11/13/56

Memorandum No. 1

Subject: 1957-58 Agenda

At the October meeting the commission authorized the Chairman and Executive Secretary to select an agenda of topics to be presented to the 1957 Session of the Legislature for approval from the 19 topics tentatively approved for study by the commission. This was done because it then appeared possible that the commission's 1957 report would be ready to go to the printer before the November meeting. As an initial step in the process of selecting a 1957-58 agenda, descriptions of the 19 topics were prepared. Copies of these topic descriptions are enclosed. The topics selected for study by the Chairman and Executive Secretary are in the group labelled "A"; those not selected are in the group labelled "B". Enclosed also is a list of all 19 topics, with an estimate of the cost of having them done by research consultants.

Copies of the descriptions of all 19 topics were sent to the Judicial Council and the State Bar with a statement that the commission is considering including them in its 1957-58 calendar and would appreciate an expression of their views concerning the appropriateness of these topics for study by the commission. A copy of Mr. Chief Justice Gibson's reply on behalf of the Judicial Council is enclosed. The inclusion of Topics 3 and 7 in group "A" was considerably influenced by Mr. Justice Gibson's letter. (You will note that Topic No. 7 has been revised by us to eliminate the study of whether the legal definition of insanity should be revised.)

In selecting the agenda the Chairman and Executive Secretary had in mind that the commission will carry over into 1957-58 all or part of seven topics

authorized for study during the current year. These, with their estimated cost are the following: *

Study No. 19 -	Overlapping Provisions of Penal and Vehicle Codes	$ 300
Study No. 20 -	Guardians for nonresidents	300
Study No. 21 -	Confirmation of partition sales	300
Study No. 22 -	Cut-off date for motion for new trial	300
Study No. 29 -	Post-conviction sanity hearings	600
Study No. 34 -	Uniform Rules of Evidence - second part	$ 3,750
Study No. 36 -	Condemnation law and procedure - second part	1,500
	Total	$ 7,050

It is possible that we may have two additional studies during 1957-58 carried over from 1956-57, arising out of 1956 Topic No. 14 (A study to determine whether the Arbitration Statute should be revised) and 1956 Topic No. 17 (A study to determine whether the law respecting habeas corpus proceedings, in the trial and appellate courts, should, for the purpose of simplification of procedure to the end of more expeditious and final determination of the legal questions presented, be revised). We have begun our consideration of these topics by making studies to determine whether the Uniform Arbitration Act and the Uniform Post-conviction Procedure Act should be enacted as solutions to the questions which they respectively present. If the conclusion in either case is negative, a further study may be required to determine whether a different

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* Our 1957-58 budget includes an item for studies carried over from 1956-57 which will provide funds for the first six of these studies. We will, however, have to make an adjustment in this budget item to cover the second part of the condemnation study.

solution to the problems involved is possible. *

We believe that the studies carried over from 1956-57 will constitute approximately one-third to one-half a year's work. Thus, we decided to include in the 1957 agenda resolution only 12 of the 19 topics tentatively approved by the commission. These are included in the topic descriptions labelled "A" enclosed and are indicated by asterisks on the list of 19 topics enclosed. The cost of making these studies, based on the estimates shown on the list, would be $10,650.

Our reasons for not selecting the topics included in the group labelled "B" enclosed are the following:

Topic No.	
5	Jury instructions on death or life imprisonment -- preliminary study in preparing topic description indicates that it is questionable whether helpful instructions could be devised by commission.
11	Equitable estoppel against the government -- this topic is both interesting and important but there would probably be substantial opposition to a bill to abolish or modify the immunity.
12	Civil Code Section 1698 (alteration of written contract) -- this problem may not be of great practical significance.
13	Right of purchaser on conditional sale to redeem -- this may be part of a larger problem of the adequacy of the law governing all aspects of conditional sale contracts. In addition, a bill on this matter might well encounter substantial opposition.
15	Intrafamily tort immunity -- there might be substantial opposition to a bill to abolish such immunity.
16	Wife's right to recover for loss of consortium -- there might be substantial opposition to a bill to establish such a right of recovery. In addition, members Stanton and Babbage voted against putting it on the agenda.

* A contingent item of approximately $1,500 should probably be added to the item in the 1957-58 budget for studies carried over from 1956-57 to cover this possibility.

Topic No.	Subject	Estimated Cost
* 1	Inter vivos rights of spouse in property acquired outside California	$ 750.00
* 2	Attachment, garnishment, and property exempt from execution	2,500.00
* 3	Notice of Alibi	300.00
* 4	Small Claims Court Law	1,500.00
5	Jury instructions re choice between death and life imprisonment	800.00
* 6	Rights of good faith improver of property	600.00
* 7	Defense of insanity in criminal cases	1,200.00
* 8	Suit in common name by partnership or association	500.00
* 9	Mutuality of remedy	600.00
* 10	Revision of arson law	800.00
11	Equitable estoppel against the government	1,200.00
* 12	Civil Code § 1698 (alteration of written contract)	600.00
13	Right of purchaser on conditional sale contract to redeem	600.00
* 14	Right to counsel in juvenile court proceedings	600.00
15	Intrafamily tort immunity	600.00
16	Wife's right to recover for loss of consortium	600.00
* 17	Rights of lessor on abandonment by tenant	600.00
* 18	Whether unlicensed contractor should have right to recover for work done	500.00
* 19	Right to support after ex parte divorce	800.00
	Total	$ 15,650.00

COPY COPY

SUPREME COURT OF CALIFORNIA

STATE BUILDING

San Francisco

Chambers of the Chief
Justice

November 2, 1956

Mr. Thomas E. Stanton, Jr., Chairman
California Law Revision Commission
111 Sutter Street
San Francisco, California

Dear Mr. Stanton:

None of the list of topics now under consideration by the Commission is presently being studied by the Judicial Council.

