

Date of Meeting: June 13-14, 1958

Date of Memo: June 3, 1958

Memorandum No. 5

Subject: Study No. 44 - Partnerships and Unincorporated Associations:
Suit in Common Name; Registration of
Fictitious Name.

The 1957 Session of the Legislature authorized the Commission to make a study to determine whether partnerships and unincorporated associations should be permitted to sue in their common names and whether the law relating to the use of fictitious names should be revised.

We retained Professor Judson A. Crane of the Hastings College of Law as our research consultant on this study. Professor Crane's study is attached.

This study will be on the agenda of the June meeting.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

Study 44
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June 3, 1958

A STUDY TO ~~DETERMINE WHETHER PARTNER-~~
~~SHIPS AND UNINCORPORATED ASSOCIATIONS~~
~~SHOULD BE PERMITTED TO BRING~~
~~COURT ACTIONS IN THEIR~~
~~COMMON NAMES~~
~~AND UNINCORPORATED ASSOCIATIONS~~
NAMES SHOULD BE REVEALED

Relative To

*ACTIONS BROUGHT BY PARTNERSHIPS
AND UNINCORPORATED ASSOCIATIONS
IN THEIR COMMON NAME*

This study was made at the direction of the Law Revision Commission by Professor Judson A. Crane of the Hastings College of Law, University of California, San Francisco.

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A STUDY TO DETERMINE WHETHER PARTNERSHIPS
AND UNINCORPORATED ASSOCIATIONS SHOULD BE
PERMITTED TO SUE IN THEIR COMMON NAMES AND
WHETHER THE LAW RELATING TO THE USE OF
FICTITIOUS NAMES SHOULD BE REVISED.

This study is concerned with two aspects of California law relating to partnerships and other unincorporated associations. The first is whether they should be permitted to sue in their common names. The second is whether changes should be made in Section 2466 et seq. of the Civil Code which, inter alia, require partnerships to file and publish information relating to their membership and changes therein. These problems will be discussed separately herein.

SHOULD PARTNERSHIPS AND OTHER UNIN-
CORPORATED ASSOCIATIONS BE PERMITTED
TO BRING SUIT IN THEIR COMMON NAMES?

Present California Law

The law of California does not provide for the appearance of a partnership or other unincorporated association as a party plaintiff in its common or business name. To appear as a litigant is an incident of legal personality which courts are reluctant to attribute to any entity other than a human person or corporation, in the absence of specific statutory authorization.¹

California does, however, recognize the legal personality of an unincorporated association doing business to the extent of

permitting actions against it in its common name. Section 388 of the Code of Civil Procedure provides:

388. When two or more persons, associated in any business, transact ~~with~~ business under a common name, whether it comprises the names of such persons or not; the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability.²

No similar statute has been enacted to permit use of the common name by parties plaintiff and the appellate courts have consistently adhered to the rule that precludes suit in the common name by un-³incorporated associates. However, the courts have been quite strict in requiring the defendant to raise the objection in a timely and⁴ technically correct way.

The question whether an unincorporated association sued as a defendant under Section 388 can assert a cross-demand in its common name was raised in Case v. Kadota Fig Association. The district court of appeal held that this was improper taking the position that the pleading, treated as a cross-complaint, should have been brought in the names of the members of the association, so that the cross-defendant would have available their individual liability for costs or for restitution in case a judgment was paid and later re-⁵versed. On hearing granted, the supreme court disagreed and⁶ affirmed the judgment of the superior court for the association. The court held that the cross-demand asserted could be pleaded in the common name in which the defendant was sued because it was a

counter-claim arising out of the same transaction or contract sued on in the complaint. However, the opinion cited and discussed with approval earlier decisions holding that an original complaint by an unincorporated association must be in the names of the members and that a cross-complaint must be so captioned because it is a distinct cause of action.⁷

Thus, the California law is that for an unincorporated association or partnership to sue in its common name as plaintiff or cross-complainant is a procedural irregularity, and if timely objection is made the pleading will be held defective, subject to reasonable opportunity to amend. In one situation, however, the Legislature has relaxed this rule. Under Civil Code Section 3369 an association can bring an action to enjoin⁸ unfair competition in its common name.

