#36.300 9/26/74

First Supplement to Memorandum 74-53

Subject: Study 36.300 - Condemnation Law and Procedure (Operative Date)

This supplementary memorandum discusses the law concerning retrospective operation of statutes and three alternative operative date provisions. The Commission requested the staff to research these matters at the September meeting. Some additional background materials are attached as exhibits. Exhibit I is from Witkin's Summary of California Law; Exhibit II is Professor Van Alstyne's discussion of retrospective legislation in 5 Cal. L. Revision Comm'n Reports 520-537 (1963); Exhibit III is from 13 Cal. Jur.3d; Exhibit IV is an excerpt from Flournoy v. State, 230 Cal. App.2d 520, 41 Cal. Rptr. 190 (1964).

BACKGROUND INFORMATION

A retrospective law is frequently defined in California cases as "one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute."[1] "A statute is not made retroactive merely because it draws upon facts antecedent to its enactment for its operation. . . . It must give the previous transaction to which it relates some different legal effect from that which it had under the law when it occurred."[2]

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1. Aetna Casualty & Surety Co. v. Industrial Accident Comm'n, 30 Cal.2d 388, 182 P.2d 159 (1947).

2. Ware v. Heller, 63 Cal. App.2d 817, 148 P.2d 410 (1944). But see B. Smith, Retroactive Laws and Vested Rights, 5 Texas L. Rev. 231, 233 (1927):

> There is no such thing as a law that does not extinguish rights, powers, privileges, or immunities acquired under previously existing laws. That is what laws are for.

Retrospective application of statutes involves two questions: legislative intent and constitutionality. The question of constitutionality need not be considered until it is determined that the statute in question was intended to be retrospective.

Legislative Intent

At common law, there was a presumption against retrospectivity except where the Legislature's intention to apply a provision retrospectively clearly appeared. This presumption is continued in Code of Civil Procedure Section 3, which provides that "no part of it [the code] is retroactive, unless expressly so declared."[3] Section 3 has been variously interpreted. In Callet v. Alioto,[4] the court said that every statute will be construed so as not to affect pending causes of action and will not be given retroactive effect in the absence of a clearly expressed intention to the contrary. However, the legislative intention may be clearly or necessarily implied, particularly where it is necessary to achieve the purpose of the legislation.[5] Sometimes courts have worked backwards from a suspicion that the statute would unconstitutionally affect vested rights to determine that the Legislature must not have intended retroactive operation.[6]

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3. In In re Estrada, 63 Cal.2d 740, 408 P.2d 948, 48 Cal. Rptr. 172 (1965) (habeas corpus), the court said that an identical section in the Penal Code merely embodies a common law rule of construction and should be applied only after it is determined that it is impossible to ascertain legislative intent.

4. 210 Cal. 65, 290 P. 438 (1930). See also DiGenova v. State Board of Education, 57 Cal.2d 167, 367 P.2d 865, 18 Cal. Rptr. 369 (1962).

5. City of Sausalito v. County of Marin, 12 Cal. App.3d 550, 90 Cal. Rptr. 843 (1970); McBarron v. Kimball, 210 Cal. App.2d 218, 26 Cal. Rptr. 379 (1962).

6. See Barber v. Galloway, 195 Cal. 1, 231 P. 34 (1924); Saso v. Furtado, 104 Cal. App.2d 759, 232 P.2d 583 (1951).

It has also been said that the presumption against retroactivity stated in Section 3 applies only to substantive provisions and not to procedural matters.[7] Hence, procedural statutes may be applied retroactively although the Legislature has not expressly so stated. Retrospectivity in the case of procedural provisions apparently means application to pending actions; it does not contemplate the invalidation of procedural steps already taken. A different theory which reaches the same result is that it is not retrospective application to apply procedural statutes to pending actions.[8] The result of these two approaches is stated in Code of Civil Procedure Section 8:

> No action or proceeding commenced before this Code takes effect, and no right accrued, is affected by its provisions, but the proceedings therein must conform to the requirements of this Code as far as applicable.

Whether an action is considered pending for the purposes applying a procedural statute is also subject to varying interpretation. In People v. Nash,[9] the court said that generally procedural rules will be applied only to cases pending and undetermined on the effective date of the legislation and will not apply to causes in which judgments have been entered prior to the effective date. In Olson v. Hickman,[10] however, where a provision for attorney's fees became effective six days after the court of appeal decision, the court held that the action was still pending since the 30-day period for rehearing and 60-day period for appeal to the Supreme Court had not run.

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7. Wood v. Wood, 126 Cal. App. 237, 14 P.2d 584 (1932).

8. See Olivas v. Weiner, 127 Cal. App.2d 597, 274 P.2d 476 (1945); Arques v. National Superior Co., 67 Cal. App.2d 763, 155 P.2d 643 (1954).

9. 15 Cal. App. 320, 114 P. 784 (1911).

10. 25 Cal. App.3d 920, 102 Cal. Rptr. 248 (1972).

A basic difficulty in applying these rules is that it is impossible to determine with certainty which provisions are procedural and which are substantive.[11] Even if it can be determined from the appearance of or the label attached to a particular statute whether it is procedural or substantive, a procedural statute will be treated as substantive if its effect is substantive.[12] Similar difficulties are encountered with determining what are remedial, curative, or evidentiary provisions--all of which are entitled to special treatment unless they are substantive in effect, in which case they may run afoul of constitutional requirements.

Constitutionality

If it is determined that the Legislature "intends" a statute to apply retrospectively, the court must then determine whether it may constitutionally be given retrospective effect. It is often stated as a rule that a retrospective statute is unconstitutional if it deprives one of vested rights subject to protection by the state or if it impairs the obligation of contracts.[13] This rule is conclusory, however, for "vested right" is defined as a right which the state should protect and which cannot be abrogated by statute.[14] Writers on the subject of retrospectivity conclude that it is impossible to define vested right in advance and that courts decide questions

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11. Black's Law Dictionary defines procedural law as "that which prescribes method of enforcing rights or obtaining redress for their invasion; machinery for carrying on a suit" and substantive law as "that part of the law which creates, defines, and regulates rights."

12. See Aetna Casualty & Surety Co. v. Industrial Accident Comm'n, 30 Cal.2d 388, 182 P.2d 159 (1947); City of Sausalito v. County of Marin, 12 Cal. App.3d 550, 90 Cal. Rptr. 843 (1970).

13. See Miller v. McKenna, 23 Cal.2d 774, 147 P.2d 531 (1944); Kenney v. Wolf, 102 Cal. App.2d 132, 227 P.2d 285 (1951).

14. See Flournoy v. State, 230 Cal. App.2d 520, 530-531, 41 Cal. Rptr. 190 (1964)(attached as Exhibit IV).

of the constitutionality of retrospective statutes by a concept of due process and fairness.[15] Hochman states that the constitutionality of such statutes is determined by three factors: "the nature and strength of the public interest served by the statute, the extent to which the statute modifies or abrogates the asserted preenactment right, and the nature of the right which the statute alters."[16]

Vested rights are usually property or contract rights of persons other than public entities.[17] Partial lists of rights held to be vested or not vested are included in Exhibit I (Sections 283-284) and Exhibit III (Sections 274-275).

