

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

1966 Annual Report

December 1965

CALIFORNIA LAW REVISION COMMISSION

School of Law  
Stanford University  
Stanford, California



**CALIFORNIA LAW REVISION COMMISSION**

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*Administrative Assistant*

December 31, 1965

To HIS EXCELLENCY, EDMUND G. BROWN  
*Governor of California* and  
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission herewith submits this  
report of its activities during the year 1965.

Respectfully submitted,  
RICHARD H. KEATINGE  
Chairman



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# REPORT OF THE CALIFORNIA LAW REVISION COMMISSION FOR THE YEAR 1965

## FUNCTION AND PROCEDURE OF COMMISSION

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

The principal duties of the Law Revision Commission are to:

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

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

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

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

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

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

<sup>1</sup> See CAL. GOVT. CODE §§ 10300-10340.

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

<sup>3</sup> See CAL. GOVT. CODE § 10335.

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

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

A total of 57 bills and two proposed constitutional amendments have been drafted by the Commission to effectuate its recommendations.<sup>6</sup> Thirty-seven of these bills were enacted at the first session to which they were presented; ten bills were enacted at subsequent sessions or their substance was incorporated into other legislation that was enacted. Thus, of the 57 bills recommended, 47 eventually became law.<sup>7</sup>

<sup>5</sup> See CAL. GOVT. CODE § 10333.

<sup>6</sup> The number of bills actually introduced was in excess of 57 since, in some cases, the substance of the same bill was introduced at a subsequent session and, in the case of the Evidence Code, the same bill was introduced in both the Senate and the Assembly.

<sup>7</sup> Cal. Stats. 1955, Ch. 799, p. 1400 and Ch. 877, p. 1494. (Revision of various sections of the Education Code relating to the Public School System.)  
 Cal. Stats. 1955, Ch. 1183, p. 2193. (Revision of Probate Code Sections 640 to 646—setting aside of estates.)  
 Cal. Stats. 1957, Ch. 102, p. 678. (Elimination of obsolete provisions in Penal Code Sections 1377 and 1378.)  
 Cal. Stats. 1957, Ch. 139, p. 733. (Maximum period of confinement in a county jail.)  
 Cal. Stats. 1957, Ch. 249, p. 902. (Judicial notice of the law of foreign countries.)  
 Cal. Stats. 1957, Ch. 456, p. 1308. (Recodification of Fish and Game Code.)  
 Cal. Stats. 1957, Ch. 490, p. 1520. (Rights of surviving spouse in property acquired by decedent while domiciled elsewhere.)  
 Cal. Stats. 1957, Ch. 540, p. 1589. (Notice of application for attorney's fees and costs in domestic relations actions.)  
 Cal. Stats. 1957, Ch. 1498, p. 2824. (Bringing new parties into civil actions.)  
 Cal. Stats. 1959, Ch. 122, p. 2005. (Doctrine of worthier title.)  
 Cal. Stats. 1959, Ch. 468, p. 2403. (Effective date of an order ruling on motion for new trial.)  
 Cal. Stats. 1959, Ch. 469, p. 2404. (Time within which motion for new trial may be made.)  
 Cal. Stats. 1959, Ch. 470, p. 2405. (Suspension of absolute power of alienation.)  
 Cal. Stats. 1959, Ch. 500, p. 2441. (Procedure for appointing guardians.)  
 Cal. Stats. 1959, Ch. 501, p. 2443. (Codification of laws relating to grand juries.)  
 Cal. Stats. 1959, Ch. 528, p. 2496. (Mortgages to secure future advances.)  
 Cal. Stats. 1959, Ch. 1715, p. 4115 and Chs. 1724-1728, pp. 4133-4156. (Presentation of claims against public entities.)  
 Cal. Stats. 1961, Ch. 461, p. 1540. (Arbitration.)  
 Cal. Stats. 1961, Ch. 589, p. 1733. (Rescission of contracts.)  
 Cal. Stats. 1961, Ch. 636, p. 1838. (Inter vivos marital property rights in property acquired while domiciled elsewhere.)  
 Cal. Stats. 1961, Ch. 657, p. 1867. (Survival of actions.)  
 Cal. Stats. 1961, Ch. 1612, p. 3439. (Tax apportionment in eminent domain proceedings.)  
 Cal. Stats. 1961, Ch. 1613, p. 3442. (Taking possession and passage of title in eminent domain proceedings.)  
 Cal. Stats. 1961, Ch. 1616, p. 3459. (Revision of Juvenile Court Law adopting the substance of two bills drafted by the Commission to effectuate its recommendations on this subject.)  
 Cal. Stats. 1963, Ch. 1631. (Sovereign immunity—tort liability of public entities and public employees.)  
 Cal. Stats. 1963, Ch. 1715. (Sovereign immunity—claims, actions and judgments against public entities and public employees.)  
 Cal. Stats. 1963, Ch. 1632. (Sovereign immunity)—insurance coverage for public entities and public employees.)  
 Cal. Stats. 1963, Ch. 1633. (Sovereign immunity—defense of public employees.)  
 Cal. Stats. 1963, Ch. 1684. (Sovereign immunity—workmen's compensation benefits for persons assisting law enforcement or fire control officers.)  
 Cal. Stats. 1963, Ch. 1635. (Sovereign immunity—amendments and repeals of inconsistent special statutes.)  
 Cal. Stats. 1963, Ch. 1636. (Sovereign immunity—amendments and repeals of inconsistent special statutes.)  
 Cal. Stats. 1963, Ch. 2029. (Sovereign immunity—amendments and repeals of inconsistent special statutes.)  
 Cal. Stats. 1965, Ch. 299. (Evidence Code.)



