

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Annual Report

December 1967

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

THE CALIFORNIA LAW REVISION COMMISSION

COMMISSION MEMBERS

RICHARD H. KEATINGE <i>Chairman</i>	JAMES R. EDWARDS <i>Member</i>
SHO SATO <i>Vice Chairman</i>	JOHN R. McDONOUGH * <i>Member</i>
ALFRED H. SONG <i>Member of the Senate</i>	HERMAN F. SELVIN * <i>Member</i>
F. JAMES BEAR <i>Member of the Assembly</i>	THOMAS E. STANTON, JR. <i>Member</i>
JOSEPH A. BALL <i>Member</i>	GEORGE H. MURPHY <i>Ex Officio</i>

COMMISSION STAFF

Legal

JOHN H. DEMOULLY <i>Executive Secretary</i>	TED W. ISLES <i>Senior Attorney</i>
CLARENCE B. TAYLOR <i>Assistant Executive Secretary</i>	GORDON E. MCCLINTOCK <i>Student Legal Assistant</i>

Administrative-Secretarial

ANNE SCHMIDT-WEYLAND <i>Administrative Assistant</i>	VIOLET S. HARJU <i>Secretary</i>
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* Professor McDonough resigned from the Commission on September 6, 1967; Mr. Selvin resigned on September 15, 1967. No successors had been appointed as of December 1, 1967, the date of this report.

NOTE

This pamphlet begins on page 1301. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 8 of the Commission's REPORTS, RECOMMENDATIONS, AND STUDIES.

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LETTER OF TRANSMITTAL

December 1, 1967

To HIS EXCELLENCY, RONALD REAGAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

In conformity with Government Code Section 10335, the California Law Revision Commission herewith submits this report of its activities during 1967.

This report was printed during the first week of December 1967 so that it would be available in printed form early in January 1968. Accordingly, it does not reflect changes in Commission membership after December 1, 1967.

Respectfully submitted,

RICHARD H. KEATINGE
Chairman

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REPORT OF THE CALIFORNIA LAW REVISION COMMISSION FOR THE YEAR 1967

FUNCTION AND PROCEDURE OF COMMISSION

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

The principal duties of the Law Revision Commission are to:

(1) Examine the common law and statutes of the State for the purpose of discovering defects and anachronisms therein.

(2) Receive and consider suggestions and proposed changes in the law from the American Law Institute, the National Conference of Commissioners on Uniform State Laws, bar associations, and other learned bodies, judges, public officials, lawyers, and the public generally.

(3) Recommend such changes in the law as it deems necessary to bring the law of this State into harmony with modern conditions.²

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

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

The consultant submits a detailed research study that is given careful consideration by the Commission. After making its preliminary decisions on the subject, the Commission distributes a tentative recommendation to the State Bar and to numerous other interested persons. Comments on the tentative recommendation are considered by the Commission in determining what report and recommendation it will make to the Legislature. When the Commission has reached a conclusion on the matter, its recommendation to the Legislature, including a draft of any legislation necessary to effectuate its recommendation, is published in a printed pamphlet.⁴ If the research study has not been previously published, it usually is published in the pamphlet containing the recommendation.

¹ See CAL. GOVT. CODE §§ 10800-10840.

² See CAL. GOVT. CODE § 10330. The Commission is also directed to recommend the express repeal of all statutes repealed by implication or held unconstitutional by the Supreme Court of the State or the Supreme Court of the United States. CAL. GOVT. CODE § 10331.

³ See CAL. GOVT. CODE § 10335.

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

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

A total of 67 bills and two proposed constitutional amendments have been drafted by the Commission to effectuate its recommendations.⁶ Forty-three of these bills were enacted at the first session to which they were presented; eleven bills were enacted at subsequent sessions or their substance was incorporated into other legislation that was enacted. Thus, of the 67 bills recommended, 54 eventually became law.⁷

⁵ See CAL. GOVT. CODE § 10333.

⁶ The number of bills actually introduced was in excess of 67 since, in some cases, the substance of the same bill was introduced at a subsequent session and, in the case of the Evidence Code, the same bill was introduced in both the Senate and the Assembly.

⁷ Cal. Stats. 1955, Ch. 799, p. 1400 and Ch. 877, p. 1494. (Revision of various sections of the Education Code relating to the Public School System.)

Cal. Stats. 1955, Ch. 1183, p. 2193. (Revision of Probate Code Sections 640 to 646—setting aside of estates.)

Cal. Stats. 1957, Ch. 102, p. 678. (Elimination of obsolete provisions in Penal Code Sections 1377 and 1378.)

Cal. Stats. 1957, Ch. 139, p. 733. (Maximum period of confinement in a county jail.)

Cal. Stats. 1957, Ch. 249, p. 902. (Judicial notice of the law of foreign countries.)

Cal. Stats. 1957, Ch. 456, p. 1308. (Recodification of Fish and Game Code.)

Cal. Stats. 1957, Ch. 490, p. 1520. (Rights of surviving spouse in property acquired by decedent while domiciled elsewhere.)

Cal. Stats. 1957, Ch. 540, p. 1589. (Notice of application for attorney's fees and costs in domestic relations actions.)

Cal. Stats. 1957, Ch. 1498, p. 2824. (Bringing new parties into civil actions.)

Cal. Stats. 1959, Ch. 122, p. 3005. (Doctrine of worthier title.)

Cal. Stats. 1959, Ch. 468, p. 2403. (Effective date of an order ruling on motion for new trial.)

Cal. Stats. 1959, Ch. 469, p. 2404. (Time within which motion for new trial may be made.)

Cal. Stats. 1959, Ch. 470, p. 2405. (Suspension of absolute power of alienation.)

Cal. Stats. 1959, Ch. 500, p. 2441. (Procedure for appointing guardians.)

Cal. Stats. 1959, Ch. 501, p. 2442. (Codification of laws relating to grand juries.)

Cal. Stats. 1959, Ch. 528, p. 2496. (Mortgages to secure future advances.)

Cal. Stats. 1959, Ch. 1715, p. 4115 and Chs. 1724-1728, pp. 4133-4156. (Presentation of claims against public entities.)

Cal. Stats. 1961, Ch. 461, p. 1540. (Arbitration.)

Cal. Stats. 1961, Ch. 589, p. 1733. (Rescission of contracts.)

Cal. Stats. 1961, Ch. 636, p. 1838. (Inter vivos marital property rights in property acquired while domiciled elsewhere.)

Cal. Stats. 1961, Ch. 657, p. 1867. (Survival of actions.)

Cal. Stats. 1961, Ch. 1612, p. 3439. (Tax apportionment in eminent domain proceedings.)

Cal. Stats. 1961, Ch. 1613, p. 3442. (Taking possession and passage of title in eminent domain proceedings.)

Cal. Stats. 1961, Ch. 1616, p. 3459. (Revision of Juvenile Court Law adopting the substance of two bills drafted by the Commission to effectuate its recommendations on this subject.)

Cal. Stats. 1963, Ch. 1681. (Sovereign immunity—tort liability of public entities and public employees.)

Cal. Stats. 1963, Ch. 1715. (Sovereign immunity—claims, actions and judgments against public entities and public employees.)

Cal. Stats. 1963, Ch. 1682. (Sovereign immunity)—insurance coverage for public entities and public employees.)

Cal. Stats. 1963, Ch. 1683. (Sovereign immunity—defense of public employees.)

Cal. Stats. 1963, Ch. 1684. (Sovereign immunity—workmen's compensation benefits for persons assisting law enforcement or fire control officers.)

Cal. Stats. 1963, Ch. 1685. (Sovereign immunity—amendments and repeals of inconsistent special statutes.)

Cal. Stats. 1963, Ch. 1686. (Sovereign immunity—amendments and repeals of inconsistent special statutes.)

Cal. Stats. 1963, Ch. 2029. (Sovereign immunity—amendments and repeals of inconsistent special statutes.)

Cal. Stats. 1965, Ch. 299. (Evidence Code.)

One of the proposed constitutional amendments was approved and ratified by the people;⁸ the other was not approved by the Legislature.

Commission recommendations have resulted in the enactment of legislation affecting 1,855 sections of the California statutes: 943 sections have been added, 427 sections amended, and 485 sections repealed.

Cal. Stats. 1965, Ch. 653. (Sovereign immunity—claims and actions against public entities and public employees.)

Cal. Stats. 1965, Ch. 1151. (Evidence in eminent domain proceedings.)

Cal. Stats. 1965, Ch. 1527. (Sovereign immunity—liability of public entities for ownership and operation of motor vehicles.)

Cal. Stats. 1965, Chs. 1649, 1650. (Reimbursement for moving expenses.)

Cal. Stats. 1967, Ch. 72. (Additur.)

Cal. Stats. 1967, Ch. 262. (Evidence Code—Agricultural Code revisions.)

Cal. Stats. 1967, Ch. 650. (Evidence Code—Evidence Code revisions.)

Cal. Stats. 1967, Ch. 702. (Vehicle Code Section 17150 and related sections.)

Cal. Stats. 1967, Ch. 703. (Evidence Code—Commercial Code revisions.)

Cal. Stats. 1967, Ch. 1104. (Exchange of valuation data in eminent domain proceedings.)

Cal. Stats. 1967, Ch. 1324. (Suit by or against an unincorporated association.)

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

PERSONNEL OF COMMISSION

As of December 1, 1967, the membership of the Law Revision Commission is:

	<i>Term expires</i>
Richard H. Keatinge, Los Angeles, <i>Chairman</i> -----	October 1, 1967
Sho Sato, Berkeley, <i>Vice Chairman</i> -----	October 1, 1969
Hon. Alfred H. Song, Monterey Park, <i>Senate Member</i> -----	*
Hon. F. James Bear, San Diego, <i>Assembly Member</i> -----	*
Joseph A. Ball, Long Beach, <i>Member</i> -----	October 1, 1969
James R. Edwards, San Bernardino, <i>Member</i> -----	October 1, 1967
Thomas E. Stanton, Jr., San Francisco, <i>Member</i> -----	October 1, 1969
Vacancy-----	October 1, 1971
Vacancy-----	October 1, 1971
George H. Murphy, Sacramento, <i>ex officio Member</i> -----	†

On December 1, 1967, the Commission elected new officers. Professor Sho Sato was elected Chairman; Mr. Joseph A. Ball was elected Vice Chairman. Their terms commenced on December 31, 1967.

Professor John R. McDonough resigned from the Commission on September 6, 1967; Mr. Herman F. Selvin resigned on September 15, 1967. No successors had been appointed as of December 1, 1967.

In June 1967, Mr. Gordon E. McClintock was appointed to the Commission's staff as Student Legal Assistant.

In July 1967, Mr. Clarence B. Taylor, previously on the Commission's staff as Special Condemnation Counsel, was appointed Assistant Executive Secretary to fill the vacancy created when Mr. Joseph B. Harvey resigned to enter private law practice.

In September 1967, Mr. Ted W. Isles was appointed to the Commission's staff as Senior Attorney.

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

† The Legislative Counsel is *ex officio* a nonvoting member of the Commission.

SUMMARY OF WORK OF COMMISSION

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

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

The Commission held four one-day meetings and five two-day meetings in 1967.

¹ See pages 1315-1319, *infra*.

² See page 1320, *infra*.

³ See page 1327, *infra*.

1968 LEGISLATIVE PROGRAM

The Commission plans to submit five recommendations to the 1968 Legislature:

- (1) *Recommendation Relating to Escheat* (September 1967), reprinted in 8 CAL. L. REVISION COMM'N REPORTS 1001 (1967).
- (2) *Recommendation Relating to Recovery of Condemnee's Expenses on Abandonment of an Eminent Domain Proceeding*. See Appendix XI to this Report.
- (3) *Recommendation Relating to Improvements Made in Good Faith Upon Land Owned by Another*. See Appendix XII to this Report.
- (4) *Recommendation Relating to Damages for Personal Injuries to a Married Person as Separate or Community Property*. See Appendix XIII to this Report.
- (5) *Recommendation Relating to Service of Process on Unincorporated Associations*. See Appendix XIV to this Report.

The Commission also recommends that three studies be dropped from its calendar of topics (see page 1324, *infra*) and that it be authorized to study one additional topic (see page 1325, *infra*).

MAJOR STUDIES IN PROGRESS

INVERSE CONDEMNATION

Resolution Chapter 130 of the Statutes of 1965 directed the Commission to study "whether the decisional, statutory, and constitutional rules governing the liability of public entities for inverse condemnation should be revised, including but not limited to the liability for inverse condemnation resulting from flood control projects." The Commission intends to devote a substantial portion of its time during the next two years to the study of inverse condemnation and tentatively plans to submit a recommendation on this subject to the 1970 Legislature.

Professor Arvo Van Alstyne of the College of Law, University of Utah, has been retained as the Commission's research consultant on this topic. One portion of his research study has been completed and published. See Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727 (1967). A substantial portion of the remainder of the research study is available in mimeographed form.

CONDEMNATION LAW AND PROCEDURE

The Commission is now engaged in the study of condemnation law and procedure and tentatively plans to submit a recommendation for a comprehensive statute on this subject to the 1972 Legislature.

As it did in connection with the Evidence Code study, the Commission will publish a series of reports containing tentative recommendations and research studies covering various aspects of condemnation law and procedure. The comments and criticisms received from interested persons and organizations on these tentative recommendations will be considered before the comprehensive statute is drafted. The first report in this series has been published. See *Tentative Recommendation and a Study Relating to Condemnation Law and Procedure: Number 1—Possession Prior to Final Judgment and Related Problems*, 8 CAL. L. REVISION COMM'N REPORTS 1101 (1967). The second research study in this series, dealing with the right to take, is available in mimeographed form and arrangements are being made for its publication in a law review. The Commission's staff has begun work on the third study which will deal with compensation and the measure of damages. The Commission also has retained Professor Douglas Ayer of the Stanford Law School to prepare a research study on the procedural aspects of condemnation.

Prior to 1972, the Commission will submit recommendations concerning eminent domain problems that appear to be in need of immediate attention. The Commission submitted the first such recommendation, relating to the exchange of valuation data, to the 1967 Legislature,¹ and will submit a recommendation to the 1968 Legislature

¹ See *Recommendation Relating to Discovery in Eminent Domain Proceedings*, 8 CAL. L. REVISION COMM'N REPORTS 19 (1967). For a legislative history of this recommendation, see page 1318, *infra*. See also Cal. Stats. 1967, Ch. 1104.

relating to the recovery of the condemnee's expenses on abandonment of an eminent domain proceeding.²

EVIDENCE

The Evidence Code was enacted in 1965 upon recommendation of the Commission. Resolution Chapter 130 of the Statutes of 1965 directs the Commission to continue its study of the Evidence Code. Pursuant to this directive, the Commission has undertaken two projects.

The first is a continuing study to determine whether any substantive, technical, or clarifying changes are needed in the Evidence Code. In this connection, the Commission is continuously reviewing texts, law review articles, and communications from judges, lawyers, and others concerning the Evidence Code. As a result of this review, the Commission recommended to the 1967 Legislature that various changes be made in the Evidence Code.³

The second project is a study of the other California codes to determine what changes, if any, are needed in view of the enactment of the Evidence Code.⁴ The Commission submitted recommendations relating to the Agricultural Code⁵ and the Commercial Code⁶ to the 1967 legislative session. Mr. Jon D. Smock, a former member of the Commission's legal staff and now a member of the staff of the Judicial Council, has been retained as a research consultant to prepare research studies on the changes needed in the evidence provisions contained in the Business and Professions Code and the Code of Civil Procedure. To the extent that its work schedule permits, the Commission will submit recommendations relating to these and additional codes to future sessions of the Legislature.

² See *Recommendation Relating to Recovery of Condemnee's Expenses on Abandonment of an Eminent Domain Proceeding*, Appendix XI of this Report.

³ See *Recommendation Relating to the Evidence Code: Number 1—Evidence Code Revisions* (October 1966). For a legislative history of this recommendation, see page 1315, *infra*. See also Cal. Stats. 1967, Ch. 650.

Since the publication of its recommendations to the 1967 Legislature, the Commission has reviewed the following: Kongsgaard, *Judicial Notice and the California Evidence Code*, 18 HASTINGS L.J. 117 (1966); McDonough, *The California Evidence Code: A Précis*, 18 HASTINGS L.J. 89 (1966); Miller, *Beyond the Law of Evidence*, 40 SO. CAL. L. REV. 1 (1967); Molinari, *The Presumption Takes on a New Look in California*, 2 LINCOLN L. REV. 101 (1967); Notes, 18 HASTINGS L.J. at 198, 210, and 222 (1966), at 677 (1967). The Commission has also considered letters from judges and attorneys.

⁴ Concerning this project, see Molinari, *The Presumption Takes on a New Look in California*, 2 LINCOLN L. REV. 101, 109-110 (1967).

⁵ See *Recommendation Relating to the Evidence Code: Number 2—Agricultural Code Revisions* (October 1966). For a legislative history of this recommendation, see page 1316, *infra*. See also Cal. Stats. 1967, Ch. 262.

⁶ See *Recommendation Relating to the Evidence Code: Number 3—Commercial Code Revisions* (October 1966). For a legislative history of this recommendation, see page 1316, *infra*. See also Cal. Stats. 1967, Ch. 703.

LEGISLATIVE HISTORY OF RECOMMENDATIONS SUBMITTED TO 1967 LEGISLATIVE SESSION

Eleven bills and one concurrent resolution were introduced to effectuate the Commission's recommendations to the 1967 session of the Legislature. Seven of the bills passed the Legislature and were approved by the Governor. The concurrent resolution was adopted.

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

RECOMMENDATIONS ENACTED

Resolution Approving Topics for Study

Senate Concurrent Resolution No. 13, introduced by Senator Clark L. Bradley and adopted as Resolution Chapter 81 of the Statutes of 1967, authorizes the Commission to continue its study of topics previously authorized for study and to drop from its calendar one topic (right to support after an ex parte divorce) on which the Commission had concluded no additional legislation was needed.

Evidence Code

The Commission submitted three recommendations relating to the Evidence Code. One recommendation related to revisions of the Evidence Code itself; the others related to revisions of evidence provisions in other codes.

Evidence Code revisions. Senate Bill No. 247, which in amended form became Chapter 650 of the Statutes of 1967, was introduced by Senator Bradley to effectuate the recommendation of the Commission on this subject. See *Recommendation Relating to the Evidence Code: Number 1—Evidence Code Revisions*, 8 CAL. L. REVISION COMM'N REPORTS 101 (1967); *Report of the Senate Committee on Judiciary on Senate Bill No. 247*, SENATE J. (Mar. 30, 1967) at 789, reprinted as Appendix II to this Report.

The following significant amendments were made to Senate Bill No. 247:

(1) Proposed Evidence Code Section 646, relating to *res ipsa loquitur*, was deleted. It was not possible to achieve agreement as to the language that should be used to state the presumptive effect of *res ipsa loquitur*. Accordingly, the matter was left to court determination in accordance with the general guidelines already in the code.

(2) Proposed Public Resources Code Section 2325 was deleted as unnecessary. See the revised comment to Evidence Code Section 1602 (repealed), printed in the Senate Journal for March 30, 1967, and reprinted in Appendix II to this Report.

Agricultural Code revisions. Senate Bill No. 248, which in amended form became Chapter 262 of the Statutes of 1967, was introduced by Senator Bradley to effectuate the recommendation of the Commission on this subject. See *Recommendation Relating to the Evidence Code: Number 2—Agricultural Code Revisions*, 8 CAL. L. REVISION COMM'N REPORTS 201 (1967).

A new Agricultural Code was enacted as Chapter 15 of the Statutes of 1967. Senate Bill No. 248, which as introduced had been drafted to amend or repeal provisions of the existing Agricultural Code, was therefore amended to make the same changes in the new code. The Senate Committee on Judiciary adopted a report containing a comment to each section of the amended bill. See *Report of Senate Committee on Judiciary on Senate Bill No. 248*, SENATE J. (Mar. 30, 1967) at 785-789, reprinted as Appendix III to this Report.

Commercial Code revisions. Senate Bill No. 249, which in amended form became Chapter 703 of the Statutes of 1967, was introduced by Senators Bradley and Song to effectuate the recommendation of the Commission on this subject. See *Recommendation Relating to the Evidence Code: Number 3—Commercial Code Revisions*, 8 CAL. L. REVISION COMM'N REPORTS 301 (1967).

The following significant amendments were made to Senate Bill No. 249:

(1) Section 1202 of the Commercial Code, as amended in the bill as introduced, was further amended as follows: In subdivision (1), the phrase "document in due form purporting to be" was deleted. In paragraph (a) of subdivision (2), the phrase "A document in due form purporting to be the document referred to in subdivision (1)" was substituted for the words "The document." In paragraph (b), the phrase "Unless the contract otherwise provides" was deleted as unnecessary in view of Commercial Code Section 1102(3).

(2) Section 1209 of the Commercial Code, as added by the bill as introduced, was renumbered as Section 1210 and the reference to Section 4103 was deleted from renumbered Section 1210.

(3) Section 4103 of the Commercial Code was deleted from the bill because the Commission concluded that this section needed further study.

The Senate Committee on Judiciary adopted a report containing a comment for new Section 1210 of the Commercial Code. See *Report of*

Senate Committee on Judiciary on Senate Bill No. 249, SENATE J. (May 22, 1967) at 1997, reprinted as Appendix IV to this Report.

Additur

Senate Bill No. 250, which in amended form became Chapter 72 of the Statutes of 1967, was introduced by Senators Bradley and Song and Assemblyman Burton to effectuate the recommendation of the Commission on this subject. See *Recommendation and Study Relating to Additur*, 8 CAL. L. REVISION COMM'N REPORTS 601 (1967).

The following significant amendments were made to Senate Bill No. 250:

(1) Code of Civil Procedure Section 657 was amended to substitute "insufficiency of the evidence to" or comparable language for "the evidence does not" or comparable language in various places in the section. This amendment was made at the suggestion of the State Bar on the ground that the meaning of the existing language, which the amendment restored, has been settled by judicial decision.

(2) Code of Civil Procedure Section 662.5 was amended as follows: The phrase "and specifies in its order" was inserted in subdivisions (a) and (c). The phrase "grant a motion for" was substituted for the word "order" and the phrase "its order granting a new trial" was substituted for the phrase "such order" in subdivision (c). All of these amendments were intended to make the language clearer rather than to change it in substance.

The Senate Committee on Judiciary adopted a report containing a revised comment to Section 657. See *Report of Senate Committee on Judiciary on Senate Bill No. 250*, SENATE J. (Mar. 16, 1967) at 678-679, reprinted as Appendix V to this Report.

Vehicle Code Section 17150 and Related Sections

Senate Bill No. 244, which in amended form became Chapter 702 of the Statutes of 1967, was introduced by Senators Bradley and Song and Assemblyman Bear to effectuate the recommendation of the Commission on this subject. See *Recommendation and Study Relating to Vehicle Code Section 17150 and Related Sections*, 8 CAL. L. REVISION COMM'N REPORTS 501 (1967); *Report of Senate Committee on Judiciary on Senate Bill No. 244*, SENATE J. (Apr. 21, 1967) at 1267-1268, reprinted as Appendix I to this Report.

The bill was amended to delete the proposed provisions relating to contribution because the State Bar reported that it was making a comprehensive study of contribution and opposed the enactment of special contribution statutes before the comprehensive study is completed. Subdivision (b), relating to liability for punitive damages, was added to Vehicle Code Sections 17151 and 17709. Other technical amendments were made.

Suit By or Against An Unincorporated Association

Senate Bill No. 251, which in amended form became Chapter 1324 of the Statutes of 1967, was introduced by Senators Bradley and Song to effectuate the recommendation of the Commission on this subject. See *Recommendation and Study Relating to Suit By or Against An Unin-*

corporated Association, 8 CAL. L. REVISION COMM'N REPORTS 901 (1967); *Report of Senate Committee on Judiciary on Senate Bill No. 251*, SENATE J. (Apr. 21, 1967) at 1269-1270, portion reprinted as Appendix VI to this Report; *Report of Assembly Committee on Judiciary on Senate Bill No. 251*, ASSEMBLY J. (July 6, 1967) at 4997-4998, portion reprinted as Appendix VII to this Report.

The bill was substantially amended in the Senate and in the Assembly. The text of the bill as enacted, together with the official comment to each section of the bill, is set out as Appendix VIII to this Report. Most of the amendments were technical or clarifying; the following are the principal substantive amendments:

(1) Subdivision 2.1 of Section 411 was amended to permit service on any member of the unincorporated association if no person has been designated agent for service of process by the association or if the person so designated cannot be found. The Commission intends to submit a recommendation to the 1968 Legislature that this rule be modified. See Appendix XIV to this Report.

(2) Section 15700 of the Corporations Code, which was not affected by the bill as introduced, was amended to conform to the other provisions of the bill and to make other revisions.

