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Witkin Summary of California Law, Tenth Edition
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CHAPTER XVIII - Personal Property

Witkin Summary of California Law
I. INTRODUCTION.
A. Nature of Property and Ownership.
1. Ownership.
a. General Meaning.

13 Witkin Sum. Cal. Law Pers Prop § 1

[§ 1] General Meaning.

"The *ownership* of a thing is the right of one or more persons to possess and use it to the *exclusion* of others. In this Code, the thing of which there may be ownership is called *property*." (C.C. 654; see 12 *Summary* (10th), *Real Property*, §3.) "There may be ownership of all inanimate things which are capable of *appropriation* or of *manual delivery*; of all domestic animals; of all obligations; of such products of labor or skill as the composition of an author, the good-will of a business, trade-marks and signs, and of rights created or granted by statute." (C.C. 655; see 43 *U.C.L.A. L. Rev.* 1659 [right to individuality as justification for property rights in DNA]; 63 *C Am.Jur.2d* (1997 ed.), *Property* §26; *infra*, §46 et seq.; on goodwill, see *B. & P.C. 14102, 14260*; *Smith v. Bull* (1958) 50 *C.2d* 294, 302, 325 *P.2d* 463 [personal service organization]; 8 *Stanf. L. Rev.* 486; 38 *Am.Jur.2d* (1999 ed.), *Good Will* §1 et seq.)

Certain things are not the subject of actual or lawful ownership, and are ordinarily not considered property. Thus, there is no ownership of *oil and gas* in the land, prior to bringing it to the surface by drilling (see 12 *Summary* (10th), *Real Property*, §791); nor of *water* in a stream or other body of water (see 12 *Summary* (10th), *Real Property*, §917). (On clouds and rain, see 12 *Summary* (10th), *Real Property*, §916.)

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

B. & P.C. 14260 was repealed in 2007. On goodwill, see *B. & P.C. 14220(a)*, added in 2007.



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b. Special Meanings.

13 Witkin Sum. Cal. Law Pers Prop § 2

[§ 2] Special Meanings.

The terms "ownership" and "owner" are frequently applied, particularly in tax statutes, to interests not amounting to complete legal title. Thus:

(1) Persons in legal *possession* of personal property, such as conditional buyers or lessees, may be deemed owners, and taxes may be assessed to them. (See *San Diego v. Davis* (1934) 1 C.2d 145, 147, 33 P.2d 827; *RCA Photophone v. Huffman* (1935) 5 C.A.2d 401, 404, 42 P.2d 1059; *Johnson v. Los Angeles* (1939) 31 C.A.2d 579, 583, 88 P.2d 725; cf. *Douglas Aircraft Co. v. Byram* (1943) 57 C.A.2d 311, 316, 134 P.2d 15 [where airplanes and spare parts were made under federal Government contract providing for vesting of title in Government for property as to which progress payments were made, material and parts for which those payments were made became federal Government's property and were immune from taxation by county, even though they remained in possession of manufacturer]; and see 9 *Summary* (10th), *Taxation*, §202.)

(2) A *mortgagee* may be an "owner" within the meaning of a condemnation statute or a tax redemption statute. (See *Pacific Coast Joint Stock Land Bank of San Francisco v. Roberts* (1940) 16 C.2d 800, 805, 108 P.2d 439 [holding, however, that mortgagee did not come within provision in emergency legislation extending time for *landowners* to redeem delinquent lands].)

(3) A distinction is made in the Vehicle Code between "owner" and "legal owner." (See 4 *Summary* (10th), *Sales*, §235.)

(4) "Owner" is defined broadly for the purpose of the requirement of recording notice of completion or cessation of labor under the mechanic's lien statutes. (See C.C. 3092, 3093.)

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



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13 Witkin Sum. Cal. Law Pers Prop § 3

[§ 3] General Meaning.

In *Yuba River Power Co. v. Nevada Irr. Dist.* (1929) 207 C. 521, 279 P. 128, the court held that an applicant for a permit to appropriate water could protect his priority against adverse claims by a suit to *quiet title* under former C.C.P. 738, and approved the following definition of "property" as used in that statute: "The term 'property' is sufficiently comprehensive to include every species of estate, real and personal, and everything which one person can own and transfer to another. It extends to every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value. As applied to lands the term comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which lie in contract--those which are executory as well as those which are executed." (207 C. 523.) (See *Ponsonby v. Sacramento Suburban Fruit Lands Co.* (1930) 210 C. 229, 232, 291 P. 167; *Golden v. California* (1955) 133 C.A.2d 640, 644, 285 P.2d 49 [liquor license held property within broad statutory definition]; cf. *Douglas Aircraft Co. v. Byram* (1943) 57 C.A.2d 311, 317, 134 P.2d 15 ["[a] common characteristic of a property right, is that it may be disposed of, transferred to another ... that characteristic is lacking in plaintiff's possessory interest"]; see also *United States v. General Motors Corp.* (1945) 323 U.S. 373, 65 S.Ct. 357, 359, 89 L.Ed. 311, 359 [meaning of property under 5th Amendment in eminent domain proceeding]; *Estate of Glassford* (1952) 114 C.A.2d 181, 189, 249 P.2d 908 [similarity in meaning of "property" and "estate" when used in probate statutes and proceedings]; 117 Harv. L. Rev. 2055 [personal information as property]; 37 U.C. Davis L. Rev. 379 [same]; 43 U.C.L.A. L. Rev. 711 ["bundle of rights" definition of property]; on literary property, inventions, trademarks, and trade names, see *infra*, §46 et seq.; on equitable servitudes in chattels, see *infra*, §29; on real and personal property, see *infra*, §90 et seq.)

A thing may be "property" where its *intrinsic value* is nominal or where it is of value only to the owner and has no exchange or market value. (See *Hector v. Superior Court* (1936) 15 C.A.2d 552, 554, 59 P.2d 591 ["an old letter, a faded photograph, or a lock of hair" may be property of one who cherishes them]; *People v. Leyvas* (1946) 73 C.A.2d 863, 866, 167 P.2d 770 [gas ration stamps, being evidence of permission to buy rationed commodity, have some intrinsic value, and may be the subject of larceny or robbery].) And a *cause of action*, whether in contract or tort, is property. (See *Estate of Waits* (1944) 23 C.2d 676, 678, 146 P.2d 5; *Haro v. Southern Pac. R. Co.* (1936) 17 C.A.2d 594, 597, 62 P.2d 441; *Finley v. Winkler* (1950) 99 C.A.2d Supp. 887, 890, 222 P.2d 345; *In re Marriage of Biddle* (1997) 52 C.A.4th 396, 398, 60 C.R.2d 569, citing the text [husband's *qui tam* action, prosecuted on behalf of the United

States, was community property].)

Biological materials present special problems. (See 24 *Hastings Const. L. Q.* 1015 [inadequacy of property law to resolve custody disputes following unauthorized transfer of embryos]; 32 *San Diego L. Rev.* 1167 [examining difficulties of characterizing human biological materials as property]; 39 *Santa Clara L. Rev.* 79 [effect on parental rights of property rights in human reproductive materials]; on Uniform Anatomical Gift Act, see *infra*, §6 et seq.)

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



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13 Witkin Sum. Cal. Law Pers Prop § 4

[§ 4] Special Meanings.

Although the term "property" may include anything that is the subject of ownership (see *supra*, §3), it may be interpreted broadly or narrowly in particular statutes.

Thus, in *Hunt v. Authier* (1946) 28 C.2d 288, 169 P.2d 913, the court construed former Prob.C. 574, which gave the plaintiff a right of action against the executor or administrator of a decedent who, in his lifetime, had been guilty of waste, destruction, or conversion of "the property" of the plaintiff. The section originally referred to "goods or chattels," and it was held that by the substitution of the broader term "property," the Legislature had authorized the bringing of a tort action for damages for wrongful death against the executor or administrator, thus abolishing the former rule that death of the tortfeasor abated the cause of action. The court said: "That change clearly indicates an intent to place no restrictions or limitations on the types of property for the injury to which compensation may be recovered from the estate of the wrongdoer, and to make no distinction as to the method by which such destruction or injury is effected." (28 C.2d 295.) And further (after referring to the cases holding that damage resulting from fraud and deceit is an injury to property), the court declared: "Injuries suffered by the plaintiffs by the lessening of their estate and the invasion and deprivation of their pecuniary interest and right to future support from their decedent by the commission of the wrongful act is as much a destruction of or injury to property as was involved in the foregoing cases." (28 C.2d 296.) (For discussion of this theory and of legislative modernization of survival statutes, see 5 *Summary* (10th), *Torts*, §23 et seq.; 3 *Cal. Proc.* (4th), *Actions*, §64 et seq.)

On the other hand, in *Bogan v. Wiley* (1949) 90 C.A.2d 288, 293, 202 P.2d 824, the term was held, by its context, to be limited to tangible property. (On meaning of "property" in tax laws, see Rev.C. 103; 9 *Summary* (10th), *Taxation*, §163 et seq.; on privacy as intellectual property, see 52 *Stanf. L. Rev.* 1125, 1201; on data privacy as property right, see 52 *Stanf. L. Rev.* 1283; 34 *U.S.F. L. Rev.* 633; on cyberspace as "place" or property, see 91 *Cal. L. Rev.* 439, 521.)

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

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §12 et seq.



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B. Limitations on Ownership.

1. Dead Body.

a. Remains To Be Buried.

13 Witkin Sum. Cal. Law Pers Prop § 5

[§ 5] Remains To Be Buried.

(1) *Burial Obligation and Protection From Desecration.* Although there is no property right in a dead body, there is an obligation of burial. That obligation rests first on an agent under a power of attorney for health care who has the right and duty of disposition under *Prob.C. 4600* et seq. (infra, this section), and then on the next of kin. (*Health & Saf.C. 7100(a)*.) The courts will enforce the right of disposition and protect against the body's mutilation or desecration. (See *Enos v. Snyder* (1900) 131 C. 68, 72, 63 P. 170; *Cohen v. Groman Mortuary* (1964) 231 C.A.2d 1, 4, 41 C.R. 481, 6 Summary (10th), *Torts*, §1018; *Ross v. Forest Lawn Memorial Park* (1984) 153 C.A.3d 988, 994, 995, 203 C.R. 468, 1 Summary (10th), *Contracts*, §886 [right to dispose of decedent's remains under *Health & Saf.C. 7100* includes right to private burial services; action against cemetery for failure to keep promise to exclude unwanted guests]; *Walsh v. Caidin* (1991) 232 C.A.3d 159, 161, 283 C.R. 326 [wife had sole authority over disposition of husband's remains; thus, physician and medical corporation, defendants in wrongful death action, had no right to autopsy for civil discovery purposes]; *Estate of Jimenez* (1997) 56 C.A.4th 733, 740, 65 C.R.2d 710, 14 Summary (10th), *Wills and Probate*, §346 [right to dispose of body belongs to next of kin, not executor of decedent's estate]; 81 A.L.R.3d 1071 [statutes making it criminal offense to mistreat or wrongfully dispose of dead body]; 42 A.L.R.4th 1059 [liability of cemetery in connection with conducting or supervising burial services]; 53 A.L.R.4th 360 [liability of undertaker in connection with transportation, burial, or safeguarding of body]; 53 A.L.R.4th 394 [liability for improper reinterment]; 77 A.L.R.4th 108 [liability for desecration of graves and tombstones]; 86 A.L.R.5th 693 [hospital's civil liability for negligent handling, transportation, and disposition of corpse]; 97 A.L.R.5th 419 [civil liability for failure to perform, delay of, or negligence or other misconduct in performing, autopsy]; 15 Proof of Facts 3d 53 [liability of funeral director]; 28 Proof of Facts 3d 319 [proof of cemetery's liability in interring body]; 22A Am.Jur.2d (1988 ed.), *Dead Bodies* §§4, 35 et seq.; for arguments in favor of property rights, see 34 U.C.L.A. L. Rev. 207 [Recognizing Property Rights in the Commercial Value of Human Tissue]; 70 So. Cal. L. Rev. 805 [property rights in ancient human skeletal remains]; on identification and repatriation of human remains and cultural items to Native American tribes, see *Health & Saf.C. 8010* et seq.)

Protection of the body from desecration or mutilation is the principle underlying damages actions for unauthorized autopsies. (See *Gray v. Southern Pac. Co.* (1937) 21 C.A.2d 240, 246, 68 P.2d 1011; 22A Am.Jur.2d (1988 ed.), *Dead Bodies* §64 et seq.; cf. *Rest.2d, Torts* §868 [tort action].) (On liability for withholding corpse from relatives, see 48 A.L.R.3d 240.)

An action may be brought for tortious interference with the right to dispose of a decedent's remains, not only against a mortician or cemetery, but against a close relative who interferes with the right. (*Sinai Temple v. Kaplan* (1976) 54 C.A.3d 1103, 1110, 127 C.R. 80, 5 Summary (10th), *Torts*, §460.)

(2) *Testamentary Directions*. A limited kind of proprietary right is recognized in a person's own body, so that a testator may give valid and controlling directions as to burial or other disposal thereof, which prevail over the wishes of the next of kin. (*Health & Saf.C. 7100, 7100.1*; see *Estate of Henderson* (1936) 13 C.A.2d 449, 455, 57 P.2d 212 [distinguishing and limiting *Enos v. Snyder*, supra]; 7 A.L.R.3d 747 [validity and effect of testator's directions]; on procedures for decedent, prior to death, to direct disposition of remains, see 14 Summary (10th), *Wills and Probate*, §172; on permissible dispositions of cremated remains, see *Health & Saf.C. 7054.1, 7054.6, 7054.7, 7117, 103060*; 4 *Pacific L. J.* 683; 17 *Pacific L. J.* 743.)

(3) *Duty and Liabilities of Health Care Agent*. If the deceased executed a power of attorney for health care granting an agent the right and duty of disposition under *Prob.C. 4600* et seq., that right vests first in the named agent. (*Health & Saf.C. 7100(a)*.) The agent is liable for the costs of disposition only if the agent specifically agrees to pay them. (*Health & Saf.C. 7100(a)(1)(A)*.) Without a specific agreement, the agent is liable only for the reasonable costs incurred because of decisions concerning disposition made by the agent, to the extent that the decedent's estate or other appropriate fund is insufficient. (*Health & Saf.C. 7100(a)(1)(B)*); on designation of agent for health care decisions, see 14 Summary (10th), *Wills and Probate*, §884.)

West's Key Number Digest, Dead Bodies k.2 et seq.

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

(1) *Burial Obligation and Protection From Desecration*. See *Maffei v. Woodlawn Memorial Park* (2005) 130 C.A.4th 119, 127, 29 C.R.3d 679 [trial court did not abuse its discretion in denying surviving spouse's petition under *Health & Saf.C. 7526* to disinter his wife's remains; trial court properly considered wishes of deceased, rights and feelings of deceased's brother, who owned crypt in which deceased wife was interred, surviving spouse's original consent to interment, and surviving spouse's delay in waiting 20 years to seek disinterment]; *Bennett v. Regents of Univ. of Calif.* (2005) 133 C.A.4th 347, 355, 34 C.R.3d 579 [university did not violate *Health & Saf.C. 7054.7*, which requires individual cremations, by cremating multiple donated cadavers at one time; *Health & Saf.C. 7054.4* exempts willed body remains from individual cremation requirement, and donors had no expectations of individual burial]; *Melican v. Regents of Univ. of Calif.* (2007) 151 C.A.4th 168, 180, 59 C.R.3d 672 [university did not have duty to ensure that no commingling of cremains had occurred before returning cremains to donor's family; citing *Bennett*].



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b. Uniform Anatomical Gift Act.

1. In General.

aa. Nature and Purpose.

13 Witkin Sum. Cal. Law Pers Prop § 6

[§ 6] Nature and Purpose.

The Uniform Anatomical Gift Act of 1987 was adopted in California in 1988 with modifications and additions as *Health & Saf.C. 7150* et seq. It replaced a previous version of the Uniform Act that had been in force in California since 1968. The present Uniform Act was a response to (1) an increased demand for organs caused by advances in immunosuppressive drugs and in surgical techniques, and (2) an insufficient number of organ donations under the 1968 Act. Among the problems hindering organ donations were: failure of persons to sign written directives; failure of emergency personnel to locate written directives at accident sites; failure of medical personnel to recover organs on the basis of written directives; failure to approach family members concerning donations; and high wastage rates resulting from failure to efficiently place donated organs. In addition, amendments to the 1968 Act by individual states had eroded uniformity, leading to problems when the place of death or the place of use of the gift was not the state where the gift was executed. Thus, the Act was revised to simplify the manner of making a gift, and to require that the intentions of a donor be followed. For example, the identification of actual donors is facilitated by a duty to search for a document of gift (see *infra*, §17). (Prefatory Note to 1987 Act, 8A U.L.A. (Master Ed.), p. 6.)

The Act applies to a document of gift, revocation, or refusal to make a gift signed by the donor or authorized person, whether before, on, or after the effective date of the Act (January 1, 1989). (*Health & Saf.C. 7156*.) The Act is to be applied and construed so as to effectuate uniformity among the states with respect to anatomical gifts. (*Health & Saf.C. 7156.5*.) (See 39 *Hastings L. J.* 1079 [fetal tissue transplants]; 22 *Southwestern U. L. Rev.* 399 [organ transplants]; 55 *Stanf. L. Rev.* 2113 [four approaches to law and to allocation of body parts]; 43 *U.C.L.A. L. Rev.* 159 [legal and ethical considerations of transplanting fetal reproductive organs].)

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

The Uniform Anatomical Gift Act (*Health & Saf.C. 7150* et seq.) was repealed and replaced in 2007.

See 6 *A.L.R.6th* 365 [validity and application of Uniform Anatomical Gift Act]. *Applicability and construction:* *Health & Saf.C. 7156* and *7156.5* were repealed in 2007. The new Act applies to an anatomical gift or amendment to, revocation of, or refusal to make an anatomical gift, whenever made. (*Health & Saf.C. 7150.10(b)*, added in 2007.) The

Act is to be construed in light of the need to promote uniformity among the states that enact it with respect to anatomical gifts. (*Health & Saf.C. 7151.25*, added in 2007.)



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bb. Powers and Duties of Coroner.

13 Witkin Sum. Cal. Law Pers Prop § 7

[§ 7] Powers and Duties of Coroner.

A coroner may assist in implementation of the Act, in identifying donors, and in informing a deceased person's next of kin of their option to donate. (*Govt.C. 27491.44.*) In addition, a coroner may allow removal of body parts by a licensed physician and surgeon or trained transplant technician under the following conditions:

(1) The provision of the part will not unnecessarily mutilate the body or interfere with the autopsy. (*Govt.C. 27491.45(b)(1).*)

(2) The decedent or other person specified in *Health & Saf.C. 7151* (infra, §12) must consent to the provision of the body part, as prescribed in *Health & Saf.C. 7154*, or, after a reasonable effort has been made to locate and inform persons listed in *Health & Saf.C. 7151(a)* of their option to consent or object to the release, the appropriate person must consent, or the reasonable effort to locate and inform appropriate persons must have been unsuccessful. A search for the persons that has been underway for at least 12 hours is deemed a reasonable effort. The search must include a check of local police missing persons records, examination of personal effects, and the questioning of any persons visiting the decedent before his or her death or in the hospital, accompanying the decedent's body, or reporting the death, in order to obtain information that might lead to the location of persons listed in *Health & Saf.C. 7151(a)*. In obtaining this gift, the coroner must notify the donor of the specific part or parts requested and must obtain the donor's informed consent, as provided in *Health & Saf.C. 7150.5* or *7151*. (*Govt.C. 27491.45(b)(2).*)

(3) The coroner's authority is subject to the limitations of *Health & Saf.C. 7152* (infra, §12). (*Govt.C. 27491.45(c).*)

If the coroner knows or has reason to believe that the deceased has made a gift of his or her body or parts in accordance with the Anatomical Gift Act, the coroner must attempt to notify the physician last in attendance or surviving close relatives of the need for an autopsy. (*Govt.C. 27491.4(b).*)

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

The Uniform Anatomical Gift Act (*Health & Saf.C. 7150* et seq.) was repealed and replaced in 2007. *Govt.C. 27491.45*

has not yet been amended to refer to the appropriate section numbers in the new Act.



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cc. Removal of Organs Before Inquest or Autopsy.

13 Witkin Sum. Cal. Law Pers Prop § 8

[§ 8] Removal of Organs Before Inquest or Autopsy.

On request from a qualified procurement organization, the county medical examiner or coroner may permit the removal of organs that constitute an anatomical gift from a decedent who died under circumstances requiring an inquest. (*Health & Saf.C. 7155.7(a).*) If no autopsy is required, the organs to be removed may be released to the qualified procurement organization. (*Health & Saf.C. 7155.7(b).*) If an autopsy is required and the county medical examiner or coroner determines that the removal of the organs will not interfere with the subsequent course of an investigation or autopsy, the organs may be released for removal. The autopsy must be performed following the removal of the organs. (*Health & Saf.C. 7155.7(c).*)

Except in cases where there is no known next of kin or when a person dies in the custody of a law enforcement agency, if the medical examiner or coroner is considering withholding a potential donor's organs, the medical examiner or coroner, or a designee, on request from a qualified organ procurement organization, must be present during the procedure to remove the organs. The medical examiner, coroner, or designee may request a biopsy of the organs or deny their removal. (*Health & Saf.C. 7155.7(d).*) In specified cases, the qualified procurement organization requesting the removal of the organs must reimburse the county for the actual costs incurred in performing the duty described in *Health & Saf.C. 7155.7(d).* (*Health & Saf.C. 7155.7(e).*) *Health & Saf.C. 7155.7* will be repealed on January 1, 2006. (*Health & Saf.C. 7155.7(g).*)

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

The Uniform Anatomical Gift Act (*Health & Saf.C. 7150 et seq.*) was repealed and replaced in 2007. *Health & Saf.C. 7155.7(a)*, (b), and (c) were replaced by *Health & Saf.C. 7151.20(a)*, (b), and (c), respectively, without substantive change. Those provisions now refer to a county coroner, but not to a county medical examiner.

Health & Saf.C. 7155.7(d) was replaced by *Health & Saf.C. 7151.20(d)*. The new section provides that if a county coroner is considering withholding one or more organs of a potential donor for any reason, the county coroner, or a designee, on request from a qualified organ procurement organization, must be present during the procedure to remove the organs. The county coroner or the designee may request a biopsy of those organs or deny removal of the organs if

necessary. If the county coroner or the designee denies removal of the organs, the county coroner may explain in writing the reasons for the denial in the investigative report or provide the explanation to the qualified organ procurement organization.

Health & Saf.C. 7155.7(e) was replaced by *Health & Saf.C. 7151.20(e)*, without substantive change.



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dd. Removal on Request From Hospital, Physician, or Procurement Organization.

13 Witkin Sum. Cal. Law Pers Prop § 9

[§ 9] Removal on Request From Hospital, Physician, or Procurement Organization.

Health & Saf.C. 7151.5 authorizes a coroner or medical examiner to release and permit removal for transplantation or therapy of a part from a body within the official's custody, provided that the following occur:

(1) The official has received a request for the part from a hospital, physician, procurement organization, or, in the case of a pacemaker, from a person who reconditions pacemakers.

(2) A reasonable effort has been made to locate and inform persons listed in *Health & Saf.C. 7151(a)* (infra, §12) of their option to make, or object to making, an anatomical gift. Except where the useful life of the part does not permit, a search for the persons that has been underway for at least 12 hours is deemed a reasonable effort. The search must include a check of local police missing persons records, examination of personal effects, and the questioning of persons who visited the decedent before his or her death or in the hospital, who accompanied the decedent's body, or who reported the death, in order to obtain information that might lead to the location of persons listed in *Health & Saf.C. 7151(a)*.

(3) The official does not know of a refusal or contrary indication by the decedent or other person listed in *Health & Saf.C. 7151(a)*.

(4) The removal will be by a physician, surgeon, technician, or enucleator.

(5) The removal will not interfere with an autopsy or investigation.

(6) The removal will comply with accepted medical standards.

(7) Cosmetic restoration will be done, if appropriate. (On similar authority of hospital or local public health officer to release and permit the removal of a body part, see *Health & Saf.C. 7151.5(b), (c)*.) (On special requirements concerning the removal and release of corneal material, see *Health & Saf.C. 7151.5(e)*.)

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

The Uniform Anatomical Gift Act (*Health & Saf.C. 7150 et seq.*) was repealed and replaced in 2007. *Health & Saf.C. 7151.5* was deleted. *Health & Saf.C. 7151.15(a)*, added in 2007, requires county coroners to cooperate with procurement organizations to maximize the opportunity to recover anatomical gifts for the purpose of transplantation, therapy, research, or education. A body part must not be removed from the body of a decedent under the coroner's jurisdiction for transplantation, therapy, research, or education, unless the part is the subject of an anatomical gift. The decedent's body must not be delivered to a person for research or education unless the body is the subject of an anatomical gift. (*Health & Saf.C. 7151.15(c)*, added in 2007.)

If a coroner receives notice from a procurement organization that an anatomical gift might be available or was made with respect to a decedent whose body is under the coroner's jurisdiction, and a postmortem examination is going to be performed, the coroner must conduct the examination in a manner and within a period compatible with the preservation of the body or the part for the purposes of the gift. (*Health & Saf.C. 7151.15(b)*, added in 2007.)

Health & Saf.C. 7151(a) was repealed in 2007. (See Supp., *infra*, §12.)



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ee. Removal of Tissue by Embalmer.

13 Witkin Sum. Cal. Law Pers Prop § 10

[§ 10] Removal of Tissue by Embalmer.

B. & P.C. 7634 authorizes a licensed embalmer, at the request of a licensed physician, to "remove tissue" from "human remains" for "transplant, or therapeutic, or scientific" purposes specified in and pursuant to the Anatomical Gift Act, if the embalmer completed an approved course in "tissue removal for transplant, or therapeutic, or scientific purposes."

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



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1. In General.

ff. Immunity From Tort Liability.

13 Witkin Sum. Cal. Law Pers Prop § 11

[§ 11] Immunity From Tort Liability.

A hospital, physician, surgeon, coroner, medical examiner, local public health officer, enucleator, technician, or other person acting in accordance with *Health & Saf.C. 7150* et seq. or with the applicable anatomical gift law of another state or foreign country, or attempting in good faith to do so, is not liable for that act in a civil action or criminal proceeding. (*Health & Saf.C. 7155.5(c)*.) An individual who makes an anatomical gift, and that individual's estate or heirs, are not liable for any injury, damage, or cost that may result from the gift. (*Health & Saf.C. 7155.5(d)*.)

A coroner or medical examiner who authorizes the removal of a body part or tissue under *Health & Saf.C. 7151.5*, or an entity acting on the coroner's or examiner's request, cannot incur civil liability, except as to someone who objected to the removal beforehand, and is not subject to criminal prosecution. (*Health & Saf.C. 7151.5(f)*.) (See 33 Southwestern U. L. Rev. 553 [advocating establishment of national set of educational standards for coroners or, alternatively, expansion of coroners' personal liability].)

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

The Uniform Anatomical Gift Act (*Health & Saf.C. 7150* et seq.) was repealed and replaced in 2007. *Health & Saf.C. 7155.5(c)* and (d) were replaced by *Health & Saf.C. 7150.80(a)* and (b), respectively. A person who acts in accordance with *Health & Saf.C. 7150* et seq. or with the applicable anatomical gift law of another state, or attempts in good faith to do so, is not liable for the act in a civil action or criminal prosecution. (*Health & Saf.C. 7150.80(a)*, added in 2007.) Neither the person making an anatomical gift nor the donor's estate is liable for any injury or damage that results from the making or use of the gift. (*Health & Saf.C. 7150.80(b)*, added in 2007.)

Health & Saf.C. 7151.5 was deleted in 2007.



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13 Witkin Sum. Cal. Law Pers Prop § 12

[§ 12] Donors.

(1) *Individual Donor.* An individual who is at least 15 years old may make an anatomical gift or a limited anatomical gift, or may refuse to make an anatomical gift. (*Health & Saf.C. 7150.5(a)*; see Com. Note, 8A U.L.A. (Master Ed.), p. 25.) If the individual is between 15 and 18 years of age, the written consent of a parent or guardian is required. (*Health & Saf.C. 7150.5(m)*.)

A valid donor card or statement of gift (see *infra*, §14) must be honored, and no consent or approval from the decedent's next of kin or any other person listed in *Health & Saf.C. 7151(a)* (*infra*, this section) is required. (*Health & Saf.C. 7150.5(l)*.) (See 24 *Pacific L. J.* 922.)

(2) *Other Persons.* *Health & Saf.C. 7151(a)* sets forth the order of priority of other persons authorized to make an anatomical gift in the absence of an unrevoked refusal on the part of the decedent: (a) the agent under a power of attorney for health care that expressly authorizes or does not limit the authority of the agent to make an anatomical gift; (b) the decedent's spouse; (c) the decedent's adult son or daughter; (d) either parent of the decedent; (e) the decedent's adult brother or sister; (f) a grandparent of the decedent; and (g) a guardian or conservator of the person of the decedent. (On power of attorney for health care, see 14 *Summary* (10th), *Wills and Probate*, §885.)

Only the individual himself or herself may make an anatomical gift *if it is made known* that the individual was a member of a religion, church, sect, or denomination that relies solely on prayer for healing of disease, or that has religious tenets that would be violated by the disposition of the human body or parts thereof for any of the purposes specified in the Act. (*Health & Saf.C. 7152*.)

(3) *Protocol for Identifying Donors.* *Health & Saf.C. 7184(a)* requires "each general acute care hospital" to develop a protocol for identifying potential organ and tissue donors. The protocol must include the following requirements:

(a) The deceased's next of kin or other individual specified in *Health & Saf.C. 7151*, *supra*, must be asked at or near the time of notification of death whether the deceased was an organ donor, or if the family is a donor family. If not, the family must be informed of the option to donate under the Act.

(b) With the approval of the designated next of kin or other individual, the hospital must notify an organ and tissue procurement organization and cooperate in the procurement of gifts.

(c) "Reasonable discretion and sensitivity" must be encouraged in all discussions concerning donations, and the deceased's religious beliefs or "obvious unsuitability" for donation must be taken into account.

As an alternative to the requirements of *Health & Saf.C. 7184(a)*, the protocol may provide for the hospital to contact an organ and tissue procurement organization, which would make the required inquiries instead of the hospital. (*Health & Saf.C. 7184(c)*.) (On requirement that hospitals consult with each other and with procurement organizations to coordinate procurement and use of human bodies and parts, see *Health & Saf.C. 7154.5*; 35 U.S.F. L. Rev. 751 [overview of organ allocation system; proposing quasi-national, need-based system of distribution].)

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

The Uniform Anatomical Gift Act (*Health & Saf.C. 7150 et seq.*) was repealed and replaced in 2007.

(1) *Individual Donor.* *Health & Saf.C. 7150.5* was repealed in 2007. Under the new law, an adult donor, during the donor's life, may make an anatomical gift of the donor's body or part for the purpose of transplantation, therapy, research, or education. (*Health & Saf.C. 7150.15(a)*, added in 2007.) An emancipated minor may do the same (*Health & Saf.C. 7150.15(a)(1)*, added in 2007), as may a minor between the ages of 15 and 18 who has the written consent of a parent or guardian (*Health & Saf.C. 7150.15(a)(2)*, added in 2007).

(2) *Other Persons.* *Health & Saf.C. 7151(a)* was repealed in 2007. Under the new law, an agent of the donor, during the donor's life, may make an anatomical gift of the donor's body or part for the purpose of transplantation, therapy, research, or education, as long as the power of attorney for health care or other record expressly permits the agent to make an anatomical gift. (*Health & Saf.C. 7150.15(b)*, added in 2007.)

An anatomical gift of a decedent's body or part for the purpose of transplantation, therapy, research, or education may be made by any member of the following classes of persons who is reasonably available, in the following order of priority:

(a) An agent of the decedent at the time of death who could have made an anatomical gift under *Health & Saf.C. 7150.15(b)* immediately before the decedent's death. (*Health & Saf.C. 7150.40(a)(1)*, added in 2007.)

(b) The spouse or domestic partner of the decedent. (*Health & Saf.C. 7150.40(a)(2)*, added in 2007.)

(c) Adult children of the decedent. (*Health & Saf.C. 7150.40(a)(3)*, added in 2007.)

(d) Parents of the decedent. (*Health & Saf.C. 7150.40(a)(4)*, added in 2007.)

(e) Adult siblings of the decedent. (*Health & Saf.C. 7150.40(a)(5)*, added in 2007.)

(f) Adult grandchildren of the decedent. (*Health & Saf.C. 7150.40(a)(6)*, added in 2007.)

(g) Grandparents of the decedent. (*Health & Saf.C. 7150.40(a)(7)*, added in 2007.)

(h) An adult who exhibited special care and concern for the decedent during the decedent's lifetime. (*Health & Saf.C. 7150.40(a)(8)*, added in 2007.)

(i) The persons who were acting as the guardians or conservators of the person of the decedent at the time of death. (*Health & Saf.C. 7150.40(a)(9)*, added in 2007.)

(j) Any other person having the authority to dispose of the decedent's body, including a coroner, medical examiner, or hospital administrator, provided that reasonable effort has been made to locate and inform the persons with higher

priority. (*Health & Saf.C. 7150.40(a)(10)*, added in 2007.)*Consultation requirement: Health & Saf.C. 7154.5* was repealed in 2007. Each hospital in California must enter into agreements or affiliations with procurement organizations for coordination of procurement and use of anatomical gifts. (*Health & Saf.C. 7150.70*, added in 2007.)



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13 Witkin Sum. Cal. Law Pers Prop § 13

[§ 13] Organ and Tissue Donor Registry.

In 2001, the Legislature established the Organ and Tissue Donor Registry, which was to contain information regarding persons who had identified themselves as organ and tissue donors on their death. The California Health and Human Services Agency or its designee was to be responsible for maintaining the registry and for developing methods to increase the number of donors who enrolled in the registry. (Former Health & Saf.C. 7152.7(a).) However, the registry was not to become operative until the Director of Finance determined that enough money had been collected in a registry fund to establish the registry and to operate it for the first year. (Former Health & Saf.C. 7152.7(d).)

In 2003, the Legislature, concerned that no operational registry yet existed in California, amended *Health & Saf.C. 7152.7*. Under the amended statute, California organ procurement organizations designated under 42 U.S.C., §273 et seq. are authorized to establish the California Organ and Tissue Donor Registrar, a not-for-profit entity. The registrar is required to establish and maintain the California Organ and Tissue Donor Registry, which is to contain information regarding persons who have identified themselves as organ and tissue donors on their death. The registrar is responsible for developing methods to increase the number of donors who enroll in the registry. (*Health & Saf.C. 7152.7(a).*)

The registrar must make available to the federally designated organ procurement organizations and the state licensed tissue and eye banks information contained in the registry regarding potential donors on a 24-hours-a-day, 7-days-a-week basis. This information must be used to expedite matches between identified organ and tissue donors and potential recipients. (*Health & Saf.C. 7152.7(b).*) The registrar may receive voluntary contributions to support the registry and its activities. (*Health & Saf.C. 7152.7(c).*)

The registrar must submit an annual written report to the Director of Health Services and the Legislature that includes all of the following:

- (1) The number of donors on the registry. (*Health & Saf.C. 7152.7(d)(1).*)
- (2) The changes in the number of donors on the registry. (*Health & Saf.C. 7152.7(d)(2).*)

(3) The general characteristics of donors as determined by information provided on the donor registry forms pursuant to *Veh.C. 12811* and *13005* (infra, §15). (*Health & Saf.C. 7152.7(d)(3).*)

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

The Uniform Anatomical Gift Act (*Health & Saf.C. 7150* et seq.) was repealed and replaced in 2007. *Health & Saf.C. 7152.7(a)* through (d) were replaced by *Health & Saf.C. 7150.90(a)* through (d) without substantive change.



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aa. Authorized Methods.

13 Witkin Sum. Cal. Law Pers Prop § 14

[§ 14] Authorized Methods.

(1) *By Will.* A gift by will takes effect upon the testator's death, whether or not the will is probated. In the event the will is subsequently declared invalid, the validity of the anatomical gift is unaffected. (*Health & Saf.C. 7150.5(e).*)

(2) *By Other Document.* A gift may be made by a document of gift signed by the donor (*Health & Saf.C. 7150.5(b)(1)*), or by a document of gift signed by another individual and two witnesses, all of whom have signed at the direction and in the presence of the donor and of each other; in the latter case, it must state that it has been so signed (*Health & Saf.C. 7150.5(b)(2)*). Alternatively, the donor may make the document of gift orally by making a tape recording in the donor's own voice. (*Health & Saf.C. 7150.5(b)(3)*.) (On gift on driver's license, see *infra*, §15; on procedure whereby individual may refuse to make gift, see *Health & Saf.C. 7150.5(i)*.)

(3) *By Telephone or Other Recorded Message.* A gift by authorized persons other than the decedent (see *supra*, §12) may be made by "telegraphic, recorded telephonic, or other recorded message, or other form of communication from the person that is contemporaneously reduced to writing and signed by the recipient." (*Health & Saf.C. 7151(c)*.)

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

The Uniform Anatomical Gift Act (*Health & Saf.C. 7150 et seq.*) was repealed and replaced in 2007. The new Act authorizes some methods for a donor to make a gift and other methods for other persons. (On eligible donors, see *Health & Saf.C. 7150.15*, Supp., *supra*, §12; on others eligible to make gift, see *Health & Saf.C. 7150.40*, Supp., *supra*, §12.)

(1) *Donor Methods.* A donor may make an anatomical gift in any of the following ways:

(a) By authorizing a statement or symbol indicating that the donor has made an anatomical gift to be imprinted on the donor's driver's license or identification card and included on a donor database registry. (*Health & Saf.C. 7150.20(a)(1)*, added in 2007; for driver's license methods, see Supp., *infra*, §15; on donor database registry, see text and Supp., §13.)

(b) Directly through the Donate Life California Organ and Tissue Donor Registry Internet Website. (*Health & Saf.C. 7150.20(a)(2)*, added in 2007.)

(c) In a will. (*Health & Saf.C. 7150.20(a)(3)*, added in 2007.)

(d) During a terminal illness or injury of the donor, by any form of communication that clearly expresses the donor's wish, addressed to at least two adults, at least one of whom is a disinterested witness. The witnesses must memorialize this communication in a writing and sign and date the writing. (*Health & Saf.C. 7150.20(a)(4)*, added in 2007.)

A donor or an agent of a donor authorized to make an anatomical gift under *Health & Saf.C. 7150.15* (Supp., supra, §12) may make a gift by a donor card or other record signed by the person making the gift or by authorizing that a statement or symbol, indicating that the donor has made an anatomical gift, be included on a donor registry. If the donor or other person is physically unable to sign a record, another individual may do so at the direction of the donor or other authorized person. (*Health & Saf.C. 7150.20(b)*, added in 2007.) The record must comply with all of the following:

(a) Be witnessed by at least two adults, at least one of whom is a disinterested witness, who have signed at the request of the donor or the other person. (*Health & Saf.C. 7150.20(b)(1)*, added in 2007.)

(b) State that it has been signed and witnessed as provided in *Health & Saf.C. 7150.20(b)(1)*. (*Health & Saf.C. 7150.20(b)(2)*, added in 2007.)

(2) *Methods for Others.* A person authorized to make an anatomical gift under *Health & Saf.C. 7150.40* (Supp., supra, §12) may make an anatomical gift by a document of gift signed by the person making the gift or by that person's oral communication that is electronically recorded or is contemporaneously reduced to a record and signed by the individual receiving the oral communication. (*Health & Saf.C. 7150.45(a)*, added in 2007.)

(3) *Continued Validity of Gift.* Revocation, suspension, expiration, or cancellation of a driver's license or identification card on which an anatomical gift is indicated does not invalidate the gift. (*Health & Saf.C. 7150.20(c)*, added in 2007.) An anatomical gift made by will takes effect on the donor's death whether or not the will is probated. Invalidation of the will after the donor's death does not invalidate the gift. (*Health & Saf.C. 7150.20(d)*, added in 2007.)



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13 Witkin Sum. Cal. Law Pers Prop § 15

[§ 15] Driver's License or Identification Card.

(1) *Information Provided by Department of Motor Vehicles.* The Department of Motor Vehicles must make available, in the public area of each office where it receives applications for driver's licenses or identification cards, space for a sign or notice briefly describing the Uniform Anatomical Gift Act, and information about the California Organ and Tissue Donor Registry and about how private donations may be made. (*Veh.C. 1672(a)*; for discussion of registry, see *supra*, §13.) The department must also make available to the public in its offices a pamphlet or brochure providing more detailed information on the registry and about how private donations may be made. (*Veh.C. 1672(b)*.)

(2) *Enrollment Form and Sticker.* *Veh.C. 12811(b)* and *13005(b)* establish procedures by which persons acquiring or renewing driver's licenses or identification cards may make themselves organ or tissue donors:

(a) When the Department issues or renews a driver's license or an identification card, it must provide information on organ and tissue donation, including a standardized form to be filled out by an individual who desires to enroll in the California Organ and Tissue Donor Registry, with instructions for mailing the completed form to the California Organ and Tissue Donor Registrar established by *Health & Saf.C. 7152.7* (*supra*, §13). (*Veh.C. 12811(b)(1)*, *13005(b)(1)*.) The department must include a donor dot that may be affixed to the new driver's license or identification card. (*Veh.C. 12811(b)(1)*.)

(b) The enrollment form must be simple in design and must solicit all of the following information from an enrollee:

(1) Date of birth, sex, full name, and other information deemed necessary to provide a positive identification of an individual. (*Veh.C. 12811(b)(2)(A)*; see *Veh.C. 13005(b)(2)(A)* [requiring enrollee's address and home telephone number].)

(2) Consent for organs or tissues to be donated for transplant after death. (*Veh.C. 12811(b)(2)(B)*, *13005(b)(2)(B)*.)

(3) Any limitation of the donation to specific organs or tissues. (*Veh.C. 12811(b)(2)(C), 13005(b)(2)(C).*)

(c) The form must also include a description of the processes for having a name removed from the registry and for donating money for the benefit of the registry (*Veh.C. 12811(b)(3)(A), 13005(b)(3)*), and a statement that the name of a registry enrollee must be made available to federally recognized donor organizations (*Veh.C. 12811(b)(3)(B)*). The registry enrollment form must be posted on the websites for the department and the California Health and Human Services Agency. (*Veh.C. 12811(b)(4), 13005(b)(4).*)

(d) The form constitutes a legal document under the Uniform Anatomical Gift Act (*Veh.C. 12811(b)(5), 13005(b)(5)*) and remains binding after the donor's death despite the express desires of next of kin opposed to the donation (*Veh.C. 12811(b)(5)*).

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

(2) *Enrollment Form and Sticker.* *Veh.C. 12811(b)* was completely rewritten in 2005 and further amended in 2006 and 2007. The new version became operative on July 1, 2006. (*Veh.C. 12811(e)*, added in 2005.)

(a) Under the new procedure, the department must collect donor designation information on all applications for an original or renewal driver's license or identification card. (*Veh.C. 12811(b)(3).*) The front of the application must contain a space for an applicant to consent to being an organ and tissue donor upon death. An applicant who gives consent must be directed to read the following statement on the back of the application: "If you marked on the front of the application that you want to be an organ and tissue donor upon death, your consent shall serve as a legally binding document as outlined under the California Uniform Anatomical Gift Act. Except in the case where the donor is under the age of 18, the donation does not require the consent of any other person. For donors under the age of 18, the legal guardian of the donor shall make the final decision regarding the donation. If you want to change your decision to consent in the future, or if you want to limit the donation to specific organs, tissues, or research, you must contact Donate Life California by mail at 1760 Creekside Oaks Drive, #220, Sacramento, CA 95833, or online at www.donateLIFecalifornia.org, or www.doneVIDAcalifornia.org." (*Veh.C. 12811(b)(1).*) A person younger than 18 may register as a donor, but the person's legal guardian must make the final decision regarding the donation. (*Veh.C. 12811(b)(2).*)

(b) The department must print the word "DONOR" or another appropriate designation on the face of a driver's license or identification card issued to a person who registers as a donor. (*Veh.C. 12811(b)(4).*) On a weekly basis, the department must electronically transmit to Donate Life California, a nonprofit organization established and designated as the California Organ and Tissue Donor Registrar under *Health & Saf.C. 7150.90*, all of the following information on every applicant who has indicated willingness to participate in the organ donation program:

(1) The applicant's true full name. (*Veh.C. 12811(b)(5)(A).*)

(2) The applicant's residence or mailing address. (*Veh.C. 12811(b)(5)(B).*)

(3) The applicant's date of birth. (*Veh.C. 12811(b)(5)(C).*)

(4) The applicant's California driver's license number or identification card number. (*Veh.C. 12811(b)(5)(D).*)

(c) The enrollment form must be posted on the Internet websites for the department and the California Health and Human Services Agency. (*Veh.C. 12811(b)(7).*) It constitutes a legal document under the Uniform Anatomical Gift Act and remains binding after the donor's death despite any express desires of next of kin opposed to the donation. Except as provided in *Veh.C. 12811(b)(2)*, the donation does not require the consent of any other person. (*Veh.C. 12811(b)(8).*)

(d) A person who applies for an original or renewal driver's license or identification card may contribute \$ 2 to promote and support organ and tissue donation. The contribution must be collected by the department and treated as a voluntary contribution to Donate Life California and not as a fee for the issuance of a driver's license or identification

card. (*Veh.C. 12811(b)(6)(A).*) Although the department may use the donations to cover its actual administrative costs in implementing *Veh.C. 12811(b)(3)* through (b)(5), the remaining revenue must be deposited in the Donate Life California Trust Subaccount. (*Veh.C. 12811(b)(6)(B).*)



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[§ 16] Delivery, Amendment, or Revocation.

(1) *Delivery.* Delivery is not necessary for the validity of the gift. (*Health & Saf.C. 7153.5(a)*.) However, if the gift is made to a specified donee, the document of gift, or a copy, may be delivered to the donee to expedite the procedure after death. Alternatively, the document of gift, or a copy, may be deposited in a hospital, accredited medical or dental school, college, or university, or, in the event that the gift is for transplantation or therapy only, it may be placed with a procurement organization that accepts it for safekeeping for facilitation of procedures after death. On request by an interested person, the person in possession must allow the interested person to examine or copy the document. (*Health & Saf.C. 7153.5(b)*.)

(2) *Amendment or Revocation.* The document may be amended or revoked by a signed statement; an oral statement made in the presence of two individuals or by a tape recording in the donor's own voice; any form of communication during a terminal illness or injury addressed to a physician; the delivery of a signed statement to a specified donee; or, in the case of a gift made by will, in the manner provided for amendment or revocation of wills. (*Health & Saf.C. 7150.5(f), (g)*; on amendment and revocation of wills, see 14 *Summary* (10th), *Wills and Probate*, §§159 et seq., 173 et seq.)

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

The Uniform Anatomical Gift Act (*Health & Saf.C. 7150* et seq.) was repealed and replaced in 2007.

(1) *Delivery.* *Health & Saf.C. 7153.5* was repealed in 2007. *Health & Saf.C. 7150.60(a)*, added in 2007, provides that a document of gift need not be delivered during the donor's lifetime to be effective. After an individual's death, a person in possession of the individual's document of gift or refusal to make an anatomical gift must allow examination and copying of the document by a person authorized to make or object to the gift or by a person to which the gift could pass under *Health & Saf.C. 7150.50*. (*Health & Saf.C. 7150.60(b)*, added in 2007.)

(2) *Amendment or Revocation.* *Health & Saf.C. 7150.5(f)* and *(g)* were repealed in 2007. Amendment and revocation are now covered by *Health & Saf.C. 7150.25* and *7150.45(b)* and *(c)*, added in 2007, depending on who is

amending or revoking the gift. (On methods for refusing to make gift, see *Health & Saf.C. 7150.30*, added in 2007.)

(a) *By Donor or Donor's Agent.* A donor or an agent of the donor, authorized to make an anatomical gift under *Health & Saf.C. 7150.15* (Supp., supra, §12), may amend or revoke an anatomical gift by signing a record and recording it in a donor registry database. (*Health & Saf.C. 7150.25(a)(1)*, added in 2007.) Another individual acting at the direction of the donor or of the agent may sign the record, if the donor or agent is physically unable to sign. (*Health & Saf.C. 7150.25(a)(1)(C)*, added in 2007.) In that case, the record must accurately state that it has been witnessed by at least two adults, at least one of whom is a disinterested witness, who have signed at the request of the donor or the agent. (*Health & Saf.C. 7150.25(b)*, added in 2007.)

The donor or authorized agent may also amend or revoke an anatomical gift, either expressly or by inconsistency, using a later-executed document of gift. (*Health & Saf.C. 7150.25(a)(2)*, added in 2007.) The donor or agent may revoke a gift by destroying the document of gift or cancelling the document of gift on a donor database registry, with the intent to revoke the gift. (*Health & Saf.C. 7150.25(c)*, added in 2007.)

A donor may amend or revoke an anatomical gift that was not made in a will by any form of communication during a terminal illness or injury addressed to at least two adults, at least one of whom is a disinterested witness. The witnesses must memorialize this communication in a signed and dated writing. (*Health & Saf.C. 7150.25(d)*, added in 2007.) A donor who makes an anatomical gift in a will may amend or revoke the gift in the manner provided for amendment or revocation of wills or as provided in *Health & Saf.C. 7150.25(a)*. (*Health & Saf.C. 7150.25(e)*, added in 2007.)

(b) *By Other Persons.* An anatomical gift by a person authorized under *Health & Saf.C. 7150.40* (Supp., supra, §12) may be amended or revoked orally or in a record by any member of a prior class who is reasonably available. (*Health & Saf.C. 7150.45(b)*, added in 2007.) If more than one member of the prior class is reasonably available, the gift may be amended only if a majority of the reasonably available members agree to the amending of the gift. (*Health & Saf.C. 7150.45(b)(1)*, added in 2007.) It may be revoked only if a majority of the reasonably available members agree to the revoking of the gift or if they are equally divided as to whether to revoke the gift. (*Health & Saf.C. 7150.45(b)(2)*, added in 2007.) A revocation under *Health & Saf.C. 7150.45(b)* is effective only if, before an incision has been made to remove a part from the donor's body or before invasive procedures have begun to prepare the recipient, the procurement organization, transplant hospital, or physician or technician knows of the revocation. (*Health & Saf.C. 7150.45(c)*, added in 2007.)



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13 Witkin Sum. Cal. Law Pers Prop § 17

[§ 17] Search for Document of Gift.

If, at or near the time of death of a hospital patient, there is no medical record that the patient has made or refused to make an anatomical gift, the hospital must comply with the protocol for identifying donors (see *supra*, §12). (*Health & Saf.C. 7152.5(a)*.) A law enforcement officer finding a person who is dead or near death, or a hospital, upon admission of such a person, must undertake a reasonable search for a document of gift or of information identifying the bearer as one who has refused to make a gift. (*Health & Saf.C. 7152.5(b)*.) A hospital must notify a named donee or an appropriate procurement organization at or near the time of death of a donor. (*Health & Saf.C. 7152.5(d)*.) A person failing to comply with *Health & Saf.C. 7152.5* is subject to appropriate administrative sanctions, but not criminal or civil liability. (*Health & Saf.C. 7152.5(e)*.)

Ambulance or emergency medical personnel providing emergency services must also undertake a search for a document of gift or relevant information, if it appears that death is imminent. (*Health & Saf.C. 7152.5(b)(3)*.)

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

The Uniform Anatomical Gift Act (*Health & Saf.C. 7150 et seq.*) was repealed and replaced in 2007. *Health & Saf.C. 7152.5* was repealed. *Health & Saf.C. 7150.55(a)*, added in 2007, lists the following persons as those who must make a reasonable search of an individual believed to be dead or near death for a document of gift or other information identifying the individual as a donor or as an individual who made a refusal:

(1) A law enforcement officer, firefighter, paramedic, or other emergency rescuer finding the individual. (*Health & Saf.C. 7150.55(a)(1)*, added in 2007.)

(2) If no other source of the information is immediately available, a hospital, as soon as practical after the individual's arrival at the hospital. (*Health & Saf.C. 7150.55(a)(2)*, added in 2007.)

If a document of gift or a refusal to make an anatomical gift is located by the search required by *Health & Saf.C. 7150.55(a)(1)* and the individual or deceased individual to whom it relates is taken to a hospital, the person responsible

for conducting the search must send the document of gift or refusal to the hospital. (*Health & Saf.C. 7150.55(b)*.)

When a hospital refers an individual at or near death to a procurement organization, the organization must make a reasonable search of the records of the Donate Life California Organ and Tissue Donor Registry and any donor registry that it knows exists for the geographical area in which the individual resides to ascertain whether the individual has made an anatomical gift. (*Health & Saf.C. 7150.65(a)*, added in 2007.) A procurement organization must be allowed reasonable access to information in the records of the Donate Life California Organ and Tissue Donor Registry to ascertain whether an individual who is at or near death is a donor. (*Health & Saf.C. 7150.65(b)*, added in 2007.)



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CHAPTER XVIII - Personal Property

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I. INTRODUCTION.

B. Limitations on Ownership.

1. Dead Body.

b. Uniform Anatomical Gift Act.

5. Donees and Acceptance.

13 Witkin Sum. Cal. Law Pers Prop § 18

[§ 18] Donees and Acceptance.

(1) *Persons Eligible and Purposes.* Under *Health & Saf.C. 7153(a)*, only the following may become donees:

(a) "A hospital, physician, surgeon, or procurement organization, for transplantation, therapy, medical or dental education, research, or advancement of medical or dental science."

(b) "An accredited medical or dental school, college, or university for education, research, or advancement of medical or dental science."

(c) "A designated individual for transplantation or therapy needed by that individual."

(d) "In the case of a pacemaker, a person who reconditions pacemakers." (See *Alcor Life Extension Foundation v. Mitchell* (1992) 7 C.A.4th 1287, 1292, 9 C.R.2d 572 [Department of Health Services enjoined from refusing to recognize company storing dead bodies in "cryonic suspension" as "procurement organization" for purposes of *Health & Saf.C. 7153(a)(1)*].)

If the donee knows of the decedent's refusal or contrary indications to make an anatomical gift, or that an anatomical gift by a member of a class having priority to act is opposed by a member of the same class or a prior class under *Health & Saf.C. 7151(a)* (see *supra*, §12), the donee may not accept the gift. (*Health & Saf.C. 7153(c)*.)

(2) *Physically or Mentally Disabled Donee.* Neither a hospital, physician, surgeon, procurement organization, nor any other person may determine the ultimate recipient of an anatomical gift based on a potential recipient's physical or mental disability, except to the extent that the disability is medically significant to provision of the gift. (*Health & Saf.C. 7153.2(a)*.) A disabled person is not required to demonstrate "postoperative independent living abilities" in order to have access to a transplant as long as the person will have sufficient compensatory support and assistance. (*Health & Saf.C. 7153.2(c)*.) Actions to enforce compliance with *Health & Saf.C. 7153.2* are given priority and must be handled expeditiously. (*Health & Saf.C. 7153.2(d)*.) (See 28 *Pacific L. J.* 916 [analysis of *Health & Saf.C. 7153.2*].)

(3) *Donee Not Specified or Unavailable.* If a donee is not designated or not available, or rejects the anatomical gift,

the gift may be accepted by any hospital or, in the case of a pacemaker, by any person who reconditions pacemakers. (*Health & Saf.C. 7153(b).*)

(4) *Acceptance or Rejection by Donee.* The donee may accept or reject the gift. If it is accepted: (a) Where the gift is of the entire body, the donee may, subject to the terms of the gift, authorize embalming and funeral services. (b) Where the gift is of a part, the donee must have it removed without unnecessary mutilation, and custody of the remainder vests in the persons specified in *Health & Saf.C. 7100* (supra, §5). (*Health & Saf.C. 7154(a).*)

For all donations made by a document of gift executed after January 1, 2001, following the final disposition of the donor's remains, on request of a person specified in *Health & Saf.C. 7100*, the donee must return the donor's cremated remains at no cost to that person, unless the donor has previously designated otherwise in the document of gift. A person who knowingly returns the cremated remains of a person other than the donor will be punished by imprisonment in the county jail for not more than 1 year. (*Health & Saf.C. 7154(d).*)

(5) *Rights of Donee.* The rights of a donee created by an anatomical gift are superior to the rights of others except with respect to autopsies under *Health & Saf.C. 7155.5(b)* (specifying that the provisions of the Act are subject to the laws regarding autopsies). (*Health & Saf.C. 7154(a).*) The gift may be examined to assure medical acceptability. (*Health & Saf.C. 7155.5(a).*)

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

The Uniform Anatomical Gift Act (*Health & Saf.C. 7150* et seq.) was repealed and replaced in 2007.

(1) *Persons Eligible and Purposes.* *Health & Saf.C. 7153(a)* was repealed in 2007. *Health & Saf.C. 7150.50(a)(1)*, added in 2007, allows an anatomical gift to be made to a hospital, accredited medical school, dental school, college, university, or organ procurement organization, if named in the gift, for research or education. A gift may also be made to an individual designated by the person making the anatomical gift if the individual is the recipient of the part. (*Health & Saf.C. 7150.50(a)(2)*, added in 2007.) However, if an anatomical gift to an individual under *Health & Saf.C. 7150.50(a)(2)* cannot be transplanted into the individual, the part passes in accordance with *Health & Saf.C. 7150.50(g)* (infra, this section), in the absence of an express, contrary indication by the person making the anatomical gift. (*Health & Saf.C. 7150.50(b)*, added in 2007.) Finally, a gift may be made to an eye bank or tissue bank named in the document of gift. (*Health & Saf.C. 7150.50(a)(3)*, added in 2007.)

A person must not accept an anatomical gift if the person knows that the gift was not effectively made under *Health & Saf.C. 7150.20* or *7150.45* or if the person knows that the decedent made a refusal under *Health & Saf.C. 7150.30* that was not revoked. (*Health & Saf.C. 7150.50(j)*, added in 2007.)

(2) *Physically or Mentally Disabled Donee.* *Health & Saf.C. 7153.2(a)*, (c), and (d) were repealed and replaced in 2007 by *Health & Saf.C. 7151.35(a)*, (c), and (d), respectively, without substantive change.(3) *Donee Not Specified or Unavailable.* *Health & Saf.C. 7153(b)* was repealed in 2007. *Health & Saf.C. 7150.50(c)-(g)*, added in 2007, delineate the passage of a gift where no donee is specified.

(a) *Purpose identified.* If the document of gift does not name a person described in *Health & Saf.C. 7150.50(a)*, but identifies the purpose for which an anatomical gift may be used, all of the following rules apply:

(1) If the part is an eye and the gift is for the purpose of transplantation or therapy, the gift passes to the appropriate eye bank. (*Health & Saf.C. 7150.50(c)(1)*, added in 2007.)

(2) If the part is tissue and the gift is for the purpose of transplantation or therapy, the gift passes to the appropriate tissue bank. (*Health & Saf.C. 7150.50(c)(2)*, added in 2007.)

(3) If the part is an organ and the gift is for the purpose of transplantation or therapy, the gift passes to the appropriate organ procurement organization as custodian of the organ. (*Health & Saf.C. 7150.50(c)(3)*, added in 2007.)

(4) If the part is an organ, an eye, or tissue and the gift is for the purpose of research or education, the gift passes to the appropriate procurement organization. (*Health & Saf.C. 7150.50(c)(4)*, added in 2007.)

For the purpose of *Health & Saf.C. 7150.50(c)*, if there is more than one purpose of an anatomical gift set forth in the document of gift but the purposes are not set forth in any priority, the gift must be used for transplantation or therapy, if suitable. If the gift cannot be used for transplantation or therapy, the gift may be used for research or education. (*Health & Saf.C. 7150.50(d)*, added in 2007.)

(b) *Purpose not identified.* If the document of gift does not name a person or identify the purpose of the gift, the gift must be used only for transplantation or therapy, and the gift passes in accordance with *Health & Saf.C. 7150.50(g)* (infra, this section). (*Health & Saf.C. 7150.50(e)*, added in 2007.) If the document of gift specifies only a general intent to make an anatomical gift by words such as "donor," "organ donor," or "body donor," or by a symbol or statement of similar import, the gift may be used for transplantation, therapy, research, or education, and the gift passes in accordance with *Health & Saf.C. 7150.50(g)*. (*Health & Saf.C. 7150.50(f)*, added in 2007.)

Health & Saf.C. 7150.50(g) sets forth the following rules:

(1) If the part is an eye, the gift passes to the appropriate eye bank. (*Health & Saf.C. 7150.50(g)(1)*, added in 2007.)

(2) If the part is tissue, the gift passes to the appropriate tissue bank. (*Health & Saf.C. 7150.50(g)(2)*, added in 2007.)

(3) If the part is an organ, the gift passes to the appropriate organ procurement organization as custodian of the organ. (*Health & Saf.C. 7150.50(g)(3)*, added in 2007.)

(4) *Acceptance or Rejection by Donee.* *Health & Saf.C. 7154(a)* was repealed in 2007. *Health & Saf.C. 7150.65(h)*, added in 2007, provides that a person to whom a part passes under *Health & Saf.C. 7150.50* may accept or reject the gift. Subject to the terms of the document of gift and *Health & Saf.C. 7150* et seq., a person that accepts an anatomical gift of an entire body may allow embalming, burial, or cremation, and use of remains in a funeral service. If the gift is of a part, the person must cause the part to be removed without unnecessary mutilation, before embalming, burial, or cremation. (*Health & Saf.C. 7150.65(h)*, added in 2007.)

Health & Saf.C. 7154(d) was repealed in 2007 and replaced by *Health & Saf.C. 7151.40(b)*, without substantive change.

(5) *Rights of Donee.* *Health & Saf.C. 7154(a)* was repealed in 2007. *Health & Saf.C. 7150.65(h)*, added in 2007, provides that, subject to *Health & Saf.C. 7150.50(i)* and 7151.20, the rights of the person to which a part passes under *Health & Saf.C. 7150.50* are superior to the rights of all others with respect to the part.

Health & Saf.C. 7155.5(a) was repealed in 2007. Examinations for medical suitability are now authorized by *Health & Saf.C. 7150.65(c)* and (d), added in 2007.



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1. Dead Body.

b. Uniform Anatomical Gift Act.

6. Time of Death.

13 Witkin Sum. Cal. Law Pers Prop § 19

[§ 19] Time of Death.

(1) *In General.* The time of death must be determined by the physician or surgeon attending the donor at death, or, if there is no attending physician or surgeon, then by the physician or surgeon who certifies the death. Neither the physician or surgeon who attends the donor at death, nor the physician or surgeon who determines the time of death may participate in the removal or transplantation of a part unless the document of gift designates a particular physician or surgeon under *Health & Saf.C. 7150.5(d)*. (*Health & Saf.C. 7154(b)*.)

This provision had its origin in the Uniform Act of 1968, and the Commissioners' Note to the provision in that Act commented, "because time is short following death for a transplant to be successful, the transplant team needs to remove the critical organ as soon as possible. Hence there is a possible conflict of interest between the attending physician and the transplant team, and accordingly subsection (b) excludes the attending physician from any part in the transplant procedures. ... However, the language of the provision does not prevent the donor's attending physician from communicating with the transplant team or other relevant donees. This communication is essential to permit the transfer of important knowledge concerning the donor." (Comment, 8A U.L.A. (Master Ed.), p. 58; see 57 *Cal. L. Rev.* 688; 5 *Cal. Western L. Rev.* 110; 21 *Hastings L. J.* 100; 12 *San Diego L. Rev.* 424; 54 *So. Cal. L. Rev.* 1323, 1349 [multiple definitions of death]; 76 *A.L.R.3d* 913 [tests of death for organ transplant purposes].)

(2) *Statutory Test.* The modern test of death and the procedure for confirmation of death are set forth in *Health & Saf.C. 7180* et seq. (See 14 *Summary* (10th), *Wills and Probate*, §11 et seq.)

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

The Uniform Anatomical Gift Act (*Health & Saf.C. 7150* et seq.) was repealed and replaced in 2007.

(1) *In General.* *Health & Saf.C. 7154(b)* and *7150.5(d)* were repealed in 2007. *Health & Saf.C. 7150.65(i)*, added in 2007, provides that neither the physician who attends the decedent at death nor the physician who determines the time of the decedent's death may participate in the procedures for removing or transplanting a part from the decedent. However, the document of gift may designate a particular person to carry out the recovery procedures. (*Health & Saf.C. 7150.20(e)*, added in 2007.)



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B. Limitations on Ownership.

2. Body Tissue and Cells.

13 Witkin Sum. Cal. Law Pers Prop § 20

[§ 20] Body Tissue and Cells.

(1) *In General.* The collection and transplantation of body tissue and cells present special problems that have only recently been addressed by statute (e.g., *Health & Saf.C. 1635, 1644.5*, infra, this section) and case law, but the commentary is already extensive. (See 19 J. Juvenile Law 357 [overview of legal issues resulting from freezing of embryos, conducting of research on frozen embryos, and cloning]; 32 *Loyola L.A. L. Rev.* 381 [misappropriation of human eggs and embryos and tort of conversion]; 40 *Santa Clara L. Rev.* 257 [determining disposition of frozen embryos when gamete donors undergo change in circumstances, such as divorce]; 26 *Southwestern U. L. Rev.* 1133 [misappropriation of fertilized human eggs by fertility clinic]; 50 *U.C.L.A. L. Rev.* 1065 [contractual approach to dealing with frozen embryos upon divorce]; on the "three interventions" and the moral and social problems involved, see 65 *So. Cal. L. Rev.* 683 [Tissue Transplantation From Aborted Fetuses, Organ Transplantation From Anencephalic Infants and Keeping Brain-Dead Pregnant Women Alive Until Fetal Viability]; see also 87 *A.L.R.5th* 253 [right to custody of frozen embryo, pre-embryo, or prezygote in event of divorce, death, or other circumstances].) Research using stem cells was authorized by Proposition 71, enacted in 2004. (See Cal. Const., Art. XXXV, and *Health & Saf.C. 125290.10* et seq.)

(2) *Tissue Banks.* *Health & Saf.C. 1635* et seq. provide for licensing and regulation of "tissue banks," defined as "any place, establishment, or institution that collects, processes, stores, or distributes tissue for transplantation into human beings." (*Health & Saf.C. 1635(d)*.) (See 23 *Pacific L. J.* 683.)

The collection, processing, storage, or distribution of tissue for transplantation is a *service* and thus is not subject to U.C.C. 2101 et seq. (see 4 *Summary* (10th), *Sales*, §22 et seq.). (*Health & Saf.C. 1635.2*.) (See *Cryolife v. Superior Court* (2003) 110 *C.A.4th* 1145, 1152, 2 *C.R.3d* 396 [because of *Health & Saf.C. 1635.2*, tissue banks are not subject to strict products liability].)

(3) *Genetic Depositories.* Any entity that receives genetic material that may be used for conception must provide to the depositor forms containing specified information regarding the depositor's right to determine whether a child conceived after the depositor's death will be an heir. (*Health & Saf.C. 1644.7* et seq.)

(4) *Screening for Infectious Diseases.* Tissue may not be transplanted unless the donor has been screened and found nonreactive by laboratory tests for evidence of infection with HIV, viral hepatitis, human T lymphotropic virus-1

(HTLV-1), and syphilis. (*Health & Saf.C. 1644.5(a).*)

Health & Saf.C. 1644.5(d) provides for exceptions where the donor has not been tested or, except for HIV, has been found reactive for the diseases listed in *Health & Saf.C. 1644.5(a)* if the following conditions are satisfied:

(a) The physician and surgeon performing the transplantation have determined any of following: the intended recipient will likely die without immediate transplantation; the intended recipient already has the infectious disease; symptoms from the infectious disease are unlikely to appear during the intended recipient's life span after transplantation, or may be treated if they do appear.

(b) Consent for use of the tissue has been obtained from the intended recipient, if possible, or otherwise from a family member or legal guardian.

(5) *Physician's Use of Tissue or Cells*. A physician breaches his or her fiduciary duty to a patient by using that patient's body tissue or cells for research or other activities not related to the patient's care, without first (a) disclosing his or her interests to the patient and (b) obtaining the patient's informed consent. (*Moore v. Regents of Univ. of Calif.* (1990) 51 C.3d 120, 129, 271 C.R. 146, 793 P.2d 479, 5 Summary (10th), *Torts*, §402 [refusing on policy grounds to impose liability for conversion]; see 51 *Hastings L. J.* 909 [*Moore*]; 37 *U.S.F. L. Rev.* 757 [just model of alienability of human tissue following *Moore*]; 121 *A.L.R.5th* 315 [conversion and misappropriation of genetic material].)

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

(1) *In General*. See *California Family Bioethics Council, LLC v. California Institute for Regenerative Medicine* (2007) 147 C.A.4th 1319, 1340, 55 C.R.3d 272 [Proposition 71 is constitutional]; 31 *Hastings Const. L. Q.* 355 [federal regulation of embryonic stem cells]; 46 *Santa Clara L. Rev.* 419 [proposal for future legislative regulation of stem cell research]; 78 *So. Cal. L. Rev.* 1075 [federal funding of human embryonic stem cell research]; 37 *Southwestern U. L. Rev.* 393 [California's sperm bank industry and rights of donor-conceived individuals].(4) *Screening for Infectious Diseases*. *Health & Saf.C. 1644.5(d)* was amended in 2007 to provide for exceptions under the conditions discussed in the text where the donor has not been tested, or except for HIV or HTLV-1, has been found reactive.



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3. Wild Animals and Fish.

13 Witkin Sum. Cal. Law Pers Prop § 21

[§ 21] Wild Animals and Fish.

Wild animals and fish are subjects of ownership only when on the land of the person claiming them, when tamed, when taken and held in possession, or when disabled and immediately pursued. (C.C. 656; *People v. Truckee Lumber Co.* (1897) 116 C. 397, 401, 48 P. 374; see *People v. Brady* (1991) 234 C.A.3d 954, 959, 286 C.R. 19 [state did not own abalone illegally taken by defendants from coastal waters; thus defendants were not guilty of grand theft under P.C. 487 (see 2 *Cal. Crim. Law* (3d), *Crimes Against Property*, §4), although they could be prosecuted for violating Fish and Game laws (see 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §400)]; on ownership of fur-bearing animals, see C.C. 996; 15 *So. Cal. L. Rev.* 218; on ownership of bees, see 52 *Harv. L. Rev.* 834; and see generally 4 *Am.Jur.2d* (1995 ed.), *Animals* §5 et seq.)

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

SUPPLEMENT: [This section is current through the latest supplement]
See 4 *Am.Jur.2d* (2007 ed.), *Animals* §3 et seq.



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4. Public Office.

13 Witkin Sum. Cal. Law Pers Prop § 22

[§ 22] Public Office.

A public office is not property. "It would be a misnomer and a perversion of terms to say that an incumbent owned an office or had any title to it." (*People v. Robinson* (1933) 130 C.A. 664, 666, 20 P.2d 369; see *Sharpe v. Los Angeles* (1934) 136 C.A. 732, 735, 29 P.2d 797 [right to hold a public office "is not a property right which equity will enforce"]; 63C Am.Jur.2d (1997 ed.), *Public Officers and Employees* §10 et seq.) However, a public employee who is dischargeable only for cause may have an expectation of continued employment that rises to the level of a constitutionally protected right. (See 3 *Summary* (10th), *Agency and Employment*, §289 et seq.)

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



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5. Personal Name.

a. In General.

13 Witkin Sum. Cal. Law Pers Prop § 23

[§ 23] In General.

(1) *No Property Right.* There is no property right in a personal name. (*Melvin v. Reid* (1931) 112 C.A. 285, 292, 297 P. 91 [protection from improper exploitation is given only by tort action for invasion of privacy]; see 5 *Summary* (10th), *Torts*, §678; 16 *So. Cal. L. Rev.* 229.) Thus, ordinarily, the name cannot be exclusively appropriated as a trademark. (See *Ida May Co. v. Ida May Ensign* (1937) 20 C.A.2d 339, 343, 66 P.2d 727, *infra*, §84.)

(2) *Woman's Right to Her Name.* A woman, regardless of her married status, has the right to use her birth name or former name for any purposes, including business transactions. (See *Family C. 2080 et seq.*; *C.C.P. 1279.6*; 21 *U.C.L.A. L. Rev.* 665 [historical background]; 11 *Summary* (10th), *Husband and Wife*, §21.)

A wife who used her maiden name during marriage may petition for dissolution in that name. (See *Weathers v. Superior Court* (1976) 54 C.A.3d 286, 287, 126 C.R. 547; 11 *Summary* (10th), *Husband and Wife*, §83.)

(3) *New Name After Sex Change.* Persons who have undergone a surgical change of sex may obtain a new birth certificate to establish their new sex and name. The record change of name and sex may be obtained either in separate actions or in a single action. (*Health & Saf.C. 103425 et seq.*)

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

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

(2) *Woman's Right to Her Name.* *C.C.P. 1279.6* was amended in 2007 to extend the right to use a birth name or former name to everyone, not just women. (On right to maintain name, see *Supp.*, *infra*, §25A.)



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5. Personal Name.

b. Right To Change Name.

13 Witkin Sum. Cal. Law Pers Prop § 24

[§ 24] Right To Change Name.

(1) *In General.* A person has a common law right to change his or her name without applying to a court; the special statutory proceeding under *C.C.P. 1276* is merely intended to provide a record of the change. (*In re Ross* (1937) 8 C.2d 608, 609, 67 P.2d 94; *In re Useldinger* (1939) 35 C.A.2d 723, 726, 96 P.2d 958; *Turesky v. Superior Court* (1950) 97 C.A.2d 838, 839, 218 P.2d 784; *In re McGehee* (1956) 147 C.A.2d 25, 26, 304 P.2d 167; 26 Cal. L. Rev. 268; on change of name generally, see 57 Am.Jur.2d (2001 ed.), Name §16; 18A Am.Jur. P.P. Forms (1997 ed.), Name, Form 1 et seq.; 79 A.L.R.3d 562 [circumstances justifying grant or denial of petition].)

In re Ritchie (1984) 159 C.A.3d 1070, 206 C.R. 239, involved petitioner's attempt to change his name, as a matter of public record, from Thomas Boyd Ritchie III to the roman numeral "III" (pronounced "Three"). Petitioner alleged that approximately 6 years prior to his petition, he began using III as his name for the sake of convenience; that he kept using the name because it gave him a greater sense of personal identity; and that his friends, peers, and business associates knew him as III. Petitioner further alleged that an official recordation of his new name was essential in order to obtain credit cards and documents such as a driver's license from agencies and financial institutions. The petition was denied on the grounds that the proposed change to a numeral did not constitute a name change within the meaning of the law, and that petitioner's new name was "inherently confusing." *Held*, the denial was not an abuse of discretion.

(a) A person's name is the distinctive characterization in words by which the person is known. "While the words may consist of letters or letters and symbols, it is common knowledge that words do not consist solely of numbers or symbols." (159 C.A.3d 1073.)

(b) Given the modern trend toward high technology and data processing by computers, "it is not unreasonable to conclude that the usage of numbers for designating or describing persons might cause inherent confusion in public records which, in turn, may well facilitate deception or fraud of individuals, institutions or the public as a whole." (159 C.A.3d 1074.)

(c) Since a legal proceeding is not necessary for a change of name, petitioner was free to call himself "III"; "we merely withhold our sanction." (159 C.A.3d 1074.)

In *Lee v. Superior Court* (1992) 9 C.A.4th 510, 11 C.R.2d 763, plaintiff, a black man, petitioned under C.C.P. 1275 et seq. to change his name to "Misteri Nigger," contending that use of the name would further his goals of social justice. *Held*, denial of the petition was not an abuse of discretion.

(a) Plaintiff has a common law right to change his name without any legal proceeding. The statutory proceeding merely provides a public record of the name change. However, no person has a statutory right to change his or her name to one universally recognized as offensive. (9 C.A.4th 514, citing the text.)

(b) The trial judge's determination that the proposed name was vulgar, offensive, and a racial slur is a substantial and principled reason to deny the motion. (9 C.A.4th 515, citing *In re Ritchie, supra.*) The proposed name here may also constitute "fighting words," which the court should not sanction. "It matters not that appellant's motives may be rooted in a sincere and honest attempt to remove the sting from the word 'nigger' or that it may only be uttered in the context of a name. It is the reaction thereto that may cause a breach of the peace." (9 C.A.4th 518.)

(2) *Exception: Prisoners, Parolees, and Registered Sex Offenders.* State prisoners are not allowed to file name change applications under C.C.P. 1276 without the permission of the Director of Corrections. (C.C.P. 1279.5(b).) Moreover, a court must deny a name change application made by a person who is under the jurisdiction of the Department of Corrections, unless the person's parole agent or probation officer grants prior written approval. (C.C.P. 1279.5(c).) Similarly, the court must deny the application of a person who is required to register as a sex offender, unless the court determines that granting the application is in the best interests of justice and will not adversely affect the public safety. (C.C.P. 1279.5(d).)

(3) *Judicial Council Forms.* The Judicial Council has adopted the following forms for mandatory use:

(a) Judicial Council Form No. NC-100 [Petition for Change of Name].

(b) Judicial Council Form No. NC-200 [Petition for Change of Name and Gender].

(c) Judicial Council Form No. NC-110 [Name and Information About the Person Whose Name Is To Be Changed; Attachment to Petition (Form No. NC-100 or Form No. NC-200)].

(d) Judicial Council Form No. NC-110G [Declaration of Guardian].

(e) Judicial Council Form No. NC-120G [Order to Show Cause for Change of Name].

(f) Judicial Council Form No. NC-220 [Order to Show Cause for Change of Name and Gender].

(g) Judicial Council Form No. NC-121 [Proof of Service of Order to Show Cause].

(h) Judicial Council Form No. NC-130 [Decree Changing Name].

(i) Judicial Council Form No. NC-130G [Decree Changing Name of Minor].

(j) Judicial Council Form No. NC-230 [Decree Changing Name and Gender].

West's Key Number Digest, Names k.20

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

(1) *In General.* See 18A Am.Jur. P.P. Forms (2006 ed.), Name, §4 et seq. (2) *Exception: Prisoners, Parolees, and Registered Sex Offenders.* C.C.P. 1279.5 was amended in 2006 to provide for a "petition" for a name change, rather than an "application."

See *In re Arnett* (2007) 148 C.A.4th 654, 659, 56 C.R.3d 1 [name change for federal inmate is not illegal; court may

seek input from federal prison authorities before deciding whether to grant petition and should grant petition unless there are substantial and principled reasons to deny it].

(3) *Judicial Council Forms.*(e) Judicial Council Form No. NC-120G is now Judicial Council Form No. NC-120 [Order to Show Cause for Change of Name].

(k) *(New)* Judicial Council Form No. NC-210/NC-310 [Declaration of Physician--Attachment to Petition (Change of Name and Gender/Change of Gender)].

(l) *(New)* Judicial Council Form No. NC-300 [Petition for Change of Gender and Issuance of New Birth Certificate].

(m) *(New)* Judicial Council Form No. NC-320 [Notice of Hearing on Petition for Change of Gender and Issuance of New Birth Certificate].

(n) *(New)* Judicial Council Form No. NC-330 [Order for Change of Gender and Issuance of New Birth Certificate].



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5. Personal Name.

c. Right To Sue or Be Sued in Any Name.

13 Witkin Sum. Cal. Law Pers Prop § 25

[§ 25] Right To Sue or Be Sued in Any Name.

In *Cabrera v. McMullen* (1988) 204 C.A.3d 1, 251 C.R. 34, plaintiff Luis Cabrera filed a personal injury action against defendant, and used his brother's name, Bonfilio Cabrera. Bonfilio lived in Mexico, and plaintiff had been using his name in order to work in the United States as a farm laborer. The trial judge granted summary judgment for defendant on the grounds that the person named in the complaint had no claim against defendant. *Held*, reversed. A person may change his or her name at any time without legal formalities, and may sue or be sued in any name by which the person is known. Further, there is no prohibition against adopting a sibling's name. Here, it was undisputed that plaintiff had adopted and was known by his brother's name. "At no point in any of these proceedings could defendant have reasonably believed that the named plaintiff, whether suing under his christened name, his alias or his nickname was not the party she allegedly injured." (204 C.A.3d 4.)

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d. (New) Right To Maintain or Change Name Following Marriage or Domestic Partnership Registration.

13 Witkin Sum. Cal. Law Pers Prop § 25A

[§ 25A] (New) Right To Maintain or Change Name Following Marriage or Domestic Partnership Registration.

(1) *No Automatic Name Change.* Parties to a domestic partnership are not required to have the same name. The same rule applies to parties to a marriage. None of those parties may be required to change his or her name. A person's name will not change on registration as a domestic partner or on marriage unless that person elects to change his or her name under *Family C. 298.6(b)* or *306.5(b)*. (*Family C. 298.6(a)*, *306.5(a)*, added in 2007.)

(2) *Procedure for Changing Name.* One party or both parties to a registered domestic partnership may elect to change the middle or last names by which that party wishes to be known after registration of the domestic partnership by entering the new name in the space provided on the Declaration of Domestic Partnership form without intent to defraud. (*Family C. 298.6(b)(1)*, added in 2007.) Similarly, one party or both parties to a marriage may elect to change the middle or last names by which that party wishes to be known after solemnization of the marriage by entering the new name in the spaces provided on the marriage license application without intent to defraud. (*Family C. 306.5(b)(1)*, added in 2007.)

(3) *Permissible Name Changes.* A person may adopt any of the following middle or last names under *Family C. 298.6(b)(1)* or *306.5(b)(1)*:

(a) The current last name of the other domestic partner or spouse. (*Family C. 298.6(b)(2)(A)*, *306.5(b)(2)(A)*, added in 2007.)

(b) The last name of either domestic partner or spouse given at birth. (*Family C. 298.6(b)(2)(B)*, *306.5(b)(2)(B)*, added in 2007.)

(c) A name combining into a single last name all or a segment of the current last name or the last name of either domestic partner or spouse given at birth. (*Family C. 298.6(b)(2)(C)*, *306.5(b)(2)(C)*, added in 2007.)

(d) A hyphenated combination of last names. (*Family C. 298.6(b)(2)(D)*, *306.5(b)(2)(D)*, added in 2007.)

(4) *Effect of Name Change.* An election by a person to change his or her name under *Family C. 298.6(b)(1)* or

306.5(b)(1) will serve as a record of the name change. A certified copy of the Certificate of Registered Domestic Partnership or marriage certificate containing the new name, or retaining the former name, constitutes proof that the use of the new name or retention of the former name is lawful. (*Family C. 298.6(b)(3)(A)*, 306.5(b)(3)(A), added in 2007.) A certified copy of a Certificate of Registered Domestic Partnership or a marriage certificate will be accepted as identification establishing a true, full name for purposes of *Veh.C. 12800.7*. (*Family C. 298.6(b)(3)(B)*, 306.5(b)(3)(B), added in 2007.) (On additional documents that will be accepted under *Veh.C. 12800.7*, see *Family C. 298.6(b)(3)(C)*, 306.5(b)(3)(C), added in 2007.)

(5) *Future Name Changes for Domestic Partners*. The adoption of a new name, or the choice not to adopt a new name, by means of a Declaration of Domestic Partnership under *Family C. 298.6(b)(1)* does not abrogate the right of either party to adopt a different name through usage at a future date, or to petition the superior court for a change of name under *C.C.P. 1275* et seq. (*Family C. 298.6(b)(4)*, added in 2007.)

(6) *Future Name Changes for Spouses*. The adoption of a new name, or the choice not to adopt a new name, by means of a marriage license application under *Family C. 306.5(b)(1)* may only be made at the time the marriage license is issued. After a marriage certificate is registered by the local registrar, the certificate may not be amended to add a new name or change the name adopted under *Family C. 306.5(b)(1)*. This requirement does not abrogate the right of either party to adopt a different name through usage at a future date, or to petition the superior court for a change of name under *C.C.P. 1275* et seq. (*Family C. 306.5(b)(4)*, added in 2007.)

(7) *Common Law and Statutory Rights Preserved*. Nothing in *Family C. 298.6* or 306.5 may be construed to abrogate the common law right of any person to change his or her name, or the right of any person to petition the superior court for a change of name under *C.C.P. 1275* et seq. (*Family C. 298.6(c)*, 306.5(c), added in 2007.)

(8) *Operative Date*. *Family C. 298.6* became operative on January 1, 2008, but *Family C. 306.5* will not become operative until January 1, 2009. (*Family C. 306.5(d)*, added in 2007.)

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6. Illegally Possessed Property.

13 Witkin Sum. Cal. Law Pers Prop § 26

[§ 26] Illegally Possessed Property.

It has occasionally been held, as a result of statutory provision, that there is no property in things that are contraband, i.e., illegally possessed. However, under the better rule, such articles may be the subject of burglary or theft. (See *People v. Walker* (1939) 33 C.A.2d 18, 20, 90 P.2d 854 [slot machines]; 89 A.L.R.2d 1435 [stolen money or property as subject of larceny]; cf. *People v. Caridis* (1915) 29 C.A. 166, 169, 154 P. 1061 [charge of larceny, based on stealing lottery ticket, held to state no offense; but court suggested that charge of theft of paper might have been sufficient]; and see 2 Cal. Crim. Law (3d), *Crimes Against Property*, §21.)

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1. In General.

13 Witkin Sum. Cal. Law Pers Prop § 27

[§ 27] In General.

Property may be *acquired* by (1) occupancy; (2) accession; (3) transfer; (4) will; or (5) succession. (C.C. 1000.) The state may also acquire property by escheat (*C.C.P. 1300* et seq.; see *infra*, §36 et seq.; 14 *Summary* (10th), *Wills and Probate*, §98 et seq.), and both the state and public and quasi-public corporations may acquire property by eminent domain (*C.C.P. 1230.010* et seq.; see 8 *Summary* (10th), *Constitutional Law*, §1170 et seq.).

Property may be *owned* by private persons or by the public. (See C.C. 669, 670.) Ownership may be *absolute or qualified*. (C.C. 678, 679, 680, 681.) Ownership by several persons may be of (1) joint interests (see *infra*, §30); (2) partnership interests (see 9 *Summary* (10th), *Partnership*, §28 et seq.); (3) interests in common; or (4) community interest of husband and wife (see 11 *Summary* (10th), *Community Property*, §4). (C.C. 682.) Interests in favor of several persons are interests in common if they do not fit into the joint, partnership, or community category. (C.C. 686; see *Parker v. Walker* (1992) 5 C.A.4th 1173, 1183, 6 C.R.2d 908 [joint judgment based on common claim was personal property presumed to be held in common under C.C. 686]; 12 *Summary* (10th), *Real Property*, §39.)

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2. Future Interests in Personal Property.

13 Witkin Sum. Cal. Law Pers Prop § 28

[§ 28] Future Interests in Personal Property.

Although the Civil Code is not explicit, it appears from numerous decisions that valid future interests in personal property may be created in California. (See, e.g., *Estate of Gartenlaub* (1921) 185 C. 375, 383, 197 P. 90 [dealing with interests of life tenant and remainderman in trust of stock]; *Randall v. Bank of America* (1941) 48 C.A.2d 249, 254, 119 P.2d 754 [vested remainder interest in building and loan investment certificate]; 21 Cal. L. Rev. 1, 21 [criticizing Civil Code for failing to define future interests in personal property]; cf. *Prob.C. 21200* et seq. [Uniform Statutory Rule Against Perpetuities (12 Summary (10th), *Real Property*, §175 et seq.)]; on future interests generally, see 12 Summary (10th), *Real Property*, §127 et seq.)

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3. Equitable Servitudes in Chattels.

13 Witkin Sum. Cal. Law Pers Prop § 29

[§ 29] Equitable Servitudes in Chattels.

In *Nadell & Co. v. Grasso* (1959) 175 C.A.2d 420, 346 P.2d 505, a case of first impression in California, a shipment of Kraft fruit salad was frozen in transit. The Railroad Co. sold it to plaintiff, a dealer in salvage goods, under an agreement not to permit the goods to enter retail outlets under the Kraft label, on pain of losing all further salvage business from the Railroad Co. Plaintiff sold the shipment to V who, with knowledge of the restriction, promised to remove all Kraft labels and use his own containers. Defendant R, a former employee of plaintiff, who had participated in the transaction and had full knowledge of the restrictions, bought a quantity of the merchandise and indicated his intention to sell it in the original containers in disregard of the restrictions. *Held*, injunction sustained.

The difficulty was that defendant R was not a party to the contract that imposed the restriction. The court held, however, that an equitable servitude on the chattels was created by the contract, which was binding on a subsequent buyer of the goods with notice of the restriction. Some authority was found supporting this theory where the servitude was imposed by a manufacturer. Thus, one commentator had suggested that a contract with a manufacturer for the maintenance of prices of standardized articles or for limitations on their use is transformed from a promise to him personally into a proprietary interest in the articles for the benefit of his business as a dominant tenement. (175 C.A.2d 427, citing 41 Harv. L. Rev. 945, 964.)

But the court saw no reason to limit the application of the principle to that situation. Here, plaintiff was attempting to protect himself from the loss of the entire Railroad Co. business--i.e., the expectation of continued public patronage or goodwill. And "[i]f equitable servitudes on chattels can be sustained on the theory that the producer has a proprietary interest therein for the benefit of his business, why not the purchaser-retailer of damaged goods who also has his own good will to maintain?" (175 C.A.2d 431.) (See 48 Cal. L. Rev. 337; 74 Harv. L. Rev. 617; 12 Stanf. L. Rev. 860; on equitable servitudes in real property, see 12 Summary (10th), *Real Property*, §440 et seq.)

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4. Joint Tenancy in Personal Property.

a. In General.

1. Nature of Joint Tenancy.

13 Witkin Sum. Cal. Law Pers Prop § 30

[§ 30] Nature of Joint Tenancy.

Although most of the law on this subject deals with land (see 12 *Summary* (10th), *Real Property*, §33), a joint tenancy may be created in personal property such as a bank deposit, stocks, or bonds. (See generally *Kennedy v. McMurray* (1915) 169 C. 287, 291, 146 P. 647 [bank deposit]; *Estate of Harris* (1915) 169 C. 725, 727, 147 P. 967 [character of personal property acquired with withdrawals from joint bank account]; 28 *Cal. L. Rev.* 224 [same]; *Wallace v. Riley* (1937) 23 C.A.2d 654, 664, 74 P.2d 807 [bank deposit]; *White v. Bank of America* (1942) 53 C.A.2d 831, 834, 128 P.2d 600 [same]; 20 *Am.Jur.2d* (2005 ed.), *Cotenancy and Joint Ownership* §1 et seq.; 43 *A.L.R.3d* 971 [joint savings account as gift to survivor]; 5 *A.L.R.4th* 373 [issuance of stock certificate to joint tenants as creating gift inter vivos]; on stock certificates or bonds made out in names of parties as joint tenants, see *Corp.C.* 420(a); on change of joint tenancy in shares of stock to tenancy in common, see *California Trust Co. v. Anderson* (1949) 91 C.A.2d 832, 837, 205 P.2d 1127; on respective interests in jointly produced original works of authorship, see C.C. 981, and *infra*, §47; on denial of right of survivorship to killer of deceased joint tenant, see *Abbey v. Lord* (1959) 168 C.A.2d 499, 504, 336 P.2d 226; on joint tenancy in proceeds of property insurance, see 4 *A.L.R.3d* 427; on safe deposit boxes, see *infra*, §34.)

(1) *Manner of Creation*. "A joint tenancy in personal property may be created by a written transfer, instrument, or agreement." (C.C. 683(a); on mandatory requirement of writing and sufficiency of writing, see *Berl v. Rosenberg* (1959) 169 C.A.2d 125, 133, 336 P.2d 975 [letter to holder of securities, stating that "I wish to make a joint ownership account," sufficient].) However, C.C. 683 does not apply to a joint account governed by *Prob.C.* 5100 et seq., the Multiple-Party Accounts Law. (C.C. 683(b).) (On Multiple-Party Accounts Law, see 4 *Summary* (10th), *Negotiable Instruments*, §77 et seq.)