Topic No. 4, "A study to determine whether the Small Claims Court Law should be revised", would be an appropriate subject for the Judicial Council, but I doubt if we would be able to get to it before one or two years.

I hope you will be able to give consideration as soon as possible to Topics Nos. 3, 5 and 7. I do not wish to imply, of course, that other topics listed by you for study are not important, but I think it is imperative that we do something as soon as possible to improve the administration of justice in the criminal field.

Sincerely yours,

/s/ Phil S. Gibson

11/7/56

Topic No. 1: A study to determine what the inter vivos rights of one spouse should be in property acquired by the other spouse during marriage while domiciled outside California.

Married persons who move to California from noncommunity property states often bring with them personal property acquired during marriage while domiciled in such states. This property may subsequently be retained in the form in which it is brought to this State or it may be exchanged for real or personal property here. Other married persons who never become domiciled in this State purchase real property here with funds acquired during marriage while domiciled in noncommunity property states. The Legislature has long been concerned with what interest the nonacquiring spouse should have in such property both during the lifetime and upon the death of the spouse who acquired the property.

By Resolution Chapter 207 of the Statutes of 1955 the Law Revision Commission was authorized to make a study of Section 201.5 of the Probate Code, which deals with the rights of the surviving spouse in such property upon the death of the spouse who acquired the property. This study has been made and the commission will submit its recommendation concerning this aspect of the matter to the 1957 Session of the Legislature.

There remains the question of what right, if any, the nonacquiring spouse should have in such property during the lifetime

of both spouses. In 1917 the Legislature amended Section 164 of the Civil Code[1] to provide that all such property is community property. Estate of Thornton[2] held this amendment unconstitutional on the ground that it deprived the acquiring spouse of vested property rights. Since that decision the 1917 amendment has been treated by lawyers and judges as though it were wholly void. Yet, as is pointed out in the research consultant's report made in connection with the commission's study of Probate Code Section 201.5,[3] it is not at all clear that the amendment is void in every application which it might have, especially insofar as property acquired in California in exchange for property acquired elsewhere is concerned.

A study should be made to determine the extent to which the Legislature can and should create rights in such property in the nonacquiring spouse during the lifetime of both spouses. Such a study would be concerned with, but not limited to, such questions as what division should be made of such property upon divorce, the extent to which it should be reachable by the creditors of the nonacquiring spouse, and whether a gift of such property by the acquiring spouse to the nonacquiring spouse should be exempt from the gift tax to the extent of one-half thereof.

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1 Cal. Stat. 1917, c. 581, § 1 p. 827.

2 1 Cal.2d 1, 33 P.2d 1 (1934).

3 See Rights of Surviving Spouse in Property Acquired by Decedent During Marriage While Not Domiciled in California, Rec. & Study of Calif. Law Rev. Comm'n E-00 (Nov. 30, 1956).

11/7/56

Topic No. 2: A study to determine whether the law relating to attachment, garnishment, and property exempt from execution should be revised.

The commission has received several communications bringing to its attention anachronisms, ambiguities, and other defects in the law of this State relating to attachment, garnishment, and property exempt from execution. These communications have raised such questions as: (1) whether the law with respect to farmers' property exempt from execution should be modernized; (2) whether a procedure should be established to determine disputes as to whether particular earnings of judgment debtors are exempt from execution; (3) whether Code of Civil Procedure Section 690.26 should be amended to conform to the 1955 amendments of Sections 682, 688 and 690.11, thus making it clear that one-half, rather than only one-quarter, of a judgment debtor's earnings are subject to execution; (4) whether an attaching officer should be required or empowered to release an attachment when the plaintiff appeals but does not put up a bond to continue the attachment in effect; and (5) whether a provision should be enacted empowering a defendant against whom a writ of attachment may be issued or has been issued to prevent service of the writ by depositing in court the amount demanded in the complaint plus 10% or 15% to cover possible costs.

The State Bar has had various related problems under consideration from time to time. In a report to the Board of Governors of the

State Bar on 1955 Conference Resolution No. 28, the Bankruptcy Committee of the State Bar recommended that a complete study be made of attachment, garnishment, and property exempt from execution, preferably by the Law Revision Commission. In a communication to the commission dated June 4, 1956 the Board of Governors reported that it approved this recommendation and requested the commission to include this subject on its calendar of topics selected for study.

11/7/56

Topic No. 3: A study to determine whether a defendant in a criminal action should be required to give notice to the prosecution of his intention to rely upon the defense of alibi.

A defendant can introduce evidence of an alibi as a surprise defense in a criminal action. Often there is no opportunity for the prosecution to investigate the alleged alibi. Several states have enacted statutes requiring a defendant who intends to offer the defense of alibi either to plead it or to give notice to the prosecution of his intention to rely upon it.[1] Such statutes have been held constitutional.[2]

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1 See Annotation, 30 A.L.R.2d 480 (1953).

2 People v. Schade, 161 Misc. 212, 292 N.Y.S. 612 (1936); State v. Thayer, 124 Ohio St. 1, 176 N.E. 656 (1931); State v. Kopacka, 261 Wis. 70, 51 N.W.2d 495 (1952).

11/7/56

Topic No. 4: A study to determine whether the Small Claims Court Law should be revised.

In 1955 the commission reported to the Legislature[1] that it had received communications from several judges in various parts of the State relating to defects and gaps in the Small Claims Court Law.[2] These suggestions concerned such matters as whether fees and mileage may be charged in connection with the service of various papers, whether witnesses may be subpoenaed and are entitled to fees and mileage, whether the monetary jurisdiction of the small claims courts should be increased, whether sureties on appeal bonds should be required to justify in all cases, and whether the plaintiff should have the right to appeal from an adverse judgment. The commission stated that the number and variety of these communications suggested that the Small Claims Court Law merited study.

