business failed, he was jailed as vagrant, he stated that he was going elsewhere to live; abandonment found]; *Kassan v. Stout* (1973) 9 C.3d 39, 106 C.R. 783, 507 P.2d 87, *supra*, §676 [no abandonment found]; 21 Proof of Facts 2d 567 [proof of requisite possession].) But a lease provision giving the lessor a right to reenter on default does not justify forcible entry. (*Pickens v. Johnson*, *supra*; see *Calidino Hotel Co. v. Bank of America* (1939) 31 C.A.2d 295, 306, 87 P.2d 923 [same; provision in trust deed allowing trustee to enter on default]; 5 Summary (10th), Torts, §696.)

West's Key Number Digest, Forcible Entry and Detainer k.2 et seq.

SUPPLEMENT: [This section is current through the latest supplement]
Cross-Reference: 5 Cal. Proc. (5th), Pleading, §649 et seq.



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3. Forcible Entry and Forcible Detainer.

b. Damages for Wrongful Eviction.

12 Witkin Sum. Cal. Law Real Property § 758

[§ 758] Damages for Wrongful Eviction.

The same basic policy against forcible or other wrongful ouster that gives the tenant the summary remedy to obtain restoration of possession (*supra*, §757) gives the tenant a tort action for damages for wrongful eviction. (See *Tooke v. Allen* (1948) 85 C.A.2d 230, 237, 192 P.2d 804 [elements and measure of damages; plaintiff, wrongfully evicted from her apartment, could recover special damages consisting of loss of business earnings]; *Goldman v. House* (1949) 93 C.A.2d 572, 209 P.2d 639 [acts directed toward eviction resulting in personal injuries to tenant]; *Johnson v. Snyder* (1950) 99 C.A.2d 86, 89, 221 P.2d 164 [recovery of amount advanced for future rent (unjust enrichment), value of goodwill lost, cost of removing fixtures]; *Eichhorn v. De La Cantera* (1953) 117 C.A.2d 50, 55, 255 P.2d 70; *Barkett v. Brucato* (1953) 122 C.A.2d 264, 274, 264 P.2d 978; Cal. Civil Practice, 3 Real Property Litigation, §22:17 [complaint]; 17 A.L.R.2d 936 [tenant's recovery of damages for physical injury or mental anguish occasioned by wrongful eviction].)

In *Schuler v. Bordelon* (1947) 78 C.A.2d 581, 177 P.2d 959, plaintiffs, month-to-month tenants, had an automobile repair business that was ruined by the eviction. Defendants contended that, because the tenancy could have been terminated on 30 days' notice, recovery should be limited to loss of profits for a single month. *Held*, plaintiffs were entitled to recover for the injury to their business, including loss of good will, because the sudden eviction, without proper notice, left them with no opportunity to make other arrangements to continue their business. (78 C.A.2d 586.)

However, "damages for lost profits are limited to those losses incurred during the unexpired term of the lease, including the period following notice of termination *when the tenant is clothed with a legal right to possession.*" (*Rosano v. Superior Court* (1983) 147 C.A.3d 92, 96, 194 C.R. 749.) In *Rosano*, plaintiff's service station lease expired on July 31, 1975. The next day plaintiff and defendant lessor entered into a "mutual cancellation agreement," acknowledging that the lease had terminated but providing that plaintiff could remain in possession until October 1. (147 C.A.3d 94.) When plaintiff failed to surrender possession, defendant's representatives arrived at the station on October 1, and, finding it empty, changed the locks, took inventory, and placed plaintiff's property in storage. In plaintiff's suit for forcible entry, conversion, and trespass, the trial judge excluded evidence of lost profits after October 1. *Held*, the ruling was proper. Plaintiff's legal right to possession expired absolutely and unconditionally on October 1, 1975. (147 C.A.3d 97.)

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3. Forcible Entry and Forcible Detainer.

c. Where Landlord Has Lien.

12 Witkin Sum. Cal. Law Real Property § 759

[§ 759] Where Landlord Has Lien.

(1) *Jordan Case*. In *Jordan v. Talbot* (1961) 55 C.2d 597, 12 C.R. 488, 361 P.2d 20, plaintiff, a tenant in defendant's apartment house, was 2 months in arrears in rent. Defendant did not serve (personally or by mail) the 3-day notice to quit under C.C.P. 1162 (although he claimed to have left it under plaintiff's door). Instead, relying on a lease provision giving a right of reentry on breach and a lien on personal effects to secure rents, defendant entered plaintiff's apartment during her temporary absence, and removed her furniture to a warehouse. On her return, she inquired about her belongings, and defendant's employee said, "Get the hell out of here. ... Call Mr. Talbot." (55 C.2d 607.) After a jury verdict of \$ 6,500 for forcible entry and detainer and conversion, with \$ 3,000 punitive damages, the trial judge granted defendant's motion for a new trial. *Held*, affirmed. Defendant was liable for forcible entry and detainer but not for conversion.

(a) *Forcible entry*. C.C.P. 1159(1), defining forcible entry to include "breaking open doors," was violated by unlocking the apartment without plaintiff's consent, and by entry with the warehouse employees to remove her furniture, despite the absence of either actual violence or physical damage to the premises. In other words, "force" is "implied" from any unauthorized breaking in. (55 C.2d 605, 606.) C.C.P. 1159(2), which makes it forcible entry to enter peaceably but turn out the party in possession by force or threats, was also violated. The removal of plaintiff's furniture rendered her apartment unsuitable for residence, and when she sought her belongings the answer she received reasonably implied that any attempt to reinstall them would be met by force. "Although the entry was peaceably made, the subsequent exclusion of plaintiff by force and threats constituted a forcible entry under the statute." (55 C.2d 607.) (See 5 Cal. Proc. (4th), Pleading, §608.)

(b) *Forcible detainer*. C.C.P. 1160(1), making it forcible detainer to unlawfully withhold possession by force or threats, was likewise violated. Defendant's possession, having been obtained by forcible entry, was unlawful, and force and menace could be implied from the removal of the furniture and the harsh language with which plaintiff was ordered to leave. (55 C.2d 608.)

(c) *Defense of right of reentry*. Even if the landlord was entitled to possession, the forcible entry and detainer statutes rule out extrajudicial self-help and restrict him to his summary judicial remedy after valid service of a 3-day notice. The lease did not specify the method of enforcing the right of reentry, but if it expressly permitted a forcible

entry it would be contrary to the public policy declared in *C.C.P. 1159*. (55 C.2d 604.)

(d) *Defense of lien for rent*. Again the lease did not specify the manner of enforcement, but neither a contractual lien nor the statutory lien under C.C. 1861a can be enforced except by lawful process. (55 C.2d 609.)

(e) *Conversion*. Defendant did not make use of or claim ownership of plaintiff's belongings, and hence was not guilty of conversion (see 5 *Summary* (10th), *Torts*, §699 et seq.). The tort of trespass was committed, but only actual damages were recoverable, with a possible duty--if the circumstances established it--to minimize damages. (55 C.2d 610.)

Three dissenting justices took the position that the 3-day notice to quit was in fact given; that the entry was peaceable; and that plaintiff's conduct, including her arrears and a bad check given for one of the rent periods, did not merit the court's concern. (See 35 *So. Cal. L. Rev.* 42; 9 *U.C.L.A. L. Rev.* 453 [implications and effect of *Jordan*]; 6 *A.L.R.3d* 177 [right of landlord legally entitled to possession to dispossess tenant without legal process].)

(2) *Legislative Response*. The Legislature, in response to the *Jordan* case, amended C.C. 1861a to allow an apartment house keeper to enter peaceably and enforce his or her lien without liability to a guest or tenant "for conversion, trespass, or forcible entry." As subsequently amended, however, the section requires that the landlord obtain a court order before entry. (See 13 *Summary* (10th), *Personal Property*, §224.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Jordan Case*. *Forcible entry*:

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §649.



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- d. Entry Under Invalid Writ of Execution.

12 Witkin Sum. Cal. Law Real Property § 760

[§ 760] Entry Under Invalid Writ of Execution.

A landlord's entry under an invalid writ of execution is not privileged and an action for damages for forcible entry will lie. In *Bedi v. McMullan* (1984) 160 C.A.3d 272, 206 C.R. 578, the underlying unlawful detainer judgment in favor of defendant landlord had been set aside. Although a subsequent judgment for possession was later entered in his favor, he did not inform the marshal of the facts, and the marshal evicted plaintiffs on a writ of execution based on the vacated judgment. *Held*, reversing judgment on demurrer, a cause of action was stated.

(a) The trial judge thought that the forcible entry and detainer law applied only to landlords who engage in self-help evictions wholly outside the judicial system, while here the landlord made an attempt to use judicial process. But the eviction was carried out under an invalid writ of execution based on an unenforceable judgment. (160 C.A.3d 275.)

(b) An eviction is no less forcible because it is carried out by the marshal, instead of by the landlord personally. The fact that plaintiffs bowed to the implicit threat of force posed by the marshal rather than precipitate a showdown in no way undercuts their cause of action for forcible entry. (160 C.A.3d 276, citing *Allen v. McMillion* (1978) 82 C.A.3d 211, 218, 147 C.R. 77.)

(c) "The difference between a landlord's self-help eviction and a marshal's eviction under a writ of execution is not that the former is forcible and the latter not forcible. The difference is, society is willing to tolerate a forcible eviction if it is necessary and judicially authorized. ... For this reason we reject the trial court's conclusion the defendants are outside the ambit of the forcible entry and detainer law because they had a judgment for possession. The judgment only establishes their entitlement to possession. ... A valid writ of execution is the ultimate indispensable element of the legal process by which a party entitled to possession of the property acquires possession. Allowing the landlord to forcibly evict a tenant on the strength of a judgment alone would remove the key conditions on the use of force: necessity and judicial authorization." (160 C.A.3d 276.)

(d) The mere fact that a judgment for possession has been rendered does not mean that eviction is authorized. The judgment may have been stayed, the tenant may have been granted relief from it, or the occupant may not have been named in it. (160 C.A.3d 276.)

Bedi v. McMullan was distinguished in *Glass v. Najafi* (2000) 78 C.A.4th 45, 92 C.R.2d 606, an action for forcible entry and detainer brought by tenants who were evicted from a commercial property under a writ of possession that was later determined to have been invalidly issued. *Held*, judgment for defendants affirmed. The *Bedi* decision "can be most reasonably read in light of the well-established distinction between forceful self-help and reliance on orderly judicial process." (78 C.A.4th 50.) The defendants in *Bedi* allegedly manipulated the marshal, by withholding information, to induce him to act on an invalid writ. "In contrast, defendants here proceeded in accordance with orderly judicial processes. They applied to the court for an order directing the clerk to issue a writ of possession, secured the writ pursuant to the order, and recovered possession under the authority of the writ. The fact that the court later determined that it had erred in ordering issuance of the writ does not change the nature of defendants' action: they nevertheless acted in reliance on a properly issued order in securing possession. Similarly, defendants relied on court authorization by remaining in possession. The order recalling the writ expressly deleted proposed provisions ordering them to deliver possession" to plaintiffs. (78 C.A.4th 51.)

SUPPLEMENT: [This section is current through the latest supplement]



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XI. MOBILEHOMES

A. In General.

1. Governing Law.

12 Witkin Sum. Cal. Law Real Property § 761

[§ 761] Governing Law.

(1) *Development of Mobilehome Residency Law.* Mobilehomes and mobilehome parks have been subjected to extensive regulation, particularly in the area of tenants' rights. (See 5 *Pacific L. J.* 456, 457; 7 *Pacific L. J.* 300; 27 *Stanf. L. Rev.* 159.) The original statutes were repealed in 1978, and the Mobilehome Residency Law was enacted (C.C. 798 et seq.). (See C.E.B., 1 *Landlord-Tenant Practice* 2d, §6.1 et seq.; *Cal. Civil Practice*, 3 *Real Property Litigation*, Chap. 31; 10 *Pacific L. J.* 562; *infra*, §762 et seq.)

(2) *Other Statutes Regulating Mobilehomes.* A number of statutes deal with mobilehomes in areas other than the landlord-tenant relationship:

(a) The Mobilehome Parks Act (*Health & Saf.C. 18200* et seq.) regulates the construction and operation of mobilehome parks and recreational vehicle parks. (See C.E.B., 1 *Landlord-Tenant Practice* 2d, §§6.1, 6.13.)

(b) The Special Occupancy Parks Act (*Health & Saf.C. 18860* et seq.) regulates the construction, maintenance, occupancy, use, and design of special occupancy parks. A special occupancy park is a recreational vehicle park, a temporary recreational vehicle park, incidental camping area, or tent camp. (*Health & Saf.C. 18862.43*.) The provisions of the Mobilehome Parks Act, however, govern the construction, installation, maintenance, use, and occupancy of a mobilehome, manufactured home, mobilehome accessory building or structure, commercial coach, factory-built home, or permanent building in a special occupancy park. (*Health & Saf.C. 18861(b)*.)

(c) The Mobilehomes-Manufactured Housing Act (*Health & Saf.C. 18000* et seq.) deals with standards for equipment and installation (*Health & Saf.C. 18025* et seq.), sales and escrows (*Health & Saf.C. 18035* et seq.), licensing of dealers (*Health & Saf.C. 18045* et seq.), and registration and titling of mobilehomes and commercial coaches (*Health & Saf.C. 18075* et seq.).

A dealer or salesperson licensed under *Health & Saf.C. 18045* et seq., who obtains buyers for used manufactured homes, must conduct a "reasonably competent and diligent visual inspection" of a home offered for sale and must disclose to a prospective buyer "all facts materially affecting the value or desirability of the home that an investigation would reveal." (*Health & Saf.C. 18046(d)*.) When a transfer disclosure statement is required under C.C. 1102(b) (*supra*, §§480, 490), a dealer or salesperson must discharge the inspection duty by completing the agent's portion of the transfer

disclosure statement that a seller prepares under C.C. 1102(b). If no statement is required, but the transaction is not exempt under C.C. 1102.2, the dealer must discharge the duty by completing and delivering to the prospective buyer an exact reproduction of Sections III, IV, and V of the statement required by C.C. 1102(b). (*Health & Saf.C. 18046(d)*); on standard of care owed by dealer, see *Health & Saf.C. 18046.1*.)

(d) The Mobilehome Park Ownership Assistance Act (*Health & Saf.C. 50523*) authorizes technical assistance to residents of mobilehome parks who desire to purchase the parks in which they reside.

(e) The Manufactured Home Recovery Fund (*Health & Saf.C. 18070* et seq.) establishes a fund for payment of claims of loss arising from unlawful activities involving the sale or purchase of manufactured homes.

(f) The Manufactured Housing Community Act (*Health & Saf.C. 18800* et seq.) governs land where two or more manufactured home lots are rented or leased, held out for rental or lease, or were formerly held out for rental or lease and later converted to a subdivision, cooperative, condominium, or other form of resident ownership only to accommodate the use of manufactured homes or mobilehomes containing two or more dwelling units. (*Health & Saf.C. 18800(a)*.) Land zoned for agricultural purposes and used to house fewer than five agricultural employees is excepted. (*Health & Saf.C. 18800(b)*.) The Act incorporates the provisions of the Mobilehome Parks Act, but provides that the Department of Housing and Community Development may adopt reasonable regulations for the construction, maintenance, occupancy, use, and design of manufactured housing communities, which may supplant the otherwise applicable provisions of the Mobilehome Parks Act. (*Health & Saf.C. 18821*.)

(g) *Pub.Util.C. 2791* et seq. govern the provision of electric or gas service to residents of master-metered mobilehome parks.

(h) One article of the Mobilehome Residency Law regulates subdivisions, cooperatives, and condominiums for mobilehomes. (See C.C. 799 et seq.) Other statutes impose warranties on the sale of new mobilehomes and manufactured homes. (C.C. 1797 et seq.; 4 *Summary* (10th), *Sales*, §65.) (On sale of used mobilehomes, see 4 *Summary* (10th), *Sales*, §396; on deficiency judgment after sale of mobilehome, see 4 *Summary* (10th), *Sales*, §253; on security interests in mobilehomes, see 4 *Summary* (10th), *Secured Transactions in Personal Property*, §111.)

(3) *Related Statutes*. The Floating Home Residency Law (C.C. 800 et seq.) enacts a comprehensive scheme of regulation of landlord-tenant relations in floating home marinas similar to those in the Mobilehome Residency Law. (See 22 *Pacific L. J.* 664.)

The Recreational Vehicle Park Occupancy Law (C.C. 799.20 et seq.) deals with recreational vehicle parks, which are for recreational vehicles, camping cabins, or tents (C.C. 799.30; *Health & Saf.C. 18862.39*), and it does not apply to mobilehomes (C.C. 799.41). (See C.E.B., 1 Landlord-Tenant Practice 2d, §6.5.)

West's Key Number Digest, Landlord and Tenant k.370 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Development of Mobilehome Residency Law*. See Cal. Civil Practice, 4 Real Property Litigation, Chap. 31.

(2) *Other Statutes Regulating Mobilehomes*.

(a) *Mobilehome Parks Act*: See *Santa Cruz v. Waterhouse* (2005) 127 C.A.4th 1483, 1488, 26 C.R.3d 543 [Act preempts county ordinance requiring local planning approval for installation of multi-story mobilehomes; goal of Act is to promote uniformity in mobilehome construction and installation standards].(c) *Mobilehomes--Manufactured Housing Act*: The Mobilehomes--Manufactured Housing Act was renamed the Manufactured Housing Act in 2007. (*Health & Saf.C. 18000(a)*, amended in 2007.)

See *Castillo v. Express Escrow Co.* (2007) 146 C.A.4th 1301, 1306, 53 C.R.3d 485 [escrow agent violated *Health*

& *Saf.C. 18035(f)* by closing escrow after receiving copy of letter from buyer's attorney to seller that outlined dispute between parties].

(f) *Manufactured Housing Community Act*: The Manufactured Housing Community Act (*Health & Saf.C. 18800* et seq.) was repealed in 2007. The Mobilehome Parks Act (*Health & Saf.C. 18200* et seq., text, p. 886) now includes a definition of "manufactured housing community" that is substantially similar to former *Health & Saf.C. 18800(a)* and (b). (*Health & Saf.C. 18210.7*, added in 2007.)



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CHAPTER XVII - Real Property

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XI. MOBILEHOMES

A. In General.

2. Definitions.

12 Witkin Sum. Cal. Law Real Property § 762

[§ 762] Definitions.

C.C. 798.1 et seq. define a number of significant terms governing the construction of the Mobilehome Residency Law. (See C.E.B., 1 Landlord-Tenant Practice 2d, §6.2 et seq.)

(1) "Mobilehome" is a structure "designed for human habitation and for being moved on a street or highway" under a *Veh.C. 35790* permit. It includes a manufactured home as that term is defined in *Health & Saf.C. 18007*, and a mobilehome as defined in *Health & Saf.C. 18008*. Excluded from the definition are a recreational vehicle as defined in C.C. 799.29, a commercial coach as defined in *Health & Saf.C. 18001.8*, and a trailer or other recreational vehicle in a park that is subject to the Recreational Vehicle Park Occupancy Law (C.C. 799.20 et seq.). However, mobilehomes include recreational vehicles of all types defined in *Health & Saf.C. 18010*, other than motor homes, truck campers, and camping trailers, if they are used for human habitation and either (a) occupied a site in a mobilehome park under a mobilehome rental agreement with a term of at least 1 month on November 15, 1992, or (b) occupied a site for 9 or more continuous months after November 15, 1992. (C.C. 798.3; see *24 Pacific L. J. 992*.)

(2) A "mobilehome park" is an area of land where two or more mobilehome sites are rented to accommodate mobilehomes used for human habitation. (C.C. 798.4.) The term "park" refers to a mobilehome park or a manufactured housing community, as defined in *Health & Saf.C. 18801*. (C.C. 798.6.)

(3) A "homeowner" is a person who has a tenancy in a mobilehome park under a rental agreement. (C.C. 798.9.)

(4) A "resident" is a homeowner or other person lawfully occupying a mobilehome. (C.C. 798.11.)

(5) "Tenancy" is a homeowner's right to use a site within a mobilehome park on which to locate, maintain, and occupy a mobilehome, site improvements, and accessory structures for human habitation, including the use of the park's services and facilities. (C.C. 798.12.)

(6) A "rental agreement" is an agreement between the management and the homeowner establishing the terms and conditions of park tenancy. A lease is a rental agreement. (C.C. 798.8.)

(7) "Change of use" means a use of the park for a purpose other than the rental of two or more mobilehome sites to accommodate mobilehomes used for human habitation. It does not encompass the adoption, amendment, or repeal of a

park rule or regulation. A change of use may affect an entire park or a portion of the park. The term includes a change of the park or a portion to a condominium, stock cooperative, planned unit development, or form of ownership in which spaces within the park are to be sold. (C.C. 798.10.)

(8) The "management" means the owner of a mobilehome park or an agent or representative authorized to act on the park owner's behalf in connection with matters relating to a tenancy. (C.C. 798.2.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Mobilehome park*: C.C. 798.6 was amended in 2007 to refer to *Health & Saf.C. 18210.7* instead of *Health & Saf.C. 18801*.



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XI. MOBILEHOMES

A. In General.

3. Mobilehome Ombudsman.

12 Witkin Sum. Cal. Law Real Property § 763

[§ 763] Mobilehome Ombudsman.

(1) *Legislative Finding and Creation of Office.* Increasing numbers of Californians live in manufactured homes and mobilehomes and most of those manufactured home and mobilehome owners reside in mobilehome parks. Because of the growing number of problems and complaints dealing with various aspects of living in manufactured homes and mobilehomes, the Legislature created a Mobilehome Ombudsman within the Department of Housing and Community Development "to better provide assistance to the public in handling and coordinating the resolution to those problems and complaints." (*Health & Saf.C. 18150, 18151(a).*)

(2) *Duties of Ombudsman.* The ombudsman must assist in taking complaints from the public relating to manufactured homes and mobilehomes, and must help coordinate the resolution of those complaints. The complaints may include problems of titling and registration, installation, warranties, financing, sales, inspection of homes and parks, mobilehome accessories and improvements, and problems relating to the Mobilehome Residency Law. (*Health & Saf.C. 18151(b).*) The ombudsman may not arbitrate, mediate, negotiate, or provide legal advice on mobilehome park rent disputes, lease or rental agreements, or disputes arising from lease or rental agreements, but may provide information on these issues. (*Health & Saf.C. 18151(c).*)

The ombudsman must establish procedures to deal with complaints, must make forms and written materials available to the public to inform them of the functions of the office, and must provide information about manufactured homes and mobilehomes. (*Health & Saf.C. 18153.*)

(3) *Posting of Ombudsman's Name, Address, and Phone Number.* A sign disclosing the name, address, and telephone number of the ombudsman must be posted in a conspicuous public place within a mobilehome park. (C.C. 798.29; *Health & Saf.C. 18253.5(a).*)

SUPPLEMENT: [This section is current through the latest supplement]



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XI. MOBILEHOMES

B. Rental Agreement.

1. Required and Optional Provisions.

12 Witkin Sum. Cal. Law Real Property § 764

[§ 764] Required and Optional Provisions.

(1) *Required Provisions.* A mobilehome rental agreement (supra, §762) must be in writing and contain specified provisions. (C.C. 798.15; see C.E.B., 1 Landlord-Tenant Practice 2d, §6.22 et seq.) These are:

(a) The term of the tenancy and the rent. (C.C. 798.15(a).)

(b) The park's rules and regulations. (C.C. 798.15(b).)

(c) A copy of the text of the Mobilehome Residency Law. The copy must be attached as an exhibit and incorporated by reference into the mobilehome park rental agreement. The management must provide all homeowners with a new copy of the Mobilehome Residency Law before February 1 of each year, if any significant changes were made in the law in the prior year. (C.C. 798.15(c).)

(d) A provision specifying that it is the management's responsibility to provide and maintain physical improvements in the common facilities in good working order and condition. Management has a reasonable period of time to repair a sudden or unforeseeable breakdown or deterioration in the common facilities, after it knows or should have known of the problem. "Reasonable period of time" means as soon as possible in situations affecting health or safety, and no more than 30 days in other cases unless exigent circumstances justify a delay. (C.C. 798.15(d); see 25 *Pacific L. J.* 779.)

(e) A description of the physical improvements to be provided to the homeowner. (C.C. 798.15(e).)

(f) A provision listing services that are provided at the time the rental agreement is executed and that will continue to be offered for the term of the tenancy, and the fees to be charged for those services. (C.C. 798.15(f).)

(g) A provision stating that the management may charge a reasonable fee for services relating to maintenance in the event the homeowner fails to maintain the premises. (C.C. 798.15(g).)

(h) All other provisions governing the tenancy. (C.C. 798.15(h).)

(2) *Optional Provisions.* A rental agreement may include other provisions permitted by law, but need not include

specific language contained in state or local laws that is not a part of the Mobilehome Residency Law. (C.C. 798.16(a).)

(3) *Homeowner's Copy*. The management must return an executed copy of the rental agreement to the homeowner within 15 business days after the management receives the rental agreement signed by the homeowner. (C.C. 798.16(b).)

West's Key Number Digest, Landlord and Tenant k.383 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Required Provisions*. See *Manufactured Home Communities v. San Luis Obispo* (2008) 167 C.A.4th 705, 713, 84 C.R.3d 367 [leases that set forth 12-month tenancy term and amount of rent were facially valid under C.C. 798.15, even though they authorized park to increase rents "at any time upon 90 days' notice"; right to raise rents was subject to state and local laws].



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XI. MOBILEHOMES
B. Rental Agreement.
2. Invalid Provisions.

12 Witkin Sum. Cal. Law Real Property § 765

[§ 765] Invalid Provisions.

(1) *Waiver*. No mobilehome rental agreement may contain a provision by which the homeowner waives rights under the Mobilehome Residency Law. A waiver of that type is contrary to public policy and void. (C.C. 798.19.)

(2) *Discrimination*. Discrimination on the basis of race, color, religion, sex, national origin, ancestry, or marital status in determining membership in a private club or organization as a condition for tenancy in a park is prohibited. (C.C. 798.20; see Cal. Civil Practice, 3 Real Property Litigation, §31:63 [allegation of discrimination].)

(3) *Pets*. No lease agreement entered into, modified, or renewed on or after January 1, 2001, may prohibit a homeowner from keeping at least one pet within the park, subject to reasonable rules and regulations of the park. However, this prohibition may not be construed to affect another right provided by law to keep a pet within the park. (C.C. 798.33(a).) "Pet" means a domesticated bird, cat, dog, aquatic animal kept in an aquarium, or other animal agreed to between the management and the homeowner. (C.C. 798.33(c).) (See *114 A.L.R.5th 443* [effect of lease clause restricting keeping of pets].)

(4) *Recreational Vehicles*. In a mobilehome park developed after January 1, 1982, spaces may not be rented for recreational vehicles, as defined in C.C. 799.29, unless the park has a specifically designated area for those vehicles that is separate from the area designated for mobilehomes. (C.C. 798.22(a).) However, a new mobilehome park developed after January 1, 1982, is not subject to this restriction until 75% of the spaces have been rented for the first time. (C.C. 798.22(b).)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Discrimination*. C.C. 798.20 was amended and subdivided in 2006. Rather than listing the groups against whom discrimination is prohibited, C.C. 798.20(a) now prohibits discrimination based on the same characteristics as in the Fair Employment and Housing Act (*Govt.C. 12955(a)*, (d), *8 Summary* (10th), *Constitutional Law*, §947). C.C. 798.20(a) does not apply to housing for older persons, as defined in *Govt.C. 12955.9*. (C.C. 798.20(b), added in 2006.)

See Cal. Civil Practice, 4 Real Property Litigation, §31:66 [allegation of discrimination].(5) *(New) Management's Right of First Refusal*. A rental agreement entered into or renewed on and after January 1, 2006, may not include a clause, rule, regulation, or another provision that grants to management the right of first refusal to purchase a

mobilehome that is offered for sale to a third party under C.C. 798.70 et seq. (text, §778 et seq.). A separate agreement for separate consideration granting a right of first refusal to purchase the mobilehome is not precluded. (C.C. 798.19.5, added in 2005.)



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B. Rental Agreement.
3. Term.

12 Witkin Sum. Cal. Law Real Property § 766

[§ 766] Term.

A homeowner must be offered a rental agreement for (1) a term of 12 months, or (2) a lesser period if requested by the homeowner, or (3) a longer period as mutually agreed on by the homeowner and management. (C.C. 798.18(a).) (On rental agreements in excess of 12 months as exempt from local rent control laws, see *infra*, §767.)

No agreement may contain terms or conditions with respect to charges for rent, utilities, or incidental reasonable service charges that would be different during the first 12 months of the agreement from the corresponding terms or conditions that would be offered to the homeowners on a month-to-month basis. (C.C. 798.18(b).) Rental agreement provisions must not give either party the sole option of automatically extending or renewing the agreement for a term longer than 12 months. (C.C. 798.18(c); see *24 Pacific L. J. 1008*.) C.C. 798.17(g) imposes the same restriction on rental agreements that are exempt from local rent control under C.C. 798.17(a) (see *infra*, §767).

SUPPLEMENT: [This section is current through the latest supplement]



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XI. MOBILEHOMES

C. Rent Control.

1. Exemption From Local Rent Control.

a. Long-Term Agreements.

12 Witkin Sum. Cal. Law Real Property § 767

[§ 767] Long-Term Agreements.

(1) *Basis for Exemption.* A rental agreement that meets specified criteria is exempt from a local ordinance, rule, regulation, or initiative measure that establishes a maximum amount that a landlord may charge a tenant for rent. The terms of the rental agreement prevail over a conflicting local regulation. If the agreement is not extended, and no new agreement in excess of 12 months' duration is made, the last rental rate charged for the space under the previous agreement is the base rent for purposes of applicable provisions of law. (C.C. 798.17(a); see *Mobilepark West Homeowners Assn. v. Escondido Mobilepark West* (1995) 35 C.A.4th 32, 45, 41 C.R.2d 393 [C.C. 798.17 preempted city ordinance that imposed requirements on owners and residents before mobilehome leases could be exempt from local rent control]; *People v. Beaumont Inv.* (2003) 111 C.A.4th 102, 113, 3 C.R.3d 429 [long-term leases signed by mobilehome dealers, which mobilehome purchasers were required to assume, were not exempt from local rent control; under local ordinance and C.C. 798.17, actual and personal residency of mobilehome was prerequisite to exemption].)

The criteria are set forth in C.C. 798.17(b):

(a) The agreement must be for a term in excess of 12 months.

(b) The agreement must be for the homeowner's personal and actual residence.

(c) The homeowner must have at least 30 days from the date the agreement is first offered to accept or reject the agreement.

(d) The agreement may be voided by the homeowner within 72 hours after the homeowner executes it.

(2) *Homeowner's Option for Shorter Agreement.* The homeowner has the option to reject the offered rental agreement and instead accept an agreement for a term of 12 months or less from the date the offered agreement begins. If the homeowner elects to have a rental agreement for a term of 12 months or less, including a month-to-month agreement, the agreement must contain the same rental charges, terms, and conditions as the offered rental agreement during the first 12 months, except for options contained in the offered agreement to extend or renew it. (C.C. 798.17(c).) However, nothing in C.C. 798.17(c) prevents the management from offering gifts, "other than rental rate reductions" to

homeowners who execute a rental agreement under C.C. 798.17. (C.C. 798.17(d).)

(3) *Notification Requirements.* The first sentence of the first paragraph of a rental agreement meeting the criteria in C.C. 798.17(b) must notify the homeowner that the agreement will be exempt from local rent control law. The notification must be in at least 12-point boldface type if printed, or capitalized if typed. (C.C. 798.17(a).)

When a rental agreement is first offered to the homeowner, the management must provide written notice of the homeowners' 30-day right to inspect the rental agreement and 72-hour right to void the agreement. Receipt of the notice must be acknowledged in writing by the homeowner. Failure to provide the notice makes the rental agreement voidable at the homeowner's option on discovery of the failure. (C.C. 798.17(f); see 23 *Pacific L. J.* 731.)

(4) *Jurisdiction To Determine Applicability of Exemption.* In *Village Trailer Park v. Santa Monica Rent Control Bd.* (2002) 101 C.A.4th 1133, 124 C.R.2d 857, mobilehome park tenants filed complaints with the local rent control board, alleging that their landlord violated local rent control law by overcharging them. The landlord objected that the board had no jurisdiction to decide whether the tenants' leases were subject to or exempt from the rent control law. The board found that the leases were subject to the rent control law and that the tenants were entitled to restitution of all annual rent increases. On the landlord's petition for writ of mandamus, the trial court found that the board acted properly, except in its calculation of damages. *Held*, the board acted properly in all respects.

(a) Although C.C. 798.17 does not expressly direct rent control boards to determine whether a mobilehome lease is exempt from regulation, authority to make this determination may be implied from the local agency's function of enforcing local laws prohibiting landlords from charging excess rents. The local rent control agency's determination is, of course, subject to judicial review. By applying C.C. 798.17 to the leases before it, the board did not usurp a judicial function. (101 C.A.4th 1143.) *Mobilepark West Homeowners Assn. v. Escondido Mobilepark West*, *supra*, "is inapposite." (101 C.A.4th 1141.) The court in *Escondido* did not consider whether the city usurped a judicial function by applying C.C. 798.17 to a particular case. (101 C.A.4th 1141.)

(b) The fact that the leases here include a clause stating that disputes must be submitted to arbitration does not remove the leases from the ambit of the rent control law. First, a landlord cannot exempt itself from the operation of local law by simply announcing that its leases are subject to arbitration. Second, the board is not a party to the leases and is not bound by any arbitration clause or declaration of exemption from rent control. Third, the leases state that rent control laws do not apply to the tenancies; therefore, the parties did not contemplate that a rent control dispute would be an arbitrable matter. Fourth, local ordinance voids a provision that purports to waive a tenant's right to pursue a claim under the rent control law. (101 C.A.4th 1144.)

(c) The board properly calculated the tenants' damages. When a landlord fails to comply with the local rent control law, as here, the board does not give the landlord the benefit of implementing regular rent increases that the landlord would have enjoyed had the law been obeyed. By denying regular rent increases to noncompliant landlords, the board is taking reasonable, nonarbitrary measures to induce compliance. (101 C.A.4th 1147.) (For cases discussing the validity of mobilehome rent control ordinances, see *infra*, §770.)

(5) *Exemption From Administrative Fee.* A mobilehome park may not be assessed a fee or other exaction imposed by an ordinance, rule, regulation, or initiative measure for a park space that is exempt under C.C. 798.17(a). (C.C. 798.17(e).)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Rent Control.

1. Exemption From Local Rent Control.

b. New Construction.

12 Witkin Sum. Cal. Law Real Property § 768

[§ 768] New Construction.

Notwithstanding C.C. 798.17 (supra, §767), "new construction" in a mobilehome park is exempt from local rent control. (C.C. 798.45.) "New construction" means any newly constructed spaces initially held out for rent after January 1, 1990. (C.C. 798.7.)

Local governments may not adopt or enforce a local mobilehome rent control ordinance, rule, or regulation that prohibits or limits the duration of rental agreements or leases for manufactured housing communities or mobilehome parks that are new construction, if the enactment operates to circumvent the provisions of C.C. 798.7. (*Govt.C. 65852.11.*)

SUPPLEMENT: [This section is current through the latest supplement]



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XI. MOBILEHOMES

C. Rent Control.

1. Exemption From Local Rent Control.
- c. Space That Is Not Principal Residence.

12 Witkin Sum. Cal. Law Real Property § 769

[§ 769] Space That Is Not Principal Residence.

Notwithstanding C.C. 798.17 (supra, §767), if a mobilehome space within a mobilehome park is not the principal residence of the homeowner and the homeowner has not rented the mobilehome to another party, the space is exempt from local rent control. (C.C. 798.21(a).) A mobilehome is considered a homeowner's principal residence unless state or county records show that the homeowner is receiving a homeowner's exemption for another property or mobilehome in California, or unless public records reasonably demonstrate that the homeowner's principal residence is out of state. (C.C. 798.21(c); on modification of rent following review of records, see C.C. 798.21(d), (e).)

C.C. 798.21 does not apply if (1) the homeowner is not permitted to rent or lease the mobilehome; (2) the mobilehome is being "actively held available for sale"; or (3) the legal owner has taken possession or ownership, or both, of the mobilehome from a registered owner through either a surrender of ownership interest by the registered owner or a foreclosure proceeding. (C.C. 798.21(f).)

SUPPLEMENT: [This section is current through the latest supplement]



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XI. MOBILEHOMES

C. Rent Control.

2. Challenges to Rent Control.

12 Witkin Sum. Cal. Law Real Property § 770

[§ 770] Challenges to Rent Control.

In *Yee v. Escondido* (1990) 224 C.A.3d 1349, 274 C.R. 551, defendant city adopted an initiative mobilehome rent control ordinance providing for a rollback of rents for mobilehome spaces to those existing on January 1, 1986. State law compels a park owner, except in limited circumstances, to accept the purchaser of an existing tenant's mobilehome as a new tenant. Plaintiff owners of mobilehome parks pointed out that, as a result of the state law, the price of used mobilehomes in the city increased dramatically after passage of the ordinance, because existing tenants were able to monetize the value to mobilehome owners living in a rent-controlled jurisdiction. They contended that the combined effect of the state law and ordinance constituted a compensable taking of property without compensation, in violation of the federal and state Constitutions (see 8 *Summary* (10th), *Constitutional Law*, §§1125, 1132). *Held*, judgment for defendant city on demurrer affirmed.

(a) "Mobilehomes and mobilehome park spaces are what economists refer to as complementary goods. Because they are used together, there is a direct and necessarily inverse relationship between the prices for complementary goods. ... [W]here government acts to reduce (or at least limit increases in) the rental prices charged for mobilehome spaces, the price of mobilehomes will increase. This is particularly true where, as in California, other statutes generally compel a park owner to accept the purchaser of an existing tenant's mobilehome as a new tenant. This assures that the complementary good effect will be substantially limited to those mobilehomes currently occupying rent-controlled spaces." (224 C.A.3d 1352.)

(b) "Recognizing that 'the function of government may often be to tamper with free markets, correcting their failures and aiding their victims' ... , decisions of the United States and California Supreme Courts have established that local governments may, consistent with the police power, adopt rent control ordinances where imperfections in the unregulated market for rental housing allow landlords to charge excessive rents. ... The U.S. Supreme Court has repeatedly reaffirmed that rent control ordinances are not per se takings for the purposes of the Fifth Amendment's requirement of due compensation." (224 C.A.3d 1353.)

(c) "Where a governmental regulation purports to reduce the excessive and unfair price to a reasonable level, the mere fact that the price for complementary goods and services rises as a result does not transmute an otherwise reasonable price regulation into a compensable 'taking.' " (224 C.A.3d 1353, citing and quoting *Oceanside Mobilehome Park Owners' Assn. v. Oceanside* (1984) 157 C.A.3d 887, 907, 204 C.R. 239.) The Escondido ordinance effects a

transfer of value from landlords to tenants, but the critical question is whether such a transfer can be justified by a rational governmental purpose; i.e., are the controlled rents fair and reasonable? Plaintiffs do not allege that the ordinance denies them fair and reasonable rents, and they have never attempted to obtain approval for what they consider to be a "fair" rent. "In the absence of such a contention, we assume the rents provided for by the ordinance are fair. If they are, there is no 'taking.' The fact that used mobilehomes in Escondido are selling for more than they have in the past is irrelevant." (224 C.A.3d 1354.)

A dissenting justice objected to the decision of "a complex issue" on demurrer without the benefit of evidence. (224 C.A.3d 1359.) (See *Casella v. Morgan Hill* (1991) 230 C.A.3d 43, 52, 280 C.R. 876 [following *Yee v. Escondido*; absence of vacancy decontrol provision in defendant city's mobilehome rent control ordinance did not constitute taking of plaintiff owner's property without just compensation].)

Yee v. Escondido was affirmed by the United States Supreme Court in *Yee v. Escondido* (1992) 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153. (See *Sandpiper Mobile Village v. Carpinteria* (1992) 10 C.A.4th 542, 546, 12 C.R.2d 623 [following *Casella*, and United States Supreme Court decision in *Yee*, on similar facts]; 26 *Loyola L.A. L. Rev.* 1 [criticizing United States Supreme Court decision in *Yee*]; 35 *U.C.L.A. L. Rev.* 399 [legal and economic analysis of mobilehome rent controls (before *Yee* decisions)]; 8 *Summary* (10th), *Constitutional Law*, §1155.)

In *Kirkpatrick v. Oceanside* (1991) 232 C.A.3d 267, 283 C.R. 191, plaintiff mobilehome park owners challenged defendant city's mobilehome rent control ordinance in an action for inverse condemnation, alleging that they earned only a 2% rate of return. *Held*, judgment for defendant on demurrer reversed.

(a) *Yee v. Escondido* acknowledged that a facially valid rent control ordinance might, as applied, amount to a taking. Here, plaintiffs' allegations that the ordinance prevents them from receiving a "just and fair return," if proven, "would support a determination the government has gone too far and taken their property without just compensation." (232 C.A.3d 276.)

(b) Plaintiffs are not barred on grounds of res judicata, even though they were parties in *Oceanside Mobilehome Park Owners' Assn. v. Oceanside*, *supra*. The holding in *Oceanside* concerned the facial validity of the ordinance, not the constitutionality as applied at issue here. (232 C.A.3d 281.)

Other cases discussing challenges to, or the applicability of, local rent control laws affecting mobilehomes include the following:

Galland v. Clovis (2001) 24 C.4th 1003, 1021, 103 C.R.2d 711, 16 P.3d 130, *supra*, §§595, 596 [availability of damages under 42 U.S.C., §1983 for confiscatory rent ceiling imposed on mobilehome park owner].

Palomar Mobilehome Park Assn. v. Mobile Home Rent Review Com. (1993) 16 C.A.4th 481, 20 C.R.2d 371, *supra*, §584 [rent control authority should not have factored in appreciated value of property when determining whether landlord was receiving fair return on investment].

Yee v. Mobilehome Park Rental Review Bd. (1993) 17 C.A.4th 1097, 23 C.R.2d 1, *supra*, §584 [effect of potential tax shelter benefits on fair return].

Thomsen v. Escondido (1996) 49 C.A.4th 884, 897, 56 C.R.2d 902 [city rent control ordinance did not provide for vacancy control, i.e., continued regulation of rents at current tenant's level on sale or transfer of mobilehome].

Rainbow Disposal Co. v. Escondido Mobilehome Rent Review Bd. (1998) 64 C.A.4th 1159, 1165, 75 C.R.2d 746 [rent review board properly excluded amount owner spent to improve mobilehome park's gas and electric utility systems from consideration as capital improvement costs].

Montclair Parkowners Assn. v. Montclair (1999) 76 C.A.4th 784, 794, 90 C.R.2d 598 [ordinance that limited

mobilehome park owners' ability to raise rent on sale of mobilehomes was facially constitutional; ordinance, which would protect current mobilehome owners' equity in homes and protect prospective mobilehome owners from excessive rent increases, was not arbitrary regulation; applying constitutionality standard of *Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 C.4th 952, 81 C.R.2d 93, 968 P.2d 993, supra, §580].

Hillsboro Properties v. Public Util. Com. (2003) 108 C.A.4th 246, 257, 133 C.R.2d 343 [Public Utilities Commission did not improperly usurp city's rent control authority by determining that manner in which mobilehome park owner increased rents impermissibly increased tenants' electricity rates].

Morgan v. Chino (2004) 115 C.A.4th 1192, 1198, 9 C.R.3d 784, supra, §582 [landlord who failed to present evidence necessary to calculate her overall rate of return was not entitled to rent increase to compensate her for capital improvement to streets of her mobilehome park].

SUPPLEMENT: [This section is current through the latest supplement]

Cases discussing challenges to local rent control laws affecting mobilehomes: See *H.N. & Frances C. Berger Foundation v. Escondido* (2005) 127 C.A.4th 1, 9, 11, 25 C.R.3d 19 [rent review board's authorization of \$ 31 per month per space rent increase lacked evidentiary support; there was no showing that two of three figures that board relied on were within range of reasonable rents under fair return standard]; *Stardust Mobile Estates, LLC v. San Buenaventura* (2007) 147 C.A.4th 1170, 1181, 55 C.R.3d 218 [rent board's method for calculating increase was appropriate; rent could be increased by 50% of change in consumer price index from base year]; *TG Oceanside, L.P. v. Oceanside* (2007) 156 C.A.4th 1355, 1376, 68 C.R.3d 320 [mobilehome park owner failed to demonstrate that two methods of rent adjustment set forth in ordinance (annual CPI increase or net operating income adjustment) would not provide just and reasonable return on investment; owner's experts did not analyze returns that methods would have produced and instead presented alternative formula for calculating fair return].



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CHAPTER XVII - Real Property

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XI. MOBILEHOMES

D. Fees and Charges.

1. Improper Fees and Charges.

12 Witkin Sum. Cal. Law Real Property § 771

[§ 771] Improper Fees and Charges.

The following fees and charges are prohibited:

(1) A fee for items other than rent, utilities, and incidental reasonable charges for services actually rendered, or a fee for obtaining a lease on a mobilehome lot for (a) a term of 12 months, or (b) a lesser period requested by the homeowner. (C.C. 798.31; see *Karrin v. Ocean-Aire Mobile Home Estates* (1991) 1 C.A.4th 1066, 1071, 2 C.R.2d 581 [capital improvement assessment fee for repaving roads in mobilehome park, and ordinance permitting fee were void due to conflict with C.C. 798.31]; *Dills v. Redwoods Associates, Ltd.* (1994) 28 C.A.4th 888, 893, 33 C.R.2d 838 [C.C. 798.31 does not preclude park owner from structuring rent to include pass-through of capital expenditures; disagreeing with *Karrin*, insofar as it implies that any explicit effort to recover capital costs is barred]; *Robinson v. Yucaipa* (1994) 28 C.A.4th 1506, 1513, 34 C.R.2d 291 [C.C. 798.31 did not preempt rent control ordinance permitting increases for capital improvements]; *Vance v. Villa Park Mobilehome Estates* (1995) 36 C.A.4th 698, 705, 706, 42 C.R.2d 723 [C.C. 798.31 does not preclude rent increases that include pass-throughs for governmental services and improvements, property taxes, and insurance; following *Dills*]; *Greening v. Johnson* (1997) 53 C.A.4th 1223, 1226, 1228, 62 C.R.2d 214 [charge for cable television that tenants did not want was not permissible as "utility" charge under C.C. 798.31; utilities are generally essential services and cable television cannot reasonably be considered essential]; on improper fees generally, see C.E.B., *Landlord-Tenant Practice* 2d, §6.36 et seq.)

(2) A fee for services actually rendered that are not listed in the rental agreement, unless the homeowner is given written notice 60 days before imposition of the charge. (C.C. 798.32(a).) Fees and charges subject to C.C. 798.32(a) must be separately stated on the homeowner's regular billing, with a notice of the expiration date if applicable. (C.C. 798.32(b); see 24 *Pacific L. J.* 994.)

(3) A fee for keeping a pet, unless special facilities or services are provided. If special facilities are maintained by the management, the fee charged must reasonably relate to the cost of maintenance of the facilities or services and the number of pets kept in the park. (C.C. 798.33(b); see *People v. McKale* (1979) 25 C.3d 626, 635, 159 C.R. 811, 602 P.2d 731.)

(4) A fee for a guest who does not stay for more than a total of 20 consecutive days or 30 days in a calendar year. (C.C. 798.34(a).)

(5) A fee for a person who is living alone and wishes to share the mobilehome with one other person. (C.C. 798.34(b).)

(6) A fee based on the number of members in the homeowner's immediate family. (C.C. 798.35.)

(7) A fee for the enforcement of the park's rules and regulations, except for a reasonable fee for maintenance of the premises on which the mobilehome is located in the event the homeowner fails to maintain the premises in accordance with rules and regulations. (C.C. 798.36.)

(8) A fee for entry, installation, hookup, or landscaping as a condition of tenancy, except for an actual fee or cost imposed by a local government. (C.C. 798.37.)

(9) A fee for a person over 18 years of age who provides live-in health or supportive care to a homeowner who is 55 years of age or older. (C.C. 798.34(c).) Moreover, a parent, sibling, child, or grandchild of a homeowner who is 55 years of age or older in an age-restricted mobilehome park may share the mobilehome with the homeowner without charge, if that relative is over 18 years of age and requires live-in health or supportive care. (C.C. 798.34(d).)

(10) A fee or rent increase that reflects the cost of any fine, forfeiture, penalty, money damages, or fee assessed by a court against management for violating the Mobilehome Residency Law, or related attorneys' fees or costs. (C.C. 798.42(a).) Rental agreement provisions permitting an increase for the cost of money damages are void if they were entered into, renewed, or modified after January 1, 1995. (C.C. 798.42(c).)

Furthermore, the management may not acquire a lien or security interest in a mobilehome located in the park unless it is mutually agreed on by both the homeowner and the management. Billing and payment for the obligation must be kept separate from current rent. (C.C. 798.40.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Fees for items other than rent, utilities, and services actually rendered:* See *Cacho v. Boudreau* (2007) 40 C.4th 341, 348, 53 C.R.3d 43, 149 P.3d 473 [C.C. 798.31 did not preempt local rent control ordinance that allowed pass-through of property taxes as component of rent; disapproving *Karrin v. Ocean-Aire Mobile Home Estates* (1991) 1 C.A.4th 1066, 2 C.R.2d 581, text, p. 899]. (7) *Fees for enforcement of park rules and regulations:* C.C. 798.36 was amended and subdivided in 2005. The exception for a reasonable maintenance fee is now in C.C. 798.36(a). C.C. 798.36(b), added in 2005, creates an exception for a fee for removal and storage of a homeowner's or resident's personal property when necessary to bring the premises into compliance with park rules and regulations, the provisions of the Mobilehome Parks Act, or specified state regulations. (9) *Fees for health care providers:* C.C. 798.34(c) was amended in 2008 to remove the 55-year-old age requirement for homeowners who receive live-in care.



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D. Fees and Charges.

2. Method of Charging Proper Fees.

12 Witkin Sum. Cal. Law Real Property § 772

[§ 772] Method of Charging Proper Fees.

(1) *Notice of Rent Increase.* The management must give a homeowner written notice of a rent increase at least 90 days before the date of the increase. (C.C. 798.30.)

(2) *Fees Imposed by Governmental Entity on Rent-Controlled Space.* The management may charge a homeowner separately for certain fees, assessments, or other charges imposed by a local agency on a rent-controlled mobilehome space, including charges imposed by the state or federal governments on or after January 1, 1995. (C.C. 798.49(a); see *24 Pacific L. J. 994.*)

(3) *Utility Service Fees.* Unless the rental agreement specifically provides otherwise, the park management may bill a homeowner separately for service fees and charges for natural gas or liquid propane gas, electricity, water, cable television, garbage or refuse service, and sewer service. In order for these fees and charges not to be considered rent under the rental agreement or a rent control regulation, the rent must be reduced as of the first separate utility billing by an amount equal to the average monthly charge for utility service to the homeowner's space during the previous year. (C.C. 798.41(a).) C.C. 798.41 does not apply to a rental agreement entered into before January 1, 1991, until the agreement is extended or renewed on or after that date. (C.C. 798.41(b).) Utility service fees billed separately under C.C. 798.41(a) must be stated separately on the homeowner's regular billing, with a notice of the expiration date if applicable. (C.C. 798.41(c); see *24 Pacific L. J. 994.*)

C.C. 798.41 and C.C. 798.31 (*supra*, §771) address fundamentally different concerns. C.C. 798.31 specifies permissible charges to homeowners, whereas C.C. 798.41 specifies the method by which certain utility charges may be assessed, assuming they are permissible under C.C. 798.31. (*Greening v. Johnson* (1997) 53 C.A.4th 1223, 1227, 62 C.R.2d 214 [charge for cable television was not permissible as utility charge under C.C. 798.31, even though cable television is listed as utility in C.C. 798.41].) (See *Hillsboro Properties v. Public Util. Com.* (2003) 108 C.A.4th 246, 257, 133 C.R.2d 343 [park owner violated *Pub.Util.C. 739.5*, which regulates utility costs paid by submetered tenants, by increasing rents in manner that increased tenants' electricity rates].)

SUPPLEMENT: [This section is current through the latest supplement]



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D. Fees and Charges.

3. Security Deposits.

12 Witkin Sum. Cal. Law Real Property § 773

[§ 773] Security Deposits.

(1) *Limitations.* The management may only demand a security deposit on or before initial occupancy, and the security deposit may not exceed 2 months' rent, in addition to any rent for the first month. (C.C. 798.39(a).)

(2) *Refund.* Security deposits collected on or after January 1, 1989, must be refunded on the homeowner's written request, if the homeowner has promptly paid, within 5 days of the date the amount is due, rent, utilities, and charges for 12 consecutive months, or on resale of the mobilehome, whichever occurs first. The refund must be made within 30 days following the end of the 12-month period of prompt payment or the date of the resale of the mobilehome. (C.C. 798.39(b).) Security deposits collected before January 1, 1989, must be refunded within 60 days of the homeowner's written request, if the rental agreement or lease between the homeowner and the management is extended or renewed. To receive a refund, the homeowner must have promptly paid, within 5 days of the date the amount is due, all of the rent, utilities, and reasonable service charges for the 12-consecutive-month period preceding the receipt of the written request. (C.C. 798.39(c).)

(3) *Handling During Sale of Park.* If a mobilehome park is sold, the seller must deposit in escrow an amount equal to all security deposits collected before January 1, 1989, with directions that deposits held by the owner for more than 12 months be refunded at the close of escrow to homeowners who promptly paid their rent and other charges. (C.C. 798.39(d).) Amounts not refunded by the seller go to the buyer of the park, who is subject to statutory security deposit requirements. (C.C. 798.39(e); see C.C. 798.39(g) [section does not affect validity of buyer's title].)

(4) *No Interest Required.* The management is not required to place a security deposit in an interest-bearing account or to provide a homeowner with interest on the security deposit collected. (C.C. 798.39(f).)

SUPPLEMENT: [This section is current through the latest supplement]



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E. Management of Mobilehome Park.

1. Maintenance of Premises.

12 Witkin Sum. Cal. Law Real Property § 774

[§ 774] Maintenance of Premises.

(1) *Common Area Facilities.* Common area facilities must be open or available to residents at all reasonable hours, and the hours of operation must be posted at the facility. (C.C. 798.24.)

(2) *Protection of Quiet Enjoyment.* Except in an emergency or when a resident has abandoned a mobilehome, park owners and managers may not enter the premises of a mobilehome without the prior written consent of the owner or occupant. (C.C. 798.26, 799.2.5; see *10 Pacific L. J.* 565.)

(3) *Removal of Vehicles.* Management may remove a vehicle other than a mobilehome from the park under *Veh.C.* 22658, when there is compliance with the posting requirements of *Veh.C.* 22658(a)(1) (governing signs prohibiting public parking and warning of removal at the owner's expense). (C.C. 798.28.5(a).) Management must comply with specified notice requirements before removing a vehicle from a resident's or a homeowner's driveway or designated parking space. (See C.C. 798.28.5(b).)

(4) *Maintenance of Trees.* Management is solely responsible for trimming, pruning, and removing trees on rental spaces in the mobilehome park, and for the costs of that maintenance, on written notice by a homeowner or a determination by park management that the tree poses a specific hazard or a health and safety violation. In the case of a dispute over that assertion, the park management or a homeowner may request an inspection by the Department of Housing and Community Development or a local agency responsible for the enforcement of the Mobilehome Parks Act (*Health & Saf.C.* 18200 et seq., supra, §761) to determine whether a violation of the Act exists. (C.C. 798.37.5(a).) Management is solely responsible for trimming, pruning, and removing trees in the common areas of the park, including the costs of doing so. (C.C. 798.37.5(b).) No homeowner may plant a tree within the mobilehome park without written permission from the management. (C.C. 798.37.5(d).) C.C. 798.37.5 applies to rental agreements entered into, renewed, or extended on or after January 1, 2001. (C.C. 798.37.5(f); on prior agreements, see C.C. 798.37.5(e).)

(5) *Maintenance of Driveways.* Management is solely responsible for the maintenance, repair, replacement, paving, sealing, and related expenses of driveways installed by management, including repair of root damage to driveways and foundation systems and removal. Homeowners are responsible for the maintenance, repair, replacement, paving, sealing, and related expenses of a homeowner-installed driveway. A homeowner may be charged for damage to the driveway caused by the homeowner's actions or a breach of the homeowner's responsibilities under the rules and

regulations, as long as those rules and regulations are not inconsistent with C.C. 798.37.5. (C.C. 798.37.5(c).) C.C. 798.37.5 applies to rental agreements entered into, renewed, or extended on or after January 1, 2001. (C.C. 798.37.5(f); on prior agreements, see C.C. 798.37.5(e).)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Protection of Quiet Enjoyment.* C.C. 798.26 was amended in 2008 to extend its protections to enclosed accessory structures.



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E. Management of Mobilehome Park.

2. Rules and Regulations.

12 Witkin Sum. Cal. Law Real Property § 775

[§ 775] Rules and Regulations.

(1) *Amendment.* Management, when proposing an amendment to the park's rules and regulations, must meet and consult with the homeowners or their representatives, or both, after providing written notice of the proposed amendments and the meeting to all homeowners at least 10 days before the meeting. (C.C. 798.25(a); see *Rancho Santa Paula Mobilehome Park, Ltd. v. Evans* (1994) 26 C.A.4th 1139, 1146, 32 C.R.2d 464, *infra*, this section [management may amend park rules and regulations without homeowners' consent, but rules must be reasonable]; C.E.B., 1 Landlord-Tenant Practice 2d, §§6.141, 6.142.) Unless the homeowners consent, the rules and regulations of a mobilehome park may not be changed without at least 6 months' notice. Rules and regulations that apply to recreational facilities, however, require only 60 days' notice. (C.C. 798.25(b); see 10 *Pacific L. J.* 564.) Furthermore, if the proposed amendment is mandated by a change in the law, the management may implement the amendment, as to a particular homeowner, with that homeowner's consent or without consent 60 days or more after giving written notice. The written notice must include a citation to the law that necessitated the proposed amendment. (C.C. 798.25(d).)

An amendment may not create a new fee that is payable by a homeowner, unless the homeowner and management expressly agreed to the fee in the written rental agreement or lease. (C.C. 798.25(e).)

(2) *Application of Rules to Owner and Employees.* Mobilehome park owners and their employees are subject to park rules and regulations to the same extent as residents and their guests. (C.C. 798.23(a).) The statute makes exceptions for rules and regulations governing the age of residents or guests (C.C. 798.23(b)(1)), and for acts taken by an owner or employee to fulfill park "maintenance, management, and business operation responsibilities" (C.C. 798.23(b)(2)).

(3) *Unilateral Denial of Jury Trial Is Prohibited.* Any rule or regulation that is unilaterally adopted by management and implemented without the consent of the homeowners, and purports to deny homeowners the right to a jury trial or to mandate binding arbitration of a dispute between management and homeowners, is void and unenforceable. (C.C. 798.25.5; see 25 *Pacific L. J.* 778; on injunction against violations of reasonable rules and regulations, see C.C. 798.88, *infra*, §789; Cal. Civil Practice, 3 Real Property Litigation, §31:62 [form of complaint for injunctive relief].)

(4) *Retroactive Rule Against Subletting Is Prohibited.* In *Rancho Santa Paula Mobilehome Park, Ltd. v. Evans*, *supra*, defendant leased her mobilehome after unsuccessfully seeking a buyer. A month later, plaintiff mobilehome park

amended the park rules to require a registered mobilehome owner to regularly reside in each home. The trial court granted plaintiff's petition for an injunction prohibiting defendant from allowing an unlawful occupant to reside in her mobilehome. *Held*, reversed.

(a) A violation of *reasonable* park rules and regulations may be remedied by injunctive relief under C.C. 798.88 (infra, §789) or by eviction under C.C. 798.56(d) (infra, §786). Hence, while C.C. 798.25 permits management to amend park rules and regulations without the homeowners' consent, the rules must be reasonable to be enforceable. And one purpose of the Mobilehome Residency Law, stated in C.C. 798.55 (infra, §784), is to protect mobilehome owners from actual or constructive eviction. (26 C.A.4th 1146.)

(b) A rule prohibiting subleasing goes to the heart of ownership and residency, and would force a mobilehome owner who finds living in the park no longer desirable, practical, or possible to either sell the home or leave it vacant. There are obvious advantages to the community in having such a restriction--owners are more likely to be long-term residents, and to have an interest in maintaining the premises and the park as a whole. There is no reason why parties may not freely agree to such a provision. But when applied *retroactively*, this restriction is contrary to the purpose of the Mobilehome Residency Law, and is therefore unreasonable. (26 C.A.4th 1147.)

A strong dissent argued that (a) the Legislature elected not to treat the issue of subleasing in the otherwise comprehensive Mobilehome Residency Law; (b) substantial evidence supported the trial judge's finding that the restriction in this case was reasonable as applied; and (c) the Mobilehome Residency Law was designed to protect mobilehome owners, not subtenants, and enforcement of the rule against defendant would not result in an eviction. (26 C.A.4th 1149.) (On rental or subletting of mobilehome in event of medical emergency or treatment, see C.C. 798.23.5, infra, §783.)

(5) *Display of Political Campaign Sign*. A homeowner or resident may not be prohibited from displaying a political campaign sign relating to a candidate for election to public office or to the initiative, referendum, or recall process in the window or on the side of a manufactured home or mobilehome, or within the site on which the home is located or installed. The size of the face of a political sign may not exceed 6 square feet, and the sign may not be displayed more than 90 days before an election and 15 days after it. A local ordinance within the jurisdiction where the mobilehome park is located may impose a more restrictive period of time for the sign's display. (C.C. 798.51(e); on action to enforce right provided by C.C. 798.51, see C.C. 798.52 (infra, §777); see C.C. 799.10 [right to display political campaign sign applies to residents of subdivisions, cooperatives, and condominiums for mobilehomes].)

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SUPPLEMENT: [This section is current through the latest supplement]

(3) *Unilateral Denial of Jury Trial Is Prohibited*. See Cal. Civil Practice, 4 Real Property Litigation, §31:65 [form of complaint for injunctive relief]. (6) *(New) Accommodations for Disabled*. The management may not prohibit a homeowner or resident from installing accommodations for the disabled, including ramps or handrails on the outside of the home, as long as the accommodations comply with code and any required permits. The management may require the accommodations to be removed by the current homeowner when the mobilehome is removed from the park or sold in place. (C.C. 798.29.6, 799.11, added in 2008.)



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E. Management of Mobilehome Park.
3. Notices and Disclosures.

12 Witkin Sum. Cal. Law Real Property § 776

[§ 776] Notices and Disclosures.

(1) *Required Notices.* The management must give written notice to all homeowners and prospective homeowners of (a) the nature of the zoning or use permit under which the mobilehome park operates, and (b) the duration of any lease of the park, or portion thereof, in which the management is a lessee. (C.C. 728.27(a).) If there is a change in the zoning or use permit or any lease, the management must, within 30 days, give all homeowners written notice of the change. (C.C. 798.27(b).)

On request of the homeowner, the management of a mobilehome park must disclose, in writing, the name, the business address, and the business telephone number of the mobilehome park owner. (C.C. 798.28.)

Management must provide at least 72 hours' advance notice of a nonemergency interruption in utility service of more than 2 hours for maintenance, repair, or replacement of utility systems controlled by management. (C.C. 798.29.5.)

(2) *Delivery.* Unless otherwise provided, all notices required by the Mobilehome Residency Law must be either delivered personally to the homeowner or deposited in the United States mail, postage prepaid, addressed to the homeowner at his site within the mobilehome park. (C.C. 798.14.)

SUPPLEMENT: [This section is current through the latest supplement]



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F. Homeowner Meetings.

12 Witkin Sum. Cal. Law Real Property § 777

[§ 777] Homeowner Meetings.

(1) *Legislative Intent.* The Legislature enacted C.C. 798.50 et seq. to ensure that homeowners and residents of mobilehome parks have the right to peacefully assemble and freely communicate about mobilehome living or for social or educational purposes. (C.C. 798.50.)

(2) *Meetings by Homeowners.* No provision in a mobilehome park rental agreement, rule, or regulation may deny or prohibit the right of a homeowner or park resident to do any of the following:

(a) Peacefully assemble or meet in the park, at reasonable hours and in a reasonable manner, for a lawful purpose. Meetings may be held in the park community or recreation hall or clubhouse when the facility is not otherwise in use, and, with the homeowner's consent, in a mobilehome within the park. (C.C. 798.51(a)(1).)

(b) Invite public officials, candidates, or representatives of mobilehome owner organizations to meet with homeowners and residents and speak about matters of public interest, in accordance with C.C. 798.50. (C.C. 798.51(a)(2).)

(c) Canvass and petition homeowners and residents for noncommercial purposes relating to mobilehome living, election to public office, or the initiative, referendum, or recall processes, at reasonable hours and in a reasonable manner, including distributing information. (C.C. 798.51(a)(3).)

(3) *Prohibited Restrictions on Meetings.* A homeowner or resident may not be charged a cleaning deposit in order to use the park recreation hall or clubhouse for meetings of resident organizations for the purposes stated in C.C. 798.50 and 798.51, even if guests from outside the park are invited to attend the meeting, if a homeowner or resident is hosting the meeting and all homeowners or residents are allowed to attend. (C.C. 798.51(b).) A homeowner or resident may not be required to obtain liability insurance in order to use common area facilities for the purposes specified in C.C. 798.50 and 798.51. If, however, alcoholic beverages are to be served at a meeting or private function, the management may require a liability insurance binder. The management may prohibit the consumption of alcoholic beverages in common area facilities, if the rental agreement or the park's rules and regulations prohibit it. (C.C. 798.51(c).) Homeowners using a recreation hall or clubhouse under C.C. 798.51 must adhere to relevant limitations or restrictions regarding vehicle parking or maximum occupancy. (C.C. 798.51(d).)

(4) *Injunctions.* A homeowner or resident who is prevented by management from exercising the rights in C.C. 798.51 may sue to enjoin enforcement of a rule, regulation, or other policy that unreasonably deprives a homeowner or resident of those rights. (C.C. 798.52.)

(5) *Meetings Between Homeowners and Management.* Within 30 days of a written request, the management must meet and consult with the homeowners ("either individually, collectively, or with representatives of a group of homeowners who have signed a request to be so represented") on the following matters:

(a) Resident concerns about park rules that are not subject to C.C. 798.25 (requiring meetings on amendments to park rules; see *supra*, §775). (C.C. 798.53(a).)

(b) Standards for maintaining physical improvements in the park. (C.C. 798.53(b).)

(c) Addition, alteration, or deletion of service, equipment, or physical improvements. (C.C. 798.53(c).)

(d) Rental agreements offered pursuant to C.C. 798.17 (see *supra*, §767). (C.C. 798.53(d).)

A collective meeting may be conducted only after notice to all the requesting homeowners 10 days or more before the meeting. (C.C. 798.53.)

SUPPLEMENT: [This section is current through the latest supplement]



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G. Transfer of Mobilehomes.

1. Listing for Sale.

12 Witkin Sum. Cal. Law Real Property § 778

[§ 778] Listing for Sale.

(1) *Advertising and Listing.* Unless prohibited by an agreement with the management, a homeowner or an heir, joint tenant, or personal representative of the homeowner's estate who gains ownership of a mobilehome in the mobilehome park through the homeowner's death, or the agent of one of those persons, may advertise the sale, rental, or exchange of the mobilehome by means of a sign posted as prescribed by statute. (C.C. 798.70.) The management may not show or list for sale a manufactured home or mobilehome without the owner's written authorization specifying the terms and conditions. (C.C. 798.71(a)(1).) The management may require that a homeowner advise the management in writing that the manufactured home or mobilehome is for sale, although failure to do so does not invalidate a transfer. (C.C. 798.71(a)(2).) The management may not prohibit the listing or sale of a manufactured home or mobilehome within the park by the homeowner or other specified persons (C.C. 798.71(b)), and may not require those persons to authorize the management to act as the agent in the sale as a condition of resale or for approving a buyer or prospective homeowner (C.C. 798.71(c)). (See C.C. 798.81; C.E.B., 1 Landlord-Tenant Practice 2d, §6.57.)

(2) *Fees.* No transfer or selling fee may be charged by the management as a condition of a sale of a mobilehome unless for actual services performed at the homeowner's written request. (C.C. 798.72(a).) The management may not charge a fee to a prospective homeowner on the purchase of a mobilehome, as a condition of approval for residency, unless the management performs a specific service in the sale. (C.C. 798.72(b).) The management may not charge a fee (other than for a credit check in accordance with C.C. 798.74(b)) for an interview of a prospective homeowner. (C.C. 798.72(b); see *Vance v. Villa Park Mobilehome Estates* (1995) 36 C.A.4th 698, 706, 42 C.R.2d 723 [rent increase triggered by transfer and sale of mobilehome was not transfer or selling fee within meaning of C.C. 798.72].)

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SUPPLEMENT: [This section is current through the latest supplement]



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G. Transfer of Mobilehomes.

2. Repair or Removal of Home.

12 Witkin Sum. Cal. Law Real Property § 779

[§ 779] Repair or Removal of Home.

(1) *Removal of Home From Park.* During the term of a rental agreement, or in the 60 days following the initial notice of termination required by C.C. 798.55(b)(1) (infra, §785), the management may not require the removal of a mobilehome from the park even though it is sold to a third party. However, in order to upgrade the quality of the park, the management may require that specified mobilehomes that are old or in disrepair be removed. (C.C. 798.73.) When a mobilehome in disrepair is removed, management may not require repairs and improvements to the park space or property owned by management, except for damage caused by the homeowner or the homeowner's agent. (C.C. 798.73(d).) (See C.E.B., 1 Landlord-Tenant Practice 2d, §6.58.)

(2) *Repairs to Park or Mobilehome.* When a mobilehome that will remain in the park is sold or transferred, the park management may not require repairs or improvements to the park space or property owned by management, except for damage caused by the actions or negligence of the homeowner or the homeowner's agent. (C.C. 798.83.) Moreover, the management may only require repairs or improvements to the mobilehome, its appurtenances, or an accessory structure that meet all of the following conditions:

(a) Except as provided by C.C. 798.83, the repair or improvement is to the mobilehome, its appurtenances, or an accessory structure that is not owned and installed by the management. (C.C. 798.73.5(a)(1).)

(b) The repair or improvement is based on or required by a local ordinance or state statute or regulation relating to mobilehomes, or a rule or regulation of the mobilehome park that implements or enforces such an ordinance, statute, or regulation. (C.C. 798.73.5(a)(2).)

(c) The repair or improvement relates to the exterior of the mobilehome, its appurtenances, or an accessory structure that is not owned and installed by the management. (C.C. 798.73.5(a)(3).)

The management must provide a homeowner with a written summary of required repairs or improvements no later than 10 business days following the receipt of a request for this information, as part of the notice required by C.C. 798.59 (infra, §784). The summary must include specific references to the rules, regulations, ordinances, and statutes on which the request for repair or improvement is based. (C.C. 798.73.5(b).) C.C. 798.73.5 is declarative of existing law. It specifically limits repairs and improvements that can be required of a homeowner by park management at the time of

sale or transfer to the same repairs and improvements that can be required at any other time during a residency. (C.C. 798.73.5(c).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Removal of Home From Park.* The management may not require a mobilehome to be removed from the park under C.C. 798.73, unless the management has provided notice to the homeowner, particularly specifying the condition that permits the mobilehome's removal. (C.C. 798.73(e), added in 2007.)



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3. Management's Prior Approval of Purchaser.

12 Witkin Sum. Cal. Law Real Property § 780

[§ 780] Management's Prior Approval of Purchaser.

The management may require the right to approve the purchaser of a mobilehome that will remain in the park. In determining whether the purchaser has the financial ability to pay the rent and park charges, the management may not require the purchaser to submit copies of personal income tax returns in order to obtain approval for residency in the park. However, the management may require the purchaser to document the amount and source of the purchaser's gross monthly income or means of financial support. (C.C. 798.74(a).) (See C.E.B., 1 Landlord-Tenant Practice 2d, §6.55.)

On request, management must inform a prospective purchaser of a mobilehome that will remain in the park of the information it will require to determine the purchaser's acceptability as a homeowner. During the 15-day period following management's receipt of the requested information, the prospective homeowner must comply with a request by the management for a personal interview. Also during that 15-day period, management must notify the seller and prospective purchaser in writing of either acceptance or rejection and the reason for rejection. If approval is withheld for a reason other than the reasons specified by the Mobilehome Residency Law relating to transfer of mobilehomes, the management or owner of the park may be held liable for all damages proximately resulting from disapproval. (C.C. 798.74(a).) (On notice to specified persons that mobilehome *park* is for sale, see C.C. 798.80.)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Purchaser's Acceptance of Rental Agreement.

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[§ 781] Purchaser's Acceptance of Rental Agreement.

(1) *Agreement of Purchaser.* An escrow, sale, or transfer agreement involving a mobilehome that is to remain in the park must contain a copy of a fully executed rental agreement, or a statement signed by park management and the prospective homeowner that the parties have agreed to the terms and conditions of a rental agreement. (C.C. 798.75(a).) A purchaser who fails to execute the rental agreement does not have any rights of tenancy. (C.C. 798.75(b).)

(2) *Rental Agreement Disclosure Form.* The management must provide a prospective homeowner with a completed written disclosure form concerning the park at least 3 days before execution of a rental agreement or a statement signed by the management and the prospective homeowner that the parties have agreed to the terms and conditions of the rental agreement. The management must update the information on the disclosure form annually or whenever there is a material change in the condition of the park. (C.C. 798.75.5(a).) The form and contents of the disclosure are set forth in C.C. 798.75.5(b). The form requires the management to disclose the existence and condition of numerous facilities and aspects of the park, such as the clubhouse, walkways, streets, utilities systems, playground, parking areas, swimming pool, and laundry.

(3) *Compliance With Age Requirements.* Management may require compliance with a rule or regulation that limits residency based on age requirements for housing for older persons, if the rule or regulation complies with the federal Fair Housing Act and its implementing regulations. (C.C. 798.76; see *Schmidt v. Superior Court* (1989) 48 C.3d 370, 256 C.R. 750, 769 P.2d 932, 8 Summary (10th), *Constitutional Law*, §908 [construing C.C. 798.76, and upholding validity of park rule limiting residence to adults 25 years or older]; see C.E.B., 1 Landlord-Tenant Practice 2d, §6.6.)

(4) *Unlawful Occupant.* An occupant of a mobilehome who has no rights of tenancy and who refuses to surrender the park site for a period of 5 days after a demand to do so has been made is an "unlawful occupant" and is subject to summary proceedings under C.C.P. 1159 et seq. (see supra, §703 et seq.). (C.C. 798.75(c).) However, the occupant is not an "unlawful occupant" if the following conditions are met:

(a) The occupant is the mobilehome's registered owner. (C.C. 798.75(d)(1).)

(b) The management has determined that the occupant has the financial ability to pay the rent and park charges, will comply with the park's rules and regulations, based on the occupant's prior tenancies, and will comply with C.C. 798.70

et seq. (C.C. 798.75(d)(2).)

(c) The management did not offer the occupant a rental agreement. (C.C. 798.75(d)(3).)

(5) *Waiver of Rights Prohibited*. A waiver of rights in a rental or sale agreement is void. (C.C. 798.77.)

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5. Sale Following Death of Mobilehome Owner.

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[§ 782] Sale Following Death of Mobilehome Owner.

(1) *Prerequisites for Sale.* An heir, joint tenant, or personal representative who gains ownership of a mobilehome through the death of its owner may sell the mobilehome to a third party, if responsibilities for payment of rent, utilities, and reasonable maintenance of the mobilehome arising since the homeowner's death are satisfied up to the date the mobilehome is resold. (C.C. 798.78(a); on similar requirements for resale by legal or junior lienholder, see C.C. 798.79.) If the requirements of C.C. 798.78(a) are not satisfied, the management may require the mobilehome's removal from the park. (C.C. 798.78(b).)

(2) *Repair or Replacement of Mobilehome Before Sale.* Before selling the mobilehome, the heir, joint tenant, or personal representative may replace the existing mobilehome with another mobilehome, either new or used, or may repair the existing mobilehome to meet specified health and safety standards. (C.C. 798.78(c).)

(3) *Tenancy Instead of Sale.* An heir, joint tenant, or personal representative of the estate who desires to establish a tenancy in the park must comply with those provisions of C.C. 798.70 et seq. that identify the requirements for a prospective purchaser of a mobilehome that remains in the park. (C.C. 798.78(d).)

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6. Renting or Subletting in Medical Emergency.

12 Witkin Sum. Cal. Law Real Property § 783

[§ 783] Renting or Subletting in Medical Emergency.

C.C. 798.23.5 ensures that mobilehome owners may rent or sublet their homes and spaces in the event of a medical emergency. The management must permit a homeowner to rent his or her home that serves as the homeowner's primary residence, or sublet his or her space, if a medical emergency or medical treatment requires the homeowner to be absent from the home and this is confirmed in writing by an attending physician. (C.C. 798.23.5(a).) The management may, however, require the homeowner to reside in the mobilehome park for 1 year before permitting the renting or subletting of the home or space. (C.C. 798.23.5(b)(5).)

The rental or sublease must be for 6 to 12 months, unless the management approves a different term. (C.C. 798.23.5(b)(1).) The management may require approval of a prospective renter or sublessee, subject to the process and restrictions provided by C.C. 798.74(a) (supra, §780) for prospective purchasers of mobilehomes. A prospective sublessee must comply with rules limiting residency based on age requirements under C.C. 798.76 (supra, §781) and may be asked to pay for a personal reference check or consumer credit report. (C.C. 798.23.5(b)(2).) The renter or sublessee must comply with all the park's rules and regulations, and failure to do so may result in the termination of the homeowner's tenancy under C.C. 798.56. (C.C. 798.23.5(b)(3).)

The homeowner remains liable for the mobilehome park rent and other park charges (C.C. 798.23.5(b)(4)) and must keep his or her current address and telephone number on file with the management during the term of rental or sublease (C.C. 798.23.5(b)(7)). If a security deposit has been refunded to the homeowner under C.C. 798.39(b) or 798.39(c) (supra, §773), the management may require the homeowner to resubmit a security deposit for up to 2 months' rent in addition to the first month's rent and may retain the security deposit for the term of the rental or sublease. (C.C. 798.23.5(b)(6).) A homeowner may not charge a renter or sublessee more than the amount necessary to cover the cost of space rent, utilities, and scheduled loan payments on the mobilehome. (C.C. 798.23.5(c).)

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1. In General.

12 Witkin Sum. Cal. Law Real Property § 784

[§ 784] In General.

(1) *Legislative Findings.* Because of the high cost of moving mobilehomes, the potential for damage resulting from moving them, the requirements relating to their installation, and the cost of landscaping or lot preparation, owners of mobilehomes in mobilehome parks must be provided with the unique protection from actual or constructive eviction afforded by the provisions of the Mobilehome Residency Law. (C.C. 798.55(a).)

(2) *Termination by Homeowner.* A homeowner must give written notice to the management of not less than 60 days before vacating his or her tenancy. (C.C. 798.59.)

(3) *Obtaining Possession.* The provisions of C.C. 798.55 et seq. do not affect unlawful detainer rights or proceedings under *C.C.P. 1159* et seq. (supra, §703 et seq.). (C.C. 798.60.)

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H. Termination of Tenancy.

2. Notice of Termination.

12 Witkin Sum. Cal. Law Real Property § 785

[§ 785] Notice of Termination.

(1) *First Notice.* The management may not terminate or refuse to renew a tenancy except for a reason specified in C.C. 798.55 et seq. The management must give written notice to the homeowner (in the manner provided in *C.C.P. 1162*) to sell or remove, at the homeowner's election, the mobilehome from the park within a period of not less than 60 days, which period must be specified in the notice. A copy of the notice must be sent to the legal owner, each junior lienholder, and the registered owner of the mobilehome if other than the homeowner, by United States mail, within 10 days after the notice to the homeowner. The copy may be sent by regular or certified mail. (C.C. 798.55(b)(1); see C.E.B., 1 Landlord-Tenant Practice 2d, §6.74; Cal. Civil Practice, 3 Real Property Litigation, §31:50 et seq. [procedural checklists]; for form of notice, see Cal. Civil Practice, 3 Real Property Litigation, §31:55.)

(2) *Second Notice.* If the homeowner fails to pay the rent due within 3 days after receiving the first notice, and if the first notice was not sent by certified or registered mail with return receipt requested, another copy of the notice of termination must be sent to each of the specified parties within 10 days. This second notice must be sent by certified or registered mail with return receipt requested. (C.C. 798.55(c).)

(3) *Resident's Responsibilities Following Notice.* A mobilehome resident who remains in the mobilehome park after service of the notice remains subject to the Mobilehome Residency Law and the park's rules, including rules regarding maintenance of the space. (C.C. 798.55(d).) Management may take lawful acts to enforce the Law and the park's rules without waiving or otherwise affecting the notice to remove the mobilehome. (C.C. 798.55(e).)

The homeowner must pay past due rent and utilities if the mobilehome is sold under C.C. 798.55(b)(1). (C.C. 798.55(b)(2).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *First Notice.* See Cal. Civil Practice, 4 Real Property Litigation, §31:51 et seq. [procedural checklists]; Cal. Civil Practice, 4 Real Property Litigation, §31:56 [form of notice].(3) *Resident's Responsibilities Following Notice.* C.C. 798.55(d) was relettered C.C. 798.55(e) in 2005. C.C. 798.55(e) was relettered C.C. 798.55(f) in 2005.

(4) *(New) Recovery of Cost of Providing Notice.* If the management obtains a court judgment against a homeowner or resident, the management may recover the cost incurred in obtaining a title search for the purpose of complying with

the notice requirements of C.C. 798.55. (C.C. 798.55(d), added in 2005.)



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3. Grounds for Termination.

12 Witkin Sum. Cal. Law Real Property § 786

[§ 786] Grounds for Termination.

(1) *Permissible Grounds.* A tenancy may be terminated only for the reasons set forth by statute. (See C.E.B., 1 Landlord-Tenant Practice 2d, §6.63 et seq.; 43 A.L.R.5th 705 [validity, construction, and application of statutes regulating grounds for eviction of mobilehome owners].) The following grounds are specified:

(a) Failure of the homeowner or resident to comply with a local ordinance or state law or regulation relating to mobilehomes within a reasonable time after notice of noncompliance. (C.C. 798.56(a).)

(b) Conduct by the homeowner or resident on park premises that is a substantial annoyance to other homeowners or residents. (C.C. 798.56(b).)

(c) Conviction of the homeowner or resident for prostitution, for battery under P.C. 243(d), for assault under P.C. 245(a)(2) or (b), for lewd or lascivious acts under P.C. 288, for arson under P.C. 451, or for a felony controlled substance offense committed anywhere on the premises of the park, including within the homeowner's mobilehome. (C.C. 798.56(c)(1).) However, the tenancy may not be terminated for this reason if the person convicted has permanently vacated, and does not subsequently reoccupy, the mobilehome. (C.C. 798.56(c)(2).)

(d) Failure of the homeowner or resident to comply with a reasonable rule or regulation of the park that is part of the rental agreement after specified notice. (C.C. 798.56(d); see Cal. Civil Practice, 3 Real Property Litigation, §31:56.)

(e) Nonpayment of rent, utility charges, or reasonable incidental service charges as specified. (C.C. 798.56(e); see Cal. Civil Practice, 3 Real Property Litigation, §31:57.)

(f) Condemnation of the park. (C.C. 798.56(f).)

(g) Change of use of all or a portion of the park under specified circumstances. (C.C. 798.56(g); see *Keh v. Walters* (1997) 55 C.A.4th 1522, 1533, 65 C.R.2d 42 [forced vacancy of single space does not constitute "change of use" and thus park owner's eviction of tenant on that basis was unauthorized]; Cal. Civil Practice, 3 Real Property Litigation, §§31:58, 31:59.)

(2) *Impermissible Grounds.* A tenancy may not be terminated for the purpose of making a homeowner site available

to a person who purchased or proposes to purchase, or rents or proposes to rent, a mobilehome from the owner of the park or the owner's agent. (C.C. 798.58; see C.E.B., 1 Landlord-Tenant Practice 2d, §6.71.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Permissible Grounds.*(d) *Failure to comply with rule or regulation:* See Cal. Civil Practice, 4 Real Property Litigation, §31:57.

(e) *Nonpayment of rent or charges:* See Cal. Civil Practice, 4 Real Property Litigation, §31:58.

(g) *Change of use:* See Cal. Civil Practice, 4 Real Property Litigation, §§31:59, 31:60.



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H. Termination of Tenancy.

4. Abandoned Mobilehome.

12 Witkin Sum. Cal. Law Real Property § 787

[§ 787] Abandoned Mobilehome.

(1) *Definition.* An "abandoned mobilehome" is one about which all the following are true: (a) no rent has been paid on the site for the preceding 60 days, (b) the mobilehome is unoccupied, and (c) a reasonable person would believe it to be abandoned. (C.C. 798.61(a)(1); see C.C. 798.62(a)(2) [term includes trailer coaches, recreational vehicles, and uninhabitable mobilehomes].)

(2) *Notice.* After determining that a mobilehome has been abandoned, the management must post a notice to that effect for 30 days, and mail the notice to the last known address of the homeowner, registered owner, and holder of a security interest. The notice must be mailed by registered or certified mail with return receipt requested. (C.C. 798.61(b).)

(3) *Petition.* When the 30-day period has expired, the management may file a petition in the superior court in the county in which the park is located for a judicial declaration of abandonment. Copies must be served on the homeowner, the registered owner, and any security interest holder. Copies are served by "mailing copies to those persons at their last known addresses by registered or certified mail with a return receipt requested in the United States mail, postage prepaid." A copy of the petition must be posted on the mobilehome. The proceeding is a limited civil case (see 2 *Cal. Proc.* (4th), *Courts*, Supp., §248A). (C.C. 798.61(c); see *Marlow v. Campbell* (1992) 7 *C.A.4th* 921, 925, 9 *C.R.2d* 516, 2 *Cal. Proc.* (4th), *Courts*, §250 [jurisdiction over abandonment petitions conferred by C.C. 798.61(c) is exclusive]; *Cal. Civil Practice*, 3 Real Property Litigation, §31:61 [form of petition].)

(4) *Hearing and Judgment.* The matter is entitled to preference. (C.C. 798.61(d)(1).) If a preponderance of the evidence shows that the home was abandoned, and no party establishes an interest in it, the court must enter a judgment of abandonment, determine the amount of charges to which the petitioner is entitled, and award costs to the petitioner. The judgment must include an award of attorneys' fees if the petitioner prevails. An interest in the mobilehome is established by evidence of a right to possess it or a security or ownership interest in it. (C.C. 798.61(d)(2).) A default judgment may be entered if no responsive pleading is filed within 15 days after service of the petition by mail. (C.C. 798.61(d)(3).)

(5) *Sale.* Within 10 days following the judgment of abandonment, the management must inventory the contents of the mobilehome and submit the inventory to the court. (C.C. 798.61(e)(1).) The management must post and mail a

notice of intent to sell the abandoned mobilehome and its contents. The notice must specify the date of sale. (C.C. 798.61(e)(2).) A person who has a right to possession of the mobilehome may recover and remove it from the premises on payment to the management of all rent or other charges due, including reasonable costs of storage and other costs awarded by the court. When the management receives the payment and the mobilehome is removed, the management must immediately file an acknowledgment of satisfaction of judgment. (C.C. 798.61(e)(3).)

Following the judgment of abandonment, but not less than 10 days following the notice of sale, management may conduct a public sale of the abandoned mobilehome and its contents. (C.C. 798.61(f); on management's bid and offset and distribution of the proceeds, see C.C. 798.61(f); on required accounting to court, see C.C. 798.61(g).)

The management must provide the purchaser with the judgment of abandonment and evidence of the sale, as specified by the State Department of Housing and Community Development or the Department of Motor Vehicles, which must register the title (see *Veh.C.* 5903). The sale passes title to the purchaser free of any prior interest, including security interests in the mobilehome. Title is subject to any lien under *Health & Saf.C. 18116.1* (mobilehome registration fees). (C.C. 798.61(h).)

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SUPPLEMENT: [This section is current through the latest supplement]

(3) *Petition*. See Cal. Civil Practice, 4 Real Property Litigation, §31:64 [form of petition]. *Limited civil cases:*

Cross-Reference: 2 Cal. Proc. (5th), Courts, §241 et seq.

Marlow case:

Cross-Reference: *Marlow v. Campbell* is not discussed in 2 Cal. Proc. (5th), Courts.



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5. Rights of Legal Owners and Junior Lienholders.

12 Witkin Sum. Cal. Law Real Property § 788

[§ 788] Rights of Legal Owners and Junior Lienholders.

(1) *Options.* Within 60 days following receipt, or 65 days following mailing, of the notice of termination of tenancy (see *supra*, §785) for nonpayment of rent or other charges, the legal owner and each junior lienholder must notify the management in writing of at least one of the following:

(a) Its offer to sell the obligation secured by the mobilehome to the management for a specified amount. In that event, the management has 15 days following receipt of the offer to accept or reject the offer in writing. If the offer is rejected, the owner or lienholder has 10 days in which to exercise one of the other options contained in C.C. 798.56a and must notify management in writing of its choice. (C.C. 798.56a(a)(1).)

(b) Its intention to foreclose on its security interest in the mobilehome. (C.C. 798.56a(a)(2).)

(c) Its request that the management pursue the termination of tenancy against the homeowner and its offer to reimburse management for reasonable attorneys' fees and court costs in doing so. If this request and offer are made, the owner or lienholder must reimburse the management within 60 calendar days after being notified of the amount of the fees and costs, or on or before the date the mobilehome is resold, whichever occurs first. (C.C. 798.56a(a)(3).) (See 24 *Pacific L. J.* 995.)

(2) *Right To Keep Mobilehome on Site Until Resold.* A legal owner or junior lienholder has the right to sell the mobilehome within the park to a third party and to keep the mobilehome on the site until it is resold only if the owner or lienholder performs all of the following acts:

(a) Notifies management in writing of the intention to exercise either option described in C.C. 798.56a(a)(2) or (a)(3) within the time period specified in C.C. 798.56a(a), and satisfies all of the homeowner's responsibilities and liabilities owing to the management for the 90 days preceding the mailing of the notice of termination of tenancy and then continues to satisfy them as they accrue from the date of the mailing of that notice until the date the mobilehome is resold. (C.C. 798.56a(b)(1); see C.C. 798.56a(c) ["homeowner's responsibilities and liabilities" defined].) Satisfaction, under C.C. 798.56a, of the homeowner's responsibilities and liabilities does not cure the homeowner's default. (C.C. 798.56a(g).)

(b) Within the time period specified in C.C. 798.56a(a), "commences all repairs and necessary corrective actions so that the mobilehome complies with park rules and regulations in existence at the time the notice of termination of tenancy was given as well as the health and safety standards specified in" *Health & Saf.C. 18550, 18552, 18605* "and completes these repairs and corrective actions within 90 calendar days of that notice, or before the date the mobilehome is sold, whichever is earlier." (C.C. 798.56a(b)(2).)

(c) Complies with the requirements of C.C. 798.70 et seq. relating to the transfer of the mobilehome to a third party (see *supra*, §778 et seq.). (C.C. 798.56a(b)(3).)

(3) *Failure To Exercise Options*. Notwithstanding any other provision of law, in the event neither the legal owner nor a junior lienholder notifies the management of its decision pursuant to C.C. 798.56a(a) within the period allowed, or performs as agreed within 30 days, the management may either remove the mobilehome from the premises and place it in storage or store it on its site. The management has the same storage options if a registered owner of an unencumbered mobilehome fails to comply with a notice of termination and is either legally evicted or vacates the premises. If the management chooses one of the storage options, the management has a warehouseman's lien under U.C.C. 7209 (see 13 *Summary* (10th), *Personal Property*, §228) against the mobilehome for the costs of dismantling and moving, if appropriate, as well as storage, which is superior to all other liens, except the lien provided for in *Health & Saf.C. 18116.1*. It may enforce the lien pursuant to U.C.C. 7210 (see 13 *Summary* (10th), *Personal Property*, §229), either after the judgment in an unlawful detainer action or after the resident physically vacates the mobilehome, whichever occurs earlier. After the sale to enforce the lien, the management must provide the purchaser with evidence of the sale to be used to register title to the mobilehome to the purchaser. (C.C. 798.56a(e).)

(4) *Effect of Homeowner's Bankruptcy*. In the event the homeowner files for bankruptcy, the periods set forth in C.C. 798.56a are tolled until the mobilehome is released from bankruptcy. (C.C. 798.56a(d).)

(5) *Notices*. All written notices required by C.C. 798.56a must be sent to the other party by certified or registered mail with return receipt requested. (C.C. 798.56a(f).)

SUPPLEMENT: [This section is current through the latest supplement]



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XI. MOBILEHOMES
I. Actions and Penalties.

12 Witkin Sum. Cal. Law Real Property § 789

[§ 789] Actions and Penalties.

(1) *Management's Wilful Violation.* If the mobilehome owner or former owner prevails in a civil action, including a small claims court action, against the management to enforce rights under the Mobilehome Residency Law, the homeowner, in addition to damages afforded by law, may in the discretion of the court be awarded an amount not to exceed \$ 2,000 for each wilful violation of the statute. (C.C. 798.86(a); see *10 Pacific L. J.* 566; *39 A.L.R.4th* 859 [landlord's fraud or deceptive trade practices].) "Willful," for purposes of C.C. 798.86, refers to intentional conduct undertaken with knowledge or consciousness of its probable results. Wilful conduct does not require a purpose or specific intent to bring about a result, but it does require more than negligence or accidental conduct. (*Patarak v. Williams (2001) 91 C.A.4th* 826, 829, *111 C.R.2d* 381 [wilful failure to maintain septic system and wilful denial of access to common areas].)

De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates (2001) 94 C.A.4th 890, *114 C.R.2d* 708, held that actual damages, the statutory penalty provided in C.C. 798.86, and costs and attorneys' fees authorized by C.C. 798.85 are the exclusive remedies in an action to enforce the Mobilehome Residency Law and that punitive damages are not available when the action is based solely on a violation of the statute. (*94 C.A.4th* 906 [although association alleged tort causes of action, it did not pursue them at trial].) However, C.C. 798.86(b), enacted after *De Anza Santa Cruz*, provides that a homeowner or former homeowner who prevails in a civil action against management to enforce his or her rights under the Mobilehome Residency Law may be awarded either punitive damages under C.C. 3294 or the statutory penalty provided in C.C. 798.86(a).

(2) *Management's Failure To Maintain Facilities.* The substantial failure of the management of a park to provide and maintain common facilities in good working order and condition is deemed to create a public nuisance, and the same is true of a substantial violation of a mobilehome park rule. The remedy, however, is limited to a civil action or abatement. (C.C. 798.87(a), (b); see *14 Pacific L. J.* 696.) The civil action may be brought by a park resident or the park management. In addition, the action may be brought in the name of the people of the State of California by the Attorney General or by the district attorney, the county counsel, or the city attorney of the jurisdiction in which the park is located. (C.C. 798.87(c).)

(3) *Costs and Attorneys' Fees.* In an action under the Mobilehome Residency Law, the prevailing party is entitled to reasonable attorneys' fees and costs. A party is deemed prevailing if judgment is rendered in the party's favor, or the action is dismissed in the party's favor before or during trial, unless the parties otherwise agree. (C.C. 798.85; see *Del*

Cerro Mobile Estates v. Proffer (2001) 87 C.A.4th 943, 948, 105 C.R.2d 5 [tenant was entitled to recover attorneys' fees under C.C. 798.85 after landlord voluntarily dismissed action for abatement of nuisance].)

(4) *Notice of Impending Action*. Before a homeowner may commence an action (except an action for personal injury or wrongful death) based on the management's alleged failure to maintain the physical improvements in the common facilities in good working order or condition or an alleged reduction of service, the homeowner must give the management at least 30 days' prior notice of the homeowner's intention. (C.C. 798.84(a).) The statute specifies the form, content, and manner of service of the notice. (C.C. 798.84(b), 798.84(c), 798.84(d), 798.84(e); see Cal. Civil Practice, 3 Real Property Litigation, §31:60.)

(5) *Injunctive Relief for Rule Violations*. Management may file a petition for injunctive relief against violations of reasonable mobilehome park rules or regulations. (C.C. 798.88(a), 798.88(b).) A 15-day temporary restraining order may be issued on a showing that a continuing or recurring violation by a homeowner or resident would cause great or irreparable harm to management or to other homeowners or residents. (C.C. 798.88(b), (c).) A hearing must be held within 15 days of the petition's filing, and if the court finds clear and convincing evidence of a violation, it must issue an injunction prohibiting it. (C.C. 798.88(d).) The duration of the injunction must not exceed 3 years (C.C. 798.88(d)), but within 3 months of its expiration, management may petition for a new injunction where there have been recurring or continuous violations of the injunction, or where there is a threat of future violations of park rules on termination of the injunction (C.C. 798.88(e)). (See *Rancho Santa Paula Mobilehome Park, Ltd. v. Evans* (1994) 26 C.A.4th 1139, 1146, 32 C.R.2d 464 [retroactive restriction against subleasing was unreasonable and therefore unenforceable under C.C. 798.88].) The remedy in C.C. 798.88 is nonexclusive and nothing in C.C. 798.88 precludes or limits the management's rights to terminate a tenancy. (C.C. 798.88(g).)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Costs and Attorneys' Fees*. C.C. 798.85 provides for fees in actions "arising out of" the Mobilehome Residency Law. This phrase encompasses only those actions directly involving the application of the Mobilehome Residency Law's provisions in specific factual contexts addressed by the statute, such as actions by mobilehome park residents against management for failing to maintain common facilities in good working order. (*MHC Financing Ltd. Partnership Two v. Santee* (2005) 125 C.A.4th 1372, 1396, 1398, 23 C.R.3d 622 [declaratory relief action claiming that Mobilehome Residency Law preempted provisions of local rent control ordinance related to, but did not arise out of, Law]; see *SC Manufactured Homes v. Canyon View Estates* (2007) 148 C.A.4th 663, 673, 56 C.R.3d 79 [mobilehome dealer's action against other dealers and mobilehome park managers and owners, alleging that kickback scheme among defendants prevented plaintiff from selling mobilehomes, did not arise out of Mobilehome Residency Law; plaintiff sought to protect its own pocketbook, not rights of tenants].)(4) *Notice of Impending Action*. See Cal. Civil Practice, 4 Real Property Litigation, §31:62.

(5) *Injunctive Relief for Rule Violations*. Although C.C. 798.55 (text, §784) limits the eviction rights of mobilehome park owners, C.C. 798.88 expressly preserves their ability to secure the quiet enjoyment of mobilehome park tenants by pursuing injunctive relief against offending tenants. (*Andrews v. Mobile Aire Estates* (2005) 125 C.A.4th 578, 591, 22 C.R.3d 832 [mobilehome park tenants presented triable issues of fact whether park owner breached duty to preserve tenants' quiet enjoyment by failing to take action against troublesome neighboring tenant].)



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XI. MOBILEHOMES

J. Conversion of Mobilehome Park.

12 Witkin Sum. Cal. Law Real Property § 790

[§ 790] Conversion of Mobilehome Park.

(1) *Conversion to Other Uses.* When a subdivider files a tentative or parcel map for a subdivision to be created from the conversion of a mobilehome park to another use, the subdivider must also file a report on the impact of the conversion on the displaced residents of the mobilehome park to be converted. The report must address the availability of adequate replacement space in mobilehome parks. (*Govt.C. 66427.4(a)*; on tentative and final maps for creation of subdivisions, see *infra*, §§811, 812.) The subdivider must make a copy of the report available to each resident of the mobilehome park at least 15 days before the hearing on the map by the advisory agency or, if there is no advisory agency, by the legislative body that decides whether to approve the subdivision. (*Govt.C. 66427.4(b)*.) The legislative body or advisory agency that is authorized to approve the map may require the subdivider to take steps to mitigate adverse impacts of the conversion on the ability of displaced mobilehome park residents to find adequate space in a mobilehome park. (*Govt.C. 66427.4(c)*.)

(2) *Conversion to Resident Ownership.* *Govt.C. 66427.4* does not apply to a subdivision that is created from the conversion of a rental mobilehome park to resident ownership. (*Govt.C. 66427.4(e)*.) Instead, *Govt.C. 66427.5* sets forth the manner in which a subdivider must avoid the economic displacement of all nonpurchasing residents in that type of conversion. At the time of filing a tentative or parcel map for the subdivision to be created from the conversion of a rental mobilehome park to resident ownership, the subdivider must offer each existing tenant an option to either purchase the tenant's unit or to continue residency as a tenant. (*Govt.C. 66427.5(a)*.) The subdivider must file a report on the impact of the conversion (*Govt.C. 66427.5(b)*) and make the report available to each resident of the mobilehome park at least 15 days before the hearing on the map (*Govt.C. 66427.5(c)*). The subdivider must survey the park residents to determine their level of support for the conversion. (*Govt.C. 66427.5(d)*.) The subdivider will be subject to a hearing by the legislative body or advisory agency that is authorized to approve the map, but the scope of the hearing is limited to the issue of compliance with *Govt.C. 66427.5*. (*Govt.C. 66427.5(e)*.) (See *El Dorado Palm Springs, Ltd. v. Palm Springs* (2002) 96 C.A.4th 1153, 1157, 118 C.R.2d 15 [city council exceeded authority in imposing conditions on applicant seeking conversion of mobilehome park; scope of council's hearing on application was limited to compliance with *Govt.C. 66427.5(d)*, and council's reliance on *Govt.C. 66427.4(c)*, which allows mitigation of adverse impact of conversion on displaced residents, but which clearly applies only when park is converted to wholly different use, was misplaced].)

The subdivider must avoid the economic displacement of nonpurchasing residents by limiting the time period over which rents may increase from the preconversion rent to market levels. (See *Govt.C. 66427.5(f)(1)* [schedule for rent

increases]; *Donohue v. Santa Paula West Mobile Home Park* (1996) 47 C.A.4th 1168, 1173, 55 C.R.2d 282 [city's rent initiative, rather than Govt.C. 66427.5, governed rents at mobilehome park where tentative map had been filed, but conversion had never occurred].)

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XII. OIL AND GAS LEASES

A. In General.

1. Nature of Right to Oil and Gas.

12 Witkin Sum. Cal. Law Real Property § 791

[§ 791] Nature of Right to Oil and Gas.

Under the modern view there is no ownership of oil and gas "in place." The landowner merely has an exclusive right to drill on his or her land and reduce the oil or gas to possession, thereby gaining title to the part severed. (*Callahan v. Martin* (1935) 3 C.2d 110, 117, 43 P.2d 788; *Bernstein v. Bush* (1947) 29 C.2d 773, 778, 177 P.2d 913; *Gerhard v. Stephens* (1968) 68 C.2d 864, 878, 69 C.R. 612, 442 P.2d 692, *infra*, §793; see *Pacific Gas & Elec. Co. v. Zuckerman* (1987) 189 C.A.3d 1113, 1137, 234 C.R. 630 ["rule of capture" doctrine]; 51 *Cal. L. Rev.* 506 [historical development of oil and gas law of United States]; 3 *U.C.L.A. L. Rev.* 424 [oil and gas leases in California]; 3 *U.C.L.A.* 449 [primer of mineral and royalty conveyancing]; Brown, *The Law of Oil and Gas Leases* 2d; Kuntz (Thornton), *Law of Oil and Gas*; 28 *A.L.R.3d* 1426 [lessee's right and duty of geophysical or seismograph exploration or survey]; Summers, *Law of Oil and Gas*; 38 *A.L.R.3d* 983 [rights to "distillate," "condensate," or "natural gasoline"]; 94 *A.L.R.2d* 543 [rights to gas reduced to possession and later stored in natural reservoir]; 19 *A.L.R.4th* 1182 [rights and obligations, with respect to adjoining landowners, arising out of secondary recovery of gas, oil, and other fluid minerals]; 56 *A.L.R.4th* 539 [oil and gas royalty as real or personal property]; 38 *Am.Jur.2d* (1999 ed.), *Gas and Oil* §1 et seq.; 9 *Am.Jur. Legal Forms* 2d (2002 ed.), *Gas and Oil*, §129:6 et seq.; 12B *Am.Jur. P.P. Forms* (1999 ed.), *Gas and Oil*, §61 et seq.)

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XII. OIL AND GAS LEASES

A. In General.

2. Ordinary Lease Distinguished.

12 Witkin Sum. Cal. Law Real Property § 792

[§ 792] Ordinary Lease Distinguished.

The object of an oil lease is not the use of the premises, but the discovery and production of oil and gas, and the lease is a method by which the landowner is able to finance the development of the land. The lessee furnishes the capital and technical skill, takes the speculative risks, and receives the major portion of the oil and gas produced, but pays a "royalty" or rent. (See *13 Pacific L. J.* 485 [whether oil and gas lease in California is still landlord-tenant relationship]; *7 U.C.L.A. L. Rev.* 358 [oil lease as trust asset]; *7 U.C.L.A. L. Rev.* 409 [protecting interests carved out of lease].)

The lease gives the lessee the exclusive right to take the oil and gas. This right has been characterized as a *profit a prendre* in gross (because it is not connected with a dominant tenement). (See *Dabney v. Edwards* (1935) 5 C.2d 1, 11, 53 P.2d 962; *Tanner v. Title Ins. & Trust Co.* (1942) 20 C.2d 814, 819, 129 P.2d 383; *Gavina v. Smith* (1944) 25 C.2d 501, 505, 154 P.2d 681; *Lough v. Coal Oil* (1990) 217 C.A.3d 1518, 1525, 266 C.R. 611.) The lease may run for a fixed term of years, in which case it is a *chattel real*, or "for so long thereafter" as oil is produced in paying quantities, in which case it is a *determinable fee*. (See *Dabney v. Edwards*, *supra*; *Callahan v. Martin* (1935) 3 C.2d 110, 118, 43 P.2d 788; *Renner v. Huntington-Hawthorne Oil & Gas Co.* (1952) 39 C.2d 93, 98, 244 P.2d 895; *Montana-Fresno Oil Co. v. Powell* (1963) 219 C.A.2d 653, 659, 666, 33 C.R. 401 [determinable fee].) But it is unenforceable after 99 years from the commencement of the term. (C.C. 718f.)

If land subject to an oil and gas lease is subdivided without reference to oil rights, California follows the apportionment rule, under which the royalties are apportioned among the lot owners instead of going entirely to the owner of the lot on which oil is produced. (*Standard Oil Co. v. John P. Mills Organization* (1935) 3 C.2d 128, 133, 43 P.2d 797; see *Dishman v. Union Oil Co.* (1956) 145 C.A.2d 261, 265, 302 P.2d 326 [method of apportionment]; *5 U.C.L.A. L. Rev.* 555 [entirety clause providing for apportionment].)

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A. In General.
3. Abandonment of Interest.

12 Witkin Sum. Cal. Law Real Property § 793

[§ 793] Abandonment of Interest.

In *Gerhard v. Stephens* (1968) 68 C.2d 864, 69 C.R. 612, 442 P.2d 692, successors of stockholders in defunct corporations claimed mineral rights in property dating from 1910. The chief defense was that defendants had occupied the surface for 47 years, and that plaintiffs and their predecessors had failed to assert the rights until defendants struck oil. Plaintiffs contended that their legal interest in fee simple could not be abandoned. On this new question for California, the court held that oil and gas interests could be abandoned, and the trial judge's finding of abandonment by one set of plaintiffs was sustained.

(a) The original grant to plaintiffs' predecessors was of the exclusive privilege of drilling for oil and gas, unlimited in duration, i.e., an estate in fee. (68 C.2d 880.) But perpetual easements created by grant may be abandoned (see *supra*, §422), and for purposes of this issue, easements and profits are indistinguishable. (68 C.2d 882.) Opinions stating that a "fee interest cannot be abandoned" use the term in its possessory rather than its durational sense. (68 C.2d 883.)

(b) "To summarize, we look to the *nature* of the interest as well as its *duration* to define plaintiffs' rights. Incorporeal interests, as distinguished from corporeal ones, may be abandoned, whatever their life, whether limited or unlimited in time, whether 'fee' or a term, whether perpetual or restricted. In short, the temporal life of the hereditament does not tell us for this purpose what *kind* of a legal interest it is; we must classify it according to its genus, not merely its durational characteristic." (68 C.2d 886.)

(c) Both principle and policy support this conclusion. The historical rule against abandonment theorized that title to land must rest somewhere, but no abeyance results from abandonment of a perpetual easement or profit, for the interest returns to the estate out of which it is carved--the servient tenement (easement) or surface estate (profit to remove oil and gas). Moreover, abandonment of the mineral interest helps to clear the title and remove impediments to development. (68 C.2d 887.)

(d) The elements of abandonment of easements by grant may be considered: nonuse, accompanied by unequivocal and decisive acts showing intention to abandon. (68 C.2d 890.) The question is one of fact, and, in order to support the conclusion, "the trial court must find either that the owner's future use of the right could result only from a palpably unsound business judgment or that the owner has given a further indication of his intent to abandon." (68 C.2d 895.) (See 21 *Stanf. L. Rev.* 1227 [abandonment of mineral rights]; 5 *Cal. Western L. Rev.* 313 [*Gerhard*]; 2 *Loyola L.A. L.*

Rev. 152 [same]; 38 Am.Jur.2d (1999 ed.), Oil and Gas §§244, 245.)

In response to a Law Revision Commission Recommendation, the 1984 Legislature enacted a statutory procedure for termination of dormant mineral rights. (See C.C. 883.110 et seq.; supra, §§345, 346; *16 A.L.R.4th 1029* [validity and construction of statutes providing for reversion of mineral estates for abandonment or nonuse].)

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A. In General.
4. Special Problems.

12 Witkin Sum. Cal. Law Real Property § 794

[§ 794] Special Problems.

Some important aspects of this subject, either beyond the scope of this work or covered in other chapters, may be noted here:

(1) Leasing problems arising where land is subject to a life estate (see 3 *U.C.L.A. L. Rev.* 484, 601), or is concurrently owned. (See 3 *U.C.L.A. L. Rev.* 495; *supra*, §51.)

(2) Separate grant of estate in surface or minerals. (See *supra*, §17.)

(3) Reservation in a grant as a violation of the rule against perpetuities. (See *supra*, §187 et seq.)

(4) Recordation of a fictitious oil lease. (C.C. 1219.)

(5) Title insurance problems. (See 3 *U.C.L.A. L. Rev.* 523.)

