Commissioner Primarily Responsible: Stanton

9/10/68

Memorandum 68-80

Subject: Program Budget and Five-Year Schedule of Projects

Management Memo No. 68-30 (Department of Finance) requests each state agency to make a searching reappraisal of the programs for which it is responsible. A copy of this memo is attached (gold sheets). An examination of the memo will reveal that the Department of Finance is concerned that each state agency establish a need for its program or programs, that the output of the agency justify the cost of the program, and that the agency take effective measures to reduce the cost of the program.

The Department of Finance has scheduled a one-hour hearing on the program, output, and cost reduction efforts of the Law Revision Commission on September 23 in Sacramento. (All agencies will have a similar hearing.) The department requested that the Commission provide the materials required by Management Memo No. 68-30 as early in September as possible. We are today transmitting to the Department of Finance the attached materials entitled "Policy and Program Hearing Materials for the California Law Revision Commission," which includes a copy of Exhibits I and II of this memorandum. Suggestions from members of the Commission for revisions or supplements to the attached material (these changes will be included in the oral presentation on September 23) are sought.

One requirement of Program Budgeting is a five-year schedule of activities. Memorandum 68-1, which was discussed at the first Commission meeting held in 1968, presented this matter for Commission decision, but Commission action was deferred until the new Commissioners had had an opportunity to become familiar with the activities of the Commission. We are, however, required to have a five-year schedule of projects and

to keep it up to date. Accordingly, the staff has prepared Exhibit I (pink)--a suggested five-year schedule of activities for the Law Revision Commission. It is difficult to project our activities for a five-year period because we must be responsive to legislative desires as to priorities and topics. Nevertheless, the staff believes that the suggested five-year schedule represents a realistic schedule based on past experience as to what the Commission can reasonably be expected to accomplish. (Because of the turnover in Commission membership during 1967-68, we do not consider the low output for the 1968 and 1969 legislative sessions to be representative of the output that can reasonably be expected of the Commission.) The determinations that the Commission makes on the recommendations listed in the five-year schedule to be submitted to the 1969 Legislature after the Commission has considered comments from interested persons may result in some recommendations being dropped from the 1969 legislative program and require that the five-year schedule be modified accordingly.

Exhibit II (yellow) is a listing of each topic authorized for study with an indication as to the status of each topic.

Also attached is a copy of a statement concerning "Fees and User Charges--California Law Revision Commission." In compliance with a requirement of the Department of Finance, we are submitting this statement prior to our policy and program hearing. The statement reflects the past decisions of the Commission on charging for its publications. If any member of the Commission wishes to discuss this material or to suggest changes in policy, he should make his suggestions at the meeting.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

SUGGESTED 5-YEAR SCHEDULE OF PROJECTS

OCTOBER 1968 - JANUARY 1970

Legislative Consideration of Recommendations to 1969 Legislature

Powers of Appointment

Leases

Additur and Remittitur

Evidence Code (Revisions of Privileges Article)

Sovereign Immunity (Statute of Limitations in Actions Against Public Entities and Public Employees)

Mutuality of Remedies in Suits for Specific Performance

Topics to be added to or dropped from Agenda of Topics (to be determined)

Preparation of Recommendations to 1970 Legislature

Fictitious Business Name Statute

Sovereign Immunity (Prisoners and Mental Patients)

Civil Code Section 1698 (Oral modification of contract in writing)

Code of Civil Procedure Section 1974 (Writing required to hold person liable for representation as to credit of third person)

Work on Other Topics

Condemnation Law and Procedure (TOP PRIORITY)

Inverse Condemnation (TOP PRIORITY)

Evidence Code

Revisions of Business and Professions Code

Revisions of Civil Code

Arbitration

Consideration of Recommendations to 1969 Legislature That Are Not Enacted

JANUARY 1970 - JANUARY 1971

Legislative Consideration of Recommendations to 1970 Legislature

Fictitious Business Name Statute

Sovereign Immunity (Prisoners and Mental Patients)

Condemnation Law and Procedure (Right to Enter for Survey or Examination)

Civil Code Section 1698 (Oral modification of contract in writing)

Code of Civil Procedure Section 1974 (Writing required to hold person liable for misrepresentation as to credit of third person)

Topics to be added to or dropped from Agenda of Topics (to be determined)

Preparation of Recommendations to 1971 Legislature

Condemnation Law and Procedure (The Right to Take)

Evidence Code

Revisions of Business and Professions Code

Revisions of Civil Code

Revisions of the Code of Civil Procedure

Arbitration

Work on Other Topics

Condemnation Law and Procedure (TOP PRIORITY)

Inverse Condemnation (TOP PRIORITY)

Consideration of Recommendation to 1970 Legislature That Are Not Enacted

Additional Topics (to be determined on basis of priorities and assignments given by legislative committees)

JANUARY 1971 - JANUARY 1972

Legislative Consideration of Recommendations to 1971 Legislature

Condemnation Law and Procedure (The Right to Take)

Evidence Code

Revisions of Business and Professions Code

Revisions of Civil Code

Revisions of Code of Civil Procedure

Arbitration

Topics to be added to or dropped from Agenda of Topics (to be determined)

Preparation of Recommendations to 1972 Legislature

Condemnation Law and Procedure (Comprehensive Statute)

Other Topics (to be determined on basis of priorities and assignments given by legislative committees)

Work on Other Topics

Inverse Condemnation (TOP PRIORITY)

Other Topics (to be determined on basis of priorities and assignments given by legislative committees)

Consideration of Recommendations to 1971 Legislature That Were Not Enacted

JANUARY 1972 - JANUARY 1973

Legislative Consideration of Recommendations to 1972 Legislature

Condemnation Law and Procedure (Comprehensive Statute)

Other Topics (to be determined on basis of priorities and assignments given by legislative committees)

Preparation of Recommendations to 1973 Legislature

Inverse Condemnation

Work on Other Topics

To be determined on basis of priorities and assignments given by legislative committees

JANUARY 1973 - JANUARY 1974

Priorities to be determined on basis of priorities and assignments given by legislative committees

Memo 68-80

EXHIBIT II

TOPICS AUTHORIZED FOR 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 (Cal. Stats. 1965, Res. Ch. 130, p. 5289).

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. The first three portions of his research study have been completed and published. See Van Alstyne *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727 (1967); *Modernizing Inverse Condemnation: A Legislative Prospectus*, 8 SANTA CLARA LAWYER 1 (1967); and *Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction*, 20 STAN. L. REV. 617 (1968). Additional portions of the study are in preparation. One additional portion will be published by the Hastings Law Journal early in 1969.

This topic has proved to be much more difficult and complex than was anticipated when work on the topic was commenced. Professor Van Alstyne has found that it is not possible to produce the study on a schedule that will permit us to submit a comprehensive recommendation prior to the 1973 Legislature. Moreover, the Commission's study of the four portions of the study already prepared indicates that it will not be possible to prepare legislation covering many aspects of inverse condemnation. Thus, although recommendations covering individual aspects of this subject may be submitted to the Legislature before 1973, it is unlikely that work on this topic can be substantially completed prior to the 1973 Legislature.

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] 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*, 8 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 8 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. 2990 (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). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS 60 (1969). See also Cal. Stats. 1968, Ch. 133.

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.

will soon be

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 submitted a second recommendation to the 1968 Legislature relating to the recovery of the condemnee's expenses on abandonment of an eminent domain proceeding.[2]

[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.

[2] See *Recommendation Relating to Recovery of Condemnee's Expenses on Abandonment of an Eminent Domain Proceeding*, 8 CAL. L. REVISION COMM'N REPORTS 1361 (1967). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS 60 (1969). See also Cal. Stats. 1968, Ch. 133.

Whether the doctrine of sovereign or governmental immunity in California should be abolished or revised (Cal. Stats. 1957, Res. Ch. 202, p. 4589).[3]

[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—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).

Sovereign immunity legislation was enacted in 1963 and 1965 upon recommendation of the Commission. The Commission is continuing to study this subject[4] and, as a result of this review, [redacted] **plans to submit a recommendation relating to the statute of limitations in actions against public entities and public employees to the 1969 Legislature and may submit recommendations to future sessions of the Legislature.**

[4] Since the publication of its last Annual Report, the Commission has reviewed the following: Chotiner, *California Government Tort Liability*, 42 CAL. S.B.J. 223 (1968); Notes on the California Tort Claims Act, 19 HASTINGS L. J. at 561 (1968); *The Discretionary Immunity Doctrine in California*), 573 (*California Public Entity Immunity From Tort Claims by Prisoners*), and 584 (*Sovereign Liability for Defective or Dangerous Plan or Design—California Government Code Section 830.6*) (1968); Note, *Liability of California Municipalities for Damage Caused by Riots*, 3 LINCOLN L. REV. 62 (1967); Note, *California Tort Claims Act: Discretionary Immunity*, 39 SO. CAL. L. REV. 470 (1966). The Commission has also considered the decisions of the California Supreme Court and Courts of Appeal interpreting and applying the sovereign immunity legislation.