The 1955 Session of the Legislature declined to authorize the commission to study the Small Claims Court Law at that time. No comprehensive study of the Small Claims Court Law has since been made. Meanwhile, the commission has received communications making additional suggestions for revision of the Small Claims Court Law: e.g., that the small claims court should be empowered to set aside the judgment and reopen the case when it is just to do so; that the plaintiff should be permitted to appeal when the defendant prevails on a counterclaim;

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1. Report of California Law Revision Commission 25 (1955).

2. Cal. Code Civ. Proc. § 117.

and that the small claims form should be amended to (1) advise the defendant that he has a right to counterclaim and that failure to do so on a claim arising out of the same transaction will bar his right to sue on the claim later and (2) require a statement as to where the act occurred in a negligence case.

This continued interest in revision of the Small Claims Court Law has induced the commission again to request authority to make a study of it.

11/7/56

Topic No. 6: A study to determine whether the law relating to the rights of a good faith improver of property belonging to another should be revised.

The common law rule, codified in Civil Code Section 1013, is that when a person affixes improvements to the land of another in the good faith belief that the land is his, the thing affixed belongs to the owner of the land in the absence of an agreement to the contrary. The common law denies the innocent improver any compensation for the improvement he has constructed[1] except that when the owner has knowingly permitted or encouraged the improver to spend money on the land without revealing his claim of title the improver can recover the value of the improvement,[2] and when the owner sues for damages for the improver's use and occupation of the land the improver can set off the value of the improvement.[3]

About three-fourths of the states have ameliorated the common-law rule by the enactment of "betterment statutes" which make payment of compensation for the full value of the improvement a condition of the owner's ability to recover the land. The owner generally is given

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1. Ford v. Holton, 5 Cal. 319 (1855); Kinard v. Kaelin, 22 Cal. App. 383, 134 Pac. 370 (1913).

2. See 26 Cal. Jur. 2d 194, 199-203.

3. See Green v. Biddle, 8 Wheat (U.S.) 1, 81-82 (1833).

the option either to pay for the improvement and recover possession or to sell the land to the improver at its value excluding improvements.[4] Usually no independent action is given the improver in possession, although in some states he may sue directly if he first gives up the land.[5]

California, on the other hand, grants the improver only the limited relief of set-off[6] when the owner sues for damages and the right to remove the improvement when this can be done.[7] It would seem to be unjust to take a valuable improvement from one who built it in the good faith belief that the land was his and give it to the owner as a complete windfall. Provision should be made for a more equitable adjustment between the two innocent parties.

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4. See Ferrier, 15 Calif. L. Rev. 189, 190-93 (1927); Restatement, Restitution p. 169 (1936).

5. See 27 Am. Jur. p. 280 and discussion of cases and statutes in Jensen v. Probert, 174 Ore. 143, 148 P.2d 248 (1944).

6. Code Civ. Proc. § 741.

7. Civ. Code § 1013.5.

11/7/56

Topic No. 7: A study to determine whether the separate trial on the issue of insanity in criminal cases should be abolished or whether, if it is retained, evidence of the defendant's mental condition should be admissible on the issue of specific intent in the trial on the other pleas.

Section 1026 of the Penal Code provides that when a defendant pleads not guilty by reason of insanity and also enters another plea or pleas he shall be tried first on the other plea or pleas and in such trial shall be conclusively presumed to have been sane at the time the crime was committed. This provision was originally interpreted by the Supreme Court to require exclusion of all evidence of mental condition in the first trial, even though offered to show that the defendant lacked the mental capacity to form the specific intent required for the crime charged -- e.g., first degree murder.[1] This interpretation was criticized on the ground that a defendant might be so mentally defective as to be unable to form the specific intent required in certain crimes and yet not be so insane as to prevail in the second trial on the defense of insanity. In 1949 the Supreme Court purported to modify somewhat its view of the matter in People v. Wells.[2] The court's opinion states that evidence of the defendant's mental condition at the time of the crime may be introduced in the first trial to show that the defendant did not have the specific intent required for the crime charged but not to show that he could not have had such intent. This distinction does not seem to be a very meaningful or workable one or to meet adequately the criticisms made of the earlier interpretation adopted by the

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1. People v. Troche, 206 Cal. 35, 273 Pac. 767 (1928); People v. Coleman, 20 Cal.2d 399, 126 P.2d 349 (1942).

2. 33 Cal.2d 330, 202 P.2d 53 (1949).

Court. A study should now be made to determine (1) whether the separate trial on the defense of insanity should be abolished, with all issues in the case being tried in a single proceeding or (2) if separate trials are to be continued, whether Section 1026 should be revised to provide that any competent evidence of the defendant's mental condition shall be admissible on the first trial, the jury being instructed to consider it only on the issue of criminal intent.

Topic No. 8: A study to determine whether partnerships and unincorporated associations should be permitted to sue in their common names and whether the law relating to the use of fictitious names should be revised.

Code of Civil Procedure Section 388 provides that when two or more persons associated in any business transact such business under a common name they may be sued by such common name. However, such associates may not bring suit in the common name.[1] In the case of a partnership or association composed of many individuals this results in an inordinately long caption on the complaint and in extra expense in filing fees, neither of which appears to be necessary or justified.

Sections 2466 to 2471 of the Civil Code also have a bearing on the right of partnerships and unincorporated associations to sue. These sections provide, inter alia, that a partnership doing business under a fictitious name cannot maintain suit on certain causes of action unless it has filed a certificate naming the members of the partnership,[2] and that a new certificate must be filed when there is a change in the membership.[3] These provisions, which have been held to be applicable to unincorporated associations,[4] impose a substantial burden on partnerships and associations which add new members and lose old members at fairly frequent intervals.

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1. Juneau Spruce Corp. v. International Longshoremen's and Warehousemen's Union, 37 Cal.2d 760, 763-64, 235 P.2d 607, 609 (1951) (dictum); Case v. Kadota Fig Assn., 35 Cal.2d 596, 602-3, 220 P.2d 912, 916 (1950) (dictum).