Law of Other Jurisdictions

In England copartners may both sue and be sued in their firm name under Order 48a, rule 1 of the Rules of the Supreme Court which provides:

Any two or more persons claiming or being liable as co-partners and carrying on business within the jurisdiction may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action; and any party to an action may in such case apply by summons to a judge for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, co-partners in any such firm, to be furnished in such manner and verified on oath

or otherwise as the judge may direct. And when the names of the partners are so declared, the action shall proceed in the same manner and the same consequences in all respects shall follow as if they had been named as the plaintiffs in the writ. But all the proceedings shall, nevertheless, continue in the name of the firm.⁹

Suit against a partnership or other unincorporated association in a United States district court is governed by Rule 17 (b) of the Federal Rules of Civil Procedure which provides:

The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the District Court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C. Sec. 754 and 959 (a).

The laws of Colorado,¹⁰ Iowa,¹¹ New York,¹² Nebraska,¹³
New Mexico,¹⁴ Ohio,¹⁵ Texas,¹⁶ and Wyoming¹⁷ permit suit by
partnerships or unincorporated associations in their common names.

In Michigan a group is charged with the responsibility of making recommendations pertaining to revision of the procedural rules of the state. Professor Charles M. Joiner of the University of Michigan Law School is Chairman. He has written me that the group will propose as part of the rule on capacity to sue and be sued the following:

A partnership, partnership association, or any unincorporated voluntary association having a

distinguishing name shall have the capacity to sue or be sued in its partnership name or in the names of any of its members or both.

Discussion of Policy Considerations

The common-law rule that a partnership or unincorporated association could sue or be sued only in the names of all of the persons comprising it was based not on considerations of policy but on the legal theory that such a business group is an aggregate of individuals rather than a legal entity. The New York Judicial Council has described the common-law rule as "merely a useless relic of the strict procedural rules at common law with nothing, apparently, to justify its continued existence."¹⁸

The present California rule requiring a partnership or unincorporated association to sue in the names of all of its members requires a greatly extended caption on the complaint or cross-complaint, particularly in the case of cooperatives, labor unions and other large unincorporated enterprises such as firms of stock brokers, accountants and attorneys. Such a pleading is onerous to prepare and serves no useful purpose. Moreover, a filing fee must be paid for appearance in behalf of each of the named plaintiffs.¹⁹ This work and expense would be eliminated if partnerships and unincorporated associations were permitted to sue in their common names. A collateral advantage of such an innovation would be that cases involving such plaintiffs would be indexed in clerks' offices and published reports by the familiar name of the group -

e.g., "Kadota Fig Association" rather than the name of the member of the Associations who happened to be listed first in the caption of the complaint.

For California to permit partnerships and other unincorporated association to bring suit in their common names would be to some extent to recognize the "entity theory" with respect to such organizations. It is not believed, however, that this can properly be regarded as a valid objection to the proposal. California has already gone far toward recognizing the "entity" theory. That Section 388 of the Code of Civil Procedure, which permits such persons to be sued in their common name, does so was recognized²⁰ by the Supreme Court in Artana v. San Jose Scavenger Co. and²¹ in Jardine v. Superior Court. In the latter case the Court said:

A number of well-considered cases, hereinafter discussed, have dealt with its [C.C.P. § 388] application to unincorporated associations of various kinds. They have all tacitly recognized the validity of the statute. Whether, for the purpose of the suit, the unincorporated association is to be considered as as an entity, or whether the statute merely permits an action to be brought against the associates in the name of the association, is a point upon which the decisions from other jurisdictions are not in agreement. In California the entity theory has been established by a number of decisions...²²

Moreover, many provisions of the Uniform Partnership Act,²³ adopted in California in 1929, are more consistent with the entity theory of partnership than with any other.²⁴ This is particularly true as respects "tenure in partnership."²⁵ and the provision to the effect that "Any estate in real property may be acquired in the partnership name. Title so acquired

can be conveyed only in the partnership name."²⁶

Again, the provisions of the Uniform Fraudulent Conveyance Act, also adopted in California,²⁷ which define partnership insolvency²⁸ and fraudulent conveyances of partnership property²⁹ without fair consideration to the partnership³⁰ are consistent with the entity view of partnership.