ALTERNATIVE OPERATIVE DATE PROVISIONS

1. Single Effective Date--Leave Application to Courts

At the last meeting, the Commission tentatively adopted the following operative date provision:

§ 1230.065. Operative date

1230.065. This title becomes operative July 1, 1977.

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15. See Greenblatt, Judicial Limitations on Retroactive Civil Legislation, 51 Nw. U.L. Rev. 540 (1956); Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692 (1960); B. Smith, Retroactive Laws and Vested Rights, 5 Texas L. Rev. 231 (1927) & 6 Texas L. Rev. 409 (1928).

16. Hochman, supra, at 697. Hochman's analysis is quoted and applied by the court in Flournoy v. State. See Exhibit IV at 532-534.

17. See 13 Cal. Jur.3d Constitutional Law § 274 at 506 (1974). For the view that governmental entities normally are not considered to have vested rights, see Hochman, supra, at 724; and Van Alstyne, Exhibit II, at 521.

The staff was directed to expand the Comment to this section to state the general rules concerning construction of an operative date provision. Accordingly, we suggest the following:

> Comment. Section 1230.065 delays the operative date of this title until July 1, 1977, to allow sufficient time for interested persons to become familiar with the new law. Procedural provisions of this title are applicable to pending actions as far as practicable. See Code Civ. Proc. § 8. Substantive provisions of this title are applicable only prospectively. Cf. Code Civ. Proc. § 3. For a discussion of these principles, see 5 B. Witkin, Summary of California Law, Constitutional Law §§ 282-289 at 3571-3580 (8th ed. 1974).

The staff considers this alternative to be undesirable. While it is obvious from the preceding discussion and the material in the attached exhibits that it is impossible to state with complete certainty which provisions may be made retrospective and which may not, the Commission should not conclude from this that the entire problem is best left to the courts. The broad rules stated in the Comment offer little guidance. If this alternative is adopted, the implementation of the new law would be left to the vagaries of rules of construction. Litigation would occur concerning the legislative intent and whether a particular provision is substantive, procedural, or procedural but substantive in effect. The courts would have to decide whether to apply substantive provisions to causes of action arising before the effective date where proceedings have not been commenced before such date. If anything can be done to alleviate this uncertainty, it should be done.

2. Uniform Code Scheme--New Law as Far as Practicable

At the last meeting, the Commission discussed a draft of an operative date provision based on the Uniform Code. It is set forth on page 7 of Memorandum 74-46. The staff considers this alternative to be preferable to the first alternative. It solves the problem of determining to which proceedings the new law applies. Subdivision (b) makes clear that the new

law applies to pending proceedings; subdivision (c) provides that provisions concerning the right to take, precondemnation activities, and pleadings do not apply to pending proceedings; and subdivision (d) makes clear that post-trial motions and appeals are governed by the old law. This alternative makes the legislative intent clear. Some litigation would result from subdivision (b) which applies the new law, both substantive and procedural, to the "fullest extent practicable." However, the question of what is substantive and what is procedural is eliminated. It is also possible under this alternative to raise a constitutional claim that to apply certain substantive provisions of the new law retroactively (i.e., in pending proceedings) would abrogate vested rights. However, such claims should be at a minimum since, in most respects, the new Eminent Domain Law does not restrict rights of individuals.

3. Printed Tentative Recommendation Alternative--Old Law for Pending Actions

Section 1230.070 of the printed tentative recommendation, in relevant part, provides as follows:

> 1230.070. No proceeding to enforce the right of eminent domain, . . . commenced prior to the enactment of this title and the repeal of former Title 7 of this part, is affected by such enactment and repeal.

This alternative has the virtue of making the legislative intent certain. It also avoids the difficult problems of deciding the difference between substance and procedure, the meaning of vested rights, and the extent to which new procedure may practicably be applied to pending cases. While the staff prefers this alternative from the standpoint of certainty, we prefer the second alternative from the standpoint of implementation. The third alternative continues old law for a longer period than the second alternative. By allowing old law to apply depending on the date of commencement of proceedings,

public entities will be encouraged by the third alternative to file all the actions they can before the operative date of the new law. Moreover, for a considerable period of time (especially if appeals and retrials are considered), the courts and lawyers will be applying two different bodies of law depending on when the complaint was filed.

Conclusion

Since the Eminent Domain Law contains many improvements over existing law, the Commission should choose the operative date provision which puts the new law into effect as soon as feasible, consonant with constitutional limitations. The staff believes that the second alternative based on the Uniform Code offers the best balance of speedy implementation and certainty. The staff believes the third alternative to be preferable to the first.

Respectfully submitted,

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First Supplement to
Memorandum 74-53

EXHIBIT I

[5 B. Witkin, Summary of California Law, Constitutional Law §§ 282-289 (8th Ed. 1974)]

B. Retrospective Legislation.

1. Changes Affecting Substantive Rights.

(a) [§282] In General.

(1) *What Constitutes Invalid Retrospective Law.* A retrospective or retroactive law is not invalid *as such.* Neither the federal nor California Constitution prohibits the enactment of legislation operating on preexisting matters, rights or obligations. (*McCann v. Jordan* (1933) 218 C. 577, 579, 24 P.2d 457; *Los Angeles v. Oliver* (1929) 102 C.A. 299, 309, 283 P. 298; *Macedo v. Macedo* (1938) 29 C.A.2d 387, 390, 84 P.2d 552; *League v. Texas* (1902) 184 U.S. 156, 22 S.Ct. 473, 46 L.Ed. 478; see 73 Harv. L. Rev. 693.)

Such a law is invalid, however, if in conflict with certain constitutional protections: (a) If it is an *ex post facto law* (supra, §258); (b) if it impairs the *obligation of a contract* (infra, §619); (c) if it deprives a person of a *vested right* or substantially impairs such right, thereby denying *due process.* (*Roberts v. Wehmeyer* (1923) 191 C. 601, 612, 218 P. 22; see 73 Harv. L. Rev. 692; 48 Cal. L. Rev. 216 ["Constitutional and Legislative Considerations in Retroactive Lawmaking"]; 16 Am.Jur.2d, Constitutional Law §413 et seq.)

(2) *Statute Prospective in Effect.* Even though a statute in some respects deals with a prior event or transaction, its actual effect may be prospective, and its operation valid. (See *Record v. Indemnity Ins.*

Co. (1951) 103 C.A.2d 434, 443, 229 P.2d 851 [amendment providing for attorney's fee in industrial accident case, validly applied to *prior injury* where the fee was for *subsequent services*]; cf. *Hogan v. Ingold* (1952) 38 C.2d 802, 243 P.2d 1, infra, §285.)

(b) [§283] Vested Right as Basis of Attack.

A person attacking a retrospective law must first establish some *vested right*. Thus, if a landowner applies for or obtains a permit to construct a building under an existing zoning ordinance, and thereafter the ordinance is amended to prohibit structures of that type in the particular zone, the new law may operate retroactively to compel denial or revocation of the permit, where he has not engaged in substantial building or incurred expenses in connection therewith. (*Brougher v. Board of Pub. Works* (1928) 205 C. 426, 432, 271 P. 487; see also *McCann v. Jordan* (1933) 218 C. 577, 579, 24 P.2d 457; *Vincent Pet. Corp. v. Culver City* (1941) 43 C.A.2d 511, 516, 111 P.2d 433 [license or permit issued under police power, e.g., to drill for oil in a particular district, is a mere privilege and not property, and can be revoked at any time]; *Cox v. State Social Welfare Board*, (1961) 193 C.A.2d 708, 718, 14 C.R. 776 [legislative power to withdraw or specify conditions on old age benefits upheld; no vested right]; *Spindler Realty Corp. v. Monning* (1966) 243 C.A.2d 255, 53 C.R. 7; 16 Am.Jur.2d, Constitutional Law §419 et seq.; on professional license, see infra, §284; on retroactive tax legislation, see *Taxation*, §24.)