(2) *United States Savings Bonds*. Formerly, C.C. 704, providing that United States savings bonds held in joint tenancy become the absolute property of the surviving coowner, precluded a testamentary disposition of savings bonds to one other than the named beneficiary. (*Davies v. Beach* (1946) 74 C.A.2d 304, 309, 168 P.2d 452; cf. *Estate of Raphael* (1953) 115 C.A.2d 525, 531, 252 P.2d 979 [owner could not, by agreement with wife to convert separate property into community, divest beneficiary of his right].)

In *Katz v. Driscoll* (1948) 86 C.A.2d 313, 194 P.2d 822, decedent obtained old age security benefits and county

indigent aid by falsely representing that he had no personal property in excess of \$ 600; in fact he owned U.S. savings bonds of the value of \$ 2,250, payable to defendants as beneficiaries. *Held*, plaintiff, administrator of his estate, could enforce a constructive trust in the proceeds of the bonds to the extent necessary to meet expenses of administration and creditors' claims, including the state and county claim for aid. The court pointed out that former C.C. 704, which followed federal Treasury Regulations, was intended to make the sole ownership of the survivor *conclusive* and, consequently, the survivor's right to possess and to enforce payment of the bonds to himself or herself cannot be challenged on the grounds of fraud. But the regulations and the statute do not guarantee the survivor's right to retain the money paid when, under equitable principles, a constructive trust should be imposed. (86 C.A.2d 318.)

In view of the federal regulations, the Legislature deemed C.C. 704 to be unnecessary and repealed it in 1991. (See 20 Cal. Law Rev. Com. Reports, p. 2733.)

(3) *Equitable Lien of Cotenant*. One cotenant of personal property (joint tenant or tenant in common) is entitled to his or her share of the profits of the use of property in the exclusive possession of the other, and has an *equitable lien* on the interest of the other cotenant to secure payment. But the lien cannot be enforced against a bona fide purchaser from the other cotenant. (*Palpar v. Thayer* (1953) 115 C.A.2d 333, 337, 252 P.2d 51; see 20 Am.Jur.2d (2005 ed.), *Cotenancy and Joint Ownership* §47 et seq.)

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a. In General.

2. Termination of Tenancy.

aa. In General.

13 Witkin Sum. Cal. Law Pers Prop § 31

[§ 31] In General.

Destruction of unity of title (e.g., by sale of one tenant's interest to a third party) terminates a joint tenancy. (See 12 *Summary* (10th), *Real Property*, §§33, 55; 64 *A.L.R.2d* 918 [when acts by one or more tenants will terminate tenancy]; 39 *A.L.R.4th* 1068 [contract of sale or granting of option to purchase as severing or terminating tenancy]; on abrogation of former exception for joint tenancy personal property, see *Estate of Propst* (1990) 50 *C.3d* 448, 458, 268 *C.R.* 114, 788 *P.2d* 628, *infra*, §32.)

A joint tenancy bank account will not be affected by immaterial changes in possession. Thus, in *Doran v. Hibernia Savings & Loan Soc.* (1947) 80 *C.A.2d* 790, 182 *P.2d* 630, decedent opened joint tenancy accounts with a niece and a nephew. Then decedent was adjudged incompetent and the niece was appointed her guardian. Later, decedent died. *Held*, the surviving joint tenants took the accounts; the change of possession from that of decedent herself to that of her guardian did not destroy the joint tenancy, for the guardian's possession is for the benefit of, and not adverse to, the ward. (80 *C.A.2d* 795.)

A joint tenancy in personal property may, however, be terminated by acts of a cotenant under circumstances showing knowledge and implied consent by the other. (*Lagar v. Erickson* (1936) 13 *C.A.2d* 365, 368, 56 *P.2d* 1287.)

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2. Termination of Tenancy.

bb. Unilateral Severance.

13 Witkin Sum. Cal. Law Pers Prop § 32

[§ 32] Unilateral Severance.

Estate of Propst (1990) 50 C.3d 448, 268 C.R. 114, 788 P.2d 628, abrogated the long-established California rule that a joint tenancy in personal property could not be severed by the unilateral action of one joint tenant.

Decedent's widow claimed her survivor interest in all of the money that decedent had withdrawn from their joint tenancy bank accounts and placed in new accounts under his name alone. The trial judge and Court of Appeal upheld her claim, following the existing case law holding that a party to a joint tenancy in personal property cannot change its character without an agreement. *Held*, reversed.

(a) The common law allowed severance of a joint tenancy in either real or personal property without the consent of the other joint tenants, thereby defeating the right of survivorship. (*50 C.3d 455*.) California courts have consistently applied this rule to joint tenancies in real property. (*50 C.3d 456*; see *12 Summary (10th), Real Property*, §55.) But a series of California decisions departed from the common law in personal property joint tenancy cases, prohibiting severance without the consent of the cotenants. (*50 C.3d 456*.)

(b) This exception to the common law rule was based on a flawed interpretation of a leading California case, and its adverse consequences were pointed out by the Law Revision Commission in its recommendation for legislative change (20 Cal. Law Rev. Com. Reports, p. 104). And the 1989 Legislature made the recommended changes for banks and savings and loan associations (*Prob.C. 5128, 5303(c)*). (*50 C.3d 452, 463*.) The new provisions, effective July 1, 1990, are prospective, and do not apply directly to the present case; but they reflect a legislative policy that should be applied to all personal property held in joint tenancy. (*50 C.3d 452, 461*.)

(c) "Accordingly, we hold that in the absence of prior contrary agreement, a joint tenant of personal property may unilaterally sever his or her own interest from the joint tenancy and thereby nullify the right of survivorship, as to that interest, of the other joint tenant or tenants without their consent." (*50 C.3d 461*.) Prior Supreme Court decisions in *Fish v. Security-First Nat. Bank of Los Angeles (1948) 31 C.2d 378, 189 P.2d 10*, and *Estate of Harris (1937) 9 C.2d 649, 72 P.2d 873*, are overruled; and inconsistent statements in Court of Appeal opinions (e.g., *Taylor v. Crocker-Citizens Nat.*

Bank (1968) 258 C.A.2d 682, 65 C.R. 771, *infra*, §33; *Doran v. Hibernia Savings & Loan Soc.* (1947) 80 C.A.2d 790, 182 P.2d 630, *supra*, §31; and *Lagar v. Erickson* (1936) 13 C.A.2d 365, 56 P.2d 1287, *supra*, §31) are disapproved. (50 C.3d 462.)

(d) This holding is retroactive. Although it was unforeseeable in the legal community, it is likely that "most individuals have conducted their affairs in reliance upon the principle we adopt today." (50 C.3d 464.) However, a person who contracted for an estate plan or who gave up an opportunity to purchase life insurance in reliance on a lawyer's advice, and claims a right of survivorship, may prove that the application of the new rule would cause substantial detriment, and may then be entitled to the right of survivorship in accordance with the former rule. (50 C.3d 464.) Accordingly, the cause is remanded to afford respondent an opportunity to present such proof. (50 C.3d 465.)

Two justices in separate opinions concurred in the holding on change in the rule, but strongly disagreed on retroactivity. The first opinion points out that the concept being overruled originated with the Supreme Court 75 years ago, and was followed by a number of Supreme Court and Court of Appeal decisions; and the justice argues that innumerable persons relying on advice of attorneys should be protected by making the new holding prospective. (50 C.3d 466.) The second opinion asserts that to make substantial reliance on the old rule an affirmative defense will engender a far larger volume of litigation than the old rule created. (50 C.3d 467.) (See 18 *Pepperdine L. Rev.* 822.)

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a. In General.

3. Proceeds of Joint Tenancy Property.

13 Witkin Sum. Cal. Law Pers Prop § 33

[§ 33] Proceeds of Joint Tenancy Property.

In *Taylor v. Crocker-Citizens Nat. Bank* (1968) 258 C.A.2d 682, 65 C.R. 771, decedent husband conveyed encumbered real property to himself and plaintiff wife in joint tenancy. Later, she consented to refinancing the property with a larger loan. Decedent realized \$ 6,266.81 in cash, which he lent to the corporation of which he was vice-president. The corporation executed a note payable to "George A. Taylor and Helen O. Taylor." The president testified that decedent said he wanted the note payable to his wife if anything happened to him. On his death, plaintiff wife claimed the whole as surviving joint tenant, and defendant, daughter of decedent by a former marriage, claimed half on the theory that the note was held in tenancy in common. *Held*, plaintiff wife was entitled.

(a) The trial judge upheld defendant's claim on the theory that (1) there was no language or other writing to comply with C.C. 683 (supra, §30), and (2) the statutory presumption then in effect made property acquired by a married woman and another tenancy in common unless a different intention was expressed. (258 C.A.2d 685, 686.)

(b) These statutes apply to the *creation* of an interest. But after its creation, proceeds of joint tenancy property, in the absence of a contrary agreement, retain the character of the property from which they were acquired. Here, the money lent was merely a reinvestment of proceeds of joint tenancy realty, and the note was merely evidence of that underlying debt. (258 C.A.2d 687.)

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4. Joint Tenancy in Personal Property.

b. Safe Deposit Boxes.

13 Witkin Sum. Cal. Law Pers Prop § 34

[§ 34] Safe Deposit Boxes.

(1) *Joint Access Card.* Persons renting a safe deposit box use a form furnished by the bank. A mere *joint access card*, giving both of the renters the right to possession and use of the box, does not make them joint owners of the contents. (*Security-First Nat. Bank of Los Angeles v. Stack* (1939) 32 C.A.2d 586, 591, 90 P.2d 337; see 32 Cal. L. Rev. 301; 33 Cal. L. Rev. 328; 4 A.L.R.3d 1462 [bank's liability for denying access]; for form of signature card, see 3B Am.Jur. Legal Forms 2d (1996 ed.), §38:234.)

(2) *Joint Tenancy Prohibited.* A statute forbidding safe deposit joint tenancies was enacted in 1949: "No contract or other arrangement made after the effective date of this section between any person, firm, or corporation engaged in the business of renting safe-deposit boxes and the renter or renters of a safe-deposit box, *shall create a joint tenancy* in or otherwise establish ownership in any of the contents of such safe-deposit box. *Any such contract or other arrangement purporting so to do shall be to such extent void and of no effect.*" (C.C. 683.1; on former rule allowing such arrangements, see *Estate of Gaines* (1940) 15 C.2d 255, 260, 100 P.2d 1055; *Young v. Young* (1932) 126 C.A. 306, 313, 14 P.2d 580 ["all the contents of said safe now or hereafter placed therein, are our joint property ... title ... rests in the survivor of us"].)

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



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5. Coownership of Automobile.

13 Witkin Sum. Cal. Law Pers Prop § 35

[§ 35] Coownership of Automobile.

Two statutes, one pertaining to registration (*Veh.C. 4150.5*) and one to transfer (*Veh.C. 5600.5*), make detailed provision for different kinds of coownership of automobiles. The two statutes, substantially identical, first recite that ownership may be held (or transferred) in coownership as provided in C.C. 682 (joint interests, partnership interests, interests in common, community property), and then set forth *exceptions* as follows:

(1) *Alternative "or": Joint tenancy.* A vehicle may be registered in the names of two or more persons "in the alternative by the use of the word 'or.' " This is deemed to be held in joint tenancy: (a) Each coowner is deemed to have granted the others the absolute right to dispose of the title and interest. (b) At death, a coowner's interest passes to the survivor unless a contrary intention is set forth in writing on the application for registration or request for transfer. (*Veh.C. 4150.5(a), 5600.5(a).*)

(2) *Alternative "or": Community property or tenancy in common.* A vehicle may be registered in the names of two or more persons "in the alternative by the use of the word 'or' and if declared in writing upon the application ... to be community property, or tenancy in common," each coowner has the absolute power to transfer the title or interest of the others "only during the lifetime of such coowners." (*Veh.C. 4150.5(b), 5600.5(b).*)

(3) *Conjunctive "and": Joint tenancy.* A vehicle may be registered in the names of two or more persons "in the conjunctive by the use of the word 'and.' " Thereafter, the signature of each coowner or that owner's personal representative is necessary for transfer unless the title "is set forth in joint tenancy." In the latter case, the signature of each coowner or personal representative is required "only during the lifetime of the coowners," and on death of a coowner title passes to the survivor. (*Veh.C. 4150.5(c), 5600.5(c).*)

The Department of Motor Vehicles is authorized to adopt suitable abbreviations to appear on the certificates of registration and ownership to designate the types of ownership. (*Veh.C. 4150.5(d), 5600.5(d).*)

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6. Unclaimed Property Law.

a. In General.

1. Former Law.

13 Witkin Sum. Cal. Law Pers Prop § 36

[§ 36] Former Law.

(1) *General Law of Abandoned Property.* Title to abandoned property may be acquired by *finding* (see *infra*, §117 et seq.), or by *escheat* under statutes usually termed "abandoned" or "unclaimed" property acts. (See generally *1 Am.Jur.2d* (1994 ed.), *Abandoned, Lost, and Unclaimed Property* §1 et seq.; *27A Am.Jur.2d* (1996 ed.), *Escheat* §1 et seq.; *15 Pacific L. J.* 977 [salvor's right to sunken aircraft]; *19 Stanf. L. Rev.* 619; *25 Proof of Facts* 2d 685 [proof of abandonment of tangible personal property]; *32 A.L.R.4th* 728 [disposition of abandoned motor vehicle by state or municipality].)

The differences in the statutes, and the uncertainties surrounding the concept of *situs* of some kinds of personal property, give rise to difficult questions of jurisdiction and conflict of laws. (See *14 Summary* (10th), *Wills and Probate*, §53; *2 Cal. Proc.* (4th), *Jurisdiction*, §252.)

(2) *Original California Legislation.* In 1945, the Legislature enacted a statute (former C.C.P. 1274.1 et seq.) providing a detailed procedure for acquisition of title by the state to money in a bank or other similar organization, unclaimed for 20 years. (See *Umbsen v. Crocker First Nat. Bank of San Francisco* (1949) *33 C.2d* 599, 601, *203 P.2d* 752; *Estate of Costa* (1952) *109 C.A.2d* 735, 739, *241 P.2d* 621.) In 1951, the former act was repealed and a new comprehensive statute was enacted, covering various kinds of unclaimed and abandoned property and escheat proceedings. (C.C.P. 1300 et seq.)

(3) *First Uniform Act.* In 1959, the sections dealing with abandoned and unclaimed property (former C.C.P. 1460-1578) were repealed and replaced by a modified version of the first *Uniform Disposition of Unclaimed Property Act*. This statute defined in great detail the kinds of property covered and the periods of time within which they were presumed abandoned. (See *Douglas Aircraft Co. v. Cranston* (1962) *58 C.2d* 462, 463, *24 C.R.* 851, *374 P.2d* 819 [discussing California version]; *98 A.L.R.2d* 304.)

(4) *Revised Uniform Acts.* A revised Uniform Act was approved by the Commissioners in 1966, principally to take care of problems involving money orders and traveler's checks. The 1966 Act was in turn superseded by the Uniform Unclaimed Property Act (1981) and the Uniform Unclaimed Property Act (1995). (See *8C U.L.A.* (Master Ed.), p. 87.)

(5) *Nature of Uniform Act.* The Uniform Act departed from earlier statutes in two significant respects:

First, it is custodial; there is no escheat. "[T]he state does not take title to unclaimed property, but takes custody only, and holds the property in perpetuity for the owner." (Prefatory Note to 1995 Act, 8C U.L.A. (Master Ed.), p. 89.)

Second, a reciprocity provision precludes the possibility of multiple liability of the holder. "[I]f the law of the State of the owner's last known address does not provide for escheat or taking custody of the unclaimed property or if that State's escheat or unclaimed property law is not applicable to the property in question, the property is subject to claim by the State in which the holder is domiciled. In that instance, the State of the owner's last known address may thereafter claim the property if it enacts an applicable unclaimed property law. The holder State will act as custodian and pay or deliver the property to the owner or the State which has priority." (Comment to §4 of 1995 Act, 8C U.L.A. (Master Ed.), p. 113.)

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

(1) *General Law of Abandoned Property.* See 1 *Am.Jur.2d* (2005 ed.), *Abandoned, Lost, and Unclaimed Property* §1 et seq.; 27A *Am.Jur.2d* (2008 ed.), *Escheat* §1 et seq.

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §261.(3) *First Uniform Act.* 98 *A.L.R.2d* 304, text, p. 45, was superseded by 29 *A.L.R.6th* 507, Supp., *infra*, §38.



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aa. Purpose of Revision.

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[§ 37] Purpose of Revision.

Pursuant to the recommendation of the Law Revision Commission, the Unclaimed Property Law (*C.C.P. 1500* et seq.) was enacted in 1968 to bring California law in conformity with the holding in *Texas v. New Jersey* (1965) 379 U.S. 674, 85 S.Ct. 626, 13 L.Ed.2d 596, 2 Cal. Proc. (4th), *Jurisdiction*, §252. (See Comment to *C.C.P. 1510*; see also *Uniform Unclaimed Property Act* (1995), 8C U.L.A. (Master Ed.), p. 87; *Cory v. Public Util. Com.* (1983) 33 C.3d 522, 528, 189 C.R. 386, 658 P.2d 749 ["[t]he purposes of the Unclaimed Property Law are to protect unknown owners by locating them and restoring their property and to give the state the benefit of the use of it".])

The Act contains many complex provisions, and the Law Revision Commission's Comments, reproduced in the Annotated Code, should be consulted in all research.

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

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §261.



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bb. Nature of Law.

13 Witkin Sum. Cal. Law Pers Prop § 38

[§ 38] Nature of Law.

(1) *Restatement of Former Uniform Act.* The Unclaimed Property Law is largely a restatement and continuation of the Uniform Disposition of Unclaimed Property Act which was in effect in California from 1959 to 1968 (see *supra*, §36). Hence, substantially similar provisions should be construed as restatements rather than as new enactments. (*C.C.P. 1506*; see Comment.)

The new law, however, rejects the concept of perpetual custody of property (see *supra*, §36), and provides for the escheat of both tangible and intangible personal property. (See *C.C.P. 1510 et seq.*) The basic change relates to intangibles: They are subject to escheat if this state is the last known address of the apparent owner of the property. (See *C.C.P. 1510*, and Comment; *infra*, §40.)

(2) *Search Agreements.* *C.C.P. 1582*, as adopted in 1959 and subsequently amended, imposes limitations on agreements to search for and locate unclaimed property for compensation and fixes a maximum level of compensation. This provision has been held constitutionally valid as serving a reasonable and legitimate legislative purpose and does not deny equal protection of the laws to persons lawfully engaged in such business. (*Goodman v. Cory* (1983) 142 C.A.3d 737, 743, 191 C.R. 272.)

(3) *Which State Is Entitled To Escheat.* The issue of which state was entitled to escheat amounts payable on traveler's checks, money orders, and similar instruments was the subject of federal legislation in 1974. The Law Revision Commission then recommended amendments to the California Code of Civil Procedure to follow the federal statute, principally the revision of *C.C.P. 1511*. The new version of *C.C.P. 1511* was enacted in 1975, together with some of the other minor conforming amendments.

Former *C.C.P. 1511* stated a presumption that the state of purchase of the instrument was the state of the last known address of the apparent owner. The new version dropped the presumption approach and adopted the rules laid down in the federal statute. The sum payable on "a money order, travelers check, or other similar written instrument (other than a third-party bank check) on which a business association is directly liable" *escheats to this state if:*

(a) The books and records of the association show that the instrument *was purchased in this state*.

(b) The association has its *principal place of business in this state* and (1) its books and records *do not show* the state in which the instrument was *purchased* or (2) its books and records show the *state of purchase* and the *laws* of that state *do not provide for escheat*. (On the duty of an association that sells such instruments in this state to keep records showing purchase in this state, see *C.C.P. 1581*.)

The revised section applies to sums payable on instruments "deemed abandoned" (as these words are used in the federal statute) on or after February 1, 1965, except to the extent that they have been paid over to a state prior to January 1, 1974. (*C.C.P. 1511(b)*.)

(4) *Agreements With Other States*. The State Controller may enter into reciprocal agreements with other states for the exchange of information on unclaimed property subject to escheat, and the Controller may by regulation require the reporting of information necessary to ensure compliance with such agreements. (*C.C.P. 1573*; see Comment.) Compliance with the escheat laws of another state may be enforced by the Attorney General if that state will act similarly, and the Attorney General may request another state to bring an action to recover property escheated to California. (*C.C.P. 1574, 1575*.)

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

(1) *Restatement of Former Uniform Act*. See 29 *A.L.R.6th* 507 [validity, construction, and application of state statutes implementing Uniform Unclaimed Property Act or predecessor Uniform Disposition of Unclaimed Property Act].



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3. Other Statutes Dealing With Unclaimed Property.

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[§ 39] Other Statutes Dealing With Unclaimed Property.

The Unclaimed Property Law applies only to property not covered by other statutes. (See *C.C.P. 1510* and Comment.) The other statutes fall mainly into two classes:

(1) Those which provide that unclaimed funds shall be treated as if received under the Unclaimed Property Law. (See, e.g., *C.C.P. 570* [receiver's funds]; *Corp.C. 2008(b)*; *Fin.C. 3121, 3150, 3162*; *Ins.C. 1056.5*; *Welf.C. 4126* et seq.)

(2) Those which deal generally with unclaimed property or with particular kinds of property. (See, e.g., *C.C.P. 1300* et seq. [unclaimed property generally]; *C.C. 1140* [procedure for disposition of die, mold, or form by molder or tool or die maker if customer does not claim possession within 3 years following last use]; *C.C. 1834.5, 1834.6* [abandoned animals]; *C.C. 1862.5* [property left in a licensed hospital for 180 days after departure of owner]; *Govt.C. 26642* [unclaimed property of prisoner in county jail who died or was released]; *Harb. & Nav.C. 522* [abandoned vessels]; *P.C. 1411* [unclaimed, recovered stolen property]; *P.C. 5061* et seq. [unclaimed property of inmates of a state correctional institution who die, escape, or are discharged or paroled]; *Veh.C. 22523, 22524, 22669, 22710* [abandoned motor vehicles]; *Veh.C. 22660* [authority to adopt local ordinances on abandoned motor vehicles]; *Welf.C. 217* [use of unclaimed personal property with value of not more than \$ 500 for prevention of juvenile delinquency]; on found property, see *C.C. 2080* et seq., *infra*, §118 et seq.; on disposition of tenant's personal property abandoned at termination of tenancy, see *C.C. 1980* et seq., *12 Summary (10th), Real Property*, §749 et seq.; and see Comment to *C.C.P. 1519*.)

Prior to 1983, California law did not specifically provide for the rights of museums or lenders of property to museums as to property left unclaimed by the owner for an extended period of time. *C.C. 1899* et seq., enacted in 1983, contains comprehensive provisions regulating the rights of the parties where property is loaned to a museum either for an indefinite term or a term in excess of 7 years. These provisions (1) permit a lender to file a notice of intent to preserve an interest in the loaned property (*C.C. 1899.4, 1899.5*); (2) require museums to give specified notices and information to the lender (*C.C. 1899.3, 1899.7*); (3) provide for termination of the loan, at the option of the museum, upon giving of a notice to terminate (*C.C. 1899.9*); (4) permit a museum to apply conservation measures to, or dispose of, loaned property without the lender's permission under specified circumstances (*C.C. 1899.6*); (5) provide limitations

on actions relating to loaned property (C.C. 1899.8, 1899.10); and (6) authorize a museum to report certain unclaimed property to the Controller for disposition under the Unclaimed Property Law (C.C. 1899.11).

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



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13 Witkin Sum. Cal. Law Pers Prop § 40

[§ 40] Escheat of Unclaimed Personal Property.

Intangible property escheats to California if this is the state of the last known address of the apparent owner as shown on the holder's records. (*C.C.P. 1510(a)*.) Property that would ordinarily escheat to another state, however, may escheat to California if the other state does not provide for escheat and the holder is a domiciliary or governmental agency of this state. (*C.C.P. 1510(c)*.) The same is true of property owned by a person whose last known address is in a foreign nation. (*C.C.P. 1510(d)*.)

Where no address of the apparent owner appears on the holder's records, property is subject to escheat to this state if (1) the apparent owner's last known address is here or (2) the property has not previously been paid to the state of last known address and the holder is a domiciliary or a governmental agency of the state. (*C.C.P. 1510(b)*.)

The law specifies in elaborate detail the conditions and procedure for escheat of the following kinds of property:

(1) Traveler's checks, bank deposits, funds paid toward the purchase of an interest in a financial organization, drafts, certified checks, money orders, and other written instruments on which a financial organization is directly liable. (*C.C.P. 1513* [specifying minimum periods before escheat may occur, and prohibiting the discontinuance of interest or dividends on inactive accounts subject to the law]; see *Bank of America v. Cranston* (1967) 252 C.A.2d 208, 212, 60 C.R. 336 [considering similar provisions of former Act]; 42 A.L.R.3d 846 [lost or stolen traveler's checks].) Financial institutions must inform depositors of the period and circumstances in which escheat of their accounts may occur "if the holder has in its records an address for the apparent owner, which the holder's records do not disclose to be inaccurate." (*C.C.P. 1513.5(a)*.)

C.C.P. 1513 exempts from its provisions, when certain conditions are met, any funds held by a business association in an individual retirement account or under retirement plans for self-employed individuals or similar accounts or plans established under the federal or state tax laws. (*C.C.P. 1513(f)*.)

(2) Contents of safe deposit box unclaimed for more than 3 years. (*C.C.P. 1514*.)

(3) Life insurance or annuity unclaimed for more than 3 years. (*C.C.P. 1515*.)

(4) Property distributable in the course of a demutualization or related reorganization of an insurance company is deemed abandoned as follows:

(a) On the date of the demutualization or reorganization, if the instruments or statements reflecting the distribution are not mailed to the owner because the address on the books and records for the holder is known to be incorrect. (*C.C.P. 1515.5(a).*)

(b) Two years after the date of the demutualization or reorganization, if instruments or statements reflecting the distribution are mailed to the owner and returned by the post office as undeliverable and the owner has not adequately communicated with the holder. (*C.C.P. 1515.5(b).*)

(c) Three years after the date of the demutualization or reorganization, if instruments or statements reflecting the distribution are mailed to the owner and not returned by the post office as undeliverable and the owner has not adequately communicated with the holder. (*C.C.P. 1515.5(c).*)

(5) Dividends, profits, distributions, interest, payments on principal, or other sums held or owing by a business association for its shareholders or other security holders, if the owner has not claimed it or corresponded in writing with the association concerning it within 3 years after the payment or delivery date. (*C.C.P. 1516(a).*) Intangible interests now escheat after 3 years whether or not a dividend or other distribution is owed by the association. (*C.C.P. 1516(b);* see Comment.)

(6) Unclaimed distributions from the voluntary or involuntary dissolution or liquidation of business associations, unclaimed within 6 months after final distribution or liquidation. (*C.C.P. 1517(a);* see Comment.)

(7) Unclaimed distributions from the voluntary or involuntary dissolution or liquidation of an insurer or other person under *Ins.C. 1010* et seq., unclaimed within 6 months after final distribution. (*C.C.P. 1517(b).*)

(8) Property, tangible or intangible, held in a fiduciary capacity, within 3 years after payment or distribution date, if the owner has not indicated an interest therein. (*C.C.P. 1518(a).*) Funds in individual retirement accounts or retirement plans for self-employed individuals or similar accounts or plans established under the federal or state tax laws are not payable or distributable within the meaning of *C.C.P. 1518(a)* unless, under the terms of the account or plan, distribution would then be mandatory. (*C.C.P. 1518(b).*)

(9) Property, tangible or intangible, held for the owner by a governmental agency and unclaimed for more than 3 years. (*C.C.P. 1519;* but see *C.C.P. 1502*, infra, §41; for exception for money collected by Agricultural Labor Relations Board from employers on behalf of employees, see *Lab.C. 1161(c)(1).*)

(10) Sums held by a business association that have been ordered refunded by a court or administrative agency, and which have remained unclaimed for more than 1 year after becoming payable. (*C.C.P. 1519.5.*)

(11) Property, tangible or intangible, including income but deducting lawful charges, held or owing in the ordinary course of the holder's business if unclaimed for 3 years after the payment or distribution date. (*C.C.P. 1520(a);* see *California v. Pacific Far East Line* (1968) 261 C.A.2d 609, 612, 68 C.R. 67 [decided under former Act, holding unclaimed wages of seaman subject to escheat; Congress did not preempt field]; *Blue Cross of Northern Calif. v. Cory* (1981) 120 C.A.3d 723, 735, 174 C.R. 901 [intangible property]; and see *C.C.P. 1520(b)* [reasonable efforts must be made to notify owner of period and circumstances of escheat]; *C.C.P. 1520.5* [*C.C.P. 1520* does not apply to gift certificates subject to *C.C. 1749.45* et seq., except those having expiration date and that are given in exchange for money or something else of value].)

C.C.P. 1520 prohibits service charges except as specifically authorized by statute or contract. *C.C.P. 1522* prohibits service charges even when authorized by the chapter, if the holder would not have charged them in the event the property had been claimed before being reported or remitted to the Controller. (See *Cory v. Golden State Bank* (1979)

95 C.A.3d 360, 369, 157 C.R. 538 [decided on former provision of C.C.P. 1513(d), authorizing lawful service charges, and holding provision unenforceable against Controller when it had been waived as to members of general public].)

Unclaimed refunds payable by a telephone company come within C.C.P. 1520 and must be held for the benefit of unlocated customers and for use of the state in accordance with the Unclaimed Property Law; they should not be paid pro rata to the company's *current* customers. (*Cory v. Public Util. Com.* (1983) 33 C.3d 522, 526, 528, 189 C.R. 386, 658 P.2d 749.)

(12) Unclaimed distributions or income from employee benefit plan distributions after 3 years, if the owner has not expressed, either in writing or as evidenced by a memorandum, an interest in the property. (C.C.P. 1521(a).) But such property is not subject to the law if the plan provides for forfeiture of an unclaimed interest. (C.C.P. 1521(b); see C.C.P. 1521(c) [participant entitled to distribution in form of residuals as defined in C.C.P. 1501(j) is relieved from forfeiture under C.C.P. 1521(b) by making claim]; *Screen Actors Guild v. Cory* (1979) 91 C.A.3d 111, 115, 154 C.R. 77 [association bylaw held to be private escheat device not qualifying for this exemption]; 3 *Summary* (10th), *Agency and Employment*, §403.)

(13) Wages or salaries that have remained unclaimed by the owner for more than 1 year after the wages or salaries become payable. (C.C.P. 1513(g).)

(14) Insurance rebates ordered or negotiated under Proposition 103, if the insurer, after a good faith effort, determines that the policyholder entitled to the rebate cannot be located. (C.C.P. 1523; on payment of rebates from escheated funds, see *Ins.C.* 12936.)

(15) Property specifically provided for by other statutes. (See C.C.P. 1510, and Comment; *supra*, §39.)

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

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c. Exemptions.

13 Witkin Sum. Cal. Law Pers Prop § 41

[§ 41] Exemptions.

The following are not subject to escheat under the Unclaimed Property Law:

- (1) Property escheated to the state under the general escheat statute (*C.C.P. 1300 et seq.*). (*C.C.P. 1502(b).*)
- (2) Property in the official custody of a municipal utility district. (*C.C.P. 1502(a)(1).*)
- (3) Property in the official custody of certain local agencies. (*C.C.P. 1502(a)(2).*)
- (4) Property escheated by another state prior to September 18, 1959. (*C.C.P. 1504(b).*)
- (5) Specified property not subject to escheat under the former Act. (*C.C.P. 1503.*)
- (6) Unclaimed funds held by a life insurance corporation organized or admitted as a domestic fraternal benefit society "so long as such funds are used for scholarship funds, exclusive of costs of administration thereof." (*C.C.P. 1528.*)
- (7) A proprietary interest in an agricultural cooperative association. (*Food & Ag.C. 54041* [under specified conditions, becomes property of association instead of being transferred to state].)

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

(3a) (*New*) *Property in court custody:* Property in the official custody of a court is not subject to escheat if the property may be transferred to the Trial Court Operations Fund under *Govt.C. 68084.1*. (*C.C.P. 1502(a)(3)*, added in 2007.)



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d. Procedure in Escheating Property.

13 Witkin Sum. Cal. Law Pers Prop § 42

[§ 42] Procedure in Escheating Property.

(1) *Report by Holder.* The holder of escheated property must submit a verified report to the Controller on an approved form, including specified information. (*C.C.P. 1530.*) The Controller or an authorized licensing or regulating agency may, at reasonable times and on reasonable notice, examine the records of any person whom the Controller reasonably believes to have failed to report escheated property. (*C.C.P. 1571.*) An action may be brought to enforce the duty to permit this examination, or to obtain a judicial determination that property is subject to escheat. (*C.C.P. 1572(a)(1)(2).*) Criminal penalties are prescribed for wilful failure to report. (*C.C.P. 1576(a).*)

The running of the applicable statute of limitations on the owner's claim against the holder does not prevent the property from being escheated or affect the holder's duty to report or surrender escheated property. (*C.C.P. 1570*; see *Bank of America v. Cory* (1985) 164 C.A.3d 66, 74, 75, 210 C.R. 351 [no limitation on time in which Controller may bring action to enforce Unclaimed Property Law; hence, action against bank to recover dormant funds was not barred by 3-year period of limitations of *C.C.P. 338*].) But this provision is not retroactive. (See *C.C.P. 1503(b)*, and Comment to *C.C.P. 1570.*)

(2) *Notice by Controller.* The Controller is required, within 1 year after payment or delivery of escheated property valued at \$ 50 or more, to publish notice in a newspaper of general circulation that is most likely to give notice to the apparent owner. (*C.C.P. 1531(a).*) The notice must be entitled "notice to owners of unclaimed property" (*C.C.P. 1531(b)*) and must state that further information can be obtained from the Controller (*C.C.P. 1531(c)*). If the account paid or delivered to the Controller includes a Social Security number, the Controller must obtain the apparent owner's current address from the Franchise Tax Board. If that address is different from the one previously reported to the Controller, the Controller must mail a notice to that address. (*C.C.P. 1531(d).*) (See *Harris v. Westly* (2004) 116 C.A.4th 214, 220, 222, 10 C.R.3d 343 [failure to comply with notice requirements of *C.C.P. 1531* does not prevent Controller from selling escheated property, and sale of escheated property without notice does not violate owner's due process rights].)

With regard to property escheating to the state under *C.C.P. 1514* (contents of safe deposit box), the Controller must also cause a notice to be published as provided in *C.C.P. 1531* within 1 year after receipt of property. (*C.C.P. 1532.1.*)

(3) *Payment to State.* Persons filing a report under *C.C.P. 1530* must "pay or deliver to the Controller all escheated property specified in the report at the same time the report is filed." A payment of unclaimed cash of \$ 20,000 or more must be made by electronic funds transfer in accordance with the Controller's regulations. (*C.C.P. 1532(a)*.) Failure to report, pay, or deliver unclaimed property to the Controller within the prescribed time results in interest charges of 12% per annum. However, a person who has reasonable cause for failing to report, pay, or deliver unclaimed property within the prescribed time limits is exempt from liability for interest. (*C.C.P. 1577*; see *Bank of America v. Cory*, *supra*, 164 C.A.3d 80 [12% rate is not limited to property reportable on and after January 1, 1977, the effective date of *C.C.P. 1577*; rate applies to all sums *subject to* Unclaimed Property Law on and after that date]; on amnesty program applicable to escheated property paid or delivered to Controller by December 31, 2002, see *C.C.P. 1577.5*; *Westly v. U. S. Bancorp* (2003) 114 C.A.4th 577, 583, 7 C.R.3d 838 [although *C.C.P. 1577.5* was intended to be retroactive, its application to holders of property delivered to state prior to its enactment constitutes impermissible gift of public funds].) The Controller may bring an action to enforce delivery. (*C.C.P. 1572(a)(3)*.) Wilful refusal to deliver is a crime. (*C.C.P. 1576(b)*.)

If, after the holder pays or delivers, a person or another state claims the property, the Controller must defend the holder and indemnify him or her against any liability on the claim. (*C.C.P. 1561(a)*.)

(4) *Custody and Sale.* The state assumes custody and is responsible for the safekeeping of escheated property paid or delivered to the Controller. (*C.C.P. 1560(a)*.) The property is sold in the manner specified by the statute (see *C.C.P. 1563*), and the proceeds, together with all other money received under the law, are deposited in the Unclaimed Property Fund. (*C.C.P. 1564(a)*.)

The Controller may reject tangible personal property upon a determination that it would not be in the state's interest to take custody. (*C.C.P. 1533*.) And the Controller may destroy or otherwise dispose of property of no apparent commercial value. (*C.C.P. 1565*.)

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

(1) *Report by Holder.* See *California v. Bank of America Corp.* (2005) 126 C.A.4th 225, 235, 23 C.R.3d 746 [citing the text]. (2) *Notice by Controller.* *C.C.P. 1531.5*, added in 2007, requires the Controller to establish and conduct a notification program designed to inform owners about the possible existence of unclaimed property received under the Unclaimed Property Law.

C.C.P. 1531(d) was amended in 2007. It now provides that, within 165 days after the final date for filing the report required by *C.C.P. 1530*, the Controller must mail a notice to each person having an address listed in the report who appears to be entitled to escheated property valued at \$ 50 or more. If the report includes a Social Security number, the Controller must request the Franchise Tax Board to provide a current address for the apparent owner on the basis of that number. The Controller must mail the notice to the apparent owner for whom a current address is obtained if the address is different from the address previously reported to the Controller. If the Franchise Tax Board does not provide an address or a different address, then the Controller must mail the notice to the address listed in the report. (On contents of notice, see *C.C.P. 1531(e)*, added in 2007.)

(3) *Payment to State.* *C.C.P. 1532(a)* was amended in 2007. Payment must now be made no sooner than 7 months and no later than 7 months and 15 days after the final date for filing the report, rather than at the same time the report is filed.

If a person establishes a right to receive property specified in the report to the satisfaction of the holder before that property has been delivered to the Controller, or it appears that, for another reason, the property may not be subject to escheat, the holder must not pay or deliver the property to the Controller but must instead file a report with the Controller, as prescribed by the Controller, containing information about the property. (*C.C.P. 1532(b)*, added in 2007.)

A corporation that delivers duplicate stock certificates to the Controller, as required by *C.C.P. 1532(b)* (now *C.C.P.*

1532(d)), is "relieved from all liability of every kind to any person" for losses or damages that the person suffers from the delivery. This immunity is absolute. (*Harris v. Verizon Communications* (2006) 141 C.A.4th 573, 577, 46 C.R.3d 185 [trial court properly sustained corporation's demurrer in action alleging that corporation failed to comply with statutory notice requirements].)(4) *Custody and Sale*. C.C.P. 1565 was amended in 2007 to require the Controller to wait at least 18 months following delivery of the property before destroying or disposing of it.

See *Morris v. Chiang* (2008) 163 C.A.4th 753, 757, 77 C.R.3d 799 [because title to plaintiff's unclaimed property was legitimately vested in state while state had custody, plaintiff was not entitled to interest earned on property; state's retention of interest under C.C.P. 1562 was not unconstitutional taking without compensation].



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6. Unclaimed Property Law.

e. Claim by Owner of Interest.

13 Witkin Sum. Cal. Law Pers Prop § 43

[§ 43] Claim by Owner of Interest.

(1) *Filing of Claim and Hearing by Controller.* A verified claim to escheated property or its proceeds may be filed with the Controller. (C.C.P. 1540(a).) The Controller must consider it within 180 days after filing, and may hold a hearing and receive evidence. (C.C.P. 1540(b).) Written notice of denial must be given to the claimant. (C.C.P. 1540(b).)

(2) *Action To Establish Claim.* An action may be brought in the superior court by any person whose claim either has been denied or has not been determined within 180 days after filing. Suit must be commenced within 90 days after the Controller's decision or within 270 days from the filing of the claim if no decision has been made. The Attorney General and the Controller must be served, and the Controller has 60 days to answer. The action is tried without a jury. (C.C.P. 1541.)

(3) *Subsequent Claims.* After payment or delivery to any claimant, no suit can be maintained against the state or its officers or employees by another claimant. (C.C.P. 1566(a); see Comment, pointing out that this section does not affect the true owner's right to recover the property from the person to whom it was erroneously paid or delivered.) And, except as provided in C.C.P. 1541, supra, no suit can be maintained against the state or its officers or employees "for or on account of any transaction entered into by the State Controller pursuant to this chapter." (C.C.P. 1566(b); see *Fong v. Westly* (2004) 117 C.A.4th 841, 852, 12 C.R.3d 76 [action by owners of escheated stock against Controller for violating notice requirements of Unclaimed Property Law was precluded by C.C.P. 1566(b), where owners had already used C.C.P. 1541 to obtain proceeds from stock; to extent damages sought were not "for or on account of any transaction entered into by the State Controller," action was also barred by failure to file appropriate tort claims].)

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



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f. Claim by Another State.

13 Witkin Sum. Cal. Law Pers Prop § 44

[§ 44] Claim by Another State.

Another state is entitled to recover escheated property surrendered to California if the last known address of the apparent owner, as shown on the holder's records, is in the other state and the property has escheated under its laws. (*C.C.P. 1542(a)(2)*.) However, a holder who has already delivered the property to the State Controller is relieved of liability. (*C.C.P. 1560*.)

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



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7. Partition of Personal Property.

13 Witkin Sum. Cal. Law Pers Prop § 45

[§ 45] Partition of Personal Property.

Title 10.5 of the Code of Civil Procedure, entitled "Partition of Real and Personal Property" (*C.C.P. 872.010* et seq.), governs actions for partition of real property, "and, except to the extent not applicable, actions for partition of personal property." (*C.C.P. 872.020.*) (For a full discussion of *C.C.P. 872.010* et seq., see 12 *Summary* (10th), *Real Property*, §66 et seq.)

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1. State Protection.

a. Former Law.

13 Witkin Sum. Cal. Law Pers Prop § 46

[§ 46] Former Law.

(1) *Nature of Common Law Right.* Former C.C. 980 et seq., originally enacted in 1947 and superseding more loosely worded statutes, recognized the common law right of the owner of a composition to *exclusively* possess it, use it, and transfer or otherwise dispose of it. This right existed indefinitely until *publication* of the composition. (See *Carpenter Foundation v. Oakes* (1972) 26 C.A.3d 784, 794, 103 C.R. 368; *Read v. Turner* (1966) 239 C.A.2d 504, 510, 48 C.R. 919 [distinguishing limited and general publication]; *Zachary v. Western Publishing Co.* (1977) 75 C.A.3d 911, 920, 143 C.R. 34 [same].)

(2) *Remedies of Author.* Violation of the common law right was commonly redressed in four kinds of actions:

(a) A *tort action* for damages for plagiarism (infringement). (See *Golding v. R.K.O. Pictures* (1950) 35 C.2d 690, 694, 221 P.2d 95; 38 U.S.F. L. Rev. 391 [role of courts with respect to plagiarism].)

(b) An action for *breach of contract*, express or implied, to compensate the author for unauthorized use. (See *Minnear v. Tors* (1968) 266 C.A.2d 495, 502, 72 C.R. 287.)

(c) An action in *quasi-contract* to recover the reasonable value of the property wrongfully taken. (See *Desny v. Wilder* (1956) 46 C.2d 715, 734, 299 P.2d 257.)

(d) An action to *enjoin* the unauthorized use. (See *Carpenter Foundation v. Oakes*, *supra*, 26 C.A.3d 792.)

(3) *Architect's Plans.* In *Smith v. Paul* (1959) 174 C.A.2d 744, 345 P.2d 546, plaintiff designer of homes made plans for C, which he filed with the local building department, and from which a builder constructed C's home. Defendants used the plans and specifications without plaintiff's consent, and he sued for their reasonable value. *Held*, judgment for defendants reversed with directions to try the issue of damages; the plans were protectible under common law copyright. "As this is a case of first impression in California we must decide between adopting the rather limited view of the three cases in other jurisdictions above mentioned which held that filing in a municipal building department of architectural plans or the building of the structure therefrom, constitutes a general publication causing the loss of the architect's common-law copyright or adopting what to us appears the better reasoning and the more equitable result,

namely, that both acts constitute a limited publication which does not cause such loss. We adopt the latter view and hold that in this case the plaintiff did not lose his common-law copyright." (174 C.A.2d 758.)

Smith involved plans for one home for one client, and its holding was limited to such an individual design in *Shanahan v. Macco Const. Co.* (1964) 224 C.A.2d 327, 36 C.R. 584. In *Shanahan*, plaintiffs designed and built 1,435 tract homes in five subdivisions, over 30,000 people inspected them at plaintiffs' invitation, and brochures and national advertising in trade magazines gave wide distribution to the plans. After most of the tract homes had been sold, defendants commenced to use the same plans and specifications. *Held*, this was a general publication, regardless of whether plaintiffs intended to place the plans in the public domain. (224 C.A.2d 339.) (See also *Oakes v. Suelynn Corp.* (1972) 24 C.A.3d 271, 277, 100 C.R. 838 [no recovery where previously prepared plans used to determine existing condition of structure without appropriation of design].)

The rules of both *Smith* and *Shanahan* were applied in *Read v. Turner, supra*. Plaintiffs conceived a floor plan of a residence and drew the plans. They gave them to defendant concrete subcontractor to bid on the job. Defendant gave them to a designer who used them to design 10 houses. *Held*: (a) Plaintiffs, by listing the house for sale and inviting the public to view it, and also by giving the purchaser a copy of the plans without restriction on use, made a general publication. (239 C.A.2d 513.) (b) They did not make such a publication by merely delivering the plans to defendant for the limited purpose of his bid. (239 C.A.2d 513.)

(4) *Professor's Lectures*. A lecture is an oral expression of a protectible product of the mind, i.e., the lecturer's composition in written and mental notes. As such, it was entitled to the common law protection. (See *Williams v. Weisser* (1969) 273 C.A.2d 726, 730, 736, 78 C.R. 542.)

In *Williams*, plaintiff, a professor of anthropology at U.C.L.A., prepared notes and delivered lectures in a course. Defendant, a commercial publisher of classroom notes, hired a student to take notes of the lectures and deliver them to him. Defendant then published them without a copyright notice and sold them to students. *Held*, this was (a) an infringement of common law copyright and (b) an invasion of privacy, and a judgment for injunction and compensatory and punitive damages was affirmed. There was no distribution of tangible copies of the lectures, and the oral presentation was to a limited class admitted for instruction; hence, there was no general publication. (273 C.A.2d 741.)

West's Key Number Digest, Copyright and Intellectual Property k.1 et seq.

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



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1. State Protection.

b. Revised Statutes.

13 Witkin Sum. Cal. Law Pers Prop § 47

[§ 47] Revised Statutes.

The federal copyright law enacted in 1976 contains specific provisions preempting any state law granting or conferring rights that are the equivalent to any of the exclusive rights within the general scope of the federal Act. (See *infra*, §57 et seq.) Various provisions of state law conflicting with the federal law (former B. & P.C. 14700 et seq.) were repealed in 1982, and state copyright protection for works of authorship not protectible under the federal law was expanded. (See *14 Pacific L. J.* 694.)

(1) *Ownership Rights.* The author of any original work of authorship not fixed in any tangible medium of expression has exclusive ownership in the representation or expression thereof except against one who originally and independently created the same or a similar work. For this purpose, a work is not "fixed" when it is not embodied in a tangible medium of expression or when its embodiment in a tangible medium is not sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration, either directly or with the aid of a machine or device. (C.C. 980(a)(1).)

C.C. 980(a)(2) likewise grants exclusive ownership to the author of an original work of authorship consisting of a sound recording initially fixed prior to February 15, 1972, until February 15, 2047, except against one who independently makes or duplicates another sound recording that does not recapture the actual sounds fixed in such prior sound recording but consists of an independent fixation of other sounds, even though such sounds imitate or simulate the sounds of the prior recording.

"The inventor or proprietor of any invention or design, with or without delineation, or other graphical representation, has an exclusive ownership therein, and in the representation or expression thereof, which continues so long as the invention or design and the representations or expressions thereof made by him remain in his possession." (C.C. 980(b).)

An original work of authorship not fixed in any tangible medium of expression and in the creation of which several persons are jointly concerned is *owned by them in equal proportion* unless it is otherwise agreed. (C.C. 981(a); see *75 So. Cal. L. Rev. 1* [narrative's role in reshaping joint authorship doctrine].)

C.C. 983 states: "If the owner of any invention or design intentionally makes it public, a copy or reproduction may be made public by any person, without responsibility to the owner, so far as the law of this state is concerned."

(2) *Right To Transfer: Residual Rights.* The owner of any rights in original works of authorship not fixed in any tangible medium of expression may transfer ownership. (C.C. 982(a).) Likewise, the owner of any invention or design, or a representation or expression thereof, may transfer his or her proprietary interest in it. (C.C. 982(b).)

C.C. 988 provides that whenever an exclusive or nonexclusive conveyance of a right relating to a work of art is made by or on behalf of the creating artist or the owner at the time of the conveyance, ownership of the physical work remains with the artist or owner unless such right of ownership is expressly transferred by the conveying document. (C.C. 988(b).) Any ambiguity with respect to the nature or extent of the rights conveyed must be resolved in favor of the reservation of the right unless federal copyright law provides to the contrary. (C.C. 988(c).) For purposes of these residual rights, "work of art" is defined as "any work of visual or graphic art of any media including, but not limited to, a painting, print, drawing, sculpture, craft, photograph or film." (C.C. 988(a)(2).)

(3) *Miscellaneous Statutes.* The Legislature, beginning in the mid-1970's, has enacted a number of other statutes conferring protections on those working in the fine arts. (See *infra*, §48 et seq.; on regulation of contracts between proprietors of retail establishments and copyright owners and performing rights societies, see *B. & P.C. 21750 et seq.*, 1 *Summary* (10th), *Contracts*, §617; on criminal penalties for illegal electronic dissemination of commercial recordings or audiovisual works, see *P.C. 653aa*, 2 *Cal. Crim. Law* (3d), *Crimes Against Property*, Supp., §227A.)

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



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1. State Protection.

c. Reproduction Rights in Fine Arts.

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[§ 48] Reproduction Rights in Fine Arts.

(1) *1975 Legislation.* Nonretroactive legislation in 1975, by extensive additions to C.C. 982, introduced an innovation in common law copyright: an artist's right of reproduction of a work of fine art that has been transferred to another, on or after January 1, 1976.

(2) *Legislative Policy.* The enacting statute (Stats. 1975, Chap. 952) states a legislative finding that advances in color printing and other means of graphic reproduction, combined with technological processes for reproducing three-dimensional objects, have created a "new dimension" in the field: "The traditional concept of a work of fine art as a unique one-of-a-kind creation has been replaced by important new property rights of substantial monetary value based on the reproduction of works of fine art. ... It is therefore declared to be the policy of this state to establish clear guideposts for all parties concerning legal ownership of the right of reproduction of works of fine art."

(3) *Scope of Protection: What Constitutes Fine Art.* "Fine art" is defined as "any work of visual art," including but not limited to (a) a drawing, painting, sculpture, mosaic, or photograph; (b) a work of calligraphy; (c) a work of graphic art, including an etching, lithograph, offset print, silk screen, or a work of like nature; (d) crafts, including those in clay, textile, fibre, wood, metal, plastic and like materials; or (e) mixed media, including a collage, assemblage, or "any combination of the foregoing art media." (C.C. 982(d)(1).)

C.C. 997 provides: "In this state, for any purpose, porcelain painting and stained glass artistry shall be considered a fine art and not a craft."

(4) *Scope of Protection: Right of Reproduction.* The right includes, without limitation, (a) reproductions as prints suitable for framing; (b) facsimile casts of sculpture; (c) reproductions used for greeting cards; (d) reproductions in general books and magazines not devoted primarily to art, and in newspapers in other than art or news sections, when "used for purposes similar to those of material for which the publishers customarily pay"; (e) art films; (f) television, except from stations operated for educational purposes or on educational programs from all stations; (g) reproductions used in "any form of advertising, including magazines, calendars, newspapers, posters, billboards, films or television." (C.C. 982(d)(3).)

(5) *Transfer: Reservation of Right of Reproduction.* The owner of any rights in an original work of authorship not fixed in a tangible medium of expression may transfer ownership therein. (C.C. 982(a).) Also, the owner of any invention or design or a representation or expression thereof may transfer the proprietary interest in it. (C.C. 982(b).) The general rule as to reservation of rights is stated in C.C. 982(c): "[W]henever a work of fine art is transferred, whether by sale or on commission or otherwise, by or on behalf of the artist who created it, or that artist's heir, legatee, or personal representative, the right of reproduction thereof is reserved to such artist or such heir, legatee, or personal representative until it passes into the public domain by act or operation of law."

The exceptions are also stated in C.C. 982(c):

(a) Where the right is expressly transferred by writing, signed by the owner or the owner's agent, in which "reference is made to the specific right of reproduction."

(b) If the transfer is pursuant to an employment relationship, the right is transferred to the employer unless it is expressly reserved in writing.

(c) If the transfer is pursuant to a legacy or inheritance, the right is transferred to the legatee or heir unless it is expressly reserved by will or codicil.

C.C. 982(c) adds: "Nothing contained herein, however, shall be construed to prohibit the fair use of such work of fine art."

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



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1. State Protection.

d. Fine Arts Resale Royalties Act.

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[§ 49] Fine Arts Resale Royalties Act.

(1) *Purpose of Act.* C.C. 986, applicable to works of fine art created before or after its operative date of January 1, 1977 (C.C. 986(d)), establishes an American "droit de suite" law, requiring the seller of a work of art to pay the artist 5% of the sales price. (See 8 *Golden Gate L. Rev.* 239; 29 *Hastings L. J.* 249; 9 *Pacific L. J.* 855; 26 *U.C.L.A. L. Rev.* 322; 19 *U.S.F. L. Rev.* 1; on porcelain painting and stained glass as fine art, see C.C. 997, *supra*, §48; on sale of fine prints generally, see 4 *Summary* (10th), *Sales*, §355.)

(2) *Right to Payment.* "Whenever a work of fine art is sold and the seller resides in California or the sale takes place in California, the seller or the seller's agent shall pay to the artist of such work of fine art or to such artist's agent 5 percent of the amount of such sale." (C.C. 986(a); see C.C. 986(c), defining "fine art" as "an original painting, sculpture, or drawing, or an original work of art in glass"; *Robert H. Jacobs v. Westoaks Realtors* (1984) 159 *C.A.3d* 637, 644, 205 *C.R.* 620 [architect's plans were not "fine art" covered under Act].) The right may be *waived* only by a *written contract* providing for *an amount in excess of 5%*. (C.C. 986(a).) Formerly, the right to receive a royalty was nontransferable, but an amendment to C.C. 986(a) in 1982 permits the artist to assign the right to collect the royalty to another individual or entity. Also, such an assignment is expressly declared not to constitute a waiver of the right to receive a royalty (which is prohibited by C.C. 986(a)).

Upon the death of an artist after January 1, 1983, the artist's rights and duties inure to his or her heirs, legatees, or personal representative, until 20 years after the date of the artist's death. (C.C. 986(a)(7).)

(3) *Withholding by Seller or Agent.* When a work of fine art is sold at auction or by a gallery, dealer, broker, museum, or other person acting as the agent for the seller, the agent must withhold the 5%, locate the artist, and pay him or her. (C.C. 986(a)(1).) Money withheld is exempt from enforcement of a money judgment by the creditors of the seller or agent. (C.C. 986(a)(6).)

(4) *Locating Artist.* If the seller or agent is unable to locate the artist within 90 days, the amount must be transferred to the Arts Council and placed in a special account in the State Treasury. (C.C. 986(a)(2)(4).) The Arts Council must attempt to locate the artist; but, if it is unable to do so and the artist does not file a claim within 7 years of the date of sale, his or her right terminates and the money must be transferred to the council for use in acquiring fine art. (C.C.

986(a)(5).)

(5) *Exclusions*. The statute does not apply to (a) the initial sale where legal title is vested in the artist himself or herself; (b) resale at a price of less than \$ 1,000; (c) except as provided in C.C. 986(a)(7), resale after death of the artist; (d) resale for a price less than the purchase price paid by the seller; (e) an exchange of art where value of the property exchanged is less than \$ 1,000; (f) resale by an art dealer, to a purchaser within 10 years of the initial sale by the artist to an art dealer, provided all intervening resales are between art dealers; (g) a sale of a work of stained glass artistry where the work has permanently attached to real property and is sold as part of the sale of that real property. (C.C. 986(b).)

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

(1) *Purpose of Act*. See 27 California Lawyer 37 (November 2007) [liability of art experts for authentication and appraisal].



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e. Fine Arts Protection Against Alteration.

1. Purpose and Nature of Act.

13 Witkin Sum. Cal. Law Pers Prop § 50

[§ 50] Purpose and Nature of Act.

The California Art Preservation Act (C.C. 987) was adopted in 1979 to prohibit alteration or destruction of a work of "fine art," defined as "an original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality," but not including work prepared under contract for commercial use (C.C. 987(b)(2); see *Robert H. Jacobs v. Westoaks Realtors* (1984) 159 C.A.3d 637, 644, 205 C.R. 620 [architect's plans were "work prepared under contract for commercial use" and not protected under Act].) (On porcelain as fine art, see supra, §48; on definition of "commercial use," see C.C. 987(b)(7).) The *legislative finding* was "that the physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation, and *artists* therefore *have an interest* in protecting their works of fine art against such alteration or destruction; and that there is also a *public interest* in preserving the integrity of cultural and artistic creations." (C.C. 987(a).) The section became operative on January 1, 1980, and applies to "claims based on proscribed acts occurring on or after that date to works of fine art whenever created." (C.C. 987(j).) (See generally 15 *Loyola L.A. L. Rev.* 29 [Artists' Statutory *Droit Moral* in California: A Critical Appraisal]; 19 *San Diego L. Rev.* 675 [Moral Rights in California; a critique of the Act]; 14 *U.C. Davis L. Rev.* 975 [The California Art Preservation Act: A Safe Hamlet for "Moral Rights" in the U.S.]; on possible preemption of Act by federal law, see *Lubner v. Los Angeles* (1996) 45 C.A.4th 525, 53 C.R.2d 24, *infra*, §51.)

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2. Prohibition of Alteration.

13 Witkin Sum. Cal. Law Pers Prop § 51

[§ 51] Prohibition of Alteration.

The Act prohibits specified intentional acts by anyone other than the artist: "No person, except an artist who owns and possesses a work of fine art which the artist has created, shall intentionally commit, or authorize the intentional commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art." (C.C. 987(c)(1).) The Act also prohibits grossly negligent acts by specified persons: "[N]o person who frames, conserves, or restores a work of fine art shall commit, or authorize the commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art by any act constituting gross negligence." (C.C. 987(c)(2).) "Gross negligence" is defined as "the exercise of so slight a degree of care as to justify the belief that there was an indifference to the particular work of fine art." (C.C. 987(c)(2).) (For definitions of "frame," "restore," and "conserve," see C.C. 987(b).)

The types of destruction that are prohibited by the Act were examined in *Lubner v. Los Angeles* (1996) 45 C.A.4th 525, 53 C.R.2d 24. Plaintiffs were two artists who lost much of their lives' work after a trash truck owned by defendant city rolled down a hill and crashed into their home. In their action against defendant, the trial judge precluded plaintiffs from presenting evidence of loss of reputation, determining that the Act does not permit a cause of action for destruction due to simple negligence. *Held*, affirmed.

(a) C.C. 987(c) prohibits intentional and grossly negligent acts of destruction, but nothing in subdivision (c) or any other subdivision of the Act explicitly permits an action based on simple negligence. (45 C.A.4th 529.)

(b) The plain language of C.C. 987(a) does not imply a legislative intent to create a remedy for simple negligence. Furthermore, legal commentators generally use examples involving intentional destruction of artists' works when discussing the threats that the Act was intended to address. (45 C.A.4th 530.)

(c) The enactment of C.C. 987 precludes a common law recovery for plaintiffs. "[W]here a statute creates a right that did not exist at common law and provides a comprehensive and detailed remedial scheme for its enforcement, the statutory remedy is exclusive." (45 C.A.4th 530.)

(d) It "appears" that C.C. 987 has been preempted by the Visual Artists Rights Act of 1990 (*infra*, §61), which,

under *17 U.S.C.*, §106A(a)(3)(B), proscribes any "intentional or grossly negligent destruction" of a visual artist's "work of recognized stature." If C.C. 987 is preempted, this would be an additional reason why plaintiff's action for simple negligence is not viable. (*45 C.A.4th* 531.)

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3. Rights of Artist.

13 Witkin Sum. Cal. Law Pers Prop § 52

[§ 52] Rights of Artist.

The Act specifies the nature and scope of the artist's rights as follows:

(1) "The artist shall retain at all times the right to claim authorship, or, for a just and valid reason, to disclaim authorship of his or her work of fine art." (C.C. 987(d).)

(2) The rights of the artist created by the statute exist in the artist or his or her heir, beneficiary, devisee, or personal representative until the 50th anniversary of the artist's death. (C.C. 987(g)(1).)

(3) The rights are in addition to any others that may be or become applicable. (C.C. 987(g)(2).)

(4) Except where a work cannot be removed (see *infra*, §53), the rights may not be waived except by a written instrument signed by the artist. (C.C. 987(g)(3).)

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13 Witkin Sum. Cal. Law Pers Prop § 53

[§ 53] Removal of Work From Building.

The Act addresses removal of an artistic work from a building as follows: (1) If the work *cannot be removed from the building* without *substantial alteration*, etc., the rights and duties under the statute are *deemed waived* unless expressly reserved by a *written instrument signed by the owner of the building*. The instrument, which must include a legal description of the property, binds subsequent owners if it is recorded. (C.C. 987(h)(1).) (2) If the work can *be removed without substantial harm* to the work, and either during or after removal, the owner intends to allow the fine art to suffer physical defacement, mutilation, alteration, or destruction, the rights and duties apply unless the owner (a) has diligently attempted without success to notify the artist (or the artist's heir, beneficiary, devisee, or personal representative) in writing of his or her intended action, or (b) did provide notice and the person notified failed within 90 days either to remove the work or to pay for its removal. If the work is removed at the expense of the artist, or the artist's heir, beneficiary, devisee, or personal representative, title to it passes to that person. (C.C. 987(h)(2).) (On procedures to be followed where building is scheduled for demolition and work of fine art can be removed without substantial harm, see C.C. 987(h)(3).)

In *Botello v. Shell Oil Co.* (1991) 229 C.A.3d 1130, 280 C.R. 535, plaintiff artists were hired by defendant oil company to paint a mural on the wall of one of defendant's service stations. The mural covered 1,200 square feet, was visible to motorists and passersby, and bore plaintiffs' names and addresses. Defendant subsequently authorized destruction of the wall to which the mural was affixed, in order to make room for a parking lot. Plaintiffs, who were not notified until the destruction was completed, sought damages under C.C. 987; and they presented evidence that the mural could have been removed without damaging the mural or the wall. The trial judge granted summary judgment in favor of defendant. *Held*, reversed.

(a) Defendant argued that statutes enacted prior to C.C. 987 referred separately to "murals" and "paintings" and that the singular reference to "painting" in C.C. 987(b)(2) (defining "fine art") demonstrates an intent to exclude murals. But where statutory language is unambiguous, legislative intent is determined from the plain meaning of the language itself, and it is apparent that a mural is a form of painting. "A crabbed construction of the statute, depriving artists who execute murals from the protection accorded those who execute other kinds of paintings, would hardly serve the declared policies of protecting artistic expression and preserving the integrity of cultural and artistic creations, which are the

purposes of the statute." (229 C.A.3d 1135, 1136.)

(b) Construing the term "painting" to include murals would not place an unconstitutional burden on the owner of property on which a mural has been painted. There is no duty at all if the mural cannot be detached from the structure without damage, unless the artist had preserved his or her rights in a recorded instrument. Where the mural can be removed without damage, the owner's duty is limited to notifying the artist so that the artist can remove the mural without expense to the owner. (229 C.A.3d 1138.) (On rights of muralists, and proposed amendments to the Act to more fully protect such rights, see 24 U.C. Davis L. Rev. 531, 549.)

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5. Remedies of Artist.

13 Witkin Sum. Cal. Law Pers Prop § 54

[§ 54] Remedies of Artist.

The artist's remedies are specified as follows:

(1) The artist may enforce his or her rights by an action for damages, in which the artist may recover actual damages, attorneys' fees, and expert witness fees. Punitive damages may also be awarded, but "the court shall, in its discretion, select an organization or organizations engaged in charitable or educational activities involving the fine arts in California to receive punitive damages." (C.C. 987(e).)

(2) The artist may also seek injunctive relief. (C.C. 987(e)(1).)

(3) An action must be brought within 3 years of the act complained of or 1 year after its discovery, whichever is longer. (C.C. 987(i).)

(4) "In determining whether a work of fine art is of recognized quality, the trier of fact shall rely on the opinions of artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art." (C.C. 987(f).)

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f. Preservation of Integrity of Fine Art.

13 Witkin Sum. Cal. Law Pers Prop § 55

[§ 55] Preservation of Integrity of Fine Art.

(1) *Purpose of Act.* C.C. 989 was enacted in 1982 upon a finding by the Legislature that there is a public interest in preserving the integrity of cultural and artistic creation. (C.C. 989(a).) "Fine art" is defined as "an original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality, and of substantial public interest." (C.C. 989(b)(1).) In determining whether a work of fine art is of recognized quality and of substantial public interest, the opinions of those persons described in C.C. 987(f) (see *supra*, §54) must be relied upon. (C.C. 989(d).) (See 77 *Cal. L. Rev.* 339 [The Public Interest in Cultural Property]; on possible preemption by federal law, see *infra*, §61.)

(2) *Action To Preserve Integrity.* If there is some evidence showing a reasonable likelihood that a work of art can be removed from real property without substantial physical harm to it, an organization (a public or private not-for-profit entity or association; see C.C. 989(b)(2)) may bring a legal action to determine that issue, provided it is prepared to pay the cost of removal. If the work of fine art cannot be removed without substantial harm to it, no action to preserve its integrity may be brought. (C.C. 989(e)(1).)

(3) *Removal Without Substantial Harm.* If a real property owner wishes to remove a work of fine art which is part of the real property, but which can be removed without substantial harm to the fine art, and during or after removal the owner intends to allow the fine art to suffer physical harm, the owner must comply with specified procedures relating to notices to the artist or the artist's heir, legatee, or personal representative. (C.C. 989(e)(2).)

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g. Audit Rights of Sound Recording Royalty Recipient.

13 Witkin Sum. Cal. Law Pers Prop § 56

[§ 56] Audit Rights of Sound Recording Royalty Recipient.

A "royalty recipient" (defined in C.C. 2500(a) as a sound recording artist who has a right to receive royalties under a contract for the furnishing of services in the production of sound recordings) has a right to audit the books and records of the "royalty reporting party" (defined in C.C. 2500(a) as the contractual party obligated to pay royalties to the recipient). The statutory audit right may not be exercised more than once a year, and it is in addition to any rights provided by the contract. (C.C. 2501.)

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2. Federal Statutory Copyright.

a. In General.

13 Witkin Sum. Cal. Law Pers Prop § 57

[§ 57] In General.

The chief protection of authors is provided by the federal Copyright Act of 1976 (*17 U.S.C., §101 et seq.*). (See generally Nimmer on Copyright; *18 Am.Jur.2d (2004 ed.)*, *Copyright and Literary Property §1 et seq.*; Abrams, *The Law of Copyright*; C.E.B., *1 Business Litigation*, §7.4 et seq.; Cal. Civil Practice, *6 Business Litigation*, §68:3 et seq.; on the theoretical justifications for copyright protection, see *84 Harv. L. Rev. 281*; *20 U.C.L.A. L. Rev. 75*; for a history and analysis of copyright laws, see *8 Hastings L. J. 146*; and see *23 California Lawyer 43* (May 2003) [copyright myths debunked]; *87 Cal. L. Rev. 1* [symposium on impact of proposed Uniform Commercial Code Article 2B on contract and copyright law]; *88 Cal. L. Rev. 2187* [accommodation of new technologies by copyright law during 20th century]; *92 Cal. L. Rev. 1331* [questioning view that placing property in public domain will necessarily lead to its being equally exploited by all]; *113 Harv. L. Rev. 1503* [argument for federal legislation that would invalidate copyright registration if creator violated specific criminal laws in immediate production of material for which copyright protection is sought]; *46 Hastings L. J. 581* [software copyrights as loan collateral]; *47 Hastings L. J. 221* [rights of university faculty in their copyrighted creations]; *32 Loyola L.A. L. Rev. 531* [inadequacy of copyright protection for industrial design]; *14 Pepperdine L. Rev. 571* [copyright and First Amendment]; *77 So. Cal. L. Rev.* [copyright policy toward shared works]; *33 Southwestern U. L. Rev. 347* [assignment of copyright licenses]; *41 Stanf. L. Rev. 1343* [merits of copyright protection]; *43 Stanf. L. Rev. 943* [review of Goldstein's treatise]; *47 Stanf. L. Rev. 707* [perspectives on copyright duration and reversion]; *54 Stanf. L. Rev. 1* [applicability of First Amendment to enforcement of copyright]; *43 U.C.L.A. L. Rev. 1* [goal of copyright law to make commercialized materials accessible to public]; *48 U.C.L.A. L. Rev. 1057* [copyright and First Amendment]; *51 U.C.L.A. L. Rev. 1233* [overview of Act, as originally enacted, and subsequent amendments]; *30 U.S.F. L. Rev. 153* [copyrighted material as community property]; *29 West L.A. L. Rev. 149* [government ownership of copyrights].)

Protection of authors' rights throughout the world gives rise to foreign and international copyright issues, and the commentary is extensive. (See *3 Nimmer on Copyright*, Chap. 17; *18 Am.Jur.2d (2004 ed.)*, *Copyright and Literary Property §197 et seq.*; *42 Cal. L. Rev. 89* [Universal Copyright Convention]; *75 Cal. L. Rev. 633* [copyright protection of software in European Economic Community]; *77 Cal. L. Rev. 1431* [protection of artist's moral rights after United States accession to the Berne Convention]; *26 Golden Gate L. Rev. 627* [UNIDROIT Convention's attempt to regulate international theft and trafficking of cultural art]; *41 So. Cal. L. Rev. 769* [pirate broadcasting and British legislation];

19 *Stanf. L. Rev.* 499 [Berne Convention]; 49 *Stanf. L. Rev.* 917 [advantages of alternative dispute resolution for resolving international copyright disputes]; 38 *U.S.F. L. Rev.* 555 [territorial limitations of Copyright Act].)

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See 118 *Harv. L. Rev.* 1940 [negative effect of copyright law on jazz]; 38 *Loyola L.A. L. Rev.* 19 [similarities between copyright issues faced in analog and digital ages, particularly transformative use and copyright term legislation]; 42 *San Diego L. Rev.* 1 [Liberty Versus Property? Cracks in the Foundations of Copyright Law]; 42 *San Diego L. Rev.* 29 [Is Copyright Property?]; 47 *Santa Clara L. Rev.* 785 [copyright protections and liabilities for digital photographers and photo labs and their customers]; 79 *So. Cal. L. Rev.* 993 [copyright history]; 40 *U.C. Davis L. Rev.* 559 [symposium on intellectual property and social justice]. *Foreign and international copyright issues:* See 57 *Stanf. L. Rev.* 485 [copyright formalities and Berne Convention]; 29 *A.L.R. Fed* 2d 501 [restoring copyright protection to foreign works that have fallen into public domain in United States].



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b. Revision of Copyright Law.

1. Nature of Protection.

13 Witkin Sum. Cal. Law Pers Prop § 58

[§ 58] Nature of Protection.

(1) *Under Current Act.* The current copyright law was enacted in 1976, and became generally effective January 1, 1978. (17 U.S.C., §101 et seq.) It abolished the distinction between common law and statutory copyright, gave automatic statutory protection to all works from the time of their creation, and changed the duration of protection to life plus 50 years. (On duration of copyrights subsisting on January 1, 1978, see 17 U.S.C., §304; 3 Nimmer on Copyright, Chap. 9; and see generally 10 *Golden Gate L. Rev.* 587 [Misappropriation and the New Copyright Act: An Overview]; 11 *Loyola L.A. L. Rev.* 1 [impact of new Act on motion pictures]; 4 *Pepperdine L. Rev.* 171, 213 [overview]; 15 *U.C. Davis L. Rev.* 703 [Free Lance Artists, Works for Hire, and the Copyright Act of 1976]; 24 *U.C.L.A. L. Rev.* 951 [symposium on new Act].)

(2) *Extension of Copyright Period.* The duration of copyright protection was extended in 1998 to life plus 70 years. (See 17 U.S.C., §302 (Copyright Term Extension Act); *Eldred v. Ashcroft* (2003) 537 U.S. 186, 123 S.Ct. 769, 783, 154 L.Ed.2d 683, 704 [CTEA does not exceed Congress's authority under the Copyright Clause]; 117 *Harv. L. Rev.* 246 [analysis of CTEA and *Eldred*]; 36 *Loyola L.A. L. Rev.* 1 [discussion of CTEA and challenges to its constitutionality; part of symposium on *Eldred*, preceding United States Supreme Court's decision]; 36 *Loyola L.A. L. Rev.* 123 ["dubious" constitutionality of CTEA]; 36 *Loyola L.A. L. Rev.* 159 [retrospective application of CTEA and negative effects on creativity]; 36 *Loyola L.A. L. Rev.* 199 [scope of judicial review of CTEA]; 36 *Loyola L.A. L. Rev.* 253 [myths behind attacks on duration of copyright protection]; 36 *Loyola L.A. L. Rev.* 323 [effect of term extension on promotion of progress of science]; 36 *Loyola L.A. L. Rev.* 389 [defense of CTEA against claims of public domain advocates]; 36 *Loyola L.A. L. Rev.* 437 [arguing that term extension provides individual authors with negligible incentive to create]; 44 *Santa Clara L. Rev.* 365 [criticizing copyright extension as ignoring public interest]; 33 *Southwestern U. L. Rev.* 327 [same]; 38 *U.S.F. L. Rev.* 525 [*Eldred*].)

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(2) *Extension of Copyright Period.* See 92 *Cal. L. Rev.* 1639 [fair use and statutory reform after *Eldred*]; 58 *Hastings L. J.* 433 [incentives and expectations in copyright law; analysis of *Eldred*]; 38 *U.C. Davis L. Rev.* 1755 [criticism of *Eldred* for failing to balance incentives and access].



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2. Preemption of State Law.

aa. In General.

13 Witkin Sum. Cal. Law Pers Prop § 59

[§ 59] In General.

The Act provides that "[o]n and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright" as specified in the Act in properties that are copyrightable under the Act (see *infra*, §63), "whether created before or after that date and whether published or unpublished," are governed exclusively by the Act. "Thereafter, *no person is entitled to any such right or equivalent right* in any such work under the *common law or statutes of any State*." (17 U.S.C., §301(a); see *Klekas v. EMI Films* (1984) 150 C.A.3d 1102, 1111, 198 C.R. 296; *Robert H. Jacobs v. Westoaks Realtors* (1984) 159 C.A.3d 637, 642, 205 C.R. 620 [architect's action for common law copyright infringement of building plans was preempted by Act]; *Gladstone v. Hillel* (1988) 203 C.A.3d 977, 989, 990, 250 C.R. 372 [action for conversion of jewelry design molds; relief forbidding use of molds was proper, but prohibiting copying of designs improperly gave right equivalent to copyright]; *Fleet v. CBS* (1996) 50 C.A.4th 1911, 1920, 1923, 58 C.R.2d 645 [plaintiffs' performances in movie were copyrightable, and thus their claims under C.C. 3344 (see 5 *Summary* (10th), *Torts*, §681) against movie's copyright holder, although denominated "misappropriation of right to publicity," were preempted]; *KNB Enterprises v. Matthews* (2000) 78 C.A.4th 362, 366, 92 C.R.2d 713, *infra*, §60 [distinguishing *Fleet*]; *Melchior v. New Line Productions* (2003) 106 C.A.4th 779, 791, 131 C.R.2d 347 [Copyright Act preempted author's action for conversion and unjust enrichment against film company that allegedly used author's work and distributed film derived from his work; allegations were equivalent to copyright claim]; 1 *Nimmer on Copyright*, Chap. 1; 18 *Am. Jur.2d* (2004 ed.), *Copyright and Literary Property* §5 et seq.; C.E.B., 1 *Business Litigation*, §7.27 et seq.; on preemption of state law regarding publicity rights, see 27 *Southwestern U. L. Rev.* 299; 36 *U.C. Davis L. Rev.* 199; 36 *U.C.L.A. L. Rev.* 861; on preemption of shrinkwrap license agreements, see 68 *So. Cal. L. Rev.* 1239; 45 *U.C.L.A. L. Rev.* 569; see also 18 *Southwestern U. L. Rev.* 415 [no preemption of state copyright protection for improvisational works].)

In *Klekas v. EMI Films*, *supra*, plaintiff sued defendants for the unauthorized use of his unpublished novel in the writing of a screenplay, the making of a movie, and the publication of a book based on the movie. The trial judge ruled that he lacked subject matter jurisdiction over any claims relating to the book or movie; that he had jurisdiction over the screenplay; but that, as a matter of law, there was no substantial similarity between the screenplay and plaintiff's novel.

Accordingly, he granted defendants' motion for summary judgment. *Held*, affirmed. The distribution of the movie and the publication of the book occurred after January 1, 1978, and any claim plaintiff may have had based on a common law copyright theory was preempted by the federal Copyright Act of 1976. (150 C.A.3d 1111.) However, the trial judge properly adjudicated plaintiff's claim in connection with the screenplay since that was written in 1976 or 1977. (150 C.A.3d 1110.)

In *Maheu v. CBS* (1988) 201 C.A.3d 662, 247 C.R. 304, plaintiff sought damages from defendants, the author and publishers of a book about Howard Hughes. Plaintiff had been an employee of Hughes, and had communicated with him through the exchange of letters. Defendants allegedly converted the letters and incorporated them into the book. Plaintiff sought to recover for the defendants' unauthorized reproduction of the intangible literary or intellectual property contained in the letters. *Held*, plaintiff's claim was preempted by the federal Copyright Act.

(a) Plaintiff's letters fell within the subject matter of federal copyright law. The letters were copyrightable, since creation of a work of nonfiction, including a mere compilation of facts, entails originality. (201 C.A.3d 671.) It did not matter that the letters were ineligible for federal protection due to plaintiff's failure to comply with various statutory requirements, including notice. (201 C.A.3d 672.)

(b) The right plaintiff sought to protect under state law (the right to prevent unauthorized publication) was equivalent to the right protected under the federal Act. (201 C.A.3d 673.)

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bb. Preemption Confined to State Copyright Laws.

13 Witkin Sum. Cal. Law Pers Prop § 60

[§ 60] Preemption Confined to State Copyright Laws.

The Copyright Act supersedes state copyright laws only, and does not preempt state laws granting or protecting rights not within the general scope of copyright. (*In re Marriage of Worth* (1987) 195 C.A.3d 768, 777, 241 C.R. 135, 11 Summary (10th), *Community Property*, §111 [Act does not preempt California's community property law, and copyrights on books written by one spouse during marriage constituted divisible community assets].) (See *Balboa Ins. Co. v. Trans Global Equities* (1990) 218 C.A.3d 1327, 1340, 1353, 267 C.R. 787, 13 Summary (10th), *Equity*, §104 [Act preempted insurance company's claim against former employee and other companies for misappropriation of computer software, but complaint survived preemption to extent that it stated claims for trade secret, breach of confidentiality, and breach of fiduciary duty]; *People v. Anderson* (1991) 235 C.A.3d 586, 593, 286 C.R. 734 [Act does not preempt P.C. 653w, record piracy statute requiring disclosure of name and address of manufacturer of audio and video recordings]; *PMC v. Saban Entertainment* (1996) 45 C.A.4th 579, 594, footnote 8, 52 C.R.2d 877 [Act did not preempt tort claims for interference with contract and interference with prospective economic advantage]; *United States Golf Assn. v. Arroyo Software Corp.* (1999) 69 C.A.4th 607, 623, 81 C.R.2d 708 [plaintiff's state misappropriation claim and attempt to prevent defendant from using plaintiff's golf handicap system and formulas were not preempted by Act; handicap system and formulas were not works of authorship that came within subject matter of copyright and, although copying is exclusive right protected under Act, use and appropriation are not]; *Durgom v. Janowiak* (1999) 74 C.A.4th 178, 186, 87 C.R.2d 619 [plaintiff's alleged state law right to receive royalties under contract was not equivalent to exclusive rights secured by federal copyright, such as right to copy, distribute, perform or display publicly, or prepare derivative works based on, copyrighted work; action for royalties was not preempted].)

In *KNB Enterprises v. Matthews* (2000) 78 C.A.4th 362, 92 C.R.2d 713, plaintiff, a business that displayed erotic photographs on its website, owned the copyright to hundreds of photographs of noncelebrity models. Plaintiff intermittently posted its copyrighted photographs to certain Usenet newsgroups. Defendant used a software program to copy the models' photographs from the Usenet and display them, without plaintiff's permission, on defendant's commercial website. The models assigned their rights under C.C. 3344, *supra*, to plaintiff, who brought an action alleging the models' misappropriation claims under the statute. *Held*, summary judgment for defendant reversed. The

subjects of the claims were the models' likenesses, which were not copyrightable even if captured in a copyrighted photograph, and the right of publicity asserted under C.C. 3344 does not fall within the subject matter of copyright. (78 C.A.4th 374.) Hence, the claims were not the equivalent of a copyright infringement claim and were not preempted by federal copyright law. (78 C.A.4th 375.) The broad language in *Fleet v. CBS* (1996) 50 C.A.4th 1911, 58 C.R.2d 645, regarding preemption of claims under C.C. 3344 should be limited to the unique facts of that case: preemption occurs when an actor or model with no copyright interest in a work seeks to prevent the exclusive copyright holder from displaying the copyrighted work. No preemption occurs where, as here, the defendant has no legal right to publish the copyrighted work. (78 C.A.4th 374.)

In *Kabehie v. Zoland* (2002) 102 C.A.4th 513, 125 C.R.2d 721, plaintiffs, a music production company and its principal, entered into a number of contracts with defendants, a music composer, his partner, and their company, under which plaintiffs agreed to pay defendants for exclusive rights in several albums of music produced by defendants. Defendants breached the agreements by producing, duplicating, advertising, and selling the musical materials covered by the agreements and by refusing to deliver the master recordings for several of the albums. Plaintiffs sued, alleging breach of contract, rescission, common counts, accounting, interference with economic relations, and fraud. The trial court granted defendants' motion for judgment on the pleadings on federal preemption grounds. *Held*, reversed. For their breach of contract claims to survive preemption, plaintiffs had to allege an extra element beyond unauthorized reproduction or distribution that made their state claims qualitatively different from a copyright infringement claim. (102 C.A.4th 528, 529.) Plaintiff's breach of contract claims based on production, marketing, and distribution of the music in violation of the contract were not qualitatively different from a copyright infringement action and thus were preempted. However, plaintiffs' breach of contract claim based on the failure to deliver master recordings and musical compilations included the extra element of failure to deliver and thus was not preempted by federal copyright law. (102 C.A.4th 529.) Likewise, plaintiffs' cause of action for fraud was not preempted; it contained the extra elements that defendants misrepresented their ownership of the rights to the music and that they falsely promised to deliver master recordings. (102 C.A.4th 530.)

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c. Additions to Copyright Law.

1. Visual Artists Rights Act.

13 Witkin Sum. Cal. Law Pers Prop § 61

[§ 61] Visual Artists Rights Act.

Congress enacted the Visual Artists Rights Act in 1990, effective June 1, 1991. The Act defines a "work of visual art" (17 U.S.C., §101); grants authors of visual arts rights of attribution and integrity (17 U.S.C., §106A); and provides for protection of visual art incorporated into a building (17 U.S.C., §113(d)).

The Act preempts rights granted by state law that are equivalent to any of the rights conferred by the Act. (17 U.S.C., §301(f) [exempting from preemption state causes of action filed prior to June 1, 1991]; see *Lubner v. Los Angeles* (1996) 45 C.A.4th 525, 531, 53 C.R.2d 24, supra, §51 [although it is "not certain" whether Act and C.C. 987 (supra, §50) are equal in scope, it "appears" that Act preempts C.C. 987].) (See 20 California Lawyer 69 (September 2000) [conflicts between Visual Artists Rights Act of 1990 and private property and free speech rights]; 107 Harv. L. Rev. 1977 [Visual Artists' Rights in a Digital Age]; 23 Pacific L. J. 445 [The Visual Artists Rights Act of 1990--What It Does, and What It Preempts]; 41 Santa Clara L. Rev. 203 [need for states to take action with regard to visual artists' moral rights]; 75 So. Cal. L. Rev. 1 [narrative's role in reshaping moral rights and Visual Artists Rights Act]; 51 U.C.L.A. L. Rev. 849 [postmortem moral rights under Act]; 30 Proof of Facts 3d 427 [artists' moral rights claims under 17 U.S.C., §106A and corresponding state statutes]; 74 Proof of Facts 3d 1 [proof of infringement of Visual Artists Rights Act].)

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2. Digital Millenium Copyright Act.

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[§ 62] Digital Millenium Copyright Act.

Congress enacted the Digital Millennium Copyright Act in 1998. The Act implements the World Intellectual Property Organization Copyright Treaty and the Performances and Phonograms Treaty, which were agreed to in 1996 by members of the World Intellectual Property Organization. In addition to amending various provisions of *17 U.S.C., §101 et seq.*, the Act adds a new Chapter 12 (*17 U.S.C., §1201 et seq.*) to the federal Copyright Act. The 1998 Act prohibits any person from circumventing a technological measure that effectively controls access to a work protected by copyright (*17 U.S.C., §1201(a)*), or providing a device or service that is designed to circumvent that protection (*17 U.S.C., §1201(b)*). It also prohibits any person from knowingly, and with the intent to enable copyright infringement, providing false copyright management information (*17 U.S.C., §1202(a)*) or removing or altering copyright management information (*17 U.S.C., §1202(b)*). Copyright management information includes the title of a work, the name of the work's author or performer, the name of the copyright's owner, the terms and conditions for using the work, and other identifying numbers or symbols. (*17 U.S.C., §1202(c)*.)

The 1998 Act provides civil remedies, including damages, for persons injured by violations of *17 U.S.C., §1201* or *§1202 (17 U.S.C., §1203)*, and criminal penalties for violators (*17 U.S.C., §1204*). (See *92 Cal. L. Rev. 257* [distinguishing between knowledge requirement for contributory infringement and notification requirements under "safe harbor provisions" relating to Internet service providers]; *50 U.C.L.A. L. Rev. 1095* [misuse of anticircumvention provisions of Act]; *36 U.S.F. L. Rev. 907* ["safe harbor" provisions should be construed liberally to protect Internet service providers and encourage them to develop Internet-related services]; *179 A.L.R. Fed 319* [validity, construction, and application of Act].)

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See *41 Cal. Western L. Rev. 241* [recording industry's use of Act as weapon against Internet users' privacy rights]; *121 Harv. L. Rev. 1798* [judicial policing of domestic copyright legislation in light of internalization of copyright]; *34 Southwestern U. L. Rev. 287* [Act's protection of on-line service providers against secondary copyright liability]. *Correction:* In section title, "Millenium" should be spelled "Millennium".



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d. Properties Within Copyright Protection.

1. In General.

13 Witkin Sum. Cal. Law Pers Prop § 63

[§ 63] In General.

The Act protects "original *works of authorship* fixed in *any tangible medium of expression*, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." (17 U.S.C., §102(a); see 17 U.S.C., §102(b) [protection does not extend to "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied"]; *United States Golf Assn. v. Arroyo Software Corp.* (1999) 69 C.A.4th 607, 622, 81 C.R.2d 708 [golf handicap formulas are not type of subject matter for which copyright protection is available]; on originality requirement and copyrightability of compilations of fact, see *infra*, §65; and see generally 1 Nimmer on Copyright, Chap. 2; 18 Am.Jur.2d (2004 ed.), *Copyright and Literary Property* §17 et seq.) The following categories are specifically included as "works of authorship":

(1) *Literary works*. These are defined as "works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as *books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards*, in which they are embodied." (17 U.S.C., §101; see 1 Nimmer on Copyright §2.04; 78 Cal. L. Rev. 687 [protections available for fictional characters]; 91 Cal. L. Rev. 323 [copyrightability of religious works]; 41 Santa Clara L. Rev. 341 [setting new standard for ability to copyright characters]; 71 So. Cal. L. Rev. 219 [copyright protection for lost or destroyed works]; 31 Southwestern U. L. Rev. 575 [copyright protection and future technology clauses, which govern recreation of literary works in new media]; 44 Stanf. L. Rev. 623 [protection of literary and pictorial characters]; 21 Thomas Jefferson L. Rev. 235 [strategies for copyright protection of characters]; 17 U.C. Davis L. Rev. 1147 [Copyright Law and the Academic Community: Issues Affecting Teachers, Researchers, Students, and Libraries]; 18 Am.Jur.2d (2004 ed.), *Copyright and Literary Property* §24.)

This definition includes a computer *database* or a *computer program*, described as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." (17 U.S.C., §101; see 17 U.S.C., §117 [permissible reproductions or adaptations of computer programs]; 1 Nimmer on Copyright §2.04(C); *infra*, §64.)

(2) *Musical works and accompanying words*. (See 1 Nimmer on Copyright §2.05; 28 Cal. Western L. Rev. 395

[role of intended audience in music copyright infringement]; 108 *Harv. L. Rev.* 2059 [translation of sheet music into audio recording]; 7 *Pepperdine L. Rev.* 569 [musical performance rights in television industry]; 65 *So. Cal. L. Rev.* 1583 [music plagiarism and federal rules of evidence]; 22 *Western State L. Rev.* 75 [proposing that blanket licenses to perform copyrighted musical works constitute price-fixing]; 18 *Am.Jur.2d* (2004 ed.), *Copyright and Literary Property* §§25, 26.)

(3) *Dramatic works and accompanying music.* (See *Fleet v. CBS* (1996) 50 *C.A.4th* 1911, 1919, 58 *C.R.2d* 645 [actors' performances, once put on film, were dramatic works fixed in tangible medium of expression and thus were within scope of copyright protection]; 1 *Nimmer on Copyright* §2.06; 22 *Southwestern U. L. Rev.* 431 [copyright protection for theatrical costumes]; 32 *U.C.L.A. L. Rev.* 396 [musical videos]; 33 *U.C.L.A. L. Rev.* 891 [copyright protection where there is multiple authorship of play or musical]; 18 *Am.Jur.2d* (2004 ed.), *Copyright and Literary Property* §27.)

(4) *Pantomimes and choreographic works.* (See 1 *Nimmer on Copyright* §2.07; 27 *U.C. Davis L. Rev.* 758 [copyright protection for choreography]; 33 *U.C.L.A. L. Rev.* 1442 [same]; 18 *Am.Jur.2d* (2004 ed.), *Copyright and Literary Property* §28.)

(5) *Pictorial, graphic, and sculptural works.* These are defined as "two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans." (17 *U.S.C.*, §101 [also defining conditions under which designs of "useful articles" qualify for protection]; see 1 *Nimmer on Copyright* §2.08; 92 *Harv. L. Rev.* 1490 [protection of author's artistic reputation]; 56 *So. Cal. L. Rev.* 241 [Works of Applied Art: An Expansion of Copyright Protection]; 29 *Southwestern U. L. Rev.* 617 [independent copyright protection for sculpture incorporated into architectural work]; 30 *U.C.L.A. L. Rev.* 861 [proposal that copyright protection be extended to garment designs]; 18 *Am.Jur.2d* (2004 ed.), *Copyright and Literary Property* §29 et seq.)

(6) *Motion pictures and other audiovisual works.* (See 1 *Nimmer on Copyright* §2.09; 17 *Pacific L. J.* 49 [copyright of television formats]; 18 *Am.Jur.2d* (2004 ed.), *Copyright and Literary Property* §37 et seq.)

