

STATE OF CALIFORNIA

REPORT OF THE  
**CALIFORNIA LAW  
REVISION COMMISSION**

To the Governor and the Legislature of the  
State of California at the Legislative  
Session of 1957

January 1, 1957

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## LETTER OF TRANSMITTAL

To HIS EXCELLENCY GOODWIN J. KNIGHT  
*Governor of California*  
*and to the Members of the Legislature*

The California Law Revision Commission, created in 1953 to examine the common law and statutes of the State and to recommend such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law and to bring the law of this State into harmony with modern conditions (Government Code, Sections 10300 to 10340), herewith submits this report of its transactions during the year 1956.

THOMAS E. STANTON, JR., *Chairman*  
JOHN D. BABBAGE, *Vice Chairman*  
JESS R. DORSEY, *Member of the Senate*  
CLARK L. BRADLEY, *Member of the Assembly*  
BERT W. LEVIT  
STANFORD C. SHAW  
JOHN HAROLD SWAN  
SAMUEL D. THURMAN  
RALPH N. KLEPS, *Legislative Counsel, ex officio*

JOHN R. McDONOUGH, JR.  
*Executive Secretary*

January 1, 1957



## TABLE OF CONTENTS

	Page
I. Function of Commission.....	7
II. Personnel of Commission.....	8
III. Summary of Work of Commission.....	9
IV. Calendar of Topics Selected for Study.....	10
A. Studies in Progress.....	10
1. Studies Pursuant to Resolution Chapter 207, Statutes of 1955 .....	10
2. Studies Pursuant to Resolution Chapters 35 and 42, Statutes of 1956 .....	11
3. Revision of Fish and Game Code Pursuant to Resolu- tion Chapter 204, Statutes of 1955.....	13
B. Topics Intended for Future Consideration.....	14
V. Report on Statutes Repealed by Implication or Held Uncon- stitutional .....	27
VI. Recommendations .....	28



# REPORT OF THE CALIFORNIA LAW REVISION COMMISSION FOR THE YEAR 1956

## I. FUNCTION OF COMMISSION

The California Law Revision Commission was created by Chapter 1445 of the Statutes of 1953. The commission consists of one Member of the Senate, one Member of the Assembly, seven members appointed by the Governor with the advice and consent of the Senate, and the Legislative Counsel who is an ex officio, nonvoting member.

The principal duties of the Law Revision Commission are set forth in Section 10330 of the Government Code which provides that the commission shall, within the limitations imposed by Section 10335 of the Government Code:

- (a) Examine the common law and statutes of the State and judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms.
- (b) Receive and consider proposed changes in the law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, any bar association or other learned bodies.
- (c) Receive and consider suggestions from judges, justices, public officials, lawyers, and the public generally as to defects and anachronisms in the law.
- (d) Recommend, from time to time, such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this State into harmony with modern conditions.<sup>1</sup>

The commission's program is fixed in accordance with Section 10335 of the Government Code which provides:

The commission shall file a report at each regular session of the Legislature which shall contain a calendar of topics selected by it for study, including a list of the studies in progress and a list of topics intended for future consideration. After the filing of its first report the commission shall confine its studies to those topics set forth in the calendar contained in its last preceding report which are thereafter approved for its study by concurrent resolution of the Legislature. The commission shall also study any topic which the Legislature, by concurrent resolution, refers to it for such study.

<sup>1</sup> The commission is also directed to recommend the express repeal of all statutes repealed by implication or held unconstitutional by the Supreme Court of the State or the Supreme Court of the United States. CAL. GOV'T. CODE § 10331.

## II. PERSONNEL OF COMMISSION

Mr. Joseph A. Ball resigned from the commission in November 1956 upon his election as President of the State Bar. To the date of the preparation of this report his successor has not been appointed.

Mr. Samuel D. Thurman of Stanford was reappointed to the commission by Governor Knight in July 1956, his first term of office having expired.

As of the date of this report the membership of the Law Revision Commission is:

	<i>Term expires</i>
Thomas E. Stanton, Jr., San Francisco, Chairman .....	October 1, 1957
John D. Babbage, Riverside, Vice Chairman .....	October 1, 1959
Hon. Jess R. Dorsey, Bakersfield, Senate Member .....	*
Hon. Clark L. Bradley, San Jose, Assembly Member .....	*
Bert W. Levit, San Francisco, Member .....	October 1, 1957
Stanford C. Shaw, Ontario, Member .....	October 1, 1959
John Harold Swan, Sacramento, Member .....	October 1, 1957
Samuel D. Thurman, Stanford, Member .....	October 1, 1959
Ralph N. Kleps, Sacramento, ex officio member .....	**

\* The legislative members of the commission serve at the pleasure of the appointing power.

\*\* The Legislative Counsel is an ex officio nonvoting member of the Law Revision Commission.



### III. SUMMARY OF WORK OF COMMISSION

During 1956 the Law Revision Commission was engaged in three tasks:

1. Work on the several assignments given to the commission by the 1955 and 1956 Sessions of the Legislature to be completed for presentation to the 1957 and 1959 Sessions; <sup>2</sup>

2. Preparation of a calendar of topics selected for study to be submitted to the Legislature for its approval at the 1957 Session, pursuant to Section 10335 of the Government Code; <sup>3</sup> and

3. A study, made pursuant to Section 10331 of the Government Code, to determine whether any statutes of the State have been held by the Supreme Court of the United States or by the Supreme Court of California to be unconstitutional or to have been impliedly repealed.<sup>4</sup>

In 1956 the commission met on January 6 and 7 in San Francisco, on March 12 in Los Angeles, on May 4 and 5 in Los Angeles, on June 1 and 2 in San Francisco, on July 13 and 14 in Long Beach, on August 10 and 11 in Stanford, on September 20 and 21 in Los Angeles, on October 12 and 13 in San Francisco, on November 17 in San Francisco, and on December 21 and 22 in Riverside. In addition, the Northern Committee of the commission met in San Francisco on March 17, April 19, May 19, July 7, August 17, October 4, and December 14; and the Southern Committee met in Los Angeles on February 11, April 13, May 18, July 3, August 4, September 8, October 6, and December 15.

