

10/13/71

Memorandum 71-75

Subject: Annual Report

We have sent the attached draft Annual Report for the 1971 calendar year to the printer (with a few minor editorial revisions). We can still make changes in the report, and plan to revise some material (such as page 11) after the appointments to the Commission have been made.

The Commission must approve the Annual Report for publication at the November meeting. Please mark your revisions on the attached copy to hand to the staff at the November meeting and bring up any matters you believe are policy questions that merit Commission discussion.

Respectfully submitted,

John H. DeMouly
Executive Secretary

*Inside Title
Recast from Front Cover*

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

Annual Report

December 1970 1/

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

REPORT OF THE CALIFORNIA LAW REVISION COMMISSION FOR THE YEAR 1970

1/

FUNCTION AND PROCEDURE OF COMMISSION

The California Law Revision Commission consists of one Member of the Senate, one Member of the Assembly, seven members appointed by the Governor with the advice and consent of the Senate, and the Legislative Counsel who is *ex officio* a nonvoting member.¹

The principal duties of the Law Revision Commission are to:

- (1) Examine the common law and statutes of the State for the purpose of discovering defects and anachronisms therein.
- (2) Receive and consider suggestions and proposed changes in the law from the American Law Institute, the National Conference of Commissioners on Uniform State Laws, bar associations, and other learned bodies, judges, public officials, lawyers, and the public generally.
- (3) Recommend such changes in the law as it deems necessary to bring the law of this State into harmony with modern conditions.²

The Commission is required to file a report at each regular session of the Legislature containing a calendar of topics selected by it for study, listing both studies in progress and topics intended for future consideration. The Commission may study only topics which the Legislature, by concurrent resolution, authorizes it to study.³

Each of the Commission's recommendations is based on a research study of the subject matter concerned. Many of these studies are undertaken by specialists in the fields of law involved who are retained as research consultants to the Commission. This procedure not only provides the Commission with invaluable expert assistance but is economical as well because the attorneys and law professors who serve as research consultants have already acquired the considerable background necessary to understand the specific problems under consideration. In some cases, the research study is prepared by a member of the Commission's staff.

The research study includes a discussion of the existing law and the defects therein and suggests possible methods of eliminating those defects. The detailed research study is given careful consideration by the Commission. After making its preliminary decisions on the subject, the Commission distributes a tentative recommendation to the State Bar and to numerous other interested persons. Comments on the tentative recommendation are considered by the Commission in determining what report and recommendation it will make to the Legislature. When the Commission has reached a conclusion on the matter, its recommendation to the Legislature, including a draft of any legis-

¹ See CAL. GOVT. CODE §§ 10300-10340.

² See CAL. GOVT. CODE § 10330. The Commission is also directed to recommend the express repeal of all statutes repealed by implication or held unconstitutional by the Supreme Court of the State or the Supreme Court of the United States. CAL. GOVT. CODE § 10381.

³ See CAL. GOVT. CODE § 10335.

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lation necessary to effectuate its recommendation, is published in a printed pamphlet.⁴ If the research study has not been previously published, it usually is published in the pamphlet containing the recommendation.

l.c. The pamphlets are distributed to the Governor, Members of the Legislature, heads of state departments, and a substantial number of judges, district attorneys, lawyers, law professors, and law libraries throughout the State.⁵ Thus, a large and representative number of interested persons are given an opportunity to study and comment upon the Commission's work before it is submitted to the Legislature. The annual reports and the recommendations and studies of the Commission are bound in a set of volumes that is both a permanent record of the Commission's work and, it is believed, a valuable contribution to the legal literature of the State.

l.c. A total of 90 bills and two proposed constitutional amendments have been drafted by the Commission to effectuate its recommendations.⁶ *Sixty-four* of these bills were enacted at the first session to which they were presented; sixteen bills were enacted at subsequent sessions or their substance was incorporated into other legislation that was enacted. Thus, of the 90 bills recommended, 80 eventually became law. One of the proposed constitutional amendments was approved and ratified by the people; the other was not approved by the Legislature.

Commission recommendations have resulted in the enactment of legislation affecting 2,180 sections of the California statutes: 1,105 sections have been added, 540 sections amended, and 535 sections repealed.

⁴Occasionally one or more members of the Commission may not join in all or part of a recommendation submitted to the Legislature by the Commission.

(Footnotes 5, 6, 7, and 8 follow)

5/ For background studies published in law reviews, see Ayer, Allocating the Costs of Determining "Just Compensation," 21 Stan. L. Rev. 693 (1969); Bender, Additur--The Power of the Trial Court to Deny a New Trial on the Condition That Damages Be Increased, 3 Cal. W. L. Rev. 1 (1966), reprinted in 8 CAL. L. REVISION COMM'N REPORTS 615 (1967); Bodenheimer, The Multiplicity of Child Custody Proceedings--Problems of California Law, 23 STAN. L. REV. 703 (1971); Brunn, California Personal Injury Damage Awards to Married Persons, 13 U.C.L.A. L. REV. 587 (1966), reprinted in 8 CAL. L. REVISION COMM'N REPORTS 421 (1967); Friedenthal, Imputed Contributory Negligence: The Anomaly in California Vehicle Code Section 17150, 17 STAN. L. REV. 55 (1964), reprinted in 8 CAL. L. REVISION COMM'N REPORTS 525 (1967); Friedenthal, Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions, 23 STAN. L. REV. 1 (1970), reprinted in 10 CAL. L. REVISION COMM'N REPORTS 579 (1971); Harvey, A Study To Determine Whether the Rights and Duties Attendant Upon the Termination of a Lease Should Be Revised, 54 CAL. L. REV. 1141 (1966), reprinted in 8 CAL. L. REVISION COMM'N REPORTS 731 (1967); McClintock, Fictitious Business Name Legislation--Modernizing California's Pioneer Statute, 19 HASTINGS L.J. 1349 (1968), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 633 (1969); Matheson, Excess Condemnation in California: Proposals for Statutory and Constitutional Change, 42 SO. CAL. L. REV. 421 (1969); Merryman, Improving the Lot of the Trespassing Improver, 11 STAN. L. REV. 456 (1959), reprinted in 8 CAL. L. REVISION COMM'N ^{REPORTS} 819 (1967); Note, Mutuality of Remedy in California Under Civil Code Section 3386, 19 HASTINGS L. J. 1430 (1968), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 213 (1969); Powell, Powers of Appointment in California, 19 HASTINGS L.J. 1281 (1968), abridged version reprinted in 9 CAL. L. REVISION COMM'N REPORTS 335 (1969); Taylor,

Possession Prior to Final Judgment in California Condemnation Procedure, 7 SANTA CLARA LAWYER 37 (1966), reprinted in 8 CAL. L. REVISION COMM'N REPORTS 1171 (1967); Taylor, The Statute of Frauds and Misrepresentations as to the Credit of Third Persons: Should California Repeal Its Lord Tenterden's Act?, 16 U.C.L.A. L. REV. 603 (1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 711 (1969); Taylor, The Right to Take--The Right to Take a Fee or Any Lesser Interest, 1 PAC. L.J. 555 (1970); Van Alstyne, Statutory Modification of Inverse Condemnation: The Scope of Legislative Power, 19 STAN. L. REV. 727 (1967), reprinted in 10 CAL. L. ^{REVISION COMM'N REPORTS} ~~REV.~~ 15 (1971); Van Alstyne, Modernizing Inverse Condemnation: A Legislative Prospectus, 8 SANTA CLARA LAWYER 1 (1967), reprinted in 10 CAL. L. REVISION COMM'N REPORTS 75 (1971); Van Alstyne, Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction, 20 STAN. L. REV. 617 (1968), reprinted in 10 CAL. L. REVISION COMM'N REPORTS 111 (1971); Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 HASTINGS L.J. 431 (1969), reprinted in 10 CAL. L. REVISION COMM'N REPORTS 163 (1971); Van Alstyne, Just Compensation of Intangible Detriment: Criteria for Legislative Modifications in California, 16 U.C.L.A. L. REV. 491 (1969), reprinted in 10 CAL. L. REVISION COMM'N REPORTS 249 (1971); Van Alstyne, Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria, 44 SO. CAL. L. REV. 1 (1971), reprinted in 10 CAL. L. REVISION COMM'N REPORTS 303 (1971).

✓ See CAL. GOVT. CODE § 10838.

7. For a step by step description of the procedure followed by the Commission in preparing the 1963 governmental liability statute, see DeMouly, Fact Finding for Legislation: A Case Study, 50 A.B.A.J. 285 (1964). The procedure followed in preparing the Evidence Code is described in 7 CAL. L. REVISION COMM'N REPORTS 3 (1965).

8) The number of bills actually introduced was in excess of 90 since, in some cases, the substance of the same bill was introduced at a subsequent session and, in the case of the Evidence Code, the same bill was introduced in both the Senate

and the Assembly. For a complete list of bills enacted and constitutional amendments approved on recommendation of the Commission, see pages 000-0000 infra.

To Be REVISED LATER

PERSONNEL OF COMMISSION

In February 1970, Mr. Thomas E. Stanton, Jr., was reappointed by the Governor. Also in February 1970, Mr. G. Bruce Gourley was appointed by the Governor to complete the term of Mr. William A. Yale, who had resigned when appointed judge of the Superior Court; and Professor Joseph T. Sneed was appointed by the Governor to replace Professor Sho Sato whose term of office had expired. In March 1970, Mr. Noble K. Gregory was appointed by the Governor to complete the term of Mr. Roger Arnebergh who had resigned. In April 1970, Mr. Marc Sandstrom was appointed by the Governor to complete the term of Mr. Richard H. Wolford who had resigned. In October 1970, Mr. John N. McLaurin was appointed by the Governor to complete the term of Mr. Lewis K. Uhler who had resigned when appointed director of the State Office of Economic Opportunity. Late in November 1970, Professor Joseph T. Sneed, who had been named Dean of the Duke University School of Law, resigned from the Commission.

In February 1970, Mr. Thomas E. Stanton, Jr., was elected Chairman and Mr. John D. Miller was elected Vice Chairman of the Commission.

As of December 1, 1970, the membership of the Law Revision Commission is:

	<i>Term expires</i>
Thomas E. Stanton, Jr., San Francisco, <i>Chairman</i>	October 1, 1973
John D. Miller, Long Beach, <i>Vice Chairman</i>	October 1, 1973
Hon. Alfred H. Song, Monterey Park, <i>Senate Member</i>	*
Hon. Carlos J. Moorhead, Glendale, <i>Assembly Member</i>	*
G. Bruce Gourley, Santa Maria, <i>Member</i>	October 1, 1971
Noble K. Gregory, San Francisco, <i>Member</i>	October 1, 1971
John N. McLaurin, Los Angeles, <i>Member</i>	October 1, 1971
Marc Sandstrom, San Diego, <i>Member</i>	October 1, 1973
Vacancy	†
George H. Murphy, Sacramento, <i>ex officio Member</i>	†

In June 1970, Mr. E. Craig Smay and Mr. Nathaniel Sterling were appointed to the Commission's legal staff to fill vacancies created by the resignations of Mr. Clarence B. Taylor and Mr. John L. Cook.

* The legislative members of the Commission serve at the pleasure of the appointing power.
† The Legislative Counsel is *ex officio* a nonvoting member of the Commission.

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SUMMARY OF WORK OF COMMISSION

During the past year, the Law Revision Commission was engaged in three principal tasks:

- (1) Presentation of its legislative program to the Legislature.¹
- (2) Work on various assignments given to the Commission by the Legislature.²
- (3) A study, made pursuant to Section 10331 of the Government Code, to determine whether any statutes of the State have been held by the Supreme Court of the United States or by the Supreme Court of California to be unconstitutional or to have been impliedly repealed.³ l.c.