(3) The provisions relating to filing a designation of agent for service of process or designation of principal office were substantially revised to permit use of automatic data processing equipment and to make other revisions.

Discovery in Eminent Domain Proceedings

Senate Bill No. 253, which in amended form became Chapter 1104 of the Statutes of 1967, was introduced by Senators Bradley and Song to effectuate the recommendation of the Commission on this subject. See *Recommendation Relating to Discovery in Eminent Domain Proceedings*, 8 CAL. L. REVISION COMM'N REPORTS 19 (1967); *Report of Assembly Committee on Judiciary on Senate Bill No. 253*, ASSEMBLY J. (June 28, 1967) at 4717-4720, portion reprinted as Appendix IX to this Report.

The bill was amended in the Senate and in the Assembly. The text of the bill as enacted, together with a comment to each section of the bill, is set out in Appendix X of this Report. Most of the amendments were technical or clarifying; the following are the principal substantive amendments:

(1) Subdivision (c) of Section 1272.01, relating to rules of the Judicial Council, was deleted.

(2) The bill was made inapplicable to any eminent domain case in Los Angeles County in which a pretrial conference is held.

RECOMMENDATIONS NOT ENACTED

Whether Damages for Personal Injury to a Married Person Should Be Separate or Community Property

Senate Bill No. 245 was introduced by Senators Bradley and Song and Senate Bill No. 246, a companion bill, was introduced by Senator Bradley to effectuate the recommendation of the Commission on this subject. See *Recommendation and Study Relating to Whether Damages*

for Personal Injury to a Married Person Should Be Separate or Community Property, 8 CAL. L. REVISION COMM'N REPORTS 401 (1967); *Report of Senate Committee on Judiciary on Senate Bill No. 245 and Senate Bill No. 246*, SENATE J. (Apr. 21, 1967) at 1268-1269. Neither bill was enacted. Both bills passed the Senate, Senate Bill No. 245 in amended form and Senate Bill No. 246 as introduced. Senate Bill No. 245 was defeated on the Assembly floor and Senate Bill No. 246 was thereupon ordered to the Assembly inactive file. The Commission has reviewed this recommendation and will submit a revised recommendation to the 1968 Legislature. See Appendix XIII to this Report.

The Good Faith Improver of Land Owned By Another

Senate Bill No. 254 was introduced by Senator Bradley to effectuate the recommendation of the Commission on this subject. See *Recommendation and Study Relating to the Good Faith Improver of Land Owned by Another*, 8 CAL. L. REVISION COMM'N REPORTS 801 (1967); *Report of Senate Committee on Judiciary on Senate Bill No. 254*, SENATE J. (Mar. 16, 1967) at 679-680. The bill was not enacted. It passed the Senate in amended form, passed the Assembly, reconsideration was granted, and the bill was re-referred to the Assembly Committee on Judiciary and died in that Committee. The Commission has reviewed this recommendation and will submit a revised recommendation to the 1968 Legislature. See Appendix XII to this Report.

Abandonment or Termination of a Lease

Senate Bill No. 252 was introduced by Senators Bradley and Song to effectuate the recommendation of the Commission on this subject. See *Recommendation and Study Relating to Abandonment or Termination of a Lease*, 8 CAL. L. REVISION COMM'N REPORTS 701 (1967); *Report of Senate Committee on Judiciary on Senate Bill No. 252*, SENATE J. (Mar. 16, 1967) at 679. The bill was not enacted. It passed the Senate in amended form, was favorably reported by the Assembly Committee on Judiciary, but was moved to the inactive file in the Assembly after the Commission withdrew its recommendation that the bill be enacted because the Commission concluded that the proposal needed further study.

CALENDAR OF TOPICS FOR STUDY

STUDIES IN PROGRESS

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

Topics Under Active Consideration

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

1. Whether the law and procedure relating to condemnation should be revised with a view to recommending a comprehensive statute that will safeguard the rights of all parties to such proceedings (Cal. Stats. 1965, Res. Ch. 130, p. 5289; see also Cal. Stats. 1956, Res. Ch. 42, p. 263; 4 CAL. L. REVISION COMM'N REPORTS at 115 (1963)).²
2. Whether the doctrine of sovereign or governmental immunity in California should be abolished or revised (Cal. Stats. 1957, Res. Ch. 202, p. 4589).³

¹ Section 10335 of the Government Code provides that the Commission shall study, in addition to those topics which it recommends and which are approved by the Legislature, any topic which the Legislature by concurrent resolution refers to it for such study.

The legislative directives to make these studies are listed after each topic.

² See *Recommendation and Study Relating to Evidence in Eminent Domain Proceedings; Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings; Recommendation and Study Relating to the Reimbursement for Moving Expenses When Property Is Acquired for Public Use*, 3 CAL. L. REVISION COMM'N REPORTS, Recommendations and Studies at A-1, B-1, and C-1 (1961). For a legislative history of these recommendations, see 3 CAL. L. REVISION COMM'N REPORTS 1-5 (1961). See also Cal. Stats. 1961, Ch. 1612 (tax apportionment) and Cal. Stats. 1961, Ch. 1613 (taking possession and passage of title). The substance of two of these recommendations was incorporated in legislation enacted in 1965. Cal. Stats. 1965, Ch. 1151, p. 2900 (evidence in eminent domain proceedings); Ch. 1649, p. 3744, and Ch. 1650, p. 3746 (reimbursement for moving expenses).

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

See also *Recommendation Relating to Recovery of Condemnee's Expenses on Abandonment of an Eminent Domain Proceeding*, 8 CAL. L. REVISION COMM'N REPORTS 1361 (1967).

The Commission is now engaged in the study of this topic and tentatively plans to submit a recommendation for a comprehensive statute to the 1972 Legislature. See 8 CAL. L. REVISION COMM'N REPORTS 1313 (1967).

³ See *Recommendations Relating to Sovereign Immunity: Number 1—Tort Liability of Public Entities and Public Employees; Number 2—Claims, Actions and Judgments Against Public Entities and Public Employees; Number 3—Insurance Coverage for Public Entities and Public Employees; Number 4—Defense of Public Employees; Number 5—Liability of Public Entities for Ownership and Operation of Motor Vehicles; Number 6—Workmen's Compensation Benefits for Persons Assisting Law Enforcement or Fire Control Officers; Number 7—*

3. Whether the decisional, statutory, and constitutional rules governing the liability of public entities for inverse condemnation should be revised, including but not limited to the liability for inverse condemnation resulting from flood control projects (Cal. Stats. 1965, Res. Ch. 130, p. 5289).
4. Whether the Evidence Code should be revised (Cal. Stats. 1965, Res. Ch. 130, p. 5289).⁴
5. Whether the law relating to the use of fictitious names should be revised (Cal. Stats. 1957, Res. Ch. 202, p. 4589; see also 1 CAL. L. REVISION COMM'N REPORTS, 1957 Report at 18 (1957)).
6. Whether the law relating to the rights and duties attendant upon termination or abandonment of a lease should be revised (Cal. Stats. 1965, Res. Ch. 130, p. 5289; see also Cal. Stats. 1957, Res. Ch. 202, p. 4589).⁵

Amendments and Repeals of Inconsistent Special Statutes, 4 CAL. L. REVISION COMM'N REPORTS 801, 1001, 1201, 1301, 1401, 1501, and 1601 (1963). For a legislative history of these recommendations, see 4 CAL. L. REVISION COMM'N REPORTS 211-213 (1963). See also *A Study Relating to Sovereign Immunity*, 5 CAL. L. REVISION COMM'N REPORTS 1 (1963). See also Cal. Stats. 1963, Ch. 1681 (tort liability of public entities and public employees); Cal. Stats. 1963, Ch. 1715 (claims, actions and judgments against public entities and public employees); Cal. Stats. 1963, Ch. 1682 (insurance coverage for public entities and public employees); Cal. Stats. 1963, Ch. 1683 (defense of public employees); Cal. Stats. 1963, Ch. 1684 (workmen's compensation benefits for persons assisting law enforcement or fire control officers); Cal. Stats. 1963, Ch. 1685 (amendments and repeals of inconsistent special statutes); Cal. Stats. 1963, Ch. 1686 (amendments and repeals of inconsistent special statutes); Cal. Stats. 1963, Ch. 2029 (amendments and repeals of inconsistent special statutes).

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

This topic will be considered in connection with the Commission's study of topic 3 (inverse condemnation).

⁴ See *Recommendation Proposing an Evidence Code*, 7 CAL. L. REVISION COMM'N REPORTS 1 (1965). A series of tentative recommendations and research studies relating to the Uniform Rules of Evidence was published and distributed for comment prior to the preparation of the recommendation proposing the Evidence Code. See 6 CAL. L. REVISION COMM'N REPORTS at 1, 101, 201, 601, 701, 801, 901, 1001, and *Appendix* (1964). For a legislative history of this recommendation, see 7 CAL. L. REVISION COMM'N REPORTS 912-914 (1965). See also *Evidence Code With Official Comments*, 7 CAL. L. REVISION COMM'N REPORTS 1001 (1965). See also Cal. Stats. 1965, Ch. 299 (Evidence Code).

See also *Recommendations Relating to the Evidence Code: Number 1—Evidence Code Revisions; Number 2—Agricultural Code Revisions; Number 3—Commercial Code Revisions*, 8 CAL. L. REVISION COMM'N REPORTS 101, 201, 301 (1967). For a legislative history of these recommendations, see 8 CAL. L. REVISION COMM'N REPORTS 1315 (1967). See also Cal. Stats. 1967, Ch. 650 (Evidence Code revisions); Cal. Stats. 1967, Ch. 282 (Agricultural Code revisions); Cal. Stats. 1967, Ch. 703 (Commercial Code revisions).

This topic is under continuing study to determine whether any substantive, technical, or clarifying changes are needed in the Evidence Code and whether changes are needed in other codes to conform them to the Evidence Code. See 8 CAL. L. REVISION COMM'N REPORTS 1314 (1967).

⁵ See *Recommendation and Study Relating to Abandonment or Termination of a Lease*, 8 CAL. L. REVISION COMM'N REPORTS 701 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS 1319 (1967).

Topics Continued on Calendar for Further Study

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

1. Whether an award of damages made to a married person in a personal injury action should be the separate property of such married person (Cal. Stats. 1957, Res. Ch. 202, p. 4589).¹
2. Whether the law relating to additur and remittitur should be revised (Cal. Stats. 1965, Res. Ch. 130, p. 5289; see also Cal. Stats. 1957, Res. Ch. 202, p. 4589).²
3. Whether Vehicle Code Section 17150 and related statutes should be revised (Cal. Stats. 1965, Res. Ch. 130, p. 5289; see also Cal. Stats. 1962, Res. Ch. 23, p. 94).³
4. Whether the law relating to the rights of a good faith improver of property belonging to another should be revised (Cal. Stats. 1957, Res. Ch. 202, p. 4589).⁴
5. Whether the law relating to suit by and against partnerships and other unincorporated associations should be revised and whether the law relating to the liability of such associations and their members should be revised (Cal. Stats. 1966, Res. Ch. 9; see also Cal. Stats. 1957, Res. Ch. 202, p. 4589).⁵
6. Whether the law relating to the escheat of property and the disposition of unclaimed or abandoned property should be revised (Cal. Stats. 1967, Res. Ch. 81; see also Cal. Stats. 1956, Res. Ch. 42, p. 263).⁶

¹ See *Recommendation and Study Relating to Whether Damages for Personal Injury to a Married Person Should be Separate or Community Property*, 8 CAL. L. REVISION COMM'N REPORTS 401 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS 1318 (1967).

The Commission will submit a revised recommendation to the 1968 Legislature.

² See *Recommendation and Study Relating to Additur*, 8 CAL. L. REVISION COMM'N REPORTS 601 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS 1317 (1967). See also Cal. Stats. 1967, Ch. 72.

³ See *Recommendation and Study Relating to Vehicle Code Section 17150 and Related Sections*, 8 CAL. L. REVISION COMM'N REPORTS 501 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS 1317 (1967). See also Cal. Stats. 1967, Ch. 702.

⁴ See *Recommendation and Study Relating to The Good Faith Improver of Land Owned by Another*, 8 CAL. L. REVISION COMM'N REPORTS 801 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS 1319 (1967).

The Commission will submit a revised recommendation to the 1968 Legislature.

⁵ See *Recommendation and Study Relating to Suit By or Against an Unincorporated Association*, 8 CAL. L. REVISION COMM'N REPORTS 901 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS 1317 (1967). See also Cal. Stats. 1967, Ch. 1324.

The Commission will submit a recommendation on this topic to the 1968 Legislature.

⁶ See *Recommendation Relating to Escheat*, 8 CAL. L. REVISION COMM'N REPORTS 1001 (1967).

The Commission will submit its recommendation on this topic to the 1968 Legislature.

7. Whether the jury should be authorized to take a written copy of the court's instructions into the jury room in civil as well as criminal cases (Cal. Stats. 1955, Res. Ch. 207, p. 4207).⁷
8. Whether the law relating to quasi-community property and property described in Section 201.5 of the Probate Code should be revised (Cal. Stats. 1966, Res. Ch. 9).⁸

Other Topics Authorized for Study

The Commission has not yet begun the preparation of a recommendation on the topics listed below. In a few cases, however, the research study is in preparation.

1. Whether the law respecting jurisdiction of courts in proceedings affecting the custody of children should be revised (Cal. Stats. 1956, Res. Ch. 42, p. 263; see also 1 CAL. L. REVISION COMM'N REPORTS, 1956 Report at 29 (1957)).
2. Whether the law relating to attachment, garnishment, and property exempt from execution should be revised (Cal. Stats. 1957, Res. Ch. 202, p. 4589; see also 1 CAL. L. REVISION COMM'N REPORTS, 1957 Report at 15 (1957)).
3. Whether the various sections of the Code of Civil Procedure relating to partition should be revised and whether the provisions of the Code of Civil Procedure relating to the confirmation of partition sales and the provisions of the Probate Code relating to the confirmation of sales of real property of estates of deceased persons should be made uniform and, if not, whether there is need for clarification as to which of them governs confirmation of private judicial partition sales (Cal. Stats. 1959, Res. Ch. 218, p. 5792; see also Cal. Stats. 1956, Res. Ch. 42, p. 263; 1 CAL. L. REVISION COMM'N REPORTS, 1956 Report at 21 (1957)).
4. Whether the Small Claims Court Law should be revised (Cal. Stats. 1957, Res. Ch. 202, p. 4589; see also 1 CAL. L. REVISION COMM'N REPORTS, 1957 Report at 16 (1957)).
5. Whether the law relating to the doctrine of mutuality of remedy in suits for specific performance should be revised (Cal. Stats. 1957, Res. Ch. 202, p. 4589; see also 1 CAL. L. REVISION COMM'N REPORTS, 1957 Report at 19 (1957)).
6. Whether Civil Code Section 1698 should be repealed or revised (Cal. Stats. 1957, Res. Ch. 202, p. 4589; see also 1 CAL. L. REVISION COMM'N REPORTS, 1957 Report at 21 (1957)).
7. Whether Section 1974 of the Code of Civil Procedure should be repealed or revised (Cal. Stats. 1958, Res. Ch. 61, p. 135; see also 2 CAL. L. REVISION COMM'N REPORTS, 1958 Report at 20 (1959)).

⁷ See *Recommendation and Study Relating to Taking Instructions to the Jury Room*, 1 CAL. L. REVISION COMM'N REPORTS at C-1 (1957). For a legislative history of this recommendation, see 2 CAL. L. REVISION COMM'N REPORTS, 1958 Report at 13 (1959).

⁸ See *Recommendation and Study Relating to Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere*, 1 CAL. L. REVISION COMM'N REPORTS at E-1 (1957). For a legislative history of this recommendation, see 2 CAL. L. REVISION COMM'N REPORTS, 1958 Report at 13 (1959). See also Cal. Stats. 1957, Ch. 490. See *Recommendation and Study Relating to Inter Vivos Marital Property Rights in Property Acquired While Domiciled Elsewhere*, 3 CAL. L. REVISION COMM'N REPORTS at I-1 (1961). For a legislative history of this recommendation, see 4 CAL. L. REVISION COMM'N REPORTS 15 (1963). See also Cal. Stats. 1961, Ch. 636.

8. 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 (Cal. Stats. 1957, Res. Ch. 202, p. 4589; see also 1 CAL. L. REVISION COMM'N REPORTS, 1957 Report at 23 (1957)).
9. Whether California statutes relating to service of process by publication should be revised in light of recent decisions of the United States Supreme Court (Cal. Stats. 1958, Res. Ch. 61, p. 135; see also 2 CAL. L. REVISION COMM'N REPORTS, 1958 Report at 18 (1959)).
10. Whether the law relating to a power of appointment should be revised (Cal. Stats. 1965, Res. Ch. 130, p. 5289).

STUDIES TO BE DROPPED FROM CALENDAR OF TOPICS

Pour-Over Trusts

In 1965, the Commission was directed to make a study to determine whether the law relating to devises and bequests to a trustee under, or in accordance with, terms of an existing inter vivos trust (the so-called "pour-over trust") should be revised. Cal. Stats. 1965, Res. Ch. 130, p. 5289.

Chapter 1640 of the California Statutes of 1965 enacted the Uniform Testamentary Additions to Trusts Act (Probate Code Sections 170-173) to deal with the problems that existed in this field of law. Accordingly, the Commission recommends that this topic be dropped from its calendar of topics.

Division of Property on Divorce or Separate Maintenance

In 1966, the Commission was directed to make a study to determine whether the law relating to the allocation or division of property on divorce or separate maintenance should be revised. Cal. Stats. 1966, Res. Ch. 9.

In December 1966, the Governor's Commission on the Family recommended the creation of a statewide family court system and revisions of the substantive law relating to the family. *Report of the Governor's Commission on the Family* (December 1966). The recommended revisions include revisions of the law relating to allocation or division of property on divorce or separate maintenance. To avoid duplicating the work of the Governor's Commission, the Law Revision Commission recommends that this topic be dropped from its calendar of topics.

Rights of a Putative Spouse

In 1956, the Commission was authorized to make a study to determine whether the law relating to the rights of a putative spouse should be revised. Cal. Stats. 1956, Res. Ch. 42, p. 263.

The recommendations of the Governor's Commission on the Family include recommendations relating to the rights of a putative spouse. *Report of the Governor's Commission on the Family* (December 1966). To avoid duplicating the work of the Governor's Commission, the Law Revision Commission recommends that this topic be dropped from its calendar of topics.

STUDIES FOR FUTURE CONSIDERATION

The Commission now has an agenda consisting of 27 studies which will require substantially all of its energies for several years. For this reason the Commission will not request authority at the 1968 legislative session to undertake any new studies. The Commission recommends, however, that it be authorized to make a study of a problem that has arisen under legislation enacted on recommendation of the Commission.

A study to determine whether the law relating to arbitration should be revised.

Code of Civil Procedure Sections 1280 to 1294.2, relating to arbitration, were enacted in 1961¹ upon recommendation of the Law Revision Commission.² Although experience under the 1961 statute has been generally satisfactory, the effect of an arbitration clause upon the right of a party to file a mechanic's lien or obtain provisional relief such as attachment is unclear.

Commentators generally agree that provisional remedies should be available for the preservation of property and to secure the satisfaction of the award to the same extent it would be available if the dispute were in litigation rather than arbitration.³ This rule has been established by statute in some jurisdictions⁴ and by judicial decision in others.⁵ The law in California, however, is unclear because of three recent Court of Appeal decisions.

In *Homestead Sav. & Loan Ass'n v. Superior Court*,⁶ the plaintiff filed a mechanic's lien claim for money due on a construction contract. Shortly thereafter, he filed a complaint for breach of contract which contained a recital of the arbitration clause and a prayer for an order to arbitrate. The defendant brought mandamus to set aside the arbitration order on the ground that the filing of the mechanic's lien and the filing of the complaint, which was in the form of a foreclosure action, constituted a repudiation and waiver of the arbitration agreement. Citing the statutory law in New York, the court held that the filing of

¹ Cal. Stats. 1961, Ch. 461, p. 1540.

² See *Recommendation and Study Relating to Arbitration*, 3 CAL. L. REVISION COMM'N REPORTS at G-1 (1961).

³ STURGES, COMMERCIAL ARBITRATION AND AWARDS § 142. See 1954 HANDBOOK, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 119-123; Sturges, *Common-law and Statutory Arbitration: Problems Arising From Their Coexistence*, 46 MINN. L. REV. 819, 851 (1962); Note, 17 N.Y.U.L.Q. 638 (1940).

⁴ The first Uniform Arbitration Act was adopted in 1924. That act provided, in Section 12, that an arbitration clause would not bar provisional remedies. It was enacted in four states: NEV. REV. STAT. § 38.130; N.C. GEN. STAT. § 1-155; UTAH CODE ANN. § 78-31-12. Wyoming Laws of 1927, Ch. 96, § 12 (repealed 1959). Connecticut also has such a statute. CONN. GEN. STAT. ANN. § 52-422. New York has a statute which only applies to mechanic's liens. N.Y. LIEN LAW § 35. Provisional remedies are preserved in actions otherwise justiciable in admiralty by the Federal Arbitration Act, 9 U.S.C. § 8.

The 1955 Uniform Arbitration Act originally provided for provisional remedies. 1954 HANDBOOK, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 206. The section was deleted, apparently because of a fear of excess labor injunctions. For discussion, see *Salvucci v. Sheehan*, 349 Mass. 659, 663-664, 212 N.E.2d 243, 245 (1965).

⁵ *Salvucci v. Sheehan*, 349 Mass. 659, 212 N.E.2d 243 (1965); *Auerbach v. Grand Nat'l Pictures, Ltd.*, 176 Misc. 1031, 29 N.Y.S.2d 747, *aff'd* 263 App. Div. 712, 31 N.Y.S.2d 670, *appeal denied* 263 App. Div. 807, 32 N.Y.S.2d 129 (1941).

⁶ 195 Cal. App.2d 697, 16 Cal. Rptr. 121 (1961).

a mechanic's lien is not inconsistent with arbitration because it merely preserves the status quo. Therefore, the plaintiff was allowed to compel arbitration despite his earlier assertion of a mechanic's lien.

In *Palm Springs Homes, Inc. v. Western Desert, Inc.*,⁷ the court reached an apparently inconsistent result on similar facts. In that case, the appellant had submitted to arbitration under an arbitration clause after filing a mechanic's lien and starting foreclosure proceedings. The court held, on an unclear record, that the arbiters apparently found that the filing of the lien under the facts was inconsistent with the agreement to submit all controversies to arbitration and therefore affirmed the award in favor of respondent for breach of contract. The alleged breach appears to have been the filing of the lien.

In the more recent case of *Ross v. Blanchard*,⁸ the plaintiff filed suit on a building contract and attached the property of the defendant. The defendant's answer alleged an arbitration clause and the trial court ordered the action stayed until the disposition of arbitration proceedings. An award was made for the plaintiff two years later and, after a confirmation of that award, defendant moved to discharge plaintiff's attachment on the ground that plaintiff had been bound to arbitrate and his filing of the suit at law had resulted in a wrongful attachment. The court first held that a party to an arbitration agreement may initially resort to the courts because a later arbitration order merely stays initial court proceedings. It then held that the attachment should not be dissolved because the plaintiff would be entitled to attachment to satisfy the award and defendant had not moved to dissolve it during the two-year interim. The court avoided deciding whether or not the defendant could have dissolved the attachment during the interim, but relied heavily on a Massachusetts case⁹ which held that the trial court had no power to discharge an attachment when an action has been stayed pending arbitration.

Sections 1280 to 1294.2 do not deal with the three problems posed by the above cases:

1. When a party to an arbitration clause seeks a provisional remedy or files a mechanic's lien, may the other party assert that this action constitutes a waiver of the arbitration clause which will preclude the plaintiff from seeking an order to arbitrate?¹⁰

2. When a party to an arbitration agreement levies an attachment or files a mechanic's lien and his opponent obtains a stay of the proceedings and an order to arbitrate, should the attachment or lien be dissolved?

3. Does the filing of a mechanic's lien or the attempt to obtain provisional relief constitute a breach of the arbitration clause such that the other party may obtain damages?

In view of the importance of these questions and the necessity to clarify California law on this point, the Commission believes that a study should be made to determine whether or not provisional remedies should be available where a plaintiff is bound by an arbitration clause. At the same time, the experience under the 1961 statute should be reviewed to determine whether any other revisions are necessary.

⁷ 215 Cal. App.2d 270, 30 Cal. Rptr. 34 (1963).

⁸ 251 A.C.A. 833, 59 Cal. Rptr. 783 (1967).

⁹ *Salvucci v. Sheehan*, 349 Mass. 659, 212 N.E.2d 243 (1965).

