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CALIFORNIA JURISPRUDENCE

A COMPLETE STATEMENT
OF THE LAW AND PRACTICE
OF THE STATE OF
CALIFORNIA

Editor

WILLIAM M. MCKINNEY

Editor Ruling Case Law,
Federal Statutes Annotated, Annotated Cases,
Encyclopaedia of Pleading
and Practice, Etc.

VOLUME VII

CORPORATIONS (Concluded) TO CRIMINAL LAW, § 137

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XVI. LIABILITY OF OFFICERS AND AGENTS.

Nonstatutory Liability.

§ 505. **In General.**—The directors of a corporation, being trustees for the stockholders and indirectly for the creditors of the corporation,¹⁵ are responsible as such trustees for the management of the property and affairs of the corporation.¹⁶ The right of a stockholder to recover against directors who are guilty of fraud or fraudulent misappropriations is treated elsewhere in this article.¹⁷ In such cases, of course, the usual rules as to what constitutes fraud and the right to recover upon the ground of fraud, are applicable.¹⁸ For example, in an action by stockholders against directors to recover for losses occasioned by their violation of duty, the complaint must affirmatively show the violation of an existing obligation and duty on their part. Thus, where there is no allegation that a ditch and canal company was organized for profit, the directors cannot be held liable for damages for a gratuitous distribution of the water, since the allegations in a suit against them must show a duty to sell the water.¹⁹ It appears that the question whether a stranger who believes false representations of the corporation that its stock has been fully paid up and who buys shares from another stranger and finds that they are not fully paid up, has an action against the directors to recover the sum so paid for the stock, has not yet been decided.²⁰

§ 506. **Negligence.**—Even before the adoption of statutes in terms making directors so liable it was recognized, both in the courts of common law and in courts of equity,

15. See *supra*, § 444.

16. See cases cited *infra* in this and succeeding sections. And see TRUSTS.

17. See *supra*, § 263 et seq.

18. See FRAUD AND DECEIT.

19. *Applegarth v. McQuiddy*, 77 Cal. 408, 19 Pac. 692.

20. *Smith v. Martin*, 135 Cal. 247, 67 Pac. 779 (statement in concurring opinion of Beatty, C. J.).

that directors as trustees were liable for acts of malfeasance or misfeasance by which the capital of the corporation might be improperly depleted, and they may still be liable under the old rules where they have been grossly negligent in the employment of the corporate servants or in the oversight of them in the management of the corporate business. In such cases questions of good faith, care and diligence are the essential ones to be determined.¹ In the absence of anything to show gross negligence, however, directors are entitled to rely upon data furnished them by subordinates,² and as to matters within their powers in which they exercise their best judgment, their actions are binding upon the stockholders even though they do not secure the best terms.³ So, an officer, such as secretary, must exercise reasonable diligence in the performance of his duties,⁴ and it is no justification in an action against an unfaithful officer to say that the directors did not do their duty in directing his acts.⁵ Likewise, the law imposes upon directors in the discharge of duties as members of an executive committee the duty of using due care, and their failure to use due care is a wrong for which the corporation is entitled to redress.⁶ Since fraud and negligence, however culpable, are not the same thing, if a plaintiff relies on negligence he ought to plead it.⁷

1. Southern California Home Builders v. Young, 31 Cal. App. Dec. 336, 188 Pac. 586. See BANK, vol. 4, p. 155.

2. Nash v. Rosesteel, 7 Cal. App. 504, 94 Pac. 850.

3. Donohoe v. Mariposa etc. Co., 66 Cal. 317, 5 Pac. 495.

4. Odd Fellows' etc. Assn. v. James, 63 Cal. 598, 49 Am. Rep. 107.

5. San Joaquin Valley Bank v. Bours, 65 Cal. 247, 3 Pac. 864.

6. Chetwood v. California Nat. Bank, 113 Cal. 414, 45 Pac. 704. See 3 Cal. Law Rev. 21, on the subject, "Diligence of directors in the management of corporations." As to executive committees generally, see supra, § 479.

7. Fox v. Hale & Norcross etc. Co., 108 Cal. 369, 41 Pac. 308. See generally FRAUD AND DECEIT; NEGLIGENCE; PLEADING.

Statutory Liability in General.

§ 507. **Statutory Provisions.**—Subdivision 1 of section 309 of the Civil Code as amended in 1917 provides that

“Unless they shall have been first permitted or authorized so to do by the commissioner of corporations, directors of corporations must not make dividends except from the surplus profits arising from the business thereof; nor must they create any debts beyond their subscribed capital stock; nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock, except as hereinafter provided, nor reduce or increase the capital stock, except as provided in section three hundred fifty-nine of this code. For a violation of the provisions of this section, the directors under whose administration the same may have happened (except those who may have caused their dissent therefrom to be entered at large on the minutes of the directors at the time, or were not present when the same did happen) are, in their individual or private capacity, jointly and severally liable to the corporation, and to the creditors thereof, to the full amount of the capital stock so divided, withdrawn, paid out, or reduced or debt contracted. Nothing herein prohibits a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon its dissolution, or the expiration of its term of existence.”

Subdivision 2 of the amendment of 1917 provided a saving clause to the effect that no right, cause of action, or liability then existing or any action or proceeding then pending should be affected by the new provisions, excepting, however, that the liability of a director theretofore incurred shall not exist in any case, where, after all the debts and liabilities of the corporation have been paid, all the stock was withdrawn or divided with the consent of all the stockholders.⁸ Also, several important changes were made in the section by way of omission.⁹ The purpose of

8. Stats. 1917, p. 657. See *infra*, § 510, as to the effect of the amendment of 1917; and *infra*, § 511, as to the statute of limitations.

9. The section as amended omits the following provisions of the prior law: first, that no statute of limitations should be a bar to any suit

the legislature in enacting the amendment of 1917 was to excuse directors only in the event that the affairs of the corporation had been wound up by consent of all parties, that is, only where the parties by agreement had arrived at a conclusion which they could have as well reached by formal application to the court for dissolution after payment of debts and obligations. Hence, a liability which would prevent dissolution, would prevent the release of the directors from their liability.¹⁰

§ 508. Necessity of Corporate Act.—All of the acts prohibited by section 309 of the Civil Code above quoted are voluntary acts of the members of the board of directors.¹¹ It is not necessary, however, that the acts forbidden by the section should be corporate acts of the board of directors, and it is not a defense that there was no corporate act where a majority of the directors did not participate in the unlawful intent. The directors may offend against the statute even though they do not all join in the common intent so to do, and the corporate act of the directors is not had in pursuance of such common intent. The penalty is imposed upon the directors during whose administration the wrong occurs; however, directors may exculpate themselves by an affirmative entry upon the minutes of the corporation of their dissent from the act.¹²

against directors under the section; second, the exception made in favor of corporations formed for the purpose of acquiring, holding and selling real estate, water and water rights so that such corporations might by vote of the stockholders divide the land, water or water rights; and third, the provision that all conveyances made by the corporation in pursuance of the section should be made and received subject to the debts of the corporation ex-

isting at the date of the conveyance.

10. *Talcott Land Co. v. Hershiser*, 184 Cal. 748, 195 Pac. 653.

11. *Moore v. Lent*, 81 Cal. 502, 22 Pac. 875. See *supra*, § 507, for enumeration of acts under the existing law.

12. *Talcott Land Co. v. Hershiser*, 184 Cal. 748, 195 Pac. 653. See note, 4 A. L. R. 166, as to motive as affecting personal liability of directors in voting for acts not in themselves illegal.

§ 509. **Nature of Liability.**—The liability of directors under section 309 of the Civil Code is purely statutory,¹³ punitive in character,¹⁴ and not contractual.¹⁵ In so far as construction is concerned, however, it seems that it matters not whether the statute be penal or remedial; that the better view is that the liability is statutory,¹⁶ and should be strictly construed only to the extent that the liability should clearly appear.¹⁷ Upon the question as to whether, for a violation of section 309 of the Civil Code, all the directors should join in the common unlawful intent, and as to whether upon the verdict of the jury exonerating two of the directors in pursuance of an instruction to the general effect that if these directors acted in good faith they should be relieved from the statutory liability, it has been held that the liability is joint and several and if the defendant is liable he cannot complain of the verdict in favor of his codefendants who are equally liable.^{17a}

§ 510. **Effect of Amendment or Repeal.**—Under the rule that whenever a right is created solely by statute and is dependent upon the statute alone, and remains inchoate and not reduced to possession or perfected by final judg-

13. *Freeman v. Glenn Co. Tel. Co.*, 184 Cal. 508, 194 Pac. 705. And see cases cited infra.

14. *Talcott Land Co. v. Hershiser*, 184 Cal. 748, 195 Pac. 653; *Freeman v. Glenn Co. Tel. Co.*, 184 Cal. 508, 194 Pac. 705; *Moss v. Smith*, 171 Cal. 777, 155 Pac. 90 (where the statute is regarded as penal in nature so far as directors are concerned, even if remedial so far as the creditor is concerned); *Moore v. Lent*, 81 Cal. 502, 22 Pac. 875. See *Irvine v. McKeon*, 23 Cal. 472 (construing section 14 of the general corporation law of April 22, 1850, and holding that this, being a statute of forfeiture or imposing a penalty, is to be strictly construed).

15. *Talcott Land Co. v. Hershiser*, 184 Cal. 748, 195 Pac. 653; *Chambers v. Farnham*, 39 Cal. App. 17, 179 Pac. 423; *Moss v. Smith*, 171 Cal. 777, 155 Pac. 90 (where for the purposes of discussion and decision only, the code provision was considered purely as a remedial statute).

16. *Freeman v. Glenn County Tel. Co.*, 184 Cal. 508, 194 Pac. 705.

17. *Moore v. Lent*, 81 Cal. 502, 22 Pac. 875 (where this seems to be the sense in which the expression "penal" is used).

17a. *Talcott Land Co. v. Hershiser*, 184 Cal. 748, 195 Pac. 653.

ment, the repeal of the statute destroys the remedy, unless it contains a saving clause,¹⁸ it has been held that the right against the directors for creating debts in excess of subscribed capital stock, being a statutory right pure and simple, and having no foundation in contract, nor any existence at common law, the change in the law, amounting to a repeal so far as a particular class of corporations is concerned, absolutely destroys the right of plaintiff before its perfection by final judgment.¹⁹ Likewise, the amendment of 1917 to section 309 of the Civil Code, operated as a repeal of the statutory liability formerly existing in those cases where distribution had been made under the conditions stated in the amendment, at any time prior to final judgment.²⁰ But such an amendment remits liability only in the cases mentioned. Thus, where there were outstanding obligations such as would have prevented a dissolution, even though assumed by other parties, it was held that the liability was not remitted.¹

§ 511. Statute of Limitations.—The legislature in the original statute had declared the wisdom of withholding the privilege of pleading the statute of limitations in actions against directors for the misfeasances covered by the statute,² and had declared that no statute of limitations was a bar to any suit against directors for any sums for which they were liable under the section.³ This portion of the statute was repealed by the amendment of 1917. Thus, it has been said that the right to compel the restoration of capital was expressly excepted from the operation

18. *Freeman v. Glenn Co. Tel. Co.*, 184 Cal. 508, 194 Pac. 705; *Moss v. Smith*, 171 Cal. 777, 155 Pac. 90. See STATUTES.

19. *Moss v. Smith*, 171 Cal. 777, 155 Pac. 90, holding that the provisions of the public utility act superseding § 309 of the Civil Code as to such corporations prevented recovery for prior violation.

20. *Freeman v. Glenn Co. Tel. Co.*, 184 Cal. 508, 194 Pac. 705.

1. *Talcott Land Co. v. Hershiser*, 184 Cal. 748, 195 Pac. 653.

2. *Wells, Fargo & Co. v. Enright*, 127 Cal. 669, 49 L. R. A. 647, 60 Pac. 439.

3. See Civ. Code, § 309, as it existed prior to the amendment of 1917.

of the statute of limitations for the purpose probably of enabling future stockholders, after the lapse of years, to enforce the liability through the corporation, after it had passed from the control of the wrongdoers.⁴ While no particular statute of limitations is declared by section 309 of the Civil Code to be applicable, there would seem to be no doubt but that the liability, being statutory,⁵ is subject to the limitation of section 359 of the Code of Civil Procedure, providing that actions against directors or stockholders to recover a penalty or forfeiture imposed, or to enforce a liability created by law, must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created.⁶

Distribution or Reduction of Capital Stock.

§ 512. **In General.**—Section 309 of the Civil Code fixes upon directors a liability for violating the provisions forbidding them, unless first permitted or authorized so to do by the commissioner of corporations, from making dividends except from the surplus profits arising from the business and from dividing, withdrawing or paying to stockholders or any of them any part of the capital stock, and from reducing or increasing the capital stock except as provided in section 359 of the Civil Code.⁷ The provi-

4. *Talcott Land Co. v. Hershiser*, 184 Cal. 748, 195 Pac. 653, per Wilbur, J.

5. See *supra*, § 509.

6. See *supra*, § 391 et seq., *supra*, as to limitation of actions against stockholders on their constitutional liability. See note, 10 A. L. R. 370, as to laches as affecting right of corporation or its stockholders to relief against directors for violation of trust.

7. See *supra*, § 507, for the full wording of the statute.

The provisions of Stats. 1853, p. 89, contained substantially the provisions now found in § 309 of the Civil Code. See *Schaake v. Eagle etc. Can Co.*, 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759; *Kohl v. Lilienthal*, 81 Cal. 378, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689; *Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365.

See Stats. 1917, p. 1321, as to corporations organized with stock of no par value. The statute provides that no such corporation shall de-

sions of section 309 have no application, however, to a corporation organized mainly for the purpose of distributing the property of the corporation to the stockholders and of liquidating its business as speedily as possible, for in such a case the corporation takes merely the legal title in trust for the purposes declared in the articles.⁸ Likewise, there is nothing in the statute to prohibit a corporation from making a sale to a stockholder, for an adequate consideration, of property owned by it.⁹ And directors are not liable for losses resulting from investments which were considered judicious at the time they were made, nor is the wisdom or prudence of their investments to be measured by a result which few persons anticipated. The result in such a case is to be treated as a loss of capital and is not converted *ex post facto* into a current working expense.¹⁰

Even before the adoption of statutes, it was recognized both by courts of common law and of equity that directors as trustees were liable for acts of malfeasance or misfeasance by which the capital of the corporation might be improperly depleted, and so it has been said that they may still be liable under the old rules in cases other than those provided for in section 309 of the Civil Code, if they have been grossly negligent in the discharge of their corporate duties.¹¹

§ 513. Purpose of the Statutory Provisions.—The supreme court has said that the legislature did not intend that corporations which have divided up the capital stock

clare a dividend which shall reduce the amount or actual value of its capital below the amount stated in the articles as the amount of capital with which the corporation will carry on business. If any such dividend is declared, the responsibility of directors provided is such as under § 309 of the Civil Code, except that it is to the full amount of any loss sustained by the corpora-

tion or its creditors respectively by reason of such dividend.

8. *Baldwin v. Miller & Lux*, 152 Cal. 454, 92 Pac. 1030.

9. *Robinson v. Muir*, 151 Cal. 118, 90 Pac. 521.

10. *Excelsior etc. Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44.

11. *Southern California Home Builders v. Young*, 31 Cal. App. Dec. 336, 188 Pac. 586.

with which they have been doing business should continue to maintain corporate existence with power to contract, incur debts and perpetrate the numerous frauds that would under such circumstances be within their power. This is clearly implied in the provisions of the Code of Civil Procedure relating to dissolution of corporations and in the provisions of section 309 of the Civil Code, allowing distribution of their remaining capital after payment of their debts, upon dissolution or expiration of the term of existence. The legislature having said that the capital stock may be distributed after payment of all debts upon dissolution or the expiration of corporate existence, the intention was that there should not be a distribution under any other circumstances.¹² One purpose of section 309 of the Civil Code was to assure existing and incoming stockholders of the corporation that its capital should not be wrongly depleted,¹³ as, for example, by the resale of stock of a corporation whose assets have been divided. And even though new stockholders are advised of such previous distribution of assets, the case is still within the purview of the law.¹⁴ The inhibition of statutes of this character has regard not only to rights of existing creditors, but to those of all persons who may deal with the corporation on the faith that the capital has not been divided.¹⁵

§ 514. Meaning of "Capital Stock."—The capital stock referred to in section 309 of the Civil Code is the actual

12. *Kohl v. Lilienthal*, 81 Cal. 378, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689.

13. *Southern California Home Builders v. Young*, 31 Cal. App. Dec. 336, 188 Pac. 586.

The section is aimed at directors alone, and its purpose is to prevent them from distributing and crippling the business by diminishing the capital stock and thus lessening the capacity of the corporation suc-

cessfully to carry on its business. *Baldwin v. Miller & Lux*, 152 Cal. 454, 92 Pac. 1030.

14. *Talcott Land Co. v. Hershiser*, 184 Cal. 748, 195 Pac. 653.

15. *Kohl v. Lilienthal*, 81 Cal. 378, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689; *Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365, holding to the rule under act of 1853 (Stats. 1853, p. 89), similar in its import to § 309 Civ. Code.

property of the corporation contributed by the shareholders of the nominal capital,¹⁶ or the actual capital or assets with which the corporation carries on the corporate business.¹⁷ The term thus has a very different meaning from that of "shares of the capital stock" as representing the interest of holders thereof in the business and property of the corporation whose shares they hold.¹⁸ Inasmuch as the entire proceeds of the sales of the stock, even when sold above par, are part of the original assets or capital stock, where money is received as premiums above the par value of stock sold, it is a part of the capital stock and is not surplus profits; hence dividends cannot be paid from such money.¹⁹

§ 515. Illegality of Transactions.—Section 309 of the Civil Code forbids the withdrawal or payment to stockholders of any part of the capital stock except upon dissolution or at the expiration of the term of existence of the corporation, and section 560 of the Penal Code condemns such transactions as criminal.²⁰ The inhibition of the

16. *Burne v. Lee*, 156 Cal. 221, 104 Pac. 438; *Tapscott v. Mexican etc. Co.*, 153 Cal. 664, 96 Pac. 271; *Excelsior W. & M. Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44 (defining the double sense in which the term "capital stock" is used); *Merchants' etc. R. Co. v. Schroeder*, 39 Cal. App. 226, 178 Pac. 540.

17. *Schulte v. Boulevard etc. Co.*, 164 Cal. 464, Ann. Cas. 1914B, 1013, 44 L. R. A. (N. S.) 156, 129 Pac. 582; *Kohl v. Lillenthal*, 81 Cal. 378, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689; *Merchants' etc. R. Co. v. Schroeder*, 39 Cal. App. 226, 178 Pac. 540; *Stewart v. Stewart Hotel Co.*, 33 Cal. App. 167, 164 Pac. 620; *E. J. Dodge Co. v. First National Bank*, 260 Fed. 758; *First National Bank v. E. J. Dodge Co.*, 233 Fed. 74, 147 C. C. A. 144.

18. *Excelsior W. & M. Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44; *Kohl v. Lillenthal*, 81 Cal. 378, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689. See supra, § 135, as to nature of shares.

19. *Merchants' etc. R. Co. v. Schroeder*, 39 Cal. App. 226, 178 Pac. 540. See note in 7 Cal. Law Rev. 183.

20. *Hedges v. Frink*, 174 Cal. 552, 163 Pac. 884; *Vercoutere v. Golden State L. Co.*, 116 Cal. 410, 48 Pac. 375.

See Pen. Code, § 560, making it a misdemeanor for any director to concur in any vote or act of the directors by which it is intended to withdraw or in any manner, except as provided by law, pay to the stockholders or any of them any part of the capital stock of a corporation. See *infra*, § 540.

statute runs against the directors because they are, under the law, the managers of the business,¹ but it applies equally to stockholders,² and the section has the effect to deprive them of the power to do the forbidden acts.³ Hence, except as permitted by statute,⁴ neither directors nor stockholders have the right to distribute the corporate capital or the property received in exchange for it among the stockholders.⁵ And even the unanimous assent or agreement of the stockholders will not authorize such a distribution.⁶ An agreement to divide the whole capital stock among the stockholders in violation of section 309 of the Civil Code is null and void,⁷ as is also a trans-

1. *Vercoutere v. Golden State L. Co.*, 116 Cal. 410, 48 Pac. 375; *Kohl v. Lilienthal*, 81 Cal. 378, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689; *Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365. See *Baldwin v. Miller & Lux*, 152 Cal. 454, 92 Pac. 1030, to effect that § 309, Civ. Code, is aimed at the directors.

2. *Burne v. Lee*, 156 Cal. 221, 104 Pac. 438; *Vercoutere v. Golden State Land Co.*, 116 Cal. 410, 48 Pac. 375; *Kohl v. Lilienthal*, 81 Cal. 378, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689.

3. *Schulte v. Boulevard Gardens etc. Co.*, 164 Cal. 464, Ann. Cas. 1914B, 1013, 44 L. R. A. (N. S.) 156, 129 Pac. 582; *E. J. Dodge Co. v. First National Bank*, 260 Fed. 758.

4. See *supra*, § 507, as to saving clause in section as amended in 1917.

5. *Hedges v. Frink*, 174 Cal. 552, 163 Pac. 884 (to the effect that such act of distribution is not permitted, whether attempted by the directors, the stockholders, or both); *O'Dea v. Hollywood Cem. Assn.*, 154 Cal. 53, 97 Pac. 1.

It does not vary the principle that the consideration to be paid is stock instead of money, where the consideration is paid, not to the trustees as a fund primarily liable to creditors, but to the stockholders for their own use; *Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365, applying the rule under the act of 1853 (State. 1853, p. 89).

6. *Kohl v. Lilienthal*, 81 Cal. 378, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689.

7. *Hedges v. Frink*, 174 Cal. 552, 163 Pac. 884; *Tapscott v. Mexican etc. Co.*, 153 Cal. 664, 96 Pac. 271. But see *Baldwin v. Miller & Lux*, 152 Cal. 454, 92 Pac. 1030, dictum, contra, to the effect that the section does not make such acts of the directors void, but declares merely that certain consequences shall follow such acts,—namely, that the directors shall personally be liable “to the corporation” and the creditors for the amount of the capital stock so divided; and to the effect further that the section does not restrain the corporation from paying dividends out of the capital stock in a case where the main purpose is

fer⁸ or distribution in violation of the statute,⁹ and a by-law providing for the withdrawal and payment to stockholders of their investment is likewise invalid.¹⁰ Being void, such agreements are incapable of ratification,¹¹ and they cannot be rendered effectual by invoking the doctrine of estoppel.¹²

§ 516. Payment of Unlawful Dividends.—Payment of dividends, except from the surplus profits arising from the business of the corporation, is directly forbidden by the statute, since if there are no surplus profits, this is a payment from capital. If, however, the corporation has made profits, although they have been applied to making

to distribute its property and to liquidate its business.

If possible, the court will place a construction upon the contract which will avoid the invalidity. *Burne v. Lee*, 156 Cal. 221, 104 Pac. 438. And see *Hammond v. Haskell*, 14 Cal. App. 522, 112 Pac. 575, construing a contract so that it would not involve the sale to the corporation of its own stock.

See *infra*, § 521, as to validity of debts created in excess of the subscribed capital stock in violation of the section.

8. *Schaake v. Eagle etc. Can. Co.*, 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759; *San Francisco etc. R. Co. v. Bee*, 48 Cal. 398.

The rule applies where such transfer of assets is made without consideration to another corporation in consideration of the issue of stock in the latter to the stockholders of the former. *O'Dea v. Hollywood Cem. Assn.*, 154 Cal. 53, 97 Pac. 1; *Schaake v. Eagle etc. Can. Co.*, 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759; *Kohl v. Lilienthal*, 81 Cal. 378, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689; *San Francisco etc. R. Co. v.*

Bee, 48 Cal. 398; *Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365. See *Triest & Co. v. Goldstone*, 173 Cal. 240, 159 Pac. 715, holding that where stockholders form themselves into partnerships and divide the merchandise, they are liable to their lessor for rent under the provisions of § 309 of the Civil Code, unless there is a surrender by operation of law of the premises, or a release.

9. *Hedges v. Frink*, 174 Cal. 552, 163 Pac. 884, holding that the distribution of assets among the stockholders is illegal and void, whether the same is accomplished by means of a transfer to a trustee for that purpose.

10. *Vercoutere v. Golden State L. Co.*, 116 Cal. 410, 48 Pac. 375.

11. *Southern California Home Builders v. Ycung*, 31 Cal. App. Dec. 336, 188 Pac. 586.

12. *Hedges v. Frink*, 174 Cal. 552, 163 Pac. 884, stating that the equitable doctrine of estoppel cannot be invoked against an innocent corporation to validate proceedings which are in violation of a civil as well as a criminal statute.

improvements on the corporate property, the corporation may later borrow money and pay a dividend to the extent of the profits.¹³ Although, in the absence of anything constituting gross negligence, directors are justified in accepting and acting on the reports of subordinates and employees of the corporation,¹⁴ nevertheless, it has been said that in an action against directors upon the statutory liability, to hold that in every such case they may be exonerated by merely testifying that they were mistaken and that they believed that there were surplus profits, having accepted the data prepared by the corporate employees, would open the door to gross frauds. As a general rule, therefore, good faith on the part of directors in declaring dividends from capital instead of from surplus profits is not a defense to a suit to recover the statutory liability. If the defense can ever be considered, it is said to be only where the pleadings clearly show facts of fraud and dishonesty practiced upon the directors and further show facts from which the conclusion follows irresistibly that they could not have guarded against such fraud.¹⁵

§ 517. Reduction of Capital Stock.—The directors of a corporation are forbidden to reduce or increase the capital stock otherwise than as provided in section 359 of the Civil Code. Apparently, no liability is fixed for an unlawful increase, but for reducing the capital stock, they are made liable to the full amount of the capital stock so reduced.¹⁶ By transferring to a shareholder property of the corporation in exchange for his stock, a corporation disposes of its capital stock, that is to say, of its capital or assets.¹⁷ While in other jurisdictions, the authorities show a sharp conflict over the question whether, in the absence of statu-

13. *Excelsior W. & M. Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44. As to what are lawful dividends, see *supra*, § 254.

14. See *supra*, § 506.

15. *Southern California Home Builders v. Young*, 31 Cal. App. Dec. 336, 188 Pac. 586, per Brittain, J.

16. See Civ. Code, § 309.

17. *Stewart v. Stewart Hotel Co.*, 33 Cal. App. 167, 164 Pac. 620.

tory or charter restrictions, a company may employ its assets for the purchase of shares of its own stock,¹⁸ in view of section 309 of the Civil Code it cannot be doubted that in California a corporation is not authorized to make such purchase, since the result would be illegally to withdraw and to pay a stockholder a part of the capital stock.¹⁹ However, the general rule admits of exceptions, and circumstances may arise where the corporation is justified in taking over the shares of one of its stockholders. Each case, it is said, must be governed by its own peculiar facts.²⁰ Thus, it has been held to be legal for a corporation to take shares of a stockholder in discharge of his indebtedness, and thus to save itself from loss.¹ And where the transaction not only brings substantial benefit to the corporation but is necessary to save it from loss and threatened bankruptcy, this is an exception to the general rule.² But ordinarily, even the doctrine of estoppel will not apply, since such contracts

18. See *Schulte v. Boulevard Gardens etc. Co.*, 164 Cal. 464, Ann. Cas. 1914B, 1013, 44 L. R. A. (N. S.) 156, 129 Pac. 582; and see note on this case, 1 Cal. Law Rev., p. 267.

19. *Schulte v. Boulevard Gardens etc. Co.*, 164 Cal. 464, Ann. Cas. 1914B, 1013, 44 L. R. A. (N. S.) 156, 129 Pac. 582; *Vercontere v. Golden State L. Co.*, 116 Cal. 410, 48 Pac. 375 (by-law permitting stockholder to turn in his stock); *Bank of San Luis Obispo v. Wickersham*, 99 Cal. 655, 34 Pac. 444; *Stewart v. Stewart Hotel Co.*, 33 Cal. App. 167, 164 Pac. 620; *E. J. Dodge Co. v. First National Bank*, 260 Fed. 758; *First National Bank v. E. J. Dodge Co.*, 233 Fed. 74, 147 C. C. A. 144.

20. *Stewart v. Stewart Hotel Co.*, 33 Cal. App. 167, 164 Pac. 620.

Where the agreement for the sale

is conditional and the stock is returned in accordance with the agreement and the contract of sale terminates and no sale has been accomplished, there is no repurchase by the corporation; *Schulte v. Boulevard Gardens etc. Co.*, 164 Cal. 464, Ann. Cas. 1914B, 1013, 44 L. R. A. (N. S.) 156, 129 Pac. 582; *Dickinson v. Zubiarte Min. Co.*, 11 Cal. App. 656, 106 Pac. 123; *First National Bank v. E. J. Dodge Co.*, 233 Fed. 74, 147 C. C. A. 144. See supra § 174, as to agreements to repurchase stock.

1. *Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476; *Stewart v. Stewart Hotel Co.*, 33 Cal. App. 167, 164 Pac. 620; *First National Bank v. E. J. Dodge Co.*, 233 Fed. 74, 147 C. C. A. 144.

2. *Stewart v. Stewart Hotel Co.*, 33 Cal. App. 167, 164 Pac. 620.

are prohibited by law, and the effect of permitting the corporation to contract by estoppel would be to override the statute.³

§ 518. Enforcement of Liability.—For a violation of the provisions of section 309 of the Civil Code directors are liable “to the corporation and to the creditors thereof to the full amount of the capital stock so divided, withdrawn, paid out or reduced.”⁴ Thus, although one of the purposes of the statute is to protect creditors, that is not the sole purpose. The statute affords protection in proper cases to the corporation, regardless of whether or not there are creditors, and the liability to the corporation is direct and not secondary because of its inability to pay creditors.⁵ Although a stockholder may have been benefited by the distribution,⁶ and although one suing on behalf of the corporation may have given his consent to the unlawful proceeding complained of, the corporation is deemed not to have acquiesced in the wrongful act and an estoppel cannot be urged against it.⁷ The actual damage to the corporation for a violation of the statute in this connection is the amount by which its capital is depleted by the unlawful distribution.⁸ The remedy of a stockholder who claims that a corporation has acted wrongfully in the distribution of capital to certain stockholders is not to ask

3. *E. J. Dodge Co. v. First National Bank*, 260 Fed. 758; *First National Bank v. E. J. Dodge Co.*, 233 Fed. 74, 147 C. C. A. 144.

4. See *supra*, § 507.

5. *Southern California Home Builders v. Young*, 31 Cal. App. Dec. 336, 188 Pac. 586, holding that the right of the corporation to recover from those to whom assets have been unlawfully transferred does not affect the statutory liability against the directors, unless the corporation has in fact caused the replacement in whole or in part of

what was taken from it, in which event the liability of directors would be diminished proportionately or extinguished.

6. *Talcott Land Co. v. Hershiser*, 184 Cal. 748, 195 Pac. 653.

7. *Freeman v. Glenn County Tel. Co.*, 28 Cal. App. Dec. 967 (opinion in district court of appeal, reversed in 184 Cal. 508, 194 Pac. 705, because of abolition of the remedy).

8. *Southern California Home Builders v. Young*, 31 Cal. App. Dec. 336, 188 Pac. 586.

equity to compel a distribution to him as well; his recourse is to compel restoration of the funds alleged to have been illegally distributed.⁹ As to all creditors prior or subsequent, an agreement to distribute capital among stockholders is simply void; and there is no reason why a creditor who has in no way promoted the void act should be estopped from contesting it.¹⁰ In an action against directors under section 309 of the Civil Code for distribution of capital stock, it has been doubted whether a judgment against the corporation is admissible for any purpose against those directors who were neither parties nor privies to the action against the corporation.¹¹

A corporation whose assets are distributed and the stockholders who received stock issued to them in payment for property sold to another corporation, are proper parties to a suit by a creditor. Stockholders who are not alleged to have received any of the stock are not required to be joined.¹² Any infirmity in the arrangement between two corporations by which the stock of one is transferred to the stockholders of the other in exchange for property, is of concern only to those having an interest in the former corporation, either as creditors or stockholders.¹³

§ 519. Necessity of Injury from Transaction.—As has been stated, stockholders, even though they have been

9. *Tapscott v. Mexican etc. Co.*, 153 Cal. 664, 96 Pac. 271.

10. *Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365.

11. *Chambers v. Farnham*, 39 Cal. App. 17, 179 Pac. 423.

12. *Schaake v. Eagle etc. Can Co.*, 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759 (holding that stockholders who have notice of the rights of creditors, as well as the transferee corporation, take their interests subject to any liability which may be

found to exist against the corporation making the illegal transfer).

13. *O'Dea v. Hollywood Cem. Assn.*, 154 Cal. 53, 97 Pac. 1; *Huey v. Patterson*, 37 Cal. App. 335, 174 Pac. 939. See *Robinson v. Muir*, 151 Cal. 118, 90 Pac. 521, questioning the right of a purchaser at a foreclosure sale to attack collaterally a transfer which has never been questioned by the corporation, its stockholders or creditors. See also *Baldwin v. Miller & Lux*, 152 Cal. 454, 92 Pac. 1030, where creditors' rights were not involved.

benefited by the distribution of unlawful dividends, may force the directors to reimburse the corporation.¹⁴ In this connection it has been said:

“The reasons which justify the recovery from the directors whether or not an injury is suffered by the individual stockholders or creditors would require a similar recovery by the corporation, notwithstanding some or all of an entirely new set of stockholders were aware of the unlawful distribution. The rule must be either that the corporation itself has the right to compel the directors to restore its capital regardless of whether or not any particular stockholder or creditor has been injured by the distribution, or on the other hand that the right to require the directors to replace the capital depends entirely upon whether or not the stockholders or creditors have been injured. The cases all seem to hold that the right is in the corporation itself, without regard to the actual injury to the stockholders. And the statute expressly gives the right of action to the corporation without reference to the wrongs of stockholders or creditors, the latter having a separate right of action.”¹⁵

That there is nothing inequitable in such a suit appears from the express provisions of section 309 of the Civil Code establishing the directors' liability. If from the facts of the particular case it would be inequitable to enforce the liability, those facts should be presented.¹⁶

Debts in Excess of Subscribed Capital Stock.

§ 520. **In General.**—Directors of corporations are expressly forbidden by section 309 of the Civil Code to create any debts beyond the subscribed capital stock, and for vio-

14. See supra, § 518.

15. *Talcott Land Co. v. Hershiser*, 184 Cal. 748, 195 Pac. 653, per Wilbur, J., decision concurred in by all the justices. See *Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365, dictum, where it is said that “If all parties interested are secured from injury, and the purpose is a lawful

one, the object of the provision [section 13 of act of 1853 corresponding to the existing statutory provision] would seem to be accomplished, and there would be no one entitled to complain.”

16. *Southern California Home Builders v. Young*, 31 Cal. App. Dec. 336, 188 Pac. 586.

lation of the prohibition they are made liable to the full amount of the debt contracted in excess of such limit.¹⁷ This provision was designed to operate as a check upon directors and to protect creditors from the effects of corporate recklessness and extravagance.¹⁸ Statutes of this character provide for making one person individually liable for the debts of another, and before the enactment of the code they were to be strictly construed.¹⁹ Although under the codes the rule of strict construction does not apply, and while such laws are to be commended as in the interest of creditors and fair dealing, it has been said that they are penal in nature and should be strictly construed, to the extent at least that the liability should clearly appear.²⁰

§ 521. **Validity of Excess Obligations.**—A reading of section 309 in connection with section 354 of the Civil Code, defining the powers of corporations, makes it appear that it was not the intention of the legislature by the enactment of section 309 to deprive corporations of the power to create debts beyond their subscribed capital stock.¹ Section 309 merely restricts the power of the di-

17. See supra, § 507, for the code provision. See Stats. 1917, p. 1321, as to liability of directors of corporations organized with stock of no par value. For assenting to the creation of any debt prior to the time the amount of capital stated in the articles, or to which it may be increased, shall be fully paid in money or in property taken at its actual value, directors are made liable for such debts, but any director paying such debt because of such liability is subrogated to all rights of the creditor against the corporation and its property and is entitled to contribution from all other directors similarly liable for the same debt.

18. *Moore v. Lent*, 81 Cal. 502, 22 Pac. 875. See *Smith v. Ferries etc. R. Co.*, 5 Cal. Unrep. 889, 51 Pac. 710, in which Chief Justice Beatty in his dissenting opinion said that the provision was designed primarily as a protection to stockholders and incidentally to protect creditors.

19. *Irvine v. McKeon*, 23 Cal. 472.

20. *Moore v. Lent*, 81 Cal. 502, 22 Pac. 875. See supra, § 509, as to the nature of the liability.

1. *Underhill v. Santa Barbara etc. Co.*, 93 Cal. 300, 28 Pac. 1049; *Smith v. Ferries & C. H. R. Co.*, 5 Cal. Unrep. 889, 51 Pac. 710 (per Garoutte, J., commenting on and approving the rule stated in *Under-*

rectors as agents of the corporation² in the exercise of their authority, as might have been done by a by-law,³ and provides a remedy in favor of the corporation and creditors against those directors by whose improvident or fraudulent exercise of power debts are created disproportionate to the subscribed capital stock and beyond the ability of the corporation to pay.⁴ The section does not, therefore, provide that the contracts or attempted contracts by which the excess of debts is created shall be void.⁵ On the contrary, it has become a rule of property that the excess indebtedness is a valid obligation of the corporation.⁶

hill v. Santa Barbara etc. Imp. Co., supra).

Transactions resulting in the creation of debts in excess of subscribed capital stock are as much within the corporate powers and as binding as are transactions creating an indebtedness within the subscribed capital stock. *Hawke v. California Realty etc. Co.*, 28 Cal. App. 377, 152 Pac. 959.

As to railroad corporations, see Civ. Code, § 456, providing that the amount of bonds or promissory notes issued under that section must not exceed in all the amount of the capital stock. See *Moss v. Smith*, 171 Cal. 777, 155 Pac. 90, where, for the purposes of discussion, it was assumed that the law limited the total debt of a railroad corporation to the amount of its capital stock, but nevertheless citing *Boyd v. Heron*, 125 Cal. 453, 58 Pac. 64, and *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225, on the subject, those being cases where it was held that § 456, as to the issuance of bonds by railroad corporations, must be construed with the

general provisions of § 359 of the Civil Code as to the manner of their issue.

2. *Smith v. Ferries etc. Co.*, 5 Cal. Unrep. 889, 51 Pac. 710 (dissenting opinion of Beatty, C. J.). In this case the judgment appealed from was affirmed, the court being equally divided, one of the justices being disqualified.

3. *Underhill v. Santa Barbara etc. Co.*, 93 Cal. 300, 28 Pac. 1049. See *Sullivan v. Triunfo etc. Co.*, 29 Cal. 585, where it was held that a by-law providing that directors should not create a debt exceeding \$10,000, did not deprive them of authority to levy and collect for the purpose of paying legal and proper expenses of the corporation, an assessment, even though the amount to be raised might exceed that sum.

4. *Underhill v. Santa Barbara etc. Co.*, 93 Cal. 300, 28 Pac. 1049; *Hawke v. California Realty etc. Co.*, 28 Cal. App. 377, 152 Pac. 959.

5. *Underhill v. Santa Barbara etc. Co.*, 93 Cal. 300, 28 Pac. 1049.

6. *Smith v. Ferries etc. Co.*, 5 Cal. Unrep. 889, 51 Pac. 710.

§ 522. Subscribed Capital Stock.—The measure of liability of directors under the statute is the amount of the debt created in excess of the subscribed capital stock.⁷ The prohibition is applicable to all the subscribed capital stock, whether it has all been paid in or only part of it, and regardless of the disposition which may have been made of it. It has been declared that the reason why the capital stock is deemed to embrace all the subscribed stock, whether paid in or not, is that since the members are not in general personally liable for debts, this fund is the stake held out for the public upon the faith of which the company obtains credit.⁸ And the language of the statute does not indicate any intention on the part of the legislature to make any distinction between stock paid for in money and that paid for in property.⁹ Any stock issued for a valuable consideration, at least for any of those valuable considerations named in section 359 of the Civil Code, is “subscribed capital stock” as the phrase is used in section 309.¹⁰

§ 523. Debts Within Meaning of the Statute.—The debts referred to by the statute are manifestly those created by voluntary act of the directors,¹¹ and only such as the directors can voluntarily create or refuse to create; otherwise, it is said, the directors, through an act of negligence for which they are absolutely blameless, might become responsible for an indebtedness without having had any opportunity to oppose its creation or to dissent therefrom. The sanctions of the statute are for those directors

7. Civ. Code, § 309.

8. *Moore v. Lent*, 81 Cal. 502, 22 Pac. 875.

Both the constitution and the statutes use the phrase “subscribed capital stock” again and again to designate all the stock which has been lawfully issued, whether formally subscribed for or not, as well as stock that has been subscribed

for but not issued; *Smith v. Ferries etc. Co.*, 5 Cal. Unrep. 889, 51 Pac. 710, in dissenting opinion of Beatty, C. J.

9. *Moore v. Lent*, 81 Cal. 502, 22 Pac. 875.

10. *Smith v. Ferries etc. Co.*, 5 Cal. Unrep. 889, 51 Pac. 710.

11. *Moore v. Lent*, 81 Cal. 502, 22 Pac. 875. See Civ. Code, § 309.

only who violate its terms; who, acting officially, consent to the creation of debts or who, being present at the time such debts are created, neglect to express their disapproval in the manner provided. Consequently, the word "debt" in such a statute cannot be construed to include a judgment for a tort.¹² The prohibited debts are ordinary subsisting debts in excess of the subscribed capital stock and not the aggregate of the debts of the company created during its entire corporate existence. The capital stock is not a debt, because such stock must exist before debts can be created. Thus, if a corporation purchases property, paying therefor in stock, the amount of the stock so issued is not a debt within the meaning of the statute.¹³ In an action for a violation of the code provision it is necessary for the plaintiff to prove that the debts were contracted in excess of the subscribed capital stock under the administration of the defendant as one of the directors of the corporation,¹⁴ and that he was present when the debt was contracted, for those who were not present are excepted from the liability imposed.¹⁵ But a debt is not created within the meaning of the statute at the time it is merely authorized. Thus, a proposed bonded debt cannot be considered as created when the certificate of authorization is filed with the secretary of state. The debt represented by any bond does not exist until the bond is issued; that is, delivered to a third person for a valuable consideration.¹⁶

12. *In re Putnam*, 193 Fed. 464 (construing Cal. Civ. Code, § 309, and holding that the word "debt" as therein used does not include a judgment for wrongful death).

13. *Moore v. Lent*, 81 Cal. 502, 22 Pac. 875.

14. *Irvine v. McKeon*, 23 Cal. 472.

15. *Irvine v. McKeon*, 23 Cal. 472 (where, however, the language was not necessary to the decision, since the debts were not shown to be in

excess of the subscribed capital stock).

16. *Merced River Elec. Co. v. Curry*, 157 Cal. 727, 109 Pac. 264 (holding that secretary of state could not refuse to file a certificate authorizing issue of bonds on the ground that the amount authorized exceeded the subscribed capital stock). See *McKee v. Title Ins. etc. Co.*, 159 Cal. 206, 113 Pac. 140 (where the company proceeded to

§ 524. **Enforcement of Liability.**—It is provided in section 309 of the Civil Code that for the acts therein specified directors shall be liable to the corporation, and to the creditors thereof to the full amount of the debt contracted.¹⁷ The liability of directors under this provision is similar to that which applies to an unpaid stock subscription, and it is a trust fund for the benefit of all the creditors ratably. It is likewise very similar to the liability of directors under the constitutional provision for misappropriations of corporate funds by directors or officers.¹⁸ In all these cases the liability can be enforced only by a bill in equity wherein all the facts and parties are brought before the court, and in which all existing equities may be properly considered. The liability is to all the creditors and consequently a director is not permitted to set off against the liability which he has incurred by reason of section 309 of the Civil Code, a claim which he has against the corporation as a creditor.¹⁹

Constitutional Liability for Misappropriations.

§ 525. **In General.**—Section 3 of article XII of the constitution provides in part that

“The directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or

increase the capital stock after authorizing a bonded indebtedness, but where the question as to validity of the bonds was not decided).

17. See *supra*, § 507, quoting the statute.

18. In *re La Jolla etc. Co.*, 243 Fed. 1004 (under Cal. Civ. Code, § 309). See *infra*, § 525 *et seq.*, as to liability for misappropriations. And see *supra*, § 296 *et seq.*, as to liability for unpaid stock subscriptions.

19. In *re La Jolla etc. Co.*, 243 Fed. 1004. See *Moss v. Smith*, 171 Cal. 777, 155 Pac. 90, where the question was raised as to whether the right of action was in all the creditors or merely in those whose debts are created in excess of the subscribed capital stock, but for the purposes of the discussion and decision only; the question was resolved in favor of the contention that it was a right for the benefit of all the creditors.

joint-stock association, during the term of office of such director or trustee.'²⁰

Any contract or contracts, verbal or written, whereby it is sought directly or indirectly to relieve any director or trustee from the liability imposed by this section are declared to be null and void.¹ The constitutional clause clearly declares who are liable, to whom and for what,² and it is self-executing.³ Directors and officers of corporations, as well as trustees, have always been held responsible for loss resulting from misappropriations of the trust property made by them or with their consent;⁴ and the constitution does not change the nature of the liability, except that for its purpose it is limited to moneys misappropriated.⁵ The constitution merely makes directors sureties for their fellow-directors and for the officers of the corporation for moneys, when so misappropriated as to make the officer misappropriating liable, and authorizes the creditors and stockholders to sue.⁶

20. An exemption is expressly made of exposition companies organized to promote and carry on international expositions or world's fairs within the state of California.

See note, 2 A. L. R. 867, as to liability of directors for defalcations by executive officer or employee.

1. Civ. Code, § 327.

2. *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77.

3. *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77; *In re Brown*, 164 Fed. 673, 90 C. C. A. 489; *In re Bartnett*, 164 Fed. 679, 90 C. C. A. 495, a memorandum case following *In re Brown*, supra.

Conceding the provision to be self-executing, the parties who may take advantage of it and the form of action by which its provisions may be enforced, are all matters of

judicial construction. *Winchester v. Mabury*, 122 Cal. 522, 55 Pac. 393.

4. *Moss v. Smith*, 171 Cal. 777, 155 Pac. 90; *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77; *Vujacich v. Southern Commercial Co.*, 21 Cal. App. 439, 132 Pac. 80.

The liability has existed ever since there have been courts of equity and corporations or trustees; *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77.

5. *Moss v. Smith*, 171 Cal. 777, 155 Pac. 90; *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77; *Hercules Oil etc. Co. v. Hocknell*, 5 Cal. App. 702, 91 Pac. 341.

6. *Moss v. Smith*, 171 Cal. 777, 155 Pac. 90; *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77; *Hercules*

§ 526. **Nature of the Liability.**—Statutes making officers and directors of a corporation responsible to creditors for losses growing out of the negligent, wrongful or fraudulent conduct of such officers or directors are regarded in most jurisdictions as of a penal nature, and not as arising out of contract.⁷ But the California constitutional provision is not penal in the technical sense, since it allows no recovery as a punishment, but only to compensate for a loss.⁸ It is contractual in its nature, and the liability therefor survives the death of the defendant director.⁹ The liability created is that of suretyship,¹⁰ in which the innocent suffers for the guilty, and in which the surety may always stand upon the very letter of his bond.¹¹ To hold directors liable as sureties for other directors and officers does not render the provision in conflict with the fourteenth amendment to the federal constitution, if the suretyship has been voluntarily assumed.¹²

§ 527. **Meaning of "Misappropriations."**—Directors are, by the constitutional provision, made liable to the corporation for certain kinds of losses occurring during their terms of office,¹³ unless a showing is made of some excuse,

Oil etc. Co. v. Hocknell, 5 Cal. App. 702, 91 Pac. 341.

7. In re Brown, 164 Fed. 673, 90 C. C. A. 489 (stating the opposing rules and citing authorities).

8. Moss v. Smith, 171 Cal. 777, 155 Pac. 90; Winchester v. Howard, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77; Hercules Oil etc. Co. v. Hocknell, 5 Cal. App. 702, 91 Pac. 341.

9. Major v. Walker, 23 Cal. App. 465, 138 Pac. 360. See ABATEMENT AND REVIVAL, vol. 1, p. 68 et seq.

It is such that a writ of attachment will issue thereon. O'Connell v. Walker, 12 Cal. App. 694, 108

Pac. 668. See ATTACHMENT, vol. 3, p. 416 et seq.

10. Winchester v. Howard, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77; Hercules Oil etc. Co. v. Hocknell, 5 Cal. App. 702, 91 Pac. 341; In re Brown, 164 Fed. 673, 90 C. C. A. 489.

11. Winchester v. Howard, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77; Hercules Oil etc. Co. v. Hocknell, 5 Cal. App. 702, 91 Pac. 341. See SURETYSHIP.

12. Winchester v. Howard, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77.

13. Fox v. Hale & Norcross etc. Min. Co., 108 Cal. 369, 41 Pac. 308.

such as a protest offered by one not consenting to the misappropriation, and of steps taken by him to prevent loss accruing to creditors; otherwise they become personally liable to the persons damaged.¹⁴ A director is in terms made liable for embezzlement or misappropriation of corporate funds by officers of the corporation. According to the words of the provision, every director is severally liable for the full amount of any misappropriation during his term of office.¹⁵ The word "misappropriation" is to be construed by the maxim, "noscitur a sociis";¹⁶ it means something like embezzlement, or, in other words, the misapplication of funds entrusted to an officer for a particular purpose by devoting them to an unauthorized purpose.¹⁷ This would not, however, apply to the payment of an extravagant price for services or materials properly appertaining to the business of the corporation,¹⁸ nor to damages resulting from mere negligence, not resulting in some misappropriation, nor to a loss through bad management, incompetency or mistake.¹⁹ Although, almost necessarily, there are allegations of fraud and negligence in these cases, such facts are immaterial, as the action is upon the constitutional liability.²⁰

§ 528. **Enforcement by Suit in Equity.**—The remedy under the constitutional provision under consideration has

14. *Vujacich v. Southern Commercial Co.*, 21 Cal. App. 439, 132 Pac. 80.

15. *Fox v. Hale & Norcross etc.* Min. Co., 108 Cal. 369, 41 Pac. 308.

16. *Fox v. Hale & Norcross etc.* Min. Co., 108 Cal. 369, 41 Pac. 308. See STATUTES.

17. *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77 (holding that if loans are made by a bank in violation of the law as to security, but solely to promote the interest of the bank, the loan would constitute a

misappropriation for which the directors would be liable, if loss ensues); *Fox v. Hale & Norcross etc.* Min. Co., 108 Cal. 369, 41 Pac. 308.

18. *Fox v. Hale & Norcross etc.* Min. Co., 108 Cal. 369, 41 Pac. 308.

19. *Moss v. Smith*, 171 Cal. 777, 155 Pac. 90; *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77; *Fox v. Hale & Norcross etc.* Min. Co., 108 Cal. 369, 41 Pac. 308.

20. *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77.

been declared to be by a bill in equity in which all creditors of the corporation are entitled to be represented, precisely as all are entitled to share in the judgment recovered,¹ and in a proceeding in which there can be an accounting and equities adjusted after all the facts have been ascertained.² The equitable principle applicable here is that as between creditors equality is equity.³ The action is not primarily to enforce an accounting. While an accounting is required for the purpose of distribution of a fund which may be recovered for all creditors, a specific demand for an accounting is not required.⁴

Where a creditor brings the action on behalf of himself and all other creditors, the plaintiff cannot, after putting himself in that position, effect a compromise of the suit and appropriate the money obtained by the compromise to his own use, or to the use of a part of the creditors, to the exclusion of others. In such case the property recovered is in equity the joint property of all the creditors. But where the plaintiff never consents to stand as plaintiff for the benefit of all creditors, and expressly limits his trusteeship by his complaint to himself and such other creditors as may join with him, he is not a trustee for those who do not act in concert to bring the action, and hence parties not joining or assisting are not entitled to share in money received in a compromise.⁵

1. *Moss v. Smith*, 171 Cal. 777, 155 Pac. 90; *Gardiner v. Bank of Napa*, 160 Cal. 577, 117 Pac. 667; *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77; *Winchester v. Mabury*, 122 Cal. 522, 55 Pac. 393.

2. *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77; *Winchester v. Mabury*, 122 Cal. 522, 55 Pac. 393; *In re La Jolla etc. Mill Co.*, 243 Fed. 1004.

3. *Winchester v. Mabury*, 122 Cal. 522, 55 Pac. 393, holding that the moneys embezzled or misappropriated constitute a fund for the benefit of all the creditors who have been injured by the wrongful acts.

4. *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77.

5. *Niccolls v. Rice*, 147 Cal. 633, 82 Pac. 321.

§ 529. **Parties to Action to Enforce.**—The constitutional provision is that in case of embezzlement or misapplication directors shall be liable “to the creditors and stockholders” for moneys embezzled or misappropriated, and the phrase “the creditors” evidently means all the creditors.⁶ Hence, a creditor who becomes such after the misappropriation may sue upon the liability. The presumption always is that the corporation has not wasted its assets, and if directors and other officers have done so, the duty is upon the directors to recover from the defaulters. The new creditors become such on the faith of the presumed assets.⁷ The creditor’s claim need not be reduced to judgment, as the action is not a creditor’s bill and can be maintained without exhausting all legal remedies; and any creditor may institute proceedings upon the liability,⁸ or an assignee of a creditor may sue, since the debt is assignable and carries the right of action.⁹ Stockholders are certainly proper parties, but for most purposes, if not for all, they may be represented by the corporation.¹⁰

6. *Winchester v. Mabury*, 122 Cal. 522, 55 Pac. 393.

The liability is enforceable for the benefit of all creditors. *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77; *In re La Jolla etc. Co.*, 243 Fed. 1004.

7. *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77.

8. *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77, holding that creditors and stockholders are entitled to recover, as creditors and as stockholders, and since the equities of creditors are superior to those of stockholders, as among themselves, the recovery will be divided among creditors according to the general

rules governing the application of payments in similar cases.

A complaint is not demurrable on the ground that there are other creditors, where it does not show on its face that there are such other creditors. *Niccolls v. Rice*, 147 Cal. 633, 82 Pac. 321; *Winchester v. Howard*, supra.

9. *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77.

10. *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77, not determining whether the constitution gives the right of action to the corporation, and whether suit might be brought on behalf of the corporation when directors refuse to bring it, or when the directors are necessary defendants, as in such cases.

Liability With Respect to Reports.

§ 530. False Reports in General.—Section 316 of the Civil Code provides that

“Any officer of a corporation who willfully gives a certificate, or willfully makes an official report, public notice, or entry in any of the records or books of the corporation, concerning the corporation or its business, which is false in any material representation, shall be liable for all the damages resulting therefrom to any person injured thereby, and if two or more officers unite or participate in the commission of any of the acts herein designated, they shall be jointly and severally liable.”

The action under this section is not the same as an action for fraud and deceit. And so, where the case rests on the liability fixed by this section, any evidence tending to establish any other liability, or, concretely, a case of fraud and deceit under section 1572 of the Civil Code, would be wholly irrelevant to the issue.^{10a} Of course, where directors are required by law to render certain reports, and a false report rendered by them is used to induce a third person to purchase stock and is actually relied on by him, the directors are liable in an action to recover damages for deceit.¹¹

§ 531. Enforcement of Liability for False Reports.—In an action under section 316 of the Civil Code, before proof of damage resulting by reason of the transaction will be permitted, the alleged report or notice or certificate concerning the corporation or its business must first be shown,

10a. *Smeland v. Benwick*, 34 Cal. App. Dec. 90, 196 Pac. 283, holding the complaint to state a cause of action under § 316, and that the mere use of the words “verbally” and “oral” did not constitute a sufficient predicate for the contention that the plaintiff relied upon and

pleaded both the statutory and common law action for fraud.

11. *MacDonald v. De Fremery*, 168 Cal. 189, 142 Pac. 73, a case concerning the report of condition of national bank required to be made under the National Bank Act, which report was falsified by the directors.

followed by a showing that it was made by an officer of the corporation to the plaintiff, and that it was false.¹² Under the general rule that a representation of value is ordinarily an expression of opinion, it has been held that where in a circular addressed to stockholders explaining the necessity of an assessment, an itemized statement of assets is given setting forth the value of oil wells, such statement is a statement of a mere opinion, not contemplated by section 316 which denounces the falsification of facts.¹³ Statements by one officer are not binding on others unless it is first shown that all of them corruptly conspired together and entered into a mutual understanding that representations should by all or any of them be made for a fraudulent purpose. If the action were against the corporation or if the names of officers were subscribed to the documents in their own proper signatures, the document might justly be held to make a prima facie showing, sufficient to put them upon their defense, that they authorized the issuance and publication of the paper or report, assuming that proof of the falsity of the statements it contained was also made. But where individuals are proceeded against to secure an individual judgment, which, as the statute declares, may be either joint or several, to establish a case under the statute it is requisite that competent testimony should show that they actually were parties to the issuance and publication of the documents and that they actually subscribed their names to the document in which their printed names as officers appear.¹⁴

§ 532. Statutes Requiring Posting of Reports.—Under the law relating to mining corporations, section 588 of the Civil Code requires the monthly posting of itemized accounts or balance sheets in the office of the company.¹⁵

12. *Smeland v. Renwick*, 34 Cal. App. Dec. 90, 196 Pac. 283, per Hart, J.

13. *Craig v. Wade*, 159 Cal. 172, 112 Pac. 891.

14. *Smeland v. Renwick*, 34 Cal.

15. This section is based upon Stats. 1873-74, p. 866, as amended, Stats. 1880, p. 134, and Stats. 1897,

If the directors fail to post such reports and accounts, they are liable, either severally or jointly in an action by a stockholder, for actual damages sustained by him.¹⁶ A statute of this character is not unconstitutional as special legislation if made applicable to all corporations of the class to which made applicable,¹⁷ although it has been said that a proviso limiting it to corporations whose stock is listed and offered for sale at public exchange would be unconstitutional.¹⁸ Such a statute may properly be limited to domestic corporations and not be made applicable to foreign corporations;¹⁹ and it may apply to all corporations organized in California for mining purposes, whether their business is done here or not.²⁰

p. 38, the only substantial change being, according to the code commissioner's note, in the omission of the proviso limiting the provisions to corporations "whose stock is listed and offered for sale at public exchange," those provisions being deemed unconstitutional. See *Johnson v. Tautphaus*, 127 Cal. 605, 160 Pac. 172.

16. Civ. Code, § 590, based on Stats. 1873-74, p. 866, as amended, Stats. 1880, p. 134, and Stats. 1897, p. 38.

The expenses of the investigation made by plaintiff stockholder to obtain the identical information which ought to have been posted monthly in the company's office and those not speculative in character and reasonably incidental to his absence from home and from his business, if such absence was reasonably necessary to enable him to properly conduct his investigation, may be recovered as damages sustained through the omission to discharge the duty. *Overton v. Noyes*, 35 Cal. App. 114.

17. *Ball v. Tolman*, 119 Cal. 358, 51 Pac. 546; *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076 (holding that the statute is directed to the internal affairs of the corporation and not to its outside dealings or to the conduct of its business); *Hewlett v. Epstein*, 63 Cal. 184, decided under Stats. 1880, p. 400, providing for the posting of reports only when the corporation has expended money and incurred liabilities.

18. *Johnson v. Tautphaus*, 127 Cal. 605, 160 Pac. 172 (where it seems to be assumed that this is the case); *Anderson v. Byrnes*, 122 Cal. 272, 54 Pac. 821 (where the point was raised but not decided). And see code commissioner's note to Civ. Code, §§ 588-590.

19. *Williams v. Gaylord*, 186 U. S. 157, 46 L. Ed. 1102, 22 Sup. Ct. Rep. 798, see, also, *Rose's U. S. Notes*.

20. *Overton v. Noyes*, 177 Cal. 450, 170 Pac. 1110; *Overton v. Noyes*, 35 Cal. App. 114. The statute applies to all corporations formed for the purpose of mining, although that purpose is but feebly prose-

§ 533. **Nature and Purpose of Statutes.**—An act imposing a liability for failure to post a balance sheet is not only penal in its nature, but it is also remedial.¹ Its general purpose is to secure to stockholders their right to have general information of the manner in which the business of the corporation is being conducted,² and to inform them of the financial condition of the corporation and its management, the development of its property and generally of all matters which would enable them to estimate the value of their stock.³ The statute receives, therefore, a construction with reference to its beneficial objects as well as to its penal character.⁴ And its purpose and intent will not be evaded or defeated on the principle of strict construction.⁵ It has been held that the repeal of the penal provisions of a statute giving a right to recover a penalty against directors at the suit of any stockholder, before the enforcement of the penalty, destroys the right to its enforcement and prevents any further prosecution of litigation pending for its enforcement.⁶ And a change of the penalty so as to limit the recovery to the actual damages alleged and proved has been held to be valid.⁷ Unless the statute specifically declares that the penalty accrues for each failure to comply therewith,⁸ the rule is that although

cuted; *Ball v. Tolman*, 119 Cal. 358, 51 Pac. 546; *Francais v. Somps*, 92 Cal. 503, 28 Pac. 592.

1. *Ball v. Tolman*, 119 Cal. 358, 51 Pac. 546; *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076; *Shanklin v. Gray*, 111 Cal. 88, 43 Pac. 399; *Eyre v. Harmon*, 92 Cal. 580, 28 Pac. 779.

2. *Ball v. Tolman*, 119 Cal. 358, 51 Pac. 546; *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076; *Eyre v. Harmon*, 92 Cal. 580, 28 Pac. 779.

3. *Shanklin v. Gray*, 111 Cal. 88, 43 Pac. 399.

4. *Ball v. Tolman*, 119 Cal. 358, 51 Pac. 546.

Such a statute imposes no unreasonable burden upon directors. *Eyre v. Harmon*, 92 Cal. 580, 28 Pac. 779.

5. *Shanklin v. Gray*, 111 Cal. 88, 43 Pac. 399.

6. *Ball v. Tolman*, 135 Cal. 375, 87 Am. St. Rep. 110, 67 Pac. 339 (under act of April 23, 1880); *Anderson v. Byrnes*, 122 Cal. 272, 54 Pac. 821 (also under act of 1880).

7. *Johnson v. Tautphaus*, 127 Cal. 605, 160 Pac. 172.

8. *Loveland v. Garner*, 71 Cal. 541, 12 Pac. 616.

several failures to perform the duty enjoined are shown, but one penalty can be recovered for any and all failures up to the time of suit.⁹ But such recovery for past delinquencies is not a bar to an action for delinquencies occurring after suit is brought;¹⁰ and although the balance sheet is posted before suit is brought, since the statute is mandatory as to time, this is not a defense.¹¹ Where a specific penalty is provided, compensation for the actual damage done to a stockholder is not intended to be given;¹² but under the prevailing statute, the recovery is expressly limited to actual damages sustained.¹³

§ 534. Enforcement of Liability for Failure to Post.— Directors, as the governing body of the corporation, have the right to direct the superintendent to make and post the reports. The statute as to posting in its penal clause addresses itself to the governing and controlling body of the corporation, and makes the directors liable for a failure to have made the reports referred to.¹⁴ But since a proceeding under the statute is not against the corporation, but against individuals, directors who became such after the delinquencies charged cannot be made liable therefor, nor can persons who had ceased to be directors be held liable for delinquencies of their successors.¹⁵ Inasmuch as de facto directors must perform the duties enjoined by law with the same fidelity as regularly elected officers and are subject to the same statutory liability for any failure of duty occurring during their term, they are liable for failure

9. *Shanklin v. Gray*, 111 Cal. 88, 43 Pac. 399; *Schofield v. Doray*, 89 Cal. 55, 26 Pac. 606; *Loveland v. Garner*, 74 Cal. 298, 15 Pac. 844; *Loveland v. Garner*, 71 Cal. 541, 12 Pac. 616.

10. *Shanklin v. Gray*, 111 Cal. 88, 43 Pac. 399; *Schofield v. Doray*, 89 Cal. 55, 26 Pac. 606.

11. *Schenck v. Bandmann*, 81 Cal. 231, 22 Pac. 654.

12. *Anderson v. Byrnes*, 122 Cal. 272, 54 Pac. 821; *Kinard v. Ward*, 21 Cal. App. 92, 130 Pac. 1194.

13. Civ. Code, § 590. See *supra*, § 532.

14. *Eyre v. Harmon*, 92 Cal. 580, 28 Pac. 779.

15. *Shanklin v. Gray*, 111 Cal. 88, 43 Pac. 399.

to have reports made and posted.¹⁶ Though a complaining stockholder has knowledge of the company's accounts by reason of his connection with the corporation and had means of learning about them by going to the books, such knowledge and means of knowledge will not excuse non-compliance with the law, for there may be still other stockholders.¹⁷ And although the reports, if made, would show very little, that little might, in some cases, be of interest to stockholders; the maxim "de minimis non curat lex" cannot be applied, because the law in such case does care for small things. It does not except them and the court is not authorized to do so.¹⁸ If, however, a paper which, according to the general understanding of merchants and bookkeepers constitutes a balance sheet, is posted, this is a compliance with the law.¹⁹

§ 535. Defenses to Action.—It is required of directors only that they shall in good faith direct the officer required to post the reports and who is at all times subject to their control, to obey the positive requirements of the law in the matter of such reports.²⁰ An evil intention is not necessary to such violation of the statute as requires a visitation of the penalty;¹ but directors are liable only for willful and intentional failure to have the duty per-

16. *Kinard v. Ward*, 21 Cal. App. 92, 130 Pac. 1194.

17. *Ball v. Tolman*, 119 Cal. 358, 51 Pac. 546; *Shanklin v. Gray*, 111 Cal. 88, 43 Pac. 399 (where the court found such facts and that there had been no injury, but where the directors were held liable).

18. *Francais v. Soms*, 92 Cal. 503, 28 Pac. 592. See *Beal v. Osborne*, 72 Cal. 305, 13 Pac. 871, holding that the record did not disclose anything which could be held to excuse the directors for their failure to have reports and accounts current made and posted as required

by statute. See *infra*, § 535, as to defenses. And see *ACTIONS*, vol. 1, p. 332.

19. *Eyre v. Harmon*, 92 Cal. 580, 28 Pac. 779, where it is observed that the law referred to expressly names two papers, a balance-sheet and an itemized account, either one of which might be posted. See *Civ. Code*, § 588.

20. *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076; *Eyre v. Harmon*, 92 Cal. 580, 28 Pac. 779.

1. *Shanklin v. Gray*, 111 Cal. 88, 43 Pac. 399.

formed.² An omission of duty, however, is necessarily willful and intentional, at least where it is shown that the directors considered the matter.³ Upon proof following an averment of failure or refusal to post the reports, a prima facie case against the directors is established. It is not incumbent upon the plaintiff under such statute to show that their failure was willful. It is a matter of defense for the directors to prove that it was not. The failure being shown, circumstances of exculpation are matters of defense.⁴ The mere unexplained fact that the defendant directors lacked information necessary to enable them to make and post the report in time does not excuse them, although it may be under such circumstances that they should be held excused under facts rendering it impossible to comply.⁵ In such case, however, the facts are at all times within the knowledge of the directors and must be set forth and proved.⁶ Where there has been an entire failure to comply with the law, mere ignorance of the law constitutes, of course, no exculpation;⁷ nor does mere inconvenience to officers in complying with the law, nor the advice of counsel, relieve from noncompliance.⁸ Neither can liability be avoided by the fact that the corporation maintains no office at which the reports can be posted, nor by reason of the fact that it does not have one of the officers required to verify the reports. This would simply permit evasion of the law.⁹

2. *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076 (holding that an averment that the directors entirely failed, refused and neglected to make or cause to be made and posted the report goes further than the language of the statute requires); *Eyre v. Harmon*, 92 Cal. 580, 28 Pac. 779.

3. *Shanklin v. Gray*, 111 Cal. 88, 43 Pac. 399.

4. *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076, stating that *Eyre v. Harmon*, 92 Cal. 580, 28 Pac.

779, is to be read in connection with *Schenck v. Bandmann*, 81 Cal. 231, 22 Pac. 654.

5. *Schenck v. Bandmann*, 81 Cal. 231, 22 Pac. 654.

6. *Hall v. Tolman*, 119 Cal. 358, 51 Pac. 546; *Schenck v. Bandmann*, 81 Cal. 231, 22 Pac. 654.

7. *Ball v. Tolman*, 119 Cal. 358, 51 Pac. 546.

8. *Shanklin v. Gray*, 111 Cal. 88, 43 Pac. 399.

9. *Chapman v. Doray*, 89 Cal. 52, 26 Pac. 605, holding a denial that

Criminal Liability.

§ 536. **In General.**—The provisions of the law relating to criminal liability of directors and officers of corporations are to be found chiefly in the Penal Code under the chapter heading “Fraudulent Insolvencies by Corporations and Other Frauds in Their Management.”¹⁰ Under the statute, officers of corporations are made liable for refusing stockholders an inspection of the books and records,¹¹ and directors are made liable for certain misconduct as directors.¹² Aside from the Penal Code provisions, officers may be liable for violating the provisions of the Corporate Securities Act,¹³ and other special statutes applicable to various subjects operative upon corporations.

It has been held that an officer is not criminally answerable for any act of a corporation in which he was not personally a participant. Thus, it does not follow as a legal conclusion that the manager or assistant manager of a corporation engaged in the publication of a newspaper acts at any time as its editor, and to charge him with contempt for matter appearing in the paper, it is necessary to show and therefore essential to charge in such a case that the defendant personally caused or, being in control, at least permitted the publication of the matter in question.¹⁴

§ 537. **Falsifying Corporate Records.**—The Penal Code provides for the punishment of frauds against corporations, committed by their officers or agents, and covers in detail offenses of this character, including the falsification

the corporation had an office insufficient to raise a material issue, since the directors had or ought to have had an office for the transaction of the business of the corporation.

10. See Pen. Code, §§ 557-573. See code commissioner's note to the chapter referred to in the text.

11. Pen. Code, § 565.

12. Pen. Code, § 560. See *infra*, § 540.

13. Stats. 1917, p. 673, § 14.

14. *Otis v. Superior Court*, 148 Cal. 129, 82 Pac. 853.

and mutilation of the corporate records.¹⁵ The language of section 563 of the Penal Code is broad enough to recover any record or document which by law is ordered to be kept by a corporation for profit, and especially should this be true with reference to a record embodying as does the minute-book statements relative to the financial condition of the corporation, and involving contract rights with it and its liability to its servants and employees as to salary and compensation.¹⁶ An indictment for making a false entry in books should specify the particular entry complained of and at least state the substance of it according to its legal effect.¹⁷ But an indictment setting out the entries in *haec verba* and alleging that they are false entries is sufficient. It is not necessary also to set out how the entries could have resulted in defrauding the corporation, for this is purely a matter of evidence to support the allegation of intent.¹⁸

§ 538. Promotion Frauds.—The statute makes it criminal for any person to sign the name of a fictitious person to any subscription for or agreement to take stock in any corporation existing or proposed, or to sign to any subscription or agreement the name of any person, knowing that such person has not the means or does not intend in good faith to comply with all the terms thereof or under any understanding or agreement that the terms of such subscription or agreement are not to be complied with or enforced.¹⁹ And any person who, without being author-

15. Pen. Code, §§ 563 and 563a.

Section 377 of the Civil Code requires all corporations for profit to keep a record of all their business transactions, a journal of all meetings of their directors and stockholders, embracing every act done or ordered to be done. See *supra*, § 126. And by § 316 of the Civil Code, officers making false entries

in records are made liable for damages resulting. See *supra*, § 530.

16. *Ex Parte McKenney*, 10 Cal. App. 357, 101 Pac. 927.

17. *People v. Palmer*, 53 Cal. 615.

18. *People v. Leonard*, 103 Cal. 200, 37 Pac. 222.

19. Pen. Code, § 557. The code commissioner's note says: "This

ized, subscribes or inserts the name of another in a prospectus, circular or other advertisement or announcement of a corporation existing or intended to be formed with the intent to permit the same to be published and thereby to lead persons to believe that the person whose name is so subscribed is an officer, agent, member or promoter of such corporation, is likewise guilty of a crime.¹

§ 539. False Reports.—The Penal Code, in section 558, provides for the punishment as a felony of certain frauds in procuring the organization of a corporation or the increase of its capital. While this section is awkwardly worded, it plainly covers the case of an officer who exhibits a false report to public officers authorized to examine the corporate affairs, with intent to deceive them.² Upon the trial of a charge under this provision the defendant's own testimony that he believed the report to be true or that he had no intent to deceive public officers is admissible, although its weight is for the jury. The objection that it is self-serving is not a valid objection to its admission.³

Section 564 of the Penal Code defines several distinct offenses, one the knowingly concurring in making a false material statement, and the other the concurrence in the publication of such statement.⁴ It is proper for the prose-

section is intended to reach a species of fraud frequently practiced in the organization of corporations."

1. Pen. Code, § 559.

2. *People v. Nash*, 15 Cal. App. 320, 114 Pac. 784 (holding that the language of the code provision is not limited to "one proposing to organize a corporation or to increase the capital stock of a corporation").

3. *People v. Martel*, 21 Cal. App. 573, 132 Pac. 600.

4. *People v. Cooper*, 53 Cal. 647. But see *People v. Youtz*, 26 Cal. App. 440, 147 Pac. 222, where the contrary was held citing authorities

but not referring to *People v. Cooper*, supra. And see *People v. Gusti*, 113 Cal. 177, 45 Pac. 263, distinguishing *People v. Cooper*, supra, and pointing out that where the acts are distinct and are alleged to have been performed at different times, as in the *Cooper* case, the indictment is demurrable, but not where the acts constitute one offense. See generally, INDICTMENT AND INFORMATION.

Where officers wish to express to stockholders or others their opinion as to the value of the assets, they should designate the several amounts

cution in order to establish knowledge and intent on the part of defendant as to the alleged misleading statements promulgated, to show the doing of a series of such similar acts as would furnish corroborating evidence.⁵

The code also provides that upon written request of not less than ten per cent of the stockholders, presented not less than two weeks prior to the annual election, a copy of a financial statement of the affairs of the corporation as provided in the statute must be served on each stockholder, the statement being signed and sworn to by the president and secretary. Such officers are made guilty of a misdemeanor if, with intent to deceive, they sign a false financial statement.⁶ It has been held that a statute which provides for the punishment as a crime of enumerated acts that may result in deceiving to their injury stockholders and others dealing with the corporation comes within the general scope of the title of "an act to protect stockholders and persons dealing with corporations in this state."⁷

§ 540. Illegal Distribution of Stock—Fictitious Transactions.—The Penal Code makes it a misdemeanor for a director of any stock corporation to concur in any vote or act of the directors of such corporation, or any of them, by which it is intended to make any unlawful dividends or to effect illegal divisions or withdrawals of the capital stock, or to make such other fictitious or forbidden manipulations of the stock, evidences of indebtedness or other property of the corporation as are defined by the statute.⁸ Section 309 of the Civil Code forbids the withdrawal or payment to the stockholders of any part of the capital stock except upon dissolution; and section 560 of the Penal

indicated upon such statements as being only estimates. *People v. Youtz*, 26 Cal. App. 440, 147 Pac. 222.

5. *People v. Youtz*, 26 Cal. App. 440, 147 Pac. 222.

6. Civ. Code, § 302a.

7. Stats. 1905, p. 786. See *People v. Merritt*, 18 Cal. App. 58, 122 Pac. 839, 844.

8. See Pen. Code, § 560, and Civ. Code, § 309. See *supra*, § 507.

Code condemns the same act as criminal.⁹ But section 560 does not make void a note given for stock and which was made in good faith for the purpose of obtaining a little more time to discharge an obligation which the stockholder recognizes as legal and binding on him.¹⁰

§ 541. **Evidence of Criminal Liability.**—In a prosecution for the making of a false corporate report it is for the state to show that the defendant was responsible for the condition of the books, and it is not enough that it was his duty to know of their contents and that in a civil action they would be competent evidence against him on that ground. He cannot be held for a crime because he has negligently performed his duty as secretary of the corporation. His knowledge and complicity in falsifying the books must first be shown.¹¹ It is sufficient, however, that a director or officer be such de facto;¹² and likewise, it is enough that the corporation was a de facto corporation.¹³ Moreover, it is no defense that the corporation was one created by the laws of another state, government or country, if it was carrying on business or keeping an office therefor in California.¹⁴ Where a director was present at a directors' meeting, he is presumed to have concurred in its acts or omissions, unless he at the time caused or in writing required his dissent therefrom to be entered

9. *Hedges v. Frink*, 174 Cal. 552, 163 Pac. 884; *Freeman v. Glenn County Tel. Co.*, 28 Cal. App. Dec. 967 (opinion in district court of appeal, reversed in 184 Cal. 508, 194 Pac. 705, on the ground that the remedy had been destroyed by amendment). The inhibition runs against the directors because they are under the law the managers of the business of the corporation. *Vercoutere v. Golden State Land Co.*, 116 Cal. 410, 48 Pac. 375.

10. *Pacific Trust Co. v. Dorsey*, 72 Cal. 55, 12 Pac. 49.

11. *People v. Martel*, 21 Cal. App. 573, 132 Pac. 600.

12. *People v. Leonard*, 103 Cal. 200, 37 Pac. 222.

The term "director" as used in the statutes embraces any of the persons having by law the direction or management of the affairs of a corporation by whatever name described in its charter or known by law. Pen. Code, § 572.

13. *People v. Leonard*, 106 Cal. 302, 39 Pac. 617. See *supra*, § 78.

14. Pen. Code, § 571.

in the minutes;¹⁵ and although not present at such meeting, he is deemed to have concurred if the facts constituting such violation appear on the records or minutes of the directors and he remains a director for six months thereafter and does not within such time cause or in writing require his dissent therefrom to be entered in the minutes.¹⁶

XVII. POWERS, FUNCTIONS AND LIABILITIES.

General Scope of Powers.

§ 542. **Code and Constitutional Provisions.**—The code enumerates the powers of every corporation, as such, as follows:

“(1) Of succession, by its corporate name, for the period limited; and when no period is limited, perpetually; (2) To sue and be sued, in any court; (3) To make and use a common seal, and alter the same at pleasure; (4) To purchase, hold, and convey such real and personal estate as the purposes of the corporation may require, not exceeding the amount limited in this part [Part IV—Corporations]; (5) To appoint such subordinate officers or agents as the business of the corporation may require, and to allow them suitable compensation; (6) To make by-laws, not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and for the transfer of its stock; (7) To admit stockholders or members, and to sell their stock or shares for the payment of assessments or installments; (8) To enter into any obligations or contracts essential to the transaction of its ordinary affairs, or for the purposes of the corporation.”¹⁷

This section defines the inherent powers of a corporation.¹⁸ In addition, however, a corporation has those

15. Pen. Code, § 569.

Every director is deemed to possess such a knowledge of the affairs of his corporation as to enable him to determine whether an act or omission of the directors is in viola-

tion of the statute. Pen. Code, § 568.

16. Pen. Code, § 570.

17. Civ. Code, § 354.

18. People's Home Sav. Bank v. Sadler, 1 Cal. App. 189, 81 Pac. 1029.

powers expressly given to it by the particular act under which it is incorporated.¹⁹ Beyond this no corporation may possess or exercise any corporate powers, except such as are necessary to the exercise of those enumerated and given.²⁰ And a corporation is forbidden to engage in any business other than that expressly authorized in its charter or the law under which it has been organized.¹ Independent of special statutory provisions, the common law annexes to a corporation when created, certain incidents and attributes, and there are several powers and capacities which tacitly are considered as inseparable from every corporation. These incidental powers are, however, regulated and limited by the act or charter of incorporation.² Generally speaking, where a natural person under similar circumstances could legally make a contract, a corporation may do so, unless by its very nature it is a power which a corporation cannot exercise.³

§ 543. General Limitations on Powers.—As has just been seen, the general principle is that a corporation has no other powers than such as are specifically granted or such as are necessarily implied for the purpose of carrying into effect the powers expressly granted.⁴ In other words,

19. Civ. Code, § 355; *Spring Valley Water Works v. Schottler*, 62 Cal. 69.

20. Civ. Code, § 355.

1. Const., art. XII, § 9. See *infra*, § 543, as to limitation of powers.

2. *Union Water Co. v. Murphy's Flat etc. Co.*, 22 Cal. 620.

A rule which necessarily applies in all cases of a grant of powers is that the body clothed with such powers may exercise, additionally, such implied or incidental powers as may be found necessary to enable it to execute its express powers, or, in

other words, to properly and fully carry out its main purposes. *Western Union Tel. Co. v. Superior Court*, 15 Cal. App. 679, 115 Pac. 1091, 1100. See *infra*, § 543.

3. *Low v. California Pac. R. Co.*, 52 Cal. 53, 28 Am. Rep. 629. See *supra*, § 47, as to the purposes of a corporation.

4. *Coleman v. San Rafael etc. Co.*, 49 Cal. 517; *Vandall v. South San Francisco Dock Co.*, 40 Cal. 83; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *Oakland v. Carpentier*, 13 Cal. 540; *Smith v. Morse*, 2 Cal. 524; *Dunbar v. Alcalde etc. of San Francisco*, 1 Cal.

the general powers of the corporation must be restricted by the nature and object of its creation.⁵⁻⁸ The powers granted by the corporate charter must be exercised in the mode prescribed;⁷ and the mode cannot be changed by the corporation or its stockholders.⁸ In determining whether a given act is authorized there must be considered, first, whether it falls within the powers expressly enumerated in the certificate; or, second, whether it is necessary to the exercise of one of the enumerated powers. And in determining the question, the general purpose for which the corporation was formed must be considered, and such reasonable construction must be given to terms employed as will tend to promote rather than to defeat or obstruct the ends for which the corporation was organized.⁹ It has been said that one dealing with a corporation is bound to take notice of the limitations of its charter.¹⁰

§ 544. Exercise of Powers Under Extraordinary Circumstances.—The theory that a corporation has no powers except those expressly given or necessarily implied is not strictly applicable under certain extraordinary circumstances, provided all the stockholders assent and none of its creditors are injured, and the state does not interfere.¹¹

355; *San Joaquin etc. Co. v. Merced County*, 2 Cal. App. 593, 84 Pac. 285.

This principle has become a maxim of the law of corporations.

5-6. *Union Water Co. v. Murphy's Flat etc. Co.*, 22 Cal. 620.

7. *Griffith v. New York Life Ins. Co.*, 101 Cal. 627, 40 Am. St. Rep. 96, 36 Pac. 113; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *Argenti v. San Francisco*, 16 Cal. 255; *Holland v. San Francisco*, 7 Cal. 361; *Colpe v. Jubilee Min. Co.*, 2 Cal. App. 393, 84 Pac. 324.

8. *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

9. *Vandall v. South San Francisco Dock Co.*, 40 Cal. 83. See *Temple St. etc. Ry. Co. v. Hellman*, 103 Cal. 634, 37 Pac. 530, holding that the giving of a corporation is not ultra vires where the object was to increase its legitimate business.

10. *Hamilton v. Bates*, 4 Cal. Unrep. 371, 35 Pac. 304; *Colpe v. Jubilee Min. Co.*, 2 Cal. App. 393, 84 Pac. 324.

11. *Sargent v. Palace Cafe Co.*, 175 Cal. 737, 167 Pac. 146; *Scales v. Holje*, 41 Cal. App. 733, 183 Pac. 308.

For example, where a promissory note was issued by a corporation to one of its directors as part payment of the purchase price on a sale by him to one of the other directors of all the stock of the corporation except the two "qualifying" shares, and where the directors were the only stockholders and there were no adverse interests of creditors involved, it has been held that such a note is neither void or voidable under the rule that directors may not deal with the property of a corporation to their own advantage. Under such circumstances the court will look through the mere form to the reality of the transaction and will treat it as a sale or purchase by individuals.¹²

It has been said, however, that there is no such thing in law as a de facto power, although there is such a thing as the exercise of power by a de facto corporation. Whatever the powers of a corporation may be, they cannot exceed those given by its charter and those necessarily implied. Hence there is an obvious distinction between a challenge to the corporate existence and a challenge to a power which may be exercised by the corporation whether it be de facto or de jure. In the former case, the general rule is, with exceptions, that the corporate existence may not be attacked collaterally; but it has been held that the ultra vires acts of the corporation may be thus challenged and often by the corporation itself, the rule applying as well to a de facto as to a de jure corporation.¹³

Ultra Vires Acts and Contracts.

§ 545. **In General.**—On the subject of ultra vires corporate acts it has been said:

"In England and also in a few states in this country, the subject [ultra vires acts and contracts] is viewed from

12. *Sargent v. Palace Cafe Co.*, 175 Cal. 737, 167 Pac. 146.

13. *Boca etc. R. R. Co. v. Sierra Valleys R. R. Co.*, 2 Cal. App. 546, 84 Pac. 298, per Chipman, J.

the standpoint of strict logic, and a corporation is regarded as a creature of the law in the strictest sense of the term. Hence, under the doctrine of the courts of those jurisdictions, if a corporation purports to enter into a contract not authorized by its charter, no rights are thereby created, even though the so-called contract is fully executed."¹⁴

As appears in the discussion following, the fictions and rigid logic of the earlier law have been gradually modified and in certain respects entirely displaced, by rules which are more conformable to present realities and ethical—not to say equitable—considerations.¹⁵ In a word, the defense of ultra vires is now generally regarded by the courts with disfavor.¹⁶ And, in addition, persons dealing with corporations are to a certain extent protected by the presumptions of law in favor of the validity of contracts.¹⁷ Thus, in the absence of evidence to the effect that the contract is ultra vires, or where on its face it is not necessarily beyond the scope of the authority of the corporation, the court will assume that it was within the powers of the corporation to contract.¹⁸ If a corporation seeks to avoid its contract on the ground of ultra vires, it must make good its defense by plea and proof.¹⁹

§ 546. Definition of Term "Ultra Vires"—Distinctions.

The term "ultra vires," whether with strict propriety or not, when applied to the act of a corporation, is used in different senses. It may indicate that the act referred to is entirely beyond the scope of the powers of the corporation to perform under any circumstances or for any pur-

14. See 6 Cal. Law Rev., p. 319, article by Robt. L. McWilliams, on "Ultra Vires Corporate Acts under the California Decisions."

15. See *infra*, §§ 547-556.

16. See *infra*, § 547.

17. *Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 620.

18. *Deane v. Gray Bros. etc. Co.*,

109 Cal. 433, 42 Pac. 443; *Brown v. Board of Education*, 103 Cal. 531, 37 Pac. 503; *Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 620.

19. *Morgan v. Board of Education*, 136 Cal. 245, 68 Pac. 703; *Brown v. Board of Education*, 103 Cal. 531, 37 Pac. 503.

pose.²⁰ And when within the scope of the general powers of the corporation an act is also sometimes said to be ultra vires with reference to the rights of certain parties when the corporation is not authorized to perform it without their consent.¹ Or again, the term may be applied to an act beyond the powers of the corporation for some purposes, but within the scope of its general powers for other purposes. The rights of persons dealing with the corporation may vary according as the act is ultra vires in one or the other of these senses.² If an act is ultra vires in the first sense, the corporation may avail itself of the plea of ultra vires as against all persons, because they are bound to know that it has no power to perform the act; but when it is ultra vires in the second sense, the defense may or may not be available, depending upon the circumstances.³ When an act is within the corporate powers for some purposes or under some conditions, the rights of the parties who have dealt with it under an express or implied representation that it is acting within such powers in making the particular contract are entitled to favorable consideration,⁴ and the defense is not available unless the party dealing with the corporation had notice of the intention to perform the act for an unauthorized purpose or under cir-

20. *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *James Eva Estate Co. v. Mecca Co.*, 40 Cal. App. 515, 181 Pac. 415.

1. *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300.

2. *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *James Eva Estate Co. v. Mecca Co.*, 40 Cal. App. 515, 181 Pac. 415; *Wykes v. City Water Co.*, 184 Fed. 752 (quoting *Miners' Ditch Co. v. Zellerbach*, supra). See infra, § 550, as to acts within powers for some purposes.

3. *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300 (where

the test, as between strangers having no knowledge of an unlawful purpose and the corporation, is said to be to compare the terms of the contract with the provisions of the law from which the corporation derives its powers, and if the court can see that the act to be performed is necessarily beyond the powers of the corporation for any purpose, the contract cannot be enforced, otherwise it can); *Wykes v. City Water Co.*, 184 Fed. 752 (quoting *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300).

4. *James Eva Estate Co. v. Mecca Co.*, 40 Cal. App. 515, 181 Pac. 415.

cumstances not justifying its performance.⁵ Where the transaction is such as the corporation has a right to authorize, it is not ultra vires, although it may be in excess of the powers of an officer conferred by the board of directors.⁶ Some matters that are ultra vires as to directors may be intra vires as to the corporation; and some matters that are ultra vires may be so simply because they are unauthorized, whereas other matters may be ultra vires because they are prohibited by law.⁷

§ 547. Attitude of Courts Toward Defense.—When invoked by a stockholder or in quo warranto proceedings by the state, particularly as to executory contracts in violation of the corporate charter or purposes, the doctrine of ultra vires is looked upon quite differently than it is when relied upon by a corporation as a shield to escape its just liabilities under an executed contract.⁸ The doctrine is regarded with much less favor in the latter than in the former case,⁹ particularly of late years when corporations have multiplied until they control and operate all kinds of business, and in many cases to the exclusion of individuals.¹⁰ The defense is said to be looked upon by courts with positive disfavor whenever it is presented for the purpose of avoiding an obligation which a corporation has assumed merely in excess of the powers conferred

5. *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *James Eva Estate Co. v. Mecca Co.*, 40 Cal. App. 515, 181 Pac. 415.

6. *Gribble v. Columbus Brewing Co.*, 100 Cal. 67, 34 Pac. 527. See *Pauly v. Pauly*, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29, using the term "ultra vires," but which, apparently, it is not a case of ultra vires but of mere unauthorized contract.

7. *Southern California Home*

Builders v. Young, 31 Cal. App. Dec. 336, 188 Pac. 586.

8. *McQuaide v. Enterprise Brewing Co.*, 14 Cal. App. 315, 111 Pac. 927.

9. *James Eva Estate Co. v. Mecca Co.*, 40 Cal. App. 515, 181 Pac. 415; *McQuaide v. Enterprise Brewing Co.*, 14 Cal. App. 315, 111 Pac. 927.

10. *McQuaide v. Enterprise Brewing Co.*, 14 Cal. App. 315, 111 Pac. 927.

upon it and not in violation of some express prohibition of the statute.¹¹

Since the defense of *ultra vires* is purely legal in aspect and in a sense technical, involving as it does a harsh and unyielding bar which if sustained necessarily precludes a consideration of the ethical features of a case and is thereby calculated to result in wrong to innocent parties, it does not appeal strongly to a court of equity.¹² In other words, it is the policy of the law and the endeavor of the courts to hold corporations, as well as natural persons, to their contracts and make them liable for the obligations they have incurred.¹³

§ 548. Doctrine of Federal Courts.—The doctrine adhered to by the federal courts, following the principles enunciated by the United States supreme court on many occasions, is radically different from that of the California courts. It is held by the federal courts that a contract which is *ultra vires* the corporation in the proper sense of the term, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is

11. *Kennedy v. California Sav. Bank*, 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039 (reversed in *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198, 17 Sup. Ct. Rep. 831, the United States supreme court applying the federal doctrine); *McQuaide v. Enterprise Brewing Co.*, 14 Cal. App. 315, 111 Pac. 927. See *infra*, § 548, as to doctrine of the federal courts.

12. *E. J. Dodge Co. v. First National Bank*, 260 Fed. 758 (where it is said that the defense that a contract is *ultra vires* or in violation of a statute is not a special favorite of the law, because such defense is almost invariably interposed from sordid motives, but the courts per-

mit the defense *ex mero motu* and not from any consideration for the immediate parties); *Wykes v. City Water Co.*, 184 Fed. 752.

13. *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *Chambers v. Security etc. Bank*, 34 Cal. App. Dec. 388, 196 Pac. 488; *McQuaide v. Enterprise Brewing Co.*, 14 Cal. App. 315, 111 Pac. 927.

That kind of plunder which holds on to the property and pleads *ultra vires* against the obligation to pay for it has no recognition or support in the law. *McKee v. Title Ins. etc. Co.*, 159 Cal. 206, 113 Pac. 140; *Lowe v. Los Angeles etc. Gas Co.*, 24 Cal. App. 367, 141 Pac. 399.

not voidable merely, but is wholly void and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. Hence, according to the federal rule, such a contract cannot be ratified by either party because it could not have been authorized by either, and no performance on either side can give the unlawful contract any validity or be the foundation of any right of action upon it.¹⁴ And such a contract made by a corporation beyond the scope of its powers, express or implied on a proper construction of its charter, cannot be enforced or rendered enforceable by the application of the doctrine of estoppel.¹⁵

§ 549. Acts Prohibited by Statute or Public Policy.—It has been said that a contract is against public policy when it is simply ultra vires, because it is against public policy that a corporation should assume to exercise powers not granted, but in such cases it is simply an executed ultra vires contract.¹⁶ But such an act may also be an attempt to do something which is unlawful without reference to the corporate franchise,—an act which would be unlawful in a natural person. In such case the act or contract of the corporation is subject to the same rule which obtains in the case of individuals. Being against public policy, it is void

14. *Chemical Nat. Bank v. Havermale*, 120 Cal. 601, 65 Am. St. Rep. 206, 52 Pac. 1071, passing on a federal question relating to the powers of national banks, and therefore adopting the federal rule.

15. *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198, 17 Sup. Ct. Rep. 831, see, also, *Rose's U. S. Notes* (reversing the decision of the California court in *Kennedy v. California Sav. Bank*, 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039, which expressed the Cali-

fornia rule and applied it to the powers of national banks). See *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047, which apparently followed the federal doctrine that an ultra vires act is void, but which may be explained as holding the particular act to have been prohibited by the constitution and therefore void and ultra vires.

16. *Visalia etc. Co. v. Sims*, 104 Cal. 326, 43 Am. St. Rep. 105, 37 Pac. 1042. See *infra*, § 554, as to who may question ultra vires act.

and the courts will not give relief to either party.¹⁷ Contracts which are *malum in se* or *malum prohibitum* will not, therefore, be enforced.¹⁸ For instance, a purchase by a corporation in the face of a positive prohibition is void.¹⁹ And it has been held that the subscription by a corporation to stock of another corporation, being prohibited by the constitution, where not within the scope of the business specified in its articles, is *ultra vires* and void.²⁰ So, also, where the provisions of a contract are wholly outside the powers of the corporation and contrary to the laws of the state of California, the contract is *ultra vires* and void. Thus, it has been held that a contract that another corporation shall select certain directors and officers and that all members of the board shall be acceptable to such other corporation is *ultra vires* and void, as contrary to the statute which provides that the business of every corporation shall be managed by the directors.¹

§ 550. Acts Within Powers for Some Purposes.—It is the established rule in California that in cases where an act is within the powers of the corporation for some purposes and claimed to be without its powers under the given circumstances, the burden of proving the latter state of affairs rests upon the corporation denying its liability.²

17. *Visalia etc. Co. v. Sims*, 104 Cal. 326, 43 Am. St. Rep. 105, 37 Pac. 1042. As to contracts against public policy generally, see *CONTRACTS*, vol. 5, p. 109 et seq.

18. *McQuaide v. Enterprise Brewing Co.*, 14 Cal. App. 315, 111 Pac. 927.

19. *Laidlaw v. Pacific Bank*, 137 Cal. 392, 70 Pac. 277; *Harrigan v. Home Life Ins. Co.*, 128 Cal. 531, 58 Pac. 180, 61 Pac. 99 (violation of statute prohibiting certain forfeitures of life insurance policies); *Griffith v. New York Life Ins. Co.*, 101 Cal. 627, 40 Am. St. Rep. 96, 36

Pac. 113 (violation of statute prohibiting certain forfeitures of life insurance policies); *California State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398.

20. *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047. See Const., art. XII, § 9.

1. *Holt v. California Dev. Co.*, 161 Fed. 3, 88 C. C. A. 167.

2. *Brown v. Board of Education*, 103 Cal. 531, 37 Pac. 503 (applying rule to private contracts of municipal corporations); *James Eva Estate Co. v. Mecca Co.*, 40 Cal. App. 515, 181 Pac. 415; *Wykes v. City*

If upon its face it is not necessarily beyond the scope of the corporate authority, a contract, in the absence of proof, will be presumed to be valid.³ Whether a contract is essential to the transaction of the ordinary affairs, or for the purposes of the corporation, within the meaning of section 305 of the Civil Code, is to be determined by the corporation or those to whom the management of its affairs is entrusted. If it is within the apparent scope of its organization, the fact that the contract has been entered into by it is a determination on the part of the corporation that it is essential, and it will be estopped thereafter to question its effect.⁴ And where the general power has been conferred, the corporation is estopped to claim *ultra vires* when only the manner of the exercise of such power is involved.⁵ Likewise, where a corporation has power to do the act for some purposes and has received benefit therefrom, it is estopped to present the defense of *ultra vires* against the enforcement of the obligation assumed.⁶

Water Co., 184 Fed. 752 (citing *Brown v. Board of Education*, supra).

3. *Brown v. Board of Education*, 103 Cal. 531, 37 Pac. 503; *San Bernardino Nat. Bank v. Colton L. & W. Co.*, 91 Cal. 124, 27 Pac. 538 (holding that where a note on its face does not suggest that it is not within the scope of the corporate authority, an innocent purchaser without knowledge that the corporation was an accommodation maker or surety may recover); *Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 620; *Chambers v. Security etc. Bank*, 34 Cal. App. Dec. 388, 196 Pac. 488 (holding that where a corporation has power to take and hold property for some purposes at least, the other party has the right to presume that the

property is acquired for purposes authorized by its charter).

4. *Dunne v. Independent Order of Foresters*, 61 Cal. Dec. 269, 196 Pac. 41; *Savings Bank of San Diego County v. Barrett*, 126 Cal. 413, 58 Pac. 914; *Bates v. Coronado Beach Co.*, 109 Cal. 160, 41 Pac. 855; *Natoma W. & M. Co. v. Clarkin*, 14 Cal. 544. See *infra*, § 557, as to exercise of power to contract in general.

5. *Guthrie v. Supreme Tent etc.*, 4 Cal. App. 184, 87 Pac. 405.

6. *Dunne v. Independent Order of Foresters*, 61 Cal. Dec. 269, 196 Pac. 41; *Chambers v. Security etc. Bank*, 34 Cal. App. Dec. 388, 196 Pac. 488; *James Eva Estate v. Mecca Co.*, 40 Cal. App. 515, 181 Pac. 415. See cases cited *infra*, § 551, to the rule as applied to executed contracts.

§ 551. **Executory and Executed Contracts.**—It is a general rule that an executory contract of a corporation made without authority cannot be enforced,⁷ for the powers of the corporation cannot in such case be extended beyond their charter limits for the purpose of enforcement.⁸ But a different question arises where the ultra vires contract has been executed.⁹ In such case the rights of parties with whom the corporation has made the contract and the consequences to him are to be carefully weighed before the court will hold the contract void.¹⁰ The law does not permit a corporation to receive and retain the benefits of a contract or transaction and escape the liability upon it,¹¹ for, as has been argued, it would be highly inequitable and unjust to permit a corporation to repudiate or question the validity of a contract the fruits of which it retains.¹² And so, where the contract has been executed

And see as to ultra vires acts of banks, *BANKS*, vol. 4, p. 172.

7. *Kennedy v. California Sav. Bank*, 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039 (reversed in *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198, 17 Sup. Ct. Rep. 831, see, also, *Rose's U. S. notes*, by application of federal doctrine as to executed contracts); *Argenti v. San Francisco*, 16 Cal. 255; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453.

8. *Main v. Casserly*, 67 Cal. 127, 7 Pac. 426.

9. *Argenti v. San Francisco*, 16 Cal. 255. As to executed and executory contracts generally, see *CONTRACTS*, vol. 5, p. 109 et seq.

10. *McQuaide v. Enterprise Brewing Co.*, 14 Cal. App. 315, 111 Pac. 927.

11. *McKee v. Title Ins etc. Co.*, 159 Cal. 206, 113 Pac. 140; *Visalia etc. Co. v. Sims*, 104 Cal. 326, 43 Am. St. Rep. 105, 37 Pac. 1042; *Ken-*

nedy v. California Sav. Bank, 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039 (reversed in *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198, 17 Sup. Ct. Rep. 831, see, also, *Rose's U. S. Notes*, by application of federal doctrine); *Main v. Casserly*, 67 Cal. 127, 7 Pac. 426; *Shaver v. Bear River etc. Co.*, 10 Cal. 396; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *California Trona Co. v. Wilkinson*, 20 Cal. App. 694, 130 Pac. 190; *McQuaide v. Enterprise Brewing Co.*, 14 Cal. App. 315, 111 Pac. 927; *Kelly v. Ning Yung Ben. Assn.*, 2 Cal. App. 460, 84 Pac. 321; *Laidlaw v. Pacific Bank*, 6 Cal. Unrep. 849, 67 Pac. 897 (see S. C., 137 Cal. 392, 70 Pac. 277, reversed on rehearing on the ground that the contract ultra vires and void).

12. *Main v. Casserly*, 67 Cal. 127, 7 Pac. 426; *Argenti v. San Francisco*, 16 Cal. 255; *Huey v. Patterson*, 37 Cal. App. 335, 174 Pac. 939.

and the corporation has enjoyed the benefit of the consideration, it has been said that an implied assumpsit arises against it.¹³ Where the contract has been fully and completely executed or performed on both sides, the court will not interpose to restore either party to his former estate or grant other relief, but will leave the parties where it finds them.¹⁴ And where the contract is not only ultra vires, but also void as against public policy, the court will not give relief to either party.¹⁵ But, however, well established this rule may be, relief will nevertheless be granted if it can be done independently of the contract, or a new, further and independent consideration subsists in support of the transaction sought to be enforced.¹⁶

§ 552. Basis of Liability on Executed Contracts.—It has been pointed out that when an ultra vires contract has been performed by one party, then the other is estopped to plead that the contract was ultra vires; and that where the corporation has received the benefit of the contract, the law interposes an estoppel to question its validity.¹⁷ In cases of executed contracts it has been said that the court simply considers the circumstances, as to whether or not the doctrine of estoppel in pais may be invoked.¹⁸ It has been claimed by one well known writer that the basis of

13. *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453, per Field, J. If the contract has been performed on one part and a benefit has been received by the other party, this will be sufficient to afford a basis for an estoppel; *Visalia etc. Co. v. Sims*, 104 Cal. 326, 43 Am. St. Rep. 105, 37 Pac. 1042; *Shaver v. Bear River etc. Co.*, 10 Cal. 396; *Kelly v. Ning Yung Ben. Assn.*, 2 Cal. App. 460, 84 Pac. 321. See *ASSUMPSIT*, vol. 3, p. 372.

14. *City of Santa Cruz v. Wykes*, 202 Fed. 357, 120 C. C. A. 485.

15. *Visalia G. & E. L. Co. v. Sims*, 104 Cal. 326, 43 Am. St. Rep. 105, 37 Pac. 1042 (and holding that the fact that the contract is performed on one part does not estop the other party to plead the invalidity of the contract); *Savings & Trust Co. v. Bear Valley Irr. Co.*, 112 Fed. 693. See *CONTRACTS*, vol. 5, p. 148 et seq.

16. *City of Santa Cruz v. Wykes*, 202 Fed. 357, 120 C. C. A. 485.

17. See *supra*, § 551.

18. *McQuaide v. Enterprise Brewing Co.*, 14 Cal. App. 315, 111 Pac. 927.

liability is not estoppel,¹⁹ but however this may be, the rule is based upon the strongest principles of justice and public policy that a contract should be enforced against a corporation which has received the consideration or the benefits of it, and that as to such contracts the doctrine of ultra vires should be limited in its scope and application.²⁰ The defense of estoppel, however, is not applicable where money received by the corporation has not been used for its own benefit but has been used for the benefit of the other party.¹

§ 553. Effect on Collateral Transactions.—Although a contract is ultra vires, as being beyond the charter powers, and forbidden, therefore, by considerations of public policy, the vice infects only the contract itself and does not affect transactions with third persons connected only indirectly with such contract.² Even though indirectly connected with the illegal transaction, an obligation will be enforced if it be supported by an independent consideration so that the plaintiff does not require the aid of the illegal transaction to make out his case.³ Likewise, there being no fraud, a corporation cannot refuse to repay money which was borrowed for the purpose of paying expenses incidental to an ultra vires act.⁴ So, also, ultra vires bonds may be guaranteed, and the fact that their issue was ultra vires will not enable the corporation assuming the responsibility for their payment to deny its liability, while retain-

19. Morawetz on Corporations, vol. 2, § 692.

20. McQuaide v. Enterprise Brewing Co., 14 Cal. App. 315, 111 Pac. 927, per Cooper, J.

1. Holt v. California Dev. Co., 161 Fed. 3, 88 C. C. A. 167.

2. Illinois Tr. & Sav. Bank v. Pacific Ry. Co., 117 Cal. 332, 49 Pac. 197, holding that the fact that a mortgage is ultra vires will not

make the debts secured by the mortgage also invalid.

3. City of Santa Cruz v. Wykes, 202 Fed. 357, 120 C. C. A. 485, holding that one purchasing property subject to mortgage and agreeing to pay the mortgage will not be held to question the validity of the liability.

4. Taylor v. North Star Gold Min. Co., 79 Cal. 285, 21 Pac. 753.

ing the consideration for its obligation.⁵ It is possible, of course, that there may be cases where ancillary operations are so inseparably connected with the main act that they would have to fall with it.⁶

§ 554. Who may Urge Ultra Vires Against Corporation.

There is a vital distinction between contracts based upon fraud or made in violation of the rights of one of the contracting parties and those made in violation of statutes designed to aid the sovereign power in the regulation of certain kinds of business.⁷ Unless the contract is declared to be void, the violation of a provision of the latter class of statutes can be taken advantage of only at the instance of the state or sovereign power in a direct proceeding;⁸ it cannot be raised collaterally by individuals.⁹ Hence, the misuser of a franchise by exceeding the corporate powers is a cause of forfeiture which can be taken advantage of by the government alone;¹⁰ and the same rule applies as to the authority of a corporation to make a loan to one who dealt with the company as having such authority;¹¹ or as to the corporation's right to receive an assignment of a contract.¹²

5. *Smith v. Ferries etc. Co.*, 5 Cal. Unrep. 889, 51 Pac. 710.

6. *Taylor v. North Star Gold Min. Co.*, 79 Cal. 285, 21 Pac. 753.

7. *Blochman Com. etc. Bank v. F. G. Investment Co.*, 177 Cal. 762, 171 Pac. 943.

8. *Blochman Com. etc. Bank v. F. G. Investment Co.*, 177 Cal. 762, 171 Pac. 943; *Bay City etc. Assn. v. Broad*, 136 Cal. 525, 69 Pac. 225; *Brittan v. Oakland Bank of Savings*, 124 Cal. 282, 17 Am. St. Rep. 58, 57 Pac. 84; *Camp v. Land*, 122 Cal. 167, 54 Pac. 839; *Savings Bank of San Diego County v. Burns*, 104 Cal. 473, 38 Pac. 102; *Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 620; *California State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398,

Cope, C. J., concurring; Natoma W. & M. Co. v. Clarkin, 14 Cal. 544.

9. *Bay City etc. Assn. v. Broad*, 136 Cal. 525, 69 Pac. 225; *Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 620.

10. *California State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398, *Cope, C. J., concurring; Martin v. Zellerbach*, 1 Cal. Unrep. 335. See *infra*, § 564, as to who may question necessity of corporation for holding property. See FRANCHISES.

11. *Bay City etc. Assn. v. Broad*, 136 Cal. 525, 69 Pac. 225; *Granger's etc. Assn. v. Clark*, 67 Cal. 634, 8 Pac. 445.

12. *Ingle Mfg. Co. v. Scales*, 36 Cal. App. 410, 172 Pac. 169.

§ 555. **Restraining Ultra Vires Acts.**—A court will not only refuse to enforce an ultra vires executory contract, but on the application of a stockholder or any other person authorized to make application it will intervene and forbid the execution of such a contract.¹³ A stockholder may stand upon his contract with the corporation as set out in its charter, and may forbid any departure from its terms. Any departure from the chartered purposes is considered an injury to every individual stockholder for which equity will under proper circumstances provide a remedy.¹⁴ Where a contract is not only ultra vires, but is void as well, in a bill by a stockholder for the benefit of the corporation to set aside such contract, it has been held that it is not necessary to tender a repayment of money advanced to the corporation under its terms.¹⁵

§ 556. **Recovery to Compensate for Benefits Received.**—The rule is given that even though a corporation cannot be charged with a contract made without the corporate power, yet if any portion of the money has been applied to proper uses of the company it may be held liable to that extent at least. The liability in such case arises not from the contract itself, but from the equitable right of the other party to recover his money which has gone to swell the company's assets.¹⁶ And the rule is the same where

13. *Main v. Casserly*, 67 Cal. 127, 7 Pac. 426.

14. *Ashton v. Dashaway Assn.*, 84 Cal. 61, 7 L. R. A. 809, 22 Pac. 660, 23 Pac. 1091.

15. *Holt v. California Dev. Co.*, 161 Fed. 3, 88 C. C. A. 167, where a contract by which one corporation loaned money to another, taking as security a majority of the stock in pledge, with the agreement that it should name three of the seven directors, the president and general

manager, was held ultra vires and void.

16. *Visalia etc. Co. v. Sims*, 104 Cal. 326, 43 Am. St. Rep. 105, 37 Pac. 1042 (stating the rule, but holding however, that no benefits had been received in the particular case and the contract being ultra vires and against public policy, no recovery could be had under the rule); *Pauly v. Pauly*, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29 (holding that a corporation must account for benefits re-

the corporation itself sues to recover benefits received by the other party under the contract.¹⁷ The rules as to ultra vires transactions of banking corporations are considered in another article of this work.¹⁸

Contractual Powers.

§ 557. **In General.**—A corporation is endowed with the capacity to enter into any obligation or contract essential for its purposes and for the transaction of its ordinary affairs.¹⁹ Whether a contract is “essential” to the transaction of its ordinary affairs, or for the purposes of the corporation, within the meaning of section 354 of the Civil Code, is to be determined by the corporation or those to whom the management of its affairs is entrusted.²⁰ The court cannot determine that a contract is beyond the powers of a corporation unless it clearly appears to be so as a matter of law. With respect to the means which a corporation may adopt to further its objects and promote its business, its managers are not limited to the use of such means as are usual or necessary to the objects con-

ceived under an ultra vires contract).

17. *Visalia etc. Co. v. Sims*, 104 Cal. 326, 43 Am. St. Rep. 105, 37 Pac. 1042, where the action was on a corporate lease void because against public policy, but where no benefits had been received from it. See *Dunne v. Independent Order of Foresters*, 32 Cal. App. Dec. 66, for a full discussion of the right of a corporation to recover money paid on account of an ultra vires transaction. Although this case was reheard in the supreme court (61 Cal. Dec. 269, 196 Pac. 41), and the decision there reversed, the supreme court did not touch on the right of

a corporation to recover benefits received under an ultra vires contract.

18. See *BANKS*, vol. 4, p. 172.

19. Civ. Code, § 354, subd. 8; *Woods Lbr. Co. v. Moore*, 183 Cal. 497, 11 A. L. R. 549, 191 Pac. 905; *McKiernan v. Lenzen*, 56 Cal. 61; *Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 620; *California State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398. And see cases cited *infra*, this section, and *infra*, § 558 et seq.

20. *Woods Lbr. Co. v. Moore*, 183 Cal. 497, 11 A. L. R. 549, 191 Pac. 905; *Bates v. Coronado Beach Co.*, 109 Cal. 160, 41 Pac. 855. And see cases cited *supra*, § 550.

templated by their organization, but, where not restricted by law, may choose such means as are convenient and adapted to the end, though they be neither usual, nor absolutely necessary for the purpose intended.¹ The power of two corporations to enter into contracts with each other depends upon the character of the contract as viewed in the light of their charters and of public policy.²

§ 558. Power to Create Debts.—Under the general laws the power of corporations to create debts is treated as an incident to the express powers, and not as itself one of such powers.³ Having power to incur debts to the amount of its capital stock paid in, a corporation has power to provide for their payment and can create the ordinary evidences of indebtedness for that purpose.⁴ But the issuing of bills, notes, or other evidences of debt, upon loans or otherwise, for circulation as money is prohibited.⁵ Even though the directors create debts in excess of the subscribed capital stock, the debts themselves are binding upon the corporation; it would appear that it was the intention of the legislature merely to provide a remedy against the directors responsible for the creation of debts

1. *Woods Lbr. Co. v. Moore*, 183 Cal. 497, 11 A. L. R. 549, 191 Pac. 905, per Shaw, J.

2. *San Diego Water Co. v. San Diego Flume Co.*, 108 Cal. 549, 29 L. R. A. 839, 41 Pac. 495.

The power of a corporation to contract may not be extended by contracting beyond the limits of the state. *E. J. Dodge Co. v. First National Bank*, 260 Fed. 758.

3. *Smith v. Eureka Flour Mills Co.*, 6 Cal. 1.

4. *Seeley v. San Jose etc. Co.*, 59 Cal. 22. See *infra*, § 580 et seq., as to creation of bonded indebtedness by a corporation.

The rule "*expressio unius est exclusio alterius*" must be applied; one cause of issuing bills or notes being expressly excluded, the right to issue them in all other proper cases must be inferred as an incident to the expressed powers or objects of the corporation; *Smith v. Eureka Flour Mills Co.*, 6 Cal. 1 (under act of 1850, § 3, and act of 1853, § 15). And see *Magee v. Mokelumne etc. Co.*, 5 Cal. 258, under act of 1850, § 3.

See note 12 A. L. R. 130, as to authority of corporate officers to indorse and transfer commercial paper.

5. Civ. Code, § 356.

disproportionate to the ability of the corporation to pay.⁶ Although a corporation has power to pledge its bonds to secure its debts,⁷ it has been held that it has no power to issue shares of stock to secure a loan to the corporation.⁸

§ 559. Guaranty or Suretyship.—It has been held that the officers of a corporation have no power to authorize the execution of a note as surety for another in respect to a matter having no relation to the corporate business and in which the corporation has no interest; such a transaction is not within the scope of its business.⁹ The rule denying corporations the right under such circumstances is said to be one of strict construction applied by the earlier cases, based upon the doctrine that a corporation may not enter into a contract or do any act not specifically authorized.¹⁰ But there is no rule of public policy which prohibits a private corporation from becoming the accommodation indorser of commercial paper.¹¹ Where, therefore, a trading

6. *Hawke v. California Realty etc. Co.*, 28 Cal. App. 377, 152 Pac. 959; *Underhill v. Santa Barbara etc. Co.*, 93 Cal. 300, 28 Pac. 1049. See *supra*, § 520 et seq.

7. See *infra*, § 597.

8. *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237. See *Hanson v. Sherman*, 25 Cal. App. 169, 143 Pac. 73, where the point was conceded for the purposes of the decision, but was not decided.

It has been held that a corporation organized under the act of April 11, 1862, has no power to contract any debt for borrowed money, or for money paid out at its request by a stockholder in discharge of its obligation to a depositor. *Laidlaw v. Pacific Bank*, 137 Cal. 392, 70 Pac. 27. See *BANKS*, vol. 4, p. 179 et seq.

9. *Hall v. Auburn Turnpike Co.*, 27 Cal. 255, 87 Am. Dec. 75 (holding

that one receiving the note with notice of the circumstances under which it was given cannot recover upon it). See *San Bernardino National Bank v. Colton L. & W. Co.*, 91 Cal. 124, 27 Pac. 538, holding that where the note on its face does not suggest that it is not within the scope of the corporate authority, an innocent purchaser without knowledge that the corporation was an accommodation maker or surety may recover.

If the alleged guaranty is founded on an agreement executed by officers without authority, it is of no validity against the company. *Granger v. Bourn*, 2 Cal. Unrep. 518, 7 Pac. 760.

10. *Armour & Co. v. R. Rosenberg & Sons Co.*, 36 Cal. App. 773, 173 Pac. 404.

11. *Sargent v. Palace Cafe Co.*, 175 Cal. 737, 167 Pac. 146, holding that where the indorsement is made

corporation guarantees a debt or obligation of a customer or other person when such course is deemed necessary to promote the business of the corporation, the obligation guaranteed thus having a relation to the corporation's own interest and being designed to promote its own business, a different principle is involved.¹² The rule is firmly established that trading corporations may in furtherance of their own interests extend financial aid to their customers by way of guaranteeing their obligations;¹³ and guaranties of this character are brought within the scope of the implied powers of the corporation.¹⁴ The fact that the arrangement did not prove profitable does not affect the power,—the power existing, the result of its exercise becomes unimportant.¹⁵ Likewise, a corporation has power to guarantee, upon a consideration, payment of bonds by another corporation or a debt which it might directly contract to pay;¹⁶ and it is not necessary that the debt should be regularly and legally issued in order that the corporation may bind itself in law to pay.¹⁷ Corpora-

with the knowledge and assent of all directors and stockholders, and all creditors are paid, no one can complain.

12. *Armour & Co. v. R. Rosenberg & Sons Co.*, 36 Cal. App. 773, 173 Pac. 404.

13. *Woods Lbr. Co. v. Moore*, 183 Cal. 497, 11 A. L. R. 549, 191 Pac. 905. See note on case, 9 Cal. Law Rev. 149; *James Eva Estate v. Mecca Co.*, 40 Cal. App. 515, 181 Pac. 415; *Armour & Co. v. R. Rosenberg & Sons Co.*, 36 Cal. App. 773, 173 Pac. 404.

See note 11 L. R. A. 554, as to power of corporation to guarantee for accommodation the contracts of its customers or vendors with third persons.

14. *Woods Lbr. Co. v. Moore*, 183 Cal. 497, 11 A. L. R. 549, 191 Pac. 905.

15. *Armour & Co. v. R. Rosenberg & Sons Co.*, 36 Cal. App. 773, 173 Pac. 404.

16. *Low v. California Pac. R. Co.*, 52 Cal. 53, 28 Am. Rep. 629.

17. *Smith v. Ferries etc. Co.*, 5 Cal. Unrep. 839, 51 Pac. 710 (guaranty of ultra vires bonds); *Western Nat. Bank v. Wittman*, 31 Cal. App. 615, 161 Pac. 137 (holding that an indorser and guarantor of a note cannot be heard to say that it was executed without consideration or was ultra vires where the corporation maker admitted its genuineness and recognized its validity for several years by making numerous payments and by acquiescence).

tions especially authorized and empowered so to do may, of course, become sureties on undertakings and bonds.¹⁸

§ 560. Entering into Partnership.—A corporation cannot lawfully enter into a copartnership agreement with another corporation nor with an individual, unless expressly empowered so to do by the terms of its charter.¹⁹ And even if it be conceded that it is competent for corporations to unite their business and capital and thus establish a partnership between them, it is evident that they cannot do so on such terms and conditions as will have the effect to withdraw the capital and turn it over to the stockholders.²⁰ Although ordinarily the assuming of the relation may be ultra vires, it has been said that there is no reason why a corporation may not enter into such a contract if so authorized by its articles and charter, since the Civil Code expressly provides that private corporations may be formed for any purpose for which individuals may lawfully associate themselves.¹ And even where a corporation is without authority under its charter to form a partnership with another it may nevertheless be held liable as a partner to prevent injustice.²

18. See Code Civ. Proc., § 1056 et seq. See SURETYSHIP.

19. *Bates v. Coronado Beach Co.*, 109 Cal. 160, 41 Pac. 855; *Fee v. McPhee Co.*, 31 Cal. App. 295, 160 Pac. 397; *McTigue v. Arctic Ice Cream S. Co.*, 20 Cal. App. 708, 130 Pac. 165.

The statutes under which a corporation exists require its powers to be exercised by a board of directors and preclude it from becoming bound by the act of one who may be only its partner; *Bates v. Coronado Beach Co.*, 109 Cal. 160, 41 Pac. 855. See supra, § 441.

20. *Martin v. Zellerbach*, 38 Cal.

300, 99 Am. Dec. 365. See supra, § 515.

1. *Mervyn Inv. Co. v. Biber*, 184 Cal. 637, 194 Pac. 1037 (citing Civ. Code, § 286).

2. *Mervyn Inv. Co. v. Biber*, 184 Cal. 637, 194 Pac. 1037. See *Fee v. McPhee Co.*, 31 Cal. App. 295, 160 Pac. 397, where the question of partnership as affecting third parties was said not to be involved. And see *Westcott v. Gilman*, 170 Cal. 562, Ann. Cas. 1916E, 437, 150 Pac. 777, where the parties were held to be partners as to third persons, but where it did not appear from the opinion whether or not the company was incorporated.

Where one has dealt with corporations acting as a partnership and has received goods from them, he is estopped from attacking the illegality of the formation of the partnership by them, or attempting to question their corporate existence, under the principles applicable to persons dealing with corporations and attempting to question their corporate existence.³ Thus, a bank which has received deposits from a partnership consisting of an individual and a corporation, is estopped to deny the validity of the partnership when sued by it to recover a deposit, or by the corporation as the surviving partner winding up the partnership business.⁴

§ 561. Contracts to Share Profit and Loss.—While, as has been seen, it is the general rule that corporations may not enter into partnerships with other corporations or individuals,⁵ nevertheless a corporation may enter into a contract by which it is agreed that the gains and losses of a venture shall be borne equally by both parties.⁶ Such agreements do not necessarily make the parties partners in legal contemplation.⁷ Thus, the fact that the rent under a lease is made a sum equal to a percentage of the net profits of the business does not of itself establish a partnership relation between a corporation and its lessee.⁸ So a corporation may enter into a contract with another corporation for the appointment of agents to operate their works and provide for the division of expenses and income,

3. *Yancy v. Morton*, 94 Cal. 558, 29 Pac. 1111.

4. *Willey v. Crocker-Woolworth Nat. Bank*, 7 Cal. Unrep. 152, 72 Pac. 832. But see *Willey v. Crocker-Woolworth Nat. Bank*, 141 Cal. 508, 75 Pac. 106, where it was deemed unnecessary to decide whether the corporation could legally enter into a partnership with an individual.

5. See *supra*, § 560.

6. *Bates v. Coronado Beach Co.*, 109 Cal. 160, 41 Pac. 855; *Fee v. McPhee Co.*, 31 Cal. App. 295, 160 Pac. 397.

7. *San Diego Water Co. v. San Diego Flume Co.*, 108 Cal. 549, 29 L. R. A. 839, 41 Pac. 495; *Fee v. McPhee Co.*, 31 Cal. App. 295, 160 Pac. 397.

8. *McTigue v. Arctic Ice Cream S. Co.*, 20 Cal. App. 708, 130 Pac. 165.

and such an agreement is not in excess of the power given by subdivisions 5 and 8 of section 354 of the Civil Code.⁹

§ 562. Contracts of Agency.—Every corporation, as such, has power to appoint such subordinate officers or agents as its business may require, and to allow them suitable compensation.¹⁰ In this respect private corporations are upon exactly the same footing as natural persons, unless they are limited by charter or by-laws to some particular method to be pursued.¹¹ In the appointment of its agent, a corporation may select another corporation for matters consistent with or in furtherance of the objects of their organization, at least where the agency is not unlimited, even though exclusive.¹² A corporation, as well as a natural person, may act as an agent of individuals.¹³

Powers With Reference to Property.

§ 563. In General.—Corporations are expressly given power to purchase, hold and convey such real and personal estate as their purposes may require, not exceeding the amount limited by law.¹⁴ The ownership of property, however, is not essential to the existence of a corporation,¹⁵ for it is obvious that a corporation is in existence before it acquires any property and it may still exist after all of its property is disposed of.¹⁶ The exception of a

9. San Diego Water Co. v. San Diego Flume Co., 108 Cal. 549, 29 L. E. A. 839, 41 Pac. 495.

10. Civ. Code, § 354, subd. 5.

11. Colpe v. Jubilee Min. Co., 2 Cal. App. 393, 84 Pac. 324.

12. San Diego Water Co. v. San Diego Flume Co., 108 Cal. 549, 29 L. E. A. 839, 41 Pac. 495.

13. Freeman v. Kieffer, 101 Cal. 254, 35 Pac. 767; Eldridge v. Mowry, 24 Cal. App. 183, 140 Pac. 978. See AGENCY, vol. 1, p. 696.

14. Civ. Code, § 354, subd. 4. See § 566, *infra*, as to limitation.

15. Sullivan v. Triunfo etc. Min. Co., 39 Cal. 459.

16. Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300.

At common law, corporations aggregate had an incidental right to dispose of their lands, unless specially restrained by their charters or statute, and though a corporation might alien all its property, yet it continued as a corporation. Martin v. Zellerbach, 1 Cal. Unrep. 335.

particular class of property from that which a corporation is prohibited from purchasing leaves the corporation free to purchase such property under the power given by section 354 of the Civil Code.¹⁷ The right to convey or *ius disponendi* necessarily attaches to property legally owned by the corporation, as an incident to the ownership, and such right may be exercised, when exigencies require.¹⁸

§ 564. Who may Question Necessity of Holding.— Whether the purchase of property is such as the purpose of a corporation requires is to be determined by its board of directors,¹⁹ and is not open to investigation at the instance of a third person.¹ And it does not lie within the power of a corporation to complain of its usurpation of power in a case wherein it has received the full benefit of its unauthorized act. It is for the state to restrain unauthorized extension of corporate powers in a *quo warranto* proceeding instituted for that purpose.² So also under a statute limiting a corporation to an amount of property necessary for its business and objects,³ the necessity of the holding is a matter between the government and the corporation and is no concern of third parties in a private action.⁴ Thus, a trespasser cannot, as a defense to an action of ejection, successfully set up want of capacity in the corporation to take land.⁵ It has been said that it would lead to infinite embarrassments if, in suits by cor-

17. *Savings Bank of San Diego County v. Barrett*, 126 Cal. 413, 58 Pac. 914.

18. *People v. President etc. of College of California*, 38 Cal. 166; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300.

19. Civ. Code, § 305.

1. *Savings Bank of San Diego County v. Barrett*, 126 Cal. 413, 58 Pac. 914.

2. *Chambers v. Security etc.*

Bank, 34 Cal. App. Dec. 388, 196 Pac. 488.

3. See Civ. Code, § 595.

4. *McCann v. Children's Home Soc.*, 176 Cal. 359, 168 Pac. 355; *California State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398, per Cope, C. J., concurring; *Natoma W. & M. Co. v. Clarkin*, 14 Cal. 544; *Southern Pac. R. Co. v. Orton*, 32 Fed. 457.

5. *Natoma W. & M. Co. v. Clarkin*, 14 Cal. 544; *Southern Pac. R. Co. v. Orton*, 32 Fed. 457.

porations to recover possession of their property, inquiries were permitted as to the necessity of such property for the purposes of the corporation, and the title made to rest upon the existence of that necessity.⁶

§ 565. General Power With Respect to Realty.—At common law, the capacity of a corporation to take and hold lands in full ownership was unlimited.⁷ In California, a corporation is expressly given power to purchase, hold and convey such real property as the purposes of the corporation may require,⁸ and it may even acquire real property by eminent domain proceedings when needed for any of the uses and purposes provided in such cases.⁹ Every corporation organized under the laws of California is presumed to have power to purchase and hold real estate, where there is nothing to show the purpose for which it is organized nor the nature of its business.¹⁰ At least, this is the presumption as against third parties.¹¹ And if there is anything in its charter or in the nature of the business in which it is engaged or in the law under which it is organized abridging this power, this must be shown affirmatively.¹² So, where land is conveyed to a grantee with a corporate name, although there is no averment that the company is a corporation or that it is capable in law of taking and holding lands, it is presumed to be capable in law.¹³ Likewise, where a patent from the government

6. California State Tel. Co. v. Alta Tel. Co., 22 Cal. 398; Natoma W. & M. Co. v. Clarkin, 14 Cal. 544.

7. Wood v. Truckee Turnpike Co., 24 Cal. 474.

8. Civ. Code, § 354, subd. 4, and § 360; Montecito Valley etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113 (relating to the power to acquire property by prescription—see *infra*, § 568).

9. Civ. Code, § 360. See EMINENT DOMAIN.

10. Stockton Sav. Bank v. Staples, 98 Cal. 189, 32 Pac. 936; People v. La Rue, 67 Cal. 526, 8 Pac. 84; Diamond Coal Co. v. Cook, 6 Cal. Unrep. 446, 61 Pac. 578.

11. Stockton Sav. Bank v. Staples, 98 Cal. 189, 32 Pac. 936.

12. Granite Gold Min. Co. v. Maginness, 118 Cal. 131, 50 Pac. 269.

13. Hagar v. Board of Suprs. of Yolo County, 47 Cal. 222.

recites that the grantee is a corporation existing under the laws of the state, that is sufficient proof, in the absence of countervailing circumstances, to show that it had capacity to take the property.¹⁴ Corporations are authorized to take and hold property as natural persons and are to be governed by the laws of the land in all particulars.¹⁵ Two corporations cannot hold as joint tenants, because two of the essential unities of a joint tenancy are wanting. Nor can a corporation hold lands as joint tenant with a natural person for there is no reciprocity of survivorship between them. But corporations may hold lands as tenants in common either with each other or with natural persons, since the only unity there required is that of possession.¹⁶ Whenever a corporation cannot take the legal title to property, neither can it take the beneficial interest in it.¹⁷

§ 566. Limitations on Holding Land.—It is provided by the Civil Code that

“No corporation shall acquire or hold any more real property than may be reasonably necessary for the transaction of its business, or the construction of its works, except as otherwise specially provided.”¹⁸

The question whether the words “acquire” and “hold” apply to a lease has not been decided.¹⁹ Besides these limitations as to amount and purposes, a corporation is expressly prohibited from holding “for a longer period than five years any real estate except such as may be necessary for carrying on its business.”²⁰ While this provision of the constitution is mandatory and prohibitory, it does not accomplish an escheat.¹ It has been said that

14. *Southern Pacific R. Co. v. Brewing Co.*, 14 Cal. App. 315, 111 Purcell, 77 Cal. 69, 18 Pac. 886. Pac. 927, where the point was raised

15. *Smith v. Morse*, 2 Cal. 524.

16. *De Witt v. San Francisco*, 2 Cal. 289. See *COTENANCY*.

17. *Coleman v. San Rafael etc. Co.*, 49 Cal. 517.

18. Civ. Code, § 360.

19. See *McQuaide v. Enterprise*

but not decided because the court found that the lease was reasonably necessary for the transaction of the business.

20. Const., art. XII, § 9 (in part).

1. *Estate of Miner*, 143 Cal. 194,

76 Pac. 968; *People v. Stockton etc.*

where a corporation is organized, as in California it may be, for the specific purpose of purchasing, holding and selling land, its power in that direction is not limited.²

§ 567. Power to Take by Will.

“A testamentary disposition may be made to any person capable by law of taking the property so disposed of, except that corporations other than counties, municipal corporations, and corporations formed for scientific, literary or solely educational purposes, cannot take, under a will, unless expressly authorized by statute, subject, however, to the provisions of section 1313 [of the Civil Code].”³

Under this statute a corporation organized for religious and not for either scientific, literary or solely educational purposes, may take where authorized by the law under which it is organized, where the bequest is in accord with and to carry out the object of the corporation,⁴ and public as well as private corporations organized solely for educational purposes, may take by will.⁵ Where, of course, a bequest or devise is made to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, the same is subject to the provisions of section 1313 of the Civil Code.⁶ A bequest is not in-

Soc., 133 Cal. 611, 85 Am. St. Rep. 225, 65 Pac. 1078. This provision of the constitution has been considered elsewhere in this work; and, at least as to banking corporations, a procedure to force the corporation to dispose of such property has been provided. See *BANKS*, vol. 4, p. 174.

2. *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225.

3. Civ. Code, § 1275.

4. *Estate of Eastman*, 60 Cal. 308. See *RELIGIOUS SOCIETIES*.

5. *Estate of Royer*, 123 Cal. 614, 44 L. R. A. 364, 56 Pac. 461 (holding that the state university as a

public corporation formed for scientific, literary or solely educational purposes, is capable of taking by will); *Estate of Bulmer*, 59 Cal. 131. See *UNIVERSITIES AND COLLEGES; WILLS*.

6. *Estate of Robinson*, 63 Cal. 620. See *CHARITIES*, vol. 5, p. 8 et seq., as to the operation of the restriction under Civ. Code, § 1313, referred to in the text; and see the same article at page 19 et seq., as to various bequests to religious or educational corporations, and page 32 et seq. as to corporations and associations as donees and trustees.

validated because of a misnomer of the corporation.⁷ Corporations organized as trust companies and duly authorized to transact such business may, of course, take property under a will.⁸ And foreign corporations also may take property devised to them by will.⁹

§ 568. Acquisition by Prescription.—Section 1007 of the Civil Code declares that occupancy for the period prescribed by the Code of Civil Procedure is sufficient to bar an action for the recovery of the property and confers a title thereto denominated a “title by prescription” which is sufficient against all. The same evidence available to prove the ownership of a natural person in property may be used to establish the title of a corporation.¹⁰ Thus, in California a corporation’s title to property—water as well as land—either by appropriation or prescription, has been recognized and upheld from the earliest days.¹¹

§ 569. Dedication of Land to Public Use.—Unless forbidden by their charters, corporations may dedicate the right to occupy and use as a public highway land conveyed

7. *In re Gibson*, 75 Cal. 329, 17 Pac. 438 (quoting provisions of Civ. Code, § 357). See *supra*, § 84, as to misnomer of corporations generally.

8. See *BANKS*, vol. 4, p. 327 et seq., as to powers of trust companies generally.

9. *Estate of Rawitzer*, 175 Cal. 585, 166 Pac. 581.

10. *Montecito Valley etc. Co. v. Santa Barbara*, 144 Cal. 578, 77 Pac. 1113.

11. *Montecito Valley etc. Co. v. Santa Barbara*, 144 Cal. 578, 77 Pac. 1113; *Gallaher v. Montecito etc. W. Co.*, 101 Cal. 242, 35 Pac. 770; *Lakeside Ditch Co. v. Crane*, 80 Cal.

181, 22 Pac. 76; *Alhambra etc. Water Co. v. Richardson*, 72 Cal. 598, 14 Pac. 379; *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 185, 30 Pac. 623; *Stein Canal Co. v. Kern Island etc. Co.*, 53 Cal. 563; *Union Water Co. v. Crary*, 25 Cal. 504, 85 Am. Dec. 145; *Bear River etc. Min. Co. v. New York Min. Co.*, 8 Cal. 327, 68 Am. Dec. 325. See *ADVERSE POSSESSION*, vol. 1, p. 512, as to right of corporation to acquire property by prescription, and see same article, page 584 et seq., as to prescriptive title to waters; and see *WATERS*, as to right to acquire by appropriation.

to the corporation for its purposes.¹² It is not necessary in such cases for the corporation to be bound by a formal act of dedication passed by its board of directors, and entered on the minutes. Dedication is a conclusion of fact to be drawn from the circumstances of each case, and a corporation as well as an individual may be bound by its acts so as to estop it from disputing the fact of dedication.¹³ The testimony of directors acting at the time a road was constructed is competent evidence as to the intention of the company to dedicate the land. And it is competent for the corporation to ratify the act of one of its directors in dedicating land in excess of his authority under a resolution.¹⁴

Dealing in Corporate Stock.

§ 570. Acquiring Stock of Other Corporations.—The general rule is that a corporation cannot own corporate stocks, unless expressly authorized. Indeed, in California a corporation is forbidden to engage in any business other than is expressly authorized by its charter or the law under which it is organized.¹⁵ To own stock in another corporation is to become interested in the business of such corporation, within the meaning of the constitutional provision. A private corporation, therefore, has no implied authority to invest in shares of another private corporation.¹⁶ Whether the purchase of shares in another corpo-

12. *Southern Pac. Co. v. Pomona*, 144 Cal. 339, 77 Pac. 929.

Railroad corporations as well as other corporations may dedicate a portion of their land as public highway. *Southern Pac. Co. v. Pomona*, 144 Cal. 339, 77 Pac. 929; *People v. Eel River etc. R. Co.*, 98 Cal. 665, 33 Pac. 728. See DEDICATION.

13. *Sussman v. San Luis Obispo County*, 126 Cal. 536, 59 Pac. 24; *People v. Eel River etc. R. Co.*, 98 Cal. 665, 33 Pac. 728. See *Los An-*

geles Cem. Assn. v. Los Angeles, 95 Cal. 420, 30 Pac. 523, where the dedication was made by formal resolution.

14. *People v. Eel River etc. R. Co.*, 98 Cal. 665, 33 Pac. 728.

15. Const., art. XII, § 9.

16. *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047 (holding a subscription by one corporation to the stock of another ultra vires and void).

ration is ultra vires or not, however, depends upon the purpose for which made and whether under the circumstances it is a reasonable or necessary means of carrying out corporate objects.¹⁷ The defense of ultra vires is not tenable where it does not appear that it was not within the scope of the powers of the corporation to acquire or hold stock of other corporations under any circumstances or for any purpose, and where it does not appear under what circumstances the stock was acquired or held.¹⁸ As elsewhere explained in this work, state banks may, under certain circumstances to prevent loss, and subject to restrictions, acquire stock in another corporation.¹⁹ National banks, of course, are under the jurisdiction of the federal courts and the federal rule of ultra vires renders void the purchase of stock other than as expressly permitted by the national banking laws.²⁰

§ 571. Purchasing Own Stock.—In view of the code provisions in California, the purchase by a corporation of its own capital stock is objectionable. A corporation is not authorized to make a purchase of its own shares, since the result would be illegally to withdraw and pay to a stockholder a part of the capital stock,¹ and is therefore

17. *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225.

18. *Evans v. Bailey*, 66 Cal. 112, 4 Pac. 1089.

19. See *BANKS*, vol. 4, p. 176.

20. *McBoyle v. Union Nat. Bank*, 162 Cal. 277, 122 Pac. 458; *Chemical Nat. Bank v. Havermale*, 120 Cal. 601, 65 Am. St. Rep. 206, 52 Pac. 1071; *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198, 17 Sup. Ct. Rep. 831, see, also, *Rose's U. S. Notes*. See *BANKS*, vol. 4, p. 176.

1. *Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, Ann. Cas. 1914B, 1013, 44 L. R. A. (N. S.) 156, 129 Pac. 582; *Bank of San Luis*

Obispo v. Wickersham, 99 Cal. 655, 34 Pac. 444. See *supra*, § 512 et seq.

In other jurisdictions, the authorities show a sharp conflict over the question whether, in the absence of any statutory or charter restrictions, a corporation may employ its assets for the purchase of shares of its own stock. *Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, Ann. Cas. 1914B, 1013, 44 L. R. A. (N. S.) 156, 129 Pac. 582; *Stewart v. Stewart Hotel Co.*, 33 Cal. App. 167, 164 Pac. 620. See *E. J. Dodge Co. v. First National Bank*, 260 Fed. 758, stating that if under the laws of California a corporation may not

ultra vires.³ Since a contract involving the sale and transfer to a corporation of its own stock would be invalid, where the contract is susceptible of another construction that construction will be adopted which will render it valid.³ The want of power to buy its own stock does not, however, prohibit a corporation from taking such stock in satisfaction of a loan, or when otherwise necessary to save itself from loss.⁴ A corporation likewise has power to purchase its own stock in default of other bidders at a delinquent assessment sale, as this right is expressly conferred by statute; but in such case the stock is not held as property of the corporation, but is held subject to the control and disposition of the stockholders.⁵

Transfer or Lease of Property as a Whole.

§ 572. In General.—Section 361a of the Civil Code in part provides that

“No sale, lease, assignment, transfer or conveyance of the business, franchise and property, as a whole, of any corporation now existing, or hereafter to be formed in this state, shall be valid without the consent of stockholders thereof, holding of record at least two thirds of the issued capital stock of such corporation.”⁶

traffic in or purchase its own stock, the fact that corporations in other jurisdictions may do so or may make such purchases from their surplus profits is immaterial. See also *Darby v. Arrowhead Hot Springs Hotel Co.*, 97 Cal. 384, 32 Pac. 454.

2. *Bank of San Luis Obispo v. Wickersham*, 99 Cal. 655, 34 Pac. 444.

3. *Hammond v. Haskell*, 14 Cal. App. 522, 112 Pac. 575.

4. *Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476; *Stewart v. Stewart Hotel Co.*, 33 Cal. App. 167, 164 Pac. 620.

Where stock is purchased by the corporation, it is not extinguished by the purchase, but may be reissued by the corporation; *Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476; *Bank of San Luis Obispo v. Wickersham*, 99 Cal. 655, 34 Pac. 444.

5. *Robinson v. Spaulding Gold etc. Co.*, 72 Cal. 32, 13 Pac. 65; Civ. Code, §§ 343, 344. See supra, § 359, as to purchase by corporation on delinquent assessment sale.

6. See infra, § 573, as to purpose and effect of this statute, and infra, § 574, as to expression and authen-

It is further provided that the power of the directors to make sales and other transfers of less than the whole property is not limited.⁷ The words of section quoted expressly apply to "any corporation" existing at the time of the adoption of the code provision or thereafter to be formed, which of necessity includes quasi-public corporations.⁸ In the absence of legislative restrictions, an ordinary commercial corporation not doing a public service business can alienate or lease its entire property whenever it is necessary or proper to do so for the best interest of its stockholders and creditors.⁹ And in such case the transfer of all its property does not work a dissolution of the corporation nor operate as a transfer of the corporate franchise.¹⁰ It would seem that stockholders and creditors alone have the right to object to such a transfer by a private corporation, as it is a matter of private concern only,¹¹ though perhaps the state may maintain an action to forfeit the corporate franchise for nonuser or misuser.¹²

§ 573. Purpose and Effect of Statute.—The enactment contained in section 361a of the Civil Code is not a mere

tication of consent of the stockholders.

See note 5 A. L. R. 930, as to power of directors to sell property of corporation without consent of stockholders.

7. See *infra*, § 575.

8. *South Pasadena v. Pasadena Land etc. Co.*, 152 Cal. 579, 93 Pac. 490.

9. *South Pasadena v. Pasadena Land etc. Co.*, 152 Cal. 579, 93 Pac. 490; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300 (restricting rule to private corporations, not quasi-public corporations); *McTigue v. Arctic Ice Cream S. Co.*, 20 Cal. App. 708, 130 Pac.

165 (applying the rule to a lease of the entire business).

10. *South Pasadena v. Pasadena Land etc. Co.*, 152 Cal. 579, 93 Pac. 490; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300.

11. *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300.

12. *South Pasadena v. Pasadena Land etc. Co.*, 152 Cal. 579, 93 Pac. 490. See Civ. Code, § 358, which

names as one of the conditions under which corporate powers shall cease and as a ground for forfeiture, after the organization and commencement of the business of the corporation, "if . . . it shall lose or dispose of all of its property," etc.

negative or prohibitive statute, forbidding that which before was permitted. It is both affirmative and negative in its terms. It expresses a consent to such transfer in the manner prescribed as well as a prohibition against such transfer in any other mode.¹³ The affirmative provisions might, it has been said, be paraphrased thus: "With the consent of the stockholders thereof, holding of record at least two thirds of its capital stock (expressed in the prescribed manner) any corporation in this state may make a valid sale, lease, assignment, transfer or conveyance of its business, franchises and property as a whole."¹⁴ The effect of the statute is twofold. It deprives ordinary private business corporations of the power they previously possessed to dispose of their entire property, franchise and business as a whole at the will of a mere majority of the stockholders or of less than two-thirds of them,¹⁵ and it confers upon quasi-public corporations the power to make such dispositions with the consent of two-thirds of the stockholders expressed in the mode fixed, a power which such corporations did not have before.¹⁶ But while the section authorizes the sale of the business, franchise and property of the corporation as a whole, it does not relieve the property of the burden of a vested interest in a portion of it belonging to a nonconsenting stockholder, who could not in fact be thus deprived of his property.¹⁷ Section 361a having restricted the sale, assignment, lease, transfer or conveyance of the business, franchise and prop-

13. *South Pasadena v. Pasadena Land etc. Co.*, 152 Cal. 579, 93 Pac. 490; *Porter v. Anglo & London etc. Bank*, 36 Cal. App. 191, 171 Pac. 845.

14. *South Pasadena v. Pasadena Land etc. Co.*, 152 Cal. 579, 93 Pac. 490.

15. *South Pasadena v. Pasadena Land etc. Co.*, 152 Cal. 579, 93 Pac.

490; *Porter v. Anglo & London etc. Bank*, 36 Cal. App. 191, 171 Pac. 845.

16. *South Pasadena v. Pasadena Land etc. Co.*, 152 Cal. 579, 93 Pac. 490.

17. *Bent v. Second Extension Water Co.*, 34 Cal. App. Dec. 721, 197 Pac. 657.

erty, an officer of the corporation has, of course, no power to dispose of all the corporate property.¹⁸

§ 574. Consent of Stockholders.—The only legislative restriction placed on the execution of an instrument affecting the entire business is that the consent of holders of at least two-thirds of the issued capital stock must be first procured and that such consent shall be expressed either in writing and acknowledged by such stockholders and made a part of the instrument, or by vote of such stockholders at a meeting called for the purpose of considering and consenting thereto.¹⁹ If made with written consent, that consent is necessarily an essential accompaniment of the instrument which evidences the sale. While consent expressed by a two-thirds vote at a stockholders' meeting called for that purpose, need not, perhaps, accompany the evidence of the sale, nevertheless, in the absence of a showing that the sale was consummated in conformity with the statutory requirements, the court may correctly conclude that it was void as against an execution creditor of the corporation and therefore ineffectual to transfer any right or title whatsoever to the purchaser.²⁰ Where consent, in writing, of holders of two-thirds of the stock has been obtained, the failure to file the same does not invalidate a deed of the property. The consent of the stockholders is the essential thing; the filing is formal and subsidiary. The statute requiring the consent to be filed is for the protection of stockholders, and they only can take advantage of failure to comply with the statute—creditors cannot.¹

18. *In re American Guarantee & Sec. Co. of California*, 192 Fed. 405. See *Waratah Oil Co. v. Beward Oil Co.*, 23 Cal. App. 638, 139 Pac. 91, where officers were given power to sell all the property.

19. See Civ. Code, § 361a; *McTigue v. Arctic Ice Cream S. Co.*, 20 Cal. App. 708, 130 Pac. 165.

20. *Porter v. Anglo & London etc. Bank*, 36 Cal. App. 191, 171 Pac. 845.

1. *Buxton v. Pennsylvania Lbr. Co.*, 221 Fed. 718 (case arising in California but involving a New York corporation).

So far as the rights of a nonassenting stockholder are concerned, he is bound by the action of the holders of two-thirds of the stock consenting to the transfer proposed and the action of the directors in accordance therewith, in the absence of fraud in the transaction.² Where the authority is given by the board of directors, of which one of the members is owner of practically all of the stock, a mere formal meeting of the stockholders and a recording of their assent under section 361a of the Civil Code can add nothing. Whether the assent is recorded as stockholder or as director makes no practical difference.³

§ 575. Transfer or Lease as Including All Property.—Section 361a of the Civil Code uses the words "sale, lease, assignment, transfer or conveyance of the business, franchise and property, as a whole."⁴ Hence, where a lease does not cover the whole of the corporate property, no question arises as to the application of this section.⁵ And where the sale of all the property of the corporation does not prevent it from continuing business, the code provision is not applicable.⁶ This much is said to be certain as to the meaning of the code section, that if a corporation is engaged in business, such business must be included in the

2. *Graham v. Pasadena Land etc. Co.*, 152 Cal. 596, 93 Pac. 498.

3. *Bell v. Blessing*, 225 Fed. 750, 141 C. C. A. 34. See *Manning v. App. Consol. Gold Min. Co.*, 171 Cal. 610, 154 Pac. 301, where all the property of the corporation was transferred, but the question as to formalities of transfer was not raised, and where one stockholder owned both the transferring and transferee corporations.

4. See *supra*, § 572, for wording of the code provision.

5. *Shaw v. Hollister etc. Co.*, 166 Cal. 257, 135 Pac. 965; *Seal of Gold Min. Co. v. Slater*, 161 Cal. 621, 120

Pac. 15. See *Waratah Oil Co. v. Reward Oil Co.*, 23 Cal. App. 638, 139 Pac. 91, in which it did not appear that all the assets were sold, although authority to the officers gave them the power to sell all. In any event, section 361a was not cited by the court. And see *Manning v. App. Cons. Gold Min. Co.*, 171 Cal. 610, 154 Pac. 301, where apparently all property was transferred, but there was no mention of the code section, and where one man owned both corporations.

6. *Bradford v. Sunset Land etc. Co.*, 30 Cal. App. 87, 157 Pac. 20.

sale before the sale can be brought within either the terms or the meaning of the section.⁷ The inhibition of the section being as to "sale, lease, assignment, transfer or conveyance," it follows that an option contract for the purchase and sale of real estate is not within the terms of the section and an option holder is not in position to complain of failure of the stockholders to signify assent until he exercises his option.⁸

Torts and Crimes.

§ 576. **Torts.**—According to the earlier cases and the rather archaic view that a corporation is incapable of malevolence, an action for a wrong in the commission of which malice was an essential element could not be maintained against a corporation aggregate as such.⁹ But that a corporation may be liable civilly for that class of torts in which specific malicious intention is an essential element is not disputed in this day.¹⁰ Therefore, a corporation is responsible for a libel,¹¹ malicious prosecution,¹² or false

7. *Shaw v. Hollister etc. Co.*, 166 Cal. 257, 135 Pac. 965. See note in case in 2 Cal. Law Rev. 61. This probably accounts for the fact that the section was not complied with in *Waratah Oil Co. v. Reward Oil Co.*, 23 Cal. App. 638, 139 Pac. 91, and *Manning v. App Cons. Gold Min. Co.*, 171 Cal. 610, 154 Pac. 301.

"Business" does not mean stock or machinery or capital and the like. While business cannot be done without these, it is distinct from them—it is the activities in which they are employed. *Shaw v. Hollister etc. Co.*, 166 Cal. 257, 135 Pac. 965.

8. *Bradford v. Sunset Land etc. Co.*, 30 Cal. App. 87, 157 Pac. 20.

9. *Maynard v. Fireman's Fund*

Ins. Co., 34 Cal. 48, 91 Am. Dec. 672, citing cases taking the earlier view, but holding that a corporation must be deemed by imputation to be guilty of a wrong and punishable for it as an individual would be.

10. *United States v. John Kelso Co.*, 86 Fed. 304.

11. *Brady v. Times-Mirror Co.*, 106 Cal. 56, 39 Pac. 209; *Maynard v. Fireman's Fund Ins. Co.*, 47 Cal. 207; *Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 48, 91 Am. Dec. 672; *United States v. John Kelso Co.*, 86 Fed. 304. See LIBEL AND SLANDER.

12. *United States v. John Kelso Co.*, 86 Fed. 304. See MALICIOUS PROSECUTION.

arrest and false imprisonment.¹³ And exemplary damages for a fraudulent, oppressive or malicious breach of duty may be recovered.¹⁴ Likewise, even though a corporation may not be punishable criminally, this is no reason why the law may not make reparation to the innocent or secure the property of creditors from the operation of a fraud.¹⁵ The fact that the commission of such wrongs by the executive body of the corporation is without the scope of the objects and purposes of the corporation is said to be no argument for relieving the stockholders of liability to respond.¹⁶ Moreover, a corporation may be liable under the rule of respondeat superior, although it neither authorized the doing of the particular act, nor ratified it after it was done.¹⁷

A corporation may even be held liable for torts involving the use of violence. Thus where a corporation during a strike issues instructions broad enough to contemplate the use of force if necessary to repel assaults of strikers or their sympathizers, or in arresting such persons as might injure or destroy corporate property, it is not only liable under the doctrine of respondeat superior for an unwarranted assault and imprisonment of a person committed by its employees in carrying out its instructions, but also as a joint participant in their wrongful acts.¹⁸

The rule is that in actions founded upon tort, the defense of ultra vires is not available. In such an action it

13. *Korkman v. Hanlon Drydock etc. Co.*, 35 Cal. App. Dec. 370, 199 Pac. 880. See *Concoff v. Hippodrome Theater Co.*, 180 Cal. 626, 182 Pac. 273, where the employee had no authority, express or implied, to cause the arrest and imprisonment. See FALSE IMPRISONMENT.

14. *Lowe v. Yolo Co. etc. Co.*, 157 Cal. 503, 108 Pac. 297. See *Wardrobe v. California Stage Co.*, 7 Cal. 118, 68 Am. Dec. 231, holding that a principal will be liable only for simple negligence and that exemplary

damages cannot be imposed upon him when the grossly negligent act is performed by the agent.

15. *Smith v. Morse*, 2 Cal. 524.

16. *Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 48, 91 Am. Dec. 672.

17. *Chamberlain v. Southern California Edison Co.*, 167 Cal. 500, 140 Pac. 25. See MASTER AND SERVANT.

18. *McInerney v. United Railroads*, 34 Cal. App. Dec. 99, 195 Pac. 958.

makes no difference that the party causing the injury may have been engaged in performing an ultra vires contract when the injury was inflicted.¹⁹ But a different rule obtains where the ultra vires act is that of a municipal corporation.²⁰ A corporation is liable for the torts of its servants, if they have authority from it to do the tortious act, but not otherwise; and the burden is on the plaintiff to prove such authority, which may be express or implied.²¹

§ 577. Criminal Liability.—The Penal Code provides that the word “person” shall include a corporation, as well as a natural person.¹ As to those crimes where the only intention required is an intention to do the prohibited act, that is to say, where the crime is complete when the prohibited act has been intentionally done, the more recent cases hold that a corporation may be charged with an offense which only involves this kind of intention and may be properly convicted when in its corporate capacity and by direction of those controlling its corporate acts it does the prohibited act. In such case the intention of the directors that the prohibited act should be done is imputed to the corporation itself.²⁻³ So, too, a corporation can be punished for contempt in disobeying an injunction.⁴

19. *Chamberlain v. Southern California Edison Co.*, 167 Cal. 500, 140 Pac. 25 (see note on case in 2 Cal. Law Rev., p. 410). *Magee v. Pacific Improvement Co.*, 98 Cal. 678, 35 Am. St. Rep. 199, 33 Pac. 772 (where a corporation was held liable as an innkeeper for tortious acts, although innkeeping was not enumerated as one of the objects of its incorporation).

20. *Healdsburg etc. Co. v. Healdsburg*, 5 Cal. App. 558, 90 Pac. 955, and cases cited. See MUNICIPAL CORPORATIONS.

21. *Concoff v. Hippodrome Theater Co.*, 180 Cal. 626, 182 Pac. 273. See MASTER AND SERVANT.

1. Pen. Code, § 7.

It would be judicial legislation to hold that “misdemeanors” means “misdemeanors committed by a natural person.” *People v. Palermo etc. Co.*, 4 Cal. App. 717, 89 Pac. 723, 725.

2-3. *United States v. John Kelso Co.*, 86 Fed. 304 (citing authorities). See CRIMINAL LAW.

4. *'76 Land & W. Co. v. Superior Court*, 93 Cal. 139, 28 Pac. 813; *Golden Gate etc. Co. v. Superior Court*, 65 Cal. 187, 3 Pac. 628. See *Morton v. Superior Court*, 65 Cal. 496, 4 Pac. 489, holding officers and agents bound by an injunction against the corporation. See CON-

While of course there are certain crimes of which a corporation cannot be guilty, where the statute in general terms prohibits the doing of an act which can be performed by a corporation and does not expressly exempt corporations from its provisions, there is no reason why the statute should be construed as not applying to them, when the punishment provided for its infraction is one that can be inflicted upon a corporation.⁵ In California, where a fine is imposed upon a corporation it may be collected by virtue of the order imposing it by the sheriff of the county out of the company's real and personal property in the same manner as upon an execution in a civil action.⁶

§ 578. Jurisdiction in Criminal Actions.—Jurisdiction over a corporation in a criminal proceeding is secured by service of the summons on the president or other officer thereof as provided in section 1390 of the Penal Code.⁷ The jurisdiction itself is determined rather by the nature of the offense than by the form of procedure by which it is prosecuted. Hence, even though the form of procedure provided is applicable only to cases tried in the superior court and seems to contemplate that all criminal charges against corporations shall be submitted to such tribunal, the test of jurisdiction afforded by the statute may make it triable in the justice's court. And in general the measure of jurisdiction over an offense committed by a corporation is not different from that to be invoked where an individual is charged with the same or a similar crime.⁸

TEMPT, vol. 5, p. 894 et seq., as to punishment of corporations and their officers for contempt.

5. United States v. John Kelso Co., 86 Fed. 304. See CRIMINAL LAW, as to parties to crimes generally.

6. Pen. Code, § 1397.

7. United States v. John Kelso Co., 86 Fed. 304. See infra, § 579. as to criminal procedure against corporations.

8. People v. Palermo Land etc. Co., 4 Cal. App. 717, 89 Pac. 723, 725. See CRIMINAL LAW.

§ 579. **Criminal Proceedings.**—Sections 1390 to 1397, inclusive, of the Penal Code, relate to proceedings against corporations. These sections simply provide a mode of procedure against corporations charged with crime and do not affect jurisdiction of the crime.⁹ The code provides the form of summons to be used in such cases,¹⁰ prescribes the manner of service thereof,¹¹ and the procedure to be adopted on the examination of the charge.¹² Section 1396 of the Penal Code provides that if an indictment is found, or information is filed, the corporation may appear by counsel to answer the same. If it does not thus appear, a plea of not guilty must be entered, and the same proceedings had thereon as in other cases.¹³ Unless the procedure prescribed by these provisions is substantially complied with, an order committing a corporation for trial is voidable, or not a legal commitment, and may be set aside on motion upon a sufficient showing. In other words, the magistrate can acquire jurisdiction to act in such case only by following substantially the procedure prescribed for proceeding against a corporation before him to be examined on the charge preferred against it.¹⁴ Section 1427 of the Penal Code apparently furnishes a rule of procedure in the case of a corporation charged with a misdemeanor triable in a justice's or police court.¹⁵ The procedure provided may be made available to the justice's court; but if not apt and adequate, then resort must be had to the sections of the code in reference to trials of individuals, and to section

9. *People v. Palermo Land etc. Co.*, 4 Cal. App. 717, 89 Pac. 723, 725.

10. See Pen. Code, § 1391. See CRIMINAL LAW.

11. See Pen. Code, § 1392.

12. See Pen. Code, §§ 1393-1395; *Western Meat Co. v. Superior Court*, 9 Cal. App. 538, 99 Pac. 976.

13. *Western Meat Co. v. Superior*

Court, 9 Cal. App. 538, 99 Pac. 976. See, also, *People v. Western Meat Co.*, 13 Cal. App. 539, 110 Pac. 338.

14. *Western Meat Co. v. Superior Court*, 9 Cal. App. 538, 99 Pac. 976.

15. *People v. Palermo L. & W. Co.*, 4 Cal. App. 717, 89 Pac. 723, 725, in the decision of the supreme court denying application for hearing and determination in that court.

187 of the Code of Civil Procedure, which provides that a suitable process or mode of proceeding may be adopted.¹⁶

XVIII. BONDS AND BONDED INDEBTEDNESS.

General Considerations.

§ 580. Power to Incur Bonded Indebtedness — Definitions.—Authority to borrow money and give evidences of indebtedness created is an implied power of corporations which may be exercised whenever necessary to carry out their purposes.¹⁷ Bonds constitute one form of evidence of indebtedness, and are generally used where large amounts are involved, and a formal authorization required. In their nature as contracts, however, there is no essential difference between bonds and promissory notes.¹⁸ Bonded indebtedness comes, of course, within the provisions of law limiting the indebtedness of corporations to the amount of the capital stock subscribed.¹⁹ But bonds are not void even though they are issued in an amount beyond the subscribed capital stock.²⁰

The term “bonded indebtedness” in the sense that it is used in the constitution does not embrace a non-negotiable note and mortgage executed by a private corporation to secure its indebtedness for money loaned, money paid, property purchased or labor performed in the ordinary course of its business, and actually received and used in the business; and even conceding that to constitute bonded indebtedness in the constitutional sense the debt must be

16. *People v. Palermo Land etc. Co.*, 4 Cal. App. 717, 89 Pac. 723, 725.

17. See supra, § 558. At common law, a corporation has power to issue a bond or note to pay a debt, and it has just as much right to do so under the general law as a natural person. *McLane v. Placer-ville etc. Co.*, 66 Cal. 606, 6 Pac. 748.

18. *Kohn v. Sacramento etc. Co.*, 168 Cal. 1, 141 Pac. 626.

19. Civ. Code, § 309; *Underhill v. Santa Barbara etc. Co.*, 93 Cal. 300, 28 Pac. 1049. See supra, § 520 et seq.

20. *Smith v. Ferries etc. Co.*, 5 Cal. Unrep. 889, 51 Pac. 710. See supra, § 521.

secured by a mortgage, it does not follow that all indebtedness secured by mortgage is bonded indebtedness in that sense.¹ Likewise, the guaranty of bonded indebtedness of another corporation belongs rather to that class of instruments which includes promissory notes, checks, bills of exchange and like obligations issued in the ordinary course of business, and this class of obligations is not within the term "bonded indebtedness."²

§ 581. Negotiability.—Under former provisions of the Civil Code, bonds were expressly declared to be one of the classes of negotiable instruments,³ and there is nothing in the Negotiable Instruments Act which would alter the rule.⁴ It was said in an early case that it was the design of the legislature to place bonds and notes on the same footing in respect to defenses.⁵ And in a recent case it has been held that where the provisions of a bond are at war with the principles of negotiability, it is, like a note, subject to all equitable defenses.⁶ Where the names of owners appear on the face of the bonds, this is sufficient indication of ownership to put a pledgee upon inquiry as to the ownership. Although a bond is negotiable, the transferee thereof, to be a holder in due course, must have acquired the instrument without notice of any defect or infirmity in the title of him who transfers it.⁷ Although

1. *Underhill v. Santa Barbara etc. Co.*, 93 Cal. 300, 28 Pac. 1049.

It is not necessary that bonds be secured by mortgage. Thus, although it may be ultra vires to mortgage certain property, it may nevertheless be intra vires for the corporation to borrow money and issue bonds in evidence of the indebtedness; *Illinois Tr. & Sav. Bank Pacific Ry. Co.*, 117 Cal. 332, 49 Pac. 197.

2. *Bank of Newman v. Monterey County etc. Co.*, 32 Cal. App. Dec. 619, 191 Pac. 970. See infra, § 584, as to guaranty of bonds.

3. Civ. Code, § 3095, as it existed prior to amendment in 1917; *Kohn v. Sacramento etc. Co.*, 168 Cal. 1, 141 Pac. 626.

4. See Civ. Code, §§ 3082-3087. See NEGOTIABLE INSTRUMENTS.

5. *Comstock v. Breed*, 12 Cal. 286.

6. *Kohn v. Sacramento etc. Co.*, 168 Cal. 1, 141 Pac. 626 (where the bonds were payable from a special fund rather than absolutely).

7. *Popp v. Exchange Bank*, 35 Cal. App. Dec. 616 (rehearing granted by supreme court).

a holder takes bonds after some of the coupons on each of them are past due and unpaid, he is nevertheless a bona fide holder where he takes before the bonds are due, in good faith and for their market value.⁸

§ 582. Restoring Lost or Destroyed Bonds.—The Civil Code, section 329, provides in detail for the bringing of an action against a corporation for the purpose of obtaining new or duplicate bond or bonds which have been lost or destroyed in California by fire, earthquake or other calamity. This subject is properly considered in this work in the general article which deals with all lost or destroyed instruments.⁹⁻¹⁰

§ 583. Coupons.—The usual form of interest coupon attached to corporation bonds consists of a simple promise to pay to bearer at a given date and place a certain sum of money, as interest on one of the bonds.¹¹ In the absence of any provision to the contrary in the bonds or the instrument securing them, the coupons are independent obligations, and when they have been detached and transferred to others than the holders of the bonds, the statute of limitations begins to run from the time of the maturity of the coupons.¹² While the supreme court has stated a rule apparently at variance with that given above,¹³ it is plausible to suppose that it was not intended to do other than affirm the rule that coupons are governed by the same

8. *McLane v. Placerville etc. R. Co.*, 66 Cal. 606, 6 Pac. 748.

9-10. See LOST INSTRUMENTS.

11. *California Safe etc. Co. v. Sierra etc. R. Co.*, 158 Cal. 690, Ann. Cas. 1912A, 729, 112 Pac. 274.

12. *California Safe etc. Co. v. Sierra etc. R. Co.*, 158 Cal. 690, Ann. Cas. 1912A, 729, 112 Pac. 274; *Mather v. City and County of San Francisco*, 115 Fed. 37, 52 C. C. A. 631.

13. See *Meyer v. Porter*, 65 Cal. 67, 2 Pac. 884, and the two companion cases of *Roeding v. Porter* (Cal.), 2 Pac. 888, and *Hausmeister v. Porter* (Cal.), 3 Pac. 123, decided in the same month as the *Meyer* case, and based upon its authority alone. And see discussion of these last-named cases in *California Safe etc. Co. v. Sierra etc. R. Co.*, 158 Cal. 690, Ann. Cas. 1912A, 729, 112 Pac. 274.

statute of limitations as applies to bonds,—that is to say, if the bond be a specialty, the coupon, which may be a simple promise to pay will be considered a specialty and be governed by the statute of limitations applicable to specialties.¹⁴ The right of the holder of a coupon to take advantage of a default in the provisions of the trust deed or mortgage securing the bond is considered in another section.¹⁵

§ 584. Guaranty of Bonds.—A corporation may, for a valid consideration, guarantee or assume the payment of bonds of another corporation.¹⁶ It is not necessary that the bonds be regularly and legally issued in order that the corporation may bind itself in law to pay them as they mature. While retaining the consideration and assuming the payment of the bonds, it cannot deny its liability.¹⁷ Such a guaranty, not purporting to have any relation to any past bonded indebtedness of the guarantor corporation or to be issued in the form or with the intent of creating or increasing any bonded indebtedness of such corporation, is not bonded indebtedness of the guarantor corporation requiring consent of the stockholders to its creation or to the issuance of a writing to evidence the same.¹⁸ Under the rule that a guarantor cannot be held beyond the express term of his contract,¹⁹ if the agreement merely guarantees that the principal of bonds will be paid on a certain date, the guarantor cannot be called on to pay the amount prior to the due date; but if the guaranty is that if the several sums agreed to be paid by the mortgage are not paid in the manner therein stated as they severally

<p>14. <i>California Safe etc. Co. v. Sierra etc. R. Co.</i>, 158 Cal. 690, Ann. Cas. 1912A, 729, 112 Pac. 274;</p> <p><i>Mather v. City and County of San Francisco</i>, 115 Fed. 37, 52 C. C. A. 631.</p> <p>15. See <i>infra</i>, § 604.</p> <p>16. <i>Low v. California Pac. R. Co.</i>, 52 Cal. 53, 28 Am. Rep. 629; <i>Smith</i></p>	<p><i>v. Ferries etc. Co.</i>, 5 Cal. Unrep. 889, 51 Pac. 710. See <i>supra</i>, § 559.</p> <p>17. <i>Smith v. Ferries etc. Co.</i>, 5 Cal. Unrep. 889, 51 Pac. 710.</p> <p>18. <i>Bank of Newman v. Monterey County etc. Co.</i>, 32 Cal. App. Dec. 619, 191 Pac. 970.</p> <p>19. See GUARANTY; PRINCIPAL AND SURETY.</p>
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become due, then the guarantor will pay them, this includes the payment of principal which has become due under a clause providing for acceleration of maturity upon a declaration by the trustee.²⁰

§ 585. Assumption of Bonded Indebtedness.—An agreement between a corporation which leases its property to another corporation and such lessee that the latter shall assume the liability of the lessor with regard to its bonded indebtedness, paying the interest thereon and performing the conditions of the mortgage or deed of trust and paying the indebtedness itself as it matures, has the effect of making the lessee the principal debtor to the bondholders and the lessor the surety. Hence, it has been held that a bondholder who desires to collect coupons which have not been paid, cannot sue the lessee as upon an independent contract of guaranty, but must foreclose the mortgage or deed of trust, resort being had against the lessee only for any deficiency. The rule as to such assumption of bonded indebtedness is the same whether the grant is of a leasehold interest or of an estate in fee.¹

Authorization of Bond Issues.

§ 586. In General.—As stated elsewhere in this article, the creation or increase of bonded indebtedness by corporations is subject to the provisions of the constitution.² The general law providing for the mode of authorizing the creation or increase of bonded indebtedness for all corporations is contained in section 359 of the Civil Code.^{2a}

20. *San Francisco etc. Seminary v. Monterey County etc. Co.*, 179 Cal. 166, 175 Pac. 693. See *infra*, § 600, as to acceleration of maturity.

1. *Shuey v. Mulerevy*, 34 Cal. App. 218, 166 Pac. 1019. See *supra*, § 584.

2. See *infra*, § 588.

2a. *Boyd v. Heron*, 125 Cal. 453,

58 Pac. 64 (holding that the provisions of § 456 of the Civil Code, giving railroad corporations power to borrow money and issue bonds is to be construed with § 359, which is applicable to all corporations); *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225. See *infra*, § 588.

Although section 359 is not restricted in its terms to domestic corporations, it was evidently framed with a view only to its application to corporations organized under the laws of the state of California.³ The statutes make no provision for a decrease of bonded indebtedness or for any formal authorization of retirement of bonds outstanding, but simply provide for the authorization of an original indebtedness and for an increase thereof.⁴

§ 587. Consent of Stockholders.—In the absence of a statute prescribing the mode of exercising the power to issue bonds, the power may be exercised by a majority vote of the board of directors,⁵ as coming within their general powers. It was only by the statute of 1899 that the power was taken from the directors and given to the stockholders with relation to the original creation of bonded indebtedness, although the power then existed under the constitution as to increase of bonded indebtedness.⁶ Section 359 of the Civil Code, which gives to stockholders a voice in saying whether or not a bonded indebtedness shall be created or increased, is for their benefit, so far as an original issue is concerned, and intended only as a protection to them against such issue without the consent of those having a two-thirds interest. The code provision is not for the protection of creditors. Hence, where no stockholder asserts his right, objection cannot be raised by a creditor.⁷ Irrespective of whether bonds issued without approval of the stockholders are void, so as to cast no liability on the corporation, in default of approval by them as required by statute no liability is created upon such

3. *McKee v. Title Ins. etc. Co.*, 159 Cal. 206, 113 Pac. 140, not deciding whether § 359 of the Civil Code could be substantially complied with and enforced against foreign corporations issuing bonds in connection with their business done in California.

4. See *infra*, § 589.

5. *McLane v. Placerville etc. Co.*, 66 Cal. 606, 6 Pac. 748. And cases cited *infra*.

6. *Smith v. Ferries etc. Co.*, 5 Cal. Unrep. 889, 51 Pac. 710.

7. *McKee v. Title Ins. etc. Co.*, 159 Cal. 206, 113 Pac. 140.

bonds as against the stockholders.⁸ In giving their consent to a bonded indebtedness at a meeting, stockholders may be represented by proxies. Even though section 312 of the Civil Code should be construed as not covering the subject, a by-law providing that stockholders may vote by proxy at all meetings would enable them to be so represented at a meeting to consider authorization of a bonded indebtedness.⁹

§ 588. Constitutional and Code Provisions.—The constitution provides that

“The . . . bonded indebtedness of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock, at a meeting called for that purpose, giving sixty days’ public notice, as may be provided by law.”¹⁰

The code provides that such indebtedness may be increased only by vote of stockholders representing at least two-thirds of the subscribed or issued capital stock, at a meeting called by the board of directors and after notice given, pursuant to the statute, by publication in a newspaper to be designated by the board in the order calling the meeting.¹¹ The notice must be published once a week

8. *Boyd v. Heron*, 125 Cal. 453, 58 Pac. 64. See *Illinois Tr. & Sav. Bank v. Pacific Ry. Co.*, 115 Cal. 285, 47 Pac. 60, as to the necessity in alleging a bonded indebtedness in an action thereon, to allege specifically the consent of stockholders as to its creation, but holding, however, an allegation that the bonds were duly issued and mortgage duly executed by the corporation, sufficient where the parties go to trial upon the pleading without objection to its sufficiency.

9. *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225. See

supra, § 291, as to stockholders’ right to vote by proxy.

10. Const., art. XII, § 11. And see supra, § 147, for similar provision in respect to increase or reduction of capital stock, and as to its mandatory character.

11. Civ. Code, § 359, subs. 1 and 3. And see subd. 8 of the same section. Providing that when the by-laws of the corporation prescribe the paper in which notices of meetings of directors or stockholders are to be published, the notices shall be published in that paper unless publication thereof has ceased.

for at least sixty days, and it must specify the object of the meeting and the amount to which it is proposed to increase the indebtedness, the time and place of holding the meeting, which must be at the principal place of business of the corporation and at the building where the directors usually meet.¹² In addition to the notice by publication, the secretary is required to address and mail a notice to each of the stockholders at least thirty days before the day appointed for the meeting.¹³

§ 589. Authorization of an Original Issue by Meeting.—

The provision of the constitution declaring that a bonded indebtedness shall not be increased except at a meeting called upon sixty days' public notice does not purport to restrict the original creation of such an indebtedness.¹⁴ Being a restriction of the inherent right freely to contract, its meaning is not to be unnecessarily extended beyond its fair import.¹⁵ As in the case of an increase of the bonded indebtedness,¹⁶ such an indebtedness may be created by a vote of the stockholders representing at least two-thirds of the subscribed or issued capital stock at a meeting called by the board of directors, noticed and held for that purpose.¹⁷ It is not necessary, however, in order that a bonded indebtedness may be originally created at a stockholders' meeting that they should have been notified as prescribed by law. If the meeting is held by the consent of all the stockholders, this is sufficient,¹⁸ except, of course,

See *supra*, § 274 et seq., as to meetings of stockholders.

12. Civ. Code, § 359, subd. 2.

13. Civ. Code, § 359, subd. 4.

14. *McKee v. Title Ins. etc. Co.*, 159 Cal. 206, 113 Pac. 140; *Merced River Electric Co. v. Curry*, 157 Cal. 727, 109 Pac. 264; *Union Loan & T. Co. v. Southern California etc. Co.*, 51 Fed. 840. See *supra*, § 588, for wording of the constitutional provision.

15. *McKee v. Title Ins. etc. Co.*, 159 Cal. 206, 113 Pac. 140.

16. See *supra*, § 588.

17. Civ. Code, § 359.

18. *Smith v. Ferries etc. Co.*, 5 Cal. Unrep. 889, 51 Pac. 710 (holding that § 317, Civ. Code, abrogates the necessity for notice where all the stockholders consent to the creation of the indebtedness at the meeting); *Lowe v. Los Angeles etc. Co.*, 24 Cal. App. 367, 141 Pac. 399.

where the constitution or statutory provisions requiring notice are mandatory and not merely directory.¹⁹ The code provides that the notice shall state the amount of the bonded indebtedness which it is proposed to create or the amount of the proposed increase of such indebtedness.²⁰ In a case where a consolidated corporation seeking to create a bonded indebtedness had no bonds outstanding, but where its constituent companies had bonds for which the consolidated corporation was bound to make payment and had the right to treat as its own obligations, it has been held that specifying that the purpose of the meeting was to act upon the proposition to create a bonded indebtedness of a certain amount, a portion thereof to be used in retiring existing bonded indebtedness, and to increase the bonded indebtedness in the aggregate to a specified amount, was not too indefinite and uncertain.¹

§ 590. Authorization of an Original Issue by Written Assent.—Inasmuch as the constitution does not require a stockholders' meeting to be held or notice given in order to create an original bonded debt, and as the statute authorizes the creation of a bonded debt without the formality or delay of a meeting of stockholders called upon sixty days' published notice,² in lieu of the call of a meeting of stockholders by published notice and a vote at such meeting, a corporation may originally create a bonded indebtedness by a resolution adopted by the unanimous vote of its board of directors at a regular meeting or at a special meeting called for that purpose and approved by the written assent of stockholders holding two-thirds of the subscribed or issued capital stock, which assent must be filed

19. *Navajo Min. etc. Co. v. Curry*, 147 Cal. 581, 109 Am. St. Rep. 176, 82 Pac. 247 (applied in case involving an increase of capital stock,—see supra, § 147 et seq.).

20. Civ. Code, § 359.

1. *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225. See *infra*, § 591, as to consolidated bonded indebtedness.

2. See supra, § 589.

with the secretary of the corporation.³ The statute does not demand the unanimous vote of all the "directors" or of all the "members" of the board, but only the unanimous vote of the board, that is, the body constituting a board of directors rather than the individuals, the requirement of the statute is satisfied if the resolution is adopted by unanimous vote of all present at the meeting, a quorum being present.⁴ The secretary is required to address and send by mail a copy of the resolution passed by the directors to each of the company's holders at least thirty days before a certificate of creation of bonded indebtedness may be made and signed or filed. Within that time any stockholder may file with the secretary his dissent in writing. If, however, within thirty days, the assents of all stockholders are filed, the certificate may be immediately executed and filed.⁵

§ 591. Consolidated Bonded Indebtedness.—It is provided by the code that any two or more corporations may, by a separate compliance with the provisions of the statute, create or increase a consolidated bonded indebtedness, to be binding jointly and severally on such corporations. Such an issue of bonds may be secured by a consolidated mortgage or deed of trust executed by all such corporations, mortgaging or conveying in trust all or any of the properties of all such corporations, acquired or to be ac-

3. Civ. Code, § 359, subd. 5; *McKee v. Title Ins. etc. Co.*, 159 Cal. 206, 113 Pac. 140; *Merced River Elec. Co. v. Curry*, 157 Cal. 727, 109 Pac. 264; *Rauer's Law etc. Co. v. Harrell*, 32 Cal. App. 45, 162 Pac. 125.

4. *Tidewater So. R. Co. v. Jordan*, 163 Cal. 105, Ann. Cas. 1913E, 1293, 41 L. R. A. (N. S.) 130, 124 Pac. 716 (stating that an opposite interpretation might block or delay the transaction by the stockholders of

business of great importance, if for any reason it became impossible to secure the attendance of any one member of the board). See *Merced River Elec. Co. v. Curry*, 157 Cal. 727, 109 Pac. 264, where it is said: "The statute authorizes the creation of a bonded debt by the unanimous vote of all the directors," etc., but in making this statement, the court evidently had in mind the vote of all directors present at a meeting.

5. Civ. Code, § 359, subd. 5.

quired.⁶ The consolidated bonded indebtedness may be created or increased to an amount equal to the par or face value of the aggregate amount of the subscribed or issued capital stocks of the corporations, but not to exceed the aggregate amount.⁷

§ 592. Certificate of Creation or Increase.—Upon a creation or increase of the bonded indebtedness of a corporation in accordance with the provisions of the statute, a certificate must be executed and filed, showing a compliance by such corporation with the requirements of the statute, and the manner of compliance.⁸ The formalities as to the authentication of such certificate, its filing with the secretary of state, and the filing of certified copies thereof in the office of the county clerk of the county where the principal place of business of the corporation is located and in the counties where the corporation has or holds real estate, are the same as those which apply to certificates as to the increase or diminishing of the capital stock;⁹ and as in cases relating to the capital stock, upon filing as required by the statute, the certificate is conclusive proof of the creation or increase and of the validity thereof.¹⁰ But it has been held that a certificate reciting that the consent of stockholders to the stockholders' meeting was had might be contradicted by the testimony of stockholders.¹¹

§ 593. Effect of Noncompliance With Law.—There is no provision of the statute that bonds of an original issue not

6. Civ. Code, § 359, subd. 6. See *infra*, § 592, as to certificate of creation or increase of bonded indebtedness by each of the corporations.

7. Civ. Code, § 359, subd. 8.

8. See Civ. Code, § 359, subd. 7.

9. See Civ. Code, § 359, subd. 8. See *supra*, § 147 et seq., as to increase or reduction of capital stock.

See *McKee v. Title Ins. etc. Co.*, 159 Cal. 206, 113 Pac. 140, as to effect of the statute in respect to bonds issued by a foreign corporation in connection with its business in California.

10. Civ. Code, § 359, subd. 8. See *supra*, § 151.

11. *Lowe v. Los Angeles etc. Co.*, 24 Cal. App. 367, 141 Pac. 399.

issued in conformity with the statute shall be void, either in favor of creditors or at all. The proceedings provided for are intended only as a protection to stockholders against an issue without their consent, and not for the protection of creditors, hence where no stockholder objects to the issue, and where the corporation has received value for the bonds, it is estopped to dispute their validity.¹² And the estoppel of the corporation to question the validity of the bonds under such circumstances extends to the trust deed or mortgage executed to secure their payment.¹³ But where section 359 of the Civil Code is not complied with as to giving the stockholders a voice in deciding as to whether a bonded indebtedness shall be created, the stockholders are not liable upon the bonds.¹⁴

§ 594. Authorization of Corporation Commissioner.—

Under the provisions of the Corporate Securities Act (commonly known as the "blue-sky" law),¹⁵ no corporation, domestic or foreign, may sell, offer for sale, negotiate for the sale of or take subscriptions for any security of its own issue without the permit of the corporation commissioner authorizing it so to do.¹⁶ The term "securities" under the provisions of the act includes all bonds, debentures and evidences of indebtedness issued by any company, excepting, however, bills of exchange and promissory notes not offered to the public by the drawer, maker or underwriter thereof, and all mortgages and deeds of trust of property situated in this state executed to

12. *McKee v. Title Ins. etc. Co.*, 159 Cal. 206, 113 Pac. 140. See *Harvey v. Dale*, 96 Cal. 160, 31 Pac. 14, where the question as to the validity of bonds was raised but not decided.

13. *Lowe v. Los Angeles etc. Co.*, 24 Cal. App. 367, 141 Pac. 399. See *supra*, § 592, as to the certificate of creation or increase of bonded indebtedness, when properly filed, be-

ing conclusive proof of the creation or increase and of the validity thereof.

14. *Boyd v. Heron*, 125 Cal. 453, 58 Pac. 64, not deciding whether the corporation was liable upon the bonds or whether they were void.

15. Stats. 1917, p. 673, as amended Stats. 1919, p. 231.

16. Corp. Sec. Act, § 3.

secure the payment thereof, and excepting also securities listed in a standard manual of information as to which the commissioner has first made and filed his written finding to the effect that such security is fully and adequately described in such manual and will not, in his opinion, work a fraud upon the purchaser thereof.¹⁷ The act further provides that securities issued without a permit from the commissioner authorizing the same then in effect shall be void.¹⁸

Issue of Bonds.

§ 595. **In General.**—The debt represented by any bond does not exist nor is it created until the bond is issued by the company, that is, actually delivered for a valuable consideration. A bonded debt is not created by execution of the certificate of creation of bonded indebtedness, nor by the filing of the certificate as to its authorization with the secretary of state.¹⁹ Corporate bonds are, upon their issuance, prima facie valid,²⁰ and import a consideration without further proof.¹ It has been held in an action by a trustee to foreclose upon corporate bonds that their possession by the plaintiff implies that they were delivered to him to be dealt with by it in accordance with the trust imposed upon him.²

17. Corp. Sec. Act, § 2, subd. 6.

18. Corp. Sec. Act, § 12. See, also, supra, § 183 et seq., as to "blue sky" regulations with reference to the sale of corporate stock.

19. Merced River Electric Co. v. Curry, 157 Cal. 727, 109 Pac. 264, holding that the secretary of state cannot refuse to file the certificate simply because it authorizes a bonded indebtedness greater in amount than the existing subscribed capital stock.

20. Equitable Trust Co. v. Western L. & P. Co., 38 Cal. App. 535, 176 Pac. 876; Union Loan & T. Co.

v. Southern California etc. Co., 51 Fed. 106.

1. Mercantile Tr. Co. v. Superior Court, 178 Cal. 512, 174 Pac. 51; Equitable Trust Co. v. Western L. & P. Co., 38 Cal. App. 535, 176 Pac. 876.

It has been held that where engraved bonds are substituted for lithographed bonds, the former are to be regarded as mere duplications or reissues of the latter bonds for which they are exchanged; Illinois Tr. & Sav. Bank v. Pacific Ry. Co., 117 Cal. 332, 49 Pac. 197.

2. Equitable Trust Co. v. West-

§ 596. **Sale of Bonds.**—The constitutional and the code provision that “no corporation shall issue stock or bonds, except for money paid, labor done, or property actually received,”³ does not forbid the sale of bonds at a discount.⁴ Neither does the so-called “trust fund doctrine” have any application to bonds, which are not assets of the corporation within the meaning of the doctrine.⁵ Where bonds are issued for a valuable consideration and there is no fraud, this is sufficient compliance with the law. Mere inadequacy of price does not avoid them. A construction which would make such bonds void in the hands of a holder for value at the instance of other creditors would, it has been said, be against equity and justice and should not be favored.⁶ In an action to recover on promissory notes given to a corporation and where the defense was that liability on the notes was conditioned upon the tender or delivery of certain bonds of the corporation, which the defendant had undertaken to “underwrite,” and that such bonds were not tendered or delivered because the stockholders of the corporation holding two-thirds of the subscribed capital stock had not filed with the secretary of state their written assent to their issuance as required by subdivision 5 of section 359 of the Civil Code, it has been held that where it was claimed that the defendant, who was a director, stockholder and secretary of the corporation, prevented the securing of the consent of the required number of stockholders to the bond issue, the burden is upon the plaintiff to show affirmatively such contention.⁷

On a sale of corporate bonds between individuals, the buyer has the same opportunity as the vendor to ascertain

ern L. & P. Co., 38 Cal. App. 535, 176 Pac. 876.

3. See Const., art. XII, § 11; Civ. Code, § 359.

4. *McKee v. Title Ins. etc. Co.*, 159 Cal. 206, 113 Pac. 140.

5. *McKee v. Title Ins. etc. Co.*, 159 Cal. 206, 113 Pac. 140 (where con-

sideration for bonds was subscription to stock). See *supra*, § 302.

6. *McKee v. Title Ins. etc. Co.*, 159 Cal. 206, 113 Pac. 140.

7. *Rauer's Law & Collection Co. v. Harrell*, 32 Cal. App. 45, 162 Pac. 125.

the steps taken by the corporation in issuing them, and, whether he makes such examination or not, he buys subject to the rule of *caveat emptor* and assumes all the risk of their invalidity by reason of noncompliance by the corporation with section 359 of the Civil Code.⁸

§ 597. Issue in Pledge.—Bonds are issued by a corporation when they are pledged as security for the payment of a note of the corporation, and this is so irrespective of who holds legal title to the bonds during their hypothecation.⁹ The cases upon the subject uphold the right to pledge as included in the right to sell bonds,¹⁰ for the reason that if the other bonds are invalid his own shares of the proceeds from foreclosure will be larger. There is no law in California fixing the limit at which stock or bonds can be hypothecated. Thus, bonds may be pledged as collateral security for a debt less in amount than their par value, where not for a pre-existing indebtedness.¹¹ But a pledge of bonds for a pre-existing indebtedness is in violation of the provisions of article XII, section 11, of the constitution.¹²

§ 598. Interim Certificates.—It is common for corporations creating a bonded indebtedness to issue, pending

8. *Harvey v. Dale*, 96 Cal. 160, 31 Pac. 14.

9. *Illinois Tr. & Sav. Bank v. Pacific Ry. Co.*, 117 Cal. 332, 49 Pac. 197; *Smith v. Pillsbury*, 39 Cal. App. 240, 178 Pac. 719 (holding that the liability of a stockholder upon the bonds arose at the time of pledge, not at time of sale under the pledge).

10. *Illinois Tr. & Sav. Bank v. Pacific Ry. Co.*, 117 Cal. 332, 49 Pac. 197.

The general power of a private corporation to sell or pledge its bonds is well settled, and the word "issue" in the constitution and code

is broad enough to cover a pledge as well as a sale of bonds; *Atlantic Trust Co. v. Woodbridge etc. Co.*, 79 Fed. 843.

11. *Atlantic Trust Co. v. Woodbridge etc. Co.*, 79 Fed. 842.

12. *Union Loan & T. Co. v. Southern California etc. Co.*, 51 Fed. 840; *Farmers' L. & T. Co. v. San Diego etc. Co.*, 45 Fed. 518. See note, 4 Cal. Law Rev., p. 504 (In re Progressive Wallpaper Corporation, 229 Fed. 489, L. R. A. 1916E, 563, 143 C. C. A. 557). Corporate bonds so issued are not valid obligations; *Farmers' L. & T. Co. v. San Diego etc. Co.*, 45 Fed. 518.

preparation of the bonds themselves, interim certificates which call for bonds in exchange for such certificates.¹³ Where an interim certificate calls for the issuance of bonds and the issuance thereof is waived by the person to whom the certificate is issued, the contention that the doctrine that equity will consider done that which ought to have been done, cannot be maintained, for equity will not regard as done that which a party has for a consideration waived. In the absence of notice of assignment, therefore, payment is properly made to the one to whom the certificate is issued. It is not necessary that the corporation before making payments, in such case, should assure itself that the recipient of the payments has the certificate in his possession.¹⁴

Mortgage or Deed of Trust.

§ 599. **In General.**—The power to make a mortgage to secure the payment of corporate bonds is said to be too clear to admit of dispute.¹⁵ It is not necessary, however, that a bond issue be secured by mortgage, although this is usually the case.¹⁶ And it is not material whether an instrument securing a bond issue is called a mortgage or a deed of trust,¹⁷ or for most purposes whether it is simply a mortgage or is a deed of trust.¹⁸ A trust deed given as security for the payment of corporate bonds and interest coupons must be regarded as and in effect a mortgage.¹⁹ As a matter of fact, the instrument securing

13. Such certificates merely evidence the indebtedness, as does the bond subsequently issued.

14. *Smith v. Central etc. Co.*, 31 Cal. App. Dec. 87, 187 Pac. 456.

15. *McLane v. Placerville etc. R. Co.*, 66 Cal. 606, 6 Pac. 748.

16. See *supra*, § 580.

17. *McLane v. Placerville etc. R. Co.*, 66 Cal. 606, 6 Pac. 748.

18. *Sacramento etc. R. Co. v. Superior Court*, 55 Cal. 453.

19. *McLane v. Placerville etc. Co.*, 66 Cal. 606, 6 Pac. 748; *Shuey v. Mulcrevy*, 34 Cal. App. 218, 166 Pac. 1019. See *California Safe etc. Co. v. Sierra etc. R. Co.*, 158 Cal. 690, Ann. Cas. 1912A, 729, 112 Pac. 274, where the instrument was described in the bonds as a mortgage and was held to be such.

bond issues is generally self-styled as a "mortgage or deed of trust."²⁰ The provisions of such instruments are in general similar to those contained in ordinary mortgages or in deeds of trust executed by individuals.¹

§ 600. Provisions Accelerating Maturity.—A provision usually placed in the trust deed or mortgage is that, if, for a specified length of time, default be made in the payment of interest coupons, the whole amount of the principal of the bonds may, at the election of the trustee, be deemed immediately due and payable.² While it has been said that if the trust deed contains no other than an optional provision for advancing the maturity of the entire obligation, the fact that the trustee never makes such election and never institutes any proceeding to foreclose might possibly limit the remedy of the holder of the bonds to a right to have the property or so much of it sold, as is required for the satisfaction of accrued and unpaid interest installments, this, however, is not the case where it further appears that the trustee shall on default of payment of interest, and on demand of the bondholder, exercise his power to enforce their rights. Under such circumstances, where the demand has been made, the rights of the bondholder will not be allowed to fail by reason of the refusal or omission of the trustee to perform his duty.³

§ 601. Trustee.—It is usual in mortgages or deeds of trust to name as trustee a qualified trust company, because

20. See *Title Ins. etc. Co. v. California Dev. Co.*, 171 Cal. 173, 152 Pac. 542.

1. See **MORTGAGES; TRUST DEEDS.** As to sinking fund provisions, see *California etc. Corp. v. Union Trust Co.*, 178 Cal. 65, 172 Pac. 146. See, with reference to underlying mortgages, *California etc. Corp. v. Union Trust Co.*, 178 Cal. 65, 172 Pac. 146; *Title Ins. etc. Co. v. California Dev. Co.*, 171 Cal. 173, 152 Pac. 542.