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

A total of 1,764 sections of the California statutes has been affected by Commission recommended legislation that was enacted by the Legislature: 923 sections were added, 365 sections were amended, and 476 sections were repealed.

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

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

<sup>8</sup> CAL. CONST., Art. XI, § 10 (1960). (Power of Legislature to prescribe procedures governing claims against chartered cities and counties and employees thereof.)

## PERSONNEL OF COMMISSION

As of December 31, 1965, the membership of the Law Revision Commission is :

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

In November 1965, the Commission elected new officers. Mr. Richard H. Keatinge was elected Chairman. Professor Sho Sato was elected Vice Chairman. Their terms commenced on December 31, 1965.

In October 1965, Mr. John L. Reeve was appointed to the staff of the Commission to fill the vacancy created when Mr. Jon D. Smock joined the staff of the Judicial Council.

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

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

## SUMMARY OF WORK OF COMMISSION

During 1965, the Law Revision Commission was engaged in three principal tasks:

- (1) Presentation of its 1965 legislative program to the Legislature.<sup>1</sup>
- (2) Work on various assignments given to the Commission by the Legislature.<sup>2</sup>
- (3) A study, made pursuant to Section 10331 of the Government Code, to determine whether any statutes of the State have been held by the Supreme Court of the United States or by the Supreme Court of California to be unconstitutional or to have been impliedly repealed.<sup>3</sup>

The Commission held five two-day meetings and five three-day meetings in 1965.

<sup>1</sup> See this report, *infra* at 912-914.

<sup>2</sup> See this report, *infra* at 915-918.

<sup>3</sup> See this report, *infra* at 919-920.

# 1965 LEGISLATIVE PROGRAM OF THE COMMISSION

## TOPICS SELECTED FOR STUDY

Senate Concurrent Resolution No. 2 was introduced by Honorable James A. Cobey, the Senate Member of the Law Revision Commission. This resolution requested legislative authorization for the Commission to continue its study of topics previously approved by the Legislature.<sup>1</sup> The resolution was adopted by the Legislature, becoming Resolution Chapter 127 of the Statutes of 1965.

Senator Cobey also introduced Senate Concurrent Resolution No. 80. This resolution directed the Commission to study three additional topics, expanded the scope of three topics previously authorized for study, and slightly changed the description of one topic previously authorized. The topics added or affected by this resolution are included in the list of studies in progress contained in this report.<sup>2</sup> The resolution was adopted by the Legislature, becoming Resolution Chapter 130 of the Statutes of 1965.

## OTHER MEASURES

### *Evidence Code*

Assembly Bill No. 333, which in amended form became Chapter 299 of the Statutes of 1965, was introduced by Honorable Alfred H. Song, the Assembly Member of the Law Revision Commission, and by Senator Cobey and other members of the Legislature to effectuate the recommendation of the Commission on this subject.<sup>3</sup>

Assembly Bill No. 333 was substantially amended. The amendments, other than those of a strictly technical nature, are indicated in the *Appendix, infra* at 923-928. Many of the amendments were intended to clarify the code without changing its substance. The most significant substantive changes were:

(1) Section 402, which required that the question of the admissibility of a confession be heard out of the presence of the jury, was limited to cases where any party so requests.

<sup>1</sup> Section 10335 of the Government Code provides that the Commission shall confine its studies to those topics set forth in the calendar of topics contained in the last preceding report which are thereafter approved for its study by concurrent resolution of the Legislature. The section also requires that the Commission study any topic which the Legislature, by concurrent resolution, refers to it for such study. Cal. Stats. 1963, Ch. 1797, creates a joint legislative committee to study the Penal Code and related laws and authorizes the committee to request the Commission to undertake the study of specific portions of the Penal Code and related laws.

<sup>2</sup> See this report, *infra* at 915-917.

<sup>3</sup> See *Recommendation Proposing an Evidence Code*, 7 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 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. LAW REVISION COMM'N, REP., REC. & STUDIES at 1, 101, 201, 601, 701, 801, 901, 1001, and *Appendix* (1964).

A companion bill, Senate Bill No. 110, was also introduced by Senator Cobey and Assemblyman Song to effectuate the recommendation of the Commission proposing the Evidence Code. The Senate bill was made unnecessary when Assembly Bill No. 333 was enacted.

(2) Section 451, which made judicial notice of sister-state law mandatory, was amended so that judicial notice of sister-state law is discretionary unless the court is requested to take judicial notice of such law and is provided with sufficient information to enable it to do so.

