





**THE  
NOTARY'S MANUAL**  
(NINTH EDITION)

BASED UPON

**THE SECTIONS OF THE CALIFORNIA  
CODES RELATING TO NOTARIES  
PUBLIC**

**WITH EXTRACTS FROM AND NOTES ON STATE  
SUPREME COURT DECISIONS**

ALSO CONTAINS

**LEGAL FORMS FOR THE VARIOUS NOTARY'S  
CERTIFICATES AND PROTEST**

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PREPARED BY  
A MEMBER OF THE SAN FRANCISCO BAR



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**14-12-10. [Protesting bills and notes; notice.]**

Each notary public when any bill of exchange, promissory note or other written instrument shall be by such notary protested for nonacceptance or nonpayment shall give notice in writing thereof to the maker and to each and every endorser of such bill of exchange, and to the maker of each security, or the endorsers of any promissory note or other written instrument, immediately after such protest shall have been made.

**History:** Laws 1909, ch. 55, § 8; Code 1915, § 3935; C.S. 1929, § 94-112; 1941 Comp., § 11-109; 1953 Comp., § 35-1-9.

**Cross references.** - For civil and criminal liability for false certificate as to protest, see 56-5-4 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 11 Am. Jur. 2d Bills and Notes § 797



**14-12-20. [Notary affiliated with bank or corporation; power restricted.]**

It shall be lawful for any notary public who is a stockholder, director, officer or employee of a bank or other corporation to take the acknowledgment of any party to any written instrument executed to or by such corporation, or to administer an oath to any other stockholder, director, officer, employee or agent of such corporation or to protest for nonacceptance or nonpayment bills of exchange, drafts, checks, notes and other negotiable instruments which may be owned or held for collection by such corporation; provided, it shall be unlawful for any notary public to take the acknowledgment of an instrument by or to a bank or other corporation of which he is a stockholder, director, officer or employee, where such notary is a party to such instrument, either individually or as a representative of such corporation, or to protest any negotiable instrument owned or held for collection by such corporation, where such notary is individually a party to such instrument.



**14-12-1. Notaries; powers and duties.**

The office of "notary public" is established. At any place within the state, a notary public may:

- A. administer oaths;
- B. take and certify acknowledgments of instruments in writing;
- C. take and certify depositions;
- D. make declarations and protests; and
- E. perform other duties as provided by law.

**History:** 1953 Comp., § 35-1-1, enacted by Laws 1969, ch. 168, § 1.



**14-12-11. [Service of notice of protest.]**

Each notary public may serve notice personally upon each person protested against by delivering to such person a notice in writing, or he may make such service by placing such notice in a sealed envelope with sufficient postage thereon addressed to the person to be charged, at his last place of residence, according to the best information that the person giving the notice may obtain, and by depositing such envelope containing such notice in the United States mail or post office.

**History:** Laws 1909, ch. 55, § 9; Code 1915, § 3936; C.S. 1929, § 94-113; 1941 Comp., § 11-110; 1953 Comp., § 35-1-10.

**14-12-12. [Recording protest notices; use as evidence.]**

Each notary public shall keep record of all protest notices and of the time and manner in which the same were served and of the names of all persons to whom the same were directed. Also the description and the amount of the instrument protested, which record, or a copy thereof certified by the notary public under seal, shall at all times be competent evidence to prove such notice in any court of this state.

**History:** Laws 1909, ch. 55, § 10; Code 1915, § 3937; C.S. 1929, § 94-114; 1941 Comp., § 11-111; 1953 Comp., § 35-1-11.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 11 Am. Jur. 2d Bills and Notes § 798; 12 Am. Jur. 2d Bills and Notes § 1237.



## P R E F A C E

This volume, as the name indicates, has been prepared especially for the use of notaries public. It is based upon the Codes of California and the decisions of the Supreme Court of this and other states so far as they relate to the law authorizing and governing the acts of these officers, and references to all sections and decisions are given. The chapters on deeds, mortgages and homesteads have been inserted for the purpose of giving general information on these subjects, and because the notary is frequently expected to draw as well as take the acknowledgment of these instruments. The contents of this volume on the subject of Bills and Notes is based upon the "Negotiable Instruments Law" adopted in California in 1917 and the amendments thereto. A thorough understanding of this important subject is, of course, necessary to the intelligent protesting of negotiable paper. Practical forms of certificates, notices, protests, etc., are appended.

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# The Notary's Manual

## NINTH EDITION

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### CHAPTER I.

#### NOTARIES PUBLIC.

- §1 Appointment.
- 2 Eligibility.
- 3-4 Qualification.
- 5 Duties.
- 6 Compensation.
- 7 Jurisdiction.
- 8 Term of office.
- 9-11 Records.
- 12 Seal
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#### Appointment.

SECTION 1. Notaries Public are public officers appointed by the governor, usually upon petition addressed to him setting forth the qualifications of the applicant and signed by citizens and residents requesting the appointment. There is no restriction upon the number that may be appointed for the several counties of the state—the governor having authority to appoint such number “as he shall deem necessary for the public convenience”—except that the number to be appointed in counties of the second class is limited to one hundred and fifty-five.

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(1) Political Code, §791

**Eligibility.**

SECTION 2. The only qualifications required by statute are the following: The person must, at the time of appointment, be a citizen of the United States and of this state, twenty-one years of age, and must have resided in the county for which the appointment is made for six months prior thereto. Women having these qualifications may be appointed.<sup>2</sup>

**Qualification.**

SECTION 3. *Official Bond and Oath.* When the commission is granted the appointee is required to execute an official bond in the sum of five thousand dollars which bond must be approved by a judge of the superior court of the county in which such notary is commissioned to act, and after approval the bond must be recorded in the office of the county recorder and then filed and kept in the office of the county clerk. He must also take, subscribe and file his oath of office in the office of the county clerk. The time within which he must file his official bond and take, subscribe and file his oath of office in the office of the county clerk, is twenty days from the date of his commission.<sup>3</sup>

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(2) Political Code, §792

(3) Political Code, §§799, 800

**SECTION 4. *Certificate of Facts.*** He is also required to transmit a certificate of the facts of his appointment under the hand and seal of the county clerk, together with a copy of his official oath signed by him with his own proper signature, to the office of the secretary of state, which certificate must be filed in the office of the secretary of state within thirty days from the date of his commission. He is then duly qualified to perform the duties of his office.

**Duties.**

**SECTION 5.** It is the duty of notaries public,—

1. — When requested, to demand acceptance and payment of foreign, domestic and inland bills of exchange, or promissory notes, and protest the same for non-acceptance and non-payment, and to exercise such other powers and duties as by the law of nations and according to commercial usages, or by the laws of any other state, government, or country, may be performed by notaries. (See Bills and Notes, Secs. 155-253, *post.*)

2. To take the acknowledgment or proof of powers of attorney, mortgages, deeds, grants, transfers, and other instruments of writing exe-

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(4) Political Code, §800

cuted by any person, and to give a certificate of such proof or acknowledgment, indorsed on or attached to the instrument. (See Acknowledgment and Proof of Instruments, Secs. 15-45, *post.*)

3. To take depositions and affidavits, and administer oaths and affirmations, in all matters incident to the duties of the office, or to be used before any court, judge, officer, or board in this state. (See Affidavits, Secs. 128-135, *post.*; Depositions, Secs. 136-154, *post.*)

4. To keep a record of all official acts done by them.

5. To keep a record of the parties to, date, and character of every instrument acknowledged or proved before them. (See Records, Secs. 9-12, *post.*)

6. When requested, and upon payment of their fees therefor, to make and give a certified copy of any record in their office.

7. To provide and keep official seals, upon which must be engraved the arms of this state, the words "notary public," and the name of the county for which they are commissioned.

8. To authenticate with their official seals all official acts.<sup>5</sup> (See Seal, Sec. 12, *post.*)

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(5) Political Code, §794

**Compensation.**

SECTION 6. The fees of notaries are fixed by law and are as follows:

For drawing and copying every protest for the non-payment of a promissory note, or for the non-payment or non-acceptance of a bill of exchange, draft, or check, two dollars.

For drawing and serving every notice of non-payment of a promissory note, or of the non-payment or non-acceptance of a bill of exchange, order, draft, or check, one dollar.

For recording every protest, one dollar.

For drawing an affidavit, deposition, or other paper for which provision is not herein made, for each folio, thirty cents.

For taking an acknowledgment or proof of a deed or other instrument, to include the seal and the writing of the certificate, for the first two signatures, one dollar each, and for each additional signature, fifty cents.

For administering an oath or affirmation, fifty cents.

For every certificate, to include writing the same, and the seal, one dollar.

**Jurisdiction.**

SECTION 7. A notary can only transact official business in the county for which he was appointed and in which he resides. His authority is confined to the county for which he was appointed and commissioned.

In the case of *Fairbanks, Morse & Co. v. Getchell*, 13 Cal. App. 458, a notary public in and for the County of Kern had taken the oath of an affiant in Los Angeles to an affidavit for attachment over the telephone. The evidence showed that the affiant had related the facts contained in the affidavit to the notary and stated they were true, and that the notary was familiar with his voice and recognized it over the telephone. The act of administering the oath was declared to be a nullity, and the purported affidavit upon which the attachment was issued, was declared to be void and of no effect. It was contended in that case that an oath administered by communication had between notary and affiant over the telephone, was for that reason alone void and of no effect. This point, however, was not determined, the court saying:

“Such contention finds direct support in the case of *Sullivan v. First Nat. Bank*, 37 Tex. Civ. App. 228 (83 S. W. 421). According to our view, however, it is unnecessary to determine this point. Assuming, but not deciding, that an oath may

be administered and the obligations thereof assumed by communication had over the telephone, the validity of such act must be held to apply to those cases only where both notary and affiant are within the territorial limits for which the notary has been appointed and commissioned.”