<sup>2</sup> See Part IV A of this report, p. 10 *infra*.

<sup>3</sup> See Part IV B of this report, p. 14 *infra*.

<sup>4</sup> See Part V of this report, p. 27 *infra*.

## IV. CALENDAR OF TOPICS SELECTED FOR STUDY

### A. STUDIES IN PROGRESS

#### 1. Studies pursuant to Resolution Chapter 207, Statutes of 1955

The following topics, which are described in the 1955 Report of the Law Revision Commission to the Legislature, were recommended for study by the commission and approved by the 1955 Session of the Legislature, and were studied by the commission during 1956. The commission is submitting recommendations relating to most of these topics to the 1957 Session of the Legislature: <sup>5</sup>

- 1955**
1. Whether the sections of the Civil Code prohibiting the suspension of the absolute power of alienation should be repealed.<sup>6</sup>
  2. Whether the courts of this State should be required or authorized to take judicial notice of the law of foreign countries.<sup>7</sup>
  3. Whether the Dead Man Statute should be repealed or, if not, whether the rule with respect to waiver of the statute by the taking of a deposition should be clarified.<sup>8</sup>
  4. Whether California should continue to follow the rule that survival of actions arising outside California is governed by California law.<sup>9</sup>
  5. Whether Section 201.5 of the Probate Code should be revised [treatment of separate property brought into California].<sup>10</sup>
  6. Whether Section 660 of the Code of Civil Procedure should be amended to specify the effective date of an order granting a new trial.<sup>11</sup>
  7. Whether, when the defendant moves for a change of place of trial of an action, the plaintiff should in all cases be permitted to oppose the motion on the ground of the convenience of witnesses.<sup>12</sup>
  8. Whether the law with respect to the "for and against" testimonial privilege of husband and wife should be revised in certain respects.<sup>13</sup>

<sup>5</sup> The commission is not submitting at this time a recommendation relating to Topics 11, 14 and 16.

<sup>6</sup> See 1955 REP. CALIF. LAW REV. COMM'N 18.

<sup>7</sup> *Id.* at 19.

<sup>8</sup> *Id.* at 20.

<sup>9</sup> *Id.* at 21.

<sup>10</sup> *Id.* at 22.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Id.* at 23.

<sup>13</sup> *Id.* at 24.

9. Revision of Sections 1377 and 1378 of the Penal Code to eliminate certain obsolete language therein [compromise of misdemeanor charge].<sup>14</sup>
10. Resolution of conflict between Penal Code Section 19a, limiting commitment to a county jail to one year in misdemeanor cases, and other provisions of the Penal Code and other codes providing for longer county jail sentences in misdemeanor cases.<sup>15</sup>
11. Whether Sections 2201 and 3901 of the Corporations Code should be made uniform with respect to notice to stockholders relating to sale of all or substantially all of the assets of a corporation.<sup>16</sup>
12. Whether the jury should be authorized to take a written copy of the jury instructions into the jury room in civil as well as criminal cases.<sup>17</sup>
13. Whether Sections 389 and 442 of the Code of Civil Procedure, relating to bringing additional parties into a civil action by cross-complaint, should be revised.<sup>18</sup>
14. Whether a statute should be enacted to make it unnecessary to appoint an administrator in a quiet title action involving property to which some claim was made by a person since deceased.<sup>19</sup>
15. Whether, when the defendant in a divorce or annulment action has defaulted, the court should be authorized to include an award of attorney's fees and costs in a decree of annulment or an interlocutory or final decree of divorce without requiring that an order to show cause or notice of motion be served on the defendant.<sup>20</sup>
16. Whether there is need for clarification of the law respecting the duties of city and county legislative bodies in connection with planning procedures and the enactment of zoning ordinances when there is no planning commission.<sup>21</sup>

## 2. Studies pursuant to Resolution Chapters 35 and 42, Statutes of 1956

The following topics were approved for study by the commission by the 1956 Session of the Legislature. Most of the topics in this group were recommended for study by the commission pursuant to Government Code Section 10335; a description of them is contained in the 1956 report of the commission to the Legislature. The commission expects to be able to report on Topic 8 to the 1957 Session of the Legislature and will report on the other topics to the 1959 Session:

<sup>14</sup> *Id.* at 26.

<sup>15</sup> *Id.* at 27.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Id.* at 28.

<sup>18</sup> *Id.* at 29.

<sup>19</sup> *Id.* at 30.

<sup>20</sup> *Id.* at 31.

<sup>21</sup> *Id.* at 32.