(6) Right of a representative (executor, administrator, or guardian) to enter into a lease of oil lands. (See 14 *Summary* (10th), *Wills and Probate*, §502.)

(7) Power of governmental agency to lease public lands. (See *Pub.Res.C.* 6851 et seq., 7056; 3 *U.C.L.A. L. Rev.* 505; on tideland leases, see 5 *U.C.L.A. L. Rev.* 427.)

(8) General business and financing problems. (See 3 *U.C.L.A. L. Rev.* 550.)

(9) Interests subject to Corporate Securities Law. (See 9 *Summary* (10th), *Corporations*, §401 et seq.)

(10) Absolute liability for damage from erupting well. (See 6 *Summary* (10th), *Torts*, §1415.)

(11) Federal regulation of natural gas. (See 5 *U.C.L.A. L. Rev.* 563.)

(12) State regulations: nuisances and conservation (proration, spacing, pooling, unitization, unreasonable waste of natural gas). (See *Pub.Res.C.* 3000 et seq.; *LeBard v. Richfield Oil Corp.* (1961) 56 C.2d 532, 535, 15 C.R. 617, 364 P.2d 449 [sale of land in pooled unit without reserving oil and gas rights]; 5 *U.C.L.A. L. Rev.* 503; 50 A.L.R.3d 240

[duty to plug abandoned well]; 8 *Summary* (10th), *Constitutional Law*, §1069.)

(13) Local county and municipal regulations (zoning, nuisance, etc.). (See 5 *U.C.L.A. L. Rev.* 513.)

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B. Form and Content of Lease.
1. In General.

12 Witkin Sum. Cal. Law Real Property § 795

[§ 795] In General.

The complex problems involved in oil leasing have led to the development of several typical, although not wholly standard, forms of lease used in various oil producing areas. (See Brown, 2 *The Law of Oil and Gas Leases* 2d, §18.01 et seq.; 9 *Am.Jur. Legal Forms* 2d (2002 ed), Gas and Oil, §129:6 et seq.; for specific provisions, see *infra*, §796 et seq.)

Often a number of adjoining landowners pool their interests and join in a single "community lease," agreeing to share in benefits in proportion to the areas of their respective lands. (See *Tanner v. Olds* (1946) 29 *C.2d* 110, 115, 173 *P.2d* 6; *Kirker v. Shell Oil Co.* (1951) 104 *C.A.2d* 497, 498, 231 *P.2d* 905; *Hancock Oil Co. v. Meeker-Garner Oil Co.* (1953) 118 *C.A.2d* 379, 381, 257 *P.2d* 988; Brown, 1 *The Law of Oil and Gas Leases* 2d, §12.02; cf. *Taylor v. Continental Southern Corp.* (1951) 104 *C.A.2d* 425, 432, 233 *P.2d* 577 [lessor must own some land; plaintiff, purporting only to have acquired interests in dedicated streets and alleys, was denied share of royalties].)

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B. Form and Content of Lease.

2. Granting and Habendum Clauses.

12 Witkin Sum. Cal. Law Real Property § 796

[§ 796] Granting and Habendum Clauses.

(1) *Granting Clause.* A common granting clause states that the owner "does hereby grant, demise, lease and let" to the lessee for the sole purpose of exploring and operating for oil and gas. (See Brown, 1 *The Law of Oil and Gas Leases* 2d, §3.05 et seq.; 61 *A.L.R.3d* 1109 [grant, lease, exception or reservation as including oil shale].)

(2) *Habendum Clause.* This provision states a primary term of years (to cover the exploration period) and an indefinite term thereafter for profitable production; e.g., "To have and to hold the same for 20 years ... and so long thereafter as oil or gas or other hydrocarbon substances can be secured therefrom in paying quantities." (See *Renner v. Huntington-Hawthorne Oil & Gas Co.* (1952) 39 *C.2d* 93, 96, 244 *P.2d* 895; *Barnard v. Gibson* (1950) 100 *C.A.2d* 527, 533, 224 *P.2d* 90 [meaning of "paying quantities" under habendum clause, i.e., kind of production necessary to keep lease in effect]; *Valer Oil Co. v. Souza* (1960) 182 *C.A.2d* 790, 797, 6 *C.R.* 301; *Montana-Fresno Oil Co. v. Powell* (1963) 219 *C.A.2d* 653, 659, 33 *C.R.* 401; *West v. Russell* (1970) 12 *C.A.3d* 638, 643, 90 *C.R.* 772, *infra*, §804; *Southern Pac. Land Co. v. Westlake Farms* (1987) 188 *C.A.3d* 807, 818, 233 *C.R.* 794 [term stated in habendum clause extended by other lease provision]; *Lough v. Coal Oil* (1990) 217 *C.A.3d* 1518, 1526, 1528, 266 *C.R.* 611; *San Mateo Community College Dist. v. Half Moon Bay Ltd. Partnership* (1998) 65 *C.A.4th* 401, 413, 76 *C.R.2d* 287; 100 *A.L.R.2d* 885 [rights of parties to oil and gas lease or royalty deed after expiration of fixed term where production temporarily ceases]; 96 *A.L.R.2d* 322 [what amounts to development or operation for oil or gas within terms of habendum clause extending primary term while premises are being "developed or operated"]; 43 *A.L.R.3d* 8 [meaning of "paying quantities" in oil and gas lease]; Brown, 1 *The Law of Oil and Gas Leases* 2d, §5.01 et seq.; 38 *Am.Jur.2d* (1999 ed.), *Gas and Oil* §§134, 228, 229.)

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B. Form and Content of Lease.
3. Other Provisions.

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[§ 797] Other Provisions.

The most important additional provisions of the lease are those that set forth the obligations of the lessee (*infra*, §799 et seq.). But many other matters may be included, e.g.:

- (1) A lesser interest clause. (See *infra*, §800.)
- (2) A lessor's warranty clause. (See 3 *U.C.L.A. L. Rev.* 445; Brown, 1 *The Law of Oil and Gas Leases* 2d, §14.01 et seq.)
- (3) A "shut-in royalty clause," permitting the lessee to cap or shut in a gas well and pay a fixed sum per acre when no market is available. (See 3 *U.C.L.A. L. Rev.* 564; Brown, 1 *The Law of Oil and Gas Leases* 2d, §6.08; 38 *Am.Jur.2d* (1999 ed.), *Gas and Oil* §92; 96 *A.L.R.2d* 345 ["shut-in royalty" payment provisions in oil and gas leases].)
- (4) A lessee's covenant to operate in accordance with customary field practices. (See *Baldwin v. Kubetz* (1957) 148 *C.A.2d* 937, 939, 307 *P.2d* 1005 [failure to maintain proper equipment, creation of fire hazard]; 7 *U.C.L.A. L. Rev.* 409 [covenants protecting owner of interests in production against operator].)
- (5) A pooling and unitization clause, to allow pooling of contiguous small lots and economical operation of the producing area as a unit, with royalties prorated in accordance with the amount of land owned. (See 3 *U.C.L.A. L. Rev.* 439; Brown, 1 *The Law of Oil and Gas Leases* 2d, §8.00 et seq.; 38 *Am.Jur.2d* (1999 ed.), *Gas and Oil* §188; 9 *Am.Jur. Legal Forms* 2d (2002 ed.), *Gas and Oil*, §§129:82 et seq., 129:375 et seq.)
- (6) A lessee's covenant to restore the premises to their original condition at expiration of the lease. (See *Ballsun v. Star Petroleum Co.* (1930) 105 *C.A.* 679, 681, 288 *P.* 437; 62 *A.L.R.4th* 1153 [duty of lessee to restore surface on termination of operations].)
- (7) A *force majeure* clause, excusing performance when prevented by the elements, or war, strike, etc. (See *Kirker v. Shell Oil Co.* (1951) 104 *C.A.2d* 497, 500, 231 *P.2d* 905; *San Mateo Community College Dist. v. Half Moon Bay Ltd. Partnership* (1998) 65 *C.A.4th* 401, 413, 76 *C.R.2d* 287; Brown, 1 *The Law of Oil and Gas Leases* 2d, §13.01 et seq.; 38 *Am.Jur.2d* (1999 ed.), *Gas and Oil* §91; 9 *Am.Jur. Legal Forms* 2d (2002 ed.), *Gas and Oil*, §129:64 et seq.; 46 *A.L.R.4th* 976 [construction and effect of gas and oil lease *force majeure* provisions].)

(8) A default clause, providing that if the lessee violates any term or condition of the lease, and fails to cure the default within a specified time after written notice from the lessor, the lessor may terminate. (See *Reserve Oil & Gas Co. v. Metzenbaum* (1948) 84 C.A.2d 769, 771, 191 P.2d 796; 3 U.C.L.A. L. Rev. 443; 9 Am.Jur. Legal Forms 2d (2002 ed.), Gas and Oil, §§129:222 et seq., 129:256 et seq.)

(9) A clause restricting assignment or subletting by the lessee. (See 3 U.C.L.A. L. Rev. 442; 9 Am.Jur. Legal Forms 2d (2002 ed.), Gas and Oil, §129:202 et seq.; supra, §546 et seq.)

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B. Form and Content of Lease.
4. Right To Use Surface.

12 Witkin Sum. Cal. Law Real Property § 798

[§ 798] Right To Use Surface.

In *Wall v. Shell Oil Co.* (1962) 209 C.A.2d 504, 25 C.R. 908, plaintiffs, by transfers originating in the fee simple owner, acquired oil rights in a large tract, with the right to enter on the surface for development and production. Thereafter, the successors of the owner subdivided the tract, and contended that plaintiffs were limited to use of the surface area overlying the oil. *Held*, the contention was unsound.

(a) "The true rule is that (1) where the owner of a parcel of land sells a portion thereof reserving or excepting the oil and mineral rights therein, or where a person purchases the oil and mineral rights in a specific tract of land, the surface area of such lands may be subjected only to such burdens as are reasonably necessary to the full enjoyment of the mineral estate in such particular specific parcels and the surface area may not be burdened by installations or surface fixtures designed to serve oil producing facilities located without the parcels; but (2) the owner of the surface area in the parcel following such sales or transfers may not by any subsequent subdivision of the surface area deprive the owner of the oil and mineral estate of his rights in the entire parcel." (209 C.A.2d 513.)

(b) Each subsequent purchaser of a subdivision with notice of the prior sale and reservation of rights takes with knowledge that the surface ownership "may be burdened in part, and, in very rare cases perhaps, in its totality," by the reasonable exercise of the rights of the owner of the oil and mineral estate. (209 C.A.2d 513.) Although the judgment failed to declare that plaintiffs' rights must be exercised in a reasonable manner, conditions may change and affect the reasonableness of the oil producer's choice of location for a particular facility. "If a particular facility is necessary and convenient to the operations of the oil and mineral owner, it may be placed anywhere upon the surface area in which he has the right of user, so long as such placement is reasonable under prevailing conditions and even though such placement in particular instances may work a hardship on the surface owner. Certainly, the owner of the oil and mineral estate cannot be required to spread his facilities over a multiple division tract solely in order that a prorata burden must fall on each subdivision." (209 C.A.2d 517.) (See *Cassinis v. Union Oil Co.* (1993) 14 C.A.4th 1770, 1780, 18 C.R.2d 574 [owner of surface estate could not give lessee of mineral estate valid authorization to inject off-site wastewater into well on lease; citing *Wall v. Shell Oil Co.*]; 53 A.L.R.3d 16 [what constitutes reasonably necessary use of surface by mineral owner, lessee, or driller].)

C.C.P. 772.010 et seq. authorize an action by the owner against the lessee to terminate the right of entry to all or part of the land where (a) the lease is more than 20 years old, (b) the land to be freed is not occupied by a producing

well, and (c) termination of the right of entry will not significantly interfere with the lessee's right to continue to produce oil in an appropriate manner. The court, in terminating the right of entry, may impose equitable conditions. (See *Donlan v. Weaver* (1981) 118 C.A.3d 675, 679, 173 C.R. 566 [statute constitutional]; *Butcher v. Okmar Oil Co.* (1977) 65 C.A.3d 972, 135 C.R. 713 [summary judgment for defendant on affidavit that termination would significantly interfere with production].)

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C. Lessee's Principal Obligations.
1. Development.

12 Witkin Sum. Cal. Law Real Property § 799

[§ 799] Development.

(1) *In General.* The lessee cannot procure a lease and then remain inactive, holding the land for speculative purposes. The lessee has a duty to explore and attempt to discover resources, and to make diligent efforts to develop and market them. (*Hall v. Augur* (1927) 82 C.A. 594, 599, 256 P. 232; *Jones v. Interstate Oil Corp.* (1931) 115 C.A. 302, 310, 1 P.2d 1051; *Rice v. Lee* (1941) 44 C.A.2d 909, 912, 113 P.2d 235; *Fisher v. Hampton* (1975) 44 C.A.3d 741, 747, 118 C.R. 811 [damages for lessee's breach of contract to drill]; see 79 A.L.R.2d 792 [lessor's right to cancel lease for breach of implied obligation to explore and develop further after initial discovery of oil or gas, in absence of showing reasonable expectation of profit to lessee from further drilling]; 15 A.L.R.3d 450 ["dry hole" as "well" within undertaking to drill well]; 71 A.L.R.2d 1219 [duty to market].)

This duty is usually expressly stated in the lease's development clause, which in substance requires that the lessee drill with reasonable diligence until oil is found in "paying quantities." (See *Renner v. Huntington-Hawthorne Oil & Gas Co.* (1952) 39 C.2d 93, 96, 244 P.2d 895; *Siemon v. Lyon* (1942) 51 C.A.2d 350, 352, 124 P.2d 893; *Baldwin v. Kubetz* (1957) 148 C.A.2d 937, 940, 307 P.2d 1005, *infra*, §801 [covenant to drill additional wells]; Brown, 2 The Law of Oil and Gas Leases 2d, §17.06; 38 Am.Jur.2d (1999 ed.), *Gas and Oil* §§127 et seq., 133 et seq.; 9 Am.Jur. Legal Forms 2d (2002 ed.), *Gas and Oil*, §129:116 et seq.)

(2) *Drill or Pay Clause.* This clause protects against strict forfeiture for failure to commence drilling operations. The lessee covenants to commence or pay a certain sum as delay rental. If the lessee does neither, the lessor may elect to terminate the lease and maintain an action for accrued rental. But termination is not automatic; notice of default and election to forfeit is necessary. (See *Butler v. Nepple* (1960) 54 C.2d 589, 594, 6 C.R. 767, 354 P.2d 239; 3 U.C.L.A. L. Rev. 436; 38 Am.Jur.2d (1999 ed.), *Gas and Oil* §67.)

(3) *Unless Clause.* This clause provides that if operations are not commenced within the development period (e.g., 1 year), the lease will terminate unless the lessee pays the delay rental. The lessor has no action for rent, but is not required to give a notice of forfeiture even if the lease contains another provision for written notice of default. The latter provision applies to nonperformance of ordinary covenants, and not to the requirement of commencement of drilling on penalty of termination. "From the nature of the 'unless' type of lease, it carries within its own phraseology an automatic termination which clicks when the lessee fails to commence drilling operations within the time specified and also fails to exercise his privilege of paying delay rentals in advance." (*Richfield Oil Corp. v. Bloomfield* (1951) 103 C.A.2d 589,

591, 229 P.2d 838; see *Wilcox v. West* (1941) 45 C.A.2d 267, 270, 114 P.2d 39; *Norris Oil Co. v. Von Glahn* (1951) 104 C.A.2d 159, 160, 230 P.2d 885; *Valer Oil Co. v. Souza* (1960) 182 C.A.2d 790, 800, 6 C.R. 301; 3 U.C.L.A. L. Rev. 436; Brown, 1 The Law of Oil and Gas Leases 2d, §7.03; 38 Am.Jur.2d (1999 ed.), Gas and Oil §67; 5 A.L.R.2d 993 [mistake, accident, inadvertence, etc., as ground for relief from termination or forfeiture of oil or gas lease for failure to complete well, commence drilling, or pay rental, strictly on time].)

The policy of this seemingly harsh result is defended in *Richfield, supra*, as follows: "The duty to drill and explore the property, where no substantial cash consideration is involved, should be treated not as a mere covenant but as a condition to the lease's continued existence for the reason that practically the entire consideration depends on the undertaking. Certainly, the lessee should not be assisted and encouraged to hold the lease for speculative purposes only without making any attempt to develop the property's possible resources." (103 C.A.2d 591.)

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2. Royalty and Other Compensation.

12 Witkin Sum. Cal. Law Real Property § 800

[§ 800] Royalty and Other Compensation.

(1) *Landowner's Royalty*. The usual compensation called for by the lease is royalty, a fraction or percentage of the production (usually 12.5%, but sometimes more) as a form of rent. This may be an actual share of the oil or gas produced, but ordinarily is a money payment based on the value of the production. (See *Hancock Oil Co. v. Hopkins* (1944) 67 C.A.2d 218, 221, 153 P.2d 993 [lesser interest clause, providing for proportional royalty payments to lessor whose interest is less than total fee ownership of minerals]; Brown, 1 The Law of Oil and Gas Leases 2d, §6.00 et seq.; 78 Harv. L. Rev. 1113 [apportionment of royalties when land is subdivided among several parties]; 3 U.C.L.A. L. Rev. 438, 440, 461; 73 A.L.R.2d 1056 [lessee's deduction of expenses and taxes]; 48 A.L.R.3d 706 [validity, construction, and application of entirety clause]; 58 A.L.R.3d 1052 [right to partition of "overriding royalty" interest]; 10 A.L.R.4th 732 [market value standard for measuring royalties]; 99 A.L.R.5th 415 [allocation of postproduction costs between lessor and lessee when lease provides that royalties are to be valued "at the well"]; 38 Am.Jur.2d (1999 ed.), Gas and Oil §97; 9 Am.Jur. Legal Forms 2d (2002 ed.), Gas and Oil, §129:136 et seq.)

If the lease gives the lessor the election to take the royalty in oil produced or its value in cash, and the lessor elects to take the cash, in the absence of another provision, the lessor must stand the expense of dehydrating "wet oil" (cleaning it). (*Vedder Petroleum Corp. v. Lambert Lands Co.* (1942) 50 C.A.2d 102, 110, 122 P.2d 600; *Western Gulf Oil Co. v. Title Ins. & Trust Co.* (1949) 92 C.A.2d 257, 263, 206 P.2d 643.)

(2) *Bonus*. The lease may also provide for an advance payment of a cash sum by the lessee for the execution of the lease. (See *Elsinore Oil Co. v. Signal Oil & Gas Co.* (1935) 3 C.A.2d 570, 572, 40 P.2d 523; Brown, 2 The Law of Oil and Gas Leases 2d, §17.04; 38 Am.Jur.2d (1999 ed.), Gas and Oil §97.)

(3) *Delay Rental*. Another type of compensation is the delay rental paid in lieu of commencement of drilling operations under a "drill or pay" or "unless" lease (supra, §799). (See *Butler v. Nepple* (1960) 54 C.2d 589, 595, 6 C.R. 767, 354 P.2d 239; Brown, 1 The Law of Oil and Gas Leases 2d, §7.09; 38 Am.Jur.2d (1999 ed.), Gas and Oil §§130, 131.)

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3. Implied Covenants.

12 Witkin Sum. Cal. Law Real Property § 801

[§ 801] Implied Covenants.

The following obligations of the lessee are generally held to be implied by law without mention in the lease: (1) to drill an exploratory or test well; (2) to drill additional wells for further development; (3) to operate producing wells and market the product with reasonable diligence; (4) to protect against drainage from adjoining wells by drilling offset wells. (See *Hartman Ranch Co. v. Associated Oil Co. (1937)* 10 C.2d 232, 239, 73 P.2d 1163 [drill offset wells]; *Baldwin v. Kubetz (1957)* 148 C.A.2d 937, 943, 307 P.2d 1005 [drill additional wells]; *Wallace v. Imbertson (1961)* 197 C.A.2d 392, 395, 17 C.R. 117, citing the text [diligence in exploration and development]; 3 U.C.L.A. L. Rev. 447, 508; Brown, 2 The Law of Oil and Gas Leases 2d, §16.01 et seq.; 38 Am.Jur.2d (1999 ed.), Gas and Oil §100 et seq.; 79 A.L.R.2d 792 [duty to develop after initial discovery, in absence of reasonable expectation of profit]; 4 A.L.R.3d 284 [measure of damages for breach of obligation to drill exploratory well]; 18 A.L.R.4th 14 [implied duty of oil and gas lessee to protect against drainage]; 18 A.L.R.4th 147 [remedy for breach of implied duty of oil and gas lessee to protect against drainage].)

There may also be an implied covenant "to refrain from depletory acts," e.g., fraudulent drainage by the lessee on other lands, or destruction of a producing well. (See *R.R. Bush Oil Co. v. Beverly-Lincoln Land Co. (1945)* 69 C.A.2d 246, 253, 158 P.2d 754; 3 U.C.L.A. L. Rev. 508, 594.)

In *Baldwin v. Kubetz, supra*, defendant sought to excuse his failure to drill additional wells by invoking the zoning ordinance, which prohibited drilling except under a variance permit. *Held*, this was not a defense. Such a permit was readily granted on a showing of probability of oil, and it was his duty to apply for it. "[T]here is an implied covenant of diligent exploration and diligent operation of any producing wells. ... Immanent in this implied obligation is that of doing such incidental or subsidiary acts as may be reasonably necessary to accomplish the major purpose--in this instance the procuring of the drilling permit through an easily obtained zoning exception." (148 C.A.2d 943.)

On the other hand, it has been pointed out that the practice of expressly stating the lessee's covenants in California leases has reduced the importance of the doctrine of implied covenants in this field. (See 3 U.C.L.A. L. Rev. 428, 447.) Thus, the duty to drill is generally covered by the development clause. (See *supra*, §744.) And the duty to drill offset wells is likewise commonly stated as an express covenant that, if a producing well is brought in on adjacent land within a certain distance from the boundary of the leased land, the lessee must within a stated time drill the offset well. (See *Mitchell v. Union Drilling & Petroleum Co. (1934)* 1 C.2d 56, 57, 32 P.2d 1069; 3 U.C.L.A. L. Rev. 445, 518; 9

Am.Jur. Legal Forms 2d (2002 ed.), Gas and Oil, §129:94 et seq.)

If the parties to an oil and gas lease have described the lessee's exploration and development duties in a way that leaves "no room for the implication of a duty to do more than that which is specified in their agreement," the courts will not recognize an implied covenant of further exploration. (*Lundin/Weber Co. LLC v. Brea Oil Co. (2004) 117 C.A.4th 427, 432, 437, 11 C.R.3d 768* [declining to decide "more fundamental question whether, and to what extent, California courts will imply a covenant of further exploration when such a covenant would not conflict with the express terms of the oil and gas lease"].)

Some leases attempt to exclude implied covenants entirely. (See 3 *U.C.L.A. L. Rev.* 447, 596.)

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1. Abandonment.

12 Witkin Sum. Cal. Law Real Property § 802

[§ 802] Abandonment.

The lessee's failure to commence operations constitutes an abandonment of the lease, and no notice of forfeiture is required as a condition to termination. (*Romero v. Brewer* (1943) 58 C.A.2d 759, 762, 137 P.2d 872; *Rice v. Lee* (1941) 44 C.A.2d 909, 912, 113 P.2d 235; *Rehart v. Klossner* (1941) 48 C.A.2d 40, 44, 119 P.2d 145; *Wallace v. Imbertson* (1961) 197 C.A.2d 392, 395, 17 C.R. 117 [evidence sufficient and forfeiture upheld]; see 13 A.L.R.2d 951 [abandonment by parol declaration]; supra, §793.) But no abandonment results where a cessation of operations follows a lessor's unjustified declaration of forfeiture and suit to quiet title. (*Alphonzo E. Bell Corp. v. Listle* (1946) 74 C.A.2d 638, 645, 169 P.2d 462.)

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D. Termination of Lease.

2. Surrender.

12 Witkin Sum. Cal. Law Real Property § 803

[§ 803] Surrender.

Even though the lessee seeks to abandon, the common law rule of surrender by operation of law, where the lessor relets without proper notification of the lessee, has been applied to an oil lease. (See *Dorcich v. Time Oil Co. (1951) 103 C.A.2d 677, 683, 230 P.2d 10*; supra, §§675, 690, 693.) Some leases have a surrender clause that enables the lessee to surrender and quitclaim his or her interest, where the land appears unattractive, thereby avoiding further delay rental. (See *Elsinore Oil Co. v. Signal Oil & Gas Co. (1935) 3 C.A.2d 570, 572, 40 P.2d 523*; *Beverly Hills Oil Co. v. Beverly Hills Unified School Dist. (1968) 264 C.A.2d 603, 607, 70 C.R. 640* [meaning of "rentals" in clause]; *3 U.C.L.A. L. Rev. 441*; *7 U.C.L.A. L. Rev. 417, 434* [covenant requiring lessee to give notice of intention to surrender]; *38 Am.Jur.2d (1999 ed.)*, *Gas and Oil §241*; *9 Am.Jur. Legal Forms 2d (2002 ed.)*, *Gas and Oil*, §§129:215 et seq., 129:262.)

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3. Expiration.

12 Witkin Sum. Cal. Law Real Property § 804

[§ 804] Expiration.

If no oil or gas is discovered within the primary period of the lease, it will expire. There is some uncertainty, however, about the effect of discovery but no paying production or marketing during the primary period, where the lessee makes reasonable efforts to find a market.

In *Renner v. Huntington-Hawthorne Oil & Gas Co.* (1952) 39 C.2d 93, 244 P.2d 895, the lease was made in 1921 for a primary period of 20 years "and so long thereafter" as oil could be obtained in paying quantities. In 1923, the only well was brought in, and in 1941 (the end of the primary period), its production was below 50 barrels per day (the lease definition of paying quantities). The lessor nevertheless accepted royalty payments until suing to quiet title. *Held*: (a) The determinable fee created by the "so long thereafter" provision terminated by expiration in 1941 when oil could no longer be produced in the paying quantities defined in the lease. (39 C.2d 98.) (b) The acceptance of royalties after that time did not preclude the lessor from asserting expiration. There was no change of position by defendant lessee and hence no estoppel. (39 C.2d 101.) (c) However, acceptance of royalty payments after expiration of the leasehold made the lessee holding over a tenant from month to month, and that tenancy could not be terminated without notice. Hence, the judgment quieting title without the notice was reversed. (39 C.2d 102.) (See *San Mateo Community College Dist. v. Half Moon Bay Ltd. Partnership* (1998) 65 C.A.4th 401, 413, 76 C.R.2d 287 [lease terminated on date specified in habendum clause, because there was no well being drilled and no production occurring on that date; habendum clause did not excuse failure of condition required to extend lease term, and *force majeure* clause referred only to suspending lessee's obligations, not to modifying or enlarging lease term].)

In *West v. Russell* (1970) 12 C.A.3d 638, 90 C.R. 772, the lease was to continue for 5 years and "so long thereafter as oil and/or gas" was produced "in paying quantities." The land, located in a rural area when the lease was executed, became part of a city, and the taxes were considerably in excess of the lessor's royalties. In the lessor's suit to quiet title, the lessee showed that he was receiving royalties slightly in excess of the cost of operation. *Held*, judgment for defendant lessee affirmed. The lessor's contention that the phrase "production in paying quantities" means "mutually profitable" to both the lessor and the lessee was rejected. The great weight of authority holds this to mean "production in such quantity as will pay a profit to the lessee over and above the cost of operating the well ... and marketing the product, although the cost of drilling and equipping the well ... may never be repaid." The theory is that the lessee who undertakes the risk of drilling is entitled to the benefit of the bargain "so long as production is financially advantageous to him." (12 C.A.3d 642.) (See 9 A.L.R.4th 1121 [production on one tract as extending term on other tract, where one

mineral deed conveys oil or gas in separate tracts for as long as oil or gas is produced]; 35 *A.L.R.4th* 1167 [same].)

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4. Forfeiture.

12 Witkin Sum. Cal. Law Real Property § 805

[§ 805] Forfeiture.

(1) *Forfeiture Allowed.* The doctrine that forfeitures are not favored (see *supra*, §670; 13 *Summary* (10th), *Equity*, §20) does not apply to oil leases if the lessee fails to perform the basic obligation to drill. The reason is that the lease ties up the lessor's property for a long period, and failure to develop its production involves the danger of depletion of the oil by wells on adjoining lands. Hence, the lessor's right to declare a forfeiture for this kind of default is generally recognized, with or without an express forfeiture clause. (See *John v. Elberta Oil Co.* (1932) 124 C.A. 744, 748, 13 P.2d 538; *Rice v. Lee* (1941) 44 C.A.2d 909, 912, 113 P.2d 235; *Banks v. Calstar Petroleum Co.* (1947) 82 C.A.2d 789, 792, 187 P.2d 127; 38 *Am.Jur.2d* (1999 ed.), *Gas and Oil* §242.)

(2) *Compliance With Forfeiture Clause.* Despite the rejection of the policy against forfeitures, an express forfeiture clause is strictly construed, and compliance with its terms is essential to an effective forfeiture. (See *Welpport Oil Co. v. Fairfield* (1942) 51 C.A.2d 533, 537, 125 P.2d 97 [premature notice]; *Swigert v. Stafford* (1948) 85 C.A.2d 469, 471, 193 P.2d 106 [no notice]; 38 *Am.Jur.2d* (1999 ed.), *Gas and Oil* §§237, 243.)

(3) *Relief Against Forfeiture.* The rejection of the policy against forfeitures has been limited to cases where the lessee has failed to drill. The present tendency is to apply the general doctrine of *Barkis v. Scott* (1949) 34 C.2d 116, 208 P.2d 367, 13 *Summary* (10th), *Equity*, §62, to protect a lessee from an unjust forfeiture.

Thus, in *El Rio Oils (Canada) Ltd. v. Chase* (1949) 95 C.A.2d 402, 212 P.2d 927, the oil was of low gravity and heavy consistency, difficult to pump and sell. The lessee injected distillate to aid pumping and production and to improve the gravity. The cost was deducted from the lessor's royalties under the lease provision concerning the expense of "treatment" of the oil. *Held*: (a) The expense was incurred to increase production and was overhead to be borne exclusively by the lessee. (b) But the deduction was made in good faith in reliance on advice of counsel, and the trial judge therefore properly relieved the lessee from forfeiture for the breach. (95 C.A.2d 410.) (See *Baldwin v. Kubetz* (1957) 148 C.A.2d 937, 947, 307 P.2d 1005 [relief was denied where lessee was wilfully and persistently in default].)

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E. Transfer of Interest in Lease.
1. Lessee's Interest.

12 Witkin Sum. Cal. Law Real Property § 806

[§ 806] Lessee's Interest.

(1) *Sublease or Transfer of Operating Rights.* Unless expressly restricted, the lessee may sell his or her drilling rights to another operator by a transfer of the leasehold interest, i.e., the lessee's profit or exclusive right to take oil and gas, reserving a royalty in the production. The transfer may be technically either an assignment or a sublease. (See *Hartman Ranch Co. v. Associated Oil Co.* (1937) 10 C.2d 232, 246, 73 P.2d 1163 [sublease]; *Chase v. Trimble* (1945) 69 C.A.2d 44, 47, 158 P.2d 247 [assignment]; *Garner v. Knudsen* (1955) 129 C.A.2d 747, 754, 277 P.2d 890 [sublease]; Brown, 1 The Law of Oil and Gas Leases 2d, §§11.01, 11.04, 11.06; 38 Am.Jur.2d (1999 ed.), *Gas and Oil* §195 et seq.; 9 Am.Jur. Legal Forms 2d (2002 ed.), *Gas and Oil*, §129:347 et seq.)

(2) *Sale of Overriding Royalty.* Instead of transferring drilling rights, the lessee may seek to finance his or her own drilling operations. The typical method is the sale of fractional interests in production, usually called "overriding royalties." The lessee transfers to the assignee or purchaser a right to receive a fraction or percentage of the proceeds remaining with the lessee, after the lessee has paid the landowner a royalty and met the costs of production. (See *Schiffman v. Richfield Oil Co.* (1937) 8 C.2d 211, 215, 64 P.2d 1081; *La Laguna Ranch Co. v. Dodge* (1941) 18 C.2d 132, 135, 114 P.2d 351; *Austin v. Hallmark Oil Co.* (1943) 21 C.2d 718, 723, 134 P.2d 777; *Federal Oil Co. v. Brower* (1950) 36 C.2d 367, 368, 224 P.2d 4; *Recovery Oil Co. v. Van Acker* (1947) 79 C.A.2d 639, 640, 180 P.2d 436; Brown, 2 The Law of Oil and Gas Leases 2d, §§17.01, 18.03(3), 18.10; 38 Am.Jur.2d (1999 ed.), *Gas and Oil* §215 et seq.; 9 Am.Jur. Legal Forms 2d (2002 ed.), *Gas and Oil*, §129:364.)

(3) *Rights of Assignee.* Because the lessee's interest is considered real property, the assignee likewise acquires an interest in real property. Subsequent transferees of the leasehold itself (i.e., transferees of the lessee's operating rights, or sublessees), who have actual or constructive notice of the prior assignment of royalty interests, take subject to the prior right of the royalty assignees. (*Schiffman v. Richfield Oil Co.* (1937) 8 C.2d 211, 222, 64 P.2d 1081; *Recovery Oil Co. v. Van Acker* (1947) 79 C.A.2d 639, 642, 180 P.2d 436; see 38 Am.Jur.2d (1999 ed.), *Gas and Oil* §201 et seq.)

However, the lessee's assignee takes a speculative interest with knowledge of the terms and conditions of the lease, e.g., that the lease may be terminated by the lessor for failure to drill, or absence of oil in paying quantities, and that termination of the lease will carry with it the assignee's interests. (*Dos Pueblos Ranch & Imp. Co. v. Ellis* (1941) 44 C.A.2d 299, 300, 112 P.2d 302.)

La Laguna Ranch Co. v. Dodge (1941) 18 C.2d 132, 137, 114 P.2d 351, held that, in the absence of any showing of fraud or unjust enrichment, a voluntary surrender by the lessee (after the lessor had indicated the intention to declare a forfeiture) had the effect of terminating the assignee's overriding royalty interests. *Payne v. Callahan* (1940) 37 C.A.2d 503, 99 P.2d 1050, was overruled on this point. *Chase v. Trimble* (1945) 69 C.A.2d 44, 49, 158 P.2d 247, reached a similar conclusion where the lessees assigned the operating rights and the assignee after default quitclaimed to the lessor. The surrender by the assignee terminated the lessee's rights (overriding royalties).

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 934, 2nd line from the bottom, year of *Garner v. Knudsen* should be (1954).



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CHAPTER XVII - Real Property

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XII. OIL AND GAS LEASES
E. Transfer of Interest in Lease.
2. Lessor's Interest.

12 Witkin Sum. Cal. Law Real Property § 807

[§ 807] Lessor's Interest.

The landowner-lessee may also transfer his or her mineral interests. (See 3 *U.C.L.A. L. Rev.* 449; 38 *Am.Jur.2d* (1999 ed.), *Gas and Oil* §219 et seq.; on forms, see 3 *U.C.L.A. L. Rev.* 471; 9 *Am.Jur. Legal Forms 2d* (2002 ed.), *Gas and Oil*, §129:269 et seq.) There are two principal methods:

(1) *Transfer of Reversion or Part of Reversion*. The landowner may transfer the land (i.e., the reversion or possibility of reverter) or an interest in it. If the landowner sells part of his or her interest, the purchaser becomes a tenant in common with the landowner, and entitled to share in the landowner's various rights. (*Callahan v. Martin* (1935) 3 *C.2d* 110, 125, 43 *P.2d* 788; see *Little v. Mountain View Dairies* (1950) 35 *C.2d* 232, 235, 217 *P.2d* 416 [grant of fraction of oil in, under, and that may be produced from land, creates expense-bearing mineral fee interest rather than expense-free royalty interest]; *Harv. L. Rev.* 905 [*Little*]; 3 *U.C.L.A. L. Rev.* 456, 463.)

(2) *Assignment of Royalties*. The landowner may retain ownership of the surface rights and reversion or possibility of reverter, and merely sell and assign fractional interests in the royalties that the lessor is to receive from the lessee. These interests are usually called landowner's overriding royalties. (See *Callahan v. Martin, supra*, 3 *C.2d* 113 [assignment is of interest in real property, and recordation imparts constructive notice to subsequent grantee of fee]; *Dabney-Johnston Oil Corp. v. Walden* (1935) 4 *C.2d* 637, 644, 52 *P.2d* 237; *Tanner v. Title Ins. & Trust Co.* (1942) 20 *C.2d* 814, 820, 129 *P.2d* 383; *Paddock v. Vasquez* (1953) 122 *C.A.2d* 396, 400, 265 *P.2d* 121 [drafting problems]; 38 *Am.Jur.2d* (1999 ed.), *Gas and Oil* §223 et seq.; 4 *A.L.R.2d* 492 [what constitutes oil or gas "royalty" or "royalties" within language of conveyance, exception, reservation, devise, or assignment].)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XVII - Real Property

Witkin Summary of California Law XIII. ENVIRONMENTAL REGULATION OF REAL PROPERTY A. Land Use Planning and Regulation. 1. In General.

12 Witkin Sum. Cal. Law Real Property § 808

[§ 808] In General.

(1) *Statutory Framework.* The Planning and Zoning Law (*Govt.C. 65000 et seq.*) establishes a planning agency in each city and county (*Govt.C. 65100*) to prepare a comprehensive, long-term general plan for physical development (*Govt.C. 65300*). Local zoning ordinances must conform to the local plan. (*Govt.C. 65860*; see *Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors of El Dorado* (1998) 62 C.A.4th 1332, 1336, 74 C.R.2d 1 [consistency of project with general plan]; 8 *Summary* (10th), *Constitutional Law*, §1005 et seq.)

Additional important statutes that govern land use planning include the following:

- (a) Subdivision Map Act (*Govt.C. 66410 et seq.*). (See *infra*, §809 et seq.)
- (b) Subdivided Lands Act (B. & P.C. 11100 et seq.). (See *infra*, §820.)
- (c) Community Redevelopment Law (*Health & Saf.C. 33000 et seq.*). (See *infra*, §827 et seq.)
- (d) California Environmental Quality Act (*Pub.Res.C. 21000 et seq.*). (See *infra*, §831 et seq.)
- (e) California Coastal Act (*Pub.Res.C. 30000 et seq.*). (See *infra*, §861 et seq.)
- (f) Permit Streamlining Act (*Govt.C. 65920 et seq.*). (See *infra*, §870.)
- (g) *Govt.C. 66030 et seq.* [mediation procedures for resolution of land use disputes involving public agencies].

(2) *Commentary.* Land use planning and regulation are professional disciplines requiring background knowledge of economics and ecology as well as law. The following topics have been the subject of extensive commentary:

- (a) *Land use planning.* (See 13 Powell, Chap. 79D [land use planning and development]; 49 *Cal. L. Rev.* 699 [British town and country planning systems]; 8 *Golden Gate L. Rev.* 317 [curbing real estate speculation]; 68 *Harv. L. Rev.* 1154 [comprehensive plans]; 109 *Harv. L. Rev.* 715 [economic analysis of protecting property rights through property rules or through liability rules]; 15 *Pacific L. J.* 1151 [preservation of agricultural land]; 2 *Pepperdine L. Rev.* S1 [symposium on land use planning and control]; 1 *San Diego L. Rev.* 28 [planning residential communities]; 9 *San*

Diego L. Rev. 1 [local general plans]; 9 *San Diego L. Rev. 28* [land use and operational controls in planned developments]; 13 *Santa Clara Lawyer* 183 [land regulation innovations]; 42 *So. Cal. L. Rev. 70* [real estate investment trusts]; 51 *So. Cal. L. Rev. 165* [public sector land development]; 54 *So. Cal. L. Rev. 447* [deregulation of land use planning]; 11 *Southwestern U. L. Rev. 545* [multiland use permits; estoppel and vesting]; 11 *U.C. Davis L. Rev. 65* [governmental regulation of agricultural land]; 12 *U.C.L.A. L. Rev. 707* [symposium on emerging policies and techniques in land planning]; 27 *U.C.L.A. L. Rev. 859* [land development and environmental control in California Supreme Court]; 31 *U.C.L.A. L. Rev. 1208* [controlling land surface subsidence].)

(b) *Zoning and growth control*. (See 5 *Pacific L. J. 570* [local implementation of timing and sequential control of residential development]; 15 *Santa Clara Lawyer* 1 [case study of land use growth controls]; 6 *Southwestern U. L. Rev. 607* [limitation of zoning as control and planning device]; 11 *Southwestern U. L. Rev. 545* [multiland use permits; estoppel and vesting]; 12 *Southwestern U. L. Rev. 561* [limitation of zoning as control and planning device]; 8 *Summary* (10th), *Constitutional Law*, §1012 et seq.)

(c) *Constitutional issues*. (See 23 *Ecology L. Q. 631* [relationship between "land ethic" and private property rights]; 8 *Hastings Const. L. Q. 449* [symposium on constitutional issues in land use regulation]; 8 *Loyola L.A. L. Rev. 253* [environmental protection and private property rights]; 25 *Pacific L. J. 157* [land use regulation and Endangered Species Act]; 15 *Santa Clara Lawyer* 50 [procedural due process in land use regulation]; 68 *So. Cal. L. Rev. 885* [property rights and takings in context of environmental surveillance]; 15 *Southwestern U. L. Rev. 435* [Brandeis brief for decontrol of land use; need for constitutional reform]; 43 *U.C.L.A. L. Rev. 77* [taking of sensitive lands]; 8 *Summary* (10th), *Constitutional Law*, §1005 et seq.)

(d) *Conflict among federal, state, and local regulations*. (See 70 *Cal. L. Rev. 151* [regional land use control]; 71 *Cal. L. Rev. 848* [problems of local, piecemeal land control]; 25 *Hastings L. J. 1165* [impact of existing and proposed federal regulation on state land use control]; 4 *Pacific L. J. 117* [regional planning in urban centers]; 68 *So. Cal. L. Rev. 1075* [minimum environmental state standards on Native American land]; 15 *U.S.F. L. Rev. 509* [state and federal housing planning versus local land use regulation].)

West's Key Number Digest, Health and Environment k.25.5(4)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XVII - Real Property

Witkin Summary of California Law XIII. ENVIRONMENTAL REGULATION OF REAL PROPERTY A. Land Use Planning and Regulation. 2. Subdivisions.

a. Nature and Scope of Subdivision Map Act.

12 Witkin Sum. Cal. Law Real Property § 809

[§ 809] Nature and Scope of Subdivision Map Act.

(1) *Former Law and Reenactment.* In 1943, the statutory provisions regulating subdivisions were consolidated in the original Subdivision Map Act (former B. & P.C. 11500 et seq.). In 1975, the Business and Professions Code sections were repealed and a new Subdivision Map Act was placed in the Government Code (*Govt.C. 66410* et seq.) as Division 2 (Subdivisions) of Title 7 (Planning and Zoning). (See *California Coastal Com. v. Quanta Inv. Corp. (1980) 113 C.A.3d 579, 588, 170 C.R. 263* [legislative history of subdivision regulation]; *6 Pacific L. J. 357* [major changes in Act].)

(2) *Scope of Act.* The Act regulates the design, improvement, and sale of subdivisions and authorizes conditions for approving subdivision maps, such as dedicating open space, paying fees, or installing improvements. (See *Associated Home Builders of the Greater East Bay v. Walnut Creek (1971) 4 C.3d 633, 637, 94 C.R. 630, 484 P.2d 606*, *infra*, §819 [dedication requirement]; Cal. Civil Practice, 2 Real Property Litigation, §14:58 et seq.; *9 Miller & Starr 3d*, §25:146 et seq.) (On procedure for protesting fees, dedication, and other exactions, see *infra*, §818; on mandatory dedication by subdividers, see *supra*, §244, *infra*, §819; on cost of improvements paid by local agencies, see *Govt.C. 66486*; for restrictions on improvements that may be required of small subdivisions, see *Govt.C. 66411.1*.)

The Act applies to traditional subdivisions, condominium projects, community apartment projects, and residential stock cooperatives involving five or more parcels or units. (*Govt.C. 66424, 66426*.) (See *Shelter Creek Dev. Corp. v. Oxnard (1983) 34 C.3d 733, 736, 738, 195 C.R. 361, 669 P.2d 948* [exemption for conversions that took place before January 1, 1980]; *California Coastal Com. v. Quanta Inv. Corp., supra*, *113 C.A.3d 600* [applicability to conversion of apartments into stock cooperative]; *11 Pacific L. J. 617* [extension of Act to dwelling units in stock cooperatives].)

(3) *Enabling Legislation.* The Act is enabling legislation. It establishes generalized statewide criteria for subdivision planning, but delegates authority to cities and counties to consider the details of proposed subdivisions. (On local implementation of Act, see *infra*, §817; on enforcement, see *infra*, §822.)

(4) *Merger of Parcels and Reversion to Acreage.* The Act provides for the merger and separation of contiguous parcels held by the same owner. (See *Govt.C. 66451.10* et seq., *66451.30* et seq., *66499.203/4*.) The following are among the cases discussing these provisions:

Morehart v. Santa Barbara (1994) 7 C.4th 725, 760, 29 C.R.2d 804, 872 P.2d 143 [Govt.C. 66451.11 reflects paramount state concern for uniformity in standards governing compulsory merger to control development, and impliedly preempts local ordinances that do not comply with its standards].

Gardner v. Sonoma (2003) 29 C.4th 990, 1003, 129 C.R.2d 869, 62 P.2d 103, *infra*, §814 [applicability of antimerger provision of Govt.C. 66451.10(a)].

Negron v. Dundee (1990) 221 C.A.3d 1502, 1506, 271 C.R. 381, *supra*, §422 [resubdivision provisions of Govt.C. 66499.201/2, which provide that all streets and easements not shown on parcel map are abandoned, apply only to subdivision map that has previously been recorded].

Gomes v. Mendocino (1995) 37 C.A.4th 977, 981, 44 C.R.2d 93 [subdivision of property into four parcels was merger and resubdivision of previously subdivided lands under Govt.C. 66499.201/2; resubdivision extinguished federal patents underlying one parcel].

Van't Rood v. Santa Clara (2003) 113 C.A.4th 549, 576, 6 C.R.3d 746 [1970 parcel map submitted by vendor of two parcels sold to vendor's neighbors invalidly merged neighbors' preexisting parcels and those purchased from vendor; vendor did not have authority as agent to effect voluntary merger and neighbors were not afforded due process required before involuntary merger].

Moore v. Board of Supervisors of Mendocino County (2004) 122 C.A.4th 883, 889, 19 C.R.3d 206 [parcels automatically merged under county ordinance before enactment of Act, and county preserved automatic merger by notifying owners of new merger provisions as required by Act; county's lack of compliance with its own later enacted notice ordinance was immaterial].

The Act also establishes procedures under which subdivided land may be reverted to acreage. (See Govt.C. 66499.11 *et seq.*; *Los Angeles v. Amwest Surety Ins. Co.* (1998) 63 C.A.4th 378, 385, 73 C.R.2d 729 [decision to revert to acreage is discretionary, not ministerial]; on refund of fees where subdivided land reverts to acreage, see Govt.C. 66499.17, 66499.19; *B & P Dev. Corp. v. Saratoga* (1986) 185 C.A.3d 949, 961, 230 C.R. 192 [action for refund of fees by developer who abandoned project after approval; once final map is approved, Govt.C. 66499.17 and 66499.19 provide exclusive procedure for refund of fees paid under Act].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Scope of Act.* See *Fishback v. Ventura* (2005) 133 C.A.4th 896, 901, 35 C.R.3d 199 [four parcels that were conveyed without compliance with earlier versions of Act were illegal; applicable earlier versions defined subdivision as division of land into five or more parcels in 1-year period, and once fifth parcel was created within 1-year period, all parcels created within that year constituted subdivision]; *Blackmore v. Powell* (2007) 150 C.A.4th 1593, 1602, 59 C.R.3d 527 [easement, construed by trial court to allow easement's owner to build garage, was too restricted in scope to constitute subdivision under Act; garage would cover only small portion of easement and owner's exclusive occupation of garage would be restricted to terms of deed].

(4) *Merger of Parcels and Reversion to Acreage.* See *Kalway v. Berkeley* (2007) 151 C.A.4th 827, 832, 60 C.R.3d 477 [married couple could not avoid merger of two parcels by conveying grant deed to one parcel from husband to wife; city was entitled to ignore transfer and merge parcels, although it did not have authority to void grant deed]; *Christian v. Flora* (2008) 164 C.A.4th 539, 547, 78 C.R.3d 892 [recording of 1979 parcel map pursuant to Govt.C. 66499.203/4 amended parcel map recorded in 1977 and substituted new easement for easements shown on deeds and CC&Rs that referenced 1977 map; 1979 map did not replace 1977 map, which continued to be valid, final map, as amended by 1979 map].



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XIII. ENVIRONMENTAL REGULATION OF REAL PROPERTY
A. Land Use Planning and Regulation.
2. Subdivisions.
b. Exclusions.

12 Witkin Sum. Cal. Law Real Property § 810

[§ 810] Exclusions.

The Act does not apply to the following:

(1) The financing or leasing of apartments, offices, stores, or similar spaces within apartment buildings, industrial buildings, commercial buildings, mobilehome parks, or trailer parks. (*Govt.C. 66412(a).*)

(2) The financing or leasing of a parcel in connection with the construction of commercial or industrial buildings on a single parcel, if the project is subject to review under local design and improvement ordinances, or the financing or leasing of existing separate commercial or industrial buildings on a single parcel. (*Govt.C. 66412.1.*)

(3) Mineral, oil, and gas leases. (*Govt.C. 66412(b).*)

(4) Land dedicated for cemetery purposes. (*Govt.C. 66412(c).*)

(5) Approved lot line adjustments between adjacent parcels that do not create additional parcels. (*Govt.C. 66412(d).*) (See *San Dieguito Partnership, L.P. v. San Diego* (1992) 7 C.A.4th 748, 756, 9 C.R.2d 440 [*Govt.C. 66412(d)* is not limited to "minor" lot line adjustments, but includes all adjustments that do not create more parcels]; *La Fe v. Los Angeles* (1999) 73 C.A.4th 231, 242, 86 C.R.2d 217 [although proposed lot line adjustments were excluded from Subdivision Map Act by *Govt.C. 66412(d)*, they remained subject to permit requirements of Coastal Act (*infra*, §861)].)

(6) Certain boundary agreements in which the state or a local agency is a party. (*Govt.C. 66412(e).*)

(7) A separate tax assessment of a community apartment or cooperative housing project. (*Govt.C. 66412(f).*)

(8) Certain conversions of community apartment projects and stock cooperatives to condominiums. (*Govt.C. 66412(g)(h).*)

(9) A lease of land or the grant of an easement in connection with a wind-powered electrical generation device if the project is subject to discretionary local action. (*Govt.C. 66412(i).*)

(10) The construction, financing, or leasing of certain dwelling units for senior citizens or of certain second units. (*Govt.C. 66412.2.*)

(11) Certain small subdivisions of commercial property, when excluded by local ordinance. (*Govt.C. 66412.5.*)

(12) Permission for a telephone corporation to use land for cellular radio transmission facilities, if the project is subject to discretionary action by the advisory agency or legislative body. (*Govt.C. 66412(j).*)

(13) Leases of agricultural land for cultivation of food or fiber, or pasturing of livestock. (*Govt.C. 66412(k).*)

A local agency must act on an application for an exclusion under *Govt.C. 66412* within 60 days. (*Govt.C. 66451.7.*) (See *Van't Rood v. Santa Clara (2003) 113 C.A.4th 549, 576, 6 C.R.3d 746* [under *Govt.C. 66499.25*, landowners were entitled to exclusion from 1970 parcel map that invalidly merged their preexisting parcels with parcels purchased from neighbor; landowners had no other remedy for releasing property from operation of invalid map and county had no reasonable objection to exclusion, given that properties were in compliance with zoning measures in effect in 1970].)

SUPPLEMENT: [This section is current through the latest supplement]

(5) *Lot line adjustments:* See *People v. Tehama County Bd. of Supervisors (2007) 149 C.A.4th 422, 433, 56 C.R.3d 558* [lot line adjustment that created 29 parcels out of 27 was not excluded from Subdivision Map Act by *Govt.C. 66412(d)*].

(14) *(New) Solar electrical generation:* The Act does not apply to the leasing of, or the granting of an easement to, a parcel of land, in conjunction with the financing, erection, and sale or lease of a solar electrical generation device on the land. To be exempt, the project must be subject either to review under other local agency ordinances regulating design and improvement or to other discretionary action by the advisory agency or legislative body. (*Govt.C. 66412(l)*, added in 2008.)



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Witkin Summary of California Law XIII. ENVIRONMENTAL REGULATION OF REAL PROPERTY

A. Land Use Planning and Regulation.

2. Subdivisions.

c. Map Procedure.

1. Tentative Maps.

12 Witkin Sum. Cal. Law Real Property § 811

[§ 811] Tentative Maps.

(1) *Map Review.* A tentative map is made for the purpose of showing the design and improvement of a proposed subdivision and the existing conditions in and around it. A tentative map need not be based on an accurate or detailed final survey of the property. (*Govt.C. 66424.5(a).*)

The subdivider prepares and submits a tentative map of the proposed subdivision. (*Govt.C. 66452.*) The map is reviewed and either approved, conditionally approved, or disapproved by the local advisory agency or legislative body. (*Govt.C. 66452.1 et seq.*) (For definition of "advisory agency," see *Govt.C. 66415*; on due process notice and hearing rights of adjoining landowners, see *Horn v. Ventura* (1979) 24 C.3d 605, 612, 156 C.R. 718, 596 P.2d 1134, 7 Summary (10th), *Constitutional Law*, §676.)

(2) *Evaluation Process.* The following are among the factors used to evaluate tentative maps:

(a) The proposed subdivision's consistency with applicable general plan and specific plans. (*Govt.C. 66473.5, 66474(a), (b)*; see *Corona-Norco Unified School Dist. v. Corona* (1993) 13 C.A.4th 1577, 1585, 17 C.R.2d 236 [general requirement of consistency with local general plan imposed by *Govt.C. 66473.5* is subject to more specific provisions of *Govt.C. 65996*, which precludes local agency from denying project approval under Subdivision Map Act based on inadequate school facilities]; *Sequoyah Hills Homeowners Assn. v. Oakland* (1993) 23 C.A.4th 704, 717, 29 C.R.2d 182 [exact match between proposed subdivision and general plan is not required; *Govt.C. 66473.5* requires map to be in agreement or harmony with plan].)

(b) The physical suitability of the proposed site for the type and proposed density of development. (*Govt.C. 66474(c), 66474(d).*)

(c) The possibility of environmental damage, injury to wildlife, or serious public health problems from the design of the subdivision or the proposed improvements. (*Govt.C. 66474(e), (f).*) (See *Carmel Valley View, Ltd. v. Board of Supervisors* (1976) 58 C.A.3d 817, 822, 130 C.R. 249 [county's rejection of map was supported by adverse environmental impact report and substantial evidence of harmful environmental effect of development].)

(d) Whether the design of the subdivision or the proposed improvements will conflict with public access to property within the subdivision. (*Govt.C. 66474(g)*.) (On public access to water resources, see *infra*, §816.)

(e) Whether subdivided parcels of land subject to *Govt.C. 51200* et seq. (*infra*, §880) would be too small to sustain their agricultural use. (*Govt.C. 66474.4*.)

(f) The effect of waste discharge from the proposed subdivision on existing community sewer systems. (*Govt.C. 66474.6*.)

Before acting on the tentative map, the local agency with jurisdiction over the tentative map application must consider recommendations submitted by neighboring local agencies (*Govt.C. 66453*), the state Departments of Transportation (*Govt.C. 66455.1*) and Water Resources (*Govt.C. 66455.1*), and local school districts (*Govt.C. 66455.7*). (On approval of map despite finding that mitigation measures identified in environmental impact report are not feasible, see *Govt.C. 66474.01*.)

For specified large subdivisions, or subdivisions that create a 10% increase in the number of water connections, the local agency must require proof that a sufficient water supply will be available. (*Govt.C. 66473.7(b)(1)*); on applicability of requirement, see *Govt.C. 66473.7(a)(1)*.) (On review to determine compliance with generally accepted engineering or surveying practices, see *Govt.C. 66474.10*; on time limit (60 working days) for agency or legislative body to act on submitted improvement plan, see *Govt.C. 66456.2*.)

Special rules apply to Los Angeles (city with population of over 2.8 million). (*Govt.C. 66474.60* et seq.)

(3) *Deemed Approval*. An advisory agency must make its written report on the tentative map to the legislative body within 50 days after the map is filed (*Govt.C. 66542.1(a)*), or if the agency is authorized to approve or disapprove the map, it must do so within 50 days after the map is filed (*Govt.C. 66542.1(b)*). These time periods commence after certification of an environmental impact report, adoption of a negative declaration, or a determination by the local agency that the project is exempt from the requirements of the California Environmental Quality Act (CEQA). The local agency must comply with the time periods referred to in *Pub.Res.C. 21151.5* (*infra*, §853). (*Govt.C. 66452.1(c)*); on CEQA, see *infra*, §831 et seq.)

If the agency or legislative body does not take timely action on the tentative map, the map is deemed to be approved, "insofar as it complies with other applicable requirements." (*Govt.C. 66452.4(a)*); see *Pongputmong v. Santa Monica* (1993) 15 C.A.4th 99, 104, 18 C.R.2d 550 [tentative map could not be deemed approved, where application failed to comply with local law].) Once a tentative map is deemed approved under *Govt.C. 66452.4(a)*, a subdivider may obtain a written certification of approval from the local agency or the legislative body. (*Govt.C. 66452.4(b)*.)

(4) *Administrative Appeal From Action on Map*. The subdivider may appeal from an advisory agency's action with respect to a tentative map to the appeal board established by local ordinance or, if none, to the legislative body. (*Govt.C. 66452.5(a)*.) The subdivider or the advisory agency may appeal from the appeal board's action to the legislative body. (*Govt.C. 66452.5(b)*.) These appeals must be taken within 10 days after the action from which the appeal is being taken. (*Govt.C. 66452.5(a), (b)*.)

(5) *Expiration of Map*. An approved or conditionally approved tentative map expires 24 months after its approval or conditional approval, or after an additional period of time that a local ordinance prescribes, not to exceed an additional 12 months. (*Govt.C. 66452.6(a)(1), 66463.5(a)*.) This period is subject to extension for subdividers who are required to expend \$ 178,000 or more (adjusted annually for inflation) on public improvements outside the property boundaries of the tentative map. (*Govt.C. 66452.6(a)(1)*); see *Griffis v. Mono* (1985) 163 C.A.3d 414, 425, 426, 209 C.R. 519 [local agency is not authorized to modify tentative map extension procedures]; *Native Sun/Lyon Communities v. Escondido* (1993) 15 C.A.4th 892, 911, 19 C.R.2d 344 [existence and extent of development moratorium tolling expiration of map under *Govt.C. 66452.6*]; *California Country Club Homes Assn. v. Los Angeles* (1993) 18 C.A.4th 1425, 22 C.R.2d 917 [analyzing statutory cap on extensions of tentative map under *Govt.C. 66452.6(a), (e)*]; *McPherson v. Manhattan Beach*

(2000) 78 C.A.4th 1252, 1260, 1263, 93 C.R.2d 725 [city ordinance that required filing of parcel map within 36 months of approval clearly applied to *final* parcel map and thus was not preempted by provisions in Act allowing extensions of tentative maps; delivery of final map to city engineer did not constitute timely filing for purposes of preserving vesting rights under approved vesting tentative map; because developer did not record final map in time, its rights under vesting tentative parcel map expired]; *Friends of Westhaven & Trinidad v. Humboldt* (2003) 107 C.A.4th 878, 883, 132 C.R.2d 561 [application for litigation stay under Govt.C. 66463.5(e) must be made before tentative map expires].)

SUPPLEMENT: [This section is current through the latest supplement]

(5) *Expiration of Map*. See *Bodega Bay Concerned Citizens v. Sonoma* (2005) 125 C.A.4th 1061, 1069, 23 C.R.3d 327 [under Govt.C. 66452.6(d) and (e), county could approve developer's timely application for extension of its tentative map after map had otherwise expired]; on 12-month extension for maps due to expire before January 1, 2011, see Govt.C. 66452.21, added in 2008.

The period of time specified in Govt.C. 66452.6(a) (setting the life of a tentative map) does not include a period "during which a development moratorium, imposed after approval of the tentative map, is in existence." However, the length of the moratorium must not exceed 5 years. (Govt.C. 66452.6(b)(1).) The 5-year limitation applies to the length of the moratorium-related tolling. It does not limit the length of development moratoria. (*Ailanto Properties v. Half Moon Bay* (2006) 142 C.A.4th 572, 581, 596, 48 C.R.3d 340 [tentative map that was subject to multiple development moratoria expired after 5-year tolling period ended; furthermore, delivery of final map to city engineer did not extend tentative map's life for 36 months under Govt.C. 66452.6(a)(1) and (d), where final map did not conform to tentative map's conditions].)



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2. Final Maps.

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[§ 812] Final Maps.

If a tentative map has been approved, the subdivider may survey the property and have a final map prepared. (*Govt.C. 66456.*) Once all required certificates or statements on the map have been signed, it may be filed with the legislative body. (*Govt.C. 66457*; see *Gardner v. Sonoma (2003) 29 C.4th 990, 998, 129 C.R.2d 869, 62 P.2d 103*, *infra*, §814 [antiquated map filed in 1865 did not qualify as final map under Subdivision Map Act].) (On filing multiple final maps, see *Govt.C. 66456.1*; on preparation, form, and certification of final maps, see *Govt.C. 66433 et seq.*)

The legislative body approves or disapproves the map, based on conformity with the requirements of the Act, the local ordinance, and any subsequent rulings. (*Govt.C. 66458(a).*) A final map must be approved if it is in substantial compliance with an approved tentative map. (*Govt.C. 66474.1*; see *Youngblood v. Board of Supervisors (1978) 22 C.3d 644, 654, 150 C.R. 242, 586 P.2d 556* [board of supervisors must approve final map in conformity with previously approved tentative map if subdivider has complied with all conditions attached to earlier approval]; *El Patio v. Permanent Rent Control Bd. (1980) 110 C.A.3d 915, 922, 924, 168 C.R. 276* [following *Youngblood*]; *South Cen. Coast Regional Com. v. Charles A. Pratt Const. Co. (1982) 128 C.A.3d 830, 834, 180 C.R. 555* [subdivider's vested right to exemption from permit requirements of California Coastal Act (*infra*, §861) arises only when subdivider is entitled to final map approval; distinguishing *Youngblood*]; *Soderling v. Santa Monica (1983) 142 C.A.3d 501, 508, 191 C.R. 140* [local ordinance requiring installation of smoke detectors in condominium conversion was proper condition of approval of tentative map; city council was required, under *Govt.C. 66473*, to disapprove final map when condition was not fulfilled].)

Maps that fail to meet the requirements or conditions imposed by the Subdivision Map Act or by local ordinances must be disapproved, but a final map may be disapproved only for failing to satisfy conditions that were applicable to the subdivision at the time the tentative map was approved. (*Govt.C. 66473.*) If a timely decision is not made, a map that conforms to the requirements of the Act, the local ordinance, and any subsequent rulings is deemed approved. (*Govt.C. 66458(b).*) (On completion of improvements as condition of approval of final map, see *Govt.C. 66462, 66462.5*; *Hill v. Clovis (2000) 80 C.A.4th 438, 445, 94 C.R.2d 901* [*Govt.C. 66462.5*, which requires local governing body to acquire interest in land on which subdivider is obligated to build improvements within 120 days of filing of final subdivision map, does not apply when off-site improvement is required and neither governing body nor subdivider

holds sufficient title to land on which improvement is required]; *Anthony v. Snyder* (2004) 116 C.A.4th 643, 660, 10 C.R.3d 505 [subdivision's tentative map approval did not include implied condition that developer fulfill existing subdivision ordinance requirement, including improvement of road that was outside subdivision; neighboring landowner could not later force developer to make improvement].)

SUPPLEMENT: [This section is current through the latest supplement]

When final map may be disapproved: Under Govt.C. 66413.5(a), a newly incorporated city must approve a final map where the tentative map has been approved by the county and the final map meets all the conditions of the tentative map and the requirements of the Act. However, under Govt.C. 66413.5(f), two temporal conditions must be met before the city's approval becomes mandatory. First, the application for the tentative map or vesting tentative map must have been submitted before the first signature was placed on the incorporation petition, and second, the county must have approved the tentative map before the incorporation election. (*Goleta v. Superior Court* (2006) 40 C.4th 270, 276, 52 C.R.3d 114, 147 P.3d 1037 [city had discretion to deny final map where temporal conditions were not met, and fact that city had adopted all county ordinances in effect at time of its incorporation did not deprive it of discretion].)



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[§ 813] Alternative Maps.

(1) *Parcel Map*. A parcel map, rather than a final map, is required in specified circumstances. (Govt.C. 66426.) However, local ordinances must provide a procedure for waiving the requirement. (Govt.C. 66428.) Applications for a parcel map waiver under Govt.C. 66428 must be acted on by a local agency within 60 days. (Govt.C. 66451.7.) (On preparation and submission of parcel maps, see Govt.C. 66444 et seq.; on procedure for processing and approving parcel maps, see Govt.C. 66463; on use of tentative map where parcel map is required, see Govt.C. 66428, 66463.5.)

A parcel map must be approved if it is in substantial compliance with an approved tentative map. (Govt.C. 66474.1.) The standards for approving or disapproving a tentative map apply to the approval or disapproval of a parcel map for which a tentative map was not required. (Govt.C. 66473.5, 66474; for standards, see supra, §811.)

(2) *Vesting Tentative Map*. A vesting tentative map refers to a map that meets the requirements of a tentative map under Govt.C. 66424.5(a) (supra, §811) and is marked as a "vesting tentative map" in accordance with Govt.C. 66452. (Govt.C. 66424.5(b).) It may be filed in lieu of a tentative or parcel map. (Govt.C. 66428(c), 66498.1(a).) Approval or conditional approval confers on the subdivider a vested right to proceed with development in "substantial compliance" with existing requirements. (Govt.C. 66498.1(b); on legislative intent, see Govt.C. 66498.9.) (See *Bright Dev. v. Tracy* (1993) 20 C.A.4th 783, 798, 24 C.R.2d 618 [Govt.C. 66498.1 et seq. precluded requiring developer to bury off-site utilities, where requirement arose after vesting tentative map was deemed complete]; *Kaufman & Broad Cen. Valley v. Modesto* (1994) 25 C.A.4th 1577, 1588, 30 C.R.2d 904 [after developer's rights have vested, increase in fee requires not only general fee escalation provision but also reasonable notice of fee's nature and manner of calculation, under Govt.C. 66498.1]; 22 *Loyola L. Rev.* 791, 813 [vested rights in California; Govt.C. 66498.1 et seq.]; 16 *Pacific L. J.* 704 [same].)

West's Key Number Digest, Zoning and Planning k.302 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Vesting Tentative Map*. The vested right, conveyed by Govt.C. 66498.1(b), to proceed in compliance with existing requirements applies to local ordinances, policies, and standards. Under Govt.C. 66498.6(b), subdividers are not exempt from compliance with state or federal laws, regulations, and policies. (*Charles A. Pratt Const. Co. v. California Coastal*

Com. (2008) 162 C.A.4th 1068, 1074, 76 C.R.3d 466 [filing of vesting tentative map did not deprive Coastal Commission of jurisdiction to determine whether proposed project complied with Coastal Act; Commission applies state law to determine whether development permit complies with local coastal plan].)



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[§ 814] Recording.

(1) *Statutory Requirement.* Once a final or parcel map is approved, it is filed with the county recorder. (*Govt.C. 66464.*) (On amendment of final or parcel map, see *Govt.C. 66469 et seq.*) Only final and parcel maps may be filed for record (*Govt.C. 66429*) and, except as otherwise provided by the Subdivision Map Act, the written consent of all parties having record title interest in the property to be subdivided is required (*Govt.C. 66430*). (On statements of consent and exceptions to consent requirement, see *Govt.C. 66436.*) Until the required final or parcel map has been filed with the recorder, no parcel may be sold, leased, financed, conveyed, or developed. (*Govt.C. 66499.30(a), (b), (c)*; on enforcement of Act, see *infra*, §822.)

(2) *Exception to Requirement.* *Govt.C. 66499.30(a), (b), and (c)* do not apply to a subdivision parcel offered for sale or lease, contracted for sale or lease, or sold or leased in compliance with or exempt from any law (including a local ordinance) regulating the design and improvement of subdivisions in effect at the time the subdivision was established. (*Govt.C. 66499.30(d)*; see *John Taft Corp. v. Advisory Agency* (1984) 161 C.A.3d 749, 756, 757, 207 C.R. 840 [Act applied to contiguous parcels held by common owner; federal survey map showing separate parcels did not "establish" subdivision exempt from map filing requirements under *Govt.C. 66499.30(d)*]; *Lakeview Meadows Ranch v. Santa Clara* (1994) 27 C.A.4th 593, 597, 32 C.R.2d 615 [lots created before 1893 adoption of subdivision regulations were exempt from Act under *Govt.C. 66499.30(d)*; distinguishing *John Taft Corp.*])

In *Gardner v. Sonoma* (2003) 29 C.4th 990, 129 C.R.2d 869, 62 P.2d 103, plaintiffs, owners of 158 acres of land, sought to establish that their property consisted of 12 lawfully subdivided parcels in compliance with the Act. In 1865, the owner of over 1,000 acres, of which plaintiffs' land was a part, had recorded a map (the "Greene map") that purported to depict a subdivision of the 1,000-acre property into about 90 rectangular lots. Over the years, numerous parts of the Greene property were conveyed to different parties, including, in 1990, the conveyance of 158 acres to plaintiffs. Plaintiffs' property included 2 of the original rectangular lots in full and fragments of 10 others. Plaintiffs applied to defendant county for 12 certificates of compliance with the Act. Defendant denied plaintiffs' request, primarily on the grounds that recordation of the Greene map did not create parcels cognizable under the Act. The trial court denied plaintiffs' petition for a writ of mandamus to compel issuance of the certificates. *Held*, affirmed.

(a) The Greene map is not a "final map," a "parcel map," or an "official map" under the Act. (29 C.4th 998.) Thus, it does not itself qualify as a certificate of compliance under the Act. (29 C.4th 999.)

(b) The "grandfather clause" of Govt.C. 66499.30(d) does not exempt plaintiffs' property from compliance with the Act. Govt.C. 66499.30(d) provides that the prohibitions and requirements of the Act do not apply to parcels that were "in compliance with or exempt from any law ... regulating the design and improvement of subdivisions in effect at the time the subdivision was established." (29 C.4th 999.) Even assuming, for sake of argument, that the statutory phrase "exempt from" may be construed to mean "not subject to," plaintiffs cannot demonstrate that recordation of the Greene map in 1865 lawfully "established" the claimed subdivision for purposes of Govt.C. 66499.30(d). (29 C.4th 1000.) The first California act providing statewide authorization for the formal recordation of subdivision maps for purposes of lot sales was enacted in 1893, long after the Greene map was recorded in 1865. No state or local legislation authorized the establishment or creation of subdivided parcels in defendant county by map recordation before 1893. Furthermore, case law indicates that, where an antiquated map was not recorded pursuant to a subdivision law, a subdivided lot shown on that map generally enjoyed no independent legal status until the owner actually conveyed the lot separately from the surrounding lands through a deed or patent. (29 C.4th 1001, citing *Lakeview Meadows Ranch* and *John Taft Corp.*) Plaintiffs' property has remained intact under sequential owners throughout its history. Consequently, plaintiffs cannot fit their case within the decisions that recognize the establishment of subdivisions by conveyance of subdivided parcels. (29 C.4th 1009.)

(c) The "grandfather clause" of Govt.C. 66412.10(a) does not exempt plaintiffs' property from compliance with the Act. Govt.C. 66412.10(a), commonly known as the "anti-merger provision," prevents local agencies from automatically merging contiguous legal parcels when those parcels come into common ownership. It applies to only those units of land that already were "created" as separate parcels at some point in the past. (29 C.4th 1003.) It does not address the creation of parcels in the first instance, or provide a basis for legal recognition of subdivided lots depicted on antiquated maps. The antimerger provision has no application if the lots were not legal subdivisions before the Act. (29 C.4th 1004, citing *John Taft Corp.*) Because recordation of the Greene map in 1865 did not lawfully create the 12 parcels at issue, plaintiffs' reliance on Govt.C. 66451.10(a) is misplaced. (29 C.4th 1004.)

(d) Issuing certificates of compliance based on the Greene map would frustrate the Act's objectives "to encourage and facilitate orderly community development, coordinate planning with the community pattern established by local authorities, and assure proper improvements are made, so that the area does not become an undue burden on the taxpayer." (29 C.4th 1005.) The 12 parcels at issue here were found to be substandard by defendant's board of supervisors. To allow the parcels to be sold without compliance with the Act would exempt them from required consistency with applicable general and specific plans, from consideration of impact and dedication fees, and from discussion and input from interested persons, thus thwarting the Act's objectives and protections. (29 C.4th 1005.)

(3) *Effect of Recordation on Subsequent Building Permits.* For 5 years after the final map or parcel map for a residential subdivision is recorded, a local government may not impose a condition on the issuance of a building permit for the residential units that it could have lawfully imposed as a condition to the approved tentative or parcel map. Similarly, the local government may not refuse to issue a building permit for failure to conform with a condition that it could have lawfully imposed as a condition to the approved tentative or parcel map. (Govt.C. 65961; for exceptions, see Govt.C. 65961(a), (b), (c).) (See *Golden State Homebuilding Associates v. Modesto* (1994) 26 C.A.4th 601, 612, 31 C.R.2d 572 [Govt.C. 65961 only limits conditions that could have been "lawfully imposed" on previously approved map; hence, city could impose fees where it had not established fee policy when map application was complete].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Requirement.* See *Black Hills Inv. v. Albertson's* (2007) 146 C.A.4th 883, 892, 53 C.R.3d 263 [contracts under which developer agreed to purchase two parcels in shopping center development were void at time of execution; seller had not yet recorded parcel map in compliance with Govt.C. 66499.30(b)]. (2) *Exception to Requirement.* Neither Govt.C. 66499.30(a) nor 66499.30(b) prohibits an offer or contract to sell, lease, or finance real property or to construct improvements on real property, where the sale, lease, or financing, or the commencement of construction, is expressly

conditioned on the approval and filing of a final subdivision map or parcel map. (*Govt.C. 66499.30(e)*; see *Black Hills Inv. v. Albertson's*, *supra* [*Govt.C. 66499.30(e)* did not apply; contracts gave *seller*, not *buyer*, right to terminate contracts if seller failed to obtain government approval of parcels and did not condition sale on approval of parcel map].)

In *Witt Home Ranch v. Sonoma* (2008) 165 C.A.4th 543, 81 C.R.3d 123, the owner of a 120-acre parcel recorded a subdivision map of the property in 1915, showing 25 lots. In 2005, plaintiff, the owner's successor in interest, sought certificates of compliance for each of the lots, in anticipation of selling them individually. Defendant county refused to issue the certificates, concluding that the statutes governing the recordation of subdivision maps in 1915 were essentially surveying regulations that did not regulate the substance of private subdivision maps. Plaintiff filed a petition for writ of mandamus, and the trial court held that the lots described in the 1915 map were not covered by the grandfather clause of *Govt.C. 66499.30(d)*. *Held*, affirmed.

(a) *Gardner v. Sonoma* (2003) 29 C.4th 990, 129 C.R.2d 869, 62 P.3d 103, text, p. 947, expressly refused to consider the application of *Govt.C. 66499.30(d)* to subdivision maps recorded between 1893 and 1929. (165 C.A.4th 554.)

(b) Statutes enacted before 1943 contained a broad grandfather clause that granted recognition to all maps filed or recorded before the statutes took effect. (165 C.A.4th 556.) In 1943, the narrower clause that directly led to *Govt.C. 66499.30(d)* was enacted, including the language that grandfathers a subdivision in compliance with "any law ... regulating the design and improvement of subdivisions in effect at the time the subdivision was established." (165 C.A.4th 557.) Although legislative history indicates that the 1943 legislation was not intended to change the legal effect of the earlier grandfather clauses, its plain language indicates otherwise. (165 C.A.4th 557.) Therefore, the legislative history must be disregarded in favor of the statute's plain language. (165 C.A.4th 558.)

(c) The statute in effect in 1915 required subdivision maps to depict and identify lots, highways, and property set aside for public dedication. This requirement merely constituted regulation of the drawing depicting the subdivision, rather than regulation of the subdivision's improvement and configuration. The local governing body had no authority to impose constraints on the subdivision's features. Moreover, although the statute granted the governing body the authority to approve the maps, the approval was limited to ensuring that the map was accurate, professionally prepared, and otherwise in compliance with statutory requirements. (165 C.A.4th 561.)

(d) The one bit of authority granted to local governments, the ability to require a subdivider to widen roads and make them conform to adjoining streets, was insufficient to satisfy *Govt.C. 66499.30(d)*. This provision did not regulate subdivision "improvement," as that term is defined in *Govt.C. 66419*, because it did not authorize the governing body to require the installation of infrastructure. Furthermore, although it did regulate a design element, the location and width of roads, it did not regulate subdivision "design," as that term is defined in *Govt.C. 66418*. (165 C.A.4th 562.)



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[§ 815] Statute of Limitations for Judicial Review.

An action to attack, review, set aside, void, or annul the decision of an advisory agency, appeal board, or legislative body concerning a subdivision, or of any of the proceedings, acts, or determinations made before the decision, or to determine the reasonableness, legality, or validity of a condition attached to the decision, must be commenced within 90 days after the date of the decision. (*Govt.C. 66499.37*; see *Hensler v. Glendale* (1994) 8 C.4th 1, 24, 32 C.R.2d 244, 876 P.2d 1043, 8 Summary (10th), *Constitutional Law*, §1166 [*Govt.C. 66499.37* applies broadly to any action challenging ordinance or regulation enacted under Subdivision Map Act, or governmental action taken under ordinance or regulation; short limitation period is intended to permit and promote sound fiscal planning by state and local governments]; *Griffis v. Mono* (1985) 163 C.A.3d 414, 423, 209 C.R. 519 [in action challenging extension of tentative map, limitations period began to run at time extension was granted and did not begin to run anew when final map was approved]; *Hunt v. Shasta* (1990) 225 C.A.3d 432, 436, 441, 275 C.R. 113 [vote by board of supervisors rejecting request for certificate of compliance was final for purpose of permitting judicial review, and 90-day period of *Govt.C. 66499.37* began to run at time of vote]; *Presenting Jamul v. Board of Supervisors* (1991) 231 C.A.3d 665, 672, 282 C.R. 564 [*Govt.C. 66499.37* applies to action for declaratory relief attacking denial of request to toll expiration of tentative map]; *Anthony v. Snyder* (2004) 116 C.A.4th 643, 657, 10 C.R.3d 505 [neighboring property owner who failed to appeal conditions imposed on subdivision's tentative map approval and who did not participate in final map approval failed to exhaust administrative remedies and could not later challenge county's failure to make developer improve road]; 22 *Pepperdine L. Rev.* 1746 [*Hensler*].)

Govt.C. 66499.37 does not apply to a breach of contract claim unless the claim primarily concerns acts that could have been challenged as a violation of the Subdivision Map Act. (*Legacy Group v. Wasco* (2003) 106 C.A.4th 1305, 1313, 131 C.R.2d 460 [developers' claim that city breached development agreement by withdrawing funding for infrastructure was not action arising out of Act and thus was not subject to 90-day limitations period; claim that city breached contracts by refusing to approve final tract maps, however, directly concerned matter addressed by Act and was subject to limitations period]; see *Anthony v. Snyder, supra*, 116 C.A.4th 653 [*Govt.C. 66499.37* barred property owner's action to enforce subdivision improvement agreement between county and developer and to force developer to improve private road outside of subdivision; agreement was procedure created by and included in Subdivision Map Act

and thus was subject to limitations period; distinguishing *Legacy Group*].)

SUPPLEMENT: [This section is current through the latest supplement]
The following are among the cases discussing *Govt.C. 66499.37*:

Fishback v. Ventura (2005) 133 C.A.4th 896, 905, 35 C.R.3d 199 [*Govt.C. 66499.37* barred action alleging that ordinance requiring additional fees and surveys was preempted by Subdivision Map Act; statute began to run on date ordinance was enacted].

Branciforte Heights, LLC v. Santa Cruz (2006) 138 C.A.4th 914, 926, 928, 42 C.R.3d 96, Supp., infra, §818 [limitations period of *Govt.C. 66020*, rather than *Govt.C. 66499.37*, applied to developer's action challenging city's refusal to extend private open space credit to offset park and recreation fees assessed against developer].

Fogarty v. Chico (2007) 148 C.A.4th 537, 541, 55 C.R.3d 795 [limitations period of *Govt.C. 66499.37*, rather than *Govt.C. 66020(d)(2)*, applied to developers' action challenging city's decision to preclude any residential use of developers' parcel].

People v. Tehama County Bd. of Supervisors (2007) 149 C.A.4th 422, 430, 431, 56 C.R.3d 558 [limitations period of *Govt.C. 66499.37* did not apply to action challenging lot line adjustment; county planning director who approved adjustment was not "advisory agency, appeal board or legislative body"].



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[§ 816] Public Access to Water Resources.

Subdivisions bordering on public rivers and streams must provide "reasonable public access" from public highways (*Govt.C. 66478.4(a)*) and must dedicate a public easement along the bank sufficient to achieve "reasonable public use" (*Govt.C. 66478.5(a), (b)*). Similar requirements apply to subdivisions fronting on public lakes and reservoirs, bays, and the ocean. (See *Govt.C. 66478.11* et seq.)

In *Kern River Public Access Com. v. Bakersfield* (1985) 170 C.A.3d 1205, 217 C.R. 125, defendant city approved a subdivision along the Kern River without public access to the river or its bank within the subdivision, finding that public access downstream and on the opposite bank of the river provided adequate alternative access. Plaintiffs sought mandamus directing defendant to rescind approval. *Held*, judgment on peremptory writ affirmed, with directions to include a reasonable public easement along the river bank within the subdivision.

(a) *Public access requirement.* *Govt.C. 66478.4(a)* requires public access to "that portion of the bank of the river or stream bordering or lying within the proposed subdivision." The access need not be through or across the subdivision itself. Under *Govt.C. 66478.8*, "reasonable public access" may be "available within a reasonable distance from the subdivision." However, the alternative access may not be access to an area of the bank outside the subdivision. *Govt.C. 66478.8* "provides for alternative access routes but does not provide any alternative to the *object* of the access," i.e. the bank bordering or lying within the subdivision. (170 C.A.3d 1218.)

(b) *Public easement requirement.* *Govt.C. 66478.5* requires "a public easement along a portion of the bank of the river or stream bordering or lying within the proposed subdivision." The easement "is a right to use part of that same riverbank for recreational, educational and scientific pursuits," and is not encompassed by the alternative access provisions of *Govt.C. 66478.8*. (170 C.A.3d 1219, 1220.) The right to use the bank provided by *Govt.C. 66478.5* is distinguishable from the right to a usable route to get to the bank provided by *Govt.C. 66478.4*. (170 C.A.3d 1220.) *Govt.C. 66478.5* neither mandates nor prohibits an easement along the entire bank of the river within the subdivision. The extent, width, and character of the easement are to be determined by the local agency under *Govt.C. 66478.5(b)*. However, the statute is to be broadly construed to require a reasonable public easement. "The only limitation of the public's right to such an easement is *public safety*." (170 C.A.3d 1224, 1225.)

SUPPLEMENT: [This section is current through the latest supplement]



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12 Witkin Sum. Cal. Law Real Property § 817

[§ 817] In General.

(1) *Local Authority.* "Regulation and control of the design and improvement of subdivisions are vested in the legislative bodies of local agencies." (*Govt.C. 66411.*) Each local agency must, by ordinance, regulate and control the initial design and improvement of common interest developments and subdivisions that require a tentative and final or parcel map. (*Govt.C. 66411, 66451.*) Other subdivisions may also be regulated, provided that the regulations are no more restrictive than those applicable where regulation is mandatory. In the development, adoption, revision, and application of the ordinance, the local agency must comply with *Govt.C. 65913.2* (housing development approvals). (*Govt.C. 66411.*) (See *Associated Home Builders of the Greater East Bay v. Walnut Creek (1971) 4 C.3d 633, 645, 94 C.R. 630, 484 P.2d 606*, *infra*, §819 [constitutionality of local implementing ordinances]; *Benny v. Alameda (1980) 105 C.A.3d 1006, 1011, 164 C.R. 776* [city's ordinance requiring compliance with zoning regulations before filing of tentative map did not violate Subdivision Map Act; ordinance was consistent with city's undisputed authority to disapprove map when project does not conform to zoning ordinances or to condition approval on future compliance]; on common interest developments, see *supra*, §85 *et seq.*) In carrying out the Act, local agencies must balance regional housing needs against the public service needs of local residents and available fiscal and environmental resources. (*Govt.C. 66412.3.*)

(2) *Specific Provisions of Local Ordinances.* When a tentative and final or parcel map are required, a subdivision ordinance must provide for proper grading and erosion control. (*Govt.C. 66411.*) A soils report is necessary for all subdivisions for which a final map is required and for other subdivisions if required by local ordinance. (*Govt.C. 66490.*) A local ordinance authorizing a soils report may also authorize review of the report by the city or county engineer, and a soil investigation of each lot in the subdivision, if the preliminary report indicates the presence of critically expansive soils, soil problems that could lead to structural defects, or deleterious chemicals that could cause construction materials to corrode or deteriorate. (*Govt.C. 66491.*)

Local ordinances may require subdividers to provide for appropriate cable television systems and for communication systems, including telephone and Internet services. (*Govt.C. 66473.3.*) The ordinances may impose fees to defray the cost of drainage and sewage facilities (*Govt.C. 66483*), groundwater recharge facilities (*Govt.C. 66484.5*), bridges and major thoroughfares (*Govt.C. 66484*). Subdivisions must also, "to the extent feasible," provide for future

passive or natural heating or cooling opportunities, such as lot size and configuration designed to take advantage of exposure, shade, and prevailing breezes. (*Govt.C. 66473.1.*)

Local ordinances may provide that areas within a subdivision be reserved for parks, recreational facilities, fire stations, libraries, or other public uses, subject to statutory standards. (*Govt.C. 66479.*) If the public agency for whose benefit the area has been reserved does not enter into a binding agreement to purchase the property within a statutory time limit, the reservation terminates automatically. (*Govt.C. 66480, 66481.*)

(3) *Limitations on Local Authority.* Local authority is limited by the purposes and scope of the Act. (*Santa Clara County Contractors & Homebuilders Assn. v. Santa Clara* (1965) 232 C.A.2d 564, 573, 43 C.R. 86; see *Morehart v. Santa Barbara* (1994) 7 C.4th 725, 760, 29 C.R.2d 804, 872 P.2d 143 [local zoning ordinances requiring merger of parcels as condition of development are preempted insofar as they impose standards inconsistent with those of Act]; for limitations on local authority to impose development fees, see *infra*, §818; on local authority to require dedication of open space, see *infra*, §819.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XVII - Real Property

Witkin Summary of California Law XIII. ENVIRONMENTAL REGULATION OF REAL PROPERTY

A. Land Use Planning and Regulation.

2. Subdivisions.

e. Local Restrictions.

2. Imposition of Development Fees.

12 Witkin Sum. Cal. Law Real Property § 818

[§ 818] Imposition of Development Fees.

(1) *Limitations on Local Authority.* Although local governments have the power to adopt many regulations in connection with the matters covered by the Subdivision Map Act, the power to impose large fees or contributions for general benefits as a condition of map approval "may not reasonably be implied, and it is entirely inconsistent with the language and apparent intent of the statute." (*Santa Clara County Contractors & Homebuilders Assn. v. Santa Clara* (1965) 232 C.A.2d 564, 573, 43 C.R. 86 [local fees for general recreational purposes were void]; see *Kelber v. Upland* (1957) 155 C.A.2d 631, 638, 318 P.2d 561 [local fees for future park and school sites and drainage facilities were void]; *Hirsch v. Mountain View* (1976) 64 C.A.3d 425, 432, 134 C.R. 519 [because Act did not previously regulate consolidation of parcels, charter city's constitutional powers enabled it to levy fees as condition to map approval]; 97 A.L.R.5th 123 [validity, construction, and application of laws imposing road or transportation impact fees].)

The Mitigation Fee Act sets forth uniform procedures for the imposition of development fees by local agencies. (*Govt.C. 66000 et seq.*; see *Ehrlich v. Culver City* (1996) 12 C.4th 854, 865, 50 C.R.2d 242, 911 P.2d 429, 8 Summary (10th), *Constitutional Law*, §1157 [*Govt.C. 66000 et seq.* codify reasonable relationship standard to measure validity of required dedications of land, or fees imposed in lieu of dedications, that are challenged as takings]; *Centex Real Estate Corp. v. Vallejo* (1993) 19 C.A.4th 1358, 1362, 24 C.R.2d 48 [city excise tax imposed on issuance of building permits was not development fee subject to limitations of *Govt.C. 66000 et seq.*]; *Capistrano Beach Water Dist. v. Taj Dev. Corp.* (1999) 72 C.A.4th 524, 527, 85 C.R.2d 382 [fees paid by developer to connect its hotel to sanitation district's sewer system were sewer connection fees or capacity charges, not development fees subject to refund remedy of *Govt.C. 66001(e)*]; *Rincon Del Diablo Mun. Water Dist. v. San Diego County Water Authority* (2004) 121 C.A.4th 813, 818, 17 C.R.3d 666 [transportation rate portion of water rate was not capacity charge and did not violate *Govt.C. 66013*]; on fees in lieu of dedication, see *infra*, §819.)

(2) *Protesting Imposition of Fees.* The procedures for protests against the imposition of fees, dedications, reservations, or other exactions imposed by local agencies on residential housing developments are set forth in *Govt.C. 66020 et seq.* (See 35 U.C. *Davis L. Rev.* 103 [effect of United States Supreme Court's takings jurisprudence on local imposition of exactions and impact fees]; 36 Proof of Facts 3d 417 [proof of grounds for challenging imposition of development exactions].) Cases discussing these procedures include the following:

Utility Cost Management v. Indian Wells Valley Water Dist. (2001) 26 C.4th 1185, 1189, 114 C.R.2d 459, 36 P.3d 2 [120-day statute of limitations imposed by Govt.C. 66022 applied to action for refund of capital facilities fees; Govt.C. 66022 expressly applies to fees that are subject to Govt.C. 66013].

California Ranch Homes Dev. Co. v. San Jacinto Unified School Dist. (1993) 17 C.A.4th 573, 577, 21 C.R.2d 557 [enforcing time limits imposed by Govt.C. 66020(d) on challenges to imposition of school impact fees].

Ponderosa Homes v. San Ramon (1994) 23 C.A.4th 1761, 1770, 29 C.R.2d 26 [time limits imposed by Govt.C. 66020(d) run from time fee or condition is created, not from time compliance is required].

Western/Calif., Ltd. v. Dry Creek Joint Elementary School Dist. (1996) 50 C.A.4th 1461, 1469, 58 C.R.2d 220 [developers' challenge to imposition of school facilities fee was not barred by statute of limitations, but developers were not entitled to refund of fee].

N.T. Hill v. Fresno (1999) 72 C.A.4th 977, 986, 85 C.R.2d 562 [time limits imposed by Govt.C. 66020 apply to action challenging adjudicatory decision by local agency to impose capacity charge on specific residential development, whereas time limits imposed by Govt.C. 66022 apply to action challenging legislative decision promulgating or changing capacity charge].

Utility Cost Management v. East Bay Mun. Util. Dist. (2000) 79 C.A.4th 1242, 1246, 94 C.R.2d 777 [action for refund of fees paid by school district to utility district for capital improvements was barred by 120-day statute of limitations in Govt.C. 66022].

Warmington Old Town Associates, L.P. v. Tustin Unified School Dist. (2002) 101 C.A.4th 840, 867, 124 C.R.2d 744 [Govt.C. 66020(e) requires interest at 8% per annum on refunds awarded in fee protest action].

California Psychiatric Transitions v. Delhi County Water Dist. (2003) 111 C.A.4th 1156, 1161, 4 C.R.3d 503 [120-day limitations period of Govt.C. 66022, rather than 180-day limitations period of Govt.C. 66020(d)(2), applied to builder's action challenging imposition of water and sewer connection fees; citing *Utility Cost Management* and distinguishing *N.T. Hill*].

Williams Communications, LLC v. Riverside (2003) 114 C.A.4th 642, 656, 8 C.R.3d 96 [under Govt.C. 66020 and 66021, telecommunications company could recover payments that city illegally required it to make before installing fiber optic cable along city streets; although payment was not "fee" under those provisions, it was "exaction"].

Regents of Univ. of Calif. v. San Francisco (2004) 115 C.A.4th 1109, 1114, 9 C.R.3d 728 [120-day period of Govt.C. 66022, during which university could sue city for refund of allegedly excessive water and sewer charges, began to run on effective date of city's resolutions increasing water and sewer rates, not on date of city's annual budget resolution].

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Limitations on Local Authority.* See *Regents of Univ. of Calif. v. East Bay Mun. Util. Dist.* (2005) 130 C.A.4th 1361, 1377, 31 C.R.3d 278 [definition of "capacity charge" in Govt.C. 66013 is narrower than definition of "capacity charge" or "capital facilities fee" in Govt.C. 54999.1(b); distinguishing *Rincon Del Diablo Mun. Water Dist. v. San Diego County Water Authority* (2004) 121 C.A.4th 813, 17 C.R.3d 666, text, p. 953]; *Orange v. Barratt Amer.* (2007) 150 C.A.4th 420, 430, 58 C.R.3d 542 [county met duty, under Govt.C. 66016(a), to use excess revenues from overcollection of fees "to reduce the fee or service charge creating the excess"; county was not required to use surplus exclusively to directly reduce future fees, but could also spend surplus on reasonable and necessary costs of providing service for which fee was charged]; 16 A.L.R.6th 289 [validity, construction, and application of laws imposing school impact fees].

(2) *Protesting Imposition of Fees.* In *Barratt Amer. v. Rancho Cucamonga* (2005) 37 C.4th 685, 37 C.R.3d 149, 124 P.3d 719, defendant city adopted a comprehensive fee schedule for various services, including building permits and

plan reviews. The schedule was reenacted several times over the course of 3 years. Plaintiff developer sued the city, alleging that the building permit and plan review fees were excessive. Plaintiff sought (a) under *Govt.C. 66020*, a refund of fees it had already paid, (b) under *Govt.C. 66016(a)*, a writ of mandamus compelling the city to apply excess fee revenues to reduce future fees and to perform an annual audit, (c) a declaration that the fees were invalid "special taxes," and (d) invalidation of the most recent resolution adopting the fee schedule. The trial court sustained the city's demurrer, and the Court of Appeal affirmed. *Held*, affirmed, except with regard to the invalidation request. (On audit and "special taxes" issues, see 9 *Summary* (10th), *Taxation*, Supp., §§117, 137.)

(a) *Govt.C. 66020* applies only to "development fees" that alleviate the effects of development on the community. Building permit and plan review fees do not qualify as development fees. Instead, they are regulatory fees, governed by *Govt.C. 66014* and *66016*, and subject to the limitations period of *Govt.C. 66022*. (37 *C.4th* 696.) *Govt.C. 66020* does not authorize an individual refund action for overcharges of building permit and plan review fees. (37 *C.4th* 697.)

(b) Plaintiff may challenge the most recent reenactment of the resolution establishing the fee schedule. The reenactment constituted a modification or amendment of an existing fee or service charge, subject to challenge under *Govt.C. 66022(a)*. Although the amount of the building permit and plan review fees remained the same, the resolution changed the duration of those fees by extending their applicability. Unless reenactments are subject to challenge, a fee that was not challenged at its initial enactment, as these were not, would be immune from judicial review thereafter. There would be no effective enforcement mechanism to ensure that local agencies are complying with their duty to reduce the fees if revenues exceed actual costs. (37 *C.4th* 703.) Furthermore, the reenactment changed other fees in the schedule, and under the "reenactment rule" of statutory interpretation, the unamended portion of a statute is reenacted with the amended portion, so that the statute is deemed to have been acted on as a whole. (37 *C.4th* 704.)

If a party properly avails itself of the fee protest procedures of *Govt.C. 66020* to challenge allegedly excessive fees imposed on a development project or as a condition for obtaining governmental approval of a development project, the limitations period is the one established by *Govt.C. 66020*. If, however, a party does not comply with those fee protest procedures to challenge fees imposed as a condition for approval of a tentative map or parcel map, a traditional mandamus action must be brought within the time specified by *Govt.C. 66499.37* (text, §815), the statute of limitations generally applicable to subdivision decisions. (*Branciforte Heights, LLC v. Santa Cruz* (2006) 138 *C.A.4th* 914, 926, 928, 42 *C.R.3d* 96 [limitations period of *Govt.C. 66020*, rather than *Govt.C. 66499.37*, applied to developer's action challenging city's refusal to extend private open space credit to offset park and recreation fees assessed against developer]; see *Fogarty v. Chico* (2007) 148 *C.A.4th* 537, 541, 55 *C.R.3d* 795 [limitations period of *Govt.C. 66499.37*, rather than *Govt.C. 66020(d)(2)*, applied to developers' action challenging city's decision to preclude any residential use of developers' parcel, even though developer filed protest under Mitigation Fee Act; "exactions" that may be protested under Fee Act do not include land use restrictions that do not divest developer of money or possessory interest in subject property].)



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[§ 819] Dedication of Open Space.

A city or county may, by ordinance, require a subdivider to dedicate land for park or recreational purposes or to pay fees in lieu of dedication. (*Govt.C. 66477.*) The in-lieu fees enable a community to acquire outside land in close proximity to the subdivision when land within it is unsuitable. (See *supra*, §244 et seq.; 43 *A.L.R.3d* 862 [validity and construction of statute or ordinance requiring land developer to dedicate portion of land for recreational purposes or to make payment].)

In *Associated Home Builders of the Greater East Bay v. Walnut Creek* (1971) 4 *C.3d* 633, 94 *C.R.* 630, 484 *P.2d* 606, defendant city adopted an ordinance requiring dedication, and plaintiff corporation, in a class action on behalf of subdividers, raised a number of constitutional challenges to the authorizing statute. *Held*, all were without merit.

(a) The contention that a dedication requirement can be valid only if the need for park facilities is attributable to the increase in population resulting from the subdivision is based on the misconception that the city is in effect condemning part of the property for use by the public generally and making the subdivider (and ultimately the subdivision residents) pay for it. The city is not exercising the power of eminent domain; the requirement is a reasonable exercise of police power in an area now recognized as vital: preservation of open space. (4 *C.3d* 638.)

(b) The question whether there must be a direct relationship between the particular subdivision and an increase in the community's recreational needs does not call for an answer in this case, for the statute provides all the relationship necessary: The land dedicated or purchased from in lieu fees is to be used only for facilities to serve the subdivided area. (4 *C.3d* 640.)

(c) The contention that the exercise of police power must be directly related to health and safety is answered by the accepted view that recreational facilities are sufficiently related. (4 *C.3d* 641.)

(d) The contention that to uphold the regulation would imply that a subdivider may be required to make a similar special contribution for fire and police protection or other countywide governmental services overlooks the unique problem involved in utilization of undeveloped land. That land is a limited resource, and park areas are needed because

of the subdivision and are used mainly by its residents. (4 C.3d 641.)

(e) The clear weight of judicial authority and the views of commentators uphold the constitutionality of statutes like the one here. The subdivider realizes a profit from governmental approval of a subdivision because subdivision renders the land more valuable. In return for this benefit, the city may require the subdivider to dedicate a portion of the land for park purposes whenever the influx of new residents will increase the need for park and recreational facilities. (4 C.3d 644.)

(f) Plaintiff argues that the statute discriminates against horizontal subdivisions in favor of vertical ones; i.e., the subdivider who creates tract homes has to give the free land, while the apartment house builder, who creates similar living units, does not. This objection "has some arguable merit in the sense that the apartment builder, by increasing the population of an area, may add to the need for public recreational facilities to the same extent as the subdivider." (4 C.3d 643.) However, the Legislature could reasonably have assumed that an apartment house is ordinarily constructed on less land than most subdivisions and the apartment is, therefore, not decreasing the limited supply of open space to the same extent as the formation of a subdivision. (4 C.3d 643.) (See 23 *Hastings L. J.* 436 [different view of factual situation].)

(g) "It may come to pass, as [plaintiff] states, that subdividers will transfer the cost of the land dedicated or the in-lieu fee to the consumers who ultimately purchase homes in the subdivision, thereby to some extent increasing the price of houses to newcomers. While we recognize the ominous possibility that the contributions required by a city can be deliberately set unreasonably high in order to prevent the influx of economically depressed persons into the community, a circumstance which would present social and legal problems, there is nothing to indicate that [defendant's] enactments ... raise such a spectre. The desirability of encouraging subdividers to build low-cost housing cannot be denied and unreasonable exactions could defeat this object, but these considerations must be balanced against the phenomenon of the appallingly rapid disappearance of open areas in and around our cities." (4 C.3d 648.) (See *Norsco Enterprises v. Fremont* (1976) 54 C.A.3d 488, 499, 126 C.R. 659 [fees in lieu of dedication were payable on conversion of apartments into condominiums, based on value of unimproved land].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Branciforte Heights, LLC v. Santa Cruz* (2006) 138 C.A.4th 914, 932, 42 C.R.3d 96 [although Govt.C. 66477(e) authorizes municipal ordinance that provides private open space credit to offset fees imposed under Govt.C. 66477, city that had not adopted ordinance was not required to provide credit].



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f. Regulation of Sales and Leases.

1. By Real Estate Commissioner.

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[§ 820] By Real Estate Commissioner.

(1) *Lands Subject to Regulation.* The Real Estate Commissioner supervises all subdivision sales in California whether the land is located here or elsewhere within the United States. (See *B. & P.C. 10249* et seq., *11000* et seq. (Subdivided Lands Act); *10 Cal. Code Reg. §2790* et seq.; *California Coastal Com. v. Quanta Inv. Corp. (1980) 113 C.A.3d 579, 588, 170 C.R. 263* [distinction between Subdivided Lands Act (sale of subdivided lands) and Subdivision Map Act (subdivision of real property)], supra, §809 et seq.; C.E.B., Condominium Practice §3.1 et seq.; 9 Miller & Starr 3d, §25:2 et seq.; on disclaimer requirement for offerings outside United States, see *B. & P.C. 10249.9*.) The commissioner's authority extends to any subdivision divided into five or more parcels (*B. & P.C. 11000(a)*) and to planned developments, community apartment projects, condominiums, stock cooperatives, and limited-equity housing cooperatives. (*B. & P.C. 11004.5*; on commissioner's authority over time-share interests, see *B. & P.C. 11210* et seq.; on common interest developments, see supra, §85 et seq.)

(2) *Excluded Transactions.* The leasing of space in residential, commercial, or industrial buildings, or in mobilehome parks (except long-term leasing as a mandatory requirement of tenancy in a mobilehome park) is excluded, as is the sale of specified lots or parcels of 160 acres or more, unless the land is to be divided for oil and gas sales. (*B. & P.C. 11000(a)*.)

The Subdivided Lands Act does not apply to the proposed sale or lease of five or more parcels in a subdivision, or the sale of one or more parcels that are intended to be further subdivided into five or more parcels, to any person who acquires the parcels in order to engage in the business of constructing residential, commercial, or industrial buildings, or for the purpose of resale or lease of the parcels to persons engaged in this business. However, the purchase or lease agreement or a separate disclosure document must state that the purchaser or lessee is required to comply with *B. & P.C. 11000* et seq. before offering the parcels for sale or lease. (*B. & P.C. 11010.35(a)*.) The exemption provided by *B. & P.C. 11010.35(a)* does not apply to a proposed sale or lease of parcels that is done to evade another provision of *B. & P.C. 11000* et seq. (*B. & P.C. 11010.35(b)*.) *B. & P.C. 11010.35(a)* is intended to clarify the application of *B. & P.C. 11000* et seq. to the commercial sale or lease of residential subdivision interests and does not impose requirements on transactions entered into before January 1, 2001. (*B. & P.C. 11010.35(c)*.)

(3) *Notice of Intent.* Before subdivision parcels may be offered for sale or lease, a notice of intent must be filed with the commissioner. (See *B. & P.C. 11010*; on exemptions from notice requirement, see *B. & P.C. 11010.3, 11010.4, 11010.6, 11010.7*.) This notice requires extensive disclosures that the commissioner may require to be further amplified by a questionnaire (*B. & P.C. 11010*) and by investigation (*B. & P.C. 11014*). The information thus obtained includes identities of the participants, condition of title, encumbrances, terms of sale, proposed use, development of utilities, use or occupancy restrictions, soil and fill information, and estimates of indebtedness and taxes necessary for improvements on community facilities. (*B. & P.C. 11010(b)*.)

(4) *Grounds for Denial.* The commissioner may deny authority to offer parcels on any of the following grounds:

(a) Failure to comply with *B. & P.C. 11000* et seq. or the commissioner's regulations. (*B. & P.C. 11018(a)*.)

(b) The sale or lease would constitute misrepresentation, deceit, or fraud. (*B. & P.C. 11018(b)*.)

(c) Inability to deliver title or other interest contracted for. (*B. & P.C. 11018(c)*.)

(d) Inability to demonstrate that adequate financial arrangements have been made for all off-site improvements included in the offering. (*B. & P.C. 11018(d)*.)

(e) Inability to demonstrate that adequate financial arrangements have been made for any community, recreational, or other facilities included in the offering. (*B. & P.C. 11018(e)*.)

(f) Failure to show that the parcels can be used for the purpose for which they are offered, and in the case of a residential subdivision, failure to show that vehicular access and a source of potable domestic water will be available. (*B. & P.C. 11018(f)*.)

(g) Failure to provide in the contract or other writing the uses for which the parcels are offered, together with any covenants or conditions relative to those uses. (*B. & P.C. 11018(g)*.)

(h) Failure to comply with the commissioner's regulations with regard to agreements or bylaws to provide for management or other services pertaining to common facilities in the offering. (*B. & P.C. 11018(h)*.)

(i) Failure to demonstrate that adequate financial arrangements have been made for a guaranty or warranty included in the offering. (*B. & P.C. 11018(i)*.)

B. & P.C. 11018.5 lists the requirements for approval of condominium or community apartment project, stock cooperative, or planned development. (On hearing after denial, see *B. & P.C. 11018.3*.)

(5) *Public Report.* If the commissioner approves the subdivision, a public report, containing the information elicited, must be supplied to each prospective purchaser. (See *B. & P.C. 11018.1(a)*; on issuance of conditional public report for up to 6 months, see *B. & P.C. 11018.12*.) Prospective purchasers must also be given a statement of general information about common interest developments (*B. & P.C. 11018.1(c)*), and access to the articles of incorporation and bylaws of the homeowners association, declarations of covenants, conditions, and restrictions, and similar documents (*B. & P.C. 11018.6*). (On public report requirements for time-share plans, see *B. & P.C. 11227, 11234*.)

The commissioner's report must be supplied, on request, to members of the public, and a copy of the report and a statement advising that the report may be obtained must be conspicuously posted at any office where sales, leases, or offers are regularly made. (*B. & P.C. 11018.1(b)*; see *People v. Byers* (1979) 90 C.A.3d 140, 147, 153 C.R. 249 [statute is constitutional]; *West Hollywood v. 1112 Inv. Co.* (2003) 105 C.A.4th 1134, 1149, 130 C.R.2d 168, supra, §574 [apartment building owners who allowed public report to lapse lost right to sell units as condominiums without obtaining further approval from city].)

The commissioner may abandon an application for a subdivision public report for failure to provide the data

required by *B. & P.C. 11010* within 3 years after filing a notice of intention. (*B. & P.C. 11018.13*.)

(6) *Further Regulation*. False or misleading advertising is prohibited. Prior approval of advertisements by the Department of Real Estate is available. If disapproval is not communicated within 15 days, a proposed advertisement is deemed approved, but disapproval of a later use of the same or similar advertising is not foreclosed. (*B. & P.C. 11022*.)

Security interests in parcels are regulated to protect purchasers' investments. (See *B. & P.C. 11013* et seq.; C.C. 1133 [subdivider must give purchaser of property subject to "blanket encumbrance" written notice of fact that purchaser, through foreclosure, could lose purchaser's interest even if not delinquent in payments]; *Corby v. Gulf Ins. Co.* (2004) 114 C.A.4th 1371, 1376, 8 C.R.3d 663 [purchaser of parcel in subdivision could recover on bond issued under *B. & P.C. 11013.2* and *11013.4*, even though purchaser had deposited money with developer before date that bond was issued; statutes require bond to be issued for benefit and protection of all purchasers and lessees of subdivided lots].)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Grounds for Denial*. See *Property Owners of Whispering Palms v. Newport Pac.* (2005) 132 C.A.4th 666, 674, 33 C.R.3d 845 [regulation implementing *B. & P.C. 11018.5* did not apply to standard subdivision; although regulation did not expressly limit its application to common interest developments, limitation was clear when regulation was considered in context of whole statutory and regulatory scheme].



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2. By Federal Statute.

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[§ 821] By Federal Statute.

The Interstate Land Sales Full Disclosure Act (15 U.S.C., §1701 et seq.) regulates sales, involving the mails or interstate communications or transportation, from subdivisions divided into 25 or more parcels. (See 15 U.S.C., §§1702(a)(1), 1703(a).) The Act requires disclosures to the Secretary of Housing and Urban Development. (See 15 U.S.C., §1704 et seq.) Pursuant to 15 U.S.C., §1708, directing cooperation with states having analogous disclosure requirements, the Secretary accepts a copy of the California filings in lieu of the federal requirements. (24 C.F.R., §1710.506.) (See 9 Miller & Starr 3d, §25:230 et seq.)

The National Conference of Commissioners on Uniform State Laws has approved the Model Land Sales Practices Act dealing with the promotional sale of real estate. (See 7A (Part II) U.L.A. (Master Ed.), p. 366.)

SUPPLEMENT: [This section is current through the latest supplement]

Volume 7A (Part II) of the Uniform Laws Annotated was revised in 2006. The Land Sales Practices Act is now at 7A (Part II) U.L.A. (Master Ed.), p. 205.



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g. Enforcement of Subdivision Requirements.

12 Witkin Sum. Cal. Law Real Property § 822

[§ 822] Enforcement of Subdivision Requirements.