Whether the Evidence Code should be revised (Cal. Stats. 1965, Res. Ch. 130, p. 5289).[2]

[2] 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. 262 (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).

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] **and will submit a recommendation to the 1969 Legislature that certain revisions be made in the Privileges Article of the Evidence Code.**

[3] See *Recommendation Relating to the Evidence Code: Number 1—Evidence Code Revisions* (October 1966). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS at 1315 (1967).

Since the publication of its last Annual Report, the Commission has reviewed the following: Alexander, *California's New Evidence Code: Changes in the Law of Privileged Communications Relating to Psychotherapy*, 1 V. SAN FERNANDO VALLEY L. REV. 56 (1967); Harvey, *Evidence Code Section 1224—Are an Employee's Admissions Admissible Against His Employer?*, 8 SANTA CLARA LAWYER 59 (1967); Note, *Impeaching the Accused by His Prior Crimes: A New Approach to an Old Problem*, 19 HASTINGS L. J. 919 (1968); Note, *Admissibility of an Agent's Declarations Against His Employer Under Evidence Code Section 1224*, 19 HASTINGS L. J. 1395 (1968); Note, *Markley v. Beagle: Rewriting the New Evidence Code*, 4 CAL. WESTERN L. REV. 210 (1968). The Commission also considered the decisions of the California Supreme Court and Courts of Appeal interpreting and applying the Evidence Code. The Commission has also considered letters from judges and attorneys.

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 Code [5] and the Commercial Code [6] 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.

[4] Concerning this project, see Mollnari, *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 8 CAL. L. REVISION COMM'N REPORTS at 1316 (1967). 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 8 CAL. L. REVISION COMM'N REPORTS at 1316 (1967). See also Cal. Stats. 1967, Ch. 703.

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)).

The study of this topic was authorized by the Legislature in 1957 as a part of the study on suit by and against unincorporated associations. The pertinent portion of the Commission's request for authority to study this topic is set out below.

> Sections 2466 to 2471 of the Civil Code also have a bearing on the right of partnerships and unincorporated associations to sue. These sections provide, *inter alia*, that a partnership doing business under a fictitious name cannot maintain suit on certain causes of action unless it has filed a certificate naming the members of the partnership,[54] and that a new certificate must be filed when there is a change in the membership.[55] These provisions, which have been held to be applicable to unincorporated associations,[56] impose a burden on partnerships and associations.
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> [54] CAL. CIV. CODE § 2468.
> [55] Id., § 2469.
> [56] Kaplan Fig Assn. v. Case-Swayne Co., 73 Cal. App.2d 796, 167 P.2d 518 (1946).

The Commission plans to submit a recommendation on this topic to the 1970 Legislature.

Whether the law relating to arbitration should be revised (Cal. Stats. 1968, Res. Ch. 110).[2]

[2] This is a supplemental study; the present California arbitration law was enacted in 1961 upon Commission recommendation. See *Recommendation and Study Relating to Arbitration*, 3 CAL. L. REVISION COMM'N REPORTS at G-1 (1961). For a legislative history of this recommendation, see 4 CAL. L. REVISION COMM'N REPORTS 15 (1963). See also Cal. Stats. 1961, Ch. 461.

Code of Civil Procedure Sections 1280 to 1294.2, relating to arbitration, were enacted in 1961[1] 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 jurisdictions[4] 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. 1516.

[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 § 342. See 1951 HANDBOOK, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 119-123; Sturges, *Common Law and Statutory Arbitration Problems Arising From Their Coexistence*, 31 MINN. L. REV. 349, 361 (1947); 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. § 1-567; UTAH CODE ANN. § 78-31-12. Wyoming Laws of 1927, Ch. 96, § 12 (repealed 1955). 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 arbitration by the Federal Arbitration Act, 9 U.S.C. § 8.

The 1955 Uniform Arbitration Act originally provided for provisional remedies. 1951 HANDBOOK, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 266. The section was deleted, apparently because of a fear of excess labor injunctions. For discussion, see Salvucci v. Sheehan, 349 Mass. 659, 662-663, 212 N.E.2d 243, 245 (1965).

[5] Salvucci v. Sheehan, 349 Mass. 658, 212 N.E.2d 243 (1965); Amerinach v. Grand Nat'l Pictures, Inc., 176 Misc. 1051, 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 case[9] 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.

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[7] 213 Cal. App.2d 276, 30 Cal. Rptr. 31 (1963).
[8] 251 A.C.A. 853, 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., 223 Cal. App.2d 385, 35 Cal. Rptr. 218 (1963).

A study to determine whether Civil Code Section 1698 should be repealed or revised.

Section 1698 of the Civil Code, which provides that a contract in writing may be altered by a contract in writing or by an executed oral agreement and not otherwise, might be repealed. It frequently frustrates contractual intent. Moreover, two avoidance techniques have been developed by the courts which considerably limit its effectiveness.[64] One technique is to hold that a subsequent oral agreement modifying a written contract is effective because it is executed, and performance by one party only has been held sufficient to render the agreement executed.[65] The second technique is to hold that the subsequent oral agreement rescinded the original obligations[66] and substituted a new contract, that this is not an "alteration" of the written contract and, therefore, that Section 1698 is not applicable.[67] These techniques are not a satisfactory method of ameliorating the rule, however, because it is necessary to have a lawsuit to determine whether Section 1698 applies in a particular case.

If Section 1698 is to be retained, the question arises whether it should apply to all contracts in writing, whether or not required to be written by the statute of frauds or some other statute. It is presently held to apply to all contracts in writing[68] and is thus contrary to the common law rule and probably contrary to the rule in all other states. This interpretation has been criticized by both Williston and Corbin who suggest that the language is the result of an inaccurate attempt to codify the common law rule that contracts required to be in writing can only be modified by a writing.[69]

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[64] See Note, 4 HASTINGS L.J. 59 (1952).
[65] D. L. Godbey & Sons Const. Co. v. Deane, 39 Cal.2d 429, 246 P.2d 946 (1952).
[66] Civil Code Section 1689 permits rescission of a contract by mutual assent.
[67] McClure v. Alberti, 190 Cal. 348, 212 Pac. 204 (1922) (rescission of executory written contract by oral agreement); Treadwell v. Nickel, 194 Cal. 242, 228 Pac. 25 (1924) (rescission of written contract by substituted oral contract).
[68] P. A. Smith Co. v. Muller, 201 Cal. 216, 256 Pac. 411 (1927).
[69] 2 CORBIN, CONTRACTS § 301 (1951); 6 WILLISTON, CONTRACTS § 1823 (Rev. ed. 1938).

We plan to prepare a staff study on this topic when time permits.

A study to determine whether Section 1974 of the Code of Civil Procedure should be repealed or revised.

Section 1974 of the Code of Civil Procedure, enacted in 1872, provides that no evidence is admissible to charge a person upon a representation as to the credit of a third person unless the representation, or some memorandum thereof, be in writing and either subscribed by or in the handwriting of the party to be charged. Section 1974 is open to the criticism commonly leveled at statutes of frauds, that they shelter more frauds than they prevent. This result has been avoided by the courts to a considerable extent with respect to the original Statute of Frauds by liberal construction of the Statute and by creating numerous exceptions to it.[63] However, Section 1974 has been applied strictly in California. For example, in *Baron* v. *Lange*[64] an action in deceit failed for want of a memorandum against a father who had deliberately misrepresented that his son was the beneficiary of a large trust and that part of the principal would be paid to him, thus inducing the plaintiff to transfer a one-third interest in his business on the son's note.