While it may be conceded that there is less hardship in requiring all of the members of a partnership or an unincorporated association to be named as plaintiffs than in requiring them to be named as defendants because the plaintiff suing a partnership may not know the names of all the partners whereas a firm suing as plaintiff does, the effort and expense involved would appear to warrant a change in the present law. The only objection to such a change which may be regarded as entitled to any weight is that if the suit is brought in the common name a defendant who obtains a judgment on a cross-demand or for costs will not be able to collect it from the individual members of the partnership or association. This could be remedied, however, by the enactment of either or both of two provisions: (1) a provision making a judgment for costs or a cross-demand against the partnership or unincorporated association binding on all of the members; (2) a provision similar to that incorporated in the English statute, supra, that the defendant be authorized to apply to the court for an order, to be made for good cause shown, requiring the plaintiff to furnish a statement of the names and addresses of its members at the time when cause of action arose.

Recommendation

It is recommended that California authorize partnerships and unincorporated associations to sue in their common names.

This might be done by either of two enactments:

(1) Amend Section 388 of the Code of Civil Procedure as follows:

388. When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may sue or be sued by such common name. The summons in such cases of suits against such associates shall be being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability.

(2) Enact a new Section 388a of the Code of Civil Procedure to read:

388a. When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may sue in such common name, subject to compliance with the provisions of Civil Code Secs. 2466 et seq., requiring registration by persons doing business in a fictitious name.

If this recommendation is not accepted, it is recommended that California at least enact a new statute permitting a partnership or unincorporated association sued in its common name under Section 388 of the Code of Civil Procedure to prosecute any set-off, counterclaim, cross-complaint or other cross-demand in such common

name, thus overruling the distinction taken by the Supreme Court in Case v. Kadota Fig Association³¹ between counterclaims and cross-complaint in this respect. Such a provision has been enacted in Pennsylvania³² which otherwise follows the California rule that an unincorporated association cannot sue in its common name.

SHOULD SECTION 2466 ET SEQ. OF THE
CIVIL CODE BE REPEALED OR REVISED?

Section 2466 of the Civil Code provides, inter alia (1) that every partnership transacting business in this State³³ under a fictitious name, or a designation not showing the names of the persons interested as partners in the business, must file with the clerk of the county in which the partnership has its principal place of business a subscribed and acknowledged certificate stating the full name and residence of the members of the partnership and (2) that the certificate must subsequently be published in a newspaper in the county.³⁴ Section 2469 requires a new certificate to be filed and published on every change in the membership of the firm. Section 2469.1 authorizes but does not require a partnership, upon ceasing to use a fictitious name, to file and publish a certificate of abandonment thereof.³⁵ The courts have said that the purpose of these provisions is to enable persons dealing with partnerships to know the individuals with whom they are dealing or to whom they are giving credit or becoming bound.³⁶

The only penalty provided for failure to comply with Section 2466 et seq. is stated in Section 2468: neither the partners or their assignee may maintain any action upon or on account of any contracts made or transactions had under such fictitious name until the certificate has been filed and publication has been made. This provision has been liberally construed in favor of partnerships, the courts holding that the certificate may be filed and publication made after suit is brought and any time before trial.³⁷

Sections 2466 et seq. of the Civil Code impose requirements which are rather onerous in their application to large partnerships such as stockbrokers, accountants, and attorneys. This is particularly true with respect to the requirement of Section 2469 that a new certificate be filed and published on every change in the members of the partnership. It may, therefore, be appropriate to consider whether these provisions are of sufficient value to warrant retention as a part of the law of this State.