During the past year, the Commission has received and considered a number of suggestions for topics that might be studied by the Commission. Some of these suggested topics appear to be in need of study.

Nevertheless, because of the limited resources available to the Commission and the substantial topics already on its agenda, the Commission has determined not to request authority to study any new topics. The Commission will, however, request that the scope of one topic previously authorized for study be expanded.⁴

The Commission held five two-day meetings and six three-day meetings in 1971.

¹ See pages 1017-1023 *infra*.

² See pages 1012-1016, 1024-1031 *infra*.

³ See pages 1033-1034 *infra*.

⁴ See page 0000 *infra*.

1972 LEGISLATIVE PROGRAM

The Commission will submit a recommendation to the 1972 Legislature relating to wage garnishment procedure and related matters. See Recommendation Relating to Attachment, Garnishment, and Exemptions From Execution: Employees' Earnings Protection Law (December 1971), reprinted in 10 CAL. L. REVISION COMM'N REPORTS 701 (1971).

In addition, the Commission is working on the subject of prejudgment attachment procedure and plans to submit some recommendations on this subject to the 1972 Legislature.

The Commission also recommends that the scope of one topic previously authorized for study be expanded (see page 0000 infra).

MAJOR STUDIES IN PROGRESS

ATTACHMENT, GARNISHMENT, AND EXEMPTIONS FROM EXECUTION

Resolution Chapter 202 of the Statutes of 1957 authorizes the Commission to make a study to determine whether the law relating to attachment, garnishment, and property exempt from execution should be revised. The Commission, working with a special committee of the State Bar, is now actively considering this topic. Professor William D. Warren, U.C.L.A. Law School, and Professor Stefan A. Riesenfeld, Boalt Hall Law School, University of California at Berkeley, are serving as consultants to the Commission.

Any comprehensive revision of the law in this area will necessarily require extended study. For this reason, recommendations to deal with problems in need of immediate legislative attention will be submitted to the Legislature prior to completion of work on a comprehensive revision of the entire field of law. A recommendation was submitted to the 1971 Legislature dealing with discharge from employment because of garnishment of wages. See Recommendation Relating to Attachment, Garnishment, and Exemptions from Execution: Discharge From Employment (March 1971), ^{reprinted in} 10 Cal. L. Revision Comm'n Reports 0000 (1971). The recommended legislation was enacted. See Cal. Stats. 1971, Ch. 0000. A recommendation dealing with wage garnishment procedure and related matters will be submitted to the 1972 Legislature. See Recommendation Relating to Attachment, Garnishment, and Exemptions From Execution: Employees' Earnings Protection Law (December 1971), ^{reprinted in} 10 CAL. L. REVISION COMM'N REPORTS 701 (1971). In Randone v. Appellate Department, 5 Cal.3d 536, P.2d, Cal. Rptr. (1971), the California Supreme Court held the California prejudgment levy of attachment

procedure unconstitutional. The Commission is studying the ramifications of this decision and tentatively plans to submit a recommendation to the 1972 Legislature to provide a constitutional procedure for prejudgment levy of attachment in appropriate cases.

CONDEMNATION LAW AND PROCEDURE

The Commission is now engaged in the study of condemnation law and procedure and tentatively plans to submit a recommendation for a comprehensive statute on this subject to the 1975 Legislature.

As it did in connection with the Evidence Code study, the Commission plans to publish a series of reports containing tentative recommendations and research studies covering various aspects of condemnation law and procedure. The comments and criticisms received from interested persons and organizations on these tentative recommendations will be considered before the comprehensive statute is drafted. The first report in this series has been published. See *Tentative Recommendation and a Study Relating to Condemnation Law and Procedure: Number 1—Possession Prior to Final Judgment and Related Problems*, 8 CAL. L. REVISION COMM'N REPORTS 1101 (1967). Work on the second report in

this series, dealing with the right to take, is well under way. Work on the third report, which will deal with compensation and the measure of damages, has been started. The Commission has retained two consultants to prepare background studies on other aspects of eminent domain law. Mr. Norman E. Matteoni, Deputy Counsel of Santa Clara County, is preparing a background study on certain procedural aspects of condemnation; Mr. Joseph B. Harvey, a Susanville attorney, is preparing a background study on the problems arising from divided interests in property sought to be acquired.

Prior to 1975, the Commission will submit recommendations concerning eminent domain problems that appear to be in need of immediate attention. The Commission submitted the first such recommendation (exchange of valuation data) to the 1967 Legislature,² a second recommendation (recovery of the condemnee's expenses on abandonment of an eminent domain proceeding) to the 1968 Legislature,³ and a third recommendation (arbitration of just compensation) to the 1970 Legislature.⁴

² See *Recommendation Relating to Discovery in Eminent Domain Proceedings*, 8 CAL. L. REVISION COMM'N REPORTS 19 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS 1318 (1967). The recommended legislation was enacted. See Cal. Stats. 1967, Ch. 1104.

³ See *Recommendation Relating to Recovery of Condemnee's Expenses on Abandonment of an Eminent Domain Proceeding*, 8 CAL. L. REVISION COMM'N REPORTS 1361 (1967). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS 19 (1968). The recommended legislation was enacted. See Cal. Stats. 1968, Ch. 133.

⁴ See *Recommendation Relating to Arbitration of Just Compensation*, 10 CAL. L. REVISION COMM'N REPORTS 123 (1969). For a legislative history of this recommendation, see 10 CAL. L. REVISION COMM'N REPORTS 1018 (1971). The recommended legislation was enacted. See Cal. Stats. 1970, Ch. 417.

CALENDAR OF TOPICS FOR STUDY

TOPICS AUTHORIZED FOR STUDY

The Commission has on its calendar of topics the topics listed below. Each of these topics has been authorized for Commission study by the Legislature.¹

Topics Under Active Consideration

During the next year, the Commission plans to devote substantially all of its time to consideration of the following topics:

1. Attachment, garnishment, exemptions from execution. Whether the law relating to attachment, garnishment, and property exempt from execution should be revised. ✓

¹ Section 10835 of the Government Code provides that the Commission shall study, in addition to those topics which it recommends and which are approved by the Legislature, any topic which the Legislature by concurrent resolution refers to it for such study.

² Authorized by Cal. Stats. 1957, Res. Ch. 202, at 4589; see also 1 CAL.

L. REVISION COMM'N REPORTS, 1957 Report at 15 (1957).

See Recommendation Relating to Attachment, Garnishment, and Exemptions From Execution: Discharge From Employment (March 1971), reprinted in 10 CAL. L. REVISION COMM'N REPORTS 000 (1971). For a legislative history of this recommendation, see 10 CAL. L. REVISION COMM'N REPORTS 0000 (1971). The recommended legislation was enacted. See Cal. Stats. 1971, Ch. 0000.

See also Recommendation Relating to Attachment, Garnishment, and Exemptions From Execution: Employees' Earnings Protection Law (December 1971), reprinted in 10 CAL. L. REVISION COMM'N REPORTS 701 (1971). This recommendation will be submitted to the 1972 Legislature. The Commission also plans to submit to the 1972 Legislature a recommendation relating to prejudgment levy of attachment procedure.

2. Condemnation law and procedure. Whether the law and procedure relating to condemnation should be revised with a view to recommending a comprehensive statute that will safeguard the rights of all parties to such proceedings. ✓
3. Right of nonresident aliens to inherit. Whether the law relating to the right of nonresident aliens to inherit should be revised. ✓
4. Liquidated damages. Whether the law relating to liquidated damages in contracts and, particularly, in leases, should be revised. ✓
5. Oral modification of a written contract. Whether Section 1698 of the Civil Code (oral modification of a written contract) should be repealed or revised. ✓

3 Authorized by Cal. Stats. 1965, Res. Ch. 130, at 5289; see also Cal. Stats.

1956, Res. Ch. 42, at 263; 4 CAL. L. REVISION COMM'N REPORTS 115 (1963).

See Recommendation and Study Relating to Evidence in Eminent Domain Proceed-

ings; Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings; Recommendation and Study Relating to the Reimbursement for Moving Expenses When Property Is Acquired for Public Use, 3 CAL. L. REVISION COMM'N REPORTS at A-1, B-1, and C-1 (1961). For a legislative history of these recommendations, see 3 CAL. L. REVISION COMM'N REPORTS 1-5 (1961). See also Cal. Stats. 1961, Ch. 1612 (tax apportionment) and Cal. Stats. 1961, Ch. 1613 (taking possession and passage of title). The substance of two of these recommendations was incorporated in legislation enacted in 1965. Cal. Stats. 1965, Ch. 1151 (evidence in eminent domain proceedings); Ch. 1649 and Ch. 1650 (reimbursement for moving expenses).

See also Recommendation and Study Relating to Condemnation Law and Procedure: Number 4—Discovery in Eminent Domain Proceedings, 4 CAL. L. REVISION COMM'N REPORTS 701 (1963). For a legislative history of this recommendation, see 4 CAL. L. REVISION COMM'N REPORTS 213 (1963). See also Recommendation Relating to Discovery in Eminent Domain Proceedings, 8 CAL. L. REVISION COMM'N REPORTS 19 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS 1318 (1967). See Cal. Stats. 1967, Ch. 1104 (exchange of valuation data).

See also Recommendation Relating to Recovery of Condemnee's Expenses on Abandonment of an Eminent Domain Proceeding, 8 CAL. L. REVISION COMM'N REPORTS 1361 (1967). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS 19 (1969). The recommended legislation was enacted. See Cal. Stats. 1968, Ch. 133.

See also Recommendation Relating to Arbitration of Just Compensation, 9 CAL. L. REVISION COMM'N REPORTS 123 (1969). For a legislative history of this recommendation, see 10 CAL. L. REVISION COMM'N REPORTS 1018 (1971). The recommended legislation was enacted. See Cal. Stats. 1970, Ch. 417.

The Commission is now engaged in the study of this topic and tentatively plans to submit a recommendation for a comprehensive statute to the 1975 Legislature. See 10 CAL. L. REVISION COMM'N REPORTS 2000 (1971). See also Tentative Recommendation and a Study Relating to Condemnation Law and Procedure: Number 1—Possession Prior to Final Judgment and Related Problems, 8 CAL. L. REVISION COMM'N REPORTS 1101 (1967).

The recommended legislation was enacted.

4 Authorized by Cal. Stats. 1969, Res. Ch. 224, at 3888.

5 Authorized by Cal. Stats. 1969, Res. Ch. 224, at 3888.

6 Authorized by Cal. Stats. 1957, Res. Ch. 202, at 4589; see also 1 CAL. L. REVISION COMM'N REPORTS, 1957 Report at 21 (1957).

Other Topics Authorized for Study

The Commission has not yet begun the preparation of a recommendation on the topics listed below.

1. Custody proceedings. Whether the law respecting jurisdiction of courts in proceedings affecting the custody of children should be revised. ✓
2. Nonprofit corporations. Whether the law relating to nonprofit corporations should be revised. ✓
3. Partition procedures. Whether the various sections of the Code of Civil Procedure relating to partition should be revised and whether the provisions of the Code of Civil Procedure relating to the confirmation of partition sales and the provisions of the Probate Code relating to the confirmation of sales of real property of estates of deceased persons should be made uniform and, if not, whether there is need for clarification as to which of them governs confirmation of private judicial partition sales. ✓
4. Parol evidence rule. Whether the parol evidence rule should be revised. ⁴
5. Prejudgment interest. Whether the law relating to the award of prejudgment interest in civil actions and related matters should be revised. ⁵

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Authorized by Cal. Stats. 1956, Res. Ch. 42, at 263; see also 1 CAL. L.

