Meeting

11/8/62

Memorandum No. 77 (1962)

Subject: Study No. 52(L) - Sovereign Immunity (Retroactive Application of Tort Liability Legislation)

You have received a copy of the portion of the sovereign immunity research study entitled "Problems of Constitutionality of Legislative Solution." On pages 749 and 750 of the research study, our consultant has summarized his conclusions on this matter. He indicates that the only significant constitutional problem is: to what extent may the new statute relating to tort liability be given retroactive application?

Analytically, there are three significant dates in connection with the extent to which the new tort liability statute should be given retrospective application:

1. The date of the Muskopf decision--January 27, 1961.

2. The effective date of the Anti-Muskopf Statute--Civil Code Section 22.3--September 15, 1961. (See Exhibit I, attached, on yellow sheets.)

3. The effective date of the tort liability legislation proposed by the Commission.

The staff believes that the new tort liability legislation proposed by the Commission should be given retrospective application to the extent constitutionally permissible. It would, of course, be possible to make the new legislation apply only to causes of action that accrue after its normal effective date and to permit the Muskopf and Lipman decisions to apply to causes of action that accrued prior to that date. The result would be that a great number of causes of

action would be governed by the uncertain rules of those cases. The policy considerations we took into account in formulating our rules of liability and immunity would not apply to these causes of action. Attorneys and the courts would find it necessary to develop two bodies of law governing governmental tort liability. Accordingly, it is suggested that the new tort liability statute should be given the maximum retrospective application that is constitutionally permissible.

One method of approaching the problem of what retroactive effect should be given to the new tort liability statute requires an analysis of the types of claims that exist for various periods of time. The following analysis may be helpful.

I. PRE-MUSKOPF EVENTS. Claims based on facts that occurred prior to the Muskopf decision--(January 27, 1961.)

1. Claims on which there was no liability under pre-Muskopf law but on which liability exists under Muskopf decision.

Claims based on negligence would be barred if no claim was filed as required by law. Claims based on intentional torts would be barred if action was not commenced within period prescribed by law. This leaves only those claims where a claim has been filed or an action commenced.

Consultant states that the Legislature apparently could, without violation of constitutional limitations, abolish or curtail the range or application of all or any part of those common law liabilities of public entities, arising

from factual events occurring prior to the effective date of the Muskopf decision, for which public entities were then immune. (Study at pages 740-743.)

The effect of abolishing such liabilities, as the consultant points out, is the fact that any general elimination of such claims would necessarily eliminate the claim of plaintiff Muskopf herself, a result which would appear to be particularly unfair in view of the substantial time and effort expended by this litigant in the successful attempt to overthrow the immunity doctrine.

The following provision, designed to preserve Muskopf's right of action, together with others then pending in litigation, should be considered by the Commission:

> Except for causes of action reduced to judgment or pending in the courts on January 27, 1961, any cause of action against a public entity which accrued prior to January 27, 1961, hereby is abolished if it would not have existed under the doctrine of governmental immunity from tort liability.
>
> As used in this section, the doctrine of "governmental immunity from tort liability" means that form of the doctrine which was adopted by statute in this State in 1850 as part of the common law of England, subject to any modifications made by laws enacted prior to January 1, 1961, and including the interpretations of that doctrine by the appellate courts of this State in decisions rendered on or before January 1, 1961.

Note that the above provision would abolish causes of action even though liability would exist under the legislation recommended by the Commission. If it is desired to permit the continued existence of causes of action that exist under the new tort liability statute, the words

"enacted prior to January 1, 1961," should be deleted from the second paragraph of the above section and in their place the words "heretofore or hereafter enacted" should be inserted.

2. Claims on which there was liability under pre-Muskopf law but not under the legislation recommended by the Commission.

Consultant states that abolition or curtailment of either statutory or common law tort causes of action arising in the pre-Muskopf period, for which public entities were then liable, would appear to be unconstitutional.

II. EVENTS OCCURRING AFTER MUSKOPF BUT PRIOR TO ANTI-MUSKOPF STATUTE.

1. Claims on which there was no liability under pre-Muskopf law but on which liability exists under Muskopf decision.

Constultant states that the Legislature apparently could not constitutionally abolish or curtail the range or application of either statutory or common law causes of action which arose between the date of the Muskopf decision and the effective date of the abolishing or curtailing legislation.

2. Claims on which liability existed under pre-Muskopf law but not under the legislation recommended by the Commission.

Abolishing liability on such claims would be unconstitutional.

III. EVENTS OCCURRING AFTER ANTI-MUSKOPF STATUTE BUT BEFORE EFFECTIVE DATE OF NEW TORT LIABILITY STATUTE.

1. Claims on which there was no liability under pre-Muskopf law but on which liability exists under Muskopf decision.

Although consultant does not so indicate, the staff believes that the anti-Muskopf statute would permit abolishing claims on which no liability existed under the law prior to Muskopf but on which liability would exist under the Muskopf decision. The following provision is suggested to abolish these claims:

(a) This Act applies to:

(1) All causes of action that accrue on or after its effective date; and

(2) All causes of action that accrued on or after September 15, 1961, and which were barred solely by the provisions of subdivision (a) of Section 4 of Chapter 1404 of the Statutes of 1961.

(b) An action on any cause of action referred to in paragraph (1) of subdivision (a) shall be brought within six months after the effective date of this act.

Note that under the above provision, liability will exist if it existed under pre-Muskopf law or under the new tort liability statute.

2. Claims on which liability existed under pre-Muskopf law but not under the legislation recommended by the Commission.

It would appear that abolishing liability on such claims would be unconstitutional.

In the above discussion, we have indicated that abolishing liability on certain claims would be unconstitutional. The consultant suggests two alternative methods of dealing with these liabilities. (See items 5 and 6 on page 750 of study).

Time did not permit us to draft suggested language on these alternative methods of cutting down liability by imposing procedural obstacles.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

CHAPTER 1404

An act adding Section 22.3 to the Civil Code, relating to the tort liability of governmental entities.

The people of the State of California do enact as follows:

SECTION 1. Section 22.3 is added to the Civil Code, to read:

22.3. The doctrine of governmental immunity from tort liability is hereby re-enacted as a rule of decision in the courts of this State, and shall be applicable to all matters and all governmental entities in the same manner and to the same extent that it was applied in this State on January 1, 1961. This section shall apply to matters arising prior to its effective date as well as to those arising on and after such date.

As used in this section, the doctrine of "governmental immunity from tort liability" means that form of the doctrine which was adopted by statute in this State in 1850 as part of the common law of England, subject to any modifications made by laws heretofore or hereafter enacted and including the interpretations of that doctrine by the appellate courts of this State in decisions rendered on or before January 1, 1961.

SEC. 2. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

SEC. 3. Section 1 of this act shall remain in effect until the 91st day after the final adjournment of the 1963 Regular Session of the Legislature, and shall have no force or effect on and after that date.

SEC. 4. (a) On or after the 91st day after the final adjournment of the 1963 Regular Session of the Legislature, an action may be brought and maintained in the manner prescribed by law on any cause of action which arose on or after February 27, 1961 and before the 91st day after the final adjournment of the 1963 Regular Session, and upon which an action was barred during that period by the provisions of this act, if and only if both of the following conditions are met: (1) a claim based on such cause of action has been filed with the appropriate governmental body in the manner and within the time prescribed for the filing of such claims in Division 3.5 (commencing with Section 600) of Title 1 of the Government Code, and (2) the bringing of the action was barred solely by the provisions of this act and is not barred by any other provision of law enacted subsequent to the enactment of this act.

(b) The statute of limitations otherwise applicable to the bringing of an action allowed pursuant to subdivision (a) of this section shall commence to run on or after the 91st day after the final adjournment of the 1963 Regular Session of the Legislature.

(c) Nothing in this section shall be deemed to permit an action on, or to permit reinstatement of, a cause of action that is barred prior to the effective date of this act or as to which a claim has not been filed with the appropriate governmental body as required by law.

PROBLEMS OF CONSTITUTIONALITY OF LEGISLATIVE SOLUTION

In the course of this study, a variety of suggestions have been advanced with respect to possible legislation to cope with the problems posed by the Muskopf and Lipman decisions. Entirely apart from the merits of these suggestions, it is apparent from the existing state of the law that a comprehensive legislative program would inevitably incorporate substantial changes in both common law and statutory rules pertaining to governmental tort liability. Such legislation, for example, might restore in part the principle of tort immunity which, as a judicially created rule, was laid to rest in Muskopf. On the other hand, it conceivably might establish rules of governmental liability which, in some instances, are more liberal to injured plaintiffs than the partial liability recognized in Lipman in cases where official discretion is tortiously exercised. Presumably, also, some of the statutory immunities identified in the study might be eliminated, while limitations might be created to restrict the scope of at least some of the existing statutory liabilities.