- 1956
1. Whether the Penal Code and the Vehicle Code should be revised to eliminate certain overlapping provisions relating to the unlawful taking of a motor vehicle and the driving of a motor vehicle while intoxicated.<sup>22</sup>
  2. Whether the procedures for appointing guardians for nonresident incompetents and nonresident minors should be clarified.<sup>23</sup>
  3. A study of provisions of the Code of Civil Procedure relating to the confirmation of partition sales and the provisions of the Probate Code relating to the confirmation of sales of real property of estates of deceased persons to determine (1) whether they should be made uniform and (2) if not, whether there is need for clarification as to which of them governs confirmation of private judicial partition sales.<sup>24</sup>
  4. Whether the law relating to motions for new trial in cases where notice of entry of judgment has not been given should be revised.<sup>25</sup>
  5. Whether the provisions of the Civil Code relating to rescission of contracts should be revised to provide a single procedure for rescinding contracts and achieving the return of the consideration given.<sup>26</sup>
  6. Whether the law respecting mortgages to secure future advances should be revised.<sup>27</sup>
  7. Whether Probate Code Sections 259, 259.1 and 259.2, pertaining to the rights of nonresident aliens to inherit property in this State, should be revised.<sup>28</sup>
  8. Whether the law relating to escheat of personal property should be revised.<sup>29</sup>
  9. Whether the law relating to the rights of a putative spouse should be revised.<sup>30</sup>
  10. Whether the rule, applied in cases involving the value of real property, that evidence relating to sales of nearby properties is not admissible on the issue of value should be revised.<sup>31</sup>
  11. Whether the law respecting post-conviction sanity hearings should be revised.<sup>32</sup>
  12. Whether the law respecting jurisdiction of courts in proceedings affecting the custody of children should be revised.<sup>33</sup>
  13. Whether the doctrine of worthier title should be abolished in California.<sup>34</sup>

<sup>22</sup> See 1956 REP. CALIF. LAW REV. COMM'N 19.

<sup>23</sup> *Id.* at 21.

<sup>24</sup> *Id.* at 22.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Id.* at 23.

<sup>27</sup> *Id.* at 24.

<sup>28</sup> *Id.* at 25.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Id.* at 27.

<sup>31</sup> *Id.* at 28.

<sup>32</sup> *Id.* at 29.

<sup>33</sup> *Id.* at 31.

<sup>34</sup> *Id.* at 33.

The commission has consolidated this topic with Topic 18 *infra*.

14. Whether the Arbitration Statute should be revised.<sup>35</sup>
15. Whether the law in respect of survivability of tort actions should be revised.<sup>36</sup>
16. Whether the law of evidence should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference.
17. 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.
18. Whether the law and procedure relating to condemnation should be revised in order to safeguard the property rights of private citizens.
19. A study of the various provisions of law relating to the filing of claims against public bodies and public employees to determine whether they should be made uniform and otherwise revised.

### **3. Revision of Fish and Game Code pursuant to Resolution Chapter 204, Statutes of 1955**

Resolution Chapter 204 of the Statutes of 1955, which was authored by Honorable Pauline Davis, Member of the Assembly, directed the Law Revision Commission to undertake a study of the Fish and Game Code and to prepare a proposed revision of such code which would eliminate obsolete, superseded, ambiguous, anachronistic, and defective provisions thereof, and to study and report its recommendations on the problem of how best to inform the public of the provisions of the code and the regulations of the Fish and Game Commission.

Because of the scope of this assignment, as revealed by a preliminary study, the commission contracted to have the Legislative Counsel prepare a draft of a revised code for the commission's consideration. The commission also discussed revision of the code with representatives of the Fish and Game Commission and the Department of Fish and Game. In addition, the commission sent approximately 900 letters to interested persons and groups throughout the State calling attention to its assignment to revise the code and soliciting suggestions for such revision.

After the draft code was prepared by the Legislative Counsel it was distributed by the commission to interested persons throughout the State with a request that they study it and send their comments to the commission. Copies of the draft were also sent to the Fish and Game Commission and the Department of Fish and Game. The department made a careful study of the draft and submitted many helpful suggestions to the Law Revision Commission. On the basis of consideration of the draft code and the comments of the department and of

<sup>35</sup> *Ibid.*

<sup>36</sup> *Id.* at 34.

interested persons and groups, the commission is recommending revisions of the Fish and Game Code.

In connection with the presentation of its revisions to the Legislature, the commission will also submit its recommendations regarding how best to inform the public of the provisions of the Fish and Game Code and regulations of the Fish and Game Commission as required by Resolution Chapter 204 of the Statutes of 1955.

## B. TOPICS INTENDED FOR FUTURE CONSIDERATION

Section 10335 of the Government Code provides:

The commission shall file a report at each regular session of the Legislature which shall contain a calendar of topics selected by it for study, including a list of the studies in progress and a list of topics intended for future consideration. After the filing of its first report the commission shall confine its studies to those topics set forth in the calendar contained in its last preceding report which are thereafter approved for its study by concurrent resolution of the Legislature. The commission shall also study any topic which the Legislature, by concurrent resolution, refers to it for such study.

Pursuant to this section the commission reported 23 topics which it had selected for study to the 1955 Session of the Legislature; 16 of these topics were approved. The commission reported 15 additional topics which it had selected for study to the 1956 Session; all of these topics were approved. The 1956 Session of the Legislature also referred four other topics to the commission for study.

The commission expects to complete the major portion of its work on most of the studies heretofore authorized by July 1, 1957. It has, therefore, selected 14 new topics for study during Fiscal Year 1957-58. The legislative members of the commission will introduce at the 1957 Session of the Legislature a concurrent resolution authorizing the commission to study these topics, which are the following:

**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<sup>37</sup> to provide that all such property is community property. *Estate of Thornton*<sup>38</sup> 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,<sup>39</sup> 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.

**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

<sup>37</sup> Cal. Stat. 1917, c. 581, § 1, p. 827.

<sup>38</sup> 1 Cal.2d 1, 33 P.2d 1 (1934).

<sup>39</sup> See *Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere*, REC. & STUDY CALIF. LAW REV. COMM'N E-29-23 (Dec. 20, 1956).

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.

**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.<sup>40</sup> Such statutes have been held constitutional.<sup>41</sup>

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

In 1955 the commission reported to the Legislature<sup>42</sup> 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.<sup>43</sup> 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.

<sup>40</sup> See 30 A.L.R.2d 480 (1953).

<sup>41</sup> *People v. Schade*, 161 Misc. 212, 292 N.Y. Supp. 612 (Queens Cty. Ct. 1936); *State v. Thayer*, 124 Ohio St. 1, 176 N.E. 656 (1931); *State v. Kopačka*, 261 Wis. 70, 51 N.W.2d 495 (1952).