Only a few states have statutes similar to Section 1974.[65] The courts of some of these states have been more restrictive in applying the statute than has California. Thus, some courts have held or said that the statute does not apply to misrepresentations made with intention to defraud[66] but fraudulent intent will not avoid Section 1974.[67] Again, some states hold the statute inapplicable when the defendant had an interest in the action induced,[68] but this interpretation was rejected in *Bank of America* v. *Western Constructors, Inc.*[69] And in *Carr* v. *Tatum*[70] the California court failed to apply two limitations to Section 1974 which have been applied to similar statutes elsewhere: (1) construing a particular statement to be a misrepresentation concerning the value of property rather than one as to the credit of a third person;[71] (2) refusing to apply the statute where there is a confidential relationship imposing a duty of disclosure on the defendant.[72] Indeed, the only reported case in which Section 1974 has been held inapplicable was one where the defendant had made the representation about a corporation which was his alter ego, the court holding that the representation was not one concerning a third person.[73]

Section 1974 was repealed as a part of an omnibus revision of the Code of Civil Procedure in 1901[74] but this act was held void for unconstitutional defects in form.[75]

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[63] See *e.g.*, Willis, *The Statute of Frauds—A Legal Anachronism*, 3 Ind. L. J. 427, 528 (1928); 2 Corbin, Contracts, *passim* (1950).
[64] 92 Cal. App.2d 718, 207 P.2d 611 (1949).
[65] 5 Williston, Contracts §1620A, p. 4257 (rev. ed. 1937); *Credit—Representations—Writing*, 33 A.L.R.2d 742, 744 n. 3 (1953).
[66] See *e.g.*, Clark v. Dunham Lumber Co., 86 Ala. 220, 5 So. 560 (1889); W. G. Jenkins & Co. v. Standrod, 46 Idaho 614, 269 Pac. 586 (1928) (dictum); *cf.* Bank of Commerce & Trust Co. v. Schooner, 263 Mass. 199, 160 N.E. 799 (1928).
[67] Beckford v. Shusher, 22 Cal. App.2d 659, 667, 71 P.2d 820, 824 (1937); Carr v. Tatum, 133 Cal. App. 274, 24 P.2d 195 (1933); *cf.* Cutler v. Bowes, 10 Cal. App.2d 31, 51 P.2d 164 (1935). *Accord:* Cook v. Churchman, 104 Ind. 141, 3 N.E. 759 (1885); Knight v. Rawlings, 205 Mo. 412, 104 S.W. 58 (1907).
[68] See *e.g.*, Dinsmore v. Jacobsen, 242 Mich. 192, 218 N.W. 760 (1928).
[69] 110 Cal. App.2d 166, 242 P.2d 366 (1952).
[70] 133 Cal. App. 274, 24 P.2d 195 (1933).
[71] Walker v. Russell, 126 Mass. 65, 71 N.E. 56 (1904) (representation as to the financial credit of a corporation, made to induce the purchase of shares in the corporation, held to be a representation of fact bearing upon value of the shares and thus not within the statute).
[72] See *e.g.*, W. G. Jenkins & Co. v. Standrod, 46 Idaho 614, 269 Pac. 586 (1928) (misrepresentation made in violation of fiduciary relationship held not within statute).
[73] Grant v. United States Electronics Corp., 125 Cal. App.2d 193, 270 P.2d 64 (1954).
[74] Cal. Stat. 1901, c. 102, p. 117.
[75] Lewis v. Dunne, 134 Cal. 291, 66 Pac. 478 (1901).

We plan to prepare a staff study on this topic when time permits.

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]

[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).

Legislation recommended by the Commission on this subject was submitted to the 1967 Legislature. The Commission withdrew its recommendation that the legislation be enacted after it concluded that several problems needed further study. The Commission plans to submit a recommendation on this topic to the 1969 Legislature.

Whether the law relating to a power of appointment should be revised (Cal. Stats. 1965, Res. Ch. 130, p. 5289).

The Legislature directed that the Commission study this topic. The Commission plans to submit a comprehensive statute for enactment by the 1969 Legislature.

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).[4]

[4] 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.

Legislation on additur was enacted by the 1967 Legislature on recommendation of the Commission. However, because of a recent decision of the California Supreme Court, the legislation as enacted does not reflect the decisional law which authorizes additurs in cases not stated in the statute. The Commission plans to submit a recommendation to the 1969 Legislature to conform the statute to the Supreme Court decision and to also provide statutory recognition for remittitur.

A study to determine whether the law relating to the doctrine of mutuality of remedy in suits for specific performance should be revised.

Civil Code Section 3386 provides:

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

Section 3386 states substantially the doctrine of mutuality of remedy in suits for specific performance as it was originally developed by the Court of Chancery. The doctrine has been considerably modified in most American jurisdictions in more recent times. Today it is not generally necessary, to obtain a decree of specific performance, to show that the plaintiff's obligation is specifically enforceable, so long as there is reasonable assurance that plaintiff's performance will be forthcoming when due. Such assurance may be provided by the plaintiff's past conduct, or his economic interest in performing, or by granting a conditional decree or requiring the plaintiff to give security for his performance.[57]

Civil Code Section 3386 states a much more rigid rule. It is true that Section 3386 is considerably ameliorated by Civil Code Sections 3388, 3392, 3394 and 3423(5) and by court decisions granting specific performance in cases which would fall within a strict application of the doctrine of mutuality of remedy.[58] On the other hand, the mutuality requirement has in some cases been applied strictly, with harsh results.[59]

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

[57] 5 CORBIN, CONTRACTS § 1150 (1951); 5 WILLISTON, CONTRACTS § 1440 (Rev. ed. 1937).

[58] See e.g., Miller v. Dyer, 20 Cal.2d 525, 127 P.2d 901 (1942); Magee v. Magee, 174 Cal. 276, 162 Pac. 1023 (1917); Calanchini v. Branstetter, 34 Cal. 249, 94 Pac. 149 (1920); Vassault v. Edwards, 13 Cal. 458 (1872).

[59] See e.g., Poultry Producers v. Barlow, 189 Cal. 278, 208 Pac. 93 (1922); Linehan v. Devincenzo, 170 Cal. 307, 149 Pac. 584 (1915); Pacific etc. Ry. Co. v. Campbell-Johnston, 153 Cal. 166, 94 Pac. 623 (1908).

The Commission plans to submit a recommendation on this topic to the 1969 Legislature.

A study to determine whether the law respecting jurisdiction of courts in proceedings affecting the custody of children should be revised.

There are in this State various kinds of statutory proceedings relating to the custody of children. Civil Code Section 138 provides that in actions for divorce or separate maintenance the court may make an order for the custody of minor children during the proceeding or at any time thereafter and may at any time modify or vacate the order. Civil Code Section 199 provides that, without application for divorce, a husband or wife may bring an action for the exclusive control of the children; and Civil Code Section 214 provides that when a husband and wife live in a state of separation, without being divorced, either of them may apply to any court of competent jurisdiction for divorce proceeding under Civil Code Section 138 or a guardianship proceeding under Probate Code Section 1440? (c) If a guardian has been appointed under Probate Code Section 1440, may a divorce court or a court acting pursuant to Civil Code Sections 199 or 214 later award custody to the parent who is not the guardian?

A few of these matters were clarified by the decision of the California Supreme Court in *Greene* v. *Superior Court*,[67] holding that a divorce court which had awarded custody pursuant to Civil Code Section 138 has continuing jurisdiction and a court in another county has no jurisdiction to appoint a guardian of the children under Probate Code Section 1440. The Supreme Court stated that the general objective should be to avoid "unseemly conflict between courts"[68] and indicated that a proper procedure would be to apply to the divorce court for a change of venue to the county where the children reside.[69]

It is not clear whether the exclusive jurisdiction principle of the *Greene* case either will or should be applied in all of the situations in which the question may arise. An exception should perhaps be provided at least in the case where a divorce action is brought after a custody or guardianship award has been made pursuant to Civil Code Sections 199 or 214 or Probate Code Section 1440, on the ground that it may be desirable to allow the divorce court to consider and decide all matters of domestic relations incidental to the divorce.[70]

(3) There appear to be at least two additional problems of jurisdiction arising under the statutory provisions relating to custody of children. One is whether a court awarding custody under Civil Code Section 214 has continuing jurisdiction to modify its order. Although both Sections 138 and 199 provide that the court may later modify or amend a custody order made thereunder, Section 214 contains no such provisions. Another problem is the apparent conflict between Section 199 and Section 214 in cases where the parents are separated. Section 199 presumably can be used to obtain custody by any married person, whether separated or not, while Section 214 is limited to those persons living "in a state of separation." The two sections differ with respect to the power of the court to modify its order and also with respect to whether someone other than a parent may be awarded custody.

[67] 37 Cal. 2d 307, 231 P. 2d 821 (1951).
[68] *Id.* at 311, 231 P. 2d at 823.
[69] *Id.* at 312, 231 P. 2d at 823.
[70] Another exception might be desirable in a proceeding under the Juvenile Court Law to declare a minor a ward of the court. See Smith v. Smith, 31 Cal. App. 2d 272, 276, 87 P. 2d 863, 865 (1939).

Interim Committees are now studying the family court bill. When legislation based on that bill has been enacted, the staff will study the legislation to determine whether it eliminates the problems described above. If it does, we will recommend that this topic be dropped from our agenda. If it does not, we will undertake to prepare a study on this topic when time permits. It is unlikely that such a study could be prepared during the next five years.

A study of 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 to determine (1) whether they should be made uniform and (2) if not, whether there is need for clarification as to which of them governs confirmation of private judicial partition sales.