REVISION COMM'N REPORTS, 1956 Report at 29 (1957).

A background study has been prepared by the Commission's consultant. See Bodenheimer, The Multiplicity of Child Custody Proceedings--Problems of California Law, 23 STAN. L. REV. 703 (1971). The Commission recommends that the scope of this topic be expanded. See page 0000 infra.

2

Authorized by Cal. Stats. 1970, Res. Ch. 54, at 3548; see also 9 CAL. L.

REVISION COMM'N REPORTS 107 (1969).

3

Authorized by Cal. Stats. 1959, Res. Ch. 218, at 5792; see also Cal. Stats. 1956, Res. Ch. 42, at 263; 1 CAL. L. REVISION COMM'N REPORTS, 1956 Report at 21 (1957).

4

Authorized by Cal. Stats. 1971, Res. Ch. 75; see also 10 CAL. L. REVISION COMM'N REPORTS 1031 (1971).

5

Authorized by Cal. Stats. 1971, Res. Ch. 75.

6. Arbitration. Whether the law relating to arbitration should be revised

Topics Continued on Calendar for Further Study

On the following topics, studies and recommendations relating to the topic, or one or more aspects of the topic, have been made. The topics are continued on the Commission's Calendar for further study of recommendations not enacted or for the study of additional aspects of the topic or new developments.

1. Governmental liability. Whether the doctrine of sovereign or governmental immunity in California should be abolished or revised.

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Authorized by Cal. Stats. 1968, Res. Ch. 110, at 3103; see also 8 CAL. L.

REVISION COMM'N REPORTS 1325 (1967).

This is a supplemental study; the present California arbitration law was enacted in 1961 upon Commission recommendation. See Recommendation and Study

Relating to Arbitration, 3 CAL. L. REVISION COMM'N REPORTS at G-1 (1961). For a legislative history of this recommendation, see 4 CAL. L. REVISION COMM'N REPORTS 15 (1963). See also Cal. Stats. 1961, Ch. 461.

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Authorized by Cal. Stats. 1957, Res. Ch. 202, at 4589.

See Recommendations Relating to Sovereign Immunity: Number 1--Tort Liability

of Public Entities and Public Employees; Number 2--Claims, Actions and Judgments Against Public Entities and Public Employees; Number 3--Insurance Coverage for Public Entities and Public Employees; Number 4--Defense of Public Employees; Number 5--Liability of Public Entities for Ownership and Operation of Motor Vehicles; Number 6--Workmen's Compensation Benefits for Persons Assisting Law Enforcement or Fire Control Officers; Number 7--Amendments and Repeals of Inconsistent Special Statutes, 4 CAL. L. REVISION COMM'N REPORTS 801, 1001, 1201, 1301, 1401, 1501, and 1601 (1963). For a legislative history of these recommendations, see 4 CAL. L. REVISION COMM'N REPORTS 211-213 (1963). See also *A Study Relating to Sovereign Immunity*, 5 CAL. L. REVISION COMM'N REPORTS 1 (1963). See also Cal. Stats. 1963, Ch. 1681 (tort liability of public entities and public employees); Cal. Stats. 1963, Ch. 1716 (claims, actions and judgments against public entities and public employees); Cal. Stats. 1963, Ch. 1682 (insurance coverage for public entities and public employees); Cal. Stats. 1963, Ch. 1683 (defense of public employees); Cal. Stats. 1963, Ch. 1684 (workmen's compensation benefits for persons assisting law enforcement or fire control officers); Cal. Stats. 1963, Ch. 1685 (amendments and repeals of inconsistent special statutes); Cal. Stats. 1963, Ch. 1686 (amendments and repeals of inconsistent special statutes); Cal. Stats. 1963, Ch. 2029 (amendments and repeals of inconsistent special statutes).

See also *Recommendation Relating to Sovereign Immunity: Number 8--Revisions of the Governmental Liability Act*, 7 CAL. L. REVISION COMM'N REPORTS 401 (1965). For a legislative history of this recommendation, see 7 CAL. L. REVISION COMM'N REPORTS 914 (1965). See also Cal. Stats. 1965, Ch. 653 (claims and actions against public entities and public employees); Cal. Stats. 1965, Ch. 1527 (liability of public entities for ownership and operation of motor vehicles).

See also *Recommendation Relating to Sovereign Immunity: Number 9--Statute of Limitations in Actions Against Public Entities and Public Employees*, 9 CAL. L. REVISION COMM'N REPORTS 49 (1969). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS 98 (1969).

See also *Recommendation Relating to Sovereign Immunity: Number 10--Revisions of the Governmental Liability Act*, 9 CAL. L. REVISION COMM'N REPORTS 801 (1969). For a legislative history of this recommendation, see 10 CAL. L. REVISION COMM'N REPORTS 1020 (1971). Most of the recommended legislation was enacted. See Cal. Stats. 1970, Ch.

662 (entry to make tests) and Ch. 1099 (liability for use of pesticides, liability for damages from tests). See also Proposed Legislation Relating to Statute of Limitations in Actions Against Public Entities and Public Employees, 9 CAL. L. REVISION COMM'N REPORTS 175 (1969). For a legislative history of this recommendation, see 10 CAL. L. REVISION COMM'N REPORTS 1021 (1971). The recommended legislation was enacted. See Cal. Stats. 1969, Ch. 104.

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2. Evidence. Whether the Evidence Code should be revised. ²
3. Inverse condemnation. Whether the decisional, statutory, and constitutional rules governing the liability of public entities for inverse condemnation should be revised (including but not limited to the liability for inverse condemnation resulting from flood control projects) and whether the law relating to the liability of private persons under similar circumstances should be revised.

2

Authorized by Cal. Stats. 1965, Res. Ch. 130, at 5289.

See Recommendation Proposing an Evidence Code, 7 CAL. L. REVISION COMM'N

REPORTS 1 (1965). A series of tentative recommendations and research studies relating to the Uniform Rules of Evidence was published and distributed for comment prior to the preparation of the recommendation proposing the Evidence Code. See 6 CAL. L. REVISION COMM'N REPORTS at 1, 101, 201, 301, 701, 801, 901, 1001, and Appendix (1964). For a legislative history of this recommendation, see 7 CAL. L. REVISION COMM'N REPORTS 912-914 (1965). See also Evidence Code With Official Comments, 7 CAL. L. REVISION COMM'N REPORTS 1001 (1965). See also Cal. Stats. 1965, Ch. 299 (Evidence Code).

See also Recommendations Relating to the Evidence Code: Number 1—Evidence Code Revisions; Number 2—Agricultural Code Revisions; Number 3—Commercial Code Revisions, 8 CAL. L. REVISION COMM'N REPORTS 101, 201, 301 (1967). For a legislative history of these recommendations, see 8 CAL. L. REVISION COMM'N REPORTS 1315 (1967). See also Cal. Stats. 1967, Ch. 650 (Evidence Code revisions); Cal. Stats. 1967, Ch. 262 (Agricultural Code revisions); Cal. Stats. 1967, Ch. 703 (Commercial Code revisions).

See also Recommendation Relating to the Evidence Code: Number 4—Revision of the Privileges Article, 9 CAL. L. REVISION COMM'N REPORTS 501 (1969). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS 98 (1969).

See also Recommendation Relating to the Evidence Code: Number 5—Revisions of the Evidence Code, 9 CAL. L. REVISION COMM'N REPORTS 137 (1969). For a legislative history of this recommendation, see 10 CAL. L. REVISION COMM'N REPORTS 1018 (1971). Some of the recommended legislation was enacted. See Cal. Stats. 1970, Ch. 69 (*res ipsa loquitur*), 1397 (psychotherapist-patient privilege).

Ch.

See also report concerning Proof of Foreign Official Records, 10

CAL. L. REVISION COMM'N REPORTS 1022; Cal. Stats. 1970, Ch. 41.

This topic is under continuing study to determine whether any substantive, technical, or clarifying changes are needed in the Evidence Code and whether changes are needed in other codes to conform them to the Evidence Code. See 10 CAL. L. REVISION COMM'N REPORTS 1015 (1971).

3

Authorized by Cal. Stats. 1970, Res. Ch. 45, at 3539; see also Cal. Stats. 1965, Res. Ch. 130, at 5289.

See Recommendation Relating to Inverse Condemnation: Insurance Coverage (October 1970), reprinted in 10 CAL. L. REVISION COMM'N REPORTS 1051 (1971). For a legislative history of this recommendation, see 10 CAL. L. REVISION COMM'N REPORTS 0000 (1971). The recommended legislation was enacted. See Cal. Stats. 1971, Ch. 140.

See also Recommendation Relating to Sovereign Immunity: Number 10--Revisions of the Governmental Liability Act, 9 CAL. L. REVISION COMM'N REPORTS 801 (1969). For a legislative history of this recommendation, see 10 CAL. L. REVISION COMM'N REPORTS 1020 (1971). Most of the recommended legislation was enacted. See Cal. Stats. 1970, Ch. 662 (entry to make tests) and Ch. 1099 (liability for use of pesticides, liability for damages from tests). See also Proposed Legislation Relating to Statute of Limitations in Actions Against Public Entities and Public Employees, 9 CAL. L. REVISION COMM'N REPORTS 175 (1969). For a legislative history of this recommendation, see 10 CAL. L. REVISION COMM'N REPORTS 1021 (1971). The recommended legislation was enacted. See Cal. Stats. 1969, Ch. 104.

(June 1971),

See also Van Alstyne, California Inverse Condemnation Law, reprinted in 10 CAL. L. REVISION COMM'N REPORTS 1 (1971).

20

4. Lease law. Whether the law relating to the rights and duties attendant upon termination or abandonment of a lease should be revised. ✓₄
5. Fictitious business names. Whether the law relating to the use of fictitious names should be revised. ✓₅
6. Escheat; unclaimed property. Whether the law relating to the escheat of property and the disposition of unclaimed or abandoned property should be revised. ✓₆

4

Authorized by Cal. Stats. 1965, Res. Ch. 130, at 5289; see also Cal. Stats. 1957, Res. Ch. 202, at 4589.

See Recommendation and Study Relating to Abandonment or Termination of a

Lease, 8 CAL. L. REVISION COMM'N REPORTS 701 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS 1318 (1967).

See also *Recommendation Relating to Real Property Leases*, 9 CAL. L. REVISION COMM'N REPORTS 401 (1969). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS 98 (1969).

See also *Recommendation Relating to Real Property Leases*, 9 CAL. L. REVISION COMM'N REPORTS 153 (1969). For a legislative history of this recommendation, see 10 CAL. L. REVISION COMM'N REPORTS 1018 (1971). The recommended legislation was enacted. See Cal. Stats. 1970, Ch. 89.

5

Authorized by Cal. Stats. 1957, Res. Ch. 202, at 4589.

See Recommendation Relating to Fictitious Business Names, 9 CAL.

L. REVISION COMM'N REPORTS 71 (1969). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS 98 (1969).

The recommended legislation was enacted. See Cal. Stats. 1969, Ch. 114.

See also Recommendation and Study Relating to Fictitious Business Names, 9 CAL. L. REVISION COMM'N REPORTS 601 (1969). For a legislative history of this recommendation, see 10 CAL. L. REVISION COMM'N REPORTS 1019 (1971). The recommended legislation was enacted. See Cal. Stats. 1970, Ch. 618.

6

Authorized by Cal. Stats. 1967, Res. Ch. 81, at 4592; see also Cal. Stats. 1956, Res. Ch. 42, at 263.

See Recommendation Relating to Escheat, 8 CAL. L. REVISION COMM'N REPORTS

1001 (1967). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS 10-18 (1969). Most of the recommended legislation was enacted. See Cal. Stats. 1968, Ch. 247 (escheat of decedent's estate) and Ch. 356 (unclaimed property act).