<sup>42</sup> 1955 REP. CALIF. LAW REV. COMM'N 25.

<sup>43</sup> CAL. CODE CIV. PROC. § 117.



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; 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.

**Topic No. 5: 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<sup>44</sup> 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,<sup>45</sup> 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.<sup>46</sup>

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 the option either to pay for the improvement and recover possession or to sell the land to the improver at its value excluding improvements.<sup>47</sup> 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.<sup>48</sup>

California, on the other hand, grants the improver only the limited relief of set-off<sup>49</sup> when the owner sues for damages and the right to remove the improvement when this can be done.<sup>50</sup> 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

<sup>44</sup> *Ford v. Holton*, 5 Cal. 319 (1855); *Kinard v. Kaelin*, 22 Cal. App. 383, 134 Pac. 370 (1913).

<sup>45</sup> See *Improvements*, 26 CAL. JUR.2d 194, 199-203 (1956).

<sup>46</sup> See *Green v. Biddle*, 8 Wheat (U.S.) 1, 81-82 (1823).

<sup>47</sup> See *Ferrier, A Proposed California Statute Compensating Innocent Improvers of Realty*, 15 CALIF. L. REV. 189, 190-93 (1927); *RESTATEMENT, RESTITUTION* p. 169 (1936).

<sup>48</sup> See *Improvements*, 27 AM. JUR. 280-81 (1940) and discussion of cases and statutes in *Jensen v. Probert*, 174 Ore. 143, 148 P.2d 248 (1944).

<sup>49</sup> CAL. CODE CIV. PROC. § 741.

<sup>50</sup> CAL. CIV. CODE § 1013.5.

complete windfall. Provision should be made for a more equitable adjustment between the two innocent parties.

**Topic No. 6:** 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.<sup>51</sup> 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*.<sup>52</sup> 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 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. 7:** 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.<sup>53</sup> In the case

<sup>51</sup> *People v. Troche*, 206 Cal. 35, 273 Pac. 767 (1928); *People v. Coleman*, 20 Cal.2d 399, 126 P.2d 349 (1942).

<sup>52</sup> 33 Cal.2d 330, 202 P.2d 53 (1949).

<sup>53</sup> *Juneau Spruce Corp. v. International Longshoremen*, 37 Cal.2d 760, 763-64, 235 P.2d 607, 609 (1951) (dictum); *Case v. Kadota Fig Assn.*, 35 Cal.2d 596, 602-603, 220 P.2d 912, 916 (1950) (dictum).

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,<sup>54</sup> and that a new certificate must be filed when there is a change in the membership.<sup>55</sup> These provisions, which have been held to be applicable to unincorporated associations,<sup>56</sup> impose a burden on partnerships and associations.

**Topic No. 8: 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.<sup>57</sup>

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 which would fall within a strict application of the doctrine of mutuality of remedy.<sup>58</sup> On the other hand, the mutuality

<sup>54</sup> CAL. CIV. CODE § 2468.

<sup>55</sup> *Id.*, § 2469.

<sup>56</sup> *Kadota Fig Assn. v. Case-Swayne Co.*, 73 Cal. App.2d 796, 167 P.2d 518 (1946).

<sup>57</sup> 5 CORBIN, CONTRACTS § 1180 (1951); 5 WILLISTON, CONTRACTS § 1440 (Rev. ed. 1937).

<sup>58</sup> See *e.g.*, *Miller v. Dyer*, 20 Cal.2d 526, 127 P.2d 901 (1942); *Magee v. Magee*, 174 Cal. 276, 162 Pac. 1023 (1917); *Calanchini v. Branstetter*, 84 Cal. 249, 24 Pac. 149 (1890); *Vassault v. Edwards*, 43 Cal. 458 (1872).

requirement has in some cases been applied strictly, with harsh results.<sup>59</sup>

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.

**Topic No. 9: 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.<sup>60</sup> Thus, in general, California follows the historical approach in defining arson,<sup>61</sup> 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 the amount of property damage involved in a burning.<sup>62</sup> 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

<sup>59</sup> See *e.g.*, *Poultry Producers v. Barlow*, 189 Cal. 278, 208 Pac. 93 (1922); *Linehan v. Devincense*, 170 Cal. 307, 149 Pac. 584 (1915); *Pacific etc. Ry. Co. v. Campbell-Johnston*, 153 Cal. 106, 94 Pac. 623 (1908).

<sup>60</sup> CAL. PEN. 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.

<sup>61</sup> See MILLER, *CRIMINAL LAW* 323 (1934).

<sup>62</sup> See *e.g.*, LA. STAT. §§ 14.51-14.53 (1950); N.Y. PEN. LAW §§ 221-25 (1950); WIS. STAT. §§ 943.01, 943.02, 943.11 (1955).

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*<sup>63</sup> 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.

**Topic No. 10: 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.<sup>64</sup> 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.<sup>65</sup> The second technique is to hold that the subsequent oral agreement rescinded the original obligations<sup>66</sup> and substituted a new contract, that this is not an "alteration" of the written contract and, therefore, that Section 1698 is not applicable.<sup>67</sup> 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<sup>68</sup> 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.<sup>69</sup>

**Topic No. 11: 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

<sup>63</sup> 31 Cal.2d 43, 187 P.2d 411 (1947).

<sup>64</sup> See Note, 4 HASTINGS L.J. 59 (1952).

<sup>65</sup> D. L. Godbey & Sons Const. Co. v. Deane, 39 Cal.2d 429, 246 P.2d 946 (1952).

<sup>66</sup> Civil Code Section 1689 permits rescission of a contract by mutual assent.