(7) *Sound recordings.* (See 1 *Nimmer on Copyright* §2.10; 30 *Hastings L. J.* 683 [compulsory licensing of musical compositions for phonorecords]; 45 *Hastings L. J.* 359 [digital sound sampling]; 55 *Hastings L. J.* 759 [recording industry's response to illegal file-sharing]; 37 *San Diego L. Rev.* 1165 [criticism of federal copyright legislation that excludes personal computers from definition of "digital audio recording devices"]; 42 *Santa Clara L. Rev.* 967 [effect on music industry of music-swapping Internet services such as Napster; plan for cooperation between services and industry]; 64 *So. Cal. L. Rev.* 135 [digital sound sampling]; 16 *Southwestern L. Rev.* 757 [jukebox royalties]; 24 *Southwestern U. L. Rev.* 351 [creating performance right for digital transmissions of sound recordings]; 31 *Southwestern U. L. Rev.* 701 [fair compensation and digital performance rights]; 31 *Southwestern U. L. Rev.* 753 [record industry's battle to stop online copyright infringement through MP3 technology]; 33 *Southwestern U. L. Rev.* 379 [authorship of sound recordings]; 29 *U.C.L.A. L. Rev.* 168 [rights in sound recordings]; 16 *U.S.F. L. Rev.* 133 [same]; 18 *Am.Jur.2d* (2004 ed.), *Copyright and Literary Property* §39; 151 *A.L.R. Fed* 433 [scope of exclusive rights in sound recordings under 17 *U.S.C.*, §114(b)]; 26 *Proof of Facts* 3d 537 [proof of music sampling in copyright infringement].)

(8) *Architectural works.* (See 1 *Nimmer on Copyright* §2.20; 18 *Am.Jur.2d* (2004 ed.), *Copyright and Literary Property* §33.)

West's Key Number Digest, Copyright and Intellectual Property k.3 et seq.

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

(2) *Musical works and accompanying words.* See 5 *Pepperdine Dispute Resolution L. J.* 83 [alternative dispute resolution between Recording Industry Association of America and small webcasters]; 37 *A.L.R.6th* 243 [judicial

decisions involving American Society of Composers, Authors and Publishers (ASCAP), organization that ensures that music creators are paid promptly when their works are performed publicly].(5) *Pictorial, graphic, and sculptural works*. See 119 *Harv. L. Rev.* 2486 [proposal for limiting copyright protection for advertisements].

(6) *Motion pictures and other audiovisual works*. See 34 *Southwestern U. L. Rev.* 325 [who owns physical property and copyright of Zapruder film]; 81 *So. Cal. L. Rev.* 351 [whether companies that edit consumers' personal copies of motion pictures for moral content infringe movie studios' copyrights].

(7) *Sound recordings*. See 78 *So. Cal. L. Rev.* 559 [rethinking role of copyright in age of digital distribution of music]; 34 *Southwestern U. L. Rev.* 267 [protection of royalties for Internet music downloads in foreign countries].(9) *(New) Fashion and jewelry designs*. See 35 *Pepperdine L. Rev.* 107 [extension of copyright protection to fashion world; proposed Design Piracy Prohibition Act]; 30 *U.C.L.A. L. Rev.* 861 [proposal that copyright protection be extended to garment designs]; 30 *A.L.R. Fed 2d* 577 [copyright protection for jewelry designs].



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2. Computer Software.

13 Witkin Sum. Cal. Law Pers Prop § 64

[§ 64] Computer Software.

The definition of literary work in 17 U.S.C., §101 (see supra, §63) is broad enough to encompass computer software. (See 1 Nimmer on Copyright §2.04(C); 18 *Am.Jur.2d* (2004 ed.), *Copyright and Literary Property* §48 et seq.) The commentary in this area is extensive and growing rapidly. (See 103 *Harv. L. Rev.* 1046 [protection of computer intellectual property]; 106 *Harv. L. Rev.* 978 [argument that recommendation of National Commission on New Technological Uses of Copyrighted Works (CONTU), to extend copyright protection to computer programs, databases and computer-generated works, was correct]; 21 *Loyola L.A. L. Rev.* 255 [copyright protection for structure and sequence of computer programs]; 24 *Loyola L.A. L. Rev.* 1301 [copyright protection for computer program's "user interface"]; 28 *Loyola L.A. L. Rev.* 401 [protection against computer-generated "read-alike" works that copy an author's style]; 30 *Loyola L.A. L. Rev.* 215 [licensing of multimedia content through "supercollectives"]; 23 *Santa Clara L. Rev.* 979 [symposium on protection of intellectual property in computer field by use of copyright, patent, and trade secrecy law]; 66 *So. Cal. L. Rev.* 1705 [argument that computer software developers should be permitted to use protected material in an improved or different product]; 30 *Southwestern U. L. Rev.* 479 [copyright protection for computer program graphical user interfaces]; 38 *Stanf. L. Rev.* 497 [scope of protection for computer software]; 39 *Stanf. L. Rev.* 1329 [tailoring legal protection for computer software]; 41 *Stanf. L. Rev.* 1045 [scope of copyright protection for application programs]; 42 *Stanf. L. Rev.* 163 [application-specific integrated circuits as computer programs entitled to copyright protection]; 45 *Stanf. L. Rev.* 1061 [analysis of pro-compatibility trend in computer software copyright cases]; 49 *Stanf. L. Rev.* 255 [use of patent protection, rather than copyright protection, to encourage efficient reuse of software components]; 20 *U.C. Davis L. Rev.* 105 [use of contractual provisions to fill gaps in copyright protection of computer software]; 34 *U.C.L.A. L. Rev.* 1493 [determining proper scope of copyright protection for computer programs]; 35 *U.C.L.A. L. Rev.* 723 [idea/expression dichotomy in copyright protection of computer software]; 39 *U.C.L.A. L. Rev.* 397 [software copyright law]; 31 *U.S.F. L. Rev.* 433 [using trademark, rather than copyright or patent, law to protect computer icons]; 23 *Western State L. Rev.* 39 [protection of computer program's graphical user interface]; 26 *West L.A. L. Rev.* 159 [copyright issues in multimedia productions]; 38 *A.L.R.5th* 1 [validity, construction, and application of computer software licensing agreements]; see also 24 *Pepperdine L. Rev.* 121 [proposal to protect copyrights of content providers on "information superhighway"]; on protection of semiconductor chip products, see 17 U.S.C., §901 et seq.; 14 *Southwestern L. Rev.* 685; 2 Nimmer on Copyright, Chap. 8A; 18 *Am.Jur.2d* (2004 ed.), *Copyright and Literary*

Property §179 et seq.)

As copyright matters come within the exclusive jurisdiction of the federal courts (see 2 *Cal. Proc.* (4th), *Jurisdiction*, §78), the case law in this area is federal. (See 70 *A.L.R. Fed* 176 [protection of computer programs under federal copyright laws]; 113 *A.L.R. Fed* 605 [sufficiency of copyright notice with respect to computer programs]; 119 *A.L.R. Fed* 489 [determining substantial similarity between computer programs in copyright infringement litigation]; 180 *A.L.R. Fed* 1 [copyrightability of computer programs].)

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

See 58 *Hastings L. J.* 205 [need for changes in copyright law regarding software]; 121 *Harv. L. Rev.* 1387 [regulation of user-generated content services that display and distribute user-uploaded and user-generated audio and video content on Internet]. *Federal jurisdiction:*

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §77.



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3. Compilations of Facts.

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[§ 65] Compilations of Facts.

Compilations are not necessarily outside the protection of the Copyright Act. (See 17 U.S.C., §103 ["subject matter of copyright ... includes compilations and derivative works"].) In *Feist Publications v. Rural Tel. Service Co.* (1991) 499 U.S. 340, 111 S.Ct. 1282, 113 L.Ed.2d 358, the United States Supreme Court laid out the principles for distinguishing between factual compilations that are copyrightable and those that are not. Plaintiff Feist published a directory of white page telephone listings in a number of counties and service areas, distributing it free to subscribers, and earning revenue by selling yellow page advertisements. Plaintiff was not a telephone company, and had no independent access to subscriber information; instead, it offered to pay for the use of white page listings of all local telephone companies. All accepted except defendant Rural, which was a competitor for yellow page advertising. Since the absence of Rural's listing would have left a hole in Feist's directory, making it less attractive to potential yellow page advertisers, Feist copied Rural's white page listings without Rural's consent, and Rural sued for copyright infringement. *Held*, Rural's compilation of names, towns, and telephone numbers of its subscribers did not meet the requirements for copyright protection.

(a) "This case concerns the interaction of two well-established propositions. The first is that facts are not copyrightable; the other, that compilations of facts generally are." (111 S.Ct. 1287, 113 L.Ed.2d 368.) "There is an undeniable tension between these two propositions. Many compilations consist of nothing but raw data--i.e., wholly factual information not accompanied by any original written expression. ... Common sense tells us that 100 uncopyrightable facts do not magically change their status when gathered together in one place. Yet copyright law seems to contemplate that compilations that consist exclusively of facts are potentially within its scope." (111 S.Ct. 1287, 113 L.Ed.2d 368, 369.)

(b) "The key to resolving the tension lies in understanding why facts are not copyrightable. The *sine qua non* of copyright is originality. ... Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. ... Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying." (111 S.Ct. 1287, 113 L.Ed.2d 369.) Originality is a constitutional and statutory requirement for all works. (111 S.Ct. 1288, 113 L.Ed.2d 369.)

(c) "It is this bedrock principle of copyright that mandates the law's seemingly disparate treatment of facts and factual compilations. ... This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: the first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence." (111 S.Ct. 1288, 113 L.Ed.2d 370.)

(d) "Factual compilations, on the other hand, may possess the requisite originality. The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. ... Thus, even a directory that contains absolutely no protectible written expression, only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement." (111 S.Ct. 1289, 113 L.Ed.2d 370, 371.) However, the copyright in a factual compilation is thin: "Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement." (111 S.Ct. 1289, 113 L.Ed.2d 371.) Although this may seem unfair, the primary objective of copyright is not to reward the labor of authors, but to promote the progress of science and useful arts; and to this end copyright assures authors the right to their original expression, but encourages others to build freely on the ideas and information conveyed by a work. "This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship." (111 S.Ct. 1290, 113 L.Ed.2d 372.)

(e) The 1976 revisions of the Copyright Act "leave no doubt that originality, not 'sweat of the brow,' is the touchstone of copyright protection in directories and other fact-based works. ... The revisions explain with painstaking clarity that copyright requires originality, § 102(a); that facts are never original, § 102(b); that the copyright in a compilation does not extend to the facts it contains, § 103(b); and that a compilation is copyrightable only to the extent that it features an original selection, coordination, or arrangement, § 101." (111 S.Ct. 1295, 113 L.Ed.2d 378.)

(f) Here, Rural took the data provided by its subscribers (name, town, and telephone number), and listed it alphabetically by surname; the end product was "a garden-variety white pages directory, devoid of even the slightest trace of creativity." (111 S.Ct. 1296, 113 L.Ed.2d 380.) "As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity. Rural's white pages, limited to basic subscriber information and arranged alphabetically, fall short of the mark. As a statutory matter, 17 U.S.C. § 101 does not afford protection from copying to a collection of facts that are selected, coordinated, and arranged in a way that utterly lacks originality." (111 S.Ct. 1297, 113 L.Ed.2d 380.) (See 111 Harv. L. Rev. 1149 [unavailability of copyright protection for "functional expression" and resulting uncertainty about copyright for computer programs and their user interface; *Feist*]; 37 Santa Clara L. Rev. 427 [post-*Feist* protection of international databases through multilateral treaty solution]; 38 Santa Clara L. Rev. 1 [need for legal protection of databases after *Feist*]; 25 U.C. Davis L. Rev. 331 [*Feist*; nonobviousness as element of copyrightability]; on question whether copyright law preempts state misappropriation law with regard to challenges to transmission of real-time sports information, see 110 Harv. L. Rev. 1143; 71 So. Cal. L. Rev. 445.)

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e. Infringement.

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[§ 66] Infringement.

The owner of a copyright is granted certain *exclusive* rights, including the right to reproduce the work; to prepare derivative works; to distribute copies to the public by sale or lease; and to publicly perform or display the work. (17 U.S.C., §106; see 2 Nimmer on Copyright, Chap. 8; 18 *Am.Jur.2d* (2004 ed.), *Copyright and Literary Property* §69 et seq.; on assignment of renewal rights, see *Stewart v. Abend* (1990) 495 U.S. 207, 110 S.Ct. 1750, 1760, 109 L.Ed.2d 184, 200, 201; 22 *Pacific L. J.* 1; 80 *Cal. L. Rev.* 179.)

Violation of a copyright owner's exclusive rights constitutes *infringement*, for which the owner can obtain legal and equitable relief. (17 U.S.C., §501 et seq.; see 3 Nimmer on Copyright, Chap. 12; C.E.B., Attorney's Guide to Damages 2d, §6.15 et seq.; 18 *Am.Jur.2d* (2004 ed.), *Copyright and Literary Property* §208 et seq.; 76 *Cal. L. Rev.* 421 [music plagiarism litigation]; 104 *Harv. L. Rev.* 1289 [Clarifying the Copyright Misuse Defense: The Role of Antitrust Standards and First Amendment Values]; 34 *McGeorge L. Rev.* 533 [comparison of personal injury and copyright law]; 34 *McGeorge L. Rev.* 541 [differences between common law of restitution and statutory law of intellectual property]; 16 *Pepperdine L. Rev.* 663 [Eleventh Amendment as bar to action against state for copyright infringement]; 17 *Pepperdine L. Rev.* 493 [musical copyright infringement: expert testimony and "actual audience" test]; 17 *Santa Clara L. Rev.* 885 [pretrial remedies in infringement actions]; 60 *So. Cal. L. Rev.* 785 [proving infringement of musical composition]; 71 *So. Cal. L. Rev.* 247 [arguing that judges should be conscious of aesthetics when deciding copyright cases]; 46 *Stanf. L. Rev.* 401 [argument against using antitrust-based approach in cases where copyright infringer raises defense of copyright misuse]; 20 *U.C. Davis L. Rev.* 719 [Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity]; 25 *U.C. Davis L. Rev.* 229 [substantial similarity]; 45 *U.C.L.A. L. Rev.* 1777 [proposing new standard for substantial similarity in infringement cases]; 31 *U.S.F. L. Rev.* 257 [whether awards of both copyright and trademark damages constitute double recovery]; 31 *U.S.F. L. Rev.* 505 [using forum non conveniens to dismiss copyright infringement action by foreign owner of U.S. copyrights]; 148 *A.L.R. Fed* 413 [laches or undue delay as defense in copyright infringement action]; 150 *A.L.R. Fed* 661 [application of *de minimis non curat lex* to copyright infringement claims]; 185 *A.L.R. Fed* 123 [copyright misuse as defense to copyright infringement action]; 77 *Am.Jur. Trials* 449 [copyright infringement litigation]; 50 *Proof of Facts* 2d 263 [damages for copyright infringement]; 18 *Proof of Facts* 3d 721 [infringement of screenplay]; 20 *Proof of Facts* 3d 431 [copyright infringement of literary works]; 28 *Proof of Facts* 3d 379 [proof of extraordinary remedies for copyright infringement]; 37 *Proof of Facts* 3d 315 [misuse of

copyright as claim in antitrust action or as defense to action for infringement].)

The bulk of recent commentary on infringement concerns issues arising from new technology. (See C.E.B., 12 California Business Law Practitioner, 33, 36 (Spring 1997) [employer liability for employee's copyright infringement using e-mail]; 89 Cal. L. Rev. 817 [copyright implications of Website modification technology]; 27 Golden Gate L. Rev. 555 [liability of Internet access provider for copyright infringement by bulletin board subscriber]; 96 Harv. L. Rev. 450 [Toward a Unified Theory of Copyright Infringement for an Advanced Technological Era]; 105 Harv. L. Rev. 726 [music sampling]; 116 Harv. L. Rev. 1139 [tackling global software piracy with international law]; 52 Hastings L. J. 961 [promoting economic efficiency by holding parties responsible for contributory or vicarious infringement through digital copying and distribution]; 18 Loyola L.A. L. Rev. 919 [proving copyright infringement of computer software]; 35 McGeorge L. Rev. 181 [symposium on ownership of digital creations]; 26 Pepperdine L. Rev. 559 [joint effort of copyright owners and internet service providers to prevent copyright infringement on Internet]; 28 Pepperdine L. Rev. 879 [inadequacy of traditional copyright protections for entertainment industries in Internet age]; 35 San Diego L. Rev. 219 [Internet copyright infringement; proposing negotiated rule-making]; 44 Santa Clara L. Rev. 861 [peer-to-peer file-sharing]; 68 So. Cal. L. Rev. 1091 [copyright protection for lock-out programs]; 77 So. Cal. L. Rev. 397 [proposing compulsory licensing as method of regulating digital sampling]; 33 Southwestern U. L. Rev. 397 [infringement over peer-to-peer networks]; 33 Southwestern U. L. Rev. 419 [issues arising from sanitizing of R-rated movies]; 50 Stanf. L. Rev. 1671 [arguing that "trusted systems" technology, which enables copyright owners to control their intangible property, must be regulated to preserve utilitarian balance of copyright law]; 56 Stanf. L. Rev. 531 [establishing sustainable "copyright culture," rooted in balance between public interest and private gain, in digital age]; 56 Stanf. L. Rev. 1345 [suggesting ways to reduce digital copyright infringement without restricting innovation]; 22 Thomas Jefferson L. Rev. 183 [direct and contributory copyright infringement of works on Internet]; 29 U.C.L.A. L. Rev. 1160 [use of film's underlying copyrighted works in video software as copyright infringement]; 43 U.C.L.A. L. Rev. 587 [copyright infringement by bulletin board services]; 29 U.S.F. L. Rev. 509 [solutions to music industry's dilemma caused by distribution of used compact discs]; 33 U.S.F. L. Rev. 1 [evaluating risks of copyright infringement on Internet for Internet service providers, bulletin board operators, and web site operators]; 31 West L.A. L. Rev. 171 [part of 2001 symposium volume on cyber rights; discussion of infringement litigation against Napster, an online provider of free software enabling computer users to download music files]; 23 Western State L. Rev. 39 [no infringement of graphical user interface]; 54 Am.Jur. Trials 261 [defending action for software infringement under copyright law]; 52 Proof of Facts 3d 107 [proof of copyright infringement by unauthorized use of software]; 63 Proof of Facts 3d 1 [proof of copyright infringement by file-sharing].)

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

Infringement and relief: See 34 Pepperdine L. Rev. 185 [copyright implications of transposing "Lennon/McCartney" songwriting credit to read "McCartney/Lennon"]; 46 Santa Clara L. Rev. 137 [test for copyright infringement involving tonal music]; 57 Stanf. L. Rev. 901 [rethinking copyright misuse]; 39 U.C. Davis L. Rev. 1669 [expert testimony in music infringement cases]; 41 U.C. Davis L. Rev. 477 [need for copyright theory to understand copying as part of creativity]; 92 Proof of Facts 3d 249 [proof of facts establishing damages and other relief for copyright infringement]. *Issues arising from new technology:* One who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties. (*Metro-Goldwyn-Mayer Studios v. Grokster, Ltd. (2005) 545 U.S. 913, 125 S.Ct. 2764, 2780, 162 L.Ed.2d 781, 795* [summary judgment for distributors of software that allowed users to share files through peer-to-peer networks was error; evidence of distributors' intent to induce others to infringe on copyrights was unmistakable]; see 25 California Lawyer 37 (November 2005) [peer-to-peer file sharing and copyright liability after *Grokster*]; 38 Golden Gate L. Rev. 381 [third-party liability of companies doing business over Internet for infringement by individuals who download or view unauthorized images]; 119 Harv. L. Rev. 366 [*Grokster*]; 32 Pepperdine L. Rev. 947 [file-sharing programs and copyright infringement]; 33 Pepperdine L. Rev. 761 [reforming copyright law to encourage building of universal digital libraries]; 46 Santa Clara L. Rev. 921 [9th Circuit's contributory copyright infringement analysis and *Grokster*]; 80 So. Cal. L. Rev. 189 [mandatory licensing proposal to resolve questions about peer-to-peer liability after *Grokster*]; 53 U.C.L.A. L. Rev. 977 [copyright and role of libraries in peer-to-peer world]; 54

U.C.L.A. L. Rev. 509 [focusing on facts of *Grokster* to uncover legal rule]; 7 *A.L.R. Fed* 2d 269 [infringement actions involving video, electronic, and computer games].)



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CHAPTER XVIII - Personal Property

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I. INTRODUCTION.

D. Literary and Artistic Property.

2. Federal Statutory Copyright.

f. Fair Use Doctrine.

13 Witkin Sum. Cal. Law Pers Prop § 67

[§ 67] Fair Use Doctrine.

The "fair use" of a copyrighted work "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" is not an infringement of copyright. (*17 U.S.C.*, §107; see *Campbell v. Acuff-Rose Music* (1994) 510 U.S. 569, 114 S.Ct. 1164, 1178, 127 L.Ed.2d 500, 525 [commercial parody of song may qualify as fair use under factors listed in *17 U.S.C.*, §107]; 4 Nimmer on Copyright §13.05; 18 *Am.Jur.2d* (2004 ed.), Copyright and Literary Property §78 et seq.; 86 *Cal. L. Rev.* 843 [fair use doctrine and fragmented copying of content from digital medium]; 88 *Cal. L. Rev.* 1145 [misuse of licensing evidence in fair use analysis]; 89 *Cal. L. Rev.* 369 [rescuing fair use from right of first publication]; 91 *Cal. L. Rev.* 323 [accommodating unauthorized use of religious works through fair use doctrine]; 25 *Cal. Western L. Rev.* 97 [fair use doctrine and digital audio tape recording]; 103 *Harv. L. Rev.* 1105 [general discussion of fair use doctrine]; 108 *Harv. L. Rev.* 139, 331 [*Campbell*]; 115 *Harv. L. Rev.* 1193 [rewriting and fair use of "Gone With the Wind"]; 43 *Hastings L. J.* 473 [Commercial-Zapping VCRs]; 21 *Pepperdine L. Rev.* 165 [when commercial parodies constitute infringement]; 35 *San Diego L. Rev.* 61 [fair use and privatization in copyright]; 69 *So. Cal. L. Rev.* 767 [economic analysis of *Campbell*]; 74 *So. Cal. L. Rev.* 617 [preserving educational fair use]; 76 *So. Cal. L. Rev.* 1067 [copyright law's silencing effect on noninfringing creative materials]; 23 *Southwestern U. L. Rev.* 571 [reverse engineering of computer software as fair use]; 51 *Stanf. L. Rev.* 1633 [potential impact of Trade Related Aspects of Intellectual Property (TRIPS) agreement on doctrine of fair use]; 33 *U.C. Davis L. Rev.* 289 [substantial similarity and fair use defense applied to trivia book about "Seinfeld" television series]; 33 *U.C.L.A. L. Rev.* 518 [satire and doctrine of fair use]; 43 *U.C.L.A. L. Rev.* 1 [implications of accessibility and commercialization for fair use doctrine and injunctive relief]; 44 *U.C.L.A. L. Rev.* 1449 [praising *Campbell* for "rescuing" fair use doctrine]; 50 *U.C.L.A. L. Rev.* 775 [argument that scope of fair use should expand as copyright work ages, especially as to derivative works and uses]; 34 *U.S.F. L. Rev.* 129 [fair use doctrine as defense to copyright infringement on Internet]; 35 *U.S.F. L. Rev.* 83 [fair use, First Amendment, and freedom to link]; 36 *U.S.F. L. Rev.* 759 [problems of applying fair use doctrine to fine art works]; 144 *A.L.R. Fed* 537 [what constitutes fair use of medical, scientific, and technical writings].)

In *Harper & Row Publishers v. Nation Enterprises* (1985) 471 U.S. 539, 105 S.Ct. 2218, 85 L.Ed.2d 588, Time Magazine had agreed to purchase from plaintiff copyright holder the exclusive right to print prepublication excerpts from former President Ford's memoirs. Defendant Nation Magazine acquired the unpublished manuscript from an

unauthorized source, and, prior to the scheduled appearance of the excerpts in Time, published an article using quotes, paraphrases, and facts drawn from the manuscript. Time then cancelled its contract, and plaintiff sued defendant. *Held*, defendant's article was not a fair use of the manuscript and constituted an infringement of plaintiff's copyright.

(a) The *purpose* of defendant's use went beyond mere reporting of newsworthy, uncopyrightable information, for defendant sought to exploit its unauthorized first publication. The fact that publication was commercial rather than nonprofit weighed against a finding of fair use. (105 S.Ct. 2231, 85 L.Ed.2d 608.)

(b) The *nature* of the copyright work was fact rather than fiction, but defendant's use, focusing on the most expressive elements of the work, exceeded that necessary to disseminate the facts and infringed on plaintiff's interests in confidentiality and creative control. (105 S.Ct. 2232, 2233, 85 L.Ed.2d 609.)

(c) "Where an author and publisher have invested extensive resources in creating an original work and are poised to release it to the public, no legitimate aim is served by pre-empting the right of first publication. The fact that the words the author has chosen to clothe his narrative may of themselves be 'newsworthy' is not an independent justification for unauthorized copying of the author's expression prior to publication." (105 S.Ct. 2229, 85 L.Ed.2d 605.) In view of the Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment afforded by fair use, there is no basis for expanding the doctrine "to create what amounts to a public figure exception to copyright." (105 S.Ct. 2230, 85 L.Ed.2d 607.)

In *Sony Corp. of America v. Universal City Studios* (1984) 464 U.S. 417, 104 S.Ct. 774, 78 L.Ed.2d 574, plaintiff owners of copyrights to certain television programs sued defendant manufacturer and seller of home videotape recorders for copyright infringement. Plaintiffs alleged that purchasers of defendant's Betamax videotape recorders used the recorders to tape copyrighted works, and that defendant, by marketing the recorders, was liable for the infringement committed by the purchasers. *Held*, defendant's sale of the recorders did not constitute contributory infringement of plaintiffs' copyrights. The evidence revealed that the average member of the public uses a videotape recorder primarily to record for later viewing a program he or she cannot view when it is being televised. This "time-shifting" enlarges the viewing audience, and plaintiffs were unable to prove that the practice harmed the value of their copyrights. (104 S.Ct. 778, 796, 78 L.Ed.2d 579, 600.) In short, "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses." (104 S.Ct. 789, 78 L.Ed.2d 592.)

Four justices dissented, arguing that (a) taping a copyrighted program is infringement under the Act unless it is a fair use (104 S.Ct. 805, 78 L.Ed.2d 612); (b) time-shifting is not a fair use in view of its adverse effect upon plaintiffs' ability to exploit the potential market comprised of persons who would "pay for the privilege of watching copyrighted work at their convenience" (104 S.Ct. 811, 78 L.Ed.2d 619); and (c) defendant induced and materially contributed to the infringement by manufacturing and selling the Betamax and advertising it as suitable for recording "favorite shows" (104 S.Ct. 813, 78 L.Ed.2d 621). (See 22 Cal. Western L. Rev. 159 [Sony]; 97 Harv. L. Rev. 1395 [possible effects of Sony on fair use doctrine and parody defense]; 101 Harv. L. Rev. 1661 [criticism of Harper & Row and Sony]; 52 Hastings L. J. 939 [implications of Sony for Napster and other Internet technologies]; 21 Santa Clara L. Rev. 49 [home audiovisual recording and fair use]; 52 So. Cal. L. Rev. 573 [home videorecording as infringement or fair use]; 56 So. Cal. L. Rev. 647 [home taping of sound recordings].)

West's Key Number Digest, Copyright and Intellectual Property k.51 et seq.

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

See 95 Cal. L. Rev. 597 ["Mary Sue" fan fiction as fair use]; 95 Cal. L. Rev. 941 [criticism of *Sony Corp. of America v. Universal City Studios* (1984) 464 U.S. 417, 104 S.Ct. 774, 78 L.Ed.2d 574, text, p. 83]; 25 California Lawyer 37 (November 2005) [secondary liability for copyright infringement]; 41 Loyola L.A. L. Rev. 739 [estates as aggressive enforcers of copyrights of deceased creators; restrictions on fair use of material by scholars]; 34 Southwestern U. L. Rev. 151 [symposium on Sony]; 38 U.C. Davis L. Rev. 465 [fair use and natural-law copyright]; 39 U.C. Davis L. Rev.

1669 [using preemption doctrine to challenge adhesion contracts that limit fair use].



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D. Literary and Artistic Property.

2. Federal Statutory Copyright.

g. Miscellaneous Provisions of Act.

13 Witkin Sum. Cal. Law Pers Prop § 68

[§ 68] Miscellaneous Provisions of Act.

(1) *Derivative Works*. The owner of a copyright has the exclusive right to prepare derivative works based on the copyrighted work. (17 U.S.C., §106; for definition of "derivative work," see 17 U.S.C., §101; and see *Mills Music v. Snyder* (1985) 469 U.S. 153, 105 S.Ct. 638, 652, 83 L.Ed.2d 556, 575 [music publisher was entitled to share of royalty income generated by derivative works of copyrighted song subsequent to termination of publisher's copyright grant]; 1 Nimmer on Copyright, Chap. 3; 22 *Loyola L.A. L. Rev.* 1161 [colorized motion pictures as derivative works]; 27 *Pepperdine L. Rev.* 769 [need for amendment of termination of transfers provision of Act]; 40 *Santa Clara L. Rev.* 325 [amount of originality needed to attain copyright protection in derivative work]; 52 *So. Cal. L. Rev.* 635 [derivative works exception]; 28 *U.C.L.A. L. Rev.* 715 [Derivative Motion Pictures]; 18 *Am.Jur.2d* (2004 ed.), *Copyright and Literary Property* §71; 149 *A.L.R. Fed* 527 [what constitutes derivative work under Act].)

(2) *Notice*. A notice of copyright may be placed on publicly distributed copies of published protected works. (17 U.S.C., §401 [specifying form and position of notice]; see 2 Nimmer on Copyright §7.02 et seq.; 18 *Am.Jur.2d* (2004 ed.), *Copyright and Literary Property* §123 et seq.)

(3) *Divisibility of Copyright*. Any of the exclusive rights granted to the owner of a copyright (see supra, §66) may be transferred and owned separately. (17 U.S.C., §201(d); see *PMC v. Saban Entertainment* (1996) 45 C.A.4th 579, 591, 52 C.R.2d 877 [transfer of exclusive license under 17 U.S.C., §201(d) must be in writing]; 3 Nimmer on Copyright, Chap. 10; 14 *Cal. Western L. Rev.* 590 [Act's abolition of indivisibility concept]; 19 *Santa Clara L. Rev.* 171 [analysis of divisibility concept]; 18 *Am.Jur.2d* (2004 ed.), *Copyright and Literary Property* §67.)

(4) *Works Made for Hire*. Any employer or other person for whom the work was prepared is considered the author for purposes of the Act, and, in the absence of a written agreement to the contrary, owns all the rights comprised in the copyright. (17 U.S.C., §201(b); see 1 Nimmer on Copyright §5.03; 32 *Loyola L.A. L. Rev.* 611 [proposing exception to work for hire presumption when employer breaches express or implied agreement with employee]; 14 *Pepperdine L. Rev.* 381 [commissioned works]; 75 *So. Cal. L. Rev.* 375 [effect of repeal of amendment that would have made sound recordings eligible for "work made for hire" status]; 15 *U.C. Davis L. Rev.* 703 [free-lance artists and work for hire doctrine]; 37 *U.S.F. L. Rev.* 783 [musical sound recordings as works made for hire]; 18 *Am.Jur.2d* (2004 ed.), *Copyright and Literary Property* §§62, 63.)

In *Community for Creative Non-Violence v. Reid* (1989) 490 U.S. 730, 109 S.Ct. 2166, 104 L.Ed.2d 811, plaintiff nonprofit association, which was dedicated to eliminating homelessness, commissioned defendant to produce a sculpture depicting the plight of a homeless family. Two months after the sculpture had been returned to defendant for repairs, defendant refused to return it to plaintiff, whereupon the parties filed competing certificates of copyright registration. *Held*, plaintiff was not the author of the sculpture under the "work made for hire" doctrine.

(a) Under 17 U.S.C., §101, a work is "for hire" if (1) it is prepared by an employee within the scope of employment; or (2) it is one of nine categories of "specially ordered or commissioned" works and the parties have agreed in writing that the work is "for hire." Thus, there are two mutually exclusive ways for a work to acquire "work for hire" status, one for employees and the other for independent contractors, and the hiring party's right to control the product is not determinative. (109 S.Ct. 2177, 104 L.Ed.2d 829.)

(b) Here, defendant was not plaintiff's employee, he was an independent contractor working in his own studio with his own tools and being paid a fixed sum on completion. Neither did the sculpture fall within one of the nine categories of "specially ordered or commissioned" works enumerated in 17 U.S.C., §101, and there was no written agreement between plaintiff and defendant that the sculpture was a "work for hire." (109 S.Ct. 2179, 104 L.Ed.2d 832.) (See 18 *Pepperdine L. Rev.* 589.)

(5) *Contributions to Collective Works*. Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole. It vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of rights under it, the owner of the copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, a revision of that collective work, and a later collective work in the same series. (17 U.S.C., §201(c); see *New York Times Co. v. Tasini* (2001) 533 U.S. 483, 121 S.Ct. 2381, 2390, 150 L.Ed.2d 500, 515 [reproduction in electronic databases of freelance authors' print articles, without authors' permission, infringed authors' copyrights and was not privileged under 17 U.S.C., §201(c)]; 29 *Western State L. Rev.* 85 [*New York Times*].)

(6) *Attorneys' Fees*. 17 U.S.C., §505 provides that in any copyright action, the court may award reasonable attorneys' fees to the prevailing party as part of the costs. In *Fogerty v. Fantasy* (1994) 510 U.S. 517, 114 S.Ct. 1023, 127 L.Ed.2d 455, defendant sought attorneys' fees as the prevailing party. The trial judge denied fees, applying the Ninth Circuit's "dual" standard, which awards fees to prevailing *plaintiffs* almost as a matter of course, but which requires prevailing *defendants* to show that the copyright action was frivolous or brought in bad faith. *Held*, reversed. Under §505, attorneys' fees are to be awarded to prevailing parties only as a matter of the court's discretion. However, prevailing defendants must not be held to a more stringent standard than prevailing plaintiffs. (114 S.Ct. 1033, 127 L.Ed.2d 470.) (See 25 *Southwestern U. L. Rev.* 107 [evenhanded treatment of defendants under 17 U.S.C., §505; discussing *Fogerty*]; 47 *U.C.L.A. L. Rev.* 1381 [effect that *Fogerty* has had on attorneys' fees awards; arguing that new standard still favors prevailing plaintiffs]; 174 *A.L.R. Fed* 289 [right to attorneys' fees under 17 U.S.C., §505]; 179 *A.L.R. Fed* 449 [computation of attorneys' fees under 17 U.S.C., §505].)

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

(1) *Derivative Works*. See 29 *California Lawyer* 38 (January 2009) [campaign advertisements derived from copyrighted works]; 119 *Harv. L. Rev.* 1488 [derivative works entitlement and "recoding" (appropriation of copyrighted cultural object for new expression in way that ascribes different meaning to object than intended by its creator)]. (2) *Notice*. See 16 *A.L.R. Fed* 2d 1 [form and sufficiency of copyright notice].

(4) *Works Made for Hire*. See 26 *California Lawyer* 41 (June 2006) [ownership of websites created by independent designers or programmers]. (5) *Contributions to Collective Works*. See 5 *A.L.R. Fed* 2d 1 [copyright protection afforded to republication of collective works in electronic databases].



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I. INTRODUCTION.

D. Literary and Artistic Property.

3. Ideas.

a. No Property Right.

13 Witkin Sum. Cal. Law Pers Prop § 69

[§ 69] No Property Right.

(1) *General Principle.* An abstract idea, method, or plan, e.g., for a film or a radio or television show, is not copyrightable, and is not regarded as literary property capable of exclusive ownership or entitled to protection by a tort action for plagiarism. This was made clear in California by the 1947 amendment of C.C. 980, eliminating the former reference to "any product of the mind," and protecting only the *representation or expression of a composition*. "The Legislature has abrogated the rule of protectibility of an idea and California now accepts the traditional theory of protectible property under common law copyright." (*Weitzenkorn v. Lesser* (1953) 40 C.2d 778, 789, 256 P.2d 947; see also *Kurlan v. Columbia Broadcasting System* (1953) 40 C.2d 799, 806, 256 P.2d 962; *Desny v. Wilder* (1956) 46 C.2d 715, 731, 299 P.2d 257; *Ware v. Columbia Broadcasting System* (1967) 253 C.A.2d 489, 491, 61 C.R. 590; *Mann v. Columbia Pictures* (1982) 128 C.A.3d 628, 633, 180 C.R. 522 ["[t]he outline of various characters and scenes was no more than a collection of ideas which was never developed in the form of a script or a story"]; 56 Cal. L. Rev. 1780 [copying of character]; 58 Cal. L. Rev. 1169, 1173 [idea-expression dichotomy in context of television formats]; 14 U.C.L.A. L. Rev. 735 [idea-expression fallacy]; 18 Am.Jur.2d (2004 ed.), *Copyright and Literary Property* §230.)

Neither the 1976 federal Copyright Act (see *supra*, §57) nor the 1982 amendment of C.C. 980 (see *supra*, §47) changes the rule denying protection to abstract ideas. (See *Klekas v. EMI Films* (1984) 150 C.A.3d 1102, 1111, 198 C.R. 296, *supra*, §59, citing the text; *Rokos v. Peck* (1986) 182 C.A.3d 604, 612, 227 C.R. 480, *infra*, §72, citing the text; see also 35 San Diego L. Rev. 111 [uncopyrightability of jokes].)

(2) *Combination of Ideas or Form of Expression.* In *Desny v. Wilder*, *supra*, the complaint alleged that plaintiff conceived a literary composition based on an incident in the life of Floyd Collins (sensational event involving entrapment in a cave); that he submitted a synopsis to defendant W, a writer and producer for Paramount Studios, for the purpose of sale; and that they used it in a photoplay without payment. In reversing a summary judgment for defendants, the court elaborately discussed the meaning of literary property and the distinction between protectible compositions and unprotectible ideas. Quoting from leading out-of-state cases, the court observed that "[t]here may be literary property in a particular combination of ideas [and this must presuppose an expression thereof] or in the form in which ideas are embodied. There can be none in the ideas." (46 C.2d 732.) And, "[o]nly in the 'expression' of a copyrighted work does any monopoly inhere; the 'theme,' the 'plot,' the 'ideas' may always be freely borrowed." (46 C.2d 732.)

But the opinion points out that protectible literary property may be created out of unprotectible material such as historical events or the relatively few basic plots or dramatic situations. The composition may be a compilation of materials accessible to all; i.e., it may be *original* without being *novel*. Thus defendants could have done their own research into the Floyd Collins tragedy and prepared their own story, but they could not use plaintiff's synopsis--a valuable literary composition. (46 C.2d 741.) (See 46 Cal. L. Rev. 699 [*Desny*]; 4 U.C.L.A. L. Rev. 296, 323 [same]; 45 U.C.L.A. L. Rev. 1125 [failure of copyright merger doctrine, under which copyright protection is denied where idea and its expression have merged].)

West's Key Number Digest, Copyright and Intellectual Property k.4.5

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

(1) *General Principle*. See 119 Harv. L. Rev. 705 [proposal for greater common law protection of ideas].



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D. Literary and Artistic Property.

3. Ideas.

b. Contractual Protection.

1. Transfer of Idea as Consideration.

13 Witkin Sum. Cal. Law Pers Prop § 70

[§ 70] Transfer of Idea as Consideration.

An abstract idea is not the subject of ownership; thus, its protection cannot be found in property doctrines (*supra*, §69). Nevertheless, it is common practice in the film, radio, and television industries to conceive and submit ideas for sale, before developing a concrete literary composition. The modern view is that the idea, though not property, has value, and may be the consideration for an express or implied-in-fact contract, or a basis of recovery in quasi-contract. In *Desny v. Wilder* (1956) 46 C.2d 715, 299 P.2d 257, *supra*, §69, the court characterizes the transaction as the *rendition, on request*, of services by a person with specialized knowledge, constituting the *conveyance of an idea* (46 C.2d 723, 733), and the opinion concludes:

"But, assuming legality of consideration, the idea purveyor cannot prevail in an action to recover compensation for an abstract idea unless (a) before or after disclosure he has obtained an express promise to pay, or (b) the circumstances preceding and attending disclosure, together with the conduct of the offeree acting with knowledge of the circumstances, show a promise of the type usually referred to as 'implied' or 'implied-in-fact.' ... That is, if the idea purveyor has clearly conditioned his offer to convey the idea upon an obligation to pay for it if it is used by the offeree and the offeree, knowing the condition before he knows the idea, voluntarily accepts its disclosure (necessarily on the specified basis) and finds it valuable and uses it, the law will either apply the objective test ... and hold that the parties have made an express (sometimes called implied-in-fact) contract, or under those circumstances, as some writers view it, the law itself, to prevent fraud and unjust enrichment, will imply a promise to compensate." (46 C.2d 738.) (See *Stanley v. Columbia Broadcasting System* (1950) 35 C.2d 653, 656, 221 P.2d 73 [elaborate discussion of test of similarity of materials]; *Weitzenkorn v. Lesser* (1953) 40 C.2d 778, 795, 256 P.2d 947; *Kurlan v. Columbia Broadcasting System* (1953) 40 C.2d 799, 802, 811, 256 P.2d 962; *Chandler v. Roach* (1957) 156 C.A.2d 435, 439, 319 P.2d 776; *Colvig v. KSFO* (1964) 224 C.A.2d 357, 367, 36 C.R. 701; *Davies v. Krasna* (1966) 245 C.A.2d 535, 549, 54 C.R. 37; *Donahue v. Ziv Television Programs* (1966) 245 C.A.2d 593, 604, 54 C.R. 130; *Minnear v. Tors* (1968) 266 C.A.2d 495, 503, 72 C.R. 287; *Donahue v. United Artists Corp.* (1969) 2 C.A.3d 794, 807, 83 C.R. 131 [retrial of *Donahue v. Ziv Television Programs*, *supra*; judgment for plaintiff affirmed]; *Blaustein v. Burton* (1970) 9 C.A.3d 161, 184, 88 C.R. 319; *Faris v. Enberg* (1979) 97 C.A.3d 309, 318, 158 C.R. 704 [no recovery on implied-in-fact contract where idea voluntarily submitted and no evidence to show expectation of compensation]; *Gunther-Wahl Productions v.*

Mattel (2002) 104 C.A.4th 27, 35, 38, 128 C.R.2d 50, citing the text [quoting *Desny*; trial court erred in instructing jury that, in order to show implied contract, creator of idea for toy line had to have "clearly conditioned" disclosure of idea on toy manufacturer's agreement to pay for it if manufacturer decided to use idea]; 46 Cal. L. Rev. 699 [*Desny*]; 27 Santa Clara L. Rev. 693 [Using the Uniform Commercial Code to Protect the "Ideas" That Make the Movies]; 26 So. Cal. L. Rev. 459 [*Weitzenkorn*]; 27 So. Cal. L. Rev. 120 [law of ideas]; 27 So. Cal. L. Rev. 290 [contractual protection for literary and dramatic material]; 23 A.L.R.2d 244 [literary and artistic rights in connection with film, radio, and television].)

Thus, in *Chandler v. Roach*, *supra*, plaintiff writer conceived an idea for a dramatic work based on the activities of the Public Defender's office. He and his agent discussed it with defendant television producer, and drafts of contracts were made but never signed. Thereafter, defendant produced a series of programs along the lines suggested by plaintiff. *Held*, these facts established circumstantially the elements of an implied-in-fact contract: submission of material to a producer with a reasonable expectation of payment, and acceptance of the material under those conditions. (156 C.A.2d 442.)

Similar principles apply to ideas useful in business. (See 32 So. Cal. L. Rev. 299 [federal case involving folding chair]; on the law and practical problems, see 65 Harv. L. Rev. 673.) In *Teich v. General Mills* (1959) 170 C.A.2d 791, 339 P.2d 627, plaintiff conceived a nonnovel (hence nonpatentable and noncopyrightable) gadget for use as a children's premium in cereal boxes. He disclosed it to defendant's California agents on a contractual basis of payment if used. It was rejected, but later the Minneapolis office of defendant purchased a similar device from others who conceived and developed it without knowledge of plaintiff's work. *Held*, defendant was not liable. The showing of similarity and access raised an inference of copying, but this was dispelled by proof of independent creation. (170 C.A.2d 799.)

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

Independent creation of idea: See *Hollywood Screentest of America v. NBC Universal* (2007) 151 C.A.4th 631, 646, 60 C.R.3d 279 [because television network presented extensive evidence documenting development and creation of possible television show by entities entirely independent of network, and plaintiff, who claimed to have given idea to network, did not provide evidence calling network's evidence into question, summary judgment for network was appropriate; citing *Teich v. General Mills* (1959) 170 C.A.2d 791, 339 P.2d 627, text, p. 90].



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CHAPTER XVIII - Personal Property

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I. INTRODUCTION.

D. Literary and Artistic Property.

3. Ideas.

b. Contractual Protection.

2. Novelty or Concreteness Not Required.

13 Witkin Sum. Cal. Law Pers Prop § 71

[§ 71] Novelty or Concreteness Not Required.

Some earlier cases, not clearly distinguishing the bases of recovery on property and contract, contain intimations that there can be no contract or quasi-contract recovery unless the idea is both novel and reduced to concrete form. (See, e.g., *Stanley v. Columbia Broadcasting System (1950)* 35 C.2d 653, 656, 221 P.2d 73.) This approach has been criticized as theoretically unsound, for there is no need of contractual protection if the test of a property right is met. (See 26 So. Cal. L. Rev. 459.)

In *Chandler v. Roach (1957)* 156 C.A.2d 435, 319 P.2d 776, the court approved the criticism and rejected the requirement, declaring that even though the idea may be common or open to public knowledge, its disclosure is sufficient consideration for the promise to pay, and that "[w]e see no reason to impose blindly and automatically upon the implied-in-fact contract the elements which may be necessary to establish a property right." (156 C.A.2d 444.)

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



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D. Literary and Artistic Property.

3. Ideas.

c. Distinction: Rights in Ideas Nonassignable.

13 Witkin Sum. Cal. Law Pers Prop § 72

[§ 72] Distinction: Rights in Ideas Nonassignable.

In *Rokos v. Peck* (1986) 182 C.A.3d 604, 227 C.R. 480, B wrote to a suicide prevention center, outlining the theme of a script she had written concerning teenage suicide, and seeking the center's support in producing a film based on the script. Defendant, a staff psychologist at the center, wrote back and asked for copies of the script to show various producers. B complied, but 3 months later (in October 1977) defendant returned the script and stated that he had been unable to generate any interest for the project. In April 1978, B contracted with plaintiff, an independent producer, to promote and/or produce the script. Plaintiff contacted the American Broadcasting Company, but was informed that ABC was in the process of producing its own film on teenage suicide. In January 1979, ABC televised a movie on the subject, listing defendant and the suicide prevention center as consultants. Plaintiff then brought this action for breach of an implied-in-fact contract not to use B's idea without compensation. *Held*, judgment of nonsuit affirmed.

(a) An idea, unlike other property entitled to copyright protection, cannot be segmented into varying rights and independently assigned. (182 C.A.3d 616.) Although California employs the "implied-in-fact contract" device to protect persons who, in attempting to market their ideas, must disclose them to producers and publishers, the device does not invest ideas with "the attendant divisible assignability of those rights which constitute property ownership." (182 C.A.3d 614.) Thus, although an action for breach of an implied-in-fact contract can be assigned, B's assignment to plaintiff of the *right to produce* her script did not give plaintiff the right to share in the claim for breach of an implied-in-fact contract that arose prior to plaintiff's agreement with B. (182 C.A.3d 612, 616.)

(b) The federal copyright statutes protect owners of literary and artistic property rights who seek to assign or divide those rights. To allow plaintiff to share in the claim for breach of an implied-in-fact contract "would be tantamount to affording state *copyright protection* coextensive with that afforded by federal law." (182 C.A.3d 612.)

(c) There is a practical basis for denying plaintiff's cause of action: California does not provide a statutory scheme for recording the transfers of ideas or parts thereof. Thus, adopting plaintiff's divisibility argument would "place producers or others to whom ideas are 'pitched' in jeopardy of unforeseen or unanticipated liability." (182 C.A.3d 617.)

(d) Plaintiff had no cause of action for unjust enrichment, which was in effect a cause of action for breach of

confidence. Plaintiff had no contact with defendant or the center and, thus, could not assert a claim that defendant had breached any obligation to her regardless of the purported assignment of production rights in *B's idea*. (182 C.A.3d 618, 619.)

(e) A cause of action for common law copyright infringement was preempted by the federal Copyright Act of 1976 (see *supra*, §59), for the alleged plagiarist had no access to the script until 1978. (182 C.A.3d 620, 621.)

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D. Literary and Artistic Property.

4. Titles.

13 Witkin Sum. Cal. Law Pers Prop § 73

[§ 73] Titles.

The title of a work cannot be copyrighted by itself. (See *Johnston v. Twentieth Century-Fox Film Corp.* (1947) 82 C.A.2d 796, 810, 187 P.2d 474; 32 So. Cal. L. Rev. 108; 72 Harv. L. Rev. 1115; 18 Am.Jur.2d (2004 ed.), *Copyright and Literary Property* §58.) Nor does an author have any common law property right in a title that he or she uses for a book, play, or other literary composition. (See *Jackson v. Universal Int. Pictures* (1950) 36 C.2d 116, 121, 222 P.2d 433; 32 So. Cal. L. Rev. 106.) Nevertheless, titles are given substantial protection in two ways:

(1) *Contractual Protection: Consideration for Contract.* In *Johnston v. Twentieth Century-Fox Film Corp.*, *supra*, the author sold to defendant motion picture company the title to his book, "Queen of the Flat Tops," without the accompanying literary material. The court said: "We should be realistic. It is common knowledge that since the advent of motion pictures--and particularly since the advent of radio--titles, names, slogans, catch-phrases and the like have become of great value. Agreements for their use in particular fields are common." (82 C.A.2d 818.) (See 32 So. Cal. L. Rev. 136, 139.)

(2) *Secondary Meaning Acquired.* The principle of the trademark cases, that words or symbols that the public has identified with the product are protectible and transferable because of that association, is applied to the title of a literary work. Hence, if the title of a novel or play has become so identified in the public mind with the book that it has this "secondary meaning," its unauthorized use will subject the wrongful user to liability for damages. (*Jackson v. Universal Int. Pictures*, *supra*; see *Lutz v. De Laurentiis* (1989) 211 C.A.3d 1317, 1323, 260 C.R. 106 [whether title has acquired secondary meaning is question of fact; court improperly held as matter of law that no secondary meaning could attach to title, "The Amityville Horror"].)

In *Jackson*, plaintiff's play, rehearsed in Los Angeles and produced in Philadelphia and New York, had little publicity, an unfavorable reception from the critics, and a short run. *Held*, nevertheless, defendant was liable for the use of the title in a wholly dissimilar motion picture. The court examined and rejected defendant's theory that the title had not acquired a secondary meaning because the play was unsuccessful: (a) The "public" does not mean all the people, and the title of a play produced in New York may acquire a secondary meaning throughout the United States. (b) The work need not be popular; it is enough that notoriety and adverse comment may bring about widespread identification of the play by its title. (c) A long period of use is unnecessary; the test is not of time but of impact on the public mind. (d) It need not be shown that the title is associated with the author; it is usual and sufficient to show identification with

the literary work. (e) The fact that plaintiff did not produce his play during a 2-year period after its New York closing did not show abandonment of the title as a matter of law. (36 C.2d 121.) (See also 52 So. Cal. L. Rev. 279 [Legal Protection for Titles in the Entertainment Industry]; 41 A.L.R.3d 434 [geographical extent of protection].)

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I. INTRODUCTION.

E. Inventions.

1. Common Law Right During Possession.

13 Witkin Sum. Cal. Law Pers Prop § 74

[§ 74] Common Law Right During Possession.

Common law rights in inventions were redefined by 1949 amendments to C.C. 980, 981, 982, and 983. C.C. 980(b) provides: "The inventor or proprietor of any invention or design, with or without delineation, or other graphical representation, has an exclusive ownership therein, and in the representation or expression thereof, which continues so long as the invention or design and the representations or expressions thereof made by him remain in his possession." (See 23 *So. Cal. L. Rev.* 41; on joint ownership, see C.C. 981(b); on transfer of ownership, see C.C. 982(b); on employer's rights in employee's invention, see 3 *Summary* (10th), *Agency and Employment*, §101 et seq.; and see generally 43 *Cal. L. Rev.* 459, 460.)

"If the owner of any invention or design intentionally makes it public, a copy or reproduction may be made public by any person, without responsibility to the owner, so far as the law of this state is concerned." (C.C. 983.) In other words, the inventor's right at common law, though unlimited in time, is protected only so long as he or she keeps the invention secret. (See *Summerhays v. Scheu* (1935) 10 *C.A.2d* 574, 576, 52 *P.2d* 512; 43 *Cal. L. Rev.* 458, 461.) And the inventor's right of action is only against a person who acquires the secret by improper means. (See 43 *Cal. L. Rev.* 461, 464.)

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I. INTRODUCTION.

E. Inventions.

2. Federal Patent Law.

a. Nature of Protection.

1. In General.

13 Witkin Sum. Cal. Law Pers Prop § 75

[§ 75] In General.

Under the federal statute (35 U.S.C., §1 et seq.), a patent may be granted, giving the inventor the exclusive right to make, use, and sell the invention for 17 years, even though the inventor makes no actual use of it. (On nature and purpose of the law, see *Sears, Roebuck & Co. v. Stiffel Co.* (1964) 376 U.S. 225, 84 S.Ct. 784, 787, 11 L.Ed.2d 661, 665; *Brulotte v. Thys Co.* (1964) 379 U.S. 29, 85 S.Ct. 176, 178, 13 L.Ed.2d 99, 101; *Kewanee Oil Co. v. Bicron Corp.* (1974) 416 U.S. 470, 94 S.Ct. 1879, 1885, 40 L.Ed.2d 315, 325, 13 Summary (10th), Equity, §84; and see generally 88 Cal. L. Rev. 2187 [accommodation of new technologies by patent law during 20th century]; 89 Cal. L. Rev. 1 [scope of software patents]; 90 Cal. L. Rev. 1889 [patent rights and standard-setting organizations]; 92 Cal. L. Rev. 1479 [bar on patenting of inventions that were on sale before patent application was filed]; 33 Cal. Western L. Rev. 49 [major biotechnology issues for U.S. Patent and Trademark Office]; 75 Harv. L. Rev. 602 [patent use restrictions]; 78 Harv. L. Rev. 1269 [comparing design patent and trademark protection]; 108 Harv. L. Rev. 2053 [monopoly pricing power resulting from patents for AIDS drugs]; 47 Hastings L. J. 221 [rights of university faculty in patentable inventions]; 54 Hastings L. J. 1299 [consideration of necessity of patent priority rules (system of awarding patent to first to invent, rather than first to file)]; 32 Loyola L.A. L. Rev. 531 [inadequacy of patent protection for industrial design]; 22 Pepperdine L. Rev. 59 [federal prosecution of trade secrets thefts]; 31 San Diego L. Rev. 279 [use restrictions on intellectual property]; 22 Santa Clara L. Rev. 325 [patent secrecy orders]; 35 Santa Clara L. Rev. 611 [inapplicability of attorney-client privilege and work product doctrine to patent attorneys]; 37 Santa Clara L. Rev. 253 [federal patent and trademark statutes--preemption issues]; 37 Santa Clara L. Rev. 673 [proposal for collective action by employee-inventors to retain ownership of their patents]; 67 So. Cal. L. Rev. 1151 [judicial discretion in patent law]; 49 Stanf. L. Rev. 255 [use of patent protection, rather than copyright protection, to encourage efficient reuse of software components]; 34 U.C.L.A. L. Rev. 1341 [comparing design patents and copyright protection]; 31 U.S.F. L. Rev. 433 [using trademark, instead of copyright or patent, law to protect computer icons]; 32 U.S.F. L. Rev. 1 [rights to data government obtains through procurement contracts]; C.E.B., Trade Secrets Practice 2d, Appendix C [chart comparing patents, trade secrets, copyright, and trademarks]; Cal. Civil Practice, 6 Business Litigation, §70:1 et seq.; on patent applications, see 60 Am.Jur.2d (2003 ed.), Patents §294 et seq.; 14B Am.Jur. Legal Forms 2d (2000 ed.), §196:13 et seq.; on Federal Trade Commission's jurisdiction where patent obtained by fraud, see 77 Harv. L. Rev. 1505; on federal patent policy as an instrument of regulation of industry, see 39 So. Cal. L. Rev. 491.)

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

See *Quanta Computer v. LG Electronics* (2008) ___ U.S. ___, 128 S.Ct. 2109, 2115, 170 L.Ed.2d 996, 1005 [patent exhaustion doctrine applied to method patents]; 95 *Cal. L. Rev.* 535 [compulsory licenses and other options for governments to access medical patents, such as Tamiflu medication]; 118 *Harv. L. Rev.* 2007 [whether patent system effectively disseminates technological information]; 34 *Hastings Const. L. Q.* 447 [extent to which Congress can change patent right without effecting a taking]; 58 *Hastings L. J.* 205 [need for changes in patent law regarding software]; 38 *Loyola L.A. L. Rev.* 177 [commodification of patents]; 78 *So. Cal. L. Rev.* 457 [software regulation]; 57 *Stanf. L. Rev.* 1223 [criticism of patent office's proposal of biological research tool patent pool]; 58 *Stanf. L. Rev.* 1221 [patent law and drug innovation]; 60 *Stanf. L. Rev.* 45 [questioning presumption in favor of patent office's decision on patent validity]; 60 *Stanf. L. Rev.* 221 [maintaining constitutionality of patent system]; 60 *Stanf. L. Rev.* 803 [distributing patent rights through auctions]; 37 *Southwestern U. L. Rev.* 323 [suggesting two-tiered system of patent review; alternatives to presumption of patent validity]; 53 *U.C.L.A. L. Rev.* 871 [pushing patents "downstream" to promote drug development]; 39 *U.S.F. L. Rev.* 33 [efficiency trade-offs in patent litigation settlements]; 39 *U.S.F. L. Rev.* 57 [economic analyses of patent settlement agreements]; 27 *A.L.R. Fed* 2d 151 [construction and application of Patent Act by United States Supreme Court].



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E. Inventions.

2. Federal Patent Law.

a. Nature of Protection.

2. Infringement.

13 Witkin Sum. Cal. Law Pers Prop § 76

[§ 76] Infringement.

(1) *In General.* The federal courts have exclusive jurisdiction over actions for patent infringement (28 U.S.C., §1338(a); see 2 *Cal. Proc.* (4th), *Jurisdiction*, §78). A patentee is entitled to damages and to an injunction against future infringement. (See generally C.E.B., 2 *Business Litigation*, §8:12 et seq.; C.E.B., *Attorney's Guide to Damages* 2d, §6.1 et seq.; 60 *Am.Jur.2d* (2003 ed.), *Patents* §937 et seq.; 19A *Am.Jur. P.P. Forms* (1997 ed.), *Patents*, Form 34 et seq.; 54 *Am.Jur. Trials* 261 [defending action for software infringement under patent law]; 37 *Proof of Facts* 3d 315 [patent misuse as defense in infringement action]; and see 78 *Cal. L. Rev.* 1599 [criticism of patent misuse doctrine, barring infringement suits by patentees who have misused their patent grant]; 86 *Cal. L. Rev.* 179 [promoting theory of "efficient infringement": using liability rules to determine whether injunctive relief is necessary and proper]; 91 *Cal. L. Rev.* 117 [use of defense of independent invention to avoid preliminary injunction in patent infringement actions]; 32 *Cal. Western L. Rev.* 257 [disqualification of attorney in patent infringement actions]; 116 *Harv. L. Rev.* 2164 [improving patent administration through prosecution history estoppel]; 20 *Hastings L. J.* 1106 [invalidity of patent as defense]; 55 *Hastings L. J.* 399 [arguing that antitrust analysis is inadequate method of testing for patent misuse]; 26 *Loyola L.A. L. Rev.* 455 [application of "obviousness" standard by Federal Court of Appeals]; 43 *Santa Clara L. Rev.* 751 [patent infringement liability for offering to sell invention]; 61 *So. Cal. L. Rev.* 215 [Vertical Territorial Restrictions as Patent Misuse]; 70 *So. Cal. L. Rev.* 281 [recovery of lost profits on unpatented products in patent infringement cases]; 77 *So. Cal. L. Rev.* 683 [suggesting mandatory joinder as way of encouraging defendants in patent infringement actions to challenge bad patents]; 25 *Stanf. L. Rev.* 551 [venue in actions]; 49 *Stanf. L. Rev.* 917 [advantages of alternative dispute resolution for resolving international patent disputes]; 26 *Thomas Jefferson L. Rev.* 85 [tension between patent reissue provisions and doctrine prohibiting use of reissue process to cover subject matter of previously surrendered claim]; 26 *Thomas Jefferson L. Rev.* 421 [safe harbor provision relating to generic drugs]; 33 *U.C. Davis L. Rev.* 601 [doctors' liability or immunity from liability for using patented medical procedures]; 37 *U.C. Davis L. Rev.* 701 [infringement by offering in United States to sell invention abroad]; 9 *U.C.L.A. L. Rev.* 76 [misuse doctrine]; 42 *U.C.L.A. L. Rev.* 221 [infringement suits involving functional patent claims]; 50 *U.C.L.A. L. Rev.* 1413 [six tips for federal district judges in patent cases]; 33 *U.S.F. L. Rev.* 435 [role of judge and jury in determining amount of enhanced damages for patent infringement]; on contributory infringement, see *Aro Mfg. Co. v. Convertible Top Replacement Co.* (1964) 377 U.S. 476, 84 S.Ct. 1526, 1530, 12 L.Ed.2d 457, 466; *Dawson Chemical Co. v. Rohm & Haas Co.* (1980) 448

U.S. 176, 100 S.Ct. 2601, 2605, 65 L.Ed.2d 696, 701 [contributory infringement and patent misuse]; *78 Harv. L. Rev. 305; 38 So. Cal. L. Rev. 363; 184 A.L.R. Fed 369* [whether imported product made by U.S. patented process has been materially changed by subsequent process in order to avoid infringement]; see also *Aetna Cas. & Surety Co. v. Superior Court* (1993) *19 C.A.4th 320, 328, 23 C.R.2d 442* [insurer had no duty to defend manufacturer against claims of direct and contributory patent infringement].)

(2) *Doctrine of Equivalents*. Under the doctrine of equivalents, a product or process that does not literally infringe on the express terms of a patent claim may nonetheless be found to infringe because of equivalence between elements of the product or process and the patent terms. (See *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.* (1997) *520 U.S. 17, 117 S.Ct. 1040, 1046, 137 L.Ed.2d 146, 158* [scope and applicability of doctrine]; *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.* (2002) *535 U.S. 722, 122 S.Ct. 1831, 1838, 152 L.Ed.2d 944, 956* [amendment of patent application may trigger prosecution history estoppel, but is not absolute bar to claim of infringement under doctrine of equivalents]; *111 Harv. L. Rev. 400* [criticizing *Warner-Jenkinson Co.* for unnecessarily increasing complexity of patent law]; *111 Harv. L. Rev. 2330* [effect of *Warner-Jenkinson Co.* on doctrine of prosecution history estoppel, whereby patentee that has given up territory previously claimed during patent prosecution cannot later complain about competitor's invention within surrendered area]; *116 Harv. L. Rev. 402* [*Festo Corp.*]; *26 Pepperdine L. Rev. 89* [*Warner-Jenkinson Co.*; need for balance between encouraging patentees to develop inventions and protecting competitors who could face liability for infringement when they attempt to improve invention]; *44 U.C.L.A. L. Rev. 2031* [*Warner-Jenkinson Co.*; how modern courts are undermining "doctrine of equivalents"].)

(3) *States' Sovereign Immunity*. In *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank* (1999) *527 U.S. 627, 119 S.Ct. 2199, 2204, 144 L.Ed.2d 575, 584*, the United States Supreme Court held unconstitutional a federal law that expressly abrogated the states' sovereign immunity from patent infringement actions. (See *89 Cal. L. Rev. 507* [holding sovereign's universities accountable for patent infringement after *Florida Prepaid Postsecondary Education Expense Bd.*]; *37 San Diego L. Rev. 637* [regulatory takings of intellectual property following *Florida Prepaid Postsecondary Education Expense Bd.*]; *42 Santa Clara L. Rev. 607* [conditional waivers; whether Congress can require states to waive sovereign immunity from private patent infringement actions as condition of receiving federal patent rights]; *34 U.C. Davis L. Rev. 271* [*Florida Prepaid Postsecondary Education Expense Bd.*; expansion of doctrine of state sovereign immunity and weakening of federal patent law]; *35 U.S.F. L. Rev. 407* [ability of United States to meet its obligations to protect intellectual property rights under international agreements after *Florida Prepaid Postsecondary Education Expense Bd.*].)

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

(1) *In General*. *Food & Ag.C. 52300 et seq.*, added in 2008, establish a protocol for obtaining and testing a crop sample to determine whether a farmer has infringed a patent on a genetically-engineered plant.

See *eBay v. MercExchange, L.L.C.* (2006) *547 U.S. 388, 126 S.Ct. 1837, 1839, 164 L.Ed.2d 641, 645* [traditional test used by equity courts to determine propriety of permanent injunctive relief applies to patent disputes]; *28 California Lawyer 43* (April 2008) [changes in standards for enforcing patent laws]; *34 Ecology L. Q. 713* [property rights movement's embrace of intellectual property; *eBay* as example]; *56 Hastings L. J. 769* [proposal to require holders of genetic seed patents to provide notice to alleged infringing farmers]; *57 Hastings L. J. 921* [experimental use defense to patent infringement for universities]; *59 Hastings L. J. 1257* [improving quality of appellate review of jury verdicts in patent infringement cases by incorporating "fuzzy logic"]; *34 Lincoln L. Rev. 1* [indemnification for patent infringement under Uniform Commercial Code]; *37 McGeorge L. Rev. 129* [nanotechnology and experimental use defense to patent infringement]; *42 San Diego L. Rev. 405* [exporting software components and extraterritorial patent infringement]; *46 Santa Clara L. Rev. 307* [problems created when infringement damages exceed value of patent]; *60 Stanf. L. Rev. 263* [patentee overcompensation and entire market value rule]; *39 U.C. Davis L. Rev. 225* [inducing patent infringement]; *41 U.S.F. L. Rev. 407* [patent litigants' access to declaratory judgment remedy]; *7 A.L.R. Fed 2d 269* [infringement actions involving video, electronic, and computer games]; *19A Am.Jur. P.P. Forms* (2007 ed.), Patents §20 et seq.; *84 Proof of Facts 3d 243* [establishing liability for infringement of utility patent]; *88 Proof of Facts 3d 75* [establishing liability for

infringement of plant patent]; 89 Proof of Facts 3d 1 [issue preclusion as defense in patent infringement action]; 94 Proof of Facts 3d 179 [establishing liability of generic drug manufacturer for inducing patent infringement]; 96 Proof of Facts 3d 1 [establishing defense of patent invalidity].

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §77.(2) *Doctrine of Equivalents*. See 77 *So. Cal. L. Rev.* 1383 [need for certainty and uniformity in patent infringement cases after *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.* (2002) 535 U.S. 722, 122 S.Ct. 1831, 152 L.Ed.2d 944; proposal for specialized patent trial court with rule of greater deference]; 43 *San Diego L. Rev.* 379 [doctrine of equivalents and claim vitiation doctrine]; 59 *Stanf. L. Rev.* 955 [demise of doctrine of equivalents]; 27 *Thomas Jefferson L. Rev.* 371 [continuation and reissue as means of obtaining optimum patent protection after *Festo*].



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a. Nature of Protection.

3. Transfer and License.

13 Witkin Sum. Cal. Law Pers Prop § 77

[§ 77] Transfer and License.

The patent is a property right that may be transferred by *assignment*. (*Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 C.A.2d 748, 758, 258 P.2d 852.*) Or the patentee may *license* the use of the patent by a licensee, to make the patented article in consideration of royalties or other compensation, and such a license is itself assignable. (*Farmland Irr. Co. v. Dopplmaier (1957) 48 C.2d 208, 222, 308 P.2d 732; 75 Harv. L. Rev. 602* [patent use restrictions]; *77 Harv. L. Rev. 492* [assignment of rights on inventions made under government research contracts]; *60 Am.Jur.2d (2003 ed.)*, *Patents §1007 et seq.*; *14B Am.Jur. Legal Forms 2d (2000 ed.)*, §196:142 et seq.; on compulsory licensing, see *47 Cal. L. Rev. 51; 53 Cal. L. Rev. 1520; 84 Cal. L. Rev. 1293*; on rights of employer and employee, see *31 So. Cal. L. Rev. 38.*)

In a licensor's action for royalties under a license agreement, the licensee is not estopped to deny the validity of the licensor's patent, and may avoid payment of royalties if he or she can prove it invalid. (*Lear v. Adkins (1969) 395 U.S. 653, 89 S.Ct. 1902, 1911, 23 L.Ed.2d 610, 623*, reversing *Adkins v. Lear (1967) 67 C.2d 882, 891, 64 C.R. 545, 435 P.2d 331*; for comments on the *Lear* case, see *59 Cal. L. Rev. 873; 84 Harv. L. Rev. 477; 7 San Diego L. Rev. 325.*)

West's Key Number Digest, Patents k.226 et seq.

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

See *Superbrace v. Tidwell (2004) 124 C.A.4th 388, 393, 21 C.R.3d 404* [state law, not federal common law, determines whether patent license is assignable; citing *Farmland Irr. Co. v. Dopplmaier (1957) 48 C.2d 208, 308 P.2d 732*, text, p. 97]; *60 Stanf. L. Rev. 863* [tradable patent rights as means of weeding out patent thickets]; *53 U.C.L.A. L. Rev. 279* [proposal to create, through use of government license defense, limited patent compulsory licensing regime for fruits of federally funded research].



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CHAPTER XVIII - Personal Property

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I. INTRODUCTION.

E. Inventions.

2. Federal Patent Law.

b. What Constitutes Patentable Invention.

13 Witkin Sum. Cal. Law Pers Prop § 78

[§ 78] What Constitutes Patentable Invention.

An enormous body of case law on the elusive subject of patentability exists; only a few illustrative citations are given here. (See *Cuno Engineering Corp. v. Automatic Devices Corp.* (1941) 314 U.S. 84, 62 S.Ct. 37, 41, 86 L.Ed. 58, 63; *Funk Bros. Seed Co. v. Kalo Inoculant Co.* (1948) 333 U.S. 127, 68 S.Ct. 440, 441, 92 L.Ed. 588, 592; *Great Atlantic & Pac. Tea Co. v. Supermarket Equipment Corp.* (1950) 340 U.S. 147, 71 S.Ct. 127, 130, 95 L.Ed. 162, 167; *Sears, Roebuck & Co. v. Stiffel Co.* (1964) 376 U.S. 225, 84 S.Ct. 784, 788, 11 L.Ed.2d 661, 667; *Graham v. John Deere Co. of Kansas City* (1966) 383 U.S. 1, 86 S.Ct. 684, 697, 701, 15 L.Ed.2d 545, 560, 564; *United States v. Adams* (1966) 383 U.S. 39, 86 S.Ct. 708, 712, 15 L.Ed.2d 572, 578; *Brenner v. Manson* (1966) 383 U.S. 519, 86 S.Ct. 1033, 1039, 16 L.Ed.2d 69, 76; *Parker v. Flook* (1978) 437 U.S. 584, 98 S.Ct. 2522, 2528, 57 L.Ed.2d 451, 460 [mathematical formula not patentable]; *Diamond v. Chakrabarty* (1980) 447 U.S. 303, 100 S.Ct. 2204, 2208, 65 L.Ed.2d 144, 150 [under existing statute, living microorganism (oil-eating bacterium) was patentable]; *Diamond v. Diehr* (1981) 450 U.S. 175, 101 S.Ct. 1048, 1055, 67 L.Ed.2d 155, 164 [process for curing synthetic rubber which includes mathematical formula and programmed digital computer patentable; distinguishing *Parker v. Flook*, *supra*]; *Pfaff v. Wells Electronics* (1998) 525 U.S. 55, 119 S.Ct. 304, 308, 142 L.Ed.2d 261, 268 [discussion of statutory prohibition against patenting invention that has been "on sale" more than 1 year before patent application filed].)

The legal literature on the subject is similarly extensive. (See 56 *Cal. L. Rev.* 497 [patentability of chemical intermediates]; 76 *Cal. L. Rev.* 803 [invention's commercial success as factor in determining whether to award patent]; 84 *Cal. L. Rev.* 1395 [patent protection for innovations in agricultural biotechnology]; 87 *Cal. L. Rev.* 421 [proposal to redefine requirement that patentable invention be "useful"]; 81 *Harv. L. Rev.* 1541 [computer programs and proposed patent law revision]; 91 *Harv. L. Rev.* 1357 [living organisms]; 16 *Hastings Const. L. Q.* 221 [patenting human genetic engineering products]; 30 *Hastings L. J.* 1627 [*Parker v. Flook* and Computer Program Patents]; 35 *Loyola L.A. L. Rev.* 355 [patentability of intangible innovations in information processing]; 31 *McGeorge L. Rev.* 1043 [gene patent applications and implications of written description requirement on biotechnology industry]; 32 *McGeorge L. Rev.* 111 [biotechnology and property rights]; 30 *Pepperdine L. Rev.* 553 [implications of current patent law on embryonic stem cell research]; 28 *San Diego L. Rev.* 937 [living organisms; on *Diamond v. Chakrabarty*, *supra*]; 32 *San Diego L. Rev.* 819 [effect of utility requirement on patentability of pioneering pharmaceuticals]; 33 *San Diego L. Rev.* 1241 [patentability of discoveries that are not inventions]; 37 *San Diego L. Rev.* 987 [imperfect patent protection for common

pool of genetic resources]; 40 *San Diego L. Rev.* 947 [written description requirement for DNA patents]; 41 *San Diego L. Rev.* 903 [criticizing federal court decision lowering standard for DNA sequence patentability]; 23 *Santa Clara L. Rev.* 979 [symposium on protection of intellectual property in computer field by use of copyright, patent, and trade secrecy law]; 43 *Santa Clara L. Rev.* 249 [patentability of drugs: conflict between protecting drug patents and providing sufficient access to medication]; 43 *Santa Clara L. Rev.* 597 [ownership and patenting of inventions resulting from stem cell research]; 43 *Santa Clara L. Rev.* 823 [applying appropriate economic line between unlawful business monopolies and lawful patent protection to determine patentability]; 44 *Santa Clara L. Rev.* 307 [genomic technology]; 66 *So. Cal. L. Rev.* 937 [biotechnology patents and requirement that inventors deposit sample of genetically engineered organism with patent office]; 68 *So. Cal. L. Rev.* 1091 [patent protection for lock-out programs]; 75 *So. Cal. L. Rev.* 943 [recognition of business method software patents in international intellectual property system]; 21 *Southwestern U. L. Rev.* 1103 [patentability of genetic engineering process]; 32 *Southwestern U. L. Rev.* 501 [patentability of inventions involving human material and need to define "human being"]; 26 *Stanf. L. Rev.* 893 [operable versus substantial assembly of patented combinations]; 44 *Stanf. L. Rev.* 1051 [recombinant DNA technology]; 55 *Stanf. L. Rev.* 303 [patentability of newly discovered, naturally occurring genes, DNA fragments, proteins, and other biochemicals]; 23 *Thomas Jefferson L. Rev.* 115 [patentability of human-animal chimeras]; 23 *Thomas Jefferson L. Rev.* 337 [approval of gene patents without substantial demonstration or disclosure of gene's actual utility]; 25 *Thomas Jefferson L. Rev.* 271 [genetic patents]; 26 *U.C. Davis L. Rev.* 227 [objective test for chemical patents]; 28 *U.C. Davis L. Rev.* 219 [product-by-process patent claims]; 33 *U.C. Davis L. Rev.* 491 [patentability of computer software; evisceration of subject matter requirement]; 41 *U.C.L.A. L. Rev.* 443 [argument that patent protection should be extended to ethnobiological knowledge of indigenous peoples]; 43 *U.C.L.A. L. Rev.* 961 [patentability of human genome]; 25 *U.S.F. L. Rev.* 583 [patenting human-based bioproducts]; 22 *Western State L. Rev.* 295 [computer-related patents and requirement of "non-obviousness"]; 26 *West L.A. L. Rev.* 159 [patent issues in multimedia productions]; 60 *Am.Jur.2d* (2003 ed.), *Patents* §69 et seq.; 171 *A.L.R.Fed* 39 [issuance of patent following public use of invention for experimental purposes]; 64 *Proof of Facts* 3d 1 [proof of patentability of method of electronic commerce].)

West's Key Number Digest, Patents k.16 et seq.

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

See *KSR Int. Co. v. Teleflex* (2007) 550 U.S. 398, 127 S.Ct. 1727, 1739, 167 L.Ed.2d 705, 718 [proper test for determining that invention is obvious and thus not patentable]; 121 *Harv. L. Rev.* 375 [*KSR Int.*]; 39 *U.S.F. L. Rev.* 641 [*Diamond v. Chakrabarty* (1980) 447 U.S. 303, 100 S.Ct. 2204, 65 L.Ed.2d 144, text, p. 98, as example of dynamic statutory interpretation]. *Legal literature:* See 35 *Golden Gate L. Rev.* 225 [whether newsgroup Internet postings should be considered printed publications for purposes of rule that prohibits patent for design that was discussed in print more than 1 year before patent application]; 38 *Golden Gate L. Rev.* 139 [patenting diagnosis of disease]; 32 *Lincoln L. Rev.* 1 [multidimensional problem of patenting human life]; 79 *So. Cal. L. Rev.* 1 [proposing that definition of patentable biotechnology invention should be limited to state of the art at time of invention]; 81 *So. Cal. L. Rev.* 631 [argument against tax strategy patents]; 58 *Stanf. L. Rev.* 601 [patenting nanotechnology]; 41 *U.C. Davis L. Rev.* 177 [narrowing scope of patents claiming naturally occurring gene sequences].



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CHAPTER XVIII - Personal Property

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I. INTRODUCTION.

E. Inventions.

3. Right To Use Unpatented Article.

13 Witkin Sum. Cal. Law Pers Prop § 79

[§ 79] Right To Use Unpatented Article.

In *Sears, Roebuck & Co. v. Stiffel Co.* (1964) 376 U.S. 225, 84 S.Ct. 784, 11 L.Ed.2d 661, Stiffel manufactured a distinctive pole lamp on which it obtained mechanical and design patents. Sears manufactured a substantially exact copy and sold it at a much lower price. Stiffel sued in the federal district court of Illinois. That court determined that the patents were invalid, but nevertheless, applying Illinois law, granted an injunction and damages for unfair competition, on findings that confusion was likely to occur and had occurred in some instances. *Held*, reversed. Under the Supremacy Clause (see 7 *Summary* (10th), *Constitutional Law*, §8 et seq.), the federal patent law controls. A state cannot directly extend the life of a patent beyond its expiration date, and it cannot indirectly protect an unpatented or unpatentable invention by its own law: "To allow a State by use of its law of unfair competition to prevent the copying of an article which represents too slight an advance to be patented would be to permit the State to block off from the public something which federal law has said belongs to the public. The result would be that while federal law grants only 14 or 17 years' protection to genuine inventions, ... States could allow perpetual protection to articles too lacking in novelty to merit any patent at all under federal constitutional standards. This would be too great an encroachment on the federal patent system to be tolerated." (84 S.Ct. 789, 11 L.Ed.2d 667.)

The same result was reached in *Compco Corp. v. Day-Brite Lighting* (1964) 376 U.S. 234, 84 S.Ct. 779, 11 L.Ed.2d 669, where Compco copied an invalid design patent of Day-Brite. The court pointed out that state law may require a seller to identify his products, and may make it unlawful to deceive the public by palming off copies as the originals; but it cannot impose liability for the acts of copying and selling. (See *Bonito Boats v. Thunder Craft Boats* (1989) 489 U.S. 141, 109 S.Ct. 971, 986, 103 L.Ed.2d 118, 145 [following *Sears* and *Compco*; Florida statute prohibiting use of direct molding process to duplicate unpatented boat hulls offered patent-like protection, and was preempted by Supremacy Clause]; *Sammons & Sons v. Ladd-Fab* (1982) 138 C.A.3d 306, 310, 187 C.R. 874 [following *Sears* and *Compco*]; 78 *Harv. L. Rev.* 309 [*Sears* and *Compco*].)

An unpatented though patentable process may receive protection under state trade secret laws. (*Kewanee Oil Co. v. Bicron Corp.* (1974) 416 U.S. 470, 94 S.Ct. 1879, 40 L.Ed.2d 315, 13 *Summary* (10th), *Equity*, §84.) But a complaint based upon mere copying of unpatented and uncopyrighted material, without allegations of agency or other fiduciary relationship, does not state a cause of action. (*Sammons & Sons v. Ladd-Fab*, *supra*, 138 C.A.3d 309, 312, distinguishing *Kewanee*; see 70 *So. Cal. L. Rev.* 281 [recovery of lost profits on unpatented products in patent infringement cases].)

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



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I. INTRODUCTION.

E. Inventions.

4. Right To Use Expired Patent.

13 Witkin Sum. Cal. Law Pers Prop § 80

[§ 80] Right To Use Expired Patent.

In *Brulotte v. Thys Co.* (1964) 379 U.S. 29, 85 S.Ct. 176, 13 L.Ed.2d 99, Thys owned patents for a hop-picking machine which were about to expire. In accordance with its usual practice, it sold machines and licensed their use for (a) a flat payment, plus (b) seasonal royalties based on use. The licenses continued beyond the expiration dates of the patents. *Held*, Thys was not entitled to royalties that accrued after the last patent had expired. These rights became public property, and any attempted continuation, by any legal device, was against the policy of the patent laws. (85 S.Ct. 178, 13 L.Ed.2d 101.)

Thys' contention, supported by the dissenting opinion (85 S.Ct. 180, 13 L.Ed.2d 103), was that it could sell or license the use of a patented article for a total price, with payments spread over any period, even though it extended beyond the patent period. But the majority thought the contract was a legal device, somewhat similar to a tie-in sale (see 1 *Summary* (10th), *Contracts*, §570), to evade the limitations of the patent law: "The present licenses draw no line between the term of the patent and the post-expiration period. The same provisions as respects both use and royalties are applicable to each. The contracts are, therefore, on their face a bald attempt to exact the same terms and conditions for the period after the patents have expired as they do for the monopoly period." (85 S.Ct. 179, 13 L.Ed.2d 102.)

The *Brulotte* case was followed in *Finnegan v. Spiegl Farms* (1965) 234 C.A.2d 408, 410, 44 C.R. 645. (Cf. *Aronson v. Quick Point Pencil Co.* (1979) 440 U.S. 257, 99 S.Ct. 1096, 1100, 59 L.Ed.2d 296, 303 [contract to pay royalties where patent application was pending and ultimately unsuccessful, enforceable; distinguishing *Brulotte*]; see also 79 *Harv. L. Rev.* 199; 60 *Am.Jur.2d* (2003 ed.), *Patents* §700; 3 *A.L.R.3d* 770.)

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



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Witkin Summary of California Law

I. INTRODUCTION.

F. Trademarks and Trade Names.

1. Trademarks.

a. Nature of Trademark.

13 Witkin Sum. Cal. Law Pers Prop § 81

[§ 81] Nature of Trademark.

(1) *In General.* A trademark is "any word, name, symbol, or device or any combination thereof adopted and used by a person to identify goods made or sold by him and to distinguish them from goods made or sold by others." (*B. & P.C. 14207*; see also *74 Am.Jur.2d (2001 ed.), Trademarks and Tradenames §1 et seq.*)

The name of the seller or producer, written in a distinctive manner, or some individual design, is a typical example. (See *Ward-Chandler Bldg. Co. v. Caldwell (1935) 8 C.A.2d 375, 377, 47 P.2d 758*; *California Prune & Apricot Growers' Assn. v. H.R. Nicholson Co. (1945) 69 C.A.2d 207, 158 P.2d 764*; *Cole of Calif. v. Grayson Shops (1946) 72 C.A.2d 772, 775, 165 P.2d 963* [word "Swooner" held valid trademark for bobby socks and other women's apparel, being suggestive of style (proper basis) rather than quality (not proper basis)]; *88 Cal. L. Rev. 2187* [accommodation of new technologies by trademark law during 20th century]; *16 California Lawyer 56 (April 1996)* [trademarks for multimedia software]; *116 Harv. L. Rev. 1845* [trademark's ability to capture consumer "badwill" or negative inferences, thereby reducing consumer decision costs and inducing producers to make high-quality products]; *40 San Diego L. Rev. 375* [restructuring domain name dispute resolution policies]; *51 U.C.L.A. L. Rev. 621* [arguing for application of semiotic analysis to trademark law]; *26 West L.A. L. Rev. 159* [trademark issues in multimedia productions]; *96 A.L.R.5th 1* [when domain name violates state trademark protection statute]; *114 A.L.R.5th 129* [reverse confusion doctrine under state trademark law]; *22 Proof of Facts 3d 623* [proof of common law trademark or tradename rights in geographical areas in which one entity used name or mark prior to other entity's use or registration]; *22 Proof of Facts 3d 691* [proof that trademark is distinctive or that it has acquired secondary meaning]; *87 Am.Jur. Trials 75* [defense of domain name dispute].)

In 1967, the California trademark statute was repealed and a new Act was adopted, based on the Model State Trademark Bill prepared by the United States Trademark Association, to provide uniformity with the trademark laws of other states and the Federal Trademark Act of 1946 (Lanham Act). (*B. & P.C. 14200 et seq.*; see *58 Cal. L. Rev. 905*; *2 U.S.F. L. Rev. 198.*)

(2) *Third Restatement.* The rules governing the protection of trademarks are addressed in *Rest.3d, Unfair Competition §9 et seq.* (See Comment to §9, reviewing use of trademarks from ancient Roman times to present.)

(3) *Servicemark Distinguished*. A servicemark is an emblem or logo used in the sale or advertising of *services* to identify their source (B. & P.C. 14206), and it may be registered in the same manner as a trademark (B. & P.C. 14230). (See *KGB v. Giannoulas* (1980) 104 C.A.3d 844, 857, 164 C.R. 571 [concept of parading as a mascot in animal costume is in public domain, and cannot be a valid servicemark].)

West's Key Number Digest, Trade Regulation k.1

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

(1) *In General*. The Trademark Law (B. & P.C. 14200 et seq.) was repealed in 2007. The Model State Trademark Law (B. & P.C. 14200 et seq.) was enacted in its place. "Trademark" is now defined as "any word, name, symbol, or device, or any combination thereof, used by a person to identify and distinguish the goods of that person, including a unique product, from those manufactured or sold by others, and to indicate the source of the goods, even if that source is unknown." (B. & P.C. 14202(a), added in 2007.) (3) *Servicemark Distinguished*. B. & P.C. 14206 and 14230 were repealed in 2007. "Servicemark" is now defined in B. & P.C. 14202(b), added in 2007. Registration of the mark is now governed by B. & P.C. 14207, added in 2007.



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F. Trademarks and Trade Names.

1. Trademarks.

b. Methods of Protection.

13 Witkin Sum. Cal. Law Pers Prop § 82

[§ 82] Methods of Protection.

Trademarks are protected in several ways:

(1) *The registration procedure to evidence the mark.* (See *infra*, §§85, 86.)

(2) *An action for damages for infringement.* (*B. & P.C. 14340(a)*) [plaintiff may recover up to three times the defendant's profits from, and up to three times all damages suffered by reason of, the wrongful manufacture, use, display, or sale of a registered mark]; see *Rest.3d, Unfair Competition* §36; *Lebas Fashion Imports of USA v. ITT Hartford Ins. Group* (1996) 50 C.A.4th 548, 558, 59 C.R.2d 36 [under commercial liability policy provision covering damages for "advertising injury," insurer had duty to defend action alleging trademark infringement]; 55 *Hastings L. J.* 737 [measure of damages in case of wilful reverse confusion]; 15 *Pacific L. J.* 491; 31 *U.S.F. L. Rev.* 257 [whether awards of both copyright and trademark damages constitute double recovery]; 31 *U.S.F. L. Rev.* 433 [using trademark, rather than copyright or patent, law to protect computer icons]; 31 *West L.A. L. Rev.* 227 [part of 2001 symposium volume on cyber rights; protecting trademarks in Internet era]; C.E.B., 1 *Business Litigation*, §6.22 et seq.; *Cal. Civil Practice*, 6 *Business Litigation*, §67:43 et seq. [complaints and allegation forms]; 74 *Am.Jur.2d* (2001 ed.), *Trademarks and Tradenames* §136 et seq.; 23A *Am.Jur. P.P. Forms* (2002 ed.), *Trademarks and Tradenames*, Form 81 et seq.; 54 *Am.Jur. Trials* 261 [defending action for software infringement under trademark law]; 47 *Proof of Facts* 2d 643 [misuse of trade name]; 37 *Proof of Facts* 3d 315, 330 [trademark misuse as defense in action for damages for infringement]; 38 *Proof of Facts* 3d 1 [proving dilution of trademark in civil action for damages]; 5 *Summary* (10th), *Torts*, §721; on damages under the federal Act, see *Fleischmann Distilling Corp. v. Maier Brewing Co.* (1967) 386 U.S. 714, 87 S.Ct. 1404, 1408, 18 L.Ed.2d 475, 479.)

(3) *An injunction against infringement.* Suits for injunctive relief are authorized by statute. (*B. & P.C. 14340(a)*); see *B. & P.C. 14330* [grounds for injunctive relief]; *Rest.3d, Unfair Competition* §35; *Nutro Products v. Cole Grain Co.* (1992) 3 C.A.4th 860, 866, 5 C.R.2d 41 [granting preliminary injunction based on likelihood of confusion between "nutro" and "nutrix"]; and see generally 35 *Proof of Facts* 3d 255 [proof of grounds for injunction or other extraordinary relief in trademark infringement action]; 38 *Proof of Facts* 3d 1 [proving dilution of trademark in civil action for injunctive relief]; 74 *Am.Jur.2d* (2001 ed.), *Trademarks and Tradenames* §133 et seq.; *Cal. Civil Practice*, 6 *Business Litigation*, §67:43 et seq. [complaints and allegation forms]; 23A *Am.Jur. P.P. Forms* (2002 ed.), *Trademarks and*

Tradenames, Form 90 et seq.) The court may also order the destruction of all counterfeit marks, means of making the marks, and all articles bearing the marks. Alternatively, the court may dispose of these materials, after obliteration of the counterfeit mark, by ordering their transfer to the state, a civil claimant, an eleemosynary institution, or any appropriate private person other than the person from whom the materials were obtained. (*B. & P.C. 14340.*)

In *Mallard Creek Industries v. Morgan* (1997) 56 C.A.4th 426, 65 C.R.2d 461, plaintiff, a producer of bagged wood shavings, sought damages and an injunction against a former distributor, alleging that defendant was infringing on plaintiff's registered trademark by using plaintiff's name and logo to sell bagged wood shavings of his own. Defendant contended that he had permission to use plaintiff's name and logo and had done so for over 10 years before the registration without objection, and thus that *B. & P.C. 14342* offered a complete defense. The trial judge granted summary judgment for defendant. *Held*, reversed.

(a) *Plaintiff established a prima facie case of trademark infringement.* Plaintiff's logo (a pair of ducks flying off a marsh) is a relatively strong mark. (56 C.A.4th 435.) The names and logos used by plaintiff and defendant are identical. The products sold by plaintiff and defendant are "proximate," because they are identical, they are both used as mulch or stable bedding, and customers for the two products are the same. (56 C.A.4th 436.) Both parties market their products through feedstores. (56 C.A.4th 437.) Hence, defendant's use of plaintiff's name and logo created a substantial likelihood of confusion and deception. (56 C.A.4th 438.)