7. Quasi-community property. Whether the law relating to quasi-community property and property described in Section 201.5 of the Probate Code should be revised. ✓
8. Powers of appointment. Whether the law relating to a power of appointment should be revised. ✓
9. Unincorporated associations. Whether the law relating to suit by and against partnerships and other unincorporated associations should be revised and whether the law relating to the liability of such associations and their members should be revised. ✓

7

Authorized by Cal. Stats. 1966, Res. Ch. 9, at 241.

See Recommendation and Study Relating to Rights of Surviving Spouse in Prop-

erty Acquired by Decedent While Domiciled Elsewhere, 1 CAL. L. REVISION COMM'N REPORTS at E-1 (1957). For a legislative history of this recommendation, see 2 CAL. L. REVISION COMM'N REPORTS, 1958 Report at 13 (1959). The recommended legislation was enacted. See Cal. Stats. 1957, Ch. 490. See *Recommendation and Study Relating to Inter Vivos Marital Property Rights in Property Acquired While Domiciled Elsewhere*, 3 CAL. L. REVISION COMM'N REPORTS at I-1 (1961). For a legislative history of this recommendation, see 4 CAL. L. REVISION COMM'N REPORTS 15 (1963). The recommended legislation was enacted. See Cal. Stats. 1961, Ch. 636.

See also *Recommendation Relating to Quasi-Community Property*, 9 CAL. L. REVISION COMM'N REPORTS 113 (1969). For a legislative history of this recommendation, see 10 CAL. L. REVISION COMM'N REPORTS 1019 (1971). The recommended legislation was enacted. See Cal. Stats. 1970, Ch. 312.

8

Authorized by Cal. Stats. 1965, Res. Ch. 130, at 5289.

See Recommendation and Study Relating to Powers of Appointment,

9 CAL. L. REVISION COMM'N REPORTS 301 (1969). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS 98 (1969). The recommended legislation was enacted. See Cal. Stats. 1969, Chs. 118, 155.

9

Authorized by Cal. Stats. 1966, Res. Ch. 9, at 241; see also Cal. Stats. 1957, Res. Ch. 202, at 4589.

See Recommendation and Study Relating to Suit by or Against an Unincorporated

Association, 8 CAL. L. REVISION COMM'N REPORTS 901 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS 1317 (1967). The recommended legislation was enacted. See Cal. Stats. 1967, Ch. 1324.

See also *Recommendation Relating to Service of Process on Unincorporated Associations*, 8 CAL. L. REVISION COMM'N REPORTS 1403 (1967). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS 18-19 (1969). The recommended legislation was enacted. See Cal. Stats. 1968, Ch. 132.

10. Counterclaims and cross-complaints. Whether the law relating to counterclaims and cross-complaints should be revised. 10

11. Joinder of causes of action. Whether the law relating to joinder of causes of action should be revised. 11

10

Authorized by Cal. Stats. 1969, Res. Ch. 224, at 3888; see also 9 CAL. L. REVISION COMM'N REPORTS 25 (1969).

See Recommendation and Study Relating to Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions (October 1970), reprinted in 10 CAL. L. REVISION COMM'N REPORTS 501 (1971). For a legislative history of this recommendation, see 10 CAL. L. REVISION COMM'N REPORTS 0000 (1971). The recommended legislation was enacted. See Cal. Stats. 1971, Ch. 244. See also Cal. Stats. 1971, Ch. 0000.

11

Ibid.

TOPICS FOR FUTURE CONSIDERATION

During the next few years, the Commission plans to devote its attention primarily to (1) attachment, garnishment, and exemptions from execution and (2) condemnation law and procedure. Legislative committees have indicated that they wish these topics to be given priority.

Because of the limited resources available to the Commission and the substantial topics already on its agenda, the Commission does not recommend any additional topics for inclusion on its agenda. The Commission does recommend, however, that the scope of one previously authorized topic be expanded. The expanded topic is described below.



24

A study to determine whether the law relating to custody of children, adoption, guardianship, freedom from parental custody and control, and related matters should be revised.

Resolution Chapter 42 of the Statutes of 1956 authorized the Law Revision Commission to study "whether the law relating to jurisdiction of courts in proceedings affecting the custody of children should be revised."¹ The Commission retained Professor Brigitte M. Bodenheimer, Research Professor of Law, University of California, Davis, to prepare a background study on this topic. Professor Bodenheimer's study has been completed and published in the Stanford Law Review.² Perhaps the most important of Professor Bodenheimer's recommendations is that the standards for custody determinations be made uniform, whether the custody issue is raised in a proceeding under the Family Law Act or in a guardianship, adoption, or other proceeding.

One problem in attempting to achieve such uniformity is that the present provisions relating to child custody are hopelessly intertwined with other matters in the various statutes dealing with the subject. For example, the statute governing guardianship proceedings commingles provisions relating to guardianship of the person of a minor with provisions relating to guardianship of the person of an adult incompetent and, in addition, commingles these provisions with provisions relating to guardianship of the estates of such persons. To deal with the child custody problems in a guardianship proceeding, it will be necessary to sort out the provisions relating to guardianship of

1. See 1 Cal. L. Revision Comm'n Reports, 1956 Report at 29 (1957).

2. See Bodenheimer, The Multiplicity of Child Custody Proceedings--Problems of California Law, 23 Stan. L. Rev. 703 (1971).

the person of a minor and to completely reorganize the entire guardianship statute. Any useful reorganization of the guardianship statute should also include revisions needed to modernize the statute generally. However, the study previously authorized covers only child custody and does not permit a study of other needed changes in the guardianship law.

Similarly, some reorganization of the existing statutory provisions relating to adoption is absolutely essential in order to draft legislation to effectuate Professor Bodenheimer's recommendations. But, in addition, the Commission believes an overall reorganization of this body of law is needed. In reorganizing a new adoption statute, it would no doubt be desirable to also make substantive revisions that might not be within the scope of the previously authorized study.

In short, the Commission believes that the maximum return for the resources expended can be realized only if other aspects of the various statutes that will need to be reorganized in effectuating the child custody recommendations are reviewed at the time these statutes are redrafted. Accordingly, the Commission recommends that the scope of the study previously authorized be expanded to permit this review.³

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3. In connection with the study of the law relating to guardianship proceedings, it should be noted that a special committee of the State Bar has been appointed to study the Uniform Probate Code. This committee has under study the provisions of the Uniform Probate Code dealing with the protection of persons under disability and their property. See California and the Uniform Probate Code, 46 Cal. S.B.J. 290, 294 (1971). If the previously authorized study is expanded as recommended, the Commission would defer work on child custody aspects of guardianship law until the State Bar committee has completed its study of the related portion of the Uniform Probate Code.

LEGISLATIVE HISTORY OF RECOMMENDATIONS SUBMITTED TO 1971 LEGISLATIVE SESSION

Four bills and two concurrent resolutions were introduced to effectuate the Commission's recommendations to the 1971 session of the Legislature. All of the bills were enacted, and

The concurrent resolutions were adopted. Of 108 sections recommended to the 1971 Legislature, 107 were enacted.

Following past practice, special reports were adopted by legislative committees that considered the bills recommended by the Commission. Each report, which was printed in the legislative journal, accomplished three things: First, it declared that the Committee presented the report to indicate more fully its intent with respect to the particular bill; second, where appropriate, it stated that the comments under the various sections of the bill contained in the Commission's recommendation reflected the intent of the Committee in approving the bill except to the extent that new or revised comments were set out in the Committee report itself; third, where necessary, the report set out one or more new or revised comments to various sections of the bill in its amended form, stating that such comments also reflected the intent of the Committee in approving the bill. The report relating to the bills that were enacted ~~is~~ included as ~~an~~ appendix to this Report. The following legislative history includes a reference to the report or reports that relate to each bill.

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Resolutions Approving Topics for Study

Senate Concurrent Resolution No. 22, introduced by Senator Alfred H. Song and adopted as Resolution Chapter 74 of the Statutes of 1971, authorizes the Commission to continue its study of topics previously authorized for study and to remove from its calendar two topics (taking instructions to the jury room in civil cases and trial preferences) on which no legislation was recommended and to remove seven additional topics on which Commission recommended legislation has already been enacted.

Senate Concurrent Resolution No. 23, introduced by Senator Song and adopted as Resolution Chapter No. 75 of the Statutes of 1971, authorizes the Commission to make a study to determine whether the parol evidence rule should be revised and whether the law relating to the award of pre-judgment interest in civil actions and related matters should be revised.

Pleading Revisions

* Senate Bill 201.

^ Senate Bill 201, which in amended form became Chapter 244 of the Statutes of 1971, was introduced by Senator Song and Assemblyman Moorhead to effectuate the recommendation of the Commission on this subject. See Recommendation and Study Relating to Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions, 10 CAL. L. REVISION COMM'N REPORTS 501 (1971); Report of Senate Committee on Judiciary on Senate Bill 201, Senate J. (April 1, 1971) at 884, reprinted as Appendix I to this Report; Communication From Assembly Committee on Judiciary on Senate Bill 201, Assembly J. (June 16, 1971) at 5238, reprinted as Appendix II to this Report.

* Senate Bill 953.

^ Section 379 of the Code of Civil Procedure was amended by Chapter 244 of the Statutes of 1971. Senate Bill 953, which had been introduced by Senator Song, was amended upon recommendation of the Commission and was enacted as Chapter 950 of the Statutes of 1971. Chapter 950 amends Section 379 of the Code of Civil Procedure to add subdivision (c), which retains without change former Code of Civil Procedure Section 379c. Subdivision (c) was added to retain the effect of the decision of the California Supreme Court in Landau v. Salam, 4 Cal.3d 901, 484 P.2d 1390, 95 Cal. Rptr. 46 (1971). See Report of Senate Committee on Judiciary on Senate Bill 953, Senate J. (Sept. 27, 1971) at 6746, reprinted as Appendix III to this Report.

* Amendments made to Senate Bill 201.

^ The following significant amendments were made to Senate Bill 201:

(1) Code of Civil Procedure Section 425.20, as introduced (providing that causes of action did not need to be separately stated), was deleted; a new Section 425.20 (specifying when causes of action must be separately stated) was substituted.

(2) Section 426.20, which would have been added to the Code of Civil Procedure by the bill as introduced, was deleted. A reference to that section was deleted from Section 431.70.

(3) Code of Civil Procedure Section 426.30 was amended to substitute in subdivision (a) the clause "such party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded" for the clause "all his rights against the plaintiff on the related cause of action not pleaded shall be deemed waived and extinguished."

(4) Code of Civil Procedure Section 426.50 was amended as follows: In the first sentence, the phrase "in good faith" was deleted following "A party who"; the phrase "may apply to the court for leave to amend his pleading, or to file a cross-complaint, to assert such cause at any time during the course of the action" was substituted for "shall upon application to the court prior to trial be granted leave to assert such cause unless the granting of such leave will result in substantial injustice to the opposing party." The second and third sentences were added. Subdivision (b), which was included in the bill as introduced, was deleted.

(5) Code of Civil Procedure Section 426.60 was amended to add subdivision (c).

(6) Code of Civil Procedure Section 428.10 was amended to add the second sentence to subdivision (a).

(7) Code of Civil Procedure Section 428.30 was amended to add the phrase "other than the plaintiff in an eminent domain proceeding."

(8) Code of Civil Procedure Section 429.40, which was not included in the bill as introduced, was added.

(9) Code of Civil Procedure Section 430.10 was amended to add the phrase "by demurrer or answer as provided in Section 430.30" to the introductory clause. Subdivision (e) was amended to conform to amended Section 425.20.