Whatever legislative modifications emerge, moreover, will undoubtedly take into account the element of time. Although there is little doubt that the Muskopf and Lipman decisions could have been declared by the Supreme Court to have only prospective effect[2314] a device which has been employed by other courts which have abrogated the governmental immunity doctrine[2315] the court failed (or refused) to do so. Later decisions[2316] have made it clear that Muskopf and Lipman have retrospective as well as prospective effect, wiping out the

immunity doctrine and making the common law of torts (except as limited by Lipman)applicable to injuries sustained before as well as after their effective date. While the practical implementation of the common law rules has been suspended temporarily by the 1961 moratorium legislation,[2317] a substantial number of claims which would appear to be actionable thereunder have accrued (and will continue to accrue) between the effective date of Muskopf and Lipman and the effective date of the legislative response thereto. That response will thus necessarily look to both the future and the past. If it purports to establish a uniform system of governmental tort liability with only prospective effect, it will constitute an implied legislative authentication of the judicial application of common law standards to previously accrued causes of action. The alternative is an explicit application to previously accrued injuries of some expressly declared legislative policy, whether that be a policy of abrogation or of recognition. In either event, the legislative solution will have retrospective effect.

At least two significant constitutional problems thus appear to be involved in the development of an appropriate legislative program: (a) To what extent may the legislature constitutionally modify or eliminate the existing common law rules governing tort liability of governmental entities? This issue, it will be noted, comprises both the potential enlargement of governmental tort liability beyond, as well as its diminution below, the level which would obtain under the common law as

declared in Muskopf and Lipman. (b) To what extent may newly declared statutory rules governing tort liability of governmental entities constitutionally be given retrospective effect to authorize, modify or eliminate liabilities arising from factual occurrences prior to the effective date of such rules? In analyzing this problem, attention should be directed to possible distinctions between claims which arose prior to the effective date of the Muskopf decision and those arising subsequent thereto.

Legislative Competence to Alter the Common Law

Putting to one side the problem of retrospective application, there can be little doubt that the legislature constitutionally may alter, modify or eliminate the common law rules governing tort liability of public entities, provided, of course, that such legislation does not violate constitutional restrictions against arbitrary classification. Since the multivarious differences between public entities and private individuals (including corporations) preclude any effective contention that legislative distinctions favoring public entities in matters of tort liability would be arbitrary,[2318] it is significant that even as to matters of purely private tort liability, the constitutional power of the legislature is exceedingly broad. In 1927, for example, the Supreme Court flatly announced that "No question can arise as to the power of the legislature to modify or abrogate a rule of the common law."[2319] In 1948, the same point was stated in somewhat different words, to the effect that the legislature "has

complete power to determine rights of individuals. It may create new rights or provide that rights which have previously existed shall no longer arise."[2320]

In accordance with these principles, the courts have sustained the validity of a number of statutes which altered common law rules of tort liability. In 1939, for example, the legislature enacted Section 43.5 of the Civil Code, which abolished causes of action for alienation of affection, criminal conversation, seduction of a person over the age of legal consent, and breach of promise of marriage. Although it was recognized that this legislation radically altered the common law tort rules, it was uniformly sustained as constitutional as against the contention that it had unreasonably deprived injured parties of a basic right to redress for serious personal wrongs.[2321] Another relatively recent illustration is found in decisions sustaining the constitutionality of legislation curtailing the common law rules governing liability for libel or slander by conditioning the recovery of general damages in certain cases to instances in which the plaintiff has, without avail, made a proper and timely demand for retraction.[2322] Even the simple common law negligence action has not escaped legislative attention; thus the so-called "guest statute", which eliminates the right of an injured guest in a motor vehicle to recover damages resulting from the negligence of the operator of the vehicle, has been held to be well within the constitutional power of the legislature.[2323]

Perhaps the most striking illustration of a legislative overhauling and revision of common law tort rules is in the system of workmen's compensation which was enacted a half-century ago as a substitute for the then-prevailing common law rules governing the tort liability of employers for injuries sustained by their employees. Although the California Supreme Court, in considering the constitutionality of this legislation, recognized that it was "radical, not to say revolutionary" in its elimination of the settled rules of negligence, contributory negligence, assumption of risk and negligence of a fellow-servant, as well as of measure of damages, it could find no basis for concluding that the new procedure constituted a deprivation of due process of law or of any other constitutional right.[2324] Pointing out that the rules of the common law "are not necessarily expressions of fixed and immutable principles, inherent in the nature of things", the court quoted approvingly from a decision of the United States Supreme Court which declared:[2325]

> "A person has no property, no vested interest, in any rule of the common law. That is only one form of municipal law, and is no more sacred than any other. . . . Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstance."

In the light of the cited authorities, it appears that the legislature is competent to alter or modify the rules of common law liability adversely to private persons injured as a consequence of governmental activities. This view is confirmed

also by the statutory provisions discussed in the present study in which a measure of immunity from tort liability has been granted to public entities and public personnel,[2326] thereby indicating substantial legislative understanding that such power does exist.[2327]

There is likewise little doubt that the legislature may impose new liabilities upon public entities, thereby modifying existing immunities and establishing remedies in favor of private persons injured by actions or omissions of public entities. Prior to Muskopf, the cases were numerous in which the courts declared that any enlargement of tort liability of public entities should come from the legislature[2328] statements which presumably would not have been made had there been any doubt as to the power of the legislature to constitutionally enact such changes in the then-prevailing rule of governmental immunity. Moreover, as the study points out,[2329] there are numerous statutes which expressly impose liability upon public entities in situations where the immunity doctrine would otherwise be applicable; and such statutes, when challenged on constitutional grounds, have been uniformly sustained as within the legislative power.[2330] The only reservations which have been judicially expressed on this score relate solely to the question whether enlargement of the tort liability of public entities beyond the level of private common law tort liability might constitute a forbidden gift of public funds.[2331] Such intimations, however, must be evaluated against more recent decisions establishing the modern rule that liabilities unknown to the common law may

be imposed upon public entities without violating the "gift" clause if a rational public purpose would discernably be served by the expenditures thereby required.[2332] So considered, it would seem that the "gift" clause is not a significant deterrent to the fullest expression of legislative policy regarding public entity tort liability, for the public purpose to be served by compensating persons injured as a result of governmental functions, together with the incentives to accident prevention which such liability would provide, is broad and pervasive.

Finally, there appears to be no constitutional reason why the legislatively prescribed rules of governmental tort liability (or immunity) cannot be applied to all public agencies in the State. Most governmental entities are simply creatures of the legislature and hence subject to its plenary legislative powers.[2333] Even charter cities, which have constitutional "home rule" powers with respect to municipal affairs and hence are independent of legislative control in such matters,[2334] are well within the ambit of legislative control so far as their tort liability is concerned. It is settled law that the conditions and limitations of tort liability are not municipal affairs but questions of state-wide concern with respect to which the "home-rule" powers of charter cities are subordinated to state statutory control.[2335]

For similar reasons, legislatively prescribed rules of tort liability would also appear to be fully applicable to the University of California, notwithstanding its quasi-independent

status as conferred by section 9 of Article IX of the California Constitution. The appellate courts have uniformly recognized that in respect to matters not within the constitutional independence given by the cited provision to the Board of Regents of the University as to "organization and government," the University is subject to the operation of general legislative measures on matters of state-wide concern enacted in the exercise of the police power. For example, a state statute regulating an aspect of the public health (such as a compulsory vaccination law) "would be paramount as against a rule of the Regents in conflict therewith."[2336] Even in dealing with such internal administrative matters as the employment of teaching personnel for the University, the supremacy of state statutes over conflicting university policy has been sustained. In the words of the Supreme Court, speaking through Mr. Chief Justice Gibson, "It is well settled . . . that laws passed by the Legislature under its general police power will prevail over regulations made by the regents with regard to matters which are not exclusively university affairs."[2337] Since the matter of governmental tort liability has been uniformly regarded as a matter of state-wide concern,[2338] it appears that the University of California enjoys no special constitutional immunity from legislative regulation in this field.

Validity of Retrospective Legislation

It is well established that retrospective legislation is not inherently bad,[2239] and that the legislature is competent to enact laws which look to the past as well as the future provided constitutional rights are not abridged. The law which pertains to the issues of constitutional abridgement, however, is in a state of considerable uncertainty.[2240] Part of the uncertainty is the result of the interaction of statutory interpretation and constitutional adjudication. It is often said, for example, that statutes will be given a purely prospective interpretation unless it is clearly evident that the legislature intended them to operate retrospectively.[2241] As a rule of interpretation, this principle should give no trouble; but the courts often attempt to justify a prospective interpretation by suggesting that any retrospective application would involve grave constitutional difficulties.[2242] Not only do opinions written along these lines convey a strong, but possibly delusive, implication as to constitutional issues not actually decided by the court, but they sometimes are exceedingly obscure with respect to the basis of the implication. Since cases dealing with expressly retrospective statutes are relatively few in number, however, the implications drawn from the ambiguous decisions referred to must be taken into account in assessing the present status of the law.

Any legislative solution to the problem of governmental tort liability should, of course, seek to avoid interpretative problems as to retrospective application by making the legislative intent

in that connection crystal clear. For present purposes, it will be assumed that the legislation is expressly declared to be retrospective in effect. Could the statute be successfully challenged, then, on the ground that additional tort liabilities are being unconstitutionally imposed upon public entities, arising from already completed factual events, than were applicable at the time of their happening under the common law rules made applicable by the Muskopf decisions? A similar contention might be made with respect to changes arising from possible amendments to existing public liability statutes, insofar as such amendments liberalize the basis of liability retrospectively. Or, perhaps, a statutory immunity in effect at the time of plaintiff's injury may be repealed with retrospective intent. In each of these possible situations, the issue arises whether the resulting increased liability upon public entities violates any applicable constitutional limitation.