¹⁰ An arbitration clause can be waived by a party. CAL. CODE CIV. PROC. § 1281.2. Such a waiver may be effected by initiating an action at law on the contract. *Berman v. Renart Sportswear Corp.*, 222 Cal. App.2d 385, 35 Cal. Rptr. 218 (1963).

REPORT ON STATUTES REPEALED BY IMPLICATION, OR HELD UNCONSTITUTIONAL

Section 10331 of the Government Code provides:

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

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

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

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

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

(4) One decision of the Supreme Court of California holding a statute of this state unconstitutional has been found. In *Bagley v. Washington Township Hospital District*,³ the Supreme Court of California held Government Code Section 3205, which limits the right of public officers or employees to take active part in political activities of a local agency, unconstitutional on the ground that the sweeping prohibitions of the statute are not necessary to an efficient functioning of the civil service system.

¹ This study has been carried through 67 Adv. Cal. 246 (1967) and 388 U.S. 292 (1967).

² Government Code Section 10331 refers only to *statutes* that have been held unconstitutional. It is noted, however, that, in *Reitman v. Mulkey*, 387 U.S. 369 (1967), the Supreme Court of the United States held unconstitutional Article I, Section 26, of the California Constitution (Proposition 13, submitted by the initiative and approved by the electors, November 3, 1964) which provided, in part, that neither the state nor any of its subdivisions or agencies shall deny or abridge the right of any person to sell, lease, or rent his realty, or decline to do so, to anyone he chooses. The California Supreme Court had also held Proposition 13 unconstitutional. *Mulkey v. Reitman*, 64 Cal.2d 529, 50 Cal. Rptr. 881, 413 P.2d 825 (1966).

³ 65 Cal.2d 499, 55 Cal. Rptr. 401, 421 P.2d 409 (1966).

RECOMMENDATIONS

The Law Revision Commission respectfully recommends that the Legislature authorize the Commission to complete its study of the topics listed as studies in progress on pages 1320-1324 of this report, to study the new topic listed on page 1325 of this report, and to drop from its calendar of topics the three topics listed on page 1324 of this report.

Pursuant to the mandate imposed by Section 10331 of the Government Code, the Commission recommends the repeal of Section 3205 of the Government Code to the extent that this section has been held unconstitutional.

APPENDIX I

REPORT OF SENATE COMMITTEE ON JUDICIARY ON SENATE BILL NO. 244

[Extract from Senate Journal for April 21, 1967 (1967 Regular Session).]

In order to indicate more fully its intent with respect to Senate Bill No. 244, the Senate Committee on Judiciary makes the following report.

Except for the revised comments set out below, the comments contained under the various sections of Senate Bill No. 244 as set out in the *Recommendation of the California Law Revision Commission Relating to Vehicle Code Section 17150 and Related Sections* (October 1966) reflect the intent of the Senate Committee on Judiciary in approving the various provisions of Senate Bill No. 244.

The following revised comments to various sections of Senate Bill No. 244 also reflect the intent of the Senate Committee on Judiciary in approving Senate Bill No. 244.

Vehicle Code Section 17150 (amended)

Comment. Under the prior language of Section 17150, a vehicle owner was not liable for injuries caused by the willful misconduct or intoxication of the operator. *Weber v. Pinyan*, 9 Cal.2d 226, 70 P.2d 183 (1937); *Jones v. Ayers*, 212 Cal. App.2d 646, 28 Cal. Rptr. 223 (1963); *Stober v. Halsey*, 88 Cal. App.2d 660, 199 P.2d 313 (1948). Under Section 17150 as amended, a vehicle owner will be liable for the damages caused by the willful misconduct or intoxication of an operator using the vehicle with the owner's permission. Of course, liability based solely on vehicle ownership and not arising out of a master-servant relationship is only a secondary liability that is expressly limited in dollar amount. See Vehicle Code Sections 17151-17153.

The last clause of Section 17150 has been deleted because it, together with Section 17158, prevented an innocent vehicle owner from recovering any damages for a personal injury caused by the concurring negligence of his driver and a third person. Instead of barring an owner's cause of action in such a case, Section 17150 as amended permits him to recover his damages from the negligent third person.

Vehicle Code Section 17151 (amended)

Comment. The amendment of subdivision (a) merely conforms this subdivision to Section 17150 as amended.

Subdivision (b) has been added to make it clear that the extension of ownership liability to include damages caused by a "wrongful" act or omission does not make the owner, bailee of an owner, or personal representative of a decedent liable for punitive damages. Since punitive damages are awarded primarily for the purpose of punishing the *wrongdoer*, they cannot be awarded against a person not implicated in the wrongful conduct. Of course, the owner, bailee, or personal representative can be held liable for punitive damages if he is himself guilty of conduct that justifies their imposition.

Subdivision (b) adopts the same rule that governs the recovery of punitive damages from persons who are vicariously liable. For example, in an action against an employer for his employee's tort, punitive damages may be recovered from the employer only if it is shown that the employer participated in, previously authorized, or subsequently ratified the employee's wrongful act. *Deevy v. Tassi*, 21 Cal.2d 109, 130 P.2d 389 (1942); *Farvour v. Geltis*, 91 Cal. App.2d 603, 205 P.2d 424 (1949); 2 Witkin, *Summary of California Law*, Torts § 398 (1960).

Vehicle Code Section 17709 (amended)

Comment. Section 17709 is revised to conform to amended Sections 17151, 17707, and 17708. See the Comments to those sections.

APPENDIX II

REPORT OF SENATE COMMITTEE ON JUDICIARY ON SENATE BILL NO. 247

[Extract from Senate Journal for March 30, 1967 (1967 Regular Session).]

In order to indicate more fully its intent with respect to Senate Bill No. 247, the Senate Committee on Judiciary makes the following report.

Except for the revised comment set out below, the comments contained under the various sections of Senate Bill No. 247 as set out in the *Recommendation of the California Law Revision Commission Relating to the Evidence Code: Number 1—Evidence Code Revisions* (October 1966) reflect the intent of the Senate Committee on Judiciary in approving the various provisions of Senate Bill No. 247.

The following revised comment to Evidence Code Section 1602 also reflects the intent of the Senate Committee on Judiciary in approving Senate Bill No. 247.

Evidence Code Section 1602 (repealed)

Comment. Section 1602 of the Evidence Code is repealed because a patent for mineral lands does not contain a statement of the date of the location of the claim or claims upon which the granting or issuance of the patent is based. See Bureau of Land Management Form 4-1081 (September 1963) and Form 4-1082 (January 1963). As to patents issued before 1963, the California office of the Bureau of Land Management of the United States Department of Interior reports: "No patents have been found which recite the date of location. To our knowledge, it has never been the practice to refer to the location date in the patent." Letter, California Office of Bureau of Land Management, January 25, 1967, on file in office of California Law Revision Commission.

APPENDIX III

REPORT OF SENATE COMMITTEE ON JUDICIARY ON SENATE BILL NO. 248

[Extract from Senate Journal for March 30, 1967 (1967 Regular Session).]

In order to indicate more fully its intent with respect to Senate Bill No. 248, the Senate Committee on Judiciary makes the following report.

Senate Bill No. 248 is based on the *Recommendation of the California Law Revision Commission Relating to the Evidence Code: Number 2—Agricultural Code Revisions* (October 1966). The following comments to Senate Bill No. 248 reflect the intent of the Senate Committee on Judiciary in approving the bill.

Section 18 (amended)

Comment. Numerous sections of the Agricultural Code prohibit the sale of a commodity that does not comply with standards established by statute or regulation. "Sell" is defined in Agricultural Code Section 44 to include "possess for sale." The purpose of Section 18 is to facilitate proof that a commodity in possession of a person engaged in the sale of that kind of commodity is in possession for sale. 17 OPS. CAL. ATTY. GEN. 154 (1951). *Cf.* 21 OPS. CAL. ATTY. GEN. 171 (1953).

Under Evidence Code Section 604, the effect of a presumption affecting the burden of producing evidence is "to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate."

Section 590½ (amended)

Comment. The word "believe" is substituted for "presume" in Sections 5904, 5905, 6461, 6521, and 6524 to reflect the obvious meaning of the sections and to eliminate the improper use of the word "presume." No presumption is involved in the determinations referred to in those sections.

Section 5905 (amended)

See comment to Section 5904.

Section 6461 (amended)

See comment to Section 5904.

Section 6521 (amended)

See comment to Section 5904.

Section 6524 (amended)

See comment to Section 5904.

Section 11765 (amended)

Comment. A presumption is not an appropriate method of accomplishing the purpose of Section 11765. Under the Evidence Code, the only effect of a rebuttable presumption is to shift either the burden of proof or the burden of producing evidence. See Evidence Code Sections 601, 604, and 606 and the *Comments* thereto. Since the person required to file the report of damage from pesticides under this article already has the burden of proof and the burden of producing evidence, Section 11765 can have no effect.

Prior to the enactment of the Evidence Code, the presumption that arose upon proof of failure to file the report was itself evidence that no loss or damage occurred. This resulted from the former rule that a presumption was evidence that had to be weighed against conflicting evidence. *Smellie v. Southern Pac. Co.*, 212 Cal. 540, 299 Pac. 529 (1931). Section 600 of the Evidence Code abolished this rule. Hence, Section 11765 has been amended to restore the substantive effect that this provision had before the Evidence Code was enacted.

Section 14588 (amended)

Comment. Section 14588 not only provides an exception to the hearsay rule but also creates a presumption. EVIDENCE CODE § 602 ("A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption."). Under Evidence Code Section 606, the effect of a presumption affecting the burden of proof is "to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact."

Although the certificate is admissible in a criminal action, no presumptive effect is given to it in a criminal action. This gives a reasonable construction to the clause "in any action, civil or criminal, in any court in this state" which formerly appeared in the section.

Section 16412 (repealed)

Comment. Sections 16412, 17402, 18202, 20202, 23042, 24522, and 56416 are repealed as unnecessary. The Government Code article referred to authorizes the director to conduct investigative hearings. The repealed sections merely authorize the admission of departmental records in such hearings. The sections are unnecessary for this purpose since the Government Code does not limit the admission of evidence in investigative hearings. The authority to introduce such records in administrative hearings is adequately stated in Government Code Section 11513 and is unaffected by the repeal of these sections.

Section 17402 (repealed)

See comment to Section 16412.

Section 18202 (repealed)

See comment to Section 16412.

Section 20202 (repealed)

See comment to Section 16412.

Section 20608 (amended)

Comment. Agricultural Code Section 20605 provides that it is unlawful to use an unrecorded, forfeited, or canceled brand. Section 20608 is designed to further the public policy against the use of such brands by making it unlawful for a person to own or possess cattle with an unlawful brand unless he can establish that he was not the one who branded the cattle.

The offense under Sections 20605 and 20608 is analogous to the provision of the Dangerous Weapons' Control Law (Penal Code Section 12901) that makes possession of a firearm whose identification marks have been tampered with presumptive evidence that the tampering was done by the possessor. In a criminal action, Penal Code Section 12091 requires the possessor to raise a reasonable doubt as to whether he tampered with the identification marks. *People v. Scott*, 24 Cal.2d 774, 151 P.2d 517 (1944). See Evidence Code Section 607 and the *Comment* thereto. Under the Evidence Code, as under the previously existing law, Penal Code Section 12091 has the effect of making it a matter of defense for the person in possession of the firearm to show that he is not the one who tampered with the identification marks. Agricultural Code Section 20608, as amended, has the same effect. Evidence Code § 606 ("The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact.")

When Section 20608 applies in a criminal case, the defendant can establish his defense by merely raising a reasonable doubt as to whether he was the person who used the unlawful brand on the cattle owned or possessed by him. See Evidence Code Section 607 and the *Comment* thereto. In a civil case, the defendant would have to establish his defense by a preponderance of the evidence. See Evidence Code Section 115.

Section 20609 (amended)

Comment. Under Evidence Code Section 606, the effect of a presumption affecting the burden of proof is "to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact."

Classifying this presumption as a presumption affecting the burden of proof makes it clear that this presumption prevails over the presumption affecting only the burden of producing evidence provided by Evidence Code Section 637: "The things which a person possesses are presumed to be owned by him."

Section 23042 (repealed)

See comment to Section 16412.

Section 24522 (repealed)

See comment to Section 16412.

Section 27556 (amended)

Comment. Sections 27556, 29444, 42851, and 46886 create a presumption. Evidence Code § 602 ("A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption."). The presumption arises when it is established that the sample was taken in accordance with the methods prescribed by statute or regulation. Since the presumption is one that affects the burden of proof, it places on the person claiming that the sample is not representative of the entire lot the burden of proving that to be a fact. Evidence Code § 606 ("The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact."). Concerning the effect of this presumption in a criminal action, see Evidence Code Section 607 and the *Comment* thereto.

The phrase "in any court in this state" or "in the courts in the state" has been deleted from Section 27556, 29444, and 42851 as unnecessary.

Section 29444 (amended)

See comment to Section 27556.

Section 34564 (amended)

Comment. Section 34564 is a part of a comprehensive statute designed to regulate the use of containers and other dairy equipment marked with a registered brand. In substance, the statute requires that any person who finds or receives such equipment must return it to the owner within seven days (Section 34561) and prohibits use or sale of such equipment by any person other than the owner without the owner's written permission (Sections 34652 and 34653). Section 34564 facilitates proof of a violation of the statute by creating a presumption that operates to place on the person who uses such container or equipment or upon the junk dealer or secondhand dealer in possession of such container or equipment the burden of proving that his use or possession is not unlawful. See EVIDENCE CODE § 606 ("The effect of a presumption affecting the burden of proof is to impose on the party against whom it operates the burden of proof as to the nonexistence of the presumed fact.").

When Section 34564 applies in a criminal action, the defendant can establish his defense by merely raising a reasonable doubt as to the unlawfulness of his possession or use. See Evidence Code Section 607 and the *Comment* thereto. In a civil case, the defendant would have to establish that his possession or use was lawful by a preponderance of the evidence. See Evidence Code Section 115.

Section 38903 (amended)

Comment. Under Evidence Code Section 606, the effect of a presumption affecting the burden of proof is "to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact."

Section 40532 (amended)

Comment. Section 40532 not only provides an exception to the hearsay rule and the best evidence rule but also creates a presumption. EVIDENCE CODE § 602 ("A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption."). The presumption established by Section 40532 is classified as one affecting the burden of proof. Under Evidence Code Section 606, the effect of a presumption affecting the burden of proof is "to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact."

The words "shall be received in all courts of the State of California" have been deleted as unnecessary.

Section 40818 (amended)

Comment. Sections 40818, 41102, 52061, 52062, 55603, and 56277 not only provide an exception to the hearsay rule but also create a presumption. EVIDENCE CODE § 602 ("A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption."). Under Evidence Code Section 606, the effect of a presumption affecting the burden of proof is "to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact."

The phrase "before any court in this state" or similar language has been deleted from Sections 41102, 52061, and 56277 as unnecessary.

Section 40874 (amended)

Comment. The presumption created by Section 40874 is a presumption affecting the burden of proof. As a result, when the grower establishes that a load of tomatoes was rendered unsuitable for canning purposes because it was not inspected within the time specified in the section, the canner has the burden of proof to establish that the delay was not willfully or negligently caused or permitted by him. EVIDENCE CODE § 606 ("The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact.").

Section 41102 (amended)

See comment to Section 40818.

Section 42851 (amended)

See comment to Section 27556.

Section 42852 (amended)

Comment. Section 42852 not only provides an exception to the hearsay rule but also creates a presumption. EVIDENCE CODE § 602 ("A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption."). Under Evidence Code Section 606, the effect of a presumption affecting the burden of proof is "to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact."

The phrase "in any court in this state" has been deleted as unnecessary.

Section 46886 (amended)

See comment to Section 27556.

The phrase "as provided in Section 42851 of this code" has been deleted as unnecessary.

Section 52061 (amended)

See comment to Section 40818.

Section 52062 (amended)

See comment to Section 40818.

Section 52363 (amended)

Comment. Subdivision (a) of Section 52363 creates a presumption. EVIDENCE CODE § 602 ("A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption."). The presumption arises when it is established that the sample was taken in accordance with the method prescribed by the rules and regulations. Since the presumption is one that affects the burden of proof, it places on the person claiming that the sample is not representative of the entire lot the burden of proving that to be a fact. EVIDENCE CODE § 606 ("The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact."). Concerning the effect of this presumption in a criminal action, see Evidence Code Section 607 and the *Comment* thereto.

Subdivision (b) not only provides an exception to the hearsay rule but also creates a presumption. See Evidence Code Section 602. The presumption is a presumption affecting the burden of proof. See Evidence Code Section 606.

The phrase "in any court in this state" has been deleted as unnecessary.

Section 55603 (amended)

See comment to Section 40818.

Section 55788 (amended)

Comment. The revision of the last sentence of Sections 55788 and 56476 is necessary because, under Division 8 (commencing with Section 900) of the Evidence Code, the privileges applicable in some administrative proceedings are at times different from those applicable in civil actions. As revised, the last sentence of Sections 55788 and 56476 conforms to the last sentence of Government Code Section 11513 (part of the State Administrative Procedure Act) as amended by Chapter 299 of the Statutes of 1965, the act that enacted the Evidence Code.

Section 56277 (amended)

See comment to Section 40818.

Section 56278 (amended)

Comment. When the facts that give rise to the presumption created by Section 56278 have been established, the commission merchant has the burden of proving the absence of fraud. EVIDENCE CODE § 606 ("The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact."). Concerning the effect of this presumption in a criminal action, see Evidence Code Section 607 and the *Comment* thereto.

This presumption has been classified as a presumption affecting the burden of proof in recognition of the fact that a commission merchant serves in a fiduciary capacity. See *Raymond v. Independent Growers, Inc.*, 133 Cal. App. 2d 154, 284 P.2d 57 (1955). See also Section 56277 which provides that the commission merchant has the burden of proving the correctness of his accounting as to any transaction which may be questioned.

Section 56416 (repealed)

See comment to Section 16412.

Section 56476 (amended)

See comment to Section 55788.

Section 61384 (amended)

Comment. Under Evidence Code Section 606, the effect of a presumption affecting the burden of proof is "to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact."

Section 61413 (amended)

Comment. Under Evidence Code Section 604, the effect of a presumption affecting the burden of producing evidence is "to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate."

Section 64257 (amended)

Comment. Section 64257 not only provides an exception to the hearsay rule but also creates a presumption. EVIDENCE CODE § 602 ("A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption."). Since the presumption is a presumption affecting the burden of proof, the person who claims that the amount estimated by the director is not correct has the burden of proving the correct amount. Evidence Code § 606 ("The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact.")

APPENDIX IV

REPORT OF SENATE COMMITTEE ON JUDICIARY ON SENATE BILL NO. 249

[Extract from Senate Journal for May 22, 1967 (1967 Regular Session).]

In order to indicate more fully its intent with respect to Senate Bill No. 249, the Senate Committee on Judiciary makes the following report.

Except for the new comment set out below, the comments contained under the various sections of Senate Bill No. 249 as set out in the *Recommendation of the California Law Revision Commission Relating to the Evidence Code: Number 3—Commercial Code Revisions* (October 1966) reflect the intent of the Senate Committee on Judiciary in approving the various provisions of Senate Bill No. 249.

The following new comment also reflects the intent of the Senate Committee on Judiciary in approving Senate Bill No. 249.

Section 1210

Comment. Section 1210 classifies as presumptions affecting the burden of producing evidence the presumptions that are established by Commercial Code Sections 3114(3), 3304(3)(c), 3307(1)(b), 3414(2), 3416(4), 3419(2), 3503(2), 3510, and 3105(2)(b). The introductory "except clause" refers to a presumption which is classified as a presumption affecting the burden of proof. See Commercial Code Section 1202 and the Law Revision Commission's Comment to that section. The "except clause" does not include a reference to Commercial Code Section 4103 because that section does not create a presumption.

Section 1210 has the same substantive effect as subdivision (31) of Section 1-201 of the Uniform Commercial Code as promulgated by the National Conference of Commissioners on Uniform State Laws, but Section 1210 incorporates the comprehensive Evidence Code provisions relating to presumptions affecting the burden of producing evidence. Under Evidence Code Section 604, a presumption affecting the burden of producing evidence requires the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. If contrary evidence is introduced, the presumption vanishes from the case and the trier of fact must weigh the inferences arising from the facts that gave rise to the presumption against the contrary evidence and the inferences arising therefrom and resolve the conflict. See Evidence Code Section 604 and the *Comment* to that section.

APPENDIX V

REPORT OF SENATE COMMITTEE ON JUDICIARY ON SENATE BILL NO. 250

[Extract from Senate Journal for March 16, 1967 (1967 Regular Session).]

In order to indicate more fully its intent with respect to Senate Bill No. 250, the Senate Committee on Judiciary makes the following report.

Except for the revised comment set out below, the comments contained under the various sections of Senate Bill No. 250 as set out in the *Recommendation of the California Law Revision Commission Relating to Additur* (October 1966) reflect the intent of the Senate Committee on Judiciary in approving the various provisions of Senate Bill No. 250.

The following revised comment to amended Section 657 of the Code of Civil Procedure also reflects the intent of the Senate Committee on Judiciary in approving Senate Bill No. 250.

Code of Civil Procedure Section 657

Comment. The amendments to Section 657 simply codify judicial decisions declaring its substantive effect.

First, the amended section explicitly recognizes that an inadequate award of damages is a ground for granting a new trial just as an excessive award of damages presently is recognized. The availability of this basis for granting a new trial, on the ground of "insufficiency of the evidence to justify the verdict," is well settled in California. *Harper v. Superior Air Parts, Inc.*, 124 Cal. App.2d 91, 268 P.2d 115 (1954); *Reilley v. McIntire*, 29 Cal. App.2d 559, 85 P.2d 169 (1938) (neither passion nor prejudice need be shown). Thus, the revisions of Section 657 continue the power of the trial judge to grant a new trial when, after weighing the evidence, he is convinced from the entire record, including reasonable inferences therefrom, that the award of damages clearly is inadequate.

Second, the qualifying language in subdivision 5 and in the last paragraph that purports to limit the ground of excessive damages to an award influenced by "passion or prejudice" is eliminated as unnecessary. In the past, the basis for granting a new trial because of excessive damages has been that the verdict is against the weight of the evidence, i.e., "the insufficiency of the evidence to justify the verdict or other decision"; neither passion nor prejudice had to be shown. *Koyer v. McComber*, 12 Cal.2d 175, 82 P.2d 941 (1938). See *Sims v. Owens*, 33 Cal.2d 749, 205 P.2d 3 (1949). Thus, the revisions of Section 657 continue the power of the trial judge to grant a new trial when, after weighing the evidence, he is convinced from the entire record, including reasonable inferences therefrom, that the award of damages clearly is excessive.

Third, an explicit reference to "excessive or inadequate damages" is added to the second paragraph following subdivision 7, and the phrase "different verdict or decision" is substituted for "contrary verdict or decision" in the same paragraph to avoid any misunderstanding that might result from the addition of a reference to excessive or inadequate damages. The reference to "excessive or inadequate damages" has been added in recognition of the fact that the true basis for granting a new trial on either of these grounds has been "the insufficiency of the evidence to justify the verdict or other decision." Conforming changes are also made in the last paragraph of the section.

APPENDIX VI

REPORT OF SENATE COMMITTEE ON JUDICIARY ON SENATE BILL NO. 251

[Extract from Senate Journal for April 21, 1967 (1967 Regular Session).]

In order to indicate more fully its intent with respect to Senate Bill No. 251, the Senate Committee on Judiciary makes the following report.

Except for the new and revised comments set out below, the comments contained under the various sections of Senate Bill No. 251 as set out in the *Recommendation of the California Law Revision Commission Relating to Suit By or Against an Unincorporated Association* (October 1966) reflect the intent of the Senate Committee on Judiciary in approving the various provisions of Senate Bill No. 251.

The following new and revised comments to various sections of Senate Bill No. 251 also reflect the intent of the Senate Committee on Judiciary in approving Senate Bill No. 251.

[*Note:* This report originally contained comments to Sections 395.2 and 411 of the Code of Civil Procedure and Sections 15700 and 24003-24006 of the Corporations Code. The comment to Code of Civil Procedure Section 411 was superseded by the comment contained in the *Report of Assembly Committee on Judiciary on Senate Bill No. 251*. The other comments are set out following the appropriate section of the bill as enacted in Appendix VIII to this Report.]

APPENDIX VII

Special Report of Assembly Committee on Judiciary on Senate Bill No. 251

[Extract from Assembly Journal for July 6, 1967 (1967 Regular Session).]

In order to indicate more fully its intent with respect to Senate Bill No. 251, the Assembly Committee on Judiciary makes the following report.

Except for the revised comment set out below, the comments contained under the various sections of Senate Bill No. 251, as set out in the *Recommendation of the California Law Revision Commission Relating to Suit by or Against an Unincorporated Association* (October 1966), as revised and supplemented by the *Report of the Senate Committee on Judiciary on Senate Bill No. 251* as printed in the Senate Journal for April 21, 1967, reflect the intent of the Assembly Committee on Judiciary in approving the various provisions of Senate Bill No. 251.