**Term of Office.**

SECTION 8. The term of office is four years from and after the date of the commission.<sup>7</sup>

People v. Edleman, 152 Cal. 317, is an important case relating to the term of office of notaries public. In the city and county of San Francisco where the number is limited, the question arose as to whether, upon the death of a notary, the new appointee was appointed for the balance of the unexpired term, or for the full term of four years. It was there held that the office comes into full being only when and as the governor names specific men for the places; that as to his term and office, no notary is the legal successor of another, and each is appointed for the specified term; and that since, under the law, the term of a notary is made a full term of four years from the date of his commission, and as the death of a notary does not create a vacancy, each notary when appointed is appointed, not for an unexpired

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(7) Political Code, §793

term, but for the full term of four years.

Resignations must be in writing and made to the governor,<sup>8</sup> and in case the office becomes vacant before the expiration of the term, the notary's records must be delivered to the county clerk of his county as set forth in the following section.

#### Records.

SECTION 9. *On Death or Resignation.* Exact and particular records are required to be kept of all official acts (see Duties, Sec. 5, subs. 4-5, *supra*), and if any notary die, resign, is disqualified, removed from office, or removes from the county for which he is appointed, his records and all his public papers must, within thirty days, be delivered to the clerk of the county, who must deliver them to the notary's successor when qualified.<sup>9</sup> (See Term of Office, Sec. 8, *supra*.)

SECTION 10. *Of Predecessor.* It is further provided that every notary having in his possession the records and papers of his predecessor in office, may grant certificates or give certified copies of such records and papers in like manner and with the same effect as such predecessor could have done.<sup>10</sup>

SECTION 11. *Open to Public Inspection.* The records in the office of a notary are public records,

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(8) Political Code, §995

(9) Political Code, §796

(10) Political Code, §797

and are at all times during office hours open to the inspection of any citizen of this state.<sup>11</sup>

**Seal.**

SECTION 12. Seal of officer taking acknowledgment must be annexed, and his certificate cannot be used in evidence unless so authenticated.

In the absence of a statute requiring it, the name of the notary need not appear on his seal; but in view of the illegibility of signatures in general, it is quite important that the seal show the official name of the notary.

**Liability.**

SECTION 13. *On Bond.* For the official misconduct, or neglect of a notary public, he and the sureties on his official bond are liable to the parties injured thereby for all damages sustained.<sup>12</sup> (See Liability on bond for failure to comply with statute, Secs. 21-25, *post.*)

SECTION 14. *Criminal responsibility.* He is also criminally responsible under Section 167 of the Penal Code, which provides that every public officer authorized by law to make or give any certificate or other writing who makes and delivers as true any such certificate or writing containing statements which he knows to be false, is guilty of a misdemeanor.

(11) Political Code, §1032

(12) Political Code, §801

## CHAPTER II.

## ACKNOWLEDGMENT AND PROOF OF INSTRUMENTS.

- §15 Nature of acknowledgment.
- 16 Nature of proof.
- 17 Purpose of acknowledgment or proof.
- 18 Private writings may be acknowledged or proved.
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- 20-25 Mode of taking acknowledgment.
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- 27-34 Certificate of acknowledgment.
- 35-40 Proof of execution when not acknowledged.
- 41 Certificate of proof.
- 42-45 Defective certificates.

## Nature of Acknowledgment.

SECTION 15. The acknowledgment of an instrument is the declaration or admission made by the party executing it to an officer having authority to take acknowledgments, that the instrument was executed by him and the same is his act and deed. It is then the duty of the officer to indorse on or attach to the instrument his certificate of acknowledgment. (See Certificate of Acknowledgment, Secs. 27-34, *post.*) The acknowledgment adds nothing to the validity or effect of the instrument as between the parties. It "is only the mode provided by law for authenticating the act of the parties so as to entitle the

instrument to record and make it notice to subsequent purchasers, and to entitle it to be read in evidence without other proofs. If purchasers neglect to have their deeds properly authenticated and recorded, they will be liable to have their title divested by subsequent conveyances to innocent parties, and to the further inconvenience of being compelled to prove their execution when called upon to put them in evidence.”<sup>1</sup>

#### Nature of Proof.

SECTION 16. It is usual to acknowledge instruments at the time of executing them, but under certain sections of our Civil Code the execution of conveyances, when not acknowledged, may be proved by the subscribing witnesses, and when the subscribing witnesses are dead or cannot be had, the end may be accomplished by proving the handwriting of the party and of the subscribing witnesses by other witnesses (see Proof of execution when not acknowledged, Secs. 35-40, *post*), and upon such proof the officer may make his certificate thereof and the instrument thereafter becomes entitled to record and to be read in evidence without further proof. It has been held that this may be done years after

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(1) *Landers v. Bolton*, 26 Cal., 405

the actual making of the deed and even after the parties and witnesses to it are dead;<sup>2</sup> the law, however, protects innocent parties who have acquired rights in the meantime without notice.

#### **Purpose of Acknowledgment or Proof.**

SECTION 17. The purpose of acknowledgment is twofold: to enable the instrument to be recorded (see Acknowledgment necessary, Sec. 46, *post*; also see Purpose and Effect of Recording, Secs. 53-55, *post*), and to entitle it to be used as evidence without further proof. It is a rule of evidence that every instrument conveying or affecting real property, acknowledged or proved, and certified, as provided by law, may, together with the certificate of acknowledgment or proof, be read in evidence in an action or proceeding, without further proof.<sup>3</sup> (See Record of Instrument may be used in evidence, Sec. 55, *post*.)

#### **Private Writings May Be Acknowledged or Proved.**

SECTION 18. Every private writing, except last wills and testaments, may be acknowledged or proved and certified in the manner provided for the acknowledgment or proof of conveyances

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(2) *Landers v. Bolton*, 26 Cal., 406  
(3) Code of Civil Procedure, §1951

of real property, and the certificate of such acknowledgment or proof is *prima facie* evidence of the execution of the writing in the same manner as if it were a conveyance of real property.<sup>4</sup>

**Authority to Take.—Disqualification.**

SECTION 19. Acknowledgment or proof of an instrument may be made in this state, within the city, county, city and county, township or district for which the officer was elected or appointed, before either of several officers, one of which is a notary public.<sup>5</sup> (See Jurisdiction, Sec. 7, *supra*.) A notary is, however, disqualified from taking an acknowledgment where he himself is the grantee or mortgagee in the instrument acknowledged. In such case the acknowledgment has been held to be void and of no effect.<sup>6</sup> It is the general law that a party beneficially interested in an instrument is incapable of taking and certifying an acknowledgment of it. He is not, however, disqualified by reason merely of being the agent of a party to the instrument, if not pecuniarily interested in the transaction.<sup>7</sup> Whether a notary who is a stockholder of a

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(4) Code of Civil Procedure, §1948

(5) Civil Code, §1181

(6) *Lee v. Murphy*, 119 Cal., 370; *Murray v. Tulare, etc.*, 120 Cal., 311

(7) *Bank of Woodland v. Oberhaus*, 125 Cal., 320; *Chapman v. Hicks*, 41 Cal. App. 164.

corporation, has such an interest as to avoid an acknowledgment of the corporation taken before him, is not altogether clear, but such an acknowledgment seems to have been upheld in this state on the ground that the notary exercises merely ministerial, and not judicial powers. An instance of the exercise of quasi-judicial functions on the part of the notary, is where the law requires a privy examination of a married woman apart from her husband, but such law has not existed in this state since 1891.<sup>8</sup> In the same case, the acknowledgment of a deed to a bank taken by a notary who was assistant cashier of the bank, was declared valid.

#### Mode of Taking Acknowledgments.

SECTION 20. *Identity of party must be ascertained.* The notary is required to know that the person who appears before him and makes the acknowledgment is the person described in and who executed the instrument, and if he does not know it he must require satisfactory evidence of that fact. Section 1185 of the Civil Code reads as follows:

“The acknowledgment of an instrument must not be taken, unless the officer taking it knows or has satisfac-

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(8) *First National Bank v. Merrill*, 167 Cal., 396

tory evidence, on the oath or affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in and who executed the instrument; or, if executed by a corporation, that the person making such acknowledgment is the president or secretary of such corporation, or other person who executed it on its behalf.”

The importance of a strict compliance with the course prescribed by this section in the taking of acknowledgments has been declared by the supreme court in the case of *Joost v. Craig*, 131 Cal. 504, and by the appellate court in the case of *Homan v. Wayer*, 9 Cal. App. 123, and because of the emphasis with which this matter is treated in these cases, they are quoted from somewhat at length in the following section.

SECTION 21. *Liability on bond for failure to comply with statute.* In the case of *Joost v. Craig*, 131 Cal., 504, a deed was apparently executed and acknowledged properly, and the certificate of the notary stated that the person who acknowledged the execution of the instrument personally appeared before him and was known to him to be the person described in and who

executed the said instrument. The deed turned out to be a forgery. The plaintiff in the case accepted the deed and paid his money, relying solely on the certificate of the notary. In its opinion the supreme court uses the following language:

“He (the grantee) had a right to rely upon the certificate of the notary and to presume without question that such officer had done his duty. \* \* \* The whole theory that the record of such instruments gives constructive notice of the contents of recorded instruments is founded upon the proposition that upon proper investigation the genuineness of such instruments has been determined. The certificate is also received as evidence in a trial in a court of law that the deed is genuine. If the deed is not genuine but is forged, the notary and his sureties ought to be held for all damages unless they have taken the precautions expressly required by the statute. The legislature has taken great care, though considering the importance of the matter, not too great, to make this certificate reliable. \* \* \* The notary is expressly forbidden to take the acknowledgment unless he knows that the person making the acknowledgment is the person described in the

instrument. \* \* \* If he did not know this it should have been proven by the oath of a credible witness, whose name must be stated. (C. C., Sec. 1189.) It is not enough that the person be introduced to the notary by a responsible person. If that were enough there would be no purpose in requiring the oath, for such person could always furnish the introduction. This point has been often decided though sufficiently obvious from the statute. To take an acknowledgment upon such introduction without the oath is negligence sufficient to render the notary liable in case the certificate turns out to be untrue. \* \* \* The same matter was discussed in *State v. Meyer*, 2 Mo. App., 413. The court makes some suggestions as to what degree of acquaintance will authorize the notary to certify that he has personal knowledge, and also upon the proposition that an introduction, even by a responsible person, could not be relied upon, and says: 'It is obvious that when an officer taking an acknowledgement and making a certificate assumes any such fact, he does it at his own risk. The law warns him when he has not "personal knowledge" of his own to resort to certain observances which the law supposes to be sufficient in practice to prevent imposition. \* \* \* But such a cer-

certificate is infinitely less liable to deceive or mislead than a declaration that the party making the acknowledgment is well known to the officer making the certificate. It puts all persons upon inquiry and furnishes a clue for conducting it; and it complies with the law.' This makes the certificate upon personal knowledge a guaranty of the genuineness of the instrument, and the court adds: 'It is perfectly idle for him to protest that he did not know or suspect that his certificate was false. That may be taken for granted, but is nothing to the purpose. His business was to know that it was true.'