(b) *B. & P.C. 14342 does not provide a defense.* The statute prevents actions for infringement of a registered trademark against anyone who has adopted and lawfully used the same or a confusingly similar mark in the manufacture or sale of the same or similar goods from a date before the complaining party's registration of the trade or service mark. (56 C.A.4th 429, 438.) The facts here do not present the type of "use" envisioned by *B. & P.C. 14342*. (56 C.A.4th 439.) No authority recognizes a distributor's promotional use of a registered trademark to sell the trademark owner's products as a protectible "use" within the meaning of trademark law. (56 C.A.4th 440.) "It would severely undermine the entire body of trademark and unfair competition law if a distributor of trademarked products acquired a protectable and recognized 'use' simply because it had the trademark owner's permission to market the owner's products to the public for the owner's profit. It would certainly have the effect of forcing manufacturers/owners to abandon distributorships for a safer method of placing one's trademarked goods into the stream of commerce." (56 C.A.4th 441, 442.)

(4) *Seizure of counterfeited goods.* (*B. & P.C. 14340(b)*) [plaintiff must support motion by showing good cause and probability of success on the merits in suit to enjoin manufacture, use, display, or sale of counterfeits, and by posting an undertaking]; on procedure for seizure, and liability when goods are wrongfully seized, see *B. & P.C. 14340(c)-(h)*; 15 *Pacific L. J.* 491.)

(5) *Criminal sanctions for forgery or improper use.* (See *B. & P.C. 14341*; P.C. 350; 2 *Cal. Crim. Law* (3d), *Crimes Against Property*, §§152, 210; cf. *B. & P.C. 14342* [no registered servicemark or trademark may be enforced against party who has adopted and lawfully used the same or a confusingly similar mark in providing goods or services in the state "from a date prior to the effective date of registration" of the mark under *B. & P.C. 14200* et seq.].)

(6) *International protection under the international convention.* (See 68 *Harv. L. Rev.* 908; 70 *Harv. L. Rev.* 743; 116 *Harv. L. Rev.* 1139 [tackling global software piracy with international law]; 49 *Stanf. L. Rev.* 917 [advantages of alternative dispute resolution for settling international trademark and trade secret disputes].)

(7) *International protection against imported goods.* (See 19 *Southwestern U. L. Rev.* 141 [regulating the importation of gray-market goods].)

West's Key Number Digest, Trade Regulation k.331 et seq.

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

The Trademark Law (*B. & P.C. 14200* et seq.) was repealed in 2007. The Model State Trademark Law (*B. & P.C.*

14200 et seq.) was enacted in its place.

(2) *Action for damages for infringement.* *B. & P.C. 14340(a)* was repealed in 2007. An action for damages for infringement is now authorized by *B. & P.C. 14250(a)*, added in 2007.

See 25 California Lawyer 39 (May 2005) [legal issues linking trademark infringement and Internet use]; 84 Proof of Facts 3d 93 [establishing liability for trademark infringement by use of website metatags]; 84 Proof of Facts 3d 371 [establishing liability for trademark infringement of design].

38 Proof of Facts 3d 1, text, p. 103, was superseded by 98 Proof of Facts 3d 313 [proof of dilution].(3) *Injunction against infringement.* *B. & P.C. 14340(a)* and *14330* were repealed in 2007. An injunction against infringement is now authorized by *B. & P.C. 14250(a)*, added in 2007, as is destruction of counterfeit marks and the materials used to make them. (On injunction against use of famous and distinctive mark, see *B. & P.C. 14247*, added in 2007.)*B. & P.C. 14342* was repealed in 2007. *B. & P.C. 14200 et seq.*, added in 2007, do not contain an equivalent provision.

(4) *Seizure of counterfeited goods.* *B. & P.C. 14340* was repealed in 2007. *B. & P.C. 14250(b)*, added in 2007, replaces *B. & P.C. 14340(b)* without substantive change. (On procedure for seizure, and liability when goods are wrongfully seized, see *B. & P.C. 14250(c)-(h)*, added in 2007.)(5) *Criminal sanctions for forgery or improper use.* *B. & P.C. 14341* was repealed in 2007. The new law does not provide for criminal sanctions, but instead refers to those provided by P.C. 350. (See *B. & P.C. 14252*, added in 2007.) *B. & P.C. 14342* was repealed in 2007. *B. & P.C. 14200 et seq.*, added in 2007, do not contain an equivalent provision.



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1. Trademarks.

c. Transfer of Trademark.

13 Witkin Sum. Cal. Law Pers Prop § 83

[§ 83] Transfer of Trademark.

A trademark and its registration may be transferred by a signed and acknowledged instrument filed with the Secretary of State. (See *B. & P.C. 14260*; *Rest.3d, Unfair Competition §34*; *74 Am.Jur.2d (2001 ed.)*, *Trademarks and Tradenames §14* et seq.)

Like its counterpart, former B. & P.C. 14273, *B. & P.C. 14260* provides for assignment "with the goodwill of the business." This qualification has been construed to prohibit a bare assignment of the trademark, i.e., separated from the business and goodwill, it is not property and cannot be sold or assigned as such, nor subjected to attachment or execution. (*Ward-Chandler Bldg. Co. v. Caldwell (1935) 8 C.A.2d 375, 378, 47 P.2d 758*; see *68 Harv. L. Rev. 868*.)

However, an exception to the general rule of nontransferability apart from the business is recognized where the mark denotes a quality or characteristic of the goods, e.g., that they are made under a patent. (See *Leventhal v. Ollie Morris Equipment Corp. (1960) 184 C.A.2d 553, 558, 7 C.R. 911*.)

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

The Trademark Law (*B. & P.C. 14200* et seq.) was repealed in 2007. The Model State Trademark Law (*B. & P.C. 14200* et seq.) was enacted in its place. *B. & P.C. 14260* was replaced, without substantive change, by *B. & P.C. 14220(a)*.

See *Iskenderian v. Iskenderian (2006) 144 C.A.4th 1162, 1168, 1170, 51 C.R.3d 163* [transfer of business to trust included transfer of business' goodwill, and thus, its trademark; transfer was not unlawful even though it ultimately resulted in joint ownership of trademark by plaintiff and trust's beneficiaries].



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CHAPTER XVIII - Personal Property

Witkin Summary of California Law

I. INTRODUCTION.

F. Trademarks and Trade Names.

1. Trademarks.

d. What Cannot Be Trademarks.

13 Witkin Sum. Cal. Law Pers Prop § 84

[§ 84] What Cannot Be Trademarks.

The following are the more important limiting rules on the "word, name, symbol, or device" (supra, §81) that may become a valid trademark.

(1) Words or phrases *in common use* cannot be trademarks. Anyone is entitled to use such words and no person can claim an exclusive appropriation of them. (*Purity Springs Water Co. v. Redwood Ice Delivery Co.* (1928) 203 C. 286, 291, 263 P. 810; *Applebaum v. Senior* (1957) 154 C.A.2d 371, 374, 316 P.2d 410; *Cytanovich Reading Center v. Reading Game* (1984) 162 C.A.3d 107, 112, 208 C.R. 412 [reading improvement business could not appropriate as trademark either last four digits represented alphanumerically as "READ," or word "READ" itself]; see 74 *Am.Jur.2d* (2001 ed.), *Trademarks and Tradenames* §43.)

(2) Words or phrases that are *descriptive of the goods* cannot be claimed, because any seller is entitled to use such language to describe goods of the same type. (*B. & P.C. 14220(e)(1)*; see *North Carolina Dairy Foundation v. Foremost-McKesson* (1979) 92 C.A.3d 98, 106, 154 C.R. 794, citing the text [generic and descriptive terms]; *Rest.3d, Unfair Competition* §14; 68 *Harv. L. Rev.* 825; 74 *Am.Jur.2d* (2001 ed.), *Trademarks and Tradenames* §46 et seq.; 156 *A.L.R. Fed* 131 [cancellation of registered trademark that has become generic term]; 37 *Proof of Facts* 2d 67 [same].)

(3) A *geographical name*, whether or not it is the place of origin, e.g., the city where the business is conducted, is not a valid trademark, because any producer of such goods at that place is equally entitled to use it. (*B. & P.C. 14220(e)(2)*; see *Rest.3d, Unfair Competition* §14; *Alhambra Transfer & Storage Co. v. Muse* (1940) 41 C.A.2d 92, 95, 106 P.2d 63; 68 *Harv. L. Rev.* 825; 74 *Am.Jur.2d* (2001 ed.), *Trademarks and Tradenames* §52.)

(4) The *personal name* of the seller or producer cannot be exclusively claimed as a trademark, because others of the same name are equally entitled to its use. (*B. & P.C. 14220(e)(3)*; see *Rest.3d, Unfair Competition* §14; *Ida May Co. v. Ida May Ensign* (1937) 20 C.A.2d 339, 341, 66 P.2d 727; 68 *Harv. L. Rev.* 825; 44 *A.L.R.2d* 1156 [right to use one's own name for business purposes]; 72 *A.L.R.3d* 8 [use of "family name" by corporation as unfair competition]; 74 *Am.Jur.2d* (2001 ed.), *Trademarks and Tradenames* §50.) However, the name may be acceptable if it has, through prior use, become distinctive of the goods or services to which it applies. (See *B. & P.C. 14220(e)(3)*.)

(5) The general rule is that mere *colors* or the *shape* of a box or other container cannot be a trademark. (*Scudder Food Products v. Ginsberg* (1943) 21 C.2d 596, 598, 599, 134 P.2d 255; *Sun-Maid Raisin Growers of Calif. v. Mosesian* (1927) 84 C.A. 485, 491, 258 P. 630; see 74 Am.Jur.2d (2001 ed.), *Trademarks and Tradenames* §§37, 38.) However, the Lanham Act (infra, §86) permits the federal registration of a trademark that consists purely of a color. (*Qualitex Co. v. Jacobson Products Co.* (1995) 514 U.S. 159, 115 S.Ct. 1300, 1308, 131 L.Ed.2d 248, 260; see 26 *Santa Clara L. Rev.* 581 [trademark registration of product colors].)

(6) Other statutory qualifications prohibit trademarks that are immoral, deceptive, disparaging of persons or institutions, or involve the use of official flags or insignia. (See B. & P.C. 14220; 74 Am.Jur.2d (2001 ed.), *Trademarks and Tradenames* §41.)

West's Key Number Digest, Trade Regulation k.9 et seq.

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

The Trademark Law (B. & P.C. 14200 et seq.) was repealed in 2007. The Model State Trademark Law (B. & P.C. 14200 et seq.) was enacted in its place.(2) *Words that are descriptive of the goods:* B. & P.C. 14220(e)(1) was replaced, without substantive change, by B. & P.C. 14205(e)(1) in 2007.

(3) *Geographical name:* B. & P.C. 14220(e)(2) was replaced, without substantive change, by B. & P.C. 14205(e)(2) in 2007.

(4) *Personal name:* B. & P.C. 14220(e)(3) was replaced, without substantive change, by B. & P.C. 14205(e)(3) in 2007.(6) *Immoral, deceptive, or disparaging trademarks:* B. & P.C. 14220 was replaced, without substantive change, by B. & P.C. 14205 in 2007.



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CHAPTER XVIII - Personal Property

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I. INTRODUCTION.

F. Trademarks and Trade Names.

1. Trademarks.

e. State Registration.

13 Witkin Sum. Cal. Law Pers Prop § 85

[§ 85] State Registration.

Any otherwise qualified mark (see *supra*, §81), adopted and used in California, may be registered with the Secretary of State. (See *B. & P.C. 14230* et seq.; C.E.B., 1 Business Litigation, §6.61 et seq.; Cal. Civil Practice, 6 Business Litigation, §67.4 et seq.; on state registration generally, see *74 Am.Jur.2d (2001 ed.)*, *Trademarks and Tradenames §§80, 81.*)

Upon registration a certificate is issued, which is "admissible in evidence as competent and sufficient proof of the registration" and is prima facie evidence of ownership of the mark. (*B. & P.C. 14241*; see *Cole of Calif. v. Grayson Shops (1946) 72 C.A.2d 772, 777, 165 P.2d 963.*) Registration of the mark provides constructive notice of the registrant's claim of ownership. (*B. & P.C. 14242*; on fraudulent registration, see *B. & P.C. 14300.*)

The registration is effective for a term of 10 years. Upon application to the Secretary of State, marks still in use may be renewed for successive 10-year periods. (See *B. & P.C. 14250, 14253.*)

If the trademark is abandoned, registration may be *cancelled*. (*B. & P.C. 14281(a)*; see *3 A.L.R.2d 1226* [abandonment of trademark or trade name]; on voluntary request for cancellation, see *B. & P.C. 14280(a).*)

West's Key Number Digest, Trade Regulation k.131 et seq.

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

The Trademark Law (*B. & P.C. 14200* et seq.) was repealed in 2007. The Model State Trademark Law (*B. & P.C. 14200* et seq.) was enacted in its place. *B. & P.C. 14230* et seq. was replaced by *B. & P.C. 14205* et seq.

Certificate: *B. & P.C. 14241* was replaced by *B. & P.C. 14215(b).*

Constructive notice: *B. & P.C. 14242* was deleted.

Fraudulent registration: *B. & P.C. 14300* was replaced by *B. & P.C. 14240.*

Term of registration: *B. & P.C. 14250* was replaced by *B. & P.C. 14217(a)* and (b), and the term of registration and

renewal was reduced from 10 to 5 years. *B. & P.C. 14253* was replaced by *B. & P.C. 14217(d)*.

Cancellation: B. & P.C. 14281(a) was replaced by *B. & P.C. 14230(c)(1)*. *B. & P.C. 14280(a)* was replaced by *B. & P.C. 14230(a)*.



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CHAPTER XVIII - Personal Property

Witkin Summary of California Law

I. INTRODUCTION.

F. Trademarks and Trade Names.

1. Trademarks.

f. Federal Registration.

13 Witkin Sum. Cal. Law Pers Prop § 86

[§ 86] Federal Registration.

(1) *In General.* Under the Federal Trademark or Lanham Act (15 U.S.C., §1051 et seq.), a trademark used in interstate or foreign commerce may be registered in the Patent Office. The application must state: (a) the date of the applicant's first use of the mark, (b) the date of the applicant's first use of it in commerce, and (c) the applicant's belief in its ownership. (15 U.S.C., §1051(a); see 68 *Harv. L. Rev.* 819, 834.) Additionally, any person having a bona fide, good faith intention to use a trademark in commerce may apply to register the trademark *before* it has been used. (15 U.S.C., §1051(b).)

(2) *Scope of Protection.* The Act, which became effective in 1947, greatly expanded the scope of protection of such marks. (See *Park 'N Fly v. Dollar Park & Fly* (1985) 469 U.S. 189, 105 S.Ct. 658, 661, 83 L.Ed.2d 582, 587 [holder of registered servicemark consisting of logo of airplane and words "Park 'N Fly" could rely on mark's incontestable status under Act to enjoin infringement; infringement action could not be defended on grounds that mark was merely descriptive]; *San Francisco Arts & Athletics v. United States Olympic Committee* (1987) 483 U.S. 522, 107 S.Ct. 2971, 2980, 97 L.Ed.2d 427, 447 [Congress could reasonably find that United States Olympic Committee's efforts distinguished word "Olympic"; thus, granting committee limited property right in "Olympic" was within scope of trademark law protection]; *Moseley v. V Secret Catalogue* (2003) 537 U.S. 418, 123 S.Ct. 1115, 1124, 155 L.Ed.2d 1, 14 [Federal Trademark Dilution Act (15 U.S.C., §1125(c)) requires showing of actual dilution, rather than likelihood of dilution; owner of famous mark need not prove actual loss of sales or profit, but mere fact that consumers associate junior user's mark with famous mark does not establish actionable dilution]; *Duggan's Funeral Service v. Duggan's Serra Mortuary* (2000) 80 C.A.4th 151, 158, 95 C.R.2d 253 [trial court properly cancelled funeral service operator's trademark of family name on basis of fraud; operator never used family name alone as mark, use of name was not exclusive, and operator's president was aware of these facts when he declared otherwise in order to obtain federal registration]; on damages under Act, see C.E.B., *Attorney's Guide to Damages* 2d, §6.28 et seq.; *Fleischmann Distilling Corp. v. Maier Brewing Co.* (1967) 386 U.S. 714, 87 S.Ct. 1404, 1408, 18 L.Ed.2d 475, 479.)

In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.* (1999) 527 U.S. 666, 119 S.Ct. 2219, 2224, 144 L.Ed.2d 605, 614, the United States Supreme Court held that the federal trademark statutes do not validly abrogate state sovereign immunity. (See 37 *San Diego L. Rev.* 637 [regulatory takings of intellectual property following *College Savings Bank*]; 35 *U.S.F. L. Rev.* 407 [ability of United States to meet its obligations to protect

intellectual property rights under international agreements after *College Savings Bank*].)

Commentary on the Act and its scope of protection is extensive. (See 88 *Cal. L. Rev.* 127 [arguing that Lanham Act claims for false advertising or false endorsement should be allowed only when allegedly unlawful language consists of commercial speech, not editorial content]; 29 *Golden Gate L. Rev.* 683 [parody as trademark infringement]; 71 *Harv. L. Rev.* 564 [problems arising from importation of foreign-made goods]; 78 *Harv. L. Rev.* 1269 [design patent and trademark protection]; 117 *Harv. L. Rev.* 430 [Federal Trademark Dilution Act]; 117 *Harv. L. Rev.* 2387 [application of initial interest confusion doctrine in on-line context]; 36 *Loyola L.A. L. Rev.* 1321 [expanding First Amendment right to musical parody of trademark-protected cultural icons]; 22 *Pepperdine L. Rev.* 1 [Lanham Act challenges to use of Native American images as trademarks]; 29 *Pepperdine L. Rev.* 689 [conflicting federal decisions regarding federal trademark dilution]; 40 *San Diego L. Rev.* 341 [recent developments addressing cyberspace trademark threats, such as metatags, keywords, and links]; 41 *San Diego L. Rev.* 721 [suggesting more stringent standard for finding of likelihood of confusion]; 37 *Santa Clara L. Rev.* 253 [federal patent and trademark statutes--preemption issues]; 40 *Santa Clara L. Rev.* 511 [trademarking "Jeet Kune Do," personal expression of martial arts]; 42 *Santa Clara L. Rev.* 63 [legal mechanisms for combatting "cybersquatting"]; 42 *Santa Clara L. Rev.* 863 [requirement that plaintiff in infringement action under Lanham Act prove bad faith by defendant before trial judge can order accounting of defendant's profits]; 43 *Santa Clara L. Rev.* 1431 [how uniform domain name dispute resolution policy is influenced by Anticybersquatting Consumer Protection Act (15 U.S.C., §1125(d))]; 44 *Santa Clara L. Rev.* 1179 [trademark parody]; 71 *So. Cal. L. Rev.* 1105 [local government regulation of federally registered trademarks on exterior signs; relationship between municipal zoning and signage ordinances and federal trademark law]; 74 *So. Cal. L. Rev.* 1623 [federal registration of name, badge, and motto of Los Angeles Police Department as example of expansion of intellectual property rights]; 77 *So. Cal. L. Rev.* 705 [extraterritorial reach of Act]; 16 *Stanf. L. Rev.* 736 ["free ride" doctrine]; 17 *Stanf. L. Rev.* 926 [antitrust problems in trademark franchising]; 18 *Stanf. L. Rev.* 1196 [incontestability]; 52 *Stanf. L. Rev.* 665 [constitutionality of cancelling "Redskins" trademark]; 21 *Thomas Jefferson L. Rev.* 305 [parody and trademark infringement]; 22 *Thomas Jefferson L. Rev.* 133 [federal relief from illicit use of trademarked material in website meta tags]; 22 *Thomas Jefferson L. Rev.* 201 [infringement of company's trademark through deep-linking to internal website beneath company's home page]; 32 *U.C. Davis L. Rev.* 255 [violation of federal trademark law to link, through meta tags, one's website to another's trademarks]; 37 *U.C. Davis L. Rev.* 1267 [arguing that exclusion of trademarks from intellectual property bankruptcy should be abolished]; 3 *U.S.F. L. Rev.* 327 [container or product shape]; 28 *U.S.F. L. Rev.* 1079 [telephone numbers as protectible trademarks]; 33 *U.S.F. L. Rev.* 641 [using trademark dilution theory to combat "cybersquatters," who register names or trademarks of companies as Internet domain names]; 152 *A.L.R. Fed* 573 [liability as vicarious or contributory infringer under Lanham Act]; 177 *A.L.R. Fed* 1 [validity, construction, and application of Anticybersquatting Consumer Protection Act]; 179 *A.L.R. Fed* 181 [parody as trademark dilution or infringement]; 183 *A.L.R. Fed* 553 [trademark infringement by "initial interest confusion" (when junior user of trademark creates misperception that junior user is source of senior user's goods)]; 187 *A.L.R. Fed* 271 [likelihood of confusion created by "reverse confusion" (when junior user saturates market with trademark that is same as, or similar to, senior user's trademark and overwhelms senior user)]; 195 *A.L.R. Fed* 251 [injunctive relief on theory of trademark infringement against competitor using Internet pop-up ad]; 197 *A.L.R. Fed* 17 [infringement actions in Internet and website contexts]; 74 *Am.Jur.2d* (2001 ed.), *Trademarks and Tradenames* §62 et seq.; C.E.B., 1 *Business Litigation*, §6.26 et seq.)

(3) *Trade Dress*. "Trade dress" of a business or product refers to its total image and overall appearance. Where trade dress is inherently distinctive, it is protectible under the Lanham Act without a showing that it has acquired a secondary meaning. (*Two Pesos v. Taco Cabana* (1992) 505 U.S. 763, 112 S.Ct. 2753, 2758, 120 L.Ed.2d 615, 625 [distinct appearance of fast food restaurant chain infringed by very similar motif of competing chain]; cf. *Wal-Mart Stores v. Samara Brothers* (2000) 529 U.S. 205, 120 S.Ct. 1339, 1342, 146 L.Ed.2d 182, 187 [product design is entitled to protection as unregistered trade dress only if it has acquired secondary meaning]; 38 *Cal. Western L. Rev.* 481 [protecting product design after *Wal-Mart Stores*]; and see 51 *Hastings L. J.* 1131 [arguing that trade dress does not belong on principal trademark register]; 43 *Santa Clara L. Rev.* 971 [difficulty of obtaining trade dress protection with expired utility patent]; 45 *Stanf. L. Rev.* 2037 [argument for exercise of restraint in expanding trade dress protection]; 55

Proof of Facts 3d 383 [proving trade dress infringement]; 161 *A.L.R. Fed* 327 [determining when trade dress is inherently distinctive].)

West's Key Number Digest, Trade Regulation k.131 et seq.

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

(2) *Scope of Protection*. In 2006, 15 U.S.C., §1125(c) was amended in response to the decision in *Moseley v. V Secret Catalogue* (2003) 537 U.S. 418, 123 S.Ct. 1115, 155 L.Ed.2d 1, text, p. 108. The statute now provides that, subject to the principles of equity, the owner of a distinctive, famous mark is entitled to an injunction against another person who uses the mark in a way that is "likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury." (See 46 *Santa Clara L. Rev.* 677 [proposal to amend Federal Trademark Dilution Act to overcome actual dilution requirement imposed by *Moseley v. V Secret Catalogue*].)

See *KP Permanent Make-Up v. Lasting Impression I* (2004) 543 U.S. 111, 125 S.Ct. 542, 547, 160 L.Ed.2d 440, 448 [although plaintiff claiming infringement of incontestable mark must show likelihood of consumer confusion as part of prima facie case, defendant who raises affirmative defense that term is used descriptively, fairly, and in good faith has no independent burden to negate likelihood of confusion; some possibility of consumer confusion is compatible with fair use]; 94 *Cal. L. Rev.* 1581 [empirical study of multifactor tests used by various federal circuits to determine likelihood of consumer confusion]; 56 *Hastings L. J.* 117 [arguing that dilution law should be replaced with independent cause of action that explicitly prevents free-riding on famous marks]; 34 *Pepperdine L. Rev.* 185 [trademark implications of transposing "Lennon/McCartney" songwriting credit to read "McCartney/Lennon"]; 41 *San Diego L. Rev.* 1787 [analysis of celebrity false endorsement claims and artistic expression]; 35 *Southwestern U. L. Rev.* 603 [overlap between trademark and identification of region in which wine is produced]; 37 *Southwestern U. L. Rev.* 183 [extraterritorial application of Lanham Act]; 39 *U.C. Davis L. Rev.* 371 [appropriate role of "trademark use" requirement in Internet trademark actions]; 40 *U.C. Davis L. Rev.* 559 [symposium on intellectual property and social justice]; 53 *U.C.L.A. L. Rev.* 833 [value of particular trademark protections, such as dilution doctrine, assignments in gross, "intent to use" applications, and logo protection]; 41 *U.S.F. L. Rev.* 671 [Internet pop-up advertisements as "use in commerce" under Lanham Act]; 7 *A.L.R. Fed* 2d 269 [infringement actions involving video, electronic, and computer games]; 97 Proof of Facts 3d 1 [proof of cyberpiracy under Anticybersquatting Consumer Protection Act (15 U.S.C., §1125(d))]; 98 Proof of Facts 3d 313 [proof of dilution]; 99 Proof of Facts 3d 107 [proof of infringement by establishing trademark rights in geographic areas within company's natural zone of expansion].(3) *Trade Dress*. See *Magic Kitchen LLC v. Good Things Int., Ltd.* (2007) 153 C.A.4th 1144, 1154, 63 C.R.3d 713 [trade dress infringement claim filed 10 years after kitchen tool manufacturer learned that distributor was selling sourced versions of tool was presumptively untimely for laches purposes].



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F. Trademarks and Trade Names.

2. Trade Names.

a. Nature of Protection.

13 Witkin Sum. Cal. Law Pers Prop § 87

[§ 87] Nature of Protection.

Though similar in purpose to a trademark, a *trade name* is distinguishable in that it may identify not only goods but also *services or business*, and hence obviously need not be affixed to goods. However, a name identifying goods and affixed to them may be both a trademark and a trade name, and the same protections are accorded to both. (See generally *B. & P.C. 14401* et seq.; *Eastern Columbia v. Waldman* (1947) 30 C.2d 268, 271, 181 P.2d 865 ["Eastern Columbia," trade name of retail merchandising business]; *Benioff v. Benioff* (1923) 64 C.A. 745, 748, 222 P. 835; *Hall v. Holstrom* (1930) 106 C.A. 563, 568, 289 P. 668 [chain of restaurants using name of "The White Spot"]; *Weatherford v. Eytchison* (1949) 90 C.A.2d 379, 383, 202 P.2d 1040 [transfer and storage business using name "Ford" in several forms]; *Ball v. American Trial Lawyers Assn.* (1971) 14 C.A.3d 289, 300, 92 C.R. 228 [American College of Trial Lawyers]; 40 Cal. L. Rev. 571; 19 So. Cal. L. Rev. 272; 29 So. Cal. L. Rev. 488; 23B Am.Jur. P.P. Forms (2002 ed.), Trademarks and Tradenames, Form 131 et seq.; 74 Am.Jur.2d (2001 ed.), Trademarks and Tradenames §§2, 5, 8; 47 Proof of Facts 2d 643 [wrongful use of another's tradename]; Cal. Civil Practice, 6 Business Litigation, §67:33 et seq.; on prohibition against using or trafficking in any container bearing a brand, unless certain requirements have been met, see *B. & P.C. 14425* et seq.)

The filing of a *fictitious name certificate* (see *B. & P.C. 17910*; 9 Summary (10th), *Partnership*, §2 et seq.) creates "a rebuttable presumption that the registrant has the exclusive right to use as a trade name the fictitious business name, as well as any confusingly similar trade name, in the county in which the statement is filed, if the registrant is the first to file such a statement containing the fictitious business name in that county, and is actually engaged in a trade or business utilizing such fictitious business name or a confusingly similar name in that county." (*B. & P.C. 14411*; see 4 *Pacific L. J.* 279; *B. & P.C. 14412* [termination of the presumption].)

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

(New) *Deceptive use of musical recording group's name:* *B. & P.C. 17537.12*, added in 2007, makes it unlawful for any performing group or its promoter, manager, or agent to advertise or conduct a live musical performance or production through the use of a false, deceptive, or misleading affiliation, connection, or association between the performing group and a recording group. Exceptions apply in the following circumstances:

- (1) The performing group is the authorized registrant and owner of a federal service mark for the group registered

in the United States Patent and Trademark Office. (*B. & P.C. 17537.12(c)(1).*)

(2) At least one member of the performing group was previously a member of the recording group and has a legal right by virtue of use or operation under the group name without having abandoned the name or affiliation of the group. (*B. & P.C. 17537.12(c)(2).*)

(3) The live musical performance or production is identified in all advertising and promotion as a salute or tribute, and the name of the vocal or instrumental group performing is not so closely related or similar to that used by the recording group that it would tend to confuse or mislead the public. (*B. & P.C. 17537.12(c)(3).*)

(4) The advertising does not relate to a live musical performance or production taking place in California. (*B. & P.C. 17537.12(c)(4).*)

(5) The performance or production is expressly authorized by the recording group. (*B. & P.C. 17537.12(c)(5).*)



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F. Trademarks and Trade Names.

2. Trade Names.

b. What Cannot Be Trade Names.

13 Witkin Sum. Cal. Law Pers Prop § 88

[§ 88] What Cannot Be Trade Names.

The same limiting rules (*supra*, §84) as are applied to trademarks are applied to trade names. The following are illustrations:

(1) Words in common use. (*Applebaum v. Senior* (1957) 154 C.A.2d 371, 374, 316 P.2d 410 ["Junior Boot Shop"]; see 74 Am.Jur.2d (2001 ed.), *Trademarks and Tradenames* §43.)

(2) Words descriptive of a business. (*Applebaum v. Senior, supra* [held "only a dressed-up way of saying 'Children's Shoe Store' "]; see 74 Am.Jur.2d (2001 ed.), *Trademarks and Tradenames* §47.)

(3) Geographical names. (*Beverly Hills Hotel Corp. v. Hilton Hotels Corp.* (1955) 134 C.A.2d 345, 351, 285 P.2d 1012 ["Beverly Hills Hotel"]; *Cebu Assn. of Calif. v. Santo Nino De Cebu USA* (1979) 95 C.A.3d 129, 133, 157 C.R. 102 [geographic term]; see 74 Am.Jur.2d (2001 ed.), *Trademarks and Tradenames* §52.)

(4) Personal names. (*D & W Food Corp. v. Graham* (1955) 134 C.A.2d 668, 673, 286 P.2d 77; see 44 A.L.R.2d 1156 [right to use one's own name for business purposes]; 72 A.L.R.3d 8 [use of "family name" by corporation as unfair competition]; 74 Am.Jur.2d (2001 ed.), *Trademarks and Tradenames* §50.)

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



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F. Trademarks and Trade Names.

3. Other Protected Names and Insignia.

13 Witkin Sum. Cal. Law Pers Prop § 89

[§ 89] Other Protected Names and Insignia.

Two sets of statutes protect the *name* and *insignia* of *noncommercial organizations*:

(1) *Name of Noncommercial Organization. B. & P.C. 14492, 14493, 14494, and 14495* provide for injunctive relief to prevent the unauthorized use of the name of a noncommercial "organization" (charitable association, fraternal society, labor union, etc.). (See *37 A.L.R.3d 277* [right of charitable or religious association or corporation to protect use of name].)

(2) *Insignia of Nonprofit Association. Corp.C. 21308, 21309, and 21310* provide for injunctive relief against the unauthorized use of the insignia of any nonprofit association. (See *76 A.L.R.2d 1396* [right of benevolent or fraternal society or organization to protect use of name or insignia].)

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



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I. INTRODUCTION.

G. Real and Personal Property.

1. In General.

a. Test of Mobility.

13 Witkin Sum. Cal. Law Pers Prop § 90

[§ 90] Test of Mobility.

The distinction between real and personal property is based upon mobility.

Real property is immovable property, and consists of (1) land; (2) things affixed to land; (3) things incidental or appurtenant to land; (4) things immovable by law. (C.C. 658; see C.C. 659 [defining "land"]; C.C. 662 [defining "appurtenance"]; *Callahan v. Martin* (1935) 3 C.2d 110, 118, 43 P.2d 788; 63C Am.Jur.2d (1997 ed.), *Property* §11; on test applied to conflict of laws respecting property, see 12 *Summary* (10th), *Real Property*, §4; on distinction between real property and "land," see 12 *Summary* (10th), *Real Property*, §3.)

Personal property is movable property, but includes every kind that is not real property. (C.C. 663; see 63C Am.Jur.2d (1997 ed.), *Property* §18; on solid mineral royalty as personal property, see 68 A.L.R.2d 728; on manure as real or personal property, see 82 A.L.R.2d 1099; on estate for years as a *chattel real*, i.e., personal property, see 12 *Summary* (10th), *Real Property*, §504.)

The single word "property," when used in the Codes, includes both real and personal property. (See C.C.P. 17(b)(1); C.C. 14(1); P.C. 7(10); *People v. Roland* (1933) 134 C.A. 675, 683, 26 P.2d 517.) But for purposes of taxation, the definitions and classifications of real and personal property in the particular statute are generally controlling. (See *San Diego Trust & Savings Bank v. San Diego* (1940) 16 C.2d 142, 147, 105 P.2d 94; *Southern Pac. Co. v. Riverside* (1939) 35 C.A.2d 380, 387, 388, 95 P.2d 688.)

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b. Water.

13 Witkin Sum. Cal. Law Pers Prop § 91

[§ 91] Water.

Water in its natural state is a part of the land, and therefore *real property*. When severed from the realty, reduced to possession, and placed in containers, it becomes *personal property*. (*Stanislaus Water Co. v. Bachman* (1908) 152 C. 716, 725, 93 P. 858; *San Francisco v. Alameda* (1936) 5 C.2d 243, 247, 54 P.2d 462; *Lewis v. Scazighini* (1933) 130 C.A. 722, 724, 20 P.2d 359; 78 Am.Jur.2d (2002 ed.), *Waters* §1.)

Water diverted into ditches, canals, pipe lines, or reservoirs, to be used for *irrigation*, is not deemed severed and thus remains real property. (*Copeland v. Fairview Land & Water Co.* (1913) 165 C. 148, 154, 131 P. 119; *Relovich v. Stuart* (1931) 211 C. 422, 428, 295 P. 819; 1 Cal. L. Rev. 484.) (See generally 12 *Summary* (10th), *Real Property*, §917 et seq.)

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c. Growing Crops and Trees.

13 Witkin Sum. Cal. Law Pers Prop § 92

[§ 92] Growing Crops and Trees.

(1) *In General. Trees and perennial crops* ("fructus naturales"), e.g., grass and berry vines, are part of the land, and consequently are governed by the rules relating to *real property*. But *annual crops*, planted and harvested each year ("fructus industriales"), are for some purposes treated as personal property. (See *21A Am.Jur.2d* (1998 ed.), *Crops* §3 et seq.; *4 Summary* (10th), *Sales*, §26). In California, the application of this latter theory is extended beyond mere annual crops, and includes periodical fruit crops (but not, of course, the trees or vines themselves). (See *Vulicevich v. Skinner* (1888) 77 C. 239, 240, 19 P. 424 [sale of fruit crop, statute of frauds provision on transfer of realty inapplicable]; *Congdon v. G.M.H. Wagner & Sons* (1929) 207 C. 373, 378, 278 P. 863 [crop mortgage on grapes held unaffected by decree under former Torrens Act, which related only to title to realty]; and see discussion, *Story v. Christin* (1939) 14 C.2d 592, 595, 95 P.2d 925; 13 So. Cal. L. Rev. 517; see generally *52 Am.Jur.2d* (2000 ed.), *Logs and Timber* §7 et seq.; *63C Am.Jur.2d* (1997 ed.), *Property* §16.)

(2) *Growing Crops Prior to Severance*. Prior to severance or an agreement to sever growing crops (see U.C.C. 2107(2); C.C. 658, 660), they are generally treated as real property. Thus, annual crops will pass with the land to a grantee under a deed unless reserved in writing; and an owner who redeems his or her land after a tax sale is entitled to the growing crops as against the state, subject to the rights of any tenant under a lease from the state. (*List v. Sandell* (1941) 42 C.A.2d 505, 507, 109 P.2d 376 [crop of grain; redemption from tax sale].) Also, after foreclosure of a mortgage on the land, the purchaser is entitled to the unsevered crops, in preference to a subsequent crop mortgagee with notice of the prior real mortgage. (*Penryn Fruit Co. v. Sherman-Worrell Fruit Co.* (1904) 142 C. 643, 645, 76 P. 484 [fruit crop]; *Phillips v. Pacific Land & Cattle Co.* (1931) 116 C.A. 290, 292, 2 P.2d 566 [alfalfa].) Similarly, growing crops are regarded as real property for purposes of local venue in actions for injuries to real property. (*Stauffer Chemical Co. v. Superior Court* (1968) 265 C.A.2d 1, 2, 71 C.R. 202.) However, if agreed to be severed under a contract of sale, emblements and crops are subject to the sales provisions of the Commercial Code. (See *4 Summary* (10th), *Sales*, §26.)

(3) *Nursery Stock*. Young trees temporarily placed in the soil but held for sale and not intended to grow there are neither crops nor fixtures, but are personal property; they constitute a *stock in trade of goods*. Hence, where defendant vendor, on default by plaintiff purchaser, repossessed land and sold plaintiff's nursery stock, defendant was liable for conversion. (*Story v. Christin*, *supra*; see 13 So. Cal. L. Rev. 517.)

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

(1) *In General.* See *21A Am.Jur.2d (2008 ed.)*, *Crops* §3 et seq.



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13 Witkin Sum. Cal. Law Pers Prop § 93

[§ 93] Standing Timber.

Standing timber, sold with the object of severance within a reasonable or fixed time, is personal property, and the sale is one of *goods* rather than of an interest in realty. (C.C. 658, 660; *Ascherman v. McKee* (1956) 143 C.A.2d 277, 282, 299 P.2d 367; *Sloan v. Hiatt* (1966) 245 C.A.2d 926, 929, 54 C.R. 351.) The Official Text of the Uniform Commercial Code originally made the contract one for the sale of goods only if the timber was to be severed by the seller. California rejected this provision; the sale is one of goods whether severance is by the buyer or the seller. (See U.C.C. 2107(2), 4 *Summary* (10th), *Sales*, §26; C.E.B., 1 UCC Sales and Leases, §1.6.) The revised Official Text of Unif.Com.C. 2-107(2) follows the California rule. (See 1 U.L.A. (Master Ed.), p. 382.)

If, however, the contract of sale calls for removal within a specified time, title passes to the buyer only as to those trees that the buyer cuts and removes within the designated period; the balance remains the property of the seller (landowner). (*Whittaker v. Thompson* (1959) 53 C.2d 192, 194, 1 C.R. 7, 347 P.2d 7; *Drewry v. Welch* (1965) 236 C.A.2d 159, 165, 46 C.R. 65.)

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1. Nature of Doctrine and Tests.

13 Witkin Sum. Cal. Law Pers Prop § 94

[§ 94] Nature of Doctrine and Tests.

A *fixture* is a thing, originally personal property, but later *affixed or annexed* to realty, so that it is considered *real property*. "A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts or screws." (C.C. 660.) (See generally Cal. Civil Practice, 3 Real Property Litigation, §24:1 et seq.; 35A *Am.Jur.2d* (2001 ed.), *Fixtures* §1; 8 Powell §57.01 et seq.)

However, under modern theories, the manner of its annexation is not the sole or the most important test. There are three main factors: (1) physical annexation; (2) adaptation to use with real property; (3) *intention* to annex to realty. Of these, intention is the most significant, but the manner of annexation and the use to which the property is put are relevant in determining such intention. (See generally *Los Angeles v. Klinker* (1933) 219 C. 198, 206, 25 *P.2d* 826; *M.P. Moller v. Wilson* (1936) 8 *C.2d* 31, 38, 63 *P.2d* 818; *San Diego Trust & Savings Bank v. San Diego* (1940) 16 *C.2d* 142, 149, 105 *P.2d* 94; *Rinaldi v. Goller* (1957) 48 *C.2d* 276, 279, 309 *P.2d* 451 [building need not be physically anchored, may be "secured to the realty by force of gravity alone"]; *Bell v. Bank of Perris* (1942) 52 *C.A.2d* 66, 73, 74, 125 *P.2d* 829; *People v. Church* (1943) 57 *C.A.2d Supp.* 1032, 1041, 136 *P.2d* 139; *Fry v. Lost Key Mines* (1952) 108 *C.A.2d* 568, 573, 239 *P.2d* 69; *United Pac. Ins. Co. v. Cann* (1954) 129 *C.A.2d* 272, 275, 276 *P.2d* 858 [portions not attached, but used with and essential to, other portions attached are a unit and constructively annexed]; *Grupp v. Margolis* (1957) 153 *C.A.2d* 500, 503, 314 *P.2d* 820; *Larkin v. Cowert* (1968) 263 *C.A.2d* 27, 30, 69 *C.R.* 290, *infra*, §102; *Cornell v. Sennes* (1971) 18 *C.A.3d* 126, 132, 95 *C.R.* 728, *infra*, §104, quoting the text; 8 *So. Cal. L. Rev.* 55; 29 *Cal. L. Rev.* 21; 10 *A.L.R.2d* 207 [constructive annexation of plumbing material and heating apparatus]; 69 *A.L.R.4th* 359 [air conditioning equipment as fixture]; 54 *Proof of Facts* 3d 303 [proving that personal property has become fixture]; *infra*, §95 et seq.)

The question whether personal property has become a fixture arises mainly where one party (e.g., a tenant, licensee, defaulting purchaser, or conditional seller) seeks to remove them from the land of another, and in miscellaneous situations where legal incidents flow from their characterization as real property. The significance of the doctrine in the first mentioned class of cases has, however, been greatly diminished by the enactment of the *removal statute* (C.C.

1013.5) in 1953. (See *infra*, §98 et seq.) Moreover, the attempt to solve, by a single doctrine, problems involving rights of parties in widely differing legal relationships, has not been too successful. (See 26 *So. Cal. L. Rev.* 21; and see *infra*, §§95, 102 et seq.; on application of doctrine to determine liability of possessor of land for defective condition thereof, see *Knell v. Morris* (1952) 39 *C.2d* 450, 456, 247 *P.2d* 352, 6 *Summary* (10th), *Torts*, §1250; 26 *So. Cal. L. Rev.* 54; cf. *Goodman v. Harris* (1953) 40 *C.2d* 254, 262, 253 *P.2d* 447, 12 *Summary* (10th), *Real Property*, §651 [landlord not liable for death from defective gas heater; not a fixture].)

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

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13 Witkin Sum. Cal. Law Pers Prop § 95

[§ 95] Property Held To Be Fixtures.

Bearing in mind the importance of intention (*supra*, §94), the effect of special relationships (*infra*, §102 et seq.), and the statutory right of removal (*infra*, §98), the following are illustrations of the kinds of property that, under the particular circumstances, have been treated as fixtures:

(1) Refrigerating system. (*Frick v. Frigidaire Corp.* (1932) 119 C.A. 707, 710, 7 P.2d 321.)

(2) Presses and other processing equipment of a newspaper publisher. (*Los Angeles v. Klinker* (1933) 219 C. 198, 209, 210, 25 P.2d 826 [proceeding to condemn real property on which plant was located]; see 26 So. Cal. L. Rev. 56; *infra*, §109.)

(3) Gasoline service station. (See *R. Barcroft & Sons Co. v. Cullen* (1933) 217 C. 708, 713, 20 P.2d 665, *infra*, §104.)

(4) Garage. (*Rinaldi v. Goller* (1957) 48 C.2d 276, 279, 309 P.2d 451.)

(5) Pump on concrete foundation. (*Bell v. Bank of Perris* (1942) 52 C.A.2d 66, 76, 125 P.2d 829.)

(6) Sewer line embedded in soil and not removable without serious damage to the line. (*Palos Verdes Properties v. County Sanitation Dist. No. 5 of Los Angeles* (1960) 177 C.A.2d 679, 688, 2 C.R. 537.)

(7) Drapes and wall-to-wall carpeting. (*Larkin v. Cowert* (1968) 263 C.A.2d 27, 29, 69 C.R. 290, *infra*, §102.)

(8) Computer hardware. (*Bank of America v. Los Angeles* (1964) 224 C.A.2d 108, 113, 36 C.R. 413.)

(9) Cargo cranes installed on wharf. (*Seatrains Terminals of Calif. v. Alameda* (1978) 83 C.A.3d 69, 75, 147 C.R. 578.)

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13 Witkin Sum. Cal. Law Pers Prop § 96

[§ 96] Property Held Not Affixed.

A wall bed, easily removable, is not a fixture. (*Southern Calif. Hardwood & Mfg. Co. v. Borton* (1920) 46 C.A. 524, 530, 189 P. 1022; see also *Fisher v. Pennington* (1931) 116 C.A. 248, 250, 2 P.2d 518; 26 So. Cal. L. Rev. 55.) The same is true of a kitchen unit (stove, sink, and refrigerator). (*Daniger v. Hunter* (1952) 114 C.A.2d 796, 798, 251 P.2d 353, *infra*, §104; cf. 57 A.L.R.2d 1103 [electric range].) A gasoline service station is usually removable without damage to the premises, and therefore may be treated as personal property. (*People v. Church* (1943) 57 C.A.2d Supp. 1032, 1037, 136 P.2d 139 [lessee allowed to remove as against state condemning real property; but see *infra*, §109]; see 9 So. Cal. L. Rev. 416.) (For other examples, see *Kruse Metals Mfg. Co. v. Utility Trailer Mfg. Co.* (1962) 206 C.A.2d 176, 178, 183, 23 C.R. 514 [easily removable industrial equipment]; *Pajaro Valley Bank v. Santa Cruz* (1962) 207 C.A.2d 621, 628, 24 C.R. 639 [safe deposit boxes stacked in tiers on floor of vault]; *San Joaquin v. State Bd. of Equalization* (1970) 9 C.A.3d 365, 372, 88 C.R. 12, citing the text [deep well agricultural pump, set in open space and movable, with useful life of only a few years].)

In *M.P. Moller v. Wilson* (1936) 8 C.2d 31, 63 P.2d 818, a residence pipe organ was installed by plaintiff conditional seller. It was not fastened, but stood on legs; and, though pipes ran through the walls, and partitions surrounded the organ, they were removable without injury to the building. Defendant, purchaser of the land at a foreclosure sale, claimed the organ as part of the realty. *Held*, it was not a fixture, and plaintiff, the unpaid conditional seller, could remove it. The court pointed out that the lack of fastenings would not preclude a determination that it was a fixture, nor would its weight compel such a determination. "It must also appear from the nature of the chattel that if used for the purpose for which it was designed it would naturally and necessarily be annexed to and become a permanent and integral part of some realty; in other words, that it would become essential to the ordinary and convenient use of the property to which it was annexed." (8 C.2d 38.) A pipe organ is a musical instrument, and not an appliance like a heating system or plumbing fixtures; and neither its weight nor the easily removable pipes and partitions showed an intent to annex it permanently to the realty. (8 C.2d 38, 39.)

In *Gosliner v. Briones* (1921) 187 C. 557, 204 P. 19, plaintiff erected a five-room house and a windmill on redwood mudsills placed upon the surface of another's land, the owner of the land agreeing that they could remain

temporarily until plaintiff could remove them to his own adjoining lot. *Held*, the buildings were the personal property of plaintiff, and he could recover for their destruction by the owner of the land. (187 C. 561.) (See also *Alderman v. Baggett* (1933) 134 C.A. 501, 503, 25 P.2d 532; *Clifford v. Epstein* (1951) 106 C.A.2d 221, 225, 234 P.2d 687; 26 So. Cal. L. Rev. 24.)

A similar result was reached in *Taylor v. Heydenreich* (1949) 92 C.A.2d 684, 207 P.2d 599, which indicates that the element of physical annexation is of relatively slight importance, and that the element of intention may be "inferred" so that it becomes merely a rationalization of the court's view as to the justice of giving the property to the landowner or allowing it to be removed. Defendant aunt, pursuant to a license from plaintiff nephew, constructed buildings, a windmill, and a water system, valued at \$ 4,000, on his farm. Later, after a disagreement, she moved them to other land. *Held*, since she was a mere licensee subject to ouster at any time, "it is not reasonable to infer" that the parties intended that plaintiff should become owner of this property, and his consent to her continued ownership would be "implied" in the absence of evidence of a contrary intention. (92 C.A.2d 688, 689.)

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3. Agreement and Constructive Severance.

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[§ 97] Agreement and Constructive Severance.

(1) *In General.* Parties may agree that articles affixed to realty shall nevertheless remain personal property, and such an agreement is binding between them, and against third persons with notice thereof. (See C.C. 1013; *Cone v. Western Trust & Savings Bank* (1937) 21 C.A.2d 176, 180, 68 P.2d 981 [lease gave lessee right to remove "buildings and structures ... machinery and equipment" at termination thereof]; *Bedell v. Mashburn* (1948) 87 C.A.2d 417, 423, 197 P.2d 98; cf. *Kaiser Co. v. Reid* (1947) 30 C.2d 610, 631, 184 P.2d 879 [disapproving prior case law implying that "when recorded, a private agreement fixing the legal character of property is binding upon the assessor"]; see also 29 Cal. L. Rev. 21, 24; and see generally 35A Am.Jur.2d (2001 ed.), *Fixtures* §16; 8A Am.Jur. Legal Forms 2d (1998 ed.), §119:5 et seq.)

As to *third persons without notice*, e.g., bona fide purchasers or encumbrancers of the land, the agreement is ineffective, and a fixture will be regarded as real property. (*Oakland Bank of Savings v. California Pressed Brick Co.* (1920) 183 C. 295, 302, 191 P. 524; see also *Dauch v. Ginsburg* (1931) 214 C. 540, 544, 6 P.2d 952; *Frick v. Frigidaire Corp.* (1932) 119 C.A. 707, 712, 7 P.2d 321; cf. *People v. Church* (1943) 57 C.A.2d Supp. 1032, 1039, 136 P.2d 139 [pumps and pneumatic hoist were tenant's personal property, as specified in lease, and were not acquired by state when it condemned underlying real property]; see 9 So. Cal. L. Rev. 416; 4 Summary (10th), *Security Transactions in Real Property*, §§67, 68.) And where a lessee with the right of removal defaults and the lessor reenters, rights under the agreement are forfeited, and neither the lessee nor the lessee's chattel mortgagee may remove them. (*Rinaldi v. Goller* (1957) 48 C.2d 276, 281, 309 P.2d 451; see *infra*, §99; 12 Summary (10th), *Real Property*, §684.)

(2) *Uniform Commercial Code.* The former Sales Act treated fixtures that were agreed to be severed as goods, and C.C. 658 and C.C. 660 were amended at the time of adoption of that Act to state the same rule. Although these sections are still operative, U.C.C. 2107(2) states a distinct rule of severance "without material harm," regardless of who is to effect the severance. (See U.C.C. 2107, Official Comment 2; 4 Summary (10th), *Sales*, §26.)

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

(1) *In General.* See 8A Am.Jur. Legal Forms 2d (2007 ed.), *Fixtures* §119:4 et seq.



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aa. Nature of Statute.

13 Witkin Sum. Cal. Law Pers Prop § 98

[§ 98] Nature of Statute.

The fixtures doctrine, strictly applied, often works an injustice against persons who innocently affix their personal property to another's realty. Some of the harsh effects have been mitigated by the trade fixture rule protecting tenants (see *infra*, §99), and by judicial liberality exercised in favor of others (see, e.g., *M.P. Moller v. Wilson* (1936) 8 C.2d 31, 63 P.2d 818, and *Taylor v. Heydenreich* (1949) 92 C.A.2d 684, 207 P.2d 599, *supra*, §96). However, adequate and consistent protection of the innocent improver without unfairness to other innocent parties seems to require legislative action. Accordingly, in 1953, C.C. 1013 was amended and C.C. 1013.5 was enacted to accomplish this object. (See *Cornell v. Sennes* (1971) 18 C.A.3d 126, 135, 95 C.R. 728, *infra*, §104; 27 So. Cal. L. Rev. 89; 11 Stanf. L. Rev. 478; 6 Miller & Starr 2d, §19:33; Cal. Civil Practice, 3 Real Property Litigation, §24:19.)

C.C. 1013 retains the general fixture doctrine, but qualifies it by reference to the right of removal under C.C. 1013.5. The latter section provides as follows:

(1) *Who May Exercise Right.* Any person who, "acting in good faith and erroneously believing because of a *mistake either of law or fact* that he has a *right* to do so, affixes improvements to the *land of another*," may remove them; and his or her "successor in interest" has the same right. (C.C. 1013.5(a).) The elements of good faith and mistaken belief are necessary prerequisites to the statutory relief. (*Cornell v. Sennes*, *supra*, 18 C.A.3d 136, citing the text; see *infra*, §99 et seq.)

(2) *Condition: Payment of Damages.* The right of removal is conditioned "upon payment, as their interests shall appear, to the owner of the land, and any other person having any interest therein who acquired such interest for value after the commencement of the work of improvement and in reliance thereon, of all their damages proximately resulting from the affixing and removal of such improvements." (C.C. 1013.5(a).)

(3) *Condition: Consent of Holder of Lien.* Where a lien is acquired in good faith and for value after commencement of the work of improvement and in reliance thereon (e.g., a mortgage), or where a mechanic's lien attaches, removal cannot be had unless the lienholder gives written consent. (C.C. 1013.5(d).)

(4) *Procedure: Action To Enforce Right.* The improver who brings an action to enforce the right of removal must join the owner and encumbrancers of record as defendants, and record a lis pendens. (C.C. 1013.5(b).) If the damages cannot readily be ascertained before removal, an interlocutory judgment may be rendered authorizing removal on payment into court of an estimated amount ordered by the court or as stipulated. (C.C. 1013.5(c).) The required lienholder's written consent (see *supra*) must be filed with the court before final or interlocutory judgment. (C.C. 1013.5(d).) In any action, the *owner* of the land is entitled to his or her *costs* and a reasonable *attorney's fee* to be fixed by the court. (C.C. 1013.5(b).)

West's Key Number Digest, Fixtures k.30 et seq.

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13 Witkin Sum. Cal. Law Pers Prop § 99

[§ 99] Fixtures Installed by Tenant.

Under former law, a fixture installed by a tenant might become the property of the landlord on termination of the tenancy. (See *Alden v. Mayfield* (1912) 163 C. 793, 796, 127 P. 44; *Camp v. Matich* (1948) 87 C.A.2d 660, 667, 197 P.2d 345; 26 So. Cal. L. Rev. 40.) The Code, however, has long recognized two exceptional situations:

(1) Where there is an agreement permitting removal. (C.C. 1013; see *United Pac. Ins. Co. v. Cann* (1954) 129 C.A.2d 272, 275, 276 P.2d 858 [right must be exercised within reasonable time after termination of tenancy]; cf. *Rinaldi v. Goller* (1957) 48 C.2d 276, 281, 309 P.2d 451 [no right after lessee's default and lessor's reentry]; 12 *Summary* (10th), *Real Property*, §685.)

(2) Where the fixtures are added for the purpose of "trade, manufacture, ornament, or domestic use," unless they have been so affixed as to "become an integral part of the premises." (C.C. 1019; see *Alden v. Mayfield*, *supra* [plate glass window and marble front held integral part of building, not removable]; *Hessell v. Healey* (1955) 131 C.A.2d 144, 149, 280 P.2d 124 [paint spray booth installed in service station held integral part of premises]; 26 So. Cal. L. Rev. 42; Cal. Civil Practice, 3 Real Property Litigation, §24:21 [affirmative defense allegation]; 107 A.L.R.5th 311 [what constitutes trade fixture]; 109 A.L.R.5th 421 [time within which tenant must exercise right to remove trade fixtures]; 1 Proof of Facts 2d 171 [status of building or structure as trade fixture].)

Under C.C. 1013.5 (*supra*, §98): (1) An agreement will still permit removal. (C.C. 1013.) (2) Trade fixtures that have not become an integral part of the premises may doubtless be removed as before; i.e., C.C. 1019 was not repealed, and it does not appear to be so inconsistent with the new statute as to be deemed repealed by implication. (See 27 So. Cal. L. Rev. 89, note 163.) (3) Any other thing affixed by the tenant, whether a trade fixture or not, and regardless of whether it has become an integral part of the premises, may be removed by him or her if it was affixed in good faith by mistake, provided that the tenant pays the damages resulting from affixing and removal, and obtains any necessary lienholder's consent. (C.C. 1013.5; see 27 So. Cal. L. Rev. 90.)

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

(2) *Fixtures added for purpose of "trade, manufacture, ornament, or domestic use"*: 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. 121].



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cc. Fixtures Installed by Buyer.

13 Witkin Sum. Cal. Law Pers Prop § 100

[§ 100] Fixtures Installed by Buyer.

Under former law, the reserved title of a conditional seller offered no protection if the goods were subsequently affixed to land, unless the seller recorded the conditional sales contract as an instrument affecting title to real property. (See 4 *Summary* (10th), *Security Transactions in Real Property*, §67; 26 *So. Cal. L. Rev.* 46.) Under C.C. 1013.5, removal might be possible on payment of any damages suffered; but two obstacles remain: (1) If a lien was acquired in reliance on the fixtures, the consent of the lienholder is required. (C.C. 1013.5(d); see 27 *So. Cal. L. Rev.* 91.) (2) The statute allows removal by "any person" who "affixes" the property or by "his successor in interest." The affixing is normally done by the conditional buyer, and the removal is usually sought by the unpaid conditional seller. (See 27 *So. Cal. L. Rev.* 91.) The latter, in order to come within the literal terms of the statute, would perhaps have to be characterized as a successor in interest by virtue of the exercise of the seller's right of repossession.

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13 Witkin Sum. Cal. Law Pers Prop § 101

[§ 101] Fixtures Installed by Trespasser or Licensee.

A trespasser or licensee formerly had no right to remove fixtures in the absence of the landowner's agreement or consent. (See *United States v. A Certain Tract of Land in Monterey County* (1874) 47 C. 515, 516 [trespasser]; cf. *Taylor v. Heydenreich* (1949) 92 C.A.2d 684, 689, 207 P.2d 599, supra, §96 ["implied" consent that structures remain property of licensee]; see also 26 So. Cal. L. Rev. 32; 27 So. Cal. L. Rev. 90; 35A Am.Jur.2d (2001 ed.), Fixtures §115.) These persons may now invoke the removal statute if they can meet its conditions of mistaken belief of right to affix and payment of damages for removal. (See 27 So. Cal. L. Rev. 90.)

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b. Fixtures Installed by Grantor or Mortgagor.

13 Witkin Sum. Cal. Law Pers Prop § 102

[§ 102] Fixtures Installed by Grantor or Mortgagor.

When a grantor conveys real property, do fixtures pass to the grantee? And if a mortgagor mortgages real property, do fixtures become part of the mortgagee's security? The rule favors the grantee and mortgagee. (See *Harper v. Buckles* (1937) 19 C.A.2d 481, 485, 65 P.2d 947; 35A Am.Jur.2d (2001 ed.), *Fixtures* §37 et seq.; 4 *Summary* (10th), *Security Transactions in Real Property*, §§67, 68; cf. 26 So. Cal. L. Rev. 24, 27 [discussing cases relying on "construction of conveyance" approach].)

Thus, in *Pacific Mortg. Guaranty Co. v. Rosoff* (1937) 20 C.A.2d 383, 385, 67 P.2d 110, linoleum cemented to floors and curtain rods screwed to walls were held fixtures where there was a clear intention to affix them permanently and their removal would impair the security of the encumbrancer. And, although in *Southern Calif. Hardwood & Mfg. Co. v. Borton* (1920) 46 C.A. 524, 531, 189 P. 1022, a wall bed placed on brackets was said not to be a fixture, the same type of bed was held a fixture where purchased by an owner with proceeds of a building loan, with the intention that it should become part of the security for the loan. (*Pacific Mortg. Guaranty Co. v. Rosoff*, *supra*.) (See also *Bell v. Bank of Perris* (1942) 52 C.A.2d 66, 76, 125 P.2d 829 [deep well centrifugal pump, on concrete foundation, enclosed in pump house and fastened thereto, held a fixture].)

In *Larkin v. Cowert* (1968) 263 C.A.2d 27, 69 C.R. 290, the owners of apartment houses installed drapes and wall-to-wall carpeting. Defendant foreclosed his trust deed, purchased, and took possession, claiming the drapes and carpets as part of the realty. *Held*, judgment for defendant affirmed. Both drapes and carpets were physically removable, but the controlling intent was to keep them as part of the building during their useful life. (263 C.A.2d 30.)

There seems to be no basis for applying the removal statute (C.C. 1013.5, *supra*, §98) to these situations: The statute deals with mistaken affixing to the land "of another," while here the grantor and mortgagor, not acting under any mistake, place the fixtures on their own lands.

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



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c. Fixtures Installed by Defaulting Purchaser.

13 Witkin Sum. Cal. Law Pers Prop § 103

[§ 103] Fixtures Installed by Defaulting Purchaser.

A purchaser under an executory contract for the sale of land, who takes possession and improves it, cannot remove the fixtures on default, even though the same things might have been removable as "trade fixtures" by a tenant at the expiration of his or her term (*supra*, §99). The tenant pays for occupation and use of the property and is therefore equitably entitled to remove the structures incidental to such use. The purchaser, however, makes improvements in contemplation of becoming the owner of the land, and the fixtures are therefore regarded as part of the real property of the owner (vendor) on the purchaser's default. (See *Teater v. Good Hope Dev. Corp. (1939) 14 C.2d 196, 207, 93 P.2d 112; Oakley Co. v. Butler (1936) 15 C.A.2d 572, 575, 59 P.2d 826; 26 So. Cal. L. Rev. 38.*)

The language of the removal statute (*supra*, §98) does not seem to apply to this situation. The purchaser, as the equitable owner of the land, is not affixing improvements to the land of "another" in the same sense as a conditional seller, tenant, trespasser, or licensee. Nor is the purchaser acting under a mistaken belief of right to make improvements; the purchaser has the right at the time he or she makes them. It may be, therefore, that the defaulting purchaser must find relief solely under the equitable rule against forfeitures. (See *13 Summary (10th), Equity*, §20.)

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d. Fixtures Subject to Mechanic's Lien.

13 Witkin Sum. Cal. Law Pers Prop § 104

[§ 104] Fixtures Subject to Mechanic's Lien.

(1) *In General.* A mechanic's lien attaches only to real property. (See 4 *Summary* (10th), *Security Transactions in Real Property*, §26 et seq.; 26 *So. Cal. L. Rev.* 59.) Whether chattels affixed to the land are part of the realty subject to the lien again calls for an application of the doctrine of fixtures.

In *R. Barcroft & Sons Co. v. Cullen* (1933) 217 C. 708, 20 P.2d 665, a seller sold a gasoline service station on conditional sale, and an unpaid contractor without notice of the seller's rights filed a mechanic's lien on the property. *Held*, the service station might, as between a landlord and tenant, be deemed personal property; but the rule favoring purchasers and mortgagees was applied to the mechanic's lien claimant, the station being treated as a fixture and subject to the claimant's lien. (217 C. 713.) (See 22 *Cal. L. Rev.* 114; 26 *So. Cal. L. Rev.* 59.)

In *Shelley v. Kofka* (1951) 107 C.A.2d 827, 237 P.2d 984, plaintiff mechanic's lien claimant furnished an irregularly shaped carpet, tacked to dwelling house floors, and of little salvage value. *Held*, it was a question of fact whether this was a fixture within the mechanic's lien law, and the trial judge erred in granting a nonsuit. (107 C.A.2d 830.)

In *Daniger v. Hunter* (1952) 114 C.A.2d 796, 798, 251 P.2d 353, a kitchen unit, consisting of a gas stove, sink, and refrigerator, removable without damage to the realty (by unplugging or unscrewing the connection), was held a chattel as a matter of law, and judgment imposing a mechanic's lien was reversed. (See also *Kruse Metals Mfg. Co. v. Utility Trailer Mfg. Co.* (1962) 206 C.A.2d 176, 182, 23 C.R. 514 ["bag house" and blower system in shed of foundry plant, easily removable, held personal property not subject to lien].)

(2) *Conditional Seller's Claim of Mechanic's Lien.* In *Cornell v. Sennes* (1971) 18 C.A.3d 126, 95 C.R. 728, plaintiff conditional seller sold air conditioning equipment to defendant S, lessee of a restaurant. The lessee defaulted. Plaintiff sued defendant owners to foreclose a mechanic's lien against the property, and thereafter repossessed the equipment and sold it to a third person. *Held*, judgment against owners reversed.

(a) As between the seller and buyer, the equipment was personal property; as to the owners of the realty, however, who had notice of the installation and failed to file a notice of nonresponsibility, it could be a fixture subject to a mechanic's lien. (18 C.A.3d 133, quoting the text.)

(b) The new question for California was whether the conditional seller who retained title to a chattel could also have a mechanic's lien on property to which the chattel was affixed. The answer, based on outside authority, was yes; retention of title is merely a factor relating to the issue of whether the chattel became a fixture. (18 C.A.3d 133; see 53 Am.Jur.2d (1996 ed.), *Mechanics' Liens* §301.)

(c) However, by the subsequent repossession and sale, plaintiff reasserted his own title to the equipment as personal property, and thereby waived his right to treat it as a fixture giving him a mechanic's lien against the real property. (18 C.A.3d 135.)

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

(2) *Conditional Seller's Claim of Mechanic's Lien.*

Retention of title: See 53 Am.Jur.2d (2006 ed.), *Mechanics' Liens* §295.



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1. Trade Fixtures.

13 Witkin Sum. Cal. Law Pers Prop § 105

[§ 105] Trade Fixtures.

In *Trabue Pittman Corp. v. Los Angeles* (1946) 29 C.2d 385, 175 P.2d 512, a bank leased premises and installed a vault door, tellers' cages, counters, and similar equipment, clearly trade fixtures (see *supra*, §99). However, defendant county's assessor treated them as "improvements" and taxable as real property of plaintiff lessor. *Held*, the assessment was valid. (a) The trade fixtures doctrine does not regard the affixed chattels as retaining their original character (personal property); they become real property for most purposes, except that, unlike the rest of the realty, they are removable by the tenant. (29 C.2d 395.) (b) It was proper for tax purposes to ignore the distinction between fixtures generally and trade fixtures. The doctrine arose out of commercial necessity, for the limited purpose of protecting the tenant's ownership; it applies only between landlord and tenant, and not where other parties in other relationships are involved. (29 C.2d 397.) (See 26 So. Cal. L. Rev. 57.)

This approach was restated in *Simms v. Los Angeles* (1950) 35 C.2d 303, 217 P.2d 936, where the court declared that the test of "intention" for tax purposes must be the reasonably manifested outward appearance without regard to the annexor's status as landlord or tenant. Defendant county's assessor had classified bank vault doors and counterlines (combinations of counters, wickets, grilles, partitions, etc.) as real property (following *Trabue Pittman, supra*), but treated similar property of nonbanking businesses (including vault doors and counterlines of jewelers and furriers, newspaper printing presses, and heavy industrial machinery) as personal property. *Held*, this classification was improper; there is no tenable ground for separate treatment of trade fixtures of different businesses, and all are fixtures and taxable as real property. (35 C.2d 309, 310.) (See also *Pajaro Valley Bank v. Santa Cruz* (1962) 207 C.A.2d 621, 626, 24 C.R. 639 [safe deposit boxes in containers ("nests") stacked in tiers and faced with a metal frame, but not attached and easily removed without damage to building or vault; held not fixtures and not taxable as real property]; *United States Nat. Bank of San Diego v. Los Angeles* (1965) 234 C.A.2d 195, 201, 44 C.R. 286 [safe deposit boxes held personal property and not taxable; following *Pajaro* and distinguishing *Bank of America v. Los Angeles* (1964) 224 C.A.2d 108, 36 C.R. 413, *infra*, §106]; *Ventura v. Channel Islands State Bank* (1967) 251 C.A.2d 240, 244, 59 C.R. 404 [bank sign and night depository held fixtures and taxable]; *Seatrains Terminals of Calif. v. Alameda* (1978) 83 C.A.3d 69, 75, 147 C.R. 578 [self-propelled cargo cranes running on rails installed in wharf with intention of permanency; held fixtures]; 40 So. Cal. L. Rev. 669 [bank fixtures].)

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2. Computer Components.

13 Witkin Sum. Cal. Law Pers Prop § 106

[§ 106] Computer Components.

The characterization of computer components as fixtures or personal property has evolved in response to the technological explosion in the computer industry.

(1) *Computer System Taxable as Fixture.* In *Bank of America v. Los Angeles* (1964) 224 C.A.2d 108, 36 C.R. 413, the bank's computer system was housed in seven buildings, six of which were specifically designed as accounting centers requiring the system; each system's components were interconnected by hundreds of cables; the floors of the buildings were raised solely for the system and at great expense; air conditioning and humidity systems were installed to insure the system's optimum operating efficiency; the machinery was extremely heavy and expensive to move; and certain machines were connected to air compressors by means of rigid iron pipe. *Held*, the computer system was a fixture taxable as real property. (224 C.A.2d 113.) (See 6 A.L.R.3d 497 [*Bank of America*].)

(2) *"Constructive Annexation" and "Unit For Use" Concepts.* In *Security Data v. Contra Costa* (1983) 145 C.A.3d 108, 193 C.R. 121, the computers were installed in a general purpose office building, not in buildings specially constructed to house computers, as in *Bank of America*. *Held*, the computer components were not fixtures. An article placed on real property, but not so physically attached as to meet the ordinary test of a fixture, may be deemed "constructively annexed," if used in such a way that it constitutes a "unit for use" with another article that is a fixture because it is attached. However, these concepts may be applied only where the use of the nonattached article is significantly associated with the purpose for which the building is used. (145 C.A.3d 119, 120, 121.)

(3) *Standardized Systems as Personality.* "[S]tandardized off-the-shelf, general purpose computers and computer components, placed in general purpose office buildings, and connected to a power source by means of standardized plugs, and to each other by means of standardized cables, are and remain personality regardless of whether or not use of a computer is essential to efficient and competitive operation of the business in which they are employed. Minor structural alterations to the realty in which such computers are situated, such as movable partitions or flooring, supplemental air conditioning units, and 220-volt wiring, do not alter the character of such computers from personality to realty." (*Allstate Ins. Co. v. Los Angeles* (1984) 161 C.A.3d 877, 891, 892, 207 C.R. 888 [office computer systems owned by bank and insurance company were personality; distinguishing *Bank of America*, on the ground it involved

permanent expensive installations].)

In *Crocker Nat. Bank v. San Francisco* (1989) 49 C.3d 881, 264 C.R. 139, 782 P.2d 278, plaintiff bank sought refunds for real property taxes paid on electronic data processing equipment defendant city had classified as a fixture. The trial judge ruled that the equipment was a fixture of the building plaintiff had been leasing, and the Court of Appeal affirmed. *Held*, reversed.

(a) *Standard of review*. The Court of Appeal erred in reviewing the trial judge's classification as the resolution of a question of fact under the substantial evidence test. "[I]t is plain that on appeal a trial court's classification of a particular item as a fixture must be reviewed independently. The question of classification is mixed: it involves the application of the rule to the facts and the consequent determination whether the rule is satisfied. And the question is predominantly legal: the pertinent inquiry bears on the various policy considerations implicated in the solution of the problem of taxability, and therefore requires a critical consideration, in a factual context, of legal principles and their underlying values." (49 C.3d 888.)

(b) *Equipment was not a fixture*. The equipment was comprised of several separate items, including central processing units and "peripheral" devices. Most of the equipment was described as "general purpose," "off the shelf," and "fungible." It was not physically attached to the building through permanent connections, but was instead attached through standardized "quick-disconnect" plugs that were inserted into the power source. The items were readily movable without damage to themselves or to the building. The equipment was not designed or modified for the building, nor was the building designed or modified to accommodate the equipment. Further, there were no other objective manifestations of permanence sufficient to outweigh the evidence that the equipment did not constitute a permanent part of the building. (49 C.3d 890.)

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3. Vessel Used as Tourist Attraction.

13 Witkin Sum. Cal. Law Pers Prop § 107

[§ 107] Vessel Used as Tourist Attraction.

In *Specialty Restaurants Corp. v. Los Angeles* (1977) 67 C.A.3d 924, 136 C.R. 904, the city of Long Beach acquired the ocean liner *Queen Mary*, located it at a pier, and leased premises on the ship to plaintiffs. The county of Los Angeles assessed the leasehold interests of plaintiffs as interests in real property under Rev.C. 105 (see 9 *Summary* (10th), *Taxation*, §165). Plaintiffs, contending that their leases gave them nontaxable possessory interests in personal property, sued to recover taxes paid under protest and recovered. *Held*, reversed.

(1) *Intention to make the ship a permanent addition to the realty.* "The *Queen Mary* houses a museum, a hotel, restaurants and various shops. Extensive sums of money were expended by the city to develop the *Queen Mary* and its site at Pier J as a tourist attraction. A large rock dike encloses the *Queen Mary*. A system has been established to protect the underwater hull of the *Queen Mary* and to eliminate the necessity of moving the ship to a dry dock to maintain its underwater surfaces. An extensive system of utilities has been established to supply the ship with such items as water, steam, sewage disposal, electricity and communication. A power plant was built to service the *Queen Mary* exclusively. An extensive system of gangways reached by means of elevators and escalators was built to allow access to the ship by tourists and other patrons. A large parking facility was established to accommodate visitors and large sums of money were expended on access roads and bridges. A consideration of the physical facts compels the inference that the city intended the *Queen Mary* to be a permanent addition to real property." (67 C.A.3d 933.)

(2) *Adaptability of the ship to purpose for which realty was used.* All of the improvements made to the land were designed to accommodate the ship as a tourist attraction, and the ship's presence makes the land peculiarly valuable in use. (67 C.A.3d 935, 936.)

(3) *Manner of annexation to land.* Despite the fact that the ship floats in the ocean, it is securely fastened to the wharf; its movement is minimal; the service lines, the mooring lines, and the gangway structure all connect the ship with the wharf in a permanent manner. And the decision to allow it to float instead of securing it to the ocean floor was to protect against possible earthquake damage. (67 C.A.3d 936, 937.)

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4. No Immunity From Sales Tax.

13 Witkin Sum. Cal. Law Pers Prop § 108

[§ 108] No Immunity From Sales Tax.

The rules and tests governing real property taxation of fixtures are inapplicable to *sales taxes* on transfers of such property; property classifiable as a fixture for assessment of real property taxes is not necessarily immune from classification as personal property for sales tax purposes. (See *Standard Oil Co. of Calif. v. State Bd. of Equalization* (1965) 232 C.A.2d 91, 100, 42 C.R. 543, 9 Summary (10th), *Taxation*, §352; *United States Lines v. State Bd. of Equalization* (1986) 182 C.A.3d 529, 539, 227 C.R. 347 [750-ton container cranes were personal property in hands of shipping line, subject to sales tax upon transfer to port in connection with leaseback agreement, even though after transfer cranes became fixtures subject to real property taxation].)

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f. Fixtures Condemned as Real Property.

13 Witkin Sum. Cal. Law Pers Prop § 109

[§ 109] Fixtures Condemned as Real Property.

Prior to 1957, the usual tests of physical annexation, adaptation to use with real property, and intention to annex (see *supra*, §94), were applied in eminent domain proceedings to determine what was included in the real property taken and therefore compensable. (See *Los Angeles v. Klinker* (1933) 219 C. 198, 202, 25 P.2d 826.)

In 1957, the rule was abrogated as to industrial equipment by the enactment of C.C.P. 1248b, which conclusively established the owner's right to compensation. In 1975, C.C.P. 1248b was superseded by C.C.P. 1263.205(a), which defines compensable "improvements pertaining to the realty" as including "any machinery or equipment installed for use on property taken by eminent domain, or on the remainder if such property is part of a larger parcel, that cannot be removed without a substantial economic loss or without substantial damage to the property on which it is installed, regardless of the method of installation." (For decisions under former section, see *Los Angeles v. Sabatasso* (1970) 3 C.A.3d 973, 981, 83 C.R. 898 [severance damages where equipment located in part of building not condemned]; *California v. Texaco* (1972) 25 C.A.3d 514, 519, 101 C.R. 923; *Concrete Service Co. v. California* (1972) 29 C.A.3d 664, 667, 105 C.R. 721; C.E.B., 2 Condemnation Practice 2d, §10.5.)

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H. Conflict of Laws.

1. In General.

a. Restatement 2d.

13 Witkin Sum. Cal. Law Pers Prop § 110

[§ 110] Restatement 2d.

The Second Restatement of Conflict of Laws rejects the mechanical doctrines of situs law and domiciliary law in favor of the more flexible doctrine of "most significant relationship" to the thing and the parties. (*Rest.2d, Conflict of Laws* §222; see Leflar 4th, §175 et seq.; Scoles & Hay 3d, §19.2 et seq.; *16 Am.Jur.2d* (1998 ed.), *Conflict of Laws* §52 et seq.; 1 *Summary* (10th), *Contracts*, §59 et seq.)

The Restatement treats separately the topics of conveyances (see *infra*, §112), encumbrances (see *infra*, §114), powers (see *infra*, §113), marital property (see 11 *Summary* (10th), *Husband and Wife*, §49; 11 *Summary* (10th), *Community Property*, §34), and succession on death (see 14 *Summary* (10th), *Wills and Probate*, §53).

SUPPLEMENT: [This section is current through the latest supplement]
See McDougal, *American Conflicts Law* 5th, §163 et seq.



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H. Conflict of Laws.

1. In General.

b. Commercial Code.

13 Witkin Sum. Cal. Law Pers Prop § 111

[§ 111] Commercial Code.

Choice-of-law rules set forth in the Commercial Code "determine most issues arising from the non-gratuitous transfer of interests in movables, including secured transactions." (Rest.2d, Conflict of Laws, Introductory Note preceding §244, p. 62.) The Code departs from the traditional view, substitutes modern concepts, and allows relatively free choice of law.

U.C.C. 1105(1) provides generally that the parties to a transaction (within the scope of the Code) may designate the jurisdiction whose law is to govern if it bears a "reasonable relation" to the transaction; and, in the absence of such a designation, the Code is applicable to any transaction having an "appropriate relation" to any state that enacts it. (See U.C.C. 1105(1), West's California Code Comment and Official Comments; 63 *A.L.R.3d* 341 [what constitutes "reasonable" or "appropriate" relation to transaction]; cf. 42 *Cal. L. Rev.* 653 [international sale of goods].) The Restatement concept of "most significant relationship" may be of assistance in interpretation of the Code terms "appropriate relation" and "reasonable relation." (See Rest.2d, Conflict of Laws, Introductory Note preceding §244, p. 65.)

However, U.C.C. 1105(2) limits the parties' right to choose the applicable law in certain areas covered by Code provisions: (1) Rights of creditors against sold goods. (U.C.C. 2402; see 4 *Summary* (10th), *Sales*, §134.) (2) Personal property leases. (U.C.C. 10105, 10106; see *infra*, §196 et seq.) (3) Bank deposits and collections. (U.C.C. 4102; see 4 *Summary* (10th), *Negotiable Instruments*, §73.) (4) Letters of credit. (U.C.C. 5116; see 4 *Summary* (10th), *Negotiable Instruments*, §136 et seq.) (5) Bulk sales. (U.C.C. 6103; see 4 *Summary* (10th), *Sales*, §219 et seq.) (6) Investment securities. (U.C.C. 8110; see 9 *Summary* (10th), *Corporations*, §136.) (7) Perfection of security interests, and the priority of security interests and agricultural liens. (U.C.C. 9301 et seq.; see 4 *Summary* (10th), *Secured Transactions in Personal Property*, §146; *infra*, §§115, 116.)

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

U.C.C. 1105 was repealed in 2006. Former U.C.C. 1108, a severability provision, was amended and redesignated U.C.C. 1105. The substance of former U.C.C. 1105 is now in U.C.C. 1301, added in 2006.



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Witkin Summary of California Law

I. INTRODUCTION.

H. Conflict of Laws.

2. Conveyances.

13 Witkin Sum. Cal. Law Pers Prop § 112

[§ 112] Conveyances.

(1) *Single Transaction.* Issues relating to the validity and effect of a single conveyance are determined by the law of the state that, with respect to the particular issue, has the most significant relationship to the parties, the chattel, and the conveyance. (*Rest.2d, Conflict of Laws §244(1)*; see Comment b; Leflar 4th, §177; cf. *Auto Auction v. Riding Motors* (1960) 187 C.A.2d 693, 696, 10 C.R. 110 [mechanical application of law of place where chattel located]; for choice-of-law rules relating to a *contract* for the sale of an interest as distinguished from the conveyance of such an interest, see 1 *Summary* (10th), *Contracts*, §98.)

The most important contact is usually the location of the chattel at the time of the conveyance. (*Rest.2d, Conflict of Laws §244(2)*; see Comment f.) However, if a conveyance is invalid under the law of the state of location, but valid under the law of another state with a close relationship to the transaction, the choice-of-law policy protecting the justified expectations of the parties may warrant application of the validating law. (See *Rest.2d, Conflict of Laws §244*, Comment g.)

(2) *Different Transactions.* When there are different transactions, the effect of a conveyance is usually determined by the law of the state where the chattel was located at the time of the conveyance. (*Rest.2d, Conflict of Laws §245(1)(2)*; see Comments and Illustration; and see also *infra*, §§114, 115.)

(3) *Adverse Possession.* The law of the state where the chattel was located determines adverse possession or prescription and the nature of the interest transferred. (*Rest.2d, Conflict of Laws §246*; see Leflar 4th, §178; Scoles & Hay 3d, §19.14; 3 *Am.Jur.2d* (2002 ed.), *Adverse Possession* §9.)

(4) *Assignment for Benefit of Creditors.* The effectiveness of a voluntary assignment for the benefit of creditors is determined by the law of the state that, with respect to the particular issue, has the most significant relationship to the debtor and the assignment. If the debtor is an individual, this is usually the debtor's domicile; if a corporation, usually the state of incorporation. The debtor's principal place of business is also an important contact. (*Rest.2d, Conflict of Laws §250*; see Comments b, c; 6 *Am.Jur.2d* (1999 ed.), *Assignments for Benefit of Creditors* §137; and see also 1 *Summary* (10th), *Contracts*, §710.)

(5) *Chattel Embodied in a Document.* Where title to a chattel is embodied in a document, e.g., a bill of lading or

warehouse receipt, the effect of a conveyance of an interest in the chattel is determined by the law of the state of location of the chattel. (*Rest.2d, Conflict of Laws* §248(2)(a).) If the document itself is transferred, the effect is governed by the law of the state where the document was located. (*Rest.2d, Conflict of Laws* §248(2)(b).) The law of the state of location of the document is also applied to a transfer of an intangible right embodied in a document, e.g., a bond or draft. (*Rest.2d, Conflict of Laws* §249(2)(b).) (See also Leflar 4th, §181; 16 *Am.Jur.2d* (1998 ed.), *Conflict of Laws* §57.)

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

(1) *Single Transaction*. See McDougal, *American Conflicts Law* 5th, §165.(3) *Adverse Possession*. See McDougal, *American Conflicts Law* 5th, §166.

(4) *Assignment for Benefit of Creditors*. See 6 *Am.Jur.2d* (2008 ed.), *Assignments for Benefit of Creditors* §132 et seq.

(5) *Chattel Embodied in a Document*. See McDougal, *American Conflicts Law* 5th, §169.



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I. INTRODUCTION.

H. Conflict of Laws.

3. Powers.

13 Witkin Sum. Cal. Law Pers Prop § 113

[§ 113] Powers.

(1) *Power Created by Operation of Law.* The power of an executor, administrator, guardian, receiver, sheriff, or other administrative officer to transfer interests in a chattel, and the nature of the interest created, are governed by the law of the state of location of the chattel. (*Rest.2d, Conflict of Laws §255(1)(2)*; see *Leflar 4th, §178.*)

(2) *Power Created by Owner.* The owner of a chattel may contract to give another power to transfer an interest in it. In such cases of consensual power, the validity of its exercise and the rights created thereby are governed by the law of the state of the most significant relationship to the parties, the chattel, and the exercise of the power; but, in the absence of an effective choice of law, greater weight will usually be given to the state of location of the chattel. (*Rest.2d, Conflict of Laws §256.*)

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

(1) *Power Created by Operation of Law.* See *McDougal, American Conflicts Law 5th, §166.*



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I. INTRODUCTION.

H. Conflict of Laws.

4. Encumbrances.

13 Witkin Sum. Cal. Law Pers Prop § 114

[§ 114] Encumbrances.

As between the parties, the validity and effect of a security interest in a chattel are usually determined by the law of the state where the chattel was located when the security interest attached. (*Rest.2d, Conflict of Laws* §251(1)(2); see *16 Am.Jur.2d* (1998 ed.), *Conflict of Laws* §§59, 60; cf. U.C.C. 9301 et seq., *infra*, §115.) A similar situs rule governs issues relating to enforcement and redemption of security interests. (*Rest.2d, Conflict of Laws* §254(1)(2).)

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



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I. INTRODUCTION.

H. Conflict of Laws.

5. Effect of Removal of Property.

13 Witkin Sum. Cal. Law Pers Prop § 115

[§ 115] Effect of Removal of Property.

(1) *California Law Prior to Commercial Code.* Where property was removed from one state without the consent of the owner, secured creditor, or lienholder, and brought to this state, California did not apply its law (e.g., of recordation or registration) to defeat rights protected by the other state. (See *Mercantile Acceptance Co. v. Frank* (1928) 203 C. 483, 492, 265 P. 190; *Atha v. Bockius* (1952) 39 C.2d 635, 639, 248 P.2d 745; *Motor Acceptance Co. v. Finn* (1932) 124 C.A. 766, 768, 13 P.2d 761; 42 Cal. L. Rev. 323; 47 Cal. L. Rev. 545, 555.)

If the removal was with consent of the mortgagee or conditional seller, the law of the place to which it was brought could be applied to protect the interests of bona fide purchasers or encumbrancers (see 47 Cal. L. Rev. 555, 557; *Rest.2d, Conflict of Laws* §253); and an out-of-state mortgagee's lack of diligence in following and reclaiming the property could give rise to an estoppel to deny the title of a local bona fide purchaser. (See *Atha v. Bockius, supra*; *First Nat. Bank of Hays City v. Sprigg* (1962) 209 C.A.2d 258, 260, 25 C.R. 838; 42 Cal. L. Rev. 323; 47 Cal. L. Rev. 560.)

(2) *Commercial Code.* U.C.C. 9301 et seq. provide rules to govern perfection and the effect of perfection or nonperfection of security interests in multiple-state transactions:

(a) *Documents, instruments, and goods generally.* The perfection of a nonpossessory security interest in negotiable documents, instruments, and goods is governed by U.C.C. 9301(3)(C), 4 *Summary* (10th), *Secured Transactions in Personal Property*, §146. The perfection of a possessory security in collateral is governed by U.C.C. 9301(2), 4 *Summary* (10th), *Secured Transactions in Personal Property*, §146.

(b) *Accounts, general intangibles and mobile goods.* U.C.C. 9301(1), 4 *Summary* (10th), *Secured Transactions in Personal Property*, §146, states the general rule that the law of the jurisdiction in which the debtor is located governs perfection of a security interest in collateral.

(c) *Chattel paper.* The perfection of a possessory security interest is governed by U.C.C. 9301(2), 4 *Summary* (10th), *Secured Transactions in Personal Property*, §146. The rule applicable to a nonpossessory security interest in tangible chattel paper is in U.C.C. 9301(3)(C), 4 *Summary* (10th), *Secured Transactions in Personal Property*, §146.

(d) *Minerals and accounts resulting from their sale.* The perfection of as-extracted collateral is governed by U.C.C.

9301(4), 4 *Summary* (10th), *Secured Transactions in Personal Property*, §146.

(e) *Uncertificated securities*. The perfection of uncertificated securities is governed by U.C.C. 9305(a)(2), 4 *Summary* (10th), *Secured Transactions in Personal Property*, §150.

(f) *Other investment property*. U.C.C. 9305, 4 *Summary* (10th), *Secured Transactions in Personal Property*, §150, governs perfection of investment property, including certificated securities, security entitlements and securities accounts, and commodity contracts and commodity accounts.

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



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H. Conflict of Laws.

6. Statutory Rules on Motor Vehicles.

13 Witkin Sum. Cal. Law Pers Prop § 116

[§ 116] Statutory Rules on Motor Vehicles.

Full faith and credit is given to out-of-state motor vehicle ownership certificates as long as the laws of the other state provide for the notation of all liens and encumbrances other than those dependent on possession. (*Veh.C. 4304.*) If the Department of Motor Vehicles is not satisfied as to the ownership, it may withhold issuance of an ownership certificate and merely issue a registration certificate of a distinctive color (*Veh.C. 4307*), or it may issue an ownership certificate on further proof of ownership or filing of a bond to protect any subsequent purchaser, lienholder, or secured creditor. (*Veh.C. 4157*; see 47 *Cal. L. Rev.* 543, 551; 7A *Am.Jur.2d* (1997 ed.), *Automobiles and Highway Traffic* §27 et seq.)

The Commercial Code rule is similar in effect. Goods become covered by a certificate of title when a valid application for the certificate of title and the applicable fee are delivered to the appropriate authority. They cease to be covered by the certificate "at the earlier of the time the certificate of title ceases to be effective under the law of the issuing jurisdiction or the time the goods become covered subsequently by a certificate of title issued by another jurisdiction." (U.C.C. 9303(b).) The law of the jurisdiction under whose certificate of title the goods are covered governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in goods covered by a certificate of title "from the time the goods become covered by the certificate of title until the goods cease to be covered by the certificate of title." (U.C.C. 9303(c); see 42 *A.L.R.3d* 1179; 4 *Summary* (10th), *Secured Transactions in Personal Property*, §148.)

SUPPLEMENT: [This section is current through the latest supplement]
See 7A *Am.Jur.2d* (2007 ed.), *Automobiles and Highway Traffic* §29 et seq.



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Witkin Summary of California Law II. ACQUISITION OF TITLE TO PERSONAL PROPERTY

A. Finding.

1. Finder's Common Law Right of Possession.

13 Witkin Sum. Cal. Law Pers Prop § 117

[§ 117] Finder's Common Law Right of Possession.

(1) *In General.* The California law of finding is partly based on old common law doctrines of somewhat uncertain content and scope protecting *possession* against anyone but the true owner (*infra*, this section), and partly on statutory procedures under which a finder may acquire *title* (*infra*, §118 et seq.). The principal common law rules deal with the rights of the finder, as against the owner of land on which the article is found and the finder's employer. (For general discussions of the common law, see 52 *Harv. L. Rev.* 1105; 6 *Hastings L. J.* 180; for a suggested approach based on modern conditions and practice, see 52 *Harv. L. Rev.* 1125.)

(2) *Rights Against Landowner.* The finder's right of possession in abandoned property, treasure trove, or lost property is usually held superior to that of the landowner. (On abandoned property and treasure trove, see 52 *Harv. L. Rev.* 1111, 1113; 6 *Hastings L. J.* 182; 38 *U.C.L.A. L. Rev.* 1659 [Property Owners' Constructive Possession of Treasure Trove: Rethinking the Finders Keepers Rule]; 61 *A.L.R.4th* 1180 [ownership of treasure trove as between finder and owner of property on which treasure was found]; 1 *Am.Jur.2d* (1994 ed.), *Abandoned, Lost, and Unclaimed Property* §§16, 26; on lost property, see 52 *Harv. L. Rev.* 1109; 6 *Hastings L. J.* 190; 1 *Am.Jur.2d* (1994 ed.), *Abandoned, Lost, and Unclaimed Property* §§4, 18.) However, if the property was not "lost" but merely "misaid," the landowner is entitled to its possession; i.e., the landowner, not the finder, is the more appropriate bailee to hold the mislaid article for the true owner if the latter returns to claim it. (See 52 *Harv. L. Rev.* 1117; 6 *Hastings L. J.* 190; 1 *Am.Jur.2d* (1994 ed.), *Abandoned, Lost, and Unclaimed Property* §§6, 24.)

(3) *Rights Against Employer.* As between the finder and his or her employer, if the employee is under an express duty to deliver articles found to the employer, the latter is entitled to their possession. On the other hand, where the purpose of the employment is unrelated to the finding, the property belongs to the employee. (See *Burns v. Clark* (1901) 133 C. 634, 638, 66 P. 12; 52 *Harv. L. Rev.* 1116; 6 *Hastings L. J.* 181; 3 *Summary* (10th), *Agency and Employment*, §100; on property found by public employees, see *infra*, §120.)