The following revised comment to amended Code of Civil Procedure Section 411 also reflects the intent of the Assembly Committee on Judiciary in approving Senate Bill No. 251.

[Note: This report originally contained a comment to Code of Civil Procedure Section 411. It is set out following Section 411 in Appendix VIII to this Report.]

APPENDIX VIII

Senate Bill No. 251

CHAPTER 1324

An act to amend Sections 388, 410, and 411 of, and to add Section 395.2 to, the Code of Civil Procedure, and to amend Section 15700 of, and to add Part 4 (commencing with Section 24000) to Title 3 of the Corporations Code, relating to unincorporated associations.

[Approved by Governor August 23, 1967. Filed with Secretary of State August 23, 1967.]

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

Code of Civil Procedure Section 388

SECTION 1. Section 388 of the Code of Civil Procedure is amended to read:

388. (a) Any partnership or other unincorporated association, whether organized for profit or not, may sue and be sued in the name which it has assumed or by which it is known.

(b) Any member of the partnership or other unincorporated association may be joined as a party in an action against the unincorporated association. If service of process is made on such member as an individual, whether or not he is also served as a person upon whom service is made on behalf of the unincorporated association, a judgment against him based on his personal liability may be obtained in the action, whether such liability be joint, joint and several, or several.

Law Revision Commission Comment

Comment. Under Section 388, any unincorporated association, whether engaged in business or not, may be sued in the association name. Under the prior law, only persons transacting *business* under a common name could be sued in that name. The term "business," however, was construed so broadly that it constituted little, if any, limitation on the right to sue an unincorporated association. See *Herald v. Glendale Lodge No. 1289*, 46 Cal. App. 325, 189 Pac. 329 (1920).

Section 388 also grants unincorporated associations the privilege of suing in the association name. The extent to which an unincorporated association could sue in its own name was unclear under prior law. Compare *Daniels v. Sanitarium Ass'n, Inc.*, 59 Cal.2d 602, 30 Cal. Rptr. 828, 381 P.2d 652 (1963) (labor union could maintain action in its own name), with *Kadota Fig Ass'n v. Case-Swayne Co.*, 73 Cal. App.2d 796, 167 P.2d 518 (1946) (unincorporated cooperative association could not sue in its own name).

The provisions formerly contained in Section 388 dealing with service of process are superseded by Code of Civil Procedure Sections 410 and 411(2.1), and the provisions formerly contained in Section 388 dealing with the enforcement of judgments are superseded by Corporations Code Section 24002.

Code of Civil Procedure Section 395.2

Sec. 2. Section 395.2 is added to the Code of Civil Procedure, to read:

395.2. If an unincorporated association has filed a statement with the Secretary of State pursuant to Section 24003 of the Corporations Code listing its principal office in this state, the proper county for the trial of an action against such unincorporated association is the same as it would be if the unincorporated association were a corporation and, for the purpose of determining such county, the principal place of business of the unincorporated association shall be deemed to be the principal office in this state listed in the statement.

Legislative Committee Comment—Senate

Comment. Under Section 16 of Article XII of the Constitution of California, both corporations and unincorporated associations may be sued "in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs." In addition, that section of the Constitution provides that a corporation (but not an association) may be sued in the county where its principal place of business is located. By statute, however, an unincorporated association may be sued in any county where the plaintiff can sue a member of the association. *Juneau Spruce Corp. v. Int'l Longshoremen & Warehousemen's Union*, 37 Cal.2d 760, 235 P.2d 607 (1951) (construing Section 395 of the Code of Civil Procedure). Thus, large unincorporated associations may be subjected to a kind of "forum shopping" that is not possible where corporations or individuals are concerned.

Under Section 395.2, an unincorporated association, by filing a statement designating its principal office in this state, may avoid this sort of forum shopping and may secure the advantages of the venue provisions applicable to corporations under the state Constitution. Section 395.2 does not apply, however, unless the association maintains an office in this state and has filed a statement designating its principal office in this state. The procedure for filing such a statement is prescribed by Corporations Code Section 24003.

Code of Civil Procedure Section 410

Sec. 3. Section 410 of the Code of Civil Procedure is amended to read:

410. The summons may be served by the sheriff, a constable, or marshal, of the county where the defendant is found, or any other person over the age of 18, not a party to the action. A copy of the complaint must be served, with the summons, upon each of the defendants. When the service is against a corporation, or against an unincorporated association in an action brought under Section 388, there shall appear on the copy of the summons that is served a notice stating in substance: "To the person served: You are hereby served in the within action (or proceeding) on behalf of (here state the name of the corporation or the unincorporated association) as a person upon whom the summons and a copy of the complaint must be served to effect service against said party under the provisions of (here state appropriate provisions of Section 411) of the Code of Civil Procedure." When service is intended to be made upon said person as an individual as well as a person upon whom service must be made on behalf of said corporation or said association, said notice shall also indicate that service is had upon said person as an individual as well as on behalf of said corporation or said association. In a case in which the foregoing provisions of the section require that notice of the

capacity in which a person is served must appear on the copy of the summons that is served, the certificate or affidavit of service must recite that such notice appeared on such copy of the summons, if, in fact, it did appear. When service is against a corporation, or against an unincorporated association in an action brought under Section 388, and notice of that fact does not appear on the copy of the summons or a recital of such notification does not appear on the certificate or affidavit of service of process as required by this section, no default may be taken against such corporation or such association. When service is made upon the person served as an individual as well as on behalf of the corporation or association, and the notice of that fact does not appear on the copy of the summons or a recital of such notification does not appear in the certificate or affidavit of service of process as required by this section, no default may be taken against such person.

When the summons is served by the sheriff, a constable or marshal, it must be returned, with his certificate of its service, and of the service of a copy of the complaint, to plaintiff if he is acting as his own attorney, otherwise to plaintiff's attorney. When it is served by any other person, it must be returned to the same place, with the affidavit of such person of its service, and of the service of a copy of the complaint.

If the summons is lost subsequent to service and before it is returned, an affidavit of the official or other person making service, showing the facts of service of the summons, may be returned in lieu of the summons and with the same effect as if the summons were itself returned.

Law Revision Commission Comment

Comment. The amendments to Section 410 merely conform the section to the amended versions of Sections 388 and 411.

Code of Civil Procedure Section 411

SEC. 4. Section 411 of the Code of Civil Procedure is amended to read:

411. The summons must be served by delivering a copy thereof as follows:

1. If the suit is against a domestic corporation: to the president or other head of the corporation, a vice president, a secretary, an assistant secretary, general manager, or a person designated for service of process or authorized to receive service of process. If such corporation is a bank, to any of the foregoing officers or agents thereof, or to a cashier or an assistant cashier thereof. If no such officer or agent of the corporation can be found within the state after diligent search, then to the Secretary of State as provided in Sections 3301 to 3304, inclusive, of the Corporations Code, unless the corporation be of a class expressly excepted from the operation of those sections.

2. If the suit is against a foreign corporation, or a non-resident joint stock company or association, doing business

in this state: in the manner provided by Sections 6500 to 6504, inclusive, of the Corporations Code.

2.1. If the suit is against an unincorporated association (not including a foreign partnership covered by Section 15700 of the Corporations Code): if the unincorporated association has designated an agent for service of process as provided in Section 24003 of the Corporations Code, to the person so designated as agent for service of process. If no person has been designated as agent for service of process as provided in Section 24003 of the Corporations Code, or if the person so designated cannot be found at his address as specified in the index referred to in Section 24004 of the Corporations Code, then to any one or more of the association's members and by mailing a copy thereof to the association at its last known mailing address.

2.2. If the suit is against a foreign partnership covered by Section 15700 of the Corporations Code: in the manner provided by Section 15700 of the Corporations Code.

3. If the suit is against a minor, under the age of 14 years, residing within this state: to such minor, personally, and also to his father, mother, or guardian; or if there be none within this state, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed.

4. If the suit is against a person residing within this state and for whom a guardian or conservator has been appointed: to such person, and also to his guardian or conservator.

5. Except as otherwise specifically provided by statute, in an action or proceeding against a local or state public agency, to the clerk, secretary, president, presiding officer or other head thereof or of the governing body of such public agency. "Public agency" includes (1) every city, county, and city and county; (2) every public agency, authority, board, bureau, commission, corporation, district and every other political subdivision; and (3) every department and division of the state.

6. In all cases where a corporation has forfeited its charter or right to do business in this state, or has dissolved, by delivering a copy thereof to one of the persons who have become the trustees of the corporation and of its stockholders or members; or, in a proper case, as provided in Sections 3305 and 3306 of the Corporations Code.

7. If the suit is one brought against a candidate for public office and arises out of or in connection with any matter concerning his candidacy or the election laws and said candidate cannot be found within the state after diligent search, then as provided for in Section 54 of the Elections Code.

8. In all other cases to the defendant personally.

Legislative Committee Comment—Assembly

Comment. Subdivision 2.1 has been added to Section 411 to provide greater assurance that the responsible officers of an unincorporated association will become aware of any action brought against the association. Under language formerly con-

tained in Code of Civil Procedure Section 388, service could be made on any "one or more of the associates." Under subdivision 2.1, however, service must be made on the agent designated for service of process if the unincorporated association has designated such an agent and he can be found at the address set out in the records of the Secretary of State. If no agent has been designated or if the agent designated cannot be found at such address, service may be made on any member of the association as formerly was provided in Section 388. See 30 Cal. Jur.2d *Labor* § 139 (1956); Comment, 33 Cal. L. Rev. 444, 446 (1945). Where service is made on a member, however, a copy of the summons must also be mailed to the association at its last known mailing address.

The improvements in the procedure for service on unincorporated associations should do much to eliminate the problem of default judgments. Nevertheless, there may be cases where a member of the association is served but the association fails to appear in the action because its responsible officers lack knowledge of the action. Code of Civil Procedure Section 473 provides adequate authority for relief from default judgments in such cases. *Of. Roehl v. Texas Co.*, 107 Cal. App. 708, 291 Pac. 262 (1930); *Roberts v. Wilson*, 3 Cal. App. 32, 84 Pac. 216 (1906).

Subdivision 2.2 has been added to Section 411 because the procedure for service of summons on a foreign partnership covered by Section 15700 of the Corporations Code is specified in that section.

Corporations Code Section 15700

Sec. 5. Section 15700 of the Corporations Code is amended to read:

15700. Every partnership, other than a commercial or banking partnership established and transacting business in a place without the United States, which is domiciled without this state and has no regular place of business within this state, shall, within 40 days from the time it commences to do business in this state, file a statement in the office of the Secretary of State in accordance with Section 24003 designating some natural person or corporation as the agent of the partnership upon whom process issued by authority of or under any law of this state directed against the partnership may be served. A copy of such designation, duly certified by the Secretary of State, is sufficient evidence of such appointment.

Such process may be served in the manner provided in subdivision (e) of Section 24003 on the person so designated, or, in the event that no such person has been designated, or the person designated cannot be found at the address as specified in the index referred to in Section 24004, then service may be made by personal delivery to the Secretary of State, Assistant Secretary of State or a deputy secretary of state of the process, together with a written statement signed by the party to the action seeking such service, or by his attorney, setting forth the last-known address of the partnership and a service fee of five dollars (\$5). The Secretary of State shall forthwith give notice of such service to the partnership by forwarding the process to it by registered mail, return receipt requested, at the address given in the written statement.

Service on the person designated, or personal delivery of the process and statement of address together with a service fee of five dollars (\$5) to the Secretary of State, Assistant Secretary of State or a deputy secretary of state, pursuant to this section is a valid service on the partnership. The partnership so served shall appear within 30 days after service on the person designated or within 30 days after delivery of the process to the Secretary of State, Assistant Secretary of State or a deputy secretary of state.

Legislative Committee Comment—Senate

Section 15700 has been amended to adopt the general procedure provided by Corporations Code Section 24003 for designating an agent for service of process and for making service on such agent. The substantive effect of the amendment is to permit a foreign partnership covered by Section 15700 to designate a corporate agent for service of process. This gives the foreign partnership the same right as all other unincorporated associations.

Section 15700 has also been amended to eliminate the requirement that notice of service be given by telegram and to make other clarifying changes. *Compare* Corporations Code Section 6408 (notice by telegram not required for service on foreign corporation that has failed to designate agent for service of process).

Corporations Code Section 24000

SEC. 6. Part 4 (commencing with Section 24000) is added to Title 3 of the Corporations Code, to read:

**PART 4. LIABILITY; LEVIES AGAINST PROPERTY;
DESIGNATION OF AGENT FOR SERVICE AND OF
PRINCIPAL OFFICE**

24000. (a) As used in this part, "unincorporated association" means any partnership or other unincorporated organization of two or more persons, whether organized for profit or not, but does not include a government or governmental subdivision or agency.

(b) As used in this section, "person" includes a natural person, corporation, partnership or any other unincorporated organization, and a government or governmental subdivision or agency.

Law Revision Commission Comment

Comment. Section 24000 provides a definition that includes all private unincorporated associations of any kind and excludes all governmental entities, authorities, boards, bureaus, commissions, departments, and associations of any kind.

Although subdivision (a) provides that a governmental entity or agency is not an unincorporated association under this part, subdivision (b) provides that an unincorporated association is subject to this part even though its membership may include governmental entities or agencies.

Corporations Code Section 24001

24001. (a) Except as otherwise provided by statute, an unincorporated association is liable to a person who is not a member of the association for an act or omission of the association, and for the act or omission of its officer, agent, or employee acting within the scope of his office, agency, or employment, to the same extent as if the association were a natural person.

(b) Nothing in this section in any way affects the rules of law which determine the liability between an association and a member of the association.

Law Revision Commission Comment

Comment. Section 24001 provides that unincorporated associations are liable for acts or omissions done by or under the authority of the

association to the same extent that natural persons are liable. The exception at the beginning of the section is intended to avoid the repeal of any statutory limitations on association liability, such as that found in Section 21400 of the Corporations Code (relating to death benefits payable by unincorporated fraternal societies).

Section 24001 is probably declarative of the prior California law insofar as the tort liability of unincorporated associations is concerned. See *Inglis v. Operating Engineers Local Union No. 12*, 58 Cal.2d 269, 23 Cal. Rptr. 403, 373 P.2d 467 (1962); *Marshall v. Int'l Longshoremen's & Warehousemen's Union*, 57 Cal.2d 781, 22 Cal. Rptr. 211, 371 P.2d 987 (1962).

Whether Section 24001 is declarative of the prior California law relating to the contractual liability of unincorporated associations is uncertain. In the absence of statute, a contract of an unincorporated association was regarded as the contract of the individual members of the association who authorized or ratified the contract. *Pacific Freight Lines v. Valley Motor Lines, Inc.*, 72 Cal. App.2d 505, 164 P.2d 901 (1946); *Security-First Nat'l Bank v. Cooper*, 62 Cal. App.2d 653, 145 P.2d 722 (1944); *Leake v. City of Venice*, 50 Cal. App. 462, 195 Pac. 440 (1920). By statute, however, unincorporated associations have been authorized to enter into a wide variety of transactions and thus incur liability on behalf of the association. See, e.g., COM. CODE § 1201 (28), (29), (30); CORP. CODE § 21200; LABOR CODE § 1126. Section 24001 eliminates whatever gaps may have remained in the previous statutory provisions making unincorporated associations responsible for their contractual obligations.

Corporations Code Section 24002

24002. Only the property of an unincorporated association may be levied upon under a writ of execution issued to enforce a judgment against the association.

Law Revision Commission Comment

Comment. Section 24002 permits the plaintiff to resort only to the assets of an unincorporated association to satisfy a judgment against the association. Of course, nothing in the section precludes the plaintiff from also resorting to the individual property of a member of the association to satisfy a judgment against the member in a case where the member was also a party defendant. The procedure provided by Code of Civil Procedure Sections 414 and 989-994 may also be available in a case where the members of the association are jointly liable with the association on a contract and are named as joint defendants.

Insofar as Section 24002 provides that the assets of the association may be levied upon to satisfy a judgment against the association, it restates the law formerly stated in Code of Civil Procedure Section 388. The former version of Section 388 also authorized satisfaction of the judgment against the association from the individual assets of a member who had been served with process in the action against the association. However, a 1959 amendment to Code of Civil Procedure Section 410 precluded this unless the summons served on the member indicated that service was being made upon him in his individual capacity. Under Section 24002, it is necessary not only to serve an

individual member in his individual capacity but also to name him as a defendant before a judgment can be obtained that may be satisfied from his individual assets.

Corporations Code Section 24003

24003. (a) An unincorporated association may file with the Secretary of State on a form prescribed by him a statement containing either of the following:

(1) A statement designating the location and complete address of the association's principal office in this state. Only one such place may be designated.

(2) A statement (i) designating the location and complete address of the association's principal office in this state in accordance with paragraph (1) or, if the association does not have an office in this state, designating the complete address of the association to which the Secretary of State shall send any notices required to be sent to the association under Sections 24005 and 24006, and (ii) designating as agent of the association for service of process any natural person residing in this state or any corporation which has complied with Section 3301.5 or Section 6403.5 and whose capacity to act as such agent has not terminated.

(b) If a natural person is designated as agent for service of process, the statement shall set forth his complete business or residence address. If a corporate agent is designated, the statement shall set forth the state or place under the laws of which such agent was incorporated and the name of the city, town, or village wherein it has the office at which the association designating it as such agent may be served, as set forth in the certificate filed by such corporate agent pursuant to Section 3301.5, 3301.6, 6403.5, or 6403.6.

(c) Presentation for filing of a statement and one copy, tender of the filing fee, and acceptance of the statement by the office of the Secretary of State constitutes filing under this section. The Secretary of State shall note upon the copy of the statement the file number and the date of filing the original and deliver or send the copy to the unincorporated association filing the statement.

(d) At any time, an unincorporated association that has filed a statement under this section may file a new statement superseding the last previously filed statement. If the new statement does not designate an agent for service of process, the filing of the new statement shall be deemed to revoke the designation of an agent previously designated. A statement filed under this section expires five years from December 31 following the date it was filed in the office of the Secretary of State, unless previously superseded by the filing of a new statement.

(e) Delivery by hand of a copy of any process against the unincorporated association (1) to any natural person designated by it as agent, or (2) if the association has designated a corporate agent, at the office of such corporate agent, in the

city, town, or village named in the statement filed by the association under this section to any person at such office named in the certificate of such corporate agent filed pursuant to Section 3301.5 or 6403.5 if such certificate has not been superseded, or otherwise to any person at such office named in the last certificate filed pursuant to Section 3301.6 or 6403.6, constitutes valid service on the association.

(f) For filing a statement as provided in this section, the Secretary of State shall charge and collect the fee prescribed in Government Code Section 12185 for filing a designation of agent.

Legislative Committee Comment—Senate

Comment. Sections 24003–24006 provide a procedure whereby an unincorporated association may designate a principal office in this state for venue purposes (Code of Civil Procedure Section 395.2) and an agent upon whom service of process may be made (subdivisions 2.1 and 2.2 of Section 411 of the Code of Civil Procedure). See the Comments to Code of Civil Procedure Sections 395.2 and 411. See also Corporations Code Section 15700.

The procedure provided by Sections 24003–24006 is designed to permit the use of automatic data processing equipment in recording and indexing the statements filed by unincorporated associations. The procedure is based in part on Commercial Code provisions relating to the filing of financing statements. See Commercial Code Sections 9403 and 9407.

Section 24003 also is based in part upon Corporations Code Section 3301 but the designation of an agent is permissive rather than mandatory.

Corporations Code Section 24004

24004. (a) The Secretary of State shall mark each statement filed under Section 24003 with a consecutive file number and the date of filing. He may destroy or otherwise dispose of any such statement four years after the statement expires. In lieu of retaining the original statement, the Secretary of State may retain a copy thereof in accordance with Government Code Section 14756.

(b) The Secretary of State shall index each statement filed under Section 24003 according to the name of the unincorporated association as set out in the statement and shall enter in the index the file number and the address of the association as set out in the statement and, if an agent for service of process is designated in the statement, the name of the agent and his address.

(c) Upon request of any person, the Secretary of State shall issue his certificate showing whether, according to his records, there is on file in his office, on the date and hour stated therein, any presently effective statement filed under Section 24003 for an unincorporated association using a specific name designated by the person making the request. If such a statement is on file, the certificate shall include the information required by subdivision (b) to be included in the index. The fee for such a certificate is two dollars (\$2).

(d) When a statement has expired under subdivision (d) of Section 24003, the Secretary of State shall enter that fact in the index together with the date of such expiration.

(e) Four years after a statement has expired, the Secretary of State may delete the information concerning that statement from the index.

Legislative Committee Comment—Senate

Comment. See the Comment to Section 24003.

Corporations Code Section 24005

24005. (a) An agent designated by an unincorporated association for the service of process may file with the Secretary of State a written statement of resignation as such agent which shall be signed and execution thereof shall be duly acknowledged by the agent. Thereupon the authority of the agent to act in such capacity shall cease and the Secretary of State forthwith shall give written notice of the filing of the statement by mail to the unincorporated association at its address as set out in the statement filed by the association.

(b) Any unincorporated association may at any time file with the Secretary of State a revocation of a designation of an agent for service of process. The revocation is effective when filed.

(c) Notwithstanding subdivisions (a) and (b), service made on an agent designated by an unincorporated association for service of process in the manner provided in subdivision (e) of Section 24003 is effective if made within 30 days after the statement of resignation or the revocation is filed in the office of the Secretary of State.

Legislative Committee Comment—Senate

Comment. In order that the plaintiff may rely upon a certificate from the Secretary of State indicating the designation of an agent for service of process for 30 days from the date of the certificate, service on such agent is permitted during the 30-day period following the filing of the statement of resignation or the revocation. Where the designation of an agent for service of process is deemed revoked by the filing of a new statement under subdivision (d) of Section 24003, this 30-day period commences to run from the date of the filing of the new statement that superseded the statement designating the agent for service of process.

Corporations Code Section 24006

24006. Between the first day of October and the first day of December immediately preceding the expiration date of a statement filed under Section 24003, the Secretary of State shall send by first class mail a notice, indicating the date on which the statement will expire and the file number assigned to the statement, to the unincorporated association at its address as set out in the statement. Neither the failure of the Secretary of State to mail the notice as provided in this section nor the failure of the notice to reach the unincorporated association shall continue the statement in effect after the date of its expiration. Neither the state nor any officer or employee of the state is liable for damages for failure to mail the notice as required by this section.

Legislative Committee Comment—Senate

Comment. Section 24006 is included to minimize the danger that the unincorporated association will be unaware of the impending expiration of the statement.

Temporary provision

SEC. 7. A statement may be presented to the Secretary of State for filing at any time after the effective date of this act but the Secretary of State is not required to file such statement prior to January 1, 1968, and no such statement is effective until January 1, 1968.

APPENDIX IX

Report of Assembly Committee on Judiciary on Senate Bill No. 253

[Extract from Assembly Journal for June 28, 1967 (1967 Regular Session).]

In order to indicate more fully its intent with respect to Senate Bill No. 253, the Assembly Committee on Judiciary makes the following report.

The comments, set out below, for various sections of Senate Bill No. 253 reflect the intent of the Assembly Committee on Judiciary in approving this bill.

[*Note:* This report contained a comment to each section of Senate Bill No. 253. The comments are set out following the appropriate section of the bill in Appendix X to this Report.]

APPENDIX X

Senate Bill No. 253

CHAPTER 1104

An act to add a chapter heading immediately preceding Section 1237 of, and to add Chapter 2 (commencing with Section 1272.01) to Title 7 of Part 3 of, the Code of Civil Procedure, relating to eminent domain.

[Approved by Governor August 14, 1967. Filed with Secretary of State August 14, 1967.]

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

SECTION 1. A chapter heading is added immediately preceding Section 1237 of the Code of Civil Procedure, to read:

CHAPTER 1. EMINENT DOMAIN GENERALLY

SEC. 2. Chapter 2 (commencing with Section 1272.01) is added to Title 7 of Part 3 of the Code of Civil Procedure, to read:

CHAPTER 2. EXCHANGE OF INFORMATION IN EMINENT DOMAIN PROCEEDINGS

Code of Civil Procedure Section 1272.01

1272.01. (a) Not later than 50 days prior to the day set for the trial, any party to an eminent domain proceeding may serve upon any adverse party and file a demand to exchange lists of expert witnesses and statements of valuation data.

(b) A party on whom a demand is served may, not later than 40 days prior to the day set for the trial, serve upon any adverse party and file a cross-demand to exchange lists of expert witnesses and statements of valuation data relating to the parcel of property described in the demand.

(c) The demand or cross-demand shall:

(1) Describe the parcel of property to which the demand or cross-demand relates, which description may be made by reference to the complaint.