"A notary may take all due precautions and fully comply with the statute and still be deceived. In such case he would not be held liable, but if he has not fully complied with the statute, the rule announced above is not a whit too stringent.

"It may here be remarked that the witness by whose oath the execution of an instrument is proven when the person executing the instrument was not previously known to the officer, must himself be known to the notary. This is implied by the requirement that the officer shall certify that such person is a credible witness. When these necessary facts do not exist, the notary is expressly forbidden from taking the acknowledg-

ment at all. When the notary does not obey this statute he should expect to be held liable. And I wish to repeat, these requirements are of great importance to the business world and not at all too exacting.”

This case further sets at rest the fact that notaries in taking acknowledgments act ministerially and not judicially. It appears that for judicial acts officers are not liable for either negligence or ignorance, but only for corrupt and intentional misconduct in the discharge of their official duties; while, on the other hand, ministerial officers are liable in damages.

In the case of *Homan v. Wayer*, 9 Cal. App. 123, the grantor named in the deed was Mary E. Griswold, but the person who acknowledged the deed was not Mary E. Griswold but one who impersonated her in the execution and acknowledgment of the deed. To this deed the notary attached his certificate in the usual form wherein he certified “before me \* \* \* personally appeared Mrs. Mary E. Griswold, a widow, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.” It was not contended by the notary that he knew the woman whom he certified to be Mary E. Griswold. His knowledge

of her identity was gained by an introduction from a man whom he did not know, a re-assuring remark or two from this man, and an "oath" administered to the woman herself at the time of taking her acknowledgment. The court said:

"If we were permitted to consider the so-called 'oath' of the woman as proof or evidence upon which the notary could base his certificate, it did not establish the things which he is required to know and certify. The essential fact to be known by, or proven to, the notary is that the person making the acknowledgment is the person described in and who executed the instrument. The woman who executed the deed was asked if her name was Mary E. Griswold and if she was the sole owner of the property. Her name might have been Mary E. Griswold, and she not the person described in the deed. The notary is not required to certify to the ownership of the property \* \* \* and this only indirectly bore upon the matter to be certified. The purpose of the certificate is to establish the identity of the grantor and the genuineness of the signature to the deed. \* \* \*

"A certificate of personal knowledge is not justified by swearing the person who executed the instrument or any other person. The

statute draws a distinction between those 'known' and those 'proven to be' the individual described in the instrument. In the former case no taking of testimony and no 'satisfactory evidence' is required; it is sufficient that the officer knows. If the officer does not 'know,' then the law makes it his duty to inform himself by satisfactory evidence on the oath or affirmation of a credible witness. In this event he is called upon to certify by whose oath it was proven to him that the person whose acknowledgment was taken is the person described in the instrument. \* \* \*

"This is not a case where a mistake was made through inadvertence, or one in which due precaution was taken, the statute fully complied with, and still the notary was deceived. It is not within the exception stated in the Joost-Craig case, but comes clearly within the rule of law declared in the case of State v. Meyer, 2 Mo. App. 413, therein cited. \* \* \*"

The evidence in this case showed that the plaintiff relied upon the false certificate of the notary. The various defenses made on behalf of the defendant, namely: That there was a conspiracy to defraud the owner, that the neglect of the notary was not the proximate cause of the

injury, and that there was no privity of contract between the notary and the person injured, were of no avail, and it was held that the loss sustained was the result of official misconduct or neglect for which the notary and his sureties were liable.

The case of *Kleinpeter v. Castro*, 11 Cal. App. 83, is another case where a notary made a false certificate of acknowledgment of a forged deed and was held liable on his official bond for all damages sustained.

Again, an important case for notaries to read is that of *Anderson v. Aronsohn*, 181 Cal. 294. In this case the particular question discussed is, what degree of acquaintance will authorize the notary to certify that he has personal knowledge. It was held that personal knowledge involves something more than the casual meetings which followed the notary's original introduction to the parties in this transaction. That there was nothing to arouse suspicion was no excuse. The notary should have required the oath of a credible witness.

SECTION 22. *Introduction by third party not sufficient.* In addition to what has been said with respect to mere introduction by third party in the preceding section, see also *Hatton v. Holmes*, 97 Cal., 212, wherein the supreme court

says that a notary has no right, in disregard of the plain provision of the statute, to certify that he knows a person whom he does not know on the mere introduction of some third party, and if he does so, and loss results therefrom, he renders himself and his sureties liable to make good the loss. This case further holds, however, that this liability does not extend to a case where the negligence of the losing party is the proximate cause of the loss.

SECTION 23. *Negligence of injured party excuses notary.* Should the injured party have taken the impostor before and introduced him to the notary and requested the notary to certify to the acknowledgment and execution of the deed by the impostor, in such case, while the officer would not have been justified, he would have been guilty of contributory negligence only.<sup>9</sup> For cases in which the negligence of the notary was not the direct or proximate cause of the loss and he was therefore held not liable, see *Bank of Savings v. Murfey*, 68 Cal., 455; *Over-acre v. Blake*, 82 Cal., 77.

SECTION 24. *Notary's negligence must be proximate cause of injury.* In *Brown v. Rives*, 42 Cal. App. page 482, we have the case of a party who forged the names of the owners of a piece

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(9) *Joost v. Craig*. 131 Cal., 510

of property, and also the notarial certificate of their acknowledgments, to a deed whereby the property was conveyed to a fictitious grantee, and then assumed the name of such fictitious grantee for the purpose of deeding the property to an innocent purchaser. He was introduced in good faith to the notary who took his acknowledgment to the last named deed. In that decision the case of *Joost v. Craig, supra*, is distinguished, and the notary was not held liable for the injury to the real owners, for the reason that the deed to which he affixed his certificate was genuine, and his certificate was true. (See Mode of taking affidavits, Sec. 135 *post*.)

And where the notary's negligence was not the only cause of the injury he has not been held liable. Such is the case of *Ross v. New Amsterdam Casualty Co.* reported in 56 Cal. App. at page 254. In that case, while the notary negligently attached his certificate, in regular form, to a bill of sale by "John Reed" of an automobile, and it developed later that John Reed was a fictitious person, yet the notary was not held liable, for the reason that the notary does not certify to the ownership of the property but only to the identity of the grantor and the genuineness of his signature; and as the bill of sale was valueless for the reason that the title was in some one

other than John Reed, it could not be made the basis of a recovery against the notary and his surety. (Citing *Heidt v. Minor*, 89 Cal. 115, and *McAllister v. Clement*, 75 Cal. 182.)

SECTION 25. *Witness swearing falsely may be prosecuted.* We have another case (*In re Carpenter*, 64 Cal., 271) where a person appeared before the notary for the purpose of acknowledging a deed, and the notary being unacquainted with him, administered an oath to him as a witness in his own behalf for the purpose of ascertaining if he was the person who signed the deed he wished to acknowledge. Upon that evidence the notary took the acknowledgment, certified to it and returned the deed with his certificate annexed to the person making it. The court held that such party was a competent witness in his own behalf in the proceedings before the notary and when he testified falsely on the oath administered to him by the notary, he subjected himself to prosecution for perjury.

#### Acknowledgment by Married Women.

SECTION 26. A conveyance by a married woman has the same effect as if she were unmarried and may be acknowledged in the same manner.<sup>10</sup> This is now the law. Formerly (prior to 1891) it was necessary that a married woman

(10) Civil Code, §1187

should be examined and made acquainted with the contents of the instrument apart from her husband, and consequently a separate form of certificate was necessary in case of acknowledgment by a married woman. That law being repealed, the general form of certificate is now used.

**Certificate of Acknowledgment.**

SECTION 27. *Notary must attach.* A notary taking the acknowledgment of an instrument must indorse thereon or attach thereto his certificate of acknowledgment.<sup>11</sup> The form of the certificate is prescribed by law and a substantial compliance therewith is required. It is, of course, well to follow the form prescribed with exactness. However, where a certificate of acknowledgment was objected to because the officer certified that the grantor "acknowledged to me" the execution of the instrument (the words "to me" not being a part of the statutory form), the variation was declared immaterial. Again, where a foreign notary certified that the grantor "appeared before me, being personally known to me to be the same person described in and who executed the foregoing instrument, and acknowledged that he signed and sealed the same as his free and voluntary act and deed for

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(11) Civil Code, §1188

the uses and purposes therein mentioned," this was held to be a substantial compliance with the requirements of our statute.<sup>12</sup>

SECTION 28. *General form of.* The general form of certificate of acknowledgment is as follows:

"State of \_\_\_\_\_, County of \_\_\_\_\_, ss.

"On this \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, before me (here insert name and quality of the officer), personally appeared \_\_\_\_\_, known to me (or proved to me on the oath of \_\_\_\_\_) to be the person whose name is subscribed to the within instrument, and acknowledged that he (she or they) executed the same."<sup>13</sup>

[Appendix Forms Nos. 1, 2 and 3.]

SECTION 29. *Form of, when acknowledgment is by corporation.*

"State of \_\_\_\_\_, County of \_\_\_\_\_, ss.

"On this \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, before me (here insert the name and quality of the officer), personally appeared \_\_\_\_\_, known to me (or proved to me on the oath of \_\_\_\_\_) to be the president (or the secretary) of the corporation that executed the within instrument (where, however, the instrument is executed in behalf of the corporation by some

(12) *Holland v. Hotchkiss*, 162 Cal., 376-7

(13) Civil Code, 1189

one other than the president or secretary) insert known to me (or proved to me on the oath of ———) to be the person who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same.”<sup>14</sup>

[Appendix Forms Nos. 4, 5 and 6.]