(1) *No Sale Without Compliance.* It is unlawful to sell subdivided parcels without complying with the Subdivided Lands Act (*supra*, §820) and the Subdivision Map Act (*supra*, §809). (See *B. & P.C. 11018.2*; *Govt.C. 66499.30*; *Murphy v. San Gabriel Mfg. Co. (1950) 99 C.A.2d 365, 368, 222 P.2d 85* [material changes in sales setup approved by commissioner]; *Pratt v. Adams (1964) 229 C.A.2d 602, 605, 40 C.R. 505* [use of partition action to circumvent Subdivision Map Act]; on similar attempts to evade requirements of Subdivided Lands Act, see 9 Miller & Starr 3d, §25:6.)

Sales in violation of the Subdivision Map Act are voidable at the option of the purchaser within 1 year after the discovery of a violation. (*Govt.C. 66499.32(a)*.) This option is not available, however, when a certificate of compliance, parcel map, or final map ratifies the seller's compliance with the Act. On the other hand, the purchaser may void the sale when the seller violates the Act, and by doing so, also violates the certificate of compliance, parcel map, or final map. (*Le Gault v. Erickson (1999) 70 C.A.4th 369, 374, 82 C.R.2d 692* [lender who had been given deed of trust and power of sale on one lot in parcel had option of voiding transaction after discovering that lot had previously been merged with other lots, even though certificate of compliance with Act had been recorded at time of merger; transaction involving merged lot violated both Act and certificate of compliance]; see *Stell v. Jay Hales Dev. Co. (1992) 11 C.A.4th 1214, 1227, 1228, 15 C.R.2d 220* [neighbors lacked standing to set aside conveyance under *Govt.C. 66499.32* in nuisance action challenging construction of house on subdivided lot]; *Drake v. Martin (1994) 30 C.A.4th 984, 992, 36 C.R.2d 704* [subsequent purchasers of subdivided land had no standing to rescind prior sale through which their predecessor in interest had purchased the land, even though prior sale had violated Subdivided Lands Act]; *77 A.L.R.3d 1058* [failure of vendor to comply with statute or ordinance requiring approval or recording of plat before conveyance of property as rendering sale void or voidable].)

The commissioner may summarily order any developer to desist and refrain from making sales in violation of *B. & P.C. 11000* et seq. or related regulations. (*B. & P.C. 11019(a)*); on enforcement of Subdivided Lands Act, see C.E.B., Condominium Practice §3.100 et seq.) Violations may also result in fines or imprisonment. (See *B. & P.C. 11023*; *Govt.C. 66499.31*.)

(2) *False Public Report.* It is a public offense punishable by fine or imprisonment to knowingly make, issue,

publish, deliver, or transfer a public report that is forged, altered, false, or counterfeit. (*B. & P.C. 11020*; on public report, see *B. & P.C. 11010*, *supra*, §820.)

(3) *Innocent Purchaser*. In *Keizer v. Adams* (1970) 2 C.3d 976, 88 C.R. 183, 471 P.2d 983, plaintiffs purchased an unimproved parcel without knowledge that it was one of 10 parcels that the seller had unlawfully subdivided from a 20-acre tract. Plaintiff's subsequent application for a building permit was denied by defendant county officers on the ground of violation of the Subdivision Map Act. *Held*, mandamus was properly granted to compel consideration of the application without reference to the Act. Its sanctions run only against the seller, and an innocent purchaser should not suffer for his grantor's violation. (2 C.3d 980.) (See *Stell v. Jay Hales Dev. Co.*, *supra* [Subdivision Map Act does not punish innocent purchasers for predecessors' violations; furthermore, certificate of compliance foreclosed any claim that subdivided parcel had been merged].)

The Legislature subsequently nullified the *Keizer* holding, but added safeguards to protect innocent purchasers:

(a) Communities may prevent or disapprove development of unlawfully subdivided parcels if the development "is contrary to the public health or the public safety," even if the owner purchased without knowledge of the violations. (*Govt.C. 66499.34*.)

(b) Communities must file notice of violations with the county recorder to put purchasers on notice. (See *Govt.C. 66499.36*.) (On filing certificates of compliance with Act, see *Govt.C. 66499.35*; *San Luis Obispo v. Superior Court* (2001) 90 C.A.4th 288, 292, 108 C.R.2d 753 [once mortgage foreclosure divested former property owner of all interest in property, county could not issue certificates of compliance to former owner; under *Govt.C. 66499.35*, certificates may not be issued to someone who has no interest in land].)

(c) The 1-year period in which purchasers may set aside unlawful sales (see *supra*) begins running only after discovery of the violation. (*Govt.C. 66499.32(a)*.)

(4) *Material Changes Without Notification*. In *PJNR v. Department of Real Estate* (1991) 230 C.A.3d 1176, 281 C.R. 673, defendant department ordered plaintiff developer to stop offering or selling lots in a subdivision. Defendant claimed that plaintiff had failed to fulfill representations in the public report governing the subdivision (see *supra*, §820), to inform defendant of material changes in the report, to fund a reserve account, and to perform under subsidy agreements made with the development's association. Plaintiff admitted that it had failed to establish the reserve account required by the report, but claimed that it had overpaid assessments by providing or paying for services for the association, and that the issue had been disposed of by a settlement agreement with the association. After defendant's order was affirmed by an administrative law judge, plaintiff petitioned for mandamus, and the trial judge issued a peremptory writ commanding defendant to set aside its decision. *Held*, reversed and remanded to the administrative law judge to determine plaintiff's offset.

(a) The object of *B. & P.C. 11012* is to "prevent injury by making a violation of its mandate illegal per se." Defendant need not demonstrate an impairment to the association's finances to prove a statutory violation. Moreover, the record presents no evidence that the reserve account was fully funded from assessments, as required by the report. (230 C.A.3d 1187.)

(b) The settlement agreement between plaintiff and the association, of which defendant was not notified, did not bind defendant, and the association had no authority to excuse plaintiff's statutory violations. If a settlement agreement could bind the Department of Real Estate, a developer could circumvent the legislative mandate of *B. & P.C. 11012* by inducing the party whom the law seeks to protect into approving the unlawful conduct after the harm has been done. (230 C.A.3d 1188.)

(c) Under equitable principles, plaintiff is entitled to a limited offset for its payment of operational items identified in the approved budget for the project. It is not entitled to an offset against assessments intended to fund the reserve account or for payments exceeding the allotments in the approved budget. (230 C.A.3d 1189.) To the extent a developer

alters or exceeds the subdivision budget or subsidy agreement, it must comply with the mandatory notice and reporting requirements. If it fails to do so, unilateral expenditures are without legal authority and at the developer's risk. (230 C.A.3d 1190.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *No Sale Without Compliance*. See *Black Hills Inv. v. Albertson's* (2007) 146 C.A.4th 883, 894, 53 C.R.3d 263 [Govt.C. 66499.32(a) did not apply to sale of parcels that had not yet been subdivided at time sales contracts were executed]; *Daro v. Superior Court* (2007) 151 C.A.4th 1079, 1093, 61 C.R.3d 716 [tenants of apartment building had no standing under Unfair Competition Law to sue for violation of Subdivided Lands Act; tenants were not injured by developers' failure to comply with Act, which is not intended to protect tenants but instead to protect purchasers of units in subdivisions]; *Witt Home Ranch v. Sonoma* (2008) 165 C.A.4th 543, 565, 81 C.R.3d 123 [issuance of certificate of compliance is merely ministerial act].



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CHAPTER XVII - Real Property

Witkin Summary of California Law XIII. ENVIRONMENTAL REGULATION OF REAL PROPERTY A. Land Use Planning and Regulation. 3. Housing and Urban Development. a. In General.

12 Witkin Sum. Cal. Law Real Property § 823

[§ 823] In General.

(1) *Home Financing and Rehabilitation Statutes.* Numerous laws and programs are designed to increase available affordable housing. (See *Wilson v. Laguna Beach* (1992) 6 C.A.4th 543, 545, 7 C.R.2d 848, *infra*, §825, citing the text; on statutes that encourage private construction of low-income housing, see *infra*, §824.) The following statutes are illustrative of California's extensive legislative concern with this issue:

(a) *Health & Saf.C. 37910 et seq.* (Marks-Foran-Residential Rehabilitation Act of 1973). (See *Anderson v. San Francisco Rent Stabilization & Arbitration Bd.* (1987) 192 C.A.3d 1336, 1344, 237 C.R. 894 [purposes of Act discussed].)

(b) *Health & Saf.C. 50000 et seq.* (Zenovich-Moscone-Chacon Housing and Home Finance Act).

(c) *Health & Saf.C. 50199.50 et seq.* (Farmworker Housing Assistance Program).

(d) *Health & Saf.C. 50400 et seq.* (Department of Housing and Community Development).

(e) *Health & Saf.C. 50660 et seq.* [deferred payment housing rehabilitation loans].

(f) *Health & Saf.C. 50660 et seq.* (establishing California Disaster Housing Repair Fund, for making deferred-payment loans to provide disaster relief).

(g) *Health & Saf.C. 50850* (Housing Preservation and Information Service).

(h) *Health & Saf.C. 50835 et seq.* (local agencies authorized to satisfy matching fund requirement of National Affordable Housing Act by tax and assessment exemptions).

(i) *Health & Saf.C. 50896 et seq.* (administration of funds received by state under federal Home Investment Partnership Act).

(j) *Health & Saf.C. 50680 et seq.* (housing programs for developmentally disabled, mentally disordered, and

physically disabled persons).

(k) *Health & Saf.C. 50690* et seq. (California Housing Advisory Service to promote owner construction or rehabilitation of housing).

(l) *Health & Saf.C. 50710* et seq. (housing assistance program for migratory agricultural workers).

(m) *Health & Saf.C. 50735* et seq. (state financial assistance for local development of low-income rental housing).

(n) *Health & Saf.C. 50775* et seq. (state assistance to renters for purchase of units being converted to condominium, planned development, or stock cooperative ownership).

(o) *Health & Saf.C. 50840* et seq. (housing trust funds for housing programs that serve very low-income families).

(p) *Health & Saf.C. 51320* et seq. (Manufactured Housing Assistance Act, providing assistance in financing the purchase of mobilehomes and the development of mobilehome parks).

(q) *Health & Saf.C. 52000* et seq. (cities and counties authorized to provide financial assistance for home purchasers and to issue revenue bonds).

(r) *Health & Saf.C. 52535* et seq. (California Housing Partnership, providing for nonprofit corporation to finance low-income housing developments).

(s) *Health & Saf.C. 53500* et seq. (Housing and Emergency Shelter Trust Fund Act of 2002).

(t) *Health & Saf.C. 19902* et seq. (shared housing for elderly and handicapped in publicly funded residential developments).

(2) *Historic Preservation. Health & Saf.C. 18950* et seq. assist in the preservation of historic buildings by providing alternative building regulations and standards for rehabilitation, alteration, and reconstruction. (See 13 *Powell* §79D.02; 20 *Santa Clara L. Rev.* 189 [federal programs and standards].)

Pub.Res.C. 5020 et seq. govern historical resources. *Pub.Res.C. 5020.4* states the duties and functions of the State Historical Resources Commission. *Pub.Res.C. 5024.1* establishes the California Register of Historical Resources. Administration of the Register is among the duties of the State Office of Historic Preservation. (*Pub.Res.C. 5024.6(c)*; see 24 *Pacific L. J.* 1006.) *Pub.Res.C. 5079* et seq. establish the California Heritage Fund, and specify the powers and duties of the State Office of Historic Preservation. (See *Prentiss v. South Pasadena* (1993) 15 C.A.4th 85, 94, 18 C.R.2d 641 [distinguishing voluntary character of historical preservation statutes from mandatory nature of zoning and other land use restrictions].)

(3) *Earthquake Safety. Health & Saf.C. 19160* et seq. authorize cities and counties to require reconstruction of buildings that constitute earthquake hazards. (See 11 *Pacific L. J.* 539; 24 *Santa Clara L. Rev.* 971 [earthquake insurance].) Other statutes intended to address earthquake safety include the following:

(a) *Govt.C. 8871* et seq. (Earthquake Hazards Reduction Act).

(b) *Govt.C. 8870* et seq. (Seismic Safety Commission).

(c) *Govt.C. 29900.5, 43602.5, Sts. & H.C. 10100.2* (public financing for seismic strengthening of buildings).

(d) *Health & Saf.C. 129675* et seq. (seismic safety of hospital facilities).

(e) *Health & Saf.C. 17922.2, 18941.6* (local programs to mitigate potentially hazardous buildings).

(f) *Pub.Res.C. 2690 et seq.* (Seismic Hazards Mapping Act).

(g) *Pub.Res.C. 2705* (Strong-Motion Instrumentation and Seismic Hazards Mapping Fund).

(h) *Govt.C. 8879 et seq.* (Seismic Retrofit Bond Act).

(i) *Health & Saf.C. 18613.4* (seismic standards for installation of manufactured homes or mobilehomes). (See 26 *Pacific L. J.* 669.)

(j) *Sts. & H.C. 180 et seq.* (seismic retrofitting of highways).

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Home Financing and Rehabilitation Statutes.*

(c) *Farmworker Housing Assistance Program: Health & Saf.C. 50199.50 et seq.* were repealed in 2008.



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CHAPTER XVII - Real Property

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12 Witkin Sum. Cal. Law Real Property § 824

[§ 824] Public and Low-Rent Housing.

(1) *Voter Approval of Public Housing Projects.* The California Constitution requires majority approval of low-rent housing projects. (Cal. Const., Art. XXXIV, §1.) The constitutional provision is implemented by *Health & Saf.C. 37000* et seq. The following projects are excluded from the constitutional requirement:

(a) Privately owned housing that is not tax-exempt, other than under Rev.C. 214(f), (g) (certain housing for the elderly, handicapped, and poor), and in which not more than 49% of the units are occupied by low-income families. (*Health & Saf.C. 37001(a)*; on Rev.C. 214(f), (g), see 9 *Summary* (10th), *Taxation*, §187.)

(b) Privately owned housing that is not tax-exempt and that is not financed with direct long-term public loans. (*Health & Saf.C. 37001(b)*.)

(c) Developments intended for owner occupancy, including cooperative or condominium ownership and limited equity housing cooperatives. (*Health & Saf.C. 37001(c)*.)

(d) Developments consisting of newly constructed, privately owned, one- to four-family dwellings not located on adjoining sites. (*Health & Saf.C. 37001(d)*.)

(e) Developments consisting of existing dwelling units leased by the state from private owners. (*Health & Saf.C. 37001(e)*.)

(f) Developments consisting of the rehabilitation, reconstruction, improvement, addition to, or replacement of existing low-rent housing projects. (*Health & Saf.C. 37001(f)*.)

(g) Developments consisting of the acquisition, rehabilitation, reconstruction, or improvement of a rental housing development subject to federal or state assistance to provide affordable housing for low-income households if that assistance is continued. (*Health & Saf.C. 37001(g)*.)

Discrimination in public housing has been the focus of commentary. (See 69 *Harv. L. Rev.* 551 [denial of federally aided housing to "subversives"]; 85 *Harv. L. Rev.* 870 [effect of projects on racial concentrations]; 23 *Stanf. L. Rev.* 63

[racial discrimination in site selection]; 45 So. Cal. L. Rev. 263 [discrimination against tenants who are welfare recipients]; 8 Summary (10th), *Constitutional Law*, §945 et seq.)

(2) *Validity of Nonspecific Ballot Measures*. In *Davis v. Berkeley* (1990) 51 C.3d 227, 272 C.R. 139, 794 P.2d 897, the court rejected the contention that a ballot measure specifying the maximum number of low-rent housing units to be developed, but providing no other information about the proposed project, did not satisfy the requirement of Cal. Const., Art. XXXIV. "Although article XXXIV specifically requires local entities to obtain voter approval before undertaking a 'low rent housing project,' it has no language purporting to prescribe what information such a ballot proposition must contain. It does not state that a ballot measure must specify the number of units contemplated, the size of the units, the location or value of the site or sites on which the units may be developed, the anticipated number of residents, the proposed architectural design, or any other fact that might logically be relevant to a voter's decision. It does not limit the number of projects that may be authorized by a single ballot measure, nor does it limit the time for completion of the authorized project or projects." (51 C.3d 234.) (See 18 *Pepperdine L. Rev.* 648 [Davis].)

(3) *Private Construction of Low-Income Housing*. The Legislature has adopted a number of provisions designed to stimulate the construction of low-and moderate-income housing by the private sector. (See 4 *Ecology L. Q.* 797 [rebuilding inner cities]; 81 *Harv. L. Rev.* 1295 [tax incentives for private investment in low-cost housing]; 29 *Hastings L. J.* 793 [California's lower income housing policy]; 38 So. Cal. L. Rev. 594 [financing multifamily residential construction]; 43 So. Cal. L. Rev. 309 [condominiums for the poor]; 19 *Stanf. L. Rev.* 554 [rent supplement program].) The following are illustrative:

(a) *Govt.C. 65915* et seq. (density bonuses and other incentives).

(b) *Govt.C. 65913* et seq. (procedures to assure sufficient zoning for affordable housing).

(c) *Govt.C. 65852.1* (authorizing zoning variance, special use permit, or conditional use permit for construction of certain dwelling units for persons age 60 or over).

(d) *Govt.C. 11011.1(d)* (sale of surplus state property at below market value subject to low- and moderate-income housing requirements).

(e) *Govt.C. 65852.150* (legislative intent to encourage construction of second housing units) and *Govt.C. 65852.2* (governing control by local agencies over second residential units in single-family and multifamily zoned areas, with intent to reduce barriers to affordable housing). (See *infra*, §825).

(f) *Health & Saf.C. 19900* (permit for low-rent housing development for elderly).

(g) *Govt.C. 65590, 65590.1* (replacement of converted or demolished low- or moderate-income housing in coastal zone). (See *Venice Town Council v. Los Angeles* (1996) 47 C.A.4th 1547, 1558, 55 C.R.2d 465 [replacement or payment of in-lieu fee is mandatory].)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Private Construction of Low-Income Housing*.

(a) *Density bonuses and other incentives*: See *Friends of Lagoon Valley v. Vacaville* (2007) 154 C.A.4th 807, 823, 65 C.R.3d 251 [city had discretion to award 40% density bonus to developer under *Govt.C. 65915*; maximum of 35% set forth in statute is maximum that city must provide, but not maximum that developer can ever obtain].

(c) *Dwelling units for persons over 60*: *Govt.C. 65852.1(b)*, added in 2006, repealed the specific authority of local agencies to issue variances, special use permits, and conditional use permits for these dwelling units, but units constructed under variances or permits issued before January 1, 2007, are deemed to be in compliance with relevant laws, ordinances, rules, and regulations. (d) *Sale of surplus state property*: *Govt.C. 11011.1* was repealed in 2008.

Govt.C. 11011.1, added in 2008, governs the sale of surplus state real property to local agencies or to nonprofit affordable housing sponsors.

(g) *Housing in coastal zone*: See *Coalition of Concerned Communities v. Los Angeles* (2004) 34 C.4th 733, 736, 21 C.R.3d 676, 101 P.3d 563 [*Govt.C. 65590(d)*, which requires new housing developments constructed within coastal zone to provide low-income units, applies only to developments that will have housing impact within coastal zone; project that neither affected existing affordable housing within coastal zone nor had new housing impact within coastal zone did not have to comply with requirement].



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CHAPTER XVII - Real Property

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12 Witkin Sum. Cal. Law Real Property § 825

[§ 825] "Granny Flat" Statute.

The "granny flat" statute governing local control over second residential units in single-family and multifamily zoned areas provides three options to local agencies:

- (1) Adopt an ordinance providing criteria for the creation of second units. (*Govt.C. 65852.2(a).*)
- (2) Adopt an ordinance prohibiting second units based on specified findings. (*Govt.C. 65852.2(c).*)
- (3) Adopt neither type of ordinance, and grant applications for variances or special use permits for second units if certain criteria are met. (*Govt.C. 65852.2(b).*)

The third option was at issue in *Wilson v. Laguna Beach* (1992) 6 C.A.4th 543, 7 C.R.2d 848. Owners of single-family dwellings with second units were threatened with abatement by the city. They sought mandamus to compel the city to accept and process applications for conditional use permits. The trial court found that the city had actively discouraged conditional use permit applications and misled applicants during the period before the passage of an ordinance imposing conditions, including parking restrictions, that were stricter than those of *Govt.C. 65852.2(b)*. The trial court also ruled that *Govt.C. 65852.2(b)* did not provide a basis for requiring applicants to show that they could provide additional parking. However, the trial court denied the request for mandamus, finding that the city should not be estopped from enforcing its new ordinance in order to allow applications to be made under *Govt.C. 65852.2(b)*. *Held*, reversed as to the denial of relief.

(a) The trial court properly found that parking restrictions are not permitted under *Govt.C. 65852.2(b)*. Parking is expressly mentioned as a criterion in *Govt.C. 65852.2(a)*, but not in *Govt.C. 65852.2(b)*. (6 C.A.4th 554.) *Govt.C. 65852.2(b)* was amended before its enactment to delete a provision allowing local governments to demand additional parking. (6 C.A.4th 555.) And the provision of *Govt.C. 65852.2(b)* requiring construction to conform to "other zoning requirements" applies to proposed buildings, not existing ones. (6 C.A.4th 556.)

(b) The second unit owners were entitled to the writ. The Legislature had "commandeered" the city's zoning power, making a value judgment that the public is better served by the additional housing created by the approval of second

units than by allowing cities to condition approval on extra parking. (6 C.A.4th 558.) The city had a ministerial duty under *Govt.C. 65852.2(b)* to process applications for conditional use permits and to grant them if they met the applicable criteria. (6 C.A.4th 559.) Characterizing the owners as "scofflaws" was no ground for denying them equitable relief. The Legislature intended to confer on the owners of otherwise illegal second units an opportunity to legalize those units. (6 C.A.4th 560.) (See *Govt.C. 65852.2(e)* [limiting parking requirements that may be imposed for second units]; *Govt.C. 65852.2(d)* [permitting minimum and maximum unit size requirements as long as they allow at least an efficiency unit to be constructed in compliance with local development standards].)

SUPPLEMENT: [This section is current through the latest supplement]



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XIII. ENVIRONMENTAL REGULATION OF REAL PROPERTY

A. Land Use Planning and Regulation.

3. Housing and Urban Development.

d. Uniform Building Codes.

12 Witkin Sum. Cal. Law Real Property § 826

[§ 826] Uniform Building Codes.

(1) *Preemption of Local Regulation. Health & Saf.C. 17922* incorporates into state law the Uniform Housing Code, and other uniform codes relating to construction. The effect of this provision on local regulation was considered in *Briseno v. Santa Ana* (1992) 6 C.A.4th 1378, 8 C.R.2d 486. Plaintiff challenged the validity of a city ordinance that established more stringent limits on the maximum occupancy of a dwelling unit than those provided in the Uniform Housing Code. The trial court found that state law did not preempt local ordinances regarding occupancy standards. *Held*, reversed.

(a) The history of the state's housing laws demonstrates the Legislature's desire to preempt local regulations generally. *Health & Saf.C. 17951* originally allowed local governments to impose restrictions equal to or greater than those imposed by state housing laws, but in 1970 that provision was deleted as part of the legislative revisions incorporating the requirements of the uniform building codes. (6 C.A.4th 1382.)

(b) The Legislature has also impliedly preempted most local regulations by prescribing the manner in which local authorities can adopt ordinances varying from the uniform codes. *Health & Saf.C. 17958.5* permits modifications where "reasonably necessary because of local climatic, geological, or topographical conditions," and *Health & Saf.C. 17958.7(a)* requires an express finding that those conditions exist. Here, the city had not and probably could not make any findings that local conditions necessitated a departure from the occupancy standards of the *Uniform Housing Code*. (6 C.A.4th 1383.)

In *ABS Institute v. Lancaster* (1994) 24 C.A.4th 285, 29 C.R.2d 224, the court followed the preemption rule stated in *Briseno*, but held that local conditions justified a deviation from state law. Plaintiff, a trade association for acrylonitrile-butadiene-styrene (ABS) plastic pipe suppliers and manufacturers, filed a complaint against defendant city challenging the adoption of an ordinance prohibiting the use of ABS cellular core pipe. The version of the Uniform Plumbing Code adopted under *Health & Saf.C. 17922* permits the use of ABS pipe for drain, waste, and vent pipe in residential structures of one or two stories. Defendant initiated a study on the safety of ABS pipe in response to citizen concerns, and held a hearing at which expert and nonexpert testimony was given in opposition to the use of ABS pipe, and nonexpert testimony was heard in its favor. The city council then approved the ordinance, making express findings that deviation from the Uniform Plumbing Code was necessitated by local climatic, geological, and topographical

conditions, including the city's proximity to the San Andreas Fault, the susceptibility of its soils to liquefaction in an earthquake and to shrinking and swelling, the climatic extremes in the area, and prevailing high-wind conditions, all of which made ABS pipe unsuitable because of its flammability and its weakness when subjected to stress or temperature fluctuation. *Held*, judgment for defendant affirmed.

(a) "There is a statewide interest in uniform building codes and the field has therefore been preempted by state law, subject to a statutory exception which permits a local entity to modify the provisions of the California Building Standards Code when it determines, and expressly finds, that such changes are reasonably necessary because of local climatic, geological or topographical conditions." (24 C.A.4th 293, citing *Health & Saf.C. 17922, 17958.5, and 17958.7*, and *Briseno*.)

(b) Plaintiff argued that, under *Health & Saf.C. 17958.5*, defendant had to find that local conditions deviated from prevailing statewide conditions so as to directly affect the element of the statewide code being modified. But the statute requires only a showing that local conditions make it reasonably necessary to deviate from what is required or permitted for the rest of the state. For example, defendant only had to show that its proximity to a major earthquake fault made it reasonably necessary to prohibit the use of ABS pipe, not that this proximity deviated from statewide conditions. (24 C.A.4th 294.)

(c) The trial judge properly found defendant's findings sufficient under either the substantial evidence or the abuse of discretion standard. The uncontroverted testimony of the only expert to appear at the hearing provided detailed information on the properties of ABS pipe and the effect of local conditions. Defendant's findings were primarily based on this substantial evidence, and hence, it did not abuse its discretion. (24 C.A.4th 296, 297.) (See *Building Industry Assn. v. Livermore* (1996) 45 C.A.4th 719, 727, 52 C.R.2d 902 [*Health & Saf.C. 17958, 17958.5, and 17958.7* authorize city to adopt more stringent residential fire sprinkler standards than those found in state law; citing *Briseno* and *ABS Institute*]; *California Apartment Assn. v. Fremont* (2002) 97 C.A.4th 693, 699, 118 C.R.2d 603 [*Health & Saf.C. 17958* does not preclude cities from making amendments, additions, or deletions to state code more than 180 days after its publication; statute simply provides that if particular city does not make changes within 180 days, state code provisions become effective by default in that city].)

Housing codes have been the subject of considerable commentary. (See 69 *Harv. L. Rev.* 1115 [municipal housing codes]; 89 *Harv. L. Rev.* 1815 [desirability of rental housing codes]; 54 *So. Cal. L. Rev.* 529 [homebuyers protection act as alternative to building codes for single-family homes]; 63 *A.L.R.5th* 517 [validity and construction of laws requiring installation of automatic sprinklers].)

(2) *Other Building Regulations*. The following are among the statutes other than the uniform building codes that govern building standards:

(a) *Health & Saf.C. 17000 et seq.* (Employee Housing Act).

(b) *Health & Saf.C. 17910 et seq.* (regulation of residential buildings).

(c) *Health & Saf.C. 18901 et seq.* (state building standards). (See *International Assn. of Plumbing & Mechanical Officials v. California Bldg. Standards Com.* (1997) 55 C.A.4th 245, 253, 64 C.R.2d 129 [*Health & Saf.C. 18901 et seq.* do not preclude adoption of Uniform Mechanical Code].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Other Building Regulations*.

(c) *State building standards*: See *Plastic Pipe & Fittings Assn. v. California Bldg. Standards Com.* (2004) 124 C.A.4th 1390, 1407, 1409, 22 C.R.3d 393 [adoption of 2000 Model Plumbing Code without certain provisions allowing use of cross-linked polyethylene (PEX) pipes was supported by evidence that use of PEX could present unreasonable risk of harm, where available information did not allow adopting agencies to determine whether use of PEX actually

would present unreasonable risk of harm; moreover, provisions were not automatically adopted within statutory time limit, where relevant agency never affirmatively adopted standards or forwarded them to Commission].



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CHAPTER XVII - Real Property

Witkin Summary of California Law
XIII. ENVIRONMENTAL REGULATION OF REAL PROPERTY

A. Land Use Planning and Regulation.

3. Housing and Urban Development.

e. Community Redevelopment Law.

1. In General.

12 Witkin Sum. Cal. Law Real Property § 827

[§ 827] In General.

(1) *Statutory Framework.* The Community Redevelopment Law (*Health & Saf.C. 33000 et seq.*) governs redevelopment in the following areas:

(a) Creation and operation of redevelopment agencies (*Health & Saf.C. 33100 et seq.*).

(b) Redevelopment procedures (*Health & Saf.C. 33300 et seq.*).

(c) Requisites of redevelopment plans and related reports (*Health & Saf.C. 33330 et seq.*).

(d) Redevelopment in areas where military bases are being closed (*Health & Saf.C. 33492 et seq.*). (See *Govt.C. 67800 et seq.* [cities and counties may establish military base reuse authority to plan for future use and development of military bases scheduled for closure]; *Govt.C. 13998 et seq.* [development of state and local plans for retention of defense installations and conversions of closed facilities]; *28 Pacific L. J. 861* [redeveloping California's military bases].)

(e) Litigation and financing problems (*Health & Saf.C. 33500 et seq.*).

(f) Special housing and renewal (*Health & Saf.C. 33701 et seq.*).

Additional statutes governing community redevelopment include the following:

(a) *Health & Saf.C. 34100 et seq.* (community development commissions).

(b) *Health & Saf.C. 36100 et seq.* (Model Cities program).

(c) *Govt.C. 61601.1* (graffiti abatement districts).

(d) *Sts. & H.C. 36500 et seq., 36600 et seq.* (parking and business improvement areas).

(2) *Commentary*. Problems arising in application of the community redevelopment laws have given rise to extensive commentary. (See 45 *Cal. L. Rev.* 134 [administrative procedure in urban redevelopment]; 21 *Ecology L. Q.* 705 [environmental justice and urban redevelopment]; 72 *Harv. L. Rev.* 504 [eliminating and preventing urban deterioration]; 83 *Harv. L. Rev.* 1558 [community development corporations]; 21 *Hastings L. J.* 317, 433 [judicial enforcement of housing and urban development acts]; 3 *San Diego L. Rev.* 24 [overlapping districts versus municipal authorities in urban redevelopment]; 37 *So. Cal. L. Rev.* 55 [concept and objectives of urban renewal under federal statutes]; 23 *Stanf. L. Rev.* 148 [community control of urban renewal]; 40A *Am.Jur.2d* (1999 ed.), *Housing Laws and Urban Redevelopment* §1 et seq.)

(3) *Relocation Assistance*. The problem of relocation necessitated by community redevelopment has provoked judicial and legislative responses. (See *Pacific Tel. & Tel. Co. v. Redevelopment Agency* (1977) 75 C.A.3d 957, 962, 142 C.R. 584 [telephone company must bear cost of relocating underground facilities necessitated by vacation of streets in furtherance of redevelopment project]; *East Bay Mun. Util. Dist. v. Richmond Redevelopment Agency* (1979) 93 C.A.3d 346, 353, 155 C.R. 636 [following *Pacific Tel. & Tel.*; same holding as to municipal utility district]; on relocation problems, see *Govt.C.* 7260 et seq.; on relocation assistance statutes, see 8 *Summary* (10th), *Constitutional Law*, §1271 et seq.; 49 *A.L.R.4th* 491 [validity and application of relocation assistance statutes].) The problem has also been the subject of commentary. (See 5 *Ecology L. Q.* 433 [revenue sharing and urban relocation assistance]; 82 *Harv. L. Rev.* 864 [family relocation in urban renewal]; 8 *Pacific L. J.* 627 [urban renewal and displacement of poor]; 8 *Southwestern U. L. Rev.* 751 [relocation planning and judicial review]; 21 *Stanf. L. Rev.* 801 [relocation assistance].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Framework*.(c) *Requisites of redevelopment plans and related reports*: See *Boelts v. Lake Forest* (2005) 127 C.A.4th 116, 126, 25 C.R.3d 164 [under *Health & Saf.C.* 33457.1, proposed amendment of redevelopment plan, to add power of eminent domain, warranted new findings regarding blight]; *Blue v. Los Angeles* (2006) 137 C.A.4th 1131, 1142, 41 C.R.3d 10 [reports and information made public before amendment to redevelopment plan satisfied requirements of *Health & Saf.C.* 33457.1 and 33352; administrative record contained lists of physical and economic conditions causing blight and maps identifying blighted parcels].

(f) *Special housing and renewal*: *Health & Saf.C.* 33701 et seq. were repealed in 2007.

Additional statutes:

(c) *Graffiti abatement districts*: *Govt.C.* 61601.1 was repealed in 2005.

(2) *Commentary*. See 38 *McGeorge L. Rev.* 216 [analysis of *Health & Saf.C.* 33445]; 40A *Am.Jur.2d* (2008 ed.), *Housing Laws and Urban Redevelopment* §1 et seq.



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A. Land Use Planning and Regulation.

3. Housing and Urban Development.

e. Community Redevelopment Law.

2. Determining Blight.

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[§ 828] Determining Blight.

(1) *"Blight" Defined.* Redevelopment procedures under the Community Redevelopment Law are available for predominantly urbanized areas that are "blighted." (See *Health & Saf.C. 33320.1(a)*.) To be found blighted, an area must be (a) predominantly urbanized, (b) characterized by one or more statutorily defined conditions of physical blight, (c) characterized by one or more statutorily defined conditions of economic blight, and (d) affected by a cumulative effect of physical and economic blight so prevalent and so substantial that it causes the area to be underutilized and creates a serious physical and economic burden on the community. The burden must be so great that it cannot be reasonably expected to be reversed or alleviated by private enterprise or government action, or both, without redevelopment. (*San Franciscans Upholding the Downtown Plan v. San Francisco* (2002) 102 C.A.4th 656, 698, 125 C.R.2d 745; for statutory definition of blight, see *Health & Saf.C. 33030(b)* [description of blight], *Health & Saf.C. 33031* [physical and economic conditions that cause blight]; 45 A.L.R.3d 1096 [defining "blighted areas" for renewal or redevelopment].)

(2) *Illustrations.* Numerous cases have discussed whether an area was sufficiently blighted or sufficiently urbanized to qualify as a redevelopment area, including the following:

Sweetwater Valley Civic Assn. v. National City (1976) 18 C.3d 270, 277, 133 C.R. 859, 555 P.2d 1099 [agency determination that golf course was blighted area under *Health & Saf.C. 33030* et seq. set aside].

Regus v. Baldwin Park (1977) 70 C.A.3d 968, 977, 139 C.R. 196 [following *Sweetwater Valley Civic Assn.*; noncontiguous residential-commercial and commercial-industrial areas were not blighted].

Emmington v. Solano County Redevelopment Agency (1987) 195 C.A.3d 491, 497, 237 C.R. 636 [finding that agricultural property is blighted was not supported by substantial evidence].

Leach v. San Marcos (1989) 213 C.A.3d 648, 653, 654, 261 C.R. 805 [following *Sweetwater Valley Civic Assn.* and *Regus*].

Morgan v. Community Redevelopment Agency of Los Angeles (1991) 231 C.A.3d 243, 249, 284 C.R. 745 [residents of project area were adequately notified and project committee was properly formed under *Health & Saf.C.* 33385; substantial evidence supported finding that area is blighted].

Franklin-McKinley School Dist. v. San Jose (1991) 234 C.A.3d 1599, 1603, 286 C.R. 656 [review under substantial evidence rule].

Gonzales v. Santa Ana (1993) 12 C.A.4th 1335, 1338, 16 C.R.2d 132 [finding of blight was proper, but redevelopment district was unduly large and redevelopment plan was deficient in failing to identify relocation housing for displaced persons].

Riverside v. Murrieta (1998) 65 C.A.4th 616, 620, 624, 76 C.R.2d 606 [project area was neither predominantly urbanized nor blighted; when rural-residential and equestrian-residential uses were eliminated, only 65.7% of project area was developed for urban uses; also, fewer than 5% of project area's structures were unsafe or unhealthy].

Beach-Courchesne v. Diamond Bar (2000) 80 C.A.4th 388, 396, 95 C.R.2d 265 [although project area was predominantly urbanized, it was not blighted under *Health & Saf.C.* 33030 or 33031; citing *Riverside*].

Friends of Mammoth v. Mammoth Lakes Redevelopment Agency (2000) 82 C.A.4th 511, 538, 98 C.R.2d 334 [no substantial evidence to support town's findings that area was predominantly urbanized and characterized by physical conditions that cause blight]. (See 52 *Hastings L. J.* 991 [analyzing *Beach-Courchesne* and *Friends of Mammoth*, and proposing more liberal definition of blight].)

Graber v. Upland (2002) 99 C.A.4th 424, 435, 439, 121 C.R.2d 649 [area that was 20% vacant was not sufficiently urbanized; even though vacant area had once contained rock mine and dump, those are not necessarily urban uses; moreover, each noncontiguous subarea was not both economically and physically blighted].

San Franciscans Upholding the Downtown Plan v. San Francisco, *supra*, 102 C.A.4th 656, 698 [evidence of physical blight included buildings that were unsafe and unhealthy for occupancy and susceptible to collapse in moderate earthquake, and had substandard foundations, poorly reinforced walls, inadequate connections between buildings and foundations, weak cripple walls, inadequate roof and floor membranes, and substandard construction; evidence of economic blight included depreciated property values, abnormally high-business vacancies, business bankruptcies, and elevated crime rate].

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Illustrations.* Other cases discussing whether an area was sufficiently blighted or sufficiently urbanized to qualify as a redevelopment area include the following:

Boelts v. Lake Forest (2005) 127 C.A.4th 116, 135, 25 C.R.3d 164 [evidence was insufficient to support city's finding of blight; city did not show that few allegedly deteriorated or dilapidated buildings in project area were deteriorated or dilapidated or had any safety or health problems, nor did it cite evidence of health code violations, structural defects, or declines in property values].

Evans v. San Jose (2005) 128 C.A.4th 1123, 1146, 27 C.R.3d 675 [evidence was sufficient to support city's finding of blight, which was based on detailed report prepared by redevelopment consultants; city properly included allegedly nonblighted neighborhood within project area, where planned improvements for infrastructure, traffic, and parking necessarily involved neighborhood].

Blue v. Los Angeles (2006) 137 C.A.4th 1131, 1149, 41 C.R.3d 10 [findings of physical and economic blight to support amendment to redevelopment plan were valid; record indicated that 50% of buildings in project area needed at least moderate rehabilitation, 13% required extensive rehabilitation or were dilapidated, property values were stagnant, vacancy rates were high, and lease rates were low].

Neilson v. California City (2007) 146 C.A.4th 633, 643, 53 C.R.3d 143 [redevelopment agency erred when it determined that area was blighted; lack of legal and physical access to right-of-way did not render lots to be of "irregular form and shape" under *Health & Saf.C. 33031(a)*].



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3. Other Redevelopment Issues.

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[§ 829] Other Redevelopment Issues.

Cases discussing other aspects of the Community Redevelopment Law include the following:

Berman v. Parker (1954) 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed.2d 27, 8 Summary (10th), Constitutional Law, §1063 [litigation stemming from redevelopment programs].

Berggren v. Moore (1964) 61 C.2d 347, 349, 38 C.R. 722, 392 P.2d 522 [conduct of hearings before redevelopment agency].

Marek v. Napa Community Redevelopment Agency (1988) 46 C.3d 1070, 1080, 251 C.R. 778, 761 P.2d 701 [under Cal. Const., Art. XVI, §16, and *Health & Saf.C. 33670, 33675*, "indebtedness," upon which redevelopment agency's right to tax increment revenues is based, includes agency's executory financial obligations under redevelopment contracts].

Fellom v. Redevelopment Agency of San Francisco (1958) 157 C.A.2d 243, 246, 320 P.2d 884 [constitutionality of condemnation for redevelopment].

Kehoe v. Berkeley (1977) 67 C.A.3d 666, 676, 135 C.R. 700 [local ordinance in conflict with state statute was not binding on redevelopment agency].

Santa Cruz v. Watsonville (1985) 177 C.A.3d 831, 846, 223 C.R. 272 [redevelopment funds were properly used for building roads not connected with development of building sites].

Fosselman's v. Alhambra (1986) 178 C.A.3d 806, 810, 224 C.R. 361 [judicial review of agency approval of redevelopment plan was governed by substantial evidence standard].

Torres v. Yorba Linda (1993) 13 C.A.4th 1035, 1044, 17 C.R.2d 400, 4 Cal. Proc. (4th), Pleading, §140 [nonresidents with "interest" in moving to city lacked standing to challenge city's redevelopment project].

Meaney v. Sacramento Housing & Redevelopment Agency (1993) 13 C.A.4th 566, 576, 16 C.R.2d 589 [school districts had standing to challenge construction financing contract between city and redevelopment agency by way of validation proceeding].

Arcadia Redevelopment Agency v. Ikemoto (1993) 16 C.A.4th 444, 453, 20 C.R.2d 112 [redevelopment agencies were properly assessed with costs of administering general property taxes].

Santa Clara v. Redevelopment Agency of San Jose (1993) 18 C.A.4th 1008, 1013, 22 C.R.2d 868 [where consistent with redevelopment plan, redevelopment project may be financed with bonds maturing after expiration of plan].

Lancaster Redevelopment Agency v. Dibley (1993) 20 C.A.4th 1656, 1661, 25 C.R.2d 593 [funds earmarked for housing under *Health & Saf.C. 33000* et seq. could not be used to secure bonds for improvements to support commercial development].

Craig v. Poway (1994) 28 C.A.4th 319, 327, 33 C.R.2d 528 [analyzing statutory requirements for low- and moderate-income housing funds].

Bernardi v. City Council (1997) 54 C.A.4th 426, 435, 63 C.R.2d 347 [stipulated judgment validating redevelopment plan, including provisions imposing fiscal cap and debt acquisition deadline, was binding and conclusive and could not be unilaterally modified 17 years later].

North Hollywood Project Area Committee v. Los Angeles (1998) 61 C.A.4th 719, 723, 71 C.R.2d 675 [project area committee, which is supposed to consult with and advise community redevelopment agency, is not entitled to independent, outside counsel; city council may offer services of city attorney].

Graber v. Upland (2002) 99 C.A.4th 424, 431, 121 C.R.2d 649 [deletion of 77-acre parcel from existing redevelopment project, for improper purpose of changing base year value of parcel, was invalid.]

SUPPLEMENT: [This section is current through the latest supplement]

Torres case:

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §158.

Cases discussing other aspects of the Community Redevelopment Law include the following:

Carson v. La Mirada (2004) 125 C.A.4th 532, 540, 22 C.R.3d 815 [office products distribution center was "big box" retailer for purposes of *Health & Saf.C. 33426.7* and *Govt.C. 53084*, which prohibit redevelopment agency from providing financial assistance to big box retailer that is relocating from one community to another within same market area].

Hesperia Citizens for Responsible Dev. v. Hesperia (2007) 151 C.A.4th 653, 658, 60 C.R.3d 124 [redevelopment agency's execution of municipal services agreement involving city and tribe that hoped to build gaming facility did not violate *Health & Saf.C. 33426.5*, which prohibits redevelopment agencies from assisting businesses in development of gaming facilities; nothing in statute requires agency to oppose gaming enterprises within redevelopment area or prohibits agency from being party to contract in which other governmental entities assist gaming facility developers].

Community Dev. Com. of Oxnard v. Ventura (2007) 152 C.A.4th 1470, 1482, 1483, 62 C.R.3d 383 [tax increment calculation under *Health & Saf.C. 33670(b)*, by which redevelopment agency receives portion of "levied taxes" in excess of taxes attributable to base year assessments, includes "all tax revenue generated from property" in redevelopment area; thus it includes escape assessments].

Fontana Redevelopment Agency v. Torres (2007) 153 C.A.4th 902, 911, 62 C.R.3d 875 [bond issue exceeded

bonded debt limit under *Health & Saf.C. 33334.1* and did not meet agency's obligation to provide low-income housing].



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A. Land Use Planning and Regulation.
4. National Environmental Policy Act.

12 Witkin Sum. Cal. Law Real Property § 830

[§ 830] National Environmental Policy Act.

(1) *Statutory Requirements.* The National Environmental Policy Act of 1969 (NEPA) (42 U.S.C., §4321 et seq.) is the cornerstone of modern environmental legislation. It declares a national policy to "encourage productive and enjoyable harmony" between humans and the environment. (42 U.S.C., §4321.) NEPA created the Council on Environmental Quality to appraise federal programs in light of the national policy. (42 U.S.C., §4342.) NEPA requires federal agencies to prepare environmental impact statements on "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." (42 U.S.C., §4332(C); see *Kleppe v. Sierra Club* (1976) 427 U.S. 390, 96 S.Ct. 2718, 49 L.Ed.2d 576 [NEPA did not require federal officials responsible for coal development in Northern Great Plains to file regionwide environmental impact statement; statements are required only for actual proposals for major federal action]; *Weinberger v. Catholic Action of Hawaii/Peace Education Project* (1981) 454 U.S. 139, 102 S.Ct. 197, 203, 70 L.Ed.2d 298, 305 [requirement that Navy consider environmental consequences of storing nuclear weapons].)

(2) *Commentary.* NEPA has been the subject of extensive commentary. (See 81 Cal. L. Rev. 929 [judicial review of administrative record in NEPA litigation]; 13 Cal. Western L. Rev. 1 [energy and the environment under NEPA]; 3 Ecology L. Q. 173 [substantive review under NEPA]; 3 Ecology L. Q. 705 [alternatives under NEPA]; 3 Ecology L. Q. 799 [environmental impact statements at policy level]; 4 Ecology L. Q. 93 [NEPA's impact on federal decisionmaking]; 5 Ecology L. Q. 321 [NEPA and foreign aid]; 10 Ecology L. Q. 253 [project modifications]; 12 Ecology L. Q. 363 [EPA settlements of administrative litigation]; 17 Ecology L. Q. 317 [Can EPA Sue Other Federal Agencies?]; 88 Harv. L. Rev. 735 [substantive review under NEPA using "least adverse alternative" approach]; 91 Harv. L. Rev. 815 [environmental impact requirement in agency enforcement adjudication]; 22 Hastings L. J. 805 [retroactive application of NEPA]; 22 Pepperdine L. Rev. 1089 [application of environmental impact statement requirement to international trade agreements]; 25 San Diego L. Rev. 161 [NEPA and environmental impact statements for offshore oil drilling]; 15 Santa Clara Lawyer 303 [fact of compliance as procedural or substantive question]; 19 Santa Clara L. Rev. 541 [injunction bonding in environmental litigation]; 45 So. Cal. L. Rev. 397 [role of federal government in environmental protection]; 3 Southwestern U. L. Rev. 88 [implementing NEPA]; 10 Southwestern U. L. Rev. 403 [future of environmental litigation]; 24 Stanf. L. Rev. 1092 [cost benefit analysis and NEPA]; 30 Stanf. L. Rev. 767 [scope of environmental impact statement requirement]; 31 U.C. Davis L. Rev. 253 [NEPA and standing doctrine]; 23 U.C.L.A. L. Rev. 124 [environmental impact statements at planning and program levels]; 10 U.S.F. L. Rev. 415 [judicially

enforceable substantive rights under NEPA]; *14 U.S.F. L. Rev. 403* [procedures]; *21 U.S.F. L. Rev. 501* [environmental review of recombinant DNA experiments]; 38 Proof of Facts 3d 547 [proof of necessity and sufficiency of environmental impact statement]; *61C Am.Jur.2d (1999 ed.), Pollution Control §97 et seq.*)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Commentary.* See 86 Proof of Facts 3d 99 [citizen suit for injunctive relief pending federal agency's compliance with NEPA].



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A. Land Use Planning and Regulation.

5. California Environmental Quality Act (CEQA).

a. In General.

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[§ 831] In General.

(1) *Nature of Statute.* The California Environmental Quality Act (CEQA) (*Pub.Res.C. 21000 et seq.*) establishes, at the state level, government commitment to the "maintenance of a quality environment for the people of this state now and in the future." (*Pub.Res.C. 21000(a).*) CEQA applies to discretionary projects proposed to be carried out or approved by public agencies, including, but not limited to, the enactment and amendment of zoning ordinances, the issuance of zoning variances, the issuance of conditional use permits, and the approval of tentative subdivision maps unless the project is exempt from CEQA. (*Pub.Res.C. 21080(a).*) The Office of Planning and Research and the Secretary of the Resources Agency must prepare and adopt guidelines for the implementation of CEQA by public agencies. (*Pub.Res.C. 21083(a)*; *14 Cal. Code Reg. §15000 et seq.*; see *Communities for a Better Environment v. California Resources Agency* (2002) 103 C.A.4th 98, 110, 126 C.R. 441 [invalidating numerous guidelines promulgated by Resources Agency].)

(2) *Relationship to National Environmental Policy Act.* CEQA is so parallel to the National Environmental Policy Act (*supra*, §830), at least with respect to environmental impact reports (see *infra*, §832 et seq.), that judicial interpretation of the federal Act "is strongly persuasive in our deciding the meaning of our state statute." (*Environmental Defense Fund v. Coastside County Water Dist.* (1972) 27 C.A.3d 695, 701, 104 C.R. 197; see *Bowman v. Berkeley* (2004) 122 C.A.4th 572, 591, 18 C.R.3d 814 [NEPA cases can be persuasive authority for interpreting CEQA].) CEQA requires coordination with federally required statements. (*Pub.Res.C. 21083.5 et seq.*)

(3) *Commentary.* CEQA has been the subject of extensive commentary and practice materials. (See *Cal. Civil Practice, Environmental Litigation*, §8:1 et seq.; 69 *Cal. L. Rev.* 112 [substantive enforcement]; 30 *Ecology L. Q.* 955 [amending CEQA to mandate consideration of wildlife corridors]; 30 *Golden Gate L. Rev.* 459 [erroneous and unauthorized revisions to CEQA]; 25/26 *Lincoln L. Rev.* 71 [impact of California Supreme Court's depublication practice on development of published case law interpreting CEQA]; 15 *Pacific L. J.* 1089 [emergency exemptions under CEQA]; 19 *Pepperdine L. Rev.* 1447 [review of CEQA after two decades]; 10 *San Diego L. Rev.* 693 [environmentally sensitive land use regulation in California]; 19 *Santa Clara L. Rev.* 513 [introduction to CEQA]; 19 *Santa Clara L. Rev.* 579 [project approval under CEQA], 19 *Santa Clara L. Rev.* 719 [preservation of historical structures under CEQA], 19 *Santa Clara L. Rev.* 777 [exclusionary zoning and CEQA]; 21 *Santa Clara L. Rev.* 727 [role of probable future projects in environmental assessments]; 18 *U.C. Davis L. Rev.* 197 [judicial development of CEQA])

West's Key Number Digest, Health and Environment k.25.10 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Commentary*. See C.E.B., Practice Under the California Environmental Quality Act 2d.



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A. Land Use Planning and Regulation.

5. California Environmental Quality Act (CEQA).

b. Environmental Impact Reporting Requirement.

1. Public Projects.

aa. Statutory Requirement.

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[§ 832] Statutory Requirement.

(1) *In General.* All state agencies, boards, and commissions must prepare, or cause to be prepared by contract, and certify an environmental impact report (EIR) on any project they propose to carry out or approve that may have a significant effect on the environment. (*Pub.Res.C. 21100*; see *Pub.Res.C. 21151* [same requirement for all "local agencies"]; *Vedanta Soc. of Southern Calif. v. California Quartet, Ltd. (2000) 84 C.A.4th 517, 525, 100 C.R.2d 889* [certification of EIR by unelected county planning commission could not be upheld, on appeal to elected county board of supervisors, by tie vote; appeal had to be decided by majority of board]; *Communities for a Better Environment v. California Resources Agency (2002) 103 C.A.4th 98, 125, 126 C.R.2d 441* [invalidating CEQA guideline that excludes "[o]rganizational or administrative activities of governments which are political or which are not physical changes in the environment" from definition of project]; Cal. Civil Practice, Environmental Litigation, §8:7 et seq.; on requirement of notice to interested parties of proposed reports, see *Pub.Res.C. 21091* et seq.; *Oceanside Marina Towers Assn. v. Oceanside Community Dev. Com. (1986) 187 C.A.3d 735, 742, 231 C.R. 910* [published notice to adjoining property owners is sufficient; mailed notice is not required]; on use of master EIRs for certain projects, see *infra*, §847; on definition of "project" under *Pub.Res.C. 21065*, see *infra*, §834.)

(2) *Specific Projects.* Reports on specific projects are required by the following provisions:

(a) *Pub.Res.C. 21151.1* (waste burning projects).

(b) *Pub.Res.C. 21151.4* (facilities that might emit hazardous air emissions near schools).

(c) *Pub.Res.C. 21096* (projects near airports).

(d) *Pub.Res.C. 21080.09* (location and development of public higher education campuses).

(3) *Adverse Changes to Environment Trigger Application of CEQA.* The purpose of CEQA is to protect the environment from proposed projects, not to protect proposed projects from the existing environment. The Act is

implicated only by adverse changes in the environment. It does not require an EIR when the proposed project is challenged on the basis of preexisting environmental conditions. (*Baird v. Contra Costa* (1995) 32 C.A.4th 1464, 1468, 1469, 38 C.R.2d 93 [EIR was not required where site of proposed project was already contaminated by oil that could affect proposed facility].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* *Save Tara v. West Hollywood* (2008) 45 C.4th 116, 84 C.R.3d 614, 194 P.3d 344, explored the meaning of "carry out or approve" in *Pub.Res.C. 21100(a)* and *21151(a)*. Defendant city entered into a draft agreement with a private developer. The city agreed to convey city-owned property to the developer and to provide the developer with a loan to construct senior housing. The agreement was conditioned on satisfaction of all applicable CEQA requirements. Plaintiff, a neighborhood association, filed a mandamus petition, alleging that defendant city should have prepared an EIR before entering into the draft agreement and approving the loan. The trial court denied the petition, and the Court of Appeal reversed. *Held*, affirmed. Entering into the agreement constituted approval for CEQA purposes and required preparation of an EIR.

(a) The CEQA guidelines define "approval" to mean the decision by a public agency that commits the agency to a definite course of action. Approval occurs, according to the guidelines, at the "earliest commitment to issue or the issuance by the public agency of a discretionary contract, grant, subsidy, loan, or other form of financial assistance, lease, permit, license, certificate, or other entitlement for use of the project." (45 C.4th 129.) Case law has recognized that CEQA must not be interpreted (1) to require an EIR before a project is well enough defined to allow for meaningful environmental evaluation, or (2) to allow an EIR to be delayed beyond the time when it can serve its intended function of informing and guiding decision makers. (45 C.4th 130.) An agency has no discretion to define "approval" in a way that allows its commitment to a project to precede the preparation of an EIR. (45 C.4th 132.)

(b) A CEQA compliance condition can be appropriate in a preliminary public-private agreement for exploration of a proposed project. (45 C.4th 132.) Plaintiff's argument that, as soon as a private project has been described in detail, any public-private agreement related to it requires CEQA review, must be rejected. (45 C.4th 136.) On the other hand, the level of public agency commitment that triggers CEQA is not limited to unconditional agreements that irrevocably vest development rights. (45 C.4th 134.) Instead, courts should determine "whether, as a practical matter, the agency has committed itself to the project as a whole or to any particular features, so as to effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered, including the alternative of not going forward with the project. ... In this analysis, [an agreement's] conditioning of final approval on CEQA compliance is relevant but not determinative." (45 C.4th 139.)

(c) The draft agreement here constituted approval of the project. The agreement demonstrated that defendant city was committed to the project by stating that its purpose was to "cause the reuse and redevelopment" of the property in accordance with the outlined project. (45 C.4th 140.) Defendant city agreed to lend the developer almost half a million dollars, regardless of CEQA compliance, and had indicated a willingness to waive its authority over the CEQA process. (45 C.4th 141.) City officials publicly announced the city's determination to proceed with the project and took steps to relocate existing tenants. (45 C.4th 141, 142.) All of these actions demonstrated that the city had committed itself to a definite course of action before fully evaluating its environmental effects, which is exactly what *Pub.Res.C. 21100(a)* and *21151(a)* prohibit. (45 C.4th 142.)

A public agency may not divide a single project into smaller individual projects in order to avoid considering the environmental impacts of the project as a whole. However, if the second activity is independent of, and not a contemplated future part of, the first activity, the two activities may be reviewed separately, even though they are similar in nature. (*Sierra Club v. West Side Irr. Dist.* (2005) 128 C.A.4th 690, 698, 27 C.R.3d 223 [rule against segmentation did not apply to assignments of water rights from two irrigation districts to city, where assignments were two separate, independent projects, approved by different agencies, and were not interrelated or contingent on each other; preparation of negative declarations, rather than EIRs, was proper].)

See *Western States Petroleum Assn. v. South Coast Air Quality Management Dist.* (2006) 136 C.A.4th 1012, 1023, 39 C.R.3d 354 [less formal environmental assessment (EA), prepared by air quality district before adopting rule limiting emissions from oil refineries, was adequate; EA did not need to examine effects of technology that no refineries intended to use]; *Moss v. Humboldt* (2008) 162 C.A.4th 1041, 1050, 76 C.R.3d 428 [expiration of tentative map (see text, §811) did not convert subdivision project, for which mitigated negative declaration had been prepared, into new project requiring EIR under *Pub.Res.C. 21151*]; C.E.B., 1 Practice Under the Environmental Quality Act 2d, Chap. 4.

Requirement of notice to interested parties: See *Gilroy Citizens for Responsible Planning v. Gilroy* (2006) 140 C.A.4th 911, 921, 45 C.R.3d 102 [although published notice did not comply with *Pub.Res.C. 21091(a)*, mailed notice was sufficient].



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5. California Environmental Quality Act (CEQA).

b. Environmental Impact Reporting Requirement.

1. Public Projects.

bb. Illustrations.

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[§ 833] Illustrations.

(1) *Environmental Impact Report Required.* The following are among the numerous cases that have determined that preparation of an EIR was necessary:

No Oil v. Los Angeles (1974) 13 C.3d 68, 80, 118 C.R. 34, 529 P.2d 66 [city council failed to comply with CEQA before enacting ordinances creating three oil drilling districts within residential area].

Bozung v. Local Agency Formation Com. (1975) 13 C.3d 263, 279, 118 C.R. 249, 529 P.2d 1017 [Local Agency Formation Commission approval of city annexation is "project" and requires report if annexation is prerequisite to environmentally significant changes in land use]. (See 64 Cal. L. Rev. 532 [Bozung]; 6 Golden Gate L. Rev. 203 [Bozung]; 7 Pacific L. J. 467 [legislative response to Bozung]; 16 Santa Clara L. Rev. 403 [Bozung].)

Inyo v. Yorty (1973) 32 C.A.3d 795, 802, 108 C.R. 377 [EIR was required for project to extract groundwater to export to distant city]. (See 6 San Fernando Valley L. Rev. 199 [Inyo].)

Natural Resources Defense Council v. Arcata Nat. Corp. (1976) 59 C.A.3d 959, 967, 968, 131 C.R. 172 [report was required for state forester's approval of timber-harvesting plan].

Carmel-By-The-Sea v. Board of Supervisors (1986) 183 C.A.3d 229, 242, 227 C.R. 899 [following Bozung; rezoning parcel as first step in development is "project" and requires report].

Christward Ministry v. Superior Court (1986) 184 C.A.3d 180, 190, 228 C.R. 868 [report was required for amendment to general plan designating existing landfill as solid waste management facility; amendment authorized potential new uses at site].

Livermore v. Local Agency Formation Com. (1986) 184 C.A.3d 531, 538, 541, 230 C.R. 867 [revision of LAFCO guidelines for physical boundaries and service areas of local governmental agencies is "project" and requires report].

Heninger v. Board of Supervisors (1986) 186 C.A.3d 601, 605, 231 C.R. 11 [report required for ordinance amendment authorizing installation of alternative sewage disposal systems for single-family homes].

Citizens for Non-Toxic Pest Control v. Department of Food & Agriculture (1986) 187 C.A.3d 1575, 1583, 232 C.R. 729 [report required for use of toxic pesticide by Department of Food and Agriculture].

Murrieta Valley Unified School Dist. v. Riverside (1991) 228 C.A.3d 1212, 1218, footnote 1, 279 C.R. 421 [general plan amendment is "project" subject to environmental assessment under CEQA].

Sierra Club v. Sonoma (1992) 6 C.A.4th 1307, 1322, 8 C.R.2d 473 [new EIR was required for mining project with impacts not considered in earlier program EIR for mining in county].

Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist. (1992) 9 C.A.4th 644, 657, 11 C.R.2d 850 [EIR was required for amendments to air quality regulations regarding architectural coatings, due to evidence that new regulations would require use of lower quality products, causing net increase in emissions].

League for Protection of Oakland's Architectural & Historic Resources v. Oakland (1997) 52 C.A.4th 896, 906, 60 C.R.2d 821 [demolition of presumptively historical building required preparation of report, even though building had not been formally included in historical register].

Citizens for Responsible Government v. Albany (1997) 56 C.A.4th 1199, 1211, 1213, 66 C.R.2d 102 [submitting zoning amendment to electorate was exempt from CEQA, but development agreement was "project" under CEQA and submitting agreement to voters constituted conditional approval of project].

Amador v. El Dorado County Water Agency (1999) 76 C.A.4th 931, 956, 91 C.R.2d 66 [CEQA review of proposed transfer of hydroelectric project from utility to irrigation district, which involved shift from single-purpose hydroelectric project to multipurpose use including consumption of water, was not preempted by Federal Power Act (see *infra*, §922)].

Arviv Enterprises v. South Valley Area Planning Com. (2002) 101 C.A.4th 1333, 1345, 125 C.R.2d 140 [city properly imposed building hiatus pending preparation of EIR where developer had filed numerous, serial applications for permits, disguising fact that he was planning to build 21-house development; scientific or expert studies were not required to provide substantial evidence to support fair argument that project may have significant environmental impacts; personal observations of residents of development area sufficed].

(2) *Environmental Impact Report Not Required.* The following are among the numerous cases that have determined that preparation of an EIR was not necessary:

Simi Valley Recreation & Park Dist. v. Local Agency Formation Com. (1975) 51 C.A.3d 648, 663, 124 C.R. 635 [application of *Bozung*; LAFCO approval of detachment of land from park district is not "project" if no particular land use is dependent on it].

Simons v. Los Angeles (1976) 63 C.A.3d 455, 465, 133 C.R. 721 [no report was required for transfer of city park land to city public works department without substantial change in land's use].

No Oil v. Los Angeles (1987) 196 C.A.3d 223, 237, 242 C.R. 37 [oil drilling and transportation project; report properly deferred in-depth consideration of proposed pipeline routes until marketable oil is found and approval for pipeline is sought].

Kaufman & Broad-South Bay v. Morgan Hill Unified School Dist. (1992) 9 C.A.4th 464, 474, 11 C.R.2d 792 [formation of special tax district was not "essential step" toward or commitment to new school construction, and therefore was not "project" subject to reporting requirement].

Nacimiento Regional Water Management Advisory Committee v. Monterey County Water Resources Agency (1993) 15 C.A.4th 200, 205, 19 C.R.2d 1 [schedule for annual release of water from reservoir constructed before enactment of CEQA was part of ongoing reservoir project and hence was exempt from CEQA review].

Black Property Owners Assn. v. Berkeley (1994) 22 C.A.4th 974, 985, 28 C.R.2d 305 [city's acknowledgment of rent control ordinance in update of general plan housing element did not require EIR, where ordinance was exempt from CEQA when enacted and no change was contemplated].

National Parks & Conservation Assn. v. Riverside (1996) 42 C.A.4th 1505, 1518, 1519, 50 C.R.2d 339 [EIR for proposed landfill adequately treated prospective trash processing facilities, even though environmental impacts of facilities were not considered, where analysis of those impacts would be speculative and conjectural; review of facilities may be properly deferred].

Riverwatch v. San Diego (1999) 76 C.A.4th 1428, 1445, 91 C.R.2d 322 [EIR that deferred analyzing impact of widening state road until after review of widening by other agency was not defective; EIR found that widening would have significant impact that could be mitigated, although extent of mitigation was unknown pending other agency's review].

Sherwin-Williams Co. v. South Coast Air Quality Management Dist. (2001) 86 C.A.4th 1258, 1286, 104 C.R.2d 288 [inclusion by Air Resources Board of local district's rule in state implementation plan was not "project" requiring EIR or equivalent; *Pub.Res.C. 21065* refers to underlying activity that may be subject to approval by one or more governmental agencies, not to each of several approvals sequentially issued by those agencies].

Not About Water Committee v. Board of Supervisors (2002) 95 C.A.4th 982, 1001, 116 C.R.2d 526 [water district's formation of assessment district to fund water delivery system that would provide water hookups and fire protection services to properties within and outside district was not "project" within meaning of CEQA; citing *Kaufman*].

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Environmental Impact Report Required*. See *Amador v. Plymouth* (2007) 149 C.A.4th 1089, 1099, 1111, 57 C.R.3d 704 [approval of municipal services agreement between city and tribe was project requiring initial study and possible EIR; agreement obligated city to support tribe's federal application for gaming development and to construct fire station and sewer and water services and to vacate portion of city road, and agreement did not acknowledge that these or future actions might require CEQA review; distinguishing *Citizens to Enforce CEQA v. Rohnert Park* (2005) 131 C.A.4th 1594, 33 C.R.3d 208, *infra*, this section]. (2) *Environmental Impact Report Not Required*. Among the cases that have determined that preparation of an EIR was not necessary are the following:

Citizens to Enforce CEQA v. Rohnert Park, *supra*, 131 C.A.4th 1600 [memorandum of understanding between city and potential developers of casino was not "project"; city merely agreed to establish source of funds for potential future improvements if casino project were ever to occur, and memorandum specifically acknowledged that CEQA review could be required at later stage; citing *Kaufman & Broad-South Bay v. Morgan Hill Unified School Dist.* (1992) 9 C.A.4th 464, 11 C.R.2d 792, text, p. 981].

Concerned McCloud Citizens v. McCloud Community Services Dist. (2007) 147 C.A.4th 181, 191, 54 C.R.3d 1 [water district's approval and execution of agreement with bottling company did not constitute approval of project requiring CEQA review; agreement did not commit district to definite course of action and further action was contingent on district's eventual compliance with CEQA].

Friends of the Sierra R. v. Tuolumne Park & Recreation Dist. (2007) 147 C.A.4th 643, 656, 54 C.R.3d 500 [district's sale of land containing historic railroad right-of-way was not "project"; buyer had not yet proposed any concrete development proposals and thus meaningful CEQA review was not possible; citing *Kaufman & Broad-South Bay* and distinguishing *Bozung v. Local Agency Formation Com.* (1975) 13 C.3d 263, 118 C.R. 249, 529 P.2d 1017,

text, p. 979].



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aa. Statutory Requirement.

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[§ 834] Statutory Requirement.

In *Friends of Mammoth v. Board of Supervisors* (1972) 8 C.3d 247, 259, 104 C.R. 761, 502 P.2d 1049, the court held the environmental impact report requirement applicable to private building projects for which a governmental permit of some kind is necessary. A strong dissent challenged the legislative construction. (8 C.3d 273.) (See 61 Cal. L. Rev. 562 [similar criticism]; 9 Cal. Western L. Rev. 536 [developments after *Mammoth*]; 3 Ecology L. Q. 349 [history and aftermath of *Mammoth*]; 5 Pacific L. J. 19, 26, 92 [developments after *Mammoth*]; 76 A.L.R.3d 388 [validity, construction, and application of statutes requiring assessment of environmental information before grants of entitlements for private land use].)

Pub.Res.C. 21065, added in 1972, defines "project" consistently with *Mammoth*. (See *Russian Hill Imp. Assn. v. Board of Permit Appeals* (1974) 44 C.A.3d 158, 162, 118 C.R. 490 [legislative response to *Mammoth*].) "Project" means an activity that may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that is any of the following:

- (1) An activity directly undertaken by a public agency. (*Pub.Res.C. 21065(a)*.)
- (2) An activity undertaken by a person that is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies. (*Pub.Res.C. 21065(b)*.)
- (3) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies. (*Pub.Res.C. 21065(c)*.) (See *Neighbors of Cavitt Ranch v. Placer* (2003) 106 C.A.4th 1092, 1102, 131 C.R.2d 379 [county properly included two distinct elements (church and housing development) of proposed development in one EIR, even though elements sought different approvals and permits from county; definition of project under *Pub.Res.C. 21065(c)* is not limited to one development activity undertaken by one person and elements did not have different direct or indirect impacts on environment].)

The "whole of an action" must be considered in determining whether a project exists. (*Association for a Cleaner*

Environment v. Yosemite Community College Dist. (2004) 116 C.A.4th 629, 638, 639, 10 C.R.3d 560 [closure of college shooting range, cleanup activity at site, and removal and transfer of shooting range activities and classes were all part of single, coordinated endeavor that had potential for change in environment; community college district had to conduct initial study, even though range had already been closed, because other aspects of whole project could result in mitigated negative declaration (infra, §846) or EIR containing mitigation measures].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Plastic Pipe & Fittings Assn. v. California Bldg. Standards Com. (2004) 124 C.A.4th 1390, 1412, 22 C.R.3d 393* [adoption of regulations allowing use of cross-linked polyethylene (PEX) pipes was project requiring CEQA review]; *Martin v. San Francisco (2005) 135 C.A.4th 392, 405, 37 C.R.3d 470* [homeowner's proposed modifications to interior of existing single-family residence lacked potential for causing significant effect on environment and were beyond reach of CEQA, even though residence was listed as city landmark and was within state and national historic district]; *Tuolumne County Citizens for Responsible Growth v. Sonora (2007) 155 C.A.4th 1214, 1221, 66 C.R.3d 645* [proposed home improvement center and realignment of adjacent road were part of single CEQA project, even though city had separate plans to realign road; project proponent would fund and complete realignment, and home improvement center could not open until road realignment was completed; citing *Association for a Cleaner Environment v. Yosemite Community College Dist. (2004) 116 C.A.4th 629, 10 C.R.3d 560*, text, p. 983]; C.E.B., 1 Practice Under the Environmental Quality Act 2d, Chap. 4.



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bb. Illustrations.

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[§ 835] Illustrations.

(1) *Environmental Impact Report Required.* The following are among the numerous cases that have determined that preparation of an EIR was necessary for a private project:

Day v. Glendale (1975) 51 C.A.3d 817, 823, 124 C.R. 569 [city's issuance of grading permit was "discretionary project" subject to CEQA].

Myers v. Board of Supervisors (1976) 58 C.A.3d 413, 421, 129 C.R. 902 [county was without power to classify 8.1-acre residential subdivision as categorically exempt from requirement of EIR].

Environmental Protection Information Center v. Johnson (1985) 170 C.A.3d 604, 614, 216 C.R. 502 [CEQA applies to timber harvesting under Forest Practices Act (*Pub.Res.C. 4511 et seq.*)].

Antioch v. City Council (1986) 187 C.A.3d 1325, 1333, 1337, 232 C.R. 507 [EIR required for construction of road and sewer project in undeveloped area as catalyst for further development].

Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster (1997) 52 C.A.4th 1165, 1188, 61 C.R.2d 447 [classifying unlined 80-acre area as interim landfill and authorizing disposal of over 3 million tons of municipal waste is "plainly" project for purposes of CEQA].

Sunset Drive Corp. v. Redlands (1999) 73 C.A.4th 215, 222, 86 C.R.2d 209 [agency has no discretion to refuse to complete EIR when project requires one].

(2) *Environmental Impact Report Not Required.* The following are among the cases that have determined that preparation of an EIR was not necessary for a private project:

Running Fence Corp. v. Superior Court (1975) 51 C.A.3d 400, 413, 124 C.R. 339 [sustaining local agencies' negative declarations that 24-mile "running fence" art project, to be displayed for 14 days, would have no significant

environmental effect].

Natural Resources Defense Council v. California Coastal Zone Conservation Com. (1976) 57 C.A.3d 76, 90, 129 C.R. 57 [CEQA was not applicable to permit for which 1972 Coastal Zone Act required finding of absence of substantial adverse environmental effect].

Vernon v. Public Util. Com. (2001) 88 C.A.4th 672, 678, 106 C.R.2d 145 [railroad facility expansion project did not require EIR; requirements of CEQA may not be grafted onto determination of project's reasonableness under *Pub.Util.C.* 762 and 762.5].

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Environmental Impact Report Not Required.* See *Madrigal v. Huntington Beach* (2007) 147 C.A.4th 1375, 1383, 55 C.R.3d 209 [issuance of grading permit was step in nursery project that had been previously approved and left unchallenged under CEQA, not separate project requiring CEQA review].



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3. Statutory Exemptions.

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[§ 836] Statutory Exemptions.

(1) *In General.* *Pub.Res.C. 21080(b)* exempts the following projects and activities from CEQA:

(a) Ministerial projects proposed to be carried out or approved by public agencies. (*Pub.Res.C. 21080(b)(1).*) (See *infra*, this section.)

(b) Emergency repairs to public service facilities necessary to maintain service (*Pub.Res.C. 21080(b)(2)*) and specific actions necessary to prevent or mitigate an emergency (*Pub.Res.C. 21080(b)(4)*). (See *infra*, this section.)

(c) Projects to repair property damaged or destroyed as a result of certain disasters. (*Pub.Res.C. 21080(b)(3).*)

(d) Projects that a public agency rejects or disapproves. (*Pub.Res.C. 21080(b)(5)*); see *Main San Gabriel Basin Watermaster v. State Water Resources Control Bd.* (1993) 12 C.A.4th 1371, 1380, 16 C.R.2d 288 [project disapprovals by public agency are exempt from CEQA review under *Pub.Res.C. 21080(b)(5)*]; *Native Sun/Lyon Communities v. Escondido* (1993) 15 C.A.4th 892, 906, 19 C.R.2d 344 [following *Main San Gabriel Basin Watermaster*].)

(e) Enumerated actions undertaken by a public agency relating to a thermal power plant site or facility, if the facility will be the subject of an environmental impact report, negative declaration, or other document, prepared pursuant to a certified regulatory program under *Pub.Res.C. 21080.5* (*infra*, §850). (*Pub.Res.C. 21080(b)(6).*)

(f) Activities or approvals necessary to carrying out an Olympic games, except for the construction of facilities necessary for the games. (*Pub.Res.C. 21080(b)(7).*)

(g) The establishment or modification of specified rates, tolls, fares, or other charges by public agencies. (*Pub.Res.C. 21080(b)(8)*); see *Surfrider Foundation v. California Coastal Com.* (1994) 26 C.A.4th 151, 156, 31 C.R.2d 374 [issuance of permit to install parking fee collection devices at state park beaches was exempt from CEQA under *Pub.Res.C. 21080(b)(8)* and *21084(a)* (categorical exemption for small structures)]; 8 U.S.F. L. Rev. 752 [electrical public utility rate hearings as possible subject of EIR].)

(h) Projects for the institution or increase of passenger or commuter services on rail or highway rights-of-way already in use, including modernization of existing stations and parking facilities. (*Pub.Res.C. 21080(b)(10)*; see *Napa Valley Wine Train v. Public Util. Com.* (1990) 50 C.3d 370, 377, 267 C.R. 569, 787 P.2d 976 [institution of passenger service on Napa Valley Wine Train project was exempted from CEQA]; *Pub.Res.C. 21080.04* [legislative response to *Napa Valley Wine Train*, making that project subject to CEQA]; 18 *Pepperdine L. Rev.* 762 [*Napa Valley Wine Train*].)

(i) Projects for the institution or increase of passenger or commuter service on high-occupancy vehicle lanes already in use, including the modernization of existing stations and parking facilities. (*Pub.Res.C. 21080(b)(11)*.)

(j) Facility extensions of 4 miles or less that are required for transferring passengers from or to exclusive public mass transit guideway or busway public transit services. (*Pub.Res.C. 21080(b)(12)*.)

(k) Projects for the development of a regional transportation improvement program, the state transportation improvement program, or a congestion management program prepared under *Govt.C. 65089*. (*Pub.Res.C. 21080(b)(13)*.)

(l) Projects located in other states that will be subject to environmental impact review under NEPA (*supra*, §830) or similar state laws. However, emissions or discharges that would have a significant effect on the environment in California are subject to CEQA. (*Pub.Res.C. 21080(b)(14)*.)

(m) Projects undertaken by a local agency to implement a rule or regulation imposed by a state agency, board, or commission through a certified regulatory program under *Pub.Res.C. 21080.5* (*infra*, §850). A site-specific effect of the project that was not analyzed under *Pub.Res.C. 21080.5* is subject to CEQA. (*Pub.Res.C. 21080(b)(15)*.)

(2) *Exemption for Ministerial Projects.* In *Friends of Westwood v. Los Angeles* (1987) 191 C.A.3d 259, 235 C.R. 788, the issue was whether defendant city's issuance of a building permit for a major construction project--a 26-story office tower--was a "ministerial project" exempt from environmental assessment under CEQA by *Pub.Res.C. 21080(b)(1)*. "[T]he question here is whether the city had the power to deny *or condition* this building permit or otherwise modify this project in ways which would have mitigated environmental problems an EIR might conceivably have identified. If not, the building permit process indeed is 'ministerial' within the meaning of CEQA. If it could, the process is 'discretionary.' It is also discretionary if the city possessed the power to require another form of approval--in addition to the building permit--which could have been denied or conditioned on the basis of the EIR, but chose not to. None of this means the ordinances governing building permit approvals must expressly mention EIRs or authorize denial or modification of permits based specifically on the results of environmental assessments. It is enough the city possesses discretion to require changes which would mitigate in whole or in part one or more of the environmental consequences an EIR might conceivably uncover." (191 C.A.3d 273.) (See *Miller v. Hermosa Beach* (1993) 13 C.A.4th 1118, 1139, 17 C.R.2d 408 [following *Friends of Westwood*; issuance of building permit for hotel was discretionary]; *Prentiss v. South Pasadena* (1993) 15 C.A.4th 85, 90, 18 C.R.2d 641 [issuance of building permit for residential addition was ministerial; citing *Friends of Westwood*].)

(3) *Emergency Exemption.* Specific actions necessary to prevent or mitigate an emergency are exempt from CEQA. (*Pub.Res.C. 21080(b)(4)*.) "Emergency" means a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services. It includes fires, floods, earthquakes, other soil or geologic movements, riots, accidents, and sabotage. (*Pub.Res.C. 21060.3*; see *Western Mun. Water Dist. v. Superior Court* (1986) 187 C.A.3d 1104, 1110, 232 C.R. 359 [predicted earthquake was not emergency as defined in *Pub.Res.C. 21060.3*]; *Castaic Lake Water Agency v. Santa Clarita* (1995) 41 C.A.4th 1257, 1267, 49 C.R.2d 79 [community recovery plan following earthquake was not exempt emergency project under *Pub.Res.C. 21080(b)(3)* and (b)(4); plan contained numerous infrastructure and economic revitalization measures independent from earthquake damage]; *CalBeach Advocates v. Solana Beach* (2002) 103 C.A.4th 529, 536, 127 C.R.2d 1 [potential collapse of sandstone bluff was occurrence, rather than condition, and thus satisfied definition of "emergency"].)

(4) *Other Statutory Exemptions.* Other statutory exemptions include the following:

(a) *Pub.Res.C. 21080.01 et seq., 21080.03, 21080.07* (exemption of specified prison construction projects). (See *Sagaser v. McCarthy* (1986) 176 C.A.3d 288, 299, 221 C.R. 746 [exemption in *Pub.Res.C. 21080.03* was valid and constitutional].)

(b) *Pub.Res.C. 21080.05* (commuter train project between San Francisco and San Jose).

(c) *Pub.Res.C. 21080.08* (funding by Rural Economic Infrastructure Development Panel).

(d) *Pub.Res.C. 21080.8* (conversion of rental mobilehome park to resident initiated subdivision, cooperative, or condominium for mobilehomes). (See *supra*, §790.)

(e) *Pub.Res.C. 21080.22* (preparation of general plan amendments by local governments).

(f) *Pub.Res.C. 21080.23* (inspection, repair, removal, or similar work on existing pipelines).

(g) *Pub.Res.C. 21080.24* (issuance, modification, amendment, or renewal of air pollution control permits).

(h) *Pub.Res.C. 21080.33* (emergency repair, not involving expansion, of highway damaged by fire, flood, storm, earthquake, land subsidence, gradual earth movement, or landslide).

(i) *Pub.Res.C. 21159.22* (construction or conversion of residential housing for agricultural employees, where specified conditions are met).

(j) *Pub.Res.C. 21159.23* (construction or conversion of residential affordable housing, where specified conditions are met).

(k) *Pub.Res.C. 21159.24* (small, urban, residential project on infill site, where specified conditions are met).

(l) *Govt.C. 65457* (residential development project, including subdivision, or zoning change that is undertaken to implement and is consistent with specific plan for which EIR has been certified).

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See C.E.B., 1 Practice Under the Environmental Quality Act 2d, §5.5 et seq. (2) *Exemption for Ministerial Projects.* See *Madrigal v. Huntington Beach* (2007) 147 C.A.4th 1375, 1383, 55 C.R.3d 209 [issuance of grading permit was ministerial; city was required to issue permit if grading plan conformed to requirements of conditional use permit]. (4) *Other Statutory Exemptions.* (c) *Rural Economic Infrastructure Development Panel:* *Pub.Res.C. 21080.08* was repealed in 2006.

(m) *(New) Levee repairs:* *Pub.Res.C. 21080.12*, added in 2006 (repair of critical levees under State Plan for Flood Control).

(n) *(New) Seismic retrofitting:* *Pub.Res.C. 21080.14* and *21080.16*, added in 2006 (seismic retrofitting of specified highway structures and bridges).



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CHAPTER XVII - Real Property

Witkin Summary of California Law XIII. ENVIRONMENTAL REGULATION OF REAL PROPERTY

A. Land Use Planning and Regulation.

5. California Environmental Quality Act (CEQA).

b. Environmental Impact Reporting Requirement.

4. Categorical Exemptions.

12 Witkin Sum. Cal. Law Real Property § 837

[§ 837] Categorical Exemptions.

(1) *In General.* CEQA's regulatory guidelines set forth a list of exempt categories or classes of projects that the Resources Agency has determined do not have a significant effect on the environment, such as the reconstruction or negligible expansion of an existing facility or structure, construction of a single-family residence, new construction or conversion of a small structure, minor alterations to land, or an action taken for the protection of the environment. (See *Pub.Res.C. 21084(a), 21080(b)(9); 14 Cal. Code Reg. §15300 et seq.*) These are called categorical exemptions.

(2) *Exemption for Single-Family Residences.* In *Association for Protection of Environmental Values in Ukiah v. Ukiah* (1991) 2 C.A.4th 720, 3 C.R.2d 488, a citizens group challenged a city council's determination that a single-family residence for which the city granted a site development permit was categorically exempt from CEQA requirements under state regulations. *Held*, the exemption was properly applied.

(a) Plaintiff's argument that the project was ineligible for a categorical exemption because it was "discretionary" rather than "ministerial" was clearly wrong. Ministerial projects are already exempt from CEQA requirements under *Pub.Res.C. 21080(b)(1)*; categorical exemptions under the regulations apply to projects that are not ministerial. Thus, had this project required only a ministerial act such as a building permit, it would have been within the statutory exemption. Because approval was discretionary due to the need for a site development permit, the regulatory categorical exemption applied. (2 C.A.4th 732.)

(b) The residence at issue, which was the last to be built in an otherwise fully developed neighborhood, did not come within any of the exceptions provided in the regulations regarding categorical exemptions. There was no evidence that its location or cumulative impacts were environmentally significant. (2 C.A.4th 733.) Nor was there substantial evidence of any significant environmental effect due to unusual circumstances. (2 C.A.4th 734.)

(3) *Exemption for Existing Facilities.* In *Bloom v. McGurk* (1994) 26 C.A.4th 1307, 31 C.R.2d 914, petitioner challenged the issuance of permits for the continued operation of a medical waste treatment facility. The permits were required due to passage of the Medical Waste Management Act in 1990. The facility had operated since 1982 without undergoing CEQA review, although it held permits from the air quality management district, wastewater discharge

permits, and hazardous waste licenses. The trial judge denied relief based on the categorical exemption from CEQA granted to existing facilities under state regulations. *Held*, affirmed. The time at which a facility "exists" for purposes of the categorical exemption, and when its impact on the environment must be evaluated, is when the agency determines whether to require an EIR, and not the time of CEQA's enactment in 1970. "We presume that thousands of permits are renewed each year for the ongoing operation of regulated facilities, and we discern no legislative or regulatory directive to make each such renewal an occasion to examine past CEQA compliance at every facility built in the past 24 years." (26 C.A.4th 1315, disagreeing with contrary views in *Lewis v. Seventeenth Dist. Agricultural Assn.* (1985) 165 C.A.3d 823, 211 C.R. 884, and *Committee for a Progressive Gilroy v. State Water Resources Control Bd.* (1987) 192 C.A.3d 847, 237 C.R. 723.)

A number of other decisions deal with the exemption for existing facilities. (See *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 C.A.4th 1165, 1192, 1198, 61 C.R.2d 447 [existing facility exemption did not apply to continued dumping into large, municipal waste landfill; moreover, categorical exemptions are not available where, as here, there is reasonable possibility that activity will have significant effect on environment due to unusual circumstances]; *Amador v. El Dorado County Water Agency* (1999) 76 C.A.4th 931, 966, 91 C.R.2d 66 [neither "existing facility" exemption nor "ongoing use" exemption applied to proposed operation of hydroelectric project for consumptive water use; "existing facility" categorical exemption applies to simple ownership transfer, not to major change in focus of project; remarkable change in proposed operation from nonconsumptive to consumptive use prevented project from being termed "ongoing"]; *Woodward Park Homeowners Assn. v. Garreks* (2000) 77 C.A.4th 880, 888, 890, 92 C.R.2d 268 [fact that developer completed and began operating car wash project without obtaining EIR did not render challenge to project moot on appeal; effective relief was still possible because preparation of EIR could result in modification or removal of project; developer's decision to complete and operate project despite pending litigation "in no way" provides exemption].)

(4) *Exemption for Small, Commercial Structure.* The state regulations categorically exempt any small commercial structure in an urbanized area that involves the construction of up to four commercial buildings on a parcel zoned for commercial use, so long as the total floor area of the building or buildings does not exceed 10,000 square feet. (See *Fairbank v. Mill Valley* (1999) 75 C.A.4th 1243, 1251, 89 C.R.2d 233 [5,855-square-foot retail/office building met exemption standard and there were no unusual circumstances that would nullify exemption; although project was likely to cause minor, adverse changes in traffic and parking patterns, these effects could not be deemed significant].)

(5) *Other Decisions.* Other decisions applying and interpreting the categorical exemptions include the following:

Pasadena v. California (1993) 14 C.A.4th 810, 820, 17 C.R.2d 766 [determination of categorical exemption from CEQA is made as part of preliminary review; hence, if project is exempt no formal environmental evaluation is made].

Apartment Assn. of Greater Los Angeles v. Los Angeles (2001) 90 C.A.4th 1162, 1172, 1174, 109 C.R.2d 504 [categorical exemption for projects consisting of restoration or rehabilitation of deteriorated or damaged structures applied to city's permanent code enforcement program; city was not required to conduct initial study to determine whether program was categorically exempt].

Santa Monica Chamber of Commerce v. Santa Monica (2002) 101 C.A.4th 786, 792, 124 C.R.2d 731 [municipal ordinance creating large parking district where residential parking permits would be required was exempt from CEQA review under categorical exemption for minor alterations of existing streets or highways that involve negligible or no expansion of use].

Magan v. Kings (2002) 105 C.A.4th 468, 474, 129 C.R.2d 344 [ordinance regulating and eventually eliminating use of sewage sludge on land was clearly adopted for protection of environment and thus fell within categorical exemption for regulatory actions to assure maintenance, restoration, enhancement, or protection of environment; opponent of regulation did not demonstrate reasonable possibility of adverse environmental impact sufficient to remove ordinance from categorical exemption].

Association for a Cleaner Environment v. Yosemite Community College Dist. (2004) 116 C.A.4th 629, 640, 10 C.R.3d 560 [neither categorical exemption for changes to interior of school or training structure nor categorical exemption for minor cleanup actions applied to project involving closure of college shooting range, cleanup activity at site, and removal and transfer of shooting range activities and classes].

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* Only those projects having no significant effect on the environment are categorically exempt from CEQA review. If a project may have a significant effect on the environment, CEQA review must occur and only during that review are mitigation measures relevant. Mitigation measures may support a negative declaration, but not a categorical exemption. (*Salmon Protection & Watershed Network v. Marin* (2004) 125 C.A.4th 1098, 1102, 1106, 23 C.R.3d 321 [county erred in finding proposed single-family home categorically exempt; home was planned for area of "critical concern" and mitigation measures could not be used to create eligibility for categorical exemption; citing *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 C.A.4th 1165, 61 C.R.2d 447, text, p. 988]; on mitigated negative declaration, see text, §846.)

See C.E.B., 1 Practice Under the Environmental Quality Act 2d, §5.68 et seq.

(2) *Exemption for Single-Family Residences.* See *Salmon Protection & Watershed Network v. Marin*, *supra* [exemption for single-family residences did not apply where proposed residence was in county-designated area of critical concern]. (3) *Exemption for Existing Facilities.* See *Turlock Irr. Dist. v. Zanker* (2006) 140 C.A.4th 1047, 1065, 45 C.R.3d 167 [exemption applied to implementation of water conservation rules; rules involved installation of meter mechanisms on existing meter connectors and sought reduction rather than expansion of existing use; exception to exemption for significant effects caused by unusual circumstances did not apply]; *Save Our Carmel River v. Monterey Peninsula Water Management Dist.* (2006) 141 C.A.4th 677, 697, 46 C.R.3d 387 [exemption did not apply to transfer of water credit from demolished commercial building to city, even though city planned to transfer credit back to same site with "understanding" that property owner would construct "similar-sized" building; city had no plans, reports, or proposals with which to compare replacement structure and existing structure]. (5) *Other Decisions.* Other decisions applying and interpreting the categorical exemptions include the following:

Banker's Hill, Hillcrest, Park West Community Preservation Group v. San Diego (2006) 139 C.A.4th 249, 270, 277, 42 C.R.3d 537 [substantial evidence supported city's determination that categorical exemption for urban in-fill development projects applied to proposed 14-story residential building; project was substantially surrounded by urban uses and consistent with general plan, would not result in significant traffic effects, and would not have significant environmental effect "due to unusual circumstances"].

San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist. (2006) 139 C.A.4th 1356, 1376, 44 C.R.3d 128 [school district's decision to close two elementary schools was project under CEQA, but was categorically exempt because additions to remaining schools would be minor; opponents of closure failed to carry burden of showing exception to exemption].

California Farm Bureau Federation v. California Wildlife Conservation Bd. (2006) 143 C.A.4th 173, 187, 49 C.R.3d 169 [acquisition of conservation easement was not categorically exempt as acquisition of land for preservation of fish and wildlife or as minor alteration in condition of land; acquisition involved converting property into wildlife habitat, rather than preserving existing habitat, and alterations would not be minor].

Madrigal v. Huntington Beach (2007) 147 C.A.4th 1375, 1385, 55 C.R.3d 209 [issuance of grading permit fell within categorical exemption for minor alterations to land].

(6) *(New) No Categorical Exemption for Historical Resource.* A categorical exemption cannot apply to a project that may cause a substantial adverse change in the significance of an historical resource. (*Pub.Res.C. 21084(e)*; see *Committee to Save the Hollywoodland Specific Plan v. Los Angeles* (2008) 161 C.A.4th 1168, 1185, 74 C.R.3d 665 [city

should not have applied categorical exemption for minor alteration to land to building of fence on historic stone wall; any change to old, unique wall could significantly alter its physical composition, integrity, and aesthetic appeal[.]

In *Valley Advocates v. Fresno* (2008) 160 C.A.4th 1039, 1058, 1064, 74 C.R.3d 151, an applicant sought to demolish a building and replace it with a parking lot. Defendant city determined that the building should not be placed on the local historic register. The proposed project later proceeded through CEQA review. After being informed by its staff that the earlier determination to deny historic register listing meant that the building was not an historic resource under CEQA, defendant determined that the project was categorically exempt from CEQA review. Plaintiff, a public interest advocacy group, filed a petition for writ of mandamus, which the trial court denied. *Held*, reversed.

(a) A lead agency has the discretion to address whether a building is an historical resource for purposes of CEQA's discretionary historical resources category. "This discretion exists notwithstanding previous decisions not to list the object or building on the local register of historical resources." (160 C.A.4th 1060.) Here, defendant city was misinformed about its discretion and did not elect to consider whether the building qualified as an historical resource. (160 C.A.4th 1061.) As a result, defendant city prejudicially abused its discretion. (160 C.A.4th 1063.) Following remand to vacate the order denying mandamus, defendant must conduct a preliminary review that properly considers the discretionary historical resources category. (160 C.A.4th 1074.)

(b) The decision not to place the building on the local register did not necessarily resolve all factual questions about the building's historical resource status under CEQA. Although they overlap, the two decisions are not the same. Therefore, plaintiff's claim that defendant erred in applying CEQA's discretionary historical resource category is not an unlawful collateral attack on its prior determination not to list the building on the local register. (160 C.A.4th 1067.)

(c) Defendant was not required to apply the low threshold of the fair argument standard when determining whether the building was an historical resource under CEQA, even though that inquiry was made in the context of exceptions to the categorical exemptions. (On fair argument standard, see Supp., *infra*, §859.) Defendant city did not violate CEQA on that ground. (160 C.A.4th 1074.)



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5. California Environmental Quality Act (CEQA).

b. Environmental Impact Reporting Requirement.

5. Commonsense Exemptions.

12 Witkin Sum. Cal. Law Real Property § 838

[§ 838] Commonsense Exemptions.

CEQA's regulatory guidelines establish a "commonsense" exemption for projects "[w]here it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment." (14 *Cal. Code Reg. §15061(b)(3)*.) This exemption provides a "short way" for agencies to handle discretionary activities that could arguably be subject to CEQA but that common sense dictates should not be. (*Davidon Homes v. San Jose* (1997) 54 C.A.4th 106, 112, 113, 62 C.R.2d 612.) Unlike a categorical exemption determination (see *supra*, §837), an agency's commonsense exemption determination is not supported by an implied finding by the Resources Agency that a project will not have a significant environmental impact. Therefore, the agency carries the initial burden of supporting the decision with substantial evidence. (54 C.A.4th 116, 117, distinguishing *Pasadena v. California* (1993) 14 C.A.4th 810, 17 C.R.2d 766, and *Association for Protection of Environmental Values in Ukiah v. Ukiah* (1991) 2 C.A.4th 720, 3 C.R.2d 488, *infra*, §837.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 C.4th 372, 381, 385, 60 C.R.3d 247, 160 P.3d 116 [commission's adoption of air force base land use compatibility plan was project, but commonsense exemption applied; plan simply incorporated existing restrictions on residential housing development and thus any potential housing displacement from plan's adoption had already been caused]; *California Farm Bureau Federation v. California Wildlife Conservation Bd.* (2006) 143 C.A.4th 173, 195, 49 C.R.3d 169 [acquisition of conservation easement was not subject to commonsense exemption; project involved physical reshaping of land to create wetlands and uplands for habitat, and agencies did not carry burden of showing that there was "no possibility" of significant environmental impact].



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6. Ballot Measure Exemptions.

12 Witkin Sum. Cal. Law Real Property § 839

[§ 839] Ballot Measure Exemptions.

The act of placing a rent control initiative on the ballot is not a "project" and is not subject to CEQA. (*Stein v. Santa Monica* (1980) 110 C.A.3d 458, 460, 168 C.R. 39; see *Native American Sacred Site & Environmental Protection Assn. v. San Juan Capistrano* (2004) 120 C.A.4th 961, 965, 16 C.R.3d 146 [city's adoption of voter-sponsored initiative in compliance with *Elec.C.* 9214 was ministerial act and exempt from CEQA under *Pub.Res.C.* 21080(b)(1) (supra, §836)].) However, an environmental impact report is required for an ordinance conditioning conversion of residential hotels to other uses on construction or rehabilitation of replacement units or payment of an in lieu fee. (*Terminal Plaza Corp. v. San Francisco* (1986) 177 C.A.3d 892, 903, 904, 223 C.R. 379.)

In *Friends of Sierra Madre v. Sierra Madre* (2001) 25 C.4th 165, 105 C.R.2d 214, 19 P.3d 567, defendant city placed on the ballot an ordinance that removed 29 properties from the city's register of historic landmarks. After the voters approved the measure, plaintiffs petitioned for a writ of mandamus to set aside the election. The trial court granted plaintiffs' petition on the ground that the election procedures violated the Elections Code, but rejected plaintiffs' allegation that the measure violated CEQA. The Court of Appeal concluded that the city had substantially complied with the Elections Code, but that plaintiffs' petition should be granted based on the CEQA violation. *Held*, judgment of the Court of Appeal affirmed.

(a) *CEQA compliance is required when a project is proposed and placed on the ballot by a public agency.*

(1) CEQA's regulatory guidelines provide that a "project" subject to CEQA does not include "[t]he submittal of proposals to a vote of the people of the state or of a particular community" (14 Cal. Code Reg. §15378(b)(3)). However, the exemption is limited to voter-sponsored initiatives and does not include ballot measures placed before the electorate by a public agency in the exercise of the agency's discretion. (25 C.4th 187.) The regulation cites *Stein*, suggesting that the Resources Agency intended the exemption to apply only in the *Stein* situation, i.e., when placing an initiative measure on the ballot is a ministerial act compelled by law. In this way, the guideline conforms to *Pub.Res.C.* 21080(b)(1), which expressly excepts "[m]inisterial projects proposed to be carried out or approved by public agencies." (25 C.4th 189.)

(2) "[T]he distinction between initiatives generated by a city council and voter-sponsored initiatives serves a significant governmental policy. Voters who are advised that an initiative has been placed on the ballot by the city council will assume that the city council has done so only after itself making a study and thoroughly considering the potential environmental impact of the measure. ... By contrast, voters have no reason to assume that the impact of a voter-sponsored initiative has been subjected to the same scrutiny and, therefore, will consider the potential environmental impacts more carefully in deciding whether to support or oppose the initiative." (25 C.4th 190.)

(3) *Lee v. Lompoc* (1993) 14 C.A.4th 1515, 18 C.R.2d 389, in which the Court of Appeal held that CEQA review was not necessary to put a zoning ordinance on the ballot for voter approval regardless of whether the measure was an initiative or a referendum, is distinguishable. There, the city council had reached an impasse over the adoption of amendments to its general plan and zoning ordinance. Before the stalemate occurred, however, the city had complied with CEQA and prepared an *EIR*. (25 C.4th 190.) Under the circumstances in which the matter reached the ballot, the result in *Lee* was correct, although the conclusion that it was irrelevant whether a matter reached the voters by a city council-generated initiative or a voter-sponsored petition was not. (25 C.4th 191.)

(b) *A petition for mandamus is a procedurally proper means of challenging the validity of the ordinance.* Noncompliance with CEQA is not listed among the exclusive statutory bases for an election contest under *Elec.C. 16100*, and thus this action was not a permissible election contest. (25 C.4th 194.) However, *Pub.Res.C. 21168.5* authorizes mandamus to review and set aside a public agency action taken without CEQA compliance. Moreover, it was appropriate to grant plaintiff relief by invalidating the ordinance, even though plaintiff had sought to set aside the election. When a mandamus petitioner is not entitled to the relief sought, the court may grant appropriate relief instead. (25 C.4th 196.)

SUPPLEMENT: [This section is current through the latest supplement]

See *San Bernardino Associated Governments v. Superior Court* (2006) 135 C.A.4th 1106, 1114, 38 C.R.3d 293 [action by board of supervisors placing transportation sales tax measure on ballot was ministerial and not subject to CEQA; different public agency, of which board was member agency, was agency that exercised discretion in shaping measure and would have had discretion to respond to environmental concerns; citing *Stein v. Santa Monica* (1980) 110 C.A.3d 458, 168 C.R. 39, text, p. 990, and distinguishing *Friends of Sierra Madre v. Sierra Madre* (2001) 25 C.4th 165, 105 C.R.2d 214, 19 P.3d 567, text, p. 991].



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5. California Environmental Quality Act (CEQA).

c. Content of Environmental Impact Reports.

1. Detailed Statement.

12 Witkin Sum. Cal. Law Real Property § 840

[§ 840] Detailed Statement.

(1) *Statutory Requirement.* An environmental impact report must include a detailed statement setting forth all of the following:

(a) All significant effects on the environment of the proposed project. (*Pub.Res.C. 21100(b)(1)*; see *infra*, §841.)

(b) Any significant effects on the environment that could not be avoided or would be irreversible if the project were implemented. (*Pub.Res.C. 21100(b)(2)(A)*, (b)(2)(B); see *infra*, §841.) These effects must be set forth in a separate section of the report. (*Pub.Res.C. 21100(b)(2)*.)

(c) Mitigation measures proposed to minimize significant effects on the environment, including, but not limited to, measures to reduce the wasteful, inefficient, and unnecessary consumption of energy. (*Pub.Res.C. 21100(b)(3)*; see *infra*, §842.)

(d) Alternatives to the proposed project. (*Pub.Res.C. 21100(b)(4)*; see *infra*, §844.)

(e) The growth-inducing impact of the proposed project. (*Pub.Res.C. 21100(b)(5)*.)

The report must also contain a statement briefly indicating the reasons for determining that various effects of a project on the environment are not significant and consequently have not been discussed in detail in the EIR. (*Pub.Res.C. 21100(c)*; see *Pub.Res.C. 21080(c)*; *Pub.Res.C. 21064* [defining "negative declaration"], *infra*, §845.) (See *San Joaquin Raptor/Wildlife Rescue Center v. Stanislaus* (1994) 27 C.A.4th 713, 722, 32 C.R.2d 704 [EIR for residential development failed to comply with CEQA in all major respects]; *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 C.A.4th 1099, 1109, 11 C.R.3d 104 [EIR that discussed effects of replacing earthen canal with pipeline was inadequate because, contrary to requirements of *Pub.Res.C. 21100(c)*, it did not explain why reduction in stream flow that would result from replacement would not be significant]; *Maintain Our Desert Environment v. Apple Valley* (2004) 124 C.A.4th 430, 419, 15 C.R.3d 322 [project description need not identify end users or tenants of proposed project]; Cal. Civil Practice, Environmental Litigation, §8:17 *et seq.*; on report of

environmental impact on archaeological resources, see *Pub.Res.C. 21083.2*; *Society for Calif. Archaeology v. Butte* (1977) 65 C.A.3d 832, 839, 135 C.R. 679 [report failed to deal with archaeological effects of proposed subdivision]; 6 *Golden Gate L. Rev.* 1 [preserving Indian archaeological sites].)

CEQA does not require a public agency to speculate about or rely on proposed or draft regional plans in evaluating a project. (*Chaparral Greens v. Chula Vista* (1996) 50 C.A.4th 1134, 1145, 58 C.R.2d 152.)

(2) *Simplification of Reporting Requirements.* *Pub.Res.C. 21003* declares a policy of simplifying reports by eliminating unnecessary descriptions and minimizing unnecessary duplication through appropriate cross-references. (See *Pub.Res.C. 21100.1*.) Matters of public record may be briefly described with citation of the source. (*Pub.Res.C. 21061*.) In order to reduce the time and cost of preparing an EIR, lead agencies must focus the discussion in an EIR on those potential effects on the environment that the agency has determined to be significant. Discussion of other effects may be limited to a brief discussion of why they are not potentially significant. (*Pub.Res.C. 21002.1(e)*); see 26 *Pacific L. J.* 547 [simplification measures]; on streamlined review procedures under master EIR, see *infra*, §847.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Requirement.* See *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 C.A.4th 1184, 1213, 22 C.R.3d 203 [although specific identification of tenant's name may be unnecessary, EIR must recognize characteristics of shopping center's tenants so that environmental consequences of project approval can be accurately identified and analyzed; distinguishing *Maintain Our Desert Environment v. Apple Valley* (2004) 124 C.A.4th 430, 15 C.R.3d 322, text, p. 993]; *Save Round Valley Alliance v. Inyo* (2007) 157 C.A.4th 1437, 1447, 70 C.R.3d 59 [EIR accurately described project as subdivision of 74-acre parcel into 27 2.5-acre lots on which single-family residences could be built; description did not have to refer to possibility that future lot owners could build second dwelling units, where possibility was extremely uncertain and impacts were highly speculative]; *Sierra Club v. Orange* (2008) 163 C.A.4th 523, 532, 78 C.R.3d 1 [description of project was adequate even though it did not include exact boundaries of areas that could be annexed to city; EIR reviewed entire project area]. *Correction:* Page 993, 18th line, "124 C.A.4th 430, 419" should be "124 C.A.4th 430, 443".



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c. Content of Environmental Impact Reports.

2. Significant Environmental Effects.

12 Witkin Sum. Cal. Law Real Property § 841

[§ 841] Significant Environmental Effects.

(1) *Definition.* "Environment" means the physical conditions that exist within the area that will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, and objects of historic or aesthetic significance. (*Pub.Res.C. 21060.5*.) "Significant effect on the environment" means a substantial, or potentially substantial, adverse change in the environment. (*Pub.Res.C. 21068*.) (See *Communities for a Better Environment v. California Resources Agency* (2002) 103 C.A.4th 98, 110, 126 C.R. 441 [invalidating CEQA guideline that set regulatory standards to determine whether project could have significant environmental effect].)

The definition of significant environmental effects in *Pub.Res.C. 21060.5* and *21068* limits the concern of CEQA to changes in *physical conditions* within an area. "Economic and social changes resulting from a project are not treated as significant environmental effects." (*San Franciscans for Reasonable Growth v. San Francisco* (1989) 209 C.A.3d 1502, 1516, 258 C.R. 267) [effects of unavailability of child care programs are outside scope of CEQA]; see *Marin Mun. Water Dist. v. KG Land Calif. Corp.* (1991) 235 C.A.3d 1652, 1661, 1 C.R.2d 767 [EIR for moratorium on new water service connections reasonably refused to speculate about possible environmental consequences of long-term economic and social changes; citing *San Franciscans for Reasonable Growth*]; *Goleta Union School Dist. v. Regents of Univ. of Calif.* (1995) 37 C.A.4th 1025, 1031, 44 C.R.2d 110 [project proponent was not required either to consider potential classroom crowding in elementary school district as significant environmental effect or to commit funds for building permanent classrooms]; *Alliance of Small Emitters/Metals Industry v. South Coast Air Quality Management Dist.* (1997) 60 C.A.4th 55, 65, 70 C.R.2d 54 [citing *Marin Mun. Water Dist.*; environmental assessment prepared by local air quality management district was sufficient, even though it did not analyze environmental impacts of proposed air pollution control program for years after 2000; any efforts to assess impacts of unknown and unknowable technology would be pure speculation]; 22 *Ecology L. Q.* 213 [reconciling environmental protection with need for creativity with regard to significance threshold for CEQA].

(2) *Significant, Unavoidable Impacts.* An EIR must separately discuss the significant environmental effects that could not be avoided if the project were implemented. (*Pub.Res.C. 21100(b)(2)(A)*); see *Fairview Neighbors v. Ventura* (1999) 70 C.A.4th 238, 243, 82 C.R.2d 436 [board of supervisors properly approved conditional use permit for expanded mining operations where environmental impact report imposed all feasible mitigation measures and adopted

statement of overriding considerations as to significant, unmitigable impacts]; *Defend the Bay v. Irvine* (2004) 119 C.A.4th 1261, 1269, 15 C.R.3d 176 [sufficient evidence supported conclusions in EIR for proposed development of former military base that conversion of 3,100 acres of prime farmland would be significant, unavoidable adverse impact and that mitigation of impact would be infeasible].)

(3) *Adequate Descriptions*. Numerous cases have determined that an EIR's description of the significant environmental effects of a proposed project was adequate, including the following:

Lake County Energy Council v. Lake (1977) 70 C.A.3d 851, 856, 139 C.R. 176 [report on drilling exploratory geothermal wells was adequate even though dealing with impact only of exploration and not of possible production].

Atherton v. Board of Supervisors (1983) 146 C.A.3d 346, 350, 351, 194 C.R. 203 [report on proposed transit corridor was adequate even though discussion and supporting data were general and vague, where project was conceptual proposal in which various forms of transit had not yet been specified].

Dusek v. Redevelopment Agency (1985) 173 C.A.3d 1029, 1038, 1039, 219 C.R. 346 [report adequately considered impact of demolition of certified historic structure proposed by redevelopment agency as part of plan to rehabilitate blighted area].

Browning-Ferris Industries of Calif. v. City Council (1986) 181 C.A.3d 852, 865, 226 C.R. 575 [evidence provided by toxic pollutant and seismic experts was sufficient to support city's approval of report on rezoning parcel to allow solid waste disposal].

Dry Creek Citizens Coalition v. Tulare (1999) 70 C.A.4th 20, 25, 36, 82 C.R.2d 398 [general description in EIR of technical aspects of project's stream diversion structures was adequate; description allowed understanding of project's environmental impacts and did not narrow scope of review or minimize impacts, and more detailed technical description might have hindered public's understanding of project].

Fairview Neighbors v. Ventura, supra, 70 C.A.4th 242 [EIR properly assumed existing traffic impact of expanded mining operations to be traffic generated when mine operates at full capacity; discussing effects of project based on actual traffic counts would have been misleading because flow of traffic for mining operations fluctuates considerably].

National Parks & Conservation Assn. v. Riverside (1999) 71 C.A.4th 1341, 1354, 84 C.R.2d 563 [EIR adequately addressed proposed landfill's effects on wilderness experience and desert tortoise habitat in nearby national park].

Association of Irrigated Residents v. Madera (2003) 107 C.A.4th 1383, 1396, 1401, 133 C.R.2d 718 [EIR for construction and operation of dairy sufficiently analyzed effect of dairy on kit fox and alternative of operating with reduced size of dairy herd].