Sections 752 to 801.15 of the Code of Civil Procedure provide for actions for partition of property. Section 784 deals with the confirmation of partition sales. Probate Code Sections 784 and 785 deal with the confirmation of private sales of real property of estates. These sections differ from Code of Civil Procedure Section 784 in three important respects. One difference is in the percentage by which an offer made in court must exceed the amount of the original bid.[14] Another difference is that under the Probate Code the original bid must equal 90 percent of the appraised value of the property,[15] whereas under Code of Civil Procedure Section 784 there is no such requirement. A third difference is that the Probate Code contains detailed provisions regarding real estate brokers' commissions,[16] whereas the Code of Civil Procedure is silent on this matter. It may be that there is little reason for these differences.

If it is found that some or all of these differences should be retained, the question of whether the Code of Civil Procedure or the Probate Code governs confirmation of private partition sales should be clarified. The Code of Civil Procedure provides that private partition sales shall be "conducted" in the manner required for private sales of real property of estates.[17] It is not clear whether this provision makes applicable to such sales the provisions of the Probate Code regarding the confirmation of sales, or whether, on the other hand, a private partition sale should be confirmed in the manner provided by Section 784 of the Code of Civil Procedure. The latter section deals with confirmation of partition sales but is ambiguous as to whether it applies to both public and private partition sales or only to public partition sales. The question is important because, as is shown above, the provisions of the Probate Code and the Code of Civil Procedure relating to confirmation are different; it will remain important if the two sets of provisions are not made uniform.

[14] CAL. PROB. CODE Section 785.
[15] *Id.* Section 784.
[16] *Id.* Section 785.
[17] CAL. CODE CIV. PROC. Section 775.

The staff recommends that a staff study be prepared on this topic when time permits. It appears unlikely, however, that such a study can be prepared and considered by the Commission during the next five years. At the 1959 session, the Legislature approved a Commission request that the scope of this study be expanded to include study of whether the various sections of the Code of Civil Procedure relating to partition should be revised.

A study to determine whether the law relating to attachment, garnishment, and property exempt from execution should be revised.

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

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

The staff recommends that this topic be given priority after we have completed our work on inverse condemnation and condemnation law and procedure if it appears, at that time, that a study of this topic is needed.

A study to determine whether California statutes relating to service of process by publication should be revised in light of recent decisions of the United States Supreme Court.

Two recent decisions by the United States Supreme Court have placed new and substantial constitutional limitations on service of process by publication in judicial proceedings. Theretofore, it had generally been assumed that, at least in the case of proceedings relating to real property, service by publication meets the minimum standards of procedural due process prescribed by the Fourteenth Amendment to the United States Constitution.[53] However, in *Mullane* v. *Central Hanover Bank & Trust Co.*,[54] decided in 1950, the Supreme Court held unconstitutional a New York statute which authorized service on interested parties by publication in connection with an accounting by the trustee of a common trust fund under a procedure established by Section 100-c(12) of the New York Banking Law. The Court stated that there is no justification for a statute authorizing resort to means less likely than the mails to apprise persons whose names and addresses are known of a pending action. Any doubt whether the rationale of the *Mullane* decision would be applied by the Supreme Court to cases involving real property was settled by *Walker* v. *City of Hutchinson*,[55] decided in 1956, which held that notice by publication of an eminent domain proceeding to a land owner whose name was known to the condemning city was a violation of due process.

The practical consequence of the *Mullane* and *Walker* decisions is that every state must now review its statutory provisions for notice by publication to determine whether any of them fail to measure up to the requirements of the Fourteenth Amendment. A preliminary study indicates that few, if any, California statutes are questionable under these decisions, inasmuch as our statutes generally provide for notice by mail to persons whose interests and whereabouts are known.[56] However, a comprehensive and detailed study should be undertaken to be certain that all California statutory provisions which may be affected by the *Mullane* and *Walker* decisions are brought to light and that recommendations are made to the Legislature for such changes, if any, as may be necessary to bring the law of this State into conformity with the requirements of the United States Constitution.

[53] Arndt v. Griggs, 134 U.S. 316, 327 (1890); see Pennoyer v. Neff, 95 U.S. 714, 727, 734 (1877).

[54] 339 U.S. 306 (1950).
[55] 352 U.S. 112 (1956).

A comprehensive study of service of process is being made by the State Bar. If the legislation recommended by the State Bar as a result of this study covers this topic, the staff will bring this to the attention of the Commission so that the Commission may consider whether this topic should be dropped from the agenda of topics.

A study to determine whether Section 7031 of the Business and Professions Code, which precludes an unlicensed contractor from bringing an action to recover for work done, should be revised.

Section 7031 of the Business and Professions Code provides:

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

The effect of Section 7031 is to bar the affirmative assertion of any right to compensation by an unlicensed contractor, whether in an action on the illegal contract,[83] for restitution,[84] to foreclose a mechanic's lien,[85] or to enforce an arbitration award[86] unless he can show that he was duly licensed.

The courts have generally taken the position that Section 7031 requires a forfeiture and should be strictly construed. In fact, in the majority of reported cases forfeiture appears to have been avoided. One technique has been to find that the artisan is not a "contractor" within the statute, but is merely an "employee."[87] But this device is restricted by detailed regulations of the Contractor's State License Board governing qualifications for licenses and the scope of the statutory requirements.[88] Another way around the statute has been to say that there was "substantial" compliance with its requirements.[89] In addition, Section 7031 has been held not to apply to a suit by an unlicensed subcontractor against an unlicensed general contractor on the ground that the act is aimed at the protection of the public, not of one contractor against a subcontractor.[90] Similarly, the statute does not bar a suit by an unlicensed contractor against a supplier of construction material.[91] And the statute has been held not to apply when the contractor is the defendant in the action.[92]

But with all of these qualifications Section 7031 has a wide area of application in which it operates to visit a forfeiture upon the contractor and to give the other party a windfall. Many jurisdictions, taking into account such factors as moral turpitude on both sides, statutory policy, public importance, subservience of economic position, and the possible forfeiture involved,[93] allow restitution to an unlicensed person.[94] But in California, Section 7031 expressly forbids "any action" and this prohibition of course includes restitution. The court can weigh equities in the contractor's favor only where the contractor is the defendant. If the contractor is asserting a claim, equities generally recognized in other jurisdictions cannot be recognized because of Section 7031.

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[83] Kirman v. Borrage, 65 Cal. App.2d 156, 150 P.2d 3 (1944).
[84] Cash v. Blackett, 37 Cal. App.2d 233, 150 P.2d 585 (1938).
[85] Siemens v. Meconi, 41 Cal. App.2d 641, 112 P.2d 304 (1941).
[86] Loving & Evans v. Blick, 33 Cal.2d 603, 204 P.2d 23 (1949) (4-3 decision).
[87] Martin v. Henderson, 124 Cal. App.2d 502, 269 P.2d 117 (1954); Doruk v. Spivack, 107 Cal. App.2d 206, 236 P.2d 540 (1951).
[88] CAL. ADM. CODE tit. 16, §§ 706-97.
[89] Gatti v. Highland Park Builders, Inc., 27 Cal.2d 687, 166 P.2d 265 (1946) (seemingly in disregard of CAL. BUS. & PROF. CODE § 7025); Citizens State Bank v. Gentry, 20 Cal. App.2d 415, 67 P.2d 364 (1937) (corporation in whose name new license taken held alter ego of original licensed contractor); Oddo v. Hodde, 101 Cal. App.2d 375, 225 P.2d 929 (1950).
[90] Matchett v. Gould, 131 Cal. App.2d 821, 281 P.2d 524 (1955); see also Wilson v. Stearns, 123 Cal. App.2d 472, 267 P.2d 39 (1954).
[91] Rutherford v. Standard Engineering Corp., 88 Cal. App.2d 554, 199 P.2d 364 (1948).
[92] Comet Theatre Enterprises v. Cartwright, 155 F.2d 80 (9th Cir. 1963) (buyer unable to recover money paid to contractor); Marshall v. Von Zumwalt, 120 Cal. App.2d 807, 262 P.2d 303 (1953) (contractor may set off value of services when sued by buyer).
[93] 6 CORBIN, CONTRACTS §§ 1534-36 (1951); RESTATEMENT, RESTITUTION § 140 and comment *b*.
[94] 6 CORBIN, CONTRACTS §§ 1510-34 (1951).

The staff plans to prepare a memorandum recommending that this topic be dropped from our agenda. Recent developments have minimized the injustice that has resulted in the past. More important, we see no possibility of the enactment of legislation to repeal or modify Section 7031.

A study to determine 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.

Penal Code Section 1137 authorizes a written copy of the court's instructions to be taken into the jury room in criminal cases. It has been held, however, that Sections 612 and 614 of the Code of Civil Procedure preclude permitting a jury in a civil case to take a written copy of the instructions into the jury room.[68] There seems to be no reason why the rule on this matter should not be the same in both civil and criminal cases.