(10) Code of Civil Procedure Section 430.20 was amended to add the phrase "by demurrer as provided in Section 430.30" to the introductory clause.

(11) Code of Civil Procedure Section 431.70 was amended to substitute the phrase "failure to assert it in a prior action" for the phrase "previous failure to assert it" in the third sentence.

Other technical amendments were made.

Insurance Against Inverse Condemnation Liability

Assembly Bill 333, which became Chapter 140 of the Statutes of 1971, was introduced by Assemblyman Moorhead and Senator Song to effectuate the recommendation of the Commission on this subject. See Recommendation Relating to Inverse Condemnation: Insurance Coverage, 10 CAL. L. REVISION COMM'N REPORTS 1051 (1971). The bill was enacted as introduced.

Discharge From Employment

Senate Bill 594, which became Chapter of the Statutes of 1971, was introduced by Senator Song and Assemblyman McAlister to effectuate the recommendation of the Commission on this subject. See Recommendation Relating to Attachment, Garnishment, and Exemptions From Execution: Discharge From Employment (March 1971), reprinted as Appendix IV to this Report. The bill was enacted after the words "the payment of" were inserted in the second sentence of subdivision (b) of Labor Code Section 2929.

REPORT ON STATUTES REPEALED BY IMPLICATION OR HELD UNCONSTITUTIONAL

Section 10331 of the Government Code provides:

The Commission shall recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the Supreme Court of the State or the Supreme Court of the United States.

Pursuant to this directive the Commission has made a study of the decisions of the Supreme Court of the United States and of the Supreme Court of California handed down since the Commission's last Annual Report was prepared.¹ It has the following to report:

(1) No decision of the Supreme Court of the United States or of the Supreme Court of California holding a statute of this state repealed by implication has been found.

(2) No decision of the Supreme Court of the United States holding a statute of this state unconstitutional has been found.

(3) Eight decisions of the Supreme Court of California holding statutes of this state unconstitutional have been found.

In re Antazo² held that an indigent defendant's imprisonment because of his inability to pay a fine imposed as a condition of probation was an invidious discrimination based upon wealth, and therefore Penal Code Sections 1205 and 13521 (which authorize the imposition of a fine and the levy of a penalty assessment as well as imprisonment pending payment thereof) violate the equal protection clause of the Fourteenth Amendment of the United States Constitution when applied to indigent defendants.

People v. Tenorio³ held that Health and Safety Code Section 11718 (which provided that, except upon motion of the district attorney, a court could not strike from an accusatory pleading an allegation of fact which, if admitted or found to be true, would change the penalty for the offense charged in a narcotics case) violated the constitutional separation of powers embodied in Article VI, Section 1, and Article III of the California Constitution.

¹ This study has been carried through 39 U.S.L.W. 4893 (June 30, 1971) and 5 Cal.3d 670 (1971).

² 3 Cal.3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970).

³ 3 Cal.3d 89, 473 P.2d 993, 89 Cal. Rptr. 249 (1970), overruling People v. Sidener, 58 Cal.2d 645, 375 P.2d 641, 25 Cal. Rptr. 697 (1962).

In re King⁴ declared unconstitutional that portion of Penal Code Section 270 which made nonsupport by a resident father a misdemeanor and nonsupport by a father who remained out of the state for 30 days a felony. It was held that such a distinction abridged the equal protection clause embodied in the Fourteenth Amendment to the United States Constitution and Sections 11 and 21 of Article I of the California Constitution, the constitutional "right to travel," and the privileges and immunities clause of Article IV, Section 2, of the United States Constitution.

Sail'er Inn, Inc. v. Kirby⁵ held unconstitutional Business and Professions Code Section 25656, which prohibited females from tending bar except in certain situations. Section 25656 was found repugnant both to Section 18 of Article XX of the California Constitution (which declares that a person may not be disqualified because of sex from entering or pursuing a lawful business) and to the equal protection clause of the California and United States Constitutions. Section 25656 was also held to conflict with the federal Civil Rights Act of 1964.

Esteybar v. Municipal Court⁶ declared that Penal Code Section 17(b)(5) violated the doctrine of separation of powers set forth in Section 1 of Article III of the California Constitution insofar as the statute required the consent of the prosecutor before a magistrate ^{could} ~~may~~ exercise the power to determine that a charged offense ^{was} ~~is~~ to be tried as a misdemeanor.

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4. 3 Cal.3d 226, 474 P.2d 983, 90 Cal. Rptr. 15 (1970). For the constitutional right to travel, see, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969).
 5. 5 Cal.3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).
 6. 5 Cal.3d 119, 485 P.2d 1140, 95 Cal. Rptr. 524 (1971).

Blair v. Pitchess⁷ held that execution of the California claim and delivery process under Code of Civil Procedure Sections 509-521 violated both the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Section 13 of Article I of the California Constitution and the unreasonable searches and seizures provisions of the Fourth Amendment of the United States Constitution and Section 19 of Article I of the California Constitution.

Randone v. Appellate Department⁸ held that the California prejudgment levy of attachment procedure under subdivision 1 of Section 537 of the Code of Civil Procedure--which permitted the initial attachment of a debtor's property without affording him either notice of the attachment or a prior hearing--violated procedural due process as guaranteed by Section 13 of Article I of the California Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

7. 5 Cal.3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

8. 5 Cal.3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).

Serrano v. Friest⁹ held that a complaint, alleging in substance that the California public school financing system violates the equal protection clauses of the federal and state constitutions by effecting substantial educational inequality between wealthy and poorer school districts, stated facts sufficient to constitute a cause of action.¹⁰ Accepting as true the facts alleged in the complaint as supplemental by matters judicially noted, the court found "irrefutable" plaintiff's contention that the California school financing system classifies on the basis of wealth, stated that education is a "fundamental interest," rejected the argument that the financing system as presently constituted is necessary to the attainment of any compelling state interest, and therefore concluded that the California school financing system¹¹ violates the equal protection clauses of the Fourteenth Amendment to the United States Constitution and Sections 11 and 21 of Article I of the California Constitution.¹²

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9. 5 Cal.3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).
 10. The trial court sustained demurrers with leave to amend and, on plaintiffs' failure to do so, granted defendants' motion for dismissal. The Supreme Court reversed the judgment of dismissal and remanded with directions to overrule the demurrers and allow defendants a reasonable time to answer.
 11. Although the court refers to various statutory provisions, it did not indicate the specific statutory provisions held to be unconstitutional, and the Commission has made no attempt to determine the specific statutory provisions that are affected by the court's decision.
 12. See 5 Cal.3d 584, 596 n.11, 487 P.2d 1241, 1249 n.11, 96 Cal. Rptr. 601, 609 n.11 (1971).

RECOMMENDATIONS

The Law Revision Commission respectfully recommends that the Legislature authorize the Commission to complete its study of the topics previously authorized for study (see pages 0000-0000 of this Report) and that the scope of one topic previously authorized for study be expanded (see pages 0000-0000 of this Report).

Pursuant to the mandate imposed by Section 10331 of the Government Code, the Commission recommends the repeal of the provisions referred to on pages 0000-0000 to the extent that those provisions are unconstitutional.

APPENDIX I

REPORT OF SENATE COMMITTEE ON JUDICIARY
ON SENATE BILL 201

[Extract from Senate Journal for April 1, 1971 (1971 Regular Session).]

In order to indicate more fully its intent with respect to Senate Bill 201, the Senate Committee on Judiciary makes the following report:

Except for the revised comments set out below, the comments contained under the various sections of Senate Bill 201 as set out in the *Recommendation of the California Law Revision Commission Relating to Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions* (October 1970), 10 Cal. L. Revision Comm'n Reports 501 (1971), reflect the intent of the Senate Committee on Judiciary in approving the various provisions of Senate Bill 201.

Code of Civil Procedure Section 425.20 (new)

Comment. Section 425.20 continues without substantive change the portion of former Code of Civil Procedure Section 427 that related to the separate statement of causes of action.

Code of Civil Procedure Section 426.30 (new)

Comment. Section 426.30 continues the substance of the former compulsory counterclaim rule (former Code of Civil Procedure Section 439). However, since the scope of a cross-complaint is expanded to include claims which would not have met the "defeat or diminish" or "several judgment" requirements of the former counterclaim statute, the scope of the former rule is expanded by Section 426.30 to include some causes of action that formerly were not compulsory. See discussion in Friedenthal, *Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions*, 23 STAN. L. REV. 1, 17-27 (1970). As to the limitations under former law, compare *Hill v. Snidow*, 100 Cal. App.2d 37, 222 P.2d 962 (1950) (later action by purchaser to recover money paid under land sale contract barred for failure to assert it by counterclaim in prior quiet title action), with *Hanes v. Coffee*, 212 Cal. 777, 780, 300 P. 963, 964 (1931) ("The complaint seeks to quiet title; the counterclaim is for damages. The granting of the recovery prayed for in the counterclaim would not diminish or defeat the plaintiff's recovery; it would not affect the relief demanded in the complaint in the slightest degree.").

Only related causes of action that exist at the time of service of the answer to the complaint on the particular plaintiff are affected by Section 426.30.

A court must grant to a party who acted in good faith leave to assert a related cause of action he failed to allege in a cross-complaint if the party applies for such leave. See Section 426.50.

Subdivision (b) is new. It is designed to prevent unjust forfeiture of a cause of action. Paragraph (1) treats the situation where a party is not subject to a personal judgment, jurisdiction having been obtained only over property owned by him. In this situation, although the party against whom the complaint (or cross-complaint) is filed is not required to plead his related cause of action in a cross-complaint, he may do so at his election. If he elects to file a cross-complaint, he is required to assert all related causes of action in his cross-complaint. Paragraph (1) is similar to Rule 13(a)(2) of the Federal Rules of Civil Procedure. See Section 426.10(a) (defining complaints to include cross-complaints).

Paragraph (2) of subdivision (b) permits a party to default without waiving any cause of action. If the party does not desire to defend the action and a default judgment is taken, it would be unfair if an additional consequence of such default were that all related causes of action the party had would be waived and extinguished.

Note that, although Section 426.30 may not apply to a particular case, independent application of the rules of res judicata or collateral estoppel, if any, is not affected.

Code of Civil Procedure Section 426.50 (new)

Comment. Under Section 426.50, the court must grant leave to assert a cause if the party requesting leave acted in good faith. This section is to be construed liberally to prevent forfeiture of causes of action. Where necessary, the court may grant such leave subject to terms or conditions which will prevent injustice, such as postponement or payment of costs.

Section 426.50 supplements the authority provided generally to amend pleadings. See Section 473 of the Code of Civil Procedure. For authority to file a permissive cross-complaint, see Section 428.50. Likewise, Section 426.50 does not preclude the granting of relief from a judgment or order under Section 473.

Code of Civil Procedure Section 426.60 (new)

Comment. Section 426.60 limits the application of compulsory joinder of causes to ordinary civil actions.

Subdivision (a). Subdivision (a) makes the provisions for compulsory joinder of causes inapplicable to special proceedings. The statute governing a particular special proceeding may, of course, provide compulsory joinder rules for that proceeding, and Sections 426.60 has no effect on those rules. Likewise, the fact that this article is not applicable in special proceedings does not preclude the independent application, if any, of res judicata or collateral estoppel.

The extent to which former Code of Civil Procedure Section 439 (compulsory counterclaims) applied to special proceedings was unclear. *Cf. Bacciocco v. Curtis*, 12 Cal.2d 109, 116, 82 P.2d 385, 388 (1938) (court stated that res judicata did not bar subsequent action by lessee to recover deposit paid to lessor where lessee failed to assert his claim for return of deposit in earlier unlawful detainer proceeding). As a practical matter, the requirement that the counterclaim diminish or defeat the plaintiff's recovery probably severely limited the applicability of Section 439 in special proceedings. See discussion in Comment to Section 426.30.