Public entities, unlike private persons or private corporations, ordinarily are not deemed to have standing to assert any claims of personal or property rights as against the state,[2243] for such entities as creatures of the state are subject to legislative control. As the Supreme Court stated more than fifty years ago,[2244]

> In the absence of any constitutional restriction, the legislature has absolute power over the organization, the dissolution, the extent, the powers, and the liabilities of municipal and other public corporations established as agencies of the state for purposes of local government.

In the exercise of this plenary legislative power, for example, it has been held that the legislature may divest a public entity

of title and control over part of its property without compensation,[2245] and may even authorize the uncompensated destruction of, or damage to, public buildings and other assets of a public entity in order to implement the legislature's conceptions of sound public policy.[2246]

Imposition of increased tort liability retrospectively (i.e., with respect to factual events occurring subsequent to Muskopf, for example) would not seem to pose insurmountable constitutional problems in the light of the cited cases. The constitutional protection occasionally vouchsafed to contracts of public entities as against impairment by legislative action[2247] would of course have no direct application to the present problem of tort liability. Nor would charter cities find any protection in their constitutionally granted "home rule" powers, in light of the settled law that tort liability is a matter of state-wide concern and hence not within the sphere of municipal "home rule" autonomy.[2248]

It might be contended, however, that retroactive imposition of tort liability constitutes a forbidden gift of public funds in violation of Section 31 of Article IV of the Constitution. To be sure, a casual obiter dictum in a Supreme Court opinion of thirty-two years ago would appear to support such a contention,[2249] while additional support is found in several older cases.[2250] The more recent, and hence more authoritative, decisions, however, have underscored the modern view that an authorized expenditure of public funds is not a forbidden gift if supported by reasons of public policy serving a public purpose deemed beneficial to the entity expending the funds.[2251] In Dittus v. Cranston, for

example, the legislature authorized the payment of some $350,000 to fishermen and fish processing companies to reimburse them for losses previously sustained when certain boats, nets and other fishing equipment had been rendered practically valueless as the consequence of enactment of certain fish conservation laws. The Supreme Court rejected a contention that since there was no legal liability upon the State for such losses, the expenditure would be an illegal gift of public funds. The Court reasoned that the legislature could reasonably have determined that the expenditure would result in more efficient and less burdensome enforcement and administration problems for conservation officers, through the elimination of noncomplying equipment and the encouragement of voluntary compliance with the law by fishermen. This purpose, being a public one, saved the appropriation from being a prohibited gift, notwithstanding that there was no legal liability upon the state to make it, or that it was in effect a retrospective assumption of liability.[2253]

By analogy to Dittus, strong arguments can be made that at least a limited form of retrospective imposition of liability in tort would also serve a public purpose, in that it would tend to relieve injured persons from burdens caused by public functions, would eliminate invidious discriminations which would otherwise exist between persons who were injured in the past (e.g., during the moratorium period established by Section 22.3 of the Civil Code and related legislation) and those injured in the future, and would tend to simplify the administration and settlement of

claims. Moreover, such limited retrospective imposition of liability would appear to be not inconsistent with and possibly even to implement the reasonable expectations of persons and public entities affected by the legislative moratorium. As the Supreme Court has recognized,[2254] the purpose of that moratorium was to afford an opportunity to the Legislature to study the entire problem of governmental immunity and liability and to develop a legislative program consistent with its findings. Private persons and public entities alike were, in effect, placed on notice that tort claims subject to the moratorium would be governed by common law principles, although some legislative changes were to be anticipated. It would appear to be consistent with this view to anticipate that the courts would sustain the validity of a legislative decision to make any legislative enlargement of tort liability fully applicable to factual occurrences during the moratorium as well as to events transpiring after the effective date of the legislation embodying such enlargement. The occasion for the legislative study urgently arose with the Muskopf decision; hence, it should not be difficult to identify a sufficient public purpose to sustain the legislative program so far as it retrospectively grants additional rights to private persons with respect to events subsequent to Muskopf. To this extent, at least, it would seem that, by analogy to the rule that the state may constitutionally surrender rights of action or remedies existing in its favor without violating the gift clause[2255] it may also surrender existing defenses against tort liability.

To extend the retroactivity of the enlarged liability to a period earlier than the date of the Muskopf decision, however, would greatly attentuate the public purpose rationale, possibly to the point of unconstitutionality. Like most questions of constitutional law, the gift problem involves questions of degree; and it is believed that the date of the Muskopf decision constitutes the most pertinent and appropriate operative fact to mark the boundary between permissibility and invalidity. It is concluded, therefore, that the legislative program would in all likelihood survive attack on constitutional grounds insofar as it created new or additional tort liabilities for public entities arising from factual events transpiring during the period following the effective date of Muskopf.

It should be noted at this point, however, that the analysis just advanced would not necessarily sustain a retrospective elimination or diminution of tort liability, thereby wiping out previously accrued causes of action to the detriment of injured private plaintiffs. Private persons, it must be borne in mind, are within the protection of constitutional limitations which do not apply to public entities, and hence may be in a position to challenge impairments of their tort claims against public entities, even though such entities may have no reciprocal basis for challenging enlargements of their tort liabilities.

The problem of retrospective application is most acute where private rights are affected. It may be anticipated, for example, that the legislative program governing governmental tort liability will expressly seek to eliminate some, if not all, classes of liabilities based upon factual events occurring before its

effective date. For the sake of analysis, it should be noted that four different classes of claims might conceivably be involved in any such proposal: (a) Claims grounded upon existing statutes imposing tort liability on public entities, which accrued before the Muskopf decision; (b) similar statutory claims which accrued after the Muskopf decision (during the legislative moratorium period); (c) non-statutory claims grounded on common law rules, which accrued before the Muskopf decision; and (d) similar non-statutory claims which accrued during the post-Muskopf moratorium period. It may be assumed for present purposes that some specific claims in each of these classes will be retrospectively eliminated by express legislative action. Would such action survive attack on constitutional grounds?

The basic principle which constitutes the starting point for analysis declares that retrospective legislation is a violation of the Due Process Clauses of the state and federal constitutions if it cuts off or deprives any person of a previously "vested" right.[2256] The key to decision obviously resides in the identification of what types of interests are "vested" and what types are not.[2257] The Supreme Court of California has candidly recognized the latitude of judicial discretion involved in this question, by defining a "vested right" as "an interest which it is proper for the state to recognize and protect, and of which the individual may not be deprived arbitrarily without injustice. The question of what constitutes such a right is confided to the courts."[2258] Many cases document the point that contract rights,[2259] and traditionally recognized interests in real or personal property,[2260]

are "vested" within the meaning of the rule against retrospective legislation. For present purposes, the issue would seem to be whether accrued tort causes of action, not yet reduced to judgment, against public entities, are such interests as would be regarded as "vested" by the courts.

A good starting point, in seeking the answer to the question just posed, is found in the case of Callet v. Alioto,[2261] decided in 1930. This was an action for personal injuries in which a guest in a motor vehicle had recovered a judgment against the operator of the vehicle on the basis of simple negligence. The injury occurred in 1925, and an appeal from the judgment for the plaintiff was apparently pending but undecided when, in 1929, the legislature enacted the "guest statute", under which ordinary negligence was eliminated as a ground of recovery in such cases. In the Supreme Court, the defendant contended that the statutory change had wiped out the basis of the trial court's judgment and thus required a reversal. The court rejected this position, and affirmed the judgment. Its analysis included the following significant points. (1) All purely statutory rights are declared by section 327 of the Political Code (now Section 9606 of the Government Code) to be pursued in contemplation of the power of repeal; hence as a general rule "a cause of action or remedy dependent on a statute falls with a repeal of the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute".[2262] (2) However, the same rule does not apply to common law causes of action or to actions arising by virtue of statutes codifying the common law, for an accrued

cause of action in these categories "is a vested property right which may not be impaired by legislation."[2263] (3) Since the plaintiff's cause of action founded upon negligent operation of the vehicle by defendant was a common law (and hence "vested") cause of action, the 1929 guest statute had no application thereto.

The distinction adverted to in the Callet case, between statutory causes of action and common law causes of action, seems exceedingly formal. Manifestly, if a person can be deemed to pursue a statutory right in contemplation of possible repeal of the statute, by the same token he may be taken to pursue any common law right in contemplation of a possible abrogation of that right by legislation. In any event, even the statutory foundation for the court's position that statutory rights are distinguishable from common law rights does not support the distinction. Section 9606 of the Government Code expressly declares that:

> Any statute may be repealed at any time, except when vested rights would be impaired. Persons acting under any statute act in contemplation of this power of repeal. (Emphasis added.)

Taken at face value, this provision simply means that persons acting in pursuit of statutory rights act in contemplation of the fact that the legislature power to repeal the statute provided it does not thereby destroy any rights which have become "vested". To rely upon this section as a basis for the distinction noted in Callet is surely specious, since it really begs the question as to what are the identifying characteristics of a "vested" right.