Section 2466 et seq. were enacted as a part of the original Civil Code of 1872. In 1929 both the Uniform Partnership Act and the Uniform Limited Partnership Act were enacted in this State. Both contain some provisions for filing and publishing information relating to the entities with which they are concerned. Thus, the Uniform Partnership Act as amended contains Corporations Code Section 15010.5 which provides:

15010.5. (1) A statement of partnership, in the name of the partnership, signed, acknowledged and verified by two or more of the partners, or such a statement signed by two or more of the partners as individuals, acknowledged and verified by each signing

partner, may be recorded in the office of the county recorder of any county. The statement shall set forth the name of the partnership and the name of each of the partners, and shall state that the partners named are all of the partners.

When any such statement has been recorded, it shall be conclusively presumed, in favor of any bona fide purchaser for value of the partnership real property located in the county, that the persons named as partners therein are members of the partnership named and that they are all of the members of the partnership, unless there is recorded by anyone claiming to be a partner a statement of partnership, verified and acknowledged by the person executing it--which shall set forth the name of the partnership, a statement that such person claims to be a member of such partnership or a statement that any of the persons named in a previously recorded statement of partnership are not members of such partnership.

(2) As used in this section and in Section 15010 "conveyance" includes every instrument in writing by which any estate or interest in real estate is created, alienated, mortgaged, or encumbered, or by which the title to any real property may be affected, except wills; "convey" includes the execution of any such instrument; and "purchaser" includes any person acquiring an interest under any such instrument.

The Uniform Partnership Act also contains Corporations Code Section 15035.5 which provides:

15035.5. Whenever a partnership is dissolved, a notice of the dissolution shall be published at least once in a newspaper of general circulation in the place, or in each place if more than one, at which the partnership business was regularly carried on, and an affidavit showing the publication of such notice shall be filed with the county clerk within thirty days after such publication.

The Uniform Limited Partnership Act contains Corporations Code Section 15502 which requires persons desiring to form a limited partnership to sign and acknowledge a certificate setting forth the names and residences of the members of the firm and a good deal of other information and to file the certificate in the county clerk's office and the county recorder's office in the

county in which the limited partnership has its principal place of business and to file the certificate in the recorder's office in each other county where it has a place of business or holds title to real property. ³⁸ Section 15502 then provides:

15502 (4) Filing and recording of the certificate in accordance with (1) (b) above or recording of a copy of the certificate in accordance with (3) above shall create the same conclusive presumptions as provided in Section 15010.5 of this code; any other person claiming to be a partner who has been omitted from any such statement shall have the right to file a corrective statement as provided in said Section 15010.5.

It might be argued that these Corporations Code Provisions should be regarded as superseding Section 2466 et seq. of the Civil Code in principle even though not technically repealing them by implication and that the latter are, therefore, no longer necessary. The contention here would be that in enacting the Uniform Acts in 1929 and amending them since the Legislature has undertaken to legislate generally and completely on the subject matter of partnerships, including their rights and duties vis-a-vis third persons. The provisions of the Corporations Code relating to filing and publishing information concerning general and limited partnerships should, therefore, be taken to provide all the protection to third persons which is today believed to be necessary or desirable. If this view were taken, it would follow that Section 2466 et seq. of the Civil Code should be repealed.

If Sections 2466 et seq. are not to be repealed, certain amendments may warrant consideration. Among these are the following:

1. Should Section 2469 be revised to eliminate the

requirement of publication of each new certificate re-
quired to be filed upon a change in the partnership?
Pennsylvania has recently eliminated this provision from
its law.³⁹

2. Inasmuch as Section 2466 et seq. require filing
and publication only in the county in which the partner-
ship has its principal place of business they may not
afford adequate protection to those who deal with the
partnership elsewhere in the State. Perhaps a duplicate
of the certificate should be required to be filed in the
office of the Secretary of State or in each county where
the partnership has a place of business or holds title to
real property.