(3) Section 451 was amended to make mandatory judicial notice of the rules of professional conduct for members of the bar.

(4) Section 454 was amended to add a requirement that the advice of foreign law experts, if not received in open court, be in writing.

(5) Section 607, which prescribes the effect of a presumption that operates to establish a fact essential to the guilt of a criminal defendant, was amended to provide that the presumption operates only if the facts that give rise to the presumption have been found or otherwise established beyond a reasonable doubt and, in such case, the defendant need only raise a reasonable doubt as to the existence of the presumed fact.

(6) Section 665, which codified the presumption that an arrest without a warrant is unlawful, was deleted and Section 664 was revised to make it clear that it did not affect the common law presumption formerly contained in Section 665.

(7) A new Section 665 was added to retain the presumption that a person intends the ordinary consequences of his voluntary act.

(8) A new Section 668 was added to retain the presumption of unlawful intent from the doing of an unlawful act.

(9) Section 788, relating to impeachment of a witness by a prior conviction, was amended to state generally the substance of previously existing law.

(10) The new psychotherapist-patient privilege (Sections 1010-1026) was extended to cover examinations of a person's mental or emotional condition made for the purpose of scientific research on mental or emotional problems.

(11) Section 1042 was amended to eliminate the requirement that an adverse order be made where the official information or identity of an informer privilege is claimed in a "disciplinary proceeding."

(12) The previously existing newsman's statutory immunity from contempt for refusing to disclose his news source was inserted in place of Sections 1070-1073.

(13) Section 1230, the hearsay exception for declarations against interest, was limited to cases where the declarant is unavailable as a witness.

(14) Section 1237, relating to a writing containing past recollection, was amended to provide that the writing itself is inadmissible unless offered by an adverse party.

(15) Section 1241, relating to contemporaneous statements, was amended to eliminate the requirement that the declarant be unavailable as a witness and to limit the exception to statements offered to explain, qualify, or make understandable conduct of the declarant which were made while the declarant was engaged in such conduct.

(16) Section 1291, relating to former testimony offered against a party to the former proceeding, was revised to remove the additional

limitations on the use of such former testimony against the defendant in a criminal action.

(17) Section 1292, relating to the use of former testimony offered against a person not a party to the former proceeding, was limited to civil actions.

The Evidence Code as originally enacted by Chapter 299 of the Statutes of 1965 was affected by two other 1965 acts: Chapter 937 added a new subdivision (c) to Evidence Code Section 1042 and Chapter 1151 added Sections 810-822 to the Evidence Code and amended and renumbered one article heading to facilitate this addition.

Special reports on Assembly Bill No. 333 were prepared by the Assembly Committee on Judiciary and the Senate Committee on Judiciary and were printed in the Assembly and Senate Journals.<sup>4</sup> These reports were made in order to reflect the intent of the legislative committees in approving the various provisions of Assembly Bill No. 333. The reports state that the *Comments* contained in the Commission's printed recommendation reflect the committee's intent except to the extent that they are superseded by new or revised *Comments* appearing in the legislative reports. Each report contains revised *Comments* to several sections of the bill. These revised *Comments* reflect the amendments made to the bill and otherwise clarify and expand the *Comments* contained in the Commission's printed recommendation.

In August 1965, the Commission published the Evidence Code as enacted with the pertinent *Comments* from the Commission's recommendation and the Assembly and Senate Journals.<sup>5</sup>

#### *Claims and Actions Against Public Entities and Public Employees*

Assembly Bill No. 1733, which in amended form became Chapter 653 of the Statutes of 1965, was introduced by Assemblyman Song and Senator Cobey to effectuate the recommendation of the Commission on this subject.<sup>6</sup> A number of amendments were made. Most of them were of a technical or clarifying nature. The amendments, other than those of a strictly technical nature, are listed in the *Appendix, infra* at 928.

#### *Liability of Public Entities for Ownership and Operation of Motor Vehicles*

Assembly Bill No. 1735, which in amended form became Chapter 1527 of the Statutes of 1965, was introduced by Assemblyman Song and Senator Cobey to effectuate the recommendation of the Commission on this subject.<sup>7</sup> One technical amendment was made in the title of the bill.

<sup>4</sup> Assembly Journal for April 6, 1965; Senate Journal for April 21, 1965.

<sup>5</sup> See 7 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1001 (1965).

<sup>6</sup> See 7 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 401 (1965). The recommendation is entitled: *Recommendation Relating to Sovereign Immunity: Number 8—Revisions of the Governmental Liability Act (Liability of Public Entities for Ownership and Operation of Motor Vehicles; Claims and Actions Against Public Entities and Public Employees)*.

<sup>7</sup> *Ibid.*

# CALENDAR OF TOPICS FOR STUDY

## STUDIES IN PROGRESS

During the year covered by this report, the Commission had on its agenda the topics listed below, each of which it had been authorized and directed by the Legislature to study. The Commission proposes to continue its study of these topics.