Notwithstanding the apparent fallacy in the judicial reasoning just referred to, the distinction between "unvested" statutory rights and "vested" common law rights has been approved by the courts on many occasions.[2264] For example, the implied repeal of the usury law by a subsequent constitutional amendment was held to have eliminated the plaintiff's right to recover under the statute as to usury which allegedly occurred prior to the repealing act, even though the plaintiff's action instituted in reliance on the statute was actually pending undecided when the repeal took place.[2265] Similarly, the statutory liability of corporate directors to shareholders for corporate debts incurred in excess of the corporation's subscribed capital stock was held to have been wiped out by repealing legislation which became effective after the plaintiff's cause of action had been reduced to judgment, where that judgment was not yet final on the date of the repeal.[2266] Again, a 1939 statute expressly abolishing all causes of action and terminating all pending litigation to recover taxes illegally levied under an erroneously computed, and thus excessive, tax rate was held constitutionally valid with respect to causes of action which had accrued in 1933 and 1934.[2267] In all of these cases, the courts grounded the results reached upon the position that the causes of action which had been wiped out were purely statutory in nature and were unknown to the common law.

Along the same lines, but more directly relevant to the problems of tort liability, is a recent decision of the Ninth Circuit Court of Appeals,[2268] involving a wrongful death action instituted under the Federal Tort Claims Act on behalf of the

heirs of a federal employee killed in the course of fire-fighting duties as a "smoke jumper". After the cause of action had accrued, Congress enacted an amendment to the Federal Employees Compensation Act declaring that the remedies under that Act were the exclusive remedies available in the case of employment connected injuries. The court found no difficulty in dismissing the Tort Claims Act action, notwithstanding that the plaintiffs' cause of action had accrued before the enactment of the abolishing legislation.

Another application of the noted distinction in a tort context is found in the case of Krause v. Rarity,[2269] decided by the California Supreme Court in 1930. The court here reached the conclusion that the enactment of the "guest statute" had not effected an implied repeal of the statutory authorization to sue for wrongful death. In purposeful dictum, however, the court declared that wrongful death was purely a statutory right unknown to the common law, and hence could be retroactively abolished in light of the rule that "the repeal of the statute destroys the right unless the right has been reduced to final judgment or unless the repealing statute contains a saving clause protecting the right in a pending litigation".[2270] On the other hand, the court pointed out that if the plaintiff were suing for personal injuries during his life, the right of action would be grounded upon common law principles and hence "would be a vested right and survive a repeal of the statute".[2271]

One might readily conclude from the foregoing cases that a legislative program which curtailed or abolished purely statutory causes of action against public entities in a retrospective manner would be constitutional. Unfortunately, such a conclusion cannot be reached with any degree of confidence. Other decisions can be found - some of them much more recent than those cited above - which squarely hold that even purely statutory causes of action which have accrued cannot be abolished by statute.[2272]

One decision of the District Court of Appeal, for example, flatly declares that even statutory rights become "vested" when they accrue; "While statutory remedies," announced the court, "are said to be pursued with full realization that the legislature may abolish the right to recover . . . , this rule does not apply to an existing right of action which has accrued."[2273] A more authoritative pronouncement is found in a Supreme Court decision less than twenty years ago.[2274] The court there held that the 1933 amendment to Section 583 of the Code of Civil Procedure, requiring a dismissal of actions for failure to bring them to trial within five years after commencement thereof, could not be constitutionally applied (although the legislature had expressly declared the amendment applicable to "any action heretofore commenced") to pending actions commenced more than five years before the effective date of the amendment. Under previous law, such actions were not subject to dismissal unless not brought to trial within five years after the defendant's answer was filed; hence many pending actions (including the instant one) would, under such previous law, still be viable unless wiped out by the amendment by reason of the fact

that more than five years had elapsed since their commencement. The court's basis of decision resides in its statement, in a unanimous decision by Traynor, J., to the effect that: "Since a statute cannot cut off a right of action without allowing a reasonable time after its effective date for the exercise of the right . . . the new statute cannot constitutionally apply to plaintiff's actions".[2275] The significance of this decision lies in the fact that the plaintiff was suing for recovery of taxes paid under protest, a type of action which had repeatedly been declared to be purely statutory in nature.[2276] The rule laid down in the cases discussed above, under which such statutory causes of action could be abolished at will, was neither mentioned or considered by the court in its opinion.

Even more directly in point, so far as the validity of retrospective abolition of tort causes of action are concerned, are two cases involving actions brought under the authority of the Public Liability Act for injuries resulting from dangerous or defective conditions of public property. Since each of the cases was decided at a time when the doctrine of governmental tort immunity was the prevailing common law rule, it would seem that the causes of action sued upon were purely statutory in nature and hence, under the rules announced in such cases as Callet and Krause, discussed above, subject to being eliminated by legislation at any time before final judgment.

In the first case,[2277] the Supreme Court ruled that the 1931 statute which established a ninety day claims presentation

procedure as a prerequisite to suit under the Public Liability Act "could not attach" to a claim which had accrued more than ninety days before the effective date of the statute. To hold that the ninety-day limit was applicable would, of course, have totally wiped out plaintiff's cause of action retrospectively, for the ninety-day period following the accrual of the cause of action had expired long before the effective date of the claim statute. The court's refusal to apply the ninety-day requirement to this purely statutory claim, although not clearly explained in the opinion, appears to be rooted in the principle that procedural changes "may be applied to pending actions or to causes of action not yet sued upon provided that vested rights are not destroyed".[2278] Apparently the plaintiff's cause of action was regarded as "vested".

The second case referred to was for wrongful death under the Public Liability Act.[2279] It was thus purely statutory in a double sense, for the wrongful death action was also of purely statutory origin.[2280] At the time of the fatal injury to plaintiff's decedent, plaintiff (the decedent's mother) was authorized to bring the action in her own name alone; but a subsequent amendment to the Code of Civil Procedure, which was in effect at the time of the trial, required the natural father (from whom the mother had been divorced for several years) to be joined as a party. His residence being unknown, the father had not been joined; and defendant city moved to dismiss on the basis of this absence of an alleged indispensible party. The denial of the motion by the

trial court was approved on appeal. In the words of Justice Drapeau:[2281]

> Respondent's right of action for the wrongful death of her minor child vested in her on the date of his death and it is not within the power of the Legislature to impair such vested right.

It seems impossible, on a purely doctrinal level, to reconcile these last cited cases with the decisions previously discussed in which statutory causes of action were held to be subject to elimination at any time by retrospective legislation. The absence of express reference in the opinions to the earlier line of authority might even suggest that the judicial classification of statutory rights as "vested" in the later cases was inadvertent.[2282] A more plausible explanation is that the courts were convinced that the kinds of causes of action involved in the later cases represented sufficiently significant interests of the respective plaintiffs that they deserved judicial protection against legislative annulment. Although little support for this analysis is found in the written opinions cited, it is consistent with the view that the retrospective legislative policy being invoked was manifestly of subordinate importance in a comparative balancing of the interests at stake.[2283] Undoubtedly, the courts were influenced also by the unanimity with which common law causes of action have been treated as "vested" interests beyond the scope of legislative impairment,[2284] for the analogy between a common law negligence action and a negligence action grounded upon the Public Liability Act, for example, is a demonstrably close one.

In view of the cases discussed, it is doubtful whether the legislature could constitutionally abolish or eliminate retrospectively statutory causes of action which accrued before the effective date of the abolishing legislation. A more definite conclusion to the same effect may be reached with respect to common law causes of action previously accrued; for the courts have uniformly invoked the classification of "vested rights" when considering the retrospective application of statutory changes in such cases.[2285] The substantive law applicable to personal injuries arising from negligent automobile driving, for example, has been held to be fixed or "vested" as of the time of the injury, so that the cause of action is unaffected by subsequent legislation, such as a statutory change from negligence to wilful misconduct as the basis of liability,[2286] or a statutory change in the applicable speed law in effect at the time of the accident.[2287] The general rule, where common law causes of action are concerned, seems to be accurately epitomized in a statement to the effect that the legislature has no constitutional power to "cut off the right to prosecute an action which is already pending" since to do so would amount to "absolutely cutting off a property right".[2288] That there might be no mistake on the point, the District Court of Appeal in one case, after articulating the same view, pointedly announced that "the principles herein discussed are applicable alike to cases of tort or actions arising ex delicto as well as to those sounding in contract."[2289] The fact that the defendant is a public entity, it should be noted, apparently makes no difference in result, for the constitutionally "vested" nature of a common

law cause of action has been squarely affirmed in such cases.[2290]

The general principle seemingly supported by the case law here reviewed - that retrospective elimination of previously accrued tort claims, whether statutory or common law in origin, would be of doubtful constitutionality - does not necessarily dispose of the problem under consideration. Attention should also be given to possible special limitations upon the general conclusion thus expressed, as well as to possible alternative methods whereby a legislative policy to eliminate previously accrued claims might be accomplished at least in part.

First, there may be a feasible basis for distinguishing between tort causes of action which accrued prior to the effective date of the Muskopf decision and those which accrued thereafter. Most of the commentators on the problem of retrospective legislation have recognized that the "vested rights" rationale is simply a doctrinal formulation employed by courts to support decisions grounded on other more pragmatic considerations.[2291] Among considerations usually identified as relevant, the element of action in reliance is often mentioned. Where a person has made commitments or engaged in a change of position in reliance on existing law, only to be confronted later on with a newly formulated rule of law which operates to his detriment and which he had no opportunity to anticipate or guard against, sound public policy ordinarily will favor implementation of his reasonable expectations and mitigation of the detrimental consequences of the "surprise" change in the law.[2292] As to common law tort causes of action arising prior to Muskopf, the element of reliance is

practically nonexistent so far as retroactive abolition of such causes is concerned. Not only is reliance at a minimum where torts are concerned,[2293] but abolition would merely reinforce the then reasonable expectation, thoroughly grounded in the case law, that no such causes of action existed. (It is to be understood, of course, that the present discussion relates only to claims for which public entities were immune before Muskopf, and does not relate to either statutory or common law liabilities then recognized to exist.)