Mira Mar Mobile Community v. Oceanside (2004) 119 C.A.4th 477, 492, 14 C.R.3d 308 [EIR for proposed condominium development adequately analyzed impact that development would have on views from adjacent private property].

Defend the Bay v. Irvine, supra, 119 C.A.4th 1266 [sufficient evidence supported conclusion in EIR for proposed development of former military base that development would not have a significant adverse impact on housing or employment growth, despite creating more jobs than housing].

(4) *Inadequate Descriptions*. Numerous cases have determined that an EIR's description of the significant environmental effects of a proposed project was not adequate, including the following:

People v. Kern (1976) 62 C.A.3d 761, 770, 133 C.R. 389 [report on subdivision failed to respond to numerous adverse environmental criticisms].

Galante Vineyards v. Monterey Peninsula Water Management Dist. (1997) 60 C.A.4th 1109, 1121, 71 C.R.2d 1 [EIR was inadequate in description of project site and project's impact on viticulture; report failed to identify consequences of potential introduction of pests, discuss additional traffic and congestion impacts, or address potential climatic influences of building reservoir].

Amador v. El Dorado County Water Agency (1999) 76 C.A.4th 931, 949, 952, 91 C.R.2d 66 [EIR for proposed project designed to take water for consumptive use from three lakes was fundamentally flawed; it was predicated on county's draft general plan rather than on adopted general plan and it failed to describe adequately baseline environment and historic operations].

Riverwatch v. San Diego (1999) 76 C.A.4th 1428, 1451, 91 C.R.2d 322 [EIR did not have to account for prior illegal activity in vicinity of proposed quarry by using early baseline from which impacts could be measured; however, EIR did not properly evaluate significance of air pollution created by quarry].

Friends of Mammoth v. Mammoth Lakes Redevelopment Agency (2000) 82 C.A.4th 511, 532, 98 C.R.2d 334 [because *Pub.Res.C. 21090* deems all activities under redevelopment plan to be "single project," as much environmental review as possible should occur at outset of redevelopment process; town's failure to analyze indirect or secondary impacts likely to be caused by each of 72 proposed projects within redevelopment plan violated CEQA].

Cadiz Land Co. v. Rail Cycle, L.P. (2000) 83 C.A.4th 74, 91, 99 C.R.2d 378 [EIR for proposed landfill violated CEQA because it did not discuss volume of water contained in aquifer under landfill site or aquifer's size].

Save Our Peninsula Committee v. Monterey County Bd. of Supervisors (2001) 87 C.A.4th 99, 118, 104 C.R.2d 326 [EIR inadequately discussed baseline water use on property of proposed project: it assumed without evidence that preproject use of water on property was for irrigation; it introduced new methodology for baseline determination at end of environmental review process without informational discussion or opportunity for public review; and it invited agency to select one of several baseline figures with no meaningful analysis and no showing that figures represented historical use; analysis of property's riparian rights was also inadequate].

Napa Citizens for Honest Government v. Napa County Bd. of Supervisors (2001) 91 C.A.4th 342, 371, 381, 110 C.R.2d 579 [because sources for water and resources for wastewater treatment identified in EIR were uncertain, EIR should have identified alternative sources and environmental consequences of tapping them; EIR also should have discussed possible impact of proposed project on steelhead trout, which had been identified as endangered species within project area].

Berkeley Keep Jets Over the Bay Committee v. Board of Port Commrs. (2001) 91 C.A.4th 1344, 1357, 1363, 1371, 111 C.R.2d 598 [EIR for airport expansion project did not have to describe new runway that existed only as concept in long-range plans subject to constant revision; however, EIR inadequately analyzed effects of increase in toxic air contaminants and noise].

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Definition.* See 33 *Ecology L. Q.* 1015 [CEQA analysis of impacts of development displaced by restrictive land use planning]. (3) *Adequate Descriptions.* The following are among the cases determining that an EIR's description of the significant environmental effects of a proposed project was adequate:

Anderson First Coalition v. Anderson (2005) 130 C.A.4th 1173, 1182, 30 C.R.3d 738 [EIR adequately considered project's impact on urban decay and concluded that impact was less than significant; distinguishing *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 C.A.4th 1184, 22 C.R.3d 203, *infra*, this section].

State Water Resources Control Bd. Cases (2006) 136 C.A.4th 674, 785, 39 C.R.3d 189 [EIR adequately described potential effect of change in points of water diversion on salinity levels in river].

Western Placer Citizens for an Agricultural & Rural Environment v. Placer (2006) 144 C.A.4th 890, 906, 50 C.R.3d 799 [water supply analysis that described existing, available, and sufficient sources of water for project was adequate; EIR did not have to identify guaranteed source of water].

Eureka Citizens for Responsible Government v. Eureka (2007) 147 C.A.4th 357, 370, 54 C.R.3d 485 [EIR did not need to consider alleged violations in construction of existing playground; EIR adequately analyzed noise, historic, and aesthetic impacts of allowing playground to be used].

Santa Clarita Organization for Planning the Environment v. Los Angeles (2007) 157 C.A.4th 149, 158, 68 C.R.3d 449 [analysis of water supplies for residential and commercial development was adequate, even though EIR identified water transfer that could be affected by pending litigation as one water source; EIR disclosed uncertainty, but contained substantial evidence that water from transfer source would be available].

Save Round Valley Alliance v. Inyo (2007) 157 C.A.4th 1437, 1469, 70 C.R.3d 59 [EIR adequately considered visual impacts of proposed development, even though it did not explicitly address impact of proposed fire structures; EIR concluded that project would have significant, irreversible impact on existing scenic views of area, so consideration of structures probably would not have changed that conclusion].

St. Vincent's School for Boys, Catholic Charities CYO v. San Rafael (2008) 161 C.A.4th 989, 1004, 75 C.R.3d 213 [EIR properly assessed effects of general plan amendments on existing conditions at project site; EIR did not need to compare effects of amendments with alternative of leaving existing general plan policies in place].

Sierra Club v. Orange (2008) 163 C.A.4th 523, 539, 78 C.R.3d 1 [analysis of baseline pollution levels for lake was adequate, where EIR cited to runoff management plan that contained information that project opponent contended was necessary].(4) *Inadequate Descriptions*. In *Bakersfield Citizens for Local Control v. Bakersfield*, *supra*, defendant city certified the EIRs for two retail shopping center projects and approved both projects. Plaintiff argued that the EIRs failed to comply with the information disclosure provisions of CEQA because they failed to consider whether the shopping centers could, individually or cumulatively, trigger urban decay. The trial court concluded that the failure to study urban decay rendered the EIRs inadequate and ordered them decertified, but allowed partial construction to continue while defendant conducted limited environmental review. *Held*, reversed. Both certification of the EIRs and approval of the projects must be voided. (For discussion of procedural issues, see Supp., *infra*, §855.)

(a) Although proposed new shopping centers do not trigger a *conclusive* presumption of urban decay, when the evidence suggests that the economic and social effects caused by a proposed shopping center ultimately could result in urban decay or deterioration, the lead agency is obligated to assess this indirect impact. "Many factors are relevant, including the size of the project, the type of retailers and their market areas and the proximity of other retail shopping opportunities. The lead agency cannot divest itself of its analytical and informational obligations by summarily dismissing the possibility of urban decay or deterioration as a 'social or economic effect' of the project." (124 C.A.4th 1207.)

(b) Neither EIR here contains even a statement indicating reasons why urban decay was not a significant effect of the proposed projects, despite a great deal of evidence that the shopping centers could cause a ripple of store closures and consequent long-term vacancies that would eventually result in general deterioration and decay within and outside the market area of the shopping centers. (124 C.A.4th 1208.) CEQA requires analysis of this potential environmental impact. (124 C.A.4th 1212.)

Other cases determining that an EIR's treatment of a significant environmental effect was inadequate include the following:

Vineyard Area Citizens for Responsible Growth v. Rancho Cordova (2007) 40 C.4th 412, 438, 53 C.R.3d 821, 150 P.3d 709 [EIR used inconsistent supply and demand figures for provision of long-term water supplies to large development and failed to explain how figures matched up].

Endangered Habitats League v. Orange (2005) 131 C.A.4th 777, 791, 32 C.R.3d 177 [EIR used wrong test for determining whether project would have significant environmental effect on biological resources; correct legal standard, taken from CEQA Guidelines, is not as lenient as standard used in EIR].

California Oak Foundation v. Santa Clarita (2005) 133 C.A.4th 1219, 1236, 35 C.R.3d 434 [EIR's discussion of water supplies for proposed industrial development was inadequate; EIR failed to discuss uncertainties caused by fact that EIR for separate water purchase project, on which industrial development would rely, had been decertified, and without projected entitlement from water purchase project, sufficient water supplies would not exist].

San Joaquin Raptor Rescue Center v. Merced (2007) 149 C.A.4th 645, 654, 57 C.R.3d 663 [EIR for proposed expansion of mining operation failed to clearly identify baseline assumptions regarding established levels of permitted use, misled public about whether and how much project would increase existing production, and failed to analyze water and traffic impacts from increased production].

Woodward Park Homeowners Assn. v. Fresno (2007) 150 C.A.4th 683, 706, 58 C.R.3d 102 [EIR that compared proposed commercial development with buildout of site under existing zoning, rather than with vacant land that actually existed at site, used inaccurate baseline].



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A. Land Use Planning and Regulation.

5. California Environmental Quality Act (CEQA).

c. Content of Environmental Impact Reports.

3. Mitigation Measures.

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[§ 842] Mitigation Measures.

The environmental impact report must include a discussion of mitigation measures. (*Pub.Res.C. 21100(b)(3).*) The following cases are among those discussing the adequacy of an EIR's discussion of mitigation measures:

Citizens for Quality Growth v. Mount Shasta (1988) 198 C.A.3d 433, 442, 243 C.R. 727 [city's failure to adopt or reject mitigation measures was error requiring reversal of trial court's denial of petition for mandamus].

Sacramento Old City Assn. v. City Council (1991) 229 C.A.3d 1011, 1019, 280 C.R. 478 [measures in EIR to mitigate need for parking caused by new office building were adequate].

Los Angeles Unified School Dist. v. Los Angeles (1997) 58 C.A.4th 1019, 1028, 68 C.R.2d 367 [EIR was inadequate because it failed to consider whether air-conditioning two schools would be feasible method of mitigating impact of proposed development's air pollution].

Napa Citizens for Honest Government v. Napa County Bd. of Supervisors (2001) 91 C.A.4th 342, 357, 110 C.R.2d 579 [county had authority to delete mitigation measures adopted in original EIR when it certified subsequent EIR 12 years later; governing body must have power to modify land use plans as circumstances require, as long as it states legitimate reason, supported by substantial evidence, for deleting existing mitigation measure].

San Franciscans Upholding the Downtown Plan v. San Francisco (2002) 102 C.A.4th 656, 695, 125 C.R.2d 745 [EIR adequately identified specific traffic mitigation measures, including adjustment of traffic signal timing, alteration of traffic lines at congested intersections, and public transit incentive programs; EIR also adequately discussed means of mitigating secondary environmental impacts of increased parking demand].

Mira Mar Mobile Community v. Oceanside (2004) 119 C.A.4th 477, 494, 14 C.R.3d 308 [EIR for proposed condominium development adequately mitigated significant biological effects by requiring replacement of disturbed coastal sage scrub at ratio of three square feet of mitigation for every square foot of disturbance, and by requiring maintenance and management of habitat].

Defend the Bay v. Irvine (2004) 119 C.A.4th 1261, 1273, 15 C.R.3d 176 [EIR for proposed development of former military base properly deferred plans for mitigation of impacts to several species plants and animals].

SUPPLEMENT: [This section is current through the latest supplement]
See C.E.B., 1 Practice Under the Environmental Quality Act 2d, Chap. 14.

Cases discussing the adequacy of mitigation measures include the following:

Lincoln Place Tenants Assn. v. Los Angeles (2005) 130 C.A.4th 1491, 1507, 31 C.R.3d 353 [city improperly allowed demolition of buildings in redevelopment project, without requiring demolition to comply with mitigating conditions that city had placed on project during EIR process; because demolition was clearly part of redevelopment project, city had to either require compliance with conditions or conduct further CEQA review to determine whether conditions were feasible].

Endangered Habitats League v. Orange (2005) 131 C.A.4th 777, 793, 32 C.R.3d 177 [EIR improperly deferred analysis and mitigation of noise and interference from construction, supply depots, and vehicle staging areas for development project; mitigation measure did no more than require report to be prepared and followed, and it allowed approval by county department without setting standards for approval].

Environmental Council of Sacramento v. Sacramento (2006) 142 C.A.4th 1018, 1034, 48 C.R.3d 544 [mitigation measure requiring purchase of .5 acre for habitat reserves for every acre of development was adequate; substantial evidence supported agency's finding that higher ratio was not feasible].

State Water Resources Control Bd. Cases (2006) 136 C.A.4th 674, 788, 39 C.R.3d 189 [opponents did not show that EIR's discussion of mitigation of impacts of water diversion on water levels and fish and wildlife was inadequate; opponents challenged final decision by board without addressing discussion in EIR].

San Joaquin Raptor Rescue Center v. Merced (2007) 149 C.A.4th 645, 668, 57 C.R.3d 663 [analysis of mitigation measures in EIR for proposed expansion of mining operation improperly deferred formulation of land management measures to future management plans].

Woodward Park Homeowners Assn. v. Fresno (2007) 150 C.A.4th 683, 723, 58 C.R.3d 102 [EIR's discussion of traffic mitigation measures for proposed commercial development was inadequate; city illegally took position that it did not need to impose any freeway mitigation measure, based on its long-standing dissatisfaction with information provided by state highway agency].

Gray v. Madera (2008) 167 C.A.4th 1099, 1115, 1121, 85 C.R.3d 50 [EIR's discussion of mitigation measures for proposed quarry was inadequate; supplying replacement water, such as bottled drinking water, to neighbors whose well levels might decline would be inadequate; also, improvements that would lessen traffic impacts were not certain to happen and were deferred for several years at best].



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5. California Environmental Quality Act (CEQA).

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4. Cumulative Impact.

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[§ 843] Cumulative Impact.

Under *Pub.Res.C. 21083(b)(2)*, the EIR must consider the project's cumulative effects on the environment. This is a critical aspect of the report. (*Los Angeles Unified School Dist. v. Los Angeles* (1997) 58 C.A.4th 1019, 1024, 1025, 68 C.R.2d 367 [EIR was inadequate because it failed to consider cumulative impact of existing and projected traffic noise in area around two schools; cumulative impact must be considered even though noise level around schools is already beyond maximum level permitted by law]; see *Communities for a Better Environment v. California Resources Agency* (2002) 103 C.A.4th 98, 116, 126 C.R.2d 441 [invalidating CEQA guidelines that measured de minimis incremental contributions to cumulative impact and that listed probable future projects for cumulative impact purposes].)

In *Citizens Assn. for Sensible Dev. of Bishop Area v. Inyo* (1985) 172 C.A.3d 151, 217 C.R. 893, two parts of the plan for a single-project, a regional shopping center, were separately submitted to environmental review and approved by the local lead agency: (a) the general plan amendments and zone reclassification, and (b) the tentative tract map approval and road abandonment. *Held*, separate review was an abuse of discretion requiring reversal. The agency failed to consider the cumulative environmental impact of the entire project. (172 C.A.3d 165, 166.) "This approach is inconsistent with the mandate of CEQA that a large project shall not be divided into little ones because such division can improperly submerge the aggregate environmental considerations of the total project." (172 C.A.3d 167, citing *Bozung v. Local Agency Formation Com.* (1975) 13 C.3d 263, 279, 118 C.R. 249, 529 P.2d 1017, *supra*, §833.)

The following are among other decisions that have evaluated an EIR's discussion of cumulative effects:

Whitman v. Board of Supervisors (1979) 88 C.A.3d 397, 405, 151 C.R. 866 [inadequate discussion of cumulative impact].

Orinda Assn. v. Board of Supervisors (1986) 182 C.A.3d 1145, 1171, 227 C.R. 688 [where demolition of existing buildings was part of larger project, issuance of unconditional demolition permit before approval of project's EIR was improper].

Santa Clarita Organization for Planning the Environment v. Los Angeles (2003) 106 C.A.4th 715, 720, 131 C.R.2d

186 [EIR's analysis of cumulative impact of past, present, and future development on amount of water available was inadequate; EIR relied heavily on entitlements to water from incomplete state water project, rather than on amount of water that project could actually deliver].

Association of Irrigated Residents v. Madera (2003) 107 C.A.4th 1383, 1396, 1403, 133 C.R.2d 718 [EIR for construction and operation of dairy sufficiently discussed cumulative impact on groundwater quality].

Friends of the Eel River v. Sonoma County Water Agency (2003) 108 C.A.4th 859, 868, 134 C.R.2d 322 [EIR did not adequately analyze cumulative impact of withdrawing water from one river in combination with possible curtailment of water diversions from another river].

SUPPLEMENT: [This section is current through the latest supplement]

Decisions evaluating an EIR's discussion of cumulative effects include the following:

Bakersfield Citizens for Local Control v. Bakersfield (2004) 124 C.A.4th 1184, 1213, 22 C.R.3d 203, Supp., supra, §841 [EIRs for two retail shopping center projects were inadequate; each EIR failed to refer to other shopping center and neither assessed and disclosed combined environmental effects of building both].

Sierra Club v. West Side Irr. Dist. (2005) 128 C.A.4th 690, 700, 27 C.R.3d 223 [two irrigation districts properly determined that assignments of water rights from districts to city would have no incremental effect on cumulative impacts of other projects in area; districts did not need to expressly determine existence of cumulative impact from assignments].

Environmental Council of Sacramento v. Sacramento (2006) 142 C.A.4th 1018, 1031, 48 C.R.3d 544 [EIR for habitat conservation plan adequately considered cumulative impacts of past, present, and reasonably foreseeable future projects; environmental analysis of unspecified and uncertain development that might later be approved under memorandum of understanding between local governments would be of little value].

Gray v. Madera (2008) 167 C.A.4th 1099, 1122, 85 C.R.3d 50 [EIR's discussion of cumulative impact of noise from proposed quarry was inadequate; EIR should have considered whether noise when added to existing levels would be significant, rather than assessing additional amount alone].



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5. Alternatives to Project.

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[§ 844] Alternatives to Project.

(1) *Standard of Review.* In *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 C.3d 553, 276 C.R. 410, 801 P.2d 1161, the Supreme Court upheld the decision of the county board rejecting proposed, off-site alternatives as infeasible. (52 C.3d 559.) "Our discussion and holding in this matter are designed to illustrate, not exhaust, the circumstances where a review of off-site alternatives to a private project may be feasible; as we have stated, there is no ironclad rule governing the nature or scope of the alternatives to be discussed in an EIR, other than the rule of reason. The wisdom of approving this or any other development project, a delicate task which requires a balancing of interests, is necessarily left to the sound discretion of the local officials and their constituents who are responsible for such decisions. The law as we interpret and apply it simply requires that those decisions be informed, and therefore balanced. Concurrently, we caution that rules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement." (52 C.3d 576.) (See *Stand Tall on Principles v. Shasta Union High School Dist.* (1991) 235 C.A.3d 772, 780, 1 C.R.2d 107 [school district could prepare EIR before acquiring school site, rather than before choosing site, as long as EIR thoroughly assessed alternative sites]; 18 *Pepperdine L. Rev.* 1175 [*Citizens of Goleta Valley*]; 21 *Southwestern U. L. Rev.* 1079 [environmental review after *Citizens of Goleta Valley*]; 26 *Southwestern U. L. Rev.* 57 [how *Citizens of Goleta Valley* changed California's environmental review process].)

(2) *Alternatives Adequately Discussed.* The following cases are among those determining that an EIR's discussion of alternatives to the proposed project was adequate:

Mann v. Community Redevelopment Agency of Hawthorne (1991) 233 C.A.3d 1143, 1150, 1151, 285 C.R. 9 [discussion of four alternatives was sufficient; discussion of rejected proposal was not required in absence of evidence that it offered "substantial environmental advantages"].

Save Our Residential Environment v. West Hollywood (1992) 9 C.A.4th 1745, 1752, 12 C.R.2d 308 [finding in EIR that city contained no alternative sites for senior citizen housing development, with stated reasons, was sufficient].

Save San Francisco Bay Assn. v. San Francisco Bay Conservation & Dev. Com. (1992) 10 C.A.4th 908, 919, 13

C.R.2d 117 [consideration of alternatives to site for aquarium project in San Francisco was sufficient].

Sequoyah Hills Homeowners Assn. v. Oakland (1993) 23 C.A.4th 704, 712, 29 C.R.2d 182 [EIR for subdivision was adequate; decreased density alternative was legally infeasible under Govt.C. 65589.5(j)(1) (specific adverse impact on health or safety required to condition approval of development on decrease in density)].

Concerned Citizens of South Cen. Los Angeles v. Los Angeles Unified School Dist. (1994) 24 C.A.4th 826, 843, 29 C.R.2d 492 [no abuse of discretion in failure to reconsider alternative sites for school after riot damage, where inspection of damaged areas revealed no site of sufficient size; nor did inspection have to be discussed at hearing or in report].

Fremont v. San Francisco Bay Area Rapid Transit Dist. (1995) 34 C.A.4th 1780, 1787, 41 C.R.2d 157 [analysis of economic feasibility of alternatives was adequate, where cost information was summarized in series of tables].

San Franciscans Upholding the Downtown Plan v. San Francisco (2002) 102 C.A.4th 656, 689, 125 C.R.2d 745 [although EIR must identify reasonable range of potentially feasible alternatives and compare their environmental impacts with those of proposed project, it does not have to address economic feasibility of alternatives].

Sierra Club v. Napa (2004) 121 C.A.4th 1490, 1501, 1508, 19 C.R.3d 1 [EIR does not have to contain analysis of economic feasibility of alternatives to project, nor does it have to identify and analyze alternatives that would not meet project's objectives].

Mira Mar Mobile Community v. Oceanside (2004) 119 C.A.4th 477, 487, 14 C.R.3d 308 [EIR for proposed condominium development adequately discussed "no project" alternative and two reduced density alternatives; EIR did not need to discuss off-site alternatives, where proposed development was consistent with city's existing plans, policies, and zoning, which had given public ample opportunity to discuss appropriateness of high density development in area].

(3) *Alternatives Not Adequately Discussed.* The following cases are among those determining that an EIR's discussion of alternatives to the proposed project was not adequate:

Inyo v. Los Angeles (1977) 71 C.A.3d 185, 195, 139 C.R. 396 [EIR that failed to consider "no project" alternative was inadequate]. (See *Inyo v. Los Angeles* (1981) 124 C.A.3d 1, 3, 177 C.R. 479 [second EIR was inadequate also]; 18 *Santa Clara L. Rev.* 1099 [Inyo].)

Citizens of Goleta Valley v. Board of Supervisors (1988) 197 C.A.3d 1167, 1177, 1180, 243 C.R. 339 [failure to consider whether there was feasible alternate site was unreasonable and rendered report inadequate].

Planning & Conservation League v. Department of Water Resources (2000) 83 C.A.4th 892, 908, 100 C.R.2d 173 [EIR for revision of long-term water supply contracts between Department of Water Resources and local water contractors was deficient because it failed to consider "no project" alternative; EIR should have thoroughly examined environmental impacts of original contractual solution to permanent water shortages].

Friends of the Eel River v. Sonoma County Water Agency (2003) 108 C.A.4th 859, 872, 134 C.R.2d 322 [EIR did not adequately discuss alternatives that could mitigate impact of withdrawing water from one river in combination with possible curtailment of water diversions from another river].

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Alternatives Adequately Discussed.* See *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 C.4th 1143, 1162, 77 C.R.3d 578, 184 P.3d 709 [EIR for management plan for bay-delta water did not have to analyze alternative of reducing exports from delta; reduced export alternative would have prevented implementation of other plan objective of water supply reliability]; *Sierra Club v. Orange* (2008) 163 C.A.4th 523, 545, 78 C.R.3d 1 [EIR did not have to discuss only alternatives that would provide substantial environmental advantages]

over proposed project in all respects; discussion of alternative that is superior only in some respects suffices]; C.E.B., 1 Practice Under the Environmental Quality Act 2d, Chap. 15.(3) *Alternatives Not Adequately Discussed*. The following are among the cases finding that an EIR did not adequately discuss project alternatives:

Preservation Action Council v. San Jose (2006) 141 C.A.4th 1336, 1352, 46 C.R.3d 902 [EIR failed to properly analyze reduced size alternatives for home improvement warehouse project proposed for site occupied by unused historic building; EIR did not include enough facts and analysis to support conclusion that alternative was not feasible].

Woodward Park Homeowners Assn. v. Fresno (2007) 150 C.A.4th 683, 714, 58 C.R.3d 102 [EIR that compared proposed commercial development with buildout of site under existing zoning, rather than with vacant land that actually existed at site, used inaccurate "no project alternative"].

Save Round Valley Alliance v. Inyo (2007) 157 C.A.4th 1437, 1454, 1465, 70 C.R.3d 59 [EIR failed to adequately analyze possible land exchange between owner of parcel proposed for development and federal Bureau of Land Management; EIR concluded that exchange would be infeasible, using only "barest of facts" about aesthetics, views, and economic objectives].



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CHAPTER XVII - Real Property

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XIII. ENVIRONMENTAL REGULATION OF REAL PROPERTY

- A. Land Use Planning and Regulation.
 - 5. California Environmental Quality Act (CEQA).
 - d. Alternative and Supplemental Reports.
 - 1. Negative Declarations.

12 Witkin Sum. Cal. Law Real Property § 845

[§ 845] Negative Declarations.

(1) *Definition.* A "negative declaration" is a written statement briefly describing the reasons that a proposed project will not have a significant effect on the environment and does not require the preparation of an EIR. (*Pub.Res.C. 21064*; see Cal. Civil Practice, Environmental Litigation, §8:13 et seq.)

(2) *Illustrations.* Numerous decisions have examined the propriety of an agency's determination that a project will not significantly affect the environment, including the following:

Ukiah v. Mendocino (1987) 196 C.A.3d 47, 54, 241 C.R. 585 [negative declaration was properly adopted for gravel mining company's reclamation plan under *Pub.Res.C. 2710* et seq., *infra*, §888, which calls only for collection of data and hence has no significant environmental impact].

Schaeffer Land Trust v. San Jose City Council (1989) 215 C.A.3d 612, 619, 263 C.R. 813 [negative declaration was proper for general plan amendment permitting land zoned for industry to be developed as mixture of residential, office, and retail uses].

Leonoff v. Monterey County Bd. of Supervisors (1990) 222 C.A.3d 1337, 272 C.R. 372 [negative declaration for contractor's center was proper where there was no substantial evidence of potentially significant environmental impact].

Stanislaus Audubon Soc. v. Stanislaus (1995) 33 C.A.4th 144, 152, 39 C.R.2d 54 [certification of negative declaration for proposed country club project was abuse of discretion, where collective weight of evidence indicated that project might have significant adverse "growth-inducing" effect].

Silveira v. Las Gallinas Valley Sanitary Dist. (1997) 54 C.A.4th 980, 985, 63 C.R.2d 244 [negative declaration was proper for condemnation of property next to sanitation plant to create odor buffer zone: project would not alter natural state of condemned property; there was no plausible evidence that acquiring property would have environmental impacts; and slight inadequacies in initial study did not necessitate EIR].

Pala Band of Mission Indians v. San Diego (1998) 68 C.A.4th 556, 574, 80 C.R.2d 294 [county properly certified

negative declaration in connection with summary plan and siting element of integrated waste management plan where there was no substantial evidence to support fair argument that adoption of summary plan and siting element might have significant environmental impact; preparation of EIR for 10 "tentatively reserved" landfill sites would have been premature].

Snarled Traffic Obstructs Progress v. San Francisco (1999) 74 C.A.4th 793, 798, 88 C.R.2d 455 [negative declaration for parking lot project that had been approved 9 years earlier was not superseded by subsequent events, and thus preparation of EIR was not required; modified version of project called for smaller structure than originally proposed, and site and its surrounding area had not changed substantially].

Redlands v. San Bernardino (2002) 96 C.A.4th 398, 405, 117 C.R.2d 582 [negative declaration for amendments to county's general plan relating to land use regulation of unincorporated territory located within city's sphere of influence was improper; county failed to accurately describe project, which had far broader consequences than merely clarifying county's authority relating to land use planning].

Fat v. Sacramento (2002) 97 C.A.4th 1270, 1277, 119 C.R.2d 402 [county properly used physical conditions that existed at time of request for project approval, rather than those existing at time of CEQA's enactment, as baseline for deciding whether to issue negative declaration for project allowing expansion of private airport that had operated illegally for decades; citing *Riverwatch v. San Diego* (1999) 76 C.A.4th 1428, 91 C.R.2d 322].

El Dorado County Taxpayers for Quality Growth v. El Dorado (2004) 122 C.A.4th 1591, 1596, 20 C.R.3d 224 [project description for approval of mining reclamation plan, including type of mine, type of mining disturbance, size of project, actions that would comprise reclamation, environmental and other goals of actions, and nature of land and its uses after reclamation, was sufficient to support preparation of negative declaration; county properly determined that potential geologic, wildlife, and air quality impacts did not require EIR].

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Definition.* See C.E.B., 1 Practice Under the Environmental Quality Act 2d, Chap. 7.

(2) *Illustrations.* Decisions determining the propriety of an agency's determination that a project will not significantly affect the environment include the following:

County Sanitation Dist. No. 2 of Los Angeles v. Kern (2005) 127 C.A.4th 1544, 1577, 27 C.R.3d 28 [county should have prepared EIR, rather than approving negative declaration, before adopting ordinance restricting application of sewage sludge on land within county; because of alternative methods of disposal that would have to be implemented as result of ordinance, substantial evidence supported fair argument that ordinance would cause potentially significant adverse environmental effects, even if net overall effect would be beneficial; distinguishing *Magan v. Kings* (2002) 105 C.A.4th 468, 129 C.R.2d 344, text, §837].

Sierra Club v. West Side Irr. Dist. (2005) 128 C.A.4th 690, 702, 27 C.R.3d 223 [two irrigation districts properly prepared negative declarations for assignments of water rights from districts to city where there was no evidence that assignments would induce growth that had not already been planned and evaluated in city's general plan and general plan EIR].

Lighthouse Field Beach Rescue v. Santa Cruz (2005) 131 C.A.4th 1170, 1194, 31 C.R.3d 901 [because initial study did not allow for fully informed decisionmaking regarding general plan revisions affecting leashing of dogs on beach, negative declaration had to be set aside; once informational requirements of complete initial study were met, city could determine whether negative declaration, mitigated negative declaration, or EIR was appropriate].



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 - 2. Mitigated Negative Declarations.

12 Witkin Sum. Cal. Law Real Property § 846

[§ 846] Mitigated Negative Declarations.

(1) *Definition.* A "mitigated negative declaration" (MND) is a negative declaration issued where the initial study identifies potentially significant effects on the environment, but (a) revisions made or agreed to by the applicant before public review would avoid those effects, and (b) there is no substantial evidence in light of the whole record that the project, as revised, might have a significant effect on the environment. (*Pub.Res.C. 21064.5.*) After public review of a mitigated negative declaration, the lead agency may delete mitigation measures that it finds "infeasible or otherwise undesirable," and substitute other measures that it finds equally or more effective, after holding a public hearing on the matter. (*Pub.Res.C. 21080(f).*) (See *26 Pacific L. J. 547*; on lead agency, see *infra*, §851.)

(2) *Illustrations.* Numerous decisions have examined the propriety of issuing a mitigated negative declaration, including the following:

Quail Botanical Gardens Foundation v. Encinitas (1994) 29 C.A.4th 1597, 1607, 35 C.R.2d 470 [city erred in certifying MND where substantial evidence supported fair argument that proposed subdivision would have significant view impact].

Gentry v. Murrieta (1995) 36 C.A.4th 1359, 1411, 1412, 43 C.R.2d 170 [adoption of MND was improper where there was substantial evidence that project, even as mitigated, would have significant adverse environmental effects and where mitigating condition was added without recirculating MND].

Citizens' Committee to Save Our Village v. Claremont (1995) 37 C.A.4th 1157, 1168, 44 C.R.2d 288 [preparation of MND, rather than EIR, was sufficient where project opponents failed to provide substantial evidence that project would have significant adverse impact on historical resources].

Citizens for Responsible Dev. v. West Hollywood (1995) 39 C.A.4th 490, 499, 500, 501, 45 C.R.2d 917 [MND, rather than EIR, was sufficient where MND eliminated any possible significant adverse impact on historical resources].

San Joaquin Raptor/Wildlife Rescue Center v. Stanislaus (1996) 42 C.A.4th 608, 622, 49 C.R.2d 494 [county's

adoption of MND was proper where project opponents presented no evidence to support fair argument that project could have significant adverse environmental impact].

Fall River Wild Trout Foundation v. Shasta (1999) 70 C.A.4th 482, 491, 82 C.R.2d 705 [county's adoption of MND was improper where county failed to send copy of MND to Department of Fish and Game, thus depriving county of information necessary to informed decisionmaking and public participation; following *Gentry*].

Baldwin v. Los Angeles (1999) 70 C.A.4th 819, 843, 83 C.R.2d 178 [city's adoption of MND was proper where no substantial evidence supported fair argument that proposed housing project would have significant effect on established recreational uses; existing recreational opportunities in immediate neighborhood of project site appeared adequate to accommodate neighborhood with proposed housing].

San Bernardino Valley Audubon Soc. v. Metropolitan Water Dist. of Southern Calif. (1999) 71 C.A.4th 382, 400, 83 C.R.2d 836 [use of MND was improper; project's use of "mitigation bank credits" and "habitat value formula" could lead to future take of, and other significant effects on, endangered and threatened species throughout large region; mitigation measures might be inadequate to compensate for take; allowing actual take to be mitigated by potential habitat might be insufficient; project might have significant cumulative effects on 65 species].

Burrtec Waste Industries v. Colton (2002) 97 C.A.4th 1133, 1139, 119 C.R.2d 410 [city's adoption of MND was improper where there was insufficient evidence that notice of intention to adopt MND was posted in accordance with *Pub.Res.C. 21092* and *21092.3*; because interested parties could not comment on proposed MND, failure to post was prejudicial error; citing *Fall River Wild Trout Foundation*].

Ocean View Estates Homeowners Assn. v. Montecito Water Dist. (2004) 116 C.A.4th 396, 401, 10 C.R.3d 451 [water district improperly issued MND where substantial evidence supported fair argument that building aluminum cover over reservoir could have significant adverse aesthetic impact; relying on *Quail Botanical Gardens Foundation*].

Bowman v. Berkeley (2004) 122 C.A.4th 572, 581, 18 C.R.3d 814 [city properly prepared MND instead of EIR for proposed senior citizens housing complex; EIR is not required where sole environmental impact is aesthetic merit of building in highly developed area].

Architectural Heritage Assn. v. Monterey (2004) 122 C.A.4th 1095, 1112, 19 C.R.3d 469 [EIR, rather than MND, was required for proposed demolition of county jail; substantial evidence supported fair argument that jail was historic resource, that its demolition would have significant environmental impact, and that proposed mitigation measures (photographic documentation, preparation of historic monograph, salvage of certain architectural elements, and maintenance of set of blueprints) were inadequate].

(3) *Reporting or Monitoring Program*. If an agency approves a project by finding that changes or alterations mitigate or avoid significant environmental effects identified in the report (*Pub.Res.C. 21081(a)*) or adopts a mitigated negative declaration (*Pub.Res.C. 21080(c)*), the agency must adopt a "reporting or monitoring program for the changes" to the project which it has adopted or made a condition of project approval. If the changes are required or requested by an agency having "jurisdiction by law over natural resources affected by the project," that agency must prepare and submit a proposed reporting or monitoring program if requested by the lead or responsible agency. (*Pub.Res.C. 21081.6(a)*; see *Pub.Res.C. 21081.7* [submission of transportation information resulting from reporting or monitoring program].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Illustrations*. Decisions that have examined the propriety of issuing an MND, instead of an EIR, include the following:

Pocket Protectors v. Sacramento (2004) 124 C.A.4th 903, 929, 21 C.R.3d 791 [EIR, rather than MND, was required where substantial evidence supported fair argument that proposed housing project conflicted with objectives of planned

unit development; testimony by neighbors counted as substantial evidence on issues of potential impacts on land use policies and aesthetics; distinguishing *Bowman v. Berkeley* (2004) 122 C.A.4th 572, 18 C.R.3d 814, text, p. 1005].

Mejia v. Los Angeles (2005) 130 C.A.4th 322, 336, 29 C.R.3d 788 [EIR, rather than MND, was required where substantial evidence supported fair argument that proposed residential development could have significant impact on wildlife and traffic].

Sierra Club v. California Dept. of Forestry & Fire Protection (2007) 150 C.A.4th 370, 380, 59 C.R.3d 9 [EIR, rather than MND, should have been prepared for project to convert timberland to vineyard; expert's opinion was that project could create increased sediment due to erosion, could reduce groundwater discharges, could significantly increase demand for irrigation water, and could result in permanent loss of 63 acres of spotted owl habitat].

Porterville Citizens for Responsible Hillside Dev. v. Porterville (2007) 157 C.A.4th 885, 899, 69 C.R.3d 105 [MND for proposed hillside development was adequate in absence of substantial evidence supporting fair argument that development would have adverse effect on aesthetics, density, or grading and erosion; evidence primarily consisted of testimony of neighbors who objected to possible effect of development on their property values, rather than scientific or expert analysis of effects].

Citizens for Responsible & Open Government v. Grand Terrace (2008) 160 C.A.4th 1323, 1332, 73 C.R.3d 202 [EIR, rather than MND, should have been prepared for 120-unit, multistory, air-conditioned, senior housing project in low-density, residential neighborhood that consisted of single-family homes and elementary school; substantial evidence supported fair argument that project would have significant density, height, and noise impacts].



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5. California Environmental Quality Act (CEQA).

d. Alternative and Supplemental Reports.

3. Master Environmental Impact Reports.

12 Witkin Sum. Cal. Law Real Property § 847

[§ 847] Master Environmental Impact Reports.

(1) *Statutory Authorization.* CEQA allows initial review of certain kinds of projects in a master environmental impact report that evaluates cumulative impacts, growth-inducing impacts, and irreversible significant environmental effects, with subsequent related projects receiving substantially limited review. (*Pub.Res.C. 21156*; see *25 Pacific L. J. 661* [noting that streamlining provisions were compromise between business and environmental interests, and that further CEQA reform is likely]; Cal. Civil Practice, Environmental Litigation, §8:21; on fee program to support master environmental impact report preparation, see *Pub.Res.C. 21157(c)*.)

(2) *Eligible Projects.* A master environmental impact report may be prepared for the following projects:

- (a) A general plan, element, general plan amendment, or specific plan. (*Pub.Res.C. 21157(a)(1)*.)
- (b) A project consisting of smaller individual projects to be carried out in phases. (*Pub.Res.C. 21157(a)(2)*.)
- (c) A rule or regulation to be implemented by subsequent projects. (*Pub.Res.C. 21157(a)(3)*.)
- (d) A project carried out or approved under a development agreement. (*Pub.Res.C. 21157(a)(4)*.)
- (e) A public or private project carried out or approved under a redevelopment plan. (*Pub.Res.C. 21157(a)(5)*.)
- (f) A state highway or mass transit project subject to multiple stages of review or approval. (*Pub.Res.C. 21157(a)(6)*.)
- (g) A regional transportation or congestion management plan. (*Pub.Res.C. 21157(a)(7)*.)
- (h) A local agency plan for reuse of a closed federal military base. (*Pub.Res.C. 21157(a)(8)*.)
- (i) Hunting and fishing regulations adopted by the Fish and Game Commission. (*Pub.Res.C. 21157(a)(9)*.)

(3) *Contents of Master Report.* A master environmental impact report prepared by a lead agency must include the following:

(a) The detailed statement described in *Pub.Res.C. 21100* (see *supra*, §840). (*Pub.Res.C. 21157(b)(1).*)

(b) A description of anticipated subsequent projects within the scope of the master environmental impact report, including information on the projects' kind, size, intensity, and location, as well as an implementing program governing the submission and approval of subsequent projects. (*Pub.Res.C. 21157(b)(2).*)

(c) A description of potential impacts of subsequent projects for which there is insufficient information to support a full assessment. (*Pub.Res.C. 21157(b)(3).*)

(4) *Time Limit for Use of Master Environmental Impact Report.* A master environmental impact report may be used for 5 years after its certification. (*Pub.Res.C. 21157.6(a)(1).*) Thereafter, it may be used only if the lead agency reviews it and either (a) finds that there have been no substantial changes in circumstances or no new information (*Pub.Res.C. 21157.6(b)(1).*), or (b) after preparing an initial study, either certifies a supplemental EIR that is incorporated into or references changes in the original master EIR or approves a mitigated negative declaration that addresses any substantial changes or new information (*Pub.Res.C. 21157.6(b)(2).*). The same review requirements are applicable where approval of a project not described in the master EIR may affect the adequacy of the report's environmental review of a subsequent project. (*Pub.Res.C. 21157.6(a)(2).*)

(5) *Initial Study of Subsequent Projects.* After certification of a master environmental impact report, the lead agency must respond to a proposed subsequent project by preparing an initial study, analyzing whether the project is within the scope of the master EIR and whether it may cause significant environmental effects not considered in the master EIR. If it is determined that the project will have no significant environmental effects, no further documents or findings are required; otherwise, the lead agency must prepare a mitigated negative declaration or an EIR. (*Pub.Res.C. 21157.1.*) If the agency must prepare an EIR, or is authorized to prepare a focused EIR (*infra*, this section), it may not rely on *Pub.Res.C. 21080.5(a)* (*infra*, §850) for that purpose, even though the agency's regulatory program is otherwise certified under *Pub.Res.C. 21080.5*. (*Pub.Res.C. 21158.1.*)

(6) *Mitigated Negative Declaration.* A mitigated negative declaration may be prepared where (a) the initial study identified significant environmental effects not analyzed in the master environmental impact report, and (b) the applicant agrees to the incorporation of feasible mitigation measures or alternatives, and there is no substantial evidence in light of the whole record that the project, as revised, will have a significant effect on the environment. (*Pub.Res.C. 21157.5*; see *Pub.Res.C. 21064.5*, *supra*, §846.)

(7) *Focused Environmental Impact Report.* A focused environmental impact report, analyzing only the subsequent project's additional significant environmental effects and any new mitigation measures or alternatives, may be prepared if the lead agency finds that the master EIR analysis of cumulative impacts, growth-inducing impacts, and irreversible significant environmental effects is adequate for the subsequent project. (*Pub.Res.C. 21158*; see *Pub.Res.C. 21158.5* [focused EIR may be used for residential developments meeting specified criteria]; *Pub.Res.C. 21159 et seq.* [focused EIR may be used for installation of mandated pollution control equipment in specified circumstances].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Eligible Projects.*

(j) *(New) School district projects:* A plan for district projects to be undertaken by a school district, that also complies with applicable school facilities requirements, including those in *Educ.C. 17070.10 et seq.* and *17210 et seq.* (*Pub.Res.C. 21157(a)(10)*, added in 2006.)

(k) *(New) Highway 99 improvements:* A plan adopted by the Department of Transportation for improvements to regional segments of Highway 99 funded under *Govt.C. 8879.23(b)*. (*Pub.Res.C. 21157.7(b)*, added in 2006.)(3)

Contents of Master Report. See *Citizens for Responsible Equitable Environmental Dev. v. San Diego Redevelopment Agency* (2005) 134 C.A.4th 598, 608, 612, 36 C.R.3d 249 [even though EIR for redevelopment plan included "master environmental impact report" in title, opponents failed to prove that EIR was master EIR subject to *Pub.Res.C. 21157*, rather than program EIR].



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 - 4. Tiered Reports.

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[§ 848] Tiered Reports.

CEQA's "tiering" provisions allow an agency to avoid repetitious analysis of the effects of a project when those effects have already been addressed in a previous EIR. "Tiering" is the coverage of general matters and environmental effects in an EIR prepared for a policy, plan, program, or ordinance followed by narrower or site-specific EIR that incorporate by reference the discussion in a prior EIR. The later reports concentrate on the environmental effects that (1) are capable of being mitigated, or (2) were not analyzed as significant effects on the environment in the prior EIR. (*Pub.Res.C. 21068.5*; see *Pub.Res.C. 21093* [Legislature's intent in allowing tiering was to promote housing and other needed development].)

Tiering is available only if the later project (1) is consistent with the program, plan, policy, or ordinance for which an EIR has been prepared and certified, (2) is consistent with applicable local land use plans and zoning, and (3) is not subject to *Pub.Res.C. 21166* (subsequent reports; see *infra*, §849). (*Pub.Res.C. 21094(b)*.) *Pub.Res.C. 21094* authorizes tiering where the previous EIR was *certified*. (*Friends of the Santa Clara River v. Castaic Lake Water Agency* (2002) 95 C.A.4th 1373, 1384, 116 C.R.2d 54 [decertification of water agency's EIR was required because another appellate court had found that previous EIR, on which water agency's EIR was tiered, was inadequate and had decertified it; tiering on decertified EIR was prejudicial error because water agency did not address environmental effects of its project without protections for agricultural contractors, which were part of decertified EIR].)

The tiering provisions do not eliminate the requirement that an EIR must state all significant effects on the environment of a proposed project. (*Stanislaus Natural Heritage Project v. Stanislaus* (1996) 48 C.A.4th 182, 194, 55 C.R.2d 625 [EIR that deferred consideration of effects of supplying water to large resort and residential community, to be proposed and built in phases, was inadequate]; *Communities for a Better Environment v. California Resources Agency* (2002) 103 C.A.4th 98, 122, 126 C.R. 441 [invalidating CEQA guideline that delineated when significant environmental effects have been adequately addressed for tiering purposes].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Vineyard Area Citizens for Responsible Growth v. Rancho Cordova* (2007) 40 C.4th 412, 438, 53 C.R.3d 821, 150 P.3d 709 [EIR that attempted to tier from future environmental document in analysis of long-term water supply, and

that failed to properly incorporate impact and mitigation discussion from other environmental document, was legally inadequate]; *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings (2008)* 43 C.4th 1143, 1169, 1173, 77 C.R.3d 578, 184 P.3d 709 [EIR for management plan for bay-delta water was first-tier, program EIR that sufficiently identified potential sources of water and adequately analyzed effects of environmental water account; identification of specific water sources and details of account would be considered in later-tier documents]; *Gilroy Citizens for Responsible Planning v. Gilroy (2006)* 140 C.A.4th 911, 929, 45 C.R.3d 102 [draft EIR stating that it tiered from earlier mitigated negative declaration, initial study, and general plan EIR clearly notified interested persons of its genealogy; potential for urban decay, which had been studied for earlier documents, was adequately considered in connection with proposed project].



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 - 5. Subsequent Reports.

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[§ 849] Subsequent Reports.

(1) *When Required.* When an EIR has been prepared for a project, a subsequent or supplemental EIR may not be required unless one or more of the following events occurs:

(a) Substantial changes are proposed in the project that will require major revisions of the EIR. (*Pub.Res.C. 21166(a).*)

(b) Substantial changes occur with respect to the circumstances under which the project is being undertaken that will require major revisions in the environmental impact report. (*Pub.Res.C. 21166(b).*)

(c) New information, which was not known and could not have been known at the time the EIR was certified as complete, becomes available. (*Pub.Res.C. 21166(c).*) (On use of master EIRs for certain projects, see *supra*, §847.)

(2) *Illustrations.* Decisions discussing the need for an agency to prepare a subsequent report include the following:

San Jose v. Great Oaks Water Co. (1987) 192 C.A.3d 1005, 1015, 237 C.R. 845 [city violated CEQA by failing to determine if intended condemnation and redesign of water project required subsequent or supplemental report].

Fund for Environmental Defense v. Orange (1988) 204 C.A.3d 1538, 1544, 252 C.R. 79 [subsequent report is required by *Pub.Res.C. 21166* only if environmental ramifications of substantial change were not considered in original report].

Security Environmental Systems v. South Coast Air Quality Management Dist. (1991) 229 C.A.3d 110, 122, 280 C.R. 108 [*Pub.Res.C. 21166* applies where negative declaration has been made; EIR was properly required for extension of permit to build hazardous waste incinerator where new information raised possibility of increased health risk and new technology to lessen risk].

Rio Vista Farm Bureau Center v. Solano (1992) 5 C.A.4th 351, 371, 7 C.R.2d 307 [EIR for county hazardous waste management plan, contemplating subsequent "project EIR's," did not improperly segment project or inadequately

describe its impacts].

Sierra Club v. Sonoma (1992) 6 C.A.4th 1307, 1318, 8 C.R.2d 473 [Pub.Res.C. 21166 controls whether supplemental EIR is required for single project, but Pub.Res.C. 21094 (supra, §848) requires "tiered EIR's" for later projects after certification of EIR for program or plan].

A Local & Regional Monitor v. Los Angeles (1993) 12 C.A.4th 1773, 1799, 16 C.R.2d 358 [no subsequent EIR on traffic effects was required where original EIR was sufficient, and no hearing was required on alleged "new information"].

A Local & Regional Monitor v. Los Angeles (1993) 16 C.A.4th 630, 642, 20 C.R.2d 228 [city properly certified staged EIR for multiphased commercial office building project requiring a number of discretionary permits].

Al Larson Boat Shop v. Board of Harbor Commrs. (1993) 18 C.A.4th 729, 741, 22 C.R.2d 618 [upholding sufficiency of final program EIR for amendment to port master plan, which considered alternatives but reserved approval of specific projects for later EIRs].

River Valley Preservation Project v. Metropolitan Transit Dev. Bd. (1995) 37 C.A.4th 154, 171, 43 C.R.2d 501 [supplemental EIR was not required to analyze effects of changing dimensions of berm where agency had already carefully studied effects of using elevated berms].

Fort Mojave Indian Tribe v. Department of Health Services (1995) 38 C.A.4th 1574, 1596, 1597, 45 C.R.2d 822 [late submission of scientific report did not require supplemental EIR where report provided "only another point of view" on issues that agency had already considered].

Cucamongans United for Reasonable Expansion v. Rancho Cucamonga (2000) 82 C.A.4th 473, 478, 98 C.R.2d 202 [subsequent EIR is required only when agency grants discretionary approval; after city denied developer's design review application, city did not have jurisdiction to require subsequent EIR].

Friends of Mammoth v. Mammoth Lakes Redevelopment Agency (2000) 82 C.A.4th 511, 532, 98 C.R.2d 334 [under Pub.Res.C. 21166, and Pub.Res.C. 21090, which deems all activities under redevelopment plan to be "single project," as much environmental review as possible should occur at outset of redevelopment process; further review is prohibited unless significant changes or new information on plan's constituent projects becomes available].

Friends of Davis v. Davis (2000) 83 C.A.4th 1004, 1018, 100 C.R.2d 413 [no supplemental review was required after prospective tenant of retail development that had already undergone CEQA review was identified as large, chain bookstore; nor was it necessary to perform initial study to determine whether supplemental review was needed].

Natural Resources Defense Council v. Los Angeles (2002) 103 C.A.4th 268, 281, 126 C.R.2d 615 [project to construct container terminal was not within scope of earlier program EIR for port transportation improvement program or earlier environmental impact statement; project was site-specific and was to be carried out over three phases, making tiered EIR addressing all three phases most appropriate].

Eller Media Co. v. Community Redevelopment Agency (2003) 108 C.A.4th 25, 39, 133 C.R.2d 324 [proposal to construct billboard within redevelopment project area was individual, site-specific project, specific impacts of which could not have been identified 13 years earlier when final EIR for redevelopment area was certified; supplemental EIR was required to assess "new information" that might have significant effects not discussed in previous EIR].

Santa Teresa Citizen Action Group v. San Jose (2003) 114 C.A.4th 689, 702, 7 C.R.3d 868 [extension of water recycling program through use of pipeline alignment that had not been specifically considered in initial EIR did not necessitate supplemental EIR; location of new alignment was not significantly different from one that had been fully evaluated and subject to public review and comment in connection with previous initial study and negative declaration,

and concerns about groundwater contamination had been addressed].

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Illustrations.* Cases discussing the need for an agency to prepare a subsequent report include the following:

Federation of Hillside & Canyon Assn. v. Los Angeles (2004) 126 C.A.4th 1180, 1199, 24 C.R.3d 543 [city's finding that mitigation measures were not feasible due to funding uncertainty did not trigger need for subsequent EIR or supplement to EIR; finding did not result in either new significant environmental effects or substantial increase in severity of significant effects that were already identified in EIR].

Citizens for Responsible Equitable Environmental Dev. v. San Diego Redevelopment Agency (2005) 134 C.A.4th 598, 605, 612, 36 C.R.3d 249 [Pub.Res.C. 21090 did not require agencies to prepare project-specific EIR for hotel project; substantial evidence supported finding that earlier EIRs, prepared for redevelopment plan of which hotel was part, adequately examined potential environmental effects of hotel project; distinguishing *Natural Resources Defense Council v. Los Angeles* (2002) 103 C.A.4th 268, 126 C.R.2d 615, text, p. 1011].

Wal-Mart Stores v. Turlock (2006) 138 C.A.4th 273, 286, 41 C.R.3d 420 [zoning ordinance that prohibited development of big box retail stores containing full-service grocery departments was not subject to further environmental review; ordinance was consistent with general plan for which EIR had been certified and presented no reasonably foreseeable, significant project-specific changes to environment; applying Pub.Res.C. 21083.3 and equivalent guidelines].

Save Our Neighborhood v. Lishman (2006) 140 C.A.4th 1288, 1294, 45 C.R.3d 306 [city improperly relied on Pub.Res.C. 21166 and corresponding guidelines to determine that it needed to prepare no more than addendum to earlier mitigated negative declaration for project that was approved but never built; proposed project and earlier project were planned for same land and involved similar mixes of uses, but totality of circumstances indicated that proposed project was new project altogether].

American Canyon Community United for Responsible Growth v. American Canyon (2006) 145 C.A.4th 1062, 1072, 52 C.R.3d 312 [city violated Pub.Res.C. 21166(a) by approving change in proposed development from shopping center to 24-hour supercenter without requiring supplemental review; city unreasonably minimized size increase and different retail nature presented by change and failed to properly analyze traffic impacts and urban decay effects].

Citizens for a Megaplex-Free Alameda v. Alameda (2007) 149 C.A.4th 91, 102, 111, 56 C.R.3d 728 [substantial evidence supported city's determination that there was no new information demonstrating that project to restore theater and construct parking garage would have significant environmental effects; city had approved project through issuance of mitigated negative declaration and opponents had failed to challenge approval in timely manner, so Pub.Res.C. 21166 set forth applicable standard of review].

Mani Bros. Real Estate Group v. Los Angeles (2007) 153 C.A.4th 1385, 1397, 64 C.R.3d 79 [city properly prepared addendum, rather than supplemental EIR, for project that was modified from primarily commercial to primarily residential, because, with exception of increased need for police services, modified project would not have newer or more severe environmental impacts than previously disclosed; distinguishing *Save Our Neighborhood v. Lishman*, in which original project involved negative declaration, not full EIR; criticizing focus in *Lishman* on whether modified project was "new project"].

Moss v. Humboldt (2008) 162 C.A.4th 1041, 1057, 76 C.R.3d 428 [supplemental review under Pub.Res.C. 21166 was required for subdivision project that languished in litigation for so long that its tentative map expired (see text, §811); in interim, new information about potentially significant impacts on water supply to downstream users and on population of trout came to light].



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CHAPTER XVII - Real Property

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XIII. ENVIRONMENTAL REGULATION OF REAL PROPERTY

A. Land Use Planning and Regulation.

5. California Environmental Quality Act (CEQA).

d. Alternative and Supplemental Reports.

6. Regulatory Procedure in Lieu of Report.

12 Witkin Sum. Cal. Law Real Property § 850

[§ 850] Regulatory Procedure in Lieu of Report.

(1) *Statutory Authorization.* In specified circumstances, when the regulatory program of a state agency requires a plan or other written documentation containing environmental information to be submitted in support of an activity, the plan or other written documentation may be submitted in lieu of the EIR if the Secretary of the Resources Agency has certified the regulatory program. (*Pub.Res.C. 21080.5(a)*; see *Wildlife Alive v. Chickering* (1976) 18 C.3d 190, 195, 196, 132 C.R. 377, 553 P.2d 537 [*Pub.Res.C. 21080.5* applied to setting of hunting season by Fish and Game Commission].)

(2) *Delisting Endangered Species.* In *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 C.4th 105, 65 C.R.2d 580, 939 P.2d 1280, defendant Fish and Game Commission decided to remove the Mojave ground squirrel from the list of threatened species, a list that defendant is required to establish and maintain by the California Endangered Species Act (CESA) (*Fish & Game C. 2050* et seq., infra, §885). In plaintiffs' action to set aside the decision, the trial court determined that removing a species from the threatened species list was an activity subject to CEQA, and thus that defendant should have prepared an environmental impact report before taking the action. The trial court ordered defendant to vacate its delisting decision. *Held*, affirmed.

(a) *Defendant's decision is not exempt from CEQA.*

(1) There is no irreconcilable conflict between CESA and CEQA. Nothing in the language or history of either statute indicates that the Legislature intended to exempt defendant from CEQA when carrying out its responsibilities under CESA. If the Legislature had believed that state agencies with environmental responsibilities under other statutes were exempt from CEQA, it would not have needed to enact *Pub.Res.C. 21080.5*, which allows agencies to use their own procedures, in lieu of an EIR, to review proposed projects. (16 C.4th 116.)

(2) The Legislature intended CEQA to apply, to the fullest extent possible, to all public agencies undertaking discretionary projects, even if the agency's discretion to comply with CEQA is constrained by the agency's governing statute. (16 C.4th 117.) The numerous statutory and administrative provisions governing the listing and delisting of species leave no doubt that delisting is a discretionary act. (16 C.4th 118.)

(3) The reasoning of *Pacific Legal Foundation v. Andrus* (6th Cir. 1981) 657 F.2d 829, which held that the Secretary of the Interior was not required to file an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA) when making a decision to list a species under the federal Endangered Species Act (ESA), does not apply here. (16 C.4th 119.) The conclusion in *Andrus* was not sound, given that there is no clear and fundamental conflict between NEPA and ESA that would exempt a federal agency from NEPA's requirements. (16 C.4th 121.) Moreover, NEPA and ESA differ significantly from CEQA and CESA. Whereas NEPA's language and legislative history may suggest that Congress intended to exempt federal agencies that were already engaged in protecting the environment from NEPA's EIS requirements, the existence of *Pub.Res.C. 21080.5* precludes a similar conclusion here. (16 C.4th 121, 122.) Finally, preparation of an EIR before a delisting cannot be considered a "waste of time," as the *Andrus* court determined preparation of an EIS before a listing to be. The potential impacts of a delisting decision are obviously different from those of a listing decision. A delisting decision made in accordance with CEQA would help to inform defendant's exercise of discretion. (16 C.4th 122.)

(4) The delisting decision is not eligible for a categorical exemption, which is a determination that a particular project does not have a significant effect on the environment. (16 C.4th 124.) Because a delisting decision withdraws a number of statutory and regulatory protections from a species, it has the potential to reduce the species population or restrict its habitat. (16 C.4th 125.)

(b) *Delisting decision is part of certified regulatory program.* Defendant's regulatory program under the Fish and Game Code, which has been certified by the Secretary of the Resources Agency under *Pub.Res.C. 21080.5*, includes more than simply the enforcement of hunting and fishing regulations. (16 C.4th 126.) Thus, defendant is exempt from the EIR requirement when it makes a delisting decision, as long as it adheres to its certified program's requirements. (16 C.4th 129.)

(c) *Defendant failed to comply with its own procedures under certified regulatory program.* Defendant proceeded with the delisting under the mistaken belief that the decision was categorically exempt from CEQA. (16 C.4th 132.) Thus, defendant failed to respond to significant opposition until after the decision was made. (16 C.4th 133.) Furthermore, defendant did not adequately assess alternatives to the decision or mitigation measures that would lessen its impact. (16 C.4th 134.)

(3) *Timber-Harvesting Plans.* *Pub.Res.C. 21080.5* authorizes a timber-harvesting plan under the Forest Practices Act (*Pub.Res.C. 4511 et seq.*) in lieu of an EIR. (*Environmental Protection Information Center v. Johnson* (1985) 170 C.A.3d 604, 616, 216 C.R. 502; see *Laupheimer v. California* (1988) 200 C.A.3d 440, 458, 246 C.R. 82 [rejecting contention that *Pub.Res.C. 21080.5* exemption is inapplicable because Forest Practices Act does not comply with CEQA]; *Elk County Water Dist. v. Department of Forestry & Fire Protection* (1997) 53 C.A.4th 1, 61 C.R.2d 536 [Department of Forestry properly exempted specified harvesting activities from discretionary review under either Forest Practice Act or CEQA]; *Schoen v. Department of Forestry & Fire Protection* (1997) 58 C.A.4th 556, 572, 68 C.R.2d 343 [timber-harvesting plan submitted in lieu of EIR must include alternatives and mitigation measures and undergo public review]; 41 *Hastings L. J.* 727 [timber-harvesting-plan exemption; criticizing *Laupheimer*]; for additional authority, see *infra*, §884.)

(4) *Other Illustrations.* Other cases discussing whether an agency's regulatory procedure may be substituted for preparation of an EIR include the following:

Coronado v. California Coastal Zone Conservation Com. (1977) 69 C.A.3d 570, 580, 138 C.R. 241 [requiring Coastal Commission to comply with CEQA in determining whether to permit state park facility; distinguishing *Natural Resources Defense Council v. California Coastal Zone Conservation Com.* (1976) 57 C.A.3d 76, 129 C.R. 57].

Sacramento v. State Water Resources Control Bd. (1992) 2 C.A.4th 960, 976, 3 C.R.2d 643 [*Pub.Res.C. 21080.5* exempted Department of Food and Agriculture from CEQA compliance for preparation of annual rice pesticide plan that was certified by Secretary of Resources Agency].

Dunn-Edwards Corp. v. South Coast Air Quality Management Dist. (1993) 19 C.A.4th 519, 534, 24 C.R.2d 90 [substitute documentation need only be responsive to opposition, and provide information for agency to intelligently account for environmental consequences].

La Costa Beach Homeowners' Assn. v. California Coastal Com. (2002) 101 C.A.4th 804, 819, 124 C.R.2d 618 [Coastal Commission's regulatory program for considering coastal development permits (see *infra*, §865) is exempt from EIR requirements; because Commission's regulations do not require it to consult other agencies when action is for public purpose, Commission's failure to consult other agencies before amending applicants' permit conditions did not violate CEQA].

Morgan Hill v. Bay Area Air Quality Management Dist. (2004) 118 C.A.4th 861, 878, 13 C.R.3d 420 [California Energy Resources Conservation and Development Commission certificate constitutes only state, local, or regional approval necessary to construct and operate power plant; further CEQA review is not required].

Santa Barbara County Flower & Nursery Growers Assn. v. Santa Barbara (2004) 121 C.A.4th 864, 871, 873, 17 C.R.3d 489 [Coastal Commission's process for approving amendments to local coastal plans is exempt from EIR requirement under *Pub.Res.C. 21080.5*; county did not waive exemption by submitting EIR along with proposed amendment].

Coalition for Reasonable Regulation of Naturally Occurring Substances v. California Air Resources Bd. (2004) 122 C.A.4th 1249, 1265, 19 C.R.3d 635 [Air Resources Board's regulatory program for adoption of ambient air quality standards has been certified by Secretary of Resources Agency].

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Authorization.* The exemption from CEQA procedures for certified regulatory programs is limited to the procedures set forth in *Pub.Res.C. 21100 et seq.*, *21150 et seq.*, and *21167*. (*Pub.Res.C. 21080.5(c)*; see *Joy Road Area Forest & Watershed Assn. v. California Dept. of Forestry & Fire Protection* (2006) 142 C.A.4th 656, 667, 47 C.R.3d 846 [Department of Forestry abused discretion by failing to comply with notice and recirculation requirements of *Pub.Res.C. 21092* and *21092.1*]).(3) *Timber-Harvesting Plans.* See *Joy Road Area Forest & Watershed Assn.*, *supra*, 142 C.A.4th 673, 679 [plan did not adequately analyze cumulative impacts of fog drip reduction and potential for future housing].

(4) *Other Illustrations.* The following are among the cases discussing whether an agency's regulatory procedure may be substituted for preparation of an EIR:

Arcadia v. State Water Resources Control Bd. (2006) 135 C.A.4th 1392, 1423, 38 C.R.3d 373 [although water boards' basin planning process is certified regulatory program, documentation submitted about adoption of trash total maximum daily load (trash TMDL) was inadequate; because there was fair argument that trash TMDL could have significant environmental impacts, water boards would need to prepare EIR or functional equivalent].

Californians for Alternatives to Toxics v. Department of Food & Agriculture (2005) 136 C.A.4th 1, 15, 38 C.R.3d 638 [Department of Food and Agriculture impermissibly relied on certified regulatory program of Department of Pesticide Regulation as substitute for evaluating possible environmental impacts of using pesticides under proposed disease control program].

Californians for Alternatives to Toxics v. California Dept. of Pesticide Regulation (2006) 136 C.A.4th 1049, 1067, 39 C.R.3d 393 [because department's procedure for yearly renewal of pesticide registrations complied with certified pesticide regulatory program, it complied with CEQA].

Los Angeles v. California State Water Resources Control Bd. (2006) 143 C.A.4th 985, 1003, 50 C.R.3d 619 [water permit issued by regional board in accordance with requirements of federal Clean Water Act was subject to limited CEQA review; *Water C. 13389* excluded permitting process from requirements of *Pub.Res.C. 21100 et seq.*, but board

had to prepare certification under *Pub.Res.C. 21080.5*; citing *Arcadia*].

California Sportfishing Protection Alliance v. State Water Resources Control Bd. (2008) 160 C.A.4th 1625, 1642, 73 C.R.3d 560 [regional board considered all significant environmental implications of adopting amendment to temperature objectives of basin plan before finding that project would not have significant adverse effect on tributary; report prepared by board was functional equivalent of full EIR].



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A. Land Use Planning and Regulation.

5. California Environmental Quality Act (CEQA).

e. Administrative Proceedings.

1. Lead Agency.

12 Witkin Sum. Cal. Law Real Property § 851

[§ 851] Lead Agency.

(1) *Responsibilities.* Environmental protection consists largely of qualitative decisions and is primarily entrusted to administrative agencies. (See 5 *U.C. Davis L. Rev.* 309 [administrative rulemaking under CEQA]; 24 *U.C.L.A. L. Rev.* 838 [decisionmaking under CEQA].) CEQA provides for the concentration of responsibility for each project in a single "lead agency." The lead agency is responsible for determining whether an EIR, a negative declaration, or a mitigated negative declaration is required for a project. (*Pub.Res.C. 21080.1(a), 21165.*)

The lead agency is responsible for considering the effects, both individual and collective, of all activities involved in a project. A "responsible agency," on the other hand, is responsible for considering only the effects of those activities involved in a project that it is required by law to carry out or approve. (*Pub.Res.C. 21002.1(d).*) A trustee agency is an agency that has jurisdiction by law over natural resources affected by a project that are held in trust for the people of California. (*Pub.Res.C. 21070*; on lead agency's consultation with responsible and trustee agencies, see *Pub.Res.C. 21080.3, 21104, 21153*; on lead agency's duty to consult with transportation planning agencies and public agencies with transportation facilities, see *Pub.Res.C. 21092.4.*)

Lead agencies must circulate environmental impact reports for public and agency comment. (*Sutter Sensible Planning v. Board of Supervisors* (1981) 122 *C.A.3d* 813, 819, 176 *C.R.* 342; see *Laurel Heights Imp. Assn. v. Regents of Univ. of Calif.* (1993) 6 *C.4th* 1112, 1129, 26 *C.R.2d* 231, 864 *P.2d* 502 [defining when information added after comment period is "significant" enough to require recirculation of EIR; discussing *Sutter*]; *Chaparral Greens v. Chula Vista* (1996) 50 *C.A.4th* 1134, 1146, 58 *C.R.2d* 152 [recirculation of EIR was not necessary; citing *Laurel Heights Imp. Assn.*]; *Ultramar v. South Coast Air Quality Management Dist.* (1993) 17 *C.A.4th* 689, 699, 21 *C.R.2d* 608 [public comment period is required for abbreviated EIRs prepared under *Pub.Res.C. 21080.5* (supra, §850)]; on length of public review period for draft reports, see *Pub.Res.C. 21091 et seq.*)

(2) *Substantial Evidence.* Agencies look for substantial evidence to determine whether a project may have a significant effect on the environment. The finding must be made "in light of the whole record." (*Pub.Res.C. 21080(d), 21082.2(d).*) Argument, speculation, unsubstantiated opinion, clearly inaccurate evidence, or evidence of social or economic impacts unrelated to physical impacts on the environment do not constitute substantial evidence. Substantial

evidence includes facts, and reasonable assumptions and expert opinion supported by facts. (*Pub.Res.C. 21080(e), 21082.2(c).*)

(3) *Examples of Lead Agencies.* The following are among the decisions illustrating the identity and responsibilities of lead agencies:

Friends of Cuyamaca Valley v. Lake Cuyamaca Recreation & Park Dist. (1994) 28 C.A.4th 419, 426, 33 C.R.2d 635 [Department of Fish and Game, not local park district, was lead agency for purposes of regulating duck hunting].

Gentry v. Murrieta (1995) 36 C.A.4th 1359, 1386, 43 C.R.2d 170 [lead agency must notify other "trustee agencies" concerned with project of intent to adopt negative declaration (see *supra*, §845)].

Fall River Wild Trout Foundation v. Shasta (1999) 70 C.A.4th 482, 490, 82 C.R.2d 705 [county was required to give copy of mitigated negative declaration regarding proposed development next to river to Department of Fish and Game, a trustee agency].

Planning & Conservation League v. Department of Water Resources (2000) 83 C.A.4th 892, 903, 100 C.R.2d 173 [in preparing EIR for revision of long-term water supply contracts between Department of Water Resources and local water contractors, department, rather than one of contractors, should have been lead agency].

Eller Media Co. v. Community Redevelopment Agency (2003) 108 C.A.4th 25, 45, 133 C.R.2d 324 [community redevelopment agency that determined whether buildings would be permitted in redevelopment project area was lead agency for CEQA purposes, even though city had ultimate responsibility for issuing building permits].

El Morro Community Assn. v. California Dept. of Parks & Recreation (2004) 122 C.A.4th 1341, 1349, 19 C.R.3d 445 [certification of final EIR by deputy director of lead agency, as designee of director, was proper].

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Responsibilities.* See *McAllister v. Monterey (2007) 147 C.A.4th 253, 294, 54 C.R.3d 116* [when Coastal Commission accepted administrative appeal from county's decision to issue coastal development permit, county's CEQA decisions were superseded by commission's review process, even though county was lead agency]. *Public and agency comment:* See *Vineyard Area Citizens for Responsible Growth v. Rancho Cordova (2007) 40 C.4th 412, 447, 53 C.R.3d 821, 150 P.3d 709* [EIR required recirculation for comments on impact of groundwater withdrawal on river flow and salmon migration; EIR authors identified substantial new impact when they added proviso about periods of low flow]; *Gilroy Citizens for Responsible Planning v. Gilroy (2006) 140 C.A.4th 911, 925, 45 C.R.3d 102* [city responded to agency comments in compliance with *Pub.Res.C. 21092.5*; EIR contained responses to all comments received and evidence indicated that final EIR was provided to both agencies and individuals]; *Western Placer Citizens for an Agricultural & Rural Environment v. Placer (2006) 144 C.A.4th 890, 898, 50 C.R.3d 799* [agency did not have to add new information to EIR before deciding whether new information was significant enough to require recirculation; furthermore, substantial evidence supported agency's decision not to recirculate where changes to project created no new environmental impacts and actually reflected improvements to environmental conditions].

(2) *Substantial Evidence.* See *Lighthouse Field Beach Rescue v. Santa Cruz (2005) 131 C.A.4th 1170, 1206, 31 C.R.3d 901* [evidence in record indicating controversy over presence of unleashed dogs on beach did not constitute substantial evidence under *Pub.Res.C. 21082.2*; whether presence of unleashed dogs on beach would decrease enjoyment of other beach users was question of social, not physical, impact].



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2. Preparation of Report by Consultant.

12 Witkin Sum. Cal. Law Real Property § 852

[§ 852] Preparation of Report by Consultant.

In *Friends of La Vina v. Los Angeles* (1991) 232 C.A.3d 1446, 284 C.R. 171, the analytical documentation for an EIR, including responses to public comments, was prepared by the permit applicant's consultant. The trial judge ruled that CEQA required the EIR to be written and composed by the public agency charged with preparing it. *Held*, reversed.

(a) "[A]n agency may comply with CEQA by adopting EIR materials drafted by the applicant's consultant, so long as the agency independently reviews, evaluates, and exercises judgment over that documentation and the issues it raises and addresses." (232 C.A.3d 1452.)

(b) *Pub.Res.C. 21082.1*, which requires agency "preparation" of the EIR, specifically requires the agency to consider outside comments and information and to include them in the EIR. Both the legislative history of this provision and CEQA's regulatory guidelines validate documentary reliance on an applicant's consultant. (232 C.A.3d 1453, citing *Laurel Heights Imp. Assn. v. Regents of Univ. of Calif.* (1988) 47 C.3d 376, 253 C.R. 426, 764 P.2d 278.) In addition, a consistent line of appellate decisions endorses the use of consultants to prepare both draft and final reports. (232 C.A.3d 1454, citing *Concerned Citizens of Palm Desert v. Board of Supervisors* (1974) 38 C.A.3d 272, 113 C.R. 338, *Foundation for San Francisco's Architectural Heritage v. San Francisco* (1980) 106 C.A.3d 893, 165 C.R. 401, and *Poway v. San Diego* (1984) 155 C.A.3d 1037, 202 C.R. 366.)

(c) The appropriate test is not who wrote the words, but whether the agency "sufficiently exercised independent judgment over the environmental analysis and exposition." (232 C.A.3d 1455.) (See *Mission Oaks Ranch, Ltd. v. Santa Barbara* (1998) 65 C.A.4th 713, 723, 77 C.R.2d 1 [consultant's duty to provide accurate report is to public agency, not to project developer, and agency's duty to prepare and release accurate report is to public, not to project developer]; *Sunset Drive Corp. v. Redlands* (1999) 73 C.A.4th 215, 222, 223, 86 C.R.2d 209 [rejecting draft EIR prepared by applicant's consultant does not satisfy agency's duty to prepare report; if applicant cannot fulfill responsibility of preparing report, agency must select other means of doing so]; 10 U.S.F. L. Rev. 272 [qualifications and accountability of preparers of EIRs].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Eureka Citizens for Responsible Government v. Eureka* (2007) 147 C.A.4th 357, 369, 54 C.R.3d 485 [applicant's preparation of EIR that analyzed effects of allowing use of outdoor playground was proper; city conducted detailed review and critique of applicant's submission].



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3. Time Limits on Preparation of Reports.

12 Witkin Sum. Cal. Law Real Property § 853

[§ 853] Time Limits on Preparation of Reports.

(1) *Determination Whether Environmental Impact Report or Negative Declaration Is Required.* In the case of a project described in *Pub.Res.C. 21065(c)* (supra, §834) (activity for which public agency must issue lease, permit, license, certificate, or other entitlement for use), the determination required by *Pub.Res.C. 21080.1* (whether EIR or negative declaration is required) must be made within 30 days from the date on which the lead agency receives the project application and accepts it as complete. The lead agency and the project applicant may consent to extend this period for up to 15 days. (*Pub.Res.C. 21080.2*.)

(2) *Preparation of Reports and Negative Declarations.* For projects described in *Pub.Res.C. 21065(c)* (supra, §834), each state and local agency must complete and certify EIRs within 1 year and must complete and adopt negative declarations within 180 days. (*Pub.Res.C. 21100.2(a)(1)* [state agency]; *Pub.Res.C. 21151.5(a)(1)* [local agency]; see *Sunset Drive Corp. v. Redlands* (1999) 73 C.A.4th 215, 221, 86 C.R.2d 209 [mandamus is appropriate remedy to enforce time limit imposed by *Pub.Res.C. 21151.5*].)

If an EIR is prepared under a contract with a local agency (supra, §852), the contract must be executed within 45 days of the date on which the agency sends a notice of determination under *Pub.Res.C. 21080.4* that an EIR is required. The agency may take longer to execute the contract, if the project applicant and the agency mutually agree to an extension of time. (*Pub.Res.C. 21151.5(b)*.) Parallel provisions are applicable to contracts with state agencies. (*Pub.Res.C. 21100.2(b)*.)

(3) *Consultations.* Meetings requested by specified responsible agencies to determine the scope and content of the environmental information that the agencies may require must be convened by the lead agency as soon as possible, but not later than 30 days after the date that the meeting was requested. (*Pub.Res.C. 21080.4(b)*.)

SUPPLEMENT: [This section is current through the latest supplement]



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[§ 854] Project Approval After Environmental Impact Report.

(1) *Required Findings.* In order to approve a project for which a certified EIR identifies one or more significant effects on the environment, a public agency must make one or more of the following findings as to each significant effect:

(a) Changes have been made that mitigate or avoid the effect. (*Pub.Res.C. 21081(a)(1).*)

(b) Those alterations are the responsibility of another agency and have been or should be adopted by that agency. (*Pub.Res.C. 21081(a)(2).*)

(c) Specific economic, legal, social, technological, or other considerations, including employment opportunities for highly trained workers, make the mitigation measures or alternatives identified in the EIR infeasible, and specific benefits of the project outweigh its effects on the environment. (*Pub.Res.C. 21081(a)(3), (b).*)

(2) *Mandatory Measures.* An agency must ensure that mitigation measures are "fully enforceable through permit conditions, agreements, or other measures," and conditions of project approval may be set forth in referenced documents, or made part of a plan, policy, regulation, or project design. (*Pub.Res.C. 21081.6(b)*; see *Federation of Hillside & Canyon Assn. v. Los Angeles* (2000) 83 C.A.4th 1252, 1260, 100 C.R.2d 301 [transportation mitigation measures identified in EIR for adoption of city's general plan framework were not "required in, or incorporated into" framework as required by *Pub.Res.C. 21081(a)(1)*; city failed to provide that mitigation measures would actually be implemented as required by *Pub.Res.C. 21081.6(b)*].)

If a condition of project approval is set aside in an administrative or judicial proceeding, and the condition was necessary to avoid a significant effect on the environment, the lead agency's negative declaration is invalid and a new review process must be conducted before the project can be reapproved. Alternatively, the lead agency may substitute a new condition that it finds, after a public hearing, to be equally or more effective than the disapproved condition. (*Pub.Res.C. 21080(g)*; on lead agency's substitution of mitigation measures, see *Pub.Res.C. 21080(f)*, *supra*, §846.)

(3) *Information From Other Agencies.* A responsible agency or an agency with jurisdiction over natural resources

affected by the project must either provide the lead agency with performance objectives for mitigation measures related to resources subject to that agency's authority, or refer the lead agency to appropriate guidelines or reference documents. (*Pub.Res.C. 21081.6(c)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Required Findings.* On exemption from *Pub.Res.C. 21081(a)* for traffic impacts of specified small, multifamily housing developments, see *Pub.Res.C. 21081.2*, added in 2006.

A statement of overriding considerations supplements the findings required by *Pub.Res.C. 21081(a)* and supports an agency's determination to proceed with a project despite adverse environmental effects. (See *Federation of Hillside & Canyon Assn. v. Los Angeles* (2004) 126 C.A.4th 1180, 1199, 24 C.R.3d 543 [city did not have to consider additional mitigation measures and project alternatives, apart from those identified in adequate EIR, before adopting statement of overriding considerations].)

In *Marina v. Board of Trustees of Calif. State University* (2006) 39 C.4th 341, 46 C.R.3d 355, 138 P.3d 692, defendant trustees certified an EIR for the major expansion of a college campus on a former military base, despite identifying five significant environmental effects (drainage, water supply, traffic, wastewater management, and fire protection) for which they failed to implement mitigation measures. The trustees argued that basewide infrastructure improvements by the authority charged with transforming the base to civilian use would mitigate the effects, that the trustees could not lawfully contribute funds to the authority to be used for mitigation, that the authority bore the ultimate responsibility for mitigating the effects, and that overriding circumstances justified certifying the EIR. The authority and a neighboring city challenged certification of the EIR by filing petitions for writs of mandamus, which the trial court granted. The Court of Appeal reversed. *Held*, writ of mandamus should be granted.

(a) The trustees are not prohibited from voluntarily contributing funds to the authority as a form of mitigation. These voluntary payments would not constitute a special assessment in violation of Cal. Const., Art. XIII, §3(a) or *Govt.C. 54999* et seq. (9 *Summary* (10th), *Taxation*, Supp., §181). (39 C.4th 357.) The question of payment arises not because the authority has imposed a charge, but because CEQA requires the trustees to mitigate, if feasible, the significant environmental effects of their project and because payments may represent a feasible form of mitigation. (39 C.4th 359.) Furthermore, a voluntary payment in mitigation would not constitute an unlawful gift of public funds. (39 C.4th 363.)

(b) The fact that the trustees cannot guarantee that the authority will actually implement the proposed infrastructure improvements does not make voluntary mitigation payments infeasible. The authority has been given statutory powers to ensure that the base is prepared for civilian development, and courts may presume that the authority will comply with the law. (39 C.4th 365.)

(c) The trustees' finding, under *Pub.Res.C. 21081(a)(2)*, that the authority has the exclusive authority to mitigate the identified environmental effects does not withstand close scrutiny. Although the authority has responsibility for implementing infrastructure improvements, the costs of those improvements may and will be borne by those who benefit from them. (39 C.4th 366.) Even though the trustees lack the power to construct off-campus infrastructure improvements themselves, they may pay a third party, such as the authority, to do so. The trustees cannot disclaim responsibility for making payments before at least asking the Legislature for the necessary funds. (39 C.4th 367.)

(d) If the trustees' reasons for determining that mitigation is infeasible were valid, "we would give much deference to [their] weighing of the project's benefits against the remaining environmental effects" under *Pub.Res.C. 21081(b)*. (39 C.4th 368.) Because the trustees abused their discretion in determining that the identified effects cannot be feasibly mitigated, however, their statement of overriding circumstances is also invalid. "CEQA does not authorize an agency to proceed with a project that will have significant, unmitigated effects on the environment, based simply on a weighing of those effects against the project's benefits, unless the measures necessary to mitigate those effects are truly infeasible." (39 C.4th 368, 369.) (See *San Diego v. Grossmont-Cuyamaca Community College Dist.* (2006) 141 C.A.4th 86, 101, 45

C.R.3d 674 [because community college district was authorized by various statutes and regulations to spend public funds to mitigate significant adverse traffic impacts of proposed campus expansion, district's claim of legal infeasibility failed].)

See *Uphold Our Heritage v. Woodside* (2007) 147 C.A.4th 587, 598, 54 C.R.3d 366 [town's finding that proposed alternatives to demolition of historic home were infeasible was not supported by substantial evidence; EIR did not compare costs of alternatives with cost of demolishing home and constructing new residence; statement of overriding considerations and approval of demolition permit were invalid]; *Woodward Park Homeowners Assn. v. Fresno* (2007) 150 C.A.4th 683, 717, 719, 58 C.R.3d 102 [statement of overriding considerations, used to justify approval of commercial development, was inadequate and misleading; statement inaccurately described proposed alternatives as "no development or development to a lesser degree" rather than "no shopping center or a smaller shopping center"]; C.E.B., 2 Practice Under the Environmental Quality Act 2d, §17.2 et seq.



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CHAPTER XVII - Real Property

Witkin Summary of California Law XIII. ENVIRONMENTAL REGULATION OF REAL PROPERTY

A. Land Use Planning and Regulation.

5. California Environmental Quality Act (CEQA).

f. Judicial Review.

1. Exhaustion of Administrative Remedies.

12 Witkin Sum. Cal. Law Real Property § 855

[§ 855] Exhaustion of Administrative Remedies.

(1) *Statutory Requirement.* No action or proceeding may be brought under *Pub.Res.C. 21167* (infra, §856) unless the alleged grounds for noncompliance with CEQA were presented to the public agency orally or in writing during the public comment period or before the close of the public hearing on the project before the issuance of the notice of determination. (*Pub.Res.C. 21177(a)*.) Thus, the exhaustion requirement applies only where (a) CEQA provides a public comment period, or (b) there is a public hearing before a notice of determination is issued. (*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 C.A.4th 1165, 1210, 61 C.R.2d 447 [*Pub.Res.C. 21177* does not apply to action challenging exemption determination].) Furthermore, to maintain an action or proceeding, a person must have objected to the project orally or in writing during the public comment period or before the close of the public hearing on the project before the issuance of the notice of determination. (*Pub.Res.C. 21177(b)*.) *Pub.Res.C. 21177* does not apply to an alleged grounds for noncompliance for which there was no public hearing or other opportunity for members of the public to raise those objections orally or in writing before the project was approved, or if the public agency failed to give the notice required by law. (*Pub.Res.C. 21177(e)*; *Santa Teresa Citizen Action Group v. San Jose* (2003) 114 C.A.4th 689, 701, 7 C.R.3d 868 [*Pub.Res.C. 21177* did not apply to action challenging approval of recycled water program where there had been no clearly defined administrative procedure in which petitioners could resolve their concerns about project as it was finally configured]; *Maintain Our Desert Environment v. Apple Valley* (2004) 124 C.A.4th 430, 404, 15 C.R.3d 322 [exception provided in *Pub.Res.C. 21177(e)* did not apply and thus advocacy group was not excused from failure to exhaust its remedies with regard to specified issues; grounds presented by group members during public comment period, however, could be raised].)

A party may bring an action under *Pub.Res.C. 21167* as long as the party has raised an objection to the adequacy of an EIR before certification. (*Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 C.A.4th 1109, 1121, 71 C.R.2d 1 [petitioners could maintain action despite their failure to participate in public comment period for second supplemental draft EIR because they raised concerns before certification]; *Federation of Hillside & Canyon Assn. v. Los Angeles* (2000) 83 C.A.4th 1252, 1263, 100 C.R.2d 301 [even though petitioners did not challenge feasibility or range of alternatives during draft EIR public comment period, another project opponent did so and petitioners objected to project on some ground before city's final approval; exhaustion requirement was therefore

satisfied; citing *Galante Vineyards*].)

(2) *Illustrations*. Cases applying the exhaustion requirement include the following:

Resource Defense Fund v. Local Agency Formation Com. (1987) 191 C.A.3d 886, 894, 236 C.R. 794 [plaintiff's failure to call city council's attention to defect in report precluded judicial review of issue].

California Aviation Council v. Amador (1988) 200 C.A.3d 337, 342, 246 C.R. 110 [Pub.Res.C. 21177 construed].

Murrieta Valley Unified School Dist. v. Riverside (1991) 228 C.A.3d 1212, 1228, 279 C.R. 421 [school district challenge to county's EIR; failure to bring school overcrowding to county's attention under statutes specifically designed for that purpose (Govt.C. 65970 et seq.) was not failure to exhaust administrative remedy].

Garrison v. Board of Directors of the United Water Conservation Dist. (1995) 36 C.A.4th 1670, 1676, 1677, 43 C.R.2d 214 [applying Pub.Res.C. 21177(c), which allows organization formed after approval of project to maintain action if member of organization exhausted administrative remedies].

Castaic Lake Water Agency v. Santa Clarita (1995) 41 C.A.4th 1257, 1265, 49 C.R.2d 79 [there are no administrative procedures to be followed before filing mandamus challenge to agency's decision that project is exempt from CEQA].

Temecula Band of Luiseno Mission Indians v. Rancho Calif. Water Dist. (1996) 43 C.A.4th 425, 433, 50 C.R.2d 769 [failure to exhaust administrative remedies was not excused by agency's purportedly inadequate notice of project under consideration].

Endangered Habitats League v. State Water Resources Control Bd. (1997) 63 C.A.4th 227, 238, 73 C.R.2d 388 [exhaustion doctrine was inapplicable where agency gave no notice and provided no opportunity for comments at "second tier" implementation stage of project].

Fall River Wild Trout Foundation v. Shasta (1999) 70 C.A.4th 482, 489, 82 C.R.2d 705 [plaintiffs were excused from exhausting their administrative remedies by county's failure to give required copy of mitigated negative declaration to Department of Fish and Game].

Waste Management of Alameda County v. Alameda (2000) 79 C.A.4th 1223, 1239, 94 C.R.2d 740 [exhaustion of administrative remedies under Pub.Res.C. 21177 does not automatically confer standing to seek judicial review].

Tahoe Vista Concerned Citizens v. Placer (2000) 81 C.A.4th 577, 588, 96 C.R.2d 880 [citizen's group that raised issue of noncompliance with CEQA in first hearing provided on project, but failed to raise same issue in subsequent administrative appeal, did not comply with exhaustion requirement of Pub.Res.C. 21177].

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Requirement*. See *Concerned McCloud Citizens v. McCloud Community Services Dist.* (2007) 147 C.A.4th 181, 189, 54 C.R.3d 1 [Pub.Res.C. 21177(b) did not bar group's challenge to water district's approval of agreement with bottling company; district did not hold public hearing or solicit public comments because it did not consider entry into agreement to be approval of project within meaning of CEQA]; C.E.B., 2 Practice Under the Environmental Quality Act 2d, §23.97 et seq.

Where public agency failed to give required notice: See *Gilroy Citizens for Responsible Planning v. Gilroy* (2006) 140 C.A.4th 911, 919, 45 C.R.3d 102 [project opponents should have objected during administrative proceedings that EIR did not notify public that it tiered from earlier EIR; their attempt to characterize tiering issue as "notice error" under Pub.Res.C. 21177(e) was not successful]. *Certification as trigger*: *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 C.A.4th 1184, 22 C.R.3d 203, disapproved of identifying *certification* of the EIR, rather than approval of the

project, as the crucial cutoff point before which a party must raise an objection. Defendant city certified the EIRs for two retail shopping center projects on its nonpublic consent calendars. Later the same day, after a public hearing, it approved both projects. Plaintiff, a local group opposed to the projects, filed CEQA actions challenging the sufficiency of the EIRs and contesting the project approvals. The trial court concluded that the failure to study urban decay rendered the EIRs inadequate and ordered them decertified, but allowed partial construction to continue while defendant conducted limited environmental review. *Held*, reversed. Both certification of the EIRs and approval of the projects must be voided. (See Supp., supra, §841, for discussion of substantive issues.)

(a) Plaintiff has standing to challenge defendant's action, despite the developer's assertion that plaintiff is an economic competitor and not a "bona fide environmental group." (124 C.A.4th 1198.) One of plaintiff's members is a homeowner residing near one of the projects and he spoke in opposition to the projects at a public hearing before they were approved. "This is sufficient to satisfy CEQA's liberal standing requirement." (124 C.A.4th 1198.)

(b) Plaintiff properly exhausted its administrative remedies under *Pub.Res.C. 21177(b)* when its counsel voiced all of its objections, including CEQA defects, during the hearing on project approvals. *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 C.A.4th 1109, 71 C.R.2d 1, text, p. 1020, incorrectly identifies certification of the EIR, rather than approval of the project, as the crucial cutoff point. *Federation of Hillside & Canyon Assn. v. Los Angeles* (2000) 83 C.A.4th 1252, 100 C.R.2d 301, text, p. 1020, on the other hand, states the correct formulation that *Pub.Res.C. 21177(b)* prescribes: a party may litigate objections to project approval that were raised during the public comment period or before the close of the public hearing on the project. Here, because defendant improperly segregated environmental review from project approval, plaintiff was forced to raise its objections after the EIRs were certified. (124 C.A.4th 1200.)

(c) Defendant "appears to have thought that the public's role in the environmental review process ends when the public comment period expires. Apparently, it did not realize that if a public hearing is conducted on project approval, then new environmental objections could be made until close of this hearing. ... If the decision making body elects to certify the EIR without considering comments made at this public hearing, it does so at its own risk. If a CEQA action is subsequently brought, the EIR may be found to be deficient on grounds that were raised at any point prior to close of the hearing on project approval." (124 C.A.4th 1201.)

(2) *Illustrations.* The following are among the cases applying the exhaustion requirement:

Central Delta Water Agency v. State Water Resources Control Bd. (2004) 124 C.A.4th 245, 273, 20 C.R.3d 898 [opponents of wetlands project waived issue of board's failure to consider mitigation measures for loss of agricultural land by failing to raise objection before close of public hearing on project; distinguishing *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 C.A.4th 1109, 71 C.R.2d 1, text, p. 1020].

State Water Resources Control Bd. Cases (2006) 136 C.A.4th 674, 791, 795, 39 C.R.3d 189 [opponents of water use agreements raised issue whether EIR adequately analyzed effect on return flows; even though opponents did not use "magic words" that "EIR is inadequate," issue was raised in written briefing to board and through cross-examination of witnesses].

Banker's Hill, Hillcrest, Park West Community Preservation Group v. San Diego (2006) 139 C.A.4th 249, 281, 282, 42 C.R.3d 537 [opponents of proposed development were precluded from arguing that city impermissibly issued shoring, grading, and pad footing permits before undertaking CEQA analysis; opponents failed to raise issue of "piecemealing" to city].

Citizens for Open Government v. Lodi (2006) 144 C.A.4th 865, 873, 50 C.R.3d 636 [group opposing project exhausted its administrative remedies even though it did not itself file notice of appeal that brought decision of planning commission to city council; representatives from group appeared and objected at every planning commission meeting and every city council hearing].

Mani Bros. Real Estate Group v. Los Angeles (2007) 153 C.A.4th 1385, 1394, 64 C.R.3d 79 [group opposing project adequately protested approval of addendum to EIR changing primarily commercial project to primarily residential project; city and redevelopment agency held regularly scheduled meetings, rather than duly noticed public hearings under CEQA, and opponents voiced objections at those meetings and submitted four letters].

Woodward Park Homeowners Assn. v. Fresno (2007) 150 C.A.4th 683, 711, 716, 720, 58 C.R.3d 102 [exhaustion requirement was met where comment letter from party other than petitioner raised issue of inadequacy of discussion of baseline conditions and of "no project alternative"; also, brief, general objections to statement of overriding considerations were adequate where statement was made available to public only short time before city council voted on it].

Porterville Citizens for Responsible Hillside Dev. v. Porterville (2007) 157 C.A.4th 885, 909, 69 C.R.3d 105 [neighborhood group failed to present to city, before adoption of mitigated negative declaration, claims that project was inconsistent with general plan, that general plan was inadequate, or that city failed to comply with CEQA notice requirement].

Sierra Club v. Orange (2008) 163 C.A.4th 523, 535, 78 C.R.3d 1 [project opponent who made statements in response to agency's issuance of notice to prepare EIR did not satisfy *Pub.Res.C. 21177(b)*, which requires comments to be made during public comment period or at public hearing; disagreeing with contrary holding in *Woodward Park Homeowners Assn.*]. *Correction:* Page 1020, 1st line, "124 C.A.4th 430, 404" should be "124 C.A.4th 430, 437".



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XIII. ENVIRONMENTAL REGULATION OF REAL PROPERTY

A. Land Use Planning and Regulation.

5. California Environmental Quality Act (CEQA).

f. Judicial Review.

2. Statutes of Limitations.

12 Witkin Sum. Cal. Law Real Property § 856

[§ 856] Statutes of Limitations.

(1) *Where Agency Has Not Determined Whether Project Could Have Significant Environmental Effect.* An action or proceeding alleging that a public agency is carrying out or has approved a project that may have a significant effect on the environment without having determined whether the project may have a significant effect on the environment must be commenced within 180 days from the date of the public agency's decision to carry out or approve the project. If, however, the project is undertaken without a formal decision by the public agency, the action must be commenced within 180 days from the date the project is commenced. (*Pub.Res.C. 21167(a)*; see *Concerned Citizens of Costa Mesa v. 32nd Dist. Agricultural Assn.* (1986) 42 C.3d 929, 939, 231 C.R. 748, 727 P.2d 1029 [where agency made substantial changes in project after report was filed, and failed to file subsequent report required by *Pub.Res.C. 21166(a)*, limitations period of *Pub.Res.C. 21167(a)* began to run when plaintiff knew or should have known that actual project was substantially different from proposed project]; *Endangered Habitats League v. State Water Resources Control Bd.* (1997) 63 C.A.4th 227, 240, 73 C.R.2d 388 [petition for writ of mandamus was timely under *Pub.Res.C. 21167(a)*; statute of limitations did not begin to run until petitioner knew that drainage channels were going to be built in certain locations with certain structure to which petitioner objected]; *Riverwatch v. San Diego* (1999) 76 C.A.4th 1428, 1439, 91 C.R.2d 322 [under *Pub.Res.C. 21167*, time in which to bring CEQA challenge to project that has not been subject of "formal decision" commences when project commences; deemed approval under *Govt.C. 65956(b)* (*infra*, §871) occurs without formal decision]; *Cumming v. San Bernardino Redevelopment Agency* (2002) 101 C.A.4th 1229, 1232, 125 C.R.2d 42 [180-day limitations period of *Pub.Res.C. 21167* began to run when redevelopment agency approved sale of property within redevelopment project for use as recycling facility, after publishing notice as required by *Health & Saf.C. 33431* and *33433*; agency did not have to separately notify public under CEQA of its decision not to conduct further environmental review].)

(2) *Where Agency Has Determined Whether Project Could Have Significant Environmental Effect.* An action or proceeding alleging that a public agency has improperly determined whether a project may have a significant effect on the environment must be commenced within 30 days from the date the notice of approval or determination to carry out the project required by *Pub.Res.C. 21108(a)* (state agency) or *Pub.Res.C. 21152(a)* (local agency) is filed. (*Pub.Res.C. 21167(b)*; see *Save Our Bay v. San Diego Unified Port Dist.* (1996) 42 C.A.4th 686, 693, 49 C.R.2d 847 [mandamus

action dismissed for failure to join indispensable party within 30-day limitations period of *Pub.Res.C. 21167(b), (c)*]; *Temecula Band of Luiseno Mission Indians v. Rancho Calif. Water Dist.* (1996) 43 C.A.4th 425, 434, 50 C.R.2d 769 [review of challenge to project that modified earlier project was limited to review of incremental effects of later project; challenge to prior project was time-barred].)

(3) *Where Agency Has Prepared Environmental Impact Report.* An action or proceeding alleging that an EIR does not comply with CEQA must be commenced within 30 days from the date the lead agency files the notice of approval or determination to carry out the project required by *Pub.Res.C. 21108(a)* or *21152(a)*. (*Pub.Res.C. 21167(c)*); see *Mission Oaks Ranch, Ltd. v. Santa Barbara* (1998) 65 C.A.4th 713, 722, 77 C.R.2d 1 [developer's action challenging EIR was untimely; it was not filed within 30 days of denial of project by board of supervisors as required by *Pub.Res.C. 21167(c)*]; on conditional approval pending determination of compliance, see *Pub.Res.C. 21167.3*.) If no action or proceeding alleging that an EIR does not comply with CEQA is commenced during the period prescribed in *Pub.Res.C. 21167(c)*, the EIR will be conclusively presumed to comply with CEQA for use by responsible agencies, unless the provisions of *Pub.Res.C. 21166* (*supra*, §849) apply. (*Pub.Res.C. 21167.2*.)

(4) *Where Agency Has Determined That Project Is Not Subject to CEQA.* An action or proceeding alleging that a public agency has improperly determined that a project is not subject to CEQA under *Pub.Res.C. 21080(b)* or *21172* must be commenced within 35 days from the date the notice of determination to carry out the project authorized by *Pub.Res.C. 21108(b)* or *21152(b)* is filed. If the notice has not been filed, the action or proceeding must be commenced within 180 days from the date of the public agency's decision to carry out or approve the project, or, if a project is undertaken without a formal decision by the public agency, within 180 days from the date the project commences. (*Pub.Res.C. 21167(d)*); see *Chula Vista v. San Diego* (1994) 23 C.A.4th 1713, 1720, 29 C.R.2d 89 [demurrer to writ petition was properly granted for failure to comply with 180-day period imposed by *Pub.Res.C. 21167(d)*]; *Amador v. El Dorado County Water Agency* (1999) 76 C.A.4th 931, 962, 91 C.R.2d 66 [challenge to determination that proposed project was exempt was timely, despite not having been made within 35 days of filing of notice of exemption; because agency did not approve project before filing notice of exemption, notice was not valid and limitations period did not run; challenge therefore was properly brought within 180 days of date of project approval].)

(5) *Other Act or Omission by Agency.* An action or proceeding alleging that another act or omission of a public agency does not comply with CEQA must be commenced within 30 days from the date the notice of approval or determination to carry out the project required by *Pub.Res.C. 21108(a)* or *21152(a)* is filed. (*Pub.Res.C. 21167(e)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Where Agency Has Not Determined Whether Project Could Have Significant Environmental Effect.* See C.E.B., 2 Practice Under the Environmental Quality Act 2d, §23.18 et seq. (3) *Where Agency Has Prepared Environmental Impact Report.* See *Sierra Club v. Orange* (2008) 163 C.A.4th 523, 531, 78 C.R.3d 1 [project opponent properly relied on second notice of determination to commence 30-day period, where first notice contained substantive errors]. (4) *Where Agency Has Determined That Project Is Not Subject to CEQA.* See *San Bernardino Associated Governments v. Superior Court* (2006) 135 C.A.4th 1106, 1121, 38 C.R.3d 293 [35-day limitations period of *Pub.Res.C. 21167(d)* began to run when agency responsible for shaping transportation sales tax measure posted notice of exemption, not when board of supervisors placed measure on ballot].



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3. Preparation of Record.

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[§ 857] Preparation of Record.

The plaintiff or petitioner in an action under *Pub.Res.C. 21167* (supra, §856) must request that the respondent public agency prepare the record of proceedings relating to the subject of the action. The request, together with the complaint or petition, must be served personally on the public agency not later than 10 business days from the date the action or proceeding is filed. (*Pub.Res.C. 21167.6(a)*.) (See *Protect Our Water v. Merced* (2003) 110 C.A.4th 362, 373, 1 C.R.3d 726 [because court could not determine, from poorly prepared record, agency's findings about project alternatives and reasons for rejecting alternatives, approval of project had to be reversed]; *Orange v. Superior Court* (2003) 113 C.A.4th 1, 8, 6 C.R.3d 286 [*Pub.Res.C. 21167.6(e)* contemplates that administrative record will include "pretty much everything that ever came near a proposed development or to the agency's compliance with CEQA in responding to that development"]; *Leavitt v. Madera* (2004) 123 C.A.4th 1502, 1523, 22 C.R.3d 101 [trial court may impose terminating sanction for failure to timely prepare record of proceedings if petitioners violated court order that defined scope of record or if court has no other means to bring about compliance].)

Pub.Res.C. 21167.6(a) imposes a *jurisdictional* requirement that a mandamus petition raising a CEQA challenge be served within 10 days of filing. (*Board of Supervisors v. Superior Court* (1994) 23 C.A.4th 830, 844, 28 C.R.2d 560.) However, failure to comply is not necessarily fatal. The trial judge has discretion to impose a remedial sanction after weighing the petitioner's excuse for failure to comply against the respondent's showing of prejudice. (23 C.A.4th 848; see dissent, 23 C.A.4th 852 [arguing that *Pub.Res.C. 21167.6(a)* is notice provision, not jurisdictional service requirement].)

SUPPLEMENT: [This section is current through the latest supplement]

Pub.Res.C. 21167.6 authorizes only three ways to prepare a CEQA record: (1) the public agency may prepare and certify the record; (2) the petitioner may prepare the record, subject to certification by the public agency; or (3) the parties may agree to an alternative method of preparing the record, subject to certification by the public agency. (*Hayward Area Planning Assn. v. Hayward* (2005) 128 C.A.4th 176, 182, 26 C.R.3d 783 [city's delegation of task to real party in interest, without petitioner's consent, undermined statutory scheme for controlling costs of record preparation and statutory purpose of expediting CEQA litigation].)

The prevailing party in a CEQA proceeding involving traditional mandamus under *Pub.Res.C. 21168.5* may recover as costs the amounts it reasonably and necessarily incurred in preparing the record of proceedings. (*Wagner Farms v. Modesto Irr. Dist.* (2006) 145 C.A.4th 765, 776, 778, 52 C.R.3d 683 [prevailing party included documents that were created after agency approved final EIR and project and that did not, therefore, reflect agency proceedings; remand was necessary to recalculate costs more precisely]; *St. Vincent's School for Boys, Catholic Charities CYO v. San Rafael* (2008) 161 C.A.4th 989, 1013, 75 C.R.3d 213 [trial court properly charged nonprevailing applicant, who prepared record, for costs that prevailing party incurred in supplementing record with materials that applicant requested; applicant had responsibility for containing preparation costs].)

See *Eureka Citizens for Responsible Government v. Eureka* (2007) 147 C.A.4th 357, 366, 54 C.R.3d 485 [city properly declined to include in record 47 documents that were not presented to or considered by city in its CEQA deliberations]. *Service within 10 days of filing petition*: Although the 10-day time limit for service set forth in *Pub.Res.C. 21167.6(a)* may be extended for good cause, in no event may service of the petition be extended beyond the 90-day limit on challenging local government decisions under the Planning and Zoning Law in *Govt.C. 65009* (8 Summary (10th), *Constitutional Law*, §1011). (*Royalty Carpet Mills v. Irvine* (2005) 125 C.A.4th 1110, 1121, 23 C.R.3d 282 [trial court properly dismissed petition that was served 97 days after city approved conditional use permit].)



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[§ 858] Expedited Proceedings.

(1) *Request for Hearing.* In an action or proceeding alleging noncompliance with CEQA, the petitioner must request a hearing within 90 days from the date the petition is filed. Otherwise the petition will be subject to dismissal on the court's own motion or on the motion of any interested party. (*Pub.Res.C. 21167.4(a)*; see *Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist.* (1992) 9 C.A.4th 644, 652, 11 C.R.2d 850 [when there is change of venue, time limit under *Pub.Res.C. 21167.4* does not commence until receipt of notice that transferred case was filed]; *Miller v. Hermosa Beach* (1993) 13 C.A.4th 1118, 1136, 17 C.R.2d 408 [excusing mistake of law under *Pub.Res.C. 21167.4*]; *Dakin v. Department of Forestry & Fire Protection* (1993) 17 C.A.4th 681, 686, 21 C.R.2d 490 [time limit of *Pub.Res.C. 21167.4* applies to proceedings to review approval of timber-harvesting plan]; *Guardians of Elk Creek Old Growth v. Department of Forestry & Fire Protection* (2001) 89 C.A.4th 1431, 1433, 108 C.R.2d 259 [distinguishing *Dunn-Edwards Corp.*; petitioner who received notice that case had been transferred was subject to 90-day time limit for requesting hearing imposed by *Pub.Res.C. 21167.4*]; *Nacimiento Regional Water Management Advisory Committee v. Monterey County Water Resources Agency* (2004) 122 C.A.4th 961, 965, 18 C.R.3d 921 [relief under C.C.P. 473(b) (8 Cal. Proc. (4th), *Attack on Judgment in Trial Court*, §196) was not available to party whose case was dismissed when party's attorney failed to request hearing within time set forth in *Pub.Res.C. 21167.4(a)*]; *Association for Sensible Dev. At Northstar v. Placer* (2004) 122 C.A.4th 1289, 1292, 19 C.R.3d 440 [petitioner satisfies *Pub.Res.C. 21167.4(a)* by filing request for hearing and need not take further affirmative steps to set matter for hearing]; *Leavitt v. Madera* (2004) 123 C.A.4th 1502, 1514, 22 C.R.3d 101 [request for hearing under *Pub.Res.C. 21167.4* need not include setting of hearing date]; on service of notice of hearing request, see *Pub.Res.C. 21167.4(b)*.)

(2) *Briefing Schedule and Hearing Date.* When the petitioner requests a hearing, or when any party applies, the court must establish a briefing schedule and a hearing date. In the absence of good cause, briefing must be completed within 90 days from the date that the request for a hearing is filed, and the hearing, to the extent feasible, must be held within 30 days thereafter. Good cause includes the conduct of discovery, determination of the completeness of the record of proceedings, the complexity of the issues, and the length of the record of proceedings and the timeliness of its production. The parties may stipulate to a briefing schedule or hearing date that differs from this schedule if the court approves the stipulation. (*Pub.Res.C. 21167.4(c)*.)

(3) *Priority Over Other Civil Actions.* *Pub.Res.C. 21167.1(a)* gives actions and proceedings to review agency decisions under CEQA priority over all other civil actions, and requires appellate courts to commence hearings on an appeal within 1 year of its filing, to the extent feasible. (See *Pub.Res.C. 21167.1(b)* [superior courts in counties of over 200,000 residents must designate one or more judges to develop expertise in CEQA and related environmental proceedings]; *Pub.Res.C. 21167.1(c)* [court may sever CEQA action from another cause of action with which it is joined in interest of judicial and administrative economy].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Request for Hearing.* See *Fiorentino v. Fresno (2007) 150 C.A.4th 596, 602, 59 C.R.3d 30* [trial court properly dismissed CEQA petition where petitioners did not file request for hearing within 90 days, as required by *Pub.Res.C. 21167.4(a)*; dismissal was mandatory even though petitioners filed request for hearing before city filed motion to dismiss].

Relief under C.C.P. 473(b):

Cross-Reference: 8 *Cal. Proc. (5th), Attack on Judgment in Trial Court*, §196.



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CHAPTER XVII - Real Property

Witkin Summary of California Law
XIII. ENVIRONMENTAL REGULATION OF REAL PROPERTY

A. Land Use Planning and Regulation.

5. California Environmental Quality Act (CEQA).

f. Judicial Review.

5. Standards of Review.

12 Witkin Sum. Cal. Law Real Property § 859

[§ 859] Standards of Review.