Subdivision (b). Subdivision (b) excepts actions brought in small claims court from compulsory joinder requirements. Thus, the compulsory joinder rules do not require that a person join a related cause of action in an action in the small claims court—even where the related cause is for an amount within the court's jurisdiction.

The substance of the rule that the only claim by the defendant that is permitted in the small claims court is one within the jurisdictional limit of the small claims court is continued in Code of Civil Procedure Sections 117h and 117r. However, such a claim is not compulsory under Section 426.30. This changes prior law under which counterclaims within the jurisdictional limits of the small claims court apparently were compulsory. See *Thompson v. Chew Quan*, 167 Cal. App.2d Supp. 825, 334 P.2d 1074 (1959) (dictum). For a criticism of the prior law and a discussion of the problems resulting from the application of the former compulsory counterclaim rule in the small claims court, see Friedenthal, *Civil Procedure*, CAL LAW—TRENDS AND DEVELOPMENTS 191, 238-243 (1969). As to the application of the doctrine of res

judicata to small claims courts, see *Sanderson v. Nicmann*, 17 Cal.2d 563, 110 P.2d 1025 (1941). See also 3 B. WITKIN, CALIFORNIA PROCEDURE *Judgments* § 46 (b) (1954).

Subdivision (c). Subdivision (c) makes the provisions for compulsory joinder of causes inapplicable where the only remedy sought by any party to an action is a declaration of the rights and duties of the parties. If any party to an action seeks a remedy other than declaratory relief, the compulsory joinder provisions apply. The inapplicability of the compulsory joinder provisions in actions involving solely a claim for declaratory relief does not preclude any application of the doctrines of res judicata or collateral estoppel.

Code of Civil Procedure Section 427.10 (new)

Comment. Section 427.10 supersedes former Code of Civil Procedure Section 427 and eliminates the arbitrary categories set forth in that section. Section 427.10 relates only to joinder of causes of action against persons who are properly made parties to the action; the rules governing permissive joinder of parties are stated in Sections 378, 379, and 428.20.

Under former Section 427, plaintiff could join causes unrelated to one another only when they happened to fall within one of the stated categories. The broad principle reflected in Section 427.10 (complaints) and Sections 428.10 and 428.30 (cross-complaints)—that, once a party is properly joined in an action because of his connection to a single cause of action, adverse parties may join any other causes against him—has been adopted in many other jurisdictions. See, e.g., Rule 18(a) of the Federal Rules of Civil Procedure. For further discussion, see Friedenthal, *Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions*, 23 STAN. L. REV. 1 (1970).

Any undesirable effects that might result from the unlimited joinder permitted by Section 427.10 may be avoided by severance of causes or issues for trial under Section 1048 of the Code of Civil Procedure.

Code of Civil Procedure Section 428.30 (new)

Comment. Section 428.30 provides permissive joinder rules that treat a cross-complaint the same as a complaint in an independent action. Cf. Section 427.10. Thus, if a party files a cross-complaint against either an original party or a stranger or both, he may assert in his cross-complaint any additional causes of action he has against any of the cross-defendants. See the Comment to Section 427.10. Any undesirable effects that might result from joinder of causes under Section 428.30 may be avoided by severance of causes or issues for trial under Section 1048.

Code of Civil Procedure Section 428.50 (new)

Comment. The first sentence of Section 428.50 continues the substance of a portion of former Code of Civil Procedure Section 442 except that it makes clear that a cross-complaint may be filed "before" as well as at the same time as the answer. As under former Section 442, permission of the court is required to file a cross-complaint subsequent to the answer. The language "may be granted" of Section

428.50 places the question of leave to file a cross-complaint after the answer wholly in the discretion of the court; it is to be distinguished from the mandatory language "shall grant" of Section 426.50 relating to compulsory cross-complaints.

Code of Civil Procedure Section 430.10 (new)

Comment. Section 430.10 continues the grounds for objection to a complaint by demurrer (former Code of Civil Procedure Section 430) or answer (former Code of Civil Procedure Section 433) except that improper joinder of causes of action is no longer a ground for objection. Any cause of action may be joined against any person who is properly a party in the action. See Sections 427.10, 428.10, and 428.30 (joinder of causes). See also Sections 378 and 379 (joinder of parties).

In addition, Section 430.10 applies to cross-complaints (which now include claims that formerly would have been asserted as counterclaims) while former Code of Civil Procedure Sections 430 applied only to a "complaint."

Code of Civil Procedure Section 431.70 (new)

Comment. Section 431.70 continues the substantive effect of former Code of Civil Procedure Section 440. See *Jones v. Mortimer*, 28 Cal.2d 627, 170 P.2d 893 (1946); *Sunrise Produce Co. v. Malovich*, 101 Cal. App.2d 520, 225 P.2d 973 (1950). Section 431.70, however, is expressly limited to cross-demands for money and specifies the procedure for pleading the defense provided by the section. It is not necessary under Section 431.70, as it was not necessary under Section 440, that the cross-demands be liquidated. See *Hauger v. Gates*, 42 Cal.2d 752, 269 P.2d 609 (1954). Section 431.70 ameliorates the effect of the statute of limitations; it does not revive claims which have previously been waived by failure to plead them under Section 426.30. This was implied (under former Code of Civil Procedure Section 439) in *Jones v. Mortimer*, *supra*. See also *Franck v. J. J. Sugarman-Rudolph Co.*, 40 Cal.2d 81, 251 P.2d 949 (1952), holding that Code of Civil Procedure Section 440 did not revive claims previously waived. It should be noted that, if defendant defaults without answering, he will not later be barred from maintaining an action on what would have been a compulsory counterclaim. See Section 426.30(b)(2). Though the statute of limitations may run on such a claim saved by prior default, it will be permitted as set-off under Section 431.70 as in other cases. Where a cause of action is one not required to be asserted in a cross-complaint under Section 426.30, there is no requirement that it be asserted by way of defense under Section 431.70.

Code of Civil Procedure Section 1048 (amended)

Comment. Section 1048 is revised to conform in substance to Rule 42 of the Federal Rules of Civil Procedure. The revision makes clear not only that the court may sever causes of action for trial but also that the court may sever issues for trial. For further discussion, see the Advisory Committee's Note of 1966 to Subdivision (b) of Rule 42 of the Federal Rules of Civil Procedure. Formerly, Section 1048 provided

that "an action may be severed" by the court but did not specifically authorize the severance of issues for trial. Absent some specific statute dealing with the particular situation, the law was unclear whether an issue could be severed for trial. See 2 B. WITKIN, CALIFORNIA PROCEDURE Pleading § 160 at 1138 (1954) ("There is a dearth of California authority on the meaning and effect of [the "action may be severed" portion of Section 1048]; the relatively few decisions merely emphasize its discretionary character.").

Section 1048 does not deal with the authority of a court to enter a separate final judgment on fewer than all the causes of action or issues involved in an action or trial. See Code of Civil Procedure Sections 578-579; 3 Cal. Jur.2d *Appeal and Error* § 40; California Civil Appellate Practice §§ 5.4, 5.15-5.26 (Cal. Cont. Ed. Bar 1966); 3 Witkin, California Procedure *Appeal* §§ 10-14 (1954). This question is determined primarily by case law, and Section 1048 leaves the question to case law development.

Section 1048 *permits* the court to sever issues for trial. It does not affect any statute that *requires* that a particular issue be severed for trial. *E.g.*, Code of Civil Procedure Section 597.5 (separate trial on issue whether action for negligence of person connected with healing arts barred by statute of limitations required on motion of any party). The authority to sever issues for trial under Section 1048 may duplicate similar authority given under other statutes dealing with particular issues. *E.g.*, Code of Civil Procedure Sections 597 (separate trial of special defenses not involving merits), 598 (separate trial of issue of liability before trial of other issues). These sections have been retained, however, because they include useful procedural details which continue to apply.

Where there are multiple parties, the court, under Section 379.5, may order separate trials or make such other orders as appear just to prevent any party from being embarrassed, delayed, or put to undue expense.

APPENDIX II

COMMUNICATION FROM ASSEMBLY COMMITTEE ON
JUDICIARY ON SENATE BILL 201

[Extract from Assembly Journal for June 16, 1971 (1971 Regular Session).]

The Honorable Bob Moretti
Speaker of the Assembly

Dear Mr. Speaker: The Assembly Committee on Judiciary, having considered Senate Bill 201 and having reported the bill with an "Amend and Do Pass" recommendation, submits the following report in order to indicate more fully its intent with respect to this bill.

Senate Bill 201 was introduced to effectuate the *Recommendation of the California Law Revision Commission Relating to Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions* (October 1970). Except for the new and revised comments set out below, the comments contained under the various sections of Senate Bill 201 as set out in the Commission's recommendation, as revised by the Report of the Senate Committee on Judiciary on Senate Bill 201 (printed in the Senate Journal for April 1, 1971), reflect the intent of the Assembly Judiciary Committee in approving the bill.

The following new and revised comments also reflect the intent of the Assembly Committee on Judiciary in approving Senate Bill 201.

Code of Civil Procedure Section 378 (amended)

Comment. Section 378 continues the substance of former California law. See 3 B. Witkin, *California Procedure Pleading* §§ 161-163 (2d ed. 1971). It supersedes former Code of Civil Procedure Section 381, portions of Code of Civil Procedure Section 378, and portions of former Code of Civil Procedure Sections 383 and 384.

Subdivision (a)(1) and subdivision (b) of Section 378 are phrased in substantial conformity with Rule 20(a) of the Federal Rules of Civil Procedure. The broadest sort of joinder is permitted under the transaction clause of the federal rule and of Section 378. See C. Clark, *Code Pleading* 367 n.86, 369 n.94 (2d ed. 1947); 3 B. Witkin, *California Procedure Pleading* § 163 (2d ed. 1971). Paragraph (2) of subdivision (a) is derived from the "interest in the subject of the action" provision formerly found in Section 378 and expressed in principle in former Code of Civil Procedure Sections 381, 383, and 384. Paragraph (2) is not needed to expand the broad scope of permissive joinder under the transaction clause of subdivision (a)(1) but has been included to eliminate any possibility that the omission of the "interest in the subject of the action" provision formerly found in Section 378, and the deletion of other permissive joinder provisions, might be construed to preclude joinder in cases where it was formerly permitted.

The power of the court to sever causes where appropriate, formerly found in Section 378, is now dealt with separately in Section 379.5 (new).

Code of Civil Procedure Section 379 (amended)

Comment. Section 379 is amended to provide statutory standards for joinder of defendants comparable to those governing joinder of plaintiffs. See the Comment to Section 378.

The deleted provisions of Section 379 and former Code of Civil Procedure Sections 379a, 379b, 379c, 380, and 383 provided liberal joinder rules but were criticized for their uncertainty and overlap. See 1 J. Chadbourn, H. Grossman & A. Van Alstyne, *California Pleading* § 618 (1961); 3 B. Witkin, *California Procedure Pleading* § 166 (2d ed. 1971). The amendment to Section 379 substitutes the more understandable "transaction" test set forth in Rule 20(a) of the Federal Rules of Civil Procedure. However, in so doing, the section probably merely makes explicit what was implicit in prior decisions. See *Hong v. Superior Court*, 207 Cal. App.2d 611, 24 Cal. Rptr. 659 (1962). Paragraph (2) of subdivision (a) of Section 379 is included merely to make clear that Section 379 as amended permits joinder in any case where it formerly was permitted. See Comment to Section 378.

Paragraph (2) is derived from the deleted provisions of Section 379 and the principle stated in former Code of Civil Procedure Sections 379a, 379b, 379c, 380, and 383.