<sup>67</sup> McClure v. Alberti, 190 Cal. 348, 212 Pac. 204 (1923) (rescission of executory written contract by oral agreement); Treadwell v. Nickel, 194 Cal. 243, 228 Pac. 25 (1924) (rescission of written contract by substituted oral contract).

<sup>68</sup> P. A. Smith Co. v. Muller, 201 Cal. 219, 256 Pac. 411 (1927).

<sup>69</sup> 2 CORBIN, CONTRACTS § 301 (1951); 6 WILLISTON, CONTRACTS § 1828 (Rev. ed. 1938).

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.<sup>70</sup> Thus, it has been held that a minor is not entitled to a jury trial in a juvenile court proceeding,<sup>71</sup> that the court need not advise him of his right not to give incriminating testimony,<sup>72</sup> that he is not entitled to bail pending appeal from an order of commitment,<sup>73</sup> 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.<sup>74</sup>

It is not entirely clear whether a minor has a right to counsel in a juvenile court proceeding. *In re Contreras*<sup>75</sup> appears to have held that he is.<sup>76</sup> *People v. Fifield*<sup>77</sup> 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.<sup>78</sup> 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<sup>79</sup> 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.<sup>80</sup>

The Supreme Court held recently in *People v. Dotson*<sup>81</sup> 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.<sup>82</sup> 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 the validity of an order 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.

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

<sup>70</sup> *People v. Fifield*, 136 Cal. App.2d 741, 289 P.2d 303 (1955).

<sup>71</sup> *In re Daedler*, 194 Cal. 320, 228 Pac. 467 (1924); *People v. Fifield*, 136 Cal. App.2d 741, 289 P.2d 303 (1955).

<sup>72</sup> *In re Dargo*, 81 Cal. App.2d 205, 183 P.2d 282 (1947).

<sup>73</sup> *In re Magnuson*, 110 Cal. App.2d 73, 242 P.2d 362 (1952).

<sup>74</sup> *People v. Silverstein*, 121 Cal. App.2d 140, 262 P.2d 656 (1953).

<sup>75</sup> 109 Cal. App.2d 787, 241 P.2d 631 (1952).

<sup>76</sup> 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 charges preferred against him." [Emphasis added.] *Id.* at 792, 241 P.2d at 634.

<sup>77</sup> 136 Cal. App.2d 741, 289 P.2d 303 (1955).

<sup>78</sup> *Id.* at 743, 289 P.2d at 304.

<sup>79</sup> *In re Rider*, 50 Cal. App. 797, 195 Pac. 965 (1920).

<sup>80</sup> *In re Hill*, 78 Cal. App. 23, 247 Pac. 591 (1926).

<sup>81</sup> 46 Adv. Cal. 905, 299 P.2d 875 (1956).

<sup>82</sup> The defendant was represented at all times by counsel in the superior court, but not upon his appearance in the juvenile court.

minor charged with a criminal offense should have a right to counsel in juvenile court proceedings.

**Topic No. 12: A study to determine whether Section 7031 of the Business and Professions Code, which precludes an unlicensed contractor from bringing an action to recover for work done, should be revised.**

Section 7031 of the Business and 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,<sup>83</sup> for restitution,<sup>84</sup> to foreclose a mechanic's lien,<sup>85</sup> or to enforce an arbitration award<sup>86</sup> 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 statute, but is merely an "employee."<sup>87</sup> 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.<sup>88</sup> Another way around the statute has been to say that there was "substantial" compliance with its requirements.<sup>89</sup> 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.<sup>90</sup> Similarly, the statute does not bar a suit by an unlicensed contractor against a supplier of construction material.<sup>91</sup> And the statute has been held not to apply when the contractor is the defendant in the action.<sup>92</sup>

<sup>83</sup> *Kirman v. Borzage*, 65 Cal. App.2d 156, 150 P.2d 3 (1944).

<sup>84</sup> *Cash v. Blakett*, 87 Cal. App.2d 233, 196 P.2d 585 (1948).

<sup>85</sup> *Siemens v. Meconi*, 44 Cal. App.2d 641, 112 P.2d 904 (1941).

<sup>86</sup> *Loving & Evans v. Blick*, 33 Cal.2d 603, 204 P.2d 23 (1949) (4-3 decision).

<sup>87</sup> *Martin v. Henderson*, 124 Cal. App.2d 602, 269 P.2d 117 (1954); *Dorsk v. Spivack*, 107 Cal. App.2d 206, 236 P.2d 840 (1951).

<sup>88</sup> CAL. AD. CODE tit. 16, §§ 700-97.

<sup>89</sup> *Gatti v. Highland Park Builders, Inc.*, 27 Cal.2d 687, 166 P.2d 265 (1946) (seemingly in disregard of CAL. 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).

<sup>90</sup> *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).

<sup>91</sup> *Rutherford v. Standard Engineering Corp.*, 88 Cal. App.2d 554, 199 P.2d 354 (1948).

<sup>92</sup> *Comet Theatre Enterprises v. Cartwright*, 195 F.2d 80 (9th 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).

But with all of these qualifications Section 7031 has a wide area of 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,<sup>93</sup> allow restitution to an unlicensed person.<sup>94</sup> 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.

**Topic No. 13: 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 the lessor's rights against the lessee thereunder were held to be terminated on the theory that the tenant had offered to surrender the premises and the lessor 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.<sup>95</sup> 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.<sup>96</sup>

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 allowed, with certain restrictions, even in the absence of a clause in the lease.<sup>97</sup> 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<sup>98</sup> and it is doubtful that it can be made available to the lessor without legislative enactment.<sup>99</sup>

<sup>93</sup> 6 CORBIN, CONTRACTS §§ 1534-36 (1951); RESTATEMENT, RESTITUTION § 140 and comment b.

<sup>94</sup> 6 CORBIN, CONTRACTS §§ 1510-14 (1951).