(1) *Administrative Mandamus*. An action or proceeding challenging a public agency's determination on the grounds of noncompliance with CEQA must be in accordance with *C.C.P. 1094.5* (administrative mandamus; see 9 *Cal. Proc. (4th), Administrative Proceedings, §122*), if the agency's determination was made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in a public agency. In these actions, the court must not exercise its independent judgment on the evidence but must only determine whether the act or decision is supported by substantial evidence in light of the whole record. (*Pub.Res.C. 21168*; see *Pub.Res.C. 21005(c)* [court finding that agency has not complied with CEQA must specify each ground for noncompliance]; *Residents Ad Hoc Stadium Committee v. Board of Trustees* (1979) 89 C.A.3d 274, 280, 152 C.R. 585 [substantial evidence test for judicial review; *Pub.Res.C. 21168, 21168.5*]; *Twain Harte Homeowners Assn. v. Tuolumne* (1982) 138 C.A.3d 664, 673, 188 C.R. 233 [substantial evidence test for judicial review; *Pub.Res.C. 21168, 21168.5*]; *Del Mar Terrace Conservancy v. City Council of San Diego* (1992) 10 C.A.4th 712, 725, 12 C.R.2d 785 [trial court's error in proceeding under administrative mandamus (*Pub.Res.C. 21168*) instead of ordinary mandamus (*Pub.Res.C. 21168.5*) was harmless]; *Mission Oaks Ranch, Ltd. v. Santa Barbara* (1998) 65 C.A.4th 713, 722, 77 C.R.2d 1 [administrative mandamus is exclusive means of attacking compliance with CEQA; developer could not sue county for damages for failure to prepare proper EIR]; Cal. Civil Practice, Environmental Litigation, §8:25 et seq.; 6 *Pacific L. J.* 331 [challenging CEQA decision]).

(2) *Ordinary Mandamus*. In actions or proceedings, other than those under *Pub.Res.C. 21168*, challenging an agency on the grounds of noncompliance with CEQA, the inquiry may extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence. (*Pub.Res.C. 21168.5*; see *Friends of Sierra Madre v. Sierra Madre* (2001) 25 C.4th 165, 194, 105 C.R.2d 214, 19 P.3d 567, supra, §839 [petition for mandamus under *Pub.Res.C. 21168.5* is proper method to challenge validity of statute or ordinance enacted without compliance with CEQA]; *Kings County Farm Bureau v. Hanford* (1990) 221 C.A.3d 692, 711, 270 C.R. 650 [in determining whether agency committed prejudicial abuse of discretion, court under *Pub.Res.C. 21168.5* determines "whether the EIR is sufficient as an informational document"]; *Association for Protection of Environmental Values in Ukiah v. Ukiah*

(1991) 2 C.A.4th 720, 731, 3 C.R.2d 488, supra, §837 [grant of categorical exemption from CEQA was reviewable under *Pub.Res.C. 21168.5* because no findings were required, even though decision was combined with approval of site development permit that required findings and was thus reviewable under *Pub.Res.C. 21168*]; *CalBeach Advocates v. Solana Beach* (2002) 103 C.A.4th 529, 538, 127 C.R.2d 1 [city's determination that emergency exemption of *Pub.Res.C. 21080(b)(4)* (supra, §836) applied to project was subject to review under *Pub.Res.C. 21168.5*, which did not require city to make findings to support decision]; *Association for a Cleaner Environment v. Yosemite Community College Dist.* (2004) 116 C.A.4th 629, 636, 10 C.R.3d 560 [determinations that agency makes about which CEQA document, if any, must be prepared are subject to judicial review under abuse of discretion standard of *Pub.Res.C. 21168.5*.)]

(3) *Illustrations of Substantial Evidence Standard.* The substantial evidence standard of judicial review has been an issue in numerous decisions, including the following:

Laurel Heights Imp. Assn. v. Regents of Univ. of Calif. (1993) 6 C.4th 1112, 1135, 26 C.R.2d 231, 864 P.2d 502 [substantial evidence standard applies to agency decision whether information added after public comment period requires recirculation of EIR].

Western States Petroleum Assn. v. Superior Court (1995) 9 C.4th 559, 565, 38 C.R.2d 139, 888 P.2d 1268 [evidence outside administrative record is generally inadmissible to show whether quasi-legislative decision was supported by substantial evidence and whether agency making decision proceeded in manner required by law]. (See 23 *Pepperdine L. Rev.* 372 [*Western States Petroleum Assn.*].)

Bowman v. Petaluma (1986) 185 C.A.3d 1065, 1075, 230 C.R. 413 [substantial evidence test for determining whether additional report is required for modification of approved project].

Western Mun. Water Dist. v. Superior Court (1986) 187 C.A.3d 1104, 1110, 232 C.R. 359 [reviewing court must determine whether substantial evidence supports finding of emergency that would trigger exemption from EIR requirement (see supra, §836)].

Long Beach Savings & Loan Assn. v. Long Beach Redevelopment Agency (1986) 188 C.A.3d 249, 259, 232 C.R. 772 [substantial evidence test for review of negative declaration that project will not have significant environmental impact].

Schaeffer Land Trust v. San Jose City Council (1989) 215 C.A.3d 612, 620, 263 C.R. 813 [substantial evidence standard applies to review of negative declaration].

Citizen Action to Serve All Students v. Thornley (1990) 222 C.A.3d 748, 754, 272 C.R. 83 [standard of judicial review for negative declaration is whether there is "substantial evidence in support of a 'fair argument' of potential environmental impact"].

Uhler v. Encinitas (1991) 227 C.A.3d 795, 802, 278 C.R. 157 [appellate court reviews record as a whole to determine whether trial court's findings are supported by substantial evidence].

Sacramento Old City Assn. v. City Council (1991) 229 C.A.3d 1011, 1019, 280 C.R. 478 [substantial evidence standard applies under both *Pub.Res.C. 21168* (administrative mandamus) and *Pub.Res.C. 21168.5* (traditional mandamus)].

Burbank-Glendale-Pasadena Airport Authority v. Hensler (1991) 233 C.A.3d 577, 590, 284 C.R. 498 [substantial evidence standard does not permit reviewing court to make its own factual findings].

Marin Mun. Water Dist. v. KG Land Calif. Corp. (1991) 235 C.A.3d 1652, 1660, 1 C.R.2d 767 [reviewing court assesses only sufficiency of EIR as informative document, not correctness of its environmental conclusions].

Sierra Club v. Sonoma (1992) 6 C.A.4th 1307, 1317, 8 C.R.2d 473 [distinguishing strict "sufficiency of evidence to support fair argument" standard of review as to whether EIR is required initially, or for project with impacts not considered in program EIR, from deferential substantial evidence test as to whether supplemental EIR is required].

Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist. (1992) 9 C.A.4th 644, 654, 11 C.R.2d 850 ["substantial evidence to support fair argument" standard was applicable to agency's decision to claim exemption from CEQA requirements when it amended air quality regulations].

Fort Mojave Indian Tribe v. Department of Health Services (1995) 38 C.A.4th 1574, 1591, 45 C.R.2d 822 [submission of scientific report after completion of EIR did not justify remand for reconsideration of EIR, where report merely restated and elaborated opinions about project that agency had already considered].

Barthelemy v. Chino Basin Mun. Water Dist. (1995) 38 C.A.4th 1609, 1620, 45 C.R.2d 688 [substantial evidence is proper standard of review for project opponent's claims that EIR omitted relevant information].

Cadiz Land Co. v. Rail Cycle, L.P. (2000) 83 C.A.4th 74, 116, 99 C.R.2d 378 [trial court did not abuse discretion in denying request for discovery of evidence outside administrative record; citing *Western States Petroleum Assn.* and *Fort Mojave Indian Tribe*].

Association of Irrigated Residents v. Madera (2003) 107 C.A.4th 1383, 1391, 133 C.R.2d 718 [standard for reviewing whether relevant information was omitted from EIR is not whether substantial evidence supported agency's ultimate decision, but whether failure to include relevant information precluded informed decisionmaking and public participation].

Santa Theresa Citizen Action Group v. San Jose (2003) 114 C.A.4th 689, 706, 7 C.R.3d 868 [extra-record evidence of alleged presence of toxins in recycled water was inadmissible to support petitioners' argument that new information necessitated preparation of supplemental EIR; citing *Western States Petroleum Assn.*].

El Morro Community Assn. v. California Dept. of Parks & Recreation (2004) 122 C.A.4th 1341, 1358, 19 C.R.3d 445 [trial court properly refused to consider items that were not part of record before department; relying on *Western States Petroleum Assn.*].

An agency's decision not to require an EIR can be upheld only when there is no credible evidence to the contrary. Deference to the agency's determination is not appropriate. The applicable standard of review involves a question of law requiring a certain degree of independent review of the record, rather than the typical substantial evidence standard. (*Quail Botanical Gardens Foundation v. Encinitas* (1994) 29 C.A.4th 1597, 1602, 1603, 35 C.R.2d 470 [adopting standard applied in *Sierra Club*, and rejecting standard applied in *Uhler*].)

SUPPLEMENT: [This section is current through the latest supplement]
(1) *Administrative Mandamus*.

Cross-Reference: 9 Cal. Proc. (5th), *Administrative Proceedings*, §148 et seq.(3) *Illustrations of Substantial Evidence Standard*. "[T]he fair argument standard of review is not the typical substantial evidence standard, i.e., whether there is substantial evidence to support the decision not to prepare an EIR. Rather, the fair argument standard of review is whether, after examining the entire record, there is substantial evidence to support a fair argument that a project may have a significant effect on the environment. This is a low threshold for the preparation of an EIR, reflecting a preference to resolve doubts in favor of full-blown environmental review." (*Sierra Club v. California Dept. of Forestry & Fire Protection* (2007) 150 C.A.4th 370, 381, 59 C.R.3d 9.)

Other cases discussing the substantial evidence standard of review include the following:

Citizens for Responsible Equitable Environmental Dev. v. San Diego Redevelopment Agency (2005) 134 C.A.4th

598, 609, 36 C.R.3d 249 [decision not to prepare subsequent EIR for hotel project, which was part of redevelopment plan for which program EIR had been prepared, was reviewed under deferential substantial evidence standard; rejecting opponents' argument that EIR had to be prepared because fair argument could be made that project would have significant environmental impacts].

Citizens for a Megaplex-Free Alameda v. Alameda (2007) 149 C.A.4th 91, 102, 111, 56 C.R.3d 728 [substantial evidence standard of review under Pub.Res.C. 21166 applied to city's determination that there was no new information requiring preparation of subsequent EIR].

Porterville Citizens for Responsible Hillside Dev. v. Porterville (2007) 157 C.A.4th 885, 893, 69 C.R.3d 105 [when deciding whether to prepare EIR or mitigated negative declaration for development project, city did not consider EIR for city's general plan amendment or hillside development ordinance; documents constituted extra-record evidence and were not admissible to challenge substantiality of evidence to support city's decision; citing *Western States Petroleum Assn. v. Superior Court* (1995) 9 C.4th 559, 38 C.R.2d 139, 888 P.2d 1268, text, p. 1027].*Correction:* Page 1028, 2nd case from bottom of page, "Santa Theresa Citizen Action Group" should be "Santa Teresa Citizen Action Group".



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A. Land Use Planning and Regulation.

5. California Environmental Quality Act (CEQA).

f. Judicial Review.

6. Types of Relief.

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[§ 860] Types of Relief.

(1) *Mandatory Settlement Meeting*. Shortly after being served with the petition for mandamus, the public agency must give notice of a settlement meeting, at which the parties must attempt to settle. (*Pub.Res.C. 21167.8(a), (b).*) The trial court may sanction any party who fails to participate. (*Pub.Res.C. 21167.8(e).*) Personal attendance by the litigants, however, is not required; their attorneys may attend for them. (*McDowell v. Watson (1997) 59 C.A.4th 1155, 1163, 69 C.R.2d 692.*)

(2) *Mandates*. If a court finds, as a result of a trial, hearing, or remand from an appellate court, that a determination, finding, or decision of a public agency has been made without compliance with CEQA, the court must enter an order that includes one or more of the following:

(a) A mandate that the public agency void the determination, finding, or decision, in whole or in part. (*Pub.Res.C. 21168.9(a)(1).*)

(b) If the court finds that specific project activities will prejudice the consideration or implementation of particular mitigation measures or alternatives to the project, a mandate that the public agency and any real parties in interest suspend specific project activities, pursuant to the determination, finding, or decision, that could result in an adverse change or alteration to the physical environment, until the public agency has taken actions that may be necessary to bring the determination, finding, or decision into compliance with CEQA. (*Pub.Res.C. 21168.9(a)(2).*)

(c) A mandate that the public agency take specific action as may be necessary to bring the determination, finding, or decision into compliance with CEQA. (*Pub.Res.C. 21168.9(a)(3).*)

(3) *Limitations*. An order under *Pub.Res.C. 21168.9(a)* must include only those mandates that are necessary to achieve compliance with CEQA and only those specific project activities in noncompliance with CEQA. The order must be made by the issuance of a peremptory writ of mandate specifying what action by the public agency is necessary to comply with CEQA. However, the order must be limited to that portion of a determination, finding, or decision or the specific project activities found to be in noncompliance only if a court finds that (a) the portion or specific project

activities are severable, (b) severance will not prejudice complete and full compliance with CEQA, and (c) the court has not found the remainder of the project to be in noncompliance with CEQA. The trial court retains jurisdiction over the public agency's proceedings until it determines that the public agency has complied with CEQA. (*Pub.Res.C. 21168.9(b)*.)

(4) *Illustrations*. The following are among numerous decisions reviewing orders directing public agency compliance:

Laurel Heights Imp. Assn. v. Regents of Univ. of Calif. (1988) 47 C.3d 376, 423, 253 C.R. 426, 764 P.2d 278 [*Pub.Res.C. 21168.9* construed; university was permitted to continue activities at project pending Regents' certification of proper report]. (See 16 *Pepperdine L. Rev.* 1210 [*Laurel Heights*]; 22 *Pacific L. J.* 289 [same].)

Sierra Club v. Contra Costa (1992) 10 C.A.4th 1212, 1221, 13 C.R.2d 182 [*Pub.Res.C. 21168.9* requires issuance of writ if CEQA was not complied with; prejudgment remand for consideration of additional alternatives was erroneous].

Endangered Habitats League v. State Water Resources Control Bd. (1997) 63 C.A.4th 227, 244, 73 C.R.2d 388 [under *Pub.Res.C. 21168.9(b)*, writ should require a return to ensure that party complies with writ and reports compliance to court].

Federation of Hillside & Canyon Assn. v. Los Angeles (2000) 83 C.A.4th 1252, 1266, 100 C.R.2d 301 [city's approval of general plan framework (GPF) and its finding on mitigation of transportation impacts had to be vacated, but its certification of EIR for GPF did not; city could comply with CEQA by amending GPF].

San Bernardino Valley Audubon Soc. v. Metropolitan Water Dist. of Southern Calif. (2001) 89 C.A.4th 1097, 1102, 109 C.R.2d 108 [trial court erred in invalidating only one part of project (issuance of mitigation credits for take of certain species) without requiring preparation of full EIR for project, as appellate court had determined was necessary; before limiting writ under *Pub.Res.C. 21168.9*, trial court must consider whether mitigation feature is severable, whether severance would prejudice full compliance with CEQA, and whether rest of project complies with CEQA].

Redlands v. San Bernardino (2002) 96 C.A.4th 398, 414, 117 C.R.2d 582 [trial court's order under *Pub.Res.C. 21168.9*, mandating that county not readopt amendment to general plan without first preparing and considering EIR and fully complying with CEQA, was not overbroad].

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Limitations*. See *County Sanitation Dist. No. 2 of Los Angeles v. Kern* (2005) 127 C.A.4th 1544, 1603, 27 C.R.3d 28 [although county's adoption of ordinance restricting application of sewage sludge did not comply with CEQA, under *Pub.Res.C. 21168.9(b)*, heightened treatment standards included in ordinance would remain operative pending county's completion of EIR and approval of appropriate replacement ordinance]; *Anderson First Coalition v. Anderson* (2005) 130 C.A.4th 1173, 1178, 30 C.R.3d 738 [under *Pub.Res.C. 21168.9(b)*, trial court properly severed proposed gas station from rest of shopping center project, suspended gas station activity until developers complied with CEQA regarding station's traffic and air quality effects, and allowed rest of project to proceed]; *Amador v. Plymouth* (2007) 149 C.A.4th 1089, 1112, 57 C.R.3d 704 [severance under *Pub.Res.C. 21168.9(b)* was not possible; rewriting municipal service agreement to eliminate provisions requiring CEQA compliance would result in city receiving little benefit while still being obligated to support applicant's gaming development]. (4) *Illustrations*. In *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 C.A.4th 1184, 22 C.R.3d 203, defendant city certified the EIRs for two retail shopping center projects on its nonpublic consent calendars. Later, after public hearing, it approved both projects. Plaintiff, a local group opposed to the projects on the ground that they would cause urban decay, filed CEQA actions challenging the sufficiency of the EIRs and contesting the project approvals. The trial court denied plaintiff's request for temporary restraining orders and the project developers proceeded to begin construction while the actions were ongoing. The trial court eventually concluded that the failure to study urban decay rendered the EIRs inadequate and ordered them

decertified, but it left the project approvals intact and allowed partial construction to continue while defendant conducted limited environmental review. *Held*, reversed. Both certification of the EIRs and approval of the projects must be voided, and defendant must certify new EIRs.

(a) Although the trial court allowed partial construction of the projects to proceed prior to full CEQA compliance, which resulted in some retail businesses already operating at both sites and some transfers of portions of the sites to nonparties, the CEQA issues remain viable and the appeals from the trial court's decisions are not moot. The developers expressly recognized that they were proceeding at their own risk when they relied on the contested project approvals during the pendency of this litigation. "As a matter of public policy and basic equity, developers should not be permitted to effectively defeat a CEQA suit merely by building out a portion of a disputed project during litigation or transferring interests in the underlying real property. Failure to obtain an injunction should not operate as a de facto waiver of the right to pursue a CEQA action." (124 C.A.4th 1203.) Moreover, the questions of urban decay and cumulative impacts constitute important issues of broad public interest that are likely to reoccur. (124 C.A.4th 1203.)

(b) Defendant must fully and sincerely assess the new information gathered as part of the CEQA compliance ordered by the trial court and fairly and independently decide whether reapproval of the projects is in the best interests of defendant's residents, giving no weight to the fact that the shopping centers are partially constructed. (124 C.A.4th 1204.) Defendant may require modification of the projects or additional mitigation measures as conditions of reapproval and may require completed portions of the projects to be changed or removed. (124 C.A.4th 1222.)

See *Save Tara v. West Hollywood* (2008) 45 C.4th 116, 143, 84 C.R.3d 614, 194 P.3d 344 [city's approval of project, rendered before preparation of EIR, had to be set aside, but EIR certified while city's action was being challenged in court could be considered during new approval process, unless supplemental or subsequent EIR was required under *Pub.Res.C. 21166* (text, §849)]; *Californians for Alternatives to Toxics v. Department of Food & Agriculture* (2005) 136 C.A.4th 1, 21, 38 C.R.3d 638 [injunction under *Pub.Res.C. 21168.9(a)(2)*, prohibiting agency from any activity under disease control program, was not appropriate; even though agency failed to sufficiently consider effects of using pesticides in program, program contained options for combating pest based on conditions as they developed in future and trial court would be in best position to fashion injunctive relief as needed].



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CHAPTER XVII - Real Property

Witkin Summary of California Law XIII. ENVIRONMENTAL REGULATION OF REAL PROPERTY

A. Land Use Planning and Regulation.

6. Coastal Lands.

a. Development of California Coastal Act.

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[§ 861] Development of California Coastal Act.

(1) *Predecessor Statute.* The California Coastal Zone Conservation Act of 1972 (former Pub.Res.C. 27000 et seq.), an initiative measure, established regional control over coastline development. (See *8 Pacific L. J.* 352 [history of Act].) The Act created 6 regional commissions with jurisdiction over a "permit area" extending from 1,000 yards inland to the seaward limit of the state's jurisdiction. Within the permit area, the regional commission controlled all development by the issuance of permits.

The Act gave rise to extensive litigation. (See *San Diego Coast Regional Com. v. See The Sea, Ltd.* (1973) 9 C.3d 888, 891, 109 C.R. 377, 513 P.2d 129 [vested rights under former Pub.Res.C. 27404]; *Avco Community Developers v. South Coast Regional Com.* (1976) 17 C.3d 785, 798, 132 C.R. 386, 553 P.2d 546 [vested right did not arise from developer's work on subdividing, grading, street improvements, and utilities, where developer had not obtained building permit]; *South Coast Regional Com. v. Gordon* (1977) 18 C.3d 832, 834, 135 C.R. 781, 558 P.2d 867 [necessity of presenting exemption claim to commission as condition of raising it in trial court]; *REA Enterprises v. California Coastal Zone Conservation Com.* (1975) 52 C.A.3d 596, 609, 125 C.R. 201 [tie vote of state commission was insufficient for granting permit]; *Davis v. California Coastal Zone Conservation Com.* (1976) 57 C.A.3d 700, 705, 129 C.R. 417 [mandamus review of state commission's denial of permit]; *Sierra Club v. California Coastal Zone Conservation Com.* (1976) 58 C.A.3d 149, 156, 129 C.R. 743 [upholding commission's denial of exemption based on vested right]; *Patterson v. Central Coast Regional Com.* (1976) 58 C.A.3d 833, 840, 130 C.R. 169 [mandamus review of denial by regional commission]; *Oceanic Calif. v. North Cen. Coast Regional Com.* (1976) 63 C.A.3d 57, 66, 133 C.R. 664 [vested right did not arise from zoning and county approval of development plans before cutoff date]; *South Coast Regional Com. v. Higgins* (1977) 68 C.A.3d 636, 644, 137 C.R. 551 [off-site manufacture of prefabricated houses was not "substantial work" creating vested right under *San Diego Coast Regional Com.*]; *Raley v. California Tahoe Regional Planning Agency* (1977) 68 C.A.3d 965, 977, 137 C.R. 699 [following *Avco*]; *Call v. Feher* (1979) 93 C.A.3d 434, 443, 155 C.R. 387 [tract improvements, etc., without final map approval, give no vested right to subdivide; following *Avco* and *Raley*]; 6 *Ecology L. Q.* 755 [*Avco* and legislative responses]; 15 *Southwestern U. L. Rev.* 695 [same].)

(2) *Coastal Act.* The Coastal Zone Conservation Act was superseded in 1976 by the California Coastal Act (Pub.Res.C. 30000 et seq.; see *8 Pacific L. J.* 352, 354.) The 1976 Act was a substantial reenactment of the 1972 Act. (*South Coast Regional Com. v. Gordon* (1978) 84 C.A.3d 612, 617, 618, 148 C.R. 775 [provision for attorneys' fees was

not carried over into new Act].)

The Act's policies are derived from the recommendations of a detailed coastal plan prepared in accordance with the California Coastal Zone Conservation Act. (*Pub.Res.C. 30002*; see *49 So. Cal. L. Rev. 710* [symposium on coastal plan submitted by state commission under Act].) The Act sets forth policies regarding public access (*Pub.Res.C. 30210 et seq.*), recreation (*Pub.Res.C. 30220 et seq.*), marine environment (*Pub.Res.C. 30230 et seq.*), land resources (*Pub.Res.C. 30240 et seq.*), new development (*Pub.Res.C. 30250 et seq.*), and industrial facilities (e.g., tanker facilities, oil and gas development, electric generating plants) (*Pub.Res.C. 30260 et seq.*).

(3) *Commentary*. Coastal zone land use has been the subject of extensive commentary. (See *11 Powell §79A.03*; *9 Cal. Western L. Rev. 391* [land use controls in coastal areas]; *2 Ecology L. Q. 571* [California Beach Access: Mexican Law and the Public Trust]; *14 Ecology L. Q. 9* [federal requirements for coastal zone management]; *30 Golden Gate L. Rev. 717* [symposium on law and nature in coastal zone]; *25 Hastings L. J. 191* [management planning for coastal zone]; *8 Pacific L. J. 783* [Coastal Act as instrument of state influence over federal oil and gas leasing on the continental shelf (*supra*, §209)]; *17 Pacific L. J. 863* [Coastal Commission and regulatory takings]; *15 San Diego L. Rev. 1241* [effect of Act on public beach access and recreation]; *24 San Diego L. Rev. 727* [sand rights; protection against coastal erosion]; *21 Santa Clara L. Rev. 395* [public access and the California Coastal Commission]; *21 Santa Clara L. Rev. 439* [land use planning in the coastal zone]; *28 U.C.L.A. L. Rev. 1049* [public beach access exactions by the Coastal Commission]; *16 Southwestern U. L. Rev. 699* [state and local conflict under Act].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Coastal Act*. See *Dunn v. Santa Barbara (2006) 135 C.A.4th 1281, 1293, 1295, 38 C.R.3d 316* [substantial evidence supported county's finding that parcel contained wetlands under *Pub.Res.C. 30121*, where parcel possessed all three of commonly used "Cowardin" factors; substantial evidence supported finding that parcel was environmentally sensitive habitat area (ESHA) under *Pub.Res.C. 30107.5*, where biologist had identified birds using area as habitat and county had designated all wetlands as ESHA].

(3) *Commentary*. See *34 Ecology L. Q. 533* [sea level rise and protection of coastal resources].



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A. Land Use Planning and Regulation.

6. Coastal Lands.

b. Implementation of Act by Coastal Commission and Local Governments.

12 Witkin Sum. Cal. Law Real Property § 862

[§ 862] Implementation of Act by Coastal Commission and Local Governments.

(1) *Coastal Commission.* The Coastal Act assigns chief responsibility for regulating the use and development of the "coastal zone" (*Pub.Res.C. 30103*) to a 15-member California Coastal Commission. (*Pub.Res.C. 30300, 30301, 30330 et seq.*) (On boundary of coastal zone, see *Pub.Res.C. 30150 et seq.*) The Commission's regulatory functions are coordinated with those of other state agencies having overlapping responsibilities. (*Pub.Res.C. 30400 et seq.*)

(2) *Local Governments.* A local government located within the coastal zone must prepare a local coastal program for the portion of the coastal zone that is within its jurisdiction (*Pub.Res.C. 30500(a)*), which is presented to the Commission for certification (*Pub.Res.C. 30512(a)*). (See *Conway v. Imperial Beach* (1997) 52 C.A.4th 78, 90, 60 C.R.2d 402 [city's interim zoning ordinance, which did not authorize use that was not permitted by local coastal plan, did not require certification by Commission before city could implement and enforce it].) Amendments to a local coastal program may be adopted by initiative. (*San Mateo County Coastal Landowners' Assn. v. San Mateo* (1995) 38 C.A.4th 523, 539, 540, 45 C.R.2d 117 [amendments adopted by initiative did not conflict with Act's requirements of full consultation with Coastal Commission and full public participation].) Special provisions apply to plans for port areas. (*Pub.Res.C. 30410, 30700 et seq.*) (On responsibility of local governments with regard to development permits, see *infra*, §863 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Coastal Commission.* See *Marine Forests Soc. v. California Coastal Com.* (2005) 36 C.4th 1, 24, 30 C.R.3d 30, 113 P.3d 1062, 7 Summary (10th), *Constitutional Law*, Supp., §138 [statutory provisions governing composition of Commission (*Pub.Res.C. 30301, 30312*) do not violate Separation of Powers Clause of California Constitution]; *Douda v. California Coastal Com.* (2008) 159 C.A.4th 1181, 1199, 72 C.R.3d 98 [Commission's authority to regulate scenic and visual resources extended inland as far as boundary of coastal zone].



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12 Witkin Sum. Cal. Law Real Property § 863

[§ 863] In General.

(1) *When Permits Are Required.* Coastal development permits are required for most developments in the coastal zone. (*Pub.Res.C. 30600(a)*.) The conversion of an apartment house to a stock cooperative constitutes a "division of land" within the meaning of *Pub.Res.C. 30106*, and therefore is a "development" subject to the permit requirements of the Act. (*California Coastal Com. v. Quanta Inv. Corp. (1980) 113 C.A.3d 579, 609, 170 C.R. 263*; see *Buckley v. California Coastal Com. (1998) 68 C.A.4th 178, 188, 80 C.R.2d 562* [by designating, under *Pub.Res.C. 30610.1*, lot as area in coastal zone where construction of single-family residence would not require coastal development permit, Commission relinquished jurisdiction over development decisions regarding entire lot; statute does not allow Commission to designate only portion of lot]; *La Fe v. Los Angeles (1999) 73 C.A.4th 231, 239, 86 C.R.2d 217* [proposed adjustments of lot lines between parcels constituted "development" under *Pub.Res.C. 30106* and thus required permit; adjustments would have facilitated development by making all lots accessible to public street, but public street would not have provided sufficient access for fire fighting equipment; citing *California Coastal Com. v. Quanta Inv. Corp.*].) Permits are not required for developments in which the owner had a prior vested right. (*Pub.Res.C. 30608*.)

(2) *Issuance.* Development permits are issued by local governments whose local coastal programs have been certified. (*Pub.Res.C. 30600(d)*); on permits issued by Commission, see *Pub.Res.C. 30600(c), 30601*; *Healing v. California Coastal Com. (1994) 22 C.A.4th 1158, 1166, 27 C.R.2d 758* [Commission erroneously denied permit application based on county's failure to institute review board under coastal plan; plan was not certified due to dispute between county and Commission, so Commission, not county, had jurisdiction to rule on application].) If a local government finds that a proposed development is in conformity with a certified local coastal program, it must issue a permit. (*Pub.Res.C. 30604(b)*.) (See *Surfrider Foundation v. California Coastal Com. (1994) 26 C.A.4th 151, 157, 31 C.R.2d 374* [Commission's grant of permit to install parking fee collection devices at state park beaches did not violate Coastal Act]; *Trancas Property Owners Assn. v. Malibu (1998) 61 C.A.4th 1058, 1060, 72 C.R.2d 131* [applicant must commence project, as opposed to actual construction, before permit's expiration date; here, project was commenced when subdivision map was approved, which was 7 months before expiration date]; *Kirkorowicz v. California Coastal Com. (2000) 83 C.A.4th 980, 986, 100 C.R.2d 124* [Commission properly denied property owners coastal development

permit to expand horse stables and boarding facilities based on finding that property contained jurisdictional wetland].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *When Permits Are Required.* See *Lt-WR, L.L.C. v. California Coastal Com.* (2007) 152 C.A.4th 770, 782, 804, 60 C.R.3d 417 [construction of two gates with fence sections and no trespassing signs was development within meaning of *Pub.Res.C. 30106*; applicant was required to use commission's procedure for obtaining vested rights determination under *Pub.Res.C. 30608*; assertion of vested rights could not be made initially in application for permit]. (2) *Issuance.* See *Sierra Club v. California Coastal Com.* (2005) 35 C.4th 839, 847, 28 C.R.3d 316, 111 P.3d 294 [Commission correctly declined to deny permit based on impacts within coastal zone that allegedly would result from proposed development outside coastal zone; under plain meaning of *Pub.Res.C. 30604(d)*, Commission may not deny permit where development's impacts within coastal zone have been fully mitigated and only purpose for denial would be to indirectly regulate development outside zone]; *Lt-WR, L.L.C. v. California Coastal Com.*, *supra*, 152 C.A.4th 805 [commission erred in denying permit for postconstruction approval of gates and no trespassing signs on speculative ground that permit could interfere with potential prescriptive rights; commission has no authority to adjudicate existence of prescriptive rights for public use of private property]; *Douda v. California Coastal Com.* (2008) 159 C.A.4th 1181, 1191, 72 C.R.3d 98 [where local coastal program had not been certified, and Commission retained permitting authority, Commission had authority to designate area that was subject of permit application as environmentally sensitive habitat area]; on consolidated application where project requires permit from both local government and Commission, see *Pub.Res.C. 30601.3*, added in 2006.



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2. Applicability to Federal Lands.

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[§ 864] Applicability to Federal Lands.

In *California Coastal Com. v. Granite Rock Co.* (1987) 480 U.S. 572, 107 S.Ct. 1419, 94 L.Ed.2d 577, Granite Rock was the holder of unpatented mining claims on federally owned lands under the Mining Act of 1872 (30 U.S.C., §22 et seq.). The Forest Service, in accordance with regulations under the Multiple Use Mining Act, which amended the Materials Act of 1947 (30 U.S.C., §601 et seq.), approved Granite Rock's plan to mine the claims. The California Coastal Commission, acting pursuant to the California Coastal Act, instructed Granite Rock to apply for a coastal development permit for any mining undertaken after the date of the Commission's letter. Granite Rock sought injunctive and declaratory relief in the federal district court, claiming that the Commission's permit requirement was preempted by federal law. The district court denied relief, but the Court of Appeals reversed, holding that the permit requirement was preempted by the Mining Act of 1872 and Forest Service regulations. *Held*, reversed.

(a) The Property Clause of the Constitution (U.S. Const., Art. IV, §3; see 8 *Summary* (10th), *Constitutional Law*, §1346), which gives Congress plenary power to legislate on the use of federal land, does not exempt federal lands from all state regulation. Whether Congress has enacted legislation that would preempt any requirement that Granite Rock obtain a California Coastal Commission permit requires the determination, utilizing standard preemption analysis, of whether Congress has evidenced an intent to occupy this field of law, or, if Congress has not entirely displaced state regulation, whether the state law actually conflicts with federal law or stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. (107 S.Ct. 1425, 94 L.Ed.2d 592; see 7 *Summary* (10th), *Constitutional Law*, §9.)

(b) Neither the Mining Act of 1872 nor regulations adopted under the Multiple Use Mining Act express any intent to preempt state law. Rather the regulations appear to assume that those submitting plans of operations will comply with state laws. (107 S.Ct. 1426, 94 L.Ed.2d 593.) And the Forest Service team that prepared the environmental assessment of Granite Rock's plan of operation, as well as the Forest Service officer who approved the plan, expected compliance with state as well as federal law. (107 S.Ct. 1427, 94 L.Ed.2d 594.)

(c) The Coastal Commission's permit requirement is not preempted as impermissible state land use regulation by the Federal Land Policy and Management Act of 1976 (43 U.S.C., §1701 et seq.) and the National Forest Management

Act (16 U.S.C., §1600 et seq.), even if it is assumed that the combination of these statutes preempts the extension of state land use plans onto unpatented mining claims in national forest lands. The Coastal Commission asserts, as permitted by the California Coastal Act, that it will use its permit conditions to impose environmental regulation, not to prohibit Granite Rock's mining entirely. While environmental regulation and land use planning may overlap, they describe undoubtedly different core activities. "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." (107 S.Ct. 1428, 94 L.Ed.2d 596.) Because Congress has indicated its understanding of this distinction, "it would be anomalous to maintain that Congress intended any state environmental regulation of unpatented mining claims in national forests to be *per se* pre-empted as an impermissible exercise of state land use planning." (107 S.Ct. 1429, 94 L.Ed.2d 596.) The Coastal Commission's identification of a possible set of permit conditions not preempted by federal law is sufficient to rebuff Granite Rock's facial challenge to the permit requirement, notwithstanding that the Coastal Commission chooses to impose its environmental regulation by means of a permit requirement. (107 S.Ct. 1429, 94 L.Ed.2d 597.)

(d) The Coastal Zone Management Act (CZMA)(16 U.S.C., §1451 et seq.), through which financial assistance is provided to states for the development of coastal zone management programs, does not declare a legislative intent to exclude federal lands from all state coastal zone regulation by excluding federal lands from its definition of the coastal zone. Even if all federal lands are excluded from the CZMA definition of "coastal zone," Congress has specifically disclaimed any intention to preempt preexisting state authority in the CZMA. 16 U.S.C., §1456(e)(1) and its legislative history "demonstrate Congress' refusal to use the CZMA to alter the balance between state and federal jurisdiction." (107 S.Ct. 1431, 94 L.Ed.2d 599.)

Four justices dissented in two opinions. (107 S.Ct. 1432, 1438, 94 L.Ed.2d 600, 608.) (See 25 Cal. Western L. Rev. 173 [*Granite Rock Co.*]; 20 *Pacific L. J.* 247 [same]; 23 *U.S.F. L. Rev.* 123 [same].)

SUPPLEMENT: [This section is current through the latest supplement]



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12 Witkin Sum. Cal. Law Real Property § 865

[§ 865] Development Requirements.

(1) *Grupe Case*. Much of the litigation involving the coastal zone has focused on the validity of permit requirements, primarily those requiring dedication of public access or open-space easements. (See *Remmenga v. California Coastal Com.* (1985) 163 C.A.3d 623, 631, 209 C.R. 628 [constitutionality of *Pub.Res.C. 30610.8*, applicable to one designated subdivision, requiring permit fee in lieu of dedicated public access]; 14 *Pepperdine L. Rev.* 357 [constitutionality of property exactions].)

In *Grupe v. California Coastal Com.* (1985) 166 C.A.3d 148, 212 C.R. 578, plaintiff, a beachfront property owner, applied for a permit to construct a single-family home. Defendant Coastal Commission imposed as a condition that plaintiff offer to dedicate to a public agency or an approved private association "an easement for public access and passive recreational use along the shoreline," encompassing approximately two-thirds of the area of plaintiff's lot. The permit required that the offer remain irrevocable for 21 years and provided that the easement would become effective only when the offer was accepted. *Held*, the requirement was valid.

(a) *Authority to impose access requirements*. Public access to navigable waters is protected by the California Constitution (see Cal. Const., Art. X, §4, *infra*, §919). Its mandate is carried out, in part, by *Pub.Res.C. 30210* et seq. Defendant's authority to impose access requirements arises from *Pub.Res.C. 30212(a)*, providing that, with specified exceptions, access from the nearest public roadway to the sea (vertical access) and access along the coast (lateral access) "shall be provided in new development projects." (166 C.A.3d 161.)

(b) *Standard for testing access requirements*. A requirement of public access must, at least indirectly, relate "to needs to which the development contributes." It need not benefit the development either directly or indirectly. (166 C.A.3d 164 et seq., citing *Associated Home Builders of the Greater East Bay v. Walnut Creek* (1971) 4 C.3d 633, 94 C.R. 630, 484 P.2d 606, *supra*, §819, and *Georgia-Pac. Corp. v. California Coastal Com.* (1982) 132 C.A.3d 678, 183 C.R. 395.) Here, the access requirement meets this test. Although plaintiff's "home alone has not created the need for access to tidelands fronting his property, it is one small project among a myriad of others which together do severely limit public access to the tidelands and beaches of this state, and therefore collectively create a need for public access." (166 C.A.3d 167.)

(c) *Constitutionality of access requirement involved in this case.*

(1) The requirement does not offend substantive due process. It is reasonably related to the legitimate governmental purpose of protecting the public's right of access to tidelands. Defendant is forced to proceed on a permit-by-permit basis. If it fails to provide for access when a permit is issued, it is effectively prohibited from obtaining access at a later date. The access requirement does not create a patch of public beach bounded on three sides by private property. Until plaintiff's offer of dedication is accepted, there is no easement and the public may be excluded. By requiring plaintiff "to execute an irrevocable offer to dedicate an easement which will not likely be accepted unless and until the easement can feasibly be effectuated," defendant recognizes the impracticability of creating small public beaches surrounded by private property while providing the potential for lateral access should it become practical within the 21-year period of the offer. (166 C.A.3d 170.)

(2) The access requirement does not constitute an unconstitutional taking of property without just compensation. The "diminution in value" test developed in zoning cases is relevant here. In *Agins v. Tiburon* (1979) 24 C.3d 266, 157 C.R. 372, 598 P.2d 25, 8 Summary (10th), *Constitutional Law*, §1058, the "California Supreme Court determined that there can be no taking of property through regulation unless its effect is to deprive the landowner of substantially all reasonable use--and therefore all reasonable economic value--of his property." Here, despite the existence of the access requirement, plaintiff's property is sufficiently valuable to secure a loan of \$ 540,000. (166 C.A.3d 175.) In addition, plaintiff has been substantially benefited by being allowed to develop his property and thereby greatly increase its value. In return for this benefit, defendant may impose the access requirement. (166 C.A.3d 177.)

(3) The access requirement does not violate the principle of fundamental fairness. The condition here is fair and bears a sufficient relationship to the needs which the project creates or enhances. (166 C.A.3d 179.) (See *Whaler's Village Club v. California Coastal Com.* (1985) 173 C.A.3d 240, 254, 220 C.R. 2 [following *Grupe*; irrevocable offer to dedicate easement for public access and passive recreational use could be required as condition for construction of seawall to protect beachfront homes from storm damage]; *Paoli v. California Coastal Com.* (1986) 178 C.A.3d 544, 553, 223 C.R. 792 [open-space easement around development to preserve "critical view corridor" described in county land use plan was valid condition; citing *Grupe* and *Whaler's Village Club*]; *Carstens v. California Coastal Com.* (1986) 182 C.A.3d 277, 294, 227 C.R. 135 [amendment to permit for expansion of nuclear power plant, allowing implementation of safety measures and requiring utilities to convey two oceanfront parcels to state in lieu of providing full access at plant site, was reasonable under circumstances].)

(2) *Nollan Case and Its Progeny.* In *Nollan v. California Coastal Com.* (1986) 177 C.A.3d 719, 223 C.R. 28, the Commission's requirement that plaintiffs grant an easement as a condition for receipt of a rebuilding permit was upheld on the basis of *Grupe*. The United States Supreme Court reversed the Court of Appeal decision in *Nollan v. California Coastal Com.* (1987) 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677, 8 Summary (10th), *Constitutional Law*, §1157, holding that the condition was a taking rather than a valid exercise of police power, and that if the Commission wanted the access easement the state would have to pay for it. (107 S.Ct. 3150, 97 L.Ed.2d 692.) (See 102 Harv. L. Rev. 992.)

In *Surfside Colony, Ltd. v. California Coastal Com.* (1991) 226 C.A.3d 1260, 227 C.R. 371, defendant Commission imposed the grant of an easement for public access to a private beach as a condition for a permit to build a rock embankment. Plaintiff owner challenged the condition as an uncompensated taking. *Held*, the condition was invalid.

(a) *Nollan* requires a substantial relationship between the public burden posed by the construction and conditions imposed to permit the construction. Here, there was no site-specific evidence that construction would burden the public by exacerbating erosion and thus no substantial evidence to justify the condition. Hence, the access requirement amounted to a taking of plaintiff's property. (226 C.A.3d 1268, 1269.)

(b) *Whaler's Village Club* is distinguishable. There, nonsite-specific evidence was sufficient to pass constitutional muster on a rational basis test. *Nollan* changed the standard of constitutional review, and the rational test of *Whaler's Village Club* no longer applies. (226 C.A.3d 1270.) (See *La Costa Beach Homeowners' Assn. v. California Coastal*

Com. (2002) 101 C.A.4th 804, 815, 124 C.R.2d 618 [Commission properly deleted permit requirement that applicants create view corridors on their land and properly substituted dedication of undeveloped parcel nearby; Commission's mandate to maximize public access authorized it to accept off-site mitigation that could result in better view and public beach access]; Cal. Civil Practice, Environmental Litigation, §8:73 et seq.; 38 Cal. Western L. Rev. 255 [regulating seawalls under Coastal Act].)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *(New) Validity of Other Requirements.* The Coastal Commission may not consider whether a proposed development impacts views of the coast from offshore, ocean-based vantage points. (*Schneider v. California Coastal Com. (2006) 140 C.A.4th 1339, 1345, 44 C.R.3d 867* [neither *Pub.Res.C. 30251* nor relevant local coastal program authorized permit conditions designed to protect scenic views of coast from ocean].) The Commission does, however, have broad discretion to adopt measures designed to mitigate all significant impacts that the construction of a seawall may have. (*Ocean Harbor House Homeowners Assn. v. California Coastal Com. (2008) 163 C.A.4th 215, 240, 77 C.R.3d 432* [Commission had authority to impose mitigation fee on homeowners association in exchange for permission to build seawall; fee would be used to buy acre of land elsewhere to mitigate loss of recreational land at site; citing *La Costa Beach Homeowners' Assn. v. California Coastal Com. (2002) 101 C.A.4th 804, 124 C.R.2d 618*, text, p. 1039].)



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4. Commission's Appellate Review.

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[§ 866] Commission's Appellate Review.

(1) *Actions Subject to Appeal.* After certification of its local coastal program, a local government's approval of a coastal development permit application may be appealed to the Commission, but only for specified types of developments, such as those located close to the sea, a wetland, an estuary, a stream, or a coastal bluff, on tidelands, submerged lands, or public trust lands, or in a sensitive coastal resource area. (*Pub.Res.C. 30603(a)*; see *Ciani v. San Diego Trust & Savings Bank* (1991) 233 C.A.3d 1604, 285 C.R. 699, *infra*, §871 [right to appeal local agency's "deemed approval" of permit for demolition in coastal zone under *Govt.C. 65956*].) The grounds for an appeal are limited to an allegation that the development does not conform to the standards set forth in the certified local coastal program or the public access policies set forth in the Coastal Act. (*Pub.Res.C. 30603(b)(1)*; on appeal of action taken before certification of local coastal program, see *Pub.Res.C. 30602*; on appeals of actions by Commission or actions by local governments other than approval of permit, see *infra*, §868.) (See *Half Moon Bay v. Superior Court* (2003) 106 C.A.4th 795, 805, 131 C.R.2d 213 [Commission does not have appellate jurisdiction to modify local government's permit approval that was issued solely to comply with court order in proceeding in which Commission was litigant].)

The denial or approval of a major public works project or a major energy facility may also be appealed to the Commission. (*Pub.Res.C. 30603(a)(5)*.) The appeal will be limited to determining whether the development conforms to the standards set forth in the certified local coastal program and the public access policies set forth in the Coastal Act. (*Pub.Res.C. 30603(b)(1), (b)(2)*.)

(2) *Procedures.* The procedures for appeals from actions on permit applications are set forth in *Pub.Res.C. 30620 et seq.* The executive director of the Commission must determine, within 5 working days after receiving an appeal under *Pub.Res.C. 30602* or *30603*, whether the appeal is patently frivolous. If the executive director determines that an appeal is patently frivolous, the appellant has 5 working days to pay a filing fee of \$ 300 to maintain the appeal. The fee is refunded if the commission subsequently finds that the appeal raises a substantial issue. (*Pub.Res.C. 30620(d)*.)

A properly submitted appeal is considered to be filed when the executive director determines that the appeal is not patently frivolous, when the 5-day period for making that determination expires without a determination, or when the appellant pays the filing fee. (*Pub.Res.C. 30621(b)*.) The Commission must set a hearing on the appeal no later than 49

days after the appeal is filed, with notice to any affected person and anyone who requests notification. (*Pub.Res.C. 30621(a)*.) The Commission may (1) initially determine whether there is a substantial issue as to the propriety of a permit application at a hearing held within the 49-day period specified by *Pub.Res.C. 30621*, and then (2) continue the matter for a hearing on the merits beyond the 49-day limit without losing its appellate jurisdiction. (*Coronado Yacht Club v. California Coastal Com. (1993) 13 C.A.4th 860, 872, 17 C.R.2d 10.*) It is not enough for the Commission only to "calendar" or "open" a case within the 49-day period. The Commission must at a minimum determine whether a substantial issue exists. (*Encinitas Country Day School v. California Coastal Com. (2003) 108 C.A.4th 575, 583, 133 C.R.2d 551* [determining whether substantial issue exists includes determining whether proposed project is within geographical boundaries of Commission's appellate jurisdiction].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Actions Subject to Appeal.* See *McAllister v. Monterey (2007) 147 C.A.4th 253, 294, 54 C.R.3d 116* [when commission accepted administrative appeal from county's decision to issue coastal development permit, county's CEQA decisions were superseded by commission's review process; county was no longer adversary to opponent of project and its CEQA determinations were no longer subject to judicial review]; *Security Nat. Guaranty v. California Coastal Com. (2008) 159 C.A.4th 402, 418, 71 C.R.3d 522* [Commission acted in excess of jurisdiction under *Pub.Res.C. 30603(b)(1)* when, in course of appeal from grant of coastal development permit, it designated property as environmentally sensitive habitat area (ESHA); designation contradicted local coastal plan, which could only be amended by local government]; *Charles A. Pratt Const. Co. v. California Coastal Com. (2008) 162 C.A.4th 1068, 1076, 76 C.R.3d 466* [Commission correctly determined that local coastal plan had already designated much of developer's land to be ESHA; distinguishing *Security Nat. Guaranty* on ground that Commission did not seek to create new ESHA designation].

(2) *Procedures. 49-day rule:* See *Lt-WR, L.L.C. v. California Coastal Com. (2007) 152 C.A.4th 770, 786, 60 C.R.3d 417* [commission's failure to comply with 49-day rule of *Pub.Res.C. 30621(a)* did not divest it of jurisdiction to hear and deny application; 49-day rule is directory, not jurisdictional]; *Mt. Holyoke Homes, LP v. California Coastal Com. (2008) 167 C.A.4th 830, 840, 84 C.R.3d 452* [applicant was estopped from asserting that Commission lost jurisdiction by failing to comply with 49-day rule of *Pub.Res.C. 30621(a)*; applicant continued to participate fully in Commission proceedings for several years after alleged loss of jurisdiction].

Notice of hearing: See *Benson v. California Coastal Com. (2006) 139 C.A.4th 348, 353, 42 C.R.3d 580* [written notice to developer was constitutionally adequate, even though recommendation by Commission's staff and telephone conversation with staff led developer to believe that meeting would not include determination whether substantial issue existed; developer should have known that staff's recommendation to continue hearing without substantive determination was not binding on Commission].



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12 Witkin Sum. Cal. Law Real Property § 867

[§ 867] Enforcement of Coastal Act.

The Commission and its executive director may issue cease-and-desist orders. (*Pub.Res.C. 30809, 30810.*) The Commission or a local authority may order restoration of a site that has been developed without a permit, if the development is inconsistent with the Act and is causing continuing resource damage. (*Pub.Res.C. 30811.*) *Pub.Res.C. 30812* establishes a procedure under which the Commission notifies an owner who has allegedly developed property in violation of the Act, the owner may object to the Commission's proposed filing of a notice of violation, and the Commission, after a hearing, either issues a clearance letter or records a notice of violation. (See *34 McGeorge L. Rev. 476.*)

Any person may sue for enforcement of the act or for recovery of civil fines (*Pub.Res.C. 30803(a), 30804, 30805*), and the Commission may sue for exemplary damages (*Pub.Res.C. 30822*). The penalty provisions of *Pub.Res.C. 30820* provide minimum and maximum amounts for civil liability, varying according to whether a violation was intentional, and specify factors for consideration in determining that liability. Civil liability may be imposed on any person who violates any provision of the Act. (*Pub.Res.C. 30820(a)(1)* [liability for undertaking unauthorized development]; *Pub.Res.C. 30820(a)(2)* [liability for other violations; specifying no minimum amount].)

The Commission's efforts to enforce the Act through civil fines and injunctive relief were upheld in *Ojavan Investors v. California Coastal Com.* (1997) 54 C.A.4th 373, 62 C.R.2d 803. Defendant Commission imposed deed restrictions on a piece of coastal property as a condition of granting coastal development permits. Among other things, the permits required the recombination of 77 lots into 2 lots that could not be subdivided. Plaintiffs, a group of investors, subsequently bought the property and despite the deed restrictions, sold 19 of the lots to third parties. Defendant ordered plaintiffs to cease and desist from the sale or transfer of the property, plaintiffs sued to challenge the cease-and-desist order, and defendants cross-complained for injunctive relief, civil fines under former *Pub.Res.C. 30820* and *30821*, and exemplary damages under *Pub.Res.C. 30822*. The trial judge granted summary adjudication establishing plaintiffs' liability under the Act, enjoined them from violating the terms of the permits, ordered rescission of the previous sales, and imposed over \$ 9 million in civil fines. *Held*, affirmed.

(a) Former *Pub.Res.C. 30820* and *30821* authorized fines for coastal permit violations, even though they did not specifically list permit violations as among the activities subject to fine, as current *Pub.Res.C. 30820* does. (54 C.A.4th

386.)

(b) Even though plaintiffs did not alter the property, holding title to and reselling the lots constituted "performing or undertaking development" for purposes of coastal development permit requirements. Dividing the recombined lots triggered Coastal Act liability under *Pub.Res.C. 30106*. (54 C.A.4th 387.)

(c) Rescission of the previous lot sales does not amount to an unconstitutional forfeiture. This remedy was not intended to punish or criminalize plaintiffs and the buyers of the lots, but rather to protect the public from violations of the Coastal Act. The remedy was civil in nature, and forfeiture does not apply. (54 C.A.4th 393, 394.)

(d) The fines imposed were within the trial judge's discretion. Each separate purchase and sale constituted a separate violation of the Act, resulting in 73 violations. The fines were proportional to the number of violations and plaintiffs' "flagrant disregard" of the restrictions. (54 C.A.4th 398.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Feduniak v. California Coastal Com.* (2007) 148 C.A.4th 1346, 1360, 56 C.R.3d 591, 13 Summary (10th), *Equity*, Supp., §197 [Commission was not estopped from ordering removal of golf course that had been in existence for over 18 years]; 58 *Hastings L. J.* 1297 ["repair and maintenance" as way around Coastal Act's prohibition against seawalls].



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e. Judicial Review of Actions Under Coastal Act.

12 Witkin Sum. Cal. Law Real Property § 868

[§ 868] Judicial Review of Actions Under Coastal Act.

(1) *Appeal From Action of Commission.* An aggrieved person has the right to judicial review of a decision or action of the Commission by administrative mandamus under *C.C.P. 1094.5*, within 60 days after the decision or action has become final. An "aggrieved person" is someone who, in person or through a representative, appeared at a public hearing of the Commission, local government, or port governing body in connection with the decision or action appealed, or who, by other appropriate means before a hearing, informed the Commission, local government, or port governing body of the nature of his concerns, or who for good cause was unable to do either. "Aggrieved person" includes the applicant for a permit and, in the case of approval of a local coastal program, the local government involved. (*Pub.Res.C. 30801*; see *Ojavan Investors v. California Coastal Com. (1994) 26 C.A.4th 516, 524, 32 C.R.2d 103* [60-day limitation period of *Pub.Res.C. 30801* barred petition and complaint filed within 60 days of cease-and-desist order, but 2 to 12 years after issuance of challenged permits]; *Serra Canyon Co., Ltd. v. California Coastal Com. (2004) 120 C.A.4th 663, 668, 16 C.R.3d 110* [property owner whose predecessor agreed to dedication condition in development permit was bound by predecessor's failure to challenge condition within 60-day limitation period]; *Cal. Civil Practice, Environmental Litigation, §8:82 et seq.*)

In reviewing a decision of the Commission, the court is not limited to an inquiry into whether the Commission acted within the scope of its authority. It determines whether there was substantial evidence to support the decision. (*Chula Vista v. Superior Court (1982) 133 C.A.3d 472, 485, 183 C.R. 909*; see *Barrie v. California Coastal Com. (1987) 196 C.A.3d 8, 18, 241 C.R. 477* [substantial evidence supported Commission decision requiring relocation of seawall constructed under emergency permit]; *Sierra Club v. California Coastal Com. (1993) 12 C.A.4th 602, 615, 15 C.R.2d 779* [no substantial evidence supported Commission's denial of environmentally sensitive habitat area status to pygmy forests]; *Sierra Club v. California Coastal Com. (1993) 19 C.A.4th 547, 557, 23 C.R.2d 534* [substantial evidence supported Commission approval of plan to restore lagoon; Commission has power to measure environmental costs and risks]; *Bolsa Chica Land Trust v. Superior Court (1999) 71 C.A.4th 493, 505, 510, 514, 83 C.R.2d 850* [Commission improperly approved local coastal plan authorizing residential development in wetlands, filling of pond to make way for building of road, and relocation of bird habitat from eucalyptus grove that had been designated as environmentally sensitive habitat area].)

(2) *Appeal From Action of Local Government.* The right to review by administrative mandamus also applies to a

person, including an applicant for a permit or the commission, aggrieved by the decision or action of a local government that is implementing a certified local coastal program or certified port master plan, or is exercising its permit powers under *Pub.Res.C. 30600.5*, if the decision or action is one that may not be appealed to the Commission. The appeal must be taken within 60 days after the decision or action has become final. (*Pub.Res.C. 30802*.)

(3) *Declaratory Relief*. Any person may maintain an action, without posting a bond, for declaratory and equitable relief to restrain a violation of the Coastal Act, of a cease-and-desist order issued under *Pub.Res.C. 30809* or *30810*, or of a restoration order issued under *Pub.Res.C. 30811*. (*Pub.Res. C. 30803(a)*; on cease-and-desist orders and restoration orders, see *supra*, §867.) A court may stay the operation of the cease-and-desist order after it provides notice to the Commission and holds a hearing. The stay may be imposed or continued only if it is not against the public interest. (*Pub.Res. C. 30803(b)*.)

SUPPLEMENT: [This section is current through the latest supplement]



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f. California Coastal Conservancy.

12 Witkin Sum. Cal. Law Real Property § 869

[§ 869] California Coastal Conservancy.

The State Coastal Conservancy, established by *Pub.Res.C. 31000* et seq., has power to acquire, lease, sell, or exchange land within the coastal zone in order to preserve agricultural lands (*Pub.Res.C. 31150* et seq.) or restore improperly developed areas (*Pub.Res.C. 31200* et seq.), and may make grants to state or local public agencies or nonprofit organizations for various purposes of coastal preservation or enhancement (*Pub.Res.C. 31251* et seq.).

The Conservancy is also responsible for administering the Urban Waterfront Restoration Act of 1981 (*Pub.Res.C. 31300* et seq.). (*Pub.Res.C. 31302.*) This Act is designed to restore urban waterfront areas through the creation of parks, open space, visitor facilities, and housing for all income levels in a manner integrating man-made features into a natural coastal environment. (*Pub.Res.C. 31301, 31305.*) The California Urban Waterfront Area Restoration Financing Authority is authorized to issue revenue bonds totaling up to \$ 650 million at any one time to finance the restoration of both coastal and inland urban waterfront areas. (*Pub.Res.C. 32100.*)

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12 Witkin Sum. Cal. Law Real Property § 870

[§ 870] Time Limits for Agency Action.

(1) *Statutory Framework.* The Permit Streamlining Act (*Govt.C. 65920 et seq.*) is intended to ensure clear understanding of the specific requirements that must be met in connection with the approval of development projects and to expedite decisions on those projects. (*Govt.C. 65921; see 9 Pacific L. J. 638.*) Article 5 of the Act (*Govt.C. 65950 et seq.*) prescribes time limits during which decisions on development permit applications must be made. (See 19 California Lawyer 70 (April 1999) [time limits for project approvals under Permit Streamlining Act, California Environmental Quality Act, and Subdivision Map Act].)

An agency may not disapprove an application for a development project in order to comply with the statutory time limits. Every disapproval must specify reasons other than the agency's failure to timely act. (*Govt.C. 65952.2.*)

(2) *Lead Agency.* A lead agency for a development project must approve or disapprove the project within whichever of the following periods is applicable:

(a) 180 days from the date the lead agency certifies an environmental impact report if an environmental impact report is prepared under *Pub.Res.C. 21100* or *21151* for the development project. (*Govt.C. 65950(a)(1)*; on 90-day limit for specified low-income development projects, see *Govt.C. 65950(a)(2)*; on 90-day limit following certification of combined EIR-environmental impact statement, see *Govt.C. 65951*; on EIR requirement, see *supra*, §832 et seq.) If there has been an extension of time under *Pub.Res.C. 21100.2* or *21151.5* (*supra*, §853) to complete and certify an environmental impact report, the lead agency must approve or disapprove the project within 90 days after certification of the report. (*Govt.C. 65950.1.*)

(b) 60 days from the date the lead agency adopts a negative declaration if a negative declaration is completed and adopted for the development project. (*Govt.C. 65950(a)(3)*; on negative declaration, see *supra*, §845.)

(c) 60 days from the date the lead agency determines that the project is exempt from the California Environmental Quality Act. (*Govt.C. 65950(a)(4)*; on exemptions from CEQA, see *supra*, §836 et seq.)

(3) *Responsible Agency.* A responsible agency for a development project that has been approved by a lead agency

must approve or disapprove the development project within whichever of the following periods of time is longer:

(a) Within 180 days of the date on which the lead agency approves the project. (*Govt.C. 65952(a)(1).*)

(b) Within 180 days of the date on which the responsible agency receives and accepts the completed application for the development project. (*Govt.C. 65952(a)(2).*)

If a lead agency disapproves a development project, applications for the project that are filed with responsible agencies are deemed withdrawn. (*Govt.C. 65952(b).*)

SUPPLEMENT: [This section is current through the latest supplement]



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b. Deemed Approval.

12 Witkin Sum. Cal. Law Real Property § 871

[§ 871] Deemed Approval.

(1) *Statutory Authorization.* A development project is deemed approved if the responsible public agency fails to act within the time limits required by *Govt.C. 65950* et seq. (*Govt.C. 65956(b)*); see *Palmer v. Ojai* (1986) 178 C.A.3d 280, 291, 293, 223 C.R. 542 [time limits are valid and mandatory; where public agency failed to approve or disapprove project application within statutory time limits, mandamus directing agency to issue building permit was granted]; on appeal regarding agency's failure to take timely action, see *Govt.C. 65956.5*.)

(2) *Projects Approved by Passage of Time.* In *Orsi v. City Council* (1990) 219 C.A.3d 1576, 268 C.R. 912, plaintiffs applied to defendant city on May 27, 1986, for a planned unit development permit. On July 7, 1986, the application was returned as "incomplete," with a request that the application be signed and additional copies of the plans submitted. A new application, identical to the previous one except that it was signed, was submitted on August 15, 1986. Defendant approved a negative declaration under CEQA, but ultimately denied the application on February 25, 1987. *Held*, the project was approved by operation of law on December 26, 1986.

(a) Plaintiff's application was deemed complete on June 26, 1986. Under *Govt.C. 65943*, "the City had 30 days, and 30 days only, in which to notify the applicants that their application was 'defective.' " (219 C.A.3d 1584.) Although *Govt.C. 65943(a)* provides that resubmittal of an application triggers a new 30-day period, a review of its legislative history indicates that plaintiff's resubmittal of their original application was not the type of resubmittal that would trigger the running of a new 30-day period. Plaintiff's first application had already been "deemed complete" before defendant requested the additional plans and signatures, and the "fact that plaintiffs were cooperative with the City should not preclude them from the benefits that they had already obtained from the Act." (219 C.A.3d 1586.)

(b) *Govt.C. 65950* provides that if a negative declaration is adopted, the lead agency has 6 months from the date the application is accepted as complete to approve or disapprove the project. *Govt.C. 65956(b)* provides that the agency's failure to act within the time limit is deemed an approval of the project. (219 C.A.3d 1583, 1587.) Hence, when defendant "failed to approve or disapprove plaintiffs' project by December 26, 1986, it was approved by operation of law." (219 C.A.3d 1588.)

(3) *Projects Not Approved by Passage of Time.* In *Ciani v. San Diego Trust & Savings Bank* (1991) 233 C.A.3d

1604, 285 C.R. 699, plaintiffs, including the California Coastal Commission, sought to prevent demolition of historic buildings in the coastal zone. In seeking demolition, defendant owner contended that the demolition permit was "deemed approved" under Govt.C. 65956 by the local public agency's failure to act within statutory time limits. *Held*, the appeal was proper and the permit was not deemed approved.

(a) *Pub.Res.C. 30603* (supra, §866) authorizes an appeal to the Coastal Commission where a local agency approves a development permit in the coastal zone. This appeal right is equally available where a permit is "deemed approved" under Govt.C. 65956. (233 C.A.3d 1615.)

(b) Under Govt.C. 65956, deemed approval is absolutely conditioned on compliance with the notice requirements of applicable law, including the law governing the particular permit in question. Here, defendant's failure to notify the Coastal Commission, as required by the Commission's regulations, precluded deemed approval of the permit. (233 C.A.3d 1620.)

In *Findleton v. Board of Supervisors* (1993) 12 C.A.4th 709, 15 C.R.2d 665, a proceeding to compel defendant board to issue plaintiff an unconditional certificate of compliance with the Subdivision Map Act (supra, §809), plaintiff contended that his application for the certificate was "deemed approved" under Govt.C. 65956 due to the board's failure to act within the statutory time limits. *Held*, judgment denying relief affirmed; the time limits did not apply here.

(a) In order to trigger the time limits, Govt.C. 65956(b) requires that a citizen must be pursuing approval of a "development project." Under the definition provided by Govt.C. 65928, "development project" includes projects involving the issuance of a permit for construction or reconstruction, but not "ministerial projects ... proposed to be ... approved by public agencies." A "ministerial project" is one that requires no exercise of discretion by a public agency. (12 C.A.4th 713.)

(b) Here, plaintiff pleaded that defendant had a ministerial duty to issue him a certificate of compliance, and that, under Govt.C. 66495.35, the board was required to do so after determining that the property complied with the Subdivision Map Act. Hence, plaintiff's request for the certificate involved a "ministerial project" and the statutory time limits were irrelevant. (12 C.A.4th 714.) (See *Riverwatch v. San Diego* (1999) 76 C.A.4th 1428, 1439, 91 C.R.2d 322 [Govt.C. 65956 did not apply to developer's permit application that required EIR; processing of initial EIR was halted at developer's request, which excused county from acting on initial EIR, prevented 90-day time limit of Govt.C. 65950.1 (supra, §870) from beginning to run, and prevented automatic approval provisions from coming into effect]; *Eller Media Co. v. Los Angeles* (2001) 87 C.A.4th 1217, 1220, 105 C.R.2d 262 [because Govt.C. 65950 measures time limits for approval using specific CEQA actions, applicant who filed suit before any of those actions had been completed could not state cause of action for deemed approval under Govt.C. 65956(b)].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Authorization.* A permit may be deemed approved only if the "public notice required by law" has occurred. (Govt.C. 65956(b).) The required notice, whether given by the agency or the applicant, must state that the project will be deemed approved if the permitting agency has not acted within the required time. (*Mahon v. San Mateo* (2006) 139 C.A.4th 812, 821, 43 C.R.3d 235 [permit applications were not deemed approved where county's notices did not warn of potential for deemed approval].)



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c. Waiver of Time Limits.

12 Witkin Sum. Cal. Law Real Property § 872

[§ 872] Waiver of Time Limits.

(1) *Judicial Authorization.* In *Bickel v. Piedmont* (1997) 16 C.4th 1040, 68 C.R.2d 758, 946 P.2d 427, plaintiffs applied to the local planning commission for approval of an addition to their home. At a hearing, the commission indicated that the application would not "pass tonight" and that the matter would be continued "if that's what the applicant would like." Plaintiffs agreed to a 3-month continuance. They later submitted a revised application, which was denied for design reasons. Plaintiffs appealed to defendant city, contending that their application was deemed approved under *Govt.C. 65956* because the commission had not acted within the statutory time limit set forth in the Permit Streamlining Act. Defendant affirmed the commission's ruling. Plaintiffs sought a writ of mandamus, which the trial court denied on grounds of waiver and estoppel. The Court of Appeal reversed, concluding that the statutory time limits cannot be waived. *Held*, trial court ruling affirmed. Waiver is permissible under the Act.

(a) A person may waive the advantage of a law intended for the person's benefit, although a law established for a public reason cannot be waived by a private act. (16 C.4th 1048.) The statutory time limits here are primarily for the benefit of applicants. They protect applicants from the "caprice and arbitrariness associated with protracted and unjustified delays by the government." The benefits to the public, such as those to neighboring landowners, other applicants, and taxpayers, are merely incidental. (16 C.4th 1049.)

(b) Nothing in the language of the Act prohibits a permit applicant from waiving the statutory time limits, and several of the Act's provisions expressly allow the public agency and the applicant to mutually agree to extensions (see *Govt.C. 65950, 65957*). (16 C.4th 1050, 1051.) The fact that one of these provisions describes its extension as being available "once" only clarifies that unlimited extensions are not allowed and does not address the issue of waiver. (16 C.4th 1051.)

(c) The concern that applying the waiver doctrine here may lead to subtly coerced waivers is unfounded. "[I]f an agency improperly coerces an applicant into relinquishing the right to have the agency act within the statutory time limits, the applicant cannot be said to have voluntarily given up that right. In that event, there is no waiver." (16 C.4th 1052.)

(d) Waiver can work to an applicant's advantage. Without the ability to postpone a decision to a date beyond the

statutory time limits, an applicant whose application contained substantial but curable defects would have to accept a denial of the original application, submit a new application, and pay new application fees. (16 C.4th 1052.)

Three justices dissented, arguing that the Act does not permit unilateral waivers of its time limits. (16 C.4th 1055.)

(2) *Legislative Response*. In response to the holding in *Bickel*, the Legislature amended *Govt.C. 65957* to provide that the time limits established by *Govt.C. 65950*, *65950.1*, *65951*, and *65952* may be extended once on mutual written agreement of the project applicant and the public agency for a period not to exceed 90 days from the date of the extension. No other extension, continuance, or waiver of these time limits either by the project applicant or the lead agency is permitted, except as provided in *Govt.C. 65957* and *65950.1*. Failure of the lead agency to act within these time limits may result in the project being deemed approved under *Govt.C. 65956(b)*.

In making these amendments, the Legislature was aware of the decision in *Bickel* and intended to clarify that the Permit Streamlining Act "does not provide for the application of the common law doctrine of waiver by either the act's purpose or its statutory language." (Stats. 1998, Chap. 283, §5.)

SUPPLEMENT: [This section is current through the latest supplement]



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12 Witkin Sum. Cal. Law Real Property § 873

[§ 873] Regional Plans.

(1) *Lake Tahoe Regional Plan.* Lake Tahoe is divided among Nevada and five California counties, separate jurisdictions unable to cope with an environmental crisis resulting from recreational development and population growth. (See 52 *Cal. L. Rev.* 563 [future of Lake Tahoe; land use, water, and pollution].) To save the lake and the Tahoe basin environment, Nevada and California adopted the Tahoe Regional Planning Compact (*Govt.C.* 66801). The Compact deals with problems of land use, transportation, conservation, recreation, and public facilities around the lake. It established the Tahoe Regional Planning Agency, a bi-state commission, and conferred upon it "broad powers to make and enforce a regional plan of an unusually comprehensive scope." (*People v. El Dorado* (1971) 5 *C.3d* 480, 487, 96 *C.R.* 553, 487 *P.2d* 1193 [compact is constitutional]; see 60 *Cal. L. Rev.* 997 [*El Dorado*]; 1 *Ecology L. Q.* 3 [water quality control at Lake Tahoe]; 22 *Hastings L. J.* 705 [regional government for Lake Tahoe].) (On compacts, see 7 *Summary* (10th), *Constitutional Law*, §66; on California Tahoe Regional Planning Agency, see *Govt.C.* 67000 et seq.; *Raley v. California Tahoe Regional Planning Agency* (1977) 68 *C.A.3d* 965, 977, 137 *C.R.* 699 [proposed 26-acre regional shopping center adjacent to state highway near Lake Tahoe was subject to regulation by agency]; *Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 *C.A.4th* 1459, 1467, 28 *C.R.2d* 734 [property owners association was not entitled to preliminary injunction against imposition of mitigation fees by agency].)

The California Tahoe Conservancy (*Govt.C.* 66905 et seq.) is a state agency authorized to acquire real property in the Tahoe region by gift, exchange, donation, or dedication (*Govt.C.* 66907.2) "for the purposes of protecting the natural environment, providing public access or public recreational facilities, preserving wildlife habitat areas, or providing access to or management of acquired lands." (*Govt.C.* 66907.) It administers the Lake Tahoe Acquisitions Bond Act (*Govt.C.* 66950 et seq.), which authorized an \$ 85 million bond issue to acquire undeveloped land in the Tahoe region for purposes of environmental protection and public access. (*Govt.C.* 66956, 66957.)

(2) *San Francisco Bay Plan.* The San Francisco Bay Conservation and Development Commission was created in 1965. (*Govt.C.* 66600 et seq.) The enacting legislation views the bay as "a delicate physical mechanism in which changes that affect one part of the bay may also affect all other parts" (*Govt.C.* 66600), but the bay has been subjected to land fill on a piecemeal basis under the independent jurisdictions of the surrounding cities and counties (see *Govt.C.* 66601). The Commission represents state and federal interests, but is predominantly composed of representatives from the local governments concerned with the bay (see *Govt.C.* 66620 et seq.). It has jurisdiction over the bay and a 100-foot shoreline strip (see *Govt.C.* 66610), and controls land fill by a permit system administered under its San

Francisco Bay Plan (see *Govt.C. 66603, 66632 et seq.*). (See 55 *Cal. L. Rev.* 728 [regional regulation for protection and development of San Francisco Bay]; 23 *Stanf. L. Rev.* 349 [saving San Francisco Bay]; 46 *A.L.R.3d* 1422 [validity of legislation regulating filling and dredging].)

Regulation by the Commission has been the subject of litigation, including the following decisions:

Leslie Salt Co. v. San Francisco Bay Conservation & Dev. Com. (1984) 153 *C.A.3d* 605, 611, 616, 200 *C.R.* 575 [Commission properly issued cease-and-desist order requiring landowner to remove fill material placed on marshy wetlands on parcels located within Commission's permit jurisdiction].

Save San Francisco Bay Assn. v. San Francisco Bay Conservation & Dev. Com. (1992) 10 *C.A.4th* 908, 923, 13 *C.R.2d* 117 [comparing consideration of project alternatives under CEQA and under *Govt.C. 66600 et seq.*].

San Mateo County Harbor Dist. v. People (1994) 25 *C.A.4th* 1789, 1795, 31 *C.R.2d* 447 [under statutory scheme, Bay Plan, and regulations, permit from Commission is required for live-aboard boat berths in marinas].

People v. Smith (1994) 26 *C.A.4th* 113, 120, 31 *C.R.2d* 488 [residential vessels moored offshore constituted floating fill under *Govt.C. 66632(a)* and were subject to permit requirement].

Littoral Dev. Co. v. San Francisco Bay Conservation & Dev. Com. (1994) 24 *C.A.4th* 1050, 1057, 29 *C.R.2d* 518 (*Littoral I*) [seaward boundary of 100-foot shoreline strip subject to Commission's jurisdiction under *Govt.C. 66610* is mean high-tide line, except in marshlands where it is line 5 feet above mean sea level].

Littoral Dev. Co. v. San Francisco Bay Conservation & Dev. Com. (1995) 33 *C.A.4th* 211, 217, 218, 39 *C.R.2d* 266 (*Littoral II*) [definition of "marshland" in *Govt.C. 66610* is not unconstitutionally vague or broad; "marshland" definition was properly applied in *Littoral I*].

SUPPLEMENT: [This section is current through the latest supplement]



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12 Witkin Sum. Cal. Law Real Property § 874

[§ 874] In General.

Resource conservation and management have become a major focus of commentary and governmental regulation. (See *Pub.Res.C. 9001* et seq. [statewide program of soil, water, and related natural resource conservation]; *Pub.Res.C. 5097.993* et seq. [Native American Historic Resource Protection Act; prohibiting specified types of excavation and destruction of Native American cultural, historic, or sacred sites]; *13 Ecology L. Q.* 939 [landslides]; *22 Ecology L. Q.* 677 [valuing loss of natural resources]; *23 Ecology L. Q.* 521 [privatization of public lands]; *53 Stanf. L. Rev.* 607 [use of environmental trading markets in environmental and resource management policy]; *45 So. Cal. L. Rev.* 450 [legal rights of natural objects]; *18 U.C.L.A. L. Rev.* 855 [property rights in exhaustible resources]; *43 U.C.L.A. L. Rev.* 547 [Native American Treaty Rights to Sacred Natural Resources]; for conservation and management of specific resources, see *infra*, §876 et seq.) (On role of public trust doctrine in resource conservation, see *National Audubon Soc. v. Superior Court* (1983) *33 C.3d* 419, 433, *189 C.R.* 346, *658 P.2d* 709, *infra*, §920 [exhaustive analysis of doctrine]; *5 Ecology L. Q.* 291 [doctrine and international environmental protection]; *10 Ecology L. Q.* 455 [public trust doctrine and judicial intervention in public land law]; *14 U.C. Davis L. Rev.* 181 [symposium on public trust doctrine]; *45 U.C.L.A. L. Rev.* 385 [public trust doctrine].)

Under the California Environmental Protection Program (*Pub.Res.C. 21190* et seq.), proceeds from the sale of motor vehicle "vanity" license plates are used for pollution control, environmental education, the acquisition and preservation of parks and natural areas, the protection of certain plants and animals and their habitats, and the protection of Lake Tahoe.

SUPPLEMENT: [This section is current through the latest supplement]

See *Pub.Res.C. 5860* et seq. [California Natural Landmarks Program, intended to identify and preserve natural areas that best illustrate biological and geological character of California], added in 2006; *Center for Biological Diversity v. FPL Group* (2008) *166 C.A.4th* 1349, 1359, *83 C.R.3d* 588 [public trust doctrine applies to wildlife, including birds, and can be enforced by private citizens; opponents of windmills that allegedly killed birds, however, should have sued public agencies that were supposed to protect public trust, rather than directly suing owners of windmills]; *33 Ecology L. Q.* 363 [cultural analysis of environmentalism and Supreme Court].



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12 Witkin Sum. Cal. Law Real Property § 875

[§ 875] Recycling.

The Integrated Waste Management Act of 1989 (*Pub.Res.C. 42000 et seq.*, *infra*, §908) emphasizes recycling. (See *Waste Management of the Desert v. Palm Springs Recycling Center* (1994) 7 C.4th 478, 28 C.R.2d 461, 869 P.2d 440, *infra*, §909; on recycling generally, see 89 *Cal. L. Rev.* 1231 [effect of social norms on recycling and other "large-number, small-payoff" collective action]; 15 *Ecology L. Q.* 537 [conservation and industrial utilization of recyclable materials]; on water recycling, see *infra*, §876.)

Numerous statutes deal with recycling of particular items, including the following:

(1) *Beverage containers.* (*Pub.Res.C. 14500 et seq.* [California Beverage Container Recycling and Litter Reduction Act]; see *Californians Against Waste v. Department of Conservation* (2002) 104 C.A.4th 317, 324, 127 C.R.2d 905 [calculating amount of processing fee paid by beverage container manufacturers under *Pub.Res.C. 14575*]; *Pub.Res.C. 70000 et seq.* [prohibiting use of ceramic materials in glass food and beverage containers]; *Pub.Res.C. 19500 et seq.* [Fiberglass Recycled Content Act of 1991].)

(2) *Oil.* (*Pub.Res.C. 48600 et seq.* [California Oil Recycling Enhancement Act]; *Pub.Res.C. 3460 et seq.* [Used Oil Recycling Act].)

(3) *Batteries.* (*Pub.Res.C. 15000 et seq.* [uniform labeling requirements for rechargeable batteries to promote recycling and proper disposal].)

(4) *Tires.* (*Govt.C. 66799.60 et seq.*; *Pub.Res.C. 42950 et seq.* [regulation of waste tire haulers].)

(5) *Paper.* (*Educ.C. 32370 et seq.* [paper recycling program for educational agencies].)

SUPPLEMENT: [This section is current through the latest supplement]

On purchase of recycled items by state agencies and local governments, see *Pub.Contr.C. 12153 et seq.*

(1) *Beverage containers.* See *Shamsian v. Department of Conservation* (2006) 136 C.A.4th 621, 632, 39 C.R.3d 62 [Pub.Res.C. 14501 did not create private right of action allowing plaintiff to sue department for failure to provide sufficient beverage container redemption opportunities].

(3) *Batteries*. See *Pub.Res.C. 42451* et seq. [Rechargeable Battery Recycling Act of 2006], added in 2005 and operative July 1, 2006.(6) *(New) Plastic Bags*. See *Pub.Res.C. 42250* et seq. [at-store recycling program for clean plastic carryout bags], added in 2006 and operative from July 1, 2007, until January 1, 2013.



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B. Resource Conservation and Management.

3. Water Resources.

a. In General.

12 Witkin Sum. Cal. Law Real Property § 876

[§ 876] In General.

(1) *Statutes.* Management of California's water resources is partially a problem of transportation, with a water supply predominantly located in the northern half of the state and demand in the Central Valley and the south. (On water rights, see *infra*, §915 et seq.; on regulation of water quality, see *infra*, §892 et seq.) Numerous statutes address water resources management, including the following:

- (a) *Water C. 10000* et seq. (conservation, development, and utilization of state water resources).
- (b) *Water C. 10004* et seq. (California Water Plan).
- (c) *Water C. 10610* et seq. (Urban Water Management Planning Act).
- (d) *Water C. 10800* et seq. (Agricultural Water Management Planning Act).
- (e) *Water C. 5975, 5976* (California-Nevada Compact).
- (f) *Water C. 8400* et seq. (Flood Plain Management Act).
- (g) *Water C. 12930* et seq. (California Water Resources Development Bond Act).
- (h) *Water C. 74000* et seq. (water conservation districts).
- (i) *Govt.C. 65591* et seq. (Water Conservation in Landscaping Act).
- (j) *Water C. 10520* et seq. (Agricultural Water Conservation and Management Act of 1992).
- (k) *Water C. 525* (water meters required on new potable water connections); *Water C. 500* et seq. (Water Measurement Law).
- (l) *Pub.Res.C. 29700* et seq. (Delta Protection Act of 1992; resource management plan for Sacramento-San Joaquin Delta).

(m) *Health & Saf.C. 17921.3* (water closets and urinals must average 1.6 gallons per flush).

(n) *Govt.C. 65352(a)(6)* (notice to public water systems of adoption or amendment of general plan).

(o) *Water C. 79000* et seq. (Safe Drinking Water, Clean Water, Watershed Protection, and Flood Protection Act; creating bond fund).

(p) *Water C. 10530* et seq. (Integrated Regional Water Management Planning Act of 2002; regional water management group may adopt regional plan addressing water supply, water quality, and flood protection).

(q) *Pub.Res.C. 5808* et seq. (California Watershed Protection and Restoration Act; voluntary, local, and collaborative watershed protection partnerships).

(2) *Cases and Commentary.* Water resources management has also been the subject of extensive commentary and some court decisions. (See *Gilbert v. California* (1990) 218 C.A.3d 234, 243, 266 C.R. 891 [Department of Health Services has authority to require utility district moratorium on additional connections pending development of adequate water supply]; *Brydon v. East Bay Mun. Util. Dist.* (1994) 24 C.A.4th 178, 187, 29 C.R.2d 128 [upholding water rate structure imposed by utility district as part of drought management program]; *Friends of the Santa Clara River v. Castaic Lake Water Agency* (2004) 123 C.A.4th 1, 8, 19 C.R.3d 625 [urban water management plan adopted under *Water C. 10610* et seq. failed to address adequately issue of perchlorate contamination]; 45 *Cal. L. Rev.* 665 [water conservation and flood control districts]; 76 *Cal. L. Rev.* 671 [liability rules as solution to problem of waste]; 2 *Ecology L. Q.* 733 [Delta water rights: environmental versus consumptive uses]; 7 *Ecology L. Q.* 881 [trends in water resource management]; 12 *Ecology L. Q.* 429 [regulating water supply in the Northeast]; 31 *Ecology L. Q.* 117 [land use and water planning]; 22 *Hastings L. J.* 523, 732 [water transfer from northern to southern California]; 27 *Hastings L. J.* 753 [water hookup moratoria and distributors' duty to augment supply]; 45 *Hastings L. J.* 249 [analysis of recent reallocations of state's water resources]; 3 *Lincoln L. Rev.* 35 [watershed development]; 34 *McGeorge L. Rev.* 903 [authority of State Water Resource Control Board over water transfers]; 13 *Pacific L. J.* 975 [water resource management]; 19 *Pacific L. J.* 111 [decisions on Delta diversions]; 19 *Pacific L. J.* 1165 [water marketing]; 25 *Pacific L. J.* 1053 [water marketing and legacy of 1987-1992 drought]; 23 *Stanf. L. Rev.* 811 [recreation and subdivisions on lakes and reservoirs]; 44 *Stanf. L. Rev.* 429 [justification for denying water service to new consumers to control growth]; 15 *U.C.L.A. L. Rev.* 1299 [interregional water diversion].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutes.*

(p) *Integrated Regional Water Management Planning Act of 2002:* *Water C. 10530* et seq. were repealed and reenacted in 2008. The new Integrated Regional Water Management Planning Act authorizes a regional water management group to adopt a plan that addresses water-related objectives and conflicts within a region, water management strategies, and environmental protections. (See *Water C. 10540*.) (r) *(New) Integrated Water Supply and Flood Protection. Water C. 83000* et seq. were added in 2008 to integrate state flood protection and water supply systems.

(2) *Cases and Commentary.* See 33 *Ecology L. Q.* 313 [history of water privatization debate]; 35 *Golden Gate L. Rev.* 285 [symposium on restoration of urban rivers; six case studies]. *Correction:* Page 1052, paragraph (n), "*Govt.C. 65352(a)(6)*" should be "*Govt.C. 65352(a)(7)*".



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12 Witkin Sum. Cal. Law Real Property § 877

[§ 877] Recycling and Irrigation.

(1) *Statutes.* Several statutes provide for water reclamation and irrigation projects, including the following:

- (a) *Water C. 230* (surveys and investigations about reclaiming wastewaters).
- (b) *Water C. 460 et seq.* (Water Reuse Law).
- (c) *Water C. 11950 et seq.* (water conservation and reclamation projects in the Central Valley).
- (d) *Water C. 12000* (cooperation and contracts between private entities and United States).
- (e) *Water C. 13500 et seq.* (Water Recycling Law).
- (f) *Water C. 13575 et seq.* (Water Recycling Act of 1991).
- (g) *Govt.C. 65601 et seq.* (Water Recycling in Landscaping Act).

(2) *Cases and Commentary.* Water recycling and irrigation have been the subject of cases and commentary. (See *Environmental Defense Fund v. East Bay Mun. Util. Dist.* (1977) 20 C.3d 327, 342, 142 C.R. 904, 572 P.2d 1128 [reclamation and use of wastewater]; 9 *Ecology L. Q.* 243 [Legal Issues in Implementing Water Reuse in California]; 18 *U.C. Davis L. Rev.* 97 [federal Reclamation Act and state water rights]; 9 *U.C.L.A. L. Rev.* 1 [irrigation acreage limitations under federal programs]; 45 *Am.Jur.2d* (1999 ed.), *Irrigation* §1 et seq.; 50 *Am.Jur.2d* (1995 ed.), *Levees and Flood Control* §1 et seq.; on rights to groundwater, see *infra*, §956.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Cases and Commentary.* See 50 *Am.Jur.2d* (2006 ed.), *Levees and Flood Control* §1 et seq.



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12 Witkin Sum. Cal. Law Real Property § 878

[§ 878] Groundwater.

(1) *Statutes.* Groundwater management is a significant aspect of water resource management. (See *Baldwin v. Tehama* (1994) 31 C.A.4th 166, 175, 36 C.R.2d 886 [county ordinance regulating pumping practices and uses of groundwater was valid].) Several statutes have been enacted in this area, including the following:

- (a) *Water C. 10750 et seq.* (groundwater management plans by local agencies).
- (b) *Water C. 10795 et seq.* (grants to local public agencies for groundwater studies, monitoring, and management activities).
- (c) *Water C. 10780 et seq.* (comprehensive groundwater quality monitoring program for state).

(2) *Commentary.* Commentary on groundwater management has been extensive. (See 50 *Cal. L. Rev.* 56 [groundwater basin management]; 1 *Cal. Western L. Rev.* 136 [interbasin water transfer]; 20 *Cal. Western L. Rev.* 223 [district management of groundwater resources]; 5 *Ecology L. Q.* 625 [underground water storage projects]; 11 *Ecology L. Q.* 373 [reform of California groundwater law]; 33 *Hastings L. J.* 903 [public regulation of "proprietary" groundwater rights]; 35 *Hastings L. J.* 1007 [groundwater rights on public land]; 11 *Pacific L. J.* 41 [groundwater storage program for California State Water Project]; 11 *Pacific L. J.* 863 [general overview of legal solutions to groundwater problems]; 14 *Pacific L. J.* 1279 [need for comprehensive groundwater management program]; 19 *Pacific L. J.* 1225 [imported groundwater banking]; 25 *Pacific L. J.* 1021 [Institutional Reforms in California Groundwater Law]; 38 *So Cal. L. Rev.* 484 [groundwater basin management]; 32 *Southwestern U. L. Rev.* 117 [allocating storage space in California's groundwater basins].)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Resource Conservation and Management.
3. Water Resources.
d. Ocean Resources.

12 Witkin Sum. Cal. Law Real Property § 879

[§ 879] Ocean Resources.

(1) *California Waters*. It is the policy of the State of California to "encourage the conservation, maintenance, and utilization of the living resources of the ocean and other waters under the jurisdiction and influence of the state." (*Fish & Game C. 1700*; see 5 *Ecology L. Q.* 753 [ocean dumping]; 6 *Ecology L. Q.* 65 [seabed resource management]; 11 *Ecology L. Q.* 583 [Coastal Barrier Resources Act (16 U.S.C., §3501 et seq.)]; 29 *Ecology L. Q.* 649 [marine restoration and shortcomings of current federal regulation of oceans]; 18 *Santa Clara L. Rev.* 157 [pursuit of clean oceans]; 8 *Southwestern U. L. Rev.* 967 [onshore impact of offshore drilling]; 21 *U.C. Davis L. Rev.* 227 [wetland protection through state regulation]; on ownership and regulation of tidelands, see *supra*, §§209, 210; on protection of coastal zone, see *supra*, §861 et seq.)

The California Coastal Sanctuary Act of 1994 (*Pub.Res.C. 6240* et seq.) creates a sanctuary consisting of all state waters subject to tidal influence, except those subject to an oil and gas lease in effect on January 1, 1995. (*Pub.Res.C. 6242*.) New oil and gas leases are prohibited, unless there is a presidential finding of severe energy supply interruption, the Governor finds that resources of the sanctuary would significantly alleviate the problem, and the Legislature amends the Act. (*Pub.Res.C. 6243*.) (See 26 *Pacific L. J.* 544.)

Other statutes designed to aid the management of California's ocean resources include the following:

- (a) *Pub.Res.C. 36000* et seq. (California Ocean Resources Management Act of 1990).
- (b) *Pub.Res.C. 36970* et seq. (California Ocean Resources Stewardship Act of 2000; ocean research science projects).
- (c) *Pub.Res.C. 28000* et seq. (establishing Morro and San Diego Bays as "State Estuaries," and developing management plan for Morro Bay and its watershed).
- (d) *Pub.Res.C. 35500* et seq. (establishing Ocean Protection Council to coordinate and improve state efforts to protect ocean resources).

(2) *International Waters*. Jurisdiction over the sea and international law governing the oceans has been the subject

of extensive commentary. (See 4 *Ecology L. Q.* 279 [proposed seabed treaty]; 5 *Ecology L. Q.* 531 [nations' coastal jurisdiction]; 13 *Ecology L. Q.* 381 [Pacific Ocean resources]; 17 *Santa Clara L. Rev.* 523 [freedom of navigation]; 11 *U.S.F. L. Rev.* 1 [territorial sea and contiguous zone].) Much of the commentary has focused on the Law of the Sea. (See 11 *San Diego L. Rev.* 535; 12 *San Diego L. Rev.* 491; 13 *San Diego L. Rev.* 483; 14 *San Diego L. Rev.* 507; 15 *San Diego L. Rev.* 357; 16 *San Diego L. Rev.* 451; 17 *San Diego L. Rev.* 513; 18 *San Diego L. Rev.* 387; 19 *San Diego L. Rev.* 451; 20 *San Diego L. Rev.* 475; 21 *San Diego L. Rev.* 491; 22 *San Diego L. Rev.* 725; 23 *San Diego L. Rev.* 485; 24 *San Diego L. Rev.* 595; 25 *San Diego L. Rev.* 425; 26 *San Diego L. Rev.* 417.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *International Waters.* See 31 *Ecology L. Q.* 689 [recommendations for better management of nation's marine resources].



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12 Witkin Sum. Cal. Law Real Property § 880

[§ 880] Agricultural Land.

(1) *Williamson Act*. Property tax assessment of agricultural land based on its development potential tends to raise the farmer's costs and make agricultural uses unprofitable. The California Land Conservation Act of 1965, also known as the Williamson Act (*Govt.C. 51200 et seq.*), was enacted to preserve prime agricultural land by allowing farmers to enter into commitments of at least 10 years' duration to restrict their property to agricultural uses. Restricted land qualifies for special statutory property tax assessment standards. (See *Sierra Club v. Hayward* (1981) 28 C.3d 840, 851, 852, 171 C.R. 619, 623 P.2d 180 [nature and purpose of Act]; *Honey Springs Homeowners Assn. v. Board of Supervisors* (1984) 157 C.A.3d 1122, 1133, 203 C.R. 886 [cancellation of restriction during 1-year "window period" provided by former Govt.C. 51282.1]; *Lewis v. Hayward* (1986) 177 C.A.3d 103, 113, 114, 222 C.R. 781 [former Govt.C. 51282.1 was unconstitutional; it was inconsistent with requirement of Cal. Const., Art. XIII, §8, that preferentially taxed lands be "enforceably restricted"]; *People v. Triplett* (1996) 48 C.A.4th 233, 252, 55 C.R.2d 610 [state Department of Conservation had standing to challenge county assessor's calculation of fee to cancel contract under Act]; *Friends of East Willits Valley v. Mendocino* (2002) 101 C.A.4th 191, 204, 123 C.R.2d 708 [county properly cancelled Williamson Act restrictions on Native American tribe's land, allowing tribe to pursue low-income housing project; tribe members had compelling need for low-income housing and there was no proximate, suitable, noncontracted land available for project]; 9 *Summary* (10th), *Taxation*, §223 et seq.)

(2) *Other Statutes*. Other statutes concerned with the preservation of agricultural resources include the following:

(a) *Pub.Res.C. 21095* (development of methodology for ensuring that effects of agricultural land conversions are consistently considered in environmental review process).

(b) *Pub.Res.C. 10200 et seq.* (California Farmland Conservancy Program Act).

(c) *Pub.Res.C. 10330 et seq.* (Rangeland, Grazing Land, and Grassland Protection Act; funds for acquisition of conservation easements).

(3) *Commentary*. The preservation of agricultural resources has been the subject of commentary. (See 8 *Ecology L. Q.* 303 [proposal for statewide regulation of agricultural land preservation]; 14 *Ecology L. Q.* 401 [statewide land use

programs for preservation of farmland]; 1 *U.C. Davis L. Rev.* 649 [proposal for requirement of environmental impact report for controlled burning of rangeland]; 23 *U.C. Davis L. Rev.* 401 [agricultural law symposium]; 18 *U.S.F. L. Rev.* 171 [proposal for farmland trust].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Williamson Act*. See *Humboldt v. McKee* (2008) 165 *C.A.4th* 1476, 1489, 82 *C.R.3d* 38 [revised guidelines that increased minimum size of parcels that could be sold applied to preserve created before guidelines were adopted; contract for preserve had been renewed numerous times since adoption and each renewal effectively incorporated revised guidelines; under *Govt.C. 51251*, trial court could fashion appropriate remedy to address unlawful sales by preserve's owner]; C.E.B., Easements and Boundaries, Chap. 6.



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12 Witkin Sum. Cal. Law Real Property § 881

[§ 881] Open Space.

The protection and conservation of open-space land is encouraged by the California Constitution, which limits the valuation for property tax purposes of property forcibly restricted to recreation, the enjoyment of scenic beauty, the use or conservation of natural resources, or the production of food or fiber. (Cal. Const., Art. XIII, §8; see *Associated Home Builders of the Greater East Bay v. Walnut Creek* (1971) 4 C.3d 633, 638, 94 C.R. 630, 484 P.2d 606, supra, §819 [scope of open-space policy declared by former constitutional provision; "Statutes which further the underlying policy expressed in the constitutional section must be upheld whenever possible in order to effectuate its salutary purposes"]; 1 *Ecology L. Q.* 330 [preserving rural land resources]; 3 *Ecology L. Q.* 1 [increasing tax incentives for conservation easement donations]; 5 *Golden Gate L. Rev.* 191 [use of development rights transfer to conserve open space]; 19 *Hastings L. J.* 421 [property tax and open-space preservation]; 10 *San Diego L. Rev.* 381 [preservation of private open space by floodplain zoning]; 13 *Santa Clara Lawyer* 284 [long-range open-space policies]; 12 *U.C.L.A. L. Rev.* 830 [open space in subdivisions]; on preserving open space in land development, see supra, §819; on parks, see infra, §882; on wilderness areas, see infra, §883; on zoning to maintain open space, see 8 *Summary* (10th), *Constitutional Law*, §1038.)

The following statutes implement the state policy of protecting open space:

(1) Rev.C. 421 et seq. (valuation of open-space land for real property tax purposes). (See 9 *Summary* (10th), *Taxation*, §§223, 224.)

(2) Govt.C. 50575 et seq. (Open-Space Maintenance Act).

(3) Govt.C. 65560 et seq. (local open-space plans). (See *Save El Toro Assn. v. Days* (1977) 74 C.A.3d 64, 71, 141 C.R. 282 [city could not have adopted local open-space plan where general plan did not include conservation element, seismic safety element, noise element, scenic highway element, or safety element].)

(4) Govt.C. 65910 et seq. (local open-space zoning ordinances).

(5) Govt.C. 51070 et seq. (Open-Space Easements Act).

(6) *Pub.Res.C. 5620* et seq. (Urban Recreation and Open-Space Program Act).

(7) C.C. 815 et seq. (conservation easements). (See *supra*, §386.)

(8) *Pub.Res.C. 37000* et seq. (tax credits for donations of land to protect wildlife habitat, open space, and agricultural land).

(9) *Pub.Res.C. 5500* et seq. (creation and powers of park and open-space districts). (See *Johnston v. Sonoma County Agricultural Preservation & Open Space Dist. (2002) 100 C.A.4th 973, 983, 123 C.R.2d 226 [Pub.Res.C. 5540*, which requires voter or legislative approval of transfers of real property that is preserved for open space, did not apply to district's conveyance of utility easement to city; statute applies only to voluntary transfers and district's conveyance was spurred by city's credible and imminent threat to exercise power of eminent domain].)

SUPPLEMENT: [This section is current through the latest supplement]



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12 Witkin Sum. Cal. Law Real Property § 882

[§ 882] Parks and Recreation Areas.

The California State Park System (*Pub.Res.C. 5001* et seq.) classifies public lands, from wilderness areas (*infra*, §883) to campgrounds and beaches, and strictly controls the extent of improvements permitted for those uses. (See *Pub.Res.C. 5019.50* et seq.; *18 Ecology L. Q. 485* [proposal for public land acquisition in Lake Tahoe Basin for purposes of environmental protection]; on parks and recreation areas in subdivisions, see *supra*, §819.)

The Safe Neighborhood Parks, Clean Water, Clean Air, and Coastal Protection Bond Act of 2000 (*Pub.Res.C. 5096.300* et seq.) seeks to "revive state stewardship of natural resources by investing in neighborhood parks and state parks, clean water protection, and coastal beaches and scenic areas." (*Pub.Res.C. 5096.301*.) It authorizes the issuance and sale of bonds, creates a bond fund, and sets forth the projects for which the Legislature may appropriate money from the fund. (*Pub.Res.C. 5096.310*.) (See *Rolfe v. California Trans. Com. (2002) 104 C.A.4th 239, 243, 127 C.R.2d 871* [state transportation agency could condemn park land that county had purchased under park bond act and could use land for toll road without first obtaining legislative approval; *Pub.Res.C. 5096.27*, prohibiting use of land for other than park, applies only to county, as grantee of bond funds].)

Other statutes regulating the development and use of park lands and recreation areas include the following:

- (1) *Pub.Res.C. 5099* et seq. (California Outdoor Recreation Resources Plan Act; development of outdoor recreation sources so as to meet requirements of federal law authorizing grants to states).
- (2) *Sts. & H.C. 84.5, 991, 1809; Govt.C. 66478.1* et seq. (public access to rivers and beaches); *supra* §816.
- (3) *C.C.P. 1240.690* (protection of parks, wildlife areas and historical sites from condemnation for highway use).
- (4) *Govt.C. 51238.5* (encouraging permissive recreational use of private land).
- (5) *Pub.Res.C. 5097* et seq. (preservation of archaeological, paleontological and historical sites).
- (6) *Pub.Res.C. 5700* et seq. (community Parkland Fund to preserve and develop local parks and recreational areas).

(7) *Pub.Res.C. 5640* et seq. (local assistance program offering grants for acquisition and development of urban parks and recreational areas and facilities).

(8) *Pub.Res.C. 5090.01* et seq. (Off-Highway Motor Vehicle Recreation Act of 2003). (See 15 *Ecology L. Q.* 159.)

Land acquired by local entities from tax revenues for streets and highways and related purposes, when no longer required for those purposes, may "be used for local public park and recreational purposes." (Cal. Const., Art. XIX, §8.) Cal. Const., Art. XIX, §9 authorizes the transfer of surplus state property located in the coastal zone to the Department of Parks and Recreation for state park purposes. (See *Citizens for Hatton Canyon v. Department of Trans.* (2003) 112 C.A.4th 838, 842, 5 C.R.3d 480 [transfer of land from Department of Transportation to Department of Parks and Recreation for use as state park was consistent with Cal. Const., Art. XIX, §9, even though most of land was outside coastal zone].)

SUPPLEMENT: [This section is current through the latest supplement]

Other statutes:

(9) (New) *Sierra Nevada conservancy: Pub.Res.C. 33300* et seq., added in 2004 (creation of Sierra Nevada conservancy to provide increased opportunities for tourism and recreation and to protect, conserve, and restore region's physical, cultural, archaeological, historical, and living resources). (See 36 *McGeorge L. Rev.* 895 [discussing whether conservancy is best way to save Sierra Nevada region].)



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4. Land Resources.
d. Wilderness Areas.

12 Witkin Sum. Cal. Law Real Property § 883

[§ 883] Wilderness Areas.

"State wildernesses" are areas "where the earth and its community of life are untrammelled by man and where man himself is a visitor who does not remain." (*Pub.Res.C. 5019.68* [qualifications]; see *Pub.Res.C. 5093.30* et seq. [California Wilderness Act].) Other legislation is similarly directed towards preserving untouched areas, including the following:

- (1) *Fish & Game C. 1580* et seq. (ecological reserves).
- (2) *Pub.Res.C. 14000* et seq. (California Conservation Corps.)
- (3) *Pub.Res.C. 5093.50* et seq. (California Wild and Scenic Rivers Act).
- (4) *C.C.P. 1240.690* (protection of wildlife areas from condemnation for highway use).
- (5) *16 U.S.C., §1131* et seq. (federal Wilderness Act).

Commentary on wilderness preservation is extensive. (See 8 *Cal. Western L. Rev.* 488 [conflicts between conservationists and Army Corps of Engineers]; 3 *Ecology L. Q.* 145 [U.S. Forest Service and wilderness preservation]; 14 *Ecology L. Q.* 639 [duty of agencies to assert reserved water rights in wilderness areas]; 15 *Ecology L. Q.* 249 [legal framework of wilderness management]; 15 *Ecology L. Q.* 319 [effect of hydropower developments]; 19 *Ecology L. Q.* 445, 454 [streamflows]; 29 *Ecology L. Q.* 457 [National Wildlife Refuge System].)

SUPPLEMENT: [This section is current through the latest supplement]

Commentary: See 32 *Ecology L. Q.* 391 [Supreme Court's failure to enforce federal Wilderness Act].



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CHAPTER XVII - Real Property

Witkin Summary of California Law
XIII. ENVIRONMENTAL REGULATION OF REAL PROPERTY
B. Resource Conservation and Management.
4. Land Resources.
e. Forests.

12 Witkin Sum. Cal. Law Real Property § 884

[§ 884] Forests.

(1) *Forest Practices Act*. A substantial body of legislation deals with management of forest products. The primary statute is the Z'berg-Nejedly Forest Practices Act of 1973 (*Pub.Res.C. 4511 et seq.*), which regulates the use of timberland to assure sustained productivity. (See *Bayside Timber Co. v. Board of Supervisors of San Mateo* (1971) 20 C.A.3d 1, 14, 97 C.R. 431 [predecessor statute].) A number of decisions interpret and apply the Forest Practices Act:

Public Resources Protection Assn. v. Department of Forestry & Fire Protection (1994) 7 C.4th 111, 118, 27 C.R.2d 11, 865 P.2d 728 [timber-harvesting plan compliance with state regulations protecting spotted owl]. (See 23 *Pepperdine L. Rev.* 317.)

Sierra Club v. State Bd. of Forestry (1994) 7 C.4th 1215, 1228, 32 C.R.2d 19, 876 P.2d 505 [Department of Forestry has authority under CEQA to request information that is necessary to identify impacts of timber-harvesting plan, but not specified in forest practice rules]. (See 22 *Pepperdine L. Rev.* 1266.)

Natural Resources Defense Council v. Arcata Nat. Corp. (1976) 59 C.A.3d 959, 967, 131 C.R. 172 [EIR required for approval of timber-harvesting plan].

Environmental Protection Information Center v. Johnson (1985) 170 C.A.3d 604, 614, 216 C.R. 502 [CEQA applies to timber harvesting under Forest Practices Act].

Laupheimer v. California (1988) 200 C.A.3d 440, 456, 460, 246 C.R. 82 [due process and equal protection challenges to hearing procedures rejected; approval of second of two timber-harvesting plans ordered set aside for failure to analyze cumulative impact]. (See 41 *Hastings L. J.* 745 [criticizing *Laupheimer*].)

Lexington Hills Assn. v. California (1988) 200 C.A.3d 415, 246 C.R. 97 [after timber-harvesting plan was approved, Caltrans properly issued encroachment permits giving logging trucks access to highway without complying with CEQA; following *Laupheimer*].

T.R.E.E.S. v. Department of Forestry & Fire Protection (1991) 233 C.A.3d 1175, 1179, 285 C.R. 26 [Department of Forestry has no duty to require timber owner to amend timber-harvesting plan and cannot be compelled to do so by

mandamus].

Dakin v. Department of Forestry & Fire Protection (1993) 17 C.A.4th 681, 686, 21 C.R.2d 490 [analyzing applicability of CEQA procedural provisions to review of timber-harvesting plan approval].

Environmental Protection Information Center v. Department of Forestry & Fire Protection (1996) 43 C.A.4th 1011, 1022, 50 C.R.2d 892 [forestry regulation purporting to exempt timber operations on small parcels from preparation of timber harvesting plan was not authorized by Forest Practice Act].

Friends of the Old Trees v. Department of Forestry & Fire Protection (1997) 52 C.A.4th 1383, 1395, 61 C.R.2d 297 [Department of Forestry abused its discretion by approving timber-harvesting plan without cumulative impacts analysis, particularly by failing to consider impact on local water supply in combination with other nearby activities].

Hewlett v. Squaw Valley Ski Corp. (1997) 54 C.A.4th 499, 523, 63 C.R.2d 118 [ski resort operators who cut down trees without timber-harvesting plan violated Forest Practice Act and committed unlawful business practice; there was ample evidence that operators cut trees intending to sell lumber].

Schoen v. Department of Forestry & Fire Protection (1997) 58 C.A.4th 556, 575, 68 C.R.2d 343 [department abused discretion in approving logging company's analysis of cumulative impacts as minor deviations].

Westhaven Community Dev. Council v. Humboldt (1998) 61 C.A.4th 365, 368, 71 C.R.2d 536 [Forest Practice Act preempts county ordinance requiring local permit for timber operations where operations are to occur on three or more acres].

Santa Cruz v. State Bd. of Forestry (1998) 64 C.A.4th 826, 830, 75 C.R.2d 393 [regulation that excuses timber owners and operators experiencing financial emergency from compliance with normal timber-harvesting requirements was within scope of board's authority; distinguishing *Environmental Protection Information Center v. Johnson*].

Redwood Coast Watersheds Alliance v. State Bd. of Forestry & Fire Protection (1999) 70 C.A.4th 962, 969, 83 C.R.2d 24 [State Board of Forestry had mandatory duty under Forest Practice Act to enact regulations to ensure maximum sustained production of high-quality timber products].

Ebbetts Pass Forest Watch v. Department of Forestry & Fire Protection (2004) 123 C.A.4th 1331, 1346, 20 C.R.3d 808 [timber-harvesting plans were properly approved; timber company's choice of geographical area to assess was appropriate, department properly considered information from federal agencies and adequately responded to public comments, and department properly assessed plans' cumulative impacts and impacts of herbicide use].

(2) *Other Statutes.* The following are among other statutes governing the use of forest land and products in California:

(a) The Forest and Rangeland Resources Assessment and Policy Act of 1977 (*Pub.Res.C. 4789 et seq.*) requires the Director of Forestry and the State Board of Forestry to prepare and implement a periodic assessment of forest resources and management.

(b) The Wild Land Fire Protection and Resource Management Act of 1978 (*Pub.Res.C. 4461 et seq.*) establishes an experimental program for fire protection.

(c) The California Forest Improvement Act of 1978 (*Pub.Res.C. 4790 et seq.*) provides a program of loans and technical assistance to improve timber productivity.

(d) The California Timberland Productivity Act of 1982 (*Govt.C. 51100 et seq.*) provides for the creation of timberland production zones, which are restricted to growing and harvesting timber and compatible uses. The method of taxing timberland has been substantially revised to encourage conservation and sound forestry practices. (See 9

Summary (10th), *Taxation*, §225.)

(e) *Food & Ag.C. 77501* et seq. create the California Forest Products Commission so that producers of forest products can benefit from collective action in generic product promotion, public information and education, and research. (*Food & Ag.C. 77507*.)

(f) The California Forest Legacy Program Act of 2000 (*Pub.Res.C. 12200* et seq.) establishes a program to conserve private forest lands. The Department of Forestry and Fire Protection is authorized to acquire conservation easements (*Pub.Res.C. 12240*) of eligible properties according to specified criteria (*Pub.Res.C. 12251, 12260*). The acquired conservation easements are to be held by federal and state agencies, local governments, and nonprofit land trust organizations. (*Pub.Res.C. 12244*.) The Act expires on January 1, 2007. (*Pub.Res.C. 12291*.) (See 32 *McGeorge L. Rev.* 632 [analysis of Act].)

(3) *Commentary*. Commentary on the management of forests is extensive. (See 50 *Cal. L. Rev.* 381 [federal forest administration]; 5 *Ecology L. Q.* 139 [regulation of private logging]; 7 *Ecology L. Q.* 781 [preservation of Redwood National Park]; 10 *Ecology L. Q.* 507 [role of Forest Service in ski resort development]; 25 *Ecology L. Q.* 624 [argument against enlarging role of local communities in managing public forests]; 25 *Ecology L. Q.* 630 [formal and informal claims to federal forest lands]; 29 *Ecology L. Q.* 747 [community based planning and management in Sierra Nevada forests]; 25/26 *Lincoln L. Rev.* 71 [impact of California Supreme Court's depublication practice on development of published case law interpreting Forest Practice Act].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Forest Practices Act. Pub.Res.C. 4514(c)*, part of the Act's savings clause, provides that no provision of the Act or any ruling, requirement, or policy of the State Board of Forestry and Fire Protection limits the power of any state agency in the enforcement or administration of a law that the agency is specifically authorized or required to administer or enforce. Thus, the Act and its regulations are not the exclusive mechanism through which the State Water Resources Control Board and the Regional Water Quality Control Boards may address water quality control concerns implicated by logging operations under a timber harvesting plan. (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 *C.4th* 921, 930, 38 *C.R.3d* 220, 126 *P.3d* 1040 [water boards could order timber harvester to adopt water quality program that had not been required by Department of Forestry].)