Taking Instructions to the Jury Room: Senate Bill No. 33, which was drafted by the Commission to effectuate its recommendation on this subject, was introduced by Senator Dorsey.[12] Following circulation by the Commission to interested persons throughout the State of its recommendation and study on this matter, a number of questions were raised by members of the bench and bar relating to practical problems involved in making a copy of the court's instructions available to the jury in the jury room. Since there would not have been an adequate opportunity to study these problems and amend the bill during the 1957 Session, the Commission determined not to seek enactment of the bill but to hold the matter for further study.

During the next five years, the staff suggests that the Judicial Council be again contacted to determine whether the Judicial Council will undertake a study of this matter. If so, the staff will recommend that the topic be dropped from our agenda.

A study to determine whether the Small Claims Court Law should be revised.

In 1955 the commission reported to the Legislature[42] that it had received communications from several judges in various parts of the State relating to defects and gaps in the Small Claims Court Law.[43] These suggestions concerned such matters as whether fees and mileage may be charged in connection with the service of various papers, whether witnesses may be subpoenaed and are entitled to fees and mileage, whether the monetary jurisdiction of the small claims courts should be increased, whether sureties on appeal bonds should be required to justify in all cases, and whether the plaintiff should have the right to appeal from an adverse judgment. The commission stated that the number and variety of these communications suggested that the Small Claims Court Law merited study.

The 1955 Session of the Legislature declined to authorize the commission to study the Small Claims Court Law at that time. No comprehensive study of the Small Claims Court Law has since been made. Meanwhile, the commission has received communications making additional suggestions for revision of the Small Claims Court Law: *e.g.*, that the small claims court should be empowered to set aside the judgment and reopen the case when it is just to do so; that the plaintiff should be permitted to appeal when the defendant prevails on a counterclaim; and that the small claims form should be amended to (1) advise the defendant that he has a right to counterclaim and that failure to do so on a claim arising out of the same transaction will bar his right to sue on the claim later and (2) require a statement as to where the act occurred in a negligence case.

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

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[42] 1955 Rep. Calif. Law Rev. Comm'n 25.
[43] Cal. Code Civ. Proc. § 117.

Before a study of this topic is undertaken, the staff believes that recent developments should be examined and the Judicial Council should again be contacted to determine if the problems, if any, that exist are more appropriately considered by the Judicial Council.

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).[5]

[5] See *Recommendation Relating to Escheat*, 8 CAL. L. REVISION COMM'N REPORTS 1001 (1967). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS at 60 (1969). See also Cal. Stats. 1968, Ch. 247 (escheat of decedent's estate) and Ch. 358 (unclaimed property act).

Legislation recommended by the Commission on this subject was enacted by the 1968 Legislature. The topic is retained on the agenda for study of future developments under the new legislation.

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).[4]

[4] 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. 1321.

See also *Recommendation Relating to Service of Process on Unincorporated Associations*, 8 CAL. L. REVISION COMM'N REPORTS at 1403 (1967). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS at 00 (1969). See also Cal. Stats. 1968, Ch. 132.

Legislation recommended by the Commission on this topic was enacted by the 1967 and 1968 Legislatures. The topic is retained on the agenda for study of future developments under the new legislation.

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]

[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).
See also *Recommendation Relating to Damages for Personal Injuries to a Married Person as Separate or Community Property*, 8 CAL. L. REVISION COMM'N REPORTS at 1385 (1967). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS at 00 (1969). See also Cal. Stats. 1968, Chs. 457 and 458.

Legislation recommended by the Commission on this subject was enacted by the 1968 Legislature. The topic is retained on the agenda for study of future developments under the new legislation.

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).[2]

[2] 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.

Legislation recommended by the Commission on this subject was enacted by the 1967 Legislature. The topic is retained on the agenda for study of future developments under the new legislation.

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).[3]

[3] See *Recommendation and Study Relating to The Good Faith Improver of Land Owned by Another*, 8 CAL. L. REVISION COMM'N REPORTS 501 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS 1319 (1967).

See also *Recommendation Relating to Improvements Made in Good Faith Upon Land Owned by Another*, 8 CAL. L. REVISION COMM'N REPORTS at 1373 (1967). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS at 60 (1969). See also Cal. Stats. 1968, Ch. 150.

Legislation recommended by the Commission on this topic was enacted by the 1968 Legislature. The topic is retained on the agenda for study of future developments under the new legislation.

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).*

* 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 B-1 (1957). For a legislative history of this recommendation, see 2 CAL. L. REVISION COMM'N REPORTS, 1958 Report at 13 (1958). See also Cal. Stats. 1957, Ch. 190. *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.

We requested authority in 1966 to continue our study of this topic. We wanted to study tax problems and division of property on divorce. The State Bar recommended legislation to the 1967 Legislature to eliminate the tax problems but the legislation was not enacted. The problems of division on divorce are being considered by the Legislature in the course of its study of the Family Court Bill. Hence, we plan to reexamine this topic in five years or so to determine whether it should be dropped from the agenda.

DEPARTMENT OF FINANCE
SACRAMENTO

August 14, 1968

Management Memo No. 68-30

TO: ALL STATE AGENCIES

SUBJECT: PREPARATION OF 1969-70 GOVERNOR'S BUDGET

The financial resources for the 1969-70 fiscal year are limited, and it is necessary for us to make a searching reappraisal of the programs of the State. It is vitally important that you analyze each of the programs for which you are responsible on the following basis:

For the Department:

1. What is the status of the Programming and Budgeting System in your department? Program budgets? Multi-year programs?

2. Do you use PABS in your department? If not, what do you use to make major management decisions?

For Each Program:

1. What is the need for the program?

2. What is the program objective?

3. What is the program structure?

4. Are you accomplishing the objective and what is the evidence?

5. Are there activities that can be reduced; what activities can be increased in order to better accomplish the program objective?

6. Why was the existing level of service chosen? What are the alternatives?

7. Are there changes in law or organization that would better respond to public need and your program effectiveness?

8. What major areas of efficiency are you considering, and what assistance can the Department of Finance give to your efforts?

9. Are there major problems of coordination with other departments, with subordinate levels of state government, or with the federal government that should be clarified? What steps do you recommend be taken?

Management Memo 68-24, dated June 11, 1968, requires each department to submit program budget narratives of existing programs to the Department of Finance by August 1, 1968. These program budget narratives of existing programs are to be put into print and copies returned to each department. You were reminded again of this requirement in Transmittal Letter No. 126 which contains the price letter.

Each department should make a self-analysis on the basis of the questions enumerated above and then update the preprint of the program budget narrative by adding any program changes contemplated. Proposed expenditure levels for continuing programs and for program changes should be developed.

The updated preprint reflecting proposed expenditure levels should be submitted to the Department of Finance by September 1 in order for the staff of the Budget Division to prepare an analysis. The Budget Division staff will then schedule a Policy and Program Hearing with the Director of Finance during the period September 10 through October 15.

During the Policy and Program Hearing, departmental and such other representatives should be present as will be necessary for an adequate examination of each program within the department. The questions enumerated above will be discussed to the extent necessary to reach an understanding of the program and to make the policy and program decisions necessary to allow subsequent completion of the departmental program budget.

Following the Policy and Program Hearing, the department will use the policy and program decisions reached to complete their program budgets and the traditional budgets without narratives as soon as practicable and will then submit these to the Department of Finance for processing. It appears desirable to schedule policy hearings as early as practicable to facilitate the crossover process between the program budget and the traditional budget expenditures.

If problems arise in any stage of this process, the staff of the Budget Division is available to provide assistance.

CASPAR W. WEINBERGER
Director of Finance

DISTRIBUTION:

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CALIFORNIA LAW REVISION COMMISSION

Composition of Commission

The California Law Revision Commission consists of one Senator, one Assemblyman, 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.

The Commission's staff consists of the Executive Secretary, Assistant Executive Secretary, two additional attorneys, an Administrative Assistant, two secretaries, and the equivalent of one additional position in intermittent part-time legal and clerical employees.

Objective and Need

The primary objective of the Law Revision Commission is to study the statutory and decisional law of this state to discover defects and anachronisms and to recommend legislation to effect needed reforms. The Commission assists the Legislature in keeping the law up to date by intensively studying complex--and often controversial--subjects, gathering and considering the views of interested persons and organizations, and drafting recommended legislation for the Legislature's consideration. The Commission also identifies deficiencies in the law in fairly narrow areas that otherwise might not come to legislative attention and recommends corrective legislation.

The efforts of the Commission permit the Legislature to devote its time to resolving significant policy questions rather than having to be concerned with the technical problems involved in preparing background studies, working out intricate legal problems, and drafting needed legislation. The output of the Commission thus enables the Legislature to accomplish needed reforms that the Legislature might otherwise not be

able to effect because of the heavy demands on legislative time. In some cases, the Commission's study results in a determination that no legislation on a particular topic is needed, thus relieving the Legislature of the burden of devoting its time to the study of that topic.