<sup>95</sup> *Welcome v. Hess*, 90 Cal. 507, 27 Pac. 369 (1891).

<sup>96</sup> *De Hart v. Allen*, 26 Cal.2d 829, 161 P.2d 453 (1945), 34 CALIF. L. REV. 252 (1946).

This case appears to involve a partial repudiation of *Welcome v. Hess*, 90 Cal. 507, 27 Pac. 369 (1891).

<sup>97</sup> *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).

<sup>98</sup> *Welcome v. Hess*, 90 Cal. 507, 27 Pac. 369 (1891).

<sup>99</sup> See *Dorchich v. Time Oil Co.*, 103 Cal. App.2d 677, 230 P.2d 10, 39 CALIF. L. REV. 588 (1951).



Civil Code 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.

**Topic No. 14: 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,<sup>100</sup> 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.<sup>101</sup> It seems reasonable to suppose that the Supreme Court would reach the same result both in a case in which there was no prior support decree<sup>102</sup> 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

<sup>100</sup> 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.

<sup>101</sup> *Estin v. Estin*, 334 U.S. 541 (1948).

<sup>102</sup> *Cf. Armstrong v. Armstrong*, 350 U.S. 568 (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.

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.<sup>103</sup> 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.<sup>104</sup> 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.

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.<sup>105</sup> Other states have enacted legislation allowing an action for alimony after a divorce, whether the husband or wife obtained the divorce.<sup>106</sup> 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.<sup>107</sup>

<sup>103</sup> *Campbell v. Campbell*, 107 Cal. App.2d 732, 238 P.2d 81 (1951).

<sup>104</sup> *Dimon v. Dimon*, 40 Cal.2d 516, 254 P.2d 528 (1953) (Traynor, J., dissenting).

<sup>105</sup> See *Cummings v. Cummings*, 138 Kan. 359, 26 P.2d 440 (1933); *Stephenson v. Stephenson*, 54 Ohio App. 239, 6 N.E.2d 1005 (1936); *Spradling v. Spradling*, 74 Okla. 276, 181 Pac. 148 (1919); *Adams v. Abbott*, 21 Wash. 29, 56 Pac. 931 (1899).

<sup>106</sup> 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 (1933) as interpreted by *Phillips v. Phillips*, 39 R.I. 92, 97 Atl. 593 (1916).

<sup>107</sup> See New York Legislative Document No. 65 (K) (1953); N.Y. CIV. PRAC. ACT § 1170-B.

## V. REPORT ON STATUTES REPEALED BY IMPLICATION OR HELD UNCONSTITUTIONAL

Section 10331 of the Government Code provides:

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

The commission has examined the cases decided by the Supreme Court of the State and the Supreme Court of the United States since its 1956 report was prepared. No decision of either court holding any statute of the State either unconstitutional or repealed by implication has been found.

## VI. RECOMMENDATIONS

The Law Revision Commission respectfully recommends:

1. That the Legislature enact the statutes recommended by the commission.
2. That the Legislature enact the revised Fish and Game Code prepared under the commission's direction.
3. That the Legislature authorize the commission to study the topics listed in Part IV B of this report.

Respectfully submitted,

THOMAS E. STANTON, JR., *Chairman*

JOHN D. BABBAGE, *Vice Chairman*

JESS R. DORSEY, *Member of the Senate*

CLARK L. BRADLEY, *Member of the Assembly*

BERT W. LEVIT

STANFORD C. SHAW

JOHN HAROLD SWAN

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RALPH N. KLEPS, *Legislative Counsel, ex officio*

JOHN R. McDONOUGH, JR.

*Executive Secretary*

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# HISTORY IN THE LEGISLATURE OF MEASURES INTRODUCED IN 1957 SESSION ON RECOMMENDATION OF CALIFORNIA LAW REVISION COMMISSION \*

## Calendar of Topics Selected for Study

Assembly Concurrent Resolution No. 22, embodying a calendar of 14 topics selected for study by the Law Revision Commission pursuant to Government Code Section 10335, was introduced by Mr. Bradley.<sup>1</sup> The resolution was adopted by the Legislature, becoming Resolution Chapter 202 of the Statutes of 1957, after being amended on the motion of various members to add the following topics to the commission's study calendar:

A study to determine whether the doctrine of sovereign or governmental immunity in California should be abolished or revised.

A study to determine whether an award of damages made to a married person in a personal injury action should be the separate property of such married person.

A study of the Juvenile Court Law to determine whether changes in that law or in existing procedures should be made so that the term "ward of the juvenile court" would be inapplicable to non-delinquent minors.

A study to determine whether a trial court should have the power to require, as a condition of denying a motion for a new trial, that the party opposing the motion stipulate to the entry of judgment for damages in excess of the damages awarded by the jury.

## Fish and Game Code

Assembly Bill No. 616, introduced by Mr. Bradley and Mrs. Davis, embodied the revised Fish and Game Code prepared by the commission pursuant to Resolution Chapter 204 of the Statutes of 1955.<sup>2</sup> After a number of amendments were made to the bill, it was passed by the Legislature and signed by the Governor, becoming Chapter 456 of the Statutes of 1957.

## The Maximum Period of Confinement in a County Jail

Senate Bill No. 30 was introduced by Senator Dorsey to effectuate the recommendation of the commission on this subject.<sup>3</sup> The bill was amended in the Senate to delete Section 41 which would have amended

\* For the history in the Legislature of bills introduced in the 1955 Session on the recommendation of the Law Revision Commission see 1956 REP. CALIF. LAW REV. COMM'N 10-11 *supra*.

<sup>1</sup> For a description of these topics see 1957 REP. CALIF. LAW REV. COMM'N 14-26 *supra*.

<sup>2</sup> See 1957 REP. CALIF. LAW REV. COMM'N 13-14 *supra*.