The following decisions interpret and apply the Act:

Big Creek Lumber Co. v. Santa Cruz (2006) 38 *C.4th* 1139, 1150, 45 *C.R.3d* 21, 136 *P.3d* 821 [county zoning ordinances relating to permissible locations for timber operations, rather than to manner in which operations may be conducted, were not preempted by Forest Practices Act or by Timberland Productivity Act].

Ebbetts Pass Forest Watch v. California Dept. of Forestry & Fire Protection (2008) 43 *C.4th* 936, 945, 951, 77 *C.R.3d* 239, 183 *P.3d* 1210 [timber harvesting plans adequately analyzed potential cumulative impacts on two species, even though they did not explicitly designate different assessment areas for each, where plans clearly analyzed impacts on broad scale; plans also adequately analyzed effect of herbicide use by extensively discussing potential impacts, mitigation measures, and alternatives].

Environmental Protection & Information Center v. California Dept. of Forestry & Fire Protection (2008) 44 *C.4th* 459, 491, 80 *C.R.3d* 28, 187 *P.3d* 888 [sustained yield plan, which was supplement to timber harvest plan process, should not have been approved where no single, agreed upon plan had been submitted; on resubmission, plan should analyze cumulative impacts of timber harvesting at individual watershed planning level].

Cockshott v. Department of Forestry & Fire Protection (2004) 125 *C.A.4th* 235, 238, 22 *C.R.3d* 675 [statute of limitations governing petition for administrative mandamus challenging decision of Board of Forestry and Fire Protection is set forth in *Pub.Res.C. 4601.3(a)*, rather than *Govt.C. 11523*; *Pub.Res.C. 4601.3(a)* is special statute

applicable to judicial review of actions undertaken by board, whereas *Govt.C. 11523* is general statute, applicable to wide variety of administrative procedures].(2) *Other Statutes*.

(d) *Timberland Productivity Act*: See *Big Creek Lumber Co., supra.*(f) *California Forest Legacy Program Act*: The California Forest Legacy Program Act of 2007 was enacted in 2007. (*Pub.Res.C. 12200* et seq., added in 2007.) It is substantially similar to the previous Act, which expired on January 1, 2007. The new Act will expire on January 1, 2015. (*Pub.Res.C. 12292*, added in 2007.)

(3) *Commentary*. See *31 Ecology L. Q.* 639 [criticism of Healthy Forests Restoration Act, which seeks to solve wildfire problem through prescribed burning and hazardous fuel reduction projects].



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CHAPTER XVII - Real Property

Witkin Summary of California Law XIII. ENVIRONMENTAL REGULATION OF REAL PROPERTY B. Resource Conservation and Management. 5. Animals and Wildlife. a. Endangered Species Acts.

12 Witkin Sum. Cal. Law Real Property § 885

[§ 885] Endangered Species Acts.

(1) *California Statute.* The California Endangered Species Act (*Fish & Game C. 2050 et seq.*) provides for lists of endangered species and regulates their import, export, taking, possession, and sale. (See *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 C.4th 105, 65 C.R.2d 580, 939 P.2d 1280, supra, §850 ["delisting" of species requires compliance with CEQA]; *Natural Resources Defense Council v. Fish & Game Com.* (1994) 28 C.A.4th 1104, 1111, 33 C.R.2d 904 [overview of California Endangered Species Act; evidentiary standard for Commission's decision on listing species as candidate for protection under *Fish & Game C. 2074.2* is "substantial possibility" that requested listing could occur]; 57 So. Cal. L. Rev. 361.)

(2) *Federal Statute.* The federal Endangered Species Act (16 U.S.C., §1531 et seq.) has been the subject of numerous cases and much commentary. (See *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351, 7 Summary (10th), *Constitutional Law*, §139 [standing requirements]; *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* (1995) 515 U.S. 687, 115 S.Ct. 2407, 2412, 132 L.Ed.2d 597, 610 [Act gives Secretary of Interior authority to interpret prohibition on taking of species to include some habitat modification]; 109 Harv. L. Rev. 299 [Sweet Home]; 24 Pepperdine L. Rev. 695 [Sweet Home]; 88 Cal. L. Rev. 2375 [strategy for preserving Act; key legal issues encountered in enforcing Act]; 21 Ecology L. Q. 243 [consultation provision of Act and delegable federal programs]; 21 Ecology L. Q. 1007 [Act's impact on pumping from Edwards Aquifer in Texas]; 23 Ecology L. Q. 369 [suggestions for streamlining process of developing habitat conservation plans under federal Act]; 27 Ecology L. Q. 215 [constitutional analysis of Act under Commerce Clause and Treaty Power]; 30 Ecology L. Q. 279 [conflict between irrigation and federal Act in Klamath Basin]; 30 Ecology L. Q. 497 [weakening of "take" provisions of Act]; 30 Ecology L. Q. 593 [deadlines for listing species as endangered or threatened]; 33 Golden Gate L. Rev. 447 [responding to attacks on critical habitat designations under Act]; 22 Hastings Const. L. Q. 771 [conflict between protection of eagles and Native American free exercise of religion]; 28 Hastings Const. L. Q. 167 [using Congress' power under Property Clause, in absence of power under Commerce Clause, to uphold Act]; 39 Hastings L. J. 399 [regulated taking of threatened species]; 52 Hastings L. J. 1149 [need for legislation, beyond federal Endangered Species Act, to protect "hotspots," ecosystems with very high concentration of species]; 25 Pacific L. J. 157 [threats to vitality of Act]; 25 Pacific L. J. 1107 [federal Act and water resources development in California]; 22 Stanf. L. Rev. 1289 [federal programs regarding endangered species]; 21 Southwestern U. L. Rev. 991 [threats to vitality of Act]; 171

A.L.R. Fed 419 [attorneys' fees under 16 U.S.C., §1540(g)(4)]; 176 *A.L.R. Fed* 405 [designation of critical habitat under federal Act].)

P.C. 653o et seq. provide criminal penalties for the importation, possession, and sale of endangered species, and apply to all species protected by the federal Endangered Species Act.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *California Statute*. See *Environmental Protection & Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 C.4th 459, 506, 80 C.R.3d 28, 187 P.3d 888 [permit allowing lumber company to take particular endangered species was invalid, where permit's "no surprises" clauses assured company that it would not be required to perform additional mitigation measures, even if unforeseen circumstances arose]; *Environmental Council of Sacramento v. Sacramento* (2006) 142 C.A.4th 1018, 1042, 48 C.R.3d 544 [habitat conservation plan complied with California act; evidence was sufficient to support agency's finding that plan would minimize and fully mitigate incidental take of hawks and snakes, that permits would not jeopardize continued existence of either species, and that mitigation measures would be adequately funded]; *California Forestry Assn. v. California Fish & Game Com.* (2007) 156 C.A.4th 1535, 1544, 1549, 68 C.R.3d 391 [evolutionarily significant units of coho salmon were properly listed as endangered species; units were endangered throughout California range and did not have to be endangered worldwide]; *Center for Biological Diversity v. California Fish & Game Com.* (2008) 166 C.A.4th 597, 609, 82 C.R.3d 855 [Commission erred in rejecting petition to list tiger salamander under *Fish & Game C.* 2074.2, where evidence showed substantial possibility that listing could occur; salamander did not breed prolifically, was vulnerable to several significant threats, had lost most of its original habitat, and had been displaced by hybrid from significant portion of its region; citing *Natural Resources Defense Council v. Fish & Game Com.* (1994) 28 C.A.4th 1104, 33 C.R.2d 904, text, p. 1063].

(2) *Federal Statute*. See 95 *Cal. L. Rev.* 513 [standing for nonhuman animals]; 31 *Ecology L. Q.* 459 [Commerce Clause challenges to Act]; 39 *U.S.F. L. Rev.* 789 [same]; 32 *Ecology L. Q.* 73 [scientific analysis of Act and irrigation in upper Klamath basin]; 32 *Ecology L. Q.* 575 [role of international boundaries under Act]; 32 *Ecology L. Q.* 821 [need for constitutional amendment to empower Congress to preserve, protect, and promote environment]; 36 *Golden Gate L. Rev.* 431 [case for narrowing agency discretion to interpret "significant portion" of endangered species' habitat]; 36 *Golden Gate L. Rev.* 489 [constitutional framework beyond Commerce Clause for protecting endangered species]; 39 *McGeorge L. Rev.* 299 [Endangered Species Act and "best available science" mandate]; 89 *Proof of Facts* 3d 125 [citizens' suits under Act]. *Criminal penalties under state law*: See *Viva! Int. Voice for Animals v. Adidas Promotional Retail Operations* (2007) 41 C.4th 929, 940, 63 C.R.3d 50, 162 P.3d 569 [P.C. 653o, which prohibits importation and sale of kangaroo products in California, is not preempted by federal law or federal management practices; federal law neither prohibits nor authorizes importation of kangaroo products and thus 16 U.S.C., §1535(f) grants states room to regulate].



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B. Resource Conservation and Management.

5. Animals and Wildlife.

b. Wildlife Conservation.

12 Witkin Sum. Cal. Law Real Property § 886

[§ 886] Wildlife Conservation.

A number of other statutes are directed at wildlife conservation and the protection of native species:

(1) *Fish & Game C. 1300 et seq.* (Wildlife Conservation Law of 1947).

(2) *Fish & Game C. 1360 et seq.* (Oak Woodlands Conservation Act).

(3) *Fish & Game C. 1385 et seq.* (California Riparian Habitat Conservation Act).

(4) *Fish & Game C. 1400 et seq.* (Inland Wetlands Conservation Program).

(5) *Fish & Game C. 1600 et seq.* (fish and wildlife protection). (See *People v. Weaver* (1983) 147 C.A.3d Supp. 23, 35, 197 C.R. 521; *People v. Murrison* (2002) 101 C.A.4th 349, 357, 124 C.R.2d 68 [landowner who diverted creek water had to notify Department of Fish and Game under former Fish & Game C. 1603 (now *Fish & Game C. 1602*), even though he claimed that his water rights predated 1914, year of enactment of Water Commission Act; only substantive difference between appropriative water rights obtained before 1914 and those obtained after 1914 is that post-1914 rights must go through administrative process before State Water Resources Control Board; neither is exempt from police power to protect wildlife]; *People v. Osborn* (2004) 116 C.A.4th 764, 769, 772, 11 C.R.3d 14 [suction dredger had to notify department of his activity under former Fish & Game C. 1603 (now *Fish & Game C. 1602*), even though he possessed valid suction dredge permit under *Fish & Game C. 5653*]; on other statutes regulating fish in particular, see *infra*, §887.)

(6) *Fish & Game C. 1750 et seq.* (Native Species Conservation and Enhancement Act).

(7) *Fish & Game C. 1770 et seq.* (Endangered and Rare Fish, Wildlife, and Plant Species Conservation and Enhancement Account to support programs for endangered and rare animals and native plant species). (On taxpayer contributions to Account, see *Rev.C. 18741 et seq.*)

(8) *Fish & Game C. 1800 et seq.* (conservation of wildlife resources).

(9) *Fish & Game C. 1900 et seq.* (native plant protection).

(10) *Fish & Game C. 2116 et seq.* (importation, transportation, and sheltering of restricted wild animals). (See *24 Pacific L. J. 878.*)

(11) *Fish & Game C. 2800 et seq.* (Natural Community Conservation Planning Act).

(12) *Fish & Game C. 2900, 2901* (Habitat Maintenance Funding Act; provisions for assessments are in *Govt.C. 50060 et seq.*).

(13) *Food & Ag.C. 80001 et seq.* (California Desert Native Plants Act; applicable only in certain southern California counties).

(14) *Water C. 1243* (fish and wildlife conservation as factor in consideration of water appropriation permits).

Commentary on the protection of endangered species is plentiful. (See *11 Ecology L. Q. 267* [protection of endangered species in Canada]; *10 Ecology L. Q. 5* [state damages for fish and wildlife losses caused by pollution]; *24 San Diego L. Rev. 243* [habitat conservation]; *65 So. Cal. L. Rev. 2039* [protection of ecosystems to preserve biological diversity]; *47 Stanf. L. Rev. 319* [same]; *44 A.L.R.3d 1008* [statutes prohibiting sale of skin or body of specified wild animals].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Center for Biological Diversity v. FPL Group (2008) 166 C.A.4th 1349, 1359, 83 C.R.3d 588* [public trust doctrine applies to wildlife, including birds, and can be enforced by private citizens].

Other statutes:(5) *Fish & Game C. 1600 et seq.*: See *Environmental Protection & Information Center v. California Dept. of Forestry & Fire Protection (2008) 44 C.4th 459, 518, 80 C.R.3d 28, 187 P.3d 888* [no agency findings were required prior to streambed alteration agreement under former *Fish & Game C. 1603* (now *Fish & Game C. 1602*)].



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B. Resource Conservation and Management.

5. Animals and Wildlife.

c. Fish and Marine Mammals.

12 Witkin Sum. Cal. Law Real Property § 887

[§ 887] Fish and Marine Mammals.

(1) *Fish and Fishing.* The conservation of fish and the management of fishing are regulated by the Fish and Game Code. (See *Fish & Game C. 1725* et seq. [trout and steelhead management and conservation], *Fish & Game C. 1740* et seq. [black bass conservation and management]; *4 Ecology L. Q. 319* [international regulation of fisheries]; *29 Ecology L. Q. 71* [using National Marine Sanctuaries Act and Antiquities Act to establish fishery reserves and fishery management zones]; *49 So. Cal. L. Rev. 569* [California coastal fisheries management]; *55 So. Cal. L. Rev. 641* [Magnuson Fishery Conservation and Management Act of 1976 (*16 U.S.C., §1801* et seq.)]; *60 So. Cal. L. Rev. 585* [harvesting ocean's resources of oil and fish].) The Shellfish Protection Act of 1993 (*Water C. 14950* et seq.) was enacted to protect commercial shellfish growing areas from the effects of water pollution. (On other statutes regulating fish as part of general wildlife protection, see *supra*, §886.)

(2) *Marine Mammals.* Whales and other marine mammals are subject to regulatory protection. (See *Fish & Game C. 3002* [prohibition against shooting marine mammals from boat]; *Fish & Game C. 4500* [prohibition against taking of marine mammals]; *16 U.S.C., §916* et seq. [Whaling Convention Act]; *16 U.S.C., §1361* et seq. [Marine Mammal Protection Act of 1972]; *P.C. 6530* et seq. [criminal penalties for importation, possession, and sale of marine mammal protected by federal act]; *Japan Whaling Assn. v. American Cetacean Soc. (1986) 478 U.S. 221, 106 S.Ct. 2860, 92 L.Ed.2d 166* [Whaling Convention Act]; *People v. K. Sakai Co. (1976) 56 C.A.3d 531, 535, 128 C.R. 536* [P.C. 6530; penalty for selling imported whale meat]; *6 Ecology L. Q. 323, 571* [international management of whales, dolphins and porpoises]; *14 Ecology L. Q. 485* [Japan Whaling Assn.]; *21 Ecology L. Q. 1* [demise of trade sanctions to protect endangered marine species]; *16 San Diego L. Rev. 249* [California sea otter].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Fish and Fishing.* See *30 A.L.R. Fed 2d 411* [Magnuson Fishery Conservation and Management Act provision for national standards for conservation and management of fisheries]; *31 A.L.R. Fed 2d 337* [preemption of state and local regulations by Magnuson Fishery Conservation and Management Act].

(2) *Marine Mammals.* See *Coastside Fishing Club v. California Resources Agency (2008) 158 C.A.4th 1183, 1193, 1194, 71 C.R.3d 87* [Marine Life Protection Act (*Fish & Game C. 2850* et seq.) authorized Department of Fish and Game to enter into memorandum of understanding with private foundation, through which department would receive

funding to comply with its mandates; private funding was not impermissible gift to state, and entering into memorandum of understanding did not violate doctrine of separation of powers].



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Witkin Summary of California Law XIII. ENVIRONMENTAL REGULATION OF REAL PROPERTY

B. Resource Conservation and Management.

6. Minerals and Energy.

a. Mining, Oil, and Gas.

12 Witkin Sum. Cal. Law Real Property § 888

[§ 888] Mining, Oil, and Gas.

(1) *Mining and Mineral Rights.* The Surface Mining and Reclamation Act of 1975 (*Pub.Res.C. 2710 et seq.*) regulates mining and provides for the reclamation of mined lands. (See *Ukiah v. Mendocino* (1987) 196 C.A.3d 47, 57, 241 C.R. 585 [gravel company's reclamation plan, which relied on natural processes and required only collection and reporting of data, complied with *Pub.Res.C. 2710 et seq.*].) Under *Pub.Res.C. 6401 et seq.*, oil, gas, and mineral rights in public lands are reserved to the state.

(2) *Oil and Gas Resources.* *Pub.Res.C. 3000 et seq.* provide for the conservation of petroleum resources and for proper drilling techniques to avoid surface subsidence under the administration of oil and gas commissions in six state districts (*Pub.Res.C. 3100 et seq.*). (See *Long Beach v. Vickers* (1961) 55 C.2d 153, 155, 10 C.R. 359, 358 P.2d 687 [*Pub.Res.C. 3315 et seq.*, authorizing unitary operation of tideland oil production, were valid]; on civil penalties for violation of regulations, see *Pub.Res.C. 3236.5*; on "hazardous wells" and "idle-deserted wells," see *Pub.Res.C. 3250 et seq.*; *Wells Fargo Bank v. Goldzband* (1997) 53 C.A.4th 596, 604, 61 C.R.2d 826 [mineral rights owner who derived substantial financial benefit from nine "idle-deserted" oil wells was responsible for plugging and abandoning them].) (See 1 *Ecology L. Q.* 749 [taxation as means of oil conservation]; 2 *Ecology L. Q.* 118 [oil prorationing]; 11 *Ecology L. Q.* 401 [federal regulation of offshore oil and gas development].)

(3) *Well-Spacing and Unitized Operation.* *Pub.Res.C. 3600 et seq.* and *3630 et seq.* regulate the spacing of wells and the operation of oil and gas fields on a unitized basis. (See *Richfield Oil Corp. v. Crawford* (1952) 39 C.2d 729, 734, 249 P.2d 600 [well-spacing]; *Western Gulf Oil Co. v. Superior Oil Co.* (1949) 92 C.A.2d 299, 311, 206 P.2d 944 [in absence of statute, court cannot compel unitization of field to insure proper repressuring]; 65 *Harv. L. Rev.* 1155 [conservation by proration, well-spacing, pooling, and unitization]; 7 *U.C.L.A. L. Rev.* 312 [compulsory unitization].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Mining and Mineral Rights.* See *People v. El Dorado* (2005) 36 C.4th 971, 983, 32 C.R.3d 109, 116 P.3d 567 [director of Department of Conservation had standing to challenge reclamation plans and financial assurances approved by county under *Pub.Res.C. 2710 et seq.*]; *Save Our Sunol v. Mission Valley Rock Co.* (2004) 124 C.A.4th 276, 281, 21 C.R.3d 171 [county's issuance of permit under *Pub.Res.C. 2770(a)* constituted approval of quarry project; thus, later enacted initiative, requiring voter approval of projects that had not already been approved by county, did not apply to

quarry project]; *Mineral Assns. Coalition v. State Mining & Geology Bd.* (2006) 138 C.A.4th 574, 583, 41 C.R.3d 544 [regulation requiring concurrence of Director of Conservation before lead agency approves reclamation and releases financial assurances did not conflict with Surface Mining and Reclamation Act; citing *People v. El Dorado*]; *Calvert v. Yuba* (2006) 145 C.A.4th 613, 622, 633, 51 C.R.3d 797 [when county determined, without notice and hearing, that mining operator had vested right to mine without permit, county violated procedural due process rights of other interested parties; public hearing would have to be held before mining could continue; private parties could not, however, seek injunction against mining operator]; 31 *Ecology L. Q.* 795 [federal enforcement and liability for environmental consequences of hard rock mining].



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CHAPTER XVII - Real Property

Witkin Summary of California Law XIII. ENVIRONMENTAL REGULATION OF REAL PROPERTY B. Resource Conservation and Management. 6. Minerals and Energy. b. Energy Resources.

12 Witkin Sum. Cal. Law Real Property § 889

[§ 889] Energy Resources.

(1) *Statutes.* The following statutes are illustrative of legislation regulating the development and conservation of energy resources:

(a) *Govt.C. 4217.10 et seq.* (development of energy conservation, cogeneration, and alternate energy supply sources at public agency facilities).

(b) *Govt.C. 52000 et seq.* (local comprehensive energy planning).

(c) *Health & Saf.C. 41515 et seq.* (cogeneration technology and resource recovery projects).

(d) *Pub.Res.C. 25000 et seq.* (State Energy Resources Conservation and Development Act); *Pub.Res.C. 25901* (30-day statute of limitations for filing petition for review of Energy Resources Conservation and Development Commission's determination under *Pub.Res.C. 25000 et seq.*). (See *Department of Water & Power v. Energy Resources Conservation & Dev. Com.* (1991) 2 C.A.4th 206, 214, 3 C.R.2d 289 [*Pub.Res.C. 25500* gives Energy Resources Conservation and Development Commission jurisdiction over construction and modification of thermal power plants]; *Figueroa v. California Energy Resources Conservation & Dev. Com.* (2003) 110 C.A.4th 1115, 1119, 2 C.R.3d 376 [30-day limitations period of *Pub.Res.C. 25901* did not begin until 30 days after Commission filed its decision, as specified in decision]; *Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 C.A.4th 861, 878, 13 C.R.3d 420 [under *Pub.Res.C. 25500*, Commission certificate constitutes only state, local, or regional approval necessary to construct and operate power plant]; 6 *Pacific L. J.* 329.)

(e) *Pub.Res.C. 25410 et seq.* (energy conservation assistance).

(f) *Pub.Res.C. 25630 et seq.* (Small Business Energy Technology Loan Program).

(g) *Pub.Res.C. 25910 et seq.* (standards for insulation materials). (See 9 *Pacific L. J.* 543; 11 *Pacific L. J.* 517.)

(h) *Pub.Res.C. 26000 et seq.* (California Alternative Energy and Advanced Transportation Financing Authority Act).

(i) *Pub.Res.C. 35000* (Coastal Resources and Energy Assistance Act).

(j) *Pub.Res.C. 25645 et seq.* (Energy Research, Development, Demonstration, and Commercialization Act of 1993).

(k) *Pub.Res.C. 25620.10* (requires State Energy Resources Conservation and Development Commission to develop grant program to offset the cost of eligible distributed generation systems (*Pub.Res.C. 25620.10(a)*), such as microcogeneration, gas turbines, fuel cells, electricity storage technologies other than solar systems under *Pub.Res.C. 25619* (*infra*, §890) and reciprocating internal combustion engines).

(l) *Pub.Res.C. 25425 et seq.* (Energy Conservation Act of 2001; establishes energy efficiency incentives in form of grants and loans to low-income residents, small businesses, and residential property owners).

(m) *Pub.Res.C. 3700 et seq.* (development of geothermal power resources); *Pub.Res. C. 3754.5* (civil penalties for violation of geothermal regulations).

(n) *Pub.Res.C. 6901 et seq.* (Geothermal Resources Act). (See *Post v. Prati* (1979) 90 C.A.3d 626, 635, 153 C.R. 511 [Act is constitutional].)

(o) *Pub.Res.C. 25524.1 et seq.* (*infra*, §910) (nuclear power plant siting).

(2) *Commentary.* The development and conservation of energy resources is the subject of extensive comment. (See 8 *Ecology L. Q.* 725 [energy law and environment]; 15 *Ecology L. Q.* 103 [government's role in developing California's wind energy industry]; 100 *Harv. L. Rev.* 1002 [use of regulatory process to secure public consent for development of electricity]; 28 *Hastings L. J.* 1075 [energy and the law]; 33 *Hastings L. J.* 427 [classification and use of water produced at geothermal resource]; 8 *Pacific L. J.* 349 [energy from solid waste]; 13 *Pacific L. J.* 1301 [regulating wind access in California]; 18 *Pacific L. J.* 1225 [state and federal regulation of hydroelectric projects]; 13 *San Diego L. Rev.* 253 [impact of energy development on coastal environment]; 22 *Santa Clara L. Rev.* 1151 [introduction to energy law and policy]; 54 *So. Cal. L. Rev.* 767 [ocean thermal energy conversion]; 22 *Stanf. L. Rev.* 1073 [power plant and transmission regulation by Federal Power Commission]; 32 *Stanf. L. Rev.* 373 [state and local control of energy development on federal lands]; 18 *U.C. Davis L. Rev.* 287 [federal incentives for hydroelectric power projects]; 18 *U.C. Davis L. Rev.* 321 [interagency conflicts over hydroelectric power regulation]; 24 *U.C.L.A. L. Rev.* 1313 [California Energy Commission and power plant siting].)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XVII - Real Property

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XIII. ENVIRONMENTAL REGULATION OF REAL PROPERTY
B. Resource Conservation and Management.
6. Minerals and Energy.
c. Solar Power.

12 Witkin Sum. Cal. Law Real Property § 890

[§ 890] Solar Power.

Solar power is an important present and future source of energy for California. (See 67 *Cal. L. Rev.* 350 [solar energy and restricting covenants]; 28 *Cal. Western L. Rev.* 57 [symposium on alternative fuels]; 11 *Ecology L. Q.* 47 [nuisance action available in Wisconsin to prevent obstruction of solar access]; 7 *Golden Gate L. Rev.* 765 [protecting solar access]; 32 *Hastings L. J.* 1 [encouraging solar energy development through state and federal tax incentives]; 9 *Pacific L. J.* 543 [solar energy tax credits]; 17 *San Diego L. Rev.* 355 [solar energy in California]; 28 *U.C.L.A. L. Rev.* 1 [planning a transition to solar]; on solar easements, see *supra*, §385.)

Pub.Res.C. 25619 requires the State Energy Resources Conservation and Development Commission to develop a grant program to offset a portion of the cost of eligible solar energy systems (*Pub.Res.C. 25619(a)*), which are new, previously unused solar energy devices that are primarily meant to provide for the collection, conversion, transfer, distribution, storage, or control of solar energy for water heating or electricity generation (*Pub.Res.C. 25619(g)(2)(A)*). *Pub.Res.C. 25619* expires on January 1, 2006. (*Pub.Res.C. 25619(h)*.) Other statutes designed to optimize use of solar power include the following:

- (1) *Health & Saf.C. 53000* et seq. (Solar and Energy Conservation Mortgage Corporation Act of 1981).
- (2) *Pub.Res.C. 25603.5* (passive solar design competition).
- (3) *Pub.Res.C. 25980* et seq. (Solar Shade Control Act).

SUPPLEMENT: [This section is current through the latest supplement]

- (4) (*New*) *Water heating: Pub.Util.C. 2860* et seq. (Solar Water Heating and Efficiency Act).



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XIII. ENVIRONMENTAL REGULATION OF REAL PROPERTY
C. Pollution Control.
1. In General.

12 Witkin Sum. Cal. Law Real Property § 891

[§ 891] In General.

(1) *Forms of Pollution.* Pollution comes from numerous sources and takes many forms. (See 89 Cal. L. Rev. 917 [rethinking assumption that business firms are rational polluters]; 30 Hastings L. J. 301 [industrial siting and pollution]; 61B Am.Jur.2d (1999 ed.), Pollution Control §1 et seq.) Specific forms of pollution are discussed in more detail in this topic, as follows:

- (a) Water pollution. (See infra, §892 et seq.)
- (b) Air pollution. (See infra, §897 et seq.)
- (c) Hazardous waste. (See infra, §903 et seq.)
- (d) Solid waste. (See infra, §908 et seq.)
- (e) Radiation and nuclear waste. (See infra, §910 et seq.)
- (f) Pesticides and other toxic chemicals. (See infra, §911.)
- (g) Noise. (See infra, §912 et seq.)

(2) *Federal and State Regulation.* Environmental pollution is regulated by both federal and state law. (See *Lake Carriers' Assn. v. MacMullan* (1972) 406 U.S. 498, 92 S.Ct. 1749, 32 L.Ed.2d 257 [state water pollution law attacked as inconsistent with federal requirements]; 85 Harv. L. Rev. 1439 [application of federal law to interstate pollution problems]; 87 Harv. L. Rev. 1762 [state environmental protection legislation and Commerce Clause]; 115 Harv. L. Rev. 553 [federalism and environmental regulation]; 22 Hastings L. J. 488 [jurisdiction over continental shelf]; 13 Southwestern U. L. Rev. 571 [federalism and interstate environmental law]; 37 Stanf. L. Rev. 1267 [regulatory efficiency--uniform environmental standards]; 37 Stanf. L. Rev. 1339 [reforming environmental law]; 16 U.S.F. L. Rev. 539 [emergency environmental health protection in California]; on federal Clean Water Act, see infra, §896; on federal Clean Air Act, see infra, §897; on federal statutes dealing with hazardous waste (RCRA and CERCLA), see infra, §903.)

(3) *Interstate and International Cooperation.* Some problems, particularly those of pollution in rivers and lakes, require interstate or international cooperation. (See 2 *Ecology L. Q.* 333 [water pollution compacts]; 4 *Ecology L. Q.* 63 [air pollution compacts]; 7 *Ecology L. Rev.* 1 [transnational environmental risk]; 18 *Ecology L. Q.* 677 [international control of marine "pollution" by exotic species]; 20 *Ecology L. Q.* 1 et seq. [international approaches to environmental regulation in European Community]; 28 *Ecology L. Q.* 1 [compliance with international environmental law through complaint-based monitoring]; 28 *Ecology L. Q.* 569 [designing marketable permit schemes to control local and regional pollutants]; 29 *Ecology L. Q.* 371 [NAFTA's elevation of foreign investors' rights over governments' rights to protect human health and environment]; 29 *Ecology L. Q.* 395 [agreement on means by which industrialized countries may meet greenhouse gas emissions reduction requirements established by Kyoto Protocol]; 32 *Golden Gate L. Rev.* 345 [symposium on 1992 Earth Summit on Climate Change and Biodiversity]; 83 *Harv. L. Rev.* 1527 [proposing multistate river basin authorities to deal with river pollution]; 104 *Harv. L. Rev.* 1484 [developments in international environmental law]; 104 *Harv. L. Rev.* 1521 [creation and enforcement of international agreements]; 104 *Harv. L. Rev.* 1609 [extraterritorial regulation]; 24 *Hastings L. J.* 67 [international ocean quality agreements]; 31 *San Diego L. Rev.* 1025 [NAFTA and Environmental Side Agreement]; 75 *So. Cal. L. Rev.* 727 [keeping NAFTA "green" for investors and environment]; 17 *Southwestern U. L. Rev.* 43 [transfrontier pollution and international joint commission]; 1 *U.C. Davis L. Rev.* 43 [interstate water pollution compacts]; 36 *U.C.L.A. L. Rev.* 1207 [United States-Canadian acid rain crisis]; 40 *U.C.L.A. L. Rev.* 1061 [environmental regulation in context of General Agreement on Tariffs and Trade]; on Lake Tahoe compact, see *supra*, §873; on interstate compacts generally, see 7 *Summary* (10th), *Constitutional Law*, §66.)

(4) *Environmental Justice.* Environmental "racism" and the effect of siting polluting facilities in or near poor neighborhoods has been the subject of much commentary. (See 86 *Cal. L. Rev.* 775 [examining environmental justice movement from perspective of poor residents who attempted to stop clustering of waste facilities in their community]; 20 *Ecology L. Q.* 721 [review of environmental justice movement]; 21 *Ecology L. Q.* 705 [environmental justice and urban redevelopment]; 108 *Harv. L. Rev.* 477 [book review of Bullard, *Unequal Protection: Environmental Justice and Communities of Color*]; 39 *Santa Clara L. Rev.* 207 [emissions trading as environmental injustice].)

(5) *Permit Coordination.* The Environmental Protection Permit Reform Act of 1993 (*Pub.Res.C.* 71000 et seq.) was adopted to allow applicants to request the designation of a consolidated permit agency to coordinate the processing of projects requiring permits from two or more environmental agencies. The Act applies to a wide range of environmental permits and pollution control agencies, but not to any certification or decision made under *Pub.Res.C.* 21000 et seq. (California Environmental Quality Act; see *supra*, §831). (*Pub.Res.C.* 71012.) The Act requires the adoption of regulations establishing an expedited appeals process by which an applicant may challenge an agency's failure to take timely action on the issuance or denial of an environmental permit. (*Pub.Res.C.* 71030; 27 *Cal. Code Reg.* §10310 et seq.) (See *Health & Saf.C.* 57050 et seq. [consolidated permit agency may coordinate permits for repair and maintenance of commercial and industrial facilities that must be maintained to prevent environmental damage]; 17 *San Diego L. Rev.* 979 [guide to obtaining required regulatory approvals for new industrial facilities in California]; on Permit Streamlining Act, see *supra*, §870.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Forms of Pollution.* See 93 *Cal. L. Rev.* 797 [liability issues arising from pollution caused by concentrated livestock production].

(2) *Federal and State Regulation.* See 92 *Cal. L. Rev.* 1779 [risk trading and regulatory flexibility]; 32 *Ecology L. Q.* 821 [need for constitutional amendment to empower Congress to preserve, protect, and promote environment].

(3) *Interstate and International Cooperation.* See 31 *Ecology L. Q.* 719 [Mexican trucks entering United States under NAFTA without environmental impact assessments]. (4) *Environmental Justice.* See 31 *Ecology L. Q.* 1007 [environmental justice perspective on Uniform Environmental Covenants Act]; 33 *Ecology L. Q.* 443 [integrating environmental justice principles in corporate social responsibility]. *Correction:* Page 1070, last line, "7 *Ecology L. Rev.* 1" should be "7 *Ecology L. Q.* 1".



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XIII. ENVIRONMENTAL REGULATION OF REAL PROPERTY

C. Pollution Control.

2. Water Quality.

a. In General.

12 Witkin Sum. Cal. Law Real Property § 892

[§ 892] In General.

Commentary on the general subject of water quality is extensive. (See 6 *Ecology L. Q.* 109 [Rivers and Harbors Act as tool of environmental protection]; 8 *Ecology L. Q.* 697 [protection of streamflows]; 23 *Hastings L. J.* 685 [thermal pollution by discharge of excessive heat from steam-powered electric-generating plants]; 19 *Pacific L. J.* 1267 [state regulation of groundwater pollution]; 17 *Ecology L. Q.* 71 [marine debris pollution]; 18 *Ecology L. Q.* 550 [marine dumping]; 18 *Ecology L. Q.* 719 [regulation of vessel-source marine pollution]; 20 *Ecology L. Q.* 441 [discussing development of program to control small source wastewater discharges]; 21 *Ecology L. Q.* 79 [permit trading and control of selenium discharges into San Francisco Bay]; 25 *Pacific L. J.* 973 [state water quality certification of hydroelectric projects]; 29 *Ecology L. Q.* 315 [use of preemption arguments by oil companies trying to avoid liability for MTBE water contamination]; 38 *Hastings L. J.* 957 [offshore oil development and California initiatives to prevent onshore support facilities]; 13 *Santa Clara Lawyer* 356 [reviewing study of federal water pollution control]; 1 *U.C. Davis L. Rev.* 1 [California programs]; 1 *U.C. Davis L. Rev.* 71 [federal programs]; 1 *U.C. Davis L. Rev.* 105 [sources of water pollution]; 1 *U.C. Davis L. Rev.* 141 [groundwater pollution]; 1 *U.C. Davis L. Rev.* 167 [pollution of the sea]; 1 *U.C. Davis L. Rev.* 209 [Sacramento-San Joaquin delta water quality]; 16 *U.C. Davis L. Rev.* 1 [res judicata impact of state judgments in federal environmental litigation]; 32 *A.L.R.3d* 215 [validity and construction of antiwater pollution statutes or ordinances]; 39 *A.L.R.3d* 910 [landowner's right to relief against pollution of water supply by industrial or commercial waste]; 47 *A.L.R.3d* 769 [class action in state court for relief against water pollution]; 94 *Am.Jur. Trials* 1 [common law liability and private rights of action regarding pollution of underground water sources]; 20 *Am.Jur. P.P.* (1998 ed.), *Pollution Control* §62 et seq.; 15 *Am.Jur. Legal Forms* 2d (2000 ed.), *Pollution Control* §205:12 et seq.)

West's Key Number Digest, Health and Environment k.25.7 et seq.

SUPPLEMENT: [This section is current through the latest supplement]
See 19C *Am.Jur. P.P. Forms* (2007 ed.), *Pollution Control* §72 et seq.



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C. Pollution Control.

2. Water Quality.

b. Porter-Cologne Water Quality Control Act.

12 Witkin Sum. Cal. Law Real Property § 893

[§ 893] Porter-Cologne Water Quality Control Act.

(1) *Statutory Framework.* Specific legislation deals with particular kinds of water pollution (*infra*, §903 et seq.) and with the preservation of water as a natural resource (*supra*, §876), but the primary statute is the Porter-Cologne Water Quality Control Act (*Water C. 13000* et seq.). This Act provides for regional administration of water quality regulations within a framework of statewide coordination and policy. (*Water C. 13000.*) It establishes regional boards (*Water C. 13200* et seq.) reporting to a state board (*Water C. 13100*), and a Water Quality Coordinating Committee to assist the state board (*Water C. 13171*). (See *United States v. State Water Resources Control Bd.* (1986) 182 C.A.3d 82, 148, 227 C.R. 161 [administration of Porter-Cologne Act]; Cal. Civil Practice, Environmental Litigation, §7:4 et seq. [regulatory proceedings].)

(2) *Specific Provisions.* The Act is comprehensive with regard to water quality and includes the following provisions:

(a) *Enforcement and implementation.* (*Water C. 13300* et seq.; *Water C. 13305* [abatement by regional water quality control board of pollution from nonoperating industrial or business locations]; *Water C. 13308* [civil penalties for noncompliance with cleanup, abatement, reporting, or cease-and-desist orders]; *Water C. 13399* et seq. [enforcement of minor violations]; see *People v. F.E. Crites* (1975) 51 C.A.3d 961, 965, 124 C.R. 664 [injunction for unauthorized dredging and water discharge]; *People v. Barry* (1987) 194 C.A.3d 158, 239 C.R. 349 [construing *Water C. 13305*; trial court properly ordered defendant property owner to grant board and its contractor access to property]; *Lake Madrone Water Dist. v. State Water Resources Control Bd.* (1989) 209 C.A.3d 163, 168, 256 C.R. 894 [dam operator was properly ordered under *Water C. 13304(a)*, 13050(d) to clean up and abate sediment discharge]; *Modesto Redevelopment Agency v. Superior Court* (2004) 119 C.A.4th 28, 34, 13 C.R.3d 865 [dry cleaning solvent manufacturers and distributors who took affirmative steps directed toward improper discharge of solvent wastes (by manufacturing system designed to dispose of wastes improperly or by instructing users of its products to dispose of wastes improperly) may be liable under *Water C. 13304(a)*, but not those who merely placed solvents in stream of commerce without warning adequately of dangers of improper disposal]; *Johnson v. State Water Resources Control Bd.* (2004) 123 C.A.4th 1107, 1112, 20 C.R.3d 441 [state board's discretionary decision not to review regional board's imposition of administrative penalties is not subject to judicial review; *Water C. 13330(b)*, which provides for direct judicial review of regional board decision when state board declines review, provides adequate scheme for challenges].)

(b) Regulation of individual and community subsurface disposal systems. (*Water C. 13280* et seq.)

(c) Compliance with the federal Clean Water Act (infra, §896). (*Water C. 13370* et seq.; see *Tahoe-Sierra Preservation Council v. State Water Resources Control Bd.* (1989) 210 C.A.3d 1421, 1430, 259 C.R. 132 [relationship between Porter-Cologne and federal act]; *People v. Buena Vista Mines* (1998) 60 C.A.4th 1198, 1202, 71 C.R.2d 101 [criminal liability for violation of *Water C. 13387(a)(4)* (discharge of pollutants in violation of federal act)].)

(d) Protection of bays and estuaries and toxic cleanup. (*Water C. 13390* et seq.; see *Central Delta Water Agency v. State Water Resources Control Bd.* (1993) 17 C.A.4th 621, 631, 21 C.R.2d 453 [upholding constitutionality of discharge fee provisions of former *Water C. 13396.5* and propriety of implementing regulation].)

(e) Water reclamation. (*Water C. 13500* et seq.; see supra, §877.)

(f) Bond issues to fund clean water programs. (*Water C. 13450* et seq., 13850 et seq., 13895 et seq., 13955 et seq., 13970 et seq., 13985 et seq., 13999 et seq.)

(3) *Sewage*. Sewage discharge into rivers and lakes is regulated under the Porter-Cologne Act. Sewage systems are subject to local ordinances under the supervision of the regional boards. (See *Water C. 13240* et seq.; on federal assistance for sewage treatment facilities, see *Water C. 13600* et seq.; on civil penalties for violation of local sewer system regulations, see *Govt.C. 54740*; 47 A.L.R.3d 1224 [validity and construction of statutes, ordinances, or regulations controlling discharge of industrial wastes into sewer systems]; 42 Proof of Facts 3d 289 [government liability for failure to maintain waterway or wastewater sewage line].)

The discharge of sewage and other waste is also controlled by *Health & Saf.C. 5410* et seq. Procedures for the abatement of contamination are provided in *Health & Saf.C. 5460* et seq. (On notification requirements and penalties relating to unauthorized discharge of sewage or other waste, see *Health & Saf.C. 5411.5, 5412.5*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Framework*. See *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 C.4th 921, 933, 38 C.R.3d 220, 126 P.3d 1040, Supp., supra, §884 [overlapping jurisdiction of water boards and Department of Forestry on water quality monitoring of logging operations].

(2) *Specific Provisions*.

(a) *Enforcement and implementation*: See *State Water Resources Control Bd. Cases* (2006) 136 C.A.4th 674, 724, 733, 39 C.R.3d 189 [board abused discretion in adopting water rights decision that failed to fully implement flow objectives of existing water quality control plan]; *Los Angeles v. California State Water Resources Control Bd.* (2006) 143 C.A.4th 985, 1002, 50 C.R.3d 619 [trial court correctly sustained regional board's demurrers to declaratory relief claims in plaintiffs' action challenging issuance of permit; *Water C. 13330(b)* provided appropriate remedy]; *Schutte & Koerting v. Regional Water Quality Control Bd. San Diego Region* (2007) 158 C.A.4th 1373, 1384, 71 C.R.3d 54 [parties aggrieved by regional board decisions could obtain judicial review without seeking hearing before regional board; *Water C. 13330(b)* requires exhaustion of remedies before state board, which parties did, but says nothing about exhaustion of remedies before regional board]. (c) *Compliance with federal Act*: See *Burbank v. State Water Resources Control Bd.* (2005) 35 C.4th 613, 625, 26 C.R.3d 304, 108 P.3d 862 [relationship between issuance of wastewater discharge permits and standards prescribed by federal Act]; *Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region* (2006) 135 C.A.4th 1377, 1385, 38 C.R.3d 450 [same]; *Arcadia v. State Water Resources Control Bd.* (2006) 135 C.A.4th 1392, 1409, 38 C.R.3d 373 [federal law did not require regional and state water boards to study assimilative capacity of Los Angeles River before adopting trash total maximum daily load (trash TMDL)]; *Los Angeles v. State Water Resources Control Bd.*, supra, 143 C.A.4th 998 [regional board had jurisdiction to issue permit required by federal Act; permit conditions requiring plaintiffs to update general plans and to amend their CEQA processes were lawful]; *California Sportfishing Protection Alliance v. State Water Resources Control Bd.* (2008) 160

C.A.4th 1625, 1639, 73 C.R.3d 560 [amendment to temperature objectives of basin plan did not violate Porter-Cologne Act or federal Act by failing to protect native cold water fish; substantial evidence supported board's findings that tributary did not have self-sustaining population of rainbow trout and that temperature objectives would protect beneficial potential use of tributary by salmonids].

(3) *Sewage*. See *Burbank v. State Water Resources Control Bd.*, *supra* [when issuing wastewater discharge permit, regional board may not consider economic factors to justify imposing pollutant restrictions that are less stringent than those required by federal Clean Water Act (text, §896); however, board may take those factors into account when considering whether to make permit restrictions more stringent than federal law requires]; *Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana*, *supra*, *135 C.A.4th 1415* [water boards sufficiently considered economic factors before adopting trash TMDL and thus complied with *Water C. 13241*]; *Sacramento v. State Water Resources Control Bd.* (2007) *153 C.A.4th 1579, 1586, 64 C.R.3d 302* [board's wastewater discharge orders setting bacteria limitations for groundwater were valid under Porter-Cologne Act and basin plan; plan set limit for organisms in groundwaters used for domestic and municipal supply, and board could interpret plan to include waters *designated for use* in domestic and municipal supply].



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C. Pollution Control.

2. Water Quality.

c. Proposition 65.

12 Witkin Sum. Cal. Law Real Property § 894

[§ 894] Proposition 65.

(1) *Statute.* Enacted by the voters in 1986, Proposition 65 (*Health & Saf.C. 25249.5 et seq.*) was designed to prevent the contamination of drinking water with, and generally protect the public from unknowing exposure to, harmful chemicals. A person in the course of doing business must not knowingly discharge or release a chemical known to the state to cause cancer or reproductive toxicity into water or onto or into land where the chemical passes or probably will pass into a source of drinking water. (*Health & Saf.C. 25249.5*; see *Health & Saf.C. 25249.8* [Governor's duty to publish list of chemicals known to state to cause cancer or reproductive toxicity]; 22 *Cal. Code Reg. §12000* [list]; *Health & Saf.C. 25249.9* [exemptions]; on requirement under Proposition 65 of issuing warning before exposure to toxic chemicals, see *infra*, §911.)

(2) *Cases.* Numerous cases have discussed Proposition 65, including the following:

People v. Superior Court (Amer. Standard) (1996) 14 *C.4th* 294, 314, 58 *C.R.2d* 855, 926 *P.2d* 1042 [*Health & Saf.C. 25249.5* ban on discharging toxins into drinking water applies to faucet water].

AFL-CIO v. Deukmejian (1989) 212 *C.A.3d* 425, 440, 260 *C.R. 479* [in listing harmful substances under *Health & Saf.C. 25249.8*, Governor has no discretion to exclude substances identified in *Lab.C. 6382(b)(1)*, (d) that are only known to be harmful to animals].

National Paint & Coatings Assn. v. California (1997) 58 *C.A.4th* 753, 761, 68 *C.R.2d* 360 [private citizen enforcement provisions of Proposition 65 are constitutional].

Western Crop Protection Assn. v. Davis (2000) 80 *C.A.4th* 741, 747, 95 *C.R.2d* 631 [Office of Environmental Health Hazard Assessment did not usurp functions of Developmental and Reproductive Toxicant Identification Committee in deciding to place certain disputed chemicals on list of chemicals known to cause reproductive toxicity after chemicals had been formally identified by federal Environmental Protection Agency].

Yeroushalmi v. Miramar Sheraton (2001) 88 *C.A.4th* 738, 750, 106 *C.R.2d* 332 [consumer advocates failed to comply with *Health & Saf.C. 25249.7*, which requires citizen enforcers of Proposition 65 to give notice of violation to

public attorneys and to violator before bringing action; notice did not provide adequate information from which to allow recipients to assess nature of violation].

Consumer Cause v. Weider Nutrition Int. (2001) 92 C.A.4th 363, 367, 111 C.R.2d 823 [Proposition 65 did not apply to manufacturers of two noncarcinogenic products that, when ingested, cause chemical reaction that increases natural levels of testosterone, which can cause cancer].

Consumer Advocacy Group v. Exxon Mobil Corp. (2002) 104 C.A.4th 438, 443, 128 C.R.2d 454 [prohibition, in *Health & Saf.C.* 25249.5, against "discharge or release" of carcinogenic or toxic chemicals into water refers to movement of chemicals from confined space into land or water, and not to subsequent passive migration of chemicals through soil or water].

Mateel Environmental Justice Foundation v. Edmund A. Gray Co. (2003) 115 C.A.4th 8, 17, 9 C.R.3d 486 [plaintiff has initial burden of proving discharge under *Health & Saf.C.* 25249.5; discussion of applicable tests].

(3) *Commentary and Practice Works.* Proposition 65 has engendered considerable commentary and practice materials. (See Cal. Civil Practice, Environmental Litigation, Chap. 4 [Proposition 65 litigation]; 15 California Lawyer 42 (August 1995) [private enforcement of Proposition 65]; 77 Cal. L. Rev. 1211 [regulations governing *Health & Saf.C.* 25249.5 et seq.]; 14 *Ecology L. Q.* 685 [right-to-know provision of Proposition 65]; 23 *Ecology L. Q.* 303 [evaluating warnings under Proposition 65]; 28 *Ecology L. Q.* 663 [regulating pesticide pollution under Proposition 65]; 39 *Hastings L. J.* 1195 [implementation of Proposition 65]; 49 *Stanf. L. Rev.* 1223 [Proposition 65 and limits of information economics]; 29 *U.S.F. L. Rev.* 809 [citizen enforcement provisions of Proposition 65].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Cases.* See *As You Sow v. Conbraco Industries* (2005) 135 C.A.4th 431, 448, 37 C.R.3d 399 [plaintiff's testing method failed to prove that unlawful discharge occurred].



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CHAPTER XVII - Real Property

Witkin Summary of California Law XIII. ENVIRONMENTAL REGULATION OF REAL PROPERTY

C. Pollution Control.

2. Water Quality.

d. Other California Statutes.

12 Witkin Sum. Cal. Law Real Property § 895

[§ 895] Other California Statutes.

(1) *In General.* In addition to the Porter-Cologne Water Quality Control Act (*supra*, §893), numerous statutes govern water quality and pollution, including the following:

(a) *Fish & Game C. 12015 et seq.* (prohibiting pollution and contamination of state waterways with material deleterious to birds, plants, fish and animals; imposing civil penalties for violation; providing funds for cleanup of polluted waterways).

(b) *Water C. 12929 et seq.* (Environmental Water Act of 1989; funding to preserve environment of Mono Lake Basin).

(c) *Health & Saf.C. 116270 et seq.* (California Safe Drinking Water Act). (See *Western States Petroleum Assn. v. Department of Health Services* (2002) 99 C.A.4th 999, 1007, 122 C.R.2d 117 [Department of Health Services had authority, under *Health & Saf.C. 116610, 116275*, to set maximum level of contaminant based on its effect on taste, odor, and appearance of water]; 21 *Pacific L. J.* 497 [California Safe Drinking Water Act].)

(d) *Govt.C. 65959 et seq.* (coordination of multiple applications for discharge permits from water control agencies).

(e) *Govt.C. 11352 et seq.* (state and regional water boards exempted from statutory requirements for adoption of regulations and review by Office of Administrative Law).

(f) *Pub.Util.C. 2821(d)* (private energy producers' proof of compliance with state and federal water pollution laws).

(g) *Pub.Res.C. 30901 et seq.* (Watershed, Clean Beaches, and Water Quality Act; grants to improve water quality at public beaches, improve water quality monitoring and sewer capability, reduce runoff pollution, and control nonpoint source water pollution).

(h) *Pub.Res.C. 5096.600 et seq.* (Clean Water, Clean Air, Safe Neighborhood Parks, and Coastal Protection Act of 2002; bond proceeds to fund programs, including those under *Pub.Res.C. 30901 et seq.*).

(i) *Water C. 79500* et seq. (Water Security, Clean Drinking Water, Coastal and Beach Protection Act of 2002; sale of bonds to finance various coastal protection and water quality projects).

(j) *Fish & Game C. 5653* (permit requirements for dredging in rivers, streams, or lakes). See *People v. Osborn* (2004) 116 C.A.4th 764, 769, 772, 11 C.R.3d 14 [possession of valid suction dredge permit under *Fish & Game C. 5653* did not entitle dredger to dredge without first notifying Department of Fish and Game].

(2) *Oil Spills*. Oil spills have been the subject of commentary (see 19 *Ecology L. Q.* 363 [Exxon Valdez oil spill; confidentiality of natural resource damage assessment data]; 22 *Pepperdine L. Rev.* 167 [regulations under Oil Pollution Act of 1990]; 20 *Southwestern U. L. Rev.* 395 [federal private causes of action for oil spill]) and of special legislation, including the following:

(a) *Govt.C. 8574.1* et seq. (state oil-spill contingency plan).

(b) *Harb. & Nav.C. 293* (strict liability for oil spills from petroleum tanker vessels).

(c) *Fish & Game C. 5655* (cleanup of petroleum products discharged into state waters).

(d) *Harb. & Nav.C. 135* (monitoring of transfer of oil and hazardous substances).

(e) *Water C. 13272* (oil spill notification requirements).

(f) *Govt.C. 8670.1* et seq. (Lempert-Keene-Sastrand Oil Spill Prevention and Response Act).

(g) *Rev.C. 46001* et seq. (procedure for collecting oil spill fees).

(h) *Pub.Res.C. 8780* et seq. (Oil Transfer and Transportation Emission and Risk Reduction Act; tracking trends in internal shipments of oil along California coastline for use in planning and emergency response).

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*.

(c) *California Safe Drinking Water Act*: See *In re Groundwater Cases* (2007) 154 C.A.4th 659, 679, 64 C.R.3d 827 [trial court properly applied drinking water standards adopted by Public Utilities Commission and Department of Health Services to determine that plaintiffs had not alleged noncompliance with state or federal standards and thus could not maintain action for damages against regulated water purveyors].



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XIII. ENVIRONMENTAL REGULATION OF REAL PROPERTY

C. Pollution Control.
2. Water Quality.
e. Federal Clean Water Act.

12 Witkin Sum. Cal. Law Real Property § 896

[§ 896] Federal Clean Water Act.

(1) *Statute.* The Federal Water Pollution Control Act (33 U.S.C., §1251 et seq.), also known as the Clean Water Act, establishes a permit system to regulate the discharge of pollutants into navigable waters. *Water C. 13370* et seq., part of the Porter-Cologne Water Quality Control Act (supra, §893), implement the federal Act by requiring reports of all persons discharging pollutants (*Water C. 13376*), specifying waste discharge restrictions (*Water C. 13377* et seq.), and imposing substantial penalties for violations (*Water C. 13385* et seq.).

(2) *Cases.* The following are among the cases that have interpreted the Clean Water Act:

Train v. Colorado Public Interest Research Group (1976) 426 U.S. 1, 96 S.Ct. 1938, 48 L.Ed.2d 434 [Act does not reach radioactive effluents regulated by Atomic Energy Act].

Environmental Protection Agency v. California (1976) 426 U.S. 200, 96 S.Ct. 2022, 48 L.Ed.2d 578 [history of Act; federal agencies need not obtain state permits]. (See 6 *Ecology L. Q.* 429 [discussing *EPA v. California*].)

E.I. DuPont de Nemours & Co. v. Train (1977) 430 U.S. 112, 97 S.Ct. 965, 51 L.Ed.2d 204.

Milwaukee v. Illinois & Michigan (1981) 451 U.S. 304, 101 S.Ct. 1784, 68 L.Ed.2d 114 [federal common law of nuisance is preempted by Act]. (See 95 *Harv. L. Rev.* 290 [*Milwaukee*]; 10 *Ecology L. Q.* 51 [same].)

Weinberger v. Romero-Barcelo (1982) 456 U.S. 305, 102 S.Ct. 1798, 72 L.Ed.2d 91 [district court's equitable discretion in determining remedies for noncompliance]. (See 11 *Ecology L. Q.* 73 [*Weinberger*].)

Chemical Mfrs. Assn. v. National Resources Defense Council (1985) 470 U.S. 116, 105 S.Ct. 1102, 84 L.Ed.2d 90 [Act permits EPA issuance of variances from toxic pollutant effluent limitations]. (See 13 *Ecology L. Q.* 643 [*Chemical Mfrs. Assn.*].)

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation (1987) 484 U.S. 49, 108 S.Ct. 376, 98 L.Ed.2d 306 [provision authorizing citizen suits for injunctive relief or civil penalties does not confer federal jurisdiction over such suits for wholly past violations]. (See 23 *Ecology L. Q.* 723 [continuing violations doctrine of *Gwaltney*]; 21 *San Diego*

L. Rev. 857 [Gwaltney].)

United States Dept. of Energy v. Ohio (1992) 503 U.S. 607, 112 S.Ct. 1627, 118 L.Ed.2d 255 [United States' sovereign immunity from liability for civil fines imposed by state for past violations of Clean Water Act or Resource Conservation and Recovery Act has not been waived].

PUD No. 1 of Jefferson County v. Washington Dept. of Ecology (1994) 511 U.S. 700, 114 S.Ct. 1900, 1909, 128 L.Ed.2d 716, 728 [Clean Water Act authorized state agency to condition permit for construction of hydroelectric plant on maintenance of minimum stream flows to protect salmon and steelhead runs].

People v. Buena Vista Mines (1996) 48 C.A.4th 1030, 1032, 56 C.R.2d 21 [violation of *Water C. 13387(c)* is felony, not misdemeanor].

People v. Appel (1996) 51 C.A.4th 495, 503, 59 C.R.2d 216 [conviction under *Water C. 13387(a)(4)* upheld; exemption for "cropland" activities did not apply to activities on land that had not been used for farming for at least 20 years]

Communities for a Better Environment v. State Water Resources Control Bd. (2003) 109 C.A.4th 1089, 1103, 1 C.R.3d 76 [water quality based effluent limit in discharge permit does not have to be numeric].

Brentwood v. Central Valley Regional Water Quality Control Bd. (2004) 123 C.A.4th 714, 719, 20 C.R.3d 322 [discharger bears burden of proving that affirmative defenses set forth in *Water C. 13885(j)(1)* relieve discharger of liability for mandatory minimum penalties set forth in *Water C. 13885(i)*; moreover, "period of six consecutive months" for assessing penalties under *Water C. 13885(i)* is measured by looking at 180-day period preceding each violation that potentially is subject to penalties].

(3) *Commentary.* The commentary on the federal Clean Water Act is extensive. (See 6 *Ecology L. Q. 1* [effluent limitations under Act]; 9 *Ecology L. Q. 1* [adjudicatory hearings on permits]; 10 *Ecology L. Q. 39* [no private cause of action]; 10 *Ecology L. Q. 161* [variances]; 10 *Ecology L. Q. 641* [transnational pollution from offshore oil development]; 11 *Ecology L. Q. 703* [oxygen depletion and the Act]; 13 *Ecology L. Q. 579* [Army Engineers' jurisdiction under Act over wetlands]; 15 *Ecology L. Q. 69* [Clean Water Act]; 17 *Ecology L. Q. 143* [pesticides in groundwater and EPA's regulatory program]; 23 *Ecology L. Q. 201* [grazing permits under Clean Water Act]; 23 *Ecology L. Q. 447* ["knowledge" requirement of Clean Water Act]; 24 *Ecology L. Q. 393* [citizen suits to enforce water quality standards under Clean Water Act]; 28 *Ecology L. Q. 297* [controlling nonpoint source water pollution through total maximum daily load provisions of Clean Water Act]; 30 *Ecology L. Q. 429* [protection from liability for holders of discharge permits under Clean Water Act]; 30 *Ecology L. Q. 543* [lack of effective enforcement provisions in Clean Water Act for nonpoint source pollution]; 30 *Ecology L. Q. 811* [using hydrological connection approach to determining which waters are navigable for purposes of Clean Water Act jurisdiction]; 27 *Golden Gate L. Rev. 43* [citizen suits under Clean Water Act to counteract inadequate government enforcement]; 92 *Harv. L. Rev. 1814* [jurisdiction to review informal EPA influence on state decisionmaking]; 28 *Hastings L. J. 223* [Army Engineers' broadened jurisdiction under Act over dredge and fill operations]; 34 *Hastings L. J. 1245* [judicial enforcement of water quality standards under Act]; 22 *Lincoln L. Rev. 1* [prosecutions under Clean Water Act for illegal dredging and filling activities in San Francisco Bay]; 34 *McGeorge L. Rev. 929* [authority to regulate "isolated water"]; 20 *San Diego L. Rev. 945* [lack of enforcement of federal water pollution laws]; 27 *San Diego L. Rev. 139* [wetlands protection under §404 of Clean Water Act]; 40 *San Diego L. Rev. 245* [municipal storm water permitting in California]; 6 *San Fernando Valley L. Rev. 117* [federal installations]; 35 *Santa Clara L. Rev. 1269* [regulation of livestock grazing under Clean Water Act]; 42 *Santa Clara L. Rev. 699* [Clean Water Act's applicability to navigable waters; whether Congress has constitutional authority to regulate nonnavigable waters]; 28 *U.C. Davis L. Rev. 1237* [regulation of wetlands and limits of Commerce Clause]; 20 *U.S.F. L. Rev. 633* [protection of groundwater under Act]; 160 *A.L.R. Fed 585* [definition of "navigable waters" for purposes of Clean Water Act]; 163 *A.L.R. Fed 531* [Supreme Court cases involving Clean Water Act]; 190 *A.L.R. Fed 1* [attorneys' fees under Clean Water Act]; 61B *Am.Jur.2d* (1999 ed.), *Pollution Control* §149 et

seq.; 26 Proof of Facts 3d 395 [proof of water quality under Clean Water Act]; 36 Proof of Facts 3d 533 [proof of wrongful discharge of pollutant into waterway in violation of Clean Water Act]; 53 Am.Jur. Trials 511 [challenging wetland regulation, under §404 of Clean Water Act, of land development].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Cases.* Additional cases interpreting the Clean Water Act include the following:

Exxon Shipping Co. v. Baker (2008) 554 U.S. ___, 128 S.Ct. 2605, 2618, 171 L.Ed.2d 570, 581 [penalty provisions of Clean Water Act do not preempt common law punitive damages for maritime spills].

S.D. Warren Co. v. Maine Bd. of Environmental Protection (2006) 547 U.S. 370, 126 S.Ct. 1843, 1847, 164 L.Ed.2d 625, 632 [operating dam to produce hydroelectricity may result in discharge into navigable waters of United States, and thus state certification that water protection laws would not be violated was prerequisite to federal license under Clean Water Act]; 34 *Ecology L. Q.* 763 [*S.D. Warren Co. v. Maine Bd. of Environmental Protection*].

Rapanos v. United States (2006) 547 U.S. 715, 126 S.Ct. 2208, 2214, 165 L.Ed.2d 159, 173 [plurality opinion discussing when wetlands are subject to Clean Water Act]; 34 *Ecology L. Q.* 801 [*Rapanos v. United States*].

Burbank v. State Water Resources Control Bd. (2005) 35 C.4th 613, 625, 26 C.R.3d 304, 108 P.2d 862 [when issuing wastewater discharge permit, regional board may not consider economic factors to justify imposing pollutant restrictions that are less stringent than those required by Clean Water Act; however, board may take these factors into account when considering whether to make permit restrictions more stringent than federal law requires].

Building Industry Assn. of San Diego County v. State Water Resources Control Bd. (2004) 124 C.A.4th 866, 880, 22 C.R.3d 128 [board's regulatory permit limiting quality and quantity of water that could be discharged from municipal storm sewers did not violate 33 U.S.C., §1342, even though permit imposed more stringent standards than federal law does; statute's language and legislative purpose indicate that Congress intended to provide regulatory agencies with discretion to achieve compliance with water quality standards].

Communities for a Better Environment v. State Water Resources Control Bd. (2005) 132 C.A.4th 1313, 1330, 34 C.R.3d 396 [discharge permit did not violate "antibacksliding" provision of Act, which prohibits renewal of permit with less stringent effluent limitations than those in previous permit; determination of federal and state administrative agencies on this issue was entitled to deference].

Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region (2006) 135 C.A.4th 1377, 1385, 38 C.R.3d 450 [municipal storm sewer permit governing 18 local entities was valid; economic considerations did not need to precede issuance of permit, permit did not need to identify specific impaired bodies of water or to include safe harbor provision, and permit was not overly prescriptive].

Divers' Environmental Conservation Organization v. State Water Resources Control Bd. (2006) 145 C.A.4th 246, 254, 51 C.R.3d 497 [permit requiring Navy to limit its stormwater chemical discharges by employing "best management practices" did not violate 33 U.S.C., §1342 or its implementing regulation; board could have, but was not required to, issue permit that imposed numeric limits on discharged chemicals].(3) *Commentary.* See 31 *Ecology L. Q.* 531 [original appellate jurisdiction under Clean Water Act]; 32 *Ecology L. Q.* 417 ["meaningfully distinct" waters and unitary waters theory]; 33 *Ecology L. Q.* 699 [public participation in enforcement in Clean Water Act]; 42 *San Diego L. Rev.* 1215 [municipal separate storm sewer system regulation under Clean Water Act]; 42 *San Diego L. Rev.* 1259 [criticism of limiting reach of Clean Water Act through unitary waters approach]; 17 *A.L.R. Fed* 2d 309 [water quality certification requirement of 33 U.S.C., §1341].



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C. Pollution Control.

3. Air Quality.

a. Federal Clean Air Act.

12 Witkin Sum. Cal. Law Real Property § 897

[§ 897] Federal Clean Air Act.

(1) *Statute.* The federal Clean Air Act (42 U.S.C., §7401 et seq.) directs the Environmental Protection Agency (EPA) to establish national air quality standards, and requires each state to submit a detailed plan for implementing the standards within a given period, normally 3 years. (42 U.S.C., §7410; on California's implementation of Act, see *infra*, §898.)

(2) *Cases.* The following are among the numerous cases construing the Clean Air Act:

Train v. Natural Resources Defense Council (1975) 421 U.S. 60, 95 S.Ct. 1470, 43 L.Ed.2d 731 [EPA supervision over variances from state plan].

Hancock v. Train (1976) 426 U.S. 167, 96 S.Ct. 2006, 48 L.Ed.2d 555 [federal facilities must conform to state air pollution control requirements but need no state permits]. (See 6 *Ecology L. Q.* 429 [*Hancock*].)

Union Elec. Co. v. Environmental Protection Agency (1976) 427 U.S. 246, 96 S.Ct. 2518, 49 L.Ed.2d 474 [economic or technological infeasibility is not ground for EPA rejection of state plan].

Adamo Wrecking Co. v. United States (1978) 434 U.S. 275, 98 S.Ct. 566, 54 L.Ed.2d 538 [emission standards].

General Motors Corp. v. United States (1990) 496 U.S. 530, 110 S.Ct. 2528, 2533, 110 L.Ed.2d 480, 490 [EPA's unreasonable delay in acting on proposed revision to state implementation plan does not bar action to enforce current plan].

(3) *Commentary.* The Clean Air Act has been the subject of much commentary. (See 68 *Cal. L. Rev.* 48 [nondegradation and visibility under Act]; 80 *Cal. L. Rev.* 1255 [use of severability clauses to solve attainment deadline dilemma]; 2 *Ecology L. Q.* 283 [federal control of stationary source air pollution]; 3 *Ecology L. Q.* 235 [role of land use controls under Act]; 3 *Ecology L. Q.* 597 [questioning exemption of EPA's clean air activities from National Environmental Policy Act of 1969 (see *supra*, §830)]; 4 *Ecology L. Q.* 441 [entire issue on Act]; 6 *Ecology L. Q.* 161 [first 6 years under Act]; 10 *Ecology L. Q.* 397 [visibility protection: preserving Southwestern scenic and parkland areas]; 11 *Ecology L. Q.* 343 [measuring emission increases under Act]; 12 *Ecology L. Q.* 399 [award of attorneys' fees

under Act]; 12 *Ecology L. Q.* 567 [regulation of arsenic emissions under Act]; 20 *Ecology L. Q.* 207 [EPA oversight of local agencies' granting of air pollution variances]; 30 *Ecology L. Q.* 617 [relevance of economic harm]; 30 *Ecology L. Q.* 715 [preemption of California's law requiring automakers to reduce carbon dioxide emissions in new vehicle fleets]; 89 *Harv. L. Rev.* 316 [enforcement against stationary sources]; 11 *Pacific L. J.* 523 [scope of state implementation of Act]; 26 *Pacific L. J.* 923 [1994 amendments to California statutes to enable state compliance with Clean Air Act]; 27 *Pacific L. J.* 1457 [symposium on federalism and Clean Air Act]; 11 *San Diego L. Rev.* 972 [local control of pollution from federal facilities]; 13 *San Diego L. Rev.* 354 [gasoline vapor recovery requirements under Act]; 6 *San Fernando Valley L. Rev.* 117 [federal installations]; 22 *U.C.L.A. L. Rev.* 323 ["irrational" national air quality standards]; 30 *U.C.L.A. L. Rev.* 740 [goals statutes or rules statutes]; 40 *U.C.L.A. L. Rev.* 1101 [Clean Air Act program allowing electric utilities to buy and sell pollution allowances]; 151 *A.L.R. Fed* 495 [EPA approval of state implementation plans]; 174 *A.L.R. Fed* 137 [propriety of EPA determinations whether state implementation plans comply with Clean Air Act]; 61B *Am.Jur.2d* (1999 ed.), *Pollution Control* §149 et seq.; 37 *Proof of Facts* 3d 501 [proving violation of air pollution emission standard, limitation, or permit requirement under Clean Air Act].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Cases.* See *Massachusetts v. Environmental Protection Agency* (2007) 549 U.S. 497, 127 S.Ct. 1438, 1459, 167 L.Ed.2d 248, 274 [Clean Air Act authorizes EPA to regulate emission of greenhouse gases from new motor vehicles; EPA must do so unless it determines that greenhouse gases do not contribute to climate change or it provides some reasonable explanation as to why it cannot or will not exercise discretion to determine whether they do].(3)

Commentary. See 31 *Ecology L. Q.* 563 [Clean Air Act and Mobile Source Air Toxics Rule]; 31 *Ecology L. Q.* 731 [limits on state power to regulate sulfur dioxide emissions]; 33 *Ecology L. Q.* 517 [litigation against electric power facilities and proposed regulatory responses]; 56 *Hastings L. J.* 901 [conflicts between models and participation in state implementation plan process]; 42 *U.S.F. L. Rev.* 111 [climate change and Clean Air Act]; 7 *A.L.R. Fed* 2d 357 [Supreme Court cases on Clean Air Act]; 13 *A.L.R. Fed* 2d 703 [Clean Air Act provision allowing for emissions standards from new motor vehicles or engines].



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CHAPTER XVII - Real Property

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C. Pollution Control.

3. Air Quality.

b. California Statutes.

1. In General.

12 Witkin Sum. Cal. Law Real Property § 898

[§ 898] In General.

(1) *Division 26.* Most of the California statutes governing air quality are set forth in Division 26 of the Health and Safety Code (*Health & Saf.C. 39000 et seq.*). The statutes coordinate state, regional, and local air pollution control by establishing "air basins" based on similar meteorological and geographical conditions. (*Health & Saf.C. 39012, 39606.*) They create a State Air Resources Board (*Health & Saf.C. 39500 et seq.*), and Regional Air Pollution Control Districts combining the smaller districts in each air basin (see *Health & Saf.C. 40000 et seq.*). These districts appoint control officers (*Health & Saf.C. 40750*) to enforce air pollution control standards. (*Health & Saf.C. 40752, 41500 et seq.*) (See *3 Ecology L. Q. 507* [air pollution rule enforcement by Los Angeles County district].)

Air quality districts must develop plans and regulations to achieve and maintain ambient air quality standards. (*Health & Saf.C. 40910 et seq.*) (See *Western Oil & Gas Assn. v. Air Resources Bd. (1984) 37 C.3d 502, 517, 208 C.R. 850, 691 P.2d 606* [factors to be considered by State Air Resources Board in adoption of air quality standards]; *Alliance of Small Emitters/Metals Industry v. South Coast Air Quality Management Dist. (1997) 60 C.A.4th 55, 61, 70 C.R.2d 54* [local air quality management district, required to analyze socioeconomic impacts of proposed air pollution control program under *Health & Saf.C. 40728.5*, need only do so to extent data are available; district's assessment of impacts was reasonably precise given limitations of data available]; *Morgan Hill v. Bay Area Air Quality Management Dist. (2004) 118 C.A.4th 861, 870, 13 C.R.3d 420* [air quality district could approve federal prevention of significant deterioration permit without complying with California Environmental Quality Act (*supra*, §831 et seq.)]; *17 U.C. Davis. L. Rev. 1117* [air pollution control district hearing boards]; *48 A.L.R.3d 326* [validity of legislation permitting administrative agency to fix permissible standards of air pollutant emission]; *66 A.L.R.4th 711* [validity, construction, and application of variance provisions in state and local air pollution control laws and regulations]; *74 A.L.R.4th 566* [validity of state and local air pollution administrative rules].)

Under *Health & Saf.C. 40001*, local air pollution control districts have the authority to require that use of a substance be phased out in order to prevent air pollution episodes, even if a permit has been issued for the use of the substance and no modification of the permit is sought. (*Ultramar v. South Coast Air Quality Management Dist. (1993) 17 C.A.4th 689, 706, 21 C.R.2d 608*; on criteria for use of market-based incentives to improve air quality, see *Health & Saf.C. 39616*; *20 Ecology L. Q. 103* [analyzing California's use of market incentives to control air pollution]; *22*

Ecology L. Q. 359 [creating market in air pollution: clear air incentives]; on enforcement, see *infra*, §899.)

Different provisions apply to nonvehicular and vehicular sources of air pollution. (See *Health & Saf.C.* 41500 et seq., *infra*, §899 [nonvehicular], *Health & Saf.C.* 43000 et seq., *infra*, §901 [vehicular]; 5 *Ecology L. Q.* 401 [emission quota strategies]; 5 *Loyola L.A. L. Rev.* 280 [economist's analysis of nonvehicular air pollution control methods]; 26 *U.C.L.A. L. Rev.* 893 [stationary source air pollution control in California].)

(2) *Other Statutes.* The following are among the various statutes governing air quality that can be found outside Division 26:

(a) *Aerosol propellants.* *Health & Saf.C.* 119150 et seq. prohibit the manufacture of aerosol propellants composed of "saturated chlorofluorocarbon not containing hydrogen," and the manufacture or sale of containers utilizing those propellants, subject to certain federally prescribed exemptions. (See 9 *Pacific L. J.* 546.)

(b) *Radionuclides.* *Health & Saf.C.* 115271 et seq. authorize the establishment of a program to implement and enforce emission standards for radionuclides in accordance with the federal Clean Air Act (*supra*, §897).

(c) *Toxic mold.* *Health & Saf.C.* 26100 et seq. require the Department of Health Services to adopt, if feasible, permissible exposure limits to molds in indoor environments (*Health & Saf.C.* 26103), to adopt standards to assess the health risks created by mold (*Health & Saf.C.* 26105), to adopt mold identification guidelines (*Health & Saf.C.* 26120), and to develop remediation guidelines (*Health & Saf.C.* 26130). (See 114 *A.L.R.5th* 397 [liability for toxic mold in residences and other buildings]; 92 *Am.Jur. Trials* 113 [litigating toxic mold cases].)

West's Key Number Digest, Health and Environment k.25.6 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Division 26.*

Air quality district regulations: See *Western States Petroleum Assn. v. South Coast Air Quality Management Dist.* (2006) 136 *C.A.4th* 1012, 1019, 1021, 39 *C.R.3d* 354 [rule requiring oil refineries to reduce emissions of ammonia and small particulate matter was supported by adequate findings that compliance would be feasible and cost-effective]. (2) *Other Statutes.*

(d) *(New) Greenhouse gases.* The California Global Warming Solutions Act of 2006 (*Health & Saf.C.* 38500 et seq., added in 2006) authorizes a statewide program to control greenhouse gas emissions. The State Air Resources Board is charged with monitoring and regulating sources of emissions of greenhouse gases that cause global warming in order to reduce emissions of greenhouse gases. (*Health & Saf.C.* 38510.) On or before January 1, 2008, the board must adopt regulations to require the reporting and verification of statewide greenhouse gas emissions and to monitor and enforce compliance with this program. (*Health & Saf.C.* 38530(a).) By January 1, 2008, the board must, after public participation, determine what the statewide greenhouse gas emissions level was in 1990 and approve a statewide greenhouse gas emissions limit that is equivalent to that level, to be achieved by 2020. (*Health & Saf.C.* 38550.) By January 1, 2011, the board must adopt greenhouse gas emission limits and emission reduction measures by regulation to achieve the maximum technologically feasible and cost-effective reductions in greenhouse gas emissions in furtherance of achieving the statewide greenhouse gas emissions limit. The regulations must become operative on January 1, 2012. (*Health & Saf.C.* 38562(a); see 27 *California Lawyer* 35 (July 2007) [California's Global-Warming Battle]; on adoption of interim measures, see *Health & Saf.C.* 38560.5; on greenhouse gas emission reduction report card to be submitted by specified state agencies, see *Govt.C.* 12890 et seq., added in 2007.)



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C. Pollution Control.

3. Air Quality.

b. California Statutes.

2. Nonvehicular Sources of Air Pollution.

aa. In General.

12 Witkin Sum. Cal. Law Real Property § 899

[§ 899] In General.

(1) *Statutory Framework.* The State Air Resources Board coordinates air pollution control activities and ensures compliance with the standards adopted under *Health & Saf.C. 39606* through review of the various districts' attainment plans, rules, regulations, programs, and enforcement practices. (*Health & Saf.C. 41500*; see *Carrancho v. California Air Resources Bd.* (2003) 111 C.A.4th 1255, 1271, 4 C.R.3d 536 [sufficiency of Air Resources Board's plan under *Health & Saf.C. 41865* for diverting rice straw left over after harvest to alternative uses].)

Health & Saf.C. 41700 prohibits the discharge of air contaminants that cause injury, detriment, nuisance, or annoyance, or that endanger the public's comfort, repose, health, or safety, or that cause, or have a natural tendency to cause, injury or damage to business or property. The discharge of smoke is also restricted. (See *Health & Saf.C. 41701*.) Furthermore, anyone who builds, erects, alters, replaces, operates, or uses an article, machine, equipment, or other contrivance that may cause the issuance of air contaminants must first obtain a permit from the district air pollution control officer. (*Health & Saf.C. 42300(a)*.)

Variances from *Health & Saf.C. 41701* or from the district's rules and regulations are available (*Health & Saf.C. 42350(a)*), but variances from the permit requirement are not (*Health & Saf.C. 42350(b)*). (See *Health & Saf.C. 42352.5* [factors that hearing board must consider before granting variance]; *Health & Saf.C. 42500* et seq. [Protect California Air Act; prohibiting districts from revising their rules for reviewing new sources of nonvehicular air pollution to be less stringent than those that existed on December 30, 2002].) *Health & Saf.C. 42320* et seq. require air quality management districts to establish programs to expedite review of permits and provide assistance in the permitting and variance processes for small business stationary sources.

(2) *Enforcement.* *Health & Saf.C. 42402* imposes civil penalties for nonvehicular air pollution. Violators are strictly liable for a penalty of up to \$ 1,000. (*Health & Saf.C. 42402(a)*.) *Health & Saf.C. 42402(b)* provides for a penalty of up to \$ 10,000 (*Health & Saf.C. 42402(b)(1)*), which, if it exceeds \$ 1,000 for each day in which the violation occurs, may be avoided by pleading and proving that the violation was not the result of intentional or negligent conduct. (*Health & Saf.C. 42402(b)(2)(A)*; see *Health & Saf.C. 42402(b)(2)(C)* [exemption for violations of facility emissions caps

established under market-based incentive program]; on entry onto private property to inspect air pollution sources, see *Health & Saf.C. 41510*; *C.C.P. 1822.50* et seq. [inspection warrants].)

The owner or operator of a source of air contaminants in violation of *Health & Saf.C. 41700* that causes actual injury to the health and safety of a considerable number of persons or the public is liable for a civil penalty of up to \$ 15,000. For this purpose, "actual injury" is defined in *Health & Saf.C. 42400(d)*. (*Health & Saf.C. 42402(c)*; see Cal. Civil Practice, Environmental Litigation, §7:55 et seq. [regulatory proceedings under state air resources statutes]; 26 *Hastings L. J. 109* [nonvehicular pollution control]; 47 *A.L.R.3d 769* [maintainability in state court of class action for relief against air pollution]; 48 *A.L.R.3d 795* [administrative air pollution abatement orders]; 20 Am.Jur. P.P. Forms (1998 ed.), Pollution Control §45 [actions against nonvehicular polluters].)

Health & Saf.C. 42421 provides for the adoption of compliance programs, including settlement agreement procedures by which violators may take actions to improve air quality in lieu of paying monetary penalties. (On administrative penalties as alternative to civil penalties, see *Health & Saf.C. 42410*.)

Actions under *Health & Saf.C. 39000* are subject to a 3-year statute of limitations. However, the cause of action is not deemed to have accrued until the discovery by the State Air Resources Board or a Regional Air Pollution Control District of the facts constituting grounds for commencing actions under their jurisdiction. (*C.C.P. 338(k)*; see 22 *Pacific L. J. 551*.) Minor violations of *Health & Saf.C. 39000* et seq. are enforced under *Health & Saf.C. 39150* et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Enforcement.* See 19C Am.Jur. P.P. Forms (2007 ed.), Pollution Control §51 et seq. [actions against nonvehicular polluters].



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2. Nonvehicular Sources of Air Pollution.

bb. Specified Pollutants.

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[§ 900] Specified Pollutants.

(1) *Toxic Air Contaminants.* *Health & Saf.C.* 39650 et seq. provide for the identification and control of emission of toxic air contaminants. (See *Health & Saf.C.* 39674 [providing penalty provisions parallel to those in *Health & Saf.C.* 42402 (supra, §899)]; *Health & Saf.C.* 39656 et seq. [coordination of state program with requirements of Federal Clean Air Act (supra, §897)]; *Coalition for Reasonable Regulation of Naturally Occurring Substances v. California Air Resources Bd.* (2004) 122 C.A.4th 1249, 1262, 19 C.R.3d 635 [Air Resources Board's regulation barring sale and supply of rock containing asbestos for surfacing of unpaved roads complied with *Health & Saf.C.* 39666(c)].) However, pesticides that constitute toxic air contaminants are regulated by the Department of Food and Agriculture. (*Food & Ag.C.* 14021 et seq.) *Health & Saf.C.* 39650 et seq. do not preclude air pollution control districts from regulating emissions of a substance before the State Air Resources Board has determined whether the substance is a toxic air contaminant. (*Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 C.3d 408, 411, 261 C.R. 384, 777 P.2d 157; 21 Pacific L. J. 831 [Western Gas & Oil Assn.]; 17 Pepperdine L. Rev. 1065 [same].) Nor do they preclude air pollution control districts from regulating emissions of pesticides and toxic air contaminants from facilities that use pesticides. The state's exclusive jurisdiction to regulate a pesticide in its pesticidal use is limited to the pesticide's actual application or use; after use, the state has no more than concurrent jurisdiction over emission of the pesticide. (*Harbor Fumigation v. San Diego Air Pollution Control Dist.* (1996) 43 C.A.4th 854, 869, 870, 50 C.R.2d 874.)

(2) *Acid Rain.* *Health & Saf.C.* 39900 et seq. provide for the study and measurement of acid rain and the development of standards to protect the environment and public health from the adverse effects of atmospheric acidity.

(3) *Oxides of Nitrogen.* *Health & Saf.C.* 44275 et seq. establish an incentive program to substantially reduce emissions of oxides of nitrogen and fine particulate matter and to achieve compliance with the federal Clean Air Act (supra, §897).

(4) *Air Toxics "Hot Spots".* *Health & Saf.C.* 44300 et seq. provide measures to monitor and regulate the release of specified toxic substances into the air. (See *Masonite Corp. v. Superior Court* (1994) 25 C.A.4th 1045, 1054, 31 C.R.2d

173 [regulation governing disclosure of trade secrets in reports to air quality districts was invalid where inconsistent with provisions of *Health & Saf.C. 44346(a)*]; *Masonite Corp. v. Mendocino Air Quality Management Dist.* (1996) 42 C.A.4th 436, 446, 49 C.R.2d 639 [emission factors are data used to calculate emission data and thus qualify as protectible trade secrets under *Health & Saf.C. 44346*].)

SUPPLEMENT: [This section is current through the latest supplement]



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b. California Statutes.

3. Vehicular Sources of Air Pollution.

12 Witkin Sum. Cal. Law Real Property § 901

[§ 901] Vehicular Sources of Air Pollution.

(1) *In General.* Engine exhaust, a primary source of air pollution, is subject to extensive regulation under *Health & Saf.C. 43000* et seq., which set emissions standards for new and used vehicles. (See *Health & Saf.C. 43100* et seq. [new vehicles], *Health & Saf.C. 43600* et seq. [used vehicles]; *Clean Air Constituency v. California State Air Resources Bd.* (1974) 11 C.3d 801, 813, 114 C.R. 577, 523 P.2d 617 [Air Resources Board exceeded discretionary powers in delaying program for installation of nitrogen oxide pollution control devices on motor vehicles]; *Western Oil & Gas Assn. v. Orange County Air Pollution Control Dist.* (1975) 14 C.3d 411, 418, 121 C.R. 249, 534 P.2d 1329 [power to regulate fuel lead content resides in Air Resources Board rather than in air pollution control district]; 64 Cal. L. Rev. 661 [Western Oil & Gas Assn.]; 30 Ecology L. Q. 893 [preemption of California's emissions laws by federal laws setting fuel economy standards]; on reports by manufacturers to Air Resources Board indicating progress in complying with federal emission standards, see *Health & Saf.C. 43206, 43207*; on notice of compliance in production of new vehicles, see *Health & Saf.C. 43200*; on legislative response to attempt to circumvent regulation by out-of-state purchase of vehicles, see *Health & Saf.C. 43151*.)

Health & Saf.C. 44000 et seq. establish a statewide motor vehicle inspection program. (See *People v. Wilmshurst* (1999) 68 C.A.4th 1332, 1342, 81 C.R.2d 221 [corporate car dealership and its president were properly found liable for selling new motor vehicles that had not been certified by State Air Resources Board under *Health & Saf.C. 43150* et seq.; statute's definition of new motor vehicle was not preempted by federal Clean Air Act (supra, §897), and it was irrelevant that vehicles might have satisfied standards of vehicle inspection program set forth in *Health & Saf.C. 44000* et seq. because that program and new vehicle certification program are not equivalent]; 15 Santa Clara Lawyer 695 [passenger vehicle air pollution control]; 3 Ecology L. Q. 639 [jet aircraft emissions]; 61B Am.Jur.2d (1999 ed.), *Pollution Control* §564 et seq.)

(2) *Specific Requirements.* The following are among the statutes that are directed at specific types of vehicular air pollutants:

(a) *Health & Saf.C. 43018.5* (State Air Resources Board must adopt regulations that achieve maximum feasible and cost-effective reduction of greenhouse gas emissions from motor vehicles). (See 34 McGeorge L. Rev. 465.)

- (b) *Health & Saf.C. 43700* et seq. (mandated regulations to reduce emissions for heavy-duty diesel motor vehicles).
- (c) *Health & Saf.C. 43702* (established Diesel Fuel Trust Fund, supplied by variance fees charged to fuel manufacturers, and used to reimburse vehicle owners for specified damage caused by fuel).
- (d) *Health & Saf.C. 43806, Veh.C. 28113, 28114* (mandated emission standards for public transit buses).
- (e) *Health & Saf.C. 43845* (employers of 50 persons or more in areas not meeting air quality standards must offer "parking cash-out program" giving cash allowance in lieu of subsidized parking space).
- (f) *Health & Saf.C. 44080* et seq. (identification and repair of vehicles that are "gross polluters" of the air).
- (g) *Health & Saf.C. 44090* et seq. (established fund for repair or removal of high-emission vehicles).
- (h) *Health & Saf.C. 44220* et seq. (fees to implement programs for reduction of motor vehicle air pollution).
- (i) *Health & Saf.C. 44470* et seq. (progressively more stringent restrictions on sale of motor vehicles with air conditioners containing halogenated refrigerants controlled by Montreal Protocol on Substances that Deplete the Ozone Layer). (See 23 *Pacific L. J.* 636.)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Tobacco Smoke.

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[§ 902] Tobacco Smoke.

The California Indoor Clean Air Act of 1976 (*Health & Saf.C. 118875 et seq.*) requires posted nonsmoking sections in the following areas:

(1) Publicly used indoor areas of public buildings. (*Health & Saf.C. 118885.*)

(2) Publicly owned buildings open to the general public for the primary purpose of exhibiting a motion picture, stage drama, music recital, or another performance, with the exception of an indoor sporting event. (*Health & Saf.C. 118895.*)

(3) Dining areas of health facilities and clinics. (*Health & Saf.C. 118890.*)

(4) Restaurants in publicly owned buildings serving food or alcoholic beverages. (*Health & Saf.C. 118900.*)

Smoking in passenger carriers and on public transportation vehicles is prohibited (*Health & Saf.C. 118925; Pub.Util.C. 561*), as is smoking in retail food production and marketing establishments, except in areas set aside for employee smoking and not open to the public (*Health & Saf.C. 118915*). Additional regulation of smoking by local governments is expressly permitted. (*Health & Saf.C. 118910, 118940.*)

Smoking in enclosed workplaces (including restaurants) is prohibited. (*Lab.C. 6404.5, 3 Summary (10th), Agency and Employment, §377.*) Smoking is restricted in family day care homes (*Health & Saf.C. 1596.795*) and near playgrounds (*Health & Saf.C. 104495*). (See *19 Pacific L. J. 1* [cigarette advertising]; *7 San Fernando Valley L. Rev. 141* [review and analysis of nonsmokers' rights]; *63 So. Cal. L. Rev. 1061* [antidote to secondhand smoke].)

SUPPLEMENT: [This section is current through the latest supplement]

Smoking in a motor vehicle in which there is a minor is prohibited. (*Health & Saf.C. 118948(a)*, added in 2007.)



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C. Pollution Control.

4. Hazardous Waste.

a. Federal Statutes.

12 Witkin Sum. Cal. Law Real Property § 903

[§ 903] Federal Statutes.

(1) *Statutes.* The primary federal statutes governing hazardous waste are the Toxic Substances Control Act (TSCA; 15 U.S.C., §2601 et seq.), the Resource Conservation and Recovery Act of 1976 (RCRA; 42 U.S.C., §6901 et seq.), which provides for improved management and control of hazardous waste, and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA; 42 U.S.C., §9601 et seq.). (See 7 *Ecology L. Q.* 207 et seq. [hazardous substances in environment--entire issue]; 10 *Ecology L. Q.* 579 [RCRA]; 24 *San Diego L. Rev.* 1249 [scope of EPA authority under RCRA]; 61 *C Am.Jur.2d* (1999 ed.), *Pollution Control* §1151 et seq.; 50 *Proof of Facts* 3d 237 [citizens' suits under TSCA].)

(2) *Commentary.* CERCLA, in particular, has engendered a tremendous amount of litigation and commentary, including the following:

(a) *Overview of Act.* (See *Cal. Civil Practice, Environmental Litigation*, Chap. 3 [Superfund litigation]; 12 *Ecology L. Q.* 189 [federal Superfund]; 13 *Ecology L. Q.* 181, 311 [liability for toxic waste cleanup under federal law]; 21 *Ecology L. Q.* 573 [human health risk assessments for Superfund]; 21 *Ecology L. Q.* 865 [military base cleanup]; 27 *Loyola L.A. L. Rev.* 1157 [CERCLA's petroleum exclusion]; 27 *San Diego L. Rev.* 407 [CERCLA and the public trust]; 6 *U.C.L.A. Journal of Environmental Law & Policy* 1 [CERCLA and Superfund Amendments and Reauthorization Act]; 33 *U.C.L.A. L. Rev.* 1737 [recovery of private cleanup costs from Superfund]; 147 *A.L.R. Fed* 469 [what constitutes "facility" for purposes of 42 U.S.C., §9601(9)]; 157 *A.L.R. Fed* 291 [United States Supreme Court cases regarding CERCLA]; 61 *C Am.Jur.2d* (1999 ed.), *Pollution Control* §1270 et seq.)

(b) *Municipalities.* (See 29 *Ecology L. Q.* 59 [supplementing CERCLA so that cities can clean up contaminated properties within their borders]; 69 *So. Cal. L. Rev.* 2193 [placing Superfund costs on municipalities].)

(c) *Allocation of liability among responsible parties.* (See 14 *Ecology L. Q.* 601 [allocation of liability]; 30 *Ecology L. Q.* 473 [limiting liability under CERCLA by defining "disposal" to not encompass passive migration of contaminants]; 35 *Loyola L.A. L. Rev.* 1107 [arguing that potentially responsible party under CERCLA can sue other potentially responsible party for contribution without first facing administrative order or cost recovery action]; 28 *U.C. Davis L. Rev.* 299 [joint and several liability under CERCLA]; 148 *A.L.R. Fed* 203 [equitable considerations in

allocating response costs under 42 U.S.C., §9613(f)); 162 *A.L.R. Fed* 371 [amount and characteristics of wastes as equitable factors in allocating response costs under 42 U.S.C., §9613(f)]; 34 *Proof of Facts* 3d 465 [validity and applicability of environmental risk allocation clauses in context of CERCLA liability]; 80 *Proof of Facts* 3d 281 [current landowner's right to recover cleanup costs from other liable parties]; 59 *Am.Jur. Trials* 231 [contractual indemnifications and releases from environmental liability].)

(d) *Corporate liability*. (See 15 *California Lawyer* 59 (November 1995) [parent corporation liability under CERCLA]; 20 *Ecology L. Q.* 313 [liability of officers and shareholders]; 47 *Hastings L. J.* 189 ["arranger" liability under CERCLA]; 22 *Pacific L. J.* 854 [liability of parent corporations]; 23 *Pacific L. J.* 1317 [liability of successor corporations]; 24 *U.S.F. L. Rev.* 421 [liability of parent corporations]; 34 *Proof of Facts* 3d 387 [establishing liability of parent, subsidiary, or successor corporation under CERCLA].)

(e) *Lender liability*. (See 14 *Ecology L. Q.* 569 [lender liability]; 20 *Ecology L. Q.* 313 [lender liability]; 38 *Hastings L. J.* 1261 [lender liability]; 104 *Harv. L. Rev.* 1249 [security interest exemption]; 18 *Pepperdine L. Rev.* 513 [lender liability]; 64 *So. Cal. L. Rev.* 1187 [lender liability]; 68 *So. Cal. L. Rev.* 1417 [lender liability]; 39 *U.C.L.A. L. Rev.* 439 [liability of Resolution Trust Corporation]; 49 *Proof of Facts* 3d 173 [lender liability].)

(f) *Litigation under Act*. (See *Key Tronic Corp. v. United States* (1994) 511 U.S. 809, 114 S.Ct. 1960, 1967, 128 L.Ed.2d 797, 807 [CERCLA does not authorize award of private litigants' attorneys' fees for bringing cost recovery action]; *Angeles Chemical Co. v. Spencer & Jones* (1996) 44 C.A.4th 112, 122, 51 C.R.2d 594 [effect of CERCLA's discovery rule (42 U.S.C., §9658) on state statutes of limitations]; *Rivas v. Safety-Kleen Corp.* (2002) 98 C.A.4th 218, 231, 119 C.R.2d 503 [42 U.S.C., §9658 did not preempt California's statute of limitations for personal injury claims (C.C.P. 340(3)) in action against manufacturers and suppliers of toxic chemicals to which workers were exposed]; 21 *Ecology L. Q.* 786 [CERCLA remedy selection]; 30 *Ecology L. Q.* 569 [sovereign immunity and war pollution]; 46 *U.C.L.A. L. Rev.* 1989 [argument for causal requirement in multisite CERCLA litigation]; 144 *A.L.R. Fed* 285 [statute of limitations for CERCLA action]; 55 *Proof of Facts* 3d 155 [citizens' suits under CERCLA and Emergency Planning and Community Right-To-Know Act]; 47 *Am.Jur. Trials* 1 [litigation under CERCLA]; 57 *Am.Jur. Trials* 1 [private cost recovery actions under CERCLA]; 68 *Am.Jur. Trials* 1 [federal agency action under CERCLA].)

(g) *Insurance coverage for cleanup costs*. (See *AIU Ins. Co. v. Superior Court* (1990) 51 C.3d 807, 814, 274 C.R. 820, 799 P.2d 1253 [ruling in favor of coverage]; *Aerojet-General Corp. v. Superior Court* (1989) 211 C.A.3d 216, 232, 257 C.R. 621 [same]; *Masonite Corp. v. Great Amer. Surplus Lines Ins. Co.* (1990) 224 C.A.3d 912, 916, 274 C.R. 206 [coverage under environmental impairment liability insurance policy]; *Cal. Civil Practice, Environmental Litigation*, Chap. 5 [insurance coverage litigation]; 16 *Ecology L. Q.* 755 [coverage under comprehensive general liability insurance policies]; 28 *San Diego L. Rev.* 711; 57 *So. Cal. L. Rev.* 745 [liability insurance for hazardous waste disposal]; 12 *U.C.L.A. Journal of Environmental Law & Policy* 435 [coverage under comprehensive general liability insurance policies].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutes*. See 32 *Ecology L. Q.* 603 [using RCRA to seek remedy for air pollution caused by crop residue burning]. (2) *Commentary*.

(a) *Overview of Act*. See 32 *Ecology L. Q.* 647 [exempting Department of Defense from federal hazardous waste laws].

(b) *Municipalities*. See 31 *Ecology L. Q.* 487 [CERCLA preemption of local enactments that enforce more stringent cleanup standards].

(c) *Allocation of liability among responsible parties*. See *United States v. Atlantic Research Corp.* (2007) 551 U.S. 128, 127 S.Ct. 2331, 2335, 168 L.Ed.2d 28, 37 [potentially responsible private party may recover voluntarily incurred cleanup costs from other potentially responsible parties under 42 U.S.C., §9607(a)]; 94 *Cal. L. Rev.* 149 [proposal for

environmental negligence cause of action for innocent owners of contaminated land]; 31 *Ecology L. Q.* 435 [liability for passive migration of hazardous waste]; 33 *Ecology L. Q.* 1 [federalism consequences of *Cooper Industries v. Aviall Services* (2004) 543 U.S. 157, 125 S.Ct. 577, 160 L.Ed.2d 548, which held that private party who has not been sued in CERCLA administrative or cost recovery action may not obtain contribution from other liable parties under 42 U.S.C., §9613(f)(1)]; 56 *Hastings L. J.* 193 [implications of *Cooper Industries*]; 12 *A.L.R. Fed* 2d 161 [innocent owner status under CERCLA]; 22 *A.L.R. Fed* 2d 233 [cost recovery and contribution rights after *Cooper Industries*]; 24 *A.L.R. Fed* 2d 133 [CERCLA requirement that public cost recovery actions not be inconsistent with national contingency plan].(f) *Litigation under Act*. See 33 *Ecology L. Q.* 675 [challenging ongoing cleanup activities to prevent irreparable environmental harm]; 8 *Pepperdine Dispute Resolution L. J.* 331 [mediation settlements of disputes under CERCLA].



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4. Hazardous Waste.

b. Hazardous Waste Control Act.

1. Statutory Framework.

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[§ 904] Statutory Framework.

The primary source of regulation of hazardous waste in California is the Hazardous Waste Control Act (*Health & Saf.C. 25100 et seq.*). (See *12 Ecology L. Q. 183* [state regulation]; *67 A.L.R.4th 822* [validity of local regulations]; *86 A.L.R.4th 401* [state hazardous waste regulation]; on radioactive wastes, see *infra*, §910.) The Act's provisions encompass the following subjects:

- (a) Listings of hazardous wastes. (*Health & Saf.C. 25140 et seq.*)
- (b) Regulation and preservation of existing hazardous waste facilities. (*Health & Saf.C. 25146 et seq.*)
- (c) Standards for handling, storing, and disposing of hazardous waste. (*Health & Saf.C. 25150 et seq.*; see *94 Harv. L. Rev 584* [allocation of disposal costs]; *53 So. Cal. L. Rev. 1709* [abandoned hazardous waste disposal sites].)
- (d) Coordination with federal acts. (*Health & Saf.C. 25159 et seq.*; on federal acts, see *supra*, §903.)
- (e) Underground discharge of hazardous waste through injection wells. (*Health & Saf.C. 25159.10 et seq.*)
- (f) Standards for transportation and hauling. (*Health & Saf.C. 25160 et seq.*, *25167.1 et seq.*; see *Health & Saf.C. 25169.5 et seq.* [handling and transportation of "hazardous wastes of concern," which have potential to be used in terrorist or intentional criminal act]; *11 Pacific L. J. 527* [transportation of hazardous waste].)
- (g) Research on methods of treatment, recycling, and disposal. (*Health & Saf.C. 25170 et seq.*, *25244 et seq.*; see *Health & Saf.C. 25244.12 et seq.* [promoting reduction of hazardous waste at source, encouraging recycling, and requiring waste treatment to minimize present and future threat to health and environment].)
- (h) Prohibition against land disposal of any hazardous waste restricted by the federal Resource Conservation and Recovery Act (*supra*, §903) and adoption of the federal minimum treatment standards. (*Health & Saf.C. 25179.1 et seq.*, *25179.5.*)

- (i) Hazardous waste-testing laboratories. (*Health & Saf.C. 25198 et seq.*)
- (j) Permits for hazardous waste facilities. (*Health & Saf.C. 25199 et seq., 25200 et seq.*; on development of hazardous waste facility regulation and permitting consolidation program, see *Health & Saf.C. 25204.6*; see *Padres Hacia Una Vida Mejor v. Davis* (2002) 96 C.A.4th 1123, 1129, 117 C.R.2d 727 [*Health & Saf.C. 25199.9(e)* required Governor to convene administrative appeal board to review county's hazardous waste facility expansion]; 25 *Ecology L. Q.* 733 [criticism of Tanner Act (*Health & Saf.C. 25199 et seq.*), which was intended to increase local control over siting of toxic waste facilities].)
- (k) Cleanup of toxic pits. (*Health & Saf.C. 25208 et seq.*)
- (l) Discharge of waste into land treatment units. (*Health & Saf.C. 25209 et seq.*)
- (m) Adoption of best management practices for managing perchlorate materials. (*Health & Saf.C. 25210.5 et seq., 25210.6.*)
- (n) Management of hazardous waste removed from major appliances. (*Health & Saf.C. 25211 et seq.*)
- (o) Safe removal and disposal of mercury-containing vehicle light switches. (*Health & Saf.C. 25214.5 et seq.*; see *Health & Saf.C. 25214.8.1* [mercury-added thermostats]; on prohibitions against retail sales of mercury fever thermometers, except by prescription, against manufacturing and sale of mercury-added novelties, such as jewelry, holiday decorations, and footwear, against sale of mercury-containing motor vehicle light switches, and against use of mercury devices in schools, see *Pub.Res.C. 15026(a), 15027(a), 15028, 15029.*)
- (p) System to reduce and recycle electronic waste. (*Health & Saf.C. 25214.9 et seq.*; 35 *McGeorge L. Rev.* 529.)
- (q) Prohibition against sale of packaging that includes lead, mercury, cadmium, or hexavalent chromium. (*Health & Saf.C. 25214.11 et seq.*; see *Health & Saf.C. 25214.14* [exemptions].)
- (r) Disposal of household hazardous waste and other small quantity generator waste. (*Health & Saf.C. 25218 et seq.*; see *Pub.Res.C. 47200 et seq.* [grants to local agencies to assist with disposal of household hazardous wastes].)
- (s) Designation of land as hazardous waste property. (*Health & Saf.C. 25220 et seq.*; see *Beck Dev. Co. v. Southern Pac. Trans. Co.* (1996) 44 C.A.4th 1160, 1183, 52 C.R.2d 518 [property owner was entitled to determination whether property should be designated hazardous waste property; regulatory agency could impose moratorium on development only as interim measure pending determination]; 74 *So. Cal. L. Rev.* 1191 [emergence of California nuisance law and consent defense as means for current property owners to recover their cleanup costs and other damages from prior owners deemed responsible for property contamination; analysis of *Beck Dev. Co.*].)
- (t) Unauthorized disposal of hazardous waste on public land. (*Health & Saf.C. 25242 et seq.*)

West's Key Number Digest, Health and Environment k.25.5(5.5)

SUPPLEMENT: [This section is current through the latest supplement]

(o) *Products containing mercury:* *Health & Saf.C. 25214.8.3 et seq.*, added in 2005, extend the statute governing mercury-added thermostats to mercury-added relays, switches, and measuring devices. (u) *(New) Lead jewelry:* Prohibition against manufacture and sale of specified jewelry containing lead. (*Health & Saf.C. 25214.1 et seq.*, added in 2006.)

(v) *(New) Lights:* Manufacture for sale of general purpose lights that contain specified levels of hazardous substances. (*Health & Saf.C. 25210.9 et seq.*, added in 2007.)



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b. Hazardous Waste Control Act.

2. Enforcement.

12 Witkin Sum. Cal. Law Real Property § 905

[§ 905] Enforcement.

(1) *Statutory Provisions.* Violators of *Health & Saf.C. 25100* et seq. and hazardous waste regulations are subject to injunction, suspension or revocation of permits, and civil and criminal penalties. (See *Health & Saf.C. 25180* et seq.; on issuance of notice of compliance as to minor violations, see *Health & Saf.C. 25117.6, 25117.9.1, 25187.8*.) The operators of hazardous waste facilities are required to be financially responsible for damages arising from the operation of the facilities and for the expense of closure and subsequent maintenance of the facilities. (*Health & Saf.C. 25245* et seq.) Anyone liable under state law for illegal disposal or release of a hazardous substance is also liable to the state or a local agency for the costs of restoring or replacing damaged natural resources. (*Health & Saf.C. 25189.1*.) (See Cal. Civil Practice, Environmental Litigation, Chaps. 1, 2 [toxic tort litigation], §7:96 et seq. [regulatory proceedings under *Health & Saf.C. 25100* et seq.]; 17 *Ecology L. Q.* 803 [local enforcement]; 99 *Harv. L. Rev.* 1459 et seq. [toxic waste litigation]; 33 *Stanf. L. Rev.* 675 [hazardous waste--nuisance penalty]; 57 *Am.Jur. Trials* 395 [handling toxic tort litigation]; 40 *Proof of Facts* 3d 457 [proof of wrongful handling or disposal of hazardous waste].)

An appeal does not stay enforcement of a judgment or order under *Health & Saf.C. 25181*, requiring compliance with hazardous waste control statutes, rules, or regulations. (*C.C.P. 917.15*.)

(2) *Cases.* The following are among the decisions construing the enforcement provisions of the Hazardous Waste Control Act:

IT Corp. v. Solano County Bd. of Supervisors (1991) 1 *C.4th* 81, 93, 2 *C.R.2d* 513, 820 *P.2d* 1023 [*Health & Saf.C. 25100* et seq. do not preempt local authority to enforce land use regulation violated by hazardous waste disposal facility]. (See 20 *Pepperdine L. Rev.* 830 [*IT Corp.*].)

Liquid Chemical Corp. v. Department of Health Services (1991) 227 *C.A.3d* 1682, 1690, 279 *C.R.* 103 [civil penalties against corporate fertilizer manufacturer and its president were proper].

People v. Sangani (1994) 22 *C.A.4th* 1120, 1129, 28 *C.R.2d* 158 [affirming criminal convictions of metal plating company and owner for disposing of hazardous waste in sewer system].

People v. Hale (1994) 29 C.A.4th 730, 734, 34 C.R.2d 690 [affirming criminal conviction under *Health & Saf.C.* 25189.5 for putting hazardous waste mixed with sawdust in Dumpster; deviations from regulatory procedures for gathering samples of alleged waste were harmless].

Department of Toxic Substances Control v. Superior Court (1996) 44 C.A.4th 1418, 1423, 1425, 52 C.R.2d 412 [*Health & Saf.C.* 25185 authorizes unannounced, routine inspections of hazardous waste management facilities, and those inspections are not precluded by pending civil litigation between department and facility].

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Cases.* See *People v. Union Pac. R. Co.* (2006) 141 C.A.4th 1228, 1254, 47 C.R.3d 92 [remedial claims involving abatement, cleanup, assessment, and remediation of injury to natural resources caused by calcium oxide spill were not preempted by federal Hazardous Materials Transportation Act].



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C. Pollution Control.

4. Hazardous Waste.

c. Hazardous Substances Account Act.

12 Witkin Sum. Cal. Law Real Property § 906

[§ 906] Hazardous Substances Account Act.

Health & Saf.C. 25300 et seq. (Carpenter-Presley-Tanner Hazardous Substances Account Act) impose taxes on the disposal of hazardous waste, and authorize bonds to fund a Hazardous Substance Account ("California Superfund") to clean up hazardous spills and waste disposal sites and, under specified circumstances, to compensate persons who are injured by exposure to the release of hazardous substances or whose property is damaged by exposure. (See *KFC Western v. Meghriq* (1994) 23 C.A.4th 1167, 1173, 28 C.R.2d 676 [petroleum exclusion provided in *Health & Saf.C. 25317* bars cost recovery for cleanup of refined petroleum products such as gasoline]; *Lodi v. Randtron* (2004) 118 C.A.4th 337, 348, 13 C.R.3d 107 [Hazardous Substances Account Act preempts local regulation of response actions on sites listed under *Health & Saf.C. 25356*; state has sole jurisdiction over removal and remedial actions at all listed sites]; Cal. Civil Practice, Environmental Litigation, §3:86 et seq. [litigation under *Health & Saf.C. 25300 et seq.*], §7:133 et seq. [regulatory proceedings under *Health & Saf.C. 25300 et seq.*].)

Health & Saf.C. 25337 establishes a separate Site Remediation Account, funded from the Hazardous Substances Account, to be used for direct site remediation costs in conjunction with the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (*supra*, §903). The Expedited Remedial Action Reform Act of 1994 (*Health & Saf.C. 25396 et seq.*) provides for remediation of sites meeting specified requirements, for arbitration of disputes and apportionment of liability arising from remediation, and for the establishment of a trust fund to implement the Act. It operates as an alternative to the Hazardous Substances Account Act for the specified sites. (*Health & Saf.C. 25397(a).*)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Hazardous Waste.

d. Other California Statutes.

12 Witkin Sum. Cal. Law Real Property § 907

[§ 907] Other California Statutes.