The phrase "in the alternative" in Section 379 retains without change the prior law under former Code of Civil Procedure Sections 379a and 379c. See 3 B. Witkin, *California Procedure Pleading* § 172(b) (2d ed. 1971); Fed. R. Civ. Proc., Rule 20(a) (permitting joinder of defendants where right to relief is asserted against them "in the alternative") and Official Form 10 ("Complaint for negligence where plaintiff is unable to determine definitely whether the person responsible is C.D. or E.F. or whether both are responsible . . ."). See *Kraft v. Smith*, 24 Cal.2d 124, 148 P.2d 23 (1944) (permitting joinder of two doctors who operated on plaintiff's leg at different times); *Landau v. Salam*, 4 Cal.3d 573, 464 P.2d 1390, 95 Cal. Rptr. 46 (May 24, 1971) (permitting joinder of two defendants who allegedly injured plaintiff in accidents occurring on separate days). See generally 3 B. Witkin, *California Procedure Pleading* §§ 172-176 (2d ed. 1971).

Code of Civil Procedure Section 379.5 (new)

Comment. Section 379.5 continues without significant substantive change the discretion of the court to sever causes where appropriate by combining former Sections 378 and 379b and making them applicable uniformly to any party—plaintiff or defendant. See generally 1 J. Chadbourn, H. Grossman & A. Van Alstyne, *California Pleading* § 622 (1961); 3 B. Witkin, *California Procedure Pleading* § 177 (2d ed. 1971). The federal counterpart to Section 379.5 is Rule 20(b) of the Federal Rules of Civil Procedure.

The general authority of a court to sever causes of action and issues for trial is contained in Section 1048.

Code of Civil Procedure Section 380 (repealed)

Comment. Section 380 is repealed. The section is made unnecessary by the liberal rule of permissive joinder set forth in Section 379. See 3 B. Witkin, *California Procedure Pleading* § 166 (2d ed. 1971); cf. 1 J. Chadbourn, H. Grossman & A. Van Alstyne, *California Pleading* § 621 (1961). Repeal of Section 380 does not affect the power of the court to issue a writ for possession in the type of case described in the section. See CODE CIV. PROC. §§ 681, 682(5). See also *Montgomery v. Tutt*, 11 Cal. 190 (1858) (power to issue writ is inherent in power to hear action and make decree).

Code of Civil Procedure Section 381 (repealed)

Comment. Section 381 is repealed as unnecessary. Its express statutory authorization of joinder of certain persons as plaintiffs was eclipsed in 1927 by the revision of Section 378. See 1 J. Chadbourn, H. Grossman & A. Van Alstyne, *California Pleading* § 615 (1961); 3 B. Witkin, *California Procedure Pleading* § 164 (2d ed. 1971).

Code of Civil Procedure Section 382 (amended)

Comment. Section 382 is amended to delete the 1872 enactment of the old common law rule of compulsory joinder. This provision has been superseded by Section 389. See Section 389 and Comment thereto. The former rule was an incomplete and unsafe guide. One could be an indispensable or necessary party in the absence of any unity in

interest. Thus, in an action brought by an unsuccessful candidate against the members of the Personnel Board to invalidate a civil service examination and void eligibility lists based thereon, all the successful candidates were held to be indispensable parties. However, they do not seem to have been united in interest in the usual sense of the term with either plaintiff or defendants. See *Child v. State Personnel Board*, 97 Cal. App.2d 467, 218 P.2d 52 (1950). On the other hand, the presence of a unity in interest did not always make one either an indispensable or necessary party. See *Williams v. Reed*, 113 Cal. App.2d 195, 204, 248 P.2d 147, 153-154 (1952) (joint and several obligors may be sued individually). See generally 1 J. Chadbourn, H. Grossman & A. Van Alstyne, California Pleading § 593 (1961); 3 B. Witkin, California Procedure Pleading § 141 (2d ed. 1971).

No change has been made in Section 382 insofar as it deals with joining an unwilling plaintiff as a defendant and with representative or class actions because these aspects of the section were beyond the scope of the Law Revision Commission's study. Accordingly, this portion of the section was not reviewed by the Commission. Its retention neither indicates approval of these provisions nor makes any change in this area of the law.

Code of Civil Procedure Section 383 (repealed)

Comment. Section 383 is repealed. The section is made unnecessary in part by the liberal rules of permissive joinder set forth in Sections 378 (plaintiffs) and 379 (defendants) and is superseded in part by the rules for compulsory joinder set forth in Section 389. See 1 J. Chadbourn, H. Grossman & A. Van Alstyne, California Pleading §§ 615, 621 (1961); 3 B. Witkin, California Procedure Pleading §§ 164-166 (2d ed. 1971).

Section 383 provided that all or any number less than all of a number of persons who are severally liable on the same obligation, or who are sureties, or who are insurers against the same loss, may sue or be sued in the same action. This rule was in part an exception to the common law rule that one or all of such persons, but not an intermediate number, might be joined. See *People v. Love*, 25 Cal. 520, 526 (1864); cf. *Stearns v. Aguirre*, 6 Cal. 176 (1856) (dictum). Insofar as Section 383 permitted such persons to join or be joined as parties to an action, it has since been replaced by Sections 378 and 379. Insofar as Section 383 provided an exception to a common law rule of compulsory joinder, it has been superseded by Section 389. See Section 389 and Comment thereto. If compulsory joinder is not required pursuant to the latter section, nothing prohibits an intermediate number of such persons from joining or being joined.

Code of Civil Procedure Section 384 (repealed)

Comment. Section 384 is repealed. The section is made unnecessary in part by the liberal rules of permissive joinder set forth in Sections 378 (plaintiffs) and 379 (defendants) and is superseded in part by the rules for compulsory joinder set forth in Section 389. See generally 1 J. Chadbourn, H. Grossman & A. Van Alstyne, California Pleading § 615 (1961); 3 B. Witkin, California Procedure Pleading §§ 164-166 (2d ed. 1971).

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At common law, in certain circumstances, all coholders of property were required to be joined in an action affecting such property; in other circumstances, coholders were prohibited from joining in one action. See *Throckmorton v. Burr*, 5 Cal. 400 (1855); *Johnson v. Sepulveda*, 5 Cal. 149 (1855). The enactment of Section 384 in 1872 changed both these rules to a flexible one permitting either all or "any number less than all" to commence or defend actions concerning their common property. See former Cal. Code Civ. Proc. § 384; *Merrill v. California Petroleum Corp.*, 105 Cal. App. 737, 288 P. 721 (1930). Insofar as Section 384 permitted all coholders to join or be joined, it has been eclipsed by the liberal joinder rules provided in Sections 378 and 379. Although Section 384 also permitted less than all coholders to join or be joined, prior case law recognized that, notwithstanding Section 384, under some circumstances all the cotenants must be joined as parties. See, e.g., *Solomon v. Redona*, 52 Cal. App. 300, 198 P. 643 (1921); *Jameson v. Chanslor-Cansfield Midway Oil Co.*, 176 Cal. 1, 167 P. 369 (1917). Cf. *Woodson v. Torgerson*, 108 Cal. App. 386, 291 P. 663 (1930). See 3 B. Witkin, *California Procedure Pleading* § 144 (2d ed. 1971). The rules determining whether all the cotenants must be joined are now set forth in Section 389. See Section 389 and Comment thereto. If compulsory joinder is not required pursuant to those rules, nothing prohibits less than all coholders to join or be joined.

Code of Civil Procedure Section 426.40 (new)

Comment. Section 426.40 is required to prevent injustice. Subdivisions (a) and (b) prohibit waiver of a cause of action which cannot be maintained.

Subdivision (a). Subdivision (a) uses language taken from Rule 13(a) of the Federal Rules of Civil Procedure. See also Code of Civil Procedure Section 389 (joinder of persons needed for just adjudication).

Subdivision (b). Subdivision (b) of Section 426.40 is designed to meet problems that may arise when the federal courts have jurisdiction to enforce a cause of action created by federal statute. In some cases, state courts have concurrent jurisdiction with the federal courts to enforce a particular cause of action. For example, such concurrent jurisdiction exists by express statutory provision in actions under the Federal Employers' Liability Act. 45 U.S.C.A. §56. Moreover, even though the federal statute does not contain an express grant of concurrent jurisdiction, the general rule is that state courts have concurrent jurisdiction to determine rights and obligations thereunder where nothing appears in the federal statute to indicate an intent to make federal jurisdiction exclusive. *Gerry of California v. Superior Court*, 32 Cal.2d 119, 122, 194 P.2d 689, 692 (1948). In cases where the state and federal courts have concurrent jurisdiction, if the cause of action created by the federal statute arises out of the same transaction or occurrence, Section 426.30 requires joinder in the state court proceeding, and subdivision (b) of Section 426.40 is not applicable.

In some cases, the federal courts have exclusive jurisdiction of the federal cause of action. See 1 B. *Jurisdiction* § 55 (2d ed. 1971). In these cases, subdivision (b) of Section 426.40, recognizing that the fed-

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eral cause of action is not permitted to be brought in the state court, provides an exception to the compulsory joinder or compulsory cross-complaint requirements.

Under some circumstances, more complex situations may arise. For example, if the claim which is the subject of a state court action by the plaintiff arises out of the same transaction as a claim which the defendant may have under both state and federal anti-trust acts, the defendant must file a cross-complaint for his cause of action under the state Cartwright Act (Business and Professions Code Section 16700 *et seq.*) in the proceeding in the state court to avoid waiver of that cause of action under Section 426.30 and must assert his federal cause of action under the Sherman Anti-Trust Act in the federal court (since his cause of action under the Sherman Anti-Trust Act is one over which the federal courts have exclusive jurisdiction). Thus, in this instance, defendant's state action must be brought as a cross-complaint and his federal action must be brought as an independent action in the federal courts. Subdivision (b) makes clear that his inability to assert his federal cause of action in the state court does not preclude him from bringing a later action in the federal court to obtain relief under the federal statute.

Subdivision (c). Subdivision (c), which makes clear the rule regarding pending actions, is the same in substance as Rule 13(a)(1) of the Federal Rules of Civil Procedure.

Code of Civil Procedure Section 428.10 (new)

Comment. Section 428.10 reflects the fact that a cross-complaint is the only type of pleading that may be filed to request relief by a party against whom a complaint or cross-complaint has been filed. It should be noted that, if the cause arises out of the same transaction or occurrence, the cross-complaint is *compulsory*. See Section 426.30. Counterclaims have been abolished. Section 428.80.

Subdivision (a) adopts the simple rule that a party against whom a complaint or cross-complaint has been filed may bring any cause of action he has (regardless of its nature) against the party who filed the complaint or cross-complaint. There need be no factual relationship between his cause and the cause of the other party. This is the rule under the Federal Rules of Civil Procedure and other modern provisions. *E.g.*, Fed. R. Civ. Proc., Rule 13. Third persons may be joined pursuant to Section 428.20.

Subdivision (b) does not, of course, limit the right of a party against whom a cause of action has been asserted to join unrelated causes of action when filing a cross-complaint under subdivision (a) against the party who asserted the cause against him. Subdivisions (a) and (b) are completely independent provisions, and it is necessary only that the person seeking to file the cross-complaint come within the provisions of one of the subdivisions.

Subdivision (a) is generally consistent with prior law (former Code of Civil Procedure Section 438) which provided for a counterclaim; but, under prior law, some causes which a party had against an oppos-

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ing party did not qualify as counterclaims because they did not satisfy the "diminish or defeat" or "several judgment" requirements. These requirements are not continued, and subdivision (a) permits unlimited scope to a cross-complaint against an opposing party. For discussion of the prior law, see the Comment to Section 426.30 and Friedenthal, *Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions*, 23 Stan. L. Rev. 1. 19-23 (1970).