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

(2) *Rights Against Landowner.* On abandoned property and treasure trove, see 1 *Am.Jur.2d* (2005 ed.), *Abandoned, Lost, and Unclaimed Property* §§21, 24, 39 et seq.; on lost property, see 1 *Am.Jur.2d* (2005 ed.), *Abandoned, Lost, and Unclaimed Property* §§12, 27 et seq.; on mislaid property, see 1 *Am.Jur.2d* (2005 ed.), *Abandoned, Lost, and Unclaimed Property* §§14, 36 et seq.



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II. ACQUISITION OF TITLE TO PERSONAL PROPERTY

A. Finding.

2. Title by Compliance With Statute.

a. Former Law and Revision.

13 Witkin Sum. Cal. Law Pers Prop § 118

[§ 118] Former Law and Revision.

The common law rule, under which the finder acquires a right of *possession* superior to all but the true owner (see *supra*, §117), is supplemented by statutes that, under certain circumstances, permit the finder to acquire a good *title*.

Under a former California law, a finder was required to file an affidavit with a judge of the municipal or justice court and record an appraisal of value in the "estrays and lost property book" or "official records"; and, if the property was worth more than \$ 20, the finder had to publish a notice and wait 1 year to get title. (See former C.C. 1864 et seq., 2080 et seq.) Criticism of these outmoded and little-known procedures (see 52 *Harv. L. Rev.* 1123; 21 *So. Cal. L. Rev.* 30) led to the enactment in 1967 of C.C. 2080 et seq., entitled "Lost Money and Goods." (See *infra*, §§119, 120.)

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



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A. Finding.

2. Title by Compliance With Statute.

b. Duties and Rights of Finders.

13 Witkin Sum. Cal. Law Pers Prop § 119

[§ 119] Duties and Rights of Finders.

C.C. 2080 et seq. simplified the duties of a finder as well as the procedure for converting the finder's right of possession into title. The major change was the shifting of most of the responsibility for handling and disposing of the property from the finder to the police or sheriff.

(1) *Bailee for Hire*. One who finds a thing lost is not bound to take charge of it--"unless the person is otherwise required to do so by contract or law"--but a finder who does so becomes a bailee for the owner, with the rights and obligations of a bailee for hire. (C.C. 2080.)

(2) *Inform Owner and Return Property*. A person or any public or private entity that finds and takes possession of "any money, goods, things in action, or other personal property, or saves any domestic animal from harm, neglect, drowning, or starvation," must, within a reasonable time, inform the owner, if known, "and make restitution without compensation, except a reasonable charge for saving and taking care of the property." If the property is a live domestic animal, humane treatment must be provided. (C.C. 2080; see *Berthiaume v. Doe* (1913) 22 C.A. 78, 79, 133 P. 515 [reasonable compensation for expenses is independent of any offer of reward]; *Rest., Security §61(e)* [finder's lien where reward offered].) Failure to make reasonable efforts to discover the owner constitutes theft. (P.C. 485; cf. *Rest., Restitution §121* [quasi-contract liability for value if property used or sold].)

(3) *Owner Unknown or Does Not Claim Property: Delivery to Police*. If the owner is unknown or has not claimed the property, and its value is \$ 100 or more, the finder (or saver of the animal) must within a reasonable time turn the property over to the police (or sheriff). And the finder must make an affidavit stating the facts of finding or saving and a description of the property. (C.C. 2080.1(a).)

(4) *Police Notify Owner*. The police must notify the owner, who may appear within 90 days, prove ownership and pay reasonable charges of storage and care, and regain the property. (C.C. 2080.1(b), 2080.2.)

(5) *Title in Finder if Owner Fails To Claim*. If the reported value of the property is \$ 250 or more and the owner does not claim within the 90-day period, the police must publish at least one notice; if no owner claims, and the finder pays the cost of the publication, title vests in the finder 7 days after the first publication. (C.C. 2080.3(a).) If the

reported value of the property is less than \$ 250 and the owner does not claim within the 90-day period, no notice is required and title vests in the finder. (C.C. 2080.3(b).) (On validity, construction, and application of lost or abandoned goods statutes, see 23 *A.L.R.4th* 1025.)

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



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A. Finding.

2. Title by Compliance With Statute.
- c. Exceptions and Special Procedures.

13 Witkin Sum. Cal. Law Pers Prop § 120

[§ 120] Exceptions and Special Procedures.

The statute contains a number of *exceptions* and provides *special procedures* for particular situations:

(1) It does not apply to things intentionally abandoned. (C.C. 2080.7; on statutory custody of abandoned property, see *supra*, §§37, 38.)

(2) It does not apply to property found in the course of employment by an employee of a public agency; if no owner appears, such property must be sold at public auction. (C.C. 2080.3; see *Noble v. Palo Alto* (1928) 89 C.A. 47, 54, 264 P. 529 [police officer].)

(3) The police may sell property at public auction when the owner cannot be found or refuses to pay the lawful charges, if the thing is in danger of perishing or losing the greater part of its value, or the charges amount to two-thirds of its value. (C.C. 2080.5.)

(4) Cities or counties may provide by ordinance for disposition of unclaimed property in the possession of the police department; the statute specifies minimum periods of holding, sale at public auction on notice, etc. (C.C. 2080.4.)

(5) Any public agency may elect to come under the statute or to adopt its own reasonable regulations, which must provide for specified minimum periods of holding and sale at public auction on notice. (C.C. 2080.6.) Similar authority is given the Regents of the University of California (C.C. 2080.8) and the Trustees of the California State University (C.C. 2080.9).

(6) Under C.C. 2080.10, a public agency that takes possession of personal property for temporary safekeeping must do the following:

(a) Store, document, and dispose of the property. (C.C. 2080.10(a)(1).)

(b) Provide the person from whom the property was taken with a receipt and instructions for retrieval. (C.C. 2080.10(a)(2); see C.C. 2080.10(b), *infra*, this section.)

(c) Make reasonable efforts to identify the owner of the property, if the agency knows that the person from whom the property was taken is not the owner. (C.C. 2080.10(a)(3).)

The person from whom the property was taken has 60 days from the date that the agency obtains possession to claim the property, or the agency will dispose of the property. The person may retrieve the property, authorize someone else to do so, or notify the agency that, because the person is in custody, he or she is unable to retrieve the property, in which case the agency must hold the property for up to 10 additional months. (C.C. 2080.10(b).) As long as the agency exercises due care in disposing of the property, it will not be liable for damages. (C.C. 2080.10(c).)

Special statutes govern in a few other situations. (See *Veh.C. 2414, 2415* [procedure for disposal of unclaimed property by Highway Patrol]; *Food & Ag.C. 34561* [finder of dairy equipment with registered brand must return it to owner or notify Director of Agriculture]; *B. & P.C. 14434* [finder of branded container or equipment must make diligent effort to find owner and return property].)

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



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13 Witkin Sum. Cal. Law Pers Prop § 121

[§ 121] Accession.

A person who takes the goods of another is guilty of conversion and ordinarily may be compelled to restore the goods or their value. (See 5 *Summary* (10th), *Torts*, §699 et seq.) But if the converter *increases their value* either by labor or by addition of materials, the question arises as to who has title to the ultimate product, and as to whether the owner should be compensated. The early common law rule was that where the goods were so changed by the converter's labor as to become a new kind or "species" of property, the original owner lost title, and the converter gained title by *accession*. Later the test became one of the amount of increase in value, the converter gaining title only if the increase was very great. (See 6 *So. Cal. L. Rev.* 42; 1 *Am.Jur.2d* (1994 ed.), *Accession and Confusion* §1 et seq.; on priority of security interests in accessions, see U.C.C. 9335, 4 *Summary* (10th), *Secured Transactions in Personal Property*, §133; 8 *U.C.L.A. L. Rev.* 943; cf. U.C.C. 9334 [priority of security interests in fixtures], 4 *Summary* (10th), *Secured Transactions in Personal Property*, §131 et seq.)

California rejects both of these artificial doctrines, and provides an equitable solution to the problem, which protects both the owner and the innocent improver. (See generally 6 *So. Cal. L. Rev.* 42; *Rest., Restitution* §42.)

(1) Where an innocent converter adds materials, the whole belongs to the owner of the *principal part* (C.C. 1025), defined as the more valuable; or if neither is more valuable, then the larger; or if something is united only for the use, ornament, or completion of the first part, the first is the principal part (C.C. 1026, 1027).

(2) Where an innocent converter *improves* the property by his or her *labor*, the owner can *reclaim* it on reimbursing the converter for the labor, unless the labor is more valuable, in which case the converter takes the product and pays the former owner the value of the property. (C.C. 1028.)

(3) Where a *wilful converter* adds materials or improves the property by labor, the converter receives no such protection. The owner, provided he or she can trace the property, may reclaim it without making compensation. (C.C. 1031; see *Rest., Restitution* §158, Comment d.)

(4) An owner who is entitled to return of property may elect instead to recover its value (C.C. 1032); and the owner may also hold a wrongdoer liable in damages (C.C. 1033).

SUPPLEMENT: [This section is current through the latest supplement]
See *1 Am.Jur.2d (2005 ed.), Accession and Confusion §1* et seq.



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B. Accession and Confusion.
2. Confusion.

13 Witkin Sum. Cal. Law Pers Prop § 122

[§ 122] Confusion.

When goods owned by different persons are intermingled so that the separate interests cannot be ascertained, there is a *confusion* of goods. (1) If the confusion is innocent, the owners of the commingled goods ordinarily become *tenants in common* in proportion to their interests. (*Arnold v. Producers' Fruit Co.* (1900) 128 C. 637, 641, 61 P. 283; see 39 A.L.R.2d 555.) (2) If the confusion was wilful, the innocent owner takes the whole, without obligation to compensate. (*Lightner Mining Co. v. Lane* (1911) 161 C. 689, 708, 120 P. 771.) (See generally 1 Am.Jur.2d (1994 ed.), *Accession and Confusion* §1 et seq.; on priority of security interests in commingled goods, see U.C.C. 9336, 4 Summary (10th), *Secured Transactions in Personal Property*, §134; 8 U.C.L.A. L. Rev. 948.)

SUPPLEMENT: [This section is current through the latest supplement]
See 1 Am.Jur.2d (2005 ed.), *Accession and Confusion* §1 et seq.



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13 Witkin Sum. Cal. Law Pers Prop § 123

[§ 123] Adverse Possession.

C.C.P. 338(c) provides that an action for the specific recovery of personal property is barred after 3 years, although the cause of action for theft of any "article of historical, interpretive, scientific, or artistic significance" is not deemed to accrue until discovery of the location of the article by the victim, or the victim's agent, or the law enforcement agency originally investigating the theft. (See *First Nat. Bank v. Thompson* (1943) 60 C.A.2d 79, 82, 140 P.2d 75; 3 Cal. Proc. (4th), *Actions*, §567 et seq.) This section, construed together with C.C. 1007, which gives title by occupancy after "the period prescribed by the Code of Civil Procedure," would seem to establish the right to acquire title to personal property by adverse possession. (See 3 Am.Jur.2d (2002 ed.), *Adverse Possession* §12.)

The court in *San Francisco Credit Clearing House v. Wells* (1925) 196 C. 701, 239 P. 319, cast some doubt upon this conclusion by suggesting that C.C. 1007 did not apply to personal property, and that, although the right of action might be barred, title would not necessarily be in the possessor. Moreover, the court intimated that taxes would have to be paid, and that there could be no tacking, each sale being regarded as a new conversion. (196 C. 707.) (See *Society of Calif. Pioneers v. Baker* (1996) 43 C.A.4th 774, 785, footnote 13, 50 C.R.2d 865, citing the text [issue whether adverse possession doctrine applies to personal property "does not appear to be settled"].) However, where a converter does possess for the full statutory period, it is clear that an action by the true owner for recovery will be barred. (*First Nat. Bank v. Thompson*, *supra*.)

SUPPLEMENT: [This section is current through the latest supplement]
Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §619 et seq.



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CHAPTER XVIII - Personal Property

Witkin Summary of California Law II. ACQUISITION OF TITLE TO PERSONAL PROPERTY D. Gift. 1. In General.

13 Witkin Sum. Cal. Law Pers Prop § 124

[§ 124] In General.

"A gift is a transfer of personal property, made voluntarily, and without consideration." (C.C. 1146.) There are two types: (1) *Gift inter vivos*, made under ordinary circumstances, and irrevocable. (C.C. 1148.) (2) *Gift in view of impending death (gift causa mortis)*, which is revocable. (See *infra*, §§134, 135.) (See also C.C. 1584.5, 1584.6, 1 *Summary* (10th), *Contracts*, §196 [receipt of unordered goods as unconditional gift]; 85 *Cal. L. Rev.* 821 [enforceability of donative promises]; 38 *Am.Jur.2d* (1999 ed.), *Gifts* §§1, 2, 7; 100 *A.L.R.2d* 1219 [automobile]; 40 *A.L.R.3d* 462 [joint lease of safe deposit box as evidence relating to gift of contents]; 5 *A.L.R.4th* 373 [issuance of stock certificate to joint tenants as creating gift inter vivos]; 39 *Proof of Facts* 2d 733 [gift rather than loan]; *Cal. Transactions Forms*, 1 Estate Planning, Chap. 7; on the Uniform Transfers to Minors Act, see *infra*, §139 et seq.; on the Restatement Second (Donative Transfers), see *infra*, §125.)

Three things are necessary for a valid gift: (1) There must be an *intent*, on the part of a donor having capacity to contract, to make an unconditional gift. (See *infra*, §126.) (2) There must be an actual or symbolical *delivery*, such as to relinquish all control by the donor. (See *infra*, §127 et seq.) (3) The donee must signify *acceptance*, except where it may be presumed. (See *infra*, §132.) (See generally *Hynes v. White* (1920) 47 *C.A.* 549, 553, 190 *P.* 836.)

Frequently, an attempt is made to establish a trust where the elements of a gift are lacking. Usually, the requisites of a trust are also lacking. (See *Lefrooth v. Prentice* (1927) 202 *C.* 215, 227, 259 *P.* 947; *Estate of Alberts* (1940) 38 *C.A.2d* 42, 46, 100 *P.2d* 538; *Fritz v. Thompson* (1954) 125 *C.A.2d* 858, 863, 271 *P.2d* 205.) If, however, these requisites are established, a gift technically defective may be given effect as a trust. (See *American Bible Soc. v. Mortgage Guarantee Co.* (1932) 217 *C.* 9, 13, 17 *P.2d* 105; 38 *Am.Jur.2d* (1999 ed.), *Gifts* §4.)

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

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

See *Burkle v. Burkle* (2006) 141 *C.A.4th* 1029, 1036, 46 *C.R.3d* 562 [triable issue of fact existed as to whether funds invested by father on behalf of daughter were gift or loan; fact-finder could reasonably infer, from absence of evidence of loan agreement, that father intended to make gift, and thus, summary judgment for father was improper].



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D. Gift.
2. Restatements 2d and 3d.

13 Witkin Sum. Cal. Law Pers Prop § 125

[§ 125] Restatements 2d and 3d.

(1) *Restatement 2d*. Volume 4 of the Restatement Second, Property (Donative Transfers) was published in 1992. It includes Division III, entitled "REQUIREMENTS FOR EFFECTUATING A DONATIVE TRANSFER."

(a) *Nature and Scope*. Volume 4 addresses problems in the law of gifts not covered in the first Restatement of Property, including gifts taking effect at the death of the donor. Chapters 31 and 32 deal with gifts made during the donor's lifetime, while Chapter 33 deals with gifts by will. Chapter 34 deals with various situations in which the law may refuse to give effect to an attempted gift for reasons of public policy. (Rest.2d, Property (Donative Transfers), Foreword, p. vii.)

(b) *Requirements for Effectuating a Donative Transfer*. "[T]he donor must do something more than mentally transfer an interest in property to the donee. This something more should tend to impress on the donor the significance of what the donor is doing as well as make it apparent to another person that the donor has made a gift to the donee. In this regard, differences may exist between gifts of personal property and gifts of real property."

"Even though the requirements for effectuating a donative transfer are met, the intended gift may fail because the donor does not have the mental capacity to make a gift or because it violates some social restriction imposed on the creation of property interests, such as the rule against perpetuities The requirements for effectuating a donative transfer may be met, but problems may arise due to inadequate manifestation of the intent of the donor as to the intended donee . . . or as to whether the interest of the donee is vested or contingent."

"This Division III is concerned first with accomplishing donative transfers that are legally effective during the donor's lifetime, whether without the use of a document of transfer (Chapter Thirty-One) or with the use of a document of transfer (Chapter Thirty-Two). This development is then followed with the means by which donative transfers are accomplished by a will, a method of transfer that has no legally operative effective until the death of the donor (Chapter Thirty-Three). The transition from the legally effective during the donor's lifetime to the legally effective on the death of the donor is made in § 32.4 (which immediately precedes Chapter Thirty-Three) by consideration of various will substitutes, the principal one of which is the revocable trust."

"Chapter Thirty-Four under Division III examines various factors that may undermine both gifts that are otherwise

legally effective during the lifetime of the donor and gifts that are legally effective only on the death of the donor. Factors such as the capacity of the donor to make a gift and the effect of the gift on the donor's spouse or on the donor's creditors are considered." (Division III, Introductory Note, p. 3.)

(c) *Organization*. Division III is divided into the following chapters:

Chapter Thirty-One. Accomplishing a Donative Transfer in Donor's Lifetime Without Using a Document of Transfer. (§§31.1-31.4.)

Chapter Thirty-Two. Accomplishing a Donative Transfer in Donor's Lifetime By a Document of Transfer. (§§32.1-32.4.)

Chapter Thirty-Three. Accomplishing a Donative Transfer By a Will. (§§33.1, 33.2.)

Chapter Thirty-Four. Failure of Attempted Donative Transfers. (§§34.1-34.9.)

Volume 4 contains an Index (p. 415), and the following tables: Table of Cases (p. 343), Table of Statutes (p. 355), Table of Secondary Authorities (p. 391), Table of Cross References to Digest System Key Numbers and ALR Annotations (p. 393).

(2) *Restatement 3d*. The first volume of the Restatement 3d, Property (Wills and Other Donative Transfers) was published in 1999. It supersedes material on probate found in Chapter 33 of the Second Restatement. (See 14 *Summary* (10th), *Wills and Probate*, §3.)

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3. Intent To Make Present Gift.

13 Witkin Sum. Cal. Law Pers Prop § 126

[§ 126] Intent To Make Present Gift.

There must be an intention on the part of the donor to transfer a *present* title or interest to the donee. If the intention is to make a future transfer, there is no gift. (*Hart v. Ketchum* (1898) 121 C. 426, 428, 53 P. 931; *Estate of Hall* (1908) 154 C. 527, 532, 98 P. 269; see 94 A.L.R.3d 608 [unexplained gratuitous transfer from relative as raising presumption of gift]; 83 A.L.R.4th 966 [inter vivos gift of remainder in chattel]; 38 Am.Jur.2d (1999 ed.), Gifts §17; on donative transfer in donor's lifetime without using document of transfer, see Rest.2d, Property (Donative Transfers), Chap. 31, Introductory Note (p. 5), and §31.1 et seq.)

Thus, while a promissory note can be the subject of a valid gift, a gift of the donor's own promissory note is a mere unenforceable promise to give a sum of money in the future, and the donee cannot enforce it against the donor or the donor's estate. (*Tracy v. Alvord* (1897) 118 C. 654, 655, 50 P. 757.) In *Coon v. Shry* (1930) 209 C. 612, 289 P. 815, such a note was delivered to the donee, and a mortgage was given to secure it. *Held*, the note was unenforceable. The mortgage was a mere incident of the obligation, and could not be enforced apart from it. (209 C. 614.)

On the other hand, a donor may make a valid gift and still retain certain rights in the property, such as a life interest, or a life income, or dividends, or interest for life on a sum given. (*Gordon v. Barr* (1939) 13 C.2d 596, 602, 91 P.2d 101; *Mercantile Trust Co. v. Reay* (1929) 96 C.A. 568, 573, 274 P. 401; *Lynch v. Lynch* (1932) 124 C.A. 454, 461, 12 P.2d 741; on gift in which donor retains reversionary interest, see Rest.2d, Property (Donative Transfers) §31.2.) And it has been said that a *power of revocation* may be reserved in a gift of personal property, just as in a deed or a trust instrument, although the cases relied upon are concerned with gifts in trust. (See *Tennant v. John Tennant Memorial Home* (1914) 167 C. 570, 576, 140 P. 242; *Gordon v. Barr*, *supra*; 13 Summary (10th), Trusts, §195.)

West's Key Number Digest, Gifts k.15

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D. Gift.

4. Delivery.

a. Nature of Requirement.

13 Witkin Sum. Cal. Law Pers Prop § 127

[§ 127] Nature of Requirement.

"The necessity for delivery in gifts of personal property has its genesis in the archaic doctrine of seisin. ... But in spite of the formalistic character of its origin, the requirement has salutary features which fully justify its retention in the law. It protects the property of the individual from ill-founded and fraudulent claims of gift by requiring strong concrete evidence that he really intended to part with his property. ... Moreover, by requiring some positive act of relinquishment such as manual tradition of the subject of the gift, the significance of the donor's act is forcefully brought home to him, and he is thus protected from ill-considered or impulsive donations of his property." (*Gordon v. Barr* (1939) 13 C.2d 596, 601, 91 P.2d 101.)

The basic requirement of a valid delivery is that the *donor give up dominion* over the property; its control must pass to the donee or some third person not subject to the donor's directions. (See generally *Beebe v. Coffin* (1908) 153 C. 174, 176, 94 P. 766; *Bishop's School Upon Scripps Foundation v. Wells* (1937) 19 C.A.2d 141, 146, 65 P.2d 105; *Rest.2d, Property (Donative Transfers)* §31.1; 38 *Am.Jur.2d* (1999 ed.), *Gifts* §22 et seq.)

West's Key Number Digest, Gifts k.17 et seq.

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D. Gift.

4. Delivery.

b. Actual Delivery by Donor.

1. Retention of Control Negatives Delivery.

13 Witkin Sum. Cal. Law Pers Prop § 128

[§ 128] Retention of Control Negatives Delivery.

The simplest method of delivery is where the donor hands the property to the donee. But retention of any control or right to use the property may be fatal to the gift. Where the donor, after declaring an intention to make the gift, causes the property to be placed with his or her *own possessions*, or in the joint possession of the donor and the donee, or in some other way retains a power to retake possession, there is no valid delivery.

Thus, in *Beebe v. Coffin* (1908) 153 C. 174, 94 P. 766, the donor handed the donee, his business agents, a sealed envelope with the donee's name on it, telling him to "put it in the safe deposit with your other things" and follow the instructions therein on the donor's death. The safe deposit box belonged to the donor, and the donee merely had access to it as his agent. *Held*, there was no gift; the envelope did not pass out of the donor's possession until his death. (153 C. 177.)

In *Edwards v. Guaranty Trust & Savings Bank* (1920) 47 C.A. 86, 190 P. 57, the donor delivered his check to the payee, and the bank mistakenly dishonored it. Then the donor died. *Held*, the giving of the check was not a completed gift, for the depositor could have stopped payment and hence had not relinquished all control prior to his death. (47 C.A. 89.) (See also *O'Shea v. Sicotte* (1921) 52 C.A. 331, 336, 198 P. 812; *Blonde v. Estate of Jenkins* (1955) 131 C.A.2d 682, 685, 281 P.2d 14; *Rest.2d, Property (Donative Transfers)* §31.1.)

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D. Gift.

4. Delivery.

b. Actual Delivery by Donor.

2. Delivery Established.

13 Witkin Sum. Cal. Law Pers Prop § 129

[§ 129] Delivery Established.

In *Hynes v. White* (1920) 47 C.A. 549, 190 P. 836, the donor gave securities to the donee, who placed them in a safe deposit box in her own name. *Held*, the fact that they arranged to have the donor keep a key to the box for certain purposes did not nullify the prior delivery. (47 C.A. 553.) (See also *Lynch v. Lynch* (1932) 124 C.A. 454, 458, 12 P.2d 741 [gift of stock, consummated by transfer on corporation books, held unaffected by arrangement permitting donor to keep the certificates, collect dividends, and vote the stock]; *Wakefield v. Wakefield* (1940) 37 C.A.2d 648, 653, 99 P.2d 1105 [delivery found, where stock certificates were indorsed and later appeared in envelope in joint safe deposit box of donor and donee]; *Rest.2d, Property (Donative Transfers)* §31.1; 6 So. Cal. L. Rev. 250.)

Where the property is *already in the possession of the donee*, it is sufficient that the donor clearly relinquishes all dominion over it; it is not necessary that the donee hand it back to the donor for redelivery. (*Skellenger v. England* (1927) 81 C.A. 176, 184, 253 P. 191.)

Similarly, in *Estate of Raphael* (1953) 115 C.A.2d 525, 252 P.2d 979, furniture of a mother was orally given to her son, but not moved from the house. *Held*, the evidence (including the fact that it was not inventoried as part of the mother's estate) supported the finding of gift. "[A]s between members of the same family living in a common home it is not necessary that bulky articles given be removed from the common home to constitute delivery, but only that dominion and control be given by the donor to the donee." (115 C.A.2d 531.)

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D. Gift.

4. Delivery.

c. Actual Delivery Through Third Person.

13 Witkin Sum. Cal. Law Pers Prop § 130

[§ 130] Actual Delivery Through Third Person.

The donor may make a valid delivery through a third person, e.g., the donor's agent, the donee's agent, or a bailee, provided the basic requirement of relinquishment of control is satisfied.

If the donor uses his or her *own agent*, the latter must make the actual delivery to the donee before revocation or other termination of the agency, for the agent's possession is that of the donor. (See *Noble v. Garden* (1905) 146 C. 225, 230, 79 P. 883; *Green v. Hynes* (1919) 42 C.A. 198, 200, 183 P. 568 [death of donor before agent delivered to donee; agency terminated and gift failed].)

If, however, the donor uses the *donee's agent* or some other *third person* not subject to the donor's control, the gift is effective upon delivery to that third person. In *Jean v. Jean* (1929) 207 C. 115, 277 P. 313, the donors (parents) had certain shares of stock transferred on the corporation books to the names of the donees (children) and delivered the new certificates to one of the sons, to hold them during the lives of the parents, and then to deliver them to the other children. *Held*, the facts established a valid gift. (207 C. 121.) (See also *Briviesca v. Coronado* (1941) 19 C.2d 244, 246, 120 P.2d 649 [donor drew check in favor of donee, gave it to donor's employer, who opened account for donee and deposited it before donor's death; *held*, delivery completed]; *Allen v. Smith* (1918) 38 C.A. 409, 176 P. 365; *White v. Bank of America* (1942) 53 C.A.2d 831, 833, 128 P.2d 600; *Yamaha Corp. of America v. State Bd. of Equalization* (1999) 73 C.A.4th 338, 357, 86 C.R.2d 362 [donor's delivery of stock-in-trade and promotional literature to common carrier for delivery to out-of-state donees was sufficient relinquishment of donor's dominion and control over property to constitute effective delivery for gift purposes]; 57 A.L.R.3d 1083 [delivery of personalty to third person with directions to deliver to donee after donor's death]; *Rest.2d, Property (Donative Transfers) §31.1.*)

Where securities are in the possession of a third person (e.g., a broker), delivery may be made by means of a writing delivered to that person. Thus, in *Berl v. Rosenberg* (1959) 169 C.A.2d 125, 131, 336 P.2d 975, decedent created a joint tenancy in securities, with himself and the donee as joint tenants, by a letter to that effect addressed to his broker.

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4. Delivery.

d. Constructive or Symbolic Delivery.

13 Witkin Sum. Cal. Law Pers Prop § 131

[§ 131] Constructive or Symbolic Delivery.

Where actual delivery is impossible or impracticable, e.g., where the thing is not immediately available to the donor, there may be a valid delivery if the donor gives the *means* of obtaining possession (constructive delivery) or some *symbol* in place of the thing (symbolic delivery). (See *Braun v. Brown* (1939) 14 C.2d 346, 354, 94 P.2d 348 [key alone delivered]; *Estate of Escolle* (1933) 134 C.A. 473, 480, 25 P.2d 860 [donor, ill, handed over key to safe deposit box and order on bank to permit entry]; 38 Am.Jur.2d (1999 ed.), Gifts §26 et seq.) A valid delivery may also be effectuated by delivery of a written instrument of gift, duly executed by the donor. (See *Driscoll v. Driscoll* (1904) 143 C. 528, 535, 77 P. 471; *Francoeur v. Beatty* (1915) 170 C. 740, 745, 151 P. 123; Rest.2d, Property (Donative Transfers) §31.1; 38 Am.Jur.2d (1999 ed.), Gifts §27; 48 A.L.R.2d 1405 [delivery by written instrument].)

But it has been held that delivery must be as complete as possible, and consequently that constructive or symbolical delivery will not be sufficient where actual delivery is practicable. Thus, in *Knight v. Tripp* (1898) 121 C. 674, 54 P. 267, the donor gave her friend the key to a strongbox. The box itself could have easily been delivered. *Held*, the delivery of the key in such a case was insufficient. (121 C. 681.)

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5. Acceptance.

13 Witkin Sum. Cal. Law Pers Prop § 132

[§ 132] Acceptance.

The intended donee may not want the property and, of course, does not have to take it. One theory is that the gift vests, subject to a right to disclaim; the other theory, followed in California, is that *acceptance* is a requisite of a valid gift. (*DeLevillain v. Evans* (1870) 39 C. 120 [deed].) In most cases, the rule works no injustice, for it is qualified by the proviso that acceptance of a beneficial gift is *presumed*. (See *Estate of Kalt* (1940) 16 C.2d 807, 813, 108 P.2d 401; *Yamaha Corp. of America v. State Bd. of Equalization* (1999) 73 C.A.4th 338, 359, 86 C.R.2d 362 [acceptance, by out-of-state donees, of donor's delivery of stock-in-trade and promotional literature was presumed at time donor handed property over to common carrier for delivery to donees]; *Rest.2d, Property (Donative Transfers)* §§31.1, 31.2, 31.3; 38 *Am.Jur.2d* (1999 ed.), *Gifts* §§33, 34; 12 *Summary* (10th), *Real Property*, §315.)

West's Key Number Digest, Gifts k.24

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6. Inter Vivos Gift by Document of Transfer.

13 Witkin Sum. Cal. Law Pers Prop § 133

[§ 133] Inter Vivos Gift by Document of Transfer.

Rest.2d, Property (Donative Transfers), Chap. 32, explores the use of a document of transfer to make a gift without delivery. (See Introductory Note, p. 67.)

(1) "An inter vivos donative document of transfer is a writing, or the equivalent of a writing, signed by the donor, or identified in some way as coming from the donor, in which: (1) the donor and donee are identified; (2) the subject matter of the gift is described; and (3) the nature of the interest given is specified; and with respect to which the donor manifests that the document is to be legally operative while the donor is alive." (*Rest.2d, Property (Donative Transfers) §32.1.*)

(2) "An inter vivos donative document of transfer that relates to property other than land transfers to the donee the specified beneficial interest in the subject matter of the gift to the extent that the donor's ownership of such subject matter makes possible such transfer." (*Rest.2d, Property (Donative Transfers) §32.2(1).*)

(3) "An inter vivos donative document of transfer is valid, even though it is a substitute for a will in that the donor's current beneficial enjoyment of the gift property is not significantly curtailed during the donor's lifetime and the donee's interest in the gift property can be revoked by the donor." (*Rest.2d, Property (Donative Transfers) §32.4.*) (See Comment, p. 96, describing and illustrating such arrangements; Statutory Note, p. 101; Reporter's Note, p. 111.)

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7. Gift in View of Impending Death. a. Nature and Presumption.

13 Witkin Sum. Cal. Law Pers Prop § 134

[§ 134] Nature and Presumption.

(1) *In General.* *Prob.C. 5700* et seq., replacing former C.C. 1149 et seq. in 1991, provide for a type of gift that is revocable while the donor lives and takes effect on the donor's death. "A gift in view of impending death" is a gift "made in contemplation, fear, or peril of impending death, whether from illness or other cause, and with intent that it shall be revoked if the giver recovers from the illness or escapes from the peril." (*Prob.C. 5702(a)*.) A statutory reference to a gift in view of death means a gift in view of impending death. (*Prob.C. 5702(b)*); see also *Prob.C. 5700* [gift is transfer of personal property made voluntarily and without consideration]; *Rest.2d, Property (Donative Transfers) §31.3*; *38 Am.Jur.2d (1999 ed.), Gifts §8*.)

(2) *Presumption.* "A gift made during the last illness of the giver, or under circumstances which would naturally impress the giver with an expectation of speedy death, is presumed to be a gift in view of impending death." (*Prob.C. 5703*; see *Rosenberg v. Broy (1961) 190 C.A.2d 591, 595, 12 C.R. 103* [decided under former C.C. 1150].)

(3) *Scope.* Except as provided by *Prob.C. 5700* et seq., a gift in view of impending death is subject to the general law relating to gifts in personal property. (*Prob.C. 5701*.) A gift of this type has two distinguishing characteristics: (a) It is revocable (see *Prob.C. 5704*, *infra*, §153), and (b) it is subject to *Prob.C. 9653* (recovery of property transferred in fraud on creditors; see *14 Summary (10th), Wills and Probate, §478*). (*Prob.C. 5705*.)

In *Berl v. Rosenberg (1959) 169 C.A.2d 125, 336 P.2d 975*, decided under the former law, the court explained that a gift by a donor contemplating suicide fails if the suicide itself fails to take place. But if the suicide occurs, the gift comes within the general rule. "Of course, there is a strong public policy against suicide, but this does not mean that public policy prevents an owner from giving away his property before committing suicide." (*169 C.A.2d 130*.) (See *60 A.L.R.2d 575*; *38 Am.Jur.2d (1999 ed.), Gifts §12*.)

West's Key Number Digest, Gifts k.53 et seq.

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- 7. Gift in View of Impending Death.
- b. Same Requisites as Gift Inter Vivos.

13 Witkin Sum. Cal. Law Pers Prop § 135

[§ 135] Same Requisites as Gift Inter Vivos.

The main difference between the two types of gifts is that the law imposes a condition of revocability upon a gift in view of impending death. Otherwise, the same essentials of intent, delivery, and acceptance apply. (See *Beebe v. Coffin* (1908) 153 C. 174, 176, 94 P. 766; *Mutual Benefit Life Ins. Co. v. Clark* (1927) 81 C.A. 546, 552, 254 P. 306; *Yates v. Dundas* (1947) 80 C.A.2d 468, 182 P.2d 305; *Prob.C. 5701*, *supra*, §134.)

In *Estate of Escolle* (1933) 134 C.A. 473, 25 P.2d 860, the donor delivered the key to her safe deposit box with a written order to allow the donee to gain access to it, and said, "Remember, if I don't die I want my stock back." *Held*, this was a valid gift, the words constituting a statement of the legal effect of a gift in view of impending death. (134 C.A. 480.)

There is a distinction, however, between a statement to the general effect that "I give it to you *now* but want it back if I don't die" (see *Estate of Escolle*, *supra*) and such words as "I give it to you *if* I die." Thus, in *Yates v. Dundas*, *supra*, the donor made a written "agreement" giving shares of stock to purported donees, "in case my capacity ... should be vacated, by an act of God, or by my death," but "[t]his agreement is void and of no effect, as long as I remain the capacity above stated, but becomes effective in case anything should happen to me." *Held*, the writing was testamentary and there was no valid gift. (See 38 *Am.Jur.2d* (1999 *ed.*), *Gifts* §3.)

Where the donor does not intend a gift but rather a testamentary disposition, it is invalid unless made in conformity with the statutes on execution of wills. (*Estate of Franco* (1975) 50 C.A.3d 374, 381, 122 C.R. 661, 123 C.R. 458.)

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D. Gift.

8. Gift of Chose in Action.

a. Chose Not Evidenced by Writing.

13 Witkin Sum. Cal. Law Pers Prop § 136

[§ 136] Chose Not Evidenced by Writing.

The general principles already discussed are applicable both to gifts of chattels and choses in action. But an important qualification is made by C.C. 1147: "A verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee." Under this section, *there cannot be an oral gift of a chose in action*. The reason is that the chose in action, being a mere *claim or right* (C.C. 953) is incapable of *delivery* unless evidenced by a writing.

Thus, in *Adams v. Merced Stone Co.* (1917) 176 C. 415, 178 P. 498, the donor, a creditor of defendant corporation, in his last sickness called the donee, his brother, who was president and general manager of the corporation, and told him that he gave him the indebtedness. The lower court upheld the gift on the ground that the donee, as managing officer, had charge of the books and had the means of obtaining possession of the sum given, by making a new entry. *Held*, there was no gift; where the chose is not evidenced by a written instrument, the only means by which the donor can give the donee control is by a *writing*. (176 C. 418.) (See also *O'Shea v. Sicotte* (1921) 52 C.A. 331, 334, 198 P. 812; 38 Am.Jur.2d (1999 ed.), Gifts §41; 36 Proof of Facts 2d 199 [creditor's gift of debt to debtor].)

If, however, a *written assignment* is made, this will be sufficient. (*Driscoll v. Driscoll* (1904) 143 C. 528, 536, 77 P. 471; *Burkett v. Doty* (1917) 176 C. 89, 93, 167 P. 518.)

West's Key Number Digest, Gifts k.28 et seq.

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b. Chose Evidenced by Writing.

13 Witkin Sum. Cal. Law Pers Prop § 137

[§ 137] Chose Evidenced by Writing.

Where the chose is evidenced by a writing, delivery of the writing is sufficient. Thus, a *passbook* of a savings bank or savings and loan association is the evidence of the obligation to the depositor, and a delivery of it will constitute a valid gift. (*Dellepiane v. Hynes* (1927) 83 C.A. 604, 609, 257 P. 180; *Cahill v. Goecke* (1935) 10 C.A.2d 279, 283, 51 P.2d 905; *White v. Bank of America* (1942) 53 C.A.2d 831, 833, 128 P.2d 600; *Copprell v. Copprell* (1948) 87 C.A.2d 4, 6, 195 P.2d 868; *Kay v. Karas* (1948) 87 C.A.2d 600, 607, 197 P.2d 396; see 63 A.L.R.2d 259, 264; on gifts resulting from joint bank deposits, see *supra*, §30.)

The same is true of *certificates of stock*, even though not indorsed. In *Crane v. Reardon* (1933) 217 C. 531, 20 P.2d 49, the donor handed stock certificates to the donee, saying, "Here, Emma, take this stock. I want you to have it. ... Give me a pen so I can sign it over to you." The donee replied that he appeared too weak, and that he could do it the next day. The donor died without signing. *Held*, the gift was valid. The intention to make the gift was clear, the delivery was complete, and the indorsement of the certificate was not essential, but would merely have facilitated the transfer on the corporation books. (217 C. 533.) (On gifts of securities generally, see 39 Proof of Facts 2d 373; 6 A.L.R.4th 250 [transfer on corporate books as sufficient for gift of stock]; 38 Am.Jur.2d (1999 ed.), *Gifts* §48 et seq.; on gifts of securities to minors, see *infra*, §141.)

Although it was briefly declared in *Hausfelder v. Security-First Nat. Bank of Los Angeles* (1946) 77 C.A.2d 478, 486, 176 P.2d 84, that federal regulations do not preclude a gift in view of impending death of U.S. Savings Bonds, the weight of authority previously held such gifts invalid, whether in view of impending death or *inter vivos*. Federal regulations now permit a gift in view of impending death. (See 31 C.F.R. §315.22(b); 38 Am.Jur.2d (1999 ed.), *Gifts* §58.)

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c. Life Insurance Policy.

13 Witkin Sum. Cal. Law Pers Prop § 138

[§ 138] Life Insurance Policy.

When an insured takes out a policy of life insurance, with a third person as beneficiary, a question arises as to whether the *naming of the beneficiary* gives the latter any interest. If the policy reserves no right to change its terms, the beneficiary acquires a *vested right*, becoming in effect the owner of the contract, and is protected against any subsequent attempt by the insured to assign, surrender, or cancel the policy, or name a new beneficiary. (See *Morrison v. Mutual Life Ins. Co. of New York* (1940) 15 C.2d 579, 582, 103 P.2d 963.)

Nearly all modern policies, however, contain provisions giving the insured control over the policy, e.g., reserving to the insured the power to change beneficiaries, or to assign or surrender it. The effect of such provisions is that the interest of the beneficiary is not a completed gift but an *expectancy*, which may ripen into an actual gift if the insured dies without taking any action (*Grimm v. Grimm* (1945) 26 C.2d 173, 175, 157 P.2d 841; *Shaw v. Board of Administration, State Employees' Retirement System* (1952) 109 C.A.2d 770, 774, 241 P.2d 635), but is subject to revocation by the insured. Hence the insured may freely assign or surrender the policy without taking the intermediate step of actually making a change of beneficiary. (*Morrison v. Mutual Life Ins.*, *supra*; see 20 *Hastings L. J.* 1181 [right to assign].)

The insured may later by contract give up the right to change the beneficiary, and, in such a case, the beneficiary's former expectancy becomes a vested equitable interest. (*Chilwell v. Chilwell* (1940) 40 C.A.2d 550, 553, 105 P.2d 122.) (For a discussion of the distinction between an ordinary beneficiary and a contract beneficiary with an equitable right in the proceeds, see *Phoenix Mut. Life Ins. Co. v. Birkelund* (1946) 29 C.2d 352, 359, 175 P.2d 5.) The same is true where the insured makes a completed *gift* of the policy by delivering it to the beneficiary with a promise not to change it. (*Cooke v. Cooke* (1944) 65 C.A.2d 260, 264, 150 P.2d 514.)

The owner of a policy, e.g., an insured who names his or her own estate or executor as beneficiary, may make a gift of it; but the beneficiary must comply with the usual requirements of a gift of a chose in action represented by a writing. (See *Mutual Benefit Life Ins. Co. v. Clark* (1927) 81 C.A. 546, 550, 254 P. 306 [no gift, donor's intent being to reserve control until death]; *Lo Presti v. Manning* (1932) 125 C.A. 442, 445, 13 P.2d 1002 [no delivery]; *Savelli v. Simon* (1938) 25 C.A.2d 365, 368, 77 P.2d 486 [no gift where policy placed in sealed envelope with instructions not to open until donor's death].) (See generally 33 A.L.R.2d 273; 38 *Am.Jur.2d* (1999 ed.), *Gifts* §43.)

West's Key Number Digest, Gifts k.28(3)

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d. Uniform Transfers to Minors Act.

1. Former Gifts to Minors Act.

13 Witkin Sum. Cal. Law Pers Prop § 139

[§ 139] Former Gifts to Minors Act.

The limited statutory exemption from gift taxes may be advantageously used by successive gifts of securities or money to minors. But, under the former law of most states, such gifts were greatly inhibited. (1) The right of minors to disaffirm contracts made it hazardous for brokers and others to deal with them, and therefore difficult for minors to sell and reinvest. (2) The appointment of a guardian to administer the property was cumbersome, expensive, and did not permit sufficient discretion in investment practices. (3) A trust could provide the necessary flexibility but usually at too great an expense. (4) Informal procedures, such as registration of the securities in the child's name or the name of a nominee with control by the donor, made effectiveness of the gift questionable and created hazards in dealing with the property. (See *44 Cal. L. Rev. 569*; *69 Harv. L. Rev. 1476*.)

To encourage such gifts, a simple and inexpensive method of making and administering them was devised by the New York Stock Exchange and the Association of Stock Exchange Firms, and embodied in a model statute promptly enacted in a number of states, including California. (See *44 Cal. L. Rev. 569*; *69 Harv. L. Rev. 1476*; *3 U.C.L.A. L. Rev. 411*; *1955 A.S. 531*.) In 1956 the model statute, with a number of minor variations, was made the basis of a new Uniform Gifts to Minors Act, approved by the National Conference of Commissioners on Uniform State Laws. (See Prefatory Note to current uniform act, *8C U.L.A. (Master Ed.)*, p. 3; *50 A.L.R.3d 528*.) And in 1959 the Legislature repealed our statute and adopted the Uniform Act as C.C. 1154 et seq.

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2. Transfers to Minors Act.

13 Witkin Sum. Cal. Law Pers Prop § 140

[§ 140] Transfers to Minors Act.

(1) *Adoption of Revised Act by Commissioners on Uniform State Laws.* In 1983, the Uniform Gifts to Minors Act was revised and restated by the National Conference of Commissioners on Uniform State Laws as the *Uniform Transfers to Minors Act*. (See 8C U.L.A. (Master Ed.), p. 1.) The original act applied to inter vivos gifts of cash, securities, life insurance policies, and annuity contracts. The revised act applies to transfers of *all kinds of property* and to transfers from *trusts, estates, guardianships, and third-party debtors*, including depository institutions, as well as inter vivos gifts. (See Prefatory Note to Uniform Transfers to Minors Act, 8C U.L.A. (Master Ed.), p. 3.)

(2) *Recommendation of California Law Revision Commission.* In 1984, the California Law Revision Commission recommended adoption of the Uniform Transfers to Minors Act. (17 Cal. Law. Rev. Com. Reports, p. 609.) The Report states:

"The Uniform Act provides a simple and inexpensive method of making a gift to a minor and administering the gift transferred. This is the reason that some version of the Uniform Gifts to Minors Act has been enacted in every state. But many states, like California, have substantially revised the Uniform Act. The new Uniform Transfers to Minors Act is recommended for enactment by all the states to eliminate the non-uniformity that now exists among the states. Uniformity in this area is important to avoid conflicts of law when the laws of more than one state may apply to a transaction or series of transactions." (17 Cal. Law. Rev. Com. Reports, p. 609.)

(3) *Enactment of Revised Act.* In response to the Commission's recommendation, the 1984 Legislature repealed the Uniform Gifts to Minors Act (C.C. 1154 et seq.) and replaced it with a new Part 9 of Division 4 of the Probate Code (*Prob.C.* 3900 et seq.). (Stats. 1984, Chap. 243.) (See 16 *Pacific L. J.* 473.) A number of conforming and technical amendments to other statutes were made. (See 17 Cal. Law Rev. Com. Reports, pp. 634 et seq., 679 et seq.; for disposition of C.C. 1154 et seq., see 17 Cal. Law Rev. Com. Reports, pp. 685, 686.)

The law may be cited as the California Uniform Transfers to Minors Act. (*Prob.C.* 3900, based on Uniform Act, §24, 8C U.L.A. (Master Ed.), p. 83.)

(4) *Principal Differences Between Uniform Act and California Act.* Despite the Law Revision Commission's emphasis on uniformity among the states, the California Act differs from the Uniform Act in a number of ways:

(a) The Uniform Act applies to transfers for the benefit of persons who have not reached the age of 21. (Uniform Act, §1(11) [definition of "minor"].) The California Act generally applies to transfers for the benefit of persons who have not reached the age of 18, but in specified circumstances may apply until the person becomes 21 or 25. (See *Prob.C. 3901(k)* [definition of "minor"]; *Prob.C. 3920.5* [delayed termination]; *infra*, §150.)

(b) The California Act specifically authorizes a minor's conservator to serve as custodian. (*Prob.C. 3911(d)*, (e), (f).) The Uniform Act contains no comparable provision.

(c) The California Act permits a transferor who is also the custodian to elect to eliminate his or her authority as custodian to distribute property for a minor's benefit, except pursuant to a court order. (*Prob.C. 3914(d)*, *infra*, §148.) The Uniform Act contains no comparable provision.

(d) The California Act provides for venue in proceedings under the Act. (*Prob.C. 3921*.) The Uniform Act contains no comparable provision.

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3. Nature and Scope of Act.

13 Witkin Sum. Cal. Law Pers Prop § 141

[§ 141] Nature and Scope of Act.

(1) *Nature.* The Act establishes procedures by which a person (the transferor) may transfer property (custodial property) to himself or herself, an adult, or a trust company (the custodian) for the benefit of a minor. (For relevant definitions, see *Prob.C. 3901*, based on Uniform Act, §1, 8C U.L.A. (Master Ed.), p. 14; for forms, see Cal. Transactions Forms, 1 Estate Planning, §7:43 et seq.; 9 Am.Jur. Legal Forms 2d (2002 ed.), §130:51 et seq.; 12B Am.Jur. P.P. Forms (1999 ed.), Gifts, Form 25 et seq.) However, the Act is not the exclusive method of making transfers to minors. (*Prob.C. 3925.*)

(2) *Property Subject to Act.* The Act applies to any interest in property transferred under the Act and to the income and proceeds of that property. (*Prob.C. 3901(f).*) "The definition of 'custodial property' has been generalized and expanded to encompass every conceivable legal or equitable interest in property of any kind, including real estate and tangible or intangible personal property. The term is intended, for example, to include joint interests with right of survivorship, beneficial interests in land trusts, as well as all other intangible interests in property." (8C U.L.A. (Master Ed.), Comment, p. 15.)

(3) *Transfers Under the Act.* The Act applies to a transfer (a) if the transfer document under *Prob.C. 3909* (infra, §145) refers to the Act, and (b) if, at the time of the transfer, the transferor, the minor, or the custodian is a California resident or the custodial property is located in California. A custodianship created under the Act remains subject to the Act despite a subsequent change in residence or removal of the property from the state. (*Prob.C. 3902(a)*, based on Uniform Act, §2, 8C U.L.A. (Master Ed.), p. 22.) (On enforcement in California of transfer made under substantially similar act of another state, see *Prob.C. 3902(c)*; on application of Act to transfers made or purporting to be made under former Act or act of another state, see *Prob.C. 3922, 3923*, based on Uniform Act, §§21, 22, 8C U.L.A. (Master Ed.), pp. 77, 78; on venue, see *Prob.C. 3921.*)

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4. Custodian.

aa. In General.

13 Witkin Sum. Cal. Law Pers Prop § 142

[§ 142] In General.

The essential feature of the Act is its provision for a "custodian" with a kind of power in trust, giving the equivalent of a guardian or trustee without the inconvenience or expense of either. (See 17 Cal. Law Rev. Com. Reports, p. 610, citing the text.)

(1) *Persons Eligible.* The custodian may ordinarily be (a) the transferor, (b) another adult person, or (c) a trust company. (*Prob.C. 3909.*) (On emancipated minor as transferor and custodian, see Legislative Com. Comment to *Prob.C. 3901.*) The custodian may also be the minor's conservator. (*Prob.C. 3911(d), (e), (f).*) For this purpose, "conservator" means the guardian of the estate of a person under 18 years of age and the conservator of the estate of a person 18 years of age or older. (Legislative Com. Comment to *Prob.C. 3901(d).*)

(2) *When Custodian May Not Be Transferor.* Where certain kinds of property are transferred (e.g., transfer by delivery and endorsement of certificate of title to tangible personal property), the custodian may not be the transferor. (*Prob.C. 3909, infra, §145.*) (See also *Prob.C. 3903(b)* [nominated custodian must be person to whom transfer of that kind of property may be made], based on Uniform Act, §3, 8C U.L.A. (Master Ed.), p. 25; *Prob.C. 3918(a), (b)* [circumstances in which transferor may not be successor custodian], based on Uniform Act, §18, 8C U.L.A. (Master Ed.), p. 63.)

(3) *Multiple Custodians Prohibited.* There may be only one custodian, and custodial property held for the same minor by the same custodian constitutes a single custodianship. (*Prob.C. 3910*, based on Uniform Act, §10, 8C U.L.A. (Master Ed.), p. 45.)

(4) *When Bond Required.* Ordinarily, the custodian need not give a bond (*Prob.C. 3915(c)*), but may be required to do so by the court on petition of the transferor or the transferor's legal representative, an adult member of the minor's family, the minor's conservator or guardian, or, if at least 14 years old, the minor (*Prob.C. 3918(f), 3918(h)*). (For definition of family member, see *Prob.C. 3901(j)*.)

(5) *Personal Jurisdiction*. The custodian is subject to personal jurisdiction in California regarding any matter relating to the custodianship. (*Prob.C. 3902(b)*, based on Uniform Act, §2, 8C U.L.A. (Master Ed.), p. 22.)

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4. Custodian.

bb. Selection, Removal, and Successor.

13 Witkin Sum. Cal. Law Pers Prop § 143

[§ 143] Selection, Removal, and Successor.

(1) *Nomination or Designation.* "A person having the right to designate the recipient of property transferable upon the occurrence of a future event" may nominate a custodian to receive the property on the occurrence of the event. The nomination is by will, trust, deed, written exercise of a power of appointment, or written designation of the beneficiary of contractual rights. The nomination is revocable until the nominating instrument becomes irrevocable or a transfer is completed under *Prob.C. 3909* (infra, §145). (*Prob.C. 3903(a)*, (c).) A custodian may also be designated by a transfer under *Prob.C. 3909* (infra, §145). (*Prob.C. 3909(a)*, based on §9 of the Uniform Act.) (See 8C U.L.A. (Master Ed.), p. 36.)

(2) *Resignation and Removal.* A named custodian may decline to serve by executing a disclaimer (*Prob.C. 3918(a)*), and may resign by giving written notice to the successor custodian (and to the minor, if the minor is at least 14 years old) and delivering the custodial property (*Prob.C. 3918(c)*). The custodian may be removed for cause on petition of the transferor or the transferor's legal representative, an adult member of the minor's family, the minor's conservator or guardian, or, if at least 14 years old, the minor. (*Prob.C. 3918(f)*, (h).) (For definition of family member, see *Prob.C. 3901(j)*.) *Prob.C. 3918* is based on §18 of the Uniform Act. (See 8C U.L.A. (Master Ed.), p. 63.)

(3) *Successor Custodian.* (a) Successor custodians and the order of their succession may be specified by the person having the right to designate the recipient of property under *Prob.C. 3903* (*Prob.C. 3903(a)*, *3918(a)*), or by the transferor in a transfer under *Prob.C. 3909* (infra, §145) (*Prob.C. 3918(b)*). (b) A custodian may designate a successor other than the transferor in a witnessed writing, but a successor custodian effectively designated by the transferor takes priority over a successor designated by the custodian. (*Prob.C. 3918(b)*.) (c) If neither the transferor nor the custodian designates a successor, a minor who is at least 14 years old may do so. (*Prob.C. 3918(d)*.) (d) A successor custodian may be appointed by the court on petition of the transferor or the transferor's legal representative, an adult member of the minor's family, the minor's conservator or guardian, or, if at least 14 years old, the minor. (*Prob.C. 3918(d)*, (f), (h).) (On conservator as successor where minor has conservator, see *Prob.C. 3918(d)*; for definition of family member, see *Prob.C. 3901(j)*.)

(4) *Hearing on Petition To Remove Custodian or Nominate Successor.* At least 15 days before the hearing on a petition to remove the custodian or nominate a successor, the petitioner must serve, by mail or personal delivery, the minor, the minor's parent or parents, and the transferor. (*Prob.C. 3918(g).*) On consideration of the petition, the court may grant relief "in the best interests of the minor." (*Prob.C. 3918(h).*)

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5. Who May Make Transfer.

13 Witkin Sum. Cal. Law Pers Prop § 144

[§ 144] Who May Make Transfer.

A "transferor" is a person who makes a transfer under the Act. (*Prob.C. 3901(p)*.) A "transfer" is a transaction that creates custodial property under *Prob.C. 3909* (infra, §145). (*Prob.C. 3901(o)*.) (On emancipated minor as transferor, see Legislative Com. Comment to *Prob.C. 3901*.) The following persons are authorized to make transfers:

(1) *Owner of Property*. The owner of property may make a transfer by irrevocable gift. (*Prob.C. 3904*, based on Uniform Act, §4, 8C U.L.A. (Master Ed.), p. 26.)

(2) *Donee of Power of Appointment*. The donee of a power of appointment may make a transfer by an irrevocable exercise of the power in favor of the custodian. (*Prob.C. 3904*, based on Uniform Act, §4, 8C U.L.A. (Master Ed.), p. 26.)

(3) *Personal Representative*. A personal representative may make an irrevocable transfer. (*Prob.C. 3905, 3906(a)*, based on Uniform Act, §§5, 6, 8C U.L.A. (Master Ed.), pp. 27, 28.) This provision permits custodianships to be used as guardianship substitutes, even though not specifically authorized by the person whose property is the subject of the transfer. (Law Rev. Com. Comment to *Prob.C. 3906*.) If the transfer is not authorized by the decedent's will, it may be made only if it is (a) in the best interest of the minor, (b) not prohibited by or inconsistent with the will, and (c) if over \$ 10,000 in value, authorized by the court. Court authorization for a transfer over \$ 10,000 is not required if the transfer is to a custodian that is a trust company or an individual designated as a trustee by the terms of a trust instrument that does not require a bond. (*Prob.C. 3906(c)*.) (For additional provisions governing devises made under the Act, see *Prob.C. 6341* et seq.; *4 Pacific L. J. 224*.)

(4) *Trustee*. A trustee may make an irrevocable transfer. (*Prob.C. 3905, 3906(a)*, based on Uniform Act, §§5, 6, 8C U.L.A. (Master Ed.), pp. 27, 28.) If the transfer is not authorized by the trust agreement, it may be made only if it is (a) in the best interest of the minor, (b) not prohibited by or inconsistent with the trust, and (c) if over \$ 10,000 in value, authorized by the court. Court authorization for a transfer over \$ 10,000 is not required if the transfer is to a custodian that is a trust company or an individual designated as a trustee by the terms of a trust instrument that does not require a bond. (*Prob.C. 3906(c)*.)

(5) *Conservator*. A conservator may make an irrevocable transfer. (*Prob.C. 3906(b)*, based on Uniform Act, §6, 8C U.L.A. (Master Ed.), p. 28.) The transfer may be made only if it is (a) in the best interest of the minor, (b) not prohibited by or inconsistent with the trust, and (c) if over \$ 10,000 in value, authorized by the court. Court authorization for a transfer over \$ 10,000 is not required if the transfer is to a custodian that is a trust company or an individual designated as a trustee by the terms of a trust instrument that does not require a bond. (*Prob.C. 3906(c)*.)

(6) *Debtor*. A person who holds property of a minor or owes a liquidated debt to a minor may make an irrevocable transfer. (*Prob.C. 3907*, based on Uniform Act, §7, 8C U.L.A. (Master Ed.), p. 32.) The following persons, among others, may create a custodianship under *Prob.C. 3907*: (a) A tort judgment debtor of the minor, (b) a bank holding a joint or pay-on-death account of which the minor is the surviving payee, or (c) an insurance company holding life insurance or benefit plan proceeds payable to the minor. *Prob.C. 3907* is mandatory when a future custodian has been nominated as a named beneficiary of an insurance policy, benefit plan, deposit account, or the like. If a custodian has not been nominated or the named custodian is not available, *Prob.C. 3907* is permissive and does not preclude the obligor from requiring the establishment of a guardianship of the estate to receive payment. (Law Rev. Com. Comment to *Prob.C. 3907*.)

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6. Manner of Making Transfer.

13 Witkin Sum. Cal. Law Pers Prop § 145

[§ 145] Manner of Making Transfer.

The manner in which a transfer is made is determined by the kind of property being transferred.

(1) *Securities*. A certificated security in registered form or an uncertificated security is (a) registered in the name of the custodian "as custodian for (Name of Minor) under the California Uniform Transfers to Minors Act," or (b) endorsed and delivered to a trust company or to an adult other than the transferor with an instrument of transfer in substantially the statutory form. (*Prob.C. 3909(a)(1)*.) A statutory form for the transfer is set forth in *Prob.C. 3909(b)*.

A "security held in the name of a broker, financial institution, or its nominee" is transferred to a broker or financial institution for credit to an account in the name of the custodian "as custodian for (Name of Minor) under the California Uniform Transfers to Minors Act." (*Prob.C. 3909(a)(2)*.)

(2) *Money*. Money is paid or delivered to a broker or financial institution for credit to an account in the name of the custodian "as custodian for (Name of Minor) under the California Uniform Transfers to Minors Act." (*Prob.C. 3909(a)(2)*.) (See *Prob.C. 3901(c)* ["broker" defined]; *Prob.C. 3901(h)* ["financial institution" defined].)

(3) *Insurance Policies and Annuities*. A life or endowment insurance policy or an annuity contract is (a) registered in the name of the custodian "as custodian for (Name of Minor) under the California Uniform Transfers to Minors Act," or (b) assigned in writing to a trust company or to an adult other than the transferor with an instrument of transfer in substantially the statutory form. (*Prob.C. 3909(a)(3)*.)

(4) *Property Subject to a Power of Appointment or Future Payment Under a Contract*. The payor, issuer, or obligor is notified in writing that the power is irrevocably exercised or the contract right is irrevocably transferred to the custodian "as custodian for (Name of Minor) under the California Uniform Transfers to Minors Act." (*Prob.C. 3909(a)(4)*.) "This paragraph covers the irrevocable exercise of a power of appointment and the irrevocable present assignment of future payment rights (such as royalties, interest and principal payments under a promissory note, or beneficial interests under life or endowment or annuity insurance contracts or benefit plans). The payor, issuer, or other obligor may require additional formalities such as completion of a specific assignment form and an endorsement, but

the transfer is effective upon delivery of the notification." (Law Rev. Com. Comment to *Prob.C. 3909(a)(4)*.)

(5) *Real Property*. An interest in real property is recorded in the name of the custodian "as custodian for (Name of Minor) under the California Uniform Transfers to Minors Act." (*Prob.C. 3909(a)(5)*.)

(6) *Tangible Personal Property Subject to Certificate of Title*. A certificate of title issued by a state or federal department or agency is (a) issued in the name of the custodian "as custodian for (Name of Minor) under the California Uniform Transfers to Minors Act," or (b) endorsed and delivered to a trust company or to an adult other than the transferor "as custodian for (Name of Minor) under the California Uniform Transfers to Minors Act." (*Prob.C. 3909(a)(6)*.)

(7) *Other Property*. An interest in any other property is transferred to a trust company or to an adult other than the transferor in substantially the statutory form set forth in *Prob.C. 3909(b)*. (*Prob.C. 3909(a)(7)*.) Partnership interests and tangible personal property not subject to title certificates are examples of property transferable under *Prob.C. 3909(a)(7)*. (Law Rev. Com. Comment to *Prob.C. 3909(a)(7)*.)

A transferor must place the custodian in control of the property "as soon as practicable." (*Prob.C. 3909(c)*.) (On delivery to successor custodian, see *Prob.C. 3918(e)*; on enforcement of transfer by nominated custodian, see *Prob.C. 3903(c)*; on enforcement by successor custodian, see *Prob.C. 3918(e)*; on written acknowledgment of delivery to custodian as receipt of transferred property, see *Prob.C. 3908*.)

A transfer under the Act requires donative intent. (*In re Marriage of Stephenson* (1984) 162 C.A.3d 1057, 1068, 1069, 209 C.R. 383 [opening of custodial accounts was prima facie evidence of donative intent despite tax avoidance purpose and retention of control of custodial property by transferor custodian].)

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7. Effect of Transfer.

13 Witkin Sum. Cal. Law Pers Prop § 146

[§ 146] Effect of Transfer.

(1) *Rights and Duties of Custodian and Minor.* The transfer is irrevocable and the custodial property is indefeasibly vested in the minor. But, while the property is held by the custodian, the custodian has the rights, powers, duties, and authority provided by the Act, and neither the minor nor the minor's legal representative has any right, power, duty, or authority except as provided by the Act. (*Prob.C. 3911(b)*, based on Uniform Act, §11, 8C U.L.A. (Master Ed.), p. 46.)

(2) *Factors Not Affecting Validity.* Under *Prob.C. 3911(a)*, the validity of a transfer is not affected by any of the following:

(a) Failure of the transferor to place the custodian in control of the property.

(b) Designation of an ineligible custodian, except designation of the transferor in the case of property for which the transferor is ineligible to serve as custodian.

(c) The death, incapacity, or disclaimer of a nominated or designated custodian.

(3) *Incorporation of Provisions of Act.* By making a transfer, the transferor incorporates the provisions of the Act and grants to the custodian and third parties dealing with him or her the respective powers, rights, and immunities provided by the Act. (*Prob.C. 3911(c)*, based on Uniform Act, §11, 8C U.L.A. (Master Ed.), p. 46.)

(4) *Transfer of Community Property Voidable by Nonconsenting Spouse.* In *re Marriage of Stephenson* (1984) 162 C.A.3d 1057, 209 C.R. 383, involved the validity of gifts under provisions of the former Gifts to Minors Act which have been continued in the Uniform Transfers to Minors Act. A husband and wife individually used community property for gifts to custodial bank accounts in the name of the husband as custodian for their minor children. In a subsequent dissolution proceeding, the wife alleged that the transactions lacked donative intent and that the husband's gifts, made without her consent, were voidable. *Held*, the husband's gifts were valid under the Act but voidable by the wife. A gift of community personal property by one spouse requires the consent of the other spouse (C.C. 5125; now *Family C. 1100*; see 11 *Summary* (10th), *Community Property*, §137), and such a gift is voidable by the nonconsenting spouse

unless a showing is made of ratification, waiver, or estoppel. Here, no such showing was made, and the wife was entitled to set aside the gifts made by the husband, despite C.C. 1157(b) (now *Prob.C. 3911(b)*), providing that a gift under the Act is irrevocable and conveys indefeasibly vested legal title to the minor. (162 C.A.3d 1071, 1072.)

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aa. Duties and Compensation of Custodian.

13 Witkin Sum. Cal. Law Pers Prop § 147

[§ 147] Duties and Compensation of Custodian.

(1) *In General.* The custodian must collect, manage, and invest the property and must register or record title when appropriate. (*Prob.C. 3912(a)*.) (For restrictions on investment in life insurance, see *Prob.C. 3912(c)*.) The custodian must keep the custodial property separate and identifiable (*Prob.C. 3912(d)*) and must maintain records of transactions involving the property (*Prob.C. 3912(e)*). *Prob.C. 3912* is based on §12 of the Uniform Act. (See 8C U.L.A. (Master Ed.), p. 49.) (On petition for accounting by custodian, see *Prob.C. 3919*, based on Uniform Act, §19, 8C U.L.A. (Master Ed.), p. 70.)

When the custodianship terminates (see *infra*, §150), the custodian transfers any remaining property to the minor or the minor's estate. (*Prob.C. 3920*, based on Uniform Act, §20, 8C U.L.A. (Master Ed.), p. 72.)

(2) *Standard of Care.* A custodian is required to observe the standard of care of a prudent person dealing with the property of another. (*Prob.C. 3912(b)*), based on Uniform Act, §12, 8C U.L.A. (Master Ed.), p. 49.) (On the prudent person rule, see 13 *Summary* (10th), *Trusts*, §76 et seq.) The standard is subject to two exceptions:

(a) An uncompensated custodian is liable only for losses to custodial property resulting from the custodian's bad faith, intentional wrongdoing, gross negligence, or failure to maintain the standard of prudent investing provided by *Prob.C. 3912*. (*Prob.C. 3912(b)(1)*.)

(b) A custodian may, without liability, retain any custodial property received from the transferor. (*Prob.C. 3912(b)(2)*.) (On the duty of a *trustee* to dispose of bad investments, see 13 *Summary* (10th), *Trusts*, §69.)

(3) *Reimbursement and Compensation.* The custodian is entitled to reimbursement from the custodial property for reasonable expenses incurred in performing custodial duties (*Prob.C. 3915(a)*), and, unless the custodian is the transferor, he or she may elect during each calendar year to charge reasonable compensation for custodial services (*Prob.C. 3915(b)*). *Prob.C. 3915* is based on §15 of the Uniform Act. (See 8C U.L.A. (Master Ed.), p. 58.)

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bb. Powers of Custodian.

13 Witkin Sum. Cal. Law Pers Prop § 148

[§ 148] Powers of Custodian.

(1) *In General.* A custodian has the rights, powers, and authority over custodial property that unmarried adults have over their property, but may exercise those rights, powers, and authority only in a custodial capacity. (*Prob.C. 3913(a).*) This provision does not relieve a custodian from liability for a breach of the duties imposed by *Prob.C. 3912* (supra, §147). (*Prob.C. 3913(b).*) *Prob.C. 3913* is based on §13 of the Uniform Act. (See 8C U.L.A. (Master Ed.), p. 54.)

(2) *Use of Property for Minor's Benefit.* The custodian's power to use the property for the minor's benefit is practically unlimited: "A custodian may deliver or pay to the minor or expend for the minor's benefit as much of the custodial property as the custodian considers advisable for the use and benefit of the minor, without court order and without regard to (1) the duty or ability of the custodian personally, or of any other person, to support the minor or (2) any other income or property of the minor which may be applicable or available for that purpose." (*Prob.C. 3914(a)*), based on Uniform Act, §14, 8C U.L.A. (Master Ed.), p. 56.) (On court order to use property for minor's benefit, see *Prob.C. 3914(b).*)

A custodian who is the transferor may elect to eliminate his or her authority to use property for the minor's benefit, except pursuant to a court order. (*Prob.C. 3914(d).*) (For discussion of tax reason for this provision, see Law Rev. Com. Comment to *Prob.C. 3914.*)

(3) *Obligation To Support Minor.* Use of property to benefit the minor is in addition to and is not a substitute for any obligation to support the minor. (*Prob.C. 3914(c).*) (See *Newman v. Newman* (1981) 123 C.A.3d 618, 621, 176 C.R. 723 [parent-custodian cannot use proceeds of custodial property to satisfy court order for child support; statutory support duty is independent personal obligation].)

"The Internal Revenue Service has taken the position that the income from custodial property, to the extent it is used for the support of the minor-donee, is includable in the gross income of any person who is legally obligated to support the minor-donee, whether or not that person or parent is serving as the custodian. ... However, ... the term 'legal obligation' includes a legal obligation to support another person if, and only if, the obligation is not affected by the

adequacy of the dependent's own resources. Thus, if under local law a parent may use the resources of a child for the child's support in lieu of supporting the child himself or herself, no obligation of support exists, whether or not income is actually used for support, at least if the child's resources are adequate." (Law Rev. Com. Comment to *Prob.C.* 3914.)

(4) *Exemption of Third Persons From Liability.* The extensive powers of the custodian are supplemented by a provision eliminating any duty of third persons to inquire: A third person in good faith may deal with "any person purporting to make a transfer or purporting to act in the capacity of a custodian" and need not determine (a) the validity of the custodian's designation, (b) the authority of the custodian to act, (c) the validity or propriety of any instrument or instructions of the transferor or the custodian, or (d) the propriety of any application of the custodial property. (*Prob.C.* 3916, based on Uniform Act, §16, 8C U.L.A. (Master Ed.), p. 60.)

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cc. Liability to Third Persons.

13 Witkin Sum. Cal. Law Pers Prop § 149

[§ 149] Liability to Third Persons.

(1) *Claim Against Custodial Property.* Under *Prob.C. 3917(a)*, the following claims may be asserted against the custodial property in a proceeding against the custodian in a custodial capacity, regardless of any personal liability of the custodian or the minor:

- (a) A claim on a contract entered into by the custodian in a custodial capacity.
- (b) A claim on an obligation arising from ownership or control of the property.
- (c) A claim based on a tort committed during the custodianship.

(2) *Limited Personal Liability of Custodian.* A custodian is not personally liable on a contract properly entered into in a custodial capacity unless the custodian failed to reveal that capacity and identify the custodianship in the contract. The custodian is not personally liable for an obligation arising from control of the property or for a tort committed during the custodianship unless the custodian is personally at fault. (*Prob.C. 3917(b)*, based on Uniform Act, §17, 8C U.L.A. (Master Ed.), p. 61.)

(3) *Limited Personal Liability of Minor.* The minor is not personally liable for an obligation arising from the ownership of the property or for a tort committed during the custodianship unless the minor is personally at fault. (*Prob.C. 3917(c)*, based on Uniform Act, §17, 8C U.L.A. (Master Ed.), p. 61.)

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dd. Termination of Custodianship.

13 Witkin Sum. Cal. Law Pers Prop § 150

[§ 150] Termination of Custodianship.

(1) *In General.* The custodian is ordinarily required to deliver the custodial property to the minor or the minor's estate on the earlier of (a) the minor's death or (b) the minor's 18th birthday. However, delivery may be delayed to a later age in specified circumstances. (*Prob.C. 3920*, based on Uniform Act, §20, 8C U.L.A. (Master Ed.), p. 72.) "Where a custodianship may continue until a specified age older than 18, the custodianship may be established after the beneficiary has attained the age of 18." (Law Rev. Com. Comment to *Prob.C. 3901*.)

(2) *When Delivery May be Delayed.* The availability and duration of delayed delivery depends on the type of transfer:

(a) Where the transfer is by a trustee under *Prob.C. 3906* (supra, §144), delivery may be delayed only if the transfer provides that the custodianship is to continue until a specified time not later than the minor's 25th birthday "or the time of termination of all present beneficial interests of the minor in the trust from which the custodial property was transferred, whichever is to occur first." (*Prob.C. 3920.5(f)*.)

(b) Where the transfer is by *irrevocable gift* under *Prob.C. 3904* (supra, §144), delivery may be delayed until not later than the minor's 21st birthday. (*Prob.C. 3920.5(e)*.) This limitation to 21 years satisfies the requirements of 26 U.S.C. §2503(c), which permits "minority trusts" to continue to age 21. (Law Rev. Com. Comment to *Prob.C. 3920.5*.)

(c) Where the transfer is by the *irrevocable exercise of a power of appointment* under *Prob.C. 3904* (supra, §144), delivery may be delayed until not later than the minor's 25th birthday. (*Prob.C. 3920.5(d)*.)

(d) Where the transfer is made by a *personal representative* or a *trustee* under *Prob.C. 3905* (supra, §144) or pursuant to a *nomination of a custodian* under *Prob.C. 3903* (supra, §143), delivery may be delayed until not later than the minor's 25th birthday, if the governing will, trust, or nomination determines the time for delayed delivery. (*Prob.C. 3920.5(c)*.)

Delayed termination has no counterpart in the Uniform Act. *Prob.C. 3920.5* permits delayed termination "since many transferors who specifically authorize a custodianship wish to preserve the custodianship as long as possible." And continuing the custodianship past the age of 18 "permits the donor to avoid the expense of preparing a trust instrument to create a trust that otherwise would be required in order to retain the property under custodial management until the young person reaches the specified age." (Law Rev. Com. Comment to *Prob.C. 3920.5*.)

(3) *Specification of Delayed Delivery Date.* A delayed delivery date must be specified in the transfer of the property to the custodian by including the designation: "as custodian for (Name of Minor) until age (Age for Delivery of Property to Minor) under the California Uniform Transfers to Minors Act." (*Prob.C. 3920.5(a), (b).*) If no age is specified, the time for delivery is the minor's 18th birthday. (*Prob.C. 3920.5(g).*) If the specified age is beyond the maximum time permitted for the type of transfer involved, the custodianship is "deemed to continue only until the time the minor attains the maximum age permitted." (*Prob.C. 3920.5(h).*)

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9. Rescission and Revocation.

a. Rescission for Mistake or Fraud.

13 Witkin Sum. Cal. Law Pers Prop § 151

[§ 151] Rescission for Mistake or Fraud.

Although the Code does not expressly recognize a right to rescind (see C.C. 1148 [gift inter vivos cannot be "revoked"])), the cases apply the general law. Hence, if the donor's intent is induced by mistake or fraud, the gift may be rescinded or set aside in an action in equity. (*Earl v. Saks & Co. (1951) 36 C.2d 602, 609, 226 P.2d 340, 1 Summary (10th), Contracts, §303* [fraud, but approving *Rest., Restitution §§26, 39*, on mistake]; *Murdock v. Murdock (1920) 49 C.A. 775, 781, 194 P. 762* [fraud]; see *25 So. Cal. L. Rev. 204 [Earl].*)

Under *Rest.2d, Property (Donative Transfers) §34.7*, a transfer that was induced by fraudulent representations may be set aside by the donor, and "[a] similar result may obtain in some circumstances if a mistake as to a relevant fact induces the donor to make a donative transfer." (See also *Rest., Restitution §127* [rights of intended donee when gift mistakenly made to another]; *Rest.2d, Torts §553* [donor's right to recover damages for fraud].)

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b. Rescission for Undue Influence.

13 Witkin Sum. Cal. Law Pers Prop § 152

[§ 152] Rescission for Undue Influence.

Undue influence, like mistake or fraud (see *supra*, §151), is held a ground for rescission despite the lack of statutory coverage, usually by citation of the numerous cases dealing with contracts and wills. Thus, a presumption of undue influence is said to arise where a relationship of trust and confidence exists between donor and donee. (See *Azevedo v. Leavitt* (1946) 76 C.A.2d 321, 324, 172 P.2d 704 [aged parent made gift to child with whom he lived, to exclusion of other children; but presumption overcome by donee's showing]; *Pfingst v. Goetting* (1950) 96 C.A.2d 293, 297, 215 P.2d 93 [elderly ill woman made gift to nephew; presumption overcome by evidence of competency and independent advice]; *McDonald v. Hewlett* (1951) 102 C.A.2d 680, 686, 228 P.2d 83 [undue influence of attorney donee on client donor; recovery by donor's estate]; 14 A.L.R.2d 649 [gift to clergyman, spiritual adviser, or church]; 24 A.L.R.2d 1288 [gift from client to attorney]; 70 A.L.R.2d 591 [gift from patient to physician, nurse, or other medical practitioner]; *Rest.2d, Property (Donative Transfers)* §34.7; 38 Am.Jur.2d (1999 ed.), *Gifts* §§35, 36; 1 *Summary* (10th), *Contracts*, §§316, 317; 14 *Summary* (10th), *Wills and Probate*, §130.)

To set aside a gift of a mentally competent donor, there must be evidence of some "act or conduct" on the part of the donees; belief of the donor alone is insufficient. (*Estate of Truckenmiller* (1979) 97 C.A.3d 326, 334, 158 C.R. 699.)

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c. Revocation of Gift in View of Impending Death.

13 Witkin Sum. Cal. Law Pers Prop § 153

[§ 153] Revocation of Gift in View of Impending Death.

A gift in view of impending death is revoked by the giver's recovery from the illness or escape from the peril, or by the death of the donee before the death of the giver. (*Prob.C. 5704(a).*) In addition, a gift in view of impending death *may be* revoked by the giver at any time, or by the giver's will if it expresses an intention to revoke the gift. (*Prob.C. 5704(b)*; see *Rosenberg v. Broy* (1961) 190 C.A.2d 591, 596, 12 C.R. 103 [decided under former C.C. 1151; gift of securities in partnership account revoked by letter with different instructions for disposal of them].) A gift in view of impending death is not affected by the giver's previous will. (*Prob.C. 5704(c).*)

When the gift has been delivered to the donee, the rights of a bona fide purchaser or encumbrancer are not affected by a subsequent revocation. (*Prob.C. 5704(d).*)

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9. Rescission and Revocation. d. Revocation of Gift in Contemplation of Marriage.

13 Witkin Sum. Cal. Law Pers Prop § 154

[§ 154] Revocation of Gift in Contemplation of Marriage.

In 1939, C.C. 1590 was enacted, making gifts in contemplation of marriage revocable if the marriage does not take place. The statute applies to either party to the contemplated marriage, and the gift is revocable not only where the *donee refuses* to marry, but where the marriage "is given up by *mutual consent*." (See *Priebe v. Sinclair* (1949) 90 C.A.2d 79, 84, 202 P.2d 577 [engagement ring]; *Stienback v. Halsey* (1953) 115 C.A.2d 213, 219, 251 P.2d 1008 [rings, other personal property]; 38 Cal. L. Rev. 529 [discussing common law basis of statute]; 38 Am.Jur.2d (1999 ed.), Gifts §73 et seq.; 44 A.L.R.5th 1 [rights to engagement and courtship presents when marriage does not ensue]; cf. *Norman v. Burks* (1949) 93 C.A.2d 687, 690, 209 P.2d 815 [recovery by decreeing *resulting trust*; C.C. 1590 not mentioned; see 38 Cal. L. Rev. 529]; and see *Rest., Restitution* §58, Comment c.)

In *Shaw v. Shaw* (1964) 227 C.A.2d 159, 38 C.R. 520, plaintiff woman lived with defendant man for 4 years. During this time, in reliance on her promise to marry him as soon as her divorce was final, he acquired real and personal property with his earnings, in the name of both as husband and wife. Eventually, after her many excuses in response to his requests to obtain a final divorce and marry him, they separated. She subsequently married another, and sued to partition the property. He cross-complained under C.C. 1590, and the trial judge awarded all of the property to him. *Held*, affirmed, rejecting the following contentions of plaintiff:

First, that C.C. 1590 allows recovery only where there was a "gift" of money or property, and that she gave a consideration by contributing services. But the putative marriage cases relied on (see 11 *Summary* (10th), *Community Property*, §260 et seq.) involved women acting in good faith, while here she was wholly at fault, and had been supported by defendant for 4 years. (227 C.A.2d 163.)

Second, that the unclean hands rule (see 13 *Summary* (10th), *Equity*, §9) should defeat defendant's claim because he filed a false statement with his employer that the parties were married, a false claim with an insurance company to the same effect so she could recover hospital expenses, and joint federal and state income tax returns; also that the parties executed documents as husband and wife. The court applied the "same transaction" limitation of the defense (see 13 *Summary* (10th), *Equity*, §12), finding that the misconduct was not connected with the matter in litigation. (227 C.A.2d 166, quoting the text.)

C.C. 1590 further provides that the donor may recover either the gift "or such part of its value as may, under all of the circumstances of the case, be found by a court or jury to be just." Thus it would appear that if the gift has been spent or consumed, *damages* are recoverable in the discretion of the jury. This hardly seems reasonable where the donee takes and consumes the property in good faith, but the marriage is thereafter declined or mutually forborne for entirely sufficient reasons. (Cf. *Rest., Restitution* §58, Comment c, which denies restitution in cases where the marriage fails to occur without the fault of the donee.)

The statute does not refer expressly to the situation where the *donor refuses* to marry, but it seems obvious that the donor cannot set aside the gift. "The clear meaning of the quoted statute is that the donee of an engagement ring is entitled to retain possession thereof when the marriage contract is breached by the donor without any fault on donee's part." (*Simonian v. Donoian* (1950) 96 C.A.2d 259, 262, 215 P.2d 119; see 38 Cal. L. Rev. 532.)

West's Key Number Digest, Gifts k.41

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



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CHAPTER XVIII - Personal Property

Witkin Summary of California Law II. ACQUISITION OF TITLE TO PERSONAL PROPERTY D. Gift.

10. Other Factors Affecting Validity of Gift.

13 Witkin Sum. Cal. Law Pers Prop § 155

[§ 155] Other Factors Affecting Validity of Gift.

The Restatement describes several additional factors that may affect the validity of a gift:

(1) *Mental Incompetence*. A mentally incompetent person cannot make a valid will or valid inter vivos donative transfer, and the legal guardian of a mentally incompetent person may make an inter vivos donative transfer of the incompetent person's property only to the extent authorized by court. However, before becoming mentally incompetent, a person may give another a power of attorney to act for him or her during any incompetency, including the power to make inter vivos donative transfers, and may transfer property to a trustee to hold in trust with an authorization to make inter vivos transfers of trust property in the event of incompetency. "Such authorized donative transfers cannot be prevented by a legal guardian or any other representative of the mentally incompetent person." (*Rest.2d, Property (Donative Transfers) §34.5.*)

(2) *Donee Criminally Causes Death of Donor*. "The current beneficial enjoyment by a donee of property disposed of under a will, or disposed of under a substitute for a will, is postponed until the death of the donor. The premature death of the donor accelerates the anticipated time for such enjoyment. If the donee criminally causes the death of the donor, the donee should be precluded from any benefits under a will or under a substitute for a will created by the donor." (*Rest.2d, Property (Donative Transfers) §34.8*; see Statutory Note, p. 322; Reporter's Note, p. 331; and see also 14 *Summary* (10th), *Wills and Probate*, §293 et seq.)

(3) *Donee Dies Before Donor*. *Rest.2d, Property (Donative Transfers) §34.6*, applies the principles of antilapse statutes (see 14 *Summary* (10th), *Wills and Probate*, §261 et seq.) to inter vivos gifts. The Comment (p. 292) explains:

"If the inter vivos donative document of transfer is a substitute for a will, by analogy to the case of a will, the result that would obtain if a will is involved may justifiably be adopted because of the similarity of the two situations. There would seem to be no justification for treating the case of a substitute for a will differently from that of a will when the donee dies before the donor."

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CHAPTER XVIII - Personal Property

Witkin Summary of California Law
III. BAILMENTS
A. In General.
1. Nature and Types.

13 Witkin Sum. Cal. Law Pers Prop § 156

[§ 156] Nature and Types.

(1) *Deposit for Particular Purpose.* A bailment (called *deposit* in the Civil Code) is the deposit of personal property with another, usually for a particular purpose, under an express or implied contract. The purpose may be to use or repair, keep, transport, sell, or exchange it, etc. (See C.C. 1813 et seq.; and see generally *8A Am.Jur.2d* (1997 ed.), *Bailments* §1 et seq.; Cal. Civil Practice, 3 Business Litigation, §37:1 et seq.; Cal. Transactions Forms, 3 Business Transactions §21:1 et seq.; 3A Am.Jur. Legal Forms 2d (1996 ed.), §36:321 et seq.; 4 Am.Jur. P.P. Forms (1995 ed.), *Bailments*, Form 1 et seq.)

(2) *Voluntary and Involuntary Bailment.* The bailment may be voluntary or involuntary. (C.C. 1813.) A *voluntary bailment* is made "by one giving to another, with his consent, the possession of personal property to keep for the benefit of the former, or of a third party." (C.C. 1814.)

An *involuntary bailment* is made by (a) accidental leaving or placing of personal property in another's possession, without negligence on the part of the owner; or (b) in cases of fire, shipwreck, inundation, insurrection, riot, or like extraordinary emergencies, by the owner committing it, *out of necessity*, to the care of any persons. (C.C. 1815; see *8A Am.Jur.2d* (1997 ed.), *Bailments* §12; 39 Proof of Facts 2d 501 [constructive bailment].) An *involuntary bailee* must take charge of the thing left with him or her (C.C. 1816), but the obligation of care is that of a gratuitous bailee (C.C. 1845). (See *20 So. Cal. L. Rev.* 91; *infra*, §163; see also C.C. 1815(c) [involuntary bailment created by acquisition and holding of stray live animal].)

Where the owner is negligent in the leaving of property, no involuntary bailment arises. (See *Copelin v. Berlin Dye Works & Laundry Co.* (1914) 168 C. 715, 721, 144 P. 961 [jewelry left in clothes delivered to cleaning driver].)

In *Sackett v. Public Storage Management* (1990) 222 C.A.3d 1088, 272 C.R. 284, plaintiff renter contracted with defendant public storage operator to store personal property in a self-service unit. The contract provided that defendant would not be liable for any loss of plaintiff's property due to theft or defendant's negligence. After plaintiff's storage unit lock was rendered inoperable by vandalism, defendant placed its own lock on the unit, notified plaintiff, and requested that plaintiff inspect the unit for possible theft or damage, and replace defendant's lock with one of his own. Plaintiff elected to have the inspection performed by a friend, who determined that nothing was missing, but who was unable to find an appropriate substitute for defendant's lock. When plaintiff later attempted to reclaim his belongings, he

discovered that his unit had been broken into and emptied. Plaintiff sued for loss of his property, contending that an involuntary bailment had been created. *Held*, the contract between the parties insulated defendant from liability, and defendant had not assumed any obligation to protect defendant's goods by temporarily placing its own lock on the unit. Defendant's actions represented a simple extension of courtesy to a customer, and not the unequivocal assumption of control necessary to establish an involuntary bailment. (222 C.A.3d 1093.)

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

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

(1) *Deposit for Particular Purpose*. See 8A Am.Jur.2d (2009 ed.), *Bailments* §1 et seq.

(2) *Voluntary and Involuntary Bailment*. An involuntary bailment is created by the abandonment or leaving of a live animal on real property that has been vacated at the termination of a lease or on foreclosure. (C.C. 1815(d), added in 2008; on involuntary bailee's duty to contact animal control officials, see C.C. 1816, as amended in 2008.)

See *McKell v. Washington Mut.* (2006) 142 C.A.4th 1457, 1490, 49 C.R.3d 227 [borrowers who alleged that they delivered money to bank to pay cost of underwriting, tax services, and wire services, and that bank breached agreement to pay actual costs of these services and return excess to borrowers, did not state cause of action for breach of bailment; borrowers' mere allegation of existence of bailment agreement was insufficient to withstand demurrer]; 8A Am.Jur.2d (2009 ed.), *Bailments* §12.



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III. BAILMENTS

A. In General.

2. Title and Estoppel To Deny.

13 Witkin Sum. Cal. Law Pers Prop § 157

[§ 157] Title and Estoppel To Deny.

Title normally remains in the bailor; the bailee has only a right of exclusive possession. But in a *bailment for exchange*, title passes to the bailee, and the relation between the parties becomes that of debtor and creditor. (C.C. 1818, 1878; *Fidelity Savings & Loan Assn. v. Rodgers* (1919) 180 C. 683, 686, 182 P. 426; see 8A Am.Jur.2d (1997 ed.), *Bailments* §§53, 54.)

The bailee is ordinarily estopped to deny the title of the bailor. (*Triggs v. Zicovich* (1953) 117 C.A.2d 768, 770, 257 P.2d 60; see 8A Am.Jur.2d (1997 ed.), *Bailments* §56 et seq.; infra, §166; for similar estoppel of tenant, see 12 *Summary* (10th), *Real Property*, §607.)

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

SUPPLEMENT: [This section is current through the latest supplement]
Bailment for exchange: See 8A Am.Jur.2d (2009 ed.), *Bailments* §§51, 52.

Estoppel: See 8A Am.Jur.2d (2009 ed.), *Bailments* §53 et seq.



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III. BAILMENTS

A. In General.

3. Bailee's Right To Sue.

13 Witkin Sum. Cal. Law Pers Prop § 158

[§ 158] Bailee's Right To Sue.

The bailee's right of possession is exclusive against any stranger. Consequently, the bailee may sue third parties for the recovery of the property where it is wrongfully taken or detained, or for full damages for injuries to it, or for its conversion. (*Whitworth v. Jones* (1922) 58 C.A. 492, 497, 209 P. 60; *Armstrong v. Kubo & Co.* (1928) 88 C.A. 331, 334, 263 P. 365; *Brown v. Roland* (1940) 40 C.A.2d Supp. 825, 827, 104 P.2d 138; see 11 Cal. L. Rev. 29; 8A Am.Jur.2d (1997 ed.), *Bailments* §172 et seq., 302, 303.)

The bailor, with an ownership interest to protect, may intervene in the action, in which case the bailee should only be allowed to recover for his or her own losses. (See 11 Cal. L. Rev. 29, 30; 4 *Summary* (10th), *Secured Transactions in Personal Property*, §2, for similar rule as to pledges.) And, under some circumstances, the bailor may bring the action. (See *Anheuser-Busch v. Starley* (1946) 28 C.2d 347, 351, 170 P.2d 448, 4 Cal. Proc. (4th), *Pleading*, §107; 8A Am.Jur.2d (1997 ed.), *Bailments* §§175 et seq., 209.) (On whether bailor has direct action against bailee's theft insurer for loss of bailed property, see 64 A.L.R.3d 1207; on effect of bailee's negligence on bailor's action, see Prosser & Keeton §74; 8A Am.Jur.2d (1997 ed.), *Bailments* §178.)

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

Action against third parties: See 8A Am.Jur.2d (2009 ed.), *Bailments* §§163 et seq., 293, 294.

Action by bailor: See 8A Am.Jur.2d (2009 ed.), *Bailments* §§167 et seq., 209.

Effect of bailee's negligence: See 8A Am.Jur.2d (2009 ed.), *Bailments* §170.

Anheuser-Busch case:

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §125.



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III. BAILMENTS

A. In General.

4. Bailee's Duty of Care.

a. In General.

13 Witkin Sum. Cal. Law Pers Prop § 159

[§ 159] In General.