The following statutes also deal with hazardous wastes:

(1) *Health & Saf.C. 25280* et seq. regulate the underground storage of hazardous substances, including the short-term storage of hazardous wastes before disposal, and ensure conformance with federal requirements under the Resource Conservation and Recovery Act (see *supra*, §903). (See *Health & Saf.C. 25283.5* [exemptions]; *Caldo Oil Co. v. State Water Resources Control Bd.* (1996) 44 C.A.4th 1821, 1827, 52 C.R.2d 609 [challenge to regulation limiting reimbursement of owners who clean up leaks from tanks]; Cal. Civil Practice, Environmental Litigation, §7:39 et seq. [regulatory proceedings involving underground tanks]; 21 *Ecology L. Q.* 643 [use of nuisance law to fill gaps in statutes on underground tanks]; 11 *A.L.R.5th* 388 [state and local governmental control of pollution from underground storage tanks]; 78 *Proof of Facts* 3d 107 [liability for petroleum contamination from leaking underground storage tanks]; on underground petroleum storage tank cleanup, see *Health & Saf.C. 25299.10* et seq.)

(2) *Health & Saf.C. 33459* et seq. (Polanco Redevelopment Act) allows redevelopment agencies to remove hazardous substances from properties within redevelopment projects, regardless of whether the agencies own the properties. (See *Redevelopment Agency v. Salvation Army* (2002) 103 C.A.4th 755, 763, 127 C.R.2d 30 [under *Health & Saf.C. 33459* et seq., redevelopment agency could recover costs expended in removing hazardous substances from property without establishing compliance with CERCLA (*supra*, §903)]; *Redevelopment Agency of San Diego v. San Diego Gas & Elec. Co.* (2003) 111 C.A.4th 912, 917, 920, 4 C.R.3d 317 [redemption agency has standing under *Health & Saf.C. 33459* et seq. to sue to compel responsible party to remove hazardous substances from redevelopment project area; agency need not allege direct financial injury].)

(3) *Health & Saf.C. 25400* limits liability of public entities and public service employees for negligence in responding to hazardous substance emergencies.

(4) *Health & Saf.C. 25500* et seq. require local inventory of hazardous materials and plans for response to their release.

(5) *Health & Saf.C. 25570* et seq. provide for voluntary registration of private persons qualified to make

environmental quality assessments of hazardous materials.

(6) P.C. 374.2 makes it unlawful to maliciously dispose of hazardous waste in a public sanitary sewer system.

(7) *Health & Saf.C. 117600 et seq.* (Medical Waste Management Act) regulate the disposal of medical waste, including waste that has been contaminated with large quantities of human blood or body fluids as a result of death, serious injury, or illness (*Health & Saf.C. 118321 et seq.*).

(8) *Pub.Util.C. 7710 et seq.* address safety concerns in the transportation of hazardous materials by rail.

(9) *Govt.C. 65959 et seq.* provide for the coordination of multiple applications for permits for the storage, treatment, handling, or disposal of hazardous waste.

(10) *Health & Saf.C. 25269 et seq.* regulate costs associated with the oversight of cleanup efforts.

(11) *Health & Saf.C. 25548 et seq.* specify types of lender and fiduciary conduct that are exempt from liability for hazardous waste contamination involving property that is owned or used by borrowers or that is part of the fiduciary estate. (On lender liability under federal acts, see *supra*, §903.)

(12) The Environmental Responsibility Acceptance Act (C.C. 850 et seq.) requires a landowner who has "actual awareness" of a hazardous materials release to identify the potentially responsible party and to notify that party and the appropriate agency. (C.C. 851(a).) Similarly, a potentially responsible party must notify the appropriate landowner of a release. (C.C. 851(b).) The Act provides for mediation between the potentially responsible party and the landowner, if necessary. (C.C. 852(b).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Health & Saf.C. 25280 et seq.*: See *Kelsoe v. State Water Resources Control Bd.* (2007) 153 C.A.4th 569, 578, 63 C.R.3d 156 [gas station owner may have been eligible for reimbursement of underground storage tank cleanup costs under *Health & Saf.C. 25299.57*, even though he did not have permit for tanks during early years of statute; board's position that earlier noncompliance rendered owner forever ineligible was not reasonable].

(4) *Health & Saf.C. 25500 et seq.*: See *People v. Union Pac. R. Co.* (2006) 141 C.A.4th 1228, 1252, 1259, 47 C.R.3d 92 [requirement of verbal notification of calcium oxide spill, under *Health & Saf.C. 25507*, was not preempted by federal Hazardous Materials Transportation Act, but some claims for alleged failure to train employees with regard to release of calcium oxide, under *Health & Saf.C. 25504*, were preempted, as were claims based on fact of spill itself].(13) (New) *Methamphetamine*: The Methamphetamine Contaminated Property Cleanup Act of 2005, *Health & Saf.C. 25400.10 et seq.*, added in 2005, provides for the identification and remediation of property contaminated by methamphetamine laboratory activity.



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C. Pollution Control.

5. Solid Waste.

a. Integrated Waste Management.

12 Witkin Sum. Cal. Law Real Property § 908

[§ 908] Integrated Waste Management.

(1) *Purpose of Integrated Management.* The Integrated Waste Management Act of 1989 (*Pub.Res.C. 40000 et seq.*) governs all solid waste activity in California. The stated purpose of the Act is "to reduce, recycle, and reuse solid waste generated in the state to the maximum extent feasible in an efficient and cost-effective manner to conserve water, energy and other natural resources, to protect the environment, to improve regulation of existing solid waste landfills, to ensure that new solid waste landfills are environmentally sound, to improve permitting procedures for solid waste management facilities, and to specify the responsibilities of local governments to develop and implement integrated waste management programs." (*Pub.Res.C. 40052.*) (See *21 Ecology L. Q. 947* [municipal solid waste management and problems with packaging]; *37 A.L.R.4th 635* [regulation of landowner's disposal of solid waste on own property]; *61C Am.Jur.2d* (1999 ed.), *Pollution Control §1134 et seq.*; *40 Proof of Facts 3d 457* [proof of wrongful handling or disposal of solid waste].)

(2) *Waste Management Plans.* The Act creates the California Waste Management Board (*Pub.Res.C. 40400 et seq.*), and requires local agencies to prepare integrated waste management plans (*Pub.Res.C. 40900 et seq.*) that promote source reduction, recycling, and composting (*Pub.Res.C. 40900.1(c)*). (See *Oregon Waste Systems v. Department of Environmental Quality of Oregon* (1994) 511 U.S. 93, 114 S.Ct. 1345, 1350, 128 L.Ed.2d 13, 22 [imposition of surcharge on disposal of solid waste generated out of state violated Commerce Clause]; *C & A Carbone v. Clarkstown, New York* (1994) 511 U.S. 383, 114 S.Ct. 1677, 1681, 128 L.Ed.2d 399, 407 [local ordinance requiring all solid waste to be processed at local facility violated Commerce Clause]; *Dublin v. Alameda* (1993) 14 C.A.4th 264, 277, 17 C.R.2d 845 [Act does not prohibit implementation of new programs by local agencies before completion of integrated plans]; on recycling of particular items, see *supra*, §875.)

In order to assist local agencies in minimizing duplication of effort and implementation costs, the Act provides for board assistance in local planning. (*Pub.Res.C. 40910 et seq.*; on assistance to rural cities and counties in complying with Act, see *Pub.Res.C. 41787 et seq.*) Cities and counties may establish regional agencies for purposes of implementation. (*Pub.Res.C. 40970 et seq.*)

(3) *Additional Provisions.* The Act requires the Waste Management Board to institute a plan to stimulate market demand for certain postconsumer and industrial waste material (*Pub.Res.C. 42000 et seq.*), regulates solid waste

facilities (*Pub.Res.C. 43000 et seq.*), provides for the division of authority over solid waste disposal between the board and the state and regional water boards (*Pub.Res.C. 43100 et seq.*), and provides for enforcement (*Pub.Res.C. 45000 et seq.*). (See *San Elijo Ranch v. San Diego* (1998) 65 C.A.4th 608, 612, 76 C.R.2d 601 [private plaintiff should have exhausted administrative remedies under Act before seeking writ of mandamus to compel county to comply with waste permit provisions; however, Act gives local governments judicial, as well as administrative remedies, and plaintiff city was free to choose judicial alternative]; 17 *Ecology L. Q.* 655 [incentive approach to regulating solid waste]; on responsibility for human health aspects of solid waste management and resource recovery, see *Health & Saf.C. 117580*; on waste disposal on shorelines and near rivers, see *Fish & Game C. 5652*; on disposal of forest products wastes, see *Pub.Res.C. 4437, 4438.*)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Additional Provisions.* See *Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v. Solano Dept. of Resource Management* (2008) 167 C.A.4th 1350, 1360, 84 C.R.3d 889 [under *Pub.Res.C. 44307*, environmental group was entitled to administrative hearing to challenge proposed revisions to solid waste facility permit for local landfill].



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C. Pollution Control.

5. Solid Waste.

b. Exclusive Franchises for Solid Waste Services.

12 Witkin Sum. Cal. Law Real Property § 909

[§ 909] Exclusive Franchises for Solid Waste Services.

Local governments may determine all aspects of solid waste handling that are of local concern, including the frequency of collection, the means of collection and transportation, the level of services, and charges and fees. (*Pub.Res.C. 40059(a)(1).*) Local governments may also decide whether the services are to be provided by means of an exclusive franchise, and may grant authority to provide solid waste handling services by resolution or ordinance. (*Pub.Res.C. 40059(a)(2).*)

In *Waste Management of the Desert v. Palm Springs Recycling Center* (1994) 7 C.4th 478, 28 C.R.2d 461, 869 P.2d 440, the question was whether a city's authority to award an exclusive franchise under *Pub.Res.C. 40059(a)(2)* extends so far to prohibit the owner of recyclable materials from selling them to someone other than the exclusive franchisee. A city and its exclusive franchisee for the collection and disposal of waste sued a recycling company that was collecting recyclable materials from large commercial customers. Plaintiffs alleged violation of their rights under the franchise agreement and a city ordinance governing waste collection. The trial court granted judgment for plaintiffs. *Held*, reversed. The Act is concerned only with material that has become "waste" because it has been discarded by its owner. Property sold for value, including recyclable materials, is not "waste" under the Act. (7 C.4th 486.) Hence, the owner of undiscarded recyclables is not required to transfer them to the holder of an exclusive franchise. (7 C.4th 489.) Two justices dissented, arguing that the majority failed to acknowledge the fundamental legislative objectives of the 1989 Act--the promotion of "integrated solid waste management"--and that allowing defendant to "skim off the cream" of the recycling business deprived the franchisee of its economic incentive and frustrated the city's effort to meet the Act's recycling requirements. (7 C.4th 499, 500.) (See 22 *Pepperdine L. Rev.* 1778 [*Waste Management of the Desert*].)

The following are among other cases discussing local government authority under *Pub.Res.C. 40059*:

Waste Resource Technologies v. Department of Public Health (1994) 23 C.A.4th 299, 304, 28 C.R.2d 422 [Act did not preempt municipal ordinance granting exclusive franchise for refuse collection; trial court properly barred other recycling operations from competing with franchisee].

San Marcos v. Coast Waste Management (1996) 47 C.A.4th 320, 326, 54 C.R.2d 588 [defendant company that charged customers fee for collecting recyclable materials was, under reasoning of *Waste Management of the Desert*,

collecting *discarded* materials in violation of city's exclusive franchise agreement with plaintiff company; injunction against defendant was proper under Act].

Waste Management of Alameda County v. Biagini Waste Reduction Systems (1998) 63 C.A.4th 1488, 1494, 74 C.R.2d 676 [city ordinance that granted solid waste disposal company exclusive franchise to collect solid waste from single-family dwellings in city did not violate Commerce Clause].

Valley Vista Services v. Monterey Park (2004) 118 C.A.4th 881, 886, 13 C.R.3d 433 [Act did not preempt city ordinance that prohibited competitor of exclusive franchisee from soliciting new business during transition period from nonexclusive to exclusive service].

SUPPLEMENT: [This section is current through the latest supplement]



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C. Pollution Control.
6. Nuclear Power and Radiation.

12 Witkin Sum. Cal. Law Real Property § 910

[§ 910] Nuclear Power and Radiation.

(1) *Nuclear Radiation.* The pollution hazards from the industrial use of nuclear technologies are recognized in many California regulatory statutes, including the following:

- (a) *Health & Saf.C. 114705* et seq. (control of radioactive contamination).
- (b) *Health & Saf.C. 114780* (ocean dumping of radioactive waste).
- (c) *Health & Saf.C. 107150* et seq. (nuclear medical technology).
- (d) *Health & Saf.C. 114815* et seq. (transportation of radioactive materials).
- (e) *Health & Saf.C. 114840* et seq. (medical X-rays).
- (f) *Health & Saf.C. 114900* et seq. (development of atomic energy and coordination with federal law).
- (g) *Health & Saf.C. 114960* et seq. (Radiation Control Law; disposal of low-level radioactive waste).
- (h) *Health & Saf.C. 115250* et seq. (Southwestern Low-Level Radioactive Waste Disposal Compact).

Federal policy regarding radioactive waste is set forth in the Low-Level Radioactive Waste Policy Amendments Act (42 U.S.C., §2021b et seq.). In *New York v. United States* (1992) 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120, 7 Summary (10th), *Constitutional Law*, §6, the Court upheld the constitutionality of monetary incentives and disposal site access incentives that are provided in the Act to obtain states' compliance with federal radioactive waste policy. (112 S.Ct. 2427, 120 L.Ed.2d 148.) However, the Court struck down a third incentive provision, which it held offered states a choice between two unconstitutional alternatives: regulating pursuant to Congress' direction, or taking ownership of and liability for low-level radioactive waste generated within their borders. (112 S.Ct. 2428, 120 L.Ed.2d 150.) (See 20 *Ecology L. Q.* 267 [analyzing Low-Level Radioactive Waste Policy Amendments Act, *New York v. United States*, and issues of federal intrusion on state sovereignty].)

(2) *Nuclear Power Plants.* *Pub.Res.C. 25524.1* et seq. impose conditions on the construction of nuclear fission

thermal power plants. No new plants may be built unless the State Energy Resources Conservation and Development Commission finds that the necessary federally approved technology and storage space exist for reprocessing and storing nuclear fuel rods (*Pub.Res.C.* 25524.1) and for disposing of high-level nuclear waste (*Pub.Res.C.* 25524.2). The federal Atomic Energy Act (42 U.S.C., §2011 et seq.) does not preempt the California statute. (*Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Com.* (1983) 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 [upholding California moratorium on new plant construction]; see 97 *Harv. L. Rev.* 238 [*Pacific Gas & Elec. Co.*]; 24 *Santa Clara L. Rev.* 497 [same]; on federal Act, see *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council* (1978) 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 [procedure under federal act]; 16 *San Diego L. Rev.* 183 [*Vermont Yankee Nuclear Power Corp.*]; 19 *Santa Clara L. Rev.* 799 [same]; 21 *U.S.F. L. Rev.* 121 [licensing].)

Health & Saf.C. 114785 et seq. provide for the monitoring of nuclear power plants, which are required to install automated alarm systems to alert emergency service agencies in the event of nuclear accidents (*Health & Saf.C.* 115275 et seq.). The Radiation Protection Act governs emergency response to nuclear power plant accidents. (*Health & Saf.C.* 114650 et seq.)

(3) *Commentary.* Commentary on nuclear power and nuclear waste is plentiful. (See 61 *Cal. L. Rev.* 961 [electricity or the environment]; 7 *Ecology L. Q.* 679 [California nuclear laws]; 7 *Ecology L. Q.* 917 [nuclear waste management]; 94 *Harv. L. Rev.* 489 [nuclear power and need for institutional reform]; 31 *Hastings L. J.* 1 [formulating and implementing energy policy]; 18 *Santa Clara L. Rev.* 491 [federal and state regulations]; 55 *So. Cal. L. Rev.* 511 [state regulation of nuclear generating plants under Clean Air Act]; 55 *So. Cal. L. Rev.* 597 [historical roots of legal system's response to nuclear power]; 15 *U.S.F. L. Rev.* 129, 441 [state opportunities to regulate nuclear power and provide alternative energy supplies]; 82 *A.L.R.3d* 751 [state regulation of nuclear power plants]; 61 *C Am.Jur.2d* (1999 ed.), *Pollution Control* §1610 et seq.; 9 *Proof of Facts* 3d 85 [radiation injuries].)

West's Key Number Digest, Health and Environment k.25.5(7)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nuclear Radiation.*

Federal policy: See 18 *A.L.R. Fed* 2d 433 [validity, construction, and application of low-level radioactive waste compact].



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C. Pollution Control.
7. Pesticides and Other Toxic Chemicals.

12 Witkin Sum. Cal. Law Real Property § 911

[§ 911] Pesticides and Other Toxic Chemicals.

(1) *Statutes.* Pesticides and toxic chemicals are extensively regulated by both federal and state law. Local regulation of pesticides is prohibited. (*Food & Ag.C. 11501.1(a).*) The primary California statutes are:

- (a) *Food & Ag.C. 11401* et seq. (agricultural pest control).
- (b) *Food & Ag.C. 12500* et seq. (pesticide residues in produce).
- (c) *Food & Ag.C. 12751* et seq. (pesticides).
- (d) *Food & Ag.C. 11501* (development of alternative biological and cultural pest control techniques).
- (e) *Food & Ag.C. 13141* et seq. (prevention of pesticide contaminated drinking water supplies).
- (f) *Food & Ag.C. 13121* et seq. (prevention of pesticide-induced abortion, birth defects, and infertility).
- (g) *Food & Ag.C. 13161* et seq. (allowing interim state registration of pesticides registered with federal Environmental Protection Agency).
- (h) *Food & Ag.C. 14021* et seq. (health effects of pesticides containing toxic air contaminants).
- (i) *Health & Saf.C. 100575* (reports on agricultural pesticide spraying.)

(2) *Warnings Under Proposition 65.* In addition to prohibiting the contamination of drinking water, Proposition 65 (*Health & Saf.C. 25249.5* et seq., supra, §894) requires anyone who, in the course of doing business, knowingly and intentionally exposes an individual to a chemical known to the state to cause cancer or reproductive toxicity, to first give a clear and reasonable warning. (*Health & Saf.C. 25249.6*; see *Health & Saf.C. 25249.10* [exemptions].) At least 60 days before commencing an action to enforce *Health & Saf.C. 25249.6*, a private enforcer must serve notice of an alleged violation on public prosecutors and the violator. The notice must include a certificate of merit stating that one or more experts have reviewed facts, studies, or other data regarding the chemical exposure at issue and believe that there is a reasonable and meritorious case for the private action. (*Health & Saf.C. 25249.7(d).*)

The following are among the decisions construing the warning requirement of Proposition 65:

Dowhal v. SmithKline Beecham Consumer Healthcare (2004) 32 C.4th 910, 923, 12 C.R.3d 262, 88 P.3d 1 [federal Food and Drug Administration could prohibit use of nicotine warning mandated by Proposition 65 that directly conflicted with warning required by FDA, even if Proposition 65 warning was truthful].

Nicolle-Wagner v. Deukmejian (1991) 230 C.A.3d 652, 281 C.R. 494 [upholding regulation providing that human consumption of foods in which listed chemicals naturally occur is not exposure under *Health & Saf.C.* 25249.6].

People v. Cotter & Co. (1997) 53 C.A.4th 1373, 1379, 62 C.R.2d 368 [Federal Hazardous Substances Act's express preemption of contrary state labeling requirements for hazardous substances did not preempt Proposition 65 warning requirement; not all possible warnings that would satisfy Proposition 65 would conflict with FHSA].

Consumer Cause v. SmileCare (2001) 91 C.A.4th 454, 466, 110 C.R.2d 627, 6 Cal. Proc. (4th), *Proceedings Without Trial*, Supp., §214 [dental corporation, which claimed to be exempt from Proposition 65 warning requirement under *Health & Saf.C.* 25249.10(c) (exposure exemption), failed to carry its initial burden of proof; exemption applies only if person responsible for exposure can show that exposure 1,000 times greater than amount in question would have no observable reproductive effect].

Consumer Cause v. Arkopharma (2003) 106 C.A.4th 824, 829, 131 C.R.2d 342 [although manufacturers' products (herbal, plant, and flower extracts and supplements, bee pollen extracts, liquid oils, and liquid extract compounds) were liquids containing ethyl alcohol and were made for human consumption, they were not intended to be consumed as alcoholic beverages and did not require Proposition 65 consumer warning label].

DiPirro v. American Isuzu Motors (2004) 119 C.A.4th 966, 972, 14 C.R.3d 787 [failure to serve certificate of merit required by *Health & Saf.C.* 25249.7(d) cannot be cured by serving certificate after action is filed].

Baxter Healthcare Corp. v. Denton (2004) 120 C.A.4th 333, 352, 15 C.R.3d 430 [trial court properly issued declaratory relief judgment that chemical contained in manufacturer's medical devices, although listed by state, posed no significant risk of cancer to humans and that, therefore, warning exemption set forth in *Health & Saf.C.* 25249.10(c) applied].

(3) *Commentary.* Regulation of pesticides and toxic chemicals has been the subject of commentary. (See 76 Cal. L. Rev. 221 [suggesting heightened standard of judicial review of government decisions to spray pesticides]; 3 *Ecology L. Q.* 277 [federal Environmental Pesticide Control Act of 1972]; 5 *Ecology L. Q.* 69 [farm workers and pesticide hazard]; 5 *Ecology L. Q.* 233 [pesticide regulation by EPA]; 17 *Ecology L. Q.* 413 [federal regulation of pesticides and biotechnology]; 19 *Ecology L. Q.* 269 [legislating acceptable cancer risk from exposure to toxic chemicals]; 20 *Ecology L. Q.* 605 [need to regulate toxic substances that can bioaccumulate]; 27 *Ecology L. Q.* 263 [environmental harms caused by farms and proposal for regulating them]; 29 *Ecology L. Q.* 623 [federal regulation of toxic chemicals]; 29 West L.A. L. Rev. 327 [critical analysis of federal pesticide legislation and regulations]; 37 *A.L.R.3d* 833 [liability for injury for spraying or dusting of crops]; 61C *Am.Jur.2d* (1999 ed.), *Pollution Control* §1738 et seq.; 57 *Am.Jur.* Trials 395 [handling toxic tort litigation].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutes.*

(c) *Food & Ag.C.* 12751 et seq.: See *Californians for Alternatives to Toxics v. California Dept. of Pesticide Regulation* (2006) 136 C.A.4th 1049, 1065, 39 C.R.3d 393 [department's yearly renewal of pesticide registrations under *Food & Ag.C.* 12824 without reevaluation complied with statutes and regulations].

(2) *Warnings Under Proposition 65.* Although *Health & Saf.C.* 25249.7(a) authorizes injunctive relief for threatened violation of *Health & Saf.C.* 25249.6, there must be some evidence of a threat, rather than merely the

abstract possibility of a violation. (*Consumer Cause v. Johnson & Johnson* (2005) 132 C.A.4th 1175, 1186, 34 C.R.3d 258 [lawsuit against manufacturers of implantable, stainless steel surgical devices was not justiciable where parties agreed that products did not violate Proposition 65; consent judgment specifying warnings that manufacturers should give if they ever manufactured devices requiring warnings had to be vacated].) *Decisions construing warning requirement*: Cases discussing the warning requirement in Proposition 65 include the following:

Environmental Law Foundation v. Wykle Research (2005) 134 C.A.4th 60, 66, 68, 35 C.R.3d 788 [manufacturer of dental amalgam containing mercury complied with *Health & Saf.C.* 25249.6 by including warning authorized by "safe harbor" regulations in insert distributed to dentists with product; warning was sufficient even though it was not provided in way that was best suited to reach patients and was not ideally placed on insert].

In re Vaccine Cases (2005) 134 C.A.4th 438, 449, 453, 36 C.R.3d 80 [agency responsible for administering Proposition 65 had authority to adopt regulation providing that, for prescription drugs, federally approved labeling and prescriber's accepted method of obtaining informed consent constitute clear and reasonable warning, and regulation was valid; furthermore, plaintiffs' failure to include certificate of merit in 60-day notice required by *Health & Saf.C.* 25249.7(d) necessitated dismissal of their complaint].

Consumer Advocacy Group v. Kintetsu Enterprises of America (2007) 150 C.A.4th 953, 967, 58 C.R.3d 778 [assessing sufficiency of notice served on hundreds of hotels and retail establishments alleging unlawful exposure to secondhand smoke, tobacco, and tobacco products; notices that failed to specify route of environmental or occupational exposure were invalid, as were those that failed to specify which of wide variety of tobacco products were sold in violation of *Health & Saf.C.* 25249.6].

DiPirro v. Bondo Corp. (2007) 153 C.A.4th 150, 186, 62 C.R.3d 722 [warning exemption of *Health & Saf.C.* 25249.10(c) applied to manufacturer of automobile touch-up paint containing toluene; manufacturer presented substantial evidence that daily exposure to toluene by average users of touch-up paint was below maximum allowable dose level].

Consumer Cause case:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §237.

(New) Settlement involving private enforcer: If there is a settlement of a Proposition 65 action brought by a person in the public interest, the plaintiff must submit the settlement, other than a voluntary dismissal in which no consideration is received from the defendant, to the court for approval. The court may approve the settlement only if the court makes all of the following findings:

(a) Any warning that is required by the settlement complies with *Health & Saf.C.* 25249.5 et seq. (*Health & Saf.C.* 25249.7(f)(4)(A).)

(b) Any award of attorneys' fees is reasonable under California law. (*Health & Saf.C.* 25249.7(f)(4)(B).)

(c) Any penalty amount is reasonable based on the criteria set forth in *Health & Saf.C.* 25249.7(b)(2). (*Health & Saf.C.* 25249.7(f)(4)(C).)

The trial court reviewing the settlement must find that it is just and serves the public interest. Because the rights of the public are implicated, "the additional safeguard of judicial review, although more cumbersome to the settlement process, serves a salutary purpose" by reminding the parties that the public interest is relevant and by guarding against a contractual clause that is otherwise illegal or unjust. (*Consumer Advocacy Group v. Kintetsu Enterprises of America* (2006) 141 C.A.4th 46, 63, 45 C.R.3d 647 [invalidating consent judgments that purported to preclude public from future litigation of known claims and additionally discovered ones, that allowed defendants to unilaterally opt out, and that allowed defendants to withdraw from judgments if judgments were contested by third party]; see *Consumer Defense*

Group v. Rental Housing Industry Members (2006) 137 C.A.4th 1185, 1205, 1207, 40 C.R.3d 832 [to avoid possibility of collusive settlements, Attorney General could initiate appeal from settlement between alleged violator and private enforcer; trial court could have rejected settlement on basis that notices of alleged violation were so broad they were meaningless.](3) *Commentary*. See *18 A.L.R.6th 793* [validity, construction, and operation of laws requiring notice of pesticide and herbicide use].



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C. Pollution Control.
8. Noise.

12 Witkin Sum. Cal. Law Real Property § 912

[§ 912] Noise.

(1) *In General.* Freedom from excessive noise is a legislative environmental concern. (*Pub.Res.C. 21001(b)*; *Health & Saf.C. 118825*; see 12 Santa Clara Lawyer 84 [decibel scale]; 4 *Ecology L. Q.* 109 [urban noise control]; 61C *Am.Jur.2d* (1999 ed.), *Pollution Control* §1532 et seq.; 20 *Am.Jur. P.P. Forms* (1998 ed.), *Pollution Control* §101.)

The California Noise Control Act of 1973 (*Health & Saf.C. 46000* et seq.) makes elaborate provision for noise control programs. The Act establishes the Office of Noise Control (*Health & Saf.C. 46040*), the duties of which include studying and monitoring noise (*Health & Saf.C. 46050* et seq.), assisting local agencies in the enactment and enforcement of noise control ordinances (*Health & Saf.C. 46060* et seq.), and coordinating the noise control activities of state and federal agencies (*Health & Saf.C. 46070* et seq.).

The following are among the additional statutes that address noise pollution:

- (a) *Veh.C. 27150* et seq. (muffler requirements).
- (b) *Sts. & H.C. 216* (abatement program for highway noise affecting schools).
- (c) *Health & Saf.C. 17922.6, 17922.7* (noise insulation standards in multi-occupant buildings).
- (d) *Harb. & Nav.C. 654.05, 654.06* (motorboat noise regulation).

(2) *Airport Noise.* *Health & Saf.C. 118830* prohibits nonemergency takeoffs and landings by aircraft that fail to meet federal noise limits. (On airport development and noise, see 49 *U.S.C.*, §47101 et seq.; on airport noise pollution generally, see 12 Santa Clara Lawyer 79; 2 *Ecology L. Q.* 159 [military aircraft noise]; on governmental liability for airport noise pollution, see 5 *Summary* (10th), *Torts*, §339; on permits for airport expansion, see *Pub.Util.C. 21664.5*.)

West's Key Number Digest, Health and Environment k.25.8

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 19C *Am.Jur. P.P. Forms* (2007 ed.), *Pollution Control* §113 et seq.



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a. Governmental Actions.

12 Witkin Sum. Cal. Law Real Property § 913

[§ 913] Governmental Actions.

The Attorney General may intervene in a judicial or administrative proceeding in which facts are alleged concerning pollution or adverse environmental effects that could affect the public generally. (*Govt.C. 12606.*) The Attorney General may also maintain an action for equitable relief against any person for the protection of California's natural resources from pollution, impairment, or destruction. (*Govt.C. 12607*; see 4 *Cal. Proc.* (4th), *Pleading*, §141 et seq.; on civil liability for violation of water quality regulations, see *Water C. 13350*; *People v. Superior Court (Oakland Port Commissioners)* (1976) 16 *C.3d* 30, 39, 127 *C.R. 122*, 544 *P.2d* 1322 [recovery of penalties in action against municipality].) In an action under the California Environmental Quality Act (*supra*, §831), copies of the plaintiff's pleadings must be served on the Attorney General. (*Pub.Res.C. 21167.7.*)

States suing on behalf of their residents have unsuccessfully attempted to invoke the original jurisdiction of the Supreme Court to consider multistate pollution problems. (See *Washington v. General Motors Corp.* (1972) 406 *U.S. 109*, 92 *S.Ct. 1396*, 31 *L.Ed.2d* 727 [18 states against major automobile manufacturers alleging conspiracy to evade federal engine emission requirements]; *Ohio v. Wyandotte Chemicals Corp.* (1971) 401 *U.S. 493*, 91 *S.Ct. 1005*, 28 *L.Ed.2d* 256, 2 *Cal. Proc.* (4th), *Jurisdiction*, §358 [action by state to enjoin pollution of Lake Erie].)

Commentary on criminal and civil enforcement actions by the government is extensive. (See *Cal. Civil Practice*, *Environmental Litigation*, Chap. 9 [criminal penalties under environmental statutes]; 2 *Ecology L. Q.* 313 [federal common law remedy of state against extraterritorial pollution]; 12 *Ecology L. Q.* 1 [burden of proof in environmental litigation]; 14 *Ecology L. Q.* 117 [criminal sanctions under federal and state environmental statutes]; 19 *Loyola L.A. L. Rev.* 1133 [symposium on environmental litigation and enforcement]; 26 *Loyola L.A. L. Rev.* 105 [deterioration of scienter under environmental criminal statutes]; 27 *Loyola L.A. L. Rev.* 867 [problems with environmental crime]; 14 *Santa Clara Lawyer* 296 [powers of state and local government attorneys]; 71 *So. Cal. L. Rev.* 1181 [enforcement through cooperation rather than deterrence]; 22 *U.S.F. L. Rev.* 31 [liability of property owner for environmental contamination]; 46 *A.L.R.3d* 758 [necessity of showing intent in prosecution for violation of air pollution regulations]; 48 *A.L.R.3d* 326 [validity of legislation permitting administrative agency to fix pollution standards]; 49 *A.L.R.3d* 1239 [preliminary mandatory injunctions to abate pollution]; 81 *A.L.R.3d* 1258 [statute permitting administrative agency to impose monetary penalties for violation of environmental pollution statute]; 87 *A.L.R.4th* 444 [liability insurance coverage for violation of antipollution laws]; 61 *C Am.Jur.2d* (1999 ed.), *Pollution Control* §2016.)

SUPPLEMENT: [This section is current through the latest supplement]
Action by Attorney General.

Cross-Reference: 4 *Cal. Proc.* (5th), *Pleading*, §159 et seq.

Wyandotte Chemicals case:

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §367.



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C. Pollution Control.

9. Enforcement.

b. Private Actions.

12 Witkin Sum. Cal. Law Real Property § 914

[§ 914] Private Actions.

Actions by private persons are expressly authorized by some environmental protection acts, and class suits have been common. (See Cal. Civil Practice, Environmental Litigation, Chap. 6 [citizen suits under environmental laws]; 2 *Ecology L. Q.* 91 [venue in conservation cases]; 2 *Ecology L. Q.* 533 [environmental class actions]; 6 *Ecology L. Q.* 639 [environmental injunctions]; 9 *Ecology L. Q.* 429 [availability of private remedies for acid rain damage]; 12 *Ecology L. Q.* 271 [citizen initiated suits]; 22 *Ecology L. Q.* 1 [obstacles and incentives in federal citizen suits provisions]; 24 *Ecology L. Q.* 393 [citizen suits to enforce water quality standards under Clean Water Act]; 27 *Golden Gate L. Rev.* 43 [citizen suits under Clean Water Act to counteract inadequate government enforcement]; 33 *McGeorge L. Rev.* 99 [using nuisance doctrine to protect environmental values while protecting private property rights]; 2 *Pacific L. J.* 620 [private actions based on environmental public trust theory]; 36 *San Diego L. Rev.* 547 [transferable property rights in common resources as alternative to private enforcement of environmental regulations and statutes]; 27 *U.C. Davis L. Rev.* 357 [argument against elevated pleading requirements in federal environmental litigation]; 45 *U.C.L.A. L. Rev.* 931 [injury in fact requirement for standing]; 39 *A.L.R.3d* 910 [landowner's action for pollution of water supply by commercial or industrial waste]; 47 *A.L.R.3d* 769 [state court class actions against polluters]; 66 *A.L.R.4th* 685 [standing to sue for violation of state environmental statute]; 35 Proof of Facts 3d 493 [proof of standing to maintain citizen suit under federal or state environmental protection laws]; 50 Proof of Facts 3d 237 [citizens' suits under Toxic Substances Control Act]; 67 Proof of Facts 3d 95 [citizens' suits under federal Safe Drinking Water Act]; 91 Am.Jur. Trials 1 [handling air pollution case seeking damages].)

SUPPLEMENT: [This section is current through the latest supplement]



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XIV. WATERS

A. Systems and Classifications of Water Rights.

1. Riparian and Appropriation Systems.

12 Witkin Sum. Cal. Law Real Property § 915

[§ 915] Riparian and Appropriation Systems.

There are three main systems of water rights in the United States:

(1) The riparian rights system, which began with common law, and still prevails in the eastern United States. (See 4 Rest.2d, Torts, p. 181.)

(2) The appropriation system, followed in Colorado, Nevada, Arizona, New Mexico, Wyoming, Montana, Idaho, and Utah. (See 9 Powell §65.01.)

(3) The California system, which recognizes both riparian and appropriation rights. (See *Peabody v. Vallejo* (1935) 2 C.2d 351, 365, 40 P.2d 486; 9 Powell §65.04; 78 Am.Jur.2d (2002 ed.), *Waters* §§3 et seq., 30 et seq., 341 et seq.)

Under the California system, water rights can be acquired in three ways: (1) by ownership of riparian land; (2) by appropriation; and (3) by prescription. But the constitutional amendment of 1928 (Cal. Const., Art. X, §2) substantially changed our early law of riparian rights. (See *United States v. Gerlach Live Stock Co.* (1950) 339 U.S. 725, 70 S.Ct. 955, 964, 94 L.Ed. 1231, 1245; *Peabody v. Vallejo*, *supra*, 2 C.2d 366; *infra*, §937.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Appropriation system:* See 32 *Ecology L. Q.* 3 [analysis of origins of appropriation doctrine as expression of radical, agrarian ideals of broadly distributed property and antimonopolism].

(3) *California system:* See 36 *McGeorge L. Rev.* 1 [symposium on 25th anniversary of Report of Governor's Commission to Review California Water Rights Law]; 38 *McGeorge L. Rev.* 461 [water rights as property].



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A. Systems and Classifications of Water Rights.

2. Classification of Waters.

12 Witkin Sum. Cal. Law Real Property § 916

[§ 916] Classification of Waters.

Waters have conventionally been divided into two classes: surface waters and underground waters. Surface waters include water from springs or precipitation that flows over the surface of the land without a definite channel (infra, §962), floodwaters from the overflow of streams (infra, §966), and running streams and other bodies of water (infra, §932). Underground waters include subterranean streams or bodies of water and percolating waters (infra, §956). (See *Rest.2d, Torts §841* [definition of "watercourse"], §842 [definition of "lake"], §845 [definition of "subterranean waters"], §846 [definition of "surface waters"].) (On artificial rainmaking, see *Water C. 400* et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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XIV. WATERS

B. Nature of Rights to Water.

1. No Ownership of Water in Watercourse.

12 Witkin Sum. Cal. Law Real Property § 917

[§ 917] No Ownership of Water in Watercourse.

There can be no ownership of the water in a running stream or similar watercourse. The party lawfully entitled to the water has a usufructuary right, which is a right to the use only. (*Hargrave v. Cook* (1895) 108 C. 72, 77, 41 P. 18; *Rancho Santa Margarita v. Vail* (1938) 11 C.2d 501, 555, 81 P.2d 533; *United States v. State Water Resources Control Bd.* (1986) 182 C.A.3d 82, 100, 227 C.R. 161; *Water C. 1000, 1001*; see 6 Miller & Starr 3d, §17:25; 78 Am.Jur.2d (2002 ed.), *Waters* §3 et seq.) But water brought in from outside the watershed ("foreign water") and reduced to possession becomes private property. (*Stevens v. Oakdale Irr. Dist.* (1939) 13 C.2d 343, 350, 90 P.2d 58.) (On ownership of groundwater by state, see *infra*, §957; on water as real or personal property, see 13 *Summary* (10th), *Personal Property*, §91; on taxation of water rights, see 9 *Summary* (10th), *Taxation*, §§164, 178.)

West's Key Number Digest, Waters and Water Courses k.2 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

See 31 *Ecology L. Q.* 957 [implications of formulating international human right to water].



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B. Nature of Rights to Water.

2. Public Rights.

a. In General.

12 Witkin Sum. Cal. Law Real Property § 918

[§ 918] In General.

(1) *Political Subdivisions*. The fact that a stream flows through a political subdivision does not give that subdivision any rights in the water. The state and its subdivisions have no rights except insofar as they own lands in their proprietary capacity. The same is true of the United States and its licensees. (*Palmer v. Railroad Com. of Calif.* (1914) 167 C. 163, 173, 138 P. 997; *Miller & Lux v. San Joaquin Light & Power Corp.* (1932) 120 C.A. 589, 612, 8 P.2d 560.) A municipality may, however, acquire water rights by following the statutory procedure for appropriation. (See *Water C.* 1460 et seq., 106.5, 1203; infra, §942 et seq.)

(2) *Pueblo Rights*. The old pueblos, under Spanish and Mexican law, did have certain priority in water rights, and a municipality as successor of the pueblo may claim those rights even against riparian owners. (*San Diego v. Cuyamaca Water Co.* (1930) 209 C. 105, 116, 287 P. 475; see *San Diego v. Sloane* (1969) 272 C.A.2d 663, 669, 77 C.R. 620 [value of riparian rights considered in condemnation award].) The pueblo right was always limited to the needs of the city, and hence was unaffected by the constitutional amendment of 1928 (infra, §937). (*Los Angeles v. Glendale* (1943) 23 C.2d 68, 74, 142 P.2d 289; see 32 *McGeorge L. Rev.* 341, 353 [creation, extension, and modification of pueblo water rights doctrine in California].)

SUPPLEMENT: [This section is current through the latest supplement]



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XIV. WATERS

B. Nature of Rights to Water.

2. Public Rights.

b. Navigable Waters.

12 Witkin Sum. Cal. Law Real Property § 919

[§ 919] Navigable Waters.

(1) *Nature of Navigable Waters.* Navigable waters and all streams of sufficient capacity to transport the products of the country are public ways for the purposes of navigation and transportation. However, the floodwaters of a navigable watercourse are not considered navigable waters for public use. (*Harb. & Nav.C. 100.*) Tidal waters above the mean high-tide line are not navigable waters, and thus are not subject to public navigational or recreational rights. (*Lechuza Villas West v. California Coastal Com. (1997) 60 C.A.4th 218, 244, 70 C.R.2d 399* [trial court properly concluded that developer's private property was not subject to public rights landward of fluctuating ordinary hightide line]; on federal rights to navigable waters, see *infra*, §922.)

A basic right is reserved by the state in navigable waters, for navigation and fishing. The test is navigability in fact, by any kind of vessel, for any kind of commerce or travel. In *Bohn v. Albertson (1951) 107 C.A.2d 738, 238 P.2d 128*, a parcel of swamp land was granted by the state and the patentee reclaimed and used it for agriculture. In 1938 a levee broke and inundated the land, and thereafter, it was covered with water and used by many pleasure craft. Plaintiffs, lessees of the owners, developed the area for recreational purposes, and sought to exclude members of the public from boating and fishing there. *Held*, relief denied.

(a) If, at the time of the state's conveyance, there were navigable waters on the land, the public rights of navigation and fishery would have been reserved without express statement in the patent. (*107 C.A.2d 741.*)

(b) Although there were no navigable waters at that time, there are now, despite such obstructions as abandoned farm equipment and submerged tree stumps. (*107 C.A.2d 747.*)

(c) The avulsion did not affect the title of the owner of the inundated lands, and he still may reclaim them. But it did create navigable waters in which the public, until the owner's reclamation, has the right of navigation and fishery so long as the waters are reached without trespassing on his land. (*107 C.A.2d 748, 749, 752, 757.*) (See *People v. Mack (1971) 19 C.A.3d 1040, 1048, 97 C.R. 448*, citing the text.)

Hitchings v. Del Rio Woods Recreation & Park Dist. (1976) 55 C.A.3d 560, 127 C.R. 830, involved the test of navigability of a river that had minimal flow during late summer and autumn months.

(a) Although the question is one of fact, the term "navigability" has been variously defined in different circumstances. Federal definitions are controlling where the issue is federal control of navigable waters under the Commerce Clause (see *infra*, §922). But where exclusive control of waters is in the state, it may make its own different and less stringent test. (55 C.A.3d 567, 568.)

(b) California, in *People v. Mack, supra*, adopted a liberal "recreational boating test," favoring free use of recreational water. (55 C.A.3d 568.) Following this approach, a stream may be regarded as navigable in fact even though it is not navigable throughout the entire year. (55 C.A.3d 569.) The trial judge found that the part of the river in question was navigable under the recreational boating test for about 9 months. "This is a sufficient period to make it suitable, useful and valuable as a public recreational highway for most of the year, and therefore it is navigable in law." (55 C.A.3d 571.)

(2) *Constitutional Provision*. No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in California may exclude the right of way to the water whenever it is required for a public purpose. Nor may anyone destroy or obstruct the free navigation of the water. The Legislature must enact laws that give the most liberal construction to this provision, so that access to the navigable waters of California will always be attainable for Californians. (Cal. Const., Art. X, §4; see *Graf v. San Diego Unified Port Dist.* (1992) 7 C.A.4th 1224, 1232, 9 C.R.2d 530 [Cal. Const., Art. X, §4, does not give boaters a constitutional right to unregulated long-term anchorage in public navigable waters].)

This provision was applied to unusual facts in *Pacific Gas & Elec. Co. v. Superior Court* (1983) 145 C.A.3d 253, 193 C.R. 336. Plaintiff and his family were camping at a United States Forest Service campground bordering Lake Shasta, a navigable lake. Defendant utility had installed power poles on its shore land, and the power lines extended over the water. The mast of plaintiff's sailboat came in contact with the power lines and plaintiff was injured. In this personal injury action defendant relied on C.C. 846, giving an owner of real property immunity from tort liability to persons entering the property for designated recreational purposes, including water sports (see 6 *Summary* (10th), *Torts*, §1103). *Held*, the statute was not a defense.

(a) *Construction of C.C. 846*. Although plaintiff was involved in a recreational water sport, the injury did not take place on defendant's land underneath the lake or the poles and wires. It occurred on the navigable waters of the lake; hence, there was no "entry" or "use" of defendant's land for a recreational purpose. (145 C.A.3d 257.)

(b) *Constitutional right of access to navigable waters*. Cal. Const., Art. X, §4 declares, and the cases confirm, "the public right of passage, in a lawful manner, over waters usable only for small-craft recreational boating, irrespective of the ownership of the water bed." (145 C.A.3d 258.) Hence, defendant's ownership of the underlying land and the overhanging power lines did not give it any right to exclude members of the public from entering on and using the waters of the lake for recreational purposes. (145 C.A.3d 258.) The proper construction of C.C. 846 is, therefore, that it does not confer negligence immunity on contiguous or subjacent owners of real property fronting or underlying navigable waters, against persons injured while using those waters. (145 C.A.3d 259.)

(c) *State jurisdiction*. Although the federal Government has paramount control over navigable waters (see *infra*, §922), when not in conflict with federal dominion, "exclusive jurisdiction over the waters resides in the state, which may establish a more liberal right of passage." (145 C.A.3d 257, footnote 3.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature of Navigable Waters*. See 96 Proof of Facts 3d 263 [navigability disputes involving nontidal waters on private land].



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B. Nature of Rights to Water.

2. Public Rights.

c. Public Trust Doctrine.

12 Witkin Sum. Cal. Law Real Property § 920

[§ 920] Public Trust Doctrine.

(1) *Development of Doctrine.* *National Audubon Soc. v. Superior Court* (1983) 33 C.3d 419, 189 C.R. 346, 658 P.2d 709, "brings together for the first time two systems of legal thought: the appropriative water rights system which since the days of the gold rush has dominated California water law, and the public trust doctrine which, after evolving as a shield for the protection of tidelands, now extends its protective scope to navigable lakes." (33 C.3d 425.)

Mono Lake, the second largest in California, is saline and contains no fish, but supports a population of brine shrimp that feed nesting and migratory birds, and it is also of geological interest and a tourist attraction. The lake is principally fed from five freshwater streams, and in 1940 the predecessor of the California Water Resources Board granted the Department of Water and Power of the City of Los Angeles (DWP) a permit to appropriate virtually the entire flow of four of the streams. As a result the level of the lake dropped, the surface area was diminished by one-third, and both its scenic beauty and ecological values are imperiled. In 1979 plaintiffs sued for injunctive and declaratory relief. The trial court granted summary judgment against them on the grounds that (a) the public trust doctrine does not function independently of the California water rights system, and (b) plaintiffs must exhaust their remedy before the Water Board. Plaintiffs sought mandamus to review the summary judgment. *Held*, writ granted.

(a) *Public trust doctrine in California.* "[T]he core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters." (33 C.3d 425.) Three aspects of the doctrine are involved here: the purpose of the trust; the scope of the trust; and the powers and duties of the state as trustee.

(1) *Purpose of the trust.* "The objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways." (33 C.3d 434.) Thus the traditional triad of uses--navigation, commerce, and fishing--does not limit the public interest; protection of recreational and ecological values is within the purposes of the trust. (33 C.3d 435.)

(2) *Scope of the trust.* In the United States generally and in California the trust is not limited to tidelands, but extends to navigable lakes and streams. (33 C.3d 435.) This case presents the new question whether the trust limits conduct (e.g., diversion) affecting nonnavigable tributaries to navigable waters. Under principles laid down in early

decisions, it does. (33 C.3d 437.)

(3) *Duties and powers of state.* The state has a duty to exercise continued supervision over the trust, and cannot abdicate its trust any more than it can abdicate its police powers. (33 C.3d 437.) Under the principles laid down in *Berkeley v. Superior Court* (1980) 26 C.3d 515, 534, 162 C.R. 327, 606 P.2d 362, supra, §211, the power extends to the revocation of previously granted rights or to the enforcement of the trust against lands long thought to be free of it. (33 C.3d 440.) Acquisition of a right to use former trust property free of trust restrictions is a rare thing. It is possible only if (a) the Legislature intended to grant a right free of the trust and (b) either the grant serves the purpose of the trust or the grantee, in reasonable reliance on the grant, has rendered the property unsuitable for trust purposes. Except for such rare instances, "the grantee holds subject to the trust, and while he may assert a vested right to the servient estate (the right of use subject to the trust) and to any improvements he erects, he can claim no vested right to bar recognition of the trust or state action to carry out its purposes." (33 C.3d 440.) However, "trust uses" do not encompass all public uses; the term relates to uses and activities in the vicinity of the lake, stream, or tidal reach at issue. (33 C.3d 440.)

(b) *California water rights system.* Cal. Const., Art. X, §2, establishes state water policy: All uses of water, including public trust uses, must conform to the standard of reasonable use. (33 C.3d 443.) *Water C. 1243* provides that use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use. (33 C.3d 443.) Furthermore, the Water Board, in undertaking planning and allocation of water resources, is required by statute to take interests protected by the public trust into account. (33 C.3d 444.)

(c) *Relationship between trust doctrine and water rights system.* The important precepts of the doctrine and the system must be accommodated as follows:

(1) "The state as sovereign retains continuing supervisory control over its navigable waters and the lands beneath those waters. This principle, fundamental to the concept of the public trust, applies to rights in flowing waters as well as to rights in tidelands and lakeshores; it prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust." (33 C.3d 445.)

(2) "As a matter of current and historical necessity, the Legislature, acting directly or through an authorized agency such as the Water Board, has the power to grant usufructuary licenses that will permit an appropriator to take water from flowing streams and use that water in a distant part of the state, even though this taking does not promote, and may unavoidably harm, the trust uses at the source stream. The population and economy of this state depend upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values." (33 C.3d 446.)

(3) "The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. Just as the history of this state shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests." (33 C.3d 446.)

(d) *Reconsideration of prior allocation decisions.* The state, in exercising its duty of continuing supervision, is not confined by past allocation decisions that may be incorrect in the light of current knowledge or inconsistent with current needs. (33 C.3d 447.) It may reconsider them even though they were made after due consideration of their effect on the public trust. The case for reconsideration is even stronger where, as here, the board in rendering its prior decisions on diversion of the flow of Mono Lake tributaries failed to weigh and consider the impact on the Mono Lake environment. (33 C.3d 447.)

(e) *Exhaustion of administrative remedies.* Plaintiffs had a Water Board remedy under *Water C. 2501* (see *infra*, §926), which has been broadly construed to give the board substantive powers adequate to carry out the legislative mandate of comprehensive protection of water resources. The statute permits plaintiffs to seek a determination of allocation of water on a consideration of interests protected by the public trust. (33 C.3d 449.) The board, however, does

not have exclusive primary jurisdiction in such matters. *Water C. 2000* and *2001* (see *infra*, §926) necessarily imply that the superior court has concurrent original jurisdiction in suits to determine water rights. (33 C.3d 449, 451.)

(f) *Significance of decision.* This decision does not dictate any particular allocation of water, but merely clears away the legal barriers that have prevented either the Water Board or the courts from taking into account the "human and environmental uses" of the lake. (33 C.3d 452.)

In *United States v. State Water Resources Control Bd.* (1986) 182 C.A.3d 82, 227 C.R. 161, the court held that, under the public trust doctrine set forth in *National Audubon Soc.*, the State Water Resources Control Board has continuing jurisdiction over appropriation permits to protect fish and wildlife by regulating the salt content of the Sacramento-San Joaquin Delta. (182 C.A.3d 106, 149 et seq.) (See *Personal Watercraft Coalition v. Marin County Bd. of Supervisors* (2002) 100 C.A.4th 129, 144, 122 C.R.2d 425 [county ordinance banning use of personal watercraft on county's territorial waters did not violate public trust doctrine]; 14 *Ecology L. Q.* 713 [*United States v. State Water Resources Control Bd.*].)

(2) *Doctrine Is Inapplicable to Nonnavigable Waters.* In *Golden Feather Community Assn. v. Thermalito Irr. Dist.* (1989) 209 C.A.3d 1276, 1283, 257 C.R. 836, the issue was "whether members of the public may, through a judicial action asserting the public trust doctrine, insist that an authorized diverter of a nonnavigable stream continue the diversion of water but forego the authorized uses thereof in order to maintain an artificial reservoir for the recreational (primarily fishing) use of the public." *Held*, the public trust doctrine does not apply. (209 C.A.3d 1278, 1287.)

(3) *Commentary.* The "public trust" in tidelands and nontidal navigable bodies of water has been the subject of a number of decisions and law review comments. (See 6 *Miller & Starr 3d*, §15:12; 52 *Cal. L. Rev.* 171 [public use of private waters]; 60 *Cal. L. Rev.* 225 [private fills in navigable waters]; 27 *Ecology L. Q.* 135 [evolution of public trust doctrine and degradation of trust resources]; 33 *Hastings L. J.* 653; 19 *Pacific L. J.* 1201 [public trust and public interest]; 44 *Santa Clara L. Rev.* 831 [using public trust doctrine to save Walker Lake]; 16 *U.C. Davis L. Rev.* 573 [symposium on access to waterways, discussing navigability of inland waterways, public trust, and constitutional right to fish]; 47 *A.L.R.2d* 381 [right of public to fish in stream despite objection by riparian owner]; 40 *A.L.R.3d* 776 [right of public in tidelands of navigable lake]; 6 *A.L.R.4th* 1030 [public's right to make recreational use of inland stream where bed is privately owned]; *supra*, §§211, 276.)

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B. Nature of Rights to Water.

3. State Rights in Interstate Waters.

12 Witkin Sum. Cal. Law Real Property § 921

[§ 921] State Rights in Interstate Waters.

(1) *Conflicting Claims.* If streams flow through more than one state, problems arise as to the rights of owners in each state. (See *19 Pacific L. J. 1339* [water allocation issues involving Lake Tahoe, Truckee River, and Pyramid Lake]; *19 Pacific L. J. 1391* [rights to waters of Colorado River].) The principal rules are as follows:

(a) Where two states have the same water doctrine, the rights of individuals in those states will be determined as if the state line were obliterated. (*Wyoming v. Colorado* (1922) 259 U.S. 419, 42 S.Ct. 552, 559, 66 L.Ed. 999, 1016; *Nebraska v. Wyoming* (1945) 325 U.S. 589, 65 S.Ct. 1332, 1342, 89 L.Ed. 1815, 1821.)

(b) Where the states have different water doctrines, an equitable apportionment of the benefits should be made. (*Kansas v. Colorado* (1907) 206 U.S. 46, 27 S.Ct. 655, 670, 51 L.Ed. 956, 976; *Colorado v. New Mexico* (1982) 459 U.S. 176, 103 S.Ct. 539, 546, 74 L.Ed.2d 348, 355; *Idaho v. Oregon* (1983) 462 U.S. 1017, 103 S.Ct. 2817, 2823, 77 L.Ed.2d 387, 395; 24 *Santa Clara L. Rev.* 489 [*Idaho v. Oregon*].)

(c) In actions between citizens of different states, the courts of either state may take jurisdiction. (*Rickey Land & Cattle Co. v. Miller & Lux* (1910) 218 U.S. 258, 31 S.Ct. 11, 54 L.Ed. 1032.)

(d) In actions between states, the determination of relative rights is not governed by the same considerations that apply between individuals. A principle of "equitable division" is followed, and injunctive relief will not be granted unless the threatened invasion of rights is of a serious magnitude. (*Connecticut v. Commonwealth of Massachusetts* (1931) 282 U.S. 660, 51 S.Ct. 286, 289, 75 L.Ed. 602, 607; *New Jersey v. New York* (1931) 283 U.S. 336, 51 S.Ct. 478, 479, 75 L.Ed. 1104, 1106.)

(e) If apportionment of the water has been made under federal authority, the principle of "equitable division" will not be applied. Thus, in *Arizona v. California* (1963) 373 U.S. 546, 83 S.Ct. 1468, 1480, 10 L.Ed.2d 542, 558, the Court held that the federal Boulder Canyon Project Act created its own scheme of apportionment of the Colorado River waters among California, Arizona, and Nevada, under the direction of the Secretary of the Interior.

(2) *Compacts.* Problems may arise other than those involving conflicting claims to use of the water, e.g., pollution by sewage or industrial wastes. A practical solution is a compact between the states, pursuant to the federal

Constitution's Compact Clause (U.S. Const., Art. I, §10(3), 7 *Summary* (10th), *Constitutional Law*, §66). (See *Govt.C.* 175 et seq. [Colorado River Boundary Compact between Arizona and California]; *West Virginia v. Sims* (1951) 341 U.S. 22, 71 S.Ct. 557, 95 L.Ed. 713; *People v. El Dorado* (1971) 5 C.3d 480, 96 C.R. 553, 487 P.2d 1193 [Tahoe Regional Planning Compact between Nevada and California]; 75 *Harv. L. Rev.* 342 [inadequacy of compacts to solve problems of water supply].)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Nature of Rights to Water.

4. Federal Rights.

a. Navigable Waters.

12 Witkin Sum. Cal. Law Real Property § 922

[§ 922] Navigable Waters.

(1) *Improvement of Navigation.* Under the Commerce Clause, the federal Government has a paramount right in navigable streams for the purpose of improving navigation. (*Kansas v. Colorado* (1907) 206 U.S. 46, 27 S.Ct. 655, 662, 51 L.Ed. 956, 970; *Arizona v. California* (1931) 283 U.S. 423, 51 S.Ct. 522, 525, 75 L.Ed. 1154, 1164; *United States v. Willow River Power Co.* (1945) 324 U.S. 499, 65 S.Ct. 761, 767, 89 L.Ed. 1101, 1111; *United States v. Kansas City Life Ins. Co.* (1950) 339 U.S. 799, 70 S.Ct. 885, 888, 94 L.Ed. 1277, 1282; *United States v. Twin City Power Co.* (1956) 350 U.S. 222, 76 S.Ct. 259, 100 L.Ed. 240; *United States v. Grand River Dam Authority* (1960) 363 U.S. 229, 80 S.Ct. 1134, 1136, 4 L.Ed.2d 1186, 1188; see 78 Am.Jur.2d (2002 ed.), *Waters* §136 et seq.)

(2) *Development of Power.* The same paramount authority exists where navigable waters are used for the development of electric power. The United States, under the Federal Power Act (16 U.S.C., §791a et seq.), may issue a license for a project without consent of a state and free from any state veto power or regulation. (*First Iowa Hydro-Elec. Cooperative v. Federal Power Com.* (1946) 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed. 1143; *Tacoma v. Taxpayers* (1958) 357 U.S. 320, 78 S.Ct. 1209, 1217, 2 L.Ed.2d 1345, 1353; see *California v. Federal Energy Regulatory Com.* (1990) 495 U.S. 490, 110 S.Ct. 2024, 2029, 109 L.Ed.2d 474, 484 [Federal Power Act preempts California minimum stream flow requirements for federally licensed hydroelectric project; following *First Iowa Hydro-Elec. Cooperative*]; *Amador v. El Dorado County Water Agency* (1999) 76 C.A.4th 931, 956, 960, 91 C.R.2d 66 [Federal Power Act did not preempt review of proposed transfer of hydroelectric project from utility to irrigation district under California Environmental Quality Act (supra, §831 et seq.); applying CEQA did not interfere with Federal Energy Regulatory Commission licensing procedures, implicate licensing or operating of hydroelectric power resources, or vest state with veto power over federal project; distinguishing *California v. Federal Energy Regulatory Com.*]; 17 U.C. Davis L. Rev. 1179 [Federal Power Act and hydroelectric development]; 18 U.S.F. L. Rev. 535 [same].)

The Federal Power Act does not abolish or impair the private proprietary rights of individuals existing under state law to use waters of navigable streams for irrigation or power. (*Federal Power Com. v. Niagara Mohawk-Power Corp.* (1954) 347 U.S. 239, 74 S.Ct. 487, 489, 98 L.Ed. 666, 671.) Although a power company has a valid license from the federal Government to construct a dam, the state court has jurisdiction over an action to abate a public nuisance caused by sudden releasing and stopping of water. (*California Oregon Power Co. v. Superior Court* (1955) 45 C.2d 858, 869, 291 P.2d 455.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Improvement of Navigation*. See 3 *A.L.R. Fed* 2d 375 [portage necessity as affecting navigability of waterway under nonenvironmental federal law].



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4. Federal Rights.

b. Nonnavigable Waters.

12 Witkin Sum. Cal. Law Real Property § 923

[§ 923] Nonnavigable Waters.

The Property Clause of the Constitution (U.S. Const., Art. IV, §3) is the basis for a paramount federal authority to license power projects on waters that are not navigable but are within a "reservation" (federal land not subject to disposal under public land laws). (See *Federal Power Com. v. Oregon* (1955) 349 U.S. 435, 75 S.Ct. 832, 837, 99 L.Ed. 1215, 1223; *Cappaert v. United States* (1976) 426 U.S. 128, 96 S.Ct. 2062, 2069, 48 L.Ed.2d 523, 536 [reserved water rights doctrine applied to groundwater]; 14 Cal. Western L. Rev. 382 [*Cappaert*]; on application of reserved-rights doctrine to national forest lands, see *Arizona v. California* (1963) 373 U.S. 546, 83 S.Ct. 1468, 1498, 10 L.Ed.2d 542, 578; *United States v. New Mexico* (1978) 438 U.S. 696, 98 S.Ct. 3012, 57 L.Ed.2d 1052; 14 *Ecology L. Q.* 639 [federal reserved water rights in wilderness areas]; 15 *Ecology L. Q.* 627 [McCarren Amendment authorizing suits against United States to determine water rights]; 34 *Hastings L. J.* 1293 [application of California riparian water rights doctrine to federal lands in Mono Lake basin]; 15 *Hastings Const. L. Q.* 125 [federal reserved water rights in wilderness areas]; 31 *Stanf. L. Rev.* 885 [nonreserved water rights after *New Mexico*]; on federally reserved Indian water rights, see 76 *Cal. L. Rev.* 179; 17 *Ecology L. Q.* 355; 19 *Ecology L. Q.* 547; 17 *San Diego L. Rev.* 449; 34 *So. Cal. L. Rev.* 1; 30 *Stanf. L. Rev.* 1111; 27 *U.C. Davis L. Rev.* 501.)

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B. Nature of Rights to Water.

4. Federal Rights.

c. Federal Irrigation Projects.

12 Witkin Sum. Cal. Law Real Property § 924

[§ 924] Federal Irrigation Projects.

(1) *Acreage Limitation.* The General Welfare Clause (U.S. Const., Art. I, §8) and the Property Clause (U.S. Const., Art. IV, §3) have both been invoked to sustain federal authority over reclamation. Pursuant to this authority, the Reclamation Act of 1902 (43 U.S.C., §391 et seq.) was passed. It is now established that the United States may expend federal funds and acquire federal property to promote agriculture by reclamation and irrigation projects. (*Ivanhoe Irr. Dist. v. McCracken* (1958) 357 U.S. 275, 78 S.Ct. 1174, 1185, 2 L.Ed.2d 1313, 1327.) The congressional policy to make the water available to the largest possible number of people was carried out by Section 5 (43 U.S.C., §431), providing that no right to use the water should be sold for lands in excess of 160 acres in single ownership. (See *Ivanhoe Irr. Dist. v. McCracken*, *supra*, 78 S.Ct. 1184, 2 L.Ed.2d 1325; *Bryant v. Yellen* (1980) 447 U.S. 352, 100 S.Ct. 2232, 65 L.Ed.2d 184 [160-acre limitation was inapplicable to perfected rights in Imperial Valley]; 22 *Santa Clara L. Rev.* 267 [Bryant].)

When contracts were made for use of the water in the California Central Valley Project, larger landowners challenged the 160-acre limitation, and the California Supreme Court held it invalid. The theory was that Section 8 of the Reclamation Act (43 U.S.C., §383) disclaimed a congressional intent to interfere with state laws "relating to the control, appropriation, use, or distribution of water used in irrigation"; that water rights in California were subject to a trust in the state for the benefit of water users; and that the United States could not acquire an interest free from the trust. (*Ivanhoe Irr. Dist. v. All Parties & Persons* (1957) 47 C.2d 597, 620, 626, 627, 628, 306 P.2d 824.) This unique trust theory was criticized in strong dissents (47 C.2d 648, 663), and the decision was reversed in *Ivanhoe Irr. Dist. v. McCracken*, *supra*. The United States Supreme Court rejected the notion that Section 8 effectively nullified Section 5. Section 8 "merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. ... We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State." (78 S.Ct. 1183, 2 L.Ed.2d 1325.)

Following the decision of the United States Supreme Court in *McCracken*, the California court filed its second opinion in *Ivanhoe Irr. Dist. v. All Parties & Persons* (1960) 53 C.2d 692, 709, 3 C.R. 317, 350 P.2d 69, rejecting its former theory and upholding the contracts in conformity with the federal decision. (See *Metropolitan Water Dist. v. Marquardt* (1963) 59 C.2d 159, 186, 28 C.R. 724, 379 P.2d 28; on valid state conditions on federal appropriation of water, see *California v. United States* (1978) 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018; 30 *Hastings L. J.* 1645 [

California v. United States]; 11 U.C. Davis L. Rev. 401 [after *California v. United States*]; 11 U.C. Davis L. Rev. 472 [water districts contracting with Bureau of Reclamation]; on federal preemption, see *Environmental Defense Fund v. East Bay Mun. Util. Dist.* (1980) 26 C.3d 183, 161 C.R. 466, 605 P.2d 1.)

(2) *Commentary.* Commentary about federal reclamation law is extensive. (See 2 Cal. Western L. Rev. 99 [acreage limitation]; 14 Cal. Western L. Rev. 563 [litigation of Reclamation Law in Imperial Valley]; 4 *Ecology L. Q.* 343 [state versus federal control of reclamation project water]; 5 *Ecology L. Q.* 707 [federal public land distribution]; 22 *Ecology L. Q.* 143 [reclamation reform]; 40 *Hastings L. J.* 657 [reclamation reform]; 19 *Pacific L. J.* 1299 [federal-state water relations in California]; 19 *Pacific L. J.* 1323 [cooperative federalism in acquisition of water rights]; 15 *San Diego L. Rev.* 887 [acreage, residency and excess land sale]; 13 U.C. Davis L. Rev. 89 [federal reclamation laws].)

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(2) *Commentary:* See 31 A.L.R. Fed 2d 475 [construction and application of Reclamation Reform Act of 1982].



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XIV. WATERS

C. Administration of Water Rights.

1. In General.

12 Witkin Sum. Cal. Law Real Property § 925

[§ 925] In General.

The administration of water rights is a function of the State Water Resources Control Board, the successor to the State Water Rights Board and the State Water Quality Control Board. (See *Water C. 174* et seq.; on protection of water rights of Northern California areas supplying water to Central Valley projects, see *Water C. 1215* et seq.; on liability for pollution that interferes with use of water, see *Rest.2d, Torts §849*; on criminal offenses, see *2 Cal. Crim. Law (3d), Crimes Against Public Peace and Welfare, §§407, 408*; on mutual water companies and districts, see *Orange County Water Dist. v. Riverside (1959) 173 C.A.2d 137, 164, 343 P.2d 450*; *Erwin v. The Gage Canal Co. (1964) 226 C.A.2d 189, 193, 37 C.R. 901.*)

Commentary on the administration of water rights is plentiful. (See 9 Powell §65.01 et seq.; *81 Cal. L. Rev. 673* [comprehensive analysis of local water institutions' role in water markets]; *2 Ecology L. Q. 695* [pollution control in water rights administration]; *25 Ecology L. Q. 674* [creating "risk sharing water entitlement regime" models for water reallocation and watershed management]; *45 Hastings L. J. 249* [analysis of recent reallocations of state's water resources]; *19 Pacific L. J. 957* [symposium]; *19 Pacific L. J. 1031* [changing judicial attitudes toward property rights in California from vested rights to utilitarian reallocations]; *25 Pacific L. J. 901* [symposium on environmental restraints on water law]; *12 U.C. Davis L. Rev. 105* [administrative water rights inspections]; *25 Am.Jur. P.P. Forms (2001 ed.)*, Waterworks and Water Companies §5 et seq.; *20 Am.Jur. Legal Forms 2d (2000 ed.)*, Waterworks and Water Companies §261:1 et seq.)

There are a number of important provisions designed to promote the more efficient use of water. (See *12 Pacific L. J. 525.*) Particular provisions are covered later in this topic as follows:

- (1) Enforcement of water rights. (See *infra*, §927.)
- (2) Transfer of water rights. (See *infra*, §928 et seq.)
- (3) Legislative policy on reasonable use. (See *infra*, §938.)
- (4) Nonuse of water and reversion to public. (See *infra*, §954.)
- (5) Ownership of treated wastewater. (See *infra*, §955.)

SUPPLEMENT: [This section is current through the latest supplement]

Commentary: See 57 *Hastings L. J.* 1237 [symposium on California water law]; 20 Am.Jur. Legal Forms 2d (2009 ed.), Waterworks and Water Companies §261:1 et seq.



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C. Administration of Water Rights.

2. Proceedings To Determine Water Rights.

12 Witkin Sum. Cal. Law Real Property § 926

[§ 926] Proceedings To Determine Water Rights.

In order to expedite litigation to determine water rights, the court may make an order of reference to the State Water Resources Control Board "of any or all issues" involved (*Water C. 2000*), or may call on the board for an investigation and report on the physical facts (*Water C. 2001*). These functions were previously performed by the Department of Public Works (Division of Water Resources). (See *Fleming v. Bennett (1941) 18 C.2d 518, 522, 116 P.2d 442*; *California Water Service Co. v. Edward Sidebotham & Son (1964) 224 C.A.2d 715, 721, 37 C.R. 1.*)

Reference to the board is permissive. No positive duty rests on the court. (*Allen v. California Water & Tel. Co. (1946) 29 C.2d 466, 489, 176 P.2d 8.*) However, as observed in *Pasadena v. Alhambra (1949) 33 C.2d 908, 917, 207 P.2d 17*: "Every recent major water law decision of this court has expressly or impliedly approved the reference procedure ... and has recommended, in view of the complexity of the factual issues in water cases and the great public interests involved, that the trial courts seek the aid of the expert advice and assistance provided for." (See *Williams v. Rankin (1966) 245 C.A.2d 803, 814, 54 C.R. 184* [approval of board's physical solution and retention of jurisdiction to adjust future differences].)

The board is also allowed to determine water rights among conflicting claimants in an administrative proceeding. (*Water C. 2501.*) The board's order establishing these rights is certified to the superior court (*Water C. 2750*), and, after a hearing and the taking of additional evidence where necessary (*Water C. 2767*), the court makes its decree determining the rights of all parties (*Water C. 2768*). (See *In re Water of Hallett Creek Stream System (1988) 44 C.3d 448, 454, footnote 1, 243 C.R. 887, 749 P.2d 324* [describing proceedings under *Water C. 2500 et seq.*].)

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C. Administration of Water Rights.

3. Enforcement of Water Rights.

12 Witkin Sum. Cal. Law Real Property § 927

[§ 927] Enforcement of Water Rights.

(1) *Legislative Intent.* Enforcement of water rights is governed by *Water C. 1825* et seq. (See *12 Pacific L. J. 529.*) "It is the intent of the Legislature that the state should take vigorous action to enforce the terms and conditions of permits, licenses, certifications, and registrations to appropriate water, to enforce state board orders and decisions, and to prevent the unlawful diversion of water." (*Water C. 1825*; see *Del Norte v. Crescent City* (1999) 71 C.A.4th 965, 973, 976, 84 C.R.2d 179 [neither *Water C. 1825* nor operating permit required city that operated water system for its residents to furnish new hookups to unincorporated areas; because city had no incentive to provide utilities to areas that competed with city businesses, city's refusal to furnish hookups was not arbitrary].)

(2) *Cease-and-Desist Orders.* The board may issue a cease-and-desist order to a person who is violating, or threatening to violate, any of the following: (a) the prohibition in *Water C. 1052* against the unauthorized diversion or use of water; (b) a term or condition of a permit, license, certification, or registration; or (c) a decision or order of the board, in which the person to whom the cease-and-desist order will be issued, or a predecessor in interest to that person, was named as a party. (*Water C. 1831(a), (d).*) The cease-and-desist order must require that person to comply "forthwith" or in accordance with a time schedule set by the board. (*Water C. 1831(b).*) The board may issue a cease-and-desist order only after notice and an opportunity for a hearing as provided in *Water C. 1834*. (*Water C. 1831(c).*) An order is effective on its issuance, but the board, after notice and opportunity for a hearing, may modify, revoke, or stay it in whole or in part. (*Water C. 1832.*)

(3) *Enforcement of Cease-and-Desist Order by Attorney General.* If a person fails to comply with a cease-and-desist order issued by the board, the Attorney General, at the board's request, must petition the superior court for prohibitory or mandatory injunctive relief, including a temporary restraining order, preliminary injunction, or permanent injunction. (*Water C. 1845(a).*) A person or entity who violates a cease-and-desist order may be liable for up to \$ 1,000 for each day in which the violation occurs. (*Water C. 1845(b)(1).*) Civil liability may be imposed by the superior court, on petition by the Attorney General (*Water C. 1845(b)(2).*), or administratively by the board under *Water C. 1055* (*Water C. 1845(b)(3).*). In determining the appropriate amount, the board, like the court, must consider all relevant circumstances. (*Water C. 1845(c).*)

(4) *Effect of Order on Private Litigation.* Factual or legal determinations made pursuant to a cease-and-desist order are conclusive and preclude a party to the order from raising those issues in a subsequent administrative proceeding. (

Water C. 1850.) *Water C. 1825* et seq. does not limit the right of a person to bring an action for equitable or legal relief where harm is caused by an unauthorized diversion or a violation of a term or condition of a permit or license. The person need not exhaust any administrative remedy provided by *Water C. 1825* et seq. (*Water C. 1851.*)

(5) *Jurisdiction To Modify Consent Judgment.* In *Big Bear Mun. Water Dist. v. Bear Valley Mut. Water Co.* (1989) 207 C.A.3d 363, 254 C.R. 757, the trial court rendered a consent judgment in water litigation involving numerous party entities, and expressly reserved continuing jurisdiction to interpret, enforce, or carry out the judgment. Nine years later, the trial court denied a motion by one party, the district, to interpret and modify the physical solution injunction in the judgment, and the district appealed. *Held*, affirmed.

(a) The trial court did not have inherent authority under Cal. Const., Art. X, §2 (public policy as to use and conservation of water resources) to modify the physical solution injunction in the consent judgment and adopt the district's "conjunctive use plan." (207 C.A.3d 375, 378.) The district failed to make the requisite showing of changed conditions to confer jurisdiction. (207 C.A.3d 378, 379, footnote 6.) Also, the district's contention that the trial court abdicated its responsibilities under the public trust doctrine by refusing to consider adoption of a conjunctive use plan was without merit. (207 C.A.3d 379, 381.)

(b) The trial court properly refused to accept jurisdiction to determine if the water company had forfeited its water rights through nonuse under *Water C. 1241* (see *infra*, §954). (207 C.A.3d 381.)

(c) Jurisdiction could not be grounded on purported changes in the law of wastewater reclamation (207 C.A.3d 382) nor on the alleged unilateral action by the water company expanding the district's in lieu water delivery obligation (207 C.A.3d 384).

(6) *Investigations by Board.* The board must conduct field investigations and prepare staff analyses of all "minor protested applications" (*Water C. 1345*) and all "minor protested petitions for change" (*Water C. 1704.1*). Minor applications or petitions for change are those that do not involve direct diversions in excess of three cubic-feet per second or storage in excess of 200 acre-feet per year. (*Water C. 1348, 1704.4.*)

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XIV. WATERS

C. Administration of Water Rights.

4. Transfer of Water Rights.

a. In General.

12 Witkin Sum. Cal. Law Real Property § 928

[§ 928] In General.

(1) *Declaration of Policy.* "The Legislature hereby finds and declares that the growing water needs of the state require the use of water in an efficient manner and that the efficient use of water requires certainty in the definition of property rights to the use of water and transferability of such rights. It is hereby declared to be the established policy of this state to facilitate the voluntary transfer of water and water rights where consistent with the public welfare of the place of export and the place of import." (*Water C. 109(a)*.) The appropriate state agencies are directed to encourage voluntary transfers by such means as providing technical assistance to increase water conservation so that additional water will be available for transfer. (*Water C. 109(b)*.) (See *31 McGeorge L. Rev. 411* [water rights protection and Expedited Short-Term Water Transfer Act of 1999]; *47 Stanf. L. Rev. 533* [federal income tax implications of water transfers]; *31 U.C. Davis L. Rev. 591* [salvaging remains of agricultural water conservation in California]; on state program to facilitate transfer of surplus water, see *Water C. 470 et seq.*)

(2) *Transfer Is Not Evidence of Waste.* The sale, lease, exchange, or transfer of water or water rights does not in itself constitute evidence of waste or unreasonable use, unreasonable method of use, or unreasonable method of diversion. (*Water C. 1244*.) The transfer of water, or the offer of water for transfer, does not cause, and may not be the basis for, a forfeiture, abandonment, or modification of a water right, contract right, or other right to use the water. An offer of water for transfer, contract negotiations, or a transfer agreement may not be used as evidence of waste or unreasonable use, or cessation of use, of the water. (*Water C. 1014*.)

(3) *Transfer by Local or Regional Public Agency.* Because local or regional public agencies are best suited to make many of the water management decisions (*Water C. 380(c)*), they may transfer surplus water and water that users voluntarily forgo using for use outside of the agency. (*Water C. 382(a)*.) (On what constitutes surplus water, see *Water C. 383*.) The agency must comply with all provisions relating to the transfer of water rights (*Water C. 384*), and must obtain the prior consent of the agency within whose boundaries the transferee is located (*Water C. 385*).

(4) *Methods Creating Excess.* Excess water rights resulting from the use of reclaimed, desalinated, or polluted water or from conservation efforts may be transferred pursuant to any applicable provision, including those governing changes in point of diversion, place of use, and purpose of use due to the transfer. (*Water C. 1010(b)* [use of reclaimed, desalinated, or polluted water]; *Water C. 1011(b)* [conservation efforts].)

(5) *Water Supplier Contracts.* Public or private water suppliers may contract with persons entitled to water service, including public agencies, to reduce or eliminate their water use. (*Water C. 1745, 1745.02.*) A supplier may also contract with a state drought water bank, another state or local supplier, or a water user to transfer water, or store water as part of a transfer, under prescribed conditions. (*Water C. 1745.04 et seq.*)

(6) *Reversion.* If a transferee's right to use transferred water is divested because of the transferee's abandonment, forfeiture, waste, or unreasonable use of the transferred water, the divested portion of the right will revert immediately to the transferor. (*Water C. 1015.*) At the conclusion of the term of a water transfer agreement, the water rights subject to the agreement revert to the transferor. (*Water C. 1016(a).*) The transferee or a beneficiary of the transfer must not claim a right to a continued supply of water. (*Water C. 1016(b).*)

(7) *Short-Term Leases To Assist Water Conservation.* *Water C. 1020 et seq.* provide for and regulate water leases not to exceed 5 years "to assist water conservation efforts." (*Water C. 1020.*) These water leases are not subject to *Water C. 1700 et seq.* or *Water C. 1725 et seq.* (*infra*, §929). (*Water C. 1025.7.*)

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4. Transfer of Water Rights.

b. Temporary Change in Diversion or Use.

12 Witkin Sum. Cal. Law Real Property § 929

[§ 929] Temporary Change in Diversion or Use.

(1) *Definition of Temporary Change.* "Temporary change" means "any change of point of diversion, place of use, or purpose of use involving a transfer or exchange of water or water rights for a period of one year or less." The 1-year period does not include any time required for monitoring, reporting, or mitigation before or after the change is carried out. If, within 1 year or less, the water involved in the temporary change is moved to off-stream storage in a different watershed, the change will be considered temporary and the moved water may be put to beneficial use in the place and for the purposes specified in the board's order approving the change. (*Water C. 1728.*)

(2) *When Temporary Change Is Permitted.* "A permittee or licensee may temporarily change the point of diversion, place of use, or purpose of use due to a transfer or exchange of water or water rights if the transfer would only involve the amount of water that would have been consumptively used or stored by the permittee or licensee in the absence of the proposed temporary change, would not injure any legal user of the water, and would not unreasonably affect fish, wildlife, or other instream beneficial uses." (*Water C. 1725*; on definition of "consumptively used," see *Water C. 1725.*) A proposed temporary change under *Water C. 1725* et seq. is exempt from the requirements of *Pub.Res.C. 21000* et seq. (CEQA) (see *supra*, §831 et seq.). (*Water C. 1729.*)

Water rights determined under a court decree issued pursuant to *Water C. 2500* et seq. (see *supra*, §926) are transferable under *Water C. 1725* et seq. and *Water C. 1700* et seq. "The court having the appropriate jurisdiction over the decreed rights may enter a supplemental decree modifying any rights involved upon motion of the board or any party with a vested water right." (*Water C. 1740.*)

Special provisions permit expedited approval of a request for a temporary change when the permittee or licensee has an urgent need to change a point of diversion, place of use, or purpose of use. (See *Water C. 1435* et seq.)

(3) *Petition.* A permittee or licensee who proposes a temporary change must submit a petition to the State Water Resources Board to change the terms of the permit or license to accomplish the proposed change. (*Water C. 1726.*) The petition must be filed by the permittee or licensee, but if the change is for the benefit of a contractor or user supplied by the permittee or licensee, the permittee or licensee may authorize the contractor or user to participate as a copetitioner. The copetitioner must be identified in the petition. (*Water C. 1726(a)(1).*) A contractor or user, whether or not

designated as a copetitioner, and the person to whom the water is proposed to be transferred, must be named as parties to the proceeding, with the same rights to receive notices, respond to board determinations, and petition for writ of mandamus as the petitioner. (*Water C. 1726(a)(2).*)

The petition must refer to the permit or license that serves as the basis for the water transfer. (*Water C. 1726(b)(1).*) It must describe the changes in water storage, timing, and point of diversion, place and purpose of use, timing and point of return flow, and water quality of instream flows that are likely to occur because of the proposed temporary change. (*Water C. 1726(b)(2).*) (On copies of petition, see *Water C. 1726(c).*) Within 10 days of submitting a petition, the petitioner must publish, in at least one newspaper of general circulation in the county or counties in which the water is currently stored or used, a notice of the petition and a brief description of the proposed change. Also within 10 days of submitting the petition, the petitioner, using a list supplied by the board, must notify the water rights holders who may be affected by the transfer, and the board must post notice of the petition on its website. The notice must specify the date on which comments are due. The board may impose additional notice requirements on the petitioner. (*Water C. 1726(d).*)

(4) *Board Inspection and Review.* Within 10 days of receiving a petition, the board must begin investigating the proposed temporary change. The board must determine if the water proposed for transfer would have been consumptively used or stored under the petitioner's permit or license in the absence of the transfer or conserved under *Water C. 1011*. The board must also evaluate the changes in water storage, timing and point of diversion, place and purpose of use, timing and point of return flow, water quality, and instream flows, and other changes that are likely to occur. (*Water C. 1726(e).*)

Water users that may be affected by a proposed change and any other interested party may file a written comment regarding a petition with the board no later than 30 days after the publication date under *Water C. 1726(d)*. The board must take all timely comments into consideration. (*Water C. 1726(f).*)

The board must approve a temporary change if it determines that a preponderance of the evidence shows both of the following:

(a) The proposed temporary change would not injure any legal user of the water, during any potential hydrologic condition that the board determines is likely to occur during the proposed change, through significant changes in water quantity, water quality, timing of diversion or use, consumptive use of the water, or reduction in return flows. (*Water C. 1727(b)(1).*)

(b) The proposed temporary change would not unreasonably affect fish, wildlife, or other instream beneficial uses. (*Water C. 1727(b)(2).*) (On burdens of proof, see *Water C. 1727(c)*; on timing of decision, see *Water C. 1726(g)*.)

(5) *Effect of Enforcement Action Alleging Water Use Violations.* If an enforcement action or other proceeding that alleges water use violations commences during the term of a temporary change, and the water involved is, at the time of the alleged violation, subject to a water transfer, the determination of the alleged violation must be based on an assessment of the transferee's use of the transferred water. (*Water C. 1015.*)

(6) *Reversion.* Following the expiration of the temporary change period, all rights automatically revert to the original holder of the right without any action by the board. (*Water C. 1731.*)

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4. Transfer of Water Rights.

c. Long-Term Transfers.

12 Witkin Sum. Cal. Law Real Property § 930

[§ 930] Long-Term Transfers.

"A long-term transfer" is a transfer for a period of more than 1 year. (*Water C. 1735.*) The board may consider a petition for a long-term transfer of water or water rights involving a change of point of diversion, place of use, or purpose of use. (*Water C. 1735.*) The board, after providing notice and an opportunity for a hearing, may approve a petition for a long-term transfer "where the change would not result in substantial injury to any legal user of water and would not unreasonably affect fish, wildlife, or other instream beneficial uses." (*Water C. 1736.*) Following the expiration of the long-term transfer period, all rights automatically revert to the original holders of the right without any action by the board. (*Water C. 1737.*)

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See *State Water Resources Control Bd. Cases (2006) 136 C.A.4th 674, 735, 39 C.R.3d 189* [board properly approved petitions by irrigation districts to add part of river as place of use and to add fish and wildlife enhancement as purpose of use; fear that some users would fail to meet salinity objectives was not sufficient to show that changes would cause injury to legal user of water].



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D. Rights in Surface Waters.

1. Riparian Rights.

a. In General.

12 Witkin Sum. Cal. Law Real Property § 931

[§ 931] In General.

(1) *Right Annexed to Land.* The theory of riparian rights is that the right to use of water belongs to all the abutting or riparian owners in a sort of common ownership. (*Miller & Lux v. Enterprise Canal & Land Co.* (1915) 169 C. 415, 440, 147 P. 567; see 9 Powell §65.06; 4 Rest.2d, Torts, p. 209 [Introductory Note on the Nature of Riparian Rights and Legal Theories for Determination of the Rights]; 19 *Pacific L. J.* 1165 [salinity control and riparian rights]; 78 *Am.Jur.2d* (2002 ed.), *Waters* §30 et seq.)

The right is annexed to the land. It is identified with the land, and "part and parcel" of it. (*Lux v. Haggin* (1886) 69 C. 255, 4 P. 919, 10 P. 674.) It begins when the water reaches the riparian land. Before that time, the only right of the owner is to ensure that the owner gets the full flow. The owner cannot go above the intake of an upper riparian owner and divert water to his or her own land, but instead must wait until the water reaches it. (*Miller & Lux v. Enterprise Canal & Land Co.*, supra; on nature and situs of rights, see *San Bernardino Valley Mun. Water Dist. v. Meeks & Daley Water Co.* (1964) 226 C.A.2d 216, 221, 38 C.R. 51 [condemnation of rights].)

An early case held that the riparian right, as such, cannot be transferred apart from the land. By grant of the right alone, the riparian owner is merely estopped to assert his claim, and the grantee's interest cannot accurately be classed as a riparian right. (See *Spring Valley Water Co. v. Alameda* (1927) 88 C.A. 157, 167, 263 P. 318.) This doctrine was, however, substantially modified in *Carlsbad Mut. Water Co. v. San Luis Rey Dev. Co.* (1947) 78 C.A.2d 900, 178 P.2d 844. The court held that the grant of a portion of the owner's riparian rights actually transferred those rights to the nonriparian grantee and proportionately diminished the grantor's correlative rights against other riparian owners. Hence, to permit the grantor (or successors in interest) to exercise their full, original riparian rights "would result in a double riparian right" for the land. (78 C.A.2d 913.) (See *Rest.2d, Torts* §§856, 857 [grants or licenses to nonriparian owners]; 35 *Cal. L. Rev.* 603 [criticizing decision for benefiting riparian owners who are not parties to grant and for being inconsistent with estoppel doctrine].)

(2) *Correlative Right.* The riparian right is a correlative right that must be shared with the other riparian owners. (*Half Moon Bay Land Co. v. Cowell* (1916) 173 C. 543, 549, 160 P. 675; *Prather v. Hoberg* (1944) 24 C.2d 549, 560, 150 P.2d 405; see 65 *A.L.R.2d* 143 [apportionment and division of area of river as between riparian tracts fronting on same bank]; 14 *A.L.R.4th* 1028 [allocation of riparian rights among lakefront owners in absence of agreement or

specification].)

(3) *Vested Right*. The riparian right is a vested property right that cannot be lost through disuse. (*Lux v. Haggin*, supra; *In re Waters of Long Valley Creek Stream System* (1979) 25 C.3d 339, 347, 158 C.R. 350, 599 P.2d 656, infra, §941; *Orange County Water Dist. v. Riverside* (1959) 173 C.A.2d 137, 184, 343 P.2d 450.)

West's Key Number Digest, Waters and Water Courses k.34 et seq.

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1. Riparian Rights.

b. Riparian Land.

1. Characteristics.

12 Witkin Sum. Cal. Law Real Property § 932

[§ 932] Characteristics.

(1) *Within Watershed*. Riparian land is land within the watershed that touches the watercourse. (*Anaheim Union Water Co. v. Fuller* (1907) 150 C. 327, 330, 88 P. 978; *Rancho Santa Margarita v. Vail* (1938) 11 C.2d 501, 528, 81 P.2d 533; *Hudson v. West* (1957) 47 C.2d 823, 828, 306 P.2d 807 [pleading]; *Smith v. Wheeler* (1951) 107 C.A.2d 451, 455, 237 P.2d 325; *Gonzales v. Arbelbide* (1957) 155 C.A.2d 721, 723, 318 P.2d 746; see *Rest.2d, Torts §§843, 844; 78 Am.Jur.2d* (2002 ed.), *Waters §38 et seq.*)

(2) *Contiguity*. Although the land must be contiguous to the water, the amount that is contiguous is not determinative of the right. A large tract, with a small frontage on a stream, may be riparian to the stream. (*Rancho Santa Margarita v. Vail, supra*, 11 C.2d 528, 533.) The original grant determines the character of the land, and only the smallest contiguous tract held under a single title retains riparian rights. Thus, if a large plot of land were within the watershed, but the original owner secured a patent from the government to a narrow strip along the stream, that strip alone would have riparian rights. Contiguous parcels within the watershed, but not abutting on the stream, would never have riparian rights even though they eventually became the property of the owner of the riparian land. (See *Boehmer v. Big Rock Irr. Dist.* (1897) 117 C. 19, 26, 48 P. 908; *Hudson v. West* (1957) 47 C.2d 823, 830, 306 P.2d 807; *Gonzales v. Arbelbide, supra*, 155 C.A.2d 723; *Williams v. Rankin* (1966) 245 C.A.2d 803, 808, 814, 54 C.R. 184.)

(3) *Watercourse*. It is not necessary that there be a flowing stream. Lands bordering on ponds, lakes, or sloughs have riparian rights, and the rights of the land abutting a slough or other tributary of the stream are equal to those of land on the main channel. (*Turner v. James Canal Co.* (1909) 155 C. 82, 88, 99 P. 520; see *Crum v. Mt. Shasta Power Corp.* (1934) 220 C. 295, 300, 30 P.2d 30; *Crum v. Mt. Shasta Power Corp.* (1931) 117 C.A. 586, 596, 4 P.2d 564; *Haun v. De Vours* (1950) 97 C.A.2d 841, 843, 218 P.2d 996; *Rest.2d, Torts §§841, 843.*) A creek may also be a watercourse, even though it is dry at times and serves as a mere channel by which a watershed is drained. (*Van Zyl v. Spiegelberg* (1969) 2 C.A.3d 367, 374, 82 C.R. 689.)

The various definitions have been summarized as follows: "[W]e are left with a somewhat nebulous concept, the only concrete element of which seems to be the requirement of definite bed, banks, and channel." (*South Santa Clara Valley Water Conservation Dist. v. Johnson* (1964) 231 C.A.2d 388, 394, 41 C.R. 846.)

Ordinarily riparian rights attach only to a natural watercourse, and not to artificial channels such as canals or aqueducts used to convey water from a stream. However, the artificial watercourse may originate in a manner that gives rise to riparian rights; e.g., where a stream is diverted into a new channel, and the artificial channel is permanently substituted for the natural. (See *Chowchilla Farms v. Martin* (1933) 219 C. 1, 18, 25 P.2d 435; *Tusher v. Gabrielsen* (1998) 68 C.A.4th 131, 146, 80 C.R.2d 126 [plaintiffs did not acquire riparian rights to artificial pond that was located almost entirely on defendants' property; pond served as detention basin for water from three drain pipes that were fed by hill drainage, roof water, and sheets of water running off from streets above property]; *Rest.2d, Torts §841*, Comment h.)

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b. Riparian Land.

2. Federal Desert Land Act.

12 Witkin Sum. Cal. Law Real Property § 933

[§ 933] Federal Desert Land Act.

For some time it was thought that the federal Desert Land Act of 1877 (43 U.S.C., §321 et seq.) established the appropriation doctrine in lands then belonging to the federal government, abolishing riparian rights, and leaving the water open to appropriation even after the lands passed into private ownership. (See *California Oregon Power Co. v. Beaver Portland Cement Co.* (1935) 295 U.S. 142, 55 S.Ct. 725, 79 L.Ed. 1356; but see *San Joaquin & Kings River Canal & Irr. Co. v. Worswick* (1922) 187 C. 674, 689, 203 P. 999 [stating contrary rule].)

However, it was later held in California that the Desert Land Act did not abolish riparian rights in those lands, but merely left the matter wholly within the control of the states, so that each state might determine for itself the extent of appropriation or riparian rights in the lands. Under this view, riparian rights, recognized by the law of this jurisdiction, could be established. (*Williams v. San Francisco* (1938) 24 C.A.2d 630, 634, 76 P.2d 182; *Williams v. San Francisco* (1942) 56 C.A.2d 374, 133 P.2d 70; on federal riparian rights on reserved land, see *infra*, §934.)

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3. Federal Riparian Rights on Reserved Lands.

12 Witkin Sum. Cal. Law Real Property § 934

[§ 934] Federal Riparian Rights on Reserved Lands.

In re Water of Hallett Creek Stream System (1988) 44 C.3d 448, 243 C.R. 887, 749 P.2d 324, holds that the federal Government has California riparian water rights on federal land reserved for national forest purposes, and that those rights are not defeasible.

(a) *Federal proprietary rights.*

(1) "Private and government ownership of land obviously differ in certain fundamental respects. Unlike private property, government land usually cannot be condemned or seized, or obtained by adverse possession. A private owner holds property under local law; the government holds and controls land by virtue 'of its own fiat' and may change the rules of ownership at will. ... In this respect, to speak of government 'ownership' is really to describe a variety of governmental powers over the regulation and control of the property it holds. Not surprisingly, therefore, a close reading of United States Supreme Court decisions involving water rights disputes between the states and the federal government reveals that the court has consistently premised its holdings on the sovereign rights, rather than the proprietary interests, of the United States." (44 C.3d 459.) However, the Supreme Court has recognized that the federal Government, under the Property Clause (see *supra*, §923), also has the rights of an ordinary proprietor over public lands. (44 C.3d 460.)

(2) The Court "has reaffirmed the long-established principle that Congress not only may defer, but nearly always has deferred, to state law in determining rights to water on federal lands." (44 C.3d 460.) Thus, in *United States v. New Mexico (1978) 438 U.S. 696, 98 S.Ct. 3012, 57 L.Ed.2d 1052*, *supra*, §923, the Court held that the United States was entitled under federal law to only so much water as was required to accomplish the specific or primary purposes of the national forests, which did not include wildlife preservation. Hence, where water is only valuable for a secondary use, the inference arises that the United States would acquire water in the same manner as any other public or private appropriator. Thus, the United States may acquire riparian rights under *California law*. (44 C.3d 461.)

(b) *Riparian rights and severance doctrine.* In *California Oregon Power Co. v. Beaver Portland Cement Co. (1935) 295 U.S. 142, 55 S.Ct. 725, 79 L.Ed. 1356*, the Court held that a federal patent of desert land did not

automatically convey "federal" riparian rights. (44 C.3d 465.) Thus, "the United States Supreme Court essentially opted for the Oregon doctrine, concluding that the Desert Land Act had severed the waters of the public domain from the soil, so that a federal patent conveyed rights to land but not to water." But the Court rejected the view that the Act had imposed a uniform rule of appropriation, holding instead that the Act recognized each state's power to determine whether the rule of appropriation or the common law rule of riparian rights should obtain. (44 C.3d 466.) Hence, "under California law riparian water rights exist on federal lands located within the State of California." (44 C.3d 467.)

(c) *Federal riparian rights are not defeasible.* The Desert Land Act subordinated the interests of the federal Government in the waters of the public domain to the rights of subsequent appropriators recognized under state and local law. (44 C.3d 467.) But the Act did not apply to federal reserved lands, i.e., lands reserved from the public domain for some predetermined purpose. (44 C.3d 468, 470.) And the concept of a federally held "defeasible riparian right" has no support in California. "Though the unexercised riparian rights of any owner--governmental or otherwise--may be *limited* under California law, they cannot be altogether abolished." (44 C.3d 470.) Hence, "the riparian water rights of the United States on its reserved national forest lands in California are as fully immune from defeasance as the riparian rights of a private owner." (44 C.3d 470.)

(d) *Limitations on federal riparian right.* The State Water Resources Control Board has authority to decide that an unexercised riparian claim loses its priority with respect to all rights currently being exercised, and it may also determine that the future riparian right will have a lower priority than any uses of water it authorizes before the riparian owner in fact attempts to exercise his right. (44 C.3d 471, quoting *In re Waters of Long Valley Creek Stream System* (1979) 25 C.3d 339, 158 C.R. 350, 599 P.2d 656, *infra*, §941.) Under *Long Valley*, the board may determine the scope, nature, and priority of the unexercised federally held riparian rights recognized in the present opinion, as the board deems reasonably necessary to the promotion of the state's interest in fostering the most reasonable and beneficial use of its water resources. (44 C.3d 471.) Thus, "the United States must apply to the Board whenever it proposes to exercise its riparian right, so that the Board may evaluate the proposed use in the context of other uses and determine whether the riparian use should be permitted in light of the state's interest in promoting the most efficient and beneficial use of the state's waters." (44 C.3d 472.) (See 41 *Stanf. L. Rev.* 1529 [analysis of *Hallett Creek* and its implications in development of modern water law]; 20 *U.C. Davis L. Rev.* 921 [California water for national forests; written before Supreme Court opinion in *Hallett Creek*].)

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1. Riparian Rights.

c. Riparian Uses and Rights Against Other Owners.

12 Witkin Sum. Cal. Law Real Property § 935

[§ 935] Riparian Uses and Rights Against Other Owners.

When the correlative rights of several riparian owners are involved, one owner is limited to a reasonable use, which is determined largely by the facts of each case. (*Cowell v. Armstrong* (1930) 210 C. 218, 226, 290 P. 1036; *Prather v. Hoberg* (1944) 24 C.2d 549, 562, 150 P.2d 405; *Drake v. Tucker* (1919) 43 C.A. 53, 57, 184 P. 502; *Gonzales v. Arbelbide* (1957) 155 C.A.2d 721, 724, 318 P.2d 746; see 54 A.L.R.2d 1450 [relative riparian rights respecting removal of water from natural, private, nonnavigable lake]; 78 Am.Jur.2d (2002 ed.), *Waters* §32 et seq.)

The use of water to generate power is a proper riparian use, even where the electricity so generated is carried away and sold in nonriparian territory. In that case, the water is not consumed, for after passing through the power plant it is returned to the stream undiminished. (*Mentone Irr. Co. v. Redlands Elec. Light & Power Co.* (1909) 155 C. 323, 327, 100 P. 1082; *Fall River Valley Irr. Dist. v. Mt. Shasta Power Corp.* (1927) 202 C. 56, 70, 259 P. 444.)

An early case held that the upper riparian owner had the right reasonably to impound and store water, where no injury resulted to lower owners. (*Stanford v. Felt* (1886) 71 C. 249, 253, 16 P. 900.) But seasonal or "cyclic" storage, extending from one season's flow to another, the water being stored in the wet season for use in the dry, is not a proper riparian use. (*Seneca Consol. Gold Mines Co. v. Great Western Power Co.* (1930) 209 C. 206, 215, 287 P. 93; *Colorado Power Co. v. Pacific Gas & Elec. Co.* (1933) 218 C. 559, 564, 24 P.2d 495.) Equally objectionable are periodic storage and discharge during the dry season, for power purposes, the water being released at odd times that suit the convenience of the upper owner. The result of this storage may be alternating deprivation of the lower owner's supply, and inundation of his irrigation system by the sudden release of large amounts of water. (*Moore v. California Oregon Power Co.* (1943) 22 C.2d 725, 733, 140 P.2d 798.)

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CHAPTER XVII - Real Property

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XIV. WATERS

D. Rights in Surface Waters.

1. Riparian Rights.

d. Extent of Riparian Right.

1. Former Law.

12 Witkin Sum. Cal. Law Real Property § 936

[§ 936] Former Law.

Before the 1928 constitutional amendment (*infra*, §937) the riparian owner had a right to all the ordinary and natural flow, undiminished except by reasonable use of upper riparian owners and those with other lawfully acquired rights. (*Herminghaus v. Southern Calif. Edison Co.* (1926) 200 C. 81, 95, 252 P. 607; *Miller & Lux v. Madera Canal & Irr. Co.* (1909) 155 C. 59, 64, 99 P. 502.) When lower owners did not use any of the water, the upper riparian owner could take all of it for a riparian use. (*Pabst v. Finmand* (1922) 190 C. 124, 130, 211 P. 11.) The same rule applied to opposite riparian owners. (*Joerger v. Mt. Shasta Power Corp.* (1932) 214 C. 630, 636, 7 P.2d 706.)

Where others lawfully entitled to the water demanded use of it, the riparian owner was limited to a reasonable use on riparian land. (See *Gould v. Eaton* (1897) 117 C. 539, 542, 49 P. 577 [injunction granted to lower riparian owner against use by upper riparian owner on nonriparian land]; *San Joaquin & Kings River Canal & Irr. Co. v. Fresno Flume & Irr. Co.* (1910) 158 C. 626, 629, 112 P. 182 [plaintiff must show some actual or potential injury]; *Crum v. Mt. Shasta Power Corp.* (1931) 117 C.A. 586, 599, 4 P.2d 564 [same]; 2 *Cal. L. Rev.* 340.)

A statutory provision attempted to limit the riparian right to a reasonable use of water. In the celebrated case of *Herminghaus v. Southern Calif. Edison Co.*, *supra*, 200 C. 115, this provision was held invalid as an impairment of vested rights of the riparian owner. And in *Fall River Valley Irr. Dist. v. Mt. Shasta Power Corp.* (1927) 202 C. 56, 68, 259 P. 444, the court reached a similar conclusion, declaring that, although in proper circumstances the riparian right might yield to the police power, the statute did not purport to be an exercise of that power.

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2. Constitutional Amendment of 1928.

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[§ 937] Constitutional Amendment of 1928.

In 1928, former Article XIV, §3 (now Art. X, §2) was added to the California Constitution. This section declares the policy of the state to cause the waters to be put to beneficial use, and provides that the riparian right will be limited to reasonable methods of diversion and use. Although describing the amendment as "cryptic," the United States Supreme Court, in *United States v. Gerlach Live Stock Co.* (1950) 339 U.S. 725, 70 S.Ct. 955, 964, 969, 94 L.Ed. 1231, 1245, 1249, stated its effect as follows: "Riparianism, pressed to the limits of its logic, enabled one to play dog-in-the-manger. The shore proprietor could enforce by injunction his bare technical right to have the natural flow of the stream even if he was getting no substantial benefit from it. This canine element in the doctrine is abolished." (See *17 Hastings Const. L. Q.* 225 [common law origins of Amendment]; *17 Hastings Const. L. Q.* 275 [applications of amendment from maximum water development to instream flow protection].)

In *Gin S. Chow v. Santa Barbara* (1933) 217 C. 673, 22 P.2d 5, plaintiff riparian owner sought to enjoin a diversion by defendant city. He claimed the right to the uninterrupted flow on the ground that his land benefited by seepage of water. An injunction was denied. *Held*, the constitutional amendment was a valid exercise of police power, and, as a result of its adoption, the riparian right had been limited to a reasonable use of the water. (217 C. 701.) (See *California Trout v. State Water Resources Control Bd.* (1989) 207 C.A.3d 585, 255 C.R. 184, *infra*, §943; *Jordan v. Santa Barbara* (1996) 46 C.A.4th 1245, 1261, 54 C.R.2d 340 [defendant cities diverted water in accordance with rights adjudicated in *Gin S. Chow* and use of water was not unreasonable; prior adjudication did not require defendants to store surface flow for plaintiffs' benefit].)

In the subsequent case of *Peabody v. Vallejo* (1935) 2 C.2d 351, 368, 40 P.2d 486, the court stated the major problems as follows: "[A]fter excluding all of the reasonable beneficial uses present and prospective (considering in connection therewith reasonable methods of use and reasonable methods of diversion) to which the waters of the stream are put, either under the riparian right or by prior appropriation, is there then water wasted or unused or not put to any beneficial use? If so ... no injunction may issue ... and the appropriator may take the surplus or excess without compensation." (See *Water C. 100* [beneficial use]; *Water C. 101* [extent of riparian rights]; *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 C.2d 489, 524, 45 P.2d 972; *Meridian, Ltd. v. San Francisco* (1939) 13 C.2d 424, 446, 90 P.2d 537, 91 P.2d 105; *Pasadena v. Alhambra* (1949) 33 C.2d 908, 925, 207 P.2d 17; *Stevinson Water*

Dist. v. Roduner (1950) 36 C.2d 264, 270, 223 P.2d 209; *Joslin v. Marin Mun. Water Dist.* (1967) 67 C.2d 132, 137, 60 C.R. 377, 429 P.2d 889; *Carlsbad Mut. Water Co. v. San Luis Rey Dev. Co.* (1947) 78 C.A.2d 900, 911, 178 P.2d 844; *People v. Forni* (1976) 54 C.A.3d 743, 749, 126 C.R. 851; *United States v. State Water Resources Control Bd.* (1986) 182 C.A.3d 82, 105, 227 C.R. 161.)

To carry out the constitutional policy, the Department of Water Resources and the State Water Resources Control Board are directed to take appropriate action to prevent waste, unreasonable use, or unreasonable methods of diversion of water. (*Water C.* 275; see *Imperial Irr. Dist. v. State Water Resources Control Bd.* (1986) 186 C.A.3d 1160, 1169, 231 C.R. 283 [*Water C.* 275 authorizes board to adjudicate unreasonable use].) The development of the state's water resources is of vital concern to the people (*Water C.* 105), the people have a paramount interest in its use, and the state must determine what water "can be converted to public use or controlled for public protection." (*Water C.* 104.)

In *Trussell v. San Diego* (1959) 172 C.A.2d 593, 343 P.2d 65, plaintiffs were landowners in a valley traversed by a creek that ran partly on the surface and partly underground. Defendant city built a dam that impounded water, lowering the water table from a former 12 to 20 feet below the ground level to 44 feet below, and injuring plaintiffs' riparian and appropriative rights. In affirming judgment for damages and injunctive relief, the court held that it was not essential to fix a definite amount of water as plaintiffs' reasonable use, for the conditions here did not call for this strict rule. Hence, it was not error for the trial judge to refrain from finding in acre-feet or other units the exact reasonable requirements of plaintiffs. (172 C.A.2d 609.) Nor was the trial judge required to find a physical solution where one was not available. Jurisdiction was retained, so that a physical solution might be devised if possible, or if the present injunction protecting a particular water table were found unworkable. (172 C.A.2d 617.)

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aa. Wasteful Use Eliminated.

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[§ 938] Wasteful Use Eliminated.

Herminghaus v. Southern Calif. Edison Co. (1926) 200 C. 81, 91, 106, 252 P. 607, held that plaintiff, a lower riparian owner, was entitled to the undiminished flow of a river, including the regular seasonal accretions from melting snow and rain, for the purpose of depositing silt and contributing to the growth of grass on pasture land, and that a riparian owner was not required to employ artificial means of irrigation to make a more economical use of the water. In *Peabody v. Vallejo* (1935) 2 C.2d 351, 369, 40 P.2d 486, however, the court pointed out that under the constitutional amendment (supra, §937), the holding of *Herminghaus* was no longer possible, and that the riparian owner was not entitled to the full flow merely to deposit silt or remove the saline content of the soil. (See *Joslin v. Marin Mun. Water Dist.* (1967) 67 C.2d 132, 141, 60 C.R. 377, 429 P.2d 889 [use of waters to carry and deposit sand, gravel, and rock is unreasonable]; *Water C. 1201* [water not beneficially used becomes public water subject to appropriation]; *Water C. 1004* [beneficial use for irrigation of uncultivated land is limited to 21/2 acre-feet of water per acre in any one year].)

In *Meridian, Ltd. v. San Francisco* (1939) 13 C.2d 424, 90 P.2d 537, 91 P.2d 105, defendant city, an upper appropriator, sought to divert and impound water for purposes of flood control (equalization of flow), and as "holdover storage" to provide a future supply in the possible event of drought. *Held*, a lower riparian owner, who had no use for the water taken, could not enjoin the acts, even though the city was diverting more than it could actually use. Although the riparian right is still paramount, the riparian owner can enjoin a taking only by showing an actual or threatened injury. Here, plaintiff was not damaged, but in fact benefited by the storage. (13 C.2d 447, 458.)

In *Erickson v. Queen Valley Ranch Co.* (1971) 22 C.A.3d 578, 99 C.R. 446, plaintiff appropriator diverted water from a creek by a 21/2 mile open ditch over arid land, losing five-sixths of the flow en route. His actual use of the water that arrived was agricultural and hence beneficial, and the practice of diversion by open ditch was not unusual in the area. But the trial judge's finding that the use was reasonable, in the face of such a huge loss, could not be upheld under the constitutional policy. (22 C.A.3d 585.) (See *People v. Murrison* (2002) 101 C.A.4th 349, 359, 124 C.R.2d 68 [requirement in *Fish & Game C. 1603* (now *Fish & Game C. 1602*) that appropriator notify Department of Fish and Game before diverting water from river applied to ranch owner; ban on wasteful use in Cal. Const., Art. X, §2, is not only permissible restriction on right to appropriate water].)

Reasonable use is a question of fact. (*People v. Forni* (1976) 54 C.A.3d 743, 750, 126 C.R. 851; *United States v. State Water Resources Control Bd.* (1986) 182 C.A.3d 82, 129, 227 C.R. 161.) Conformity of a use, method of use, or method of diversion of water with local custom is not solely determinative of its reasonableness, but is one factor to be weighed in the determination of the reasonableness, within the meaning of Cal. Const., Art. X, §2. (*Water C. 100.5*; see *Water C. 1244* (supra, §928) [transfer of water or water rights not in itself evidence of unreasonable use].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Turlock Irr. Dist. v. Zanker* (2006) 140 C.A.4th 1047, 1060, 45 C.R.3d 167 [district had authority to impose water conservation rules on town's use of water under Cal. Const., Art. X, §2 and *Water C. 22258*].