Prior to the amendment of 1905 a conveyance by a corporation could only be acknowledged by its president or secretary.

SECTION 30. *Form of, when acknowledgment is by attorney in fact.*

“State of ———, County of ———, ss.

“On this ——— day of ———, in the year ———, before me (here insert the name and quality of the officer), personally appeared ———, known to me (or proved to me on the oath of ———) to be the person whose name is subscribed to the within instrument as the attorney in fact of ———, and acknowledged to me that he subscribed the name of ——— thereto as principal, and his own name as attorney in fact.”<sup>15</sup>

[Appendix Form No. 7.]

SECTION 31. *When acknowledgment is taken outside of state.* It is expressly provided that

(14) Civil Code, §1190

(15) Civil Code, §1192

any acknowledgment taken without this state in accordance with the laws of the place where the acknowledgment is made, shall be sufficient in this state; *and further*, that the certificate of the clerk of a court of record of the county or district where such acknowledgment is taken, that the officer certifying to the same is authorized by law so to do, and that the signature of the said officer to such certificate is his true and genuine signature, and that such acknowledgment is taken in accordance with the laws of the place where the same is made, shall be *prima facie* evidence of the facts stated in the certificate of said clerk.<sup>16</sup>

The provision of the foregoing section in regard to certificates of the clerk, is only applicable to cases where the certificate of the foreign notary does not show an acknowledgment which would be good under our own statutes.<sup>17</sup>

When an acknowledgment is taken in this state for the purpose of being used outside of the state, such certificate of the clerk should generally be attached.

SECTION 32. *Venue—Name and quality of officer.* “State of ———, County of ———, ss.” at the head of the certificate is a part of the

(16) Civil Code, §1189

(17) *Holland v. Hotchkiss*, 162 Cal., 377

certificate as prescribed by law. The purpose of the venue is to show that the official act was done within the territorial jurisdiction of the officer. In the case of *Emeric v. Alvarado*, 90 Cal., 463, a certificate is commented on in which the venue was missing and the name and quality of the officer in the body of the certificate was left blank, and it was held that the certificate was fatally defective because it did not appear therefrom in what county or state the acknowledgment was taken. In this connection the court said: "Defects in certificates of acknowledgment should be usually overlooked as much as possible, but in this case the defect is so radical that, so far as we can see, to condone it would not be in the interest of justice." In the same case (*Id.*, p. 478) another certificate is commented on which showed the venue in the City and County of San Francisco and the official seal of the notary attached showed that he was not a notary public in and for the City and County of San Francisco, but for the county of Contra Costa. The court found that the material statements in the certificate were not true and it was insufficient on its face.

SECTION 33. *Signature—Name of office and seal—Variance.* It is further required that officers taking and certifying acknowledgments

or proof of instruments for record, must authenticate their certificates by affixing thereto their signatures, followed by the names of their offices, and also their seals of office.<sup>18</sup> Where certificate of notary is on separate slip which is attached to instrument, his seal should be impressed through both instrument and certificate.

The proper official name of a notary is "Notary Public in and for" the county for which he was appointed. In *Duckworth v. Watsonville etc. Co.* 150 Cal. 521, the certificate of acknowledgment to a deed recited the name and official character of the notary as a notary public in and for the county named, in the usual form, but was signed by him merely with the words "Notary Public" after his signature, and it was objected that this was not a sufficient statement of the name of his office. The court held, however, in view of the statement made in the body of the certificate, that the name of the office was sufficiently stated after the signature.

There must be no variance between the name and description of the party as it appears in the instrument, and the name and description appearing in the certificate.

SECTION 34. *When not conclusive.* A certificate of acknowledgment is *prima facie* evi-

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(18) Civil Code, §1193

dence of the fact of acknowledgment; that is, evidence which suffices for proof until contradicted and overcome by other evidence. It is therefore not conclusive and may be impeached by parol evidence that the person named therein never in fact appeared before the notary certifying to the acknowledgment. If such is the case the act of the officer is wholly void and the certificate is nothing but a fabrication. So held in *Le Mesnager v. Hamilton*, 101 Cal., 532. In this case the certificate of the notary showed upon its face that the instrument was duly acknowledged by one of the parties to it who was a married woman, when, in fact, she had never appeared before the notary for the purpose of acknowledging it. A distinction is made between a case of this kind where the officer is entirely without authority and his certificate is void *in toto*, and one where the party actually appeared before the notary and made some kind of acknowledgment, and an attempt is made to attack the certificate because of some defect in the manner of acknowledgment. Such a case would come within the rule which makes the certificate of acknowledgment conclusive in favor of an innocent purchaser in good faith and who has relied on the truth of the certificate.<sup>19</sup>

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(19) *De Arnaz v. Scandon*, 59 Cal., 486

**Proof of Execution When Not Acknowledged**

SECTION 35. *How made.* Proof of the execution of an instrument when not acknowledged may be made, either (1) by the party executing it, or either of them; (2) by a subscribing witness; or (3) by other witnesses, who, under certain conditions are permitted to testify to the handwriting of the party or subscribing witness.<sup>20</sup> (See Handwriting, when may be proved, Secs. 38-39, *post.*)

SECTION 36. *Subscribing witness defined.* A subscribing witness is one who sees a writing executed or hears it acknowledged, and at the request of the party thereupon signs his name as a witness.<sup>21</sup>

SECTION 37. *By Subscribing Witness, requisites of.* If proof of the execution of an instrument is made by a subscribing witness, such witness must be personally known to the officer taking the proof to be the person whose name is subscribed to the instrument as a witness, or must be proved to be such by the oath of a credible witness.<sup>22</sup> And the subscribing witness must prove that the person whose name is subscribed to the instrument as a party, is the person described in it, and that such person executed it.

(20) Civil Code, §1195

(21) Code of Civil Procedure, §1935

(22) Civil Code, §1196

and that the witness subscribed his name thereto as a witness.<sup>23</sup>

[Appendix Form No. 8.]

SECTION 38. *By Handwriting, when may be made.* The execution of an instrument may be established by proof of the handwriting of the party and of a subscribing witness, if there is one, in the following cases:

1. When the parties and all the subscribing witnesses are dead; or
2. When the parties and all the subscribing witnesses are non-residents of the state; or
3. When the place of their residence is unknown to the party desiring the proof, and cannot be ascertained by the exercise of due diligence; or
4. When the subscribing witness conceals himself, or cannot be found by the officer by the exercise of due diligence in attempting to serve the subpoena or attachment; or
5. In case of the continued failure or refusal of the witness to testify for the space of one hour after his appearance.<sup>24</sup> (See Mode of recording when execution has been established by proof of handwriting, Sec. 52, *post.*)

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(23) Civil Code, §1197

(24) Civil Code, §1198

In *Follmer v. Rohrer*, 158 Cal. 759, the point was made that the deed in question, being neither acknowledged nor witnessed, was not an instrument "entitled to be proved for record" and that the plaintiffs had not, therefore, shown their right under section 1203 of the Civil Code (see Section 40, *post*) to a "judgment proving such instrument." The court there held that under the foregoing section providing that "the execution of an instrument may be established by proof of the handwriting of the party and of a subscribing witness, *if there is one*, in the following cases: 1. When the parties and all the subscribing witnesses are dead; \* \* \* " the subscription of a witness is not necessary to the validity of a deed, and the language of the section last quoted carries the clear implication that where there is no such witness, proof of the handwriting of the party executing is sufficient.

SECTION 39. *What must be proved by evidence of handwriting.* The evidence taken under the preceding section must satisfactorily prove to the officer the following facts:

1. The existence of one or more of the conditions mentioned therein; and
2. That the witness testifying knew the person whose name purports to be subscribed to the

instrument as a party, and is well acquainted with his signature, and that it is genuine; and

3. That the witness testifying personally knew the person who subscribed the instrument as a witness, and is well acquainted with his signature, and that it is genuine; and

4. The place of residence of the witness.<sup>25</sup>  
Appendix Forms Nos. 9, 10 and 11.]

SECTION 40. *Powers of officer taking proof.*  
Officers authorized to take the proof of instruments are authorized in such proceedings:

1. To administer oaths or affirmations.
2. To employ and swear interpreters.
3. To issue subpoena.
4. To punish for contempt.<sup>26</sup>

**Certificate of Proof.**

SECTION 41. An officer taking proof of the execution of any instrument must, in his certificate indorsed thereon or attached thereto, set forth all the matters required by law to be done or known by him, or proved before him on the proceeding, together with the names of all the witnesses examined before him, their places of residence respectively, and the substance of their testimony.<sup>27</sup>

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(25) Civil Code, §1199  
(26) Civil Code, §1201  
(27) Civil Code, §1200

**Defective Certificates.**

SECTION 42. *Notary may not correct.* It is the duty of the notary to take the acknowledgment and certify it as a part of the same transaction. After taking the acknowledgment and making and delivering the return, he is discharged from all further authority over the subject.<sup>28</sup> Therefore, if he has made a false or defective certificate and the instrument has been recorded or offered in evidence, he cannot alter or amend it.

SECTION 43. *Action to amend.* But what he cannot do can be done under the provisions of Sections 1202 and 1203 of the Civil Code, which provide that when the acknowledgment or proof of the execution of an instrument is properly made but defectively certified, any party interested may have an action in the superior court to obtain a judgment correcting the certificate;<sup>29</sup> and any person interested under an instrument entitled to be proved for record, may institute an action in the superior court against the proper parties to obtain a judgment proving such instrument.<sup>30</sup> A deed, although it is neither acknowledged nor witnessed, is an instrument entitled to be proved for record.<sup>31</sup>

(28) *Bours v. Zachariah*, 11 Cal., 281; *Wedel v. Herman*, 59 Cal., 507.

(29) Civil Code, §1202

(30) Civil Code, §1203

(31) *Follmer v. Rohrer*, 158 Cal. 755.