In *Spindler Realty Corp. v. Monning*, supra, plaintiff, contemplating the construction of a hotel or apartment house, obtained a grading permit, and spent a considerable sum grading. But before he could complete his plans and get a building permit the city adopted a zoning ordinance prohibiting the proposed use. *Held*, a grading permit, though here a necessary prerequisite to a building permit, was not its equivalent, and no vested right arose. (243 C.A.2d 264.)

On the other hand, in *Trans-Oceanic Oil Corp. v. Santa Barbara* (1948) 85 C.A.2d 776, 194 P.2d 148, a permit to drill for oil was granted by defendant city council, and substantial expenses were incurred by plaintiff in preparation for drilling. *Held*, plaintiff obtained a vested right to drill, and the attempted revocation of the permit was a denial of due process. The *Vincent* case, supra, was distinguished and its language limited to the situation in which the permittee fails to comply with the conditions of the permit. (85 C.A.2d 795.) And in *Santa Barbara v. Modern Neon Sign Co.* (1961) 189 C.A.2d 188, 195, 11 C.R. 57, the zoning cases on invalidity of destruction of a nonconforming use

without a reasonable amortization period (see infra, §477 et seq.) were applied by analogy to an ordinance requiring the removal, within one year, of moving signs visible from the highway.

In California, the various amendments to our community property laws, enlarging the interest and rights of the wife and limiting those of the husband, were held invalid where retroactively applied to property acquired prior thereto. (See *Community Property.*) And an attempt by *repeal* of a statute to deprive a plaintiff of an accrued contractual cause of action is a violation of the due process as well as the contract clause. (*Coombes v. Getz* (1932) 285 U.S. 434, 52 S.Ct. 435, 76 L.Ed. 866, infra, §621.) (See also *Wexler v. Los Angeles* (1952) 110 C.A.2d 740, 747, 243 P.2d 868 [divorced mother's accrued cause of action for child's death not subject to statutory change making father a necessary party].)

The principles were reexamined in *Flournoy v. California* (1964) 230 C.A.2d 520, 41 C.R. 190, upholding the retroactive application of statutory immunities under the new governmental liability law (see *Torts,* §92).

(1) The term "vested right" is not susceptible of clear definition, and its meaning is not dependent upon the distinction between statutory and common law rights or between contract and tort causes of action. (230 C.A.2d 531.)

(2) Retroactivity is determined by certain factors: "the nature and strength of the policy interest served by the statute, the extent to which the statute modifies or abrogates the asserted preenactment right, and the nature of the right which the statute alters." (230 C.A.2d 532, quoting 73 Harv. L. Rev. 697.) Thus, the first factor is illustrated by the *Blaisdell* (mortgage moratorium) case (infra, §629); the second is applied by the cases which distinguish between statutes affecting rights and those affecting remedies; the third involves the element of reliance or reasonable expectation of continuance of preexisting law. (230 C.A.2d 531.)

(3) Here the public interest in the limited defense given by Govt.C. 835.4 is important; the effect on the preenactment right is not great, and retroactivity involves no element of surprise:

"Grouping together the three factors, upon the summation of which constitutional retroactivity depends, we find here legislation wherein public interest is great and such interest attaches importantly to its retroactive application. We weigh this against a right which has not been, in our estimate, grievously impaired. And also, as a part of the weighing process, we deal with a right which only existed

through the retroactive application of *Muskopf*. The result of this weighing tips the scales to require our decision that the legislative declaration of retroactivity . . . is not unconstitutional—as applied to the facts and provisions of the 1963 legislation here involved." (230 C.A.2d 537.) (For other cases holding the new governmental liability statutes retroactive, see *Torts*, §92.)

(c) [§284] Changes in Conditions of License.

It is frequently declared that the license to practice a profession or calling, such as medicine or law, once obtained by compliance with legally prescribed conditions, is a "property right" or "vested property right" and entitled to protection as such. The cases which state this proposition are, however, mainly concerned with arbitrary proceedings which deny procedural due process. A distinct question arises where a regulatory statute retroactively changes the qualifications for the license, so that the licensee faces more onerous conditions or is actually prevented from further practice. In *Rosenblatt v. Calif. State Bd.* (1945) 69 C.A.2d 69, 73, 158 P.2d 199, the court held that the granting of the license confers no vested right on the licensee, and that he accepts it subject to the power of the state to impose further regulations in the public interest. Accordingly, while petitioner had qualified and had been licensed as an "assistant pharmacist" on the basis of certain training and experience, it was held proper to deny him a renewal license after the Legislature had repealed the statutes permitting persons of such lesser skill to engage in this work.

Similarly, in *Castleman v. Scudder* (1947) 81 C.A.2d 737, 185 P.2d 35, petitioners, business opportunity brokers, made contracts to sell businesses. The contracts lacked a definite termination date. Thereafter B. & P.C. 10301(f) was enacted to provide for revocation or suspension of a broker's license for demanding a fee under such a contract. *Held*, the statute was applicable to petitioners, who made claims for commissions after the statute became effective. "[H]aving qualified as licensees in a business already regulated under the police power of the state, they thereby accepted such licenses subject to the possibility of further regulatory legislation upon the same subject matter." (81 C.A.2d 740.)

2. Changes in Procedure.

(a) [§285] Valid Retrospective Laws.

There is no vested right in existing *remedies* and rules of *procedure and evidence*. Hence, generally speaking, the Legislature may

change such rules and make the changes apply retroactively to causes of action or rights which accrued prior to the change. (*Los Angeles v. Oliver* (1929) 102 C.A. 299, 315, 283 P. 298; *San Bernardino v. Ind. Acc. Com.* (1933) 217 C. 618, 628, 20 P.2d 673; *Beal v. Superior Court* (1934) 137 C.A. 559, 31 P.2d 223; *Patek v. Calif. Cotton Mills* (1935) 4 C.A.2d 12, 40 P.2d 927; *Mattson v. Dept. of Labor* (1934) 293 U.S. 151, 55 S.Ct. 14, 79 L.Ed. 251; see 35 Harv. L. Rev. 193; 12 So. Cal. L. Rev. 471; 41 A.L.R.2d 798; 16 Am.Jur.2d, Constitutional Law §427.)