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bb. Preference for Domestic Use.

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[§ 939] Preference for Domestic Use.

Use of water for domestic purposes is the highest use. The next highest use is for irrigation. (*Water C. 106*.) Although domestic use, for the household and domestic animals, may take precedence over use for irrigation, there is no priority of claim for commercial livestock herds over irrigation. (See *Cowell v. Armstrong* (1930) 210 C. 218, 226, 290 P. 1036; *Gonzales v. Arbelbide* (1957) 155 C.A.2d 721, 724, 318 P.2d 746.)

In *Deetz v. Carter* (1965) 232 C.A.2d 851, 43 C.R. 321, plaintiffs were lower riparian owners and defendants were upper riparian owners on a small creek that had a year-round flow. Plaintiffs needed the full flow for domestic uses. Defendants needed none for those uses, but diverted part of the water for livestock, causing a lessened and muddy flow. *Held*, plaintiffs were entitled to an injunction.

(a) *Water C. 106* is a statutory extension of the traditional rule preferring "natural" uses--consumption by people, household conveniences, and care of domestic (not commercial) livestock. (232 C.A.2d 854.) "The domestic water need of plaintiffs, as downstream riparian owners, is entitled to priority over the nondomestic need of defendant, the upper riparian." (232 C.A.2d 855.)

(b) What determines the needed amount? "Quality as well as quantity is a factor in water use. If quality maintenance of natural stream water intended for domestic use calls for a flow in excess of actual consumption, then the priority conferred on domestic needs should not be quantitatively limited to actual consumption. Rather, the priority should extend to that flow necessary to make the domestic use effective, even though an excess over actual domestic consumption may become available for nondomestic purposes. Re-use of the excess for other purposes causes the upstream riparian no injury, since he was not entitled to that part of the flow necessary to assure the lower riparian water of adequate quality for his domestic needs." (232 C.A.2d 856.) Hence, the trial judge's decree, which declared that plaintiffs needed the entire flow for "agricultural and domestic use," was properly interpreted as meaning that they needed the entire flow to maintain quality, and that water remaining unconsumed could be used for agriculture. (223 C.A.2d 856.)

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[§ 940] Other Uses.

In addition to the normal and preferred uses for domestic and irrigation purposes (*Water C. 106*, supra, §939), the riparian owner has a right to the flow to maintain the underground and percolating water supply, subject to the correlative rights of other owners. (*Peabody v. Vallejo* (1935) 2 C.2d 351, 371, 40 P.2d 486; see *Water C. 1242* [water stored underground must be applied to beneficial purpose for which it was stored].)

Several types of use have been held beneficial. In *Los Angeles v. Aitken* (1935) 10 C.A.2d 460, 52 P.2d 585, defendants owned valuable resort property fronting on Mono Lake, and plaintiff sought to condemn water from the streams feeding the lake. *Held*, defendants were entitled to substantial damages, for the use of the stream flow to maintain the level of the lake was beneficial and reasonable. (10 C.A.2d 474.) (See *Los Angeles County Flood Control Dist. v. Abbott* (1938) 24 C.A.2d 728, 734, 76 P.2d 188 [use of seasonal flow to deposit rock, sand, and gravel, which were reclaimed and marketed commercially, was reasonable]; on competing uses, see *Rest.2d, Torts §850* [harm by one riparian proprietor to another], §850A [reasonableness of use], §864 [no liability for use of surface water unless use made for purpose of causing harm].)

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4. Future Reasonable Use.

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[§ 941] Future Reasonable Use.

(1) *Former Rule Protecting Unexercised Right.* *In re Waters of Soquel Creek Stream System* (1978) 79 C.A.3d 682, 145 C.R. 146, involved a petition by a city to the State Water Resources Control Board to determine rights of claimants to water in a stream system. (On determination of claims by board, see *supra*, §926.) The board, following its well-established practice, determined both appropriative and riparian rights and their priorities in a final order. Certain riparian owners, who had not yet exercised their rights and were given a low priority, objected and filed exceptions to the order. The trial judge sustained their exceptions, concluding that the board lacked the power to quantify unexercised riparian rights, that it erred in giving unexercised riparian rights a priority different from that given exercised rights, and that both exercised and unexercised riparian rights must receive a priority higher than appropriative rights. *Held*, affirmed. The rights of a riparian owner are not impaired by nonuse of the water. (79 C.A.3d 687; see *supra*, §931.) The constitutional amendment of 1928 did not change this rule; as interpreted by the leading cases, the provision "protects present and future riparian rights from infringement, to the extent that such rights are exercised in a manner which is both reasonable and beneficial and to which riparian land may be made adaptable." (79 C.A.3d 687, citing *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 C.2d 489, 45 P.2d 972, and *Meridian, Ltd. v. San Francisco* (1939) 13 C.2d 424, 90 P.2d 537, 91 P.2d 105, *supra*, §938.)

(2) *Limitations on Unexercised Rights.* The *Soquel* holding was partially rejected by *In re Waters of Long Valley Creek Stream System* (1979) 25 C.3d 339, 158 C.R. 350, 599 P.2d 656. In 1966, nine claimants brought a proceeding under *Water C. 2500 et seq.* to determine all rights to the use of water in the Long Valley Creek Stream System in Lassen, Sierra, and Plumas Counties. After extensive investigation and hearings involving 234 claims and 42 contests, the board entered an order "determining and establishing the several rights to the water of the stream system." For the past 60 years, R and his predecessors had exercised riparian rights for 89 acres of irrigated land, but R claimed future rights as riparian owner of an additional 2,884 acres. The board awarded him water for only the 89 acres and extinguished his claim of future rights. The trial court entered a decree in conformity with the board's determination. *Held*, reversed. The future rights could be limited, but not extinguished.

(a) *Riparian right and authority of board.* Prior cases recognized that the right exists whether exercised or not, and that in resolving a dispute, the trial court may retain jurisdiction so that the riparian owner's prospective right can be

quantified at the time he decides to exercise it. (25 C.3d 347; see supra, §931.) These cases involved disputes among a small number of persons, with judgments binding only on those who are parties to the litigation. The most that the trial court can do in such a situation is to retain jurisdiction over prospective riparian claims. The present case involves a different issue: whether the Legislature may delegate authority to the board to make a comprehensive determination of all rights to the use of water in a stream system. (25 C.3d 347.) This delegation is made in *Water C. 2501* and 2769, and the statutory language clearly discloses that the Legislature intended to grant the board broad authority pursuant to the statutory adjudication procedure to define and otherwise limit the scope of a riparian's future right. (25 C.3d 348.)

(b) *Constitutional power to limit riparian right.* Riparian rights are limited by Cal. Const., Art. X, §2, to reasonable and beneficial use (see supra, §937). This "provision nowhere suggests that the public interest or general welfare requires the elevation of riparian rights, future or otherwise, to a level of equal or superior constitutional protection." (25 C.3d 351.) And *Tulare* does not preclude the broad grant of authority to the board. That case involved a statute treating the riparian right as automatically abandoned after 10 years' nonuse, without consideration of other needs and uses; hence, it was inconsistent with the constitutional mandate to promote the reasonable beneficial use of water. (25 C.3d 353, 354.) Policy considerations support the legislative procedure for determination of all rights in a stream system. Uncertainty concerning the rights of water users is a major problem in contemporary law, and riparian rights are a principal source of this uncertainty. (25 C.3d 355.)

(c) *No constitutional power to extinguish unexercised riparian right.* In light of *Tulare*, "we are reluctant to conclude that the Board may altogether extinguish a riparian's future claim when it has not been established that the imposition of other less drastic limitations on the claim would be less effective in promoting the most reasonable and beneficial use of the stream system." (25 C.3d 358.)

(d) *Constitutionally permissible limitations.* The board may decide that an unexercised riparian claim loses its priority with respect to all rights currently being exercised. The board may also determine that the future riparian right will have a lower priority than any uses it authorizes before the riparian in fact attempts to exercise his right. (25 C.3d 358.) "In other words, while we interpret the Water Code as not authorizing the Board to extinguish altogether a future riparian right, the Board may make determinations as to the scope, nature and priority of the right that it deems reasonably necessary to the promotion of the state's interest in fostering the most reasonable and beneficial use of its scarce water resources." (25 C.3d 359.) To the extent *In re Waters of Soquel Creek Stream System* is in conflict with the views expressed in this opinion, it is disapproved. (25 C.3d 359, footnote 15.) (See 11 *Pacific L. J.* 1113.)

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2. Appropriation Rights.

a. Method of Appropriation.

1. Obtaining Permit and License.

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[§ 942] Obtaining Permit and License.

(1) *Statutory Authorization.* An appropriator is one who takes water from the stream not under riparian right. Appropriators in California were originally trespassers on government land. Later, both the federal Government and California enacted statutes licensing their entry for the purpose of taking water, and protecting their rights in the water. (See *Water C. 102*; *Palmer v. Railroad Com. of Calif.* (1914) 167 C. 163, 172, 138 P. 997; 9 Powell §65.07; 11 U.C. Davis L. Rev. 441 [appropriate water rights transfers]; 78 Am.Jur.2d (2002 ed.), *Waters* §341 et seq.)

The method of appropriation is governed by the Water Commission Act. (*Water C. 1003* et seq., 1052, 1225; see *Temescal Water Co. v. Department of Public Works* (1955) 44 C.2d 90, 95, 280 P.2d 1; *Madera Irr. Dist. v. All Persons* (1957) 47 C.2d 681, 689, 306 P.2d 886; *People v. Murrison* (2002) 101 C.A.4th 349, 357, 124 C.R.2d 68 [landowner who diverted creek water had to notify Department of Fish and Game under *Fish & Game C. 1603* (now *Fish & Game C. 1602*), even though he claimed that his rights to water predated 1914, date of enactment of Water Commission Act; only substantive difference between appropriative water rights obtained before 1914 and those obtained after 1914 is that post-1914 rights must go through administrative process before board]; 44 Cal. L. Rev. 833 [administration of water rights in California].)

(2) *Permit Required.* A permit must be secured from the State Water Resources Control Board. This function was previously performed by the Division of Water Resources of the Department of Public Works. (*Water C. 1250* et seq., 1375 et seq.; see *Temescal Water Co. v. Department of Public Works*, *supra*, 44 C.2d 99.) The board has jurisdiction over all unappropriated water (*Water C. 1252*), including that in artificial watercourses (*Modesto Properties Co. v. State Water Rights Bd.* (1960) 179 C.A.2d 856, 860, 4 C.R. 226). (On temporary permits, see *Water C. 1425* et seq.)

An appropriator who applies for a permit and appropriates water in compliance with the law has a sufficient property right, even before obtaining the permit, to quiet title to adverse claims to the use of the water. (*Yuba River Power Co. v. Nevada Irr. Dist.* (1929) 207 C. 521, 523, 279 P. 128; see *Miller & Lux v. Bank of America* (1963) 212 C.A.2d 719, 726, 28 C.R. 401.)

(3) *Considerations in Granting Permit.* In acting on applications for permits, the board must consider the relative

benefit to be derived from the following:

(a) All beneficial uses of the water concerned, including use for domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, recreational, mining and power purposes, and uses specified to be protected in a relevant water quality control plan. (*Water C. 1257.*)

(b) The applicant's proposed reuse or reclamation of the water to be appropriated. The board may subject the appropriation to the terms and conditions that will best develop, conserve, and utilize the water in the public interest. (*Water C. 1257.*)

It was formerly held that a permit could not be granted merely to provide a minimum flow necessary to protect fish and fishing rights; i.e., that a physical taking of appropriated water is required. (See *Fullerton v. State Water Resources Control Bd.* (1979) 90 C.A.3d 590, 596, 153 C.R. 518; *California Trout v. State Water Resources Control Bd.* (1979) 90 C.A.3d 816, 820, 153 C.R. 672.) Now, however, in acting on an application, the board *must* consider streamflow requirements proposed by the Director of Fish and Game under *Pub.Res.C. 10001* and *10002*, and *may*, as a condition for a permit or license, impose streamflow requirements necessary to protect fish and wildlife. (*Water C. 1257.5*; see *16 Ecology L. Q.* 667 [instream appropriative water rights].)

(4) *License.* The work of appropriation must be carried on with diligence and in accordance with the terms of the permit, or the permit will be revoked. (*Water C. 1396, 1410.*) After completion of the project pursuant to the permit, the holder may obtain a license for the diversion. (*Water C. 1610* et seq.; see *Madera Irr. Dist. v. All Persons*, *supra*, 47 C.2d 690.) The board may subsequently give permission to change the point of diversion, or place or purpose of use (*Water C. 1701*), or to improve or enlarge the works (*Water C. 1800*). (See *Eaton v. State Water Rights Bd.* (1959) 171 C.A.2d 409, 415, 340 P.2d 722, *infra*, §945 [lack of diligence cannot be challenged collaterally].)

West's Key Number Digest, Waters and Water Courses k.127 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Considerations in Granting Permit.* See *Central Delta Water Agency v. State Water Resources Control Bd.* (2004) 124 C.A.4th 245, 257, 271, 20 C.R.3d 898 [board improperly issued permits for wetlands project without determining actual, intended use of water and whether that use would be beneficial as required by Cal. Const., Art. X, §2 (text, §937) and *Water C. 100*; permits would have to be amended to include this information and then board could proceed with analysis of environmental impacts under CEQA (text, §831 et seq.)]; 36 *McGeorge L. Rev.* 295 [overview of protection of instream uses].



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a. Method of Appropriation.

2. Conditions for Permit or License.

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[§ 943] Conditions for Permit or License.

In *California Trout v. State Water Resources Control Bd.* (1989) 207 C.A.3d 585, 255 C.R. 184, several conservation groups sought mandamus to command the board to rescind licenses confirming rights of Los Angeles to appropriate water in Mono and Inyo Counties. Petitioners claimed that the licenses violated *Fish & Game C. 5946*, which provides that permits or licenses to appropriate water in Mono and Inyo Counties must be conditioned on compliance with *Fish & Game C. 5937* (dam owners must allow sufficient flow of water to keep fish below the dam in good condition). The trial court denied the requested writs on the ground that *Fish & Game C. 5946* was not meant to apply to dams constructed before the effective date of the statute. *Held*, judgment denying writs reversed, and the trial court was directed to issue appropriate writs commanding the board to exercise its ministerial duty to attach the conditions required by *Fish & Game C. 5937* and *5946* to the licenses. (207 C.A.3d 632.)

(a) *Fish & Game C. 5946*, by its express terms, applies to permits or licenses that authorize the appropriation of *all* of the available water from a stream. (207 C.A.3d 592, 599, 603.) The trial court confused two distinct requirements of *Fish & Game C. 5946*. The provisions that apply to the construction of dams concern their physical capacity to accommodate fish ladders, which is not at issue here. The provision that applies to a license for the appropriation of water by means of diversion from dams is limited only by the date of issuance of the license. (207 C.A.3d 592, 604.)

(b) Application of *Fish & Game C. 5946* to the licenses did not retroactively alter rights claimed by the city to have been acquired under permits issued before the enactment of the statute, in light of the fact that the project contemplated by the permits was insufficient to accomplish the full appropriation of water authorized. (207 C.A.3d 592, 608, 612.)

(c) *Fish & Game C. 5946* is not unconstitutional, notwithstanding that Cal. Const., Art. X, §2, provides that water rights do not extend to the waste or unreasonable use or diversion of water. By its enactment of the statute, the Legislature resolved the competing claims for the beneficial use of water in fishing streams in Mono and Inyo Counties in favor of preservation of their fisheries. Because the legislative policy choice does not sanction a "manifestly unreasonable use of water," that choice is entitled to judicial deference. (207 C.A.3d 593, 622, 625.)

After this decision, the superior court allowed the board to defer imposition of the conditions pending the board's

establishment of the required release rates by studies, estimated to conclude in December 1992, and refused petitioners' request for interim relief. In *California Trout v. Superior Court* (1990) 218 C.A.3d 187, 266 C.R. 788, petitioners sought mandamus to compel the superior court to require immediate compliance with the appellate judgment. *Held*, writ granted. "As required by our prior decision, we will direct that the Water Board immediately attach the conditions mandated by section 5946 to L.A. Water and Power's licenses. We will further direct that the superior court expeditiously consider a request by petitioners that it set interim release rates pending the Water Board's action. We do so in view of the Water Board's disavowal of interim authority, the request for guidance by L.A. Water and Power in fulfilling its statutory duty, the factual predicate for relief which petitioners have established, and the concurrent jurisdiction of the courts over compliance proceedings involving section 5946." (218 C.A.3d 194.)

SUPPLEMENT: [This section is current through the latest supplement]

See *El Dorado Irr. Dist. v. State Water Resources Control Bd.* (2006) 142 C.A.4th 937, 963, 48 C.R.3d 468 [board abused discretion when it included term in water district's permit that required district to curtail its diversion of water during certain times; appropriators with rights junior to those of district were not subject to same term, so board's action contravened rule of priority]; *Phelps v. State Water Resources Control Bd.* (2007) 157 C.A.4th 89, 68 C.R.3d 350 [Water C. 1126(b) barred farmers from challenging permit and license condition that required them to curtail diversion under specified circumstances; farmers should have challenged condition in timely manner after condition was included in their permits and licenses, rather than raising issue for first time in board's action charging them with unauthorized diversion].



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2. Appropriation Rights.

a. Method of Appropriation.

3. Registration of Small Use Domestic Appropriations.

12 Witkin Sum. Cal. Law Real Property § 944

[§ 944] Registration of Small Use Domestic Appropriations.

A person may obtain a right to appropriate water for a small domestic or livestock stockpond use by registering that use with the State Water Resources Control Board in accordance with prescribed procedures and requirements, and thereafter applying the water to "reasonable and beneficial use with due diligence." (*Water C. 1228.2*; for definitions, see *Water C. 1228.1(b)* [domestic use], *Water C. 1228.1(c)* [livestock stockpond use]; for form of registration, see *Water C. 1228.3*.) With regard to an appropriation for small domestic use, a facility is limited to no more than one registration in effect at any time. (*Water C. 1228.2(a)(2)*.) With regard to an appropriation for livestock stockpond use, a registrant may have more than one registration in effect at a time if the registered stockponds do not exceed the ratio of 1 per 50 acres. (*Water C. 1228.2(a)(3)*.) Registration of a small domestic or livestock stockpond use must be renewed every 5 years as prescribed (*Water C. 1228.5*) and specified fees must be paid for registration and renewal (*Water C. 1228.8*). No right to appropriate or use water for a small domestic use may be initiated except in compliance with *Water C. 1228 et seq.* (*Water C. 1228.9*.)

SUPPLEMENT: [This section is current through the latest supplement]



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a. Method of Appropriation.

4. Review of Board's Determination.

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[§ 945] Review of Board's Determination.

It was originally held that the Water Commission Act of 1913 gave the Commission (now the State Water Resources Control Board) no judicial power and that mandamus would lie for arbitrary refusal to issue a permit. (*Tulare Water Co. v. State Water Com.* (1921) 187 C. 533, 537, 202 P. 874; *Mojave River Irr. Dist. v. Superior Court* (1927) 202 C. 717, 722, 262 P. 724; see *Wood v. Pendola* (1934) 1 C.2d 435, 442, 35 P.2d 526; *East Bay Mun. Util. Dist. v. Department of Public Works* (1934) 1 C.2d 476, 481, 35 P.2d 1027.)

Subsequent legislation has resulted in modernization of both the administrative procedure and the mechanics of review. The board has more than a mere supervisory function in issuing permits. It "exercises a broad discretion in determining whether the issuance of a permit will best serve the public interest," and the proper method of review is by mandamus under *C.C.P. 1094.5* as used in the review of other administrative determinations. (See *Temescal Water Co. v. Department of Public Works* (1955) 44 C.2d 90, 100, 280 P.2d 1; *United States v. State Water Resources Control Bd.* (1986) 182 C.A.3d 82, 103, 112, 114, 227 C.R. 161; 44 Cal. L. Rev. 843; on administrative review by mandamus, see 8 Cal. Proc. (4th), *Extraordinary Writs*, §§30, 257 et seq.)

The procedure is thus described in *Eaton v. State Water Rights Bd.* (1959) 171 C.A.2d 409, 415, 340 P.2d 722: "By the filing of an application the applicant secures a right of procedural priority, a conditional right to the future acquisition of the right to the use of water. The issuance of a permit carries forward the right of procedural priority and adds the consent of the state to begin construction and to initiate the use of water, limited by the terms of the permit. ... While the issuance of a permit does not confer on the permittee a fully perfected right, it does continue in effect the priority of right and gives the permittee the right to take and use the amount of water specified in the permit until the issuance or the refusal of a license. ... The final procedural step in perfecting a water right is the issuance of a license as prescribed in *sections 1600 through 1677 of the Water Code*. The issuance of a license is merely confirmatory of a right acquired by use in accordance with the permit." (171 C.A.2d 415.)

In *Eaton*, two prior permits had been issued to appropriate water from L Creek. Petitioners then sought a permit, conceding that there was insufficient water for all three, but contending that the prior permittees had failed to exercise due diligence, had been granted void extensions of time, and had no valid permits. *Held*, so long as the permits were

outstanding and had not been revoked or invalidated in a proceeding directly brought for that purpose in the manner provided by statute, they could not be challenged collaterally. Hence, petitioners' application was properly denied.

SUPPLEMENT: [This section is current through the latest supplement]

Administrative review by mandamus:

Cross-Reference: 8 Cal. Proc. (5th), *Extraordinary Writs*, §§32, 258 et seq.



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2. Appropriation Rights.

b. Rights Against Other Users.

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[§ 946] Rights Against Other Users.

(1) *Rights Between Appropriators.* The appropriator is entitled only to the amount of water reasonably necessary for the appropriator's actual, beneficial use. (*California Pastoral & Agricultural Co. v. Madera Canal & Irr. Co.* (1914) 167 C. 78, 83, 138 P. 718.) The right is not a correlative one, as is the riparian right (see *supra*, §931). The rule of prior appropriation was originally applied between appropriators, the first taker being entitled to all the water beneficially used before the subsequent taker could get any. (*Wishon v. Globe Light & Power Co.* (1910) 158 C. 137, 140, 110 P. 290.) But this rule does not fully apply to appropriations under the Water Code, which are limited by the terms of the permit. (See *Water C. 1455*.) Furthermore, a municipal appropriation for use of inhabitants is first in right, even if it is not first in time. (*Water C. 1460*.) (See 9 Powell §65.03; 78 *Am.Jur.2d* (2002 ed.), *Waters* §359.)

The right of priority attaches to the definite quantity of water that the appropriator has put to reasonable beneficial uses. The appropriator is entitled to divert that quantity, if needed, as long as it is available after appropriators with prior rights have satisfied their rights. The appropriator may not take more than that definite quantity, even if the appropriator's needs are greater. (*Pleasant Valley Canal Co. v. Borror* (1998) 61 C.A.4th 742, 776, 72 C.R.2d 1 [defendants used 1916 decision involving predecessors in interest to establish appropriative right to divert amount specified in decision].)

(2) *Rights Between Appropriators and Riparians.* The appropriator normally gets no rights against riparian owners except by grant or prescription. (*Cave v. Tyler* (1901) 133 C. 566, 567, 65 P. 1089; *Cory v. Smith* (1929) 206 C. 508, 511, 274 P. 969.) In one situation, however, a lower appropriator will prevail over an upper riparian owner: where the lower appropriation is on government land, and is made before the upper riparian government land is patented. (*San Joaquin & Kings River Canal & Irr. Co. v. Worswick* (1922) 187 C. 674, 685 203 P. 999.) But a lower appropriation on private land will not prevail over upper riparian rights, even though at the time of appropriation the upper riparian land was unpatented government land. (*Thorne v. McKinley Bros.* (1936) 5 C.2d 704, 710, 56 P.2d 204; see 9 Powell §65.03; 78 *Am.Jur.2d* (2002 ed.), *Waters* §360.)

"As against an appropriator, a riparian owner is entitled to the full flow of the stream." Since the constitutional amendment in 1928 (see *supra*, §937), however, the right is limited to the amount of water the riparian owner is presently putting to a reasonable beneficial use. (*Pleasant Valley Canal Co. v. Borror*, *supra*, 61 C.A.4th 776.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Rights Between Appropriators*. See *Barnes v. Husa* (2006) 136 C.A.4th 1358, 1366, 39 C.R.3d 659 [*Water C.* 1706 gave appropriators right to use first priority water on property other than property contemplated by original decree, as long as change in place of use did not injure others with rights to water; there was no evidence that change in place of use affected return flows or that use was greater than amount to which users were entitled under decree]; *El Dorado Irr. Dist. v. State Water Resources Control Bd.* (2006) 142 C.A.4th 937, 963, 48 C.R.3d 468 [board abused discretion when it included term in water district's permit that required district to curtail its diversion of water during certain times; appropriators with rights junior to those of district were not subject to same term, so board's action contravened rule of priority].



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c. Water Subject to Appropriation.

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[§ 947] Water Subject to Appropriation.

(1) *In General.* The first appropriations were made on public lands, but appropriation may also be made on private property by obtaining a right of way from the owner. (See *San Joaquin & Kings River Canal & Irr. Co. v. Worswick* (1922) 187 C. 674, 683, 203 P. 999.) Appropriation may be made of waters in navigable streams, but the taking must not interfere with navigation. (See *supra*, §919.)

(2) *Foreign Waters.* It was formerly the view that "foreign waters," brought from outside the watershed and added to the stream, were "abandoned waters" belonging to no one, and available to the first taker. (See *E. Clemens Horst Co. v. New Blue Point Mining Co.* (1918) 177 C. 631, 635, 171 P. 417.) This theory has now been rejected, and the rule is that these waters are subject to appropriation, and that the usual appropriation rights may be gained in them. (*Crane v. Stevinson* (1936) 5 C.2d 387, 394, 54 P.2d 1100; *Bloss v. Rahilly* (1940) 16 C.2d 70, 74, 104 P.2d 1049; see *Stevinson Water Dist. v. Roduner* (1950) 36 C.2d 264, 270, 223 P.2d 209; *Haun v. De Vours* (1950) 97 C.A.2d 841, 843, 218 P.2d 996; 20 *Stanf. L. Rev.* 1218 ["diffused surface waters"].)

However, in *Stevens v. Oakdale Irr. Dist.* (1939) 13 C.2d 343, 90 P.2d 58, defendant, the upper producer of the flow, brought in foreign water that plaintiff, a lower appropriator, used for many years. Later defendant built a dam and sump on its own land, recapturing the water and depriving plaintiff of his accustomed flow. *Held*, there was no right of action. (a) The upper producer of an artificial flow of foreign water is not obligated to maintain it; the lower appropriator acquires rights in the actual water taken, but no right to have the flow continue. (b) The producer may not only discontinue the deposit of the water, but may also deposit and then reclaim it, using the stream as a temporary conduit instead of a ditch; i.e., the deposit of foreign waters is an abandonment only of the waters allowed to flow past his land. (13 C.2d 348.)

(3) *State Lands Not Open for Appropriation.* In *California v. Hansen* (1961) 189 C.A.2d 604, 608, 11 C.R. 335, the court rejected the startling contention that the constitutional amendment (see *supra*, §937) was an invitation to persons to appropriate unused water from unoccupied state-owned lands without permission.

(4) *Declaration of Fully Appropriated Stream System.* Water C. 1205 authorizes the board, following notice and hearing as prescribed, and on specified findings, to adopt a declaration that a stream system, as defined, is fully

appropriated. The board is prohibited from thereafter accepting for filing any application for a permit to appropriate water from the stream system (*Water C. 1206(a)*), but the board may specify conditions and limitations under which it will accept filings of applications (*Water C. 1206(b)*). The board may revoke or revise a declaration in accordance with prescribed procedures. (*Water C. 1205(c)*.)

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2. Appropriation Rights.

d. Extent of Appropriation Right.

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[§ 948] Extent of Appropriation Right.

Under former law, a prior appropriator obtained a right to the amount of water beneficially, though extravagantly, used. Hence, the prior appropriator could claim the full flow of a stream to force a small quantity of the water into the underground basin, allowing the rest to be ultimately wasted. (See *Miller v. Bay Cities Water Co.* (1910) 157 C. 256, 280, 107 P. 115.)

In *Lodi v. East Bay Mun. Util. Dist.* (1936) 7 C.2d 316, 60 P.2d 439, this view was repudiated. Plaintiff city, a prior appropriator, had established wells supplying underground water to its inhabitants. Defendant, a subsequent appropriator, proposed to divert and store water from the river that fed the underground basin. The trial court ordered defendant to release sufficient flow to maintain the underground supply. *Held*, (a) the decree, involving waste of much of the water, was improper; (b) the court in these cases must take expert evidence to ascertain whether there is a physical solution that will both protect the prior appropriator and prevent waste; and (c) the court here should find what levels must be maintained in plaintiff's wells to meet its needs, and require defendant to maintain them. (7 C.2d 338.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Turlock Irr. Dist. v. Zanker* (2006) 140 C.A.4th 1047, 1054, 45 C.R.3d 167 [town had right to receive water from districts as secondary customers of appropriators, but district could charge subscribers in town for maintenance and capital improvements necessary for treatment of water]; *Nicoll v. Rudnick* (2008) 160 C.A.4th 550, 557, 72 C.R.3d 879 [because appropriative water right, recognized in 1902, was appurtenant to entire 300.5-acre parcel, landowner who later acquired 52% of parcel, by conveyance that did not limit water rights, thereby acquired 52% of water right, even though only 25% of water usage before parcel was divided had occurred on acquired portion].



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D. Rights in Surface Waters.

3. Prescriptive Rights.

a. Nature of Prescriptive Right.

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[§ 949] Nature of Prescriptive Right.

(1) *Requirements.* A prescriptive right to waters is gained in the usual manner: by adverse user under color of title or claim of right for the required period of 5 years. (See *Pasadena v. Alhambra* (1949) 33 C.2d 908, 926, 207 P.2d 17 [prescriptive rights in percolating waters]; *Los Angeles v. San Fernando* (1975) 14 C.3d 199, 214, 270, 281, 123 C.R. 1, 537 P.2d 1250; *Big Rock Mut. Water Co. v. Valyermo Ranch Co.* (1926) 78 C.A. 266, 273, 248 P. 264; *Orchard v. Cecil F. White Ranches* (1950) 97 C.A.2d 35, 43, 217 P.2d 143; *Lindsay v. King* (1956) 138 C.A.2d 333, 335, 292 P.2d 23; *Saxon v. DuBois* (1962) 209 C.A.2d 713, 719, 26 C.R. 196; 4 *Hastings Const. L. Q.* 703 [Los Angeles]; 78 *Am.Jur.2d* (2002 ed.), *Waters* §367 et seq.) (On prescription generally, see *supra*, §401.)

The use must be continuous and uninterrupted for the prescriptive period. (*Alta Land & Water Co. v. Hancock* (1890) 85 C. 219, 227, 24 P. 645.) It may be interrupted and the adverse claim destroyed by obtaining a judgment against the claimant. But mere verbal protest or clandestine entry is insufficient; the acts of interruption must be equal in dignity and character to those required to initiate the adverse possession. (See *Armstrong v. Payne* (1922) 188 C. 585, 597, 206 P. 638; *Morgan v. Walker* (1933) 217 C. 607, 617, 20 P.2d 660.) Although filing an action will toll the statute during its pendency, there is no ultimate interruption of the prescriptive period where the action is later dismissed or abandoned. (*Yorba v. Anaheim Union Water Co.* (1953) 41 C.2d 265, 270, 259 P.2d 2; see *supra*, §227.)

(2) *Against Whom Right Is Acquired.* A riparian owner was held entitled to gain a prescriptive right against other riparians where he made an appropriation on upper government land before it passed into private ownership. (See *Rindge v. Crags Land Co.* (1922) 56 C.A. 247, 252, 205 P.2d 36.) It was formerly held that a prescriptive right might be acquired against an irrigation district (*Big Rock Mut. Water Co. v. Valyermo Ranch Co.* (1926) 78 C.A. 266, 248 P. 264), but this rule was later abrogated by statute. (C.C. 1007; see *Orange County Water Dist. v. Riverside* (1959) 173 C.A.2d 137, 222, 343 P.2d 450 [prescriptive rights of cities]; *supra*, §213.)

Statutes dating from 1913 prohibit the diversion or use of water except by following the procedure for appropriation. Do the statutes preclude the acquisition of a common law prescriptive right by adverse user commenced after that date? (See 39 *Cal. L. Rev.* 369, 525; 42 *Cal. L. Rev.* 219.) The question was answered in *People v. Shirokow* (1980) 26 C.3d 301, 304, 162 C.R. 30, 605 P.2d 859. The court adopted the view that prescriptive rights of that nature cannot be acquired against the state, and that defendant's diversion of water without a permit was a trespass enjoined

under *Water C. 1052*. (See 69 Cal. L. Rev. 1204.)

(3) *Action To Enjoin Trespass*. The Attorney General, on request of the board, must bring an action to enjoin trespass. An action may be brought in the case of a threatened diversion or use. (*Water C. 1052(c)*.) The board is authorized to administratively impose civil liability, in accordance with prescribed procedures, for commission of such a trespass, not to exceed \$ 500 per day. (*Water C. 1052(b)*, 1055 et seq.) Alternatively, any person or entity committing such a trespass may be held liable in a prescribed superior court proceeding, for a sum not to exceed \$ 500 for each day on which the trespass occurs. (*Water C. 1052(d)*, 1055.2.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Against Whom Right Is Acquired*.

Prescriptive rights after 1913: People v. Shirokow (1980) 26 C.3d 301, 162 C.R. 30, 605 P.2d 859, text, p. 1147, holds that a prescriptive claim cannot lie against the state when the state seeks to enjoin unauthorized use under *Water C. 1052*. Prescriptive rights in surface water may, however, be perfected between private, riparian parties. (*Brewer v. Murphy* (2008) 161 C.A.4th 928, 936, 938, 74 C.R.3d 436 [lower riparian owner who diverted water directly from stream on upper riparian owner's land gained prescriptive right to water; diversion was hostile and adverse to upper riparian's rights, where diverter never conceded that upper owner held same rights that diverter claimed].)



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3. Prescriptive Rights.

b. Extent of Prescriptive Right.

1. Definite Amount Beneficially Used.

12 Witkin Sum. Cal. Law Real Property § 950

[§ 950] Definite Amount Beneficially Used.

(1) *Definite Amount.* An absolute right is acquired to a fixed amount of water, the quantity being determined by the use, regardless of the needs or demands of other riparians or appropriators. (*Akin v. Spencer* (1937) 21 C.A.2d 325, 332, 69 P.2d 430.) Present use is the measure of the right. Future needs cannot be included. (*Eden Township County Water Dist. v. Hayward* (1933) 218 C. 634, 638, 24 P.2d 492; see *Orange County Water Dist. v. Riverside* (1959) 173 C.A.2d 137, 222, 343 P.2d 450.) There must be a showing, and a finding based on that showing, of a definite quantity used. (*Crain v. Hoefling* (1942) 56 C.A.2d 396, 402, 132 P.2d 882; see *Orchard v. Cecil F. White Ranches* (1950) 97 C.A.2d 35, 43, 217 P.2d 143; *Lindsay v. King* (1956) 138 C.A.2d 333, 344, 292 P.2d 23.)

(2) *Beneficial Use.* The absolute quantity is determined not by the amounts diverted but by the amount beneficially used. So where an appropriator diverted more than he needed, and allowed the excess to go to waste, the prescriptive right did not include the excess. (*California Pastoral & Agricultural Co. v. Madera Canal & Irr. Co.* (1914) 167 C. 78, 83, 138 P. 718.) In *Antioch v. Williams Irr. Dist.* (1922) 188 C. 451, 205 P. 688, plaintiff city appropriated a certain amount of water near the mouth of the San Joaquin River for the prescriptive period. Defendant irrigation district then appropriated water many miles above on the Sacramento River, so that the current was lessened, and the salt water of the ocean, normally kept in check by the waters of the rivers, was forced up the lower part of the San Joaquin by tidal action, rendering the water at plaintiff's intake unfit for domestic use. The action sought to enjoin the upper taking. *Held*, plaintiff could not gain a prescriptive right to the wasteful use of the current as a "booster." (188 C. 465.)

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3. Prescriptive Rights.

b. Extent of Prescriptive Right.

2. Improper Change of Use.

12 Witkin Sum. Cal. Law Real Property § 951

[§ 951] Improper Change of Use.

The owner of a prescriptive right cannot change the place or manner of use when the rights of others would be injured. (*Scott v. Fruit Growers Supply Co.* (1927) 202 C. 47, 53, 258 P. 1095.)

In *Moore v. California Oregon Power Co.* (1943) 22 C.2d 725, 140 P.2d 798, defendant, an upper riparian owner, acquired a prescriptive right to store water for power purposes, by impounding it at night, and on Sundays and holidays, and releasing it during the daytime. The result was that plaintiff, a lower riparian owner, actually received a regular flow sufficient for his needs. Later, defendant changed its methods by storing the water for longer periods and releasing it suddenly, thus depriving plaintiff of all water at certain times, and washing away his irrigation works at others. *Held*, the change in manner of use was not justified by the prescriptive right, and damages should be awarded. (22 C.2d 740.)

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3. Prescriptive Rights.

c. Prescription Running Downstream.

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[§ 952] Prescription Running Downstream.

(1) *Between Riparian Owners.* Between riparian owners, prescription does not run downstream (i.e., an upper riparian owner does not get a prescriptive right against a lower riparian owner) unless the lower owner's use is interfered with or notice of the adverse claim is brought to him. The reason is that the lower owner is entitled to assume that the taking by the upper owner is under riparian right and not adverse. (*Oliver v. Robnett* (1922) 190 C. 51, 55, 210 P. 408.) This rule apparently holds true even though the upper owner takes all the water. (*Pabst v. Finmand* (1922) 190 C. 124, 130, 211 P. 11.) But use of substantially all the water, coupled with actual knowledge by the lower owner of the adverse claim, will result in a prescriptive right. (*Morgan v. Walker* (1933) 217 C. 607, 615, 20 P.2d 660; *Sibbett v. Babcock* (1954) 124 C.A.2d 567, 571, 269 P.2d 42.)

(2) *Between Riparian Owners and Appropriators.* It was formerly held that, between an upper appropriator and a lower riparian owner, the prescriptive period began to run from the first taking, even though the riparian owner continued to get enough water for his use. The theory was that the lower riparian owner was entitled to the full flow, and any taking by the upper appropriator was adverse. (*E. Clemens Horst Co. v. Tarr Mining Co.* (1917) 174 C. 430, 436, 163 P. 492.) Under present law, the appropriator may lawfully take what a riparian owner does not need for a reasonable use (see *supra*, §937). Hence, it would seem that the prescriptive right should not arise, unless, as in the case of two riparian owners, the lower owner's use is interfered with or he has notice of the adverse claim.

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3. Prescriptive Rights.

d. Prescription Running Upstream.

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[§ 953] Prescription Running Upstream.

Prescription never runs upstream against an upper riparian owner in favor of a lower riparian or appropriator. The reason is that the taking by the lower user does not interfere with the flow above, and hence does not invade any right of the upper owner. (*Bathgate v. Irvine* (1899) 126 C. 135, 140, 58 P. 442; see *Lindsay v. King* (1956) 138 C.A.2d 333, 340, 292 P.2d 23 [recognizing rule but holding it inapplicable where lower owner directly diverted water from upper owner's lands].) The rule does not apply, however, between appropriators. If the upper taking is an appropriation, a lower appropriator can gain a prescriptive right, and damages should be awarded.

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4. Termination of Rights.

12 Witkin Sum. Cal. Law Real Property § 954

[§ 954] Termination of Rights.

(1) *Riparian*. The riparian right originally depends on access to the stream. If the access is taken away by severance of the land, the right may or may not survive, depending on the nature of the severance.

If a nonabutting portion is conveyed without mention of riparian rights, that portion loses its rights forever, even though the original owner later gets back the portion conveyed. (*Anaheim Union Water Co. v. Fuller* (1907) 150 C. 327, 331, 88 P. 978; see *Murphy Slough Assn. v. Avila* (1972) 27 C.A.3d 649, 658, 104 C.R. 136 [grant of strip partially adjacent to stream without mention of riparian rights construed as right of way; grantors did not intend to convey riparian interest and riparian rights of nonabutting portions not severed].) If a conveyance expressly provides that the grantee will have the same riparian rights in the land as the grantor formerly had, the rights are preserved. (*Miller & Lux v. J.G. James Co.* (1919) 179 C. 689, 691, 178 P. 716.)

A different rule applies to partition. Each parcel retains its riparian rights without mention of them in the decree. (*Rancho Santa Margarita v. Vail* (1938) 11 C.2d 501, 538, 81 P.2d 533.)

(2) *Appropriation*. Under the judicially established rule, the appropriator forfeits the right to take the water by abandonment or by nonuse. (*Big Rock Mut. Water Co. v. Valyermo Ranch Co.* (1926) 78 C.A. 266, 273, 248 P. 264; see *Water C. 1202* [unappropriated water includes water that is no longer being beneficially used], *Water C. 1240* [right ceases when appropriator ceases to use it for beneficial purpose]; see *Lindblom v. Round Valley Water Co.* (1918) 178 C. 450, 455, 173 P. 994 [after defendant appropriator lost his right, plaintiff riparian owner's right was revived].)

If appropriative rights remain unused for 5 years (formerly 3 years), the unused water may revert to the public and become unappropriated public water. The reversion occurs when the board so finds, after notice to the permittee and a public hearing, if requested. (*Water C. 1241*.)

However, when all or part of an appropriation right is not used because of water conservation efforts, the right is not forfeited. (*Water C. 1011(a)*; on water transfer not being basis for loss of right, see *Water C. 1014*, supra, §928.) To encourage conjunctive use of surface water and groundwater supplies, there is no forfeiture of the appropriative right to water for which such an alternative supply is substituted, under prescribed conditions. (*Water C. 1011.5*.)

(3) *Prescriptive*. A prescriptive right is also lost by nonuse. (*Smith v. Hawkins* (1895) 110 C. 122, 127, 42 P. 453; *Bazet v. Nugget Bar Placers* (1931) 211 C. 607, 617, 296 P. 616; see 62 A.L.R.5th 219 [loss of private easement by nonuse].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Appropriation*. See *Barnes v. Hussa* (2006) 136 C.A.4th 1358, 1371, 39 C.R.3d 659 [there was no forfeiture under *Water C. 1241* where there was no evidence that, for at least 5 years, excess water was available but holder of water rights failed to divert it]; *North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 C.A.4th 555, 565, 567, 576, 54 C.R.3d 578 [in determining forfeiture of common law water rights, trial court properly identified 5-year forfeiture period and properly used monthly increments to measure use and nonuse during that period; with regard to forfeiture of junior rights, trial court should have considered junior appropriator's theoretical entitlement at particular daily stage of flow as well as any water released by senior appropriator that was available to junior appropriator].



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D. Rights in Surface Waters.

5. Ownership of Treated Wastewater.

12 Witkin Sum. Cal. Law Real Property § 955

[§ 955] Ownership of Treated Wastewater.

The owner of a wastewater treatment plant holds "the exclusive right to the treated waste water as against anyone who has supplied the water discharged into the waste water collection and treatment system, including a person using water under a water service contract, unless otherwise provided by agreement." (*Water C. 1210.*) Before changing the point of discharge, place of use, or purpose of use of the water, the plant owner must obtain the board's approval. (*Water C. 1211(a).*) *Water C. 1211(a)* does not apply to changes in the discharge or use of treated wastewater that do not result in decreasing the flow in a portion of a watercourse. (*Water C. 1211(b).*)

The board may not grant a permit or license to a person other than the treated wastewater producer for the appropriation of treated wastewater where the producer has introduced the water into the watercourse with the prior stated intention of maintaining or enhancing fishery, wildlife, recreational, or other instream beneficial uses. Holders of existing water rights may not use or claim the water. (*Water C. 1212.*)

SUPPLEMENT: [This section is current through the latest supplement]



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E. Underground Waters.

1. In General.

12 Witkin Sum. Cal. Law Real Property § 956

[§ 956] In General.

Waters in defined subterranean channels are subject to the same rules as surface watercourses. (*Los Angeles v. Pomeroy* (1899) 124 C. 597, 633, 57 P. 585; see *Water C. 1200*.) Percolating waters that are tributary to and feed the surface flow of a stream are regarded as part of the stream itself. In *Montecito Valley Water Co. v. Santa Barbara* (1904) 144 C. 578, 77 P. 1113, defendants drove tunnels into the underlying rock strata parallel to the creek and below its level, drawing into them the natural flow of the stream. Held, having no right to the surface flow, they could not acquire the right by subterranean tapping. (144 C. 588.) (See *Eckel v. Springfield Tunnel & Dev. Co.* (1927) 87 C.A. 617, 622, 262 P. 425.)

Ordinary groundwaters at common law belonged to the owner of the surface land, just as minerals, but this doctrine has been repudiated in California. (See *Miller v. Bay Cities Water Co.* (1910) 157 C. 256, 276, 107 P. 115; on nature of groundwater, see *Rest.2d, Torts §845* [definition], §858 [liability for use].)

Groundwater, which has its origin in rainfall and is replenished, is distinguishable from geothermal water, which was present at the formation of geological structures and is a depletable deposit. The geothermal water system is physically separate from the normal groundwater system and is properly treated as a mineral deposit. (*Geothermal Kinetics v. Union Oil Co.* (1977) 75 C.A.3d 56, 63, 141 C.R. 879, supra, §17 [grant of mineral estate included geothermal resources].)

SUPPLEMENT: [This section is current through the latest supplement]

See *North Gualala Water Co. v. State Water Resources Control Bd.* (2006) 139 C.A.4th 1577, 1590, 43 C.R.3d 821 [board could require water company to obtain permit to pump groundwater from two wells located near river because groundwater was from "subterranean streams flowing through known and definite channels" as required by *Water C. 1200*; four-part test to determine board's jurisdiction over groundwater was consistent with language and intent of *Water C. 1200* and was correctly applied by board].



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E. Underground Waters.

2. State's Ownership of Groundwater.

12 Witkin Sum. Cal. Law Real Property § 957

[§ 957] State's Ownership of Groundwater.

In *California v. Superior Court (Riverside)* (2000) 78 C.A.4th 1019, 93 C.R.2d 276, the state, after having been found liable for environmental cleanup costs at a toxic waste facility that it maintained and operated, sought coverage from defendants, the issuers of various liability insurance policies. Defendants refused coverage based on the "owned property" exclusion in the policies, under which insurers refuse to pay for loss or damage to property owned by an insured. The state sought declaratory relief regarding defendants' duty to defend and to indemnify it. The trial court found that the state owned the groundwater at the site, thus, the owned property exclusion applied. *Held*, state's petition for writ of mandamus granted.

(a) Although the state owns the groundwater under the surface of the state in a regulatory, supervisory sense, it does not own it in a possessory, proprietary sense. (78 C.A.4th 1033.) *Water C. 102*, which provides that "[a]ll water within the State is the property of the people of the State," expresses the preeminent right of the people of the state to make water policy and control water use. The state's power to control and regulate use, however, is distinct from the concept of "ownership" as used in the Civil Code and in common usage. (78 C.A.4th 1030.) Given the evanescent and transitory nature of water, it is impossible to accept defendants' proposal that the state has an ownership interest in the "corpus" of state waters even though individual users have usufructuary rights. "The ownership proposed by [defendants] is impossible to define and virtually unrelated to the common sense of the term. ... We decline to recognize such a partial proprietary 'ownership.'" (78 C.A.4th 1032.)

(b) Because the state does not own the groundwater in a possessory, proprietary sense, the "owned property" exclusion is not *clearly* applicable here. The record is not adequate to determine (1) who drafted the policies, (2) whether the term "owned property" was used in an ordinary and popular sense, and (3) what either party understood the language to mean in general or with respect to unconfined and unappropriated waters. "We therefore do not reach the issue but leave it for the trial court to resolve after such further proceedings as it and the parties may deem appropriate." (78 C.A.4th 1034.)

SUPPLEMENT: [This section is current through the latest supplement]



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E. Underground Waters.

3. Overlying, Appropriative, and Prescriptive Rights.

12 Witkin Sum. Cal. Law Real Property § 958

[§ 958] Overlying, Appropriative, and Prescriptive Rights.

"Rights in water in an underground basin ... are classified as overlying, appropriative, and prescriptive. Generally speaking, an overlying right, analogous to that of a riparian owner in a surface stream, is the right of the owner of the land to take water from the ground underneath for use on his land within the basin or watershed; the right is based on ownership of the land and is appurtenant thereto. ... The term 'appropriation' is said by some authorities to be properly used only with reference to the taking of water from a surface stream on public land for nonriparian purposes. ... The California courts, however, use the term to refer to any taking of water for other than riparian or overlying uses." (*Pasadena v. Alhambra* (1949) 33 C.2d 908, 925, 207 P.2d 17.) (See *California Water Service Co. v. Edward Sidebotham & Son* (1964) 224 C.A.2d 715, 725, 37 C.R. 1 [classification of underground water rights]; 53 Cal. L. Rev. 541 [recapture of reclamation project groundwater]; 19 *Pacific L. J.* 1225 [imported groundwater banking]; 20 *Pacific L. J.* 31 [groundwater dispute resolution]; 25 *Pacific L. J.* 1021 [institutional reforms in groundwater law]; 30 *U.S.F. L. Rev.* 803 [protecting groundwater through "total aquifer management"]; 78 *Am.Jur.2d* (2002 ed.), *Waters* §203 et seq.)

Appropriative rights may be based on conservation of groundwater through substitution of, or replenishment from, an alternate supply. (*Water C.* 1005.1 et seq.; on replenishment, see *Niles Sand & Gravel Co. v. Alameda County Water Dist.* (1974) 37 C.A.3d 924, 934, 112 C.R. 846, *infra*, §960; *Water C.* 13551 [using recycled water in lieu of extracting groundwater does not result in loss or diminution of existing water rights].)

In *Hi-Desert County Water Dist. v. Blue Skies Country Club* (1994) 23 C.A.4th 1723, 28 C.R.2d 909, the court surveyed the priority of rights to groundwater, and concluded that the trial judge had erroneously redefined the parties' rights to water in an overdrafted basin. A stipulated judgment entered in 1977 declared the rights of plaintiff water district and various defendants to the water beneath a high desert basin, appointed plaintiff as watermaster to devise a physical solution to the overdraft problem, and reserved jurisdiction over the issue. Financing the physical solution--importing supplemental water--quickly became a concern, and the court approved a budget under which the parties to the judgment paid a flat fee to pump their adjudicated allotment, and then a higher rate for further amounts. Subsequently, plaintiff found this arrangement inadequate and proposed an assessment on amounts extracted beyond each user's *safe yield allocation*, i.e., the percentage of the basin's native safe yield corresponding to the user's proportionate share of all adjudicated rights. The trial judge approved this plan, determined the safe yield of the basin, and declared the rights of all users to be equal in priority. Defendant country club, which operated a golf course, appealed. *Held*, reversed.

(a) The right of the overlying user is paramount. The right of an appropriator is limited to the amount of the surplus and must yield to the overlying owner in the event of a shortage. The appropriator may gain prescriptive rights by taking nonsurplus waters, but under the doctrine of "self help," the overlying user may limit such prescriptive rights by continuing to extract water in the face of an adverse appropriative use. (23 C.A.4th 1730, 1731, citing *Pasadena*.) Continued pumping from an overdrafted basin preserves an overlying owner's rights and priority, but the right to amounts not pumped may be taken by prescription. (23 C.A.4th 1731, 1732, citing *Los Angeles v. San Fernando* (1975) 14 C.3d 199, 123 C.R. 1, 537 P.2d 1250.)

(b) Here, the stipulated judgment determined the amount of defendant's overlying right, and stated that it had been protected from prescription by self help. (23 C.A.4th 1732.) Plaintiff's right was described as "appropriative," acknowledging defendant's priority. Hence, the order declaring the parties' rights equal in priority improperly redefined those rights, and ignored the judgment's specific allocations to the overlying owners and to plaintiff. (23 C.A.4th 1733.)

(c) Plaintiff relied on the mutual prescription doctrine instituted in *Pasadena* (see *infra*, §960), which required a proportionate reduction of water use by all parties regardless of priority. But mechanical application of the mutual prescription doctrine was rejected in *Los Angeles v. San Fernando*, *supra*, and *Pasadena* is distinguishable on its facts. There, some appropriative extraction had commenced after the overdraft had begun, so that a reduction on the basis of priority would have eliminated newer prescriptive users; here, none of the parties began extractions after the safe yield was exceeded. (23 C.A.4th 1734.) Implementation of the proportionate share system might force defendant to shut down due to the high cost of the replenishment assessment. Unlike the judgment in *Pasadena*, the stipulated judgment in this case was intended not to relieve the overdraft so much as to allocate rights and plan for financing the cost of supplemental water. (23 C.A.4th 1735.)

(d) The real issue here was money--who must pay for importing water to replenish amounts taken in excess of the safe yield. (23 C.A.4th 1736.) The stipulated judgment intended to allocate financial liability for supplemental water to latecomers to the area, not to defendant. The restructuring proposed by plaintiff and approved by the trial judge was an effort to extract money from defendant to pay for the supplemental water, in direct violation of the terms of the judgment. (23 C.A.4th 1737.)

West's Key Number Digest, Waters and Water Courses k.99 et seq.

SUPPLEMENT: [This section is current through the latest supplement]
See 89 Proof of Facts 3d 233 [proof of wrongful interference with use of water well].



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E. Underground Waters.

4. Correlative Rights Doctrine.

a. Development of Doctrine.

12 Witkin Sum. Cal. Law Real Property § 959

[§ 959] Development of Doctrine.

The California rule on percolating waters is the same as the rule of riparian rights. (1) The owners of land overlying strata of percolating waters have a right superior to that of other persons, but only to the extent of a reasonable use, and (2) as between themselves, the owners have correlative rights. This was decided in the leading case of *Katz v. Walkinshaw* (1903) 141 C. 116, 70 P. 663, 74 P. 766. Plaintiffs and defendant were owners of land overlying percolating waters. Defendant sank artesian wells and pumped water to lands outside the artesian belt in such quantities that plaintiffs were deprived of necessary water for agricultural purposes. *Held*, an injunction should be granted. The rights in percolating waters are mutual and reciprocal, and no overlying owner can divert water to outside lands to the injury of others. (141 C. 134.) (See *Revis v. I.S. Chapman & Co.* (1933) 130 C.A. 109, 113, 19 P.2d 511; on distinction between groundwater and riparian rules, see *infra*, §961.)

In *Burr v. Maclay Rancho Water Co.* (1908) 154 C. 428, 98 P. 260, the doctrine was further elaborated, as follows: (1) As between overlying owners, each can take all that he or she can beneficially use, if the quantity is sufficient; if the quantity is insufficient, each is limited to a proper proportion, but none can divert to other lands to the injury of others. (2) As between overlying owners and appropriators of water for use on other lands, the owner has a superior right to the amount necessary for the owner's use, and may protect that right, in equity, even before the owner commences to use the water, in order to prevent the acquisition of a prescriptive right. But the appropriator is entitled to take the surplus over that necessary quantity, and, if the overlying owner has not begun to use any, the appropriator may take all the water for beneficial use elsewhere. (154 C. 436.) This doctrine is in harmony with the rule now prevailing as to surface streams, under the constitutional amendment. (*Peabody v. Vallejo* (1935) 2 C.2d 351, 371, 40 P.2d 486; see *Water C.* 1242 [underground storage may be beneficial use]; *Hillside Water Co. v. Los Angeles* (1938) 10 C.2d 677, 686, 76 P.2d 681; *Tehachapi-Cummings County Water Dist. v. Armstrong* (1975) 49 C.A.3d 992, 1001, 122 C.R. 918 [factors considered in determining proportionate shares of overlying owners].)

SUPPLEMENT: [This section is current through the latest supplement]
See 89 Proof of Facts 3d 233 [proof of wrongful interference with use of water well].



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4. Correlative Rights Doctrine.

b. Illustrations.

12 Witkin Sum. Cal. Law Real Property § 960

[§ 960] Illustrations.

Later cases restate the two important aspects of the rule. (1) The rights of overlying owners are superior to those of persons seeking to export water to places beyond the watershed. (*Allen v. California Water & Tel. Co. (1946) 29 C.2d 466, 483, 176 P.2d 8*; see *Pasadena v. Alhambra (1949) 33 C.2d 908, 926, 207 P.2d 17*; *Smith v. Wheeler (1951) 107 C.A.2d 451, 455, 237 P.2d 325*.) (2) The overlying owners are restricted to a reasonable beneficial use. (*Pasadena v. Alhambra, supra*, 33 C.2d 925; see *California Water Service Co. v. Edward Sidebotham & Son (1964) 224 C.A.2d 715, 725, 37 C.R. 1*; *Orange County Water Dist. v. Colton (1964) 226 C.A.2d 642, 645, 647, 38 C.R. 286* [observing that rights are not entirely analogous to those of riparian owners on surface streams, and raising but not deciding whether one overlying owner may make effective grant of rights].)

In *Pasadena*, excess pumping by overlying owners and appropriators had seriously depleted the underground water supply. The court concluded that the owners and appropriators had, by long failure to claim priorities, created mutual prescriptive easements, and should be treated alike. Accordingly, as a practical solution, an order for a pro rata reduction in pumping, on the part of all parties, was approved. (See *Hi-Desert County Water Dist. v. Blue Skies Country Club (1994) 23 C.A.4th 1723, 1734, 28 C.R.2d 909* [distinguishing *Pasadena*]; *Central & West Basin Water Replenishment Dist. v. Southern Calif. Water Co. (2003) 109 C.A.4th 891, 908, 911, 135 C.R.2d 486* [entities' right to extract water from groundwater basin did not create concomitant right to allocate unused storage space in basin among themselves in proportion to each entity's extraction allocation, and entities' right to carry over extraction allocation did not confer right to additional storage space; because entities had not appropriated unused storage space, doctrine of mutual prescription did not apply].)

In *Niles Sand & Gravel Co. v. Alameda County Water Dist. (1974) 37 C.A.3d 924, 112 C.R. 846*, defendant water district, pursuant to a replenishment program, forced stored water below ground. Plaintiff, operator of sand and gravel quarries, found its pits flooded, and constantly pumped out water in huge quantities, to be discharged into San Francisco Bay. Plaintiff brought an action in inverse condemnation, seeking damages for the flooding. Defendant brought its own action to enjoin the waste of water. *Held*, judgment enjoining discharge of the water and denying damages affirmed. (a) Under the correlative rights doctrine, plaintiff was entitled only to a reasonable use of the water in correlation of the rights of others. (*37 C.A.3d 933, 934*, citing the text.) (b) The injunction against waste was therefore not a compensable taking or damaging of property. (*37 C.A.3d 935*.) (c) Even if it is assumed that there was damage to the property, it was

not compensable because the prohibition of waste was an exercise of police power. (37 C.A.3d 936; see supra, §937.)

The superior rights of overlying owners were reaffirmed in *Barstow v. Mojave Water Agency* (2000) 23 C.4th 1224, 99 C.R.2d 294, 5 P.3d 853, a dispute among various cities, a water agency, some dairy and alfalfa farmers, and substantially all other users of groundwater in an overdrafted river basin. After lengthy negotiations, a committee representing numerous parties submitted to the trial court a draft physical solution, which was an equitable distribution of the groundwater among the users. The physical solution allotted a "free production allowance" to each party based on the party's prior use and established a fee to purchase replacement water when a party uses more than the allowance. Significantly, the physical solution did not apportion production rights on the basis of preexisting legal water rights. All the parties stipulated to the physical solution, except a group of dairy and alfalfa farmers, who claimed overlying rights based on the groundwater underneath their property. In addition, a water company engaged in trout production wanted to participate in the physical solution and did not challenge its legality, but disagreed with the physical solution's allocation of acre-feet of water to it. The trial court found it unnecessary to adjudicate individual legal water rights and instead concluded that the physical solution would be fair and equitable to all parties. It enjoined all parties from asserting special priorities or preferences. The farmers and the water company appealed. The Court of Appeal reversed the trial court's judgment as to both appellants. *Held*, trial court's judgment is reversed as to the farmers and affirmed as to the water company.

(a) The trial court erred when it disregarded the farmers' legal water rights as overlying owners in order to apportion the water on an equitable basis to all the users in the basin. (23 C.4th 1240.) No appellate court has endorsed an equitable apportionment solution that disregards overlying owners' existing rights. (23 C.4th 1249.) Although "it is clear that a trial court may impose a physical solution to achieve a practical allocation of water to competing interests, the solution's general purpose cannot simply ignore the priority rights of the parties asserting them. ... In ordering a physical solution, therefore, a court may neither change priorities among the water rights holders nor eliminate vested rights in applying the solution without first considering them in relation to the reasonable use doctrine." (23 C.4th 1250.) Cal. Const., Art. X, §2, requires the greatest number of beneficial users that the water supply can support, but this use must be subject to the rights of those with lawful priority to the water. (23 C.4th 1250.) As overlying owners, the farmers have the right to pump water from the ground underneath their respective lands for use on their lands. The overlying right is correlative and is therefore defined in relation to other overlying water rights holders in the basin. In the event of water supply shortage, the overlying users have priority over appropriative users. (23 C.4th 1253.) The farmers have retained their overlying rights by pumping and no claim of prescription has been asserted to reduce those rights. (23 C.4th 1253, 1254.)

(b) The trial court did not err in determining the yearly free water production allowance due the trout production company. The trial court's judgment allowed the company to continue to use recirculated water for aquaculture, but required it to discharge the water directly to the river after this use. The company was one of 26 users that recirculated water. (23 C.4th 1255.) The trial court reasonably differentiated these users from others who did not recirculate water, but who put their full gross production amount to use. No reasonable, beneficial purpose would have been served by allowing the company to retain both the amount of water used and the amount recirculated. (23 C.4th 1256.) (See 32 *McGeorge L. Rev.* 991 [long-standing principles of California water law affirmed in *Barstow*].)

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4. Correlative Rights Doctrine.

c. Riparian System Distinguished.

12 Witkin Sum. Cal. Law Real Property § 961

[§ 961] Riparian System Distinguished.

In *Wright v. Goleta Water Dist.* (1985) 174 C.A.3d 74, 219 C.R. 740, a groundwater dispute among private parties and public entities, the trial court attempted to define or otherwise limit future groundwater rights of an overlying owner who had not yet exercised those rights. The trial court based its decision on the riparian rights case of *In re Waters of Long Valley Creek Stream System* (1979) 25 C.3d 339, 347, 158 C.R. 350, 599 P.2d 656, supra, §941. *Held*, this extension of *Long Valley* is inappropriate. (174 C.A.3d 87.) The Legislature's comprehensive administrative scheme for the adjudication of surface water rights (*Water C. 2500* et seq.) is not applicable to groundwater. Statutory adjudication provides for notice to all parties, a decree conclusive as to the rights of all existing claimants and the foreclosure of future claims. Although complete resolution of water rights in an underground basin is "theoretically possible," "this action did not purport to do so." Not all overlying landowners were joined and their right to future use could be prejudiced by defendant's absolute priority for 1,103 acre-feet. (174 C.A.3d 88.) "[A]bsent a statutory scheme for *comprehensive determination* of all ground water rights, the application of *Long Valley* to private adjudication would allow prospective rights of overlying landowners to be subject to the vagaries of an individual plaintiff's pleading without adequate due process protections." (174 C.A.3d 89.)

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F. Injuries to Property Caused by Waters.

1. Surface Waters.

a. Obstruction by Private Owner.

1. Former Law.

12 Witkin Sum. Cal. Law Real Property § 962

[§ 962] Former Law.

In its narrower meaning, the term "surface water" has reference to water originating in springs, rainfall, or melting snow, having no regular flow or defined channel. (See *Rest.2d, Torts §846*.) Traditionally, the upper owner had a right to have the surface water flow off his land, and a private lower owner could not construct a levee to hold back the waters so as to flood the upper land. (*Thomson v. La Fetra* (1919) 180 C. 771, 773, 183 P. 152; *LeBrun v. Richards* (1930) 210 C. 308, 313, 291 P. 825; *Board of Trustees of Leland Stanford Junior University v. Rodley* (1918) 38 C.A. 563, 565, 177 P. 175; *Turner v. Hopper* (1948) 83 C.A.2d 215, 217, 188 P.2d 257; *Rest.2d, Torts §833*; for present approach, see *infra*, §963.)

Because an owner normally had no right to divert surface waters onto another's land, diversion for the period of the statute of limitations could create an easement by prescription. (*Hails v. Martz* (1946) 28 C.2d 775, 778, 172 P.2d 52.) However, if the surface waters naturally drained into a particular stream, it was not actionable to institute artificial methods of drainage to gather them together for discharge into the stream, even though the accelerated flow imposed added burdens of protection on the lower owner. (*San Gabriel Valley Country Club v. Los Angeles* (1920) 182 C. 392, 404, 188 P. 554; see *Locklin v. Lafayette* (1994) 7 C.4th 327, 27 C.R.2d 613, 867 P.2d 724, *infra*, §965.)

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1. Surface Waters.

a. Obstruction by Private Owner.

2. Tort Liability.

12 Witkin Sum. Cal. Law Real Property § 963

[§ 963] Tort Liability.

(1) *Keys Case*. In *Keys v. Romley* (1966) 64 C.2d 396, 50 C.R. 273, 412 P.2d 529, the court reexamined and revised the long-established rule, derived from the civil law, that the upper owner has a right to have surface waters flow off his land undisturbed by acts of the lower owner. The rule, appropriate to rural areas, is unsuited to heavily developed urban areas. Accordingly, a new policy approach, based on modern tort principles rather than property rights, was employed. Both parties have duties, neither is immune from liability, and the basic inquiry is as to reasonable conduct under the circumstances. Two broad principles were declared to carry out this policy.

(a) "It is therefore incumbent upon every person to take reasonable care in using his property to avoid injury to adjacent property through the flow of surface waters. Failure to exercise reasonable care may result in liability by an upper to a lower landowner. It is equally the duty of any person threatened with injury to his property by the flow of surface waters to take reasonable precautions to avoid or reduce any actual or potential injury." (64 C.2d 409.)

(b) "If the actions of both the upper and lower landowners are reasonable, necessary," liability is determined under the traditional civil law rule. (64 C.2d 409.)

"Reasonableness" of the conduct is a question of fact, to be determined by considering factors such as the amount of the harm caused, the foreseeability of the harm that results, the purpose or motive with which the possessor acted, and "all other relevant matter." (64 C.2d 410.) If land is developed, it is proper to consider objectively whether the utility of the possessor's use of the land outweighs the gravity of the harm that results from alteration of the flow. (64 C.2d 410.) (See *Pagliotti v. Acquistapace* (1966) 64 C.2d 873, 50 C.R. 282, 412 P.2d 538 [companion case].)

(2) *Effect of Keys*. The effect of *Keys* was explained in *Burrows v. California* (1968) 260 C.A.2d 29, 33, 66 C.R. 868, as follows: If the upper owner is reasonable and the lower owner is unreasonable, the upper owner wins; if the upper owner is unreasonable and the lower owner is reasonable, the lower owner wins; if both are reasonable, the lower owner wins. (It is not clear what happens if both are unreasonable). "Thus, *Keys* offers no incentive to a reasonable lower owner to try to plead and prove that the upper owner's diversion of surface water has been unreasonable. He prevails, whatever the nature of the upper owner's conduct. Why should he undertake the burden of proving the upper

owner's diversion to be unreasonable? The reasonable diverter's money spends just as nicely. The truth of the matter is that the bite of *Keys* lies in its focus on the lower owner's conduct; the upper owner now has a defense he did not have before, to wit, the unreasonableness of his lower neighbor's conduct. The burden of pleading and proving this defense should be on defendant." (260 C.A.2d 33.)

In *Sheffet v. Los Angeles* (1970) 3 C.A.3d 720, 84 C.R. 11, it was contended that the lower owner had acted unreasonably in failing to take any affirmative action to protect his property from an increased flow of water and mud caused by the clearing and grading of the upper land. *Held*, *Keys* does not require this. "Reasonable conduct may or may not require affirmative action by the lower owner, depending upon all the circumstances." (3 C.A.3d 730.) (See *Locklin v. Lafayette* (1994) 7 C.4th 327, 368, 27 C.R.2d 613, 867 P.2d 724, *infra*, §965 [extending rule of *Keys* to liability for damage caused by discharge of surface waters into natural watercourse]; *Marmont v. Castlewood Country Club* (1973) 30 C.A.3d 483, 486, 105 C.R. 853 [reversal for failure to instruct properly on *Keys* test of reasonableness]; *Gdowski v. Louie* (2000) 84 C.A.4th 1395, 1404, 101 C.R.2d 609 [trial court erred in refusing to give instruction that upper owner is liable for damage caused to adjacent property by discharge of water in unnatural manner and instead giving instructions that embodied general negligence principles; citing *Keys*]; 6 Miller & Starr 3d, §14:21; 31 *Stanf. L. Rev.* 457 [efficient land use and internalization of beneficial spillovers]; 88 A.L.R.4th 891 [liability for diversion of surface water by raising level of land]; 93 A.L.R.3d 1193 [interference with drainage of surface waters]; 87 Am.Jur. Trials 423 [proof of landowner's unreasonable interference with surface water drainage].)

(3) *Intentional Diversion*. The rules deal with intentional diversion. If the diversion is negligent, the usual negligence principles apply. (See *Western Salt Co. v. Newport Beach* (1969) 271 C.A.2d 397, 402, 76 C.R. 322.) The rules do not apply to "normal development and improvement of upstream property by developers and improvers acting pursuant to subdivision, construction and building permits." (*Ellison v. San Buenaventura* (1976) 60 C.A.3d 453, 459, 131 C.R. 433.)

SUPPLEMENT: [This section is current through the latest supplement]



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F. Injuries to Property Caused by Waters.

1. Surface Waters.

b. Obstruction by Governmental Agency.

12 Witkin Sum. Cal. Law Real Property § 964

[§ 964] Obstruction by Governmental Agency.

A governmental agency, such as a municipality or flood control district, when acting under the police power without negligence, e.g., constructing streets and highways or embankments for flood control, is immune from the ordinary liability for obstructing surface waters. (*O'Hara v. Los Angeles County Flood Control Dist. (1941) 19 C.2d 61, 63, 119 P.2d 23*; *Jefferis v. Monterey Park (1936) 14 C.A.2d 113, 117, 57 P.2d 1374*; 7 So. Cal. L. Rev. 295.) But if the work of construction is negligently done, liability is imposed. (See *House v. Los Angeles County Flood Control Dist. (1944) 25 C.2d 384, 390, 153 P.2d 950*; *Andrew Jergens Co. v. Los Angeles (1951) 103 C.A.2d 232, 235, 229 P.2d 475*; *Callens v. Orange (1954) 129 C.A.2d 255, 260, 276 P.2d 886*; *Yue v. Auburn (1992) 3 C.A.4th 751, 758, 4 C.R.2d 653, 5 Cal. Proc. (4th), Pleading, §650*, citing the text [reversing dismissal of inverse condemnation complaint against city for damage caused by surface water runoff through storm drains from new subdivision, and distinguishing floodwater rules]; *Locklin v. Lafayette (1994) 7 C.4th 327, 368, 27 C.R.2d 613, 867 P.2d 724*, *infra*, §965 [overruling *Yue* by implication; same rule of reasonableness applies to floodwater and surface water runoff, and to tort and inverse condemnation causes of action].)

SUPPLEMENT: [This section is current through the latest supplement]

Yue case:

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §691.



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1. Surface Waters.

c. Discharge of Surface Waters into Natural Watercourse.

12 Witkin Sum. Cal. Law Real Property § 965

[§ 965] Discharge of Surface Waters into Natural Watercourse.

In *Locklin v. Lafayette* (1994) 7 C.4th 327, 27 C.R.2d 613, 867 P.2d 724, the court undertook a comprehensive review of the law pertaining to damage caused by the discharge of surface waters into a natural watercourse. The court concluded that the rule of reasonable conduct established by *Keys v. Romley* (1966) 64 C.2d 396, 50 C.R. 273, 412 P.2d 529, supra, §963, was broadly applicable in this context, and that a governmental entity acting unreasonably may be held liable in inverse condemnation for downstream damage caused by the discharge of surface waters from public works or improvements on publicly owned land.

Plaintiffs owned property extending to the center of a creek bed in a watershed that had been increasingly developed over a 50-year period. They sued a variety of public entities, alleging that defendants' actions or improvements had contributed to the increased volume and velocity of water in the creek, which was a substantial factor in damaging plaintiffs' properties. In their inverse condemnation cause of action, plaintiffs claimed that they had been singled out to suffer a substantial burden of the storm drainage system, which included the creek and was a public use. *Held*, judgment was properly entered for defendants, because (a) the creek had not become a public improvement; (b) no public improvements in the creek bed had contributed to plaintiffs' damages; (c) defendants had not acted unreasonably in discharging surface water runoff into the creek; and (d) there was no demonstrated damage to plaintiffs' properties that could not have been prevented by reasonable measures taken by plaintiffs to protect their properties. (7 C.4th 338, 369.)

(a) Tort liability.

(1) *The natural watercourse rule.* The Court of Appeal affirmed the judgment against plaintiffs based on the statement in *Archer v. Los Angeles* (1941) 19 C.2d 19, 119 P.2d 1, infra, §968, that no liability is incurred by gathering surface waters for a reasonable purpose and discharging them into the stream that is their natural means of drainage, even if the stream channel is inadequate to accommodate the increased flow. (7 C.4th 344.) This natural watercourse rule was an exception to the civil law rule formerly followed in California, which barred an owner of higher land from gathering surface waters by artificial means and discharging them onto lower land in a greater volume or different manner than the natural flow. (7 C.4th 349.) The natural watercourse rule actually had two aspects, both of which were intended to facilitate development of upstream properties: (a) A riparian owner was permitted to gather surface waters

and discharge them into the watercourse at a different location from the natural drainage (see *supra*, §962); and (b) the owner was also permitted to make improvements to the banks and bed of the stream to improve drainage and prevent erosion (see *infra*, §968). (7 C.4th 351.)

(2) *The rule of reasonableness.* The civil law rule governing surface water runoff onto adjacent lands was modified in *Keys*, which subjected both uphill and downhill landowners' conduct in using or altering their property to a test of reasonableness (see *supra*, §963). (7 C.4th 351, 352.) Defendants argued that the natural watercourse rule did not include the element of reasonableness and should remain the law, out of concern for the extraordinary liability that public entities would face solely because storm waters falling on their thoroughfares ultimately reach a natural watercourse. (7 C.4th 352.) But the rule of reasonable use is not one of strict liability, and defendants offered no justification other than fear of liability for distinguishing between riparian owners' duty to avoid injury to downstream owners and the duty of uphill owners to downhill owners. (7 C.4th 353.) A series of Court of Appeal decisions have applied the rule of reasonableness stated in *Keys* to discharges into natural watercourses or flood control improvements in watercourses, and this reflects a nationwide trend toward merging the rules governing diffused surface waters and those governing watercourses. (7 C.4th 354, 355, 356, discussing *Ektelon v. San Diego* (1988) 200 C.A.3d 804, 246 C.R. 483, *infra*, §968; *Martinson v. Hughey* (1988) 199 C.A.3d 318, 244 C.R. 795, *infra*, §971; and *Weaver v. Bishop* (1988) 206 C.A.3d 1351, 254 C.R. 425, *infra*, §967.) "*Keys v. Romley* states a rule that is applicable to all conduct by landowners in their disposition of surface water." (7 C.4th 357.)

(3) *Combination of both rules.* The issue of reasonableness is a question of fact to be determined under the relevant circumstances of each case. (7 C.4th 359.) Under *Keys*, if both landowners act reasonably with respect to draining surface waters onto adjacent property, the civil law rule applies and the upper owner is liable for damage caused by alteration of the waters' natural flow (see *supra*, §963). But the civil law rule dictates a different result for riparian owners than for upland owners; the upper riparian owner is immunized for damage caused by altering the natural discharge of surface water into a watercourse or improving the stream bed. Hence, if the upper owner acts reasonably, or if the lower owner does not act reasonably to protect the property, the lower riparian owner must accept the burden of damage caused by the stream water. The reasonableness of a discharge of surface water runoff into a natural watercourse or an alteration the watercourse itself cannot be determined in isolation, however--riparian owners are liable only for the proportion of damage attributable to their conduct. The purpose of both the civil law rule governing surface water runoff onto adjacent property and the natural watercourse rule was to ensure that development of property would not be foreclosed, and that purpose is furthered by limiting the immunity created by those rules to conduct that is reasonable. (7 C.4th 360.)

(b) *Inverse condemnation.*

(1) *Former rule of immunity.* The Court of Appeal in this case followed the holding in *Archer* that the natural watercourse rule immunizes a governmental entity from inverse condemnation liability. (7 C.4th 361, 364.) But *Archer* based this holding on a general view of inverse condemnation--that compensation is mandated only where the plaintiff would have had a cause of action against a private property owner--that has survived only vestigially as an exception to the general rule requiring compensation where the damaged property owner has contributed disproportionately to a public undertaking. (7 C.4th 364, 365, citing *Albers v. Los Angeles* (1965) 62 C.2d 250, 42 C.R. 89, 398 P.2d 129, 8 Summary (10th), *Constitutional Law*, §1134; *Holtz v. Superior Court* (1970) 3 C.3d 296, 90 C.R. 345, 475 P.2d 441, 8 Summary (10th), *Constitutional Law*, §1134; and *Belair v. Riverside County Flood Control Dist.* (1988) 47 C.3d 550, 253 C.R. 693, 764 P.2d 1070, 8 Summary (10th), *Constitutional Law*, §1146.) After *Belair*, the *Archer* exception applied only to limit a public entity's liability for damage caused by *unreasonable* conduct involving flood control projects in natural watercourses. Nevertheless, because *Belair* involved only flood control projects, and *Holtz* acknowledged exceptions to inverse condemnation liability for "privileged" activities, some lower courts continued to apply the *Archer* exception in other cases when a public agency invoked the natural watercourse rule. (7 C.4th 366.)

(2) *New rule of conditional privilege.* "We now hold that the privilege to utilize a natural watercourse for drainage of surface waters from improved public property and to make improvements in or alterations to a natural watercourse

for the purpose of improving such drainage is a conditional privilege, not an absolute privilege. If an absolute privilege existed, downstream owners could be forced to bear a disproportionate share of the burden of improvements undertaken for the benefit of the public at large." (7 C.4th 366.) "The privilege is conditional ... in recognition that riparian property is subject to the natural watercourse rule as modified by the rule of reasonableness. ... [T]he public agency is liable only if its conduct posed an unreasonable risk of harm to the plaintiffs, and that unreasonable conduct is a substantial cause of the damage to plaintiff's property. The rule of strict liability generally followed in inverse condemnation ... is not applicable in this context." (7 C.4th 367.)

(3) *Standards of reasonable conduct.* "The reasonableness of the public agency's conduct must be determined on the facts of each case, taking into consideration the public benefit and the private damages. ... Inverse condemnation liability ultimately rests on the notion that the private individual should not be required to bear a disproportionate share of the costs of a public improvement." (7 C.4th 367.) The factors identified in *Albers* are important considerations (see 8 *Summary* (10th), *Constitutional Law*, §1134). "[H]owever, inverse condemnation liability for damage caused by drainage of surface waters into or alteration of a natural watercourse is limited to situations in which the public entity's unreasonable conduct constitutes a substantial cause of the damage suffered by property owners. As with tort liability ... a public agency is liable only for the proportionate amount of damage caused by its actions." The basic requirements of reasonable conduct identified in *Keys* apply in this context (see *supra*, §963), and further standards have been proposed by a leading commentator. (7 C.4th 368, citing 20 *Hastings L. J.* 431 and listing standards.) "Reasonableness in this context also considers the historic responsibility of riparian owners to protect their property from damage caused by the stream flow and to anticipate upstream development that may increase that flow. ... [P]laintiff must demonstrate that the efforts of the public entity to prevent downstream damage were not reasonable in light of the potential for damage posed by the entity's conduct, the cost to the public entity of reasonable measures to avoid downstream damage, and the availability of and the cost to the downstream owner of means of protecting that property from damage." (7 C.4th 369.)

Locklin's reasonableness rule was extended in *Bunch v. Coachella Valley Water Dist.* (1997) 15 C.4th 432, 436, 63 C.R.2d 89, 935 P.2d 796, *infra*, §969, to assess liability of a public entity for damage caused when, as part of flood control improvements along a natural watercourse, the entity diverts and rechannels water and its diversion efforts later fail. (See 22 *Pepperdine L. Rev.* 1352 [*Locklin*]; 32 *San Diego L. Rev.* 637 [*Locklin*; universal rule for reasonable disposition of surface waters].)

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F. Injuries to Property Caused by Waters.

2. Floodwaters.

a. Right of Owner To Divert.

12 Witkin Sum. Cal. Law Real Property § 966

[§ 966] Right of Owner To Divert.

(1) *Common Enemy Rule*. Floodwaters are waters that overflow the banks of a stream. The conditions that create them are unusual, and the somewhat harsh "common enemy" rule applies. They are deemed the enemy of each owner, and one owner may protect his or her land by levees even though the waters are thereby forced onto another's land. (*Jones v. California Dev. Co.* (1916) 173 C. 565, 575, 160 P. 823; *Mogle v. Moore* (1940) 16 C.2d 1, 10, 104 P.2d 785; *McManus v. Otis* (1943) 61 C.A.2d 432, 439, 143 P.2d 380; see 6 Miller & Starr 3d, §14:23; 23 A.L.R.2d 750 [right of riparian owner to construct dikes, embankments, or other structures necessary to maintain or restore bank of stream or to prevent flood]; 50 Am.Jur.2d (1995 ed.), *Levees and Flood Control* §13 et seq.)

The rule is also applied in favor of a governmental agency engaged in flood control projects. (See *Belair v. Riverside County Flood Control Dist.* (1988) 47 C.3d 550, 253 C.R. 693, 764 P.2d 1070, 8 Summary (10th), *Constitutional Law*, §1146; *Bunch v. Coachella Valley Water Dist.* (1989) 214 C.A.3d 203, 262 C.R. 513, 8 Summary (10th), *Constitutional Law*, §1146; *Weck v. Los Angeles County Flood Control Dist.* (1951) 104 C.A.2d 599, 610, 232 P.2d 293; *Shaeffer v. California* (1972) 22 C.A.3d 1017, 1020, 99 C.R. 861 ["If such flood control improvements do not subject a landowner's property to any additional flooding than would have occurred absent the work or improvement, the state incurs no liability for the acts complained of"]; *Tri-Chem v. Los Angeles County Flood Control Dist.* (1976) 60 C.A.3d 306, 311, 132 C.R. 142; *Bunch v. Coachella Valley Water Dist.* (1997) 15 C.4th 432, 436, 63 C.R.2d 89, 935 P.2d 796, *infra*, §969.)

(2) *Limited to Reasonable Measures*. The protective measures must, however, be reasonable. (*Weinberg Co. v. Bixby* (1921) 185 C. 87, 96, 196 P. 25.) In *Tahan v. Thomas* (1970) 7 C.A.3d 78, 86 C.R. 440, defendant owned land in Madera County that was protected from floodwaters of the Fresno River by a levee. The county constructed a road bisecting his land and cutting through the levee. The river overflowed, the waters threatened the land, and defendant then built a dike across the county road, recreating the original condition. The result was that the waters were forced away, inundating plaintiff's land. In plaintiff's action, defendant invoked the common enemy rule and obtained a summary judgment. *Held*, reversed. (a) No authority supports the asserted right of a landowner to construct a barrier across a public road to protect himself from floodwaters. (7 C.A.3d 82.) (b) When the county cut the gap in the levee it depreciated land such as defendant's, and in its condemnation proceeding, the county conceivably compensated defendant for the depreciation. Defendant cannot interfere with the improvement to protect his land from the very

contingency for which he was compensated. (7 C.A.3d 83.)

In *Beckley v. Reclamation Bd.* (1962) 205 C.A.2d 734, 23 C.R. 428, the state contended that its diversion of floodwaters, causing permanent damage to plaintiff's private water control system, was not compensable under the constitutional provision on taking or damaging private property. The court, extensively reviewing prior cases, refused to apply the common enemy rule in so drastic a manner.

(a) Neither the common enemy doctrine, nor the police power can justify subjecting hundreds of acres of previously dry, privately owned lands to the burden of permanent and perpetual servitude of overflow. (205 C.A.2d 753.)

(b) The taking by the state or its agencies of such an easement for a public purpose is an exercise of the power of eminent domain and requires payment of just compensation so that individual landowners will not be required to bear more than their just portion of a burden that should be shared by all the taxpayers. (205 C.A.2d 753.)

(c) Deliberate acts "negligently performed in the execution of a public project negligently conceived" do not come within the common enemy doctrine. (205 C.A.2d 754.) (On trend toward rule of reasonableness, see *infra*, §967.)

(3) *Definition of Floodwaters.* The common enemy rule is applied only to "vagrant flood waters" in the strict sense, i.e., those that escape from the stream and overrun adjacent property. (*Costello v. Bowen* (1947) 80 C.A.2d 621, 630, 182 P.2d 615 [defendant enjoined from maintaining dam across a drainage channel that was natural watercourse]; see *Mogle v. Moore* (1940) 16 C.2d 1, 11, 104 P.2d 785 [creek that ran only during rainy season was nevertheless natural watercourse; thus, waters escaping from its banks could be classed as floodwaters, and common enemy rule applied]; but see *Everett v. Davis* (1941) 18 C.2d 389, 393, 115 P.2d 821 [rule was inapplicable where seasonal stream formed debris cone at its end, into which waters flowed; floodwaters are those that overflow channel, and cannot include flow of stream at its end]; *Locklin v. Lafayette* (1994) 7 C.4th 327, 345, 27 C.R.2d 613, 867 P.2d 724 [distinguishing floodwaters ("the extraordinary overflow of rivers and streams") from surface waters and stream waters].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Common Enemy Rule.* See 50 Am.Jur.2d (2006 ed.), *Levees and Flood Control* §13 et seq.



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2. Floodwaters.

b. Recovery Based on Negligence.

12 Witkin Sum. Cal. Law Real Property § 967

[§ 967] Recovery Based on Negligence.

In *Weaver v. Bishop* (1988) 206 C.A.3d 1351, 254 C.R. 425, the court attempted to clarify the basis of liability for diversion of waters by rejecting the theory of liability without fault and adopting the negligence approach of *Keys v. Romley* (1966) 64 C.2d 396, 50 C.R. 273, 412 P.2d 529, *supra*, §963. Defendants placed boulders along the banks of a creek to stop washing away of their land, and as a result, the land of plaintiffs was eroded. The jury found that the conduct of defendants was reasonable, and the court gave judgment for defendants. *Held*, affirmed.

(a) "The liability of a landowner for causing harm to another by diverting or obstructing water presents one of the most confusing areas of California law. ... The usual formula made liability dependent on the nature of the water causing the harm. First, one has no right to obstruct the flow onto his land of what are technically known as *surface waters*. ... Second, one has the right to protect himself against *flood waters*. ... Third, one may not obstruct or divert the flow of a *natural watercourse*." (206 C.A.3d 1353, quoting *LeBrun v. Richards* (1930) 210 C. 308, 291 P. 825; *supra*, §962.)

(b) Plaintiffs contended that the present case came within the third category, and that under the traditional rule, defendants were subject to strict liability for obstruction of a natural stream. But this rule was soon subjected to several competing rules, among them the owner's right under the common enemy doctrine to build levees, bulkheads, dikes, or similar structures to repel floodwater; and this right extended not only to the prevention of inundation, but also to protecting banks from washing away. (206 C.A.3d 1354, citing *Archer v. Los Angeles* (1941) 19 C.2d 19, 119 P.2d 1, *infra*, §968; *San Gabriel Valley Country Club v. Los Angeles* (1920) 182 C. 392, 188 P. 554, *infra*, §962; and *Weck v. Los Angeles County Flood Control Dist.* (1951) 104 C.A.2d 599, 232 P.2d 293, *infra*, §966.)

(c) The later cases use the negligence approach of *Keys*, holding that a defendant owner modifying the flow of surface waters can defend by showing that his conduct was reasonable and that of the plaintiff owner was unreasonable. (206 C.A.3d 1355, 1356.) The reasonable use doctrine of *Key* applies "where one landowner seeks damages for the loss of land along a stream, claiming that the loss was caused by another owner's installation of measures to protect his or her bank from being washed away." (206 C.A.3d 1356.)

(d) "One whose land is being washed away by a stream faces a situation much like that of an owner threatened by

surface or flood waters. In all three situations the owner must either act or protect the land or else suffer its virtual or actual loss, or at least the loss of its beneficial use. All three situations are closely analogous to that of a coastal owner who can only protect himself against marine erosion by erecting groins, which may in turn divert the sea's erosive force to neighboring lands." (206 C.A.3d 1356.) This situation in England gave rise to the common enemy doctrine, and it was the analogy between the coastal situation and the riparian one which led the California court to adopt the common enemy doctrine where watercourse flooding was involved. (206 C.A.3d 1356.) This doctrine, peculiar to water law, was based on the "generally perceived reasonableness" of measures taken to protect one's property. (206 C.A.3d 1357.)

(e) The nearly unanimous trend has been away from per se rules based on categorical judgments of reasonableness, and toward fact-based determinations of reasonableness in the particular circumstances. (206 C.A.3d 1357.) "More broadly, as *Keys* acknowledges and illustrates, the general trend in water-damage cases is to replace the rigidities of property law with the more flexible, conduct-oriented principles of tort. ... Under the latter as expressed in the Second Restatement of Torts, defendants' liability would depend on a balancing of reasonableness, either by analogy to the rules concerning interference with water use, or under the rules of nuisance and trespass. ... This undoubtedly reflects the emerging state of the law in this field." (206 C.A.3d 1358.) (See *Locklin v. Lafayette* (1994) 7 C.4th 327, 356, 27 C.R.2d 613, 867 P.2d 724, supra, §965 [citing *Weaver* with approval, and adopting broad application of rule of reasonable use]; 26 *San Diego L. Rev.* 685 [approving *Weaver*].)

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3. Diversion or Obstruction of Watercourse.

a. In General.

12 Witkin Sum. Cal. Law Real Property § 968

[§ 968] In General.

(1) *Liability of One Who Diverts or Changes Natural Course.* Private persons and governmental agencies, such as municipalities and flood control districts, have been held equally liable for damage resulting from improper diversion or obstruction of a watercourse. One who changes the course of a stream, or diverts water from its natural channel and discharges it into a different channel or onto neighboring land, is liable to the injured property owner. (*Shaw v. Sebastopol* (1911) 159 C. 623, 624, 115 P. 213; *Bauer v. Ventura* (1955) 45 C.2d 276, 283, 289 P.2d 1; *Durante v. Oakland* (1937) 19 C.A.2d 543, 549, 65 P.2d 1326; *Los Angeles Brick & Clay Products Co. v. Los Angeles* (1943) 60 C.A.2d 478, 485, 141 P.2d 46; see *Clement v. State Reclamation Bd.* (1950) 35 C.2d 628, 635, 220 P.2d 897, *infra*, §971; *Williams v. Pacific Coast Aggregates* (1954) 128 C.A.2d 777, 784, 276 P.2d 28 [defendant was not liable where result was not foreseeable]; 6 Miller & Starr 3d, §14:23; 42 A.L.R.3d 426 [injunctive relief against diversion by municipality or public utility].)

Construction projects by or for government agencies or public utilities that will divert, obstruct, or change the natural flow, bed, channel, or bank of a stream cannot proceed without approval of the Fish and Game Department. (*Fish & Game C. 1602.*)

(2) *Liability of One Who Obstructs Natural Flow.* Similarly, one who obstructs the natural flow of the watercourse may be liable. (See *Smith v. Los Angeles* (1944) 66 C.A.2d 562, 572, 153 P.2d 69 [dikes across the channel]; *Clement v. State Reclamation Bd.*, *supra*; 29 A.L.R.2d 447 [liability for damages caused by flooding from obstructing stream, ravine, or similar area by debris or waste].) A municipal corporation may ordinarily grade and improve streets without regard to the effect on surface waters (see *supra*, §964), but if these waters have formed a definite channel in which they flow, the city is liable for damages resulting from its obstruction, though the channel does not amount to a regular watercourse. (*White v. Santa Monica* (1931) 114 C.A. 330, 332, 299 P.2d 819; *Mitchell v. Santa Barbara* (1941) 48 C.A.2d 568, 572, 120 P.2d 131; *Arreola v. Monterey* (2002) 99 C.A.4th 722, 754, 122 C.R.2d 38 [state was liable for damage to property from floodwaters that were created when river levee project failed and that were obstructed by state's highway; state had duty to avoid obstructing escaping floodwaters, regardless of cause of flood].)

(3) *Distinction: Improvement of Natural Channel.* A distinction is made, however, where there is no diversion or obstruction but merely the improvement of a natural channel. The upper owner, to drain or protect his land, may

deepen, widen, or straighten the channel, or improve its natural drainage area, without liability, even though the effect is to increase and accelerate the flow of water and thereby to cause damage to lower land. A governmental agency has the same right. Thus, in *Archer v. Los Angeles* (1941) 19 C.2d 19, 119 P.2d 1, defendant city straightened and widened a creek channel, and constructed storm drains following the natural drainage, but did not improve the outlet of the creek to accommodate the increased flow. *Held*, there was no liability to plaintiff, whose land was flooded by overflow during a rainstorm. (19 C.2d 25.) (See *Clement v. State Reclamation Bd.*, *supra*, 35 C.2d 642 [approving reasoning and test of *Archer*].)

Ektelon v. San Diego (1988) 200 C.A.3d 804, 246 C.R. 483, discussed the rule of *Archer* and followed the theory of *Linville v. Perello* (1987) 189 C.A.3d 195, 234 C.R. 392, that *Archer* does not eliminate a reasonableness requirement on the construction of upstream improvements. (200 C.A.3d 807, 808.) "An upstream landowner has no absolute right to protect his land from floodwaters by constructing structures which increase the downstream flow of water into its natural watercourse, but is instead governed by the ordinary principles of negligence." (200 C.A.3d 810.) (See *Locklin v. Lafayette* (1994) 7 C.4th 327, 356, 27 C.R.2d 613, 867 P.2d 724, *supra*, §965 [disapproving *Archer*, citing *Ektelon* with approval, and applying rule of reasonableness to liability for damage caused by discharge of surface waters into natural watercourse].)

West's Key Number Digest, Waters and Water Courses k.51 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Liability of One Who Diverts or Changes Natural Course*. See *Martin v. Riverside County Dept. of Code Enforcement* (2008) 166 C.A.4th 1406, 1412, 83 C.R.3d 624 [*Fish & Game C. 1602* did not preempt county's grading ordinance, which derived from state housing law of equal dignity and authority; thus, landowner was required to obtain grading permit before repairing spillway].



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b. Constitutional Liability for Construction.

12 Witkin Sum. Cal. Law Real Property § 969

[§ 969] Constitutional Liability for Construction.

(1) *General Rule.* A governmental agency is liable where the improvement is negligently or improperly designed or constructed, on the theory that the injury is a taking or damaging for public use without compensation under Cal. Const., Art. I, §19. (*House v. Los Angeles County Flood Control Dist.* (1944) 25 C.2d 384, 391, 153 P.2d 950; *Clement v. State Reclamation Bd.* (1950) 35 C.2d 628, 637, 220 P.2d 897, *infra*, §971.) Numerous cases have construed this rule, including the following:

Bauer v. Ventura (1955) 45 C.2d 276, 286, 289 P.2d 1 [embankment raised and obstruction placed causing waters to back up in direction opposite from natural flow].

Youngblood v. Los Angeles County Flood Control Dist. (1961) 56 C.2d 603, 606, 15 C.R. 904, 364 P.2d 840 [uncompleted revetment caused debris to accumulate, and water then eroded plaintiff's property].

Belair v. Riverside County Flood Control Dist. (1988) 47 C.3d 550, 253 C.R. 693, 764 P.2d 1070, 8 Summary (10th), *Constitutional Law*, §1146.

Locklin v. Lafayette (1994) 7 C.4th 327, 356, 27 C.R.2d 613, 867 P.2d 724, *supra*, §965 [stating rule of conditional privilege applicable to liability in inverse condemnation for damage caused by discharge of surface waters into natural watercourse].

Ward Concrete Products Co. v. Los Angeles County Flood Control Dist. (1957) 149 C.A.2d 840, 847, 309 P.2d 546 [metal grill over drain, to strain debris, clogged and discharged water over plaintiff's land].

Amador Valley Investors v. Livermore (1974) 43 C.A.3d 483, 491, 117 C.R. 749 [water project resulting in continued discharge of sewage water in unreasonable manner].

Yee v. Sausalito (1983) 141 C.A.3d 917, 190 C.R. 595, 8 Summary (10th), *Constitutional Law*, §1147.

Bunch v. Coachella Valley Water Dist. (1989) 214 C.A.3d 203, 262 C.R. 513, 8 Summary (10th), *Constitutional Law*, §1146.

Odello Bros. v. Monterey (1998) 63 C.A.4th 778, 790, 73 C.R.2d 903, 8 Summary (10th), *Constitutional Law*, §1139 [emergency exception to inverse condemnation liability did not apply to county's decision to intentionally breach flood levee and flood plaintiffs' property, even though there was immediate threat of flooding on date of decision].

(2) *Strict Liability Rejected*. The inverse condemnation liability formerly extended to situations in which no negligence was involved. Any injury to property proximately caused by the improvement was compensable whether foreseeable or not. (See *Sheffet v. Los Angeles* (1970) 3 C.A.3d 720, 732, 735, 84 C.R. 11 [applying rule of *Albers v. Los Angeles* (1965) 62 C.2d 250, 263, 42 C.R. 89, 398 P.2d 129, 8 Summary (10th), *Constitutional Law*, §1134, to obstruction of surface waters].)

"Reasonableness," rather than strict liability, is now the proper standard to assess liability of a public entity for damage caused when, as part of flood control improvements along a natural watercourse, the entity diverts and rechannels water and its diversion efforts later fail. (*Bunch v. Coachella Valley Water Dist.* (1997) 15 C.4th 432, 436, 63 C.R.2d 89, 935 P.2d 796 (*Bunch II*).)

In *Bunch II*, defendant water district had constructed a system of dikes and levees to divert floodwaters. A severe tropical storm caused the system to fail, resulting in property damage to plaintiffs' apartment building. Plaintiffs filed an inverse condemnation action against defendant, and the trial judge, applying then traditional standards of inverse condemnation, concluded that defendant was strictly liable for the property damage without regard to the reasonableness of its flood control measures. A jury awarded damages to plaintiffs. While the award was on appeal, the Supreme Court decided *Belair*, which held that "when a public flood control improvement fails to function as intended, and properties historically subject to flooding are damaged as a proximate result thereof, plaintiff's recovery in inverse condemnation requires proof that the failure was attributable to some unreasonable conduct" by the public entity. In light of *Belair*, the Court of Appeal ordered a second trial limited to whether the flood control design, construction, and maintenance had been reasonable. The trial judge ruled that defendant had acted reasonably, and the Court of Appeal affirmed. *Held*, affirmed.

(a) In *Locklin v. Lafayette* (1994) 7 C.4th 327, 27 C.R.2d 613, 867 P.2d 724, supra, §965, the reasonableness rule of *Belair* was more broadly applied to cases in which a public entity deliberately drains excess surface water into a natural watercourse, eventually causing damage to downstream property. (15 C.4th 444.) *Locklin* identified the following "balancing" factors to be used in assessing public entity liability: "(1) The overall public purpose being served by the improvement project; (2) the degree to which the plaintiff's loss is offset by reciprocal benefits; (3) the availability to the public entity of feasible alternatives with lower risks; (4) the severity of the plaintiff's damage in relation to risk-bearing capabilities; (5) the extent to which damage of the kind the plaintiff sustained is generally considered as a normal risk of land ownership; and (6) the degree to which similar damage is distributed at large over other beneficiaries of the project or is peculiar only to the plaintiff." (15 C.4th 446.)

(b) The *Locklin* balancing rule is equally applicable to cases in which a public entity diverts and rechannels water under a flood control system that later fails and causes damage to properties historically subject to flooding. The rule is not limited to conduct that would have been immune from liability under the common enemy doctrine (see supra, §966). (15 C.4th 447.) Compensation "should rest not on antiquated notions of fault, or common law labels defining the type of waters requiring flood control measures, but rather on the balancing of interests that [Cal. Const., Art. I, §19] requires." (15 C.4th 451.)

(c) Here, the record supports the trial judge's conclusion that defendant acted reasonably and promptly in repairing past damage to its flood control system, in undertaking a more permanent flood control plan, and in attempting to provide the Coachella Valley with effective flood control. (15 C.4th 452, 453.)

The holding in *Bunch II* was applied to one set of plaintiffs and limited as to another set in *Akins v. California* (1998) 61 C.A.4th 1, 71 C.R.2d 314. Plaintiffs' properties were damaged by flooding during heavy storms, prompting them to sue the state, a reclamation district, and a flood control district for inverse condemnation. One set of plaintiffs,

who owned properties in an area known as Strawberry Manor, alleged that defendants failed to have a flood watch plan to close a gap built into a levee, thereby causing a failure in the system designed to protect plaintiffs' properties. The other plaintiffs alleged that flood control works that were designed to protect lower lying lands created a hydraulic dam and backwater effect that caused flooding of plaintiffs' upper lying lands. The trial court found defendants liable to both sets of plaintiffs. *Held*, reversed and remanded for further factual findings.

(a) *Liability to plaintiffs with properties outside of Strawberry Manor*. The reasonable conduct standard of *Belair* and *Bunch II* does not apply to intentional diversions to property not historically subject to flooding. "Using private property not historically subject to flooding as a retention basin to provide flood protection to other property exacts from those owners whose properties are flooded a contribution in excess of their proper share to the public undertaking. We see no reason to put such property owners to the task of proving the governmental entities acted unreasonably in order for the owners to recover in inverse condemnation." (61 C.A.4th 29.) The trial court already correctly determined that the diversion here was intentional. (61 C.A.4th 40.) On remand, the trial court must determine whether plaintiffs' properties were historically subject to flooding. If they were not, the reasonableness standard does not apply and the trial court's original finding of liability is sustainable. If they were, then plaintiffs must show that defendants' conduct was unreasonable under the factors listed in *Locklin* and *Bunch II*. (61 C.A.4th 34.)

(b) *Liability to Strawberry Manor plaintiffs*. All parties agree that the *Belair* reasonableness standard applies to these plaintiffs; their properties flooded when a flood control system designed to protect them failed. However, because *Locklin* was decided after the trial court's decision here, the trial court did not apply the *Locklin* factors. (61 C.A.4th 42.) Remand is necessary for that purpose. (61 C.A.4th 43.) (See *Paterno v. California* (1999) 74 C.A.4th 68, 81, 87 C.R.2d 754 [remand necessary so that trial court can apply *Locklin* factors before imposing takings liability for damage from failure of levee that was part of flood control project; citing *Akins*]; *Paterno v. California* (2003) 113 C.A.4th 998, 1023, 6 C.R.3d 854, 8 Summary (10th), *Constitutional Law*, §1146 [applying *Locklin* factors on appeal; state was liable for damages caused by flooding after levee broke].)

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c. Tort Liability for Negligent Maintenance.

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[§ 970] Tort Liability for Negligent Maintenance.

In *Hayashi v. Alameda County Flood Control & Water Conservation Dist.* (1959) 167 C.A.2d 584, 334 P.2d 1048, plaintiffs, operators of a greenhouse, alleged that defendant district's levee broke and debris obstructed the stream, endangering their property, but that, despite repeated warnings, no repairs were made, and water discharged on their land caused extensive damage. *Held*, a cause of action was stated. (a) There was no constitutional liability (*supra*, §969), because there was no negligent design or construction or deliberate diversion. (b) The defendant was negligent, however, in the operation and maintenance of the structure. After notice of disrepair, it had an affirmative duty to act to maintain it, in the same manner as a private landowner (*Rest.2d, Torts* §365). (167 C.A.2d 587, 591.) (See *Granone v. Los Angeles* (1965) 231 C.A.2d 629, 648, 42 C.R. 34; 20 A.L.R.3d 1294 [liability of water distributor for damage caused by water escaping from main]; *Van Zyl v. Spiegelberg* (1969) 2 C.A.3d 367, 375, 82 C.R. 689 [installation of driveway obstructing channel; failure to keep drainpipe free of debris]; 42 Proof of Facts 3d 289 [government's liability for failure to maintain wastewater sewage lines]; 6 *Summary* (10th), *Torts*, §1088.)

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d. Change in Permanent Artificial Condition.

12 Witkin Sum. Cal. Law Real Property § 971

[§ 971] Change in Permanent Artificial Condition.

"Where the creator of the artificial condition intended it to be *permanent*, and a community of landowners or water users has been allowed to adjust itself to the presence and existence of the artificial watercourse or other artificial condition, acting upon the supposition of its continuance, and this has proceeded for a long time beyond the prescriptive period, the new condition will be regarded as though it were a natural one, its artificial origin being then disregarded by the law as it has been by the community." (*Clement v. State Reclamation Bd. (1950) 35 C.2d 628, 638, 220 P.2d 897.*)

In *Natural Soda Products Co. v. Los Angeles (1943) 23 C.2d 193, 143 P.2d 12*, defendant city built a dam and diverted water from a river, drying up a lake bed. Plaintiff acquired mineral rights and built and operated a plant to remove soda products therefrom. Many years later the city released surplus water into the lake, damaging its chemical content and flooding the plant. *Held*, damages were recoverable. Plaintiff had made substantial expenditures in reliance on the apparently permanent diversion, and was entitled to as much protection as if the condition were natural. Defendant could have disposed of its excess water by a different means. (*23 C.2d 198.*)

In *Clement*, levees had been constructed by the original owners, beginning in 1870. Defendants made improvements in the levee systems as flood control measures, including cuts that filled plaintiff's farm with silt. The trial judge's instructions were framed on the theory that defendants were not liable for any overflow above the old natural stream as it existed prior to the first levees, because the overflow came within the common enemy floodwaters rule (*supra*, §966). *Held*, judgment for defendants reversed. On a proper showing plaintiff would be entitled to recover on the constitutional governmental liability (*supra*, §969).

(a) "In view of the long continued maintenance of the levees, together with the expenditure of substantial sums in farm investments in reliance thereon, the levees came to be the natural banks." The waters they contained "must be regarded as natural stream waters that cannot be diverted onto the lands of another to his detriment without liability." (*35 C.2d 638.*)

(b) *Weinberg Co. v. Bixby (1921) 185 C. 87, 196 P. 25*, is distinguishable. There a 10-year-old dike, inadequate and a hazard, was cut by defendants to protect their lands from inundation, and the court held that there was no duty to maintain it and hence no actionable wrong in reopening the old outlet. "It is clear that a landowner is not deprived of the

protection of the common enemy doctrine by its failure to maintain a faulty and insecure barrier in the construction of protective levees. It does not follow, however, that there is no duty not to destroy the barrier when it has proved substantially secure, has been maintained for more than 60 years, and substantial sums have been expended in reliance upon its continued maintenance." (35 C.2d 639.)

(c) Plaintiff is entitled to recover "for whatever damage to his land is attributable to defendants' lowering of the levee and diversion of the natural stream waters into an artificial channel, but cannot recover for any damage caused by flood waters against which he had the duty of self-protection, even though the velocity of those waters and their carrying capacity were increased by the construction of the flood control project." (35 C.2d 642; citing *Archer v. Los Angeles* (1941) 19 C.2d 19, 119 P.2d 1, supra, §968.)

In *Martinson v. Hughey* (1988) 199 C.A.3d 318, 244 C.R. 795, defendant lower owner obstructed the flow of surface and irrigation tail water from plaintiff upper owners' improved drainage ditch into a similar ditch on defendant's land. The trial court, applying the rule of reasonable use developed in *Keys v. Romley* (1966) 64 C.2d 396, 50 C.R. 273, 412 P.2d 529, supra, §963, enjoined defendant from obstructing the ditch and awarded plaintiffs damages. *Held*, affirmed.

(a) "[T]he upper owner has the right to discharge reasonable and noninjurious amounts of irrigation water through natural areas of flow onto the lower owner's property. The lower owner has a co-equal burden to receive reasonable and noninjurious amounts of irrigation water through natural flowage channels. ... [T]he construction of artificial drainage systems by the upper owner may increase the velocity though not the volume of discharge." (199 C.A.3d 328.)

(b) In this case defendant and his predecessors had blocked a natural watercourse with a berm and built a compensating ditch to receive waters flowing from above, and it was inferable that plaintiffs had developed their properties in reliance on the existence of these features. (199 C.A.3d 329.) Thus, the appropriate rule was that a permanent artificial watercourse relied on by adjoining landowners for a substantial period is regarded as though it were a natural condition. (199 C.A.3d 330.) (See *Locklin v. Lafayette* (1994) 7 C.4th 327, 356, 27 C.R.2d 613, 867 P.2d 724, supra, §965 [citing *Martinson* with approval, and adopting broad application of rule of reasonable use].)

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4. Seawall or Breakwater.

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[§ 972] Seawall or Breakwater.

The common enemy rule on floodwaters (*supra*, §966) applies also to inroads from the sea. A littoral owner may build a groin or sea wall for protection. The littoral owner cannot do so, however, for the purpose of improving his or her property by causing a beach to form by accretion, to the injury of another owner. (*Katenkamp v. Union Realty Co.* (1936) 6 C.2d 765, 774, 59 P.2d 473; *Katenkamp v. Union Realty Co.* (1940) 36 C.A.2d 602, 98 P.2d 239.)

However, a distinction has been drawn between private and public improvement. In *Miramar Co. v. Santa Barbara* (1943) 23 C.2d 170, 143 P.2d 1, defendant city, for the improvement of navigation, built a breakwater on its tidelands. As a result of the change in currents, plaintiff's beach, 3 miles away, was denuded of sand, and its beach resort ruined. *Held*, this was neither a taking nor damaging of property within the meaning of the California constitutional provision on eminent domain, and no compensation could be recovered. The littoral owner has a right against a private party to the uninterrupted flow of sand by ocean currents, but no similar right against a state or city exercising the paramount power to improve tidelands in aid of navigation. The state may, in the exercise of that power, bar access to the water from the land, and it is equally free to make an improvement that merely checks the flow of sand to the land. (23 C.2d 173.)

SUPPLEMENT: [This section is current through the latest supplement]