The Commission is permitted to study only topics which the Legislature, by concurrent resolution adopted each regular session, authorizes it to study. The Commission is required to submit a report at each regular session of the Legislature listing both studies in progress and topics that the Commission recommends it be authorized to study. Thus, the topics previously authorized for study are reviewed each session by the Legislature.

During the last eight years, all of the new topics that have been authorized for Commission study have been referred to the Commission by the Legislature on its own initiative. (In several cases, the Commission requested authority to make supplemental studies of legislation previously enacted upon Commission recommendation or requested that the scope of a previously authorized study be extended to cover closely related problems.)

For the most part, the Commission has found that the studies the Legislature on its own initiative has directed the Commission to make have involved problems that are so complex and interrelated that they can be solved only in comprehensive legislation. The Evidence Code, enacted in 1965 upon the Commission's recommendation, is an example. The study of Condemnation Law and Procudure is another example. (The Assembly Judiciary Committee at the 1968 legislative session, after devoting considerable hearing time to a number of bills relating to condemnation, concluded that significant problems exist in this field

but that, because of the complex interrelationship of various aspects of this field of law, the bills did not provide satisfactory solutions to the problems; the committee referred the bills to the Commission for consideration in the course of its study of this field of law.)

Formulating comprehensive legislation in a field such as Evidence or Condemnation often requires intensive study over a period of years. Legislative interim committees ordinarily are unable to engage in studies of this type (involving the preparation of background studies and the drafting of complex, controversial legislation) and at the same time to deal with the many other problems that require immediate legislative attention.

The Legislature must, of course, resolve the policy issues raised by the Commission's proposed legislation; but the background research prepared by the Commission and the Commission's collection and consideration of the views of interested persons and organizations in preparing its recommended legislation permits the Legislature to make informed decisions on these policy questions and, as previously mentioned, largely relieves the Legislature of the task of devoting hearing time to consideration of amendments needed to eliminate technical defects in the bills.

The Commission makes available to the state the services of the outstanding attorneys who serve on it. These members contribute an impressive range of talent and experience to resolution of the most difficult problems that exist in areas of law where lawyers can make a distinctive contribution. In addition, the Commission provides a means for bringing to bear on complex legal problems the talents not only of its members but also those of many other persons and organizations. For example, the following persons and organizations made substantial contributions in developing the new Evidence Code.

SENATE FACT FINDING COMMITTEE ON JUDICIARY

Edwin J. Regan, *Chairman*
Weaverville

Special Subcommittee on Rules of Evidence

Donald L. Grunsky, *Chairman*
Watsonville

Carl L. Christensen, Jr.
Eureka

Joseph A. Rattigan
Santa Rosa

ASSEMBLY INTERIM COMMITTEE ON JUDICIARY

George A. Willson, *Chairman*
Huntington Park

Subcommittee on Law Revision

Alfred H. Song, *Chairman*
Monterey Park

John Francis Foran
San Francisco

James E. Whetmore
Garden Grove

William F. Stanton
San Jose

George A. Willson
Huntington Park

ASSEMBLY INTERIM COMMITTEE ON CRIMINAL PROCEDURE

Gordon H. Winton, Jr., *Chairman*
Merced

SPECIAL SUBCOMMITTEE OF THE JUDICIAL COUNCIL

Members

Justice John B. Molinari, *Chairman*

Judge Bertram D. Janes

Judge Thomas Kongsgaard

Justice Frederick E. Stone

Former Member

Chief Justice Roger J. Traynor

Staff

Ralph N. Kleps, *Director*
Administrative Office of the Courts

Stephen C. Birdlebough

Warren P. Marsden

SPECIAL COMMITTEE OF THE STATE BAR TO CONSIDER THE UNIFORM RULES OF EVIDENCE

Present Members

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Albert R. Abramson
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John B. Bates
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Los Angeles

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Judge Shirley M. Hufstedler
Los Angeles

Walter H. Stammer
Fresno

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Los Angeles

SPECIAL COMMITTEE OF THE CONFERENCE OF CALIFORNIA JUDGES

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Los Angeles

Judge Mark Brandler
Los Angeles

Justice Mildred L. Lillie
Los Angeles

Judge Howard E. Crandall
San Pedro

Judge Raymond J. Sherwin
Fairfield

Judge James C. Toothaker
San Diego

SPECIAL COMMITTEE OF THE MUNICIPAL COURT JUDGES' ASSOCIATION OF LOS ANGELES COUNTY

Judge Elisabeth E. Zeigler, *Chairman*
Los Angeles

Judge Hector P. Baida
Santa Monica

Judge Peter Cook
Downey

Judge Alan Campbell
Los Angeles

Judge Winthrop Johnson
West Covina

OFFICE OF THE ATTORNEY GENERAL

Thomas C. Lynch, *Attorney General*
Sacramento

(Justice Stanley Mosk, *Former Attorney General*)

Albert W. Harris, Jr.
San Francisco

Gordon Ringer
Los Angeles

Doris H. Maier
Sacramento

Willard A. Shank
Sacramento

Norman B. Peek
Los Angeles

Arlo E. Smith
San Francisco

STATE DEPARTMENT OF PUBLIC WORKS
(Division of Contracts & Rights-of-Way)

Harry S. Fenton, *Chief Counsel*
Sacramento

Emerson W. Rhyner, *Deputy Chief Counsel*
Sacramento

Robert F. Carlson, *Assistant Chief Counsel*
Sacramento

CALIFORNIA COMMISSION ON UNIFORM STATE LAWS

Alvin J. Rockwell, *liaison member*
San Francisco

STATE OFFICE OF ADMINISTRATIVE PROCEDURE

Charles H. Bobby, *Special Counsel*
Sacramento

OFFICE OF THE LEGISLATIVE COUNSEL

George H. Murphy, *Legislative Counsel*
Sacramento

(Angus C. Morrison (Deceased), *Former Legislative Counsel*)

DISTRICT ATTORNEYS' ASSOCIATION OF CALIFORNIA

Jay Ballantyne, *President*
Visalia

Spencer M. Williams, *Past President*
San Jose

Representative at Commission meetings

Joseph T. Powers
Los Angeles

Office of County Counsel
Monterey County
Sacramento County
San Bernardino County
Santa Barbara County
Santa Clara County

Office of District Attorney
Alameda County
Contra Costa County
Los Angeles County
Placer County
Ventura County

LEAGUE OF CALIFORNIA CITIES

City Attorneys of Anaheim, Bakersfield, Berkeley, Beverly Hills, Burbank, Coachella, Cudahy, Culver City, El Monte, Eureka, Fresno, Fullerton, Gardena, Inglewood, Long Beach, Los Angeles, Los Gatos, Oakland, Pasadena, Redlands, Richmond, Riverside, Sacramento, San Diego, San Francisco, San Jose, San Leandro, San Marino, Santa Monica, Temple City, Torrance, and West Covina

LOCAL BAR ASSOCIATIONS

The following local bar associations appointed committees or designated members to study the Commission's proposals. Some of them submitted comments for Commission consideration in formulating this recommendation.

Alameda County Bar Association
Beverly Hills Bar Association
Colusa County Bar Association
Compton Judicial District Bar Ass'n
Hollywood Bar Association
Lassen County Bar Association
Long Beach Bar Association
Marin County Bar Association
Merced County Bar Association
Placer County Bar Association
San Benito County Bar Association
San Diego County Bar Association
San Francisco Bar Association
San Gabriel Valley Bar Association
San Mateo County Bar Association
Solano County Bar Association
Sonoma County Bar Association
Sunnyvale Bar Association
Tehama County Bar Association

INDIVIDUALS

Thomas G. Baggot
Los Angeles

Homer H. Bell
Monrovia

William A. Bellamy, M.D.
San Francisco

Dominic Bianco
Bakersfield

Maleta J. Boatman, M.D.
San Francisco

Professor Alexander D. Brooks
Rutgers School of Law
Newark, New Jersey

Professor Kenneth C. Davis
University of Chicago Law School
Chicago, Illinois

James H. Denison
Los Angeles

Bernard L. Diamond, M.D.
San Francisco

Jerrold A. Fadem
Los Angeles

Elmer F. Galioni, M.D.
Sacramento

Milnor E. Gleaves
Los Angeles

Stephen W. Hackett
San Francisco

Professor Donald G. Hagman
Law School
University of California at
Los Angeles

Edward E. Hause, M.D.
San Francisco

Albert T. Henley
San Jose

Professor John B. Hurlbut
Stanford Law School

Jess S. Jackson, Jr.
San Mateo

David I. Lippert
Los Angeles

Professor David W. Louisell
Law School
University of California at Berkeley

Judge Philbrick McCoy
Los Angeles

John N. McLaurin
Los Angeles

J. Victor Monke, M.D.
Beverly Hills

Timothy W. O'Brien
Ukiah

Richard H. Perry
San Francisco

Professor Arthur H. Sherry
Law School
University of California at Berkeley

John A. Stroud, M.D.
Sacramento

Fred M. Tetzlaff, M.D.
San Francisco

Lloyd Tunik
San Rafael

B. E. Witkin
Berkeley

More than 300 persons and organizations are assisting the Commission with critical evaluations of its tentative recommendations relating to condemnation law and procedure. Many of these persons submit detailed comments on each tentative recommendation distributed for comment.