Perhaps of equal importance in the judicial equation is the weighing of the public interest to be served by the retrospective statute against the unfairness to private interests which will result from giving it retrospective effect.[2294] In this view, for example, "windfall" benefits are entitled to relatively little judicial solicitude;[2295] and several significant federal cases have concluded that such windfalls may be retrospectively eliminated without violence to constitutional principles.[2296] Pre-Muskopf tort claims, it may be plausibly argued, are much like windfalls since a right of action, not believed to exist at the time of the injury, suddenly arose thereafter. Causes arising after Muskopf, however, do not so snugly fit within the windfall rationale; and, since many such causes will have been acted upon by engagement of counsel, filing of formal claims, institution of law suits, and conduct of discovery proceedings,[2297] the element of action in reliance cannot be said to be wholly absent.

It would seem to follow from the foregoing analysis that there is a substantially greater possibility that the courts would sustain a retrospective elimination of pre-Muskopf tort claims for which public entities were then immune, than is the case with respect to post-Muskopf claims. A principal difficulty with this approach to legislative drafting, however, is the fact that any general elimination of pre-Muskopf claims would necessarily eliminate the claim of plaintiff Muskopf herself, a result which would appear to be particularly unfair in view of the substantial time and effort expended by this litigant in the successful attempt to overthrow the immunity doctrine. Perhaps this difficulty could be surmounted by carefully drafting general legislative language designed to preserve Muskopf's right of action together with others then pending in litigation, relying upon the uniqueness of the situation and the reasonableness of the exception to save it from being invalidated as discriminatory or special legislation. Another difficulty, however, would be that such retrospective voiding of claims would apparently be permissible only with respect to common law causes of action for which public entities were immune prior to Muskopf. It would not be effective, if the foregoing analysis of the case law is accurate, with respect to accrued statutory causes of action (e.g., causes founded on the Public Liability Act) nor as to causes of action founded upon nuisance or "proprietary" negligence, for such causes would probably be regarded as fully "vested" before Muskopf. Hence, any legislative modifications curtailing the latter types of

claims could not be made effective with respect to pre-Muskopf injuries. As a consequence, it would seem that any legislative program which incorporates, either in whole or in part, a substantive diminution of governmental tort liability below the level which obtained before the Muskopf decision may be given prospective effect, but constitutionally may not be applied, in the interest of uniformity, to all previously accrued claims.

Second, consideration should be given to the possibilities inherent in the general rule that procedural changes ordinarily may be given retrospective effect without violence to constitutional rights.[2298] To be sure, the courts have often insisted that this rule cannot be permitted to operate in such a way as to destroy vested rights.[2299] It has been authoritatively declared, for example, that "the legislature may not, under the pretense of regulating procedure or rules of evidence, deprive a party of a substantive right, such as a good cause of action or an absolute or a substantial defense which existed theretofore."[2300] However, some room for legislative action would still appear to be available notwithstanding the comprehensiveness of the quoted language.

It will be recalled that one of the theoretical reasons underlying the rule of governmental immunity is that there is no right to sue a governmental entity without its consent.[2301] This doctrine was not discarded by the Muskopf decision, and in fact was expressly stated to still be in effect as part of the law of California.[2302] Only the rule of substantive immunity was abrogated by the Supreme Court in that case. Accordingly, the possibility exists that the legislature could effectively control liabilities in tort arising before the enactment of the statute purporting to do so, by the simple expedient of revoking the State's consent

that public entities be sued except in cases expressly permitted by law. Such a statutory provision, it will be noted, would in theory recognize the continued existence of the substantive causes of action in question, but would simply deny to them any judicial remedy.

The decision of the Supreme Court in the case of Pacific Gas & Electric Co. v. State of California,[2303] decided in 1931, lends support to the suggested device. The plaintiff had commenced an action on implied contract against the State, relying upon an 1893 statute in which the State consented to be sued on claims "on contract or for negligence". The State contended that this consent statute did not extend to implied contracts, but included only express contracts. The trial court sustained the State's position, and dismissed the action on demurrer. While the plaintiff's appeal was pending, the legislature in 1929 enacted a new measure, repealing the 1893 statute, and consenting, so far as material to the particular problem, solely to be sued on express contract. The State contended in the Supreme Court that this 1929 statute had withdrawn the State's consent to be sued on implied contract, thereby requiring an affirmance of the dismissal of the case without regard for the proper construction of the repealed 1893 statute. The Supreme Court expressly concurred in the validity of this contention, stating that it was a correct rule of law "that the repeal of a statute takes away all remedies given by such statute, and defeats all actions pending under it at the time of the repeal."[2304] Only because the legislature had then

changed its mind and subsequently, before decision of the appeal, had again authorized suits on implied contract, was the action held to continue and require decision on the merits.

Support for this view is also found in the decision of the United States Supreme Court in the case of Lynch v. United States,[2305] decided by a unanimous opinion written by Mr. Justice Brandeis in 1934. Plaintiffs in this litigation had sued to recover sums due them as beneficiaries under term policies of War Risk Insurance issued during World War I. The Government's defense was that subsequent to the accrual of plaintiffs' claim, consent of the United States to be sued on such policies had been abolished by a 1933 statute expressly repealing all laws pertaining to such term policies. The court squarely held that insofar as the Congress had attempted to abrogate its contractual obligations on the policies in question, the 1933 statute constituted an unconstitutional taking of property without due process of law. However, this holding only went to the plaintiffs' substantive rights. As to his remedies, the court pointed out that:[2306]

> The rule that the United States may not be sued without its consent is all embracing. . . . Although consent to sue was . . . given when the policy issued, Congress retained power to withdraw the consent at any time. For consent to sue the United States is a privilege accorded; not a grant of a property right protected by the Fifth Amendment. The consent may be withdrawn, although given after much deliberation and for a pecuniary consideration. . . . The sovereign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced. . . . The character of the cause of action - the fact that it is in contract as distinguished from tort - may be important in determining (as under the Tucker Act) whether consent to sue was given. Otherwise, it is of no significance. For immunity from suit is an attribute of sovereignty which may not be bartered away.

In conclusion, the court pointed out that even the withdrawal of all remedies, legal or administrative, would be distinguishable from a repudiation of the underlying contractual obligation. A later decision contains the pertinent remark of Chief Justice Hughes, explaining the Lynch case by declaring:[2307]

> The fact that the United States may not be sued without its consent is a matter of procedure which does not effect the legal and binding character of its contracts. While the Congress is under no duty to provide remedies through the courts, the contractual obligation still exists and, despite infirmities of procedure, remains binding upon the conscience of the sovereign.

A legitimate inference from the cited decisions, of course, is that the legislature could simply eliminate the right to sue public entities on any previously accrued causes of action which it deemed undesireable to expose to adjudication. By the same reasoning, in order to achieve uniformity in the application of its legislative program for disposition of tort liabilities of public entities, the legislature could apparently utilize the simple expedient of withdrawing its consent to being sued on any previously accrued causes of action (in effect denying the courts any jurisdiction in actions founded thereon) except to the extent that the defendant entity would be liable under the rules of tort liability declared applicable prospectively.[2308] However, one cannot predict with full assurance that techniques such as these would be given effect. In the Muskopf decision, there are intimations that the right of the sovereign to withhold its consent to be sued may also be in judicial disfavor with the California Supreme Court, at least insofar as it may constitute a barrier to governmental responsibility in tort.[2309] Moreover,

cutting off the judicial remedy by withdrawing consent to be sued is not unlike the creation of a retrospective procedural requirement which, in practical effect, likewise cuts off the right to litigate a previously accrued claim. Yet, as we have already seen, the courts have refused to permit such requirements to operate in derogation of accrued causes of action, even as against public entities.[2310] By analogy, the same judicial disposition might attend a withdrawal of consent to be sued. Such withdrawal, no matter how artfully formulated to preserve the theoretical continued recognition of the substantive underlying cause of action, would in most cases amount to a practical repudiation of that underlying obligation, for public entities cannot be expected to voluntarily accept responsibility for damage claims which are unenforceable in the courts.

A suggestion by Mr. Justice Brandeis may point the way to a feasible solution of the difficulty. In the Lynch case, he amplifies his conclusion that elimination of all remedies, judicial or administrative, would not necessarily imply repudiation of the underlying obligation, by pointing out that: "So long as the . . . obligation is recognized, Congress may direct its fulfillment without the interposition of either a court or an administrative body."[2311] In line with this thought, the legislature of California might accompany its withdrawal of consent to be sued (i.e., abolition of all judicial remedies) with the establishment of an express statutory duty upon the governing body of any public entity against which such judicially non-enforceable claims are

asserted to consider and evaluate their merits, and to settle those which, in the absence of the withdrawal of judicial remedies would have been actionable, by payment of such sums as the governing body finds to be fair and equitable.[2312] Additional procedural incidents to such duty might also be necessary, in order to provide for the enforcement of any award made by the governing body as well as to bring such award within the reach of any available insurance coverage and of procedures for funding of liabilities and distributing losses over periods of time. The principal value of the provision would lie in its recognition of the continued existence of the underlying liability as one to be determined conclusively by the governing body rather than by the courts.