Subdivision (b) continues the rule (former Code of Civil Procedure Section 442) that a cross-complaint may be asserted against any person, whether or not a party to the action, if the cause of action asserted in the cross-complaint arises out of the same transaction or occurrence or involves the same property or controversy (see discussion in Comments to Sections 378, 379, and 426.10). Subdivision (b) thus permits a party to assert a cause of action against a person who is not already a party to the action if the cause has a subject matter connection with the cause already asserted in the action. For further discussion, see Friedenthal, *supra*, at 25-26.

Section 428.10 restricts cross-complaints in eminent domain actions to those that assert a cause of action arising out of the same transaction or occurrence or that involve the same property or controversy. Subdivision (a) which permits assertion of unrelated causes of action is made specifically inapplicable to eminent domain actions; but subdivision (b), which permits assertion of related causes, is applicable.

Any undesirable effects that might result from joinder of causes under Section 428.10 may be avoided by severance of causes or issues for trial under Section 1048 of the Code of Civil Procedure.

Code of Civil Procedure Section 428.30 (new)

Comment. Section 428.30 provides permissive joinder rules that treat a cross-complaint generally the same as a complaint in an independent action. *Cf.* Section 427.10. Thus, with a single exception, if a party files a cross-complaint against either an original party or a stranger or both, he may assert in his cross-complaint any additional causes of action he has against any of the cross-defendants. See the Comment to Section 427.10. The exception is the filing of a cross-complaint against the plaintiff in an eminent domain action. In such a case, the cross-complaint may state only those causes of action which arise out of the same transaction or occurrence or involve the same property or controversy. See Section 428.10. Any undesirable effects that might result from joinder of causes under Section 428.30 may be avoided by severance of causes or issues for trial under Section 1048.

Code of Civil Procedure Section 429.40 (new)

Comment. Section 429.40 makes clear that nothing in this title affects the authority of the Judicial Council to provide by rule for the practice and procedure under The Family Law Act, notwithstanding that former Code of Civil Procedure Sections 426a and 426c are continued as Sections 429.10 and 429.20 of the Code of Civil Procedure.

Code of Civil Procedure Section 430.30 (new)

Comment. Section 430.30 continues prior law under various repealed sections of the Code of Civil Procedure except that former pro-

visions applicable to complaints have been made applicable to cross-complaints. Subdivision (a) continues the rule formerly found in Sections 430 and 444; subdivision (b) continues the rule formerly found in Section 433; and subdivision (c) continues the rule formerly found in Sections 431 and 441.

Where a ground for objection to the complaint or cross-complaint appears on the face of the pleading and no objection is taken by demurrer, the objection is waived except as otherwise provided in Section 430.80. See 3 B. Witkin, *California Procedure Pleading* §§ 808-809 at 2418-2419 (2d ed. 1971). In this respect, Section 430.30 continues prior law.

Code of Civil Procedure Section 1048 (amended)

Comment. Section 1048 is revised to conform in substance to Rule 42 of the Federal Rules of Civil Procedure. The revision makes clear not only that the court may sever causes of action for trial but also that the court may sever issues for trial. For further discussion, see the Advisory Committee's Note of 1966 to Subdivision (b) of Rule 42 of the Federal Rules of Civil Procedure. Formerly, Section 1048 provided that "an action may be severed" by the court but did not specifically authorize the severance of issues for trial. Absent some specific statute dealing with the particular situation, the law was unclear whether an issue could be severed for trial. See 3 B. Witkin, *California Procedure Pleading* § 266 at 1936 (2d ed. 1971) ("There is a dearth of California authority on the meaning and effect of [the "action may be severed" portion of Section 1048]; the relatively few decisions merely emphasize its discretionary character.").

Section 1048 does not deal with the authority of a court to enter a separate final judgment on fewer than all the causes of action or issues involved in an action or trial. See Code of Civil Procedure Sections 578-579; 3 Cal. Jur. 2d *Appeal and Error* § 40; California Civil Appellate Practice §§ 5.4, 5.15-5.26 (Cal. Cont. Ed. Bar 1966); 3 B. Witkin, *California Procedure Appeal* §§ 10-14 (1954). This question is determined primarily by case law, and Section 1048 leaves the question to case law development.

Section 1048 permits the court to sever issues for trial. It does not affect any statute that requires that a particular issue be severed for trial. *E.g.*, Code of Civil Procedure Section 597.5 (separate trial on issue whether action for negligence of person connected with healing arts barred by statute of limitations required on motion of any party). The authority to sever issues for trial under Section 1048 may duplicate similar authority given under other statutes dealing with particular issues. *E.g.*, Code of Civil Procedure Sections 597 (separate trial of special defenses not involving merits), 598 (separate trial of issue of liability before trial of other issues). These sections have been retained, however, because they include useful procedural details which continue to apply.

Where there are multiple parties, the court, under Section 379.5, may order separate trials or make such other orders as appear just to prevent any party from being embarrassed, delayed, or put to undue expense.

I respectfully request that this report be printed in the Assembly Journal.

Respectfully yours,

CHARLES WARREN, Chairman
Assembly Committee on Judiciary

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APPENDIX III

REPORT OF SENATE COMMITTEE ON JUDICIARY ON SENATE BILL 953

[Extract from Senate Journal for September 27, 1971 (1971 Regular Session).]

In order to indicate more fully its intent with respect to Senate Bill 953, the Senate Committee on Judiciary makes the following report:

This Committee has made a previous report concerning Senate Bill 201, which report is printed in the Senate Journal for April 1, 1971. To supplement that report, this Committee makes this report containing a revised comment to Section 379 of the Code of Civil Procedure, to reflect the amendment of Section 379 in Senate Bill 953.

Code of Civil Procedure Section 379 (amended)

Comment. Section 379 is amended to provide statutory standards for joinder of defendants comparable to those governing joinder of plaintiffs. See the Comment to Section 378.

The deleted provisions of Section 379 and former Code of Civil Procedure Sections 379a, 379b, 379c, 380, and 383 provided liberal joinder rules but were criticized for their uncertainty and overlap. See 1 J. Chadbourn, H. Grossman & A. Van Alstyne, *California Pleading* § 118 (1961); 3 B. Witkin, *California Procedure Pleading* § 166 (2d ed. 1971). The amendment to Section 379 substitutes the more understandable "transaction" test set forth in Rule 20(a) of the Federal Rules of Civil Procedure. However, in so doing, the section probably merely makes explicit what was implicit in prior decisions. See *Hoag v. Superior Court*, 207 Cal. App.2d 611, 24 Cal. Rptr. 659 (1962). Paragraph (2) of subdivision (a) of Section 379 is included merely to make clear that Section 379 as amended permits joinder in any case where it formerly was permitted. See Comment to Section 378. Paragraph (2) is derived from the deleted provisions of Section 379 and the principle stated in former Code of Civil Procedure Sections 379a, 379b, 379c, 380, and 383.

Subdivision (c) retains without change former Code of Civil Procedure Section 379c. See *Kraft v. Smith*, 24 Cal.2d 124, 148 P.2d 23 (1944) (permitting joinder of two doctors who operated on plaintiff's leg at different times); *Landau v. Salam*, 4 Cal.3d 901 (1971) (permitting joinder of two defendants who allegedly injured plaintiff in accidents occurring on separate days). See generally 3 B. Witkin, *California Procedure Pleading* §§ 172-176 (2d ed. 1971).

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CUMULATIVE TABLE OF MEASURES ENACTED UPON

COMMISSION RECOMMENDATION

Constitutional Provisions

* CAL. CONST., Art. XI, § 10 (1960) (Power of Legislature to prescribe procedures governing claims against chartered cities and counties and employees thereof).

Statutes

- Cal. Stats. 1955, Ch. 799 and Ch. 577 (Revision of various sections of the Education Code relating to the Public School System).
- Cal. Stats. 1956, Ch. 1183 (Revision of Probate Code Sections 640 to 646—setting aside of estates).
- Cal. Stats. 1957, Ch. 102 (Elimination of obsolete provisions in Penal Code Sections 1877 and 1878).
- Cal. Stats. 1957, Ch. 139 (Maximum period of confinement in a county jail).
- Cal. Stats. 1957, Ch. 249 (Judicial notice of the law of foreign countries).
- Cal. Stats. 1957, Ch. 456 (Recodification of Fish and Game Code).
- Cal. Stats. 1957, Ch. 490 (Rights of surviving spouse in property acquired by decedent while domiciled elsewhere).
- Cal. Stats. 1957, Ch. 540 (Notice of application for attorney's fees and costs in domestic relations actions).
- Cal. Stats. 1957, Ch. 1498 (Bringing new parties into civil actions).
- Cal. Stats. 1959, Ch. 122 (Doctrine of worthier title).
- Cal. Stats. 1959, Ch. 468 (Effective date of an order ruling on motion for new trial).
- Cal. Stats. 1959, Ch. 469 (Time within which motion for new trial may be made).
- Cal. Stats. 1959, Ch. 470 (Suspension of absolute power of alienation).
- Cal. Stats. 1959, Ch. 500 (Procedure for appointing guardians).
- Cal. Stats. 1959, Ch. 501 (Codification of laws relating to grand juries).
- Cal. Stats. 1959, Ch. 528 (Mortgages to secure future advances).
- Cal. Stats. 1959, Ch. 1715 and Chs. 1724-1728. (Presentation of claims against public entities).
- Cal. Stats. 1961, Ch. 461 (Arbitration).
- Cal. Stats. 1961, Ch. 589 (Rescission of contracts).
- Cal. Stats. 1961, Ch. 636 (Inter vivos marital property rights in property acquired while domiciled elsewhere).
- Cal. Stats. 1961, Ch. 657 (Survival of actions).
- Cal. Stats. 1961, Ch. 1612 (Tax apportionment in eminent domain proceedings).
- Cal. Stats. 1961, Ch. 1613 (Taking possession and passage of title in eminent domain proceedings).
- Cal. Stats. 1961, Ch. 1616 (Revision of Juvenile Court Law adopting the substance of two bills drafted by the Commission to effectuate its recommendations on this subject).
- Cal. Stats. 1963, Ch. 1681 (Sovereign immunity—tort liability of public entities and public employees).
- Cal. Stats. 1963, Ch. 1715 (Sovereign immunity—claims, actions and judgments against public entities and public employees).
- Cal. Stats. 1963, Ch. 1692 (Sovereign immunity—insurance coverage for public entities and public employees).
- Cal. Stats. 1963, Ch. 1688 (Sovereign immunity—defense of public employees).
- Cal. Stats. 1963, Ch. 1684 (Sovereign immunity—workmen's compensation benefits for persons assisting law enforcement or fire control officers).
- Cal. Stats. 1963, Ch. 1685 (Sovereign immunity—amendments and repeals of inconsistent special statutes).
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- Cal. Stats. 1965, Ch. 853 (Sovereign immunity—claims and actions against public entities and public employees).
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- Cal. Stats. 1967, Ch. 650 (Evidence Code—Evidence Code revisions).
- Cal. Stats. 1967, Ch. 702 (Vehicle Code Section 17150 and related sections).
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- Cal. Stats. 1967, Ch. 1104 (Exchange of valuation data in eminent domain proceedings).
- Cal. Stats. 1967, Ch. 1324 (Suit by or against an unincorporated association).
- Cal. Stats. 1968, Ch. 132 (Unincorporated associations).
- Cal. Stats. 1968, Ch. 133 (Fees on abandonment of eminent domain proceeding).
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- Cal. Stats. 1968, Ch. 356 (Unclaimed property act).
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- Cal. Stats. 1969, Ch. 115 (Additur and remittitur).
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