SECTION 44. *Judgment attached to instrument may be recorded.* A certified copy of such a judgment showing the proof of the instrument and attached thereto, entitles such instrument to record with like effect as if acknowledged.<sup>32</sup>

SECTION 45. *Defectively acknowledged instruments validated.* It has been the custom of the legislature, however, from time to time, to validate all previously recorded instruments, notwithstanding any defect, omission, or informality in the execution of the instrument, or in the certificate of acknowledgment thereof, or the absence of any such certificate. This is done by amendment to Section 1207 of the Civil Code.

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(32) Civil Code, §1204

## CHAPTER III.

## RECORDING OF INSTRUMENTS.

- §46 Acknowledgment necessary.
- 47-49 What may be recorded without acknowledgment.
- 50-52 Mode of recording.
- 53-55 Purpose and effect of recording.
- 56 Effect of failure to record.
- 57 Unrecorded instrument, when valid.
- 58 Instruments to be acknowledged and recorded.

**Acknowledgment Necessary.**

SECTION 46. Any instrument affecting the title to or possession of real property may be recorded—unless it belongs to one of the classes expressly excepted from the rule (see What may be recorded without acknowledgment, Secs. 47-49, *post*)—when and only when its execution has been acknowledged by the person executing it, or, if executed by a corporation, by its president or secretary or other person executing it on behalf of the corporation, or proved by a subscribing witness, or the execution established by proof of the handwriting, and the acknowledgment or proof certified as prescribed by law and as set forth in the foregoing chapter.<sup>1</sup> The stat-

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(1) Civil Code, §§1158, 1161

ute is mandatory and these steps must be taken before an instrument can be recorded.

It is provided, however, that whenever a grant of real property is made to a political corporation or governmental agency, for public purposes, that it shall not be accepted for recordation without the consent of the grantee evidenced by its resolution of acceptance attached to such deed or grant.

**What May Be Recorded Without Acknowledgment.**

SECTION 47. *Judgments.* Judgments affecting the title to or possession of real property authenticated by the certificate of the clerk of the court in which such judgments were rendered (and notices of location of mining claims) may be recorded without acknowledgment or further proof.<sup>2</sup> Also, as we have seen, a judgment obtained in an action brought for the purpose of correcting a defective certificate of acknowledgment, when attached to the instrument, entitles the same to record. (See Judgment attached to instrument may be recorded, Sec. 44, *supra*.)

SECTION 48. *Letters patent.* Letters patent from the United States or from the state of California, executed and authenticated pursuant to existing law, may be recorded without ac-

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(2) Civil Code, §1159

knowledge or further proof.<sup>3</sup> This refers only to the recording of letters patent affecting real property; letters patent for an invention are, of course, not entitled to record.

SECTION 49. *Certificates of residence.* Any person, firm, or corporation, may record in the office of the county recorder of any county in the state of California a certificate setting forth the name of said person, firm, or corporation, and the place of residence of said person, firm, or corporation, and the place where service of summons may be made upon said person, firm, or corporation. The said certificate must be verified by the oath of the person, or of a member of the firm, or officer of the corporation making the same, and may be recorded without acknowledgment. Such person, firm, or corporation may upon a change of place of residence file affidavit as herein provided and such last affidavit filed shall be the place designated as the place where service of summons may be made as herein provided. The fee of the recorder for recording said certificate shall be fifty cents; and the recorder shall keep in his office an index entitled "Index to Certificates of Residence," in which must be entered the name of the person, firm, or corporation in whose behalf said certificate was filed.<sup>4</sup>

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(3) Civil Code, §1160

(4) Civil Code, §1163

**Mode of Recording.**

SECTION 50. *Instrument must be recorded where.* The instrument must be recorded in the office of the county recorder of the county in which the real property affected is situated.<sup>5</sup> The different classes of instruments have been generally recorded in different sets of books, but the recorder now has discretion under section 4131 of the Political Code to record all instruments in one general series of books called "Official Records".

SECTION 51. *When deemed recorded.* The instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited with the proper officer for record.<sup>6</sup> The time of recording is endorsed on the instrument when deposited, and is important, as it gives constructive notice from the moment it is filed with the recorder. (See Constructive notice, Sec. 53, *post.*)

SECTION 52. *When execution is established by proof of handwriting.* When the execution of an instrument is established by proof of handwriting (see Proof by handwriting when may be made, Secs. 38, 39), the instrument, though prop-

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(5) Civil Code, §§1169, 1171

(6) Civil Code, §1170

erly proved and certified according to law, may only be recorded in the proper office if the original is at the same time deposited therein to remain for public inspection.<sup>7</sup>

**Purpose and Effect of Recording.**

SECTION 53. *Constructive notice.* Every conveyance of real property, acknowledged or proved, and certified and recorded, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees;<sup>8</sup> and such notice is conclusive, except that it has been held that this language only contemplates conveyances by persons having title, and does not apply to a deed by a stranger.<sup>9</sup> Until so filed for record the instrument is void as against subsequent *bona fide* purchasers or mortgagees without notice. (See Effect of failure to record, Sec. 56, *post*, and Unrecorded instrument, when valid, Sec. 57, *post*.)

SECTION 54. *Certified copy may be recorded in another county.* A certified copy of any such recorded conveyance, or a certified copy of the record of such instrument, may be recorded in any other county, and when so recorded the record thereof shall have the same force and effect as

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(7) Civil Code, §1162

(8) Civil Code, §1213

(9) *Bothin v. Cal. Title Ins. Co.* 153 Cal. 724

though it was of the original conveyance, and where such original conveyance has been recorded in any county wherein the property therein mentioned is not situated, a certified copy of such recorded conveyance may be recorded in the county where such property is situated with the same force and effect as if the original conveyance had been recorded in such county.<sup>10</sup>

SECTION 55. *Record of instrument may be used in evidence.* It is further provided that the original record of such conveyance or instrument, acknowledged or proved and certified as provided by law, or a certified copy of the record of such conveyance or instrument thus acknowledged or proved, may be read in evidence on a trial in court with like effect as the original instrument, without further proof.<sup>11</sup>

#### Effect of Failure to Record.

SECTION 56. Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting

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(10) Civil Code, §§1213, 1218.

(11) Code of Civil Procedure, §1951

the title, unless such conveyance shall have been duly recorded prior to the record of notice of action, and the term "conveyance" as used here, embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged or encumbered.<sup>11</sup>

Consequently, a deed of land executed prior to a mortgage of the same land to another party, but recorded after the mortgage, is subject and subsequent to the mortgage if the mortgagee took in good faith, for value, and without actual notice of the deed;<sup>12</sup> and a subsequent mortgage first recorded, takes precedence over a prior unrecorded mortgage, if taken in good faith and for a valuable consideration, without notice.<sup>13</sup>

#### Unrecorded Instrument, When Valid.

SECTION 57. An unrecorded instrument is valid, as between the parties thereto and those who have notice thereof.<sup>14</sup> Therefore, a purchaser with notice of another's claim cannot take advantage of the fact that the conveyance under which the other claims was not recorded.<sup>15</sup> The rule as to what constitutes notice is, that notice of

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(11) Civil Code, §§1214, 1215; Warnock v. Harlow, 96 Cal., 306

(12) Emeric v. Alvarado, 90 Cal., 444

(13) Odd Fellows' Sav. Bk. v. Bouton, 46 Cal., 605

(14) Civil Code, §1217

(15) Robinson v. Muir, 151 Cal. 122

facts sufficient to put one upon inquiry is notice of all the facts to which inquiry would lead. Hence, possession is notice to all the world of the holder's rights, and it has been held that one who purchases land in the possession of a third person, has no right to rely on the record title alone in making the purchase, but is bound to look beyond the record title for the purpose of ascertaining what rights, if any, the party in possession has in the premises.<sup>16</sup> In another case, where a person about to make a loan and take a mortgage upon land as security employed an agent to make the negotiation, a declaration made by a tenant in possession to the agent that another person had an interest in the land, was sufficient to put the mortgagee on inquiry, and if he failed to make such inquiry, the mortgage was subject to the rights of such other person in the land even though the paper title appeared to be in the mortgagor.<sup>17</sup>

#### Instruments to be Acknowledged and Recorded.

SECTION 58. As one of the duties of notaries (see Duties, Sec. 5, sub. 2, *supra*) is, "to take the acknowledgment or proof of powers of attorney, mortgages, deeds, grants, transfers, and

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(16) *Security, etc. Co. v. Willamette, etc. Co.*, 99 Cal., 636; *Pollard v. Rebman*, 162 Cal., 633; *Shurtleff v. Kehrer*, 163 Cal., 24

(17) *Bauer v. Pierson*, 46 Cal., 293

other instruments of writing, executed by any person, and to give a certificate of such proof or acknowledgment indorsed on or attached to the instrument," and as such officers are frequently called upon to draw these instruments, as well as constantly required to handle them, the next three chapters on deeds, mortgages, and homesteads will set forth the general law governing such instruments.

## CHAPTER IV.

## DEEDS.

- §59 Definitions.
- 60 Separate and community property.
- 61 Must be in writing.
- 62-66 Form and contents of.
- 67-70 Execution.
- 71-74 Power of attorney.
- 75-78 Delivery.
- 79 Interpretation of.
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## Definitions.

SECTION 59. A deed is a written instrument executed and delivered, by which the title and possession of real property is transferred from one person to another. It is described in the Civil Code as a "grant of an estate in real property." A "grant, bargain and sale" deed is, as the name implies, a grant by way of bargain and sale. This form of deed imports a transfer and delivery of property by one person to another for a consideration agreed upon between them as the value of the property, and the words "grant, bargain and sell" imply a general warranty that the grantor has done no act by which the estate conveyed by him can be defeated. (See Implied covenants, Sec. 83, *post.*)

A "gift" deed is a voluntary transfer of property without any consideration or compensation. The consideration recited in the established form of gift deed is, "love and affection which the party of the first part has and bears unto the party of the second part, as also for the better maintenance, support, protection and livelihood of the party of the second part." The effect of a gift deed to a husband or wife is to make the property conveyed the separate property of the grantee. (See Separate and community property, Sec. 60, *post*).