Thus, in *Los Angeles v. Oliver*, supra, 102 C.A. 311, at the time a condemnation suit was brought the statute made the value of the property determinable as of the time of *trial;* an amendment was held validly applicable to a suit already commenced which changed the time to that of *summons* (23 months earlier). The court pointed out that the only vested right was that just compensation be paid, and that the procedure for ascertainment, within reasonable limits, was subject to legislative change. (See also *Mercury Herald Co. v. Moore* (1943) 22 C.2d 269, 274, 138 P.2d 673 [changes in procedure to redeem lands sold for tax delinquency]; *Casey v. Katz* (1952) 114 C.A.2d 391, 250 P.2d 291 [1949 amendment to Prob.C. 707 requiring filing of claim against estate of decedent tortfeasor validly applied to cause of action for malicious prosecution which arose prior to the enactment]; *Halbert v. Berlinger* (1954) 127 C.A.2d 6, 14, 273 P.2d 274 [same amendment; *Casey* followed]; *Hogan v. Ingold* (1952) 38 C.2d 802, 812, 243 P.2d 1 [Corp.C. 834, requiring security for costs in shareholder's derivative suit, validly applied to action commenced after enactment although brought by a plaintiff who acquired his shares before, and based on wrongs allegedly committed before; see dissent]; *Owens v. Superior Court* (1959) 52 C.2d 822, 833, 345 P.2d 921, 1 *Cal. Proc.*, 2d, *Jurisdiction*, §90 [provision governing service on person leaving state]; *Siteman v. City Board of Education* (1964) 61 C.2d 88, 37 C.R. 191, 389 P.2d 719 [law giving probationary teacher right to hearing and protection against dismissal except for cause]; 81 A.L.R.2d 417 [shortening time allowed for appellate review]; 98 A.L.R.2d 1105 [imposing, removing or changing monetary limitation of recovery for personal injury or death].)

(b) [§286] Necessity That Efficient Remedy Be Left.

An important qualification of the rule stated in the preceding section is that the Legislature cannot, by a purported change in procedure, cut off all remedy. Unless it leaves a reasonably efficient remedy to enforce the right, the right itself is affected, and the statute

will be held invalid as an impairment of a substantive right (supra, §283). (See *Lane v. Wilson* (1939) 307 U.S. 268, 59 S.Ct. 872, 876, 83 L.Ed. 1281, 1283 [statute requiring Negroes to register in a 12-day period or be perpetually barred from voting; period held too restricted].)

The distinction is illustrated by cases dealing with the 1933 amendments to C.C.P. 583, providing for mandatory dismissal of an action not brought to trial within 5 years. Formerly the period ran from the filing of the *answer;* by amendment the period ran from filing of the *action* (complaint), an earlier date. As to pending actions in which the time had already run if the new statute were applied, it was invalid because it immediately cut off the entire remedy. (*Coleman v. Superior Court* (1933) 135 C.A. 74, 76, 26 P.2d 673.) But as to pending actions in which a substantial period of time still remained to bring the case to trial, the amendment was given a valid retroactive application. (*Rosefield Packing Co. v. Superior Court* (1935) 4 C.2d 120, 122, 47 P.2d 716.) (See also, holding the time adequate, *Casey v. Katz* (1952) 114 C.A.2d 391, 250 P.2d 291; *Halbert v. Berlinger* (1954) 127 C.A.2d 6, 14, 273 P.2d 274.)

There is considerable authority to the effect that the *statute* must, in such situations, expressly provide a reasonable time limit, and that where the Legislature fails to do so, retroactive application is invalid even though in fact a substantial period was available before it became effective. However, in the *Rosefield* case, supra, California took the contrary view.

The doctrine that an efficient remedy must be left is relevant only where a statute affects the remedy of a private person. It does not apply where *the state gives up a remedy* of its own or of one of its agencies. The issue in such a case is not due process, but whether the Legislature has made a gift of public money in violation of the constitutional prohibition. (*Calif. Emp. Stab. Com. v. Payne* (1947) 31 C.2d 210, 215, 187 P.2d 702, *Taxation*, §17.)

3. [§287] Deprivation of Defense.

It has been held that a statute which deprives a person of an existing defense to another's claim may be deemed an impairment of a vested right; i.e., the immunity from successful suit is equivalent to a right.

Thus, in *Morris v. Pacific Elec. Ry. Co.* (1935) 2 C.2d 764, 767, 43 P.2d 276, the law at the time of an automobile accident made violation

of the speed limit contributory negligence per se, barring recovery. After the suit was commenced, an amendment made such violation only prima facie evidence of negligence. *Held*, the amendment could not be applied to the pending action, for it would deprive the defendant of an absolute defense. (See generally 113 A.L.R. 768; 16 Am.Jur.2d, Constitutional Law §425.)

There are two chief illustrations of statutes taking away existing defenses:

(a) *Statutes of Limitation.* Where the statute has not yet run, the Legislature may validly extend the period. (*Mudd v. McColgan* (1947) 30 C.2d 463, 468, 183 P.2d 10.) But where it has already run, the defense is regarded in most states as a vested right and the Legislature cannot remove the bar and destroy the defense by a retroactive law. (See *Chambers v. Gallagher* (1918) 177 C. 704, 708, 171 P. 931; 133 A.L.R. 384; 63 Harv. L. Rev. 1191.) The United States Supreme Court has taken the contrary position, holding that the statute of limitations ordinarily relates to remedies rather than rights, and that the retroactive revival of a barred personal claim for money or damages merely disappoints a hope of defense and does not deprive the defendant of a vested right. Under this view an extension of the period of the statute is void only where the lapse of time has created a *property right*, e.g., a title to real or personal property by adverse possession. (*Chase Securities Corp. v. Donaldson* (1945) 325 U.S. 304, 65 S.Ct. 1137, 1142, 89 L.Ed. 1628, 1635.) (See 2 *Cal. Proc.*, 2d, *Actions*, §244.)

(b) *Curative Statutes.* Where the performance of governmental functions is unauthorized or invalid, by reason of irregularities or inaccuracies in compliance with law, the Legislature may sometimes remedy the defects and validate the acts by a *curative statute.* The theory is that what the Legislature could have authorized originally it can later validate by ratification, and that procedural requirements which it could have omitted originally it can dispense with later. (See *Swayne & Hoyt v. United States* (1937) 300 U.S. 297, 57 S.Ct. 478, 480, 81 L.Ed. 659, 663; *Graham & Foster v. Goodcell* (1931) 282 U.S. 409, 51 S.Ct. 186, 194, 75 L.Ed. 415, 440; *Chase v. Trout* (1905) 146 C. 350, 80 P. 81; *Miller v. McKenna* (1944) 23 C.2d 774, 781, 147 P.2d 531; 51 Harv. L. Rev. 1069; 140 A.L.R. 959; 16 Am.Jur.2d, Constitutional Law §430; *Taxation* §184.) But where a right or title has already vested, it cannot be impaired by subsequent curative legislation. (*Miller v. McKenna*, supra; see *Taxation*, §184.)

4. [§288] Construction Against Retroactivity.

A statute affecting a substantive right will, if possible, be construed prospectively to avoid a declaration of unconstitutionality. (See *Saso v. Furtado* (1951) 104 C.A.2d 759, 764, 232 P.2d 583 [statutory regulation restricting manner and extent of transfer of liquor license held inapplicable to agreement to transfer, performance of which was due before act went into effect].)

Even a procedural statute which may validly be given a retrospective operation will ordinarily, for reasons of fairness, be construed as prospective, unless the legislative intent to make it retroactive clearly appears. (*Krause v. Rarity* (1930) 210 C. 644, 655, 293 P. 62; *Callet v. Alioto* (1930) 210 C. 65, 67, 290 P. 438; *Estate of Whiting* (1930) 110 C.A. 399, 403, 294 P. 502; *Jones v. Summers* (1930) 105 C.A. 51, 54, 286 P. 1093; *Rainey v. Michel* (1936) 6 C.2d 259, 281, 57 P.2d 932; *Medical Finance Assn. v. Wood* (1936) 20 C.A.2d Supp. 749, 750, 63 P.2d 1219; *Douglas Aircraft Co. v. Cranston* (1962) 58 C.2d 462, 465, 24 C.R. 851, 374 P.2d 819; see 18 Cal. L. Rev. 331 [*Krause* case].)