<sup>3</sup> See Recommendation and Study, p. A-1, *supra*.

Section 23303 of the Revenue and Taxation Code to reduce the maximum county jail sentence authorized therein to one year. This amendment was made to avoid a technical conflict between the bill and Assembly Bill No. 181 which also amended Section 23303. Assembly Bill No. 181 was amended by its author to incorporate the change made by Section 41 of the bill. In the Assembly the bill was further amended to substitute "offense" for "misdemeanor" in that part of Penal Code Section 19a, as proposed to be amended, authorizing county jail sentences in excess of one year in the case of consecutive sentences. The purpose of this amendment was to make it clear that when consecutive county jail sentences are imposed as a condition of probation or in lieu of payment of fine upon conviction of two or more felonies the period of confinement may exceed one year. The amended bill was passed by the Legislature and signed by the Governor, becoming Chapter 139 of the Statutes of 1957.

### **Notice of Application for Attorney's Fees and Costs in Domestic Relations Actions**

Senate Bill No. 29 was introduced by Senator Dorsey to effectuate the recommendation of the commission on this subject.<sup>4</sup> The following amendments were made to the bill in the Senate:

1. In the second sentence of Section 137.3 of the Civil Code, as proposed to be amended, "or costs incurred" was inserted after "rendered" and "whether or not such relief was requested in the complaint, cross-complaint or answer," was inserted after "therein".

2. In the first sentence of the second paragraph of Section 137.3 of the Civil Code, "shall" was substituted for "may" after "both"; "on notice" was inserted after the first "motion"; and "except that it may be made without notice by an oral motion in open court" was inserted after "cause".

3. In the third paragraph of Section 137.3, "No application or notice, other than an oral motion in open court, is necessary when attorney's fees or costs or both are awarded" was deleted; in subdivision (a) thereof "of the cause" was inserted after "hearing" and "or" was deleted; and in subdivision (b) thereof "entry of" was inserted before "judgment" and "section" was substituted for "subdivision".

The purpose of these amendments was (1) to make it clear that an award may be made in appropriate cases for costs incurred after judgment, (2) to provide that an award may be made for costs incurred or services rendered after judgment even though such relief is not requested in the pleadings (notice of postjudgment applications is required to be given in all cases), and (3) to make it clear that an application for an order making, augmenting or modifying an award of attorney's fees and costs must be made by a motion on notice or an order to show cause except when the award is made at the time of the hearing on the merits or against a party whose default has been entered.

<sup>4</sup> See Recommendation and Study, p. B-1, *supra*.

The bill was also amended in the Assembly to insert "custody" before "support" in the first sentence of Section 137.3 of the Civil Code. This amendment was made to avoid a technical conflict between the bill and Senate Bill No. 434 which amended Section 137.3 to make it applicable to custody actions. The amended bill was passed by the Legislature and signed by the Governor, becoming Chapter 540 of the Statutes of 1957.

### **Taking Instructions to the Jury Room**

Senate Bill No. 33 was introduced by Senator Dorsey to effectuate the recommendation of the commission on this subject.<sup>5</sup> Thereafter, a number of practical problems involved in making a copy of the court's instructions available to the jury in the jury room, for which provision was not made in the bill, came to the commission's attention. Since there would not have been an adequate opportunity to study these problems and amend the bill during the 1957 Session, the commission determined not to seek enactment of the bill but to hold the matter for further study.

### **The Dead Man Statute**

Assembly Bill No. 247 was introduced by Mr. Bradley to effectuate the recommendation of the commission on this subject.<sup>6</sup> The bill was passed by the Assembly. In the Senate it was amended to add Section 3 to the bill to revise subdivision 4 of Section 1870 of the Code of Civil Procedure by inserting "the declaration of a person of unsound mind or a deceased person as provided in Section 1880.1 of this code" after "property". The purpose of this amendment was to conform Section 1870 to new Section 1880.1 proposed to be added to the Code of Civil Procedure by the bill, thus eliminating a potential conflict between the language of the two sections. The amended bill was tabled by the Senate Judiciary Committee.

### **Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere**

Assembly Bill No. 250 was introduced by Mr. Bradley to effectuate the recommendation of the commission on this subject.<sup>7</sup> The bill was passed by the Legislature and signed by the Governor, becoming Chapter 490 of the Statutes of 1957.

### **The Marital "For and Against" Testimonial Privilege**

Assembly Bill No. 248 was introduced by Mr. Bradley to effectuate the recommendation of the commission on this subject.<sup>8</sup> The bill was

<sup>5</sup> See Recommendation and Study, p. C-1, *supra*.

<sup>6</sup> See Recommendation and Study, p. D-1, *supra*.

<sup>7</sup> See Recommendation and Study, p. E-1, *supra*.

<sup>8</sup> See Recommendation and Study, p. F-1, *supra*.

passed by the Assembly. In the Senate it was amended on April 23 as follows:

1. Section 2 of the bill was amended to make the following changes in new Section 1882 proposed to be added to the Code of Civil Procedure:

(a) "in an action for damages against another person for adultery committed by either husband or wife with such person or" was deleted after "except" because the civil action for criminal conversation has been abolished in California;

(b) "or in a proceeding brought under Title 10a of Part 3 of this code or Title 3 of Part 3 of Division 1 of the Civil Code" was inserted after the second "spouse" in order to have a cross-reference in Section 1882 to all other provisions of law creating exceptions to the marital privilege in civil cases.

2. Section 3 of the bill was amended to make a technical amendment to Penal Code Section 1322, as proposed to be amended, and to amend subdivision (d) of Section 1322 by making a cross-reference therein to Sections 266g, 266h, and 266i of the Penal Code in order to have a cross-reference in Section 1322 to all other provisions of law creating exceptions to the marital privilege in criminal cases.