2. *Lowe v. Los Angeles etc. Co.*, 24 Cal. App. 367, 141 Pac. 399. See **NEGOTIABLE INSTRUMENTS.**

3. *Lowe v. Los Angeles etc. Co.*, 24 Cal. App. 367, 141 Pac. 399. And see *San Francisco etc. Seminary v. Monterey County etc. Co.*, 179 Cal. 166, 175 Pac. 693, where the trustee upon default of payment of interest for the specified period was empowered to declare the principal forthwith due and payable.

of the more permanent existence of such a trustee desirable in the case of bonds running for long periods of time. A foreign corporation is permitted to act as trustee under a mortgage or deed of trust or other instrument securing notes or bonds issued by any corporation.⁴ A trustee under a deed of trust does not assume the important obligations which usually cast upon a trustee by operation of law. An ordinary trust deed is little more than a mortgage with power to convey, and the trustee is the common agent of both parties required to act impartially. Some authorities hold that he is not a trustee at all in a technical sense.⁵ The trustee derives his power from the instrument creating the trust, and the same document furnishes the measure of his obligations. He owes a duty to the bondholders for the preservation and protection of the security, if the means of defense are known to him or may with diligence be discovered.⁶ And it is the duty of the trustee to make use of the power conferred for the express

4. Bank Act, § 90. See BANKS, vol. 4, p. 328 et seq., as to powers of trust companies generally; and p. 133 of the same article, as to the trust powers of foreign corporations.

A foreign corporation acting as trustee for holders of bonds, collecting accrued interest and taking title to property as security, and otherwise discharging the duties of trustee, is not carrying on business within the state within the meaning of statutes regulating foreign corporations; *Equitable Trust Co. v. Western L. & P. Co.*, 38 Cal. App. 535, 176 Pac. 876. See, also, *infra*, §§ 704-706.

5. *Ainsa v. Mercantile Trust Co.*, 174 Cal. 504, 163 Pac. 898, citing authorities to the various propositions

stated in the text. See TRUST DEEDS; TRUSTS.

The primary object of having trustees is to enable the security to be created and rendered effectual for the bondholders. The expenses of the trustee under a deed of trust, if reasonably incurred in the discharge of the trust are a lien upon the trust property, and the trustee will not be compelled to part with the property until its disbursements are paid. If the trust estate is insufficient for reimbursement, it may call upon the cestui que trust in whose behalf and at whose request it acted personally for reasonable compensation; *McLane v. Placerville etc. R. Co.*, 66 Cal. 606, 6 Pac. 748.

6. *Ainsa v. Mercantile Trust Co.*, 174 Cal. 504, 163 Pac. 898.

purpose of insuring the payments to which the bondholders are entitled.⁷

The trustee ordinarily attaches to each bond his certificate to the effect that the bond is one of a certain series issued by the corporation, and that the bond and coupons attached are genuine. Such a certificate merely guarantees the bonds and coupons as the issue of the corporation, and does not embrace a guaranty of the truthfulness of the description of the property mortgaged or of the legal sufficiency of the security supporting the bonds.⁸

§ 602. Duties of Trustee in Foreclosure.—An action to foreclose upon the security is properly brought by the mortgagee or trustee.⁹ Although the trustee is the proper plaintiff in an action to foreclose, and the duty of prosecuting the action rests upon him, it does not follow that he has such absolute control of the proceeding as is accorded to those who litigate in their own right and not for the benefit of another. If, for example, in violation of his duty, he refuses to bring action, this will not prevent foreclosure.¹⁰ A bondholder, however, is a beneficiary of the trust, is represented by the trustee and is bound by his bona fide acts so long as the bondholder does not appear in the proceeding individually. When he does so appear, he is entitled to stand upon and to take such action as he sees fit for the protection of his own rights.¹¹

§ 603. Action by Bondholder—Demand on Trustee.—In the absence of any provision to the contrary, a default in payment may be taken advantage of by the holder of a

7. *Sacramento etc. R. Co. v. Superior Court*, 55 Cal. 453, holding that the trustee should exercise a right to take possession of and operate property as a receiver.

8. *Ainsa v. Mercantile Trust Co.*, 174 Cal. 504, 163 Pac. 898.

9. *Illinois Tr. & Sav. Bank v. Pa-*

cific Ry. Co., 117 Cal. 332, 49 Pac. 197.

10. *Thomas v. San Diego etc. Co.*, 111 Cal. 358, 43 Pac. 965.

11. *Title Ins. etc. Co. v. California Dev. Co.*, 171 Cal. 227, 152 Pac. 564.

single bond or coupon.¹² Where a trustee is authorized to proceed upon the written request of a majority of the bondholders, he cannot act without such petition; but a bondholder has a right of action upon showing that the trustee has refused to bring suit, even though the trustee was justified under the terms of the deed in refusing; otherwise it would be possible for a majority to deprive the minority of the remedy of foreclosure, which it could not do in the absence of a provision in the trust deed authorizing such limitation upon the rights of the bondholders.¹³ The trustee does not have absolute control of the action and his refusal to perform his duty will not tie the hands of the court or bondholders and thereby prevent foreclosure.¹⁴

§ 604. Right of Action of Coupon-holder.—Any holder of unpaid coupons may sue thereon upon refusal of the trustee to do so, after request upon him, although by the terms of the trust deed the trustee is authorized to act only upon the written request of a majority of the bondholders.¹⁵ And in a case where the trust deed provided that no action shall be brought on the coupons, except by the trustee, unless after a request in writing and a tender of full indemnity, it has been held that the failure or neglect of the trustee to begin proceedings, does not prevent a coupon-holder from bringing an action; but on the contrary expressly protects his right to do so in the event the trustee shall fail to bring action upon proper demand.

12. *California Safe etc. Co. v. Sierra etc. R. Co.*, 158 Cal. 690, Ann. Cas. 1912A, 729, 112 Pac. 274. See *infra*, § 604, as to right of action of coupon holder.

13. *Citizens' Bank v. Los Angeles Iron etc. Co.*, 131 Cal. 187, 82 Am. St. Rep. 341, 63 Pac. 462.

14. *Thomas v. San Diego etc. Co.*, 111 Cal. 358, 43 Pac. 965. See *Lowe*

v. Los Angeles etc. Co., 24 Cal. App. 367, 141 Pac. 399, stating that where a proper demand has been made upon the trustee and refused, the rights of bondholders will not be allowed to fail by reason of the refusal or omission of the trustee to perform his duty.

15. *Citizens' Bank v. Los Angeles Iron etc. Co.*, 131 Cal. 187, 82 Am. St. Rep. 341, 63 Pac. 462.

Such right of a coupon-holder is not affected by a provision that if interest remains unpaid for a given period the principal shall become due and the trustee may foreclose. Such a clause is restrictive of the coupon-holder's right to bring suit only when it is sought to take advantage of the default as advancing the date when the principal becomes due.¹⁶

§ 605. Foreclosure in General.—Where there is a mortgage security for the bonds of a corporation, any action thereon must be directed to the enforcement of such security, since, under the provisions of section 726 of the Code of Civil Procedure, there can be but one action for the recovery of a debt secured by mortgage, namely an action to foreclose the mortgage.¹⁷ A formal demand on the corporation is not necessary; a suit is all the demand required.¹⁸ In foreclosure proceedings under a mortgage or deed of trust securing corporate bonds, the court can adjudicate only the rights between the mortgagor and mortgagee and cannot adjudicate the title of a person claiming adversely to both.¹⁹ And a judgment of foreclosure puts an end to a leasehold interest in the property which is subordinated to the mortgage or deed of trust, in the absence of equitable grounds sufficient to overcome the legal status given to such security by its priority.²⁰ In the case of a mere guaranty of bonds, the guarantor's obligation is an independent one, not secured by the mortgage, and suit may be maintained upon it without reference to

16. *California Safe etc. Co. v. Sierra etc. R. Co.*, 158 Cal. 690, Ann. Cas. 1912A, 729, 112 Pac. 274. Rep. 341, 63 Pac. 462. See ACTIONS, vol. 1, p. 340.

17. *Illinois Tr. & Sav. Bank v. Pacific Ry. Co.*, 117 Cal. 332, 49 Pac. 197. See MORTGAGES.

18. *Citizens' Bank v. Los Angeles etc. Co.*, 131 Cal. 187, 82 Am. St.

19. *Mercantile Trust Co. v. Sunset R. Oil Co.*, 34 Cal. App. Dec. 39, 195 Pac. 466.

20. *Mercantile Trust Co. v. Sunset R. Oil Co.*, 176 Cal. 461, 168 Pac. 1037. See, also, *infra*, § 607.

any proceeding against the principal debtor or the mortgage security.¹

§ 606. Remedies Aside from Foreclosure—Possession or Sale.—A provision in a trust deed or mortgage that the trustee may, after default in the payment of principal or default for a specified length of time in the payment of interest on any of the bonds, take possession of the mortgaged property and collect the income and profits therefrom, applying them as provided in the instrument, may be specifically enforced by the appointment of the trustee as a receiver, although there is no proceeding for foreclosure of the mortgage itself. Courts of equity exercise such jurisdiction,² and the appointment, therefore, comes within the provisions of section 564, subdivision 6, of the Code of Civil Procedure, authorizing such appointments where receivers have heretofore been appointed by the usages of courts of equity.³ A provision that on default the trustee may take possession of the property and declare all sums secured immediately due and payable in addition to a provision that on default the trustee may take possession and foreclose the mortgage or deed of trust, is not intended to limit the ordinary right of foreclosure.⁴ Although the terms of a mortgage may not authorize a sale under the circumstances of the case, nevertheless if there is a necessity for the sale, as where the mortgagor is insolvent, and the property is being operated at a loss by the trustee as receiver, with no funds to meet expenses and with the security becoming less, the court will order such a sale under its general equity powers.⁵

1. *San Francisco etc. Seminary v. Monterey County etc. Co.*, 179 Cal. 166, 175 Pac. 693.

2. *Sacramento etc. R. Co. v. Superior Court*, 55 Cal. 453.

3. *McLane v. Placerville etc. R. Co.*, 66 Cal. 606, 6 Pac. 748; *Sacramento etc. R. Co. v. Superior Court*, 55 Cal. 453 (holding that a bill in

equity is the proper form of proceeding to compel the corporation to deliver possession to the trustee).

See RECEIVERS.

4. *Mercantile Trust Co. v. Sunset R. Oil Co.*, 176 Cal. 461, 168 Pac. 1037.

5. *McLane v. Placerville etc. R. Co.*, 66 Cal. 606, 6 Pac. 748.

§ 607. Rights and Priorities Between Bondholders.—A mortgage to secure a bond issue is a single security in favor of all the bondholders. As between different bondholders there are no priorities or preferences. Thus, those who agree to subordinate their bonds to a lease of the properties do not thereby agree to surrender their lien upon the mortgaged property or to make their bonds and liens subordinate to those of the nonassenting bondholders. If there be any foreclosure, it must be for the benefit of all outstanding bonds. The court cannot, therefore, order the properties sold in parcels until nonassenting bondholders are paid and allow the remainder to be sold subject to the lease, for such a sale would be in violation of the rights of all bondholders to share equally in the security and would give to part of them a prior lien upon some or all of the property.⁶ Each bondholder has a direct interest in the validity of the bonds held by other bondholders. If, therefore, there are circumstances which estop one bondholder from asserting an equality of his bonds with the others, the one entitled to assert such estoppel has the right to have the dispute determined prior to the sale, although the foreclosure itself would not be prevented.⁷

§ 608. Sale to Bondholders and Reorganization.—A reorganization whereby bondholders become stockholders of a new corporation is not unusual in the case of properties which must necessarily be operated, such as railroads. Indeed, it has been said by the supreme court of the United States that this is the best way to effect such reorganization, that is to say, to reorganize the enterprise on the basis of existing mortgages as stock or something which is equivalent, and by a new mortgage with a lien superior to

6. *Mercantile Trust Co. v. Sunset B. Oil Co.*, 176 Cal. 458, 168 Pac. B. Oil Co., 176 Cal. 461, 168 Pac. 1036; *Mercantile Trust Co. v. Miller*, 1037. 166 Cal. 563, 137 Pac. 913.

7. *Mercantile Trust Co. v. Sunset*

the old, raise the money which is required.⁸ The bondholders may by agreement confer on a committee appointed to represent them, such powers as they see fit to effect such a reorganization, and may agree in advance that their bonds shall be subjected to any plan which the committee may adopt. Upon a reorganization the bondholders have the right, without regard to any of the equities of the stockholders or creditors of the company, to foreclose their lien and bid in the properties.⁹

XIX. ACTIONS BY AND AGAINST CORPORATIONS.

In General.

§ 609. Powers as to Suit and General Considerations.—All corporations have by the constitution “the right to sue and are subject to be sued, in all courts, in like cases as natural persons.”¹⁰ The Civil Code also enumerates the right “to sue and be sued in any court” as one of the powers of every corporation.¹¹ In general, actions by and against corporations are conducted in the same manner as those by and against individuals. Certain additional rules, of course, are necessary, as for instance those with reference to the disqualification of judges because of their relation to the corporation,¹² qualifications of jurors,¹³ and

8. *Ginty v. Ocean Shore R. Co.*, 172 Cal. 31, 155 Pac. 77 (citing U. S. and other authorities). See *Dallemand v. Odd Fellows' Sav. Bank*, 74 Cal. 598, 16 Pac. 497, where a bank was reorganized by its depositors becoming stockholders to the amount of their deposits.

9. *Ginty v. Ocean Shore R. Co.*, 172 Cal. 31, 155 Pac. 77. As to sales of property as an entirety and without right of redemption, see *Title Ins. etc. Co. v. California Dev. Co.*, 171 Cal. 173, 152 Pac. 542; and see **MORTGAGES; TRUST DEEDS.**

10. Const., art. XII, § 4.

11. Civ. Code, § 354, subd. 2.

The right of an individual member of a corporation to sue the corporation has never been doubted. *Barnstead v. Empire Min. Co.*, 5 Cal. 299. But the power of officers of the corporation with reference to litigation may be limited; *Pacific Bank v. Stone*, 121 Cal. 202, 53 Pac. 634; *Streeten v. Robinson*, 102 Cal. 542, 36 Pac. 946.

12. See § 233, supra. See **JUDGE.**

13. Code Civ. Proc., § 602, defining grounds for challenge for cause, in-

rules with reference to witnesses.¹⁴ Statutes sometimes prescribe conditions precedent to the exercise of the power to sue, such as the filing of articles or copies of articles.¹⁵ It is not necessary for a corporation to show affirmatively that it has complied with the license tax act before being permitted to prosecute an action. The corporate existence and capacity of the plaintiff being established, it is a matter for defendant to show that plaintiff has failed to comply with the tax law and therefore should not be permitted to proceed.¹⁶ Other phases of actions are touched on elsewhere in this article.¹⁷

Compromise of actions.—Directors of a corporation possess sufficient authority with reference to suits that, acting in good faith and in the exercise of their best judgment, they may settle a pending action, and such settlement is binding upon the stockholders, even though it subsequently appears that they failed to secure the best terms to which the corporation was entitled.¹⁸

§ 610. Pleadings.—The statutes make no distinction between the rules of pleading applicable to natural persons and those applicable to artificial persons.¹⁹ There is, it has been declared, no necessity or propriety of holding a

cluding consanguinity or affinity within the fourth degree to any party, or to an officer of a corporation, which is a party. See JURY.

14. Code Civ. Proc., § 2043, providing that if either party requires it, the judge may exclude from the courtroom any witness of the adverse party not at the time under examination, so that he may not hear the testimony of other witnesses, but providing that a party to the action or proceeding cannot be so excluded, and if a corporation is a party, it is entitled to the presence of one of its officers, to be designated by its attorney.

15. Civ. Code, §§ 299, 362. See § 52, supra. And, as to foreign corporations, see § 699, infra.

16. Alaska Salmon Co. v. Standard Box Co., 158 Cal. 567, 112 Pac 454.

17. As to criminal proceedings against corporations, see § 577 et seq., supra.

18. Donohoe v. Mariposa etc. Co., 66 Cal. 317, 5 Pac. 495. See COMPROMISE AND SETTLEMENT, vol. 5, p. 397.

19. San Francisco Gas Co. v. San Francisco, 9 Cal. 453.

different rule in respect to corporations—that to make an exception of corporations in this regard would be for the court to exercise legislative functions.²⁰ Thus, the officers and agents of a corporation are presumed to know the contracts entered into by it, the purchases it makes and the property it uses, and the corporation is not permitted to shelter itself under an assertion of ignorance of such matters by denial on information and belief.¹ If the matters alleged in an action against a corporation are presumptively within the knowledge or belief of any of its officers, even though the officer verifying the answer¹ is himself without any information and belief upon the subject, the corporation cannot place its denials upon its want of information and belief.² The requirements of the rules of pleading as to certain particular allegations are treated of in other parts of this article.³

§ 611. Verification.—The code provides that “When a corporation is a party, the verification [of a pleading in an action] may be made by any officer thereof.”⁴ And as to special proceedings, where a law is silent as to the character or class of officers authorized to affix the corporate

20. *Hunt v. City of San Francisco*, 11 Cal. 250.

1. *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453. See *Zany v. Rawhide Gold Min. Co.*, 15 Cal. App. 373, 114 Pac. 1026, holding that the rule that facts presumptively within the knowledge of the defendant must be answered positively and that a denial on information and belief will be treated as an evasion, applies as well to corporations as to natural individuals.

2. *Sloane v. Southern California Ry. Co.*, 111 Cal. 668, 32 L. R. A. 193, 44 Pac. 320.

3. As to allegations of corporate existence, see § 73 et seq., supra. Pleading name, see § 83, supra.

Although compliance with certain statutes must be pleaded in the case of foreign corporations (see § 698, infra), there is no requirement that such allegations need be made by domestic corporations.

4. Code Civ. Proc., § 446. As to verification in general, see PLEADING.

The manager of a corporation is an officer and as such is authorized to verify a complaint; *Stockton Lbr. Co. v. Blodgett*, 3 Cal. App. 94, 84 Pac. 441.

See note 1 A. L. R. 58, as to verification by corporate officer of answer making discovery sought to be introduced in evidence.

name, the papers may be signed or verified by any one of the officers or agents.⁵ Where an officer verifies an answer, the corporation is charged with knowledge of the averments of the complaint.⁶ But the president of a corporation who verifies pleadings does not thereby become a party to the action, and punishable for contempt as such.⁷ The clause in section 446 of the Code of Civil Procedure providing for verification of a pleading by an officer when the corporation is a party is not exclusive. It is permissive only, and does not exclude an attorney or other person from making the verification in a proper case. The clause is qualified by the preceding part of the section and is not to be construed as a limitation that only the officers of a corporation can verify the pleadings thereof. But an affidavit made by one other than an officer must set forth the reasons why it is not made by one of the parties.⁸ The statement of the vice-president that he is such officer of the corporation is sufficient to give validity to the affidavit under section 446 of the Code of Civil Procedure.⁹

§ 612. **Affidavits or Oaths.**—In an earlier article, consideration is given to the rules required to be observed when an affidavit or oath is required of a party and that party is a corporation.¹⁰ It is there seen that the action

5. *Southern Pac. Milling Co. v. Superior Court*, 14 Cal. App. 240, 111 Pac. 625 (petition in insolvency).

6. *Allen v. Los Molinos Land Co.*, 25 Cal. App. 206, 143 Pac. 253.

7. *Ex parte Hollis*, 59 Cal. 405, holding that in insolvency proceedings neither the president, secretary, individual directors nor stockholders are parties. See *Mercantile Trust Co. v. Stockton etc. Co.*, 43 Cal. App. 512, 185 Pac. 860, to the effect that where the secretary of a defendant corporation was served with summons but was not named as a party in the complaint and

was granted an order extending the time in which he was allowed to appear in the action, but no order was ever made extending the time for defendant corporation to plead, it was no abuse of discretion to refuse to set aside a default against the corporation because of such extension granted to the secretary.

8. *Bittleston Law etc. Agency v. Howard*, 172 Cal. 357, 156 Pac. 515.

9. *In re Close*, 106 Cal. 574, 39 Pac. 1067.

10. See *AFFIDAVITS*, vol. 1, p. 657. As to acknowledgments by corporations, see *ACKNOWLEDGMENTS*, vol. 1, p. 252.

in such case must necessarily act through some one of the authorized officers of the corporation. If no particular officer is designated in the statute as the person who shall make the affidavit, it may be made by any one of the officers or agents. And where the affidavit of all the parties to a mortgage is required, it is not necessary to have the affidavit of all the members of the corporation party to the instrument.¹¹ The fact that the name of a corporation is attached to the affidavit is of no importance and involves no ambiguity upon the question as to who in fact made it. That the affiant affixed the corporate name, followed by his own name as president, does not change the fact that he personally made the affidavit on behalf of the corporation.¹²

An affidavit to a claim against an estate, if made by a person other than the claimant, is required to set forth the reason why it is not made by claimant.¹³ But where a corporation presents a claim, an averment of the fact that claimant is a corporation constitutes a sufficient reason why the affidavit is not made by the claimant.¹⁴ And where the affidavit is made by an officer, it is made by the corporation itself through one of its officers, and is not made by a third person; hence the affidavit does not need to set forth the reasons why it is made by a person other than the claimant.¹⁵ In the absence of an averment setting forth the fact that the claimant is a corporation, this cannot be assumed, and the affidavit is defective in not assigning some reason which would relieve the claimant from

11. *Alferitz v. Scott*, 130 Cal. 474, 62 Pac. 735.

12. *A. P. Hotaling & Co. v. Brogan*, 12 Cal. App. 500, 107 Pac. 711. See *Alferitz v. Scott*, 130 Cal. 474, 62 Pac. 735 (where the affidavit was signed in the company name by the officer).

13. Code Civ. Proc., § 1494. See EXECUTORS AND ADMINISTRATORS.

14. *Maier Pkg. Co. v. Frey*, 5 Cal. App. 80, 89 Pac. 875.

15. *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 Pac. 496; *Scott Stamp etc. Co. v. Leake*, 9 Cal. App. 511, 99 Pac. 731. See *Gee Chong Pong v. Harris*, 38 Cal. App. 214, 175 Pac. 806, discussing cases.

making it.¹⁶ It should appear from the affidavit that the person acting on behalf of the claimant is an officer thereof, presumed from his official position to have sufficient knowledge of its affairs; or if made by other than such official, it should contain averments tending to show that the nature of his relation to the company is of a character calculated to place him in possession of the requisite information.¹⁷

It is competent for the general manager of a corporation to make and file a claim of lien in the name of and on behalf of the corporation and to verify it.¹⁸ The secretary of a corporation is in charge of its books and records, hence a statement in an affidavit that he is secretary is substantially equivalent to a statement by him that the matters stated are true of his own knowledge.¹⁹

§ 613. Injunctions to Suspend Business.—The Code of Civil Procedure in section 531 provides:

“An injunction to suspend the general and ordinary business of a corporation cannot be granted without due notice of the application therefor to the proper officers or managing agent of the corporation, except when the people of this state are a party to the proceeding.”

This section has reference only to lawful acts performed in the course of general and ordinary business, and notice is not required of an application for a temporary injunction to restrain a corporation from committing unlawful acts injurious to the applicant.²⁰ And where the injunc-

16. *Maier Pkg. Co. v. Frey*, 5 Cal. App. 80, 89 Pac. 875. See *Scott Stamp etc. Co. v. Leake*, 9 Cal. App. 511, 99 Pac. 731, in which it was alleged in the complaint and found by the court that the claimant was a corporation, but where it did not appear from the opinion whether the affidavit itself alleged that the claimant was a corporation. The case did not refer to *Maier Pkg.*

Co. v. Frey, 5 Cal. App. 80, 89 Pac. 875.

17. *Maier Packing Co. v. Frey*, 5 Cal. App. 80, 89 Pac. 875.

18. *Coghlan v. Quartararo*, 15 Cal. App. 662, 115 Pac. 664.

19. *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 Pac. 496.

20. *Hobbs v. Amador etc. Co.*, 66 Cal. 161, 4 Pac. 1147; *Golden Gate*

tion only restrains the conduct of operations in a particular manner alleged to injure the plaintiff in the action in which the injunction is issued, but does not suspend the general and ordinary business of the corporation, it is not within the provisions of the section.¹ The remedy for nonobservance of this section is by motion to dissolve the injunction, and an appeal from an order denying the motion.² An application for a writ of prohibition to restrain the court from hearing contempt proceedings under the injunction is properly denied, since prohibition is not the proper remedy.³ An injunction order issued at the commencement of proceedings for involuntary dissolution against the corporation, its directors, agents, attorneys and creditors, prohibiting them from carrying on any litigation and from interfering with or taking possession of any of the assets of the corporation, is without authority, and they are not in contempt of court for disregarding such order.⁴

Venue of Actions Against Corporations.

§ 614. Constitutional Provision.

“A corporation or association may be sued (1) in the county where the contract is made (2) or is to be performed, (3) or where the obligation or liability arises (4) or the breach occurs; (5) or in the county where the principal place of business of such corporation is situated,

Con. H. Min. Co. v. Superior Court, 65 Cal. 187, 3 Pac. 628. See INJUNCTION.

1. Eureka etc. Co. v. Superior Court, 66 Cal. 311, 5 Pac. 490; Golden Gate Con. H. Min. So. v. Superior Court, 65 Cal. 187, 3 Pac. 628.

2. Fischer v. Superior Court, 110 Cal. 129, 42 Pac. 561.

3. Hill v. Superior Court, 21 Cal.

App. 424, 131 Pac. 1061, where the court issued an injunction against certain defendants in an action, individually and as officers, directors and stockholders of a corporation, from interfering with the carrying on of business under the management of the plaintiff.

4. Harrison v. Hebbard, 101 Cal. 152, 35 Pac. 555. See § 670 et seq., as to receivers.

subject to the power of the court to change the place of trial as in other cases."⁵

This provision is obviously self-executing,⁶ and is of the nature of a code provision in regard to procedure, and so is to be so construed.⁷ In so far as the provision conflicts with a statute, the statute must, of course, give way.⁸ The provision confers no greater privileges than if it had been made by statute; it is only a rule of procedure to be acted upon in connection with other like rules.⁹ It relates exclusively to private corporations and has no application to suits against municipalities.¹⁰ An unincorporated association, however, is within the application of the provision.¹¹

§ 615. Purpose of Constitutional Provision.—The constitutional provision above quoted was, it is said,¹² mainly designed to apply to actions against railroad corporations for damages. That such actions were removed to a distant county where the corporation had its principal place of business was the grievance to be redressed, and this is why it was made a rule of procedure with which the legislature could not tamper. The effect of the section is to permit a corporation to be sued in certain counties other than that of its residence or principal place of business. This effected an important change in the law as it before existed in so far as it denies the right of a corporation to

5. Const., art. XII, § 16. See *Ivey v. Kern County Land Co.*, 115 Cal. 196, 46 Pac. 926 (quoting the constitution with numbered divisions).

6. *Miller & Lux v. Kern County Land Co.*, 134 Cal. 586, 66 Pac. 856. As to self-executing provisions of the constitution, see CONSTITUTIONAL LAW, vol. 5, p. 576 et seq.

7. *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77; *Miller & Lux v. Kern County Land Co.*, 134 Cal. 586, 66 Pac. 856.

8. *Miller & Lux v. Kern County Land Co.*, 134 Cal. 586, 66 Pac. 856.

9. *Griffin & Skelly Co. v. Magnolia etc. Co.*, 107 Cal. 378, 40 Pac. 495.

10. *Gallup v. Sacramento etc. Dist.*, 171 Cal. 71, 151 Pac. 1142; *Buck v. City of Eureka*, 97 Cal. 135, 31 Pac. 845.

11. *Kendrick v. Diamond Creek etc. Co.*, 94 Cal. 137, 29 Pac. 324.

12. *Miller & Lux v. Kern County Land Co.*, 134 Cal. 586, 66 Pac. 856. See also for another statement of the reasons for the provision, *Cook*

a change of venue to the county of its principal place of business when sued in any one of the other counties named in the section, and this seems to be the only effect of the section.¹³ It has been said also that the members of the constitutional convention in adopting the provision had in mind the difference between real and quasi-real actions and those personal actions covered by the terms of the section.¹⁴

§ 616. Construction of Provision.—The constitution gives to a plaintiff a right to sue a corporation in any of the counties therein referred to. This option includes something more than simply the bare right to choose the county where the complaint shall be filed in the first instance, and confers on plaintiff the right also to prosecute such action in the county where it is commenced, unless the place of trial is changed for some reason other than that of the residence of the defendant corporation,¹⁵ that is, it can only secure a removal “as in other cases.”¹⁶ The constitutional provision is merely permissive to the plaintiff¹⁷ and not mandatory. Although the constitution

v. W. S. Ray Mfg. Co., 159 Cal. 694, 115 Pac. 318; Lakeside Ditch Co. v. Packwood Ditch Co., 33 Cal. App. Dec. 754, 195 Pac. 284.

13. Fresno Nat. Bank v. Superior Court, 83 Cal. 491, 24 Pac. 157.

14. Cook v. W. S. Ray Mfg. Co., 159 Cal. 694, 115 Pac. 318.

15. Cook v. W. S. Ray Mfg. Co., 159 Cal. 694, 115 Pac. 318; Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 65 L. R. A. 90, 74 Pac. 855; Whitney v. Sellers' Com. Co., 130 Cal. 188, 62 Pac. 472; Lakeshore Cattle Co. v. Modoc Land etc. Co., 108 Cal. 261, 41 Pac. 472; Jager v. California Bridge Co., 104 Cal. 542, 38 Pac. 413; Trezevant v. W. R. Strong Co., 102 Cal. 47, 36 Pac. 395; Fresno Nat. Bank v. Superior Court,

83 Cal. 491, 24 Pac. 157; Bush & Co. v. Van Camp etc. Co., 34 Cal. App. Dec. 554, 196 Pac. 918; Lakeside Ditch Co. v. Packwood Ditch Co., 33 Cal. App. Dec. 754, 195 Pac. 284; Raphael v. People's Bank of Benicia, 30 Cal. App. Dec. 920, 187 Pac. 53; Bond v. Karma-Ajax etc. Co., 15 Cal. App. 469, 115 Pac. 254; Krogh v. Pacific Gateway etc. Co., 11 Cal. App. 237, 104 Pac. 698; Eddy v. Houghton, 6 Cal. App. 85, 91 Pac. 397.

16. Lakeside Ditch Co. v. Packwood Ditch Co., 33 Cal. App. Dec. 754, 195 Pac. 284.

17. Miller & Lux v. Kern County Land Co., 134 Cal. 586, 66 Pac. 856; Griffin & Skelly Co. v. Magnolia etc. Co., 107 Cal. 378, 40 Pac. 495;

further provides that its provisions are mandatory and prohibitory unless by express words they are declared to be otherwise, the words "may be sued" are expressly merely permissive, and by these words the section is "declared to be otherwise" than mandatory, if mere permission is different from a command.¹⁸ Thus, "may be sued" is not to be interpreted "must be sued," and a judgment in a suit brought in a county other than those named would not be without jurisdiction.¹⁹ The provision does not deprive the superior court of any county of jurisdiction to hear and determine all classes of actions within the limitations of its jurisdiction as defined in the constitution.²⁰

With the exception of actions concerning title to and possession of real property and enforcement of liens thereon, actions may be commenced in any county, subject to the power of the court to change the place of trial as provided in the Code of Civil Procedure. This rule antedates the constitutional provision and is necessarily modified by it to the extent that corporations are now permitted to be sued in the county where the alleged liability arose or the breach of contract occurred.¹

Fresno Nat. Bank v. Superior Court, 83 Cal. 491, 24 Pac. 157.

18. **Fresno Nat. Bank v. Superior Court**, 83 Cal. 491, 24 Pac. 157 (stating that to hold the provision mandatory might bring it into conflict with the provisions of art. VI, § 5). See CONSTITUTIONAL LAW, vol. 5, p. 571 et seq.

19. **Bond v. Karma-Ajax etc. Co.**, 15 Cal. App. 469, 115 Pac. 254.

20. **Miller & Lux v. Kern County Land Co.**, 134 Cal. 586, 66 Pac. 856; **Griffin & Skelly Co. v. Magnolia etc. Co.**, 107 Cal. 378, 40 Pac. 495; **White v. Fresno Nat. Bank**, 98 Cal. 166, 32 Pac. 979 (holding where

action on the contract is brought outside county of principal place of business and no motion made to change venue to principal place of business, a denial of a writ of prohibition to restrain the proceedings for want of jurisdiction is res adjudicata); **Fresno Nat. Bank v. Superior Court**, 83 Cal. 491, 24 Pac. 157 (art. VI, § 5, Const., gives superior courts jurisdiction over the subject matter of the action); **Bond v. Karma-Ajax etc. Co.**, 15 Cal. App. 469, 115 Pac. 254.

1. **Strassburger v. Santa Fe Land Imp. Co.**, 35 Cal. App. Dec. 851, 200 Pac. 1065.

§ 617. **Conflict With Federal Constitution.**—Since corporations are within the protection of the fourteenth amendment to the United States constitution, any construction of the provisions of section 16 of article XII of the constitution which would make an arbitrary discrimination against corporations in the matter of the place of trial of actions against them would be a violation of the rights of the defendant corporation under the constitution of the United States. Thus, it has been held that there is no ground why a natural person should have a right to trial of an action involving land in the county where the land is situated and the same right should be denied to a corporation.² It has been contended that the same principle is applicable to transitory personal actions as applies to real and quasi-real actions, and that suit must be brought at their places of residence under section 395 of the Code of Civil Procedure; and there is dictum to support such contention.³ But in view of the purposes of the constitutional provision,⁴ and the causes surrounding its enactment, none of which affect the class of cases provided for in section 392 of the Code of Civil Procedure, the discrimination made between corporations and natural persons as to the venue of personal actions was deemed by the framers of the constitution to be sufficiently justified, and it has been so held by the courts.⁵

2. Grocers' etc. Union v. Kern County Land Co., 150 Cal. 466, 89 Pac. 120, construing § 16, art. XII, so that it would not discriminate against corporations. See §§ 616, 617, supra. See Cook v. W. S. Ray Mfg. Co., 159 Cal. 694, 115 Pac. 318 (discussing Grocers' Union case).

3. Krogh v. Pacific Gateway etc. Co., 11 Cal. App. 237, 104 Pac. 698, where it was said that what was true of the rights of corporations arising under § 392, Code Civ. Proc., must be true of the rights of cor-

porations arising under § 395, and that a corporation is to be accorded the same rights as a natural person.

4. See § 615, supra.

5. Cook v. W. S. Ray Mfg. Co., 159 Cal. 694, 115 Pac. 318; Lakeside Ditch Co. v. Packard Ditch Co., 33 Cal. App. Dec. 754, 195 Pac. 284; Raphael v. People's Bank of Benicia, 30 Cal. App. Dec. 920, 187 Pac. 53. See Lewis v. South Pac. C. R. Co., 66 Cal. 209, 5 Pac. 79, where in an action for damages for personal injuries, the court said it was not

§ 618. Applicability to Cases of Contracts and Torts.—The provisions of the section of the constitution under consideration are applicable to actions of tort as well as those founded upon contract.⁶ This is quite obvious from the language used in that section. The clauses thereof are disjunctively connected and in effect refer to actions upon contract or to actions to enforce an obligation or liability. The law imposes upon one who has injured another the duty of making reparation and upon this obligation the action for damages is based. The word "liability" has always been held to apply to responsibility for torts as well as for breach of contracts.⁷ Not only does the language employed admit of no restriction to contracts to the exclusion of torts, but that no such restriction was intended by the framers of the instrument is said to appear plainly from the proceedings of the constitutional convention which adopted the section.⁸

Since proceedings in eminent domain are founded neither upon contract nor upon tort, it has been suggested that they clearly are not within the provision, and that therefore there is nothing to prevent the full operation of sec-

able to see wherein the provision of the state constitution conflicted with the provisions of the fourteenth amendment to the United States constitution. This case was said in the Grocers' Union case (cited supra, note 2) to be no longer authority on the ground that at the time of the decision the state courts had held that corporations were not persons within the fourteenth amendment and therefore not within the protection of such amendment, and that while the language of the court was sustainable under the then condition of the law, it was no longer to be supported. See also the statement in Krogh v. Pacific Gateway etc. Co., 11 Cal. App. 237, 104 Pac. 698, that the Lewis case

was overruled in so far as it held that the provisions of the state constitution were not in conflict with the fourteenth amendment. It is apparent that the case was unnecessarily overruled in the Grocers' Union case, because obviously a personal, not a local action, and therefore not in point.

6. Tingley v. Times-Mirror Co., 144 Cal. 205, 77 Pac. 918; Miller & Lux v. Kern County Land Co., 134 Cal. 586, 66 Pac. 856; Lewis v. South Pac. C. R. Co., 66 Cal. 209, 5 Pac. 79.

7. Miller & Lux v. Kern County Land Co., 134 Cal. 586, 66 Pac. 856.

8. Lewis v. South Pac. C. R. Co., 66 Cal. 209, 5 Pac. 79.

tion 1243 of the Code of Civil Procedure requiring all such proceedings to be instituted in the county where the land is situated.⁹

§ 619. **Real and Quasi-real Actions.**—It was early held that in an action against a corporation for threatened injuries to real property, section 392 of the Code of Civil Procedure was applicable.¹⁰ It has also been decided that an action for specific performance of a contract for the sale of land under an allegation that the purchase price has been paid is local in character and within the same provision, as an action for the determination of a right or interest in real property.¹¹ An action to have a deed absolute declared a mortgage concerns a right or interest in land and is properly brought in the county where the land is situated. Within the meaning of section 16 of article XIII of the constitution, it is there that the liability or obligation (if any) arose.¹² Where the subject matter of the action is land, as has been seen, no reason or distinction appears why the right should be given to a natural person to have such action tried in the county where the land is situated and the same right denied to a corporation, and a refusal to change the place of trial to the county where

9. *Miller & Lux v. Kern County Land Co.*, 134 Cal. 586, 66 Pac. 856 (discussing opinion of commissioner in department). See *California So. R. Co. v. Southern Pac. R. Co.*, 65 Cal. 394, 4 Pac. 344, and *California So. R. Co. v. Southern Pac. R. Co.*, 65 Cal. 409, 4 Pac. 388, in which a demand for change of venue in condemnation proceedings to county of principal place of business from the county in which the land was situated was denied on the ground that § 1243, Code Civ. Proc., was applicable, without discussing the effect of the constitutional pro-

vision, but denying the applicability of § 395, Code Civ. Proc.

10. *Drinkhouse v. Spring Valley Water Works*, 80 Cal. 308, 22 Pac. 252, not passing on § 16 of art. XII of the constitution. This case is not cited by later cases, except in the department opinion in *Miller & Lux v. Kern County Land Co.*, 6 Cal. Unrep. 684, 65 Pac. 312, reversed in bank, 134 Cal. 586, 66 Pac. 856.

11. *Grocers' etc. Union v. Kern County Land Co.*, 150 Cal. 466, 89 Pac. 120.

12. *Baker v. Fireman's Fund Ins. Co.*, 73 Cal. 182, 14 Pac. 686.

the land is situated, based upon the constitutional provision, is not justified.¹³ The language of the constitutional provision presents, it has been said, a ready solution for harmonizing its provisions and section 392, Code of Civil Procedure, in the words "subject to the power of the court to change the place of trial as in other cases."

"As the power of the court to change the place of trial rests entirely upon legislative enactment, it follows that here in the constitution itself is a distinct permission to courts to change the place of trial in accordance with the legislative enactment. The constitutional provision is, therefore, as though it read: 'Any and all actions may be commenced against corporations in the county of the principal place of business of the corporation, provided, however, that the courts may change the place of trial of such actions in accordance with the laws governing such places of trial.' The right still remains in the plaintiff to commence his action in the county of the principal place of business, and the right remains to the corporation to have the place of trial changed under exercise of the court's power in enforcing the legislative enactment in regard thereto."¹⁴

Hence, actions relating to real property which do not come within article VI, section 5 of the constitution are subject to no provision requiring them to be commenced in the county where the real property is situated and when commenced in another county the court acquires jurisdiction to try the cause unless the defendant applies for a transfer to the county where the real property is situ-

13. Grocers' etc. Union v. Kern County Land Co., 150 Cal. 466, 89 Pac. 120 (overruling Miller & Lux v. Kern County Land Co., 134 Cal. 586, 66 Pac. 856, and Miller & Lux v. Kern County Land Co., 140 Cal. 132, 73 Pac. 836). See Cook v. W. S. Ray Mfg. Co., 159 Cal. 94, 115 Pac. 318 (discussing the cases above cited). See also Lakeside Ditch Co. v. Packwood Ditch Co., 33 Cal. App.

Dec. 754, 195 Pac. 284 (reviewing cases and giving reasons for change of holding); Miller & Lux v. Kern County Land Co., 6 Cal. Unrep. 684, 65 Pac. 312 (subsequently reversed by opinion in bank, 134 Cal. 586, 66 Pac. 856). See supra, § 617.

14. Grocers' etc. Union v. Kern County Land Co., 150 Cal. 466, 89 Pac. 120, per Henshaw, J.

ated.¹⁵ Article VI, section 5 of the constitution, of course, is a limitation on the general jurisdiction of the superior court. It prohibits the commencement of certain actions affecting real property in counties other than those in which such realty is situated. But if the complaint does not show that such action is within the provisions of such constitutional provision, the fact that the answer raises the question does not operate to change the character of plaintiff's action and oust the jurisdiction of the court in which the action is brought.¹⁶

§ 620. Venue in County of Residence.—Section 395 of the Code of Civil Procedure provides in general that in all cases other than certain special ones, in some way involving or affecting real property and those which may in the absence of a better designation be termed quasi-personal actions, the action must be tried in the county in which the defendants or some of them reside at the commencement of the action, subject, of course, to the power of the court to change the place of trial.¹⁷ The place of residence of a corporation within the meaning of this section is in the county where its principal place of business is situated.¹⁸ That is the county in which personal actions against it are to be tried, subject, however, to the provisions of section

15. *Miller & Lux v. Madera Canal etc. Co.*, 155 Cal. 59, 22 L. R. A. (N. S.) 391, 99 Pac. 502; *Grocers' etc. Union v. Kern County Land Co.*, 150 Cal. 466, 89 Pac. 120.

16. *Miller & Lux v. Kern County Land Co.*, 140 Cal. 132, 73 Pac. 836. See *Bond v. Karma-Ajax etc. Co.*, 15 Cal. App. 469, 115 Pac. 254 (which, in referring to art. VI, § 5, states that the legislature has power to determine in what counties trials of certain actions shall be had, but of course it could not provide that a change of place of trial could be had on the ground of residence in

another county where the conditions affecting the subject matter are among those enumerated in § 16, art. XII, of the constitution); *Fresno Nat. Bank v. Superior Court*, 83 Cal. 491, 24 Pac. 157 (saying that to hold § 16 of art. XII mandatory might bring it into conflict with art. VI, § 5, which is mandatory).

17. *Lakeside Ditch Co. v. Packwood Ditch Co.*, 33 Cal. App. Dec. 754, 195 Pac. 284.

18. See § 100, *supra*, as to residence of corporations.

16 of article XII of the constitution and the power of the court to change the place of trial as provided in the code.¹⁹ Where, therefore, an action is not properly brought within the provisions of this section of the constitution, the corporation may demand a change of the place of trial to the county of its principal place of business, which is its residence.²⁰

§ 621. Contractual Actions.—The venue of actions on contracts to which corporations are parties is the same as that pertaining to individual contracts. A contract is supposed to be made at some place, and it is at the place where it becomes complete that it is made. This is ordinarily where the acceptance occurs. If approval of a contract is necessary to be indorsed upon the contract, the contract is consummated where such approval is indorsed. But if a contract is to be performed by payment in the county of venue, the action is properly commenced there, regardless of where it was made. A cause of action to rescind becomes complete and the rights of the party to rescind accrues when an offer is made to restore the parties to statu quo. And a quasi contract to repay the money had and received goes into effect instantly upon service of the notice of rescission, and at the place where service is had and the liability there arises. This subject is fully considered with citation of authorities in other articles in this work.¹

§ 622. Actions for Torts.—Liability for torts, whether by a corporation or an individual, arises where the injury occurs,² and a person having a right of action therefor

19. *McSherry v. Pennsylvania etc. Co.*, 97 Cal. 637, 32 Pac. 711. See *Cook v. W. S. Ray Mfg. Co.*, 159 Cal. 694, 115 Pac. 318. And see § 617, as to validity of constitutional provision.

20. See § 625, *infra*.

1. See *CONFLICT OF LAWS*, vol. 5, p. 449 et seq.; *CONTRACTS*, vol. 6, p. 1.

2. *McDonald v. California Timber Co.*, 151 Cal. 159, 90 Pac. 548; *Tingley v. Times-Mirror Co.*, 144 Cal. 205, 77 Pac. 918; *Jager v. California*

against a corporation may bring his suit either in the county where the damage was sustained or in the county in which the defendant had its principal place of business.³ Thus, an action for breach of a common carrier's obligation may be brought in the county where such breach occurred, as well as in the county where the defendant had its principal place of business.⁴ In 1911, section 395 of the Code of Civil Procedure was so amended as to provide as to natural persons even that if the action be for injuries to person or property or for death from wrongful act or neglect it may be commenced in the county where the injury occurs, or the injury causing death occurs, or in the county where the defendants, or some of them, reside at the commencement of the action.⁵ This subject of the place of trial in all such actions is properly considered in other articles.⁶

§ 623. Presumption and Proof.—In the absence of an affirmative showing in such particular, the presumption is that the county in which the action is entitled is *prima facie* the proper county in which to bring the action,⁷ where the court of such county has jurisdiction of the subject matter,⁸ although the principal place of business of the corporation is in another county.⁹ So, where the record does not show anything as to the place of residence or the principal place of business of a defendant corporation, the burden is upon the moving party to establish that

Bridge Co., 104 Cal. 542, 38 Pac. 413; Kendrick v. Diamond Creek etc. Co., 94 Cal. 137, 29 Pac. 324; Lewis v. South Pac. C. R. Co., 66 Cal. 209, 5 Pac. 79; Robinson v. Order of Railway Employees, 35 Cal. App. Dec. 552, 200 Pac. 87.

3. Tingley v. Times-Mirror Co., 144 Cal. 205, 77 Pac. 918.

4. Chase v. South Pac. C. R. Co., 83 Cal. 468, 23 Pac. 532.

5. Rains v. Diamond Match Co., 171 Cal. 326, 153 Pac. 239.

6. See TRIAL. And see titles of articles considering particular torts as DEATH; LIBEL AND SLANDER, etc.

7. Lakeside Ditch Co. v. Packwood Ditch Co., 33 Cal. App. Dec. 754, 195 Pac. 284.

8. Fresno Nat. Bank v. Superior Court, 83 Cal. 491, 24 Pac. 157.

9. Chase v. South Pac. C. R. Co., 83 Cal. 468, 23 Pac. 532.

none of the defendants are residents of the county in which the action is brought.¹⁰ If the only showing of venue is in the title of the action, there is at least a prima facie showing of venue, which is sufficient to cast the burden on defendant to show that the contract was not made nor to be performed or that the breach thereof by it or its liability by reason of the breach thereof did not occur or arise in said county.¹¹ This follows from the rule that a corporation defendant is not entitled as of right, as in cases of transitory actions in which defendants are natural persons, to have an action against it removed from the county in which it is commenced to the county of its residence where the action is brought in a county other than that in which its principal place of business is.¹²

In case of conflicting affidavits as to whether the contract sued on was made in the county in which suit was brought, the order of court denying the motion for change of place of trial will not be disturbed.¹³ And an allegation that the corporation is located in the county of the venue and does business therein and that the transactions took place therein, where not controverted in the affidavit of merits filed by defendant or at all, is sufficient to show the venue in that county. From the allegation that it is

10. See *Bloom v. Michigan Salmon Min. Co.*, 11 Cal. App. 122, 104 Pac. 324.

11. *Lakeside Ditch Co. v. Packwood Ditch Co.*, 33 Cal. App. Dec. 754, 195 Pac. 284.

12. *Lakeside Ditch Co. v. Packwood Ditch Co.*, 33 Cal. App. Dec. 754, 195 Pac. 284. But see *Hammond v. Ocean Shore Dev. Co.*, 22 Cal. App. 167, 133 Pac. 978, holding that when the corporation has shown its principal place of business to be in another county, to defeat a motion for change of venue the burden is on plaintiff to show that the contract was made or to be performed or that the obligation or lia-

bility arose or the breach occurred in the county where the action is brought, citing *Brady v. Times-Mirror Co.*, 106 Cal. 56, 39 Pac. 209, and *Griffin & Skelly Co. v. Magnolia etc. Co.*, 107 Cal. 378, 40 Pac. 495, on the proposition that the right of the plaintiff to have an action tried in another county than that in which the defendant has his residence being exceptional, if plaintiff would claim such right he must bring himself within the terms of the exception. These two cases did not, however, decide as to the burden of proof.

13. *Brown v. San Francisco Sav. Union*, 122 Cal. 648, 55 Pac. 598.

located in the county, it is fairly inferable that its place of business is in that county.¹⁴

§ 624. Rights of Other Defendants—Waiver.—Where an action is brought in the county of the principal place of business of a corporation which is a necessary party, an individual, though the principal defendant, cannot secure a change of place of trial to the county of his residence.¹⁵ But where the corporation is a proper but not a necessary party defendant, it has no right to have the action tried in the county of its principal place of business.¹⁶ And where the action is brought in the county of the principal place of business and the corporation is not a necessary or a proper party, demand for a change of venue by one of the individual defendants is properly granted upon sufficient showing of merits.¹⁷

Under the provisions of section 16 of article XII of the constitution, if an action is brought against a corporation alone, the plaintiff's right to have it tried in one of the counties specified in the provision, other than that in which the principal place of business of the corporation is located, is undoubted,¹⁸ but the privilege thus given to a plaintiff in actions against corporations may be waived by him, and in case of waiver the statutory provisions will control.¹⁹ By including in the action other defendants whose residence is outside that county, the plaintiff waives the right given by the constitutional provision to sue the corporation other than at its residence, and a motion for

14. *Lakeside Ditch Co. v. Packwood Ditch Co.*, 33 Cal. App. Dec. 754, 195 Pac. 284.

15. *Hellman v. Logan*, 148 Cal. 58, 82 Pac. 848.

16. *Bailey v. Cox*, 102 Cal. 333, 36 Pac. 650.

17. *Eddy v. Houghton*, 6 Cal. App. 85, 91 Pac. 397, where one of the corporate defendants consented to change.

18. *Griffin & Skelly Co. v. Magnolia etc. Co.*, 107 Cal. 378, 40 Pac. 495; *Brady v. Times-Mirror Co.*, 106 Cal. 56, 39 Pac. 209. See supra, §§ 614-616.

19. *Miller & Lux v. Kern County Land Co.*, 134 Cal. 586, 66 Pac. 856; *Griffin & Skelly Co. v. Magnolia etc. Co.*, 107 Cal. 678, 40 Pac. 495.

change of venue must be determined by the provisions of the statute.²⁰ If, however, individual defendants do not exercise the right to have the action tried in the county of their residence, it is no concern of the corporation. The plaintiff is not ipso facto deprived of a right given by the constitution because he joins the individuals, although the right may become ineffective by the exercise of the right of an individual defendant to have the action removed to the place of his residence.¹ The joining of other defendants is plaintiff's own act and he cannot in this manner deprive them of a right held by them.²

A motion concerning the venue is determined upon the pleadings as they stand at the time thereof. The plaintiff cannot, after the motion is made, defeat it by allowing an amendment of the complaint striking out other defendants joined.³ Where another defendant is fraudulently named for the mere purpose of defeating the right of the corporation to a change of place of trial, the joinder does not prevent the corporation from securing a removal to the proper county.⁴ And where one or more necessary defendants reside in the county of venue, this is the place for trial, and all the defendants cannot, by joining in the demand of the corporate defendant for a change to the principal place of business, defeat plaintiff's right.⁵

20. Griffin & Skelly Co. v. Magnolia etc. Co., 107 Cal. 378, 40 Pac. 495; Brady v. Times-Mirror Co., 106 Cal. 56, 39 Pac. 209; Nelson v. East Side Grocery Co., 26 Cal. App. 344, 146 Pac. 1055.

It was not the intention of the constitutional provision to deprive an individual defendant of his right to have an action against him tried in the county of his residence, and he is not deprived of this right because a corporation is joined with him as a defendant. Strassburger

v. Santa Fe Land Imp. Co., 35 Cal. App. Dec. 851, 200 Pac. 1065.

1. Strassburger v. Santa Fe Land Imp. Co., 35 Cal. App. Dec. 851, 200 Pac. 1065.

2. Griffin & Skelly Co. v. Magnolia etc. Co., 107 Cal. 378, 40 Pac. 495.

3. Brady v. Times-Mirror Co., 106 Cal. 56, 39 Pac. 209.

4. McDonald v. California Timber Co., 151 Cal. 159, 90 Pac. 548.

5. Aisbett v. Paradise etc. Co., 21 Cal. App. 267, 131 Pac. 330.

Where the action is commenced in the county where the liability arose, by joining fictitious defendants the plaintiff does not waive his right; granting that the fictitious defendants are individuals residing outside the county of venue, such facts do not confer on the corporation any right to have the place of trial changed on that ground.⁶

§ 625. Right to Change of Place of Trial.—The provision of section 16 of article XII of the constitution that the court may change the place of trial as in other cases indicates that the section is no more controlling upon the action of the court than any other statutory enactment.⁷ Although a motion for change of venue to the county of the principal place of business is properly denied where the action is brought in one of the counties mentioned in the constitutional provision,⁸ yet where the action is brought in a county other than one of those mentioned in section 16 of article XII of the constitution, the corporation defendant is entitled to have the case tried in the county of its principal place of business, that is, its residence, and the change of venue granted because the action has not been brought in the proper county.⁹ So, also, the clause of the constitutional provision, "subject to the power of the court to change the place of trial as in other cases," is authority for the court to look to section 394 of the Code of Civil Procedure, relating to actions to which corporations are parties, as providing for some of the

6. *Strassburger v. Santa Fe Land Imp. Co.*, 35 Cal. App. Dec. 851, 200 Pac. 1065, per Kerrigan, J.

7. *Griffin & Skelly Co. v. Magnolia etc. Co.*, 107 Cal. 378, 40 Pac. 495.

8. See *supra*, § 616. See, also, § 624.

9. *McDonald v. California Timber Co.*, 151 Cal. 159, 90 Pac. 548; *Byrum v. Stockton etc. Works*, 91 Cal. 657, 27 Pac. 1093; *Cohn v. Central*

Pac. R. Co., 71 Cal. 488, 12 Pac. 498; *L. & E. Emanuel, Inc., v. Oberlin Bros. Co.*, 33 Cal. App. 235, 164 Pac. 818; *Waechter v. Atchison etc. R. Co.*, 10 Cal. App. 70, 101 Pac. 41; *Krogh v. Pacific Gateway etc. Co.*, 11 Cal. App. 237, 104 Pac. 698 (where the county of venue is not one of those mentioned, the section is inapplicable and the provision for action at the principal place of business is the only one applicable).

“other cases” referred to in the constitution in which a change of the place of trial is provided for.¹⁰ And likewise in the case of local actions it has been held that the language of the constitution permits the court to look to section 392 of the same code as the legislative enactment governing the change of the place of trial in such cases.¹¹ But a corporation defendant may, of course, by failure to object to the bringing of the suit in the wrong county, waive its right to have the action brought in the proper county.¹²

§ 626. Actions Against Foreign Corporations.—Section 395 of the Code of Civil Procedure provides that if none of the defendants reside in California, or, if residing in the state, the county in which they reside is unknown to plaintiff, the action may be tried in any county which the plaintiff may designate in his complaint.¹³ This section covers two classes of cases, one dealing with actions against residents and the other with actions against non-residents. The provision of the section permitting commencement of actions for injuries to person or property or for death from wrongful act or negligence in the county where the injury occurs or in the county where the defendants or some of them reside, has no application to actions against nonresidents.¹⁴ The right to sue a nonresident in any county which the plaintiff may designate exists, however, only in the case where the nonresident is the only defendant, and not where joined with resident defend-

10. *Yuba County v. North America etc. Min. Co.*, 12 Cal. App. 223, 107 Pac. 139, holding that no right is given to a transfer to the county of the principal place of business, nor to any other particular county, but that the naming of the county is left to the discretion of the court.

11. *Grocers' etc. Union v. Kern County Land Co.*, 150 Cal. 466, 89 Pac. 120.

12. *White v. Fresno Nat. Bank*, 98 Cal. 166, 32 Pac. 979. And see *supra*, § 624.

13. See *supra*, § 100, as to residence of corporation.

14. *Rains v. Diamond Match Co.*, 171 Cal. 326, 153 Pac. 239; *Ryan v. Inyo Cerro Gordo Min. etc. Co.*, 41 Cal. App. 770, 183 Pac. 250.

ants.¹⁵ A foreign corporation has no residence within the meaning of section 395 and may be sued in any county designated by the plaintiff in his complaint.¹⁶

A principal place of business of a foreign corporation not expressly authorized by law does not admit a foreign corporation to the constitutional privileges of domestic corporations.¹⁷ Compliance with the requirements of the law concerning foreign corporations entering the state does not give such a corporation a residence in or give it the rights of domestic corporations in regard to the place of trial of actions.¹⁸

It has never been decided whether section 16 of article XII of the constitution is applicable to actions against foreign corporations.¹⁹ But it has been held that a statute may not take a particular class of foreign corporations out of the provisions of the general section relating to the place of trial of actions, for, it has been argued, that would have the effect of creating a specially privileged class of nonresident corporations who would be favored, not only above nonresident natural persons, but above all other

15. *Ludington Exp. Co. v. La Fortuna etc. Min. Co.*, 4 Cal. App. 369, 88 Pac. 290.

16. *Rains v. Diamond Match Co.*, 171 Cal. 326, 153 Pac. 239; *Thomas v. Placerville etc. Co.*, 65 Cal. 600, 4 Pac. 641; *Ryan v. Inyo Cerro Gordo Min. etc. Co.*, 41 Cal. App. 770, 183 Pac. 250; *Waechter v. Atchison etc. R. Co.*, 10 Cal. App. 70, 101 Pac. 41; *Ludington Exp. Co. v. La Fortuna etc. Min. Co.*, 4 Cal. App. 369, 88 Pac. 290.

17. *Waechter v. Atchison etc. R. Co.*, 10 Cal. App. 70, 101 Pac. 41.

18. *Ryan v. Inyo Cerro Gordo Min. etc. Co.*, 41 Cal. App. 770, 183 Pac. 250.

19. See *Ludington Exp. Co. v. La Fortuna etc. Min. Co.*, 4 Cal. App.

369, 88 Pac. 290, where it was not decided whether, if a foreign corporation has a principal place of business in a county, it would have to be sued there under § 16 of art. XII, of the constitution, although the point was raised.

It would seem apparent that, if applicable, foreign corporations are not permitted to do business in the state on more favorable conditions in this respect than domestic corporations, within the meaning of section 15 of article XII of the constitution, since suit against such corporations is permitted, not only in any of the counties mentioned in section 16 of article XII, but in any county designated by the plaintiff in his complaint. See *infra*, § 701 et seq.

foreign corporations that might be doing business in the state, and would be obnoxious to the provisions of the constitution prohibiting special legislation.²⁰

XX. DISSOLUTION OR FORFEITURE.

General Considerations.

§ 627. **Modes and Grounds for Dissolution.**—The law provides for three methods of dissolution of a corporation, one by direct act of the legislature, another by quo warranto, and a third by voluntary act of the corporation itself;¹ and the rule is that a corporation can be dissolved only in the manner prescribed by statute.² As the jurisdiction of the superior court to decree dissolution exists only by virtue of the statute,³ either at the suit of an individual or at the suit of the state, the court is limited by the provisions of the statute both as to the conditions under which a dissolution may be brought about, and as to the extent of the judgment which it may make in the exercise of this jurisdiction.⁴ A court cannot treat a corporation as already dissolved because its condition is such

20. *Waechter v. Atchison etc. Ry. Co.*, 10 Cal. App. 70, 101 Pac. 41, discussing section 407 of the Civil Code.

1. *Sullivan v. Triunfo etc. Min. Co.*, 39 Cal. 459; *Henderson v. Palmer Union Oil Co.*, 29 Cal. App. 451, 156 Pac. 65. See *infra*, § 632 et seq., as to voluntary dissolutions; and *infra*, § 634, as to involuntary dissolutions; and *infra*, § 647 et seq., as to quo warranto.

2. *Merrill Lodge v. Ellsworth*, 78 Cal. 166, 2 L. R. A. 841, 20 Pac. 399, 400, holding that the provision of the constitution of a grand lodge that in certain contingencies a subordinate lodge should be deemed extinct and its charter forfeited did not

have the slightest effect upon the legal existence of the subordinate lodge where it was incorporated. See cases cited *infra*.

3. *State Inv. etc. Co. v. Superior Court*, 101 Cal. 135, 35 Pac. 549 (holding that the court has no power to appoint a receiver under section 601 of the Political Code, providing for the dissolution of delinquent insurance corporations); *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121; *French Bank Case*, 53 Cal. 495; *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508.

4. *State Inv. etc. Co. v. San Francisco*, 101 Cal. 135, 35 Pac. 549.

that it will be necessary or proper for it to institute proceedings for dissolution.⁵ And as ownership of property is not essential to the existence of a corporation,⁶ a transfer of all its property does not work a dissolution.⁷ But if a corporation loses or disposes of all its property and fails for a period of two years to elect officers and transact, in regular order, its business, it may be dissolved at the instance of any creditor at the suit of the state, on the information of the attorney general.⁸

In an early decision it was stated that no statute in California conferred upon a private person, either as stockholder or creditor, the right to maintain an action to dissolve a corporation.⁹ Later it was said that if in California a corporation may be dissolved at the suit of a stockholder, the court is justified in refusing such decree upon facts showing only a denial by the secretary of the stockholder's right to inspection,¹⁰ or upon a showing merely of the illegal levying of an assessment,¹¹ or that the corporation is losing money,¹² or that its plan of operation is impracticable.¹³ It should be noted that the legislature may at any time repeal or amend the code pro-

5. *Sullivan v. Triunfo etc. Min. Co.*, 39 Cal. 459.

6. *Sullivan v. Triunfo etc. Min. Co.*, 39 Cal. 459; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *Bradford v. Sunset Land etc. Co.*, 30 Cal. App. 87, 157 Pac. 20. See *supra*, § 572 et seq., as to sale or lease of all property.

7. *South Pasadena v. Pasadena L. etc. Co.*, 152 Cal. 579, 93 Pac. 490; *Kohl v. Lilienthal*, 81 Cal. 378, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689; *Sullivan v. Triunfo etc. Min. Co.*, 39 Cal. 459; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300.

8. Civ. Code, § 358.

9. *French Bank Case*, 53 Cal. 495. See *People v. Bogart*, 45 Cal. 73, holding that the use of an abbreviation of the corporate name is not a usurpation such as will support an action on the part of the state for dissolution.

10. *Burham v. San Francisco Fuse Mfg. Co.*, 76 Cal. 24, 17 Pac. 940.

11. *People v. Rosenstein-Cohn Cigar Co.*, 131 Cal. 153, 63 Pac. 163; *Burham v. San Francisco Fuse Mfg. Co.*, 76 Cal. 24, 17 Pac. 940.

12. *Burham v. San Francisco Fuse Mfg. Co.*, 76 Cal. 24, 17 Pac. 940.

13. *People v. Reclamation Dist. No. 108*, 53 Cal. 346.

visions relating to corporations, and may dissolve all corporations created under such provisions.¹⁴

§ 628. Effect of Dissolution.—Except as otherwise provided by statute, the effect of the dissolution of a corporation is to terminate its existence as a legal entity;¹⁵ whether the dissolution be voluntary,¹⁶ or involuntary.¹⁷ Statutes such as section 400 of the Civil Code do not have the effect of continuing the existence of the corporation as a cestui que trust or otherwise so as to render it capable of defending actions in the corporate name.¹⁸ Where a corporation has ceased to exist, neither it nor its directors can be compelled to continue to do business. The machinery of the corporation is thereupon superseded by that of the trustees in liquidation, who cannot be allowed or required to perform further functions in their capacity as

14. Civ. Code, § 404.

15. Los Angeles etc. Land Co. v. Marr, 62 Cal. Dec. 385, 200 Pac. 1051; Hanson v. Choynski, 180 Cal. 275, 180 Pac. 816; Aalwyn's Law Institute v. Martin, 173 Cal. 21, 159 Pac. 158; Crossman v. Vivienda Water Co., 150 Cal. 575, 89 Pac. 335; Dammann v. Hydraulic Clutch Co., 31 Cal. App. Dec. 212, 187 Pac. 1069; Nezik v. Cole, 43 Cal. App. 130, 184 Pac. 523; Slayden v. O'Dea, 29 Cal. App. Dec. 267, 189 Pac. 1062; Henderson v. Palmer Union Oil Co., 29 Cal. App. 451, 156 Pac. 65. And cases cited *infra*.

It is the termination of the corporate existence that the statute contemplates by the word "dissolution." Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121; Henderson v. Palmer Union Oil Co., 29 Cal. App. 451, 156 Pac. 65.

The rights of creditors as against the corporate property, however, are not affected. See *infra*, § 660.

16. Crossman v. Vivienda Water Co., 150 Cal. 575, 89 Pac. 335; Dammann v. Hydraulic Clutch Co., 31 Cal. App. Dec. 212, 187 Pac. 1069.

17. Los Angeles etc. Land Co. v. Marr, 62 Cal. Dec. 385, 200 Pac. 1051; Rossi v. Claire, 62 Cal. Dec. 140, 199 Pac. 1042; Hanson v. Choynski, 180 Cal. 275, 180 Pac. 816; Aalwyn's Law Institute v. Martin, 173 Cal. 21, 159 Pac. 158; Brandon v. Umpqua etc. Co., 166 Cal. 322, 136 Pac. 62; Newhall v. Western Zinc Min. Co., 164 Cal. 380, 128 Pac. 1040; Kaiser Land etc. Co. v. Curry, 155 Cal. 638, 103 Pac. 341; Slayden v. O'Dea, 29 Cal. App. Dec. 267, 189 Pac. 1062; In re Double Star Brick Co., 210 Fed. 980, see note on this case, 2 Cal. Law Rev., p. 489.

18. Crossman v. Vivienda Water Co., 150 Cal. 575, 89 Pac. 335. See Hanson v. Choynski, 180 Cal. 275, 180 Pac. 816, to the same effect. And see Brandon v. Umpqua etc. Co., 166 Cal. 322, 136 Pac. 62, hold-

a corporation or as directors thereof.¹⁹ Under the provisions of the present license tax act, however, the penalty provided is not that of absolute death, so to speak, but simply of a suspended animation, subject to revival,—the suspension of corporate rights, privileges and powers being substituted for the drastic visitation of the earlier acts.²⁰

§ 629. Judgment Against Dissolved Corporation.—A dissolved corporation is incapable of suing or of being sued as a corporate body or in its corporate name.¹ There being no one who can appear or act for the corporation, all actions pending against it are abated, and any judgment attempted to be given against it is void—a mere nullity,² except as otherwise provided by stat-

ing that § 10a of the tax act of 1905, before amendment, was similar to § 400, Civ. Code, in this respect, although the amendment changed the law as to actions against corporations whose charters were forfeited under the tax act.

19. *Lewis v. Miller & Lux*, 156 Cal. 101, 103 Pac. 496; *Lewis v. Curry*, 156 Cal. 93, 103 Pac. 493 (holding that the corporation cannot by mandamus compel the secretary of state to accept the license tax for a year subsequent to forfeiture).

A director who continues the business of the corporation not only does so in violation of his powers and of the express mandate of the statute, but makes himself criminally liable for his conduct, under the provisions of the tax acts. *Newhall v. Western Zinc Min. Co.*, 164 Cal. 380, 128 Pac. 1040 (under act of 1905). See present license tax act as to penalties, Stats. 1917, p. 371, § 11. See *infra*, § 653 et seq., as to winding up the affairs of a

corporation following its dissolution.

20. *Rossi v. Caire*, 62 Cal. Dec. 140, 199 Pac. 1042.

1. *Crossman v. Vivienda Water Co.*, 150 Cal. 575, 89 Pac. 335; *Slyden v. O'Dea*, 29 Cal. App. Dec. 267, 189 Pac. 1062.

No statute exists in California authorizing the commencement or continuance of an action against a corporation after its legal death. *Crossman v. Vivienda Water Co.*, 150 Cal. 575, 89 Pac. 335 (pointing out that such a rule exists, however, in some of the states). See note in 4 Cal. Law Rev. 409, discussing *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, 155 Pac. 986, and the effect of Civ. Code, § 404.

2. *California Nat. Supply Co. v. Flack*, 183 Cal. 124, 190 Pac. 634; *Hanson v. Choyinski*, 180 Cal. 275, 180 Pac. 816; *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, 155 Pac. 986; *Lowe v. Superior Court*, 165 Cal. 708, 134 Pac. 190

ute.³ Such a void judgment, therefore, is no bar to a subsequent action against the trustees of the corporation.⁴

§ 630. Estoppel to Attack Judgment.—So far as a dissolved corporation itself is concerned, there can be no admission or estoppel, and those sufficiently interested to be allowed to assail the judgment cannot be held bound by any unauthorized appearance or admission attempted to be made on behalf of such a corporation unless estopped by their own acts or omissions.⁵ Notwithstanding the interest of one who seeks to assail a void judgment against such corporation, the way to a successful assault upon it may be barred, if, by his own conduct, he has estopped himself from questioning the judgment.⁶ Thus, where the president of a dissolved corporation defended the action upon its merits on behalf of the corporation, and concealed the fact that it had ceased to exist by virtue of the dissolu-

(see note in case, 2 Cal. Law Rev. 60); *Newhall v. Western Zinc Min. Co.*, 164 Cal. 380, 128 Pac. 1040 (see note in this case, 1 Cal. Law Rev., p. 266); *Crossman v. Vivienda Water Co.*, 150 Cal. 575, 89 Pac. 335.

Although a judgment against a corporation recites due service upon the corporation, or the appearance for it by some authorized person, it may be set aside upon proof that it had been dissolved and had no legal existence for any purpose at the time the action was begun and until the rendition of the judgment: *Livermore v. Ratti*, 150 Cal. 458, 89 Pac. 327.

Even though the corporation could be served with process, still the filing of an answer or demurrer by anyone in its behalf is a nullity. *Slayden v. O'Dea*, 29 Cal. App. Dec. 267, 189 Pac. 1062; *Nezik v. Cole*, 43 Cal.

App. 130, 184 Pac. 523. See *ABATEMENT AND REVIVAL*, vol. 1, p. 17.

3. *Lowe v. Superior Court*, 165 Cal. 708, 134 Pac. 190 (see note on this case, 2 Cal. Law Rev., p. 60); *Crossman v. Vivienda Water Co.*, 150 Cal. 575, 89 Pac. 335. See Code Civ. Proc., § 416, which permits trustees to be sued under the corporate name where forfeiture has occurred in like manner as if no forfeiture had occurred. See *infra*, §§ 662, 663.

4. *California Nat. Supply Co. v. Flack*, 183 Cal. 124, 190 Pac. 634.

5. *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, 155 Pac. 986; *Crossman v. Vivienda Water Co.*, 150 Cal. 575, 89 Pac. 335; *Slayden v. O'Dea*, 29 Cal. App. Dec. 267, 189 Pac. 1062.

6. *Slayden v. O'Dea*, 29 Cal. App. Dec. 267, 189 Pac. 1062, where the attack was made on appeal by motion to dismiss the appeal.

tion or forfeiture of its charter, a fact unknown to the plaintiff, and thereby induced the plaintiff to prosecute his action to final judgment, such person is estopped from moving on behalf of the corporation for any modification of the judgment based on the theory that the corporation was not an existing entity at the time the action was commenced.⁷ It is the manifest duty of a person undertaking to appear on behalf of the defunct corporation to plead the facts in the case so that the plaintiff may call in the trustees and prosecute his action against them. And it is not incumbent upon the plaintiff to plead the facts constituting an estoppel where he is not advised of the nature of the defense.⁸

Voluntary Dissolution.

§ 631. **In General.**—At common law, both municipal and private corporations may be dissolved by a surrender of their franchises.⁹ In California, however, the code prescribes particular methods for dissolving corporations organized under its provisions;¹⁰ and where the statute prescribes a particular method, that method must be pursued.¹¹ But in the absence of any statutory provision de-

7. *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, 155 Pac. 986; *Slayden v. O'Dea*, 29 Cal. App. Dec. 267, 189 Pac. 1062.

8. *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, 155 Pac. 986.

9. *People v. President & Trustees, etc. of California College*, 38 Cal. 166.

10. See Code Civ. Proc., §§ 1227–1233, inclusive; *Dammann v. Hydraulic Clutch Co.*, 31 Cal. App. Dec. 212, 187 Pac. 1069; *Nightingale v. Milwaukee Furniture Co.*, 71 Fed. 234. And see *infra*, § 639, as to dissolution upon expiration of the charter period.

11. *Elliott v. Superior Court*, 168 Cal. 727, 145 Pac. 101; *Kohl v. Lillienthal*, 81 Cal. 378, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689; *People v. President & Trustees, etc., of California College*, 38 Cal. 166 (stating the rule); *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508 (holding that a court of equity cannot accomplish the dissolution of a corporation in an indirect mode where it has no power to do so directly); *In re Balfour & Garrette*, 14 Cal. App. 281, 111 Pac. 615; *In re American Guarantee etc. Co.*, 192 Fed. 405 (construing the California statutes); *Nightingale v. Milwaukee Furniture Co.*, 71 Fed. 234.

fining the mode, it has been held that a corporation aggregate may surrender its franchise by proper proceeding for that purpose.¹² The statutory provisions forbidding a distribution of capital among stockholders also show the intention that a distribution shall not be had under any other circumstances,¹³ except by permission of the corporation commissioner.¹⁴ Where a statute permits dissolution in a certain way, the fact that another and better method exists does not prevent the former method from being used.¹⁵ Statutory provisions for voluntary dissolution are not violative of the constitutional inhibition against the impairment of the obligation of contracts, since the debts of a corporation are not vacated by its dissolution.¹⁶ Under the rule that the laws as to corporations may be altered or amended, there is no merit in the contention that a dissolution must be in accordance with the law existing at the time an objecting stockholder became a stockholder.¹⁷

§ 632. Application or Petition.—The code provides that a corporation may be dissolved by the superior court of the county where its principal place of business is situated, upon its voluntary application for that purpose.¹⁸ Such

12. *People v. President & Trustees, etc., of California College*, 38 Cal. 166 (not laying down, however, any precise rule as to the particular method by which the surrender might be accomplished and rendered effectual). But see *Nightingale v. Milwaukee Furniture Co.*, 71 Fed. 234, holding that there is no authority in a federal court, in the absence of legislation, to dissolve a corporation organized under the laws of California, and to wind up its affairs.

13. *Kohl v. Lilienthal*, 81 Cal. 378, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689. See *supra*, § 512 et seq.

14. Civ. Code, § 309.

15. *Tognazzini v. Jordan*, 165 Cal. 19, Ann. Cas. 1914C, 655, 130 Pac. 879.

16. *Crossman v. Vivienda Water Co.*, 150 Cal. 575, 89 Pac. 335. See as to impairment of the obligation of contracts generally, *CONSTITUTIONAL LAW*, vol. 5, p. 759 et seq.

17. *Matter of College Hill Land Assn.*, 157 Cal. 596, 108 Pac. 681; See, as to right to alter corporation laws, vol. 6, p. 620.

18. Code Civ. Proc., § 1227; *Huey v. Patterson*, 37 Cal. App. 335, 174 Pac. 939.

application can be made only as provided in section 1228 of the Code of Civil Procedure,¹⁹ which prescribes the essentials of a petition for a voluntary dissolution²⁰ as follows:

“The application must be in writing, and must set forth: (1) That at a meeting of the stockholders or members called for that purpose, the dissolution of the corporation was resolved upon by a vote of two-thirds of the members or of the holders of two-thirds of the subscribed capital stock; (2) That all claims and demands against the corporation have been satisfied and discharged.”²¹

In order to accomplish a dissolution it is a legal prerequisite that the debts of the corporation be paid.²² The application for voluntary dissolution must be signed by a majority of the board of trustees, directors or other officers having the management of the affairs of the corporation, and must be verified in the same manner as a complaint in a civil action.²³

§ 633. Notice, Hearing and Decree.—Upon the filing of an application, the clerk must give notice of the same for such time as the court may order, but not less than thirty nor more than fifty days, by publication in some newspaper published in the county; or if none is published therein, then by notices posted in three of the principal

19. See *supra*, § 631, as to the method provided by statute being exclusive.

20. *In re Balfour & Garrette*, 14 Cal. App. 261, 111 Pac. 615.

1. Code Civ. Proc., § 1228, was amended in 1907, changing the former provision that a dissolution might be resolved upon by a “two-thirds vote of all the stockholders or members” to the present provision, the code commissioner saying that the present language substituted for the ambiguous words in the former statute was what was really intended by the legislature.

See *Elliott v. Superior Court*, 168 Cal. 727, 145 Pac. 101, referring to the method of voluntary dissolution.

2. *Dammann v. Hydraulic Clutch Co.*, 31 Cal. App. Dec. 212, 187 Pac. 1069, holding that an opposing stockholder is not entitled to an injunction against the directors and officers of a corporation restraining them from levying and collecting an assessment upon the stock for the purpose of paying corporate debts and thereby enable the corporation to disincorporate.

3. Code Civ. Proc., § 1229.

public places in the county.⁴ The provisions of the code as to notice are not unconstitutional in providing that the only notice required is by publication; and there is no merit in the contention that the opportunity of creditors to recover is thereby restricted or that the obligation of contracts is thereby impaired.⁵ After the time of publication has expired, the court may upon five days' notice to the persons who have filed objections, or without further notice if no objections have been filed, proceed to hear and determine the application, and if the statements therein made are shown to be true, must declare the corporation dissolved. A certified copy of the decree and order of the court must be filed in the office of the secretary of state.⁶ From the judgment, an appeal may be taken as from other judgments of the superior court, the application and proof of publication, the objections (if any), and declaration of dissolution constituting the judgment roll.⁷ Upon an appeal from a judgment denying a dissolution it has been held that a finding that a claim against the corporation has not been satisfied is of itself sufficient to support the judgment.⁸

§ 634. Objections or Opposition.—At any time before the expiration of the time of publication of the notice prescribed by section 1230 of the Code of Civil Procedure, any person may file his objections to the application.⁹ And an answer to said opposition may be filed.¹⁰ Creditors have a right to object to the voluntary dissolution of a corporation. And there is nothing in the provisions of section 400 of the Civil Code which in anywise conflicts with that right. The remedy given by section 400 is cumulative and additional to that afforded by the proceedings authorized

4. Code Civ. Proc., § 1230.
5. *Crossman v. Vivienda Water Co.*, 150 Cal. 575, 89 Pac. 335, per Angellotti, C. J.

6. Code Civ. Proc., § 1232.
7. Code Civ. Proc., § 1233.

8. *In re Balfour & Garrette*, 14 Cal. App. 261, 111 Pac. 615.

9. Code Civ. Proc., § 1231.

10. *In re Balfour & Garrette*, 14 Cal. App. 261, 111 Pac. 615.

by sections 1227 et seq. of the Code of Civil Procedure. The former authorizes the creditor after dissolution to proceed against the trustees, the latter is to preserve to the creditor his right to proceed directly against the corporation. The purpose of an opposition is to show that all claims and demands against the corporation have not been satisfied and discharged, and thus prevent a decree of the court declaring it dissolved. This is the only issue involved and is the only question that can be submitted for trial in this proceeding, aside from those other necessary facts which section 1228 provide must be set forth in the petition.¹¹ A contingent liability constitutes a claim or demand which will interrupt voluntary dissolution under section 1228 of the Code of Civil Procedure.¹² It has been held that one cannot object to dissolution as a stockholder, where it appears that he was not a stockholder at the time of the dissolution.¹³

§ 635. Proof.—Even where a creditor fails to object, it is nevertheless still incumbent upon the corporation to prove the essential averments of the petition for dissolution. On the failure of such proof the court is as powerless to declare a corporation dissolved as it would be if legal objections by some person had been made and sustained by the proofs.¹⁴ The burden of proving all the facts re-

11. *In re Balfour & Garrette*, 14 Cal. App. 261, 111 Pac. 615, commissions of agent for selling land.

12. *In re Balfour & Garrette*, 14 Cal. App. 261, 111 Pac. 615 (holding, however, that it is improper in this proceeding to adjudicate the claims of creditors). See *Talcott Land Co. v. Hershiser*, 184 Cal. 748, 195 Pac. 653, holding that under the last clause of Civ. Code, § 309, directors are released from their liability only in the event the affairs of the corporation have been wound up by consent of all parties

by an agreement, and stating that such conclusion could have as well been reached by a formal application for dissolution after the payment of the debts, and holding also that a contingent liability is an obligation.

13. *Matter of College Hill Land Assn.*, 157 Cal. 596, 108 Pac. 681 (where the stock of the objecting persons had been sold for delinquent and unpaid assessments).

14. *In re Balfour & Garrette*, 14 Cal. App. 261, 111 Pac. 615.

quired to be set forth in the petition is, of course, upon the corporation seeking dissolution.¹⁵ The question as to the truth of the allegations is one solely for the court to which the application is made, and even though such allegations are false in fact, this does not affect the jurisdiction of the court in any degree, but provides merely a ground for a direct attack upon the judgment on the ground of fraud.¹⁶ Before granting a decree for the voluntary dissolution the court must be satisfied that all taxes due the state have been paid, and that all taxes and penalties provided for in the license tax act have been paid.¹⁷ A court is likewise forbidden to enter a decree dissolving a corporation which has not paid its franchise tax.¹⁸

Involuntary Dissolution or Forfeiture.

§ 636. **In General.**—When a corporation fails to perform the duties which it is incorporated to perform and in which the public is interested, or does acts which it is not authorized to do, the state may effect a forfeiture of its franchise and dissolve it by an information in the nature of a quo warranto.¹⁹ Corporate charters are granted upon the implied condition that the privileges conferred will be used for the advantage, or at least not to the disadvantage, of the state; and if this condition is broken, the charter which the state has given is taken back. But the forfeiture of its charter does not involve a forfeiture of the property belonging to the corporation.²⁰ The courts treat a franchise as a trust, and the terms of the charter are the conditions of the trust, and a forfeiture of the

15. *In re Balfour & Garrette*, 14 Cal. App. 261, 111 Pac. 615.

16. *Crossman v. Vivienda Water Co.*, 150 Cal. 575, 89 Pac. 335.

17. Stats. 1917, p. 371, § 13.

18. Pol. Code, § 3668c.

19. *People v. Dashaway Assn.*, 84 Cal. 114, 12 L. R. A. 117, 24 Pac.

277. See QUO WARRANTO.

See note 9 A. L. R. 106, as to criminal prosecution as a condition of a civil action or proceeding for the cancellation of a corporate charter for violation of law.

20. *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

charter takes place when one or more of the essential conditions of the trust are violated.¹ The power of the legislature to prescribe conditions as well as its right to revoke a corporate charter as a penalty for noncompliance with such conditions, is unquestioned and, speaking generally, it may exercise its power in any manner it may choose. Accordingly, the legislature may exercise this power directly by itself, or it may declare a dissolution as a result which shall follow a judicial investigation.² If the corporation must suffer an involuntary dissolution, the state and not a private party should institute proceedings with that object in view.³

§ 637. Grounds and Classes of Forfeiture in General.—Cases of forfeiture are said to be divided into two great classes,—first, those of perversion, as where a corporation does an act inconsistent with the nature, or destructive of the purposes of the grant; and secondly, those involving a usurpation or the exercise of powers that the corporation has no right to exercise.⁴ To these a third ground of forfeiture may very properly be added, for a corporation may lose its franchise not only for the positive acts of perversion or usurpation, but for a nonuser thereof,⁵ that is, for failure or refusal to act in certain essential particulars,—as, for example, where, within the statutory

1. *People v. Rosenstein-Cohn Cigar Co.*, 131 Cal. 153, 63 Pac. 163; *People v. Dashaway Assn.*, 84 Cal. 114, 12 L. R. A. 117, 24 Pac. 277.

It is a tacit condition of the grant of incorporation that the grantees shall act up to the end and design for which they are incorporated. *People v. Stanford*, 77 Cal. 360, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

2. *State Inv. etc. Co. v. San Francisco*, 101 Cal. 135, 35 Pac. 549.

3. *Elliott v. Superior Court*, 163 Cal. 727, 145 Pac. 101.

4. *People v. Rosenstein-Cohn Cigar Co.*, 131 Cal. 153, 63 Pac. 163; *People v. Dashaway Assn.*, 84 Cal. 114, 12 L. R. A. 117, 24 Pac. 277 (where, however, no forfeiture was declared).

5. *People v. Stanford*, 77 Cal. 360, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693, holding that a corporation may lose its franchise by a misuser or nonuser.

period prescribed, it fails to effect an organization,⁶ as where it fails to comply with the license tax acts and does not take advantage of legislation permitting a revivor upon the conditions prescribed by the statute.⁷ An example of misuser of its franchise is where the corporation employs the right of eminent domain by taking private property for private use. In such case the state may interpose by the attorney general to correct the abuse.⁸ In a case involving a perversion of the purposes of a corporation, the rule is that unless such perversion amounts to an injury to the public, it will not work a forfeiture. But in cases of usurpation, the question of forfeiture is not dependent upon any injury to the public.⁹

Ordinarily, of course, the state is not expected to institute a proceeding in quo warranto to deprive a corporation of its charter and procure its dissolution for a trivial defect, and it must be presumed, it has been said, that the attorney general would not have instituted an inquiry if he were not convinced that there were reasons sufficient to justify it. Where the action is instituted and the statute authorizes it, if the statute has not been complied with in some respect, even though the corporation acts in good faith and is a de facto corporation, the complaint must be held to state a cause of action.¹⁰

§ 638. Modes of Effecting Forfeitures—Self-executing Statutes.—Acts sufficient to cause a forfeiture of a corporate franchise do not per se produce a forfeiture. The corporation continues to exist until the state, by proper proceedings in a proper court, procures and enforces an adjudication.¹¹ Whether a corporation has violated its

6. See Civ. Code, § 358. See infra, § 645. See supra, § 56, as to organization after incorporation.

7. See infra, §§ 640, 641.

8. *People v. Pittsburgh R. Co.*, 53 Cal. 694. See EMINENT DOMAIN.

9. *People v. Rosenstein-Cohn Cigar Co.*, 131 Cal. 153, 63 Pac. 163; *Peo-*

ple v. Dashaway Assn., 84 Cal. 114, 12 L. R. A. 117, 24 Pac. 277.

10. *People v. Montecito Water Co.*, 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236.

11. *Robinson v. Blood*, 151 Cal. 504, 91 Pac. 258; *City of San Pedro v. Southern Pac. R. Co.*, 101 Cal.

charter by misuse of its franchise by usurpation of powers is a question between the corporation and the state alone.¹² Hence, it is a rule that a cause of forfeiture can be taken advantage of by the state alone and in proceedings instituted for that purpose.¹³ Although at common law a forfeiture does not operate to divest the title of the owner until, by a proper judgment in a suit instituted for that purpose, the rights of the state have been determined, nevertheless the cases agree that a statute prescribing a forfeiture may be self-executing;¹⁴ and the courts will declare a forfeiture to be self-executing where the intent of the legislature is clear.¹⁵ But a statute will be construed against such an ipso facto forfeiture, if the language used is fairly susceptible of such interpretation.¹⁶ Since a judgment declaring and enforcing a forfeiture does nothing more than work a forfeiture, where the breach of condition under the statute ipso facto has such effect, there is no office for a judgment to perform, except perhaps to supply conclusive evidence of the fact.¹⁷

333, 35 Pac. 993; *People v. Los Angeles etc. Co.*, 91 Cal. 338, 27 Pac. 673; *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121; *Hatfield v. People's Water Co.*, 25 Cal. App. 502, 144 Pac. 300.

12. *Southern Pac. R. Co. v. Orton*, 32 Fed. 457.

13. *Spring Valley Water Works v. San Francisco*, 22 Cal. 434; *Mokelumne Hill etc. Co. v. Woodbury*, 14 Cal. 424, 73 Am. Dec. 658; *Hatfield v. People's Water Co.*, 25 Cal. App. 502, 144 Pac. 300; *Martin v. Zellerbach*, 1 Cal. Unrep. 335. See *supra*, § 70, as to attack upon de facto corporations.

14. *Kaiser Land & F. Co. v. Curry*, 155 Cal. 638, 103 Pac. 341; *Oakland*

R. Co. v. Oakland etc. Co., 45 Cal. 365, 13 Am. Rep. 181.

15. *Kaiser Land etc. Co. v. Curry*, 155 Cal. 638, 103 Pac. 341 (under act of 1905). See *infra*, § 640.

16. *Kaiser Land etc. Co. v. Curry*, 155 Cal. 638, 103 Pac. 341.

17. *Kaiser Land etc. Co. v. Curry*, 155 Cal. 638, 103 Pac. 341; *Los Angeles Ry. Co. v. Los Angeles*, 152 Cal. 242, 125 Am. St. Rep. 54, 15 L. R. A. (N. S.) 1269, 92 Pac. 490 (under Civ. Code, § 502, requiring work to be commenced within one year). See, also, *People v. Sutter St. Ry. Co.*, 117 Cal. 604, 49 Pac. 736; *People v. Los Angeles R. Co.*, 91 Cal. 338, 27 Pac. 673; *Santa Rosa etc. Co. v. Central etc. Co.*, 4 Cal. Unrep. 950, 38 Pac. 986 (cases under Civ. Code, § 502).

§ 639. Expiration of Charter.—A corporation is dissolved at the expiration of its term of corporate existence as declared in the articles of incorporation.¹⁸ If, however, after the period of existence has expired, instead of winding up its affairs, the corporation continues to transact business in ordinary course, it may become a corporation de facto.¹⁹ This method of dissolution by “expiration of its charter” or by operation of law is one class of dissolution for which no provision was made in the codes,²⁰ although it must necessarily be implied from the limitation of the period of existence of corporations.¹

§ 640. Forfeiture for Noncompliance With License Tax Act.—The penalty imposed upon corporations under the former license tax acts for failure to pay the tax² was exceedingly severe, involving a forfeiture of the charter, so that the corporation ceased to exist,³ as in the case of a

18. *Tognazzini v. Jordan*, 165 Cal. 19, Ann. Cas. 1914C, 655, 130 Pac. 879 (see note on this case, 1 Cal. Law Rev., p. 373); *Kohl v. Lillienthal*, 81 Cal. 378, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689; *Clark v. San Francisco*, 53 Cal. 306; *Nozik v. Cole*, 43 Cal. App. 130, 184 Pac. 523; *Porter v. Anglo & London etc. Bank*, 36 Cal. App. 191, 171 Pac. 845 (it ceases to exist at midnight of the last day of the period stipulated); *Henderson v. Palmer Union Oil Co.* 29 Cal. App. 451, 156 Pac. 65.

19. *First Nat. Bank v. Pennig*, 28 Cal. App. 267, 151 Pac. 1153. See as to de facto corporations generally, supra, §§ 65-72.

20. *Henderson v. Palmer Union Oil Co.*, 29 Cal. App. 451, 156 Pac. 65, holding that the provisions of § 565, Code Civ. Proc., as to appointment of receivers upon dissolution are applicable to a dissolution by ex-

piration of charter. See Civ. Code, § 402, added in 1921, where a dissolution by expiration of the term of existence was expressly mentioned as being included within the term “dissolution.”

1. See supra, § 61.

2. Stats. 1905, p. 493; Stats. 1915, p. 422. See *Hanson v. Choynski*, 180 Cal. 275, 180 Pac. 816, holding that Civ. Code, § 400, applies to corporations dissolved for nonpayment of license tax as well as to corporations dissolved under the provisions of the codes. And see *Carpenter v. Bradford*, 23 Cal. App. 560, 138 Pac. 946, as to the status of a foreign corporation under the license act of 1905.

3. *Hanson v. Choynski*, 180 Cal. 275, 180 Pac. 816 (decision by Wilbur, J., considering and construing Civ. Code, § 400, in connection with forfeitures under the statutes); *Rossi v. Caire*, 62 Cal. Dec. 140, 199

forfeiture for cause by judicial decree.⁴ Under the present license tax act, however, the penalty for the nonpayment imposed upon a delinquent corporation is not absolute dissolution, but it is analogous rather to a condition of suspended animation.⁵ And so it has been said that, although, pending such time, the corporation is not a "going concern," it is nevertheless a living legal entity.⁶ Persons attempting to exercise powers forbidden under the statute are guilty of a misdemeanor and all contracts made in violation of its provisions are declared to be void.⁷ Its powers are declared incapable of being exercised for any purpose or in any manner except to execute and deliver deeds to real property in pursuance of contracts therefor made prior to such time, and to defend in court any action brought against such corporation.^{7a} During the time its taxes are unpaid the corporation is shorn of all rights, except those expressly reserved by the statutes. Thus, the right to institute or maintain actions is not included in this reservation, but is denied to corporations

Pac. 1042 (decision by Angellotti, C. J., and involving the forfeiture considered on the first appeal—see S. C., citation, *infra*); *Rossi v. Caire*, 174 Cal. 74, 161 Pac. 1161 (decision by Shaw, J., holding that under the statute of 1905 the forfeiture takes effect instantly upon the failure to pay the license tax within the time allowed). See *supra*, § 628, as to effect of dissolution.

4. *Rossi v. Caire*, 62 Cal. Dec. 140, 199 Pac. 1042.

5. Stats. 1917, p. 371, "Corporation License Act," and see Pol. Code, § 3669d, as amended (Stats. 1921, p. 768); *Rossi v. Caire*, 62 Cal. Dec. 140, 199 Pac. 1042. See, also, *Ransome-Crummey Co. v. Superior Court*, 63 Cal. Dec. 346, quoting from *Rossi v. Caire*, *supra*.

The provisions of the present law

are that the powers of the delinquent corporation are incapable of being exercised except to execute deeds of real estate in pursuance of prior contracts and to defend in court any action brought against such corporation. Stats. 1917, p. 371, § 11.

6. See *Preston v. Superior Court*, 33 Cal. App. Dec. 534, rehearing in supreme court, 184 Cal. 658, 195 Pac. 916.

It does not cease to exist during the period of suspended animation, hence, its right to maintain an action is not governed by rules relating to dissolved corporations. *Ransome-Crummey Co. v. Superior Court*, 63 Cal. Dec. 346.

7. Stats. 1917, p. 371, § 11.

7a. Stats. 1917, p. 371, § 11. Cf. Pol. Code, § 3669c, subd. 2 (franchise tax).

as a part of the penalty. That it was not intended that acts during the time of suspension should have any effect whatever is shown by the fact that the performance of any such acts by any person on behalf of the corporation is made a misdemeanor.^{7b} But a corporation may exist de facto even after its period of existence has expired,^{7c} and it has been held that a corporation which continues to do business after its forfeiture, as a de facto corporation, is liable upon contracts made in good faith by its purported officers during the period of forfeiture in the course of its business.^{7d} And where the president of a corporation who owned all of its stock carried on its business as an individual in the corporate name after the forfeiture, a contract made by him is a valid contract which may be enforced by an assignee.^{7e}

From the fact that the act in express terms provides for a "forfeiture" of the right of a foreign corporation to transact intrastate business within the state and speaks only of suspending the rights and privileges of domestic corporations, the conclusion is said to be irresistible that by this latest enactment the legislature ex industria intended to make a distinction between the forfeiture of corporate rights and a mere suspension thereof. That this is so is further made manifest by section 13 of the act which expressly declares that "no court shall have jurisdiction to make or enter any decree of dissolution of any domestic corporation until all taxes and penalties due under this act shall have been paid."⁸

7b. *Ransome-Crummey Co. v. Superior Court*, 63 Cal. Dec. 346, where franchise tax was also unpaid, and where it was held that the receipt of a notice of entry of judgment, being an exercise of a corporate power, the corporation could not receive it nor could any person lawfully receive it in the name of the corporation, nor could notice of motion for new trial be given on behalf of the corporation.

7c. See supra, § 639.

7d. *Van Landingham v. United Tuna Packers*, 36 Cal. App. Dec. 992, opinion of district court of appeal (rehearing granted in supreme court), where after revivor the corporation repudiated the contract.

7e. *Alexson v. Steward*, 36 Cal. App. Dec. 731, 203 Pac. 423.

8. *Ransome-Crummey Co. v. Superior Court*, 63 Cal. Dec. 346; *Preston v. Superior Court*, 33 Cal.

By a recent enactment, there must be filed at the time of the payment of the license tax a certificate of the secretary of the corporation setting forth the names and addresses of the acting directors and managers of the corporation at the time of payment of the tax. For failure to file such certificate the corporation is "suspended" or its franchise is "forfeited" as the case may be in accordance with the provisions of the tax act.⁹

§ 641. Forfeiture for Failure to Pay Franchise Tax.—If the taxes, penalties and costs provided for in the constitution and which are more particularly provided for by the sections of the Political Code, enacted to carry the constitutional provisions into effect, are not paid on or before the hour and the day fixed, the corporate powers, rights and privileges of a delinquent domestic corporation are suspended and the right of delinquent foreign corporations to do intrastate business in California is forfeited.¹⁰ As in the case of forfeiture for nonpayment of license tax, provision is made for a revivor of the rights of delinquent corporations upon an application to that end, and the payment of the prescribed taxes and penalties.¹¹

App. Dec. 534 (rehearing in supreme court, 184 Cal. 658, 195 Pac. 916), per Finlayson, J.

Although a corporation is not dissolved by suspension of its rights and powers, it would seem that the legislature had in mind the winding up of its affairs and that directors should become trustees for stockholders as under the earlier acts. See provisions of §§ 411 and 416 of Code Civ. Proc., as to service of summons upon the trustees, and provisions of § 400, Civ. Code.

9. License Tax Act, § 3a, added by Stats. 1921, p. 1424. The secretary of state has advised corpora-

tions that "because of inconsistencies in the law which make it impossible of enforcement," "no corporation will be penalized for not filing such document."

10. Const., Art. XIII, § 14; and see Pol. Code, §§ 3664a, 3664b, 3664c, 3664d, as to taxes on various corporations and their franchises; and Pol. Code, § 3669c, as to suspension of corporate powers on failure to pay taxes. See *Ransome-Crummey Co. v. Superior Court*, 63 Cal. Dec. 346, where corporation had failed to pay franchise tax as well as license tax.

11. See *infra*, §§ 643, 644.

§ 642. Pleading and Proof of Forfeiture.—Since the statutory acts required to be performed in conjunction with a failure to pay the license tax, before a forfeiture of the corporate franchise occurs, must become matters of public record, the existence of such facts cannot be put in issue by a denial based solely upon information and belief.¹² The forfeiture must be shown by competent proof.¹³ And it has been held that the certificate of the secretary of state is incompetent as evidence of a forfeiture in the absence of any statute declaring it to be such evidence, and where no showing was made as to any proclamation of forfeiture as an essential step to that end.¹⁴ For the same reason, the testimony of a deputy of the secretary of state that he has made due search of the records for the purpose and found that no tax has been paid by the corporation for the particular year is incompetent for the purpose of showing a forfeiture.¹⁵ Under the present license act, however, certified copies of the list of corporations failing to pay the tax made by the secretary of state and transmitted to the county clerks and recorders and filed in their respective offices, or any copy thereof certified by the secretary of state are to be received in evidence in lieu of the original record on file with the secretary of state, as prima facie evidence of the truth of all statements contained therein in respect to the tax.¹⁶

§ 643. Revivor in General.—The license tax act provides that the corporate powers and privileges suspended or forfeited under its provisions may be revived and restored upon application therefor by any stockholder or creditor of the corporation and upon payment of all accrued taxes and penalties under the license act and also under the provisions of the constitution, article XIII, section 14, sub-

12. *William Wilson Co. v. Trainor*,
27 Cal. App. 43, 148 Pac. 954.

13. See cases cited *infra*.

14. *Kehrlein-Swinerton Const. Co.*

v. Rapken, 30 Cal. App. 11, 156
Pac. 972.

15. *Conlin v. Southern Pac. Co.*,
40 Cal. App. 733, 182 Pac. 67.

16. *Stats. 1917*, p. 371, § 10.

division (d).¹⁷ In case the revivor is not made during the year in which suspension or forfeiture occurred, the corporation must pay in addition a sum equal to the tax imposed or that should have been paid under the act during the year in which suspension or forfeiture occurred for each year succeeding said year in which suspension or forfeiture occurred. And in addition there must be paid a sum equal to the tax last assessed under the constitutional provision for each such year succeeding such forfeiture or suspension.¹⁸ The controller upon such payment issues a certificate evidencing the payment and restoration, which certificate is to be recorded in the office of the county recorder to release the corporate property from the lien of the tax, and the county clerk is also required to keep a record of corporations so revived.¹⁹ Provision is made also for revivor of corporations suffering suspension or forfeiture for failure to pay the franchise tax levied under the constitutional provision,²⁰ the application being made by any stockholder or creditor or by the majority of the surviving trustees or directors filed with the state controller.¹

Effect of Revivor.—The revival by payment of the tax authorized by law is intended to fully reinstate the corporation with all its powers, rights, duties and obligations.² The revived corporation is the same corporation as

17. Stats. 1917, p. 371, § 12, as amended in Stats. 1921, p. 606.

18. Stats. 1917, p. 371, § 12, as amended in 1921. Under the former provisions, a franchise tax was not assessed to the suspended or forfeited corporation, hence it was not necessary to pay the tax for succeeding years intervening between the time of suspension or forfeiture and the time of revivor.

19. Stats. 1917, p. 371, § 12. Amended Stats. 1921, p. 606.

20. Pol. Code, § 3669c. Compare with § 12 of the License Act as to

the amount of penalties to be paid upon revivor.

1. Pol. Code, § 3669d, as amended in 1921.

2. *Rossi v. Caire*, 62 Cal. Dec. 140, 199 Pac. 1042 (the rehabilitated corporation should proceed exactly as if no forfeiture had occurred); *Talcott Land Co. v. Hershiser*, 184 Cal. 748, 195 Pac. 653 (under the act of 1915, p. 422, permitting restoration of corporations whose charters were forfeited under the provisions of that act). See *Fites v. Marsh*, 171 Cal. 487, 153 Pac. 926

the one whose charter has been forfeited under the act. Thus, it is held that the liability of directors of the old concern for distributing its capital stock may be enforced in favor of stockholders of the reinstated corporation.^{2a} But the subsequent revival of corporate rights, powers and privileges does not have the effect of validating the acts attempted during the period of suspension. The revival is not made retroactive by the statute. The suspension is a disability imposed as a penalty and it would tend to deprive the statute of its force and encourage corporations in default to postpone payment of taxes if it were held that by subsequent payment all the benefits of attempted acts could be secured.^{2b}

Limitation of actions against trustees.—An action to set aside transactions of a majority of the trustees of any corporation dissolved by operation of law, including a revivor of the corporation, must be brought within six months or it is barred.³ This provision did not, it has been said, destroy any right of action existing at the time of its adoption, which would be its effect if applied in any other way than as requiring an action to be instituted within a reasonable time from the taking effect of such provision, as to rights of action which had already accrued.⁴

(where stock had been sold between individuals after a forfeiture of the corporate charter, but where it was assumed that fraud was not contemplated but that the vendor proposed to revivify the corporation as could easily and legally be done by payment of the delinquent license tax). And *Cordes v. Hammond*, 36 Cal. App. Dec. 589, 203 Pac. 131 (where a corporation had forfeited its charter for nonpayment of the license tax, but where, prior to commencement of the action, it had been, through the method permitted by statute, restored to its former corporate status).

2a. *Talcott Land Co. v. Hershiser*, 184 Cal. 748, 195 Pac. 653.

2b. *Ransome-Crummey Co. v. Superior Court*, 63 Cal. Dec. 346. If, however, the corporation has been carrying on business as a corporation de facto, it may be liable. See supra, § 640.

3. Code Civ. Proc., § 341, subd. 3, as amended in 1917.

4. *Rossi v. Caire*, 62 Cal. Dec. 140, 199 Pac. 1042 (holding that an action just four years after attempted revivor and a month after taking effect of the provision of § 341 of the Code of Civil Procedure, was not barred).

§ 644. Revivor of Rights Forfeited Under Former Acts.

The present license tax act provides that corporations which suffered forfeiture for failure to pay taxes imposed by act of 1905, as amended, or by the act of 1915, may be relieved of the forfeiture or restored to their right to do business upon paying the license tax or penalty prescribed by the act under which the forfeiture occurred. Application for restoration may be made by any stockholder or creditor or by a majority of the surviving trustees or directors.⁵ Provision is also made for revivor of rights forfeited under former statutes relating to the franchise tax.⁶ Similar provisions as to forfeitures which had occurred under former statutes were made in the license act of 1915 and in the act repealing the act of 1905.⁷ It has been said to appear that the idea of the framers of these loosely drawn relief amendments was that the statutory trustees should represent the former corporation in the matter of revival and that the assent of this body alone, and the payment by it of the tax and penalties would be sufficient to effect a rehabilitation of the corporation.⁸ The original license tax act⁹ contained no provision for revivor where a charter was forfeited for failure to pay the tax, but at each succeeding session of the legislature the act was amended to provide for such revivor as to corporations which had theretofore failed to pay.¹⁰ The provisions were designed simply to relieve corporations which had failed to pay the charges for certain specified years from the effect of a forfeiture that had already occurred,¹¹ and did not provide for a revivor of forfeitures under the then

5. Stats. 1917, p. 371, § 14, as amended Stats. 1921, p. 766. And see supra, § 643.

6. Pol. Code, § 3669d, as amended by Stats. 1921, p. 768. And see supra, § 643.

7. Stats. 1915, p. 422; Stats. 1913, pp. 513, 680, repealing act of 1905.

8. Rossi v. Caire, 62 Cal. Dec. 140, 199 Pac. 1042.

9. Stats. 1905, p. 493.

10. Stats. 1906, Extra Sess., p. 22; Stats. 1907, p. 745; Stats. 1909, p. 454; Stats. 1911, p. 1094; Stats. 1913, pp. 513, 680, when act was repealed.

11. Kaiser Land etc. Co. v. Curry, 155 Cal. 638, 103 Pac. 341.

present act.¹² The constitutional provision that the legislature shall not extend any franchise or charter, nor remit the forfeiture of any franchise or charter of any quasi-public corporation existing under the laws of the state,¹³ was amended in 1908 so as to allow the legislature to provide for the remission of a forfeiture of the franchise and charter of any except quasi-public corporations, if it saw fit so to do.¹⁴

It is plain that upon the death of a corporation under the earlier license provisions (without provisions of law for rehabilitation) the corporation could no longer have any interest in the company property and stockholders became immediately vested with a right to have its affairs settled by the trustees.¹⁵ A rehabilitation, therefore, under the provisions of a later act, cannot, as against the will of former stockholders, affect their rights so vested.¹⁶ And the proviso in the acts providing for rehabilitation to the effect that such rehabilitation shall be without prejudice to any action, defense or right which accrued by reason of the original forfeiture, cannot be so construed as to impair such right.¹⁷

§ 645. Failure to Effect Organization — Cessation of Business.—If a corporation does not “organize” and commence the transaction of business or the construction of

12. *Rossi v. Caire*, 62 Cal. Dec. 140, 199 Pac. 1042.

13. Const., Art. XII, § 7.

14. *Rossi v. Caire*, 62 Cal. Dec. 140, 199 Pac. 1042.

15. *Rossi v. Caire*, 62 Cal. Dec. 140, 199 Pac. 1042. See *Fratessa v. Morrissey*, 39 Cal. App. 131, 178 Pac. 303, where after passage of the act enabling defunct corporations to have their charters revived, the corporation was rehabilitated by other persons than the trustees, but where, under the facts, the court restrained the sale of the property by the

former trustees for the ostensible purpose of winding up the corporate affairs.

16. *Rossi v. Caire*, 62 Cal. Dec. 140, 199 Pac. 1042. See *Rossi v. Caire*, 174 Cal. 74, 161 Pac. 1161, not deciding whether it was within the power of the trustees to relieve the corporation from the forfeiture and reinstate it as a corporation, without consent of all the stockholders.

17. *Rossi v. Caire*, 62 Cal. Dec. 140, 199 Pac. 1042.

its works within one year from the date of incorporation, or if, after its organization and commencement of business, it loses or disposes of all its property and fails for a period of two years to elect officers and transact in regular order, the business of the corporation, then its corporate powers cease, and it may be dissolved at the instance of any creditor, at the suit of the state, on the information of the attorney general. The resumption of business in good faith prior to commencement of proceedings, however, is a bar to the suit.¹⁸ And where the evidence, though slight, tends to show an organization and the transaction of business within the time prescribed and tends also to show good faith, there can be no forfeiture.¹⁹ A corporation once formed and organized according to law does not become dissolved or cease to exist merely because of a failure to transact business. Its term of life is prescribed by law and only at the instance of the state can its existence in the meantime be questioned,²⁰ even though it has ceased to perform corporate functions.¹ Where a corporation is engaged in litigation affecting its whole property, although this is the only business it transacts, it cannot be said to be failing to transact its business in regular order.²

§ 646. Defective Incorporation.—A common ground of forfeiture is that of defective compliance with the laws of

18. Civ. Code, § 358.

The provision of the statute that due incorporation of a company and its right to exercise corporate powers shall not be inquired into by a private party evidently refers to a corporation which has not failed to "organize" and which does exercise corporate powers. *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368.

19. *People v. Rosenstein-Cohn Cigar Co.*, 131 Cal. 153, 63 Pac. 163; *People v. Stockton etc. R. Co.*, 45 Cal. 306, 13 Am. Rep. 178 (holding

that where a corporation purchases materials within six months and expends within the year a considerable amount of money in the prosecution of its enterprise, it is duly organized and entitled to exercise corporate powers).

20. *Robinson v. Blood*, 151 Cal. 504, 91 Pac. 258; *San Diego Gas Co. v. Frame*, 137 Cal. 441, 70 Pac. 295.

1. *McCann v. Children's Home Society*, 176 Cal. 359, 168 Pac. 355.

2. *Robinson v. Blood*, 151 Cal. 504, 91 Pac. 258.

incorporation, such that the corporation failed to comply substantially with the statute. Exercise of corporate powers after failure to comply with the conditions of the law upon which the incorporation is permitted is deemed in itself a usurpation of such powers.³ But the due incorporation of any company claiming in good faith to be a corporation under the law, and doing business as such, or its right to exercise corporate powers, cannot be inquired into collaterally in any private suit; such inquiry may be had at the suit of the state on information of the attorney general, provided, however, if the corporation has been doing business for ten consecutive years as such, then no inquiry can be made by the state or by any person whatsoever.⁴ If, in a proceeding to forfeit a charter, it is found that the company was never legally incorporated, proceedings should be had by which the affairs of the de facto corporation may be wound up and settled by the trustees, and the surplus, if any, divided among the stockholders.⁵

Quo Warranto Proceedings.

§ 647. In General.—The Code of Civil Procedure provides as follows:

“An action may be brought by the attorney general, in the name of the people of this state, upon his own information, or upon a complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise, or against any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state. And the attorney general must bring the action, whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held or exercised by

3. See supra, §§ 65 et seq., as to de facto corporations. Pac. 495. See infra, § 653, as to winding up the affairs of corporations.

4. Civ. Code, § 358.

5. *People v. Flint*, 64 Cal. 49, 28

any person or when he is directed to do so by the governor."⁶

It has been held that this section provides the exclusive remedy of the state to inquire into the right of a corporation to exist and exercise its corporate powers.⁷ Originally the section contained no express provision concerning corporations, the mind of the legislature apparently being occupied with a consideration of the usurpation of public office. Under a provision that a "person" usurping any franchise may be excluded therefrom, however, it was held that a corporation might be dissolved, but only by a judgment excluding it from exercising the franchise of being a corporation; hence, to reach that result there must be an averment of the usurpation of the franchise of being a corporation.⁸

Section 358 of the Civil Code, of course, permits an inquiry into the due incorporation or the right to exercise corporate powers, at the suit of the state, on information of the attorney general, or the dissolution of a corporation failing to organize and commence business or ceasing to transact business as therein provided, at the instance of any creditor, at the suit of the state, on the information of the attorney general.⁹

§ 648. Writs.—The writ of scire facias, which originally was the more usual proceeding where a legally existing corporation had abused powers and franchises, is abolished.¹⁰ In general, the remedy now afforded for an abuse of corporate powers and franchises is an information in

6. Code Civ. Proc., § 803.

7. *Jaques v. Board of Supervisors*, 24 Cal. App. 381, 141 Pac. 404.

8. *Yore v. Superior Court*, 108 Cal. 431, 41 Pac. 477.

Code Civ. Proc., § 803, was amended in 1907 by adding the specific clause concerning corporations.

9. See *supra*, § 646.

10. Code Civ. Proc., § 802. See *SCIRE FACIAS*, as to the writ generally.

The writ was ordinarily used in such cases, but it would not lie in the case of a mere de facto corporation.

the nature of quo warranto.¹¹ The information in the nature of quo warranto, which has succeeded the writ of that name, was originally a criminal proceeding in form to punish the usurpation of the franchise by a fine as well as to seize the franchise. This information has in process of time become, in substance, a civil proceeding to try the mere right to the franchise. The mode of proceeding under the several writs has not been very uniform in modern times, but it has been said that it makes little difference as to whether the constitution, authorizing the superior courts and their judges to issue writs of quo warranto, as well as the amendment of section 76 of the Code of Civil Procedure to the same effect, had the effect of repealing sections 802 to 810 of the Code of Civil Procedure, for in any event the power under the writ of quo warranto is quite as broad as under the statute itself.¹²

§ 649. Parties Defendant.—The question of proper parties defendant in an action in the nature of quo warranto depends on whether the proceeding is upon the theory that there is no corporation or that a corporation exists. By making the corporation a party, its corporate character is admitted and it cannot be questioned that it is a person which can be sued.¹³ If it is intended to draw in question the franchise of the corporation, the proceeding must be against the individuals who usurp it.¹⁴ But if it is claimed

11. *People v. Dashaway Assn.*, 84 Cal. 114, 12 L. R. A. 117, 24 Pac. 277; *People v. Stanford*, 77 Cal. 360, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693, not deciding whether the attorney general could institute an action on behalf of the people in the absence of an authorizing statute. See **QUO WARRANTO**.

See note 1 A. L. R. 197, as to right of corporation to act as relator in quo warranto.

12. *People v. Dashaway Assn.*, 84

Cal. 114, 12 L. R. A. 117, 24 Pac. 277.

13. *People v. Montecito Water Co.*, 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236; *People v. Stanford*, 77 Cal. 360, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

14. *People v. Stanford*, 77 Cal. 360, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693; *People v. City of Riverside*, 66 Cal. 288, 5 Pac. 350; *People v. Chambers*, 42 Cal. 201. See *People v. Stockton etc. R. Co.*, 45 Cal.

that the corporation is usurping privileges and powers not belonging to it, the corporation is a proper and the only proper party defendant.¹⁵ It has been held that where there is a corporation de facto, which it is claimed did not become a corporation de jure because of noncompliance with the conditions precedent to rightful incorporation, the corporation is a legal entity and is not only a proper but a necessary party to the proceeding.¹⁶

§ 650. Pleading.—It was a peculiarity of both quo warranto and the information in the nature of quo warranto that the ordinary rules of pleading were reversed and the state was bound to show nothing. In other words, the defendant was required to show his right to the franchise in question; and if he failed to show authority, judgment went against him. It is now the practice, however, for the information to set forth the facts relied upon to show the intrusion, misuser or nonuser complained of.¹⁷ Authorities to the effect that the people are not bound to prove anything where the defendants attempt to justify their right or disclaim, are, it has been said, applicable

306, 13 Am. Rep. 178, where the question was raised but not decided.

15. *People v. Stanford*, 77 Cal. 360, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

16. *People v. Montecito etc. Co.*, 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236; *People v. Flint*, 64 Cal. 49, 28 Pac. 495. See *People v. Gunn*, 85 Cal. 238, 24 Pac. 718, and *People v. City of Riverside*, 66 Cal. 288, 5 Pac. 350, cases involving municipal corporations.

17. *People v. Dashaway Assn.*, 84 Cal. 114, 12 L. R. A. 117, 24 Pac. 277; *People v. San Francisco etc. Exch.*, 4 Cal. Unrep. 85, 33 Pac. 785, where it was held that a complaint is insufficient unless facts are alleged showing that the defendant

was not operating within its constitution and by-laws or that while its constitution and by-laws on their face appear to be legal, the business done demonstrates their illegality.

Where a corporation is organized under general laws, as in California, it is sufficient to aver the existence and due organization of the corporation under the general laws. But where it is chartered by special act, it has been held necessary that the information for misuser or nonuser refer to the act by which the corporation was chartered in order that the court might determine what things it was authorized to do or to omit. *People v. Stanford*, 77 Cal. 360, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

only where it is admitted that they are exercising the franchises, and the question is as to their right to exercise them; but such authorities are not applicable where the issue presented is not one of right but whether the franchise is being exercised.¹⁸ Where it is admitted that the defendant claims and is exercising the disputed franchise, the burden is on it to show by what warrant or authority it claims and exercises the franchise.¹⁹ But where individual defendants specifically deny that they are making such claim, their denial that they are exercising the rights and privileges alleged is a complete defense to the action as to them.²⁰ In an action against individuals charging that they are wrongfully claiming to act as a corporation, it is sufficient to allege in general terms that there never was such a corporation, for this covers the whole ground and is an allegation of fact.¹ But where the existence of the corporation is expressly averred or admitted, it is not sufficient to allege that it has ceased to exist. The facts showing that its existence has terminated must be set forth.² The pleader may allege merely that defendant is claiming and exercising a franchise, and aver that it is without right, or may aver the existence of a franchise at some time and show that it has terminated or been forfeited. In the latter case, the facts showing that it has

18. *People v. Stanford*, 77 Cal. 360, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

19. *People v. Volcano etc. Co.*, 100 Cal. 87, 34 Pac. 522; *People v. Lowden*, 2 Cal. Unrep. 537, 8 Pac. 66.

20. *People v. Stanford*, 77 Cal. 360, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

1. *People v. Stanford*, 77 Cal. 360, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

It must necessarily follow that a denial in the same general form is

likewise sufficient. *People v. Stanford*, 77 Cal. 360, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693. See *People v. Pfister*, 57 Cal. 532, where there was a general denial, but question not raised. See, also, *People v. Lowden*, 2 Cal. Unrep. 537, 8 Pac. 66, where the complaint specifically alleged facts showing illegality, which of course, had to be specifically denied, hence a denial of legal conclusions was not sufficient.

2. *People v. Stanford*, 77 Cal. 360, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

ended or been forfeited must be stated.³ Mere allegations in the answer that the corporation is duly, regularly and legally formed is not sufficient in quo warranto, where the burden is on the defendants to show that it was legally formed.⁴

§ 651. Judgment.—The statute defines the character of the judgment which must be rendered when the defendant is found guilty, namely, that it be excluded from the franchise it has usurped or abused, and provides that the court may also in its discretion impose a fine not exceeding five thousand dollars.⁵ This is all the punishment that the legislature has in terms prescribed; and rendition of the judgment authorized by the statute ends the proceedings so far as the superior court is concerned.⁶ Where a judgment of dissolution is rendered in the action, the object for which it was brought—the revocation of the corporate charter—is accomplished, and the functions of the state are at an end.⁷ Should the court render a judgment as to matters outside the issues, the stockholders will not be bound thereby.⁸ A judgment in quo warranto, even though it should determine that the company had not been legally organized, does not annul or affect acts performed by the corporation before the judgment,⁹ for the judgment

3. *People v. Volcano etc. Co.*, 100 Cal. 87, 34 Pac. 522; *People v. Stanford*, 77 Cal. 360, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

4. *People v. Lowden*, 2 Cal. Unrep. 537, 8 Pac. 66.

5. Code Civ. Proc., § 809; *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

6. *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

7. *Harrison v. Hebbard*, 101 Cal. 152, 35 Pac. 555; *State Inv. etc.*

Co. v. Superior Court, 101 Cal. 135, 35 Pac. 549; *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

8. *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121, holding that the court went beyond its jurisdiction in appointing a receiver to take over the property of the corporation.

9. *McPhee v. Reclamation Dist. No. 765*, 161 Cal. 566, 119 Pac. 1077; *People v. Flint*, 64 Cal. 49, 28 Pac. 495.

of ouster is not retroactive.¹⁰ It has been pointed out that formerly, in the case of the information in quo warranto, there were two forms of judgment. When against an officer or individual, the judgment was ouster; when against a corporation by its corporate name, the judgment was ouster and seizure of the franchise.¹¹

§ 652. Limitation and Estoppel.—Where a proceeding is one to secure a forfeiture for the misuse or nonuser of corporate powers, the statute of limitations may be pleaded in bar.¹² But the continued exercise of a franchise without right is a continuously renewed usurpation on which a new cause of action arises each day.¹³ It is provided, though, that no inquiry into the due incorporation of a company or its right to exercise corporate powers can be made either by the state or an individual, where the company, claiming to be a corporation in good faith, has been doing business as such for ten consecutive years.¹⁴ Where a judgment is obtained under statutory authority, confirming the validity of the organization of a corporation, it is *res judicata* and binds the whole world, including the state, and this is a bar to a subsequent proceeding in quo warranto.¹⁵

A judgment in a collateral action, however, is not a bar to quo warranto. The attorney general may commence the proceeding upon his own information or upon the complaint of a private party. The action is commenced in the

10. *McPhee v. Reclamation Dist.* No. 765, 161 Cal. 566, 119 Pac. 1077.

11. *People v. Dashaway Assn.*, 84 Cal. 114, 12 L. R. A. 117, 24 Pac. 277.

12. *People v. Stanford*, 77 Cal. 360, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693 (rule so stated in the department decision; but in the decision in banc the court did not deem it necessary to express an opinion on this point). Code Civ. Proc.,

§ 345, providing that the limitations prescribed in the chapter apply to actions brought in the name of the state or for the benefit of the state.

13. *People v. Stanford*, 77 Cal. 360, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693 (on hearing in department).

14. Civ. Code, § 358.

15. *People v. Linda Vista Irr. Dist.*, 128 Cal. 477, 61 Pac. 86.

interest of the public, hence it is not barred because of any prior acts or misrepresentations of the informant, and the doctrine of estoppel cannot be invoked.¹⁶ But if the state has passed a curative act recognizing the validity of corporations such as the defendant, it is estopped to deny that the corporation could have been formed to carry on such business.¹⁷

Winding Up Affairs.

§ 653. **In General.**—In various jurisdictions statutes on the subject of winding up the affairs of dissolved corporations have been enacted with the object, in some instances, of abrogating the old law of forfeiture and reversion; in others of committing the administration to other courts than courts of equity; in still others to provide uniform rules of procedure; and, in certain instances, to keep the matter out of the courts altogether, as by allowing the dissolved corporation to continue its existence for a term for the purposes of liquidation, but for no other purpose. Such legislation, it has been said, seems to be pervaded by the one idea of simplifying the means of accomplishing the transfer to the stockholders of a defunct corporation their full shares of its surplus assets.¹⁸ In California the statute provides for the administration and settlement of a defunct corporation by the directors or managers at the time of its dissolution unless the court shall for some reason appoint other trustees.¹⁹

16. *People v. Lowden*, 2 Cal. Unrep. 537, 8 Pac. 66.

17. *People v. Perrin*, 56 Cal. 345.

18. *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121 (pointing out that anciently when the doctrine prevailed that such of the property of a dissolved corporation as did not revert to its grantors was forfeited or escheated to the crown, some officer exercising a general authority under the common

law or statutes or invested with a special authority for the occasion was charged with the duty of collecting the assets for the benefit of the king or his donee). See *infra*, § 658, as to descent of the corporate property.

19. See *infra*, § 654, as to code provisions; *infra*, § 656, as to trustees appointed by the court; and *infra*, § 655, as to directors or trustees in liquidation.

§ 654. Statutory Provisions.—The administration upon the estate of a defunct corporation is provided for in section 400 of the Civil Code, which reads, in part, as follows:

“Unless other persons are appointed by the court, the directors or managers of the affairs of the corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full powers to settle the affairs of the corporation.”²⁰

The provisions of this section are applicable to all cases of corporate dissolution,¹ whether voluntary or involuntary,² that is, whether the corporation becomes extinct by lapse of time, by voluntary dissolution, or by judgment of forfeiture for neglect or abuse of corporate powers,³ or for nonpayment of the corporation license tax.⁴ The trustees are made jointly and severally and personally liable not only to stockholders or members but to creditors to the extent of the property and effects of the corporation that shall come into their hands.⁵

§ 655. Directors as Trustees in Liquidation.—Subject to the provision of the code permitting an appointment of

20. The portion of the section above quoted constituted the original section of the code. It has since been extended by adding a more detailed enumeration of the duties of the trustees.

1. See cases cited *infra*; and see code commissioners' note to original section. .

2. *Crossman v. Vivienda Water Co.*, 150 Cal. 575, 89 Pac. 335; *State Inv. etc. Co. v. Superior Court*, 101 Cal. 135, 35 Pac. 549; *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121; *Nezik v. Cole*, 43 Cal. App. 130, 184 Pac. 523.

3. *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121 (pointing

out the fact that the provision was adopted from the New York statute without the limitation under the laws of that state, to cases of voluntary dissolution); *Henderson v. Palmer Union Oil Co.*, 29 Cal. App. 451, 156 Pac. 65.

4. *Hanson v. Choynski*, 180 Cal. 275, 180 Pac. 816. See *Anthony v. Janssen*, 183 Cal. 329, 191 Pac. 538, to the effect that under the License Act the directors become trustees of the corporation to settle its affairs and have the same power under Civ. Code, § 400.

5. Civ. Code, § 400. See *infra*, § 660, as to creditors' rights; *infra*, § 662, as to suits against trustees; and *infra*, § 667, as to suit in equity to enforce the duties of trustees.

trustees by the court,⁶ the directors or managers of the affairs of the corporation at the time of its dissolution are trustees of the creditors and stockholders of the corporation dissolved, with full power to settle its affairs.⁷ Upon forfeiture of the corporate charter, the directors in office at the time become at once and ipso facto trustees of the corporation and of its stockholders for the purpose of closing up the affairs of the corporation and, after payment of debts and expenses of liquidation, for distributing the remaining assets among those entitled thereto.⁸ They become such trustees by virtue of the statute, and without the intervention or necessity for the intervention of any court.⁹ Accordingly, where in a complaint there is no allegation of the manner in which the persons alleged to be trustees became such after the forfeiture of the charter, evidence that the persons named were the directors of the corporation waives the defect.¹⁰ The trustees are simply trustees in liquidation and nothing else; and so it has been held where the corporation was dissolved for non-payment of the state license tax, that directors or managers on becoming trustees under the statute, cannot be allowed or required to perform further functions in their capacity as a corporation or as directors thereof.¹¹

§ 656. Right of Trustees to Administer—Extent of Powers of the Court.—The object of the statute is to leave the whole matter of liquidation and distribution to the

6. See *supra*, § 654, and *infra*, § 656.

7. Civ. Code, § 400. As to directors' powers and duties as trustees of banks in liquidation, see *BANKS*, vol. 4, p. 287.

8. *Binford v. Boyd*, 178 Cal. 458, 174 Pac. 56; *Clark v. San Francisco*, 53 Cal. 306; *Porter v. Anglo & London etc. Bank*, 36 Cal. App. 191, 171 Pac. 845; *Turney v. Morrissey*, 22 Cal. App. 271, 134 Pac. 335.

9. *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

This was the rule under the statutes existing before the codes. *Clark v. San Francisco*, 53 Cal. 306.

10. *Binford v. Boyd*, 178 Cal. 458, 174 Pac. 56.

11. *Rossi v. Caire*, 62 Cal. Dec. 140, 199 Pac. 1042; *Lewis v. Miller & Lux*, 156 Cal. 101, 103 Pac. 496.

trustees who cannot be interfered with without cause as for neglect or abuse of power; otherwise it is improper for a court to interfere or to supervise their proceedings in any particular.¹² If there should chance to be no directors in office at the time of dissolution or if for some reason the directors ought not to be entrusted with the subsequent control of the corporate affairs, the court should appoint others in their place.¹³ Such other persons when appointed become trustees in the place of the directors and with the same powers and responsibilities as are conferred by section 400 of the Civil Code upon directors.¹⁴ The trustees can be deprived of their control over the property of the defunct corporation only at the instigation of a creditor or stockholder. Since the state has no interest either in the assets of the corporation or in its debts, it cannot interfere.¹⁵ New and distinct proceedings upon the part of the beneficiaries of the trust or some of them is an essential condition of any jurisdiction in the court to take the property out of the control of the trustees.¹⁶

Death, resignation or failure or inability to act constitutes a vacancy in the position of trustee which may be filled by appointment by the superior court upon petition of any person or creditor interested in the property. Vacancies in office of trustees of corporations whose charters have been forfeited by law are filled in the same manner as in other cases of dissolution.¹⁷

12. *Rossi v. Caire*, 174 Cal. 74, 161 Pac. 1161; *People v. Union Bldg. etc. Assn.*, 127 Cal. 400, 58 Pac. 822, 59 Pac. 692; *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121; *Crystal Pier Co. v. Schneider*, 40 Cal. App. 379, 180 Pac. 948; Civ. Code, § 400. See *infra*, § 664, as to powers and duties of trustees in general.

13. Civ. Code, § 2289; *State Inv. etc. Co. v. Superior Court*, 101 Cal.

135, 35 Pac. 549; *Clark v. San Francisco*, 53 Cal. 306 (under statutes prior to the codes).

14. *State Inv. etc. Co. v. Superior Court*, 101 Cal. 135, 35 Pac. 549. See also Civ. Code, § 402, and *infra*, § 657.

15. *State Inv. etc. Co. v. Superior Court*, 101 Cal. 135, 35 Pac. 549.

16. *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

17. Civ. Code, § 400.

§ 657. Determination of Who are Trustees.—By a recent enactment, it is provided that where, on dissolution, the identity of the directors or managers at the time of dissolution shall not be otherwise judicially established, any person interested in the assets at the time of dissolution may bring a proceeding in the superior court by petition setting forth certain specific matters, and by such petition request that a decree be entered establishing the identity of the persons who were such directors or managers at the time of dissolution and for an order appointing successors to any who may be dead or unable to act; or, if it is impossible to determine the identity of all or any of such directors or managers, then for an order appointing trustees in their place. The statute prescribes the procedure to be followed upon such an application.¹⁸ While, strictly speaking, the books of the corporation would furnish the best evidence upon the question of who are the de jure directors, the testimony of individuals is sufficient to establish at least their de facto capacity, which has been held sufficient for the purposes of a motion to substitute them as plaintiffs in place of a defunct corporation.¹⁹

§ 658. Title to Property of Dissolved Corporation.—When a corporation is dissolved, it can no longer have any interest in property,²⁰ and it has then no right to dispose of its property as a corporation.¹ The rule in California is that when a trading corporation is dissolved, its property neither reverts to its grantors nor escheats to the

18. Civ. Code, § 402 (new section added by Stats. 1921, p. 92).

19. Reed & Co. v. Harshall, 12 Cal. App. 697, 108 Pac. 719.

20. Rossi v. Caire, 62 Cal. Dec. 140, 199 Pac. 1042; Aalwyn's Law Inst. v. Martin, 173 Cal. 21, 159 Pac. 158 (holding that an action cannot be brought by a stockholder in be-

half of a dissolved corporation to quiet its title); Crystal Pier Co. v. Schneider, 40 Cal. App. 379, 180 Pac. 948.

1. Los Angeles & Arizona Land Co. v. Marr, 62 Cal. Dec. 385, 200 Pac. 1051; Dammann v. Hydraulic Clutch Co., 31 Cal. App. Dec. 212, 187 Pac. 1069.

state,² but, rather, the title to all such property passes to the persons who were the stockholders at the time of the dissolution,³ and is to be disposed of according to law.⁴ Such title does not pass to the directors, who become merely trustees to settle the affairs of the corporation.⁵ The old common-law rule was to the effect that when a corporation was dissolved, such real estate as it then had reverted or escheated to the grantor or donor,⁶ and this rule survives in California with respect to charitable corporations.⁷ The rule did not, however, apply to real estate acquired by purchase for value. In such case, upon a dissolution of the corporation and in the absence of stock-

2. *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

3. *Rossi v. Caire*, 62 Cal. Dec. 140, 199 Pac. 1042; *Anthony v. Janssen*, 183 Cal. 329, 191 Pac. 538; *Rossi v. Caire*, 174 Cal. 74, 161 Pac. 1161; *State Inv. etc. Co. v. Superior Court*, 101 Cal. 135, 35 Pac. 549; *Slayden v. O'Dea*, 29 Cal. App. Dec. 267, 189 Pac. 1062; *Crystal Pier Co. v. Schneider*, 40 Cal. App. 379, 180 Pac. 948; *Henderson v. Palmer Union Oil Co.*, 29 Cal. App. 451, 156 Pac. 65. See *Freeman v. Glenn County Tel. Co.*, 28 Cal. App. Dec. 967, to the same effect. This opinion of the district court of appeal in this case was subsequently reversed by the supreme court in 184 Cal. 508, 194 Pac. 705, but on other grounds.

Such property vests in the stockholders, subject only to the claims of creditors and is thereafter held under the same tenure and subject to the same conditions as similar property owned by other natural persons; *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

4. *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121. See *infra*, § 665 et seq.

5. *Crystal Pier Co. v. Schneider*, 40 Cal. App. 379, 180 Pac. 948. See *Aalwyn's Law Institute v. Martin*, 173 Cal. 21, 159 Pac. 158, apparently *contra*, where it is said that the title to the property vests in the former directors as trustees. And *Clark v. San Francisco*, 53 Cal. 306, where it is said directors are successors of the legal title in trust for the stockholders. And see, also, *Rossi v. Caire*, 62 Cal. Dec. 140, 199 Pac. 1042, where it was said to be unnecessary to decide whether title vested in the trustees or merely the right of possession for the settling of corporate affairs.

6. *Victoria Hospital Assn. v. All Persons*, 169 Cal. 455, 147 Pac. 124; *People v. Dashaway Assn.*, 84 Cal. 114, 12 L. R. A. 117, 24 Pac. 277.

7. *Victoria Hospital Assn. v. All Persons*, 169 Cal. 455, 147 Pac. 124 (assuming the existence of the common-law rule). See *CHARITIES*, vol. 5, p. 34.

holders or creditors, the title would vest in the state in the same manner as the personal property.⁸

§ 659. Mode of Action by Trustees.—There is no provision of law authorizing trustees of a defunct corporation to act separately in the exercise of their powers as trustees. Such powers must be exercised by the united action of all of them in order to be valid.⁹ The law authorizes the directors and not one of them to act as trustees.¹⁰ Thus, although a deed by a single trustee would, as a conveyance of his own right, operate to convey whatever title or interest he then had as a stockholder, yet such deed is not binding on the trust property and conveys no title unless executed in consummation of some disposition of the property made by all the trustees acting unitedly.¹¹ So in an action to determine the ownership of money in the hands of such a trustee, it is necessary that the other trustees be joined as defendants, for otherwise there can be no adjudication binding upon the property. One trustee alone has no authority by default or otherwise to bind the property of the corporation.¹²

§ 660. Creditors' Rights.—In the absence of statute, equity treats the assets of a defunct corporation as a trust fund for creditors and stockholders and enables the bene-

8. *People v. President & Trustees etc. of California College*, 38 Cal. 166 (dissolution of a membership corporation organized for literary and educational purposes).

9. *Newhall v. Western Zinc Min. Co.*, 164 Cal. 380, 128 Pac. 1040; *Anthony v. Janssen*, 183 Cal. 329, 191 Pac. 538 (citing Civ. Code, §§ 2268, 860). As to necessity of directors acting as a board, see *supra*, § 443.

10. *Newhall v. Western Zinc Min. Co.*, 164 Cal. 380, 128 Pac. 1040.

11. *Anthony v. Janssen*, 183 Cal. 329, 191 Pac. 538.

12. *Hanson v. Choynski*, 180 Cal. 275, 180 Pac. 816. See the concurring opinion of Shaw, J., in which it is said that the court has full authority in a suit against one trustee alone to give judgment declaring that he holds money as a trustee, but could not go further and direct the administration and distribution of the trust funds unless the other trustees were parties.

ficiaries to reach the same by appropriate proceedings.¹³ Since creditors are interested in the administration and settlement of the estate of a defunct corporation, they have a right to sue the trustees to recover their claims.¹⁴ But creditors must ordinarily pursue their usual remedies at law against the directors or trustees of the corporation.¹⁵ It has been held that the provision in section 400 of the Civil Code, for the protection of the rights of creditors of a dissolved corporation, does not conflict with the right given upon voluntary dissolution to object to such dissolution. If dissolved, having creditors who did not object to the dissolution in the proceeding for that purpose, section 400 still affords such creditors a remedy for the protection and judicial assertion of their claims against the corporation.¹⁶ And in the case of forfeiture under the provisions of the license act, it has been said that it was certainly not the intention of the legislature to impose any penalty upon or to destroy the rights of creditors. Thus, the estate of a bankrupt corporation may be administered by the bankruptcy court in spite of such forfeiture.¹⁷

The dissolution of a corporation, as by forfeiture of its charter, or by operation of law, does not have the effect of maturing its obligations.¹⁸ There is no authority, therefore, for holding that notes, bonds and other obliga-

13. *Crossman v. Vivienda Water Co.*, 150 Cal. 575, 89 Pac. 335. See *infra*, § 667, as to suit to enforce duties of trustees.

14. *Hanson v. Choynski*, 180 Cal. 275, 180 Pac. 816 (citing *Stats.* 1907, p. 746, § 10a). See cases cited *infra*; and see *infra*, § 667.

15. *Sherman v. S. K. D. Oil Co.*, 61 Cal. Dec. 515, 197 Pac. 799; *Hanson v. Choynski*, 180 Cal. 275, 180 Pac. 816; *Crossman v. Vivienda Water Co.*, 150 Cal. 575, 89 Pac. 335; *Nezik v. Cole*, 43 Cal. App. 130, 184 Pac. 523.

See note 9 A. L. R. 1437, as to

right of creditors as against directors or officers to whom property has been transferred for a consideration other than payment of debts due them.

16. *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

17. *In re Double Star Brick Co.*, 210 Fed. 980.

18. *Sherman v. S. K. D. Oil Co.*, 61 Cal. Dec. 515, 197 Pac. 799; *California Nat. Supply Co. v. Dinsmore*, 35 Cal. App. Dec. 93, 199 Pac. 552.

tions of a corporation become due upon its dissolution by operation of law. The policy of the law is opposed to such a conclusion.¹⁹

§ 661. **Suit by the Trustees.**—Unless the statute otherwise provides, a corporation after dissolution is incapable of suing or being sued as a corporation or in the corporate name.²⁰ But the surviving directors or trustees are given authority to sue for and recover the debts and property of the corporation.¹ Thus, they may sue to recover for damages arising from fraudulent misrepresentations and acts by which the corporation had been defrauded.² Under a statute providing that no action pending against any corporation shall abate by reason of a forfeiture for nonpayment of license tax, it has been held that this gives the right, in an action against a corporation, to continue the defense, as well as the prosecution, in the corporate name notwithstanding a forfeiture pending the action and such right of defense includes the right to prosecute an appeal in the name of the corporation.³ While under section 385 of the Code of Civil Procedure, a substitution of the trustees is necessary to a prosecution of an action by or against a dissolved corporation.⁴ Apparently there is nothing to prevent the bringing of the suit in the corpo-

19. *Sherman v. S. K. D. Oil Co.*, 61 Cal. Dec. 515, 197 Pac. 799, per Wilbur, J.

20. *Hanson v. Choynski*, 180 Cal. 275, 180 Pac. 816; *Brandon v. Umpqua etc. Co.*, 166 Cal. 322, 136 Pac. 62; *Newhall v. Western Zinc Min. Co.*, 164 Cal. 380, 128 Pac. 1040; *Crossman v. Vivienda Water Co.*, 150 Cal. 575, 89 Pac. 335. See *supra*, §§ 628, 629.

In prohibiting the doing of business in this state, while under the disability of forfeiture, it has been decided that the institution and

maintenance of an action is included within the inhibition of the statute with respect to doing business after such forfeiture. *Kehrlein-Swinerton Const. Co. v. Rapken*, 30 Cal. App. 11, 156 Pac. 972.

1. Civ. Code, § 400.

2. *Hallidie v. Enginger*, 175 Cal. 505, 166 Pac. 1.

3. Stats. 1907, p. 745, § 10a; *Brandon v. Umpqua etc. Co.*, 166 Cal. 322, 136 Pac. 62.

4. See *infra*, § 663, as to substitution of trustees.

rate name, although a substitution would prove necessary upon a showing of the facts.⁵

§ 662. Suit Against Trustees.—Trustees of a dissolved corporation may be sued in any court by any person, having a claim against the corporation or its property.⁶ In fact, an action may be maintained only against them, and the corporation is not a proper party defendant.⁷ In other words, after dissolution, the trustees are necessary parties to any action affecting the rights or interest of the late corporation in property real or personal.⁸ And under the provisions of the code, in all cases where a corporation has forfeited its charter or right to do business, the summons must be served by delivering a copy thereof to one of the persons who have become the trustees.⁹ It is further provided that in such cases the trustees of such corporation and of its stockholders or members may be sued in the corporate name in like manner as if no forfeiture had occurred. And from the time of service of summons and a copy of the complaint in a civil action upon one of the trustees or completion of the publication of summons, where ordered, the court is deemed to have acquired jurisdiction of all such trustees and to have control of all the subsequent proceedings.¹⁰ If the corporation is a defendant, but the action is really against the directors to force

5. *Kehrlein-Swinerton Const. Co. v. Rapken*, 30 Cal. App. 11, 156 Pac. 972.

6. Civ. Code, § 400. See *California Nat. Supply Co. v. Flack*, 183 Cal. 124, 190 Pac. 634, holding that a judgment against a dissolved corporation is no bar to a subsequent action against the trustees of the corporation. And see *supra*, § 629, as to judgment against dissolved corporation.

7. *Carpenter v. Bradford*, 23 Cal. App. 560, 138 Pac. 946.

8. *Clark v. San Francisco*, 53 Cal

306. See *Ephraim v. Pacific Bank*, 129 Cal. 589, 62 Pac. 177, as to joinder of directors' trustees in action against liquidating bank under old statutes relating to the liquidation of banks.

9. Code Civ. Proc., § 411, subd. 6.

10. Code Civ. Proc., § 416, as amended in 1921. It is to be noted that this section does not authorize suit against the corporation, but permits the trustees to be sued in the corporate name and authorizes service upon one to secure jurisdiction over all.

them to pay money into the corporate treasury, the court should determine whether or not it is for the best interests of all that a receiver be appointed.¹¹

§ 663. Necessity for Substitution of Trustees.—Section 385 of the Code of Civil Procedure, which provides that an action on a cause which survives does not abate by the death or disability of a party, if applicable to the case of a dissolved corporation, does not authorize the continuance of the action against the corporation itself, but allows it to be continued only against the “representative or successors in interest,” brought in on motion.¹² The legislature has clearly expressed the condition upon which such a pending action might be continued, namely, the substitution of the representative or successor in interest.¹³ Section 10a of the original corporation license tax act as amended in 1907, provided that on forfeiture “no action pending against any corporation shall abate thereby, but may be prosecuted to final judgment, . . . in like manner as though no forfeiture had occurred.”¹⁴ This statute contained no provision similar to that of section 385 of the Code of Civil Procedure, relating to the necessity of substitution, and this omission has been considered significant. In view of this difference it has been held that section 10a of the act as amended by the addition of this proviso should be construed as providing that any action included within the meaning of the proviso shall not abate by reason of forfeiture, but may be continued and prosecuted in the corporate name to final judgment, the control and management of the action so far as the corporate interests are concerned being in the directors or managers

11. *Freeman v. Glenn County Tel. Co.*, 28 Cal. App. Dec. 967, opinion of district court of appeal; reversed in 184 Cal. 508, 194 Pac. 705 on other grounds.

12. *Crossman v. Vivienda Water Co.*, 150 Cal. 575, 89 Pac. 335. See

ABATEMENT AND REVIVAL, vol. 1, p. 17.

13. *Lowe v. Superior Court*, 165 Cal. 708, 134 Pac. 190 (see note on case, 2 Cal. Law Rev., p. 60).

14. Stats. 1907, p. 745.

in office at the time of the forfeiture, as trustees.¹⁵ While the trustees may properly be substituted as parties defendant in an action against the corporation, nevertheless such substitution is not essential to a continuance of an action such as is contemplated by the license tax act.¹⁶ Where though the fact of forfeiture had been called to the attention of the court either by the pleadings and proof or by suggestion, the names of the trustees should be substituted for that of the corporation, and it has been held to be an abuse of discretion for the court to refuse such formal change.¹⁷

§ 664. Powers and Duties of Trustees in General.—The trustees have power to settle the affairs of the corporation, to sue and recover the debts and property of the corporation, to collect and pay outstanding debts, to sell the assets thereof in such manner as the court shall direct and to distribute the proceeds of such sales and all other assets to the stockholders. These powers and duties are the same whether the dissolution is by forfeiture or otherwise.¹⁸ As trustees, they are bound to settle the affairs of the defunct corporation, and they have all the power to deal with and dispose of the property necessary to accomplish that object.¹⁹ And the power to manage the corporate property and settle its affairs involves, of course, the payment of creditors' claims where there is sufficient property.²⁰ Such trustees are the donees of a power in trust;

15. *Lowe v. Superior Court*, 165 Cal. 708, 134 Pac. 190; *Reed & Co. v. Marshall*, 12 Cal. App. 697, 108 Pac. 719 (not an abuse of discretion to permit such substitution).

16. *Lowe v. Superior Court*, 165 Cal. 708, 134 Pac. 190.

17. *Kehrlein-Swinerton Const. Co. v. Rapken*, 30 Cal. App. 11, 156 Pac. 972, saying that § 10a did not expressly require trustees, in winding up affairs and taking legal proceedings necessary thereto, to act in

their own names instead of in the name of the corporation.

18. Civ. Code, § 400; *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

19. *Rossi v. Caire*, 174 Cal. 74, 161 Pac. 1161; *Crystal Pier Co. v. Schneider*, 40 Cal. App. 379, 180 Pac. 948.

20. *Hanson v. Choynski*, 180 Cal. 275, 180 Pac. 816.

and they are trustees only in the sense that donees of a power hold the power in trust to be executed in the interests of the beneficiaries. No license or authority from nor, in the absence of statutory requirement, confirmation by any court, is necessary, as the donees of such power in trust may execute the power without interposition of any court.¹ The duties of the trustees are measured by their powers and by the principles of law and equity applicable to the conditions. The interests they are to serve are those of the stockholders and of the creditors of the defunct corporation whose debts constitute a paramount charge upon the property.² It is clear that the trustees cannot, with due regard to their duties to stockholders and creditors, pay themselves from the funds held in trust for all.³

§ 665. Sale of Property.—Stockholders after dissolution own the property of the defunct corporation,⁴ but subject to the right vested in the directors in office at the time to possess the corporate assets under a power to administer them in settlement of the affairs of the corporation.⁵ The directors receive upon dissolution only what the statute gives them and that is a power over the property, and the right of possession, not, however, the title.⁶ And the powers of the trustees include authority to sell and convey the property whenever in their judgment it is necessary for the settlement of the corporate affairs.⁷

1. *Crystal Pier Co. v. Schneider*, 40 Cal. App. 379, 180 Pac. 948.

2. *Rossi v. Caire*, 174 Cal. 74, 161 Pac. 1161.

3. *Hanson v. Choynski*, 180 Cal. 275, 180 Pac. 816.

4. See *infra*, § 658.

5. *Anthony v. Janssen*, 183 Cal. 329, 191 Pac. 538; *Rossi v. Caire*, 174 Cal. 74, 161 Pac. 1161; *Slayden v. O'Dea*, 29 Cal. App. Dec. 267, 189 Pac. 1062.

6. *Rossi v. Caire*, 174 Cal. 74, 161 Pac. 1161; *Crystal Pier Co. v. Schneider*, 40 Cal. App. 379, 180 Pac. 948.

7. *Anthony v. Janssen*, 183 Cal. 329, 191 Pac. 538; *Crystal Pier Co. v. Schneider*, 40 Cal. App. 379, 180 Pac. 948.

As to what is the effect of the provision that trustees have full power to sell the assets "in such manner as the court shall direct"

Since the "affairs" of a defunct corporation, frequently complex and multifarious, can seldom be settled without a sale or other disposition of at least some of the assets, a power of sale is necessarily implied in the legislative grant of power to settle the affairs of the corporation. This power should be exercised whenever necessary to serve the interests of the stockholders and with the discretion of the trustees, in the absence of fraud or collusion, courts will not interfere.⁸ But where there are no debts or charges against the property, it cannot be sold by the trustees.⁹

§ 666. Conveyances.—The general rule requires all the trustees to join in a deed conveying the property of a dissolved corporation.¹⁰ It is provided, however, by recent enactment, that any deed executed in the name of a corporation by its president or vice-president and secretary or assistant secretary after a dissolution thereof, or after a forfeiture of its charter, or after a suspension of its corporate rights, privileges and powers, which deed is duly recorded in the proper book or records of the county in which the land or any part of it is situated, shall have the same force and effect as if executed and delivered prior to the said dissolution, forfeiture or suspension.¹¹ Prior to this late enactment, corporate powers were forbidden to

has not been decided. This provision was added in 1917 by amendment to § 400 of the Civil Code.

8. *Anthony v. Janssen*, 183 Cal. 329, 191 Pac. 538; *Crystal Pier Co. v. Schneider*, 40 Cal. App. 379, 180 Pac. 948.

9. *Fratessa v. Morrissey*, 39 Cal. App. 131, 178 Pac. 303, where the assignee of all the stockholders secured a restraining order against a proposed sale of the property.

10. See *supra*, § 658.

11. Civ. Code, § 400 (as amended Stats. 1921, p. 574).

While this enactment speaks of the execution of deeds by the "president," "secretary," etc., of a corporation "after a dissolution" thereof, it is perhaps a recognition in rather loose phraseology of the trusteeship of such officers imposed upon them by virtue of the statute at the time of dissolution, and perhaps will be so construed. It seems incongruous, to say the least, to speak of the "officers" of a corporation that had ceased to exist. See *supra*, § 655, as to officers becoming trustees immediately upon dissolution of the corporation.

be exercised by anyone for any purpose or in any manner except to execute and deliver deeds to real property in pursuance of contracts therefor made prior to the time of forfeiture.¹² In any event, a stockholder of a corporation which has forfeited its charter cannot, as the corporation, convey its real property, and one not shown to be a director in office at the time of the forfeiture, cannot properly execute a deed as president and trustee.¹³ And it has been held that a deed reciting that certain persons were "the last board of directors" of a certain defunct corporation, but which does not purport to convey the title of the company, assuming that it has any, the grantors signing as individuals and not as trustees, is a mere quitclaim deed of the individual grantors and does not convey any other title.¹⁴

§ 667. Suit to Enforce Duties of Trustees.—The directors as trustees, like trustees in general, are peculiarly subject to the jurisdiction of a court of equity, and may be called to account by a party aggrieved for any neglect of duty or abuse of power.¹⁵ Not only is such action a plain, speedy and adequate remedy for a stockholder who claims that he is entitled to receive all the assets but it is the most appro-

12. See Stats. 1917, p. 371, § 11. See *Los Angeles etc. Land Co. v. Marr*, 62 Cal. Dec. 385, 200 Pac. 1051, holding that where there was a finding of a conveyance, but no date of forfeiture, it will be implied that the conveyance was prior to the forfeiture.

13. *Ginaca v. Peterson*, 262 Fed. 904; *Alexson v. Steward*, 36 Cal. App. Dec. 731, 203 Pac. 423. But if the individual is not only president but is the owner of all the capital stock, he may make conveyance of the property and no one can complain except creditors existing at the time of the disposi-

tion: *Ginaca v. Peterson*, 262 Fed. 904.

14. *Warden v. South Pasadena Realty etc. Co.*, 178 Cal. 440, 174 Pac. 26.

15. *Hanson v. Choynski*, 180 Cal. 275, 180 Pac. 816 (where the directors or trustees were using their power and authority for the purpose of preferring themselves at the expense of creditors and stockholders); *Rossi v. Caire*, 174 Cal. 74, 161 Pac. 1161; *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121; *Turney v. Morrissey*, 22 Cal. App. 271, 134 Pac. 335.

priate remedy, for in such action the court is vested with power to determine whether or not all debts have been paid and to pass upon any claims of the trustees for expenses incurred and compensation in the matter of closing up the affairs of the defunct corporation; and until there has been such an accounting and adjudication it is the only remedy, hence mandamus will not lie.¹⁶ It is an action in equity to compel trustees to perform their duties imposed by law, and though the assets are real estate, it is not an action for the determination of an interest in real property. The determination of the interests of the parties is only incidental to the relief which is the main object of the action, namely, to place the trustees under the control and supervision of the court and to compel them to proceed to the execution of their trust.¹⁷

To justify interference, the mere fact of dissolution or forfeiture is not enough; the facts must be of a character to show that the trustees are incompetent or unfaithful or are mismanaging the property to the injury of the beneficiaries.¹⁸ Since creditors are necessarily interested in the conduct of the trustees, they may be the complainants,¹⁹ or the action may be properly brought by a stockholder,²⁰ or by the successor in interest of a stockholder.¹ The trustees are necessary parties to such an action,² and it is necessary to join all of them.³ It is provided that an

16. *Turney v. Morrissey*, 22 Cal. App. 271, 134 Pac. 335.

Until they are called to account in an independent action or proceeding by a party interested, no court has any excuse for interference and if sued without sufficient cause even by a creditor or stockholder the trustee may recover costs; *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

17. *Rossi v. Caire*, 174 Cal. 74, 161 Pac. 1161.

18. *Rossi v. Caire*, 174 Cal. 74,

161 Pac. 1161. See supra, § 654, as to the liability of the trustees to the creditors and to the stockholders or members.

19. *Hanson v. Choynski*, 180 Cal. 275, 180 Pac. 816.

20. See generally cases cited in this section.

1. *Rossi v. Caire*, 62 Cal. Dec. 140, 199 Pac. 1042.

2. *Clark v. San Francisco*, 53 Cal. 306.

3. *Hanson v. Choynski*, 180 Cal. 275, 180 Pac. 816.

action to set aside or invalidate any action taken or performed by a majority of the trustees of a corporation dissolved by operation of law must be commenced within six months, otherwise it is barred.⁴

§ 668. Compensation and Expenses of Trustees.—When expenses are necessarily incurred by directors while winding up the affairs of a corporation, they should be paid as a preferred claim. Any other rule would make the directors personally liable for costs incurred in good faith for the benefit of the creditors.⁵ The payment of the debts and the expenses of liquidation is contemplated prior to distribution of the remaining assets of the corporation among those entitled thereto.⁶ Admitting, however, the right to compensation for winding up the affairs of defunct corporations, nevertheless, where the record discloses that the trustees rendered no services and whatever expenditures they made were in pursuit of a claim initiated by themselves and to which they were not entitled, such expenses must be borne by themselves.⁷

§ 669. Right of Stockholder in Distribution.—The shares of stockholders represent the proportion to which the respective stockholders who are such at the date of distribution are severally entitled in the final distribution of the estate of the corporation, when from any cause it shall cease to exist and its estate shall have been fully administered.⁸ Holders of stock by assignment, of course, have the right to an accounting and to participate in the division of the

4. Code Civ. Proc., § 341 (subd. 3, added Stats., 1917, p. 381). See supra, § 643.

5. Ephraim v. Pacific Bank, 136 Cal. 646, 69 Pac. 436.

6. Rossi v. Caire, 62 Cal. Dec. 140, 199 Pac. 1042; Fratessa v. Morrissey, 39 Cal. App. 131, 178 Pac. 303; Turney v. Morrissey, 22 Cal. App. 271, 134 Pac. 335 (intimating that

compensation is to be allowed in an accounting).

7. Fratessa v. Morrissey, 39 Cal. App. 131, 178 Pac. 303.

8. Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121; Kohl v. Lilienthal, 81 Cal. 378, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689.

assets by virtue of such ownership;⁹ and the assignee is entitled to enforce against the trustees his rights to liquidation and distribution of the assets of the corporation.¹⁰

XXI. RECEIVERS OF CORPORATIONS.

§ 670. **In General.**—Courts are not authorized before dissolution to appoint a receiver to take charge of the business and property of a corporation, dispose of its assets and wind up its affairs.¹¹ On the contrary, the courts of California have long and consistently held that they have no jurisdiction to appoint a receiver of the entire assets of a corporation in a suit prosecuted by a private party.¹² No jurisdiction is vested in courts of equity to dissolve a corporation. The power of a receiver when put in motion necessarily displaces the corporate management and substitutes its own;¹³ and a court cannot do indirectly that which it has no power to do directly.¹⁴ Even the consent of the cor-

9. *Lewis v. Miller & Lux*, 156 Cal. 101, 103 Pac. 496; *Carpenter v. Bradford*, 23 Cal. App. 560, 138 Pac. 946.

Such a stockholder, however, is at most the owner of a mere equitable interest in the assets of the defunct corporation. *Aalwyn's Law Institute v. Martin*, 173 Cal. 21, 159 Pac. 158.

10. *Rossi v. Caire*, 62 Cal. Dec. 140, 199 Pac. 1042.

11. *Elliott v. Superior Court*, 168 Cal. 727, 145 Pac. 101.

12. *Elliott v. Superior Court*, 168 Cal. 727, 145 Pac. 101; *Murray v. Superior Court*, 129 Cal. 628, 62 Pac. 191; *Fischer v. Superior Court*, 110 Cal. 129, 42 Pac. 561; *People's Home Sav. Bank v. Superior Court*, 103 Cal. 27, 36 Pac. 1015; *Harrison v. Hebbard*, 101 Cal. 152, 35 Pac. 555; *State Inv. etc. Co. v. Superior Court*, 101 Cal. 135, 35 Pac. 549;

Smith v. Superior Court, 97 Cal. 348, 32 Pac. 322; *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. E. A. 627, 24 Pac. 121; *French Bank Case*, 53 Cal. 495; *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508; *Smith v. Los Angeles etc. B. Co.*, 4 Cal. Unrep. 237, 34 Pac. 242.

13. *Elliott v. Superior Court*, 168 Cal. 727, 145 Pac. 101; *Fischer v. Superior Court*, 110 Cal. 129, 42 Pac. 561; *People's Home Sav. Bank v. Superior Court*, 103 Cal. 27, 36 Pac. 1015; *French Bank Case*, 53 Cal. 495; *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508.

Courts of equity have no inherent power to appoint a receiver of a corporation. *French Bank Case*, 53 Cal. 495; *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508.

14. *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508.

poration cannot confer jurisdiction on a court to appoint a receiver for such purpose,¹⁵ for a corporation will not be permitted thus to destroy itself and put beyond its reach the power to do that for which it was created.¹⁶ Moreover, the code expressly provides that the powers, business and property of all corporations must be exercised, conducted and controlled by the board of directors.¹⁷ In certain instances, however, where the effect of an appointment is not to dissolve the corporation but merely to place its assets in safe hands,¹⁸ or where the appointment is made under the provisions of section 565 of the Code of Civil Procedure,¹⁹ or where the appointment concerns only specific property,²⁰ or where otherwise the usages of equity might authorize it, a receiver for a corporation may be appointed.¹

§ 671. Statutory Provisions.—The general statutory provisions concerning the appointment of receivers for corporations are found in the Code of Civil Procedure. Section 564 of that code provides in part that

“A receiver may be appointed by the court in which an action is pending, or by the judge thereof— . . . (5) In

15. *Elliott v. Superior Court*, 168 Cal. 727, 145 Pac. 101; *Yore v. Superior Court*, 108 Cal. 431, 41 Pac. 477; *Smith v. Superior Court*, 97 Cal. 348, 32 Pac. 322; *Murray v. American Surety Co.*, 70 Fed. 341, 17 C. C. A. 138 (under California Bank Commissioner's Act).

16. *Elliott v. Superior Court*, 168 Cal. 727, 145 Pac. 101.

17. *Elliott v. Superior Court*, 168 Cal. 727, 145 Pac. 101. See *supra*, § 441, as to necessity of exercise of powers by directors.

18. *Boyle v. Superior Court*, 176 Cal. 671, L. R. A. 1918D, 226, 170 Pac. 1140.

19. See *infra*, § 671, for terms of this provision.

20. See *infra*, § 677.

1. See *infra*, § 672 et seq.; *Bories v. Union Bldg. etc. Assn.*, 141 Cal. 79, 74 Pac. 554; *People v. Union Bldg. etc. Assn.*, 127 Cal. 400, 58 Pac. 822, 59 Pac. 692 (receivership under Building and Loan Act of 1893); *Dabney Oil Co. v. Providence Oil Co.*, 22 Cal. App. 233, 133 Pac. 1155 (where, however, following the tests of equity a receivership was not authorized). See, generally, RECEIVERS.

See note, 8 A. L. R. 441, as to right to bring action against corporation or prosecute pending action as affected by appointment of receiver.

the cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights; . . . (7) In all other cases where receivers have heretofore been appointed by the usages of courts of equity.”

Section 565 of the same code provides:

“Upon the dissolution of any corporation, the superior court of the county in which the corporation carries on its business or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or members thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over among the stockholders or members.”

Power is often exercised under the statutes for the appointment of receivers upon insolvency or dissolution.²

§ 672. Jurisdiction of Court.—The statute expressly provides for the appointment of a receiver upon the dissolution of a corporation, and such receiver is charged with the duty of winding up its affairs.³ Construing the provisions of section 565 of the Code of Civil Procedure, it has been held that upon dissolution of a corporation by expiration of its charter, the jurisdiction of the superior court to appoint a receiver is limited by the code provisions, as in all other classes of dissolution, to the particular superior court of the county where the corporation carries on its business, or has its principal place of business.⁴ So, where the complaint fails to show the county in which the action is brought to be the county in which the corporation had its principal place of business or carried on its busi-

2. See *infra*, § 675.

3. Code Civ. Proc., § 565.

4. *Henderson v. Palmer Union Oil Co.*, 29 Cal. App. 451, 156 Pac. 65.

ness, the court is without jurisdiction to make the appointment under section 565 of the Code of Civil Procedure.⁵

§ 673. Remedy as Ancillary.—Under the rule that the appointment of a receiver when made is ancillary to or in aid of the action brought, and that there is no such thing as an action brought distinctly for the appointment of a receiver,⁶ the authority conferred upon the court to appoint a receiver under section 564, subdivision 5, presupposes that an action is pending before it, and was instituted by someone authorized by law to commence it.⁷ It would seem that the proceeding under section 565 of the Code of Civil Procedure, however, is a new and distinct proceeding,⁸ and it would also seem to be the proceeding contemplated by section 400 of the Civil Code for the appointment of persons as trustees upon a dissolution in place of directors, where the directors are shown to be unworthy of the trust and responsibility.⁹

§ 674. Grounds of Appointment in General—Security. Aside from statutory provision, insolvency alone is not sufficient ground for the appointment of a receiver of a corporation.¹⁰ Prior to the enactment of section 565 of the Code of Civil Procedure in 1880,¹¹ the cases in which

5. *Henderson v. Palmer Union Oil Co.*, 29 Cal. App. 451, 156 Pac. 65. See *People v. Wakao*, 33 Cal. App. 454, 165 Pac. 720, where this holding is referred to.

6. See cases cited *infra*; and as to the general principle, see RECEIVERS.

7. *Murray v. Superior Court*, 129 Cal. 628, 62 Pac. 191; *French Bank Case*, 53 Cal. 495; *Hobson v. Pacific States Mercantile Co.*, 5 Cal. App. 94, 89 Pac. 866.

8. *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121. See opinion of district court of appeal in

Preston v. Superior Court, 33 Cal. App. Dec. 534; rehearing, 184 Cal. 658, 195 Pac. 916.

9. *Henderson v. Palmer Union Oil Co.*, 29 Cal. App. 451, 156 Pac. 65. See *supra*, § 656.

10. *Murray v. Superior Court*, 129 Cal. 628, 62 Pac. 191 (stating that courts of equity have no greater control over the affairs of a private corporation when it becomes insolvent than they have over the affairs of an individual); *Hobson v. Pacific States Mercantile Co.*, 5 Cal. App. 94, 89 Pac. 866.

11. Code Amdts. 1880, p. 4.

the court might appoint a receiver were restricted to such as were covered by section 564 of the Code of Civil Procedure.¹² Subdivision 5 of this last-named section of the code¹³ does not contemplate the appointment of a receiver of an insolvent corporation in an action brought merely for that purpose,¹⁴ and section 565 of the Code of Civil Procedure provides for the appointment of a receiver only upon the dissolution of a corporation. Apart from such dissolution, there is no statutory provision authorizing an appointment upon the ground that the corporation is not prosperous or because its liabilities are greater than its assets.¹⁵ A provision that the court must decree a winding up of the affairs of the corporation in quo warranto does not contemplate that this shall be done under the direction of a court, nor does it authorize the appointment of a receiver.¹⁶ Hence it has been held that, as the court cannot take the estate of the corporation into its custody or exercise any control over it before the judgment of dissolution, it can have no property under its control which it is authorized to preserve pending an appeal from its judgment by the appointment of a receiver.¹⁷

An appointment cannot be made unless some party interested, either a creditor or stockholder, can show that, for the protection of his rights, a receiver and administration of the assets under the control and superintendency of a court of equity are necessary.¹⁸ And even then no

12. French Bank Case, 53 Cal. 495; Dabney Oil Co. v. Providence Oil Co., 22 Cal. App. 233, 133 Pac. 1155.

13. See supra, § 671.

14. Murray v. Superior Court, 129 Cal. 628, 62 Pac. 191. See supra, § 673, as to the remedy being merely ancillary.

15. Murray v. Superior Court, 129 Cal. 628, 62 Pac. 191; Yore v. Superior Court, 108 Cal. 431, 41 Pac. 477.

16. State Inv. etc. Co. v. Superior Court, 101 Cal. 135, 35 Pac. 549.

The law does not prescribe that this is one of the penalties designed by the legislature as part of the punishment to be visited upon a corporation which has incurred a forfeiture of its charter; Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

17. State Inv. etc. Co. v. Superior Court, 101 Cal. 135, 35 Pac. 549.

18. People v. Union Bldg. etc. Assn., 127 Cal. 400, 58 Pac. 822, 59 Pac. 692; Havemeyer v. Superior

receiver will be appointed upon his *ex parte* application without requiring ample security by undertaking with sufficient sureties for all damages that may be caused by the appointment if it shall turn out that it was made without sufficient cause.¹⁹

§ 675. **Appointment "upon Dissolution."**—Following dissolution a means is provided for winding up the corporation and distributing its assets according to the equitable rights of those interested. In the absence of any statute regulating the matter, a court of equity undoubtedly has the right, in a proper proceeding instituted by a creditor or stockholder, to appoint a receiver to administer the property.²⁰ Under the code, however, the rule is not to appoint a receiver, but to leave the whole matter of liquidation and distribution to the exclusive control of the directors in office at the date of dissolution of the corporation.¹ The appointment of a receiver is the exception, not the rule,² and is to be made only when necessary for the purpose of preserving and distributing the property and only upon application of a party interested, namely, a creditor or stockholder.³ "Upon the dissolution" necessarily implies dissolution effected in any manner.⁴ It is the fact of dissolution, the termination of the existence of

Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121. See *infra*, § 678, as to who may ask for the appointment of a receiver.

19. *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

20. *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

1. Civ. Code, § 400. See *supra*, § 656.

2. *People v. Union Bldg. etc. Assn.*, 127 Cal. 400, 58 Pac. 822, 59 Pac. 692; *Havemeyer v. Superior*

Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

3. *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

Section 565 of the Code of Civil Procedure permits the appointment of a receiver upon dissolution, on application of a creditor or stockholder. The corporation not having been dissolved, it is evident that this section does not authorize an appointment. *Murray v. Superior Court*, 129 Cal. 628, 62 Pac. 191.

4. *State Inv. etc. Co. v. Superior Court*, 101 Cal. 135, 35 Pac. 549;

the corporation as such that the statute contemplates. It matters not whether dissolution is the result of the operation of law, the voluntary act of the parties, or is accomplished through quo warranto proceedings—the legislature has made no distinction.⁵ It is clear that “upon the dissolution” does not mean “before dissolution”; the phrase means “after dissolution” and it is not limited to any particular lapse of time, hence it may include an application made immediately following dissolution or one separated by a period of time.⁶

§ 676. Under Usages of Equity.—In the absence of a substantive right of action, courts of equity are not authorized to appoint a receiver of a corporation under the subdivision of section 564 of the Code of Civil Procedure giving the power to appoint “in all other cases where receivers have heretofore been appointed by the usages of courts of equity.”⁷ But where the proceeding is not directed toward closing the affairs of the corporation or not an attempt to dissolve it, but is merely directed against the individual directors whom it is sought to remove and to place the assets of the corporation in safe hands, the unfaithful directors having abandoned their trust, it is proper for the court, through the agency of a receiver, to take charge of the property, if necessary for its preservation, pending proceedings for the removal of the directors.⁸ Dissensions, or honest differences of opinion, which result in making it impossible for the corporation to carry on its business to advantage, or to carry it on at all, are sufficient

Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121; Henderson v. Palmer Union Oil Co., 29 Cal. App. 451, 156 Pac. 65.

5. Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121; Henderson v. Palmer Union Oil Co., 29 Cal. App. 451, 156 Pac. 65.

6. Henderson v. Palmer Union Oil Co., 29 Cal. App. 451, 156 Pac. 65.

7. French Bank Case, 53 Cal. 495; Code Civ. Proc., § 564, subd. 7.

8. Boyle v. Superior Court, 176 Cal. 671, L. R. A. 1918D, 226, 170 Pac. 1140; California etc. Assn. v. Superior Court, 8 Cal. App. 711, 97 Pac. 769.

to invoke the action of a court of equity. But, as has been said: "As soon as a lawfully constituted and competent governing body comes into existence, whether by adjustment of dissensions or by the election of a new body, and such body is ready to take possession of the property of the corporation and proceed in the proper discharge of its duties, the court must lift its hand and retire."⁹

§ 677. Receiver for Specific Property.—The principle that a court has no jurisdiction to appoint a receiver of the entire assets of the corporation in a suit prosecuted by a private party is not opposed to the appointment of a receiver of specific property of the corporation where such an appointment would be proper under the provisions of section 564 of the Code of Civil Procedure in certain actions between private parties.¹⁰ It has not been decided, however, whether the provision permitting the appointment of a receiver after judgment, to carry the judgment into effect applies to a judgment obtained against a corporation in a suit brought by a private person.¹¹ But in a stockholder's suit, it is proper to appoint a receiver to apportion the funds and pay it out to the parties entitled.¹² And the court may order unpaid subscriptions to be paid to a receiver to constitute a fund to be distributed among the creditors.¹³ Where a corporation is a mere agent for a partnership in holding property, in a suit for dissolution of the partnership, the court may appoint a receiver to take charge of the assets of the partnership, and he may take charge of such property even though it stands in the name of a corporation.¹⁴

9. Boyle v. Superior Court, 176 Cal. 671, L. R. A. 1918D, 226, 170 Pac. 1140 (quoting from 5 Pomeroy's Equity Jurisprudence, § 124). See note on the case, 6 Cal. Law Rev., p. 223.

10. Elliott v. Superior Court, 168 Cal. 727, 145 Pac. 101.

11. Fischer v. Superior Court, 110 Cal. 129, 42 Pac. 561.

12. Fox v. Hale & Norcross, etc. Co., 108 Cal. 475, 41 Pac. 328.

13. Welch v. Sargent, 127 Cal. 72, 59 Pac. 319.

14. Fischer v. Superior Court, 98 Cal. 67, 32 Pac. 875. See Whitley

§ 678. **Persons Who may Ask Receiver on Dissolution.** A receiver may be appointed upon dissolution on the application of any creditor or stockholder, according to the express provision of section 565 of the Code of Civil Procedure,—this provision being correlative to section 400 of the Civil Code making the directors on dissolution trustees for creditors and stockholders.¹⁵ The statute, it has been said, makes it unnecessary to look further for a definition of the circumstances under which a receiver may be appointed.¹⁶ Accordingly, the jurisdiction to make the appointment rests upon an application therefor by either a creditor or a stockholder, and can neither be invoked at the instance of a stranger, nor assumed by the court of its own motion,¹⁷ nor may the state ask the appointment of a receiver.¹⁸ And it has been held that the state is not a creditor within the meaning of the section merely because it has obtained a judgment for a fine upon the declaration of a forfeiture in quo warranto proceedings, although the decision on this point is not to be construed as a holding that in a new and distinct proceeding the state as creditor could not ask such appointment.¹⁹

v. Bradley, 13 Cal. App. 720, 110 Pac. 596, holding that where a corporation was to be formed and was to receive property of a partnership, which never was in fact transferred to the corporation, the power of the court to appoint a receiver for the partnership business on its dissolution is not affected by the formation of the corporation.

15. See Civ. Code, § 400.

16. Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121, referring to the doctrine, "expressio unius est exclusio alterius."

17. State Inv. etc. Co. v. Superior Court, 101 Cal. 135, 35 Pac. 549.

18. Sullivan v. Gage, 145 Cal. 759, 79 Pac. 537 (refusing to allow attorneys' fees based upon void appointment of receiver); People v. Union Bldg. etc. Assn., 127 Cal. 400, 58 Pac. 822, 59 Pac. 692; State Inv. etc. Co. v. Superior Court, 101 Cal. 135, 35 Pac. 549; Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

19. Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121. See Yore v. Superior Court, 108 Cal. 431, 41 Pac. 477, where it was not deemed necessary to decide whether the matter had been finally determined in the Havemeyer case, supra.

XXII. FOREIGN CORPORATIONS.

In General.

§ 679. **Scope of Chapter.**—Many topics incidentally relating to foreign corporations are treated elsewhere in this article or in other articles. Thus, the matter of proof of the existence of such corporations is considered in an earlier section.²⁰ So, also, the liability of stockholders of foreign corporations for debts and liabilities contracted or incurred by such corporations in California is dealt with under the head of stockholders' liability.¹ Questions arising in suits by or against foreign corporations are in general covered in the parts of this article relating to domestic corporations.² The details of the service of process upon foreign corporations are properly dealt with under another heading,³ while the matter of taxation of such corporations is treated of in the next chapter.⁴

§ 680. **What are Foreign Corporations.**—Every corporation organized under the laws of another state, territory, or of a foreign country is a foreign corporation within the meaning of statutes regulating the terms and conditions upon which such corporations may transact business in California.⁵ Corporations organized under the laws of the United States, however, are sometimes treated by the statutes as foreign corporations,⁶ although such corporations cannot be restricted as can other foreign corporations,⁷ but corporations such as national banking associations,

20. § 81, *infra*.

1. §§ 371 and 372.

2. As to venue, see § 626, *supra*.
3. See PROCESS. See, however, *infra*, § 707, as to jurisdiction in general, where service is incidentally considered.

4. See § 710 *et seq.*, *infra*.

5. Under § 405, Civ. Code, now superseded by the Corporation Li-

cense Act, corporations other than those created under the laws of this state were considered foreign corporations. See Stats. 1917, p. 371, "Corporation License Act."

6. Civ. Code, § 407, including such corporations among foreign railway corporations.

7. See § 691, *infra*.

which are located in a particular state, are treated in many respects as domestic corporations.⁸ In general, corporations are regarded as citizens of the state of their creation, and in other states they are regarded as foreign corporations.⁹

§ 681. As "Person" or "Citizen."—Under the system prevailing in this country, corporations are regarded as citizens of the state in which they are created,¹⁰ and no averment to the contrary is permitted. By engaging in business or acquiring property in another state, a corporation does not thereby cease to be a citizen of the state in which it was created.¹¹ Although organized under the laws of another state, a corporation, within the meaning of the fourteenth amendment to the constitution of the United States, is a "person," and as a person cannot be denied by a state the equal protection of the laws.¹² A foreign corporation in California, however, may be justly regarded as an inhabitant for the purposes of jurisdiction, although a citizen only of the state which gave it life.¹³

§ 682. As "Absent."—Being citizens and residents of the state by whose laws they are created, and having no legal existence elsewhere, save by comity, foreign corporations come within the principles of statutes which make a saving as to absent debtors, in favor of whom, so long as they remain without the jurisdiction, the statute of limitations will not run.¹⁴ In contemplation of law, such cor-

8. See *BANKS*, vol. 4, pp. 114, 183.

9. *Jameson v. Simonds Saw Co.*, 2 Cal. App. 582, 84 Pac. 289.

10. *Keystone etc. Co. v. Superior Court*, 138 Cal. 738, 72 Pac. 398; *Pierce v. Southern Pac. Co.*, 120 Cal. 156, 40 L. R. A. 350, 47 Pac. 874, 52 Pac. 302; *O'Brien v. Big Casino etc. Co.*, 9 Cal. App. 283, 99 Pac. 209; *Jameson v. Simonds Saw Co.*, 2 Cal. App. 582, 84 Pac. 289.

11. *United States v. Southern Pac. R. Co.*, 49 Fed. 297.

12. *American etc. Tel. Co. v. Superior Court*, 153 Cal. 533, 126 Am. St. Rep. 125, 17 L. R. A. (N. S.) 1117, 96 Pac. 15. See § 4, *supra*.

13. *United States v. Southern Pac. R. Co.*, 49 Fed. 297.

14. *O'Brien v. Big Casino etc. Co.*, 9 Cal. App. 283, 99 Pac. 209.

porations are absent from all other states than the one of their situs.¹⁵ It has even been held as to domestic corporations that, though legal residents for many purposes, they may nevertheless depart from the state within the meaning of statutes relating to the service of process, where all their officers and agents leave the state.¹⁶ But when a foreign corporation has a managing agent in California, openly exercising his authority as such and without fraudulent concealment, the corporation is within the state within the intent of the statute of limitations.¹⁷ A foreign corporation may, however, be considered as coming to California and as being within the state. A corporation which is doing business here through its officers or managing agents is considered to be within the state and not absent therefrom within the meaning of a statute limiting the time within which such corporation as a creditor may present a claim against the estate of a decedent.¹⁸

15. *Keystone etc. Co. v. Superior Court*, 138 Cal. 738, 72 Pac. 398; *Pierce v. Southern Pac. Co.*, 120 Cal. 156, 40 L. R. A. 350, 47 Pac. 874, 52 Pac. 302. See, also, as to statutes of limitations, *infra*, § 700.

16. *McKendrick v. Western Zinc Min. Co.*, 165 Cal. 24, 130 Pac. 865 (under Code Civ. Proc., § 412).

17. *Lawrence v. Ballou*, 50 Cal. 258. See, dictum, *Pierce v. Southern Pac. Co.*, 120 Cal. 156, 40 L. R. A. 350, 47 Pac. 874, 52 Pac. 302, contra, stating that it is the general rule that foreign corporations, although having agents and transacting business in the state, come within the statutes limiting the time for the commencement of actions and making a saving against absent debtors. See *Harrigan v. Home Life Ins. Co.*, 128 Cal. 531, 58 Pac. 180, 61 Pac. 99, approving *Lawrence v. Ballou*, and saying that it cannot be held to have been over-

ruled or affected by the dictum in the opinion in *Pierce v. Southern Pac. Co.*, which was unnecessary to the decision of the case, and where the case of *Lawrence v. Ballou* was not called to the attention of the court, nor alluded to in the opinion. It might be noted, however, that the action in *Lawrence v. Ballou* was begun before the passage of the statutes of 1871-72, affecting the matter (see *infra*, § 700), and the foreign corporation might therefore be deemed to have complied with all provisions of law.

18. *Tropico Land etc. Co. v. Lambourn*, 170 Cal. 33, 148 Pac. 206, under Code Civ. Proc., § 1493, providing time within which claims against estate are barred, excepting, where it is made to appear by affidavit, that the claimant had no notice by reason of being out of the state.

§ 683. **Residence.**—A corporation is domiciled in the state by whose laws it was created.¹⁹ Its home is in the state or country where alone it has its being.²⁰ And when “residence” is spoken of, that also is considered to be within the state under whose laws the company was incorporated,¹ and not where it may be transacting business.² So long as a corporation confines the exercise of its powers within the state of its creation it is beyond the reach of the process of the courts of other states.³ Thus, since the situs of a chose in action follows the person of its owner, if the owner is a corporation, the situs is the state of incorporation.⁴ So, where notes are presumptively payable at the residence of a foreign corporation, attachment will not lie even though the corporation does business in California.⁵ Such a corporation is a nonresident within the meaning of attachment laws.⁶

As a domestic corporation does not reside in a foreign country within the meaning of section 395 of the Code of

19. *United States v. Southern Pac. R. Co.*, 49 Fed. 297.

20. *Thomas v. Placerville etc. Co.*, 65 Cal. 600, 4 Pac. 641.

1. *Reins v. Diamond Match Co.*, 171 Cal. 326, 153 Pac. 239; *Tropico Land etc. Co. v. Lambourn*, 170 Cal. 33, 148 Pac. 206; *Wait v. Kern River etc. Co.*, 157 Cal. 16, 106 Pac. 98; *Keystone etc. Co. v. Superior Court*, 138 Cal. 738, 72 Pac. 398;

Thomas v. Placerville etc. Co., 65 Cal. 600, 4 Pac. 641; *Waechter v. Atchison etc. Co.*, 10 Cal. App. 70, 101 Pac. 41; *Jameson v. Simonds Saw Co.*, 2 Cal. App. 582, 84 Pac. 289.

2. *Keystone etc. Co. v. Superior Court*, 138 Cal. 738, 72 Pac. 398. But see *infra*, § 684, as to domestication of foreign corporation.

Under the terms of an insolvency act requiring a voluntary petition to be filed in the county of resi-

dence, a foreign corporation could not become a voluntary insolvent: *Keystone etc. Co. v. Superior Court*, 138 Cal. 738, 72 Pac. 398. But as to involuntary insolvency, the petition being required to be filed where the debtor resides or has his place of business, a foreign corporation might have a place of business in some county. In *re Castle Dome etc. Co.*, 3 Cal. Unrep. 1, 18 Pac. 794.

3. *Jameson v. Simonds Saw Co.*, 2 Cal. App. 582, 84 Pac. 289. See *infra*, § 707, as to jurisdiction over foreign corporations.

4. *Fenton v. Edwards*, 126 Cal. 43, 77 Am. St. Rep. 141, 46 L. R. A. 832, 58 Pac. 320.

5. *Atwood v. Little Bonanza etc. Co.*, 13 Cal. App. 594, 110 Pac. 344. See *ATTACHMENT*, vol. 3, p. 417.

6. *Title Ins. etc. Co. v. California Dev. Co.*, 171 Cal. 173, 152 Pac. 542.

Civil Procedure, so a foreign corporation does not reside in California within the meaning of that section.⁷ The fact that it cannot do business without subjecting itself to the jurisdiction of the courts of the state, does not entitle it, as a corollary, to claim a residence. It may be sued in California, not because it resides in the state, but because it has chosen to do business here.⁸ By doing business in California, therefore, it does not establish a residence in any particular county.⁹ No statute has ever been given a local county residence to such a corporation, where alone it can be sued,¹⁰ and in the absence of such a statute a mere affidavit of an officer that the corporation has its principal place of business in a certain county cannot be held to admit such corporation to the constitutional rights and privileges of a domestic corporation.¹¹

§ 684. **Domestication.**—The fact that a foreign corporation has complied with the provisions of the law required for doing business does not, of course, make it a domestic corporation.¹² However, for many practical purposes, a foreign corporation may be considered a California corporation.¹³ Thus, one which holds directors' meetings in California and does most of its business here, even though

7. *Thomas v. Placerville etc. Co.*, 65 Cal. 600, 4 Pac. 641.

8. *Thomas v. Placerville etc. Co.*, 65 Cal. 600, 4 Pac. 641. See *infra*, §§ 707, 708, as to jurisdiction.

9. *Bains v. Diamond Match Co.*, 171 Cal. 328, 153 Pac. 239; *Thomas v. Placerville etc. Co.*, 65 Cal. 600, 4 Pac. 641; *Ryan v. Inyo Cerro Gordo Min. etc. Co.*, 41 Cal. App. 770, 183 Pac. 250; *Waechter v. Atchison etc. Co.*, 10 Cal. App. 70, 101 Pac. 41. See *Ludington Exp. Co. v. La Fortuna etc. Co.*, 4 Cal. App. 369, 88 Pac. 290, not deciding the question. See *supra*, note 2.

10. *Thomas v. Placerville etc. Co.*, 65 Cal. 600, 4 Pac. 641; *Ryan v. Inyo Cerro Gordo Min. etc. Co.*, 41 Cal. App. 770, 183 Pac. 250; *Waechter v. Atchison etc. Co.*, 10 Cal. App. 70, 101 Pac. 41. See *Stats. 1917*, p. 371, § 1, as amended *Stats. 1921*, p. 638, requiring filing of copy of articles or charter in county where principal place of business in California is located.

11. *Waechter v. Atchison etc. Co.*, 10 Cal. App. 70, 101 Pac. 41.

12. *Waechter v. Atchison etc. Co.*, 10 Cal. App. 70, 101 Pac. 41.

13. *Wait v. Kern River etc. Co.*, 157 Cal. 16, 106 Pac. 98.

organized in another state, is for some purposes deemed a resident, so that stockholders may obtain jurisdiction over the corporation and its officers for the purposes of enforcing their rights in the internal management, such, for instance, as a right to inspect mining property, though located in another state,¹⁴ or the right to have stockholders' meetings called as provided in the by-laws.¹⁵ And it has been held that such a corporation may enforce the transfer and delivery of its corporate books and records by a former officer.¹⁶ Where all corporate business is transacted in California and all its property is here, there is no reason, it has been said, why the fiction as to the situs of the corporation ought not to yield in the interests of justice to the actual facts, to the extent of holding such corporation sufficiently a resident of the state to bring it within the rule applicable to domestic corporations as to the situs of their stock.¹⁷ In this connection, attention has been called by the California court to the fact that it is held by the English courts that a foreign corporation establishing an office in England and carrying on business is to be considered as a resident of England, subject to be sued in its courts.¹⁸

Rights and Powers Generally.

§ 685. Rule of Comity.—It follows from what has already been said¹⁹ that foreign corporations have no legal existence beyond the bounds of the state or sovereignty by

14. *Hobbs v. Tom Reed etc. Co.*, 164 Cal. 497, 43 L. R. A. (N. S.) 1112, 129 Pac. 781.

15. *Stabler v. El Dora Oil Co.*, 27 Cal. App. 516, 150 Pac. 643.

16. *Potomac Oil Co. v. Dye*, 10 Cal. App. 534, 102 Pac. 677. See *supra*, § 427.

17. *Wait v. Kern River etc. Co.*, 157 Cal. 16, 106 Pac. 98.

18. *Jameson v. Simonds Saw Co.*, 2 Cal. App. 582, 84 Pac. 289. See *United States v. Southern Pac. R. Co.*, 49 Fed. 297, holding a foreign corporation an inhabitant for the purposes of jurisdiction, where it maintained office and did business in the state.

19. See *supra*, §§ 680-684.

which they were created,²⁰ and can exercise none of the functions and privileges conferred by their charters in any other state or country, except by comity and consent,¹ that is, merely by grace.² They have no absolute right to recognition in other states.³ Where, however, comity or the laws of another state permit, a foreign corporation may operate entirely in such state and there exercise its franchises and functions.⁴

As comity ordinarily permits a corporation to enter another state and do business therein, it is competent for stockholders in making their charter to contract with reference to the laws of the state in which they propose to do business.⁵ Contracting with reference to those laws, they are presumed to know them.⁶ Accordingly, a foreign

20. *American etc. Tel. Co. v. Superior Court*, 153 Cal. 533, 126 Am. St. Rep. 125, 17 L. R. A. (N. S.) 1117, 96 Pac. 15; *Pierce v. Southern Pac. Co.*, 120 Cal. 156, 40 L. R. A. 350, 47 Pac. 874, 52 Pac. 302; *O'Brien v. Big Casino etc. Co.*, 9 Cal. App. 283, 99 Pac. 209; *Pinney v. Nelson*, 183 U. S. 144, 46 L. Ed. 125, 22 Sup. Ct. Rep. 52, see, also, *Rose's U. S. Notes*; as to domestication of foreign corporations, see *supra*, § 684.

1. *People v. Alaska Pac. S. S. Co.*, 182 Cal. 202, 187 Pac. 742; *H. K. Mulford Co. v. Curry*, 163 Cal. 276, 125 Pac. 236; *American etc. Tel. Co. v. Superior Court*, 153 Cal. 533, 126 Am. St. Rep. 125, 17 L. R. A. (N. S.) 1117, 96 Pac. 15; *Anglo-Californian Bank v. Field*, 146 Cal. 644, 80 Pac. 1080; *Pierce v. Southern Pac. Co.*, 120 Cal. 156, 40 L. R. A. 350, 47 Pac. 874, 52 Pac. 302; *London etc. Bank v. Aronstein*, 117 Fed. 601, 54 C. C. A. 663; *Williams v. Gold Hill Min. Co.*, 96 Fed. 454.

2. *San Francisco v. Liverpool etc.*

Ins. Co., 74 Cal. 113, 5 Am. St. Rep. 425, 15 Pac. 380.

3. *San Francisco v. Liverpool etc. Ins. Co.*, 74 Cal. 113, 5 Am. St. Rep. 425, 15 Pac. 380; *London etc. Bank v. Aronstein*, 117 Fed. 601, 54 C. C. A. 663; as to interstate commerce, see *infra*, § 691.

4. *Tropico Land etc. Co. v. Lam-bourn*, 170 Cal. 33, 148 Pac. 206. But comity, although permitting suit within the state, does not confer a local county residence therein; *Thomas v. Placerville etc. Co.*, 65 Cal. 600, 4 Pac. 641. See as to residence, *supra*, § 683.

5. *Thomas v. Matthiessen*, 232 U. S. 221, 58 L. Ed. 577, 34 Sup. Ct. Rep. 312, see, also, *Rose's U. S. Notes*; *Pinney v. Nelson*, 183 U. S. 144, 46 L. Ed. 125, 22 Sup. Ct. Rep. 52, see, also, *Rose's U. S. Notes*; *Thomas v. Wentworth Hotel Co.*, 158 Cal. 275, 139 Am. St. Rep. 120, 110 Pac. 942; *Peck v. Noee*, 154 Cal. 351, 97 Pac. 865.

6. *Thomas v. Wentworth Hotel Co.*, 158 Cal. 275, 139 Am. St. Rep. 120, 110 Pac. 942; *Pinney v. Nel-*

corporation which undertakes to do business in California is bound to know the law as to its right to do such business,⁷ and it is presumed to come into the state intending to comply with and be bound by such law.⁸ It will be presumed that the laws under which the corporation was formed conferred the same rights as are given by the laws of California.⁹

§ 686. Extent and Limitations of Rule.—By coming into California and filing its articles of incorporation, and otherwise complying with the regulatory laws, a foreign corporation obtains no grant of power or franchise of any character. Its powers are only those which it possessed by virtue of the laws of the state in which it was created.¹⁰ Under comity, California extends to foreign corporations the privilege of here exercising only the powers conferred by their charters.¹¹ Certainly a corporation cannot enlarge its powers to contract by contracting beyond the jurisdiction in which it is created.¹² Within the scope of its powers so limited, a corporation may make and enforce contracts in other states which are not forbidden by the laws of such states.¹³ Thus, one of the privileges which a corporation receives by its charter is that of maintaining or defending actions in its corporate name, and since there is no rule of the common law which forbids a corporation organized in one state from doing business in another, in the absence of any statutory inhibition there can be no

son, 183 U. S. 144, 46 L. Ed. 125, 22 Sup. Ct. Rep. 52, see, also, Rose's U. S. Notes.

7. *Olander v. Crystalline Min. Co.*, 149 Cal. 482, 86 Pac. 1082; *Keystone etc. Co. v. Superior Court*, 138 Cal. 138, 72 Pac. 398.

8. *Knapp v. Bullock Tractor Co.*, 242 Fed. 543.

9. *Hobbs v. Tom Reed etc. Co.*, 164 Cal. 497, 43 L. R. A. (N. S.) 1112, 129 Pac. 781. As to pre-

sumptions concerning foreign laws, generally, see *CONFLICT OF LAWS*, vol. 5, p. 430.

10. *People v. Alaska Pac. S. S. Co.* 182 Cal. 202, 187 Pac. 742.

11. *London etc. Bank v. Aronstein*, 117 Fed. 601, 54 C. C. A. 663.

12. *E. J. Dodge Co. v. First National Bank*, 260 Fed. 758.