Third, at least part of the legislative purpose to eliminate previously accrued causes of action might be achieved by devising substantial, but not insurmountable, procedural requirements applicable thereto. For example, it seems reasonably clear from the cases that the legislature could constitutionally provide that all such previously accrued causes of action would be totally barred unless action thereon were commenced within a relatively short period of time following the enactment of the statutory bar.[2313] A short prospective period of limitations of this type would probably reduce the volume of actions in some degree. Again, the legislature might impose a requirement that the plaintiff post a substantial good faith undertaking, to ensure payment of costs and expenses incurred by the defendant entity in the event the plaintiff did not prevail. Requirements of this nature have been

sustained as merely procedural incidents which may thus be validly applied to previously accrued causes of action.[2314] Such a device would presumably help to reduce the number of doubtful or unfounded actions which are prosecuted. Finally, there appears to be some room, the exact contours of which are not entirely clear, for the legislature to prescribe specially restrictive rules of damages applicable to such previously accrued actions; for it has been held that "no one has a vested right in a measure of damages".[2315]

Summary

The general conclusions reached on the basis of the preceding analysis may be summarized as follows:

1. The legislature appears to have ample constitutional authority to alter or eliminate common law tort liabilities of public entities, and to create new statutory liabilities or modify or eliminate existing ones, when such legislation is applied prospectively only.

2. The legislature apparently could impose new tort liabilities, or expand the range or application of existing tort liabilities, of public entities with retrospective application to facts occurring subsequent to effective date of the Muskopf decision, without violation of constitutional limitations. Enlargement of governmental tort liability with retrospective application to facts occurring earlier than the Muskopf decision, however, would be of doubtful validity.

3. The legislature apparently could, without violation of constitutional limitations, abolish or curtail the range or

application of all or any part of those common law tort liabilities of public entities, arising from factual events occurring prior to the effective date of the Muskopf decision, for which public entities were then immune. Abolition or curtailment of either statutory or common law tort causes of action arising in the pre-Muskopf period, for which public entities were then liable would appear to be unconstitutional.

4. The legislature apparently could not constitutionally abolish or curtail the range or application of either statutory or common law causes of action which arose between the date of the Muskopf decision and the effective date of the abolishing or curtailing legislation.

5. A possibility exists that, without attempting to curtail or abrogate the substantive obligations of tort liabilities previously accrued, the legislature could constitutionally withdraw its statutory consent to be sued thereon, thus eliminating only the judicial remedies for enforcement of such liabilities. Since there are some indications that total abrogation of all remedies would meet with judicial disfavor, such withdrawal of consent to be sued would be more likely to be regarded as constitutional if accompanied by a provision imposing upon the affected governmental entities an affirmative duty, together with adequate power, to consider and settle by administrative action any claims as to which judicial remedies are foreclosed.

6. Some of the objectives which would be involved in any legislative attempt to retrospectively eliminate some or all previously accrued tort claims appear to be susceptible of realization through the imposition of procedural requirements, such as a short statute of limitations, requirement that the plaintiff post a substantial undertaking for costs, and prescription of special rules governing damages.

2314. See Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 363-366 (1932), cited approvingly by Traynor, J., in Sutter Basin Corp. v. Brown, 40 Cal. 2d 235, 249, 253 P.2d 649, 667 (1953) (concurring opinion); Griffin v. Illinois, 351 U.S. 12, 26 (1956), concurring opinion by Frankfurter, J.; Levy, Realist Jurisprudence and Prospective Overruling, 109 U. Pa. L. Rev. 1 (1960).

2315. Holytz v. City of Milwaukee, Wis. , 115 N.W. 2d 618 (1962); Williams v. City of Detroit, 364 Mich. 231, 111 N.W. 2d 1 (1961); Molitor v. Kaneland Community Unity District, 18 Ill. 2d 11, 163 N.E. 2d 89 (1959).

2316. Corning Hospital District v. Superior Court, 57 A.C. 529, 20 Cal. Rptr. 621, 370 P.2d 325 (1962), holding that tort cause of action involved in the Muskopf decision was not destroyed, but merely was suspended by 1961 moratorium legislation. See also, Flournoy v. State of California, 57 A.C. 538, 20 Cal. Rptr. 627, 370 P. 2d 331 (1962), recognizing actionability of wrongful death claim which arose prior to Muskopf; Lattin v. Coachella Valley Water District, 57 A.C. 540, 20 Cal. Rptr. 628, 370 P. 2d 332 (1962), accord.

2317. Calif. Civ. Code § 22.3, added by Cal. Stat. 1961, ch. 1404, p. , as construed in Corning Hospital District v. Superior Court, 57 A.C. 529, 20 Cal. Rptr. 621, 370 P.2d 325 (1962).

2318. It appears to be settled that for tort liability purposes governmental entities may reasonably be classified differently from private persons, see Dias v. Eden Township Hospital District, 57 A.C. 543, 20 Cal. Rptr. 630, 370 P.2d 334 (1962); Powers Farms, Inc. v. Consolidated Irrigation District, 19 Cal. 2d 123, 119 P.2d 717 (1941); Von Arx v. City of Burlingame, 16 Cal.App.2d 29, 60 P.2d 305 (1936), and that all types of public entities need not be classified alike or exposed to identical tort responsibility. See Bosqui v. City of San Bernardino, 2 Cal. 2d 747, 43 P. 2d 547 (1935), holding Public Liability Act valid notwithstanding fact that it imposed tort liability upon cities, counties and school districts but not upon State or other public entities.

2319. Fall River Irrigation District v. Mt. Shasta Power Corp., 202 Cal. 56, 67, 259 Pac. 444, 449 (1927).

2320. Modern Barber College v. California Employment Stabilization Commission, 31 Cal. 2d 720, 726, 192 P.2d 916, 920 (1948).

2321. Ikuta v. Ikuta, 97 Cal. App. 2d 787, 218 P.2d 854 (1950); Langdon v. Sayre, 74 Cal.App.2d 41, 168 P. 2d 57 (1946). Similar results were reached in New York, where a comparable statute was also enacted. See Fearon v. Treanor, 272 N.Y. 268, 5 N.E. 2d 815 (1936), appeal dism. for want of substantial federal question, 301 U.S. 667 (1937); Hanfgarn v. Mark, 274 N.Y. 22,

8 N.E. 2d 47 (1937), appeal dism. for want of substantial federal question, 302 U.S. 641 (1937).

2322. Werner v. Southern California Associated Newspapers, 35 Cal. 2d 121, 216 P.2d 825 (1950), opining that "the Legislature may attack the evils of unfounded litigation by abolishing causes of action altogether." Id. at 126, 216 P.2d at 828.

2323. Forsman v. Colton, 136 Cal. App. 97, 28 P.2d 429 (1933).

2324. Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 692, 151 Pac. 398, 401 (1915).

2325. Id. at 696, 151 Pac. at 402, quoting approvingly from Munn v. Illinois, 94 U.S. 113, 134 (1877).

2326. See text supra pp.

2327. The long-continued legislative interpretation of the constitution is generally deemed to have persuasive influence on the courts in doubtful cases. See cases cited in McKinney's New California Digest, Constitutional Law § 35 (Recomp.1961).

2328. See, e.g., Talley v. Northern San Diego Hospital District, 41 Cal.2d 33, 257 P.2d 22 (1953); Madison v. City & County of San Francisco, 106 Cal.App.2d 232, 234 P.2d 995 (1951).

2329. See text supra pp.

2330. See Bosqui v. City of San Bernardino, 2 Cal.2d 747, 43 P.2d 547 (1935), affirming constitutionality of Public Liability Act; Heron v. Riley, 209 Cal. 507,

289 Pac. 160 (1930), affirming constitutionality of predecessor to Cal. Veh. Code § 17001.

2331. Brindamour v. Murray, 7 Cal.2d 73, 59 P.2d 1009 (1936).

2332. See, e.g., Dittus v. Cranston, 53 Cal.2d 284, 1 Cal. Reptr. 327, 347 P.2d 671 (1960); Subsequent Injuries Fund of California v. Industrial Accident Commission, 49 Cal.2d 354, 317 P.2d 8 (1957). It is noteworthy that the case of Brindamour v. Murray, supra note 2331, was recently cited by the Supreme Court for the proposition that, unlike a private person, a public entity is not liable for an automobile accident caused by the negligence of one of its employees operating such vehicle outside the course of his employment but with the entity's consent. Jurd v. Pacific Indemnity Co., 57 A.C. 745, 21 Cal.Rptr. 793, 371 P.2d 569 (1962). The result reached in this case, however, actually is consistent with the view that such liability would not be a forbidden gift. The court held that an insurance carrier is liable on its policy of liability insurance issued to a school district, where a district employee has been adjudged personally liable for negligence in operating a district vehicle with the consent of the district although not in the course of his employment, since such employee is an "additional insured" under the omnibus coverage clause of the policy. In effect, the court assumed the propriety of statutory authorization for the district to purchase such insurance coverage

out of public funds, even though the district was not itself liable under common law principles. Manifestly, this decision undercuts the rationale of the Brindamour case, for there is little save a purely technical distinction between liability directly imputed to a public entity and liability which, although not so imputed, the entity may nonetheless assume in the form of insurance premium payments. The propriety of construing the policy as including the employee acting with consent was justified by the court on the ground of the strong public purpose to protect the public in cases of permissive use of motor vehicles, as reflected in the statutory provisions governing omnibus clauses in liability policies. The same public purpose argument, it is submitted, would apparently support a direct imposition of imputed liability upon public entities as owners of vehicles used with permission, comparable to the statutory liability of private owners in such cases. See Cal. Veh. Code § 17150.