### *Studies Which the Legislature Has Directed the Commission to Make*<sup>1</sup>

1. Whether an award of damages made to a married person in a personal injury action should be the separate property of such married person.
2. Whether the law relating to additur and remittitur should be revised.
3. 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.<sup>3</sup>
4. Whether the doctrine of sovereign or governmental immunity in California should be abolished or revised.<sup>2</sup>

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

The legislative directives to make these studies are found in the following :

No. 1 : Cal. Stats. 1957, Res. Ch. 202, p. 4589.

No. 2 : Cal. Stats. 1965, Res. Ch. 130 ; see also Cal. Stats. 1957, Res. Ch. 202, p. 4589.

No. 3 : Cal. Stats. 1965, Res. Ch. 130 ; see also Cal. Stats. 1956, Res. Ch. 42, p. 263.

No. 4 : Cal. Stats. 1957, Res. Ch. 202, p. 4589.

Nos. 5 and 6 : Cal. Stats. 1965, Res. Ch. 130.

No. 7 : Cal. Stats. 1965, Res. Ch. 130 ; see also Cal. Stats. 1962, Res. Ch. 23, p. 94.

No. 8 : Cal. Stats. 1965, Res. Ch. 130 ; see also Cal. Stats. 1957, Res. Ch. 202, p. 4589.

No. 9 : Cal. Stats. 1965, Res. Ch. 130.

<sup>2</sup>See *Recommendation and Study Relating to Evidence in Eminent Domain Proceedings*; *Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings*; *Recommendation and Study Relating to the Reimbursement for Moving Expenses When Property is Acquired for Public Use*, 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendations and Studies at A-1, B-1, and C-1 (1961). For a legislative history of these recommendations, see 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1-5 (1961). See also *Recommendation and Study Relating to Condemnation Law and Procedure: Number 4—Discovery in Eminent Domain Proceedings*, 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 701 (1963). For a legislative history of this recommendation, see 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 213 (1963).

<sup>3</sup>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. LAW REVISION COMM'N, REP., REC. & STUDIES 801, 1001, 1201, 1301, 1401, 1501, and 1601 (1963). For a legislative history of these recommendations, see 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 211-213 (1963). See also *A Study Relating to Sovereign Immunity*, 5 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1 (1963).

See also *Recommendation Relating to Sovereign Immunity: Number 8—Revisions of the Governmental Liability Act*, 7 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 401 (1965). For a legislative history of this recommendation, see 7 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 914 (1965).

5. 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.
6. Whether the law relating to devises and bequests to a trustee under, or in accordance with, terms of an existing inter vivos trust should be revised and whether the law relating to a power of appointment should be revised.
7. Whether Vehicle Code Section 17150 and related statutes should be revised.
8. Whether the law relating to the rights and duties attendant upon termination or abandonment of a lease should be revised.
9. Whether the Evidence Code should be revised.

*Studies Authorized by the Legislature Upon the Recommendation  
of the Commission*<sup>1</sup>

1. 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.<sup>2</sup>
2. Whether the law relating to escheat of personal property should be revised.<sup>3</sup>
3. Whether the law relating to the rights of a putative spouse should be revised.<sup>4</sup>
4. Whether the law respecting jurisdiction of courts in proceedings affecting the custody of children should be revised.<sup>5</sup>
5. Whether the law relating to attachment, garnishment, and property exempt from execution should be revised.<sup>6</sup>
6. Whether the Small Claims Court Law should be revised.<sup>7</sup>
7. Whether the law relating to the rights of a good faith improver of property belonging to another should be revised.<sup>8</sup>
8. Whether partnerships and unincorporated associations should be permitted to sue in their common names and whether the law relating to the use of fictitious names should be revised.<sup>9</sup>
9. Whether the law relating to the doctrine of mutuality of remedy in suits for specific performance should be revised.<sup>10</sup>

<sup>1</sup> Section 10335 of the Government Code requires the Commission to file a report at each regular session of the Legislature containing, *inter alia*, a list of topics intended for future consideration, and authorizes the Commission to study the topics listed in the report which are thereafter approved for its study by concurrent resolution of the Legislature.

The legislative authority for the studies in this list is:

No. 1: Cal. Stats. 1955, Res. Ch. 207, p. 4207.

Nos. 2 through 6: Cal. Stats. 1956, Res. Ch. 42, p. 263.

Nos. 7 through 12: Cal. Stats. 1957, Res. Ch. 202, p. 4589.

Nos. 13 through 15: Cal. Stats. 1958, Res. Ch. 61, p. 135.

No. 16: Cal. Stats. 1959, Res. Ch. 218, p. 5792; Cal. Stats. 1956, Res. Ch. 42, p. 263.

<sup>2</sup> For a description of this topic, see 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1955 Report at 28 (1957). For the legislative history, see 2 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1958 Report at 13 (1959).

<sup>3</sup> See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1956 Report at 25 (1957).

<sup>4</sup> *Id.* at 26.

<sup>5</sup> *Id.* at 29.

<sup>6</sup> See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1957 Report at 15 (1957).

<sup>7</sup> *Id.* at 16.

<sup>8</sup> *Id.* at 17.

<sup>9</sup> *Id.* at 18.

<sup>10</sup> *Id.* at 19.