Thus, in *DiGenova v. State Board of Education* (1962) 57 C.2d 167, 18 C.R. 369, 367 P.2d 865, the Education Code was amended to require revocation of teaching credentials of a person convicted of certain defined sex offenses. *Held*, the new law was inapplicable to petitioner, convicted before its adoption: "It is settled therefore that no statute is to be given retroactive effect unless the Legislature has expressly so declared and that this rule is not limited by a requirement that a statute be liberally construed to effect its objects and promote justice." (57 C.2d 174.)

This policy is particularly strong where the statute, though partly procedural in form, is mainly substantive in nature or effect. In *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 C.2d 388, 394, 182 P.2d 159, the contention was made that there is no presumption against retrospective construction of statutes relating merely to remedies and modes of procedure. The court's answer was as follows: "This reasoning . . . assumes a clear-cut distinction between purely 'procedural' and purely 'substantive' legislation. In truth, the distinction relates not so much to the form of the statute as to its effects. If *substantial* changes are made, even in a statute which might ordinarily be classified as procedural, the operation on existing rights would be retroactive because the legal effects of past events would be changed, and the statute will be construed to operate only in future unless the

legislative intent to the contrary clearly appears." (30 C.2d 394.) (See also *California v. Ind. Acc. Com.* (1957) 48 C.2d 355, 361, 310 P.2d 1 [following *Aetna* case]; *Estate of Giordano* (1948) 85 C.A.2d 588, 193 P.2d 771 [statute changing burden of proof as to reciprocal inheritance rights, construed prospectively]; *Ghera v. Sugar Pine Lumber Co.* (1964) 224 C.A.2d 88, 89, 36 C.R. 305, 2 *Cal. Proc.*, 2d, *Actions*, §242 [new statute enlarging limitation period for recovery of penal damages for trespass]; *General Ins. Co. v. Commerce Hyatt House* (1970) 5 C.A.3d 460, 471, 85 C.R. 317 [statute providing that parties to contract may require written notice of intention to rely on excuse of prevention]; 66 A.L.R.2d 1444 [changing manner of distribution of recovery or settlement for wrongful death]; 98 A.L.R.2d 1105 [statute imposing, removing or changing monetary limitation of recovery for personal injury or death]; 22 So. Cal. L. Rev. 194.)

C. [§289] Extraterritorial Legislation.

Rights vested in one state cannot be impaired by legislation of another. So, if a citizen of one state exercises his privilege of coming into another, the latter state cannot, as a condition of entrance, compel him to give up property rights vested elsewhere. (See *Estate of Thornton* (1934) 1 C.2d 1, 5, 33 P.2d 1; 8 So. Cal. L. Rev. 221; *Community Property.*) Similarly, one state cannot tax land or interests in land situated outside its borders. (*Senior v. Braden* (1935) 295 U.S. 422, 55 S.Ct. 800, 79 L.Ed. 1520; see *Taxation*, §26.)

One state cannot impose additional burdens and liabilities on a party under a contract validly made in another state. (*Hartford Ind. Co. v. Delta Co.* (1934) 292 U.S. 143, 54 S.Ct. 634, 636, 78 L.Ed. 1178, 1181.) However, in *Osborn v. Ozlin* (1940) 310 U.S. 53, 60 S.Ct. 758, 761, 84 L.Ed. 1074, 1078, it was held that a state may require that all insurance contracts on property or persons within the state be signed by a local agent who receives the usual fee, even though the contract is written outside the state with a broker outside the state. "[T]he mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids." (See also *Watson v. Employers Liability Assur. Corp.* (1954) 348 U.S. 66, 75 S.Ct. 166, 170, 99 L.Ed. 74, 82 [state statute allowing direct tort action against liability insurer validly applied to foreign insurer whose contract was made in another state with a clause against such action].)

Statutes providing for escheat of intangible property, such as unclaimed insurance money due on matured policies, or shares of stock

and dividends, raise serious questions of extraterritoriality, for the situs of the intangible is fictional, and more than one state may seek to apply its statute to the property. The constitutional principle is now established that the holder of the property (e.g., the insurance company or other corporation) is deprived of due process if it is compelled to give it up in one jurisdiction without assurance of freedom from suit in another. (See *Western Union Tel. Co. v. Pennsylvania* (1961) 368 U.S. 71, 82 S.Ct. 199, 201, 7 L.Ed.2d 139, 142; *Texas v. New Jersey* (1965) 379 U.S. 674, 85 S.Ct. 626, 13 L.Ed.2d 596; 76 Harv. L. Rev. 132; 79 Harv. L. Rev. 201; 50 Cal. L. Rev. 735; 1 *Cal. Proc.*, 2d, *Jurisdiction*, §160.)

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EXHIBIT III

[13 Cal. Jur.3d, Constitutional Law §§ 274-275 (1974)]

§ 274. In general

The right of an heir to his inheritance depends on positive law and is not a natural or absolute right. It is therefore competent for the legislature to change the rights of inheritance.[43] The legislature may also change the laws governing testamentary power.[44] But when, by the death of a testator or intestate, the rights of the heirs have vested, such rights cannot be impaired by subsequent legislative acts.[45] Similarly, amendments whereby it is sought to lessen, enlarge, or change in any manner the rights of the respective spouses in community property are not to be given a retroactive effect in any case as to rights which have vested prior to the enactment of the amendment.[46] Neither can the right of survivorship in a joint tenancy be divested retroactively.[47]

43. DECEDENTS' ESTATES (2d ed., DESCENT AND DISTRIBUTION § 6).

44. WILLS (2d ed., § 2).

45. *Packer Estate 125 C 396, 58 P 59; Kavanagh v Board of Police Pension Fund Comrs. 134 C 50, 66 P 36; Newlove Estate 142 C 377, 75 P 1083; Patterson Estate 155 C 626, 102 P 941; Potter Estate 188 C 55, 204 P 826; Wellings Estate 197 C 159, 240 P 21.*

An amendment that does not deprive heirs of any right which they had, but merely changes to a slight extent the time and place for asserting such right, does not impair vested rights. *Benvenuto Estate 183 C 382, 191 P 678.*

For general discussion as to what law governs the rights of succession, see DECEDENTS' ESTATES (2d ed., DESCENT AND DISTRIBUTION § 4); WILLS (2d ed., § 3).

Annotations: Constitutionality of statute repealing or changing course of descent and distribution of property, 103 ALR 223; Statutory change of age of majority as affecting vested rights in decedents' estates, 170 ALR 222.

Law Review: 5 CLR 49 (vested right in power of testamentary disposition and in inheritance).

46. *McKay v Lauriston 204 C 557, 269 P 519.*

For general discussion as to what law governs community property rights, see FAMILY LAW (2d ed., COMMUNITY PROPERTY § 5).

47. *Greer v Blanchar 40 C 194.*

As to right of survivorship in joint tenancy generally, see COTENANCY AND JOINT OWNERSHIP (2d ed., COTENANCY § 16).