FOOTNOTES

1. *Jardine v. Superior Court*, 213 Cal. 301, 2 P.2d 756, 759 (1931).
2. This statute has been interpreted as applying to actions against associations not for profit "associated in any business." See *Armstrong v. Superior Court*, 173 Cal. 341, 159 Pac. 1176 (1916) (labor union); *Juneau Spruce Corp. v. International Longshoremen's and Warehousemen's Union*, 37 Cal. 2d 760, 235 P.2d 607 (1951) (labor union); *Jardine v. Superior Court*, 213 Cal. 301, 2 P.2d 756 (1931) (stock exchange).
3. For a recent case stating that associates cannot sue in the common name see *Juneau Spruce Corp. v. International Longshoremen's and Warehousemen's Union*, 37 Cal. 2d 760, 235 P.2d 607 (1951).

4. The following cases are illustrative:

A. M. Gilman & Co. v. Cosgrove, 22 Cal. 356 (1863).

The complaint in an action for goods sold was entitled "A. M. Gilman & Co. v. James N. Cosgrove" and contained no other description or designation of the party plaintiff. At the trial defendant objected to the introduction of evidence of the sale on the ground that the complaint did not sufficiently designate the party plaintiff. The objection was overruled and judgment for plaintiff affirmed.

The court said:

The complaint should have set forth the names of the individuals composing the firm of A. M. Gilman & Co., as the plaintiffs, if the action was intended to be in behalf of individuals composing the firm. The objection to this defect has, however, not been taken in a way to be available... [T]he defendant should have demurred to the complaint for a defect of parties....The objection not having been taken in a proper mode there was no error committed on this point....

Holden v. Messenger, 175 Cal. 300, 165 Pac. 950 (1917).

A lien claim was filed in the common name of a partnership. The complaint to foreclose the claim was in the names of the partners. This was held not to be a fatal variance because there is no requirement that lien claims be filed in the names of the partners.

Kadota Fig Assn. v. Case-Swayne Co. 73 Cal. App.2d 796, 167 P.2d 518 (1946). Plaintiff was named as "Kadota Fig Association of Producers, a growers' cooperative association." It was held that the complaint was subject to demurrer for want of capacity apparent on the face thereof to sue in a common name, but that it was error to dismiss the complaint without giving plaintiff an opportunity to amend. To the same effect see Ginsberg Tile Co. v. Faraone, 99 Cal. App. 381, 278 Pac. 866 (1929).

5. [REDACTED] 207 P.2d 86 (1949).
6. Case v. Kadota Fig Assn., 35 Cal.2d 596, 220 P.2d 912 (1950).
7. The earlier stages of the Kadota litigation are noted in 35 Calif. L. Rev. 115 (1947). The final decision is noted with approval in 39 Calif. L. Rev. 264 (1950), with suggestions

- for amendment of Code of Civil Procedure Section 388. The overlapping of cross-complaint and counterclaim in California law is discussed in 3 Stan. L. Rev. 99 (1950).
8. This provision was applied in Athens Lodge No. 70 v. Wilson, 117 Cal. App.2d 322, 255 P.2d 482 (1953).
 9. Quoted from Pollock, Partnership, 123 (14th ed.).
 10. Rules of Civil Procedure, c.3, Rule 17(b) of the Colorado Revised Statutes (1953).
 11. Code of 1897, § 3468 provided "Actions may be brought by or against a partnership as such...." See Anderson v. Wilson, 142 Ia. 158, 120 N.W. 677 (1909). This has been superseded by R.C.P. 4. See Tuttle v. Nichols Poultry & Egg Co., 240 Ia. 208, 35 N.W.2d 875 (1949).
 12. By Section 222a of Civil Practice Act, enacted in 1945, c. 842, it is provided that "Two or more persons carrying on business as partners may sue or be sued in their partnership name whether or not such name comprises the names of the persons...." This section is discussed in Ruzicka v. Rager, 305 N.Y. 191 111 N.E.2d 878 (1953), which held that the entity theory of the firm was so far recognized by this provision as to preclude a counterclaim by a person sued by the firm, based on liabilities of individual members.
 13. Section 24 of the Code provided that "Any company or association of persons formed for the purpose of carrying on any trade or business, or for the purpose of holding any species of property in this State, and not incorporated, may sue and be sued by

such usual name as such company, partnership, or association may have assumed to itself, or be known by, and it shall not be necessary in such case to set forth in the process or pleading or to prove at the trial, the names of the persons composing such company." See *Leach v. Milburn Wagon Co.*, 14 Neb. 106, 15 N.W. 232 (1883). This provision is now found in Neb. Rev. Stat. § 25-313 (1956).