A life estate may be reserved by the grantors by including in the habendum clause of the deed a proviso that they reserve the right to the use and occupation of the property so long as they, or either of them, shall live. An estate may also be granted for life, but whenever the death of a person terminates a life estate, a legal proceeding is necessary to establish such death and the termination of the life estate.

By a "joint-tenancy" deed property may be transferred to two persons, or the survivor of them, and to the heirs or assigns of the survivor. Under such a deed upon the death of either joint-tenant the property goes to the survivor, but in that case also a proceeding is necessary to establish the death of the joint-

tenant and the termination of the joint-tenancy. A joint-tenancy deed should not be drawn without careful thought, as it can be readily seen that such a deed may work out unfairly as to the heirs of the joint-tenant who shall die first.

A "quit-claim" deed only purports to pass whatever title, or apparent title, the grantor has in the property conveyed. It conveys whatever title the grantor has, but does not convey after-acquired title. (See Effect of, Sec. 80 *post*).

A "correction" deed may be made for the purpose of correcting mistakes in a prior conveyance. Such a deed must distinctly show and define the mistake that it is intended to correct; but a void deed cannot be confirmed by the giving of a subsequent deed by way of correction. (See Description of property, Sec. 66, *post*).

A conveyance may be to a person or persons in trust, for the purpose of securing the performance of certain specified acts, and the instrument is then called a "deed of trust." (See Deeds of trust, Sec. 88 *post*).

SECTION 60. *Of Separate and community property.* All property owned before marriage and that acquired afterwards by gift, bequest, devise or descent, is separate property, and all other property acquired after marriage is community property.<sup>1</sup>

<sup>(1)</sup> Civil Code, §§162-164

Consequently, when a husband makes a deed of gift to his wife, whether of his own separate property or of community property, the property granted thereupon becomes the separate property of the wife, and *vice versa*. Gift deeds have frequently been passed between husband and wife for the purpose of avoiding probate proceedings without considering their effect upon the nature of the property.

Whenever property is conveyed to a married woman the presumption is that the title is thereby vested in her as her separate property, but a conveyance to the husband alone is presumptively to the community.<sup>2</sup> A conveyance to both husband and wife presumptively vests an undivided one-half interest in the wife as her separate property.<sup>3</sup>

It has also been held that under a grant, bargain and sale deed by a husband to his wife of his separate property for an expressed consideration of ten dollars, where no consideration was in fact paid, the property became the wife's separate property.<sup>4</sup> Hence, in a grant, bargain and sale deed from husband and wife, a valuable consideration should be shown unless it is intended to be a gift vesting title in the wife as her separate property.

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(2) Civil Code, §164.

(3) *Gilmour v. North Pasadena Land Co.*, 178 Cal., 6.

(4) *Estate of Klumpke*, 167 Cal., 415.

**Must Be in Writing.**

SECTION 61. An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing.<sup>5</sup>

Under the statute of frauds, any agreement that by its terms is not to be performed within a year from the making thereof, is invalid unless put in writing,<sup>6</sup> and the supreme court has held that if the time from the making of the agreement to the end of its performance exceeds a year ever so little, this statute applies, and consequently an oral lease for one year to commence *in futuro* is void.<sup>7</sup> An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission must also be in writing.<sup>8</sup>

**Form and Contents of.**

SECTION 62. *Code form.* The code form of a grant of real property is as follows:

“I, A B, grant to C D all that real property situated in (insert name of county) county, state

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(5) Civil Code, §1091

(6) Civil Code, §1624, Sub. 1

(7) *Wickson v. Monarch Cycle Mfg. Co.*, 128 Cal., 153

(8) Civil Code, §1624, Sub. 6

of California, bounded (or described) as follows: (here insert description, or if the land sought to be conveyed has a descriptive name, it may be described by the name, as, for instance, 'The Norris Ranch').

“Witness my hand, this (insert day) day of (insert month), 19—  
A B.”,

It is customary in drawing deeds to use the printed forms which are in common use, and which are generally safe. It is then only necessary to fill in the date, parties, consideration and description of property.

SECTION 63. *Parties.* The parties to the instrument should be named and described. A deed which does not contain the name of the grantee would be void as a conveyance. If the grantee is misnamed the grantor cannot by a subsequent deed correct an error in the grantee's name.<sup>10</sup> Furthermore, a deed is void unless the grantee named is a person, either natural or artificial, capable of taking the property conveyed;<sup>11</sup> hence, a deed to the estate of a deceased person is a nullity, as the estate cannot be recognized as a party to a contract.<sup>12</sup> Neither should

(9) Civil Code, §109?

(10) *Walters v. Mitchell*, 6 Cal. App. 410

(11) *Rixford v. Zeigler*, 150 Cal., 435

(12) *Simmons v. Spratt*, 1 So. (Fla.), 860; *McInerney v. Beck*, 39 Pac. (Wash.), 130

there be any variance between the name of the grantor as it appears in the body of the deed and the signature. In case the grantor has, since acquiring the property, changed his or her name from any cause, the conveyance should set forth the name in which the title to the property stands as well as his or her present name.<sup>13</sup>

SECTION 64. *Consideration.* A consideration need not be expressed in a deed. It is usual to recite a consideration, however, even though it be a nominal one. In this state a written instrument is presumptive evidence of a consideration. Either party may show what the real consideration was.

SECTION 65. *Words of inheritance.* Words of inheritance or succession are not requisite to transfer a fee in real property,<sup>14</sup> but they, too, are usually inserted.

SECTION 66. *Description of property.* Great care should be taken to have the description of property minute and accurate. An error in the description is sure to cause future annoyance and trouble. Should an error inadvertently be made in the description it can be corrected by a subsequent deed between the same parties. In such subsequent deed a statement, showing the purpose of the deed, should be inserted after

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(13) Civil Code, §1096

(14) Civil Code, §1072

the habendum clause; as, for instance, "This deed is made for the purpose of correcting an error in the description of property contained in that certain deed (describing it), and to make such description more definite and certain." As before stated, however, a correction deed cannot be used to correct an error in the grantee's name. (See Parties, Sec. 63, *ante*.)

**Execution.**

SECTION 67. *In general.* —The deed should be subscribed by the grantor, and when subscribed should be acknowledged as provided in the chapter on "Acknowledgment and Proof of Instruments."

SECTION 68. *By person who cannot write.* The word "signature" or "subscription" includes mark, and when a person cannot write, he may make his mark and his name may be written near it by a person who writes his own name as a witness. It is provided, however, that when a signature is by mark, it must, in order that the same may be acknowledged or may serve as the signature to any sworn statement, be witnessed by two persons who must subscribe their own names as witnesses thereto.<sup>15</sup> This applies to all written instruments, and notaries are frequently called upon to sign for and take the ac-

<sup>15</sup> Code of Civil Procedure, §17

knowledge of persons who cannot write. It is usual in such cases to make the statement that "———, being unable to write his name, has made his mark, and I, at his request and in his presence, have written his name for him near his mark, and now sign my own name as a witness," and have the same attested by two other witnesses.

SECTION 69. *By attorney in fact.* When an attorney in fact executes an instrument transferring an estate in real property, he must subscribe the name of his principal to it, and his own name as attorney in fact.<sup>16</sup> (See Power of attorney, Secs. 71-74, *post.*)

SECTION 70. *By married women.* A grant or conveyance of real property made by a married woman may be made, executed, and acknowledged in the same manner and has the same effect as if she were unmarried.<sup>17</sup>

#### Power of Attorney.

SECTION 71. *Defined.* "Power of attorney" indicates that a power or authority is conferred. It is an instrument by which the authority of one person to act in the place and stead of another is set forth. It must be in writing, subscribed, acknowledged or proved, certified and recorded. A

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(16) Civil Code, §1095  
(17) Civil Code, §1093

general power of attorney confers power to act generally; a special power of attorney confers power to perform some particular act.

SECTION 72. *By married women.* A married woman may make, execute, and revoke powers of attorney for the sale, conveyance, or encumbrance of her real or personal estate, which shall have the same effect as if she were unmarried, and may be acknowledged in the same manner as a grant of real property.<sup>18</sup>

SECTION 73. *Revocation of.* No instrument containing a power to convey or execute instruments affecting real property, which has been recorded, is revoked by any act of the party by whom it was executed, unless the instrument containing such revocation is also acknowledged or proved and certified, and recorded in the same office in which the instrument containing the power was recorded.<sup>19</sup>

SECTION 74. *Termination of.* Under the law of agency, a power of attorney, unless coupled with an interest in the subject of the agency, is terminated as to every person having notice thereof, by:

1. Its revocation by the principal;
2. His death; or,
3. His incapacity to contract.<sup>22</sup>

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(18) Civil Code, §1094

(19) Civil Code, §1216

(22) Civil Code, §2356

**Delivery of Deed.**

SECTION 75. *Necessity of.* A grant takes effect so as to vest the interest intended to be transferred, only upon its delivery by the grantor.<sup>20</sup> Delivery is essential to give the conveyance legal effect, and a valid delivery is only made when the conduct and acts of the grantor manifest a present intent to dispose of the title conveyed. A delivery merely for the purpose of safe keeping or custody is not such a delivery.<sup>21</sup> Further, a deed cannot be delivered conditionally. Delivery to the grantee, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon.<sup>23</sup> This applies to a grant of personal property as well as of real property. A grant duly executed is presumed to have been delivered at its date.<sup>24</sup> It is well settled that delivery is not complete until the grantor has so dealt with the instrument that he has lost all control over it. Therefore, if a person should make a deed and duly acknowledge it before a notary public, but keep it in his possession and die without having delivered it, the deed is of no effect. (See Redelivery, Sec. 78, *post.*)

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(20) Civil Code, §1054

(21) *Follmer v. Rohrer*, 153 Cal., 755

(23) Civil Code, §1056

(24) Civil Code, §1055

A notary, therefore, is not justified in signing a deed as a witness to the delivery, unless he has seen it delivered, with intent to deliver.