13. *United States v. Southern Pac. R. Co.*, 49 Fed. 297.

doubt that comity permits a foreign corporation which had entered California and has done business here to maintain or defend actions arising out of such business.¹⁴

Comity also permits the exercise of the franchise in other states in all respects where such exercise will not contravene any principle of local policy or any general statute.¹⁵ Comity is limited by public policy, which may be inferred from general attitude of the state toward foreign corporations, or may be positively declared by statutory enactment or by constitutional provision as is the case in California.¹⁶ Legislation specifying the extent of comity, and the terms with which a foreign corporation must comply is not objectionable so long as it does not permit such corporations to do business on more favorable conditions than are imposed upon domestic corporations.¹⁷ The state of California has properly taken the precautions to prescribe regulations and impose certain conditions so that no injury or injustice may be done to its own citizens.¹⁸

§ 687. Exercise of Powers — Eminent Domain.— The powers of a foreign corporation are such and such only as are conferred by the laws of the state in which it was created, and it may exercise such powers in California by the comity unless restricted by law.¹⁹ These powers include those incidental to the main purposes of the corporation, such as the power to prosecute and defend suits, use a common seal, to take and hold property and to sell the

14. *American etc. Tel. Co. v. Superior Court*, 153 Cal. 533, 126 Am. St. Rep. 125, 17 L. R. A. (N. S.) 1117, 96 Pac. 15. See *infra*, §§ 707-709.

15. *London etc. Bank v. Aronstein*, 117 Fed. 601, 54 C. C. A. 663; *Williams v. Gold Hill Min. Co.*, 96 Fed. 454.

16. *Williams v. Gold Hill Min. Co.*, 96 Fed. 454, referring to art. XII, § 15 of the constitution.

17. *Anglo-Californian Bank v. Field*, 146 Cal. 644, 80 Pac. 1080. See *infra*, §§ 701-703, as to prohibition of discrimination against domestic corporations.

18. *London etc. Bank v. Aronstein*, 117 Fed. 601, 54 C. C. A. 663.

19. *People v. Alaska Pac. S. S. Co.*, 182 Cal. 202, 187 Pac. 742. See *supra*, §§ 686, 687.

same when the interests of the corporation require.²⁰ For all purposes of business within their capacity, foreign corporations are classed with domestic corporations, provided they comply with the statutes allowing them to do business. Foreign corporations have always been allowed to enter California and do therein any business within their corporate powers.¹

It has been held that the state may permit foreign corporations to exercise the right of eminent domain.² Section 407 of the Civil Code granting to certain corporations the power to exercise this right was not intended, it has been said, to prevent other corporations than those described in such section from exercising it.³

Restrictions and Conditions.

§ 688. Right to Prescribe Conditions.—A state may prescribe the terms upon which a foreign corporation may carry on business within its territory. Having no absolute right of recognition, it follows as a matter of course that assent to the admission of such corporations and to the doing of business by them may be granted upon such terms and conditions as the state may think proper to impose.⁴ The state may entirely exclude a foreign corporation not engaged in interstate commerce,⁵ or may admit

20. General Conference of Free Baptists v. Berkey, 156 Cal. 466, 105 Pac. 411. As to incidental powers generally, see supra, §§ 542-544.

1. San Joaquin etc. Irr. Co. v. Stevinson, 164 Cal. 221, 128 Pac. 924.

2. Deseret etc. Co. v. State, 167 Cal. 147, 138 Pac. 981; San Joaquin etc. Irr. Co. v. Stevinson, 164 Cal. 221, 128 Pac. 924; Western Union Tel. Co. v. Superior Court, 15 Cal. App. 679, 115 Pac. 1091, 1100. See EMINENT DOMAIN.

3. San Joaquin etc. Irr. Co. v. Stevinson, 164 Cal. 221, 128 Pac. 924; Western Union Tel. Co. v. Superior Court, 15 Cal. App. 679, 115 Pac. 1091, 1100.

4. H. K. Mulford Co. v. Curry, 163 Cal. 276, 125 Pac. 236; Black v. Vermont Marble Co., 1 Cal. App. 718, 82 Pac. 1060. But as to business consisting of interstate commerce, see infra, § 691.

5. H. K. Mulford Co. v. Curry, 163 Cal. 276, 125 Pac. 236; Black v. Vermont Marble Co., 1 Cal. App. 718, 82 Pac. 1060; Hooper v. Cali-

it conditionally⁶ and subject it to such restrictions as the legislature may prescribe.⁷ Thus, it has been said that the legislature could, if it so elect, require foreign corporations to reincorporate under the laws of California as a condition precedent to their right to do business,⁸ or it may restrict their business to particular localities, or may exact such security for the performance of their contracts as in its judgment may best promote the public interest. The whole matter rests in its discretion.⁹ Certainly, the legislature may prescribe, as a condition of its consent, that foreign corporations pay a license tax,¹⁰ and it may prescribe conditions as to service of process upon such corporations.¹¹

§ 689. Classification and Discrimination.—A foreign corporation is not entitled as a matter of right to the same privileges as are enjoyed by corporations organized and existing under the laws of California.¹² The state has the right to discriminate between the two classes, as, for instance, in the imposition of an inheritance tax on bequests

fornia, 155 U. S. 648, 39 L. Ed. 297, 15 Sup. Ct. Rep. 207, see, also, *Rose's U. S. Notes; London etc. Bank v. Aronstein*, 117 Fed. 601, 54 C. C. A. 663.

6. *San Francisco v. Liverpool etc. Ins. Co.*, 74 Cal. 113, 5 Am. St. Rep. 425, 15 Pac. 380; *Hooper v. California*, 155 U. S. 648, 39 L. Ed. 297, 15 Sup. Ct. Rep. 207, see, also, *Rose's U. S. Notes*.

7. *Jameson v. Simonds Saw Co.*, 2 Cal. App. 582, 84 Pac. 289.

8. *Western Union Tel. Co. v. Superior Court*, 15 Cal. App. 679, 115 Pac. 1091, 1100.

9. *Black v. Vermont Marble Co.*, 1 Cal. App. 718, 82 Pac. 1060.

10. *Kaiser L. & F. Co. v. Curry*, 155 Cal. 638, 103 Pac. 341. As to

interstate commerce, see *infra*, § 691.

11. *Jameson v. Simonds Saw Co.*, 2 Cal. App. 582, 84 Pac. 289. See *infra*, § 694; and see *PROCESS*.

12. *Keystone etc. Co. v. Superior Court*, 138 Cal. 738, 72 Pac. 398, holding that the act providing that foreign corporations should not maintain or defend actions until compliance with statutory provisions did not violate fourteenth amendment to federal constitution. And see *Francioni v. Soledad L. & W. Co.*, 170 Cal. 221, 149 Pac. 161, stating that the fact that a statute is applicable to domestic corporations only might justify the classification. See *infra*, §§ 701-703, as to prohibition of discrimination against domestic corporations.

received by foreign companies.¹³ The operation of a law is none the less uniform because it operates differently upon different classes, provided there is a reasonable and constitutional basis for the classification. Thus, with respect to corporations there is a difference in the power of the state as regards those which are domestic and those which are foreign, which difference furnishes a proper basis for providing different penalties in cases of tax delinquency.¹⁴ So the laws providing for service of process upon foreign corporations cannot be condemned as special laws regulating practice in courts, or granting special and exclusive rights, privileges and immunities to any corporation.¹⁵ Where, however, the intention to discriminate does not appear, foreign will be included with domestic corporations in the provisions of general statutes.¹⁶ And it is here to be noted that the constitution furnishes proof of the existence of a public policy that there shall be no discrimination in favor of foreign corporations.¹⁷

§ 690. General Limitations on Power to Restrict.—A corporation, unless expressly forbidden, may, as has been seen, acquire rights of contract and property in a foreign jurisdiction. It has been seen also that the state may absolutely exclude a foreign corporation not engaged in interstate commerce from doing domestic business, and so may impose conditions upon which alone such business may be done, provided no unconstitutional condition is made a part of any actual agreement.¹⁸ Thus, it is funda-

13. *Estate of Fiske*, 178 Cal. 116, 172 Pac. 390.

14. *Kaiser L. & F. Co. v. Curry*, 155 Cal. 638, 103 Pac. 341, as to License Act of 1905 providing for forfeiture of charter of domestic corporations and forfeiture of right to do business in state of foreign corporations, which in each case was all that the state had given and therefore all it could take away. As to constitutionality of classification gen-

erally, see CONSTITUTIONAL LAW, vol. 5, p. 823.

15. *Anglo-Californian Bank v. Field*, 146 Cal. 644, 80 Pac. 1080.

16. *Estate of Fiske*, 178 Cal. 166, 172 Pac. 390.

17. *Williams v. Gold Hill Mtn. Co.*, 96 Fed. 454. See *infra*, §§ 701-703.

18. *H. K. Mulford Co. v. Curry*, 163 Cal. 276, 125 Pac. 236. See *supra*, §§ 688, 689.

mental that the method of citation in securing jurisdiction over foreign corporations should be fairly calculated to bring home to the defendant actual notice of the pendency of the action and should allow it a reasonable time to put in a defense, for even a foreign corporation is entitled to due process of law.¹⁹ A foreign corporation does not waive a constitutional objection to a tax levied on it by continuing to do business after the passage of the tax law.²⁰ And when a foreign corporation has once engaged in domestic business, the state may not exercise its powers of exclusion or regulation to the destruction of the property of the corporation or of its vested constitutional rights.¹ There is no intimation in the decisions that foreign corporations are not, when permitted to do business, entitled to the protection of the laws of the state as fully as citizens.²

§ 691. Interstate Commerce.—It is now the settled doctrine of the United States supreme court, whose decisions are controlling on the subject, that a corporation of one state may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of interstate commerce, and any statute which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause of the federal constitution.³ The California decisions are in accord with this rule. They held that the admitted power of the state to pre-

19. *Knapp v. Bullock Tractor Co.*, 242 Fed. 543. See *Olender v. Crystalline Min. Co.*, 149 Cal. 482, 86 Pac. 1082, *contra*, holding that where a foreign corporation had not exercised its right under the state laws, it was not in a position to invoke the constitutional doctrines that a defendant must have notice of an action against him and an opportunity to be heard therein. See *infra*, § 707.

20. *San Francisco v. Liverpool*

etc. Ins. Co., 74 Cal. 113, 5 Am. St. Rep. 425, 15 Pac. 380.

1. *H. K. Mulford Co. v. Curry*, 163 Cal. 276, 125 Pac. 236.

2. *San Francisco v. Liverpool etc. Ins. Co.*, 74 Cal. 113, 5 Am. St. Rep. 425, 15 Pac. 380, saying that it is not a federal question.

3. *Dahnke-Walker Milling Co. v. Bondurant*, — U. S. —, 42 Sup. Ct. Rep. — (Adv. Sheets, 114), 66 L. Ed. —.

scribe terms under which a foreign corporation may engage in business is subject to the limitation that where such corporation is engaged in interstate as well as intrastate business, no condition or requirement, though expressly directed to intrastate business, and no matter what its name or form, will be upheld if it imposes any burden upon the interstate business of the corporation.⁴ It is likewise held that the right of a foreign corporation to carry on interstate business and to acquire and convey real property necessary therefor and to maintain actions to protect its rights therein is not subject to taxation by the state.⁵

A foreign corporation when it comes into California for the purpose of doing interstate and intrastate business is required by statute to file its articles and designate its resident agent in order to enable it to maintain actions for the protection and enforcement of its rights,⁶ but for failure to so comply with the law such corporation is only deprived of its rights as to suit with respect to intrastate business.⁷ The requirement that foreign corporations file a certified copy of their articles, standing alone, is a reasonable requirement, not in restraint of interstate com-

4. *H. K. Mulford Co. v. Curry*, 163 Cal. 276, 125 Pac. 236.

While the state may impose reasonable regulations on foreign corporations which have accepted the obligations prescribed by the act of Congress relating to telegraph companies, it will not be permitted, whether under the guise of regulation or otherwise, to enact legislation the effect of which would or might be to prevent them from doing business in the state, or in effect result in an attempt on the part of such state to regulate commercial intercourse between its citizens and those of other states.

Such legislation would be in direct conflict with the laws of Congress and therefore void. *Western Union Tel. Co. v. Superior Court*, 15 Cal. App. 679, 115 Pac. 1091, 1100.

5. *People v. Alaska Pac. S. S. Co.*, 182 Cal. 202, 187 Pac. 742; *H. K. Mulford Co. v. Curry*, 163 Cal. 276, 125 Pac. 236. See as to taxation, *infra*, § 726.

6. *People v. Alaska Pac. S. S. Co.*, 182 Cal. 202, 187 Pac. 742; *Stats. 1917*, p. 371, § 1, as amended *Stats. 1921*, p. 638. See *infra*, §§ 693, 694.

7. *Stats. 1917*, p. 371, § 1, as amended *Stats. 1921*, p. 638.

merce, and therefore valid.⁸ But if the foreign corporation is engaged wholly in interstate commerce, the statute is inapplicable, because, as has been seen, the state cannot put any burden upon corporations wholly so engaged.⁹

§ 692. General Nature and Construction of Restrictions.

The laws relating to foreign corporations are negative and restrictive in character. They impose a penalty upon the corporation which does not file its articles and designate its agent as required, and provide that unless they do so, they shall not maintain any suit or action in any court of California or acquire or convey the legal title to any real property within the state. It has been said that the state does not thereby grant to a foreign corporation power to do domestic business, but merely forbids the exercise herein of a small part of the corporate power it already possesses, except on the specified conditions.¹⁰ Statutes which purport to curtail the privilege of foreign corporations to maintain or defend actions in California and to impose conditions upon compliance with which alone they may be permitted to do so will not, it has been said, be construed to extend beyond the plain meaning of their terms considered in connection with their objects and purposes.¹¹

§ 693. Filing Articles or Charter.—Every foreign corporation doing an interstate or intrastate business in California or maintaining an office therein or entering the state for the purpose of doing business therein is required to file in the office of the secretary of state a certified copy of its articles of incorporation, or of its charter, or of the

8. *H. K. Mulford Co. v. Curry*, 163 Cal. 276, 125 Pac. 236.

9. *Kimball Co. v. Read*, 43 Cal. App. 342, 185 Pac. 192.

10. *People v. Alaska Pac. S. S. Co.*, 182 Cal. 202, 187 Pac. 742, per *Shaw, J.*

11. *American etc. Tel. Co. v. Superior Court*, 153 Cal. 533, 126 Am. St. Rep. 125, 17 L. R. A. (N. S.) 1117, 96 Pac. 15; *Winston v. Idaho Hardwood Co.*, 23 Cal. App. 211, 137 Pac. 601. See as to actions *infra*, §§ 707-709.

statute, or legislative, or executive, or governmental act creating it. Such document must be certified by the secretary of state or other officer authorized by the law of the jurisdiction under which such corporation is formed. Payment of the fee for filing and of the license tax is also required.¹² Such a foreign corporation must also file a certified copy of its articles or charter, duly certified by the secretary of state of California, in the office of the county clerk of the county where its principal place of business in California is located and also where it owns any real property.¹³ A foreign corporation is further required to file with the secretary of state, with its charter or articles, an affidavit, sworn to by its president or secretary, which shall state the amount of the corporation's authorized capital stock, and if subject to license tax, such an affidavit must be filed annually at the time of payment of the tax. Amendments to or changes in the provisions of the original articles of incorporation or charter, or of the statute or legislative, executive or governmental act or acts creating the corporation, must likewise be filed.¹⁴ If a foreign corporation makes application to the commissioner of corporations for a permit to issue securities or for a certificate as agent or broker for the sale of securi-

12. Stats. 1917, p. 371, § 1, as amended Stats. 1921, p. 638. The provisions of this statute replace the provisions of former §§ 408 and 409 of the Civil Code, repealed in 1917. See as to filing of articles by domestic corporations, supra, §§ 50, 51. As to filing fee and license tax, see § 712 et seq., infra.

13. Stats. 1917, p. 371, § 1, as amended by Stats. 1921, p. 638. This provision for filing where the corporation "owns" any real property would not seem to require the filing until after the property has been acquired so far as the filing in the county is concerned, although,

of course, unless the filing has been had with the secretary of state, the corporation cannot acquire or convey any legal title to its property, or maintain or defend any action or proceeding concerning its property in this state or any intrastate business or transaction in any court of this state. See supra, § 51 et seq., as to filing of copies of the articles of a domestic corporation under § 299 of the Civil Code. As to principal place of business, see supra, §§ 99, 100.

14. Stats. 1917, p. 371, § 1, as amended Stats. 1921, p. 638.

ties, it must file with its application a copy of its articles of incorporation, together with a certificate executed by the proper officer of the state, territory or government, under which the corporation was organized, not more than thirty days before the filing of such application, showing that the applicant is authorized to transact business in such state, territory or government.¹⁵

§ 694. Designation of Agent for Process.—Every foreign corporation is required to file with the secretary of state a designation of some person residing in California upon whom process may be served. A copy of such designation certified by the secretary of state is sufficient evidence of the appointment of the representative.¹⁶ The fact that the corporation maintains an agent to comply with this provision of the statute solely, and who performs no other duties, does not constitute “doing business.”¹⁷ Process may be served on the person so designated,¹⁸ while the designation is unrevoked,¹⁹ or, in the event no representative is designated, then on the secretary of state, and such service is a valid service on the corporation.²⁰ The fact that no appointment of the secretary of state as its agent is made by the corporation is immaterial, since a corporation coming into the state is presumed to come intending to comply with its laws. But where the statute does not require the secretary of state to give notice to the corporation of the pendency of the action against it, it is un-

15. Stats. 1917, p. 673, § 3 (permit to sell securities), § 5 (certificate as agent or broker for the sale of securities).

16. Stats. 1917, p. 371, § 1, as amended Stats. 1921, p. 638.

17. *Bryant & May v. Scott*, 226 Fed. 875.

18. Stats. 1917, p. 371, § 1, as amended Stats. 1921, p. 638. See PROCESS.

19. *Eureka etc. Co. v. Superior Court*, 66 Cal. 311, 5 Pac. 490.

20. Stats. 1917, p. 371, § 1, as amended Stats. 1921, p. 638. This section is identical with provisions of § 405, Civ. Code, repealed in 1917, which the statute supersedes. After its repeal and the enactment of this statute, § 405 was declared unconstitutional by the federal court in the decision cited in the next note.

constitutional as in violation of the due process clause of the federal constitution, since the method of citation must be one calculated to bring home to the corporation actual notice of the pendency of an action.¹ The designation of an agent may be revoked by writing filed with the secretary of state, and within forty days after such revocation or after death or removal from the state of the person designated, the corporation must make a new designation.²

Although the provisions of the present statute as to service on the secretary of state in the absence of a designation of agent for process³ are identical with older provisions which have been declared by the federal court to be unconstitutional, nevertheless all foreign corporations making application to the commissioner of corporations for a permit to dispose of securities within the state must file with the commissioner a written instrument irrevocably appointing him its true and lawful attorney upon whom all process in any action or proceeding against them may be served with the same effect as if the corporations were organized under the laws of California and had been lawfully served with process therein.⁴ In proceedings against a corporation thereafter, service of process may be made upon the commissioner, who is required by law forthwith to forward by mail, postage prepaid, to the person previously designated by the corporation or to

1. Knapp v. Bullock Tractor Co., 242 Fed. 543, per Bledsoe, J. (holding Civ. Code, § 405, unconstitutional). See, also, *infra*, § 707.

2. Stats. 1917, p. 371, § 1, as amended Stats. 1921, p. 638. Similar to provisions of Civ. Code, § 406, repealed in 1917.

3. Stats. 1917, p. 371, § 1, as amended by Stats. 1921, p. 638.

4. Stats. 1917, p. 673. "Corporate Securities Act," § 3. Cf. Gutzeil v. Pennie, 95 Cal. 598, 30 Pac. 836,

under statute making similar provisions as to insurance corporations. See, also, § 5 of Stats. 1917, p. 673, requiring a foreign corporation applying for an agent's or broker's certificate to make a similar appointment of the commissioner of corporations as agent for the service of process in any action or proceeding against it arising out of or founded upon the actual fraud of such applicant in the sale of securities within this state.

the last known address of the corporation, a copy of such process.⁵

§ 695. Repeal of Acts.—The effect of the repeal of acts relating to foreign corporations and prescribing penalties for failure to comply therewith is to preclude the enforcement of any penalty for past acts or delinquencies under the terms of the prior statute, so that the corporation has a right to transact business on compliance with the new conditions prescribed by the law.⁶ Thus, statutes taking away the right to maintain or defend actions for failure to comply with provisions of the law are not applicable to actions begun after their repeal.⁷ Where, however, the statute adds a new penalty for noncompliance, it is not necessarily a repeal of the prior act.⁸

§ 696. Withdrawal of Foreign Corporation.—Any foreign corporation is permitted to surrender its right to engage in intrastate business in California upon filing with the corporation license tax exemption board an affidavit, sworn to by the president of the corporation, and containing a concise statement of the nature, character and manner of doing any business of any kind that the corporation may thereafter intend to transact in California. The corporation must furnish such other or additional information as the board may require. The order of the board approving the application terminates the right of the corporation to transact an intrastate business, so that thereafter any person attempting on behalf of the corporation to transact such business is punishable in the same manner as for such offense after a forfeiture under the license tax act for failure to pay the license tax.⁹

5. Stats. 1917, p. 673, § 18. This method of service, of course, avoids the defects pointed out in *Knapp v. Bullock Tractor Co.*, 242 Fed. 543.

6. *Commercial Union Assur. Co. v. Wolf*, 8 Cal. App. 413, 97 Pac. 79.

As to effect of repeals generally, see STATUTES.

7. *Kimball Co. v. Read*, 43 Cal. App. 342, 185 Pac. 192.

8. *Keystone etc. Co. v. Superior Court*, 138 Cal. 738, 72 Pac. 398.

9. Stats. 1917, p. 371, § 15.

Noncompliance With Conditions.

§ 697. **In General.**—Every foreign corporation which complies with the provisions of the statute as to filing of articles and designation of an agent for the service of process upon it,¹⁰

“is thereafter entitled to the benefit of the laws of this state limiting the time for the commencement of civil actions, but any corporation created by or under the laws of any foreign state or country and that has not complied with this section is not entitled to the benefit thereof, nor can any such foreign corporation maintain or defend any action or proceeding concerning its property in this state or any intrastate business or transaction, in any court of this state or acquire or convey any legal title to any real property within this state.”¹¹

Under the provisions for penalties for noncompliance the legislature does not ordinarily purport to prohibit a corporation from engaging in business before compliance with the statutory provisions nor to affect the validity of any transaction it may enter into or any contract it may make.¹² But of course such corporation could not acquire or convey legal title to real property unless it complies with the statute. In addition, every corporation subject to the provisions of the law, neglecting or failing to file as required with the secretary of state, is subject to a fine of five hundred dollars; and when advised that a foreign corporation is doing business within the state without com-

10. §§ 693, 694, *supra*.

11. Stats. 1917, p. 371, § 1, as amended Stats. 1921, p. 638. Prior to 1917 there were separate penalties for noncompliance with the provision for filing of articles and the provision for designation of an agent, contained in §§ 405 to 410 of the Civil Code. The present statute is practically a combination of the

penalties provided in those sections. See *Kimball Co. v. Read*, 43 Cal. App. 342, 185 Pac. 192, where court referred to new provisions of act of 1917. *People v. Alaska Pac. S. S. Co.*, 182 Cal. 202, 187 Pac. 742 (discussing penalty for noncompliance).

12. *Black v. Vermont Marble Co.*, 1 Cal. App. 718, 82 Pac. 1060.

plying with the law, it is the duty of the secretary of state and of the state board of equalization to report such fact to the attorney general who is required, as soon as practicable, to institute proceedings to recover such fine.¹³ Every contract made by or on behalf of any foreign corporation failing to comply with the statutory provisions as to filing affecting the personal liability thereof or relating to property within the state, is void on its behalf and on behalf of its assigns, but is made enforceable against it or them by the other party.¹⁴

§ 698. Pleading and Proof of Noncompliance.—Noncompliance by foreign corporations with the statutes providing conditions for the maintenance of suit is available by a plea in abatement,¹⁵ which is a dilatory plea, to be strictly construed, and one which is not favored by the law.¹⁶ Failure to plead such noncompliance in the answer or before trial is a waiver of the defense.¹⁷ Thus, where a motion is made after trial on the merits to permit the filing of an amended or supplemental answer alleging noncompliance by the plaintiff corporation, the motion is properly denied,¹⁸ and denial of such a motion made during the course of trial is not error.¹⁹ An allegation of compliance with the statutory conditions for doing business is not necessary in a complaint by a foreign corporation. If it does not appear on the face of the complaint that plaintiff has not complied with the statute, such want of capacity to sue cannot be raised by demurrer.²⁰

13. Stats. 1917, p. 371, § 1, as amended Stats. 1921, p. 638.

14. Stats. 1917, p. 371, § 1, as amended Stats. 1921, p. 638.

15. Reed & Co. v. Harshall, 12 Cal. App. 697, 108 Pac. 719.

16. Bernheim Distilling Co. v. Elmore, 12 Cal. App. 85, 106 Pac. 720.

720. See ABATEMENT AND REVIVAL, vol. 1, p. 80.

17. Reed & Co. v. Harshall, 12

Cal. App. 697, 108 Pac. 719; Bernheim Distilling Co. v. Elmore, 12

Cal. App. 85, 106 Pac. 720.

18. Reed & Co. v. Harshall, 12 Cal. App. 697, 108 Pac. 719.

19. Bernheim Distilling Co. v. Elmore, 12 Cal. App. 85, 106 Pac. 720.

20. Redding etc. Min. Co. v. National Surety Co., 18 Cal. App. 488, 123 Pac. 544; Bernheim Distilling

A denial on information and belief that the plaintiff has complied with the laws requiring the filing of copies of the articles by a foreign corporation in the county where its principal place of business is located and where it owns property,¹ or a denial on information and belief that plaintiff is authorized to do business in California,² is insufficient.³ Whether the plaintiff is entitled as a foreign corporation to transact business in California within the meaning of the statutory requirements is a matter of record, and not being denied positively is deemed admitted.⁴ Likewise, it is proper to refuse an amendment to an answer to allege noncompliance, where it does not allege that the foreign corporation was doing business in the state at the time of commencement of the action, but only that "it is now doing business."⁵ The burden is on the party pleading the bar of the statute to show that the case comes within its terms.⁶

§ 699. Maintenance or Defense of Actions.—A foreign corporation which has not complied with the law as to the filing of copies of its articles and designation of an agent is not entitled to maintain or defend in the courts of California any action or proceeding concerning its property or any intrastate business or transaction.⁷ The provision

Co. v. Elmore, 12 Cal. App. 85, 106 Pac. 720.

1. Lincoln County Bank v. Fetterman, 170 Cal. 357, 149 Pac. 811.

2. Art Metal Const. Co. v. A. F. Anderson Co., 182 Cal. 29, 186 Pac. 776.

3. Art Metal Const. Co. v. A. F. Anderson Co., 182 Cal. 29, 186 Pac. 776; Lincoln County Bank v. Fetterman, 170 Cal. 357, 149 Pac. 811.

4. Art Metal Const. Co. v. A. F. Anderson Co., 182 Cal. 29, 186 Pac. 776.

5. Lincoln County Bank v. Fetterman, 170 Cal. 357, 149 Pac. 811.

6. Kimball & Co. v. Read, 43 Cal. App. 342, 185 Pac. 192.

7. Stats. 1917, p. 371, § 1, as amended by Stats. 1921, p. 638; Kimball Co. v. Read, 43 Cal. App. 342, 185 Pac. 192. See cases arising under § 299, Civ. Code, § 52, supra.

It should be noted that this provision of the statute has been changed from the provision of §§ 406 and 410 of the Civil Code as they existed prior to 1917 covering "any action or proceeding," to the present language, "any action or proceeding concerning its property in this state or any intrastate busi-

that the corporation shall not "maintain" any action does not deny to it the right to "commence" an action for the protection of its property or the enforcement of its rights,⁸ for to maintain an action is not the same as to commence one, but implies that the action has already been commenced.⁹ It is within the power of such corporation at any time after commencement of the action to comply with the statute and thereafter maintain it.¹⁰ So, if the corporation complies with the condition prior to filing of an amended complaint, it is not precluded from maintaining the action.¹¹

The prohibition against maintaining an action does not prevent the foreign corporation from defending an action against it. Thus, under the provisions of former sections 406 and 410 of the Civil Code, the first section applying to failure to designate an agent prohibited the corporation from maintaining or defending, but the latter section, applying to a failure to file articles, denied only the right to maintain an action and did not purport to deny the right to defend; hence, in such case the corporation might defend an action against it.¹² By taking away the right to

ness or transaction." It would appear that this would not prevent a suit on a transaction arising in another state, which would be permitted by comity.

Whether or not the court erred in its conclusion that the corporation has no capacity to sue in this state by reason of noncompliance with the statute is immaterial where the record shows a finding against it on the merits of the case. *International Textbook Co. v. Holmes*, 25 Cal. App. 474, 144 Pac. 146.

8. *Ward Land etc. Co. v. Mapes*, 147 Cal. 747, 82 Pac. 426; *Black v. Vermont Marble Co.*, 1 Cal. App. 718, 82 Pac. 1060.

9. *Ward Land etc. Co. v. Mapes*, 147 Cal. 747, 82 Pac. 426.

10. *Black v. Vermont Marble Co.*, 1 Cal. App. 718, 82 Pac. 1060.

11. *Ward Land etc. Co. v. Mapes*, 147 Cal. 747, 82 Pac. 426.

12. *American etc. Tel. Co. v. Superior Court*, 153 Cal. 533, 126 Am. St. Rep. 125, 17 L. R. A. (N. S.) 1117, 96 Pac. 15; *Winston v. Idaho Hardwood Co.*, 23 Cal. App. 211, 137 Pac. 601 (holding that under § 405 of the Civil Code a corporation was not required to file the designation until after filing its articles, and if the articles were not filed, only the penalty under § 410 for not filing the articles could accrue, not that of § 406 for failure to file the designation).

defend in case of noncompliance, however, it has been said that the legislature did not intend that the corporation should be without protection of the law or that its property might be confiscated through the forms of law without any right to defend against the same.¹³ When only the right to maintain and not the right to defend an action is taken away, clearly an order of court striking out an answer because of failure to comply with the statutory provisions is unauthorized.¹⁴

§ 700. Benefit of Statute of Limitations.—Statutes of limitations are purely matters of legislative creation. In the absence of any statute upon the subject, lapse of time does not constitute a defense to the right to enforce an obligation.¹⁵ It would, it has been said, be competent for the legislature to declare that there should be no limitation of time against the enforcement of any obligation of a foreign corporation, and its declaration that, upon failure to file a designation of an agent for service of process, it shall be denied the benefit of the statute of limitations, is only an exercise of this admitted power,¹⁶ which power it has exercised for many years.¹⁷ So long as a foreign corporation remains out of the jurisdiction, it is without the state within the meaning of the statute of limitations.¹⁸ In the absence of a statute,¹⁹ a foreign corporation which is exercising its power in California through a managing agent is not absent from the state so as to prevent the

13. *Black v. Vermont Marble Co.*, 1 Cal. App. 718, 82 Pac. 1060 (not deciding whether noncompliance would authorize a judgment against the corporation as upon a default.

14. *American etc. Tel. Co. v. Superior Court*, 153 Cal. 533, 126 Am. St. Rep. 125, 17 L. R. A. (N. S.) 1117, 96 Pac. 15.

15. *Black v. Vermont Marble Co.*, 1 Cal. App. 718, 82 Pac. 1060. See **LIMITATION OF ACTIONS.**

16. *Black v. Vermont Marble Co.*, 1 Cal. App. 718, 82 Pac. 1060.

17. Stats. 1871-72, p. 826, as amended by Stats. 1899, p. 111; Stats. 1880, p. 21. Civ. Code, § 406, repealed in 1917; Stats. 1917, p. 371, § 1, as amended by Stats. 1921, p. 638.

18. *O'Brien v. Big Casino etc. Co.*, 9 Cal. App. 283, 99 Pac. 209.

19. *Black v. Vermont Marble Co.*, 1 Cal. App. 718, 82 Pac. 1060.

running of the statute of limitations,²⁰ for, having accepted the invitation of the state, and doing business therein on the conditions imposed, a foreign corporation is within the state for all purposes of suit with respect to matters growing out of such business and it has all of the ordinary rights of litigants, including the right to rely upon the statute of limitations, that right not having been denied it by law.¹

Under the statute, however, where it appears that the defendant is a foreign corporation, if it fails to show at the trial that it has complied with the law, it cannot invoke the benefit of the laws limiting the time for the commencement of civil actions.² Failure to perform its duty in complying with the law deprives it of the right to rely on the statute of limitations, and having failed to produce any proof addressed to that point, the court is not only justified in finding, but is required to find, against it on the plea of the statute of limitations.³ When it is admitted that a defendant is a foreign corporation, compliance with the statutory conditions becomes a necessary fact to be proven as a predicate to its right to avail itself of the statute of limitations.⁴

20. *Lawrence v. Ballou*, 50 Cal. 258. But see dictum, in *Pierce v. Southern Pac. Co.*, 120 Cal. 156, 40 L. R. A. 350, 47 Pac. 874, 52 Pac. 302.

1. *Harrigan v. Home Life Ins. Co.*, 128 Cal. 531, 58 Pac. 180, 61 Pac. 99, where the corporation had complied with similar provision as to appointment of agents under law applicable to insurance companies, and where the court said that it would be a manifest legal inconsistency to say that, for the purpose of bringing an action against it here and serving process upon it, the corporation is within the state,

but for the purpose of making a common and legitimate defense to such action it is out of the state.

2. *O'Brien v. Big Casino etc. Co.*, 9 Cal. App. 283, 99 Pac. 209, under Civ. Code, §§ 405, 406, requiring filing of designation of agent.

3. *Pierce v. Southern Pac. Co.*, 120 Cal. 156, 40 L. R. A. 350, 47 Pac. 874, 52 Pac. 302 (under Stats. 1871-72, p. 826); *O'Brien v. Big Casino etc. Co.*, 9 Cal. App. 283, 99 Pac. 209.

4. *Pierce v. Southern Pac. Co.*, 120 Cal. 156, 40 L. R. A. 350, 47 Pac. 874, 52 Pac. 302.

Where noncompliance takes away the right to the defense of the statute of limitations, the special defense of the statute is deemed controverted, and the fact that it is a foreign corporation being admitted, the statute takes from it the right to avail itself of this defense unless it shows that it has complied with its provisions.⁵ Compliance is prospective from its date, however, as to the protection of the statute of limitations, and a corporation cannot avail itself of any defense as to the running of the statute prior thereto.⁶

Prohibition of Discrimination Against Domestic Corporations.

§ 701. In General.—It has been declared that, in the absence of express constitutional limitation, the state might permit foreign corporations alone within its borders, or might impose a license tax upon domestic corporations which is not imposed upon foreign corporations.⁷ But the constitution declares the public policy of the state with regard to foreign corporations to be to the contrary.⁸

“No corporation organized outside the limits of this state shall be allowed to transact business within this state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state.”⁹

It has not been decided whether this section requires foreign corporations to transact business here on conditions identical with domestic corporations or merely prohibits their doing business on more favorable conditions,¹⁰ although it would seem obvious that the latter is the mean-

5. *Black v. Vermont Marble Co.*,
1 Cal. App. 718, 82 Pac. 1060.

6. *Black v. Vermont Marble Co.*,
1 Cal. App. 718, 82 Pac. 1060.

7. *San Francisco v. Liverpool etc.*
Ins. Co., 74 Cal. 113, 5 Am. St. Rep.
425, 15 Pac. 380.

8. *Williams v. Gold Hill Min. Co.*,
96 Fed. 454.

9. Const., art. XII, § 15.

10. *Lum v. American Wheel etc.*
Co., 165 Cal. 657, Ann. Cas. 1915A,
816, 133 Pac. 303 (question raised
but not decided).

ing.¹¹ Of course, if the conditions are the same, as to both kinds of corporations, the act prescribing them is not in conflict with the constitution.¹² Nor has it been decided whether this provision is self-executing or whether it is addressed to the legislature alone as a prohibition against the passing of laws affirmatively giving superior privileges to foreign corporations.¹³ But it has been ruled that the fact that a plaintiff is a foreign corporation and that it is therefore more difficult for it to comply with a regulatory statute, does not exempt it from the obligation to comply in view of the constitutional prohibition.¹⁴

Even though an act relating to the transaction of business in terms applies to domestic corporations alone, nevertheless the constitution requires a foreign corporation to comply with such law.¹⁵ But it has been held that if the provision is such that a foreign corporation cannot comply therewith, compliance is not necessary.¹⁶ However, if literal compliance is impossible, it may be that the corporation should comply substantially.¹⁷

§ 702. Organization or Internal Affairs.—The constitutional provision forbidding discrimination against domes-

11. See § 688, *supra*, as to right to prescribe conditions.

12. *Kaiser L. & F. Co. v. Curry*, 155 Cal. 638, 103 Pac. 341.

13. *General Conference of Free Baptists v. Berkey*, 156 Cal. 466, 105 Pac. 411. As to self-executing provisions generally, see *CONSTITUTIONAL LAW*, vol. 5, p. 576 et seq.

14. *Bank British North America v. Madison*, 99 Cal. 125, 33 Pac. 762. See *Bank of British North America v. Alaska Imp. Co.*, 97 Cal. 28, 31 Pac. 726 (under same act).

15. *Francioni v. Soledad L. & W. Co.*, 170 Cal. 221, 149 Pac. 161.

16. *South Yuba Water etc. Co. v. Rosa*, 80 Cal. 333, 22 Pac. 222, holding that it was impossible for a for-

eign corporation to comply with § 299 of the Civil Code in the absence of a law requiring or even authorizing a foreign corporation to file a copy of its articles or of its legislative act of incorporation in the office of the secretary of state. See *Anglo-Californian Bank v. Field*, 146 Cal. 644, 80 Pac. 1080, not deciding whether a foreign corporation should comply with Civ. Code, § 299.

17. See *McKee v. Title Ins. etc. Co.*, 159 Cal. 206, 113 Pac. 140, not deciding whether under the constitutional provision it is necessary for a foreign corporation issuing bonds to comply substantially with § 359 of the Civil Code.

tic corporations was not designed to limit the power of the legislature in dealing with the organization and government of domestic corporations. Over such corporations it has and may exercise full powers of control. But over the organization and internal government of foreign corporations it has no such power. The laws of California have no extraterritorial force, and it would be meaningless to legislate upon the internal affairs of corporations of other states.¹⁸ Such matters are to be conducted in pursuance of the provisions of the charter of the foreign corporation and of the laws under which it was created, and the courts of California cannot control them.¹⁹ Certainly, the legislature cannot alter, amend or repeal the charter of a corporation existing under the laws of another state,²⁰ nor dissolve such corporation.¹ Accordingly, an act directed to the internal affairs of domestic corporations, and not relating to the business of the corporation, nor imposing burdens or restrictions upon domestic corporations in the conduct of their business, from which foreign corporations are relieved, is not within the prohibition of the constitution.² So, an act providing for the making of reports by the superintendent of a mining corporation for the benefit of stockholders is a matter of internal manage-

18. *Miles v. Woodward*, 115 Cal. 303, 46 Pac. 1076. As to extraterritorial force of laws, see *CONFLICT OF LAWS*, vol. 5, p. 420.

19. *London etc. Bank v. Aronstein*, 117 Fed. 601, 54 C. C. A. 663; *Williams v. Gold Hill Min. Co.*, 96 Fed. 454. See *Royal Con. Min. Co. v. Royal Con. Mines Co.*, 157 Cal. 737, 137 Am. St. Rep. 165, 110 Pac. 123 (where the question was raised but not decided as to whether § 312 of the Civil Code as to meetings and elections of stockholders applied to foreign corporations). See *De Moulin v. Magnesite Ref. Co.*,

32 Cal. App. Dec. 1043, opinion of district court of appeal (see 61 Cal. Dec. 751, 199 Pac. 42, in supreme court), where question was considered as to whether directors' meetings of foreign corporations should be held in accordance with rules governing domestic corporations.

20. *Johnson v. Goodyear Min. Co.*, 127 Cal. 4, 78 Am. St. Rep. 17, 47 L. R. A. 338, 59 Pac. 304.

1. *Carpenter v. Bradford*, 23 Cal. App. 560, 138 Pac. 946.

2. *Miles v. Woodward*, 115 Cal. 303, 46 Pac. 1076.

ment.³ Such reports are matters which concern the stockholders alone and do not affect the rights of others.⁴

Likewise, it is not necessary for a foreign corporation to comply with provisions by which individuals may form a corporation under the laws of California. The constitutional provision refers solely to the transaction of business after the corporation is born, not to requisites essential to the formation of corporations. Such things cannot constitute part of the "business," for they must be complied with by domestic corporations before such corporations are able to transact business at all, and to say that such matters are a necessary part of the business or functions for which such corporations are formed would, it has been argued, be to hold that they may perform part of their corporate functions before they have acquired capacity to do any business at all.⁵

§ 703. Transacting Business.—Although California laws and decisions cannot control the internal affairs of foreign corporations,⁶ yet in the management and method of their business affairs in the state with citizens and residents thereof, such corporations must conform to the laws of California.⁷ The phrase "to transact business" as used in the provision of the constitution forbidding the favoring of foreign as compared with domestic corporations, is equivalent to the words "to do business" found in the statutes of many states prohibiting foreign corporations from "doing business" in such states until they have complied with the statutory conditions.⁸ Thus, a single sale

3. *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076; *Williams v. Gaylord*, 186 U. S. 157, 46 L. Ed. 1102, 22 Sup. Ct. Rep. 798, see, also, *Rose's U. S. Notes*.

4. *Williams v. Gaylord*, 186 U. S. 157, 46 L. Ed. 1102, 22 Sup. Ct. Rep. 798, see, also, *Rose's U. S. Notes*.

5. *Western Union Tel. Co. v. Su-*

perior Court, 15 Cal. App. 679, 115 Pac. 1091, 1100, per Hart, J.

6. See *supra*, § 702.

7. *London etc. Bank v. Aronstein*, 117 Fed. 601, 54 C. C. A. 663; *Williams v. Gold Hill Min. Co.*, 96 Fed. 454.

8. *General Conference of Free Baptists v. Berkey*, 156 Cal. 466, 105 Pac. 411. See *infra*, § 704 et

of property is not the transacting of business within the meaning of the constitutional provision, and in making such sale a foreign religious corporation need not comply with the provisions prescribed for similar domestic corporations in making sales.⁹ But it has been held that in the sale, disposition or transfer of its stock, a foreign corporation must conform to the laws of California.¹⁰ And section 322 of the Civil Code prescribing for foreign corporations the same stockholders' liability for debts and liabilities as to business transacted in this state as is prescribed for domestic corporations, is but the carrying out of the constitutional mandate under consideration.¹¹

When a corporation sells or encumbers property, incurs debts, or gives securities, it does business, and a statute regulating such transactions does not regulate the internal affairs of the corporation.¹² And in regulating the mode of authorization of a mortgage or sale of property, the state has power to prescribe conditions, not only from its power over foreign corporations doing business within the state, but also by reason of its power over the manner of conveyance and disposition of property situate in the state.¹³ The execution of a note and mortgage is a business transaction and does not relate to the organization and internal management of the corporation, but involves a commercial affair of common occurrence.¹⁴ It has also

seq., as to what constitutes doing business.

9. General Conference of Free Baptists v. Berkey, 156 Cal. 466, 105 Pac. 411.

10. London etc. Bank v. Aronstein, 117 Fed. 601, 54 C. C. A. 663.

11. Thomas v. Wentworth Hotel Co., 158 Cal. 275, 139 Am. St. Rep. 120, 110 Pac. 942.

12. Williams v. Gaylord, 186 U. S. 157, 46 L. Ed. 1102, 22 Sup. Ct. Rep. 798, see, also, Rose's U. S. Notes; Williams v. Gold Hill Min.

Co., 96 Fed. 454 (requiring consent of stockholders). As to applicability of laws requiring consent of stockholders to conveyances, see *supra*, § 250.

13. Williams v. Gaylord, 186 U. S. 157, 46 L. Ed. 1102, 22 Sup. Ct. Rep. 798, see, also, Rose's U. S. Notes.

14. See opinion of district court of appeal in De Moulin v. Magnesite Ref. Co., 32 Cal. App. Dec. 1043; rehearing in supreme court, 61 Cal. Dec. 751, 199 Pac. 42.

been held that if a domestic insurance corporation must have its whole capital stock paid up before transacting business, a foreign corporation may do business in this state only if its entire capital stock is paid up.¹⁵

What Constitutes "Doing Business."

§ 704. **In General.**—There is no satisfactory or comprehensive definition of what constitutes "doing business" in the state within the meaning of the statutes regulating foreign corporations.¹⁶ The general consensus of opinion is that a corporation must, to come within the provisions, transact some substantial part of its ordinary business by its officers or agents selected for that purpose,¹⁷ and that the transaction of an isolated business act is not the carrying on or doing business.¹⁸ If the corporation is engaged in a more or less continuous effort, not merely casual, sporadic or isolated, to conduct and carry on within the state some part of the business in which it is usually and generally engaged, it may be said to be doing business within the state.¹⁹ Where the business transacted is both continuous and vital to the well-being of the corporation, and where it could not successfully operate without doing somewhere what it is doing, the corporation is doing business within the meaning of tax acts.²⁰

§ 705. **Single Act or Act Outside Ordinary Business.**—In most jurisdictions it is held that statutes as to "doing business" by foreign corporations have reference to a continuous transaction of business in some form, and do not apply in cases where a single act of business is done within

15. *Liverpool etc. Co. v. Clunie*, 88 Fed. 160. See **INSURANCE**.

16. *Knapp v. Bullock Tractor Co.*, 242 Fed. 543.

17. *Davenport v. Superior Court*, 183 Cal. 506, 191 Pac. 911; *Jameson v. Simonds Saw Co.*, 2 Cal. App. 582, 84 Pac. 289; *Knapp v. Bullock*

Tractor Co., 242 Fed. 543; *Doe v. Springfield etc. Co.*, 104 Fed. 684,

44 C. C. A. 128.

18. See § 705.

19. *Knapp v. Bullock Tractor Co.*, 242 Fed. 543.

20. *Bullfrog Goldfield R. Co. v. Jordan*, 174 Cal. 342, 163 Pac. 40.

the state.¹ And even in those exceptional cases which announce the doctrine that the doing of a single act may bring the corporation within the purview of the statutes, it is held that the single act must be an act of the ordinary business of the corporation, that is, a doing of some of the things, or an exercise of some of the functions, for which the corporation was created.² The few California cases apparently accept these rules, and it has been held that an act which is outside the ordinary business of the corporation is not doing business; that the act must, to come within such terms, be an act of the ordinary business of the corporation.³ And it has also been held that where a foreign corporation merely acts as trustee for holders of bonds of a corporation, collecting accruing interest and performing other duties of a trustee, it is not "carrying on business" within the meaning of statutes regulating foreign corporations and requiring the filing of articles of incorporation.⁴

§ 706. Illustrations of "Doing Business."—The maintenance of an office in California where the corporation is represented by its managers shows it is doing business,⁵ and this is so although such office is maintained for the purpose of soliciting passengers and freight over a railroad of the corporation in another state.⁶ But whether a corporation has a regularly established place of business

1. General Conference of Free Baptists v. Berkey, 156 Cal. 466, 105 Pac. 411; Doe v. Springfield etc. Co., 104 Fed. 684, 44 C. C. A. 128. See 12 Ruling Case Law, p. 69.

2. General Conference of Free Baptists, 156 Cal. 466, 105 Pac. 411.

3. General Conference of Free Baptists v. Berkey, 156 Cal. 466, 105 Pac. 411 (single sale of property by a foreign religious corporation); Kimball Co. v. Read, 43 Cal. App. 342, 185 Pac. 192; Equitable Trust

Co. v. Western L. & P. Co., 38 Cal. App. 535, 117 Pac. 876.

4. Equitable Tr. Co. v. Western L. & P. Co., 38 Cal. App. 535, 117 Pac. 876.

5. Black v. Vermont Marble Co., 1 Cal. App. 718, 82 Pac. 1060.

6. Mauser v. Union Pac. R. Co., 243 Fed. 274; Denver & R. G. R. Co. v. Roller, 100 Fed. 738, 41 C. C. A. 22. See Bullfrog Goldfield R. Co. v. Jordan, 174 Cal. 342, 163 Pac. 40, where the general offices were maintained in this state.

or not, if it has an agent representing it, it is doing business.⁷ Thus, where an agent purchases merchandise and ships it to his company, acting in the company name and making contracts for it, jurisdiction of the corporation may be secured by service on him.⁸ But the fact that the corporation maintains within the state an agent designated for the purposes of the statute solely, and performing no other duties, does not bring it within the phrase "doing business."⁹ It has been said that while it might be held that the selling of goods by a traveling salesman for the account of a foreign corporation would be regarded as the transaction of business by such corporation, the mere employment of a person to act as such salesman would not of itself be regarded as doing business.¹⁰ It seems to be agreed that the mere prosecution or defending of suits is not doing business within the meaning of the statutes.¹¹

The court has observed with reference to the law of other jurisdictions that it has frequently been decided that the purchase of property in one state by a corporation having its place of business in another state, to be shipped to the place of its domicile from the state in which it is purchased, does not constitute doing business in the latter state.¹² Whether or not the ownership by a foreign corporation of a large number of shares of stock in a domestic

7. *Premo Specialty Mfg. Co. v. Jersey-Creme Co.*, 200 Fed. 352, 43 L. R. A. (N. S.) 1015, 118 C. C. A. 458.

8. *Charles Ehrlich & Co. v. J. Ellis Slater Co.*, 183 Cal. 709, 192 Pac. 526. See PROCESS.

9. *Bryant & May v. Scott*, 226 Fed. 875.

10. *Jameson v. Simonds Saw Co.*, 2 Cal. App. 582, 84 Pac. 289.

11. *General Conference of Free Baptists v. Berkey*, 156 Cal. 466, 105 Pac. 411. But see *Robinson v. Blood*, 151 Cal. 504, 91 Pac. 258,

holding that the defense by a domestic corporation of a foreclosure suit on its entire property was transacting business by a corporation "in regular order" within Civ. Code, § 358.

12. *Moon v. Martin*, 61 Cal. Dec. 428, 197 Pac. 77, where it was said that if a corporation is not doing business when it makes a sale in this manner without entering the state for any purpose except through the mails, clearly a partnership is not doing so.

corporation would constitute "doing business" has not been decided.¹³

Actions.

§ 707. **Jurisdiction in General.**—At common law, jurisdiction could be obtained over a foreign corporation only by its voluntary appearance.¹⁴ And now, so long as a foreign corporation confines the exercise of its powers within the state of its creation, it is beyond the reach of process of courts of other states. To acquire jurisdiction to render a personal judgment against it, other than by voluntary appearance, its presence in another state must be manifested by the transaction therein of its corporate business.¹⁵ Foreign corporations, therefore, necessarily require statutes as to process bringing them into court differing from those applicable to domestic corporations.¹⁶ The basis of all process against such corporations is their actual or implied assent by entering the state and doing business, whether service be made on an officer of the state or an agent of the corporation.¹⁷ When a foreign corporation accepts the privilege of doing business in the state, and prosecutes that business through its agents, it submits itself to the laws of the state and to the jurisdiction of the courts.¹⁸

The statutory condition relative to service of process on foreign corporations is that such corporations be doing

13. *R. H. Herron Co. v. Westside Elec. Co.*, 18 Cal. App. 778, 124 Pac. 455, where the question was raised but not decided.

14. *Jameson v. Simonds Saw Co.*, 2 Cal. App. 582, 84 Pac. 289.

Of course a foreign corporation may become a suitor and thereby submit to the jurisdiction of the courts and comply with the conditions attached to any relief awarded; *Loaiza v. Superior Court*,

85 Cal. 11, 20 Am. St. Rep. 197, 9 L. R. A. 376, 24 Pac. 707.

15. *Jameson v. Simonds Saw Co.*, 2 Cal. App. 582, 84 Pac. 289.

16. *Anglo-Californian Bank v. Field*, 146 Cal. 644, 80 Pac. 1080. See PROCESS.

17. *Fry v. Denver & R. G. R. Co.*, 226 Fed. 893.

18. *Tropico Land etc. Co. v. Lam-bourn*, 170 Cal. 33, 148 Pac. 206.

business within the state,¹⁹ and this condition applies likewise to service of a summons upon the secretary of state.²⁰ That a foreign corporation must be doing business in California as a fundamental requisite for acquiring jurisdiction over it by service of process is, indeed, well settled,¹ and it is incumbent on the plaintiff to show that such corporation is so doing business.² The fact that a foreign corporation is engaged in interstate commerce does not render it immune from the jurisdiction of the state courts in any state in which it may be engaged in doing business.³

The statute formerly provided for service on foreign corporations having no agent within the state by publication of summons,⁴ but for such method there was substituted service upon the secretary of state.⁵ Such a method of securing jurisdiction has been sustained by the state courts,⁶ although the mode of service was constructive and not personal.⁷ But, according to a decision of the federal court, such a provision is unconstitutional as violating the due process clause of the federal constitution so far as no

19. Code Civ. Proc., § 411, subd. 2. See PROCESS, as to method of service on foreign corporations.

20. *George Frank Co. v. Leopold & Ferron Co.*, 13 Cal. App. 59, 108 Pac. 878.

1. *Carpenter v. Bradford*, 23 Cal. App. 560, 138 Pac. 946; *R. H. Heron Co. v. Westside Elec. Co.*, 18 Cal. App. 778, 124 Pac. 455; *Dickinson v. Zubiato Min. Co.*, 11 Cal. App. 656, 106 Pac. 123; *Jameson v. Simonds Saw Co.*, 2 Cal. App. 582, 84 Pac. 289.

2. *Eureka etc. Co. v. California Ins. Co.*, 130 Cal. 153, 62 Pac. 393, holding a judgment in a foreign state against a California corporation which had ceased to do business there could not be sued on in California.

3. *Knapp v. Bullock Tractor Co.*, 242 Fed. 543.

4. Code Civ. Proc., § 412, prior to amendment of 1913, expressly made such provision.

5. *Olender v. Crystalline Min. Co.*, 149 Cal. 482, 86 Pac. 1082.

6. *Olender v. Crystalline Min. Co.*, 149 Cal. 42, 86 Pac. 1082; *Willey v. Benedict Co.*, 145 Cal. 601, 79 Pac. 270; *Keystone etc. Co. v. Superior Court*, 138 Cal. 738, 72 Pac. 398.

7. *Holiness Church v. Metropolitan Church Assn.*, 12 Cal. App. 445, 107 Pac. 633, holding that under Civ. Code, § 405, the secretary of state was not required to give notice of the pendency of the action.

provision is made for giving notice of the pendency of the action to the corporation by the secretary of state.⁸

§ 708. Jurisdiction as to Business Done in State.—Where it is sought to make a foreign corporation a defendant, it is not enough that such corporation be doing business in the state; it must also appear that the cause of action arose from the business here done. This fact is essential to jurisdiction.⁹ The state having granted permission to do business on the conditions imposed by law, including the means by which the corporation might be served with process, the corporation is within the state for all purposes of suit with respect to matters growing out of such business.¹⁰

§ 709. Security for Costs.—When the plaintiff in an action or special proceeding is a foreign corporation, security for the costs and charges which may be awarded against such plaintiff, may be required by the defendant, and when so required proceedings must be stayed until an undertaking is filed to pay costs and charges not exceeding the sum of three hundred dollars.¹¹ If, after the lapse of thirty days from service of notice that security is required, or of an order for new or additional security as ordered by the court or judge, upon proof thereof and that no undertaking as required has been filed, the court or judge may order the dismissal of the action or special proceeding.¹² This requirement in reference to a bond for costs is almost in the exact language of the provision re-

8. Knapp v. Bullock Tractor Co., 242 Fed. 543, per Bledsoe, J. See supra, § 694.

9. Fry v. Denver & R. G. R. Co., 226 Fed. 893. See, however, Denver & R. G. R. Co. v. Roller, 100 Fed. 738, 41 C. C. A. 22, where a foreign railroad corporation was sued in California upon a tort committed by it in another state, and

where it did not appear that the tort was the result of contract of passage made in this state.

10. Harrigan v. Home Life Ins. Co., 128 Cal. 531, 58 Pac. 180, 61 Pac. 99.

11. Code Civ. Proc., § 1036. As to security for costs generally, see COSTS.

12. Code Civ. Proc., § 1037.

quiring the so-called cost bond on appeal.¹³ In both cases the amount as well as the condition of the bond is prescribed, and the court has nothing to do with the fixing of the same. The statute vests in the defendant the right to have the bond, and the court cannot against his will deprive him of that right or alter the amount or terms of the bond required; and when demand for security is made in a proper case, the law itself enjoins further proceedings on the part of the plaintiff until the demand is complied with.¹⁴

XXIII. TAXATION.

In General.

§ 710. **Constitutional and Statutory Provisions.**—The constitution provides for the taxation, in proportion to its value, of all property in the state except as otherwise in the constitution provided, not exempt under the laws of the United States. And the word “property” as used in the constitution, is declared to include “moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal and mixed, capable of private ownership.”¹⁵ By the code, also, all taxable property is required to be assessed at its full cash value,¹⁶ or, in other words, the amount at which it would be taken in payment of a just debt from a solvent debtor.¹⁷ By the taxation of the entire property of a corporation, including its franchise, every element giving value to its shares is included. It is clear, therefore, that to tax the shares also, as representing such value, would be double taxation, not contemplated by the constitution or laws.¹⁸ Since this is so, by special provision of the code, shares of stock in corpora-

13. *Meade County Bank v. Bailey*, 137 Cal. 447, 70 Pac. 297. See Code Civ. Proc., § 941.

14. *Meade County Bank v. Bailey*, 137 Cal. 447, 70 Pac. 297.

15. Const., art. XIII, § 1. See TAXATION.

16. Pol. Code, § 3627.

17. Pol. Code, § 3617, subd. 5.

18. *Crocker v. Scott*, 149 Cal. 575, 87 Pac. 102.

tions are expressly exempted from assessment and taxation, excepting, however, from the operation of this rule national banking associations, whose property, other than real estate, is exempt from assessment by federal statute.¹⁹ These provisions are fully considered in connection with the taxation of bank shares,²⁰ and the power of the state to tax shares in national banks.¹

Exemptions of certain kinds of property from taxation is a matter referable rather to the nature of the property or the purpose to which the property is devoted, than to the character of the ownership, whether individual or corporate.² However, since educational institutions of a collegiate grade are commonly owned and operated by corporations, it may be noted that the property devoted exclusively to that use and not operated for profit is, within certain limitations prescribed by the constitution, exempt from taxation;³ and church buildings and their necessary lands where used exclusively for religious worship and not for profit are likewise exempt, whether owned by individuals or corporations.⁴

§ 711. Miscellaneous Taxes.—All corporations are liable to taxation on their property, real and personal, in like manner as individuals, unless otherwise provided in the constitution.⁵ It is provided by the constitution that the taxes upon all franchises of every kind and nature shall be entirely and exclusively for state purposes.⁶ But even those corporations which are subject to the state corporation taxes under the constitution, in lieu of all other taxes, state and local, are subject to local taxation upon their real property.⁷ In addition, there are taxes levied upon the

19. See Pol. Code, § 3608.

20. See BANKS, vol. 4, pp. 314-317.

1. See BANKS, vol. 4, p. 317 et seq.

2. See TAXATION.

3. Const., art. XIII, § 1a. See UNIVERSITIES AND COLLEGES.

4. Const., art. XIII, § 1½. See RELIGIOUS SOCIETIES.

5. See TAXATION.

6. Const., art. XIII, § 14, subd. (d). See *infra*, § 725.

7. See Const., art. XIII, § 14, subds. (a), (b), (c). See TAXATION. And, for application of principles to

income, profits or business of corporations by the laws of the United States. Corporations are also subject to the federal capital stock tax,⁸ as well as to other federal taxes.⁹

§ 712. Filing Fees.—The statutes provide for payment of certain fees by corporations upon filing their articles of incorporation with the secretary of state. All corporations organized under the laws of the state must pay to the secretary of state the fees prescribed by section 409 of the Political Code.¹⁰ The fees for certifying and filing a certificate of extension of the corporate existence, and the certified copy thereof, are the same as those prescribed by law for certifying and filing articles of incorporation in such cases.¹¹ For the filing, recording of articles, and filing of other organic papers, various fees are charged by

various types of corporations, see **BANKS**, vol. 4, p. 314 et seq.; **INSURANCE**; **JOINT STOCK COMPANIES**; **RAILROADS**; **SLEEPING-CAR COMPANIES**; **STREET RAILWAYS**; **TELEGRAPHS AND TELEPHONES**; etc.

8. See Title X of Revenue Act of 1918 as to capital stock tax.

9. See *California Associated Pipe Line Co. v. United States*, 258 Fed. 800, 170 C. C. A. 94 (taxation of corporation under corporation tax law of 1909, 36 U. S. Stats. 111, 112, c. 6).

10. Stats. 1917, p. 371, § 2. The fees range in amounts from fifteen dollars, if the capital stock amounts to twenty-five thousand dollars or less, to one hundred dollars where the capital stock amounts to over five hundred thousand dollars and not over a million dollars, with fifty dollars additional for each five hundred thousand dollars or fraction thereof of capital stock over and above one million dollars, except for

corporations without capital stock which must pay a fee of five dollars. Pol. Code, § 409, subd. 4.

For filing the certified copy of the articles or charter of a foreign corporation, a flat fee or charge of seventy-five dollars must be paid, other than by those corporations organized for educational, religious, scientific or charitable purposes and having no capital stock, and nonprofit corporations, which are all subject to a fee of five dollars. Stats. 1917, p. 371, § 1, amended Stats. 1921, p. 638.

It is to be noted, of course, that the filing fee varies from that imposed upon domestic corporations, being larger for small capitalization and smaller in proportion for larger capitalization. See *supra*, § 701 et seq., as to foreign corporations doing business in this state upon more favorable conditions than are accorded to domestic corporations.

11. Civ. Code, § 401.

the secretary of state,¹² while for the filing and indexing of articles of incorporation and other services in connection with filing and certifying copies, county clerks are entitled to the fees prescribed by the code.¹³ The filing fee paid to the secretary of state is exacted as a privilege or occupation tax, exclusively upon the right to do a domestic business. The tax is an excise tax and not a property tax. It is not on nor based upon the capital stock, but is merely admeasured by the capital stock.¹⁴

Other fees, such as those payable by a corporation upon an application to the commissioner of corporations for permission to issue securities are prescribed by the statutes.¹⁵

License Tax.

§ 713. **In General.**—The charge imposed by the license tax acts¹⁶ is one upon the privilege of being and continuing to exist as a corporation in the case of a domestic corporation, and a charge for the privilege of doing business as a corporation in the state of California in the case of a foreign corporation.¹⁷ The payment of the fee is exacted as a privilege or occupation tax and is an excise tax, not a property tax; hence, the requirements of section 1 of article XIII of the constitution that taxation shall be in proportion to value do not apply thereto.¹⁸ Excepting

12. See Pol. Code, § 409, making provision for such fees.

13. Pol. Code, § 4300a.

14. *Albert Pick & Co. v. Jordan*, 169 Cal. 1, Ann. Cas. 1916C, 1237, 145 Pac. 506; affirmed, 244 U. S. 647, 61 L. Ed. 1370, 37 Sup. Ct. Rep. 741.

15. Stats. 1917, p. 673, § 20, as amended; Stats. 1921, p. 1114.

16. Stats. 1917, p. 371, superseding act of 1915, Stats. 1915, c. 190, and act of 1905, Stats. 1905, c. 386, each as amended. Stats. 1917,

p. 371, amended by Stats. 1921, p. 638, 766, 1424, 606.

17. *Lewis v. Curry*, 156 Cal. 93, 103 Pac. 493 (under act of 1905); *Kaiser Land etc. Co. v. Curry*, 155 Cal. 638, 103 Pac. 341 (under act of 1905).

It is a revenue measure, and not one of police regulation. *Van Landingham v. United Tuna Packers*, 36 Cal. App. Dec. 992 (rehearing granted in supreme court).

18. *Albert Pick & Co. v. Jordan*, 169 Cal. 1, Ann. Cas. 1916C, 1237,

educational, religious, scientific and charitable institutions and corporations not organized for pecuniary profit, and foreign corporations doing solely an interstate business,¹⁹ the burden of such license tax is imposed on every domestic corporation without reference as to whether or not it does any business;²⁰ but it is, of course, imposed only on such foreign corporations as engage in intrastate business in California,¹—the words of the statute “now doing business or which shall hereafter engage in business in this state,” having reference only to foreign corporations.² But if the business transacted in the state is both continuous and vital to the well-being of the corporation, it is liable to the payment of the license tax, although its physical properties are entirely operated in another state.³

At the time of payment of the annual license tax, corporations are required to file with the secretary of state a certificate setting forth the names and addresses of each and all of the acting directors and managers of the corporation.⁴

145 Pac. 506; affirmed, 244 U. S. 647, 61 L. Ed. 1370, 37 Sup. Ct. Rep. 741; *Kaiser Land etc. Co. v. Curry*, 155 Cal. 638, 103 Pac. 341.

19. See *infra*, §§ 714, 715.

20. *Lewis v. Curry*, 156 Cal. 93, 103 Pac. 493 (holding that the fact that a domestic corporation transferred its property to a foreign corporation organized for similar purposes does not relieve the former from the tax even though the latter pays a tax as a foreign corporation). *Kaiser Land etc. Co. v. Curry*, 155 Cal. 638, 103 Pac. 341.

1. Stats. 1917, p. 371, § 3. See *supra*, § 704 et seq., as to what constitutes doing business within the state.

2. *Kaiser Land etc. Co. v. Curry*, 155 Cal. 638, 103 Pac. 341.

The mere fact that a foreign corporation maintains an agent in the state to comply with the statutory provisions but who performs no other duties, does not bring the corporation within the phrase “doing business” and therefore subject it to the license tax. *Bryant & May v. Scott*, 226 Fed. 875.

Foreign corporations may surrender their right to engage in intrastate business by filing with the corporation license tax exemption board the affidavit required by the act. Stats. 1917, p. 371, § 15.

3. *Bullfrog Goldfield R. Co. v. Jordan*, 174 Cal. 342, 163 Pac. 40. As to what constitutes doing business by foreign corporations, see *supra*, §§ 704–706.

4. Stats. 1921, p. 1424, adding § 3a to Stats. 1917, p. 371.

§ 714. Corporations Subject to Tax—Exemptions.—It is said that the obvious intention of the statute is that the license tax shall be paid by every corporation whose articles are on file in the office of the secretary of state, that is, that the secretary of state shall act upon the records of his office showing the corporations in fact authorized to do business; and all corporations so authorized are liable to the tax.⁵ The license tax act expressly exempts corporations organized and conducted solely for educational, religious, scientific or charitable purposes, and corporations not organized or conducted for profit, as well as foreign corporations doing solely and exclusively an interstate business, and those corporations taxed under subdivisions (a), (b), and (c) of section 14 of article XIII of the constitution;⁶ but since corporations subject to the provisions of subdivision (d) of section 14 of article XIII of the constitution have not been included in the exemptions,⁷ it has been held that the fact that a franchise is assessed as a thing of value does not preclude the state from imposing a license tax for the privilege of acting as a corporation.⁸ The secretary of state, state controller and members of the state board of control constitute the corporation license tax exemption board, with power to pass finally and conclusively on claims of exemption.⁹ Claims for exemption are not required to be filed by educational, religious, scientific or charitable corporations, nor by corporations taxed under subdivisions (a), (b) and (c) of the

5. *Kaiser Land etc. Co. v. Curry*, 155 Cal. 638, 103 Pac. 341. See *supra*, § 713.

6. *Stats.* 1917, p. 371, § 6.

See the following cases where the corporations, coming within one or the other of the classes exempted under the constitution were held to be exempt from the local or municipal license tax imposed. *Southern Tr. Co. v. City of Los Angeles*, 168

Cal. 762, 145 Pac. 94; *Hartford Fire Ins. Co. v. Jordan*, 168 Cal. 270, 142 Pac. 839; and *San Francisco v. Pacific Tel etc. Co.*, 166 Cal. 244, 135 Pac. 971. See *infra*, § 715, as to corporations doing an interstate business.

7. *Stats.* 1917, p. 371, § 6.

8. *Kaiser Land etc. Co. v. Curry*, 155 Cal. 638, 103 Pac. 341.

9. *Stats.* 1917, p. 371, §§ 7 and 8.

aforesaid provision of the constitution.¹⁰ The mere creation of a corporation by filing of articles is not sufficient to bring a corporation within the exemptions as a public service corporation subject to tax under subdivision (a) of the constitutional provision, and until it has in fact become a public service corporation by rendering service it is subject to the license tax.¹¹

§ 715. Corporations Doing Interstate Business.—No license tax is constitutional which imposes any burden upon the interstate business of a corporation, whatever be its name or form.¹² And so where the interstate business of a corporation is a constituent part of its local business within a municipality in the state, a license tax imposed upon the corporation which covers its entire business regardless of its nature operates as a burden on interstate commerce and is therefore invalid.¹³ Even if expressly directed to intrastate business, no fee or regulation can be upheld, if, in the view of the supreme court of the United States, such exaction imposes a burden on the interstate business. And if a license tax as applied to foreign corporations doing business within the state is a burden on interstate commerce, equally must it be so with a domestic corporation engaged elsewhere in interstate commerce and intrastate business and owning property without the state.¹⁴ Where, though the tax is not on the capital stock, nor based upon the capital stock, but is exacted as a mere privilege or occupation tax—an excise, not a property tax—exclusively upon the right to do a domestic business within the state, and is merely admeasured by the capital

10. Stats. 1917, p. 371, § 7.

107 Cal. 524, 29 L. R. A. 327, 40

11. Transcontinental Tel. Co. v. Neylan, 34 Cal. App. 379, 167 Pac. 541.

Pac. 796. See supra, § 691.

12. H. K. Mulford Co. v. Curry, 163 Cal. 276, 125 Pac. 236; San Bernardino v. Southern Pac. Co.,

13. San Bernardino v. Southern Pac. Co., 107 Cal. 524, 29 L. R. A. 327, 40 Pac. 796.

14. H. K. Mulford Co. v. Curry, 163 Cal. 276, 125 Pac. 236.

14. H. K. Mulford Co. v. Curry, 163 Cal. 276, 125 Pac. 236.

stock of the corporation, it is a valid tax.¹⁵ A domestic corporation formed among other things to do interstate business cannot refuse to pay the tax on the ground that its exaction would constitute a burden on interstate commerce, for even though the state permit its formation, the corporation might never engage in interstate commerce.¹⁶

§ 716. Amount of Tax.—The license tax act provides that all corporations excepting those designated shall procure annually from the secretary of state a license authorizing the transaction of business in California, and must pay a tax, measured by the capital stock of the corporation as appears from the articles of incorporation on file or from documents relating to an increase or decrease in the authorized capital stock.¹⁷ The license so provided for authorizes the transaction of business within the state during the year or fractional part thereof for which the license is issued, the year being computed from the first day of January to the following thirty-first day of December,¹⁸ and the payment of a proportional tax for the unexpired portion of the year in which the articles of a new corporation are filed is provided for.¹⁹ The tax is not on, nor

15. *Albert Pick & Co. v. Jordan*, 169 Cal. 1, Ann. Cas. 1916C, 1237, 145 Pac. 506; affirmed, 244 U. S. 647, 61 L. Ed. 1370, 37 Sup. Ct. Rep. 741, reversing on this point, the decision in *H. K. Mulford Co. v. Curry*, 163 Cal. 276, 125 Pac. 236, where it was held that such tax was void because based upon the total capital stock, without just relation to the proportion which the capital used in this state bore to the whole capital. After the decision in the *Mulford* case, supra, and before the decision overturning it, the legislature repealed the act. See *Transcontinental Tel. Co. v. Neylan*, 34 Cal. App. 379, 167 Pac. 541.

16. *City Properties Co. v. Jordan*, 163 Cal. 587, 126 Pac. 351.

17. Stats. 1917, p. 371, § 3. Foreign corporations are required to file an affidavit annually setting forth the amount of their authorized capital stock and the tax is measured by such amount.

18. Stats. 1917, p. 371, § 4.

19. Stats. 1917, p. 371, § 5.

The amount of the license tax ranges from ten dollars, where the authorized capital stock does not exceed ten thousand dollars, through increasing amounts according to capitalization, to one thousand dollars, where the authorized capital stock exceeds ten million dollars. Where the capital stock has no par

based upon, the capital stock of the corporation, but is merely admeasured thereby.²⁰

§ 717. Time of Payment—Penalties.—The license tax for any new corporation must be paid at the time of filing its articles of incorporation.¹ As to existing corporations, the statute prescribes that notices be given of when the tax is due and payable, of the penalties for delinquency, and of suspensions or forfeitures. The mailing of notices is not, however, a jurisdictional prerequisite to the accrual of a forfeiture or suspension of the corporate powers, nor a prerequisite to imposition of any penalty for delinquency or nonpayment.² Upon the tax becoming due and payable,³ it becomes a lien binding on the real property of the corporation until paid or until the property is sold for the payment thereof.⁴

A penalty under the license act does not necessarily accrue immediately upon delinquency. Penalties are not favored, and the interpretation should be against their imposition unless the statute so provides. There is a broad difference, it has been said, between a mere delinquency and a penalty attached because thereof.⁵ Following upon its delinquency the corporate rights, privileges and powers of every domestic corporation which has failed to pay the tax and money penalty for nonpayment thereof,

value, the tax is one hundred dollars, and if part of the stock has a par value and part has not, the amount as provided by the usual schedule must be paid upon the par value stock, to which sum shall be added the sum of fifty dollars. Corporations organized for profit without a capital stock must pay a tax of ten dollars annually. Stats. 1917, p. 371, § 3.

20. *Albert Pick & Co. v. Jordan*, 169 Cal. 1, Ann. Cas. 1916C, 1237, 145 Pac. 506; affirmed 244 U. S.

647, 61 L. Ed. 1370, 37 Sup. Ct. Rep. 741.

1. Stats. 1917, p. 371, § 5.

2. Stats. 1917, p. 371, § 9. See §§ 3 and 3a of the act as to time of delinquencies, suspensions and forfeitures and procedure to be taken to remove such suspensions or forfeitures.

3. Stats. 1917, p. 371, § 3.

4. Stats. 1917, p. 371, § 10.

5. *Ukiah Guaranty Co. v. Curry*, 148 Cal. 256, 82 Pac. 1048, under act of 1905.

are suspended and incapable of being exercised for any purpose or in any manner except to execute and deliver deeds to real property in pursuance of contracts therefor made prior to such time, and except to defend in court any action brought against it, until the tax with all accrued penalties, taxes and charges are paid. The right of every foreign corporation to transact intrastate business in the state of California is subject to forfeiture for like cause. Furthermore, the statute makes attempts by persons to exercise the powers after such suspension or forfeiture a misdemeanor subject to punishment by fine and imprisonment.⁶ No court has power to make or enter a decree of dissolution of a domestic corporation until the taxes and penalties due under the act are paid.⁷ The effect of a suspension or forfeiture upon the corporate existence and corporate rights is treated in another part of this article.⁸

§ 718. Effect of Illegal Tax—Remedy.—On failure of a corporation to pay the license tax, a forfeiture by the self-executing provisions of the act is declared against its right to do business in the state, and it is either compelled to make such payment or go out of business.⁹ A declaration of forfeiture under the act can have no legal efficacy, however, if the exaction of the tax were illegal; if not subject to the tax, no forfeiture can result from the declaration of forfeiture. And so, when the right of the corporation to do business is attacked in any proceeding subsequently, either by the state in quo warranto or in a civil or criminal

6. Stats. 1917, p. 371, § 11.

The primary, if not the only, purpose of the statute is to take away from a defaulting corporation the power to act as such corporation, and its privilege to do business is withdrawn as a penalty for its failure to pay the license fee or tax. In re Double Star Brick Co., 210 Fed. 980. See § 10 of the act as to duty of secretary of state to make

a list of corporations so failing to pay the tax and to transmit a certified copy of it to each county clerk and county recorder in the state. As to revivor, see supra, §§ 643, 644.

7. Stats. 1917, p. 371, § 13.

8. See supra, §§ 628, 640 et seq.

9. Hartford Fire Ins. Co. v. Jordan, 168 Cal. 270, 142 Pac. 839.

action, the corporation may oppose the attempted forfeiture on the ground of the invalidity of the act declaring it.¹⁰ The state cannot, of course, be sued to recover license taxes without its consent, since it has the attributes of sovereignty.^{10a}

Franchise Tax.

§ 719. **In General.**—The constitution provides in effect that all property, with certain exceptions, shall be assessed at its actual cash value, and franchises are expressly included as property.¹¹ Franchises are legal estates, not mere naked powers; they are sometimes classed as real property of that kind styled incorporeal hereditaments, although in California they are considered as personalty. But whether real or personal estate, such a franchise is property, and so long as it exists is as fully protected as any other kind of property by the constitutional guaran-

10. *Hartford Fire Ins. Co. v. Jordan*, 168 Cal. 270, 142 Pac. 839 (holding, however, that the corporation could not recover from the secretary of state who has paid the tax to the treasurer, although paid under protest); *Grand Trunk etc. Co. v. Curry*, 162 Fed. 978 (where in an action under the act of 1905, an injunction against the enforcement of the license tax act was refused on the ground that should the state attempt to enforce the act it would necessarily be by civil action to collect the tax or by prosecution under the penal clause and such proceedings could be had only under the forms of law and the complainant could invoke and secure the protection of the constitution and laws of the United States).

10a. *McClellan v. State of California*, 35 Cal. App. 605, 170 Pac. 662.

11. *Kaiser Land etc. Co. v. Curry*, 155 Cal. 638, 103 Pac. 341 (stating that the franchise constitutes one of the elements of value of the shares of the corporation). *Bank of California v. San Francisco*, 142 Cal. 276, 100 Am. St. Rep. 130, 64 L. R. A. 918, 75 Pac. 832 (a corporate franchise may be taxed directly as property and not as a mere excise tax); *Spring Valley Water Works v. Schottler*, 62 Cal. 69; *San Jose Gas Co. v. January*, 57 Cal. 614; *San Joaquin etc. Irr. Co. v. Merced County*, 2 Cal. App. 593, 84 Pac. 285; Const., art. XIII, § 1. See supra, § 710, where the provision is set out.

The right to be a corporation is in itself a franchise. *Spring Valley Water Works v. Schottler*, 62 Cal. 69; *People v. Selfridge*, 52 Cal. 331. See supra, § 714, as to corporations subject to license tax.

ties.¹² The corporations subject to taxation under subdivisions (a), (b) and (c) of section 14, article XIII, of the constitution, are not subject to the franchise tax provided by subdivision (d),¹³ but if a corporation does not bring itself within one of those classes, it is subject to the franchise and license tax.¹⁴ Since a corporate franchise is inseparable from the being or personality of the corporate body,¹⁵ it is to be assessed at the principal place of business of the corporation.¹⁶

§ 720. Constitutional and Statutory Provisions.—The constitution provides in article XIII, section 14, subdivision (d) thereof, that all franchises other than those expressly provided for in section 14, shall be assessed at their actual cash value, in the manner to be provided by law, and shall be taxed at the rate of one per centum each year, and the taxes collected thereon shall be exclusively for the benefit of the state.¹⁷ This provision is declared to be self-executing, but the legislature is granted power to pass all laws necessary to carry it into effect and to

12. *Spring Valley Water Works v. Schottler*, 62 Cal. 69.

A corporate franchise is considered as property separate and distinct from the so-called franchises which the corporation may acquire subsequent to its incorporation. *Bank of California v. San Francisco*, 142 Cal. 276, 100 Am. St. Rep. 130, 64 L. E. A. 918, 75 Pac. 832; *San Joaquin etc. Irr. Co. v. Merced County*, 2 Cal. App. 593, 84 Pac. 285. See FRANCHISES.

13. Const., art. XIII, § 14, subd. (d).

14. *Transcontinental Tel. Co. v. Neylan*, 34 Cal. App. 379, 167 Pac. 541.

15. *San Joaquin etc. Irr. Co. v. Merced County*, 2 Cal. App. 593, 84 Pac. 285.

16. *Los Angeles v. Western Union Oil Co.*, 161 Cal. 204, 118 Pac. 720 (holding that the fact that franchises of other corporations escape assessment will not relieve a corporation from the duty of paying an assessment upon its franchise properly levied); *Stockton Gas etc. Co. v. San Joaquin Co.*, 148 Cal. 313, 7 Ann. Cas. 511, 5 L. E. A. (N. S.) 174, 83 Pac. 54 (opinion of Beatty, C. J., concurring); *San Joaquin etc. Irr. Co. v. Merced County*, 2 Cal. App. 593, 84 Pac. 285.

17. The franchises "otherwise expressly provided in the section" are those in subdivisions (a), (b) and (c), relating to public service, insurance and banking corporations. See BANKS, vol. 4, p. 314 et seq., as to taxation of banks. And see INSURANCE; RAILROADS, etc.

provide for a valuation and assessment of the property and for the duties of the state board of equalization and other officers; and the legislature is given power to alter the rate of taxation upon a two-thirds vote of both houses.¹⁸ No injunction is permitted to issue in any suit or proceeding to enjoin collection of the tax, but a remedy by action to recover a tax illegally collected as provided by law is given.¹⁹ The statutes passed for the enforcement of the constitutional provisions are contained in sections 3664d and following of the Political Code.²⁰

§ 721. Corporate Franchise and Goodwill. — Although one of the early cases fixing the rule for the valuation of the franchise of a corporation negatives the idea that any such element of the value of shares in a trading corporation as goodwill can be recognized,¹ nevertheless, the difference between the aggregate market value of the shares and the value of the tangible property is necessarily the aggregate cash value of such intangible property as under the decisions belongs to the corporation, whether it be called franchise, goodwill, or dividend earning power. Whatever it is, the law requires it to be assessed at its full cash value.² Corporate “excess” necessarily includes

18. Const., art. XIII, § 14, subd. (f). The legislature has since changed the rate of taxation on several occasions, the last being by Stats. 1921, p. 23. See Pol. Code, § 3664d.

19. Const., art. XIII, § 14, subd. (g).

20. See Pol. Code, §§ 3664d-3671d, inclusive. See Pol. Code, § 3669, as to recovery of taxes erroneously or illegally collected.

1. Spring Valley Water Works v. Schottler, 62 Cal. 69.

2. Crocker v. Scott, 149 Cal. 575, 87 Pac. 102. See also the concurring opinion of Henshaw, J. (commented on by Olney, J., in Miller &

Lux, Inc., v. Richardson, 182 Cal. 115, 187 Pac. 411), in which it is said that the fault of our system is not in the assessment of intangible property represented by the difference between the market value of the stock and the value of the intangible property, but is in calling this difference the value of the “franchise” and taxing it as franchise; and reaching the conclusion that this property is and logically can be nothing other than the goodwill of the business, and should be assessed, but not under the misleading and deceptive misnomer of franchise, but for what it really is, namely, goodwill.

all intangibles, of which goodwill, if the corporation has any, is but one.³ The enforcing statutes provide that franchises shall be assessed at their actual cash value, after making due deduction for goodwill.⁴ There is no provision in the constitution, however, for any deduction from the full cash value of the franchise or for goodwill or anything else, and it is evident that an assessment of a franchise made by deducting something from its value is an assessment for less than its value and in violation of the constitutional provision. The provision of the statute, therefore, cannot result in the deduction of goodwill from the value of the franchise and cannot be so construed.⁵

§ 722. Valuation of Franchise—To Whom Assessed.—

The constitutional provision requires taxation of all property in proportion to its value,⁶ and the statutes require all property to be assessed at its full cash value.⁷ Likewise, subdivision (d) of section 14 of article XIII of the constitution requires franchises in particular to be assessed at their full cash value.⁸ It is settled that the proper method for ascertaining the value of the franchise is by deducting from the aggregate market value of the shares the value of the tangible property, and taking the difference as the value of the franchise.⁹ The tax must be according to a

3. *Miller & Lux, Inc., v. Richardson*, 182 Cal. 115, 187 Pac. 411.

4. Pol. Code, § 3664d.

5. *Miller & Lux, Inc., v. Richardson*, 182 Cal. 115, 187 Pac. 411, per Olney, J.

6. Const., art. XIII, § 1. See supra, § 710.

7. Pol. Code, § 3617.

8. *Miller & Lux, Inc., v. Richardson*, 182 Cal. 115, 187 Pac. 411.

9. *Miller & Lux, Inc., v. Richardson*, 182 Cal. 115, 187 Pac. 411; *Los Angeles v. Western Union Oil Co.*, 161 Cal. 204, 118 Pac. 720; *Crocker v. Scott*, 149 Cal. 575, 87 Pac. 102;

Stockton Gas etc. Co. v. San Joaquin Co., 148 Cal. 313, 7 Ann. Cas. 511, 5 L. R. A. (N. S.) 174, 83 Pac. 54 (opinion of Beatty, C. J., concurring); *Bank of California v. San Francisco*, 142 Cal. 276, 100 Am. St. Rep. 130, 64 L. R. A. 918, 75 Pac. 832; *Spring Valley Water Works v. Schottler*, 62 Cal. 69; *San Jose Gas Co. v. January*, 57 Cal. 614; *People v. Badlam*, 57 Cal. 594.

Market value is synonymous with "value" and "full cash value" as defined by Pol. Code, § 3617. In the absence of exceptional conditions giving abnormal value to stock at the

valuation made by the officers charged with that duty,¹⁰ who, at present, compose the state board of equalization.¹¹

The franchise must be assessed to the corporation, not to the members or stockholders.¹² This is apparent, since a stockholder cannot be assessed upon his stock, inasmuch as his shares represent simply an interest in the property held by the corporation and the assessment of all the property covers everything represented by the certificate of stock.¹³

§ 723. "Franchise" as Corporate Excess.—By the corporate franchises in the constitutional provision providing for assessment and taxation¹⁴ is meant the so-called corporate excess, although such is not the usual, nor, strictly speaking, a proper, use of the word "franchise." And it has been said that the value of all the intangible properties of a corporation may properly be included in an assessment of its franchise.¹⁵ The constitutional provision is a part of an amendment proposed by the special session of the legislature in 1910 and approved by the people in the fall of that year, and was the result of the labors of a tax commission appointed some years before, having for its primary purpose the separation of state and county taxes. The report of the commission indicated that no change was made except to transfer the administration of the law from the counties to the state. In addition, two purposes sought to be accomplished would not, it has been said, be

time fixed by the assessors for taking the market value, such value fairly represents the full cash value. *Los Angeles v. Western Union Oil Co.*, 161 Cal. 204, 118 Pac. 720; *Crocker v. Scott*, 149 Cal. 575, 87 Pac. 102.

10. *Spring Valley Water Works v. Schottler*, 62 Cal. 69.

11. Pol. Code, § 3668.

12. *Crocker v. Scott*, 149 Cal. 575, 87 Pac. 102; *Bank of California v.*

San Francisco, 142 Cal. 276, 100 Am. St. Rep. 130, 64 L. R. A. 918.

13. *Bank of California v. San Francisco*, 142 Cal. 276, 100 Am. St. Rep. 130, 64 L. R. A. 918, 75 Pac. 832; *Spring Valley Water Works v. Schottler*, 62 Cal. 69; *People v. Badlam*, 57 Cal. 594.

14. See *supra*, § 721.

15. See *supra*, §§ 721, 722. See *FRANCHISE*.

accomplished if by franchise was meant something other than corporate excess. One purpose was to prevent the escape of intangible values from assessment. Another purpose was that matters of assessment committed to county assessors should be as simple as possible.¹⁶ It has been held that an assessment of franchises "per state law" embraces all franchises granted the corporation, including a franchise acquired under the statute.¹⁷

§ 724. Foreign Corporations and Federal Franchises.—

Since a corporate franchise is personal property and is to be assessed at the principal place of business of the corporation, which in the case of foreign corporations is without the state, the franchise of such corporations cannot be assessed.¹⁸ However, under subdivision (d) of section 14 of article XIII of the constitution, the actual exercise of the right to do business as a corporation in the state of California, when such right is exercised by a corporation of another state or country, is taxable.¹⁹ A franchise from a state to a corporation which has subsequently received a federal franchise may be taxed by the state, if not merged in the franchise received from the federal government;²⁰ but a tax on the federal franchise of the corpora-

16. *Miller & Lux, Inc., v. Richardson*, 182 Cal. 115, 187 Pac. 411, per Olney, J. See *infra*, § 725, as to valuation of franchise.

17. *Los Angeles Gas etc. Co. v. County of Los Angeles*, 21 Cal. App. 517, 132 Pac. 282.

18. *People v. Alaska Pac. S. S. Co.*, 182 Cal. 202, 187 Pac. 742; *Los Angeles v. Western Union Oil Co.*, 161 Cal. 204, 118 Pac. 720.

19. Pol. Code, § 3664d. See *People v. Alaska Pac. S. S. Co.*, 182 Cal. 202, 187 Pac. 742, decided under Tax Act of 1911, § 5, identical in this respect with § 3664d, Pol. Code.

The only franchise of a foreign corporation which can be characterized as property within the state of California, is one which it exercises within the state, and it can remain such only so long as it is exercised herein. *People v. Alaska Pac. S. S. Co.*, 182 Cal. 202, 187 Pac. 742.

A franchise tax is not discriminatory against domestic corporations in that it is not levied against the franchises of foreign corporations. *Los Angeles v. Western Union Oil Co.*, 161 Cal. 204, 118 Pac. 720.

20. *People v. Central Pac. R. Co.*, 105 Cal. 576, 38 Pac. 905. See *San*

tion cannot be levied,¹ although the property of a corporation holding national franchises has never been held exempt from state taxation.² Thus, the tangible property in California possessed by an interstate commerce company, its incorporeal hereditaments in the nature of local franchises or rights in real property or to the use thereof, and in fact all the instrumentalities by means of which it carries on interstate commerce and which have a local situs as property within the state may be taxed, although the right to carry on the interstate commerce business is not taxable.³

Shares of Stock.

§ 725. **In General.**—Inasmuch as shares of stock in corporations possess no intrinsic value over and above the actual value of the property which they represent,⁴ it is provided by the code that “no assessment shall be made of shares of stock in any corporation except as prescribed in the constitution of this state and the laws enacted pursuant to such provisions of the constitution.”⁵ The word “property,” as used in the constitution defining taxable property, includes stock, however;⁶ but double taxation is neither required nor permitted.⁷ The resultant of these provisions is that the substantial thing represented by shares of stock is property subject to taxation, but that where it is once taxed as property it cannot be also taxed as “shares.”⁸ Prior to the adoption of section 3608 of the

Benito Co. v. Southern Pac. R. Co., 77 Cal. 518, 19 Pac. 827 (reversing Central Pac. R. Co. v. State Board of Equalization, 60 Cal. 35).

1. San Francisco v. Western Union Tel. Co., 96 Cal. 140, 17 L. R. A. 801, 31 Pac. 10. See FRANCHISES.

2. San Francisco v. Western Union Tel. Co., 96 Cal. 140, 17 L. R. A. 301, 31 Pac. 10.

3. People v. Alaska Pac. S. S.

Co., 182 Cal. 202, 187 Pac. 742. See supra, § 691. See TAXATION.

4. See supra, § 710.

5. Pol. Code, § 3608. See infra, § 727, as to the constitutionality of this code provision.

6. Const., art. XIII, § 1; see supra, § 710, where constitutional provision is quoted.

7. Pol. Code, § 3607.

8. See infra, § 727, as to construction of the statute.

Political Code, section 3640 of the same code provided for the assessment of shares by taking from the market value of the entire capital stock the value of property assessed to it and by dividing the remainder by the entire number of shares, the words "market value" as used therein being synonymous with the terms value and full cash value as used in section 3617; but section 3608 was added and the other provisions as to direct assessment of stock were eliminated.⁹

§ 726. Constitutionality of Statute.—Section 1 of article XIII of the constitution which requires all property in the state, including stock, to be taxed in proportion to its value, is not self-executing to the extent that the duty of prescribing the machinery by which to ascertain the value of property was left to the legislature.¹⁰ The legislature has supplied the deficiency by defining cash values and declaring that all property should be assessed thereat.¹¹ It is upon the theory that the sum total of the value of shares of stock is the equivalent of the value of all of the property of every kind, including franchises, that the court has held section 3608 of the Political Code, prohibiting the assessment of shares of stock, not to be in conflict with section 1 of article XIII of the constitution, requiring all property to be taxed in proportion to its value.¹² Section 3608, would, it has been said, be in defiance of that consti-

9. Crocker v. Scott, 149 Cal. 575, 87 Pac. 102.

10. Chesebrough v. City and County of San Francisco, 153 Cal. 559, 96 Pac. 288; Crocker v. Scott, 149 Cal. 575, 87 Pac. 102; McHenry v. Downer, 116 Cal. 20, 45 L. R. A. 737, 47 Pac. 779. See generally as to self-executing provisions of constitutions, CONSTITUTIONAL LAW, vol. 6, p. 576 et seq.

11. Chesebrough v. City and County of San Francisco, 153 Cal.

559, 96 Pac. 288; Crocker v. Scott, 149 Cal. 575, 87 Pac. 102; Pol. Code, §§ 3617, 3627.

12. Bank of California National Assn. v. Roberts, 173 Cal. 398, 160 Pac. 225; Bank of California v. San Francisco, 142 Cal. 276, 100 Am. St. Rep. 130, 64 L. R. A. 918, 75 Pac. 832; McHenry v. Downer, 116 Cal. 20, 45 L. R. A. 737, 47 Pac. 779; Spring Valley Water Works v. Schottler, 62 Cal. 69; People v. Badlam, 57 Cal. 594.

tutional provision if its effect was to relieve from taxation a single element that entered into and gave value to shares of stock.¹³

§ 727. Construction of Statute.—Shares of stock represent the value of all the assets of the corporation,¹⁴ and while a share is undoubtedly property, it represents an interest in the property held by the corporation itself.¹⁵ When capital stock is assessed, the assets of the corporation are subjected to tax,¹⁶ and since shares represent no value independent of the corporate property, when all such property is assessed to the corporation, it would be double taxation to assess the shares as well as the corporate property.¹⁷ But, as has been pointed out, the result of double taxation could only follow where all of the property of the corporation is assessed and it could not apply where none or only a portion of the property going to make up the value of the stock is taxed. The only method by which an assessor could avoid double taxation would be to deduct from the value of the shares the value of the property situated in the state of California and taxed directly to the corporation.¹⁸ And so, if the shares of stock owned by a resident of California represent property situated outside the state, it is obvious that the rule as to double taxation would not apply, for the reason that, aside from the taxing of such shares, such property is beyond the jurisdiction of

13. *Crocker v. Scott*, 149 Cal. 575, 87 Pac. 102. See *supra*, § 710.

14. Pol. Code, § 3608; *Chesebrough v. City and County of San Francisco*, 153 Cal. 559, 96 Pac. 288; *People v. National Bank of D. O. Mills & Co.*, 123 Cal. 53, 69 Am. St. Rep. 32, 45 L. R. A. 747, 55 Pac. 685; *Spring Valley Water Works v. Schottler*, 62 Cal. 69; *People v. Badlam*, 57 Cal. 594.

15. *People v. Badlam*, 57 Cal. 594.

16. *People v. National Bank of D. O. Mills & Co.*, 123 Cal. 53, 69

Am. St. Rep. 32, 45 L. R. A. 747, 55 Pac. 685.

17. *Chesebrough v. City and County of San Francisco*, 153 Cal. 559, 96 Pac. 288; *Bank of California v. San Francisco*, 142 Cal. 276, 100 Am. St. Rep. 130, 64 L. R. A. 918, 75 Pac. 832; *Spring Valley Water Works v. Schottler*, 62 Cal. 69; *People v. Badlam*, 57 Cal. 594; Pol. Code, § 3608.

18. *Chesebrough v. City and County of San Francisco*, 153 Cal. 559, 96 Pac. 288.

the state to tax, and the fact that the property so represented has been taxed in some other state does not prohibit the taxation of the shares in California.¹⁹

§ 728. Situs of Shares for Taxation.—Shares of stock of a foreign corporation when held in California by one of its citizens are subject to the taxing power of the state as personal property following the person of the owner,²⁰ regardless of the fact that the foreign law has taxed the capital or part of it elsewhere.¹ Thus, shares of a foreign corporation the certificates for which are in the possession of an executrix within the state of California are subject to tax under the law of the domicile.² While it is true as a general rule that the domicile of the owner determines the situs of the personalty of which he may die possessed, the rule has its exceptions.³ And so, where a testator, owning stock in a foreign corporation, had in his lifetime transferred the legal title to nonresident trustees, domiciled where the corporation was organized, and where it had its principal place of business, and had given the trustees full power to hold, manage and control the stock, it has been held that the stock so held by the trustees was property having its situs in the state of their domicile and is not to be considered as within the jurisdiction of the taxing power, and hence that the executor could recover from the county a tax assessed upon it in California which he had been required to pay.⁴ The familiar maxim, *mobilia sequuntur personam*, is one which the state in its taxing laws may modify or reverse. Thus, where the in-

19. See *infra*, § 729.

20. *Chesebrough v. City and County of San Francisco*, 153 Cal. 559, 96 Pac. 288; *San Francisco v. Fry*, 63 Cal. 470.

1. *San Francisco v. Fry*, 63 Cal. 470.

2. *Stanford v. San Francisco*, 131 Cal. 34, 63 Pac. 145.

3. See *Murphy v. Crouse*, 135 Cal. 14, 87 Am. St. Rep. 90, 66 Pac. 971, stating the rule and discussing the exceptions.

4. *Lowry v. County of Los Angeles*, 38 Cal. App. 158, 175 Pac. 702. See note in 7 Cal. Law Rev., p. 117.

inheritance tax law requires all property of a nonresident within the state to be taxed, shares in a domestic corporation are subject to the tax at the domicile of the corporation as property within the state, and this without regard to where the certificate may be kept.⁵ No deductions should be allowed in a solvent estate on account of debts due nonresident creditors or expenses of foreign administration not shown to have been paid or to be paid out of California assets.⁶

The authority of the state having actual control of the subject matter, either because it is personal property actually within its limits, or because it is the stock of one of its corporations, is of necessity the superior. Thus, where stock of a foreign corporation comes into the California estate of a decedent only after payment of the tax in the foreign state, the only thing which California secures is what remains after deducting that tax, hence this is the value of such stock.⁷

§ 729. Corporation Holding Property Out of State.— While the value of shares of stock is determined by the aggregate value of the property of the corporation, the property which goes to make up such value may or may not be within the jurisdiction of California. If it is within the state and assessed to the corporation, then the shares of stock may not also be assessed to the stockholders, as that would clearly constitute double taxation.⁸ But section 3608 of the Political Code must be read in the light of the preliminary language of the section declaring the reason why stock shall not be assessed and cannot be extended so as to exempt such shares from taxation when all

5. *McDougald v. Lilienthal*, 174 Cal. 698, L. R. A. 1917F, 267, 164 Pac. 387.

6. *McDougald v. Low*, 164 Cal. 107, 127 Pac. 1027, not deciding, however, whether debts due California creditors not shown to have

been paid from the estate in California could be deducted.

7. *Estate of Miller*, 184 Cal. 674, 16 A. L. R. 694, 195 Pac. 413.

8. *Chesebrough v. City and County of San Francisco*, 153 Cal. 559, 96 Pac. 288. See *supra*, § 727.

the assets of the corporation are not taxed in this state by reason of the fact that some of them are beyond its jurisdiction.⁹ It has been said that it is not important that the tangible property of the corporation is situated in another state and has been there taxed. The fact that some of the property is assessed in another state or country is no prohibition of the taxation of the shares of stock held here. This does not constitute taxation of all the property of the corporation within the terms of section 3608 of the Political Code. The inhibition of double taxation only applies to such taxation in the same state or government.¹⁰ There is no difference between the former section 3640 and the present section 3608 of the Political Code, as far as the application of this doctrine is concerned. Under either section the exemption from taxation exists only where there is assessed in the state of California to the corporation all the property thereof the value of which is represented by the shares of stock.¹¹ But the courts have said that no construction of section 3608 of the Political Code should be had which will permit shares held by domestic corporations whose properties are located beyond the state to escape their just proportion of taxation.¹²

9. *Chesebrough v. City and County of San Francisco*, 153 Cal. 559, 96 Pac. 288; *San Francisco v. Flood*, 64 Cal. 504, 2 Pac. 264; *San Francisco v. Fry*, 63 Cal. 470.

10. *Chesebrough v. City and County of San Francisco*, 153 Cal. 559, 96 Pac. 288.

11. *Chesebrough v. City and* 288.

12. *Canfield v. County of Los Angeles*, 157 Cal. 617, 108 Pac. 705; *Chesebrough v. City and County of San Francisco*, 153 Cal. 559, 96 Pac.

(E. W. D.)

COSTS.

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I. INTRODUCTORY.

§ 1. **Definition and Scope of Article.**—Although “costs” has been judicially said to mean those charges which are required by law to be paid to the courts or some of their officers, or the amount of which is expressly fixed by law,¹ such a definition is more applicable to the term “fees” than to “costs,” since the latter term is generally understood to include only those statutory allowances to a party for expenses incurred in an action, and has reference only to the parties and the amounts paid by them.² This article is confined to costs in actions generally. Reference is made in the notes to other titles for treatment of costs in particular actions and proceedings.³

1. *Blair v. Brownstone Oil & Refining Co.*, 20 Cal. App. 316, 128 Pac. 1022. See *Kellogg v. Howes*, 93 Cal. 586, 29 Pac. 230 (stating that the term “costs” has a well-known meaning).

2. *Pezel v. Yerex*, 37 Cal. App. Dec. 256, 205 Pac. 475.

3. See **ALIMONY AND SEPARATE MAINTENANCE**, vol. 1, p. 989 et seq., as to counsel fees, suit money and costs in divorce proceedings.

APPEAL AND ERROR, vol. 2, p. 356 et seq., security for costs on appeal, cost bond, etc.

ATTACHMENT, vol. 3, p. 474, costs in actions in which attachment is proper.

ATTORNEYS AT LAW, vol. 3, p. 679 et seq., as to compensation of attorneys and actions for compensation.

CLAIM AND DELIVERY, vol. 5, pp. 210, 211.

CONTINUANCE, vol. 5, p. 1007, as to imposition of costs as condition of granting continuance.

CORONERS, expenses of coroners' inquests in state prisons.

CORPORATIONS, as to security for costs where plaintiff is a foreign corporation, Code Civ. Proc., § 1036.

COUNTIES, cost of surveying disputed county boundaries, Pol. Code, § 3974.

COURTS, as to fees in general of reporters, Code Civ. Proc., §§ 271, 274.

CRIMINAL LAW, costs on discharge of defendant after acquittal in police and justices' courts.

DAMAGES, inclusion of attorney's fees in damages and contracts for such fees as part of damage to be recovered.

DEPOSITIONS, as to costs upon taking depositions, Code Civ. Proc., § 2025½.

DISMISSAL, DISCONTINUANCE AND NONSUIT, as to dismissal of action or judgment of nonsuit on payment of costs by plaintiff, Code Civ. Proc., § 581.

ELECTIONS, costs in election proceedings, Code Civ. Proc., § 1125.

EMINENT DOMAIN, costs in condemnation proceedings.

ESCAPE AND RESCUE, expenses of trial for escape.

§ 2. Nature and Source of Right to Costs.—Costs were not recoverable at common law. They are given solely by virtue of statutory provisions, and in the absence of a

ESCHEAT, costs in proceedings to determine rights to escheated property, Code Civ. Proc., §§ 1271, 1272.

EXECUTIONS, recovery of costs occasioned by loss from bidder refusing to pay amount bid at execution sale, Code Civ. Proc., § 695.

EXECUTORS AND ADMINISTRATORS, costs in administration of estates.

FISH AND FISHERIES, cost of trial of person violating fish laws.

FORCIBLE ENTRY AND DETAINER, assessment of damages and costs in actions in unlawful detainer and forcible entry.

FRAUDULENT CONVEYANCES, costs of setting aside fraudulent conveyances on suit of attorney general, Pol. Code, § 470.

GARNISHMENT, imposition of costs on party refusing to give memorandum of goods attached, Code Civ. Proc., § 546.

GUARDIAN AND WARD, fixing of attorney's fees for minor by court, Code Civ. Proc., § 1810b.

HOMESTEADS, costs in homestead proceedings, appraisement, and proceedings, to subject homesteads to creditors' demands.

INJUNCTION, dissolving or modification of injunction on giving bond, Code Civ. Proc., § 532.

INSANE PERSONS, costs in determining insanity, Code Civ. Proc., §§ 2175, 2176.

JUDGMENTS, as to entry of costs in judgment, etc., Code Civ. Proc., §§ 1035, 1134, 1135, 1138.

JUSTICES OF THE PEACE, fees, costs on change of trial from one justice court to another, requisites and

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LEVY AND SEIZURE.

MANDAMUS, recovery of damages and costs in actions on writ of mandate, Code Civ. Proc., § 1095.

MECHANICS' LIENS.

MORTGAGES, payment of costs and giving of bonds by commissioner in foreclosure suits, Code Civ. Proc., § 726.

NEGOTIABLE INSTRUMENTS, provisions in negotiable instruments providing for costs.

PARTITION, costs in partition suits. Code Civ. Proc., §§ 763, 768, 769, 771, 796, 798, 799, 801.

PRISONS AND PRISONERS, cost of trial of convict for crimes committed in state prison.

PUBLIC OFFICERS, imposition of costs on one found guilty of usurping a public office, the giving of an undertaking for costs by one prosecuting an action against a party whom, he contends, is usurping a public office, etc., Code Civ. Proc., §§ 809, 810.

PUBLIC SECURITIES, payment of costs in action to restrain issuance of bonds of city, etc., Code Civ. Proc., § 526B.

QUIETING TITLE, payment of costs on disclaimer of interest by defendant in suit to quiet title, Code Civ. Proc., § 739.

REFERENCE, referee's fees, and adjudging of costs in trial by referee in claims against estate, Code Civ. Proc., §§ 1028, 1508.

TRIAL, payment of costs on transferring of cause from one court to

statute providing therefor, no costs can be recovered by either party to an action or proceeding.⁴⁻⁵ The general rule is that recovery of costs is governed by the statute in force at the time of the accrual of the right to have them taxed.⁶ Whether the award of costs in a given case rests in the discretion of the court depends, therefore, upon whether the legislature has committed such discretion to the court.⁷ When costs are provided for they are allowed solely as an incident to the cause of action and to the judgment given upon the issues in the action.⁸ Accordingly, a

another, Code Civ. Proc., § 399, Pol. Code, §§ 4308, 4309.

SURETYSHIP, right of surety on payment of judgment to be subrogated to rights of judgment creditor, Code Civ. Proc., § 1059.

WILLS, costs in cases where will is contested, Code Civ. Proc., § 1332.

4-5. *Wood v. Niemeyer*, 185 Cal. 526, 197 Pac. 795; *Whitaker v. Title Ins. etc. Co.*, 179 Cal. 111, 175 Pac. 460; *Turner v. East Side Canal & Irr. Co.*, 177 Cal. 570, 171 Pac. 299; *Williams v. Atchison etc. Ry. Co.*, 156 Cal. 140, 134 Am. St. Rep. 117, 19 Ann. Cas. 1260, 103 Pac. 885; *Fox v. Hale & Norcross*, S. Min. Co., 122 Cal. 219, 54 Pac. 731; *Henry v. Superior Court*, 93 Cal. 569, 29 Pac. 230; *Sime v. Hunter*, 36 Cal. App. Dec. 664, 202 Pac. 967 (stating that he who would claim costs must put his finger on the statute which awards the same; the measure of the statute is the measure of the right). *City Inv. Co. v. Pringle*, 33 Cal. App. Dec. 209, 193 Pac. 504; *People v. Ferand*, 31 Cal. App. Dec. 369, 188 Pac. 843; *McArthur v. John McArthur Co.*, 39 Cal. App. 704, 179 Pac. 700; *Smith v. McCallum*, 36 Cal. App. 143, 172 Pac. 408; *Kummeth v. Atkison*, 23 Cal. App. 401, 138 Pac. 116; *Bond*

v. United Railroads, 20 Cal. App. 124, 128 Pac. 786; *Duley v. Peacock*, 17 Cal. App. 418, 119 Pac. 1086, *Naylor v. Adams*, 15 Cal. App. 353; 114 Pac. 997; *Murphy v. Casey*, 13 Cal. App. 781, 110 Pac. 956; *Linforth v. San Francisco Gas etc. Co.*, 9 Cal. App. 434, 99 Pac. 716.

6. *Turner v. East Side Canal & Irr. Co.*, 177 Cal. 570, 171 Pac. 299; *Begbie v. Begbie*, 128 Cal. 154, 49 L. R. A. 141, 60 Pac. 667. See *infra*, § 43, as to time of accrual on appeal.

7. *Duley v. Peacock*, 17 Cal. App. 418, 119 Pac. 1086, per Hart, J. See *infra*, § 7.

8. *Huber v. Shedoudy*, 180 Cal. 311, 181 Pac. 63; *Whitaker v. Title Ins. etc. Co.*, 179 Cal. 111, 175 Pac. 460; *Meyer v. O'Rourke*, 150 Cal. 177, 88 Pac. 706; *Begbie v. Begbie*, 128 Cal. 154, 49 L. R. A. 141, 60 Pac. 667; *Glugermovich v. Zicovich*, 113 Cal. 64, 45 Pac. 174; *Henigan v. Ervin*, 110 Cal. 37, 42 Pac. 457; *Duncan v. Times-Mirror Co.*, 109 Cal. 602, 42 Pac. 147; *Stockman v. Riverside Land & I. Co.*, 64 Cal. 57, 28 Pac. 116; *Bolton v. Landers*, 27 Cal. 104; *Gray v. Dougherty*, 25 Cal. 266; *Lawrence v. Martin*, 22 Cal. 173 (holding that costs are only an incident of a verdict and when the verdict is from its nature unassign-

court is without power to exercise discretion to award costs, when such discretion exists, until there has been a final determination of the litigation.⁹

II. RIGHT TO COSTS.

§ 3. In General.—Costs are allowed to the plaintiff of course, upon a judgment in his favor in the following cases:

“1. In an action for the recovery of real property; 2. In an action to recover the possession of personal property, where the value of the property amounts to three hundred dollars or over; such value shall be determined by the jury, court, or referee by whom the action is tried; 3. In an action for the recovery of money or damages, when plaintiff recovers three hundred dollars or over; 4. In a special proceeding; 5. In an action which involves the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine.”¹⁰

able an attempt to assign it will not pass the costs); *Zabriskie v. Torrey*, 20 Cal. 173; *McMillan v. Vischer*, 14 Cal. 232 (holding that an execution issued by the clerk for the costs does not enter into or form a part of the judgment of the trial court); *Dunphy v. Guindon*, 13 Cal. 28; *Shay v. Tuolumne Water Co.*, 6 Cal. 286; *Hudson v. Doyle*, 6 Cal. 101; *Cain v. French*, 29 Cal. App. 725, 156 Pac. 518; *Hatton v. Gregg*, 4 Cal. App. 542, 88 Pac. 594.

⁹. *Estate of Berthol*, 163 Cal. 343, 125 Pac. 750; *Estate of Yoell*, 160 Cal. 741, 117 Pac. 1047; *Henry v. Superior Court*, 93 Cal. 569, 29 Pac. 230; *Begbie v. Begbie*, 128 Cal. 154, 49 L. R. A. 141, 60 Pac. 667 (if a court by abatement of action loses power to render any judgment in the case before it, it is powerless to render any judgment for costs incurred therein). See, also, *Whit-*

aker v. Title Ins. etc. Co., 179 Cal. 111, 175 Pac. 460 (holding that undertaking on appeal need not include costs to be operative as stay bond). See *infra*, § 30, as to power to award costs.

¹⁰. Code Civ. Proc., § 1022; *Whitaker v. Title Ins. etc. Co.*, 179 Cal. 111, 175 Pac. 460; *Petitpierre v. Maguire*, 155 Cal. 242, 100 Pac. 690; *Meyer v. O'Rourke*, 150 Cal. 177, 88 Pac. 706; *McCarthy v. Gaston Ridge Mill etc. Co.*, 144 Cal. 542, 78 Pac. 7; *Clark v. Brown*, 141 Cal. 93; 74 Pac. 548; *Estate of Olmstead*, 120 Cal. 447, 52 Pac. 804; *Beal v. Stevens*, 72 Cal. 451, 14 Pac. 186; *Bond v. United Railroads*, 20 Cal. App. 124, 128 Pac. 786; *Pratt v. Welcome*, 6 Cal. App. 475, 92 Pac. 500. And see cases cited *infra*, §§ 4-6.

See *infra*, § 7, as to cases where costs may be imposed in the discretion of the court.

And the code further provides that costs are to be allowed of course to the defendant in the above-enumerated actions and in special proceedings upon a judgment in his favor.¹¹ In these cases the words "of course" mean as a matter of right, and the question of costs is not left to the discretion of the court but they follow the judgment as a matter of course.¹² Where the case falls within the provisions of section 1022, the court is obviously without power to render judgment for costs in favor of the plaintiff and against the defendant unless the further condition of the statute is met. Recovery must have been had in the case by the plaintiff.¹³ In passing upon section 1024 it has been held that where, upon a construction of the pleadings as a whole, the only material issue raised is decided in favor of the defendant he is entitled to his costs.¹⁴ When there are several defendants not united in interest and making separate defenses by separate answers, and plaintiff fails to recover judgment against all, the court must award costs to such of the defendants as have judgment in their favor.¹⁵

§ 4. Actions Involving Title or Possession of Real Property.—Costs are allowed of course to the plaintiff upon a judgment in his favor in an action for the possession of real property and in actions involving the title or possession of real estate.¹⁶ The code provisions to this effect have been held to include costs in actions concerning conflicting claims to water rights (such actions being in the nature of

11. Code Civ. Proc., § 1024; *Davis v. Hurgren*, 125 Cal. 48, 57 Pac. 684.

12. *Sierra Union etc. Co. v. Wolff*, 144 Cal. 430, 77 Pac. 1038; *Schmidt v. Klotz*, 130 Cal. 223, 62 Pac. 470; *Stoddard v. Treadwell*, 29 Cal. 281 (stating that if the rule is a harsh one, the fault lies with the statute and the remedy with the legislature). *Silva v. Angelo*, 34 Cal. App. Dec. 895, 198 Pac. 56.

13. *Benson v. Braun*, 134 Cal. 41, 66 Pac. 1.

14. *Muzio v. Erickson*, 41 Cal. App. 413, 182 Pac. 974; *Weller v. Brown*, 25 Cal. App. 216, 143 Pac. 251.

15. Code Civ. Proc., § 1026.

16. Code Civ. Proc., § 1022, subds. 1 and 5. *Stokes v. Watkinson*, 35 Cal. App. Dec. 836, 201 Pac. 134, and cases cited *infra*.

suits to quiet title),¹⁷ and costs in actions involving the title or possession of easements, as well as in other actions in regard to the title or possession of real property.¹⁸

In determining whether a party is entitled to costs as of course in such cases the question does not depend upon the nature of the action,—whether legal or equitable,—but depends rather upon the question whether the case comes within the terms of the statute relating to costs,—namely, section 1022 of the Code of Civil Procedure.¹⁹ And although, as is pointed out elsewhere in this article, the granting of costs is usually discretionary in equitable actions, nevertheless the form of the action is immaterial where the case comes within the provisions of section 1022.²⁰ Thus a successful plaintiff is entitled to costs as

17. Northern California Power Co. v. Waller, 174 Cal. 377, 163 Pac. 214; Miller & Lux v. Enterprise Canal etc. Co., 169 Cal. 415, 147 Pac. 567 (action by a riparian proprietor against another for damages for a diversion of water above the lands of the former); Hoyt v. Hart, 149 Cal. 722, 87 Pac. 569; Peake v. Harris, 32 Cal. App. Dec. 703, 192 Pac. 310; Stimson Canal & I. Co. v. Lemoore Canal & I. Co., 31 Cal. App. 396, 160 Pac. 845. But see Gallatin v. Corning Irr. Co., 163 Cal. 405, Ann. Cas. 1914A, 74, 126 Pac. 864, and Bathgate v. Irvine, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442, holding that an action by a riparian proprietor to enjoin a threatened diversion of a certain portion of the ordinary flow of a stream is an equitable action in which costs may be allowed, apportioned or withheld in the discretion of the court.

18. Hoyt v. Hart, 149 Cal. 722, 87 Pac. 569 (holding that possession or title of an easement is involved in an action seeking damages for

past trespasses and a restraint against future trespasses upon such easement, where the defendant puts in issue the existence of the easement); Schmidt v. Klotz, 130 Cal. 223, 62 Pac. 470; Imperial Water Co. No. 1 v. Wores, 29 Cal. App. 253, 155 Pac. 124.

19. Coffman v. Bushard, 164 Cal. 663, 130 Pac. 425 (stating that notwithstanding that case was an action in equity it came within the purview of § 1022 and therefore costs should be awarded as a matter of right); Hoyt v. Hart, 149 Cal. 722, 87 Pac. 569; Gibson v. Hamman, 145 Cal. 454, 78 Pac. 953 (holding that where costs have been improperly disallowed in such case, prevailing party may move to amend under § 663, Code Civ. Proc.); Sierra Union Water etc. Co. v. Wolff, 144 Cal. 430, 77 Pac. 1038; Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820; Hart v. Carnall-Hopkins Co., 103 Cal. 132, 37 Pac. 196.

20. Northern California Power Co. v. Waller, 174 Cal. 377, 163 Pac.

of course in an action to quiet title where the defendant has denied his alleged ownership.¹ And where an action is based upon fraud and deceit but the real purpose is to recover real property out of which the plaintiff has been defrauded, the title is involved within the meaning of the code provision and the successful plaintiff is entitled to costs as of course notwithstanding that the action is in equity.² However, a plaintiff is not entitled to costs in an action to quiet title as against a defendant who disclaims all interest in the property.³

Where judgment is rendered in favor of the defendant in suits involving the title or possession of real property as in other actions enumerated in section 1022, he is entitled to his costs and disbursements.⁴ Thus it has been held that where the only material issue in a suit by a grantee of land to quiet title is the existence of an easement in

214 (where injunction was asked for); *Imperial Water Co. No. 1 v. Wores*, 29 Cal. App. 253, 155 Pac. 124 (suit involving title or right to use of waste canal and to enjoin the defendant from interfering with the plaintiff's free ingress or egress for the purpose of cleaning, repairing or inspecting such canal, etc.). See *infra*, § 7, as to cases where granting of costs is discretionary.

1. *Petitpierre v. Maguire*, 155 Cal. 242, 100 Pac. 690; *Gibson v. Ham-mang*, 145 Cal. 454, 78 Pac. 953; *Sierra Union etc. Co. v. Wolff*, 144 Cal. 430, 77 Pac. 1038. See *Faxon v. All Persons*, 166 Cal. 707, L. R. A. 1916B, 1209, 137 Pac. 919 (where, without deciding whether a proceeding under the *McEnerney* Act when only one person appeared and contested the suit came within the provisions of § 1022, it was held that the court did not abuse its discretion in awarding costs to the plaintiff, judgment being in his

favor, the action becoming in effect a simple action to quiet title between the parties).

2. *Coffman v. Bushard*, 164 Cal. 663, 130 Pac. 425.

3. See Code Civ. Proc., § 739, and see QUIETING TITLE.

4. Code Civ. Proc., § 1024; *Gonzales v. Leon*, 31 Cal. 98 (holding that in an action for the recovery of certain real property, when the defendants deny plaintiffs' title and ouster, and set up title in themselves to a part only, a special verdict awarding the defendants that part of the property claimed without a general verdict, if accepted by plaintiffs, is a finding in favor of defendants and entitles them to their costs.) *Muzio v. Erickson*, 41 Cal. App. 413, 182 Pac. 974 (as to existence of easement); *Weller v. Brown*, 25 Cal. App. 216, 143 Pac. 251; *Lawrence v. Getchell*, 2 Cal. Unrep. 267, 2 Pac. 746. See *supra*, § 3.

favor of the defendant as to which judgment is awarded him, the plaintiff though adjudged to be the owner of the fee is not entitled to costs.⁵

Partial recovery.—Where the plaintiff recovers part of the property sued for in an action involving title or possession of real property, he is entitled to costs as a matter of right, under section 1022.⁶ Thus where the plaintiff has any judgment in his favor in an action of ejectment,⁷ or in an action to quiet title,⁸ though it be for only a part of the property, and though the defendant has judgment in his favor for the residue, the plaintiff is entitled, under the terms of the statute, to recover his costs as of course.⁹ Where both the plaintiff and the defendant ask for affirmative relief and each secures in part by the decree some of the relief for which he has asked, each is entitled to costs as a matter of right.¹⁰

§ 5. Actions for Money or Damages.—The code specifically allows costs as a matter of course to a plaintiff, upon a judgment in his favor in an action for the recovery of

5. *Muzio v. Erickson*, 41 Cal. App. 413, 182 Pac. 974; *Weller v. Brown*, 25 Cal. App. 216, 143 Pac. 251.

6. *Northern California Power Co. v. Waller*, 174 Cal. 377, 163 Pac. 214; *Hoyt v. Hart*, 149 Cal. 722, 87 Pac. 569; *Gibson v. Hammang*, 145 Cal. 454, 78 Pac. 953; *Sierra Union etc. Co. v. Wolff*, 144 Cal. 430, 77 Pac. 1038; *Schmidt v. Klotz*, 130 Cal. 223, 62 Pac. 470; *Lawton v. Gordon*, 37 Cal. 202; *Havens v. Dale*, 30 Cal. 547; *Stimson Canal & I. Co. v. Lemoore, C. & I. Co.*, 31 Cal. App. 396, 160 Pac. 845; *F. A. Hihn Co. v. City of Santa Cruz*, 24 Cal. App. 365, 141 Pac. 391.

7. *Havens v. Dale*, 30 Cal. 547; *Luckhardt v. Ogden*, 30 Cal. 547.

8. *Sierra Union etc. Co. v. Wolff*, 144 Cal. 430, 77 Pac. 1038; *Stim-*

son C. & I. Co. v. Lemoore C. & I. Co., 31 Cal. App. 396, 160 Pac. 845.

9. *Gibson v. Hammang*, 145 Cal. 454, 78 Pac. 953 (action to annul a deed made by a testator in her lifetime to the defendant, brought by the heirs at law who were devisees under the will); *Stimson C. & I. Co. v. Lemoore C. & I. Co.*, 31 Cal. App. 396, 160 Pac. 845 (action involving water rights).

10. *Hoyt v. Hart*, 149 Cal. 722, 87 Pac. 569 (holding that in such a case it will not be presumed on appeal that the rights of plaintiff were injuriously affected by the apportionment of the costs, where no error appears upon the record); *Peake v. Harris*, 32 Cal. App. Dec. 703, 192 Pac. 310; *F. A. Hihn Co. v. City of Santa Cruz*, 24 Cal. App. 365, 141 Pac. 391.

money or damages where he recovers three hundred dollars or over;¹¹ but costs cannot be awarded to the plaintiff if the amount of his recovery is less than three hundred dollars.¹² The purpose of this limitation is to discourage the bringing of actions in the superior courts which should be tried in justices' courts.¹³ The rule applies in all cases where in an action for money or damages the plaintiff recovers less than the stipulated amount. Thus a plaintiff is not entitled to costs who accepts an offer of the defendant to allow judgment to be entered for less than three hundred dollars,¹⁴ or who voluntarily consents to the reduction of a judgment to an amount less than that sum,¹⁵ or who recovers a less amount by reason of a reduction due

11. Code Civ. Proc., § 1022, subd. 3; *Wood v. Niemeyer*, 185 Cal. 526, 197 Pac. 795; *Whitaker v. Title Ins. etc. Co.*, 179 Cal. 111, 175 Pac. 460; *Fox v. Hale & Norcross S. M. Co.*, 122 Cal. 219, 54 Pac. 731 (holding that the prevailing party is entitled to costs incurred by him whether his recovery be for the whole or a portion of his claim or whether his claim be made up of one or several causes of action, provided he recover three hundred dollars or over); *Stoddard v. Treadwell*, 29 Cal. 281, and cases cited *infra*.

12. Code Civ. Proc., § 1025, and § 1022, subd. 3; *Wood v. Niemeyer*, 185 Cal. 526, 197 Pac. 795 (action for slander where recovery was less than \$300); *Boland v. Ashurst Oil Land etc. Co.*, 145 Cal. 405, 78 Pac. 871 (holding that in such a case, judgment carried no costs even though it contained a blank space for the costs to be inserted); *Sullivan v. California Realty Co.*, 142 Cal. 201, 75 Pac. 767; *Kishlar v. Southern Pac. R. R. Co.*, 134

Cal. 636, 66 Pac. 848; *Fox v. Hale etc. Mining Co.*, 122 Cal. 219, 54 Pac. 731; *Quitow v. Perrin*, 120 Cal. 255, 52 Pac. 632; *Anthony v. Grand*, 101 Cal. 235, 35 Pac. 859; *Greenbaum v. Martinez*, 86 Cal. 459, 25 Pac. 12; *Derby v. Stevens*, 64 Cal. 287, 30 Pac. 820; *Jacobi v. Baur*, 55 Cal. 554; *Lund v. Lachman*, 29 Cal. App. 31, 154 Pac. 295; *Bernard v. Weaver*, 23 Cal. App. 532, 138 Pac. 941 (that the judgment has an unfilled blank space for costs is immaterial); *Frese v. Mutual Life Ins. Co.*, 11 Cal. App. 387, 105 Pac. 265 (rule applied to action on policy of insurance).

13. *Greenbaum v. Martinez*, 86 Cal. 459, 25 Pac. 12; *Murphy v. Casey*, 13 Cal. App. 781, 110 Pac. 956. See *Pratt v. Welcome*, 6 Cal. App. 475, 92 Pac. 500, stating that no other penalty will be imposed where the action is brought in good faith.

14. *Murphy v. Casey*, 13 Cal. App. 781, 110 Pac. 956.

15. *Edwards v. Crepin*, 68 Cal. 37, 8 Pac. 616.

to defendant's counterclaim,¹⁶ or who fails to recover a judgment, joint or several, for three hundred dollars or over in a suit against several defendants,¹⁷ or who recovers nominal damages only.¹⁸ And although costs may ordinarily be awarded in actions for equitable relief,¹⁹ in an action for damages and for equitable relief, where the relief is denied, a judgment for less than three hundred dollars does not carry costs, since the action is then to be regarded merely as an action for damages.²⁰ But a money judgment for over three hundred dollars carries costs as of course, though equitable relief is also sought and denied.¹

The rule as to the necessity for recovering three hundred dollars has been held as not intended to apply to an action tried anew in the superior court on appeal from the justice's court.² Neither does the rule apply to a defendant who is allowed by the specific provisions of the code to recover costs as of course when judgment is in his favor.³ Thus upon the failure of the plaintiff to recover in the action, costs are to be allowed as a matter of course to a defendant, who is awarded judgment on a counterclaim notwithstanding the amount of the recovery, by the defendant, is less than three hundred dollars upon his counterclaim.⁴ However, it is clear that neither party can recover costs where judgment is in favor of the plaintiff and his recovery is less than three hundred dollars.⁵

16. *Poswa v. Jones*, 21 Cal. App. 664, 132 Pac. 629.

17. *Derby v. Stevens*, 64 Cal. 287, 30 Pac. 820.

18. *Martin v. Pritchard*, 62 Cal. Dec. 105, 199 Pac. 849; *Liljefelt v. Blum*, 33 Cal. App. 721, 166 Pac. 384 (assault and battery); *Lund v. Lachman*, 29 Cal. App. 31, 154 Pac. 295.

19. See *infra*, § 7.

20. *Brown v. Delavan*, 63 Cal. 303; *Himes v. Johnson*, 61 Cal. 259.

1. *Silva v. Angelo*, 34 Cal. App.

Dec. 895, 198 Pac. 56, action for money judgment against defendant for money due as plaintiff's share in proceeds of a sale as well as for reformation of a lease.

2. *Healey v. Superior Court*, 167 Cal. 22, 138 Pac. 687. See *infra*, § 62.

3. *Davis v. Hurgren*, 125 Cal. 48, 57 Pac. 684. Code Civ. Proc., § 1024. See *supra*, § 4.

4. *Davis v. Hurgren*, 125 Cal. 48, 57 Pac. 684.

5. *Anthony v. Grand*, 101 Cal.

As has already been noted, recovery must be had in favor of the plaintiff to allow him to recover costs.⁶ It has therefore been held that a plaintiff who fails to recover against a defendant on a money demand is not entitled to any costs against him, notwithstanding his costs were largely incurred in defending against a counterclaim of such defendant upon which the defendant also failed to recover.⁷

§ 6. Actions for Personal Property—Special Proceedings.—A plaintiff is entitled to costs as a matter of course, upon a judgment in his favor, in an action for the recovery of personal property where the value of the property amounts to three hundred dollars or over. The value of the property is to be determined by the jury, court or referee by whom the action is tried.⁸ And although the plaintiff recovers only a portion of the personal property sued for in an action of replevin, but the value of that recovered is in excess of the statutory requirement, he is entitled to costs.⁹ No costs can be allowed when the value of the property is less than three hundred dollars.¹⁰ But it has been held that a defendant who has judgment in his favor in a suit to recover personal property is entitled to costs where the complaint sets the value of the property sought to be recovered at more than the statutory minimum although the jury fails to find it to be more.¹¹ The right to costs is to be determined by the right to the pos-

235, 35 Pac. 859; *Frese v. Mutual Life Ins. Co. of New York*, 11 Cal. App. 387, 105 Pac. 265.

6. See *supra*, § 3, and § 1022, Code Civ. Proc.

7. *Benson v. Braun*, 134 Cal. 41, 66 Pac. 1.

8. Code Civ. Proc., § 1022, subd. 2.

9. *Bohr v. McCaig*, 33 Cal. 309.

10. Code Civ. Proc., § 1022; *CLAIM AND DELIVERY*, vol. 5, p. 211. *Williams v. Atchison, T. & S. F.*

Ry. Co., 156 Cal. 140, 134 Am. St. Rep. 117, 19 Ann. Cas. 1260, 103 Pac. 885; *J. Dewing Co. v. Thompson*, 19 Cal. App. 85, 124 Pac. 1035; *Pratt v. Welcome*, 6 Cal. App. 475, 92 Pac. 500.

11. *Edgar v. Gray*, 5 Cal. 267. See, also, Code Civ. Proc., § 1024, as to allowance of defendant's costs of course, and *Martin v. Porter*, 84 Cal. Cal. 476, 24 Pac. 109, allowing costs to defendant.

session of the property at the time of the commencement of the action. If the right of possession changes from one of the parties to the other pending the action, the party originally entitled to possession will be given a judgment for costs.¹²

Special proceedings.—The code specifically awards costs as of course to the prevailing party in a special proceeding.¹³

§ 7. Costs Discretionary.—Although costs are allowed to the prevailing party as of course in equitable proceedings where the action concerns the title or possession of real property,¹⁴ the general rule as to costs in actions in equity is that they may be allowed, withheld or apportioned in the discretion of the court.¹⁵ Thus in such cases, costs

12. *Pico v. Pico*, 56 Cal. 453; *Bolander v. Gentry*, 36 Cal. 105, 95 Am. Dec. 162; *O'Connor v. Blake*, 29 Cal. 312; *Wildman v. Radenaker*, 20 Cal. 615.

See CLAIM AND DELIVERY, vol. 5, p. 211.

13. Code Civ. Proc., §§ 1022, subd. 4, 1024; *People v. Campbell*, 138 Cal. 11, 70 Pac. 918 (holding that in a proceeding in quo warranto to try the title of a certain defendant to office and judgment was given in favor of the relator and against the defendant and an intervener, that costs were rightly imposed on the intervener under § 1024 or § 1025, Code Civ. Proc., whether the proceeding between him and the plaintiff was considered an action or a special proceeding); *Power v. May*, 123 Cal. 147, 55 Pac. 796 (mandamus); *Matson v. Fortuna High School Dist.*, 36 Cal. App. Dec. 423, 202 Pac. 167; *Smith v. McCallum*, 36 Cal. App. 143, 172 Pac. 408 (holding that in an original proceeding in mandamus in the appellate court

to compel a court reporter to make a transcription of his notes in a criminal case for the use of the defendant on appeal, the petitioner, if successful, is entitled to his costs, although the judge of the trial court refused to order the transcription on the ground that the defendant was not entitled thereto); *Kummeth v. Atkison*, 23 Cal. App. 401, 138 Pac. 116 (mandamus). See MANDAMUS; but see *Platnauer v. Superior Court*, 33 Cal. App. 394, 165 Pac. 41, denying costs against judge of superior court in certiorari proceeding; and see *infra*, § 12.

14. See *supra*, § 4.

15. Code Civ. Proc., § 1025; *Smalley v. George C. Peckham Co.*, 175 Cal. 146, 165 Pac. 438; *Gallatin v. Corning Irr. Co.*, 163 Cal. 405, Ann. Cas. 1914A, 74, 126 Pac. 864 (action for an injunction); *Gutierrez v. Wege*, 145 Cal. 730, 79 Pac. 449; *McCarthy v. Gaston Ridge Mill etc. Co.*, 144 Cal. 542, 78 Pac. 7 (abatement of nuisance); *Clark v. Brown*, 141 Cal. 93, 74 Pac. 548 (foreclosure

may be apportioned between the parties on the same or adverse sides,¹⁶ or awarded to the unsuccessful party,¹⁷ or they may be refused to both parties;¹⁸ or they may be made payable out of the fund in dispute.¹⁹ This "discretion," however, means discretion which is guided by law and based upon sound judgment and inspired by a desire to promote justice. It must not be arbitrary or capricious.²⁰ Thus where equitable relief is refused a plaintiff because of his fraudulent misrepresentations, it is an abuse of discretion to award him costs where the defendant is free from blame.¹ However, it has been held to be no abuse of discretion to impose costs on the prevailing party

of mechanic's lien); *De Leonis v. Walsh*, 140 Cal. 175, 73 Pac. 813 (action for reconveyance of property given to secure a debt); *Bemmerly v. Smith*, 136 Cal. 5, 68 Pac. 97; *Bathgate v. Irvine*, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442 (injunction); *Faulkner v. Hendy*, 103 Cal. 15, 36 Pac. 1021; *Brenot v. Brenot*, 102 Cal. 294, 36 Pac. 672; *Abram v. Stuart*, 96 Cal. 235, 31 Pac. 44; *Kelly v. Central Pac. R. R. Co.*, 74 Cal. 565, 16 Pac. 390 (specific performance); *Davidson v. Devine*, 70 Cal. 519, 11 Pac. 664 (injunction); *Cerf v. Ashley*, 68 Cal. 419, 9 Pac. 658 (action to foreclose mortgage); *Hillman v. Newington*, 57 Cal. 56; *Williams v. MacDougal*, 39 Cal. 84; *Randolph v. Harris*, 28 Cal. 561, 87 Am. Dec. 139 (holding that where a tender of indemnity is not made prior to the institution of an action on a lost note the plaintiff is not entitled to costs unless defendant has waived a tender, in which case costs are in the discretion of the court); *Gray v. Dougherty*, 25 Cal. 266; *Harvey v. Chilton*, 11 Cal. 114; *Esmond v. Chew*, 17 Cal. 336 (injunction); *Crosby v. McDermitt*, 7 Cal. 146;

Hudson v. Doyle, 6 Cal. 101 (action to abate nuisance); *Von Schmidt v. Huntington*, 1 Cal. 55 (action to dissolve a joint-stock association and distribute its funds); *Smith v. McCallum*, 36 Cal. App. 143, 172 Pac. 408; *Hatton v. Gregg*, 4 Cal. App. 542, 88 Pac. 594.

16. *Bathgate v. Irvine*, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442; *Abram v. Stuart*, 96 Cal. 235, 31 Pac. 44; *Cerf v. Ashley*, 68 Cal. 419, 9 Pac. 658.

17. *Hatton v. Gregg*, 4 Cal. App. 542, 88 Pac. 594.

18. *Clint v. Eureka Crude Oil Co.*, 3 Cal. App. 463, 86 Pac. 817.

19. *Von Schmidt v. Huntington*, 1 Cal. 55.

20. *Born v. Castle*, 175 Cal. 680, 167 Pac. 138; *Kelly v. Central Pacific R. R. Co.*, 74 Cal. 565, 16 Pac. 390 (arguendo); *Duley v. Peacock*, 17 Cal. App. 418, 119 Pac. 1086; *Cargnani v. Cargnani*, 16 Cal. App. 96, 116 Pac. 306; *Clint v. Eureka Crude Oil Co.*, 3 Cal. App. 463, 86 Pac. 817 (holding that the circumstances may be such that neither party should be awarded costs).

1. *Kelly v. Central Pacific R. R. Co.*, 74 Cal. 565, 16 Pac. 390.

where it appears that the issues for the determination of which the costs were chiefly incurred were decided against the plaintiff.²

The amount of damages awarded in an equitable proceeding has no bearing upon the power of the court to impose costs.³ It follows that a successful plaintiff in an action for equitable relief and for damages is entitled to costs although the damages awarded are only nominal or less than three hundred dollars.⁴ However, as has already been pointed out, a judgment for less than three hundred dollars will not carry costs in an action for equitable relief and damages where the claim for equitable relief is denied.⁵

In proceedings other than in a suit in equity, the allowance of costs is also within the discretion of the court, but such instances are considered elsewhere in this work. Thus the court may impose such terms as are just in granting a continuance,⁶ or in granting leave to amend a pleading, although in certain instances amendments must be allowed without the imposition of costs.⁷ Similarly the court may upon "such terms as may be just" set aside a default judgment taken against a party through his mistake, inadvertence, surprise or excusable neglect.⁸ And costs may be imposed within the discretion of the court as a condition of granting a new trial.⁹

2. *Bathgate v. Irvine*, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442; *Abram v. Stuart*, 96 Cal. 235, 31 Pac. 44.

3. *Robinett v. Brown*, 167 Cal. 735, 141 Pac. 368; *Gallatin v. Corning Irr. Co.*, 163 Cal. 405, Ann. Cas. 1914A, 74, 126 Pac. 864; *McCarthy v. Gaston Ridge Mill etc. Co.*, 144 Cal. 542, 78 Pac. 7; *Gutierrez v. Wege*, 145 Cal. 730, 79 Pac. 449; *Hillman v. Newington*, 57 Cal. 56; *Marius v. Bicknell*, 10 Cal. 217; *Hudson v. Doyle*, 6 Cal. 101.

4. *Broads v. Mead*, 159 Cal. 765, Ann. Cas. 1912C, 1125, 116 Pac. 46; *McCarthy v. Gaston Ridge Mill etc. Co.*, 144 Cal. 542, 78 Pac. 7; *Clark v. Brown*, 141 Cal. 93, 74 Pac. 548; *Bemmerly v. Smith*, 136 Cal. 5, 68 Pac. 97; *Davidson v. Devine*, 70 Cal. 519, 11 Pac. 664.

5. See *supra*, § 5.

6. See CONTINUANCE, vol. 5, p. 1007.

7. See PLEADING.

8. See JUDGMENTS.

9. See NEW TRIAL.

§ 8. Tender—Offer to Compromise.

“When in an action for the recovery of money only the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which he was entitled and thereupon deposits in court for plaintiff the amount so tendered, and the allegation be found to be true, the plaintiff cannot recover costs but must pay costs to the defendant.”¹⁰

To entitle a defendant to costs he must not only plead a tender, but aver that he has always been and is ready to pay the sum tendered and the money must be brought into court.¹¹ A tender which is insufficient in amount has no effect.¹²

Section 997 of the Code of Civil Procedure provides that defendant may, at any time before trial or judgment, serve upon plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified, and upon acceptance of the offer judgment must be entered by the clerk. It further provides that if plaintiff fails to obtain a more favorable judgment he cannot recover costs, but must pay defendant's costs from the time of the offer. The general effect of this section has been stated in another article,¹³ but here it may be noted that, under section 1493 of the Civil Code, such offer must be made in good faith in order to prevent the recovery of costs.¹⁴ Hence an offer not made in good faith, by one who has not the means with which to make it good, is not effectual to stop the accruing of future costs even

10. Code Civ. Proc., § 1030; *De La Cuesta v. Montgomery*, 144 Cal. 115, 77 Pac. 887; *Rottman v. Hevener*, 36 Cal. App. Dec. 358, 202 Pac. 329; *Rottman v. Hevener*, 36 Cal. App. Dec. 355, 202 Pac. 334 (holding that deposit in bank after suit brought is neither available as a defense to an action on a demand note, nor operative to deprive plaintiff of his right to costs).

11. *Bryan v. Maume*, 28 Cal. 238, decided under Practice Act.

12. *Fell v. Frierson*, 171 Cal. 351, 153 Pac. 229.

13. See COMPROMISE AND SETTLEMENT, vol. 5, p. 405 et seq.

14. Civ. Code, § 1493, provides that an offer of performance must be made in good faith and in such manner as is most likely under the circumstances to benefit the creditor.

though the subsequent judgment does not exceed the amount of the offer.¹⁵

§ 9. Bringing Unnecessary Separate Suits.—The code provides that a plaintiff who brings several actions on the same cause of action against several defendants who might have been joined as defendants in the same cause of action is not entitled to costs in more than one action.¹⁶ This section does not apply to costs in separate suits brought against several tort-feasors whose acts contributed to the same injury, where the acts were not joint in a sense that would make the wrongdoers liable to be sued in a common action as joint tort-feasors. In such case, even though satisfaction of one of the judgments obtained operates to satisfy and extinguish all other judgments rendered, still the plaintiff is entitled to recover the costs of the actions against the other wrongdoers.¹⁷

Where a plaintiff may obtain all the relief to which he is entitled in one action but asserts his rights in more than one suit, he is not entitled to costs after having prosecuted his original claim, although the rules of procedure may permit him to recover judgment in a subsequent suit.¹⁸

§ 10. Abatement of Action.—When the court loses power to render a judgment between the parties upon the issues before it, it is equally powerless to render a judgment for costs in favor of one of the parties. Thus where a suit abates by the death of a party there can be no judgment for costs in favor of the survivor. The right to costs up to the time of abatement is extinguished unless the costs are payable out of a particular fund or are connected with a duty toward the party claiming costs. The rule is

15. *Horan v. Harrington*, 130 Cal. 142, 62 Pac. 400.

16. Code Civ. Proc., §1023.

17. *Butler v. Ashworth*, 110 Cal. 614, 43 Pac. 4, 386.

18. *Longmaid v. Coulter*, 123 Cal. 208, 55 Pac. 791. See as to splitting causes of action, *ACTIONS*, vol. 1, p. 369.

the same when the action abates after judgment and pending an appeal where no costs were allowed in the judgment of the trial court. Upon the abatement each party must bear his own costs incurred prior thereto.¹⁹

III. PERSONS WHO MAY RECOVER OR WHO ARE LIABLE.

§ 11. **Persons Who may Recover.**—A judgment for costs must be entered in favor of a party to the action and cannot be entered in favor of one not a party.²⁰ Where a party to an action transfers all his interest in the subject matter and the transferee permits the suit to be prosecuted in the names of the original parties, it has been held that there is no rule that prevents such parties from recovering costs.¹ One who has unjustly been brought into court and compelled to continue his appearance may recover whatever costs he has thus incurred.² As has been pointed out in another section, a party to an equitable action, in accordance with the well-recognized principles, may be refused costs by reason of his misrepresentations or other wrongful conduct.³ On a similar principle it has been held that a defendant, not interested in the subject matter of the litigation, who neglects to advise the plaintiff of this fact in his pleadings or otherwise until some time during the trial, is not entitled to his costs.⁴

19. *Begbie v. Begbie*, 128 Cal. 154, 49 L. R. A. 141, 60 Pac. 667, per Harrison, J., action for divorce. See ABATEMENT AND REVIVAL, vol. 1, pp. 74, 75.

20. See 7 Ruling Case Law, p. 788. See *Rankin v. Central Pac. R. R. Co.*, 73 Cal. 96, 15 Pac. 57 (holding that a defendant in favor of whom judgment has been entered cannot complain of the granting of a new trial upon payment of plaintiff's

costs to a codefendant against whom judgment has been entered).

1. *Crittenden v. San Francisco Savings Union*, 157 Cal. 201, 107 Pac. 103. See generally as to assignments pendente lite, ASSIGNMENTS, vol. 3, p. 297.

2. *Summerville v. March*, 142 Cal. 554, 100 Am. St. Rep. 145, 76 Pac. 388.

3. See supra, § 7.

4. *Born v. Castle*, 175 Cal. 680, 167 Pac. 138.

Joint defendants.—When there are several defendants in an action mentioned in section 1022 of the Code of Civil Procedure, not united in interest and making separate defenses by separate answers, and plaintiff fails to recover judgment against all, the court must award costs to such of the defendants as have judgment in their favor.⁵ Where the suit is one in equity and there are several defendants making separate defenses, the court may, of course, apportion costs in its discretion.⁶

§ 12. Persons Liable.—Costs cannot be taxed against one who is not a party to the action or proceeding.⁷ Accordingly, where an action of interpleader is dismissed as to the plaintiff and the defendants litigate between themselves the right to a fund deposited in court, upon appeal from the final judgment the costs of appeal cannot be recovered from such plaintiff when no question is involved as to his right to bring the action.⁸ But costs may be taxed against a party defendant in an action of interpleader and they may be imposed upon the losing party where the court, instead of making an order of interpleader, consolidates two actions brought against a single

5. Code Civ. Proc., § 1026. It was held in an early case that where an action has been commenced against several defendants and there has been a judgment in their favor, they are not all entitled to recover separate costs to the amount allowed by the statute allowing costs, but can only recover jointly as though there had been but one defendant. *Rice v. Leonard*, 5 Cal. 61. See, also, *Leadbetter v. Lake*, 118 Cal. 515, 50 Pac. 686, holding that it is not erroneous to enter a joint judgment for costs in favor of defendants who are sued jointly but who answer separately.

6. See *supra*, § 7.

7. *Mojave etc. R. R. Co. v. Cuddeback*, 28 Cal. App. 439, 152 Pac. 943, holding that a defendant cannot recover as costs against the plaintiff the expenses of a mandamus proceeding against the judge to compel him to set the case for trial.

As to rule that only a party can recover costs, see *supra*, § 11.

8. *San Francisco Sav. Union v. Long*, 137 Cal. 68, 69 Pac. 687 (such costs can only be enforced against respondent upon that appeal); *Long v. Superior Court*, 127 Cal. 686, 60 Pac. 464. See INTERPLEADER.

defendant for possession of funds in his control.⁹ Costs may be taxed against an intervener if he is unsuccessful,¹⁰ but he cannot be taxed with costs which arose prior to his becoming a party.¹¹ Costs cannot be awarded against a defendant who is neither a necessary or proper party.¹² One cannot, however, claim that he has no interest in the controversy and thus be freed from payment of costs, where he has filed pleadings which in effect are claims to an interest in the subject of the action.¹³ The liability for costs is not affected by the manner in which parties designate themselves in the pleading.¹⁴ And where costs are imposed on one of several defendants and the plaintiff, such defendant cannot object on the ground that he is a codefendant when he filed a cross-complaint which rendered necessary the incurring of costs by the other defendants in defeating his claim.¹⁵ Persons acting in representative capacities are ordinarily not liable for costs.¹⁶

9. *Dunlap v. Commercial Nat. Bank of Los Angeles*, 34 Cal. App. Dec. 29, 195 Pac. 688.

10. *People v. Campbell*, 138 Cal. 11, 70 Pac. 918, holding that judgment may be rendered in favor of relator and against an intervener for costs incurred subsequent to the filing of a complaint of intervention, where judgment is in favor of relator.

11. *Whitten v. Dabney*, 171 Cal. 621, 154 Pac. 312.

12. *Campodonico v. Grossini*, 66 Cal. 358, 5 Pac. 609; *Sweet v. Richvale Land Co.*, 29 Cal. App. 111, 154 Pac. 608, holding that in an action to obtain possession of land an order awarding costs is unwarranted where the complaint really states no cause of action against the defendant and the evidence shows that the defendant had and claimed no interest in or to the property.

13. *Collins v. O'Laverty*, 136 Cal. 31, 68 Pac. 327, holding that where an action is brought against a husband and wife to set aside a deed to the wife and the wife and husband file an answer which is in effect a joint claim to the property, costs may be awarded against both.

14. *Gilmour v. North Pasadena Land etc. Co.*, 178 Cal. 6, 171 Pac. 1066, holding that costs ran against plaintiffs as individuals although they had styled themselves as "water committee for residents of Block A."

15. *Summerville v. Stockton Milling Co.*, 142 Cal. 529, 76 Pac. 243.

16. *Sterling v. Gregory*, 149 Cal. 117, 85 Pac. 305, holding that where an action was brought by plaintiff as the trustee of an express trust and there was no charge of mismanagement or bad faith on his part, costs recovered against him should be chargeable only against the

But in certain cases trustees, executors, etc., may be held personally.¹⁷ Nor are costs taxable against a judge whose action is sought to be reviewed in a proceeding in certiorari.¹⁸

When state or county is a party.—When a state or county is a party and costs are awarded against them they must, according to code provisions, be paid out of the state or county treasury.¹⁹ But these provisions authorize costs to be paid from the state or county treasury only when the state or county, as the case may be, is a party.²⁰ And it has been held that in speaking of “costs” the statute deals merely with costs as such, and therefore the state is not liable for attorneys’ fees awarded by a court.¹

IV. SECURITY FOR COSTS.

§ 13. **Right to Security.**—“Where the plaintiff in an action or special proceeding resides out of the state, or is a foreign corporation, security for the costs and charges which may be awarded against such plaintiff, may be required by the defendant.”² All proceedings must be

trust property described in the complaint.

17. *Thompson v. Wood*, 115 Cal. 302, 47 Pac. 50.

See *infra*, § 56 et seq., as to penalty which may be imposed upon party for frivolous appeal. See EXECUTORS AND ADMINISTRATORS; TRUSTS.

18. *Platnauer v. Superior Court*, 33 Cal. App. 394, 165 Pac. 41.

19. Code Civ. Proc., §§ 1, 38, 1739; *Cabill v. Colgan*, 3 Cal. Unrep. 622, 31 Pac. 614.

20. *Lamberson v. Jeffers*, 116 Cal. 492, 48 Pac. 485; *Lamberson v. Jeffers*, 116 Cal. 492, 48 Pac. 485.

1. *Sullivan v. Gage*, 145 Cal. 739, 79 Pac. 537. See *infra*, § 27, as to allowance of attorneys’ fees.

2. Code Civ. Proc., § 1036; *Stimp-*

son ete. Scale Co. v. Superior Court, 12 Cal. App. 536, 107 Pac. 1013.

§ 1936 was amended to include special proceedings by Stats. 1903, p. 187. Prior to this amendment it was held that a contest to revoke the probate of a will is a special proceeding and not an action within the meaning of this section requiring nonresident plaintiffs to give security for costs and therefore in such proceeding a nonresident contestant was not required to give such security. *Estate of Joseph*, 118 Cal. 660, 50 Pac. 768.

See APPEAL AND ERROR, vol. 2, p. 356 et seq., as to security for costs on appeal.

CORPORATIONS, as to security for costs where plaintiff is a foreign corporation.

stayed until such undertaking is filed.³ The court exercises no discretion in the requirement of security when it is demanded. The statute invests the defendant with the right to it, and the court cannot, against his will, deprive him of it.⁴ When the demand for security is made in a proper case, the law itself enjoins further proceedings on the part of the plaintiff until the demand is complied with.⁵

§ 14. Notice of Requirement—Undertaking.—No action on the part of the demanding party appears to have been contemplated by the statute other than that he should require security as provided in section 1036 of the Code of Civil Procedure by a "notice" that security is required.⁶ The undertaking to be filed must be executed by two or more persons "to the effect that they will pay such costs and charges as may be awarded against the plaintiff by

JUSTICES OF THE PEACE, security in justices' courts and on appeal therefrom §§ 923, 926, Code Civ. Proc.

LIBEL AND SLANDER, as to security for costs in actions for libel and slander (Stats. 1871-72, p. 533).

3. Code Civ. Proc., § 1036.

4. *Carter v. Superior Court*, 176 Cal. 752, 169 Pac. 667; *Meade County Bank v. Bailey*, 137 Cal. 447, 70 Pac. 297; *Clune v. Sullivan*, 56 Cal. 249; *Gadette v. Recorder's Court of City of East San Diego*, 35 Cal. App. Dec. 337, 199 Pac. 817.

5. *Gadette v. Recorder's Court of City of East San Diego*, 35 Cal. App. Dec. 337, 199 Pac. 817, stating that it differs from § 1037, Code Civ. Proc., allowing a dismissal of action, in that no discretion is here allowed the court, and applying rule as stated in *Meade County Bank v. Bailey*, 137 Cal. 447, 70 Pac. 297, as to construction of § 1037, and holding that prohibition will lie to prevent further proceedings pending the filing of the undertaking. See

Carter v. Superior Court, 176 Cal. 752, 169 Pac. 667 (to same effect). See, also, *Comstock v. Clemens*, 19 Cal. 77 (holding under § 512 of the Practice Act which contained the word "shall" instead of "must," that where the notice to give security was not accompanied with an order staying proceedings, after judgment on appeal it was too late to move to dismiss the action).

6. Where the demand was for "security from plaintiff for defendant's costs and charges . . . as provided for under section 1036, Code of Civil Procedure, of the state of California," it was held to be sufficient to apprise plaintiff that it was claimed that he was either a foreign corporation or a nonresident. *Gadette v. Recorder's Court of the City of East San Diego*, 35 Cal. App. Dec. 337, 199 Pac. 817, stating that the code is indefinite as to how the fact of nonresidence is to be determined in case it is disputed.

judgment or in the progress of the action or special proceeding, not exceeding the sum of three hundred dollars.”⁷ It must be of the same nature as a cost bond upon appeal—that the sureties will pay such costs and charges as may be awarded against the plaintiff by the judgment, not exceeding three hundred dollars.⁸ Where the undertaking recites that “plaintiff will pay all costs and charges,” etc., it is insufficient, since such recital is not the promise of the sureties to pay. An undertaking by a qualified surety corporation is sufficient. The qualification of such corporation need not, however, appear on the face of the undertaking. It is sufficient if the corporation be in fact qualified as required by law.⁹ The court has no power to fix a sum less than the statutory amount nor to change the amount and condition of the bond fixed by the statute.¹⁰ But the court does not lose jurisdiction of the action after the expiration of thirty days by reason of the filing of a defective undertaking. It may in its discretion give leave to file a proper one.¹¹

§ 15. Additional Security.—“A new or additional undertaking may be ordered by the court or judge upon proof that the original undertaking is insufficient security, and proceedings in the action or special proceeding stayed until such new or additional undertaking is executed and filed.”¹² Service of exception to the sureties in an undertaking is not authorized; the only remedy given by the code if the security is insufficient is that the court may order a new or additional undertaking.¹³ By section 1037 of the Code of Civil Procedure thirty days are allowed to file such additional undertaking. It follows that an order

7. Code Civ. Proc., § 1036.

8. Meade County Bank v. Bailey, 137 Cal. 447, 70 Pac. 297. See APPEAL AND ERROR, vol. 2, p. 366, et seq.

9. Carter v. Superior Court, 176 Cal. 752, 169 Pac. 667. See APPEAL AND ERROR, vol. 2, pp. 382, 453.

10. Meade County Bank v. Bailey, 137 Cal. 447, 70 Pac. 297.

11. Carter v. Superior Court, 176 Cal. 752, 169 Pac. 667.

12. Code Civ. Proc., § 1036.

13. Estate of Baker, 176 Cal. 430, 168 Pac. 881.

requiring additional security to be given in a time shorter than that provided by the code is ineffectual. When proceedings are stayed in accordance with the statute until the giving of additional security, such stay has the effect of vacating the time fixed for trial, and further notice of trial to the plaintiff is required if, before the expiration of the thirty days, a sufficient bond should be filed by one desiring that the trial proceed. The mere giving of an undertaking by a coplaintiff before the expiration of the time given by the statute in which to file the bond is no more effectual as to the other plaintiffs than a waiver by the defendants of the benefit of an order requiring additional security. In either case the other plaintiffs are entitled to notice of any change in existing conditions which would render a trial of the issues possible.¹⁴

§ 16. **Dismissal on Failure to Give.**—Upon failure to file a proper undertaking within thirty days from notice that such security is required or after an order for new or additional security is required, the court may order the action or proceeding dismissed.¹⁵ But this code provision, unlike that in regard to the proceedings being stayed until security is given, is permissive and not mandatory and in the absence of dismissal the court retains jurisdiction of the action.¹⁶ It has therefore been held that under the provisions of section 1054 of the Code of Civil Procedure, in regard to the extension of time within which an act is to be done, the superior court has power to extend the time to file the bond, and where it is filed within the extended time the action will not be dismissed.¹⁷ And as has been seen, where a defective undertaking is filed, the court,

14. *Estate of Dean*, 149 Cal. 487, 87 Pac. 13, holding also that the court before dismissing the proceeding for failure of plaintiffs to appear should require proof that they had notice that giving of additional security was waived or had been given by a coplaintiff.

15. *Code Civ. Proc.*, § 1037; *Meade County Bank v. Bailey*, 137 Cal. 447, 70 Pac. 297.

16. *Estate of Baker*, 176 Cal. 430, 168 Pac. 881. See *supra*, § 13.

17. *Hertz v. Superior Court*, 35 Cal. App. 83, 169 Pac. 258.

after the expiration of thirty days, does not lose jurisdiction of the action or proceeding and is not bound to dismiss it but may, in its discretion, give leave to file a proper undertaking.¹⁸

§ 17. Effect of Judgment on Dismissal.—A judgment dismissing an action for failure to give security for costs in conformity with the requirements of sections 1036 and 1037 of the Code of Civil Procedure, is not one on the merits and concludes only the matter then directly adjudged. The matter directly adjudged is that plaintiff has failed to give security and therefore cannot be heard and not that he has no cause of action or that the defendant has a valid defense. A judgment that a party cannot be heard is conclusive only as to that question. It does not determine the merits of the action which the court refuses to consider. Not being a judgment on the merits it does not preclude a plaintiff, after becoming a resident of California or after he is able to give security, from bringing another suit.¹⁹ Such a judgment has been said not to be a judgment at all in the strict sense; it is treated as such for the purpose of taking an appeal because it finally disposes of the action as effectually as would any formal judgment based on a ruling on demurrer or on findings or verdict on the facts.²⁰

V. ACTIONS IN FORMA PAUPERIS.

§ 18. Nature and Extent of Right.—The privilege of suing in forma pauperis, so far as regards the exemption from court fees, was conceded to litigants at common law, and the power to grant such exemption in proper cases now exists in courts of general jurisdiction in the absence

18. See *supra*, § 14.

19. *Rosenthal v. McMann*, 93 Cal. 505, 29 Pac. 121, per Temple, C.

20. *Wood, Curtis & Co. v. Mis-*

souri etc. Ry. Co., 152 Cal. 344, 92 Pac. 868, per Angellotti, J., *arguendo*. See JUDGMENTS.

of an express statutory declaration.¹ Accordingly, in accord with the doctrine that rights which are incorporated into our jurisprudence by reason of their existence at common law will not be held to be curtailed except by plain legislative direction,² it is held that existing statutes as to the payment of fees by litigants have not taken away the common-law right to sue in forma pauperis.³ And the express grant to litigants of the right to sue in justices' courts without payment of costs in no way affects the right as it exists in courts of general jurisdiction without statute.⁴ It necessarily follows from the existence of this right that upon the granting of an application to prosecute an action in forma pauperis, the plaintiff is entitled to all the rights which are open to a litigant upon payment of fees, including the right of trial by jury, and every officer is required to perform his duty as fully as though legal fees had been paid.⁵ The court has not liberty to refuse

1. *Majors v. Superior Court of Alameda Co.*, 181 Cal. 270, 6 A. L. B. 1274, 184 Pac. 18; *Martin v. Superior Court*, 176 Cal. 289, L. R. A. 1918B, 313, 168 Pac. 135 (the right to remit fees was one of the inherent powers of the English courts quite independently of statute); *Hammond v. Justice's Court*, 37 Cal. App. 506, 174 Pac. 69; *Wait v. Superior Court*, 35 Cal. App. 330, 169 Pac. 916.

2. See COMMON LAW, vol. 5, p. 257.

3. *Majors v. Superior Court of Alameda Co.*, 181 Cal. 270, 6 A. L. B. 1274, 184 Pac. 18 (holding that the act of 1917 [Stats. 1917, pp. 788, 789], providing if in any trial in a civil case the jury be for any cause discharged without finding a verdict, the fees of the jury shall be paid by the party who shall have announced that a trial by jury is required, and until they are paid no further proceedings shall be allowed

in the action, does not require a plaintiff suing in forma pauperis to pay the fees of the jury, where the jury was discharged before the close of the trial in order to permit the plaintiff to amend his complaint, in the absence of any showing of vexatious conduct); *Martin v. Superior Court*, 176 Cal. 289, L. R. A. 1918B, 313, 168 Pac. 135.

4. *Martin v. Superior Court*, 176 Cal. 289, L. R. A. 1918B, 313, 168 Pac. 135. See Code Civ. Proc., § 91, providing that in actions in justice's courts the payment of fees in advance "shall not be exacted from parties who may prove to the satisfaction of the presiding judge that they have a good cause of action and that they are not of sufficient pecuniary ability to pay the legal fees."

5. *Martin v. Superior Court*, 176 Cal. 289, L. R. A. 1918B, 313, 168 Pac. 135, per Henshaw, J.

to allow a poor suitor to prosecute an action in forma pauperis in a proper case.⁶

§ 19. Persons Entitled to Sue.—Although an indigent plaintiff has a right to prosecute a civil action in forma pauperis in a proper case,⁷ the discretion of the trial court in the case of one originally seeking to be admitted so to sue is exercised with a view to confine the privilege strictly to those who, having a substantial right to enforce or preserve, are unable otherwise so to do, and who, once having been admitted to proceed in forma pauperis, pursue a course free from unreasonable delay or vexatious conduct.⁸ “The question whether one once admitted to sue in forma pauperis should, on account of vexatious conduct, delay, etc., be prevented from having further benefit of uncompensated service, is one for the court having jurisdiction in the case or proceeding to determine in the exercise of a wise discretion.” Common-law courts were jealous of extending the privilege and were not very ready to extend the privileges of a second trial to one suing in forma pauperis if there were circumstances indicating vexatious conduct. No fixed rule was followed. There was a rule that if a pauper gave notice of trial and did not proceed he should be dispaupered, but even the practice at the com-

6. *Martin v. Superior Court*, 176 Cal. 289, L. R. A. 1918B, 313, 168 Pac. 135 (mandamus will issue to compel the granting of the application); *Wait v. Superior Court*, 35 Cal. App. 330, 169 Pac. 916 (but dismissing writ because question had become moot); *Hammond v. Justice's Court*, 37 Cal. App. 506, 174 Pac. 69 (holding that township justices' courts are vested with power to admit parties to sue in forma pauperis). See *infra*, § 19, as to discretion of court.

7. *Majors v. Superior Court*, 181 Cal. 270, 6 A. L. R. 1274, 184 Pac.

18; *Martin v. Superior Court*, 176 Cal. 289, L. R. A. 1918B, 313, 168 Pac. 135; *Hammond v. Justice's Court*, 37 Cal. App. 506, 174 Pac. 69; *Wait v. Superior Court*, 35 Cal. App. 330, 169 Pac. 916. See *supra*, § 18.

8. *Majors v. Superior Court of Alameda County*, 181 Cal. 270, 6 A. L. R. 1274, 184 Pac. 18, per Melvin, J., holding that such discretion should be used with care to the end that unworthy persons who are neither indigent nor possessed of substantial rights may not enjoy this privilege.

mon law did not in general dispauperize one who merely failed to obtain a verdict or who by the action of his counsel in securing a postponement of the cause for correction of pleadings permitted a jury to be discharged before the submission of issues of fact. And such is the rule under the California practice.⁹

§ 20. Application.—It is no objection to an application to sue as a poor person that it employs the Latin words “in forma pauperis” instead of the equivalent English phrase, although such words are not used in the statutes of California. Nor is it objectionable that the moving papers fail to specify the remission of just what fees is sought, for the litigant has a right to seek the remission of all fees exacted by law. And complaint cannot be made that the motion is made after plaintiff has paid his original filing fees for the commencement of the action, for the right to prosecute was as fully recognized at common law as the right to commence an action. Where a motion for leave to further prosecute an action in forma pauperis is filed it should be so entitled, but it has been held not to be misleading to entitle such a motion a “Notice of Motion for Leave to Sue in Forma Pauperis.”¹⁰ In order to be entitled to the benefit of the exemption a suitor must have a meritorious cause,¹¹ but an affidavit of merits is not called for by statute, nor was it called for by the common law. While the court may demand a sufficient affidavit of merits, or indeed any other form of satisfactory evidence before issuing its order, the need thereof is said to be much less when the action has been brought and is at issue on its facts. Nor, it has been further declared, would a defective affidavit of merits justify a court in refusing a

9. *Majors v. Superior Court of Alameda Co.*, 181 Cal. 270, 6 A. L. R. 1274, 184 Pac. 18, per Melvin, J.

10. *Martin v. Superior Court*, 176 Cal. 289, L. E. A. 1918B, 313, 168 Pac. 135, per Henshaw, J.

11. *Martin v. Superior Court*, 176 Cal. 289, L. R. A. 1918B, 313, 168 Pac. 135; *Wait v. Superior Court*, 35 Cal. App. 330, 169 Pac. 916.

poor suitor the relief sought if in all other respects he is entitled to it, without at least giving him an opportunity to present an affidavit measuring up to the requirements of the law.¹²

VI. AMOUNT AND ITEMS ALLOWABLE.

§ 21. Determination by Court.—The legislature has not provided specifically for the amount and items of costs recoverable in the trial court.¹³ The statute merely declares that one who claims costs must file “a memorandum of the items of his costs and necessary disbursements.”¹⁴ Necessarily, therefore, the determination of items allowable is left largely to the discretion of the trial judge,¹⁵ and in the absence of a showing of abuse of its discretion such determination will not be disturbed upon appeal.¹⁶ As a general rule, however, such costs as are “necessary in order to make the litigation effectual” should be allowed.¹⁷ It is patent that a party is not entitled to costs for expenditures made in bad faith or for purposes of obstruction.¹⁸

12. *Martin v. Superior Court*, 176 Cal. 289, L. R. A. 1918B, 313, 168 Pac. 135, per Henshaw, J., stating that at common law the unfortunate suitor whose cause of action proved to be nonmeritorious stood liable to be “whipt.”

13. As to costs recoverable on appeal, see *infra*, § 49 et seq.

14. Code Civ. Proc., § 1033. See *infra*, §§ 30–36, as to taxation and award.

15. *Fay v. Fay*, 165 Cal. 469, 132 Pac. 1040; *Meyer v. City of San Diego*, 132 Cal. 35, 64 Pac. 124; *Miller v. Highland Ditch Co.*, 91 Cal. 103, 27 Pac. 536; *Barnhart v. Kron*, 88 Cal. 447, 26 Pac. 210; *Blair v. Brownstone Oil & Refn. Co.*, 20 Cal. App. 316, 128 Pac. 1022; *Bond v. United Railroads*, 20 Cal. App. 124, 128 Pac. 786. As to items

of costs recoverable on appeal, see *infra*, § 49 et seq.

16. *Welch v. Alcott*, 178 Cal. 530, 174 Pac. 34; *Lomita Land & Water Co. v. Robinson*, 154 Cal. 36, 18 L. R. A. (N. S.) 1106, 97 Pac. 10; *Mesnager v. De Leonis*, 140 Cal. 402, 73 Pac. 1052; *Miller v. Highland Ditch Co.*, 91 Cal. 103, 27 Pac. 536; *Barnhart v. Kron*, 88 Cal. 447, 26 Pac. 210; *Harvey v. Chilton*, 11 Cal. 114.

17. *Estate of Bell*, 157 Cal. 528, 108 Pac. 497; *Miller v. Highland Ditch Co.*, 91 Cal. 103, 27 Pac. 536; *Bank of Woodland v. Hiatt*, 59 Cal. 580; *Bond v. United Railroads*, 20 Cal. App. 124, 128 Pac. 786.

18. *San Joaquin etc. Irr. Co. v. Stevinson*, 165 Cal. 540, 132 Pac. 1021; *San Francisco v. Collins*, 98 Cal. 259, 33 Pac. 56.

Nor is one entitled to costs for fees which he has not paid nor for the payment of which he has incurred no liability.¹⁹ And even where awarding or withholding of costs is within the discretion of the court, it has no authority to allow costs not properly chargeable as such.²⁰ Thus the discretion of the court to award costs in a suit in equity is limited to the costs ordinarily allowed in an equitable proceeding. So it has been held that costs incurred by a prevailing party for his own benefit in the preparation of his case are not taxable in the action.¹

§ 22. Fees and Mileage of Witnesses.—Fees paid to witnesses to secure their attendance are, as a general rule, items properly included in a bill of costs.² If the witnesses are summoned in good faith their fees may be taxed, although they were not called to testify at the trial.³ But a party is not entitled to recover costs for witnesses unnecessarily called.⁴ And fees of witnesses who refuse to

19. *Fay v. Fay*, 165 Cal. 469, 132 Pac. 1040; *Freshour v. Hihn*, 99 Cal. 443, 34 Pac. 87; *City Investment Co. v. Pringle*, 33 Cal. App. Dec. 209, 193 Pac. 504.

20. *Bathgate v. Irvine*, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442 (costs for surveying and making maps at the instance of one of the parties not acting under direction of the court); *Miller v. Highland Ditch Co.*, 91 Cal. 103, 27 Pac. 536 (costs of preparing map); *Faulkner v. Hendy*, 79 Cal. 265, 21 Pac. 754 (cost of employing expert accountant to dissolve partnership); *People v. Feraud*, 31 Cal. App. Dec. 369, 188 Pac. 843 (cost of making and conducting investigation before commencement of suit under Red-light Abatement Act); *White v. White*, 4 Cal. Unrep. 15, 33 Pac. 399.

1. *People v. Feraud*, 31 Cal. App. Dec. 369, 188 Pac. 843.

2. *Fay v. Fay*, 165 Cal. 469, 132 Pac. 1040 (holding that court cannot disallow items for attendance of witnesses where there is nothing in the record to suggest any reason for such disallowance); *Barnhart v. Kron*, 88 Cal. 447, 26 Pac. 210; *Beal v. Stevens*, 72 Cal. 451, 14 Pac. 186; *Randall v. Faulkner*, 41 Cal. 242; *Whitaker v. Moran*, 23 Cal. App. 758, 139 Pac. 901; *Naylor v. Adams*, 15 Cal. App. 353, 114 Pac. 997.

3. *Randall v. Faulkner*, 41 Cal. 242; *Whitaker v. Moran*, 23 Cal. App. 758, 139 Pac. 901.

4. *Barnhart v. Kron*, 88 Cal. 447, 26 Pac. 210, stating that the character of the testimony of a witness at the trial, however, is not a test of the necessity of subpoenaing him.

receive the same will not be allowed.⁵ The right of a witness to his fees in civil cases is purely statutory and a court is without power to saddle on the vanquished party costs which are not thus strictly authorized.⁶ But it is equally true that where the statute allows fees it is not within the discretion of the court to disallow such items on the cost bill.⁷ The statute which allows fees and mileage relates, in ordinary cases, only to witnesses who may be compelled by subpoena to attend or to give their deposition, and, in case of a party, to one who has been subpoenaed by the opposite party. It follows that a party in whose favor judgment is rendered, who voluntarily attends without being subpoenaed by the opposite party, is not entitled to fees by reason of being called as a witness by his adversary while in attendance.⁸ But charge may properly be made in the cost bill for witnesses who attend at the request of the prevailing party though not served with a subpoena.⁹ Per diem allowance may be charged for a witness who attends a trial and thus subjects himself to the jurisdiction of the court, although such witness resides at such a distance from the place of trial that he could not have been compelled to attend.¹⁰

5. *Linforth v. San Francisco Gas etc. Co.*, 9 Cal. App. 434, 99 Pac. 716.

6. *Naylor v. Adams*, 15 Cal. App. 353, 114 Pac. 997, where witness not compelled to attend, voluntarily traveled two hundred miles to place of trial, mileage of such witness is not allowable. See Code Civ. Proc., § 1989, as amended by Stats. 1915, p. 330, providing that no witness can be compelled to attend upon any court out of the county in which he resides unless the distance is less than fifty miles from his place of residence to the trial. See WITNESSES.

7. *Engel v. Ebret*, 21 Cal. App. 112, 130 Pac. 1197, holding that the

superior court of San Francisco is without power to disallow mileage fees to witnesses residing in such city when Pol. Code, § 4300g fixes the right at the sum of ten cents per mile actually traveled, one way only.

8. *Beal v. Stevens*, 72 Cal. 451, 14 Pac. 186. See WITNESSES.

9. *Linforth v. San Francisco Gas etc. Co.*, 9 Cal. App. 434, 99 Pac. 716, since a witness who has been called and sworn upon attendance by request has placed himself under and subject to the order of the court as much as if subpoenaed.

10. *Naylor v. Adams*, 15 Cal. App. 353, 114 Pac. 997.

§ 23. Compensation of Experts.—Fees paid to expert witnesses may be taxed as costs where the services of experts are necessary for the proper presentation and determination of the case and where the experts have been appointed by and act under the direction of the court.¹¹ The burden is upon the party who contends that such charges should be allowed in his cost bill to show that the disbursements were necessary and proper and made under the direction of the court. In the absence of such showing the witnesses should be allowed only the usual fees for attendance and mileage.¹² This rule is based upon the theory that in order to secure disinterested services an expert should be appointed by the court and if either party sees fit to employ one for his own benefit, the court should not require the opposite party to pay for services thus rendered.¹³

§ 24. Reporter's Fees.

“In civil cases the fees for reporting and for transcripts ordered by the court to be made must be paid by the parties in equal proportions, and either party may, at his opinion, pay the whole thereof; and, in either case, all amounts so paid by the party to whom costs are awarded must be taxed as costs in the case.”¹⁴

11. *Bathgate v. Irvine*, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442; *In re Levinson's Estate*, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479 (holding that the allowance of money paid by administrator to expert accountants for examining the books of a partnership of which decedent was a member, for the purpose of litigation, is a matter committed to the sound discretion of the court). *Faulkner v. Hendy*, 79 Cal. 265, 21 Pac. 754; *Linforth v. San Francisco Gas etc. Co.*, 9 Cal. App. 434, 99 Pac. 716. See *WITNESSES*.

12. *Bathgate v. Irvine*, 126 Cal.

135, 77 Am. St. Rep. 158, 58 Pac. 442 (holding that expert witnesses should not be allowed the expenses incurred by them in making surveys or preparing maps when not acting under the direction of the court); *Miller v. Highland Ditch Co.*, 91 Cal. 103, 27 Pac. 536; *Linforth v. San Francisco Gas etc. Co.*, 9 Cal. App. 434, 99 Pac. 716; *Estate of McGinn*, 2 Cal. Prob. Dec. 313.

13. *Faulkner v. Hendy*, 79 Cal. 265, 21 Pac. 754, per *Works, J.*

14. *Code Civ. Proc.*, § 274. As to fees of court reporters in general, see *COURTS*.

Construing this provision it has been uniformly held that where a transcript of the evidence is made by the reporter upon an order of the court, the fees paid by the successful party pursuant to such order become a necessary part of the costs and disbursements incurred by him for which he is entitled to reimbursement.¹⁵ The code section already quoted from further provides, that "The fees for transcripts and copies ordered by the parties must be paid by the party ordering the same." Where a party pays the fees, therefore, without an order of the court he cannot recover them as costs or disbursements.¹⁶ As to what constitutes a sufficient order by the court so that reporters' fees may be recovered as costs, it has been held that a verbal direction that the reporter transcribe his notes and file them with the clerk is sufficient.¹⁷ Section 274 does not authorize the payment of traveling expenses of a reporter in civil cases. Accordingly the traveling expenses of a reporter obtained from another county cannot be taxed as costs.¹⁸

15. *Welch v. Alcott*, 178 Cal. 530, 174 Pac. 34 (where court had ordered transcript of testimony to be made and paid for by plaintiff and during the course of taking the testimony plaintiff was without further funds to pay for the same, it was within the discretion of the court to say whether the plaintiff should recover the cost of the part of the testimony transcribed); *Bell v. Pleasant*, 145 Cal. 410, 104 Am. St. Rep. 61, 78 Pac. 957; *Barkly v. Copeland*, 86 Cal. 493, 25 Pac. 3 (where court makes no direction as to apportioning of fees, each side should pay one-half and the prevailing party may thereafter recover the sum so paid by him); *Blair v. Brownstone Oil & Refining Co.*, 20 Cal. App. 316, 128 Pac. 1022.

16. *Senior v. Anderson*, 130 Cal.

290, 62 Pac. 563 (where the court refused to order the transcribing of the reporter's notes without the plaintiff's consent, which could not be obtained); *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. 585; *Barkly v. Copeland*, 86 Cal. 493, 25 Pac. 3; *Sime v. Hunter*, 36 Cal. App. Dec. 664, 202 Pac. 967 (holding that provision in § 274 is not repealed by the amendment of 1919, Stats. 1919, p. 73, to § 1027, Code Civ. Proc., concerning costs of appeal). See *infra*, § 50, as to costs of transcript as costs on appeal.

17. *Taylor v. McConigle*, 120 Cal. 123, 52 Pac. 159.

18. *Irrgang v. Ott*, 9 Cal. App. 440, 99 Pac. 528, where there was no regular court reporter in the county of venue or otherwise.

§ 25. **Depositions.**—Disbursements incurred in taking depositions are properly put into a cost bill unless they were unnecessary or for some special reason should not be allowed.¹⁹ But for such items to be proper, the depositions should be taken in the mode provided by law.²⁰ Items for taking depositions may be put into the bill even though the depositions were not used at the trial.¹ In such cases the question whether the taking of a deposition was reasonably necessary is one for decision by the trial court on the facts before it.² Even in the case of nonsuit or a judgment on the pleadings it has been held to be within the discretion of the trial court to allow as costs the expense of taking a deposition in preparation for a trial though such deposition was not used.³

19. *Lomita Land & Water Co. v. Robinson*, 154 Cal. 36, 18 L. B. A. (N. S.) 1106, 97 Pac. 10; *California Farm & Fruit Co. v. Schiappa-Pietra*, 151 Cal. 732, 91 Pac. 593; *Lindy v. McChesney*, 141 Cal. 351, 74 Pac. 1034; *Eades v. Los Angeles Ry. Corp.*, 43 Cal. App. 259, 184 Pac. 884; *Kummeth v. Atkisson*, 23 Cal. App. 401, 138 Pac. 116; *Nicholls v. Mapes*, 1 Cal. App. 349, 82 Pac. 265, holding that the cost of taking depositions forms no part of the damage and should be determined in the cost bill.

20. See Code Civ. Proc., § 2019 et seq.; *California Farm etc. Co. v. Schiappa-Pietra*, 151 Cal. 732, 91 Pac. 593 (deposition taken after service of the summons, properly allowable); *Eades v. Los Angeles Ry. Corp.*, 43 Cal. App. 259, 184 Pac. 884; *Kummeth v. Atkisson*, 23 Cal. App. 401, 138 Pac. 116 (holding that in a special proceeding, under § 2021 of the Code Civ. Proc., cost of taking deposition prior to appearance of petitioner and the presentation of any issue of law

or fact cannot be allowed). See DEPOSITIONS.

1. *Welch v. Alcott*, 178 Cal. 530, 174 Pac. 34; *Lindy v. McChesney*, 141 Cal. 351, 74 Pac. 1034; *Hughes v. Hughes*, 33 Cal. App. Dec. 120, 193 Pac. 148.

2. *Welch v. Alcott*, 178 Cal. 530, 174 Pac. 34; *Lomita Land & Water Co. v. Robinson*, 154 Cal. 36, 18 L. B. A. (N. S.) 1106, 97 Pac. 10; *California Farm etc. Co. v. Schiappa-Pietra*, 151 Cal. 732, 91 Pac. 593; *Lindy v. McChesney*, 141 Cal. 351, 74 Pac. 1034; *Engel v. Ehret*, 21 Cal. App. 112, 130 Pac. 1197 (holding that court has discretion to disallow an item for costs expended in taking the depositions of witnesses who appeared and testified at the trial); *Hughes v. Hughes*, 33 Cal. App. Dec. 120, 193 Pac. 148.

3. *Hughes v. Hughes*, 33 Cal. App. Dec. 120, 193 Pac. 148 (holding that the fact that such deposition was not finally signed did not alter the situation); *Lindy v. McChesney*, 141 Cal. 351, 74 Pac. 1034.

§ 26. Jurors' Fees.—In proper cases jury fees may be assessed as costs, but a plaintiff who neither paid nor incurred any expense because of the attendance of a jury is not entitled to tax the attendance fees of the jurors.⁴ Allowable fees do not include the board of the jurors during deliberation upon their verdict.⁵ By statutory provision the prevailing party in a civil case who has paid jury fees for a jury which he has demanded may recover them as costs even when the jury is discharged without finding a verdict.⁶

§ 27. Attorney's Fees.—The general rule is that attorney's fees are not recoverable by a successful party to an action either at law or in equity; except in the instances where they are expressly allowed by statute.⁷ Even when

4. *Freshour v. Hihn*, 99 Cal. 443, 34 Pac. 87, where jury was not expressly demanded and the case was tried by the court without a jury.

5. *Irrgang v. Ott*, 9 Cal. App. 440, 99 Pac. 528.

6. Stats. 1869-70, p. 148, amended Stats. 1917, pp. 788, 789; *Martin v. Superior Court*, 176 Cal. 289, L. R. A. 1918B, 313, 168 Pac. 135.

The act of March 28, 1868, required payment by the plaintiff of the jury fees under such circumstances. See Stats. 1867-68, p. 436. Pursuant to this statute it was held that where a nonsuit is granted in a civil case, and the jury discharged, the jury fees must be paid by the plaintiff and no further proceedings should be allowed in the case until such payment. *Fairchild v. King*, 102 Cal. 320, 36 Pac. 649; *Rhodes v. Spencer*, 68 Cal. 199, 8 Pac. 855; *Lukes v. Logan*, 66 Cal. 33, 4 Pac. 883.

This act does not apply to persons suing in forma pauperis. See supra, § 18.

7. *Commercial Savings Bank v. Hornberger*, 140 Cal. 16, 73 Pac. 625 (stating that compensation of attorneys is left to agreement of the parties and where there is no agreement to pay such fees the court has no authority to allow them); *Gage v. Atwater*, 136 Cal. 170, 68 Pac. 581 (stating that an attorney has no lien for his services upon a judgment recovered in favor of his client); *Hays v. Wind-sor*, 130 Cal. 230, 62 Pac. 395 (replevin); *Sanger v. Ryan*, 122 Cal. 52, 54 Pac. 522; *In re Olmstead*, 120 Cal. 447, 52 Pac. 804; *Brooks v. Forington*, 117 Cal. 219, 48 Pac. 1073; *Miller v. Kehoe*, 107 Cal. 340, 40 Pac. 485; *Salmina v. Juri*, 96 Cal. 418, 31 Pac. 365; *Bates v. Santa Barbara County*, 90 Cal. 543, 27 Pac. 438; *Williams v. Mac-Dougall*, 39 Cal. 80; *Selby v. The Alice Tarlton*, 1 Cal. 103; *City Inv. Co. v. Pringle*, 33 Cal. App. Dec. 209, 193 Pac. 504; *McArthur v. John McArthur Co.*, 39 Cal. App. 704, 179 Pac. 700; *Pacific Gas etc.*

allowed by statute, such fees cannot be awarded to the losing party and against the successful party.⁸ Courts of equity in some cases, however, and where justice requires it, allow attorney's fees as part of the relief granted.⁹ Thus fees may be allowed in an action for the preservation or distribution of a fund where all the parties have a common interest;¹⁰ but a plaintiff who brings suit for himself and others interested cannot recover counsel fees against a defendant who denies the right of each and all of the plaintiffs and sets up in himself an adverse and independent title to the thing in litigation.¹¹ Where the court is expressly authorized to allow an attorney's fee, such fee is not technically to be regarded as a part of the costs,

Co. v. Chubb, 24 Cal. App. 265, 141 Pac. 36; Graham v. Light, 4 Cal. App. 400, 88 Pac. 373 (holding that attorney's fees are not recoverable in an action on a note by a pledgor); Caffey v. Mann, 3 Cal. App. 124, 84 Pac. 424; Nicholls v. Mapes, 1 Cal. App. 349, 82 Pac. 265 (conversion).

See Code Civ. Proc., § 1021, stating that the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties. See ELECTIONS; EMINENT DOMAIN; EXECUTORS AND ADMINISTRATORS; LIBEL AND SLANDER; MECHANICS' LIENS; MORTGAGES; PARTITION.

See, also, CONSTITUTIONAL LAW, vol. 5, p. 851 et seq., as to constitutionality of statutes allowing attorney's fees in certain actions and proceedings.

8. McArthur v. John McArthur Co., 39 Cal. App. 704, 179 Pac. 700.

9. Estate of Olmstead, 120 Cal. 447, 52 Pac. 804; Miller v. Kehoe, 107 Cal. 340, 40 Pac. 485; Wickersham v. Crittenden, 103 Cal. 582, 37

Pac. 513; Alemany v. Wensinger, 40 Cal. 288.

10. Hays v. Windsor, 130 Cal. 230, 62 Pac. 395 (stating the rule arguendo); Miller v. Kehoe, 107 Cal. 340, 40 Pac. 485; Wickersham v. Crittenden, 103 Cal. 582, 37 Pac. 513; Alemany v. Wensinger, 40 Cal. 288 (holding that the costs of litigation including reasonable counsel fees to a counsel in a proceeding for the sale of property held in trust for religious or charitable purposes are a proper charge on the trust fund and should be allowed by the court); Von Schmidt v. Huntington, 1 Cal. 55 (applying rule to distribution of assets of joint-stock company upon its dissolution).

11. Miller v. Kehoe, 107 Cal. 340, 40 Pac. 485 (holding that the court cannot decree attorneys' fees to be paid to the creditors, plaintiffs, nor to the assignee in insolvency, out of the gross proceeds of the sale of the property); Williams v. MacDougall, 39 Cal. 80; Miller v. Kehoe, 107 Cal. 340, 40 Pac. 485; Salmina v. Juri, 96 Cal. 418, 31 Pac. 365.

although it is said to bear some resemblance to costs, inasmuch as it is incident to the judgment.¹² And an attorney's fee provided for by the terms of a contract is not to be deemed a part of the costs or recoverable as such, but is in the nature of special damages expressly authorized by the contract to be recovered in addition to the general damages.¹³

§ 28. Expense of Service of Process—Clerk's Fees.—A successful plaintiff is entitled to recover as costs the fees prescribed by law for the service by officers of summons and subpoenas, provided he paid or was liable for the payment of such fees to the party making the service.¹⁴ And where the statute provides for service by publication and taxation by the court of all expenses and costs of the proceeding, the cost of publication of summons is to be included in the taxed costs.¹⁵

Clerk's and sheriff's fees are proper items of cost.¹⁶ But clerk's fees are not recoverable when there was no necessity for incurring them. Thus it has been held that clerk's fees for certifying papers which are not required by law to be certified cannot be recovered.¹⁷ And clerk's fees paid by the defendant upon his appearance after the action has been dismissed by the plaintiff, are properly disallowed, since the fact of dismissal could have been ascertained by an examination of the clerk's register.¹⁸

12. Schallert-Ganahl Lumber Co. v. Neal, 94 Cal. 192, 29 Pac. 622.

13. Fell v. Frierson, 171 Cal. 351, 153 Pac. 229; Brooks v. Forington, 117 Cal. 219, 48 Pac. 1073; Prescott v. Grady, 91 Cal. 518, 27 Pac. 755; City Inv. Co. v. Pringle, 33 Cal. App. Dec. 209, 193 Pac. 504 (arguendo, stating that even where counsel fees may be allowed as costs, such an allowance is not to be made unless the party claiming them has either paid or has become obligated to pay them). See DAMAGES.

14. Fay v. Fay, 165 Cal. 469, 132 Pac. 1040, even though the service was made by one not a peace officer.

15. Lawrence v. Booth, 46 Cal. 187. See ATTACHMENT, vol. 3, p. 474, as to costs of serving of writs of attachment, etc.

16. Chapin v. Broder, 16 Cal. 403.

17. Edmondson v. Mason, 16 Cal. 386.

18. Caffey v. Mann, 3 Cal. App. 124, 84 Pac. 424.

§ 29. **Miscellaneous Items.**—Pursuant to the code provision that a party entitled to costs may recover disbursements necessarily incurred in the action,¹⁹ it is held that the sheriff's charge for keeper's fees and expenses incurred in keeping property held under a writ of attachment is a necessary disbursement.²⁰ Among disbursements which have been held not to be allowable as costs are a charge for filing the cost bill,¹ and charges for numerous documents and copies which were not offered in evidence nor shown to be necessary.² The statutes formerly provided that the prevailing party in litigated cases in the city and county of San Francisco should be entitled to a percentage of five per cent on the amount recovered, as costs.³ This provision was repealed in 1905.⁴

19. Code Civ. Proc., § 1033.

20. *Legg v. Shaw Co. v. Worthington*, 157 Cal. 488, 108 Pac. 284; *Hotchkiss v. Smith*, 108 Cal. 285, 41 Pac. 304; *Unwin v. Barstow-San Antonio Oil Co.*, 36 Cal. App. 508, 172 Pac. 622; *Nisbet v. Clio Min. Co.*, 2 Cal. App. 436, 83 Pac. 1077; *Nisbet v. Clio Min. Co.*, 2 Cal. App. 436, 83 Pac. 1077.

But expenditures made by a sheriff for fire insurance premiums on property attached are not proper items of costs. *Galindo v. Roach*, 130 Cal. 389, 62 Pac. 597.

Pol. Code, § 4300b, provides that there shall be allowed the sheriff, as keeper's fees, "such sum as the court may fix." See *LEVY AND SEIZURE*.

1. *Linforth v. San Francisco Gas etc. Co.*, 9 Cal. App. 434, 99 Pac. 716.

2. *Senior v. Anderson*, 130 Cal. 290, 62 Pac. 563 (copies of numer-

ous papers from the commissioner of the general land office).

3. Stats. 1865-66, p. 68; *Golden Gate L. Co. v. Sahrbacher*, 105 Cal. 114, 38 Pac. 635 (action to foreclose liens of materialmen and subcontractors); *Fanning v. Leviston*, 93 Cal. 186, 28 Pac. 943 (action to enforce a street assessment); *Wheatland Mill Co. v. Pirrie*, 89 Cal. 459, 26 Pac. 964 (holding that act did not include a judgment in the alternative in an action of replevin); *Packard v. Wilson*, 72 Cal. 124, 13 Pac. 220; *Hilton v. Curry*, 124 Cal. 84, 56 Pac. 784; *Whitaker v. Haynes*, 49 Cal. 596; *Corwin v. Ward*, 35 Cal. 195, 95 Am. Dec. 93; *Allsopp v. Joshua Hendy Machine Works*, 5 Cal. App. 228, 90 Pac. 39; *Doyle v. Eschen*, 5 Cal. App. 55, 89 Pac. 836.

4. Stats. 1905, p. 387.

VII. TAXATION AND AWARD.

In General.

§ 30. **Power to Tax.**—The award of costs is a judicial function, and where there is no power in a court to impose costs its judgment awarding them is of course void.⁵ But a party in whose favor costs are ultimately adjudged is entitled to recover those incurred in good faith in all proceedings in the case, even though part were incurred in proceedings later held to be void.⁶ Arbitrators have the power to award costs though no mention be made of costs in the articles of submission.⁷ But a jury cannot award costs,⁸ and a clerk has no authority to tax and settle a cost bill.⁹ The insertion of costs in a judgment by the clerk, being a mere ministerial act, is of no effect unless performed in compliance with the terms of the statute and the only judgment for costs which he has authority to enter is for such as have been taxed.¹⁰ His authority ter-

5. *Hopkins v. Superior Court*, 136 Cal. 552, 69 Pac. 229. See *supra*, § 2, as to statutory authority to allow costs.

6. *Meyer v. City of San Diego*, 132 Cal. 35, 64 Pac. 124.

7. *Dudley v. Thomas*, 23 Cal. 365. See *ARBITRATION AND AWARD*, vol. 3, p. 91.

8. *Shay v. Tuolumne Water Co.*, 6 Cal. 286.

9. *Hopkins v. Superior Court*, 136 Cal. 552, 69 Pac. 229.