(2) Include a statement in substantially the following form: "You are required to serve and deposit with the clerk of court a list of expert witnesses and statements of valuation data in compliance with Chapter 2 (commencing with Section 1272.01) of Title 7 of Part 3 of the Code of Civil Procedure not later than 20 days prior to the day set for trial. Except as otherwise provided in that chapter, your failure to do so will constitute a waiver of your right to call unlisted expert witnesses during your case in chief and of your right to introduce on direct examination during your case in chief any matter that is required to be, but is not, set forth in your statements of valuation data."

(d) Not later than 20 days prior to the day set for trial,

each party who served a demand or cross-demand and each party upon whom a demand or cross-demand was served shall serve and deposit with the clerk of the court a list of expert witnesses and statements of valuation data. A party who served a demand or cross-demand shall serve his list and statements upon each party on whom he served his demand or cross-demand. Each party on whom a demand or cross-demand was served shall serve his list and statements upon the party who served the demand or cross-demand.

(e) The clerk of the court shall make an entry in the register of actions for each list of expert witnesses and statement of valuation data deposited with him pursuant to this chapter. The lists and statements shall not be filed in the proceeding, but the clerk shall make them available to the court at the commencement of the trial for the limited purpose of enabling the court to apply the provisions of this chapter. Unless the court otherwise orders, the clerk shall, at the conclusion of the trial, return all lists and statements to the attorneys for the parties who deposited them. Lists or statements ordered by the court to be retained may thereafter be destroyed or otherwise disposed of in accordance with the provisions of law governing the destruction or disposition of exhibits introduced in the trial.

Legislative Committee Comment—Assembly

Comment. This chapter provides a simplified procedure for exchanging valuation information in eminent domain cases. The procedure is not mandatory; it applies only if it is invoked by a party to the proceeding. As to practice in Los Angeles County, however, see Section 1272.07 and the Comment to that section.

Existence of the procedure provided by this chapter does not prevent the use of depositions, interrogatories, or other discovery procedures in eminent domain proceedings. See Section 1272.08 and the Comment to that section.

In requiring that demands be served not later than 50 days before the date set for trial, subdivision (a) does not presuppose that, in all cases, a trial date will be set more than 50 days in advance of the trial. Although this usually will be the case, to assure timely service the party must anticipate the trial date that may be set (at a pretrial or trial setting conference or otherwise) and serve his demand at least 50 days before the date that is fixed for the trial. The 50-day period is necessary to allow time for the service of cross-demands, the preparation of lists and statements, and the service of such lists and statements 20 days before trial.

Subdivision (b) permits a party upon whom a demand has been served to serve another demand—a cross-demand—on any other party to the proceeding. Such a cross-demand may be used, for example, by a party who wishes to protect himself from being required to reveal his expert witnesses and valuation data to a party who has only a nominal interest in the proceeding while receiving no significant information in return. Under these circumstances, the party upon whom the demand was served may wish to serve a cross-demand on the party who has a substantial interest in the proceeding. Absent such cross-demand, he would obtain no valuation information from this party since the exchange takes place only between the party who served the demand and the party upon whom the demand was served. The cross-demand, however, may relate only to the parcel or parcels of property described in the demand. This limitation takes into account the fact that several parcels may be included in a single proceeding even though the parcels have entirely different owners or sets of owners. See Code of Civil Procedure Section 1244.

If a party serves a demand to exchange valuation information on another party to the proceeding, both the party serving the demand and the party upon whom the demand has been served are required to exchange such information not later than 20 days before the day set for trial. Under subdivision (d) the party who serves a demand must, as a matter of course, serve his list and statements upon each party upon whom he served the demand. The parties required to make an exchange may stipulate or agree to the precise time when the exchange will take place in order to insure that it is complete and simultaneous. Absent such agreement, the exchange nevertheless will be substantially simultaneous because both parties normally will serve, and deposit with the clerk, the required lists and statements approximately 20 days prior to the day set for trial.

Subdivision (e) requires that deposits with the clerk of lists and statements be entered in the register of actions. With respect to maintenance of the register, see Government Code Section 69845. Such entries will permit the court to determine whether a list and statements have been deposited in compliance with the chapter. However, the statements or appraisal reports used as statements (see subdivision (f) of Section 1272.02) will not necessarily be in the form prescribed by court rules for papers to be filed. Also, the copies deposited with the clerk serve the limited purpose of enabling the trial court to rule upon the admissibility of opinions and supporting data under Section 1272.05. Hence, the subdivision does not require or permit the filing of lists and statements, but requires the clerk to maintain custody of them and make them available to the trial court at the commencement of the trial. In the usual case, the copies furnished to the court will have served their only purpose at the conclusion of evidence. The subdivision therefore permits them to be returned to the attorneys. For those instances in which the copies might be of significance in connection with an appeal or post-trial motion, the subdivision permits the court, on its own initiative or on request of a party, to order them retained. In this event, the copies retained may thereafter be disposed of in the manner of exhibits introduced in the trial. The disposition of exhibits is governed by Sections 1952 through 1952.3 of the Code of Civil Procedure.

Code of Civil Procedure Section 1272.02

1272.02. (a) A statement of valuation data shall be exchanged for each person intended to be called as a witness by the party to testify to his opinion as to any of the following matters:

(1) The value of the property or property interest being valued.

(2) The amount of the damage, if any, to the remainder of the larger parcel from which such property is taken.

(3) The amount of the special benefit, if any, to the remainder of the larger parcel from which such property is taken.

(b) The statement of valuation data shall give the name and business or residence address of the witness and shall include a statement whether the witness will testify to an opinion as to any of the matters listed in subdivision (a) and, as to each such matter upon which he will give an opinion, what that opinion is and the following items to the extent that the opinion on such matter is based thereon:

(1) The estate or interest being valued.

(2) The date of valuation used by the witness.

(3) The highest and best use of the property.

(4) The applicable zoning and the opinion of the witness as to the probability of any change in such zoning.

(5) The sales, contracts to sell and purchase, and leases supporting the opinion.

(6) The cost of reproduction or replacement of the existing improvements on the property, the depreciation or obsolescence the improvements have suffered, and the method of calculation used to determine depreciation.

(7) The gross income from the property, the deductions from gross income, and the resulting net income; the reasonable net rental value attributable to the land and existing improvements thereon, and the estimated gross rental income and deductions therefrom upon which such reasonable net rental value is computed; the rate of capitalization used; and the value indicated by such capitalization.

(8) If the property is a portion of a larger parcel, a description of the larger parcel and its value.

(c) With respect to each sale, contract, or lease listed under paragraph (5) of subdivision (b):

(1) The names and business or residence addresses, if known, of the parties to the transaction.

(2) The location of the property subject to the transaction.

(3) The date of the transaction.

(4) If recorded, the date of recording and the volume and page or other identification of the record of the transaction.

(5) The price and other terms and circumstances of the transaction. In lieu of stating the terms contained in any contract, lease, or other document, the statement may, if the document is available for inspection by the adverse party, state the place where and the times when it is available for inspection.

(d) If any opinion referred to in subdivision (a) is based in whole or in substantial part upon the opinion of another person, the statement of valuation data shall include the name and business or residence address of such other person, his business, occupation, or profession, and a statement as to the subject matter to which his opinion relates.

(e) Except when an appraisal report is used as a statement of valuation data as permitted by subdivision (f), the statement of valuation data shall include a statement, signed by the witness, that the witness has read the statement of valuation data and that it fairly and correctly states his opinions and knowledge as to the matters therein stated.

(f) An appraisal report that has been prepared by the witness which includes the information required to be included in a statement of valuation data may be used as a statement of valuation data under this chapter.

Legislative Committee Comment—Assembly

Comment. Section 1272.02 provides for "statements of valuation data" and specifies the required content of a statement whether it is specially prepared for purposes of this chapter or is an appraisal report prepared by the expert witness.

Subdivision (a). Section 1272.02 requires that a statement of valuation data be provided for each person who is to testify to his opinion as to value, damages, or special benefits, whether or not that person is to qualify as an expert. For example, a statement must be provided for the owner of the property if he is to testify concerning value, damages, or special benefits. See EVIDENCE CODE § 813(a)(2) (owner may testify concerning value).

Subdivisions (b) and (c). These subdivisions require that each statement of valuation data recite whether the witness has an opinion as to value, damages, or special benefits and, if he does, what that opinion is. These subdivisions also require the setting forth of specified basic data to the extent that any opinion is based thereon. Cf. EVIDENCE CODE §§ 814-821. The subdivisions do not require that the specified data be set forth if the witness' opinion is not based thereon even though such data may have been compiled or ascertained by the witness. For example, if an appraiser does not support his opinion as to value by reference to reproduction costs or a capitalization of income, the information specified by paragraphs (6) and (7) of subdivision (b) need not be given in his statement or appraisal report. Also, the supporting data required by subdivisions (b) commonly will pertain to the witness' opinion as to value, and the same data will be considered by the witness to support his opinion as to damages and special benefits. In this case, the statement or appraisal report may simply recite that the opinion as to damages or special benefits is supported by the same data as the opinion as to value. The required information, however, may not be identical with respect to all opinions of the witness. For example, the witness' opinion as to the "highest and best use" of

the remainder of a larger parcel may not be the same use he contemplated in forming his opinion as to the value of the portion being taken. In such a case, subdivision (b) requires that the item of supporting data be stated separately with respect to each opinion of the witness.

Subdivision (d). Subdivision (d) requires that each valuation statement give the name, address and profession of any person who will not be called as a witness but upon whose opinion the testimony of the valuation witness will be based in whole or substantial part. For example, a real estate appraiser's opinion as to an element of severance damages will often be based on the opinion or estimate of an engineer or contractor as to the costs of repairs, fencing, or the like. The additional information is needed by the adverse party not only for the general purpose of properly preparing for trial but also to enable him to utilize his right under Section 804 of the Evidence Code to call the other expert and examine him as if under cross-examination concerning his opinion. The subdivision also requires a statement of the subject matter of the supporting opinion. As to this requirement, and the parallel requirement under Section 1272.03, see the Comment to Section 1272.03.

Subdivision (e). Subdivision (e) requires that each valuation statement include a recitation, signed by the witness, that he has read the statement and that it accurately reflects his opinions and informations. The purpose of the requirement is to guard against misinterpretation or misstatement of the witness' opinions or supporting data in preparation of the statement.

Subdivision (f). Ordinarily an appraisal report prepared by an expert witness will contain all of the information required by subdivisions (b), (c), and (d) to be set forth for such witness. To the extent that the report does so, this subdivision permits use of the report in lieu of a statement of valuation data for such witness.

Code of Civil Procedure Section 1272.03

1272.03. The list of expert witnesses shall include the name, business or residence address, and business, occupation, or profession of each person intended to be called as an expert witness by the party and a statement as to the subject matter to which his testimony relates.

Legislative Committee Comment—Assembly

Comment. Section 1272.03 requires the list of expert witnesses to include all persons to be called as experts. The list therefore must include not only the valuation experts for whom statements of valuation data or appraisal reports are required by Section 1272.02, but also any experts who will testify concerning other matters that may be presented to the trier of fact to facilitate understanding and weighing of the valuation testimony. See EVIDENCE CODE §§ 813(b), 814. For example, in a case involving a partial taking, if a party intends to present expert testimony concerning the character of the improvement to be constructed by the plaintiff (see EVIDENCE CODE § 813(b)), the proposed witness must be listed. Similarly, a party is required to list a structural engineer who is to testify concerning the structural soundness of an existing building or a geologist who is to testify concerning the existence of valuable minerals on the property.

In addition to naming each proposed expert witness, the list must give his address, indicate his profession or calling, and identify the subject matter of his testimony. For example, the subject matter may be identified as "valuation testimony," "character of proposed improvement," "structural soundness of building on subject property," "existence of oil on subject property," and the like. This further information is necessary to apprise the adverse party of the range and general nature of the expert testimony to be presented at the trial. Unlike Section 1272.02, this section does not require that the particulars of the expert opinion be stated or that the supporting factual data be set forth.

Code of Civil Procedure Section 1272.04

1272.04. (a) A party who is required to exchange lists of expert witnesses and statements of valuation data shall diligently give notice to the parties upon whom his list and statements were served if, after service of his list and statements, he:

(1) Determines to call an expert witness not included in his list of expert witnesses to testify on direct examination during his case in chief;

(2) Determines to have a witness called by him testify on

direct examination during his case in chief to any opinion or data required to be listed in the statement of valuation data for that witness but which was not so listed; or

(3) Discovers any data required to be listed in a statement of valuation data but which was not so listed.

(b) The notice required by subdivision (a) shall include the information specified in Sections 1272.02 and 1272.03 and shall be in writing; but such notice is not required to be in writing if it is given after the commencement of the trial.

Legislative Committee Comment—Assembly

Comment. Section 1272.04 requires that a party promptly advise the other party if he intends to call an expert witness required to be but not included in his list of expert witnesses or to have a witness called by him to testify to an opinion or data required to be but not listed in a statement of valuation data. Compliance with the section does not, however, insure that the party will be permitted to call the witness or have a witness testify as to the opinion or data. See Section 1272.06.

Code of Civil Procedure Section 1272.05

1272.05. Except as provided in Section 1272.06, upon objection of any party who has served his list of expert witnesses and statements of valuation data in compliance with Section 1272.01:

(a) No party required to serve a list of expert witnesses may call an expert witness to testify on direct examination during the case in chief of the party calling him unless the information required by Section 1272.03 for such witness is included in the list served by the party who calls the witness.

(b) No party required to serve statements of valuation data may call a witness to testify on direct examination during the case in chief of the party calling him to his opinion of the value of the property described in the demand or cross-demand or the amount of the damage or benefit, if any, to the remainder of the larger parcel from which such property is taken unless a statement of valuation data for the witness was served by the party who calls the witness.

(c) No witness called by any party required to serve statements of valuation data may testify on direct examination during the case in chief of the party who called him to any opinion or data required to be listed in the statement of valuation data for such witness unless such opinion or data is listed in the statement served, except that testimony that is merely an explanation or elaboration of data so listed is not inadmissible under this section.

Legislative Committee Comment—Assembly

Comment. Section 1272.05 provides a sanction calculated to insure that the parties make a good faith exchange of lists of expert witnesses and essential valuation data. For applications of the same sanction to other required pretrial disclosures, see Code of Civil Procedure Sections 454 (copies of accounts) and 2032 (physicians' statements). Although the furnishing of a list of expert witnesses and statements of valuation data is analogous to responding to interrogatories or a request for admissions, the consequences specified by Code of Civil Procedure Section 2034 for failure or refusal to make discovery are not made applicable to a failure to comply with the requirements of this chapter. Existence of the sanction provided by Section 1272.05 does not, of course, prevent those consequences from attaching to a failure to make discovery when regular discovery techniques are invoked in the proceeding.

Under exceptional circumstances, the court is authorized to permit the use of a witness or of valuation data not included in the list or statements. See Section 1272.06 and the Comment to that section.

Section 1272.05 limits only the calling of a witness, or the presentation of testimony, during the case in chief of the party calling the witness or presenting the testimony. The section does not preclude a party from calling a witness in rebuttal or having a witness give rebuttal testimony that is otherwise proper. See *San Francisco v. Tillman Estate Co.*, 205 Cal. 651, 272 Pac. 585 (1928); *State v. Loop*, 127 Cal. App.2d 786, 274 P.2d 885 (1954). The section also does not preclude a party from bringing out additional data on redirect examination where it is necessary to meet matters brought out on the cross-examination of his witness. However, the court should take care to confine a party's rebuttal case and his redirect examination of his witnesses to their purpose of meeting matters brought out during the adverse party's case or cross-examination of his witnesses. A party should not be permitted to defeat the purpose of this chapter by reserving witnesses and valuation data for use in rebuttal where such witnesses could and should have been used during the case in chief and such valuation data presented during the direct examination.

Application of the concept of "case in chief" to the presentation of evidence by the plaintiff requires particular attention. As the burden of proof on the issues of value and damages is upon the defendants (see *San Francisco v. Tillman Estate Co.*, *supra*), those parties ordinarily are permitted to present their case in chief first in the order of the trial. Therefore, the following presentation by the plaintiff may include evidence of two kinds; i.e., evidence comprising the case in chief of the plaintiff and evidence in rebuttal of evidence previously presented by the defendants. If the evidence offered in rebuttal is proper as such, this section does not prevent its presentation at that time.

Code of Civil Procedure Section 1272.06

1272.06. (a) The court may, upon such terms as may be just, permit a party to call a witness, or permit a witness called by a party to testify to an opinion or data on direct examination, during the party's case in chief where such witness, opinion, or data is required to be, but is not, included in such party's list of expert witnesses or statements of valuation data if the court finds that such party has made a good faith effort to comply with Sections 1272.01 to 1272.03, inclusive, that he has complied with Section 1272.04, and that, by the date of the service of his list and statements, he:

(1) Would not in the exercise of reasonable diligence have determined to call such witness or discovered or listed such opinion or data; or

(2) Failed to determine to call such witness or to discover or list such opinion or data through mistake, inadvertence, surprise, or excusable neglect.

(b) In making a determination under this section, the court shall take into account the extent to which the opposing party has relied upon the list of expert witnesses and statements of valuation data and will be prejudiced if the witness is called or the testimony concerning such opinion or data is given.

Legislative Committee Comment—Assembly

Comment. Section 1272.06 allows the court to permit a party who has made a good faith effort to comply with Sections 1272.01–1272.04 to call a witness or use valuation data that was not included in his list of expert witnesses or statements of valuation data. The standards set out in the section are similar to those applied under Code of Civil Procedure Section 657 (for granting a new trial upon newly discovered evidence) and under Code of Civil Procedure Section 473 (for relieving a party from default). The court should apply the same standards in making determinations under this section. The consideration listed in subdivision (b) is important but is not necessarily the only consideration to be taken into account in making determinations under this section.

The court, in permitting a party to call a witness or use valuation data under this section, may impose such limitations and conditions as the court determines to be just under the circumstances of the particular case.

Code of Civil Procedure Section 1272.07

1272.07. This chapter does not apply in any eminent domain proceeding in any county having a population in excess of 4,000,000 in which a pretrial conference is held.

Legislative Committee Comment—Assembly

Comment. Section 1272.07 makes this chapter inapplicable in an eminent domain proceeding in Los Angeles County if a pretrial conference is held in the proceeding. In that county, the volume of eminent domain cases has required creation of a special department for the disposition of various matters before trial in such cases. That volume and experience with the special department have also given rise to special procedures that are not followed and are not available in any other county. Among these procedures is a well established system for disclosing valuation data under judicial supervision. This system and other procedures before trial are provided for by a policy memorandum. See *Policy Memorandum, Eminent Domain (Including Inverse Condemnation)*, Superior Court, County of Los Angeles (dated June 15, 1966; effective July 1, 1966); McCoy, *Pretrial in Eminent Domain Actions*, 38 L.A. Bar Bull. 439 (1963), reprinted in 1 *Modern Practice Commentator* 514 (1964). Under the memorandum, an initial pretrial order requires that all appraisal reports be furnished to the court at the time of a final pretrial conference. At the final conference the reports are exchanged among the parties if the court determines the reports to be "comparable" and an exchange to be appropriate in the particular case. Valuation opinions and data that are not disclosed under this procedure may not be introduced at the trial. The power of that court to require such an exchange in connection with pretrial conferences was recognized in *Swartzman v. Superior Court*, 231 Cal. App.2d 195, 200-204, 41 Cal. Rptr. 721, 726-728 (1964).

Accordingly, Section 1272.07 makes this chapter, and the simplified procedure it provides, inapplicable in Los Angeles proceedings in which one or more pretrial conferences are held. In such proceedings, the procedure for exchanging information provided by this chapter would be superfluous. In cases in which no conference is held, however, the procedure provided by this chapter should be available to the parties. The exclusion therefore is limited to cases in which a pretrial conference is held.

Code of Civil Procedure Section 1272.08

1272.08. The procedure provided in this chapter does not prevent the use of discovery procedures or limit the matters that are discoverable in eminent domain proceedings. Neither the existence of the procedure provided by this chapter, nor the fact that it has or has not been invoked by a party to the proceeding, affects the time for completion of discovery in the proceeding.

Legislative Committee Comment—Assembly

Comment. This chapter has no effect on the use of discovery procedures, on the matters that may be discovered, or on the time for completion of discovery. It should be noted, however, that a party may be entitled to a protective order if no good cause is shown for the taking of a deposition of his expert prior to the exchange of valuation data. See *Swartzman v. Superior Court*, 231 Cal. App.2d 195, 41 Cal. Rptr. 721 (1964).

Code of Civil Procedure Section 1272.09

1272.09. Nothing in this chapter makes admissible any evidence that is not otherwise admissible or permits a witness to base an opinion on any matter that is not a proper basis for such an opinion.

Legislative Committee Comment—Assembly

Comment. The admission of evidence in eminent domain proceedings is governed by Evidence Code Sections 810-822 and other provisions of the Evidence Code. The exchange of information pursuant to this chapter has no effect on the rules set out in the Evidence Code.

APPENDIX XI

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

**Recovery of Condemnee's Expenses on
Abandonment of an Eminent
Domain Proceeding**

September 1967

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

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted. They are cast in this form because their primary purpose is to undertake to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

CALIFORNIA LAW REVISION COMMISSION

SCHOOL OF LAW
STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305



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Ex Officio

September 1, 1967

To HIS EXCELLENCY, RONALD REAGAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was directed by Resolution Chapter 130 of the Statutes of 1965 to study condemnation law and procedure.

The Commission submits herewith its recommendation on one aspect of this subject that appears to be in need of immediate attention—recovery of the condemnee's expenses on abandonment of an eminent domain proceeding. In 1961, the Legislature enacted legislation recommended by the Commission that codified an equitable rule for determining when an eminent domain proceeding may or may not be abandoned, but that legislation was only incidentally concerned with the subject of this recommendation. See *Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings*, 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at B-1 (1961) and Cal. Stats. 1961, Ch. 1613, p. 3442.

For the research study upon which this recommendation is based, see Taylor, *Possession Prior to Final Judgment in California Condemnation Procedure*, 7 SANTA CLARA LAWYER 37, 98-101 (1966), reprinted in the Commission's *Tentative Recommendation and a Study Relating to Possession Prior to Final Judgment and Related Problems* (September 1967).

Respectfully submitted,

RICHARD H. KEATINGE
Chairman

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

Recovery of Condemnee's Expenses on Abandonment of an Eminent Domain Proceeding

Section 1255a of the Code of Civil Procedure permits the condemnor to abandon an eminent domain proceeding at any time after the filing of the complaint and before the expiration of 30 days after final judgment. The section provides, however, that upon motion of the condemnee the court may set aside such an abandonment if it determines "that the position of the moving party has been substantially changed to his detriment in justifiable reliance upon the proceeding and such party cannot be restored to substantially the same position as if the proceeding had not been commenced."

Section 1255a also includes a provision that permits the condemnee to recover certain expenses upon abandonment:

(c) Upon the denial of a motion to set aside such abandonment or, if no such motion is filed, upon the expiration of the time for filing such a motion, on motion of any party, a judgment shall be entered dismissing the proceeding and awarding the defendants their costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and during trial and reasonable attorney fees. These costs and disbursements, including expenses and attorney fees, may be claimed in and by a cost bill, to be prepared, served, filed and taxed as in civil actions; provided, however, that upon judgment of dismissal on motion of plaintiff, defendants, and each of them, may file a cost bill within 30 days after notice of entry of such judgment; that said costs and disbursements shall not include expenses incurred in preparing for trial where the action is dismissed 40 days or more prior to the time set for the pretrial conference in the action or, if no pretrial conference is set, the time set for the trial of the action.

The general purpose of this provision is to reimburse the condemnee for the expenses he necessarily incurs by reason of the condemnor's failure to carry the eminent domain proceeding through to its conclusion.¹ It has been held that reasonable attorney's fees may be re-

¹ See *Pacific Tel. & Tel. Co. v. Monolith Portland Cement Co.*, 234 Cal. App.2d 352, 44 Cal. Rptr. 410 (1965); *Oak Grove School Dist. v. City Title Ins. Co.*, 217 Cal. App.2d 678, 32 Cal. Rptr. 288 (1963); *County of Kern v. Galatas*, 200 Cal. App.2d 353, 19 Cal. Rptr. 348 (1962). For a summary of California decisions, see Annot., 92 A.L.R.2d 355, 377 (1963).