SECTION 76. *In Escrow.* The law provides for the delivery of a deed in escrow, thus: A grant may be deposited by the grantor with a third person, to be delivered on performance of a condition, and, on delivery by the depository, it will take effect. While in the possession of the third person, and subject to condition, it is called an escrow.<sup>25</sup> On the performance of the condition it becomes incumbent on the depository to make delivery. The grantor must have intended to part with the possession for all time, and cannot revoke it after delivery in escrow.<sup>26</sup>

SECTION 77. *Constructive delivery.* Though a deed be not actually delivered into the possession of the grantee, it is yet to be deemed constructively delivered in the following cases:

1. Where the instrument is, by the agreement of the parties at the time of execution, understood to be delivered, and under such circumstances that the grantee is entitled to immediate delivery; or

2. Where it is delivered to a stranger for the benefit of the grantee, and his assent is shown, or may be presumed.<sup>27</sup>

(25) Civil Code, §1057

(26) *McDonald v. Huff*, 77 Cal., 279; *Whitney v. Sherman*, 178 Cal., 435

(27) Civil Code, §1059

SECTION 78. *Redelivery.* Redelivering a grant of real property to the grantor, or canceling it, does not operate to retransfer the title.<sup>28</sup> It can only be retransferred by an instrument as formal as the one transferring it.

**Interpretation of.**

SECTION 79. In the construction of a deed the understanding and intention of the parties should be ascertained, and for this purpose the whole of the instrument should be considered.<sup>29</sup> A clear and distinct provision in a grant is not controlled by other words less clear and distinct. If the operative words of a grant are doubtful, recourse may be had to its recitals to assist the construction.

It is to be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor.

If several parts are absolutely irreconcilable, the former part prevails.

Where a future interest is limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, or in equivalent words, such words must be taken to mean

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(28) Civil Code, §1058

(29) *Stockton v. Weber*, 98 Cal., 433

successors, or issue living at the death of the person named as ancestor.<sup>30</sup>

Effect of.

SECTION 80. *What passes.* A fee-simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended. Where a person purports by proper instrument to convey real property in fee simple, without expressly restricting the conveyance to any particular interest therein, and subsequently acquires any title, or claim of title thereto, the same passes by operation of law to the grantee, or his successors.<sup>31</sup> Even if the grantor had no title whatever to land at the time he executed a grant, bargain, and sale deed of it purporting to convey the fee, any title he afterwards acquired would pass to his grantee under such deed.<sup>32</sup> This is not true of a quit-claim deed. As a rule, a quit-claim deed does not carry after-acquired title. A grant made by the owner of an estate for life or years, purporting to transfer a greater estate than he could lawfully transfer, does not work a forfeiture of his estate, but passes to the grantee all the estate which the grantor could lawfully

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(30) Civil Code, §§1067-1071; *Pavkovich v. S. P. R. R. Co.* 150 Cal. 45

(31) Civil Code, §§1105, 1106

(32) *Cecil v. Gray*, 170 Cal., 137

transfer.<sup>33</sup> A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed.<sup>34</sup> A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant.<sup>35</sup> Where a grant is made upon condition subsequent, and is subsequently defeated by the non-performance of the condition, the person otherwise entitled to hold under the grant must reconvey the property to the grantor or his successors, by grant duly acknowledged for record. An instrument purporting to be a grant of real property, to take effect upon condition precedent, passes the estate upon the performance of the condition.<sup>36</sup>

SECTION 81. *As to tenants.* Grants of rents or of reversions or of remainders are good and

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(33) Civil Code, §1108

(34) Civil Code, §§1104, 1084

(35) Civil Code, §1112; *Warden v. Realty Co.* 178 Cal., 440.

(36) Civil Code, §§1109, 1110

effectual without attornments of the tenants; but no tenant who, before notice of the grant, shall have paid rent to the grantor must suffer any damage thereby.<sup>37</sup>

SECTION 82. *How far conclusive.* Every grant of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him, except a purchaser or encumbrancer who in good faith and for a valuable consideration acquires a title or lien by an instrument that is first duly recorded.<sup>38</sup> (See Effect of failure to record, Sec. 56, *supra*.)

SECTION 83. *Implied covenants.* From the use of the word "grant" in any conveyance by which an estate of inheritance or fee-simple is to be passed, the following covenants, and none other, on the part of the grantor, for himself and his heirs, to the grantee, his heirs and assigns, are implied, unless restrained by express terms contained in such conveyance:

1. That, previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, or any right, title, or interest therein, to any person other than the grantee.

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(37) Civil Code, §1111

(38) Civil Code, §1107

2. That such estate is at the time of the execution of such conveyance free from encumbrances done, made, or suffered by the grantor, or any person claiming under him.

Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance.<sup>39</sup>

#### Instrument Made with Intent to Defraud, When Void.

SECTION 84. Every instrument, other than a will, affecting an estate in real property, including every charge upon real property, or upon its rents or profits, made with intent to defraud prior or subsequent purchasers thereof, or encumbrancers thereon, is void as against every purchaser or encumbrancer, for value, of the same property, or the rents or profits thereof. But no instrument is to be avoided hereunder in favor of a subsequent purchaser or encumbrancer having notice thereof at the time his purchase was made, or his lien acquired, unless the person in whose favor the instrument was made was privy to the fraud intended.<sup>40</sup>

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(39) Civil Code, §1113

(40) Civil Code, §§1227, 1228

## CHAPTER V.

## MORTGAGES.

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87	Transfer when a mortgage.
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## Nature of Mortgages in General.

SECTION 85. Mortgage as defined by the Civil Code, is a contract by which specific property is hypothecated for the performance of an act without the necessity of a change of possession. It conveys no title, but gives only the security of a lien upon property. It may be created upon property held adversely to the mortgagor. It can be created, renewed or extended only by

writing executed with the formalities required in the case of a grant of real property. The lien of a mortgage is special, unless otherwise expressly agreed, and is independent of possession.<sup>1</sup> It is a lien on everything that would pass by a grant of the property.<sup>2</sup> It does not bind the mortgagor personally to perform the act for the performance of which it is security, unless there is an express covenant to that effect. Title acquired by the mortgagor subsequent to the execution of the mortgage enures to the mortgagee as security for the debt in like manner as if acquired before the execution. The person whose interest in the property is subject to the lien of a mortgage may not do any act to impair the mortgagee's security.<sup>3</sup>

#### Possession of the Property.<sup>4</sup>

SECTION 86. A mortgage does not entitle the mortgagee to the possession of the property, unless authorized by the express terms of the mortgage; but after the execution of the mortgage the mortgagor may agree to such change of possession without a new consideration.<sup>4</sup>

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(1) Civil Code, §§2920-2923  
(2) Civil Code, §2926  
(3) Civil Code, §§2928-2930  
(4) Civil Code, §2927

The instrument is required to be recorded, in order to give notice to subsequent purchasers or mortgagees, and the recording of the instrument is substituted in place of the change of possession. A change of possession of personal property mortgaged, would change it into a pledge.

#### Transfer When a Mortgage.

SECTION 87. Every transfer of an interest in property, other than in trust, made only as security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is deemed a pledge.<sup>5</sup>

Consequently, a deed absolute on its face, if made as security for the payment of a debt, is in reality a mortgage, and the fact that a transfer was made subject to defeasance on a condition may, for the purpose of showing such transfer to be a mortgage, be proved (except as against a subsequent purchaser or encumbrancer for value and without notice), though the fact does not appear by the terms of the instrument.<sup>6</sup> (See When grant of real property is recorded as mortgage. Sec. 97, *post.*)

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(5) Civil Code, §2924  
(6) Civil Code, §2925

**Deeds of Trust.**

SECTION 88. *Notice of default and election to sell.* In 1917 section 2924 of the Civil Code of this state relative to sales of property under deeds of trust was amended so as to require notice of the breach of obligation and of election to sell, to be recorded at least three months prior to the sale, and the exact language of that section as now amended is as follows:

“Where, by a mortgage created after July 27, 1917, of any estate in real property, other than an estate at will or for years, less than two, or in any transfer in trust made after July 27, 1917, of a like estate to secure the performance of an obligation, a power of sale is conferred upon the mortgagee, trustee, or any other person, to be exercised after a breach of the obligation for which such mortgage or transfer is a security, such power shall not be exercised (except where such mortgage or transfer is made pursuant to an order, judgment, or decree of a court of record, or to secure the payment of bonds or other evidences of indebtedness authorized or permitted to be issued by the commissioner of corporations, or is made by a public utility subject to the provisions of the public utilities act), until (a) the trustee, mortgagee or beneficiary shall first record, in the office of the recorder of the

county wherein the mortgaged or trust property or some part thereof is situated, a notice of such breach and of his election to sell or cause to be sold such property to satisfy the obligation; (b) not less than three months shall thereafter elapse; and (c) the mortgagee, trustee or other person authorized to make the sale shall give notice of the time and place thereof in the manner and for a time not less than that required by law for sales of real property upon execution.”

#### Foreclosure.

SECTION 89. A mortgage is usually given as security for a debt, and the debt is evidenced by a promissory note, copy of which is usually inserted in the mortgage. If the debt is not paid in accordance with the terms of the note, the mortgagee may foreclose the mortgage in the manner prescribed by law. A power of sale may be conferred by the mortgagor upon the mortgagee or any other person, to be exercised after a breach of the obligation for which the mortgage is security.<sup>7</sup>

#### Power of Attorney to Execute.

SECTION 90. A power of attorney to execute a mortgage must be in writing, subscribed, ac-

(7) Civil Code, §§2931, 2932

known or proved, certified and recorded, in like manner as powers of attorney for grants of real property.<sup>8</sup>

#### Assignment of Debt.

SECTION 91. The assignment of a debt secured by a mortgage, carries with it the security.<sup>9</sup>

#### Record of Assignment of Mortgage.

SECTION 92. An assignment of a mortgage may be recorded in like manner as a mortgage, and such record operates as notice to all persons subsequently deriving title to the mortgage from the assignor.