14. Section 4077 of the Code of 1915 provided "Suits may be brought by or against a partnership as such, or against all or either of the individual members thereof; and a judgment against the firm as such may be enforced against the partnership's property, or that of such members as have been served with summons; but a new action may be brought against the other members in the original cause of action. When the action is against the partnership as such, service of summons on one of the members, personally, shall be a sufficient service on the firm." Quoted in Warren, 197. The current citation of this provision is N.M. Stat. Ann. § 21-6-5 (1953).
15. A partnership formed for the purpose of carrying on a trade or business in this State, or holding property therein, may sue or be sued by the usual or ordinary name which it has assumed, or by which it is known; and in such case it shall not be necessary to allege or prove the names of the individual members thereof. Ohio Rev. Code Ann. tit. 23, § 2307.24 (Page 1953).
16. A partnership or other unincorporated association, or an individual doing business under an assumed name, may sue or be

sued in the partnership, assumed or common name for the purpose of enforcing for or against it a substantive right." Tex. Stat., Rules Civ. Proc., rule 28 (Vernon 1948). This is said in the Texas Statutes to be derived from part of Rule 17, Federal Rules of Civil Procedure.

17. Wyo. Comp. Stat. Ann. § 3-169 (1945).
18. Eleventh Annual Report of the Judicial Council 221, 224-25 (1945).
19. See, e.g., Merola v. Stanley, Executor, E. F. Hutton & Co., et al., in the Superior Court of California in and for the City and County of San Francisco, No. 433339. There E.F. Hutton & Co., defendants, filed a cross-complaint. It was necessary to name all twenty-five partners as cross-complainants and to pay appearance fees of over \$70.
20. 181 Cal. 627, 185 Pac. 850 (1919). See also Warren, Corporate Advantages Without Incorporation, 151 et seq. (1929).
21. 213 Cal. 301, 2 P.2d at 759.
22. Id. at 309, 2 P.2d at 759.
23. Cal. Corp. Code § 15001 et seq.
24. Warren, Corporate Advantages Without Incorporation, 293-301 (1929); Crane, The Uniform Partnership Act, 28 Harv. L. Rev. 762, 769-74 (1915).
25. Cal. Corp. Code § 15025.
26. Cal. Corp. Code § 15008 (3).
27. Cal. Civ. Code § 3439 et seq.
28. Cal. Civ. Code § 3439.02.
29. Cal. Civ. Code § 3439.08.

30. Warren, Corporate Advantages Without Incorporation, 78-80 (1929).
31. 35 Cal.2d 596, 220 P.2d 912 (1950).
32. Pa. Stat. Ann. tit. 12, Rule 2128 (b) (Purdon 1951).
33. Section 2467 of the Civil Code exempts from this requirement a commercial or banking partnership established and transacting business outside the United States.
34. Section 2468 of the Civil Code specifies in detail how and when the certificate is to be prepared and filed.
35. Section 2470 requires the county clerk to keep a register of the names of firms mentioned in the certificates filed with him and Section 2471 makes certified copies of the entries of a county clerk in such register presumptive evidence of the facts therein stated.
36. Andrews v. Glick, 205 Cal. 699, 272 Pac. 587 (1928); Bank of America, N.T. & S.A. v. National Funding Corp., 45 Cal. App.2d 320, 114 P.2d 49 (1941).
37. See, e.g., Rudneck v. Southern Cal. Metal Etc. Co., 184 Cal. 274, 193 Pac. 775 (1920).
38. The certificate is required to be amended in various circumstances Cal. Corp. Code §§ 15508, 15524, 15525.
39. Pa. Laws 1957, Act 126. Pa. Stat. tit. 54, §§ 28.1-28.13 (Purdon 1957).