2. Civ. Code § 2468.

3. Civ. Code § 2469.

4. Kadota Fig Assn. v. Case-Swayne Co., 73 Cal. App.2d 796, 167 P.2d 518 (1946).

11/7/56

Topic No. 9: A study to determine whether the law relating to the doctrine of mutuality of remedy in suits for specific performance should be revised.

Civil Code Section 3386 provides:

> § 3386. Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance.

Section 3386 states substantially the doctrine of mutuality of remedy in suits for specific performance as it was originally developed by the Court of Chancery. The doctrine has been considerably modified in most American jurisdictions in more recent times. Today it is not generally necessary, to obtain a decree of specific performance, to show that the plaintiff's obligation is specifically enforceable, so long as there is reasonable assurance that plaintiff's performance will be forthcoming when due. Such assurance may be provided by the plaintiff's past conduct, or his economic interest in performing, or by granting a conditional decree or requiring the plaintiff to give security for his performance.[1]

Civil Code Section 3386 states a much more rigid rule. It is true that Section 3386 is considerably ameliorated by Civil Code Sections 3388, 3392, 3394 and 3423(5) and by court decisions granting specific performance in cases

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1. Williston, Contracts, 4022-24 (Rev. ed. 1937); Corbin, Contracts, 793-94 (1951).

which would fall within a strict application of the doctrine of mutuality of remedy. [2] On the other hand, the mutuality requirement has in some cases been applied strictly, with harsh results. [3]

On the whole, the California decisions in terms of results may not be far out of line with the more modern and enlightened view as to mutuality of remedy. But insofar as they have reached sensible results it has often been with difficulty and the result has been inconsistent with a literal reading of Section 3386. And not infrequently poor decisions have resulted. A study of the requirement of mutuality of remedy in suits for specific performance would, therefore, appear to be desirable.

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2. See e.g., Miller v. Dyer, 20 Cal.2d 526, 127 P.2d 901 (1942); Vassault v. Edwards, 43 Cal. 458 (1872); Magee v. Magee, 174 Cal. 276, 162 Pac. 1023 (1917); Calandrini v. Bransletter, 84 Cal. 249, 24 Pac. 149 (1890).

3. See e.g., Pacific etc. Ry. Co. v. Campbell-Johnson, 153 Cal. 106, 94 Pac. 623 (1908); Linehan v. Devincense, 170 Cal. 307, 149 Pac. 584 (1915); Poultry Producers etc. v. Barlow, 189 Cal. 278, 208 Pac. 93 (1922).

11/7/56

Topic No. 10: A study to determine whether the provisions of the Penal Code relating to arson should be revised.

Definition of Arson. Chapter 1 of Title 13 of the Penal Code (Sections 447a to 451a) is entitled "Arson". Section 447a makes the burning of a dwelling-house or a related building punishable by a prison sentence of two to twenty years. Section 448a makes the burning of any other building punishable by a prison sentence of one to ten years. Section 449a makes the burning of personal property, including a streetcar, railway car, ship, boat or other water craft, automobile or other motor vehicle, punishable by a sentence of one to three years. [1] Thus, in general, California follows the historical approach in defining arson, [2] in which the burning of a dwelling-house was made the most serious offense, presumably because a greater risk to human life was thought to be involved. Yet in modern times the burning of other buildings, such as a school, a theatre, or a church, or the burning of such personal property as a ship or a railway car often constitutes a far graver threat to human life than the burning of a dwelling-house. Some other states have, therefore, revised their arson laws to correlate the penalty not with the type of building or property burned but with the risk to human life and with

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1. Penal Code § 450a makes it a crime to burn personal property to defraud an insurance company. Section 451a makes it a crime to attempt a burning proscribed by the foregoing sections.

2. See Miller, Criminal Law, 323 (1934).

the amount of property damage involved in a burning.[3] A study should be made to determine whether California should similarly revise Chapter 1 of Title 13 of the Penal Code.

Use of Term "Arson" in Statutes. When the term "arson" is used in a penal or other statute, the question arises whether that term includes only a violation of Penal Code Section 447a, which alone labels the conduct which it proscribes as "arson", or whether it is also applicable to violations of Penal Code Sections 448a, 449a, 450a and 451a, which define other felonies related to the burning of property. For example, Penal Code Section 189, defining degrees of murder, states that murder committed during the perpetration of arson, or during attempted arson, is murder in the first degree. There is nothing in that section which makes it clear what is meant by "arson". On the other hand, Penal Code Section 644, concerning habitual criminals, refers specifically to "arson as defined in Section 447a of this code." On the basis of these enactments it could be argued that "arson" is only that conduct which is proscribed by Section 447a. Yet in In re Bramble[4] the court held that a violation of Section 448a was "arson". Thus, there is considerable doubt as to the exact meaning of the term "arson" in relation to the conduct proscribed by Penal Code Sections 448a, 449a, 450a, and 451a.

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3. See, e.g., La. Stat. §§ 14.51 - 14.53 (1950); New York Penal Law, §§ 221-225 (1950); Wisconsin Stats. §§ 943.01, 943.02, 941.11 (1955).

4. 31 Cal.2d 43, 187 P.2d 411 (1947).

11/7/56

Topic No. 13: A study to determine whether the law relating to the right of the purchaser under a conditional sale contract to redeem property repossessed should be revised.

The right of the purchaser under a conditional sale contract to redeem property repossessed is not entirely clear. In a recent case the Supreme Court permitted the seller both to take back the property and to retain the payments made by the purchaser, which nearly equalled the value of the property.[1] A study might reveal that a statute embodying a more equitable adjustment of the rights of the parties, possibly along the lines of that provided in the Uniform Conditional Sales Act, should be enacted.

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1. Bird v. Kenworthy, 43 Cal.2d 656, 277 P.2d 1 (1954).

Topic No. 14: A study to determine whether minors should have a right to counsel in juvenile court proceedings.