10. Whether Civil Code Section 1698 should be repealed or revised.<sup>11</sup>
11. 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.<sup>12</sup>
12. Whether a former wife, divorced in an action in which the court did not have personal jurisdiction over both parties, should be permitted to maintain an action for support.<sup>13</sup>
13. Whether California statutes relating to service of process by publication should be revised in light of recent decisions of the United States Supreme Court.<sup>14</sup>
14. Whether Section 1974 of the Code of Civil Procedure should be repealed or revised.<sup>15</sup>
15. Whether the various sections of the Code of Civil Procedure relating to partition should be revised and whether the provisions of the Code of Civil Procedure relating to the confirmation of partition sales and the provisions of the Probate Code relating to the confirmation of sales of real property of estates of deceased persons should be made uniform and, if not, whether there is need for clarification as to which of them governs confirmation of private judicial partition sales.<sup>16</sup>

## STUDIES TO BE DROPPED FROM CALENDAR OF TOPICS FOR STUDY

### *Studies Relating to Criminal Law and Procedure*

In 1963, the Legislature created a joint legislative committee to revise the penal laws and procedures.<sup>1</sup> In order to avoid duplicating the work of this committee, the Commission recommends that the following topics be dropped from its calendar of topics:

1. Whether the law respecting habeas corpus proceedings, in the trial and appellate courts, should, for the purpose of simplification of procedure to the end of more expeditious and final determination of the legal questions presented, be revised.
2. Whether the laws relating to bail should be revised.
3. Whether the law respecting post conviction sanity hearings should be revised.
4. Whether the separate trial on the issue of insanity in criminal cases should be abolished or whether, if it is retained, evidence of the defendant's mental condition should be admissible on the issue of specific intent in the trial on the other pleas.
5. Whether the provisions of the Penal Code relating to arson should be revised.

The Commission has provided the joint legislative committee with research studies relating to some of the topics listed above.

<sup>11</sup> *Id.* at 21.

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

<sup>13</sup> *Id.* at 25.

<sup>14</sup> See 2 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1958 Report at 18 (1959).

<sup>15</sup> *Id.* at 20.

<sup>16</sup> See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1956 Report at 21 (1957).

<sup>1</sup> Cal. Stats. 1963, Ch. 1797, p. 3626.

*Study Relating to Election of Remedies*

In 1958, the Commission was authorized to make a study to determine whether the doctrine of election of remedies should be abolished in cases where relief is sought against different defendants.<sup>2</sup>

The Commission retained Professor Robert A. Girard of the School of Law, Stanford University, to do the research work in connection with this assignment. A preliminary study by Professor Girard revealed that no legislation is needed because the courts are satisfactorily resolving the problems that exist in this area of the law. Accordingly, the Commission recommends that this topic be dropped from its calendar of topics.

**STUDIES FOR FUTURE CONSIDERATION**

The Commission now has an agenda consisting of 24 studies in progress,<sup>3</sup> some of substantial magnitude, that will require all of its energies for a number of years. For this reason, the Commission is not at this time requesting authority to undertake additional studies.

<sup>2</sup> This study was authorized by Cal. Stats. 1958, Res. Ch. 61, p. 135. For a description of the topic, see 2 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1958 Report at 21 (1959).

<sup>3</sup> For a complete list of these studies, see this report, *supra* at 915-917.

## REPORT ON STATUTES REPEALED BY IMPLICATION OR HELD UNCONSTITUTIONAL

Section 10331 of the Government Code provides:

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

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

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

(2) Two decisions of the Supreme Court of the United States holding statutes of this state unconstitutional have been found.

In *Griffin v. California*,<sup>2</sup> the Supreme Court held provisions of California law unconstitutional to the extent that such provisions authorize "comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."<sup>3</sup> Provisions affected by this decision include Article I, Section 13, of the California Constitution, Article VI, Section 19, of the California Constitution, and Penal Code Sections 1093, 1127, and 1323,<sup>4</sup> insofar as they purport to authorize such comment or instructions.

In *Jordan v. Silver*,<sup>5</sup> the Supreme Court affirmed a United States District Court decision holding unconstitutional "the present plan of Senate apportionment by districts in California . . ."<sup>6</sup> The order as affirmed required the state Legislature to reapportion the Senate by July 1, 1965, and further provided that, if the Legislature had not presented an adequate plan of reapportionment by that time, the court would hold further proceedings and devise its own plans to bring the Senate in compliance with the Constitution of the United States. The Legislature failed to adopt any such plan. However, before the United States District Court could hold further proceedings in the matter, the California Supreme Court accepted jurisdiction in two cases discussed below, determined that the apportionment of both houses of the Legislature violated the United States Constitution, and gave the Legislature

<sup>1</sup> This study has been carried through 63 Adv. Cal. 334 (1965) and 381 U.S. 763 (1965).

<sup>2</sup> 380 U.S. 609 (1965). See *Malloy v. Hogan*, 378 U.S. 1 (1964); *People v. Bostick*, 62 Cal.2d 820, 823, 44 Cal. Rptr. 649, 650, 402 P.2d 529, 530 (1965) (The "comment of the prosecutor and the trial court's instruction herein [both relating to criminal defendant's failure to testify] each constituted error.").