10. *Kaiser v. Barron*, 153 Cal. 474, 95 Pac. 879; *Foley v. California Horseshoe Co.*, 115 Cal. 184, 56 Am. St. Rep. 87, 47 Pac. 42; *Janes v. Bullard*, 107 Cal. 130, 40 Pac. 108 (holding that the insertion of costs by the clerk in a decree before the same had been taxed is a mere clerical misprision which may be cured by a subsequent order of the court

taxing costs); *Riddell v. Harrell*, 71 Cal. 254, 12 Pac. 67 (an entry of costs in a judgment by the clerk, while a motion to tax them is pending is without effect); *Chapin v. Broder*, 16 Cal. 403. But see *Leonis v. Leffingwell*, 126 Cal. 369, 58 Pac. 940, where correction of clerical misprision was not allowed on appeal since there was nothing in the record to show that it was not the judgment of the court.

See *Code Civ. Proc.*, § 1035, providing that if costs are not included in the judgment, they must be inserted by the clerk in a blank left in the judgment for that purpose within two days after they are taxed or ascertained; *Hihn v. Parkhurst*, 1 Cal. Unrep. 541; *Antoine Co. v. Ridge Co.*, 23 Cal. 219 (applying same rule under the *Practice Act*).

minates with the entry of the judgment, and the court alone, on motion to amend, is competent to relieve where costs are omitted by mistake or otherwise.¹¹ But in a case where the court has discretion to award costs, yet costs are not prayed for in the answer and the judgment is advisedly silent as to them, the court has no power at a subsequent time to amend the judgment nunc pro tunc so as to include costs not originally contemplated.¹²

§ 31. Memorandum of Costs.—By section 1033 of the Code of Civil Procedure, the party in whose favor the judgment is rendered and who claims his costs must deliver to the clerk and serve upon the adverse party a verified memorandum of the items of his costs and necessary disbursements in the action or proceeding.¹³ Since the right to costs is wholly statutory,¹⁴ the memorandum must state the items claimed and a failure to claim costs or any item thereof in the manner required by the statute is a waiver of such costs and precludes recovery.¹⁵ Unless the judgment is one which carries costs as of course—in which case, as has already been pointed out, it is not necessary to specifically include costs—¹⁶ it should include the imposition of costs in order to entitle the prevailing party to file his memorandum, otherwise such memorandum avails *him* nothing.¹⁷

11. *Kaiser v. Barron*, 153 Cal. 474, 95 Pac. 879; *Leonis v. Leffingwell*, 126 Cal. 369, 58 Pac. 940; *Estate of Potter*, 141 Cal. 424, 75 Pac. 850; *Foley v. California Horseshoe Co.*, 115 Cal. 184, 56 Am. St. Rep. 87, 47 Pac. 42; *Janes v. Bullard*, 107 Cal. 130, 40 Pac. 108; *Chapin v. Broder*, 16 Cal. 403. See as to retaxation *infra*, § 35.

12. *Estate of Potter*, 141 Cal. 424, 75 Pac. 850.

13. *Whitaker v. Title Ins. etc. Co.*, 179 Cal. 111, 175 Pac. 460.

14. See *supra*, § 2.

15. *Galindo v. Roach*, 130 Cal. 389, 62 Pac. 597; *Hotchkiss v. Smith*, 108 Cal. 285, 41 Pac. 304; *Riddell v. Harrell*, 71 Cal. 254, 12 Pac. 67; *Chapin v. Broder*, 16 Cal. 403; *City Inv. Co. v. Pringle*, 33 Cal. App. Dec. 209, 193 Pac. 504; *Griffith v. Welbanks & Co.*, 26 Cal. App. 477, 147 Pac. 986; *McKinney v. Roberts*, 2 Cal. Unrep. 532, 8 Pac. 3.

16. See *supra*, § 3.

17. *Gould v. Moss*, 158 Cal. 548, 111 Pac. 925.

The memorandum must be verified by the oath of the party or his attorney or agent, or by the clerk of his attorney, stating that to the best of his knowledge and belief the items are correct and that the disbursements have been necessarily incurred.¹⁸ An attorney who verifies the memorandum need not be the attorney of record; it is sufficient if he is employed to assist in the case.¹⁹

§ 32. Time of Filing and Service of Memorandum.—The memorandum of costs must be delivered to the clerk and served upon the adverse party within five days after the verdict or notice of the decision of the court or referee unless entry of judgment is stayed, in which case it must be filed before such entry is made.²⁰ This requirement is jurisdictional.¹ A cost bill filed before the time authorized,² as well as after such time should be stricken from the files.³ Actual notice of the decision to the party entitled to costs is sufficient to satisfy the requirement of the code, and if his memorandum is filed more than five days after he has such notice, though he has received no written notice from his opponent, the filing is too late and costs will be stricken from the judgment upon motion.⁴ Where entry of judgment is stayed or a case is reserved for argument upon briefs after verdict, a bill of costs may be filed at any time before such entry is made, though more than five days may have elapsed after notice of the decision or

18. Code Civ. Proc., § 1033.

19. *Yorba v. Dobner*, 90 Cal. 337, 27 Pac. 185. See *Burnham v. Hays*, 3 Cal. 115, 58 Am. Dec. 389 (holding under former statute providing memorandum of costs shall be accompanied by affidavit of party, affidavit may be made by the attorney of the party).

20. Code Civ. Proc., § 1033.

1. *Riddell v. Harrell*, 71 Cal. 254, 12 Pac. 67; *Chapin v. Broder*, 16 Cal. 403; *Griffith v. Welbanks & Co.*, 26 Cal. App. 477, 147 Pac. 986.

2. *Sellick v. De Carlow*, 95 Cal. 644, 30 Pac. 795.

3. *United Casting Co. v. Duncan*, 44 Cal. App. 384, 186 Pac. 403; *Mullally v. Irish etc. Benevolent Society*, 69 Cal. 559, 11 Pac. 215; *O'Neil v. Donahue*, 57 Cal. 226.

4. *Dow v. Ross*, 90 Cal. 562, 27 Pac. 409; *Mullally v. Irish etc. Benevolent Society*, 69 Cal. 559, 11 Pac. 215; *O'Neil v. Donahue*, 57 Cal. 226.

verdict.⁵ A trial judge has power to grant an extension of time for the service and filing of a cost bill.⁶

Definition of "decision."—By the "decision" of the court or referee referred to in section 1033 of the Code of Civil Procedure "is meant the signing and filing of the findings of fact and conclusions of law,"⁷ as the basis of the judgment entered.⁸ Where findings of fact are waived or are not required, an entry on the minutes of the court directing judgment for one or the other of the parties constitutes the decision, and the time for serving and filing the memorandum of costs commences to run from the minute entry date, or the date of notice to the party claiming costs, of such minute entry.⁹ Thus since no findings are necessary to a judgment of nonsuit, the "decision" referred to in section 1033 must be understood to mean a judgment entered upon the motion.¹⁰

§ 33. Formalities of Filing and Service.—A cost bill left in the clerk's office after closing time, there being no person present to receive it and file it, is not filed as required by the statute.¹¹ But a cost bill properly presented for filing and served in time cannot be stricken out because the clerk has neglected to perform his duty in regard to some formality of filing.¹² Service must be made in the manner prescribed by the Code of Civil Procedure in re-

5. *Taylor v. McConigle*, 120 Cal. 123, 52 Pac. 159; *Bedolla v. Williams*, 15 Cal. App. 738, 115 Pac. 747 (stating that if the case be viewed as one in equity, then a cost bill filed within five days after decision of court, although over five days after special verdict of jury, was sufficient).

6. *Beilby v. Superior Court*, 138 Cal. 51, 70 Pac. 1024. See Code Civ. Proc., § 1054, authorizing extensions of time of "a notice other than appeal."

7. Code Civ. Proc., § 1033.

8. *Porter v. Hopkins*, 63 Cal. 53.

9. *Estate of Purcell*, 164 Cal. 300, 128 Pac. 932 (granting motion of nonsuit); *Collins v. Belland*, 37 Cal. App. 139, 173 Pac. 601.

10. *Estate of Purcell*, 164 Cal. 300, 128 Pac. 932.

11. *Estate of McGovern*, 1 Cal. Prob. Dec. 150.

12. *Beck v. Pasadena etc. Water Co.*, 130 Cal. 50, 62 Pac. 219, where clerk failed to file memorandum because of an old fee which the party owed him.

gard to service of papers generally,¹³ and costs cannot be allowed where service is improperly made.¹⁴ However, the right to a written notice of the actual time of the filing of a cost bill may, like any other civil right, be waived.¹⁵ A cost bill need not be served upon parties not adverse to each other.¹⁶

§ 34. Amendment.—After expiration of the time limited for filing the memorandum, a cost bill cannot be amended so as to insert additional items of disbursement, nor can a judgment for such additional items be rendered, in the absence of a showing that the omission was excusable on some of the grounds mentioned in section 473 of the Code of Civil Procedure.¹⁷ But where no objection is made to an order amending a cost bill filed after the time for filing has passed and the order allowing the amendment has become final by the lapse of time, the amendment is then as effective as if made within the period of the limiting statute.¹⁸ When the original bill of costs is filed within the time prescribed by the statute, an amendment allowed after the time relates back to the time of filing the original of which it forms merely a part.¹⁹

13. See Code Civ. Proc., § 1011.

14. *Thompson v. Brannan*, 76 Cal. 618, 18 Pac. 783, holding service of cost bill void where it was made by a deposit in the postoffice at the place where the attorney on whom the service was to be made, resided.

15. *Griffith v. Welbanks & Co.*, 26 Cal. App. 477, 147 Pac. 986; *Bell v. Thompson*, 8 Cal. App. 483, 97 Pac. 158.

16. *Hubbard v. Jurian*, 32 Cal. App. Dec. 256, 190 Pac. 1052, holding that failure of an appellant to serve a coappellant with a copy of a cost bill from whom it does not seek costs is no ground for striking out a cost bill.

17. *Galindo v. Roach*, 130 Cal. 389, 62 Pac. 597; *Dow v. Ross*, 90 Cal. 562, 27 Pac. 409.

18. *Legg & Shaw Co. v. Worthington*, 157 Cal. 488, 108 Pac. 284, knowledge of such order and failure to object thereto will operate as a waiver of the right to object after the order has become final.

19. *Burnham v. Hays*, 3 Cal. 115, 58 Am. Dec. 389, where opposing party had not objected on the ground of original bill being a nullity but had moved for a retaxation of costs thus placing such bill before the court for that purpose.

*Relief from Erroneous Taxation.***§ 35. Retaxation.**

“A party dissatisfied with the costs claimed may, within five days after notice of filing of the bill of costs, file a motion to have the same taxed by the court in which the judgment was rendered or by the judge thereof at chambers.”²⁰

A party failing to file objection in accord with this provision is conclusively deemed to have waived objection thereto.¹ In construing this statute it has been decided that the motion itself need not be in writing, and there is a sufficient compliance when the party who is dissatisfied makes known his objections and the grounds on which he will move to correct or strike out by a proper notice in writing, served and filed within five days after notice of the bill of costs, and specifying the time when the application to the court or judge will be made and on the day designated in the notice or to which the hearing is postponed to call up the motion.²

Since a notice of a motion must state the grounds upon which it will be made,³ the court will consider only such

20. Code Civ. Proc., § 1033. See *Cary v. Dowdell*, 129 Cal. 244, 61 Pac. 1126, stating that this provision was added by an amendment of March 24, 1874, but it was new only in the sense of being a provision of statute, because the remedy to retax was in existence under the practice as it had already been defined by the court. All that was new was in fixing a definite time within which the motion would be made and a provision that it might be made either before the court or in chambers.

1. *Galindo v. Roach*, 130 Cal. 389, 62 Pac. 597; *Hotchkiss v. Smith*, 108 Cal. 285, 41 Pac. 304; *Rogers v. Druffel*, 46 Cal. 654; *Petty v.*

County Court San Joaquin Co., 45 Cal. 245; *Meeker v. Harris*, 23 Cal. 285; *Chapin v. Broder*, 16 Cal. 403.

2. *Kishlar v. Southern Pac. R. R. Co.*, 134 Cal. 636, 66 Pac. 848; *Cary v. Dowdell*, 129 Cal. 244, 61 Pac. 1126, per *Van Dyke, J.* (stating that this was formerly the practice before the amendment of the statute and that the statute will not be construed so as to give it an absurd or inconsistent operation); *Meeker v. Harris*, 23 Cal. 285 (where it was said before the amendment to the statute that the remedy of the objecting party is by motion to retax and to strike out the objectionable items).

3. Code Civ. Proc., § 1010.

objections to the claim for costs as are specified. All other objections are waived by failure to mention them. Thus a party who objects to items on the ground that they are unlawful and not properly taxable cannot later maintain that they are excessive.⁴ It is sufficient to specify certain items in the cost bill as objected to and to state that they are not legally chargeable and were not necessary disbursements.⁵ No affidavit need accompany the notice but upon the hearing any competent evidence, oral or written, may be presented.⁶ The code provision does not require the dissatisfied party to serve a copy of his motion. The statute says he "may . . . file a motion to have the same taxed by the court."⁷ Under section 1005 of the Code of Civil Procedure notice of the hearing of such motion to tax costs must be given five days before the hearing, but in accord with the further provision "that the court may prescribe a shorter time," it has been held that the court may make an order shortening the time within which the motion is to be heard.⁸

§ 36. Burden of Proof.—A verified bill of costs, properly filed, is prima facie evidence that the items thereof have been necessarily incurred. And where the showing of the party claiming costs which appear upon their face to be necessary and proper is not controverted in some way, it should control the decision of the court, the burden being on the party moving to strike out to show that the charges objected to are illegal or improper.⁹ Similarly an affidavit supported by the testimony of the attorney for the party entitled to costs, showing the necessity of costs in-

4. *Mojave etc. R. R. Co. v. Cuddeback*, 28 Cal. App. 439, 152 Pac. 943. (N. S.) 1106, 97 Pac. 10; *Senior v. Anderson*, 130 Cal. 290, 62 Pac. 563.

5. *Senior v. Anderson*, 130 Cal. 290, 62 Pac. 563; *Carpy v. Dowdell*, 129 Cal. 244, 61 Pac. 1126.

6. *Lomita Land & Water Co. v. Robinson*, 154 Cal. 36, 18 L. R. A.

7. *Furtinata v. Butterfield*, 14 Cal. App. 25, 110 Pac. 962.

8. *Griffith v. Welbanks & Co.*, 26 Cal. App. 477, 147 Pac. 986.

9. *Fay v. Fay*, 165 Cal. 469, 132 Pac. 1040.

curring, has been held to be sufficient to establish the correctness of a charge in the memorandum.¹⁰ This is said to be the correct rule where the charges appear on their face to be for proper and necessary disbursements. But where items do not so appear and their correctness is challenged by the affidavit of the contesting party or by other evidence, the burden is then upon the claimant to prove that the items are necessary and proper charges, and if he fails to introduce evidence to that effect they should be stricken out on motion.¹¹

VIII. REVIEW AND ENFORCEMENT OF TAXING ORDER.

§ 37. Attack on Judgment.—Subject to the rule that upon collateral attack a judgment will be set aside only where there is lack of jurisdiction of the person, lack of jurisdiction of the subject matter of the action, or an absolute lack of jurisdiction to render such a judgment as the one given,¹² it is uniformly held that mere error in an order taxing costs can be corrected only in the proceed-

10. *Meyer v. City of San Diego*, 132 Cal. 35, 64 Pac. 124 (item in verified cost bill for fees paid to the reporter for transcribing the evidence); *Senior v. Anderson*, 130 Cal. 290, 62 Pac. 563; *San Francisco v. Collins*, 98 Cal. 259, 33 Pac. 56; *Miller v. Highland Ditch Co.*, 91 Cal. 103, 27 Pac. 536; *Barnhart v. Kron*, 88 Cal. 447, 26 Pac. 210; *Whitaker v. Moran*, 23 Cal. App. 758, 139 Pac. 901; *Caffey v. Mann*, 3 Cal. App. 124, 84 Pac. 424 (holding that a verified cost bill supported by documentary evidence proves the incurring of specified items of expense where there is no evidence to the contrary).

11. *Senior v. Anderson*, 130 Cal. 290, 62 Pac. 563; *Miller v. Highland Ditch Co.*, 91 Cal. 103, 27 Pac. 536; *Miller v. Highland Ditch Co.*, 91

Cal. 103, 27 Pac. 536; *Faulkner v. Hendy*, 79 Cal. 265, 21 Pac. 754 (charges in a cost bill for the services of an expert accountant, or of a surveyor in a field, or for the making of maps which do not appear on their face to have been necessarily incurred); *Whitaker v. Moran*, 23 Cal. App. 758, 139 Pac. 901 (holding that it is improper to allow costs charged for taking depositions not offered or considered in evidence on the hearing of the motion to tax, where the only showing made in opposition to the affidavit of the party attacking such items on the ground of irrelevancy and immateriality is an unverified statement concerning the particulars of the costs charged).

12. See JUDGMENTS.

ing in which it arose. It cannot be attacked collaterally.¹³ Such error cannot be reviewed or corrected on certiorari where there is a right of appeal,¹⁴ or where the court has acted within its jurisdiction.¹⁵ But a void order, such as a judgment for costs entered by the clerk without filing or service of the cost bill,¹⁶ may be collaterally attacked.¹⁷

§ 38. Appealable Orders.—An appeal can be taken from an order taxing costs only when it is final.¹⁸ Thus a judgment for costs only, for or against any one of the parties, plaintiff or defendant, where the action is left pending as to other parties, is not a final judgment from which an appeal may be taken.¹⁹ Where a judgment itself awards costs, that part awarding costs is as much a part of the judgment, subject to review on appeal from the judgment, as any other part of it.²⁰

It is now settled that an order on a motion to retax a cost bill made after the rendition and entry of final judgment is appealable as a special order after final judgment.¹ But an appeal does not lie from an order on a

13. *Baldwin v. Foster*, 157 Cal. 643, 108 Pac. 714; *Garoutte v. Haley*, 104 Cal. 497, 38 Pac. 194 (holding that an order making the payment of costs a condition prerequisite to the granting of a new trial can be reviewed only upon a separate appeal from the order itself and cannot be attacked in a collateral proceeding); *Rogers v. Druffel*, 46 Cal. 654; *Hihn v. Parkhurst*, 1 Cal. Unrep. 541.

14. *Elledge v. Superior Court*, 131 Cal. 279, 63 Pac. 360. See *CERTIORARI*, vol. 4, p. 1060.

15. *Petty v. County Court*, 45 Cal. 245. See *CERTIORARI*, vol. 4, p. 1038.

16. See *supra*, § 30.

17. *Emeric v. Alvarado*, 64 Cal. 529, 2 Pac. 418; *Chapin v. Broder*, 16 Cal. 403.

18. *Code Civ. Proc.*, § 939; *Nolan v. Smith*, 137 Cal. 360, 70 Pac. 166.

19. *Nolan v. Smith*, 137 Cal. 360, 70 Pac. 166. See *Grant v. Los Angeles etc. Ry. Co.*, 116 Cal. 71, 47 Pac. 872, where judgment affected all parties and was therefore appealable.

See *APPEAL AND ERROR*, vol. 2, p. 141.

20. *Kelly v. Central Pac. R. R. Co.*, 74 Cal. 565, 16 Pac. 390; *White v. Gaffney*, 1 Cal. App. 715, 82 Pac. 1088.

1. *Elledge v. Superior Court*, 131 Cal. 279, 63 Pac. 360; *Crane v. Forth*, 95 Cal. 88, 30 Pac. 193; *Yorba v. Dobner*, 90 Cal. 337, 27 Pac. 185; *Empire Gold Min. Co. v. Bonanza etc. Min. Co.*, 67 Cal. 406,

motion to retax costs made before the entry of final judgment since such order is interlocutory.³ Thus an order granting a motion to retax, strike out and disallow a bill of costs upon the going down of the remittitur in the case of a reversal of a judgment is not an appealable order, since the effect of the reversal is to remand the proceeding for a new trial and a review of such order may be had only upon an appeal from the final judgment.³

§ 39. Record on Appeal.—Where the court has discretion to allow, disallow or apportion costs, the question of error in the making proper adjustment cannot be raised where the appeal is upon the judgment-roll alone.⁴ Such adjustment is reviewable only where an exception has been reserved to the ruling of the court below and is properly presented by the record to the appellate court.⁵ Failure

7 Pac. 810 (overruling *Lasky v. Davis*, 33 Cal. 677); *Clark v. Crane*, 57 Cal. 629; *Calderwood v. Peyser*, 42 Cal. 110; *Dooly v. Norton*, 41 Cal. 439; *In re Kling*, 32 Cal. App. Dec. 991, 192 Pac. 453. See *APPEAL AND ERROR*, vol. 2, p. 163.

2. *Crane v. Forth*, 95 Cal. 88, 30 Pac. 193; *Muir v. Meredith*, 82 Cal. 19, 22 Pac. 1080; *Levy v. Gettleston*, 27 Cal. 685; *In re Kling*, 32 Cal. App. Dec. 991, 192 Pac. 453; *Irrgang v. Ott*, 9 Cal. App. 440, 99 Pac. 528. See *APPEAL AND ERROR*, vol. 2, p. 163.

3. *In re Kling*, 32 Cal. App. Dec. 991, 192 Pac. 453.

4. *Lomita Land & Water Co. v. Robinson*, 154 Cal. 36, 18 L. R. A. (N. S.) 1106, 97 Pac. 10; *Hoyt v. Hart*, 149 Cal. 722, 87 Pac. 569; *County of Madera v. Raymond Granite Co.*, 139 Cal. 128, 72 Pac. 915; *Meyer v. City of San Diego*, 132 Cal. 35, 64 Pac. 124; *Alameda County v. Crocker*, 125 Cal. 101, 57

Pac. 766; *Irvine v. Perry*, 119 Cal. 352, 51 Pac. 544, 949; *Faulkner v. Hendy*, 103 Cal. 15, 36 Pac. 1021.

5. *Estate of Weir*, 168 Cal. 330, 143 Pac. 612 (where objection was made that record showed that the bill of costs was not filed within the time required by the code); *County of Madera v. Raymond G. Co.*, 139 Cal. 128, 72 Pac. 915; *People v. County of Marin*, 103 Cal. 223, 26 L. R. A. 659, 37 Pac. 203 (where judgment did not include costs, although the court below found as a conclusion of law that the defendants were entitled to them); *Muir v. Meredith*, 82 Cal. 19, 22 Pac. 1080; *Fraser v. Fraser*, 39 Cal. App. 467, 179 Pac. 427 (objection to order denying a motion to strike out a cost bill); *Whitaker v. Moran*, 23 Cal. App. 758, 139 Pac. 901 (holding that allowance for certified documents, etc., will be presumed to be proper on appeal where the documents are not set

to present the question for review constitutes a waiver of any objection to the costs in the judgment.⁶ But where the judgment shows on its face that costs were awarded contrary to law, no bill of exceptions is necessary, as the question is presented by the judgment-roll.⁷ Similarly, the power of the court to award costs has been considered on appeal although such question was not presented by a bill of exceptions.⁸

Appeal from order retaxing costs.—Where the appeal is from an order made after judgment denying or allowing a motion to retax costs⁹ it is incumbent on the appellant to show error affirmatively¹⁰ as all intendments are in favor of the regularity of the action of the trial court.¹¹ The appellate court cannot review an order to retax costs where it has only the judgment-roll before it.¹²

forth in the bill of exceptions). See *APPEAL AND ERROR*, vol. 2, p. 520 et seq.

See *Crane v. Forth*, 95 Cal. 88, 30 Pac. 193, and *Gates v. Buckingham*, 4 Cal. 286, holding that such error should be presented by statement on motion for a new trial or by a bill of exceptions. It is to be noted that statements on motions for new trials have been abolished. See *APPEAL AND ERROR*, vol. 2, p. 489.

6. *Muir v. Meredith*, 82 Cal. 19, 22 Pac. 1080.

7. *Benson v. Braun*, 134 Cal. 41, 66 Pac. 1; *Schmidt v. Klotz*, 130 Cal. 223, 62 Pac. 470 (where costs followed judgment as of course and their award was not within discretion of court); *Fox v. Hale & Norcross S. M. Co.*, 122 Cal. 219, 54 Pac. 731; *Quitow v. Perrin*, 120 Cal. 255, 52 Pac. 632 (where court had no power to award costs in action involving less than \$300); *Kelly v. Central Pacific R. R. Co.*, 74 Cal. 565, 16 Pac. 390; *White v. Gaffney*, 1 Cal. App. 715, 82 Pac.

1088 (holding that the appeal will not be dismissed even though the only question involved is the portion of the judgment awarding costs). See *supra*, §§ 3-6, as to power to award costs as of course.

8. *McCarthy v. Gaston Ridge Mill etc. Co.*, 144 Cal. 542, 78 Pac. 7; *People v. Campbell*, 138 Cal. 11, 70 Pac. 918.

9. See *supra*, § 38.

10. *Bedolla v. Williams*, 15 Cal. App. 738, 115 Pac. 747.

11. *Bell v. Thompson*, 8 Cal. App. 483, 97 Pac. 158 (holding that upon an appeal taken from the judgment for costs it must be presumed that all questions respecting the amount thereof or the regularity of the proceedings upon which the judgment for costs was based were included therein and litigated on the appeal). See *APPEAL AND ERROR*, vol. 2, p. 493 et seq.

12. *Kelly v. McKibben*, 54 Cal. 192, stating that the memorandum of costs forms no part of the judgment-roll.

In an appeal from an order retaxing costs the appellate court will presume that those items which are prima facie proper should have been allowed by the court in absence of a showing to the contrary.¹³ But where the affidavits relating to the taxation of costs are conflicting and some of the items relate to facts of which the trial court had actual knowledge, its ruling will not be disturbed on appeal.¹⁴

§ 40. Jurisdiction on Appeal.—The rule was laid down in the earlier decisions that the jurisdiction of the appellate court over an appeal from an order taxing costs was governed by the amount of the cost bill.¹⁵ But this doctrine was later rejected and the earlier cases were overruled on the theory that the jurisdiction of the courts of appeal includes all appealable orders which may be taken in a case which is within its jurisdiction.¹⁶ And the present rule is that in all cases, legal or equitable, where the appellate court has appellate jurisdiction of the matter brought in controversy in the lower court, the appealability of an order taxing costs is not controlled or affected by the amount involved in such order.¹⁷ On the other hand, it

13. *Fay v. Fay*, 165 Cal. 469, 132 Pac. 1040; *San Francisco v. Collins*, 98 Cal. 259, 33 Pac. 56.

14. *Fanning v. Leviston*, 93 Cal. 186, 28 Pac. 943. See *APPEAL AND ERROR*, vol. 2, p. 921 et seq.

15. Thus an order made after final judgment taxing a cost bill was held to be a separate independent proceeding, and when the whole amount involved was less than three hundred dollars, such order was not appealable and the appellate court had no jurisdiction of an appeal therefrom. *McKay v. Superior Court*, 120 Cal. 143, 40 L. R. A. 585, 52 Pac. 147; *Quitow v. Perrin*, 120 Cal. 255, 52 Pac. 632; *Foley v. California Horseshoe Co.*, 115 Cal. 184, 56 Am. St. Rep. 87, 47 Pac. 42;

Perry v. Quackenbush, 105 Cal. 299, 38 Pac. 740; *Fairbanks v. Lampkin*, 99 Cal. 429, 34 Pac. 101; *Oullahan v. Morrissey*, 73 Cal. 297, 14 Pac. 864 (applying rule to dismissal of action); *Langan v. Langan*, 83 Cal. 618, 23 Pac. 1084. See *Sellick v. De Carlow*, 95 Cal. 644, 30 Pac. 795 (stating but not deciding the question); *Bolton v. Landers*, 27 Cal. 104 (where \$200 under Practice Act was limitation); *Meecker v. Harris*, 23 Cal. 285.

16. *Harron v. Harron*, 123 Cal. 508, 56 Pac. 334. See *Code Civ. Proc.*, § 939, as to appealable orders in general. See *APPEAL AND ERROR*, vol. 2, p. 206.

17. *Sierra Union etc. Co. v. Wolf*, 144 Cal. 430, 77 Pac. 1038

must be borne in mind that costs, being merely incidental to the action, constitute no part of the matter in dispute, and cannot be deemed a part of the demand for the purpose of testing or conferring jurisdiction.¹⁸

The supreme court will not order a cause transferred to that court solely for the purpose of reviewing the exercise of the discretionary power of a district court of appeal with relation to costs of appeal, where the matter was never in any way suggested to that court.¹⁹

§ 41. Payment.—Upon enforcing payment of a contract made payable in a specific kind of money, the costs, since they become a component part of the judgment,²⁰ are payable in the kind of money specified in the judgment.¹ Where a conditional order as entered upon the minutes of the court, fixes no time of payment of the costs required as a condition, it is to be construed as making the costs payable on demand.² In a conditional order fixing a time for payment, where there is an error in the bill of costs, the party who is required to pay may, within the time limited, tender the sum actually due, and if such tender is refused,

(action to quiet title); *People v. Madden*, 134 Cal. 611, 66 Pac. 874; *Elledge v. Superior Court*, 131 Cal. 279, 63 Pac. 360; *Southern California Ry. Co. v. Superior Court*, 127 Cal. 417, 59 Pac. 789; *Harron v. Harron*, 123 Cal. 508, 56 Pac. 334; *S. C.*, 128 Cal. 303, 60 Pac. 932; *Meyer v. Perkins*, 20 Cal. App. 661, 130 Pac. 206; *Caffey v. Mann*, 3 Cal. App. 124, 84 Pac. 424 (action for damages, holding that it is the amount claimed in the complaint and not the amount of the cost bill that determines the question of jurisdiction); *White v. Gaffney*, 1 Cal. App. 715, 82 Pac. 1088 (action to abate a nuisance).

18. *Henigan v. Ervin*, 110 Cal. 37, 42 Pac. 457; *Maxfield v. Johnson*, 30 Cal. 545; *Zabriskie v. Torrey*, 20

Cal. 173; *Votan v. Reese*, 20 Cal. 89; *Dumphy v. Guindon*, 13 Cal. 28 (overruling *Gordon v. Ross*, 2 Cal. 156, holding that costs may be added to amount recovered to confer jurisdiction).

See *infra*, § 62, as to appealability of order taxing costs on appeal in the superior court from judgment of the justice's court. See *APPEAL AND ERROR*, vol. 2, p. 204.

19. *Cosgrave v. Donovan*, 62 Cal. Dec. 91, 199 Pac. 810. See *COURTS*, as to transfer of causes from district court of appeal to supreme court.

20. See *supra*, §§ 2, 38.

1. *Carpentier v. Atherton*, 25 Cal. 564.

2. *Holtum v. Greif*, 144 Cal. 521, 78 Pac. 11 (new trial).

he may move to retax the costs after the expiration of the time limit and the court may retax them and refuse to let an execution issue.³

§ 42. Execution.—Execution cannot issue while a motion to tax the costs is pending, even though judgment for costs has been erroneously entered.⁴ But the inclusion of items in a bill of costs which are not properly taxable affords no just ground for refusing to issue an execution or recalling one. The remedy is by motion to retax.⁵ When an appeal is taken from an order taxing costs and the judgment of the trial court is affirmed, the appellant is estopped from litigating any question involved in the appeal and the respondent is entitled to enforce execution upon the judgment for costs.⁶

Costs on appeal.—The code provides that after costs on appeal have been taxed or the time for taxing the same has expired, execution may issue therefor, as upon a judgment.⁷ It has been held that in view of the authority given to the clerk in section 958 of the Code of Civil Procedure in regard to the duties of the clerk on receipt of the remittitur, execution for costs issues pursuant to the judgment of the appellate court and that no action is required on the part of the superior court to authorize the entry of the judgment or the issuance of the execution.⁸ But it has also been held that when a judgment is reversed by the supreme court and the case remanded for further proceedings and the clerk of the court below issues an execution

3. Higuerra v. Bernal, 46 Cal. 580.

4. Kaiser v. Barron, 153 Cal. 474, 95 Pac. 879, holding that execution issued on judgment of costs erroneously entered by the clerk while a motion to tax them was pending was untimely, and the court erred in refusing to recall the execution. See EXECUTION.

5. Meeker v. Harris, 23 Cal. 285. See supra, § 35, as to retaxation.

6. Bell v. Thompson, 8 Cal. App. 483, 97 Pac. 158.

7. Code Civ. Proc., § 1034.

8. McMann v. Superior Court, 74 Cal. 106, 15 Pac. 448; Ex parte Burrill, 24 Cal. 350. See Marysville v. Buchanan, 3 Cal. 212 (holding that the district court had no authority to prevent the immediate execution of the judgment of the supreme court).

for all the costs, as well for those of appeal as for those accruing before notice of appeal was filed, the judge of the court below has power to make an order staying the execution in the hands of the sheriff until an application can be made to the court to retax and adjust the costs.⁹ Where costs on appeal to the supreme court are not entered on the judgment docket in the court below, they do not become a lien on property until the levy of an execution.¹⁰ The statute of limitations begins to run against the issuance of an execution for the recovery of costs of appeal from the time that a minute of the judgment of the supreme court is entered on the docket of the trial court.¹¹

IX. COSTS ON APPEAL.

Parties Entitled to Costs.

§ 43. **In General.**—The statute governing the allowance of costs on appeal is section 1027 of the Code of Civil Procedure,¹² which reads as follows:

“The prevailing party on appeal shall be entitled to his costs excepting when judgment is modified, and in that event the matter of costs is within the discretion of the appellate court. The party entitled to costs, or to whom costs are awarded, may recover all amounts actually paid out by him in connection with said appeal, and the preparation of the record for the appeal, including the costs of printing briefs; provided, however, that no amount shall be allowed as costs of printing briefs in excess of one hundred dollars to any one party. The appellate court may reduce costs in case of the insertion of unnecessary matter in the record.”¹³

9. *Ex parte Burrill*, 24 Cal. 350.

10. *Chapin v. Broder*, 16 Cal. 403.

11. *McMann v. Superior Court*, 74 Cal. 106, 15 Pac. 448. As to stay of execution on appeal and necessity of giving undertaking to effect

stay, see *APPEAL AND ERROR*, vol. 2, pp. 428, 450.

12. *Sime v. Hunter*, 36 Cal. App. Dec. 664, 202 Pac. 967.

13. See Code Civ. Proc., § 1027, as amended in 1919 (Stats. 1919, p. 73).

As has already been seen, costs are given only by statutory direction and their allowance depends on the terms of the statute in force at the time of the accrual of the right to have them taxed.¹⁴ This time, in regard to costs on appeal, is the time of the rendition of the judgment on appeal.¹⁵ It follows that the rule pertaining to the allowance of costs may be changed or modified by statute during the pendency of the proceeding.¹⁶

Section 1027 has been held to be applicable to all appeals except in so far as it may be inconsistent with other statutes applicable to certain proceedings or is limited by constitutional provisions,¹⁷ and costs follow as a matter of course to the prevailing party.¹⁸ It is of course clear that costs of appeal cannot be recovered from one not a party to the action.¹⁹

"When the decision of a court of inferior jurisdiction in a special proceeding is brought before a court of higher jurisdiction for a review, in any other way than by appeal, the same costs must be allowed as in cases on appeal, and may be collected by execution, or in such manner as the court may direct, according to the nature of the case."²⁰

14. See *supra*, § 2.

15. *Turner v. East Side Canal & Irr. Co.*, 177 Cal. 570, 171 Pac. 299; *Eaton v. Southern Pac. Co.*, 31 Cal. App. 379, 160 Pac. 687; *Cain v. French*, 29 Cal. App. 725, 156 Pac. 518.

16. *Turner v. East Side Canal & Irr. Co.*, 177 Cal. 570, 171 Pac. 299.

17. *Oakland v. Pacific Coast Lumber etc. Co.*, 172 Cal. 332, Ann. Cas. 1917 E, 259, 156 Pac. 468.

18. *Estate of Prager*, 167 Cal. 737, 141 Pac. 369; *Hupp v. Superior Court*, 22 Cal. App. 162, 133 Pac. 987; *Code Civ. Proc.*, § 1027, provided, prior to the amendment of 1913, that the allowance of costs on appeal was in the discretion of the appellate court upon the granting of a new trial or the modification of

the judgment of the trial court. See *Fay v. Stubenrauch*, 141 Cal. 573, 75 Pac. 174; *Yule v. Bishop*, 133 Cal. 574, 62 Pac. 68, 65 Pac. 1094, and *Reniff v. The Cynthia*, 18 Cal. 669, holding that under the statute as it formerly read, costs in certain instances could be awarded against the prevailing party.

19. *San Francisco Sav. Union v. Long*, 137 Cal. 68, 69 Pac. 687, where in an action in interpleader plaintiff was dismissed by trial court and thereby ceased to be a party to the action. See, also, *Long v. Superior Court*, 127 Cal. 686, 60 Pac. 464, to the same effect. See *supra*, § 12.

20. *Code Civ. Proc.*, § 1032; *Smith v. McCallum*, 36 Cal. App. 143, 172 Pac. 408 (holding petitioner entitled

§ 44. **Affirmance and Reversal.**—In view of the rule stated in the preceding section that the prevailing party on appeal is entitled to costs of appeal, it follows that on affirmance of the judgment of the trial court the right of the respondent to recover necessary costs of appeal is now beyond question, and he cannot be deprived of this right through failure of the clerk to award him costs in the remittitur.¹ Similarly a successful appellant is entitled to costs upon a reversal of the judgment.² Where an appeal is from two judgments and one of the judgments appealed from is affirmed and the other reversed, the costs of appeal should be apportioned between the parties in an equitable manner.³

to his costs in an original proceeding in mandamus to compel a court reporter to make a transcription of his notes in a criminal case); *Platnauer v. Superior Court*, 33 Cal. App. 394, 165 Pac. 41 (holding section inapplicable in a certiorari proceeding running against a court). See *supra*, § 12, as to parties against whom costs can be recovered.

1. *Estate of Prager*, 167 Cal. 737, 141 Pac. 369; *Burr v. Maclay Rancho Water Co.*, 26 Cal. App. 611, 147 Pac. 990 (right to have costs entered held not to be affected by stipulation entered into between parties); *Morgrage v. National Bank of California*, 25 Cal. App. 133, 142 Pac. 1124. See *Fay v. Stubentrauch*, 141 Cal. 573, 75 Pac. 174, where under statute as it formerly read it was held that appellant was entitled to costs although decree was affirmed, where appeal was taken from a decree, an error in which substantially affected the rights of the appellant, which error was not corrected until after the appeal was taken.

See *infra*, §§ 47, 48, as to duty of clerk to enter costs in remittitur.

2. *Robinett v. Brown*, 167 Cal. 735, 141 Pac. 368; *Reay v. Butler*, 99 Cal. 477, 33 Pac. 1134 (holding that where a judgment for an intervener is reversed and the intervention is ordered dismissed by the supreme court, the costs of the trial together with costs of appeal should be taxed against the intervener).

3. *De Leon v. Pacific Mut. Ins. Co.*, 186 Cal. 488, 199 Pac. 789; *Perazzi v. Doe Estate Co.*, 40 Cal. App. 617, 181 Pac. 398 (where in consolidated actions two of the liens involved were held to be invalid and one valid, it was held that under such circumstances the costs of the appeal should be prorated between them). It has been held where an appeal was taken from a judgment and from an order denying a motion for a new trial and the appellate court ordered the submission set aside as to the judgment but reversed the order denying a motion for a new trial, that the appellant was entitled to his costs on appeal under rule 23 of the su-

§ 45. Dismissal.—Since, by section 955 of the Code of Civil Procedure, the dismissal of an appeal is in effect an affirmance of the judgment appealed from unless expressly made without prejudice to another appeal,⁴ it would seem, in view of the provisions of section 1027 of the Code of Civil Procedure, that where such dismissal is in effect an affirmance of the judgment of the trial court, the respondent is entitled to costs as of course.⁵ Even before the amendment of section 1027 it has been frequently held that an appellate court upon dismissal of an appeal will not retain the appeal for the purpose of deciding who is entitled to the costs of appeal.⁶ But under a statute which required appeals to be taken within a certain time after the rendition of the judgment, it has been ruled that, upon dismissal, the appellant was entitled to costs of appeal where the appeal was taken before the determination of appellant's motion for a new trial which was afterwards granted by the trial court.⁷

§ 46. Modification.—The rule that the appellate court may award costs in its discretion on modification of the judgment of the trial court was formerly contained in the Practice Act,⁸ and has been incorporated into the Code of Civil Procedure.⁹ Pursuant to this rule a judgment may be modified on appeal without allowing costs of ap-

preme court, which provides for costs to be entered in favor of the appellant where the judgment is reversed. *Dixon v. Pluns*, 4 Cal. Unrep. 502, 35 Pac. 1047. See *infra*, § 47.

4. See *APPEAL AND ERROR*, vol. 2, p. 777.

5. See *supra*, §§ 43, 44.

6. *Turner v. Markham*, 156 Cal. 68, 103 Pac. 319; *Nelson v. Nelson*, 153 Cal. 204, 94 Pac. 880; *Langan v. Langan*, 83 Cal. 618, 23 Pac. 1084; *Blair v. Cummings*, 39 Cal.

667; *Wilson v. Chesley*, 23 Cal. App. 630, 138 Pac. 958.

7. *Blackburn v. Abila*, 4 Cal. Unrep. 982, 39 Pac. 797. See *Wilson v. Chesley*, 23 Cal. App. 630, 138 Pac. 958, holding that where it appeared from the record that the trial court abused its discretion in making the order appealed from but that such appeal must be dismissed, the costs on appeal should be shared equally between the parties and not all placed on the appellant.

8. Practice Act, § 500.

9. Code Civ. Proc., § 1027.

peal to either party,¹⁰ or the costs on appeal may be divided equally between the parties, or in such proportions as is equitable,¹¹ or the costs may be imposed wholly upon one of the parties.¹² Thus an appellant has been denied costs where the modification was based upon a point raised by him after the filing of his reply brief,¹³ and where the record showed that because of the consent of the respondent to a reduction of the amount of the judgment, the appellant could have obtained such modification by a proper motion in the trial court.¹⁴ Where the purpose of the ap-

10. *Petitpierre v. Maguire*, 155 Cal. 242, 100 Pac. 690 (where judgment of trial court was modified as to costs but appellant was not allowed costs of appeal); *Lomita Land and Water Co. v. Robinson*, 154 Cal. 36, 18 L. R. A. (N. S.) 1106, 97 Pac. 10; *Forsyth v. Butler*, 152 Cal. 396, 93 Pac. 90; *Estate of Langdon*, 129 Cal. 451, 62 Pac. 73; *Lambert v. Schmalz*, 118 Cal. 33, 50 Pac. 13; *Bradbury v. Barnes*, 19 Cal. 120; *Clint v. Eureka Crude Oil Co.*, 3 Cal. App. 463, 86 Pac. 817.

11. *Huellmantel v. Huellmantel*, 124 Cal. 583, 57 Pac. 582; *McInerney v. United Railroads*, 34 Cal. App. Dec. 99, 195 Pac. 958 (where an appeal from a judgment for an assault and alleged false imprisonment was modified by the appellate court so as to strike therefrom exemplary damages which had been allowed in the trial court, an order was entered that each party should pay its costs on the appeal); *Wilson v. Chesley*, 23 Cal. App. 630, 138 Pac. 958.

12. *Boscus v. Bohlig*, 173 Cal. 687, 162 Pac. 100. See *Meads v. Lasar*, 93 Cal. 530, 29 Pac. 125 (holding that a decision on appeal, in an action of claim and delivery, directing the trial court to correct its

judgment so as to make it in the alternative, is a clear and important modification of the judgment within the meaning of the rule); *Eades v. Los Angeles Ry. Corporation*, 43 Cal. App. 259, 184 Pac. 884; *Chapman v. Hughes*, 3 Cal. App. 622, 86 Pac. 908 (holding that a discharge in insolvency proceedings did not relieve defendant from liability for costs placed upon him in appellate court so as to authorize trial court to strike them from the judgment); *Cole v. Swanston*, 1 Cal. 51, 52 Am. Dec. 288; *P. A. Lamping & Co. v. Red Star Co.*, 1 Cal. Unrep. 166 (allowing appellant costs on modification of default judgment).

Rule XXIII of the supreme court rules requires the clerk, where an order of modification contains no directions as to costs, to enter upon the record and insert in the remittitur a direction that the appellant recover costs of appeal. See *infra*, § 47.

13. *Allen v. Globe Grain & Milling Co.*, 156 Cal. 286, 104 Pac. 305.

14. *Herman v. Paris*, 81 Cal. 625, 22 Pac. 971; *Alpers v. Schammel*, 75 Cal. 590, 17 Pac. 708 (applying rule to erroneous computation of interest on judgment); *Noonan v. Hood*, 49

peal is to obtain an absolute reversal but the modification decreed does not substantially change the important features of the judgment, the appellants should not recover the costs of appeal.¹⁵

Where the judgment appealed from is modified and affirmed as modified but no direction is given as to costs, under the law and under the rules of the appellate courts, respondents are obligated to pay the costs of appeal.¹⁶

§ 47. Insertion in Remittitur.—It is the duty of the clerk under rule XXIII of the supreme court, in all cases in which the judgment or order appealed from is reversed or modified, and the order of reversal or modification contains no directions as to the costs of appeal, to enter upon the record, and to insert in the remittitur, a judgment that the appellant recover the costs of appeal.¹⁷ And the clerk is also required, pursuant to a recent revision of this rule, to enter upon the record and to insert in the remittitur a judgment that the respondent recover the costs of appeal, in cases where the judgment or order appealed from is affirmed.¹⁸ It was held prior to this revision that the omission in the rules of the supreme court of a provision as to costs to the prevailing party on affirmance could not

Cal. 293; *Cassin v. Marshall*, 18 Cal. 689; *Tyron v. Sutton*, 13 Cal. 490; *Ledbetter v. Bayside Land Co.*, 36 Cal. App. Dec. 629, 202 Pac. 945 (where respondents consented to a modification of the judgment before the bill of exceptions was prepared); *Conlin v. Emanuel Lewis Investment Co.*, 26 Cal. App. 388, 147 Pac. 472; *Charleton v. Reed*, 1 Cal. Unrep. 695.

15. *Southern California I. & Steel Co. v. Amalgamated Assn. of Iron etc. Workers*, 186 Cal. 604, 200 Pac. 1.

16. *Cosgrave v. Donovan*, 62 Cal. Dec. 91, 199 Pac. 810. See *infra*, § 47, as to entry of costs in remittitur.

17. *Crittenden v. San Francisco*

Savings Union, 157 Cal. 201, 107 Pac. 103; *Meads v. Lasar*, 93 Cal. 530, 29 Pac. 125; *Hubbard v. Jurian*, 35 Cal. App. 757, 170 Pac. 1093 (where particular claimants in action concerning mechanics' lien were relieved from costs); *Burr v. Maclay Rancho Water Co.*, 26 Cal. App. 611, 147 Pac. 990; *Dixon v. Pluns*, 4 Cal. Unrep. 502, 35 Pac. 1047.

18. Rule XXIII, Supreme Court Rules, 1918. This revision was made because of the amendment in 1913 of Code Civ. Proc., § 1027, awarding costs of appeal to the prevailing party. See *supra*, § 43.

operate to take away the right granted by section 1027 of the Code of Civil Procedure.¹⁹ Even before the amendment of section 1027, awarding costs to the prevailing party as of course, it was not the custom of the appellate court formally to award costs of appeal, and costs, as now, followed the judgment as of course and were included by the clerk in the remittitur without formal direction from the court.²⁰

§ 48. Correction of Remittitur.—Pursuant to the rule that the appellate court has power at any time to recall a remittitur that, through mistake, etc., does not correctly state the judgment actually rendered by the court,¹ it has been held that where the clerk makes an erroneous award of costs,² or where the remittitur contains no provision that the prevailing party shall recover his costs on appeal, the remittitur may be recalled on motion and such mistake or omission be corrected.³ But the rule is different where the judgment as to costs is that actually given by the appellate court. In such case the court has no power after its judgment becomes final to change or modify the provisions as to costs.⁴ The trial court cannot vacate or set aside a judgment for costs on appeal, docketed in conformity with the rules of the supreme court, and section 958 of the Code of Civil Procedure, though it may

19. *Estate of Prager*, 167 Cal. 737, 141 Pac. 369. See *supra*, § 44.

20. *Bell v. Superior Court*, 150 Cal. 31, 87 Pac. 1031; *Hupp v. Superior Court*, 22 Cal. App. 162, 133 Pac. 987; *Hathaway v. Davis*, 33 Cal. 161 (holding similar rule prevailed under the Practice Act).

1. See *Appeal and Error*, vol. 2, pp. 1068-1070.

2. *Oakland v. Pacific Coast Lumber etc. Co.*, 172 Cal. 332, Ann. Cas. 1917E, 259, 156 Pac. 468; *Critten-den v. San Francisco Savings Union*, 157 Cal. 201, 107 Pac. 103; *San*

Joaquin etc. Irr. Co. v. Stevinson, 165 Cal. 540, 132 Pac. 1021; *Baker v. Southern California Ry. Co.*, 130 Cal. 113, 62 Pac. 302.

3. *Estate of Prager*, 167 Cal. 737, 141 Pac. 369; *Morgrage v. National Bank of California*, 25 Cal. App. 133, 142 Pac. 1124.

4. *Oakland v. Pacific Coast Lumber etc. Co.*, 172 Cal. 332, Ann. Cas. 1917E, 259, 156 Pac. 468; *Crenshaw Bros. & Saffold v. Southern Pac. Co.*, 42 Cal. App. 44, 183 Pac. 208. See *APPEAL AND ERROR*, vol. 2, p. 1067.

set aside such judgment so as to make it conform to the judgment actually rendered on appeal.⁵

Items Allowable—Taxation.

§ 49. **In General.**—The code provides that the party entitled to costs on appeal, or to whom costs are awarded, may recover all amounts actually paid out by him in connection with the appeal and in the preparation of the record for the appeal, including the cost of printing briefs.⁶ Prior to the enactment of this provision no statute specifically provided for the items of recoverable costs on appeal,⁷ and the matter was largely within the discretion of the appellate court,⁸ and was provided for in its rules.⁹ The supreme court has, however, nothing to do with assessing the particular items of costs to which a party may be entitled under a judgment rendered therefor by the court. What they are and the specific amounts are matters to be determined by the trial court to which the cause is remanded, or to which the remittitur runs. The determination of that court on the subject necessarily constitutes the definite and specific judgment concerning which the general right to recover was declared by the appellate court.¹⁰

5. *Chapman v. Hughes*, 3 Cal. App. 622, 86 Pac. 908.

6. Code Civ. Proc., § 1027. See *infra*, § 53, as to amount that may be allowed for printing briefs.

7. *Bond v. United Railroads*, 20 Cal. App. 124, 128 Pac. 786.

8. *Burr v. Maclay Rancho Water Co.*, 26 Cal. App. 611, 147 Pac. 990; *Blair v. Brownstone Oil & Refining Co.*, 20 Cal. App. 316, 128 Pac. 1022; *Bond v. United Railroads*, 20 Cal. App. 124, 128 Pac. 786. See *supra*, § 21, as to determination of allowable costs by trial court.

9. See supreme court rules XIII,

1892-1912, now covered by Code Civ. Proc., § 1027; *Bond v. United Railroads*, 20 Cal. App. 124, 128 Pac. 786.

10. *Bell v. Superior Court*, 150 Cal. 31, 87 Pac. 1031, per Lorigan, J. See *infra*, § 55.

The determination of the trial court is of course subject to review by the appellate court. See *supra*, §§ 37-40; *Blair v. Brownstone Oil & Refn. Co.*, 20 Cal. App. 316, 128 Pac. 1022; *Bond v. United Railroads*, 20 Cal. App. 124, 128 Pac. 786.

As required by the code, an expenditure cannot be recovered as costs, unless it has been paid out in connection with the appeal.¹¹ Hence an expense which is incurred purely as an expense in the conduct of the case in the superior court and not as a part of the preparation of the appeal will not be allowed as costs on appeal.¹² It has been held that section 1027 is not sufficiently broad to include the traveling expenses of an attorney. These are disbursements of his and not of his client, and the settled practice on the trial and on appeal has been not to include as costs the personal expenses of the attorney of the prevailing party.¹³

§ 50. Transcript.—The right to recover costs of a transcript used on the appeal depends upon whether, in conformance with section 1027 of the Code of Civil Procedure, the costs were actually paid out in connection with the appeal and the preparation of the record.¹⁴ Thus payments to the official reporter by the successful plaintiff in the superior court for a transcript of the testimony obtained for the purpose of assisting plaintiff's counsel in the preparation of amendments to a bill of exceptions prepared by the defendant on its motion for a new trial in the superior court are an expense in the conduct of the case in the superior court and not a part of the record for the appeal, and are not allowable as costs on appeal although the bill of exceptions may have been used on the appeal

11. Code Civ. Proc., § 1027.

12. See *infra*, § 50.

13. *Sime v. Hunter*, 36 Cal. App. Dec. 664, 202 Pac. 967. See *supra*, § 27, as to attorney's fees generally.

14. *Turner v. East Side Canal etc. Co.*, 177 Cal. 570, 171 Pac. 299; *Woodland Bank v. Hiatt*, 59 Cal. 580; *Countryman v. California Trona Co.*, 39 Cal. App. 753, 180 Pac. 22; *Eaton v. Southern Pac. Co.*, 31 Cal. App. 379, 160 Pac. 687.

See, also, Code Civ. Proc., § 274, and *supra*, § 49. Before the amendment to § 1027, Code Civ. Proc., Rule XIII of the supreme court provided that the expense of printing transcripts on appeal "in civil causes and pleadings, affidavits, or other papers constituting the record in original proceedings upon which the case is heard in this court, required by these rules to be printed shall be allowed as costs, and taxed in bills of costs in the usual mode."

from the judgment.¹⁵ As has already been seen, money paid to a reporter for a transcript of the evidence is not recoverable as costs unless it is paid under a court order directing the transcription to be made.¹⁶ Where the conduct of a respondent is the direct cause of the filing of two identical transcripts in two distinct appeals taken by different appellants from the same order, upon reversal in both appeals the appellant is liable for the costs of both transcripts as necessary expenditures.¹⁷

§ 51. Reduction for Unnecessary Matter in Record.— The appellate court is authorized by the code to reduce costs in case of the insertion of unnecessary matter in the record.¹⁸ This rule was well established before its incorporation into the statutory law, and it has been uniformly held that an appellant who inserts unnecessary and irrelevant matter in the transcript cannot, if he succeeds on the appeal, recover costs for procuring or printing the irrelevant and unnecessary portion.¹⁹ The same rule applies in

15. *Turner v. East Side Canal etc. Co.*, 177 Cal. 570, 171 Pac. 299; *Countryman v. California Trona Co.*, 39 Cal. App. 753, 180 Pac. 22. See, also, *Woodland Bank v. Hiatt*, 59 Cal. 580, holding that an appellant who procured and paid for a transcript of the evidence but before the statement was settled, appealed on the judgment-roll and the judgment was reversed, was not entitled to recover costs of such transcript.

16. See *supra*, § 24.

17. *Estate of Bell*, 157 Cal. 528, 108 Pac. 497, stating that it is not the duty of different appellants on separate appeals to unite in filing a transcript.

18. Code Civ. Proc., § 1027. See, also, § 650, Code Civ. Proc., providing that it is the duty of the judge or referee in settling a bill of exceptions to strike out all redundant

and useless matter so that the exceptions and proceedings may be presented as briefly as possible.

19. *Estate of Pease*, 149 Cal. 167, 85 Pac. 149 (appellant allowed to recover two-thirds of cost of transcript); *Jones v. Iverson*, 131 Cal. 101, 63 Pac. 135 (appellant allowed one-fifth of cost of transcript); *Bullard v. Creditors*, 56 Cal. 600 (appellant refused costs because of voluminous transcript); *People v. Miles*, 56 Cal. 401 (appellant refused costs); *McDougal v. Downey*, 45 Cal. 165 (appellant allowed one-half cost of printing where unnecessary "statement on appeal" was inserted); *Sichel v. Carrillo*, 42 Cal. 493 (appellant allowed costs less one-half of the expense of procuring and printing the transcript); *Kimball v. Semple*, 31 Cal. 657 (stating that if matter clearly im-

relation to a prevailing respondent who is responsible for the insertion of unnecessary matter in the record.²⁰ But a respondent will not be taxed with any part of the costs of printing the transcript where the matter inserted at his instance is necessary to meet the assignments of error of the appellant.¹ Where a judgment is reversed, additional costs will not be imposed on the respondents on account of their inserting a large amount of unnecessary matter, as by the reversal they are required to pay the expense of printing the same.²

§ 52. Certification of Transcript.—Rule XI of the supreme court provides that if a transcript on appeal be presented to the attorney of the adverse party with a request for his certificate that it is correct and he refuses so to certify or to specify wherein it is incorrect, the costs of procuring the certificate to such transcript from the clerk shall be taxed against such party whose attorney so neglects or refuses. Pursuant to this rule there is no question but that a successful appellant is entitled to recover the cost of the clerk's certification to a transcript, where the respondent's attorney refuses to join in certifying to its correctness.³ This rule does not mean, however, that the respondent, upon failure to certify to the correct-

material is inserted against objection and exception of one of the parties and the fact is made to appear on the record, the party insisting upon its introduction will be taxed with the costs of the immaterial matter irrespective of his success on appeal. *Per Sawyer, J.*)

20. *People v. Holden*, 28 Cal. 123 (where respondent was in a great measure responsible for voluminous record, he was taxed with half the costs of preparing transcript); *Harper v. Minor*, 27 Cal. 107 (party responsible for insertion of irrelevant matter will be required to pay

for same whether he succeeds or not).

1. *Duffy v. Duffy*, 104 Cal. 602, 38 Pac. 443, where respondent caused to be incorporated the greater part of the evidence in the case to show that the exclusion of certain testimony sought to be stricken out would not change the result.

2. *In re Robinson's Estate*, 106 Cal. 493, 39 Pac. 862.

3. *Estate of Bell*, 157 Cal. 528, 108 Pac. 497; *Loftus v. Fischer*, 113 Cal. 286, 45 Pac. 328.

ness of the transcript as presented to him, is required to pay the cost of the clerk's certification to the appellant regardless of the merits or outcome of the appeal. By reason of the rule the respondent, in case the appeal is successful, may protect himself against the payment of the costs of certification by having previously stipulated to the correctness of the transcript. But he is not obliged and cannot by order or rule of court be compelled to perform this labor. If the transcript be presented and respondent under the rule refuses to certify, then in the event of appellant's success the latter may recover the costs.⁴ The rule does not relieve an appellant from the duty of advancing the cost of the clerk's certification or from the burden of paying such cost, if his appeal is unsuccessful.⁵

§ 53. **Briefs.**—Prior to 1913 there was no provision by statute or by rule of the supreme court authorizing the taxing as costs of the expense of printing briefs to be used on appeal,⁶ and it was held that the failure of the rules of the supreme court in regard to taxable costs to include the expense of printing briefs among the items named, necessarily excluded it by implication.⁷ However, section 1027 of the Code of Civil Procedure as amended now allows a party entitled to costs on appeal to include the expense of printing briefs to the limit of one hundred dollars.⁸ Pursuant to the rule elsewhere stated that the terms of the statute in force at the time of the rendition

4. *Loftus v. Fischer*, 113 Cal. 236, 45 Pac. 328, per Henshaw, J.

5. *Loftus v. Fischer*, 117 Cal. 128, 48 Pac. 1030; *Loftus v. Fischer*, 114 Cal. 131, 45 Pac. 1058.

6. *Estate of Prager*, 167 Cal. 737, 141 Pac. 369; *Hibernia Sav. & L. Soc. v. Behnke*, 121 Cal. 339, 53 Pac. 812; *Cain v. French*, 29 Cal. App. 725, 156 Pac. 518; *Bond v. United Railroads*, 20 Cal. App. 124,

128 Pac. 786; *Blair v. Brownstone Oil & Refn. Co.*, 20 Cal. App. 316, 128 Pac. 1022.

7. *Bond v. United Railroads*, 20 Cal. App. 124, 128 Pac. 786.

8. *Sime v. Hunter*, 36 Cal. App. Dec. 664, 202 Pac. 967, holding that under § 1027, \$100 is the full amount to which the appellant is entitled.

of the judgment on appeal, govern the allowance of costs on appeal,⁹ it has been held that a party is entitled to costs not exceeding the statutory maximum, for printing a brief on appeal, where such brief was filed before the enactment of the amendment allowing such costs but where the judgment did not become final until after the amendment had gone into effect.¹⁰ It is not clear whether the expressage on briefs should also be allowed as costs on appeal, but where the amount claimed was very small, the appellate court, in conformity with the maxim "de minimis," has ignored the contention that such allowance should be made.¹¹

§ 54. Costs of Former Trials.—The party ultimately prevailing in an action is entitled to recover from the defeated party the costs of previous trials.¹² This of course includes only costs that are legitimate and properly taxed, and costs of former trials do not carry interest.¹³ Such costs do not include the costs of a former appeal upon which costs were awarded to the adversary of the party ultimately prevailing.¹⁴ When a case is remanded for further proceedings and costs awarded in the appellate court in general terms, the costs on appeal only are included leaving the costs of the former trial to abide the event of the suit.¹⁵ An appellant is not estopped from questioning the correctness of a portion of a judgment because of a voluntary receipt of the costs awarded to him

9. See *supra*, § 43.

10. *Turner v. East Side Canal & Irr. Co.*, 177 Cal. 570, 171 Pac. 299; *Cain v. French*, 29 Cal. App. 725, 156 Pac. 518.

11. *Sime v. Hunter*, 36 Cal. App. Dec. 664, 202 Pac. 967.

12. *Bell v. Pleasant*, 145 Cal. 410, 104 Am. St. Rep. 61, 78 Pac. 957; *Senior v. Anderson*, 130 Cal. 290, 62 Pac. 563; *Huellmantel v. Huellmantel*, 124 Cal. 583, 57 Pac. 582;

Fox v. Hale & Norcross S. M. Co., 122 Cal. 219, 54 Pac. 731; *Stoddard v. Treadwell*, 29 Cal. 281; *Ex parte Burrill*, 24 Cal. 350; *Visher v. Webster*, 13 Cal. 58; *Gray v. Gray*, 11 Cal. 341.

13. *Huellmantel v. Huellmantel*, 124 Cal. 583, 57 Pac. 582.

14. *Huellmantel v. Huellmantel*, 124 Cal. 583, 57 Pac. 582.

15. *Ex parte Burrill*, 24 Cal. 350; *Gray v. Gray*, 11 Cal. 341.

by such judgment, but, upon a reversal of such judgment, he must return such costs received by him before he will be entitled to a new trial.¹⁶ The party responsible for erroneous proceeding after a remittitur has been sent down must pay the costs of those proceedings and the costs consequent on a second appeal caused by them.¹⁷

§ 55. Taxation.—An appellate court is not authorized to tax or retax the costs it allows on appeal from a judgment or order of the superior court. That is a matter solely for consideration in the lower court.¹⁸ And a memorandum of costs should be filed in the trial court and not in the appellate court.¹⁹

“Whenever costs are awarded to a party by an appellate court, if he claims such costs, he must within thirty days after the remittitur is filed with the clerk below, deliver to such clerk and serve upon the adverse party a memorandum of his costs, verified as prescribed by the preceding section [§ 1033, Code Civ. Proc.]. The party dissatisfied with the costs claimed may move to have the same taxed in the same manner and within a like time after notice of filing of bill of costs, as prescribed by the preceding section [§ 1033]. After such costs have been taxed, or the time for taxing the same has expired, execution may issue therefor as upon a judgment.”²⁰

Prior to 1919 no provision was made by the code for the retaxing of costs awarded on appeal. It has been said, however, that section 1034 of the Code of Civil Procedure, in regard to the collection of costs awarded upon appeal, if taken strictly alone, would be unconstitutional, as allowing property to be taken without notice or an opportunity to be heard; and that section must be construed with section 1033 as analogous, so as to require service of the

16. *Stockman v. Riverside L. & Irr. Co.*, 64 Cal. 57, 28 Pac. 116.

17. *Argenti v. City of San Francisco*, 30 Cal. 458.

18. *Bell v. Superior Court*, 150 Cal. 31, 87 Pac. 1031.

19. *Gray v. Gray*, 11 Cal. 341.

20. Code Civ. Proc., § 1034, as amended May 6, 1919 (Stats. 1919, p. 291). See *Mabb v. Stewart*, 7 Cal. Unrep. 186, 77 Pac. 402, holding that a memorandum of costs filed three days after the filing of the remittitur is filed in due time.

memorandum upon the opposite party and an opportunity for retaxation before execution could be issued thereupon, and if not so served, the memorandum of costs should be stricken out.¹⁻³

Penalty for Frivolous Appeal.

§ 56. In General.

“When it appears to the appellate court that the appeal was made for delay, it may add to the costs such damages as may be just.”³

This language was taken from the Practice Act of 1851, section 345, and that in turn from the New York Code.⁴ The object of imposing a penalty for frivolous appeals has been said to be twofold—to discourage the same, as well as to compensate to some extent for the loss which results from delay.⁵ It has also been observed that although the remedy may seem to be a harsh one for the reason that, as a rule, a client is governed largely in such matters by the advice of his attorney, courts should impose penalties to discourage unnecessary congestion.⁶ If possible the penalty will be imposed upon the party responsible for taking the frivolous appeal.⁷

1-2. *Bell v. Superior Court*, 150 Cal. 31, 87 Pac. 1031. See *supra*, § 35, as to retaxing of costs.

3. Code Civ. Proc., § 957. See *APPEAL AND ERROR*, vol. 2, p. 977.

4. *Huber v. Shedoudy*, 180 Cal. 311, 181 Pac. 63; *Dowdell v. Carpy*, 137 Cal. 333, 70 Pac. 167; *Nevills v. Shortridge*, 129 Cal. 575, 62 Pac. 120; *Langan v. Langan*, 86 Cal. 132, 24 Pac. 852; *Hall v. Cline*, 31 Cal. App. Dec. 282, 188 Pac. 295; *Johnson v. Dixon Farms Co.*, 29 Cal. App. 52, 155 Pac. 134, 136 (where on petition for hearing in supreme court that court said that it would have been a proper case for the imposition of damages for a frivolous

appeal); *Dunn v. Warden*, 28 Cal. App. 202, 151 Pac. 671.

5. *Huber v. Shedoudy*, 180 Cal. 311, 181 Pac. 63; *McKelvey v. Wagy*, 157 Cal. 406, 108 Pac. 268.

6. *Huber v. Shedoudy*, 180 Cal. 311, 181 Pac. 63; *Hall v. Cline*, 31 Cal. App. Dec. 282, 188 Pac. 295 (assessing \$50 as penalty); *First Nat. Bank of Corona v. Coplen*, 39 Cal. App. 619, 179 Pac. 708 (adding \$100 as penalty).

7. *Estate of Snowball*, 156 Cal. 235, 104 Pac. 446 (where executrix took unjustified appeal penalty was imposed upon her and she was not allowed to resort to the estate for costs); *McMillan v. Vischer*, 14 Cal.

§ 57. **Amount.**—In determining the amount of damages which should be awarded in case of a frivolous appeal the court will consider the facts and the effect of the delay. The practice in the supreme court in this respect has not been uniform.⁸ Penalties as high as fifty per cent of the judgment have been imposed,⁹ and damages amounting to twenty per cent have been frequently assessed,¹⁰ as well as penalties amounting to fifteen per cent of the judgment.¹¹ In early practice the imposition of a ten per cent penalty was common,¹² and there are a few early cases imposing damages of five per cent of the judgment.¹³ The later practice in the appellate courts has

232 (where only one defendant appeals and the appeal is frivolous, the penalty will be imposed only on the party appealing).

8. *Huber v. Shedoudy*, 180 Cal. 311, 181 Pac. 63, per Wilbur, J.

9. *Van Slyke v. Miller*, 60 Cal. 411 (affirming judgment and imposing fifty per cent as damages for frivolous appeal); *Kincaid v. Johnson*, 47 Cal. 618 (affirming judgment for \$90 and assessing fifty per cent as damages). See, also, *Goodcell v. Davis*, 62 Cal. 617 (assessing twenty-five per cent damages).

10. *Lemon v. Rucker*, 80 Cal. 609, 22 Pac. 471; *Williams v. Hall*, 79 Cal. 606, 21 Pac. 965; *Shain v. Belvin*, 79 Cal. 262, 21 Pac. 747; *Perkins v. Patrick*, 45 Cal. 393; *Nickerson v. California Stage Co.*, 10 Cal. 520; *Meerholz v. Sessions*, 9 Cal. 277; *Heney v. Alpers*, 2 Cal. Unrep. 164; *Flynn v. Travers*, 1 Cal. Unrep. 27. See, also, *Cary v. Osio & Randall*, referred to in *McMillan v. Vischer*, 14 Cal. 232, where a penalty of twenty per cent, amounting to \$2,698.53, was imposed.

11. *Bateman v. Blumenthal*, 61 Cal. 628; *Dillon v. Kelly*, 1 Cal. Unrep. 251.

12. *Mix v. Boothe*, 54 Cal. 589 (where there was no appearance on behalf of appellant and no points or authorities filed by him, the court being satisfied that the appeal was taken for delay, affirmed the judgment of the lower court with ten per cent damages); *Adler v. Winkle*, 53 Cal. 187; *Bates v. Vischer*, 2 Cal. 355; *Russell v. Williams*, 2 Cal. 158; *Buckley v. Stebbins*, 2 Cal. 149; *Wheeler v. Turner*, 1 Cal. Unrep. 798; *Stebbins v. Smiley*, 1 Cal. Unrep. 133; *Parburt v. Monroe*, 1 Cal. Unrep. 72; *Spencer v. Barney*, 1 Cal. Unrep. 56; *De Wolf v. Bailey*, 1 Cal. Unrep. 37. See *Huber v. Shedoudy*, 180 Cal. 311, 181 Pac. 63, stating that the supreme court of the United States adopted as the ordinary measure of damages for a frivolous appeal, under a statute authorizing them to give just damages for delay, ten per cent upon the amount of the judgment.

13. *Magruder v. Melvin*, 12 Cal. 559 (the appellant's case being supported by neither law, justice nor fact, and the appeal appearing to be taken for delay); *Pinkham v. Wemple*, 12 Cal. 449; *Dwyer v. Cal-*

been to impose a nominal penalty of from twenty-five to one hundred dollars for a frivolous appeal.¹⁴ However,

ifornia Steam Nav. Co., 1 Cal. Unrep. 442; Berri v. Minturn, 1 Cal. Unrep. 50.

14. Estate of Kelley, 182 Cal. 81, 186 Pac. 1041 (\$100 imposed); Los Angeles Paving Co. v. Los Angeles Foundry Co., 181 Cal. 685, 186 Pac. 593 (\$100 added to costs); Estate of Youngblood, 180 Cal. 307, 181 Pac. 57 (\$100 awarded for frivolous appeal where the effect was to cause the guardian of a ward to become unnecessarily liable for attorney's fees); Stoddart v. Golden, 179 Cal. 663, 3 A. L. R. 1060, 178 Pac. 707 (\$100 added as damages because of delay); Lieman v. Golly, 178 Cal. 544, 174 Pac. 33 (\$50 added); Levings v. Pacific Electric Ry. Co., 178 Cal. 231, 173 Pac. 87 (where \$100 was imposed as penalty where appeal was entirely without merit); Foster v. Branen, 178 Cal. 118, 172 Pac. 382 (\$100 added to costs); Laughlin v. Pacific Coast Motor Car Co., 177 Cal. 86, 169 Pac. 996 (where principles were well settled and it appeared that appeal was taken without cause, unless for delay, \$50 was imposed as penalty); Pringle v. Fassler, 176 Cal. 264, 168 Pac. 114 (\$100 imposed as part of costs); Miller v. Oliver, 174 Cal. 404, 163 Pac. 357 (\$100 assessed as damages to be added to costs of appeal); Roberts v. Buckingham, 172 Cal. 458, 156 Pac. 1018 (\$100 added to costs); Goodwin v. Whittier, Coburn Co., 170 Cal. 305, 149 Pac. 583 (where court said that it would be stultifying the law to enter into any exposition of the insufficiency of the complaint to charge a cause of action and \$50 was added to costs for frivolous ap-

peal); Lapique v. Agoure, 170 Cal. 79, 148 Pac. 517 (\$100 imposed where claim was of a nature that the court said "nothing quite so preposterous has to our knowledge ever been presented in any court"); Barry v. All Persons Claiming, etc., 158 Cal. 435, 111 Pac. 249 (where it appeared that appeal was taken only for the purpose of vexing respondent and clouding his title, \$100 was imposed for taking and prosecuting the appeal); Fox v. Campbell, 157 Cal. 605, 108 Pac. 680 (\$100 imposed); McKelvey v. Waggy, 157 Cal. 406, 108 Pac. 268 (where principles involved were axiomatic court adjudged that appeal must have been frivolous and assessed \$50 as damages); Santa Rosa Bank v. Paxton, 149 Cal. 195, 86 Pac. 193 (affirming judgment with costs and \$100 damages); Hearst v. Hart, 128 Cal. 327, 60 Pac. 846 (affirming judgment with \$100 damages); Henehan v. Hart, 127 Cal. 656, 60 Pac. 426 (affirming judgment with \$50 damages); Clark v. Nordholt, 121 Cal. 26, 53 Pac. 400 (adding \$50 damages as penalty); Koelling v. Rutz, 108 Cal. 664, 41 Pac. 781 (\$50 imposed); Janes v. Bullard, 107 Cal. 130, 40 Pac. 108 (\$50 imposed); Johnson v. Klein, 70 Cal. 186, 11 Pac. 606 (affirming judgment with \$50 damages); Russell v. Hill, 59 Cal. 21 (\$100 damages); Clough v. Borello, 5 Cal. Unrep. 657, 48 Pac. 330 (\$100 and costs); Younglove v. Cunningham, 5 Cal. Unrep. 281, 43 Pac. 755 (\$100 damages to be recovered as part of costs of appeal); Grogan v. Nolan, 4 Cal. Unrep. 600, 36 Pac. 397 (where it was contended that in a judgment foreclos-

it has been said in a recent decision of the supreme court that on account of the great number of frivolous appeals which have found their way to the calendar of that court, more attention will hereafter be given to the subject and the rule enforced according to its letter and spirit.¹⁵

ing a mortgage that the court had no power to allow an attorney's fee except as a part of the bill of costs in spite of the fact that the mortgage itself provided for a reasonable attorney's fees, and upon this contention \$100 was imposed for a frivolous appeal); Meyers v. Trujillo, 3 Cal. Unrep. 505, 30 Pac. 579 (\$100 damages); De Pena v. Trujillo, 3 Cal. Unrep. 504, 30 Pac. 560 (\$100 damages); Dunphy v. Heilmann, 2 Cal. Unrep. 851, 17 Pac. 5 (\$50 damages); Lindley v. Knowlton, 31 Cal. App. Dec. 814, 189 Pac. 798 (imposing penalty of \$100); Verdier v. Stoll, 31 Cal. App. Dec. 696, 188 Pac. 826 (\$50 penalty); Dillon v. Dillon, 30 Cal. App. Dec. 1018, 187 Pac. 27 (awarding \$100 as penalty where frivolous appeal was taken from judgment in divorce action); City Street Imp. Co. v. Silvershield, 40 Cal. App. 597, 181 Pac. 393 (imposing \$50 damages); Blythe v. Lamberth, 39 Cal. App. 583, 179 Pac. 533 (\$100 added as penalty); Union Mach. Co. v. Chicago Bonding etc. Co., 36 Cal. App. 585, 172 Pac. 1113 (\$50 damages awarded for frivolous appeal); Duncan v. Tom Poste, Inc., 36 Cal. App. 370, 172 Pac. 163 (\$50 damages together with costs); Solomon v. Justices' Court, 36 Cal. App. 152, 171 Pac. 817 (where no brief was filed and error affirmatively shown, it appearing that appeal was frivolous \$50 was added to costs); Winkler v. Sierra Park Co., 36 Cal. App. 119, 171 Pac. 805 (\$75 added to costs);

Dunn v. Barry, 35 Cal. App. 325, 169 Pac. 910 (affirming judgment with \$100 damages); Brannigan v. Miller, 35 Cal. App. 292, 169 Pac. 696 (\$50 damages); Moore v. Lauff, 30 Cal. App. 452, 158 Pac. 557 (\$50 awarded); Crofford v. Crofford, 29 Cal. App. 662, 157 Pac. 560, (\$50 added to costs); Weinstock-Nichols Co. v. Courtney, 28 Cal. App. 445, 147 Pac. 218 (\$100 added to costs); Bell v. Camm, 10 Cal. App. 388, 102 Pac. 225 (\$50 damages); Goff v. Healey, 2 Cal. App. 95, 83 Pac. 89 (it appearing that the appeal was without merit and had kept plaintiff out of his money for upwards of two years and had put him to costs for attorney's fees and printing a brief, \$100 was awarded for frivolous appeal).

15. Huber v. Shedoudy, 180 Cal. 311, 181 Pac. 63, per Wilbur, J., where penalty imposed was \$720, which was in way of compensation to respondent for delay caused by appeal. See, also, Estate of Wall, 183 Cal. 431, 191 Pac. 687 (where penalty of \$200 was imposed where estate worth \$75,000 was in litigation); Lutz v. Brown, 182 Cal. 707, 189 Pac. 1072 (\$250 added to costs as damages because of delay); Foote v. Hayes, 4 Cal. Unrep. 976, 39 Pac. 601 (\$200 imposed where appeal was utterly frivolous); and Crane v. State Savings etc. Bank, 173 Cal. 110, 159 Pac. 585 (where in order to control pernicious activities of the appellant in the appellate court it was adjudged that he

Likewise, the district court of appeal has lately been more rigid in observing the letter and spirit of the rule. Thus where it appeared that the whole procedure of the appellant from the time of his first appearance in the case down to the rendering of the decision on appeal was marked with a deliberate design to delay, a penalty of five hundred dollars was imposed.¹⁶

§ 58. Grounds for Imposing and Refusing to Impose.—Where the appellant's contentions on appeal are utterly without merit, he will be penalized for taking and prosecuting a frivolous appeal.¹⁷ And where the only error in the record is manifestly a trivial clerical one which would have been corrected by the court below upon having its attention called to the matter, damages should be imposed.¹⁸ If appellant takes an appeal in spite of the fact that the very question presented for determination had been finally determined, the case is a proper one for the imposition of a penalty.¹⁹ And where the various questions made by the record have either been repeatedly settled by the appellate courts or are decided by reference to plain elementary principles, damages will ordinarily be assessed.²⁰ Similarly where there is a failure to file briefs on the part of the appellant and his conduct and the

pay penalty of \$250 damages to the treasury of an insolvent corporation whose coffers he had been attempting to loot of money due to creditors).

16. *Findley v. Lindsay*, 43 Cal. App. 158, 184 Pac. 883. See, also, *Webber v. Herbert*, 31 Cal. App. Dec. 454, 188 Pac. 819, where respondent was compensated to the amount of \$250 for the loss of the beneficial use of \$2,000 he had already paid out.

17. *Jones v. California Growers & Shippers*, 182 Cal. 777, 190 Pac. 172, citing *Johnson v. Dixon Farms Co.*, 29 Cal. App. 52, 155 Pac. 134, 136;

Berry v. Miami Cycle & Mfg. Co., 34 Cal. App. Dec. 333, 196 Pac. 94 (declining to impose the penalty, however, because of respondent's failure to file brief); *Dysert v. Weaver*, 31 Cal. App. Dec. 789, 189 Pac. 492; *First Nat. Bank of Corona v. Coplen*, 39 Cal. App. 619, 179 Pac. 708 (\$100 added as damages). See, also, cases cited supra, § 57.

18. *Rountree v. I. X. L. Lime Co.*, 106 Cal. 62, 39 Pac. 16.

19. *Estate of McKenna*, 168 Cal. 339, 143 Pac. 605.

20. *Pinkham v. Wemple*, 12 Cal. 449.

record justify the court in its conclusion that the appeal is taken for delay, damages will be imposed.¹

A penalty for taking a frivolous appeal has been refused where, from the circumstances of the case, the court deemed that it was not proper to grant such relief to the respondent.² Thus the court has declined to affix a penalty where the respondent is also grossly at fault in failing to present or file a brief.³ It has been said that the court is not inclined to consider seriously an assertion that an appeal is frivolous when the maker of the assertion has employed a great number of pages in an endeavor to demonstrate that it is not meritorious.⁴ Where there was no reason for appealing from the judgment as given but the only effect of the appeal was to stay the appellant's own judgment from drawing ten per cent interest per annum, it has been held not necessary to give damages.⁵

§ 59. On Dismissal—Failure to File Transcript.—It has been decided that upon a motion to dismiss an appeal and for damages, the appellate court will not look into the record to see if the appeal be frivolous,⁶ and that dam-

1. *Botwin v. Wise*, 31 Cal. App. Dec. 723, 189 Pac. 312 (allowing \$100 as damages); *City Street Improvement Co. v. Silvershield*, 40 Cal. App. 597, 181 Pac. 393 (imposing \$50 penalty for taking a frivolous appeal from a judgment of \$108.05 interest and costs); *Emhoff v. McMann*, 3 Cal. Unrep. 243, 23 Pac. 302 (but granting relief from damages where it later appeared that failure to appear and file brief was due to ignorance of the fact that cause was on the calendar).

2. *Block v. Kearney*, 6 Cal. Unrep. 660, 64 Pac. 267, where in a suit for unlawful detainer the plaintiff had already recovered by way of penalty three times the amount of rent due.

3. *Berry v. Miami Cycle & Mfg. Co.*, 34 Cal. App. Dec. 333, 196 Pac. 94, per Richards, J.

4. *Couts v. O'Neill*, 34 Cal. App. Dec. 363, 196 Pac. 109, stating that the courts are heavily burdened and their labors are made more onerous by the presentation of lengthy briefs.

5. *Howard v. Low*, 1 Cal. Unrep. 82.

6. *Randall v. Duff*, 104 Cal. 126, 43 Am. St. Rep. 79, 37 Pac. 803; *Kirby v. Harrington*, 2 Cal. Unrep. 740, 13 Pac. 218 (holding that where the appeal is dismissed the appellate court is not authorized to decide it to be frivolous on the ex parte affidavit of respondent that he has been informed and believes it to be without merit).

ages will not be awarded upon that ground until the final disposition of the appeal on its merits.⁷ But it has also been held that where an uncontradicted affidavit shows that the appeal was taken for delay, damages will be allowed on the dismissal of the appeal.⁸ In the absence of a transcript there is nothing from which to determine that an appeal was taken for delay. It follows that in such a case an application to impose damages for taking a frivolous appeal will be denied.⁹ However, upon the filing of a transcript by the respondent the judgment may be affirmed,¹⁰ or dismissed with damages, where the court is satisfied that the appellant is prosecuting a frivolous appeal.¹¹

§ 60. Avoidance of Penalty.—The right and duty of an appellate court to assess damages where the appeal is frivolous does not depend upon the belief of the attorney prosecuting the appeal that he has sufficient ground for a reversal.¹² In many cases an appeal may be prosecuted with the full belief that the cause may be reversed and not only the appeal be taken but the reversal desired for

7. *Nevills v. Shortridge*, 129 Cal. 575, 62 Pac. 120; *Randall v. Duff*, 105 Cal. 271, 38 Pac. 739; *Randall v. Duff*, 104 Cal. 126, 43 Am. St. Rep. 79, 37 Pac. 803; *Vaughn v. Werley*, 62 Cal. 181.

To dismiss an appeal upon the ground that it is frivolous is to refuse to consider its merits and therefore there can be no dismissal of any appeal on the ground that it is without merit; for to reach this conclusion the merits must be considered and the record must be examined. See *APPEAL AND ERROR*, vol. 2, p. 749.

8. *McFadden v. Dietz*, 115 Cal. 697, 47 Pac. 777 (imposing \$100 as damages); *Koelling v. Rutz*, 108 Cal. 664, 41 Pac. 781; *Duncan v.*

Grady, 99 Cal. 552, 34 Pac. 112; *Buckley v. Stebbins*, 2 Cal. 149 (where no transcript, record, or other papers in the case were filed).

9. *Vaughn v. Werley*, 62 Cal. 181.

10. *Dillon v. Kelly*, 1 Cal. Unrep. 251.

11. *Pacheco v. Bernal*, 2 Cal. 150.

12. *Lemon v. Rucker*, 80 Cal. 609, 22 Pac. 471; *Younglove v. Cunningham*, 5 Cal. Unrep. 281, 43 Pac. 755 (stating that a party cannot be permitted to avoid the consequences of a wholly groundless appeal by indulging himself in a mere unsubstantial belief that there is merit in his case when the slightest investigation would have assured him to the contrary).

delay only. This may and generally does occur where the appeal does not affect the merits of the case but rests entirely on technical grounds.¹³ The assurance upon oral argument that an appeal is taken in good faith is not sufficient to prevent the imposition of a penalty for taking a frivolous appeal, but the record must furnish support for such contention.¹⁴ However, no penalty will be imposed for the prosecution of a frivolous appeal, although such appeal was taken either to delay or harass the respondent, where it is apparent that the appellant is not the party responsible for the delay.¹⁵ And where the appeal appears to be without merit and frivolous, but the court cannot say upon the record that it was not taken in good faith or that it was for delay, it will decline to impose a penalty asked for by the respondent.¹⁶

X. COSTS IN JUSTICES' COURTS.

§ 61. **In General.**—The prevailing party to an action in a justice's court is entitled to costs,¹⁷ and the justice must tax and include in the judgment the costs allowable by law.¹⁸ The prevailing party is also entitled to costs of any proceedings taken by him in aid of an execution issued upon any judgment recovered in such court.¹⁹ The code authorizes justices in all cases to require a deposit

13. *Lemon v. Bucker*, 80 Cal. 609, 22 Pac. 471.

14. *Younglove v. Cunningham*, 5 Cal. Unrep. 281, 43 Pac. 755.

15. *Bridgford v. McAdoo*, 32 Cal. App. Dec. 689, 191 Pac. 1135. See *supra*, § 56.

16. *Alves v. Alves*, 36 Cal. App. Dec. 406, 203 Pac. 157 (where counsel for appellants seemed to be in earnest in their efforts to present the appeal); *Offerdahl v. Brydges*, 31 Cal. App. Dec. 305, 188 Pac. 612; *Dunn v. Warden*, 28 Cal. App. 202, 151 Pac. 671 (where party took ap-

peal in propria persona and it did not appear that he was cognizant of the fact that appeal was frivolous).

17. Code Civ. Proc., § 924.

18. Code Civ. Proc., § 896; *Webster v. Hanna*, 102 Cal. 177, 36 Pac. 421.

19. Code Civ. Proc., § 924; *Healey v. Superior Court*, 167 Cal. 22, 138 Pac. 687, holding that such costs may be recovered on appeal to superior court even though amount involved is less than \$300.

of money or an undertaking, as security, for costs of court, before issuing a summons.²⁰ But this section does not apply to the exceptional cases of indigent suitors who, at common law, were entitled to sue without payment of such costs. Hence, justices' courts are, as were courts at common law, vested with power to, and should upon a proper showing, admit parties to sue in forma pauperis.¹ A written offer by a defendant before trial to allow judgment to be taken against him for a specified sum authorizes the plaintiff to take judgment for such amount with the costs then accruing; and if the plaintiff does not accept such offer and fails to recover in the action a sum in excess thereof, he cannot recover costs after the offer, but costs must be adjudged against him.²

§ 62. On Appeal.—Section 1022 of the Code of Civil Procedure denying costs to the plaintiff in an action for money or damages where the judgment is for less than three hundred dollars is not intended to apply to an action tried anew in the superior court on appeal from a justice's court. In such case the prevailing party is entitled to recover his costs notwithstanding the judgment rendered on the appeal is for a sum less than three hundred dollars.³ Since costs are merely incidental to the action,⁴ it follows that the costs of an action in a justice's court and in the superior court upon appeal therefrom cannot be made the subject of an appeal to the supreme court in a case over which the supreme court has no jurisdiction on appeal. Hence where the case is one not appealable to the supreme court, an order after judgment refusing to

20. Code Civ. Proc., § 923.

1. *Hammond v. Justice's Court*, 37 Cal. App. 506, 174 Pac. 69. See supra, §§ 18-20, for discussion in general of suits in forma pauperis. See, also, Code Civ. Proc., § 91, as to payment of fees in advance in justice court, but stating that fees will not be required from parties

who have not sufficient pecuniary ability to pay them.

2. Code Civ. Proc., § 895. See JUSTICES OF THE PEACE.

3. *Healey v. Superior Court*, 167 Cal. 22, 138 Pac. 687. See supra, §§ 5, 6, as to construction of § 1022, Code Civ. Proc.

4. See supra, §§ 2, 40.

strike out a cost bill in the superior court in a case appealed from the justice's court is not appealable to the supreme court although the cost bill amounts to over three hundred dollars.⁵

As in the case of appeals from the superior court to the appellate courts, the superior court in an appeal from a justice court has power to assess damages where it appears that an appeal is prosecuted solely for delay, but such penalty is limited to twenty-five per cent of the judgment appealed from.⁶

5. *Henigan v. Ervin*, 110 Cal. 37, 42 Pac. 457.

6. Code Civ. Proc., § 980. See JUSTICES OF THE PEACE.

COTENANCY.

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I. INTRODUCTORY.

§ 1. **Scope of Article.**—This article treats of both joint tenancy and tenancy in common. The term “cotenancy” is ordinarily employed in modern jurisprudence to desig-

nate the ownership by several persons, (1) of joint interests, and (2) of interests in common.¹ Two other forms of ownership of property by several persons are designated in section 682 of the Civil Code, to wit: partnership interests,² and the community interest of husband and wife.³ Aside from noting the distinctions between cotenancies and partnerships, and apart from distinguishing between joint tenancy and tenancy by entirety,⁴ such other forms of co-ownership are elsewhere considered,⁵ as are also other kindred forms of co-interests.⁶ Under the California law, where two or more persons own or acquire a mining claim for the purpose of working it, they form what is known as a mining partnership,⁷ and since this form of tenancy has many features peculiar to itself, it is considered in the article on mines.⁸ This article also excludes the subject of partition as between joint tenants or tenants in common,⁹ the conversion of property belonging to a cotenancy,¹⁰ declarations of homestead out of common property,¹¹ and matters that pertain to adverse possession as against a cotenant, or which (also in connection with adverse possession) relate to the effect of conveyances during a cotenancy.¹²

§ 2. Distinctions—Tenancy by entirety.—The common-law tenancy by entirety was a modification of joint tenancy and arose where an estate was conveyed to a husband and wife under circumstances which would have created simply a joint tenancy if the conveyance had been

1. See Civ. Code, § 682.

2. See PARTNERSHIP.

3. See COMMUNITY PROPERTY, vol. 5, p. 261.

4. See *infra*, § 2.

5. See references *supra*.

6. See ACCESSION, vol. 1, p. 121; CONFUSION OF GOODS, vol. 5, p. 488; CROPS; FENCES; JOINT ADVENTURES; PARTY-WALLS, etc. See Civ. Code, § 680, as to definition of qualified ownership. And see PROPERTY.

7. See Civ. Code, § 2512.

8. See MINES AND MINERALS. And see *infra*, § 2, as to distinctions between cotenancies and partnerships.

9. See PARTITION.

10. See TROVER AND CONVERSION.

11. See HOMESTEADS.

12. See ADVERSE POSSESSION, vol. 1, pp. 543, 545.

made to any two persons other than a husband and a wife. Such estate was still, at common law, a joint tenancy, but because of the disabilities of the wife, the common law regarding the husband and wife as one, by construction the courts erected a modification of the tenancy. The modification was that while such estates had, like a joint tenancy, the quality of survivorship, they differed in the essential respect that neither spouse could convey his or her interest so as to affect the right of survivorship in the other. In the eye of the law the spouses were not seised of moieties but of entireties. Thus, while in the case of a joint tenancy a severance of any of the unities, as a conveyance by one of the joint tenants to a third person, terminated the joint tenancy and transformed the new estate into a tenancy in common, this could not be done in a tenancy by entirety, owing to the fiction of the law that, in the latter tenancy, each held an undivided right to the whole and not, as in a joint tenancy, a right to an undivided half. But tenancy by entirety does not exist in California.¹³ Under the code¹⁴ in case of a conveyance to a married woman and to her husband, the presumption is that the married woman takes the part conveyed to her as tenant in common, unless a different intention is expressed in the instrument.¹⁵ And it has been said that the trend of the decisions elsewhere is to treat tenancy by entirety as a simple joint tenancy, unless the language of the instrument forbids such interpretation.¹⁶

Partnerships.—The mere joint ownership of property does not constitute a partnership.¹⁷ Neither does the ownership of property as tenants in common make the tenants partners; although persons who own a mining

13. *Swan v. Walden*, 156 Cal. 195, 134 Am. St. Rep. 118, 20 Ann. Cas. 194, 103 Pac. 931. cited in *COMMUNITY PROPERTY*, vol. 5, p. 284, note 8.

14. Civ. Code, § 164.

15. *Swan v. Walden*, 156 Cal. 195, 134 Am. St. Rep. 118, 20 Ann. Cas. 194, 103 Pac. 931. 16. *Swan v. Walden*, 156 Cal. 195, 134 Am. St. Rep. 118, 20 Ann. Cas. 194, 103 Pac. 931.

17. *Noonan v. Nunan*, 76 Cal. 44, Cas. 194, 103 Pac. 931. And see cases 18 Pac. 98.

claim as tenants in common are to be considered as partners in the working of the mine.¹⁸ Even in such a case, however, the tenants do not own the property as partners. There are certain fundamental distinctions between cotenancy and partnership, one of the chief of which consists in the fact that while cotenants can become such or cease to be such at pleasure, one cannot buy in or sell out a partnership at pleasure.¹⁹

II. JOINT TENANCY.

§ 3. In General.—Joint tenancy has been characterized as a technical feudal estate, founded, like the laws of primogeniture, on the principle of the aggregation of landed estates in the hands of a few, and opposed to their division among many persons.²⁰ After the fashion of the earlier authorities, it has been said that for “the creation of a joint tenancy, four unities are required, namely: unity of interest, unity of title, unity of time, [as to the creation of the tenancy], and unity of possession.” But the distinguishing incident is a right of survivorship.¹ In

18. See Civ. Code, § 2511 et seq.; *Dougherty v. Creary*, 30 Cal. 290, 89 Am. Dec. 116. And see MINES AND MINERALS, for the character of mining partnership.

19. *Bradley v. Harkness*, 26 Cal. 69, wherein Sanderson, C. J., further commented on the distinction as follows: “Such an act would of itself work a dissolution of the partnership and necessitate its final settlement and closing out. A tenancy in common results from a rule of law by which it is also controlled and governed. A partnership, on the contrary, is the result of agreement between parties, which also supplies the rules for its government. The former relation is undisturbed by a change of tenants, but

the latter admits of no change as to its members; and where a change takes place by the consent and agreement of all the parties concerned, the old firm is thereby dissolved and a new one created. Thus the incidents annexed to each have a different origin and are diverse. Also, the proceedings for a dissolution of these relations are different and are grounded upon entirely different facts. As to the first, the mere desire of one of the tenants is sufficient to set the courts in motion; but as to the latter, cause must be shown.” See PARTNERSHIP.

20. *De Witt v. San Francisco*, 2 Cal. 289.

1. See *infra*, § 4, as to right of survivorship.

other words, joint estates are such as are acquired at the same time and by the same title,² and this is the purport of the language of the code provision:

“A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants.”³

Under this provision it is necessary to the creation of a joint tenancy that there be some operative words declaring the intention to create it.⁴ However, it is unnecessary to accompany the creation of the joint ownership with a declaration respecting survivorship. That follows as a legal incident to the creation of the joint interest, where, otherwise the intent is disclosed.⁵ So a deed to a husband and wife as “joint tenants with fee to the survivor,” and a deed to them “during their lives, as joint tenants, and afterwards to the survivor in fee simple absolute,” create a simple joint tenancy in them.⁶ But unless the property was owned jointly in the lifetime of both parties, there is no joint interest therein to which the incident of survivorship can attach. Hence, it has been held that upon the deposit of money which is the separate property of the wife, the taking of a pass-book showing an account in the names of the husband and his wife, “and payable to the order of either of them,” does not,

2. *Denigan v. San Francisco Sav. Union*, 127 Cal. 142, 78 Am. St. Rep. 35, 59 Pac. 390.

3. Civ. Code, § 683; *Denigan v. San Francisco Sav. Union*, 127 Cal. 142, 78 Am. St. Rep. 35, 59 Pac. 390; *Lynam v. Vorwerk*, 13 Cal. App. 507, 110 Pac. 355.

4. *Estate of Hittell*, 141 Cal. 432, 75 Pac. 53, holding that a devise to two persons named did not create a joint tenancy where there was nothing in the will or in any extrinsic

evidence showing such an intent, but that such devise created only a clear tenancy in common. See DESCENT AND DISTRIBUTION; WILLS.

5. *Kennedy v. McMurray*, 169 Cal. 287, Ann. Cas. 1916D, 515, 146 Pac. 647. See note, 7 A. L. R., p. 1063, as to survivorship agreements in joint tenancies.

6. *Swan v. Walden*, 156 Cal. 195, 134 Am. St. Rep. 118, 20 Ann. Cas. 194, 103 Pac. 931.

by the form of the deposit, indicate any gift to the husband, or any joint interest of both parties in the deposit, with right of survivorship, or change the rules applicable to a deposit of the wife's separate property in the alternative names of the husband or wife.⁷ Likewise, a writing given to a bank showing that the deposit was in the joint names of the husband and wife, payable to either on the return of the book, was held not to create a joint tenancy in the husband and wife, with right of survivorship.⁸ The joint tenancy referred to in section 683 of the Civil Code is the estate known as such at common law. Where the effect of the agreement was to create a joint estate in the property to which it relates, evidence cannot be introduced to change the terms or legal effect of the agreement.⁹

As the law does not require the execution of a writing to effect a transfer of personal property, it follows that a joint tenancy in personal property may be created by an oral agreement by which the title to the property is transferred to two persons as joint tenants.¹⁰

§ 4. Right and Effect of Survivorship.—One of the chief incidents of joint tenancy is the right of survivorship. In fact, title by survivorship exists only when the estate is held in joint ownership.¹¹ And so, it is the well-understood incident of a joint tenancy that, upon the death of one of two joint tenants, the survivor thereupon becomes

7. *Denigan v. San Francisco Sav. Union*, 127 Cal. 142, 78 Am. St. Rep. 35, 59 Pac. 390; *Robinson v. Mutual Savings Bank*, 7 Cal. App. 842, 95 Pac. 533. See *Halsted v. Central Savings Bank*, 36 Cal. App. 500, 172 Pac. 613, holding that the expression that "the parties agree to become partners" in the case of creating a joint account, does not change its meaning from a joint tenancy.

8. *Lyman v. Vorwerk*, 13 Cal. App. 507, 110 Pac. 355. See *infra*, § 4, as to joint bank deposits; and see *BANKS*, vol. 4, p. 195.

9. *Estate of Gurnsey*, 177 Cal. 211, 170 Pac. 402.

10. *Estate of Harris*, 169 Cal. 725, 147 Pac. 967.

11. *Denigan v. San Francisco Sav. Union*, 127 Cal. 142, 78 Am. St. Rep. 35, 59 Pac. 390.

the sole owner of the entirety, not by descent, but by survivorship, and in virtue of the original grant creating the tenancy.¹² Both at common law and under the Civil Code of California this is the legal effect of a joint tenancy,¹³ except as changed by statute;¹⁴ and there is no distinction, in this respect, between real property and personal property.¹⁵ It is therefore said to be a mistake to say of joint tenants that the title vests in the survivor upon the death of the cotenant, or that it descends to him from his cotenant; for it had already vested in him by, and at the time of, the original grant.¹⁶ And, similarly, when trustees, with power to sell, hold as joint tenants, and one of them dies, as the whole estate descends to the survivors, so the power annexed to the trust devolves on them, and they may sell and convey the legal title.¹⁷

Perhaps the most common joint tenancy is that which is created in bank deposits, a form of joint tenancy which has been fully treated in another article of this work.¹⁸

12. *Green v. Skinner*, 185 Cal. 435, 197 Pac. 60; *Estate of Gurnsey*, 177 Cal. 211, 170 Pac. 402; *McDougald v. Boyd*, 172 Cal. 753, 159 Pac. 168 (holding that the wife surviving her husband does not take any interest in joint tenancy as his heir or successor, but by virtue of her estate originating at the time of the creation of such tenancy); *Kennedy v. McMurray*, 169 Cal. 287, Ann. Cas. 1916D, 515, 146 Pac. 647; *Greer v. Blanchard*, 40 Cal. 194; *De Witt v. San Francisco*, 2 Cal. 289; *Halsted v. Central Savings Bank*, 36 Cal. App. 500, 172 Pac. 613; *McCarthy v. Holland*, 30 Cal. App. 495, 158 Pac. 1045; *Crowley v. Savings Union Bank etc. Co.*, 30 Cal. App. 144, 157 Pac. 516; *Hannon v. Southern Pac. R. R. Co.*, 12 Cal. App. 350, 107 Pac. 335. And cases cited *infra* this section.

13. *Estate of Gurnsey*, 177 Cal.

211, 170 Pac. 402; *Hannon v. Southern Pac. R. Co.*, 12 Cal. App. 350, 107 Pac. 335.

No delivery of anything is necessary to effectuate such result; *Kennedy v. McMurray*, 169 Cal. 287, Ann. Cas. 1916D, 515, 146 Pac. 647.

14. See *infra*, § 7, as to certain statutory changes in the rule.

15. *Kennedy v. McMurray*, 169 Cal. 287, Ann. Cas. 1916D, 515, 146 Pac. 647; *Estate of Harris*, 169 Cal. 725, 147 Pac. 967; *Denigan v. San Francisco Sav. Union*, 127 Cal. 142, 78 Am. St. Rep. 35, 59 Pac. 390.

16. *Estate of Gurnsey*, 177 Cal. 211, 170 Pac. 402. But see *infra*, § 7, as to changes in the rule effected by statute.

17. *Saunders v. Schmaelzle*, 49 Cal. 59.

18. See *BANKS*, vol. 4, pp. 197, 199. In each of the following cases it was held that the joint deposit con-

Following the rule of survivorship, it has been held that the creation of a joint tenancy in deposits of money which was previously community property is neither a testamentary disposition nor a transfer of property to vest in one cotenant upon the death of the other, and, not being derived by inheritance, it is not a transfer in contemplation of death within the meaning of the inheritance tax law.¹⁹ Since under the existing law the wife's share of the community property is "not to be deemed to pass to her as heir of her husband,"²⁰ the rule of survivorship applies to such right, and not the rule of succession which prevailed under the California decisions prior to the statute of 1917.¹

§ 5. Corporation as Joint Tenant.—It was said in an early case that corporations cannot hold property as joint tenants, "because two of the essential unities are wanting, namely: of the same capacity and title. Nor can they hold as joint tenants, for another reason, being each perpetual,

stituted a joint tenancy. *Estate of Gurnsey*, 177 Cal. 211, 170 Pac. 402; *McDougald v. Boyd*, 172 Cal. 753, 159 Pac. 168; *Kennedy v. McMurray*, 169 Cal. 287, Ann. Cas. 1916D, 515, 146 Pac. 647; *Estate of Harris*, 169 Cal. 725, 147 Pac. 967; *Estate of Hall*, 154 Cal. 527, 98 Pac. 269; *Sprague v. Walton*, 145 Cal. 228, 78 Pac. 645; *Denigan v. Hibernia Sav. & L. Soc.*, 127 Cal. 137, 59 Pac. 389; *Booth v. Oakland Bank of Savings*, 122 Cal. 19, 54 Pac. 370; *Williams v. Union Trust Sav. Bank*, 33 Cal. App. 659, 166 Pac. 368; *Waters v. Nevis*, 31 Cal. App. 511, 160 Pac. 1081; *McCarthy v. Holland*, 30 Cal. App. 495, 158 Pac. 1045; *Crowley v. Savings Union Bank etc. Co.*, 30 Cal. App. 144, 157 Pac. 516; *Drinkhouse v. German Sav. & L. Soc.*, 17 Cal. App. 162, 118 Pac. 953; *Carr v. Carr*, 15

Cal. App. 480, 115 Pac. 261. See *Lynam v. Vorwerk*, 13 Cal. App. 507, 110 Pac. 355, where it was held that a joint tenancy was not created. See note in 3 Cal. Law Rev., p. 418, as to bank deposits and joint ownership therein with right of survivorship.

19. *Estate of Gurnsey*, 177 Cal. 211, 170 Pac. 402; *McDougald v. Boyd*, 172 Cal. 753, 159 Pac. 168. See note, 4 Cal. Law Rev., p. 507; and note, 7 A. L. R., p. 1032 et seq., for discussion of inheritance tax in case of joint tenancies. See DESCENT AND DISTRIBUTION.

20. Stats. 1917, p. 880. See COMMUNITY PROPERTY, vol. 5, p. 334.

1. See COMMUNITY PROPERTY, vol. 5, p. 334. And see note, 4 Cal. Law Rev., p. 158, as to the rule prior to 1917 and the effect of the change wrought by the statute.

there can be no survivorship between them . . . nor can a corporation hold lands as joint tenant with a natural person, for there is no reciprocity of survivorship between them."² It must be noted, however, that the reason for this holding arose in a case in which the power of a municipal corporation was involved, such a corporation alone having the right of perpetual succession under the California law.³ The question has not arisen in California as to the right of a private corporation to hold as a joint tenant. Since a private corporation is not endowed with perpetuity, being limited to an existence of fifty years at the most,⁴ and subject to even earlier dissolution,⁵ it is clear that on the point as to the capacity of a private corporation so to hold property, the question is an open one. Moreover, the code does not distinguish between natural persons and private corporations in this particular, or in fact in any particular, in the definition of a joint interest or joint tenancy.⁶

§ 6. Kinds of Property.—A joint tenancy may exist in an estate for years,⁷ and, in fact, it can exist in all kinds of property.⁸ The character of the prior ownership may be a circumstance of no importance if the written instrument declares and discloses a purpose and intent to transfer the property and does so transfer it into a joint tenancy.⁹ But a joint tenancy cannot be established in respect of money belonging to another by an independent title, without any express declaration that the money should be held in joint tenancy.¹⁰

2. *De Witt v. San Francisco*, 2 Cal. 289. Union, 127 Cal. 142, 78 Am. St. Rep. 35, 59 Pac. 390.

3. See CORPORATIONS, vol. 6, p. 61. Personal property may be held And see MUNICIPAL CORPORATIONS. by two or more persons in joint

4. See Civ. Code, § 290, subd. 4. tenancy. *Estate of Harris*, 169 Cal.

5. See CORPORATIONS, vol. 6, p. 725, 147 Pac. 967.

61. 9. *Kennedy v. McMurray*, 169 Cal. 287, Ann. Cas. 1916D, 515, 146 Pac. 647.

6. Civ. Code, § 683. See supra, § 3, for this code provision.

7. *Young v. Polack*, 3 Cal. 208. 10. *Denigan v. San Francisco Sav.*

8. *Denigan v. San Francisco Sav.* Union, 127 Cal. 142, 78 Am. St.

X § 7. **Dissolution—Proceedings to Determine Fact of Death.**—A joint tenancy may be severed and ended by a conveyance by one of the tenants of his share, and a conveyance will have this effect even though it be but remainder after the death of the grantor. But the severance or attempted severance must take place before the death of the joint tenant and before the other, as a consequence of the tenancy, has become the owner of the whole by virtue of his right of survivorship. Following these principles, where a joint tenant executes a deed of his moiety, delivers the deed, intending the delivery as an immediately effective one, but delivers it to a person other than the grantee, with instructions that it is not to be delivered to the latter until the grantor's death, and thereafter dies, subsequent to which event the deed is delivered to the grantee and he then, for the first time, learns of it, the deed so delivered does not terminate the joint tenancy so as to destroy the right to the whole property which accrued to the other joint tenant by survivorship.¹¹ The dissolution by partition of joint tenancies, as of tenancies generally in which two or more persons are interested, is treated elsewhere in this work.¹²

Proceedings to determine fact of death.—By an enactment in 1917 proceedings for the establishment by decree of the fact of death when it terminates an estate held with another were extended to cases which affect a joint tenancy.¹³ In this connection the code provides that "any inheritance tax which becomes payable by reason of such death must be paid before such decree is made."¹⁴ Conformably to the change in the statute it is provided also that whenever property, real or personal, is held or owned

Rep. 35, 59 Pac. 390; *Robinson v. Mutual Sav. Bank*, 7 Cal. App. 642, 95 Pac. 533.

11. *Green v. Skinner*, 185 Cal. 435, 197 Pac. 60. See *infra*, § 28, as to effect of sale of distinct part of

property held in cotenancies generally.

12. See PARTITION.

13. See Code Civ. Proc., § 1723, as amended by Stats. 1917, p. 1397.

14. See Code Civ. Proc., § 1723, as amended in 1921.

in joint tenancy, the right of the surviving joint tenant to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable under the provisions of the Inheritance Tax Act, excepting therefrom, however, such part thereof as may be proved by the surviving joint tenant to have originally belonged to him and never to have belonged to the decedent.¹⁵

§ 8. Tendency to Restrict Creation.—While, under section 683 of the Civil Code, it would seem that an express declaration in the instrument of conveyance is necessary to create a joint estate,¹⁶ this is apparently opposed by another provision of the code to the following effect:

“An obligation imposed upon several persons, or a right created in favor of several persons, is presumed to be joint, and not several, except in the special cases mentioned in the title on the interpretation of contracts. This presumption, in the case of a right, can be overcome only by express words to the contrary.”¹⁷

This last-quoted provision has reference, however, merely to the relation between the parties in whose favor the right is created and the party against whom it is created; it is correlative to the obligation incurred by the party against whom the right exists, but does not purport to determine the interest of the parties in whose favor the right exists as between themselves.¹⁸ In fact, joint tenancies are not favored under the California law.¹⁹ The act of April 27, 1855, provides that “Every interest in real estate, granted or denied to two or more persons, other than executors and trustees, as such, shall be tenancy in common, unless expressly declared in the grant or devise

15. Stat. 1917, p. 880, subd. 5. Union, 127 Cal. 142, 78 Am. St. Rep. See supra, § 4, as to the rule in the absence of statutes effecting a change. 35, 59 Pac. 390; Conde v. Dreisam Gold Min. Co., 3 Cal. App. 583, 86 Pac. 825.

16. See supra, § 8.

17. Civ. Code, § 1431.

18. Denigan v. San Francisco Sav.

19. Denigan v. San Francisco Sav. Union, 127 Cal. 142, 78 Am. St. Rep.

35, 59 Pac. 390.

to be a joint tenancy.²⁰ This act was not retroactive, and did not convert existing joint tenancies which were not expressly declared to be such, in the grant or demise by which they were created, into tenancies in common.¹ However, under this act, in order to constitute a joint estate in lands in two or more persons, such estate must have been expressly declared in the conveyance itself, otherwise it would be held by the grantees as tenants in common.² And this is the rule under section 683 of the Civil Code.³ The only exceptions to this rule are, as embodied in the law itself, in case of grants to executors or trustees. And so, whenever, by the terms of a conveyance to trustees with power to sell, it is doubtful whether the trustees take as joint tenants, or tenants in common, it will be presumed, if possible, that they take as joint tenants.⁴

III. TENANCY IN COMMON.

In General.

§ 9. Code Provisions—Parties to Cotenancy.—Section 685 of the Civil Code provides that

“An interest in common is one owned by several persons, not in joint ownership or partnership.”

And section 686 of the same code provides that

“Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint interest, as provided in section six hundred and eighty-three,⁵ or unless acquired as community property.”

20. This act was practically re-enacted in Civ. Code, § 683.

1. Greer v. Blanchard, 40 Cal. 194; Dewey v. Lambier, 7 Cal. 347.

2. Bowen v. May, 12 Cal. 348.

3. See generally cases cited in this section.

4. Saunders v. Schmaelzle, 49 Cal. 59.

5. See supra, § 3, for Civ. Code, § 683.

If the presumption of joint ownership in a promissory note should attach, it is overcome, so as to destroy any right of survivorship, where it appears in proof that the deceased was the owner of a half interest in the note and a mortgage given as security for it.⁶ Under the code husband and wife may hold property as joint tenants, as tenants in common or as community property.⁷ It has been held that, in the absence of any evidence as to the source of moneys with which a house was built, or of the manner in which property was acquired, there is no presumption that it was community property or the separate property of either spouse, rather than that it was held by them in joint tenancy or tenancy in common.⁸

Tenancy in common requires for its existence but one unity, namely, that of possession. If, therefore, a grant should be made to two persons, which in its terms should imply a joint tenancy, but such an estate could not vest, for the reason that some of the requisite unities were wanting, the result would be the creation of a tenancy in common. The rule is, that a grant shall not fail if there is a capacity to take under it, and if the higher estate cannot vest, the next estate which is possible shall vest. So corporations may be tenants in common in either a chattel, or in lands. No one of the reasons for a want of capacity to hold as joint tenants prevents them so holding, for this estate requires but one unity, that of possession.⁹ In order that a tenancy in common may exist between parties in the holding of land, it is necessary that they possess some color of title and assert their claim in some tangible way.¹⁰

6. *Robinson v. Bledsoe*, 23 Cal. App. 687, 139 Pac. 245; *Conde v. Dreisam Gold Min. Co.*, 3 Cal. App. 583, 86 Pac. 825.

7. Civ. Code, § 161.

8. *Harlow v. Standard Imp. Co.*, 145 Cal. 477, 78 Pac. 1045. But see

as to all presumptions relating to community, *COMMUNITY PROPERTY*, vol. 5, pp. 317-320.

9. *De Witt v. San Francisco*, 2 Cal. 289.

10. *Robinson v. Bledsoe*, 23 Cal. App. 687, 139 Pac. 245.

§ 10. **Creation of Relation Generally—Dissolution.**—Tenancy in common is created as indicated in sections 685 and 686 of the Civil Code.¹¹ In other words, such an estate is created whenever the instrument bringing an estate in two or more persons into existence does not specifically state that the estate created is one other than a tenancy in common.¹² Thus, such a tenancy may be created by descent,¹³ will,¹⁴ purchase or sale,¹⁵ or other agreements,¹⁶ by presumption of law,¹⁷ and in various other ways.¹⁸

A dissolution of a cotenancy is effected by partition either by agreement between the cotenants or by an action

11. See supra, § 9.

12. Estate of Hittell, 141 Cal. 432, 75 Pac. 53; Wittenbrock v. Wheadon, 128 Cal. 150, 79 Am. St. Rep. 32, 60 Pac. 664; Hewlett v. Owens, 50 Cal. 474.

It has been held that joint proprietors of water ditches, in the absence of any special facts constituting them something else, are tenants in common of real estate, and their rights in the ditches and sales of water are governed by the law of tenancy in common. Bradley v. Harkness, 26 Cal. 69.

13. McLeran v. Benton, 73 Cal. 329, 2 Am. St. Rep. 814, 14 Pac. 879; Hart v. Robertson, 21 Cal. 346. See DESCENT AND DISTRIBUTION.

14. Estate of Hittell, 141 Cal. 432, 75 Pac. 53; In re Grider, 81 Cal. 571, 22 Pac. 908 (where children omitted from a will of the father became tenants in common with the widow in all the real property of the deceased, subject to administration, their proportion depending on whether the property was community property or the separate property of the decedent). See WILLS.

15. See infra, § 11.

16. See infra, § 12.

17. McVay v. Central California Inv. Co., 6 Cal. App. 184, 91 Pac. 745 (holding that an allegation in a complaint, in an action of trespass, that the plaintiffs are the owners of the property injured, raises the presumption that they are tenants in common); Tabler v. Peverill, 4 Cal. App. 671, 88 Pac. 994 (holding that in an action of divorce, where issue is joined as to the separate or community character of the real property acquired by the husband, but the property is undisposed of by the decree, the divorced parties became tenants in common of the community property).

18. See generally cases cited in this and succeeding sections. See Ornbaum v. His Creditors, 61 Cal. 455, holding that a finding to the effect that plaintiff's neighbors had grazed cattle on the uninclosed portion of the land described in the plaintiff's declaration of homestead in common with him, they at the same time recognizing the land as the plaintiff's, does not show a tenancy in common with the land by prescription.

instituted for that purpose. The procedure for a partition of tenancies in common does not differ from that prescribed for other forms of cotenancies, and hence this branch of the general subject is treated elsewhere in this work.¹⁹ It is clear that a tenant in common may sell or encumber his interest at pleasure, regardless of the knowledge or consent or wishes of his cotenants without affecting the legal relation between them beyond the going out of one and the coming in of another.²⁰ In this connection it has been said that a mere desire of one of the tenants is sufficient to authorize a court to dissolve the relations.¹

§ 11. Creation by Conveyance, Purchase or Sale.—By far the most common method of creating a tenancy in common is by purchase, sale or conveyance. Conveyances from the United States government to two or more persons ordinarily make the grantees tenants in common. So, a decree of confirmation and a patent issued thereunder by the United States to several persons jointly vests the legal title to the premises granted in all of the grantees as tenants in common,² as, for example, in case of a grant to the heirs of a presumption claimant.³ Conveyances of undivided portions of property vest an estate in common in the grantee, and make him a tenant in common with the other owners.⁴ And frequently, where several persons own property, and one of them conveys the whole thereof, without authority from the other owners, the effect is to grant only the interest which the grantor had in the property, and to make him a tenant in common with the other

19. See PARTITION.

20. *Bradley v. Harkness*, 26 Cal. 69. See *infra*, § 11, as to effect of purchases and conveyances.

1. *Bradley v. Harkness*, 26 Cal. 69.

2. *Bihler v. Platt*, 52 Cal. 550.

3. *Wittenbrock v. Wheadon*, 128

Cal. 150, 79 Am. St. Rep. 32, 60 Pac. 664.

4. *Gordon v. San Diego*, 101 Cal. 522, 40 Am. St. Rep. 73, 36 Pac. 18; *Reed v. Spicer*, 27 Cal. 57 (tenants in common of a ditch by conveyance); *Lick v. O'Donnell*, 3 Cal. 59, 58 Am. Dec. 383 (conveyance of "one-half my lot").

owners.⁵ So, if an undivided portion of land is common property of husband and wife, and the remaining undivided part is the separate property of the wife, the grantee of the husband becomes a tenant in common with the wife or those claiming under her.⁶

Where a deed is of a given quantity of land, parcel of a larger tract, and the deed fails to locate the quantity so conveyed by a sufficient description, the grantee, on delivery of the deed, becomes interested in all the lands embraced within the larger area, as tenant in common with his grantor.⁷ The grantee has no right to locate the quantity called for by his deed or any portion of the larger area, as against the will of his grantor, unless such right is conferred upon him by some stipulation to that effect in the deed, although of course he can claim a partition.⁸ Tenancy in common may also be created by purchase or sale. Thus, where a married woman purchased land in part with money belonging to her separate funds, and in part with money belonging to the community funds, she becomes a tenant in common of the land, with her husband in proportion of her separate estate to the whole purchase price.⁹

§ 12. Agreements to Work Property on Shares.—Contracts for working property on shares as a rule, create co-

5. Hager v. Spect, 52 Cal. 579 (where owner of one-half conveys an undivided two-thirds); Stokes v. Stevens, 40 Cal. 391 (partnership property conveyed by one partner).

6. Ewald v. Corbett, 32 Cal. 493.

7. Cullen v. Sprigg, 83 Cal. 56, 23 Pac. 222; Lawrence v. Ballou, 37 Cal. 518; Schenk v. Evoy, 24 Cal. 104.

8. Schenk v. Evoy, 24 Cal. 104.

9. Schuyler v. Broughton, 70 Cal. 282, 11 Pac. 719. See McClure v. Colyear, 80 Cal. 378, 22 Pac. 175,

holding that where a person leaves certain personal property, and dies intestate, and the widow invests the proceeds in certain real property, the children and the widow are tenants in common in the ownership of the fund and in the equitable ownership of the land in which the fund was invested; and the possession of the widow is the possession of the children through her. And see COMMUNITY PROPERTY, vol. 5, p. 261.

tenancies, as, for example, cropping contracts.¹⁰ The true test lies in the question whether there be any provision for dividing the specific products. If any such provision exists, whatever its form, a tenancy in common arises.¹¹ The same rules apply to other forms of working property on shares. Thus in a case where an owner of sheep let them to another for a specified time, with an agreement that the latter was to take care of and pasture and shear them, and sack the wool, and deliver the same to the owner of the sheep, or to a commission merchant to be sold, and that when the wool was sold the proceeds should be equally divided, it was held that the parties became tenants in common of the wool, and that its delivery was merely a step looking to a division to be had between them.¹² And where two persons present agree to work a mine with a third person, to bear a certain part of the expense, and to receive a certain share of the product of their labors, they become tenants in common of the mine with such third person.¹³

Use and Care of Property.

§ 13. Character and Effect of Possession Generally.—Tenants in common are seised per my and not per tout, and are entitled to the possession of the whole. This must

10. *Curtner v. Lyndon*, 128 Cal. 35, 60 Pac. 462; *Rohrer v. Babcock*, 126 Cal. 222, 58 Pac. 537; *Crocker v. Cunningham*, 122 Cal. 547, 55 Pac. 404; *Clarke v. Cobb*, 121 Cal. 595, 54 Pac. 74; *Jones v. Durrer*, 96 Cal. 95, 30 Pac. 1027; *Schneider v. Brown*, 85 Cal. 205, 24 Pac. 715; *Baughman v. Reed*, 75 Cal. 319, 7 Am. St. Rep. 170, 17 Pac. 222; *Schell v. Simon*, 66 Cal. 264, 5 Pac. 238; *Howell v. Foster*, 65 Cal. 169, 3 Pac. 647; *Sunol v. Molloy*, 63 Cal. 369; *Walls v. Preston*, 25 Cal. 59; *Knox v. Marshall*, 19 Cal. 617; *Bernal v. Hovious*, 17 Cal. 541, 79 Am. Dec. 147; *Moosios v. Ruseconi*, 37 Cal. App. 471, 174 Pac. 92; *Kloster v. Hawn*, 33 Cal. App. 100, 164 Pac. 402; *Adams v. Thornton*, 5 Cal. App. 455, 90 Pac. 713; *Adams v. Thornton*, 7 Cal. Unrep. 219, 82 Pac. 215; *McDermott v. Apgar*, 1 Cal. Unrep. 149. See for a full discussion of this subject, **CROPS**.
11. *Bernal v. Hovious*, 17 Cal. 541, 79 Am. Dec. 147.
12. *Hewlett v. Owens*, 50 Cal. 474.
13. *Henderson v. Allen*, 23 Cal. 519. See **MINES AND MINERALS**.

be so because no one of them can certainly state which part of the property is his own; and further, a tenant in common is not seised per my et per tout, for such a tenure would make him a joint tenant.¹⁴ Tenants in common, hold the common land by unity of possession, and each of them has the right to enter upon and occupy the whole and every part thereof. This being so, such a tenant has no right to exclude his cotenant from any portion of the common lands.¹⁵ So a tenant in common of an undivided portion of the property is entitled to the possession of the whole thereof as against all persons except his cotenants.¹⁶

As each and every tenant in common has the right to enter upon and occupy the whole of the property in common, it logically follows that the possession of one is possession for all. So long as one of several tenants remains in possession, as he is presumed to hold for himself and for his cotenant, his acts of ownership are naturally construed as evidence of the possession of both.¹⁷ And each has a right to assume that the possession of his cotenant is his own possession, until informed to the contrary, either by express notice, or by acts and declarations which may be equivalent to notice.¹⁸ The presumption is that the possession of one cotenant is amicable until the contrary is shown.¹⁹ There being nothing to indicate a dis-

14. Lytle Creek W.-Co. v. Perdew, 65 Cal. 447, 4 Pac. 426.

15. Lytle Creek W. Co. v. Perdew, 65 Cal. 447, 4 Pac. 426; Tevis v. Hicks, 38 Cal. 234; Carpentier v. Webster, 27 Cal. 524; Wolf v. Fleischacker, 5 Cal. 244, 63 Am. Dec. 121.

While a cotenant can at any moment enter into equal enjoyment of the possession of another cotenant, his neglect to do so may be regarded as an assent to the sole occupation of the other. Pico v. Col-

umbet, 12 Cal. 414, 73 Am. Dec. 550.

16. Mahoney v. Van Winkle, 21 Cal. 552; Hart v. Robertson, 21 Cal. 346; Touchard v. Crow, 20 Cal. 150, 81 Am. Dec. 108; Knox v. Marshall, 19 Cal. 617. See, also, *infra*, § 35.

17. Packard v. Moss, 68 Cal. 123, 8 Pac. 818.

18. Aguirre v. Alexander, 58 Cal. 21; Tabler v. Peverill, 4 Cal. App. 671, 88 Pac. 994.

19. Tully v. Tully, 71 Cal. 338, 12 Pac. 246; McNeil v. First Congre-

proportion in the shares of the tenants, they will be deemed to be equal.²⁰

§ 14. Exclusive Possession by One Tenant.—While the possession of one tenant in common is possession for all, this effect ceases when the possession of one becomes adverse to the others.¹ However, one tenant cannot by mere exclusive possession acquire the title of his cotenant;² and this is true even if the possession of one, as a tenant in common, is not disturbed by his cotenants.³ As pointed out elsewhere in this work, the tenant in common out of possession, has a right to assume that the possession of his cotenant is his possession until informed to the contrary, either by express notice or by acts and declarations, which may possibly be equivalent to notice.⁴

§ 15. Extent and Limitations of Use and Care—Waste. Cotenants have the right to the enjoyment of the estate, and to do any acts in this connection which are a legitimate exercise of the right. Thus, if the common property is timber land, each tenant has the right to cut timber and dispose of it, at least to an extent corresponding to his share of the estate.⁵ And since, from the very nature of mining property, it is valuable only because of the mineral it is supposed to contain, each of the cotenants may work it, without being guilty of waste. The cotenants out of possession may at any time enter into an equal enjoyment

gational Society, 66 Cal. 105, 4 Pac. 1096; *Olney v. Sawyer*, 54 Cal. 379; *Carpentier v. Mendenhall*, 28 Cal. 484, 87 Am. Dec. 135.

20. *Hardenbergh v. Bacon*, 33 Cal. 356.

1. *Colman v. Clements*, 23 Cal. 245; *Partridge v. McKinney*, 10 Cal. 181. See *ADVERSE POSSESSION*, vol. 1, p. 542 et seq., as to adverse possession between cotenants.

2. *Faubel v. McFarland*, 144 Cal. 717, 78 Pac. 261.

3. *McCauley v. Harvey*, 49 Cal. 497.

4. And see *ADVERSE POSSESSION*, vol. 1, p. 544, as to ouster of cotenant, and cases there cited.

5. *McCord v. Oakland Q. Min. Co.*, 64 Cal. 134, 49 Am. Rep. 686, 27 Pac. 863; *Hihn v. Peck*, 18 Cal. 640. See note, 2 A. L. R., p. 995, as to right of tenant in common to cut and sell timber.

of their possession, their neglect to do so being regarded as an assent to the sole occupation of the other.⁶ As a further application of these principles, tenants in common of water rights are entitled to use an amount of water in proportion to their share of interest in the land.⁷ But while each cotenant has an equal right to an enjoyment of the estate, his enjoyment thereof must be in accordance with the nature and character of the property, and he can do no acts which permanently injure the estate.⁸

§ 16. Duty to Make Repairs and Pay Taxes.—Although there are no decided cases in California on the liability of one cotenant to make repairs to the common property, the general rule is that he is not liable for failure so to do, the duty to repair being equal.⁹ The act of 1889 relating to tenancies in common waters¹⁰ provides in substance that where two or more persons construct a common ditch and use the same for the irrigation of their lands, each shall be liable to the other for the reasonable expense of maintaining and repairing the same in proportion to his share in the use of the water, and that if either neglects, after demand in writing, to pay his proportion of such expenses, he shall be liable therefor in an action by the party who has paid the same, with two per cent interest thereon from the time such demand was made. But a tenancy in common in a ditch cannot be construed as conferring any beneficial ownership in one of the tenants to any part of the ditch below the line of his side ditch; and any barren title which he may have therein, as a tenant in common, raises no implied promise to pay for improvements made

6. *McCord v. Oakland Q. M. Co.*, 64 Cal. 134, 49 Am. Rep. 686, 27 Pac. 863 (the rule is different, of course, as to trespassers). See TRESPASS; WASTE. See cases cited *infra*. See *infra*, § 27, as to right of tenant in common to lease the lands held in cotenancy.

7. *Verdugo Canon W. Co. v. Ver-*

dugo, 152 Cal. 655, 93 Pac. 1021. See WATERS.

8. *Scarborough v. Woodill*, 7 Cal. App. 39, 93 Pac. 383. See *infra*, § 34, as to enjoining waste. And see WASTE.

9. 5 Ruling Case Law, p. 824.

10. Stats. 1889, p. 202. See WATERS.

thereto without his consent.¹¹ A tenant in common of land is under no duty to pay the taxes assessed upon the undivided interest of his cotenants.¹²

§ 17. Compensation for Care of Property.—Ordinarily, one tenant in common is not entitled to compensation for his efforts in the care and management of the common property, in the absence of an agreement therefor between him and his cotenants.¹³ So where a tenant in common embarks with his cotenants in an enterprise to use the common property for the common benefit and at the common expense, he owes to the other tenants, if he proposes to reserve a part of the benefit to himself exclusively, the duty to inform the others fully in regard to it; and if he does not, he will be estopped to assert such claim after the others have incurred the expense.¹⁴ In a case where trustees managed the entire property held in common, it has been held that they are not entitled to compensation or fees for the management and care of an interest not connected with their trust.¹⁵ But it has been held that a tenant in common employed as agent by agreement between himself and his cotenants to take charge of land, and make sales thereof at certain prices, and for a commission at a specified rate, may sue his cotenants for the services rendered to the land outside of services rendered in selling it.¹⁶

§ 18. Liability of Cotenant for Profits.—The statutes of 4 and 5 Anne gave a right of action to one joint tenant, or tenant in common, against another who, as bailiff,

11. *Arroyo Ditch etc. Co. v. Bequette*, 149 Cal. 543, 87 Pac. 10. See *WATERS*, as to rights of tenants in common in ditches, etc.

12. *Oglesby v. Hollister*, 76 Cal. 136, 9 Am. St. Rep. 177, 18 Pac. 146.

13. *Howard v. Throckmorton*, 59 Cal. 79.

14. *Verdugo Canon W. Co. v. Verdugo*, 152 Cal. 655, 93 Pac. 1021.

15. *Blanckenburg v. Jordan*, 86 Cal. 171, 24 Pac. 1061.

16. *Thompson v. Salmon*, 18 Cal. 632.

received more than his proportional share of the profits from the common property. But these statutes are not in force in California.¹⁷ It is here established that, in ordinary cases, an action at law cannot be maintained by a tenant in common against a cotenant in sole possession of the premises, to recover a share of the profits derived from the estate by means of the labor and money expended by the party in occupation. The occupation by one tenant, so long as he does not exclude his cotenant, is but the exercise of a legal right. The money he invests at his own risk; if his transactions result in a loss he cannot call upon his cotenant for contribution, and if they result in a profit his cotenant is not entitled to share in such profits.¹⁸ It has been said that there is no equity in the claim of a tenant in common to share in the profits resulting from the labor and money of his cotenant, when he has expended neither, and has never claimed possession, and has never been liable for contribution in case of loss.¹⁹ Since each tenant is entitled to the occupation of the premises, and neither can exclude the other,²⁰ it is obvious that if the sole occupation of one could render him liable to the others, it would be in the power of the latter, by voluntarily remaining out of possession, to keep out his companion also, except upon the condition of the payment of rent. Thus, the enjoyment of the absolute legal right of one tenant would be dependent upon the caprice or indolence of his cotenants.¹

§ 19. Circumstances Creating Liability for Rents and Profits.—While the general rule is that a tenant in common is not liable to his cotenants for the profits derived directly by him from the cotenancy,² this rule does not

17. *Pico v. Columbet*, 12 Cal. 414, 73 Am. Dec. 550.

18. *McCord v. Oakland Q. Min. Co.*, 64 Cal. 134, 49 Am. Rep. 686, 27 Pac. 863.

19. *Pico v. Columbet*, 12 Cal. 414, 73 Am. Dec. 550.

20. See *supra*, §§ 13, 14.

1. *Pico v. Columbet*, 12 Cal. 414, 73 Am. Dec. 550.

2. See *supra*, § 18.

apply to rents received by a tenant in common from another for use of the common property.³ A tenant may, without being required to pay rent, derive profits directly from the use of the common property, for this is a right characteristic of cotenancy;⁴ but when he obtains rents and profits from a third party for the use of the common property, a different principle of law governs. It has been said that the operations may then be regarded as a partnership—the shareholders as partners being entitled to participate in the profits of the common property.⁵ Although no authority has clearly stated the basis of liability of a tenant in common to his cotenants in such cases, it would seem that the principles of equity which enjoin the highest good faith upon partners and trustees generally in the conduct of their common enterprises, and the further fact that the law is not disposed to look with favor upon special advantages obtained by one co-owner over another, might set bounds to the operation of the general rule of cotenancy, especially where there has been the slightest misrepresentation or concealment.⁶ It is in line with equity, of course, that for rents so received, the tenant may deduct the amount paid for taxes and for necessary and proper repairs and additions for the preservation of the property during the period for which the rents were collected.⁷ And it has been held that in an action for partition of a water ditch an account of the proceeds for water rates can be taken, and if one of the

3. *McCord v. Oakland Q. M. Co.*, 64 Cal. 134, 49 Am. Rep. 686, 27 Pac. 863; *Howard v. Throckmorton*, 59 Cal. 79; *Clark v. Jones*, 49 Cal. 618; *Abel v. Love*, 17 Cal. 233; *Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540.

4. See *supra*, § 18.

5. *Howard v. Throckmorton*, 59 Cal. 79.

6. See Civ. Code, §§ 2229, 2411; and see generally PARTNERSHIP;

TRUSTS. See ADVERSE POSSESSION, vol. 1, p. 543, and cases cited in note 5 to the point that, owing to the relations of trust and confidence ordinarily existing between cotenants, one may not acquire an adverse title to the lands held, without being charged as a trustee in the holding for the joint benefit of the tenancy.

7. *Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540.

tenants holds a mortgage on the interest of his cotenants, that can be adjusted in the action by an application of the proceeds of the mortgagor's interest toward the payment thereof.⁸ If one is in possession as a tenant in common under a wrongful or invalid title, it was decided in an early case that he may be compelled to account for the rents and profits received by him. Thus if one becomes a tenant through purchase at a judicial sale, and afterwards the sale is set aside, he may be compelled to account to the original tenants for the rents and profits received during the period he was a tenant in common.⁹

§ 20. Right to Value of Improvements and Repairs.— A tenant in common has no power to compel a cotenant to unite with him in erecting buildings or in making any other improvements on the common property.¹⁰ However, if a cotenant has assented to or authorized improvements to be made, he is answerable therefor, and a lien on his property for the amount thereof exists against him and his grantees with notice.¹¹ But there is no right in cotenants who make improvements on the common property to seize the property of a noncontributing member and so summarily work out their remedy for his failure to contribute to the cost of improvements made with his consent.¹² While a cotenant cannot compel the other tenants to contribute to the value of improvements made by him, in the absence of authorization, nevertheless, the cotenant in possession is entitled to deduct from the rents and profits received by him the cost of all proper expenditures made by him in working the property and developing it and protecting the common estate.¹³ He is also entitled

8. *Bradley v. Harkness*, 26 Cal. 69.

9. *Raun v. Reynolds*, 18 Cal. 275.

10. *Robinson v. Bledsoe*, 23 Cal. App. 687, 139 Pac. 245.

11. *Young v. Polaek*, 3 Cal. 208; *Robinson v. Bledsoe*, 23 Cal. App. 687, 139 Pac. 245.

12. *Robinson v. Bledsoe*, 23 Cal. App. 687, 139 Pac. 245.

13. *McCord v. Oakland Q. M. Co.*, 64 Cal. 134, 49 Am. Rep. 686, 27 Pac. 863; *Raun v. Reynolds*, 18 Cal. 275.

to reasonable allowance, to be deducted from the rents, for the use of his individual property, when such was required in order to let the premises themselves. But he is not entitled to allowances for the use of any individual property in connection with the premises not thus required, nor to any allowances for his personal services in taking charge of the property, renting the same, and collecting the rents.¹⁴

§ 21. Purchase of Outstanding Title or Encumbrance.—

A tenant in common cannot take advantage of any defect in the common title by purchasing an outstanding title or encumbrance and assert it against his companions in interest. Such a purchase is, notwithstanding his design to the contrary, for the common benefit of all the cotenants. The legal title acquired by him is held in trust for the others if they choose within a reasonable time to claim the benefit of the purchase by contributing or offering to contribute their proportion of the purchase money.¹⁵ But unless a cotenant makes his election to participate within a reasonable time, and contributes or offers to contribute his ratio of the consideration actually paid, he will be deemed to have repudiated the transaction and to have abandoned its benefits.¹⁶ Pursuant to this rule in an action by one tenant against others to be let into posses-

14. *Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540. And see *supra*, p. 15.

15. *Stevenson v. Boyd*, 153 Cal. 630, 19 L. R. A. (N. S.) 525, 96 Pac. 284; *Jenkins v. Frink*, 30 Cal. 586, 89 Am. Dec. 134. See *Mills v. Tukey*, 22 Cal. 373, 83 Am. Dec. 74, holding that the rule that a tenant in common cannot acquire a tax title and set it up as against his cotenant rests upon the doctrine of constructive fraud, and is not applicable to a case where the deed can be attacked only for actual

fraud. See *infra*, § 22, as to purchases on judicial sales. See note, 6 A. L. R., p. 297, as to effect of purchase on foreclosure sale of mortgage, by tenant in common in possession.

16. *Stevenson v. Boyd*, 153 Cal. 630, 19 L. R. A. (N. S.) 525, 96 Pac. 284; *Mandeville v. Solomon*, 39 Cal. 125.

An offer of contribution by a tenant in common to reimburse his cotenant who has purchased an outstanding title to the common property must be made promptly; an

sion, the defendants cannot justify an ouster of the plaintiff by setting up an outstanding title (though it might be the true title) purchased by them while in possession under the common title.¹⁷ And in an action of ejectment by one tenant against another, the latter cannot invoke the maxim *ex dolo malo non oritur actio*; nor defend upon the ground that he and the plaintiff entered upon the premises wrongfully in the first instance. A tenant in common, entering and remaining in possession as such, cannot, as against his cotenant, assail the common title, or call it in question.¹⁸

§ 22. Purchase at Judicial or Tax Sale.—The reasons which prevent a cotenant from purchasing and asserting an outstanding title do not apply with equal, and generally not with any force against his purchasing the title of his cotenants, whether the same be voluntary or involuntary. The reason is that it is only while a privity amounting to a community of interest exists between the parties, with a corresponding duty on each to protect the others, that equity will not countenance the acquisition by one of a title adverse to the other. The rule ceases with the reason and the reason ceases at once when all those interests and all the privity and community interests have been terminated under their judicial sale. So unless some fraud can be shown to have been perpetrated, or some superior knowledge taken advantage of, a tenant in common may purchase at an execution or judicial sale the moiety of any of his cotenants, and he may retain and assert the title thereby acquired as fully as though he were a stranger to the judgment defendant.¹⁹ Under sec-

offer made years after the acquisition of the title, and after the land has doubled or trebled in value, does not appeal to equity; *McNutt v. Nuevo Land Co.*, 167 Cal. 459, 140 Pac. 6.

17. *Olney v. Sawyer*, 54 Cal. 379.

18. *Olney v. Sawyer*, 54 Cal. 379; *Bornheimer v. Baldwin*, 42 Cal. 27.

19. *McNutt v. Nuevo Land Co.*, 167 Cal. 459, 140 Pac. 6, per *Henshaw, J.*; *Mills v. Tukey*, 22 Cal. 373, 83 Am. Dec. 74. And see note, 6 A. L. R., p. 306, citing au-

tion 701 of the Code of Civil Procedure, a redemption of land by a tenant in common, after a sale under a foreclosure of mortgage executed by all the cotenants, puts an end to the sale, and restores the parties to their original title. The tenant in common making such redemption acquires thereby an equitable lien upon the interests of his cotenants for the payment of their several proportions of the money paid by him in effecting the redemption; and a court of equity will enforce such lien by decreeing that in default of payment, the interest of the cotenant be sold, and the proceeds applied to the extinguishment of the lien.²⁰

If a tenant in common permits the common property to be sold for nonpayment of taxes and buys it, either in person or through another, his purchase is considered a mode of paying the taxes for himself and his cotenants.¹ If one is under any legal or moral obligation to pay the taxes, he cannot, by neglecting to pay them, and allowing the land in consequence of such right, to be sold, add to or strengthen his title by purchasing at the sale himself, or by subsequently buying from a stranger who purchased at the sale. Otherwise, it has been said, he would be allowed to gain an advantage from his own fraud or negligence in failing to pay the taxes. This the law does not permit, either directly or indirectly.² It has been held that an attempted purchase at a tax sale by one tenant of his cotenant's title, and the taking of a tax deed void on its face, purporting to convey the same, indicate a purpose by the purchaser to claim the whole title adversely to his cotenant.³

thorities to what is there termed the minority rule and which rule is that to which the cases in California on the point subscribe.

20. *Calkins v. Steinbach*, 66 Cal. 117, 4 Pac. 1103.

1. *Klumpke v. Henley*, 24 Cal. App. 35, 140 Pac. 313.

2. *Christy v. Fisher*, 58 Cal. 256.

3. *Oglesby v. Hollister*, 76 Cal. 136, 9 Am. St. Rep. 177, 18 Pac. 146.

§ 23. **Acts in Protection of Estate.**—One tenant in common may at any time protect the entire estate from injury or loss without calling to his aid the assistance of the other cotenants. He may resist an intruder, or evict a trespasser, renew an encumbrance, or redeem from a burden, and since his acts in this behalf are in the interest of and for the benefit of his cotenants, their authority therefor, if necessary, will be presumed. Although one tenant has no power to create encumbrances upon the entire estate, or to impose any burden upon the interest of his cotenants, he may, nevertheless, at any time protect the entire estate from injury or loss, and his acts inure to the benefit of his cotenants. Accordingly, it has been held that a protest against a proposed street improvement is not rendered ineffectual by reason of the fact that it was signed by only one of several cotenants of a lot fronting upon the proposed improvement.⁴

§ 24. **Forfeiture—Mining Claims.**—In order that a forfeiture may take place, there must be some person, natural or artificial, who is entitled to receive the benefit of the forfeiture when it occurs, and no forfeiture of real estate can take place for nonperformance of conditions, precedent or subsequent, unless there are two contracting parties who have, at the same time or successively, an interest in the estate upon which the condition is reserved, for the nonperformance of which the forfeiture is claimed. So, where several persons owning a tract of mining claims as tenants in common and acting under a company name, have not the capacity to take or hold, in the name of the company, the interest of any one or more of the tenants in common, by forfeiture. The reason for this is that tenants in common, acting under a company name, are incapable, in the company name, of taking and holding land by grant, or by any other means by which title to real estate would pass.⁵

4. Los Angeles Lighting Co. v. Los Angeles, 106 Cal. 156, 39 Pac. 535.

5. Wiseman v. McNulty, 25 Cal. 230. See MINES AND MINERALS.

Contracts, Leases, Sales and Encumbrances.

§ 25. **In General.**—A tenant in common property has the right to dispose of his own undivided share, but he may not sell the whole property, nor any portion thereof, except his own, and if he undertakes to dispose of any larger interest his co-owners are not bound thereby.⁶ So where, under a contract of sale of their land, cotenants tender a deed, and demand payment of the purchase price which is refused, they are not bound by the act of one of them in accepting the purchase money and promising a deed, after the right to the deed had been forfeited. The rule as to partners that one is the agent for the whole firm, and may, in such capacity, bind them by his acts, does not apply in cotenancies.⁷ Though a deed by one cotenant of the common property does not convey the legal title, where two persons hold lands as tenants in common, a deed by one of them purporting to convey the entire tract is sufficient to give color of title, and possession thereunder by the grantee claiming title to the whole premises, if continued for a sufficient period, will bar the right of the latter to recover.⁸ While a cotenant may, of course, convey the legal title to the common property if he has been authorized so to do by the other tenants, if the authority is not sufficient and he contracts in his own name, the contract and a conveyance in pursuance thereof bind only his interest in the land.⁹

6. *People v. Marshall*, 8 Cal. 51 (stating that this is the rule also as to joint tenants). *Waterford Irr. Dist. v. Turlock Irr. Dist.*, 33 Cal. App. Dec. 666, 194 Pac. 757.

A tenancy in common results when each cotenant sells out or encumbers his interest at pleasure, regardless of the knowledge or consent of the co-owners. *Bradley v. Harkness*, 26 Cal. 69.

7. *Pearis v. Covillaud*, 6 Cal. 617, 65 Am. Dec. 543.

8. *Frick v. Sinon*, 75 Cal. 337, 7 Am. St. Rep. 177, 17 Pac. 439; *Packard v. Moss*, 68 Cal. 123, 8 Pac. 818. See ADVERSE POSSESSION, vol. 1, p. 574.

9. *Mora v. Murphy*, 83 Cal. 12, 23 Pac. 62. See VENDOR AND PURCHASER.

§ 26. **Contracts With Third Persons.**—A tenant in common has no power to bind any of his cotenants by contract.¹⁰ And no action of one of them can impair the rights of the others.¹¹ The rights of the parties are distinct and not identical, and the acts and admissions of one are not, by virtue of that relation, the acts or admissions of the other. Of course, if one is the agent of his cotenant, he may bind both, but it has been held that a husband cannot, within this rule, be presumed to be the agent of his wife in the management of her separate property from the mere fact of the marital relation.¹² Although a husband and wife may acquire property in cotenancy, when they join as coplaintiffs to recover damages for a trespass thereon, a settlement of damages made by the husband, without the knowledge, consent, or acquiescence of the wife, binds only his interest, and is not binding on that of the wife. In such a case, the defendant can show a settlement with one or both, or with one for both, but he cannot avoid liability to one tenant by showing payment to the other without the knowledge or consent or subsequent acquiescence of that other.¹³

§ 27. **Lease.**—Not only may a tenant in common enjoy the common estate,¹⁴ but, by either lease or license, he may confer upon another person the right to occupy and use it as fully as such lessor or licensor himself might if such lease or license had not been granted.¹⁵ And if a

10. *Nielson v. Gross*, 17 Cal. App. 74, 118 Pac. 725.

11. *Mahoney v. Van Winkle*, 21 Cal. 552.

One tenant in common or joint tenant cannot create an easement in the common estate against his cotenant; *Pfeiffer v. Regents of University*, 74 Cal. 156, 15 Pac. 622; *Waterford Irr. Dist. v. Turlock Irr. Dist.*, 33 Cal. App. Dec. 666, 194 Pac. 757.

12. *Wagoner v. Silva*, 139 Cal. 559, 73 Pac. 433. See **HUSBAND AND WIFE**.

13. *Schumacher v. Truman*, 134 Cal. 430, 66 Pac. 591; *Nielson v. Gross*, 17 Cal. App. 74, 118 Pac. 725.

14. See *supra*, §§ 13-15.

15. *Lee Chuck v. Quan Wo Chong*, 91 Cal. 593, 28 Pac. 45; *Blankenburg v. Jordan*, 86 Cal. 171, 24 Pac. 1061; *Ord v. Chester*, 18 Cal. 77;

cotenant expel such licensee or lessee, he may be found guilty of a trespass.¹⁶ The proposition is clear that a lease of an entire tract made by one tenant in common is binding on the other tenants when ratified by them, and one method of ratification is the acceptance of benefits under the lease by the cotenants.¹⁷

§ 28. Sale of Part of Property.—During the lives of cotenants the rules regulating a transfer of their interest are substantially the same, whether they hold in joint tenancy or in common. Neither one can do any act to the prejudice of his cotenants in their estate. Hence, a conveyance by one tenant of a parcel of a general tract owned by several is inoperative to impair any of the rights of his cotenants. The conveyance must be subject to the ultimate determination of their rights, and upon obvious grounds. One tenant cannot appropriate to himself any particular parcel of the general tract; for, upon a partition, which may be claimed by the cotenants at any time, the parcel may be entirely set apart in severalty to a cotenant. He cannot defeat this possible result while retaining his interest, nor can he defeat it by the transfer of his interest. He cannot invest his grantee with rights greater than he possesses. The grantee must take, therefore, subject to the contingency of the loss of the premises, if, upon the partition of the general tract, they should not be allotted to the grantor.¹⁸ Subject to this contingency, however, the conveyance is valid, and passes the interest of the grantor. The deed is ineffectual against

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Waterford Irr. Dist. v. Turlock Irr. Dist., 23 Cal. App. Dec. 666) 194 Pac. 757.

16. Lee Chuck v. Quan Wo Chong, 91 Cal. 593, 28 Pac. 45.

17. Beashe v. General Petroleum Corp., 81 Cal. Dec. 753) 199 Pac. 22.

18. Gates v. Salmon, 35 Cal. 576, 95 Am. Dec. 139 (holding that the conveyance does not sever the spe-

cial tract from the general tract of which it is a part, so far as the cotenants of the grantor are concerned, and the whole tract is subject to partition, so far as the cotenants of the grantor are concerned, as it would be had the conveyance of the special tract not been made). Stark v. Barrett, 15 Cal. 361.

the assertion by a cotenant of his interest in a suit for partition of the general tract, but is good against all others. Until such partition, the grantee will be entitled to the use and possession as cotenant, in the parcel conveyed, with the other owners.¹⁹ The grantee in such a case occupies the precise position, so far as title is concerned, which his grantor or grantors held in the land described in the deed, and becomes a tenant in common, so far as the land conveyed is concerned, with those tenants who did not unite in the deed.²⁰ It does not follow, however, that because one of two cotenants can convey his estate in a part of the property so held, therefore the rights of his cotenant are affected. This cotenant will still have the same interest in every part, and in the whole of the property. He can still compel partition, and may have his share set off to him in severalty, in the same manner as he could have done had no conveyance been made.¹ Nor can a grantor who makes such a conveyance be estopped to assert his title as a tenant in common in the portion of the larger tract which he did not wholly convey, but of which he conveyed only an undivided portion.²

§ 29. Mortgage or Encumbrance by One Cotenant.—

Where real property is assessed for taxes to two or more persons, the legal presumption is that all are joint owners. Being the common property of all, one of the joint owners as a tenant in common cannot do any act in hostility to the common title. He cannot, by his act alone, and without special authority, encumber or charge the estate of his cotenants. If, for example, he signs a petition for the opening of a street over the common lands, which will lead to assessment to pay the cost, his signature affects only his own estate; he does not represent or bind the es-

19. *Stark v. Barrett*, 15 Cal. 361.
See PARTITION.

1. *Stark v. Barrett*, 15 Cal. 361.

2. *Gordon v. San Diego*, 101 Cal.

20. *Gates v. Salmon*, 46 Cal. 361. 522, 40 Am. St. Rep. 73, 36 Pac. 18.

tate of his cotenant.³ One joint owner or tenant in common cannot create an easement in the common estate as against his cotenant, though probably he, himself, would be estopped to dispute a grant thus made. For the same reason, one tenant cannot, when conveying his own interest in the common property, create by reservation a personal and separate easement over the same for the benefit of his adjoining separate property.⁴ While certain authorities⁵ seem to be opposed to this rule, it was customary at one time for individual tenants in common of Mexican grants to convey, or to undertake to convey, their interests in particular parts of the common land by metes and bounds called "special locations." These early decisions held (1) that the grants of such special locations were good as against valid trespassers; and (2) that they were not absolutely void as against the cotenants of the grantor, but were taken subject to the cotenant's right of partition of the whole tract, and might be lost to the grantees when such partition took place. But these early cases arose out of the particular circumstances of the time, and are not to be extended further than the limits of their express term. And so it has been held that inasmuch questions as to easements did not arise in these early cases, the grants being of all the interest or estate of the grantor in the whole land described in the conveyance, the general rule applicable to easements is not altered.⁶

§ 30. Attachment and Execution.—Where a sheriff has an attachment against one of several tenants of property held in cotenancy, he may levy on that tenant's interest therein; and to effect this, may take and retain possession of the entire property; but he can sell on execution under the judgment that may be recovered in the action, only the undivided interest of the tenant against whom he

3. Mulligan v. Smith, 59 Cal. 206.

95 Am. Dec. 139; Stark v. Barrett,

4. Pfeiffer v. Regents of University, 74 Cal. 156, 15 Pac. 622.

15 Cal. 361.

5. Gates v. Salmon, 35 Cal. 576,

6. Pfeiffer v. Regents of University, 74 Cal. 156, 15 Pac. 622.

holds the attachment, and the purchaser at the sale becomes a tenant in common with the other owners of the property.⁷ However, if several persons are the owners of property as tenants in common, and an action is commenced against all of them as individuals, on a money demand, a sale on execution does not convey title to the interest of the defendants who were not served with process, and who did not appear in the action.⁸ Where the assignee of the owner's interest in the property has satisfied all existing liens against it, he thereby becomes the owner thereof as against the sheriff, and, being in possession thereof as a tenant in common, no subsequent levy of the sheriff upon such interest and sale thereof under execution can affect his rights as such assignee.⁹ If a sheriff, on a writ of attachment against one tenant, levies on and takes into his possession the personal property of the tenants in common, and puts the tenant who was sued in possession as his keeper, the keeper cannot make a partition so as to destroy the tenancy, nor can the sheriff do it without the consent of the plaintiff in the action.¹⁰ It has been held to be the duty of a sheriff, in the execution of a writ of assistance, to place the purchaser on foreclosure of mortgage of an estate in common in the possession of every part and parcel of the land, jointly with the other tenants in common. But in the execution of the writ, the sheriff cannot remove any of the tenants in common who hold under a title derived from a source independent of him through whom the purchaser claims.¹¹

7. Bernal v. Hovious, 17 Cal. 541,
79 Am. Dec. 147.

8. Wiseman v. McNulty, 25 Cal.
230.

9. Curtner v. Lyndon, 128 Cal. 35,
60 Pac. 462.

10. Veach v. Adams, 51 Cal. 609.
See PARTITION.

11. Tevis v. Hicks, 38 Cal. 234.
See ASSISTANCE, WRIT OF, vol. 3,
p. 332.

IV. REMEDIES BETWEEN COTENANTS.

§ 31. **In General.**—Certain actions may be maintained between joint tenants or tenants in common, as, for example, actions for partition,¹² for waste,¹³ to determine adverse claims,¹⁴ for a forcible entry or detainer,¹⁵ for an accounting under certain circumstances, for rents and profits derived by one tenant in common from third parties for the use of the common property,¹⁶ and to determine the fact of death as affecting cotenancies and joint tenancies.¹⁷ Unless the acts of a cotenant or joint tenant involve a denial and a usurpation of the correlative rights of the co-owners, actions by one tenant in common do not lie against another for trespass,¹⁸ or ejection,¹⁹ or for waste,²⁰—the reason being that such remedies are not ordinarily consistent with the right of joint tenants and tenants in common to the possession of the common property.¹

It has been held that a contract between tenants in common to sell the whole of their land after a minimum price is reached, or before when a maximum fixed price is reached, or thereafter when a further price is agreed upon, and to pay out of the proceeds of any sale a certain sum to one of them, and to divide equally the remainder, can be specifically enforced by one of the cotenants only when the terms or conditions of the agreement so to sell are met, and within the time stipulated.²

12. See PARTITION.

13. See *infra*, § 34.

14. See *infra*, § 35.

15. See *infra*, § 36.

16. See *infra*, § 32; and see *supra*, §§ 18, 19.

17. See Code Civ. Proc., § 1723. See *supra*, § 7, for discussion of this proceeding in reference to joint tenancies.

18. *Woodbeck v. Wilders*, 18 Cal. 131.

19. See *infra*, § 35.

20. See *infra*, § 34.

1. See *supra*, § 13, as to the right of all cotenants to possession of the common property.

2. *Sefton v. Roach*, 4 Cal. App. 60, 87 Pac. 252.

§ 32. **Accounting—Rents and Profits.**—While no remedy, either at law or in equity, is given for mere sole use and occupation by one of the tenants in common,³ equity will sustain an action of accounting in favor of one tenant in common, act of possession, against his cotenant in possession, for the rents and profits, in those cases where the amount is a collateral incident to a claim for partition, and the rents and profits claimed are due from the defendants, either as a tenant of the interest of the plaintiff, or were received by him when they belonged to both parties, or were the proceeds of their joint labor or expenditures. So an action of accounting lies for rents received by a cotenant from occupants of the premises, and the rents are not the fruit of the labor of the cotenant while in exclusive possession.⁴ But a tenant in common who has been ousted by his cotenant cannot recover the increased amount of the value of the rents and profits arising from valuable permanent improvements put upon the premises by such cotenant.⁵ If a tenant in common or a joint tenant, working the common property, can be required to account to his cotenants for a share of the profits, this can be done only in an action brought for the purpose of an accounting; an action for damages on the ground of waste is not a proper action for an accounting.⁶ When a ten-

3. *Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540. See as to right to sole use, *supra*, § 14; *Pico v. Columbet*, 12 Cal. 414, 73 Am. Dec. 550.

4. *Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540.

By the common law one tenant in common has no remedy against another who exclusively occupies the premises and receives the entire profits, unless he is ousted from possession (when ejectment may be brought), or unless the other is acting as bailee of his interest by agreement, when the action of ac-

count will lie; *Pico v. Columbet*, 12 Cal. 414, 73 Am. Dec. 550.

A tenant in common who has recovered in ejectment may maintain an action for mesne profits against his cotenant. *Carpentier v. Mitchell*, 29 Cal. 330. See *infra*, § 35, as to ejectment.

5. *Carpentier v. Mitchell*, 29 Cal. 330. See *supra*, § 20, as to improvements and repairs.

6. *McCord v. Oakland Q. M. Co.*, 64 Cal. 134, 49 Am. Rep. 686, 27 Pac. 863. See *Howard v. Throckmorton*, 59 Cal. 79, holding that where

ant out of possession sues the tenant in possession for rents, issues and profits, it is essential to aver that the latter occupied the premises upon an agreement with the former as receiver or bailiff of his share of the rents and profits.⁷ A plaintiff who bases his right to an accounting upon an allegation of a partnership between himself and the defendant, is not entitled to such relief upon the mere proof of a tenancy in common.⁸

§ 33. Action for Possession—Trover.—It is an established principle of the law that a tenant in common cannot maintain an action against his cotenant for the recovery of the common property or even for his undivided interest therein,⁹ for each tenant in common has an equal right to the possession of the whole.¹⁰ Therefore, an action of replevin, or of claim and delivery, for the common property, is not maintainable by one tenant against another. Nor is trover maintainable unless there has been such a loss, destruction, or disposal of the property as amounts to a conversion; or the property be divisible in its nature and ascertainable by measurement, weight, or count. In such a case a tenant may demand of his cotenants, having possession of the whole, his share, and on a refusal, or a conversion, he may sue in trover.¹¹

one of several tenants in common conveys his interest to a third party to secure a debt, both the grantor and grantee are necessary parties to an action between the cotenants for an accounting. See ACCOUNTS AND ACCOUNTING, vol. 1, p. 182.

7. *Plass v. Plass*, 122 Cal. 3, 54 Pac. 372; *Pico v. Columet*, 12 Cal. 414, 73 Am. Dec. 550 (holding that in an action of account to recover a share of the profits of the estate, filed by one tenant in common out of possession against another who is in possession, the complaint should allege that the defendant occupied the premises upon an

agreement with the plaintiff as receiver or bailiff of his share of the profits).

8. *Noonan v. Nunan*, 76 Cal. 44, 18 Pac. 98.

9. See CLAIM AND DELIVERY, vol. 5, p. 162.

10. See supra, § 13 et seq.

11. *Balch v. Jones*, 61 Cal. 234 (holding, however, that trover is not maintainable upon mere proof of demand and refusal). *Adams v. Thornton*, 5 Cal. App. 455, 90 Pac. 713.

One tenant in common cannot maintain either trover or replevin against his cotenant for a sale of

§ 34. Injunction to Restrain Waste.

“If a . . . joint tenant or tenant in common of real property, commit waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be a judgment for treble the damages.”¹²

Waste is not defined by the code.¹³ By the common law one tenant in common was not liable to his cotenant in an action for waste, for the injury done to their common estate. Nevertheless, under the code, injunction will lie under certain circumstances to restrain waste by a tenant in common, as for instance, where such tenant is committing an irreparable injury to the property of the cotenancy.¹⁴ However, injunctions are but rarely granted to restrain a cotenant from exercising control over the joint property. To authorize an injunction, it should appear either that the defendant is insolvent, or that the act sought to be enjoined will effect a partial or entire destruction of the estate.¹⁵ An injunction will not issue to restrict a cotenant from the legitimate enjoyment of the estate, since to interfere with the exercise of that right would be to deny him an essential element of the title—that is, an undivided occupation.¹⁶

§ 35. Action to Determine Adverse Claims—Ejectment.

“Any two or more persons claiming any estate or interest in lands under a common source of title, whether holding as tenants in common, joint tenants, coparceners, or in severalty, may unite in an action against any person claiming an adverse estate or interest therein, for the pur-

the common property which he is authorized by contract to make, nor will it lie against the person to whom the cotenant sold the property. *Hewlett v. Owens*, 50 Cal. 474. See TROVER AND CONVERSION.

12. Code Civ. Proc., § 732.

13. *Scarborough v. Woodill*, 7 Cal. App. 39, 93 Pac. 383. See WASTE.

14. *Schneider v. Brown*, 85 Cal.

205, 24 Pac. 715; *Scarborough v. Woodill*, 7 Cal. App. 39, 93 Pac. 383 (stating the rules). See INJUNCTIONS; WASTE.

15. *Hihn v. Peck*, 18 Cal. 640; *Scarborough v. Woodill*, 7 Cal. App. 39, 93 Pac. 383.

16. *McCord v. Oakland Q. M. Co.*, 64 Cal. 134, 49 Am. Rep. 686, 27 Pac. 863. See *supra*, § 14.

pose of determining such adverse claim, or of establishing such common source of title, or of declaring the same to be held in trust, or of removing a cloud upon the same."¹⁷

A tenant in common, or a joint tenant, who has been ousted from the common property, may maintain an action of ejectment against the cotenant who has ousted him.¹⁸ However, in such a case, he cannot recover possession of the entire premises to the exclusion of the defendant cotenants, nor can he recover his undivided portion without proof of an ouster.¹⁹ There is considerable variety of opinion as to what acts constitute an ouster so as to authorize the ousted tenant to maintain an action of ejectment. But speaking generally, if the act of a tenant in common manifests an intention on his part to hold exclusively for himself it is equivalent in law to an ouster. But such an act must be "manifested" to the person against whom an ouster is directed,²⁰—a mere secret intention to oust a cotenant is not sufficient.¹ One tenant in common may be guilty of an ouster of a cotenant by excluding him from a portion less than the whole of the property held in common.² And a party who has been ousted by his cotenant may recover the damages resulting from such ouster, as well as when ousted by an entire stranger to the land. But he can recover damages only from the time of the actual ouster.³

Demand.—To maintain ejectment against a tenant in common there must have been a demand for entry by the

17. Code Civ. Proc., § 381.

18. *Lawrence v. Ballou*, 37 Cal. 518.

19. *Ewald v. Corbett*, 32 Cal. 493.

20. See ADVERSE POSSESSION, vol. 1, p. 544, and cases there cited.

1. See ADVERSE POSSESSION, vol. 1, p. 544, and cases cited in notes 11 and 12; and see enumeration on page 545 of the same article of particular acts constituting an ouster.

The law will not presume that one tenant in common intends to oust another; the intent must be established by proof.

2. *Carpentier v. Webster*, 27 Cal. 524.

3. *Miller v. Myers*, 46 Cal. 535; *Carpentier v. Mitchell*, 29 Cal. 330; *Carpentier v. Mendenhall*, 28 Cal. 484, 87 Am. Dec. 135. See EJECTMENT.

tenant out of possession, and a refusal by the tenant in possession.⁴ But the action will not fail on the ground that there was no demand made previous to the commencement of the action, if the defendant alleges that he holds the premises in adverse possession.⁵ A refusal after a proper demand by a tenant in common, in possession, to admit his cotenant, is itself an ouster, and dispenses with further proof on that point.⁶

§ 36. Forcible Entry and Detainer.—While a joint tenant or tenant in common may maintain an action of forcible entry and detainer against a cotenant who has ejected him, the right to restitution is restricted to his right of reinstatement to the common possession only. Hence, a judgment the effect of which is to oust the cotenant and give the plaintiff the exclusive right to the possession of the property, is erroneous.⁷ In a case where two persons operate a mine as tenants in common with another who is out of possession, the proper remedy of the person out of possession, if excluded from the premises by the two other tenants, is not the action of unlawful detainer.⁸ And in an early case it was held that one tenant in common cannot maintain an action of forcible entry and detainer against another, for holding over. He must first resort to a court of equity for a partition of the land in dispute.⁹

4. Packard v. Johnson, 57 Cal. 180; Packard v. Johnson, 51 Cal. 545; Carpentier v. Mendenhall, 28 Cal. 484, 87 Am. Dec. 135.

5. Carpentier v. Mendenhall, 28 Cal. 484, 87 Am. Dec. 135.

6. Greer v. Tripp, 56 Cal. 209 (S. C., sub nom. "Freer" v. Tripp, 72 Cal. Unrep. 91); Miller v. Myers, 46 Cal. 535; Carpentier v. Mendenhall, 28 Cal. 484, 87 Am. Dec. 135.

7. Noble v. Manatt, 42 Cal. App. 496, 183 Pac. 823, per Shaw, J. See ASSISTANCE, WRIT OF, vol. 3, p. 339, as to writ of assistance against one of the tenants in common, and the possession of the petitioner thereunder.

8. Ross v. Heintzen, 36 Cal. 313; Henderson v. Allen, 23 Cal. 519.

9. Lick v. O'Donnell, 3 Cal. 59, 58 Am. Dec. 383.

V. ACTIONS BY OR AGAINST THIRD PERSONS.

§ 37. In General.

“All persons holding as tenants in common, joint tenants, or coparceners, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party.”¹⁰

Under this code provision tenants in common are entitled to maintain an action for damages for an injury to the common property.¹¹ And it has been held that a tenant in common may alone bring an action to protect the common property from injury or destruction.¹² And so, under section 384 of the Code of Civil Procedure, one cotenant may maintain an action of unlawful detainer without joining the other cotenants. And this is a civil action within the meaning of the act allowing one or more of several tenants in common to bring an action for the protection of the common property.¹³ Construing the effect of the code, it has been held that where a homestead was declared upon the wife's separate property for the joint benefit of herself and husband, she may sue alone and the husband is not a necessary party, for the protection of any right she may have, whether the homestead be considered as creating a joint tenancy or not, as against one having no interest in the lands.¹⁴

10. Code Civ. Proc., § 384.

11. *Harlow v. Standard Imp. Co.*, 145 Cal. 477, 78 Pac. 1045.

Tenants in common may join as plaintiffs in an action for damages for the sale of land, under an erroneous judgment, which is afterward reversed. *Reynolds v. Hosmer*, 45 Cal. 616.

12. *Fortain v. Smith*, 114 Cal. 494, 46 Pac. 381.

Actions for the diversion of waters of ditches are in the nature of actions for the abatement of

nuisances, and may be maintained by tenants in common in a joint action. *Smith v. Stearns Rancho Co.*, 129 Cal. 58, 61 Pac. 662. See *Conde v. Dreisam Gold Min. Co.*, 3 Cal. App. 583, 86 Pac. 825, holding that where two or more persons are jointly interested in the funds secured by a mortgage, they must all unite in foreclosing it.

13. *Bowers v. Cherokee Bob*, 45 Cal. 495.

14. *Prey v. Stanley*, 110 Cal. 423, 42 Pac. 908.

Prior to the enactment of section 384 of the Code of Civil Procedure and prior to the statutes upon which that section was based,¹⁵ the rule was that though cotenants should in general be joined in actions for the protection of the common property, they must sue severally in real actions, as they all have separate titles.¹⁶

§ 38. **Ejectment.**—A joint tenant, or tenant in common, may maintain an action of ejectment for the entire property against anyone other than his cotenants, without joining the cotenants as parties.¹⁷ So, a tenant in common may sue one in possession of the common property under an adverse claim, and, if he represents the better title, recover the premises.¹⁸ And if one tenant in common of the demanded premises brings ejectment against a defendant who entered without title, the fact that the defendant has acquired, by adverse possession, the title of the tenants in common who are not made parties plaintiff, does not preclude the plaintiff from recovering the whole of the premises.¹⁹ Likewise, the grantee of a tenant in common may recover in ejectment the whole of the property, as against all persons except the original cotenants and their

15. Stats. 1867-68, p. 62.

16. Parke v. Kilborn, 8 Cal. 77, 68 Am. Dec. 310 (holding that the rule which determines whether tenants in common should sue jointly or severally depends upon the nature of their interest in the matter or thing which is in controversy; for injuries to their common property, as trespass quare clausum fregit, or nuisance, they should all be joined); De Johnson v. Sepulbeda, 5 Cal. 149; Throckmorton v. Burr, 5 Cal. 400.

17. Touchard v. Crow, 20 Cal. 150, 81 Am. Dec. 108; Newman v. Bank of California, 80 Cal. 368, 13 Am. St. Rep. 169, 5 L. R. A. 467, 22 Pac.

261; Christy v. Fisher, 58 Cal. 256; Morenhaut v. Wilson, 52 Cal. 263; Treat v. Reilly, 35 Cal. 129; Mahoney v. Van Winkle, 21 Cal. 552; Hart v. Robertson, 21 Cal. 346; Covillaud v. Tanner, 7 Cal. 38; Throckmorton v. Burr, 5 Cal. 400. See **EJECTMENT.**

18. Collier v. Corbett, 15 Cal. 183.

19. Chipman v. Hastings, 50 Cal. 310.

As a tenant in common may sue alone or with others to recover the common property, the executor of a deceased cotenant can unite with the cotenants of his testator in such an action. Touchard v. Keyes, 21 Cal. 202.

grantees.²⁰ If one of several tenants in common recover judgment in ejectment against an adverse claimant of the premises, the judgment determines the right of possession of the whole premises, and the effect of the recovery inures to the benefit of other cotenants not suing, so as to prevent the acquisition of title by adverse possession as against them pending the action.¹ In an action of ejectment to recover an undivided interest in the property of the cotenancy it is not necessary to make defendants in such action those who are in possession of such property, holding other undivided interests, and who claim no right to the interest sued for.² However, it has been suggested that it is the better practice to make all the cotenants parties to an action involving the property of the cotenancy.³

§ 39. Injunction Against Trespasser — Recovery of Profits.—Inasmuch as a tenant in common may maintain an action against a trespasser and recover possession of the whole estate held in common,⁴ it follows that he can take steps to protect the whole; for, as it has been said, it would be an anomaly in the law if such tenant could recover the whole property from a wrongdoer, and could not alone intervene to protect it from nuisances and trespasses which can be redressed by the preventive process of injunction.⁵ Although by force of the same argument it might be very reasonably contended that, as against a trespasser, a tenant in common should be allowed to re-

20. *Stark v. Barrett*, 15 Cal. 361.

1. *McCormick v. Marcy*, 165 Cal. 386, 132 Pac. 449; *Newman v. Bank of California*, 80 Cal. 369, 13 Am. St. Rep. 169, 5 L. R. A. 467, 22 Pac. 261. And see ADVERSE POSSESSION, vol. 1, p. 561 et seq.

2. *Colman v. Clements*, 23 Cal. 245; *Waring v. Crow*, 11 Cal. 366.

3. *Colman v. Clements*, 23 Cal. 245.

4. See *supra*, § 38.

5. *Lytle Creek W. Co. v. Perdew*, 65 Cal. 447, 4 Pac. 426, holding that where several persons are tenants in common of the waters of a stream, any and each of them may maintain an action to enjoin a trespasser from diverting any portion of the water appropriated by such tenants.

cover on behalf of all interested in the cotenancy, the value of the use of the property during the wrongful holding,⁶ the rule seems to be to the contrary, for it has been held that where one tenant in common obtains judgment against a stranger for the possession of the entire premises, he cannot recover all the rents and profits but only a proportion thereof corresponding to his interest in the land.⁷ However, if, in such a case, judgment is rendered for all the rents and profits, the court on appeal will not reverse it, provided the plaintiff offers to remit the excess; thus modified, it will be allowed to stand.⁸ And it has been held that where there is evidence of an agreement between cotenants by the terms of which each was to collect the rents for every alternate period of six months, one cotenant, in a proper action, may recover all rents and profits due for the periods allotted to him. Especially is this the rule where the defendant is in possession of the property, not as a trespasser, but with the license or consent of one of the tenants in common. In such a case it has been held to be error to render a judgment in favor of the plaintiff for restitution and possession of the whole property. All that he is entitled to is to be let into possession with the defendant so as to enjoy his moiety.⁹

6. See *supra*, § 13, as to the rule that the possession of one tenant in common is deemed to be possession for all his cotenants.

7. *Clark v. Huber*, 20 Cal. 196. And see *Lee Chuck v. Quan Wo Chong & Co.*, 91 Cal. 592, 28 Pac.

44, citing *Muller v. Boggs*, 25 Cal. 175, to the rule, but not, however, applying it. See *infra* for the holding in the *Lee Chuck* case.

8. *Muller v. Boggs*, 25 Cal. 175.

9. *Lee Chuck v. Quan Wo Chong & Co.*, 91 Cal. 593, 28 Pac. 45.

COTERMINOUS OWNERS.

See *ADJOINING LAND OWNERS*, vol. 1, p. 388; *BOUNDARIES*, vol. 4, p. 370; *FENCES*.

COUNTERCLAIM.

See *SETOFF AND COUNTERCLAIM*.

COUNTERFEITING.

1. Definition and Scope of Article.
2. Jurisdiction of State to Define and Punish Offense.
3. Counterfeit Coin or Bullion and Paper Money.
4. Counterfeit Dies and Plates.
5. Fictitious Bank Notes or Bills.
6. Elements of the Offense.
7. The Indictment.
8. Evidence Generally.
9. Proof of Other Offenses.
10. Sufficiency of Evidence.

§ 1. Definition and Scope of Article.—The term counterfeit, both by its etymology and common intendment, signifies the fabrication of a false image or representation. In its broadest sense counterfeiting means the making of a copy or imitating, without authority or right, with a view to deceive or defraud by passing the copy or imitation for that which is original or genuine.¹ This definition is comprehensive enough to include forgery. But “counterfeiting” as used in this article and as ordinarily understood is applied only to the fraudulent and criminal imitation of money or its equivalent. Here are considered the power of the state to define and punish counterfeiting, the several statutes of California relating to the subject and the elements of the offenses therein defined, and questions relating to procedure and evidence. The federal statutes relating to counterfeiting are not considered.²

1. Ruling Case Law, p. 913.

relating to offenses against the cur-

2. See 7 Fed. Stats. Ann., 2d ed.,
p. 704, for United States statutes

rency and coinage with citation of
cases decided thereunder.

Cases are cited in this article to and including 185 Cal., 44 Cal. App. and 200 Pac.

The closely related subject of forgery,³ and of the rights of an innocent taker of counterfeit money,⁴ are treated elsewhere in this work.

§ 2. Jurisdiction of State to Define and Punish Offense.

The federal constitution expressly grants to congress power to provide for the punishment of counterfeiting the securities and current coin of the United States.⁵ But this provision does not prevent the several states from passing such laws in relation to the subject as they may deem necessary for the protection of their citizens.⁶ Violation of the federal laws on the subject is cognizable in the federal courts alone. But, while the state cannot punish for an infraction of federal statutes, it can punish for a violation of its own statutes on the same subject, when the object is to exercise the police power which appertains to it.⁷

§ 3. Counterfeit Coin or Bullion and Paper Money.—

Section 477 of the Penal Code defines the crime of counterfeiting gold or silver coin current, or any kind of species of gold-dust, gold or silver bullion, or bars, lumps, pieces or nuggets. Counterfeiting as defined by this section is punishable by imprisonment in the state prison for not less than one nor more than fourteen years.⁸ The Penal Code also denounces as a crime the possession of counterfeit coin or bullion and prescribes the punishment therefor.⁹ As to counterfeiting paper money the same code declares that "Every person who makes, issues, or puts in circulation any bill, check, ticket, certificate, promissory note, or the paper of any bank, to circulate as money, except as authorized by the laws of the United States, for the first offense, is guilty of a misdemeanor,

3. See FORGERY.

285, 13 Am. St. Rep. 159, 22 Pac. 190.

4. See PAYMENT.

5. U. S. Const., art. I, § 8.

8. Pen. Code, § 478.

6. *People v. White*, 34 Cal. 183.

9. Pen. Code, § 479.

7. *People v. McDonnell*, 80 Cal.

and for each and every subsequent offense, is guilty of felony."¹⁰

§ 4. Counterfeit Dies and Plates.—Section 480 of the Penal Code penalizes the making or possession of counterfeit dies, plates, paper, or machines of a certain kind. The language of this above section denounces the known possession of any of the implements mentioned, without expressly requiring that such possession shall be accompanied with a criminal intent. But there can be no doubt that the possession intended to be prohibited is a criminal one, or a possession with a criminal intent. To hold otherwise would, it has been argued, be to ignore one of the indispensable elements of crime.^{10a} In a case construing similar language employed in section 78 of the Crimes Act (upon which the section of the Penal Code is founded), it was held necessary not only to prove known possession of the counterfeiting tools and implements, but also to prove that such possession was with criminal intent.¹¹

It has been held, also, that the legislature intended by the comprehensive words "bank notes and bills," as used in this section, to mean all bank notes and bills, both foreign and domestic, current in California, or otherwise. Accordingly the counterfeiting of notes of the Bank of England is punishable under Penal Code, section 480.

§ 5. Fictitious Bank Notes or Bills.—The word "fictitious" as used in section 476 of the Penal Code, dealing with the making, passing or uttering of fictitious bills, notes, checks, etc., is defined as "false, not genuine," and refers to the time when the instrument is made or passed. Thus the fact that bills might have been genuine at some prior time when they left the bank whose name they bear can make no difference if at the time they were used to

10. Pen. Code, § 648.

10a. See CRIMINAL LAW.

11. *People v. White*, 34 Cal. 183.

12. *People v. McDonnell*, 80 Cal.

285, 13 Am. St. Rep. 159, 22 Pac.

190.

defraud, the bank that issued them was not in existence, and the bills as prepared and passed were in effect a simulation of current bank notes and intended to deceive. Moreover, in view of such fact, it is immaterial to the question that the bills were originally incomplete and illegally issued.¹³ Construing section 76 of the Crimes Act it has been held that to constitute the crime of possessing counterfeit notes with intent to pass them, the law only requires guilty possession. It is not necessary that the intent to fill up unfinished notes should be proven by an attempt to do so. Possession, with knowledge of the purpose for which they are designed, is sufficient.¹⁴ In so far as section 476 deals with the making and passing of instruments other than bank notes or bills, which are the equivalent of money, it is not within the scope of this article and is considered under another title.¹⁵

§ 6. Elements of the Offense.—The crime of counterfeiting and the offenses related to it are defined by statutes which determine with exactness the particular elements of each offense.¹⁶ An indispensable element of the crime of counterfeiting, as of all crimes, is a criminal intent.¹⁷ It would seem that even though the language of a statute does not express in specific terms the idea of criminal intent, nevertheless it is to be read in that sense.¹⁸ It is not material that the counterfeited instrument may have been genuine at some prior date, if at the time it is passed it is not genuine but an instrument of fraud and deceit. Nor is it material that the instrument is not complete and legally issued if it be in effect a simulation of a genuine

13. *People v. Harben*, 5 Cal. App. 29, 91 Pac. 398.

14. *People v. Ah Sam*, 41 Cal. 645 (cited with approval in *People v. McDonnell*, 80 Cal. 285, 13 Am. St. Rep. 159, 22 Pac. 190).

15. See FORGERY.

16. See *supra*, § 3, as to counterfeiting coin or bullion and paper

money; § 4, as to making or possessing dies and plates used in counterfeiting; § 5, as to fictitious bank notes or bills.

17. See CRIMINAL LAW.

18. *People v. White*, 23 Cal. 183. See *supra*, § 4.

instrument, for the object is to guard the public from false and counterfeit paper purporting on its face to be genuine.¹⁹ "Possession," as that term is employed in the statutes, contemplates possession with knowledge of the purpose for which the instruments were designed. It is not necessary to prove, in addition to the guilty possession, an attempt to commit the offense intended.²⁰

§ 7. The Indictment.—In pursuance of general rules, an indictment or information for counterfeiting is sufficient if, in substance, it describes the offense charged in the language of the statute by which it is created or defined.¹ Thus an information, based on section 476 of the Penal Code, which charges defendant with passing a fictitious bill of a bank not in existence with intent to cheat and defraud the complaining witness, and with knowledge of the false and fictitious character of the bill and of the nonexistence of the bank named in the bill at the time he passed the same, sufficiently sets forth every essential element of the offense for which punishment is provided.² It is not essential that the particular elements of the offense should be charged in the precise words of the statute provided they are substantially charged.³ Criminal intent being an indispensable element of the crime should ordinarily be averred. However, under a statute making it an offense for any person knowingly to have in his possession any tools, implements, or materials used in counterfeiting,

19. *People v. Harben*, 5 Cal. App. 29, 91 Pac. 398.

20. *People v. Ah Sam*, 41 Cal. 645; *People v. McDonnell*, 80 Cal. 285, 13 Am. St. Rep. 159, 22 Pac. 190. See *supra*, § 5.

1. *People v. Ah Sam*, 41 Cal. 645; *People v. Stanton*, 39 Cal. 698; *People v. White*, 34 Cal. 183; *People v. Harben*, 5 Cal. App. 29, 91 Pac. 398. See INDICTMENTS AND INFORMATIONS.

2. *People v. Harben*, 5 Cal. App. 29, 91 Pac. 398.

3. *People v. Stanton*, 39 Cal. 698, holding that in an indictment for the possession of counterfeit coin, with the intention to utter the same, the knowledge of the defendant of the spurious character of the coin is sufficiently charged by the allegation that the defendant "willfully, feloniously and knowingly did have in his possession five counterfeit silver coins" with intent to utter the same.

it has been held that the criminal intent, though an essential element of the offense, need not be specially averred.⁴

It has been held that, in an indictment for counterfeiting notes or for possessing counterfeit notes of a banking institution, it is not necessary to charge that the banking house whose notes have been imitated was an incorporated company, the fact of its incorporation not being an element of the crime. And by the same case it was ruled that an indictment for counterfeiting may be arranged in several counts provided the different counts refer to each other in such manner as to show clearly that they are but different descriptions of the same offense. Nor, it was further decided, is there any repugnancy in saying that the unfinished blank bills have the form and similitude of those which have been finished.⁵

§ 8. Evidence Generally.—The rules of evidence in prosecutions for counterfeiting are in general the same as those relating to other crimes.⁶ On the trial of a defendant, for the crime of knowingly having in his possession counterfeiting tools and implements where the main question involved is whether the tools or implements found in the possession of the defendant were held with a criminal intent, testimony showing that he had counterfeit money in his possession at the same time is admissible.⁷ It has been stated that an indictment for counterfeiting the notes of a banking institution need not aver that the banking house was incorporated;⁸ but where such an indictment charges that the bills were in the form of the bills of an incorporated banking company, it is competent to prove by reputation the existence and incorporation of the company.⁹

4. *People v. White*, 34 Cal. 183. 285, 13 Am. St. Rep. 159, 22 Pac. 190.
The same rule obtains in the federal courts. *Baender v. United States*, 260 Fed. 832, 171 C. C. A. 558 (citing *People v. White*, 34 Cal. 183).

6. See CRIMINAL LAW.

7. *People v. White*, 34 Cal. 183.

8. See *supra*, § 9.

9. *People v. Ah Sam*, 41 Cal. 645;

5. *People v. McDonnell*, 80 Cal. 285, 13 Am. St. Rep. 159, 22 Pac. 190.

§ 9. Proof of Other Offenses.—As a general rule, when a person is on trial for one offense, it is not competent to prove that he has committed other distinct and substantive offenses.¹⁰ But there are certain well-known exceptions to that rule and one is that, for the purpose of showing guilty knowledge or intent evidence may be introduced to show the commission of other crimes of the same nature. Accordingly, the practice of permitting the introduction of evidence to prove other or similar offenses to show knowledge, intent, design or system in cases of counterfeiting has long been recognized. Some confusion, however, exists in the cases as to the rule which governs the admission of such evidence. It has been stated as follows: Evidence of similar crimes to show knowledge of the character of the instrument alleged to have been fraudulently uttered must be confined to prior passage of other fraudulent instruments; but on the question of fraudulent intention, and to show a systematic scheme to defraud, similar offenses subsequent to the utterance of the instrument in question may be proved.¹¹ Where the evidence of another offense tends to establish an intent to defraud, and is admissible for that purpose, it will not be rejected merely because it may also tend to prove the identity of the person who committed the crime being tried; and this is true though the defense is an alibi.¹²

§ 10. Sufficiency of Evidence.—On the trial of one charged with passing a fictitious bill of a bank having no existence at the time, evidence showing that the bill as passed by defendant was in effect a simulation of a current bank note, but was in fact "false" bills of a non-existent bank pasted together, and was intended to

13 Am. St. Rep. 159, 22 Pac. 190.
As to proof of corporate existence generally, see CORPORATIONS, vol. 6, p. 667.

10. See CRIMINAL LAW.

11. *People v. Harben*, 5 Cal. App.

29, 91 Pac. 398. The same rule obtains in the federal courts. *York v. United States*, 241 Fed. 656, 154 Pac. 414.

12. *People v. Harben*, 5 Cal. App.

29, 91 Pac. 398.

defraud and deceive, and had that effect, is sufficient to warrant the jury in convicting.¹³ And where a defendant is indicted for having counterfeit coin in his possession with intent to pass the same to defraud a certain person and others, evidence tending to prove that he had in his possession counterfeit coin for sale, and evidence that he sold some of the coin to the person intended to be defrauded is sufficient to warrant a conviction.¹⁴ In cases involving the counterfeiting of bank notes it is not necessary to prove the legal existence and incorporation of the banking house. It is sufficient to prove that the company is known as a corporate company and is acting as such, and as such issues bank notes or bills which come within the statute.¹⁵ A defendant charged with passing counterfeit money with intent to defraud may be convicted upon the uncorroborated testimony of one who, acting in concert with the police, succeeded in purchasing some of the money. Such person is, at most, but a feigned accomplice, and the rule that a defendant cannot be convicted of a criminal offense on the testimony of an accomplice, unless the same is corroborated, does not apply.¹⁶

13. *People v. Harben*, 5 Cal. App. 29, 91 Pac. 398.

14. *People v. Farrell*, 30 Cal. 316, the court saying that while it might be true that such evidence did not tend to prove an intent on the part of defendant to defraud the particular person, but that it manifested an intent to defraud or aid

in defrauding "others," there could be no question.

15. *People v. Ah Sam*, 41 Cal. 645; *People v. McDonnell*, 80 Cal. 285, 13 Am. St. Rep. 159, 22 Pac. 190.

16. *People v. Farrell*, 30 Cal. 316. See CRIMINAL LAW.

COUNTIES.

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I. INTRODUCTORY.

§ 1. **Scope of Article.**—This article treats of purposes served by the division of the state into counties, and of the law applicable thereto as found in the statutes and decisions. Included herein are discussions of the status of counties as bodies politic and corporate, their creation, organization, government and powers, including their police powers, and of matters pertaining to their property,

contracts and liabilities. The article includes, also, a consideration of claims against counties and of actions by and against them. The treatment excludes the law relating to towns and townships,¹ the election of county officers,² public officers generally,³ taxes for county purposes,⁴ county bonds and other securities,⁵ and, in general, questions concerning consolidated city and county government, except in so far as this is considered as ordinary county government.⁶ Certain activities of counties are also excluded, because separately treated in this work, such as those relating to the building of bridges,⁷ the construction of roads,⁸ the care and relief of the poor,⁹ and the maintenance of schools^{9a} and hospitals.^{9b}

§ 2. Definition and Origin.—“A county,” as defined by statute, “is the largest political division of the state having corporate powers.”¹⁰ The dividing of a state into counties had its origin in England, preceding the organization of the kingdom itself. The civil divisions thus created were thereafter continued, from recognized necessities in government, as other countries had their departments or their provinces. In such divisions it was found that the purposes of local government and of the administration of justice were promoted. Differing from those in England in their origin, counties in this country were first created by the legislatures of the various colonies, and subsequently by the states of the Union. They are, in effect, subdivisions of the state established for the more convenient administration of government, and are invested with such powers as are necessary to be exercised for the

1. See MUNICIPAL CORPORATIONS;
TOWNSHIPS.

2. See ELECTIONS.

3. See PUBLIC OFFICERS.

4. See TAXATION.

5. See PUBLIC SECURITIES.

6. See MUNICIPAL CORPORATIONS.

7. See BRIDGES, vol. 4, p. 513.

8. See HIGHWAYS.

9. See PAUPERS.

9a. See SCHOOLS.

9b. See HOSPITALS AND ASYLUMS.

10. Pol. Code, § 3901.

welfare, advantage, and protection of the people within their boundaries.¹¹

The state of California is divided into counties, named, bounded and constituted as provided by law.¹² The several counties as they now exist,¹³ and such other counties as may be hereafter organized, according to law, are "recognized as legal subdivisions of the state."¹⁴ The courts take judicial notice of such divisions as far as political government is concerned or affected.¹⁵

§ 3. Nature and Status.—The decisions are not entirely harmonious as to the nature of counties. It is settled, however, that counties are not municipal corporations or, strictly speaking, corporations of any kind.¹⁶ It is true that both municipal corporations and counties are governmental agencies, but the manner and source of their creation and the purposes, respectively, to subserve which they are brought into existence are entirely at variance.¹⁷

11. Buling Case Law, vol. 7, p. 923.

12. Pol. Code, § 3902. See Pol. Code, §§ 3909-3966, as to the boundaries of the several counties; Pol. Code, §§ 3903-3908, as to the definition of terms used in describing courses.

13. Const., art. XI, § 1; Pol. Code, § 3902.

14. Pol. Code, § 3902.

15. *People v. Smith*, 1 Cal. 9.

16. *County of Sacramento v. Chambers*, 33 Cal. App. 142, 164 Pac. 613, (wherein it was said that counties are lacking in the essentials which chiefly characterize municipal corporations); *Hunsaker v. Borden*, 5 Cal. 288, 63 Am. Dec. 130. But this scarcely accords with the statutory declaration that counties are possessed of "corporate powers." Pol. Code, § 3901. In some states, as in New York,

counties are declared to be municipal corporations, and this, no doubt, often accounts for the lack of harmony in the decisions of the various states affecting their status and liability.

17. *County of Sacramento v. Chambers*, 33 Cal. App. 142, 164 Pac. 613. And see *County of San Mateo v. Coburn*, 130 Cal. 631, 63 Pac. 78, 621 (holding that a county is not a municipal corporation within the meaning of § 14 of art. I of the constitution, which provides that "No right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court, for the owner, irrespective of any benefit from any improvement proposed by such corporation"); *People v. McFadden*, 81 Cal. 489, 15 Am. St. Rep. 66, 22 Pac.

With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy.¹⁸ Thus they are properly regarded as mere political subdivisions of the state for purposes of government.¹⁹

It is admitted, however, that counties possess some corporate characteristics. Like all involuntary subdivisions of the state, they are classed as quasi corporations. But whatever may be their proper classification, it would seem that counties are within the inhibitions of the constitution against the drawing or appropriation of money from the state treasury for the benefit of a corporation or any institution not under the exclusive control and management of the state and against the making of any gift of such money to any individual, municipal, or other corporation of whatsoever kind or character.²⁰

§ 4. Municipal Corporations Distinguished.—The legal status of a county is not the same as that of a municipal corporation. A county is a governmental agency or political subdivision of the state, organized for purposes of exercising some functions of the state government, whereas a municipal corporation is an incorporation of the inhabi-

851 (holding that counties are not municipal corporations within the meaning of § 6, art. XI, of the constitution, which provides that corporations for municipal purposes shall not be created by special act); *People v. Sacramento County*, 45 Cal. 692 (where, prior to the adoption of the constitution, it was declared that a county is not a municipal corporation within the meaning of that term as used in the Political Code). And see *infra*, § 4, as to distinction between counties and municipal corporations.