Our courts have held that when a minor who is charged with a crime appears in the juvenile court he is not entitled to the rights accorded an adult in a criminal proceeding. The reason given is that a juvenile court proceeding is not criminal in character but is in the nature of a guardianship proceeding, brought by the State acting as parens patriae, to provide care, custody, and training for the purpose of rehabilitating the minor.[1] Thus, it has been held that a minor is not entitled to a jury trial in a juvenile court proceeding,[2] that the court need not advise him of his right not to give incriminating testimony,[3] that he is not entitled to bail pending appeal from an order of commitment,[4] and that a subsequent trial in the superior court on a charge upon the basis of which he was previously committed to the Youth Authority by the juvenile court does not constitute double jeopardy.[5]

It is not entirely clear whether a minor has a right to counsel in a juvenile court proceeding. In re Contreras[6] appears to have held that he

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1. People v. Fifield, 136 Cal. App.2d 741, 289 P.2d 303 (1955).
2. In re Daedler, 194 Cal. 320, 228 Pac. 467 (1924); People v. Fifield, note 1 supra.
3. In re Dargo, 81 Cal. App.2d 205, 183 P.2d 282 (1947).
4. In re Magnuson, 110 Cal. App.2d 73, 242 P.2d 362 (1952).
5. People v. Silverstein, 121 Cal. App.2d 140, 262 P.2d 656 (1953).
6. 109 Cal. App.2d 787, 241 P.2d 631 (1952).

is.[7] People v. Fifield[8] held that it is not error for the judge of the juvenile court to fail to advise a minor that he is entitled to be represented by counsel but added that had the minor retained counsel he would have been entitled to be represented by him.[9] Moreover, it has been held that a minor held in the juvenile hall pending trial on a felony charge has a right to consult privately with his attorney concerning the preparation of his defense[10] and that the parents of a child are entitled to be present at juvenile court proceedings affecting him and to be advised and represented by counsel in such proceedings.[11]

The Supreme Court held recently in People v. Dotson[12] that a minor was not entitled to counsel at a juvenile court hearing in which an order was made remanding him to the superior court for trial.[13] The Court's opinion suggests that a minor is not entitled to be represented by counsel in any juvenile court proceeding. However, the case involved a refusal of the juvenile court to exercise jurisdiction rather than validity of an order of commitment made in a proceeding in which the minor was not represented by counsel, and it is not, therefore, entirely clear whether the Dotson case overrules the authorities discussed above insofar as they suggest that a minor is entitled to counsel in juvenile court proceedings.

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7. The court referred at several points to the fact that the minor had not been represented by counsel in the proceedings and at the end of its opinion stated: "The motion [to set aside an order of commitment to the Youth Authority] should have been granted, thereby enabling said minor, with the aid of counsel, to properly prepare and present a defense to the charge preferred against him." Id. at 792, 241 P.2d at 634 (1952). (Emphasis added.)

8. 136 Cal. App.2d 741, 289 P.2d 303 (1955).

9. Id. at 743, 289 P.2d 303 at 304 (1955).

10. In re Rider, 50 Cal. App.797, 195 Pac. 965 (1920).

11. In re Hill, 78 Cal. App. 23, 247 Pac. 591 (1926).

12. 46 Adv. Cal. 905, 299 P.2d 875 (1956).

13. The defendant was represented at all times by counsel in the superior court, but not upon his appearance in the juvenile court.

In view of this uncertain state of the law and the importance of the question involved, a study should be made to determine whether a minor charged with a criminal offense should have a right to counsel in juvenile court proceedings.

Topic No. 18: A study to determine whether Section 7031 of the Business & Professions Code, which precludes an unlicensed contractor from bringing an action to recover for work done, should be revised.

Section 7031 of the Business & Professions Code provides:

> § 7031. No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract.

The effect of Section 7031 is to bar the affirmative assertion of any right to compensation by an unlicensed contractor, whether in an action on the illegal contract, [1] for restitution, [2] to foreclose a mechanic's lien, [3] or to enforce an arbitration award [4] unless he can show that he was duly licensed.

The courts have generally taken the position that Section 7031 requires a forfeiture and should be strictly construed. In fact, in the majority of reported cases forfeiture appears to have been avoided. One technique has been to find that the artisan is not a "contractor" within the

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1. Kirman v. Borzage, 65 Cal. App.2d 156, 150 P.2d 3 (1944).
2. Cash v. Blackett, 87 Cal. App.2d 233, 196 P.2d 585 (1948).
3. Siemens v. Meconi, 44 Cal. App.2d 641, 112 P.2d 904 (1941).
4. Loving & Evans v. Blick, 33 Cal.2d 603, 204 P.2d 23 (1949) (4-3 decision).

statute, but is merely an "employee". [5] But this device is restricted by detailed regulations of the Contractor's State License Board governing qualifications for licenses and the scope of the statutory requirements. [6] Another way around the statute has been to say that there was "substantial" compliance with its requirements. [7] In addition, Section 7031 has been held not to apply to a suit by an unlicensed subcontractor against an unlicensed general contractor on the ground that the act is aimed at the protection of the public, not of one contractor against a subcontractor. [8] Similarly, the statute does not bar a suit by an unlicensed contractor against a supplier of construction material. [9] And the statute has been held not to apply when the contractor is the defendant in the action. [10]

But with all of these qualifications Section 7031 has a wide area of

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5. Dorsk v. Spivack, 107 Cal. App.2d 206, 236 P.2d 840 (1951); Martin v. Henderson, 124 Cal. App.2d 602, 269 P.2d 117 (1954).

6. 16 Cal. Adm. Code, Ch. 8, §§ 700-797.

7. Gatti v. Highland Park Builders, Inc., 27 Cal.2d 687, 166 P.2d 265 (1946) (seemingly in disregard of Bus. & Prof. Code § 7029); Citizens State Bank v. Gentry, 20 Cal. App.2d 415, 67 P.2d 364 (1937) (corporation in whose name new license taken held alter ego of original licensed contractor); Oddo v. Hedde, 101 Cal. App.2d 375, 225 P.2d 929 (1950).