If the proceeding is carried through to its conclusion, attorney, appraisal, and expert witness fees are not recoverable. *People v. Bowman*, 173 Cal. App.2d 416, 343 P.2d 267 (1959); *City of Los Angeles v. Vickers*, 81 Cal. App. 737, 254 Pac. 687 (1927); *Pacific Gas & Elec. Co. v. Chubb*, 24 Cal. App. 265, 141 Pac. 36 (1914). See also *Frustuck v. City of Fairfax*, 230 Cal. App.2d 412, 41 Cal. Rptr. 56 (1964).

covered regardless of when the proceeding is dismissed but that no other expense incurred in preparing for trial may be recovered if the proceeding is dismissed 40 days or more prior to the day set for the pretrial conference or, if no pretrial conference is set, the day set for the trial.²

Section 1255a itself states the explicit policy that abandonment will not be permitted if the condemnee "cannot be restored to substantially the same position as if the proceeding had not been commenced." Yet, the 40-day restriction on recovery of fees for the services of appraisers and other experts and other expenses of preparing for trial may preclude the condemnee from recovering a substantial portion of the expenses he necessarily incurred as a result of the proceeding. The 40-day restriction upon "expenses incurred in preparing for trial" was included in Section 1255a when that section was added in 1911 to assure the condemnee that his costs, fees, and expenses would be defrayed upon abandonment of the proceeding.³ The apparent purpose of imposing the restriction was to prevent recoupment of expenses needlessly incurred in view of the early dismissal, but it is far from clear that the restriction was intended to apply to fees reasonably incurred for the services of appraisers and other experts.⁴ In any event, the courts in applying Section 1255a have imposed a requirement that, to be recoverable, any fees, disbursements, or expenses must be incurred reasonably.⁵ To effectuate the salutary policy of restoring the condemnee "to substantially the same position as if the proceeding had not been commenced," the Commission recommends that the 40-day limitation be deleted. That arbitrary limitation should be replaced by a general requirement that, to be recoverable, any expense must be reasonably and necessarily incurred.

The Commission further recommends that Section 1255a be amended to codify what appears to be the rule under existing law (where the 40-day restriction is not applicable) that the condemnee's recoverable costs and disbursements upon abandonment of the proceeding include reasonable attorney's fees, appraisal fees, and fees for the services of other experts where such fees were actually incurred and were reasonably necessary to protect the defendant's interests in the proceeding, *whether such fees were incurred for services rendered before or after the proceeding was commenced*.⁶ This rule recognizes that the attorney may render substantial services in protecting his client's interests in the proceeding even before the complaint is filed. In the leading decision,

² *La Mesa-Spring Valley School Dist. v. Otsuka*, 57 Cal.2d 309, 19 Cal. Rptr. 479, 389 P.2d 7 (1962).

³ See Cal. Stats. 1911, Ch. 208, § 1, p. 377.

⁴ For the probable source of Section 1255a and a statement of the law as it existed before enactment of that section, see *Southern Pac. R.R. v. Reis Estate Co.*, 15 Cal. App. 216, 114 Pac. 808 (1911).

⁵ See *California Interstate Tel. Co. v. Prescott*, 228 Cal. App.2d 408, 39 Cal. Rptr. 472 (1964); *Decoto School Dist. v. M. & S. Tile Co.*, 225 Cal. App.2d 310, 37 Cal. Rptr. 225 (1964).

⁶ *La Mesa-Spring Valley School Dist. v. Otsuka*, 57 Cal.2d 309, 19 Cal. Rptr. 479, 389 P.2d 7 (1962) (attorney's fee); *Port San Luis Harbor Dist. v. Port San Luis Transp. Co.*, 213 Cal. App.2d 689, 29 Cal. Rptr. 136 (1963) (engineers' fees).

La Mesa-Spring Valley School Dist. v. Otsuka,⁷ the California Supreme Court reasoned as follows:

Eminent domain, so far as the defendant is concerned, is not based upon any activity on his part. There is no voluntary element in such an action. When the public agency announces its intention to take his property, it is telling the owner that he must sell his property whether he wants to or not. . . . Faced with such a threat, any reasonably prudent property owner would retain an attorney to protect his interests, even before the filing of suit. The careful lawyer, to adequately represent his client in this stage of negotiations, will perform many services which will be helpful and necessary if a complaint is filed and the case goes to trial. The condemnation defense lawyer, for both trial and pretrial negotiations, must acquire a working knowledge not only of the legal principles involved, but also of local real estate practices, appraisal theories and engineering techniques. . . . Almost necessarily, whether suit has been filed or not, he must inspect the property, prepare demonstrative evidence, look up the applicable law and engage in conferences with appraisers and lay witnesses in an effort to ascertain land use and value. . . . If these services are rendered after the filing of suit they clearly are recoverable. . . . Of course, if suit is never filed the land owner would have to pay the fees of his attorney, because it is only in the event suit is filed that attorney fees are recoverable. If suit is not filed the landowner must pay the price of his diligence in protecting his property. But if suit is filed, there is no sound reason why the trial court should exclude these prior services in determining a reasonable fee merely because performed before the action is commenced. The statute contemplates reimbursement for the attorney's fees reasonably incurred in preparing for trial. It would be ridiculous to require the attorney to repeat formally all of this work after the complaint is filed in order to protect his client's rights under section 1255a in the event of an abandonment.

For these reasons, in the event of abandonment, section 1255a, properly interpreted, permits attorney's fees to be allowed for services rendered in connection with the proposed taking whether those services are rendered before or after the filing of the action, provided only that they are the type of services that are reasonably necessary to protect the defendant's interests at the expected trial. The plaintiff should not escape liability because of the defendant's foresight and the fortuitous dates upon which the suit and the notice of abandonment happened to be filed. Plaintiff could have avoided assessment of costs by not filing the suit. Having done so, without prosecuting the suit to its conclusion, plaintiff has brought itself within the provisions of section 1255a and must now pay the penalty imposed by that section. [Citations omitted.]

Although the Court's holding is limited to attorney's fees, its reasoning applies with equal force to the fees of appraisers and other experts

⁷ 57 Cal.2d 309, 317-318, 19 Cal. Rptr. 479, 484, 369 P.2d 7, 12-13 (1962).

necessarily incurred for the protection of the condemnee's interests.⁸ Considerations of fairness require not only that the condemnee be reimbursed for the fees of his attorney in conferring with appraisers and other experts but also that he be reimbursed for the fees of the experts with whom his attorney confers. The Commission believes, further, that the condemnee and his attorney should be encouraged, rather than discouraged, in obtaining information from appraisers and other experts that will enable the attorney to negotiate a settlement of the matter before a complaint is filed. The recommended revision of Code of Civil Procedure Section 1255a would accomplish this objective.

Finally, the Commission recommends that Section 1255a be amended to include an express statement that, in the case of a partial abandonment, recoverable costs and disbursements shall not include any cost or disbursement, or any portion thereof, which would have been incurred had the property or property interest to be taken after the partial abandonment been the property or property interest originally sought to be taken. The condemnee should be entitled to recover costs and disbursements reasonably and necessarily incurred prior to the abandonment which would not have been necessary if the original complaint had been limited to the property or property interest subject to the proceeding after the abandonment, but he should not recover any costs or disbursements which would have been incurred notwithstanding the change in the nature of the taking. For example, where the condemnor originally determines to take a fee interest but later amends its complaint to exclude mineral interests from the property sought to be taken, the condemnee ordinarily should be entitled to recover the reasonable cost of an appraisal made of the value of the mineral interests since this expense will have no value in the proceeding after the partial abandonment.⁹ On the other hand, where there is a realignment of a highway right of way resulting in a slight decrease in the amount of property sought to be taken, the court ordinarily should not allow the condemnee any fees or expenses under Section 1255a because the change in the amount of property to be taken will have no effect on the property owner's expenditures in protecting his interests in the proceeding.¹⁰

The Commission's recommendation would be effectuated by the enactment of the following measure:

An act to amend Section 1255a of the Code of Civil Procedure, relating to eminent domain.

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

SECTION 1. Section 1255a of the Code of Civil Procedure is amended to read:

⁸ Indeed, as the Court points out, the attorney for the property owner cannot effectively handle settlement negotiations without the services of such experts. The rule applied by the Court to attorney's fees has been applied to fees for the services of other experts. See *Port San Luis Harbor Dist. v. Port San Luis Transp. Co.*, 213 Cal. App.2d 689, 29 Cal. Rptr. 136 (1963) (engineers' fees).

⁹ See *Metropolitan Water Dist. v. Adams*, 23 Cal.2d 770, 147 P.2d 6 (1944).

¹⁰ See *County of Kern v. Galatas*, 200 Cal. App.2d 353, 19 Cal. Rptr. 348 (1962).

1255a. (a) The plaintiff may abandon the proceeding at any time after the filing of the complaint and before the expiration of 30 days after final judgment, by serving on defendants and filing in court a written notice of such abandonment; ~~and~~. Failure to comply with Section 1251 of this code shall constitute an implied abandonment of the proceeding.

(b) The court may, upon motion made within 30 days after such abandonment, set aside the abandonment if it determines that the position of the moving party has been substantially changed to his detriment in justifiable reliance upon the proceeding and such party cannot be restored to substantially the same position as if the proceeding had not been commenced.

(c) Upon the denial of a motion to set aside such abandonment or, if no such motion is filed, upon the expiration of the time for filing such a motion, on motion of any party, a judgment shall be entered dismissing the proceeding and awarding the defendants their *recoverable* costs and disbursements; ~~which~~. *Recoverable costs and disbursements shall include (1) all necessary expenses reasonably and necessarily incurred in preparing for trial and during trial and (2) reasonable attorney fees, appraisal fees, and fees for the services of other experts where such fees were reasonably and necessarily incurred to protect the defendant's interests in the proceeding, whether such fees were incurred for services rendered before or after the filing of the complaint. In case of a partial abandonment, recoverable costs and disbursements shall not include any cost or disbursement, or portion thereof, which would have been incurred had the property or property interest sought to be taken after the partial abandonment been the property or property interest originally sought to be taken. These Recoverable costs and disbursements, including expenses and attorney fees, may be claimed in and by a cost bill, to be prepared, served, filed, and taxed as in civil actions. ; provided, however, that* Upon judgment of dismissal on motion of the plaintiff, the defendants, and each of them, may file a cost bill shall be filed within 30 days after notice of entry of such judgment; that said costs and disbursements shall not include expenses incurred in preparing for trial where the action is dismissed 40 days or more prior to the time set for the pretrial conference in the action or, if no pretrial conference is set, the time set for the trial of the action.

(d) If, after the plaintiff takes possession of or the defendant moves from the property sought to be condemned in compliance with an order of possession, the plaintiff abandons the proceeding as to such property or a portion thereof or it is determined that the plaintiff does not have authority to take such property or a portion thereof by eminent domain, the court shall order the plaintiff to deliver possession of such property or such portion thereof to the parties entitled to the possession thereof and shall make such provision as shall be just for the payment of damages arising out of the plaintiff's

taking and use of the property and damages for any loss or impairment of value suffered by the land and improvements after the time the plaintiff took possession of or the defendant moved from the property sought to be condemned in compliance with an order of possession, whichever is the earlier.

Comment. Subdivision (c) of Section 1255a requires that the plaintiff reimburse the defendant for all expenses reasonably and necessarily incurred in preparing for trial and during trial if the plaintiff fails to carry an eminent domain proceeding through to its conclusion.

Under prior law, reasonable attorney's fees were recoverable regardless of when the proceeding was dismissed, but other expenses incurred in preparing for trial were subject to a limitation that precluded their recovery if the action was dismissed 40 days or more prior to pretrial or trial. *La Mesa-Spring Valley School Dist. v. Otsuka*, 57 Cal.2d 309, 19 Cal. Rptr. 479, 369 P.2d 7 (1962). This limitation has been deleted and such expenses may now be recovered without regard to the date that the proceeding is dismissed.

Subdivision (c) provides for the recovery of attorney's fees, appraisal fees, and fees for services of other experts if the fees are reasonable in amount and are reasonably incurred to protect the defendant's interests in the proceeding. If they are so incurred, they may be recovered even though the services are rendered before the filing of the complaint in the eminent domain proceeding. In this respect, the subdivision continues prior law. See *La Mesa-Spring Valley School Dist. v. Otsuka*, 57 Cal.2d 309, 19 Cal. Rptr. 479, 369 P.2d 7 (1962) (attorney's fees); *Port San Luis Harbor Dist. v. Port San Luis Transp. Co.*, 213 Cal. App.2d 689, 29 Cal. Rptr. 136 (1963) (engineers' fees). See also *Decoto School Dist. v. M. & S. Tile Co.*, 225 Cal. App.2d 310, 37 Cal. Rptr. 225 (1964) (attorney's fees allowed under Section 1255a for services in connection with an appeal).

Subdivision (c), of course, permits recovery of fees and expenses only if a complaint is filed and the proceeding is later dismissed. The subdivision has no application if the efforts or resolution of the plaintiff to acquire the property do not culminate in the filing of a complaint.

In applying this section, and particularly in applying subdivision (c), the appellate courts have formulated the concept of "partial abandonment" so that the section will cover those cases in which the nature of the property or property interest being taken is substantially changed by the condemnor after the proceeding is begun. See *Metro-politan Water Dist. v. Adams*, 23 Cal.2d 770, 147 P.2d 6 (1944); *People v. Superior Court*, 47 Cal. App.2d 393, 118 P.2d 47 (1941); *Yolo Water etc. Co. v. Edmands*, 50 Cal. App. 444, 196 Pac. 463 (1920). The third sentence of subdivision (c) has been added to make clear that, in allowing costs and disbursements on a partial abandonment, the court should not include any items which would have been incurred notwithstanding the partial abandonment. The sentence codifies the view expressed in *County of Kern v. Galatas*, 200 Cal. App.2d 353, 19 Cal. Rptr. 348 (1962), that in such cases the condemnee should not receive a "windfall" by recovering costs and disbursements that he would have incurred regardless of the change in the nature of the taking. See

also *Metropolitan Water Dist. v. Adams, supra*; *Pacific Tel. & Tel. Co. v. Monolith Portland Cement Co.*, 234 Cal. App.2d 352, 44 Cal. Rptr. 410 (1965).

In a variety of relatively unusual situations, the question has arisen whether or not there has occurred such an "abandonment" or "partial abandonment" as to entitle the condemnee to costs and disbursements under this section. See *La Mesa-Spring Valley School Dist. v. Otsuka*, 57 Cal.2d 309, 19 Cal. Rptr. 479, 369 P.2d 7 (1962); *Los Angeles v. Agardy*, 1 Cal.2d 76, 33 P.2d 834 (1934); *City of Los Angeles v. Abbott*, 217 Cal. 184, 17 P.2d 993 (1932); *Mountain View Union High School v. Ormonde*, 195 Cal. App.2d 89, 15 Cal. Rptr. 461 (1961); *County of Los Angeles v. Hale*, 165 Cal. App.2d 22, 331 P.2d 166 (1958); *Torrance Unified School Dist. v. Alwag*, 145 Cal. App.2d 596, 302 P.2d 881 (1956); *Whittier Union High School Dist. v. Beck*, 45 Cal. App.2d 736, 114 P.2d 731 (1941); *City of Bell v. American States W.S. Co.*, 10 Cal. App.2d 604, 52 P.2d 503 (1934) (total abandonments); *Metropolitan Water Dist. v. Adams, supra*; *County of Kern v. Galatas, supra*; *Pacific Tel. & Tel. Co. v. Monolith Portland Cement Co., supra* (partial abandonments). Although certain limited exceptions have been recognized, the courts have generally interpreted the section as intended to require the condemnor to indemnify the condemnee against loss whenever the condemnor fails to complete the proceeding. See *Oak Grove School Dist. v. City Title Ins. Co.*, 217 Cal. App.2d 678, 32 Cal. Rptr. 288 (1963). The amendment of this section deleting the 40-day limitation from subdivision (c) and making other changes is not intended to change the decisional law as to when an abandonment or partial abandonment permitting recovery of costs and disbursements has occurred or to preclude further development of the decisional law in this respect.

APPENDIX XII
STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Improvements Made in Good Faith Upon
Land Owned by Another

September 1967

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

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted. They are cast in this form because their primary purpose is to undertake to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

CALIFORNIA LAW REVISION COMMISSION

SCHOOL OF LAW
STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305



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GEORGE H. MURPHY
Ex Officio

September 1, 1967

TO HIS EXCELLENCY, RONALD REAGAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was authorized by Resolution Chapter 202 of the Statutes of 1957 to make a study relating to whether the law relating to the rights of a good faith improver of property belonging to another should be revised.

The Commission published a recommendation and study on this subject in October 1966. See *Recommendation and Study Relating to the Good Faith Improver of Land Owned by Another*, 8 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 801 (1967). Senate Bill No. 254 was introduced at the 1967 session of the Legislature to effectuate this recommendation. The bill passed the Senate but died in the Assembly.

The Commission submits herewith a new recommendation on this subject. In preparing the new recommendation, the Commission has taken into account the objections that were made to the recommendation submitted to the 1967 Legislature.

Respectfully submitted,

RICHARD H. KEATINGE
Chairman

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

IMPROVEMENTS MADE IN GOOD FAITH ON LAND OWNED BY ANOTHER

BACKGROUND

At common law, structures and other improvements placed by one person on land owned by another became the property of the owner of the land. Continuation of this rule obviously is justified as applied to one who, in bad faith, simply appropriates another's land as a building site. However, the rule may be harsh and unjust when applied to an improver who is the victim of a mistake made in good faith. In the latter case, the landowner receives an undeserved windfall, and there would be no justification for application of the rule if his interests were fully protected in an equitable adjustment of the unfortunate situation that would ameliorate the loss to the good faith improver.

For this reason, most states have modified the common law rule. The rule has been changed by judicial decision in several states. In most jurisdictions—at least 35 states and the District of Columbia—statutes have been enacted, known as “occupying claimants acts” or “betterment acts,” to modify the common law rule to provide at least a measure of relief to the good faith improver. Such statutes also have been enacted throughout Canada. Uniformly, the objective has been to provide relief to a person who makes improvements believing, in good faith, that he owns the land.

The betterment acts are based on the principle that the landowner's just claims against the innocent improver should be limited to recovery of the land itself, damages for its injury, and compensation for its use and occupation. Generally, these acts undertake to effectuate this principle by requiring the owner to choose whether to pay for the improvements or to sell the land to the good faith improver.

The California law is less considerate of the innocent improver than the law in most other states. California enacted a betterment act in 1856, but it was declared unconstitutional by a divided court in *Billings v. Hall*, 7 Cal. 1 (1857).¹ Under the existing law, in the absence of circumstances giving rise to an estoppel against the landowner, the good faith improver has no rights beyond those accorded him by Section 741 of the Code of Civil Procedure and Section 1013.5 of the Civil Code. Section 741 permits the improver to set off the value of permanent

¹ The Commission has concluded that the *Billings* case would not preclude the enactment of legislation to improve the lot of the good faith improver. Unlike the legislation recommended by the Commission, the 1856 betterment act made no distinction between good faith improvers and bad faith improvers, and this aspect of the statute was stressed by the court in holding the statute unconstitutional.

improvements if the landowner sues him for damages for use and occupation of the land. Section 1013.5 permits the improver to remove improvements if he compensates the landowner for all damages resulting from their being affixed and removed.

The existing California law is inadequate and unfair in those cases in which the value of the improvement greatly exceeds the value of the interim use and occupation of the land and the improvement either cannot be removed or is of little value if removed.² The right of removal in such a case is useless and the right of setoff provides only limited protection against an inequitable forfeiture by the good faith improver and an unjustified windfall for the landowner.

RECOMMENDATIONS

The Law Revision Commission recommends that California join the great majority of the states that now provide more adequate relief for the improver who is the innocent victim of a bona fide mistake.³ Accordingly, the Commission recommends:

1. The relief provided should be available only to a good faith improver. The legislation should define a good faith improver as a person who acts in good faith and erroneously believes, because of a mistake either of law or fact, that he is the owner of the land. This definition would be based on language contained in Civil Code Section 1013.5 but would be more limited than that section which appears to include tenants, licensees, and conditional vendors of chattels.

Some of the betterment acts limit relief to good faith improvers who hold under "color of title." Such a limitation is undesirable. It makes relief unavailable in other situations where it is needed—where the improver owns one lot but builds on another by mistake. Moreover, the term "color of title" is of uncertain meaning. While the limitation imposed by its use may have been justified in an era when property interests were evidenced by the title documents themselves, the limitation is not suited to present conditions since virtually universal reliance is now placed upon title insurance for land transactions.

²Taliaferro v. Colasso, 139 Cal. App.2d 903, 294 P.2d 774 (1956), illustrates the unjust result which may obtain under present California law. A house was built by mistake on lot 20 instead of lot 21. The owner of lot 20 brought an action to quiet title and to recover possession. The defendant was a successor in interest to the person who built the house. The trial court gave judgment quieting title and for possession on the condition that \$3,000 be paid to the defendant. The district court of appeal affirmed that portion of the judgment awarding possession of the lot and house to the landowner, but reversed that portion requiring any payment to the defendant as a condition for obtaining possession. The court held that the "right of removal" (Civil Code Section 1013.5) and the "right of setoff" (Code of Civil Procedure Section 741) are the exclusive forms of relief available to a good faith improver and that, for this reason, the general equity powers of the court cannot be brought into play even though the landowner seeks equitable relief (quiet title). As a result, the landowner obtained possession of the lot and house without any compensation to the defendant for the value of the house.

³The need for corrective legislation is not alleviated by the prevalence of title insurance, nor would such legislation have any impact upon title insurance protection. With respect to the good faith improver, many title policies do not cover matters of survey or location; with respect to the landowner, policies do not cover matters or events subsequent to his acquisition of the property. See CALIFORNIA LAND SECURITY AND DEVELOPMENT, Mallette, *Title Insurance*, §§ 7.1-7.21 (Cal. Cont. Ed. Bar 1960).

2. The good faith improver should be permitted to bring an action (or to file a cross-complaint or counterclaim) to have the court determine the rights of the parties and grant appropriate relief. This will permit the improver to obtain some measure of relief whether or not he is in possession of the property. It also will permit him to take the initiative in resolving the unsatisfactory state of affairs.

A two-year statute of limitations should apply to an action by a good faith improver. The period should run from the date that the improver discovers that he is not the owner of the land upon which the improvements have been made.

3. The court should not be authorized to grant any other form of relief where the right of setoff (Code of Civil Procedure Section 741) or the right to remove the improvements (Civil Code Section 1013.5) would result in substantial justice to the parties under the circumstances of the case.

4. Where neither of the existing statutory remedies would suffice, the court should be empowered to adjust the rights, equities, and interests of the improver, landowner, and other interested parties to achieve substantial justice to the parties under the circumstances of the particular case, subject to the limitation that the relief granted shall protect the landowner against any pecuniary loss while avoiding, insofar as possible, enriching him unjustly at the expense of the good faith improver. Where a choice must be made between protecting one party or the other, the landowner should prevail.

5. The legislation should not apply to an encroachment case—one where a building or other improvement constructed by a person on his own land encroaches upon adjoining land—because the power of the California courts to reach a fair result in such cases through the exercise of their equitable powers is already well established. *E.g.*, *Brown Derby Hollywood Corp. v. Hatton*, 61 Cal.2d 855, 40 Cal. Rptr. 848, 395 P.2d 896 (1964); *Christensen v. Tucker*, 114 Cal. App.2d 554, 250 P.2d 660 (1952).

6. The legislation should not apply where the improvement is made by a governmental entity or is made on land owned or possessed by a governmental entity. Otherwise, unintended and undesirable changes might be made in the law relating to eminent domain, inverse condemnation, and encroachments on public lands.

7. Section 741 of the Code of Civil Procedure should be amended to eliminate the "color of title" requirement and to make applicable the recommended definition of a "good faith improver." This would extend the right of setoff to the situation, among others, where the improver constructs the improvement on the wrong lot because of a mistake in the identity or location of the land.

8. The recommended legislation should apply to any action commenced after its effective date, whether or not the improvement was constructed prior to such date. Decisions in other states are about equally divided as to whether a betterment statute can constitutionally be applied where the improvements were constructed prior to its effective date. *SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND* 58 (1953). *Cf. Billings v. Hall*, 7 Cal. 1 (1857). The California Supreme Court has recently taken a liberal view permitting retroactive application of legislation affecting property rights. *Addison v. Addison*,

62 Cal.2d 558, 43 Cal. Rptr. 97, 399 P.2d 897 (1965). See 18 STAN. L. REV. 514 (1966). The Commission believes that the statute can constitutionally be applied to improvements constructed prior to its effective date. Nevertheless, a severability clause should be included in case the courts should hold that the act cannot be so applied.

PROPOSED LEGISLATION

The Commission's recommendations would be effectuated by the enactment of the following measure:

An act to amend Sections 339 and 741 of, and to add Chapter 10 (commencing with Section 871.1) to Title 10 of Part 2 of, the Code of Civil Procedure, relating to real property.