18. *County of Sacramento v.*

Chambers, 33 Cal. App. 142, 164 Pac. 613; *Singh v. Superior Court*, 44 Cal. App. 64, 185 Pac. 985.

19. Const., art. XI, § 1; Pol. Code, § 3902; *Hill v. Board of Supervisors*, 176 Cal. 84, 167 Pac. 514; *Reclamation District v. Superior Court*, 171 Cal. 672, 154 Pac. 845; *County of San Mateo v. Coburn*, 130 Cal. 631, 63 Pac. 78, 621; *Pattison v. Board of Supervisors of Yuba County*, 13 Cal. 175; *Dillwood v. Riecks*, 42 Cal. App. 602, 184 Pac. 35.

20. *County of Sacramento v. Chambers*, 33 Cal. App. 142, 164 Pac. 613.

tants of a specified region for purposes of local government.¹ A county is created by the state, acting independently of the local population; therein it is significantly different from a city.² This distinction has been well expressed as follows: "Municipal corporations proper are called into existence either at the direct solicitation or by the free consent of the persons composing them, for the promotion of their own local and private advantage and convenience. On the other hand, counties are local subdivisions of the state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former (municipal) is asked for, or at least assented to, by the people it embraces; and the latter organization (counties) is superimposed by a sovereign and paramount authority."³ It naturally follows that the legislative control over affairs of the counties is broader and in some respects more complete than over the affairs of cities.⁴

§ 5. **Purposes.**—Counties are vested by the state with a variety of powers which the state itself may assume or resume and directly exercise.⁵ The principal purpose in establishing them is to make effectual the political organization and civil administration of the state, which require local direction, supervision and control, as, for example, over matters of local finance, education, provisions

1. *County of San Mateo v. Coburn*, 130 Cal. 631, 63 Pac. 78, 621; *Dillwood v. Riecks*, 42 Cal. App. 602, 184 Pac. 35.

2. *Boss v. Lewis*, 33 Cal. App. 792, 166 Pac. 843.

3. *County of Sacramento v. Chambers*, 33 Cal. App. 142, 164 Pac. 613, per Hart, J., (quoting 1 Dillon on Municipal Corporations, 5th ed., § 35). And see *Kahn v. Sutro*, 114 Cal. 316, 33 L. R. A. 620, 46 Pac. 87.

4. *Boss v. Lewis*, 33 Cal. App. 792, 166 Pac. 843.

5. *Reclamation District v. Superior Court*, 171 Cal. 672, 154 Pac. 845; *County of San Mateo v. Coburn*, 130 Cal. 631, 63 Pac. 78, 621; *Los Angeles County v. Orange County*, 97 Cal. 329, 32 Pac. 316; *Buckingham v. Commary-Peterson Co.*, 39 Cal. App. 154, 178 Pac. 318; *Crowell v. Sonoma County*, 25 Cal. 313.

for the poor, regulations of a police nature, and, in a large measure, the administration of public justice.⁶ Hence the functions of counties are exclusively governmental, and are only such as are imparted to them by the state.⁷ All the people of the state are directly interested in the administration of the governmental affairs of a county, whether they reside or own property therein or not, because such administration involves, to the extent of the geographical limits of a county, the administration of the affairs and policy of the state. The state may, in all cases where the people themselves have not restricted or qualified exercise of the power, apportion and delegate to the counties any of the functions which belong to it. On the other hand, the state may take back and itself resume the exercise of certain functions which it has delegated to those local agencies; and, in some cases, particularly those having reference to police power, the state and the counties may act conjointly.⁸

§ 6. Consolidated City and County Governments.—The constitution provides:

“City and county governments may be merged and consolidated into one municipal government, with one set of officers, and may be incorporated under general laws providing for the incorporation and organization of corporations for municipal purposes. The provision of this constitution applicable to cities, and also those applicable to counties, so far as not inconsistent or prohibited to cities, shall be applicable to such consolidated government.”⁹

Where a city and a county government are thus consolidated, there is neither a separate county nor a separate city governmental organization, each distinct from and

6. Ruling Case Law, vol. 7, p. 925. bers, 33 Cal. App. 142, 164 Pac. 613, per Hart, J.

7. Dillwood v. Riecks, 42 Cal. App. 602, 184 Pac. 35; Crowell v. Sonoma County, 25 Cal. 313. 9. Const., art. XI, § 7, amendment adopted November 6, 1894. See MUNICIPAL CORPORATIONS.

8. County of Sacramento v. Cham-

entirely independent of the other, as there is in ordinary counties and cities.¹⁰ On the other hand, the consolidated government partakes of the nature and has the powers and exercises the functions both county and city,¹¹ and also has attributes distinguishing it from either.¹² This situation has given rise to some difficulty in the decisions, as to when the dual organization may be regarded as a county and when as a city.¹³ Geographically, a consolidated city and county is one of the legal subdivisions of the state, and in that respect is recognized by section 1 of article XI of the constitution as one of the counties.¹⁴ Politically, it is regarded in that instrument as a municipal corporation.¹⁵ It may, therefore, be stated that a consolidated city and county is a municipal corporation, and in matters of government is to be regarded as a city.¹⁶ But, while the people of a consolidated city and county are thus to be regarded as under a municipal government, with the right to select officers to execute the powers of

10. *Crowley v. Freud*, 132 Cal. 440, 64 Pac. 696; *Martin v. Election Commissioners*, 126 Cal. 404, 58 Pac. 932; *Kahn v. Sutro*, 114 Cal. 316, 33 L. R. A. 620, 46 Pac. 87.

11. *Keyes v. San Francisco*, 177 Cal. 313, 173 Pac. 475; *Nicholl v. Koster*, 157 Cal. 416, 108 Pac. 302; *People v. Babcock*, 114 Cal. 559, 46 Pac. 818; *Kahn v. Sutro*, 114 Cal. 316, 33 L. R. A. 620, 46 Pac. 87.

12. *Kahn v. Sutro*, 114 Cal. 316, 33 L. R. A. 620, 46 Pac. 87.

13. *Keyes v. San Francisco*, 177 Cal. 313, 173 Pac. 475.

14. *Kahn v. Sutro*, 114 Cal. 316, 33 L. R. A. 620, 46 Pac. 87; *Morgan v. Menzies*, 60 Cal. 341. And see *Pol. Code*, § 3946.

15. *Const.*, art. XI, § 7; *Kahn v. Sutro*, 114 Cal. 316, 33 L. R. A. 620, 46 Pac. 87; *Stande v. Board of Election Comms.*, 61 Cal. 313; *Wood v. Election Comms.*, 58 Cal.

561; *People v. Hoge*, 55 Cal. 612; *Desmond v. Dunn*, 55 Cal. 242; *People v. Supervisors of San Francisco*, 21 Cal. 668. But see *People v. Hill*, 7 Cal. 97, stating that it was the intention of the legislature by the act of 1856 consolidating the city and county governments of Francisco to merge them into one, as a "county government," under the direction of county officers; *People v. Mullins*, 10 Cal. 20 (holding that the act, approved April 24, 1858, creating the "City and County of Sacramento," was not intended to repeal the law by which the county of Sacramento was created; and that the county and city constitute a corporation for some purposes, but are distinct as to others). And see MUNICIPAL CORPORATIONS.

16. *Kahn v. Sutro*, 114 Cal. 316, 33 L. R. A. 620, 46 Pac. 87.

that government according to the terms of its charter, the territory over which the government is exercised is at the same time a county, and for those purposes for which county officers exercise authority, not derived from the charter and disconnected with municipal government, its officers are properly termed county officers. Considered in its political and judicial relations to other portions of the state, the officers elected by its voters, to the extent that they exercise only such powers as are given by laws relating merely to counties, and who do not derive any of their authority from the charter, are to be regarded as county officers, as distinguished from city officers.¹⁷

Inasmuch as a consolidated city and county is both a city and a county, the provisions of any general law applicable to all counties are applicable thereto, in the absence, at least, of any provision on the subject contained in, or made pursuant to its charter.¹⁸⁻¹⁹ The section of the constitution declaring that municipal charters prevail over

17. *Kahn v. Sutro*, 114 Cal. 316, 33 L. R. A. 620, 46 Pac. 87; *People v. Babcock*, 114 Cal. 559, 46 Pac. 818; *Miller v. Curry*, 113 Cal. 644, 45 Pac. 877. And see *Crowley v. Freund*, 132 Cal. 440, 67 Pac. 696, holding that the decision in *Kahn v. Sutro*, supra, distinguishing between "county officers" and "municipal officers" in the consolidated city and county of San Francisco, is not overruled, or materially modified, by the subsequent case of *Martin v. Election Commrs.*, 126 Cal. 404, 58 Pac. 932.

18-19. *Keyes v. San Francisco*, 177 Cal. 313, 173 Pac. 475 (provision for collection of county taxes); *Nicholl v. Koster*, 157 Cal. 416, 108 Pac. 302 (act relating to probation officers); *Reid v. Groezinger*, 115 Cal. 551, 47 Pac. 374; *Miller v. Curry*, 113 Cal. 644, 45 Pac. 877 (act establishing fees of county officers);

Morgan v. Menzies, 60 Cal. 341 (provision as to undertaking or security in civil proceedings).

But see *Rocca v. Boyle*, 166 Cal. 94, Ann. Cas. 1915B, 857, 135 Pac. 34, (holding that San Francisco, in the matter of the procedure for the allowance of claims against it, and with respect to the authority of officers and boards to settle and allow the same, is not governed by the provisions of the Political Code, but by the city and county charter); *People v. Babcock*, 114 Cal. 559, 46 Pac. 818 (holding that the power given by subdivision 21 of § 25 of the County Government Act, as amended in 1893, to boards of supervisors to fill vacancies, does not apply to the board of supervisors of San Francisco); *Ex parte Christensen*, 85 Cal. 208, 24 Pac. 747 (holding that the provisions of the County Government Act do not ap-

general laws in municipal affairs has no application to a consolidated city and county in so far as it exercises the powers and functions of a county; the power of the legislature to enact general laws for the government of counties, as such, including consolidated city and county governments, remains unimpaired by that section.²⁰ Indeed, the constitution itself declares that all of its provisions applicable to counties (as well as those applicable to cities) so far as not inconsistent or prohibited to cities, shall be applicable to consolidated governments.¹ Likewise, when the word "county" is used in the codes it is defined to include "city and county."²

The municipal government known and designated as "the City and County of San Francisco" is the only instance, at present, of a consolidated city and county government in California.³

II. CREATION, ALTERATION AND DIVISION.

§ 7. **In General.**—Subject to the prohibitions contained in section 3 of article II of the constitution,⁴ the power of

ply to the passage and publication of ordinances of the city and county of San Francisco).

20. *Nicholl v. Koster*, 157 Cal. 416, 108 Pac. 302.

1. Const., art. XI, § 7; *Rauer v. Williams*, 118 Cal. 401, 50 Pac. 691 (holding that § 5, article XI, requiring the legislature by general and uniform laws to provide for the strict accountability of county officers for all fees which may be collected by them is applicable to consolidated cities and counties); *Kahn v. Sutro*, 114 Cal. 316, 33 L. R. A. 620, 46 Pac. 87; *Ex parte Keeney*, 84 Cal. 304, 24 Pac. 34 (holding that § 11, article XI, providing that "Any county, city, town, or township may make and enforce within

its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws," is applicable to consolidated cities and counties).

2. Civ. Code, § 14; Pen. Code, § 7; Code Civ. Proc., § 17.

3. See *Martin v. Election Commissioners*, 126 Cal. 404, 58 Pac. 932, stating that San Francisco was, at the time of the constitutional convention of 1878-79, as at the time of that decision, the only merged and consolidated municipal government in the state.

4. This section is as follows: "The legislature, by general and uniform laws, may provide for the alteration of county boundary lines, and for the formation of new coun-

the legislature in the matter of creating counties is plenary.⁵ Except as so restrained, the legislature may change the boundaries and extent of counties, consolidate two or more of them into one, divide them or create new counties out of the territory of one or more previously existing ones.⁶ Whether there should be any law under which new counties might be formed was left by the constitution to the legislature. The language in this respect is entirely permissive, being, "the legislature, by general and uniform laws, may provide," etc., and the case is not one where the word "may" can be read as "shall" or "must." If, in its wisdom, the legislature concludes that provision for the formation of new counties should be made, it may make such provision only "by general and uniform laws," and may prescribe such conditions as it sees fit, in addition to and consistent with the conditions prescribed in the constitutional provision.⁷ Among other restrictions provided in the general law enacted by the legislature relating to the creation of counties is the following:

"Nor shall any new county be formed which shall reduce to less than twelve hundred square miles the area of any existing county from which territory is taken to form such new county."⁸

ties; provided, however, that no new county shall be established which shall reduce any county to a population of less than twenty thousand; nor shall a new county be formed containing a less population than eight thousand; nor shall any line thereof pass within five miles of the exterior boundary of the city or town in which the county seat of any county proposed to be divided is situated."

5. *Elder v. Doss*, 62 Cal. Dec. 569, 202 Pac. 144; *Mundell v. Lyons*, 182 Cal. 289, 187 Pac. 950; *Wheeler v. Herbert*, 152 Cal. 224, 92 Pac. 353.

6. *Elder v. Doss*, 62 Cal. Dec. 569,

202 Pac. 144; *Reclamation District v. Superior Court*, 171 Cal. 672, 154 Pac. 845; *Riverside County v. San Bernardino County*, 134 Cal. 517, 66 Pac. 788; *Colusa County v. Glenn County*, 124 Cal. 498, 57 Pac. 477; *Tulare County v. Kings County*, 117 Cal. 195, 49 Pac. 8; *Orange County v. Los Angeles County*, 114 Cal. 390, 46 Pac. 173; *Los Angeles County v. Orange County*, 97 Cal. 329, 32 Pac. 316.

7. *Elder v. Doss*, 62 Cal. Dec. 569, 202 Pac. 144, per *Angellotti*, C. J.

8. See act approved March 15, 1907 (Stats. 1907, p. 275); amended March 8, 1909 (Stats. 1909, p. 194).

Such, it has been said, in the judgment of the legislature, was deemed an indispensable condition to the creation of a new county from the territory of an old county.⁹

As has been stated, the whole matter of the creation of new counties is clearly, in its nature, political, and belongs to the legislative department of the government.¹⁰ But it is clear, nevertheless, that the exercise of such function must be within the scope of the legislative power. Thus, it has been held that the action of the legislature in naming a place outside of the territorial limits of the state as a seat of justice of a county, and in naming persons as officers who were nonresidents of the state, whether regarded as a mistake, or as an intended assertion of jurisdiction, is in excess of their power and void.¹¹ But within its territorial limits the state has complete power to partition into counties its territory, including the beds of streams, navigable or non-navigable; and is empowered to confer on such counties the authority to exercise over all such partitioned territory the right to administer its government and to provide for the welfare of its inhabitants.¹²

§ 8. Special Acts—Validity.—It will be observed that the language of the constitution providing that “The legislature, by general and uniform laws, may provide for

9. It has been decided that if this provision is void, the entire act must necessarily be void. And consequently if a petition for the organization of a new county fails to show that the creation of the new county would not reduce the area of the old to less than twelve hundred square miles, it must be denied, whether the provision in question be regarded as valid or invalid; for, if invalid, then the entire statute is void, and there is no valid general and uniform law for the formation of new counties.

Elder v. Doss, 62 Cal. Dec. 569, 202 Pac. 144.

10. Riverside County v. San Bernardino County, 134 Cal. 517, 66 Pac. 788.

11. Reddy v. Tinkum, 60 Cal. 458, holding that neither the warrants drawn by an auditor thus named nor the claims upon which they are based form any basis for a legal demand against the county as later properly organized.

12. People v. Williams, 29 Cal. App. 552, 156 Pac. 882, per Chipman, P. J.

the alteration of county boundary lines, and for the formation of new counties," is not that of prohibition or limitation, or even of mandate, but of permission. The question, therefore, has arisen as to whether this provision implies a limitation on the power of the legislature to provide for the alteration of county boundary lines and the formation of new counties. It has been said that in the absence of any consideration other than the language itself, such an implied limitation would not be clear and that the constitutional provision would not be a sufficient justification for declaring a statute which the legislature had assumed to pass to be beyond its power. The provision, however, must be read in the light of its history and so read its prohibitory intent has been declared to be fairly plain. Prior to 1894 the section read entirely differently. It then clearly left to the legislature the power by special laws to create new counties and to divide and alter old ones.¹³ The result was a series of harassing attempts to have the legislature divide old counties and create new ones. To provide a remedy an amendment of article XI, section 3, was adopted in 1894. The material portion of the section, as so amended, read: "The legislature, by uniform and general laws, may provide for the formation of new counties."¹⁴ Under such circumstances it was held that there was but one view which could reasonably be taken of the amendment and that was that the permission given was exclusive and implied a limitation

13. *Mundell v. Lyons*, 182 Cal. 289, 187 Pac. 950; *Wheeler v. Herbert*, 152 Cal. 224, 92 Pac. 353 (holding that the prohibition against uniting parts of different counties in forming any legislative district contained in § 6 of art. IV of the constitution limits the power of the legislature in framing the general law for the decennial apportionment, but does not affect its power, included in the general grant of legislative power contained in

§ 1 of art. IV, to alter county boundaries from time to time as it may deem best); *Tulare County v. Kings County*, 117 Cal. 195, 49 Pac. 8; *People v. County of Glenn*, 100 Cal. 419, 38 Am. St. Rep. 305, 35 Pac. 302; *Los Angeles County v. Orange County*, 97 Cal. 329, 32 Pac. 316; *People v. McFadden*, 81 Cal. 489, 15 Am. St. Rep. 66, 22 Pac. 851.

14. *Mundell v. Lyons*, 182 Cal. 289, 187 Pac. 950.

that new counties should not be created other than by general law.¹⁵ In 1910 the section was again amended so as to include within its operation the alteration of county boundary lines, as well as the creation of new counties, and in this form the section has continued to the present time. If the permission given for the formation of new counties was exclusive, and implied a limitation upon the exercise of that power, the added permission to alter county boundaries is, it has been argued, necessarily of the same character and contains the same implied limitation. It follows, therefore, that the legislature has not the power either to create new counties or to alter a county boundary line by a special act.¹⁶ And a statute which contains several legislative enactments in respect of changes in county boundaries, each of which is special in nature, is not a general law within the meaning of the constitution.¹⁷

§ 9. Creation of New Counties, Generally.—Pursuant to constitutional authority,¹⁸ the legislature, by statute approved March 15, 1907,¹⁹ and amended in 1909,²⁰ and again amended in 1921,¹ provided, as the title of the act declares, for the formation, organization, and classification of new counties, for locating county seats, for the election and appointment of officers and for the adjustment and fulfillment of the rights and obligations arising between such new counties and other counties. The procedure on

15. *Mundell v. Lyons*, 182 Cal. 289, 187 Pac. 950; *Wheeler v. Herbert*, 152 Cal. 224, 92 Pac. 353.

16. *Mundell v. Lyons*, 182 Cal. 289, 187 Pac. 950, per *Olney, J.* The decision in *Wheeler v. Herbert*, *supra*, that the alteration of boundaries by special act did not come within the prohibition against the creation, in that manner, of new counties, is no longer important in view of the amendment of 1910.

17. *Mundell v. Lyons*, 182 Cal.

289, 187 Pac. 950 (holding that the act of the legislature (Stats. 1919, p. 857), changing the boundary between Los Angeles and Ventura counties, is special in nature and, therefore, void). See as to validity of and what constitutes special legislation, *CONSTITUTIONAL LAW*, vol. 5, p. 793 et seq.

18. See *supra*, §§ 7, 8.

19. Stats. 1907, p. 275.

20. Stats. 1909, p. 194.

1. Stats. 1921, p. 1644.

the formation of new counties is set forth in the act to which reference must be made for details. Section 2 of the act provides for the petition for formation, prescribes the number of qualified electors required to sign,² sets forth what the petition must contain, provides for the affidavits required to be attached to and filed with the petition and the effect thereof, and the bearing on the petition, the notice thereof, bond of the petitioners, and sets forth what the supervisors must determine at the hearing. This section also establishes a method of determining the population of the proposed new county, provides for the exclusion of certain territory upon petition therefor, and for the filing of the petition in each county out of which it is proposed to carve territory to constitute the new county. Section 3 of the act provides for the division of the proposed new county into townships, etc.,³ and for the giving of notice of an election to be held for the purpose of determining whether the territory described in the petition shall be organized into a new county.⁴

2. A "qualified elector" is defined as "one whose name appears on the great register or registers used at the general election held in the county or counties last preceding the presentation of said petition to the board of supervisors as herein provided." But see *State v. Furnish*, 48 Mont. 28, 134 Pac. 297, refusing to apply the definition of "qualified elector" as given in *Bergevin v. Curtz*, 127 Cal. 86, 59 Pac. 312, to the effect that a "qualified elector" is an elector whose name is enrolled upon the great register; and holding that under a provision requiring fifty per cent of the "qualified electors" to sign a petition for the exclusion of territory, on the formation of a new county, the board is required to determine whether the petition, at the time it was filed, contained the genuine sig-

natures of one-half the qualified electors of the territory, regardless of registration, and that for such determination the board may resort to whatever competent evidence may be at hand, including the great register so far as it avails.

3. See *People v. County of Glenn*, 100 Cal. 419, 38 Am. St. Rep. 305, 35 Pac. 302, holding that it is not fatal to an act creating a new county, that it does not itself provide for the division of the proposed county into supervisor districts, but allows five supervisors to be, in the first instance, elected at large, who have power under the general law to divide the counties into districts.

4. By subdivision 11, section 25, article IV, of the constitution, there may be a special law for holding and conducting an election "on

The act also provides for notice of election of the officers for the new county, prescribes the qualifications of those entitled to vote, and makes full provision with respect to the manner of conducting the election.^{4a} Section 4 makes provision for the canvass of the returns, the declaration of the results by resolution of the board, and for the filing of such resolution with the secretary of state; and "from and after the date of such filing said new county shall be deemed to be fully created, and the organization thereof shall be deemed completed," and the officers elected therefor shall be entitled to enter immediately upon the duties of their respective offices upon qualifying in accordance with law and giving bonds for the faithful performance of their duties, as prescribed in the act.⁵ All the officers elected at the election or appointed under the act hold their offices until the time provided by general law for the election and qualification of such officers and until successors are elected and qualified.⁶ Sec-

the organization of new counties." *People v. County of Glenn*, 100 Cal. 419, 38 Am. St. Rep. 305, 35 Pac. 302. See *People v. Nally*, 49 Cal. 478, holding that an act which submits to a popular vote of the electors of a county the question whether a portion of the territory of an adjoining county shall be annexed to it, and provides that if a majority of the votes are for annexation, that the organization of the adjoining county shall be abandoned, and its territory shall be divided and annexed, in part to the county in which the vote was taken, and in part to another adjoining county, is not an unconstitutional delegation of the legislative power.

4a. See *Wheeler v. Herbert*, 152 Cal. 224, 92 Pac. 353 (holding provision in special act as to time within which election was required to be held directory merely). See

to same effect, *Herbert v. Superior Court*, 7 Cal. Unrep. 336, 91 Pac. 800.

5. See *People v. McGuire*, 32 Cal. 140, holding that where a law is passed providing for the creation of a new county out of parts of counties already existing, which law provides for the future election of county officers, and fixes a time after their election when they shall enter upon the discharge of their duties, the territory described does not become a county until its organization is perfected by the election and qualification of its officers.

6. See *People v. Templeton*, 12 Cal. 394 (holding that it is not competent for the legislature, in organizing a new county, to change the term of judges as fixed by the constitution); *People v. Church*, 6 Cal. 76 (construing a provision in an act organizing a new county that the

tion 4 of the act also prescribes the proceedings in case the proposition for the creation of the new county is lost.

§ 10. Matters Incident to Creation.—The act of March 15, 1907, as amended,⁷ provides for the assessment and collection of taxes in a new county,⁸ the transfer of moneys that may be due to the new county,⁹ and the transcription of the records of the old county in so far as they relate to property situated in the new county.¹⁰ It also provides for the transfer of any action relating to real estate lying in the new county on motion of any party thereto;^{10a} and any other action or special proceeding which might have been commenced in the new county if the new county had been in existence at the date of the commencing thereof, in the discretion of the court in which it is pending and on motion of any party interested therein.¹¹ Under an act creating a new county out of a part of the territory of an old one, but leaving its organization to be effected at a future time, it has been held that the court of the old county has jurisdiction to find indictments for crimes committed in the territory of the new county between the time of the passage of the law and the organization of the new county; but that the court of

officers first elected shall hold office for two years and until their successors are elected and qualified, to mean that they should hold until the first general election of county officers after the expiration of the term of two years); *People v. Colton*, 6 Cal. 84 (holding that where the act organizing a county provides for the term of office of the officers first elected, but makes no provision as to their successors, the duration of the term of the latter is governed by general law).

7. See *supra*, § 9.

8. Act of 1907, § 10.

9. Act of 1907, § 11. See, also, Pol. Code, § 3975a, as to transfer of

moneys when new county has been formed. The provisions of the Political Code apply to counties heretofore divided and new counties created from the territory of the same, when no provision was made in the act creating such county for the transfer of the moneys belonging to road or school districts.

10. Act of 1907, § 12.

10a. See *Tolman v. Smith*, 85 Cal. 280, 24 Pac. 743, holding that the act creating the county of Orange did not deprive the Los Angeles courts of jurisdiction over cases previously commenced.

11. Act of 1907, § 13.

the new county has jurisdiction to try all such indictments, provided the trial is not had until the new county is organized.¹²

The act of 1907 as amended further makes provision for posting notices as a substitute for publication,¹³ for the continuation of assembly and senatorial districts,¹⁴ the recommission of notaries public,¹⁵ and prescribes a penalty for violation of the act.¹⁶ It makes provision for the officers of the new county, their qualification, bonds, duties and compensation.¹⁷ It also provides for any vacancies in office in the old counties created by reason of the provisions of the act.¹⁸

When counties might be created by special act it was held that so far as an act creating a new county deals with a subject it takes it out of the operation of the general laws; but where it contains no provision in relation to a particular subject, the general laws upon that subject control.¹⁹

§ 11. Power to Apportion Indebtedness and Assets.—The constitution provides that

“Every county which shall be enlarged or created from territory taken from any other county or counties, shall be liable for a just proportion of the existing debts and liabilities of the county or counties from which such territory shall be taken.”²⁰

It has been definitely settled that the power to determine such “just proportion” is still left with the legislature, and the question of what, if any, liability there shall be between a new county and the old one from which it has

12. *People v. McGuire*, 32 Cal. 140.

13. Act of 1907, § 14.

14. Act of 1907, § 15.

15. Act of 1907, § 16.

16. Act of 1907, § 17.

17. Act of 1907, § 5.

18. Act of 1907, § 6.

19. *People v. Ross*, 38 Cal. 76 (holding that where a statute creating a county makes no provision in relation to official bonds, they must be given in conformity to the general law upon that subject); *People v. Colton*, 6 Cal. 84. See STATUTES.

20. Art. XI, § 3.

been carved is a matter that belongs exclusively to the legislative department. There is, therefore, no legal liability between two counties, arising out of the mere fact that one has been carved out of the other, which any court may adjudicate.¹ Consequently, where an act providing for the creation of a new county out of an old one said nothing about a division of property or liability, the old one was obliged to shoulder all existing indebtedness, and each parcel of public property belonged to the county in which it happened to be situated, and in such case the old county could not maintain an action against the new one to recover any part of its existing indebtedness.² The legislature may, however, declare that certain public property shall belong to one or the other of the counties, or that one shall pay a fixed sum to the other, or be liable for a certain amount of indebtedness, and the liability, when thus created, can be enforced by the courts; or the legislature may provide that a commission or tribunal, created for the purpose, may investigate and determine what the liability or division of property shall be;³ and the legislature may, by a subsequent act, modify its former

1. *Riverside County v. San Bernardino County*, 134 Cal. 517, 66 Pac. 788; *Tulare County v. Kings County*, 117 Cal. 195, 49 Pac. 8; *Orange Co. v. Los Angeles Co.*, 114 Cal. 390, 46 Pac. 173; *Los Angeles Co. v. Orange Co.*, 97 Cal. 329, 32 Pac. 316; *Beals v. Amador County*, 28 Cal. 449.

2. *Riverside County v. San Bernardino County*, 134 Cal. 517, 66 Pac. 788 (citing and following *Laramie County Commrs. v. Albany County Commrs.*, 92 U. S. 307, 23 L. Ed. 552, see, also, *Rose's U. S. Notes*; *County of Colusa v. Glenn Co.*, 124 Cal. 498, 57 Pac. 477; *Tulare County v. Kings County*, 117 Cal. 195, 49 Pac. 8 (holding that neither § 1432 of the Civil Code,

providing for contribution between joint debtors, nor § 2847, relating to the obligation of a principal where the surety satisfies the obligation, nor § 3523, declaring that for every wrong there is a remedy, authorizes the maintenance of such an action); *Los Angeles v. Orange Co.*, 97 Cal. 329, 32 Pac. 316.

3. *Riverside County v. San Bernardino County*, 134 Cal. 517, 66 Pac. 788; *People v. Alameda County Suprs.*, 26 Cal. 641 (holding that the legislature has the further power to compel the board of supervisors of the county indebted to levy a special tax to pay the amount which the commissioners report due).

determination, and change the condition as to liability and division of property upon which the original act was passed.⁴ Where the legislature by specific provision prescribes the measure of the liability, and the means of discharging it, such provision furnishes the entire rules by which the rights of the counties are to be governed, and no additional rights may be enforced by either county. Thus where a new county was compelled to pay a portion of the debt of an old one from which it was carved, but was not required to pay interest on its proportion of the debt, it was held that such interest could not be recovered by the old county in an action therefor.⁵

Where commissioners are appointed, they are the mere instrumentalities of the legislature, and their acts are as much beyond the reach of the judiciary as the action of the legislature would have been if it had itself definitely fixed the actual liability of the counties.⁶

As the provision of the constitution relates only to indebtedness and does not require any division of the assets of the old county, the disposition of these matters remains within the scope of legislative provision; and, in the absence of any such provision, the effect of creating a new county is to give to the old county all the public property, except such as was situated in the territory embraced within the boundaries of the new one.⁷ And as the legis-

4. *Riverside County v. San Bernardino County*, 134 Cal. 517, 66 Pac. 788; *Beals v. Amador County Supervisors*, 35 Cal. 624.

5. *Beals v. Amador County Supervisors*, 28 Cal. 449. It was later held that it was competent for the legislature, by subsequent enactment, to provide for the payment of interest by the imposition of a further tax for that purpose; *Beals v. Amador County Suprs.*, 35 Cal. 624.

6. *Riverside County v. San Bernardino County*, 134 Cal. 517, 66

Pac. 788; *Orange County v. Los Angeles County*, 114 Cal. 390, 46 Pac. 173.

7. *Los Angeles Co. v. Orange Co.*, 97 Cal. 329, 32 Pac. 316. Where no provision was made by law for any change in the custody of the swamp-land fund of the original county, there was held to be no ground for equitable interposition; and no action would lie on behalf of the new county to recover a share of such fund. *County of Kings v. County of Tulare*, 119 Cal. 509, 51 Pac. 866.

lature may divide the public property and assets of the county in such mode as it may choose, it is competent for it to fix upon any date which it may select as the time for ascertaining their amount and value, as well as for determining, in connection therewith, the "just proportion" of the debts and liabilities to be assumed by the new county.⁸

§ 12. Manner of Apportioning Indebtedness.—The act of 1907, heretofore discussed,⁹ providing for the formation of new counties from portions of one or more counties already in existence, provides for the appointment by the governor of a board of commissioners to ascertain and apportion the indebtedness of each county from which territory was taken to form a new county.¹⁰ The powers and duties of the board, and the method of ascertaining the indebtedness of the old county, or counties, and of determining what proportion thereof shall be apportioned to the new county are fully described in the act. The indebtedness of the old county must be ascertained "as the same existed at the time when the result of the election thereon was declared by the board of supervisors."¹¹ Consequently, it would seem that only the indebtedness of the old county found to be existing on that date can be considered in determining what proportion thereof the new county must pay to the old, and any moneys expended by the latter after that date cannot be so considered even though expended within the territory of the new county.¹²

8. *Los Angeles Co. v. Orange Co.*, 97 Cal. 329, 32 Pac. 316.

9. See *supra*, §§ 9, 10.

10. Act of 1907, § 7. See *Tuolumne County v. Stanislaus County*, 6 Cal. 440 (holding that the appointment by the county judges of two counties of commissioners to ascertain and settle the proportionate amount of indebtedness to be assumed by each, under a law authorizing such an appointment on

the division of such counties, was a proper exercise of functions incident to their judicial position). But see *People v. Provines*, 34 Cal. 520, criticising the grounds upon which this decision was rested.

11. Act of 1907, § 8.

12. *Los Angeles Co. v. Orange Co.*, 97 Cal. 329, 32 Pac. 316 (construing act of 1889, creating county of Orange).

The act provides that the value of any property belonging to the old county at the time of the division, which is situated in the new county, shall be added to the ascertained proportion of the indebtedness which the new county is to pay to the old, and this sum together with the new county's proportion of the expenses of the election, which is provided for in the act, shall be an indebtedness from the new county to the old; and provision is made for the payment of the indebtedness thus created.¹³ Provision is also made for the compensation of the commissioners and the payment of incidental expenses.¹⁴

§ 13. Taxes When County is Divided.—The Political Code provides that

“When a county is divided or the boundary is altered, all taxes levied before the division was made or boundary changed must be collected by the officers of and belong to the county in which the territory was situated before the division or change.”¹⁵

If such taxes are paid to the new county the latter is liable in an action for money had and received upon its implied promise to pay the same to the old county.¹⁶ On the other hand, if taxes properly belonging to the new county are paid to the old, they may be recovered in like manner. But a collector who unlawfully collected taxes cannot be compelled by mandamus to pay over the moneys so collected to the tax collector of the county entitled to

13. Act of 1907, § 8.

14. Act of 1907, § 9.

15. Pol. Code, § 3975; *Kings County v. Johnson*, 104 Cal. 198, 37 Pac. 870, stating that where the legislature has not provided otherwise, all taxes due upon property situated in that portion of the old county which is set off to the new county are collectible by the old. See to same effect, *Moss v. Shear*, 25 Cal. 38,

85 Am. Dec. 94; *In re Corbett*, 1 Cal. Unrep. 314. The apportionment of railroad taxes where a county is divided is considered in *County of Colusa v. County of Glenn*, 124 Cal. 498, 57 Pac. 477, and *San Diego County v. Riverside County*, 125 Cal. 495, 58 Pac. 81.

16. *Colusa County v. Glenn County*, 117 Cal. 434, 49 Pac. 457.

such taxes where such duty is not imposed upon him by law.¹⁷

§ 14. Power to Fix Boundaries.—The location of the boundary lines between counties is a political question to be settled by the legislative power of the state, and is subject to change from time to time as such power may direct.¹⁸ The state may provide for as many surveys of county boundaries as the legislature may deem best. Thus, after having provided that any county lines not adequately marked should be run and marked by the surveyor general, it is still in the power of the legislature to enact a special law for the survey of any particular county lines, and make it conclusive until it should itself change the lines, or order another survey. And a survey made under such special act would be a legal survey.¹⁹ It is competent for the legislature to declare in advance that the line which might be surveyed and marked shall be the true line. And a provision in an act that the surveyor should “accurately run” the line of the boundary is directory only, and does not have the effect to render the survey void if he runs it inaccurately, without fraudulent intent. If the line as fixed in accord with statutory directions is inaccurately located by the person directed to

17. *Kings County v. Johnson*, 104 Cal. 198, 37 Pac. 870.

18. *Trinity County v. Mendocino County*, 151 Cal. 279, 90 Pac. 685. See *Cerini v. De Long*, 7 Cal. App. 398, 94 Pac. 582 (holding that under the act of March 14, 1907, fixing the boundary lines between the counties of Kings and Fresno, the functions of the commissioners appointed to give notice of an election held thereunder, and to canvass the result thereof, are purely ministerial, and they have no judicial power under the act, and cannot go behind the returns for any pur-

pose); *In re Corbett*, 1 Cal. Unrep. 314 (as to sufficiency of title of an act altering boundaries). But see *supra*, § 8, as to necessity for general law for altering county boundary lines.

19. *Trinity County v. Mendocino County*, 151 Cal. 279, 90 Pac. 685. (This case states that there was, on March 30, 1872, no constitutional objection to a special law on the subject. It is believed that there is no constitutional objection to such a law at present.) *County of Mariposa v. County of Madera*, 142 Cal. 50, 75 Pac. 572.

make the survey, the correction of the error lies with the legislature and not with the courts, unless the statute has provided that the courts shall determine the true location. A provision in an act declaring that the line to be run by the surveyor selected in accordance with its provisions, when it is so run, shall be the true line, is not a delegation to such surveyor of the legislative function of fixing the limits of the territory of counties, and is not in conflict with the constitutional provision prohibiting the powers of one department of the state from being conferred upon another. Likewise, where the legislature has established county boundaries, the process of marking the line is not a legislative function, but is ministerial in character, and necessarily of such a nature as to require the legislature to provide for the employment of a surveyor.²⁰

In 1921, the legislature passed an act to provide for determining, defining and establishing the location of county boundary lines where the same are indefinite or uncertain or have been obliterated.¹

§ 15.- Construction of Boundary Provisions.—In construing statutory provisions with respect to boundary lines between counties the sole question is as to the intention of the legislature.² It may be presumed that the legisla-

20. *Trinity County v. Mendocino County*, 151 Cal. 279, 90 Pac. 685.

An artificial change in the course of a river, which is the established boundary between two counties, made at the neck of a peninsula created by a bend in the stream, whereby a new channel of the river is caused, and the former channel is ordinarily left without a current, cannot operate to change the legal boundary between counties. Subsequent acts of the legislature, however, expressly repealing the former acts establishing the boundary, and indicating an intent to define the

boundary anew, and to make the changed course of the river the boundary between the two counties, have the legal effect to change the location of the land lying between the old and new channels of the river from one county to the other. *Waters v. Pool*, 130 Cal. 136, 62 Pac. 385.

1. *Stats.* 1921, p. 1607.

2. *County of Mariposa v. County of Madera*, 142 Cal. 50, 75 Pac. 572. *San Bernardino County v. Reichert*, 87 Cal. 287, 25 Pac. 692. See *STATUTES*.

ture in fixing a line intended to adopt one that could at the time be definitely ascertained. Thus it has been held that acts fixing the boundary between two counties with reference to the lines of certain private grants must be construed as intending to adopt a line that could thus be definitely fixed; and an official survey of grants which had been theretofore made and recorded is proper evidence of the location of the boundary, though not finally approved as the basis of patents confirming the grants, in preference to a subsequent survey, upon which the patents were based.³ When the legislature defines a boundary, it must be assumed that it had knowledge respecting those matters concerning which it was legislating, and that, in fixing a boundary by reference to streams, it then knew the location, trend and source of such streams.⁴ The court, however, will not declare a statute defining a boundary void for uncertainty because of a mistake in description in one definition of the boundary, but will liberally construe the statute in support of the evident intention of the legislature.⁵ Where, in defining a boundary, a certain distance is called for from a given point on a navigable stream to another point on the stream, the measurement must be made by its meanders and not in a straight line. The same rule prevails when the distance is called for upon a public highway. But when a distance is called for upon a stream which is not navigable, the distance upon the stream will be ascertained—in the absence of other controlling facts—by measuring in a straight line.⁶

§ 16. Determination of Boundaries by Survey.—The law provides, in sections 3969, 3970 and 3971 of the Political Code, a special remedy for the determination by survey of

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| 3. San Bernardino County v. Reichert, 87 Cal. 287, 25 Pac. 692. | 5. County of Mariposa v. County of Madera, 142 Cal. 50, 75 Pac. 572. |
| 4. County of Sierra v. County of Nevada, 155 Cal. 1, 99 Pac. 371. | 6. People v. Henderson, 40 Cal. 29. See BOUNDARIES, vol. 4, p. 370. |

disputed boundary lines.⁷ Hence, where the language of an act so clearly defines the lines that there is nothing to be done but run a survey along it, there is no room for question; the sections of the code furnish a plain, speedy and adequate remedy for the establishment of the line, and a court of equity cannot be called upon to do what the law in the first instance provides for having done.⁸ Where the boundary line between two counties has been adequately marked by monuments, lines, and surveys lawfully made, there is no necessity or authority for a resurvey by the surveyor-general, unless the monuments of that survey have been displaced or destroyed so that the line is no longer adequately marked. In that event the surveyor-general could be called upon to resurvey and mark the line under the provision of the code, but in so doing it would be the line fixed by the former survey which he must survey and mark, and not the actual position of the line.⁹

Conclusiveness of survey—Cost.—Section 3972 of the Political Code declares that “All surveys finally approved under the provisions of this chapter are conclusive ascertainment of lines and corners included therein.” It has been held that this is a clear and explicit declaration that such surveys are conclusive, and that in making them conclusive the legislature has not exceeded its constitutional

7. In providing that the surveys shall be “made by the surveyor-general” (Pol. Code, § 3969), it was never contemplated by the legislature that that officer should go personally into the field and direct or perform the detail work of running lines and marking boundaries. What is meant and intended is that the survey shall be made under his direction and supervision, and when completed shall have his official sanction and approval. When so made and approved the survey be-

comes his act, and is “made by the surveyor-general.” And there is no more reason for supposing that the legislature intended such work to be done by the deputy than by the surveyor-general himself. *Rice v. Trinity County*, 110 Cal. 247, 49 Pac. 809.

8. *County of Sierra v. County of Nevada*, 155 Cal. 1, 99 Pac. 371; *People v. Boggs*, 56 Cal. 648.

9. *Trinity County v. Mendocino County*, 151 Cal. 279, 90 Pac. 685.

authority in that it has conferred judicial power on the surveyor-general.¹⁰ The code also declares that all surveys and maps of boundary lines legally made and approved, are valid, and are prima facie evidence of the establishment of such lines, except so far as they are inconsistent with the provisions of the code.¹¹

“The cost of making such surveys must be apportioned equally among the counties interested, and the board of supervisors must audit the same, and the amounts must be paid out of the general county fund.”¹²

Counties are liable to a surveyor appointed by the surveyor-general for the cost of making a survey where it was officially sanctioned and approved by the surveyor-general, even though the surveyor making it was not a deputy surveyor-general.¹³

§ 17. Determination of Boundaries by Court.—As it has been seen, the remedy for determining a disputed boundary provided by sections 3969–3971 of the Political Code can only be availed of where the language of an act defining a boundary is clear.¹⁴ Where the language is not clear, and where the description is of doubtful import, or where the interpretation of a court is required to ascertain what is meant by the statute when mentioning localities, natural objects, or sources of streams, the sections of the code have no application. To leave the interpretation of doubtful language used in such a statute to the determination of the surveyor-general would, it has been said, be to confer upon that officer judicial functions. In such cases the construction of the language used by the legislature is a matter exclusively for the courts. Accordingly, when a boundary line is designated by indefi-

10. *County of Sierra v. County of Nevada*, 155 Cal. 1, 99 Pac. 371; *People v. Boggs*, 56 Cal. 648; S. C., *Borel v. Bogg*, 2 Cal. Unrep. 105.

11. Pol. Code, § 3973.

12. Pol. Code, § 3974.

13. *Rice v. Trinity County*, 110 Cal. 247, 42 Pac. 809.

14. *Supra*, § 16.

nite reference to the source of a stream as the point from which a line is to be projected and the south fork of a main river as another part, the designation is so uncertain that a court cannot say as a matter of law where the boundaries are. Under such circumstances the location of the boundaries is a question of fact to be determined by the court. And when the evidence is conflicting on that point, the conclusion of the trial court will not be disturbed on appeal.¹⁵

§ 18. County Seat.—The county seats of the respective counties of the state, as fixed by law, are recognized and declared to be such, and provision is made for elections to submit the question of removal of the county seat, by the Political Code.¹⁶ The authority of a board of supervisors to order such an election is measured by the statute. Thus it has been held that a board cannot order an election for the removal of a county seat unless the required number of electors who petition for such election have signed the identical petition presented to the board.¹⁷ Notice of the election, clearly stating the object must be given, and the election must be conducted and the returns made in all respects in the manner prescribed by law in regard to elections for county officers.¹⁸ In

15. *County of Sierra v. County of Nevada*, 155 Cal. 1, 99 Pac. 371. See BOUNDARIES, vol. 4, p. 442 et seq.

16. Pol. Code, §§ 3975b, 3976.

17. *Fox v. Board of Supervisors*, 49 Cal. 563. See *Calaveras County v. Brockway*, 30 Cal. 325, where one of the conditions of a law, submitting the question whether the county seat should be removed to a place named in the act, was that prior to the election the citizens of that place should raise a sum of money named, to pay expenses of removal, and to be applied in erect-

ing county buildings, and deposit it with a banking firm to be designated by the board of supervisors. It was held that the conditions of the act were complied with, if the money was raised and tendered to a banking firm thus designated, even though the firm refused to receive it. If, after such refusal, the money was deposited with another banking firm, and the board of supervisors afterwards ratified it, they made the deposit their own act.

18. Pol. Code, § 3979.

voting on the question, each elector must vote for the place in the county which he prefers as a seat of justice.¹⁹ When the returns have been received the results must be ascertained by the board.²⁰ And if two-thirds of the qualified voters of the county voting on the proposition shall vote in favor of removal,¹ and in favor of any particular place, the board shall so declare on its minutes, and give notice of the result.² In such notice the place selected as the county seat must be so declared from a day specified in the notice not more than ninety days after the election.³ The determination of the board of supervisors that a place voted for received a majority of the votes cast is prima facie evidence of the fact so determined, but is not conclusive; and if the fact was not as determined, it may be attacked for fraud or mistake, and the true result ascertained.⁴ A statement of the result of the election must be deposited with the county clerk, and a copy of the notice must be transmitted to the secretary of state.⁵

19. Pol. Code, § 3980.

20. Pol. Code, § 3981; *Calaveras County v. Brockway*, 30 Cal. 325.

1. Pol. Code, § 3981; Const., art. XI, § 2.

2. Pol. Code, § 3981. See *People v. Shasta County*, 75 Cal. 179, 16 Pac. 776 (holding that an injunction will not lie to restrain the supervisors from giving notice of the result of an election held by their order upon the question of the removal of the county seat, on the ground that the election was illegally ordered by the board by reason of their want of jurisdiction. *Upham v. Sutter County Supervisors*, 8 Cal. 378 (holding that the legislature can delegate the power to the voters of a county, to select a county seat therein). *Calaveras County v. Brockway*, 30 Cal. 325 (holding that a statement in a

petition for a writ of mandate, that an election was held in a county to decide whether C. or S. should be the county seat, and that the board of supervisors canvassed the returns, and estimated the vote, and declared the result to be that S. had received a majority of the votes, is a sufficient averment that S. received a majority of the votes cast).

3. Pol. Code, § 3982.

4. *Calaveras County v. Brockway*, 30 Cal. 325.

5. Pol. Code, § 3983.

An averment in a complaint that a county seat has been removed is sufficient, without setting forth all the proceedings resulting in the removal. If a complaint avers that a county seat has been removed from one place to another, and there is an old act fixing the county

The constitution provides that "A proposition of removal shall not be submitted in the same county more than once in four years."⁶

When the county seat of a county has been once removed by popular vote, it may be again removed from time to time; but no election may be ordered to effect any such subsequent removal, unless a petition praying for an election is signed by qualified electors of the county, equal in number to at least three-fourths of all the votes cast at the next preceding general election.⁷ The constitution forbids the changing of county seats by special act of the legislature.⁸

seat at the former place the court, in support of the averment, will take judicial notice of the fact that the county seat may have been removed by an election to the latter place, under the law allowing such removals. *Babeock v. Goodrich*, 47 Cal. 488.

6. Const., art. XI, § 2. See Pol. Code, § 3984, as to second election for removal of county seat. And see *A therton v. Supervisors of San Mateo Co.*, 48 Cal. 157 (holding that a provision that, if at an election a majority of the votes were cast for some other place than that fixed by law as the former county seat, no second election for the removal thereof must be held within two years, does not inhibit a second election where a majority of the votes were not cast for some other place, and the county seat remained unchanged).

Inasmuch as the constitutional provision quoted in the text is found in the section with the provision that "no county seat shall be removed unless two-thirds of the qualified electors of the county, vot-

ing on the proposition at a general election, shall vote in favor of such removal," it would seem to indicate, when construed in connection with the provision in § 3984, Pol. Code, that no second election for the removal of the county seat can be held within four years after an election in which "two-thirds of the votes are not cast for some other place than that fixed by law as the former county seat," that the provision does not inhibit a second election within four years under all circumstances. Thus an interesting question would be presented where two-thirds of the votes were in favor of removal, but the removal was not effected, because two-thirds of the votes were not in favor of any particular place, as provided by § 3981, Pol. Code, as to whether a second election could be legally ordered within four years.

7. Pol. Code, § 3985.

8. Const., art. IV, § 25, subd. 21. See note, 13 A. L. R. 734, as to the validity of contract intended or tending to influence location of county seat.

III. GOVERNMENT AND OFFICERS.

In General.

§ 19. **Establishment—Uniform System.**—The constitution provides that “The legislature shall establish a system of county governments, which shall be uniform throughout the state.”⁹ It will be observed that the constitution does not of itself—*ex proprio vigore*—establish any county governments; but, assuming that such governments are required, provides that they shall be created and established by the legislature. The whole subject is turned over to the legislature with certain admonitions only for its guidance.¹⁰ Of course, those special instances wherein the constitution itself sanctions a departure from uniformity, such, for instance, as in the case of counties or consolidated cities and counties which adopt charters, are to be considered exceptions to the general rule.¹¹ The word “system,” as here employed, means “an organized plan or scheme in keeping with which the constituent parts thereof are rendered similar and are connected and combined into one complete, harmonious whole, and it necessarily imports both a unity of purpose and entirety of operation.”¹² The constitutional man-

9. Const., art. XI, § 4. As to uniformity of operation of laws in general, see CONSTITUTIONAL LAW, vol. 5, p. 816 et seq.

10. *People v. Provines*, 34 Cal. 520, construing similar provision in constitution of 1849.

11. *Coulter v. Pool*, 62 Cal. Dec. 421, 201 Pac. 120; *Welsh v. Bramlet*, 98 Cal. 219, 33 Pac. 66. But see *People v. Board of Supervisors*, 50 Cal. 561, holding that the clause in the constitution of 1849 requiring the legislature to establish a system of county governments which shall be as nearly uniform as prac-

ticable throughout the state, should be construed as directory only, and does not deprive the legislature of the power to pass special laws in respect to matters relating to the county governments. And see to same effect, *People v. Lake County Suprs.*, 33 Cal. 487.

12. *Coulter v. Pool*, 62 Cal. Dec. 421, 201 Pac. 120, per Lennon, J. And see *Welsh v. Bramlet*, 98 Cal. 219, 33 Pac. 66.

“Uniformity means consistency, resemblance, sameness, a conformity to one pattern. In this resemblance, in this sameness, in this

date requires, therefore, one system applicable alike in all parts of the state and continuously operating equally in all of counties.¹³ Thus it has been said that if a particular county were expressly exempted from the operation of an act, there would be no doubt but that it would violate the uniformity of system contemplated. And the same result follows where no particular county is expressly exempted, but where the people of any one or more counties may, without regard to any action taken by the remaining counties, determine that they will or will not be subject to the operation of a law, and thereby, of their own volition, create an exception to the general and uniform system of county government.¹⁴

The legislature also is forbidden to pass any local or special law "regulating county and township business, or the election of the county and township officers,"¹⁵ or "creating offices, or prescribing the powers and duties of officers in counties, cities, and counties, township, election or school districts."¹⁶ Accordingly, whenever the legislature attempts to enact a law for one or more counties upon subjects which must be provided

conformity of a class to one pattern, consists the uniformity of system which is essential to the creation and continuity of a uniform system." *Coulter v. Pool*, 62 Cal. Dec. 421, 201 Pac. 120, per Lennon, J.

13. *Coulter v. Pool*, 62 Cal. Dec. 421, 201 Pac. 120; *Welsh v. Bramlet*, 98 Cal. 219, 33 Pac. 66.

14. *Coulter v. Pool*, 62 Cal. Dec. 421, 201 Pac. 120, holding "the County Engineer Act" unconstitutional and void; and distinguishing *Scott v. Boyle*, 164 Cal. 321, 128 Pac. 941; *Board of Law Library Trustees v. Board of Supervisors*, 99 Cal. 571, 34 Pac. 244; and *Tulare County v. May*, 118 Cal. 303, 50 Pac. 427.

"The legislature itself must by its own enactment establish in the first instance a system of county government uniform throughout the state, and it necessarily follows that such system when once established must, in so far as its uniformity is concerned, be kept intact by the legislature, and must not be impaired by any subsequent legislation authorizing in counties a material difference in the manner of performing functions of government intrusted to them." *Coulter v. Pool*, 62 Cal. Dec. 421, 201 Pac. 120.

15. Const., art. IV, § 25, subd. 9.

16. Const., art. IV, § 25, subd. 28; *Payne v. Murphy*, 18 Cal. App. 446, 123 Pac. 350, as to appointment of stenographer by judge of superior court.

for by general laws, or which are to form part of a uniform system for the whole state, whether such counties are designated directly by name, or by reference to a class into which they have been placed for other subjects of legislation, such law infringes these provisions of the constitution.¹⁷ So a statute providing for a system of county government which is limited to a portion of the state would be in contravention of the provisions of the constitution which require the legislature to provide a uniform system for the entire state.¹⁸ However, a special provision for one class of counties in an act purporting to provide for all classes, may be disregarded as being beyond the power of the legislature, and the general provision of the act sustained and made applicable to all counties.¹⁹

17. *Welsh v. Bramlet*, 98 Cal. 219, 33 Pac. 66, holding that a provision in a statute by which counties of one class alone are segregated from the others, and authority conferred upon the district attorney therein, which is not granted to that officer in other counties, renders the act to that extent local and special, and in violation of the constitution. And see *Hale v. McGettigan*, 114 Cal. 112, 45 Pac. 1049; *Bloss v. Lewis*, 109 Cal. 493, 41 Pac. 1081; *Turner v. County of Siskiyou*, 109 Cal. 332, 42 Pac. 434; *Walser v. Austin*, 104 Cal. 128, 37 Pac. 869; *Dougherty v. Austin*, 94 Cal. 601, 16 L. R. A. 161, 28 Pac. 834, 29 Pac. 1092; *County of San Luis Obispo v. Graves*, 84 Cal. 71, 23 Pac. 1032. But see *Tulare County v. May*, 118 Cal. 303, 50 Pac. 427, holding that the uniformity of an act is not destroyed by the exceptional privilege conferred upon officers of some classes of counties of appointing deputies whose salaries are to be paid out of the county treasury, while in the remaining classes all deputies are to

be paid by their principals out of the gross sum allowed for their compensation; overruling, as to this point, *Welsh v. Bramlet*, 98 Cal. 219, 33 Pac. 66, and *Walser v. Austin*, 104 Cal. 128, 37 Pac. 869. And in support of this holding, see *Freeman v. Barnum*, 131 Cal. 386, 82 Am. St. Rep. 355, 63 Pac. 691.

18. *Hale v. McGettigan*, 114 Cal. 112, 45 Pac. 1049. But see *Tulare County v. May*, 118 Cal. 303, 50 Pac. 427, holding that the provisions of an act, authorizing the appointment of one additional deputy sheriff and two additional deputy clerks in any county in which an additional judge of the superior court is provided for, is general and uniform in its operation, inasmuch as it applies to the whole state, and takes effect in any county whenever an additional judgeship is created therein.

19. *Hale v. McGettigan*, 114 Cal. 112, 45 Pac. 1049. See as to acts partially unconstitutional, CONSTITUTIONAL LAW, vol. 5, p. 643 et seq.

Article III of the constitution, providing that the powers of government shall be divided into three departments, and that no person charged with powers properly belonging to one of them shall exercise any functions appertaining to either of the others, relates only to the state government, and has no application to local governments such as those of counties.²⁰

§ 20. Initiative, Referendum and Recall.—The constitution declares that "The initiative and referendum powers of the people are hereby . . . reserved to the electors of each county, city and county, city and town of the state, to be exercised under such procedure as may be provided by law."¹ In accordance with this provision it has been held that a resolution of a county board of supervisors declaring the necessity for and authorizing the construction of a building, and accepting plans and specifications therefor, is legislative in character, and where, after the passage of such a resolution, a proper petition is presented requesting the submission of the resolution to a vote of the electors, the board may be compelled by mandamus to submit the question.² Another constitutional amendment provides that the right of recall shall also be exercised by the electors of each county, city and county, city and town with reference to the elective officers thereof.³

20. *Nicholl v. Koster*, 157 Cal. 416, 108 Pac. 302; *Holley v. County of Orange*, 106 Cal. 420, 39 Pac. 790; *People v. Provines*, 34 Cal. 520 (overruling a line of cases to the contrary, including *Burgoyne v. Board of Supervisors*, 5 Cal. 9; *Phelan v. San Francisco*, 6 Cal. 531, and also criticising the reason for the decision in *People v. El Dorado County Suprs.*, 8 Cal. 58).

Hence, the fact that supervisors or other county officers are invested with mixed functions does offend the con-

stitutional provision. *Holley v. County of Orange*, 106 Cal. 420, 39 Pac. 790; *People v. Provines*, 34 Cal. 520. See in general as to distribution of the powers of government, *CONSTITUTIONAL LAW*, vol. 5, p. 649 et seq.

1. Const., art. IV, § 1. See ELECTIONS; STATUTES.

2. *Hill v. Board of Supervisors*, 176 Cal. 84, 167 Pac. 574.

3. Const., art. XXIII, § 1. As to recall of public officers generally, see PUBLIC OFFICERS.

§ 21. County Charters.—By an amendment to the constitution, adopted in 1911, there was added a provision by which counties for the first time were given authority to adopt freeholders' charters for the purposes of local government. By the terms of this amendment the several things which it is competent for such charters to provide for are set forth.⁴ It is there declared that a county charter when duly adopted and approved shall supersede the general laws adopted by the legislature in pursuance of sections four and five of the constitution. But where the charter fails to provide for matters which it properly should cover, it is held that the intention is clear that the general law, which in such a case has not been superseded by the charter, shall govern.⁵

It is further declared by the constitution that county charters shall provide "for the powers and duties of boards of supervisors . . . ; provided, that the provisions of such charters relating to the powers and duties of boards of supervisors and all other county officers shall be subject to and controlled by general laws." The Political Code provides for the enactment of ordinances by the initiative process and also for referendum votes upon ordinances passed by the board of supervisors.⁶ Hence, where a charter is silent as to the time when ordinances shall take effect and as to the subjects of initiative and referendum, these matters are subject to be controlled by the provisions of the Political Code as a part of the general law of the state.⁷

4. Const., art. XI, § 7½; *Cline v. Lewis*, 175 Cal. 315, 165 Pac. 915; *Anderson v. Lewis*, 29 Cal. App. 24, 154 Pac. 287; *Gibson v. Civil Service Com.*, 27 Cal. App. 396, 150 Pac. 78.

5. *Cline v. Lewis*, 175 Cal. 315, 165 Pac. 915; *Jones v. De Shields*, 62 Cal. Dec. 517, 202 Pac. 137.

6. Pol. Code, § 4058.

7. In such a case it has been held that an ordinance fixing the salary of a sheriff as to which no referendum proceedings were taken did not become operative as an existing law until the expiration of thirty days from its passage, in accordance with the provisions of Pol. Code, § 4058; *Cline v. Lewis*, 175 Cal. 315, 165 Pac. 915.

Where a charter adopted pursuant to the constitution authorizes the board of supervisors to make provision for the appointment of probation officers, and provision is so made, the general laws of the state are superseded.⁸ Where, however, the board of supervisors, in enacting an ordinance providing for probation offices and fixing the compensation of the officers, makes no mention of the manner in which the appointments of subordinate officers shall be made, the general laws govern the manner of such appointments.⁹ But an amendment to a charter providing that all officers other than the supervisors shall be elected as is or may be provided by general law, and that the powers and duties of such officers shall be such as are provided by general law, does not refer only to those officers provided for by general law, and thereby eliminate some county officers provided for by the charter and not by general law, so that such officers cease to exist.¹⁰

The provision authorizing charters to provide, among other things, "for the powers and duties of boards of supervisors and all other county officers, for their removal . . ." includes authority to provide for the removal of probation officers; and the provisions of a charter providing for the removal of all officers supersede the provisions of the general statute, known as the juvenile law, affecting the removal of probation officers.¹¹

The constitution provides in substance that charters shall not affect the tenure of office of any elective officers, but that they shall continue to hold their respective offices until the expiration of the term for which they were

8. *Anderson v. Lewis*, 29 Cal. App. 24, 154 Pac. 287; *Gibson v. Civil Service Com.*, 27 Cal. App. 396, 150 Pac. 78.

9. *Anderson v. Lewis*, 29 Cal. App. 24, 154 Pac. 287.

10. The provisions of the charter with respect to consolidation of offices, even under such an amendment, are not superseded by the

terms of Pol. Code, § 4017, upon the same subject, in view of the provision of section 7½, that county charters shall provide "for the consolidation and segregation of county offices." *More v. Board of Supervisors*, 31 Cal. App. 388, 160 Pac. 702.

11. *Gibson v. Civil Service Com.*, 27 Cal. App. 396, 150 Pac. 78.

elected, unless sooner removed in the manner provided by law. It follows, therefore, that until the appointment and qualification of a successor to an elective officer in office at the time a charter went into effect, such elective officer continues to hold office solely by virtue of his election. His tenure of office is that prescribed by the general laws under which he was elected, and under those laws he holds, unless removed in accordance therewith, until the appointment of a successor in the manner provided by the charter, and the qualification of such successor. Such tenure cannot be affected by any provision of the charter as to removal, and as to that matter the general laws of the state still apply. So, it has been held that the proceedings provided by the Penal Code for the "removal of civil officers otherwise than by impeachment," and not the proceedings prescribed by a county charter, are applicable to a proceeding to remove, for misconduct in office, a county treasurer who, before the charter took effect, had been elected for a term.¹²

While a charter should be consistent with the constitution, a whole charter will not be declared void because it contains at the time of its adoption, certain provisions inconsistent with the constitution.¹³

§ 22. Powers of Counties—Mode of Exercise.—Every county is a body corporate and politic, and as such has the powers specified by law, and such other powers as are necessarily implied from those expressed.¹⁴ Its powers are enumerated as follows:

12. *Hunt v. Superior Court*, 178 Cal. 470, 173 Pac. 1097.

13. *Jones v. De Shields*, 62 Cal. Dec. 517, 202 Pac. 137 (holding that an allowance in a charter to the chief deputy or other deputy as salary for the services of such deputy is violative of the constitutional provision which requires that the

power to fix the number and compensation of deputies must be vested by the charter in the board of supervisors); *Martin v. De Shields*, 62 Cal. Dec. 523, 203 Pac. 118; *Winter v. De Shields*, 31 Cal. App. Dec. 807, 189 Pac. 703.

14. Pol. Code, § 4000.

“1. To sue and be sued. 2. To purchase, receive by gift or bequest, and hold land within its limits. 3. To make such contracts and purchase and hold such personal property as may be necessary to the exercise of its powers. 4. To manage and dispose of its property as the interest of its inhabitants may require. 5. To levy and collect such taxes, for purposes under its exclusive jurisdiction, as are authorized by law.”¹⁵

These powers, however, can be exercised only by the board of supervisors, or by agents and officers acting under their authority, or authority of law.¹⁶ As to certain matters coming within the legal cognizance of the governing board and other officers of a county, the mode is the measure of the power of such officers, and in such cases the statutory method of initiating the proceeding must be followed in order to make a valid exercise of the power conferred.¹⁷ But in those instances, the acts so required to be done are essentially jurisdictional—that is, they constitute jurisdictional prerequisites to a valid exercise of the power conferred and sought to be exercised. In this connection, it has been said that the procedure prescribed for the presentation to and consideration by the board of supervisors of a claim is merely formal and in no sense jurisdictional.¹⁸

§ 23. Officers Defined and Enumerated.—A county officer is a public officer, and has been defined to be one who fills a position provided for in county governments and who is selected by the county to represent that govern-

15. Pol. Code, § 4003.

16. Pol. Code, § 4001; *Contra Costa County v. Soto*, 138 Cal. 57, 70 Pac. 1019; *County of Sierra v. Butler*, 136 Cal. 547, 69 Pac. 418.

By the laws of 1850, the whole power of county government was placed in the courts of sessions of each county; they performed the duties which have since been devolved on the supervisors. *People*

v. Board of Supervisors, 50 Cal. 561 (Rhodes, J., concurring); *Draper v. Noteware*, 7 Cal. 276.

17. *House v. Los Angeles County*, 104 Cal. 73, 37 Pac. 796; *Sittig v. Raney*, 35 Cal. App. Dec. 789, 200 Pac. 824.

18. *Sittig v. Raney*, 35 Cal. App. Dec. 789, 200 Pac. 824. See *infra*, § 107 et seq., as to presentation of claims.

mental unit in carrying out certain acts with the performance of which the county is charged in behalf of the public.¹⁹ The legislature, subject to the provisions of the constitution, may create county offices, prescribe the tenure thereof, fix the salary of incumbents, prescribe their duties, and determine their qualifications.²⁰ Where the legislature has done these things, clearly the position thus created becomes a county office.¹ This is so despite the fact that the act creating the position declares that the incumbent "shall be deemed an employee and not a county officer . . . subject to the control and supervision of the board of supervisors."²

Enumeration of officers.—Section 4013 of the Political Code, as amended in 1921, enumerates the officers of a county as follows: 1. A district attorney;³ 2. A sheriff;⁴

19. *Coulter v. Pool*, 62 Cal. Dec. 421, 201 Pac. 120, citing *Sheboygan County v. Parker*, 70 U. S. 93, 18 L. Ed. 33; *State v. Samuelson*, 131 Wis. 499, 111 N. W. 712; *State v. Higginbotham*, 84 Ark. 537, 106 S. W. 484.

20. *Reed v. Hammond*, 18 Cal. App. 442, 123 Pac. 346.

1. *Coulter v. Pool*, 62 Cal. Dec. 421, 201 Pac. 120 (holding that the position of "county engineer" which the legislature attempted to provide for by "the County Engineer Act," Stats. 1919, p. 1290, is a county office); *Nicholl v. Koster*, 157 Cal. 416, 108 Pac. 302 (probation officer); *Gibson v. Civil Service Com.*, 27 Cal. App. 396, 150 Pac. 78 (probation officer); *Reed v. Hammond*, 18 Cal. App. 442, 123 Pac. 346 (office of assistant probation officer created by the Juvenile Court Act, approved April 5, 1911); *People v. Harrington*, 63 Cal. 257 (physician appointed by the board

of supervisors under the provisions of the act of 1860 relating to Yuba county, as amended in 1879). But see *People v. Wheeler*, 136 Cal. 652, 69 Pac. 435 (construing County Government Act of 1897, § 25, subd. 5); *Grindley v. Santa Cruz County*, 2 Cal. Unrep. 326, 4 Pac. 390 (construing Pol. Code, § 4046, subd. 5), and *McDaniel v. Yuba County*, 14 Cal. 444 (construing act of 1855, holding that a county physician is not a county officer).

The following have been held not to be county officers: Official reporter of the superior court, *Pratt v. Browne*, 135 Cal. 649, 67 Pac. 1082; superintendent of irrigation, *Knox v. Los Angeles Co.*, 58 Cal. 59; county judge, *People v. Martin*, 12 Cal. 409.

2. *Coulter v. Pool*, 62 Cal. Dec. 421, 201 Pac. 120.

3. See DISTRICT AND PROSECUTING ATTORNEYS.

4. See SHERIFFS.

3. A county clerk;⁵ 4. An auditor;⁶ 5. A treasurer;⁷ 6. A recorder;⁸ 7. A license collector;⁹ 8. A tax collector, who shall be ex-officio license collector;¹⁰ 9. An assessor;¹¹ 10. A superintendent of schools;¹² 11. A public administrator;¹³ 12. A coroner;¹⁴ 13. A surveyor;¹⁵ 14. Members of the board of supervisors;¹⁶ 15. A livestock inspector;¹⁷ 16. A fish and game warden;¹⁸ 17. A county librarian;¹⁹ 18. Such other officers as may be provided by law.²⁰

§ 24. Legislative Control—Uniform Laws.—The constitution directs that the legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of boards of supervisors, sheriffs, county clerks, district attorneys, and such other county, township, and municipal officers as public convenience may require, and shall prescribe their duties and fix their terms of office.¹ This provision is mandatory. It requires that any law which the legislature may enact upon these subjects be uniformly applicable to all counties.² Moreover, the constitution expressly forbids the legislature from passing any local or special laws regulating the election of county officers,³ or prescribing their powers and duties.⁴ Hence, it has been held that acts, which

5. See *infra*, § 70 et seq.

6. See *infra*, § 59 et seq.

7. See *infra*, § 63 et seq.

8. See *infra*, § 73. See, also, RECORDS.

9. See LICENSES.

10. See TAXATION.

11. See TAXATION.

12. See SCHOOLS.

13. See EXECUTORS AND ADMINISTRATORS.

14. See CORONERS, vol. 6, p. 541.

15. See *infra*, § 72.

16. See *infra*, § 36 et seq.

17. See ANIMALS; INSPECTION.

18. See FISH AND FISHERIES; GAME.

19. Pol. Code, § 4013, subd. 17 (Amendt. 1921).

20. Pol. Code, § 4013, subd. 18 (Amendt. 1921). See COURTS, as to probation officers; HEALTH, as to health officers; HOSPITALS AND ASYLUMS, as to county physicians; PRISONS AND PRISONERS, as to matrons of county jails; TOWNSHIPS, as to township officers.

1. Const., art. XI, § 5.

2. *Welsh v. Bramlet*, 98 Cal. 219, 33 Pac. 66; *Barton v. Kalloch*, 56 Cal. 95; *In re Stuart*, 53 Cal. 745. See CONSTITUTIONAL LAW, vol. 5, p. 816 et seq.

3. Const., art. IV, § 25, subd. 9.

4. Const., art. IV, § 25, subd. 28.

create offices in but one class of counties, which class is arbitrarily designated by population, notwithstanding the constitutional provision that this shall be done by general law, and that counties may be classified by population only for the purpose of fixing the compensation of officers are obnoxious to the constitution.⁵ The duty of the legislature with relation to county offices, being imposed by an express constitutional provision, cannot be delegated.⁶

Since counties are political subdivisions of the state,⁷ the duties of county officers largely pertain to the government of the state.⁸ But when the people of the whole state have yielded up part of their sovereign power to a local subdivision, the grant will not be carried, by construction, to any greater extent than the words of the granting amendment clearly go.⁹

5. *San Francisco v. Broderick*, 125 Cal. 188, 57 Pac. 887 (holding act of 1880, in relation to deputies, assistants, copyists of county clerks in any city and county of more than one hundred thousand inhabitants, and the act of 1891, amendatory thereof, unconstitutional; and citing *Rauer v. Williams*, 118 Cal. 401, 50 Pac. 691; *Earle v. Board of Education*, 55 Cal. 489).

6. *People v. Wheeler*, 136 Cal. 652, 69 Pac. 435; *Dwyer v. Parker*, 115 Cal. 544, 47 Pac. 372; *Ventura County v. Clay*, 112 Cal. 65, 44 Pac. 488; *County of Los Angeles v. Lopez*, 104 Cal. 257, 38 Pac. 42; *County of El Dorado v. Meiss*, 100 Cal. 268, 34 Pac. 716; *People v. Johnson*, 95 Cal. 471, 31 Pac. 611; *Dougherty v. Austin*, 94 Cal. 601, 16 L. R. A. 161, 28 Pac. 834; 29 Pac. 1092; *City of Woodland v. Leech*, 20 Cal. App. 15, 127 Pac. 1040. See as to delegation of legislative authority in general,

CONSTITUTIONAL LAW, vol. 5, p. 677 et seq.

7. See *supra*, § 2.

8. *Hill v. Board of Supervisors*, 176 Cal. 84, 167 Pac. 514.

9. Thus where the power over county officers conferred by the constitution upon a consolidated city and county government, went only to the extent of allowing it to provide for the manner of their election, their terms of office and their compensation, and to provide for the number and compensation of officers' deputies, it was held to confer no power to prescribe the qualifications of such deputies; *Garnett v. Brooks*, 136 Cal. 585, 69 Pac. 298; *Crowley v. Freud*, 132 Cal. 440, 64 Pac. 696. And see *Nicholl v. Koster*, 157 Cal. 416, 108 Pac. 302, holding that although under the constitution a freeholders' charter under a consolidated city and county government may fix the election and compensation of county

§ 25. Liability of Officers for Fees and Public Money.—

The constitution provides that the legislature

“shall provide for the strict accountability of county and township officers for all fees which may be collected by them, and for all public and municipal moneys which may be paid for them, or officially come into their possession.”¹⁰

In the earlier history of the state it seems to have been the policy to compensate county officials largely, by fees collected for work performed. By the constitution of 1879 a radical change was made. The constitution now provides that the legislature shall regulate the compensation of all county officers, and provide for the accountability of all fees and public money which may come into their hands.¹¹ To carry out this mandate the legislature in 1883 revised the whole subject of the duties of county officers, and provided for classifying counties by population for the purpose of regulating compensation.¹² Several county government acts have been passed since the first, in 1883, and, generally speaking, the manner of compensating officers is completely changed. Fees collected now go to the treasury and salaries are provided for officers.¹³ The Code provides that

“All salaried officers of the several counties . . . shall charge and collect for the use of their respective counties, and pay into the county treasury, on or before the fifth day of each month, the fees now or hereafter allowed by law in all cases, except where such fees, or a percentage thereof, is allowed such officers, and excepting also such fees as are a charge against the county.”¹⁴

officers and their deputies, yet in so far as it is silent as to the election or appointment of special officers or their compensation the general law must prevail. See MUNICIPAL CORPORATIONS, as to the authority of consolidated city and county government with respect to county officers.

10. Const., art. XI, § 5.

11. Const., art. XI, § 5.

12. See *infra*, § 27 et seq.

13. *Matter of Dodge*, 135 Cal. 512, 67 Pac. 973; *County of Kern v. Fay*, 131 Cal. 547, 63 Pac. 857; *County of San Diego v. Schwartz*, 145 Cal. 49, 78 Pac. 231.

14. Pol. Code, § 4292 (Amdt. 1917, Stats. 1917, p. 937). See Pol. Code,

In order that any fees allowed may be retained, and not paid over, such retention must be expressly authorized, and where a statute in regard thereto admits of two constructions the rule of strict construction against the claimant and in favor of the county is applicable.¹⁵ Where money is collected by one in his official capacity as a county officer he cannot be heard to say that it was paid to him illegally, and that he, therefore, has a right to retain it.¹⁶

§ 26. Miscellaneous Provisions—Election and qualification.—The code makes full provision for the election,¹⁷ recall,¹⁸ official bonds,¹⁹ and qualifications of county officers.²⁰ With respect to their qualifications section 4023 provides as follows:

“No person is eligible to a county, district, or township office, who, at the time of his election, is not of the age of twenty-one years, or over, a citizen of the state, and an elector of the county, district, township, or other division, in which the duties of the office are to be exercised; provided, that no person shall hereafter be eligible to the office of district attorney who has not been admitted to practice in the supreme court of the state of California;

§ 4292a (Amdt. 1917, Stats. 1917, p. 937), as to deposit and withdrawal of trust moneys; *Smith v. Dunn*, 68 Cal. 54, 8 Pac. 625 (holding that the word “fees” as used in § 165 of the County Government Act of 1883, included the commissions estimated by a percentage allowed by law on sums of money received or collected).

15. *Irwin v. County of Yuba*, 119 Cal. 686, 52 Pac. 35; *San Luis Obispo County v. King*, 69 Cal. 531, 11 Pac. 178; *Patton v. Placer County*, 30 Cal. 175; *County of San Diego v. Bryan*, 18 Cal. App. 460, 123 Pac. 347.

16. *County of Kern v. Fay*, 131 Cal. 547, 63 Pac. 857 (citing *People*

v. Hamilton, 103 Cal. 488, 37 Pac. 627; *People v. Bunker*, 70 Cal. 212, 11 Pac. 703; *McKee v. Monterey County*, 51 Cal. 275); *Placer County v. Austin*, 8 Cal. 303. See Pol. Code, § 4292 et seq., as to regulations concerning fees; § 4300 et seq., as to the fees of officers.

17. Pol. Code, § 4021.

18. Pol. Code, § 4021a.

19. Pol. Code, § 4022.

20. Pol. Code, § 4023. And see Pol. Code, § 4024, as to appointment of deputies; Pol. Code, § 4025, as to duty of the county clerk to provide appliance for holding elections.

and provided further, that the county livestock inspector shall, at the time of his appointment, be a duly qualified veterinary surgeon having on file in the office of the county clerk a certificate issued to him by the state veterinary medical board."¹

The words "at the time of his election," as used in the statute, have reference to the time of the selection or designation to the office, and the provision as to eligibility applies alike to all county officers, whether designated at an election, commonly so termed, or by appointment.²

Residence.—The code provides that sheriffs, clerks, recorders, treasurers and auditors must have their offices at the county seat.³ The failure of a county treasurer to reside at the county seat as required is not an "omission to perform any duty enjoined by law upon a public officer," within the meaning of section 176 of the Penal Code, and is not made a misdemeanor. That section does not apply to conditions or qualifications upon which the incumbent's right to hold an office depends, but to duties pertaining to the office, while in the discharge of official duties.⁴ Proceeding by mandamus is the proper remedy to compel county officers to keep their offices at a county seat.⁵

Absence from state.—The Political Code provides for the period during which county officers may be absent from the state and for the consent of the supervisors to

1. Ward v. Crowell, 142 Cal. 587, 76 Pac. 491; Reed v. Hammond, 18 Cal. App. 442, 123 Pac. 346.

2. Reed v. Hammond, 18 Cal. App. 442, 123 Pac. 346.

3. Pol. Code, § 4112.

While engaged in the performance of the duty of attending upon regular and special sessions of the board of supervisors, the official residence of each supervisor is at the county seat; Howes v. Abbott, 78 Cal. 270, 20 Pac. 572.

4. Ex parte Harrold, 47 Cal. 129.

5. In a proceeding by mandamus commenced by a county against its officers, to compel them to hold their offices at the county seat, in which an issue arises as to which of two places voted for as county seat received a majority of the votes, one of the places voted for cannot appear as a party to the action; Calaveras County v. Brockway, 30 Cal. 325.

absences in exceptional cases.⁶ The Political Code declares that an office becomes vacant on the absence of the incumbent from the state without permission of the legislature beyond the period allowed by law.⁷ Hence, if a county officer is absent from the state for more than the time permitted, without the consent of the legislature or the board of supervisors his office, ipso facto, becomes vacant.⁸

Consolidation of offices.—The code provides for the consolidation of county offices, where the board of supervisors so elect,⁹ for the separation of offices so consolidated,¹⁰ and the duty of the person elected to fill consolidated offices.¹¹ It also provides that each office not consolidated as authorized must be filled by an election or an appointment in the manner provided by law.¹² To effect a consolidation of county offices, the order of the board of supervisors passed for such purpose must be published by order of the board. A publication in a newspaper of the proceedings of the board in which such order appeared is not sufficient.¹³ Supervisors have no power, under section 4018 of the Political Code, which provides that where the duties of two offices have been consolidated, the board may by ordinance “elect to separate the duties so consolidated . . . without reconsolidation, and provide that the duties of each office shall be performed by a separate person, whenever, in their discretion, the public interest will be best subserved thereby,” after separating the duties of the office of county auditor and county recorder, to declare the office of auditor vacant and then proceed to fill

6. Pol. Code, § 4313.

7. Pol. Code, § 996, subd. 6.

8. *People v. Shorb*, 100 Cal. 537, 38 Am. St. Rep. 310, 35 Pac. 163, holding that, the fact that the absence of the officer was necessary to his health and that its continuance beyond the statutory limit

was inevitable by reason of his sickness, is immaterial.

9. Pol. Code, § 4017.

10. Pol. Code, § 4018.

11. Pol. Code, § 4019.

12. Pol. Code, § 4020.

13. *People v. Williams*, 64 Cal. 87, 27 Pac. 939; *People v. Bailhache*, 52 Cal. 310.

it. Their power is limited to the filling of vacancies, and an office becomes vacant only upon the happening of any of the events enumerated in section 996 of the Political Code, and the separation of the duties of two offices is not a "removal from office" within the meaning of subdivision four of such section.¹⁴

Classification and Compensation of Officers.

§ 27. **Constitutional Mandate.**—The constitution provides that the legislature shall regulate the compensation of all county, township and municipal officers in the several counties,

"in proportion to duties, and may also establish fees to be charged and collected by such officers for services performed in their respective offices, in the manner and for the uses provided by law, and for this purpose may classify the counties by population."¹⁵

It is recognized that the constitution has prescribed a single mode which must be adopted in fixing the compensation of county officers, and that mode is to adjust the compensation in accordance with their respective duties under a classification by population, made for this purpose.¹⁶ When such a classification has been made, a stat-

14. *People v. Gunn*, 30 Cal. App. 114, 157 Pac. 619, citing *People v. Kelsey*, 34 Cal. 470, and distinguishing *Kinsey v. Kellogg*, 65 Cal. 111, 3 Pac. 405. See PUBLIC OFFICERS. See Pol. Code, § 4314 et seq., as to other provisions relating to officers. See JURORS, as to exemption of county officers from jury duty.

15. Const., art. XI, § 5. The obvious reason for such classification is that much more official service is required in some counties than in others, the purpose of the classification being to effect equality of compensation for like services through-

out the state; *Bloss v. Lewis*, 109 Cal. 493, 41 Pac. 1081.

16. *Tucker v. Barnum*, 144 Cal. 266, 77 Pac. 919, per Henshaw, J.; *Kiernan v. Swan*, 131 Cal. 410, 63 Pac. 768 (declaring that the legislature cannot change the measure of compensation of officers fixed by the County Government Act otherwise than by an amendment of it, preserving the standard fixed by the constitution of the classification of counties according to population for the purpose of fixing such compensation; and holding the fee bill of 1895, in so far as it attempts to

ute providing for compensation within any class is a general law, and it is immaterial whether such provision be in a special statute for each class, or in a single act providing for all of the classes; and an amendment of such statute which affects an entire class is equally a general law.¹⁷ It follows, therefore, that provisions in other acts, or in other sections of the same act, regulating compensation in other classes of counties, cannot be considered for the purpose of determining from them that the provisions relating to officers in a particular class are unconstitutional because special, or local, or not uniform with those adopted for the other classes.¹⁸

It has been pointed out that in every county government law enacted since the adoption of the present constitution the legislature has prescribed different standards of compensation and different modes of determining the same in the different classes of counties created, and in some cases there have been similar differences as to the

do so, unconstitutional); *Knight v. Martin*, 128 Cal. 245, 60 Pac. 849 (holding a provision of the County Government Act conferring power upon the supervisors to authorize the district attorney of any county to appoint an assistant, who shall receive a compensation fixed by the act, unconstitutional); *Reid v. Groezinger*, 115 Cal. 551, 47 Pac. 374; *Dwyer v. Parker*, 115 Cal. 544, 47 Pac. 372; *Miller v. Kister*, 68 Cal. 142, 8 Pac. 813. But see *Thom v. County of Los Angeles*, 136 Cal. 375, 69 Pac. 18, holding that a provision regulating compensation in proportion to duties, making the measure and mode of compensation applicable to all classes, is not in conflict with the constitution.

17. *Crockett v. Mathews*, 157 Cal. 153, 106 Pac. 575; *Johnson v. Gunn*, 148 Cal. 745, 84 Pac. 665; *Summerland v. Bicknell*, 111 Cal. 567, 44

Pac. 232; *Farnum v. Warner*, 104 Cal. 677, 38 Pac. 421; *Welsh v. Bramlet*, 98 Cal. 219, 33 Pac. 66; *Cody v. Murphey*, 89 Cal. 522, 22 Am. St. Rep. 331, 12 L. R. A. 508, 26 Pac. 1081. See CONSTITUTIONAL LAW, vol. 5, p. 793 et seq.

This is because the constitution expressly authorizes the legislature to create classes and to make laws applying exclusively to any one of such classes. It furnishes a constitutional distinction for the separate legislation, and this renders it unnecessary that there should be any natural or intrinsic distinction which might also serve to make the legislation appropriate; *Johnson v. Gunn*, 148 Cal. 745, 84 Pac. 665.

18. *Crockett v. Mathews*, 157 Cal. 153, 106 Pac. 575; *Johnson v. Gunn*, 148 Cal. 745, 84 Pac. 665; *Tulare County v. May*, 118 Cal. 303, 50 Pac. 427.

different officers within the same class. In some classes there has been a fixed salary, while in others there has been allowed certain fees, and the precise amount of compensation for each year or month is thereby left indeterminate. Nevertheless, it is held that this want of uniformity does not affect the validity of the law.¹⁹

The rule is different with regard to classification laws upon subjects not pertaining to the purpose for which classification is permitted by the constitution. The legislature is not authorized to classify counties for any purpose, except that of regulating the compensation of officers.²⁰ With respect to other laws the constitutional distinction does not exist, and there must be some natural or intrinsic distinction to authorize a difference in the legislation. This doctrine has been applied to laws expressly made applicable to certain classes of counties according to the classification made for the purpose of fixing compensation of officers but which did not relate to the subject of compensation. Such discrimination is unconstitutional, unless there exists, as a reason therefor, some natural or intrinsic distinction, as distinguished from the constitutional distinction.¹

19. *Johnson v. Gunn*, 148 Cal. 745, 84 Pac. 665, per Shaw, J.; *Vail v. San Diego County*, 126 Cal. 35, 58 Pac. 392; *San Luis Obispo County v. Darke*, 76 Cal. 92, 18 Pac. 118.

20. *Sanchez v. Fordyce*, 141 Cal. 427, 75 Pac. 56; *Pratt v. Browne*, 135 Cal. 649, 67 Pac. 1082; *San Francisco v. Broderick*, 125 Cal. 188, 57 Pac. 887; *Marsh v. Hanly*, 111 Cal. 368, 43 Pac. 975; *Bloss v. Lewis*, 109 Cal. 493, 41 Pac. 1081; *Turner v. County of Siskiyou*, 109 Cal. 332, 42 Pac. 434; *Welsh v. Bramlet*, 98 Cal. 219, 33 Pac. 66; *Dougherty v. Austin*, 94 Cal. 601, 16 L. R. A. 161, 28 Pac. 834, 29 Pac. 1092; *County of San Luis Obispo v. Graves*, 84 Cal. 71, 23 Pac. 1032;

Payne v. Murphy, 18 Cal. App. 446, 123 Pac. 350.

1. *Johnson v. Gunn*, 148 Cal. 745, 84 Pac. 665; *Pratt v. Browne*, 135 Cal. 649, 67 Pac. 1082; *San Francisco v. Broderick*, 125 Cal. 188, 57 Pac. 887; *Rauer v. Williams*, 118 Cal. 401, 50 Pac. 691; *Marsh v. Hanly*, 111 Cal. 368, 43 Pac. 975; *Bloss v. Lewis*, 109 Cal. 493, 41 Pac. 1081; *Turner v. Siskiyou County*, 109 Cal. 332, 42 Pac. 434; *Welsh v. Bramlet*, 98 Cal. 219, 33 Pac. 66; *Dougherty v. Austin*, 94 Cal. 601, 16 L. R. A. 161, 28 Pac. 834, 29 Pac. 1092. See generally as to validity of laws based upon classification, CONSTITUTIONAL LAW, vol. 5, p. 823 et seq.

It was the purpose of the constitutional provision above quoted that the legislature should regulate the compensation of officers in proportion to duties, and it was not intended that compensation should be left to the discretion of the board of supervisors.² Consequently, a statute which in some measure leaves the question of compensation to the board of supervisors is unconstitutional and void.³

Discretion of legislature.—The constitution has conferred upon the legislature authority to make the classification, and its action therein is not reviewable by the judiciary. Accordingly, it is not the province of a court to determine how many classes are necessary.⁴ It is within the power of the legislature to create as many classes as it pleases, or as few,⁵ and it is entirely immaterial that there is only one county in a particular class.⁶

Proportion to duties.—The constitution does not declare that the compensation of officers must be regulated in proportion to population. Population is but a convenient method of classification, but it is the duties to be per-

2. Agard v. Shaffer, 141 Cal. 725, 75 Pac. 343; County of Butte v. Merrill, 141 Cal. 396, 74 Pac. 1036; Kiernan v. Swan, 131 Cal. 410, 63 Pac. 768; Tulare County v. May, 118 Cal. 303, 50 Pac. 427; Dwyer v. Parker, 115 Cal. 544, 47 Pac. 372 (holding the provisions of the fee bill of 1895, relative to the supervisory powers of the district attorney over the fees and bills of the justices of the peace and constables, unconstitutional); Welsh v. Bramlet, 98 Cal. 219, 33 Pac. 66; County of Orange v. Harris, 97 Cal. 600, 32 Pac. 594; People v. Johnson, 95 Cal. 471, 31 Pac. 611; Dougherty v. Austin, 94 Cal. 601, 16 L. R. A. 161, 28 Pac. 834, 29 Pac. 1092; Westerfield v. Riverside County, 5 Cal. Unrep. 855, 50 Pac. 929.

3. Agard v. Shaffer, 141 Cal. 725, 75 Pac. 343. But see Scott v. Boyle, 164 Cal. 321, 128 Pac. 941, holding that the constitutional provision requiring the legislature to regulate the compensation of county officers does not apply to offices created by the legislature, under section 14 of article XI of the constitution, to exercise a part of the police powers of the state.

4. Summerland v. Bicknell, 111 Cal. 567, 44 Pac. 232; Welsh v. Bramlet, 98 Cal. 219, 33 Pac. 66; Longan v. County of Solano, 65 Cal. 122, 3 Pac. 463.

5. Longan v. Solano County, 65 Cal. 122, 3 Pac. 463.

6. Crockett v. Mathews, 157 Cal. 153, 106 Pac. 575; Summerland v. Bicknell, 111 Cal. 567, 44 Pac. 232.

formed which the legislature must particularly have in mind, so far as it is practicable to ascertain them, when it considers the question of compensation. The legislature may, and generally does, to some extent disregard the measure afforded by population.⁷ For similar reasons it is not important that the mode of arriving at the population of the townships of a particular class of counties for the purpose of adjusting the compensation of the officers of such townships shall be the same in one class of counties as in the others.⁸ What compensation to an officer should be deemed "in proportion to his duties" is a matter of fact to be determined by the legislature, and not by the courts.⁹

Township officers.—Section 5 of article XI of the constitution, above quoted in part, empowers the legislature to classify counties for the purpose of regulating the compensation of all the officers therein named. It therefore includes the township officers in the respective classes of counties and puts them in the same category in this respect as the county officers. Hence, a law which classifies counties by population, for the purpose of regulating the compensation of the township officers of such counties, or which for that purpose creates a single class of counties embracing all which fall within certain limits of population, and which regulates the compensation of such township officers, without operating at all on the township officers of other counties not coming within the class, is constitutional because specially permitted by this clause, although in the absence of such permission it might not be possible to discover a natural or intrinsic difference between the particular county and other counties not within the class, sufficient to justify the different legisla-

7. *Johnson v. Gunn*, 148 Cal. 745, 84 Pac. 665; *Welsh v. Bramlet*, 98 Cal. 219, 33 Pac. 66; *Longan v. Solano County*, 65 Cal. 122, 3 Pac. 463.

8. *Johnson v. Gunn*, 148 Cal. 745, 84 Pac. 665.

9. *Green v. County of Fresno*, 95 Cal. 329, 30 Pac. 544; *Longan v. County of Solano*, 65 Cal. 122, 3 Pac. 463.

tion. In this connection it has been held that a provision of the law declaring the mode of ascertaining the population of the townships in counties of a particular class for the purpose of adjusting the salaries of the officers of such townships in proportion to duties is a provision relating directly to the purposes for which classification of counties is permitted, and is limited to those purposes alone. Such a law is properly made applicable exclusively to counties of that particular class and cannot be said to be either local or special or lacking in uniformity.¹⁰

The constitution does not, however, expressly confer power to classify by population townships within any particular class of counties for the purpose of regulating the compensation of the officers of such townships. The power to classify for that purpose is a part of the general power of the legislature to classify whenever there is a natural or intrinsic distinction sufficient to justify different legislation. The existence of this power is well established by the decisions.¹¹ But it is held that with respect to the different townships of a given class of counties the method of fixing the compensation of township officers

10. *Johnson v. Gunn*, 148 Cal. 745, 84 Pac. 665, per Shaw, J.

11. *Crockett v. Mathews*, 157 Cal. 153, 106 Pac. 575; *Johnson v. Gunn*, 148 Cal. 745, 84 Pac. 665; *McCauley v. Culbert*, 144 Cal. 276, 77 Pac. 923; *Tucker v. Barnum*, 144 Cal. 266, 77 Pac. 919; *Summerfield v. Dow*, 5 Cal. App. 678, 91 Pac. 156. See CONSTITUTIONAL LAW, vol. 5, p. 823 et seq. On this point the supreme court has said: "Since, within the view of the framers of the constitution, this [classifying counties by population] was the proper mode for fixing the compensation of county officers, if there be no constitutional inhibition to the contrary, no reason can be perceived why a like method of classification

of townships should be other than proper. And, notwithstanding the dictum in *Sanchez v. Fordyce*, 141 Cal. 427, 75 Pac. 56, we can discover no such inhibition in the constitution. . . . That the legislature may adopt the same scheme made applicable to counties and classify townships by population for the same purpose would seem to be not only permissible, but a course even suggested. . . . When the legislature undertakes to salary such township officers it is difficult to perceive how this can fairly be done within the requirements of the constitution, if it were not permissible so to classify townships"; *Tucker v. Barnum*, 144 Cal. 266, 77 Pac. 919, per Henshaw, J.

must be uniform and in substantially the same proportion to duties when applied to such townships. This is in accord with the proposition, before stated, that such laws are not valid unless they operate uniformly upon all the subjects as to which there exists no natural or intrinsic distinction justifying different legislation.¹³

§ 28. Basis of Classification—New Counties.—The power to classify counties for the purpose of regulating the compensation of officers is limited by the constitution to classification according to population.¹³ It is apparent that the legislature has no power arbitrarily to place any particular county in any particular class. Classes are arranged according to a graduated scale of population, and when population is determined by the legislature the classification is arrived at without trouble.¹⁴ A court will take judicial notice whether a county has a population which places it in a specified class and of the number of counties belonging to a particular class.¹⁵

The Political Code contains special provisions relative to the classification of newly created counties.¹⁶ Under a special act creating a new county and declaring such new county to be a county of a particular class, it has been held that such declaration must be regarded as simply determining the population, rather than arbitrarily fixing the class to which it should belong when organized and in which it should remain irrespective of subsequent changes in the law whereby that particular class might

12. *Millard v. Kern County*, 147 Cal. 682, 82 Pac. 329; *Tucker v. Barnum*, 144 Cal. 266, 77 Pac. 919. But see *Summerfield v. Dow*, 5 Cal. App. 678, 91 Pac. 156, holding that the adjustment of compensation by salaries in large cities, and fees in smaller cities, towns, and nonurban communities, proceeds upon intrinsic differences.

13. See *supra*, § 27.

14. *Sanders v. Sehorn*, 98 Cal. 227, 33 Pac. 58.

15. *Alameda County v. Dalton*, 148 Cal. 246, 82 Pac. 1050; *Welsh v. Bramlet*, 98 Cal. 219, 33 Pac. 66. See EVIDENCE. See Pol. Code, § 4006, as to the several classes of counties. And see Pol. Code, § 4005c, as to the population of the several counties.

16. Pol. Code, § 4006a.

be composed of counties having populations greatly larger or greatly smaller than when the new county was placed therein. Indeed, as before stated, the legislature has no power so to fix the class without regard to the population.¹⁷ When a new county is created it would seem that its population at the time of its creation, and not its population as ascertained by the last preceding census is a proper basis upon which to determine its classification.¹⁸

§ 29. Change of Classification.—The Political Code makes provision for cases in which the population of an existing county shall have been reduced, by reason of the creation of a new county from the territory thereof, below the class first assumed.¹⁹ A similar provision of the County Government Act of 1893 has been construed as not delegating to the board of supervisors the power to classify counties, and therefore not in conflict with the constitutional provision which requires the legislature to classify counties; but simply in effect as authorizing it to determine, as a fact, the population left in the old county after the new one is created, and when this fact is found, which is not a legislative act, the classification follows as declared by the statute. Nor is such a provision invalid as a local or special law; it applies to every existing county whose class is changed by having a portion of its territory detached. It has been held further that the board of supervisors, in determining what is the population of a county, out of the territory of which a new county has been organized, is not limited to an inquiry as to what was the population within its present boundaries as shown by the last federal census, notwithstanding another provision of the act making the last preceding census controlling as

17. *Sanders v. Sehorn*, 98 Cal. 227, 33 Pac. 58. And see *People v. McFadden*, 81 Cal. 489, 15 Am. St. Rep. 66, 22 Pac. 851.

18. *Kumler v. Board of Super-*

visors, 103 Cal. 393, 37 Pac. 383; *Sanders v. Sehorn*, 98 Cal. 227, 33 Pac. 58.

19. Pol. Code, § 4006a.

to the classification of the several counties of the state as they then existed; and the language of the provision, in which no reference is made to the census, is to be construed as intentionally requiring the board to determine the population as it existed at the time of the creation of the new county, and not its population as ascertained by the federal census.²⁰

§ 30. Effect of New Census.—The statute provides that whenever a new federal census is taken, counties are not by operation of law reclassified under such census, but remain in the old classification until reclassified by the legislature.¹ Under this section, it is plain that there can be no reclassification except by an affirmative and direct act of the legislature itself. It is also clear that the taking of a federal census has not the effect of automatically changing the compensation of officers according to the population as ascertained by such census, since such compensation is determined wholly upon classification for that purpose as required by the constitution. It follows that the compensation allowed can be determined only by the classification established by the legislature, and that so long as a classification once made stands undisturbed, so long will the compensation remain as regulated thereunder, notwithstanding a change in population shown by the taking of a federal or other census after such classification has been established.² It has been held that a copy of the census returns certified by the superintendent of the cen-

20. *Kumler v. Board of Supervisors*, 103 Cal. 393, 37 Pac. 383.

1. Pol. Code, § 4007.

2. *McFadden v. Borden*, 28 Cal. App. 471, 152 Pac. 977. See *Donlon v. Jewett*, 88 Cal. 530, 26 Pac. 370, construing act of March 16, 1889. (Stats. 1889, p. 232), and holding that where there is a plain conflict between an amending act adding a new class of counties with the re-establishment by the same act of

other classes, the amending act must be construed so to give consistency to the whole, which may be done by assuming a mistake in the use of numbers. And see *Hull v. Superior Court*, 63 Cal. 174, holding that a new census does not change a county government from one class to another, but imposes on the existing supervisors the duty of re-districting the county.

sus is admissible to show the census results. Moreover, courts will take judicial notice of census returns, and resort for information to appropriate documents of reference.³

§ 31. Statutory Regulation of Compensation.—The constitution imposes upon the legislature exclusively the duty of regulating the compensation of all county officers, unless a county has adopted a charter,⁴ or there is some other express exception.⁵ Any attempted delegation of this power to boards of supervisors is wholly nugatory.⁶ In pursuance of constitutional authority the legislature has prescribed the salaries and fees of all county officers.⁷ Such statutes are strictly construed and officers are entitled only to what is clearly given them by law.⁸ Neither the courts nor boards of supervisors have power to increase the compensation so fixed.⁹

§ 32. Amount of Compensation.—The Political Code in making provision for the salaries and fees of county officers declares that such provisions

3. *People v. Williams* 64 Cal. 87, 27 Pac. 939. See EVIDENCE.

4. See supra, § 21, as to county charters.

5. Const., art. XI, § 5; *Coulter v. Pool*, 62 Cal. Dec. 421, 201 Pac. 120; *Dougherty v. Austin*, 94 Cal. 601, 16 L. R. A. 161, 28 Pac. 834, 29 Pac. 1092.

6. *Coulter v. Pool*, 62 Cal. Dec. 421, 201 Pac. 120; *Agard v. Shaffer*, 141 Cal. 725, 75 Pac. 343; *County of Butte v. Merrill*, 141 Cal. 396, 74 Pac. 1036; *Tulare County v. May*, 118 Cal. 303, 50 Pac. 427; *County of El Dorado v. Meiss*, 100 Cal. 268, 34 Pac. 716; *Welsh v. Bramlet*, 98 Cal. 219, 33 Pac. 66; *County of Orange v. Harris*, 97 Cal. 600, 32 Pac. 594; *Dougherty v. Austin*, 94 Cal. 601, 16 L. R. A.

161, 28 Pac. 834, 29 Pac. 1092; *People v. Johnson*, 95 Cal. 471, 31 Pac. 611; *County of San Joaquin v. Jones*, 18 Cal. 327; *Sarter v. Siskiyou County*, 42 Cal. App. 530, 183 Pac. 852.

7. Pol. Code, § 4230 et seq. See Pol. Code, § 4288 et seq., as to general provisions relating to salaries and fees; Pol. Code, § 4305, as to the salary fund.

As to compensation of supervisors, see infra, § 52.

8. *Irwin v. County of Yuba*, 119 Cal. 686, 52 Pac. 35; *Sarter v. Siskiyou County*, 42 Cal. App. 530, 183 Pac. 852; *County of San Diego v. Bryan*, 18 Cal. App. 460, 123 Pac. 347.

9. *Sarter v. Siskiyou County*, 42 Cal. App. 530, 183 Pac. 852; *Dough-*

“shall be in full compensation for all services of every kind and description rendered by the officers named in this title either as officers or ex-officio officers, their deputies and assistants, unless in this title otherwise provided, and all deputies employed shall be paid by their principals out of the salaries provided in this title, unless in this title otherwise provided.”¹⁰

This provision is plainly a declaration that officers shall not receive any compensation from counties other than the salaries therein named for any services they may render, either in the line of their official duty or otherwise.¹¹ Its effect is to render an officer incompetent to enter into a contract for compensation for any service he may render the county, and to render such contract void.¹² By accepting office he agrees to accept the salary affixed thereto as full compensation, whether the services rendered be those enumerated in the statute or not.¹³

erty v. Austin, 94 Cal. 601, 16 L. R. A. 161, 28 Pac. 834, 29 Pac. 1092.

Where a statute provides for the compensation of a county surveyor, and further provides that such compensation shall be in full payment for all services rendered by such officer, as such, it has been held that the compensation so provided is the full amount that can be recovered for all services required to be rendered, regardless of whether the services are performed by the officer himself or an authorized deputy. And where there is no law providing for compensation to be paid to the deputy surveyor, such deputy is not entitled to and cannot legally claim compensation to be so paid, nor can his principal claim the right to be paid the compensation for such deputy; Sarter v. Siskiyou County, 42 Cal. App. 530, 183 Pac. 852.

10. Pol. Code, § 4290 (tit. II);

Santa Barbara County v. Twitchell, 179 Cal. 772, 178 Pac. 945.

11. County of Humboldt v. Stern, 136 Cal. 63, 68 Pac. 324 (holding that the county clerk as ex-officio clerk of the board of supervisors is not entitled to receive any extra compensation for work done by him in preparing data for a claim of the county against the state, whether rendered in the line of his official duty or otherwise); Dodge v. San Francisco, 135 Cal. 512, 67 Pac. 973; County of Kern v. Fay, 131 Cal. 547, 63 Pac. 857; County of San Diego v. Bryan, 18 Cal. App. 460, 123 Pac. 347.

12. County of Humboldt v. Stern, 136 Cal. 63, 68 Pac. 324; County of San Diego v. Bryan, 18 Cal. App. 460, 123 Pac. 347; County of Humboldt v. Stern, 136 Cal. 63, 68 Pac. 324.

13. Irwin v. County of Yuba, 119 Cal. 686, 52 Pac. 35; Rowe v. County of Kern, 72 Cal. 353, 14 Pac. 11.

§ 33. Legislative Control — Statutory Construction.—

There is no mandate in the constitution directing the legislature to provide for the payment of salaries to county officers.¹⁴ It is therefore within the power of the legislature to determine what salary or compensation, if any, shall be paid, and to provide that when no duty is actually performed no salary shall be allowed.¹⁵ And under the limitations of the constitution, the legislature has power to provide for but one salary as an incident to a county officer.¹⁶

The legislature has discretion in determining the mode and measure of the compensation of county officers, and may provide that some may receive fees or per diem allowances, and that others shall receive regular salaries,¹⁷ and it may adopt regulations which apply to the one class and not to the other. A statute conforming reasonably to the diverse circumstances of feed and salaried officers, and which does not proceed upon an arbitrary distinction, but upon intrinsic differences, suggesting the propriety of different adjustments relating to feed and salaried incumbents, is not special legislation within the prohibition of the constitution.¹⁸

14. *San Luis Obispo County v. Darke*, 76 Cal. 92, 18 Pac. 118; *Tout v. Blair*, 3 Cal. App. 180, 84 Pac. 671.

15. *Tout v. Blair*, 3 Cal. App. 180, 84 Pac. 671; *Merkley v. Williams*, 3 Cal. App. 268, 84 Pac. 1015.

16. *Tout v. Blair*, 3 Cal. App. 180, 84 Pac. 671.

17. *Vail v. San Diego County*, 126 Cal. 35, 58 Pac. 392; *Green v. County of Fresno*, 95 Cal. 329, 30 Pac. 544; *San Luis Obispo County v. Darke*, 76 Cal. 92, 18 Pac. 118.

18. *Crockett v. Mathews*, 157 Cal. 153, 106 Pac. 575 (holding that an act operative solely as to incumbents whose method of compensa-

tion was changed from fees to salary has a uniform operation); *Vail v. San Diego County*, 126 Cal. 35, 58 Pac. 392. But see *Miller v. Kister*, 68 Cal. 142, 8 Pac. 813, holding that a provision of a law upon the subject of the compensation of county officers, which puts the law into operation almost immediately as to the officers of several classes of counties, although by a general provision the law is suspended as to the officers of most of the counties of the state, is unconstitutional as special legislation. And see note, 1 A. L. R. 287, as to per diem compensation of county boards and other county officers.

Where the law provides that county officers shall hold office until their successors are elected or appointed and qualified, an officer is entitled to compensation in proportion to his monthly salary for such part of a month as he may hold over, after the expiration of the term for which he was elected, until his successor has qualified.¹⁹ Under a law changing the compensation but providing that such change shall not affect incumbents, it has been held that such incumbents are entitled to the compensation provided by law in force when they were elected and not the compensation provided by the new law.²⁰ And the fact that since the passage of a new law, an incumbent has received warrants only for the amount of the compensation therein provided, upon the refusal of the auditor to issue them for the amount to which he is entitled, does not estop him from demanding the balance.¹

§ 34. Salaries of Deputies.—The section of the Political Code heretofore quoted in part, provides that “all deputies employed shall be paid by their principals out of the salaries provided in this title, unless in this title otherwise provided.”²² As to the payment of county officers and their deputies, a twofold plan or scheme is provided by the code. In some classes of counties an officer is allowed a salary for himself, and is given a certain number of

19. *Dillon v. Bicknell*, 116 Cal. 111, 47 Pac. 937, holding that the County Government Act, though providing for warrants in favor of county officers for their salary, to be drawn on the first Monday of each and every month, contemplates that the warrant may be drawn for such fractional portion of a month as the officer may actually serve after the first Monday of January, with which his term ordinarily concludes. See **PUBLIC OFFICERS**.

20. *McPhail v. Jefferds*, 130 Cal. 480, 62 Pac. 735; *Ellis v. Jefferds*,

130 Cal. 478, 62 Pac. 734; *McCabe v. Jefferds*, 122 Cal. 302, 54 Pac. 897; *County of Tulare v. Jefferds*, 118 Cal. 303, 50 Pac. 427; *Cody v. Murphey*, 89 Cal. 522, 26 Pac. 1081; *Pridham v. Lewis*, 30 Cal. App. 395, 158 Pac. 333; *Los Angeles County v. Hammel*, 26 Cal. App. 580, 147 Pac. 983. See **PUBLIC OFFICERS**.

1. *Ellis v. Jefferds*, 130 Cal. 478, 62 Pac. 734; *Whiting v. Plumas Co.*, 64 Cal. 65, 28 Pac. 445.

2. Pol. Code, § 4290. See *supra*, § 22.

deputies at fixed salaries payable out of the county treasury. In other classes he is allowed a fixed amount, out of which he is required to pay all deputies, as well as himself. By both systems a fixed amount only can be drawn from the treasury in payment of the salaries of the chief official and his deputies. Both of these salary schemes have been upheld.³ It has been said that if this limitation were not imposed, and if officers were allowed to appoint deputies at will, making their salaries a charge upon the treasury, the scheme itself would be in violation of the provisions of the constitution, which prohibits the legislature from delegating to any "individual any power to make, control, appropriate, supervise or in any way interfere with any county" money, property, or effects, whether held in trust or otherwise.⁴ It follows, therefore, that if a county officer in the classes of counties where such officer is allowed a salary and is given a certain number of deputies at fixed salaries payable out of the county treasury, appoints additional deputies, as he may do under section 4024 of the Political Code, if the needs of his office so require, the compensation of these extra deputies must be paid by himself.⁵

§ 35. Increase of Compensation.—The constitution provides that

"The compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office; nor shall the term of any such officer be extended beyond the period for which he is elected or appointed."⁶

3. *San Francisco v. Broderick*, 125 Cal. 188, 57 Pac. 887; *Tulare County v. May*, 118 Cal. 303, 50 Pac. 427; *Farnum v. Warner*, 104 Cal. 677, 38 Pac. 421.

4. *San Francisco v. Broderick*, 125 Cal. 188, 57 Pac. 887; *Tulare County v. May*, 118 Cal. 303, 50 Pac. 427; *Dougherty v. Austin*, 94

Cal. 601, 16 L. R. A. 161, 28 Pac. 834, 29 Pac. 1092.

5. *San Francisco v. Broderick*, 125 Cal. 188, 57 Pac. 887, construing County Government Act of 1893. See as to compensation of deputies generally, **PUBLIC OFFICERS.**

6. Const., art. XI, § 9.

The application of this provision to various acts of the legislature passed from time to time affecting the compensation to be paid to county officers has been the subject of numerous decisions. It has been consistently and uniformly held that wherever new legislation is made which will have the effect, actually or presumptively, to increase the compensation to be paid to an incumbent officer, that such legislation is to be postponed in its effect until the commencement of a new term of office to which the successor of the incumbent may be elected.⁷ Since the consti-

7. *Smith v. Mathews*, 155 Cal. 752, 103 Pac. 199; *County of Placer v. Freeman*, 149 Cal. 738, 87 Pac. 628; *Humiston v. Shaffer*, 145 Cal. 195, 78 Pac. 651; *Agard v. Shaffer*, 141 Cal. 725, 75 Pac. 343; *County of Butte v. Merrill*, 141 Cal. 396, 74 Pac. 1036; *County of Humboldt v. Stern*, 136 Cal. 63, 68 Pac. 324; *Dodge v. San Francisco*, 135 Cal. 512, 67 Pac. 973; *County of Kern v. Fay*, 131 Cal. 547, 63 Pac. 857; *Storke v. Goux*, 129 Cal. 526, 62 Pac. 68; *Irwin v. County of Yuba*, 119 Cal. 686, 52 Pac. 35; *County of Tulare v. Jefferds*, 118 Cal. 303, 50 Pac. 427; *Power v. May*, 114 Cal. 207, 46 Pac. 6; *Farnum v. Warner*, 104 Cal. 677, 38 Pac. 421; *Welsh v. Bramlet*, 98 Cal. 219, 33 Pac. 66; *County of Orange v. Harris*, 97 Cal. 600, 32 Pac. 594; *Dougherty v. Austin*, 94 Cal. 601, 16 L. R. A. 161, 28 Pac. 834, 29 Pac. 1092; *Larew v. Newman*, 81 Cal. 588, 23 Pac. 227; *Sarter v. Siskiyou County*, 42 Cal. App. 530, 183 Pac. 852; *McFadden v. Borden*, 28 Cal. App. 471, 152 Pac. 977; *Elder v. Garey*, 19 Cal. App. 775, 127 Pac. 826; *Williams v. Garey*, 19 Cal. App. 774, 127 Pac. 826; *Baker v. Garey*, 19 Cal. App. 773, 127 Pac. 826; *Williams v. Garey*, 19 Cal. App. 769, 127 Pac. 824; *Applestill v. Gary*, 18

Cal. App. 385, 123 Pac. 228; *Hanson v. Underhill*, 12 Cal. App. 545, 107 Pac. 1016; *Williams v. Garey*, 19 Cal. App. 769, 127 Pac. 824. See *Martin v. Santa Barbara County*, 105 Cal. 208, 38 Pac. 687; *Sarter v. Siskiyou County*, 42 Cal. App. 530, 183 Pac. 852 (applying the provision to feed officers); *Santa Barbara County v. Twitchell*, 179 Cal. 772, 178 Pac. 945; *County of Santa Barbara v. Rucker*, 35 Cal. App. 676, 170 Pac. 860 (applying the provision to per diem officers).

A statute newly providing for reimbursement of traveling expenses in addition to compensation previously allowed for services is an increase of compensation; *Santa Barbara County v. Twitchell*, 179 Cal. 772, 178 Pac. 945 (supervisor as road commissioner); *County of Placer v. Freeman*, 149 Cal. 738, 87 Pac. 628; *County of Santa Barbara v. Rucker*, 35 Cal. App. 676, 170 Pac. 860.

But it has been held that an additional allowance to a county school superintendent for necessary traveling expenses during his term of office is not in violation of the constitution. That decision rests, however, upon the asserted ground that there was no increase of compensation made in the case, but

tutional provision upon this topic is applicable to other officers than those of counties, the subject is treated in detail in another article where the decisions relative to all classes of officers are considered.⁸

Boards of Supervisors.

§ 36. Status in General.—The board of supervisors is the legislative and executive authority of a county.⁹ Except as affected by provisions relative to the initiative and referendum, the entire legislative power of the county is vested in such board.¹⁰ It exercises, in fact, in a minor degree, the powers of the general government,—executive, judicial and ministerial.¹¹

“The word ‘supervisors’ when applied to county officers, has a legal signification. The duties of the officers are various and manifold—sometimes judicial and at others legislative and executive. From the necessity of the case it would be impossible to reconcile it to any particular head; and therefore in matters relating to police and fiscal regulations of counties, they are allowed to perform such duties as may be enjoined upon them by law, without any nice examination into the exact character of the powers conferred.”¹²

that the increase was merely of incidental expenses of the office; *Kirkwood v. Soto*, 87 Cal. 394, 25 Pac. 488, distinguished in *Agard v. Shaffer*, 141 Cal. 725, 75 Pac. 343; *Chapin v. Wilcox*, 114 Cal. 498, 46 Pac. 457; and *Williams v. Garey*, 19 Cal. App. 769, 127 Pac. 824.

8. See PUBLIC OFFICERS.

9. *Harris v. Gibbins*, 114 Cal. 418, 46 Pac. 292; *Frاندzen v. County of San Diego*, 101 Cal. 317, 35 Pac. 897. See *People v. Bircham*, 12 Cal. 50, construing act of 1855 creating boards of supervisors throughout the state, and providing for the transfer from the

courts of sessions to the boards of supervisors of all civil jurisdiction theretofore exercised by such courts.

10. *In re Isch*, 174 Cal. 180, 162 Pac. 1026; *Myers v. Alameda County*, 60 Cal. 287.

11. *Chinn v. Superior Court*, 156 Cal. 478, 105 Pac. 580,

12. *People v. Provines*, 34 Cal. 520, per *Sanderson, J.* And see *Chinn v. Superior Court*, 156 Cal. 478, 105 Pac. 580; *Kimball v. Board of Supervisors*, 46 Cal. 19; *People v. El Dorado County Supervisors*, 8 Cal. 58. (overruling *People v. Hester*, 6 Cal. 679).

The board of supervisors exercises judicial functions in examining and passing upon claims against the county; legislative powers in the enactment of ordinances; and executive authority in a variety of matters confided to its supervision.¹³ But because the board may exercise judicial functions, it is by no means an inferior court within the meaning of that term as employed in the constitution relative to the appellate jurisdiction of the superior courts. Consequently, an act attempting to authorize an appeal to the superior court from the board of supervisors is unconstitutional and void.¹⁴

§ 37. Membership and Organization.—Each county must, according to the Political Code, have a board of supervisors consisting of five members, not more than three of whom shall be elected at the same general election.¹⁵ After the expiration of his term, and the election and qualification of his successor, one who has held the office of supervisor is no longer an officer, either *de jure* or *de facto*, and if he attempts to act as such, is a mere naked usurper.¹⁶ The code also provides for the qualification of members,¹⁷ for the manner in which vacancies shall be

13. *Fraser v. Alexander*, 75 Cal. 147, 16 Pac. 757.

14. *Chinn v. Superior Court*, 156 Cal. 478, 105 Pac. 580. See *Courts*.

15. Pol. Code, § 4027, providing also that if in any county the terms of more than three supervisors expire at the same time, such members shall so classify themselves by lot that not more than three members shall serve for four years and two for two years. "Thereafter the term of office of each member shall be four years."

16. *Trinity County v. McCammon*, 25 Cal. 117.

17. Pol. Code, § 4028. A person elected supervisor in a district to which he had changed his residence

from another district more than one year prior to the election, and who, during that period and at the time of the election, was an "elector" of that district, as defined in § 1 of art. II of the constitution, is eligible in that district, notwithstanding he did not change his registration from the precinct of his former residence until a little more than thirty days prior to the election. *Bergevin v. Curtz*, 127 Cal. 86, 59 Pac. 312, distinguishing between "elector" under the constitution and "qualified elector" under the Political Code. See *ELECTIONS*.

See, also, Pol. Code, § 4029, as to power of supervisors to change supervisorial districts.

filled,¹⁸ and for the organization of the board by choosing a chairman. Any member is authorized to administer oaths, when necessary in the performance of his official duties. A majority of the members constitute a quorum for the transaction of business, and no act of the board is valid unless a majority of all the members concur.¹⁹

§ 38. Meetings.—A board of supervisors must be regularly convened to perform any official act.²⁰ And it is the duty of each supervisor to attend all sessions and to assist the other members in transacting such business as lawfully comes before them.¹ The code provides that the board “must, by ordinance, provide for the holding of regular meetings of the board at the county seat.”² Where the board meets on the regular day fixed, it has power to adjourn from time to time until its business is completed;³ and an ordinance passed at an adjourned meeting is not invalidated, either because the clerk in his record described the adjournment as a “recess,” or because during the time of the adjournment the supervisors acted as a board of equalization.⁴ The code contains provisions for special meetings and the business which may be transacted thereat.⁵ Unless the business to be transacted is

18. Pol. Code, § 4030. See *Myers v. Alameda County*, 60 Cal. 287, where it is said that under the late constitution and the statute thereunder, the power to appoint to fill a vacancy in a board of supervisors was with the county judge.

19. Pol. Code, § 4031. See *People v. Harrington*, 63 Cal. 257, holding, prior to present statute, that the action of a quorum is the action of the board, and that a majority of the quorum present could do any act which a majority of the board if present might do.

20. *County of San Diego v. Seifert*, 97 Cal. 594, 32 Pac. 644; *Peo-*

ple v. Dunn, 89 Cal. 228, 26 Pac. 761; *San Luis Obispo County v. Hendricks*, 71 Cal. 242, 11 Pac. 682.

1. *Howes v. Abbott*, 78 Cal. 270, 20 Pac. 572.

2. Pol. Code, § 4034.

3. *Ex parte Mirande*, 73 Cal. 365, 14 Pac. 888; *People v. Cole*, 70 Cal. 59, 11 Pac. 481; *Ex parte Benjamin*, 65 Cal. 310, 4 Pac. 23; *Ex parte Benninger*, 64 Cal. 291, 30 Pac. 846.

4. *Ex parte Mirande*, 73 Cal. 365, 14 Pac. 888.

5. Pol. Code, § 4035; *Coleman v. Board of Supervisors*, 50 Cal. 493 (special meeting to call an election

specified as required, the acts of the supervisors are a nullity.⁶

It is the duty of the chairman of the board to preside at all meetings and perform such duties as are prescribed by law or by the board. When the board is not in session, in any emergency affecting the interest of the county or when any defalcation or official misconduct comes to his knowledge, it is his duty to call a special meeting of the board to consider the same.⁷ The board has power to direct the sheriff to attend, in person or by deputy, all meetings of the board, to preserve order, serve notices, subpoenas, citations, or other process, as directed by the board.⁸ All meetings must be public, and the books, records and accounts of the board must be kept at the office of the clerk, open at all times for public inspection.⁹

§ 39. Clerk of the Board.—The county clerk is ex-officio clerk of the board of supervisors.¹⁰ His duties as such clerk are fully prescribed by statute.¹¹ It is his duty to record all proceedings of the board.¹² Among other things he must “perform all other duties required by law, or any rule or order of the board.”¹³ Under such provision it is the duty of the clerk, in response to an order of the board, to furnish the board with data from its records; and he is not entitled to receive any extra compensation for such work, since the effect would be to increase his salary in contravention of the constitutional inhibition against increasing an officer’s salary during his term of office.¹⁴ Where it is made the duty of the clerk under a

to vote on question of issuing bonds to a railroad company, under act of April 4, 1870).

6. County of El Dorado v. Reed, 11 Cal. 130.

7. Pol. Code, § 4090.

8. Pol. Code, § 4036.

9. Pol. Code, § 4033.

10. Pol. Code, § 4037.

11. Pol. Code, § 4038.

12. Pol. Code, § 4038, subd. 1; Pacheco v. Beck, 52 Cal. 3; Swamp Land Reclamation Dist. No. 407 v. Wilcox, 2 Cal. Unrep. 794, 14 Pac. 843.

13. Pol. Code, § 4038, subd. 11.

14. County of Humboldt v. Stern, 136 Cal. 63, 68 Pac. 324 (approved

valid ordinance to submit certain questions, upon which the supervisors desire the opinion of the voters, to certain precincts at each general election and to certify the result to the board, a taxpayer will not be granted a writ of mandate to prevent the clerk from obeying the ordinance.¹⁵

§ 40. Records and Minutes.—The board of supervisors is a body with limited jurisdiction, and its jurisdiction must appear in the record of its proceedings.¹⁶ It cannot be bound by acts in pais; the best and only evidence of its intentions is to be drawn from its records.¹⁷ In the absence of an allegation of fraud or corruption against the board in respect of a matter determined by it, the truth of its determination as set forth in a resolution passed by it is not subject to attack.¹⁸ The records are under the control of the board, and mandamus will not lie to the clerk to compel him to correct them.¹⁹

The code provides that the board must cause to be kept a minute-book, an allowance-book, a road-book, a franchise-book, a warrant-book, and an ordinance-book.²⁰ Records, books, and accounts must be kept at the office of the clerk at all times for public inspection.¹ The code further provides that "the records and minutes of the board must be signed by the chairman and the clerk."² The effect of this provision is merely to make their signatures evidence identifying the records and minutes. The failure of the clerk and chairman to sign does not invalidate a record as proof of the action of the board; such failure has the effect merely of requiring the party who

but distinguished in *Skidmore v. West*, 61 Cal. Dec. 792, 199 Pac. 497). See *supra*, § 35.

15. *Brown v. Lelande*, 20 Cal. App. 71, 128 Pac. 337.

16. *Finch v. Tehama County Supervisors*, 20 Cal. 453.

17. *Phelan v. San Francisco County*, 6 Cal. 531.

18. *Nickerson v. San Bernardino County*, 179 Cal. 518, 177 Pac. 465; *Pacheco v. Beck*, 52 Cal. 3; *People v. Bircham*, 12 Cal. 50.

19. *Wigginton v. Markley*, 52 Cal. 411.

20. Pol. Code, § 4039.

1. Pol. Code, § 4040.

2. Pol. Code, § 4032.

desires to prove the official action to establish the handwriting of the entries, their contemporaneous character, and the official custody from which the record was produced.³ Thus it has been held that a tax is not void, because the record of supervisors in levying it is not signed by the chairman and the clerk.⁴

The board must further cause to be kept a "minute-book," in which must be recorded all orders and decisions made, and the daily proceedings had at all regular and special meetings. When an order is so entered it becomes a record which, it is evident, one has no right to alter or amend, even though he has personal knowledge that it was erroneously entered. And a record which has been improperly altered is not admissible in evidence. Nor is parol proof admissible, in a collateral proceeding, to correct or change the record. If the record is, in fact, erroneous, the remedy is an application to the board of supervisors, or some other direct proceedings, to have it corrected.⁵

§ 41. Powers and Duties Generally.—Boards of supervisors are creatures of the statute, and the authority for any act on their part must be sought in the statute.⁶ But while their jurisdiction is confined within the statutory limits, still it includes not only the powers expressly enumerated, but also those implied powers which are necessary to the exercise of the powers expressly granted, except in the instances where such implied power is expressly or impliedly prohibited.⁷ In the exercise of their

3. *County of San Diego v. Seifert*, 97 Cal. 594, 32 Pac. 644; *People v. Eureka Lake & Y. Canal Co.*, 48 Cal. 143. See *Pacheco v. Beck*, 52 Cal. 3 (rule stated in dissenting opinions).

4. *People v. Eureka Lake & Y. Canal Co.*, 48 Cal. 143.

5. *Swamp Land Reclamation Dist. No. 407 v. Wilcox*, 2 Cal. Unrep. 794, 14 Pac. 843.

6. *Skidmore v. West*, 61 Cal. Dec. 792, 199 Pac. 497; *County of Modoc v. Spencer*, 103 Cal. 498, 37 Pac. 483; *Linden v. Case*, 46 Cal. 171; *San Joaquin County v. Jones*, 18 Cal. 327; *Robinson v. Sacramento County Supervisors*, 16 Cal. 208; *Foster v. Coleman*, 10 Cal. 278.

7. *Skidmore v. West*, 61 Cal. Dec. 792, 199 Pac. 497; *Harris v. Gibbins*, 114 Cal. 418, 46 Pac. 292;

powers, supervisors are necessarily endowed with a large discretion.⁸ The validity of their action cannot depend upon their motives.⁹ But any action of a board of supervisors which is not within the scope of its powers—either express or implied—is illegal and of no effect.¹⁰

It has been said that the general provision of section 4041 of the Political Code, which circumscribes all grants of power to boards of supervisors within “such limitations and restrictions as are prescribed by law,” neither adds to nor detracts from the force and effect of the powers granted.¹¹

§ 42. Review and Control of Powers.—A board of supervisors of a county is, as has been seen, a special tribunal with mixed powers—administrative, legislative and judicial.¹² Its judgments and orders, like those of a court of record, cannot, when within its jurisdiction, be attacked collaterally.¹³ It is also a settled rule that when the legislature has committed to such a board the power to legislate on given subjects or has committed to its judgment or discretion matters upon which it is authorized to act, courts of equity have no power to interfere with the exercise of its functions. “Whether, in the exercise

Frاندzen v. County of San Diego, 101 Cal. 317, 35 Pac. 897; *Scollay v. County of Butte*, 67 Cal. 249, 7 Pac. 661. And see *County of San Joaquin v. Budd*, 96 Cal. 47, 30 Pac. 967, where the rule laid down by the Ohio supreme court that “the board of county commissioners within the several counties is clothed with authority to do whatever the corporate or political entity, the county, might if capable of rational action, except in respect to matters the cognizance of which is exclusively vested in some other officer or person,” is said to

accurately describe the powers of the boards of supervisors in California.

8. *Hornblower v. Duden*, 35 Cal. 664.

9. *Dodge v. Kings County*, 150 Cal. 96, 88 Pac. 266.

10. *Sutro v. Pettit*, 74 Cal. 332, 5 Am. St. Rep. 442, 16 Pac. 7 (issuance of bonds without authority); *Linden v. Case*, 46 Cal. 171.

11. *City of Los Angeles v. Lewis*, 175 Cal. 777, 167 Pac. 390.

12. See *supra*, § 36.

13. *Wagh v. Chauncey*, 13 Cal. 11.

of legislative powers, the board acts wisely or unwisely is no concern of the courts."¹⁴

But it is clear that when the board acts without jurisdiction, its action may be collaterally attacked.¹⁵ And, when exercising judicial functions, if it has exceeded its jurisdiction, and there is no appeal, or, in the judgment of the court, any other plain, speedy, and adequate remedy, the proceedings of the board may be reviewed on certiorari.¹⁶ Thus the creation of an irrigation district is a legislative act and not reviewable, but in taking the various steps required for the organization of such a district pursuant to legislative authority the board exercises judicial functions and its action therein is subject to review.¹⁷ Also a determination on a petition for the formation of a road division is of a judicial or quasi-judicial nature,¹⁸ and is subject to attack only on the ground that the board acted without jurisdiction.¹⁹

14. *Nickerson v. San Bernardino County*, 179 Cal. 518, 177 Pac. 465, per Lorigan, J. And see *Glide v. Superior Court*, 147 Cal. 21, 81 Pac. 225; *Barto v. Supervisors*, 135 Cal. 494, 67 Pac. 758; *McBride v. Newlin*, 129 Cal. 36, 61 Pac. 577; *Fall v. County of Sutter*, 21 Cal. 237. See, also, *CERTIORARI*, vol. 4, p. 1069.

15. *Anaheim Sugar Co. v. County of Orange*, 181 Cal. 212, 183 Pac. 809; *Nickerson v. San Bernardino County*, 179 Cal. 518, 177 Pac. 465.

16. *Imperial Water Company v. Board of Supervisors*, 162 Cal. 14, 120 Pac. 780; *Maxwell v. Supervisors of Stanislaus Co.*, 53 Cal. 389 (holding that a taxpayer may apply for certiorari to annul an order of the board made in excess of its jurisdiction when the consequence of such order must be to add to the burden of taxation);

Miller v. Board of Supervisors of Sacramento County, 25 Cal. 93 (approval of bonds); *Hastings v. City and County of San Francisco*, 18 Cal. 49; *People v. Supervisors of Marin County*, 10 Cal. 344 (determining sufficiency of bond); *People v. El Dorado County Supervisors*, 8 Cal. 58 (overruling *People v. Hester*, 6 Cal. 679). See *CERTIORARI*, vol. 4, p. 1069 et seq., as to the rule generally.

17. *Imperial Water Company v. Supervisors*, 162 Cal. 14, 120 Pac. 780. See *CERTIORARI*, vol. 4, pp. 1072, 1073.

18. *Anaheim Sugar Co. v. County of Orange*, 181 Cal. 212, 183 Pac. 809; *Imperial Water Co. v. Supervisors*, 162 Cal. 14, 120 Pac. 780.

19. *Anaheim Sugar Co. v. County of Orange*, 181 Cal. 212, 183 Pac. 809.

It is not within the province of the courts to control by mandamus the exercise of proper discretion by the board of supervisors,²⁰ nor to review such discretion in a proceeding in prohibition.¹ But where the board does not act in a judicial but in a ministerial capacity,² or where a specific duty is imposed by law, it may be compelled to act by mandamus.³

§ 43. Specific Powers and Duties.—The general permanent powers of boards of supervisors are set forth in section 4041 of the Political Code. They are given power to supervise the work of county officers,⁴ divide counties into districts,⁵ establish election districts,⁶ build roads,⁷ maintain summer bridges,⁸ and ferries,⁹ acquire land for courthouse, etc.,¹⁰ build hospitals, etc.,¹¹ provide poor farm,¹² maintain necessary machinery,¹³ acquire cement plants,¹⁴ sell county property no longer needed,¹⁵ audit accounts,¹⁶ allow charges against the county,¹⁷ levy taxes,¹⁸ maintain public pounds,¹⁹ equalize assessments,²⁰ direct county suits,¹ insure buildings,² establish county funds,³ fill va-

20. *Splivalo v. Bryan*, 102 Cal. 403, 36 Pac. 780 (advertising for bids for the sprinkling of roads); *Davison v. Board of Supervisors*, 70 Cal. 612, 11 Pac. 680 (appointment of road overseer).

1. *People v. Nellis*, 14 Cal. App. 250, 111 Pac. 631. See PROHIBITION.

2. *Calaveras County v. Brockway*, 30 Cal. 325.

3. *Napa Valley R. R. Co. v. Napa County Supervisors*, 30 Cal. 435; *Hastings v. City and County of San Francisco*, 18 Cal. 49. See MANDAMUS.

4. Subd. 1. See *infra*, § 44.

5. Subd. 2. See *infra*, § 45.

6. Subd. 3. See ELECTIONS.

7. Subd. 4. See *infra*, § 46.

8. Subd. 4a. See BRIDGES.

9. Subd. 5. See FERRIES.

10. Subd. 6. See *infra*, § 75.

11. Subd. 7. See *infra*, § 81.

12. Subd. 8. See PAUPERS.

13. Subd. 9.

14. Subd. 9a. See *City of Los Angeles v. Lewis*, 175 Cal. 777, 167 Pac. 390, holding this provision unconstitutional and void as authorizing taxation for a private purpose. And see TAXATION.

15. Subd. 10.

16. Subd. 11.

17. Subd. 12. See *infra*, § 101, as to what constitute county charges.

18. Subd. 13. See TAXATION.

19. Subd. 14. See ANIMALS, vol. 2, p. 41 et seq.

20. Subd. 15. See TAXATION.

1. Subd. 16. See *infra*, § 48.

2. Subd. 17.

3. Subd. 18. See *Brown v. Klemmer*, 150 Cal. 454, 89 Pac. 325, holding that subdivision 18 of section

cancies,⁴ reproduce county records,⁵ employ purchasing agent,⁶ advertise for bids,⁷ make regulations,⁸ adopt a seal,⁹ license business,¹⁰ destroy pests,¹¹ protect sheep,¹² and fish and game,¹³ work prisoners,¹⁴ care for poor,¹⁵ bury indigent dead,¹⁶ make local police regulations,¹⁷ make rules for storing gunpowder,¹⁸ levy tax for advertising,¹⁹ and for public comfort stations,²⁰ regulate width of wagon tires,¹ license toll roads, etc.,² take tolls on public roads,³ repair roads,⁴ levy road fund and sanitary tax,⁵ encourage tree planting,⁶ assume municipal functions,⁷ protect river banks and protect against fire,⁸ sell

25 of the County Government Act, empowering supervisors to establish such funds "as they may deem necessary and to transfer moneys from one fund to another, as the public interest may require," does not authorize them to transfer money from the general fund to a road district fund; citing *Potter v. Fowzer*, 78 Cal. 493, 21 Pac. 118, decided under original County Government Act.

4. Subd. 19. The provision of subdivision 19 of Pol. Code, § 4041, authorizing supervisors to fill a vacancy in any elective county office, the appointee to hold office "for the unexpired term, or until the next general election," refers to the general election for filling the particular office to which the person is appointed; *People v. Col*, 132 Cal. 334, 64 Pac. 477, construing similar provision in County Government Act of 1897, and holding that a county auditor appointed by the supervisors to fill a vacancy caused by death of the elected auditor during his term, "to hold office for the unexpired term, or until the next general election," holds until the next general election provided for the election of

county officers generally, by § 58 of that act.

5. Subd. 20.

6. Subd. 21. See *infra*, § 83.

7. Subd. 22. See *infra*, § 83.

8. Subd. 23.

9. Subd. 24.

10. Subd. 25. See *infra*, § 103.

And see LICENSES.

11. Subd. 26. See *infra*, § 104.

12. Subd. 27. See ANIMALS, p. 10 et seq.

13. Subd. 28. See FISH AND FISHERIES; GAME.

14. Subd. 29. See PRISONS AND PRISONERS.

15. Subd. 29a. See PAUPERS.

16. Subd. 30. See DEAD BODIES.

17. Subd. 31. See *infra*, § 102.

18. Subd. 32. See EXPLOSIONS AND EXPLOSIVES.

19. Subd. 33. See TAXATION.

20. Subd. 33a.

1. Subd. 34.

2. Subd. 35. See TURNPIKES AND TOLL ROADS.

3. Subd. 36. See HIGHWAYS.

4. Subd. 37.

5. Subd. 38.

6. Subd. 39.

7. Subd. 39a.

8. Subd. 40.

maps,⁹ prevent the overflow of streams and rivers,¹⁰ compile war history,¹¹ plant shade trees,¹² preserve historical records,¹³ and to do other acts required by law, or which may be necessary to the full discharge of the legislative authority of the county government.¹⁴

Additional powers and duties.—In addition to the “general permanent powers” of boards of supervisors above enumerated, the Political Code in a separate article provides for certain “additional powers and duties.”¹⁵ In this article the powers and duties conferred relate to the following subjects: Improvement of streams not navigable,¹⁶ protection of highways from damage by floods,¹⁷ replacing indexes destroyed by fire,¹⁸ supplying office to county surveyor,¹⁹ collection of illegal fees by officer working forfeiture of office,²⁰ badges of sheriffs,¹ franchises for bicycles and other horseless vehicles,² advertising for bids to furnish county supplies,³ publication of proceedings of supervisors,⁴ publication of annual statistical report,⁵ requiring assessor to report,⁶ annual statement of finances,⁷ lands and other property granted,⁸ acceptance and rejection of gifts,⁹ conveyance of real property for public

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| 9. Subd. 40a. | 15. Pol. Code, art. V, §§ 4042-4056b. |
| 10. Subd. 40b (Supp. 1921). | 16. Pol. Code, § 4042. See WATERS. |
| 11. Subd. 40c (Supp. 1921). | 17. Pol. Code, § 4043. (Amdt. 1921.) See HIGHWAYS. |
| 12. Subd. 42 (Supp. 1921). | 18. Pol. Code, § 4043a. |
| 13. Subd. 43 (Supp. 1921). | 19. Pol. Code, § 4044. |
| 14. Subd. 41. See Pol. Code, § 4041b, as to the appointment of an advisory board to co-operate with the county assessor; Pol. Code, § 4041c (Amdt. 1921), as to the power of the board to allow additional assistance to county officers; Pol. Code, § 4041e (Amdt. 1921), as to acquisition and operation of work for furnishing of materials and supplies used by counties; Pol. Code, § 4041f (Amdt. 1921), as to providing homes and meeting places of veterans. | 20. Pol. Code, § 4045. |
| | 1. Pol. Code, § 4046. |
| | 2. Pol. Code, § 4047. |
| | 3. Pol. Code, § 4048. See <i>infra</i> , § 82. |
| | 4. Pol. Code, § 4049. |
| | 5. Pol. Code, § 4049a. |
| | 6. Pol. Code, § 4050. |
| | 7. Pol. Code, § 4051. |
| | 8. Pol. Code, § 4052. |
| | 9. Pol. Code, § 4052a. |

parcs,¹⁰ erection of historic monuments,¹¹ transferring money from certain funds,¹² and the repayment of same,¹³ transferring money from general fund to interest and sinking fund,¹⁴ census,¹⁵ data to state agricultural society,¹⁶ health of domestic livestock,¹⁷ and fund for making exhibitions of products.¹⁸

§ 44. Supervision of County Officers.—A board of supervisors, by virtue of the power conferred upon it by statute,¹⁹ may supervise the official conduct of officers to the extent of requiring them faithfully to discharge their duties under the law, and direct their prosecution for failure so to, but the board cannot add to those duties or relieve the officers from their discharge as provided by law. Consequently, it has no authority to contract with private parties for the performance of duties which the law enjoins upon county officers.²⁰ Manifestly the provision as to the power to require the making of reports is limited to such reports as officers are required by law to make and to such other reports as are incidental to the general supervision given to the supervisors of the official conduct of officers.¹

10. Pol. Code, § 4052b.

11. Pol. Code, § 4052c.

12. Pol. Code, § 4053.

13. Pol. Code, § 4054.

14. Pol. Code, § 4054a.

15. Pol. Code, § 4055.

16. Pol. Code, § 4056.

17. Pol. Code, § 4056a.

18. Pol. Code, § 4056b. See Pol. Code, § 4064 et seq., as to power to examine persons, books and papers.

19. Pol. Code, § 4041, subd. 1.

20. Skidmore v. West, 61 Cal. Dec. 792, 199 Pac. 497; House v. Los Angeles County, 104 Cal. 73, 37 Pac. 796. However, under a similar

provision in the County Government Act of 1893, it has been held that the board had authority to employ an expert to examine the books and accounts of county officers, in order to obtain the information necessary to enable it to discharge the duties enjoined on it, in the matter of supervision of county officers, and directing prosecution against them for delinquencies, and that the agreed compensation of such expert is a lawful charge against the county; Harris v. Gibbins, 114 Cal. 418, 46 Pac. 292.

1. Skidmore v. West, 61 Cal. Dec. 792, 199 Pac. 497.

§ 45. **Dividing Counties into Districts.**—Boards of supervisors have power to divide counties into townships, election, school, road, supervisor, sanitary, and other districts required by law, change the same, and create others, as convenience requires.² Under this provision the board has full authority to create, change, or abolish townships.³ Thus it may by ordinance abolish two contiguous judicial townships having a justice's court in each, and may establish one new consolidated township, comprising the territory of both of them; and such ordinance is not void because it thereby automatically abolishes a justice's court. It has been observed that this system has been in operation ever since the state was organized, and the power to change or abolish townships by means of a change of boundaries has never been disputed. The validity of an ordinance consolidating several townships is not affected by the failure of the board to designate what justices shall be successors of the justices of the townships so changed. And the fact that the new township has the same name as one of the old townships is wholly immaterial.⁴ In ascertaining the intention of supervisors in enacting an ordinance creating supervisorial districts the then existing conditions must be considered, and it must be assumed that the board intended to include within the boundaries of the several districts all the territory of the county, and not to leave strips of territory lying between any two districts, whether consisting of land or water, or both, without local government. The rules as to private grants are not applicable in such cases, but more liberal rules are

2. Pol. Code, § 4041, subd. 2. See Pol. Code, § 4015, as to division of county into townships. And see TOWNSHIPS.

3. Proulx v. Graves, 143 Cal. 243, 76 Pac. 1025; Osborn v. Board of Supervisors, 27 Cal. App. 85, 148

Pac. 970, holding that the abolition or creation of a judicial township by the board of supervisors is a legislative act and not a ministerial or executive act.

4. Proulx v. Graves, 143 Cal. 243, 76 Pac. 1025.

applied, the object being to ascertain the true meaning and intention of the board.⁵

§ 46. Highways.—Boards of supervisors are authorized to acquire by purchase, condemnation or otherwise, land for roads and highways, and to lay out and maintain them, and to incur a bonded indebtedness for such purposes.⁶ Where the questions whether a highway is demanded as well as its location and extent, are referred by the legislature to the supervisors and where a board has acquired jurisdiction to determine those questions, its jurisdiction is exclusive, and its determination is not subject to collateral attack or to review by the courts.⁷ Furthermore, supervisors are empowered to make and enforce regulations for the protection, management, control and use of public highways, and to enact ordinances for that purpose, and generally to make and enforce all such local, police, sanitary and other regulations as are not in conflict with general laws.⁸ And it has been held that local regulations

5. *People v. Williams*, 29 Cal. App. 552, 156 Pac. 882, per Chipman, P. J. See *Tuohy v. Chase*, 30 Cal. 524, holding that a provision in an act that boards shall have authority at their last session before the general election in each year to change the boundaries of the supervisor districts in their respective counties is merely directory and does not prohibit such change at any other session.

6. Pol. Code, § 4041, subd. 4; *Potter v. Santa Barbara County*, 160 Cal. 349, 116 Pac. 1101; *Miller v. County of Kern*, 137 Cal. 516, 70 Pac. 549; *County of Sierra v. Butler*, 136 Cal. 547, 69 Pac. 418; *County of San Mateo v. Coburn*, 130 Cal. 631, 63 Pac. 78, 621 (holding, prior to the amendment of art. I, § 14, of the constitution, that in an action by a county to con-

demn private property for a public highway, damages to the land not taken must be allowed without any deduction for benefits to such land by the opening of the road); *Devine v. Board of Supervisors*, 121 Cal. 670, 54 Pac. 262; *People v. County of Marin*, 103 Cal. 223, 26 L. R. A. 659, 37 Pac. 203; *Kimball v. Board of Supervisors*, 46 Cal. 19 (holding that supervisors, if authorized by law, may exercise the judicial powers necessary to be called into exercise in taking private lands for public highways); *Lincoln v. Colusa County*, 28 Cal. 662. See HIGHWAYS.

7. *County of San Mateo v. Coburn*, 130 Cal. 631, 63 Pac. 78, 621. See supra, § 42, as to collateral attack and review.

8. Pol. Code, § 4041, subds. 4, 31, 37 and 41; *Ham v. Los Angeles*

are not in conflict which merely place additional and more stringent limitations upon the operation of motor vehicles than those prescribed by the state law.⁹

§ 47. Supervisors as Road Commissioners.—Each supervisor is ex-officio road commissioner in his supervisor district.¹⁰ The duties performed as such commissioner are duties imposed by virtue of the status as supervisor, but the official position and functions as road commissioner are separately classified and described by the code.¹¹ Supervisors have been ex-officio road commissioners since the codes were adopted, if not before, but as the law formerly stood, they were to receive no compensation for services as commissioners. In so acting, a supervisor is none the less a county officer—his duties as commissioner being performed by virtue of his office as supervisor. Merely because he is charged with duties relating to the road district, he is not a road district officer; his identity as a supervisor is not changed or lost. The board of supervisors as a body has general supervision of all county roads, and the commissioner, although one of the board, acts as a supervisor under the direction of the board in its collective capacity. Hence, inasmuch as he is regarded as a county officer, it has been held that where there is a salary fund created out of which county officers are to be paid he is entitled to his entire compensation allowed by law as supervisor out of that fund.¹²

§ 48. County Suits—Employment of Attorneys.—The code confers on supervisors power, under such limitations as are prescribed by law, “to direct and control the prose-

County, 31 Cal. App. Dec. 496, 808, 189 Pac. 462. See AUTOMOBILES, vol. 3, p. 777 et seq.

9. Ham v. County of Los Angeles, 59 Cal. Dec. 474, 189 Pac. 462.

10. Pol. Code, § 2641. See HIGHWAYS.

11. County of Santa Barbara v. Rucker, 35 Cal. App. 676, 170 Pac. 860. See Pol. Code, § 4222, as to duties of road commissioners.

12. White v. Hayden, 126 Cal. 621, 59 Pac. 118, construing County Government Act of 1893, § 220.

ention and defense of all suits to which the county is a party, and, by a two-thirds vote of all the members, [they] may employ counsel to assist the district attorney in conducting the same."¹³ Under this provision the rule has become settled that supervisors have power to employ an attorney, other than the district attorney, to prosecute or defend an action to which the county is a party. Not only are they empowered to employ counsel to assist the district attorney, but they may also employ counsel to direct and control the prosecution and defense of the suit.¹⁴ And this power extends not only to suits to which the county is a party on the record, but also to those in the prosecution or defense of which it has or is supposed to have some interest.¹⁵ Nor is the right to employ counsel and to make the value of their services a charge upon the county dependent upon the result of the suit.¹⁶

Whether, in any particular case, special counsel shall be employed is addressed to the discretion which supervisors are to exercise in behalf of the public interests.¹⁷ This rule has been rested upon the ground that the district attorney may be incompetent, or sick, or absent from the county, or engaged in other business, so that he cannot attend to the suit, or the business to be transacted may be outside of the county.¹⁸ Thus, it has been held that the

13. Pol. Code, § 4041, subd. 16; *Woolwine v. Superior Court*, 182 Cal. 388, 188 Pac. 569; *Contra Costa County v. Soto*, 138 Cal. 57, 70 Pac. 10 19; *Gibson v. County of Sacramento*, 37 Cal. App. 523, 174 Pac. 935; *Conklin v. Woody*, 33 Cal. App. 554, 165 Pac. 973.

14. *Woolwine v. Superior Court*, 182 Cal. 388, 188 Pac. 569; *Lassen County v. Shinn*, 88 Cal. 510, 26 Pac. 365; *Scollay v. County of Butte*, 67 Cal. 249, 7 Pac. 661; *Hornblower v. Duden*, 35 Cal. 664; *Conklin v. Woody*, 33 Cal. App. 554, 165 Pac. 973.

15. *Hornblower v. Duden*, 35 Cal.

664, as to employment of an attorney to defend the interest of the county in a railroad matter, which involved the prosecution of an action of quo warranto.

16. *Lamberson v. Jefferds*, 118 Cal. 363, 50 Pac. 403; *Hornblower v. Duden*, 35 Cal. 664.

17. *Woolwine v. Superior Court*, 182 Cal. 388, 188 Pac. 569; *Lamberson v. Jefferds*, 118 Cal. 363, 50 Pac. 403, an action to enjoin the payment of salaries of the deputies of certain officers including the district attorney.

18. *Woolwine v. Superior Court*, 182 Cal. 388, 188 Pac. 569; *Merced*

employment of special counsel to collect money due the county is within the discretion of the supervisors.¹⁹ All the cases hold that the exercise of this power is not open to review by the courts, except perhaps for fraud.²⁰

A distinction is made between power to employ counsel "to defend or prosecute a suit" and power to employ an attorney to advise the supervisors concerning their duties, which power it has been held does not exist.¹ Also it is held that supervisors have no power to employ an attorney to conduct litigation which by law is devolved upon the district attorney, though they may employ an attorney to assist him in such matters.² And, of course, supervisors have no power to employ special counsel with respect to matters which are wholly beyond their jurisdiction, or contrary to public policy.³

In criminal actions.—It will be observed that there is a limitation upon the power of supervisors to employ attor-

Co. v. Cook, 120 Cal. 275, 52 Pac. 721; Merriam v. Barnum, 116 Cal. 619, 48 Pac. 727; Lassen County v. Shinn, 88 Cal. 510, 26 Pac. 365; Herrington v. Santa Clara Co., 44 Cal. 496; Hornblower v. Duden, 35 Cal. 664.

19. Power v. May, 123 Cal. 147, 55 Pac. 796; Power v. May, 114 Cal. 207, 46 Pac. 6; Lassen County v. Shinn, 88 Cal. 510, 26 Pac. 365; Kelley v. Sersanous, 5 Cal. Unrep. 485, 46 Pac. 299, as to employment of attorney to collect certain claims of the county, "by action at law or otherwise."

20. Accordingly, where a county was represented in certain actions pending in the superior court by an attorney, other than the district attorney, appointed by the supervisors of such county, it was held that the matter rested wholly in the discretion of the supervisors, and that the district attorney was not

entitled to have himself substituted as attorney in such actions when neither the county nor the attorney of record had sought a substitution; Woolwine v. Superior Court, 182 Cal. 388, 188 Pac. 569.

1. Woolwine v. Superior Court, 182 Cal. 388, 188 Pac. 569; Merriam v. Barnum, 116 Cal. 619, 48 Pac. 727.

2. Merced County v. Cook, 120 Cal. 275, 52 Pac. 721, collection of license taxes. See DISTRICT AND PROSECUTING ATTORNEYS.

3. County of Colusa v. Welch, 122 Cal. 428, 55 Pac. 243, holding that supervisors have no authority to employ special counsel for the purpose of influencing members of the legislature with respect to pending legislation affecting the interests of the county. See as to lobbying contracts generally, CONTRACTS, vol. 6, p. 124.

neys, or that it may employ them only in "suits to which the county is a party." The provision, therefore, refers only to civil actions; for a county is in no sense a party to criminal cases. The fact that counties pay the expense of criminal prosecutions confers on them no such right or interest as that contemplated by the statute. Consequently, it is beyond the power of supervisors to subject a county to any expense for the employment of counsel to act in criminal cases.⁴ Action of the board in employing attorneys to assist the district attorney in the prosecution of criminal cases and in allowing a claim for services rendered in pursuance of such employment is void, and creates no legal liability on the part of the county. A county may for this reason maintain an action to restrain payment of a warrant, drawn by the auditors in payment for such services; and while the attorneys are not necessary parties, they are proper parties to such an action.⁵

Manner of employment.—The control of suits, the employment of attorneys to prosecute them, and the compromise and settlement of the same, are acts which involve the exercise of judgment and discretion, and it is settled that the power to perform such acts cannot be delegated. Supervisors have no authority to authorize some other person to make such employment.⁶ It is said to be essential, where such employment is made, that the supervisors pass a resolution declaring their determination, and specifying the name of the person employed and the terms of the employment.⁷ However, where a majority of the members of the board authorize an employment informally, and the board in regular session approves and allows a

4. County of Modoc v. Spencer, 103 Cal. 498, 37 Pac. 483; Gibson v. County of Sacramento, 37 Cal. App. 523, 174 Pac. 935; Conklin v. Woody, 33 Cal. App. 554, 165 Pac. 973.

5. County of Modoc v. Spencer, 103 Cal. 498, 37 Pac. 483.

6. Scollay v. County of Butte, 67 Cal. 249, 7 Pac. 661; Conklin v. Woody, 33 Cal. App. 554, 165 Pac. 973.

7. Conklin v. Woody, 33 Cal. App. 554, 165 Pac. 973.

bill for services in accordance with such understanding, its action is a ratification of the employment, which is treated as equivalent to previous authority regularly given.⁸

§ 49. **Law Libraries.**—Full provisions are contained in the code for the establishment and maintenance of a law library at the county seat of each county, for its government and control, and for the creation of a fund, which shall be designated as the “law library fund.”⁹ It is discretionary with the board of supervisors of any county to provide by ordinance for the application of these provisions.¹⁰ The legislature has the power to establish such libraries, and to provide that counties may come within or remain without the provisions of the act, as the boards of supervisors of the respective counties may determine.¹¹ Such institutions are not part of the system of county government, at least in so far as the execution of political functions is concerned, and consequently do not come within the provision of the constitution requiring the legislature to “establish a system of county governments which shall be uniform throughout the state.”¹² Among other things, the code provides that supervisors shall provide a library-room for the use of the library, whenever such room may be demanded by the board of trustees of the law library.¹³ When the supervisors of a county which has once adopted the provisions of the law fail to provide a suitable or efficient library-room, the board of law library trustees may by writ of mandate compel them to act.¹⁴ When a county has once by ordinance come within

8. *Power v. May*, 123 Cal. 147, 55 Pac. 796; *Power v. May*, 114 Cal. 207, 46 Pac. 6.

9. Pol. Code, §§ 4190-4205.

10. Pol. Code, § 4203.

11. *Board of Law Library Trustees v. Supervisors*, 99 Cal. 571, 34 Pac. 244, citing *People v. McFad-*

den, 81 Cal. 489, 15 Am. St. Rep. 66, 22 Pac. 851.

12. *Coulter v. Pool*, 62 Cal. Dec. 421, 201 Pac. 120.

13. Pol. Code, § 4198.

14. *Board of Law Library Trustees v. Supervisors*, 99 Cal. 571, 34 Pac. 244.

the provisions of this law, it is there for all purposes, and cannot thereafter evade the effect of the statute by a repeal of the ordinance adopting its provisions.¹⁵ However, the code makes provision for the discontinuance of the law library in any county.¹⁶

§ 50. Appointment of Officers and Agents—Delegation of Power.—It is a constitutional duty of the legislature not only to provide for the election or appointment of county officers, but also to fix their terms of office, to prescribe their duties, and to regulate their compensation;¹⁷ and this duty cannot be delegated to boards of supervisors or others.¹⁸ Thus a board has no power to create the office of license tax collector even though the legislature attempts to give it such power.¹⁹ But the distinction is apparent between an office constituted by statute and a contract made with one to render services for a stated period, though these services are to be rendered in a capacity in the nature of a public office or appointment.²⁰ Thus the board may, under an act authorizing such action, appoint a county physician to attend to the indigent

15. Board of Law Library Trustees v. Supervisors, 99 Cal. 571, 34 Pac. 244, construing act approved March 31, 1891.

16. Pol. Code, § 4204.

17. See supra, § 24.

18. People v. Wheeler, 136 Cal. 652, 69 Pac. 435, citing Dwyer v. Parker, 115 Cal. 544, 47 Pac. 372; Ventura County v. Clay, 112 Cal. 65, 44 Pac. 488; County of Los Angeles v. Lopez, 104 Cal. 257, 38 Pac. 42; County of El Dorado v. Meiss, 100 Cal. 268, 34 Pac. 716; People v. Johnson, 95 Cal. 471, 31 Pac. 611; Dougherty v. Austin, 94 Cal. 601, 16 L. E. A. 161, 28 Pac. 834, 29 Pac. 1092; Farrell v. Board of Trustees, 85 Cal. 408, 24 Pac. 868. See supra, § 27.

19. San Luis Obispo Co. v. Greenberg, 120 Cal. 300, 52 Pac. 797; County of Los Angeles v. Lopez, 104 Cal. 257, 38 Pac. 42; County of El Dorado v. Meiss, 100 Cal. 268, 34 Pac. 716 (overruling People v. Ferguson, 65 Cal. 288, 4 Pac. 4).

The cases of People v. Stacy, 74 Cal. 373, 16 Pac. 192; County of Amador v. Kennedy, 70 Cal. 458, 11 Pac. 757, and In re Lawrence, 69 Cal. 608, 11 Pac. 217, holding that the board has power to appoint a license tax collector are based upon People v. Ferguson, 65 Cal. 288, 4 Pac. 4, and likewise must be deemed to be overruled by County of El Dorado v. Meiss, supra.

20. McDaniel v. Yuba County, 14 Cal. 444.

sick and dependent poor; and such physician is not a public officer, but a mere employee of the board.¹

While a board of supervisors may appoint agents to discharge ministerial duties, powers involving the exercise of judgment and discretion are in the nature of public trust, and cannot be delegated to others.² And in the absence of positive authority, a board cannot in any case appoint an agent to exercise powers which the board cannot itself exercise.³

It has been said that supervisors, in filling vacancies in office, appoint to office but do not elect. An appointment is not complete until the appointee has received a certificate under the seal of the board, signed by the proper officers. Therefore, an appointment made by a majority of the board may be revoked at any time before such certificate is issued, and another person may then be appointed.⁴ The rule that the appointing power cannot forestall the rights and prerogatives of their own successors by appointing successors to offices expiring after its power to appoint has expired, is applicable to boards of supervisors in exercising power, under authority of law, to fill vacancies. Hence, a board cannot either create a vacancy nor by anticipation fill one which is to arise in the future during the term of a newly elected board, and the appointment of a district attorney by an outgoing board to fill a vacancy in the office before such vacancy arises is in excess of its power and void; and such vacancy is properly filled by a succeeding board by another appointment made after the vacancy has arisen.⁵

1. *People v. Wheeler*, 136 Cal. 652, 69 Pac. 435, construing County Government Act of 1897, § 25, subd. 5, and citing *McDaniel v. Yuba County*, 14 Cal. 444, and *Grindley v. Santa Cruz County*, 2 Cal. Unrep. 326, 4 Pac. 390.

2. *House v. Los Angeles County*, 104 Cal. 73, 37 Pac. 796. And see

Holley v. County of Orange, 106 Cal. 420, 39 Pac. 790; *Scollay v. County of Butte*, 67 Cal. 249, 7 Pac. 661.

3. *House v. Los Angeles County*, 104 Cal. 73, 37 Pac. 796.

4. *Conger v. Gilmer*, 32 Cal. 75.

5. *People v. Ward*, 107 Cal. 236, 40 Pac. 538. See PUBLIC OFFICERS.

§ 51. Trial of County Officers.—A board of supervisors when engaged in the prosecution of an investigation of charges of dereliction of duty by an employee or officer of the county appointed by such board acts in an administrative, not a judicial, capacity. Accordingly, a member of the board is not disqualified to sit in judgment upon a county officer or employee in the matter of such charges because such member has himself filed the charges or procured them to be filed, or because he is biased and prejudiced.⁶ Nor are trials of charges against an officer or employee of a county subject to the rules appertaining to judicial tribunals where the law creating the exclusive tribunal by which such trials are had makes no provision for disqualifying a member of the tribunal from sitting upon the ground that he is biased or prejudiced against the person on trial. Public policy, as established by the law creating the board of supervisors the tribunal in such case, does not permit the member or members having bias or prejudice to be precluded from participating in the trial upon that ground.⁷

§ 52. Compensation.—The compensation of supervisors in the several counties is fixed by the code.⁸ The constitutional inhibition against the increase of compensation of county officers during their terms of office is applicable to

6. *Butler v. Scholesfield*, 36 Cal. App. Dec. 169, 201 Pac. 625. In this case the court said it is clear from the statute authorizing the appointment of county engineers that the legislature intended, in a case where an engineer appointed is charged with dereliction of duty, to constitute the supervisors the sole tribunal by which the charges should be heard and determined; and that the power vested in the board to investigate charges preferred and to remove the engineer if the charges be sustained is valid

and does not infringe any constitutional rights.

But see *Coulter v. Pool*, 62 Cal. Dec. 421, 201 Pac. 120, holding the "County Engineer Act," Stats. 1919, p. 1290, unconstitutional and void.

7. *Butler v. Scholesfield*, 36 Cal. App. Dec. 169, 201 Pac. 625, per Hart, J., citing *Federal Construction Co. v. Curd*, 179 Cal. 479, 177 Pac. 473; 179 Cal. 489, 2 A. L. R. 1202, 177 Pac. 469; *Grosjean v. Board of Education*, 40 Cal. App. 434, 181 Pac. 113.

8. Pol. Code, §§ 4230-4287.

supervisors acting *ex officio* as road commissioners.⁹ It can make no difference whether, as road commissioners, supervisors are or are not in a strict sense county officers, because salaries and fees paid in full compensation for work as county officers apply to all services of every kind.¹⁰ Accordingly, it has been held that a supervisor is not, as road commissioner, entitled to reimbursement for traveling expenses any more than to an increase of his aggregate per diem allowance, when at the time of the commencement of his term there was no statutory provision for such reimbursement.¹¹

Where a supervisor whose term expired was re-elected but failed to qualify as provided by law, it has been held that he continued to hold office solely by reason of his first election and the statute which permitted and required him to remain in office until his successor qualified; and under the extended term, he is entitled to that salary only which is provided by law for such term.¹² The compensation of supervisors under the County Government Act, including the compensation "for per diem and mileage or other services rendered by them," it has been held, was not intended to include any claim for services not coming within the duties of the board as prescribed by law; and hence no compensation could be allowed to a supervisor for services rendered and moneys expended by him as a representative of the board in attendance upon meetings of an anti-debris association.¹³ Similarly, claims for services as

9. *Santa Barbara County v. Twitchell*, 179 Cal. 772, 178 Pac. 945; *County of Santa Barbara v. Rucker*, 35 Cal. App. 676, 170 Pac. 860. See *supra*, § 35.

10. *Santa Barbara County v. Twitchell*, 179 Cal. 772, 178 Pac. 945.

11. *County of Placer v. Freeman*, 149 Cal. 738, 87 Pac. 628; *County of Santa Barbara v. Rucker*, 35 Cal. App. 676, 170 Pac. 860.

See *Ellis v. Tulare County*, 5 Cal. Unrep. 327, 44 Pac. 575, construing statutory provisions relating to the compensation of supervisors as road commissioners.

12. *Norton v. Lewis*, 34 Cal. App. 621, 168 Pac. 388.

13. *Irwin v. County of Yuba*, 119 Cal. 686, 52 Pac. 35. See to same effect *Shepherd v. Keagle*, 6 Cal. Unrep. 52, 53 Pac. 702.

superintendent of the construction of a drainage canal,¹⁴ and for services rendered in selling certain railroad stock owned by the county, which the board of supervisors was authorized to sell, have been denied.¹⁵ Where an act provided that the "supervisors shall receive seven dollars per diem, and twenty-five cents per mile in traveling to and from their respective residences to the county seat," and further provided that "all of which compensation in the aggregate shall not exceed four hundred dollars," it was held that the aggregate amount, such supervisors can receive, including both their per diem and mileage, is limited to four hundred dollars per annum.¹⁶ And under an act allowing supervisors mileage to and from their residences to the county seat, a supervisor is entitled only to one mileage for each session of the board, and cannot charge for daily visits to and from his home during a particular session.¹⁷

§ 53. Liability for Misconduct.—Official misconduct of county supervisors is penalized by section 4325 of the Political Code.¹⁸ Members of the board are individually responsible for moneys willfully paid out without authority of law. They are trustees of the county funds for certain specified purposes, and they may not allow them to be applied to other purposes. While not accountable for mere

14. *Domingos v. Board of Supervisors*, 51 Cal. 608.

15. *Andrews v. Pratt*, 44 Cal. 309.

16. *Chapin v. Wilcox*, 114 Cal. 498, 46 Pac. 457, construing County Government Act 1893, § 204, subd. 15.

17. *Howes v. Abbott*, 78 Cal. 270, 20 Pac. 572.

18. See *Fraser v. Alexander*, 75 Cal. 147, 16 Pac. 757, holding that the act of March 30, 1874, in so far as it provided for the removal and

punishment of a member of a board of supervisors for malfeasance in office, was inconsistent with § 55 of the County Government Act of March 14, 1883, which provided a different mode of punishment with different penalties for the same unlawful acts, and was therefore repealed by the latter act; and, further, the act being inconsistent with the provisions of the constitution of 1879, ceased to exist when the latter took effect. See PUBLIC OFFICERS, as to penal liability of public officers generally.

errors, if they willfully appropriate moneys for a purpose not authorized by law, they are liable civilly and criminally.¹⁹ In an action against the members of a board to recover the amount of illegal claims alleged to have been unlawfully allowed, the complaint must aver the nature of the claims, in order that it may be determined whether the acts complained of are illegal.²⁰ Such an action should be brought in the name of the county, and the district attorney is the proper person to prosecute it. But conceding that a taxpayer has the right, in the absence of an express statutory authorization, to prosecute the action, the complaint should then allege facts showing a refusal or neglect on the part of the district attorney to institute it.¹

While supervisors are personally liable for a neglect or refusal to perform a duty imposed by law, it has been held that the county cannot be held liable in such cases.²

§ 54. Ordinances Generally.—A board of supervisors in its legislative capacity ordinarily acts by the passage of ordinances.³ A county ordinance like a legislative statute may be good in part and void in part.⁴ If there are several provisions creating offenses, some of which are void and others valid, and a penalty is provided applying to each offense separately, the ordinance may be enforced as to the offenses respecting which it is valid.⁵ An ordi-

19. *Merriam v. Board of Supervisors*, 72 Cal. 517, 14 Pac. 137.

20. A mere allegation that the members of the board "misappropriated, wrongfully, unlawfully, and illegally allowed and paid out large sums of money," and that the demands "were wrongfully, unlawfully, and without authority of law allowed and ordered paid," states only a legal conclusion, and is insufficient; *Hedges v. Dam*, 72 Cal. 520, 14 Pac. 133.

1. *Hedges v. Dam*, 72 Cal. 520, 14 Pac. 133.

2. *Santa Cruz R. R. Co. v. County of Santa Clara*, 62 Cal. 180.

3. *Osborn v. Board of Supervisors*, 27 Cal. App. 85, 148 Pac. 970, per Burnett, J., stating that "The ordinary and usual form of legislation by the board of supervisors finds expression in the enactment of an ordinance and it would certainly be an exceptional case where it could be held that such enactment was not legislative."

4. See *CONSTITUTIONAL LAW*, vol. 5, p. 643.

5. *San Luis Obispo Co. v. Jack*,

nance in conflict with a valid general statute is void; but the ordinance must prevail, notwithstanding such conflict, if the statute is unconstitutional and the ordinance harmonizes with the constitution and with other general laws.⁶ It has been held that a county ordinance is a "law of this state" within the meaning of section 435 of the Penal Code, making it a misdemeanor for any person to carry on any business, for the transaction of which "a license is required by any law of this state, without taking out or procuring the license prescribed by such law, is guilty of a misdemeanor." Consequently, an ordinance providing no punishment for doing business without a license, is sufficient to prohibit the doing of such business, and to attach a penalty to the commission of the prohibited act.⁷

§ 55. Method of Enactment.—The Political Code prescribes the mode of enacting ordinances by the board of supervisors.⁸ The statutory mode must be pursued.⁹ Thus, the enacting clause must be as follows: "The board of supervisors of the county of — do ordain as follows."¹⁰ The code does not require ordinances to be entitled, and if this is done, the entitling portion may be treated as mere surplusage. Nor is it necessary to the validity of an ordinance that the board should state the source from which it derives authority to enact it. So

120 Cal. 307, 52 Pac. 1132; *San Luis Obispo Co. v. Greenberg*, 120 Cal. 300, 52 Pac. 797; *Ex parte Stephen*, 114 Cal. 278, 46 Pac. 86; *Ex parte Haskell*, 112 Cal. 412, 32 L. R. A. 527, 44 Pac. 725; *Ex parte Mansfield*, 106 Cal. 400, 39 Pac. 775; *San Luis Obispo v. Pettit*, 87 Cal. 499, 25 Pac. 694; *Ex parte Christensen*, 85 Cal. 208, 24 Pac. 747; *People v. Velarde*, 31 Cal. App. Dec. 217, 188 Pac. 59. As to municipal ordinances, see MUNICIPAL CORPORATIONS.

6. *County of San Luis Obispo v. Graves*, 84 Cal. 71, 23 Pac. 1032.

7. *County of Plumas v. Wheeler*, 149 Cal. 758, 87 Pac. 909, citing *Ex parte Stephen*, 114 Cal. 278, 46 Pac. 86; *Ex parte Mansfield*, 106 Cal. 400, 39 Pac. 775; *Ex parte Christensen*, 85 Cal. 208, 24 Pac. 747; *In re Sic*, 73 Cal. 142, 14 Pac. 405. See LICENSES.

8. Pol. Code, § 4057.

9. *County of San Diego v. Seifert*, 97 Cal. 594, 32 Pac. 644.

10. Pol. Code, § 4057.

long as the power of enactment exists, an incorrect recital of the source of the power does not affect the validity of the ordinance.¹¹

Every ordinance must be signed by the chairman of the board and attested by the clerk.¹² Compliance with this provision is essential.¹³ It is further provided that on the passage of ordinances the votes of the several members of the board shall be entered on the minutes, and all ordinances shall be entered at length in the "ordinance-book."¹⁴

§ 56. Enactment by Direct Legislation.—Provision is made in the Political Code for the enactment of ordinances by the initiative process and also for the referendum votes upon ordinances passed by the board of supervisors.¹⁵ It was formerly decided that there cannot be, under our system of government, two equal, co-ordinate law-making powers, "each existing without any restrictions the one upon the other"; and that under the constitution and the County Government Act, legislative power conferred upon the board of supervisors must be preferred to an inconsistent law-making power conferred upon the electors of the county.¹⁶ But under section 4058 of the Political Code

11. Ex parte Young, 154 Cal. 317, 22 L. R. A. (N. S.) 330, 97 Pac. 822; Ex parte Yung, 7 Cal. App. 440, 94 Pac. 594.

12. Pol. Code, § 4057.

13. County of San Diego v. Seifert, 97 Cal. 594, 32 Pac. 644.

14. Pol. Code, § 4057. See People v. Cole, 70 Cal. 59, 11 Pac. 481 (holding that the County Government Act of March 14, 1883, did not require that an ordinance should be recorded before it went into effect); Santa Clara Co. v. Southern Pac. R. R. Co., 66 Cal. 642, 6 Pac. 744 (holding that where an ordinance has been properly passed, omission of the clerk to add the seal of the

board to the record in the ordinance-book does not render it invalid); Keena v. Board of Supervisors, 89 Cal. 11, 26 Pac. 615 (holding that the words "proper ordinance," as used in § 2643, Pol. Code, providing that supervisors must by proper ordinance abolish or abandon such roads as are not necessary, requires nothing more than a proper order of the board entered in its minutes).

15. Pol. Code, § 4058; Cline v. Lewis, 175 Cal. 315, 165 Pac. 915.

16. Ex parte Young, 154 Cal. 317, 22 L. R. A. (N. S.) 330, 97 Pac. 822; Ex parte Anderson, 134 Cal. 69, 86 Am. St. Rep. 236, 66 Pac.

the reserved power of the electors to enact ordinances directly; as well as their power effectually to veto ordinances adopted by the board, is made paramount to the power of the board, the latter being without power to repeal an ordinance so enacted.^{16a} In harmony with these principles it has been held that an ordinance during the period when it remains subject to referendum has no validity as a law.¹⁷

The abolition or creation of a judicial township in a county by ordinance of the board of supervisors is a legislative and not a mere ministerial or executive act; and hence such ordinance is subject to referendum proceedings.¹⁸

§ 57. Publication of Ordinances.—Publication is necessary to the validity of an ordinance, and the statute in reference thereto is mandatory and not merely directory.¹⁹ Publication imparts notice to those who are or may be affected by its provisions; and if an error occurs in the pub-

194, holding that § 13 of the County Government Act of 1897 (Stats. 1897, p. 454), permitting the electors of the county to frame and pass ordinances for the government of the county, "having the same force and equal effect as though adopted and ordained by the board of supervisors," is inconsistent with the legislative power granted to the supervisors, and is, therefore, unconstitutional. But see *Brown v. Lelande*, 20 Cal. App. 71, 128 Pac. 337, holding that the power of the board of supervisors to submit questions upon which they desire the opinion of the voters, under § 13 of the County Government Act, is not affected by the fact that an independent provision in the same section authorizing an ordinance to be enacted by vote of the people has been held unconstitutional and

void, as interfering with the legislative functions of the supervisors. And see *Hobart v. Supervisors of Butte County*, 17 Cal. 23.

16a. See *Osborn v. Board of Supervisors*, 27 Cal. App. 85, 148 Pac. 970, as to requirement that signers of a referendum petition give their places of residence by street and number, and as to the sufficiency of the certificate of the clerk attached to such a petition.

17. *Cline v. Lewis*, 175 Cal. 315, 165 Pac. 915. See STATUTES, as to initiative and referendum generally.

18. *Osborn v. Board of Supervisors*, 27 Cal. 85, 148 Pac. 970.

19. *People v. Russell*, 74 Cal. 578, 16 Pac. 395; *San Luis Obispo County v. Hendricks*, 71 Cal. 242, 11 Pac. 682; *County of Mono v. Depauli*, 9 Cal. App. 705, 100 Pac. 717.

lication, which does not affect the provisions of the ordinance concerning the liability of a party thereunder, it should be held immaterial.²⁰ And where the record is admitted in evidence, proof that, in the ordinance as recorded, one of the sections was different from the same section as published, without disclosing wherein it was different, is not sufficient to show a material error in publication.¹ The reason for the requirement of publication of the names of the members voting for and against an ordinance is to show that it was passed by the requisite vote.² Publication is not rendered invalid because in numbering the sections of an ordinance consecutively, one section number does not appear in the ordinance; nor is the ordinance void because the sections are not all numbered in consecutive order.³ The code does not require that the board pass an order for publication; if it does so, and designates the newspaper in the order, the fact that the ordinance is published in another newspaper does not invalidate the ordinance.⁴ Where a statute pro-

The provisions of the Political Code as to publication are contained in § 4057.

20. *County of San Diego v. Seifert*, 97 Cal. 594, 32 Pac. 644; *San Luis Obispo County v. Hendricks*, 71 Cal. 242, 11 Pac. 682; *County of Mono v. Depauli*, 9 Cal. App. 705, 100 Pac. 717.

1. *County of San Diego v. Seifert*, 97 Cal. 594, 32 Pac. 644.

2. Where publication shows that four out of five supervisors voted for an ordinance and that there was no negative vote, it shows that the ordinance was passed, and the mere accidental omission to show the name of the chairman, who voted for it, as appears of record, does not show a substantial failure to comply with the statute, nor render the ordinance invalid; *County of*

Mono v. Depauli, 9 Cal. App. 705, 100 Pac. 717.

A complaint in an action to enforce a license tax which alleged that the ordinance, a copy of which was attached to the complaint, was duly published, an inspection of the copy showing that it was passed by a vote of five supervisors, none voting against it, sufficiently imports that the ordinance was properly passed and published; *San Luis Obispo Co. v. Greenberg*, 120 Cal. 500, 52 Pac. 797.

3. *County of Los Angeles v. Eikenberry*, 131 Cal. 461, 63 Pac. 766.

4. *San Luis Obispo County v. Hendricks*, 71 Cal. 242, 11 Pac. 682, construing § 26 of *County Government Act of 1883*.

vided that an ordinance should not take effect until it had been published in its entirety, and the entire ordinance was not published, it was treated as nonexistent.⁵

§ 58. Pleading and Proof.—A county ordinance is a private statute within the meaning of section 963 of the Penal Code, allowing a criminal pleading to refer to such a statute by its title and the day of its passage, and requiring the court to take judicial notice thereof.⁶ Hence it is not necessary in pleading a county ordinance to set out its substance, or any part of its substance. Much less is it necessary to copy any part of it into a criminal pleading.⁷ But while the rule that, as to the superior courts, ordinances are private statutes and should be pleaded as such is unquestioned, that they are private statutes as to inferior local courts, has been said not to be clear. However, it has been held that a complaint filed with a justice of the peace, charging an offense in violation of a county ordinance, need not plead the ordinance by reference to its title and date of passage. That court takes judicial notice of such local law.⁸ In charging an offense under a county ordinance it is not necessary that the information should specifically allege that the offense was committed outside of an incorporated city or town. If it follows the language of the ordinance, that is sufficient.⁹

Proof.—While a county ordinance is not admissible in evidence until the prosecution has first made proof of its publication, and of any other fact that might be a prerequisite to the existence of an operative ordinance, where, without objection, it was received in evidence as an ordi-

5. *People v. Russell*, 74 Cal. 578, 16 Pac. 395, holding that under § 26 of the County Government Act of 1883, a publication which omits the enacting clause was insufficient.

6. *Ex parte Luening*, 3 Cal. App. 76, 84 Pac. 445; *Ex parte Childs*, 1 Cal. App. 39, 81 Pac. 667.

7. *Ex parte Childs*, 1 Cal. App. 39, 81 Pac. 667. As to pleading ordinances of cities, see MUNICIPAL CORPORATIONS.

8. *Ex parte Luening*, 3 Cal. App. 76, 84 Pac. 445.

9. *People v. Velarde*, 31 Cal. App. Dec. 217, 188 Pac. 59.

nance that had become operative, it is too late on appeal to raise the point that its adoption was not attended by every act necessary to make it operative.¹⁰ The question whether an ordinance was passed, signed and attested is one of fact to be found by the court or jury upon legal evidence. The record of an ordinance, accompanied by proof of proper publication, is sufficient to entitle it to be admitted in evidence, and is prima facie proof that the ordinance was passed, signed, and attested in the form in which it appears in the record, and casts the burden on the defendant of rebutting the presumption arising from the record.¹¹ And it has been held that the record of the proceedings of the supervisors, which shows that an ordinance was duly passed and adopted by the affirmative vote of every member of the board, cannot be contradicted in a collateral proceeding by extrinsic evidence showing the recitals of the record to be untrue.¹²

The question whether a county ordinance was passed at a regular meeting of the supervisors, and whether the time for such meeting had been competently established, is within the province of the court to determine, as being essential to its jurisdiction to punish a defendant who is accused of a violation of the ordinance, and the judgment of conviction must be taken as conclusively establishing the existence of the facts upon which the jurisdiction depends, when reviewed collaterally upon writ of habeas cor-

10. *People v. Velarde*, 31 Cal. App. Dec. 217, 188 Pac. 59. As to proof of city ordinances, see MUNICIPAL CORPORATIONS.

Where the question at issue is, whether an ordinance imposing a license tax was passed at a regular meeting, and the plaintiff introduced in evidence a prior ordinance declaring that regular meetings should be held on the first Monday of every month, the validity of which ordinance was not put in issue by the pleadings, the plain-

tiff is not required to show that the meeting at which such ordinance was passed was itself a regular meeting; *County of San Diego v. Seifert*, 97 Cal. 594, 32 Pac. 644. See to same effect, *Merced County v. Fleming*, 111 Cal. 46, 43 Pac. 392.

11. *County of San Diego v. Seifert*, 97 Cal. 594, 32 Pac. 644.

12. *Ex parte Young*, 154 Cal. 317, 22 L. R. A. (N. S.) 330, 97 Pac. 822.

pus, which is a collateral and not a direct proceeding, when regarded as a means of attack upon the judgment.¹³

Auditor.

§ 59. **Duties Generally.**—The duties of a county auditor are defined by statute,¹⁴ and it is not competent for the board of supervisors to restrict him in the exercise of his office or to absolve him from the performance of these statutory duties. If a demand upon the treasury has been approved and ordered paid by the proper board or officer, and is presented to him in proper form, and he has satisfied himself that the money is legally due, and that payment is authorized by law, it becomes his duty to audit the demand, and the holder has a right to the enforcement of this duty. He is not justified in showing any favoritism by auditing the claim of one person in preference to that of another, upon the theory that there may not be sufficient money in the treasury to meet all demands upon it.¹⁵

It is no part of his duties to receive money collected for license taxes due the county; and, if he does so, and fails to account therefor, the sureties on his official bond, conditioned for the faithful performance of all "official duties required of him by law," are not liable for the defalcation. However, the money so received by the auditor belongs to the county, and may be recovered by it in an action against him for money had and received.¹⁶

Liability for neglect of duty.—Under section 710 of the Code of Civil Procedure it is the duty of the auditor to draw his warrant, upon compliance with the conditions therein specified, for the benefit of a judgment creditor of

13. Ex parte Stephen, 114 Cal. 278, 46 Pac. 86.

14. Pol. Code, §§ 4091-4100.

15. San Francisco v. Broderick, 111 Cal. 302, 43 Pac. 960.

16. San Luis Obispo County v. Farnum, 108 Cal. 567, 41 Pac. 447; San Luis Obispo County v. Farnum,

108 Cal. 562, 41 Pac. 445.

a person to whom the county owes money, and for failure to perform such duty the auditor is liable in damages to such judgment creditor.¹⁷ The auditor ought not to draw his warrant for an illegal demand, even though allowed by the board, and if he does so knowingly and willfully, he is personally responsible, and may be made to refund money thus illegally paid.¹⁸ And it has been held that a county may maintain an action against an auditor to recover money paid, upon warrants approved in good faith by the auditor, if they were drawn in payment of illegal warrants.¹⁹

§ 60. Duty to Draw Warrants.—The duties of the auditor are prescribed in the Political Code.²⁰ Section 4091 makes it his duty to draw a warrant, (1) in payment of claims that have been legally examined, allowed, and ordered paid by the board of supervisors; (2) in payment of debts and demands against the county where the amounts are fixed by law, and (3) in payment of debts and demands when approved and allowed, and are such as are authorized by law to be allowed by some person or tribunal other than by the board of supervisors.¹ Where a claim for services is a legal charge against a county, and has been presented to the board of supervisors and ordered paid, the action of the board is, in the absence of fraud, conclusive, and the auditor cannot lawfully refuse to draw his warrant therefor upon the ground that such

17. *Payne v. Baehr*, 153 Cal. 441, 95 Pac. 895; *Ruperich v. Baehr*, 142 Cal. 190, 75 Pac. 782.

18. *Walton v. McPhetridge*, 120 Cal. 440, 52 Pac. 731; *Merriam v. Board of Supervisors*, 72 Cal. 517, 14 Pac. 137. See *Cotton-Macauley Co. v. Desheils*, 35 Cal. App. Dec. 72, 198 Pac. 1026, as to the liability of an auditor issuing a warrant in payment for the construction of a bridge regardless of a stop notice

served on him pursuant to Code Civ. Proc., §§ 1183, 1184.

19. *County of Calaveras v. Poe*, 167 Cal. 519, 140 Pac. 23.

20. *White v. Mathews*, 29 Cal. App. 634, 156 Pac. 372.

1. *Frame v. Barnum*, 37 Cal. App. 411, 175 Pac. 689. See *Draper v. Noteware*, 7 Cal. 276, holding that, under the act of 1851, the auditor can draw warrants only where the claim is audited by himself.

services were never rendered, or were of less value than the amount claimed, and he may be compelled by writ of mandate to draw a warrant.² And where the law does not require the board to designate the particular fund out of which a claim is to be paid, it is the duty of the auditor to issue his warrant therefor, although the board failed to specify the fund on which the order was drawn,³ or made a mistake in designating the fund.⁴ A statute requiring a claim presented to the board of supervisors to be itemized, "giving names, dates, and particular services rendered," before it can be allowed, is directed to the supervisors alone, and the auditor has no revisory control over their action. He is not justified in withholding a warrant merely because the clerk has not certified the items of the claim, or the liability for which it was allowed; but it is his duty in such case to ascertain by inquiry the nature of the liability in order distinctly to specify it in the warrant, and to show that the claim has been allowed and ordered paid by the board of supervisors, and, upon receiving such information from the clerk it is his duty to draw the warrant.⁵

2. *Lamberson v. Jefferds*, 118 Cal. 363, 50 Pac. 403; *Lamberson v. Jefferds*, 116 Cal. 492, 48 Pac. 485; *Sehorn v. Williams*, 110 Cal. 621, 43 Pac. 8; *McFarland v. McCowen*, 98 Cal. 329, 33 Pac. 113; *Babcock v. Goodrich*, 47 Cal. 488; *Ellis v. Tulare County*, 5 Cal. Unrep. 327, 44 Pac. 575.

Averments in a complaint that the orders allowing an account, and directing the auditor to draw his warrant for the same, "were duly given and made," are sufficient to show the jurisdiction of a board of supervisors to direct a county warrant to be issued, and that there was money in the treasury, and that a tax had been levied, and that

no debt had been created when the account was allowed, which, added to the salaries of the officers, equaled the aggregate revenue; *Babcock v. Goodrich*, 47 Cal. 488.

3. *Babcock v. Goodrich*, 47 Cal. 488.

4. Assuming that it is the duty of the auditor to designate in his warrant the particular fund against which it is drawn, it is his duty to draw his warrant on the proper fund, notwithstanding the board of supervisors had erroneously ordered payment from another fund; *White v. Hayden*, 126 Cal. 621, 59 Pac. 118.

5. *Sehorn v. Williams*, 110 Cal. 621, 43 Pac. 8.

An auditor cannot refuse to issue a warrant, when ordered to do so by a board of supervisors, because the person in whose favor it is to be drawn and whose account has been allowed, has committed a fraud on the county in relation to procuring the contract on which the warrant is to be issued. Nor can the auditor refuse to draw a county warrant because there is no money in the treasury.⁶ He has, furthermore, no authority to draw his warrant on the county treasurer for the payment of a claim, unless the board of supervisors has made an express order that the claim be paid.⁷ Where the code contemplates the allowance of a salary by the board of supervisors before it shall be paid, in default of action by the board, the auditor cannot fix the salary at the minimum provided in the code. The law does not authorize him to draw a warrant for the payment of a salary which has not been fixed.⁸

§ 61. Illegal Claims.—It is the privilege and duty of the auditor to refuse to draw his warrant upon the treasurer for claims which, although ordered paid by the board of supervisors, are void upon their face for want of jurisdiction in the supervisors, or which show an excess of jurisdiction, or other plain violation of law.⁹ Mandamus will not lie to compel him to draw his warrant for an illegal claim, although it has been allowed by the board of supervisors.¹⁰ And not only this, but if he does knowingly and

6. *Babcock v. Goodrich*, 47 Cal. 488.

7. *Connor v. Morris*, 23 Cal. 447. As to drawing warrants for illegal claims, see *infra*, § 61.

8. *Peachy v. Redmond*, 59 Cal. 326.

9. *County of Calaveras v. Poe*, 167 Cal. 519, 140 Pac. 23; *Walton v. McPhetridge*, 120 Cal. 440, 52 Pac. 731; *McFarland v. McCowen*, 98 Cal. 329, 33 Pac. 113; *Merriam v. Board of Supervisors*, 72 Cal.

517, 14 Pac. 137; *Linden v. Case*, 46 Cal. 171; *Carroll v. Siebenthaler*, 37 Cal. 193.

10. *Davis v. Post*, 125 Cal. 210, 57 Pac. 901; *Walton v. McPhetridge*, 120 Cal. 440, 52 Pac. 731; *Harris v. Cook*, 119 Cal. 454, 51 Pac. 692; *Merriam v. Barnum*, 116 Cal. 619, 48 Pac. 727; *Merriam v. Board of Supervisors*, 72 Cal. 517, 14 Pac. 137; *Spring Valley Water Works v. Ashbury*, 52 Cal. 126; *Linden v. Case*, 46 Cal. 171. And see *Smeltzer*

willfully draw his warrant for an illegal demand, he is personally responsible, and may be made to refund the money thus illegally paid.¹¹ An auditor is not protected by an order of the board of supervisors allowing a claim which cannot be a charge against the county.¹² And if he refuses to issue a warrant therefor, he is acting for the county, and is protecting it against the unlawful acts of supervisors. The fact that an undertaking is dispensed with, upon an appeal by a county auditor, who is contesting a claim against a county as illegal, does not necessarily imply that a personal judgment for costs or damages may not be rendered against him on the merits of the case for refusal to issue the warrant improperly without just cause to doubt the validity of the claim.¹³

§ 62. Mandamus to Control.—The writ of mandate is a proper remedy against an auditor who refuses to issue a county warrant when directed to do so by the board of supervisors. If the board has not exceeded its powers, the relator is entitled to the warrant. The drawing of the warrant is an “act specially enjoined by law.” An action for damages against the auditor, for neglect of duty, would not be equally convenient, beneficial and effective as the proceeding by mandate.¹⁴ Under

v. Miller, 113 Cal. 163, 45 Pac. 264, holding that a taxpayer may maintain a suit to enjoin the auditor perpetually from drawing his warrant in payment of an illegal claim.

11. *Supra*, § 59.

12. *Lamberson v. Jefferds*, 116 Cal. 492, 48 Pac. 485; *Linden v. Case*, 46 Cal. 171; *Carroll v. Siebenthaler*, 37 Cal. 193; *Connor v. Morris*, 23 Cal. 447.

13. *Lamberson v. Jefferds*, 116 Cal. 492, 48 Pac. 485.

14. *Babeock v. Goodrich*, 47 Cal. 488; *First Nat. Bank v. Tyler*, 21 Cal. App. 791, 132 Pac. 1053; *Woody*

v. Peairs, 35 Cal. App. 553, 170 Pac. 660.

It will be observed that the remedy against an auditor who refuses to draw his warrant is not the same as that against a clerk of a court who refuses to issue an execution upon a simple money judgment, the remedy in the latter case being by motion in the proper court or by action against the clerk, and not by mandamus. See *CLERKS OF COURTS*, vol. 5, pp. 226-228. But it has been said that there is no strict analogy between the warrant of the auditor and an execution on an ordinary

section 710 of the Code of Civil Procedure, which provides for the filing of a transcript of a judgment with the auditor of any county from which money is owing to the judgment debtor, whereupon it becomes the duty of the auditor to draw his warrant in favor of the court from the docket of which the transcript was taken, mandamus lies to compel the auditor to draw his warrant in favor of the assignee of a claimant as to any amount assigned prior to the filing of the transcript, and in favor of the court as to any amount involved in case the transcript is filed before an assignment. Where an assignee of a claim against a county has assigned it to a bank for collection, he is the "real party in interest" in mandamus proceedings to compel the county auditor to draw a warrant for the claim.¹⁵ It is, of course, true that mandamus will not lie to compel an auditor to draw a warrant for an illegal allowance by the supervisors,¹⁶ or to compel him to issue a warrant in excess of his power.¹⁷ But while the auditor may refuse to draw an illegal warrant, he cannot substitute his own affirmative action for that of the board of supervisors; he cannot draw his warrant in favor of some other persons than the one whom the board has ordered to be paid.¹⁸ Where the court directs a writ to issue requiring the auditor to issue a warrant for the treasurer to pay a sum of money to the petitioner, the clerk cannot render a personal judgment against the auditor.¹⁹

money judgment; *Babcock v. Goodrich*, 47 Cal. 488.

The superior court has no inherent power to make an order requiring an auditor to audit a claim for services of detectives employed by the grand jury to assist in the investigation of crime, the auditor not being an officer of the court or a party to the proceeding in which the order was made; *Woody v. Peairs*, 35 Cal. App. 553, 170 Pac. 660.

15. *First Nat. Bank v. Tyler*, 21 Cal. App. 791, 132 Pac. 1053.

16. *Merriam v. Barnum*, 116 Cal. 619, 48 Pac. 727. And see cases cited in § 61, *supra*.

17. *Jenkins v. Williams*, 14 Cal. App. 89, 111 Pac. 116.

18. *Scheerer v. Edgar*, 76 Cal. 569, 18 Pac. 681.

19. *Sweeny v. Maynard*, 52 Cal. 468.

Treasurer.