2333. See, e.g., Allied Amusement Co. v. Byram, 201 Cal. 316, 256 Pac. 1097 (1927); In re East Fruitvale Sanitary District, 158 Cal. 453, 111 Pac. 368 (1910); Oakdale Irrigation District v. County of Calaveras, 133 Cal. App. 2d 127, 283 P.2d 732 (1955).

2334. See, e.g., West Coast Advertising Co. v. City & County of San Francisco, 14 Cal.2d 516, 95 P.2d 138 (1939).

2335. Eastlick v. City of Los Angeles, 29 Cal.2d 661, 177 P.2d 558, 170 A.L.R. 225 (1947); Department of Water & Power v. Inyo Chemical Co., 16 Cal.2d 744, 108 P.2d 410 (1940); Kelso v. Board of Education of City of Glendale, 42 Cal. App.2d 415, 109 P.2d 29 (1941).

2336. Wallace v. Regents of the University of California, 75 Cal.App. 274, 278, 242 Pac. 892, 894 (1925). Accord: Williams v. Wheeler, 23 Cal.App. 619, 138 Pac. 937 (1913).

2337. Tolman v. Underhill, 39 Cal.2d 708, 712, 249 P.2d 280, 282 (1952). See also, Fraser v. Regents of the University of California, 39 Cal.2d 717, 249 P.2d 283 (1952).

2338. Cases cited supra note 2335.

2239. Rosenblatt v. California State Board of Pharmacy, 69 Cal. App.2d 69, 158 P.2d 199 (1945); American States Water Service Co. v. Johnson, 31 Cal.App. 2d 606, 88 P.2d 770 (1939). See also, Fall River Irrigation District v. Mt. Shasta Power Corp., 202 Cal. 56, 259 Pac. 444 (1927).

2240. Compare Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692 (1960), with Slawson, Constitutional and Legislative Considerations in Retroactive Lawmaking, 48 Calif.L.Rev. 216 (1960). See also, Greenblatt, Judicial Limitations on Retroactive Civil Legislation, 51 Northwestern L. Rev. 540 (1956).

2241. Douglas Aircraft Co. v. Cranston, 58 A.C.____, 24 Cal.Rptr. 851, _____P.2d _____(1962); Di Genova v. State Board of Education, 57 A.C. 183, 18 Cal.Rptr. 369, 367 P.2d 865 (1962).

2242. See, e.g., Corning Hospital District v. Superior Court, 57 A.C. 529, 20 Cal. Rptr. 621, 370 P.2d 325 (1962); Callet v. Alioto, 210 Cal. 65, 290 Pac. 438 (1930); Baldwin v. City of San Diego, 195 Cal.App.2d 236, 15 Cal.Rptr. 576(1961).

2243. Mallon v. City of Long Beach, 44 Cal.2d 199, 282 P.2d 481 (1955)

2244. In re Fruitvale Sanitary District, 158 Cal. 453, 457, 111 Pac. 368, 370 (1910). To the same effect, see Allied Amusement Co. v. Byram, 201 Cal. 316, 256 Pac. 1097 (1927); Oakdale Irrigation District v. Calaveras County, 133 Cal.App.2d 127, 283 P.2d 732 (1955).

2245. See Pass School District v. Hollywood City School District, 156 Cal. 416, 105 Pac. 122 (1909). Cf. Reclamation District No. 70 v. Birks, 159 Cal. 233, 113 Pac. 170(1911).

2246. Reclamation District No. 1500 v. Superior Court, 171 Cal. 672, 154 Pac. 845 (1916).

2247. Miller v. McKenna, 23 Cal.2d 774, 147 P.2d 531 (1944); Birkhofer v. Krumm, 27 Cal.App.2d 513, 81 P.2d 609 (1938). See also, Coombes v. Getz, 285 U.S. 434 (1932), reversing decision of California Supreme Court sub nom. Coombes v. Franklin, 213 Cal. 164, 1 P.2d 992, 4 P.2d 157 (1931).

2248. Eastlick v. City of Los Angeles, 29 Cal. 2d 661, 177 P.2d 558 (1947).

2249. Heron v. Riley, 209 Cal. 507, 517, 289 Pac. 160, 164 (1930), where, in referring to the fact that the liability of public entities for vehicular torts, as enacted in 1929, was expressly declared to be prospective only, the court remarked: "The legislature has not attempted to create a liability against the state for any past acts of negligence on the part of its officers, agents or employees--something it could not do, and the doing of which would, in effect, be the making of a gift. . .".

2250. See Chapman v. State of California, 104 Cal. 690, 38 Pac. 457 (1894); Bourn v. Hart, 93 Cal. 321, 28 Pac. 951 (1892).

2251. Cf. Subsequent Injuries Fund v. Industrial Accident Comm., 39 Cal.2d 83, 244 P.2d 889 (1952), additional compensation for injured employee based on previous accident, in part, sustained as valid. To the same effect, see Subsequent Injuries Fund v. Industrial Accident Comm., 49 Cal.2d 354, 317 P.2d 8 (1957); California Employment Stabilization Comm., 31 Cal.2d 210, 187 P.2d 702 (1947).

2252. 53 Cal.2d 284, 1 Cal.Rptr. 327, 347 P.2d 671 (1959).

2253. See, to the same effect, Patrick v. Riley, 209 Cal. 350, 287 Pac. 455 (1930).

2254. Corning Hospital District v. Superior Court, 57 A.C. 529, 20 Cal.Rptr. 621, 370 P.2d 325 (1962).

2255. California Employment Stabilization Comm. v. Payne, 31 Cal. 2d 210, 187 P.2d 702 (1947), expressly disapproving contrary view expressed in California Employment Stabilization Comm. v. Chichester etc. Co., 75 Cal. App. 2d 899, 172 P.2d 100 (1946).

2256. E.g., California Employment Stabilization Commission v. Payne, 31 Cal.2d 210, 187 P.2d 702 (1947); Wells Fargo & Co. v. City & County of San Francisco, 25 Cal.2d 37, 152 P.2d 625 (1944); Wexler v. City of Los Angeles, 110 Cal.App.2d 740, 243 P.2d 868 (1952).

2257. The tendency of the "vested rights" approach to be reduced to a circular and informative rationalization of conclusions reached on other grouns has been generally recognized by the commentators. See, e.g., Smith, Retroactive Laws and Vested Rights, 5 Texas L. Rev. 231, 245-48 (1927).

2258. Miller v. McKenna, 23 Cal.2d 774, 783, 147 P.2d 531, 536 (1944), quoted with approval in Wall v. M.& R. Sheep Co., 33 Cal.2d 768, 205 P.2d 14 (1949).

2259. See Birkhofer v. Krumm, 27 Cal. App. 2d 513, 81 P.2d 609 (1938), reviewing many cases in point.

2260. See, e.g., Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228 (1897); Gordon v. Nichols, 86 Cal.App.2d 571, 195 P.2d 444 (1948).

2261. 210 Cal. 65, 290 Pac. 438 (1930).

2262. Id. at 67, 290 Pac. at 440.

2263. Id. at 68, 290 Pac. at 440.

2264. In addition to the cases cited infra, notes 2265-2269, see Penziner v. West American Finance Co., 10 Cal.2d 160, 74 P.2d 252 (1938); Lemon v. Los Angeles Terminal R. Co., 38 Cal.App. 2d 659, 102 P.2d 387 (1940).

2265. Fenton v. Markwell & Co., 11 Cal.App. 2d Supp. 755, 52 P.2d 297 (1935), disapproved on other grounds in Penziner v. West American Finance Co., supra note 2264.

2266. Moss v. Smith, 171 Cal. 777, 155 Pac. 90 (1916), appeal dismissed 246 U.S. 654 (1918).

2267. Southern Service Co. v. County of Los Angeles, 15 Cal.2d 1, 97 P.2d 963 (1940), appeal dismissed 310 U.S. 610 (1940).

2268. Thol v. United States, 218 F.2d 12 (9 Cir. 1954).

2269. 210 Cal. 644, 293 Pac. 62 (1930).

2270. Id. at 652, 293 Pac. at 65.

2271. Id. at 653, 293 Pac. at 65.

2272. In addition to the cases cited infra, notes 2273-2279, see La Forge v. Magee, 6 Cal. 650 (1855), holding that the legislature could not divest an accrued cause of action for payment of a county warrant.

2273. Coast Surety Co. v. Municipal Court, 136 Cal.App. 186, 28 P.2d 421 (1934).

2274. Wells Fargo & Co. v. City & County of San Francisco, 25 Cal.2d 37, 152 P.2d 625 (1944).

2275. Id. at 41, 152 P.2d at 627.

2276. See, e.g., Southern Service Co., Ltd. v. County of Los Angeles, supra note 2267.

2277. Norton v. City of Pomona, 5 Cal.2d 54, 53 P.2d 952 (1935).

2278. Id. at 66, 53 P.2d at 957. For dictum to the same effect, implying that an accrued cause of action under the Public Liability Act is a "vested" interest, see Thompson v. County of Los Angeles, 140 Cal.App. 73, 35 P.2d 185 (1934).