8. Matchett v. Gould, 131 Cal. App.2d 821, 281 P.2d 524 (1955); see also Wilson v. Stearns, 123 Cal. App.2d 472, 267 P.2d 59 (1954).

9. Rutherford v. Standard Engineering Corp. 88 Cal. App.2d 554, 199 P.2d 354 (1948).

10. Comet Theatre Enterprises v. Cartwright, 195 F.2d 80 (9 Cir. 1952) (buyer unable to recover money paid to contractor); Marshall v. Von Zumwalt, 120 Cal. App.2d 807, 262 P.2d 363 (1953) (contractor may set off value of services when sued by buyer).

application in which it operates to visit a forfeiture upon the contractor and to give the other party a windfall. Many jurisdictions, taking into account such factors as moral turpitude on both sides, statutory policy, public importance, subservience of economic position, and the possible forfeiture involved, [11] allow restitution to an unlicensed person. [12] But in California, Section 7031 expressly forbids "any action" and this prohibition of course includes restitution. The court can weigh equities in the contractor's favor only where the contractor is the defendant. If the contractor is asserting a claim, equities generally recognized in other jurisdictions cannot be recognized because of Section 7031.

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11. 6 Corbin, Contracts, §§ 1534-36; Restatement, Restitution § 140 and comment b.

12. 6 Corbin §§ 1510-14.

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Topic No. 19: A study to determine whether a former wife, divorced in an action in which the court did not have personal jurisdiction over both parties, should be permitted to maintain an action for support.

The question whether a woman should be permitted to sue her former husband for support after an ex parte divorce may arise in either of two situations: (1) where the wife brought the divorce action against her husband either in California or elsewhere but was unable to obtain personal jurisdiction over him and hence could not get a judgment for alimony; (2) where the husband brought the divorce action against the wife either in California or elsewhere but was unable to obtain personal jurisdiction over her and hence could not get a judgment terminating his obligation to support her.

The United States Supreme Court has held that an ex parte divorce decree of one State, even though entitled to full faith and credit insofar as it terminates the marital status of the parties,[1] need not be given effect in another state insofar as it purports to terminate the husband's obligation to support the wife and that the second state may continue to enforce against the husband a separate maintenance decree entered prior to the divorce decree.[2]

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1. The first decision in Williams v. North Carolina (317 U.S. 287 (1942)) held that an ex parte divorce entered by a state which is the domicile of the plaintiff is entitled to full faith and credit insofar as the marital status of the parties is concerned. The second decision in that case (325 U.S. 226 (1945)) held that such recognition need not be given if neither spouse was domiciled in the divorcing state. The present problem arises in the first situation - i.e., where the parties are no longer man and wife.

2. Estin v. Estin, 334 U.S. 541 (1928).

It seems reasonable to suppose that the Supreme Court would reach the same result both in a case in which there were no prior support decree [3] and in a case in which the wife was the plaintiff in the divorce action but was unable to obtain personal jurisdiction over the husband. Thus, the question whether a wife shall be permitted to sue for support even though the marital status of the parties has been terminated by an ex parte divorce appears to be one for each state to determine for itself, unembarrassed by the full faith and credit clause in any case in which the divorce action was brought in another state.

The District Court of Appeal has held that where a wife seeks to enforce a California alimony decree entered in a divorce action and the husband sets up as a defense a subsequently obtained ex parte Nevada divorce decree, the husband's support obligation survives the Nevada decree.[4] However, where there is no prior separate maintenance decree and the wife sues for support in California after entry of a sister state ex parte divorce decree entitled to recognition insofar as the status of the parties is concerned, our courts have held that the wife cannot recover. [5] Relying on Civil Code Sections 136, 137, and 139, the courts have reasoned that one element of a cause of action for support in this State is a showing that the parties are married and that this cannot be shown when they have been divorced in an ex parte proceeding.

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3. Cf. Armstrong v. Armstrong, 76 S.Ct. 629 (1956). The wife sued for support in Ohio and the defendant husband relied upon a Florida divorce decree as a defense. Ohio gave the wife a support decree. In the Supreme Court the majority held that Florida had not purported to fix support rights and that Ohio had therefore not failed to give full faith and credit to the decree. The minority held that Florida had purported to terminate the wife's right to support but that under Estin its decree was not entitled to full faith and credit.

4. Campbell v. Campbell, 107 Cal. App.2d 732, 238 P.2d 81 (1951).

5. Dimon v. Dimon, 40 Cal.2d 516, 254 P.2d 528 (1953) (Traynor J. dissenting).

Several other states have adopted the rule that where alimony could not be awarded in a divorce action obtained by the wife it may be sued for later.[6] Other states have enacted legislation allowing an action for alimony after a divorce, whether the husband or wife obtained the divorce.[7] A statute authorizing the granting of alimony notwithstanding a valid foreign judgment of divorce by a court which did not have personal jurisdiction over the wife was recently passed by New York on the recommendation of its Law Revision Commission.[8]

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6. See Adams v. Abbott, 21 Wash. 29, 56 Pac. 931 (1899); Stephenson v. Stephenson, 50 Ohio App.239, 6 N.E.2d 1005 (1936); Cummings v. Cummings, 138 Kan. 359, 26 P.2d 440 (1933); Spradling v. Spradling, 74 Okla. 276, 181 Pac. 148 (1919).

7. Mass. Ann. Laws c. 208, § 34 (1933); N.J. Stat. Ann., tit. 2A, c. 34 § 23 (1952); R.I. Gen. Laws Ann., c. 416, § 5 (1938) as interpreted by Phillips v. Phillips, 39 R.I. 92, 97 Atl. 593 (1916).

8. See New York Legislative Document No. 65 (K) (1953); New York Civil Practice Act 1170-B.

11/7/56

Topic No. 5: A study to determine whether the law respecting jury instructions relating to fixing the punishment for certain crimes at either death or life imprisonment should be revised.