§ 63. Duties Generally.—The duties of a county treasurer are prescribed by the code.²⁰ He is not an independent officer in respect to his charge and control of county funds; but in his disbursements, acts on the warrants of the auditor on claims audited by the board of supervisors, or as provided by law.¹ Where there is no authority in law for a particular order of the board of supervisors, the order is void, and the treasurer in the discharge of his official duties will properly refuse to comply with it.² Where a treasurer transfers from the general fund to a particular fund more money than he is authorized by law so to transfer, the surplus not authorized still belongs to the general fund, and it is his duty to retransfer the same to that fund without any order.³ When a treasurer is authorized to advertise for bids for the surrender of county bonds, in order that he may redeem them, he has no authority to insert in the advertisement a condition upon which bids will be received, such as that bonds must accompany a bid; and it is his duty to accept the most favorable bid, even if not accompanied by bonds.⁴

§ 64. Duty to Pay Demands.—It is the duty of a treasurer to pay all warrants issued by the auditor of his county, based on orders of the board of supervisors, or as

20. Pol. Code, §§ 4101–4123 (Amdt. 1921).

As to duty and liability of treasurer with respect to deposits in court, see FUNDS AND DEPOSITS IN COURT.

1. *People v. Fogg*, 11 Cal. 351. See Pol. Code, § 4101, subds. 6, 7.

2. *Brown v. Klemmer*, 150 Cal. 454, 89 Pac. 325, order to transfer money from general fund to road district fund.

3. Upon failure so to do, the

board of supervisors, under the jurisdiction and power conferred upon it to “supervise the official conduct of all county officers,” is authorized to pass an order requiring him to do so, and upon his refusal, to proceed against him by writ of mandate; *Modoc County v. Madden*, 120 Cal. 555, 52 Pac. 812.

4. *Mills v. Bellmer*, 48 Cal. 124. And see *Crocker v. Wolson*, 30 Cal. 663.

otherwise provided by law.⁵ He is not authorized to review the action of supervisors in any matter within their power upon which they have exercised their discretion. He may not refuse payment of any demand for an expenditure which the supervisors are authorized to make, and which they have allowed and ordered paid. It is only when the board directs payment of an expenditure which it has no power to incur that the treasurer is justified in refusing to make the payment.⁶

No moneys held by the treasurer are subject to the payment of demands, unless received in the treasury upon the certificate of the auditor. Thus the delay of a tax collector in making settlement with the auditor cannot confer upon a bondholder the right to compel payment by the treasurer of bonds prior to the settlement. The bondholder should first compel such settlement before making demand upon the treasurer.⁷

The holders of reclamation district warrants on which demand for payment and registration have been made are entitled to priority of payment in the order of their registration. Hence a treasurer is justified under section 3457 of the Political Code, providing for the registration of unpaid reclamation district warrants, in refusing to pay the amount of certain warrants out of the moneys deposited with him for the purpose of paying outstanding unpaid and registered warrants of the district, where such payment would leave an insufficient amount in his hands to pay outstanding warrants of an earlier date which had been presented and registered as unpaid warrants.⁸

5. Pol. Code, §§ 4104-4110; Keller v. Hyde, 20 Cal. 593; Cocke v. Hendley, 18 Cal. 369.

But see Watts v. Crawford, 1 Cal. Unrep. 356, holding that county treasurers are not required to pay auditors' drafts unless the consideration upon which they were issued is stated and vouched for

by the auditor on the face of the paper.

6. Van Schmidt v. Widber, 105 Cal. 151, 38 Pac. 682, Consolidation Act (Stats. 1856, p. 189).

7. Meyer v. Widber, 126 Cal. 252, 58 Pac. 532.

8. In a mandamus proceeding to compel the treasurer to pay the

§ 65. Illegal Claims and Warrants.—A county treasurer is required to pay only such warrants as are founded upon orders of the board of supervisors for the payment of claims legally chargeable against the county. He may and should refuse to pay warrants known by him to have been drawn for claims not authorized by law.⁹ Thus if, upon the face of a claim, it appears that the board did not have jurisdiction to consider the same, it is the duty of the treasurer to refuse payment; and such apparent lack of jurisdiction may be pleaded as a defense to a writ of mandamus to compel him to do so.¹⁰ But it has been held that it is the duty of a treasurer to pay an auditor's warrant if it is regular and legal in form, unless he has notice that it is not based upon a lawful demand, or has notice of facts sufficient to put an ordinarily prudent treasurer upon inquiry, which, if diligently prosecuted, would lead to discovery of the illegality upon which the warrant was founded. And sureties upon the official bond of such

later warrants, he may interpose the defense of insufficiency of funds, without first showing a demand for payment made upon him by the prior warrant holders, as the "presentation" of the warrants and their registration constitute a demand for payment; *Pacific Gas & Electric Co. v. Cole*, 32 Cal. App. 266, 162 Pac. 435, per Chipman, P. J.

9. *Ex parte Truman*, 124 Cal. 387, 57 Pac. 223; *Ventura County v. Clay*, 114 Cal. 242, 46 Pac. 9; *Von Schmidt v. Widber*, 105 Cal. 151, 38 Pac. 682; *Los Angeles County v. Lankershim*, 100 Cal. 525, 35 Pac. 153, 556; *Priet v. Hubert*, 62 Cal. 9; *Linden v. Case*, 46 Cal. 171; *Perry v. Ames*, 26 Cal. 372; *Jacks v. Taylor*, 24 Cal. App. 667, 142 Pac. 121; *Kelley v. Sersanous*, 5 Cal. Unrep. 485, 46 Pac. 299. As to auditor's duty to refuse to draw

warrants for illegal claims, see *supra*, § 61.

10. *Ventura Co. v. Clay*, 114 Cal. 242, 46 Pac. 9 (holding that an allegation of an allowance by supervisors of a claim "for assisting the recorder and auditor of said county in the performance of the duties of his office," sufficiently shows illegality; and a further allegation that the treasurer paid a warrant drawn for the amount of the claim is sufficient, in the absence of anything appearing to the contrary, to authorize the presumption, under § 114 of the County Government Act, that the warrant showed on its face the illegality of the claim for which it was drawn); *Power v. May*, 114 Cal. 207, 46 Pac. 6; *Von Schmidt v. Widber*, 105 Cal. 151, 38 Pac. 682; *Carroll v. Siebenthaler*, 37 Cal. 193; *Jacks v. Taylor*, 24 Cal. App. 667, 142 Pac. 121.

treasurer are not responsible for a loss resulting from the payment of a genuine auditor's warrant in due form, without notice, actual or constructive, of any fraud or infirmity in the claim upon which the warrant was based.¹¹ However, this rule has no application where the substance of the warrant is such that its illegality must have been apparent on its face.¹² A treasurer should not only refuse to pay demands which he believes to be illegal, but should refuse to pay a legal demand unless it shall have been presented for payment after compliance with all legal requirements touching the presentment of such a demand upon the treasury.¹³ If a treasurer knowingly and willfully pays a warrant for an illegal demand, he is personally responsible, and may be made to refund the money thus illegally paid. The warrant drawn by the auditor is no excuse for the payment of a claim known to be not a lawful charge.¹⁴

§ 66. Return of Moneys Erroneously Paid into Treasury.

Section 4123 of the Political Code, as amended in 1921, provides that "Any money other than taxes, erroneously paid in to the county treasury, may be returned to the person paying it in, upon a warrant drawn by the county auditor on the order of the board of supervisors, based upon such voucher as will show proper evidence of the facts." Prior to the enactment of this section it was held that subdivisions 6 and 7 of section 4101 of the Political Code prohibiting county treasurers from distributing the moneys in the treasury except upon warrants issued by the auditor applied only to moneys owned by the county; and that where a particular fund constituted no part of the public moneys, an auditor's warrant was not a pre-

11. *Los Angeles County v. Lanker-shim*, 100 Cal. 525, 35 Pac. 153, 556.

12. *Ventura County v. Clay*, 114 Cal. 242, 46 Pac. 9.

13. *Ex parte Truman*, 124 Cal. 387, 57 Pac. 223.

14. *Merriam v. Board of Super-visors*, 72 Cal. 517, 14 Pac. 137; *Linden v. Case*, 46 Cal. 171; *Trinity County v. McCammon*, 25 Cal. 117. As to auditor's liability under such circumstances, see *supra*, § 59.

requisite to a refunding of the same. Hence, inasmuch as the county had no title to excessive taxes held in the treasury, which belonged only to the taxpayers from whom they were received, or their assigns, no auditor's warrant was requisite to a refunding of such taxes.¹⁵

§ 67. Settlements With Controller.—The state controller is entrusted with the duty of making settlements with county treasurers for moneys received by them and belonging to the state.¹⁶ Where the controller has settled with a treasurer and allowed him his commissions, the district attorney of the county has no arbitrary power to disturb the settlement, at least, without some special showing of facts. And where the controller made a settlement with a treasurer and allowed him his commissions, which settlement had been acquiesced in for several years, it has been held that the state cannot, in the absence of fraud or clear mistake, set aside the settlement and hold the treasurer to a resettlement.¹⁷ If a treasurer, upon his settlement with the controller, is allowed to retain money for official or other services beyond the compensation to which he is entitled, it is his duty to pay such money into the county treasury and turn it over to his successor in office. He cannot claim the money on the ground that the controller exceeded his authority in making the allowance.¹⁸

§ 68. Mandamus to Control.—The remedy for the refusal of a treasurer to pay a legal demand is by mandamus, in

15. *MacMullan v. Kelly*, 19 Cal. App. 700, 127 Pac. 819, citing *Corbett v. Widber*, 123 Cal. 154, 55 Pac. 764; *Trower v. City and County of San Francisco*, 157 Cal. 762, 109 Pac. 617.

16. Pol. Code, § 3865 et seq.

17. *People v. Lattimore*, 19 Cal. 365.

18. *McKee v. Monterey Co.*, 51 Cal. 275 (citing *Placer County v.*

Astin, 8 Cal. 303). See Pol. Code, § 4111, as to monthly and annual settlements with auditor. See Act 804, General Laws (Deering), as to duty of county officers to furnish to the controller reports of all financial transactions of the county. See Act 805, General Laws (Deering), as to settlements of county treasurers when school funds have been misappropriated.

which proceeding the treasurer may make such defenses to the enforcement of the claim as he may deem meritorious.¹⁹ On an application for a writ of mandate to compel a county treasurer to pay a warrant issued by the auditor, a petition which alleges that the board of supervisors allowed the claim and ordered the auditor to draw a warrant for its amount and that the auditor in pursuance of this order issued such warrant, is sufficient, although it does not follow the exact words of the statute.²⁰ But a treasurer has the right to show, in defense, that the warrants were founded on demands not legally chargeable against the county.¹ Mandamus will not issue to compel a treasurer to pay on warrants payable out of a particular fund more money than there is in that fund at the time the mandate issues, and a judgment which commands him to pay warrants out of moneys that may thereafter come into the fund is erroneous.² Upon the hearing of an application for a writ of mandate to compel payment of a warrant, where it is averred, and not denied, that the supervisors allowed the claim and ordered a warrant drawn, and that a warrant was regularly drawn and delivered, it must be presumed that official duty in allowing and issuing the warrant was regularly performed, and the burden of proof is upon the treasurer to show that he was justified in refusing payment, and it does not rest upon the plaintiff to show that the supervisors had jurisdiction to issue the warrant, merely because aver-

19. *Ex parte Truman*, 124 Cal. 387, 57 Pac. 223; *Bank of California v. Shaber*, 55 Cal. 322; *Day v. Callow*, 39 Cal. 593. But see *People v. Fogg*, 11 Cal. 351, holding that mandamus is not the proper remedy where no warrant has been issued by the auditor.

The refusal of the treasurer cannot justify proceedings against him for contempt; and if ordered to be

imprisoned therefor, he will be released upon habeas corpus; *Ex parte Truman*, 124 Cal. 387, 57 Pac. 223. See CONTEMPT.

20. *Jones v. Morgan*, 67 Cal. 308, 7 Pac. 734; *Connor v. Morris*, 23 Cal. 447.

1. *Connor v. Morris*, 23 Cal. 447; *Keller v. Hyde*, 20 Cal. 593.

2. *Day v. Callow*, 39 Cal. 593.

ments in the answer that the supervisors had no jurisdiction to allow the claim.³

§ 69. Liability for Misconduct.—A treasurer is personally liable for the unauthorized payment of money from the county treasury,⁴ or for the conversion thereof to his own use. However, in an action against him for conversion of county funds, it is a proper defense that the treasury was robbed of such funds; but such defense must be clearly and satisfactorily established.⁵ The fact that after the election and qualification of a treasurer a statute is passed by which his duties are changed or his salary is reduced does not impair his official bond or discharge his sureties from responsibility for his acts after the change is made.⁶ And where a treasurer, in compliance with the requirements of the law, delivered a receipt to the auditor showing that he had received a certain sum of money from a license tax collector, and thereafter made sworn statement to the auditor that this money was in his hands, as treasurer, he is estopped from questioning his receipt, and will not be permitted to exonerate himself from liability to the county by showing that the sworn statements were false, and that, instead of requiring the collector to pay the money into the treasury, he had taken his promise to pay it at a subsequent date.⁷ But in an action on a treasurer's

3. *McGowan v. Ford*, 107 Cal. 177, 40 Pac. 231; *Connor v. Morris*, 23 Cal. 447.

4. See *supra*, § 65.

Money in treasury is presumptively the money of the county, and money illegally withdrawn by the treasurer will be held to belong to the county until the contrary is shown. *Sacramento Co. v. Bird*, 31 Cal. 66.

5. *County of Sonoma v. Stofen*, 125 Cal. 32, 57 Pac. 681.

6. *Sacramento Co. v. Bird*, 31 Cal. 66. See **PUBLIC OFFICERS**.

7. *County of San Luis Obispo v. Pettit*, 100 Cal. 442, 34 Pac. 1082. And see *Butte County v. Morgan*, 76 Cal. 1, 18 Pac. 115, holding that if the same person is both treasurer and tax collector, and he settles his accounts as tax collector with the auditor, and receives a certificate stating the amount due from him as tax collector, which certificate is afterwards found in the treasury, it has been held that the presumption is that the money was deposited in the treasury with the certificate, and in the absence of evidence as

official bond, if the complaint avers only a breach by a failure of the treasurer to keep the money in the county safe, and by a withdrawal of the same and conversion to his own use, a recovery cannot be had for a failure of the treasurer to pay into the treasury his commissions retained on payments made to the state.⁸

The sureties of a county treasurer are liable for public money received by him as treasurer after the expiration of his term so long as he remains in possession of the office, and until he delivers it over to his successor. And the receipts of the treasurer given to a tax collector for public money, after the expiration of his term, but before he has delivered possession of the office to his successor, are prima facie evidence to charge the sureties.⁹ If the same person is elected and acts as treasurer during three successive terms, and it is afterwards discovered that money deposited with him has been misappropriated, it will be presumed, in the absence of evidence to the contrary, that this misappropriation took place at the end of his last term, and the sureties on his last official bond are liable therefor. And where a deposit was made by the clerk of a court and receipted for by the treasurer, as required by law, and the latter regularly turned it over to his successor in office, by whom it was embezzled, any irregularity that there may have been in the manner of making the original deposit will not release the sureties on the bond of the succeeding treasurer from liability.¹⁰ But where a treasurer receipted to persons without receiving the money, but with an understanding that such persons would pay the money when he required it to make a settlement, and the treasurer died soon after, and such persons paid the money to his successor in office, who credited

to when a defalcation occurred, that it occurred after the money was so deposited; and the sureties of the treasurer are liable.

8. Sacramento Co. v. Bird, 31 Cal. 66.

9. Placer Co. v. Dickerson, 45 Cal. 12. See PUBLIC OFFICERS.

10. Heppe v. Johnson, 73 Cal. 265, 14 Pac. 833.

it to the account of the deceased, the treasurer's bondsman cannot be held for such money, for payment to the successor in office is a liquidation of the demand.¹¹

Where it was the duty of a treasurer to keep the funds of the county under his own personal control, it has been held that when he lost that control by his own neglect of official duty a cause of action arose on his official bond at once, and the statute of limitations began to run against such cause of action as early as that condition of affairs was brought to the knowledge of the county. And where an action previously commenced by the county upon the official bonds of such treasurer to recover the moneys so lost was dismissed, the commencement of such action showed knowledge by the county of the existence of the cause of action, and a second action commenced to recover such moneys more than four years thereafter was barred by the statute of limitations. The failure of the treasurer, at the conclusion of his official term, to pay to his successor the lost funds did not constitute a new or different cause of action, nor extend the period of limitation of the action upon his official bond.¹²

Receipt of private moneys.—The Penal Code declares that any county treasurer who shall accept, or allow, any deposit in the county treasury of moneys from any private and unofficial source, is guilty of a misdemeanor, and in addition to other punishment prescribed, he forfeits his office.¹³

11. *People v. Jacob*, 49 Cal. 540. See *People v. Evans*, 29 Cal. 429, holding that sureties on the bond of a treasurer can be discharged from further obligation on the same only upon proceedings had before the board or officer which, at the time of the discharge, has power to approve of the bond of such officer.

12. *County of San Diego v. Dauer*, 131 Cal. 199, 63 Pac. 338. See Pol. Code, § 4113, as to penalty for not reporting as required by law. See Pol. Code, § 4118, as to the power of supervisors to suspend a treasurer from office whenever an action, based upon official misconduct, is commenced against him.

13. Penal Code, § 180.

Clerk.

§ 70. **Duties Generally.**—The general duties of the county clerk are enumerated in section 4178 of the Political Code, and the section next following provides that “he must keep such other records and perform such other duties as are prescribed by law.”¹⁴ Under section 1014 of the Political Code it is the duty of the clerk to deliver to his successor the possession of all books and papers pertaining to his office, or in his custody by virtue of his office. If he willfully and unlawfully withholds any records, papers, or documents, from his successor, he is, under section 76 of the Penal Code, guilty of a felony.¹⁵

Ordinarily, the power of contracting on behalf of the county is lodged in the board of supervisors, which is the chief legislative and executive authority of the county.¹⁶ Unless, therefore, the clerk is clearly authorized to make a contract on behalf of the county, so as to charge it, not only with the duty of performing such contract, but with damages for its breach, a judgment against the county on such a contract cannot be sustained. And where by the code the clerk is specially charged with the duty of pre-

14. Pol. Code, § 4179 (Amdt. 1921). As to the duty of the county clerk, as a clerk of the court, see *CLERKS OF COURT*, vol. 5, p. 218.

15. *People v. Hamilton*, 103 Cal. 488, 37 Pac. 627, holding also that the clerk is not a financial custodian of public moneys, except as to fees, etc., collected or received by him to the use of the county, and for which it is his duty to account with the treasurer. And where there is no statute making it his duty to pay over public money in his hands to his successor in office, his refusal so to do does not constitute a violation of law.

But see Penal Code, § 76 (Amdt. 1905), which provides that every officer who “willfully and unlaw-

fully withholds or detains from his successor, or other person entitled thereto, any money or property in his custody as such officer” is guilty of a felony.

Under an information charging a county clerk with omission and refusal to pay over moneys to his successor, he cannot be convicted of failure to pay the moneys to the county treasurer. *People v. Hamilton*, 103 Cal. 488, 37 Pac. 627.

See note 1 A. L. R. 234, as to liability of county clerk on his bond for the defaults and misfeasances of his clerks, assistants or deputies.

16. See *supra*, § 36; *infra*, § 79 et seq.

paring the great register, and, having performed that duty, is charged by the statute with the printing of it, it has been held that this does not necessarily imply that he has the power to contract on behalf of the county for the expense of printing.¹⁷

Sections 4178 and 4312 of the Political Code, defining the duties of the clerk, require that he have an office at the county seat and for office hours thereat. But it has been held that neither of these sections supports the contention that the main central office, where the permanent records are kept, is the sole and exclusive office. Every courtroom in which a deputy clerk is assigned under the law is a part of the county clerk's office.¹⁸

§ 71. Compensation and Fees.—The Political Code prescribes the compensation of clerks throughout the state, which is to be “in full compensation for all services of every kind and description” rendered by them either as county clerks or clerks *ex officio*.¹⁹ It further directs that such officers shall pay into the county treasury the fees “allowed by law in all cases.”²⁰ This has been held to include fees received in naturalization proceedings under

17. *Frاندzen v. County of San Diego*, 101 Cal. 317, 35 Pac. 897.

18. *Keller v. Gerber*, 33 Cal. App. Dec. 433, 193 Pac. 809. See EXECUTORS AND ADMINISTRATORS, as to what constitutes filing of claims against an estate “in the office of the clerk of the court” within the meaning of section 1490 of the Code of Civil Procedure.

A county clerk is not permitted to practice law in any court of the state, or act as attorney, agent or solicitor in the prosecution of any claim or application for lands, pensions, patent rights or other proceedings, before any department of the state or general government, or

courts of the United States, during his continuance in office. Code Civ. Proc., § 171. See to the same effect Pol. Code, § 4318.

19. Pol. Code, § 4290. For fees as clerk of court, see CLERKS OF COURT, vol. 5, p. 222 et seq.

20. Pol. Code, § 4292; *County of Alameda v. Cook*, 32 Cal. App. 165, 162 Pac. 405. And see *City and County of San Francisco v. Mulcrevy*, 15 Cal. App. 11, 113 Pac. 339 (affirmed *Mulcrevy v. San Francisco*, 231 U. S. 669, 58 L. Ed. 425, 34 Sup. Ct. Rep. 260, see, also, *Rose's U. S. Notes*). See Pol. Code, § 4300a (Amdt. 1921), as to fees of county clerk.

the authority of an act of Congress which provided that the clerk of any court collecting such fees was authorized to retain one-half thereof.¹ Ordinarily, an act which fixes the compensation of a clerk at a lump sum is intended in lieu of all fees for services rendered the county.² Where a statute fixed the salary, provided that the clerk should collect all fees, and at the first of every month pay the same over to the county treasurer, "less his salary for the next preceding month," and the fees for several months were less than the salary, it was claimed that the salary was payable only out of the collected fees, but it was held that the clerk was entitled to his full salary, and that there was no legislative intention to limit it to the amount of fees received.³

Surveyor and Recorder.

§ 72. Surveyor.—The ordinary duties of the county surveyor are set forth in sections 4214 to 4220, inclusive, of

1. See *CLERKS OF COURTS*, vol. 5, p. 232.

In a case which involved the right of a clerk to retain to his own use a certain percentage of receipts for hunting licenses sold by him under an act, which provided that "for each license sold, registered and accounted for by any person excepting by a fish commissioner, he shall be allowed as compensation out of the game preservation fund, ten per cent of the amount accounted for," it has been held that the phrase "any person" was designedly employed to differentiate the service of selling licenses from the duties ordinarily required of the clerk in his official capacity, that is to say, that the selling of licenses was purely a personal service; and that such dif-

ferentiation indicated the intent to confer upon the clerk the right to retain for his own use the percentage provided for; *Sacramento County v. Pfund*, 165 Cal. 84, 130 Pac. 1041; *County of Alameda v. Cook*, 32 Cal. App. 165, 162 Pac. 405. And see for construction of statute fixing compensation of clerk for all services as county clerk, auditor and recorder where such offices were afterwards separated, *Kinsey v. Kellogg*, 65 Cal. 111, 3 Pac. 405; *San Luis Obispo County v. Darke*, 76 Cal. 92, 18 Pac. 118.

2. *Mitchell v. Stoner*, 9 Cal. 203.

3. *Sewell v. Placer County*, 42 Cal. 650.

As to compensation for additional help for county clerks, see act approved June 2, 1913, Stats. 1913, p. 363.

the Political Code. These ordinary duties are not interfered with by the legislature in providing for the conferring upon him the additional duty prescribed in subdivision 7 of section 4041 of the same code, relating to the construction of any bridge, wharf, chute, or other shipping facilities, or any repairs thereto, if the board of supervisors shall be advised by the county surveyor that the work can be done for a sum less than the lowest responsible bid therefor—which is not out of harmony with the nature of the services which the surveyor should be specifically qualified to perform.⁴

The code provides that “the surveyor must be a licensed land surveyor of the state.”⁵ This means only that one not having a licensed land surveyor’s certificate cannot hold the office. Hence the election of a surveyor who was qualified at the time of his election, with the exception that he had not then received the certificate from the state surveyor, which he obtained before his term of office commenced, cannot be successfully contested on that ground. The provision requiring such certificate does not go to his eligibility at the time of election, but only goes to his right to hold the office.⁶

4. This power and additional duty conferred upon the surveyor is not forbidden as contractual by § 4074, Pol. Code, forbidding a county officer, except for his own services, to present a claim against the county, or in any way except in the discharge of his official duty to advocate a claim against it. The official compensation of the surveyor, if he has a salary, is not increased by reason of such additional duty; and if he is paid by fees, he can have only the statutory fees allowed for his actual work. This is not unlawful, or against

public policy. Nor is this specific power inconsistent with the general power conferred upon road overseers in their respective districts over roads and bridges, and the repair thereof, when necessary. *McCarthy v. Board of Supervisors*, 15 Cal. App. 576, 115 Pac. 458.

5. Pol. Code, § 4214.

6. *Ward v. Crowell*, 142 Cal. 587, 76 Pac. 491. See **PUBLIC OFFICERS**. See *Coulter v. Pool*, 62 Cal. Dec. 421, 201 Pac. 120 (holding the “County Engineer Act,” Stats. 1919, p. 1290, unconstitutional and void).

§ 73. **Recorder.**—In prescribing the duties of the county recorder⁷ the code, among other things, declares that the recorder must procure such books for records as the business of his office requires, and that he has the custody of and must keep all books, records, maps and papers deposited in his office.⁸ The statute also provides what must be recorded,⁹ what indexes are to be kept,¹⁰ and prescribes other duties to be performed.¹¹ It also prescribes the penalty for neglect or misconduct of the recorder.¹² Where a statute made no provision for the recording of notices of locations of mining claims, such recording was held not to be within the purview of the recorder's duties; and any moneys which he might receive for such services were not fees for which he and his bondsmen were accountable.¹³ But under the code, notices of location of mining claims may now be recorded,¹⁴ and the recorder is required to keep an index of mining locations and of documents affecting the same.¹⁵ Copyists in the office of the recorder are entitled to be paid only for the words actually copied by them, and are not entitled to compensation for words contained in the printed forms in the books.¹⁶ Where an act providing for the compensation of the county clerk, who was at the time ex-officio recorder and auditor, became inoperative, and the offices of clerk, recorder and auditor were filled by different persons, it

7. Pol. Code, § 4130 et seq. See, also, RECORDS.

8. Pol. Code, § 4130; *Frame v. Barnum*, 37 Cal. App. 411, 175 Pac. 689.

9. Pol. Code, § 4131. See RECORDS.

10. Pol. Code, § 4132.

11. Pol. Code, § 4133 et seq.

12. Pol. Code, § 4140.

13. *San Bernardino County v. Davidson*, 112 Cal. 503, 44 Pac. 659, distinguishing the cases of *Placer County v. Astin*, 8 Cal. 303; *McKee v. Monterey County*, 51 Cal.

275, and *People v. Bunker*, 70 Cal. 212, 11 Pac. 703.

14. Civ. Code, § 1159.

15. Pol. Code, § 4132, subd. 23.

16. A claim for compensation for such services must be presented to and allowed by the supervisors before the county auditor is authorized to draw a warrant for its payment, since the compensation is not fixed by law, the law merely establishing a basis or standard by which the amount due may be determined; *Frame v. Barnum*, 37 Cal. App. 411, 175 Pac. 689.

has been held that the fees of the recorder became subject to an act relating to fees of officers generally.¹⁷

IV. PROPERTY.

§ 74. **Nature.**—Counties, being mere governmental agencies of the state,¹⁸ hold their property on behalf of the state for governmental purposes. The proprietary interest in all such property belongs to the public, and if there be a legal title in the county, it is a title held in trust.¹⁹ Certainly the county has no proprietary interest in such property as against the state. It follows that, in the absence of constitutional restrictions, the legislature has full control of the property held by counties as agencies of the state, and may dispose of that property without the consent of the county or without compensating it.²⁰ An illustration of this rule has been seen in the case of the creation of a new county out of the territory of another, in which case it is held that the legislature, in the absence of constitutional restrictions, may make such provision with reference to the public property and debts, or their division, as to it may seem just.¹ Applying the doctrine, it has been said to be clear that if the building of levees contemplated by an act of the legislature will injure or destroy buildings, roads and bridges of a county, the result will merely be an injury to or destruction of public property in the making of a public improvement authorized by the state itself. The state, damaging or taking its own property, is not required to provide compensation under the constitutional provision relative to eminent do-

17. *San Luis Obispo County v. Darke*, 76 Cal. 92, 18 Pac. 118; *Stoddard v. Williams*, 65 Cal. 472, 4 Pac. 452.

18. See *supra*, § 3.

19. *Reclamation District v. Superior Court*, 171 Cal. 672, 154 Pac. 845; *People v. Holladay*, 93 Cal. 241, 27 Am. St. Rep. 186, 29 Pac.

54; *Board of Education v. Martin*, 92 Cal. 209, 28 Pac. 799; *Dillwood v. Riecks*, 42 Cal. App. 602, 184 Pac. 35.

20. *Reclamation District v. Superior Court*, 171 Cal. 672, 154 Pac. 845.

1. See *supra*, § 11.

main. These views are declared to be in no wise inconsistent with the recognition of a sufficient title in counties to justify their maintaining actions against private persons or corporations injuring roads or other public property.² That such actions may be maintained is established by the decisions.³

§ 75. Power to Acquire.—A county has by statute power “To purchase, receive by gift or bequest, and hold land within its limits.”⁴ Furthermore, boards of supervisors are given power “to purchase, receive by donation, lease or otherwise acquire water rights or real or personal property necessary for the use of the county,” and “to improve, preserve, take care of, manage and control the same.”⁵ The power thus conferred is both legislative and discretionary, and when a board purchases property it must be assumed that it exercises its power to accomplish one or more of the objects contemplated by the statutory

2. Reclamation District v. Superior Court, 171 Cal. 672, 154 Pac. 845.

3. Reclamation District v. Superior Court, 171 Cal. 672, 154 Pac. 845; Yuba County v. Kate Hayes Min. Co., 141 Cal. 360, 74 Pac. 1049; Sierra County v. Butler, 136 Cal. 547, 69 Pac. 418. And see *infra*, § 119.

4. Pol. Code, § 4003, subd. 2.

5. Pol. Code, § 4041, subd. 6, making provision also for particular purposes for which the board may purchase property; Nickerson v. San Bernardino County, 179 Cal. 518, 177 Pac. 465; County of Los Angeles v. Dodge, 34 Cal. App. Dec. 598, 197 Pac. 403; Dillwood v. Riecks, 42 Cal. App. 602, 184 Pac. 35. See act approved May 25, 1917, Stats. 1917, p. 933, as to authority of counties to acquire lands for military purposes; De Witt v. San Francisco, 2

Cal. 289 (holding that authority by act of the legislature to erect a courthouse and gaol would necessarily embrace the power to purchase the land on which to erect them). But see Phelan v. San Francisco County, 6 Cal. 531 (holding that the purchase of land for a courthouse by the court of sessions was void because not incident to its judicial functions). And see People v. Loomis, 1 Cal. Unrep. 214, holding that when a statute provides, as a condition precedent to a valid purchase by county supervisors, a valuation of the property in manner specifically prescribed in the act, an alleged vendor to the county, who petitions for a mandamus to have a tax levied to pay his price, must allege that the condition has been complied with before the sale.

authority given.⁶ This assumption is conclusive upon the courts, unless it is plainly apparent to them that the view entertained by the board is without just foundation. And if supervisors may determine what improvements are calculated to advance the public interest, subject to interference by the courts only when it is plainly apparent that such improvements are not so calculated, it must necessarily be true that they may determine what price shall be paid for the improvements, subject to no greater right in the courts to interfere.⁷ A county and a city cannot hold land together as joint tenants, but the reasons which work a want of capacity to hold as joint tenants do not prevent them from holding as tenants in common.⁸

As to personal property, the statute gives a county power to purchase and hold such as may be necessary to the exercise of its powers.⁹

§ 76. Method of Purchasing.—Publication of the statutory notice¹⁰ by the board of supervisors of intention to purchase land is mandatory and is a jurisdictional prerequisite to the power to act in the matter.¹¹ The law does not require a statement of the names of the owners of the property proposed to be purchased to be stated in the notice, but only the names of the parties from whom

6. *Dillwood v. Riecks*, 42 Cal. App. 602, 184 Pac. 35; *County of Los Angeles v. Dodge*, 34 Cal. App. Dec. 598, 197 Pac. 403, per Works, J. *County, 179 Cal. 518, 177 Pac. 465; Winn v. Shaw*, 87 Cal. 631, 25 Pac. 968, holding that the fact that no newspaper published in the county is willing to publish the notice for the price fixed by the supervisors, and that all the newspapers published in the county have combined to charge higher rates for advertising than the board are willing to pay, cannot affect the jurisdiction of the board, or confer upon it power to purchase without making the publication required.

7. And see *Nickerson v. San Bernardino County*, 179 Cal. 518, 177 Pac. 465, per Lorigan, J. See supra, § 42, as to review and control of powers of supervisors.

8. *De Witt v. San Francisco*, 2 Cal. 289. See COTENANCY.

9. Pol. Code, § 4003, subd. 3. See infra, § 79.

10. Pol. Code, § 4041, subd. 6.

11. *Nickerson v. San Bernardino*

Under the provision requiring the notice to state the price to be paid

it is the board's intention to purchase.¹² Where land has been illegally purchased it cannot be inquired whether the county will gain or lose by the transaction, in an action to restrain the drawing of a warrant in payment therefor; the fact that the purchase was made without authority of law is sufficient to support such action.¹³

With respect to personal property it is undisputed that the board of supervisors, in the absence of statutory restriction, may purchase such property in the open market in like manner as other purchasers, and unless there be some statutory mode of purchase which is the measure of their power, such purchase is not without authority of law.¹⁴

§ 77. Use and Regulation.—The purchase of property under a law conferring upon the boards of supervisors power to acquire property for public purposes, and to take care of and manage the same, is for the benefit of the people of the state, and not exclusively for the people of the county; and property so acquired is held by counties as agencies of the state.¹⁵ As a corollary to this rule it is

for the property, the use of the term "more or less" in stating the acreage of the land along with the price per acre does not render the notice fatal. *Nickerson v. San Bernardino County*, 179 Cal. 518, 177 Pac. 465.

12. *Nickerson v. San Bernardino County*, 179 Cal. 518, 177 Pac. 465, where land was owned as tenants in common by a husband and wife, and the name of the husband was alone mentioned as the party from whom the land was to be purchased, the husband being the party who had offered the common property for sale; holding also that where the property is in course of administration, a statement in the notice of the name of the deceased owner is

a sufficient compliance with the statute.

13. *Winn v. Shaw*, 87 Cal. 631, 25 Pac. 968, construing County Government Act, § 25, subd. 8.

14. *Sarver v. Los Angeles County*, 156 Cal. 187, 103 Pac. 917; *People v. Nellis*, 14 Cal. App. 250, 111 Pac. 631; *Riverside County v. Yawman & Erbe Mfg. Co.*, 3 Cal. App. 691, 86 Pac. 900. In each of the cases above cited the rule was applied with respect to furnishings for public buildings, but the rule as to such furnishings has been changed by statute. See Pol. Code, § 4041, subd. 7. And see *infra*, §§ 78, 79, 82.

15. *Dillwood v. Biecks*, 42 Cal. App. 602, 184 Pac. 35. See *supra*, § 74.

held that the state, through the legislature, has, in the absence of constitutional restrictions, full control over such property, and may dispose of it at pleasure and without compensating the county therefor.¹⁶

The supervisors are the guardians of the property interests of their counties, and in that relation occupy a position of trust. Hence, if the supervisors deal with such property in any manner resulting in benefit to themselves personally the transaction is void; and this is true regardless of whether they act fairly or unfairly.¹⁷ Incident to the power of buying, selling and leasing of property and the management, care and preservation thereof, the supervisors have the right to take all legal measures necessary to that end, by suit or otherwise; and in the exercise of such right they are necessarily endowed with large discretion.¹⁸

§ 78. Buildings and Offices.—Boards of supervisors are empowered to provide and furnish such public buildings as may be necessary to carry out the work of the county government, and to provide all necessary officers, employees, attendants and supplies for the proper maintenance of the same.¹⁹ They are also charged with the duty of providing offices for the county officers who are required to have their offices at the county seat.²⁰ This power is not exhausted when once exercised, but it is a continuing one, and the assignment of offices may be changed whenever, in

16. Reclamation District No. 1500 v. Superior Court, 171 Cal. 672, 154 Pac. 845. See supra, § 74.

17. Andrews v. Pratt, 44 Cal. 309. See infra, § 87.

18. Hornblower v. Duden, 35 Cal. 664. See supra, § 48. See Pol. Code, § 4321, as to inventories of property to be made annually by certain officers. See Pol. Code, § 4041, subd. 10, as to power of supervisors to

sell county property no longer needed.

19. See Pol. Code, § 4041, subd. 7, for full provisions on the subject on buildings. See Burgoyne v. Board of Supervisors County of San Francisco, 5 Cal. 9, stating that the first legislature enjoined upon courts of sessions the duty of purchase or erection of suitable buildings for courthouses and public offices.

20. See Pol. Code, § 4312.

the judgment of the board, public convenience will be promoted. The authority to provide offices necessarily carries with it the power to designate the room which is suitable for any particular office; and this power is intrusted to the judgment of the supervisors.¹

V. CONTRACTS.

§ 79. In General.—A county has power by statute “to make such contracts and purchase and hold such personal property as may be necessary to the exercise of its powers.”² This power, of course, can be exercised only by the board of supervisors, or by agents and officers acting under their authority or authority of law.³ But a contract entered into by the supervisors, within their statutory authority, for and on behalf of the county, and signed

1. *County of San Joaquin v. Budd*, 96 Cal. 47, 30 Pac. 967 (construing County Government Act of 1883, § 25, subds. 7-9, and holding that a superior judge has no more power than any other officer to select the room in the courthouse which he will occupy as his chambers, or to take possession of any room assigned by the supervisors to another officer; though he is not compelled to occupy the room assigned to him if it is not suitable and in such case may proceed to provide a room under the authority conferred by § 144, Code Civ. Proc.); *Los Angeles Co. v. Superior Court*, 93 Cal. 380, 28 Pac. 1062, holding that the superior judge may, under proper circumstances, order the temporary furnishing of a courtroom outside of the courthouse, or may, after courtrooms are furnished and assigned to him, order such additional furniture as may be necessary; but he

has no jurisdiction to interfere with the action of the supervisors, or take the completion and furnishing of the courtrooms out of their hands. And see *COURTS*.

2. Pol. Code, § 4003, subd. 3. As to power to acquire real property, see *supra*, § 75.

If a statute both authorizes and empowers and makes it the duty of the supervisors to make a contract, it will not be construed as mandatory. *Bowers v. Sonoma County*, 32 Cal. 66.

3. Pol. Code, § 4001.

Where a tax collector had power, as once he had, to contract for publishing the delinquent list, he could bind the county for payment of the price. He was the agent of the county in such respect, and, for any reasonable exercise of that agency, the county was responsible. *Randall v. Yuba County*, 14 Cal. 219.

by the chairman of the board, is the contract of the county.⁴ And when a contract has been awarded according to law by the supervisors, work required by law to be done in performance of it is in legal effect done by order of the board, and is a charge against the county enforceable according to the terms of the contract.⁵

For any reasonable and lawful exercise of the power to contract the county is bound.⁶ Thus where the supervisors, acting within the scope of their authority, make a contract for the performance of work, the county is bound thereby and liable for a breach thereof.⁷ And a contract

4. *Babcock v. Goodrich*, 47 Cal. 488, holding that an averment in a complaint that a contract was signed by C., chairman of the board of supervisors, under authority from the board, is not demurrable on the ground of uncertainty because not averring directly that C. was chairman of the board, and had authority to make the contract.

5. *Times Pub. Co. v. Alameda County*, 64 Cal. 469, 2 Pac. 246, holding that where a board awarded a contract for publishing all notices required to be published that may be ordered published by the board, and in pursuance of the contract the plaintiff published the delinquent tax list, it was held that inasmuch as such publication was a part of the county printing for which the board was authorized to contract, no order of the board was necessary to make the publication a charge against the county according to the contract.

6. *Skidmore v. West*, 61 Cal. Dec. 792, 199 Pac. 497; *Nohl v. Del Norte County*, 31 Cal. App. Dec. 39, 187 Pac. 761; *Randall v. Yuba County*, 14 Cal. 219.

7. *Nohl v. Del Norte County*, 31 Cal. App. Dec. 39, 187 Pac. 761.

Under a provision in an act giving supervisors power to erect a jail that it shall not be erected until plans have been made therefor and adopted by the board, it has been held that a resolution of the board adopting certain plans submitted to them by an architect in pursuance of their proposal therefor, on condition that the board should receive a bid from a reliable party, is an "adoption" of such plans within the meaning of the act. The condition contained in the resolution is fulfilled if the board receive a bid from a reliable party to construct a jail in accordance with the plans for the amount limited, and who is willing to enter into a sufficient bond therefor. It is not necessary to the fulfillment of the condition that the board actually accepts the bids. *Hall v. Los Angeles County*, 74 Cal. 502, 16 Pac. 313; decision of department in same case reported in 2 Cal. Unrep. 754, 13 Pac. 854, not sustained.

Where a county having a well bored was to supply the casing, the implied covenant that it should be of proper strength and suitable for the purpose is not overcome by the code provision (Civ. Code, § 1654)

in which a county agrees to pay in county warrants for services rendered is in effect a contract payable in money and is valid.⁸

Where suit is brought on a contract entered into on behalf of a county by an agent thereof, it should appear that the agent was duly authorized. However, where a petition alleged that the county entered into the contract, acted on it, and made payments under it, and the contract recited that the county made the agreement through its duly authorized agent, it was held that the authority under which the agent acted was sufficiently set out.⁹ The rule that a county is not liable for neglect of duty by its officers has no application where the cause of action arises from breach of contract. Hence, a county cannot escape liability by setting up the neglect of its officers in failing to perform its part of a contract.¹⁰ When the validity of a contract made by a county is under consideration it is merely a question as to the power of the board of supervisors. With the question of the wisdom of a contract in so far as the county is concerned, and especially with regard to the method and amount of compensation provided, the courts have nothing to do, in the absence of a claim of fraud or mistake.¹¹

that where uncertainty exists in a contract between a private party and a public officer or body, as such, the uncertainty is presumed to be caused by the private party, and the contract must be interpreted most strongly against the private party. *McPherson v. San Joaquin Co.*, 6 Cal. Unrep. 257, 56 Pac. 802. See *CONTRACTS*, vol. 6, p. 310.

But it has been held that where a county is already in possession of a set of weights and measures according to law, it cannot be held liable for a new set purchased by the deputy sealer of weights and

measures. The fact that the county clerk refused to deliver the set to him on demand is immaterial, for he should enforce his right. *Levy v. Supervisors Yuba County*, 13 Cal. 636.

8. *Babcock v. Goodrich*, 47 Cal. 488.

9. *McPherson v. San Joaquin Co.*, 6 Cal. Unrep. 257, 56 Pac. 802.

10. *McPherson v. San Joaquin Co.*, 6 Cal. Unrep. 257, 56 Pac. 802. See *infra*, § 90, as to the rule where the cause of action arises out of tort.

11. *Skidmore v. West*, 61 Cal. Dec. 792, 199 Pac. 497.

§ 80. Statutory Requirements.—The formal requisites essential to the validity of contracts made by counties do not differ materially from those essential to the validity of contracts generally.¹² However, there are statutory requirements which must be observed or the contract will not be enforced, and where the effect of a statute is to limit the power of contracting to a mode therein pointed out, a contract made in any other way is not binding upon the county. Thus where a plaintiff proved that he did work and furnished materials for repairing a bridge at the request of the board of supervisors, and that the board promised to pay him for the same, but he failed to prove a compliance with a pertinent statute in awarding the contract, it was held that he was properly nonsuited.¹³ Similarly, a contract for the purchase of material for road improvement made by the purchasing agent on behalf of the county in violation of an express requirement of the statute authorizing such purchase is void, and hence the contractor cannot recover thereon.¹⁴ Likewise, where a tax collector had no authority to contract for publication of the delinquent list, and the only authority for such publication was vested in the supervisors who were required to contract in a particular mode, they had no authority to allow and approve a claim for the publication thereof by order of the tax collector.¹⁵ And, of course, where a stat-

12. See *CONTRACTS*, vol. 6, p. 222.

13. *Murphy v. Napa County*, 20 Cal. 497.

14. *Henry Cowell Lime & Cement Co. v. Williams*, 182 Cal. 691, 189 Pac. 838, construing act of 1907, Stats. 1907, p. 666, for improvement of highways and holding that a contract made by a county purchasing agent for the purchase of more than one thousand dollars' worth of cement to be furnished to the contractor by the county for county highway construction is void, where made without having first adver-

tised for bids; and citing to the general proposition the following cases: *Reams v. Cooley*, 171 Cal. 150, Ann. Cas. 1917A, 1260, 152 Pac. 293; *Walton v. McPhetridge*, 120 Cal. 440, 52 Pac. 731.

15. *Harris v. Cook*, 119 Cal. 454, 51 Pac. 692; *Smeltzer v. Miller*, 113 Cal. 163, 45 Pac. 264. See *infra*, § 84, as to printing and advertising contracts.

In *Frاندzen v. County of San Diego*, 101 Cal. 317, 35 Pac. 897, it was held that the authority to provide printed copies of the great

ute requires that a contract shall be let only after advertising for bids, it cannot be let in any other way.¹⁶ But in the absence of an express mode provided by statute the general power to contract may be exercised.¹⁷

An officer of a county cannot refuse to carry out a contract because of an omission which renders the contract more favorable to the county. Thus where the code provides that eight hours' labor constitutes a legal day's work, and directs that a stipulation to that effect shall be made a part of all contracts to which the state shall be a party, but does not provide that as a consequence of the omission to insert such stipulation the contract shall be void, it has been held that a contract for the erection of county buildings is not void because it does not provide that eight hours shall constitute a day's work under it.¹⁸

§ 81. Building and Construction Contracts—Bids.—The Political Code provides in detail for letting by contract, upon adopted plans and specifications and to the lowest responsible bidder, public construction and repair work.¹⁹

register was devolved by the County Government Act, § 34, upon the board of supervisors, and that the county clerk had no authority, as the law then stood, to bind the county for the printing thereof.

16. *Henry Cowell Lime & Cement Co. v. Williams*, 182 Cal. 691, 189 Pac. 838 (holding that under the act of 1907, providing for the construction of county highways, assuming that the board of supervisors are authorized to treat the furnishing of cement as a separate and distinct contract, it is essential that the purchase should be after advertisement and from the lowest responsible bidder); *Harris v. Cook*, 119 Cal. 454, 51 Pac. 692; *Smeltzer v. Miller*, 113 Cal. 163, 45 Pac. 264. See *infra*, § 81 et seq. And see MUNICIPAL CORPORATIONS.

17. *McGowan v. Ford*, 107 Cal. 177, 40 Pac. 231; *Riverside County v. Yawman & Erbe Mfg. Co.*, 3 Cal. App. 691, 86 Pac. 900.

18. *Babeock v. Goodrich*, 47 Cal. 488. See *infra*, § 88, as to ratification of unauthorized contracts.

19. Pol. Code, § 4041, subd. 7. See Pol. Code, § 4072, as to alteration of plans for buildings; Pol. Code, § 4073, as to alteration of building contracts.

See *Sarver v. Los Angeles County*, 156 Cal. 187, 103 Pac. 917, as to construction of former subd. 8 of § 4041, Pol. Code, in relation to necessity for plans and specifications for furnishing a county building, and holding that cells in a jail when consisting of steel tanks and cages independent of the building are jail furnishings, distinguishing *Ertle v.*

Under these provisions the board of supervisors has no power to let a contract upon plans and specifications to be drafted and submitted by the bidders, thereby preventing competition in bidding, and giving an opportunity for favoritism.²⁰ The term "buildings" as used in the statute is intended to include the erection of an iron "fence" around the grounds upon which the courthouse of the county is situated.¹ But, it has been held, an earlier provision having reference to the publication of bids for the erection and construction of county buildings had no application to a contract for making repairs or alterations in the courthouse, or for laying walks and making improvements upon the grounds around it.²

Rejection of bills—Authority for day's work.—As to the construction of any bridge, wharf, chute or other shipping facilities, or any repairs thereto, if the board of supervisors are advised by the county surveyor or engineer that the work can be done for a sum less than the lowest responsible bid, then it is their privilege to reject all bids and to order the work done or structure built by day's work, under the supervision and direction of the surveyor or engineer.³ Under this provision the supervisors act under express power conferred by the legislature.⁴ The specific power conferred upon the county surveyor to construct a bridge is not inconsistent with the general power conferred upon road overseers in their respective districts over roads and bridges, and the repair thereof, when

Leary, 114 Cal. 238, 46 Pac. 1, where cells were held to be a part of the building.

20. *Ertle v. Leary*, 114 Cal. 238, 46 Pac. 1, construing County Government Act of 1893, § 25, subd. 9.

1. *Swasey v. County of Shasta*, 141 Cal. 392, 74 Pac. 1031, construing County Government Act of 1897, § 25, subd. 8.

2. *McGowan v. Ford*, 107 Cal. 177, 40 Pac. 231, construing County

Government Act of 1891, § 25, subd. 9.

3. Pol. Code, § 4041, subd. 7.

4. *McCarthy v. Board of Supervisors*, 15 Cal. App. 576, 115 Pac. 458, holding, under a provision that the work was to be done under the "supervision and control" of the surveyor, that the surveyor was authorized to employ the labor and purchase the material for the work.

necessary.⁵ However, the statute provides that "road commissioners or road overseers in their respective districts shall employ all labor required, and direct the conduct of work of any kind upon any and all public roads."⁶

In case of emergency.—Furthermore, it is provided that in cases of great emergency, caused by flood, fire, earthquake or act of God, by the unanimous consent of the whole board, they may proceed at once to replace or repair any and all bridges and structures without adopting the plans and specifications, or giving notice for bids to let contract.⁷ Accordingly, in case of emergency, where the work exceeds five hundred dollars, it is a matter of discretion with the supervisors whether they should make the repairs by contract or by day labor.⁸

Where purchasing agent is employed.—Finally, the statute makes provision for dispensing with the formality of obtaining bids and letting contracts in certain cases where the county employs a purchasing agent.⁹

Control by mandamus.—Where advertising for bids is lodged in the discretion of the board of supervisors, such discretion cannot be controlled by mandamus.¹⁰

5. *McCarthy v. Board of Supervisors*, 15 Cal. App. 576, 115 Pac. 458.

6. Pol. Code, § 4041, subd. 7.

7. Pol. Code, § 4041, subd. 7.

8. *Ham v. Los Angeles County*, 31 Cal. App. Dec. 496, 808, 189 Pac. 462, bridge partly washed out by flood.

9. Pol. Code, § 4041, subd. 7. See *infra*, § 83.

10. *Splivalo v. Bryan*, 102 Cal. 403, 36 Pac. 780. But see *People v. Board of Supervisors*, 50 Cal. 561, holding that an act requiring and empowering a board of supervisors, as soon as practicable after its passage, to issue county bonds to

raise money to be used in improving roads, and providing that the bonds shall be sold to the highest bidder after notice given by publication, and further providing that immediately the county treasurer shall transfer one-half the road fund of the county over to the fund created by the act, to be repaid by money derived from the bonds, so that no delay may occur in the work, is mandatory, notwithstanding a provision in the act giving the board power to reject all bids for the bonds. The power given the board to reject all bids is a power to be used to effectuate, not to defeat the legislative will.

§ 82. County Supplies.—Section 4048 of the Political Code provides for annual advertisements for bids for county supplies. This section, literally construed, requires the board of supervisors to advertise annually for “all other supplies” furnished the county in addition to certain kinds mentioned. But this section, and a similar preceding statute, have been construed to have reference to ordinary supplies which the board is required to keep for use and replenish annually, if needed, for distribution among the county officers.¹¹ Accordingly, it has been held that the code section does not apply to furnishings for a county courthouse,¹² or to furnishings or jail fixtures¹³ or to the erection of a fence,¹⁴ or, under similar provisions in the charter of San Francisco, to the purchase of automobile buses to be used as a public utility.¹⁵ The clause, “and all other supplies,” if not limited by the other provisions of the section in which it is found, would be broad enough to cover cement furnished to the highway commission. But under the authorities the clause is limited by the context to ordinary county supplies, and does not apply to the furnishing of a large amount of cement for the carrying out of a specially authorized highway improvement.¹⁶ With respect to such supplies as are not covered by section 4048, they may be purchased in the open market, in the absence of statutory restrictions.¹⁷

11. *Henry Cowell Lime & Cement Co. v. Williams*, 182 Cal. 691, 189 Pac. 838; *Sarver v. County of Los Angeles*, 156 Cal. 187, 103 Pac. 917; *Swasey v. County of Shasta*, 141 Cal. 392, 74 Pac. 1031; *People v. Nellis*, 14 Cal. App. 250, 111 Pac. 631; *County of Riverside v. Yawman & Erbe Mfg. Co.*, 3 Cal. App. 691, 86 Pac. 900. And see *Vale v. Boyle*, 179 Cal. 180, 175 Pac. 787, construing similar provision in the charter of the City and County of San Francisco.

12. *People v. Nellis*, 14 Cal. App.

250, 111 Pac. 631; *County of Riverside v. Yawman & Erbe Mfg. Co.*, 3 Cal. App. 691, 86 Pac. 900.

13. *Sarver v. County of Los Angeles*, 156 Cal. 187, 103 Pac. 917.

14. *Swasey v. Shasta County*, 141 Cal. 392, 74 Pac. 1031.

15. *Vale v. Boyle*, 179 Cal. 180, 175 Pac. 787.

16. *Henry Cowell Lime & Cement Co. v. Williams*, 182 Cal. 691, 189 Pac. 838.

17. *Sarver v. Los Angeles County*, 156 Cal. 187, 103 Pac. 917; *People v. Nellis*, 14 Cal. App. 250, 111 Pac.

But where the statute authorizing the purchase prescribes the mode thereof, such mode becomes the measure of the power and must be complied with.¹⁸

§ 83. **Purchasing Agent.**—In 1913, the legislature added, and in 1921 amended, subdivisions 21 and 22 to section 4041 of the Political Code, authorizing the employment by boards of supervisors in their respective counties of purchasing agents, and fixing the duties of such agents.¹⁹ Previous to the adoption of these subdivisions the method of securing supplies was by annual advertisement as required by section 4048 of the Political Code, which was substantially the same as the County Government Act of 1897.²⁰ This scheme called for a general advertisement for bids for supplies, the bids so received to be a basis of subsequent purchases to be made during the year as needed. Subdivision 22 simply authorizes the purchasing agent to purchase “stationery, clothing, bedding, groceries, provisions, drugs, medicines and all other supplies,”

631; *County of Riverside v. Yawman & Erbe Mfg. Co.*, 3 Cal. App. 691, 86 Pac. 900.

It has been held that contracts for the purchase of personal property are proper without advertisement, notwithstanding a general provision requiring advertisement for supplies similar in terms to section 4048 of the Political Code. *Vale v. Boyle*, 179 Cal. 180, 175 Pac. 787, construing provision in the charter of San Francisco.

18. *Henry Cowell Lime & Cement Co. v. Williams*, 182 Cal. 691, 189 Pac. 838, holding that in proceedings under the act of 1907, Stats. 1907, p. 666, for the improvement of county highways, the adoption of plans and profiles before entering into any contract for the furnishing of materials is not a jurisdictional

prerequisite, since the money is already in the treasury, and so far as persons who perform work or furnish material are concerned, it merely represents a fund properly applicable to the expenses of improving the highway, but under such act it is essential that the purchase of material should be after advertisement and from the lowest responsible bidder.

19. *Henry Cowell Lime & Cement Co. v. Williams*, 182 Cal. 691, 189 Pac. 838. See, also, Pol. Code, § 4041, subd. 7, relating to obtaining bids and letting contracts where a county employs a purchasing agent.

20. *Henry Cowell Lime & Cement Co. v. Williams*, 182 Cal. 691, 189 Pac. 838. See *supra*, § 82.

mentioned in section 4048 of the Political Code, without the annual advertisement therefor.¹ But the provisions of subdivision 21 have been declared to be broader than the original section 4048, in that they include the purchasing of machinery, implements, material and all other personal property, material and supplies. And there is no express provision contained in subdivisions 21 and 22 with relation to the method of purchasing machinery, implements, materials and other personal property except the provision that this shall be done upon a proper requisition therefor.² It has been decided that nothing in this method of purchase is inconsistent with the plan of advertising for such property and letting a contract therefor to the lowest bidder. It follows that the purchasing agent, under the new provisions, must advertise for such property in the manner provided by the act authorizing the purchase thereof, though he need not do this annually or for the supplies, etc., covered by section 4048 of the Political Code.³ Subdivision 22 does not purport to authorize the purchasing agent to purchase personal property without advertisement where such property is not covered by section 4048, and where such an advertisement is required by the statute authorizing the purchase.⁴

§ 84. Printing and Advertising.—Construing a statutory provision similar to section 4048 of the Political Code, it

1. *Henry Cowell Lime & Cement Co. v. Williams*, 182 Cal. 691, 189 Pac. 838.

2. See *Henry Cowell Lime & Cement Co. v. Williams*, 182 Cal. 691, 189 Pac. 838, per Wilbur, J., construing subdivision 21, prior to the amendment of 1921.

3. *Henry Cowell Lime & Cement Co. v. Williams*, 182 Cal. 691, 189 Pac. 838, per Wilbur, J., holding, prior to the amendment of 1921, that cement for road-building was included within the meaning of

the phrase "personal property." A fortiori, it seems, it would be included within the meaning of the clause "material or supplies."

4. *Henry Cowell Lime & Cement Co. v. Williams*, 182 Cal. 691, 189 Pac. 838, holding that the statute of 1907 requiring the purchase of supplies for county highway construction from the lowest responsible bidder after advertisement was not modified by the addition of subsds. 21 and 22 to § 4041, Pol. Code.

has been held that the board of supervisors, of its own motion, is to fix the price of county printing and advertising, without advertising for bids or proposals. When that duty is performed by it, the county officers are authorized to procure such printing and advertising to be done, not by any bid which may have been made, but at the price previously fixed by the board, in its discretion.⁵ Under such a provision mandamus will not lie to compel the board to advertise for bids for county advertising.⁶ And the fact that a county officer advertises for sealed proposals does not entitle the lowest bidder to a writ of mandate to compel him to advertise in the newspaper of such bidder.⁷ Prior to the enactment of section 4074 of the Political Code, it has been said there was no limitation upon the general powers of the board of supervisors to contract either for printing or publication.⁸ But under the provisions of that section the board had no power to contract for any of the county printing, without ten days' public notice that such contract would be let to the lowest bidder.⁹

Delinquent tax list.—Prior to the amendment of section 3766 of the Political Code in 1921, authority for the publication of the delinquent tax list was vested by that section, as amended in 1895, in the supervisors, who were

5. *Journal Publishing Co. v. Whitney*, 97 Cal. 283, 32 Pac. 237, under County Government Act of 1891, § 25, subd. 23, and holding that the printing of the delinquent tax list was county advertising.

6. *Maxwell v. Board of Supervisors*, 3 Cal. Unrep. 782, 32 Pac. 443, construing County Government Act of 1891, § 25, subd. 23; and citing *Journal Pub. Co. v. Whitney*, 97 Cal. 283, 32 Pac. 237.

7. *Journal Pub. Co. v. Whitney*, 97 Cal. 283, 32 Pac. 237.

The printing of the great register was not included within the pro-

vision of subdivision 23 of section 25 of the County Government Act of 1891, having relation to county printing. Authority to provide printed copies was devolved by section 34 of the act upon the board of supervisors; and hence the county clerk had no authority to bind the county by his contract for the printing thereof. *Frاندzen v. County of San Diego*, 101 Cal. 317, 35 Pac. 897.

8. *Maxwell v. Supervisors of Stanislaus Co.*, 56 Cal. 114.

9. *Maxwell v. Supervisors of Stanislaus Co.*, 53 Cal. 389.

required to contract with the lowest bidder. Hence, the tax collector had no authority to contract for the publication of such list;¹⁰ nor did the neglect of the supervisors to perform their duty vest authority in the collector to make such a contract.¹¹ However, section 3766, as amended in 1921, provides that the publication of the delinquent tax list "must be paid for at the county rate for advertising as fixed by the board of supervisors."¹²

§ 85. Furnishing Information.—A board of supervisors has power to contract for the furnishing, at the expense of the county, of information reasonably essential to a proper discharge of its functions, if it is not the official duty of some county officer to furnish the same. And necessarily the board is invested with discretionary power in determining what information is essential. In such matters the courts may not properly interfere unless it is apparent that the service contracted for has no possible relation whatever to a proper discharge of the functions of the board.¹³ However, where the law confides the duties to be performed in the matters to certain officers, the supervisors have no authority in the premises, and hence a contract with private individuals for furnishing

10. *Harris v. Cook*, 119 Cal. 454, 51 Pac. 692; *Smeltzer v. Miller*, 113 Cal. 163, 45 Pac. 264.

11. *Smeltzer v. Miller*, 113 Cal. 163, 45 Pac. 264. See for other cases as to authority in this respect under the former statutes, *Randall v. Yuba County*, 14 Cal. 219; *Times Pub. Co. v. Alameda County*, 64 Cal. 469, 2 Pac. 246; *Journal Pub. Co. v. Whitney*, 97 Cal. 283, 32 Pac. 237 (construing County Government Act of 1891, § 25, subd. 23).

12. Pol. Code, § 3766 (Amdt. 1921).

13. *Skidmore v. West*, 61 Cal.

Dec. 792, 199 Pac. 497, per Angellotti, C. J., holding that a contract with third persons for furnishing information as to unredeemed property sold to the state for taxes, which information is not the legal duty of any county officer to furnish, is within the power of the board. And it is no objection to such contract that it requires such persons to include with their report their "recommendations as to further disposition of the property" involved, and to submit lists for authorization from state controller to advertise and sell under Pol. Code, § 3897.

information with respect thereto would be beyond the power conferred upon the board.¹⁴ And, of course, a contract with an officer himself for furnishing information which is within the line of his official duty to furnish is void.¹⁵

§ 86. **Ultra Vires Acts.**—Inasmuch as a county has power to make only such contracts as are expressly authorized or such as may be necessary to the exercise of its powers,¹⁶ it follows that any contract made in excess of this power is ultra vires and therefore void.¹⁷ Accordingly, it has been held that since a statute which authorizes a county to engage in the manufacture of cement as a private enterprise is violative of the constitution,¹⁸ a contract made in pursuance thereof with a city, whereby the county agreed to furnish cement to the city, is ultra vires and void so far as the county is concerned.¹⁹ Similarly, under the power to operate ferries “within the county” the supervisors of one county have no authority to enter into a contract with the supervisors of another county for the joint construction and maintenance of a free public ferry across a river forming the boundary between them;²⁰ and an injunction will lie to prevent the performance of an unauthorized contract for that purpose.¹

14. *Skidmore v. West*, 61 Cal. Dec. 792, 199 Pac. 497.

15. *County of Humboldt v. Stern*, 136 Cal. 63, 68 Pac. 324.

16. See *supra*, § 79.

17. *Riverside Portland C. Co. v. Los Angeles*, 178 Cal. 609, 174 Pac. 31. See CORPORATIONS, ante, p. 52 et seq., and MUNICIPAL CORPORATIONS, for further discussion of ultra vires contracts.

18. *City of Los Angeles v. Lewis*, 175 Cal. 777, 167 Pac. 390.

19. *Riverside Portland C. Co. v. Los Angeles*, 178 Cal. 609, 174 Pac. 31.

20. *Johnston v. County of Sacramento*, 137 Cal. 204, 69 Pac. 962, citing *Croley v. California Pac. R. R. Co.*, 134 Cal. 557, 66 Pac. 860, holding that power to erect bridges “within the county” does not include power to erect a bridge across a river which forms the boundary between two counties. See FERRIES.

1. *Johnston v. County of Sacramento*, 137 Cal. 204, 69 Pac. 962, citing *Winn v. Shaw*, 87 Cal. 631, 25 Pac. 968, and distinguishing *McBride v. Newlin*, 129 Cal. 36, 61 Pac. 577.

Where duties are enjoined by law upon county officers specially designated for their discharge, the board of supervisors is entirely without authority to contract with private parties for their performance.² Such a contract has been said to be *ultra vires* in the extreme sense of the term,³ and the acts of the person employed in pursuance of such contract create no liability against the county, however beneficial the services may have been to it.⁴ Nor can a county be held liable on an implied contract in such cases.⁵ The board of supervisors has power to contract for the collection of debts owing to the county;⁶ but in the exercise of such power it has no authority to delegate to those whom it employs the power to determine whether to commence a suit in the name of the county, and to employ attorneys to prosecute such a suit, nor to abdicate its control of such a suit, nor to make a settlement dependent upon the consent of strangers. Such a contract is *ultra vires* and void.⁷

§ 87. Illegal Contracts—Public Policy.—The Political Code, in the interest of sound public policy, declares that

2. *Skidmore v. West*, 61 Cal. Dec. 792, 199 Pac. 497 (stating rule); *Ventura County v. Clay*, 112 Cal. 65, 44 Pac. 488 (collection of license taxes); *House v. Los Angeles County*, 104 Cal. 73, 37 Pac. 796 (collection of delinquent taxes); *El Dorado County v. Meiss*, 100 Cal. 268, 34 Pac. 716 (appointment of tax collector); *Smith v. County of Los Angeles*, 99 Cal. 628, 34 Pac. 439 (procurement of bids for county bonds); *Scollay v. County of Butte*, 67 Cal. 249, 7 Pac. 661 (collection of debts). See note, 11 A. L. R. 913, as to authority of county to employ tax ferret.

3. *House v. Los Angeles County*, 104 Cal. 73, 37 Pac. 796.

4. *Smith v. Los Angeles County*, 99 Cal. 628, 34 Pac. 439.

5. A private person cannot, simply by inducing the payment of taxes to himself and then paying into the treasury the amount so received, establish a contract relation between himself and the county, from which could arise an implied promise to pay for his services, as being performed for the county; *Rowe v. County of Kern*, 72 Cal. 353, 14 Pac. 11.

6. *Contra Costa County v. Soto*, 138 Cal. 57, 70 Pac. 1019; *Power v. May*, 123 Cal. 147, 55 Pac. 796; *Power v. May*, 114 Cal. 207, 46 Pac. 6; *Lassen County v. Shinn*, 88 Cal. 510, 26 Pac. 365; *Scollay v. County of Butte*, 67 Cal. 249, 7 Pac. 661.

7. *Scollay v. County of Butte*, 67 Cal. 249, 7 Pac. 661.

supervisors must not be interested in county purchases or contracts.⁸ Aside from the statutory prohibition, however, the general rule which prohibits public officers from having any personal interest in public contracts is applicable to county officers.⁹ Thus where a county surveyor is one of the agents of the state for the sale of land, a contract made by him with another person, by which the surveyor is to assist in effecting a purchase of it, and the other is to convey a part of such land to the surveyor, is void, as against public policy.¹⁰

A contract between the board of supervisors and a county officer for the performance of services within the line of his official duties is plainly illegal, since its effect is to work an increase of salary in violation of the constitutional provision that the compensation of a county officer shall not be increased during his term of office.¹¹ And where a part of the services to be performed is within the line of official duties and a part is extra-official, but the work is intermingled, the entire contract is illegal and void.¹² However, a contract by which the supervisors employ the district attorney for a special compensation to

8. Pol. Code, § 4322. See Pol. Code, § 4323, as to procedure when majority of supervisors are interested in any application made to the board for a franchise, etc.

Under a similar provision it has been held that a supervisor cannot claim compensation for superintending work on a canal being constructed by the county; *Domingos v. Supervisors of Sacramento Co.*, 51 Cal. 608, decided under act of March 20, 1855, as amended April 29, 1857. See *CONTRACTS*, vol. 6, p. 128.

9. See Pol. Code, § 920; *PUBLIC OFFICERS*. And see *Power v. May*, 123 Cal. 147, 55 Pac. 796, and *Power v. May*, 114 Cal. 207, 46 Pac. 6, decisions relating to a contract

made by a board of supervisors with its outgoing clerk to collect a fund due from the state for a specified commission, and to an alleged collusive agreement between the clerk and the outgoing district attorney while they were in office, that the latter should perform the contract after the expiration of his term and divide the compensation with the former.

10. *Edwards v. Estell*, 48 Cal. 194.

11. *County of Humboldt v. Stern*, 136 Cal. 63, 68 Pac. 324; *Power v. May*, 114 Cal. 207, 46 Pac. 6; *Rowe v. County of Kern*, 72 Cal. 353, 14 Pac. 11.

12. *County of Humboldt v. Stern*, 136 Cal. 63, 68 Pac. 324. See *CONTRACTS*, vol. 6, p. 148.

attend to the interests of the county in a suit to be tried in another county after the expiration of his term of office, does not increase his salary as district attorney; and if the contract is made in good faith, it is not void.¹³

The supervisors may contract with one who is not a county officer to collect money due the county, and to pay him a percentage for making the collection.¹⁴ Where a contract with the supervisors was valid when made, the fact that the contractor subsequently employed some county officers to assist him, and paid them for doing so, cannot render the contract void. Mere surmise or suspicion that the contractor obtained the contract for the benefit of the county officers will not make the contract void where the good faith of the board is not questioned and the competency of the contractor is not controverted.¹⁵ A contract whereby a board of supervisors employs counsel to influence members of the legislature with respect to legislation affecting the interest of the county is void as contrary to public policy.¹⁶

§ 88. Ratification and Estoppel.—The established principles of the ratification of unauthorized public contracts have been applied to the agreements of counties.¹⁷ Thus where a board of supervisors has power to make a contract, it may cure previous informalities by subsequent ratification and recognition of liability, and in such a case

13. *Jones v. Morgan*, 67 Cal. 308, 7 Pac. 734. See DISTRICT AND PROSECUTING ATTORNEYS.

14. *Contra Costa County v. Soto*, 138 Cal. 57, 70 Pac. 1019; *Power v. May*, 123 Cal. 147, 55 Pac. 796; *Power v. May*, 114 Cal. 207, 46 Pac. 6; *Lassen County v. Shinn*, 88 Cal. 510, 26 Pac. 365.

15. *Contra Costa County v. Soto*, 138 Cal. 57, 70 Pac. 1019.

16. *County of Colusa v. Welch*, 122 Cal. 428, 55 Pac. 243. See *infra*, § 115, as to claims based on

prohibited contracts. And see CONTRACTS, vol. 6, p. 124, as to validity of lobbying contracts generally.

See note 13 A. L. R. 734, as to validity of contract intended or tending to influence location of county seat or public building.

17. *Sittig v. Raney*, 35 Cal. App. Dec. 789, 200 Pac. 824. See AGENCY, vol. 1, p. 766 et seq., for discussion of principles governing ratification of agent's contracts generally. See, also, CONTRACTS, vol. 6, p. 93.

the subsequent ratification is treated as equivalent to a previous authority.¹⁸ But where the board never had the power to make a contract, as where it did not advertise for bids as required by statute, it has been held that it could not call into existence such contract by subsequent ratification.¹⁹ Similarly, it has been held that supervisors have no authority to ratify a contract made by a grand jury employing experts to examine the books of county officials, where such a contract directly violated statutory provisions.²⁰ And clearly a contract is void because made in contravention of a provision of the constitution inhibiting it cannot be ratified by the supervisors.¹

Estoppel.—Public corporations, like individuals, are bound to act in good faith and deal justly. They are not permitted to enter into contracts involving others in expensive engagements, silently permit these contracts to be executed, and then repudiate them because certain statutory steps have not been pursued.² A county may thus be equitably estopped by its acts, in the same manner as an individual, when acting within the scope of its powers. Under this salutary doctrine, it has been held that after paying money for a bridge which has been completed, and of which the county enjoys the benefit, a county is estopped to maintain an action to recover the money, if the contract under which it was paid, though legally defective, was not immoral, inequitable, or unjust.³ Similarly, it has been held that a county which receives property under a contract with the owner is estopped to recover the pur-

18. *Power v. May*, 114 Cal. 207, 46 Pac. 6.

19. *Smeltzer v. Miller*, 125 Cal. 41, 57 Pac. 668.

20. *Jacks v. Taylor*, 34 Cal. App. 95, 166 Pac. 858.

1. *Phelan v. San Francisco*, 6 Cal. 531, holding that in order to charge a board of supervisors on its ratification of an unauthorized

contract, it must be shown that it acted with full knowledge of all the facts.

2. *Sacramento County v. Southern Pac. Co.*, 127 Cal. 217, 59 Pac. 568, 825. See *CONTRACTS*, vol. 6, p. 94; *MUNICIPAL CORPORATIONS*.

3. *Sacramento County v. Southern Pac. Co.*, 127 Cal. 217, 59 Pac. 568, 825.

chase price thereof while retaining the fruits of the bargain, even though the contract was unauthorized.⁴

§ 89. Rescission.—Where a board of supervisors has lawfully entered into a contract for the rendition of personal services in a particular position it is not in the power of the board to abrogate such contract by rescinding the order under which the person was appointed or by abolishing the position.⁵ The distinction is apparent between an office constituted by statute and a contract made with a party to render for a stated period certain services though the services are to be rendered in a capacity in the nature of a public office or appointment.⁶ While supervisors are justified in rescinding a contract if it has been induced to execute through fraudulent representations of the contractor, they cannot rescind a contract to avenge the personal injuries of them, as, for example, on the ground that the contractor has slandered certain members of the board.⁷ A contract under which a county acquired land for a public highway, approved by the highway commissioners and by the board of supervisors cannot be avoided by the county upon mere averments that the legal adviser of the highway commission was interested as a stockholder in a corporation whose land was acquired and

4. *Riverside County v. Yawman & Erbe Mfg. Co.*, 3 Cal. App. 691, 86 Pac. 900. See *CONTRACTS*, vol. 6, p. 94.

5. *McDaniel v. Yuba County*, 14 Cal. 444, holding that if, after such a contract, which compels the person (physician) to perform such services only as the supervisors might require, they put it out of his power to render the services, he is still entitled to his compensation.

6. *People v. Wheeler*, 136 Cal. 652, 69 Pac. 435; *McDaniel v. Yuba County*, 14 Cal. 444 (examining

physician of county hospital); *Grindley v. Santa Cruz County*, 2 Cal. Unrep. 326, 4 Pac. 390.

In a suit by a physician against a county on a contract for his services as examining physician at the county hospital, the objection that he is not a medical graduate, if good at all, cannot be taken by demurrer, unless the demurrer distinctly present the objection; *McDaniel v. Yuba County*, 14 Cal. 444.

7. *Hall v. County of Los Angeles*, 74 Cal. 502, 16 Pac. 313.

that the county was induced to pay an excessive consideration through the fraud of such attorney.⁸

VI. TORTS.

§ 90. **Liability Generally.**—In considering the liability of counties for torts, the distinction between counties and municipal corporations heretofore pointed out becomes important.⁹ It is a familiar rule that a municipality is liable for torts committed in its proprietary capacity, but is not liable in the absence of statute for those committed in its governmental capacity.¹⁰ Since counties are but agencies of the state their functions are exclusively governmental and such only as are imparted to them by the state.¹¹ Hence, where a county, pursuant to legislative authority, exercises a portion of the sovereign power of the state for the public benefit, it is not liable for injuries resulting.¹² And the rule that, in the absence of a statute declaring otherwise, a municipal corporation is not liable for the neglect of its officers or agents in the maintenance or care of streets or bridges, has been held applicable to counties.¹³ The relation existing between a county and its road officers bears no resemblance to that of master and servant, nor to that of employer and employee.¹⁴ If any remedy exist for injuries resulting from neglect to keep highways in repair, it must be sought against the negli-

8. *County of San Diego v. Utt*, 173 Cal. 554, 160 Pac. 657.

9. See *supra*, § 4.

10. See MUNICIPAL CORPORATIONS.

11. See *supra*, §§ 3, 5, 22.

12. *Dillwood v. Riecks*, 42 Cal. App. 602, 184 Pac. 35 (destruction by fire of stallion kept in stall rented on fair-grounds belonging to county). See note discussing this decision in 7 Cal. Law Rev. 444.

13. *Tyler v. Tehama County*, 109 Cal. 618, 42 Pac. 240; *Bank of*

Santa Cruz County v. Bartlett, 78 Cal. 301, 20 Pac. 682; *Barnett v. Contra Costa County*, 67 Cal. 77, 7 Pac. 177; *Crowell v. Sonoma County*, 25 Cal. 313; *Huffman v. San Joaquin County*, 21 Cal. 426; *South v. County of San Benito*, 40 Cal. App. 13, 180 Pac. 354; *Ham v. Los Angeles County*, 31 Cal. App. Dec. 496, 808, 189 Pac. 462. See BRIDGES, vol. 4, p. 513; HIGHWAYS. 14. *Crowell v. Sonoma County*, 25 Cal. 313.

gent officers personally.¹⁵ Furthermore, a county is not liable for the acts of officers or employees whom it appoints in pursuance of statutory requirement for the public benefit and for a purpose from which the county, as a corporate body derives no benefit.¹⁶ Nor is a county responsible for the negligent acts of its officers acting ministerially in pursuance of statutes imposing duties directly upon them, the right of action in such cases being solely against the officers.¹⁷ But where property has been damaged by works constructed for public purposes and such property has not been condemned and compensation paid, a county is liable for the damages resulting.¹⁸ Thus an action may be maintained against a county for damages for injury to private property in connection with the formation of a protection district formed in pursuance of an act of the legislature.¹⁹ The liability of counties in connection with the construction and maintenance of bridges is discussed in another article.²⁰

§ 91. Injuries Caused by Mobs.—The code provides that “Every county and municipal corporation is responsible

15. *Ham v. Los Angeles County*, 31 Cal. App. Dec. 496, 808, 59 Cal. Dec. 474, 189 Pac. 462; *Crowell v. Sonoma County*, 25 Cal. 313; *Huffman v. San Joaquin County*, 21 Cal. 426. See *infra*, § 92, as to liability of county officers.

16. *Sherbourne v. Yuba County*, 21 Cal. 113, 81 Am. Dec. 151, holding that a county is not liable in damages to one who, while an inmate of the county hospital, sustains injuries from unskillful treatment by the resident physician, or from the failure on the part of the officers of the hospital to supply sufficient and wholesome food. See *HOSPITALS AND ASYLUMS*.

17. *Elliott v. County of Los Angeles*, 183 Cal. 472, 191 Pac. 899;

Sievers v. San Francisco, 115 Cal. 648, 56 Am. St. Rep. 153, 47 Pac. 687. See *Santa Cruz R. Co. v. Santa Clara County*, 62 Cal. 180, holding that a county is not liable for the neglect or refusal of supervisor to perform a duty imposed by law, the code making the supervisor personally liable.

18. *Elliott v. County of Los Angeles*, 183 Cal. 472, 191 Pac. 899; *Tyler v. Tehama County*, 109 Cal. 618, 42 Pac. 240. See *EMINENT DOMAIN*.

19. *Elliott v. County of Los Angeles*, 183 Cal. 472, 191 Pac. 899. See *WATERS*, as to the liability of counties for injury to land caused by the construction of drains.

20. See *BRIDGES*, vol. 4, p. 537.

for injury to real or personal property situate within its corporate limits, done or caused by mobs or riots."¹ Actions for damages under this provision must be tried in the county in which the property injured is situated,² and all such actions must be commenced within one year after the act complained of is committed.³ The plaintiff in any action authorized by these provisions may not recover if it appears upon the trial that the damage complained of was occasioned or in any manner aided, sanctioned or permitted by his carelessness or negligence.⁴ A statute similar to the provisions of the present code provisions on this subject has been construed as creating a new right, and providing a new remedy therefor, which is complete in itself; and a claim thereunder for damages for property destroyed by a mob was not required to be presented to the board of supervisors for allowance before bringing an action to recover a judgment on it.⁵

§ 92. Liability of Officers.—As heretofore stated,⁶ a county is not ordinarily liable for the negligence of its officers; but the question of the liability of such officers for their own negligence presents more difficulty.⁷ The general rule in California, if there may be said to be one established, has been declared to be that county officers are liable for their negligence where the duty imposed

1. Pol. Code, § 4452.

2. Pol. Code, § 4453.

3. Pol. Code, § 4454. Pol. Code, § 4455, provides for warrants to be issued for payment of such damages and for the levy of taxes for the purpose of paying the warrants.

4. Pol. Code, § 4456. The application of the foregoing provisions to cases where levees or other works of reclamation are injured is governed by Pol. Code, § 4457.

5. Clear Lake W. W. Co. v. Lake Co., 45 Cal. 90, construing Act of

March 27, 1868. And see *Bank of California v. Shaber*, 55 Cal. 322, holding that a claim for damages for injuries to property, caused by a mob or riot in San Francisco, was not to be presented in the first instance to the supervisors for allowance, as in the case of other claims; but a judgment must first be had, and thereupon the board must order it to be paid, unless they should determine to appeal.

6. See *supra*, § 90.

7. *Dillwood v. Riecks*, 42 Cal. App. 602, 184 Pac. 35.

upon them is ministerial in character and not judicial or discretionary.⁸ The decisions lay down this general rule of liability and hold that before an official becomes liable for a breach of duty the duty must exist, and it must be such as not to involve the exercise of discretion on his part.⁹ While a county officer is not liable for mere failure to perform a duty committed to his discretion, yet, it has also been held in a late case that if he acts in execution of such discretion, his liability is the same as in the discharge of a mandatory duty, and if he performs the act or discharges the duty in a negligent manner, he is liable in an action for damages by a person injured thereby. "Whether the duty performed be discretionary or compulsory there is no reason why like consequences should not follow the negligent performance of the duty."¹⁰

8. *Ham v. Los Angeles County*, 59 Cal. Dec. 474, 189 Pac. 462; *South v. County of San Benito*, 40 Cal. App. 13, 180 Pac. 354.

It has been pointed out that such a rule of liability is first suggested, though not determined in a case, where Justice Field, in holding that no cause of action was created against a county by negligence of its officers in the performance of their duties, said, by way of dictum: "If any remedy exist for injuries resulting from neglecting to keep such bridges in repair, it must be sought either against the road overseers or supervisors personally." *Huffman v. San Joaquin County*, 21 Cal. 426.

9. *Ham v. Los Angeles County*, 59 Cal. Dec. 474, 189 Pac. 462; *South v. County of San Benito*, 40 Cal. App. 13, 180 Pac. 354, holding that the construction of a bridge between two counties is not a ministerial duty enjoined upon the supervisors by section 2713 of the

Political Code where it does not appear that the supervisors of the two counties had come to an agreement as to the proportion of cost to be borne by each county, or that there was any available fund for the construction of the bridge. See *BRIDGES*, vol. 4, p. 513.

It has been said that a fair application of the rule would be that any duty is ministerial which unqualifiedly requires the doing of a certain thing. To the extent that its performance is unqualifiedly required, it is not discretionary, even though the manner of its performance may be discretionary. *Ham v. Los Angeles County*, 59 Cal. Dec. 474, 189 Pac. 462, per Sloane, J.

10. *Dillwood v. Riecks*, 42 Cal. App. 602, 184 Pac. 35, per Chipman, P. J., holding that where county officers undertook to burn grass in an agricultural park owned by the county—a duty discretionary with them—such officers were liable

§ 93. **Official Acts in Connection With Highways.**—In the matter of repair of highways, there seems to be no longer a question under the decisions that road supervisors upon whom is imposed the duty of keeping highways in repair and to whom the means of carrying out this duty are available, are liable for a negligent performance of their duty, provided they have had statutory notice of the condition of the highway demanding attention.¹¹ And if supervisors of a county are required to provide for the repair of highways by general orders delegating the execution of the work to a road overseer, and they fail to do this, and damage results from defects in the highway of which they have notice, they, and not the road overseer, would seem to be liable. But if the supervisors have given the necessary directions to impose this duty on the road overseer, and if they have no specific knowledge of his failure to perform his duty in some particular case, they are relieved from responsibility for the results of his negligence, and he alone is responsible. And it has been further declared that where the repairs are such that they cannot be made without special action by the supervisors, the road commissioner is not liable for delay in making them. Nor can the supervisors themselves be held liable in such a case where not only the method of repair, but also the time when the repairs should be made, or whether they should be made at all, rest in the discretion of the supervisors.¹²

for damages resulting from the performance of this work in a negligent manner.

11. *Ham v. Los Angeles County*, 31 Cal. App. Dec. 496, 808, 189 Pac. 462. And see *Wurzburger v. Nellis*, 165 Cal. 48, 130 Pac. 1052. But see *South v. County of San Benito*, 40 Cal. App. 13, 180 Pac. 354, holding that the supervisors of

one county have no authority to repair highways in another, or to place warning signals thereon, and hence cannot be charged with liability under the provisions of the act of April 26, 1911, Stats. 1911, p. 1115. See HIGHWAYS.

12. *Ham v. Los Angeles*, 31 Cal. App. Dec. 496, 808, 189 Pac. 462, per Sloane, J.

VII. FISCAL MATTERS.

§ 94. **Legislative Control Over Revenue.**—While the legislature has complete power of disposition over county revenues,¹³ it cannot divest a right which is vested and determined.¹⁴ The construction of a statute which would have the effect of impairing the rights of third persons will always be unwillingly adopted, in the absence of express words to that effect.¹⁵ And while it is conceded that the legislature does not have authority to give money out of the county treasury to private persons who have no legal claim therefor, nevertheless it may by general law impose duties upon county officers and provide for them a compensation payable out of the county treasuries.¹⁶

Delegation of control.—The constitution provides that “The legislature shall not delegate to any special commission, private corporation, company, association or individual any power to make, control, appropriate, supervise, or in any way interfere with any county . . . improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments or perform any municipal function whatever,” etc.¹⁷ But where the control and the appropriation of county money are the direct effect of a statute incident to the performance of the duties imposed upon certain officers by statute, such officers are not exercising a power to appropriate county money within the meaning of the constitution, but are merely performing administrative or clerical duties which are neces-

13. *People v. Williams*, 8 Cal. 97; *Laforge v. Magee*, 6 Cal. 650. See Pol. Code, § 4085 et seq., as to the several funds of counties.

14. *Laforge v. Magee*, 6 Cal. 650. See as to vested rights, CONSTITUTIONAL LAW, vol. 5, p. 752.

15. *People v. Williams*, 8 Cal. 97.

16. *Boss v. Lewis*, 33 Cal. App.

792, 166 Pac. 843, holding that the provisions of the Vital Statistics Act which impose upon the county treasury the burden of payment of a local registrar's fees are not violative of the constitution. See supra, § 32, as to provision of compensation for county officers.

17. Const., art. XI, § 13.

sary to carry into effect the provisions of the statute.¹⁸ And it has been held that a statute empowering officers in certain classes of counties to appoint deputies whose salaries are to be paid out of the county treasury does not violate the constitutional provision that the legislature shall not delegate any power to control or appropriate county money.¹⁹

§ 95. Power of the Supervisors.—It is the declared policy of the law to confide to boards of supervisors the general supervision and control of the financial affairs of counties.²⁰ Thus they have been given charge of the management and disbursement of the public revenues of the county.¹ And it is their duty “to examine, settle, and allow all accounts legally chargeable against the county, except salaries of officers, and such demands as are authorized by law to be allowed by some other person or tribunal, and order warrants to be drawn on the county treasurer therefor.”² But a board is not empowered to create a debt or liability on the part of the county, for any purpose except as provided by law,³ or to divert the county revenues from their legitimate purposes.⁴ Formerly, the entire management of the financial business of counties, including the power of taxation and appropriation for county purposes, was vested in the courts of sessions.⁵

18. *Boss v. Lewis*, 33 Cal. App. 792, 166 Pac. 843. See in general as to delegation of legislative power, CONSTITUTIONAL LAW, vol. 5, p. 666.

19. *Tulare County v. May*, 118 Cal. 303, 50 Pac. 427.

20. *White v. Mathews*, 29 Cal. App. 634, 156 Pac. 372. See supra, § 41.

1. *Contra Costa County v. Soto*, 138 Cal. 57, 70 Pac. 1019; *Laforge v. Magee*, 6 Cal. 285. As to general

powers of supervisors, see supra, § 43 et seq.

2. Pol. Code, § 4041, subd. 12; *White v. Mathews*, 29 Cal. App. 634, 156 Pac. 372. See infra, § 105, as to allowance of claims.

3. *Foster v. Coleman*, 10 Cal. 278.

4. *Potter v. Fowzer*, 78 Cal. 493, 21 Pac. 118; *Laforge v. Magee*, 6 Cal. 285.

5. *Burgoyne v. Board of Supervisors of County of San Francisco*, 5 Cal. 9; *Thompson v. Rowe*, 2 Cal. 68.

§ 96. **Limitation of Indebtedness.**—The constitution by explicit provision declares that no indebtedness or liability shall be incurred by a county (except in the manner stated) exceeding in any year the income and revenue actually received by such county.⁶ This means that each year's revenue must pay each year's indebtedness or liability, and that no indebtedness or liability incurred in any one year shall be paid out of the revenue of any future year.⁷ Such construction of the provision has been repeatedly affirmed.⁸ Boards of supervisors will not be per-

6. And see Pol. Code, § 4071; Const., art. XI, § 18.

7. *County of Tehama v. Sisson*, 152 Cal. 167, 92 Pac. 64, citing *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 641.

8. *County of Tehama v. Sisson*, 152 Cal. 167, 92 Pac. 64; *Buck v. Eureka*, 119 Cal. 44, 50 Pac. 1065; *Pacific Undertakers v. Widber*, 113 Cal. 201, 45 Pac. 273 (claim arising under contract for burial of indigent dead); *Bradford v. San Francisco*, 112 Cal. 537, 44 Pac. 912; *Weaver v. San Francisco*, 111 Cal. 319, 43 Pac. 972; *Smith v. Broderick*, 107 Cal. 644, 48 Am. St. Rep. 167, 40 Pac. 1033; *McGowan v. Ford*, 107 Cal. 177, 40 Pac. 231; *Schwartz v. Wilson*, 75 Cal. 502, 17 Pac. 449; *Shaw v. Statler*, 74 Cal. 258, 15 Pac. 833 (holding that § 77 of the County Government Act, providing that claims against a county are entitled to payment "according to priority of time in which they were presented" must be construed as requiring priority of payment only as between the warrants of any given year); *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 641.

But see *Lewis v. Widber*, 99 Cal. 412, 33 Pac. 1128, and *Welch v. Strother*, 74 Cal. 413, 16 Pac. 22,

holding that the constitutional provision has no application to the payment of the salaries of officers fixed by law.

Section 36 of the County Government Act of 1903 (Stats. 1903, p. 402), which corresponds to section 4071 of the Political Code, has been construed to mean that whenever, for any and all purposes, in any fiscal year, seventy per cent of a particular county fund has been expended prior to the first of January of that fiscal year, or liabilities to the amount of seventy per cent have been incurred payable therefrom, no more of the fund's money may be expended prior to January first, except only for the emergency purposes enumerated in that section; *County of Glenn v. Klemmer*, 153 Cal. 211, 94 Pac. 894.

See *Babcock v. Goodrich*, 47 Cal. 488 holding that § 4070, Pol. Code, which declared in effect that the board of supervisors must not contract debts and liabilities, which, added to the salaries of officers, etc., will exceed the revenue of the county for the year, did not mean, by "revenue," the actual amount of money received into the treasury, but the estimate of the board of

mitted to evade the constitutional restriction by casting their illegal action in the form of a fictitious transaction, which, if actually consummated, they had the power to conclude.⁹ The supervisors cannot evade this provision by a recital that a debt incurred in one year had been incurred in the next,¹⁰ or by entering upon its records resolutions purporting to authorize and show a pretended sale and repurchase, which never took place.¹¹ An order by the supervisors for the payment of indebtedness incurred in one year out of revenue of the succeeding year is an order without authority of law and it is none the less without such authority, because it is cloaked in the guise of a bona fide transaction, and consequently in such a case, the district attorney is authorized, under section 4005b of the Political Code,¹² to institute suit in the name of the county to restrain the payment of the same without an order of the supervisors authorizing him to bring it.¹³ Nor will the doctrine of equitable estoppel be available against the county in such a case. To hold that a county by receiving property or services beyond its ability to pay out of the revenues of the current year could be estopped from defending against a claim that they be paid out of the revenues of a succeeding year, would, it has been said, nullify the constitutional restriction.¹⁴

Work to be paid for in installments.—A contract for work to be done in the future to be paid for in installments, where the installments payable in any one year

supervisors of what the revenue would be. It is the estimate of the supervisors, at the time an account is presented for allowance, of what the revenue of the year will be, which must control their action in allowing or rejecting it.

9. County of Tehama v. Sisson, 152 Cal. 167, 92 Pac. 64; McGowan v. Ford, 107 Cal. 177, 40 Pac. 231;

Schwartz v. Wilson, 75 Cal. 502, 17 Pac. 449.

10. McGowan v. Ford, 107 Cal. 177, 40 Pac. 231.

11. County of Tehama v. Sisson, 152 Cal. 167, 92 Pac. 64.

12. See *infra*, § 120.

13. County of Tehama v. Sisson, 152 Cal. 167, 92 Pac. 64.

14. County of Tehama v. Sisson, 152 Cal. 167, 92 Pac. 64.

do not exceed the revenue of that year, does not, at the time of entering into the contract, create any debt or liability for the aggregate amount of the installments, but only creates such debt or liability as may arise from year to year in separate amounts as the work is performed; and such contract is valid and not within the prohibition of the constitution and of the statute.¹⁵

Assent of electors.—The provision of the constitution, for procuring “the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose” requires only the assent of two-thirds of such electors as vote on the proposition of incurring the indebtedness; and if the proposition be submitted at a general election, it does not require the assent of two-thirds of all the electors who voted thereat.¹⁶

Provision for collection of annual tax.—The further requirement of the constitution, that “before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal,” does not require that at the time of the sale or issuance of bonds, or the incurring of the bonded indebtedness, a sinking fund or interest tax be levied. It requires only that at or before such time provision must be made for their collection.¹⁷ The object of this provision is simply to insure provision annually, at the time of the general tax levy, for money necessary to pay interest and principal falling due before the time of the next general tax levy; and a county bond issue is not invalidated by the fact that the payment of interest might be deferred for a short time

15. *Smilie v. Fresno County*, 112 Cal. 311, 44 Pac. 556.

16. *Howland v. Board of Supervisors*, 109 Cal. 152, 41 Pac. 864, holding that an election on the proposition of incurring indebted-

ness, although held on the same day and at the same place as the general election, is in legal effect a special election.

17. *Howland v. Board of Supervisors*, 109 Cal. 152, 41 Pac. 864.

pending proceedings for the collection of a tax for that purpose already levied, or by the fact that the payment of the first installment of the interest might be deferred until a general tax levy and collection thereunder because it fell due prior to the first general tax levy after the incurring of the indebtedness.¹⁸

Effect of limitation of state indebtedness.—It has been held that a constitutional provision prohibiting the state from creating debts over a certain amount named or from loaning its credit, etc., only applies to the state as a political sovereign, represented by her law-making power, and does not prevent the state authorizing counties to create debts when the debts of the state itself is up to the constitutional limit.¹⁹

§ 97. Enjoining Illegal Payments.—Formerly, it was the rule that any taxpayer of a county had such an interest in the proper application of county funds that he might maintain an action to prevent their withdrawal from the treasury in satisfaction of invalid demands.²⁰ This rule was subject, however, to the qualification that the remedy of injunction is not available where not necessary in order to keep the county money from being illegally drawn from the treasury.¹ This former right of any taxpayer to maintain an injunction to prevent illegal payments has been limited by section 526a of the Code of Civil Procedure, enacted in 1909, which restricts the right to sue to citizens who are residents, or corporations, who are liable to pay

18. *Johnson v. Williams*, 153 Cal. 368, 95 Pac. 655.

19. *Pattison v. Board of Supervisors of Yuba County*, 13 Cal. 175.

20. *Winn v. Shaw*, 87 Cal. 631, 25 Pac. 968 (holding that a taxpayer may sue to enjoin the county auditor from drawing his warrant in payment for the purchase of land of which no notice has been pub-

lished); *Shakespear v. Smith*, 77 Cal. 638, 11 Am. St. Rep. 327, 20 Pac. 294; *Foster v. Coleman*, 10 Cal. 278.

1. *Winn v. Shaw*, 87 Cal. 631, 25 Pac. 968; *Merriam v. Board of Supervisors*, 72 Cal. 517, 14 Pac. 137; *McCoy v. Briant*, 53 Cal. 247; *Linden v. Case*, 46 Cal. 171.

a tax within the county or who have paid a tax therein one year before the commencement of the action.²

§ 98. Funding Claims.—It was early decided that while the legislature cannot require creditors of a county to surrender their evidences of indebtedness and to accept new ones different in terms from the old, it may refuse to provide funds to pay any portion of the old indebtedness unless the creditors will accept new evidences in place of the old, and for a different sum.³ Hence, it was said there is no constitutional objection to a law which provides a county fund, out of which the holders of indebtedness can obtain fifty per cent of the nominal value of their demands, whenever they choose to accept of that sum.⁴ But a statute creating a board of commissioners for the purpose of examining into the legality of all claims outstanding against a county, and for the funding of such as they shall consider legal and just, and which further provides that no such claim shall be legal unless it is presented to and allowed by such commissioners, was declared

2. *Thomas v. Joplin*, 14 Cal. App. 662, 112 Pac. 729.

3. *People v. Morse*, 43 Cal. 534; *Rose v. Estudillo*, 39 Cal. 270; *Soher v. Supervisors of Calaveras Co.*, 39 Cal. 134 (holding that when no provision is made, in a funding statute for the payment of interest after the bonds, issued under it, have become due, no interest will accrue thereon after that date; citing *Beals v. Supervisors of Amador County*, 28 Cal. 449); *Sharp v. Contra Costa County*, 34 Cal. 284 (stating that the law of private contracts is not applicable where the state or county government is a party, in respect to the mode or measure of enforcement); *Chapman v. Morris*, 28 Cal. 393 (holding that a law authorizing a county to fund

outstanding warrants which were not to draw interest, and to make the bonds given in exchange therefor bear interest, is not unconstitutional); *English v. Supervisors of Sacramento County*, 19 Cal. 172; *McDonald v. Bird*, 18 Cal. 195; *McDonald v. Maddux*, 11 Cal. 187; *Hunsaker v. Borden*, 5 Cal. 288, 63 Am. Dec. 130; *McDonald v. Griswold*, 4 Cal. 352. See Pol. Code, § 4088, as to power of county to refund an outstanding bonded indebtedness.

4. *People v. Morse*, 43 Cal. 534. And see *University of California v. Bernard*, 57 Cal. 612, holding that the act of April, 1880, providing for funding of county indebtedness, is not a special act.

in this last respect, to be unconstitutional.⁵ The reports contain a number of cases dealing with points which arose under the funding provisions of early statutes which are now of no importance.⁶

§ 99. Loaning Credit.—The code provides that “No county shall, in any manner, give or loan its credit to or in aid of any person or corporation. An indebtedness or liability incurred contrary to this provision shall be void.”⁷ This is in accord with the constitutional provision on the subject.^{7a} But, by an amendment to the Political Code, added in 1921, it is provided that it shall not be deemed a violation of the code section for a county, whenever it shall be economical and satisfactory so to do, to perform work or to furnish goods for any special district within the county, whose affairs and funds are under the supervision and control of the board of supervisors, or for which the board of supervisors is ex officio the governing body. However, it is provided that before the work or the goods are ordered to be done or furnished by the county an amount equal to the cost thereof or an amount ten per cent in excess of the estimated cost thereof shall be so reserved from the funds of the district to be charged that it may be transferred to the county when the work shall have been done or the goods supplied. The amendment makes provision for the making of charges for work so done or goods so supplied, and for the payment therefor.⁸

Formerly, the legislature had authority to empower and compel a county to become a subscriber to the capital

5. *Rose v. Estudillo*, 39 Cal. 270; *People v. Brooks*, 16 Cal. 11; *People v. Bond*, 10 Cal. 563.

6. *Rose v. Estudillo*, 39 Cal. 270; *Sharp v. Contra Costa County*, 34 Cal. 284; *English v. Supervisors of Sacramento County*, 19 Cal. 172; *McDonald v. Bird*, 18 Cal. 195; *People v. Brooks*, 16 Cal. 11; *Emeric*

v. Gilman, 10 Cal. 404, 70 Am. Dec. 742; *Hunsaker v. Borden*, 5 Cal. 288, 63 Am. Dec. 130.

7. Pol. Code, § 4004.

7a. Const., art. IV, § 31; *Pacific Mut. Life Ins. Co. v. San Diego County*, 112 Cal. 314, 41 Pac. 423, 44 Pac. 571.

8. Pol. Code, § 4004 (Amdt. 1921).

stock of a railroad company, and to become a stockholder therein and issue its bonds for the stock, and to raise money by taxation and appropriate it to the payment of the bonds.⁹ But under the present constitution, the legislature has no power "to authorize the state, or any political subdivision thereof, to subscribe for stock, or to become a stockholder in any corporation whatever."¹⁰

§ 100. **Warrants.**—Warrants drawn on the county treasurer¹¹ do not possess the qualities of negotiable paper like bills of exchange, promissory notes and the like.¹² The fact that a warrant is payable to bearer does not therefore make it transferable by delivery like a promissory note so payable.¹³ It has held that even where there is a regular assignment of a warrant by the person to whom it was issued, the assignee cannot maintain an action on it without an assignment of the original indebtedness.¹⁴ But it has been intimated that an assignment of the warrant might be deemed in equity an assignment of the debt on which the warrant issued, and an authority to the assignee to receive the money.¹⁵ At any rate, it is clear that the county treasurer cannot be compelled to pay a warrant to any person other than the one in whose favor it is drawn, without at least an assignment by the payee.¹⁶ Furthermore, an assignee of a warrant stands in the shoes of the original holder; and the transfer of an invalid warrant is not rendered valuable as to any person against whom it

9. Santa Cruz R. R. Co. v. Santa Cruz County Supervisors, 62 Cal. 239; Coleman v. Board of Supervisors, 50 Cal. 493; Napa Valley R. R. Co. v. Napa Co., 30 Cal. 435; Robinson v. Bidwell, 22 Cal. 379; California Northern R. R. Co. v. Butte County Supervisors, 18 Cal. 671.

10. Const., art. IV, § 31.

11. Pol. Code, § 4081.

12. Bank of Santa Cruz County v. Bartlett, 78 Cal. 301, 20 Pac. 682;

People v. Gray, 23 Cal. 125; Keller v. Hicks, 22 Cal. 457, 83 Am. Dec. 78; Dana v. San Francisco, 19 Cal. 486; Martin v. San Francisco, 16 Cal. 285; Argenti v. San Francisco, 16 Cal. 255; People v. Supervisors of El Dorado County, 11 Cal. 170.

13. People v. Gray, 23 Cal. 125.

14. Martin v. San Francisco, 16 Cal. 285.

15. Dana v. San Francisco, 19 Cal. 486.

16. People v. Gray, 23 Cal. 125.

was worthless in the hands of the assignor.¹⁷ Nor is the assignor who transfers a warrant by indorsement liable to the assignee as an indorser of negotiable paper.¹⁸ If, however, a person obtains money from another by fraud and by the transfer of warrants of no value, then the consideration has failed, and he has in his hands money which equitably belongs to the other, and the latter has a right of action to recover the same.¹⁹ It has been held that a county may assign a warrant drawn in its favor by another county so as to invest the holder with the right to demand payment thereon.²⁰ Where a statute provides for the order of payment of warrants, such order cannot be changed by the supervisors.¹ A party who registers his warrants becomes a preferred creditor, and is to be paid as soon as there are sufficient funds in the treasury and any prior registered warrants are paid.²

§ 101. County Charges.—The Political Code prescribes what shall constitute county charges.³ Among other things, all expenses necessarily incurred by the district attorney in the detection of crime and the prosecution of criminal cases are made such a charge.⁴ Thus the expenses occasioned by the employment of detectives,⁵ or

17. *Bank of Santa Cruz County v. Bartlett*, 78 Cal. 301, 20 Pac. 682; *People v. Supervisors of El Dorado County*, 11 Cal. 170.

18. *Keller v. Hicks*, 22 Cal. 457, 83 Am. Dec. 78, holding further, that the assignor of warrants is not liable as assignor of an instrument in writing promising to pay money, or acknowledging money to be due, under a statute relating to bonds and due bills. See **NEGOTIABLE INSTRUMENTS**.

19. *Keller v. Hicks*, 22 Cal. 457.

20. *Beals v. Evans*, 10 Cal. 459, holding that the provisions of an act which requires the property

belonging to a county to be sold at public auction does not apply to choses in action.

1. *Laforge v. Magee*, 6 Cal. 285.

2. *McCall v. Harris*, 6 Cal. 281; *Taylor v. Brooks*, 5 Cal. 332.

3. Pol. Code, § 4307. And see Pol. Code, § 4308 (added by Stats. 1907), as to cost of criminal action on removal; and Pol. Code, § 4309, as to how such cost is certified and paid.

4. Pol. Code, § 4307, subd. 2. See **DISTRICT AND PROSECUTING ATTORNEYS**.

5. *Rocca v. Boyle*, 166 Cal. 94, Ann. Cas. 1915B, 857, 135 Pac. 34; *Langdon v. Koster*, 157 Cal. 39, 106

experts,⁶ are recognized as of the class contemplated by the statute, but it does not include the expenses for the services of a stenographer.⁷ However, it has been held that the transcription of testimony may be a necessary expense in the prosecution of a criminal case.⁸ The board of supervisors in authorizing an expenditure are the judges of the necessity, and only in a plain case of an abuse of their powers will their judgment be subject to reversal.⁹

“The expenses necessarily incurred in the support of persons charged with or convicted of crime and committed therefor to the county jail, and for other services in relation to criminal proceedings for which no specific compensation is prescribed by law,” are also named among the county charges.¹⁰ Meals furnished to prisoners confined in the county jail are expenses necessarily incurred in the support of persons charged with or convicted of crime and committed therefor to the county jail.¹¹ And services rendered by attorneys appointed by a judge of the superior court to prosecute a district attorney for misconduct in office, pursuant to the provisions of sections 758 and 771 of the Penal Code, are among the county charges contemplated by the statute, being included within the meaning

Pac. 209; *Humiston v. Shaffer*, 145 Cal. 195, 78 Pac. 651; *Thiel Detective Co. v. Tuolumne Co.*, 37 Cal. App. 423, 173 Pac. 1120.

6. *Humiston v. Shaffer*, 145 Cal. 195, 78 Pac. 651; *Victors v. Kelsey*, 31 Cal. App. 796, 161 Pac. 1006 (expense of expert as witness).

7. *Humiston v. Shaffer*, 145 Cal. 195, 78 Pac. 651.

8. *County of Yolo v. Joyce*, 156 Cal. 429, 105 Pac. 125.

9. *Langdon v. Koster*, 157 Cal. 39, 106 Pac. 209; *County of Yolo v. Joyce*, 156 Cal. 429, 105 Pac. 125; *Victors v. Kelsey*, 31 Cal. App. 796, 161 Pac. 1006.

10. Pol. Code, § 4307, subd. 3. See act of April 16, 1880, Stats. 1880, p. 102, as to power of boards of supervisors to allow compensation to defray expenses incurred by a posse comitatus in criminal cases.

11. *Fulkerth v. County of Stanislaus*, 67 Cal. 334, 7 Pac. 754. See *Neville v. Solano County*, 29 Cal. 251, holding that liability for the expense of a temporary guard for the county jail, under the act of 1851, is to the persons employed by the sheriff as such guard, and not to the sheriff.

of the clause "other services in relation to criminal proceedings."¹²

Subdivision 8 of section 4307, making "contingent expenses necessarily incurred for the use and benefit of the county" a county charge, is construed as applying only to such traveling and other expenses of certain officers as are elsewhere expressly provided for, and does not apply to the case of other expenses of a supervisor as ex-officio road commissioner, for which no such provision is made, and any allowance for which is repugnant to a provision fixing his compensation.¹³

"Every other sum directed by law to be raised for any county purpose under the direction of the board of supervisors, or declared to be a county charge" are also made county charges.¹⁴

VIII. POLICE POWER.

§ 102. **In General.**—The constitution¹⁵ directly grants to counties power to make and enforce within their limits "all such local, police, sanitary and other regulations as are not in conflict with general laws." The power thus conferred has been declared to be as broad as that vested in the legislature itself, subject to these two exceptions: that it is local to the county, and is subject to the general laws.¹⁶ By the Political Code this power is conferred

12. *Gibson v. County of Sacramento*, 37 Cal. App. 523, 174 Pac. 835. See *Lamont v. Solano Co.*, 49 Cal. 158, and *Rowe v. Yuba Co.*, 17 Cal. 62, holding that services rendered by an attorney assigned to defend an impecunious person are not a county charge.

13. *County of Placer v. Freeman*, 149 Cal. 738, 87 Pac. 628.

14. Pol. Code, § 4307, subd. 9, See *Johnson v. County of Yuba*,

103 Cal. 538, 37 Pac. 528 (publishing nominations).

15. Const., art. XI, § 11.

16. In *re Isch*, 174 Cal. 180, 162 Pac. 1026; *County of Los Angeles v. Eikenberry*, 131 Cal. 461, 63 Pac. 766; *People v. Velarde*, 31 Cal. App. Dec. 217, 188 Pac. 59; *People v. Fages*, 32 Cal. App. 37, 162 Pac. 137. But see *Arfsten v. Superior Court*, 20 Cal. App. 269, 128 Pac. 949, holding that an ordinance fixing the maximum pen-

upon boards of supervisors in their respective counties.¹⁷ Supervisors are therefore vested with authority to exercise within their jurisdictions the entire police power of the state, subject only to the control of the general laws.¹⁸

As with the statutes enacted by the legislature,¹⁹ the wisdom of the exercise of the legislative judgment is a question over which the courts have no control; and unless it clearly appears that an ordinance has no substantial relation to a proper purpose, it cannot be said that the limit of the legislative power of the county has been transcended.²⁰ Where a county has no jurisdiction to exercise its police power within the limits of an unincorporated city or town, it is not essential to the validity of an ordinance that it should expressly exclude incorporated cities and towns from its operation.¹

ality for the sale of liquor without a license, so as to bring an infraction of the ordinance within the jurisdiction of the superior court, is in conflict with Penal Code, § 435, which fixes the maximum penalty for the same offense at a less amount, so as to make it cognizable only in the justice's court, and is invalid, unreasonable and void.

An ordinance undertaking to punish precisely the same acts which are punishable under general law is void as in conflict with such law; but a void penal clause, which is independent of and severable from the part of the ordinance declaring the acts to be a misdemeanor, will not vitiate a judgment of conviction for such misdemeanor, where the judgment is in accordance with the general law; *Ex parte Stephen*, 114 Cal. 278, 46 Pac. 86; *Ex parte Mansfield*, 106 Cal. 400, 39 Pac. 775.

17. Pol. Code, § 4041, subd. 31. And see *Denton v. Vann*, 8 Cal.

App. 677, 97 Pac. 675, holding that the constitutional grant of police power to counties must be construed to mean counties in their organized condition, and is an authorization to the local legislative body to exercise the powers thereby granted.

18. *People v. Velarde*, 31 Cal. App. Dec. 217, 188 Pac. 59, holding that when a county undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make that action effective.

19. See CONSTITUTIONAL LAW, vol. 5, pp. 637, 717.

20. *People v. Velarde*, 31 Cal. App. Dec. 217, 188 Pac. 59. For cases applying the rule to municipal ordinances, see MUNICIPAL CORPORATIONS.

1. *People v. Velarde*, 31 Cal. App. Dec. 217, 188 Pac. 59. See MUNI-

In legislating in behalf of public morals, health or safety, a county may enact ordinances that incidentally impair property value.² Where such impairment is not the primary object but merely a necessary incident to the main purpose, the ordinance is not thereby rendered unconstitutional.³

Instances of exercise of power.—It is intended by the constitution that local regulations may be made and enforced except where the act described is the same act already included within the category of crimes covered by the general laws, or the punishment affixed for acts of a lesser degree than similar acts described by the statute is in excess of or not in harmony with the punishment designated by the latter.⁴ Such power includes the right to prohibit the sale of intoxicating liquors,⁵ to levy a license tax on the business of grazing sheep on lands within the county,⁶ and to prohibit the carrying of concealed deadly weapons about the person in public places.⁷

CIPAL CORPORATIONS, as to the operation of county ordinances within incorporated cities and towns.

2. See CONSTITUTIONAL LAW, vol. 3, pp. 733, 734.

3. Ex parte Young, 154 Cal. 317, 22 L. R. A. (N. S.) 330, 97 Pac. 822; People v. Velarde, 31 Cal. App. Dec. 217, 188 Pac. 59. As a means of preventing the illegal sale of liquors outside of municipal corporations, a county has the right to prescribe any reasonable regulation as a condition to the exercise of the right to bring liquor into or transport it across any part of the county, even though such liquor be owned by the person bringing it into the county and it be intended for his own personal use; People v. Velarde, 31 Cal. App. Dec. 217, 188 Pac. 59.

4. People v. Fages, 32 Cal. App. 37, 162 Pac. 137, per James, J., See as to city ordinances, MUNICIPAL CORPORATIONS. And see CONSTITUTIONAL LAW, vol. 5, p. 690 et seq.

5. In re Isch, 174 Cal. 180, 162 Pac. 1026; Ex parte Young, 154 Cal. 317, 22 L. R. A. (N. S.) 330, 97 Pac. 822; People v. Velarde, 31 Cal. App. Dec. 217, 188 Pac. 59; Denton v. Vann, 8 Cal. App. 677, 97 Pac. 675. See INTOXICATING LIQUORS.

6. County of Plumas v. Wheeler, 149 Cal. 758, 87 Pac. 909; County of Sierra v. Flanigan, 149 Cal. 767, 87 Pac. 913. See ANIMALS, vol. 2, p. 10; LICENSES.

7. Ex parte Luening, 3 Cal. App. 76, 84 Pac. 445

Reasonableness of ordinances.—Ordinances passed in the exercise of the police power of counties like those of municipalities generally must be reasonable; and an ordinance which is unreasonable cannot be enforced.⁸ Thus an ordinance forbidding under certain conditions the establishment of cemeteries anywhere within the limits of a county is unreasonable where such county has within its limits many square miles of thinly populated territory.⁹ Furthermore, an ordinance which places restrictions upon the right to pursue a lawful avocation, or which operates unequally upon different classes of citizens is invalid.¹⁰ However, an ordinance prohibiting the carrying of concealed deadly weapons about the person in public places is not unreasonable, oppressive or discriminating, because it authorizes the sheriff to grant permits to carry such weapons to officers and other persons as he may deem fit.¹¹ Whether an ordinance be reasonable and consistent with the law or not is a question for the court and not the jury.¹²

§ 103. Regulation of Business by License.—Boards of supervisors have, in the exercise of their police power, authority to license every kind of business not prohibited by law, carried on within the limits of their respective jurisdictions, as well as shows, exhibitions and games carried on therein, and to fix the rates of license tax upon the same.¹³ Formerly, supervisors had the power to col-

8. See CONSTITUTIONAL LAW, vol. 5, pp. 711, 715; MUNICIPAL CORPORATIONS.

9. See CEMETERIES, vol. 4, p. 993.

10. Los Angeles County v. Hollywood Cemetery Assn., 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 153. See CONSTITUTIONAL LAW, vol. 5, p. 703.

11. Ex parte Luening, 3 Cal. App. 76, 84 Pac. 445. And see In re Berry, 147 Cal. 523, 109 Am. St. Rep. 160, 82 Pac. 44, holding, in

1905, that a county ordinance prohibiting the use of automobiles on the public roads at night-time is not unreasonable on its face; and the burden of showing its unreasonableness is on one convicted of its violation who petitions to be discharged upon habeas corpus.

12. Merced County v. Fleming, 111 Cal. 46, 43 Pac. 392.

13. Pol. Code, § 4041, subd. 25, making exceptions in favor of soldiers and of commercial travelers

lect a license tax for purposes of revenue as well as for regulation,¹⁴ but the power is now restricted to regulation alone.¹⁵ This power gives the right to levy a license fee upon the business of grazing sheep on lands within the county, provided such fee is not more than is reasonably necessary for the regulation of the business, considering the necessary and probable expenses incident thereto. Where the license fee is not so obviously excessive as to lead irresistibly to the conclusion that it is imposed for revenue purposes, the reasonableness of the charge for expenses is a question of fact for the determination of the jury, in view of the conditions shown to exist. It is said that the presumption is in favor of the reasonableness of the charge, and that the county is not limited to the exact amount of the expense, as it may subsequently develop.¹⁶

§ 104. Destruction of Animals.—Among the powers of the supervisors is that of providing “for the destruction of gophers, squirrels, other wild animals, noxious weeds, and insects injurious to fruit or fruit trees, or vines, or vegetable or plant life.”¹⁷ The exercise of this power is authorized in all cases where the means employed are reasonable and not otherwise objectionable, but it cannot be extended so far as to require a land owner, under a penalty, to exterminate wild animals of which he is not the owner, and over which he cannot in the nature of things have any control or dominion. Hence, an ordinance requiring all occupants of lands, within ninety days, to

dealing in goods at wholesale. See Pol. Code, § 3366, for similar provision. And see LICENCES.

14. *County of Los Angeles v. Eikenberry*, 131 Cal. 461, 63 Pac. 766; *Ex parte Mansfield*, 106 Cal. 400, 39 Pac. 775; *Ex parte Mirande*, 73 Cal. 365, 14 Pac. 888.

15. *County of Plumas v. Wheeler*, 149 Cal. 758, 87 Pac. 909, construing Pol. Code, § 3366.

16. *County of Plumas v. Wheeler*, 149 Cal. 758, 87 Pac. 909, holding that a license fee of ten cents per head on sheep and lambs is not, as a matter of law, unreasonable; *County of Sierra v. Flanigan*, 149 Cal. 769, 87 Pac. 913.

17. Pol. Code, § 4041, subd. 26. See AGRICULTURE, vol. 1, p. 892; ANIMALS, vol. 1, p. 11.

exterminate the ground-squirrels on their respective lands, and thereafter to keep said lands free therefrom, and declaring a violation of the ordinance to be a misdemeanor, is unreasonable. Such ordinance is not a police, sanitary or similar regulation, and is not authorized by the constitution.¹⁸

IX. CLAIMS.

§ 105. **In General.**—Boards of supervisors in their respective counties have power, under such limitations and restrictions as are prescribed by law,

“To examine, settle, and allow all accounts legally chargeable against the county, except salaries of officers, and such demands as are authorized by law to be allowed by some other person or tribunal, and order warrants to be drawn on the county treasurer therefor.”¹⁹

It will be observed that the jurisdiction here conferred is to allow only such accounts as are “legally chargeable against the county.”²⁰ Hence one who demands payment of a claim must show some statute authorizing it, or that the claim arises from some contract, express or implied, which finds authority in law.¹ The payment of a claim cannot be allowed merely upon the theory that the services performed and for which compensation is demanded were beneficial.² Supervisors may, however, under cer-

18. *Ex parte Hodges*, 87 Cal. 162, 25 Pac. 277, construing County Government Act, and § 2, art. XI, of the constitution.

19. Pol. Code, § 4041, subd. 12; *Biggart v. Lewis*, 183 Cal. 660, 192 Pac. 437; *White v. Mathews*, 29 Cal. App. 634, 156 Pac. 372; *Jacks v. Taylor*, 24 Cal. App. 667, 142 Pac. 121.

20. *Biggart v. Lewis*, 183 Cal. 660, 192 Pac. 437; *Harris v. Cook*, 119 Cal. 454, 51 Pac. 692; *Linden v. Case*, 46 Cal. 171; *Keller v.*

Hyde, 20 Cal. 593; *People v. Supervisors of El Dorado Co.*, 11 Cal. 170.

1. *Irwin v. County of Yuba*, 119 Cal. 686, 52 Pac. 35; *Gibson v. County of Sacramento*, 37 Cal. App. 523, 174 Pac. 935; *Woods v. Potter*, 8 Cal. App. 41, 95 Pac. 1125.

2. *Irwin v. County of Yuba*, 119 Cal. 686, 52 Pac. 35; *Gibson v. County of Sacramento*, 37 Cal. App. 523, 174 Pac. 935, holding that there must be some statutory or constitutional authority for compensation,

tain circumstances, allow a claim, although all the formalities necessary to bind the county were not originally employed, and thus cure irregularities in procedure by a subsequent ratification and recognition of liability.³

The salaries of officers and such demands as are by law to be allowed by some other person or tribunal are not, of course, within the jurisdiction of the board. And there are some cases where claims against a county may be made upon an order of the judge of the superior court,⁴ or by a magistrate.⁵ These cases, however, are exceptions to the general statutory rule; in them the law expressly confers the power to order claims to be paid, and the judge or magistrate is himself the auditor.⁶ But, unless there is some statute authorizing a different course, all claims must be presented to and allowed by the supervisors in which case the auditor is required to interpose his approval as a prerequisite to the payment thereof.⁷

otherwise it cannot legally be paid, however beneficial the services performed may be.

3. *Power v. May*, 123 Cal. 147, 55 Pac. 796. And see *Coulter v. Pool*, 62 Cal. Dec. 421, 201 Pac. 120; *Power v. May*, 114 Cal. 207, 46 Pac. 6; *Sittig v. Raney*, 35 Cal. App. Dec. 789, 200 Pac. 824. See supra, § 88, as to ratification of contracts.

4. Pen. Code, § 869 (court reporter's compensation). And see *Ex parte Widber*, 91 Cal. 367, 27 Pac. 733; *Ex parte Reis*, 64 Cal. 233, 30 Pac. 806; *Boys and Girls' Aid Soc. v. Reis*, 71 Cal. 627, 12 Pac. 796 (police court).

5. *McAllister v. Hamlin*, 83 Cal. 361, 23 Pac. 357.

6. *Woody v. Peairs*, 35 Cal. App. 553, 170 Pac. 660.

7. *Woody v. Peairs*, 35 Cal. App.

553, 170 Pac. 660 (claim for services of detectives employed by grand jury). And see *Murphy v. Madden*, 130 Cal. 674, 63 Pac. 80 (fees of witnesses); *Frame v. Barnum*, 37 Cal. App. 411, 175 Pac. 689 (claim for services as copyist in recorder's office); *Thiel Detective Co. v. Tuolumne Co.*, 37 Cal. App. 423, 173 Pac. 1120 (claim for services of detectives employed by district attorney); *Gibson v. County of Sacramento*, 37 Cal. App. 523, 174 Pac. 935 (claim for services rendered by attorneys at law appointed by a judge of the superior court to prosecute a district attorney for misconduct); *White v. Mathews*, 29 Cal. App. 634, 156 Pac. 372 (claim for services of expert employed by grand jury to examine county books). As to duties of auditor, see supra, § 59.

Mandamus.—If a board of supervisors refuses to act on a claim for the reason that it has not the power to approve it, mandamus is the proper remedy to determine such power.⁸ If the court determines the board has power to audit the claim, it may compel the supervisors by mandamus to act, but cannot direct particular action.⁹ Rejection of a claim is action upon it, which is all that mandamus can require.¹⁰ And, of course, when a board has acted, either by allowing or disallowing a claim, a writ of mandate will not be issued to reverse or review the judgment. This is true even where a statute declares that a board of supervisors shall not be sued, but may be proceeded against by mandamus.¹¹

§ 106. Conclusiveness of Allowance.—A board of supervisors in passing upon a claim, acts as a quasi-judicial body and its allowance and settlement of the claim, is an adjudication which is ordinarily final and conclusive,¹² and cannot be inquired into by the courts except, perhaps, for fraud.¹³ This settled rule presupposes jurisdiction in the

8. *People v. Board of Supervisors*, 28 Cal. 429. See **MANDAMUS**.

9. *Tilden v. Sacramento County Supervisors*, 41 Cal. 68; *People v. Board of Supervisors*, 11 Cal. 42; *Tuolumne County v. Stanislaus County*, 6 Cal. 440; *Price v. Sacramento County*, 6 Cal. 254.

10. *Tilden v. Sacramento County Supervisors*, 41 Cal. 68; *Price v. Sacramento County*, 6 Cal. 254.

11. *Tilden v. Sacramento County Supervisors*, 41 Cal. 68.

12. *Biggart v. Lewis*, 183 Cal. 660, 192 Pac. 437; *Langdon v. Koster*, 157 Cal. 39, 106 Pac. 209; *County of Yolo v. Joyce*, 156 Cal. 429, 105 Pac. 125; *County of Tehama v. Sisson*, 152 Cal. 167, 92 Pac. 64; *County of Alameda v. Evers*, 136 Cal. 132, 68 Pac. 475; *County of*

Santa Cruz v. McPherson, 133 Cal. 282, 65 Pac. 574; *McBride v. Newlin*, 129 Cal. 36, 61 Pac. 577; *Lamberson v. Jefferds*, 118 Cal. 363, 50 Pac. 403; *McFarland v. McCowen*, 98 Cal. 329, 33 Pac. 113; *Colusa County v. De Jarnett*, 55 Cal. 373; *Tilden v. Sacramento County Supervisors*, 41 Cal. 68; *El Dorado County v. Elstner*, 18 Cal. 144; *Thiel Detective Co. v. Tuolumne Co.*, 37 Cal. App. 423, 173 Pac. 1120; *Victors v. Kelsey*, 31 Cal. App. 796, 161 Pac. 1006; *Jacks v. Taylor*, 24 Cal. App. 667, 142 Pac. 121; *Riverside County v. Yawman & Erbe Mfg. Co.*, 3 Cal. App. 691, 86 Pac. 900; *Placer Co. v. Campbell (Cal.)*, 11 Pac. 602.

13. *County of Alameda v. Evers*, 136 Cal. 132, 68 Pac. 475; *McFar-*

board to consider the claim at all. The mere presentation of a claim is not sufficient to clothe the board with power to consider and allow it; nor does an order of allowance ipso facto operate to foreclose forever consideration of the question as to whether or not the board had the requisite jurisdiction.¹⁴ On the other hand, the question of jurisdiction is always open to review by the courts.¹⁵ So, if it be apparent that the board has exceeded its jurisdiction, an order allowing a claim may be nullified through an action in court, or it may be disregarded by any officer called upon to give effect to the invalid determination.¹⁶

Fraud.—Also, there may be cases in which an allowance of a claim by the board will be set aside because procured by fraud.¹⁷ But in such cases, the circumstances must be set out, and it must be shown why and how defense to the claim on the part of the county was not made while the proceedings to establish it were pending before the board. The mere fact that an unjust claim has been presented and supported by unjust practices is not enough to authorize the interposition of equity.¹⁸ But, as it has

land v. McCowen, 98 Cal. 329, 33 Pac. 113; El Dorado County v. Elstner, 18 Cal. 144; Thiel Detective Co. v. Tuolumne Co., 37 Cal. App. 423, 173 Pac. 1120.

14. Walton v. McPhetridge, 120 Cal. 440, 52 Pac. 731; Jacks v. Taylor, 24 Cal. App. 667, 142 Pac. 121.

15. Biggart v. Lewis, 183 Cal. 660, 192 Pac. 437; County of Tehama v. Sisson, 152 Cal. 167, 92 Pac. 64; Walton v. McPhetridge, 120 Cal. 440, 52 Pac. 731; Keller v. Hyde, 20 Cal. 593 (distinguishing El Dorado County v. Elstner, 18 Cal. 144). See CERTIORARI, vol. 4, p. 1022 et seq.

Thus, where property has actually been bought by a county, determination by the supervisors that such

purchase is necessary, that the property is of a certain value and that such value should be paid therefor, may be conclusive, but the board cannot, by a mere entry upon their minutes that it has purchased property for a certain price, preclude an inquiry into the facts, when in reality there has been no purchase at all. County of Tehama v. Sisson, 152 Cal. 167, 92 Pac. 64.

16. Walton v. McPhetridge, 120 Cal. 440, 52 Pac. 731; Thiel Detective Co. v. Tuolumne Co., 37 Cal. App. 423, 173 Pac. 1120.

17. County of Alameda v. Evers, 136 Cal. 132, 68 Pac. 475.

18. El Dorado County v. Elstner, 18 Cal. 144 (per Baldwin, J., concurring).

been seen, where the board acts within its jurisdiction, and without any fraud in the procuring of an allowance, its decision upon questions of fact in making the allowance is without remedy in the courts.¹⁹

§ 107. **Presentation.**—Claims against a county must ordinarily be presented to the board of supervisors for allowance, and where the amount has not been fixed by statute or judgment, the board is required, if the claim be a proper charge, to find and allow the amount justly due.²⁰ But if the claim arises under the statute which provides for compensation where property is destroyed in consequence of mobs or riots, it is not necessary that it should be presented before bringing an action to recover judgment thereon.¹ While ordinarily the auditor may not audit and the treasurer may not pay warrants if the claims on which they are based have not been presented to and allowed by the board, nevertheless this point cannot be raised where no possible injury could have resulted from the omission. Thus where the board in proceedings for the purchase of land made an order directing payment of the purchase price, and without further order the auditor

19. *County of Alameda v. Evers*, 136 Cal. 132, 68 Pac. 475, holding that an allowance made for services of a coroner which were proved cannot be recovered back in a collateral action by the county in which there is no direct attack upon the judgment of the board, but which proceeds upon the alleged ground that the services were not in fact rendered by the coroner. And see cases cited supra, in this section.

20. Pol. Code, §§ 4074-4076; *Nickerson v. San Bernardino County*, 179 Cal. 518, 177 Pac. 465; *Fulkerth v. County of Stanislaus*, 67 Cal. 334, 7 Pac. 754; *Rhoda v. Alameda Co.*, 52 Cal. 350; *Gibson v. County of*

Sacramento, 37 Cal. App. 523, 174 Pac. 935; *Frame v. Barnum*, 37 Cal. App. 411, 175 Pac. 689. See *Smith v. Board of Supervisors*, 99 Cal. 262, 33 Pac. 1094, as to presentation and action on claim for bridge work where the contractor was obligated to secure the certificate of the superintendent of construction.

A claim for services as copyist in the recorder's office must be presented and allowed before the auditor may draw his warrant for payment thereof. *Frame v. Barnum*, 37 Cal. App. 411, 175 Pac. 689. And see supra, § 105.

1. *Clear Lake W. W. Co. v. Lake Co.*, 45 Cal. 90.

and treasurer paid over the money, it was held that the failure to present the claim to the board for allowance was a mere harmless irregularity.³

“No county officer shall, except for his own service, present any claim, account, or demand for allowance against the county, or in any way except in the discharge of his official duty advocate the relief asked in the claim or demand made by any other,” and

“Any person may appear before the board and oppose the allowance of any claim or demand against the county.”³

§ 108. Itemization.—A board of supervisors is not permitted to consider any claim, unless the same be itemized as required by statute.⁴ Consequently, if the board refuses to consider a claim on the ground that it does not give all the items required by the code, the objection is well taken and mandamus will not lie to compel consideration.⁵ While the language of the code provision in this respect is apparently mandatory, nevertheless it has been said that the proviso in the concluding clause indicates that compliance is directory and not essential to jurisdiction to allow claims.⁶ If the board is not satisfied with a claim as presented, it should give notice thereof to the claimant, that he may correct it; but if it does not do so but treats the claim as sufficient and allows it, the county cannot afterwards repudiate it for formal insufficiency.⁷

2. *Nickerson v. San Bernardino County*, 179 Cal. 518, 177 Pac. 465.

3. Pol. Code, § 4074.

4. Pol. Code, § 4075, which makes provision also for the proper course where a claim is not considered for want of itemizing.

5. *Christie v. Sonoma County Supervisors*, 60 Cal. 164. As to mandamus to compel consideration, see *supra*, § 105.

6. *County of Colusa v. Welch*, 122 Cal. 428, 55 Pac. 243; *Jacks v.*

Taylor, 24 Cal. App. 667, 142 Pac. 121.

7. *County of Colusa v. Welch*, 122 Cal. 428, 55 Pac. 243. Where supervisors enter into a contract for the erection of a jail, the work to be paid for in installments on the certificate of the architect that a certain sum has been expended, an account giving the sum total of an installment, without all the items of the claim certified to by the architect, is, it has been held, a suffi-

And where a statute does not fix a time for payment of the per diem compensation of a supervisor, such per diem is the proper subject of an account to be embraced in a single cause of action, and to be presented as one itemized claim.⁸ The provisions requiring a claim to be itemized before it can be allowed is directed to the supervisors alone, and the auditor has no revisory control over their action; he must draw his warrant for a claim when allowed by the board.⁹

§ 109. Verification.—Section 4075 of the Political Code declares that the board must not consider a claim unless “duly verified to be correct, and that the amount claimed is justly due.” The following section prescribes the form of the verification and declares that it shall be substantially in accordance therewith.¹⁰ It provides also that whenever a county reorganizes its accounts the supervisors may dispense with verification. Aside from the question as to whether these provisions are mandatory or directory, it is clear that they do not require that a claim be verified by the claimant. Thus where a partnership presented three claims, two of which were verified by a third person and the other by his attorney, it was held that the verifications were sufficient. Moreover, where claims have been passed on and rejected and no objection has been made to the form of the verifications until after the commencement of an action on the claims, the county

cient compliance with the code to authorize allowance of the claim. *Babcock v. Goodrich*, 47 Cal. 488.

8. *Nelson v. Merced County*, 122 Cal. 644, 55 Pac. 421. See *County of Colusa v. Welch*, 122 Cal. 428, 55 Pac. 243, as to sufficiency of itemization of claim for services as special counsel.

9. *Sehorn v. Williams*, 110 Cal. 621, 43 Pac. 8. See as to auditor's duties, *supra*, § 59.

10. Pol. Code, § 4076. See *Rhoda v. Alameda County*, 69 Cal. 523, 11 Pac. 57, as to sufficiency of verification. And see *McCormick v. Tuolumne County*, 37 Cal. 257, holding that the verification contemplated by the “Act to limit the time for presentation of claims against counties and for receiving payment for the same” (Stats. 1857, § 1, p. 167), is a verification by oath annexed to the account.

will be deemed to have waived the objection.¹¹ Likewise, where a claim was not supported by affidavit, and where there was not annexed the certificate of the clerk of the board or the auditor, it has been said that while such omissions constitute irregularities, yet since they merely go to the procedure by which the claim was presented and allowed, the irregularities are cured by the allowance of the claim.¹²

An order allowing an unverified claim will not be annulled upon petition for a writ of review upon the ground that the order was in excess of the board's jurisdiction, where it appears that the claimant, immediately after the allowance, procured a warrant from the auditor and obtained the money from the treasurer. The remedy in such case, if there be any, is by an action to recover the money unlawfully paid.¹³

§ 110. Filing—Form—Approval—Allowance.—No account may be passed upon by a board of supervisors unless filed with the clerk or with the auditor three days prior to the time of the meeting of the board at which allowance of the claim is asked.¹⁴ The primary purpose of the statute in this particular is to permit public and timely examination of claims in order that opposition may, if necessary, be made. The provision is mandatory and means that compliance with its terms is a prerequisite to the jurisdiction of the board to consider and allow claims. An attempted allowance of a claim, which has not been filed three days prior to the meeting at which it is allowed invests the claim with no validity.¹⁵ Demands on

11. *Nohl v. Del Norte County*, 31 Cal. App. Dec. 39, 187 Pac. 761; *Randall v. Yuba County*, 14 Cal. 219, holding that an objection that an account was not "authenticated" as required cannot be taken in the supreme court for the first time.

12. *Sittig v. Raney*, 35 Cal. App. Dec. 789, 200 Pac. 824.

13. *Burr v. Board of Supervisors*, 96 Cal. 210, 31 Pac. 38. See *infra*, § 120, as to actions for money unlawfully paid.

14. Pol. Code, § 4076.

15. *Jacks v. Taylor*, 24 Cal. App. 667, 142 Pac. 121.

counties must be in form substantially as prescribed in the code, and they must be¹⁶ approved before filing by the officer who directed the expenditure.¹⁷ But if a claim is not so approved before filing and no objection is made until after the commencement of an action thereon, the objection will be deemed to have been waived.¹⁸

When a claim is allowed, the clerk is required to indorse thereon the manner of such allowance, together with the date, the amount, and the fund from which it is to be paid. He is further required to attest the claim with his signature, and, when countersigned by the chairman of the board, must transmit it to the auditor, who, in case he approves it, indorses such approval thereon, together with the date and number of the warrant, and affixes his signature thereto. When the claim is so approved and signed by the auditor, it constitutes a warrant on the treasury. It is provided, however, that under certain circumstances supervisors may adopt a modified form of demand, and prescribe such other procedure for the allowance and payment of claims as may better meet the needs of the particular county. In case such modified form is adopted, it must accord with certain requirements specified in the code, and be approved by the state board of control.¹⁹

A petition for mandamus to compel a treasurer to pay a claim which shows due allowance by the supervisors and presentation to the treasurer of a warrant issued in due form by the auditor, makes a prima facie case in favor of the petitioner; and the burden of proof is upon the treasurer to show that he was justified in refusing payment, and it does not rest upon the petitioner to show that the board had jurisdiction to allow the claim, merely because the answer avers that the board did not have such jurisdiction.²⁰ However, if it appears on the face of the claim

16. See Pol. Code, § 4076, as to form of demand.

17. Pol. Code, § 4076.

18. Nohl v. Del Norte County, 31 Cal. App. Dec. 39, 187 Pac. 761.

19. Pol. Code, § 4076.

20. McGowan v. Ford, 107 Cal. 177, 40 Pac. 231. And see McFarland v. McCowen, 98 Cal. 329, 33 Pac. 113; Colusa Co. v. De Jarnett,

that it is one over which the board has no jurisdiction, or that it acted in excess of its jurisdiction, the auditor may refuse to draw his warrant in payment of the claim, or, having done so, the treasurer may refuse payment.¹

§ 111. **Time for Presenting.**—The board of supervisors cannot allow a claim against a county unless it is presented and filed with the clerk of the board, or with the auditor, within one year after the last item of the account or claim accrued.² Consequently, if the board allows a claim more than one year after it falls due, its action is void, and the auditor should refuse to draw his warrant therefor.³ But a claim is not barred unless the last item thereof accrued more than a year before presentation, and it is immaterial that some of the items may have accrued more than a year before, provided such items had not at any time become barred.⁴ But where at the time of the accrual of the last item more than a year had elapsed since the accrual of the next preceding item, such item and all earlier ones are barred, and the fact that the last of the items accrued within the year does not revive those that have become stale.⁵ Where a claim was barred by statute, and the legislature passed an act requiring the board of supervisors to act upon and reject or allow it notwithstanding the bar of the statute, it was held that

55 Cal. 373; *Kelley v. Sersanous*, 5 Cal. Unrep. 485, 46 Pac. 299.

1. *McFarland v. McCowen*, 98 Cal. 329, 33 Pac. 113; *Merriam v. Board of Supervisors*, 72 Cal. 517, 14 Pac. 137; *Linden v. Case*, 46 Cal. 171; *Carroll v. Siebenthaler*, 37 Cal. 193; *Kelley v. Sersanous*, 5 Cal. Unrep. 485, 46 Pac. 299.

2. Pol. Code, § 4075; *Nelson v. Merced County*, 122 Cal. 644, 55 Pac. 421; *Rhoda v. Alameda Co.*, 52 Cal. 350; *Welch v. County of Santa Cruz*, 30 Cal. App. 123, 156 Pac. 1003.

3. *Carroll v. Siebenthaler*, 37 Cal. 193. See as to auditor's duties, *supra*, § 59.

4. *Nelson v. Merced County*, 122 Cal. 644, 55 Pac. 421, holding that as to the claim in question, there was not at any time before the presentation and filing a point at which the account was barred, and that the interval of time between items was always less than a year.

5. *Welch v. County of Santa Cruz*, 30 Cal. App. 123, 156 Pac. 1003.

the act operated merely to remove the bar against the claim and did not have the effect of legalizing it, if it was illegal.⁶

§ 112. Rejection.—"When the board finds that any claim presented is not payable by the county, or is not a proper county charge, it must be rejected; and said rejection shall be plainly indorsed on said claim."⁷ In a proceeding to review the action of the board in rejecting a claim where the case is submitted upon an agreed statement which does not show upon what ground the claim was rejected, the court is authorized to presume that it was properly rejected if it may have been properly rejected upon any ground not negatived by the statement.⁸ A resolution of a board, after it has rejected a claim, reciting that the services on which the claim is based have been performed, but that the board has doubts as to its legality, and directing the district attorney to enter the appearance of the board in any court in which the claimant may commence an action to require the board to allow the claim, which resolution is not agreed to or accepted by the claimant, is revocable at the pleasure of the board.⁹ Where the board finds a claim "to be a proper county charge, but greater in amount than is justly due, the board may allow the claim in part, and draw a warrant for the portion allowed, on the claimant filing a receipt in full for his account. If the claimant is unwilling to receive such amount in full payment, the claim may again be considered at the next regular session of the board, but not afterward."¹⁰

§ 113. Actions on Claims.—No action can be prosecuted against a county on a claim until it has been presented in

6. *Domingos v. Supervisors of Sacramento Co.*, 51 Cal. 608.

7. Pol. Code, § 4077.

8. *Green v. County of Fresno*, 95 Cal. 329, 30 Pac. 544.

9. *Tilden v. Sacramento County*, 41 Cal. 68.

10. Pol. Code, § 4077.

the statutory manner to the board of supervisors for allowance and has been rejected.¹¹ If, however, a claim within the power of the board to allow has been rejected or allowed only in part, the decision of the board is not final, and by virtue of section 4078 of the Political Code the claimant may bring an action to establish his claim against the county as effectively as it could be established by a favorable order of the board in the first instance.¹² The code provision is general and applies to all accounts presented against a county—those arising out of tort as well as upon contract.¹³ When a claim has been partly allowed and partly rejected it is necessary that it be presented at the next regular session of the board, and the claimant must indicate his unwillingness to accept the amount allowed in order that he may maintain an action against the county; and a suit brought without such second presentation is premature.¹⁴ If, however, the claim is entirely rejected, no second presentation is required before suit can be maintained.¹⁵

The code provides that if the board refuse or neglect to act on a claim for ninety days after such claim has been

11. *Rhoda v. Alameda Co.*, 52 Cal. 350; *Alden v. County of Alameda*, 43 Cal. 270; *People v. Supervisors*, 28 Cal. 429; *Dorsey v. Tuolumne County*, 1 Cal. Unrep. 456. But see *Clear Lake W. W. Co. v. Lake Co.*, 45 Cal. 90, holding that it is not necessary to present for allowance a claim arising under a statute providing for compensation to persons whose property has been damaged by a mob.

12. *People v. Supervisors*, 28 Cal. 429; *Gibson v. County of Sacramento*, 37 Cal. App. 523, 174 Pac. 935; *Thiel Detective Co. v. Tuolumne Co.*, 37 Cal. App. 423, 173 Pac. 1120.

13. *Fulkerth v. County of Stanislaus*, 67 Cal. 334, 7 Pac. 754; *Mc-*

Cann v. Sierra County, 7 Cal. 121; *Price v. Sacramento County*, 6 Cal. 254; *Thiel Detective Co. v. Tuolumne Co.*, 37 Cal. App. 423, 173 Pac. 1120.

14. *Arbios v. San Bernardino County*, 110 Cal. 553, 42 Pac. 1080; *Marron v. County of San Diego*, 8 Cal. App. 244, 96 Pac. 814. See generally as to premature actions, *ACTIONS*, vol. 1, p. 377.

15. *Millard v. County of Kern*, 147 Cal. 632, 32 Pac. 329; *San Diego County v. Riverside County*, 125 Cal. 495, 58 Pac. 81 (claim of one county against another); *Marron v. County of San Diego*, 8 Cal. App. 244, 96 Pac. 814; *San Diego County v. Riverside County*, 6 Cal. Unrep. 170, 55 Pac. 7.

filed, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a final rejection, and a claimant dissatisfied with the rejection, or with the amount allowed on his account,

“may sue the county therefor at any time within six months after the final action of the board, but not afterward, and if, in such action, judgment is recovered for more than the board allowed, on presentation of a certified copy of the judgment, the board must allow and pay the same, together with the costs adjudged; but if no more is recovered than the board allowed, the board must pay the claimant no more than was originally allowed.”¹⁶

But the Code of Civil Procedure provides that “Actions on claims against a county, which have been rejected by the board of supervisors, must be commenced within six months after the first rejection thereof by such board.”¹⁷ There is no distinction under this provision between a bill or demand and a claim. Also the provision is applicable to actions by the state even where the cause of action arose in the exercise of its governmental functions. Thus, in an action by the state board of health against a county on bills or demands which had been rejected it was held that the action was barred six months after such rejection.¹⁸

Assumpsit is the proper remedy on an account against a county which has been rejected by the supervisors.¹⁹ The plaintiff in suing on a claim must aver all matters required by the statute in relation to presentation and rejection. An averment that the claim has been duly presented and rejected is not sufficient.²⁰

16. Pol. Code, § 4078.

17. Code Civ. Proc., § 342. See *Zirker v. Hughes*, 77 Cal. 235, 19 Pac. 423, construing Laws 1883, p. 313, § 44.

18. *State Board of Health v. Alameda County*, 42 Cal. App. 166, 183 Pac. 455.

19. *Price v. Sacramento County*, 6 Cal. 254. See ASSUMPSIT, vol. 3, p. 372.

20. *Rhoda v. Alameda Co.*, 52 Cal. 350; *Dorsey v. Tuolumne County*, 1 Cal. Unrep. 456.

Splitting demand.—The familiar principle that a party having an entire demand cannot split it up into separate causes of action applies to actions on claims against counties equally with those against individuals.¹ If a claimant undertakes such a course, the judgment in the first suit is, when properly pleaded, a bar to the other.²

§ 114. Claims of Supervisors.—All claims against a county presented by members of the board of supervisors for per diem and mileage or other service rendered by them must be itemized and verified as other claims, and must state that the service has been actually rendered. And the statute requires the district attorney to pass on the legality of such claims.³ A claim of a supervisor for services allowed and paid without presentation to and indorsement by the district attorney is invalid, and the amount thereof may be recovered by the county. The reason for this special provision with respect to claims of supervisors is apparent, and it has been held that the statute has uniformity of operation within the meaning of the constitution. Authority is not conferred upon the district attorney to determine in what cases supervisors shall be paid for services; his duty as to the claim of a supervisor is merely to advise on its legality as presented, not to decide whether it shall be allowed as a matter of policy even if found to be legal. Moreover, his conclusion upon the question of legality is not final; the supervisor whose claim is rejected has still the right to sue the county thereon in the proper court.⁴

§ 115. Illegal Claims.—In view of the provisions of section 4005 of the Political Code⁵ a claim against a county

1. *Cooley v. County of Calaveras*, 121 Cal. 482, 53 Pac. 1075; *Zirker v. Hughes*, 77 Cal. 235, 19 Pac. 423. See *ACTIONS*, vol. 1, p. 369.

2. *Zirker v. Hughes*, 77 Cal. 235, 19 Pac. 423.

3. Pol. Code, § 4079.

4. *Solano County v. McCudden*, 120 Cal. 648, 53 Pac. 213, construing similar provision in County Government Act of 1893.

5. This section provides that "All contracts, authorizations, allowances, payments, and liabilities to pay,

based on an illegal contract is also illegal, and the board of supervisors has no jurisdiction to allow it.⁶ An attempted allowance by the board does not invest a claim with a validity which it did not theretofore possess.⁷ However, an injunction will not lie at the instance of a taxpayer to restrain the board from examining, auditing or ordering paid a claim on the ground that it is not a valid demand.⁸ The board in passing upon claims acts in a quasi-judicial capacity, and it must be presumed that it will, as duty requires, reject illegal demands.⁹ Moreover, if claims not legally chargeable to the county are allowed, neither the allowance nor the warrants drawn therefor create any legal liabilities.¹⁰ And, it has been said, "if illegal claims are allowed by the board against the county, it will be the duty of the auditor to refuse to draw warrants therefor; and if warrants are drawn, it will then be the duty of the treasurer to refuse to pay them."¹¹ And where a board of supervisors, acting within its jurisdiction, has illegally allowed a claim certiorari will not lie to set aside the proceedings.¹² A court

made or attempted to be made in violation of law, shall be absolutely void, and shall never be the foundation or basis of a claim against the treasury of such county. And all officers of said county are charged with notice of the condition of the treasury of said county, and the extent of the claims against the same."

6. *Harris v. Cook*, 119 Cal. 454, 51 Pac. 692; *Smeltzer v. Miller*, 113 Cal. 163, 45 Pac. 264; *Perry v. Ames*, 26 Cal. 372; *Keller v. Hyde*, 20 Cal. 593; *Jacks v. Taylor*, 24 Cal. App. 667, 142 Pac. 121. See supra, § 7, as to illegal contracts.

7. *Phelan v. San Francisco*, 6 Cal. 531; *Jacks v. Taylor*, 24 Cal. App. 667, 142 Pac. 121.

8. *McBride v. Newlin*, 129 Cal.

36, 61 Pac. 577; *Merriam v. Board of Supervisors*, 72 Cal. 517, 14 Pac. 137; *McCoy v. Briant*, 53 Cal. 247; *Linden v. Case*, 46 Cal. 171. See supra, § 97, as to enjoining illegal payments.

9. *McBride v. Newlin*, 129 Cal. 36, 61 Pac. 577.

10. *Linden v. Case*, 46 Cal. 171; *Trinity County v. McCammon*, 25 Cal. 117; *Branch Turnpike Co. v. Supervisors of Yuba County*, 13 Cal. 190; *People v. Supervisors of El Dorado County*, 11 Cal. 170. See supra, § 106.

11. *Linden v. Case*, 46 Cal. 171, per Belcher, J. See as to duties of auditor, supra, § 59. See as to duties of treasurer, supra, § 63.

12. *Andrews v. Pratt*, 44 Cal. 309. See CERTIORARI, vol. 4, p. 1040.

of equity, however, on the complaint of a taxpayer, will enjoin the payment of and cancel county warrants illegally drawn on the treasurer by order of the board.¹³

Personal liability of officers.—Section 4005a of the Political Code makes any officer liable to any person “damaged” by an illegal authorization of a claim to the extent of his “loss by reason of the nonpayment of his claim.” But this provision does not make an officer personally liable to one who never had a legal claim against the county. Nor is the officer in such case liable to the claimant’s assignee.¹⁴ If money is paid out on an illegal demand, even though allowed by the supervisors, the auditor drawing his warrant therefor, and the treasurer paying the demand, are personally responsible, if they act with knowledge of the illegality. The members of the board are themselves individually responsible for moneys willfully paid out without authority of law. They are trustees of the funds for certain purposes, and may not allow them to be applied to other purposes. They are not accountable for mere errors, but if they willfully appropriate money for a purpose not authorized by law, they are liable civilly and criminally.¹⁵

§ 116. Claims of Counties Against State.—An act approved March 9, 1893, provides that

“On the presentation of the claim of any county of this state, or treasurer thereof, to the state controller for commissions, charges, or fees fixed or directed to be allowed by law for the collection of state taxes, the said commissions, charges, or fees for which claim is made, not having been allowed by the state, and the same having been paid into the state treasury, thereupon the state controller shall, in the next settlement thereafter to be made with the treasurer of the county presenting such claim, allow to be

13. *Smeltzer v. Miller*, 113 Cal. 163, 45 Pac. 264; *Andrews v. Pratt*, 44 Cal. 309. See *supra*, § 97, as to enjoining illegal payments.

14. *Bank of Santa Cruz County v. Bartlett*, 78 Cal. 301, 20 Pac. 682.
15. *Merriam v. Board of Supervisors*, 72 Cal. 517, 14 Pac. 137.

retained out of any moneys then in the hands of such treasurer belonging to the state, the amount of such claim; provided, however, that the moneys thus retained shall be paid into the county treasury, and shall be the property of such county."¹⁶

This statute does not create or fix any fees or charges against the state, but merely provides for the allowance of fees and commissions which, having been paid into the state treasury, might be allowed in the next settlement of the state controller with the treasurer of any county presenting a claim therefor.¹⁷

X. ACTIONS.

§ 117. **Capacity to Sue and be Sued Generally.**—At common law, an action did not lie against a county,¹⁸ and the rule was the same in California until 1854, when the legislature passed a special statute authorizing counties to sue and be sued.¹⁹ Under that act counties were given the right of prosecuting and defending actions in the same manner as individuals.²⁰ As a county is a political subdivision of the state it cannot sue or be sued except where specially permitted by statute, and such permission can be withdrawn or denied at any time the legislature may think proper.¹ The people of a county are not a corporation, and are not recognized in law as capable of suing

16. Stats. 1893, p. 109; *County of Sacramento v. Colgan*, 114 Cal. 246, 46 Pac. 175.

17. *County of Yolo v. Colgan*, 132 Cal. 265, 84 Am. St. Rep. 41, 64 Pac. 403.

18. *Tyler v. Tehama County*, 109 Cal. 618, 42 Pac. 240; *Gilman v. Contra Costa County*, 8 Cal. 52, 68 Am. Dec. 290.

19. Act of May 4, 1854; *Gilman v. Contra Costa County*, 8 Cal. 52, 68 Am. Dec. 290.

20. *Solano County v. Neville*, 27 Cal. 465; *Placer County v. Astin*, 8 Cal. 303; *Price v. Sacramento County*, 6 Cal. 254; *Gilman v. County of Contra Costa*, 6 Cal. 670, holding that the act of May, 1854, applied as well to claims existing before its passage as those which arose afterwards.

1. *Sharp v. Contra Costa County*, 34 Cal. 284; *People v. Brooks*, 16 Cal. 11; *Hunsaker v. Borden*, 5 Cal. 288, 63 Am. Dec. 130.

or being sued.² Nor can boards of supervisors be sued in their official character, in ordinary common-law actions, for claims against the county they represent, without express statutory provision. A judgment obtained against a board in such a case is not a judgment against the county.³

The Political Code, in the enumeration of the powers of a county, includes the power "to sue and be sued."⁴ This is a general authority, and any restriction upon that power must be determined from the nature or character of the action brought, and by the further requirement that all claims against a county must be first presented to the board of supervisors for allowance, and that no action can be maintained without such presentation.⁵ The right to sue is not limited to torts, malfeasance, etc., but is given in every case of account.⁶ Thus, a county may maintain an action against a city to recover the amount of fines and forfeitures paid into the city treasury, but which should have been paid into the county treasury.⁷ Similarly, one county may maintain an action against another as for money had and received, in a proper case, after the presentation of its claim to the board of supervisors of the

2. *People v. Myers*, 15 Cal. 33. As to counties as corporations, see *supra*, § 3.

3. *Hastings v. City and County of San Francisco*, 18 Cal. 49, holding that the act of 1851 creating the board of supervisors of San Francisco county, and authorizing the board "to sue and defend on behalf of the county," did not authorize the board to bring suits on behalf of the county in its own name; nor did it render the board liable to be sued directly for a claim against the county.

4. Pol. Code, § 4003; *County of Sierra v. County of Nevada*, 155 Cal. 1, 99 Pac. 371 (stating the

right); *County of Sierra v. Butler*, 136 Cal. 547, 69 Pac. 418 (stating the right, and citing County Government Act, § 4); *Nash v. El Dorado County*, 11 Sawy. 86, 24 Fed. 252 (holding that a county may be sued on its bonds).

5. *Colusa County v. Glenn County*, 117 Cal. 434, 49 Pac. 457 (construing similar provision in § 4 of the County Government Act). See *supra*, § 105, as to necessity of presentation of claims.

6. *Price v. Sacramento County*, 6 Cal. 254 (construing similar provision in act of May, 1854).

7. *Los Angeles County v. City of Los Angeles*, 65 Cal. 476, 4 Pac. 453.

latter.⁸ However, a county cannot be sued except as specially authorized by statute; and general language creating new remedies or prescribing procedure does not authorize such an action.⁹

§ 118. **Parties.**—"The name of a county designated in the law creating it is its corporate name, and it must be designated thereby in all actions and proceedings touching its corporate rights, property and duties."¹⁰ Accordingly, in an action by a county the plaintiff is properly styled "The county of" the name specified; and a complaint is not subject to a demurrer for uncertainty in so styling a county plaintiff.¹¹ Proceedings to condemn land for a private road, being a county matter, may be brought in the name of the county.¹² So an action against supervisors to recover the amount of illegal claims allowed should be brought in the name of the county and the district attorney is the proper person to prosecute it.¹³ Like-

8. *Colusa County v. Glenn County*, 117 Cal. 434, 49 Pac. 457, construing § 4 of the County Government Act.

9. *Whittaker v. County of Tuolumne*, 96 Cal. 100, 30 Pac. 1016, holding that an action will not lie against a county under Code Civ. Proc., § 1050, for the purpose of determining an adverse claim which it is alleged the defendant makes against the plaintiff for a sum of money under an ordinance imposing a license tax upon persons engaged in certain businesses, which ordinance the plaintiff claims is void.

10. Pol. Code, § 4002.

11. *County of Sutter v. McGriff*, 130 Cal. 124, 62 Pac. 412.

12. *Monterey County v. Cushing*, 83 Cal. 507, 23 Pac. 700, citing *Humboldt County v. Dinsmore*, 75 Cal. 604, 17 Pac. 710; *Tehama*

County v. Bryan, 68 Cal. 57, 8 Pac. 673; *Butte County v. Boydston*, 64 Cal. 110, 29 Pac. 511. See EMINENT DOMAIN.

13. But if a taxpayer has the right, in the absence of an express statutory authorization, to prosecute the action, the complaint must then allege facts showing a refusal or neglect on the part of the district attorney to institute it. *Hedges v. Dam*, 72 Cal. 520, 14 Pac. 133. See *Keith v. Hammel*, 29 Cal. App. 131, 154 Pac. 871, stating that the effect of the provisions of the charter of Los Angeles county and of the statutes is, not only that the conduct of actions in which the county is a party is committed to the charge of public officers, but it is the intention that the county shall be a party to actions and proceedings wherein the county "is concerned."

wise, an action to recover money belonging to the general fund of the county may be brought in the name of the county.¹⁴ A county is the proper party plaintiff to object to a contract made by the board of supervisors for the erection of a public building. But if county officers exceed their powers, or are acting, or about to act, with gross injustice and bad faith and thereby subject taxpayers to unauthorized burdens, perhaps, it has been said, one or more taxpayers might, under peculiar circumstances, bring suit in equity to prevent irreparable injury.¹⁵ In an action to recover money paid under protest to a county tax collector on a levy of taxes for the improvement of highways in a road division of the county, the county is the only proper party defendant, where the tax is essentially a county tax for a special purpose.¹⁶ Where a board of supervisors consists of three members, at least two of them should be made defendants, in an action brought to enjoin the board from purchasing property for the use of the county.¹⁷ An act which authorizes the board of supervisors to sue and defend on behalf of the county does not authorize the board to bring suit on behalf of the county in its own name; nor does it render the board liable to be sued directly for a claim against the

14. *Solano County v. Neville*, 27 Cal. 465.

In an application for a writ of mandate to compel a board of supervisors to levy a tax, the county into whose treasury the money intended to be raised by the tax will go may be the relator; *People v. Alameda County Supervisors*, 26 Cal. 641.

15. *People v. Myers*, 15 Cal. 33, stating that the people of a county are not a corporation, and cannot sue or be sued.

Provision is made in the Code of Civil Procedure for actions against county officers, among others, to re-

strain any illegal expenditure of county funds, or waste of county property. Code Civ. Proc., § 526a. See PUBLIC OFFICERS.

16. *Anaheim Sugar Co. v. County of Orange*, 181 Cal. 212, 183 Pac. 809.

17. In such case, if the complaint does not aver that at least two members of the board are about to make an order for the purchase and for a warrant to be drawn on the treasury for payment, it does not state facts sufficient to authorize an injunction to be granted. *Trinity County v. McCammon*, 25 Cal. 117.

county.¹⁸ Where an assignee of a claim has assigned it for collection, the assignee is the "real party in interest" in mandamus proceedings to compel the county auditor to draw a warrant.¹⁹

§ 119. Actions Maintainable by Counties.—The power of a county "to sue and be sued" is not limited to those cases wherein the county is specifically given the right, but includes authority to maintain actions with respect to all matters placed under its control.²⁰ Thus the special interest which a county has in the preservation of county roads authorizes resort to such remedial measures as will preserve them to the use of the public.¹ Similarly, a county as the owner of property injured by the deposit of mining debris may, in a proper case, maintain an action to enjoin the deposit.² The fact that a nuisance complained of is a public nuisance does not render a county incompetent to sue to enjoin it as a private nuisance where special injury to the county results therefrom.³

The right of a county to sue for the amount of a license tax fixed by a valid ordinance is not dependent upon the validity of a part of such ordinance creating the office of tax collector and appointing a person to fill it; and the fact that the ordinance prescribes that suit shall be

18. *Hastings v. San Francisco*, 18 Cal. 49.

19. *First Nat. Bank v. Tyler*, 21 Cal. App. 791, 132 Pac. 1053.

20. *County of Sierra v. Butler*, 136 Cal. 547, 69 Pac. 418. See *Yuba County v. Adams*, 7 Cal. 35, holding that a county may intervene to enforce the lien of a tax on property in custody of the law, and creditors having no lien upon the property cannot deny the rights of the interveners.

1. *County of Sierra v. Butler*, 136 Cal. 547, 69 Pac. 418, distinguishing *San Benito County v. Whitesides*,

51 Cal. 416, *Bailey v. Dale*, 71 Cal. 34, 11 Pac. 804, and *Hall v. Kauffman*, 106 Cal. 451, 39 Pac. 756, which cases held, construing pertinent provisions of the Political Code, that an action to abate an obstruction to a highway must be brought by the road commissioner. See HIGHWAYS.

2. *County of Yuba v. Kate Hayes Min. Co.*, 141 Cal. 360, 74 Pac. 1049.

3. *County of Yuba v. Kate Hayes Min. Co.*, 141 Cal. 360, 74 Pac. 1049; *Yolo County v. City of Sacramento*, 36 Cal. 193. See NUISANCES.

brought in the name of the county, by direction of the license tax collector named therein, and that the appointment of the tax collector under the ordinance is void, does not deprive the county of its general power to sue and enforce payment of the license.⁴ But when a county ordinance imposing license taxes provides that actions to collect such taxes shall be in the name of the people, an action cannot be brought in the name of the county as the real party in interest, since the failure to take out a license does not make the defendant liable to the county in an ordinary action of debt.⁵

Inasmuch as a county is but a department of the state, exercising certain power belonging to the state,⁶ it follows that in an action having relation to governmental functions, the county represents the authority of the state; the rights of the people are thereby put in issue, and the state is bound by the result of the litigation, if not collusive.⁷ A board of supervisors has the express power "to direct and control the prosecution and defense of all suits to which the county is a party."⁸ Hence, as a general rule, all actions brought by, or prosecuted on behalf of, a county must be brought by authority of the board.⁹ In any civil action or proceeding wherein the county is a

4. *San Luis Obispo County v. Greenberg*, 120 Cal. 300, 52 Pac. 797; *San Luis Obispo County v. Jack*, 120 Cal. 307, 52 Pac. 1132; *County of El Dorado v. Meiss*, 100 Cal. 268, 34 Pac. 716.

5. *County of Monterey v. Abbott*, 77 Cal. 541, 18 Pac. 113, 20 Pac. 73. But see *Mendocino Co. v. Bank of Mendocino*, 86 Cal. 255, 24 Pac. 1002, (holding that the supervisors had power, under the County Government Act, Stats. 1883, p. 299, to pass an ordinance fixing licenses for the transaction of business and providing that suit to collect the license tax should be brought in

the name of the county). And see LICENSES.

6. See *supra*, § 3.

7. *County of Sierra v. Butler*, 136 Cal. 547, 69 Pac. 418. See TAXATION, as to actions by county against the state or state officers for money alleged to be due for services rendered in connection with taxes.

8. See Pol. Code, § 4041, subd. 16.

9. *Contra Costa County v. Soto*, 138 Cal. 57, 70 Pac. 1019; *Ventura County v. Clay*, 119 Cal. 213, 51 Pac. 189; *Keith v. Hammel*, 29 Cal. App. 131, 154 Pac. 871 (under charter of Los Angeles County).

party plaintiff or defendant, no bond, written undertaking or security can be required of the county.¹⁰

§ 120. Recovery of Money Unlawfully Paid.—As has been seen, the general rule is that actions prosecuted in behalf of a county must be brought by authority of the board of supervisors.¹¹ Nevertheless, the district attorney has by statute a specified limited power given him with reference to the institution of suits in the name of the county to recover money unlawfully paid.¹² The constitutionality of the section of the code containing such provision has been upheld.¹³ It is evident that the language of the statute means that the board, without authority of law, must have ordered money paid, and that it must have been actually paid before an action may be maintained by the district attorney. The provision has no application to a case where the board did not order the

10. Code Civ. Proc., § 1058; San Francisco Law etc. Co. v. State of California, 141 Cal. 354, 74 Pac. 1047; Code Civ. Proc., § 529 (upon injunction).

11. *Supra*, § 119.

12. Pol. Code, § 4005b.

13. *County of Placer v. Freeman*, 149 Cal. 738, 87 Pac. 628 (action to recover back money illegally paid to supervisor, as ex-officio road commissioner, for traveling and personal expenses); *County of Contra Costa v. Soto*, 138 Cal. 57, 70 Pac. 1019. And see *County of Santa Barbara v. Rucker*, 35 Cal. App. 676, 170 Pac. 860, holding that the official bond of a supervisor and road commissioner given for the faithful performance by him of all the official duties required by law is broad enough to include his liability to the county for collecting compensation in excess of that to

which he is legally entitled, so that the sureties on the bond may be joined with him as parties defendant.

The provision which allows the county to recover from an officer to whom money has been paid as salary or fees without authority of law twenty per cent damages for the use thereof is not unconstitutional as depriving a person of property without due process of law. *County of Orange v. Harris*, 97 Cal. 600, 32 Pac. 594, holding that a tax collector who has collected taxes under Pol. Code, § 3770, and retained one-half of the amount under an order of the board of supervisors allowing the same, is liable to an action by the district attorney in the name of the county, under County Government Act, § 8, to recover the money so retained with twenty per cent damages for the use thereof.

money paid out which it is sought to recover. Thus where money has been collected for the supervisors under contract with them for a percentage, the district attorney has no authority to prosecute an action in the name of the county to recover the amount of such percentage without a previous order of the board.¹⁴

Of course a claim allowed by the supervisors and paid by the county cannot be recovered unless it was allowed and paid "without authority of law."¹⁵ But money paid "without authority of law" means money paid out by the board of supervisors upon claims based upon a subject matter not within the scope of its powers. The action of the board in allowing a claim within its jurisdiction is a conclusive adjudication.¹⁶ In such case, the order of the board constitutes "authority of law," and the amount paid thereunder cannot be recovered.¹⁷ However, an order apparently within the jurisdiction of the board is without authority of law if it is a mere cloak for a plan to expend money in defiance of the law.¹⁸

Inasmuch as the statute only applies to payments which the board has no general power to make it does not affect the principle of equitable estoppel as applied to payments made within the scope of the general powers of the board, and by virtue of which the county has acquired a benefit or an interest of which it retains the enjoyment.¹⁹ Like-

14. *Contra Costa County v. Soto*, 138 Cal. 57, 70 Pac. 1019.

15. *County of Alameda v. Evers*, 136 Cal. 132, 68 Pac. 475; *County of Santa Cruz v. McPherson*, 133 Cal. 282, 65 Pac. 574.

16. See *supra*, § 106.

17. *County of Santa Cruz v. McPherson*, 133 Cal. 282, 65 Pac. 574; *Sacramento County v. Southern Pac. Co.*, 127 Cal. 217, 59 Pac. 568, 825.

18. *County of Tehama v. Sisson*, 152 Cal. 167, 92 Pac. 64, holding that an order for the payment of

indebtedness incurred in one year out of the revenue of the succeeding year is an order made without authority of law, and that it is none the less without authority of law because it is given the guise and form of a purchase of property where no property was in fact purchased.

19. *Sacramento County v. Southern Pac. Co.*, 127 Cal. 217, 59 Pac. 568, 825, holding that where a board of supervisors has general power to construct, buy or rent a bridge,

wise, an action by a county to recover money paid as the purchase price of property with penalty, the complaint in which shows that the supervisors had paid for the property, and that the county retains the use of it, is untenable. It cannot be held, it has been said, that the legislature intended to discourage common honesty as applied to public corporations.²⁰ Furthermore, the statute contemplates an action brought against the recipient of funds illegally paid; it has no application to one brought upon the bond of the county treasurer for payment of illegal claims, and the district attorney has no authority to bring such an action unless so ordered by the supervisors.¹

The district attorney is vested with a discretion in determining whether, in a particular instance, he should bring an action under the statute, which discretion a court cannot control by mandamus.² The statutory remedy is plain, speedy and adequate, available on complaint to the district attorney, and is sufficient to defeat an application by a taxpayer for a writ of review in his own name to annul a claim which has been illegally paid, it not appearing that the district attorney failed or refused to perform his duty. The interest of a taxpayer in the recovery of money wrongfully paid does not entitle him to bring suit in his own name until after the district attorney has refused to act.³

or to purchase an exclusive right of way over a bridge, it may be equitably estopped to recover back money paid therefor, which has secured to it a benefit, though the forms of law were not complied with in making the contract under which it was paid.

20. *Riverside County v. Yawman & Erbe Mfg. Co.*, 3 Cal. App. 691, 86 Pac. 900, per Allen, J. See MUNICIPAL CORPORATIONS.

1. *Ventura County v. Clay*, 119 Cal. 213, 51 Pac. 189.

2. *Boyne v. Ryan*, 100 Cal. 265, 34 Pac. 707.

3. *Burr v. Board of Supervisors*, 96 Cal. 210, 31 Pac. 38, cited with approval in *Keith v. Hammel*, 29 Cal. App. 131, holding that a resident property owner and taxpayer has no right to maintain an action to compel the sheriff to pay into the treasury certain fees alleged to have been wrongfully appropriated by him, in the absence of a showing that the proper county officers have refused to prosecute such a proceeding.

§ 121. **Actions Against Counties.**—Authority to sue a county is given by statute in general terms,⁴ and there is no limitation upon this right except that all claims against a county must first be presented to the board of supervisors for allowance, and that no action can be maintained thereon without such presentation.⁵ Otherwise the right to sue exists in every case of tort, malfeasance and account.⁶ It extends to cases where money belonging to another party has come into the hands of a county and which the county in good conscience ought not to retain.⁷ But where a county, as such, has no interest in particular funds in the county treasury, nor any control over the same, an action will not lie against it to recover taxes paid into such funds and held by its officials, not for the benefit of the county nor subject to its disposition, but for the use of, and to be disbursed by, a distinct organization—such as a local district within the county.⁸ Assumpsit is a proper remedy on an account against a county which has been rejected by the board of supervisors.⁹

§ 122. **Limitation of Actions.**—Actions brought by counties must be commenced within the periods prescribed by law for actions generally, unless a different limitation is

4. Pol. Code, § 4003.

5. Colusa County v. Glenn County, 117 Cal. 434, 49 Pac. 457. See supra, § 105, as to necessity of presentation.

6. Price v. County of Sacramento, 6 Cal. 254, construing act of 1854. See Oroville & V. R. Co. v. Plumas County Supervisors, 37 Cal. 354, for a case in which action was brought against a county to compel it to subscribe to the stock of a railroad company.

7. Colusa County v. Glenn County, 117 Cal. 434, 49 Pac. 457. And see Trower v. City and County of San

Francisco, 157 Cal. 762, 109 Pac. 617, citing Trower v. City and County of San Francisco, 152 Cal. 479, 15 L. R. A. (N. S.) 183, 92 Pac. 1025.

8. Elberg v. County of San Luis Obispo, 112 Cal. 316, 41 Pac. 475, 44 Pac. 572 (construing § 3819, added to the Political Code in 1893). And see Pacific Mut. Life Ins. Co. v. San Diego County, 112 Cal. 314, 41 Pac. 423, 44 Pac. 571 (also construing Pol. Code, § 3819).

9. Price v. Sacramento County, 6 Cal. 254. See PROCESS, as to service of summons on county.

prescribed.¹⁰ The same rule applies to actions brought against counties, but the time within which actions on claims which have been rejected by boards of supervisors must be commenced,¹¹ and for injuries to property caused by mobs or riots,¹² and in the case of certain other actions is specifically provided for.¹³ A statute limiting the time within which an action on a claim must be commenced is applicable to the state, or an arm of the state,—as, for example, the state board of health,—even where the cause of action arose in the exercise of its governmental functions.¹⁴ The fact that all the supervisors of a county resigned for the purpose of evading service in a suit upon county bonds does not stop the running of the statute, since by section 350 of the Code of Civil Procedure, no service is necessary to constitute the commencement of a suit. Suit is commenced within the meaning of that section so as to stop the running of the statute by the filing of the complaint.¹⁵

§ 123. Venue.—Section 394 of the Code of Civil Procedure makes full provision for the place of trial of actions and proceedings to which a county or a city and county is a party. This section, as amended in 1915, is not unconstitutional, as class legislation.¹⁶ The language

10. See Code Civ. Proc., §§ 312 and 345. See LIMITATION OF ACTIONS.

11. See supra, § 113.

12. See supra, § 91.

13. See Pol. Code, § 3819, as to limitation of actions against counties for the recovery of taxes paid under protest. And see TAXATION. See Pol. Code, § 3457, as to limitation of actions on warrants of reclamation district. And see WATERS.

14. State Board of Health v. Alameda County, 42 Cal. App. 166, 183 Pac. 455 (construing Code Civ. Proc., § 345).

15. Nash v. El Dorado County, 11 Sawy. 86, 24 Fed. 252.

16. Mono Power Co. v. Los Angeles, 33 Cal. App. 675, 166 Pac. 387. And see Yuba Co. v. North America etc. Min. Co., 12 Cal. App. 223, 107 Pac. 139, holding that Code Civ. Proc., § 394, is not special legislation "regulating the practice of courts of justice," or "providing for changing the venue of actions," because it provides a different rule in the case of nonresident defendants from that which applies to residents. Legislation authorizing a change of venue in the case of non-

of that portion of the section which applies to an action or proceeding by a county against a corporation doing business in another county is mandatory, and the action or proceeding must, on motion of either party, be transferred to a county other than the plaintiff and other than that in which the defendant is doing business. While the corporation has the right to demand a transfer, no right is given to it to have a transfer to any particular county. The selection of the county to which the case is to be transferred is left to the discretion of the court. Where the defendant has designated alternative counties for the transfer, such designation will be disregarded as surplusage, leaving only the demand and motion for change of venue as contemplated by the statute.¹⁷ A motion for change of place of trial under this section need not be made at the time when the defendant answers or demurs, nor need it be accompanied by an affidavit of merits and a written demand for change of place of trial, as required by section 396 of the Code of Civil Procedure.¹⁸ The motion may be made by defendants who have been served with summons and have appeared and demurred and filed an affidavit of merits; and fictitious defendants not served with summons are not parties to be considered upon the motion.¹⁹ In an action by a county against the county treasurer and the sureties on his bond, upon a motion to change the place of trial, by the substituted administrator of one of the sureties, such administrator must prove that none of the defendants resided in the county at the time of the commencement of the action.²⁰

resident defendants is not in any just sense special legislation within the prohibition of the constitution.

17. *Yuba Co. v. North America etc. Min. Co.*, 12 Cal. App. 223, 107 Pac. 139, decided prior to amendment of 1915. See Code Civ. Proc., § 394, as amended in 1921. See CORPORATIONS, ante, p. 118 et seq.

18. *Mono Power Co. v. Los Angeles*, 33 Cal. App. 675, 166 Pac. 387.

19. *Yuba Co. v. North America etc. Min. Co.*, 12 Cal. App. 223, 107 Pac. 139.

20. *County of Modoc v. Madden*, 136 Cal. 134, 68 Pac. 491, holding also that the fact that the other sure-

§ 124. *Pleading—Actions by counties.*—A complaint in an action by a county must, of course, allege facts necessary to constitute a cause of action.¹ A complaint in an action by a county against a county treasurer to recover money alleged to have been paid out by him on a warrant issued for a claim on which the county was not liable is not demurrable because it does not set out the contents of the warrant, where from the facts alleged its illegality must have been apparent on its face.² The amendment of 1907 to section 446 of the Code of Civil Procedure provides that when a county, or any officer of a county in his official capacity is plaintiff, the complaint need not be verified. Prior to this amendment it was held that where a

ties made parties defendant, some of whom resided in the county of the venue, had settled the judgment rendered against them in another action brought by the people upon the same cause of action, against the same parties, and that the county treasurer had absconded from the county before suit, cannot sustain the motion to change the venue, where it appears that such sureties had expressly reserved a right of contribution and that the property, real and personal, of the absconding treasurer, who had resided in the county, and whose family still resided there, and who was served by publication of summons, was held under attachment prior to the motion. See *Santa Rosa v. Fountain Water Co.*, 138 Cal. 579, 71 Pac. 1123, 1136, holding that § 394, as amended in 1896, refers only to "actions," as defined in § 22 of the same code, and not "special proceedings," as defined in the following section. But see *Yuba County v. North America etc.* Min. Co., 12 Cal. App. 223, 107 Pac.

139, decided prior to the amendment of 1915, adding the words "or proceeding," holding that an action by a county brought in the superior court therein, against nonresidents to enjoin them from depositing mining debris in a river, to the injury of its property, is not a special proceeding, but is an action in equity, within the meaning of § 394.

1. *County of San Joaquin v. Budd*, 96 Cal. 47, 30 Pac. 967 (holding that a complaint in an action by a county to recover possession of rooms in the courthouse which alleges facts showing the plaintiff's right of possession of the courthouse and of the rooms therein described, and that the defendants wrongfully withhold the possession, states a cause of action). *County of San Diego v. County of Riverside*, 125 Cal. 495, 58 Pac. 81, which involved the validity of a complaint in an action by one county against another for railroad taxes collected by the defendant county.

2. *Ventura County v. Clay*, 114 Cal. 242, 46 Pac. 9.

county does not verify its complaint it is not necessary that the answer be verified.³

Actions against county.—In actions brought against counties, the usual rules for testing the sufficiency of the complaint as a statement of a cause of action have frequently been applied.⁴ Where the action is upon a contract, a denial must, in accord with general rules, be sufficient to put the plaintiff on proof of the contract.⁵ Where suit is brought on a claim against a county, the plaintiff must aver all the matters required by the statute in relation to his presentation and rejection of the claim; a mere allegation that it was duly presented and rejected is not sufficient.⁶ But where the complaint sets forth all of the proper steps taken to present a duly verified and itemized claim, and there is attached a copy of the verified itemized claim presented, the complaint is sufficient in that respect.⁷

3. *Monterey County v. Cushing*, 83 Cal. 507, 23 Pac. 700.

4. *Johnson v. County of Yuba*, 103 Cal. 538, 37 Pac. 528 (holding that in an action against a county to recover on a claim, it is not a ground of demurrer that it is not alleged that there was money in the treasury to meet the demand, nor that the allowance would not exceed the limit of liability which the county was authorized to contract for the fiscal year, but such matter, if it exists, is to be set up in defense). *Miner v. Solano County*, 26 Cal. 115 (action by justice of the peace for services); *Lincoln v. Colusa County*, 28 Cal. 662 (action for damages sustained by location of highway).

5. *Murphy v. Napa County*, 20 Cal. 497. See *CONTRACTS*, vol. 6, p. 238.

6. *Rhoda v. Alameda County*, 52

Cal. 350; *Dorsey v. Tuolumne County*, 1 Cal. Unrep. 456. See *supra*, § 107 et seq. A complaint alleging presentation of a claim and that the accompanying affidavit contained the statement that the claim "is true and correct, and that the same is due and owing from said county to deponent," substantially complies with the statute which requires presentation of a claim to the board of supervisors, together with an affidavit, "that the amount claimed is justly due," as a condition precedent to the right to maintain an action therefor. *Rhoda v. Alameda County*, 69 Cal. 523, 11 Pac. 57.

7. *Millard v. County of Kern*, 147 Cal. 682, 82 Pac. 329. And see *Sittig v. Raney*, 35 Cal. App. Dec. 789, 200 Pac. 824, holding that a variance between a claim as presented to and allowed by the board

§ 125. Judgment Against County.—A judgment against a county has the force and effect of an audited claim, in so far that it is no longer open to contestation, and it is the duty of the supervisors to allow it as an audited claim, on presentation of a certified copy of the judgment, together with the costs adjudged if the judgment was for more than the board allowed; but if no more is recovered than the board allowed, the board must pay no more than was originally allowed.⁸ If the board refuses to allow the judgment when properly presented, it can be compelled by mandamus to perform its duty in this respect. It has no discretion in the premises; and after the judgment is thus allowed, it stands upon precisely the same footing as other audited demands against the county, and is thenceforth subject to all the conditions and limitations applicable to other audited demands, and payment may be enforced in the same manner, but not otherwise.⁹

Execution and payment.—When a money judgment is recovered against a county on a claim, no execution can issue on such judgment, the only office of which is to establish the claim in so conclusive a manner that it can no longer be contested.¹⁰ When the status of the claim is thus established, the only remedy for enforcing it is to

for "rock crushed and hauled and spread on Orndorff street," and the complaint in a mandamus proceeding to compel the auditor to issue a warrant for the claim, describing the claim with the words "and spread" eliminated, is not fatal, where it appears that both the claimant and the road commissioner, who authorized the work, understood the signification of the word "spread" as having reference to the method of unloading the trucks.

8. Pol. Code, § 4078. See *Alden v. County of Alameda*, 43 Cal. 270, construing act of March 20, 1855, relating to boards of supervisors,

and providing for the disposition of claims against counties.

9. *Alden v. County of Alameda*, 43 Cal. 270; *Sharp v. Contra Costa County*, 34 Cal. 284. And see *Smith v. Broderick*, 107 Cal. 644, 48 Am. St. Rep. 167, 40 Pac. 1033; *People v. City and County of San Francisco Supervisors*, 21 Cal. 668.

10. *Alden v. County of Alameda*, 43 Cal. 270; *Emeric v. Gilman*, 10 Cal. 404, 70 Am. Dec. 742, wherein the court considered the duty of supervisors as to the application of funds and the levy of taxes to pay a judgment.

present the judgment to the supervisors for allowance as an audited claim.¹¹

In a proceeding by mandamus to compel supervisors to "allow and pay" a judgment, a defense that payment will result in incurring an indebtedness and liability exceeding the income of the county for the year cannot be interposed. If such a defense had existed, the proper place to interpose it would have been in the action in which the judgment was rendered. However, the court in such a proceeding should order the board to allow the judgment, but not direct its payment.¹² An execution levy upon a county's revenues in the hands of the treasurer is illegal and void.¹³ Nor is the private property of an inhabitant of a county liable to seizure and sale on execution for the satisfaction of a judgment recovered against the county.¹⁴

11. *Alden v. County of Alameda*, 43 Cal. 270, holding that where a statute declares that no person shall sue for any demand without first presenting the claim to the board, the language is sufficiently comprehensive to include a cause of action founded on a judgment, which is itself but an adjudicated claim.

Where, subsequent to the accruing of a claim against a county, an act was passed authorizing suits to be instituted on rejected claims, it has been held that a judgment under the act had the effect only of converting a disputed into an audited claim, and the state, by reason of

her sovereignty, still held control of the question of payment as to all its incidents of time, mode and measure. The statute allowing the county to be sued does not give a vested right to a remedy for enforcement of the judgment. *Sharp v. Contra Costa County*, 34 Cal. 284.

12. *Johnson v. Supervisors of Sacramento County*, 65 Cal. 481, 4 Pac. 463.

13. *Gilman v. County of Contra Costa*, 8 Cal. 52, 68 Am. Dec. 290.

14. *Emerie v. Gilman*, 10 Cal. 404, 70 Am. Dec. 742. See *COSTS*, ante, p. 272, as to how costs against county must be paid.

(B. R.)

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See *ASSUMPSIT*, vol. 3, p. 372; *INDICTMENTS AND INFORMATIONS*; *PLEADING*.

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A. IN GENERAL.

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§ 1. **Scope of Article.**—This article treats of the nature of courts, their jurisdiction and powers, the times and places of holding their sessions, their records, the regulation of their practice and procedure, the method of arriving at conclusions and the extent to which courts are governed by precedent. It also discusses the courts of California in particular, their organization and jurisdiction. The reader is referred to other articles for treatment of questions relating to judges¹ and clerks of courts² in their individual capacity as distinguished from the courts in which they serve; matters relating to United States courts,³ state court of impeachment,⁴ probate courts,⁵ justices of the peace, and small claims courts,⁶ courts-martial,⁷ matters peculiar to criminal courts,⁸ and the presumption as to the regularity of proceedings of courts upon collateral attack,⁹ or on appeal,¹⁰ or review.¹¹ The subjects of juries and trials are also given separate treatment.¹² Other matters of more or less relevancy discussed elsewhere include the nature of judicial functions,¹³ the entire subject of *res judicata*,¹⁴ the jurisdiction of certain tribunals, or officers, such as arbitrators,¹⁵ notaries public,¹⁶ venue,^{16a} and such questions as arise with refer-

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| 1. See JUDGES. | 11. See CERTIORARI, vol. 4, p. 1015. |
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| 5. See EXECUTORS AND ADMINISTRATORS; WILLS. | 15. ARBITRATION AND AWARD, vol. 3, p. 35 et seq., as to the jurisdiction of arbitrators. |
| 6. See JUSTICES OF THE PEACE. | 16. See ACKNOWLEDGMENTS, vol. 1, p. 240, as to jurisdiction of notaries to take acknowledgments; and see NOTARIES. |
| 7. See MILITARY. | 16a. See VENUE. |
| 8. See CRIMINAL LAW; and specific criminal titles. | |
| 9. See JUDGMENT. | |
| 10. See APPEAL AND ERROR, vol. 2, p. 884. | |

ence to jurisdiction in specific topics.¹⁷ While the subject of the records of courts and their control over them is treated in this article,¹⁸ matters pertaining to the record on appeal are considered under separate headings.¹⁹ A separate article also is devoted to the rules and practice where money is deposited in court.^{19a}

§ 2. Definitions.—A court is a tribunal presided over by one or more judges, for the exercise of such judicial power as has been conferred upon it by law. Blackstone, following Coke, defines it as “a place where justice is judicially administered.”²⁰ The term “court,” as used in the Code of Civil Procedure, means sometimes the place where the court is held, sometimes the tribunal itself, and sometimes the individual presiding over the tribunal, and

17. See the following: ACCOUNTS AND ACCOUNTING, vol. 1, p. 168 et seq.; ADOPTION, vol. 1, p. 424 et seq.; AFFIDAVITS, vol. 1, p. 661, as to their territorial limit of jurisdiction; ALIMONY AND SEPARATE MAINTENANCE, vol. 1, p. 949 et seq., as to jurisdiction over person of the husband; ASSOCIATIONS, vol. 3, p. 354 (as to jurisdiction of courts over unincorporated associations); ATTACHMENT, vol. 3, pp. 429, 464, 469; ATTORNEYS AT LAW, vol. 3, p. 590 (as to jurisdiction over the admission of attorneys to practice law), and p. 720 et seq. (as to jurisdiction in disbarment proceedings); BANKRUPTCY, vol. 4, pp. 49, 65, 67 (as to federal courts), and pp. 51, 52, 63, 66 et seq. (as to state courts); BOUNDARIES, vol. 4, p. 442 et seq., as to jurisdiction in boundary matters; CANCELLATION OF INSTRUMENTS, vol. 4, p. 760 et seq.; CERTIORARI, vol. 4, p. 1022 et seq.; QUIETING TITLE, as to jurisdictional matters—actions to de-

termine adverse claims to real property; INJUNCTIONS; RECEIVERS, etc.

18. See *infra*, § 26 et seq.

19. See APPEAL AND ERROR, vol. 2, p. 482 et seq., as to records on appeal in civil cases; and see CRIMINAL LAW as to records on appeal in criminal cases.

19a. See FUNDS AND DEPOSITS IN COURT.

20. *Ex parte Giambonini*, 117 Cal. 573, 49 Pac. 732 (holding that the first essential of jurisdiction is a court having legal cognizance of the question, and that a court which is unconstitutional has no jurisdiction whatever); *Von Schmidt v. Widber*, 99 Cal. 511, 34 Pac. 109. See, also, *Chinn v. Superior Court*, 156 Cal. 478, 105 Pac. 580, where it is said that courts are tribunals which exercise functions of a strictly judicial character; and *People v. Veuve*, 2 Cal. Unrep. 313, 3 Pac. 862, to the same effect as *Ex parte Giambonini*, *supra*.

in many cases is used synonymously, as well as interchangeably, with "judge."¹

The presence of the judge, or a competent number of them, and the performance by judges of some public act indicative of a design on their part to exercise judicial functions at the time and place appointed by law, are a prerequisite to the legal existence of a court.² It is in view of this principle that the code makes provision for adjournments of court by the sheriff or clerk, from day to day, where the judge does not attend.³

There is no provision, however, either in the constitution or by statute, which requires the presence of any other officer than the judge to constitute a court or to authorize the transaction of judicial business,⁴ and, therefore, whenever a judge of the superior court is present at the place designated for the transaction of judicial business, and there assumes to transact such business, his acts may be considered as the acts of the court of which he is a judge. Accordingly, an order made by a judge of the superior court at the place designated for holding court, and in the exercise of his judicial functions as a court, is an order of court.⁵

4. *Von Schmidt v. Widber*, 99 Cal. Cal. 511, 34 Pac. 109. See *Brewster v. Ludekins*, 19 Cal. 162, to the same effect under acts prior to the adoption of the code. And see *Oaks v. Rodgers*, 48 Cal. 197, where it is held that a statute requiring an oath to be administered by a court or judge is satisfied by an administration by the clerk in open court under the direction of the judge. See *infra*, § 3, for distinction between court and judge.

2. *People v. Sanchez*, 24 Cal. 17; *People v. Barbour*, 9 Cal. 230; *People v. Ah Chung*, 5 Cal. 103.

3. See Code Civ. Proc., § 139. And see the following cases under acts prior to the adoption of the code; *People v. Ah Ying*, 42 Cal. 18; *Bates v. Gage*, 40 Cal. 183; *People v. Sanchez*, 24 Cal. 17; *Thomas v. Fogarty*, 19 Cal. 644.

4. *Von Schmidt v. Widber*, 99 Cal. 511, 34 Pac. 109. See, however, *People v. Sanchez*, 24 Cal. 17, where Bacon's Abridgment is quoted to the effect that a clerk is necessary.

5. *Von Schmidt v. Widber*, 99 Cal. 511, 34 Pac. 109.

§ 3. Distinction Between Court and Judge.—While a judge is essential to a court,⁶ the judge of a court is not the court.⁷ A court is an incorporeal entity, distinct from the persons of the officers through whom its business is conducted. The existence of a court does not depend upon the vacancy or incumbency of the officers through which it is accustomed to act. If all the offices connected with a court should become vacant, and the court thereby even become unable for the time to discharge its functions, it would not merely for that reason become disestablished or displaced from its position in the judicial system.⁸ Upon the same theory, a court comes into existence immediately upon the taking effect of a constitutional provision or statute establishing it, without regard to the appointment of any person as justice thereof.⁹

§ 4. Classification—Inferior Courts.—In California, the courts of justice are: the court of impeachments; the supreme court, the district courts of appeal, the superior court, the justices' courts, the police courts, and such other inferior courts as the legislature may establish in any incorporated city or town, or city and county.¹⁰

“Inferior courts” are those whose jurisdiction is limited and special and whose proceedings are not according to the course of the common law.¹¹ These include justices'

6. See *supra*, § 2. And see JUDGES.

7. *Spencer Creek Water Co. v. Vallejo*, 48 Cal. 70. See JUDGES.

8. *Ex parte Stratman*, 39 Cal. 517.

9. *Harrison v. Colgan*, 148 Cal. 69, 82 Pac. 674.

10. Const., art. VI, § 1. See Code Civ. Proc., § 33, which also enumerates the courts but has not been amended so as to include the district court of appeal. See *Smith v. Andrews*, 6 Cal. 652, for enumera-

tion of courts of record prior to the enactment of the present code; and *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742, where in the concurring opinion of Sawyer, J., it is said that the classes of courts of record and not of record are frequently designated “superior” and “inferior” courts. See *infra*, § 49 et seq., as to superior courts, and *infra*, § 59 et seq., as to inferior courts. See *infra*, § 5, as to courts of record.