Commission Output

A total of 71 bills and two proposed constitutional amendments have been drafted by the Commission to effectuate its recommendations. Forty-seven of these bills were enacted at the first session to which they were

presented; fourteen bills were enacted at subsequent sessions or their substance was incorporated into legislation that was enacted. Thus, of the 71 bills recommended, 61 eventually became law. One of the proposed constitutional amendments was approved and ratified by the people; the other was not approved by the Legislature.

Commission recommendations have resulted in the enactment of legislation affecting 1,932 sections of the California statutes: 978 sections have been added, 463 sections amended, and 491 sections repealed.

In 1968, seven of the eight bills introduced to effectuate Commission recommendations were enacted; one bill was withdrawn by the Commission before it was set for hearing. These seven bills affected a total of 77 sections of the California statutes. Two concurrent resolutions recommended by the Commission were adopted by the 1968 Legislature. In approving one of the resolutions, the Legislature adopted a Commission recommendation that three topics be removed from its agenda; the Commission concluded that the existing statutes relating to one topic were adequate and that a study of the other two topics would merely duplicate work already produced by a special Governor's Commission which was then under study by interim committees.

The Commission's production for the 1968 session was somewhat lower than that for most previous years. This resulted to some extent from a turnover in the Commission's membership. Production in future years will depend primarily on the amount of time Commission members are able to devote to Commission activities and on staff turnover.

In evaluating the output of the Commission, it is important to take into account that the bills recommended by the Commission--almost without exception--are designed to make significant changes in the law.

A bill containing only a few sections may involve complex and controversial problems and require extensive Commission and legislative consideration.

Level of Service

The existing level of service demands as much in terms of time as reasonably can be expected of the members of the Commission. Although members of the public and of the Legislature have indicated a desire for an increase in the level of service, it is not reasonable to expect that members of the Commission will devote substantially more time to Commission business. Since 1960, service on the Commission has required two or two and one-half days each month in meeting time and two or three days of additional time each month in preparing for meetings and reviewing Commission materials.

A reduction in the level of service is not recommended. The problem the Commission has had with the Legislature and others has been in resisting suggestions that the level of service be increased.

Major Areas for Increased Efficiency

There are three areas in which the Commission has been making significant efforts to improve its efficiency and reduce its costs without significantly impairing the quantity or quality of its output.

Research. The Commission's recommendations are based on research studies of the subject matter concerned. Many of these studies are undertaken by specialists in the fields of law involved. These specialists 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 law professors and

occasional attorneys who serve as research consultants have already acquired the considerable background necessary to understand the specific problems under consideration and often are willing to prepare the research study for a modest honorarium that does not reflect the actual value of their services. This is possible because there is some professional prestige in serving as a consultant to the Commission. Serving as a consultant also provides the consultant with an opportunity to publish one or more law review articles and make a significant contribution to law reform.

In recent years, some of the topics that the Legislature has directed the Commission to study have been so complex and interrelated that it has not been possible to find an independent contractor to serve as a research consultant and it has been necessary for the Commission's staff to prepare the necessary research studies. Condemnation law and procedure is an example. Other topics have not been of the type that would be of interest to a law professor or other expert and the staff has necessarily prepared the study.

When the research study is completed, the Commission begins its consideration of the particular topic. The research study permits the Commission to make informed decisions. It also provides persons reviewing the Commission's recommendations with the background information necessary for critical evaluation of the recommendation. (It should be noted that research consultants are not required to conform their studies to Commission recommendations; the Commission believes that the Legislature and other interested persons should have an opportunity to examine the material submitted to the Commission by the research consultant when they evaluate the Commission's recommendation.)

The Commission is taking the following actions to reduce the cost of research (which involves not only amounts paid to independent contractors but also staff workload):

(1) The staff of the Commission has established a close relationship with the California law reviews and has encouraged these reviews to obtain writers and publish articles on subjects that the Commission has on its agenda. For example, the Hastings Law Journal, at the suggestion of the Commission, is devoting an entire issue to condemnation law and procedure. It is anticipated that the research collected in this issue will be of significant assistance to the Commission in its work on this subject. The savings that can be realized in this area may well be significant although considerable staff and Commission work is required to develop sound legislation even when an adequate background research study is available.

(2) One of the responsibilities of the Commission is to examine the common law and statutes of the state to discover defects and anachronisms and to recommend changes that would bring the law into harmony with modern conditions. However, priority has been and is being given to the major topics the Legislature has directed the Commission to study, and the Commission has not made any significant effort during recent years to determine areas of the law in need of study. Nonetheless, the Commission has within the last year completed work on a number of relatively small topics and is now in a position to work on additional relatively small topics at the same time it is devoting the major portion of its resources to the priority topics the Legislature has directed it to study. The Commission has written to the California law reviews and law faculties and requested suggestions for additional relatively narrow topics for

study, indicating that we are interested in topics where a law review article has already been published that would serve as a background research study. Although the initial response has been somewhat disappointing, we anticipate that, as a result of this procedure, we will be able to produce recommendations to make several needed reforms in the law at a minimum expense because we will have a background research study available at no expense before we undertake to study the topic.

It should also be noted that the Commission has been following with interest the progress being made in the development and use of computer searching of state statutes. At least eleven states (New York, Pennsylvania, New Jersey, Massachusetts, Ohio, Texas, Kansas, Iowa, Nebraska, Hawaii, and West Virginia) have stored the complete text of their statutes in data processing equipment for computer searching. The Commission could make a limited use of such computer searching if it were available in California. Based on the information we have available, it appears that the cost of storage, retrieval, and handling of such information--using the equipment and techniques that have already been developed--would exceed any savings that could be realized in the cost of searching statutes by other means. The development of new equipment that would substantially reduce the cost of input of data into the computer appears to be necessary before the use of computer searching of statutes will be economically feasible in California. Any use of computer searching of statutes by the Commission would, of course, be incidental to the primary use of such a service by such agencies as the Legislative Counsel, the Judicial Council, and the Attorney General.

Editing and printing. Formerly, all copy for the Commission's publications was edited and prepared for the printer by the Commission's

staff, set in type by the Office of State Printing, and then proofread and checked by the Commission's staff. This procedure has been revised in recent years to achieve significant savings. The most significant revision in procedure involves the printing and editing of background research studies. Background research studies have, whenever possible, been submitted to law reviews for publication. Most studies are now written with law review publication in mind. This eliminates much cite-checking and proofreading by the Commission's staff and results in a better product since the editors of the law reviews carefully edit and check the background studies. Further savings are achieved because the law review articles can then be photo-offset for inclusion in the Commission's report to the Legislature, a method that is substantially less expensive than the use of "hot type." In addition, it is somewhat easier to obtain research consultants if they can publish the results of their work as a law review article, and this method of publication also provides recognition to staff members who prepare research studies and may help to reduce staff turnover.

Further savings in printing could be achieved if some means (such as a VariTyper or IBM MT-ST) could be used to produce camera-ready copy at a cost lower than that for setting "hot type" by the Office of State Printing. The ideal system would be one that would permit the use of the experienced typists in the Commission's office. For several years, the Commission has been investigating this matter, and we are hopeful that we can make some arrangement with Stanford University for use of their IBM MT-ST equipment.

Many problems are involved in changing our method of printing, primarily because most of our reports are published so that they will be available early in January each year, and the workload for publishing

the reports cannot be spread over the entire year. This alternative method of producing reports is under study by the State Printer, and we are looking forward with interest to the results of that study.

In the past, the Senate has agreed to have substantial bills prepared by the Commission set in type in September prior to the legislative session. This type has been used to print the bills in the Commission's report and later to print the bills for the Legislature when introduced at the legislative session. No additional cost was incurred by the Legislature because the Legislature would have paid the cost of setting the bills when they were introduced. The difficulty with this procedure is that it requires that the type for the bills be integrated with the Commission's comments in the Commission's report and then be pulled out for use in printing the bills when introduced. The cost of this type handling is significant. Use of a method other than "hot type" would eliminate the integration problem and would permit maximum savings to be realized from setting bills at legislative expense prior to the legislative session for use in printing the Commission's report and later in printing the bill when introduced. (During the 1968 session, the bills were not preset at legislative expense, but the type used to print the lengthy bills in the Commission's reports was pulled out to print the bills when introduced, thus achieving a saving in legislative printing costs although no saving in printing costs was realized by the Commission.)

Commission and staff turnover. Turnover in Commission membership and delay in filling vacancies on the Commission resulted in a significant reduction in production during the past several years. It is anticipated that production will return to its former level during 1969.