<sup>3</sup> 380 U.S. at 615.

<sup>4</sup> Section 1323 of the Penal Code is repealed by Chapter 299 of the Statutes of 1965, operative January 1, 1967.

<sup>5</sup> 381 U.S. 415 (1965).

<sup>6</sup> *Silver v. Jordan*, 241 F. Supp. 576, 585 (S.D. Cal. 1964).

until December 9, 1965, to apportion itself. In view of the California Supreme Court's action in the matter, the United States District Court postponed further proceedings in the matter until January 8, 1966.

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

(4) One decision of the Supreme Court of California holding statutes of this state unconstitutional has been found.

In *Silver v. Brown* and *Adams v. Brown* (consolidated cases),<sup>7</sup> the California Supreme Court held unconstitutional the then existing apportionment of the Senate and Assembly of California.<sup>8</sup> As a consequence of this decision, the Governor called the Legislature into special session on September 20, 1965. This 1965 Second Extraordinary Session, which adjourned on November 4, 1965, enacted legislation that redistricted both the Senate and the Assembly.<sup>9</sup> The legislation passed at the 1965 Second Extraordinary Session did not, however, provide for the repeal of Sections 5 and 6 of Article IV of the California Constitution to the extent that those sections are unconstitutional under *Silver v. Brown*.

<sup>7</sup> 63 Adv. Cal. 278, 46 Cal. Rptr. 308, 405 P.2d 132 (1965).

<sup>8</sup> The apportionment of the Senate and Assembly which was held unconstitutional was determined by:

- (1) Sections 5 and 6 of Article IV of the California Constitution;
- (2) Chapter 2 (commencing with Section 30100) of Division 16 of the Elections Code (Senate); and
- (3) Section 30201 of the Elections Code (Assembly).

Chapter 3 of the Statutes of 1965 (2d Ex. Sess.) substituted a new chapter for Chapter 2 of Division 16 and amended Section 30201.

<sup>9</sup> Cal. Stats. (2d Ex. Sess.) 1965, Ch. 3, Senate Bill No. 13 (1965, 2d Ex. Sess.), which made technical changes in Chapter 3 of the Statutes of 1965 (2d Ex. Sess.) and which added a new section to the Legislators' Retirement Law, was vetoed by the Governor.

## RECOMMENDATIONS

The Law Revision Commission respectfully recommends that the Legislature authorize the Commission to complete its study of the topics listed as studies in progress on pages 915-917 of this report.

Pursuant to the mandate imposed by Section 10331 of the Government Code, the Commission recommends the repeal of Sections 1093 and 1127 of the Penal Code to the extent that those provisions are unconstitutional. The Commission further recommends that the Legislature take appropriate action to submit to the people amendments to Article I, Section 13, Article IV, Sections 5 and 6, and Article VI, Section 19, of the California Constitution, to eliminate the portions thereof that are in violation of the United States Constitution.



## APPENDIX

### PRINCIPAL AMENDMENTS OF BILLS INTRODUCED UPON RECOMMENDATION OF LAW REVISION COMMISSION

#### Assembly Bill No. 333

The following are the principal amendments of Assembly Bill 333:

A new section was added to designate Assembly Bill No. 333 (Chapter 299 of the Statutes of 1965) as the "Cobey-Song Evidence Act" in order to provide a convenient means of distinguishing Chapter 299 from the Evidence Code.

*Section 2* was amended to substitute "effecting its objects and promoting" for "effect its objects and to promote."

*Section 12*, which specifies that the Evidence Code becomes operative on January 1, 1967, was amended to make clear when the provisions of the Evidence Code apply to proceedings pending on that date.

*Section 115*, defining "burden of proof," was amended to substitute "establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to" for "meet the requirement of a rule of law that he."

*Section 120*, defining "civil action," was amended to substitute "civil proceedings" for "all actions and proceedings other than a criminal action."

*Section 165*, defining "oath," was amended to add the words "or declaration under penalty of perjury."

*Section 225*, defining "statement," was amended to substitute "oral or written" for the word "a" which appeared before "verbal expression" in two places in this section.

*Section 230*, defining "statute," was amended to substitute "treaty and a constitutional provision" for "provision of the Constitution."

*Section 245*, defining "verbal," was deleted and its substance was incorporated into Section 225.

*Section 300* was amended to insert "in such actions."

*Section 310* was amended as follows: Proposed Section 310 was designated subdivision (a) of Section 310. Proposed subdivision (a) of Section 311 was incorporated into Section 310 as subdivision (b) and was revised to insert the phrase "of the law of an organization of nations or."

*Section 311* was amended as follows: Proposed subdivision (a) was incorporated into Section 310. Proposed subdivision (b) of Section 311 became Section 311 and was amended to substitute "the law of an organization of nations, a foreign nation or a state other than this state, or a public entity in a foreign nation or a state other than this

state, is applicable and such law cannot be determined” for “such law is applicable and the court is unable to determine it.” Other conforming technical amendments were made.