When the mortgage is executed as security for money due, or to become due, on a promissory note, bond, or other instrument, designated in the mortgage, the record of the assignment of the mortgage is not, of itself, notice to a mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them, or either of them, to the person holding such note, bond, or other instrument.<sup>10</sup>

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(8) Civil Code, §2933

(9) Civil Code, §2936

(10) Civil Code, §§2934, 2935

**How Discharged of Record.**

SECTION 93. A recorded mortgage may be discharged by an entry in the margin of the record thereof, signed by the mortgagee, or his personal representative or assignee, acknowledging the satisfaction of the mortgage in the presence of the recorder, who must certify the acknowledgment in form substantially as follows: "Signed and acknowledged before me, this —— day of ——, in the year ——.  
A. B., Recorder."

A recorded mortgage, if not discharged as above provided, must be discharged upon the record by the officer having custody thereof, on the presentation to him of a certificate signed by the mortgagee, his personal representatives or assigns, acknowledged or proved and certified as prescribed by the chapter on recording transfers, stating that the mortgage has been paid, satisfied, or discharged.

Foreign executors, administrators and guardians may satisfy mortgages upon the records of any county in this state, upon producing and recording in the office of the county recorder of the county in which such mortgage is recorded, a duly certified and authenticated copy of their letters testamentary or of administration, or of

guardianship, and which certificate or authentication shall also recite that said letters have not been revoked.

A certificate of the discharge of a mortgage, and the proof or acknowledgment thereof, must be recorded at length, and a reference made in the record to the book and page where the mortgage is recorded, and in the minute of the discharge made upon the record of the mortgage to the book and page where the discharge is recorded.<sup>11</sup> (See Satisfaction of mortgages, Sec. 94, *post.*)

#### Satisfaction of Mortgages.

SECTION 94. When any mortgage has been satisfied, the mortgagee or his assignee must immediately, on demand of the mortgagor, execute, acknowledge, and deliver to him a certificate of the discharge thereof, so as to entitle it to be recorded, or he must enter satisfaction, or cause satisfaction of such mortgage to be entered of record, and any mortgagee, or assignee of such mortgagee, who refuses to execute, acknowledge, and deliver to the mortgagor the certificate of discharge, or to enter satisfaction, or cause satisfaction of the mortgage to be entered, as pro-

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(11) Civil Code, §§2938-2940

vided in this chapter, is liable to the mortgagor, or his grantee or heirs, for all damages which he or they may sustain by reason of such refusal, and shall also forfeit to him or them the sum of one hundred dollars.<sup>12</sup>

**What Real Property May Be Mortgaged.**

SECTION 95. Any interest in real property which is capable of being transferred may be mortgaged.<sup>13</sup>

**Form of Mortgage of Real Property.**

SECTION 96. The code form of mortgage of real property is as follows:

“This mortgage, made the —— day of ——, in the year ——, by A B, of ——, mortgagor, to C D, of ——, mortgagee, witnesseth,—

“That the mortgagor mortgages to the mortgagee (here describe the property), as security for the payment to him of —— dollars, on (or before) the —— day of ——, in the year ——, with interest thereon (or as security for the payment of an obligation, describing it, etc.)

“A B.”<sup>14</sup>

**When Grant of Real Property is Recorded as Mortgage.**

SECTION 97. When a grant of real property purports to be an absolute conveyance, but is intended to be defeasible on the performance of

(12) Civil Code, §2941

(13) Civil Code, §2947

(14) Civil Code, §2948

certain conditions, such grant is not defeated or affected as against any person other than the grantee, or his heirs or devisees, or persons having actual notice, unless an instrument of defeasance, duly executed and acknowledged, shall have been recorded in the office of the county recorder of the county where the property is situated.<sup>15</sup>

**Record of Mortgages of Real Property.**

SECTION 98. Mortgages of real property may be acknowledged or proved, certified, and recorded, in like manner and with like effect as grants thereof.<sup>16</sup>

**What Personal Property May Be Mortgaged.**

SECTION 99. Mortgages may be made upon all growing crops, including grapes and fruit, and upon any and all kinds of personal property, except the following:

1. Personal property not capable of manual delivery;
2. Articles of wearing apparel and personal adornment;
3. The stock in trade of a merchant.<sup>17</sup>

Mortgages upon personal property other than that permitted by law to be mortgaged, and mortgages not made in conformity with law, are

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(15) Civil Code, §2950  
(16) Civil Code, §2952  
(17) Civil Code, §2955

nevertheless valid between the parties, their heirs, legatees and personal representatives, and persons who, before parting with value, have actual notice thereof.<sup>18</sup>

**Form of Personal Property Mortgages.**

**SECTION 100.** The form prescribed by the Code is as follows:

“This mortgage, made the — day of —, in the year —, by A B, of —, by occupation a —, mortgagor, to C D, of —, by occupation a —, mortgagee, witnesseth,—

“That the mortgagor mortgages to the mortgagee (here describe the property), as security for the payment to him of — dollars on (or before) the — day of —, in the year —, with interest thereon (or, as security for the payment of a note or obligation, describing it, etc.)

“A B.”<sup>19</sup>

**Further Requisites of Personal Property Mortgages.**

**SECTION 101.** A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value, unless,—

1. It is accompanied by the affidavit of all the parties thereto that it is made in good faith,

(18) Civil Code, §2973; *Bank of Ukiah v. Gibson*, 109 Cal., 199

(19) Civil Code, §2956

and without any design to hinder, delay, or defraud creditors;

2. It is acknowledged or proved, certified, and recorded, in like manner as grants of real property.<sup>20</sup>

#### Record of Personal Property Mortgages.

SECTION 102. *When and where.* A mortgage of personal property must be recorded in the office of the county recorder of the county in which the mortgagor resides, if the mortgagor be a resident of this state, and it shall also be recorded in the county in which the property mortgaged is situated, or, save in the case of livestock, vehicles (other than motor vehicles) and other migratory chattels, to which it may be removed. Except as it is otherwise in this article provided, mortgages of personal property may be acknowledged or proved, certified, and recorded in like manner and with like effect as grants of real property; but they must be recorded in books kept for personal mortgages exclusively.

SECTION 103. *Of ships.* A mortgage of any vessel or part of any vessel under the flag of the United States is void as against any person (other than the mortgagor, his heirs and devisees, and persons having actual notice thereof), unless the mortgage is recorded in the office of the collector of customs where such vessel is registered or enrolled.

<sup>20</sup> Civil Code, §2957

SECTION 104. *Of Property in transit.* For the purposes of this article, property in transit from the possession of the mortgagee to the county of the residence of the mortgagor, or to a location for use, is, during a reasonable time for such transportation, to be taken as situated in the county in which the mortgagor resides, or where it is intended to be used.

SECTION 105. *Of Property of a common carrier.* For a like purpose, personal property used in conducting the business of a common carrier is to be taken as situated in the county in which the principal office or place of business of the carrier is located.

SECTION 106. *Of Property in different places.* A single mortgage of personal property, embracing several things of such character, or so situated that by the provisions of this article separate mortgages upon them would be required to be recorded in different places, is only valid in respect to the things as to which it is duly recorded.

SECTION 107. *Certified copies may be recorded.* A certified copy of a mortgage of personal property once recorded may be recorded in any other county, and when so recorded, the record thereof has the same force and effect as though it was of the original mortgage.<sup>21</sup>

<sup>21</sup> (21) Civil Code, §§2958-2964

**Removal of Property Mortgaged.**

SECTION 108. *Exempt from mortgage, when.* When personal property mortgaged is thereafter removed from the county in which it is situated, the lien of the mortgage shall not be affected thereby for thirty days after such removal; but, after the expiration of such thirty days, the property mortgaged, save in the case livestock, vehicles (other than motor vehicles) and other migratory chattels, is exempted from the operation of the mortgage, except as between the parties thereto, until either:

1. The mortgagee causes the mortgage to be recorded in the county to which the property has been removed; or

2. The mortgagee takes possession of the property, as prescribed in the next section.

If a mortgage of livestock, vehicles (other than motor vehicles) or other migratory chattels has been recorded as provided in Section 2959 of the Civil Code, and within thirty days thereafter a certificate of such record has been filed by the county recorder with the secretary of state as required by Sections 408 and 4130 of the Political Code, the property mortgaged may be removed into any county in the state without in any way affecting the lien of the mortgage.<sup>22</sup>

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(22) Civil Code, §2985

Failure of the mortgagee to record the mortgage in the county to which the property has been removed within thirty days after such removal *ipso facto* exempts the property for all time and wherever afterwards situated from the operation of the mortgage in so far as it concerns creditors of the mortgagor, unless the mortgagee within that time takes possession of the property.<sup>23</sup> But one who purchases such mortgaged property in the county to which it is removed within the period of thirty days after the removal, without actual notice of the mortgage, is guilty of conversion, for which conversion the mortgagee acquires a cause of action when it is committed and does not lose by failing subsequently to record the mortgage.<sup>24</sup>

SECTION 109. *May be taken as a pledge, when.* If the mortgagor voluntarily removes or permits the removal of the mortgaged property, save in the case of livestock, vehicles (other than motor vehicles) and other migratory chattels, from the county in which it was situated at the time it was mortgaged, the mortgagee may take possession and dispose of the property as a pledge for the payment of the debt, though the debt is not due.<sup>25</sup>

(23) *Hopper v. Keys*, 152 Cal. 488]

(24) *Hammels v. Sentous*, 151 Cal. 520

(25) Civil Code, §2966

**Attachment of Personal Property Mortgaged.**

SECTION 110. Personal property mortgaged may be taken under attachment or execution issued at the suit of a creditor of the mortgagor, but before the property is so taken the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest, or must deposit the amount thereof with the county clerk or treasurer, payable to the order of the mortgagee. When the property thus taken is sold under process, the officer must apply the proceeds of the sale as follows:

1. To the repayment of the sum paid to the mortgagee, with interest from the date of such payment; and

2. The balance, if any, in like manner as the proceeds of sales under execution are applied in other cases.<sup>26</sup>

When, however, the attachment or execution creditor presents a verified statement that the mortgage is void or invalid and delivers to the officer an indemnity bond as required by Section 2969 of the Civil Code, then the officer shall take the property, and in case of execution sell it as provided by law, and in such case the officer selling the property must first apply the

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(20) Civil Code, §§2968 2969, 2970.