The conventional classification of bailments, insofar as it determines the bailee's duty of care, is as follows: (1) *Gratuitous* bailment, for the sole benefit of the bailor (e.g., involuntary bailment): duty of slight care. (C.C. 1845, 1846; see *infra*, §163.) (2) Bailment for *benefit of both parties* (e.g., bailment for hire): duty of ordinary care. (C.C. 1852; see *infra*, §§161, 162.) (3) Bailment for *sole benefit of bailee* (e.g., borrowing of goods for bailee's own use): duty of great care. (C.C. 1886.) (See *61 So. Cal. L. Rev. 2117* [Bailment Liability: Toward A Standard of Reasonable Care]; *8A Am.Jur.2d* (1997 ed.), *Bailments* §110 et seq.; Cal. Civil Practice, 3 Business Litigation, §37:10 et seq.; *28 A.L.R.3d* 513 [duty to insure]; *54 A.L.R.5th* 393 [liability for loss of hat, coat, or other property deposited by customer in place of business]; *46 Proof of Facts* 3d 361 [liability for damage, loss, or theft of bailed property].)

But the duties established by these general rules are subject to modification by statute and contract:

First, in the case of certain bailees and in certain situations, the *statutes* contain exemptions from, or limitations on, liability. (See *infra*, §§162, 169, 170.)

Second, the duty of care may be modified by *contract*. (See *infra*, §§160, 176, 181 et seq.)

Third, liability may be *enlarged by statute*. Thus, a bailee who regularly receives personal property, other than motor vehicles, from customers for the purpose of repair or alteration is held "strictly liable to the customer for any loss occasioned by theft, fire, or vandalism" if the bailee fails to furnish the customer a written receipt including a statement, if such is the case, that the bailed property is not insured or protected to the amount of the actual cash value thereof. (C.C. 1858.1, 1858.2.) (See *8 Pacific L. J. 865* [proposal that repairers be subject to strict liability for physical harm to a user or customer]; on enlargement of liability for bailees of live animals, see *infra*, §163.)

In *Gordon H. Ball v. Parreira* (1963) 214 C.A.2d 697, 29 C.R. 679, what started as a privileged trespass became a bailment for mutual benefit, with the possibility of liability of the bailee for failure to exercise ordinary care. Plaintiff corporation's plane, piloted by its employee, made an emergency landing in defendant's oat field. The employee returned with an expert who determined that the plane could be salvaged only by disassembling; but defendant refused to allow its removal without written assurance from plaintiff or its insurer of compensation for damage to his land.

Several days later, an insurance agent gave the undertaking and was allowed to remove the plane. During the interval, no watchman had been placed there by anyone, many people had visited the scene, and equipment worth about \$ 2,000 had been stolen. In this action for damages, plaintiff was nonsuited. *Held*, reversed.

(a) At the outset, there was no involuntary bailment; the landing was not an actionable trespass, but defendant could not be forced into the relationship of a bailee without his consent. (214 C.A.2d 703.)

(b) However, it could be found that when defendant took charge of the property by refusing to permit its removal, in effect claiming a lien upon it for damage to his land (and perhaps for storage), he created a bailment for mutual benefit. (214 C.A.2d 704.)

(c) If so, he was liable for failure to exercise ordinary care for its safekeeping; and, upon his subsequent failure to deliver all of it on demand, the burden of negating his negligence passed to him. (214 C.A.2d 704.)

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

SUPPLEMENT: [This section is current through the latest supplement]
See 8A Am.Jur.2d (2009 ed.), *Bailments* §106 et seq.



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III. BAILMENTS

A. In General.

4. Bailee's Duty of Care.

b. Contractual Modifications.

13 Witkin Sum. Cal. Law Pers Prop § 160

[§ 160] Contractual Modifications.

(1) *Exemption or Limitation.* Exemption from, or limitation on, liability, may in some cases be provided for by contract. (See *Ambassador Airways v. Frank* (1932) 124 C.A. 56, 63, 12 P.2d 127; *Vilner v. Crocker Nat. Bank* (1979) 89 C.A.3d 732, 735, 736, 152 C.R. 850 [invalid exculpatory clause in bank's night depository agreement]; 73 Harv. L. Rev. 1214 [liability of subbailee]; 12 Stanf. L. Rev. 264 [same]; 8A Am.Jur.2d (1997 ed.), *Bailments* §89 et seq.; 83 A.L.R.3d 519 [bailee's liability as affected by bailment condition that bailor procure insurance]; 1 *Summary* (10th), *Contracts*, §660 et seq.; *infra*, §§176, 181 et seq.)

(2) *Enlargement.* Liability may be enlarged by contract. (See *Commercial Acetylene Supply Co. v. Fox* (1920) 47 C.A. 673, 675, 191 P. 33 ["You are responsible for any damages to any of our cylinders while they are in your possession or care"]; *Kaye v. M'Divani* (1935) 6 C.A.2d 132, 135, 44 P.2d 371 [lease of furnished house provided that lessee would redeliver furniture in good condition, and "assumes all liability"; held an insurer, and liable for stolen rug]; *Modlin v. Walter's Fur Shop* (1950) 96 C.A.2d 734, 737, 216 P.2d 42 [consignment of mink coat to retailer for 24-hour inspection; consignment statement provided that "Consignee shall be responsible for any loss from fire or theft or negligence"]; *Nelkin v. Marvin Hime & Co.* (1964) 228 C.A.2d 744, 749, 39 C.R. 701, 1 *Summary* (10th), *Contracts*, §120; 8A Am.Jur.2d (1997 ed.), *Bailments* §97 et seq.)

In *Klein v. Baker* (1931) 112 C.A. 157, 296 P. 631, defendant carrier contracted to deliver goods at a certain destination. Held, the contract created the liability of an insurer, binding him absolutely to deliver the goods, and permitting recovery by the plaintiff though their destruction was accidental. (112 C.A. 162.) It is questionable, however, whether a mere statement of the place of delivery is equivalent to an agreement to assume such an enlarged liability. And the usual simple covenant to return the goods in good condition except for wear and tear should not be construed to impose an insurer's liability. (See *J.M. Brown v. W.P. Fuller & Co.* (1915) 28 C.A. 676, 677, 153 P. 960; 3 U.C.L.A. L. Rev. 382 [discussing Washington case expressing view contrary to that of *J.M. Brown*].)

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

(1) *Exemption or Limitation.* See 8A Am.Jur.2d (2009 ed.), *Bailments* §85 et seq.

(2) *Enlargement.* See 8A Am.Jur.2d (2009 ed.), *Bailments* §93 et seq.



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4. Bailee's Duty of Care.

c. Bailment for Hire: Ordinary Care.

1. Kind of Care and Burden of Proof.

13 Witkin Sum. Cal. Law Pers Prop § 161

[§ 161] Kind of Care and Burden of Proof.

(1) *Care Required.* A bailee for hire is not an insurer of the safety of the goods. The bailee must use ordinary care, i.e., such care as an ordinarily prudent person exercises with respect to his or her own property of a similar description. The standard varies, of course, with the time and place, and is influenced by the custom and usage of business. (C.C. 1852; *Webber v. Bank of Tracy* (1924) 66 C.A. 29, 33, 225 P. 41; *England v. Lyon Fireproof Storage Co.* (1928) 94 C.A. 562, 567, 271 P. 532; *Homan v. Burkhardt* (1930) 108 C.A. 363, 366, 291 P. 624; *Beetson v. Hollywood Athletic Club* (1930) 109 C.A. 715, 718, 293 P. 821; *Windeler v. Scheers Jewelers* (1970) 8 C.A.3d 844, 850, 88 C.R. 39; *Gebert v. Yank* (1985) 172 C.A.3d 544, 551, 218 C.R. 585, citing the text; see 24 So. Cal. L. Rev. 125; 8A Am.Jur.2d (1997 ed.), *Bailments* §§105 et seq., 113 et seq.; 32 A.L.R.3d 1169 [liability of persons engaged in bulk storage or transportation of petroleum products for damage from fire or explosion]; 44 A.L.R.3d 862 [liability of bailee of aircraft for damage thereto]; 80 A.L.R.3d 264 [bailee's liability for bailor's expense of recovering stolen subject of bailment]; 39 A.L.R.4th 543 [bank's liability for employee's theft from safe deposit box]; cf. *Hall v. Osell* (1951) 102 C.A.2d 849, 852, 228 P.2d 293 [applying federal air regulations to establish negligence of bailee in intrastate airplane flight; see 25 So. Cal. L. Rev. 119].)

(2) *Burden of Proof.* The earlier cases were in conflict on the burden of proof, many placing it upon the bailor. (See *George v. Bekins Van & Storage Co.* (1949) 33 C.2d 834, 839, 205 P.2d 1037 [listing cases]; *Webber v. Bank of Tracy*, *supra*, 66 C.A. 34; *Homan v. Burkhardt*, *supra*, 108 C.A. 367; 8 *Hastings L. J.* 89; 23 So. Cal. L. Rev. 409; see also 65 A.L.R.2d 1228 [burden in action for injury to or loss of ship or vessel during bailment or charter]; 43 A.L.R.3d 607 [presumption and burden in action involving windstorm damage or loss during bailment]; 44 A.L.R.3d 171 [same; fire damage or loss].)

The former Warehouse Receipts Act placed the burden on the bailee to show freedom from fault, and it was held that the same rule applied to other bailments. (See *Downey v. Martin Aircraft Service* (1950) 96 C.A.2d 94, 98, 214 P.2d 581, *infra*, §185 ["The logic of the rule would seem to be as much applicable to a garagekeeper, parking-lot operator, or person who accepts a chattel for purposes of repair, as it is to a warehouseman"]; 8 *Hastings L. J.* 94; 8A Am.Jur.2d (1997 ed.), *Bailments* §243; cf. 64 *Harv. L. Rev.* 998 [New York case involving disappearance of money from safe deposit box].)

The Uniform Commercial Code, which superseded the Warehouse Receipts Act, also places the burden on the bailee to show freedom from fault. (U.C.C. 7403(1)(b).) However, one exception is made in California: In case of damage or destruction by fire, the burden of establishing negligence rests upon the bailor. (U.C.C. 7403(1)(b); see *infra*, §174.)

In *Gebert*, defendant was the bailee of plaintiffs' two thoroughbred horses, one of which died while in defendant's care. The jury rejected plaintiffs' cause of action for negligence, but found defendant liable for breach of the bailment contract. *Held*, the verdicts were not inconsistent, even though the finding for plaintiffs on breach of bailment involved a determination that defendant was to some degree negligent in caring for the horse. Plaintiffs had the burden of proof in the negligence cause of action, but did not have the burden of proving negligence in the breach of bailment cause of action. Thus, "[t]he jury apparently did regard the evidence on the issue of negligence as very evenly divided, but the burden operated against the defendant on the breach of bailment cause of action because of his failure to completely refute fault on his part." (172 C.A.3d 554.)

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

(1) *Care Required*. See 8A Am.Jur.2d (2009 ed.), *Bailments* §§101 et seq., 109 et seq. (2) *Burden of Proof*. 8A Am.Jur.2d (1997 ed.), *Bailments* §243 was omitted in the 2009 edition of 8A Am.Jur.2d.

Uniform Commercial Code: Division 7 (U.C.C. 7101 et seq.) was repealed and reenacted in 2006 to conform its provisions to revised Article 7 of the Uniform Commercial Code, effective January 1, 2007. Documents of title issued or bailments that arose before January 1, 2007, and the rights, obligations, and interests flowing from those documents or bailments, are governed by the former division. (Stats. 2006, Chap. 254, §81.) U.C.C. 7403(1)(b) was renumbered U.C.C. 7403(a)(2) in 2006. The California exception for goods destroyed by fire was deleted. (See Supp., *infra*, §174.)



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III. BAILMENTS

A. In General.

4. Bailee's Duty of Care.

c. Bailment for Hire: Ordinary Care.

2. Limitation of Liability to Apparent Value.

13 Witkin Sum. Cal. Law Pers Prop § 162

[§ 162] Limitation of Liability to Apparent Value.

A statutory limitation of liability, applying to bailees generally, is contained in C.C. 1840: the liability *cannot exceed the amount which the bailee is informed by the bailor, or has reason to suppose, the thing is worth*. The theory is that the bailee should be advised of the value in order to determine the amount and nature of care, or to have the opportunity of declining the bailment if the risk seems too great. (See *Hoffman v. Eastman Kodak Co.* (1929) 99 C.A. 436, 438, 278 P. 891; *Homan v. Burkhart* (1930) 108 C.A. 363, 368, 291 P. 624; 6 A.L.R.4th 934 [liability of photographic film developer for loss or destruction of film]; 9 A.L.R.4th 1245 [elements and measure of damages for loss, destruction, or conversion of personal papers, photographs, or paintings]; cf. *Gardner v. Jonathan Club* (1950) 35 C.2d 343, 350, 217 P.2d 961, *infra*, §171 [plaintiff's burden of proof on this issue waived by defendant's tender of statutory maximum].)

In *Homan*, plaintiff stored his car in defendant's garage, informing the man in charge that the suitcases and hand baggage therein were valuable, and being assured that they would be safe. The luggage, containing expensive jewelry, etc., was stolen. *Held*, defendant was liable for negligent loss of the luggage, the probable value of which could be determined by inspection, but not for the contents, since no specific value had been stated by the bailor. (108 C.A. 368, 369.)

The statute, however, only applies where the value of the goods is disclosed by the owner or where the bailee has reason to suppose the goods have special value over or under the actual value. (*Windeler v. Scheers Jewelers* (1970) 8 C.A.3d 844, 854, 88 C.R. 39, 1 Summary (10th), *Contracts*, §885 [plaintiff delivered rings to defendant jeweler for resetting, merely stating that they had sentimental value; C.C. 1840 was inapplicable, and measure of damages was actual value].)

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



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III. BAILMENTS

A. In General.

4. Bailee's Duty of Care.

d. Gratuitous Bailment.

13 Witkin Sum. Cal. Law Pers Prop § 163

[§ 163] Gratuitous Bailment.

(1) *In General.* Involuntary bailments and storage of articles as a personal favor are obviously gratuitous, and the responsibility of a gratuitous bailee is to use only slight care. (C.C. 1846; see *8A Am.Jur.2d* (1997 ed.), *Bailments* §118.) But a bailment is often not considered gratuitous even though no money is directly paid for the particular service of storage. (See *8A Am.Jur.2d* (1997 ed.), *Bailments* §§8, 12 et seq.; *46 A.L.R.3d* 1306 [employer's liability for loss of employee's property from employer's premises].)

(a) Where the bailor makes a general payment for a number of services, the bailment may be deemed included. Thus, the "red cap porter" service of a railroad is part of the service contracted for by the purchase of the ticket; hence, delivery of baggage to such a porter is not a gratuitous bailment, and the railroad must exercise ordinary care and is liable for the negligence of the porter resulting in loss of the baggage. (*Franklin v. Southern Pac. Co.* (1928) 203 C. 680, 683, 265 P. 936.) (See also *Homan v. Burkhart* (1930) 108 C.A. 363, 366, 291 P. 624 [bailment of car includes baggage therein, and garage owner is bailee for hire of both]; cf. *Copelin v. Berlin Dye Works & Laundry Co.* (1914) 168 C. 715, 721, 144 P. 961 [delivery of clothes to dry cleaner held not to constitute bailment of jewelry negligently left therein].)

(b) Compensation need not be a money payment, but may consist of other benefits. Although there is some conflict among the authorities, it has been held in California that the *good will* of a customer may take a transaction out of the gratuitous class. In *Hummingbird v. Schurich* (1937) 24 C.A.2d Supp. 757, 68 P.2d 319, plaintiff, a guest in defendant's hotel, wished to take a few days' trip and then return. She checked out, paid her bill in full, and left a suitcase which defendant accepted for safekeeping without extra charge. It was lost through defendant's ordinary negligence. *Held*, defendant was a *bailee for hire* and plaintiff could recover. The storage of the former guest's property without stated compensation was a service likely to bring back the guest, and hence was for the benefit of the defendant as well as the plaintiff. (24 C.A.2d Supp. 759.) The court did not consider the former \$ 50 limitation of C.C. 1859 (*infra*, §170).

In *Greenberg Bros. v. Earnest W. Hahn* (1966) 246 C.A.2d 529, 54 C.R. 770, plaintiff was one of many lessees of a center, and defendant, constructing it, was late in completion. Defendant's compensation from the center was dependent on holding lessees as a basis for financing. To prevent plaintiff's withdrawal from the lease, defendant agreed to store plaintiff's merchandise until its leased store was ready. *Held*, this was a bailment for mutual benefit, and defendant was

liable for the value of goods stolen by reason of his negligence. (246 C.A.2d 531.)

(2) *Live Animal Bailment.* A higher standard of care, statutorily imposed, applies to the gratuitous bailee of a live animal. The bailee must provide the animal with necessary and prompt veterinary care, adequate nutrition, water, and shelter, and must treat the animal humanely. The bailee must attempt to notify the animal's owner, if the animal has any identification. If the bailee lacks sufficient resources or desire to provide this level of care, it must "promptly turn the animal over to an appropriate care facility." (C.C. 1846(b).) If the bailee is a public pound, humane shelter, or shelter operated by a society for the prevention of cruelty to animals, it must comply with Food and Agricultural Code requirements regarding the impounding of live animals. (C.C. 1846(c).)

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

(1) *In General.* See 8A Am.Jur.2d (2009 ed.), *Bailments* §110.

Bailments not considered gratuitous: See 8A Am.Jur.2d (2009 ed.), *Bailments* §§8, 12 et seq. (2) *Live Animal Bailment.* See 90 Proof of Facts 3d 1 [actions involving injuries to animals].



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CHAPTER XVIII - Personal Property

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III. BAILMENTS

A. In General.

5. Bailee's Liability for Unauthorized Use (Deviation).

13 Witkin Sum. Cal. Law Pers Prop § 164

[§ 164] Bailee's Liability for Unauthorized Use (Deviation).

The right of a bailee to use the property ordinarily depends on contract. Hence, the rule is that where there is no contractual authority to use (e.g., where property is stored), *any use* is improper; and, where the contract specifies the particular kind of permitted use, *any unauthorized use or deviation* is improper. (See C.C. 1835; *8A Am.Jur.2d* (1997 ed.), *Bailments* §125 et seq.; Cal. Civil Practice, 3 Business Litigation, §§37:20, 37:44.)

The bailee is liable for any damage to the goods during such wrongful use "unless such damage must inevitably have happened though the property had not been thus used." (C.C. 1836; see *8A Am.Jur.2d* (1997), *Bailments* §258.) Moreover, the bailor may treat any unauthorized use as a *conversion*, making the bailee liable for the value of the property. (See *Hollywood Motion Picture Equipment Co. v. Furer* (1940) 16 C.2d 184, 189, 105 P.2d 299.) But a bailee entrusted with goods for repairs may give them to another for this purpose, unless the bailment contract expressly or impliedly requires the bailee to perform the work personally. (*Travelers Fire Ins. Co. v. Brock & Co.* (1938) 30 C.A.2d 112, 114, 85 P.2d 905.)

The deviation rule applies to any bailment, including a bailment to sell. Thus, in *Sperisen v. Heynemann* (1957) 149 C.A.2d 228, 308 P.2d 436, plaintiff bailor delivered two valuable jade lamps to defendant bailee for the sole purpose of displaying them to a prospective buyer in Texas. Defendant instead took them to Los Angeles and then on an automobile trip which started for New York. He returned the lamps in a damaged condition. *Held*, he was "absolutely liable" for the damage, irrespective of negligence. (149 C.A.2d 230.)

West's Key Number Digest, Bailment k.20

SUPPLEMENT: [This section is current through the latest supplement]
Improper use: See *8A Am.Jur.2d* (2009 ed.), *Bailments* §120 et seq.

Liability for damage: See *8A Am.Jur.2d* (2009 ed.), *Bailments* §252.



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III. BAILMENTS

A. In General.

6. Bailee's Liability for Failure To Redeliver.

a. In General.

13 Witkin Sum. Cal. Law Pers Prop § 165

[§ 165] In General.

The duty of the bailee to redeliver the goods on termination of the bailment is ordinarily absolute. A bailee who misdelivers, or intentionally fails or refuses to return them to the bailor is guilty of *conversion*, regardless of care or good faith. (*Byer v. Canadian Bank of Commerce* (1937) 8 C.2d 297, 299, 65 P.2d 67 [misdelivery; gratuitous bailee held liable]; see 8A Am.Jur.2d (1997 ed.), *Bailments* §§73 et seq., 134 et seq.; Cal. Civil Practice, 3 Business Litigation §§37:22, 37:35, 37:36.)

In *Clark v. Burns Hamman Baths* (1925) 71 C.A. 571, 236 P. 152, defendant bailee, without requiring identification, delivered plaintiff's valuables to an imposter who had found plaintiff's key. Defendant contended that plaintiff was contributorily negligent in failing to promptly report loss of the key. *Held*, defendant's liability was affirmed: plaintiff's negligence, if any, was not the proximate cause of the loss. (71 C.A. 574.)

Failure to return the property on termination of the bailment and proper demand (see C.C. 1822, 1823) constitutes a prima facie case of conversion. In *Wolfe v. Willard H. George* (1930) 110 C.A. 532, 294 P. 436, plaintiff repeatedly demanded return of furs stored with defendant. Defendant failed to comply for 18 days and, when he did send them, his employee was robbed. *Held*, although theft without negligence would have been a defense during continuance of the bailment, here the continued failure to return amounted to a conversion, and defendant was liable for their value. (110 C.A. 536.) (On the requirement of demand, and excuse thereof where it would be futile, see *Downey v. Martin Aircraft Service* (1950) 96 C.A.2d 94, 100, 214 P.2d 581 [excused where property cannot be redelivered because of loss or destruction].)

On the other hand, failure to redeliver because of negligent destruction of the goods cannot constitute conversion. (*George v. Bekins Van & Storage Co.* (1949) 33 C.2d 834, 838, 205 P.2d 1037, 5 Summary (10th), *Torts*, §718; cf. *Chatterton v. Boone* (1947) 81 C.A.2d 943, 946, 185 P.2d 610 [correctly stating that refusal to return goods on demand is a conversion, regardless of good faith, but confusing the issue by a discussion of negligent storage].)

West's Key Number Digest, Bailment k.23

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

See *8A Am.Jur.2d* (2009 ed.), *Bailments* §§70 et seq., 129 et seq.



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III. BAILMENTS

A. In General.

6. Bailee's Liability for Failure To Redeliver.

b. Where Third Party Claims Goods.

13 Witkin Sum. Cal. Law Pers Prop § 166

[§ 166] Where Third Party Claims Goods.

(1) *In General.* Because the bailee is ordinarily estopped to deny the bailor's title (*supra*, §157), the fact that a third party *may be the owner* of the goods does not alter the duty of the bailee to redeliver to the bailor. The bailee is therefore protected where he or she redelivers to the bailor prior to knowledge of any claim by the true owner. (*Steele v. Marsicano* (1894) 102 C. 666, 669, 36 P. 920.) And if the bailee, believing that another person is the true owner, gives that person notice, and that person fails within a reasonable time to establish his or her right and indemnify the bailee against liability to the bailor, the bailee is relieved of any liability to the true owner. (C.C. 1826; see Cal. Transactions Forms, 3 Business Transactions §21:53.)

However, if a third party *claims the property* adversely to the bailor, the bailee cannot ignore the claim and redeliver to the bailor, for in that case the bailee would be liable to the third party if the latter eventually proved to be the true owner. Hence, the bailee has an excuse for not delivering to the bailor. (C.C. 1822; *Palmtag v. Doutrick* (1881) 59 C. 154, 161; see *Lambert v. Valentine* (1923) 61 C.A. 712, 714, 215 P. 692 [bailee not required to deliver to third-party claimant until opportunity afforded bailor to be heard]; 8A Am.Jur.2d (1997 ed.), *Bailments* §§148, 149.) But this means that the bailee may be forced to choose, at his or her peril, between the claim of the bailor and one who claims to be the true owner. (See *Smith v. Miller* (1935) 5 C.A.2d 564, 572, 43 P.2d 347.) To avoid the harsh results of this rule, carriers and warehousemen are by statute given the remedy of interpleader. (U.C.C. 7603; on interpleader generally, see 4 Cal. Proc. (4th), *Pleading*, §216 et seq.)

Where the third party claims the goods under valid legal process, such as attachment or execution, the bailee must give prompt *notice* to the bailor so that the bailor may defend his or her right, and the bailee is liable in conversion for releasing the property without such notice. (C.C. 1825; *Branch v. Bekins Van & Storage Co.* (1930) 106 C.A. 623, 629, 290 P. 146; see 8A Am.Jur.2d (1997 ed.), *Bailments* §153; Cal. Transactions Forms, 3 Business Transactions §21:52; 3A Am.Jur. Legal Forms 2d (1996 ed.), §36:365.)

(2) *Illustrations.* In *Messerall v. Fulwider* (1988) 199 C.A.3d 1324, 245 C.R. 548, plaintiff, registered owner of a boat, agreed to sell it to S, with plaintiff retaining title until the final installment payment was made. Plaintiff had the right to retake possession in the event S defaulted. S subsequently left the boat at defendant bailee's shop for repairs. After S failed to pay plaintiff for two consecutive months, plaintiff attempted to obtain possession of the boat from

defendant. Plaintiff presented defendant with a written statement explaining why plaintiff was entitled to possession, and offered to reimburse defendant for outstanding storage charges. Defendant refused to release the boat unless plaintiff obtained a court order. Plaintiff then asked defendant to contact S for confirmation of plaintiff's claim, and offered to indemnify defendant against any claims by S. Defendant refused to investigate, whereupon plaintiff sued defendant for conversion, and had a sheriff serve a writ of possession, compelling defendant to surrender the boat. The trial judge subsequently found defendant liable for conversion, and denied his request for storage and attorneys' fees. *Held*, affirmed.

(a) Plaintiff's failure to perfect his security interest in the boat neither impaired his right to retake possession from S, nor did it preclude assertion of his priority against defendant. Defendant could defeat plaintiff's claim only by establishing that he had a right to possession. However, even assuming that defendant had that right by virtue of having a lien for storage charges, that lien ceased to exist when plaintiff redeemed it by offering to pay defendant all outstanding charges. (199 C.A.3d 1329, 1330.)

(b) Defendant's status as bailee gave him a limited right of possession, but imposed upon him a duty to investigate plaintiff's claim. Plaintiff provided reasonably compelling proof by submitting to defendant the registration certificate, the written statement under penalty of perjury asserting plaintiff's right to immediate possession, and a copy of the security agreement upon which the right was founded. Defendant's insistence on a court order in the absence of any investigation constituted an unjustified refusal to deliver possession, and made litigation inevitable. (199 C.A.3d 1332.)

(c) "If Fulwider wished to avoid the result which now has befallen him, he should have tried to get Scott's consent to a release of the property. Having failed to obtain that within a reasonable time, he should have filed an interpleader action. ... In such an action, costs and attorney's fees may be awarded in the discretion of the court ... and ordinarily should be awarded to a diligent bailee. While the initiation of such an action may place some burden on the bailee, we think that it is an inevitable cost of being in the business of bailments." (199 C.A.3d 1333.) (See also *Branch v. Bekins Van & Storage Co.*, *supra*, 106 C.A. 630, 631 [judgment against defendant storage company for conversion was supported by evidence; defendant turned over deposited goods, which were plaintiff bailor's separate property, to sheriff under writ of attachment levied in action by third party against plaintiff's husband, without giving plaintiff notice of attachment].)

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

(1) *In General*. See 8A Am.Jur.2d (2009 ed.), *Bailments* §141.

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §237 et seq.

Notice to bailor: See 8A Am.Jur.2d (2009 ed.), *Bailments* §145.



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CHAPTER XVIII - Personal Property

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III. BAILMENTS

A. In General.

7. Crimes Involving Commercial Bailments.

13 Witkin Sum. Cal. Law Pers Prop § 167

[§ 167] Crimes Involving Commercial Bailments.

The 1963 Legislature enacted a Penal Code chapter entitled "Crimes Involving Bailments" (P.C. 560 et seq.). It incorporates the Uniform Commercial Code definition of "bailee": A person "who by a warehouse receipt, bill of lading or other document of title acknowledges possession of goods and contracts to deliver them." (U.C.C. 7102(1)(a).) The statutes apply to the following persons:

(1) Any bailee who issues or aids in issuing, or any person who procures the issuance, or transfers for value, a document of title, with knowledge that the goods are not in the bailee's control. (P.C. 560.)

(2) Any bailee who fraudulently issues or aids in issuing a receipt for goods, with knowledge that it contains a false statement. (P.C. 560.1.)

(3) Any bailee who delivers goods, with knowledge that a negotiable document of title is outstanding, without obtaining possession of it (subject to exceptions specified in U.C.C. 7210, 7308, 7601, 7602). (P.C. 560.2.)

(4) Any bailor who has no title or whose goods are subject to a security interest, and who takes a document and negotiates it for value without disclosure and with intent to deceive. (P.C. 560.3.)

(5) Any bailee who issues or aids in issuing a duplicate or additional negotiable document of title, with knowledge that a former one for the same goods is outstanding, and does not plainly mark it duplicate. Exceptions are made for bills in a set and substitutes for lost, stolen, or destroyed documents. (P.C. 560.4.)

(6) A warehouseman who issues or aids in issuing a negotiable document of title to goods, and fails to disclose his or her own sole, joint, or common ownership in them. (P.C. 560.5.)

(7) Persons who issue, etc., a false warehouse receipt, e.g., one not issued by the warehouseman, or where there is no such warehouse, or no such goods are stored there, etc.; also persons who issue, etc., a receipt that lacks the required data. (P.C. 560.6.)

SUPPLEMENT: [This section is current through the latest supplement]
U.C.C. 7102(1)(a) was renumbered U.C.C. 7102(a)(1) in 2006.



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III. BAILMENTS

B. Particular Bailees.

1. Innkeeper.

a. Liability: In General.

13 Witkin Sum. Cal. Law Pers Prop § 168

[§ 168] Liability: In General.

At common law, an innkeeper was an *insurer* of the property of guests, being liable for all injury or loss irrespective of his or her negligence, unless the cause was an act of God, public enemy, or negligence of the guest. This rule was changed by statute in California in 1895. The liability of "an *innkeeper, hotel keeper, operator of a licensed hospital, rest home or sanitarium, furnished apartment house keeper, furnished bungalow court keeper, boardinghouse or lodginghouse keeper*" is that of a *bailee for hire*. (C.C. 1859; see *Muehlebach v. Paso Robles Springs Hotel* (1924) 65 C.A. 634, 640, 225 P. 19; *Hummingbird v. Schurich* (1937) 24 C.A.2d Supp. 757, 759, 68 P.2d 319; *Providence Washington Ins. Co. v. Hotel Marysville* (1943) 60 C.A.2d 338, 343, 140 P.2d 698; *Federal Ins. Co. v. Beverly Hills Hotel Corp.* (1962) 202 C.A.2d 120, 123, 20 C.R. 502; 13 So. Cal. L. Rev. 166; 24 So. Cal. L. Rev. 319; and see generally 52 A.L.R.3d 433 [liability of hotel, motel, or similar establishment for damage to or loss of guest's automobile left on premises]; 40A Am.Jur.2d (1999 ed.), *Hotels, Motels, and Restaurants* §130 et seq.; Cal. Civil Practice, 3 Business Litigation, §37:23; 9A Am.Jur. Legal Forms 2d (2002 ed.), §137:9 et seq.; 13B Am.Jur. P.P. Forms (1999 ed.), *Hotels, Motels, and Restaurants*, Form 92 et seq.)

However, a short statute of limitations applies to actions involving goods left with certain types of such bailees. When a guest departs from a "hotel, hospital, rest home, sanitarium, boarding house, lodging house, furnished apartment house, or furnished bungalow court," and leaves baggage or other personal property behind, an action to *recover* the property, or an action for its *conversion*, must be brought within 90 days from the time of departure. (C.C.P. 341a; *Pawn v. Wall* (1928) 88 C.A. 597, 600, 264 P. 268.)

West's Key Number Digest, Innkeepers k.11 et seq.

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

See 40A Am.Jur.2d (2008 ed.), *Hotels, Motels, and Restaurants* §122 et seq.; 13B Am.Jur. P.P. Forms (2009 ed.), *Hotels, Motels, and Restaurants*, §92 et seq.



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III. BAILMENTS

B. Particular Bailees.

1. Innkeeper.

b. Exemption From and Limitation of Liability.

1. Exemption: Fireproof Safe and Notice.

13 Witkin Sum. Cal. Law Pers Prop § 169

[§ 169] Exemption: Fireproof Safe and Notice.

"If an *innkeeper, hotelkeeper, operator of a licensed hospital, rest home or sanitarium, boardinghouse or lodginghouse keeper*" keeps a fireproof safe, and personally informs the guests or posts *notice* that the establishment will not be liable for *valuables* such as money, jewelry, documents, furs, or fur garments, unless placed therein, the innkeeper escapes all liability for loss of or injury to articles not so deposited for safekeeping. (C.C. 1860; see *Federal Ins. Co. v. Beverly Hills Hotel Corp.* (1962) 202 C.A.2d 120, 124, 20 C.R. 502; 88 A.L.R.3d 979 [construction of terms "jewelry" and "personal ornaments" in statute]; Cal. Transactions Forms, 3 Business Transactions §21:61.) This provision applies only where the guests *fail* to take advantage of this opportunity to place their goods in the safe; the exemption is inapplicable if they do so deposit their goods. And the section exempts the innkeeper from liability "except so far as his own acts shall contribute" to the loss; hence, an innkeeper who is negligent is not absolved. (See generally 9 A.L.R.2d 818 [effect of notice limiting hotel's liability for guest's valuables]; 28 A.L.R.4th 120 [liability of hotel or motel for guest's loss of money from room by theft of stranger]; 40A Am.Jur.2d (1999 ed.), *Hotels, Motels, and Restaurants* §154 et seq.)

In order to create a *deposit* of valuables within the meaning of this section, the guest must *inform the innkeeper* that the articles are of unusual value. Merely handing over luggage, with instructions to place it in the hotel's vault, was held insufficient to impose liability for the loss of valuable jewelry therein. (*Providence Washington Ins. Co. v. Hotel Marysville* (1943) 60 C.A.2d 338, 344, 140 P.2d 698.)

SUPPLEMENT: [This section is current through the latest supplement]
See 40A Am.Jur.2d (2008 ed.), *Hotels, Motels, and Restaurants* §143 et seq.



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III. BAILMENTS

B. Particular Bailees.

1. Innkeeper.

b. Exemption From and Limitation of Liability.

2. Statutory Limitation to Fixed Sums.

13 Witkin Sum. Cal. Law Pers Prop § 170

[§ 170] Statutory Limitation to Fixed Sums.

The statutes (C.C. 1859 and 1860, *supra*, §§168, 169) also provide for a limitation of liability in the absence of special contract:

(1) *Baggage and Similar Property*. C.C. 1859 states that the liability shall in no case exceed the sum of \$ 1,000 in the aggregate, \$ 500 for each trunk and contents, \$ 250 for each traveling bag and contents, \$ 250 for each box, bundle, or package and contents, and \$ 250 for all other personal property of any kind, *unless the innkeeper "shall have consented in writing with the owner thereof to assume a greater liability."* The effect of this provision would seem to be that (a) the innkeeper is a bailee for hire, and therefore is not liable for injury or loss unless negligent (*supra*, §168), and (b) in the case of baggage, etc., the innkeeper is not liable for more than the statutory amount, even if negligent, unless he or she so agrees in writing. (See generally 63 *A.L.R.2d* 495, 500.)

(2) *Valuables*. C.C. 1860, after stating the exemption from liability when valuables are not delivered for deposit in the safe (*supra*, §169), adds the following: "nor in any case for more than the sum of five hundred dollars (\$ 500) for any or all such property of any individual guest, patient, boarder, or lodger, *unless he shall have given a receipt in writing therefor* to such guest, patient, boarder or lodger." The effect of this section is therefore that (a) the innkeeper who keeps a fireproof safe and gives proper notice thereof is absolved from all liability for loss of or injury to valuables unless they are delivered to him or her for deposit (*supra*, §169), and (b) even if the innkeeper keeps no such safe or gives no notice, or does give notice and the valuables are deposited in the safe, the innkeeper's total liability to any one guest cannot exceed \$ 500 unless the guest has been given a *written receipt* for the property. (See 9 *A.L.R.2d* 818.)

In *Nagashima v. Hyatt Wilshire Corp.* (1991) 228 *C.A.3d* 1006, 279 *C.R.* 265, plaintiff guest sued defendant hotel for the loss of jewelry valued at \$ 72,000. During her stay, plaintiff had kept the jewelry in one of defendant's safe deposit boxes. Plaintiff had not informed defendant of the nature or value of the property. While plaintiff was standing at the checkout counter in defendant's lobby, immediately after she had reclaimed her jewelry from defendant's safe, the jewelry was stolen by an unidentified person. The trial judge ruled that C.C. 1860, which would have limited defendant's liability to \$ 500, did not apply because the jewelry was not under defendant's control at the time of the robbery. *Held*, judgment awarding plaintiff \$ 72,000 reversed, with directions to enter judgment for plaintiff in the

amount of \$ 500.

(a) The limitation of liability is not restricted to the period in which the property is actually inside the hotel's safe. Here, defendant kept a fireproof safe, gave notice of that safe to plaintiff, and did not agree to assume liability in excess of the statutory limitation. Thus, defendant's liability was limited to \$ 500 whether or not the jewelry was in its possession at the time of the robbery. (228 C.A.3d 1010.)

(b) If defendant had agreed to assume liability greater than \$ 500, it might have taken precautions to protect the jewelry until the jewelry was no longer on defendant's premises. (228 C.A.3d 1011.)

(3) *Similar Purpose and Construction.* C.C. 1859 and 1860 are both based on the theory that a guest who wishes greater protection than the statutory limitations must declare the value of the property and thereby give the innkeeper an opportunity either to refuse to assume the liability or to take appropriate steps to protect the property. In other words, liability in excess of the statutory limit arises from the innkeeper's agreement to assume it. (*Gardner v. Jonathan Club* (1950) 35 C.2d 343, 350, 217 P.2d 961, *infra*, §171; *Federal Ins. Co. v. Beverly Hills Hotel Corp.* (1962) 202 C.A.2d 120, 124, 20 C.R. 502; see generally 37 A.L.R.3d 1276 [applicability of statutory limitations to negligence cases].)

In *Ricketts v. Morehead Co.* (1954) 122 C.A.2d 948, 265 P.2d 963, plaintiffs deposited money and jewelry without obtaining a receipt, and hence concededly could only recover \$ 250 (the former statutory limit) from defendant corporation, owner of the hotel. But they sought unlimited recovery against defendant managers, on the theory that "hotel keeper" means only the proprietor. *Held*, the statute protects both *owners and operating agents*; its clear purpose and effect are to allow recovery of only a total sum of \$ 250, jointly and severally, against all defendants. (122 C.A.2d 955.)

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



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B. Particular Bailees.

1. Innkeeper.

b. Exemption From and Limitation of Liability.

3. What Constitutes Written Consent.

13 Witkin Sum. Cal. Law Pers Prop § 171

[§ 171] What Constitutes Written Consent.

The written consent to assume greater liability (*supra*, §170) need not be in any particular form, but it must indicate or acknowledge the value of the deposit or awareness of the assumption.

In *Gardner v. Jonathan Club* (1950) 35 C.2d 343, 217 P.2d 961, plaintiff member delivered a sealed envelope allegedly containing \$ 5,500 to the desk clerk of defendant club. He received a "B Check" reciting that liability was only in accordance with the statute. *Held*, defendant's liability for loss was limited to \$ 250 (the former statutory limit). The court (approving *Providence Washington Ins. Co. v. Hotel Marysville* (1943) 60 C.A.2d 338, 140 P.2d 698, and disapproving a contrary dictum in *Greer v. Los Angeles Athletic Club* (1927) 84 C.A. 272, 258 P. 155) laid down two propositions:

First, C.C. 1859 and 1860 impose the same limitation, with the same exception, for the same purpose, and must be given the same construction. The differences in language--"consented in writing" (C.C. 1859) and "receipt in writing" (C.C. 1860)--are accounted for by practical considerations: A receipt is ordinarily given for valuables placed in the safe; but property placed in a guest's room does not call for a receipt, and enlarged liability can only be assumed by a writing. Hence, "The 'receipt in writing' exception of section 1860 requires the same acknowledgment of greater liability as that required by section 1859." (35 C.2d 351.) This is consistent with C.C. 1840, limiting liability of a bailee to apparent value unless the bailor informs the bailee of greater value (*supra*, §162).

Second, a mere identification check is not sufficient. "By requiring a written receipt as an acknowledgment of having received goods or money delivered, the Legislature clearly intended an acknowledgment that a specific item was received with awareness of its nature and value. ... This requirement is not satisfied by the mere acknowledgment of an envelope received without knowledge or information of its contents or their value. There is as much likelihood that an envelope would contain a will, bonds, an insurance policy, a contract, newspaper clippings, as \$ 5,500 in cash. The 'B' check gave the depositor a means of identifying the envelope; it could not be a receipt for whatever it contained when the clerk was not informed what its contents were." (35 C.2d 352.) (See 24 So. Cal. L. Rev. 319.)

The protection afforded by the declaration of value and special receipt may be illusory, under the decision in *Robert*

Altman v. Biltmore Hotel (1961) 190 C.A.2d 274, 11 C.R. 838. Plaintiffs deposited two jewelry-sample cases in defendant hotel's vault, receiving a "Valuable Parcel Check." The cases, worth \$ 71,988.60 and \$ 8,794.20, respectively, were lost through defendant's negligence. *Held*, recovery was limited to \$ 250 (the former statutory limit) for each plaintiff; the checks were not receipts within the meaning of C.C. 1860, for plaintiffs made no declaration of the value of the contents. (190 C.A.2d 279.)

The significant aspect of the decision was the fact that "[d]efendant's employees had been instructed not to inquire as to the value of articles deposited in the vault and not to accept any articles for deposit when declarations of value were made by depositors." (190 C.A.2d 278.) Thus the bailee, despite token compliance with the statute by notices posted in the rooms and maintenance of a safe, had by its own unposted rule nullified the statutory objective. But the court found no merit in the contention that this constituted a waiver of the benefits of the statutory limitation of liability. Instead, by its brief quotation from *Gardner v. Jonathan Club*, *supra* (the innkeeper "can then refuse to assume the greater liability"), the opinion intimates that a universal practice of refusing to accept packages of declared value in excess of the statutory limit would be entirely lawful. (190 C.A.2d 280.)

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



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1. Innkeeper.

c. Liability for Acts of Employees.

13 Witkin Sum. Cal. Law Pers Prop § 172

[§ 172] Liability for Acts of Employees.

Where the loss is not a result of negligence but of theft by an employee, the cases appear to make the liability of the bailee depend upon whether the employee's acts were in the scope of employment. Thus, in *Muehlebach v. Paso Robles Springs Hotel* (1924) 65 C.A. 634, 648, 225 P. 19, the innkeeper was held liable where his clerk, in charge of the safe, stole valuables deposited by plaintiff. (See also *Transcontinental & Western Air v. Bank of America* (1941) 46 C.A.2d 708, 713, 116 P.2d 791; cf. *Copelin v. Berlin Dye Works & Laundry Co.* (1914) 168 C. 715, 721, 144 P. 961 [principal, cleaning company, did not become bailee of valuables negligently left in clothes and stolen by employee; also, employee's act held outside scope of employment]; 15 A.L.R.2d 829, 836; 40A Am.Jur.2d (1999 ed.), *Hotels, Motels, and Restaurants* §168.)

Even where the theft is within the scope of the employment, the innkeeper's liability is limited to the statutory sums specified in C.C. 1859 and 1860 (supra, §170). (*Gardner v. Jonathan Club* (1950) 35 C.2d 343, 348, 217 P.2d 961; see 24 So. Cal. L. Rev. 319.)

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

See 40A Am.Jur.2d (2008 ed.), *Hotels, Motels, and Restaurants* §157.



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III. BAILMENTS

B. Particular Bailees.

2. Warehouseman.

a. Liability.

1. In General.

13 Witkin Sum. Cal. Law Pers Prop § 173

[§ 173] In General.

The duties and liabilities of warehousemen are stated in the Uniform Commercial Code, Division 7, Documents of Title, which supersede the Uniform Warehouse Receipts Act. (U.C.C. 7101 et seq.; see 7A Anderson 3d (2001 ed.), §7-101:1 et seq.; C.E.B., 1 UCC Sales and Leases, §15.1 et seq.; Cal. Civil Practice, 4 Business Litigation, §44:18 et seq.; 21 A.L.R.3d 1339 [construction and effect of U.C.C. Art. 7]; 78 Am.Jur.2d (2002 ed.), Warehouses §§ et seq., 84 et seq.; 6A Am.Jur. P.P. Forms (2002 ed.), Commercial Code, Form 7:40 et seq.; 24B Am.Jur. P.P. Forms (1999 ed.), Warehouses, Form 5 et seq.)

(1) A *warehouseman* is defined as "a person engaged in the business of storing goods for hire." (U.C.C. 7102(1)(h); see *England v. Lyon Fireproof Storage Co.* (1928) 94 C.A. 562, 567, 271 P. 532 [pre-Code].)

(2) A *warehouse receipt* is a document that evidences the receipt of goods for storage issued by a warehouseman and that, by its terms, evidences the intention of the issuer that the person entitled under the document has the right to receive, hold, and dispose of the document and the goods it covers. (U.C.C. 1201(44); see U.C.C. 7104, 7201 et seq., 7401 et seq., 7501 et seq., 7601 et seq.; 30 *Hastings L. J.* 1 [Good Faith Purchase and Warehouse Receipts: Thoughts on the Interplay of Articles 2, 7, and 9 of the U.C.C.].)

(3) Unless otherwise provided by the warehouse receipt, a warehouseman must keep the goods covered by each receipt *separate* "so as to permit at all times identification and delivery of those goods." (U.C.C. 7207(1).) An exception is made as to *fungible* goods. (U.C.C. 7207(1), (2).)

(4) The warehouseman's duty of care is that which "a reasonably careful man would exercise under like circumstances." (U.C.C. 7204(1); see 60 A.L.R.2d 1097 [liability for injury to goods from floods, heavy rains, or the like]; 92 A.L.R.2d 1298 [liability for injury to goods resulting from failure to maintain proper temperatures]; 42 A.L.R.3d 908 [warehouseman's precautions against fire]; 76 A.L.R.4th 883 [warehouseman's liability for loss of goods stored at other than agreed-upon place].)

West's Key Number Digest, Warehousemen k.24 et seq.

SUPPLEMENT: [This section is current through the latest supplement]
See 7B Anderson 3d (2009 ed.), §7-101:1 et seq.

Division 7 (U.C.C. 7101 et seq.) was repealed and reenacted in 2006 to conform its provisions to revised Article 7 of the Uniform Commercial Code, effective January 1, 2007. Documents of title issued or bailments that arose before January 1, 2007, and the rights, obligations, and interests flowing from those documents or bailments, are governed by the former division. (Stats. 2006, Chap. 254, §81.)

(1) *Warehouseman*: U.C.C. 7102(1)(h) was renumbered U.C.C. 7102(a)(13) and amended in 2006. It now defines a "ware- house," rather than a "warehouseman," as "a person engaged in the business of storing goods for hire."

(2) *Warehouse receipt*: U.C.C. 1201(44) was renumbered U.C.C. 1201(b)(42) and amended in 2006. It now defines a "warehouse receipt" as a "receipt issued by a person engaged in the business of storing goods for hire." U.C.C. 7104 no longer discusses warehouse receipts.

(3) *Goods kept separate*: U.C.C. 7207(1) and (2) were renumbered U.C.C. 7207(a) and (b), respectively, in 2006.

(4) *Duty of care*: U.C.C. 7204(1) was renumbered U.C.C. 7204(a) and amended in 2006. It now defines the warehouse's duty of care as that which "a reasonably careful person would exercise under similar circumstances."



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2. Warehouseman.

a. Liability.

2. Failure To Deliver.

13 Witkin Sum. Cal. Law Pers Prop § 174

[§ 174] Failure To Deliver.

(1) *Former Law.* Under the Warehouse Receipts Act, on refusal or failure to deliver the goods in compliance with a proper demand by the holder of the warehouse receipt, the warehouseman had the burden of establishing the existence of a lawful excuse. (See *George v. Bekins Van & Storage Co. (1949) 33 C.2d 834, 841, 205 P. 1037* [where plaintiff shows delivery and loss by fire, defendant warehouseman has burden of proving freedom from negligence]; *Hanson v. Wells Van & Storage Co. (1950) 100 C.A.2d 332, 334, 223 P.2d 509* [evidence of customary care and unknown origin of fire insufficient to meet burden]; cf. *Lincoln Grain Co. v. M & H Warehouse (1971) 14 C.A.3d 275, 280, 92 C.R. 100* [warehouseman could make showing of due care against possible causes of fire, and thus meet his burden of proof, without showing actual cause of fire].)

(2) *Uniform Commercial Code.* The pre-Code rule is substantially continued in the Code: The warehouseman generally has the burden of establishing the existence of a lawful excuse. (U.C.C. 7403(1); see West's California Code Comments.) Upon establishing any of the following defenses, the warehouseman is excused from liability for nondelivery: (a) delivery to superior title (U.C.C. 7403(1)(a); see Official Comment 2); (b) loss for which warehouseman is not liable (U.C.C. 7403(1)(b); see Official Comment 3); (c) enforcement of lien (U.C.C. 7403(1)(c)); (d) lawful termination of storage (U.C.C. 7403(1)(c)); (e) seller's stoppage of delivery (U.C.C. 7403(1)(d)); (f) diversion, reconsignment, or similar disposition (U.C.C. 7403(1)(e)); (g) release, satisfaction, or other personal defense against the claimant (U.C.C. 7403(1)(f)); (h) any other lawful excuse (U.C.C. 7403(1)(g)). (See 7A Anderson 3d (2001 ed.), §7-403:1 et seq.; 78 *Am.Jur.2d* (2002 ed.), *Warehouses* §122 et seq.)

However, the California version of U.C.C. 7403 places the burden of proof on the plaintiff who stores goods in one situation: In case of damage or destruction of goods by *fire*, the "person entitled under the document" (see U.C.C. 7403(4)) has the burden of establishing the warehouseman's negligence. (U.C.C. 7403(1)(b); see *Lincoln Grain Co. v. M & H Warehouse, supra*, footnote 3; C.E.B., 1 UCC Sales and Leases, §15.59.)

A warehouseman is not liable for conversion of another's goods if, in good faith and with reasonable observance of commercial standards, the warehouseman receives the goods and delivers them pursuant to the terms of the document of title. (U.C.C. 7404; see Official Comment.)

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

(2) *Uniform Commercial Code*. See 7B Anderson 3d (2009 ed.), §7-403:1 et seq.

Division 7 (U.C.C. 7101 et seq.) was repealed and reenacted in 2006 to conform its provisions to revised Article 7 of the Uniform Commercial Code, effective January 1, 2007. Documents of title issued or bailments that arose before January 1, 2007, and the rights, obligations, and interests flowing from those documents or bailments, are governed by the former division. (Stats. 2006, Chap. 254, §81.)

U.C.C. 7403(1) was renumbered U.C.C. 7403(a) and amended in 2006. U.C.C. 7403(1)(a) is now U.C.C. 7403(a)(1). U.C.C. 7403(1)(b) is now U.C.C. 7403(a)(2). U.C.C. 7403(1)(c) is now U.C.C. 7403(a)(3). U.C.C. 7403(1)(d) is now U.C.C. 7403(a)(4) and includes a lessor's stoppage of delivery. U.C.C. 7403(1)(e) is now U.C.C. 7403(a)(5). U.C.C. 7403(1)(f) is now U.C.C. 7403(a)(6). U.C.C. 7403(1)(g) is now U.C.C. 7403(a)(7).

The California exception in former U.C.C. 7403(1)(b) for goods destroyed by fire was deleted in 2006. (See Uniform Commercial Code Comment 3.) The definition of "person entitled under the document" in former U.C.C. 7403(4) was moved to U.C.C. 7102(a)(9) in 2006.

U.C.C. 7404 was amended in 2006 to reflect the amended definition of "good faith" in U.C.C. 7102(a)(6). The definition now includes "the observance of reasonable commercial standards of fair dealing," and thus U.C.C. 7404 now refers only to "good faith" without the additional wording about commercial standards. (See Uniform Commercial Code Comment.)



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2. Warehouseman.

b. Limitation of Liability.

1. Former Law.

13 Witkin Sum. Cal. Law Pers Prop § 175

[§ 175] Former Law.

Under our former statute, the warehouseman's obligation to exercise ordinary care could not be impaired by contract. However, it was held in this state, following the analogy of the railroad cases, that, by requiring the bailor to declare the value of the goods before storage, the warehouseman could limit his or her liability, even for negligence, to such declared value; or, if the bailor failed to state their value upon request, the liability could be limited to a specified sum. (See *Wilson v. Crown Transfer & Storage Co.* (1927) 201 C. 701, 714, 258 P. 596; *George v. Bekins Van & Storage Co.* (1949) 33 C.2d 834, 845, 205 P.2d 1037; *McMullin v. Lyon Fireproof Storage Co.* (1925) 74 C.A. 87, 95, 239 P. 422; *Page v. Ace Van & Storage Co.* (1948) 87 C.A.2d 294, 297, 196 P.2d 816 [four oriental rugs worth \$ 2,180, stolen due to defendant's negligence; recovery held limited to 10 cents per lb. with maximum of \$ 25 for any piece, where limitation was stated in order and inventory signed by plaintiff and in warehouse receipt delivered to her]; cf. *Scott's Valley Fruit Exchange v. Growers Refrigeration Co.* (1947) 81 C.A.2d 437, 446, 184 P.2d 183 [limitation not binding where no showing of bailor's assent]; *Shell Chemical Corp. v. Owl Transfer Co.* (1959) 173 C.A.2d Supp. 796, 802, 344 P.2d 108 [limitation provision held applicable only to physical damage to goods, not to monetary damage from failure to perform duty to properly label]; and see 78 *Am.Jur.2d* (2002 ed.), *Warehouses* §139 et seq.; 1 *Summary* (10th), *Contracts*, §677.)

The unfortunate results of the typical limitation clause were illustrated in *George v. Bekins Van & Storage Co.*, *supra*. Plaintiffs wired defendant warehouseman asking storage of "my five rooms of valuable furniture"; defendant wired assent, and the goods were shipped and received January 22. A month later, defendant sent plaintiffs an "identification card" and "Non-negotiable Warehouse Receipt and Contract." The card, signed by plaintiffs and returned, provided for acceptance of the conditions of the Warehouse Receipt; the Receipt, in clear printing on its face, called attention to the conditions on the reverse side and to the "declared value" of \$ 10 per 100 lbs.; the reverse side limited the liability to that amount. *Held*, the clause was valid and binding, and accordingly plaintiffs could only recover \$ 501.40 for a loss amounting to \$ 3,126.15.

As to the *validity* of the provision, the court followed the decisions on carriers, holding that a limitation of liability based on declared valuation, coupled with a graduated scale of charges allowing higher valuation and therefore greater liability, does not constitute an illegal exemption from liability. (33 C.2d 846; see *infra*, §183.) Also, the validity of the

limitation is not affected by the actual value, nor is it material that the *bailee has knowledge* that the actual value is greater than the stipulated value (disapproving *England v. Lyon Fireproof Storage Co.* (1928) 94 C.A. 562, 567, 271 P. 532, *supra*, §173, on this point). (33 C.2d 847, 848.)

It was further held that defendant gave *consideration* for the new contract embodied in the warehouse receipt by continuing to store the goods and by storing them at the reduced rate based on the low value. (33 C.2d 849; see 23 So. Cal. L. Rev. 122.) As to *assent*, the court held that the original bailment arising by implied contract was superseded by the new contract of the warehouse receipt, which was expressly accepted when plaintiffs signed and returned the card. (33 C.2d 848.)

The dissenting opinion pointed to the fact that the original bailment, in effect for a full month, gave the bailor full protection, and argued that an attempt by a warehouseman to limit his liability by a proposed modification *after* the bailment was created should be void for lack of consideration and was also opposed to the policy of the Warehouse Receipts Act. And the technical assent to the modifying agreement, stressed by the majority, had less significance when the circumstances were considered: The bailors, having shipped their household goods and moved elsewhere, not only were ignorant of the implications of the modifying agreement but also were in no position to reopen protracted contractual negotiations or to obtain new storage. (33 C.2d 853.)

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2. Warehouseman.

b. Limitation of Liability.

2. Under Commercial Code.

13 Witkin Sum. Cal. Law Pers Prop § 176

[§ 176] Under Commercial Code.

The Uniform Commercial Code expressly provides for limitation of liability, subject to the bailor's right to obtain increased liability by paying a higher rate. (U.C.C. 7204(2); see 7A Anderson 3d (2001 ed.), §7-204:19 et seq.; C.E.B., 1 UCC Sales and Leases §15.8; Cal. Transactions Forms, 4 Business Transactions §§28:26, 28:63; 78 *Am.Jur.2d* (2002 ed.), *Warehouses* §140; 6A *Am.Jur. P.P. Forms* (2002 ed.), *Warehouse Receipts*, Form 7:52 et seq.) U.C.C. 7204(2) states:

(1) "Damages may be limited by a term in the warehouse receipt or storage agreement limiting the amount of liability in case of loss or damage, and setting forth a specific liability per article or item, or value per unit of weight, beyond which the warehouseman shall not be liable."

(2) On written request of the bailor, at the time of signing the storage agreement or within a reasonable time after receipt of the warehouse receipt, such liability may be increased on part or all of the goods. In this event, increased rates may be charged based on the increased valuation, subject, however, to two qualifications: (a) "[N]o such increase shall be permitted contrary to a lawful limitation of liability contained in the warehouseman's tariff, if any." (b) The increased rate cannot permit recovery in excess of the actual value of the goods (California addition to Code).

(3) "No such limitation is effective with respect to the warehouseman's liability for conversion to his own use."

U.C.C. 7204(3) authorizes notice of claim provisions, and U.C.C. 7204(4) provides that the section does not impair or repeal C.C. 1630 (parking or vehicle storage; see *infra*, §186) or provisions of the Public Utilities Code or Agricultural Code or regulations issued thereunder.

SUPPLEMENT: [This section is current through the latest supplement]
See 7B Anderson 3d (2009 ed.), §7-204:22 et seq.

U.C.C. 7204(2) was renumbered U.C.C. 7204(b) and amended in 2006. The provisions quoted in the text now state:

(1) "Damages may be limited by a term in the warehouse receipt or storage agreement limiting the amount of liability in case of loss or damage beyond which the warehouse is not liable."

(2) On request of the bailor in a record, at the time of signing the storage agreement or within a reasonable time after receipt of the warehouse receipt, the warehouse's liability may be increased on part or all of the covered goods. "In this event, increased rates may be charged based on an increased valuation of the goods." The two qualifications cited in the text have been deleted.(3) The limitation on liability "is not effective with respect to the warehouse's liability for conversion to its own use."

U.C.C. 7204(3) was renumbered U.C.C. 7204(c) in 2006. U.C.C. 7204(4) was renumbered U.C.C. 7204(d) in 2006.



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III. BAILMENTS

B. Particular Bailees.

3. Carrier.

a. Common and Private Carriers.

13 Witkin Sum. Cal. Law Pers Prop § 177

[§ 177] Common and Private Carriers.

(1) *In General.* Carriers of goods are bailees. They may be either *common carriers*, undertaking generally to serve the public, and subject to the regulatory powers of the Public Utilities Commission, or *private carriers*, operating under private contracts. (C.C. 2168; see *Forsyth v. San Joaquin Light & Power Corp.* (1929) 208 C. 397, 402, 281 P. 620; *Smith v. O'Donnell* (1932) 215 C. 714, 717, 12 P.2d 933 [airline]; *People v. Duntley* (1932) 217 C. 150, 158, 17 P.2d 715; *Brignoli v. Seaboard Trans. Co.* (1947) 29 C.2d 782, 791, 178 P.2d 445; *Klein v. Baker* (1931) 112 C.A. 157, 159, 296 P. 631, *supra*, §160; *Simon v. Walt Disney World Co.* (2004) 114 C.A.4th 1162, 1171, 8 C.R.3d 459 [in class action against amusement park for price discrimination by common carrier in violation of C.C. 2170, trial judge properly ruled that park was not common carrier within meaning of C.C. 2168; in light of varied activities park offered, payment of admission did not necessarily mean that carrier-passenger relationship would be established]; *13 Am.Jur.2d* (2000 ed.), *Carriers* §1 et seq.; 5A Am.Jur. P.P. Forms (1998 ed.), *Carriers*, Form 146 et seq.)

A private carrier is not protected by statutory limitations. Its ordinary liability is that of a bailee for hire, but it may, by an unqualified agreement to deliver property, assume the liability of an insurer. (*Klein v. Baker*, *supra*, 112 C.A. 161.)

In *Brignoli*, a trucking company was licensed both as a radial highway common carrier (common carrier operating within a certain area rather than between fixed termini and over a regular route) and a highway contract carrier. *Held*, the question of the capacity in which it was acting at the time of damage to goods was one of fact, primarily for the jury. (29 C.2d 792.) (See dissent, 29 C.2d 794, arguing that the question is one of law.)

(2) *Freight Forwarder.* The typical relationships of shipper (consignor), carrier, and consignee are complicated when a *freight forwarder* enters the picture. The forwarder, for a fee paid by the shipper, assembles and consolidates small amounts of goods to make carload lots for shipment by a carrier; if the forwarder makes no other engagement, its only responsibility is to select a reliable common carrier. But if the forwarder, pursuant to the provisions of the Interstate Commerce Act, expressly assumes responsibility for the transportation of the goods from the point of shipment to their destination, it becomes a *freight forwarder with common carrier liability*. In the latter case, it is liable for loss or damage while the goods are in the hands of the carrier; and, if it pays the consignee's valid claim for such loss or damage, the freight forwarder is entitled to sue the carrier. (*Merchant Shippers Assn. v. Kellogg Express &*

Draying Co. (1946) 28 C.2d 594, 597, 170 P.2d 923.)

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

(1) *In General.* See 5A Am.Jur. P.P. Forms (2008 ed.), Carriers, §143 et seq.



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B. Particular Bailees.

3. Carrier.

b. Liability and Limitation.

1. Liability as Insurer.

aa. California Law.

13 Witkin Sum. Cal. Law Pers Prop § 178

[§ 178] California Law.

(1) *General Rule.* Except where express limitations are made by contract or statute (see *infra*, §183), the carrier's liability for the safe transportation and delivery of the goods is stated in C.C. 2194 and 2195. Under C.C. 2195, the carrier is liable for negligence; but under C.C. 2194, it is liable regardless of lack of negligence, except where the loss resulted from defect in the goods, act of public enemy, act of law, or act of God. This liability has been characterized as "particularly absolute," or that of a "limited insurer." (*Anheuser-Busch v. Starley* (1946) 28 C.2d 347, 349, 170 P.2d 448; *Brignoli v. Seaboard Trans. Co.* (1947) 29 C.2d 782, 792, 178 P.2d 445; *BBD Trans. Co. v. Buller* (1975) 49 C.A.3d 124, 128, 122 C.R. 357 [strict liability under C.C. 2194]; see 39 A.L.R.2d 325 [loss through weight deficiency]; 44 A.L.R.2d 993 [damage from improper loading]; 65 A.L.R.2d 770 [damage from defects in shipper's containers]; 68 A.L.R.2d 1350 [loss of passenger's baggage or packages]; 4 A.L.R.3d 994 [failure to refrigerate]; 7 A.L.R.3d 723 [improper packing]; 13 Am.Jur.2d (2000 ed.), *Carriers* §286 et seq.; 14 Am.Jur.2d (2000 ed.), *Carriers* §534 et seq.; 4B Am.Jur. Legal Forms 2d (1997 ed.), §53:3 et seq.; 5A Am.Jur. P.P. Forms (1998 ed.), *Carriers*, Form 146 et seq.; 6A Am.Jur. P.P. Forms (2002 ed.), *Commercial Code*, Form 7:129 et seq.; on shipper's misdescription of goods as affecting carrier's liability, see 1 A.L.R.3d 736.)

The Uniform Commercial Code provides that a carrier who issues a bill of lading, whether negotiable or nonnegotiable, must exercise that "degree of care in relation to the goods which a reasonably careful man would exercise under like circumstances." (U.C.C. 7309(1); see 7A Anderson 3d (2001 ed.), §7-309:1 et seq.) The provisions of the Code do not repeal or change any law or rule of law that imposes liability on a common carrier for damages not caused by its negligence. (U.C.C. 7309(1).) Thus, the Civil Code rules stated above should remain in effect. (See also, on duties and liability of carriers, C.C. 2115, 2118, 2119; U.C.C. 7302, 7303, 7403, 7404; *supra*, §174.)

(2) *Property Open to Inspection.* Although it is said to be the general rule that the plaintiff has the burden of proving the good condition of property when delivered to the carrier (*Merchant Shippers Assn. v. Kellogg Express & Draying Co.* (1946) 28 C.2d 594, 599, 170 P.2d 923), a practical exception is recognized where the property is open to inspection. In this situation, the good condition is "presumed" from the carrier's acceptance of the freight for shipment, and the burden of proving bad condition is on the carrier. (*Schraeder v. Robinson* (1947) 78 C.A.2d 328, 335, 178 P.2d

788 [truck carrier held liable for loss of racehorse that contracted pneumonia from unnecessarily long exposure in open moving van].)

(3) *Delivery to Person Not Holding Original Bill of Lading.* The surrender of a negotiable bill of lading is required in exchange for the goods covered and shipped by that bill of lading. Delivery to a person who is not the holder of the original bill of lading, without the holder's authorization, constitutes a conversion of the goods and a breach of contract. Although a carrier may choose to follow a shipper's instruction to deliver goods covered by a negotiable bill of lading without requiring surrender of the original bill, the carrier does so at its own peril because the shipper may have negotiated the bill before giving that instruction. If the carrier delivers to a party not entitled to possession of the goods, the carrier is liable to the holder of the original bill of lading. (*BII Finance Co. v. U-States Forwarding Services Corp.* (2002) 95 C.A.4th 111, 118, 115 C.R.2d 312 [carrier, who complied with seller's instructions to deliver goods to buyer without requiring surrender of negotiable bills of lading, was liable to holder of bills of lading, who held by negotiation from seller].)

West's Key Number Digest, Carriers k.107 et seq.

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

(1) *General Rule.* See 5A Am.Jur. P.P. Forms (2008 ed.), Carriers, §144 et seq. *Degree of care:* U.C.C. 7309(1) was renumbered U.C.C. 7309(a) and amended in 2006. The portion quoted in the text now provides that the carrier must exercise "the degree of care in relation to the goods which a reasonably careful person would exercise under similar circumstances."

See 7B Anderson 3d (2009 ed.), §7-309:1 et seq.



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b. Liability and Limitation.

1. Liability as Insurer.

bb. Federal Law.

13 Witkin Sum. Cal. Law Pers Prop § 179

[§ 179] Federal Law.

Carriers in *interstate commerce* are subject to federal law. (See *New York, New Haven & Hartford R. Co. v. Nothnagle* (1953) 346 U.S. 128, 73 S.Ct. 986, 988, 97 L.Ed. 1500, 1505; *Franklin v. Southern Pac. Co.* (1928) 203 C. 680, 681, 265 P. 936; *Thayer v. Pacific Elec. Ry. Co.* (1961) 55 C.2d 430, 434, 11 C.R. 560, 360 P.2d 56 [federal law governs compliance with requirements of bill of lading].)

The Carmack Amendment to the Interstate Commerce Act (49 U.S.C. §11706 and 49 U.S.C. §14706; formerly 49 U.S.C. §11707) codifies the common law rule that the carrier is liable for damage to goods, without negligence, unless it can show that the damage was due to one of the excepted causes (act of God, public enemy, act of shipper, public authority, inherent vice or nature of the goods). The shipper therefore establishes a prima facie case by showing delivery in good condition, arrival in damaged condition, and the amount of damages. The burden of proof is then on the carrier to show both freedom from negligence and damage due to an excepted cause. (*Missouri Pac. R. Co. v. Elmore & Stahl* (1964) 377 U.S. 134, 84 S.Ct. 1142, 1144, 12 L.Ed.2d 194, 197; see *Convey-All Corp. v. Pacific Intermountain Express Co.* (1981) 120 C.A.3d 116, 120, 122, 174 C.R. 443 [carrier has burden of proving defense that damage was caused by act of the shipper, even though goods were loaded by shipper]; 14 *Am.Jur.2d* (2000 ed.), *Carriers* §539 et seq.; 193 *A.L.R. Fed* 585 [Carmack Amendment's preemption of state law; cases involving food, beverage, or livestock shipments]; 194 *A.L.R. Fed* 231 [cases involving machinery shipments].)

In *Missouri Pac. R. Co.*, E shipped a carload of honeydew melons from Texas to Chicago, and they arrived in damaged condition. E sued the carrier in Texas. Under Texas practice, the jury found on special issues (1) that the melons were in good condition when shipped, (2) that the carriers performed all services without negligence, and (3) that there was no "inherent vice" (existing defect, etc., which would cause deterioration) in the melons when shipped. Thus, the jury was unable to determine any cause of the damage, but the Texas court found the carrier liable. *Held*, affirmed. An exception to the common law rule has been recognized in livestock shipments, based on the peculiar propensity of animals to injure themselves and each other: The carrier is absolved from liability on proof that it exercised reasonable care and complied with the shipper's instructions. The carrier here argued that the modern development of long-distance transportation of fruit and vegetables has evolved a similar rule. But the Court found no

support for this theory in case law or policy. The carrier can inform itself of the condition of goods at the time it receives them, and it is the only one to acquire knowledge of what happens thereafter. (84 S.Ct. 1148, 12 L.Ed.2d 199.)

A strong dissent argued that the shipper of perishable products has superior knowledge, and that the carrier overcomes the prima facie case when it demonstrates performance of the protective services ordered and all other duties without negligence. Any other rule means that the shipper nullifies tariff provisions by paying for one service but demanding more. "What we do today allows a shipper, under the guise of buying transportation service, to sell a car of produce to the railroad." (84 S.Ct. 1151, 12 L.Ed.2d 201.)

The Carmack Amendment makes a carrier liable "for the *actual loss* or injury to the property" caused by the carrier. (49 U.S.C. §11706(a) and 49 U.S.C. §14706(a)(1); see *Wilson Furniture v. Southern Pac. Trans. Co.* (1972) 27 C.A.3d Supp. 1, 3, 103 C.R. 422 [damages awarded on basis of wholesale price where plaintiff-consignee replaced damaged property at wholesale market]; *Carlson Industries v. E.L. Murphy Trucking Co.* (1985) 168 C.A.3d 691, 694, 214 C.R. 331 [shipper was entitled to recover as part of its "actual loss" the cost of inspecting crane to determine extent of damage].)

West's Key Number Digest, Carriers k.107 et seq.

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

See 199 A.L.R. Fed 169 [Carmack Amendment's preemption of state law; cases involving shipments other than machinery, livestock, food, or beverages].



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2. Passenger Using Free Pass.

13 Witkin Sum. Cal. Law Pers Prop § 180

[§ 180] Passenger Using Free Pass.

In California, under C.C. 2175, a common carrier cannot exempt itself from liability for *gross* negligence, fraud, or wilful wrong, even as to one who gives no consideration for the transportation. (*Walther v. Southern Pac. Co.* (1911) 159 C. 769, 773, 116 P. 51 [deceased was an employee of defendant, and decision could have been placed on that ground; see *Rest.2d, Contracts §195*]; *Pratt v. Western Pac. R. Co.* (1963) 213 C.A.2d 573, 574, 29 C.R. 108; *infra*, §183.)

Under the federal law, applicable to interstate commerce, a carrier may exempt itself from liability for any kind of negligence, though not for wanton or reckless misconduct. (*Kansas City Southern Ry. Co. v. Van Zant* (1923) 260 U.S. 459, 43 S.Ct. 176, 177, 67 L.Ed. 348, 349; *Francis v. Southern Pac. Co.* (1948) 333 U.S. 445, 68 S.Ct. 611, 613, 92 L.Ed. 798, 804; *Donnelly v. Southern Pac. Co.* (1941) 18 C.2d 863, 868, 118 P.2d 465; see 18 Cal. L. Rev. 440; 30 Cal. L. Rev. 568; *infra*, §181.)

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



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aa. In General.

13 Witkin Sum. Cal. Law Pers Prop § 181

[§ 181] In General.

Under the Carmack Amendment to the Interstate Commerce Act (49 U.S.C. §11706 [rail carriers] and 49 U.S.C. §14706 [motor carriers and freight forwarders]; see *supra*, §179), a carrier may limit its liability to a value established by declaration of the shipper or by an agreement between the shipper and the carrier. (49 U.S.C. §§11706(c)(3), 14706(c)(1).) (See *Union Pac. R. Co. v. Burke* (1921) 255 U.S. 317, 41 S.Ct. 283, 284, 65 L.Ed. 656, 659; *New York, New Haven & Hartford R. Co. v. Nothnagle* (1953) 346 U.S. 128, 73 S.Ct. 986, 990, 97 L.Ed. 1500, 1507 [suitcase taken by redcap employee; no baggage check given, no knowledge or notice of limited liability]; *Franklin v. Southern Pac. Co.* (1928) 203 C. 680, 687, 265 P. 936; *Lovinger v. Greyhound Lines* (1976) 62 C.A.3d 240, 242, 132 C.R. 914 [\$50 limitation for baggage loss was valid]; 54 Harv. L. Rev. 663; 14 Am.Jur.2d (2000 ed.), *Carriers* §§539 et seq., 553, 554; cf. *Boyd v. Grand Trunk Western R. Co.* (1949) 338 U.S. 263, 70 S.Ct. 26, 27, 94 L.Ed. 55, 57 [contract by injured employee not to sue railroad under F.E.L.A. except at residence or place of injury; held void under Act]; *United States v. Atlantic Mut. Ins. Co.* (1952) 343 U.S. 236, 72 S.Ct. 666, 669, 96 L.Ed. 907, 914 ["Both-to-Blame" collision clause in ocean bill of lading held void]; *Bisso v. Inland Waterways Corp.* (1955) 349 U.S. 85, 75 S.Ct. 629, 634, 99 L.Ed. 911, 919 [exemption provision in contract of towage by tug held invalid]; 44 Cal. L. Rev. 120; 69 Harv. L. Rev. 173; 27 So. Cal. L. Rev. 221; on liability for actual loss in commercial shipment, see *Vacco Industries v. Navajo Freight Lines* (1976) 63 C.A.3d 262, 273, 133 C.R. 628; on validity and construction of stipulation exempting carrier for loss or damage to property at station without agent, see 16 A.L.R.3d 1111.)

The early cases tended to conclusively presume knowledge by the shipper of limitations in bills of lading, baggage tickets, shipping documents, and tariff schedules. The current view is that the question of notice of the limitation is one of fact. Thus, in *Bauer v. Jackson* (1971) 15 C.A.3d 358, 93 C.R. 43, plaintiffs shipped six racehorses from California to Arizona by defendant's express company. The truck was involved in a collision and the horses were injured. In plaintiff's action, defendant relied on the shipping contract limiting liability to \$200 per horse as the declared value, and reciting that plaintiff had been advised of the choice of rates and agreed to that value. The testimony showed that plaintiff did not see the document until after the animals were loaded, that he was not asked for a valuation, and that defendant's agent followed his usual practice of inserting a \$200 value for horses unless the shipper requested a higher

valuation. The trial judge decided as a matter of law that plaintiff was bound by the valuation. *Held*, reversed; it was a jury question. (15 C.A.3d 370.) (See *Dictor v. David & Simon* (2003) 106 C.A.4th 238, 245, 130 C.R.2d 588 [Carmack Amendment limited carrier's liability for loss of computer equipment that was worth over \$ 250,000 to value declared in bill of lading (\$ 7,106); shipper, who was also in carrier business, prepared bill of lading, was familiar with liability limitation, and may have declared low value in order to discourage theft].)

West's Key Number Digest, Carriers k.147 et seq.

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

See *Power Standards Lab v. Federal Express Corp.* (2005) 127 C.A.4th 1039, 1049, 1050, 26 C.R.3d 202 [federal common law doctrine of "declared value" or "released value" would limit shipper's recovery for electronic equipment that was damaged while in care of carrier subject to federal regulatory jurisdiction; recovery would be limited to amount in contract between shipper and carrier].



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13 Witkin Sum. Cal. Law Pers Prop § 182

[§ 182] Sea and Air Carriers.

(1) *Sea Carriers.* Sea carriers are regulated by the Harter Act (*46 U.S.C. Appx.*, §190 et seq.) and the Carriage of Goods by Sea Act (*46 U.S.C. Appx.*, §1300 et seq.; see *15 Pacific L. J.* 737). Both statutes grant the carrier certain exemptions from liability similar to those granted carriers generally. (See *46 U.S.C. Appx.*, §§192, 1304; *70 Am.Jur.2d* (1987 ed.), *Shipping* §690 et seq.; *40 Santa Clara L. Rev.* 473 [role of seaworthiness in hull and cargo policies].)

(a) The Harter Act prohibits any stipulation relieving the vessel, its owner, or the owner's agents from liability for negligence in the loading, storage, care, or delivery of cargo. (*46 U.S.C. Appx.*, §190.)

(b) The Carriage of Goods by Sea Act prohibits any provision in a contract relieving the carrier or ship from liability for loss or damage to cargo due to negligence, fault, or failure in the duties and obligations imposed by the Act. (*46 U.S.C. Appx.*, §1303(8).) However, neither the carrier nor the ship is liable for any loss in connection with the carriage of goods in an amount in excess of \$ 500 per package (or freight unit) unless the nature and value of the goods have been declared and inserted in the bill of lading. (*46 U.S.C. Appx.*, §1304(5); see *Varian Associates v. Compagnie Generale Transatlantique* (1978) 85 C.A.3d 369, 376, 149 C.R. 534; 33 Southwestern U. L. Rev. 139 [arguing for imposition of strict liability on shipper when inherently dangerous goods cause injury unless carrier has assumed risk].)

The enforceability of a liability limitation provision under *46 U.S.C. Appx.*, §1304(5) depends on whether the shipper was given a fair opportunity to secure greater protection than that set forth in the bill of lading. The bill of lading language is merely the first step in determining whether the shipper received that opportunity. (*Continental Ins. Co. v. Columbus Line* (2003) 107 C.A.4th 1190, 1199, 133 C.R.2d 199 [shipper's insurer was not entitled to summary adjudication of carrier's defense based on liability limitation provision in bill of lading; insurer presented no evidence as to whether fair opportunity to negotiate for greater protection had been extended to shipper].)

Special arrangements may be made (1) for specified goods (*46 U.S.C. Appx.*, §1306), or (2) limiting liability for damages occurring prior or subsequent to actual custody by the carrier. (*46 U.S.C. Appx.*, §1307; see *168 A.L.R. Fed* 631 [effect of deviation from terms of carriage contract on Act's liability limitation].)

(2) *International Air Carriers*. The liability of international carriers is governed by the provisions of the Warsaw Convention. (See *Trans World Airlines v. Franklin Mint Corp.* (1984) 466 U.S. 243, 104 S.Ct. 1776, 1780, 80 L.Ed.2d 273, 277; *HIH Marine Ins. Services v. Gateway Freight Services* (2002) 96 C.A.4th 486, 490, 116 C.R.2d 893 [Warsaw Convention's limitation on liability did not apply to cargo handler whose warehouse was located outside of airport's boundaries; nevertheless, cargo handler was acting as air carrier's agent "in service incidental to air carriage" and thus, under federal common law and terms of air carrier's waybill, handler's liability for loss of goods stolen from its warehouse was limited to \$ 20 per kilogram; shipper had declined opportunity to avoid limitation by choosing higher freight rate]; 8 *Am.Jur.2d* (1997 ed.), *Aviation* §82; 196 *A.L.R. Fed* 221 [recovery of emotional and mental injury damages under Warsaw Convention]; 29 *San Diego L. Rev.* 335 [argument that punitive damages for air carriers' wilful misconduct should be allowed under Warsaw Convention].)

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

(1) *Sea Carriers*. The Harter Act was codified in 46 U.S.C., §30701 et seq. in 2006, and the Carriage of Goods by Sea Act was transferred to 46 U.S.C., §30701 et seq. A "carrier" is defined as "the owner, manager, charterer, agent, or master of a vessel." (46 U.S.C., §30701.) The codified Act applies to a carrier engaged in the carriage of goods to or from any port in the United States. (46 U.S.C., §30702.) A carrier may not insert in a bill of lading or shipping document a provision that relieves the carrier from liability "for loss or damage arising from negligence or fault in loading, stowage, custody, care, or proper delivery." A provision to that effect is void. (46 U.S.C., §30704.) The carrier must exercise due diligence to make the vessel seaworthy and to properly staff, equip, and supply the vessel. A provision lessening or avoiding the carrier's obligation to do so is void. (46 U.S.C., §30705.) The codified Act does not contain a provision equivalent to former 46 U.S.C. Appx., §1304(5).

See *Norfolk Southern Ry. Co. v. Kirby* (2004) 543 U.S. 14, 125 S.Ct. 385, 396, 160 L.Ed.2d 283, 298 [liability limitation in former 46 U.S.C. Appx., §1304(5) extended to railroad that carried goods on final leg of journey from Australian manufacturer to United States destination; bill of lading between manufacturer and ocean carrier contained "Himalaya" clause that extended liability limitation to ocean carrier's agents and subcontractors, including railroad]; 200 *A.L.R. Fed* 249 [construction and application of Harter Act]. (2) *International Air Carriers*. See 4 *A.L.R. Fed* 2d 1 [what constitutes accident under Warsaw Convention]; 8 *Am.Jur.2d* (2009 ed.), *Aviation* §81.



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aa. Contractual and Statutory Limitations.

13 Witkin Sum. Cal. Law Pers Prop § 183

[§ 183] Contractual and Statutory Limitations.

(1) *Contractual Limitation.* C.C. 2174 states that "[t]he obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract." C.C. 2175 expressly prohibits contractual exoneration of a common carrier from liability for *gross negligence, fraud, or wilful wrong*. And C.C. 2176 provides that "[a] passenger, consignor, or consignee, by accepting a ticket, bill of lading, or written contract for carriage, with a *knowledge* of its terms, assents to the ... limitation stated therein upon the amount of the carrier's liability in case property carried in packages, trunks, or boxes, is lost or injured, when the value of such property is not named."

These statutes have been interpreted in the same manner as the federal law (see *supra*, §181), i.e., to permit "reasonable agreed valuation contracts," entered into by the shipper with knowledge of the terms and with an opportunity to obtain a higher valuation by paying a higher rate. (*Muelder v. Western Greyhound Lines* (1970) 8 C.A.3d 319, 330, 87 C.R. 297, *infra*, §184; see *Morville v. United Parcel Service* (1983) 144 C.A.3d 552, 554, 192 C.R. 779 [citing the text]; *Platzer v. Mammoth Mountain Ski Area* (2002) 104 C.A.4th 1253, 1256, 128 C.R.2d 885 [ski resort could enforce release of negligence liability signed by mother of person injured in chairlift accident; nothing in C.C. 2174 or 2175 prevents common carrier from negotiating release from liability for ordinary negligence]; *Rest.2d, Contracts* §195; 14 *Am.Jur.2d* (2000 ed.), *Carriers* §534 et seq.; Cal. Transactions Forms, 4 Business Transactions §28:18; 39 *A.L.R.2d* 325, 348 [limitation of claim for freight weight deficiency]; 67 *A.L.R.2d* 1028 [conclusiveness of receipt clauses in bill of lading]; 16 *A.L.R.3d* 1111 [stipulation exempting carrier from liability for loss or damage at nonagency station]; as to whether limitation by air carrier inures to benefit of subsequent freight forwarder, see *Globe & Rutgers Fire Ins. Co. v. Airborne Flower & Freight Traffic* (1957) 49 C.2d 38, 41, 314 P.2d 741; 46 *Cal. L. Rev.* 116; 5 *U.C.L.A. L. Rev.* 678.)

U.C.C. 7309(2), restating the Carmack Amendment doctrine (see *supra*, §181), authorizes limitation of liability of a carrier under a *bill of lading* as follows: "Damages may be limited by a provision that the carrier's liability shall not exceed a value stated in the document if the carrier's rates are dependent upon value and the consignor by the carrier's tariff is afforded an opportunity to declare a higher value or a value as lawfully provided in the tariff, or where no tariff is filed he is otherwise advised of such opportunity." But a carrier cannot limit its liability for a *conversion* of the goods

to its own use. (U.C.C. 7309(2); see 7A Anderson 3d (2001 ed.), §7-309:7 et seq.)

(2) *Statutory Limitation.* A common carrier, "by steam or electric railroad," that accepts baggage in connection with passenger transportation, is not liable for more than \$ 100 for each trunk and contents, \$ 50 for each valise and contents, or \$ 10 for each box, bundle or package and contents, unless it consents in writing to assume a greater liability. (C.C. 2178.)

Similarly, a common carrier "operating over the public highways" is not liable for more than \$ 500 for each trunk and contents or \$ 250 for each valise, box, etc., and contents unless a higher valuation is declared and assented to. (C.C. 2205.)

West's Key Number Digest, Carriers k.147 et seq.

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

(1) *Contractual Limitation.* See *Booth v. Santa Barbara Biplane Tours, LLC* (2008) 158 C.A.4th 1173, 1176, 70 C.R.3d 660 [release signed by passengers of aerial sightseeing tour company was special contract under C.C. 2174 and barred passengers' action alleging simple negligence]. *Carmack Amendment doctrine:* U.C.C. 7309(2) was renumbered U.C.C. 7309(b), with minor amendment, in 2006. The portion quoted in the text now provides: "Damages may be limited by a term in the bill of lading or in a transportation agreement that the carrier's liability may not exceed a value stated in the bill or transportation agreement if the carrier's rates are dependent upon value and the consignor is afforded an opportunity to declare a higher value and the consignor is advised of the opportunity."

See 7B Anderson 3d (2009 ed.), §7-309:8 et seq.



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4. Limitation: California Law.

bb. When Limitation Is Unenforceable.

13 Witkin Sum. Cal. Law Pers Prop § 184

[§ 184] When Limitation Is Unenforceable.

In *Muelder v. Western Greyhound Lines* (1970) 8 C.A.3d 319, 87 C.R. 297, plaintiff professor, after attending a school district meeting as consultant, left his briefcase containing valuable papers in the superintendent's office in Indio. By arrangement with plaintiff, the superintendent delivered it to defendant's depot for shipment to plaintiff at San Bernardino. The briefcase was not found at the latter terminal. In plaintiff's action, the trial judge found that the loss was due to gross negligence (allowing baggage and packages to be left unattended for long periods in places readily accessible to the public). The defenses were the \$ 50 limit in the tariff, and the statutory limit in C.C. 2200 and 2205. The superintendent testified that he had no knowledge of the tariff provisions, saw no signs at the terminal informing the public of the provisions, and did not read or sign the shipper's receipt containing the provisions; and that when he deposited the package, defendant's agent made no inquiry concerning value. The trial judge gave plaintiff judgment for \$ 7,637.70, the value of the briefcase and contents. *Held*, affirmed.

(a) *Hischmoeller v. National Ice & Cold Storage Co. of Calif.* (1956) 46 C.2d 318, 294 P.2d 433, involving a warehouseman's tariff schedule, is not controlling: (1) The plaintiff in that case was an experienced businessman with equal bargaining power; under recent decisions involving adhesion contracts, exclusionary clauses are ineffective in the absence of clear notification. (8 C.A.3d 332.) (2) A warehouseman does not have the insurer's liability of a carrier. (8 C.A.3d 334.)

(b) Where the plaintiff is, as here, a member of the general public, with unequal bargaining power, he should not be bound by a "released value" limitation in a tariff regulation or receipt, "at least where loss occurs through the carrier's gross negligence," unless he contracted with actual or constructive notice of the limitation and of the opportunity to purchase higher liability. (8 C.A.3d 336.)

(c) Here, the trial judge impliedly found absence of actual or constructive notice: (1) Although defendant's witness testified that there was a 10 by 16 sign posted at the express window, the superintendent saw none; and (2) acceptance of the receipt did not constitute constructive notice as a matter of law. (8 C.A.3d 337.) (See *Van Steinburg v. Pacific Southwest Airlines* (1980) 102 C.A.3d 842, 844, 160 C.R. 612 [following *Hischmoeller* and distinguishing *Muelder*;

plaintiff was experienced businessman well aware of tariff and availability of additional protection].)

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B. Particular Bailees.

4. Vehicle Keeper or Repairer.

a. Liability: In General.

13 Witkin Sum. Cal. Law Pers Prop § 185

[§ 185] Liability: In General.

(1) *Duty of Care.* A garagekeeper, parking lot operator, or vehicle repairer to whom a car or other vehicle is delivered has the usual duty of care and liability of a bailee for hire. (See *Homan v. Burkhart* (1930) 108 C.A. 363, 366, 291 P. 624; *Beetson v. Hollywood Athletic Club* (1930) 109 C.A. 715, 718, 293 P. 821; *Downey v. Martin Aircraft Service* (1950) 96 C.A.2d 94, 97, 214 P.2d 581; 40 *Santa Clara L. Rev.* 27 [review of cases involving liability of parking lot operators]; 16 *A.L.R.2d* 799 [liability of vehicle repairer or filling station for damage to vehicle by fire]; 27 *A.L.R.2d* 796 [liability of vehicle bailee for hire for loss of or damage to contents]; 41 *A.L.R.3d* 1320 [liability of independent servicer or repairer of aircraft]; 44 *A.L.R.3d* 1332 [liability of marina operator for injury to or loss of pleasure boat left for storage or repair]; 78 *A.L.R.3d* 1057 [liability of owner of parking lot or garage for loss of or damage to contents of parked vehicle]; 13 *A.L.R.4th* 362 [liability for loss of automobile left at parking lot or garage]; 13 *A.L.R.4th* 442 [liability for damage to automobile left in parking lot or garage]; 38 *Am.Jur.2d* (1999 ed.), *Garages and Filling and Parking Stations* §20 et seq.; Cal. Civil Practice, 3 Business Litigation, §37:23; 12B *Am.Jur.* P.P. Forms (1999 ed.), *Garages and Filling and Parking Stations*, Form 10 et seq.; on measure and elements of damages for failure to properly perform repair or service on motor vehicle, see 1 *A.L.R.4th* 347; on liability for delay in repairing motor vehicle, see 44 *A.L.R.4th* 1174; for a proposal that repairers be subject to strict liability for physical harm to a user or customer, see 8 *Pacific L. J.* 865.)

(2) *Burden of Proof.* Following the analogy of warehouseman cases under the former Warehouse Receipts Act (*supra*, §174), it has been held that the burden of proof is on the bailee to show freedom from fault. Thus, in *Downey v. Martin Aircraft Service*, *supra*, plaintiffs' airplanes, stored with defendant, were destroyed in the hangar by a fire of unknown origin. Both sides rested after the preliminary facts were produced, and a verdict was directed for defendant. *Held*, reversed. The proper rule is "that when a bailee who is under the duty of exercising ordinary care is unable to redeliver the subject of the bailment, it is not enough for him to show that the property was lost, stolen or destroyed, but that if he relies upon such fact to excuse his failure, he must go further and show that the loss occurred without negligence on his part. As heretofore stated, a contrary rule would place upon the plaintiff, in many cases, an impossible burden. It is just and fair that one who undertakes for reward to care for a chattel should have the burden of explaining its loss or destruction while in his custody and of negating an inference of negligence on his part arising from such loss or destruction." (96 C.A.2d 99.)

The effect of this rule is to create a presumption or inference of negligence of the defendant bailee, equivalent to the general presumption or inference of *res ipsa loquitur*. (See *Redfoot v. J.T. Jenkins Co.* (1955) 138 C.A.2d 108, 114, 291 P.2d 134; and see generally 43 A.L.R.2d 403, 412; 44 A.L.R.3d 862, 869; 38 Am.Jur.2d (1999 ed.), *Garages and Filling and Parking Stations* §59 et seq.)

Where the bailed goods are damaged or destroyed by *fire*, the Uniform Commercial Code rule is now contra: the burden of proof is on the bailor to establish the bailee's negligence. (U.C.C. 7403(1)(b); see *supra*, §174.)