*Section 354* was amended to insert “or recross-examination” in subdivision (c).

*Section 402* was amended to insert “if any party so requests” in subdivision (b).

*Section 451* was amended as follows: In subdivision (a), the words “of this state and of the United States and” were substituted for “of the United States and of every state of the United States and of.” In subdivision (c), the words “Rules of professional conduct for members of the bar adopted pursuant to Section 6076 of the Business and Professions Code and” were inserted.

*Section 452* was amended as follows: In subdivision (a), the words “The decisional, constitutional, and statutory law of any state of the United States and the” were inserted, and “this state” was substituted for “any state of the United States.” In subdivision (f), the words “of an organization of nations and” were inserted. In subdivisions (g) and (h), the word “specific” was deleted.

*Section 453* was amended to substitute “The trial court shall take judicial notice” for “Judicial notice shall be taken.”

*Section 454* was amended to add subdivision (b) and other technical amendments were made.

*Section 455* was amended to insert “trial” before “court” in the introductory phrases of subdivisions (a) and (b).

*Sections 456 and 457* were amended to insert “trial” before “court.”

*Section 460* was added.

*Section 550*, as proposed, was deleted and replaced by a new section.

*Sections 600, 604, and 606* were amended to delete the phrase “Subject to Section 607.”

*Section 607*, as proposed, was deleted and replaced by a new section.

*Section 664* was amended to make it clear that the presumption of regular performance of official duty does not apply when it has been established that an arrest was made without a warrant.

*Section 665*, as proposed, was deleted and replaced by a new section continuing the rebuttable presumption formerly contained in subdivision 3 of Section 1963 of the Code of Civil Procedure.

*Section 668* was added to continue the rebuttable presumption formerly contained in subdivision 2 of Section 1963 of the Code of Civil Procedure.

*Sections 703 and 704* were each amended as follows: The clause “which shall be deemed a motion for mistrial” was deleted from subdivision (b). Proposed subdivision (c) was made subdivision (d) and a new subdivision (c) was added.

*Section 710* was amended to substitute “law” for the phrase “Chapter 3 (commencing with Section 2093) of Title 6 of Part IV of the Code of Civil Procedure.”



*Section 731* was amended to substitute "board of supervisors so provides" for "procedure prescribed in this subdivision has been authorized by the board of supervisors" in subdivision (b).

*Section 768* was amended to delete "including a statement made by him that is inconsistent with any part of his testimony at the hearing" from subdivision (a).

*Section 771* was amended as follows: Proposed *Section 771* was designated subdivision (a) and the words "at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken" were substituted for "at the request of an adverse party, who may, if he chooses, inspect the writing, cross-examine the witness concerning it, and read it to the jury." Subdivisions (b) and (c) were added and other technical amendments were made.

*Section 772* was amended to substitute "interrupt" for "during" and to insert "in order to" in subdivision (c); and to insert "without his consent" in subdivision (d).

*Section 775* was amended to insert "or on the motion of any party."

*Section 776* was amended to delete the second sentence of subdivision (a).

*Section 780* was amended to substitute "statute" for "law."

*Section 788* was amended as follows: Proposed subdivision (a) was deleted entirely. In proposed subdivision (b), the introductory paragraph was deleted and replaced by a new introductory paragraph; proposed paragraphs (1), (2), (3), and (4) were redesignated subdivisions (a), (b), (c), and (d); and proposed paragraph (5) was deleted. The clause "but this exception does not apply to any criminal trial where the witness is being prosecuted for a subsequent offense" was added to new subdivision (c). Other technical changes were made.

*Section 804* was amended to insert "subject matter of the" in subdivision (b).

*Sections 810-822* (Article 2 of Chapter 1 of Division 7), relating to evidence in eminent domain and inverse condemnation cases, were added by Chapter 1151 of the Statutes of 1965. Proposed Article 2 (consisting of *Section 870*) of Chapter 1 of Division 7 was renumbered Article 3.

*Section 904*, defining "disciplinary proceeding," was deleted.

*Section 912* was amended to delete "under this division" from subdivision (c).

*Section 914* was amended to insert "nor does it apply to hearings and investigations of the Industrial Accident Commission" in subdivision (b).

*Section 962* was amended to insert "nor the successor in interest of any of them" and to substitute "one of such clients (or his successor in interest) and another of such clients (or his successor in interest)" for "such clients."

*Section 998* was amended to delete "or in a disciplinary proceeding."

*Section 1006* was amended to substitute "if such report or record is open to public inspection" for "unless the statute, charter, ordinance,

administrative regulation, or other provision requiring the report or record specifically provides that the information is confidential or may not be disclosed in the particular proceeding.”

*Section 1007* was added.

*Section 1011* was amended to insert “or who submits to an examination of his mental or emotional condition for the purpose of scientific research on mental or emotional problems.”

*Section 1012* was amended to insert “or examination” and to substitute “of the consultation or examination” for “for which the psychotherapist is consulted.”