2279. Wexler v. City of Los Angeles, 110 Cal.App.2d 740, 243 P.2d 868 (1952).

2280. Cf. Krause v. Rarity, 210 Cal. 644, 293 Pac. 62 (1930).

2281. Wexler v. City of Los Angeles, 110 Cal.App.2d 740, 747, 243 P.2d 868, 872 (1952). That this statement was not inadvertent but deliberate appears to be supported by the fact that Respondent's Brief on Appeal in this case, at page 15, asserts without avail the rule that purely statutory rights may be eliminated by subsequent legislation.

2282. But cf. note 2281, supra.

2283. Several commentators have reached the conclusion, after a study of the relevant decisions, that the validity of retrospective legislation is ordinarily determined by a judicial assessment of the respective importance and strength of the public interest to be served by the statute, as contrasted with the degree of unfairness occasioned to the private interests affected thereby. See Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 697 (1960); Smead, The Rule Against Retroactive Legislation - A Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775 (1936).

2284. Cases cited infra, notes 2285-2290.

2285. In addition to the cases cited infra, notes 2286-2287, see Rosefield Packing Co. v. Superior Court, 4 Cal.2d 120, 47 P.2d 716 (1935); Rossi v. Caire, 186 CAl. 544, 199 Pac. 1042 (1921); Crim v. City & County of San Francisco,

152 Cal. 279, 92 Pac. 640 (1907); Masonic Mines Assn. v. Superior Court, 136 Cal. App. 298, 28 P.2d 691 (1934); Coleman v. Superior Court, 135 Cal.App.74, 26 P.2d 673(1933).

2286. Callet v. Alioto, 210 Cal. 65, 290 Pac. 438 (1930). See also, Krause v. Rarity, 210 Cal. 644, 293 Pac. 62 (1930).

2287. James v. Oakland Traction Co., 10 Cal.App. 785, 103 Pac. 1082 (1909). Cf. Morris v. Pacific Electric Ry. Co., 2 Cal.2d 764, 43 P.2d 276 (1935).

2288. Coleman v. Superior Court, 135 Cal.App. 74, 78, 26 P.2d 673, 675 (1933). See also, to the same effect, Krause v. Rarity, 210 Cal. 644, 653, 293 Pac. 62, 66 (1930), describing a common law negligence cause of action as a "vested right", and declaring that in such a case, "upon the wrongful infliction of the injury a vested right accrues to the party injured freed from any disturbance by subsequent legislative enactment."

2289. James v. Oakland Traction Co., 10 Cal.App. 785, 798, 103 Pac. 1082, 1088 (1909).

2290. Crim v. City & County of San Francisco, 152 Cal. 279, 92 Pac. 640 (1907), holding that common law nuisance action city could not be eliminated retrospectively by adoption of new claim presentation requirement.

2291. See Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 696 (1960); Slawson, Constitutional and Legislative Considerations in Retroactive Lawmaking, 48 Calif. L. Rev. 216, 251 (1960); Smith, Retroactive Laws and Vested Rights, 5 Tex. L. Rev.231,

245-248 (1927).

2292. See Brown Vested Rights and the Portal-to-Portal Act, 46 Mich. L. Rev. 723, 753 (1948), suggesting that the test of constitutionality is whether the statute "defeats claims based on the reasonable expectations of the parties at the time the legal transactions occurred"; Stimson, Retroactive Application of Law - A problem in Constitutional Law, 38 Mich. L. Rev. 30, 37-38 (1939), suggesting that the common characteristic of cases invalidating retroactive legislation "is the element of surprise". See also, Smith, Retroactive Laws and Vested Rights, 6 Tex.L.Rev. 409, 418-19 (1928).

2293. Cf. Greenblatt, Judicial Limitations on Retroactive Civil Legislation, 51 Northwestern L. Rev. 540, 567 (1956).

2294. See Addison v. Huron Stevedoring Corp., 204 F.2d 88, 96-99 (2 Cir. 1953), concurring opinion of Learned Hand, J.; Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 727 (1960), concluding that "the two major factors to be weighed in determining the validity of a retroactive statute are the strength of the public interest it serves, and the unfairness created by its retroactive operation"; Slawson, Constitutional, and Legislative Considerations in Retroactive Lawmaking, 48 Calif. L. Rev. 216, 226 (1960).

2295. See Brown, Vested Rights and the Portal-to-Portal Act, 46 Mich. L. Rev. 723 (1948).

2296. See Moss v. Hawaiian Dredging Co., 187 F.2d 442 (9 Cir. 1951), sustaining validity of federal "Overtime-on-Overtime" Act, which retroactively abrogated claims for overtime pay under wage law as previously interpreted by Surpeme Court decisions; Battaglia v. General Motors Corp., 169 F.2d 254 (2 Cir. 1948), sustaining constitutionality of federal "Portal-to-Portal_ Act, which retroactively abrogated wage claims under federal wage law as construed by Supreme Court. Numerous other similar cases are collected in the court's opinion in Moss v. Hawaiian Dredging Co., supra. But cf. Ettor v. City of Tacoma, 228 U.S. 148 (1913).

2297. Such preliminary preparations for litigation were held, by the Supreme Court, to be perfectly permissible notwithstanding the pendency of the statutory moratorium imposed by Cal.Civ. Code § 22.3 upon the trial of such cases. See Corning Hospital District v. Superior Court, 57 A.C. 529, 20 Cal. Rptr. 621, 370 P.2d 325 (1962).

2298. Hogan v. Ingold, 38 Cal.2d 802, 243 P.2d 1 (1952); Feckenscher v. Gamble, 12 Cal.2d 482, 85 P.2d 885 (1938); County of San Bernardino v. Industrial Accident Comm., 217 Cal.618, 20 P.2d 673 (1933); City of Los Angeles v. Oliver, 102 Cal. App. 299, 283 Pac. 298 (1929).

2299. See Rosefield Packing Co. v. Superior Court, 4 Cal.2d 120, 47 P.2d 716 (1935), relying upon Coleman v. Superior Court, 135 Cal.App. 74, 26 P.2d 673 (1933), for proposition that procedural provision requiring dismissal of actions not timely brought to trial cannot be applied to wipe

out previously accrued causes of action until a reasonable time for complaince with the new requirements had elapsed. Cf. other cases cited supra note 2285.

2300. Morris v. Pacific Electric Railway Co., 2 Cal.2d 764, 768, 43 P.2d 276, 277 (1935).

2301. See text supra pp. _____.

2302. See Muskopf v. Corning Hospital District, 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961).

2303. 214 Cal. 369, 6 P.2d 78 (1931).

2304. Id. at 373, 6 P.2d at 80.

2305. 292 U.S. 571 (1934).

2306. Id. at 581-582.

2307. Perry v. United States, 294 U.S. 330, 354 (1935).

2308. This approach to the drafting problem was actually utilized in the Portal-to-Portal Act, sustained in Battaglia v. General Motors Corp., 169 F.2d 254 (2 Cir. 1948).

2309. See Muskopf v. Corning Hospital District, supra note 2302, as analyzed in the text, supra pp. _____.

2310. See cases cited supra, notes 2274-2290, and related text discussion.

2311. Lynch v. United States, 292 U.S. 571, 582 (1934).

2312. A possible implication that some such alternative remedy may be constitutionally essential is found in the language of the Supreme Court decisions sustaining the validity of statutes wiping out judicial remedies and substituting therefor a prescribed alternative remedy. Anniston Mfg. Co. v. Davis, 301 U.S. 337, 342-343 (1937); Burrill v. Locomobile Co., 258 U.S. 34, 38 (1922. See also, Home Bldg. &

Loan Assn. v. Blaisdell, 290 U.S. 398, 439 (1934), dictum treating a "denial of means to enforce" contractual obligations as tantamount to unconstitutional "repudiation" of them. In the language quoted from Mr. Justice Brandeis' opinion in Lynch v. United States, supra note 2311 and related text, he very likely had in mind the prevalence of the "private bill" technique under which Congress legislatively settles unadjudicable claims against the United States.

2313. See, e.g., Baldwin v. City of San Diego, 195 Cal.App.2d 236, 15 Cal.Rptr. 576 (1961), and cases there cited; Coleman v. Superior Court, 135 Cal.App. 74, 26 P.2d 673 (1933); Rhoda v. County of Alameda, 134 Cal.App. 726, 26 P.2d 691 (1933).

2314. Hogan v. Ingold, 38 Cal.2d 802, 243 P.2d 1 (1952), sustaining validity of provision requiring stockholder in derivative suit to post undertaking for costs, as applied to cause of action which accrued before provision was enacted.

2315. Fechenscher v. Gamble, 12 Cal.2d 482, 85 P.2d 885 (1938), sustaining validity of legislative change, effective after cause of action for fraud had accrued, substituting "out-of-pocket" basis for computation of damages for previous "benefit-of-bargain" rule, and thereby resulting in recovery of $4,000 less damages by plaintiff. To the same effect, see Tulley v. Tranor, 53 Cal. 274 (1878), sustaining validity of retrospective application of statutory change

in measure of damages for conversion, where result was to substantially reduce the amount of plaintiff's recovery. Cf. United States v. Standard Oil Co. of California, 21 F. Supp. 645 (S.D. Calif. 1937), affirmed 107 F.2d 402 (9 Cir. 1940); Oliver v. City of Los Angeles, 102 Cal. App. 299, 283 Pac. 298 (1929).