On April 30 the following additional amendments were made to the bill in the Senate:

3. Section 1 of the bill was amended to insert at the end of subdivision 1 of Section 1881 of the Code of Civil Procedure as proposed to be amended, "or in a hearing to determine the mental competency or condition of either husband or wife".

4. Section 2 of the bill was amended to make the following changes in Section 1882 of the Code of Civil Procedure:

(a) "without the consent of the spouse" was inserted after the first "spouse";

(b) "in an incompetency proceeding involving" was deleted and "(a) A civil action or proceeding by one spouse against the other; (b) A hearing to determine the mental competency or condition of" was inserted after "except";

(c) "or in a" was deleted and "(c) A" was inserted after the second "spouse".

5. Section 3 of the bill was amended to insert after the second "spouse" in Section 1322 of the Penal Code "without the consent of both" and subdivision (d) thereof was amended to substitute "or" for "and".

The purpose of the April 30th amendments was to eliminate from the bill the changes which it was designed to make in existing law with respect to the privilege of married persons not to testify against each other because these changes had been found by the commission to be unacceptable to the Senate Judiciary Committee. Thus, the purpose of the bill became to restate and clarify existing law and to create an exception to the marital testimonial privilege for incompetency proceedings. The amended bill did not pass in the Senate.



## Suspension of the Absolute Power of Alienation

Assembly Bill No. 249 was introduced by Mr. Bradley to effectuate the recommendation of the commission on this subject.<sup>9</sup> The bill was passed by the Assembly but did not pass in the Senate.

1959  
ch 470

## Elimination of Obsolete Provisions in Penal Code Sections 1377 and 1378

Senate Bill No. 35 was introduced by Senator Dorsey to effectuate the recommendation of the commission on this subject.<sup>10</sup> The bill was passed by the Legislature and signed by the Governor, becoming Chapter 102 of the Statutes of 1957.

## Judicial Notice of the Law of Foreign Countries

Assembly Bill No. 251 was introduced by Mr. Bradley to effectuate the recommendation of the commission on this subject.<sup>11</sup> After certain technical amendments were made to the bill, it was passed by the Legislature and signed by the Governor, becoming Chapter 249 of the Statutes of 1957.

## The Effective Date of an Order Ruling on a Motion for New Trial

1959  
ch 468

Senate Bill No. 36 was introduced by Senator Dorsey to effectuate the recommendation of the commission on this subject.<sup>12</sup> In the Senate the following amendments were made to the first of the two sentences which the bill proposed to insert at the end of Section 660 of the Code of Civil Procedure:

1. "within the applicable 60-day period" was inserted after "when".
2. "either" was inserted after "in".
3. "temporary or the permanent" was inserted before "minutes".
4. "provided, that if the order is first entered in the temporary minutes it is subsequently entered in the permanent minutes not later than five days after the expiration of such 60-day period" was inserted after "minutes".
5. "provided, that the order is filed not later than five days after the expiration of such 60-day period" was inserted after "judge".

These amendments were made in order to assure prompt entry or filing of orders ruling on motions for new trials without interfering substantially with the flexibility of the rules relating to the effective date of such orders as provided in the original bill.

The amended bill was passed by the Legislature but was not approved by the Governor.

<sup>9</sup> See Recommendation and Study, p. G-1, *supra*.

<sup>10</sup> See Recommendation, p. H-1, *supra*.

<sup>11</sup> See Recommendation and Study, p. I-1, *supra*.

<sup>12</sup> See Recommendation and Study, p. K-1, *supra*.

## Retention of Venue for Convenience of Witnesses

Assembly Bill No. 246 was introduced by Mr. Bradley to effectuate the recommendation of the commission on this subject.<sup>13</sup> The bill was passed by the Assembly but did not pass in the Senate.

## Bringing New Parties Into Civil Actions

Senate Bill No. 34 was introduced by Senator Dorsey to effectuate the recommendation of the commission on this subject.<sup>14</sup> The bill was amended in the Senate as follows:

1. Section 2 of the bill was amended to insert after the first "parties" in Section 389 of the Code of Civil Procedure, as proposed to be amended, "or would seriously prejudice any party before the court". The purpose of this amendment was to make it clear that the definition of an indispensable party includes situations falling within this language.

2. Section 2 of the bill was further amended as follows:

(a) The phrase "cause of action" was substituted for "claim" throughout Section 389 to negate the possible inference that as originally drafted the bill was intended to affect California pleading requirements;

(b) In the third paragraph of Section 389 "asserting the cause of action to which he is indispensable" was substituted for "to the action" after the second "party", and in the fourth paragraph thereof "asserting the cause of action to which he is conditionally necessary" was substituted for "to the action" after the second "party". The purpose of these amendments was to make it clear that only a party asserting a cause of action to which another person is either indispensable or conditionally necessary may be ordered to bring such person in as a party;

(c) There was substituted for the sixth paragraph of Section 389 "If, after additional parties have been brought in pursuant to this section, the court finds that the trial will be unduly complicated or delayed because of the number of parties or causes of action involved, the court may order separate trials or make such other order as may be just". The purpose of this amendment was to set forth specifically the power of the court to deal with problems which might be created by bringing in new parties.

3. Section 2 of the bill was later amended in the Senate to add to the sixth paragraph of Section 389 of the Code of Civil Procedure the words "conditionally necessary" after "additional" and the words "as to such parties" after "trials". The purpose of this amendment, which was made when the bill was before the Senate Judiciary Committee in response to a suggestion made by a member of the committee, was to make this paragraph inapplicable to indispensable parties who have been brought into an action.

The amended bill was passed by the Legislature and signed by the Governor, becoming Chapter 1498 of the Statutes of 1957.

<sup>13</sup> See Recommendation and Study, p. L-1, *supra*.

<sup>14</sup> See Recommendation and Study, p. M-1, *supra*.