Annotation: Constitutionality of ret-

Interests acquired under governmental licenses or permits may or may not amount to vested rights, according to the circumstances. Thus, a license to practice a profession is in itself a vested property right in the constitutional sense that it cannot be arbitrarily taken away.[48] But to the extent that a licensed occupation remains subject to regulation and control under the police power, rights to carry on such occupation under a license are not vested.[49] And though performance under a license or permit granted under the police power may result in the creation of vested property rights,[50] such a license or permit does not in itself create any vested right of contract or property.[51]

Vested rights do not include rights in an office or rights of political power, except those conferred by the constitution.[52] Since the right to an office or employment with the government or any of its agencies is not a vested property right,[53] removal therefrom cannot raise an issue as to due process of law.[54] But pension rights acquired by public employees under statutes become vested at

rospective application of Uniform Principal and Income Act or other statutes relating to ascertainment of principal and income and apportionment of receipts and expenses among life tenants and remaindermen, 69 ALR2d 1137.

48. *Laisne v State Board of Optometry 19 C2d 831, 123 P2d 457.*

49. *Gregory v Hecke 73 CA 268, 238 P 787; Rosenblatt v California State Board of Pharmacy 69 CA2d 69, 158 P2d 199; Murrill v State Board of Accountancy 97 CA2d 709, 218 P2d 569.*

50. *Trans-Oceanic Oil Corp. v Santa Barbara 85 CA2d 776, 194 P2d 148.*

51. *Vincent Petroleum Corp. v Culver City 43 CA2d 511, 111 P2d 433.*

As to impairment of vested rights under police power generally, see § 271, supra.

Annotations: Power of state to require changes in buildings previously erected in order to comply with new requirements and standards for protection of health and safety, 109 ALR 1117; Rezoning or amendment of zoning regulations as affecting persons who have purchased or improved property in reliance on original regulations, 138 ALR 500.

52. *Payne & Dewey v Treadwell 16 C 220; Spangle v Curnow 136 C 580, 69 P 255; Dupree v Payne 197 C 529, 241 P 869.*

53. PUBLIC OFFICERS AND EMPLOYEES (2d ed., PUBLIC OFFICERS § 9).

54. *Ludolph v Board of Police Comrs. 30 CA2d 211, 86 P2d 118; Perez v Board of Police Comrs. 78 CA2d 638, 178 P2d 537.*

least upon the happening of the contingency upon which the pension becomes payable.[55]

§ 275. Rights of litigation

A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference.[56] Where a right of action has arisen under the common law or a statute codifying the common law, the cause of action is a vested property right that may not be impaired by legislation annulling it or creating a new bar by which it may be defeated. The repeal of a statute involved in such a case does not affect existing causes of action.[57] Where a right of action does not exist at common law, on the other hand, but depends solely on a statute, the repeal of the statute destroys the right unless the right has been reduced to final judgment, or unless the repealing statute contains a saving clause protecting the right in pending litigation.[58] For example, a common-law action for personal injuries sustained by a guest as the result of the ordinary negligence of an automobile driver will survive a statutory change limiting recovery to cases of extraordinary negligence; but a statutory cause of action for a death in such a situation is terminated by the enactment of such a statutory change without a

55. *Kern v Long Beach 29 C2d 848, 179 P2d 799.*

For general discussion on effect of amendments to pension laws, see PENSIONS AND RETIREMENT SYSTEMS (2d ed., PENSIONS §§ 27 et seq.).

56. *James v Oakland Traction Co. 10 CA 785, 103 P 1082; Anderson v Ott 127 CA 122, 15 P2d 526.*

57. *Callet v Alioto 210 C 65, 290 P 438; Krause v Rarity 210 C 644, 293 P 622, 77 ALR 1327.*

58. *People v Bank of San Luis Obispo 159 C 65, 112 P 866; Willcox v Edwards 162 C 455, 123 P 276; Moss v Smith 171 C 777, 155 P 90, error dismd 246 US 654, 62 L Ed 923, 38 S Ct 335; Freeman v Glenn County Tel. Co. 184 C 508, 194 P 705; Krause v Rarity 210 C 644, 293 P 62, 77 ALR 1327; Southern Service Co. v Los Angeles County 15 C2d 1, 97 P2d 963.*

There is no vested right in a statutory penalty until it has been reduced to judgment, and the repeal of the statute giving the right to recover such a penalty, before it is enforced, destroys the right and prevents any further prosecution of litigation pending for its enforcement, unless there is a saving clause in respect of penalties that have been incurred. *Anderson v Byrnes 122 C 272, 54 P 821; Ball v Tolman 135 C 375, 67 P 339; Lemon v Los Angeles T. R. Co. 38 CA2d 659, 102 P2d 387.*

saving clause.[59] The justification for this rule is that statutory causes are pursued with the full realization that the legislature may abolish the right to recover at any time.[60] Thus, it is not a violation of due process for the legislature to attack the evils of unfounded litigation by abolishing particular causes of action, such as alienation of affections, criminal conversation, seduction, and breach of promise to marry.[61]

Like a common-law cause of action, a judgment is such a vested right of property that the legislature cannot, by a retroactive law, either destroy or diminish its value in any respect.[62] However, a party in whose favor a judgment has been rendered has no vested right in it pending an appeal.[63]

What has been said with respect to vested rights in causes of action applies reciprocally to substantial or absolute defenses to such causes.[64] For example, a statute that deprives another of an existing defense to a claim, such as the defense of the statute of limitations, retroactively impairs a vested right and is invalid. Where the statute has not yet run, it may be validly shortened or extended as to existing claims,[65] but, where it has already run, the defense of the statute is a vested right, and the legislature cannot

59. *Krause v Rarity 210 C 644, 293 P 62, 77 ALR 1327.*

Annotation: Retrospective effect of statute relating to causes of action for death, 77 ALR 1338.

Law Review: 18 CLR 331 (analysis of Krause v Rarity).

60. *Callet v Alioto 210 C 65, 290 P 438.*

61. *Werner v Southern Cal. Associated Newspapers 35 C2d 121, 216 P2d 825, 13 ALR2d 252.*

Annotation: Constitutionality of statutes abolishing civil actions for alienation of affections, criminal conversations, seduction, and breach of promise to marry, 158 ALR 617, 618, s 167 ALR 235.

62. *Barrett v Superior Court 104 CA 657, 286 P 443; Kendall v Kendall 122 CA 397, 10 P2d 131, ovrld on other grounds Rosher v Superior Court 9 C2d 556, 71 P2d 918.*

63. *People v Frisbie 26 C 135; Tulare Irrig. Dist. v Superior Court 197 C 649, 242 P 725.*

64. *Morris v Pacific E. R. Co. 2 C2d 764, 43 P2d 276; Brown v Ferdon 5 C3d 226, 54 P2d 712.*

Annotation: Character of defenses that may be cut off by retrospective legislation, 113 ALR 768.

65. § 276, infra.

remove the bar and destroy the defense retroactively.[66] And where the law at the time of an automobile accident made violation of the speed limit contributory negligence per se, barring recovery, and after a suit was commenced an amendment made such violation only prima facie evidence of negligence, the amendment could not be applied to the pending action, for it would deprive the defendant of a good defense.[67]

66. *Davis & McMillan v Industrial Acci. Com. 198 C 631, 246 P 1046, 46 ALR 1095.*

67. *Morris v Pacific E. R. Co. 2 C2d 764, 43 P2d 276.*

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EXHIBIT IV

[Flournoy v. State of California, 230 Cal.2d at 530-537 (1964)]

* * * * *

Our question narrows to the determination of whether Government Code section 835.4 can be said to deprive plaintiffs here of a vested right.