The Penal Code provides that certain crimes are punishable by either death or life imprisonment at the discretion of the jury.[1] The decisions of the Supreme Court relating to whether and how the jury should be instructed with respect to making this determination are in considerable confusion. At times the Court has said that the proper practice for the trial court is to refrain from giving any instruction which might have a tendency in the slightest degree to influence or control the jury in its determination of the proper penalty in such a case.[2] Yet in other cases the Court has said that it is not reversible error for the trial court to instruct the jury that the death penalty should

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1. Penal Code §§ 190 (murder in the first degree), 209 (kidnapping for robbery or extortion when victim suffers bodily harm), 219 (trainwrecking when no person suffers bodily harm).

2. People v. Martin, 12 Cal.2d 466, 470, 85 P.2d 880, 883 (1938).

be imposed unless there were extenuating circumstances.[3] The latter instruction has been vigorously protested by several members of the Supreme Court in recent years.[4] A study should be made to determine whether any instructions should be given as to what considerations the jury should take into account in deciding between death and life imprisonment and, if so, what these instructions should be.

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3. People v. Byrd, 42 Cal.2d. 200, 266 P.2d 505 (1954); People v. Williams, 32 Cal.2d 78, 195 P.2d 393 (1948); People v. Kolez, 23 Cal.2d 670, 145 P.2d 580 (1944).

4. See for example, Mr. Justice Carter dissenting in People v. Byrd, 42 Cal.2d 200, 214, 266 P.2d 505, 512 (1954); Mr. Justice Traynor dissenting in People v. Kolez, 23 C.2d 679, 672, 145 P.2d 580, 581 (1944).

Topic No. 11: A study to determine whether the principle of equitable estoppel should be available against governmental entities in certain cases.

Section 1962 of the Code of Civil Procedure embodies, inter alia, the well-established principle of equitable estoppel. It provides in part:

> 3. Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it.

No differentiation appears in the statute itself between private and governmental litigants and it is arguable that no such distinction should exist. The courts have held, however, that the doctrine cannot be invoked against the government in many situations. The problem can arise in various contexts:

1. Enforcement of penal laws. Although the California Supreme Court has not passed upon the issue, there is District Court of Appeal authority that good faith reliance upon official advice is a defense in a criminal prosecution. In People v. Ferguson [1] a conviction of violating the Corporate Securities Act was reversed for error in excluding evidence that the defendant failed to obtain a permit only because he had been advised by the commissioner that no permit was required in his case. However, in a later case involving the enforcement of a penal statute, the court rejected the defense of estoppel.[2]

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1. 134 Cal. App. 41, 24 P.2d 965 (1933).

2. Western Surgical Supply Co. v. Affleck, 110 Cal. App.2d 388, 242 P.2d 929 (1952).

2. Tax penalties. In Market Street Ry. v. California Bd. of Equalization [3] the court held the State estopped from imposing penalties and interest on a taxpayer who had acted in reliance upon an administrative tax ruling, but not estopped to recover the tax itself.

3. Public contracts. Contracting by public agencies is surrounded by numerous restrictions, including regulation of letting public contracts, budgetary limits, limitations on the powers of public agencies and their officers, and the restrictions against contracts involving conflict of interest. The violation of these restrictions ordinarily renders the contract void even though the other party can show that the agency or an officer thereof misrepresented its power to enter into the contract. [4]

4. Claims statutes. Various confusing and dispersed provisions regulate the filing of claims against public agencies. Although the defense of estoppel was upheld in Farrell v. County of Placer, [5] where the plaintiff had relied upon official advice in filing his claim, it has been held since that the failure to file a claim cannot be excused on the ground of estoppel. [6]

5. Other situations. The defense of equitable estoppel, if available against the government, would also arise in cases involving public land claims, procedural limitations of the Unemployment Insurance Act, actions between agencies and between an agency and its officers, zoning, etc.

A study should be made to determine whether the defense of equitable estoppel should be available against governmental entities in some or all of these situations.

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3. 137 Cal. App.2d 87, 290 P.2d 20 (1955).

4. Miller v. McKinnon, 20 Cal.2d 83, 124 P.2d 34 (1942).

5. 23 Cal.2d 624, 145 P.2d 570 (1944).

6. Slavin v. Glendale, 97 Cal. App.2d 407, 217 P.2d 984 (1950); Brown v. Sequoia Union High School Dist., 89 Cal. App.2d 604, 201 P.2d 66 (1949). See also Klimper v. Glendale, 99 Cal. App.2d 446, 222 P.2d 49 (1950).

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Topic No. 12: A study to determine whether Civil Code Section 1698 should be repealed or revised.

Section 1698 of the Civil Code, which provides that a contract in writing may be altered by a contract in writing or by an executed oral agreement and not otherwise, might be repealed. It frequently frustrates contractual intent. Moreover, two avoidance techniques have been developed by the courts which considerably limit its effectiveness.[1] One technique is to hold that a subsequent oral agreement modifying a written contract is effective because it is executed, and performance by one party only has been held sufficient to render the agreement executed.[2] The second technique is to hold that the subsequent oral agreement rescinded the original obligations and substituted a new contract, that this is not an "alteration" of the written contract and, therefore, that Section 1698 is not applicable.[4]

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1. See Note, 4 Hastings L.J. 59 (1952).

2. D. L. Godbey & Sons Const. Co. v. Deane, 39 Cal.2d 429, 246 P.2d 946 (1952).

3. Civil Code Section 1689 permits recission of a contract by mutual assent.

4. McClure v. Alberti, 190 Cal. 348, 212 Pac. 204 (1923) (recission of executory written contract by oral agreement); Treadwell v. Nickel, 194 Cal. 243, 228 Pac. 25 (1924) (recission of written by substituted oral contract).