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

SECTION 1. Section 339 of the Code of Civil Procedure is amended to read:

339. Within two years:

1. An action upon a contract, obligation or liability not founded upon an instrument of writing, other than that mentioned in subdivision 2 of Section 337 of this code; or an action founded upon a contract, obligation or liability, evidenced by a certificate, or abstract or guaranty of title of real property, or by a policy of title insurance; provided, that the cause of action upon a contract, obligation or liability evidenced by a certificate, or abstract or guaranty of title of real property or policy of title insurance shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder.

2. An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty including the nonpayment of money collected upon an execution. But this subdivision does not apply to an action for an escape.

3. An action based upon the rescission of a contract not in writing. The time begins to run from the date upon which the facts that entitle the aggrieved party to rescind occurred. Where the ground for rescission is fraud or mistake, the time does not begin to run until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

4. An action by a good faith improver for relief under Chapter 10 (commencing with Section 871.1) of Title 10 of Part 2 of the Code of Civil Procedure. The time begins to run from the date upon which the good faith improver discovers that he is not the owner of the land upon which the improvements have been made.

Comment. The statute of limitations established by subdivision 4 applies in any action by a good faith improver for relief under Sections

871.1 to 871.7. The equitable doctrine of laches may also be a defense to relief under Sections 871.1 to 871.7.

SEC. 2. Section 741 of the Code of Civil Procedure is amended to read:

741. (a) *As used in this section, "good faith improver" has the meaning given that term by Section 871.1.*

(b) *When damages are claimed for withholding the property recovered, ~~upon which permanent and improvements have been made on the property by a defendant; or his predecessor in interest as a good faith improver those under whom he claims, holding under color of title adversely to the claim of the plaintiff, in good faith, the value of amount by which~~ such improvements enhance the value of the land must be allowed as a setoff against such damages.*

Comment. Section 741 has been amended to eliminate the condition that the defendant claim the property under "color of title." The amended section requires a setoff if the defendant is a good faith improver as defined in Section 871.1. This amendment makes Section 741 consistent with later enacted Civil Code Section 1013.5. See the Comment to Section 871.1. Thus, the limited protection afforded by Section 741 is extended to include the situation, for example, where the defendant owns one lot but builds on the plaintiff's lot by mistake.

The amendment also substitutes "the amount by which such improvements enhance the value of the land" for "the value of such improvements." The new language clarifies the former wording and assures that the value of the improvement, for purposes of setoff, will be measured by the extent to which the improvement has increased the market value of the land.

SEC. 3. Chapter 10 (commencing with Section 871.1) is added to Title 10 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 10. GOOD FAITH IMPROVER OF PROPERTY OWNED BY ANOTHER

871.1. As used in this chapter, "good faith improver" means:

(a) A person who makes an improvement to land in good faith and under the erroneous belief, because of a mistake of law or fact, that he is the owner of the land.

(b) A successor in interest of a person described in subdivision (a).

Comment. The definition of "good faith improver" in Section 871.1 is based in part on the language used in Civil Code Section 1013.5 to describe a person who has a right to remove improvements affixed to the land of another. The definition in Section 871.1 is limited, however, to a person who believes he is the owner of the land; unlike Section 1013.5, the definition does not include licensees, tenants, and conditional vendors of chattels. See Comment, 27 So. CAL. L. REV. 89 (1953).

Under this section, a person is not a "good faith improver" as to any improvement made after he becomes aware of facts that preclude him from acting in good faith. For example, a person who builds a house on a lot owned by another may obtain relief under this chapter if he acted in good faith under the erroneous belief, because of a mistake of law or fact, that he was the owner of the land. However, if the same person makes an additional improvement after he has discovered that he is not the owner of the land, he would not be entitled to relief under this chapter with respect to the additional improvement.

As to what constitutes "good faith," see *Brown Derby Hollywood Corp. v. Hatton*, 61 Cal.2d 855, 858-860, 40 Cal. Rptr. 848, 850-851, 395 P.2d 896, 898-899 (1964) (encroachment case).

871.2. As used in this section, "person" includes an unincorporated association.

Comment. The definition of "person" in Code of Civil Procedure Section 17 does not clearly include an unincorporated association. Section 871.2 is included to make it clear that an unincorporated association may be a good faith improver.

871.3. A good faith improver may bring an action in the superior court or, subject to Section 396, may file a cross-complaint or counterclaim in a pending action in the superior or municipal court for relief under this chapter.

Comment. Section 871.3 requires that an action for relief under this chapter be brought in the superior court. Where relief under this chapter is sought by cross-complaint or counterclaim in a pending action in municipal court and determination of the cross-complaint or counterclaim will necessarily involve the determination of questions not within the jurisdiction of the municipal court, the action must be transferred to the superior court. See Code of Civil Procedure Section 396.

The statute of limitations for an action by a good faith improver for relief under this chapter is fixed by subdivision 4 of Section 339 of the Code of Civil Procedure.

871.4. The court shall not grant relief under this chapter if the court determines that exercise of the good faith improver's right of setoff under Section 741 of the Code of Civil Procedure or right to remove the improvement under Section 1013.5 of the Civil Code would result in substantial justice to the parties under the circumstances of the particular case.

Comment. Section 871.4 establishes a legislative ordering of priorities in determining how to deal judicially with the situation created by a good faith improver.

871.5. When an action, cross-complaint, or counterclaim is brought pursuant to Section 871.3, the court may, subject to Section 871.4, effect such an adjustment of the rights, equities, and interests of the good faith improver, the owner of the land, and other interested parties (including, but not limited to, lessees, lienholders, and encumbrancers) as is consistent with

substantial justice to the parties under the circumstances of the particular case. The relief granted shall protect the owner of the land upon which the improvement was constructed against any pecuniary loss but shall avoid, insofar as possible, enriching him unjustly at the expense of the good faith improver.

Comment. Section 871.5 authorizes the court to exercise any of its legal or equitable powers to adjust the rights, equities, and interests of the parties, but this authority is subject to the limitation that the court must utilize the right of setoff or the right of removal in any case where the exercise of one of these rights would result in substantial justice to the parties under the circumstances of the particular case.

Under this section, the court has considerable discretion to select appropriate relief from the full range of equitable and legal remedies. However, the section requires selection of a remedy that, first, will protect the landowner from any pecuniary loss and, second, will avoid, insofar as possible, the unjust enrichment of the landowner at the expense of the good faith improver. For example, if the landowner desires the land as improved, the court might order, as the trial court did in *Taliaferro v. Colasso*, 139 Cal. App.2d 903, 294 P.2d 774 (1956), that title be quieted in the owner upon condition that he pay to the improver the value of the improvements or some lesser amount. On the other hand, where the landowner does not desire the land as improved and removal of the improvement is not economically possible, the court might order that title be quieted in the improver on the condition that he pay to the landowner the value of the unimproved land or, in the alternative, that a judicial sale be made. It would also be appropriate for the court to credit the landowner with the value of the improver's use and occupation of the land and for the expenses the landowner has incurred in the action to resolve the matter. Under appropriate circumstances, the judgment might provide for deferred payments and for an equitable lien to secure such payments. The situation of the landowner, however, might require a completely different form of relief. The court should deny the improver any relief in a case where no remedy can be devised which can fully protect the landowner against pecuniary loss. For a more detailed discussion of the alternatives available to the court in administering the statute, see Merryman, *Improving the Lot of the Trespassing Improver*, 11 STAN. L. REV. 456, 483-489 (1959), reprinted in 8 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 801, 848-854 (1967).

871.6. Nothing in this chapter affects the rules of law which determine the relief, if any, to be granted when a person constructs on his own land an improvement which encroaches on adjoining land.

Comment. This chapter has no effect on the law applicable in encroachment cases. There is no necessity for relief under this chapter in such cases since existing law empowers the courts to deal appropriately with such a situation. See *Brown Derby Hollywood Corp v. Hatton*, 61 Cal.2d 855, 40 Cal. Rptr. 848, 395 P.2d 896 (1964); *Christensen v. Tucker*, 114 Cal. App.2d 554, 250 P.2d 660 (1952). See also *Recommendation and Study Relating to the Good Faith Improver of*

Land Owned by Another, 8 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 801, 845 n.101 (1967).

871.7. This chapter does not apply where the improver is a public entity or where the improvement is made to land owned or possessed by a public entity. As used in this section, "public entity" includes the United States, a state, county, city and county, city, district, public authority, public agency, or any other political subdivision or public corporation.

Comment. Section 871.7 is included so that this chapter will have no effect on the law relating to eminent domain, inverse condemnation, and encroachments on public lands (*e.g.*, Streets and Highways Code Sections 660-759.3).

SEC. 4. This act applies in any action commenced after its effective date, whether or not the improvement was constructed prior to its effective date. If any provision of this act or application thereof to any person or circumstance is held invalid, such invalidity shall not affect any other provision or application of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

Comment. This act is made retroactive in the sense that it applies to improvements constructed before, as well as after, its effective date. Decisions in other states are about equally divided as to whether a betterment statute constitutionally can be applied to improvements constructed prior to its effective date. SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND 58 (1953). *Cf. Billings v. Hall*, 7 Cal. 1 (1857). The California Supreme Court generally has taken the liberal view that permits retroactive application of legislation affecting property rights. *E.g., Addison v. Addison*, 62 Cal.2d 558, 43 Cal. Rptr. 97, 399 P.2d 897 (1965). See 18 STAN. L. REV. 514 (1966). Although it would thus appear that the act constitutionally can be applied to improvements constructed prior to its effective date, a severability clause is included in case such an application of the act is held unconstitutional.

APPENDIX XIII

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

**Damages for Personal Injuries to a Married
Person as Separate or Community Property**

September 1967

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

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted. They are cast in this form because their primary purpose is to undertake to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

CALIFORNIA LAW REVISION COMMISSION

SCHOOL OF LAW
STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305



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GEORGE H. MURPHY
Ex Officio

September 1, 1967

To HIS EXCELLENCY, RONALD REAGAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was directed by Resolution Chapter 202 of the Statutes of 1957 to make a study relating to whether an award of damages made to a married person in a personal injury action should be the separate property of such person.

The Commission published a recommendation and study on this subject in October 1966. See *Recommendation and Study Relating to Whether Damages for Personal Injury to a Married Person Should be Separate or Community Property*, 8 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 401 (1967). Senate Bills Nos. 245 and 246 were introduced at the 1967 session of the Legislature to effectuate this recommendation. The bills passed the Senate but died in the Assembly.

The Commission submits herewith a new recommendation on this subject. In preparing this new recommendation, the Commission has taken into account the objections that were made to the recommendation submitted to the Legislature in 1967.

Respectfully submitted,

RICHARD H. KEATINGE
Chairman

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

Damages for Personal Injuries to a Married Person as Separate or Community Property

BACKGROUND

In 1957 the Legislature directed the Law Revision Commission to undertake 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." This study has involved more than a consideration of the property interests in damages recovered by a married person in a personal injury action; it has also required consideration of the extent to which the contributory negligence of one spouse should be imputed to the other, for in the past the determination of this issue has turned in large part on the nature of the property interests in the award.

RECOMMENDATIONS

Personal Injury Damages as Separate or Community Property

Before 1957, damages awarded for personal injuries to a married person were community property. CIVIL CODE §§ 162, 163, 164; *Zaragosa v. Craven*, 33 Cal.2d 315, 202 P.2d 73 (1949); *Moody v. Southern Pac. Co.*, 167 Cal. 786, 141 Pac. 388 (1914). Each spouse thus had an interest in any damages that might be awarded to the other for a personal injury. Therefore, if an injury to a married person resulted from the concurrent negligence of that person's spouse and a third person, the injured person was not permitted to recover. To have allowed recovery would have permitted the negligent spouse, in effect, to recover for his own negligent act. *Kesler v. Pabst*, 43 Cal.2d 254, 273 P.2d 257 (1954).

Civil Code Section 163.5, which provides that damages awarded to a married person for personal injuries are separate property, was enacted in 1957 to prevent the contributory negligence of one spouse from being imputed to the other in order to bar recovery of damages because of the community property interest of the guilty spouse in those damages. *Estate of Simoni*, 220 Cal. App.2d 339, 33 Cal. Rptr. 845 (1963); 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property*, § 7 at 2712 (7th ed. 1960). The enactment of Section 163.5 effectively abrogated the doctrine of imputed contributory negligence between married persons insofar as that doctrine was based on the community property nature of the damages recovered.¹ But the effect of the section

¹ See *Cooke v. Tsipouroglou*, 59 Cal.2d 660, 664, 31 Cal. Rptr. 60, 62, 381 P.2d 940, 942 (1963). Section 163.5 was not completely effective in abrogating the doctrine in its application to motor vehicle accidents. However, other legislation enacted upon recommendation of the Commission eliminates imputed contributory negligence in motor vehicle cases insofar as that doctrine barred recovery because of the marital relationship or the nature of the spouse's interest in their vehicle. Cal. Stats. 1967, Ch. 702. See *Recommendation and Study Relating to Vehicle Code Section 17150 and Related Sections*, 8 CAL. LAW REVISION COMM'N, REP., REC., & STUDIES 501 (1967).

goes far beyond elimination of imputed contributory negligence between spouses. In making any recovery for personal injuries separate property, it operates whether or not the other spouse has anything to do with the accident.

This change in the nature of all personal injury damages recovered by married persons has had unintended and unfortunate consequences. It results in injustice to the spouse of the injured party in a number of circumstances:

(1) Even though expenses incurred as a result of personal injuries are paid from community property, damages awarded as reimbursement for such expenses are made the separate property of the injured spouse, thus depriving the community of reimbursement for those expenditures. See Brunn, *California Personal Injury Damage Awards to Married Persons*, 13 U.C.L.A. L. REV. 587, 591-594 (1966).

(2) Although earnings from personal services are community property (and often the chief source of such property), damages that represent lost earnings at the time of trial and the loss of future earnings are made the separate property of the injured spouse. Had the injured spouse suffered no loss of earning capacity, the community would have received the benefit of such earnings, but the community does not receive the benefit of the damages received in lieu of such earnings. This can be most unjust, for example, where the parties are divorced after the injured spouse has fully recovered and returned to work, for the damages received for personal injuries are not subject to division on divorce even though such damages represent earnings that would have been subject to division.

(3) In the case of intestate death, the surviving spouse, who inherits all the community property, may receive as little as one-third of the damages awarded for personal injuries.²

(4) As separate property, the recovery for personal injuries may be disposed of by gift or will without limitation.

In addition, changing the character of personal injury damages from community to separate property has had significant and unfavorable tax consequences. There is no California gift tax on transfers of community property between spouses³ and community property passing outright to the surviving spouse is not subject to the inheritance tax.⁴ Personal injury damages, being separate property, do not receive this favorable treatment.

Moreover, most couples probably commingle the recovery with community property and may thus convert it into community property.⁵

² To avoid this injustice in case of intestate death, a workmen's compensation award has been held to be community property. *Estate of Simoni*, 220 Cal. App.2d 339, 342, 344, 33 Cal. Rptr. 845, 847, 848 (1963). Civil Code Section 163.5, of course, precludes such a holding in the case of an award of personal injury damages.

³ REV. & TAX. CODE § 15301.

⁴ REV. & TAX. CODE § 13551(a).

⁵ If the funds recovered cannot be traced, they will be treated as community property. See *Metcalf v. Metcalf*, 209 Cal. App.2d 742, 26 Cal. Rptr. 271 (1962). Even though commingling falls short of the point where tracing becomes impossible, depositing the award in the family bank account and using it for support of the family may alone be evidence of an agreement to transmute the recovery into community property. *Weinberg v. Weinberg*, 67 Cal.2d ____ [67 A.C. 567, 580-581] (1967). See also *Lawatch v. Lawatch*, 161 Cal. App.2d 780, 790, 327 P.2d 603, 608 (1958).

The tax consequences of such conversion are significant. When one spouse converts his separate property into community property, the donee's one-half interest is subject to the California gift tax at date of conversion.⁶ Yet the conversion of such property into community property does not permit it to pass to the surviving spouse free from state inheritance tax as is the case with other community property; Revenue and Taxation Code Sections 13560 and 15310 characterize the equal interests of spouses in community property converted from separate property as separate property for inheritance tax purposes. Thus an inability to trace funds that represent personal injury damages may have disastrous tax consequences when those funds are converted into community property and commingled with other community property.⁷

To eliminate these undesirable ramifications of Section 163.5, the Commission recommends enactment of legislation that would again make personal injury damages awarded to a married person against a third party community property. The problem of imputed contributory negligence should be dealt with in a way less drastic than converting all such damages into separate property.

Although personal injury damages awarded to a married person against a third party should be community property, the Commission recommends retention of the rule that such damages are separate property when they are recovered for an injury inflicted by the other spouse. If damages recovered by one spouse from the other were regarded as community property, the tortfeasor spouse or his insurer would, in effect, be compensating the wrongdoer to the extent of his interest in the community property.

The Commission also recommends that damages for personal injuries be the separate property of the injured spouse if they are recovered (1) after rendition of an interlocutory judgment of divorce and while the injured person and his spouse are living separate and apart, (2) after rendition of a judgment of separate maintenance, (3) while the wife, if she is the injured person, is living separate from her husband, or (4) after the wife has abandoned her husband, if he is the injured person, and before she has offered to return, unless her abandoning him was justified by his misconduct. Earnings and accumulations in general are separate property if acquired under these circumstances. See Civil Code Sections 169, 169.1, 169.2, and 175. Before enactment of Civil Code Section 163.5, it was held that a cause of action for personal

⁶ REV. & TAX. CODE §§ 15201 and 15104. Conversion of separate property into community property may also result in a federal gift tax at date of conversion. See *United States v. Goodyear*, 99 F.2d 523 (9th Cir. 1938).

⁷ In *Martin & Miller, Estate Planning and Equal Rights*, 40 CAL. S.B.J. 706, 711 (1965), it is stated:

It would seem prudent to keep community property which has resulted from the conversion of separate property segregated from other community property, or else the inheritance tax authorities might assume that all the community property came from separate property, with disastrous tax consequences. Tracing thus remains a serious concern of tax practitioners in this area.

injuries vested by operation of law in the injured party upon dissolution of the marriage by divorce.⁸

Division on Divorce or Separate Maintenance

Although earnings from personal services often are the chief source of the community property, Civil Code Section 163.5 makes personal injury damages for the loss of earnings the separate property of the injured spouse. As separate property, such damages are not subject to division on divorce or separate maintenance. This inflexible rule seems especially unjust in its application to cases in which a substantial portion of the damages was awarded to compensate the victim for lost earnings that would have been received during the period of the marriage prior to the divorce or separate maintenance action. These cannot be divided between the spouses even though the earnings themselves would have been subject to division.

On the other hand, enactment of legislation that would again make personal injury damages community property would make the award subject to division even though a substantial portion of the award represents the loss of earnings that would be received after the judgment of divorce or separate maintenance. This aspect of the Commission's previous recommendation caused it to be rejected by the Assembly because, under that recommendation, personal injury damages could have been apportioned between the spouses in a divorce action brought shortly after the damages were recovered. The Assembly concluded that it would be undesirable to create the possibility that a court might award one spouse a share of the damages recovered by the other spouse under these circumstances.

To overcome this problem, and because of the generally unique nature of property received as personal injury damages, the Commission recommends enactment of a special provision governing disposition of such property on divorce or separate maintenance. Even though such property should be made community property, all of it should be awarded to the spouse who suffered the injury unless the court determines from all of the facts of the particular case that justice requires a division. The decision whether a division is required

⁸ In *Washington v. Washington*, 47 Cal.2d 249, 253, 302 P.2d 569, 571 (1956), Justice Traynor (writing the court's opinion) reasoned:

It is not unfair to the uninjured spouse to terminate his or her interest in the other's cause of action for personal injuries on divorce. . . . A rule . . . treating the entire cause of action as community property protects the community interest in the elements that clearly should belong to it. . . . Although such a rule may be justified when it appears that the marriage will continue, it loses its force when the marriage is dissolved after the cause of action accrues. In such a case not only may the personal elements of damages such as past pain and suffering be reasonably treated as belonging to the injured party, but the damages for future pain and suffering, future expenses, and future loss of earnings are clearly attributable to him as a single person following the divorce. Moreover, as in any other case involving future earnings or other after acquired property, the wife's right, if any, to future support may be protected by an award of alimony. [Citation omitted.]

should be made without regard to which spouse is granted the divorce or separate maintenance. Because of the variety of situations, the special provision should not undertake to provide exact rules for determining whether to make a division and, if so, what division to make. Rather, the statute should require the court to take into account the economic conditions and needs of the parties, the time elapsed since the damages were recovered, and any other pertinent facts in the case.

Management of Property Representing Personal Injury Damages

Because Civil Code Section 163.5 makes a wife's personal injury damages separate property, they are now subject to her management and control. It would be unnecessary and undesirable to change this rule even though personal injury damages should be made community property.

If the wife's personal injury damages were made community property without other modifications, they would be subject to the husband's management and control. The law would thus work unevenly and unfairly. A creditor of the wife, who would have been able to obtain satisfaction from the wife's earnings (CIVIL CODE § 167; *Tinsley v. Bauer*, 125 Cal. App.2d 724, 271 P.2d 116 (1954)), would be unable to levy on damages paid to the wife for the loss of those earnings. See CIVIL CODE § 167. A husband's creditor would be able to levy on damages representing the wife's lost earnings even though he could not have reached the earnings themselves. See CIVIL CODE § 168. In effect, the award of damages would operate to convert an asset of the wife, her earning capacity, into an asset of the husband. Yet, no reciprocal conversion would take place upon the husband's recovery of personal injury damages.

Before enactment of Section 163.5, Section 171c permitted the wife to manage, *inter alia*, the community property that consisted of her personal injury damages. If Section 163.5 is amended to make personal injury damages community property, Section 171c should be amended to return to the wife the right to manage her personal injury damages.

Payment of Damages for Tort Liability of a Married Person

In *Grolemund v. Cafferata*, 17 Cal.2d 679, 111 P.2d 641 (1941), the Supreme Court held that the community property is subject to the husband's liability for his torts. In *McClain v. Tufts*, 83 Cal. App.2d 140, 187 P.2d 818 (1947), it was held that the community property is not subject to liability for the wife's torts. Both of these decisions were based on the husband's right to manage the community property, and both were decided before the enactment of Civil Code Section 171c which gives the wife the right to manage her earnings. The rationale of those decisions indicates that the community property under the wife's control is subject to liability for her torts and is not subject

to liability for the husband's torts, but no reported decision has decided the question. *Cf. Tinsley v. Bauer*, 125 Cal. App.2d 724, 271 P.2d 116 (1954) (wife's "earnings" derived from embezzlement are subject to the quasi-contractual liability incurred by the wife as a result of the embezzlement).

The Commission recommends enactment of legislation to make it clear that the tort liabilities of the wife may be satisfied from the community property subject to her management and control as well as from her separate property. Such legislation will provide assurance that a wife's personal injury damages will continue to be subject to liability for her torts even though they are community instead of separate property.

A tort liability may be incurred by one spouse because of an injury inflicted upon the other. See *Self v. Self*, 58 Cal.2d 683, 26 Cal. Rptr. 97, 376 P.2d 65 (1962), and *Klein v. Klein*, 58 Cal.2d 692, 26 Cal. Rptr. 102, 376 P.2d 70 (1962) (which abandon the rule of interspousal tort immunity). It seems unjust to permit the liable spouse to use community property (including the injured spouse's share) to discharge that liability if the guilty spouse has separate property with which to discharge the liability. The guilty spouse should not be entitled to keep his separate estate intact while the community property is depleted to satisfy an obligation to the co-owner of the community.

Accordingly, the Commission recommends enactment of legislation that would require a spouse to exhaust his separate property to discharge a tort liability arising out of an injury to the other spouse before the community property subject to the guilty spouse's control may be used for that purpose.

Imputed Contributory Negligence

Although the enactment of Section 163.5 has had undesirable effects on the community property system, it did overcome the doctrine of imputed contributory negligence between spouses. Enactment of legislation making personal injury damages community property will again raise the problem that Section 163.5 was enacted to solve.

The problem of imputed contributory negligence should be met directly by providing explicitly that the negligence of one spouse does not bar recovery by the other unless such concurring negligence would be a defense if the marriage did not exist. This would retain the desirable and intended effect of Section 163.5.

PROPOSED LEGISLATION

The Commission's recommendations would be effectuated by enactment of the following measures:

I

An act to amend Sections 146, 163.5, and 171a of, and to add Sections 164.6, 164.7, and 169.3 to, the Civil Code, relating to married persons, including their community property and tort liability.