Staff turnover also has been a problem during the last few years. The Commission has followed the practice of obtaining outstanding law graduates for its staff. The two most recent additions to the Commission's staff both served on the law review, one being the Managing Editor of the Stanford Law Review. Of the persons they replaced, one ranked first in his class and the other was a law review member. These junior staff members sometimes regard service on the Commission's staff as an experience similar to serving as a law clerk to an outstanding judge and do not plan to remain with the State permanently. Others plan to remain for a longer time but find promotional opportunities in other agencies or are attracted by opportunities in private practice.

The Commission has considered it necessary to obtain persons of law review quality for its staff since much of the staff work consists of writing material that will be published as leading articles in good law reviews. This requires the ability to analyze and write material of law review quality, an ability that most often is found in graduates who have law review or equivalent experience. Hence, the Commission has considered a high staff turnover preferable to the alternative of appointing persons who would remain but would be unable to perform the required work.

At the same time, the Commission hopes to reduce staff turnover. We understand that the State Personnel Board is adopting a policy of permitting higher initial salaries for outstanding law graduates. We believe that a distinction in starting salary between an outstanding law graduate and an average graduate is justified and highly desirable. Although the proposed salaries may not match those paid by larger law firms in California for law review members, we believe that they will be of substantial assistance in recruiting and retaining the members of our staff.

As a result of staff turnover, members of our staff have had to work a significant number of hours in excess of 40 hours per week on a regular basis and, until 1968, senior members of our staff did not take any significant vacation time much less compensatory time off. We hope to reduce the substantial overtime and thus reduce staff turnover of junior staff members.

We are hopeful that the practice we are adopting of having our research studies published as law review articles will encourage junior staff members to remain on our staff by giving them the recognition that comes from having their work published in law reviews.

A significant problem in staff turnover is the loss of staff production that necessarily results because of unavoidable delay in replacement. The Commission has followed the practice of leaving positions on its legal staff vacant until an outstanding replacement could be secured. Often it is necessary to leave a position vacant for almost a year before a suitable replacement is available. And, during 1967-68, one clerical position was vacant during much of the fiscal year, primarily because we concluded that it would not be necessary to fill it until two vacant legal positions were filled and the new appointees became productive.

All positions on the Commission's legal staff are now filled with outstanding men.

Relationship with Stanford University

The Commission's offices are located at Stanford University. This is a significant factor in recruiting members of the legal staff. In addition, Stanford has made office quarters available at a modest rental, and the outstanding Stanford law library is available for Commission use.

Members of the law faculty, who are outstanding experts in various areas of the law, are available to members of the Commission's staff for informal discussions of complex legal problems. The availability of Stanford law students for part-time employment provides the Commission with outstanding law students at a relatively low expense for those tasks that require some law training but not admission to the Bar. Thus, the Commission has a very happy situation in its location at Stanford.

Program Budget and Multiyear Program Statement

A program budget in narrative form for 1969-70 has been submitted to the Department of Finance.

A Multiyear Program Statement was first prepared and submitted in 1967. The Commission considered its five-year schedule of projects early in 1968, but the Commission concluded at that time that any action to revise the project schedule should be deferred until the four new appointees to the Commission had had an opportunity to become more familiar with the Commission's operations. Attached as Exhibit I is a five-year schedule of projects prepared by the staff for the Commission's September 19-21, 1968 meeting. Exhibit II (attached) is a description of each topic the Commission is now authorized to study, together with information concerning the current status of the topic.

Use of PABS

We believe that the foregoing material demonstrates that the Commission has made and is making a serious effort to apply PABS principles in a practical way. In addition, one result of a one-day session on PABS attended by the Executive Secretary a few years ago was the institution of a system of daily time-task recording for members of the legal staff

and the administrative assistant. This record is collected weekly, and a summary of the hours devoted to each project or task by each professional employee is prepared for the Executive Secretary. These reports are reviewed weekly by the Executive Secretary. Not only does the system provide useful information to the individual employee as to the extent to which he is spending his time productively, but it also provides the Executive Secretary with information as to the amount of time devoted by individual staff members to particular projects and activities and permits him to determine whether staff resources are being effectively allocated. The reporting system is kept as brief and as simple as possible so that the system will not become another overhead item that diverts staff resources from productive activities. The reports are being retained so that the information they contain will be available for possible additional uses in the future.

FEES AND USER CHARGES -- CALIFORNIA LAW REVISION COMMISSION

1. California Law Revision Commission.

2. Pursuant to Government Code Section 14881, charges are made for certain publications of the Commission. These publications are sold by the Documents Section of the Department of General Services.

3. A charge is made to persons purchasing bound volumes and certain other publications. Most of the pamphlets (as distinguished from bound volumes) published by the Commission are distributed free of charge.

Volumes published by the Commission are distributed (one copy only) to each member of the Legislature who responds to a letter requesting him to advise whether he wishes a copy of the volume. Almost every member of the Legislature does request a copy of each volume. In addition, volumes are distributed without charge to the Governor, each member and former member of the Commission, selected libraries, law reviews, state agencies, law reform agencies in other states, and a few others. Generally, except for libraries, distribution to persons other than legislators is based on a continuing cooperative relationship. Attached is a list of persons to whom bound volumes are sent. In addition, certain individuals may receive copies of individual volumes when justified. For example, Professor Van Alstyne received several copies of Volume 5 in recognition of the fact that the volume consists entirely of his study on sovereign immunity.

Despite great pressure to enlarge the list of persons that receive free copies of bound volumes, the Commission has resisted requests. From time to time, however, the Commission provides new members of the Assembly and Senate Judiciary Committees with copies of those bound volumes that are not in short supply.

A somewhat greater free distribution has been made of those few soft-covered pamphlets for which a charge is made. For example, all persons who cooperated with the Commission in the Evidence Code study received a free copy of the tentative recommendations and studies relating to evidence that were placed on sale. These publications were placed on sale not because any great amount of money would be raised, but rather to eliminate waste of the material by insuring that the persons who requested copies had a sufficient need for the copy to justify their paying $5.00 for it.

4. The following charges have been established:

Volume 1 -- Out of print

Volume 2 -- $7.00

Volume 3 -- $7.00

Volumes 4-7 -- $12.00 each

Two pamphlets relating to evidence -- $5.00 each

Study relating to sovereign immunity (soft cover) -- $9.00

The rate is reviewed upon publication of each volume. Volume 7 was delivered by the printer in 1966. Volume 8 is substantially ready to print; page proofs are now available.

5. Actual income for 1967-68 fiscal year -- $230.00. Estimated income for 1968-69 fiscal year -- $500.00.

6. The net amount (indicated in item 5 above) from sale of publications is credited to the General Fund as a Miscellaneous Receipt.

The cost of preparing and printing the Commission's recommendations and studies is derived from the entire budget of the Commission. Since 1962, printing costs have ranged from $24,271 (1962-63) to $8,108 (1965-66).

Generally, printing costs are expected to average $15,000 per year. It is thus apparent that the amount collected from the sale of publications does not cover any significant portion of the cost of the Commission's program or even direct printing expenditures.

7. Government Code Section 10333 requires the Commission to distribute copies of its reports to the Governor, members of the Legislature, and heads of all state departments. Section 10337 of the Government Code provides that the Commission may cooperate with various associations or organizations to fulfill the purposes for which the Commission was created. Section 10333 appears to indicate a legislative intention that wide distribution be made of the Commission's reports. Distribution of reports for comment is, in fact, an important factor in the development of sound legislation. In some cases, defects in recommended legislation have been discovered by persons reviewing the reports and sending comments to the Commission, and bills have been substantially amended and even, on occasion, withdrawn for further study as a result of these comments. It is believed, therefore, that the Legislature contemplated that Commission publications would be distributed without charge.

Nevertheless, a number of years ago, the Commission faced the problem of determining what distribution should be made of its bound volumes. As the work of the Commission became known to members of the courts and bar, the Commission began to receive a substantial number of requests for its bound volumes. It was determined at that time not to increase the number published (500), but instead to place on sale substantially all of the copies that remain after an initial free distribution to a selected list of persons. A price ($12.00) was fixed that would minimize the demand for the volume. The cost of printing 500 copies of the volume

is approximately $3,500. The free distribution is intended to place copies in various locations, such as county law libraries, throughout the state.

8. The Commission has given considerable thought to the problem of selling its publications and has devised a gift-sale system that is designed (1) to assist the Commission and the Legislature in recommending and enacting sound legislation and in making materials pertinent to legislative history available at key locations throughout the state (by free distribution) and (2) at the same time, to permit persons who have a genuine use for certain publications to obtain them on a fair basis (by paying the charge imposed). The imposition of a charge system for individual pamphlets containing particular recommendations (generally distributed without charge) would cost more in its administration than the charges would produce and would discourage review of those recommendations by interested persons and organizations.