West's Key Number Digest, Automobiles k.369 et seq.

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

(2) *Burden of Proof. Goods destroyed by fire:* The rule in former U.C.C. 7403(1)(b) for goods destroyed by fire was deleted in 2006. (See Supp., *supra*, §174.)



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4. Vehicle Keeper or Repairer.

b. Invalid Disclaimer of Liability.

13 Witkin Sum. Cal. Law Pers Prop § 186

[§ 186] Invalid Disclaimer of Liability.

Garage and parking lot keepers frequently seek to limit liability by contract (e.g., claim check, receipt, repair order). In *U Drive & Tour v. System Auto Parks* (1937) 28 C.A.2d Supp. 782, 787, 71 P.2d 354, it was held that such a limitation is valid where the necessary mutual assent is established. (See C.C. 1630, imposing strict notice requirements on the bailee; 1 *Summary* (10th), *Contracts*, §123.)

The *U Drive* case was disapproved in *Gardner v. Downtown Porsche Audi* (1986) 180 C.A.3d 713, 721, 225 C.R. 757, "at least to the extent it is interpreted to allow garages to exempt themselves from liability for negligent care of the vehicles entrusted to them." (For a full discussion of the *Gardner* holding that the automobile repair garage contract affects the public interest and that the disclaimer of liability is consequently invalid, see 1 *Summary* (10th), *Contracts*, §663.)

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5. Hirer of Personal Property.

a. Applicable Law.

13 Witkin Sum. Cal. Law Pers Prop § 187

[§ 187] Applicable Law.

California Uniform Commercial Code, Division 10, enacted in 1988 (see *infra*, §196), covers most personal property leases entered into on January 1, 1990, or later. Most leases entered into before that date are governed by prior law (*infra*, §188), and motor vehicle leases are governed by the Vehicle Leasing Act (C.C. 2985.7 et seq.; *infra*, §193 et seq.). (See C.E.B., 2 UCC Sales and Leases, §19.2 et seq.)

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III. BAILMENTS

B. Particular Bailees.

5. Hirer of Personal Property.

b. Duties and Liabilities of Lessor (Bailor).

1. In General.

13 Witkin Sum. Cal. Law Pers Prop § 188

[§ 188] In General.

(1) *Other Bailments Distinguished.* Hiring differs practically from the other bailments just considered in that the important duties and liabilities are imposed on the *bailor*, who is in a position analogous to the *lessor* of real property. The lessor (bailor) of personal property must deliver it to the lessee (hirer or bailee); secure the lessee's quiet enjoyment of it against all lawful complaints; put it in a condition fit for the purpose of leasing; and repair all deteriorations not due to the fault of the lessee or the natural result of use. (C.C. 1955.) If the lessor fails to fulfill these obligations, the lessee may, after notice, make reasonable expenditures to remedy default and recover them from the lessor. (C.C. 1957.) But the lessee is liable for injury to the property resulting from his or her own negligence. (C.C. 1929; *Ambassador Airways v. Frank* (1932) 124 C.A. 56, 60, 12 P.2d 127; see BAJI (9th ed.), No. 9.25; 8A Am.Jur.2d (1997 ed.), *Bailments* §80 et seq.; 3A Am.Jur. Legal Forms 2d (1996 ed.), §36:11 et seq.; 4 Am.Jur. P.P. Forms (1995 ed.), *Bailments*, Form 26 et seq.)

Liability of the lessor for personal injuries may be based on theories of negligence (see *infra*, §189), breach of warranty (see *infra*, §190), or strict tort liability (see *infra*, §190).

When the term of the hiring expires, the lessee must return the property to the lessor at the place contemplated at the time of leasing, or, if no particular place was contemplated, to the place at which it was located at the time of leasing. (C.C. 1958.)

(2) *Duty To Inspect.* If the bailment is gratuitous, the bailor has no duty to inspect and is liable only if he or she has knowledge of the defects; if it is for hire, the bailor has a duty to inspect, i.e., to exercise reasonable care to ascertain that the chattel is suitable, irrespective of whether liability is expressed in terms of negligence or implied warranty. (*Tierstein v. Licht* (1959) 174 C.A.2d 835, 841, 345 P.2d 341.)

In *Tierstein v. Licht*, *supra*, defendant bailor lent a secondhand horse trailer to defendant bailee. Plaintiff, a veterinarian called by the bailee to treat his horse, was asked to assist in loading another horse on the trailer, and was injured by the breaking of a tie loop negligently welded and deteriorated. *Held*, nonsuit reversed. Although the bailor lent the trailer, there was evidence that he wanted to sell it and that the bailee was receptive to the idea. Hence, the jury

could have found that the bailment was for the purpose of promoting a sale, i.e., it was a hiring "for reward" (C.C. 1925). (174 C.A.2d 842.)

(3) *Liability for Expenses.* A *lessee* of personal property must bear all ordinary expenses concerning the property as might naturally be foreseen relating to it during its use; all other expenses must be borne by the *lessor*. (C.C. 1956.)

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

(1) *Other Bailments Distinguished.* See 8A Am.Jur.2d (2009 ed.), *Bailments* §77 et seq.



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2. Liability for Negligence.

13 Witkin Sum. Cal. Law Pers Prop § 189

[§ 189] Liability for Negligence.

The lessor of a dangerous chattel, like any other supplier, is liable to the lessee (hirer or bailee) for injuries resulting from his or her negligence. (See *McNeal v. Greenberg* (1953) 40 C.2d 740, 742, 255 P.2d 810 [tractor with defective brakes]; *Monroe v. East Bay Rental Service* (1952) 111 C.A.2d 574, 578, 245 P.2d 9 [defendants rented small gasoline-driven plow to plaintiff without instruction or warning of dangers in use]; on liability of bailor who negligently entrusts a chattel to a bailee who is injured through the bailee's own negligence or incompetence, see 12 A.L.R.4th 1062; *Rest.2d, Torts §390*; on liability to third persons, see 6 *Summary* (10th), *Torts*, §1168 et seq.)

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b. Duties and Liabilities of Lessor (Bailor).

3. Warranty and Strict Liability.

13 Witkin Sum. Cal. Law Pers Prop § 190

[§ 190] Warranty and Strict Liability.

(1) *Liability on Warranty.* The lessor of a chattel impliedly warrants that the property is fit for its use, and the warranty is breached by failure to exercise reasonable care to ascertain that it is safe. Thus, in *Kersten v. Young* (1942) 52 C.A.2d 1, 6, 125 P.2d 501, it was held that, in a contract of hiring of a horse for riding purposes, there is an implied warranty that the stablekeeper used reasonable care to ascertain its habits, and a keeper who should have discovered the animal's dangerous propensities, but failed to, is liable for any resulting injuries. (See also *McNeal v. Greenberg* (1953) 40 C.2d 740, 742, 255 P.2d 810; *Sproul v. Cuddy* (1955) 131 C.A.2d 85, 93, 280 P.2d 158; on liability of lessor of furnished apartment house where furniture or appliances are defective, see 12 *Summary* (10th), *Real Property*, §652.)

In *Holmes Packaging Machinery Corp. v. Bingham* (1967) 252 C.A.2d 862, 60 C.R. 769, D Co. had a process for converting blackwall automobile tires into whitewall tires, using a specially equipped commercial trailer. Defendant B, relying on demonstrations and representations of D Co.'s representative, bought two franchises. Then D Co.'s representative induced plaintiff to buy two trailers and lease them to B. Plaintiff had never dealt with either D Co. or B before. The lease contained a disclaimer clause, providing that, unless the lessee (B) inspected and notified the lessor (plaintiff) of defects within 48 hours, they were waived; also that the lessee was satisfied that the equipment was suitable for his purposes and that no representations had been made by the lessor. The equipment proved defective. B served notice of rescission, and plaintiff lessor sued to recover rent. *Held*, judgment for defendant B reversed; he was not entitled to rescind.

(a) *Warranties of bailor.* C.C. 1955 provides that the lessor must put property in fit condition. This is a declaration of the obligation of a bailor of personal property in terms of the implied warranty of fitness for the use intended. (252 C.A.2d 868.) But the sole remedy for breach of this warranty is under C.C. 1957: The lessee after notice may expend the amount necessary to make good the defect, and recover from the lessor. (252 C.A.2d 869.) Because B did not invoke this remedy, he could not avail himself of the implied warranty of C.C. 1955. (252 C.A.2d 870.)

(b) *Warranties of seller.* Sales warranties (U.C.C. 2314, 2315, 2316) furnish guidelines for implying warranties by analogy in nonsale transactions such as construction contracts (4 *Summary* (10th), *Sales*, §53). The same should be true of bailments. (252 C.A.2d 871, citing considerable authority from other jurisdictions and 68 A.L.R.2d 850, 854.) (See

also 48 A.L.R.3d 668 [application of U.C.C. warranty provisions to bailments].)

On the facts, however, the sales warranties furnished no basis for rescission:

First, the implied warranty of fitness (4 *Summary* (10th), *Sales*, §72) did not apply because B did not rely on plaintiff's skill and judgment; he relied on his negotiations with D Co.'s representative. (252 C.A.2d 873.)

Second, the implied warranty of merchantable quality (4 *Summary* (10th), *Sales*, §71) did not apply because there was no showing that plaintiff dealt in goods of that kind. (252 C.A.2d 874.)

Third, even if implied warranties were thought to be applicable, they were nevertheless effectively disclaimed by plaintiff in the agreement. (252 C.A.2d 876.)

(2) *Strict Tort Liability of Commercial Lessor*. C.C. 1955, *supra*, is not an exclusive remedy for a lessee of commercial property. The modern doctrine of strict products liability applies to a commercial lessor who supplies a defective product. (See *Price v. Shell Oil Co.* (1970) 2 C.3d 245, 252, 85 C.R. 178, 466 P.2d 722; *Fakhoury v. Magner* (1972) 25 C.A.3d 58, 63, 101 C.R. 473; 9 Cal. Western L. Rev. 547 [*Fakhoury*]; 6 *Summary* (10th), *Torts*, §1506.)

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c. Liability of Lessee (Hirer or Bailee).

13 Witkin Sum. Cal. Law Pers Prop § 191

[§ 191] Liability of Lessee (Hirer or Bailee).

Where property is leased for a particular purpose, and the lessee uses it for another purpose, the lessor may recover damages or terminate the hiring. (C.C. 1930, 1931; see *Carstensen v. Gottesburen* (1932) 215 C. 258, 260, 9 P.2d 831; 8A Am.Jur.2d (1997 ed.), *Bailments* §§128, 129.)

Insistence on form rather than substance was the basis of a doubtful decision in *Guerin v. Blair* (1949) 33 C.2d 744, 204 P.2d 884. Plaintiffs rented valuable machinery to G. The agreement prohibited subleasing without written consent, and provided that for violation of any provision the lessors might terminate on 3 days' notice. On January 15, a week after the lease was made, G subleased to defendant without consent. G paid rent to March 1. In September plaintiffs located the property in defendant's possession, demanded its return on September 6, and, the next day, filed this action for possession and damages for wrongful detention. *Held*, judgment for plaintiffs reversed, for the sublease in violation of the clause was voidable, not void, and plaintiffs were not entitled to immediate possession without compliance with the condition precedent of 3 days' notice of termination of the lease.

The court relied mainly on cases dealing with leases of real property, and the opinion does not adequately consider two points: (1) A lease of personal property that is ineffectual against the owner is an unauthorized use and renders the purported lessee liable for *conversion* (*Rest.2d, Torts* §229, Comment b; *supra*, §164); hence plaintiffs, in suing defendant (who was not in privity of contract with them), were entitled to maintain this cause of action in tort, irrespective of any language in the contract between plaintiffs and G. (2) C.C. 1931 gives the letter (lessor) authority to terminate the lease without notice where the hirer (lessee) permits an unauthorized use, which this was. The court held that the lease provision for termination in the event of any breach should be considered a *limitation on the lessor's independent statutory right under C.C. 1931*. (33 C.2d 748.) Thus, a forfeiture clause obviously intended for the *benefit* of the injured party (lessor) was interpreted as depriving him of a right that he already had by statute; and this interpretation was made, not in favor of the other party to the contract, but to aid a stranger thereto.

SUPPLEMENT: [This section is current through the latest supplement]
See 8A Am.Jur.2d (2009 ed.), *Bailments* §§123, 124.



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d. Remedies of Lessor.

13 Witkin Sum. Cal. Law Pers Prop § 192

[§ 192] Remedies of Lessor.

(1) *Application of Real Property Principles.* "Though the cases have primarily involved leases of real property, we discern no policy reason preventing the principles expressed therein from applying equally to leases of personalty." (*Puritan Leasing Co. v. August* (1976) 16 C.3d 451, 457, 128 C.R. 175, 546 P.2d 679.)

In the *Puritan* case, plaintiff made an 8-year lease of personal property, consisting of specially selected restaurant kitchen equipment, to defendant lessee. The lease provided that on the lessee's default in monthly rental payments, the lessor could either terminate the lease, or repossess and sell the property, and hold the lessee liable for the total unpaid rent and costs and expenses of repossession and resale, but crediting him with the amount received at a sale. Defendant defaulted, plaintiff repossessed and sold the equipment, and brought this action for the total rent and expenses, less the amount received. *Held*, the lease provision was valid and plaintiff was entitled to recover.

(a) The provision was not an unenforceable attempt to fix liquidated damages. (16 C.3d 456, distinguishing simple acceleration clauses; see 1 *Summary* (10th), *Contracts*, §516.)

(b) California cases have long upheld the lessor's remedy of repossession, reletting for the lessee's account, and suit for the excess of total rent reserved over amounts realized by reletting. (16 C.3d 457.) Here, as in *Yates v. Reid* (1950) 36 C.2d 383, 224 P.2d 8, and *Lawrence Barker v. Briggs* (1952) 39 C.2d 654, 248 P.2d 897 (see 12 *Summary* (10th), *Real Property*, §691), the lease contained an express provision for this remedy, with the additional option of sale of the property. (16 C.3d 459.) "Whether the theory of lessor's recovery is damages for *breach* of the lease on the one hand ... , or simply that lessor is proceeding upon the lease under a right expressly accorded him therein, on the other, the result is the same." (16 C.3d 460.)

(c) California statutes, applicable to both real and personal property, also authorize recovery calculated on the entire lease terms after termination for the lessee's default. (16 C.3d 460; see C.C. 1951.2, 12 *Summary* (10th), *Real Property*, §694; C.C. 3308, 12 *Summary* (10th), *Real Property*, §691.)

(d) Defendant lessee is not penalized and there are no policy considerations opposed to enforcement of the lease provision. The equipment was selected by the lessee and leased to him for its full, anticipated useful life. "This lease

therefore appears to have served a commercial function closely analogous to such other common financing methods as conditional sales and chattel mortgages. The latter instruments as 'security interests' covered by division 9 of the California Uniform Commercial Code, do permit repossession and resale of the security and recovery of any deficiency." (16 C.3d 461; see 4 Summary (10th), *Security Transactions in Personal Property*, §§23, 178, 180.)

(e) The traditional rule that a lessor who seeks to recover rent or damages must sue for periodic installments as they become due or wait until the end of the lease term (see 12 Summary (10th), *Real Property*, §690) does not apply to the situation here: A final sale of the property has occurred, and nothing further can be done to ascertain the precise amount of loss sustained by the lessor. "Under such circumstances no observable purpose is served by requiring the lessor to resort to periodic suits for rent. Nor should he be forced to wait another five years to sue for the entire deficiency, risking possible further deterioration not only of the equipment but in the financial condition of defendant August, as well as that of his guarantors in the interim." (16 C.3d 463.) (See 12 U.S.F. L. Rev. 257; see also *Newco Leasing v. Hull* (1985) 167 C.A.3d Supp. 1, 3, 213 C.R. 202 [under C.C. 3308, 12 Summary (10th), *Real Property*, §691, amount awarded for worth of unpaid future rents due under automobile leases must be discounted back to date leases were terminated].)

(2) *Recovery of Deficiency in Absence of Lease Provision*. In *Industrial Leasing Corp. v. Lawson* (1983) 149 C.A.3d 1098, 197 C.R. 291, plaintiff leased office furnishings to a corporation, and defendant, an officer of the corporation, executed a guarantee making him personally liable on the lease. On default of the corporation, plaintiff regained possession of the furnishings and sold them in three private sales, but did not notify defendant of the sales, and notified the corporation in connection with the first two sales only. Plaintiff then sued defendant for breach of the lease and obtained a deficiency judgment. *Held*, affirmed.

(a) *Puritan Leasing Co. v. August*, *supra*, permits recovery of a deficiency "under either an express contractual provision or under the traditional principles governing breach of a lease." (149 C.A.3d 1102.) Thus, it was unnecessary to determine whether this lease agreement expressly provided for the remedy of a deficiency judgment following repossession and sale. (149 C.A.3d 1102.)

(b) The standard of commercially reasonable conduct in the sale of repossessed equipment required by divisions 2 and 9 of the California Uniform Commercial Code does not apply to a lease of personal property, which is neither a security interest nor a contingent sale. Accordingly, contract law principles of mitigation of damages apply. (149 C.A.3d 1102, 1103.)

(c) The private sales conducted by plaintiff constituted a reasonable effort to mitigate damages. Plaintiff placed advertisements in local publications and had written several letters of inquiry to prospective purchasers. In addition, with regard to the first two private sales, plaintiff provided the lessee with notice of an offer for sale and invited a better offer. (149 C.A.3d 1103.)

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e. Vehicle Leasing Act.

1. Nature of Act.

13 Witkin Sum. Cal. Law Pers Prop § 193

[§ 193] Nature of Act.

The 1976 Legislature repealed the Automobile Leasing Act (former C.C. 2985.7 et seq.) and adopted a greatly expanded Vehicle Leasing Act, effective March 23, 1977. (C.C. 2985.7 et seq.; see 8 *Pacific L. J.* 430.) The new Act applies to leases of personal, family, or household vehicles for terms exceeding 4 months, *whether or not the lessee bears the risk of depreciation*. (C.C. 2985.7.) It does not apply to transactions governed by the Automobile Sales Finance Act (Rees-Levering Act, C.C. 2981 et seq.; see 4 *Summary* (10th), *Sales*, §239 et seq.). (C.C. 2990.) But it incorporates many of the protections found in that Act. (See *infra*, §194; see also Cal. Civil Practice, 5 Business Litigation, §58:64 et seq.)

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e. Vehicle Leasing Act.

2. Regulatory Provisions.

13 Witkin Sum. Cal. Law Pers Prop § 194

[§ 194] Regulatory Provisions.

The following description of the Vehicle Leasing Act's salient features includes references to similar provisions in the Automobile Sales Finance Act.

(1) *Solicitation and Advertising.* The content of a solicitation or advertisement designed to induce persons to enter into a lease contract is regulated. (C.C. 2985.71, 2989.4(2).) In addition, a lessor may not offer a prospective lessee a discount, rebate, or commission in exchange for assistance in locating additional lessees or buyers. (C.C. 2986.12; cf. C.C. 2982.1, 4 *Summary* (10th), *Sales*, §254.)

(2) *Contents of Lease.* The lessee must be given an exact copy of the complete, fully executed lease contract. (C.C. 2985.8(g), (i); cf. C.C. 2981.9, 2984.3, 4 *Summary* (10th), *Sales*, §§241, 244.) The contract must disclose numerous items, including information required by federal Regulation M (see C.C. 2985.7(e)), the value of the vehicle, the amount of insurance premiums, any charges for service contracts, the value of any trade-in vehicle, and document preparation fees. (C.C. 2985.8(c).) Every lease contract must contain, in a single document, all of the agreements of the lessor and lessee with respect to the obligations of each party. (C.C. 2985.8(a); see *Kroupa v. Sunrise Ford* (1999) 77 C.A.4th 835, 842, 92 C.R.2d 42 [automobile dealer, lease broker, and lessor violated C.C. 2985.8(a); facts concerning lessee's trade-ins of two vehicles, lessee's cash payment, rebates, and dealer's agreement to assume remaining negative equity and charge it back to lessee in form of higher lease payments were contained in various documents other than lease contract].)

The following documents and agreements, however, are not required to be contained in a lease contract entered into on or after January 1, 2002:

(a) An "express warranty," as that term is defined in C.C. 1791.2(a)(1), whether it relates to the sale or lease of a consumer good. (C.C. 2985.9(a).)

(b) Titling and transfer documents used to register, title, or transfer ownership of vehicles described in the lease contract with government registration authorities. (C.C. 2985.9(b).)

(c) Insurance policies, service contracts, and optional debt cancellation agreements. (C.C. 2985.9(c).)

(d) Documents that memorialize the sale or lease of goods or services, relating to the leased vehicle, between the provider of those goods or services and the lessee that are included in the gross capitalized cost of the lease and separately itemized in the "Itemization of Gross Capitalized Cost." (C.C. 2985.9(d).)

A prospective assignee that provides a lessor with a preprinted form for use as a lease contract must, at the lessor's request, provide a Spanish language translation of the form. (C.C. 2991.) For lease contracts entered into after January 1, 2002, the preprinted form must provide sufficient space on its face for the lessor to include all disclosures and itemizations required by C.C. 2985.8 and must also contain a separate blank space, no smaller than 7 1/2 square inches, for the lessor and lessee to memorialize trade-in, turn-in, and other individualized agreements. (C.C. 2992.)

(3) *Warnings.* Conspicuous warnings about signing the contract, insurance coverage, the lack of a "cooling-off" period, and the right to return the vehicle are required by C.C. 2985.8(d), (e), (f), and (j). (Cf. C.C. 2982(g), 2984.1, 4 *Summary* (10th), *Sales*, §243.)

(4) *Liability for Depreciation.* The lessor must justify the lease terms underlying the lessee's liability for depreciation, and there is a rebuttable presumption of unreasonableness when the excess of estimated over actual residual value of the vehicle is more than three times the monthly payment. (C.C. 2988.)

(5) *Prohibited Provisions.* The lease contract cannot contain (a) a power of attorney to confess judgment; (b) an assignment of wages; (c) a waiver of the lessee's right to sue for illegal acts in connection with collection of payments or repossession of the vehicle; (d) a release of the lessor from liability for any remedies the lessee may have under the contract; or (e) a provision permitting the lessor to sue in a county other than a county described in the statute. (C.C. 2986.3; cf. 2983.7, 4 *Summary* (10th), *Sales*, §254.)

(6) *Additional Security.* Agreements for security other than the leased vehicle are generally unenforceable. (C.C. 2986.6; cf. C.C. 2984.2, 4 *Summary* (10th), *Sales*, §254.)

(7) *Liability of Assignee.* The lessor's assignee is subject to the lessee's equities and defenses but has recourse against the lessor. (C.C. 2986.10, 2988.5(e); cf. C.C. 2983.5, 4 *Summary* (10th), *Sales*, §247.)

In *LaChapelle v. Toyota Motor Credit Corp.* (2002) 102 C.A.4th 977, 126 C.R.2d 32, plaintiff leased a truck from a dealer and later sought rescission of the lease agreement and damages, alleging that the transaction violated various provisions of the Vehicle Leasing Act. Plaintiff ultimately settled with the dealer, but maintained her action against assignees of the lease. The trial court granted summary judgment for defendants. *Held*, affirmed.

(a) Under C.C. 2988.5(e), an action that may be brought against an original lessor may be maintained against subsequent assignees only "where the violation from which the alleged liability arose is apparent on the face of the instrument assigned." (102 C.A.4th 982.) Plaintiff contended that it appeared from the face of the lease that there had been a violation of C.C. 2985.8(c)(4), which requires a lease to include a brief description of property being traded in and the agreed-on value of it. Plaintiff's lease recited that she traded in a 1997 Honda Civic, but a blank for "Net Trade in Allowance" was filled in with the notation: "N/A." C.C. 2985.8, however, requires disclosure of a trade-in vehicle's value only if the amounts due or owed as a result of the trade-in are made part of the financing of the lease. Here, plaintiff received cash for her equity in the Honda. The trade-in was not part of the financing for the lease. (102 C.A.4th 985.)

(b) Under C.C. 2986.10(a), an assignee of the lessor's rights is subject to all equities and defenses of the lessee against the lessor, up to the amount of the obligation owing to the assignee at the time of the assignment. Plaintiff contends that her right to rescind against the lessor under C.C. 2988.7 is an equity or defense that may be raised against defendants. (102 C.A.4th 987.) In C.C. 2988.5, however, "the Legislature struck a balance between the interests of innocent lessees and innocent assignees, creating liability on the part of assignees for a dealer's violations of the VLA

only when the violation appears on the face of the lease and therefore should be apparent to the assignee. It would be odd, indeed, if the Legislature, having determined that the competing interests should be balanced in that manner, also established a kind of back door liability for assignees" under C.C. 2986.10. (102 C.A.4th 988.) "It is far more likely that the Legislature simply recognized that lessees have 'equities and defenses' against assignees aside from the remedies provided by the VLA," and adopted C.C. 2986.10 to prevent limitation of those equities and defenses. (102 C.A.4th 988.)

(c) Under U.C.C. 10303(e) (infra, §208), a lease transfer is a transfer of rights and a delegation of duties by the transferor to the transferee, and the transferee's acceptance constitutes a promise, enforceable by the other party to the lease, to perform those duties. Plaintiff thus contended that under U.C.C. 10303(e), the dealer, in assigning the lease to defendants, must be deemed to have delegated to them its duty to comply with the VLA. The dealer's obligations under the VLA, however, "were executed--properly or improperly--at the time the parties entered into the lease agreement. The dealer could not delegate to [defendants] the duty to do something that was done before the assignment." (102 C.A.4th 990.) Furthermore, nothing in U.C.C. 10303 suggests that an assignment includes a duty to guarantee that the assignor's previously executed contractual duties were performed properly. The provision cannot be read as overriding the limitations on consumer rights set forth in the *Vehicle Leasing Act*. (102 C.A.4th 990.) (See *Bescos v. Bank of America* (2003) 105 C.A.4th 378, 388, 393, 129 C.R.2d 423 [bank that financed vehicle lease and took assignment from dealer did not have substantial involvement in lease transaction and thus was not liable as lessor; moreover, parties agreed for purposes of summary judgment that there were no defects on face of lease and thus bank was not liable as assignee; citing *LaChapelle*]; on plaintiff's claims under Consumers Legal Remedies Act, see 4 *Summary* (10th), *Sales*, §296.)

(8) *Refund of Prepayment*. A lessee's payment pending execution of the lease is refundable, subject to an exception when the downpayment is a vehicle. (C.C. 2986.13; cf. C.C. 2982.7, 4 *Summary* (10th), *Sales*, §248.)

(9) *Early Termination of Lease*. A lessee has the right to terminate a lease contract at any time before the scheduled expiration date. (C.C. 2987.) The lessee's liability is limited (C.C. 2987(b)), and the lessor or holder of the lease contract must act in good faith and in a commercially reasonable manner in disposing of the vehicle and must give specified notices to the lessee and any guarantor (C.C. 2987(d)). If the lessee terminates the lease contract, voluntarily returns possession of the vehicle to the lessor, and timely pays all required sums, the lessor or lease holder must not provide any adverse information about the early termination to credit reporting agencies. (C.C. 2987(g).) C.C. 2987 applies only to lease contracts entered into on or after January 1, 1998. (C.C. 2987(i).)

(10) *Disposition of Vehicle at Expiration of Lease*. In disposing of the vehicle at the end of the lease, the lessor must give the lessee notice of certain matters (including the lessee's right to submit a cash bid for the purchase of the vehicle), and must act in a commercially reasonable manner. (C.C. 2989.2; cf. C.C. 2983.2, 4 *Summary* (10th), *Sales*, §250.)

(11) *Remedies for Violations*. For violation of C.C. 2985.8, supra (form and content of lease), or C.C. 2988, supra (amount of lessee's liability for depreciation), the lessee may recover damages, costs, and attorneys' fees (C.C. 2988.5), or rescind the lease (C.C. 2988.7). In addition, a wilful violation of the Act is a misdemeanor. (C.C. 2989.8.)

Under C.C. 2988.9, reasonable attorneys' fees and costs must be awarded to the prevailing party in an action on a lease contract subject to the provisions of the *Vehicle Leasing Act*, regardless of whether the action is instituted by the lessor, an assignee, or the lessee. (See *LaChapelle v. Toyota Motor Credit Corp.*, supra, 102 C.A.4th 992 [prevailing assignees were entitled to fees].)

(12) *Enforcement by Department of Motor Vehicles*. The Department of Motor Vehicles may investigate violations and may adopt and enforce regulations to implement the Act. (C.C. 2989.5, 2989.6.)

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

(11) *Remedies for Violations*. If the defendant alleges in the answer that he or she tendered to the plaintiff the full amount to which the plaintiff was entitled, and then deposits the amount tendered in court, and the allegation is found to be true, then the defendant is deemed to be the prevailing party within the meaning of C.C. 2988.9. (C.C. 2988.9.) This provision merely describes one way in which a defendant will be declared a prevailing party. If the defendant tenders and deposits nothing because he or she denies all liability on the complaint, and the judgment later awards the plaintiff no relief, the defendant qualifies for attorneys' fees. (See *Hart v. Autowest Dodge* (2007) 147 C.A.4th 1258, 1261, 55 C.R.3d 249 [defendant who denied all liability was entitled to attorneys' fees from plaintiff who obtained no relief, despite not having tendered or deposited any amount].)



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[§ 195] Unlawful Subleasing.

The 1987 Legislature enacted a Penal Code Chapter entitled "Unlawful Subleasing of Motor Vehicles" (P.C. 570 et seq.), as well as a Civil Code provision (C.C. 3343.5) establishing a cause of action for persons injured by an unlawful sublease.

(1) *Elements of Offense.* P.C. 571(a) provides that a person is guilty of unlawfully subleasing a motor vehicle if all of the following conditions are met:

(a) The vehicle is subject to a lease contract (see *supra*, §§193, 194), conditional sale contract (see 4 *Summary* (10th), *Sales*, §§132, 239 et seq.), or security agreement (see 4 *Summary* (10th), *Secured Transactions in Personal Property*, §39 et seq.) prohibiting the transfer or assignment of any right or interest in the motor vehicle or under the contract or agreement.

(b) The person is not a party to the lease contract, conditional sale contract, or security agreement.

(c) The person transfers or assigns, or purports to transfer or assign, a right or interest in the motor vehicle or under the lease contract, conditional sale contract, or security agreement, to a person not a party to the contract or agreement.

(d) The person does not obtain prior written consent to the transfer or assignment from the motor vehicle's lessor, seller, or secured party.

(e) The person receives consideration for the transfer or assignment.

A person who is *not a party* to a lease contract, conditional sale contract, or security agreement also commits an offense by assisting, causing, or arranging an actual or purported transfer or assignment. (P.C. 571(b).) (See P.C. 572 [person who is *party* to contract or agreement does not commit offense by transferring or assigning, or assisting, causing, or arranging transfer or assignment, of any right or interest in motor vehicle or under contract or agreement].)

In *People v. Carter* (1994) 30 C.A.4th 775, 37 C.R.2d 59, defendant was convicted under P.C. 571. He was part

owner of a company that solicited individuals with negative equity in cars purchased under an installment contract or subject to a lease. Under defendant's scheme, the original purchaser would agree to make the company its exclusive agent and would give the company 30 days to find a sublessee. The company targeted persons with credit problems as potential sublessees. Once a sublessee was found, the company would provide an agreement for the lessee and sublessee to sign, under which the sublessee would agree to make the lessee's monthly payments. If the payments were not made, defendant's company would repossess the car and find another sublessee. In exchange for the substantial transaction fee that the company would charge each new sublessee, the company would promise to finance the vehicle in the sublessee's name after 6 months of successful payments. *Held*, conviction affirmed.

(a) *P.C. 571 and 572 are constitutional*. The Legislature had a rational basis for distinguishing between parties to the original lease, who are exempted from criminal liability under P.C. 572, and nonparties. (30 C.A.4th 778.) "The Legislature could rationally conclude the evil [of subleasing] lay not in sporadic individual transactions but in an industry which engaged essentially in a conspiracy to perpetrate fraud and interfere with contractual relationships." (30 C.A.4th 779.)

(b) *Defendant's conduct violated P.C. 571(b)*. Defendant did not violate P.C. 571(a) because his company did not transfer or assign any lease interest, but merely prepared the paperwork by which the lessees subleased their vehicles. Nevertheless, he violated P.C. 571(b) by assisting in a transfer or assignment. Subdivision (b) does not predicate culpability on assisting in a violation of subdivision (a), nor does it provide that the person making the transfer or assignment must be a nonparty. (30 C.A.4th 781.)

A brief dissent argued that subdivision (b) can only be violated by assisting a violator of subdivision (a), and because no one violated subdivision (a) here, there was no violation of subdivision (b) either. (30 C.A.4th 782.)

(2) *Penalties and Remedies*. A person guilty of unlawfully subleasing a motor vehicle is subject to a maximum fine of \$ 10,000, imprisonment for up to 1 year, or both. (P.C. 570.) In addition, a person injured by the unlawful sublease may obtain equitable relief (including an injunction and restitution), as well as actual damages, punitive damages, attorneys' fees, and costs. (C.C. 3343.5.)

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13 Witkin Sum. Cal. Law Pers Prop § 196

[§ 196] Adoption of U.C.C. Division 10.

(1) *History and Purpose.* The 1988 Legislature enacted Article 2A of the Uniform Commercial Code as Division 10 of the California Uniform Commercial Code, entitled "Uniform Commercial Code--Leases." (On Division 10 generally, see C.E.B., 2 UCC Sales and Leases, Chap. 19; 20 *Pacific L. J.* 869.) Some of the principal reasons for codifying the law with respect to the lease of goods were to distinguish between a lease and a security interest, to clarify warranty issues, and to determine a lessor's remedies in the event of a lessee's default. (California Comment to U.C.C. 10101.)

(2) *Effective Date and Transition Provisions.* Division 10 applies to lease contracts that were first made or that first became effective between the parties on or after January 1, 1990. Unless the parties specifically agree otherwise, in writing, the division does not apply to lease contracts first made or first effective between the parties prior to January 1, 1990, or to extensions, amendments, modifications, renewals, or supplements. (U.C.C. 10600.)

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13 Witkin Sum. Cal. Law Pers Prop § 197

[§ 197] Scope and Application of Division.

(1) *Applicable Transactions.* Division 10 applies to any transaction, regardless of form, that creates a lease. (U.C.C. 10102.) However, the division applies only to leases, and "a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease." (U.C.C. 10103(a)(10).) The distinction between a lease and a security interest is important. If a transaction creates a security interest disguised as a lease, then the lessor must file a financing statement or otherwise perfect its interest in the goods. (See 4 *Summary* (10th), *Secured Transactions in Personal Property*, §61 et seq.) Furthermore, in the case of a security interest, the remedies available on default are set forth in Division 9 instead of Division 10. (See 4 *Summary* (10th), *Secured Transactions in Personal Property*, §171 et seq.)

(2) *Goods.* "Goods" are defined as "all things that are movable at the time of identification to the lease contract, or are fixtures." The definition excludes money, documents, instruments, accounts, chattel paper, general intangibles, and minerals, including oil and gas, before extraction. However, the definition includes the unborn young of animals. (U.C.C. 10103(a)(8).)

(3) *Title and Possession.* Unless otherwise provided, the provisions of Division 10 apply regardless of who has title to or possession of the goods. (U.C.C. 10302.)

(4) *Other Applicable Laws.* In addition to Division 10, a personal property lease may also be subject to the following:

(a) State certificate of title statutes. (U.C.C. 10104(a)(1).)

(b) Certificate of title statutes from other jurisdictions. (U.C.C. 10104(a)(2); U.C.C. 10105.)

(c) State consumer laws, both decisional and statutory. (U.C.C. 10104(a)(3); see 4 *Summary* (10th), *Sales*, §295 et seq.)

Generally, where there is a conflict between Division 10 and one of these other laws, the other law controls. However, this is not true for conflicts involving U.C.C. 10105, U.C.C. 10304(c), or U.C.C. 10305(c). (U.C.C. 10104(b).)

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13 Witkin Sum. Cal. Law Pers Prop § 198

[§ 198] Consumer Lease.

(1) *Definition.* A consumer lease is defined as "a lease that a lessor regularly engaged in the business of leasing or selling makes to a lessee who is an individual and who takes under the lease primarily for a personal, family, or household purpose." (U.C.C. 10103(a)(5); see Cal. Transactions Forms, 5 Business Transactions §34:26 et seq.; on types of leases generally, see C.E.B., 2 UCC Sales and Leases, §19.28 et seq.)

(2) *Choice of Law and Forum.* U.C.C. 10106 invalidates certain choice of law or forum clauses that could work to the disadvantage of consumer lessees. A choice of law in a consumer lease is not enforceable unless the jurisdiction chosen is one in which: (a) the lessee resides at the time the lease agreement becomes enforceable, or within 30 days thereafter; (b) the goods are to be used; or (c) the lease is executed by the lessee. (U.C.C. 10106(a).)

A judicial forum chosen by the parties to a consumer lease is not enforceable unless it is (a) the county in which the lessee in fact signed the lease; (b) the county in which the lessee resides at the commencement of the action; (c) the county in which the lessee resided at the time the lease contract became enforceable; or (d) the county in which the goods are permanently stored. (U.C.C. 10106(b).)

(3) *Additional Protections.* Several other provisions in Division 10 offer special protection for consumer lessees. (See U.C.C. 10303(g) [specific and conspicuous language required to restrict transfers]; U.C.C. 10402(a) [remedies on repudiation, *infra*, §210]; U.C.C. 10503(c) [unconscionability of limiting consequential damages for injury, *infra*, §213]; U.C.C. 10504(c)(2) [restitution to lessee on lessor's justifiable withholding of goods]; U.C.C. 10506(a) [prohibition on limiting limitation period]; U.C.C. 10516(c), (f) [lessee's duty once tender has been accepted, *infra*, §212].)

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13 Witkin Sum. Cal. Law Pers Prop § 199

[§ 199] Finance Lease.

(1) *Definition.* A "finance lease" is a lease under which the lessor does not select, manufacture, or supply the goods, but acquires the goods or the right to possess and use the goods in connection with the lease. (U.C.C. 10103(a)(7); on finance leases generally, see Cal. Transactions Forms, 5 Business Transactions §§31:14 et seq., 31:58 [form of lease].) In addition, for a lease to be considered a finance lease within the meaning of U.C.C. 10103(a)(7), one of the following must occur:

(a) The lessee receives a copy of the contract by which the lessor acquired the goods or the right to possession and use of the goods before signing the lease contract.

(b) The effectiveness of the lease contract is conditioned on the lessee's approval of the contract by which the lessor acquired the goods or rights to the goods.

(c) Before signing the lease contract, the lessee receives an accurate and complete statement designating the promises and warranties, disclaimers of warranties, limitations or modifications of remedies, or liquidated damages provided to the lessor by the supplier of the goods.

(d) Before the lessee signs the lease contract, the lessor informs the lessee in writing: (i) of the identity of the supplier of the goods (unless the lessee has selected that person); (ii) that the lessee is entitled to the promises and warranties, including those of any third party, provided to the lessor; and (iii) that the lessee may communicate with the supplier and receive an accurate and complete statement of those promises and warranties, including any disclaimers and limitations of them or of remedies.

(2) *Treatment of Finance Lease.* Because the function performed by the lessor in a finance lease is extremely limited, many Division 10 provisions treat finance leases differently from other leases. For example, under a finance lease, the benefit of any of the supplier's promises or warranties made to the lessor extends to the lessee. (U.C.C. 10209(a).) The lessor in a finance lease is not held to implied warranties against infringement, or of merchantability or

fitness for a particular purpose. (U.C.C. 10211, 10212, 10213; see *infra*, §205.) Furthermore, the risk of loss, which otherwise would be retained by the lessor, passes to the lessee in the case of a finance lease. (U.C.C. 10219(a); see *infra*, §207.) (See also U.C.C. 10209(c) [protection against modification or rescission of supply contract]; U.C.C. 10220(a) [risk of loss on nonconforming goods]; U.C.C. 10407 [irrevocability of lessee's promises on acceptance of goods]; U.C.C. 10516 [irrevocability of acceptance of nonconforming goods].)

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13 Witkin Sum. Cal. Law Pers Prop § 200

[§ 200] Installment Lease.

An installment lease contract is a lease contract that authorizes or requires the delivery of goods in separate lots to be separately accepted. This is the case even if the lease contract contains a clause stating that "each delivery is a separate lease" or using equivalent language. (U.C.C. 10103(a)(9); on installment leases generally, see Cal. Transactions Forms, 5 Business Transactions §31:19.)

An important issue in the case of installment leases is whether a default or nonconforming delivery substantially impairs the value of the installment contract as a whole. If not, the lessee must accept delivery on adequate assurance that the defect will be cured. (U.C.C. 10510(a).) However, if the value of the entire contract is impaired, additional remedies are available. (U.C.C. 10510(b), 10508(a); see *infra*, §214.)

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aa. Formation of Contract.

13 Witkin Sum. Cal. Law Pers Prop § 201

[§ 201] Formation of Contract.

(1) *Offer.* A merchant who makes an offer to lease goods to or from another person in a signed writing that by its terms assures that it will be held open may not revoke the offer for lack of consideration during the time stated. If no time is stated, the offer may not be revoked for a reasonable time. However, the period of irrevocability may not exceed 3 months. If the offeree supplies a form containing such a term of assurance, it must be separately signed by the offeror. (U.C.C. 10205; for further discussion of lease contract formalities, see Cal. Transactions Forms, 5 Business Transactions §31:41; C.E.B., 2 UCC Sales and Leases, §19.19 et seq.)

(2) *Acceptance.* An offer to make a lease contract is construed as inviting acceptance in any manner and by any medium reasonable in the circumstances, unless otherwise unambiguously indicated by language or circumstances. (U.C.C. 10206(a).) If beginning a requested performance is a reasonable mode of acceptance, an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance. (U.C.C. 10206(b).)

(3) *Agreement.* The lease contract may be made in any manner sufficient to show agreement, including conduct by both parties that recognizes the existence of a lease contract. (U.C.C. 10204(a); on definition of "lease contract," see U.C.C. 10103(a)(12).) Such an agreement may be found "although the moment of its making is undetermined." (U.C.C. 10204(b).)

(4) *Certainty.* Even if one or more terms are left open, a lease contract does not fail for indefiniteness if the parties have intended to make a lease contract and there is a reasonably certain basis for giving an appropriate remedy. (U.C.C. 10204(c).)

(5) *Statute of Frauds.* With certain exceptions, a lease contract is not enforceable unless there is a writing sufficient to indicate that a lease contract has been made between the parties. The writing must describe the goods leased and the lease term, and must be signed by the party against whom enforcement is sought, or by that party's agent. (U.C.C. 10201(a).) The lease term is considered sufficient, even if it is not specific, if it reasonably identifies what is described.

(U.C.C. 10201(b).) A writing is not insufficient because it omits or incorrectly states a term agreed on. However, the lease contract is not enforceable beyond the term or quantity of goods shown in the writing. (U.C.C. 10201(c).)

Exceptions to the writing requirement include: (a) leases other than consumer leases that require total payments under \$ 1,000 (U.C.C. 10201(a)(1)); (b) contracts involving specially manufactured goods; (c) cases where the party against whom enforcement is sought admits that the contract was made; and (d) cases where the goods have been received and accepted by the lessee. (U.C.C. 10201(d); on lease term under these exceptions, see U.C.C. 10201(e).)

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13 Witkin Sum. Cal. Law Pers Prop § 202

[§ 202] Rules of Construction.

(1) *Course of Performance.* If a lease contract involves repeated occasions for performance, and a party knows the nature of the performance and has an opportunity to object to it, then that party's acceptance or acquiescence is considered relevant in determining the meaning of the lease agreement. (U.C.C. 10207(a).) Course of performance may also be relevant to show a waiver or modification of any term inconsistent with the course of performance. (U.C.C. 10207(c).)

(2) *Consistency.* Whenever it is reasonable to do so, the express terms of a lease agreement and any course of performance, as well as any course of dealing and usage of trade, must be construed as consistent with each other. However, if that construction is unreasonable, the following rules apply: (a) express terms control course of performance; (b) course of performance controls both course of dealing and usage of trade; and (c) course of dealing controls usage of trade. (U.C.C. 10207(b).)

(3) *Parol Evidence Rule.* Terms set forth in a writing intended by the parties as a final expression of their agreement may not generally be contradicted by evidence of prior agreements or contemporaneous oral agreements. However, they may be explained or supplemented by course of dealing, usage of trade, or by course of performance. (U.C.C. 10202(a).) The terms may also be explained or supplemented by evidence of consistent additional terms, unless a court finds that the writing was intended as a complete and exclusive statement of the terms of the agreement. (U.C.C. 10202(b).)

(4) *Identification of Goods.* In the absence of an explicit agreement between the parties, U.C.C. 10217 sets forth rules for identifying the leased goods:

(a) If the lease contract is for a lease of goods that are existing and identified, then the goods are identified when the lease contract is made.

(b) If the lease contract is for a lease of goods that are not existing and identified, then the goods are identified

when they are shipped, marked, or otherwise designated by the lessor as goods to which the lease contract refers.

(c) If the lease contract is for a lease of unborn young of animals, then identification occurs when the young are conceived.

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

(1) *Course of Performance*. U.C.C. 10207 was repealed in 2006.

(2) *Consistency*. U.C.C. 10207 was repealed in 2006.



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[§ 203] Modification, Rescission, and Waiver.

An agreement modifying a lease contract does not need consideration to be binding. (U.C.C. 10208(a).) If a signed lease agreement prohibits modification or rescission except by a signed writing, then the agreement may not be otherwise modified or rescinded. However, if such a restriction appears on a form supplied by a merchant, it must be signed separately by the other party unless the other party is also a merchant. (U.C.C. 10208(b).)

An unsuccessful attempt at modification or rescission may operate as a waiver. (U.C.C. 10208(c).)

A party who has made a waiver affecting an executory portion of a lease contract may retract the waiver. This is accomplished when the other party receives reasonable notification that strict performance will be required of any term waived. However, the waiver may not be retracted if a material change of position in reliance on the waiver would make the retraction unjust. (U.C.C. 10208(d).)

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13 Witkin Sum. Cal. Law Pers Prop § 204

[§ 204] Express Warranties.

Under U.C.C. 10210(a), there are three ways in which a lessor may create an express warranty:

(1) If the lessor makes an affirmation of fact or a promise to the lessee relating to the goods that "becomes part of the basis of the bargain," this creates an express warranty that the goods will conform to the affirmation or promise.

(2) If a description of the goods is made part of the basis of the bargain, this creates an express warranty that the goods will conform to the description.

(3) A sample or model that is made part of the basis of the bargain creates an express warranty that the whole of the goods will conform to the sample or model. (On lease contract warranty provisions generally, see Cal. Transactions Forms, 5 Business Transactions §31:44; C.E.B., 2 UCC Sales and Leases, §19.59 et seq.; *21 Pacific L. J. 1.*)

An express warranty may be created even if the lessor does not use formal words such as "warrant" or "guarantee." Nor must the lessor have a specific intention to make a warranty. However, an express warranty is not created by an affirmation of the value of the goods, or a statement purporting to be the lessor's opinion of the goods. (U.C.C. 10210(b).)

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[§ 205] Implied Warranties.

(1) *Quiet Enjoyment.* There is a warranty in every lease contract that for the lease term no person holds a claim to or interest in the goods that arose from an act or omission of the lessor, other than a claim such as infringement, that will interfere with the lessee's enjoyment of its leasehold interest. (U.C.C. 10211(a).)

(2) *Infringement.* There is an implied warranty in certain lease contracts that the goods are delivered free of rightful claims of infringement or similar claims. This warranty applies to lessors who regularly deal in the kind of goods being leased, and does not include lessors under finance leases. (U.C.C. 10211(b).) Also, lessees who furnish specifications to lessors or suppliers must hold them harmless against infringement claims arising out of compliance with the specifications. (U.C.C. 10211(c).)

(3) *Merchantability.* Except in a finance lease, a warranty that the goods will be merchantable is implied in lease contracts where the lessor is a merchant with respect to the kind of goods leased. (U.C.C. 10212(a); see also U.C.C. 10212(b) [requirements for merchantability].)

(4) *Fitness for Particular Purpose.* A lessor who has reason to know when the lease contract is made of a particular purpose for which the goods are required, and that the lessee is relying on the lessor to select or furnish suitable goods, is subject to an implied warranty that the goods will be fit for that purpose. However, this implied warranty does not apply to finance leases. (U.C.C. 10213.)

(5) *Other Warranties.* Other implied warranties may arise from course of dealing or usage of trade. (U.C.C. 10212(c).)

(6) *Exclusions or Modifications.* Unless otherwise indicated, all implied warranties may be excluded by written and conspicuous language that calls the lessee's attention to the exclusion and makes plain that there is no implied warranty. (U.C.C. 10214(c)(1).) An implied warranty may also be excluded or modified by course of dealing, course of performance, or usage of trade. (U.C.C. 10214(c)(3).) Furthermore, there is no implied warranty with regard to defects

that an examination should have revealed if the lessee, before entering into the contract, fully examined the goods or a sample or model of the goods, or refused an opportunity for such an examination. (U.C.C. 10214(c)(2); on language required to exclude or modify particular implied warranties, see U.C.C. 10214(b) [merchantability, fitness for particular purpose], U.C.C. 10214(d) [quiet possession, infringement]; for form of complaint for breach of warranties, see Cal. Civil Practice, 4 Business Litigation, §48:44.)

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

(3) *Merchantability*. See *Arriaga v. CitiCapital Commercial Corp.* (2008) 167 C.A.4th 1527, 1542, 85 C.R.3d 143, 6 Summary (10th), Torts, Supp., §1507A [under U.C.C. 10212(a), implied warranty of merchantability did not apply to finance lessor who purchased glue spreading machine for rental to company, even if company eventually bought machine by paying off lease].



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[§ 206] Construction of Warranties.

Both express and implied warranties must be construed as consistent with each other and as cumulative, unless such a construction is unreasonable. In that case, the intention of the parties determines which warranty is controlling. (U.C.C. 10215.)

U.C.C. 10215 sets forth rules for ascertaining the intention of the parties:

- (1) "Exact or technical specifications displace an inconsistent sample or model or general language of description."
- (2) "A sample from an existing bulk displaces inconsistent general language of description."
- (3) "Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose."

Wherever it is reasonable, words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit a warranty must be construed as consistent with each other. (U.C.C. 10214(a).)

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[§ 207] Insurable Interest and Risk of Loss.

(1) *Insurable Interest.* U.C.C. 10218 provides rules for determining when parties have an insurable interest in the goods. Generally, the lessee obtains an insurable interest when existing goods are identified to the lease contract. This is true even if the goods identified are nonconforming and the lessee has an option to reject them. (U.C.C. 10218(a).) However, if the lessee has an insurable interest only by reason of the lessor's identification of the goods, the lessor may substitute other goods, until default, insolvency, or notification to the lessee that identification is final. (U.C.C. 10218(b).) The lessor retains an insurable interest until an option to buy has been exercised by the lessee and risk of loss has passed to the lessee. (U.C.C. 10218(c).)

U.C.C. 10218 is not intended to impair any insurable interest recognized under other laws. (U.C.C. 10218(d).) Also, the parties may agree to require either party to insure the goods and may decide who will receive the insurance proceeds. (U.C.C. 10218(e); for further discussion, see Cal. Transactions Forms, 5 Business Transactions §31:46; C.E.B., 2 UCC Sales and Leases, §19.45.)

(2) *Risk of Loss.* Except in the case of a finance lease, the lessor generally retains the risk of loss and it does not pass to the lessee. (U.C.C. 10219(a).) However, if the parties decide that risk of loss is to pass to the lessee, and the time of passage is not stated, the Code provides rules to determine when risk of loss passes. (U.C.C. 10219; U.C.C. 10220 [nonconforming goods or default by lessee]; see also U.C.C. 10221 [casualty to goods without fault before risk passes].)

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[§ 208] Effect of Provisions Limiting Transfers.

(1) *In General.* A provision that restricts or prohibits transfer of a lease interest, whether by sale, sublease, creation of a security interest, attachment, levy, or other judicial process, may give rise to certain rights and remedies but does not generally render the prohibited transfer ineffective. (U.C.C. 10303(b); see also Cal. Transactions Forms, 5 Business Transactions §31:47; C.E.B., 2 UCC Sales and Leases, §19.68 et seq.)

(2) *Transfer of Right to Damages or Payment.* Lease provisions that prohibit transfers of the right to receive damages for default, or the right to receive payment for the transferor's performance, are not enforceable. Moreover, these are not considered transfers that may subject the transferor to liability for damages under U.C.C. 10303(d)(2) (*infra*, this section). (U.C.C. 10303(c).)

(3) *Delegation of Duties.* A transfer made in general terms such as "all my rights under the lease" is considered a transfer of rights, and unless otherwise indicated, is also considered a delegation of duties to the transferee. Thus acceptance by the transferee constitutes a promise to perform those duties. The promise is enforceable by either the transferor or the other party to the lease contract. (U.C.C. 10303(e); see *LaChapelle v. Toyota Motor Credit Corp.* (2002) 102 C.A.4th 977, 990, 126 C.R.2d 32, *supra*, §194 [U.C.C. 10303(e) did not impose automobile lessor's obligations under Vehicle Leasing Act on lessor's assignees].) A delegation of performance does not relieve the transferor of any duty to perform or liability for default, unless the parties agree otherwise. (U.C.C. 10303(f).)

(4) *Transfers Under Consumer Lease.* Specific, conspicuous written language is required in a consumer lease in order to prohibit the transfer of an interest or to make the transfer an event of default. (U.C.C. 10303(g).)

(5) *Rights and Remedies for Violation.* If a transfer is made that has been designated an event of default under the lease agreement, this gives rise to the usual rights and remedies for default. (U.C.C. 10303(d)(1); U.C.C. 10501(b); on remedies for default, see *infra*, §213 et seq.)

Under U.C.C. 10303(d)(2), the transferor may be liable for any damages caused by the transfer if the transfer was

prohibited under the lease agreement, or if the transfer: (a) materially impaired the prospect of obtaining return performance by the other party to the lease agreement; (b) materially changed that party's duty; or (c) materially increased that party's burden or risk. In addition to damages, other relief may be granted, including cancellation of the lease contract or an injunction against the transfer.

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13 Witkin Sum. Cal. Law Pers Prop § 209

[§ 209] Rights of Creditors and Subsequent Lessees, Sublessees, and Buyers.

(1) *Subsequent Lessee, Sublessee, or Buyer.* A subsequent lessee, sublessee, or buyer obtains only the leasehold interest in the goods that the original lessor or lessee had the power to transfer, and takes subject to the existing lease contract. (U.C.C. 10304(a), 10305(a).) However, if the original lessor or lessee entrusts the goods to a merchant dealing in goods of that kind, who then sells or leases the goods, then the subsequent lessee, sublessee, or buyer takes free of the existing lease contract. (U.C.C. 10304(b), 10305(b); see *Mercedes-Benz Credit Corp. v. Johnson* (2003) 110 C.A.4th 53, 56, 1 C.R.3d 396 [buyer who purchased automobile from used car dealer who had previously leased automobile from plaintiff did not take free of existing lease; plaintiff had not entrusted automobile to dealer for sale, but had leased automobile to dealer for his personal use only].)

(2) *Creditors.* The creditors of a lessor or a lessee generally take subject to the lease contract. (U.C.C. 10301, 10307(a).) One exception is the holder of a possessory lien under U.C.C. 10306. (U.C.C. 10307(a), (b).) Two additional exceptions applicable in the case of lessors' creditors include fraudulent transfers under U.C.C. 10308 and creditors holding a lien that attached to the goods before the lease contract became enforceable. (U.C.C. 10307(b).) A lessee takes a leasehold interest subject to a security interest held by a creditor of the lessor, except as otherwise provided by U.C.C. 9317 (4 *Summary* (10th), *Secured Transactions in Personal Property*, §105 et seq.), U.C.C. 9321 (4 *Summary* (10th), *Secured Transactions in Personal Property*, §113), and U.C.C. 9323 (4 *Summary* (10th), *Secured Transactions in Personal Property*, §140). (U.C.C. 10307(c).)

(3) *Holders of Liens for Materials or Services.* A lien for materials or services on leased goods in the possession of the lienholder takes priority over any interest of the lessor or lessee under the lease contract, unless the statute or law creating the lien provides otherwise. (U.C.C. 10306.)

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13 Witkin Sum. Cal. Law Pers Prop § 210

[§ 210] Repudiation.

(1) *Demand for Assurance.* Either party has the right to demand, in writing, adequate assurance of due performance if reasonable grounds for insecurity arise. If it is commercially reasonable, until receiving assurance the insecure party may suspend any performance which has not already been compensated. (U.C.C. 10401(b).) A party may accept a nonconforming delivery or payment without losing the right to demand adequate assurance of future performance. (U.C.C. 10401(e).)

(2) *Repudiation.* If the party who has demanded assurance of due performance does not receive adequate assurance within a reasonable time, not to exceed 30 days after receipt of the demand, this is considered a repudiation. (U.C.C. 10401(c).) A party may retract a repudiation before his or her next performance is due unless the other party has canceled the lease contract, materially changed position, or otherwise expressed the view that the repudiation is final. (U.C.C. 10403.) The lessee under a finance lease that is not a consumer lease may not repudiate the contract without the consent of the party to whom the promise runs. (U.C.C. 10407(a), (b).)

(3) *Rights on Repudiation.* U.C.C. 10402 specifies the rights of an aggrieved party when the other party repudiates a lease contract, other than a consumer lease, resulting in substantial impairment of the value of the contract. Under U.C.C. 10402(a), the aggrieved party may:

- (a) Await retraction of repudiation and performance, for a commercially reasonable time (U.C.C. 10402(a)(1));
- (b) Demand assurance of and await adequate future performance (U.C.C. 10402(a)(2)); or
- (c) Resort to default remedies (U.C.C. 10402(a)(3); see *infra*, §213 et seq.).

In addition, the aggrieved party may also suspend performance. An aggrieved party who is the lessor may proceed to identify goods to the lease contract notwithstanding default, or salvage unfinished goods. (U.C.C. 10402(a)(3), 10524; for further discussion, see C.E.B., 2 UCC Sales and Leases, §19.96.)

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13 Witkin Sum. Cal. Law Pers Prop § 211

[§ 211] Substituted or Excused Performance.

(1) *Failure of Payment.* If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, then the lessor may stop delivery unless the lessee provides a substantially equivalent means of payment. However, if delivery has already been taken, payment in the manner provided by regulation discharges the lessee's obligation unless the regulation is discriminatory, oppressive, or predatory. (U.C.C. 10404(b).)

(2) *Substituted Delivery.* If the agreed manner of delivery becomes commercially impracticable through no fault of the parties, then a commercially reasonable substitute performance must be tendered and accepted if available. (U.C.C. 10404(a).)

(3) *Delay or Nondelivery.* A delay in delivery or nondelivery by a lessor or a supplier is not a default under the lease contract if:

(a) The agreed performance was made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the lease contract was made, or by good faith compliance with an applicable regulation or order (U.C.C. 10405(1)); and

(b) The lessor or supplier makes a fair and reasonable allocation among customers if only part of the capacity to perform is affected (U.C.C. 10405(2)); and

(c) The lessor seasonably notifies the lessee (or, in the case of a finance lease, the supplier seasonably notifies the lessor and the lessee) that there will be delay or nondelivery, if known, and of the estimated quota if allocation is required. (U.C.C. 10405(3).)

(4) *Rights on Failure of Delivery.* On receiving notification of delay or allocation under U.C.C. 10405, the lessee may either: (a) terminate the lease contract; or (b) modify the lease contract by accepting the available quota in substitution, with due allowance from the rent payable for the deficiency, but without further right against the lessor.

However, modification of a finance lease is not permitted. (U.C.C. 10406(a).)

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8. Acceptance or Rejection of Goods.

13 Witkin Sum. Cal. Law Pers Prop § 212

[§ 212] Acceptance or Rejection of Goods.

(1) *Acceptance*. A lessee is deemed to have accepted goods if, after a reasonable opportunity for inspection, the lessee: (a) signifies that the goods are conforming; (b) signifies a willingness to retain them if they are nonconforming; or (c) fails to make an effective rejection. (U.C.C. 10515(a).) Accepting part of a commercial unit is considered acceptance of the entire unit. (U.C.C. 10515(b).)

A lessee who has accepted the goods must notify the lessor of any default within a reasonable time in order to preserve his or her rights against the lessor. (U.C.C. 10516(c); but see U.C.C. 10516(f) [U.C.C. 10516(c) inapplicable to consumer leases]; on acceptance or rejection of leased goods generally, see Cal. Transactions Forms, 5 Business Transactions §31:49; C.E.B., 2 UCC Sales and Leases, §19.50 et seq.)

(2) *Rejection*. If the goods, tender, or delivery do not conform to the lease contract, the lessee may reject the goods. The lessee may also accept one or more commercial units and reject the rest of the goods. (U.C.C. 10509(a); but see U.C.C. 10510 [restricting right to reject under installment lease].) Rejection must occur within a reasonable time after tender or delivery, and the lessee must seasonably notify the lessor. (U.C.C. 10509(b); see also U.C.C. 10511 [disposition of rejected goods]; U.C.C. 10512 [care, storage, and shipping of rejected goods].) In rejecting goods, the lessee must state a particular defect that is ascertainable by reasonable inspection; otherwise, the lessee may be precluded from relying on the defect to justify rejection or establish default. (U.C.C. 10514(a).)

(3) *Revocation of Acceptance*. In some situations, the lessee may revoke acceptance of the goods. Where a lot or unit is nonconforming, substantially impairing its value to the lessee, the lessee may revoke acceptance if: (a) the lessee accepted on the reasonable assumption that the nonconformity would be cured; or (b) the lessee accepted without discovering the nonconformity, and the acceptance was reasonably induced by the lessor's assurances or by the difficulty of discovery before acceptance. However, in the case of a finance lease, other than certain consumer leases, acceptance cannot be revoked due to a nonconformity. (U.C.C. 10517(a), 10516(b).)

A lessee may also revoke acceptance of a lot or commercial unit if the lessor defaults under the lease contract, and the default substantially impairs the value of that lot or unit to the lessee. (U.C.C. 10517(b).) In addition, the lessee may

revoke acceptance because of other defaults by the lessor if the lease agreement so provides. (U.C.C. 10517(c).)

Revocation of acceptance must occur within a reasonable time, before there is any substantial change in the condition of the goods. Revocation is not effective until the lessee notifies the lessor. (U.C.C. 10517(d).) A lessee who revokes acceptance has the same rights and duties with respect to the goods as if the lessee had rejected them. (U.C.C. 10517(e).)

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13 Witkin Sum. Cal. Law Pers Prop § 213

[§ 213] In General.

(1) *Enforcement.* A party seeking enforcement on default may pursue remedies under Division 10 or the lease agreement, and may reduce the claim to judgment, or otherwise enforce the lease contract, by any available judicial or nonjudicial procedure. (U.C.C. 10501.) The party in default is not generally entitled to notice of default or of enforcement. (U.C.C. 10502.)

(2) *Statute of Limitations.* Actions for default must be brought within 4 years of accrual of the cause of action. However, except in the case of a consumer lease, the parties may reduce the period by contract to not less than 1 year. (U.C.C. 10506.)

(3) *Limitations on Consequential Damages.* Consequential damages may be liquidated or otherwise limited unless the limitation is unconscionable. (U.C.C. 10503(c), 10504(a).) Limitation of consequential damages for personal injuries in the case of consumer goods is prima facie unconscionable. (U.C.C. 10503(c).)

(4) *Effect of Cancellation or Termination.* On cancellation or termination of a lease contract, all obligations that are still executory on both sides are discharged. However, any right based on prior default or performance survives. In the case of cancellation, the canceling party also retains any remedy for default of the whole lease contract or any unperformed balance. (U.C.C. 10505(a), (b).)

(5) *Effect of Rescission.* Neither rescission of the lease contract nor return of the goods bars a claim for damages or other remedy. (U.C.C. 10505(e).)

(6) *Waiver of Claim.* Any claim or right arising from an alleged default may be discharged by a written waiver or renunciation signed and delivered by the aggrieved party. (U.C.C. 10107.)

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13 Witkin Sum. Cal. Law Pers Prop § 214

[§ 214] Default by Lessor.

U.C.C. 10508(a) provides that the lessor is considered in default if: (1) the lessor fails to deliver the goods in conformity to the lease contract; (2) the lessor repudiates the lease contract; (3) the lessee rightfully rejects the goods; or (4) the lessee justifiably revokes acceptance of the goods.

When the lessor defaults in any of these ways, the lessee may:

- (1) Cancel the lease contract. (U.C.C. 10508(a)(1).)
- (2) Recover as much of the rent and security that has been paid as is just under the circumstances. (U.C.C. 10508(a)(2).)
- (3) Cover and recover damages as to all goods affected, whether or not they have been identified to the lease contract. (U.C.C. 10508(a)(3), 10518.)
- (4) Recover damages for nondelivery. (U.C.C. 10508(a)(3); see U.C.C. 10519 [measure of damages generally]; U.C.C. 10520 [incidental and consequential damages].)
- (5) Pursue any other remedies provided in the lease contract. (U.C.C. 10508(a)(4).)

These remedies also apply with respect to goods under an installment lease if the value of the whole lease is substantially impaired. (U.C.C. 10508(a), 10510.)

Additional remedies may be available depending on the nature of the default. If the lessor fails to deliver the goods in conformity to the lease contract, or repudiates the lease contract, the lessee may recover any identified goods, or, if appropriate, obtain specific performance or replevy the goods. (U.C.C. 10508(b).) A lessee who rightfully rejects or justifiably revokes acceptance of goods has a security interest in any goods in his or her possession or control for rent or security that has been paid and reasonable expenses. The lessee may dispose of the goods in a good faith commercially

reasonable manner. (U.C.C. 10508(e); see also U.C.C. 10527 [disposition of rejected goods].)

If the lessor defaults under the lease contract in a manner not listed in U.C.C. 10508(a), the lessee may pursue the remedies provided in the lease contract. The lessee may also recover damages for losses resulting in the ordinary course of events from the default, as well as incidental and consequential damages, less any expenses saved. (U.C.C. 10508(c), 10519(c).)

The lessee may recover damages if the lessor has breached an express or implied warranty (U.C.C. 10508(d), 10519(d)), and may deduct default damages from any rent still due. (U.C.C. 10508(f).) Specific performance is available if the goods are unique or in other proper circumstances. (U.C.C. 10521; for further discussion of lessee's remedies, see C.E.B., 2 UCC Sales and Leases, §19.99 et seq.; for forms, see Cal. Civil Practice, 4 Business Litigation, §§48:42, 48:43.)

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13 Witkin Sum. Cal. Law Pers Prop § 215

[§ 215] Default by Lessee.

U.C.C. 10523(a) sets forth a lessor's default remedies in the event that the lessee: (1) wrongfully rejects or revokes acceptance of goods; (2) fails to make payment when due; or (3) partially or wholly repudiates the contract. Where the lessee defaults in one of these ways, the lessor may:

- (1) Cancel the lease contract. (U.C.C. 10523(a)(1).)
- (2) Proceed with respect to goods not identified to the lease contract. (U.C.C. 10523(a)(2); see also U.C.C. 10524 [identification and disposition of goods].)
- (3) Withhold delivery and take possession of goods previously delivered. (U.C.C. 10523(a)(3), 10525.)
- (4) Stop delivery of the goods by any bailee. (U.C.C. 10523(a)(4), 10526.)
- (5) Dispose of or retain the goods and recover damages, or in a proper case, recover rent. (U.C.C. 10523(a)(5); see U.C.C. 10527 [damages where goods disposed of]; U.C.C. 10528 [damages where goods retained]; U.C.C. 10529 [recovery of rent].)
- (6) Pursue any other remedies provided in the lease contract. (U.C.C. 10523(a)(6).)

If the lessor does not fully obtain a remedy to which he or she is entitled under U.C.C. 10523(a), U.C.C. 10523(b) provides that the lessor may recover any losses resulting in the ordinary course of events from the lessee's default, in addition to incidental damages, less any expenses saved as a consequence of the lessee's default. (See U.C.C. 10530 [allowable incidental damages].)

In the event of a default not specified in U.C.C. 10523(a), the lessor may pursue the remedies provided in the lease contract. If the default substantially impairs the value of the lease contract to the lessor, the lessor may also pursue remedies under U.C.C. 10523(a) and (b). Otherwise, the lessor is limited to recovery under the contract or U.C.C.

10523(b). (U.C.C. 10523(c).)

A lessor may, in addition to any other remedy, recover for any damage to the lessor's residual interest in the goods caused by the default. (U.C.C. 10532; see also U.C.C. 10531 [action against third party]; for further discussion of lessor's remedies, see Cal. Transactions Forms, 5 Business Transactions §31:50 et seq.; C.E.B., 2 UCC Sales and Leases, §19.106 et seq.; for complaint form, see Cal. Civil Practice, 4 Business Litigation, §48:45.)

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IV. LIENS

A. Nature and Kinds of Liens.

13 Witkin Sum. Cal. Law Pers Prop § 216

[§ 216] Nature and Kinds of Liens.

"A lien is a *charge* imposed in some mode other than by a transfer in trust upon specific property by which it is made security for the performance of an act." (C.C. 2872; see Rest., Security, Scope Note, p. 157; *51 Am.Jur.2d* (2000 ed.), *Liens* §1 et seq.; Cal. Transactions Forms, 3 Business Transactions §22:1 et seq.; 12 Am.Jur. Legal Forms 2d (1999 ed.), §165:1 et seq.; 16B Am.Jur. P.P. Forms (2000 ed.), *Liens*, Form 1 et seq.) A lien may be created by contract or by operation of law. (C.C. 2881.)

The important *classes of liens* on personal property are as follows:

(1) *Contractual liens for security*. The traditional personal property security devices, such as pledges, trust receipts, and inventory liens, are now governed by Division 9 of the Uniform Commercial Code. (See C.C. 2914; 4 *Summary* (10th), *Secured Transactions in Personal Property*, §19 et seq.) A security interest may also be created by express reservation in a contract of sale of property. (See *Barron-Gray Packing Co. v. Tapley* (1947) 78 C.A.2d 432, 437, 177 P.2d 776 [pre-Code; vendor reserved lien on future crop]; Rest., Security §65; 4 *Summary* (10th), *Sales*, §131.)

(2) *Common law and statutory possessory liens*, usually to compensate a person who, pursuant to express or implied contract, furnishes services or materials in the improvement of a chattel, or stores it. (See Rest., Security §59; infra, §217 et seq.)

(3) *Statutory nonpossessory liens*, created usually for the same purposes as possessory liens. (See *Mercy Hosp. & Med. Center v. Farmers Ins. Group of Cos.* (1997) 15 C.4th 213, 217, 61 C.R.2d 638, 932 P.2d 210, infra, §244, citing the text [hospital lien against proceeds received by patient from third-party wrongdoer (C.C. 3045.1 et seq.) is statutory nonpossessory lien]; infra, §221.)

(4) Liens created by *attachment, judgment, or execution*. (See 6 Cal. Proc. (4th), *Provisional Remedies*, §184 et seq.; 7 Cal. Proc. (4th), *Judgment*, §66; 8 Cal. Proc. (4th), *Enforcement of Judgment*, §§75 et seq., 85 et seq.)

(5) *Equitable liens*. (See infra, §221.)

"Other things being equal, different liens upon the same property have *priority* according to the *time of their creation*." (C.C. 2897; see *Wujcik v. Wujcik* (1994) 21 C.A.4th 1790, 1794, 27 C.R.2d 102 [medical providers' and attorney's contractual liens on plaintiff's judgment in personal injury action took precedence over judgment lien of

plaintiff's former spouse for child support, where contractual liens predated divorce judgment by several years]; 51 *Am.Jur.2d* (2000 ed.), *Liens* §68 et seq.; 16B *Am.Jur. P.P. Forms* (2000 ed.), *Liens*, Forms 16, 35, 62, 64; 4 *Summary* (10th), *Security Transactions in Real Property*, §48 et seq.; on subordination of lien by agreement, see 51 *Am.Jur.2d* (2000 ed.), *Liens* §73; 12 *Am.Jur. Legal Forms 2d* (1999 ed.), §165:56; 4 *Summary* (10th), *Security Transactions in Real Property*, §51 et seq.; on marshaling assets, see C.C. 2899; 53 *Am.Jur.2d* (1996 ed.), *Marshaling Assets* §1 et seq.; 17A *Am.Jur. P.P. Forms* (2000 ed.), *Marshaling Assets*, Form 1 et seq.; 13 *Summary* (10th), *Equity*, §23.) This rule applies only where *other things are equal*. Hence, a statutory lien may be given preference over a preexisting contractual lien. (See *infra*, §234.)

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

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

See 12 *Am.Jur. Legal Forms 2d* (2008 ed.), *Liens* §165:1 et seq.(4) *Liens created by attachment, judgment, or execution*:

Cross-References: 6 *Cal. Proc.* (5th), *Provisional Remedies*, §183 et seq.; 7 *Cal. Proc.* (5th), *Judgment*, §64; 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §§82 et seq., 92 et seq.

Priority according to time of creation: See *San Bernardino v. Calderon* (2007) 148 C.A.4th 1103, 1109, 1112, 56 C.R.3d 333, Supp., *infra*, §244 [time-based priority set forth in C.C. 2897 applies to liens arising under Hospital Lien Act].

Subordination of lien by agreement: See 12 *Am.Jur. Legal Forms 2d* (2008 ed.), *Liens* §165:48.

Marshaling assets: See 53 *Am.Jur.2d* (2006 ed.), *Marshaling Assets* §1 et seq.



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IV. LIENS

B. Possessory Liens.

1. In General.

13 Witkin Sum. Cal. Law Pers Prop § 217

[§ 217] In General.

(1) *What Constitutes Possessory Lien.* A possessory lien has been defined as the *privilege* of a bailee to *retain a chattel* until some demand against the bailor has been satisfied (e.g., for services, materials, or storage). It is distinguished from a security interest in that the bailment is not to secure payment of a debt or performance of some other act by the bailor. (*Rest., Security* §59.) It may be *specific* or general. (C.C. 2873; see *51 Am.Jur.2d* (2000 ed.), *Liens* §8.)

(2) *Specific Lien.* The specific or special lien arises usually from work done on a specific chattel or from a single transaction. "A special lien is one which the holder thereof can enforce only as security for the performance of a particular act or obligation, and of such obligations as may be incidental thereto." (C.C. 2875; cf. *Rest., Security* §60(2) ["demand arising out of one contract or one tort liability, or out of one contract and such tort liabilities as arise out of the relationship created by the contract"]; see also *Rest., Security* §62, Comment a.) Most possessory liens are specific. (See *infra*, §222 et seq.; on finder's right of possession, see *supra*, §117.)

(3) *General Lien.* A general lien covers the general indebtedness to the lienholder, i.e., a demand arising out of a series of transactions. "A general lien is one which the holder thereof is entitled to enforce as a security for the performance of *all the obligations*, or all of a particular class of obligations, which exist in his favor against the owner of the property." (C.C. 2874; cf. *Rest., Security* §60(3) ["security for the balance of a general account with the bailor"]; see also *Rest., Security* §62, Comment a.)

There are relatively few general liens: (a) Banker's lien. (C.C. 3054; see *Rest., Security* §62(c); 4 *Summary* (10th), *Negotiable Instruments*, §81.) (b) Factor's lien. (C.C. 2027, 3053; see *Rest., Security* §62(a); *Rest.2d*, Agency §464; 3 *Summary* (10th), *Agency and Employment*, §44.) (c) Lien of laundryman and dry cleaner. (C.C. 3051.) (d) Warehouseman's lien. (See *infra*, §228.) (e) Attorney's general lien. (See *Rest., Security* §62(b); *infra*, §221.) (On accountant's lien on books and records of client, see *76 A.L.R.2d* 1322; *1 Am.Jur.2d* (1994 ed.), *Accountants* §13.)

(4) *Enforcement of Lien.* The possessory lien at common law gave merely a right to retain possession until payment. No special means of enforcement were available, and the remedy of the lienholder was to bring an action on the claim, and execute on the resulting judgment. (See *White v. White* (1936) 11 C.A.2d 570, 574, 54 P.2d 482.) But modern statutes give certain lienholders special methods of enforcement. (See *Rest., Security* §72; *51 Am.Jur.2d* (2000

ed.), *Liens* §79 et seq.; Cal. Transactions Forms, 3 Business Transactions §22:7; 12 Am.Jur. Legal Forms 2d (1999 ed.), §165:3 et seq.; 16B Am.Jur. P.P. Forms (2000 ed.), *Liens*, Form 20 et seq.; *infra*, §222 et seq.)

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

(3) *General Lien*. See 1 *Am.Jur.2d* (2005 ed.), *Accountants* §8.

(4) *Enforcement of Lien*. See 12 Am.Jur. Legal Forms 2d (2008 ed.), *Liens* §165:2 et seq.



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IV. LIENS

B. Possessory Liens.

2. Requisites of Lien.

13 Witkin Sum. Cal. Law Pers Prop § 218

[§ 218] Requisites of Lien.

(1) *Power To Subject Goods to Lien.* A possessory lien is ordinarily created when the owner or the owner's authorized agent delivers the chattel with instructions to have the work done. And the general rule is that only the owner or someone with authority from the owner, express or implied, may subject property to a lien. (*Lowe v. Woods* (1893) 100 C. 408, 411, 34 P. 959; *Hackett v. California Laundry* (1935) 7 C.A.2d Supp. 757, 759, 45 P.2d 833 [tenant of furnished house without authority to pledge owner's credit had furnishings laundered; laundry had no lien on goods]; *General Exchange Ins. Corp. v. Pellissier Square Garage* (1937) 24 C.A.2d Supp. 768, 769, 69 P.2d 236 [thief left car with defendant; owner held entitled to recover it without payment of charges for storage and repairs]; see 27 Cal. L. Rev. 220; 51 Am.Jur.2d (2000 ed.), *Liens* §15.)

Under the California statute, however, the legal possessor, e.g., a conditional buyer in possession, may be entitled to create a lien in one important class of cases: where the lien claimant is "a person who *makes, alters, or repairs* any article of personal property, at the request of the owner, or *legal possessor* of the property." (C.C. 3051; see *Davenport v. Grundy Motor Sales Co.* (1915) 28 C.A. 409, 410, 152 P. 932 [conditional buyer of automobile]; cf. *Lowe v. Woods*, supra [holding that statute providing for livery stablekeeper's lien did not authorize creation of lien by conditional buyer of horse]; 27 Cal. L. Rev. 220; and cf. *C.I.T. Corp. v. Biltmore Garage* (1934) 3 C.A.2d Supp. 757, 762, 36 P.2d 247 [garagekeeper, who kept conditional vendee's automobile and performed services on it, but surrendered it to vendee on daily basis, lost, on each surrender, lien for all charges previously incurred]; infra, §220.) And it has been held that a provision in a conditional sale contract, prohibiting the buyer from permitting creation of liens, is ineffective as against the improver, unless the limitation of authority is communicated to the improver. (*Pacific States Finance Corp. v. Freitas* (1931) 113 C.A. Supp. 757, 769, 295 P. 804.)

Another exception is made by *Veh.C. 22851*: A police officer may have a motor vehicle removed to a garage for such causes as illegal parking, and the garagekeeper has a lien for towage and storage. (See 85 A.L.R.3d 199 [lien for towing or storage, ordered by public officer, of motor vehicle].)

(2) *Work Done by Lien Claimant.* The right to a possessory lien is generally confined to those who do some work on the chattel, or who store or protect it. (See 48 A.L.R.2d 894 [storage of motor vehicle].) Following this theory, it was held in *Nelson v. Yonge* (1925) 73 C.A. 704, 707, 239 P. 67, that one who merely advanced freight charges due on an automobile had no lien thereon for reimbursement.

However, an improver may claim a lien even though the improver does not personally do the work, but has it performed by an agent or subcontractor. (*Goodman v. Anglo-Calif. Trust Co. (1923) 62 C.A. 702, 705, 217 P. 1078.*)

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



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IV. LIENS

B. Possessory Liens.

3. Termination of Lien.

a. In General.

13 Witkin Sum. Cal. Law Pers Prop § 219

[§ 219] In General.

Payment or proper *tender* discharges a lien. (See *Covington v. Grant* (1927) 82 C.A. 749, 751, 256 P. 213; *Bogue v. Roeth* (1929) 98 C.A. 257, 261, 276 P. 1071; *Rest., Security* §78; 51 *Am.Jur.2d* (2000 ed.), *Liens* §66; 12 *Am.Jur. Legal Forms 2d* (1999 ed.), §165:61; 16B *Am.Jur. P.P. Forms* (2000 ed.), *Liens*, Form 38; 1 *Summary* (10th), *Contracts*, §770.)

A lien is also extinguished by the running of the *statute of limitations* on the principal obligation. (C.C. 2911; see 3 *Cal. Proc.* (4th), *Actions*, §405.)

But the general rule that the debtor may not recover property from the lienholder in possession, even though the statute has run on the debt (see *Puckhaber v. Henry* (1907) 152 C. 419, 424, 93 P. 114), is applicable to these liens. (*Woodruff v. Benbow* (1931) 118 C.A. 318, 320, 5 P.2d 73; see 4 *Summary* (10th), *Secured Transactions in Personal Property*, §5.)

The lien may also be waived by *conduct*, e.g., where the lienholder denies the owner's title and refuses a demand to deliver the property without setting up his or her lien. (*Enfield v. Huffman Motor Co.* (1953) 117 C.A.2d 800, 807, 257 P.2d 458; see 51 *Am.Jur.2d* (2000 ed.), *Liens* §65.) But the court in the foregoing case observed: "The statement that a refusal based upon any other claim than a lien waives the lien is probably too broad. The proper rule is that if the refusal is based on a ground inconsistent with the lien, such lien is waived." (117 C.A.2d 808.)

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

See 12 *Am.Jur. Legal Forms 2d* (2008 ed.), *Liens* §165:49.

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §430.



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B. Possessory Liens.

3. Termination of Lien.

b. Relinquishment of Possession.

13 Witkin Sum. Cal. Law Pers Prop § 220

[§ 220] Relinquishment of Possession.

(1) *General Rule.* The possessory lien is dependent on possession of the chattel. If the improver works on goods not in his or her possession, obviously no lien arises. An improver who does have possession but voluntarily relinquishes it waives the lien, and it is not recreated by subsequent acquisition of possession. (C.C. 2913; *Goodman v. Anglo-Calif. Trust Co.* (1923) 62 C.A. 702, 704, 217 P. 1078; *Davis v. Young* (1925) 75 C.A. 359, 363, 242 P. 743; *Covington v. Grant* (1927) 82 C.A. 749, 751, 256 P. 213; see *Rest., Security §80*; 51 *Am.Jur.2d* (2000 ed.), *Liens §60*.)

Although the parties, i.e., the owner and the improver, may make a binding agreement between themselves that delivery of possession to the owner shall not extinguish the lien, an agreement of this type is ineffective against creditors of the owner and subsequent bona fide purchasers or encumbrancers. (C.C. 2913; see *Goodman v. Anglo-Calif. Trust Co.*, *supra*.)

(2) *Conditional Relinquishment of Automobile.* A special problem is presented when automobiles used during the day are stored in a garage at night. There is a growing body of authority to uphold the garagekeeper's lien for repairs, materials, and storage charges, despite the "conditional relinquishment" of possession each day. The practical consideration is, of course, that an owner or possessor who cannot obtain the use of the vehicle for his or her business may be unable to pay the charges; but it is more difficult to find a theoretical basis for sustaining the lien. (See 74 *A.L.R.4th* 90 [loss of garagekeeper's lien on repaired vehicle by owner's use of vehicle].) In California, two conflicting decisions have been rendered by the appellate department of the superior court. In *Pacific States Finance Corp. v. Freitas* (1931) 113 C.A. Supp. 757, 295 P. 804, a conditional buyer stored the car at night, and used it every day. *Held*, the garagekeeper's lien remained good against the *unpaid conditional seller*. (113 C.A. Supp. 768.) (See 5 *So. Cal. L. Rev.* 253.) The opposite conclusion was reached in *C.I.T. Corp. v. Biltmore Garage* (1934) 3 C.A.2d Supp. 757, 759, 36 P.2d 247.

In *Huie v. Soo Hoo* (1933) 132 C.A. Supp. 787, 22 P.2d 808, under the same type of storage arrangement, the car, while out of the garage, was sold to a *bona fide purchaser*. *Held*, the lien was not enforceable against him. The court distinguished the *Freitas* case, *supra*, on the ground that the conditional seller gives possession to the buyer, thus permitting him to deal with the garagekeeper, while the bona fide purchaser is wholly innocent. (132 C.A. Supp. 789.)

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IV. LIENS

C. Nonpossessory Liens.

13 Witkin Sum. Cal. Law Pers Prop § 221

[§ 221] Nonpossessory Liens.

An *equitable lien* is perhaps the most important type of nonpossessory lien. "Where property of one person can by a proceeding in equity be reached by another as security for a claim on the ground that otherwise the former would be unjustly enriched, an equitable lien arises." (*Rest., Restitution §161*; see *51 Am.Jur.2d (2000 ed.)*, *Liens §30 et seq.*; *4 Summary (10th)*, *Security Transactions in Real Property*, §18 et seq.)

In *Farmers Ins. Exchange v. Zerin (1997) 53 C.A.4th 445, 61 C.R.2d 707*, plaintiff insurer paid medical benefits to several of its insureds who had been involved in an automobile accident. The insureds hired defendant attorney to pursue their claims against third-party tortfeasors who were allegedly responsible for their injuries. Plaintiff notified defendant that its policy with the insureds contained the following provision: "When a person has been paid damages by us under this policy and also recovers from another, the amount recovered from the other shall be held by that person in trust for us and reimbursed to us to the extent of our payment." Defendant thereafter received payments from third-party tortfeasors on behalf of the insureds but failed to pay any portion to plaintiff. Plaintiff sued for, among other things, declaration of an equitable lien on the payments from the third-party tortfeasors. The trial judge sustained defendant's demurrer as to that cause of action. *Held*, affirmed.

(a) No considerations of detrimental reliance or unjust enrichment are involved here. Plaintiff alleged an equitable lien was created by virtue of the insurance policy language alone. Although those contracting with plaintiff agreed to hold in trust for and to reimburse to plaintiff any third-party recovery up to the amount of medical benefits paid, other benefit recipients, who were not parties to the insurance contract, promised plaintiff nothing. Hence, plaintiff's obligation to pay medical benefits was independent of any right of reimbursement. Plaintiff therefore did not detrimentally rely on a promise of reimbursement from a particular fund in performing its contractual obligations. (*53 C.A.4th 456.*)

(b) There is no need for equity to come to plaintiff's rescue. The complaint does not allege, for example, that plaintiff has been unable to recover reimbursement from the insureds or that defendant paid the third-party recoveries to others not entitled to them. Defendant never promised that he would protect plaintiff's interests. (*53 C.A.4th 456.*) On the bare allegations of the complaint, this matter appears to be nothing more than an attempt by plaintiff to avoid seeking repayment from the parties who are primarily responsible by simply giving notice to their legal representative. (*53 C.A.4th 457.*) (See also *Farmers Ins. Exchange v. Smith (1999) 71 C.A.4th 660, 664, 83 C.R.2d 911* [insurance policies' reimbursement provisions did not create equitable liens providing basis for insurers' recovery of payments they

had made to insureds from insureds' attorney, who had collected settlement funds from third-party tortfeasors and disbursed funds to insureds; relying on *Zerin*.)

Other nonpossessory liens are created by statute. The following are illustrative:

(1) *Animal Breeder's Lien*. (C.C. 3062, 3063, 3064; see 4 *Am.Jur.2d* (1995 ed.), *Animals* §89; 2A *Am.Jur. Legal Forms 2d* (2004 ed.), §20:161 et seq.)

(2) *Attorney's Lien*. An attorney may have a statutory lien to secure his or her fees and disbursements (e.g., in workers' compensation proceedings), or a specific charging lien on a judgment by express contract. (See 1 *Cal. Proc.* (4th), *Attorneys*, §§194, 195.) It is still uncertain whether California recognizes the common law possessory retaining lien on papers and personal property of the client, or the common law nonpossessory charging lien on the judgment. (See 1 *Cal. Proc.* (4th), *Attorneys*, §§192, 193.)

(3) *County Hospital Care Lien*. (*Health & Saf.C.* 1473; *Welf.C.* 17109, 17400 et seq.; see 52 *Cal. L. Rev.* 364.)

(4) *Loggers' and Lumbermen's Lien*. (C.C. 3065 et seq.; see *Division of Labor Law Enforcement v. Siskiyou Mills* (1964) 229 *C.A.2d* 105, 109, 40 *C.R.* 111 [liability for wage claims where mill shipped logs out of county]; *Acco Contractors v. McNamara & Peepe Lumber Co.* (1976) 63 *C.A.3d* 292, 295, 133 *C.R.* 717, 9 *Summary* (10th), *Corporations*, §1 [corporation can qualify for loggers' lien]; 52 *Am.Jur.2d* (2000), *Logs and Timber* §87 et seq.; 12A *Am.Jur. Legal Forms 2d* (1999 ed.), §§168:15, 168:28; 17 *Am.Jur. P.P. Forms* (2000 ed.), *Logs and Timber*, Form 42 et seq.)

(5) *Maritime Liens*. All vessels are subject to a lien in favor of those who furnish necessary services, supplies, repairs, wharfage, or anchorage. Also, a lien may arise in favor of a person damaged by a breach of contract for transportation of goods, or persons who suffer a personal injury or property damage from a maritime tort. (*Harb. & Nav.C.* 491.) The lien attaches to the res; the vessel may be seized by attachment, and the demand satisfied by sale of the vessel wherever it is found, notwithstanding sale to a bona fide purchaser (where the lien claimant is not guilty of laches). (*Harb. & Nav.C.* 495.1 et seq.) (See *Rest., Security, Special Note*, p. 161; 69 *Harv. L. Rev.* 525; 14 *U.S.F. L. Rev.* 641; 22A *Am.Jur. P.P. Forms* (2001 ed.), *Shipping*, Forms 52, 54.)

In *Islander Yachts v. One Freeport 36-Foot Vessel* (1985) 173 *C.A.3d* 1081, 219 *C.R.* 654, plaintiff delivered to S, a vessel dealer, a boat plaintiff had manufactured. S paid plaintiff by check, transferred title to defendant buyer, and was paid by defendant. S then stopped payment on its check to plaintiff and went out of business. Plaintiff sought to obtain payment by asserting a lien against the vessel under *Harb. & Nav.C.* 491. *Held*, judgment for defendant affirmed.

(a) Plaintiff's claim was not preempted by federal law, for federal admiralty jurisdiction exists only if a contract is related to a maritime service or transaction. Contracts for construction of a vessel, as distinguished from contracts for vessel repair, are nonmaritime contracts because a vessel, until launched, is not directly connected with navigation or commerce by water. (173 *C.A.3d* 1087.)

(b) However, plaintiff was estopped from asserting a lien since it had issued a master carpenter's certificate to defendant's lender indicating that plaintiff had transferred 100% of its interest to S. The certificate did not indicate to the lender or defendant that plaintiff intended to reserve any lien rights. (173 *C.A.3d* 1088.)

(c) Until a state vessel lien is perfected by filing a complaint and serving process or by attachment, a vessel owner can extinguish the lien by transferring the vessel to a bona fide purchaser without notice of that lien. Thus, even if plaintiff were not estopped, plaintiff's failure to file its action to foreclose on the lien until a month after defendant's purchase for value and without notice of the lien extinguished that lien. (173 *C.A.3d* 1090.)

(6) *Miner's Lien*. (C.C. 3060; see 53A *Am.Jur.2d* (1996 ed.), *Mines and Minerals* §367 et seq.; 12B *Am.Jur. Legal Forms 2d* (1999 ed.), §175:270 et seq.)

(7) *State Tax Lien*. Govt.C. 7150 et seq. establish a uniform procedure for enforcing state tax liens. (See also Rev.C. 2191.3, 2191.4 [tax collector's filing of certificate of delinquency as to property tax creates lien on assessee's personal and real property]; 31 Cal. Western L. Rev. 1 [avoiding tax liens on personal property in bankruptcy].)