These techniques are not a satisfactory method of ameliorating the rule, however, because it is necessary to have a lawsuit to determine whether Section 1698 applies in a particular case.

If Section 1698 is to be retained, the question arises whether it should apply to all contracts in writing, whether or not required to be written by the statute of frauds or some other statute. It is presently held to apply to all contracts in writing[5] and is thus contrary to the common law rule and probably contrary to the rule in all other states. This interpretation has been criticized by both Williston and Corbin who suggest that the language is the result of an inaccurate attempt to codify the common law rule that contracts required to be in writing can only be modified by a writing.[6]

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5. Smith v. Muller, 201 Cal. 219, 256 Pac. 411 (1927).

6. Williston, Contracts 5179 (rev. ed. 1938) 2 Corbin, Contracts 90-91 (1951).

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Topic No. 15: A study to determine whether intrafamily tort immunity should be abolished.

The California law on intrafamily tort immunity, which rests upon judicial decision rather than statute, is not entirely clear. As to actions between persons married at the time the tort was committed, there is immunity as to personal torts, [1] but not as to torts to the separate property [2] of either. With respect to suits between parent and child, immunity is granted when the wrong is unintentional [3] but there is no immunity when the defendant acted "wilfully". [4] It is said that immunity preserves family harmony and that to allow suits between spouses would encourage fraud and collusion when a liability insurer is the real defendant. It is open to question, however, whether these considerations are of sufficient weight to continue to deny recovery to family members in cases where a nonfamily member would be entitled to recover.

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1. Peters v. Peters, 156 Cal. 32, 103 Pac. 219 (1909); Comment, 3 U.C.L.A. L. Rev. 371 (1956). If this immunity were abolished, complications would arise from the rule that personal tort recoveries are community property unless it were provided that a recovery against a spouse is separate property.

2. Wilson v. Wilson, 36 Cal. 447 (1868); McDuff v. McDuff, 45 Cal. App. 53, 187 Pac. 37 (1919); see also Peters v. Peters, 156 Cal. 32, 36, 103 Pac. 219, 221 (1909) (dictum).

3. Trudell v. Leatherby, 212 Cal. 678, 300 Pac. 7 (1931).

4. Emery v. Emery, 289 P.2d 218 (1955).

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Topic No. 16: A study to determine whether a wife should have the right to recover for loss of consortium caused by injury to her husband.

In California, as is generally true elsewhere, a husband can recover for loss of the consortium of his wife but a wife has no reciprocal right of recovery.[1] With the passage of the Married Women's Property Acts, it was argued that a wife was put on an equal footing with a husband with respect to consortium as well as to other types of property. The argument has not generally been persuasive but it succeeded recently in the District of Columbia wherein Hitaffer v. Argonne Co.[2] held that a wife could recover for a physical injury to the husband which precluded marital relations. The California District Court of Appeal has indicated in dictum that a similar recovery might be available in this State.[3] Inasmuch as a number of important questions are involved in the adoption of such a rule, a study of the matter for consideration by the Legislature would appear to be desirable.

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1. Case Comment, 7 Hastings L. J. 326

2. 183 F.2d 811 (D.C. Cir. 1950).

3. Gist v. French, 136 Cal. App.2d 247, 257, 288 P.2d 1003, 1009 (1955).

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Topic No. 17: A study to determine whether the law respecting the rights of a lessor of property when it is abandoned by the lessee should be revised.

Under the older common law, a lessor was regarded as having conveyed away the entire term of years, and his only remedy upon the lessee's abandonment of the premises was to leave the property vacant and sue for the rent as it became due or to re-enter for the limited purpose of preventing waste. If the lessor repossessed the premises, the lease and his rights against the lessee thereunder were held to be terminated on the theory that the tenant had offered to surrender the premises and he had accepted.

In California the landlord can leave the premises vacant upon abandonment and hold the lessee for the rent. The older rule in California was, however, that if he repossessed the premises, there was a surrender by operation of law and the landlord lost any right to rent or damages against the lessee.[1] More recently it has been held by our courts that if the lessor re-enters or re-lets, he can sue at the end of the term for damages measured by the difference between the rent due under the original lease and the amount recouped under the new lease.[2]

Should the landlord not be given, however, the right to re-enter and sue for damages at the time of abandonment? In some states this has been

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1. Welcome v. Hess, 90 Cal. 507, 27 Pac. 369 (1891).

2. De Hart v. Allen, 26 Cal.2d 829, 161 P.2d 453 (1945). This case appears to involve a partial repudiation of Welcome v. Hess, note 1. 34 Calif. L. Rev. 252 (1946).

allowed, with certain restrictions, even in the absence of a clause in the lease.[3] And it has been held in many states that the landlord may enter as agent of the tenant and re-lease for a period not longer than the original lease at the best rent available. In this case, the courts have said, the landlord has not accepted a surrender, and may therefore sue for damages. But this doctrine was repudiated in California[4] and it is doubtful that it can be made available to the lessor without legislative enactment.[5]

Code of Civil Procedure Section 3308 provides that the parties to a lease may provide therein that if the lessee breaches any term of the lease,

> "The lessor shall thereupon be entitled to recover from the lessee the worth at the time of such termination, of the excess, if any, of the amount of rent and charges equivalent to rent reserved in the lease for the balance of the stated term or any shorter period of time over the then reasonable rental value of the premises for the same period. The rights of the lessor under such agreement shall be cumulative to all other rights or remedies ...."

Thus the landlord is well-protected in California if the lease so provides. The question is whether he should be similarly protected by statute when the lease does not so provide.

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3. Sagamore Corp. v. Willcutt, 120 Conn. 315, 180 Atl. 464 (1935) (lease of only one year, so not a strong holding); Auer v. Penn. 99 Pa. 370 (1882).

4. Welcome v. Hess, note 1.

5. See Dorcich v. Time Oil Co., 103 Cal. App.2d 677, 230 P.2d 10 (1951), 39 Calif. L. Rev. 588 (1951).