*Section 1026* was amended to substitute “if such report or record is open to public inspection” for “unless the statute, charter, ordinance, administrative regulation, or other provision requiring the report or record specifically provides that the information is confidential or may not be disclosed in the particular proceeding.”

*Section 1030* was amended to insert “religious practitioner.”

*Section 1032* was amended to substitute “under the discipline or tenets of his church, denomination, or organization, has a duty to keep such communications secret” for “has a duty to keep them secret.”

*Section 1042* was amended to delete references to a “disciplinary proceeding” from subdivisions (a) and (b). Subdivision (c) was added by Chapter 937 of the Statutes of 1965.

*Sections 1070–1073* were replaced by a new *Section 1070* restating the newsmen’s immunity from contempt which was formerly contained in subdivision 6 of *Section 1881* of the Code of Civil Procedure.

*Section 1150*, as proposed, was designated as subdivision (a) and subdivision (b) was added. The introductory phrase “Except as otherwise provided by law” was deleted from new subdivision (a).

*Section 1156* was amended to insert in subdivision (a) the phrase “Except as provided in subdivision (b)” and to substitute the phrase “to 2036, inclusive,” for the words “and 2036.” A new subdivision (b) was added, and other technical amendments were made.

*Section 1203* was amended to insert “subject matter of the” in subdivision (b).

*Section 1227* was amended to insert “for wrongful death.”

*Section 1230* was amended to insert “the declarant is unavailable as a witness and.”

*Section 1237* was amended to designate the proposed introductory paragraph as subdivision (a) and to add a new subdivision (b). Other technical changes were made.

*Section 1241* was amended to delete from the introductory paragraph the words “the declarant is unavailable as a witness and.” Proposed subdivisions (a) and (b) were deleted and replaced by new subdivisions (a) and (b).

*Section 1261*, as proposed, was deleted and replaced by a new *Section 1261*.

*Section 1291* was amended to delete the clause “except that testimony in a deposition taken in another action and testimony given in a pre-

liminary examination in another criminal action is not made admissible by this paragraph against the defendant in a criminal action unless it was received in evidence at the trial of such other action" from paragraph (2) of subdivision (a). Subdivision (b), as proposed, was deleted and replaced by a new subdivision (b).

*Section 1292* was amended to delete "or against the prosecution in a criminal action" from paragraph (2) of subdivision (a). Subdivision (b), as proposed, was deleted and replaced by a new subdivision (b).

*Section 1315* was amended to insert "which is contained in a writing made as a record of a church, religious denomination, or religious society" in the introductory paragraph. Proposed subdivision (c) was deleted.

*Section 1410*, as proposed, was deleted and replaced by a new Section 1410.

*Section 1413* was amended to insert "made or."

*Section 1414* was amended to substitute a new subdivision (b) for the proposed subdivision (b).

*Section 1415* was amended to substitute "genuineness" for "authenticity."

*Sections 1417 and 1418* were amended to substitute "genuineness" and "genuine" for "authenticity" and "authentic" respectively.

*Section 1419* was amended to substitute "a writing whose genuineness is sought to be proved" for "a writing sought to be introduced in evidence." The word "genuine" was substituted for "authentic" in two places.

*Section 1421* was amended to substitute "matters" for "facts."

*Section 1530* was amended to delete "that is" and to insert "existence and" in subdivision (a).

*Section 1532* was amended to insert "existence and" in subdivision (a).

*Section 1562* was amended to substitute "as evidence of" for "in evidence and" and to insert "pursuant to Section 1561 and the matters so stated" in the second sentence. The last sentence was amended to make the presumption a presumption affecting the burden of producing evidence instead of a presumption affecting the burden of proof.

*Section 1564* was amended to add the first sentence of the quoted matter.

*Section 1600* was amended to insert "existence and" in the introductory paragraph.

*Section 3544 of the Civil Code (proposed)* was deleted and its substance was inserted as a presumption in Section 665 of the Evidence Code.

*Section 1845.5 of the Code of Civil Procedure* was renumbered Section 1247c and amended by the addition of the last sentence.

*Section 1893 of the Code of Civil Procedure* was amended to add the second sentence.

*Section 5708 of the Labor Code* was added and amended, but the section was deleted before the bill was enacted because the amendment of Section 5708 was considered unnecessary.

#### Assembly Bill No. 1733

As introduced, Assembly Bill No. 1733 differed from the proposed legislation set out in the Commission's recommendation. The bill was first amended so that it conformed to the Commission's recommendation and thereafter the following significant amendments were made:

*Section 911.6* was amended to substitute "who sustained the alleged injury, damage or loss" for "required to present the claim" in paragraphs (2), (3), and (4) of subdivision (b).

*Section 930.4* was amended as follows: Subdivisions (a), (b), and (c) were deleted and proposed subdivision (d), no longer a subdivision, was made a continuation of the introductory clause.

*Section 946.6* was amended as follows: Subdivision (a) was amended to make clear what court is the proper court for filing the petition and to specify the remedy available if the petition is initially filed in the wrong court. In paragraphs (2), (3), and (4) of subdivision (c), the clause "who sustained the alleged injury, damage or loss" was substituted for the phrase "required to present the claim."

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