(8) *Thresher's Lien*. (C.C. 3061; see 3 Am.Jur.2d (2002 ed.), *Agriculture* §13 et seq.; 1B Am.Jur. Legal Forms 2d (1999 ed.), §15:25.)

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

Equitable lien: See *Los Angeles v. Construction Laborers Trust Funds for Southern Calif. Administrative Co.* (2006) 137 C.A.4th 410, 414, 39 C.R.3d 917 [attorney was entitled to equitable lien against settlement funds owed by county to attorney's client; client was aware that attorney was relying on lien to recover fees, attorney's conduct deserved protection by equity court, both parties acted throughout on assumption that security interest existed and attorney detrimentally relied on it, and client would have been unjustly enriched if it had retained funds].(1) *Animal Breeder's Lien*. See 4 Am.Jur.2d (2007 ed.), *Animals* §61.(2) *Attorney's Lien*.

Cross-References: 1 Cal. Proc. (5th), *Attorneys*, §§167, 168; 1 Cal. Proc. (5th), *Attorneys*, §166.

(4) *Loggers' and Lumbermen's Lien*. See 12A Am.Jur. Legal Forms 2d (2008 ed.), *Logs and Timber* §§168:13, 168:30.(6) *Miner's Lien*. See 53A Am.Jur.2d (2006 ed.), *Mines and Minerals* §345 et seq.; 12B Am.Jur. Legal Forms 2d (2008 ed.), *Mines and Minerals* §175:290 et seq.

(8) *Thresher's Lien*. See 1B Am.Jur. Legal Forms 2d (2008 ed.), *Agriculture* §15:22.



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IV. LIENS

D. Particular Statutory Liens.

1. Innkeeper's (Hotelkeeper's) Lien.

a. Nature and Scope.

13 Witkin Sum. Cal. Law Pers Prop § 222

[§ 222] Nature and Scope.

The lien of an innkeeper (now generally known as a hotelkeeper) differs from the usual improver's or storage lien in that it is given as security for the general charges for room, board, and similar matters, i.e., for services to the *guest* rather than to the guest's *property*. (See generally *Rest., Security* §§60, 61(c), 63; *8 Hastings L. J.* 33 [discussion of common law]; *40A Am.Jur.2d* (1999 ed.), *Hotels, Motels, and Restaurants* §190 et seq.; *9A Am.Jur. Legal Forms 2d* (2002 ed.), §137:8; *13B Am.Jur. P.P. Forms* (1999 ed.), *Hotels, Motels, and Restaurants*, Form 7 et seq.; and see also *P.C.* 537 [fraud in obtaining credit, or removal of baggage without payment].)

In some jurisdictions the innkeeper's lien extends to goods brought in by the guest but *owned by third persons*. (See *8 Hastings L. J.* 38; *Rest., Security* §63(2) and Comment h.) C.C. 1861 provides that "[h]otel, motel, inn, boardinghouse, and lodginghouse keepers" have a lien upon the *baggage and other property belonging to or legally under the control* of their guests, in such hotel, etc., for their charges, advances, and cost of enforcing the lien.

C.C. 1861a gives a similar, but less extensive, lien to "[k]eepers of *furnished and unfurnished apartment houses, apartments, cottages, or bungalow courts*." This landlord's lien extends to "baggage and other property of value belonging to" the tenant or guest and "all the right, title and interest" of the tenant or guest in and to all property in his or her possession in such apartment house, etc. (C.C. 1861a; see *49 Am.Jur.2d* (1995 ed.), *Landlord and Tenant* §942 et seq.; *16A Am.Jur. P.P. Forms* (2000 ed.), *Landlord and Tenant*, Form 107 et seq.)

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

See *40A Am.Jur.2d* (2008 ed.), *Hotels, Motels, and Restaurants* §175 et seq.; *13B Am.Jur. P.P. Forms* (2009 ed.), *Hotels, Motels, and Restaurants*, §6 et seq. *Landlord's lien*: See *49 Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §790 et seq.



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D. Particular Statutory Liens.

1. Innkeeper's (Hotelkeeper's) Lien.

b. Exemptions.

13 Witkin Sum. Cal. Law Pers Prop § 223

[§ 223] Exemptions.

C.C. 1861 formerly exempted from its coverage a musical instrument used by the owner to earn all or part of his or her living, and a prosthetic orthopedic appliance personally used by a guest, boarder, tenant, or lodger. The section was amended in 1979 to delete reference to specific items, and in 1982 to conform to the Enforcement of Judgments Law (see 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §9 et seq.). It now provides: "Any property which is exempt from enforcement of a money judgment is not subject to the lien provided for in this section."

C.C. 1861a also listed a number of specific exemptions (e.g., musical instrument used to earn a living, furniture, medicine), but a 1982 amendment eliminated them and granted an exemption for any property exempt from enforcement of a money judgment.

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

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §18 et seq.



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D. Particular Statutory Liens.

1. Innkeeper's (Hotelkeeper's) Lien.

c. Enforcement.

1. In General.

13 Witkin Sum. Cal. Law Pers Prop § 224

[§ 224] In General.

(1) *C.C. 1861*. Prior to 1979, C.C. 1861 permitted an innkeeper to sell property in his or her possession after nonpayment for a specified period and upon published notice. If the property was legally under the control of, but did not belong to, the guest, it could not be summarily sold after notice of this fact. The provisions on execution sales then became applicable, and the true owner could make a claim and recover the property unless estopped. (See *Rudolph Wurlitzer Co. v. Farb* (1931) 120 C.A. Supp. 773, 6 P.2d 358.)

This procedure was held unconstitutional by a federal district court because of the lack of any provision for a hearing prior to imposition of the lien. Accordingly, C.C. 1861 was amended in 1979 to provide that the "lien may be enforced *only after final judgment* in an action brought to recover such charges or moneys." And possession of the property subject to the lien, pending the outcome of the action may now be obtained only by *writ of possession*. (See *infra*, §226.)

(2) *C.C. 1861a*. The landlord may enforce his or her lien *only after final judgment* in an action brought to recover charges or moneys due. After 30 days from the date of final judgment, the landlord may *sell* the property *at public auction*, upon published notice pursuant to *Govt.C. 6064* and 15 days' mailed notice to the debtor. (C.C. 1861a.)

If the property is not in the landlord's possession, the lien may only be enforced in the manner provided for enforcement of a money judgment. (C.C. 1861a.)

(3) *Distribution of Surplus*. After sale by a landlord, the surplus must be paid, upon demand, to the guest or tenant, until 6 months have elapsed, when it must be paid into the county treasury. One year afterwards, if unclaimed, it goes to the general fund of the county. Such a sale is a *perpetual bar to any action against the innkeeper or landlord for damages*. (C.C. 1861a.)

Prior to 1979, C.C. 1861 contained the same provision, but by amendment in 1979, reference to the distribution of surplus proceeds was deleted.

(4) *Disposal of Unclaimed Property*. Disposal by innkeepers and landlords of unclaimed property is covered by C.C. 1980 et seq. (See 12 *Summary* (10th), *Real Property*, §749.)

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



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2. Landlord's Possession During Pendency of Action.

13 Witkin Sum. Cal. Law Pers Prop § 225

[§ 225] Landlord's Possession During Pendency of Action.

During pendency of the action, the landlord may take possession of property subject to the lien "upon an order issued by the court, where it appears to the satisfaction of the court from an affidavit filed by or on behalf of the plaintiff that the baggage or property is about to be *destroyed, substantially devalued, or removed from the premises*." (C.C. 1861a; see 16A Am.Jur. P.P. Forms (2000 ed.), Landlord and Tenant, Form 116.) The landlord must give the tenant 10 days' written notice of the hearing on the motion for the order, and must file an undertaking in a sum fixed by the court. (C.C. 1861a.) When the property is "not in the possession of the keeper as provided herein," the lien may be enforced only by writ of execution. (C.C. 1861a.) With respect to property taken into his or her possession, the landlord has the same duties and liabilities as a depository for hire. (C.C. 1861a.)

A landlord, upon court order, has the right to enter the premises "peaceably" without incurring liability to the tenant for "conversion, trespass, or forcible entry." (C.C. 1861a; see *Van Dorn v. Couch* (1937) 21 C.A.2d Supp. 749, 753, 64 P.2d 1197 [apartment-house keeper who entered apartment and removed clothing and baggage of delinquent guest not guilty of conversion or trespass].) "An entry shall be considered peaceable when accomplished with a key or passkey or through an unlocked door during the hours between sunrise and sunset." (C.C. 1861a.)

Former C.C. 1861 granted innkeepers a similar right, but this provision was deleted from C.C. 1861 in 1979. (On writ of possession procedure for innkeeper, see *infra*, §226.)

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



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aa. Application, Writ, and Restraining Order.

13 Witkin Sum. Cal. Law Pers Prop § 226

[§ 226] Application, Writ, and Restraining Order.

(1) *Application.* While an action by an innkeeper to recover the charges or moneys claimed is pending (see *supra*, §224), the plaintiff may reach property subject to the lien by a writ of possession. On the filing of a complaint or at any time thereafter, the plaintiff may file an application for the writ with the court in which the action was filed. It must be executed under oath and contain a showing of the basis of the claim, plaintiff's right to possession, a general description of the property and statement of its value, and a statement of the amount claimed to be owed. (C.C. 1861.5(a), (b); see C.C. 1861.5(c) [showing may be made by affidavit]; *C.C.P. 116.220(a)(3)* [small claims court has jurisdiction to issue the writ where plaintiff's claim is not over \$ 5,000]; C.C. 1861.28 [judicial duties to be performed in this proceeding are "subordinate judicial duties" which may be performed by court commissioners; see 2 *Cal. Proc.* (4th), *Courts*, §347 et seq.].)

(2) *Hearing.* Except in situations when *ex parte* issuance is permitted (see *infra*), no writ may be issued except after a hearing on a noticed motion. (C.C. 1861.6(a).)

(a) The defendant must be served with a copy of the summons and complaint, notice of application and hearing (with specified information), and a copy of the application and any affidavit filed in its support. (C.C. 1861.7, 1861.8.)

(b) Each party must file and serve any affidavits and points and authorities within the time prescribed by rule. (C.C. 1861.9; see C.C. 1861.27 [general rules on form and content of affidavits; verified complaint may be used in lieu of or in addition to affidavit].)

(c) The court must make its determination on the basis of the pleadings and other papers; but, on good cause shown, it may receive additional evidence and authority or may continue the hearing for the production of additional evidence, affidavits, or points and authorities. (C.C. 1861.9.)

(d) The writ will issue if the court finds that the plaintiff has established the probable validity of the claim to possession, that the property is located on the premises, and that the plaintiff has provided the undertaking required by

C.C. 1861.21, *infra*. (C.C. 1861.10(a).)

(e) Neither the failure of the defendant to oppose issuance of the writ nor the failure to rebut evidence produced by the plaintiff will constitute a waiver of any defense in the action or any other action, or have any effect on the right of the defendant to produce or exclude evidence at the trial of any such action. (C.C. 1861.13.)

(f) The determinations of the court (1) will have no effect on the determination of any issues in the action (other than those relevant to the possession proceeding); (2) will not affect the rights of any party in any other action arising out of the same claim; and (3) cannot be given in evidence or referred to in the trial. (C.C. 1861.14.)

(3) *Ex Parte Issuance of Writ.*

(a) The writ may be issued *ex parte* if probable cause appears that the following conditions exist: (1) The property is not necessary for the support of the defendant or the defendant's family; (2) there is an immediate danger that it will become unavailable to levy or substantially impaired in value; (3) *ex parte* issuance is necessary to protect it; (4) the plaintiff establishes the probable validity of the claim. (C.C. 1861.6(b).)

(b) The application must comply with C.C. 1861.5, *supra*, and must also include a showing of the conditions, *supra*; and the writ may issue if the court finds that the conditions exist and the requirements are met. (C.C. 1861.6(b).)

(c) Where a writ has been issued, the defendant, and any other person entitled to be served with a writ, must be served with a copy of the summons and complaint, a copy of the application and any supporting affidavit, and a notice in conformity with C.C. 1861.8. (C.C. 1861.6(b).)

(d) Any defendant whose property has been taken may apply for an order that the writ be quashed and the property released. The application must be made by noticed motion, and the provisions of C.C. 1861.9 (affidavits, points and authorities, etc.), *supra*, apply. Pending the hearing the court may order that delivery of property pursuant to C.C. 1861.19 (*infra*, §227) be stayed. (C.C. 1861.6(b).)

(e) If the court determines that the plaintiff is not entitled to a writ, it must quash the writ and order release and redelivery of property levied upon. It must also award the defendant any damages proximately caused by the levy and loss of possession. (C.C. 1861.6(b).)

(4) *Writ and Undertaking.* The writ must contain specified directions and information. (C.C. 1861.12.) It will not issue, however, until the plaintiff has filed an undertaking in an amount not less than twice the value of the property as determined by the court. (C.C. 1861.21; on exception to plaintiff's sureties, and effect of justification or failure to qualify, see C.C. 1861.23.) And no writ may issue directing the levying officer to enter any premises unless the plaintiff has established that there is probable cause to believe that the property is located there. (C.C. 1861.10(b).)

(5) *Temporary Restraining Order.*

(a) At or after the time of filing an application for a writ of possession, the plaintiff may apply for a temporary restraining order, prohibiting the defendant from transferring, concealing, or impairing the value of the property. (C.C. 1861.16(a), 1861.17.)

(b) The order may be made in the discretion of the court, on the filing of the same kind of undertaking by the plaintiff that is required for a writ of possession (*supra*). (C.C. 1861.17, 1861.21.)

(c) The order may issue *ex parte* on a proper showing of necessity and probable validity of the claim. (C.C. 1861.16(b).)

(d) If, at the hearing, the court determines that the plaintiff is not entitled to a writ of possession, it must dissolve the temporary restraining order; otherwise, it may issue a preliminary injunction to remain in effect until the property is

seized pursuant to the writ. (C.C. 1861.16(d).)

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

(1) *Application*.

Cross-Reference: 2 *Cal. Proc.* (5th), *Courts*, §343 et seq.



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bb. Levy on Property.

13 Witkin Sum. Cal. Law Pers Prop § 227

[§ 227] Levy on Property.

(1) *Procedure.* The procedure for levying on the property subject to the lien is set forth in C.C. 1861.18 et seq.:

(a) The levying officer must deliver a copy of the writ, with a copy of the plaintiff's undertaking attached, to the person in possession of the property. If no one is in possession, the officer must serve these papers on the defendant. (C.C. 1861.18.)

(b) After taking possession, the officer must keep the property in a secure place. (C.C. 1861.19(a).)

(c) If notice of the filing of an undertaking for redelivery or notice of objection to the plaintiff's undertaking is not received within 10 days after the levy, the officer must deliver the property to the plaintiff, on receiving "the fees for taking, and necessary expenses for keeping, the property." (C.C. 1861.19(a)(1).)

(d) If notice of filing of an undertaking for redelivery is received within the 10-day period, and the defendant's undertaking is not objected to, the officer must redeliver the property to the defendant, on receiving the required fees and expenses. If the defendant's undertaking is objected to, the officer must not deliver or redeliver the property until the time specified in C.C. 1861.23, *infra*. (C.C. 1861.19(a)(2), (a)(3).)

(e) When no undertaking for redelivery has been filed (and when not otherwise provided by contract), the court may order that the property be sold, on a showing (1) that it is perishable or will greatly deteriorate or depreciate in value, or (2) that for some other reason the interest of the parties will best be served thereby. (C.C. 1861.19(b).)

(f) The officer must "return the writ of possession, with his proceedings thereon," within 30 days after a levy, but in no event more than 60 days after the writ is issued. (C.C. 1861.20.)

(2) *Undertaking To Prevent Levy.* C.C. 1861.22, 1861.23 outline the steps the defendant may take to prevent the levy or regain possession:

(a) The defendant may file an undertaking to pay the costs and damages the plaintiff might sustain by reason of the loss of possession. The undertaking may be filed at any time before or after the levy, in the amount of the plaintiff's undertaking, and a copy must be mailed to the levying officer. (C.C. 1861.22(a), (b).)

(b) If the defendant's undertaking is not objected to, the levying officer (or the plaintiff) must deliver the property to the defendant. If objection is made, the provisions of C.C.P. 1861.23 apply. (C.C. 1861.22(c).)

(c) If the defendant's undertaking is not sufficient, the court must order delivery of the property to the plaintiff or, if the plaintiff currently has possession, his or her continued retention of possession; if the undertaking is sufficient, the court must order delivery of the property to the defendant. (C.C. 1861.23(d).)

(3) *Judgment Against Plaintiff in Main Action.* If the final judgment is *against* the plaintiff, he or she must redeliver the property to the defendant; and the plaintiff is liable for damages proximately caused by (a) operation of any restraining order or injunction, (b) levy of the writ of possession, and (c) loss of possession of the property. (C.C. 1861.15.)

(4) *Third-Party Claims.* Where the property taken is claimed by a third person, the law and procedure applicable in cases of third-party claims under C.C.P. 720.010 et seq. apply. (C.C. 1861.25; see 8 Cal. Proc. (4th), *Enforcement of Judgment*, §358 et seq.)

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

(4) *Third-Party Claims.*

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §367 et seq.



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2. Warehouseman's Lien.

a. Nature and Effect.

13 Witkin Sum. Cal. Law Pers Prop § 228

[§ 228] Nature and Effect.

(1) *Former Law.* Under the Warehouse Receipts Act, a warehouseman had a *general lien* for charges and *advances* on goods in his or her custody. (Former C.C. 1858.50 et seq.; see *San Angelo Wine & Spirits Corp. v. South End Warehouse Co.* (1936) 19 C.A.2d Supp. 749, 758, 61 P.2d 1235 [storage of whiskey; lien covered sums paid as internal revenue taxes at request of bailor].) And the Act gave the warehouseman the election of the remedies of a bailee for hire, including pledge, sale, or foreclosure, or public sale after notice. (Former C.C. 1858.56, 1858.58; see *Jewett v. City Transfer & Storage Co.* (1933) 128 C.A. 556, 560, 18 P.2d 351; *Sun Harbor Marina v. Sellick* (1967) 250 C.A.2d 281, 285, 58 C.R. 459; 21 Cal. L. Rev. 628.)

(2) *Uniform Commercial Code.* The lien provisions of the Code, as revised in California, are substantially the same as the lien provisions of the superseded Warehouse Receipts Act. (See U.C.C. 7209, West's California Code Comment; 30 *Hastings L. J.* 1 [Good Faith Purchase and Warehouse Receipts: Thoughts on the Interplay of Articles 2, 7, and 9 of the UCC]; 7A Anderson 3d (2001 ed.), §7-209:1 et seq.; 78 *Am.Jur.2d* (2002 ed.), *Warehouses* §68 et seq.)

(a) The warehouseman has a "lien against the bailor on the *goods deposited or on the proceeds thereof in his possession.*" (U.C.C. 7209(1).) The lien embraces "charges for storage, processing incidental to storage, or transportation, including demurrage and terminal charges, insurance, labor, or charges present or future in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law." (U.C.C. 7209(1); cf. C.C. 1856 [any bailee for hire has lien for storage charges, advances, insurance, and other expenses].)

(b) The warehouseman's lien is a *general lien* that may be carried over and asserted against like charges and expenses relating to other goods stored with the warehouseman, even though those other goods are no longer in the warehouseman's possession. (U.C.C. 7209(1).) If a negotiable warehouse receipt is issued, however, the warehouseman's lien, against a holder by due negotiation, is limited to charges specified on the receipt; and if no charges are specified, the lien is limited to a reasonable charge for storage of the specific goods after the date of the receipt. (U.C.C. 7209(1); see 6A *Am.Jur.* P.P. Forms (2002 ed.), *Warehouse Receipts*, Form 7:82.)

(c) If the warehouseman has a *security interest* against the bailor for charges other than those specified in U.C.C.

7209(1), such as for money advanced and interest, and a receipt is issued for the goods, the security interest is not valid against third persons without notice unless the charges are enumerated in the receipt and the maximum amount thereof stated. (U.C.C. 7209(2); see West's California Code Comment.)

(d) The warehouseman's lien and security interest are effective against "any person who so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid"; but they are not effective against the owner's interest if the goods were stolen and delivered to the warehouseman by a thief. (U.C.C. 7209(3)(a); see Official Comment 3; 6A Am.Jur. P.P. Forms (2002 ed.), Warehouse Receipts, Form 7:83.) The warehouseman's lien on household goods (furniture, furnishings, and personal effects used in a dwelling) "is also effective against all persons if the depositor was the legal possessor of the goods at the time of deposit." (U.C.C. 7209(3)(b).)

(e) The warehouseman has the right to retain goods subject to the lien until the lien is satisfied. (See U.C.C. 7209, Official Comment 4.) The lien is terminated when the warehouseman voluntarily delivers the goods or unjustifiably refuses to deliver them. (U.C.C. 7209(4); see 6A Am.Jur. P.P. Forms (2002 ed.), Warehouse Receipts, Form 7:81.) If the warehouseman makes a proper sale of the goods, however, the lien continues and attaches to the proceeds thereof in the warehouseman's possession. (U.C.C. 7209(1).)

West's Key Number Digest, Warehousemen k.29 et seq.

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

(2) *Uniform Commercial Code*. See 7B Anderson 3d (2009 ed.), §7-209:1 et seq.

Division 7 (U.C.C. 7101 et seq.) was repealed and reenacted in 2006 to conform its provisions to revised Article 7 of the Uniform Commercial Code, effective January 1, 2007. Documents of title issued or bailments that arose before January 1, 2007, and the rights, obligations, and interests flowing from those documents or bailments, are governed by the former division. (Stats. 2006, Chap. 254, §81.)

(a) *Scope of lien*: U.C.C. 7209(1) was renumbered U.C.C. 7209(a) and amended in 2006. It now provides that the warehouse has a "lien against the bailor on the goods covered by a warehouse receipt or storage agreement or on the proceeds thereof in its possession." The portion quoted in the text detailing what the lien embraces is substantially unchanged.

(b) *General lien*: U.C.C. 7209(1) was renumbered U.C.C. 7209(a) and amended in 2006. It now refers to a "warehouse" rather than a "warehouseman" throughout. (c) *Security interest*: U.C.C. 7209(2) was renumbered U.C.C. 7209(b) and amended in 2006. It now provides that a warehouse may reserve a security interest against the bailor for the maximum amount specified on the receipt for charges other than those specified in U.C.C. 7209(a), such as for money advanced and interest. The security interest is governed by U.C.C. 9101 et seq. (4 *Summary* (10th), *Secured Transactions in Personal Property*, §21 et seq.).

(d) *Effectiveness of lien*: U.C.C. 7209(3)(a) was renumbered U.C.C. 7209(c) in 2006. It continues to provide that the warehouse lien and security interest are effective against "any person that so entrusted the bailor with possession of the goods that a pledge of them by the bailor to a good-faith purchaser for value would have been valid," but they are not effective against the owner's interest if the goods were stolen and delivered to the warehouse by a thief. (See Uniform Commercial Code Comment 3.) U.C.C. 7209(3)(b) was renumbered U.C.C. 7209(d) in 2006.

(e) *Termination of lien*: U.C.C. 7209 was amended in 2006. Uniform Commercial Code Comment 4 no longer expressly discusses the warehouse's right to retain goods. U.C.C. 7209(4) was renumbered U.C.C. 7209(e) and U.C.C. 7209(1) was renumbered U.C.C. 7209(a). Both subdivisions now refer to a "warehouse" rather than a "warehouseman" throughout.



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b. Enforcement.

13 Witkin Sum. Cal. Law Pers Prop § 229

[§ 229] Enforcement.

(1) In cases of commercial storage, i.e., goods stored by a merchant in the course of his or her business, the warehouseman may enforce the lien "by *public or private sale* of the goods in bloc or in parcels, *at any time or place and on any terms which are commercially reasonable*, after notifying all persons known to claim an interest in the goods." (U.C.C. 7210(1).) In cases of noncommercial storage, such as storage of household goods by private owners, the statute requires public sale and prescribes more detailed notification procedures. (U.C.C. 7210(2); see Official Comment 1; 7A Anderson 3d (2001 ed.), §7-210:1 et seq.; 78 Am.Jur.2d (2002 ed.), Warehouses §74 et seq.)

(2) A sale is conducted in a "commercially reasonable" manner if the warehouseman (a) "sells the goods in the usual manner in any recognized market therefor," (b) "sells at the price current in such market at the time of his sale," or (c) "has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold." (U.C.C. 7210(1).) The warehouseman has the right to bid and buy at the public sale. (U.C.C. 7210(4).)

(3) Before any foreclosure sale, any person claiming a right in the goods may pay the warehouseman the amount necessary to satisfy the lien plus reasonable expenses incurred in seeking to enforce the lien; thereafter, the warehouseman may not sell the goods, but must retain them subject to the terms of the warehouse receipt and the Code. (U.C.C. 7210(3).) The warehouseman may satisfy the lien from the proceeds of the foreclosure sale, "but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods." (U.C.C. 7210(6).)

(4) A purchaser in good faith at the foreclosure sale takes good title, even if the warehouseman fails to comply with the statutory requirements for sale. (U.C.C. 7210(5).) However, a failure to comply may make the warehouseman liable for damages; and wilful violation constitutes conversion. (U.C.C. 7210(9); see Cal. Civil Practice, 4 Business Litigation, §44:43; 6A Am.Jur. P.P. Forms (2002 ed.), Warehouse Receipts, Form 7:87.)

The owner or operator of a *frozen food locker plant* has a lien that may be secured and enforced in the same manner as a warehouseman's lien. (*Health & Saf.C. 112590.*)

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

(1) *Authority for sale and notification requirements*: U.C.C. 7210(1) was renumbered U.C.C. 7210(a), with minor amendment, in 2006. The portion quoted in the text now provides that "a warehouse's lien may be enforced by public or private sale of the goods, in bulk or in packages, at any time or place and on any terms that are commercially reasonable, after notifying all persons known to claim an interest in the goods." U.C.C. 7210(2) was renumbered U.C.C. 7210(b) in 2006.

See 7B Anderson 3d (2009 ed.), §7-210:1 et seq.(2) *"Commercially reasonable"*: U.C.C. 7210(1) was renumbered U.C.C. 7210(a), with minor amendment, in 2006. The portion quoted in the text now provides that a warehouse "sells in a commercially reasonable manner if the warehouse sells the goods in the usual manner in any recognized market therefor, sells at the price current in that market at the time of the sale, or otherwise sells in conformity with commercially reasonable practices among dealers in the type of goods sold." U.C.C. 7210(4) was renumbered U.C.C. 7210(d) in 2006.

(3) *Payment before foreclosure sale and proceeds of sale*: U.C.C. 7210(3) was renumbered U.C.C. 7210(c) and U.C.C. 7210(6) was renumbered U.C.C. 7210(f) in 2006. Both subdivisions now refer to a "warehouse" rather than a "warehouseman" throughout.

(4) *Effect of failure to comply with statutory requirements*: U.C.C. 7210(5) was renumbered U.C.C. 7210(e) and U.C.C. 7210(9) was renumbered U.C.C. 7210(i) in 2006. Both subdivisions now refer to a "warehouse" rather than a "warehouseman" throughout.



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3. Self-Service Storage Facility Owner's Lien.

13 Witkin Sum. Cal. Law Pers Prop § 230

[§ 230] Self-Service Storage Facility Owner's Lien.

(1) *Nature and Effect.* Owners of facilities who rent or lease space therein to others for the storage of personal property, but who, unlike warehousemen (*supra*, §§180, 181), do not receive a document of title to the stored property, have been given a possessory lien on the property by the California Self-Service Storage Facility Act (*B. & P.C. 21700 et seq.*), enacted in 1981. A "self-service storage facility" is defined as real property designed and used to rent or lease *individual storage space* to occupants having access thereto for the purpose of storing and removing personal property or for storing *individual storage containers* provided to occupants who have exclusive use of the containers. It *does not include a garage or other storage area in a private residence*, and is not a warehouse or a public utility. (*B. & P.C. 21701(a).*)

The lien is on all personal property in the facility and is for the rent, labor, late payment fees, or other charges incurred pursuant to the rental agreement (contents specified in *B. & P.C. 21712*), as well as for expenses incurred in the preservation, sale, or disposition of the property. (*B. & P.C. 21702.*) However, the owner's lien is secondary to any lien on a motor vehicle or boat that has attached and is set forth in the documents of title to the vehicle or boat. (*B. & P.C. 21702.5(a).*)

(2) *Enforcement.* Where vehicles or vessels are subject to registration and identification under the Vehicle Code, liens are to be enforced in accordance with (a) the Civil Code, in the case of vehicles, and (b) the Harbor and Navigations Code, in the case of a vessel. (*B. & P.C. 21702.5(b), (c), (d).*) Where other liens are involved, the enforcement procedure is as follows:

(a) When the rent or other charges have remained unpaid for 14 consecutive days, the owner may terminate the occupant's right to use the facility by sending a preliminary lien notice that the right will terminate, and a lien will arise, on a specified date (not less than 14 days after the mailing of the notice), unless all sums due are paid prior thereto. (*B. & P.C. 21703* [notice may be sent by certified mail, postage prepaid, or by regular first-class mail if owner obtains certificate of mailing indicating date notice was mailed].) (On form of notice, see *B. & P.C. 21704.*)

(b) Attachment of the lien has different consequences, depending on which method the owner used to mail the preliminary lien notice required by *B. & P.C. 21703*, *supra*. If the preliminary notice was sent by certified mail, the owner may deny the occupant access to the space, enter the space, and remove any property found in the space to a

place of safekeeping. (*B. & P.C. 21705(a)*.) If, however, the preliminary notice was sent by regular first-class mail, the owner may deny the occupant access to the space and may enter the space, but may not remove the occupant's property for at least 14 days after the termination date specified in the preliminary notice. During that time, the occupant may regain full use of the space by paying the full lien amount. (*B. & P.C. 21705(b)*.) Moreover, if the preliminary notice was sent by regular mail, the subsequent notice of lien sale must state that the occupant may regain full use of the space by paying the full lien amount before the specified date of sale. (*B. & P.C. 21705(c)(1)(C)*.)

(c) If the declaration in opposition to the lien sale is not received by the specified date, the owner, after publishing or posting notice as specified (*B. & P.C. 21707(a)*), may sell the property (*B. & P.C. 21706*) in a commercially reasonable manner, retaining from the proceeds of the sale the amount of the lien and costs of sale and holding any excess on behalf of the occupant, who may claim the excess at any time within 1 year of the date of sale (*B. & P.C. 21707(b)*). Any person with a perfected security interest in the property to be sold (see U.C.C. 9101 et seq.) may obtain possession of it by paying the total amount due for storage. (*B. & P.C. 21708*.) Any person claiming a right to the property may prevent a sale by paying the amount necessary to satisfy the lien and the reasonable expenses, the property then being retained by the owner pending a court order directing disposition. (*B. & P.C. 21709*.)

(d) If a declaration in opposition to the lien sale has been timely received, the owner may enforce the lien by filing a verified complaint setting forth the facts upon which the lien is based. (*B. & P.C. 21710(a)*.) If the occupant fails to respond within 10 days (*B. & P.C. 21710(b)*), the owner may, after entry of default, apply for judgment in the amount of the lien, including costs (*B. & P.C. 21710(c)*). The judgment may be enforced by a sale conducted in a commercially reasonable manner 10 days or more from the entry of judgment unless, prior thereto, the occupant pays the full amount of the judgment. (*B. & P.C. 21710(d)*.) The occupant may stay enforcement of the judgment, and obtain possession of the property, by posting a bond in an amount one and one-half times the amount of the judgment. (*B. & P.C. 21710(e)*; see Judicial Council Form No. SUM-140 [Summons--Storage Lien Enforcement], adopted for mandatory use.)

(3) *Rights of Purchaser in Good Faith.* Even if the owner fails to comply with the provisions of the Act, a person who, in good faith, purchases goods that were sold to enforce a lien or a judgment takes the goods free of any rights of persons against whom the lien was claimed. (*B. & P.C. 21711*.)

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



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4. Carrier's Lien.

13 Witkin Sum. Cal. Law Pers Prop § 231

[§ 231] Carrier's Lien.

The Uniform Commercial Code, which superseded the Bills of Lading Act, made no substantial change in the carrier's lien. (See U.C.C. 7307, West's California Code Comment; and see generally 7A Anderson 3d (2001 ed.), §7-307:1 et seq.; 13 *Am.Jur.2d* (2000 ed.), *Carriers* §527 et seq.; 45 *A.L.R.5th* 227 [validity, construction, and applicability of U.C.C. 7307].)

(1) The Code grants a *specific lien* to carriers "on the goods covered by a bill of lading *for charges* subsequent to the date of its receipt of the goods *for storage or transportation* (including demurrage and terminal charges) and for *expenses* necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law." (U.C.C. 7307(1).) Against a purchaser for value of a negotiable bill of lading, the lien "is *limited to charges stated in the bill or the applicable tariffs*, or if no charges are stated then to a reasonable charge." (U.C.C. 7307(1); see 6A *Am.Jur.* P.P. Forms (2002 ed.), Bills of Lading, Form 7:122.)

(2) Where the carrier is required by law to receive the goods for transportation, the lien "is effective against the *consignor or any person entitled to the goods* unless the carrier had notice that the consignor lacked authority to subject the goods to such charges and expenses." (U.C.C. 7307(2); see Official Comments.) In other cases, the lien "is effective against the *consignor and any person who permitted the bailor to have control or possession* of the goods unless the carrier had notice that the bailor lacked such authority." (U.C.C. 7307(2); see Official Comments; 6A *Am.Jur.* P.P. Forms (2002 ed.), Bills of Lading, Form 7:123.)

In *Olsen v. Santa Barbara's Gracious Living* (2002) 103 *C.A.4th* 1377, 127 *C.R.2d* 744, a moving company transported goods belonging to the prospective seller of a business, at the request of the prospective buyer, who had taken possession of the business before the sale was consummated. The sale later failed to be consummated and the prospective buyer failed to pay the moving company's storage and transportation charges. The company asserted a lien against the seller's interest in the goods, which the trial court denied. *Held*, reversed. The moving company had an enforceable lien under U.C.C. 7307(2) against the seller.

(a) Although there is no California authority interpreting U.C.C. 7307, the official Comment to the Uniform Commercial Code states that the lien is valid "against anyone who permitted the bailor to have possession of the goods" even if the bailor had no authority to incur the charges, and that the lien is defeated only if the carrier has "knowledge or

reason to know of the bailor's lack of authority." Knowledge of another claim does not defeat the lien as long as the carrier is unaware that the bailor lacked authority to dispose of the goods in the normal course of its business. The fact that the carrier contracts with the bailor is immaterial under U.C.C. 7307. (103 C.A.4th 1381.)

(b) Here, the seller had permitted the buyer to take possession of goods, and the buyer and the seller had held themselves out as having consummated the sale, in order to satisfy some licensing requirements. (103 C.A.4th 1381.) Under these circumstances, the moving company could reasonably believe that the buyer had the authority to incur transport and storage charges. Furthermore, the seller's employees had an opportunity to correct this belief when the moving company's workers were moving the property, but did not. (103 C.A.4th 1382.)

(3) The carrier's lien on goods is terminated when the carrier voluntarily delivers the goods or unjustifiably refuses to deliver them. (U.C.C. 7307(3).)

(4) A carrier's lien may be *enforced* in the same manner as a warehouseman's lien. (U.C.C. 7308; see West's California Code Comment and Official Comments; 13 Am.Jur.2d (2000 ed.), *Carriers* §533; 6A Am.Jur. P.P. Forms (2002 ed.), Bills of Lading, Form 7:125 et seq.; supra, §229.)

A carrier also has a lien on freight in its possession for the total amount owed it by the shipper for freightage, charges for services, and advances due on freight previously delivered on the promise of the shipper to pay freightage, charges, and advances. (C.C. 3051.5(a).) Notice must be given that a failure to pay will give rise to a lien. (C.C. 3051.5(b).) The method of enforcement of such a lien is specified. (C.C. 3051.5(c), (d), (e).)

SUPPLEMENT: [This section is current through the latest supplement]
Uniform Commercial Code: See 7B Anderson 3d (2009 ed.), §7-307:1 et seq.

Division 7 (U.C.C. 7101 et seq.) was repealed and reenacted in 2006 to conform its provisions to revised Article 7 of the Uniform Commercial Code, effective January 1, 2007. Documents of title issued or bailments that arose before January 1, 2007, and the rights, obligations, and interests flowing from those documents or bailments, are governed by the former division. (Stats. 2006, Chap. 254, §81.)

(1) *Scope of lien:* U.C.C. 7307(1) was renumbered U.C.C. 7307(a), with minor amendment, in 2006. The portions quoted in the text now provide that a carrier has a lien "on the goods covered by a bill of lading or on the proceeds thereof in its possession for charges after the date of the carrier's receipt of the goods for storage or transportation, including demurrage and terminal charges, and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law. However, against a purchaser for value of a negotiable bill of lading, a carrier's lien is limited to charges stated in the bill or the applicable tariffs or, if no charges are stated, a reasonable charge." (2) *Effectiveness of lien:* U.C.C. 7307(2) was renumbered U.C.C. 7307(b), without substantive change, in 2006. (3) *Termination of lien:* U.C.C. 7307(3) was renumbered U.C.C. 7307(c) in 2006.

(4) *Enforcement of lien:* The amendments to U.C.C. 7308 in 2006 were not substantive.



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5. Household Goods Carrier's Lien.

13 Witkin Sum. Cal. Law Pers Prop § 232

[§ 232] Household Goods Carrier's Lien.

(1) *Statutory Authorization.* Except as provided in *Pub.Util.C. 5133*, a household goods carrier in compliance with *Pub.Util.C. 5102 et seq.* has a lien on used household goods and personal effects to secure payment for transportation and additional services ordered by the consignor. No lien attaches to food, medicine, or medical devices, items used to treat or assist an individual with a disability, or items used for the care of a minor child. (*Pub.Util.C. 5142(a).*) Notwithstanding any other law, *Pub.Util.C. 5142* exclusively establishes and provides for this lien. (*Pub.Util.C. 5142(h)*; for definitions of consignor and consignee, see *Pub.Util.C. 5142(i).*)

(2) *Amount of Lien.* The amount secured by the lien is the maximum total dollar amount for the transportation of the household goods and personal effects and any additional services that is set forth clearly and conspicuously in writing adjacent to the space reserved for the consignor's signature and that the consignor agrees to before the goods or personal effects are moved from their location or the additional services are performed. (*Pub.Util.C. 5142(b)(1).*) The dollar amount for the transportation of household goods and personal effects and additional services may not be preprinted on a form, must be just and reasonable, and must be established in good faith by the household goods carrier based on the specific circumstances of the services to be performed. (*Pub.Util.C. 5142(b)(2).*)

(3) *Extinguishment of Lien.* When the amount specified in *Pub.Util.C. 5142(b)* is tendered to the household goods carrier, the lien is extinguished, and the household goods carrier must release all household goods and personal effects to the consignee. (*Pub.Util.C. 5142(c).*) A person who possesses or controls household goods or personal effects, and who knows, or through the exercise of reasonable care should know, that the household goods carrier has been tendered the specified amount, must release the household goods and personal effects at the consignor's or consignee's request. (*Pub.Util.C. 5142(d).*)

(4) *Additional Claims and Remedies.* Nothing in *Pub.Util.C. 5142* affects the carrier's right to claim additional amounts, on an unsecured basis, or a consignor's or consignee's right to make or contest a claim. Tender of payment of the amount specified in *Pub.Util.C. 5142(b)* is not a waiver of claims by the consignor or consignee. (*Pub.Util.C. 5142(e).*) A person injured by a violation of *Pub.Util.C. 5142* may bring an action for the recovery of the greater of \$ 1,000 or actual damages, injunctive or other equitable relief, reasonable attorneys' fees and costs, and exemplary damages of not less than three times the amount of actual damages for a wilful violation. (*Pub.Util.C. 5142(f).*)

(5) *No Waiver Allowed.* A waiver of *Pub.Util.C. 5142* is void and unenforceable. (*Pub.Util.C. 5142(g).*) (On notice that carrier must provide to consignor, see *Pub.Util.C. 5143.*)

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

(1) *Statutory Authorization.* *Pub.Util.C. 5142* was amended in 2006. *Pub.Util.C. 5142(h)* was relettered *Pub.Util.C. 5142(j)*. *Pub.Util.C. 5142(i)* was relettered *Pub.Util.C. 5142(k)*. (2a) *(New) Enforcement of Lien.* A household goods carrier may enforce the lien except as to goods that the carrier voluntarily delivers or unjustifiably refuses to deliver. The lien must be enforced as provided in *Pub.Util.C. 5142* and U.C.C. 9601 et seq. (4 *Summary* (10th), *Secured Transactions in Personal Property*, §171 et seq.) for the enforcement of a security interest in consumer goods in a consumer transaction. If *Pub.Util.C. 5142* and U.C.C. 9601 et seq. are in conflict, *Pub.Util.C. 5142* prevails. Every act required in connection with enforcing the lien must be performed in good faith and in a commercially reasonable manner. (*Pub.Util.C. 5142(d)*, added in 2006.)

(2b) *(New) Notice of Disposition.* The household goods carrier must provide a notification of disposition at least 30 days before a disposition. The notice must be provided to each consignor and consignee by personal delivery, or in the alternative, by first-class and certified mail, postage prepaid and return receipt requested, at the address last known by the carrier and at the destination address, and by electronic mail if an electronic mail address is known to the carrier. If any of the required recipients of notice are married to each other, and according to the carrier's records, reside at the same address, one notice addressed to both is sufficient. Within 14 days after a disposition, the carrier must give the consignors any surplus funds from the disposition and an accounting, without charge, of the proceeds of the disposition. (*Pub.Util.C. 5142(e)*, added in 2006.)

(3) *Extinguishment of Lien.* *Pub.Util.C. 5142(d)* was relettered *Pub.Util.C. 5142(f)* in 2006 and amended to provide that if the person fails to release the household goods and personal effects to the consignor or consignee, a peace officer may take custody of the goods and effects and release them to the consignor or consignee.

(4) *Additional Claims and Remedies.* *Pub.Util.C. 5142(e)* was relettered *Pub.Util.C. 5142(g)* in 2006. *Pub.Util.C. 5142(f)* was relettered *Pub.Util.C. 5142(h)* in 2006.

(5) *No Waiver Allowed.* *Pub.Util.C. 5142(g)* was relettered *Pub.Util.C. 5142(i)* in 2006.



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a. In General.

1. Statutory List.

13 Witkin Sum. Cal. Law Pers Prop § 233

[§ 233] Statutory List.

C.C. 3051 lists a number of liens on personal property in favor of various improvers, repairers, and others performing services and furnishing materials, including: (1) One who renders service for protection, improvement, safekeeping, or carriage; (2) one who makes, alters, or repairs an article; (3) foundry proprietor (lien on patterns); (4) plastic fabricator (lien on patterns and molds); (5) laundry proprietor and dry cleaner (general lien); but a wholesale dry cleaning plant has no lien on material sent to it by a retail dry cleaner.

C.C. 3051 also governs veterinary proprietors' and veterinary surgeons' lien rights, but C.C. 3080 et seq. govern all other livestock service providers. The appropriate statutory scheme is determined by who is in possession of the livestock and who provides the services, not by the type of service provided. (*Jakubaitis v. Fischer* (1995) 33 C.A.4th 1601, 1606, 40 C.R.2d 39 [C.C. 3051 applied to veterinarian who provided medical care, boarding, and feeding to horse].)

Additional liens are provided for by some other statutes; e.g., jeweler or watchmaker (C.C. 3052a); aircraft keeper (C.C.P. 1208.61; see *infra*, §243); garagekeepers (*infra*, §237); ship repairers (*Harb. & Nav.C. 410 et seq., 490 et seq., 500 et seq.*; see *Arques v. National Superior Co.* (1945) 67 C.A.2d 763, 768, 155 P.2d 643); oil well driller or operator--lien on oil leasehold (C.C.P. 1203.50 et seq.; see *Cal-Cut Pipe & Supply v. Haradine Petroleum* (1973) 35 C.A.3d 359, 372, 110 C.R. 666; *Coates v. Shell Western E & P* (1992) 5 C.A.4th 904, 913, 7 C.R.2d 187 [lien under C.C.P. 1203.50 et seq. limited to construction, operation, and maintenance of oil and gas facilities; lien not available to subcontractor removing pipe after well had ceased production]; 38 *Am.Jur.2d* (1999 ed.), *Gas and Oil* §146 et seq.).

C.C. 3051 provides for the following exemptions:

(1) Any vessel defined in *Harb. & Nav.C. 21*.

(2) Any vehicle defined in *Veh.C. 670* that is subject to registration under that code. (On liens on registered vehicles, see *infra*, §237.)

(3) Any manufactured home as defined in *Health & Saf.C. 18007*, any mobilehome as defined in *Health & Saf.C. 18008*, or any commercial coach as defined in *Health & Saf.C. 18001.8*, whether or not such manufactured home, mobilehome, or commercial coach is subject to registration under the Health and Safety Code. *Health & Saf.C. 18001.8* was amended in 2002 to replace "commercial coach" with "commercial modular," but the amended statute also specifies that the two terms have the same meaning.

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2. Nature and Effect.

13 Witkin Sum. Cal. Law Pers Prop § 234

[§ 234] Nature and Effect.

C.C. 3051 was chiefly designed to provide for liens previously recognized at common law, and the general common law rules apply. (See *Quist v. Sandman* (1908) 154 C. 748, 755, 99 P. 207; *First Nat. Bank of Los Angeles v. Silva* (1927) 200 C. 494, 496, 254 P. 262; *Nelson v. Yonge* (1925) 73 C.A. 704, 708, 239 P. 67.)

They are, however, specially favored, and take *priority* over preexisting contract liens such as chattel mortgages. Among theories advanced to justify such special protection are two declared by the California courts: *First*, the improver generally adds value to the property commensurate with his or her charges; and *second*, a lender can keep a loan within such limits as to be sufficiently secured despite the lien, while an improver cannot be expected to examine the records for preexisting mortgages when undertaking repair of a chattel. (See *Mortgage Sec. Co. of Calif. v. Pfaffmann* (1917) 177 C. 109, 113, 169 P. 1033 [repairer of automobile]; *First Nat. Bank v. Silva*, supra [agistor]; 12 Cal. L. Rev. 67; 15 Cal. L. Rev. 396; for contrary rule, see *Rest., Security* §76.)

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3. Enforcement.

13 Witkin Sum. Cal. Law Pers Prop § 235

[§ 235] Enforcement.

C.C. 3052, referring to the liens under C.C. 3051, provides that if the charge is due and unpaid for 10 days, the lienholder may sell the property at public auction on 10 days' advertised or posted notice (but not more than 20 days before the sale), applying the proceeds to the debt and costs, and paying the surplus to the legal owner. (See *Lundblade v. Pierce* (1928) 95 C.A. 192, 194, 272 P. 329 [improver who sells property before repairs are completed and claim has become due loses lien and sale is void]; 1C Am.Jur. P.P. Forms (1995 ed.), Animals, §125 et seq. [foreclosure of agistor's lien]; 12A Am.Jur. P.P. Forms (1999 ed.), Gas and Oil, Forms 37, 39 [foreclosure of gas and oil lien]; and see generally 51 Am.Jur.2d (2000 ed.), Liens §79 et seq.; Cal. Transactions Forms, 3 Business Transactions §§22:17 et seq., 22:46 [enforcement of liens under C.C. 3051]; 12 Am.Jur. Legal Forms 2d (1999 ed.), §165:30 et seq.; 16B Am.Jur. P.P. Forms (2000 ed.), Liens, Form 20 et seq.; for alternative procedure where charges do not exceed \$ 150, see C.C. 3052b, *infra*, §236.)

C.C. 3052a, referring to the liens of jewelers or watchmakers, provides that if the charge is unpaid for 1 year the lienholder may, after 30 days' notice by registered mail to the owner's last address, or posted notice if the address is unknown, sell at "public or bona fide private sale." (See Cal. Transactions Forms, 3 Business Transactions §22:49; 12 Am.Jur. Legal Forms 2d (1999 ed.), §165:33.)

C.C. 3066 permits dry cleaners or others who clean, press, wash, or repair clothing or household goods to sell the goods for unpaid charges after *90 days*, or, where the agreement calls for subsequent storage, after *12 months*. The lien claimant must keep a notice to this effect posted in his or her receiving office, and must give 30 days' notice of the sale to the owner by registered mail. (See 12 Am.Jur. Legal Forms 2d (1999 ed.), §165:32.)

An important limitation is stated in C.C. 3051a: If any lien under C.C. 3051 is over \$ 300 for any work, services, or care, or over \$ 200 for any safekeeping, the excess is invalid unless the lien claimant gives actual notice or mails a registered letter to the holder of the *legal title*, if known.

C.C. 3052.5 provides for the enforcement of liens of dealers who service home electrical appliances and are registered with the Bureau of Repair Services (now Bureau of Electronic and Appliance Repair) under *B. & P.C. 9800*

et seq., where the serviced item is worth less than the charges and is either (1) over 3 years old and worth less than \$ 200, or (2) over 6 years old. A serviced product may be disposed of 90 days after notice of sale is given either by newspaper publication (5 times) or by mail under specified alternate procedures.

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

See 12 Am.Jur. Legal Forms 2d (2008 ed.), Liens §165:29 et seq. [generally], §165:32 [jewelers], §165:31 [dry cleaners]. *Products of nominal value:* As amended in 2006, C.C. 3052.5 provides for the disposal of products that the service dealer reasonably believes are of nominal value. Nominal value means that the product is not readily salable for more than the legitimate charges against it, and either (1) the original retail value of the product is under \$ 200 and the product is over 3 years old, or (2) the original retail value is over \$ 200 and the product is over 6 years old.



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a. In General.

4. Where Charges Do Not Exceed \$ 150.

13 Witkin Sum. Cal. Law Pers Prop § 236

[§ 236] Where Charges Do Not Exceed \$ 150.

C.C. 3052b provides an alternative to the lien sale procedure of C.C. 3052 (supra, §235), and applies to liens under C.C. 3051 (supra, §233) for charges of \$ 150 or less. (See Cal. Transactions Forms, 3 Business Transactions §22:19.)

(1) As a condition precedent to using the procedure, the lienholder must have (a) provided the property owner with an accurate written summary of the lien provisions of C.C. 3052b; (b) obtained the property owner's address and telephone number, along with the property owner's signed declaration stating that the owner read and understood the summary when entering into the transaction from which the lien arose; and (c) posted, at the time of the transaction, a notice that fully and fairly informs the public of the substance of C.C. 3052b. The notice must be posted in a visible location on the lienholder's business premises. (C.C. 3052b(a).)

(2) Upon completion of the work for which the lien is claimed, the lienholder must notify the owner of the property subject to the lien by first-class mail. (C.C. 3052b(b).) If the property owner fails to pay the charges for which the lien is claimed for 30 days following receipt of the notice, the lienholder may charge \$ 2 per day for storage. (C.C. 3052b(c).) Not less than 30 days after the notice specified in C.C. 3052b(b), the lienholder must notify the property owner, by first-class mail, that the property will be sold to satisfy the lien unless the charges are paid within 30 days following the mailing of the notice. (C.C. 3052b(d).) (See Cal. Transactions Forms, 3 Business Transactions §22:47 [form of notice].)

(3) The lienholder may sell the property subject to the lien at a public or bona fide private sale to satisfy the property owner's obligations, the costs and expenses of the sale, and interest at an annual rate of 12%, if the lienholder (a) has complied with the notice requirements of C.C. 3052b(b), (d); (b) not less than 30 days have elapsed since the notice required by C.C. 3052b(d) was mailed; and (c) the property owner has not fully paid the original charges plus any additional charges authorized by C.C. 3052b(c). (C.C. 3052b(e) [specifying manner of computing interest].)

(4) The proceeds from the sale must first be applied to the discharge of the lien, the costs of sale, and the interest specified in C.C. 3052b(e). Any surplus must be paid to the former owner. (C.C. 3052b(g).)

(5) Within 20 days following a sale under C.C. 3052b(e), the property owner has the right to redeem the property

upon paying all charges, costs, expenses, and interest. (C.C. 3052b(f).)

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b. Garagekeeper's Lien.

1. In General.

13 Witkin Sum. Cal. Law Pers Prop § 237

[§ 237] In General.

(1) *Nature and Scope of Statute.* C.C. 3067 et seq. govern the conditions and procedures of lien enforcement by those who repair, store, or rent parking space for motor vehicles. (See 6 *Pacific L. J.* 228; 7 *Pacific L. J.* 325; see also *Adams v. Department of Motor Vehicles* (1974) 11 *C.3d* 146, 156, 113 *C.R.* 145, 520 *P.2d* 961, 7 *Summary* (10th), *Constitutional Law*, §647 [prior procedure, which allowed sale without hearing, was unconstitutional].)

C.C. 3068(a) states: "Every person has a lien dependent upon possession for the compensation to which the person is legally entitled for making repairs or performing labor upon, and furnishing supplies or materials for, and for the storage, repair, or safekeeping of, and for the rental of parking space for, any vehicle of a type subject to registration under the Vehicle Code, subject to the limitations set forth in this chapter."

The provisions on vehicle liens do not apply to manufactured homes (*Health & Saf.C. 18007*), mobilehomes (*Health & Saf.C. 18008*), or commercial coaches (*Health & Saf.C. 18001.8* [specifying that "commercial coach" and "commercial modular" have the same meaning]), whether or not the vehicle is subject to registration. (C.C. 3067.2.) (On mobilehome owner rights, see 12 *Summary* (10th), *Real Property*, §761 et seq.)

(2) *Extinguishment of Lien.* Any lien under C.C. 3068 which arises because of work or services performed on a vehicle with the consent of the registered owner is extinguished and no lien sale may be conducted unless either of the following occurs:

- (a) The lienholder applies for an authorization to conduct a lien sale within 30 days after the lien has arisen; or
- (b) An action in court is filed within 30 days after the lien has arisen. (C.C. 3068(b)(1).)

The lien is also extinguished where the lienholder fails to permit the legal owner or lessor to inspect the vehicle, during normal business hours and following written demand, not sooner than 24 hours nor later than 72 hours after receipt of the demand. (C.C. 3068(b)(3).)

A person whose lien has been extinguished must turn over possession of the vehicle, at the place where the work or

services were performed, to the legal owner or lessor upon the owner's or lessor's demand and tender of cash or a cashier's check covering costs for storage, safekeeping, or parking. (C.C. 3068(b)(2).)

(3) *Revival of Lien*. If the lien is lost through deprivation of possession by trick or fraud, the garagekeeper may, by repossession, revive the lien, subject to intervening rights of bona fide purchasers, etc. (C.C. 3070(a).)

(4) *Forfeiture of Towing and Storage Claims*. A person who improperly causes a vehicle to be towed or removed in order to create or acquire a lien forfeits all claims for towing, removal, or storage. In addition, that person is liable to the vehicle's owner or lessee for the cost of removal, transportation, and storage damages, as well as for attorneys' fees and court costs. (C.C. 3070(d).)

(5) *Official Forms*. The forms used under the garagekeeper's lien law must be those prescribed by the Department of Motor Vehicles. The language "shall be simple and nontechnical." (C.C. 3067.1.)

(6) *Assignment of Lien*. The lien may be effectively assigned in writing, together with delivery of possession of the vehicle, provided that written notice, either by personal delivery or by registered or certified mail, is given to the registered and legal owners. (C.C. 3069.)

(7) *Maximum Amount of Lien Without Consent of Legal Owner*. The maximum amounts for which the lien can be established without the necessity of obtaining the actual consent of the legal owner are \$ 750 for work and services and \$ 400 for parking, storage, or safekeeping, except that the limit for storage or safekeeping requested by a person other than the legal owner or lessor is \$ 500 if an application for authorization to conduct a lien sale has been filed within 30 days after commencement of storage. (C.C. 3068(c)(1); *Universal C.I.T. Credit Corp. v. Rater* (1963) 214 C.A.2d 493, 494, 29 C.R. 631; see *Brown v. J. E. French Co.* (1967) 253 C.A.2d Supp. 1079, 1080, 60 C.R. 646 [excess is only invalid as to legal owner; registered owner is liable for full amount]; 11 So. Cal. L. Rev. 182; Cal. Transactions Forms, 3 Business Transactions, §§22:20, 22:50; 8B Am.Jur. Legal Forms 2d (1998 ed.), §128:129 et seq.; and see C.C. 3068(c)(2) [validity of portion of lien that includes charges for care, storage, safekeeping or parking of vehicle in excess of 60 days]; C.C. 3068(c)(3) [charges for care, storage, or safekeeping of vehicle where request is made for vehicle's release].)

(8) *Attorneys' Fees*. In any action brought by the legal owner or lessor to recover a vehicle alleged to be wrongfully withheld by a lien claimant, the prevailing party is entitled to reasonable attorneys' fees and costs not exceeding \$ 1,750. (C.C. 3068(d); see *Gouskos v. Aptos Village Garage* (2001) 94 C.A.4th 754, 765, 114 C.R.2d 558 [each of two prevailing defendants was entitled to \$ 1,750; total award of \$ 3,500 upheld].)

(9) *Notice to Legal Owner of Storage Fees*. Veh.C. 10652.5 requires written notice by certified mail, with return receipt requested, to the legal owner whose name and address are known or may be ascertained from the records. Storage fees may be imposed only for the first 15 days of possession and for the period commencing 3 days after the prescribed written notice is sent. (Veh.C. 10652.5(a).) The costs of notice may be charged as part of the storage fee (a) when the vehicle has been stored for an indefinite period and notice is given no sooner than the third day of possession; or (b) if the legal owner refuses to claim possession. (Veh.C. 10652.5(b); on payment of vehicle storage fees by credit card, see Veh.C. 22651.1, 22658(k) [refusal to accept valid credit card subjects storage facility to liability]; Veh.C. 22658(m) [legislative intent in enacting Veh.C. 22658(k)]; 24 Pacific L. J. 1074.)

Veh.C. 10652.5(c) provides that in an action by the legal owner to recover a motor vehicle allegedly being withheld by a person demanding storage fees or charges in excess of that permitted by Veh.C. 10652.5(a), the prevailing party is entitled to reasonable attorneys' fees not exceeding \$ 1,750.

Veh.C. 10652.5 does not apply to a motor vehicle stored by a levying officer acting under the authority of judicial process. (Veh.C. 10652.5(d).)

West's Key Number Digest, Automobiles k.373 et seq.

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

(7) *Maximum Amount of Lien Without Consent of Legal Owner.* C.C. 3068(c)(1) was amended in 2007 to raise the maximum amounts from \$ 750, \$ 400, and \$ 500, to \$ 1,500, \$ 1,025, and \$ 1,250, respectively. The lien amounts are subject to the limitations of *Veh.C. 10652.5* (text, p. 258). (C.C. 3068(c)(1) and (c)(2), as amended in 2007.)

See 8B Am.Jur. Legal Forms 2d (2007 ed.), Garages, Service Stations, and Parking Facilities §128:133 et seq.(9) *Notice to Legal Owner of Storage Fees.* *Veh.C. 22658(m)* was relettered *Veh.C. 22658(o)* in 2006.



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13 Witkin Sum. Cal. Law Pers Prop § 238

[§ 238] In General.

The procedures for conducting lien sales of vehicles differ depending on whether the value of the vehicle is over (infra, §239) or under (infra, §240) a specified amount. There is also a special procedure for vehicles removed by the authority of a public agency (infra, §241).

C.C. 3071.5 authorizes a release of interest by the registered or legal owner after the lien has arisen, and specifies the form and content of the release: (1) It must be dated when signed, and a copy given at that time to the person releasing the interest. (2) It must be in at least 12-point type, and contain "all of the following information in simple, nontechnical language": (a) Description of vehicle, including year and make, engine or vehicle identification number, and license number if available. (b) Names and addresses of registered and legal owners of record, if available. (c) Statement of amount of lien and facts concerning claim which gives rise to it. (d) Statement that person releasing understands that he or she has a legal right to a court hearing prior to any sale and is giving up the right to appear and contest the claim. (e) Statement that person releasing gives up any interest in the vehicle and gives lienholder permission to sell. C.C. 3071.5(c) adds that the release "shall not be filed with the department in connection with any transfer of interest in a vehicle."

C.C. 3074 limits the lienholder's recovery of lien sale preparation costs to \$ 70 for each vehicle valued at \$ 4,000 or less, and to \$ 100 for each vehicle valued at more than \$ 4,000. Not more than 50% of the allowable fee may be charged until the lien-sale notifications are mailed and the lienholder has possession of the required lien processing documents. There can be no charge for any vehicle redeemed within 72 hours from the initial storage. Costs may commence and become part of the lien when the lienholder requests from the Department of Motor Vehicles the names and addresses of all persons having an interest in the vehicle.

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13 Witkin Sum. Cal. Law Pers Prop § 239

[§ 239] Vehicle Valued Over Specified Amount.

(1) *In General.* The 1980 Legislature enacted provisions governing vehicle lien sales that differ depending on whether the vehicle was valued over or under \$ 300. The amount was raised several times and in 1998 reached \$ 4,000. (C.C. 3071.)

(2) *Application for Authorization To Conduct Lien Sale.* C.C. 3071(a) provides that the lienholder may apply to the Department of Motor Vehicles for an authorization to conduct a lien sale for any vehicle with a value of over \$ 4,000. The application "shall be executed under penalty of perjury" and must include all of the following: (a) Description of the vehicle; (b) names and addresses of registered and legal owners if ascertainable from registration certificates within the vehicle, and the name and address of "any person whom the lienholder knows, or reasonably should know," claims an interest; (c) statement of amount of lien and facts concerning claim giving rise to it.

The Department charges a fee for filing an application, and the fee is recoverable as a cost by the lienholder if a sale is conducted or the vehicle is redeemed. (C.C. 3071(a).)

(3) *Notice of Application.* On receipt of the application, the Department must (a) for vehicles registered in another state, notify the vehicle registry agency of that state of the pending sale, and (b) send a notice and copy of the application by certified mail, with a preaddressed return envelope, to the registered and legal owners at their addresses of record, and to any other persons whose names and addresses are listed in the application. (C.C. 3071(b).)

The notice must include all of the following statements: (a) That application has been made. (b) That the person has a right to a court hearing. (c) That, if such a hearing is desired, a Declaration of Opposition form must be signed under penalty of perjury and returned to the Department within 10 days of the date the notice was mailed. (d) That, if the Declaration of Opposition is signed and returned, a lien sale will be held only if the lienholder obtains a court judgment or a release from the person, or if the person cannot be served. (e) That, if a court action is filed, the person will be notified and may appear and contest the claim. (f) That the person may be liable for costs if judgment is entered for the lienholder. (C.C. 3071(c).)

(4) *Subsequent Steps by Department.* Upon receipt of the Declaration of Opposition form within the time provided, the Department must notify the lienholder within 16 days that no sale may be conducted unless the lienholder files a court action within 30 days of the Department's notice. A money judgment in favor of the lienholder not paid within 5 days after it becomes final may be enforced by a lien sale proceeding. (C.C. 3071(d).)

(5) *Service on Persons Completing Declaration of Opposition.* Under C.C. 3071(e), service on the declarant may be made in person or by certified mail at the address shown on the Declaration of Opposition form. If the service is returned unclaimed, the lienholder may proceed with either the judicial proceeding or the lien sale without a judicial proceeding. The lienholder may also proceed if personal service by a marshal, sheriff, or licensed process server has been attempted, but has been unsuccessful.

(6) *Lienholder's Notices of Sale.* After receiving authorization to conduct a lien sale, the lienholder must do all of the following: (a) At least 5, but not more than 20, days prior to the sale, not counting the day of sale, give notice of the sale by advertising once in a newspaper of general circulation in the county where the vehicle is located or, if there is no such newspaper, by posting, for 10 consecutive days prior to and including the day of the sale, a Notice of Sale form in three of the most public places in the town where the vehicle is located and also at the place where the vehicle is to be sold; (b) 20 days prior to the sale but not counting the day of sale, send, by certified mail with return receipt requested, a Notice of Pending Lien Sale form to the following: (i) the vehicle's registered and legal owners, if the vehicle is registered in California; (ii) all other persons known to have an interest in the vehicle; (iii) the Department. (C.C. 3071(f).)

(7) *Inspection of Vehicle: Manner of Sale.* C.C. 3071(j) prohibits a lien sale unless the vehicle has been made available for inspection at an easily accessible location for at least 1 hour prior to the sale and is at the place of sale at the time and date specified in the notice of sale. C.C. 3071(j) also prohibits sealed bids and requires the sale to be conducted in a "commercially reasonable manner."

(8) *Steps by Lienholder Following Sale.* After the sale, the person who conducts the sale must remove and destroy the vehicle's license plates. (C.C. 3071(h)(1).) Within 5 days of the sale, the person must submit a completed "Notice of Release of Liability" form to the Department (C.C. 3071(h)(2)), which the Department must retain for 2 years (C.C. 3071(i)).

(9) *Redemption of Vehicle.* A vehicle may be redeemed within 10 days after the sale, upon the payment of the amount of the sale, all costs and expenses of the sale, and interest on that sum at 12% per annum from the date the sum was due or advanced until the repayment. (C.C. 3071(k).)

(10) *Void Sales.* A lien sale under C.C. 3071 is void if the lienholder fails to comply with the provisions of C.C. 3068 et seq. Liens for parking or storage fees are subject to *Veh.C. 10652.5*. (C.C. 3071(l); on C.C. 3068 and *Veh.C. 10652.5*, see *supra*, §237.)

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cc. Vehicle Not Over Specified Value.

13 Witkin Sum. Cal. Law Pers Prop § 240

[§ 240] Vehicle Not Over Specified Value.

The procedure for conducting a lien sale of a vehicle determined to have a value of \$ 4,000 or less is set forth in C.C. 3072:

(1) *Application to Department.* The lienholder must apply to the Department of Motor Vehicles for the names and addresses of the registered and legal owners of record. The application must include a description of the vehicle. (C.C. 3072(a).)

(2) *Notice and Forms to Owner.* Immediately upon receipt of the names and addresses, the lienholder must send, by certified mail, return receipt requested, or by United States Postal Service Certificate of Mailing, a completed Notice of Pending Lien Sale form, a blank Declaration of Opposition form, and a return envelope preaddressed to the Department, to the registered owner and legal owner, and to any other person known to have an interest in the vehicle. The lienholder must also send a copy of the completed notice to the Department on the same day as the other notices are sent. (C.C. 3072(b).)

(3) *Contents of Notice.* The notice must be signed under penalty of perjury and must include all of the following: (a) A description of the vehicle. (b) The specified date, exact time, and place of sale, which may be set not less than 31, nor more than 41, days from the date of mailing. (c) The names and addresses of the vehicle's registered and legal owners, and of any other person known to have an interest in the vehicle. (d) The following statements: (i) the amount of the lien and the facts concerning the claim giving rise to it; (ii) that the person has a right to a court hearing; (iii) that, if such a hearing is desired, a Declaration of Opposition form must be signed under penalty of perjury and returned to the Department within 10 days of the date the notice was mailed; (iv) that, if the Declaration of Opposition is signed and returned, a lien sale will be held only if the lienholder obtains a court judgment or a release from the person, or if the person cannot be served; (v) that, if a court action is filed, the person will be notified and may appear and contest the claim; and (vi) that the person may be liable for costs if judgment is entered for the lienholder. (C.C. 3072(c).)

(4) *Subsequent Steps by Department.* If the Department receives the completed Declaration of Opposition form

within the specified time, it must notify the lienholder within 16 days that there may be no lien sale unless the lienholder files a court action within 30 days and obtains a judgment in the lienholder's favor, or the person subsequently releases his or her interest in the vehicle. A money judgment in favor of the lienholder not paid within 5 days after it becomes final may be enforced by a lien sale proceeding. (C.C. 3072(d).)

(5) *Service on Persons Completing Declaration of Opposition.* Service on the person completing the Declaration of Opposition form may be made in person or by certified mail with return receipt requested, and the lienholder may proceed with either the judicial proceeding or the lien sale without a judicial proceeding if (a) mailed notice is returned unclaimed, or (b) personal service by a marshal, sheriff, or licensed process server has been attempted, but has been unsuccessful. The lienholder must notify the Department of Motor Vehicles if service is unsuccessful, and the Department must notify the declarant of the authorization for the sale. (C.C. 3072(e).)

(6) *Lienholder's Notice of Pending Sale.* At least 10 consecutive days prior to and including the day of sale, the lienholder must post a Notice of Pending Lien Sale form in a conspicuous place at the lienholder's business office. This notice must remain posted until the sale is completed and must give the specified date and exact time of the sale, and a detailed description of the vehicle, as specified. If the proposed sale is to occur at a site other than the business office of the lienholder, the notice must be posted at that site. (C.C. 3072(f).)

(7) *Inspection and Manner of Sale.* C.C. 3072(i) requires that there be an opportunity for inspection of the vehicle prior to sale, prohibits sealed bids, and specifies that the sale must be conducted in a commercially reasonable manner.

(8) *Steps by Lienholder Following Sale.* After the sale, the person who conducts the sale must remove and destroy the vehicle's license plates. (C.C. 3072(g)(1).) Within 5 days of the sale, the person must submit a completed "Notice of Release of Liability" form to the Department (C.C. 3072(g)(2)), which the Department must retain for 2 years (C.C. 3072(h)).

(9) *Void Sales.* A lien sale under C.C. 3072 is void if the lienholder fails to comply with the provisions of C.C. 3068 et seq. Liens for parking or storage fees are subject to *Veh.C. 10652.5*. (C.C. 3072(j); on C.C. 3068 and *Veh.C. 10652.5*, see *supra*, §237.)

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dd. Vehicle Removed by Public Agency.

13 Witkin Sum. Cal. Law Pers Prop § 241

[§ 241] Vehicle Removed by Public Agency.

(1) *In General.* *Veh.C. 22851(a)* gives a garagekeeper a lien dependent on possession for compensation for towage and for caring for and keeping safe a parked or abandoned vehicle removed under the authority of a public agency. Possession of a vehicle within the meaning of the statute arises when the vehicle is removed and is in transit or when vehicle recovery or load salvage operations requested by a law enforcement agency have begun at the scene. If the owner returns to the vehicle while it is in the towing company's possession, but before it has been removed, the owner may pay the towing charges and regain possession. Under *Veh.C. 22851(b)*, no lien attaches to any personal property in or on the vehicle. For vehicles valued at more than \$ 500, the lien is satisfied pursuant to C.C. 3067 et seq. (*Veh.C. 22851.4*; see *supra*, §238 et seq.); for vehicles valued at \$ 500 or less, the governing provisions are *Veh.C. 22851.8* and *22851.10*, *infra*, this section. (*Veh.C. 22851.6(a)*.) (On determination of value, see *Veh.C. 22670*.)

(2) *Sale Procedure.* The procedure for a lien sale established by *Veh.C. 22851.8* is similar to that established by C.C. 3071 (see *supra*, §239) and C.C. 3072 (see *supra*, §240). The lienholder must request from the Department of Motor Vehicles, within 15 working days from the date of possession of the vehicle, the names and addresses of all persons having an interest in the vehicle (*Veh.C. 22851.8(a)*), and must send to persons having an interest in the vehicle a completed Notice of Intent To Dispose of a Vehicle Valued at \$ 500 or Less form and a blank Declaration of Opposition form (*Veh.C. 22851.8(b)*).

In addition to the amount and nature of the lien, the Notice of Intent To Dispose of a Vehicle Valued at Less Than \$ 500 form must inform the person (a) of the right to a court hearing which can be exercised by returning the Declaration of Opposition form within 10 days of the notice's mailing date; (b) that if this is done, the lienholder can dispose of the vehicle only if he or she obtains a court judgment or a subsequent release from the person, or if the person cannot be served; (c) that the person will be notified of any court action and may appear to contest the claim, but may be liable for costs if a judgment is entered for the lienholder; and (d) that the lienholder may dispose of the vehicle to a licensed dismantler or scrap iron processor if it is not redeemed or if the Declaration of Opposition form is not mailed within 10 days of the date that the notice was mailed. (*Veh.C. 22851.8(c)*.)

Persons completing a Declaration of Opposition form may be served in person or by certified mail, return receipt requested. The lienholder may proceed with either the judicial proceeding or the lien sale without a judicial proceeding if (a) mailed notice is returned unclaimed, or (b) personal service by a marshal, sheriff, or licensed process server has been attempted, but has been unsuccessful. The lienholder must notify the Department of Motor Vehicles if service is unsuccessful, and the Department must notify the declarant of the authorization for the sale. (*Veh.C. 22851.8(e).*)

Upon receiving a completed Declaration of Opposition form, the lienholder may dispose of the vehicle if he or she files a court action within 20 days of the date the aforementioned notice was mailed and obtains either a favorable judgment or a release of the person's interest in the vehicle. If a money judgment in favor of the lienholder is not paid within 5 days after it becomes final, the lienholder may dispose of the vehicle through a dismantler or scrap iron processor. (*Veh.C. 22851.8(d).*) If no Declaration of Opposition form is received, the lienholder may dispose of the vehicle to a licensed dismantler or scrap iron processor, but may not do so earlier than 15 days after the date the notice was mailed. (*Veh.C. 22851.10(a).*)

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c. Towing and Storage Lien.

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[§ 242] Towing and Storage Lien.

Every person has a lien dependent on possession to compensate the person for towing, storage, or labor associated with recovery or load salvage, of any vehicle subject to registration that has been authorized to be removed. The removal authorization may come from a public agency, a private property owner under *Veh.C.* 22658, or a lessee, operator, or registered owner of the vehicle. The lien arises when the vehicle is removed and is in transit or when vehicle recovery operations or load salvage operations begin. (C.C. 3068.1(a).) For vehicles valued over \$ 4,000, the lien may be satisfied using the procedures set forth in C.C. 3071 (supra, §239) (C.C. 3068.1(c)); for vehicles valued at or under \$ 4,000, C.C. 3072 (supra, §240) applies (C.C. 3068.1(b)). (On deficiency claim by tow truck operator, see C.C. 3068.2.)

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d. Aircraft Keeper's or Repairer's Lien.

13 Witkin Sum. Cal. Law Pers Prop § 243

[§ 243] Aircraft Keeper's or Repairer's Lien.

(1) *In General.* A possessory lien, substantially similar to that of the garagekeeper, exists in favor of one who repairs, stores, or furnishes supplies or materials for *any aircraft* (excluding those of air carriers engaged in interstate or foreign commerce); and also for reasonable charges for the use of *any landing aid* furnished. (*C.C.P. 1208.61, 1208.70*; see *International Airports v. Finn (1955) 132 C.A.2d 293, 297, 282 P.2d 102*; Cal. Transactions Forms, 3 Business Transactions §22:25; *8A Am.Jur.2d (1997 ed.), Aviation §39.*)

(a) If the amount is over \$ 250, the excess is invalid unless actual notice is given to the legal owner and mortgagee, if any, and their written consent obtained. (*C.C.P. 1208.62.*) The person named in the federal aircraft registration certificate is deemed the legal owner. (*C.C.P. 1208.62.*)

(b) If the lien is lost through fraudulent deprivation of possession, it may be revived by repossession, subject to intervening rights of bona fide purchasers or encumbrancers. (*C.C.P. 1208.64.*)

(c) The lien may be assigned by written instrument and delivery of possession of the aircraft, together with notice to the legal owner. (*C.C.P. 1208.63.*)

(d) The foregoing provisions, similar to those relating to the garagekeeper's lien (*supra*, §237), are supplemented by similar enforcement and redemption provisions. (See *C.C.P. 1208.65 et seq.*)

In *Martin v. Heady (1980) 103 C.A.3d 580, 587, 163 C.R. 117*, the lien sale provisions of the aircraft lien law (*C.C.P. 1208.65 et seq.*) were held unconstitutional under the reasoning of *Adams v. Department of Motor Vehicles (1974) 11 C.3d 146, 113 C.R. 145, 520 P.2d 961, 7 Summary (10th), Constitutional Law*, §647, but the statutes have not been amended.

(2) *Aircraft Repair Lien Law. B. & P.C. 9790 et seq.* create a lien in favor of aircraft repairpersons as follows:

(a) *Lien on civil aircraft.* One who repairs civil aircraft under a written contract signed by the customer has a lien on the aircraft, engine, and aircraft appliances for the agreed value of labor and materials, or, in the absence of an agreement, for the reasonable value of labor and materials. In specified circumstances, the lien is in addition to liens

under C.C. 3051 (supra, §233) and *C.C.P. 1208.61* et seq., supra. (See Cal. Transactions Forms, 3 Business Transactions §22:25.) The repairperson must either be insured or operating under a surety bond. (*B. & P.C. 9798.1.*)

(b) *Perfection.* The lien is perfected by recording a verified notice of lien with the FAA Aircraft Registry within 180 days after completion of the work. A copy of the notice must be sent to the registered owner and to the person consenting to the work. (*B. & P.C. 9798.2.*)

(c) *Hearing and order.* Once the lien is perfected, the repairperson is entitled to an ex parte order to show cause why the property should not be sold at auction. The order must be personally served on the registered owner, the customer, and any other person known to have an interest in the property. The court may enter an appropriate judgment, and, in its discretion, may award reasonable attorneys' fees to the prevailing party. The owner or customer may redeem by paying the full amount due, in which case the repairperson files a notice of cancellation with the FAA. (*B. & P.C. 9798.3.*)

(d) *Priority.* As between claimants of the same statutory category, liens on the same property have priority according to the time the notice of lien is recorded by the FAA. As between liens created within 30 days of each other, liens have priority by category of claimant in the following order: (1) certificated repair station, (2) certificated mechanic, (3) fixed-base operator, and (4) all other repairpersons. (*B. & P.C. 9798.4.*)

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

(1) *In General.* See *8A Am.Jur.2d (2009 ed.)*, *Aviation* §33.



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7. Hospital's Lien on Damages.

13 Witkin Sum. Cal. Law Pers Prop § 244

[§ 244] Hospital's Lien on Damages.

(1) *Nature and Extent of Lien.* A lien was created in 1961 in favor of a licensed hospital that furnishes "emergency and ongoing medical or other services to any person injured by reason of an accident or negligent or other wrongful act" and not covered by the Worker's Compensation Act (which already gives a lien for medical services; see 2 *Summary* (10th), *Workers' Compensation*, §405). (C.C. 3045.1; see *Newton v. Clemons* (2003) 110 C.A.4th 1, 12, 1 C.R.3d 90 [patient's treatment by county hospital was "ongoing" despite gap that occurred while patient sought alternative chiropractic treatment outside county medical system]; 40A Am.Jur.2d (1999 ed.), *Hospitals and Asylums* §9; 9A Am.Jur. Legal Forms 2d (2002 ed.), §136:84 et seq.; 16 A.L.R.5th 262 [construction, operation, and effect of statute giving hospital lien against recovery from tortfeasor causing patient's injuries]; 39 A.L.R.5th 787 [physicians' and surgeons' liens against tortfeasor, insurer, or other responsible party]; and see C.C. 3040 [limitation on lien for recovery of money paid or payable to enrollee or insured for services under health care service plan or disability insurance policy].)

(a) The lien is on "the damages recovered, or to be recovered, by the person, or by his or her heirs or personal representative in case of his or her death to the extent of the amount of the reasonable and necessary charges of the hospital and any hospital affiliated health facility." (C.C. 3045.1.) The lien applies "whether the damages are recovered, or are to be recovered, by judgment, settlement, or compromise." (C.C. 3045.2.)

(b) To make the lien effective, a written notice, giving information about the injured person and the hospital charges, must be sent by registered mail to the alleged tortfeasor and the tortfeasor's insurer if known, before payment of any money to the injured person. The alleged tortfeasor must disclose the insurer's name. (C.C. 3045.3; see Cal. Transactions Forms, 3 Business Transactions §§22:26, 22:58 [form].)

(c) Payment to the injured person in disregard of the notice makes the person notified liable to the hospital for the amount of its lien, "or so much thereof as can be satisfied out of 50 percent of the moneys due" under any judgment or settlement. (C.C. 3045.4; see *Mercy Hosp. & Med. Center v. Farmers Ins. Group of Cos.* (1997) 15 C.4th 213, 61 C.R.2d 638, 932 P.2d 210, *infra*, this section.) This liability may be enforced within 1 year after the date of payment. (C.C. 3045.5.)

(d) The statute does not apply to a cause of action against a regulated state or interstate common carrier. (C.C.

3045.6.)

(2) *Illustrations.* Most of the case law has involved the extent of the hospital's lien rights. (See *Nishihama v. San Francisco* (2001) 93 C.A.4th 298, 306, 112 C.R.2d 861 [hospital's lien rights were limited to amount it accepted from injured person's insurer as payment in full for services rendered; because hospital's claim derived from injured person's claim, jury's award to injured person in excess of amount hospital accepted from insurer was improper]; *Swanson v. St. John's Regional Med. Center* (2002) 97 C.A.4th 245, 249, 118 C.R.2d 325 [hospital's practice of asserting liens on third-party tortfeasor recoveries, even though patient's medical insurance carrier had agreed to pay hospital bill for discounted amount, was not unfair business practice].)

In *Mercy Hosp. & Med. Center v. Farmers Ins. Group of Cos.*, *supra*, a passenger injured in an automobile accident received emergency medical treatment valued at \$ 49,197.95 from plaintiff hospital. Plaintiff sent a notice of lien for that amount to defendant insurer, through whom the driver of the automobile had a \$ 15,000 policy. As settlement in the passenger's lawsuit against the driver, defendant disbursed the entire \$ 15,000 to the passenger, without any payment to plaintiff against its lien. Plaintiff sued to recover the full amount of its lien. The trial judge concluded that plaintiff was entitled to only \$ 7,450, which was half of the policy limit of \$ 15,000, less \$ 100. *Held*, affirmed.

Under C.C. 3045.4, when an insurer or other payor fails to pay a hospital the amount of its lien, or as much of the lien as can be satisfied out of 50% of the moneys exceeding \$ 100, at the time the judgment, compromise, or settlement is disbursed, the insurer or other payor remains liable to the hospital for this amount and no more. (15 C.4th 218, 223; explaining that after the facts in this case arose, the \$ 100 "floor" was deleted.) If the Legislature had intended that the payor would be liable for the full amount of the hospital's care, such a "dramatic consequence" would have been mentioned in the legislative history of C.C. 3045.4; it was not. (15 C.4th 221, 222.) Furthermore, such a consequence is not necessary to prevent the payor from ignoring the hospital's lien. The payor has sufficient incentive to pay at the time of disbursement because to do otherwise could result in the payor later having to pay the hospital *in addition to* having already fully paid the patient. (15 C.4th 221.)

Three dissenters argued that the statute's plain language and most commentary on its meaning indicate that once a hospital's lien has been overlooked in the initial disbursement of judgment or settlement proceeds, the 50% limit no longer applies. (15 C.4th 224, 225.) (See *Newton v. Clemons*, *supra*, 110 C.A.4th 13 [county hospital could recover, as lien, only \$ 50,000, representing 50% of \$ 100,000 insurance proceeds paid to patient in settlement of personal injury action; to recover remainder of amount owed, county would have to undertake separate contract action against patient; citing *Mercy Hosp. & Med. Center*].)

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

(1) *Nature and Extent of Lien.* See 40A Am.Jur.2d (2008 ed.), *Hospitals and Asylums* §9.(b) *Notice requirement:* A lien under the Hospital Lien Act is not created until notice of the lien is given as required by C.C. 3045.3. The lien's priority is then determined by the time of its creation relative to competing liens. (*San Bernardino v. Calderon* (2007) 148 C.A.4th 1103, 1109, 1112, 56 C.R.3d 333 [hospital's lien was created on November 13, 2003, when it gave notice to party responsible for patient's injury, not on July 14, 2003, when it provided medical services to patient; attorney's lien created by contract on July 18, 2003, had priority].)

(2) *Illustrations.* In *Parnell v. Adventist Health System/West* (2005) 35 C.4th 595, 26 C.R.3d 569, 109 P.3d 69, plaintiff was injured in an automobile accident while a passenger in a taxicab. He received treatment for his injuries from defendant hospital. Defendant presented a claim for payment for services to plaintiff's insurer and was paid in the amount specified in the provider agreement negotiated between the insurer and defendant. Plaintiff paid defendant his required share of the deductibles and copayments. Consistent with the provider agreement, each bill that plaintiff received from defendant noted that plaintiff had received a discount that would be "written off" by defendant. Plaintiff later sued the driver of the vehicle that hit the taxicab. Defendant filed a notice of lien under the Hospital Lien Act (C.C. 3045.1 et seq.) in the amount of \$ 14,450.40. The lien sought to recover the difference between the "actual" cost of the medical services and the negotiated amount received by defendant under the provider agreement. In response, plaintiff

sued defendant alleging unfair business practices and other causes of action. The trial court granted defendant's motion for judgment on the pleadings, and the Court of Appeal reversed. *Held*, judgment of Court of Appeal affirmed.

(a) Although the language of the Act is ambiguous on this point, the legislative history strongly suggests that a lien asserted under C.C. 3045.1 et seq. requires the existence of an underlying *debt* owed by the patient to the hospital. (35 C.4th 603.) The Act was originally enacted to allow hospitals to recoup losses suffered when a patient failed to discharge any portion of the hospital bill even though the patient had collected in a third-party action. (35 C.4th 603, 604.) The Legislature was "concerned with uninsured patients who failed to pay *any part of their* debt to the hospital" and intended to give hospitals the ability to collect on this debt. (35 C.4th 604.) In later expansions of the Act, the Legislature sought to enhance hospitals' ability to collect, but did not alter the underlying basis for the lien--the debt owed by the patient to the hospital. (35 C.4th 604.)

(b) *Govt.C. 23004.1*, a lien statute analogous to the Act, was construed in *San Francisco v. Sweet* (1995) 12 C.4th 105, 48 C.R.2d 42, 906 P.2d 1196, 7 Cal. Proc. (5th), *Judgment*, §251, to require a creditor-debtor relationship between a county and an injured party who received medical care from the county. Like *Govt.C. 23004.1*, the Act gives a hospital the right to assert a lien against any judgment recovered by a patient from a third-party tortfeasor for the reasonable value of the medical services furnished to the patient. Also like *Govt.C. 23004.1*, the Act is not exclusive and the hospital may still proceed directly against the patient for any unpaid balance. Thus, a lien under the Act, like one under *Govt.C. 23004.1*, is premised on a creditor-debtor relationship between the hospital and the patient. (35 C.4th 607.)

(c) In holding that a lien under the Act requires the existence of an underlying debt owed by the patient to the hospital and that, absent such a debt, no lien may attach, "we agree with the vast majority of courts from our sister states that have construed hospital lien statutes analogous to the [Act]. We therefore disapprove of [*Swanson v. St. John's Regional Med. Center* (2002) 97 C.A.4th 245, 118 C.R.2d 325, text, p. 267], to the extent it conflicts with our decision today." (35 C.4th 609.)

(d) Here, defendant received payment from plaintiff and his insurer in the amount specified in the provider agreement, which defendant agreed under the provider agreement to accept as "payment in full." Defendant concedes that plaintiff's entire debt to defendant has therefore been extinguished. Because plaintiff no longer owes a debt to defendant for its services, defendant may not assert a lien under the Act against plaintiff's recovery from the third-party tortfeasor. (35 C.4th 609.)

(e) "If hospitals wish to preserve their right to recover the difference between usual and customary charges and the negotiated rate through the lien under the [Act], they are free to contract for this right. Our decision today does not preclude hospitals from doing so." (35 C.4th 611.) (See 56 *Hastings L. J.* 319 [*Parnell*; protecting innocent patients' right to limit medical care providers' recovery by statutory lien].)



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CHAPTER XVIII - Personal Property

Witkin Summary of California Law

IV. LIENS

D. Particular Statutory Liens.

8. Agricultural Supply Liens.

13 Witkin Sum. Cal. Law Pers Prop § 245

[§ 245] Agricultural Supply Liens.

(1) *Agricultural Chemical and Seed Lien.* *Food & Ag.C. 57551* et seq. create a lien in favor of a provider of agricultural chemicals or seeds. (See *22 Pacific L. J. 354.*)

(a) *Lien on proceeds of crop.* The provider of agricultural chemicals or seeds, who has sent the debtor notice of overdue payments as provided in *Food & Ag.C. 57561(a)*, has a lien upon the proceeds of the crop for the *reasonable or agreed charges* for the chemicals or seeds, and for the costs of enforcing the lien. (*Food & Ag.C. 57561(b).*) The amount of charges secured by the lien cannot exceed the reasonable or agreed charges for chemicals furnished within a 60-day period, and for seeds furnished within a 45-day period. (*Food & Ag.C. 57561(d).*)

(b) *Effective period of notice of claim.* The notice of claim of lien remains effective so long as the provider of agricultural chemicals or seeds (a) remains unpaid for amounts secured by the lien, or (b) continues to provide chemicals or seeds on a regular basis to the lien debtor. (*Food & Ag.C. 57562* [chemicals or seeds are not provided on "regular basis" when more than 45 days elapse between deliveries].)

(c) *Perfection of lien.* The lien is perfected upon filing a notice of claim of lien with the Secretary of State. (*Food & Ag.C. 57563*; on information to be included in notice, see *Food & Ag.C. 57565*; on form of notice, see *Food & Ag.C. 57567.*) The lien claimant must provide written notice of the claim of lien to the lien debtor within 10 days of filing. (*Food & Ag.C. 57569.*)

(d) *Priority.* The lien has priority in accordance with the time the notice of claim of lien is filed (*Food & Ag.C. 57575(a)*), and has the same priority as a security interest perfected by the filing of a financing statement as of the date the notice of claim of lien was filed (*Food & Ag.C. 57575(b).*) (On priority of security interests generally, see *4 Summary* (10th), *Secured Transactions in Personal Property*, §105 et seq.) The lien does not have priority over labor claims for wages and salaries for personal services provided to a lien debtor in connection with the production of agricultural products. (*Food & Ag.C. 57575(c).*)

(e) *Applicability of Commercial Code.* Except as otherwise specifically provided, the agricultural chemical and seed lien is subject to U.C.C. 9101 et seq. (*Food & Ag.C. 57591.*)

(f) *Assignability and transferability.* The lienholder may assign or transfer the lien by filing a statement of assignment or transfer with the Secretary of State in the same manner as a secured party would do under U.C.C. 9514. (*Food & Ag.C. 57590*; see 4 *Summary* (10th), *Secured Transactions in Personal Property*, §101.)

(g) *Notice to secured creditors.* The lien claimant must provide written notice to secured creditors at least 30 days before enforcing a claim of lien. (*Food & Ag.C. 57585.*)

(h) *Foreclosure.* A lien claimant may foreclose on the lien only in an action to recover the reasonable or agreed charges for agricultural chemicals or seeds provided. (*Food & Ag.C. 57586.*)

(i) *Termination statement.* A lien claimant who receives payment and who has not been providing agricultural chemicals or seeds for 45 consecutive days must send the lien debtor a statement that the lien claimant no longer claims a security interest. The statement must be sent within 10 days or the lien claimant is liable for actual damages, as well as a penalty of \$ 100 if the failure was in bad faith. (*Food & Ag.C. 57587(a).*)

(2) *Similar Liens.* Virtually identical statutory schemes govern dairy cattle supply liens (*Food & Ag.C. 57401* et seq.; see 19 *Pacific L. J.* 467) and poultry and fish supply liens (*Food & Ag.C. 57501* et seq.; see 22 *Pacific L. J.* 354).

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

(2) *Similar Liens.*

(*New*) *Producer's lien on farm products held by processor:* *Food & Ag.C. 55631* et seq. govern farmers' and growers' liens on farm products sold and delivered to processors. *Food & Ag.C. 55638* gives a producer the right to be paid from the proceeds of a sale of the farm products. Under *Food & Ag.C. 55633*, the producer's claim to the proceeds is a lien, with priority over almost all other liens, claims, and encumbrances. (*Frazier Nuts v. American AG Credit* (2006) 141 *C.A.4th* 1263, 1274, 1277, 46 *C.R.3d* 869 [almond growers' claims to proceeds of sale of almonds had priority over lender's security interest].)