11. *Ex parte Kearny*, 55 Cal. 212; *Smith v. Andrews*, 6 Cal. 652.

courts,¹³ police courts,¹³ municipal courts and recorders' courts,¹⁴ and such other inferior courts as the legislature may from time to time establish.¹⁵ The only inherent difference ordinarily recognized between superior and inferior courts is that there is a presumption in favor of the validity of the judgments of the former, none in favor of those of the latter, and that a superior court may be shown not to have had power to render a particular judgment by reference to its record.¹⁶ But when a court acts by virtue of a special statute conferring jurisdiction in a certain class of cases, it is a court of inferior or limited jurisdiction for the time being, no matter what its ordinary status may be.¹⁷ And if at a later time its acts are shown to have been in excess of the power conferred upon it or without the limits of this special jurisdiction, such acts are nugatory and have no binding effect, even upon those who have invoked its authority or submitted to its decision.¹⁸ The limitations of the statute in such case apply both as to the conditions under which the jurisdiction may be in-

12. *Chinn v. Superior Court*, 156 Cal. 478, 105 Pac. 580; *Boys & Girls' Aid Soc. v. Reis*, 71 Cal. 27, 12 Pac. 796; *Ex parte Kearny*, 55 Cal. 212.

13. See *infra*, this section.

14. *Chinn v. Superior Court*, 156 Cal. 478, 105 Pac. 580.

A recorder's court is substantially the equivalent of a police court; *Ex parte Soto*, 88 Cal. 624, 26 Pac. 530; *Curtis v. County of Sacramento*, 13 Cal. 290; *In re Baxter*, 3 Cal. App. 716, 86 Pac. 998. See *Prince v. Fresno*, 88 Cal. 407, 26 Pac. 606, where the court in discussing the power of a recorder uses that term interchangeably with that of police judge.

15. For small-claims courts, see JUSTICES OF THE PEACE.

16. *Ex parte Kearny*, 55 Cal. 212. See JUDGMENTS. Note, however, that in California "superior court" is the name of a particular court. See *infra*, §§ 70-83.

17. *Heydenfeldt v. Superior Court*, 117 Cal. 348, 49 Pac. 210; *Cohen v. Barrett*, 5 Cal. 195.

18. *Estate of Sutro*, 143 Cal. 487, 77 Pac. 402; *Heydenfeldt v. Superior Court*, 117 Cal. 348, 49 Pac. 210; *Long v. Superior Court*, 102 Cal. 449, 36 Pac. 807; *Neary v. Godfrey*, 102 Cal. 338, 36 Pac. 655; *Smith v. Westerfield*, 88 Cal. 374, 26 Pac. 206; *Umbarger v. Chaboya*, 49 Cal. 525.

voked and the extent of the judgment which the court may make in the exercise of this jurisdiction.¹⁹

A police court has been defined as a court for the trial of offenders brought upon charges preferred by the police.²⁰ The term ordinarily refers to an inferior municipal court with a limited jurisdiction in criminal cases only.¹ But in California a limited civil jurisdiction is also conferred upon such courts.² The term "police courts," as used in that portion of the Penal Code dealing with proceedings in and appeals from those courts, includes police judges' courts, police courts, and all courts held by mayors or recorders in incorporated cities or towns.³

§ 5. Courts of Record.—Courts are divided generally into courts of record and those that are not of record. A court of record is a judicial tribunal having attributes and exercising functions independently of the person designated generally to hold it, and proceeding according to the course of the common law.⁴ In a court of record the

19. *State etc. Ins. Co. v. Superior Court*, 101 Cal. 135, 35 Pac. 549; *Watts v. White*, 13 Cal. 321.

20. *In re Baxter*, 3 Cal. App. 716, 86 Pac. 998, quoting the *Century Dictionary*. See *infra*, §§ 84-87, as to the establishment of police and other inferior courts.

1. *Graham v. City of Fresno*, 151 Cal. 465, 91 Pac. 147; *In re Baxter*, 3 Cal. App. 716, 86 Pac. 998. The jurisdiction of police courts generally is prescribed by Pol. Code, §§ 4426, 4427. See *In re Carrillo*, 66 Cal. 3, 4 Pac. 695; *City of Santa Barbara v. Stearns*, 51 Cal. 499; *Ex parte Simpson*, 47 Cal. 127; *Union Ice Co. v. Rose*, 11 Cal. App. 357, 104 Pac. 1006. As to criminal jurisdiction of police courts, see CRIMINAL LAW, and references there given.

2. See Pol. Code, § 4427, subs.

2-6. And see Code Civ. Proc., § 9337, which provides that "All proceedings in civil actions in police courts must, except as in this title otherwise provided, be conducted in the same manner as civil actions in justices' courts." See the following cases recognizing civil jurisdiction in police courts under Code Civ. Proc., § 933: *City of Santa Barbara v. Eldred*, 95 Cal. 378, 30 Pac. 562; *City of Santa Barbara v. Stearns*, 51 Cal. 499.

3. Pen. Code, pp. 1461. *In re Carrillo*, 66 Cal. 3, 4 Pac. 695; *In re Baxter*, 3 Cal. App. 716, 86 Pac. 998.

4. *Ex parte Thistleton*, 52 Cal. 220. As to what are "courts of common-law jurisdiction" within the meaning of the federal naturalization act, see ALIENAGE AND CITIZENSHIP, vol. 1, p. 911.

acts and judicial proceedings are enrolled, whereas, in courts not of record, the proceedings are not enrolled. The privilege of having these enrolled memorials constitutes the great leading distinction between courts of record and courts not of record.⁵ In California, the courts of record are specified by the constitution and by statute, namely, the court of impeachments,⁶ the supreme court,⁷ the district courts of appeal⁸ and the superior courts.⁹

§ 6. **Seals.**—It has been held under an early act that the general phrase “having a seal” was intended only to denote a court of record which was defined to be a court having a seal, and, further, that the power of the clerk was never intended to be made to depend upon the fact of his having procured this article, or the care with which he preserved it.¹⁰ But, under a more recent law, it has been said that the fact that a court has a seal does not of itself stamp its character as a court of record.¹¹ It is now provided by the code that the supreme court, the superior courts and the police courts of every city and county shall each have a seal.¹² The seal of the supreme court is that which was used by that court under the first state constitution.¹³ The seal of the superior courts is described by the code,¹⁴ as is also that used by the police courts.¹⁵ The code prescribes the course to be followed by the judges where the necessary seal for the court has not been pro-

5. *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742, per Sawyer, J., concurring. See *infra*, §§ 26-28, as to records.

6. See PUBLIC OFFICERS.

7. Const., art. VI, § 12; Code Civ. Proc., §§ 33, 34.

8. Const., art. VI, § 12; Stats. 1903, p. 737.

9. Const., art. VI, § 12; Code Civ. Proc., §§ 33, 34; *In re Hatch*, 9 Cal. App. 333, 99 Pac. 398. Under the constitutional revision of 1863,

the district, county and probate courts were also courts of record. *Caulfield v. Stevens*, 28 Cal. 118.

10. *Ingoldsby v. Juan*, 12 Cal. 564.

11. *Ex parte Thistleton*, 52 Cal. 220.

12. Code Civ. Proc., § 147. Apparently no provision is made by statute for a seal for the district court of appeal.

13. Code Civ. Proc., § 148.

14. Code Civ. Proc., § 149.

15. Code Civ. Proc., § 150.

vided;¹⁶ and it makes the clerk of the court the proper custodian of its seal.¹⁷ The code provides that the seal of the court need not be affixed to any proceeding therein or document, except to a writ,¹⁸ or to the certificate of probate of a will or of the appointment of an executor, administrator or guardian,¹⁹ or to the authentication of a copy of a record or other proceeding of a court, or of an officer thereof, or of a copy of a document on file in the office of the clerk.²⁰

§ 7. Inherent Powers.—Every court has power to preserve and enforce order in all proceedings before it or under its authority,¹ to compel obedience to its orders,² to control the conduct of its officers and all other persons connected with proceedings before it,³ to compel the attendance of witnesses,⁴ and to administer oaths where necessary to the exercise of its powers.⁵ Incidental to the jurisdiction of a court in any particular case is the power to hear and determine, in the mode provided by law, all questions of law and fact, the determination of which is

16. Code Civ. Proc., § 151.

17. Code Civ. Proc., § 152.

18. Code Civ. Proc., § 153, subd. 1.
See PROCESS.

19. Code Civ. Proc., § 153, subd. 2.
See EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; WILLS.

20. Code Civ. Proc., § 153, subd. 3.
See EVIDENCE; RECORDS.

1. Code Civ. Proc., § 128, subds. 1-3; *People v. Turner*, 1 Cal. 152.
See CONTEMPT, vol. 5, p. 889 et seq.

And see generally, as to the power of superior courts to punish for contempt, note, 8 A. L. R. 1558.

2. Code Civ. Proc., § 128, subd. 4; *Ex parte Smith*, 53 Cal. 204; *Ex parte Latimer*, 47 Cal. 131. See CONTEMPT, vol. 5, p. 890 et seq.

3. Code Civ. Proc., § 128, subd. 5; *Johnston v. Southern Pac. Co.*, 150 Cal. 535, 89 Pac. 348 (holding that a trial court has power to order a physical examination of the plaintiff in a civil action); *People v. Center*, 54 Cal. 236; *Clark v. Tulare Lake Dredging Co.*, 14 Cal. App. 414, 112 Pac. 564 (holding that a trial court has power to order the defendant to permit an expert witness for the plaintiff to examine the machinery involved in a pending action).

4. Code Civ. Proc., § 128, subd. 6; *Burns v. Superior Court*, 140 Cal. 1, 73 Pac. 597. See WITNESSES.

5. Code Civ. Proc., § 128, subd. 7.
See OATHS.

ancillary to a proper judgment in that case;⁶ and where power is especially conferred upon a court of general jurisdiction to determine a particular question and no special mode for that determination is pointed out, the jurisdiction conferred necessarily implies authority in such court to receive evidence in determining that question.⁷ When a court has general jurisdiction of a subject, it has power to make a full disposition of the matter and conclude the litigation respecting it. In other words, the power to pass upon the questions involved carries along with it, as a general rule, the power to make the decision effectual for the purpose for which it was made.⁸ To this end a court has authority to appoint a special officer to execute its process.⁹ There is also inherent in every court of record the power to afford a remedy for any injury done by its officers or by reason of its process or judgments.¹⁰

§ 8. Presumption as to Regularity of Proceedings.—

It is a well-recognized rule that there is a presumption in favor of the jurisdiction and regularity of proceedings of a court of general jurisdiction.¹¹ As has been said: "It

6. *Burris v. Kennedy*, 108 Cal. 331, 41 Pac. 458; *In re Burton*, 93 Cal. 459, 29 Pac. 36; *In re Burton*, 5 Cal. Prob. Dec. 235.

7. *People v. Chew Lan Ong*, 141 Cal. 550, 99 Am. St. Rep. 88, 75 Pac. 186; *Burns v. Superior Court*, 140 Cal. 1, 73 Pac. 597. See EVIDENCE.

8. *Kennedy v. Hamer*, 19 Cal. 374. See EQUITY, as to power of courts of equity to retain jurisdiction and to dispose of all questions. And see *infra*, §§ 9-22, for discussion of jurisdiction.

9. *People v. Boring*, 8 Cal. 406, 68 Am. Dec. 331; *Wilson v. Roach*, 4 Cal. 362.

10. *Heydenfeldt v. Superior Court*,

117 Cal. 348, 49 Pac. 210. See, also, *Costa v. Superior Court*, 137 Cal. 79, 69 Pac. 840, and *Stevenson v. Superior Court*, 62 Cal. 60, where it was held that a probate court has inherent jurisdiction to annul an administration upon the estate of a living person. See EXECUTORS AND ADMINISTRATORS.

11. *In re Bosse's Estate*, 61 Cal. Dec. 595, 200 Pac. 412 (holding that every intendment is in favor of a decree of the probate court. See APPEAL AND ERROR, vol. 2, p. 858); *McHatton v. Rhodes*, 143 Cal. 275, 101 Am. St. Rep. 125, 76 Pac. 1036; *Ex parte Stephen*, 114 Cal. 278, 46 Pac. 86; *Bullard v. McArdle*, 98 Cal. 355, 35 Am. St. Rep. 176, 33 Pac.

is necessary that confidence should be reposed in courts of such high character. It is the only safe rule for the protection of persons and property."¹² This rule has been incorporated in the code, which provides that there shall be a disputable presumption "that a court or judge, acting as such, whether in this state or any other state or country," was acting in the lawful exercise of his jurisdiction."¹³ But presumption is not extended or accorded to courts or other tribunals of inferior jurisdiction,¹⁴ since inferior courts cannot go beyond the authority conferred upon them by the statute under which they act, and cannot assume any power by implication.¹⁵

II. JURISDICTION.

§ 9. In General.—Jurisdiction is the power to hear and determine;¹⁶ and jurisdiction of a particular case is the

193; *Sherer v. Superior Court*, 94 Cal. 354, 29 Pac. 716; *Latham v. Blake*, 77 Cal. 646, 18 Pac. 150, 20 Pac. 417; *Burroughs v. De Coutts*, 70 Cal. 361, 11 Pac. 734; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742, per Sanderson, J.; *Forbes v. Hyde*, 31 Cal. 342; *Carpentier v. City of Oakland*, 30 Cal. 439; *People v. Blackwell*, 27 Cal. 65; *People v. Robinson*, 17 Cal. 363; *Gray v. Hawes*, 8 Cal. 562. In the following cases the federal courts have applied this rule to the proceedings of a California court: *Robinson v. Fair*, 128 U. S. 53, 32 L. Ed. 415, 9 Sup. Ct. Rep. 30, see, also, *Rose's U. S. Notes*; *Galpin v. Page*, 18 Wall. (85 U. S.) 350, 21 L. Ed. 959, see, also, *Rose's U. S. Notes*, per Field, J.; *Stead v. Curtis*, 205 Fed. 439, 123 C. C. A. 507. For particular application to cases where a judgment is appealed from, see *APPEAL AND ERROR*, vol. 2, pp. 852-893; or reviewed under a writ of certiorari,

see *CERTIORARI*, vol. 4, p. 1108; or attacked collaterally, see *JUDGMENT*. As to lack of presumption of jurisdiction in cases of adoption, see *ADOPTION*, vol. 1, p. 425.

12. *McHatton v. Rhodes*, 143 Cal. 275, 101 Am. St. Rep. 125, 76 Pac. 1036, per Cooper, C. J.

13. Code Civ. Proc., § 1963, subd. 16; *McHatton v. Rhodes*, 143 Cal. 275, 101 Am. St. Rep. 125, 76 Pac. 1036.

14. *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742, per Sanderson, J.; *Rickard v. Council of City of Santa Barbara*, 33 Cal. App. Dec. 7, 192 Pac. 726; *Matter of Application of Goldsworthy*, 22 Cal. App. 354, 134 Pac. 352; *Galpin v. Page*, 18 Wall. (U. S.) 350, 21 L. Ed. 959, see, also, *Rose's U. S. Notes*, per Field, J.

15. *Winter v. Fitzpatrick*, 35 Cal. 269; *People v. Gillespie*, 1 Cal. 342.

16. *Bennett v. Wilson*, 133 Cal. 379, 85 Am. St. Rep. 207, 65 Pac.

power to hear and determine that case.¹⁷ Otherwise expressed, the term "jurisdiction" implies that the person or tribunal which has acquired it is thereby empowered to declare or establish an enforceable charge or liability against the person or subject over which it has been acquired.¹⁸ Accordingly, it has been held that if the law confers the power to render a judgment or decree, then the court has jurisdiction.¹⁹ According to the code the jurisdiction sufficient to sustain a record is jurisdiction over the cause, over the parties, and over the thing, when a specific thing is the subject of the judgment.²⁰

The first question which must be determined by a court in any case before it is that of jurisdiction.¹ Any judgment rendered by a court without jurisdiction is void ab initio and no rights can be acquired under it, whether the court be the highest or the lowest in the land.² And

880; *Crew v. Pratt*, 119 Cal. 139, 51 Pac. 38; *Sherer v. Superior Court*, 96 Cal. 653, 31 Pac. 565; *Bruner v. Superior Court*, 92 Cal. 239, 28 Pac. 341; *Schroeder v. Wittram*, 66 Cal. 636, 6 Pac. 737; *North Bloomfield etc. Min. Co. v. Keyser*, 58 Cal. 315 (Sharpstein, J., concurring); *Ex parte Bennett*, 44 Cal. 84; *Central Pac. R. R. Co. v. Board of Equalization of Placer County*, 43 Cal. 365; *Hickman v. O'Neal*, 10 Cal. 292; *Yolo Water etc. Co. v. Superior Court*, 43 Cal. App. 332, 185 Pac. 195; *Rounfree v. Montague*, 30 Cal. App. 170, 157 Pac. 623; *Lange v. Superior Court*, 11 Cal. App. 1, 103 Pac. 908; *In re Hatch*, 9 Cal. App. 333, 99 Pac. 398; *Dahlgren v. Superior Court*, 8 Cal. App. 622, 97 Pac. 681; *Raine v. Lawlor*, 1 Cal. App. 483, 82 Pac. 688; *County of San Luis Obispo v. Simas*, 1 Cal. App. 175, 81 Pac. 972.

17. *Spencer Creek Water Co. v. Vallejo*, 48 Cal. 70; *Central Pac.*

R. R. Co. v. Board of Equalization of Placer County, 43 Cal. 365.

18. *Santa Cruz Rock Pav. Co. v. Broderick*, 113 Cal. 628, 45 Pac. 863. See, also, *Crew v. Pratt*, 119 Cal. 139, 51 Pac. 38, where it is said that the power to pronounce the resulting judgment constitutes a part of the "subject matter" over which the jurisdiction must extend.

19. *Raine v. Lawlor*, 1 Cal. App. 483, 82 Pac. 688.

20. *Code Civ. Proc.*, § 1917. See *infra*, § 17, as to jurisdiction over the parties; *infra*, §§ 15, 16, as to jurisdiction over the subject matter or cause.

1. *Clary v. Hoagland*, 6 Cal. 685; *Cohen v. Barrett*, 5 Cal. 195; *Dillon v. Dillon*, 30 Cal. App. Dec. 1018, 187 Pac. 27.

2. *Sullivan v. Gage*, 145 Cal. 759, 79 Pac. 537; *Pioneer Land Co. v. Maddux*, 109 Cal. 633, 50 Am. St. Rep. 67, 42 Pac. 295; *Rogers v. Cady*, 104 Cal. 288, 43 Am. St. Rep.

where a statute is passed during the pendency of a case rendering the court incompetent to act in that case, its proceedings during such incompetency are as invalid as though it had never possessed jurisdiction.³ The rule as to presumption of jurisdiction and of the regularity of proceedings has already been considered.⁴

§ 10. Power of Legislature.—Where the jurisdiction of a particular court is defined by the constitution, the legislature cannot by statute restrict or enlarge that jurisdiction.⁵ And where a statute in existence at the time the constitution was adopted conferred jurisdiction of a certain class of cases on a tribunal other than that designated in the constitution, that statute was ipso facto superseded by the constitutional provision, at least so far as the juris-

100, 38 Pac. 81; *City of Santa Barbara v. Eldred*, 95 Cal. 378, 30 Pac. 562; *Ex parte Ah You*, 82 Cal. 339, 22 Pac. 929; *Bancroft v. Crosby*, 74 Cal. 583, 16 Pac. 504; *Hill v. Wall*, 66 Cal. 130, 4 Pac. 1139 (in dissenting opinion of McKee, J., citing Code Civ. Proc., § 1917); *Forbes v. Hyde*, 31 Cal. 342; *People v. Shepard*, 28 Cal. 115; *People v. Toal*, 3 Cal. Unrep. 227, 23 Pac. 203 (per Patterson, J., concurring).

A court will vacate or set aside a judgment void on its face, or one rendered without jurisdiction over the person or subject matter, upon motion, and this without an affidavit of merits; *California Casket Co. v. McGinn*, 10 Cal. App. 5, 100 Pac. 1077, 1079.

3. *Ball v. Tolman*, 135 Cal. 375, 87 Am. St. Rep. 110, 67 Pac. 339.

4. See *supra*, § 7.

5. *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35; *People v. McKamy*, 168 Cal. 531, 143 Pac. 752; *Pacific Telephone*

& Tel. Co. v. Eshleman, 160 Cal. 640, Ann. Cas. 1915C, 822, 50 L. R. A. (N. S.) 652, 137 Pac. 1119, per Sloss, J., concurring; *Chinn v. Superior Court*, 156 Cal. 478, 105 Pac. 580; *Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317; *Burns v. Superior Court*, 140 Cal. 1, 73 Pac. 597; *Wright v. Superior Court*, 139 Cal. 469, 73 Pac. 145, per Shaw, J., dissenting; *King v. Kutner-Goldstein Co.*, 135 Cal. 65, 67 Pac. 10; *City of Tulare v. Hevren*, 126 Cal. 226, 58 Pac. 530; *Burris v. Kennedy*, 108 Cal. 331, 41 Pac. 458; *People v. Perry*, 79 Cal. 105, 21 Pac. 423; *Ex parte Wallingford*, 60 Cal. 103; *Camron v. Kenfield*, 57 Cal. 550; *Ex parte Harker*, 49 Cal. 465; *Spencer Creek Water Co. v. Vallejo*, 48 Cal. 70; *Fairchild v. Doten*, 42 Cal. 125; *Houghton's Appeal*, 42 Cal. 35, per Rhodes, C. J., dissenting; *Adams v. Woods*, 8 Cal. 306; *Haight v. Gay*, 8 Cal. 297, 68 Am. Dec. 323; *Deck's Estate v. Gherke*, 6 Cal. 666; *Thompson v. Williams*, 6 Cal. 88;

diction conferred by the former purported to be exclusive.⁶ In accordance with the spirit of the above rule, a statute will be construed, if possible, rather as merely substituting a different practice for the exercise of a court's constitutional jurisdiction than as attempting to enlarge or abridge that jurisdiction.⁷ The probate jurisdiction of the superior court⁸ is, however, apparently an exception to the general rule, in that it is under the control of the legislature, which may enlarge it or restrict it at its pleasure.⁹ It follows as a converse of the principle above stated that where the constitution has not defined the jurisdiction of a court, it is left to be regulated by the legislature under its general powers.¹⁰

§ 11. Duty to Exercise Jurisdiction Conferred.—When a certain jurisdiction has been conferred on a court, it is the duty of the court to exercise it—a duty of which it is not relieved by the failure of the legislature to provide a mode for its exercise.¹¹ A court cannot, by holding, without reason, that it has no jurisdiction of a proceeding, divest itself of jurisdiction and evade the duty of hearing and determining it,¹² either by a direct ruling or indi-

Zander v. Coe, 5 Cal. 230; Parsons v. Tuolumne Co. Water Co., 5 Cal. 43, 63 Am. Dec. 76; Wilson v. Roach, 4 Cal. 362; Caulfield v. Hudson, 3 Cal. 389; Hicks v. Bell, 3 Cal. 219; Couldthirst v. Southern Pacific R. Co., 33 Cal. App. Dec. 322, 193 Pac. 796; Yolo Water etc. Co. v. Superior Court, 29 Cal. App. Dec. 507, 185 Pac. 195; Larue v. Davies, 8 Cal. App. 750, 97 Pac. 903. For particular application to appellate jurisdiction, see APPEAL AND ERROR, vol. 2, pp. 112, 122.

6. People v. Bingham, 82 Cal. 238, 22 Pac. 1039.

7. Burns v. Superior Court, 140 Cal. 1, 73 Pac. 597.

8. See *infra*, §§ 80, 81.

9. Estate of Davis, 136 Cal. 590, 69 Pac. 412; Estate of Sutro, 2 Cal. Prob. Dec. 120. See EXECUTORS AND ADMINISTRATORS.

10. Uridias v. Morrill, 22 Cal. 473. For application to this rule to inferior courts, see *infra*, § 86.

11. Cahill v. Superior Court, 145 Cal. 42, 78 Pac. 467; People v. Jordan, 65 Cal. 644, 4 Pac. 683. As to appellate jurisdiction, see APPEAL AND ERROR, vol. 2, pp. 112.

12. Cahill v. Superior Court, 145 Cal. 42, 78 Pac. 467; Buckley v. Superior Court, 96 Cal. 119, 31 Pac. 8, per Paterson, J., dissenting; Carlson v. Superior Court, 70 Cal. 628, 11

rectly, as by a rule of procedure of its own creation.¹³ Conversely, a court cannot, by holding that it has jurisdiction when it has none, invest itself with jurisdiction, which has not been conferred upon it.¹⁴ There are, however, certain cases in which the jurisdiction of a court depends on the existence of certain quasi-jurisdictional facts which must be ascertained before the court can determine whether it has authority to act. In such case the investigation of these facts is within the jurisdiction of the court, regardless of the result of that investigation.¹⁵

§ 12. Exclusive and Concurrent Jurisdiction Generally.

While in the earlier cases some uncertainty existed as to the effect of certain grants of jurisdiction,—whether exclusive or concurrent,¹⁶—it seems now to be the established rule that where a certain jurisdiction is conferred upon a court by the constitution or by statute, it is not to be inferred that such jurisdiction is exclusive, unless the language is so plain as to show this to be the intent. In other words, where jurisdiction is given, either by the constitution or by statute, to two different courts, not indicating in either case whether such jurisdiction shall be exclusive or concurrent, it may be regarded as concurrent

Pac. 788; *Temple v. Superior Court*, 70 Cal. 211, 11 Pac. 699; *Levy v. Superior Court*, 66 Cal. 292, 5 Pac. 353; *Hyatt v. Allen*, 54 Cal. 353; *Moch v. Superior Court*, 39 Cal. App. 471, 179 Pac. 440.

13. *Lantz v. Cole*, 172 Cal. 245, 156 Pac. 45; *Connell v. Higgins*, 170 Cal. 541, 150 Pac. 769; *McKendrick v. Western Zinc Min. Co.*, 165 Cal. 24, 130 Pac. 865; *Gage v. Gunther*, 136 Cal. 338. See notes 4 A. L. R. 582, 4 A. L. R. 612, as to mandamus to compel exercise of jurisdiction.

14. *Rogers v. Cady*, 104 Cal. 288, 43 Am. St. Rep. 100, 38 Pac. 81; *Estate of Eichhoff*, 101 Cal. 600,

36 Pac. 11; *Buckley v. Superior Court*, 96 Cal. 119, 31 Pac. 8, per Paterson, J., dissenting; *Arroyo Ditch etc. Co. v. Superior Court*, 92 Cal. 47, 27 Am. St. Rep. 91, 28 Pac. 54; *Levy v. Superior Court*, 66 Cal. 292, 5 Pac. 353; *Ex parte Kearny*, 55 Cal. 212.

15. *Estate of Paulsen*, 179 Cal. 528, 178 Pac. 143; *Matter of Maginnis*, 162 Cal. 200, 121 Pac. 723; *Estate of Eichhoff*, 101 Cal. 600, 36 Pac. 11; *Ex parte Kearny*, 55 Cal. 212.

16. See cases cited *infra* as *contra* to the rule next stated.

in both courts.¹⁷ The specification in the statute of the subject matter, the form of the action, or the value of the property in controversy, or any other mode of conferring jurisdiction that does not necessarily imply that the grant to another tribunal would be contradictory or repugnant, does not render the jurisdiction granted exclusive, any more than does the mention of a form of action, as mandamus, certiorari or prohibition.¹⁸ However, it has been held that where a statute gives the supreme court appellate jurisdiction in "all" cases of a certain kind, that court is the exclusive appellate tribunal in the first instance in such cases.¹⁹ And when a statute creating a new right and prescribing a particular remedy for violation thereof, prescribes that the remedy must be pursued in a particular court, this excludes all other courts.²⁰ So, also, a specific grant of either appellate or original jurisdiction excludes the other kind.¹ In issuing writs of mandate and the other writs specifically authorized by the various jurisdictional provisions of the constitution,² the various courts

17. *Ex parte Dolan*, 128 Cal. 460, 60 Pac. 1094; *Green v. Superior Court*, 78 Cal. 556, 21 Pac. 307, 541; *Rosenberg v. Frank*, 58 Cal. 387; *Courtwright v. Bear River etc. Min. Co.*, 30 Cal. 573 (decision by Justice Rhodes, marking a definite departure from the rule stated in *Caulfield v. Stevens*, 28 Cal. 118, and *Zander v. Coe*, 5 Cal. 230, and overruling these cases); *Warner v. Steamship Uncle Sam*, 9 Cal. 697, per Terry, C. J.; *O'Callaghan v. Booth*, 6 Cal. 63; *Fitzgerald v. Urton*, 4 Cal. 235 (holding that a grant of jurisdiction of nuisance cases to the county courts did not deprive the district courts as then constituted of the jurisdiction in such cases granted by the constitution); *Dawson v. Superior Court*, 13 Cal. App. 582, 110 Pac. 479.

For the rule contra, see *Appeal of Houghton*, 42 Cal. 35; *Caulfield v. Stevens*, 28 Cal. 118; *People v. Fowler*, 9 Cal. 85; *Zander v. Coe*, 5 Cal. 230.

18. *Courtwright v. Bear River & A. W. & Min. Co.*, 30 Cal. 573 (case referred to by Justice Garoutte in *Ex parte Dolan*, 128 Cal. 460, 60 Pac. 1094, as containing an exhaustive discussion of the subject).

19. *Thomas v. Thomas*, 22 Cal. App. 806, 136 Pac. 510. And see cases cited *infra*, § 13.

20. *Smith v. Omnibus R. R. Co.*, 36 Cal. 281; *Reed v. Omnibus R. R. Co.*, 33 Cal. 212.

1. *People v. Applegate*, 5 Cal. 295; *Burgoyne v. San Francisco County Supervisors*, 5 Cal. 9; *Caulfield v. Hudson*, 3 Cal. 389.

2. See *infra*, §§ 63, 69 et seq.

have concurrent jurisdiction and are strictly on an equality.³

§ 13. **Test and Limitations as to Exercise.**—It has been said that the main test of jurisdiction in any particular matter is whether or not discretion is given the court as to that matter.⁴ Jurisdiction necessarily involves power to decide incorrectly as well as correctly a given cause or controversy within that jurisdiction.⁵ But jurisdiction does not depend upon the rightfulness of the decision made.⁶ The rule simply means that when a court has jurisdiction of the subject matter and commits error during the course of the trial or in its final decision, such error is correctable, not through a jurisdictional writ or collateral attack, but solely by appeal.⁷

3. As to supreme court and district courts of appeal: *Favorite v. Superior Court*, 181 Cal. 261, 8 A. L. R. 290, 184 Pac. 15; *Matter of Application of Davidson*, 167 Cal. 727, 141 Pac. 216; *Dawson v. Superior Court*, 158 Cal. 73, 110 Pac. 479.

As to supreme court and superior courts: *Santa Cruz etc. Co. v. Santa Clara County*, 62 Cal. 40.

As to district courts of appeal and superior courts: *Goytino v. McAleer*, 4 Cal. App. 655, 88 Pac. 991.

4. *Bruner v. Superior Court*, 92 Cal. 239, 28 Pac. 341, per *McFarland, J.*

5. *Ex parte Henshaw*, 73 Cal. 486, 15 Pac. 110; *Ex parte Bennett*, 44 Cal. 84; *Central Pac. R. R. Co. v. Placer County*, 43 Cal. 365; *People v. Dwinelle*, 29 Cal. 632; *Rich v. Superior Court*, 31 Cal. App. 689, 161 Pac. 291; *In re Hatch*, 9 Cal. App. 333, 99 Pac. 398; *Dahlgren v. Superior Court*, 8 Cal. App. 622. See *CERTIORARI*, vol. 4, p. 1022.

6. *Hibernia Sav. & L. Soc. v. Lewis*, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714; *Sherer v. Superior Court*, 96 Cal. 653, 31 Pac. 565; *Central Pac. R. R. Co. v. Placer County*, 43 Cal. 365; *Cloud v. El Dorado County*, 12 Cal. 128, 73 Am. Dec. 526; *Yolo Water etc. Co. v. Superior Court*, 43 Cal. App. 332, 185 Pac. 195; *Rountree v. Montague*, 30 Cal. App. 170, 157 Pac. 623; *Lange v. Superior Court*, 11 Cal. App. 1, 103 Pac. 908; *County of San Luis Obispo v. Simas*, 1 Cal. App. 175, 81 Pac. 972.

7. *Chase v. Christianson*, 41 Cal. 253; *Rich v. Superior Court*, 31 Cal. App. 689, 161 Pac. 291. See, also, *Bruner v. Superior Court*, 92 Cal. 239, 28 Pac. 341, where it is said that "it is difficult to express in abstract terms a statement of the distinction between error in exercising jurisdiction, and jurisdiction itself, that can be readily applied to all cases as they may arise.

A court cannot exercise jurisdiction in any instance until jurisdiction has been acquired, and it can be acquired only in the mode prescribed by statute.⁸ And so it is a rule that if a court is without original jurisdiction to determine a controversy, it cannot entertain such jurisdiction on an appeal from any judgment entered in the case, whether involving the merits or not.⁹ But if a court has original jurisdiction of the class of controversies to which a particular case belongs, the fact that the case has come before it by an appeal from a court that had no jurisdiction of it, does not affect its own jurisdiction in the matter.¹⁰

§ 14. Rule After Jurisdiction Acquired—Time When Acquired.—Where two tribunals have concurrent jurisdiction over the same parties and subject matter, the tribunal in which jurisdiction first attaches retains it exclusively.¹¹

8. *Arroyo Ditch & W. Co. v. Superior Court*, 92 Cal. 47, 27 Am. St. Rep. 91, 28 Pac. 54.

9. *Baisch v. Sausalito Land etc. Co.*, 131 Cal. 215, 63 Pac. 346; *Arroyo Ditch etc. Co. v. Superior Court*, 92 Cal. 47, 27 Am. St. Rep. 91, 28 Pac. 54; *Southern Pac. R. R. Co. v. Superior Court*, 59 Cal. 471; *County of Yuba v. North American etc. Co.*, 12 Cal. App. 121, 107 Pac. 138; *Rickey Land etc. Co. v. Glader*, 6 Cal. App. 113, 91 Pac. 414. See, also, *Stewart v. Torrance*, 9 Cal. App. 209, 98 Pac. 396, where a court without jurisdiction on appeal refused on that account to compel the settlement of the bill of exceptions. See *infra*, § 73, for application of this doctrine to superior courts in reference to their original and appellate jurisdiction.

10. *Hart v. Carnall-Hopkins Co.*, 103 Cal. 132, 37 Pac. 196; *Id.*, 101 Cal. 160, 35 Pac. 633; *City of Santa Barbara v. Eldred*, 95 Cal. 378, 30 Pac. 562.

11. *Application of Dowdall*, 60 Cal. Dec. 86, 191 Pac. 685 (probate); *In re Danneker*, 67 Cal. 643, 8 Pac. 514; *Rosenberg v. Frank*, 58 Cal. 387; *Johnson v. Gordon*, 4 Cal. 368; *McMorry v. Superior Court*, 36 Cal. App. Dec. 8, 201 Pac. 797 (stating the rule); *Williams v. Southern Pac. Co.*, 36 Cal. App. Dec. 434, 202 Pac. 356; *Guardianship of Treadwell*, 3 Cal. Prob. Dec. 309. See, also, *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131, where mention is made of the fact that the same issue between the same parties was decided differently by state and federal courts; but the supreme court declined to decide which should prevail.

In the following cases the federal courts have applied the rule by declining to entertain cases already pending in a California court. *Wolf v. District Court*, 235 Fed. 69, 148 C. C. A. 563; *Moss & Co. v. McCarthy*, 191 Fed. 202; *Thorpe v. Sampson*, 84 Fed. 63; *Gamble v.*

The other court, if of co-ordinate jurisdiction only, cannot in any form review, reverse, nullify, restrain or in any way control any of the judgments, orders, proceedings or process of the court first acquiring such jurisdiction.¹² The only case in which the power to interfere with the judgments and decrees of another court of concurrent jurisdiction is where the court in which the action is pending is unable by reason of its jurisdiction to afford the relief sought.¹³ Thus, where courts of law and equity had concurrent jurisdiction, if a court of law first acquired jurisdiction and decided a case, a court of equity would not interfere to set aside the judgment unless the party had been prevented by some fraud or accident from availing himself of the defense at law.¹⁴ The fact that the parties to the proceeding are not the same as the parties to the judgment or decree sought to be enjoined does not relieve the case from the operation of the rule, nor can the consent of the parties change the rule or relax its binding force in any particular case.¹⁵ The rule is established and enforced not so much to protect the rights of parties as to protect the rights of courts of co-ordinate jurisdiction to avoid conflict and confusion in the administration of justice.¹⁶ And where one court seeks to restrain the execution of the orders or decrees of another court of co-ordinate jurisdiction, the court in which the objectionable order or

City of San Diego, 79 Fed. 487; In re Hall & Stilson Co., 73 Fed. 527; Sharon v. Terry, 36 Fed. 337, 13 Sawy. 387, 1 L. R. A. 572. As to effect of assumption of jurisdiction over a child by juvenile court upon jurisdiction of other courts, see note, 11 A. L. R. 147.

12. Hockstacker v. Levy, 11 Cal. 76; Gorham v. Toomey, 9 Cal. 77; Uhlfelder v. Levy, 9 Cal. 607; Anthony v. Dunlap, 8 Cal. 26; Chipman v. Hibbard, 8 Cal. 268; Rickett v. Johnson, 8 Cal. 34; Averill v.

Steamer Hartford, 2 Cal. 308; In re Burton, 5 Cal. Prob. Dec. 235. See also, INJUNCTION.

13. Crowley v. Davis, 37 Cal. 268; Rickett v. Johnson, 8 Cal. 34; Anthony v. Dunlap, 8 Cal. 26. See INJUNCTION.

14. Dutil v. Pacheco, 21 Cal. 438, 82 Am. Dec. 749.

15. Crowley v. Davis, 37 Cal. 268. See *infra*, § 17, as to consent.

16. Crowley v. Davis, 37 Cal. 268; Uhlfelder v. Levy, 9 Cal. 607.

decree exists is the one to apply to for relief.¹⁷ Since the court in which process is first served has the prior jurisdiction,¹⁸ the rule has been applied, irrespective of which proceeding was first initiated.¹⁹

Limitation of rule.—The rule above stated is limited to actions which deal either actually or potentially with specific property or objects, and where a suit is strictly in personam, nothing more than a personal judgment being sought, there is no objection to a subsequent action in another jurisdiction. It has been said that there is much confusion in the decisions because of failure to recognize this limitation.²⁰

When jurisdiction is acquired.—In civil actions jurisdiction is acquired upon the due service of the summons,¹ or from the time the publication of summons is complete,² or upon a voluntary general appearance of the person sued.³ In proceedings in probate, under certain statutory

17. Rickett v. Johnson, 9 Cal. 34.

18. See cases cited *infra* as to when jurisdiction is acquired.

19. Guardianship of Treadwell, 8 Cal. Prob. Dec. 309. But see *infra* this section as to proceedings in probate.

20. Williams v. Southern Pac. Co., 36 Cal. App. Dec. 434, 202 Pac. 356, per Finch, P. J.

1. See Code Civ. Proc., § 416; White v. Patton, 87 Cal. 151, 25 Pac. 270; Powers v. Braly, 75 Cal. 237, 17 Pac. 197; Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418; Southern Pac. R. R. Co. v. Superior Court, 59 Cal. 471 (service of process must include service of copy of complaint); Bell v. Camm, 10 Cal. App. 388, 102 Pac. 225; California Casket Co. v. McGinn, 10 Cal. App. 5, 100 Pac. 1077, 1079; Ex parte Connaway, 178 U. S. 421,

44 L. Ed. 1134, 20 Sup. Ct. Rep. 951, see, also, Rose's U. S. Notes (case arising in California, and citing Cal. Code Civ. Proc., § 416); Connaway v. Overton, 98 Fed. 574.

The fact of service is essential to jurisdiction, not the proof of service. Herman v. Santee, 103 Cal. 519, 42 Am. St. Rep. 145, 37 Pac. 509. See Dunlap v. Steere, 92 Cal. 344, 27 Am. St. Rep. 143, 16 L. R. A. 361, 28 Pac. 563, holding that a judgment obtained by fraudulent publication of summons will be set aside. See PROCESS, as to sufficiency of service.

2. In re Newnan's Estate, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887; Klokke Inv. Co. v. Superior Court, 39 Cal. App. 717, 179 Pac. 728. See PROCESS.

3. Estate of Walden, 168 Cal. 759, 145 Pac. 100; Zobel v. Zobel, 151 Cal. 98, 90 Pac. 191; Adams v.

provisions, jurisdiction is acquired within the contemplation of the rule upon the filing of the petition instituting such proceedings.⁴

In probate proceedings.—Jurisdiction of proceedings for the settlement of the estate of a deceased person cannot coexist in two superior courts at the same time.⁵ And so it has been held that when jurisdiction to grant letters of administration depends on the residence of the deceased, exclusive jurisdiction exists in the court of the county in which a petition for general letters is first filed, for so long as the proceeding thus inaugurated is pending.⁶ But this rule has no proper application in so far as the appointment of a special administrator is concerned.⁷

§ 15. Of Subject Matter Generally.—It is essential to a valid judgment in any action that the court shall have jurisdiction of the subject matter thereof.⁸ And where a court has jurisdiction, it has a right to decide every question which occurs in the cause.⁹ After jurisdiction is ac-

Hopkins, 144 Cal. 19, 77 Pac. 712; *Hibernia Sav. & L. Soc. v. Cochran*, 141 Cal. 653, 75 Pac. 315; *Security etc. Co. v. Boston etc. Co.*, 126 Cal. 418, 58 Pac. 941, 59 Pac. 296; *McDonald v. Agnew*, 122 Cal. 448, 55 Pac. 125; *Hibernia Sav. & L. Soc. v. Lewis*, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714; *Hynes v. All Persons*, 19 Cal. App. 185, 125 Pac. 253 (under *McEnerney Act*); *Hodgkins v. Dunham*, 10 Cal. App. 690, 103 Pac. 351. See *APPEARANCE*, vol. 3, p. 14; *PROCESS*.

4. *Dungan v. Superior Court*, 149 Cal. 98, 117 Am. St. Rep. 119, 84 Pac. 767 (construing *Code Civ. Proc.*, §§ 1371-1379). See *infra*, this section.

5. *Dungan v. Superior Court*, 149 Cal. 98, 117 Am. St. Rep. 119, 84

Pac. 767; *Estate of Griffith*, 84 Cal. 107, 110, 23 Pac. 528, 24 Pac. 381; *Estate of Hamilton*, 34 Cal. 464.

6. *Estate of Damke*, 133 Cal. 430, 65 Pac. 889; *Miller v. Superior Court*, 62 Cal. Dec. 83, 199 Pac. 805.

7. *Miller v. Superior Court*, 62 Cal. Dec. 83, 199 Pac. 805. See *EXECUTORS AND ADMINISTRATORS*.

8. *Ex parte Henshaw*, 73 Cal. 486, 15 Pac. 110, per *Thornton, J.*, dissenting; *Gray v. Hawes*, 8 Cal. 562; *Welsh v. Koch*, 4 Cal. App. 571, 88 Pac. 604. See *APPEAL AND ERROR*, vol. 2, p. 495, as to distinction between jurisdiction over person and jurisdiction over the subject matter.

9. *Hibernia Sav. & L. Soc. v. Lewis*, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714. See *EQUITY*.

quired,¹⁰ the court is deemed "to have control of all the subsequent proceedings."¹¹ By the term "all the subsequent proceedings" is meant all proceedings upon the complaint filed, and for the cause of action stated therein. Hence, it has been held that where defendants default upon the plaintiff's summons, this does not give the court jurisdiction to enter another, further and different judgment against them, in favor of another and different party, upon another and different cause of action. Such a proceeding is not authorized by the statute; and even if it were, it would, it has been said, be in direct violation of a right guaranteed by the constitution, and one depriving the parties of their property "without due process of law."¹²

§ 16. Local and Transitory Actions.—Actions are deemed transitory where the transactions upon which they are founded might have taken place anywhere, but are local when their cause is in its nature essentially local.¹³ In respect to realty in particular, every attempt of a foreign tribunal to found a jurisdiction over it must from the very nature of the case be utterly nugatory, for land is held by the laws of the state or country where it is situated and the tribunals administering those laws are the proper forums in which titles to it should be litigated.¹⁴ Under this rule an action wherein ownership is claimed of a body of ore within the surface lines of a mining claim as against the owner of another surface claim has been

10. See *supra*, § 14.

11. See Code Civ. Proc., § 416.

12. *White v. Patton*, 87 Cal. 151, 25 Pac. 270.

13. *Ophir Silver Min. Co. v. Superior Court*, 147 Cal. 467, 3 Ann. Cas. 340, 82 Pac. 70 (quoting *Marshall, C. J.*, in *Livingston v. Jefferson*, 1 Brock. 203, Fed. Cas. No. 8411).

As to venue of actions generally, see *VENUE*.

14. *Smith v. Davis*, 90 Cal. 25, 25 Am. St. Rep. 92, 27 Pac. 26; *Ex parte Henshaw*, 73 Cal. 486, 15 Pac. 110, per *Thornton, J.*, dissenting. See *CONFLICT OF LAWS*, vol. 5, p. 469.

held to be a real action. So, also, an action for damages for injury to land is local and not transitory.¹⁵ But since timber or ores, when severed from the land by the act of a trespasser, remain the personal property of the owner and are capable of being converted by any person anywhere, an action to recover only the value of the ore or timber after severance is transitory and may be maintained wherever the trespasser can be served with summons; and the mere fact that in such action he may be compelled to allege, and, if denied, to prove, ownership of the land from which timber is cut or the ore extracted does not make the action local.¹⁶

In local or real actions, the courts of the state where the property is situated alone have jurisdiction.¹⁷ But if, on the other hand, a cause of action is transitory, the suit may be brought in any state where the defendant may be found.¹⁸ In California, the rule is statutory that an action for injuries to real property must be tried in the county where the land is situated, except in those cases where a

15. *Ophir Silver Min. Co. v. Superior Court*, 147 Cal. 467, 3 Ann. Cas. 340, 82 Pac. 70 (holding that in this respect there is no difference between a suit in equity to restrain future trespasses upon real property and an action at law for past trespasses upon the same). See MINES AND MINERALS.

16. *Ophir Silver Min. Co. v. Superior Court*, 147 Cal. 467, 3 Ann. Cas. 340, 82 Pac. 70. See LOGS AND TIMBER; MINES AND MINERALS.

17. *Title Ins. etc. Co. v. California Dev. Co.*, 171 Cal. 173, 152 Pac. 542. As to power of court of equity to affect land outside the state, see CANCELLATION OF INSTRUMENTS, vol. 4, p. 789; and see EQUITY. See CONFLICT OF LAWS, vol. 5, p. 469 et seq.

18. *Ryan v. North Alaska Salmon Co.*, 153 Cal. 438, 95 Pac. 862 (death by negligence); *Ophir Silver Min. Co. v. Superior Court*, 147 Cal. 467, 3 Ann. Cas. 340, 82 Pac. 70 (trespass to person or personal property); *Roberts v. Dunsmuir*, 75 Cal. 203, 16 Pac. 782 (damages for personal injuries); *McManus v. Red Salmon Canning Co.*, 37 Cal. App. 133, 173 Pac. 1112 (death by negligence); *Hodgkins v. Dunham*, 10 Cal. App. 690, 103 Pac. 351 (deceit). See DEATH. As to actions based on foreign statutes, see STATUTES. See CONFLICT OF LAWS, vol. 5, p. 463, as to construction of personal covenants in reference to real property situated without the state.

change of the place of trial may be ordered for special reasons.¹⁹

§ 17. Of Parties—By Consent.—In addition to jurisdiction over the subject matter of an action,²⁰ the court must have jurisdiction of the parties thereto.¹ The jurisdiction of courts of general jurisdiction as to persons extends in a general sense to all persons within their territorial limits who can be reached by their process.² Even in the case of nonresidents, the courts of a state have jurisdiction to deal with most forms of transitory actions, provided the defendant is served with summons,³ even though he is only temporarily or transiently within the state,⁴ and although the cause of action arose outside the state.⁵ They also have jurisdiction of real actions against nonresidents, provided the property is within the jurisdiction of the court.⁶ The nonresidence of the plaintiff does not affect the jurisdiction of a court in any case.⁷

Consent.—Neither one nor both parties can vest a court with jurisdiction to a controversy to which it is otherwise

19. See Code Civ. Proc., § 392. And generally, see VENUE.

20. See *supra*, § 15.

1. *Bennett v. Wilson*, 133 Cal. 379, 85 Am. St. Rep. 207, 65 Pac. 880; *Ex parte Henshaw*, 73 Cal. 486, 15 Pac. 110, per Thornton, J., dissenting; *Forbes v. Hyde*, 31 Cal. 342; *McMinn v. Whelan*, 27 Cal. 300; *Gray v. Hawes*, 8 Cal. 562; *Whitwell v. Barbier*, 7 Cal. 54. As to method of subjecting defendant to the jurisdiction, see PROCESS.

2. *McHatton v. Rhodes*, 143 Cal. 275, 101 Am. St. Rep. 125, 76 Pac. 1036. See PROCESS.

3. *Roberts v. Dunsmuir*, 75 Cal. 203, 16 Pac. 782; *Faras v. Lower California Dev. Co.*, 27 Cal. App.

688, 151 Pac. 35. These were personal injury cases.

4. *Hodgkins v. Dunham*, 10 Cal. App. 690, 103 Pac. 351 (action for deceit).

5. *Roberts v. Dunsmuir*, 75 Cal. 203, 16 Pac. 782. See CONFLICT OF LAWS, vol. 5, p. 420.

6. *First Nat. Bank v. Eastman*, 144 Cal. 487, 103 Am. St. Rep. 95, 1 Ann. Cas. 626, 77 Pac. 1043; *McHatton v. Rhodes*, 143 Cal. 275, 101 Am. St. Rep. 125, 76 Pac. 1036; *Loaiza v. Superior Court*, 85 Cal. 11, 20 Am. St. Rep. 197, 9 L. R. A. 376, 24 Pac. 707.

7. *Loaiza v. Superior Court*, 85 Cal. 11, 20 Am. St. Rep. 197, 9 L. R. A. 376, 24 Pac. 707; *Roberts v. Dunsmuir*, 75 Cal. 203, 16 Pac. 782.

a stranger.⁸ In other words, if the subject *matter* of a proposed action is not within the jurisdiction conferred upon the court, that defect cannot be supplied by the consent of the parties.⁹ But the rule is otherwise as regards jurisdiction of the parties. If the court *has* jurisdiction over the subject matter, it obtains jurisdiction over the parties by their proceeding to trial without objection.¹⁰ And so, suitors after voluntarily appearing and going to trial, cannot avail themselves of an objection to the preliminary proceedings by which the cause and the parties were in court.¹¹

§ 18. **Cases in Equity.**—A grant of jurisdiction “in all cases in equity,”¹² is not confined to cases in equity which might exist under the law as it stood when the constitution was adopted. It includes all cases in equity at all times. It is not intended as a limitation upon the power of the legislature to legislate upon the rights of persons, or to create new rights under which new equities will arise, and of which the courts will at once take cognizance. The jurisdiction of courts of equity is not thereby enlarged. Neither is it diminished when by statutory changes

8. *King v. Kutner-Goldstein Co.*, 135 Cal. 65, 67 Pac. 10; *Norwood v. Kenfield*, 34 Cal. 329; *Feillett v. Engler*, 8 Cal. 76; *Ladd v. Stevenson*, 1 Cal. 18. For application of this principle to appellate jurisdiction, see *APPEAL AND ERROR*, vol. 2, p. 122.

9. *Marin Municipal Water Dist. v. North Coast Water Co.*, 178 Cal. 324; 173 Pac. 473 (citing 7 R. C. L. 1043); *City of Oakland v. Hart*, 129 Cal. 98, 61 Pac. 779; *Yore v. Superior Court*, 108 Cal. 431, 41 Pac. 477; *Bates v. Gage*, 40 Cal. 183; *Gray v. Hawes*, 8 Cal. 562; *Feillett v. Engler*, 8 Cal. 76; *Ladd v. Stevenson*, 1 Cal. 18; *Stimpson etc.*

Co. v. Superior Court, 12 Cal. App. 536, 107 Pac. 1013. See *APPEAL AND ERROR*, vol. 2, p. 122.

10. *Faxon v. All Persons*, 166 Cal. 707, L. R. A. 1916B, 1209, 137 Pac. 919; *City of Santa Barbara v. Eldred*, 95 Cal. 378, 30 Pac. 562; *Luco v. Superior Court*, 71 Cal. 555, 12 Pac. 677; *Gray v. Hawes*, 8 Cal. 562.

11. *Faxon v. All Persons*, 166 Cal. 707, L. R. A. 1916B, 1209, 137 Pac. 919; *City of Santa Barbara v. Eldred*, 95 Cal. 378, 30 Pac. 562. As to what constitutes a sufficient objection, see *APPEARANCE*, vol. 3, pp. 18–21.

12. See *infra*, § 74.

some rights cease to exist and certain cases which courts of equity once entertained can no longer arise.¹³ The expression "cases in equity" has been held to include: an action for divorce,¹⁴ an action for maintenance,¹⁵ a suit for injunction,¹⁶ or to prevent or abate a nuisance,¹⁷ an action to establish an alleged trust in real estate,¹⁸ and an action for the foreclosure of a lien, even where the lien, by order of the court, is to be paid out of a fund deposited in court by the owner of the property.¹⁹ The phrase has been held not to include insolvency²⁰ or contempt proceedings.¹ Whether it includes an action for the collection of delinquent taxes depends upon whether there is a prayer for the foreclosure of the lien of the tax. If the prayer is for a simple money judgment, the action is not a case in equity.²

13. *Wright v. Superior Court*, 139 Cal. 469, 73 Pac. 145; *Spreckels v. Hawaiian etc. Co.*, 117 Cal. 377, 49 Pac. 353.

14. *Harron v. Harron*, 123 Cal. 508, 56 Pac. 334; *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709; *Conant v. Conant*, 10 Cal. 249, 70 Am. Dec. 717; *Stewart v. Torrance*, 9 Cal. App. 209, 98 Pac. 396; *contra*, dictum in *Bixler's Appeal*, 59 Cal. 550. See DIVORCE AND SEPARATION.

15. *Hiner v. Hiner*, 5 Cal. App. 546, 90 Pac. 957. See ALIMONY AND SEPARATE MAINTENANCE, vol. 1, p. 1023.

16. *County of Yuba v. North American etc. Co.*, 12 Cal. App. 121, 107 Pac. 138; *Rickey Land etc. Co. v. Glader*, 6 Cal. App. 113, 91 Pac. 414. See INJUNCTION.

17. *Sullivan v. Royer*, 72 Cal. 248, 1 Am. St. Rep. 51, 13 Pac. 655; *Courtwright v. Bear River etc. Co.*,

30 Cal. 573; *People v. Moore*, 29 Cal. 427; *Meek v. De Latour*, 2 Cal. App. 261, 83 Pac. 300. See NUISANCE.

18. *Haverstick v. Trudel*, 51 Cal. 431. See TRUSTS.

19. *Robinett v. Brown*, 167 Cal. 735, 141 Pac. 368; *Weldon v. Superior Court*, 138 Cal. 427, 71 Pac. 502; *Miller v. Carlisle*, 127 Cal. 327, 59 Pac. 785; *Broek v. Bruce*, 5 Cal. 279; *Emigh-Winchell Hdw. Co. v. Fylyman*, 31 Cal. App. 46; *Stockton Lumber Co. v. Schuler*, 7 Cal. App. 257, 94 Pac. 399. See generally, LIENS; MECHANICS' LIENS.

20. *People v. Roseborough*, 29 Cal. 415.

1. *Gale v. Tuolumne County Water Co.*, 169 Cal. 46, 145 Pac. 532. See CONTEMPT, vol. 5, p. 935.

2. *People v. Olvera*, 43 Cal. 492; *Mahlstadt v. Blanc*, 34 Cal. 577; *Bell v. Crippen*, 28 Cal. 327; *People v. Mier*, 24 Cal. 61. See TAXATION.

§ 19. Cases Involving the Title or Possession of Real Property.—While the courts have at times deplored the fact that an exact synonym for the word “involve” as it is employed in the statutes defining jurisdiction cannot be found in a single word³ (as though any other word would not in turn demand another synonym), it seems clear that before a matter can be said to be “involved in” an action it must at least appear to be a part of the issue which is to be tried.⁴ Statutes conferring jurisdiction of actions which involve the title or possession of real property⁵ include not only actions whose direct object is to recover such title or possession, but also actions that are brought to obtain redress for an injury to the title or possession or in the assertion of a right or claim directly springing therefrom.⁶ In this connection, “possession of real property” means such a possession as has relation to title or is necessary to the enforcement or defeat of the cause of action asserted. It is either a possession akin to title, as in ejectment, trespass or title by adverse possession, where possession is of the essence of the right sought to be established, or it is a possession which for some other good reason becomes a direct and material fact and issue in the case, upon which the plaintiff relies for a recovery or the defendant for a defense.⁷ The clause cannot be limited to cases in which the title or possession is put in issue by the pleadings, because the defendant may not take issue upon the allegation setting it up.⁸ It is sufficient if the title or claim of title, the possession or right of possession, of real

3. *Copertini v. Oppermann*, 76 Cal. 181, 18 Pac. 256; *Holman v. Taylor*, 31 Cal. 338.

4. *People v. Johnson*, 30 Cal. 98 (holding that since in a criminal proceeding, the punishment is no part of the issue, it cannot in a legal sense be said to be “involved in” the action).

5. See *infra*, § 75.

6. *Holman v. Taylor*, 31 Cal. 338. See *infra*, § 20, for illustrations of cases involving title to real property.

7. *O'Meara v. Hables*, 163 Cal. 240, 124 Pac. 1003.

8. *Holman v. Taylor*, 31 Cal. 338.

property, or any right growing out of or dependent upon either, is alleged in the pleadings as an issuable fact.⁹

It was said in the earlier cases that where title or possession of real property is merely a fact in controversy—where it is incidentally brought into the action or is only collaterally in question—the case does not involve such title or possession.¹⁰ But the later decisions have pointed out that this statement was too broad and have held that the phrase does include cases where the title or possession is only incidentally involved, provided the issue of title or possession must be decided in order to determine the case.¹¹ In other words, the idea intended to be embodied may be expressed by the paraphrase: “cases at law in which the title or right of possession of real property is a material fact in the case, upon which the plaintiff relies for a recovery or the defendant for a defense.”¹²

§ 20. Miscellaneous Cases Involving Real Property.—Actions involving the title to real property include such as an action by a vendee under a contract for the sale of land to recover a part payment made on the purchase price because of a defect in the title of the vendor;¹³ an action upon a note given by the vendee, where a defect in the title is set up as a defense;¹⁴ and similarly, an action to

9. Copertini v. Oppermann, 76 Cal. 181, 18 Pac. 256; Holman v. Taylor, 31 Cal. 338.

10. Copertini v. Oppermann, 76 Cal. 181, 18 Pac. 256; Schroeder v. Wittram, 66 Cal. 636, 6 Pac. 737; Pollock v. Cummings, 38 Cal. 683.

11. Dungan v. Clark, 159 Cal. 30, 112 Pac. 718; Hart v. Carnall-Hopkins Co., 103 Cal. 132, 37 Pac. 196.

12. Dungan v. Clark, 159 Cal. 30, 112 Pac. 718; Hart v. Carnall-Hopkins Co., 101 Cal. 160, 35 Pac. 633; Copertini v. Oppermann, 76 Cal. 181, 18 Pac. 256; Pollock v.

Cummings, 38 Cal. 683; Holman v. Taylor, 31 Cal. 338.

13. Hart v. Carnall-Hopkins Co., 101 Cal. 160, 35 Pac. 633; Copertini v. Oppermann, 76 Cal. 181, 18 Pac. 256; Bates v. Ferrier, 19 Cal. App. 79, 124 Pac. 889; contra, as to deposit, Schroeder v. Wittram, 66 Cal. 636, 6 Pac. 737; but see dissent of Morrison, C. J.

14. Dungan v. Clark, 159 Cal. 30, 112 Pac. 718 (holding further that an adverse finding on this point does not affect the jurisdiction of the court). See VENDOR AND PURCHASER.

recover money paid upon an agreement to locate the plaintiff on vacant government land, where it is alleged that the land on which the defendant located him was not vacant.¹⁵ The words also include an action brought under section 485 of the Civil Code, as it stood prior to 1915, requiring railroads which have failed to fence their track to pay for cattle killed upon their line of road which passes through or along the property of the "owner" of the cattle;¹⁶ an action to recover one-half of the value of a partition fence built on the alleged line between the lands of the plaintiff and defendant;¹⁷ and also, an action for the usurpation of a franchise by the illegal collection of tolls upon a public road, where the defendant claims the right to possess the lands constituting the road.¹⁸

The provision in question has been held not to embrace an action for damages for trespass upon real estate, either by the defendant himself¹⁹ or by animals belonging to him;²⁰ or an action to recover damages for cutting timber on the plaintiff's land;¹ or an action for damages for injury to land resulting from the clearing of brush on adjacent land and the failure to irrigate the latter, by reason of which the wind blew the sand on to the former;² or an ordinary action for damages for the killing of an animal by the neg-

15. *Hart v. Carnall-Hopkins Co.*, 4 Pac. 384. See TURNPIKES AND TOLL ROADS.
103 Cal. 132, 37 Pac. 196. See PUBLIC LANDS.

16. *Boyd v. Southern California Ry. Co.*, 126 Cal. 571, 58 Pac. 1046; *Baker v. Southern California Ry. Co.*, 110 Cal. 455, 42 Pac. 975; *S. C.*, 114 Cal. 501, 46 Pac. 604; *Cloudthirst v. Southern Pacific R. Co.*, 33 Cal. App. Dec. 322, 193 Pac. 796; *Barbee v. Southern Pacific Co.*, 9 Cal. App. 457, 99 Pac. 541. See generally, FENCES; RAILROADS.

17. *Holman v. Taylor*, 31 Cal. 338. See FENCES.

18. *People v. Horsley*, 65 Cal. 381,

19. *Livingston v. Morgan*, 53 Cal. 23; *Cornett v. Bishop*, 39 Cal. 319. Contra, dictum in *Holman v. Taylor*, 31 Cal. 338. See TRESPASS.

20. *Pollock v. Cummings*, 38 Cal. 683; *Fisch v. Nice*, 12 Cal. App. 60, 106 Pac. 598. See ANIMALS, vol. 2, p. 49.

1. *Gorton v. Ferdinando*, 64 Cal. 11, 27 Pac. 941. See LOGS AND TIMBER.

2. *Stewart v. Birchfield*, 15 Cal. App. 378, 114 Pac. 999.

ligence of a railroad, even where plaintiff's title to the adjacent land is alleged and denied,³ or an action at law to recover a specific sum of money as rent under a lease.⁴

§ 21. Cases Involving the Legality of Tax, Impost, Assessment, Toll or Municipal Fine.—An action does not “involve the legality of any tax, impost, assessment, toll or municipal fine,” under a statute conferring jurisdiction of such an action, unless the question of the legality is raised.⁵ Therefore, where the answer simply denies that the defendant is subject to the tax, it is not within the scope of this phrase.⁶ It has accordingly been held that this provision does not include an action by the party aggrieved to recover damages from an officer who has demanded and received a tax or toll greater than that fixed by law,⁷ or an application for a ferry license,⁸ although it does include a prosecution for unlawfully collecting toll without a license in violation of a statute.⁹ Each of the categories mentioned in the phrase under discussion implies a charge imposed by public authority for some public purpose.¹⁰ A “tax,” in the general sense of the word, includes every charge upon persons or property imposed by or under the authority of the legislature for public purposes. The word “impost,” in its broader sense, means

3. *Cox v. Southern Pac. Co.*, 2 Cal. App. 248, 83 Pac. 290.

4. *O'Meara v. Hables*, 163 Cal. 240, 124 Pac. 1003; *McComber v. Kellerman*, 162 Cal. 749, 124 Pac. 431.

5. See *infra*, §§ 65, 75.

6. *Williams v. Mecartney*, 69 Cal. 556, 11 Pac. 186; *De Long v. Haines*, 1 Cal. Unrep. 120. See, however, *People v. Mier*, 24 Cal. 61, where it is said that in an action by the state to collect a tax, if the defense is set up that the property is exempt from taxation or that there has been fraud in the assessment

or in failing to comply with the provisions of the statute, perhaps the legality of the tax would be involved. See **TAXATION**.

7. *Perkins v. Ralls*, 71 Cal. 87, 11 Pac. 860; *Brown v. Rice*, 52 Cal. 489.

8. *Webb v. Hanson*, 2 Cal. 133. See **FERRIES**.

9. *People v. Johnson*, 30 Cal. 98. See **TURNTPIKES AND TOLL ROADS**.

10. *Arroyo Ditch etc. Co. v. Superior Court*, 92 Cal. 47, 27 Am. St. Rep. 91, 28 Pac. 54. And see cases cited *infra*.

any tax or tribute imposed by authority.¹¹ And "assessments" has reference to such assessments as are authorized by those provisions of the constitution which relate to revenue and taxation and to such as may be made under the authority of a municipal or other public corporation for the purpose of meeting the cost or expense of some public improvement.¹² It does not include the installments or "calls," which are sometimes termed assessments, made under the provisions of section 331 of the Civil Code, by a private corporation upon its stockholders in accordance with an agreement on their part, express or implied, to pay into its treasury the amount subscribed by them to its capital stock.¹³ A "toll" is a sum of money for the use of something, but the word is generally applied to the consideration which is paid for the use of a road, bridge or the like, of a public nature.¹⁴ The words "municipal fine" do not include all fines imposed by the laws of the state, but are limited to such as are imposed by the local laws of particular places, such as towns or cities. The word "municipal" is used in its strictest sense as indicating an inferior power or jurisdiction.¹⁵ This provision has been held to include a monthly sewerage rate imposed by municipal ordinance upon private property owners for the use and connection of their dwellings with a city sewer system,¹⁶ but not pilot fees fixed by statute.¹⁷

11. *City of Madera v. Black*, 181 Cal. 306, 184 Pac. 397. See TAXATION.

12. *Taylor v. Palmer*, 31 Cal. 240.

13. *Bottle Mining etc. Co. v. Kern*, 154 Cal. 96, 97 Pac. 25; *Arroyo Ditch etc. Co. v. Superior Court*, 92 Cal. 47, 27 Am. St. Rep. 91, 28 Pac. 54.

14. *City of Madera v. Black*, 181 Cal. 306, 184 Pac. 397. See BRIDGES,

vol. 4, p. 533 et seq.; TURNPIKES AND TOLL ROADS.

15. *People v. Johnson*, 30 Cal. 98 (holding that the phrase does not cover road tolls). See FINES; MUNICIPAL CORPORATIONS.

16. *City of Madera v. Black*, 181 Cal. 306, 184 Pac. 397.

17. *Harrison v. Green*, 18 Cal. 94. See PILOTS.

§ 22. **Actions and Special Proceedings.**—In other articles the terms “actions” and “special proceedings” have been defined and distinguished generally.¹⁸ In construing these terms as used in constitution and statutes affecting the jurisdiction of courts, the following have, in addition to those noted in the earlier articles, been held to be special cases under such jurisdictional provisions: condemnation proceedings;¹⁹ proceedings for the opening, grading, extension, paving and alteration of streets and the assessment of damages caused thereby;²⁰ proceedings to contest an election;¹ proceedings to enforce a mechanic’s lien where this requires a special proceeding;² proceedings to set aside corporation elections under sections 312 and 315 of the Civil Code;³ proceedings to remove a public officer for misconduct;⁴ proceedings brought by the attorney general in the name of the people on the complaint of the bank commissioners against a banking corporation to force it into involuntary liquidation;⁵ and mandamus pro-

18. See **ACTIONS**, vol. 1, pp. 325, 328; **APPEAL AND ERROR**, vol. 2, p. 132.

19. *Vallejo & N. R. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238; *Bishop v. Superior Court*, 87 Cal. 226, 25 Pac. 435; *Stockton etc. R. R. Co. v. Galgiani*, 49 Cal. 139; *Spencer Creek Water Co. v. Vallejo*, 48 Cal. 70; *Beaulieu Vineyard v. Superior Court*, 6 Cal. App. 242, 91 Pac. 1015. See **ACTIONS**, vol. 1, p. 327; **EMINENT DOMAIN**. See *Code Civ. Proc.*, § 1243.

20. *De Witt v. Duncan*, 46 Cal. 342; *Appeal of Houghton*, 42 Cal. 35; affirmed, *City and County of San Francisco v. Certain Real Estate*, 42 Cal. 513. See **MUNICIPAL CORPORATIONS**.

1. *Lord v. Dunster*, 79 Cal. 477, 21 Pac. 865; *Day v. Jones*, 31 Cal. 261; *Knowles v. Yates*, 31 Cal. 82; *Saunders v. Haynes*, 13 Cal. 145;

Roche v. Superior Court, 30 Cal. App. 255, 157 Pac. 830; *Dudley v. Superior Court*, 13 Cal. App. 271, 110 Pac. 146. See **ACTIONS**, vol. 1, p. 328; **ELECTIONS**.

2. *Van Winkle v. Stow*, 23 Cal. 457; *McNiel v. Borland*, 23 Cal. 144. See *Brock v. Bruce*, 5 Cal. 279, holding that where the lien could be enforced in the same action as the debt, it was not a “special case.” See **ACTIONS**, vol. 1, pp. 327, 328; **MECHANICS’ LIENS**.

3. *Wickersham v. Brittan*, 93 Cal. 34, 15 L. R. A. 106, 28 Pac. 792, 29 Pac. 51.

4. *Morton v. Broderick*, 118 Cal. 474, 50 Pac. 644; *In re Marks*, 45 Cal. 199. See **APPEAL AND ERROR**, vol. 2, p. 134; **PUBLIC OFFICERS**.

5. *People v. Bank of San Luis Obispo*, 152 Cal. 261, 92 Pac. 481. See **BANKS**, vol. 4, p. 294.

ceedings.⁶ Under the term "special cases" as used in the first constitution it was held that an action to prevent or abate a nuisance was not one of this class. This conclusion was reached on the theory that the term did not include any class of cases for which the courts of general jurisdiction have always supplied a remedy.⁷

III. SESSIONS.

§ 23. Terms of Court—Former and Present Practice.—Prior to the adoption of the present constitution there were fixed terms in California for the transaction of judicial business by the several district courts.⁸ But by the

6. *People v. Day*, 15 Cal. 91. See MANDAMUS.

7. *Parsons v. Tuolumne Water Co.*, 5 Cal. 43, 63 Am. Dec. 76 (citing to the same general effect, *Reed v. McCormick*, 4 Cal. 342, and *Caulfield v. Hudson*, 3 Cal. 389). See ACTIONS, vol. 1, p. 325; NUISANCE.

8. *Falltrick v. Sullivan*, 119 Cal. 613, 51 Pac. 947; *Von Schmidt v. Widber*, 99 Cal. 511, 34 Pac. 109; *In re Gannon*, 69 Cal. 541, 11 Pac. 240; *People v. Doyell*, 48 Cal. 85; *Talbert v. Hopper*, 42 Cal. 397; *People v. Ah Ying*, 42 Cal. 18; *People v. Tyler*, 36 Cal. 522; *Norwood v. Kenfield*, 34 Cal. 329; *People v. Sanchez*, 24 Cal. 17; *Smith v. Chichester*, 1 Cal. 409.

Under the common-law system, formerly prevailing in California, the jurisdiction of a court to transact business was temporarily suspended by the end of its term or by the final adjournment of the court, and until the reconvening of the court at the commencement

of a new term, its authority to hear and determine causes ceased. *In re Gannon*, 69 Cal. 541, 11 Pac. 240. Under the old system, during an adjournment there was no longer a court, in the proper sense of the term, as distinguished from the judge of the court sitting at chambers or in vacation, and the judge could perform no judicial act except those authorized by statute; *Falltrick v. Sullivan*, 119 Cal. 613, 51 Pac. 947; *Von Schmidt v. Widber*, 99 Cal. 511, 34 Pac. 109; *Ex parte Bennett*, 44 Cal. 84; *Bates v. Gage*, 40 Cal. 183; *Willson v. Cleaveland*, 30 Cal. 192; *Wicks v. Ludwig*, 9 Cal. 173; *Peabody v. Phelps*, 7 Cal. 53; *Coffinberry v. Horrill*, 5 Cal. 493; *Smith v. Chichester*, 1 Cal. 409. (As to the powers of judge at chambers or in vacation, see JUDGES.) A court did not, however, lose jurisdiction of a case by adjournment before the case had been finally determined. All unfinished business was continued by operation of law until the next

constitution of 1879 and the Code of Civil Procedure as amended in conformity therewith, it is provided as to each of the courts established thereby that it shall be always open for the transaction of business, legal holidays and nonjudicial days excepted.⁹ The code provides that

“Adjournments from day to day, or from time to time, are to be construed as recesses in the sessions, and shall not prevent the court from sitting at any time.”¹⁰

The effect of the enactment of these provisions was to abolish the system of terms and final adjournments.¹¹

term. *Willson v. Cleaveland*, 30 Cal. 192; *Stanford v. Worn*, 27 Cal. 171.

9. As to the supreme court: Const., art. VI, § 2; Code Civ. Proc., § 47. And see *Niles v. Edwards*, 95 Cal. 41, 30 Pac. 134; *Adams v. Dohrmann*, 63 Cal. 417; *People v. Heacock*, 10 Cal. App. 450, 102 Pac. 543.

As to district courts of appeal (omitting the exception), see Const., art. VI, § 4.

As to superior courts; Const., art. VI, § 5; Code Civ. Proc., § 73; and see *Diepenbroek v. Superior Court*, 153 Cal. 597, 95 Pac. 1121; *Matter of Smith*, 152 Cal. 566, 93 Pac. 191; *People v. Helm*, 152 Cal. 532, 93 Pac. 99; *Halsey v. Superior Court*, 152 Cal. 71, 91 Pac. 987; *Doty v. Jenkins*, 142 Cal. 497, 77 Pac. 1104; *Falltrick v. Sullivan*, 119 Cal. 613, 51 Pac. 947; *Reclamation District v. Hamilton*, 112 Cal. 603, 44 Pac. 1074; *Von Schmidt v. Widber*, 99 Cal. 511, 34 Pac. 109; *In re Gannon*, 69 Cal. 541, 11 Pac. 240; *People v. Heacock*, 10 Cal. App. 450, 102 Pac. 543; *In re Culp*, 2 Cal. App. 70, 83 Pac. 89, per *McLaughlin, J.*, concurring; *County of San Luis Obispo v. Simas*, 1 Cal. App. 175, 81 Pac. 972.

See *Stewart v. Mahoney Min. Co.*, 54 Cal. 149, as to the former district courts.

As to what functions may be exercised on nonjudicial days, see HOLIDAYS; SUNDAY.

10. Code Civ. Proc., § 74; and see Code Civ. Proc., § 48, for similar provision in reference to the supreme court; *Falltrick v. Sullivan*, 119 Cal. 613, 51 Pac. 947; *In re Gannon*, 69 Cal. 541, 11 Pac. 240 (holding that “recesses” means “the times in which the court is not actually engaged in business”). As to powers of judges in recess, see JUDGES.

11. *Halsey v. Superior Court*, 152 Cal. 71, 91 Pac. 987; *Brackett v. Banegas*, 99 Cal. 623, 34 Pac. 344; *Von Schmidt v. Widber*, 99 Cal. 511, 34 Pac. 109; *Norton v. Atchison etc. R. R. Co.*, 97 Cal. 388, 33 Am. St. Rep. 193, 30 Pac. 585, 32 Pac. 452; *Carpenter v. Superior Court*, 75 Cal. 596, 19 Pac. 174; *People v. Greene*, 74 Cal. 400, 5 Am. St. Rep. 448, 16 Pac. 197; *Mace v. O'Reilley*, 70 Cal. 231, 11 Pac. 721; *In re Gannon*, 69 Cal. 541, 11 Pac. 240; *Wiggin v. Superior Court*, 68 Cal. 398, 9 Pac. 646; *People v. Soto*, 65 Cal. 621, 4 Pac. 664.

There is at present no such thing in California as a division of the year into terms of court, during which a court may sit to hear and determine causes. The courts are competent for the transaction of business at all times. Even an order for adjournment entered on the minutes of the court does not affect the power of the court to sit and exercise jurisdiction in the trial of causes or in the transaction of business at any time.¹² In construing the federal statutes, however, the regular sessions of the superior courts are considered as terms.¹³

§ 24. Times and Places of Holding Courts—Sessions.—

The supreme court is required to hold regular sessions beginning on certain days specified in the code, and special sessions at such other times as may be prescribed by the justices of that court.¹⁴ Similarly, the code provides for the time of holding the regular or special sessions of the superior courts,¹⁵ and for the occasion for holding, the manner of calling and conducting extra sessions of such courts, and the effect of proceedings therein.¹⁶

12. *Halsey v. Superior Court*, 152 Cal. 71, 91 Pac. 987; *People v. Nunley*, 142 Cal. 441, 76 Pac. 45; *In re Gannon*, 69 Cal. 541, 11 Pac. 240; *Stewart v. Mahoney Min. Co.*, 54 Cal. 149.

13. *Theurkauf v. Ireland*, 27 Fed. 769; *MacNaughton v. South. Pac. C. R. Co.*, 19 Fed. 881. See *infra*, § 24, as to time and place of holding court.

14. Code Civ. Proc., § 47.

15. Code Civ. Proc., § 73. And see the following cases construing the code provisions as to sessions of the superior courts; *Falltrick v. Sullivan*, 119 Cal. 613, 51 Pac. 947; *Athearn v. Nicol*, 62 Cal. Dec. 373, 200 Pac. 942; *In re Gannon*,

69 Cal. 541, 11 Pac. 240 (holding that by the term "sessions" as used in this code section is meant the time during which the court is in fact holding court at the place appointed and is engaged in business). See, also, *Domingues v. Domingues*, 4 Cal. 186, as to time of holding the district courts, and *People v. Tyler*, 36 Cal. 522, as to time of holding county courts.

16. Code Civ. Proc., § 67b. See *Norwood v. Kenfield*, 34 Cal. 329, and *People v. Riley*, 16 Cal. 186, treating of special terms under the common law. As to powers of individual judges in connection with special sessions, see *JUDGES*.

It is essential that the place where a court is to sit shall be designated by law.¹⁷ Accordingly, it is provided that the supreme court shall hold regular sessions for the hearing of causes, either in bank or in one or both of its departments, at the capital of the state, at the city and county of San Francisco, and at the city of Los Angeles; and special sessions at either of these places;¹⁸ that the district courts of appeal shall hold their regular sessions respectively at San Francisco, Los Angeles and Sacramento;¹⁹ and that the superior courts shall hold their sessions at the county seats of the several counties, or cities and counties, respectively.²⁰ Provision is made for the holding of the court in any other place than as so appointed whenever war, insurrection, pestilence or other public calamity, or the danger thereof, or the destruction or danger of the building appointed for holding the court may render it necessary.¹

Under section 8 of article VI of the constitution a judge of any superior court may hold a superior court in any county, at the request of a judge of the superior court thereof; and upon the request of the governor it shall be his duty so to do. And any superior court judge of the state of California may hold a superior court in any county of the state of California when requested so to do by the governor. Moreover, there may be as many sessions of the court as there are superior court judges in the county, including those assigned thereto by the governor and those acting pro tempore. The constitution also contemplates a session held by one or more judges as well as by one, and by all. Hence, the provision that the decision of one judge sitting at a separate session of the superior court is

17. Von Schmidt v. Widber, 99 Cal. 511, 34 Pac. 109.

18. Code Civ. Proc., § 47.

19. Const., art. VI, § 4.

20. Code Civ. Proc., § 73. And

see Code Civ. Proc., § 67b, providing for the holding of extra sessions at the county seat.

1. Code Civ. Proc., § 142.

equally effective as though all the judges of the superior court were sitting and rendering judgment.²

§ 25. Courtroom. —A court is not obliged to hold its sessions in its courtroom, but may, when it has been so ordered, hold them in any room of the courthouse or elsewhere, provided it conforms to the requirements of the law.³ It is the duty of the state to prepare suitable rooms, attendants, furniture, fuel, lights and stationery, for the use of the judges of the supreme court and the district courts of appeal,⁴ and of the counties to provide similar facilities for the respective superior courts.⁵ If such facilities are not so provided, the courts, or the judge or judges thereof, may direct the sheriff of the city and county, or county, to provide them, and the expenses incurred, certified by the judge or judges to be correct, shall be a charge against the city and county treasury, and paid out of the general fund thereof.⁶ And there is a similar provision with respect to the supreme court.⁷ The conveniences enumerated in the code section are necessities required in order that courts may exist and the law be administered; and it is necessary that a court have the power to provide them in order that the progress of its business shall not be retarded.⁸ The power conferred by section 144 of the Code of Civil Procedure is justified only by the necessity which may sometimes demand its exercise, and ought not to be enlarged by construction.⁹ It does not give a judge

2. *Athearn v. Nicòl*, 62 Cal. Dec. 373, 200 Pac. 942 (per Wilbur, J.).

3. *Block v. Kearney*, 6 Cal. Unrep. 660, 64 Pac. 267.

4. Code Civ. Proc., § 47.

5. *Ex parte Widber*, 91 Cal. 367, 27 Pac. 733. See COUNTIES.

6. Code Civ. Proc., § 144; *County of Los Angeles v. Superior Court*, 93 Cal. 380, 28 Pac. 1062; *Ex parte Widber*, 91 Cal. 367, 27 Pac. 733;

Falconer v. Hughes, 8 Cal. App. 56, 96 Pac. 19.

7. Code Civ. Proc., § 47; *National Bank of D. O. Mills & Co. v. Herold*, 74 Cal. 603, 5 Am. St. Rep. 476, 16 Pac. 507. See, also, act of May 25, 1919, Stats. 1919, p. 1239.

8. *Ex parte Widber*, 91 Cal. 367, 27 Pac. 733.

9. *County of Los Angeles v. Superior Court*, 93 Cal. 380, 28 Pac.

of the superior court power, when he thinks the supervisors are unnecessarily delaying the completion and furnishing of a courthouse, to take the matter out of their hands and order the necessary work done or the necessary furniture to be procured by the sheriff.¹⁰ Nor does it give him a right to select the particular room in the courthouse which he will occupy as his chambers. If, however, the room actually assigned by the supervisors for the use of the court or the judge is not suitable for that purpose, he is not compelled to occupy it, but may in that case proceed under the authority conferred by the above section.¹¹

IV. RECORDS.

§ 26. **In General.**—At common law a record signifies a roll of parchment upon which the proceedings and transactions of a court are entered or drawn up by its officers, and which is then deposited in its treasury in perpetuum rei memoriam. Originally such record consisted of the placita, memorandum, pleadings, imparlance or continuance, etc.¹² In California, the making up of the judgment-roll is the equivalent of the entry of record at common law.¹³ Section 670 of the Code of Civil Procedure expressly provides for the judgment-roll and prescribes what it shall contain. It omits the formal parts—the placita, memorandum, continuances and connecting links—some of which have been rendered unnecessary by changes in our proceedings, but contains all the essentials of the common-law record.¹⁴ In a general sense all the files and

1062; *Falconer v. Hughes*, 8 Cal. App. 56, 96 Pac. 19.

10. *County of Los Angeles v. Superior Court*, 93 Cal. 380, 28 Pac. 1062. See COUNTRIES, ante, p. 381.

11. *County of San Joaquin v. Budd*, 96 Cal. 47, 30 Pac. 967.

12. *Hahn v. Kelly*, 34 Cal. 391, 94

Am. Dec. 742, per Sawyer, J., concurring.

13. *Simmons v. Threshour*, 118 Cal. 100, 50 Pac. 312; *Kaufman v. Shain*, 111 Cal. 16, 52 Am. St. Rep. 139, 43 Pac. 393.

14. *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742, per Sawyer, J.,

minutes of the court are often spoken of in modern times as the records of courts, but this use of the term, it has been said, tends to lead to a confusion of ideas.¹⁵ Mere entries in the minutes of the court are not, properly speaking, matters of record. They become so only by being incorporated into bills of exception, and being thus made a part of the judgment-roll.¹⁶ Even in courts of limited and special jurisdiction no great strictness should be required as to the manner of stating facts in the record. It is sufficient if the facts are stated, even though not stated in the most direct and certain form.¹⁷

§ 27. Control of Records—Presumptions as to Correctness.—The records of the courts are necessarily subject to the control of the judges, so far as may be essential to the proper administration of justice.¹⁸ Accordingly, a court may withdraw a paper from its files for the use of an officer of the court.¹⁹ A court cannot, however, in the course of controlling its records, take, directly or indirectly, from the clerk the perquisites of his office for copies of opinions and papers on file, nor authorize the destruction or mutilation of any of the records.²⁰ It is a presumption of law that a judicial record, when not conclusive, does still determine or set forth the rights of the parties.¹ And it is also a disputable presumption that a printed and published book of the reports of cases adjudged in the tribunals of

concurring. See *APPEAL AND ERROR*, vol. 2, p. 509. As to supplying lost records, see *LOST INSTRUMENTS*.

15. *Haynes v. Meeks*, 10 Cal. 110, 70 Am. Dec. 703.

16. *Kaufman v. Shain*, 111 Cal. 16, 52 Am. St. Rep. 139, 43 Pac. 393. See *APPEAL AND ERROR*, vol. 2, p. 515.

17. *Haynes v. Meeks*, 10 Cal. 110, 70 Am. Dec. 703.

18. *Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565, per Field, J. For application to judgments and

orders, see *JUDGMENT*. As to custody of records by clerk, see *CLERKS OF COURT*, vol. 5, p. 227.

19. *Weldon v. Rogers*, 157 Cal. 410, 108 Pac. 266.

20. *Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565 (holding, however, that the mere revision of an opinion is not a mutilation of the record).

1. Code Civ. Proc., § 1963, subd. 17.

the state contains correct reports of such cases.³ The presumptions arising on appeal that the record exhibits all the matters material to a consideration of the points presented, and that the record is correct are considered elsewhere in this work.³

§ 28. Amendment and Correction.—At common law a court had power to amend the record upon mere suggestion during the term, but not afterwards.⁴ But to this rule there was the exception that clerical errors and misprisions with reference to the entry of judicial proceedings could be corrected by the court after the expiration of the term at which judgment was entered, provided the record showed the mistake and the party seeking the correction moved with due diligence.⁵ In California, all courts of record have the inherent power to correct their records so that they shall conform to the actual facts and speak the truth.⁶ And since the abolition of terms of

2. Code Civ. Proc., § 1963, subd. 36.

3. See APPEAL AND ERROR, vol. 2, p. 895 et seq.

4. Kaufman v. Shain, 111 Cal. 16, 52 Am. St. Rep. 139, 43 Pac. 393; Wiggin v. Superior Court, 68 Cal. 398, 9 Pac. 646; Hastings v. Cunningham, 35 Cal. 549 (but holding the rule inapplicable in the particular case); De Castro v. Richardson, 25 Cal. 49; Branger v. Chevalier, 9 Cal. 172.

5. Kaufman v. Shain, 111 Cal. 16, 52 Am. St. Rep. 139, 43 Pac. 393; Fallon v. Brittan, 84 Cal. 511, 24 Pac. 381; Wiggin v. Superior Court, 68 Cal. 398, 9 Pac. 646; Estate of Schroeder, 46 Cal. 304; Hegeler v. Henckell, 27 Cal. 491; De Castro v. Richardson, 25 Cal. 49; Swain v. Naglee, 19 Cal. 127; Branger v. Chevalier, 9 Cal. 172.

6. Erickson v. Stockton etc. R. R. Co., 148 Cal. 206, 82 Pac. 961; Holtum v. Greif, 144 Cal. 521, 78 Pac. 11; People v. Ward, 141 Cal. 628, 75 Pac. 306; People v. Durrant, 116 Cal. 179, 48 Pac. 75; People v. Curtis, 113 Cal. 68, 45 Pac. 180; Kaufman v. Shain, 111 Cal. 16, 52 Am. St. Rep. 139, 43 Pac. 393; Garoutte v. Haley, 104 Cal. 497, 38 Pac. 194; Sichler v. Look, 93 Cal. 600, 29 Pac. 220; Crim v. Kessing, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074; Fallon v. Brittan, 84 Cal. 511, 24 Pac. 381; Wiggin v. Superior Court, 68 Cal. 398, 9 Pac. 646; People v. Murback, 64 Cal. 369, 30 Pac. 608; Boyd v. Burrel, 60 Cal. 280; Sheldon v. Gunn, 57 Cal. 40; Hahn v. Kelley, 34 Cal. 391, 94 Am. Dec. 742, per Sawyer, J., concurring; Sullivan v. Hume, 4 Cal. Unrep. 161, 33 Pac. 1121; Dolan v.

court,⁷ such correction may be made at any time.⁸ And this right does not depend upon evidence appearing in the record itself.⁹ It may be made either upon the motion of the court itself or at the instance of any party interested in the matter.¹⁰ If either party to a pending proceeding is aware of any alteration of the record having been made, it is his duty to bring it to the attention of the court at the earliest opportunity after it has come to his knowledge.¹¹ Ordinarily a court will require notice of the motion to be given to all parties interested, but it has the power to make the correction without such notice.¹² Under the general rule it has been held that the court may correct an improper entry of an order by the clerk.¹³

V. REGULATION OF PROCEDURE.

§ 29. By Statute Generally.—At present, as under the common law, the course of proceeding in courts of law are regulated by four authorities, namely, general statutes,

Superior Court, 32 Cal. App. Dec. 45, 190 Pac. 469; Pipher v. Superior Court, 3 Cal. App. 626, 86 Pac. 904; Pease v. Fink, 3 Cal. App. 371, 85 Pac. 657. For particular application to judgments, see JUDGMENT. As to correction after appeal has been taken, see APPEAL AND ERROR, vol. 2, pp. 677-682.

7. See supra, § 23. See JUDGMENT, as to the amendment and correction of judgments, orders and decrees.

8. People v. Ward, 141 Cal. 628, 75 Pac. 306; Kaufman v. Shain, 111 Cal. 16, 52 Am. St. Rep. 139, 43 Pac. 393; Crim v. Kessing, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074; Mace v. O'Reilly, 70 Cal. 231, 11 Pac. 721; Wiggin v. Superior Court, 68 Cal. 398, 9 Pac.

646. See People v. Samario, 84 Cal. 484, 24 Pac. 283, holding that it was not error to deny a motion to amend the record as to a matter presumably within the recollection of the trial court. As to amendment of findings, see TRIAL; and as to power to substitute copies of lost papers, see LOST INSTRUMENTS.

9. Kaufman v. Shain, 111 Cal. 16, 52 Am. St. Rep. 139, 43 Pac. 393.

10. Crim v. Kessing, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074.

11. People v. Granice, 50 Cal. 447, 12. Crim v. Kessing 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074.

13. Kauffman v. Shain, 111 Cal. 16, 52 Am. St. Rep. 139, 43 Pac. 393; Crim v. Kessing, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074.

express written rules, prior decisions, and usage.¹⁴ The procedure by which jurisdiction is to be exercised may be prescribed by the legislature unless such regulations substantially impair the constitutional powers of the courts or practically defeat their exercise.¹⁵ This power of the legislature is universally recognized, without constitutional authority, in all states where the code system of pleading and practice prevails.¹⁶ And so, where machinery has thus been supplied for the employment of jurisdiction by legislative enactment, that machinery must be adopted or accepted by the courts. They cannot substitute rules of their own making.¹⁷ This principle applies with especial force under a statute creating a special right and prescribing a special proceeding for the enforcement of that right.¹⁸ If, however, the form prescribed does not appear essential to the judicial mind, the law will be regarded as directory and proceedings under it will be held valid even

14. *People v. Jordan*, 65 Cal. 644, 4 Pac. 683.

15. *In re Garner*, 179 Cal. 409, 177 Pac. 162; *Dungan v. Superior Court*, 149 Cal. 98, 117 Am. St. Rep. 119, 84 Pac. 767; *Burns v. Superior Court*, 140 Cal. 1, 73 Pac. 597; *Wright v. Superior Court*, 139 Cal. 469, 73 Pac. 145; *Raisch v. Sausalito Land etc. Co.*, 131 Cal. 215, 63 Pac. 346; *Heydenfeldt v. Superior Court*, 117 Cal. 348, 49 Pac. 210; *Perkins v. Wakeham*, 86 Cal. 580, 21 Am. St. Rep. 67, 25 Cal. 51; *In re Jessup*, 81 Cal. 408, 6 L. R. A. 594, 21 Pac. 976, 22 Pac. 742, 1028; *Hyde v. Redding*, 74 Cal. 493, 16 Pac. 380; *Ex parte Harker*, 49 Cal. 465; *Adams v. Woods*, 8 Cal. 306; *Cloudthirst v. Southern Pacific R. Co.*, 33 Cal. App. Dec. 322, 193 Pac. 796. See

contra, *Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565.

16. *In re Garner*, 179 Cal. 409, 177 Pac. 162.

17. *People v. Bank of San Luis Obispo*, 152 Cal. 261, 92 Pac. 481; *Estate of Davis*, 136 Cal. 590, 69 Pac. 412; *Burris v. Kennedy*, 108 Cal. 331, 41 Pac. 458; *Somers v. Somers*, 81 Cal. 608, 22 Pac. 967; *People v. Jordan*, 65 Cal. 644, 4 Pac. 683; *Stevens v. Ross*, 1 Cal. 94. As to rules of court, see *infra*, § 34.

18. *Estate of Strong*, 119 Cal. 663, 51 Pac. 1078; *Russell v. Pacific Ry. Co.*, 113 Cal. 258, 34 L. R. A. 747, 45 Pac. 323; *In re Burton*, 93 Cal. 459, 29 Pac. 36; *Smith v. West-erfield*, 88 Cal. 374, 26 Pac. 206; *Lay v. Superior Court*, 11 Cal. App. 558, 105 Pac. 775.

though the command of the statute as to form has not been strictly obeyed.¹⁹

§ 30. Constitutional Provisions.—The constitution provides: that

“All laws relative to the present judicial system of the state shall be applicable to the judicial system created by this constitution until changed by legislation.”²⁰

The effect of this section is, by a single comprehensive provision, to preserve and adopt for the courts created by the present constitution the statutory procedure formerly existing with reference to the courts which were abolished, and to authorize that procedure in all rights of action that were to be determined under the new constitution.¹ It also served to keep alive the laws in existence defining the jurisdiction of the various courts.² The amendment to the constitution establishing the district courts of appeal provides that

“All statutes now in force, allowing, providing for or regulating appeals to the supreme court shall apply to appeals to the district courts of appeal so far as such statutes are not inconsistent with this article [concerning the judicial department], and until the legislature shall otherwise provide.”³

But this provision was not intended to create a right of appeal where none existed before. Its purpose was to en-

19. Estate of Sutro, 143 Cal. 487, 77 Pac. 402.

20. Const., art. XXII, § 11; Kahn v. Sutro, 114 Cal. 316, 33 L. R. A. 620, 46 Pac. 87 (as to justices' courts); People v. Hamilton, 103 Cal. 488, 37 Pac. 627 (as to fees of the clerk); Ex parte Flood, 64 Cal. 251, 30 Pac. 437 (as governing houses of correction); Ex parte Reis, 64 Cal. 233, 30 Pac. 806 (as to court reporters); California Fruit etc. Co. v. San Francisco Superior

Court, 60 Cal. 305 (as to appeals from justice's court).

1. Wickersham v. Brittan, 93 Cal. 34, 15 L. R. A. 106, 28 Pac. 792, 29 Pac. 51.

2. California Fruit etc. Co. v. San Francisco Superior Court, 60 Cal. 305.

3. Const., art. VI, § 4, as amended 1904; Ex parte Mayen, 33 Cal. App. Dec. 375, 193 Pac. 813; Machado v. Machado, 26 Cal. App. 16, 145 Pac. 738.

able the newly organized courts of appeal to entertain and dispose of appeals which had been theretofore cognizable in the supreme court but which fall within the appellate jurisdiction of the courts brought into existence by the amendment.⁴

§ 31. By Special Laws—In General.—The constitution provides that

“The legislature shall not pass local or special laws . . . regulating the practice of courts of justice.”⁵

It has been held that the “practice of courts of justice” includes all “pleadings.”⁶ Many enactments have been declared unconstitutional under this provision; as, for example, certain laws relating to the procedure in actions upon mechanics’ liens;⁷ regulating the procedure for the enforcement of liens against property of corporations doing business in California for the wages of their employees;⁸ exempting cities of a certain class from the necessity of pleading or proving the existence or validity of any ordinance;⁹ providing that in a proceeding to con-

4. *People v. McKamy*, 168 Cal. 531, 143 Pac. 752; *Matter of Zany*, 164 Cal. 724, 130 Pac. 710.

5. Const., art. IV, § 25, subd. 3.

6. *People v. Central Pac. R. R. Co.*, 83 Cal. 393, 23 Pac. 303. As to what constitutes a local or special law generally, see CONSTITUTIONAL LAW, vol. 5, p. 793 et seq.

7. Code Civ. Proc., § 1195 (providing for attorney’s fees in favor of the plaintiff in mechanic’s lien suits); *Burnett v. Glas*, 154 Cal. 249, 97 Pac. 423; *Raphael Co., Inc., v. Grote*, 154 Cal. 137, 97 Pac. 155; *Merced Lumber Co. v. Bruschi*, 152 Cal. 372, 92 Pac. 844; *Mannix v. Tryon*, 152 Cal. 31, 91 Pac. 983; *Union Lumber Co. v. Simon*, 150 Cal. 751, 89 Pac. 1077; *Builders’*

Supply Depot v. O’Connor, 150 Cal. 265, 119 Am. St. Rep. 193, 11 Ann. Cas. 712, 17 L. R. A. (N. S.) 909, 88 Pac. 982; *Los Angeles Pressed Brick Co. v. Higgins*, 8 Cal. App. 514, 97 Pac. 414, 420; *Hill v. Clark*, 7 Cal. App. 609, 95 Pac. 382; *Stimson Mill Co. v. Nolan*, 5 Cal. App. 754, 91 Pac. 262. See MECHANICS’ LIENS.

8. Act of March 29, 1897 (Stats. 1897, p. 231); *Johnson v. Goodyear Mining Co.*, 127 Cal. 4, 78 Am. St. Rep. 17, 47 L. R. A. 338, 59 Pac. 304. See MASTER AND SERVANT.

9. Section 765 of the Municipal Corporation Act; *City of Tulare v. Hevren*, 126 Cal. 226, 58 Pac. 530. See MUNICIPAL CORPORATIONS.

firm the organization and bonds of an irrigation district "a motion for new trial must be made upon the minutes of the court";¹⁰ providing that in counties of a specified class alone "every person subpoenaed as a witness in a criminal case before the superior court shall, subject to the discretion of the judge thereof be entitled to the same per diem and mileage as jurors in like case";¹¹ prescribing the form of complaint in an action for the collection of taxes from railroad, operating in two or more counties;¹² authorizing certain prosecutions by complaint under the juvenile act;¹³ and providing that in actions on insurance policies an answer relying on casualty of peril excepted in the contract must specify the peril in detail.¹⁴ Other instances of acts which have been held to be obnoxious under this constitutional provision are noted in another article.¹⁵

§ 32. Scope of Legislative Discretion.—The mere fact that a statute regulating procedure operates on only one class of cases does not make it repugnant to the constitutional provision forbidding the enactment of local or special laws.¹⁶ The statutes contain many provisions regu-

10. Act of March 16, 1889, § 4 (Stats. 1889, p. 212); *Cullen v. Glendora Water Co.*, 113 Cal. 503, 39 Pac. 769, 45 Pac. 822, 1047. See WATERS.

11. County Government Act, § 190, subd. 16 (Stats. 1891, p. 385); *Turner v. County of Siskiyou*, 109 Cal. 332, 42 Pac. 434. See WITNESSES.

12. Pol. Code, § 3670, as it stood prior to 1895; *People v. Central Pac. R. R. Co.*, 83 Cal. 393, 23 Pac. 303. See RAILROADS; TAXATION.

13. *People v. Budd*, 24 Cal. App. 176, 140 Pac. 714; *Gardner v. Superior Court*, 19 Cal. App. 548, 126 Pac. 501. See INDICTMENT AND INFORMATION; INFANTS.

14. Code Civ. Proc., § 437a; *Board of Education of San Francisco v. Alliance Assur. Co.*, 159 Fed. 994. See INSURANCE.

15. See CONSTITUTIONAL LAW, vol. 5, p. 799 et seq.

16. *Sacramento etc. Drainage Dist. v. Rector*, 172 Cal. 385, 156 Pac. 506 (holding that the fact that a statute regulating disqualification of judges in reclamation proceedings does not apply to actions involving personal property and personal obligations does not render it invalid, as actions relating to real property, easements, rights of way and the like always are by far the most important in the litigation of reclamation and other similar districts);

lating the practice of courts, applicable only to certain classes of actions or special proceedings, made necessary by the nature of the objects and purposes of those classes.¹⁷ As elsewhere pointed out, the legislature is given a wide discretion as to the different modes of procedure or rules of practice to be prescribed for the various actions and proceedings, and its judgment on the question whether particular provision shall be made for any class of cases, and as to the classification thereof, will ordinarily be upheld.¹⁸ This rule applies with particular force to statutes regulating procedure in divorce cases. The interest of the state is sufficient to distinguish divorce from all other cases and to make it one concerning which the legislature is authorized to enact such laws of procedure as may rationally be held to protect that interest.¹⁹ On the other hand, the mere fact that a particular classification is founded on some intrinsic difference does not necessarily justify a special rule of procedure, unless there is some relation between the difference in class and the difference in the rule.²⁰ If there is no reason or necessity for the

Title etc. Co. v. Kerrigan, 150 Cal. 289, 119 Am. St. Rep. 199, 8 L. R. A. (N. S.) 632, 88 Pac. 356; Deyoe v. Superior Court, 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28 (approved in Board of Education of San Francisco v. Alliance Assur. Co., 159 Fed. 994). See cases cited *infra*; and see CONSTITUTIONAL LAW, vol. 5, p. 823 et seq.

17. Deyoe v. Superior Court, 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28.

18. See CONSTITUTIONAL LAW, vol. 5, p. 832 et seq., for a full discussion of the legislative power.

19. Deyoe v. Superior Court, 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28, holding valid the act of March 2, 1903 (Stats. 1903, p. 75),

providing that entry of final judgment in favor of the plaintiff in a divorce proceeding shall not be entered until the expiration of one year from the entry of the interlocutory judgment, even though it applies only to those actions in which it is found that a party is entitled to a divorce, and not to those in which it is denied, is supported by sound reason. This case, however, suggests that such a rule as one requiring a motion for a new trial to be made on the minutes of the court might not be justified. See DIVORCE AND SEPARATION.

20. Board of Education of San Francisco v. Alliance Assur. Co., 159 Fed. 994.

difference arising from any peculiar characteristic of the class of proceedings to which the procedure is applied or from any other source, the statute is void.¹

§ 33. Specific Acts Held Valid.—Measured by the principles stated in the preceding paragraph, many statutes have been held to be valid and not obnoxious to section 11, article I of the constitution; for example, as to allowance of attorneys' fees in certain actions;² prescribing the time within which an action to contest the validity of a municipal assessment may be brought or an appeal from a final judgment therein taken;³ providing for concurrent jurisdiction of certain police courts;⁴ providing for the venue of actions involving a county or city and county;⁵ providing for the venue in actions for negligence;⁶ limiting the meaning of the word "conspiracy" and the use of injunction in labor disputes;⁷ prescribing the disqualification of judges in reclamation proceedings;⁸ limiting the time for pronouncing judgment in criminal cases;⁹ providing for garnishee process against counties or municipal or other public corporations;¹⁰ providing that a corporation organ-

1. *Cullen v. Glendora Water Co.*, 113 Cal. 503, 39 Pac. 769, 45 Pac. 822, 1047.

2. Act of March 18, 1885, § 12, Stats. 1885, p. 147 (allowing \$15 attorney's fees to the plaintiff in actions to enforce delinquent street assessments); *Engebretson v. Gay*, 158 Cal. 30, Ann. Cas. 1912A, 690, 28 L. R. A. (N. S.) 1062, 109 Pac. 880. See MUNICIPAL CORPORATIONS.

3. Act of March 6, 1905 (Stats. 1905, p. 567); *Cohen v. City of Alameda*, 168 Cal. 265, 142 Pac. 885. See MUNICIPAL CORPORATIONS.

4. Act of March 7, 1881 (Stats. 1881, p. 74); *Ex parte Jordan*, 62 Cal. 464. See *infra*, § 85.

5. Code Civ. Proc., § 394; *County of Yuba v. America etc. Co.*, 12

Cal. App. 223, 107 Pac. 139. See COUNTIES, *ante*, p. 381; MUNICIPAL CORPORATIONS; VENUE.

6. Code Civ. Proc., § 395; *Gridley v. Fellows*, 166 Cal. 765, 138 Pac. 355. See NEGLIGENCE; VENUE.

7. Act of March 20, 1903 (Stats. 1903, p. 289); *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 Pac. 324. See CONSPIRACY, vol. 5, p. 507; INJUNCTIONS; LABOR.

8. Code Civ. Proc., § 170, subd. 5, *Sacramento etc. Drainage Dist. v. Rector*, 172 Cal. 385, 156 Pac. 506. See JUDGES.

9. Pen. Code, § 202; *People v. Lamattina*, 38 Cal. App. 82, 175 Pac. 484. See CRIMINAL LAW.

10. Code Civ. Proc., § 710; *Ruperich v. Baehr*, 142 Cal. 190, 75

ized under the laws of any state for the purpose may be accepted as surety on bonds and undertakings;¹¹ requiring an undertaking on the part of the plaintiff in libel and slander cases, for the payment of costs;¹² the Bank Commissioners' Act;¹³ and the Juvenile Court Act.¹⁴

§ 34. Rules of Court Generally.—“Every court of record may make rules not inconsistent with the laws of this state, for its own government and the government of its officers.”¹⁵ The constitution provides that the supreme court shall make and adopt rules not inconsistent with law for the government of that court and the district courts of appeal, and for regulating the practice in such courts.¹⁶ The rules adopted by the supreme court, in pursuance of the grant of power to them for the government of practice in the appellate courts of California are as essential a part of the procedure in these courts as are the rules of practice and procedure laid down by the legislature.¹⁷ Indeed,

Pac. 782. See GARNISHMENT. And see CONSTITUTIONAL LAW, vol. 5, p. 823 et seq.

11. Act of March 12, 1885 (Stats. 1885, p. 114); Cramer v. Tittle, 72 Cal. 12, 12 Pac. 869. See SURETYSHIP.

12. Act of March 23, 1872 (Stats. 1871-72, p. 533); Smith v. McDermott, 93 Cal. 421, 29 Pac. 34. See LIBEL AND SLANDER.

13. Act of March 30, 1878 (Stats. 1877-78, p. 740; Stats. 1887, p. 90); People v. Superior Court, 100 Cal. 105, 34 Pac. 492. See BANKS, vol. 4, p. 106.

14. Stats. 1909, p. 213; In re Sing, 13 Cal. App. 736, 110 Pac. 693. See *infra*, § 82, as to jurisdiction under Juvenile Court Act; and see INFANTS.

15. Code Civ. Proc., § 129; McKay v. Superior Court, 86 Cal. 431,

25 Pac. 10; People v. Williams, 32 Cal. 280; Hayes v. Butler, 25 Cal. App. 743, 145 Pac. 553; Hayden v. Superior Court, 22 Cal. App. 23, 133 Pac. 26; Tevis v. Palatine Ins. Co., 149 Fed. 560.

16. Const., art. VI, § 4; Brooks v. Union Trust etc. Co., 146 Cal. 134, 79 Pac. 843; Appeal of Houghton, 42 Cal. 35; San Joaquin etc. Co. v. Stevinson, 16 Cal. App. 235, 116 Pac. 378. As to rules of appellate courts, see APPEAL AND ERROR, vol. 2, pp. 112, 725. See, also, Estate of Sutro, 143 Cal. 487, 77 Pac. 402, where it is said that in courts of special or inferior jurisdiction, the rules as to process, evidence, etc., are generally the same as those applicable to courts of general jurisdiction.

17. Brooks v. Union Trust etc. Co., 146 Cal. 134, 79 Pac. 843; Con-

the power to establish rules providing an appropriate practice, where the legislature has not provided such, is not derived from any statute. It exists inherently in all courts of justice.¹⁸ And if a statute prescribing procedure omits any branch or feature of the power existing inherently in a court created by the constitution, that power still remains.¹⁹ This principle is embodied in the following section of the code:

“When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.”²⁰

tinental Bldg. etc. Assn. v. Woolff, 11 Cal. App. 677, 106 Pac. 107; Reclamation District v. Sherman, 11 Cal. App. 399, 105 Pac. 277.

18. *In re Garner*, 179 Cal. 409, 177 Pac. 162; *White v. Superior Court San Francisco*, 110 Cal. 60, 42 Pac. 480; *Somers v. Somers*, 81 Cal. 608, 22 Pac. 967, per Thornton, J., dissenting; *People v. Jordan*, 65 Cal. 644, 4 Pac. 683 (overruling *Warner v. Hall*, 1 Cal. 90); *Pieper v. Centinela Land Co.*, 56 Cal. 173; *Ex parte Thistleton*, 52 Cal. 220; *Estate of Johnson*, 4 Cal. Prob. Dec. 499.

19. *Burns v. Superior Court*, 140 Cal. 1, 73 Pac. 597.

20. Code Civ. Proc., § 187. See the following cases construing this code provision: *Barnes v. District Court of Appeal*, 178 Cal. 500, 173 Pac. 1100 (removal or suspension of attorney); *McKendrick v. Western Zinc Min. Co.*, 165 Cal. 24, 130 Pac. 865 (process against domestic nonresident corporations);

Weldon v. Rogers, 157 Cal. 410, 108 Pac. 266 (execution sale); *San Diego Realty Co. v. Cornell*, 150 Cal. 637, 89 Pac. 603 (approval of amount of tax and order for payment); *Bell v. Superior Court*, 150 Cal. 31, 87 Pac. 1031 (collection of costs upon appeal—per Shaw, J., dissenting); *People v. Chew Lan Ong*, 141 Cal. 550, 99 Am. St. Rep. 88, 75 Pac. 186 (taking evidence to determine the grade of a crime upon a plea of guilty); *Matter of Robinson*, 138 Cal. 491, 71 Pac. 690 (committing a minor convicted in inferior court); *Crane v. Cummings*, 137 Cal. 201, 69 Pac. 984 (appointing commissioner to sell land under decree of foreclosure of lien of street assessment); *Maxson v. Superior Court*, 124 Cal. 468, 57 Pac. 579 (remanding cause from superior court to justice's court with directions to proceed in accordance with the decisions of the former); *Scadden Flat Gold Min. Co. v. Scadden*, 121 Cal. 33, 53 Pac.

§ 35. Scope and Operation—When Rules Effective.—If an omission in the procedure established by law and rules is called to the court's attention in advance, it may by rule provide for it; if not, when the case is presented it

440 (appointment of receiver in action to compel conveyance from heirs); *Kreling v. Kreling*, 118 Cal. 413, 50 Pac. 546 (appointment of commissioner to sell property subject to lien); *Kirsch v. Kirsch*, 113 Cal. 56, 45 Pac. 164 (writ of assistance to successful party in divorce proceeding to place him in possession of the property awarded to him); *Trumpler v. Cotton*, 109 Cal. 250, 41 Pac. 1033 (compelling accounting by guardian out of jurisdiction); *Phelan v. Smith*, 100 Cal. 158, 34 Pac. 667 (setting apart homestead where none had been declared by the husband and wife during the lives of the parties); *People v. Superior Court*, 100 Cal. 105, 34 Pac. 492 (rule held applicable to insolvency cases); *Toby v. Ore. Pac. R. R. Co.*, 98 Cal. 490, 33 Pac. 550 (foreclosure of mortgage on vessel); *Somers v. Somers*, 81 Cal. 608, 22 Pac. 967 (authentication of affidavit on appeal—per Thornton, J., dissenting); *In re Jessup*, 81 Cal. 408, 6 L. R. A. 594, 21 Pac. 976, 22 Pac. 742, 1028 (per Works, J., dissenting); *In re Burdick*, 76 Cal. 639, 18 Pac. 805 (limiting homestead to \$5,000); *Brown v. Starr*, 75 Cal. 163, 16 Pac. 760 (successive reports of appraisers in homestead proceedings until satisfactory); *Estudillo v. Meyerstein*, 72 Cal. 317, 13 Pac. 869 (independent action to set aside discharge in insolvency proceedings); *Comstock v. County of Yolo*, 71 Cal. 599, 12 Pac. 728 (levy of road tax); *People v. Jordan*, 65 Cal. 644, 4 Pac. 683 (appeal in misdemeanor cases); *Golden Gate etc. Co. v. Superior Court*, 65 Cal. 187, 3 Pac. 628 (service upon attorney of order to show cause why corporation should not be adjudged guilty of contempt); *Thompson v. White*, 63 Cal. 505 (interlocutory decrees); *Estate of McCauley*, 50 Cal. 544 (setting apart homestead); *Mawson v. Mawson*, 50 Cal. 539 (setting apart homestead); *Nathan v. Porter*, 36 Cal. App. 356, 172 Pac. 170 (transmitting to appellate court of record used as the basis for a motion for a new trial in a case where an appeal from a judgment had been rightfully taken in advance of the hearing and determination of the motion); *Roche v. Superior Court*, 30 Cal. App. 255, 157 Pac. 830 (contest of election under local option law); *People v. Robinson*, 17 Cal. App. 273, 119 Pac. 527 (perfecting an appeal to the district court of appeals from an order denying a motion for a new trial in a criminal case); *Potomac Oil Co. v. Dye*, 14 Cal. App. 674, 113 Pac. 126, 130 (requiring officers and agents of corporation to hold stockholders' meeting); *Cerim v. De Long*, 7 Cal. App. 398, 94 Pac. 582 (inquiring into fraud in election); *People v. Palermo Land etc. Co.*, 4 Cal. App. 717, 89 Pac. 723, 725 (trial by justice of the peace of corporation charged with crime); *Eureka Lake etc. Canal Co. v. Superior Court*, 116 U. S. 410, 29 L. Ed. 671, 6 Sup. Ct.

must adopt for it an appropriate mode, in itself reasonable, which is to be followed in like cases until altered by statute or rule.¹ Rules must not conflict with the statutes, however, or impair the legal rights of the parties.² Thus a court has no power to declare by rule what shall constitute a waiver of a constitutional right.³ And the code provides that rules made by a court "shall neither impose any tax, charge or penalty upon any legal proceeding, or for filing any pleading allowed by law, nor give any allowance to any officer for services."⁴

In the absence of statute, rules of practice may be adopted to go into effect after such publication as the court adopting them may deem proper, or without any publication.⁵ But it is provided by the code that

"Rules adopted by the supreme court shall take effect sixty days, and rules adopted by superior courts, thirty days after their publication. When adopted they shall be spread upon the record of the court, printed and filed in the office of the clerk of the court."⁶

Long usage in the practice of the courts or of a particular court, may be considered the common law of the court,

Rep. 429 (service of process on attorney of foreign corporation); *Bates v. International Co.*, 84 Fed. 518 (service of an order on the attorney of a nonresident corporation requiring it to appear in proceedings supplementary to execution).

This section does not attempt in itself to confer jurisdiction, but merely operates to enable the court to exercise a jurisdiction otherwise created; *Union Collection Co. v. Superior Court*, 149 Cal. 790, 87 Pac. 1035; *Tulare County v. Kings County*, 117 Cal. 195, 49 Pac. 8.

1. *People v. Jordan*, 65 Cal. 644, 4 Pac. 682.

2. *In re Jessup*, 81 Cal. 408, 6 L. R. A. 594, 21 Pac. 976, 22 Pac.

1028, per Works, J., dissenting; *People v. Williams*, 32 Cal. 280; *People v. McClellan*, 31 Cal. 101; *Klokke Inv. Co. v. Superior Court*, 39 Cal. App. 717, 179 Pac. 728.

3. *Biggs v. Lloyd*, 70 Cal. 447, 11 Pac. 831; *In re Guerrero*, 69 Cal. 88, 10 Pac. 261.

4. Code Civ. Proc., § 129; *Hayes v. Butler*, 25 Cal. App. 743, 145 Pac. 553.

5. *People v. Jordan*, 65 Cal. 644, 4 Pac. 683. See, also, *Ex parte Thistleton*, 52 Cal. 220, where the court declined to decide the question of what notice is necessary. See *APPEAL AND ERROR*, vol. 2, p. 113.

6. Code Civ. Proc., § 130.

for acquiescence by the judges and officers of the court denotes that the practice is reasonable and has not been found objectionable. Such usages, however, have no innate force as rules or laws, but derived their sanction solely from the court which permits them to be followed, and which has power to alter them at any time.⁷

§ 36. Enforcement and Suspension.—Rules are for the convenience of both the tribunal and litigants, and are adopted to facilitate the transaction of business.⁸ Hence, where they are of such a nature that important rights are given by them, compliance therewith is strictly enforced,⁹ and a court may enforce compliance of its own motion.¹⁰ Since rules are but a means to accomplish the ends of justice, it is always in the power of the court to suspend its own rules or to except a particular case from their operation whenever justice so requires.¹¹ And, ordinarily, practice which is not established by statute, but by the court itself, may be disregarded by it in any particular case without infringing any right of a litigant.¹² However, it has been said that a court should give litigants every reasonable opportunity of presenting their cases on

7. *People v. Jordan*, 65 Cal. 644, 4 Pac. 683.

8. *McCabe v. Healey*, 139 Cal. 30, 72 Pac. 359; *Gage v. Gunther*, 136 Cal. 338, 89 Am. St. Rep. 141, 68 Pac. 710; *Shain v. People's Lumber Co.*, 98 Cal. 120, 32 Pac. 878.

9. *Brooks v. Union Trust etc. Co.*, 146 Cal. 134, 79 Pac. 843; *Hanson v. McCue*, 43 Cal. 170, 10 Am. Rep. 299.

10. *Martin v. Hudson*, 79 Cal. 612, 21 Pac. 1135.

11. *Connell v. Higgins*, 170 Cal. 541, 150 Pac. 769; *Brooks v. Union Trust etc. Co.*, 146 Cal. 134, 79 Pac. 843; *Gage v. Gunther*, 136 Cal. 338, 89 Am. St. Rep. 141, 68 Pac. 710;

People v. Silva, 121 Cal. 668, 54 Pac. 146; *People v. Demasters*, 105 Cal. 669, 39 Pac. 35; *Sullivan v. Wallace*, 73 Cal. 307, 14 Pac. 789; *Pickett v. Wallace*, 54 Cal. 147; *People v. Williams*, 32 Cal. 280; *People v. Lee*, 14 Cal. 512; *Symons v. Bunnell*, 3 Cal. Unrep. 69, 20 Pac. 859; *Chielovich v. Krauss*, 2 Cal. Unrep. 643, 9 Pac. 945; *Youree v. Youree*, 1 Cal. App. 152, 81 Pac. 1023.

12. *Gage v. Gunther*, 136 Cal. 338, 89 Am. St. Rep. 141, 68 Pac. 710; *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529; *People v. Williams*, 32 Cal. 280. ✓

the merits, and rules should be made to serve the purpose of expediting and facilitating the disposition of causes according to their merits, rather than be allowed to become a means of obstruction.¹³ And so, if the court is convinced that a rule is being invoked for the purpose of delay, it may be disregarded.¹⁴ In any event, the violation of rules cannot affect jurisdiction of the court over a cause. ~~X~~If, perchance, the violation of rules by the judge, without notice to a litigant, has worked the latter an injury by depriving him of some substantial right, the act would amount to an irregularity which may be corrected on appeal.¹⁵ On the other hand, parties themselves have no unqualified right to stipulate for an abrogation of the rules in a particular case.¹⁶

VI. DECISIONS.

§ 37. Duty and Office of Court Generally.—A court determines existing rights, but does not create new rights by the exercise of an uncontrolled volition.¹⁷ In other words, the obligation of courts is to declare the law as it exists; they have no right to substitute their own dogmas or assumptions for the law.¹⁸ It has been said that

“Judicial legislation is, as a rule, the worst of legislation. It is almost invariably the offspring of some real or supposed hardship which may result from the decision

13. *People v. Durrant*, 119 Cal. 201, 51 Pac. 185; *Warner v. F. Thomas etc. Works*, 105 Cal. 409, 38 Pac. 960; *Flagg v. Puterbaugh*, 98 Cal. 134, 32 Pac. 863; *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529.

14. *People v. Durrant*, 119 Cal. 201, 51 Pac. 185.

15. *White v. Superior Court*, 110 Cal. 60, 42 Pac. 480. See, also, *Callahan v. Hickey*, 63 Cal. 437, where a judgment was pronounced irregular for violation of a rule.

16. *Brooks v. Union Trust etc. Co.*, 146 Cal. 134, 79 Pac. 843; *Reynolds v. Lawrence*, 15 Cal. 359.

17. *In re Pearsons*, 113 Cal. 577, 45 Pac. 489, 1062; *Warner v. F. Thomas etc. Works*, 105 Cal. 409, 38 Pac. 960.

18. *Alferitz v. Borgwardt*, 126 Cal. 201, 58 Pac. 460; *Hart v. Burnett*, 15 Cal. 530; *Johnson v. Fall*, 6 Cal. 359, 65 Am. Dec. 518.

of the particular case in hand in accordance with existing laws or well-established rules of procedure."¹⁹

Courts cannot make or repeal a statute,²⁰ for where the law is plain, it is the duty of the courts to enforce it, leaving questions of policy or expediency for the consideration of the legislature and the people.¹ For instance, the consideration that a decision will put the legislature to inconvenience does not justify a court in overriding a positive constitutional provision.² It has been said that a court cannot consider the apparent justice or hardship of the operation of the law in particular cases, "for by so doing it might establish a principle that would cause greater injustice or greater hardship in numerous other cases."³ Where there is room for doubt, however, a court will take into consideration the practical consequences of its decision, as, for instance, that it will upset judgments which have stood for many years and under which many rights have accrued.⁴ Moreover, courts must be governed by principles rather than by fixed rules, since no specific rule can be laid down that will embrace all the cases that may

19. *Somers v. Somers*, 81 Cal. 608, 22 Pac. 967, per Works, J.

20. *Allen v. Allen*, 95 Cal. 184, 16 L. R. A. 646, 27 Pac. 30, 30 Pac. 312; *Ex parte Soto*, 88 Cal. 624, 26 Pac. 530 (per Garoutte, J., dissenting).

1. *In re Riccardi*, 182 Cal. 675, 189 Pac. 694; *Warner v. Warner*, 100 Cal. 11, 34 Pac. 523; *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742; *Johnson v. Fall*, 6 Cal. 359, 65 Am. Dec. 518; *Napa State Hospital v. County of Solano*, 4 Cal. App. 510, 88 Pac. 101. See CONSTITUTIONAL LAW, vol. 5, p. 638.

2. *Lewis v. Dunne*, 134 Cal. 291, 86 Am. St. Rep. 257, 55 L. R. A.

833, 66 Pac. 478. As to supremacy of constitution, see CONSTITUTIONAL LAW, vol. 5, p. 567.

3. *In re Jessup*, 81 Cal. 408, 6 L. R. A. 594, 21 Pac. 976, 22 Pac. 742, per Fox, J. (decision being by a divided court—four to three—the majority holding to the view of strict construction of the statute involved. The other judges, including Chief Justice Beatty, held to a more liberal view and construction. See ADOPTION, vol. 1, p. 423, as to the later tendency to adopt the rule of liberal rather than strict construction); *Giblin v. Jordan*, 6 Cal. 416.

4. *City of Oakland v. Oakland Water Front Co.*, 118 Cal. 249, 50 Pac. 268. See *infra*, § 38.

arise for its application, owing to the infinite variety of human transactions.⁵ If there are no precedents for a proceeding, either party is entitled to the benefit of any inference that can fairly be drawn from that circumstance. But when a case is new only in instance and not new in principle, the mere failure to discover a precedent in which the principle has been applied to exactly the same facts is of little consequence.⁶ Courts should not, however, render judgments which cannot be enforced by any process known to the law.⁷

§ 38. Stare Decisis.—It is elsewhere pointed out that the common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States or the state constitution or laws, is the rule of decision in California.⁸ And it is said in the code:

“Unwritten law is the law not promulgated and recorded, . . . but which is, nevertheless, observed and administered in the courts of the country. It has no certain repository, but is collected from reports of the decisions of the courts, and the treatises of learned men.”⁹

The doctrine of stare decisis may be said to be less a rule of law than a device for determining the law,—that, in the last analysis, it is a matter of method rather than principle. This seems to be the import of certain of the authorities.¹⁰ Otherwise expressed, it may be said that

5. *Murdock v. Clarke*, 88 Cal. 384, 26 Pac. 601; *In re Jessup*, 81 Cal. 408, 6 L. R. A. 594, 21 Pac. 976, 22 Pac. 42.

6. *People v. Richards*, 67 Cal. 412, 56 Am. Rep. 716, 7 Pac. 828. See as to stare decisis, *infra*, § 38.

7. *Johnson v. Malloy*, 74 Cal. 430, 16 Pac. 228; *Board of Education v. Common Council*, 1 Cal. App. 311, 82 Pac. 89.

8. See COMMON LAW, vol. 5, p. 255.

See *Waters v. Moss*, 12 Cal. 538, 73 Am. Dec. 561, and *Johnson v. Fall*, 6 Cal. 359, 65 Am. Dec. 518, for the same rule in the early history of the state.

9. Code Civ. Proc., § 1899; *White v. Merrill*, 82 Cal. 14, 22 Pac. 1129, per Thornton, J., concurring; *Bryan v. Berry*, 6 Cal. 394 (where it is said that “decided cases are in some sense evidence of what the law is”).

10. *Sacramento Bank v. Alcorn*, 121 Cal. 379, 53 Pac. 813; *Houghton*

the doctrine is but a recognition of the integrity of former decisions on parallel questions.¹¹

“The law is a science, whose leading principles are settled. They are not to be opened for discussion upon the elevation to the bench of every new judge, however subtle his intellect or profound his learning or logical his reasoning. Upon their stability men rest their property, make their contracts, assert their rights and claim protection. It is true that the law is founded upon reason, but by this is meant that it is the result of the general intelligence, learning and experience of mankind through a long succession of years, and not of the individual reasoning of one or of several judges.”¹²

Even though a prior decision is clearly erroneous, nevertheless, if its reversal would prove a greater evil than to permit it to remain, it is, generally speaking, the duty of *the courts* to refuse to overrule it.¹³ Courts examine the *consequences* which will result from a change and the *effect* it will have upon the community, and unless the *inconveniences* arising from the error greatly outweigh the *advantages* which would result from an adherence to the *rule*, the decision should be permitted to stand.¹⁴ Accordingly, it has been repeatedly held that where a conclusion *reached* in a decision has been settled by long *acquiescence* on the part of the legislature and the courts, it will *ordinarily* not be disturbed, even if its soundness is doubt-

v. *Austin*, 47 Cal. 646; *Hart v. Burnett*, 15 Cal. 530.

11. As stated by Kent: “A *solemn* decision upon a point of *law*, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the *law* applicable to the subject”; *Hibb v. Curtis*, 31 Cal. 398 (quoting 1 *Kent's Com.*, p. 476). See

Wright v. Carillo, 22 Cal. 595, to similar effect; also, *Aud v. Magruder*, 10 Cal. 282, per Baldwin, J.

12. Field, J., dissenting, in *Ex parte Newman*, 9 Cal. 502.

13. *Alferitz v. Borgwardt*, 126 Cal. 201, 58 Pac. 460; *Hart v. Burnett*, 15 Cal. 530; *Aud v. Magruder*, 10 Cal. 282.

14. *Wright v. Carillo*, 22 Cal. 595; *Welch v. Sullivan*, 8 Cal. 165.

ful.¹⁵ If there are two conflicting decisions upon a point, the later should prevail.¹⁶

§ 39. Decision as Rule of Property.—The principal justification of the doctrine of stare decisis is that where people have invested money in reliance upon a decision, it has thereby become a rule of property and injustice would result from overruling it.¹⁷ Accordingly, where a decision

15. *Rapfogel v. Klassen*, 61 Cal. Dec. 526, 197 Pac. 795 (forty-one years); *In re Riccardi*, 182 Cal. 675, 189 Pac. 694 (thirty-five years); *Gardiner v. Royer*, 167 Cal. 238, 139 Pac. 75 (twenty years); *Pugh v. Moxley*, 164 Cal. 374, 128 Pac. 1037; *Hollywood Lumber Co. v. Love*, 155 Cal. 270, 100 Pac. 698 (twenty-five years) *Crocker v. Scott*, 149 Cal. 575, 87 Pac. 102 (twenty-five years); *Schoonover v. Birnbaum*, 148 Cal. 548, 83 Pac. 999 (ten years); *Miller & Lux v. Enterprise Canal etc. Co.*, 142 Cal. 208, 100 Am. St. Rep. 115, 75 Pac. 770; *People v. Shea*, 125 Cal. 151, 57 Pac. 885; *People v. Logan*, 123 Cal. 414, 56 Pac. 56; *Angus v. Plum*, 121 Cal. 608, 54 Pac. 97; *Morton v. Broderick*, 118 Cal. 474, 50 Pac. 644; *People v. Allender*, 117 Cal. 81, 48 Pac. 1014 (thirty-five years); *Davis v. Southern Pac. Co.*, 98 Cal. 13, 32 Pac. 646; *Reay v. Butler*, 95 Cal. 206, 30 Pac. 208; *In re Dorris*, 93 Cal. 611, 29 Pac. 244 (twelve years); *McDaniel v. Cummings*, 83 Cal. 515, 8 L. R. A. 575, 23 Pac. 795 (seventeen years); *Monterey County v. Cushing*, 83 Cal. 507, 23 Pac. 700 (twenty years); *In re Stevens*, 83 Cal. 322, 17 Am. St. Rep. 252, 23 Pac. 379; *Kohl v. Lillenthal*, 81 Cal. 378, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689 (twenty years); *In re Jessup*, 81 Cal. 408, 21 Pac. 976, 6 L. R. A. 594, 22 Pac. 742, 1028; *Lord v. Dunster*, 79 Cal. 477, 21 Pac. 865; *Thompson v. Felton*, 54 Cal. 547; *Smith v. McDonald*, 42 Cal. 484; *Vassault v. Austin*, 36 Cal. 691 (thirteen years); *Hihn v. Courtis*, 31 Cal. 398 (eight years); *People v. Rosborough*, 29 Cal. 415; *Clary v. Rolland*, 24 Cal. 150 (seven years); *Fulton v. Hanlow*, 20 Cal. 450; *Clark v. Troy*, 20 Cal. 219; *Phelan v. City and County of San Francisco*, 20 Cal. 29; *Ferris v. Coover*, 11 Cal. 175; *Curtis v. Richards*, 9 Cal. 33, 278; *McFadden v. Jones*, 1 Cal. 453; *Grow v. Rosborough*, 1 Cal. Unrep. 258; *Sacramento Terminal Co. v. McDougall*, 19 Cal. App. 562, 126 Pac. 503 (twenty-seven years); *City of Los Angeles v. Gager*, 10 Cal. App. 378, 102 Pac. 17 (twenty-seven years); *People v. Richards*, 1 Cal. App. 566, 82 Pac. 691 (twenty-five years).

See *People v. McKamy*, 168 Cal. 531, 143 Pac. 752, where the rule was held not applicable.

16. *Outer Harbor etc. Co. v. City of Los Angeles*, 33 Cal. App. Dec. 45, 193 Pac. 137; *Palvutjian v. Terkanian*, 31 Cal. App. Dec. 1025, 190 Pac. 503.

17. *Gardiner v. Royer*, 167 Cal. 238, 139 Pac. 75; *Woolacott v.*

has been generally acted upon by the public so that property rights and vested interests have grown up under it, it should be adhered to even if erroneous.¹⁸ This has been declared to be especially true with reference to real property. When a rule by which the title to land is to be determined has become established by judicial decision, its inherent correctness or incorrectness, its justice or injustice, in the abstract, are of far less importance than that it should itself be constant and invariable.¹⁹ If the rule established is unjust or incorrect, the legislature can change it without the disturbance of titles and the destruction of individual rights which may follow such a change when brought about by a judicial decision.²⁰ However, the courts have frequently held it proper to correct an

Meekin, 151 Cal. 701, 91 Pac. 612; *Alferitz v. Borgwardt*, 126 Cal. 201, 58 Pac. 460; *Angus v. Plum*, 121 Cal. 608, 54 Pac. 97; *Sacramento Bank v. Alcorn*, 121 Cal. 379, 53 Pac. 813; *Ryder v. Cohn*, 37 Cal. 69; *Coppinger v. Rice*, 33 Cal. 408; *Hihn v. Courtis*, 31 Cal. 398; *Ryan v. Tomlinson*, 31 Cal. 11; *Clark v. Troy*, 20 Cal. 219; *Hart v. Burnett*, 15 Cal. 530; *Welch v. Sullivan*, 8 Cal. 165, per Terry, J., concurring; *Smith v. Ferries etc. Ry. Co.*, 5 Cal. Unrep. 889, 51 Pac. 710.

18. *Miller & Lux v. Enterprise etc. Co.*, 169 Cal. 415, 147 Pac. 567; *Pugh v. Moxley*, 164 Cal. 374, 128 Pac. 1037; *Henderson v. De Turk*, 164 Cal. 296, 128 Pac. 747; *Merced Oil Mining Co. v. Patterson*, 162 Cal. 538, 122 Pac. 950; *Hollywood Lumber Co. v. Love*, 155 Pac. 270; 100 Pac. 698; *Estate of Nigro*, 149 Cal. 702, 87 Pac. 384; *Lacy v. Gunn*, 144 Cal. 511, 78 Pac. 30; *Somers v. Somers*, 81 Cal. 608, 22 Pac. 967; *Kohl v. Lilienthal*, 81 Cal. 378, 6 L. R. A. 520, 20 Pac. 401, 22 Pac.

689; *Smith v. McDonald*, 42 Cal. 484; *Ryder v. Cohn*, 37 Cal. 69; *Seale v. Mitchell*, 5 Cal. 401.

19. *Boggs v. Dunn*, 160 Cal. 283, 116 Pac. 743; *Schoonover v. Birnbaum*, 148 Cal. 548, 83 Pac. 999; *Smith v. McDonald*, 42 Cal. 484; *Hihn v. Courtis*, 31 Cal. 398; *Pioche v. Paul*, 22 Cal. 105; *Townsend v. Gordon*, 19 Cal. 188; *Hart v. Burnett*, 15 Cal. 530; *Welch v. Sullivan*, 8 Cal. 165.

"The prosperity and progress of a country depend so much upon the validity of its land titles that no court can be justified in overturning long-settled principles of law relating to them, unless compelled to do so by the plainest dictates of reason and justice." *Wright v. Carillo*, 22 Cal. 595, per Crocker, J. See as to impairment of obligation of contracts by judicial decision, *CONSTITUTIONAL LAW*, vol. 5, p. 766.

20. *Schoonover v. Birnbaum*, 148 Cal. 548, 83 Pac. 999; *Smith v. McDonald*, 42 Cal. 484.

error in a former decision where no property rights have grown up on the faith of it.¹

§ 40. Limitations of Doctrine.—Except as to its bearing on the case itself, a judicial decision is not law. The court simply determines the rights of the parties in a particular controversy, and applies to the controversy the law as it exists when the alleged rights or liabilities accrued. In other suits the decision is authority more or less persuasive according to its reasonableness. Courts have never thought themselves bound by it as they are by a valid statute.² It was said by Justice Baldwin in an early case that:

“As this rule of stare decisis is avowedly put upon the ground of policy, we cannot conceive that its application could be rightly so made as to overthrow the paramount public policy of deciding causes by the rules of the law, when those rules work justice and do equity in the major part of the cases to which they apply, and protect the rights of the many against the claim of a few.”³

This is especially true where the decision in question itself constituted a departure from previously established

1. *San Pedro etc. R. Co. v. City of Los Angeles*, 180 Cal. 18, 179 Pac. 393; *King v. Pauly*, 159 Cal. 549, Ann. Cas. 1912C, 1244, 115 Pac. 210; *Becker v. Superior Court*, 151 Cal. 313, 90 Pac. 689; *People v. Hibernia Bank*, 51 Cal. 243, 21 Am. Rep. 704; *Hihn v. Courtis*, 31 Cal. 398; *Ferris v. Coover*, 11 Cal. 175, per Terry, C. J., dissenting.

2. *Alferitz v. Borgwardt*, 126 Cal. 201, 58 Pac. 460, per Temple, J.; *Ex parte Koser*, 60 Cal. 177, per McKinstry, J., dissenting; *Houghton v. Austin*, 47 Cal. 646; *Hart v. Burnett*, 15 Cal. 530. See *State v. Savings Union Bank & Trust Co.*,

61 Cal. Dec. 847, 199 Pac. 26, holding that the decision of the district court of appeals was not the law of the case because it was not rendered in the same action.

3. *Hart v. Burnett*, 15 Cal. 530. And see the following cases to similar effect: *In re Dorris*, 93 Cal. 611, 29 Pac. 244; *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677; *Houghton v. Austin*, 47 Cal. 646; *McFarland v. Pico*, 8 Cal. 626. As to whether a reversal of a previous decision constitutes the impairment of the obligation of a contract, see CONSTITUTIONAL LAW, vol. 5, p. 766.

doctrine,⁴ or a statute or plain rule of law.⁵ Even the fact that rights have vested does not make a decision irreversible, regardless of the extent or the number of persons claiming such rights,⁶ unless the decision in question has been so commonly acquiesced in as settled law that it has passed beyond contention.⁷ But when a court undertakes to reverse a former decision which has become a rule of property, or of contracts, it will consider carefully, not only the objections thereto, but the evils which may follow from its reversal.⁸

If, after fully considering a former decision, a court is convinced that it is wrong, it has been said to be a question of public policy for the court to determine whether proprietary rights have grown up to such an extent that it will produce more of evil than of good to restore the law to its integrity.⁹

The question of the conclusiveness of adjudications is not necessarily dependent upon the number of them. Some of the authorities use the terms "a series of decisions," "an uninterrupted series," "a long established rule," and like expressions, but this language implies not solely the age of the rule, but its permanent, settled, stable character. The meaning is that the sense of the legal pro-

4. *Alferitz v. Borgwardt*, 126 Cal. 201, 58 Pac. 460; *Franklin v. Merida*, 35 Cal. 558, 95 Am. Dec. 129; *Hihn v. Courtis*, 31 Cal. 398; *Pioche v. Paul*, 22 Cal. 105; *Aud v. Magruder*, 10 Cal. 282. See, however, concurring opinion of Terry, J., in *Welch v. Sullivan*, 8 Cal. 165, where in a case involving the law of real property, the later decision was adhered to.

5. *Huffman v. Hall*, 102 Cal. 26, 36 Pac. 417; *Golden Gate etc. Co. v. Joshua Hendy Machine Works*, 82 Cal. 184, 23 Pac. 45; *City and County of San Francisco v. Spring Valley Water Works*, 48 Cal. 493;

Hart v. Burnett, 15 Cal. 530; *Duff v. Fisher*, 15 Cal. 375; *McFarland v. Pico*, 8 Cal. 626; *Cohas v. Raisin*, 3 Cal. 443; *Ingraham v. Gildermester*, 2 Cal. 161.

6. *City and County of San Francisco v. Spring Valley Water Works*, 48 Cal. 493; *Hart v. Burnett*, 15 Cal. 530.

7. *Hart v. Burnett*, 15 Cal. 530.

8. *Alferitz v. Borgwardt*, 126 Cal. 201, 58 Pac. 460; *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677.

9. *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677; *Houghton v. Austin*, 47 Cal. 646.

fession and of the public has recognized the rule as fixed and established, as being closed to further debate. Even a single decision, if never called in question, but consistently acted on and generally acquiesced in for many years, would fall within the rule.¹⁰

§ 41. Subject Matter as Affecting Doctrine.—The weight to be given to the rule of stare decisis depends upon the subject to which it is applied. Thus, in construing statutes and the constitution the rule is almost invariable to adhere to the doctrine.¹¹ And the same is true to a somewhat lesser extent of decisions involving the constitutionality of statutes,¹² or their construction.¹³ On the other hand, it has been said that when a decision relates abstractly to the structure of the government, the limits of executive and legislative power, etc., the doctrine of stare decisis does not apply, unless it can be shown that property interests have grown up under a certain construction of the organic law.¹⁴ Nor does the rule apply to a mere rule of evidence, in which no one has a vested right,¹⁵ or where the decisions affect mere questions of practice.¹⁶

10. *Houghton v. Austin*, 47 Cal. 646; *Hart v. Burnett*, 15 Cal. 530.

11. *Schoonover v. Birnbaum*, 148 Cal. 548, 83 Pac. 999; *Miller & Lux v. Enterprise Canal etc. Co.*, 142 Cal. 208, 100 Am. St. Rep. 115, 75 Pac. 770; *People v. Hayne*, 83 Cal. 111, 17 Am. St. Rep. 217, 7 L. R. A. 348, 23 Pac. 1; *Clary v. Rolland*, 24 Cal. 147; *Ferris v. Coover*, 11 Cal. 175; *Seale v. Mitchell*, 5 Cal. 401. But see *Pioche v. Paul*, 22 Cal. 105, where the court said that it had the less hesitation in overruling a decision construing a statute because "it is within the power of the legislature to correct any misconstruction of their intention by enacting a proper

law expressing such intention in unmistakable terms."

12. *Sacramento Terminal Co. v. McDougall*, 19 Cal. App. 562, 126 Pac. 503; *Los Angeles v. Gager*, 10 Cal. App. 378, 102 Pac. 17.

13. *Hart v. Burnett*, 15 Cal. 530, holding that the rule of stare decisis is particularly applicable to cases involving questions of Spanish and Mexican law.

14. *Ex parte Koser*, 60 Cal. 177, per *McKinstry, J.*, dissenting.

15. *Williams v. Kidd*, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1.

16. *Works and Fox, JJ.*, in *Somers v. Somers*, 81 Cal. 608, 22 Pac. 967. But see concurring opinion of

It has been held that if a view of the law taken by a court frees a statutory remedy from inconvenient and burdensome restrictions imposed by a previous mistaken construction, and the view is in itself reasonable and embodies a proper construction of the statute, it ought to prevail, even if opposed to previous decisions, for no vested right can be thereby violated or impaired.¹⁷ Obviously, decisions on the interpretation of written instruments have but limited value except applied to the construction of documents embodying identical language.¹⁸

§ 42. As Affected by Relation of Courts Involved.—The limitations upon the rule of stare decisis apply only in reference to decisions of the same court in which the doctrine is invoked. In inferior courts a decision of the supreme court that has never been reversed or modified is absolutely binding authority,¹⁹ as is also a decision of a majority of the supreme court in bank when the same question comes before a department of that court.²⁰

Paterson, J., quoted in following note.

17. *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. 585; *In re Jessup*, 81 Cal. 408, 6 L. R. A. 584, 21 Pac. 976, 22 Pac. 1028.

And see concurring opinion of Paterson, J., in *Somers v. Somers*, 81 Cal. 608, 22 Pac. 967, where it is said that "It is better that a rule of mere practice be steadily adhered to, even if it has arisen out of an erroneous construction of some provision of the code. Nothing disturbs and annoys practitioners more than judicial vacillation from one rule of practice to a different one on the same matter."

18. *Estate of Whitney*, 171 Cal. 750, 154 Pac. 855; *In re Stevens*, 83 Cal. 322, 23 Pac. 379.

19. *People v. McGuire*, 45 Cal. 56; *Warner v. Steamship Uncle Sam*, 9 Cal. 697; *Winter v. De Shields*, 31 Cal. App. Dec. 807, 189 Pac. 703; *Atkinson v. Foote*, 44 Cal. App. 149, 186 Pac. 831; *Eddlemon v. South Pac. Co.*, 41 Cal. App. 340, 182 Pac. 811; *Colusa & Hamilton R. R. Co. v. Glenn*, 35 Cal. App. 205, 169 Pac. 423; *Arens v. United Railroads*, 25 Cal. App. 714, 145 Pac. 163; *Canadian Bank of Commerce v. Leale*, 14 Cal. App. 307, 111 Pac. 759.

20. *Arnold v. City of San Jose*, 81 Cal. 618, 22 Pac. 877 (where *Works and Fox, JJ.*, concurred on this ground alone); *Palvutzian v. Terkanian*, 31 Cal. App. Dec. 1025, 190 Pac. 503.

On the other hand, a decision of a department of the supreme court is not decisive upon the court in bank,¹ although if a rehearing by the court in bank is denied, this fact gives added weight to the department decision.² It has been said that where a petition to the supreme court to hear and determine a cause, after judgment of the district court of appeal, is denied, the decision thereupon possesses all the authority of a pronouncement by the supreme court itself.³ While the opinion of a trial court cannot control the interpretation to be put upon the opinion of an appellate court upon appeal therefrom, nevertheless it may be illuminating and persuasive when there is an unqualified affirmance by the latter of the decree of the former.⁴ Since the adoption of the present constitution the courts have followed as authoritative the construction placed upon the provisions of the former constitution or laws adopted thereunder by the supreme court organized under it.⁵ While the decisions of one department of the superior court are not binding as precedents upon the other departments, it has been said that they should not be departed from except for grave reasons.⁶

§ 43. Other Considerations Affecting Applicability.— Among the considerations which may serve to influence a court in abiding by a former decision is the fact that the former decision was based upon a full discussion and careful consideration⁷ and that it has never been ques-

1. Sukeforth v. Lord, 87 Cal. 399, 25 Pac. 497.

2. Palvutjian v. Terkanian, 31 Cal. App. Dec. 1025, 190 Pac. 503.

3. Bridges v. Tefft, 35 Cal. App. Dec. 379, 200 Pac. 71. But see APPEAL AND ERROR, vol. 2, p. 798.

4. Quong Ham Wah Co. v. Industrial Acc. Com., 184 Cal. 26, 192 Pac. 1021.

5. Emery v. Reed, 65 Cal. 351, 4 Pac. 200; Moulton v. Parks, 64 Cal. 166, 30 Pac. 613; Davis v. Superior Court, 63 Cal. 581.

6. Estate of Griffiths, 3 Cal. Prob. Dec. 545.

7. Estate of Nigro, 149 Cal. 702, 87 Pac. 384; People v. Shea, 125 Cal. 151, 57 Pac. 885; Kohl v. Lilienthal, 81 Cal. 378, 6 L. R. A.

tioned.⁸ Conversely, of course, it is an element of justification for reconsidering a doctrine declared in an earlier decision that it appears from the opinion in that decision that the court in reaching its conclusion was not aided by any argument or presentation of authorities on behalf of the losing party.⁹ Where the legislature has had an opportunity to change the rule laid down and has not done so, this is to be considered,¹⁰ or, likewise, that the rule has been generally relied upon by the legal profession,¹¹ or has been approved by the same court after a change of personnel.¹² But the fact that a case is a hard one is not a sufficient reason why a former decision upon the same subject should be disregarded. It has been said that "the frequent instances in which courts have relaxed rules to avoid the consequences of such cases have done more to confuse and complicate the law and destroy its symmetry than all other causes put together. A rule once established and firmly adhered to may work apparent hardship in a few cases but in the end will prove more beneficial than if constantly deviated from."¹³

§ 44. Grounds of Decision—Reports.—The constitution of California specifically provides that in the determin-

520, 20 Pac. 401, 22 Pac. 689; Wright v. Carillo, 22 Cal. 595; Pioche v. Paul, 22 Cal. 105.

8. Rapfogel v. Klassen, 61 Cal. Dec. 526, 197 Pac. 795; Hart v. Burnett, 15 Cal. 530; Weyer v. Weyer, 40 Cal. App. 765, 182 Pac. 776.

9. Becker v. Superior Court, 151 Cal. 313, 90 Pac. 689, and Franklin v. Merida, 35 Cal. 558, 95 Am. Dec. 129.

10. Rapfogel v. Klassen, 61 Cal. Dec. 526, 197 Pac. 795; In re Riccardi, 182 Cal. 675, 189 Pac. 694; Gardiner v. Boyer, 167 Cal. 238, 139 Pac. 75; Hollywood Lumber Co.

v. Love, 155 Cal. 270, 100 Pac. 698; Schoonover v. Birnbaum, 148 Cal. 548, 83 Pac. 999; Pioche v. Paul, 22 Cal. 105.

11. Hollywood Lumber Co. v. Love, 155 Cal. 270, 100 Pac. 698; Miller & Lux v. Enterprise Canal etc. Co., 142 Cal. 208, 100 Am. St. Rep. 115, 75 Pac. 770; Smith v. McDonald, 42 Cal. 484; Hart v. Burnett, 15 Cal. 530; Duff v. Fisher, 15 Cal. 375.

12. Clary v. Rolland, 24 Cal. 147.

13. Giblin v. Jordan, 6 Cal. 416 (per Murray, C. J.). See, also, supra, § 37.

ation of causes, all decisions of the supreme court in bank or in departments and of the district courts of appeal shall be given in writing, and that the grounds of the decisions must be stated.¹⁴ But in the absence of a constitutional provision, the legislature, it has been said, cannot require a court to state the reasons for its decisions.¹⁵ The object of the constitutional requirement is not to compel the judges to formulate opinions in their own language, but to put upon record the grounds of their decisions for the guidance of the public. "In order to comply with this injunction, it is undoubtedly necessary that the court, or some member to whom the duty is assigned, shall in most cases prepare a written opinion, but there may be, and in fact are, many cases in which the labor of formulating a statement of the grounds of the decision has been performed in advance or may be properly delegated to others."¹⁶ Thus, one judge may simply concur in the opinion rendered by another judge. And where several opinions are rendered in a case, it is sufficient if the grounds upon which the various justices concur in the judgment are stated anywhere in those opinions;¹⁷ or the court may adopt a statement of a proposition contained in the briefs of counsel; or it may adopt the opinion of the trial judge as its own.¹⁸ The filing of an opinion by a judge who dissents from the judgment of the court is

14. Const., art. VI, §§ 2, 24. And see Code Civ. Proc., §§ 49, 53. As to method of preparing opinions in the supreme court, see *People v. Ruef*, 14 Cal. App. 576, 114 Pac. 48, 54.

15. *Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565.

16. *People v. Hayne*, 83 Cal. 111, 118, 17 Am. St. Rep. 217, 7 L. R. A. 348, 23 Pac. 1, per Beatty, C. J., concurring. As to assistance of judges by commissioners, see *infra*, § 52.

17. *Philbrook v. Newman*, 148 Cal. 172, 82 Pac. 772.

18. *People v. Hayne*, 83 Cal. 111, 118, 17 Am. St. Rep. 217, 7 L. R. A. 348, 23 Pac. 1, per Beatty, C. J., concurring.

See the following cases where the opinions of the trial judges were adopted on appeal: *Williams v. Williams*, 73 Cal. 101, 14 Pac. 394; *Meredith v. Board of Supervisors of Sacramento County*, 50 Cal. 433; *Burrell v. Haw*, 48 Cal. 223.

ordinarily unnecessary. But in cases of great importance, it may become his duty to do so.¹⁹

“The reports are to be published under the general supervision of the supreme court, which may correct clerical errors in the opinion as filed, or authorize the same to be corrected; but may not in any manner alter the written opinion as to substance, argument or authority cited, or omit any portion of the opinion as filed. All opinions filed must be printed in full in the law reports;”²⁰ and “all opinions shall be free for publication by any person.”²¹

The secretary of state is required by law to distribute the bound volumes of the decisions of the supreme court and the district courts of appeal to various officers and libraries in California and in other states.²

§ 45. Obiter Dicta.—There are two different kinds of opinions, judicial and extrajudicial. A judicial opinion is one that is on the question before the court; it is the direct, solemn and deliberate decision of the court upon the issues raised by the record and presented in the argument. An extrajudicial opinion is an opinion given on a question that it is not necessary to decide in the case in which it was given.³ In the application of the doctrine of stare decisis a decision is authority only upon the points actually passed upon by the court and directly involved in the case,⁴ and an expression of opinion which is not necessary to a determination of the case is to be regarded as mere

19. *Buckley v. Superior Court*, 96 Cal. 119, 31 Pac. 8, per Paterson, J., dissenting.

20. Pol. Code, § 74 (in part), under authority of Const., art. VI, § 16. See infra, § 51, as to preparation and publication of reports.

1. Const., art. VI, § 16.

2. Pol. Code, §§ 410, 781.

3. *Warner v. Steamship Uncle Sam*, 9 Cal. 697, per Terry, C. J.

4. *In re Garner*, 179 Cal. 409, 177 Pac. 162; *United Land Assn. v. Knight*, 85 Cal. 448, 24 Pac. 818; *Norris v. Moody*, 84 Cal. 143, 24 Pac. 37; *Magee v. North Pac. Coast R. R. Co.*, 78 Cal. 430, 12 Am. St. Rep. 69, 21 Pac. 114; *In re Conner*, 39 Cal. 98, 2 Am. Rep. 427; *Hart v. Burnett*, 15 Cal. 530 (leading case); *Warner v. Steamship Uncle Sam*, 9 Cal. 697.

dictum.⁵ Such opinions are regarded as the mere gratuitous expressions of the judge pronouncing the judgment, and not as the deliberate ruling or opinion of the court; and though the well established reputation, for learning and ability, of the judge in whose opinion they occur may entitle them to respectful consideration, they have never been regarded as authority.⁶ The practice of introducing obiter dicta into the opinions of judges has been often deprecated.⁷ For the same reasons, expressions in judicial opinions cannot safely be applied in their most universal sense to dissimilar cases.⁸ Furthermore, the mere reasoning of the court, even upon the points decided, is not authority.⁹

The dictum of a court is by no means, however, to be always discarded. A decision may constitute a precedent,

5. *Cardenas v. Miller*, 108 Cal. 250, 49 Am. St. Rep. 84, 39 Pac. 783, 41 Pac. 472; *Adams v. Seaman*, 82 Cal. 636, 7 L. R. A. 224, 23 Pac. 53; *Banks v. Moreno*, 39 Cal. 233; *Ryder v. Cohn*, 37 Cal. 69; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742 (per Sanderson, J.); *Trinity County v. McCammon*, 25 Cal. 117; *Warner v. Steamship Uncle Sam*, 9 Cal. 697; *Haight v. Joyce*, 2 Cal. 64, 56 Am. Dec. 311. See, also, *Coburn v. Brooks*, 78 Cal. 443, 21 Pac. 2, where the circumstance is referred to as weakening the decision.

6. *City of Oakland v. Buteau*, 180 Cal. 83, 179 Pac. 170; *Grant v. Murphy*, 116 Cal. 427, 58 Am. St. Rep. 188, 48 Pac. 481; *Cullen v. Glendora Water Co.*, 113 Cal. 503, 39 Pac. 769, 45 Pac. 822, 1047; *Pierce v. Birkholm*, 110 Cal. 669, 43 Pac. 205; *Chapman v. State*, 104 Cal. 690, 43 Am. St. Rep. 158, 38 Pac. 457; *In re Johnson*, 98 Cal. 531, 21 L. R. A. 380, 33 Pac. 460; *City of Pasadena v. Stimson*, 91 Cal.

238, 27 Pac. 604; *Norris v. Moody*, 84 Cal. 143, 24 Pac. 37; *Coburn v. Brooks*, 78 Cal. 443, 21 Pac. 2; *Sharon v. Sharon*, 75 Cal. 1, 16 Pac. 345; *Ex parte Young Ah Gow*, 73 Cal. 438, 15 Pac. 76; *Hart v. Burnett*, 15 Cal. 530; *Uhlfelder v. Levy*, 9 Cal. 607; *Leonard v. Hastings*, 9 Cal. 234; *Palvutjian v. Terkanian*, 31 Cal. App. Dec. 1025, 190 Pac. 503; *People v. Baker*, 38 Cal. App. 28, 175 Pac. 88; *Flores v. Stone*, 21 Cal. App. 105, 131 Pac. 348, 351, 352.

7. *Warner v. Steamship Uncle Sam*, 9 Cal. 697, per Terry, C. J., citing 1 Black. Com., 53.

8. *City of Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604; *Warner v. Steamship Uncle Sam*, 9 Cal. 697; *Uhlfelder v. Levy*, 9 Cal. 607. See, also, *Cullen v. Glendora Water Co.*, 113 Cal. 503, 39 Pac. 769, 45 Pac. 822, 1047, where the rule was applied.

9. *Norris v. Moody*, 84 Cal. 143, 24 Pac. 37. See, also, *infra*, § 49.

even if not strictly necessary to the disposition of the case, if the matter arose in the case and was discussed by counsel and has since been recognized as law.¹⁰ And where a point, though not necessary to the decision, was elaborately considered and the conclusion thereon was concurred in by the entire court in bank, it has been held that it is entitled to great weight, even though not authority in the strict sense.¹¹

Where two independent reasons are given for a decision, neither one is to be considered mere dictum,¹² since there is no more reason for calling one ground the real basis of the decision than the other.¹³ It cannot be said that points decided are dicta where it is necessary for an appellate court, after having reached its conclusion upon the main question presented in a case, to determine other matters in order to dispose of the case,¹⁴ or in anticipation of a subsequent trial of the same cause.¹⁵

§ 46. Points not Raised.—Analogous to the principle of obiter dicta is the rule that a decision is not authority upon a point not raised by counsel or referred to in the opinion, even though necessarily involved in the decision.¹⁶

10. *San Joaquin etc. Co. v. County of Stanislaus*, 155 Cal. 21, 99 Pac. 365; *Monterey County v. Cushing*, 83 Cal. 507, 23 Pac. 700.

11. *Adams v. Seaman*, 82 Cal. 636, 7 L. R. A. 224, 23 Pac. 53.

12. *Pugh v. Moxley*, 164 Cal. 374, 128 Pac. 1037; *King v. Pauly*, 159 Cal. 549, Ann. Cas. 1912C, 1244, 115 Pac. 210; *Camron v. Kenfield*, 57 Cal. 550; *Clary v. Rolland*, 24 Cal. 148.

13. *King v. Pauly*, 159 Cal. 549, Ann. Cas. 1912C, 1244, 115 Pac. 210.

14. *People v. Scott*, 39 Cal. App. 128, 178 Pac. 298.

15. *Wallace v. Sisson*, 114 Cal. 42, 45 Pac. 1000; *Olney v. Sawyer*, 54 Cal. 379.

16. *Oakland Paving Co. v. Whittell Realty Co.*, 185 Cal. 113, 195 Pac. 1058; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742, per Sanderson, J.; *Donner v. Palmer*, 31 Cal. 500; *Duff v. Fisher*, 15 Cal. 375; *Donner v. Palmer*, 31 Cal. 500; *Warner v. Steamship Uncle Sam*, 9 Cal. 697. See, also, *Sacramento Bank v. Alcorn*, 121 Cal. 379, 53 Pac. 813, where the court refused to decide whether the point had actually been raised; and *In re Dorris*, 93 Cal. 611, 29 Pac. 244, where principle was held not applicable.

Thus, a decision which fails to note the existence of a statute is not an authority upon the construction of that statute.¹⁷ And approval generally by an appellate court of the instructions given by the trial court is not a specific approval of an instruction not criticised by counsel upon appeal.¹⁸ But it has been held that where the point involves the constitutionality of a procedure which has since been recognized and followed for a long period of time, the decision will be considered to have established the validity of the procedure, even though the question of constitutionality was not raised therein.¹⁹

§ 47. Decisions by Divided Court—Inferential Decisions.

The general rule is that where authority is conferred upon a court of more than one judge, the majority can render decisions of the court in the absence of express statutory or constitutional provision to the contrary.²⁰ Where the judges participating in a decision are equally divided, the decision possesses no value as a precedent;¹ and, as elsewhere pointed out, the equal division of the court necessitates a denial of relief.² Where the court is divided unevenly, the opinion of the majority constitutes the decision,³ although any decision rendered by a divided court is generally considered to be of less controlling authority than one concurred in unanimously.⁴ Yet even where the

17. *Mersfelder v. Spring*, 139 Cal. 593, 73 Pac. 452; *Alferitz v. Borgwardt*, 126 Cal. 201, 58 Pac. 460.

18. *Graff v. United Railroads*, 178 Cal. 171, 172 Pac. 603.

19. *Miller & Lux v. Enterprise Canal etc. Co.*, 142 Cal. 208, 100 Am. St. Rep. 115, 75 Pac. 770.

20. *Athearn v. Nicol*, 62 Cal. Dec. 373, 200 Pac. 942 (citing authorities to this rule).

1. *Smith v. Martin*, 135 Cal. 250, 67 Pac. 780; *Luco v. De Toro*, 88 Cal. 26, 11 L. R. A. 543, 25 Pac. 983.

2. See *APPEAL AND ERROR*, vol. 2, p. 976.

3. *Sudden & Christenson v. Industrial Acc. Com.*, 182 Cal. 437, 188 Pac. 803.

4. *Houghton v. Austin*, 47 Cal. 646; *In re Hatch*, 9 Cal. App. 333, 99 Pac. 398. See, also, *Warner v. Steamship Uncle Sam*, 9 Cal. 697, per Terry, C. J., where it was said that a case which has the unanimous approval of the court is a strong precedent.

actual decision is unanimous, a particular statement in the opinion is not binding unless the opinion itself is concurred in by a majority.⁵

The principles of law determined by a decision of a court are to be extracted from the record of the case in which the decision is rendered and not by the wording of the opinion.⁶ With reference to what may be called inferential decisions, it has recently been said that "Just criticism may be directed against an attempt to extend the effect of a decision beyond the court's own statement of the facts and the law and beyond what could by any possibility have been in the minds of the jurists who pronounced it."⁷ Thus, the failure of the supreme court to reconsider its opinion upon rehearing does not constitute a precedent upon a point which was then called to its attention for the first time, because it is a rule of that court not to consider such points.⁸ Similarly, an order of the supreme court refusing to transfer a cause after judgment in the district court of appeal does not adopt the opinion of the latter so as to give it, in the supreme court, the authoritative effect which one of its own decisions would

5. *Williams v. Kidd*, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1; *Del Mar Water etc. Co. v. Eshleman*, 167 Cal. 666, 140 Pac. 591, 948 (here the only opinion joined in by a majority was a concurring opinion); *Hart v. Carnall-Hopkins Co.*, 103 Cal. 132; *Farrell v. Board of Trustees*, 85 Cal. 408, 24 Pac. 868; *Copertini v. Oppermann*, 76 Cal. 181, 18 Pac. 256; *People v. Westlake*, 62 Cal. 303; *Townsend v. Corden*, 19 Cal. 188; *Hart v. Burnett*, 15 Cal. 530; *San Jose-Los Gatos etc. Ry. Co. v. San Jose Ry. Co.*, 156 Fed. 455, 13 Ann. Cas. 571, 84 C. C. A. 265. See, however, *Bryan v. Berry*, 6 Cal. 394, where it is said that "it is not so much the decision

as the reasoning upon which the decision is based, which makes it authority and requires it to be respected." With this statement, however, Field, J., in his dissenting opinion in *Ex parte Newman*, 9 Cal. 502, expressly took issue.

6. *Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565. See *infra*, § 49, for the distinction between "decision" and "opinion."

7. *Del Mar Water etc. Co. v. Eshleman*, 167 Cal. 666, 140 Pac. 591, 948, per Melvin, J.

8. *Wilcox v. Luco*, 118 Cal. 639, 62 Am. St. Rep. 305, 45 L. R. A. 579, 45 Pac. 676, 50 Pac. 758. See APPEAL AND ERROR, vol. 2, p. 790.

have.⁹ Nor does the fact that the opinion of the supreme court in a particular case was not ordered reported in the official reports,¹⁰ or that that court has affirmed a decision of an inferior court without an opinion,¹¹ indicate that the court considered its decision of doubtful validity, but rather that it regarded the grounds of challenge as without foundation. There is, however, a legitimate inference that a jurisdiction assumed¹² or a procedure followed¹³ for a long period of time is well founded.

§ 48. Decisions of Courts of Other Jurisdictions.—If a rule of law is clearly established by the decisions of the courts of California, a court is not at liberty to overrule it in favor of a rule established by the decisions of other states.¹⁴ And even though the rule has not been so settled, if the decisions in other jurisdictions are conflicting, a court should investigate the principle involved and go back to the fountain-head to ascertain a rule founded upon reason and operating with uniformity and certainty.¹⁵ Where the law is uncertain a decision of the court of last resort of another state, while not binding as authority, is strongly persuasive, especially in the construction of a statute similar to that involved in the decision in ques-

9. *Yolo Water etc. Co. v. Superior Court*, 181 Cal. 33, 183 Pac. 453; *Bohn v. Bohn*, 164 Cal. 532, 129 Pac. 981; *People v. Davis*, 147 Cal. 346, 81 Pac. 718; *In re Estate of Campbell*, 12 Cal. App. 707, 108 Pac. 669, 676, per Shaw, J., dissenting.

10. *MacDonald v. MacDonald*, 155 Cal. 665, 25 L. R. A. (N. S.) 45, 102 Pac. 927.

11. *Estate of Sutro*, 2 Cal. Prob. Dec. 120, citing *Fidelity & Deposit Co. v. United States*, 187 U. S. 315, 47 L. Ed. 194, 23 Sup. Ct. Rep. 120.

12. *Fisk v. His Creditors*, 12 Cal. 281.

13. *Kaiser v. Dalto*, 140 Cal. 167, 73 Pac. 828; *Giant Powder Co. v. San Diego Flume Co.*, 78 Cal. 193, 20 Pac. 419; *Sharon v. Sharon*, 68 Cal. 326, 9 Pac. 187; *Ellissen v. Halleck*, 6 Cal. 386 (here the procedure followed by the inferior courts was approved on this principle); *People v. Richards*, 1 Cal. App. 566, 82 Pac. 691.

14. *People v. Shea*, 125 Cal. 151, 57 Pac. 885; *San Francisco Bridge Co. v. Dumbarton etc. Co.*, 119 Cal. 272, 51 Pac. 325; *Spencer v. Houghton*, 68 Cal. 82, 8 Pac. 679.

15. *Bryan v. Berry*, 6 Cal. 394.

tion.¹⁶ This rule has been frequently applied in the construction of provisions of the constitution adopted from those of other states,¹⁷ or where the same words were used, in the same or similar contexts.¹⁸ Even the same clause may require different constructions in different constitutions to reconcile it with varying clauses in the respective contexts¹⁹ or with a dissimilar body of general law.²⁰ The same general principles apply to decisions upon matters of practice. The prevalence of a practice in other jurisdictions is very persuasive of its convenience and efficiency.¹

In the last analysis, however, it is the duty of the courts of California to construe statutes enacted by the legislature according to their own lights and not to be controlled by the decisions of any other jurisdiction.² Therefore, if the reasoning of a foreign decision upon a statutory provision is unsound, the courts of California will not follow it

16. *People v. Hayne*, 83 Cal. 111, 17 Am. St. Rep. 217, 7 L. R. A. 348, 23 Pac. 1; *White v. Merrill*, 82 Cal. 14, 22 Pac. 1129, per Thornton, J., concurring; *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237. See, also, *Frances Inv. Co. v. Superior Court*, 34 Cal. App. Dec. 670, 906, where rule was held not applicable. See, also, STATUTES.

This rule would seem to be specially applicable to the series of statutes known as the Uniform Acts.

17. *Vallejo & N. R. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238; *Matter of Coburn*, 165 Cal. 202, 131 Pac. 352; *Morton v. Broderick*, 118 Cal. 474, 50 Pac. 644; *Lord v. Dunster*, 79 Cal. 477, 21 Pac. 865; *Earle v. San Francisco Board of Education*, 55 Cal. 491; *Holman v. Taylor*, 31 Cal. 338; *People ex rel. Jacks v. Day*, 15 Cal.

91; *Caulfield v. Hudson*, 3 Cal. 389. See CONSTITUTIONAL LAW, vol. 5, p. 600.

18. *Cohen v. Wright*, 22 Cal. 293; *People v. Burbank*, 12 Cal. 378; *People v. Turner*, 1 Cal. 143 (U. S. Const.). See, also, *Lewis v. Dunne*, 134 Cal. 291, 86 Am. St. Rep. 257, 55 L. R. A. 833, 66 Pac. 478, where the principle was held not applicable because the provisions were not identical.

19. *Cohen v. Wright*, 22 Cal. 293.

20. *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742, per Sawyer, J., concurring.

1. *Wadsworth v. Wadsworth*, 81 Cal. 182, 22 Pac. 648.

2. *Elliott v. Superior Court*, 168 Cal. 727, 145 Pac. 101; *People v. Linda Vista Irr. Dist.*, 128 Cal. 477, 61 Pac. 86; *McCord v. Martin*, 32 Cal. App. Dec. 404, 191 Pac. 89.

even though the language and context are identical.³ This applies even to the supreme court of the United States. While the views expressed by that court as to the proper construction of a state statute necessarily merit great respect and careful consideration, a state court is not compelled, or indeed at liberty, to follow it, if it is of the opinion that such views are erroneous.⁴ And the same is true of any question of local, nonfederal law.⁵

Upon a federal question, however, that is to say, one upon which the supreme court of the United States has a right of review over the state courts, a decision of that court is conclusive upon the courts of California and its declaration of the law is as binding as a mandate of the constitution.⁶ Under this rule, a decision to the effect that a state statute is in violation of the federal constitution as long as it is construed in a certain way is a decision upon a federal question,⁷ as is also a construction by

3. *People v. Dorsey*, 32 Cal. 296; *Haynes v. Meeks*, 10 Cal. 110, 70 Am. Dec. 703. Rule applied, *Gurnee v. Maloney*, 38 Cal. 85, 99 Am. Dec. 352.

4. *Crocker v. Scott*, 149 Cal. 575, 87 Pac. 102.

5. *People v. Allender*, 117 Cal. 81, 48 Pac. 1014.

6. *Moon v. Martin*, 185 Cal. 361, 197 Pac. 77; *Hines v. Industrial Acc. Com.*, 184 Cal. 1, 14 A. L. R. 720, 192 Pac. 859; *In re McCready*, 179 Cal. 514, 177 Pac. 459; *Southern Pac. Co. v. Industrial Acc. Com.*, 178 Cal. 20, 171 Pac. 1071; *Albert Pick & Co. v. Jordan*, 169 Cal. 1, Ann. Cas. 1916A, 1237, 145 Pac. 506; *Elliott v. Superior Court*, 168 Cal. 727, 145 Pac. 101; *Western Union Tel. Co. v. Hopkins*, 160 Cal. 106; *Crocker v. Scott*, 149 Cal. 575, 87 Pac. 102; *In re Letcher*, 145 Cal. 563, 79 Pac. 65; *United Land Assn.*

v. Pac. Imp. Co., 139 Cal. 370, 69 Pac. 1064, 1125, 72 Pac. 988; *Foley v. Foley*, 120 Cal. 33, 65 Am. St. Rep. 147, 52 Pac. 122; *McGuire v. Brown*, 106 Cal. 660, 30 L. R. A. 384, 39 Pac. 1060; *Allen v. Allen*, 95 Cal. 184, 16 L. E. A. 646, 30 Pac. 213; *United Land Assn. v. Knight*, 85 Cal. 448, 24 Pac. 818; 3 Cal. Unrep. 211, 23 Pac. 267; *Gale v. Best*, 78 Cal. 235, 12 Am. St. Rep. 44, 20 Pac. 550; *San Benito Co. v. Southern Pac. R. R. Co.*, 77 Cal. 518, 19 Pac. 827; *Tubbs v. Wilhoit*, 73 Cal. 61, 14 Pac. 361; *Belcher v. Chambers*, 53 Cal. 635; *Gunn v. Bates*, 6 Cal. 263; *Werner v. Southern Pac. Co.*, 44 Cal. App. 76, 185 Pac. 1016; *Cunshaw Bros. v. Southern Pac. Co.*, 40 Cal. App. 603, 181 Pac. 252. See CONSTITUTIONAL LAW, vol. 5, p. 620; CONFLICT OF LAWS, vol. 5, p. 424.

7. *Crocker v. Scott*, 149 Cal. 575, 87 Pac. 102.

the supreme court of the United States of a decree issued by itself or any other federal court.⁸

§ 49. Opinions.—There is a wide difference between “decisions” and “opinions.” The decision of a court is its judgment; the opinion is only the reasons given for that judgment. But the opinions of the judges, setting forth the reasons for their judgments, are of great importance in the information they impart as to the principles of law which govern the court. The judgment or decision is entered of record, and can be changed only through a regular application to the court, upon a petition for a rehearing or a modification. The opinion, on the other hand, is the property of the judges, and subject to their revision, correction and modification in any particular deemed advisable until, with the approbation of the writer, it is transcribed in the records, after which it ceases to be the subject of change. It then becomes like a judgment record, and is beyond the interference of the judges, except through regular proceedings before the court by petition.⁹

VII. COURT OFFICERS.

§ 50. In General.—The appointment of persons to perform the acts necessary to be done to enable a court to transact its judicial work, or necessary or convenient to the exercise of its jurisdiction, has always been recognized as a power incidental to the judicial office. The legislature may indeed provide for the appointment of such assistants and thus relieve the court of the burden of choosing such persons. But if the legislature or the constitution should fail to provide such persons, a court invested with jurisdiction

8. *Schmidt v. Giovanari*, 43 Cal. 617. As to opinion of trial court as part of record and subject of review on

9. *Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565, per Field, J. appeal, see *APPEAL AND ERROR*, vol. 2, pp. 488, 809.

and having all the powers necessary to its convenient exercise, can appoint such assistants as may be required.¹⁰

§ 51. Report of Decisions.—The code provides for the appointment and tenure of office of the reporter of the decisions of the supreme court and of the district courts of appeal, and of assistant reporters,¹¹ and the constitution also makes similar provision.¹² It is the duty of the reporter of the decisions of the supreme court to prepare a report of such cases decided as the court may direct him to report,¹³ and submit it to the court for correction and approval.¹⁴ Other statutes relate to the correction of the proof-sheets,¹⁵ the style of the reports,¹⁶ the publication of the reports by contract,¹⁷ or by the state printer if no proposals are received.¹⁸

§ 52. Miscellaneous Officers of Appellate Courts.—It is provided by the code that the justices of the supreme court may appoint two secretaries and two bailiffs, who shall be citizens of the United States and of the state of

10. *Nicholl v. Koster*, 157 Cal. 416, 108 Pac. 302. See generally, *CLERK OF COURTS*, vol. 5, p. 218.

11. Pol. Code, § 767.

12. Const., art. VI, § 21 (providing also for the salary of such officers). See Pol. Code, § 739, as to salaries of reporters of the supreme and district courts of appeal. See *Smith v. Dunn*, 64 Cal. 164, 28 Pac. 232, and *Smith v. Kenfield*, 57 Cal. 138 (construing the constitutional provision in respect to salary of supreme court reporter). See, also, *Baggett v. Dunn*, 69 Cal. 75, 10 Pac. 125, referring to the compensation of a deputy supreme court reporter. And see *supra*, § 44.

13. Pol. Code, § 771; Pol. Code,

§ 776, provides for the retention of the original opinions and papers in each case by the reporter for a period not exceeding sixty days. And Pol. Code, § 773, provides that each report must be made in the manner and form as the court may direct.

14. Pol. Code, § 772. See *White v. White*, 82 Cal. 427, 23 Pac. 276, where it is pointed out that the head-note of a case in the reports is not necessarily the decision of the court.

15. Pol. Code, §§ 774, 775.

16. Pol. Code, § 777.

17. Pol. Code, §§ 778-780.

18. Pol. Code, § 782. See *supra*,

§ 44, as to publication of reports.

California,¹⁹ and provision is made for the appointment of bailiffs of the district courts of appeal.²⁰ It is also provided that the secretaries and bailiffs shall hold their offices at the pleasure of the justices, and shall perform such duties as may be required of them by the court or any justice thereof.¹ Other officers of each of the appellate courts include the clerk² and the librarian.³ Matters pertaining to the appointment, tenure of office, and duties of clerks of the supreme and district courts of appeal and of their deputies are considered in another article in this work.⁴

The former supreme court commission established in 1885,⁵ was abolished by an amendment to the constitution in 1904, which provided that no such commission should be created or provided thereafter, provision having been made also by amendment in the same year for the creation of the district courts of appeal to supersede such commission.⁶ Determining the status of the former supreme court commission, it has been held that in the absence of any

19. Code Civ. Proc., § 265; Nicholl v. Koster, 157 Cal. 416, 108 Pac. 302.

20. Pol. Code, § 758, as amended 1921, provides for the employment and appointment of a bailiff for the third district court of appeal and for one bailiff to each of the divisions of the first and second district courts of appeal; Nicholl v. Koster, 157 Cal. 416, 108 Pac. 302.

1. Code Civ. Proc., § 266.

2. Const., art. VI, § 21, providing that the supreme court and the district courts of appeal each appoints its own clerk. See CLERKS OF COURT, vol. 5, p. 220 et seq.

3. There is established by law a supreme court library for the use of the justices and counselors at law of the supreme court; Pol. Code, §§ 2313, 2315. The supreme court

library fund, which consists of fees collected by the clerk of the court, is under the control of the court; Pol. Code, §§ 2316, 753, as to fees. The librarian is appointed by the justices of the supreme court; Pol. Code, § 2314; Nicholl v. Koster, 157 Cal. 416, 108 Pac. 302. His salary is provided for in § 739, Pol. Code. The provisions with reference to the libraries of the district courts of appeal are similar to the above; Pol. Code, § 760.

4. See CLERKS OF COURT, vol. 5, p. 220 et seq.

5. Act of March 12, 1885 (Stats. 1885, p. 101).

6. Const., art. VI, § 25; Stats. 1903, p. 707. And see amendment to Const., art. VI, § 1, adopted November 8, 1904.

constitutional provision on the subject, the legislature may provide for the appointment of commissioners to assist a court or its justices in the preliminary and preparatory work necessary to the final adjudication and determination of the causes coming before it. Such commissioners did not exercise judicial power, since their reports and opinions have no force or effect whatever as judgments of the court. They acted only in an intermediate capacity, and the judgment, when rendered, was the judgment of the court.⁷

§ 53. Officers of Superior Courts Generally—Secretary. In all counties and cities and counties having a population of three hundred thousand and over, the judges of the superior court may appoint a secretary, who holds office at their pleasure and performs such duties as they may require of him,⁸ including, in addition to his regular duties, that of jury commissioner.⁹ The secretary is an adjunct of the judicial system of the state. He is not an employee or attaché of a county office.¹⁰

Commissioners.—The constitution itself authorizes the appointment of court commissioners by the several superior courts to perform some of the duties of the judges of such courts.¹¹ Pursuant to this provision the legislature has authorized the appointment of court commissioners in the various superior courts of California,¹² and prescribed their powers and duties.¹³ Under this code provision such commissioners must be citizens of the United States, and residents of the city and county, or

7. *People v. Hayne*, 83 Cal. 111, 17 Am. St. Rep. 217, 7 L. R. A. 348, 23 Pac. 1.

8. Stats. 1895, p. 98, as amended by Stats. 1909, p. 940; *Noel v. Lewis*, 35 Cal. App. 658, 170 Pac. 857.

9. Code Civ. Proc., § 204e (added in 1917 and amended in 1921);

Noel v. Lewis, 35 Cal. App. 658, 170 Pac. 857.

10. *Noel v. Lewis*, 35 Cal. App. 658, 170 Pac. 857.

11. Const., art. VI, § 14 (adopted 1911).

12. See Code Civ. Proc., § 258.

13. See Code Civ. Proc., § 259. See *infra*, § 54.

county, in which they are appointed; they hold office during the pleasure of the courts appointing them.¹⁴

Other officers.—Besides court commissioners, jurors are by the code specially invested with powers of a judicial nature.¹⁵ The code includes attorneys and counselors at law among the persons specially invested with ministerial powers relating to courts of justice.¹⁶

§ 54. Powers and Duties of Superior Court Commissioners.—It has been said that there will always be some difficulty in determining whether or not in any particular case a power vested by law otherwise than in a court comes within the category of judicial power, which is delegated exclusively to the courts.¹⁷ A court commissioner must look alone to the statute for his power to act;¹⁸ nor may authority or jurisdiction be conferred upon him as such commissioner by consent.¹⁹ The powers of such commissioners are specified in section 259 of the Code of Civil Procedure²⁰ and these may be summarized as follows:

14. Code Civ. Proc., § 258.

15. In this connection the code includes Code to trial grand jurors). Juries of inquest are also included. Code Civ. Proc., § 254.

See as to these various officers, their functions and powers, CORONERS; JURY; GRAND JURY.

16. See Code Civ. Proc. (title V, c. 1). See ATTORNEYS AT LAW, vol. 2, p. 577.

17. Burns v. Superior Court, 140 Cal. 1, 73 Pac. 597. See CONSTITUTIONAL LAW, vol. 5, p. 672, for a general discussion of the nature and extent of judicial power.

18. Quiggle v. Trumbo, 56 Cal. 626; Stone v. Bunker Hill etc. Min. Co., 28 Cal. 497; Jackson v. Puget

Sound Lumber Co., 5 Cal. Unrep. 966, 52 Pac. 838.

19. Jackson v. Puget Sound Lumber Co., 5 Cal. Unrep. 966, 52 Pac. 838.

20. Quiggle v. Trumbo, 56 Cal. 626.

The implication arising from the omission of court commissioners from section 1181 of the Civil Code is not so strong as to effect the repeal of the special provision concerning the power of court commissioners in section 259 of the Code of Civil Procedure; Malone v. Bosch, 104 Cal. 680, 38 Pac. 516.

The powers of court commissioners were prescribed by the act of 1863, "concerning the courts of justice of this state, and judicial officers." (Laws 1863, p. 338, § 40.)

(1) To hear and determine *ex parte* motions for orders and writs, except orders or writs of injunction in the superior court of the county, or city and county, for which he is appointed;¹ (2) to take proof and report his conclusions thereon as to any matter of fact other than an issue of fact raised by the pleadings, upon which information is required by the court;² (3) to take and approve bonds and undertakings whenever the same may be required in actions or proceedings in such superior courts, and to examine the sureties thereon when an exception has been taken to their sufficiency; to administer oaths and affirmations, and take affidavits and depositions in any action or proceeding whatever, and to take acknowledgments and proof of deeds, mortgages, and other instruments requiring proof or acknowledgment for any purpose under the laws of this state.³

Other provisions of the code relate to fees for the performance of their official acts,⁴ the seal to be provided,⁵ and the authentication of his official acts.⁶

A court commissioner has no jurisdiction to appoint a receiver, and a bond given by a receiver so appointed is void,⁷ for under the code the power to appoint a receiver

Stone v. Bunker Hill etc. Min. Co., 28 Cal. 497.

1. Code Civ. Proc., § 259, subd. 1 (in part). It is provided though, under this section, that he shall have power to hear and determine such motions only in the absence or inability to act of the judge or judges of the superior court of the county, or city and county.

A court commissioner has no jurisdiction to hear a motion or make any order in reference to the dissolution of an injunction, unless the motion is referred to him by the court. *Stone v. Bunker Hill etc. Min. Co.*, 28 Cal. 497.

2. Code Civ. Proc., § 259, subd. 2.

3. Code Civ. Proc., § 259, subd. 3.

A declaration of homestead may be acknowledged before a court commissioner. *Malone v. Bosch*, 104 Cal. 680, 38 Pac. 516. See *People v. Pacific Imp. Co.*, 130 Cal. 442, 62 Pac. 739 (referring to the holding in *Malone v. Bosch*, 104 Cal. 683); and see *Haile v. Smith*, 128 Cal. 415, 60 Pac. 1032; and *Winder v. Hendricks*, 56 Cal. 464, referring to § 259, Code Civ. Proc., and other sections of the code as to the officers who may administer oaths.

4. Code Civ. Proc., § 258, subd. 4.

5. Code Civ. Proc., § 259.

6. Code Civ. Proc., § 259, subd. 6.

7. *Quiggle v. Trumbo*, 56 Cal. 626 (holding that a bond given by a receiver so appointed is void).

is limited to the court or judge.⁸ Under the rule that a court commissioner, as such, has no power to try an issue of fact raised by the pleadings, it has been held that where the parties acted under a stipulation and an order transferring a case to a court commissioner "to report the evidence," and tried the whole case before such commissioner precisely as it should have been tried before a referee, the parties intended a reference.⁹

§ 55. Phonographic or Shorthand Reporters Generally—*In appellate courts.*—Phonographic reporters for the supreme court and the district courts of appeal are provided for in part three of the Political Code.¹⁰ The supreme court is thereby authorized to appoint two such reporters,¹¹ the third district court of appeal one, and each division of the first and second district courts of appeal may employ and appoint a phonographic reporter.¹² The code prescribes the duties of such reporters in detail.¹³

In superior courts.—It is provided by the code that

"The judge or judges of any superior court in the state may appoint a competent phonographic reporter, or as many such reporters as there are judges, to be known as official reporter or reporters of such court, and to hold office during the pleasure of the judge or judges appointing them."¹⁴

8. See Code Civ. Proc., § 304; *Quiggle v. Trumbo*, 56 Cal. 626. See generally, RECEIVERS.

9. *Jackson v. Puget Sound Lumber Co.*, 123 Cal. 97, 55 Pac. 788, reversing the ruling in the same case as reported in 5 Cal. Unrep. 966, 52 Pac. 838. See REFERENCE.

10. Code Civ. Proc., § 268. See Pol. Code, §§ 739 and 767-782. See *infra*, this section.

11. Pol. Code, § 769; *Nicholl v. Koster*, 157 Cal. 416, 108 Pac. 302.

12. Pol. Code, § 769 (as amended 1921).

13. See Pol. Code, § 770 (supreme court); § 259 (district courts of appeal).

14. Code Civ. Proc., § 269 (in part). *Nicholl v. Koster*, 157 Cal. 416, 108 Pac. 302; *People v. McIntyre*, 127 Cal. 423, 59 Pac. 779; *Fox v. Lindley*, 57 Cal. 650; *People v. Lon Me*, 49 Cal. 353 (holding that sections 269 and following of the Code of Civil Procedure are a substitute for all former acts respecting shorthand reporters, general and special).

The code prescribes the qualifications and test of competency of such reporters,¹⁵ their duties,¹⁶ and specifies the amount of their fees and by whom they shall be paid.¹⁷ The compensation of court reporters in criminal cases is also provided for.¹⁸ All such reporters are regarded as official adjuncts to the court and part of the judicial system of the state.¹⁹ Yet, while the reporter is in one sense an officer of the court, for the purpose of performing certain ministerial functions, he is not an officer in the sense of having a permanent tenure of office, since a different reporter may be appointed at each session of court.²⁰ Nor is he a public officer. In civil cases his duties cannot be said to be public in any sense; in criminal cases they may be so regarded in a limited sense, inasmuch as the services are paid for out of public funds. But rendering services for the public does not of itself make him a public officer.¹

§ 56. Fees of Superior Court Reporters.—The fees of official court reporters for reporting testimony and proceedings and for transcriptions in both civil and criminal cases are prescribed by the code.² Under section 274 of

15. Code Civ. Proc., § 270.

16. See Code Civ. Proc., § 271. As to oath of office, see Code Civ. Proc., § 272.

17. Code Civ. Proc., §§ 274, 274b. See *infra*, § 56, as to fees.

18. Pen. Code, §§ 869, 870. See *Mattingly v. Nichols*, 133 Cal. 332, 65 Pac. 748, holding that under section 870 of the Penal Code, fees for the transcription of the notes of a reporter taken at a preliminary examination are confined to cases where the defendant is held to answer, and are not authorized where the accused was discharged. See *infra*, § 56, as to fees of superior court reporters generally.

19. *Pratt v. Browne*, 135 Cal. 649, 67 Pac. 1082; *Stevens v. Truman*,

127 Cal. 155, 59 Pac. 397; *Ex parte Reis*, 64 Cal. 233, 30 Pac. 806 (concurring opinion of Thornton J., reviewing the history of the statutes on this subject).

20. *Pratt v. Browne*, 135 Cal. 649, 67 Pac. 1082.

1. *Stevens v. Truman*, 127 Cal. 155, 59 Pac. 397; *Smith v. Strother*, 2 Cal. Unrep. 525, 7 Pac. 801. See PUBLIC OFFICERS.

2. Code Civ. Proc., § 274; *Sime v. Hunter*, 34 Cal. App. Dec. 150, 195 Pac. 935, 202 Pac. 967 (holding that section 274 of the Code of Civil Procedure has not been repealed by implication by the enactment of section 1027 of that code); *Trower v. City and County of San Francisco*, 157 Cal. 762, 109 Pac. 617; *Pratt v.*

the Code of Civil Procedure, fees for transcripts ordered by the court are to be paid by the parties in equal proportions, or either may pay "the whole thereof";³ and it is provided that in either case all amounts so paid by the party to whom costs are awarded must be taxed as costs.⁴ Apart from any limitation in the order, it is within the discretion of the trial court to say whether a party shall recover costs for a transcript of only a part of the testi-

Browne, 135 Cal. 649, 67 Pac. 1082; Stevens v. Truman, 127 Cal. 155, 59 Pac. 397; City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585; James v. McCann, 93 Cal. 513, 29 Pac. 49 (holding that where a reporter had voluntarily taken shorthand notes in an action without demanding a deposit from the parties to the action, and judgment had been entered, the judge had no power to refuse to settle the case until his fees were paid); Ex parte Reis, 64 Cal. 233, 30 Pac. 806; Gibson v. County of Sacramento, 37 Cal. App. 523, 174 Pac. 935 (citing Code Civ. Proc., §§ 274 and 274a, with other sections as to the power of the court to incur obligations when necessary to the proper transaction of the business of the court); Irrgang v. Ott, 9 Cal. App. 440, 99 Pac. 528 (holding that no authority is given by section 274 for payment of traveling expenses of the reporter in civil cases, even where there is no regular court reporter in the county where the case is tried, by appointment or otherwise); Pipher v. Superior Court, 3 Cal. App. 626, 86 Pac. 904. See cases cited *infra*, this section. And see COSTS, ante, p. 250, as to allowance for reporter's transcripts as costs; APPEAL AND ERROR, vol. 2, p. 621, as to the duty of the court to require

reporter's transcript on appeal, and vol. 2, page 624, as to payment of the reporter for such transcript.

The act of March 21, 1885 (Stats. 1885, p. 218), amending Code Civ. Proc., § 274, was held unconstitutional because imposing legislative duties upon the judge in requiring him to fix the reporter's fees in advance of the rendering of services; Meacham v. Bear Valley Irr. Co., 145 Cal. 606, 68 L. R. A. 600, 79 Pac. 281; Stevens v. Truman, 127 Cal. 155, 59 Pac. 397; City of Los Angeles v. Pomeroy, 124 Cal. 597, 67 Pac. 585; McAllister v. Hamlin, 83 Cal. 361, 23 Pac. 357; Smith v. Strother, 68 Cal. 194, 8 Pac. 852 (reversing Smith v. Strother, 2 Cal. Unrep. 525, 7 Pac. 801).

3. Welch v. Alcott, 178 Cal. 530, 174 Pac. 34.

Under section 274 as it existed before the amendment of 1903, the service of notice upon the clerk that the reporter's fees had not been paid worked a stay of the entry of judgment, unless the court otherwise ordered. Taylor v. McConigle, 120 Cal. 123, 52 Pac. 159.

4. Meacham v. Bear Valley Irr. Co., 145 Cal. 606, 68 L. R. A. 600, 79 Pac. 281. See COSTS, ante, p. 250.

mony. And it has been held that where the court ordered that plaintiff pay for the "transcript of all the testimony," it thereby prescribed that the whole cost should, in the first instance, be met by one of the parties, instead of being divided.⁵ The court is not authorized to require the per diem fees of the reporters to be paid, in equal proportions by the parties, before the witnesses can be examined; nor may it, for the mere failure of the defendant to obey its order for the immediate deposit of one-half of the per diem of the reporter, order judgment for the plaintiff without any trial of the cause;⁶ nor may it require payment of the reporter's fees, where a jury has been discharged, as a condition of setting the cause for a second trial.⁷

Section 274 of the Code of Civil Procedure, providing for the fees to be paid official stenographers of the superior court for reporting and for transcribing testimony "ordered by the court to be made," is not a limitation on the authority of the district attorney to incur an expense for the transcription of the testimony in a criminal case. It is not necessary for the district attorney to apply to the superior court for an order directing the transcription of testimony. He has a right to determine for himself in the first instance whether it is a necessary expense to be incurred for the purposes for which he is permitted under the act to incur it, subject to having his discretion in that respect ultimately reviewed by the board of supervisors alone. When that body determines that the expense was necessarily incurred by him, and the charges fair and rea-

5. *Welch v. Alcott*, 178 Cal. 530, 174 Pac. 34.