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

CIVIL CODE

§ 146 (amended)

SECTION 1. Section 146 of the Civil Code is amended to read:

146. In case of the dissolution of the marriage by decree of a court of competent jurisdiction or in the case of judgment or decree for separate maintenance of the husband or the wife without dissolution of the marriage, the court shall make an order for disposition of the community property and the quasi-community property and for the assignment of the homestead as follows:

(a) *If Except as otherwise provided in subdivision (c), if the decree is rendered on the ground of adultery, incurable insanity or extreme cruelty, the community property and quasi-community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the conditions of the parties, may deem just.*

(b) *If Except as otherwise provided in subdivision (c), if the decree be rendered on any other ground than that of adultery, incurable insanity or extreme cruelty, the community property and quasi-community property shall be equally divided between the parties.*

(c) *Without regard to the ground on which the decree is rendered or to which party is granted the divorce or separate maintenance, community property personal injury damages shall be assigned to the party who suffered the injuries unless the court, after taking into account the economic condition and needs of each party, the time that has elapsed since the recovery of the damages, and all other facts of the case, determines that the interests of justice require another disposition, in which case the community property personal injury damages shall be assigned to the respective parties in such proportions as the court determines to be just under the facts of the case. As used in this subdivision, "community property personal injury damages" means all money or other property received by a married person as community property in satisfaction of a judgment for damages for his or her personal*

injuries or pursuant to an agreement for the settlement or compromise of a claim for such damages.

~~(e)~~ (d) If a homestead has been selected from the community property or the quasi-community property, it may be assigned to the party to whom the divorce or decree of separate maintenance is granted, or, in cases where a divorce or decree of separate maintenance is granted upon the ground of incurable insanity, to the party against whom the divorce or decree of separate maintenance is granted. The assignment may be either absolutely or for a limited period, subject, in the latter case, to the future disposition of the court, or it may, in the discretion of the court, be divided, or be sold and the proceeds divided.

~~(d)~~ (e) If a homestead has been selected from the separate property of either, in cases in which the decree is rendered upon any ground other than incurable insanity, it shall be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the party to whom the divorce or decree of separate maintenance is granted, and in cases where the decree is rendered upon the ground of incurable insanity, it shall be assigned to the former owner of such property, subject to the power of the court to assign it to the party against whom the divorce or decree of separate maintenance is granted for a term of years not to exceed the life of such party.

This section shall not limit the power of the court to make temporary assignment of the homestead at any stage of the proceedings.

Whenever necessary to carry out the purpose of this section, the court may order a partition or sale of the property and a division or other disposition of the proceeds.

Comment. Subdivision (c) has been added to Civil Code Section 146 to provide a special rule for the disposition of personal injury damages. The subdivision is limited to "*community property* personal injury damages." Under some circumstances, personal injury damages may be separate property when received. See Civil Code Sections 163.5 and 169.3.

Subdivision (c) requires that the spouse who suffered the injuries be awarded all of the community property that represents damages for his or her personal injuries unless the court determines that justice requires a division. If justice so requires, the court may make such division as is just under the facts of the particular case, without regard to the grounds or to which spouse is granted the divorce or separate maintenance. Thus, the court can award the spouse against whom a divorce is granted more than one-half of such damages if the equities of the situation so require.

Subdivision (c) specifically requires the court to take into account the economic conditions and needs of the parties and the time that has elapsed since the recovery of the damages as well as the other facts in the case. If the divorce or separate maintenance action is brought shortly after the damages are recovered, the court—absent special

circumstances—should award all or substantially all of such damages to the injured spouse. On the other hand, if a number of years has elapsed since the recovery of the damages, this fact alone may be sufficient reason to assign the personal injury damages to the respective parties in such proportions as the court determines to be just under the facts of the particular case.

Under prior law, personal injury damages were separate property and therefore were not subject to division on divorce or separate maintenance unless they had been converted into community property. This inflexible rule applied even where a substantial portion of such damages represented lost earnings that would have been received during the period of the marriage prior to the divorce. Subdivision (c) permits the court to avoid the injustice that sometimes resulted under former law.

Subdivision (c) applies even though money recovered for personal injury damages has been invested in securities or other property. However, if the amount received has been transmuted into ordinary community property, the subdivision does not apply. Such transmutation can be accomplished by agreement. See CIVIL CODE §§ 158-161. The parties may commingle the proceeds of an award with other community property. If the proceeds so commingled cannot be traced, they must be treated as ordinary community property and subdivision (c) is not applicable. *Cf. Metcalf v. Metcalf*, 209 Cal. App.2d 742, 26 Cal. Rptr. 271 (1962). Even though commingling falls short of the point where tracing becomes impossible, depositing the proceeds in the family bank account and using them for the support of the family may, under some circumstances, be sufficient evidence of an agreement to transmute the award into ordinary community property and to make subdivision (c) inapplicable. *Weinberg v. Weinberg*, 67 Cal.2d ____ [67 A.C. 567, 580-581] (1967). *Cf. Lawatch v. Lawatch*, 161 Cal. App.2d 780, 790, 327 P.2d 603, 608 (1958).

§ 163.5 (amended)

SEC. 2. Section 163.5 of the Civil Code is amended to read:

163.5. ~~All damages, special and general, awarded a married person in a civil action for personal injuries, are the separate property of such married person. All money or other property paid by or on behalf of a married person to his spouse in satisfaction of a judgment for damages for personal injuries to the spouse or pursuant to an agreement for the settlement or compromise of a claim for such damages is the separate property of the injured spouse.~~

Comment. Before enactment of Section 163.5 in 1957, damages received by a married person for personal injuries were community property. *Zaragosa v. Craven*, 33 Cal.2d 315, 202 P.2d 73 (1949). Section 163.5 made all damages awarded for personal injury to a married person the separate property of such person. *Lichtenauer v. Dorstewitz*, 200 Cal. App.2d 777, 19 Cal. Rptr. 654 (1962). Section 163.5 has been amended so that personal injury damages paid to a married person are separate property only if they are paid by the other spouse. In all other cases, the original rule—that personal injury

damages are community property—applies because the character of such damages is determined by Section 164 of the Civil Code.

§ 164.6 (new)

SEC. 3. Section 164.6 is added to the Civil Code, to read:
164.6. If a married person is injured by the negligent or wrongful act or omission of a person other than his spouse, the fact that the negligent or wrongful act or omission of the spouse of the injured person was a concurring cause of the injury is not a defense in any action brought by the injured person to recover damages for such injury except in cases where such concurring negligent or wrongful act or omission would be a defense if the marriage did not exist.

Comment. Section 164.6 is new. Section 163.5 was added in 1957 to overcome the holding in *Kesler v. Pabst*, 43 Cal.2d 254, 273 P.2d 257 (1954), that an injured spouse could not recover from a negligent tortfeasor if the other spouse were contributively negligent. The rationale in *Kesler* was that to permit recovery would allow the guilty spouse to profit from his own wrongdoing because of his community property interest in the damages. Section 163.5 made personal injury damages separate property so that the guilty spouse would not profit and his wrongdoing could not be imputed to the innocent spouse.

Section 163.5 has been amended to restore the original rule that personal injury damages are community property. To avoid revival of the rule of the *Kesler* case, Section 164.6 provides directly that the negligence or wrongdoing of the other spouse is not a defense to the action brought by the injured spouse except in cases where such negligence or wrongdoing would be a defense if the marriage did not exist.

§ 164.7 (new)

SEC. 4. Section 164.7 is added to the Civil Code, to read:
164.7. (a) Where an injury to a married person is caused in whole or in part by the negligent or wrongful act or omission of his spouse, the community property may not be used to discharge the liability of the tortfeasor spouse to the injured spouse or his liability to make contribution to any joint tortfeasor until the separate property of the tortfeasor spouse, not exempt from execution, is exhausted.

(b) This section does not prevent the use of community property to discharge a liability referred to in subdivision (a) if the injured spouse gives written consent thereto after the occurrence of the injury.

(c) This section does not affect the right to indemnity provided by any insurance or other contract to discharge the tortfeasor spouse's liability, whether or not the consideration given for such contract consisted of community property.

Comment. Section 164.7 is new. As a general rule, a married person's tort liability may be satisfied from either his separate property or the community property subject to his control. See Section 171a and the Comment to that section. Section 164.7 has been added to

require the tortfeasor spouse to resort first to his separate property to satisfy a tort obligation arising out of an injury to the other spouse. When the liability is incurred because of an injury inflicted by one spouse upon the other, it would be unjust to permit the guilty spouse to keep his separate estate intact while the community is depleted to satisfy an obligation resulting from his injuring the co-owner of the community.

Subdivision (b) permits the tortfeasor spouse to use community property before his separate property is exhausted if he obtains the written consent of the injured spouse *after* the occurrence of the injury. The limitation is designed to prevent an inadvertent waiver of the protection provided in subdivision (a) in a marriage settlement agreement or property contract entered into long prior to the injury.

Subdivision (c) is included to make it clear that Section 164.7 does not preclude the tortfeasor spouse from relying on any liability insurance policies he may have even though the premiums have been paid with community funds.

§ 169.3 (new)

SEC. 5. Section 169.3 is added to the Civil Code, to read:

169.3. (a) All money or other property received by a married person in satisfaction of a judgment for damages for his personal injuries or pursuant to an agreement for the settlement or compromise of a claim for such damages is the separate property of the injured person if such money or other property is received:

(1) After the rendition of a judgment or decree of separate maintenance;

(2) After the rendition of an interlocutory judgment of divorce and while the injured person and his spouse are living separate and apart;

(3) While the wife, if she is the injured person, is living separate from her husband; or

(4) After the wife has abandoned her husband, if he is the injured person, and before she has offered to return, unless her abandoning him was justified by his misconduct.

(b) Notwithstanding subdivision (a), if the spouse of the injured person has paid expenses by reason of his spouse's personal injuries from his separate property or from the community property subject to his management and control, he is entitled to reimbursement of his separate property or the community property subject to his management and control for such expenses from the separate property received by his spouse under subdivision (a).

Comment. Section 169.3 treats a recovery for personal injuries to a married person substantially the same as earnings and accumulations are treated under Civil Code Sections 169, 169.1, 169.2, and 175.

In some cases, medical or other expenses incurred by reason of the injury will be paid by the spouse of the injured person from his separate property or from the community property subject to his management and control. Subdivision (b) provides that the spouse of the in-

jured person is entitled to be reimbursed for these expenses from the personal injury damage recovery. In this respect, subdivision (b) adopts the same policy that is expressed in Section 171c.

§ 171a (amended)

SEC. 6. Section 171a of the Civil Code is amended to read:

171a. (a) ~~For civil injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be liable therefor, A married person is not liable for any injury or damage caused by the other spouse except in cases where he would be jointly liable with her therefor if the marriage did not exist.~~

(b) *The liability of a married person for death or injury to person or property may be satisfied only from the separate property of such married person and the community property of which he has the management and control.*

Comment. Prior to the enactment of Section 171a in 1913, a husband was liable for the torts of his wife merely because of the marital relationship. *Henley v. Wilson*, 137 Cal. 273, 70 Pac. 21 (1902). Section 171a was added to the code to overcome this rule and to exempt the husband's separate property and the community property subject to his control from liability for the wife's torts. *McClain v. Tufts*, 83 Cal. App.2d 140, 187 P.2d 818 (1947). The section was not intended to, and did not, affect the rule that one spouse may be liable for the tort of the other under ordinary principles of respondeat superior. *Perry v. McLaughlin*, 212 Cal. 1, 297 Pac. 554 (1931) (wife found to be husband's agent); *Ransford v. Ainsworth*, 196 Cal. 279, 237 Pac. 747 (1925) (husband found to be wife's agent); *McWhirter v. Fuller*, 35 Cal. App. 288, 170 Pac. 417 (1917) (operation of husband's car by wife with his consent raises inference of agency). Subdivision (a) revises the language of the section to clarify its original meaning.

Subdivision (b) has been added to eliminate any uncertainty over the nature of the property that is subject to the wife's tort liabilities. The subdivision is consistent with the California law to the extent that it can be ascertained. *Grolemund v. Cafferata*, 17 Cal.2d 679, 111 P.2d 641 (1941), held that the community property is subject to the husband's tort liabilities because of his right of management and control over the community. *McClain v. Tufts*, 83 Cal. App.2d 140, 187 P.2d 818 (1947), held that the community property is not subject to the wife's tort liabilities because of her lack of management rights over the community. Under the rationale of these cases, the enactment of Civil Code Section 171c in 1951—giving the wife the right of management over her earnings and personal injury damages—probably subjected the wife's earnings and personal injury damages to her tort liabilities, but no case so holding has been found.

The fact that separate property has been commingled with community property or that the wife's earnings have been commingled with other community property does not defeat the right of a judgment creditor to trace and reach such earnings. See *Tinsley v. Bauer*, 125 Cal. App.2d 724, 271 P.2d 116 (1954) (commingling of wife's earnings with other community property did not defeat right of judgment

creditor to trace and reach such earnings to satisfy judgment based on wife's quasi-contractual liability).

SAVINGS CLAUSE

SEC. 7. This act does not confer or impair any right or defense arising out of any death or injury to person or property occurring prior to the effective date of this act.

Comment. This act changes the nature of personal injury damages from separate to community property. To avoid making any change in rights that may have become vested under the prior law, the act is made inapplicable to causes of action arising out of injuries that occurred prior to its effective date. Note, however, that the amendment to Section 171a appears to codify preexisting law.

II

An act to amend Section 171c of the Civil Code, relating to community property.

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

Civil Code § 171c (amended)

SECTION 1. Section 171c of the Civil Code is amended to read:

171c. Notwithstanding the provisions of Section 161a and 172 of this code, ~~and subject to the provisions of Sections 164 and 169 of this code,~~ the wife has the management, and control and disposition, ~~other than testamentary except as otherwise permitted by law,~~ of the community personal property ~~money~~ earned by her, and the community personal property received by her in satisfaction of a judgment for damages for personal injuries suffered by her or pursuant to an agreement for the settlement or compromise of a claim for such damages, until it is commingled with ~~other~~ community property subject to the management and control of the husband, except that the husband may use such community property received as damages or in settlement or compromise of a claim for such damages to pay for expenses incurred by reason of the wife's personal injuries and to reimburse his separate property or the community property subject to his management and control for expenses paid by reason of the wife's personal injuries.

During such time as The wife may have the management, control and disposition of such money, as herein provided, she may not make a gift thereof of the community property under her management and control, or dispose of the same without a valuable consideration, without the written consent of the husband. The wife may not make a testamentary disposition of

such community property except as otherwise permitted by law.

This section shall not be construed as making such ~~money earnings or damages or property received in settlement or compromise of such damages~~ the separate property of the wife, nor as changing the respective interests of the husband and wife in such ~~money~~ community property, as defined in Section 161a of this code.

Comment. Prior to 1957, Section 171c provided that the wife had the right to manage and control her personal injury damages. When Section 163.5 was enacted to make such damages separate instead of community property, the provisions of Section 171c giving the wife the control over her personal injury damages were deleted. Since the amendment of Section 163.5 again makes personal injury damages community instead of separate property, Section 171c is amended to restore the provisions relating to the wife's right to manage her personal injury damages.

The personal injury damages covered by Section 171c are only those damages received as community property. Damages received by the wife from her husband are separate property under Section 163.5. Other damages are made separate property by Section 169.3. Section 171c does not give the husband any right of reimbursement from these damages since they are received as separate property. Section 169.3, however, gives the spouse of the injured person a similar right to reimbursement from damages received as separate property under that section.

Section 171c has been revised to refer to "personal property" instead of "money." This change is designed to eliminate the uncertainty that existed under the former language concerning the nature of earnings and damages that were not in the form of cash. The husband, of course, retains the right to manage and control the community real property under Section 172a.

The reference to Sections 164 and 169 has been deleted as unnecessary; neither section is concerned with the right to manage and control community property.

When act becomes effective

SEC. 2. This act shall become effective only if Assembly Bill No. --- is enacted by the Legislature at its 1968 Regular Session, and in such case this act shall take effect at the same time that Assembly Bill No. --- takes effect.

Note: The bill referred to is the first of the two proposed measures contained in this recommendation.

APPENDIX XIV

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

**Service of Process on Unincorporated
Associations**

September 1967

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

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted. They are cast in this form because their primary purpose is to undertake to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

CALIFORNIA LAW REVISION COMMISSION

SCHOOL OF LAW
STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305



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Ex Officio

September 1, 1967

To HIS EXCELLENCY, RONALD REAGAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was directed by Resolution Chapter 9 of the Statutes of 1966 to make a study to determine whether the law relating to suits by and against partnerships and other unincorporated associations should be revised.

The Commission published a recommendation and study on this subject in October 1966. See *Recommendation and Study Relating to Suit By or Against An Unincorporated Association*, 8 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 901 (1967). Senate Bill No. 251 was introduced at the 1967 session of the Legislature to effectuate this recommendation and was enacted as Chapter 1324 of the Statutes of 1967.

The Commission has reviewed the legislation enacted in 1967. As a result of this review, the Commission submits this recommendation.

Respectfully submitted,

RICHARD H. KEATINGE
Chairman

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

Service of Process on Unincorporated Associations

In 1967, subdivision 2.1 was added to Section 411 of the Code of Civil Procedure to prescribe the manner of service on an unincorporated association. This amendment to Section 411 was included in legislation enacted upon recommendation of the Law Revision Commission to make a number of procedural changes in the law relating to suits by and against incorporated associations.¹

Prior to the enactment of subdivision 2.1, service of process could be made upon an unincorporated association by serving any member of the association.² There was no requirement that the plaintiff notify any responsible officer of the association of the commencement or pendency of the action. A plaintiff could, therefore, serve a member who had only a marginal interest in the association or whose interests were actually more closely identified with those of the plaintiff than with those of the association. To remedy this situation, the Commission recommended in substance that the plaintiff be permitted to serve a member of the association only if (1) none of the responsible officers of the association could be found in this state after diligent search and (2) the agent for service of process, if one had been designated by the association, could not be found at the address indicated in the index maintained by the Secretary of State.

The Commission's recommendation was unacceptable to the Legislature because it imposed an undue procedural burden on the plaintiff; in cases in which no agent had been designated, it would have required the plaintiff to establish that he could not find any of the responsible officers of the association before he was permitted to serve a member of the association. Although Code of Civil Procedure Section 411 imposes a similar requirement for service on a domestic corporation, Corporations Code Section 3301 requires that a domestic corporation file with the Secretary of State a statement of the names of the principal officers of the corporation and the address of its principal office. No equivalent record is available for an unincorporated association.

Under subdivision 2.1 as enacted, if the unincorporated association has designated an agent for service of process (as permitted by Section 24003 of the Corporations Code), process must be served on the agent. If no agent has been designated, or if the agent cannot be found at his address as specified in the index maintained by the Secretary of State, service may be made by delivering a copy of the document to a member of the association and mailing a copy to the association at its last known mailing address.

¹ See *Recommendation and Study Relating to Suit By or Against An Unincorporated Association*, 8 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 901 (1967).
See also Cal. Stats. 1967, Ch. 1324.

² See Comment to Section 411 in *Report of Assembly Committee on Judiciary on Senate Bill No. 251*, ASSEMBLY J. (July 6, 1967), p. 4998.

Subdivision 2.1 thus precludes service on a responsible officer of the association if the association has designated an agent for service of process. The plaintiff may safely serve an officer (or other member) only after he has been advised by the office of the Secretary of State that the association has not designated an agent for service of process. In its present form, subdivision 2.1 thus imposes a significant procedural burden on the plaintiff. It also may operate as a trap for the unwary. For example, service on a partner may not be effective service on the partnership if the partnership has designated another person as its agent for service of process. In such a case, service on the partner is effective service on the partnership only if it is established that the designated agent cannot be found at his address as shown in the index maintained by the Secretary of State.

To eliminate this technical defect, the Commission recommends that subdivision 2.1 be revised to permit service on either the designated agent or a responsible officer even where the association has designated an agent. This would permit a plaintiff who knows the identity of a partner or responsible officer to serve such partner or officer without first checking with the Secretary of State to determine whether the association has designated an agent for service of process. No change is recommended in the existing law insofar as it permits service on any member of the association in any case where the association has not designated an agent or where the designated agent cannot be found at his address as shown in the index maintained by the Secretary of State. The recommended revision of subdivision 2.1 would not defeat the objective of the 1967 legislation; the association can assure that its agent for service of process or a responsible officer of the association will obtain notice of any action against it merely by designating an agent for service of process as permitted by Corporations Code Section 24003.

The Commission further recommends that the recommended legislation contain an urgency clause so that it will take effect immediately upon enactment rather than on the sixty-first day after the final adjournment of the session. This will minimize the possibility that some plaintiffs will inadvertently fail to perfect service because they are unaware of the change made in the former law by the 1967 legislation.

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Section 411 of the Code of Civil Procedure, relating to manner of service of summons, and declaring the urgency thereof, to take effect immediately.

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

SECTION 1. Section 411 of the Code of Civil Procedure is amended to read:

411. The summons must be served by delivering a copy thereof as follows:

1. If the suit is against a domestic corporation: to the president or other head of the corporation, a vice president,

a secretary, an assistant secretary, general manager, or a person designated for service of process or authorized to receive service of process. If such corporation is a bank, to any of the foregoing officers or agents thereof, or to a cashier or an assistant cashier thereof. If no such officer or agent of the corporation can be found within the state after diligent search, then to the Secretary of State as provided in Sections 3301 to 3304, inclusive, of the Corporations Code, unless the corporation be of a class expressly excepted from the operation of those sections.

2. If the suit is against a foreign corporation, or a non-resident joint stock company or association, doing business in this state: in the manner provided by Sections 6500 to 6504, inclusive, of the Corporations Code.

2.1. If the suit is against an unincorporated association (not including a foreign partnership covered by Section 15700 of the Corporations Code): if the ~~unincorporated~~ association has designated an agent for service of process as provided in Section 24003 of the Corporations Code, to the person so designated ~~as agent for service of process or to the president or other head of the association, a vice president, secretary, general manager, or general partner~~. If no person has been designated as agent for service of process as provided in Section 24003 of the Corporations Code, or if the person so designated cannot be found at his address as specified in the index referred to in Section 24004 of the Corporations Code, then to any one or more of the association's members and by mailing a copy thereof to the association at its last known mailing address.

2.2. If the suit is against a foreign partnership covered by Section 15700 of the Corporations Code: in the manner provided by Section 15700 of the Corporations Code.

3. If the suit is against a minor, under the age of 14 years, residing within this state: to such minor, personally, and also to his father, mother, or guardian; or if there be none within this state, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed.

4. If the suit is against a person residing within this state and for whom a guardian or conservator has been appointed: to such person, and also to his guardian or conservator.

5. Except as otherwise specifically provided by statute, in an action or proceeding against a local or state public agency, to the clerk, secretary, president, presiding officer or other head thereof or of the governing body of such public agency. "Public agency" includes (1) every city, county, and city and county; (2) every public agency, authority, board, bureau, commission, corporation, district and every other political subdivision; and (3) every department and division of the state.

6. In all cases where a corporation has forfeited its charter or right to do business in this state, or has dissolved, by delivering a copy thereof to one of the persons who have become the trustees of the corporation and of its stockholders or members; or, in a proper case, as provided in Sections 3305 and 3306 of the Corporations Code.

7. If the suit is one brought against a candidate for public office and arises out of or in connection with any matter concerning his candidacy or the election laws and said candidate cannot be found within the state after diligent search, then as provided for in Section 54 of the Elections Code.

8. In all other cases to the defendant personally.

Comment. Subdivision 2.1 was added to Section 411 in 1967 to prescribe the manner of service of process on an unincorporated association. Under the subdivision as originally added, if an agent for service of process had been designated by the association, service could only be made on the person designated. The subdivision is amended to provide that service may be made on the association by delivering a copy of the process to one of the responsible officers referred to in the subdivision, whether or not the association has designated an agent for service of process. No change is made in the provision that, if the association has not designated an agent or if the agent designated cannot be found at the address set forth in the index in the office of the Secretary of State, service may be effected by delivering a copy of the process to any member of the association and mailing a copy to its last known address. Accordingly, the plaintiff should determine whether an agent for process has been designated before he makes service on a member who is not one of the officers referred to in the subdivision.

SEC. 2. This act is an urgency statute necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

In 1967, subdivision 2.1 was added to Section 411 of the Code of Civil Procedure to prescribe the manner of service of process on unincorporated associations. As added, the subdivision requires that, if an agent for service of process has been designated by the association, service may be made only upon the agent designated. Hence, if an agent has been designated, service upon the association is not effected by serving the president, vice president, secretary, general manager, or general partner of the association. As the purpose of the change made in 1967 was only to preclude service on a mere member of the association if an agent had been designated, there was no need to preclude service upon a responsible officer even though an agent had been designated. The effect of this feature of the change has been to require plaintiffs to ascertain whether an agent has been designated in every case, including those in

which the plaintiff is well aware of the identity of the responsible officers. This change in longstanding practice (*e.g.*, effecting service on a partnership by serving a general partner) may also cause some plaintiffs inadvertently to fail to perfect service. To overcome these problems by permitting service to be made upon a responsible officer, as well as the designated agent, it is necessary that this act take effect immediately.

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