[9] First of all, use of the term "vested right" as a term of approach to problem settlement is not helpful. The term is "conclusory." "[A] right is vested when it has been so far perfected that it cannot be taken away by statute." (See Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation* (1960) 73 Harv.L.Rev. 692, 696, 698.) It is said in *Miller* v. *McKenna*, 23 Cal.2d 774, 783 [147 P.2d 531]: ". . . [A] vested right, as that term is used in relation to constitutional guaranties, implies an interest which it is proper for the state to recognize and protect, and of which the individual may not be deprived arbitrarily without injustice. The question of what constitutes such a right is confided to the courts."

[10] The courts have not exercised that entrusted power to declare that legislation modifying (or even wiping out) existing rights is always invalid. (See citations, *infra*.) There has not even been uniformity of decision under the same facts. (See, e.g., instances noted and cases cited, Bryant Smith, *Retroactive Laws and Vested Rights* (1927) 5 Texas L.Rev. 231, 237-240.) In California, in 1930, in *Callet* v. *Alioto*, 210 Cal. 65 [290 P. 436], the Supreme Court denied retroactive application to the then new California "guest law" but in so doing made a distinction between statutes retroactively affecting common law rights and those affecting rights based upon statute, the court saying the former were "vested" but stated on pages 67-68: "[A]ll statutory remedies are pursued with full realization that the legislature may abolish the right to recover at any time." (Citing Pol. Code, § 327, now Gov. Code, § 9606.) Other cases holding statutory rights to be "unvested" and common law rights to be "vested" have been collected by Professor Van Alstyne. (*Op. cit.*, pp. 526-527.) In *Krause* v. *Rarity*, 210 Cal. 644, [293 P. 62, 77 A.L.R. 1327], a wrongful death case, it was held that the then newly enacted guest law was not intended to have retroactive application. As dictum, however, the court asserted (on p. 654) that *had the law been intended to apply to causes of action already accrued at the time of enactment*, "the legislature would have been unrestrained by constitutional barriers" from abrogating the right of recovery, because a cause of action for wrongful death is statutory.

Here too a wrongful death action is involved, and since, in California, responsibility for defective public property rests upon statute, liability might be said to be statutory in a double sense. But resting decision upon the distinction between statutory and common law rights is neither justified

by reason nor rule. The distinction is based upon rickety reasoning because persons act no more nor less in reliance upon established rules of the common law, or in expectation that they will remain unchanged, than they do upon statutes. In *Wells Fargo & Co.* v. *City & County of San Francisco*, 25 Cal.2d 37 [152 P.2d 625], the court, without making any distinction between rights based upon statute and those based upon common law, held that a retroactive statute purporting to command a mandatory dismissal of action pending five years (Code Civ. Proc., § 583) could not constitutionally be applied to cut off a statutory tax refund action. Also in *Wexler* v. *City of Los Angeles* (1952) 110 Cal.App.2d 740 [243 P.2d 868] (hearing by Supreme Court denied), a wrongful death action brought under the Public Liability Act (and therefore doubly dependent upon statute), it was held that a statutory amendment requiring that the natural father, although divorced, be joined as a plaintiff to a wrongful death action could not apply to a cause of action accrued when the statute was enacted since "it is not within the power of the Legislature to impair such vested right"—that such would be a violation of due process.

Legal writers, studying the "multivarious" cases in which the problem of constitutional versus unconstitutional retroactivity has been considered, have frequently sought some formula by which the question can be determined. Their study has included both cases where the retroactive legislation affected preexisting contracts and causes of action sounding in tort (and the two from the standpoint of our problem here are treated as being indistinguishable.) Unanimously, it seems, the conclusion has been reached that *no definitive rule is possible*. (See, e.g., Bryant Smith, *op. cit.*, pp. 247-248; W. David Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 Cal.L.Rev. 216, 251; Hochman, *op. cit.*, p. 696; Robert L. Hale, *The Supreme Court and the Contract Clause: III*, 57 Harv.L.Rev. 852, 872-892.) And we can find none stated in the cases examined. Each decision, however, appears to rationalize its asserted rule on some basis and these bases are susceptible to statement in terms of policy factors, the expression of which by Mr. Hochman (*op. cit.*, p. 697) we accept as workable: ". . . These factors are: the nature and strength of the policy interest served by the statute, the extent to which the statute modifies or abrogates the asserted preenactment right, and the nature of the right which the statute alters."

In discussing the first factor, among a number of cases considered is *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398 [54 S.Ct. 231, 78 L.Ed. 413, 88 A.L.R. 1481]), upholding the Minnesota Mortgage Moratorium law, born of the depression, which extended mortgage redemption periods and permitted the owner to remain in possession upon payment of reasonable rentals. The United States Supreme Court (per Chief Justice Hughes) held that the law was neither an impairment of contract nor a violation of due process nor of equal protection; that it was a valid exercise of the police power having for its justification a serious emergency. That case typifies an instance where "strength of policy interest served" was a factor strongly to be weighed in favor of a ruling of constitutional retroactivity. (See comment on *Blaisdell* in *Corning Hospital Dist. v. Superior Court*, *supra*, 57 Cal.2d 488, 496.)

The factor entitled "the extent to which the statute modifies or abrogates the asserted preenactment right" includes distinctions sometimes made by the courts between statutes affecting remedies and those affecting rights. Of course, the removal of all, or substantially all, of an individual's remedies for enforcing a right would have the same practical effect as destroying the right itself. "Remedies are the life of rights." (See Bryant Smith, *op. cit.*, p. 242, quoting Justice Bradley in *Campbell v. Holt*, 115 U.S. 620, 631 [6 S.Ct. 209, 29 L.Ed. 483, 488].) But there are many instances (and we believe the case at bench is one of them) where the statute restricts the preenactment rights to a lesser degree and a court will consider the extent of such restriction in the weighing of all factors. Effectually this was done by the United States Supreme Court in *Home Bldg. & Loan Assn. v. Blaisdell*, *supra*. It was also the basis of our Supreme Court's holding, in *Corning Hospital Dist. v. Superior Court*, *supra*, 57 Cal.2d 488, that the moratorium legislation was constitutional.

The third factor, "the nature of the right which the statute alters," has reference to the degree to which a right has been, and could be, asserted and enforced, prior to the enactment of the statute. In this category there is to be considered the element of "reliance," "expectation" and "surprise." In fact it has been asserted by some writers that it is upon the sole question of whether or not there has been reliance upon, or the reasonable expectation of the continuance of, preexisting law that constitutionality of retroactive legislation *de-*

pends. (See: Ray A. Brown, *Vested Rights and the Portal-to-Portal Act* (1948) 46 Mich.L.R. 723, 746, 752-753.) Apropos this discussion are the so-called "windfall" cases referred to by Professor Van Alstyne (*op. cit.*, p. 533) although the term, perhaps, has unfortunate connotations.

Illustrative of the effect to be given the factor now under discussion, in fact to all three factors, is *Moss* v. *Hawaiian Dredging Co.* (9th Cir. 1951) 187 F.2d 442. There certain "walking bosses and warehousemen" sued their employers for overtime compensation in 32 actions. The actions were predicated upon plaintiffs' interpretation of a section of the Fair Labor Standards Act which they alleged should be construed (effectually) to allow overtime on overtime. While the actions were pending the Portal-to-Portal Act of 1947 was enacted by Congress. After trial, but before decision, the United States Supreme Court in *Bay Ridge Operating Co.* v. *Aaron*, 334 U.S. 446 [68 S.Ct. 1186, 92 L.Ed. 1502], upheld plaintiffs' contentions as to how overtime should be computed. Thereafter (and still before judgment) Congress passed Public Law 177, popularly known as the "Overtime-on-overtime" Act in which the contentions of the defendant employers in the pending litigation as regards the proper construction of the plaintiffs' rights under their contract with the employers were sustained. The provision was made retroactive. The court in the *Moss* case (per Judge Pope) held that retroactive application of the new law was not a violation of due process.

Except that private entities only were there involved the *Moss* case is not dissimilar to the case at bench.[5]

[11] We now apply these policy factors to the case before us, discussing each separately and then weighing them together to reach a decision on this question. We consider first the nature and strength of the public interest served by the 1963 legislation.

No one will quibble that *Muskopf* and its companion, *Lip-*

[5]The distinction—the fact that here we deal with the modification of an individual's right against the state, has been made the basis of differentiation (in favor of the former) in some cases. (See e.g., *Norman* v. *Baltimore & Ohio R.R. Co.*, 294 U.S. 240 [55 S.Ct. 407, 79 L.Ed. 885, 95 A.L.R. 1352].) However, these cases usually have been "contract impairment" cases where the "immorality" and obvious unfairness which attach to legislative abrogation of preexisting contracts solemnly entered into were involved. In cases involving the state's tort liability under the circumstances present here, the sense of shocking immorality disappears. In fact, it would seem the Legislature should be "given greater leeway in modifying rights against the government because of the public interest in the smooth functioning of the government." (See: Hochman, *op. cit.*, p. 728.)

man v. *Brisbane Elementary School Dist.*, 55 Cal.2d 224 [11 Cal.Rptr. 97, 359 P.2d 465], brought problems of magnitude to governmental administration. The Supreme Court recognized this in its discussion of the moratorium legislation of 1961 in *Corning Hospital Dist.* v. *Superior Court, supra*, 57 Cal.2d 488.

As we pointed out in *Ferreira* v. *Barham, supra, ante*, at page 135, the common law is not static. Yet in California in the field of governmental tort liability (except in the instances where it had attained some measure of fluidity by legislative enactment), it had remained so for more than a hundred years, this because the doctrine of governmental immunity had been so firmly fixed that there had been no opportunity to apply common law principles. If *Muskopf* had been decided in the early period of our state's history, growth of case-made common law as applied to tort liability of public entities could have kept pace with the growth and complexity of the problems of these agencies. When in 1961 the shield of governmental immunity was abruptly removed, California apparently being the pioneering state in this regard, a problem of immediacy was presented. There had been a century-long gradual whittling away of various immunities, some through legislative enactment (e.g., Public Liability Act of 1923), some through case law (e.g., the "public nuisance" extension —see *Vater* v. *County of Glenn*, 49 Cal.2d 815 [323 P.2d 85]) all aimed at the same goal—but leisurely paced. When suddenly the goal was attained by *Muskopf*, the decision as stated in the *Corning Hospital* case, *supra*, 57 Cal.2d at page 496: "inevitably . . . had far-reaching consequences" and the court in *Corning* (on p. 495) recognizes that legislative review of the many statutory provisions enacted on the basis of pre-existing law and perhaps new legislation would be necessary. The 1963 legislation, a product of the California Law Revision Commission, its research consultant Professor Van Alstyne and its staff, is the result. Its very comprehensive scope is itself proof of the magnitude of the job of bringing the gears of governmental administration into mesh with the modern common law rules of tort liability in compliance with the mandate of *Muskopf*.

The great public interest served by the performance of this task cannot be gainsaid; nor do we believe that the giving of retroactive application to the accomplishments of the Legislature is not a ponderable consideration. True, if the legislation were to be given only prospective operation, statutes of

limitation have, as regards unfiled claims, already barred most actions and will shortly bar all. (Gov. Code, §§ 911.2, 911.4 and 912.) We have no statistics on the size of potential unbarred claims and complaints now pending, but even in the restricted field of tort claims for allegedly dangerous public property, when one considers the hundreds of thousands of miles of public roads and the countless numbers of other public properties, the exposure of public entities to liability under preexisting causes of action must be considered.

Government Code section 835.4 is, as stated above, the only provision of the chapter, "Dangerous Conditions of Public Property" (Gov. Code, § 830 et seq.) which modifies plaintiffs' preexisting rights and is therefore the only one which must be considered in determining the constitutionality of retroactive application. In giving that consideration, and in weighing the factor of the strength of the public interest, we are impressed by the Law Revision Commission comment appended thereto (quoted, *ante*, p. 529). It notes that government cannot "go out of . . . business." Unlike a private entity, it cannot quit building and maintaining highways and other public properties because of its exposure to liability for payment of damages for injuries suffered by individuals. Nor are its tax-raised funds inexhaustible.

We consider the next element: The extent to which the preenactment right has been affected. We point out that in this case the effect has not been great. Under the section we are discussing the limit of the relief given the public entity is provision for a defense against the cause of action if, and only if, it can sustain the burden of proof, satisfying the trier of fact that a failure to remedy the condition alleged to have caused injury was not unreasonable, applying the statutory test. As we see it, the Legislature in fixing this limitation was doing no more than establishing the *ground rules* under which a cause of action could be proved.

And lastly we consider the "nature of the right which the statute alters." We have shown above that under the common law, and disregarding the question of governmental immunity, liability of public entities in the field relevant to this case has always been extremely limited. And *because* of governmental immunity, reliance upon the preexisting right was nil—until *Muskopf*. To state the proposition that because the rule of *Muskopf* rejected the shield of governmental immunity retroactively the shield never existed is to state arrant nonsense—when the statement is applied to an individual's expectations and the element of "surprise" which, as has been pointed out

above, is one of the principal bulwarks of the cases holding retroactive legislation to be invalid. (See *Kotronakis* v. *City & County of San Francisco*, 192 Cal.App.2d 624, 632 [13 Cal.Rptr. 709].) A right well recognized by common law may be said to be relied upon and the activities of individuals to be carried on in expectation of the continuation of the right so that its abrogation or even its modification is "surprise" legislation. But plaintiffs here acted with no such expectation or reliance.

Regardless of whether the rule of *Muskopf* may be properly characterized as a "windfall" it is certain that between the date of the accident, November 14, 1955, and the *Muskopf* decision no recognized cause of action existed.

Grouping together the three factors, upon the summation of which constitutional retroactivity depends, we find here legislation wherein public interest is great and such interest attaches importantly to its retroactive application. We weigh this against a right which has not been, in our estimate, grievously impaired. And also, as a part of the weighing process, we deal with a right which only existed through the retroactive application of *Muskopf*. The result of this weighing tips the scales to require our decision that the legislative declaration of retroactivity (Stats. 1963, ch. 1681, § 45) is not unconstitutional—as applied to the facts and provisions of the 1963 legislation here involved.