6. *Meacham v. Bear Valley Irr. Co.*, 145 Cal. 606, 68 L. R. A. 600, 79 Pac. 281 (distinguishing *Adams v. Crawford*, 116 Cal. 495, 48 Pac. 488, where it was held that if the plaintiff, after demanding a jury,

did not comply with a rule of the court requiring a deposit of the jury fee, the court did not err in refusing his demand and trying the case without a jury).

7. *Carpenter v. Jones*, 121 Cal. 362, 53 Pac. 842.

sonable, their determination is not subject to review by the court, but is final and conclusive.⁸

§ 57. Attachés of Judges of Police Courts.—Under section 8½ of article XI of the constitution⁹ it is competent for the framers of a freeholders' charter to provide for the appointment and compensation of the attachés of the judges of the police court authorized to be created thereunder. This includes all persons who may, in a general sense and in view of the jurisdiction with which such courts may be clothed, be deemed necessary to a full and efficient exercise of that jurisdiction, including among others, stenographic reporters.¹⁰ These reporters are officers of the municipality under whose charter they are appointed;¹¹ and it is immaterial in this connection that their services may be required by the judge in connection with the administration of a general law of the state.¹² Likewise, the fact that subsequent to the adoption of the charter the legislature by a general law demands additional duties of a police court reporter does not give the legislature the power to provide the means and measure of his compensation therefor.¹³ Matters pertaining to the qualifications, duties, fees, etc., of clerks of police courts and justices' clerks, are considered in other articles of this work.¹⁴

B. PARTICULAR COURTS.

I. INTRODUCTORY.

§ 58. Under the Constitution of 1849.—Prior to the adoption of the constitution of 1849 justice was admin-

8. *County of Yolo v. Joyce*, 156 Cal. 429, 105 Pac. 125.

9. See *infra*, § 87.

10. *Elder v. McDougald*, 145 Cal. 740, 79 Pac. 429.

11. *Elder v. McDougald*, 145 Cal. 740, 79 Pac. 429; *Trefts v. Mc-*

Dougald, 15 Cal. App. 584, 115 Pac. 655.

12. *Elder v. McDougald*, 145 Cal. 740, 79 Pac. 429.

13. *Trefts v. McDougald*, 15 Cal. App. 584, 115 Pac. 655.

14. See *CLERKS OF COURT*, vol. 5, p. 224; *JUSTICES OF THE PEACE*.

istered by the system of courts established under the Mexican régime, namely, the courts of first instance¹⁵ and second instance¹⁶ and the alcalde courts,¹⁷ which corresponded roughly to the subsequent district, supreme and justices' courts, respectively.¹⁸ The constitution of 1849 provided for the removal of all cases pending in tribunals under the Mexican law to courts to be created by the legislature,¹⁹ and this transfer was accomplished by the act of February 28, 1850.²⁰

Under the constitution of 1849 there was in each county a court of sessions, held by the county judge and two justices of the peace. This was a court of limited, entirely original, jurisdiction, mostly of a criminal nature.¹ The constitution of 1849 also provided for a county court in each organized county, which should "have such jurisdiction in cases arising in justices' courts, and in special cases, as the legislature may [might] prescribe, but . . . no original civil jurisdiction except in such special cases."²

15. *McNeil v. First Congregational Society*, 66 Cal. 105, 4 Pac. 1096; *Harman v. Harman*, 1 Cal. 215; *People v. Daniels*, 1 Cal. 106; *Payne v. Pacific Mail S. S. Co.*, 1 Cal. 33; *Ladd v. Stevenson*, 1 Cal. 18; *Luther v. Apollo, The Ship*, 1 Cal. 15. As to situation between the date of the cession and the passage of the act of 1850, see *Ryder v. Cohn*, 37 Cal. 69; and see Judge Morrow's INTRODUCTION to this work, vol. 1, p. xxvi.

16. *People v. Daniels*, 1 Cal. 106; *Luther v. Apollo, The Ship*, 1 Cal. 15.

17. *Horrill v. Gray*, 1 Cal. 133; *Ladd v. Stevenson*, 1 Cal. 18. The alcaldes were empowered to perform the functions of judges of first instance in those districts in which there were no such judges; *Braly v. Reese*, 51 Cal. 447; *Panaud v. Jones*,

1 Cal. 488; *Mena v. Le Roy*, 1 Cal. 216. As to the alcalde system during the period of transition from Mexican to state government, see Judge Morrow's INTRODUCTION to this work, vol. 1, p. xxvi.

18. See cases supra.

19. *McNeil v. First Congregational Society*, 66 Cal. 105, 4 Pac. 1096.

20. Stats. 1850, p. 77; *McNeil v. First Congregational Society*, 66 Cal. 105, 4 Pac. 1096.

1. *People v. Barbour*, 9 Cal. 230; *People v. Fowler*, 9 Cal. 85; *People v. Ah Chung*, 5 Cal. 103; *Webb v. Hanson*, 3 Cal. 65; *Robinson v. Fair*, 128 U. S. 53, 32 L. Ed. 415, 9 Sup. Ct. Rep. 30.

2. *Ricks v. Reed*, 19 Cal. 551; *People ex rel. Jacks v. Day*, 15 Cal. 91; *Caulfield v. Hudson*, 3 Cal. 389; *Robinson v. Fair*, 128 U. S. 53, 32 L. Ed. 415, 9 Sup. Ct. Rep. 30.

By the amendments of 1862 the jurisdiction of these courts was enlarged to include also original cognizance of certain classes of cases.³ They thus became courts of record⁴ and of general jurisdiction.⁵ The county judges were also required to hold probate courts in their several counties.⁶ Originally the probate courts were courts of limited and inferior jurisdiction.⁷

The superior court of San Francisco was established by the act of April 5, 1850, and was vested with the same original jurisdiction within the limits of the city of San Francisco, in civil cases, as might be conferred by law upon the district court.⁸ It was abolished in 1857 and its jurisdiction transferred to the district court.⁹ For a short period immediately prior to the adoption of the constitu-

3. *In re Conner*, 39 Cal. 98, 2 Am. Rep. 427; *Courtwright v. Bear River & A. W. & Min. Co.*, 30 Cal. 573; *Robinson v. Fair*, 128 U. S. 53, 32 L. Ed. 415, 9 Sup. Ct. Rep. 30.

4. *In re Conner*, 39 Cal. 98, 2 Am. Rep. 427.

5. *Yenawine v. Richter*, 43 Cal. 312; *People v. Blackwell*, 27 Cal. 65.

6. *Theller v. Such*, 57 Cal. 447; *Bush v. Lindsey*, 44 Cal. 121; *Gurnee v. Maloney*, 38 Cal. 85, 99 Am. Dec. 352; *In re Will of Bowen*, 34 Cal. 682; *Deck v. Gerke*, 12 Cal. 433, 73 Am. Dec. 555; *Robinson v. Fair*, 128 U. S. 53, 32 L. Ed. 415, 9 Sup. Ct. Rep. 30.

7. *Burris v. Kennedy*, 108 Cal. 331, 41 Pac. 458; *Ex parte Kearny*, 55 Cal. 212; *Braly v. Reese*, 51 Cal. 447; *Pryor v. Downey*, 50 Cal. 388, 19 Am. Rep. 656; *Townsend v. Gordon*, 19 Cal. 188; *Haynes v. Meeks*, 10 Cal. 110, 70 Am. Dec. 703; *Belloc v. Rogers*, 9 Cal. 123; *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237; *Smith v. Andrews*,

6 Cal. 652; *Grimes' Estate v. Norris*, 6 Cal. 621, 65 Am. Dec. 545; *Sanford v. Head*, 5 Cal. 298; *Clarke v. Perry*, 5 Cal. 58, 63 Am. Dec. 82.

But by the act of March 27, 1858 (Stats. 1858, p. 95), their proceedings were given the same standing as those of courts of general jurisdiction; *Burris v. Kennedy*, 108 Cal. 331, 41 Pac. 458; *Braly v. Reese*, 51 Cal. 447; *Irwin v. Scriber*, 18 Cal. 499.

8. Stats. 1850, p. 159; *McCauley v. Fulton*, 44 Cal. 355; *People v. Nyland*, 41 Cal. 129; *Ex parte Stratman*, 39 Cal. 517; *Vassault v. Austin*, 36 Cal. 691; *Courtwright v. Bear River etc. Min. Co.*, 30 Cal. 573; *Chipman v. Bowman*, 14 Cal. 157; *Watts v. White*, 13 Cal. 321; *Hickman v. O'Neal*, 10 Cal. 292; *Curtis v. Richards*, 9 Cal. 33; *Meyer v. Kalkman*, 6 Cal. 582; *Seale v. Mitchell*, 5 Cal. 401; *People v. Gillespie*, 1 Cal. 342.

9. *Watts v. White*, 13 Cal. 321; *Gorham v. Toomey*, 9 Cal. 77.

tion of 1879 there was a municipal court of appeals for San Francisco, having the same jurisdiction in civil appeal cases as the county court for that county had formerly had.¹⁰

District courts.—Under the constitution of 1849 and until the adoption of the present constitution, the principal trial courts were the district courts. The state was divided into judicial districts, and there was a district court for each district.¹¹ These were courts of general jurisdiction¹² and they were the highest courts of original jurisdiction,¹³ but possessed no appellate power whatever.¹⁴ Their jurisdiction comprised a large part of the original jurisdiction now exercised by the superior courts.¹⁵

§ 59. Changes Effected by Constitution of 1879.—The constitution of 1879 provides that “All courts now existing, save justices’ and police courts, are hereby abol-

10. Stats. 1877-78, p. 947; Millard v. Yee Teen, 63 Cal. 584; Davis v. Superior Court, 63 Cal. 581; Trobock v. Caro, 60 Cal. 304; Fraser v. Freelon, 53 Cal. 644.

11. People v. Melon, 40 Cal. 648; People v. Sassovich, 29 Cal. 480; Slade v. His Creditors, 10 Cal. 483.

12. People v. Robinson, 17 Cal. 363; Watts v. White, 13 Cal. 321; Gray v. Hawes, 8 Cal. 562; Ex parte Knowles, 5 Cal. 300 (“courts of record”); Reyes v. Sanford, 5 Cal. 117; Webb v. Hanson, 3 Cal. 103; Stead v. Curtis, 205 Fed. 439, 123 C. C. A. 507.

13. People v. Judge Tenth Judicial District, 9 Cal. 19; People v. Gillespie, 1 Cal. 342.

14. Beckett v. Selover, 7 Cal. 215, 68 Am. Dec. 237; Deck’s Estate v. Gherke, 6 Cal. 666; Zander v. Coe, 5 Cal. 230; Townsead v. Brooks, 5

Cal. 52; Reed v. McCormick, 4 Cal. 342; Hernandez v. Simon, 3 Cal. 464; Caulfield v. Hudson, 3 Cal. 389; People v. Peralta, 3 Cal. 379; Belt v. Davis, 1 Cal. 134. For a short period after their establishment the district courts had jurisdiction on appeal from the courts of sessions. Webb v. Hanson, 2 Cal. 133. See the following cases where the jurisdiction is stated:

15. Keech v. Joplin, 157 Cal. 1, 105 Pac. 222; Houghton’s Appeal, 42 Cal. 35; Courtwright v. Bear River & A. W. & Min. Co., 30 Cal. 573; Perry v. Ames, 26 Cal. 372; People v. Robinson, 17 Cal. 363; People ex rel. Jacks v. Day, 15 Cal. 91; Reed v. McCormick, 4 Cal. 342; Caulfield v. Hudson, 3 Cal. 389; Robinson v. Fair, 128 U. S. 53, 32 L. Ed. 415, 9 Sup. Ct. Rep. 30. See *infra*, § 73 et seq., as to the original jurisdiction of the superior courts.

ished."¹⁶ This provision operated to abolish, among others, the district courts,¹⁷ the county courts¹⁸ and the municipal court of appeals of San Francisco.¹⁹ The constitution further provides as follows:

"All records, books, papers, and proceedings from such courts, as are abolished by this constitution, shall be transferred, on the first day of January, eighteen hundred and eighty, to the courts provided for in this constitution; and the courts to which the same are thus transferred shall have the same power and jurisdiction over them as if they had been in the first instance commenced, filed, or lodged therein."²⁰

These provisions were carried into effect by an act of December 31, 1879, and another of February 4, 1880.¹ The superior courts succeeded to the jurisdiction of the dis-

16. Const., art. XXII, § 3; *Kahn v. Sutro*, 114 Cal. 316, 33 L. R. A. 620, 46 Pac. 87; *Ex parte Williams*, 87 Cal. 78, 24 Pac. 602, 25 Pac. 248; *In re Gannon*, 69 Cal. 541, 11 Pac. 240; *In re Guerrero*, 69 Cal. 88, 10 Pac. 261, holding, however, that the judicial departments of the municipalities as created by their respective charters prior to 1880 were not affected; *Ex parte Toland*, 64 Cal. 344; *People v. Colby*, 54 Cal. 184.

17. *Gale v. Tuolumne County Water Co.*, 169 Cal. 46, 145 Pac. 532; *Wright v. Central Cal. C. W. Co.*, 67 Cal. 532, 8 Pac. 70.

18. *Shay v. Superior Court*, 57 Cal. 541; *Ex parte Toland*, 54 Cal. 344.

19. *Ex parte Flood*, 64 Cal. 251, 30 Pac. 437; *Shay v. Superior Court*, 57 Cal. 541.

20. Const., art. XXII, § 3; Code Civ. Proc., § 55 (as to supreme court); § 89 (as to superior court); *Wickersham v. Brittan*, 93 Cal. 34,

15 L. R. A. 106, 28 Pac. 792, 29 Pac. 51 (holding that the omission of the legislature to substitute the names of the new courts created by the constitution of 1879 for those of the former courts in any code section or statute does not prevent the proper court from exercising the jurisdiction conferred upon it by the constitution); *Ex parte Williams*, 87 Cal. 78, 24 Pac. 602, 25 Pac. 248; *Watt v. Wright*, 66 Cal. 202, 5 Pac. 91; *Ex parte Flood*, 64 Cal. 251, 30 Pac. 437; *Gurnee v. Superior Court*, 58 Cal. 88; *People v. Colby*, 54 Cal. 184.

As to similar situation under the amendments of 1862, see the following cases: *Pryor v. Downey*, 50 Cal. 388, 19 Am. Rep. 656; *Gillis v. Barnett*, 38 Cal. 393; *In re Oliverez*, 21 Cal. 415; *Seale v. Ford*, 29 Cal. 104.

1. Stats. 1880, p. 2; *Ex parte Williams*, 87 Cal. 78, 24 Pac. 602, 25 Pac. 248; *Ex parte Flood*, 64 Cal. 251, 30 Pac. 437.

trict, county, probate, and municipal criminal courts, and the municipal courts of appeals.³

§ 60. Tribunals in Which Judicial Power is Now Vested. The present constitution provides for the vesting of the judicial power of the state of California "in the senate sitting as a court of impeachment, in a supreme court, district courts of appeal, superior courts and such inferior courts as the legislature may establish, in any incorporated city or township, county, or city and county."³ This section creates the judicial department by providing for a system of courts or judicial tribunals, the jurisdiction of which is fixed by the constitution itself;⁴ and, except for local purposes, disposes of the whole judicial power of the state and vests all of it in the courts expressly named therein, leaving none at the disposal of the

2. Code of Civ. Proc., § 79; *Gale v. Tuolumne County Water Co.*, 169 Cal. 46, 145 Pac. 532 (holding that violation of a perpetual injunction granted by a district court constituted contempt of the superior court of the same county); *Bell v. Superior Court*, 150 Cal. 31, 87 Pac. 1031; *Wickersham v. Brittan*, 93 Cal. 34, 15 L. R. A. 106, 28 Pac. 792, 29 Pac. 51; *Smith v. Hill*, 89 Cal. 122, 26 Pac. 644; *Learned v. Castle*, 67 Cal. 41, 7 Pac. 34; *San Francisco Savings Union v. Abbott*, 59 Cal. 400; *Bauder v. Tyrrell*, 59 Cal. 99; *Gurnee v. Superior Court*, 58 Cal. 88; *People v. Colby*, 54 Cal. 184.

3. Const., art. VI, § 1. And see Code Civ. Proc., § 33, for similar provision; *Carstens v. Pillsbury*, 172 Cal. 572, 158 Pac. 218; *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, Ann. Cas. 1917E, 390, 156 Pac. 491; *Pac. Coast Casualty Co. v. Pillsbury*, 171 Cal. 319, 153 Pac.

24; *Matter of Application of Westenberg*, 167 Cal. 309, 139 Pac. 674; *Nicholl v. Koster*, 157 Cal. 416, 108 Pac. 302; *Chinn v. Superior Court*, 156 Cal. 478, 105 Pac. 530; *Croly v. City of Sacramento*, 119 Cal. 229, 51 Pac. 323; *People v. Toal*, 85 Cal. 333, 24 Pac. 603; *Green v. Superior Court*, 78 Cal. 556, 21 Pac. 307, 541; *Ex parte Jordan*, 62 Cal. 464; *People v. Toal*, 3 Cal. Unrep. 227, 23 Pac. 203.

For similar provision in constitution of 1849, see the following cases: *Rosenberg v. Frank*, 58 Cal. 387 (Myrick, J., dissenting); *Ex parte Stratman*, 39 Cal. 517; *Uridias v. Morrill*, 22 Cal. 473; *Meyer v. Kalkmann*, 6 Cal. 582, *Burgoyne v. Supervisors*, 5 Cal. 9.

4. *Croly v. City of Sacramento*, 119 Cal. 229, 51 Pac. 323. See *infra*, § 61 et seq., as to the various courts enumerated in the constitutional provision.

legislature,⁵ other than such as may be placed in other tribunals by subsequent constitutional amendments, such as those giving special powers of a judicial nature to the railroad commission and the industrial accident commission.⁶ Under this provision it has been said that the legislature would be without authority to give judicial power to any general state board or tribunal not of the nature described in the section;⁷ but the constitution does not necessarily exclude the granting of judicial power by the same constitution to municipalities or other local subdivisions of the state in matters purely local and in which the state at large has no direct interest.⁸

II. SUPREME COURT.

§ 61. **Organization.**—The supreme court at present consists of a chief justice and six associate justices.⁹

“In case of the absence of the chief justice from the place at which the court is held, or his inability to act, the associate justices shall select one of their own number to perform the duties and exercise the powers of the chief justice during such absence or inability to act.”¹⁰

5. *Carstens v. Pillsbury*, 172 Cal. 158, 158 Pac. 218; *Western Metal Co. v. Pillsbury*, 172 Cal. Ann. Cas. 1917E, 390, 156 Pac. Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 153 Pac. 24. Art. XII, §§ 22, 23; art. XX, § 21; *E. Clemens Horst Co. v. Industrial Acc. Com.*, 184 Cal. 180, 16 A. L. R. 611, 193 Pac. 105. See PUBLIC UTILITIES and RAILROADS, as to railroad commission; and see WORKMEN'S COMPENSATION, as to the industrial accident commission.

7. *Pacific Coast Casualty Co. v. Pillsbury*, 171 Cal. 319, 153 Pac. 24.

8. *Croly v. City of Sacramento*, 119 Cal. 229, 51 Pac. 323. See CONSTITUTIONAL LAW, vol. 5, p. 672.

9. Const., art. VI, § 2; Code Civ. Proc., § 40; *In re Wells*, 174 Cal. 467, 163 Pac. 657.

Under the constitution of 1849 there were only two associate justices. *People v. Ah Chung*, 5 Cal. 103. By the amendments of 1862 they were increased to four. *Coffey v. Superior Court*, 2 Cal. App. 453, 83 Pac. 580.

10. See, also, Const., art. VI, § 2; Code Civ. Proc., § 46.

In the interests of efficiency the supreme court is divided into two departments, denominated respectively department "one" and department "two."¹¹

"The chief justice shall assign three of the associate justices to each department, and such assignment may be changed by him from time to time. The associate justices shall be competent to sit in either department, and may interchange with each other by agreement among themselves, or as ordered by the chief justice."¹²

"The chief justice may sit in either department, and shall preside when so sitting."¹³

"The justices assigned to each department shall select one of their number as presiding justice."¹⁴

The court may sit either in department or in bank,¹⁵ but there is only one supreme court, and whether its jurisdiction is exercised in bank or in department, its exercise is of equal import. The jurisdiction of the court in bank and in department is co-ordinate.¹⁶

The chief justice apportions the business to the departments.¹⁷ And each of the departments has the power to hear and determine causes, and all questions arising therein, subject to the provisions in relation to the court in bank.¹⁸ The presence of three justices is necessary to transact any business in either of the departments, except such as may be done at chambers,¹⁹ and the concurrence

11. Const., art. VI, § 2; Code Civ. Proc., § 43; *In re Wells*, 174 Cal. 467, 163 Pac. 657.

12. Const., art. VI, § 2; Code Civ. Proc., § 43.

13. Const., art. VI, § 2; Code Civ. Proc., § 43. But this is not mandatory. *Fresno Nat. Bank v. Superior Court*, 83 Cal. 491, 24 Pac. 157.

14. Const., art. VI, § 2.

15. Const., art. VI, § 2; *Niles v. Edwards*, 95 Cal. 41, 30 Pac. 134.

16. *Niles v. Edwards*, 95 Cal. 41, 30 Pac. 134.

17. Const., art. VI, § 2; Code Civ. Proc., § 44.

18. Const., art. VI, § 2; Code Civ. Proc., § 43; *In re Wells*, 174 Cal. 467, 163 Pac. 657. For provisions relating to the court in bank, see *infra*, § 62.

19. Const., art. VI, § 2; Code Civ. Proc., § 43. See, also, Code Civ. Proc., § 54, which provides that "The concurrence of three justices of the supreme court is necessary for . . . transaction of any business, except such as can be done at chambers," with the exception of writs of habeas corpus.

of three justices is necessary to pronounce a judgment.²⁰ But one or more of the justices may adjourn from time to time with the same effect as if all were present.¹

§ 62. In Bank.—The chief justice or any four justices may convene the supreme court in bank at any time,² and the chief justice is the presiding justice of the court when so convened.³ The presence of four justices is necessary to transact any business,⁴ and the concurrence of four justices present at the argument is necessary to pronounce a judgment in bank.⁵

The word "concurrence," as used in this connection, means agreement or union in action and design. But in contemplation of law, this joint action is taken when four justices have in writing declared their concurrence in a particular order or judgment, with intent to make it an order or judgment, and it is immaterial whether their respective signatures are appended when they are together, or whether they are made separately, at wide intervals of time and place, provided, always, that at the time such order or judgment becomes effective such four justices are qualified to act in the particular matter. On the other hand, the assent of one justice to a proposed order, in which assent no other justice has joined, amounts to nothing more than an indication by him to his associates of his

20. Const., art. VI, § 2; Code Civ. Proc., §§ 43, 54. For construction of this provision, see *infra*, § 62.

1. Code Civ. Proc., § 43.

2. Const., art. VI, § 2; Code Civ. Proc., § 45.

3. Const., art. VI, § 2.

4. Code Civ. Proc., § 45.

5. Const., art. VI, § 2; Code Civ. Proc., § 45; *Niles v. Edwards*, 95 Cal. 41, 30 Pac. 134 (holding that this means that the argument must be "considered" by the court or by those of the justices who are quali-

fied to "act" in the case, and the judgment to be rendered must be concurred in by four of the justices); *Ex parte Sternes*, 3 Cal. Unrep. 117, 21 Pac. 1132. As to the right of a judge not present at the argument to participate in the decision, see *APPEAL AND ERROR*, vol. 1, p. 971.

Under the constitution of 1849 the requisite number was two. *Blane v. Bowman*, 22 Cal. 23; *Coffey v. Superior Court*, 2 Cal. App. 453.

willingness to concur with three or more of them in such order; and so, any justice may withdraw his previously indicated assent to a decision or order at any time before the decision or order is actually made. Where such assenting judge dies or ceases to be a member of the court or leaves the state, his assent becomes ineffectual for any purpose the moment that he is no longer able to exercise judicial functions. An assent, to be in any way effectual to the making of a decision or order by the court, must be operative at the moment of the making of the decision or order.⁶

If four justices present at the argument do not concur in a judgment, then all the justices qualified to sit in the cause must hear the argument; but to render a judgment a concurrence of four judges is necessary.⁷ Therefore, if only three justices concur on a given point in a case, this is not a decision of the court upon this point.⁸ But it is not necessary to the validity of a judgment in bank that four justices shall concur therein upon the same grounds, provided they all concur in the same judgment.⁹ Any order that is made by a majority of the justices of the supreme court is an order of the court in bank.¹⁰ And it has been said that a judgment of the supreme court would not be invalid if it should happen in any case that four or more justices concurred therein but only three or a less number concurred in any opinion.¹¹

§ 63. Jurisdiction in General.—The jurisdiction of the supreme court extends only to those cases specified by the constitution and such statutes as are consistent therewith.¹² That jurisdiction is prescribed in substantially

6. *People v. Ruef*, 14 Cal. App. 576, 114 Pac. 48, 54. See *JUDGES*.

7. Const., art. VI, § 2; Code Civ. Proc., § 45.

8. *Scott v. Times-Mirror Co.*, 181 Cal. 345, 12 A. L. R. 1007, 184 Pac. 672.

9. *Philbrook v. Newman*, 148 Cal. 172, 82 Pac. 772.

10. *Niles v. Edwards*, 95 Cal. 41, 30 Pac. 134.

11. *Philbrook v. Newman*, 148 Cal. 172, 82 Pac. 772.

12. *Hyatt v. Allen*, 54 Cal. 353;

the same terms in the constitution¹³ and in the code.¹⁴ Section 4 of article VI of the constitution, as it stood prior to the amendments of 1904, was, as to those clauses defining the jurisdiction of the supreme court, in the same language as the former constitution, as amended in 1862, and necessarily had the same meaning.¹⁵ Except for cases transferred from a district court of appeal, the amendments of 1904 gave to the supreme court no appellate jurisdiction which it did not have before.¹⁶ In fact, the clauses in the amendments of 1904 prescribing the jurisdiction of the district courts of appeal¹⁷ served to modify the previous construction of the clauses relating to supreme court jurisdiction, and to diminish the jurisdiction formerly vested in that court, to the extent necessary to give the district courts full jurisdiction of the classes of cases expressly assigned to them.¹⁸

§ 64. Original Jurisdiction.—The provisions of the constitution and the code with reference to the jurisdiction of the supreme court are substantially the same.¹⁹ This jurisdiction is of two kinds: original and appellate.²⁰ In the exercise of its original jurisdiction¹ the supreme

White v. Lighthall, 1 Cal. 347;
Luther v. Apollo, The Ship, 1 Cal.
15.

13. Const., art. VI, § 4.

14. Code Civ. Proc., § 52.

15. Keech v. Joplin, 157 Cal. 1,
106 Pac. 222.

16. People v. McKamy, 168 Cal.
531, 143 Pac. 752.

17. See Const., art. VI, § 4. See
infra, § 48.

18. Keech v. Joplin, 157 Cal. 1,
106 Pac. 222.

19. Const., art. VI, § 4; Code Civ.
Proc., §§ 50-52.

20. Code Civ. Proc., § 50. See
infra, § 65, as to the appellate juris-
diction of the supreme court; and

see generally, APPEAL AND ERROR,
vol. 2, p. 122 et seq. For history
of the development of these two
branches of the jurisdiction of the
supreme court, see following note.

1. Code Civ. Proc., § 51. (The
phrase in the text above does not
occur in the similar provision in the
constitution.) Under the constitu-
tion of 1849, where the only writ
mentioned was habeas corpus the
court had no original jurisdiction
except in habeas corpus cases.
Hyatt v. Allen, 54 Cal. 353; Smith
v. City of Oakland, 40 Cal. 481;
Perry v. Ames, 26 Cal. 372; Tyler
v. Houghton, 25 Cal. 26; Miliken v.
Huber, 21 Cal. 166; Cowell v.

court has power to issue writs² of mandamus,³ certiorari,⁴ prohibition,⁵ habeas corpus,⁶ and all other writs necessary or proper to the complete exercise of its appellate jurisdiction.⁷ The writs mentioned are the writs known by those names under the common law, as they were understood and defined at the time the constitution was adopted.⁸ And the power to issue those writs, or any other writ, in a case where it may be necessary or proper to resort to it to secure the complete exercise of the appellate jurisdiction of the court, would exist, it has been

Buckilen, 14 Cal. 640; Dockett v. Salover, 7 Cal. 215, 68 Am. Dec. 237; People v. Shear, 7 Cal. 139; Caulfield v. Hudson, 3 Cal. 389; White v. Lighthall, 1 Cal. 347; People v. Turner, 1 Cal. 143, 52 Am. Dec. 295; Ex parte People, 1 Cal. 85. But the effect of the amendments of 1862, which put this clause in its present form, was to confer original jurisdiction to issue all the writs mentioned. Hyatt v. Allen, 54 Cal. 353; Smith v. City of Oakland, 40 Cal. 481; People v. Loucks, 28 Cal. 69; Perry v. Ames, 26 Cal. 372; Miller v. Board of Supervisors, 25 Cal. 93; Tyler v. Houghton, 25 Cal. 26.

2. Const., art. VI, § 4; Code Civ. Proc., § 51; People v. Jordan, 65 Cal. 644, 4 Pac. 683; Hyatt v. Allen, 54 Cal. 353; Perry v. Ames, 26 Cal. 372. As to the concurrent nature of this jurisdiction, see *supra*, § 12.

3. Scott v. Boyle, 164 Cal. 321, 128 Pac. 941; Santa Cruz etc. Turnpike Co. v. Santa Clara County, 62 Cal. 40; Tyler v. Houghton, 25 Cal. 46. See MANDAMUS.

4. Marin Water & Power Co. v. Railroad Commission, 171 Cal. 706, Ann. Cas. 1917C, 114, 154 Pac. 864; Pacific Telephone Co. v. Eshleman,

166 Cal. 640, Ann. Cas. 1915C, 822, 50 L. R. A. (N. S.) 652, 137 Pac. 1119 (per Sloss, J., concurring); Olcese v. Justice's Court, 156 Cal. 82, 103 Pac. 317. See CERTIORARI, vol. 4, p. 1081 et seq.

5. Favorite v. Superior Court, 181 Cal. 261, 8 A. L. R. 290, 184 Pac. 15; Simpson v. Police Court, 160 Cal. 530, 117 Pac. 653, per Beatty, C. J., dissenting; Camron v. Kenfield, 57 Cal. 550; Maurer v. Mitchell, 53 Cal. 289. See PROHIBITION.

6. Ex parte Thistleton, 52 Cal. 220. See, also, Ex parte Queen of the Bay, 1 Cal. 157, where this jurisdiction was exercised. See HABEAS CORPUS.

7. Somers v. Somers, 81 Cal. 608, 22 Pac. 697, per Thornton, J., dissenting; Swift v. Shepard, 64 Cal. 423, 1 Pac. 493; Hyatt v. Allen, 54 Cal. 353; Tyler v. Houghton, 25 Cal. 26; Adams v. Woods, 8 Cal. 306; Haight v. Gay, 8 Cal. 297, 68 Am. Dec. 623.

8. Pacific Telephone Co. v. Eshleman, 166 Cal. 640, Ann. Cas. 1915C, 822, 50 L. R. A. (N. S.) 652, 137 Pac. 1119 (per Sloss, J., concurring); Camron v. Kenfield, 57 Cal. 550; Maurer v. Mitchell, 53 Cal. 298.

said, had the constitution been silent on the subject.⁹ But the supreme court has no original jurisdiction to issue an injunction.¹⁰ While writs of habeas corpus may be issued either by the court as a body or by any one of its justices, all of the other enumerated writs must be issued under the direction and authority of the court itself, sitting as a court, and not by its justices as such or any of them.¹¹

§ 65. Appellate Jurisdiction.—It is provided in both the constitution and the code¹² that the supreme court shall have appellate jurisdiction on appeal from the superior courts in all cases in equity, except such as arise in justices' courts,¹³ in all cases at

9. *People v. Jordan*, 65 Cal. 644, 4 Pac. 683; *Hyatt v. Allen*, 54 Cal. 353.

10. *Swift v. Shepard*, 64 Cal. 423.

11. *Smith v. City of Oakland*, 40 Cal. 481.

12. Const., art. VI, § 4; Code Civ. Proc., § 52 (Amdt. 1919).

13. *Favorite v. Superior Court*, 181 Cal. 261, 8 A. L. R. 290, 184 Pac. 15 (holding that the district court of appeals has, nevertheless, jurisdiction to issue writs of prohibition to restrain a superior court from continuing an equity case); *Gale v. Tuolumne County Water Co.*, 169 Cal. 46, 135 Pac. 532 (holding that this does not include contempt cases); *Weldon v. Superior Court*, 138 Cal. 427, 71 Pac. 502; *Edsall v. Short*, 122 Cal. 533, 55 Pac. 327; *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709; *People v. Moore*, 29 Cal. 427; *Carstenbrook v. Wedderien*, 7 Cal. App. 465, 94 Pac. 372. See *Paramore v. Colby*, 37 Cal. App. 648, 174 Pac. 877, holding that the ap-

pellate court will relieve from a default caused by mistake where the appellant believed in good faith that the proceeding was one in equity and the appeal was properly taken by him to the supreme court.

The provision in the code omits the words "on appeal from the superior courts." Code Civ. Proc., § 52.

On the revision of the constitution in 1862 the exception as to cases arising in justices' courts was not included. *Lord v. Demster*, 79 Cal. 477, 21 Pac. 865.

Jurisdiction in these equity cases is exclusive in the first instance; *Emigh-Winchell Co. v. Pylman*, 31 Cal. App. 46; *Beswick v. Churchill Co.*, 21 Cal. App. 721, 132 Pac. 771; *Marston v. Kuhland*, 2 Cal. App. 316, 84 Pac. 357. And jurisdiction under this clause is not affected by the amount in controversy; *Harron v. Harron*, 123 Cal. 508, 56 Pac. 334 (overruling *Langan v. Langan*, 83 Cal. 618, 23 Pac. 1084, and *Fairbanks v. Lampkin*, 99 Cal. 429, 34 Pac. 101); *Appeal of Houghton*, 42 Cal. 35, per Temple, J.;

law¹⁴ which involve the title or possession of real estate,¹⁵ or the legality of any tax, impost, assessment, toll or municipal fine,¹⁶ or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to two thousand dollars;¹⁷ in all such probate matters as may be provided by

Engel v. Ehret, 21 Cal. App. 112, 130 Pac. 1197. Contra: Poland v. Carrigan, 20 Cal. 174.

As to what constitute "cases in equity," see supra, § 18; and see EQUITY. As to appeals from the justices' courts, see infra, § 83.

14. This refers only to civil, as distinguished from criminal, cases; People v. Pacific Gas & Elec. Co., 168 Cal. 496, Ann. Cas. 1917A, 328, 143 Pac. 727; Wheeler v. Donnell, 110 Cal. 655, 43 Pac. 1; People v. Johnson, 30 Cal. 98. Special cases are not "cases at law" within this provision, even though they may involve questions or values which, if involved in a case at law, would bring them within the jurisdiction; People v. Perry, 79 Cal. 105, 21 Pac. 423; Bixler's Appeal, 59 Cal. 550; Appeal of Houghton, 42 Cal. 35. And see supra, § 22.

15. O'Meara v. Hables, 163 Cal. 240, 124 Pac. 1003; Raisch v. Sausalito Land etc. Co., 131 Cal. 215, 63 Pac. 346; Hart v. Carnall-Hopkins Co., 103 Cal. 132, 37 Pac. 196; Appeal of Houghton, 42 Cal. 35; Thomas v. Thomas, 22 Cal. App. 806, 136 Pac. 510. And see supra, § 19.

This jurisdiction is irrespective of the amount involved; Southern Cal. Ry. Co. v. Superior Court, 127 Cal. 417, 59 Pac. 789; Doherty v. Thayer, 31 Cal. 140; Hesperia Land & Water Co. v. Gardner, 4 Cal. App. 357, 88 Pac. 286. See APPEAL AND ERROR, vol. 2, p. 202.

16. People v. Pacific Gas & Elec. Co., 168 Cal. 496, Ann. Cas. 1917A, 328, 143 Pac. 727; Bottle Mining etc. Co. v. Kern, 154 Cal. 96, 97 Pac. 26; Williams v. McCartney, 69 Cal. 556, 11 Pac. 186; Appeal of Houghton, 42 Cal. 35; Town of Santa Monica v. Eckert, 4 Cal. Unrep. 92, 33 Pac. 880; Keech v. Joplin, 9 Cal. App. 217, 101 Pac. 417; affirmed, 157 Cal. 1, 106 Pac. 222, holding that the supreme court has exclusive jurisdiction of all appeals involving the validity of a tax, even though that question is raised in a mandamus proceeding. And see supra, § 21.

This jurisdiction is irrespective of the amount involved. Appeal of Houghton, 42 Cal. 35. See APPEAL AND ERROR, vol. 2, p. 202. See Webb v. Hanson, 2 Cal. 133, where appeal was not allowed under similar provision in the Practice Act.

17. Randall v. Freed, 7 Cal. App. 553, 94 Pac. 1056 (construing art. VI, § 4 of the constitution—in Cal. App. report reference is to "Art. II" by mistake); McAulay v. Tahoe Ice Co., 3 Cal. App. 642, 86 Pac. 912. For construction of this provision, see APPEAL AND ERROR, vol. 2, pp. 199-207; and for construction of a similar provision in reference to the jurisdiction of superior courts, see infra, §§ 78, 79.

Before the adoption of the amendments of 1904, and the creation of the district courts of appeal, the supreme court had appella te juris-

law;¹⁸ in all cases, matters and proceedings pending before a district court of appeal which shall be ordered by the supreme court to be transferred to itself for hearing

diction in all cases where the demand, etc., amounted to \$300; *Harron v. Harron*, 123 Cal. 508, 56 Pac. 334; *Wheeler v. Donnell*, 110 Cal. 655, 43 Pac. 1; *Tyler v. Connolly*, 65 Cal. 28, 2 Pac. 414; *Dashiell v. Slingerland*, 60 Cal. 653; *Town of Santa Monica v. Eckert*, 4 Cal. Unrep. 92, 33 Pac. 880. Under the constitution of 1849 the amount was \$200: *Keech v. Joplin*, 157 Cal. 1, 106 Pac. 222; *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709; *People v. O'Neil*, 47 Cal. 109; *Bolton v. Landers*, 27 Cal. 104; *Perry v. Ames*, 26 Cal. 372; *Skillman v. Lachman*, 23 Cal. 198, 83 Am. Dec. 96; *Poland v. Carrigan*, 20 Cal. 174; *Votan v. Reese*, 20 Cal. 89; *People v. Carman*, 18 Cal. 693; *Gillespie v. Benson*, 18 Cal. 409; *Harrison v. Green*, 18 Cal. 94; *Crandall v. Blen*, 15 Cal. 406; *Simmons v. Brainard*, 14 Cal. 278; *Dumphy & Hildrith v. Guindon*, 13 Cal. 28; *Doyle v. Seawall*, 12 Cal. 280; *Conant v. Conant*, 10 Cal. 249, 70 Am. Dec. 717; *Adams v. Woods*, 8 Cal. 306; *Caulfield v. Hudson*, 3 Cal. 389; *Gordon v. Ross*, 2 Cal. 156; *Luther v. The Ship Apollo*, 1 Cal. 15; *Myers v. Liening*, 1 Cal. Unrep. 78; *Earl v. George*, 1 Cal. Unrep. 52. See APPEAL AND ERROR, vol. 2, p. 199. By the amendments of 1862 the amount was raised to \$300, which amount was retained under the constitution of 1879 until the amendments of 1904. *Henigan v. Ervin*, 110 Cal. 37, 42 Pac. 457; *People v. Perry*, 79 Cal. 105, 21 Pac. 423; *Gorton v. Ferdinando*, 64 Cal. 11, 27 Pac. 941; *Dashiell v.*

Slingerland, 60 Cal. 653; *Sweet v. Tice*, 45 Cal. 71; *Solomon v. Reese*, 34 Cal. 28; *Hopkins v. Cheeseman*, 28 Cal. 180; *Maxfield v. Johnson*, 30 Cal. 545; *Town of Santa Monica v. Eckert*, 4 Cal. Unrep. 92, 33 Pac. 880. See APPEAL AND ERROR, vol. 2, p. 199.

18. *Estate of Moore*, 68 Cal. 394, 9 Pac. 315; *Steady v. Curtis*, 191 Fed. 529, 112 C. C. A. 463.

In construing this provision, it is a settled rule that authority for an appeal in any particular probate matter must be found in subdivision 3 of section 963 of the Code of Civil Procedure, inasmuch as that subdivision specifically points out all and the only cases or instances in which an appeal may be taken in probate proceedings; *Estate of Allen*, 175 Cal. 356, 165 Pac. 1011; *In re Estate of Edelman*, 148 Cal. 233, 113 Am. St. Rep. 231, 82 Pac. 96; *In re Estate of Cahill*, 142 Cal. 628, 76 Pac. 383; *In re Estate of Winslow*, 128 Cal. 311, 60 Pac. 931; *In re Estate of Hickey*, 121 Cal. 378, 53 Pac. 818; *In re Estate of Wittmeier*, 118 Cal. 255, 50 Pac. 393; *In re Estate of Hathaway*, 111 Cal. 270, 43 Pac. 754; *In re Estate of Smith*, 98 Cal. 639, 33 Pac. 744; *In re Estate of Walkerly*, 94 Cal. 352, 29 Pac. 719; *In re Estate of Bauquier*, 88 Cal. 302, 26 Pac. 373; *In re Estate of Moore*, 86 Cal. 58, 24 Pac. 816; *In re Estate of Wiard*, 83 Cal. 619, 24 Pac. 45; *In re Estate of Ohm*, 82 Cal. 160, 22 Pac. 927; *In re Estate of Sbarboro*, 70 Cal. 147, 11 Pac. 563; *In re Estate of Moore*, 68 Cal. 394, 9 Pac. 315; *In re Estate*

and decision;¹⁹ and, on questions of law alone, in all criminal cases where judgment of death has been rendered.²⁰ Appeals in special proceedings are considered in another article of this work.¹

III. DISTRICT COURTS OF APPEAL.

§ 66. **Organization.**—In 1904, by an amendment to the constitution, the district courts of appeal were created, in order to relieve the pressure of judicial business in the supreme court.² By the terms of this amendment, California was divided into three appellate districts, in each

of Lutz, 67 Cal. 457, 8 Pac. 39; In re Estate of Calahan, 60 Cal. 232 (affirmed in Estate of Dean, 62 Cal. 613); In re Estate of Seymour, 15 Cal. App. 287, 114 Pac. 1023; In re Estate of Bouyssou, 1 Cal. App. 657, 82 Pac. 1066. As to appeals from orders and decrees in probate, see APPEAL AND ERROR, vol. 2, p. 188 et seq.

19. Pacific Telephone Co. v. Eshleman, 166 Cal. 640, Ann. Cas. 1915C, 822, 50 L. R. A. (N. S.) 652, 137 Pac. 1119, Sloss, J., concurring; Matter of Zany, 164 Cal. 724, 130 Pac. 710; People v. Davis, 147 Cal. 346, 81 Pac. 718. See, also, People v. Clark, 151 Cal. 200, 90 Pac. 549, where this jurisdiction was exercised. See *infra*, § 67.

20. People v. Mooney, 177 Cal. 642, 171 Pac. 690 (construing "on questions of law" alone); People v. Mooney, 176 Cal. 105, 167 Pac. 696; S. C., 177 Cal. 642, 171 Pac. 690; People v. McKamy, 168 Cal. 531, 143 Pac. 752; People v. Pacific Gas & Elec. Co., 168 Cal. 496, Ann. Cas.

1917A, 328, 143 Pac. 727; People v. Fleming, 166 Cal. 357, Ann. Cas. 1915B, 881, 136 Pac. 291; People v. O'Bryan, 165 Cal. 55, 130 Pac. 1042; People v. White, 161 Cal. 310, 119 Pac. 79; People v. Fitzgerald, 138 Cal. 41, 70 Pac. 1014; People v. Maroney, 109 Cal. 279, 41 Pac. 1097. For construction of this provision, see CRIMINAL LAW.

Under the constitution of 1849 and the amendments of 1862, the provision was: "The supreme court shall have appellate jurisdiction . . . in all criminal cases amounting to felony on questions of law alone." People v. Apgar, 35 Cal. 390; People v. Johnson, 30 Cal. 98; People v. War, 20 Cal. 117; People v. Judge Tenth Judicial Dist., 9 Cal. 19; People v. Vick, 7 Cal. 165; People v. Shear, 7 Cal. 139; People v. Applegate, 5 Cal. 295.

1. See APPEAL AND ERROR, vol. 2, p. 132 et seq.

2. In re Wells, 174 Cal. 467, 163 Pac. 657; Keech v. Joplin, 157 Cal. 1. 106 Pac. 222.

of which there is a district court of appeal.³ The counties embraced in the various districts are specified in the constitution and the code;⁴ but with the proviso that "the supreme court, by orders entered in its minutes, may from time to time remove one or more counties from one appellate district to another, but no county not contiguous to another county of a district shall be added to such district."⁵

"The courts of appeal for the first and second appellate districts shall each consist of two divisions of three justices each. The court of the third appellate district shall consist of three justices. . . . One of the justices of each of the district courts of appeal, and of each division of said courts, shall be the presiding justice thereof, and as such shall be appointed or elected, as the case may be. The presence of two justices shall be necessary for the transaction of any business by district court of appeal except such as may be done at chambers, and the concurrence of two justices shall be necessary to pronounce a judgment."⁶

In another section of the constitution it is provided that "When the justices of a district court of appeal are unable to concur in a judgment, they shall give their several opinions in writing and cause copies thereof to be forwarded to the supreme court."⁷

§ 67. Distribution of Work Generally.—The constitution provides as follows:

"The supreme court shall have power to order causes pending before a district court of appeal for one district to be transferred to the district court of appeal of another district, or from one division thereof to another, for hearing and decision."

3. Const., art. VI, § 4; Harrison v. Colgan, 148 Cal. 69, 82 Pac. 674.

4. Const., art. VI, § 4; Pol. Code, § 135.

5. Const., art. VI, § 4; Keech v. Joplin, 157 Cal. 1, 106 Pac. 222. See

COUNTIES as to the jurisdiction of the superior court of a county where a new county is created and carved out of the territory of the former.

6. See Const., art. VI, § 4.

7. Const., art. VI, § 24.

“The supreme court shall have power to order any cause pending before the supreme court to be heard and determined by a district court of appeal, and to order any cause pending before a district court of appeal to be heard and determined by the supreme court.”⁸

These provisions were designed to obviate the effects of any inequality in the apportionment of the jurisdiction between the respective courts;⁹ and to make the supreme court the court of final decision upon all important questions of law and to enable it to supervise the decisions of the several district courts of appeal, in order to secure a uniform rule of decision throughout the state.¹⁰ But these constitutional provisions did not create a right of appeal or give appellate jurisdiction to the supreme court in any matter where no right of appeal is given by some other provision of law. They simply give to the supreme court the appellate jurisdiction of the district court of appeals in any case, matter or proceeding which may be legally transferred from the latter to the supreme court.¹¹ And they apply with peculiar force where the justices of a district court of appeals are unable to concur in a judgment, in order to avoid the predicament of absolute inability of that court to dispose of the cause, or the imperative necessity for some of the justices to concur in a judgment which they believe to be erroneous, merely to end the litigation.¹² The provisions referred to have been held applicable even to cases of mandamus, certiorari and prohibition initiated

8. Const., art. VI, § 4. *Keech v. Joplin*, 157 Cal. 1, 106 Pac. 222; *Collins v. Superior Court*, 147 Cal. 264, 81 Pac. 509. For discussion of rehearing in supreme court of causes decided by district court of appeal, see *APPEAL AND ERROR*, vol. 2, p. 725.

9. *In re Wells*, 174 Cal. 467, 163 Pac. 657; *Keech v. Joplin*, 157 Cal. 1, 106 Pac. 222; *People v. Davis*, 147 Cal. 346, 81 Pac. 718.

10. *Matter of Zany*, 164 Cal. 724, 130 Pac. 710, per *Shaw, J.*, dissenting; *People v. Davis*, 147 Cal. 346, 81 Pac. 718.

11. *Matter of Zany*, 164 Cal. 724, 130 Pac. 710.

12. *Matter of Zany*, 164 Cal. 724, 130 Pac. 710, per *Shaw, J.*, dissenting; *Swem v. Monroe*, 148 Cal. 741, 83 Pac. 1074.

in the district court of appeals,¹³ but they do not apply to habeas corpus proceedings, since it was not intended to include any matter as to which the well-settled law excludes the idea of any right of review, except where there is a lack of jurisdiction.¹⁴

§ 68. Transfer of Cases.—Orders of transfer under the foregoing provisions are made solely for the purpose of facilitating the business of the courts, and considerations of the convenience of the parties or to the necessities of the speedy decision in any particular case play no part in the matter of such assignments. The fact that, on account of the character of the action and of the property involved, the delay necessary for a decision in the court where the case is pending will cause great and irreparable loss and injury to the parties, is material only upon the question as to whether the appeal should be advanced for hearing in that court.¹⁵ Since under the constitution the district court of appeals has concurrent jurisdiction with the supreme court in original proceedings of prohibition,¹⁶ a judgment by the former is an adjudication of the matters set forth in the petition in such proceeding. Hence if the supreme court should entertain a distinct application of the same character the petitioner would be met by an answer alleging the former adjudication in the district court, and that adjudication would be a bar. In such cases, therefore, if the applicant desires the intervention of the supreme court in the matter, the only effectual method of obtaining it is by application for a transfer of the case to that court for a reconsideration and decision.¹⁷ It has been held that the supreme court will not order a cause transferred to it solely for the purpose of reviewing the exercise of the discretionary power of a district court of

13. *Matter of Zany*, 164 Cal. 724, 130 Pac. 710, per Shaw, J., dissenting.

14. *Matter of Zany*, 164 Cal. 724, 130 Pac. 710.

15. *Gates v. Green*, 148 Cal. 728, 84 Pac. 37.

16. See *infra*, § 69.

17. *Dawson v. Superior Court*, 158 Cal. 73, 110 Pac. 479.

appeal with relation to costs of appeal, where the matter was never in any way suggested to that court.¹⁸

§ 69. Jurisdiction.—It is provided by the constitution¹⁹ that:

“The district courts of appeal shall have appellate jurisdiction on appeal from the superior courts in all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars, and does not amount to two thousand dollars;²⁰ also, in all cases of forcible and unlawful entry and detainer (except such as arise in justices’ courts),¹ in proceedings in insolvency,² and in actions to prevent or abate a nuisance;³ in proceedings of mandamus,⁴ certio-

18. *Cosgrave v. Donovan*, 35 Cal. App. Dec. 178, 199 Pac. 808; 62 Cal. Dec. 91, 199 Pac. 810.

19. Const., art. VI, § 4 (amendment adopted 1918). And see Code Civ. Proc., § 52a (enacted in 1919) for substantially the same provisions. As to effect of the following provisions upon the jurisdiction of the supreme court, see *supra*, § 63. And see *APPEAL AND ERROR*, vol. 2, p. 200.

20. *Leonard v. Home Builders*, 174 Cal. 65, 161 Pac. 1151; *Bottle Mining etc. Co. v. Kern*, 154 Cal. 96, 97 Pac. 25; *Wagner v. Cardinet etc. Co.*, 32 Cal. App. 493, 163 Pac. 337; *Williamson v. Monroe*, 28 Cal. App. 367, 152 Pac. 567; *Beswick v. Churchill Co.*, 21 Cal. App. 721, 132 Pac. 771; *Barnett v. Hull*, 19 Cal. App. 91, 124 Pac. 885; *J. Dowling Co. v. Thompson*, 19 Cal. App. 85, 124 Pac. 1035; *Erving v. Napa Valley Brewing Co.*, 17 Cal. App. 367, 119 Pac. 940; *Willow Land Co. v. Goldschmidt*, 11 Cal. App. 297, 104 Pac. 841; *Wright v. County of Sonoma*, 7 Cal. App. 567, 96 Pac. 333; *Hesperia Land & Water Co. v. Gardner*, 4 Cal. App. 357, 88 Pac.

286; *Morgan v. County of San Diego*, 3 Cal. App. 454, 86 Pac. 720; *Cox v. Southern Pac. Co.*, 2 Cal. App. 248, 83 Pac. 290; *Weldon v. Rogers*, 1 Cal. App. 388, 82 Pac. 352.

But this does not include appeals from judgments or orders made in a superior court upon appeal from the judgment of a justice's court; *Edsall v. Short*, 122 Cal. 533, 55 Pac. 327; *Pool v. Superior Court*, 2 Cal. App. 533, 84 Pac. 53. See *JUSTICE OF THE PEACE*. For construction of provision stated in the text, see *APPEAL AND ERROR*, vol. 2, pp. 199–207; and for construction of a similar provision with reference to the jurisdiction of superior courts, see *infra*, §§ 78, 79.

1. See *FORCIBLE ENTRY AND DETAINER*.

2. This jurisdiction formerly belonged to the supreme court. *People v. Shepard*, 28 Cal. 115. See *INSOLVENCY*.

3. *White v. Gaffney*, 1 Cal. App. 715, 82 Pac. 1088. See *APPEAL AND ERROR*, vol. 2, p. 201; *INJUNCTIONS; NUISANCE*.

4. *Timmons v. Joplin*, 157 Cal.

rari⁵ and prohibition,⁶ usurpation of office,⁷ contesting elections⁸ and eminent domain,⁹ and in such other special proceedings as may be provided by law (excepting cases in which appellate jurisdiction is given to the supreme court);¹⁰ also, on questions of law alone, in all criminal cases prosecuted by indictment or information in a court of record, excepting criminal cases where judgment of death has been rendered.¹¹ The said courts shall also

15, 106 Pac. 228; *Keech v. Joplin*, 157 Cal. 1, 106 Pac. 222; *Knowles v. Thompson*, 133 Cal. 245, 65 Pac. 468; *Palache v. Hunt*, 64 Cal. 474, 2 Pac. 245; *Santa Cruz Gap Turnpike etc. Co. v. Santa Clara County*, 62 Cal. 40. See *MANDAMUS*.

5. *Lamb v. McMullen*, 157 Cal. 14, 106 Pac. 229; *Beaumont v. Samson*, 4 Cal. App. 701, 89 Pac. 137. See *CERTIORARI*.

6. *Dawson v. Superior Court*, 158 Cal. 73, 110 Pac. 479. See *PROHIBITION*.

7. See *PUBLIC OFFICERS; QUO WARRANTO*.

8. See *ELECTIONS*.

9. See *EMINENT DOMAIN*.

10. Application of *Herman*, 183 Cal. 153, 191 Pac. 934; *People v. McKamy*, 168 Cal. 531, 143 Pac. 752; *People v. Bank of San Luis Obispo*, 152 Cal. 261, 92 Pac. 481; *Risdon v. Prewett*, 8 Cal. App. 434, 97 Pac. 73. See, also, *supra*, § 63.

Appellate jurisdiction in all special proceedings was formerly in the supreme court by virtue of § 52, Code Civ. Proc.; but the exception in the above provision leaves to the supreme court only those special proceedings which are committed to that court by the constitution itself. *People v. McKamy*, 168 Cal. 531, 143 Pac. 752. This case decides this point so clearly that it must be taken as authority, though

apparently inconsistent with the theory of Application of *Herman*, 183 Cal. 153, 191 Pac. 934, and *Risdon v. Prewett*, 8 Cal. App. 434, 97 Pac. 73, that the jurisdiction of the supreme court in all special proceedings by virtue of § 52, Code Civ. Proc., continued until the amendment of that section in 1919. See *People v. Bank of San Luis Obispo*, 152 Cal. 261, 92 Pac. 481, where the point is left undecided. For meaning of "special proceedings," see *supra*, § 16; *ACTIONS*, vol. 1, p. 325 et seq.; *APPEAL AND ERROR*, vol. 2, p. 132.

11. *People v. McKamy*, 168 Cal. 531, 143 Pac. 752; *People v. Fleming*, 166 Cal. 357, Ann. Cas. 1915B, 881, 136 Pac. 291; *People v. O'Bryan*, 165 Cal. 55, 130 Pac. 1042; *People v. White*, 161 Cal. 310, 119 Pac. 79; *People v. Bonzani*, 24 Cal. App. 549, 141 Pac. 1062; *Larue v. Davies*, 8 Cal. App. 750, 97 Pac. 903 (holding that no appeal lies unless prosecution is by indictment or information); *People v. Caulfield*, 7 Cal. App. 656, 95 Pac. 666; *People v. Meyers*, 5 Cal. App. 674, 91 Pac. 167. See *CRIMINAL LAW*.

This jurisdiction was formerly entirely in the supreme court. *Wheeler v. Donnell*, 110 Cal. 655, 43 Pac. 1; *In re Curtis*, 108 Cal. 661, 41 Pac. 793; *People v. Jordan*, 65 Cal. 644, 4 Pac. 683; *People v.*

have appellate jurisdiction in all cases, matters, and proceedings pending before the supreme court which shall be ordered by the supreme court to be transferred to a district court of appeal for hearing and decision."¹²

"The said courts shall also have power to issue writs¹³ of mandamus,¹⁴ certiorari,¹⁵ prohibition¹⁶ and habeas corpus,¹⁷ and all other writs necessary or proper to the complete exercise of their appellate jurisdiction."¹⁸

The district courts of appeal have appellate jurisdiction in all cases which the constitution specifically mentions as belonging to their jurisdiction, although they may incidentally involve matters within the jurisdiction of the supreme court, such as the title or possession of real estate, or the legality of a tax, impost, assessment, toll, or municipal fine. In these cases the jurisdiction of the two courts is concurrent.¹⁹

Meiggs' Wharf Co., 65 Cal. 99, 3 Pac. 491; *People v. Pingree*, 61 Cal. 141.

12. See *supra*, § 68. In *Townsend v. Brooks*, 5 Cal. 52, it was said that if a certain appellate court cannot entertain an appeal direct from a decision of a certain trial court, it is absurd to contend that the cause, having been appealed to a third court, might be transferred to the appellate court in question.

13. As to concurrent nature of this jurisdiction, see *supra*, § 12. The jurisdiction in any particular case does not depend upon the existence of appellate jurisdiction over that case. *Favorite v. Superior Court*, 181 Cal. 261, 8 A. L. R. 290, 184 Pac. 15; *Matter of Application of Davidson*, 167 Cal. 727, 141 Pac. 216, 144 Pac. 147, overruling 24 Cal. App. 407.

14. *Older v. Superior Court*, 157 Cal. 770, 109 Pac. 478; *Collins v.*

Superior Court, 147 Cal. 264, 81 Pac. 509; *Older v. Superior Court*, 10 Cal. App. 564, 102 Pac. 829; *Goytino v. McAleer*, 4 Cal. App. 655, 88 Pac. 991. See *MANDAMUS*.

15. See *CERTIORARI*, vol. 4, p. 1081.

16. *Simpson v. Police Court*, 160 Cal. 530, 117 Pac. 553, *Beatty, C. J.*, dissenting. See *PROHIBITION*.

17. *Matter of Zany*, 164 Cal. 724, 130 Pac. 710; *Matter of Application of Shoemaker*, 25 Cal. App. 551, 144 Pac. 985. See *HABEAS CORPUS*.

18. *Older v. Superior Court*, 157 Cal. 770, 109 Pac. 478, suggesting that it is possible that the words "necessary or proper to the complete exercise of their appellate jurisdiction" do not modify the words "mandamus, certiorari, prohibition or habeas corpus," but refer exclusively to "other writs."

19. *Keech v. Joplin*, 157 Cal. 1, 106 Pac. 222.

Since the appellate jurisdiction of the supreme court includes all equity cases,²⁰ the district courts of appeal have no jurisdiction of appeals in such cases,¹ except where the supreme court orders the case transferred from it to the district court of appeal for decision.²

IV. SUPERIOR COURTS.

In General.

§ 70. Organization.—The provisions of the constitution in reference to the superior courts are in part as follows:

“There shall be in each of the organized counties, or cities and counties, of the state, a superior court,³ for each of which at least one judge shall be elected. . . .⁴ In any county where there is more than one judge of the superior court, any one or more of them may hold court; . . . The judgments, orders, and proceedings of

20. See *supra*, § 65.

1. *Laam v. McLaren*, 28 Cal. App. 68, 151 Pac. 290; *Beswick v. Churchill Co.*, 21 Cal. App. 721, 132 Pac. 771; *Swanson v. Wilsen*, 13 Cal. App. 389, 110 Pac. 336; *County of Yuba v. North American etc. Min. Co.*, 12 Cal. App. 121, 107 Pac. 138; *Aetna Indemnity Co. v. Altadena etc. Co.*, 11 Cal. App. 26, 104 Pac. 470; *Litch v. O'Connor*, 8 Cal. App. 489, 97 Pac. 207; *Stockton Lumber Co. v. Schuler*, 7 Cal. App. 257, 94 Pac. 399; *Barnes v. Daveck*, 7 Cal. App. 220, 94 Pac. 779; *Rickey Land etc. Co. v. Glader*, 6 Cal. App. 113, 91 Pac. 414. See *EQUIRY*.

2. *Davey v. Mulroy*, 7 Cal. App. 1, 93 Pac. 297. See *supra*, § 67.

3. Const., art. VI, § 6. See *Code Civ. Proc.*, § 65, for substantially the same provision; *Nicholl v. Koster*, 157 Cal. 416, 108 Pac. 302. The superior court of a “city and

county” has the same jurisdiction as that of a county; *Raisch v. Warren*, 18 Cal. App. 655, 124 Pac. 95. As to power of legislature to abolish superior courts, see *Proulx v. Graves*, 143 Cal. 243, 76 Pac. 1025, where it was held that the legislature, having the power to create or abolish the territorial governmental districts, within each of which the constitution declares that a certain court shall exist, has also the power in making such changes incidentally to abolish such courts, or transfer their powers and jurisdiction to some other court of the same character.

For an interesting suggestion as to a model county court, see 3 Cal. Law Rev. 1.

4. Const., art. VI, § 6. And see *Code Civ. Proc.*, § 65. As to election of superior court judges, see *JUDGES*.

any session of the superior court, held by any one or more of the judges of said courts, . . . shall be equally effectual as if all the judges of said . . . courts presided at such session.''⁶

With reference to the superior courts of the city and county of San Francisco and the counties of the first class,⁶ it is provided that the judges shall choose, from their own number, a presiding judge, who may be removed at their pleasure;⁷ that he shall distribute the business of the court among the judges thereof, and prescribe the order of business,⁸ and perform such other duties as the judges of the court may by rule provide.⁹ Where there is more than one judge provided for the court, they may interchange among themselves in holding court, and in case one is sick, absent, or engaged in the trial of other causes, another judge of the court may step in and fill his place and thus prevent the interruption of judicial business.¹⁰ Any judge of the superior court has authority to act in any cause pending in the court. If one of them exercises authority in a matter which should more properly be heard by another, his action constitutes at most an irregularity, not an objection going to the jurisdiction.¹¹

§ 71. Departments.—Each superior court is divided into as many departments as there are judges of that court, but such division is purely imaginary and simply for convenience and the expediting of business.¹² There may be as

5. Const., art. VI, § 6. And see Code Civ. Proc., §§ 67, 67a, for the same provision; *United Railroads v. Superior Court*, 170 Cal. 755, Ann. Cas. 1916E, 199, 151 Pac. 129; *Carter v. Lothian*, 133 Cal. 451, 65 Pac. 962; *Von Schmidt v. Widber*, 99 Cal. 511, 34 Pac. 109.

6. Const., art. VI, § 6; Code Civ. Proc., §§ 67, 67a.

7. *White v. Superior Court*, 110 Cal. 60, 42 Pac. 480.

8. Const., art. VI, § 6; Code Civ. Proc., §§ 67, 67a. As to distribution of business, see *infra*, § 72.

9. Code Civ. Proc., §§ 67, 67a.

10. *Carter v. Lothian*, 133 Cal. 451, 65 Pac. 962.

11. *Graziani v. Denny*, 174 Cal. 176, 162 Pac. 397. See, also, *infra*, § 71.

12. *Carter v. Lothian*, 133 Cal. 451, 65 Pac. 962; *People v. Carantan*, 11 Cal. App. 561, 105 Pac. 768.

many sessions at the same time as there are judges of the court;¹³ and whether sitting separately or together, the judges hold but one and the same court. The jurisdiction they exercise in any cause is that of the court, and not the individual,¹⁴ since the jurisdiction of causes is vested by the constitution in the court, not in any particular judge or department thereof.¹⁵ The entire procedure from the commencement of an action to the execution of the judgment is in one court, and there is no opportunity for conflict of jurisdiction, either in pronouncing a judgment or in its execution after it has been rendered. When, therefore, a suit is commenced in the superior court upon a cause of action which is then pending before it in another suit, or which has already been carried into judgment, the procedure to be observed is the same as if the two actions were in a court with but a single judge before whom all causes therein were to be tried.¹⁶ The judge presiding in any department of the superior court has the power to make and enforce all orders necessary for the disposition of causes that have been assigned to his department, and no judge sitting in any other department of the same court can interfere with him in the exercise of such power.¹⁷ The transfer of causes from one department to

13. Const., art. VI, §§ 6-8; Code Civ. Proc., §§ 66-67a; *Graziani v. Denny*, 174 Cal. 176, 162 Pac. 397; *Carter v. Lothian*, 133 Cal. 451, 65 Pac. 962; *White v. Superior Court*, 110 Cal. 60, 42 Pac. 480; *Von Schmidt v. Widber*, 99 Cal. 511, 34 Pac. 109.

For the purpose of trial of causes, however, the departments of superior courts are as distinct as are the superior courts of different counties. *People v. Wong Bin*, 139 Cal. 60, 72 Pac. 505; *Cottrell v. Cottrell*, 83 Cal. 457, 23 Pac. 531.

14. *Nickel v. State*, 179 Cal. 126, 175 Pac. 641; *Brown v. Campbell*,

110 Cal. 644, 43 Pac. 12; *White v. Superior Court*, 110 Cal. 60, 42 Pac. 480; *People v. Carantan*, 11 Cal. App. 561, 105 Pac. 768.

15. *Graziani v. Denny*, 174 Cal. 176, 162 Pac. 397; *White v. Superior Court*, 110 Cal. 60, 42 Pac. 480; *Dorland v. Hanson*, 81 Cal. 202, 15 Am. St. Rep. 44, 22 Pac. 552; *People v. Carantan*, 11 Cal. App. 561, 105 Pac. 768.

16. *Brown v. Campbell*, 110 Cal. 644, 43 Pac. 12.

17. *People v. Wong Bin*, 139 Cal. 60, 72 Pac. 505; *Griffen v. Christ's Church*, 32 Cal. App. Dec. 541, 191 Pac. 718 (holding that one depart-

another is a matter within the discretion of the superior court, and the exercise of that discretion is not reviewable where no abuse thereof appears.¹⁸

§ 72. Distribution of Business.—In the case of the superior courts of San Francisco and Los Angeles it is provided that the presiding judge “shall distribute the business of the court among the judges thereof.”¹⁹ In the other superior courts where there is more than one judge, the judges are authorized to apportion the business among themselves as equally as may be.²⁰ The assignment of causes to different departments is made in order to expedite business, by apportioning them for trial and judgment,¹ and no notice of a transfer is necessary.² After a

ment cannot direct a certain party to execute a deed to one person while an order is in effect by another department directing him to execute a deed to a different person). See *Graziani v. Denny*, 174 Cal. 176, 162 Pac. 397, where it is suggested that if one of the judges exercises authority in a matter that should more properly be heard by another, his action constitutes an irregularity. For discussion of similar rule in regard to separate courts, see *supra*, § 12.

18. *People v. Owens*, 132 Cal. 469, 64 Pac. 770; *People v. Wheatley*, 88 Cal. 114, 26 Pac. 95 (holding that a transfer from one department to another will, on appeal, be presumed to have been made without objection from the defendant, nothing to the contrary appearing from the record). See *APPEAL AND ERROR*, vol. 2, p. 896 et seq., for full discussion of the discretionary powers of courts; and see *COSTS*, as to the discretion to determine necessary costs upon appeal.

19. Const., art. VI, § 6; Code Civ. Proc., §§ 67, 67a; *White v. Superior Court*, 110 Cal. 60, 42 Pac. 480 (holding that if this power is exercised in a grossly unfair and arbitrary manner, the remedy rests in the hands of the judges of the court in question, since they have power to remove the presiding judge at their pleasure and substitute another in his stead).

20. Const., art. VI, § 7; Code Civ. Proc., § 66.

1. *Brown v. Campbell*, 110 Cal. 644, 43 Pac. 12; *Bell v. Peck*, 104 Cal. 35, 37 Pac. 766; *Ransome-Crummey Co. v. Wood*, 40 Cal. App. 355, 180 Pac. 951. And see cases cited *supra*, § 71.

2. *Bell v. Peck*, 104 Cal. 35, 37 Pac. 766, suggesting, however, that where a party to an action makes application to the department where the case is pending for an order transferring the case from that department to another department of the same court, notice of such application should be duly served on

cause has been once assigned, it may be reassigned or transferred, even irregularly, without jeopardizing the jurisdiction of the court therein.³ Nor does the transfer of a cause for trial or disposition from one department to another effect a change or transfer of the jurisdiction of that cause. It remains at all times in the court as a single entity, and previous orders are not thereby vacated and set aside.⁴

Extra sessions.—Whenever an extra session of the superior court is called pursuant to the provisions of the code,⁵ the judge (or the majority of the judges where the court has more than one) shall apportion to the judge who may preside over said extra session such portion of the business of the court as he or they may desire, and at the close of such extra session shall order such portions of said business so apportioned and not transacted to be retransferred.⁶

Jurisdiction.

§ 73. In General.—The superior courts are courts of general jurisdiction,⁷ even when dealing with probate

the opposite party; *Ransome-Crummey Co. v. Wood*, 40 Cal. App. 355, 180 Pac. 951.

3. *White v. Superior Court*, 110 Cal. 60, 42 Pac. 480; *Stead v. Curtis*, 205 Fed. 439, 123 C. C. A. 507.

4. *People v. Carantan*, 11 Cal. App. 561, 105 Pac. 768.

5. Code Civ. Proc., § 67b. See supra, § 24.

6. Code Civ. Proc., § 67b. As to special sessions generally, see supra, § 24.

7. *Olcese v. Justice's Court*, 156 Cal. 82, 103 Pac. 317; *Bell v. Superior Court*, 150 Cal. 31, 87 Pac.

1031; *Estate of Strong*, 119 Cal. 663, 51 Pac. 1078; *Burris v. Kennedy*, 108 Cal. 331, 41 Pac. 458 (where it is said that the superior courts are the highest courts in the state having a general common-law jurisdiction); *Smith v. Westerfield*, 88 Cal. 374, 26 Pac. 206; *Bishop v. Superior Court*, 87 Cal. 226, 25 Pac. 435; *Campe v. Lassen*, 67 Cal. 139, 7 Pac. 430; *Estate of Polito*, 34 Cal. App. Dec. 788, 197 Pac. 976; *Wood v. Thompson*, 5 Cal. App. 247, 90 Pac. 38; *Guardianship of Deisen*, 2 Cof. Prob. Dec. 463. As to presumption in favor of courts of general jurisdiction, see supra, § 6.

matters.⁸ They have all the powers incident to courts of common law and courts of equity, of which they are the successors.⁹

The jurisdiction of the superior courts is of two kinds, original and appellate.¹⁰ These two classes are completely separate and distinct, and the superior court can exercise its original jurisdiction only in those cases provided by the constitution; not in those matters in which its jurisdiction is only appellate.¹¹ In appellate cases it has no power to make an order in the exercise of original jurisdiction.¹²

§ 74. Cases in Equity.—It is provided by both the constitution and the Code of Civil Procedure that the superior court shall have original jurisdiction “in all cases in equity.”¹³ This jurisdiction formerly belonged to the dis-

8. *Johnson v. Canty*, 162 Cal. 391, 123 Pac. 263; *Del Campo v. Camarillo*, 154 Cal. 647, 98 Pac. 1049; *Estate of Davis*, 151 Cal. 318, 121 Am. St. Rep. 105, 86 Pac. 183, 90 Pac. 711; *Burris v. Kennedy*, 108 Cal. 331, 41 Pac. 458; *L. Harter Co. v. Geisel*, 18 Cal. App. 282, 122 Pac. 1094; *Robinson v. Fair*, 128 U. S. 53, 32 L. Ed. 415, 9 Sup. Ct. Rep. 30; *Stead v. Curtis*, 205 Fed. 439, 123 C. C. A. 507. As to probate jurisdiction, see *infra*, §§ 80, 81. And see EXECUTORS AND ADMINISTRATORS.

9. *Olcese v. Justice's Court*, 156 Cal. 82, 103 Pac. 317; *Burns v. Superior Court*, 140 Cal. 1, 73 Pac. 597; *Wood v. Thompson*, 5 Cal. App. 247, 90 Pac. 38.

10. Code Civ. Proc., § 75.

11. *Arroyo Ditch & W. Co. v. Superior Court*, 92 Cal. 47, 27 Am. St. Rep. 91, 27 Pac. 91. See *supra*, § 10, for the rule generally as to grant of jurisdiction and its effect.

12. *Southern Pac. R. R. Co. v. Superior Court*, 59 Cal. 471. See Code Civ. Proc., § 980, as to power of superior courts on appeal. And see JUSTICES OF THE PEACE.

13. Const., art. VI, § 5; Code Civ. Proc., § 76, subd. 1; *Reclamation District v. Superior Court*, 171 Cal. 672, 154 Pac. 845; *Robinett v. Brown*, 167 Cal. 735, 141 Pac. 368; *City of Pasadena v. Superior Court*, 157 Cal. 781, 21 Ann. Cas. 1355, 109 Pac. 620; *Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317; *Union Collection Co. v. Superior Court*, 149 Cal. 790, 87 Pac. 1035; *Wright v. Superior Court*, 139 Cal. 469, 73 Pac. 145; *Herd v. Tuohy*, 133 Cal. 55, 65 Pac. 139; *Spreckels v. Hawaiian etc. Sugar Co.*, 117 Cal. 377, 49 Pac. 353; *Pennie v. Roach*, 94 Cal. 515, 29 Pac. 956, 30 Pac. 106; *Spring Valley Water Works v. San Francisco*, 82 Cal. 286, 16 Am. St. Rep. 116, 6 L. R. A. 756, 22 Pac. 910, 1046; *Hyde v. Redding*, 74 Cal. 493,

trict courts,¹⁴ and it is the same as that administered in the high court of chancery in England.¹⁵ There are, strictly speaking, no separate courts of law and equity in California.¹⁶ The jurisdiction of superior courts in equity cases is not affected by the amount in controversy; and so, it has frequently been held that since an action to foreclose a mechanic's lien is equitable, the court may retain jurisdiction even when the amount of money secured by the lien is less than three hundred dollars, and even though the plaintiff fails to establish his right to foreclosure. In such case the court may render a personal judgment for the amount for which the lien is claimed.¹⁷

The code provides further, that the superior court shall have jurisdiction "in all civil actions in which the subject

16 Pac. 380; *Wright v. Central Cal. etc. Co.*, 67 Cal. 532, 8 Pac. 70; *Hall v. Rice*, 64 Cal. 443, 1 Pac. 891, 2 Pac. 889; *Cota v. Jones*, 2 Cal. Unrep. 131; *Yolo Water etc. Co. v. Superior Court*, 29 Cal. App. Dec. 507, 185 Pac. 195; *Raisch v. Warren*, 18 Cal. App. 655, 124 Pac. 95; *Lange v. Superior Court*, 11 Cal. App. 1, 103 Pac. 908; *Cerini v. De Long*, 7 Cal. App. 398, 94 Pac. 582; *Sumner v. Nevin*, 4 Cal. App. 347, 87 Pac. 1105; *Guardianship of Deisen*, 2 Cal. Prob. Dec. 463. As to legal and equitable actions generally, see *ACTIONS*, vol. 1, p. 318 et seq.; and as to what constitute "cases in equity," see *supra*, § 18, and *EQUITY*.

14. *City of Pasadena v. Superior Court*, 157 Cal. 781, 21 Ann. Cas. 1355, 109 Pac. 620; *Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317; *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709; *Learned v. Castle*, 67 Cal. 41, 7 Pac. 34; *Rosenberg v. Frank*, 58 Cal. 387; *Bateman v. Superior Court*, 54 Cal. 285, 289;

People v. Davidson, 30 Cal. 379; *Perry v. Ames*, 26 Cal. 372; *Willis v. Farley*, 24 Cal. 491; *People v. Mier*, 24 Cal. 61; *Stead v. Curtis*, 205 Fed. 439, 123 C. C. A. 507.

15. *United Railroads v. Superior Court*, 170 Cal. 755, Ann. Cas. 1916E, 199, 151 Pac. 129; *City of Pasadena v. Superior Court*, 157 Cal. 781, 21 Ann. Cas. 1355, 109 Pac. 620; *Rosenberg v. Frank*, 58 Cal. 387; *People v. Davidson*, 30 Cal. 379; *Deck v. Gerke*, 12 Cal. 436, 73 Am. Dec. 556; *Sanford v. Head*, 5 Cal. 297.

16. *Hyde v. Redding*, 74 Cal. 493, 16 Pac. 380. See as to consolidation of law and equity jurisdiction, *ACTIONS*, vol. 1, p. 312 et seq.

17. *Robinett v. Brown*, 167 Cal. 735, 141 Pac. 368; *Ransome-Crummey Co. v. Martenstein*, 167 Cal. 406, 139 Pac. 1060; *Mannix v. Tryon*, 152 Cal. 31, 91 Pac. 984 (overruling *Miller v. Carlisle*, 127 Cal. 327, 59 Pac. 785); *Becker v. Superior Court*, 151 Cal. 313, 90 Pac. 689. See *MECHANICS' LIENS*.

of litigation is not capable of pecuniary estimation."¹⁸ This particular provision is not contained, however, in the constitution.

§ 75. Cases in Law.—Under the constitution and the code,¹⁹ the superior court has original jurisdiction also

“In all cases at law which involve the title or possession of real property,²⁰ or the legality of any tax, impost, assessment, toll or municipal fine,¹ and in all other cases in which the demand, exclusive of interest or the value of the property in controversy, amounts to three hundred dollars.”²

18. Code Civ. Proc., § 76, subd. 2.

19. Code Civ. Proc., § 76, subd. 3.

And see Const., art. VI, § 5.

20. *Faxon v. All Persons*, 166 Cal. 707, L. R. A. 1916B, 1209, 137 Pac. 919; *O'Meara v. Hables*, 163 Cal. 240, 124 Pac. 1003; *Hart v. Carnall-Hopkins Co.*, 101 Cal. 160, 35 Pac. 633; S. C., 103 Cal. 132, 37 Pac. 196; *Copertini v. Oppermann*, 76 Cal. 181, 18 Pac. 256; *Hyde v. Bedding*, 74 Cal. 493, 16 Pac. 380; *Schroeder v. Wittram*, 66 Cal. 636, 6 Pac. 737; *Bates v. Ferrier*, 19 Cal. App. 79, 124 Pac. 889. See supra, §§ 19, 20, for interpretation of this clause.

This jurisdiction was formerly in the district courts. *Holman v. Taylor*, 31 Cal. 338; *Caulfield v. Stevens*, 28 Cal. 118; *Perry v. Ames*, 26 Cal. 372; *Cullen v. Langridge*, 17 Cal. 67. For actions involving the title or right of possession of real estate, see ADVERSE POSSESSION, vol. 1, p. 484; CO-TENANCY; EJECTMENT; MINES AND MINERALS; PROPERTY; PUBLIC LANDS; QUIETING TITLE; VENDOR AND PURCHASER; VENUE; etc.

1. *City of Madera v. Black*, 181 Cal. 306, 184 Pac. 397; *People v.*

Pacific Gas & Elec. Co., 168 Cal. 496, Ann. Cas. 1917A, 328, 143 Pac. 727; *Bottle Mining etc. Co. v. Kern*, 154 Cal. 96, 97 Pac. 25; *Arroyo Ditch etc. Co. v. Superior Court*, 92 Cal. 47, 27 Am. St. Rep. 91, 28 Pac. 54; *Perkins v. Ralls*, 71 Cal. 87, 11 Pac. 860; *Williams v. McCartney*, 69 Cal. 556, 11 Pac. 186; *Culbertson v. Kinevan*, 68 Cal. 490, 9 Pac. 455. See as to the meaning of these terms, supra, § 21.

This jurisdiction formerly belonged to the district courts. *Doherty v. Thayer*, 31 Cal. 140; *Perry v. Ames*, 26 Cal. 372; *People v. Mier*, 24 Cal. 61. See generally TAXATION.

2. *Gardiner v. Royer*, 167 Cal. 238, 139 Pac. 75; *Burke v. Maguire*, 154 Cal. 456, 98 Pac. 21; *California Cured Fruit Assn. v. Ainsworth*, 134 Cal. 461, 66 Pac. 586; *Napa State Hospital v. Flaherty*, 134 Cal. 315, 66 Pac. 322; *Gallagher v. McGraw*, 132 Cal. 601, 64 Pac. 1080; *De Jarnatt v. Marquez*, 132 Cal. 700, 64 Pac. 1090; *Raisch v. Sausalito Land etc. Co.*, 131 Cal. 215, 63 Pac. 346; *Miller v. Carlisle*, 127 Cal. 327, 59 Pac. 785; *City of Tulare v. Hevren*, 126 Cal. 226, 58 Pac. 530; *Christian*

The jurisdiction of the superior court where the title or right of possession of real estate is involved is irrespective of the amount of money claimed.³ The general purpose of the second clause of the provision quoted above is to give to the sovereign power of the state, whether exercised generally or locally, the protection of having the legality of any exaction of money for public uses or needs cognizable in the first instance in the superior courts alone. In view of this purpose, the words used should be applied in their broadest sense with respect to moneys raised for public purposes or needs.⁴ Construing the clause touching the jurisdictional amount, it is the rule that if the plaintiff's demand is less than three hundred dollars, the superior court has no original jurisdiction unless the case involves a question of which the constitution has specifically given it original jurisdiction.⁵ And it has

v. Superior Court, 122 Cal. 117, 54 Pac. 518; *Lehnhardt v. Jennings*, 119 Cal. 192, 48 Pac. 56, 51 Pac. 195; *Griswold v. Pieratt*, 110 Cal. 259, 42 Pac. 820; *Greenbaum v. Martinez*, 86 Cal. 459, 25 Pac. 12; *People v. Bingham*, 82 Cal. 238, 22 Pac. 1039; *Perkins v. Ralls*, 71 Cal. 87, 11 Pac. 860; *Connely v. Superior Court*, 34 Cal. App. 773, 169 Pac. 355; *Stephens v. Weyl-Zuckerman & Co.*, 34 Cal. App. 210, 167 Pac. 171; *Tracy v. Sumida*, 31 Cal. App. 716, 161 Pac. 503; *Briggs v. Hall*, 24 Cal. App. 586, 141 Pac. 1067; *Dake Advertising Agency v. Stilson Co.*, 22 Cal. App. 31, 133 Pac. 327; *J. Dewing Co. v. Thompson*, 19 Cal. App. 85, 124 Pac. 1035; *Reeg v. McArthur*, 17 Cal. App. 203, 119 Pac. 105; *Peterson v. McDonald*, 13 Cal. App. 644, 110 Pac. 465; *Davis v. Treacy*, 8 Cal. App. 395, 97 Pac. 70; *Morgan v. County of San Diego*, 3 Cal. App. 454, 86 Pac. 720. See, also, *infra*, §§ 78, 79.

This jurisdiction formerly belonged to the district courts. *Derby v. Stevens*, 64 Cal. 287, 30 Pac. 820; *Perry v. Ames*, 26 Cal. 372. And prior to the amendments of 1862 the jurisdictional amount was \$200; *Bradley v. Kent*, 22 Cal. 169; *Cullen v. Langridge*, 17 Cal. 67; *Conant v. Conant*, 10 Cal. 249, 70 Am. Dec. 717; *Page v. Ellis*, 9 Cal. 248; *Zander v. Coe*, 5 Cal. 230; *Jackson v. Whartenby*, 5 Cal. 94; *Arnold v. Van Brunt*, 4 Cal. 89.

3. *Raisch v. Sausalito Land etc. Co.*, 131 Cal. 215, 63 Pac. 346; *Randolph v. Kraemer*, 106 Pac. 199, 39 Pac. 533; *Copertini v. Oppermann*, 76 Cal. 181, 18 Pac. 256; *Holman v. Taylor*, 31 Cal. 338; *Cullen v. Langridge*, 17 Cal. 67.

4. *City of Madera v. Black*, 181 Cal. 306, 184 Pac. 397.

5. *Gallagher v. McGraw*, 132 Cal. 601, 64 Pac. 1080; *Raisch v. Sausalito Land etc. Co.*, 131 Cal. 215, 63 Pac. 346.

been held that the superior court has no jurisdiction of an action upon a note for less than three hundred dollars, even though the amount of principal and interest exceeds that sum.⁶

§ 76. In Criminal Cases.—The superior courts are given original jurisdiction “in all criminal cases amounting to felony,⁷ and cases of misdemeanor not otherwise provided for.”⁸ This jurisdiction of the superior court is exclusive unless prosecution in some other court is provided for;⁹ and in the latter event, the jurisdiction of the other court is exclusive.¹⁰ Cases may be “otherwise provided for,”

6. *Gallagher v. McGraw*, 132 Cal. 601, 64 Pac. 1080.

“Exclusive of interest” refers to compound as well as simple interest. The debt sued on is regarded as divided into two parts, one of which in reference to the other is the principal; one represents the original debt, the other interest upon such debt. The jurisdiction must be determined by excluding all that portion which accrued as interest. *Christian v. Superior Court*, 122 Cal. 117, 54 Pac. 518; *Howe v. Halsey*, 6 Cal. Unrep. 148, 54 Pac. 748. See INTEREST.

7. *Becker v. Superior Court*, 151 Cal. 313, 90 Pac. 689; *Ex parte Williams*, 87 Cal. 78, 24 Pac. 602, 25 Pac. 248; *Ex parte Donahue*, 65 Cal. 474, 4 Pac. 449; *People v. Fahey*, 64 Cal. 342, 30 Pac. 1030; *Ex parte Flood*, 64 Cal. 251, 30 Pac. 437; *People v. Colby*, 54 Cal. 184. For construction of this provision, see CRIMINAL LAW, and articles treating of particular felonies.

8. *Robert v. Police Court*, 148 Cal. 131, 82 Pac. 828; *Ex parte Neustadt*, 82 Cal. 273, 23 Pac.

124; *Green v. Superior Court*, 78 Cal. 556, 21 Pac. 307, 541 (holding that all misdemeanors are included in this power); *Matter of the Application of Kurtz*, 68 Cal. 412, 9 Pac. 449; *Gafford v. Bush*, 60 Cal. 149; *Ex parte Wallingford*, 60 Cal. 103; *People v. Keseling*, 35 Cal. App. 501, 170 Pac. 627; *People v. Fages*, 32 Cal. App. 37, 162 Pac. 137; *People v. Cory*, 26 Cal. App. 735, 148 Pac. 532; *People v. Fortch*, 13 Cal. App. 770, 110 Pac. 823; *In re Sing*, 13 Cal. App. 736, 110 Pac. 693; *People v. Sacramento Butchers' Assn.*, 12 Cal. App. 471, 107 Pac. 712; *Union Ice Co. v. Rose*, 11 Cal. App. 357, 104 Pac. 1006; *People v. Palermo Land etc. Co.*, 4 Cal. App. 717, 89 Pac. 723, 725. See CRIMINAL LAW and articles treating of particular misdemeanors.

9. *Robert v. Police Court*, 148 Cal. 131, 82 Pac. 838; *Green v. Superior Court*, 78 Cal. 556, 21 Pac. 307, 541; *Ex parte Donahue*, 65 Cal. 474, 4 Pac. 449; *People v. Fortch*, 13 Cal. App. 770, 110 Pac. 823.

10. *People v. Hamberg*, 84 Cal. 468, 24 Pac. 298; *People v. Lawrence*, 82 Cal. 182, 22 Pac. 1120;

within the meaning of this provision, as well by statute as by the constitution itself.¹¹ It has been said that the clause "in all cases amounting to felony," imports that the criminal jurisdiction, so far as it is conferred by this clause, is to be determined by the nature of the offense charged in the indictment or information, and that a charge of any felony includes a charge of every misdemeanor which constitutes one of the elements that go to make up the greater crime.¹² The fact that a felony charge includes the lesser offense in no way affects the jurisdiction of the superior court to try and determine it.¹³

§ 77. Writs and Miscellaneous Subjects.—In further defining the original jurisdiction of superior courts, article VI, section 5, of the constitution provides in part as follows: "Said courts and their judges shall have power to issue writs¹⁴ of mandamus,¹⁵ certiorari,¹⁶ prohibition,¹⁷

People v. Joselyn, 80 Cal. 544, 72 Pac. 217; Green v. Superior Court, 78 Cal. 556, 21 Pac. 307, 541; Gafford v. Bush, 60 Cal. 149; Ex parte Wallingford, 60 Cal. 103; People v. Palermo Land etc. Co., 4 Cal. App. 717, 89 Pac. 723, 725.

11. Green v. Superior Court, 78 Cal. 556, 21 Pac. 307, 541; Gafford v. Bush, 60 Cal. 149.

12. Ex parte Donahue, 65 Cal. 474, 4 Pac. 449 (per McKinstry, J., concurring), and stating by way of argument that it would follow from this that if a person is found guilty in the superior court of a misdemeanor under a felony charge which includes the lesser offense, this would constitute a bar to a subsequent prosecution for the misdemeanor in the justice's court. See CRIMINAL LAW; and INDICTMENT AND INFORMATION.

13. People v. Fahey, 64 Cal. 342, 30 Pac. 1030.

14. As to the concurrent nature of this jurisdiction, see supra, § 12.

15. Kings County v. Johnson, 104 Cal. 198, 37 Pac. 870.

This jurisdiction formerly belonged to the district courts. Cariaga v. Dryden, 30 Cal. 244 (holding that the amount in controversy is immaterial in an action for mandamus); Perry v. Ames, 26 Cal. 372. See MANDAMUS.

16. Olcese v. Justice's Court, 156 Cal. 82, 103 Pac. 317; Hood v. Melrose, 24 Cal. App. 355, 141 Pac. 396.

This jurisdiction was formerly in the district courts. Winter v. Fitzpatrick, 35 Cal. 269; Perry v. Ames, 26 Cal. 372. See CERTIORARI, vol. 4, p. 1081.

17. Simpson v. Police Court, 160

quo warranto,¹⁸ and habeas corpus, on petition by or on behalf of any person in actual custody, in their respective counties."¹⁹ The code provision is substantially the same.²⁰ In construing this provision, it has been held that the phrase "in their respective counties" applies only to that part of the section relating to habeas corpus.¹

Miscellaneous subjects.—In addition to the original jurisdiction of the superior courts in the various subjects above enumerated, the constitution provides² that the superior courts shall have original jurisdiction ". . . of actions of forcible entry and detainer;³ of proceedings in insolvency;⁴ of actions to prevent or abate a nuisance;⁵

Cal. 530, 117 Pac. 553, per Beatty, C. J., dissenting.

This jurisdiction was formerly in the district courts. *Perry v. Ames*, 26 Cal. 372. See PROHIBITION.

18. *People v. Sutter Street Ry. Co.*, 117 Cal. 604, 49 Pac. 736 (holding that this provision does not exclude jurisdiction over regular actions to declare the forfeiture of franchises). *People v. Bingham*, 82 Cal. 238, 22 Pac. 1039; *People v. Stanford*, 77 Cal. 360, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693. See QUO WARRANTO.

19. *Kings County v. Johnson*, 104 Cal. 198, 37 Pac. 870; *Ex parte Sternes*, 77 Cal. 156, 11 Am. St. Rep. 251, 19 Pac. 275; *Robb v. Connolly*, 111 U. S. 624, 28 L. Ed. 542, 4 Sup. Ct. Rep. 544. See HABEAS CORPUS.

20. Code Civ. Proc., § 76, subd. 5 (in part).

1. *Kings County v. Johnson*, 104 Cal. 198, 37 Pac. 870.

2. See Const., art. VI, § 5.

3. The county courts formerly had exclusive jurisdiction of this class of cases. *Ivory v. Brown*, 137 Cal.

603, 70 Pac. 657; *Johnson v. Chely*, 43 Cal. 299; *Stoppelkamp v. Mangoot*, 42 Cal. 316; *Mecham v. McKay*, 37 Cal. 154; *Brummagim v. Spencer*, 29 Cal. 661; *Caulfield v. Stevens*, 28 Cal. 118. See FORCIBLE ENTRY AND DETAINER.

4. The county courts formerly had jurisdiction in this class of cases. *Flint v. Wilson*, 36 Cal. 24; *People v. Rosborough*, 29 Cal. 415. See INSOLVENCY.

5. *People v. Wing*, 147 Cal. 379, 81 Pac. 1103 (stating that the superior court is the only court in which actions of this character may be maintained); *McCarthy v. Gaston Ridge Mill etc. Co.*, 144 Cal. 542, 78 Pac. 7 (holding that the jurisdiction of the superior court to abate nuisances is irrespective of the amount of damages claimed).

This jurisdiction was formerly conferred expressly upon the county courts. *Learned v. Castle*, 67 Cal. 41, 7 Pac. 34; *Courtwright v. Bear River & A. W. & Min. Co.*, 30 Cal. 573; *People v. Moore*, 29 Cal. 427. But the district courts had concurrent jurisdiction of such cases

of all matters of probate;^{5a} of divorce and for annulment of marriage;⁶ of all such special cases and proceedings as are not otherwise provided for,⁷ and said courts shall have the power of naturalization, and to issue papers therefor.⁸ These various matters are also included in the

by virtue of their being "cases in equity." *Learned v. Castle*, 67 Cal. 41, 7 Pac. 34; *Yolo County v. City of Sacramento*, 36 Cal. 193; *Courtwright v. Bear River & A. W. & Min. Co.*, 30 Cal. 573; *Fitzgerald v. Urton*, 4 Cal. 235. See NUISANCE.

5a. *Estate of Bell*, 168 Cal. 253, 141 Pac. 1179; *Dungan v. Superior Court*, 149 Cal. 98, 117 Am. St. Rep. 119, 84 Pac. 767; *Martinovich v. Marsicano*, 137 Cal. 354, 70 Pac. 459; *Estate of Davis*, 136 Cal. 590, 69 Pac. 412; *Burriss v. Kennedy*, 108 Cal. 331, 41 Pac. 458; *Pennie v. Roach*, 94 Cal. 515, 29 Pac. 956, 30 Pac. 106; *Elizalde v. Murphy*, 4 Cal. App. 114, 87 Pac. 245; *Stead v. Curtis*, 191 Fed. 529, 112 C. C. A. 463; *Goodrich v. Ferris*, 145 Fed. 844. For construction of this provision, see *infra*, §§ 80, 81. And see EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; WILLS.

Formerly this jurisdiction was in the separate probate courts held by the county judges. *Burriss v. Kennedy*, 108 Cal. 331, 41 Pac. 458; *Rosenberg v. Frank*, 58 Cal. 387; *Hill v. Den*, 54 Cal. 6, 19; *Haverstick v. Trudel*, 51 Cal. 431; *Bush v. Lindsey*, 44 Cal. 121; *Matter of Will of Bowen*, 34 Cal. 682; *Stead v. Curtis*, 205 Fed. 439, 123 C. C. A. 507. As to former probate courts, see *supra*, § 58.

6. See DIVORCE AND SEPARATION; MARRIAGE.

7. *City of Los Angeles v. Pomero*y, 124 Cal. 597, 57 Pac. 585;

Wickersham v. Brittan, 93 Cal. 34, 15 L. R. A. 106, 28 Pac. 792, 29 Pac. 51; *Smith v. Westerfield*, 88 Cal. 374, 26 Pac. 206; *Bishop v. Superior Court*, 87 Cal. 226, 25 Pac. 435; *Van Winkle v. Stow*, 23 Cal. 457 (holding that such jurisdiction under the Practice Act is independent of the amount in controversy); *Roche v. Superior Court*, 30 Cal. App. 255, 157 Pac. 830; *Lay v. Superior Court*, 11 Cal. App. 558, 105 Pac. 775. As to what are special cases and proceedings, see *supra*, § 22; and see ACTIONS, vol. 1, pp. 325-328.

This jurisdiction was formerly in the county courts. *Spencer Creek Water Co. v. Vallejo*, 48 Cal. 70; *People v. Supervisors of Kern County*, 45 Cal. 679; *In re Marks*, 45 Cal. 199; *Appeal of Houghton*, 42 Cal. 35.

8. See ALIENAGE AND CITIZENSHIP, vol. 1, pp. 909-911. *Holmgren v. United States*, 217 U. S. 509, 54 L. Ed. 861, 30 Sup. Ct. Rep. 588.

Formerly this jurisdiction was expressly conferred upon the county courts. *In re Conner*, 39 Cal. 98, 2 Am. Rep. 427. And it was also exercised by the district courts by virtue of the federal statutes conferring jurisdiction upon all "courts of common-law jurisdiction." *In re Conner*, 39 Cal. 98, 2 Am. Rep. 427; *Cariaga v. Dryden*, 30 Cal. 245 (per *Sawyer, J.*, concurring); *Perry v. Ames*, 26 Cal. 372. See ALIENAGE AND CITIZENSHIP, vol. 1, p. 909.

code enumeration of the subjects of that court's original jurisdiction.⁹

§ 78. **Amount in Controversy.** ← The expression "**amount in controversy**," as used in section 76 of the Code of Civil Procedure, refers to the amount claimed in the ad damnum clause of the complaint.¹⁰ Any other rule, it has been said, would be fraught with uncertainties and mischiefs beyond the power of anticipation.¹¹ Where there are several counts in a complaint, it is sufficient if the aggregate amount sued for is above the required amount, even though the amount claimed in each count is less.¹² The general rule applies, however, only where

DEMAND

even this

9. See Code Civ. Proc., § 76, subds. 4, 5.

10. Rubio Canyon etc. Assn. v. Everett, 154 Cal. 29, 96 Pac. 811; People v. Madden, 134 Cal. 611, 66 Pac. 874; Hoban v. Ryan, 130 Cal. 96, 62 Pac. 296; Miller v. Carlisle, 127 Cal. 327, 59 Pac. 785; City of Tulare v. Hevren, 126 Cal. 226, 58 Pac. 530; Rodley v. Curry, 120 Cal. 541, 52 Pac. 999; Lehnhardt v. Jennings, 119 Cal. 192, 48 Pac. 56, 51 Pac. 195; Greenbaum v. Martinez, 86 Cal. 459, 25 Pac. 12; Bailey v. Sloan, 65 Cal. 387, 4 Pac. 349; Derby v. Stevens, 64 Cal. 287, 30 Pac. 820; Dashiell v. Slingerland, 60 Cal. 653; Sanborn v. Superior Court Contra Costa Co., 60 Cal. 425; Solomon v. Reese, 34 Cal. 28; Welch v. County of Santa Cruz, 30 Cal. App. 123, 156 Pac. 1003; Briggs v. Hall, 24 Cal. App. 586, 141 Pac. 1067; J. Dewing Co. v. Thompson, 19 Cal. App. 85, 124 Pac. 1035; Wright v. County of Sonoma, 7 Cal. App. 567, 96 Pac. 333; Pratt v. Welcome, 6 Cal. App. 475, 92 Pac. 500; Calloway v. Oro Mining Co.,

5 Cal. App. 191, 89 Pac. 1070; Morgan v. County of San Diego, 3 Cal. App. 454, 86 Pac. 720; Howe v. Halsey, 6 Cal. Unrep. 148, 54 Pac. 748; Town of Santa Monica v. Eckert, 4 Cal. Unrep. 92, 33 Pac. 880; Lord v. Thomas, 3 Cal. Unrep. 424, 27 Pac. 410; Galloway v. Jones, 72 Cal. xxi, 13 Pac. 712. See, also, Pennybecker v. McDougal, 48 Cal. 161, which implied this rule without referring to it. As to what constitutes amount in controversy in actions for the recovery of personal property, see CLAIM AND DELIVERY, vol. 5, p. 173; in actions for conversion, see TROVER AND CONVERSION. As to what constitutes amount in controversy in determining appellate jurisdiction, see APPEAL AND ERROR, vol. 2, pp. 199-207.

11. Rodley v. Curry, 120 Cal. 541, 52 Pac. 999; J. Dewing Co. v. Thompson, 19 Cal. App. 85, 124 Pac. 1035; Pratt v. Welcome, 6 Cal. App. 475, 92 Pac. 500.

12. Burke v. Maguire, 154 Cal. 456, 98 Pac. 21; Ventura County v. Clay, 114 Cal. 242, 46 Pac. 9.

{ the amount of the demand is actually claimed in good faith,¹³ and not where the genuine demand is intentionally enlarged with the sole purpose of giving the superior court jurisdiction.¹⁴ To determine this question, the court may consider the allegations of the complaint.¹⁵ But a mere admission of counsel for the plaintiff that there is an error in the amount of the demand which if corrected would leave it below the jurisdictional amount is not sufficient to deprive the court of jurisdiction where there is no question as to the good faith of the plaintiff in bringing the suit for a sum exceeding three hundred dollars.¹⁶ }

Any incidental items of recovery allowable by statute or by contract may be included as part of the demand, such as attorney's fees stipulated for in a note¹⁷ or, in an action for conversion, the amount expended in pursuit of the

13. *Miller v. Carlisle*, 127 Cal. 327; *Rodley v. Curry*, 120 Cal. 541, 52 Pac. 999; *Jackson v. Whartenby*, 5 Cal. 94; *Hall v. Cline*, 31 Cal. App. Dec. 282, 188 Pac. 295; *Brigga v. Hall*, 24 Cal. App. 586, 141 Pac. 1067; *J. Dewing Co. v. Thompson*, 19 Cal. App. 85, 124 Pac. 1035; *Pratt v. Welcome*, 6 Cal. App. 475, 92 Pac. 500.

14. *Becker v. Superior Court Santa Clara Co.*, 151 Cal. 313, 90 Pac. 689; *Rodley v. Curry*, 120 Cal. 541, 52 Pac. 999; *Lehnhardt v. Jennings*, 119 Cal. 192, 48 Pac. 56, 51 Pac. 195. See, however, *Greenbaum v. Martinez*, 86 Cal. 459, 25 Pac. 12, where it is implied that even this would not deprive the court of jurisdiction, but would simply prevent the plaintiff from recovering costs. See *infra*, § 79. And see *Costs*, ante, p. 250.

15. *Lehnhardt v. Jennings*, 119 Cal. 192, 48 Pac. 56, 51 Pac. 195; *Griswold v. Pieratt*, 110 Cal. 259, 42 Pac. 820; *Derby v. Stevens*, 64 Cal.

287, 30 Pac. 820; *Demartini v. Marini*, 31 Cal. App. 138, 187 Pac. 985. See, also, *California Fruit etc. Assn. v. Ainsworth etc. Co.*, 134 Cal. 461, 66 Pac. 586, where the rule was applied, and *Hall v. Cline*, 31 Cal. App. Dec. 282, 188 Pac. 295, where rule was held not applicable. See, however, *Sunset Lumber Co. v. Dunlap*, 32 Cal. App. 492, 163 Pac. 338, where it was held that if the complaint alleges a balance due on an account within the jurisdictional amount, the court has jurisdiction, even though it alleges also incidentally a payment on account of the total bill which would bring it below the jurisdictional amount, where the answer denies the former sum and the case goes to trial on that issue.

16. *Rodley v. Curry*, 120 Cal. 541, 52 Pac. 999.

17. *De Jarnatt v. Marquez*, 132 Cal. 700, 64 Pac. 1090. See, also, *Massachusetts Bonding etc. Co. v. San Francisco etc. Rys.*, 39 Cal.

property.¹⁸ Where a court has power in its discretion to impose a fine in an action for the usurpation of an office, the amount of the fine prayed determines the jurisdiction.¹⁹

§ 79. Judgment for Less Than Jurisdictional Amount—Counterclaim—Joint Actions. It follows from the rules stated above that jurisdiction does not depend in any way upon the amount which the plaintiff is finally held to be entitled to recover.²⁰ If the amount demanded in good faith is within the jurisdiction of the court, the fact that he does not succeed in establishing all that he claims does not oust the court of its jurisdiction to give judgment for so much as is established,¹ even though this is less than the jurisdictional amount.² And where there are several defendants, this rule may be applied as against any of them separately.³ Where no question is made of the good faith of the plaintiff, the only penalty for recovery of less than the jurisdictional amount is the loss of the costs.⁴

App. 388, 178 Pac. 974, where attorney's fees were held not part of the remand in an action based on a statute which did not provide for the recovery of such fees.

18. *Greenbaum v. Martinez*, 86 Cal. 459, 25 Pac. 12. See **TROVER AND CONVERSION**.

19. *People v. Perry*, 79 Cal. 105, 21 Pac. 423. See **QUO WARRANTO**.

20. *Gardiner v. Royer*, 167 Cal. 238, 139 Pac. 75; *Dashiell v. Slingerland*, 60 Cal. 653; *Solomon v. Reese*, 34 Cal. 28; *Bradley v. Kent*, 22 Cal. 169.

1. *Gardiner v. Royer*, 167 Cal. 238, 139 Pac. 75; *Becker v. Superior Court Santa Clara Co.*, 151 Cal. 313, 90 Pac. 689; *Hall v. Cline*, 31 Cal. App. Dec. 282, 188 Pac. 295; *Welch v. County of Santa Cruz*, 30 Cal. App. 123, 156 Pac. 1003.

2. *Gardiner v. Royer*, 167 Cal.

238, 139 Pac. 75; *Becker v. Superior Court Santa Clara Co.*, 151 Cal. 313, 90 Pac. 689; *Sullivan v. California Realty Co.*, 142 Cal. 201, 75 Pac. 767; *Miller v. Carlisle*, 127 Cal. 327, 57 Pac. 785; *Derby v. Stevens*, 64 Cal. 287, 30 Pac. 820; *Jackson v. Whartenby*, 5 Cal. 94; *Briggs v. Hall*, 24 Cal. App. 586, 141 Pac. 1067; *J. Dewing Co. v. Thompson*, 19 Cal. App. 85, 124 Pac. 1035; *Davis v. Treacy*, 8 Cal. App. 395, 97 Pac. 78; *Lord v. Thomas*, 3 Cal. Unrep. 424, 27 Pac. 410. As to power to grant judgment for less than jurisdictional amount in action to foreclose mechanic's lien where lien is not established, see *supra*, § 74.

3. *Derby v. Stevens*, 64 Cal. 287, 30 Pac. 820. See *infra*, this section.

4. Code Civ. Proc., § 1022, subd. 3; *Sullivan v. California Realty*

Where the defendant sets up a counterclaim entirely unconnected with the cause of action stated in the complaint, he cannot recover unless it is within the jurisdictional amount.⁵ But where the defendant's counterclaim grows out of the same transaction as that set up by the plaintiff, the superior court has jurisdiction upon it regardless of the amount.⁶

If more than one person join as parties plaintiff, the demand of each must amount to three hundred dollars.⁷ And similarly if there is more than one defendant, the demand against each one must amount to three hundred dollars.⁸ Accordingly, in an action against several stockholders of a corporation to recover from each his proportionate amount of a debt due by the corporation, the superior court has no jurisdiction to render judgment against any of those whose proportions amount to less than the jurisdictional amount.⁹ But when the superior court has jurisdiction of the original case on an indemnity bond, though each of the several sureties has a several liability

Co., 142 Cal. 201, 75 Pac. 767; Greenbaum v. Martinez, 86 Cal. 459, 25 Pac. 12; Derby v. Stevens, 64 Cal. 287, 30 Pac. 820; J. Dewing Co. v. Thompson, 19 Cal. App. 85, 124 Pac. 1035; Pratt v. Welcome, 6 Cal. App. 475, 92 Pac. 500. See COSTS, ante, p. 250, for full treatment of this subject.

5. Griswold v. Pieratt, 110 Cal. 259, 42 Pac. 820. See SETOFF AND COUNTERCLAIM.

6. Sullivan v. California Realty Co., 142 Cal. 201, 75 Pac. 767; Freeman v. Seitz, 126 Cal. 291, 58 Pac. 690; Griswold v. Pieratt, 110 Cal. 259, 42 Pac. 820; Moore v. Groft, 10 Cal. App. 714, 103 Pac.

See, also, Davis v. Hurgren, Cal. 48, 57 Pac. 684, where recovery was allowed under the circumstances stated, although the

question of jurisdiction was not discussed.

7. Winrod v. Wolters, 141 Cal. 399, 74 Pac. 1037; Miller v. Carlisle, 127 Cal. 327, 59 Pac. 785.

8. Myers v. Sierra Valley Stock etc. Assn., 122 Cal. 669, 55 Pac. 689; Hyman v. Coleman, 82 Cal. 650, 16 Am. St. Rep. 178, 23 Pac. 62; Derby v. Stevens, 64 Cal. 287, 30 Pac. 820; Evans v. Bailey, 2 Cal. Unrep. 457, 6 Pac. 424. As to the power to enter judgment for less than the jurisdictional amount, see supra, this section.

9. Myers v. Sierra Valley etc. Assn., 122 Cal. 669, 55 Pac. 689; Derby v. Stevens, 64 Cal. 287, 30 Pac. 820; Thomas v. Anderson, 58 Cal. 99; Johnson v. Hinkel, 29 Cal. App. 78, 154 Pac. 487. See CORPORATIONS, vol. 6, p. 1029.

for less than three hundred dollars, it has been held that the court has jurisdiction, upon motion, under section 1055 of the Code of Civil Procedure, to order judgment against each surety for the amount for which he was severally liable. This is upon the theory that in such case the motion is only supplemental and not an independent action.¹⁰

✓ **§ 80. In Probate Generally.**—As has been noted, the superior court has jurisdiction “of all matters of probate.”¹¹ No distinct “court of probate” has been created or recognized by the constitution of 1879,¹² and it may be said that at the present time in California there is no probate court in the sense that the term was used in the earlier cases.¹³ The jurisdiction of the superior court sitting in probate is both original and exclusive,¹⁴ but it is no larger than that of the former probate court.¹⁵ The extent of its jurisdiction has been defined by the sections of the Code of Civil Procedure which lay down the system for the settlement and distribution of the estates of decedents. Any provision coming fairly within the scope of that system is included within the phrase “matters of probate.”¹⁶ It includes matters like the probate of a will, the granting of letters testamentary or of administration,

10. *Sullivan v. California Realty Co.*, 142 Cal. 201, 75 Pac. 767; *Moore v. McSleeper*, 102 Cal. 277, 36 Pac. 593.

11. See *supra*, § 73. For a full treatment of the probate jurisdiction of the superior court, see EXECUTORS AND ADMINISTRATORS.

12. *Burris v. Kennedy*, 108 Cal. 331, 41 Pac. 458; *In re Burton*, 93 Cal. 459, 29 Pac. 36.

13. *Nickel v. State*, 179 Cal. 126, 175 Pac. 641; *Estate of Davis*, 136 Cal. 590, 69 Pac. 412. As to former probate courts, see *supra*, § 58.

14. *Silva v. Santos*, 138 Cal. 536, 71 Pac. 703, and cases cited.

15. *Estate of Hudson*, 63 Cal. 454; *Estate of McLaughlin*, 1 Cal. Prob. Dec. 257; *Estate of Maxwell*, 1 Cal. Prob. Dec. 135. As to former probate court, see *supra*, § 58.

16. *King v. Chase*, 159 Cal. 420, 115 Pac. 207. See EXECUTORS AND ADMINISTRATORS. And see generally cases cited *infra*. But every intendment is in favor of the decree in probate courts as in courts of record generally. See *supra*, § 8, and see APPEAL AND ERROR, vol. 2, p. 858.

the allowance of claims.¹⁷ The ascertainment and determination of the persons who succeed to the estate of a decedent, either as heir, devisee, or legatee, as well as the amount or proportion of the estate to which each is entitled, and also the construction or effect to be given to the language of a will,¹⁸ the sale of real property to pay debts of an estate,¹⁹ the settlement of the accounts of an executor or administrator,²⁰ the decree of distribution and the order discharging him.¹ It also confers control over the person and estates of minors and the power to appoint their guardians,² and includes the authority to settle the accounts of such guardians.³

On the other hand, there are many proceedings which relate to the estates of deceased persons which are not deemed to be matters of probate within the rule relating to jurisdiction; as, for instance, the determination of the right of possession of real estate claimed to belong to an estate,⁴ or the determination of claims against the heir or devisee for his portion of the estate arising subsequent to the death of the ancestor; or the determination of conflicting claims to the estate of an heir or devisee, or whether

17. *Haverstick v. Trudel*, 51 Cal. 431. See EXECUTORS AND ADMINISTRATORS; WILLS.

18. *Estate of Howe*, 161 Cal. 152, 118 Pac. 515; *Martinovich v. Marsicano*, 137 Cal. 354, 70 Pac. 459; *In re Blythe*, 110 Cal. 226, 42 Pac. 641; *In re Burton*, 93 Cal. 459, 29 Pac. 36. See DESCENT AND DISTRIBUTION; WILLS.

19. *In re Burton*, 93 Cal. 459, 29 Pac. 36. See EXECUTORS AND ADMINISTRATORS.

20. *King v. Chase*, 159 Cal. 420, 115 Pac. 207; *Haverstick v. Trudel*, 51 Cal. 431.

1. *In re Burton*, 93 Cal. 459, 29

Pac. 36; *Haverstick v. Trudel*, 51 Cal. 431. See EXECUTORS AND ADMINISTRATORS.

2. *Ex parte Miller*, 109 Cal. 643, 42 Pac. 428; *Murphy v. Superior Court*, 84 Cal. 592, 24 Pac. 310.

In guardianship matters the court acts strictly in a special proceeding, and by virtue of power conferred upon it to appoint guardians in the designated cases. Collins v. Superior Court, 35 Cal. App. Dec. 138, 199 Pac. 352. See GUARDIAN AND WARD.

3. *Groff v. Mesmer*, 52 Cal. 636.

4. *Haverstick v. Trudel*, 51 Cal. 431 (as to former probate court).

he has conveyed or assigned his share of the estate,⁵ or a claim against a guardian or the estate of the ward.⁶

§ 81. Relation of Probate to Law and Equity Jurisdiction.—The probate jurisdiction of the superior court is as separate and distinct from its jurisdiction in ordinary civil actions⁷ or in cases in equity,⁸ as if there were two separate and different courts exercising these powers. While the superior court is engaged in the consideration of a case belonging to one of these classes of cases, it cannot in the same matter hear and determine what is essentially a case of another class.⁹ Furthermore, while sitting as a court of probate, the superior court has only such powers as are given it by statute and such incidental powers as pertain to all courts for the purpose of enabling them to exercise the jurisdiction which is conferred upon them, and in the exercise of these powers its jurisdiction is limited and special.¹⁰ It is, however, the same superior court for all

5. Estate of Howe, 161 Cal. 152, 118 Pac. 515; Martinovich v. Marsicano, 137 Cal. 354, 70 Pac. 459.

6. Estate of Breslin, 135 Cal. 21, 66 Pac. 962.

7. In re Rose, 80 Cal. 166, 22 Pac. 86; In re Allgier, 65 Cal. 228, 3 Pac. 849; Estate of Johnson, 4 Cof. Prob. Dec. 499.

8. Raisch v. Warren, 18 Cal. App. 655, 125 Pac. 95; Estate of Blythe, 2 Cof. Prob. Dec. 152.

9. Richards v. Wetmore, 66 Cal. 365, 5 Pac. 620 (holding that the superior court sitting in an action of ejectment cannot assume the functions of the superior court sitting in the matter of the estate of a decedent, even though both are in the same county, with the same judge presiding). Estate of Maxwell, 1 Cof. Prob. Dec. 135.

10. Estate of Bell, 168 Cal. 253,

141 Pac. 1179; Estate of Sutro, 143 Cal. 487, 77 Pac. 402; Estate of Ryder, 141 Cal. 366, 74 Pac. 993; Martinovich v. Marsicano, 137 Cal. 354, 70 Pac. 459; Reither v. Murdock, 135 Cal. 197, 67 Pac. 784; Curtis v. Schell, 129 Cal. 208, 79 Am. St. Rep. 107, 61 Pac. 951; Estate of Sheid, 122 Cal. 528, 55 Pac. 328; Estate of Strong, 119 Cal. 663, 51 Pac. 1078; Maddock v. Russell, 109 Cal. 417, 42 Pac. 139; Buckley v. Superior Court, 102 Cal. 6, 41 Am. St. Rep. 135, 36 Pac. 360; Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206; Haverstick v. Trudel, 51 Cal. 431; In re Schaeffer's Estate, 35 Cal. App. Dec. 629, 200 Pac. 508; Estate of Polito, 34 Cal. App. Dec. 788, 197 Pac. 976. See contra: Heydenfeldt v. Superior Court, 117 Cal. 348, 49 Pac. 210. See, also, supra, § 7. See In re Bosse's Estate, 61

purposes where it has jurisdiction. If it has jurisdiction of the person and the subject matter, it can administer full and entire relief according to the principles of equity and also in accordance with the statutes which exist with reference to matters of probate or any others within the court's jurisdiction.¹¹ In this sense it may be said that it has equity jurisdiction while sitting in probate; but if so it has only such equitable jurisdiction as is involved in the exercise of its peculiar functions, which are to administer and distribute estates.¹²

§ 82. Under Juvenile Court Act.—In 1909 the legislature passed the Juvenile Court Act,¹³ which gives to the superior court jurisdiction to determine whether or not a child is “delinquent or dependent” as defined therein; and to

Cal. Dec. 595, 200 Pac. 412, holding that the theory of a special and limited jurisdiction vested by the California law in superior courts in the transaction of probate business, cannot be invoked to prevent a recognition of the interest of a representative of the government in the property distributed, under the terms of the Trading With the Enemy Act, which interest gives to him the right of possession for the purposes of the act.

11. Estate of Bell, 168 Cal. 253, 141 Pac. 1179; Estate of Glenn, 153 Cal. 77, 94 Pac. 230; Toland v. Earl, 129 Cal. 148, 79 Am. St. Rep. 100, 61 Pac. 914; In re Clary, 112 Cal. 292, 44 Pac. 569; Burris v. Kennedy, 108 Cal. 331, 41 Pac. 458; In re Moore, 96 Cal. 522, 31 Pac. 584; Pennie v. Roach, 94 Cal. 515, 29 Pac. 956, 30 Pac. 106; In re Burton, 93 Cal. 459, 29 Pac. 36; In re Maxwell, 74 Cal. 384, 16 Pac. 206; Estate of Heenev, 3 Cal. App. 548, 86 Pac. 842; Estate of Wolters,

5 Cal. Prob. Dec. 428. See Heydenfeldt v. Superior Court, 117 Cal. 348, 48 Pac. 210, holding that where a decree of distribution is reversed upon appeal, the superior court has inherent power to order the distributee to return to the executors the property distributed; and that such order cannot be annulled upon certiorari, upon the ground that the jurisdiction of the superior court over probate matters is special and limited. See contra: Burris v. Kennedy, 108 Cal. 331, 41 Pac. 458.

The former probate courts did not have this power. Toland v. Earl, 129 Cal. 148, 79 Am. St. Rep. 100, 61 Pac. 914; Elizalde v. Murphy, 4 Cal. App. 114, 87 Pac. 245. See supra, § 58, as to former probate courts.

12. More v. More, 133 Cal. 489, 65 Pac. 1044, 66 Pac. 76. See EXECUTORS AND ADMINISTRATORS.

13. Act of March 8, 1909 (Stats. 1909, p. 213).

commit such children to a detention home, or to the custody of some reputable person.¹⁴ The act provides as follows:

“The superior court in every county of this state shall exercise the jurisdiction conferred by this act, and, while sitting in the exercise of its jurisdiction, shall be known and referred to as the ‘juvenile court.’ ”

“All cases coming under the provisions of this act shall be heard at a special or separate session of the court, and no other matter shall be heard at such session.”¹⁵

The “juvenile court,” is, however, not a new or separate court, but simply the superior court exercising jurisdiction over a peculiar class of offenses.¹⁶ The act expressly repealed the prior act of 1903 in relation to dependent and delinquent children,¹⁷ but provided that all orders and judgments made theretofore under the act of 1903 shall continue in full force and effect, and all pending proceedings shall be continued under the provisions of the new act.¹⁸

§ 83. Appellate Jurisdiction.—The constitution provides that the superior courts “shall have appellate jurisdiction in such cases arising in inferior courts in their respective counties as may be prescribed by law.”¹⁹ But the appeals so prescribed can only be from cases arising in courts in the strict sense, and not from other quasi-

14. For complete consideration of this act, see *INFANTS*. As to effect of assumption of jurisdiction over a child by juvenile court upon jurisdiction of other courts, see note, 11 A. L. R. 147.

15. Stats. 1909, p. 213, § 5.

16. *Nicholl v. Koster*, 157 Cal. 416, 108 Pac. 302; *People v. Budd*, 24 Cal. App. 176, 140 Pac. 714; *Edington v. Superior Court*, 18 Cal. App. 739, 124 Pac. 450, 128 Pac. 338.

17. Act of February 26, 1903 (Stats. 1903, p. 44).

18. Stats. 1909, p. 213, § 32.

19. Const., art. VI, § 5. *Olcese v. Justice's Court*, 156 Cal. 82, 103 Pac. 317; *Sherer v. Superior Court*, 94 Cal. 354, 29 Pac. 716; *Luco v. Superior Court*, 71 Cal. 555, 12 Pac. 677; *Gross v. Superior Court*, 71 Cal. 382, 12 Pac. 264; *Hood v. Melrose*, 24 Cal. App. 355, 141 Pac. 396.

judicial tribunals, such as boards of supervisors, common councils and other local boards, which are not courts even when invested with mixed powers.²⁰ Under this grant of power the legislature has enacted that the superior courts shall have appellate jurisdiction in all civil actions arising in police or justices' courts in their respective counties.¹ It has been held that the provision that a court shall have jurisdiction "in such cases as may be prescribed by law" limits the exercise of its jurisdiction to the extent and mode which the legislature may prescribe. The superior court can acquire appellate jurisdiction of a cause pending in a justice's court only in conformity with the steps prescribed by the statute for taking an appeal from that court; and it cannot, after such appeal has been taken, exercise any other jurisdiction in the cause than has been authorized by statute. After its appellate jurisdiction has once been acquired, its action within the limits of that jurisdiction, unless in direct contravention of some positive statute, is entitled to all the presumptions of regularity that attach to the exercise of its original jurisdiction.²

V. INFERIOR COURTS.

§ 84. Establishment by Legislature.—As has been seen, the legislature has power to establish inferior courts in any incorporated city or town or city and county.³ And the constitution provides that the legislature shall determine the number of each of the inferior courts in incorporated cities or towns, and in townships, counties, or cities

20. *Chinn v. Superior Court*, 156 Cal. 478, 105 Pac. 580; *Inglin v. Hoppin*, 156 Cal. 483, 105 Pac. 582.

1. Code Civ. Proc., §§ 77, 974; *Hamberger v. Police Court*, 12 Cal. 153, 106 Pac. 894, 107 Pac. 614.

The county courts formerly had substantially the same jurisdiction.

Ex parte Thistleton, 52 Cal. 220; *Caulfield v. Hudson*, 3 Cal. 389.

2. *Sherer v. Superior Court*, 94 Cal. 354, 29 Pac. 716. As to jurisdiction of superior court on appeal from justice's court, see JUSTICES OF THE PEACE.

3. See *supra*, § 60.

and counties, and the number of judges or justices thereof.⁴ But it does not provide for the establishment of such inferior courts generally throughout the state. In counties in which large cities are situated, where the superior court in all departments is necessarily crowded with business, the necessity may exist for the transfer of minor cases to inferior courts, with a view of relieving the higher courts, while in other counties no such necessity exists.⁵ The legislative power includes also the authority to provide for the payment of the salaries and office rent of the judges or justices of such courts out of the treasury of the municipality,⁶ except, however, where a freeholders' charter has, pursuant to the authorization of section 8½ of article XI of the constitution, assumed control of the subject matter of such courts as "a municipal affair."⁷

§ 85. Instances of Exercise of Power.—In 1880 the legislature provided for the establishment of a police court in each of the municipalities and prescribed its jurisdiction.⁸ In 1883 the Municipal Corporation Act was passed with separate provisions for establishing police courts in each of the first four classes of cities, and recorders' courts in the fifth and sixth classes.⁹ And in 1885 the Whitney Act

4. Const., art. VI, § 11 (Amdt. of 1911). *Matter of the Application of Woods*, 161 Cal. 238, 118 Pac. 792 (holding that this amendment did not abolish the inferior courts previously established by the legislature, but that they remain in existence with the jurisdiction vested in them by the acts creating them, until the legislature in the exercise of the power given by the amendments provides otherwise).

5. *Green v. Superior Court*, 78 Cal. 556, 21 Pac. 307, 541; *Union Ice Co. v. Rose*, 11 Cal. App. 357, 104 Pac. 1006.

6. *Nicholl v. Koster*, 157 Cal. 416,

108 Pac. 302; *Fleming v. Hance*, 153 Cal. 162, 94 Pac. 620; *Elder v. McDougald*, 145 Cal. 740, 79 Pac. 429; *Coggins v. City of Sacramento*, 59 Cal. 599; *Jenks v. City of Oakland*, 58 Cal. 576; *Bishop v. City of Oakland*, 58 Cal. 572.

7. *Fleming v. Hance*, 153 Cal. 162, 94 Pac. 620; *Graham v. Mayor etc. of Fresno*, 151 Cal. 465, 91 Pac. 147. See *infra*, § 87.

8. Stats. 1880, p. 63. In *re Carrillo*, 66 Cal. 3, 4 Pac. 695.

9. Stats. 1883, p. 93, §§ 229, 390, 560, 690, 806, 882; *City of Tulare v. Hevren*, 126 Cal. 226, 58 Pac. 530; *Town of Hayward v. Pimental*,

was passed, establishing a police court in cities of between thirty and one hundred thousand inhabitants; in other words, in cities of the second class.¹⁰ Still later statutes have provided for police courts in cities of the first and one-half class¹¹ and in cities of the second class.¹² A general law establishing police courts in cities of a certain size applies to cities belonging to that class at the time when the law first becomes operative, and a city originally belonging to that class does not cease so to belong merely by a change in population; there must also be legislative action, either mediate or immediate, directed to that end.¹³

The power of the legislature to establish police courts has also been exercised by means of special acts applying to particular cities.¹⁴ For instance, in San Francisco the consolidation act established a police court for the city

107 Cal. 386, 40 Pac. 545; *Ex parte Soto*, 88 Cal. 624, 26 Pac. 530; *Prince v. City of Fresno*, 88 Cal. 407, 26 Pac. 606; *In re Baxter*, 3 Cal. App. 716, 86 Pac. 998.

10. Stats. 1885, p. 213; *Matter of Application of Westenberg*, 167 Cal. 309, 139 Pac. 674; *In re Mitchell*, 120 Cal. 384, 52 Pac. 799, per Henshaw, J., concurring. *Kahn v. Suro*, 114 Cal. 316, 33 L. R. A. 620, 46 Pac. 87; *People v. Wong Wang*, 92 Cal. 277, 28 Pac. 270; *Ex parte Halsted*, 89 Cal. 471, 26 Pac. 961; *Ex parte Reilly*, 85 Cal. 632, 24 Pac. 807; *Ex parte Ah You*, 82 Cal. 339, 22 Pac. 929; *Green v. Superior Court*, 78 Cal. 556, 21 Pac. 307, 541; *People v. Henshaw*, 76 Cal. 436, 18 Pac. 413; *Matter of Application of Yee Kim Mah*, 31 Cal. App. 196, 159 Pac. 1060. As to what cities come within the scope of this statute, see MUNICIPAL CORPORATIONS.

11. Stats. 1913, p. 469 (super-seding Stats. 1901, p. 95); *Matter*

of *Application of Westenberg*, 167 Cal. 309, 139 Pac. 674; *Fleming v. Hance*, 153 Cal. 162, 94 Pac. 620; *In re Dowell*, 36 Cal. App. 587, 172 Pac. 1121; *People v. Cory*, 26 Cal. App. 735, 148 Pac. 532; *In re Sing*, 13 Cal. App. 736, 110 Pac. 693; *Union Ice Co. v. Rose*, 11 Cal. App. 357, 104 Pac. 1006 (holding the act constitutional).

12. Stats. 1901, p. 576. *Matter of Application of Westenberg*, 167 Cal. 309, 139 Pac. 674.

13. *People v. Burns*, 121 Cal. 529, 53 Pac. 1096. *In re Mitchell*, 120 Cal. 384, 52 Pac. 799, per Henshaw, J., concurring. The main opinion in this case limits this ruling to a change indicated by a special census taken under Stats. 1897, p. 28. This opinion was cited with approval in *Williams v. Board of Trustees*, 157 Cal. 711, 109 Pac. 482.

14. See Stats. 1875-76, p. 149 (act applying to Marysville). *Ex parte Mauch*, 134 Cal. 500, 66 Pac. 734.

and county;¹⁵ and in 1881 the legislature created a second court of the same kind.¹⁶ These acts were affirmed by a later act,¹⁷ and the police court so created and maintained continued in existence until the taking effect of the charter of San Francisco in 1900.¹⁸

§ 86. Regulation of Jurisdiction.—In providing for inferior courts, the constitution does not limit the legislature to their establishment but further provides:

“The legislature shall fix by law the jurisdiction of any inferior courts which may be established in pursuance of section 1 of this article, and shall fix by law the powers, duties, and responsibilities of the judges thereof.”¹⁹

It is provided, though, that “such powers shall not in any case trench upon the jurisdiction of the several courts of record.”²⁰ Under these provisions the legislature has power to confer upon inferior courts jurisdiction of any cases not vested in some other court by the constitution itself.¹ Thus, the legislature may confer upon police courts exclusive jurisdiction of all misdemeanors committed within the boundaries of the particular municipality.²

15. *Ex parte Simpson*, 47 Cal. 127; *People v. Provines*, 34 Cal. 520.

16. *Stats.* 1881, p. 74; *Ex parte Jordan*, 62 Cal. 464.

17. See *Stats.* 1889, p. 62, and amendments thereto; *Stats.* 1893, p. 9.

18. See the following cases referring to the above courts: *Matter of Application of Westenberg*, 167 Cal. 309, 139 Pac. 674; *Kahn v. Sutro*, 114 Cal. 316, 33 L. R. A. 620, 46 Pac. 87; *Green v. Superior Court*, 78 Cal. 556, 21 Pac. 307, 541; *Ex parte Lloyd*, 78 Cal. 421, 20 Pac. 872; *Ex parte Jordan*, 62 Cal. 464; *People v. Fortch*, 13 Cal. App. 770, 110 Pac. 823. As to the police court established by freeholders' charter, see *infra*, § 87.

19. *Const.*, art. VI, §§ 11, 13; *People v. Toal*, 85 Cal. 333, 24 Pac. 603 (affirming *People v. Toal*, 3 Cal. Unrep. 227, 23 Pac. 203); *Green v. Superior Court*, 78 Cal. 556, 21 Pac. 307, 541; *Union Ice Co. v. Rose*, 11 Cal. App. 357, 104 Pac. 1006.

20. *Const.*, art. VI, § 11; *Guardianship of Deisen*, 2 *Cof. Prob.* Dec. 466.

1. *Cross v. Superior Court*, 78 Cal. 556, 21 Pac. 307, 541.

2. *Matter of Application of Westenberg*, 167 Cal. 309, 139 Pac. 674; *Green v. Superior Court*, 78 Cal. 556, 21 Pac. 307, 541; *In re Dowell*, 36 Cal. App. 587, 172 Pac. 1121; *People v. Cory*, 26 Cal. App. 735, 148 Pac. 532; *People v. Sacramento Butchers' Assn.*, 12 Cal. App. 471,

But in exercising this power, the legislature is controlled by the specific restriction contained in the constitution that it shall not pass local or special laws regulating the jurisdiction and duties of police judges.³ Therefore, it cannot create a police court by a special act without regard to the general classification of cities.⁴

Since the sections above quoted authorize the legislature to fix the jurisdiction of the inferior courts only "by law," that is, by a bill regularly passed, it cannot be done by any less formal means, as, for example, by a concurrent resolution;⁵ or by the adoption of a freeholders' charter which did not deal with the subject of police courts, or which contained void provisions in respect thereto.⁶

§ 87. Establishment by Freeholders' Charter.—Under the constitution provision is made whereby the subject matter of police and municipal courts—their establishment, constitution, regulation, government and jurisdiction—may be confided in any city or city and county desiring to assume, and assuming, control thereof, by making appropriate provision to that end in its freeholders' charter.⁷ By the adoption of such provisions pursuant to the

107 Pac. 712; *Union Ice Co. v. Rose*, 11 Cal. App. 357, 104 Pac. 1006.

3. Const., art. IV, § 25, subd. 1; *Ex parte Jordan*, 62 Cal. 464.

4. *Ex parte Giambonini*, 117 Cal. 573, 49 Pac. 732.

5. *Ex parte Sparks*, 120 Cal. 395, 52 Cal. 715; *Ex parte Reilly*, 85 Cal. 632, 24 Pac. 807; *People v. Toal*, 85 Cal. 333, 24 Pac. 603 (affirming *People v. Toal*, 3 Cal. Unrep. 227, 23 Pac. 203); *People v. Sacramento Butchers' Assn.*, 12 Cal. App. 471, 107 Pac. 712; *People v. Sands*, 4 Cal. Unrep. 424, 35 Pac. 330.

6. *Fleming v. Nance*, 153 Cal. 162, 94 Pac. 620; *Ex parte Sparks*, 120 Cal. 395, 52 Pac. 715 (holding that

there is no difference in this regard between continuing an existing court and the creation of a new one). See, however, *Milner v. Reibenstein*, 85 Cal. 593, 24 Pac. 935, where the charter of the city of Stockton "practically consolidated the former police court and the court of the city justice"; *People v. Toal*, 85 Cal. 333, 24 Pac. 603; *Matter of Application of Yee Kim Mah*, 31 Cal. App. 196, 159 Pac. 1060. As to the present rule, see *infra*, § 87.

7. Const., art. XI, § 8½, subd. 1, *Mitchell v. Koster*, 157 Cal. 416, 108 Pac. 302; *Ex parte Dolan*, 128 Cal. 460, 60 Pac. 1094; *Martin v. Election Commrs.*, 126 Cal. 404, 58 Pac. 932; *Ex parte Sparks*, 120 Cal.

constitutional authority, the matter of such courts is made purely a municipal affair.⁸ The authority thus granted to municipalities is exclusive, when exercised, and after a particular city has established a police court under a freeholders' charter by virtue thereof, the legislature no longer has the power to create such a court.⁹ However, the grant of authority is permissive only and not mandatory.¹⁰ And so, if a particular city does not take advantage of it to include in its charter a provision for the organization of a police court, the legislature still has power to create police courts in that city.¹¹ In respect to municipal courts established pursuant to its authority, the constitution provides as follows:

“In any city or any city and county, when such municipal court has been established, there shall be no other court inferior to the superior court; and pending actions, trials, and all pending business of inferior courts within the territory of such city or city and county, upon the establishment of any such municipal court, shall be and

395, 52 Pac. 715. And cases cited *infra* construing particular freeholders' charters.

See the following statutes and authorities: San Francisco freeholders' charter (adopted in 1896 effective 1900), construed in *Robert v. Police Court*, 148 Cal. 131, 82 Pac. 838; *Elder v. McDougald*, 145 Cal. 740, 79 Pac. 429; *Trefts v. McDougald*, 15 Cal. App. 584, 115 Pac. 655; *People v. Fortch*, 13 Cal. App. 770, 110 Pac. 823. And as to the former police court of San Francisco, see *supra*, § 84; Oakland charter (Stats. 1911, p. 1551), construed in *Matter of Application of Westenber*, 167 Cal. 309, 139 Pac. 674; Sacramento charter (Stats. & Amdts. to the Codes, Ex. Sess. 1911, p. 305), construed in *Matter of Application of Yee Kim Mah*, 31 Cal. App. 196, 159 Pac. 1060;

Pasadena charter (Stats. 1901, p. 922), construed in *People v. Cory*, 26 Cal. App. 735, 148 Pac. 532; and Fresno charter (Stats. 1901, p. 832), construed in *Graham v. Fresno*, 151 Cal. 465, 91 Pac. 147. See, generally, MUNICIPAL CORPORATIONS.

8. *Graham v. Mayor etc. of Fresno*, 151 Cal. 465, 91 Pac. 147; *People v. Fortch*, 13 Cal. App. 770, 110 Pac. 823.

9. *Fleming v. Hance*, 153 Cal. 162, 94 Pac. 620; *Graham v. Mayor etc. of Fresno*, 151 Cal. 465, 91 Pac. 147; *People v. Cory*, 26 Cal. App. 735, 148 Pac. 532; *People v. Fortch*, 13 Cal. App. 770, 110 Pac. 823.

10. *Fleming v. Hance*, 153 Cal. 162, 94 Pac. 620.

11. *Fleming v. Hance*, 153 Cal. 162, 94 Pac. 620; *People v. Cory*, 26 Cal. App. 735, 148 Pac. 532.

become pending in such municipal court, and all records of such inferior courts shall thereupon be and become the records of such municipal court."

It has been said that the courts so created were intended to be not only for municipal purposes, but as agencies of the state to assist, to a certain extent at least, in the enforcement of general criminal laws;¹² and yet jurisdiction over offenses under general criminal laws does not exist in the absence of an express provision to this effect, since they are courts of limited jurisdiction.¹³ As to general crimes, a charter cannot oust any other court of jurisdiction it already has providing that jurisdiction shall be "exclusive" in the police courts thereby established,¹⁴ but as to local offenses, such as violation of municipal ordinances, the framers of a charter have the exclusive right to provide.¹⁵

"Police courts" as used in the constitutional provision are not limited to those called by that name. The term is merely descriptive and refers to any inferior court having merely a municipal jurisdiction, and accordingly it has been held to include recorders' courts.¹⁶

12. *Graham v. Fresno*, 151 Cal. 465, 91 Pac. 147; *Elder v. McDougald*, 145 Cal. 740, 79 Pac. 429.

13. *Matter of Application of Yee Kim Mah*, 31 Cal. App. 196, 159 Pac. 1060.

14. *Ex parte Dolan*, 128 Cal. 460, 60 Pac. 1094.

15. *Matter of Application of Westenberg*, 167 Cal. 309, 139 Pac. 674.

16. *Graham v. Mayor etc. of Fresno*, 151 Cal. 465, 91 Pac. 147; *In re Baxter*, 3 Cal. App. 716, 86 Pac. 998.

(T. T. M.)

COVENANTS.

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I. INTRODUCTORY.

§ 1. **Scope.**—This article treats of the law of covenants in the sense of promises which, while originally characterized as being promises under seal,¹ no longer require that formality.² The treatment is limited to those promises which relate to the title, possession and use of real property, and within this limitation the article deals with the various classes of covenants; their nature, construction and operation; the estates and interests to which they relate; what constitutes a breach of covenant; and actions relating thereto. It excludes covenants incident to particular classes of instruments³ (except as they may be referred to as illustrative of general principles), and discussion of the

1. 7 Ruling Case Law, p. 1084.

2. See *infra*, § 2.

3. For covenants in leases, see LANDLORD AND TENANT; and for

building restrictions, see DEEDS. See, also, CONTRACTS, vol. 6, p. 1; MORTGAGES; VENDOR AND PURCHASER.

nature, requisites and effect of the instruments containing covenants.⁴

§ 2. Definition.—The word covenant in its specific sense ordinarily imports an agreement reduced to writing, and executed by a sealing and delivery, whereby some of the parties named, or one of them, engage that some act is already done or to be done, or is not to be done, or for the performance or nonperformance of some specified duty.⁵ But the sealing of such instruments was early regarded as a useless formality,⁶ and the distinction between instruments sealed and unsealed has been abolished by code provision.⁷ Consequently, any mere written agreement or words showing an agreement to do a thing is a covenant.⁸ While the term is broad enough to include agreements ordinarily classified as contracts⁹ it is principally used in connection with instruments pertaining to real property.

§ 3. Distinguished from Condition.—There is a decided distinction between the creation and effect of a condition and a covenant. A condition is a qualification annexed to an estate, upon the happening of which the estate is enlarged or defeated,¹⁰ and it differs from a covenant, in that it is created by mutual agreement of the parties, and is binding upon both, whereas a covenant is an agreement of the covenantor only.¹¹ A breach of condition, on which an estate is granted, ordinarily works a forfeiture of the

4. As to covenants to stand seised to the use of another, see **DEEDS**.

5. 7 Ruling Case Law, p. 1084.

6. *Ortman v. Dixon*, 13 Cal. 33.

7. Civ. Code, § 1629. See **SEALS**.

8. *O'Sullivan v. Griffith*, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323; *Levitzky v. Canning*, 33 Cal. 299;

Smith v. Brannan, 13 Cal. 107; *Ortman v. Dixon*, 13 Cal. 33.

9. See **CONTRACTS**, vol. 6, p. 1.

10. *Knight v. Black*, 19 Cal. App. 518, 126 Pac. 512; *Los Angeles University v. Swarth*, 107 Fed. 798, 46 C. C. A. 647, 54 L. R. A. 262. As to conditions in deeds, see **DEEDS**. See 7 A. L. R. 1429 as to distinction between condition and covenant in grant of land for church purposes.

11. *Knight v. Black*, 19 Cal. App. 518, 126 Pac. 512.

estate,¹² while the breach of a covenant is merely ground for the recovery of damages.¹³ To create a condition in a grant, apt and appropriate words must be appended thereto, which, *ex vi termini*, import that the vesting or continuance of the estate is to depend upon the condition,¹⁴ but mere words should not be, and have not usually been, determinative of whether a clause was intended to operate as a condition or a covenant.¹⁵ In every case the construction should follow the probable intention of the parties, viewing the matter in the light of reason.¹⁶ Thus, the words in a deed "upon the express condition," introducing restrictions upon the use of the property conveyed, though apt and appropriate to create a condition, are to be taken to import a covenant where it is evident that the parties so intend,¹⁷ even though there is a provision for forfeiture in case of breach of the condition or covenant.¹⁸ So, a provision by which parties agreed that the land conveyed should be used as a public street and not as a lot for building purposes,¹⁹ and a provision that the deed was given and accepted upon the express agreement of the grantee to build a house on the granted prem-

12. See *DEEDS*.

13. *Duckworth v. Watsonville etc. Co.*, 170 Cal. 425, 150 Pac. 58; *Firth v. Los Angeles Pac. L. Co.*, 28 Cal. App. 399, 152 Pac. 935; *Knight v. Black*, 19 Cal. App. 518, 126 Pac. 512; *Los Angeles University v. Swarth*, 107 Fed. 798, 54 L. R. A. 262, 46 C. C. A. 647. See *infra*, §§ 50-52.

14. *Werner v. Graham*, 181 Cal. 174, 183 Pac. 945; *Weller v. Brown*, 160 Cal. 515, 117 Pac. 517; *Firth v. Marovich*, 160 Cal. 257, Ann. Cas. 1912D, 1190, 116 Pac. 729; *Hawley v. Kafitz*, 148 Cal. 393, 113 Am. St. Rep. 232, 3 L. R. A. (N. S.) 741, 83 Pac. 248; *Behlow v. Southern Pac. R. R. Co.*, 130 Cal.

16, 62 Pac. 295; *Cullen v. Sprigg*, 83 Cal. 56, 23 Pac. 222; *Womble v. Womble*, 14 Cal. App. 739, 113 Pac. 353. See *DEEDS*.

15. *Los Angeles University v. Swarth*, 107 Fed. 798, 54 L. R. A. 262, 46 C. C. A. 647.

16. *Knight v. Black*, 19 Cal. App. 518, 126 Pac. 512; *Los Angeles University v. Swarth*, 107 Fed. 798, 54 L. R. A. 262, 46 C. C. A. 647.

17. *Victoria Hospital Assn. v. All Persons*, 169 Cal. 455, 147 Pac. 124.

18. *Los Angeles University v. Swarth*, 107 Fed. 798, 54 L. R. A. 262, 46 C. C. A. 647.

19. *Weller v. Brown*, 160 Cal. 515, 117 Pac. 517.

ises of a specified value within a limited time,²⁰ were construed as covenants and not as conditions, where there was no language indicating an intention to forfeit the estate upon noncompliance.¹

In the construction of a conveyance or lease, ordinarily, to avoid a forfeiture, conditions will be construed as covenants, when this can reasonably be done;² and an estate upon condition will not be deemed to have been created, except when the terms of the grant admit of no other reasonable interpretation.³ In a case where parties to a lease expressly stipulated that "all the covenants and agreements of the said lessee herein contained" are conditions, they were given effect as conditions in accordance with the intention so expressed.⁴ And in a contract of sale and conveyance of growing timber, a time limit for the removal of the timber has been construed as a covenant, and not a condition upon which to base a forfeiture.⁵ A mere recital of the use to which property conveyed is to be devoted does not import a condition.⁶

§ 4. Creation—Requisites—Validity—Law Governing.—
Any language which expresses an intent to create a con-

20. *Hawley v. Kaftz*, 148 Cal. 393, 113 Am. St. Rep. 282, 3 L. R. A. (N. S.) 741, 83 Pac. 248.

1. As to conditions generally, see DEEDS.

2. *Victoria Hospital Assn. v. All Persons*, 169 Cal. 455, 147 Pac. 124; *Gibbs v. Peterson*, 163 Cal. 758, 127 Pac. 62; *Hawley v. Kaftz*, 148 Cal. 393, 113 Am. St. Rep. 282, 3 L. R. A. (N. S.) 741, 83 Pac. 248; *Peterson v. Gibbs*, 147 Cal. 1, 109 Am. St. Rep. 107, 81 Pac. 121; *Maynard v. Polhemus*, 74 Cal. 141, 15 Pac. 451; *Firth v. Los Angeles Pac. L. Co.*, 28 Cal. App. 399, 152 Pac. 935; *Knight v. Black*, 19 Cal. App. 518, 126 Pac. 512; *Ciapusci v. Clark*, 12

Cal. App. 44, 106 Pac. 436; *Los Angeles University v. Swarth*, 107 Fed. 798, 54 L. R. A. 262, 46 C. C. A. 647.

3. *Victoria Hospital Assn. v. All Persons*, 169 Cal. 455, 147 Pac. 124; *Cullen v. Sprigg*, 83 Cal. 56, 23 Pac. 222.

4. *Knight v. Black*, 19 Cal. App. 518, 126 Pac. 512.

5. *Anderson v. Palladine*, 39 Cal. App. 256, 178 Pac. 553; *Ciapusci v. Clark*, 12 Cal. App. 44, 106 Pac. 436. See, generally, LOGS AND TIMBER.

6. *Fitzgerald v. County of Modoc*, 164 Cal. 493, 44 L. R. A. (N. S.) 1229, 129 Pac. 794.

tractual obligation is sufficient to constitute a covenant,⁷ however brief it may be.⁸ But mere recitals of facts, which do not import a promise or agreement, do not constitute a covenant.⁹ If a covenant is certain in its terms,¹⁰ and is based upon sufficient consideration,¹¹ it is valid and enforceable, provided it is reasonable and within the policy of the law,¹² or unless some wrong or injury thereby results to third persons.¹³ Thus, a covenant in a deed is not unlawful, as being in restraint of trade, because it forbids the grantee from removing for certain uses a part of the realty conveyed, where its purpose is to protect a contingent estate reserved to the grantor.¹⁴ But a covenant in a deed not to convey or lease to a Chinaman is void, as in contravention of the treaty with China, and in violation of the fourteenth amendment of the federal constitution, and is not enforceable in equity.¹⁵ And covenants restraining alienation, equally with conditions and conditional limitations, when repugnant to the interest created, are void.¹⁶ The covenants of a deed, like the conveyance itself,¹⁷ are construed and their scope ascertained from,

7. See *supra*, § 2.

8. *Levitzky v. Canning*, 33 Cal. 299.

9. See *infra*, § 5.

10. *Sacramento Sub. etc. Co. v. Whaley*, 33 Cal. App. Dec. 611, 194 Pac. 1054; *Morgan v. Dibble*, 43 Cal. App. 116, 184 Pac. 704.

11. *Upper San Joaquin etc. Co. v. Roach*, 78 Cal. 552, 21 Pac. 304.

12. *Walker v. Haslett*, 30 Cal. App. Dec. 604, 186 Pac. 622; *Guaranty Realty Co. v. Recreation Gun Club*, 12 Cal. App. 383, 107 Pac. 625. And see cases cited *infra*, this section.

13. *Los Angeles Ter. etc. Co. v. Muir*, 136 Cal. 36, 68 Pac. 308.

14. *Pavkovich v. Southern Pac. R. R. Co.*, 150 Cal. 39, 87 Pac. 1097.

15. *Gandolfo v. Hartman*, 49 Fed. 181, 16 L. R. A. 277.

16. *Ripperdan v. Weldy*, 149 Cal. 667, 87 Pac. 276; *Prey v. Stanley*, 110 Cal. 423, 42 Pac. 908 (the court saying, "Such covenants, if not within the letter of section 711 of the Civil Code, are yet obnoxious to the policy of which that section is a partial expression"); *Title Guarantee & Trust Co. v. Garrott*, 42 Cal. App. 152, 183 Pac. 470 (applying Civ. Code, § 711); Civ. Code, § 711, reads: "Conditions restraining alienation, when repugnant to the interest created, are void." See, also, *DEEDS; WILLS*.

17. See *CONFLICT OF LAWS*, vol. 5, p. 469; *DEEDS*.

and measured by, the laws of the state in which the land it conveys is located, irrespective of where the deed may have been executed, or the grantors reside.¹⁸

§ 5. Express and Implied.—Express covenants are those stated in words more or less distinctly exposing the intent to covenant, while implied covenants are those inferred by legal construction from the use of certain words of conveyance.¹⁹ Any words which may be construed as an agreement constitute an express covenant.²⁰ Thus, it has been recognized that a clause in a conveyance of a right of way over an undedicated street, reading, “said street forever to be and remain free and open as a public street,” might possibly be construed as a covenant of seizin, or of warranty, or for quiet enjoyment, on the part of the grantor.¹ Such a clause may also be construed as a restrictive covenant binding upon the grantee.² A proviso in the habendum clause of a deed, to the effect that if the grantee should ever sell any of the land conveyed, it should be sold to the grantor at a stipulated price, may be construed as a covenant.³ No covenant, however, can be implied from a mere recital of facts,⁴ as by recital in a

18. *Platner v. Vincent*, 62 Cal. Dec. 589, 202 Pac. 655 (reversing decision of district court of appeals, which drew a distinction between personal and real covenants, holding that personal covenants are no part of the deed proper and are subject to rules of construction applicable to contracts in general. See 33 Cal. App. Dec. 407, and see *CONFLICT OF LAWS*, vol. 5, p. 463, which article was published before the later decision was handed down).

19. 7 Ruling Case Law, p. 1093.

20. *Weller v. Brown*, 160 Cal. 515, 117 Pac. 517; *O'Sullivan v. Griffith*, 153 Cal. 502, 95 Pac. 873,

96 Pac. 323; *Maynard v. Polhemus*, 74 Cal. 141, 15 Pac. 451; *McDonald v. McElroy*, 60 Cal. 484; *Levitzky v. Canning*, 33 Cal. 299.

1. *McDonald v. McElroy*, 60 Cal. 484 (arguendo).

2. *Weller v. Brown*, 160 Cal. 515, 117 Pac. 517 (same case on second appeal, 25 Cal. App. 216, 143 Pac. 251).

3. *Maynard v. Polhemus*, 74 Cal. 141, 15 Pac. 451 (arguendo).

4. *McArthur v. Goodwin*, 173 Cal. 499, 160 Pac. 679; *O'Sullivan v. Griffith*, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323; *Roberts v. Krafts*, 141 Cal. 20, 74 Pac. 281.

deed that a certain street railroad franchise thereby conveyed "was duly given by the city council, and regularly confirmed at a special election";⁵ or as where in a deed conveying a water right, it was recited, in connection with a covenant against diminution of the water supply, that the grantors contemplated the diversion of the waters of a certain creek in a certain way and at a certain point.⁶ The reservation in a deed, in connection with certain water rights reserved to the grantor, of the right to connect with the flume or pipe of the grantees for the purpose of using such water, was held not to imply a covenant on the part of the grantee to construct such pipe or flume.⁷

By an express provision of the code, a "grant" of real property implies covenants against a prior conveyance by the grantor, and against encumbrances done, made or suffered by the grantor, or any person claiming under him, but implies no other covenants.⁸ But no implication arises under this provision, unless the conveyance purports to pass an estate of inheritance or fee simple.⁹

§ 6. Joint and Several.—In harmony with the provisions of the code as to the presumption to be indulged in such cases,¹⁰ where a covenant is made with two or more covenantees, the right created is ordinarily construed to be joint, and not several.¹¹ Thus, a covenant by a railroad company with a husband and wife to construct, and to continue to operate, a railroad upon a right of way conveyed to it by the wife, was held to create a joint interest in the covenantees, and they were required to join in an action for

5. *O'Sullivan v. Griffith*, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323 (the court saying that the recitals "might constitute an estoppel against the grantors in the instrument, but they do not express an agreement").

6. *Roberts v. Krafts*, 141 Cal. 20, 74 Pac. 281.

7. *Duckworth v. Watsonville Water etc. Co.*, 170 Cal. 425, 150 Pac. 58.

8. Civ. Code, § 1113 (set out in full in § 32, *infra*).

9. See *infra*, § 32.

10. Civ. Code, §§ 1431, 1659, 1660.

11. See as to contracts being joint and several, *CONTRACTS*, vol. 6, p. 341.

breach of the covenant.¹² The same principle was recognized prior to the adoption of the codes, it being held that all the grantees should join as plaintiffs in an action upon either a direct or implied covenant in a deed that the grantor had not sold or encumbered the land, or that he was seised of and had a right to convey the same.¹³ On the other hand, it has been held, where two persons joined as grantors in a deed of conveyance, that the covenants of title, both implied¹⁴ and expressed,¹⁵ were joint and several obligations, and hence one of the grantors could be sued alone and held severally liable.¹⁶ Similarly, assignees of undivided and unequal interests in a lease, while holding as tenants in common, are jointly and severally liable on covenants to repair and deliver up the demised premises at the end of the term.¹⁷ But where, from the subject matter of a covenant, it appears to be the intention that the parties therein named shall be taken jointly, and not distributively, they may be so taken.¹⁸

§ 7. Reciprocal—Dependent or Independent.—Covenants are sometimes classified as to their interbalancing considerations, as indicated by the term “reciprocal”; or they may be classified with view to their performance or enforcement.¹⁹ Reciprocal covenants are themselves the consideration for each other.²⁰ Covenants are construed to be independent, or mutual and concurrent, according to the intention and meaning of the parties,¹ a question some-

12. *Lyford v. North Pac. C. R. R. Co.*, 92 Cal. 93, 28 Pac. 103.

13. *Lawrence v. Montgomery*, 37 Cal. 183.

14. *Holzheier v. Hayes*, 133 Cal. 456, 65 Pac. 968.

15. *Platner v. Vincent*, 62 Cal. Dec. 589, 202 Pac. 655 (applying Civ. Code, §§ 1439, 1659).

16. *Platner v. Vincent*, 62 Cal. Dec. 589, 202 Pac. 655.

17. *Coburn v. Goodall*, 72 Cal. 498, 1 Am. St. Rep. 75, 14 Pac. 190. See LANDLORD AND TENANT.

18. *Vance v. Pena*, 33 Cal. 631.

19. 7 *Ruling Case Law*, p. 1092.

20. *Bryan v. Grosse*, 155 Cal. 132, 99 Pac. 499. See CONTRACTS, vol. 6, § 127.

1. *Deacon v. Blodget*, 111 Cal. 416, 44 Pac. 159; 7 *Ruling Case Law*, p. 1092.

times difficult to determine.² In general, when a covenant goes only to a part of the consideration, and a breach thereof may be paid for in damages, it is independent; but when the mutual covenants or promises go to the whole considerations on both sides, they are mutual and dependent, and neither party can claim performance without performance on his part.³ Covenants are also independent when intended by the parties to be performed at different times.⁴ And where one agrees, in consideration of a future event or act, to do or not to do a thing, the happening of the event is usually a condition precedent to the enforcement of the obligation.⁵ Thus, where land is sold with covenant of warranty accompanied by a delivery of possession, for which the vendee gives a note for the purchase money, the promise to pay and the warranty are independent covenants, and the enforcement of the one is not dependent upon the performance of the other.⁶

The intention of parties to make covenants dependent or independent is to be ascertained, if possible, from the written agreement entered into between them.⁷ And courts are disinclined to construe the stipulations of a contract as conditions precedent, unless by the language of the contract clearly expressed.⁸ An action may be brought for a breach of an independent covenant without averring performance. But, if the covenants are mutual and dependent, performance must be averred,⁹ for in such case

2. *Bensley v. Atwill*, 12 Cal. 231.

3. *Ernst v. Cummings*, 55 Cal. 179.
See *CONTRACTS*, vol. 6, § 237 et seq.

4. *Bank of Woodland v. Duncan*, 117 Cal. 412, 49 Pac. 414; *Southern Pac. R. R. Co. v. Allen*, 112 Cal. 455, 44 Pac. 796; *Front Street etc. R. R. Co. v. Butler*, 50 Cal. 574.

5. *Bensley v. Atwill*, 12 Cal. 231.

6. *Norton v. Jackson*, 5 Cal. 262.

7. *Deacon v. Blodget*, 111 Cal.

416, 44 Pac. 159; *Donovan v. Judson*, 81 Cal. 334, 6 L. R. A. 591, 22 Pac. 682; *Front Street etc. R. Co. v. Butler*, 50 Cal. 574.

8. *Antonelle v. Kennedy & Shaw L. Co.*, 140 Cal. 309, 73 Pac. 966.
See *CONTRACTS*, vol. 6, §§ 216-221.

9. *Peckham v. Stewart*, 97 Cal. 147, 31 Pac. 928; *Ernst v. Cummings*, 55 Cal. 179.

neither party can put the other in default without tendering performance, unless it is waived.¹⁰

§ 8. Covenant in Deed Poll.—It was the common-law rule that a covenant in a deed poll could not bind the grantee as a covenantor. To satisfy the formal requisites of a covenant it was necessary that the covenantor should sign and seal the instrument.¹¹ But in those jurisdictions where the distinction between sealed and unsealed instruments has been abolished, it is the rule that such a covenant becomes binding upon the grantees, and that all agreements or obligations created by the deed, which constitute real covenants running with the land, become obligatory upon the successors in interest of the grantor and grantee.¹² The deed must, however, distinctly import a covenant by the grantee.¹³ And the binding effect of the covenant is sufficiently proved by its presence in the deed, and recognition of its existence by the grantee. It is presumed in such case that the grantee had knowledge of the existence of the covenant from the time he accepted the instrument.¹⁴

§ 9. Stranger to Covenant as Beneficiary.—According to section 1085 of the Civil Code, "A present interest, and the benefit of a condition or covenant respecting property, may be taken by any natural person under a grant, although not named a party thereto." This was not the rule prior to the code, nor apparently at common law.¹⁵

10. *Heine v. Treadwell*, 72 Cal. 217, 13 Pac. 503. See generally the particular subject or class of contract involved, such as LANDLORD AND TENANT; VENDOR AND PURCHASER; SALES; MECHANICS' LIENS, etc.; and see CONTRACTS, vol. 6, § 241.

11. See *supra*, § 2.

12. 7 *Ruling Case Law*, p. 1089. See *supra*, § 2, as to the distinction being abolished in California.

13. *McArthur v. Goodwin*, 173 Cal. 499, 160 Pac. 679.

14. *Dutton v. Locke-Paddon*, 37 Cal. App. 693, 174 Pac. 674. As to acceptance of deeds, see DEEDS.

15. *Eldridge v. See Yup Co.*, 17 Cal. 44 (see, also, cases there cited). A provision similar to the code section is found in the English statutes, 8 and 9 Vict., c. 106, § 5.

Thus, it has been stated that "A person who is not a party to a deed cannot take anything by it unless it be by way of remainder. The grantor cannot covenant with a stranger to the deed."¹⁶ This early statement of the rule has been approved and applied in a comparatively recent case, in which no reference was made to the above section of the code.¹⁷

§ 10. Real and Personal.—A real covenant is one having for its object something annexed to, or inherent in, or connected with land or other real property.¹⁸ Such a covenant is said to run with the land when either the liability to perform it, or the right to take advantage of it, passes to the vendee or other transferee of the land, irrespective of any privity of contract.¹⁹ A personal covenant, on the other hand, does not possess this transitive quality, and is not binding or enforceable at law except as between the parties thereto,²⁰ or except in certain cases of restrictive covenants of which persons taking the land have notice.¹ A point of difference between real and personal covenants which obtained at common law was that while there could be no apportionment of personal contracts and covenants, apportionment of covenants which run with the land was permitted.² No distinction is made between real and personal covenants in a deed in respect to what law governs their construction.³

16. *Eldridge v. See Yup Co.*, 17 Cal. 44.

17. *Sutter Butte Canal Co. v. Richvale Land Co.*, 40 Cal. App. 451, 181 Pac. 98.

18. *Long v. Cramer M. & P. Co.*, 155 Cal. 402, 101 Pac. 297 (holding that such covenants cannot be created by parol); *Lisenby v. Newton*, 120 Cal. 571, 65 Am. St. Rep.

203, 52 Pac. 813; *McDonald v. McElroy*, 60 Cal. 484; *Farmer v. Ukiah Water Co.*, 56 Cal. 11.

19. See *infra*, § 12 et seq.

20. See *infra*, § 24.

1. See *infra*, § 26.

2. 7 Ruling Case Law, p. 1100. See *infra*, § 23.

3. See *supra*, § 4.

II. COVENANTS RUNNING WITH LAND.

§ 11. **In General.**—“Certain covenants, contained in grants of estates in real property, are appurtenant to such estates, and pass with them, so as to bind the assigns of the covenantor and to vest in the assigns of the covenantee, in the same manner as if they had personally entered into them. Such covenants are said to run with the land.”⁴ The term “running with the land” is sometimes loosely and inaccurately used to designate any covenant that affects the title to land in the hands of subsequent holders, but in a legal sense, it has a more restricted meaning. And so, while covenants that run with the land are necessarily appurtenant to estates in real property,⁵ they are not the same as, and are to be distinguished from, the servitudes or easements specified in the code;⁶ from charges and liens created against the land itself;⁷ and from covenants creating burdens upon or in respect to the use of land, the benefits thereof constituting what are frequently spoken of as “equitable easements.”⁸ A covenant running with the land does not exist where it is not made for the direct benefit of the property or some part of it, and there is no privity of estate or tenure, and no grant of an estate.⁹ Under such circumstances the covenant is only personal.¹⁰

§ 12. **Specific Kinds and Classes.**—The code specifically provides that the only covenants which run with the land

4. Civ. Code, § 1460.

5. Sacramento Sub. etc. Co. v. Whaley, 33 Cal. App. Dec. 611, 194 Pac. 1054. And see *infra*, § 16.

6. Werner v. Graham, 181 Cal. 174, 183 Pac. 945; Los Angeles Term. Land Co. v. Muir, 136 Cal. 36, 68 Pac. 308; Farmer v. Ukiah Water Co., 56 Cal. 11. See *infra*, § 30, and compare Civ. Code, §§ 801,

802, dealing with servitudes and easements.

7. See *infra*, § 29.

8. Werner v. Graham, 181 Cal. 174, 183 Pac. 945; and see *infra*, § 24 et seq.

9. See *infra*, § 13.

10. Pomona Land etc. Co. v. San Antonio etc. Co., 152 Cal. 618, 93 Pac. 881. See *infra*, § 24 et seq., as to personal covenants.

are those specified in the code itself, and those which are incidental thereto.¹¹ Pursuant to this provision the code specifies that "every covenant contained in a grant of an estate in real property, which is made for the benefit of the property, or some part of it then in existence," runs with the land;¹² and further, that such covenants include covenants of "warranty," "for quiet enjoyment," or for further assurance on the part of a grantor,¹³ "and covenants for the payment of rent, or of taxes or assessments upon the land, on the part of the grantee."¹⁴ Still another class relates to covenants for the addition of some new thing to real property not then in existence or annexed thereto, when contained in a grant of such property, and made by the covenantor expressly for his assigns or to the assigns of the covenantee. This last-mentioned class runs with the land so far only as the assigns thus mentioned are concerned.¹⁵

11. Civ. Code, § 1461; *Pomona L. & W. Co. v. San Antonio etc. Co.*, 152 Cal. 618, 93 Pac. 881; *Los Angeles Term. etc. Co. v. Muir*, 136 Cal. 36, 68 Pac. 308; *Sacramento Sub. etc. Co. v. Whaley*, 33 Cal. App. Dec. 611, 194 Pac. 1054.

12. Civ. Code, § 1462. See *infra*, § 15, as to "benefit" of the property; *infra*, § 21, as to property and estate to which covenants are annexed.

13. Civ. Code, § 1643. *Platner v. Vincent*, 62 Cal. Dec. 589, 202 Pac. 655 (holding that in the absence of a statute of a foreign state upon the subject of whether a covenant for quiet enjoyment runs with the land, it will be presumed in California courts that the law of such other state upon the subject is similar to the law of the state of California, namely, that such covenant runs with the land). *Mc-*

Cormick v. Marcy, 165 Cal. 386, 132 Pac. 449 (quiet enjoyment); *McDonald v. McElroy*, 60 Cal. 484 (holding that if a covenant of warranty or for quiet enjoyment did not run to the heirs, they are not bound where they are not named in the covenant).

And prior to the adoption of the code the rule was that the covenant of warranty ran with the land; *Blackwell v. Atkinson*, 14 Cal. 470 (warranty of title of mining claim); *Cheever v. Fair*, 5 Cal. 337. See *infra*, §§ 37-39, as to covenants of warranty running; *infra*, § 35, as to "quiet enjoyment"; and *infra*, § 36, as to "further assurance." As to covenant of warranty passing an after-acquired title, see *DEEDS*.

14. Civ. Code, § 1463. See *infra*, § 20, for examples of covenants of this character.

15. Civ. Code, § 1464.

Under section 1468 of the Civil Code.—In 1905 the legislature added a new section to the code, which reads as follows:

“A covenant made by the owner of land with the owner of other land to do or refrain from doing some act on his own land, which doing or refraining is expressed to be for the benefit of the land of the covenantee, and which is made by the covenantor expressly for his assigns or to the assigns of covenantee, runs with both of such parcels of land.”¹⁶

The enactment of this provision appears to modify the general rule stated in section 1460 of the Civil Code, although it has not been judicially construed as to this point, except by dictum.¹⁷ It is questionable if it could have been the intention of the legislature to legalize every burden upon real property that the caprice of land owners might suggest, and give it a binding effect equal to the servitudes and easements specifically authorized by the code or to legal and technical covenants running with land, irrespective of privity of estate or contract between the parties. The practice of encouraging and enforcing purely personal covenants restricting the use of land as against or in favor of the grantees or assigns of the origi-

16. Civ. Code, § 1468.

17. Referred to in *Werner v. Graham*, 181 Cal. 174, 183 Pac. 945, as being in line with the decision in that case, in that the restrictive covenants in the deed there in question were not “expressed to be for the benefit of the land of the covenantee,” the court saying: “The section was not adopted until 1905, after the deed in question was given, and is, therefore, not controlling, but it is an expression of what the necessary requirements should be in order that covenants of this character may run with the land.”

It is important to note that § 1468 of the Civil Code omits the clause “contained in grants of estates in real property,” which is found in other sections of the code that purport to specify what covenants run with the land. (See code references supra). While § 1460 purports to give the general qualifications applicable to all covenants running with the land, if any conflict exists, it will no doubt be resolved in favor of § 1468 under the established rule of construction. See Pol. Code, § 4484. And, generally, see STATUTES.

nal parties, is an innovation in our jurisprudence. It would seem more advisable to leave the enforcement of such covenants to equity, which is always adequate,¹⁸ and not to encumber the free use of property in every instance merely because a covenant restrictive of such use may denominate it a "benefit" to the land of the covenantee.¹⁹ It cannot be doubted, however, that, observing the conditions prescribed by the code, restrictive covenants may run with the land, and aside from the interpretative expressions of the supreme court in respect to section 1468 of the Civil Code, above noted, such covenants inserted in deeds to the lots of a tract, as part of a general building scheme, and expressly made binding upon every lot for the benefit of every other lot in the tract, have been held to run with each lot for the benefit of every other lot.²⁰

§ 13. Privity of Estate.—Covenants do not, ordinarily, run with the land unless a privity of estate exists or is created between the parties at the time the covenant is made;¹ although covenants falling within the provisions of section 1468 of the Civil Code may form an exception to the rule.² This is stating in another form the rule that if privity of contract be dispensed with its absence must be supplied by privity of estate.³ And a privity of estate cannot be created except by grant of an estate in real property.⁴ A mere declaration of the parties that a cove-

18. See *infra*, § 26.

19. See *infra*, § 19, as to restrictions and "equitable easements," so called.

20. *Miles v. Hollingsworth*, 30 Cal. App. Dec. 689, 187 Pac. 167 (the question of privity of estate, however, was not discussed in this case). As to building restrictions generally, see *DEEDS*.

1. See cases cited *infra*.

2. See *infra*, § 16.

3. *Pomona L. & W. Co. v. San Antonio Water Co.*, 152 Cal. 618, 93 Pac. 881; *Coburn v. Goodall*, 72 Cal. 498, 1 Am. St. Rep. 75, 14 Pac. 190.

4. *Pomona L. & W. Co. v. San Antonio Water Co.*, 152 Cal. 618, 93 Pac. 881; *Fresno Canal etc. Co. v. Rowell*, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53.

nant shall run with the land is insufficient for that purpose, unless it has the essentials of a real covenant.⁵

Under the feudal system, the transfer of every estate created privity of tenure between the parties. But when the statute of quia emptores abolished subinfeudation this privity no longer existed in cases where a fee was transferred and no reversion was left in the donor.⁶ Accordingly, the rule is that where the fee is passed and no reversion is left in the grantor, there is no privity of estate or tenure between the parties.⁷ On the other hand, it seems that where a grant of an estate is made upon condition subsequent with a provision for its reverting to the grantor on breach of the condition, privity of estate is created.⁸ Specifically, it has been held that there is no privity shown where the deed did not reserve or create any interest in the grantor and covenantee;⁹ or establish a condition subsequent to the grant;¹⁰ or attach any penalty to the violation of the covenant;¹¹ or create any limitation

5. See *infra*, § 24.

6. *Berryman v. Hotel Savoy Co.*, 160 Cal. 559, 37 L. R. A. (N. S.) 5, 117 Pac. 677; *Los Angeles Terminal etc. Co. v. Muir*, 136 Cal. 36, 68 Pac. 308.

7. *Bresee v. Dunn*, 178 Cal. 96, 172 Pac. 387 (and see the cases cited *supra*).

8. *Pavkovich v. Southern Pac. R. Co.*, 150 Cal. 39, 87 Pac. 1097 (holding, nevertheless, that the restrictive clause there in question, being a "limitation" on the use of the estate granted as well as a covenant, and made for the purpose of protecting the grantor's contingent estate, was enforceable in equity by the assignee of the grantor against the successor in interest of the grantee; this on the ground that the acts of the grantee's suc-

cessor in breach of the covenant, and which the plaintiff sought to enjoin, threatened the destruction of the contingent estate, and that the plaintiff was entitled to the relief asked, even conceding that there was "no covenant running with the land in a strict legal sense"). Compare *Strong v. Shatto*, 30 Cal. App. Dec. 903, 187 Pac. 159, holding that such reversionary contingent interest is vested and alienable. See, generally, *DEEDS*.

9. *Berryman v. Hotel Savoy Co.*, 160 Cal. 559, 37 L. R. A. (N. S.) 5, 117 Pac. 677.

10. *Bresee v. Dunn*, 178 Cal. 96, 172 Pac. 387; *Los Angeles Terminal etc. Co. v. Muir*, 136 Cal. 36, 68 Pac. 308.

11. *Bresee v. Dunn*, 178 Cal. 96, 172 Pac. 387.

upon the absolute title conveyed.¹² But in a recent case, where the plaintiff sought to quiet title to his lot against certain reciprocal building restrictions which a common grantor had attempted to impose upon the lots of plaintiff and defendants, and where the deeds contained a provision for reverter upon breach of any of the covenants or conditions contained in the deeds, the court held there was no privity of estate, between the parties to the action "at least in the usual sense of the word," and hence that the defendants were not entitled to enforce such restrictions against the plaintiff, inasmuch as in such case, the provisions as to restrictions are not in fact covenants but conditions.¹³ By the term "privity of estate," however, is sometimes meant mutual or successive relationship to the same rights of property, and not privity in estate or mutuality within the meaning of the feudal law.¹⁴ It is with this meaning that the term has apparently been used in the case last mentioned,¹⁵ in which it is said: "Likewise, there is no privity of estate between the plaintiff and the defendants, at least in the usual sense of the word. The plaintiff does not hold under or through any of the defendants, nor any of them under or through him. It follows that the covenants are not covenants recognized by the common law as running with the land, such as covenants between lessor and lessee, or between grantor and grantee for the benefit of the estate conveyed, as for instance, warranties of title, for all of which a privity of estate is required."¹⁶

12. *Weller v. Brown*, 160 Cal. 515, 117 Pac. 517.

13. *Werner v. Graham*, 181 Cal. 174, 183 Pac. 945. See *infra*, § 19, as to "equitable easements," so called, and the discussion in reference thereto in this case.

14. 7 Ruling Case Law, p. 1103.

15. *Werner v. Graham*, 181 Cal. 174, 183 Pac. 945.

16. As to privity of estate being required to enable covenants to run with land, see *supra*, § 9; and for a discussion as to the possible exception to this bearing of Civ. Code, § 1468, on the general rule, see *infra*, § 16.

§ 14. **Privity of Contract.**—There is a clear distinction between privity of estate and privity of contract.¹⁷ A right or obligation cannot be predicated upon privity of contract, unless the person affected is a party to the agreement,¹⁸ or has contractually assumed the obligations of the covenants,¹⁹ or has acquired rights by assignment from the original parties.²⁰ The original parties to a deed containing covenants are bound by privity of contract, but where an assignee or grantee of the original grantee seeks recovery for an alleged breach occurring while he held title, in the absence of a contract that the covenant should inure to his benefit, his right would not depend upon privity of contract but on privity of estate. As to the original grantee, each covenant is one of agreement and not of some law declaring that it runs with the land. And the mere transfer of the land itself, in the absence of a contract that the covenant should inure to the benefit of the transferee, does not carry such contractual interest,¹ or absolve the original grantee from the obligation of the covenant.² The distinction may be vital, as, for instance, in determining the jurisdiction of an action

17. *Realty & Rebuilding Co. v. Rea*, 184 Cal. 565, 194 Pac. 1024; *Werner v. Graham*, 181 Cal. 174, 183 Pac. 945; *William Ede Co. v. Heywood*, 153 Cal. 615, 22 L. R. A. (N. S.) 562, 96 Pac. 81; *Pomona L. & W. Co. v. San Antonio Water Co.*, 152 Cal. 618, 93 Pac. 881; *Lisenby v. Newton*, 120 Cal. 571, 65 Am. St. Rep. 203, 52 Pac. 813; *Lyford v. North Pac. C. R. Co.*, 92 Cal. 93, 28 Pac. 103; *Coburn v. Goodall*, 72 Cal. 498, 1 Am. St. Rep. 75, 14 Pac. 190; *Womble v. Womble*, 14 Cal. App. 739, 113 Pac. 353.

18. *Werner v. Graham*, 181 Cal. 174, 183 Pac. 945; *William Ede Co. v. Heywood*, 153 Cal. 615, 22 L. R.

A. (N. S.) 562, 96 Pac. 81. *Womble v. Womble*, 14 Cal. App. 739, 113 Pac. 353. See *CONTRACTS*, vol. 6, p. 211.

19. *Pomona L. & W. Co. v. San Antonio Water Co.*, 152 Cal. 618, 93 Pac. 881; *Lisenby v. Newton*, 120 Cal. 571, 65 Am. St. Rep. 203, 52 Pac. 813; *Coburn v. Goodall*, 72 Cal. 498, 1 Am. St. Rep. 75, 14 Pac. 190.

20. *Werner v. Graham*, 181 Cal. 174, 183 Pac. 945; *Lyford v. North Pac. Coast R. R. Co.*, 92 Cal. 93, 28 Pac. 103.

1. *Platner v. Vincent*, 62 Cal. Dec. 589, 202 Pac. 655.

2. See *infra*, § 41.

for breach of a covenant running with the land, that is, whether the action is transitory or local, the question depending upon whether the original grantee, or his assignee or grantee, held title at the time of the breach.³

§ 15. **Benefit and Burden.**—There is a wide difference between the transfer of the burden of a covenant running with the land and the transfer of the benefit of a covenant, or, in other words, of the liability to fulfill the covenant, as contradistinguished from the right to exact fulfillment.⁴ As under the feudal system a privity of tenure was created by every transfer of an estate in real property, both the burden and the benefit of all covenants made by either party bound and profited the assignee of either as an incident to the land.⁵ But after this system was abolished, it became a rule, where the fee was conveyed, that covenants which imposed any charge, burden or obligation upon the land were held not to be incident to it, and therefore incapable of passing with it to an assignee. If, however, the covenant were one intended to benefit the land, it was considered to be incident to and run with it, and, therefore, whoever might become the owner would also become entitled to the benefit of the covenant.⁶ Thus, while a benefit will pass with the land to which it is incident,⁷ a burden will adhere exclusively to the original covenantor,

3. *Platner v. Vincent*, 62 Cal. Dec. 589, 202 Pac. 655. See *infra*, § 54. For an exception to the general rule that the only persons who can claim the benefit of a covenant are those who are named as parties thereto, see *supra*, § 9.

4. *Berryman v. Hotel Savoy Co.*, 160 Cal. 559, 37 L. R. A. (N. S.) 5, 117 Pac. 677; *Weller v. Brown*, 160 Cal. 515, 117 Pac. 517; *Pomona L. & W. Co. v. San Antonio etc. Co.*, 152 Cal. 618, 93 Pac. 881; *Los Angeles Terminal etc. Co. v. Muir*, 136

Cal. 36, 68 Pac. 308; *Sacramento Suburban etc. Co. v. Whaley*, 33 Cal. App. Dec. 611, 194 Pac. 1054.

5. See *supra*, § 15.

6. *Berryman v. Hotel Savoy Co.*, 160 Cal. 559, 37 L. R. A. (N. S.) 5, 117 Pac. 677; *Los Angeles Terminal etc. Co. v. Muir*, 136 Cal. 36, 68 Pac. 308.

7. *Sacramento Suburban etc. Co. v. Whaley*, 33 Cal. App. Dec. 611, 194 Pac. 1054. And see cases cited *supra*.

unless a privity of estate or tenure subsist or be created between the covenantor and covenantee at the time when the covenant is made,⁸ and covenants to do or refrain from doing some act on the land of the covenantor, and expressed to be for the benefit of the land of the covenantee, run with the land under certain specified conditions.⁹

§ 16. For "Direct Benefit" of Property—In General.—According to section 1462 of the Civil Code, "Every covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property, or some part of it then in existence, runs with the land." Such covenants, and such only, run with the land as concern the land itself, in whosoever hands it may be, and become united with, and form a part of, the consideration for which the land, or some interest in it, is parted with, between the covenantor and covenantee.¹⁰ It was the rule at common law,¹¹ and has been the rule in California—at least prior to the enactment of section 1468 of the Civil Code¹²—that a covenant could not run with the land, except where it was made in connection with and as a part of the conveyance or transfer of the land itself.¹³ Unless,

8. *Bresee v. Dunn*, 178 Cal. 96, 172 Pac. 387; *Berryman v. Hotel Savoy Co.*, 160 Cal. 559, 37 L. R. A. (N. S.) 5, 117 Pac. 677; *Weller v. Brown*, 160 Cal. 515, 117 Pac. 517; *Pomona L. & W. Co. v. San Antonio etc. Co.*, 152 Cal. 618, 93 Pac. 881; *Los Angeles Terminal etc. Co. v. Muir*, 136 Cal. 36, 68 Pac. 308.

9. Civ. Code, § 1468. See *infra*, § 16.

10. *Sacramento Suburban etc. Co. v. Whaley*, 33 Cal. App. Dec. 611, 194 Pac. 1054 (citing *Washburn on Real Property*, vol. 2, § 1205). See cases cited *infra*, this section, and *infra*, §§ 17-20.

11. *Fresno Canal etc. Co. v. Dunbar*, 80 Cal. 530, 22 Pac. 275; *Fresno Canal etc. Co. v. Rowell*, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53.

12. Statutes of 1905, p. 610. See *supra*, § 12. Enacted March 21, 1905. As to what interest transferred is necessary to fill this requirement, see *infra*, § 21.

13. *Long v. Cramer M. & P. Co.*, 155 Cal. 402, 101 Pac. 297; *Bryan v. Grosse*, 155 Cal. 132, 99 Pac. 499 (in which the point was raised but not determined); *Pomona L. & W. Co. v. San Antonio etc. Co.*, 152 Cal. 618, 93 Pac. 881; *Fresno Canal etc. Co. v. Dunbar*, 80 Cal. 530,

therefore, a covenant comes clearly within the description of those specifically mentioned in the code provision, the general test determinative of the question whether it runs with the land (unless it falls within the provisions of section 1468 of the Civil Code, later referred to in this section), is whether or not it is for the direct benefit of the land.¹⁴ Hence, the courts, in determining whether a covenant in a particular case does or does not run with the land, have given primary consideration to this question of "direct benefit."¹⁵ The phrase "for the direct benefit of the property" is not restricted in its meaning to such physical benefit only as may directly accrue to the land from a covenant, but means any covenant which affects the title to real property or any interest or estate therein of the covenantee; and extends to such benefits as result from the restoration to the covenantee or the owner of the land, some right with respect thereto which he has parted with *pro re nata* or for a special purpose.¹⁶

§ 17. Covenants in Leases.—It has been stated generally that every covenant in a lease relating to¹⁷ or connected with¹⁸ the estate devised runs with the land and vests in

22 Pac. 275; Fresno Canal etc. Co. v. *Bowell*, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53. See *infra*, § 21.

14. *California Packing Corp. v. Grove*, 34 Cal. App. Dec. 409, 196 Pac. 891; *Sacramento Suburban etc. Co. v. Whaley*, 33 Cal. App. Dec. 611, 194 Pac. 1054.

15. *Werner v. Graham*, 181 Cal. 174, 183 Pac. 945; *Standard Oil Co. v. Slye*, 164 Cal. 435, 129 Pac. 589; *Berryman v. Hotel Savoy Co.*, 160 Cal. 559, 37 L. R. A. (N. S.) 5, 117 Pac. 677; *Weller v. Brown*, 160 Cal. 515, 117 Pac. 517; *Long v. Cramer M. & P. Co.*, 155 Cal. 402, 101 Pac. 297; *Los Angeles Terminal*

etc. Co. v. Muir, 136 Cal. 36, 68 Pac. 308; *Lisenby v. Newton*, 120 Cal. 571, 65 Am. St. Rep. 203, 52 Pac. 813; *Lyford v. North Pac. C. E. R. Co.*, 92 Cal. 93, 28 Pac. 103; *California Packing Corp. v. Grove*, 34 Cal. App. Dec. 409, 196 Pac. 891; *Sacramento Suburban etc. Co. v. Whaley*, 33 Cal. App. Dec. 611, 194 Pac. 1054.

16. *Sacramento Suburban etc. Co. v. Whaley*, 33 Cal. App. Dec. 611, 194 Pac. 1054.

17. *Laffan v. Naglee*, 9 Cal. 662, 70 Am. Dec. 678.

18. *Coburn v. Goodall*, 72 Cal. 498, 1 Am. St. Rep. 75, 14 Pac. 190.

point of benefit and liability in the assignee. Hence a covenant by a lessor to purchase the improvements by the lessee at the expiration of the term,¹⁹ to repair and to deliver up the demised premises at the end of the term,²⁰ giving a right of pre-emption to the lessee,¹ and for a renewal,² have been held to run with the land. Covenants for the payment of rent,³ taxes⁴ and assessments on land, made on the part of a grantee, are expressly declared to be for the direct benefit of the property within section 1462 of the Civil Code, and to run with the property as incidents thereof.⁵

§ 18. Covenants Relating to Water Rights.—Where the owners of adjoining tracts separated by a stream covenant that the waters of such stream shall be taken and conducted to a reservoir on the land of one owner by ditches and flumes constructed at their joint expense, and that the other owner may construct ditches across the land and convey one-half of the water from the reservoir to his own premises, such covenants run with the land, and are binding upon the successor in interest of the owner of the

19. California Annual Conference of M. E. Church v. Seitz, 74 Cal. 287, 15 Pac. 839; Bailey v. Richardson, 66 Cal. 416, 5 Pac. 910. But see Gardner v. Samuels, 116 Cal. 84, 58 Am. St. Rep. 135, 47 Pac. 935, holding such a covenant was personal where there was no covenant by the lessee to make the improvement.

20. Coburn v. Goodall, 72 Cal. 498, 1 Am. St. Rep. 75, 14 Pac. 190. See Realty & Rebuilding Co. v. Rea, 184 Cal. 565, 194 Pac. 1024, holding that a covenant that the lessee will repair the whole of the demised premises at his own cost is a general covenant and not one for such repairs only as are contem-

plated by Civ. Code, §§ 1941, 1942. See, generally, LANDLORD AND TENANT, as to covenants to repair, and to deliver up demised premises at end of term.

1. Laffan v. Naglee, 9 Cal. 662, 70 Am. Dec. 678.

2. Standard Oil Co. v. Slye, 164 Cal. 435, 129 Pac. 589.

3. Bonetti v. Treat, 91 Cal. 223, 14 L. R. A. 151, 27 Pac. 612; Salisbury v. Shirley, 66 Cal. 223, 5 Pac. 104.

4. Ellis v. Bradbury, 75 Cal. 234, 17 Pac. 3; Salisbury v. Shirley, 66 Cal. 223, 5 Pac. 104.

5. Civ. Code, § 1463. See supra, §-16. As to covenants in leases generally, see LANDLORD AND TENANT.

land upon which the reservoir is situated.⁶ Similarly, in a grant of a certain percentage of all the waters rising on the land of the grantor, with the grant of an easement for its conveyance to the land of the grantee, through which the grantor covenanted that he would suffer the water to flow over the intervening land, the covenant was held binding upon the successors in interest of the grantor.⁷ A water right is deemed to be real property,⁸ but it has been held that covenants respecting a division of water rights in a natural stream do not run with the land, where they are not founded in a grant of real property, and there is no privity of estate.⁹

§ 19. Building Restrictions—"Equitable Easements."—The subject of building and other restrictions as to the use of real property is treated in another article in this work,¹⁰ and the general subject of easements and servitudes is likewise considered elsewhere.¹¹ Building restrictions are here considered only in their aspect as "equitable easements," so called, inasmuch as these partake rather of the nature of covenants than easements as properly understood.¹² The enforcement of covenants re-

6. *Weill v. Baldwin*, 64 Cal. 476, 2 Pac. 249.

7. *Bean v. Stoneman*, 104 Cal. 49, 37 Pac. 777, 38 Pac. 39.

8. *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 15 L. R. A. (N. S.) 359, 93 Pac. 858, holding an agreement to sell a water right was an agreement to sell a right or interest in real property, and that the right to have the water flow from the vendor's canal through a lateral ditch to the land, for its irrigation, was a servitude upon the ditch and upon the canal, was an appurtenance to the land of the vendee and was real property. "By declaring that it should have the

effect of a covenant running with the land of one party and with the canal of the other, the parties merely adopted the technical definition of such covenants to express their intention . . . that the rights under the agreement should be appurtenant to such estates and pass with them." See, generally, **WATERS.**

9. *Pomona L. & W. Co. v. San Antonio W. Co.*, 152 Cal. 618, 93 Pac. 881.

10. See **DEEDS.**

11. See **EASEMENTS.**

12. See, also, *supra*, § 12, and *infra*, § 24, as to such covenants.

stricting the use of one parcel of land for the benefit of another parcel, not merely as between the original parties, but as between their respective grantees between whom no privity of estate or of contract can properly be said to exist, originated at a comparatively recent date in the chancery courts. Such servitudes were unknown to the common law and are not among the servitudes or easements enumerated by the code, although they are frequently spoken of as "equitable easements."¹³ They are opposed to the rule that the owner of land may not create new and heretofore unknown estates,¹⁴ and any provision of an instrument creating or claimed to create such a servitude is strictly construed, any doubt being resolved in favor of the free use of the land.¹⁵

If parties desire to create mutual rights in real property of a restrictive character, they must say so, and must say it in the only place where it can be given legal effect, namely, in the written instruments exchanged between them which constitute the final expression of their understanding. It is not the intent of the common grantor alone that governs. It is the joint intent of himself and his grantees, and as between him and each of his grantees the instrument or instruments between them, constitute the final and exclusive memorial of such intent. Moreover, if

13. *Werner v. Graham*, 181 Cal. 174, 183 Pac. 945. See *infra*, § 30, as to covenants creating easements. See 1 A. L. R. 329 as to covenants prohibiting erection of building within stated distance of side line of lot.

14. *Werner v. Graham*, 181 Cal. 174, 183 Pac. 945; *Los Angeles Terminal etc. Co. v. Muir*, 136 Cal. 36, 68 Pac. 308.

15. *Werner v. Graham*, 181 Cal. 174, 183 Pac. 945; *Bresee v. Dunn*, 178 Cal. 96, 172 Pac. 387;

Berryman v. Hotel Savoy Co., 160 Cal. 559, 37 L. R. A. (N. S.) 5, 117 Pac. 677; *Firth v. Marovich*, 160 Cal. 257, Ann. Cas. 1912D, 1190, 160 Pac. 729; *Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 36, 68 Pac. 308. See § 1468, Civ. Code, enacted in 1905, which apparently removes under specified conditions certain of the technical requirement of legal covenants running with land, namely, privity of estate, and that they be incorporated in grants of estates in real property. See *supra*, § 12.

such restrictions are to amount practically to a servitude, there must be some designation or description of what is an essential factor, namely, the dominant tenement. And so, it has been held that a servitude running with the land in favor of one parcel and against another is not created where the owner of a tract of land sells a portion of it, exacting of the grantee restrictive provisions as to its use, but without a word indicating that the land conveyed is a part of a larger tract, the balance of which the grantor still retains, or that the restrictions are intended for the benefit of other lands, or that their benefit is to inure to or pass with other lands, and without any description or designation of the land which is to be the dominant tenement.¹⁶

§ 20. Certain Miscellaneous Covenants.—Within the direct benefit rule above stated, a covenant in a mortgage providing for the release or removal of the lien of the mortgage from certain specified portions of the land mortgaged, is a covenant for the unfettering, pro tanto, of the title, and is, therefore, for the direct benefit of the land (i. e., of the estate or interest of the covenantee in the land mortgaged), and inures to the benefit of subsequent encumbrancers,¹⁷ or those who hold title under

16. *Werner v. Graham*, 181 Cal. 174, 183 Pac. 945, per Olney, J.

While it has been said in a passing criticism—admittedly tentative, however—that the opinion in *Werner v. Graham*, supra, seemed to err “in too great insistence on the formal aspects of the situation,” it would seem, though, that the decision turned on vital rather than on merely “formal” considerations. See supra, § 12, as to the enactment of section 1468, Civ. Code, in respect to building and other restrictions, and infra, § 24, as to the

enforcement in equity of such covenants against persons with notice.

17. *Sacramento Suburban etc. Co. v. Whaley*, 33 Cal. App. Dec. 611, 194 Pac. 1054, indicating such to be the better rule under a conflict of authority, the court also saying: “Section 1463 of the Civil Code lends support to the foregoing views, for, as will be observed, it is by said section declared that the ‘last section (1462) includes covenants of warranty, for quiet enjoyment,’ etc. In other words, the legislature has itself, by section

them.¹⁸ When a deed contains a clause that the grantee shall reconvey a portion of the premises to the grantor within one year, to be selected by the grantor, and the grantor then conveys to a third party his interest in the land, the right of the grantor to make the selection and to receive the deed is gone, and passes to the purchaser from him.¹⁹ Where, under a deed containing restrictive provisions, there is, as between the parties, no privity of contract, nor privity of estate, at least in the usual sense of the word, it has been held that the restrictions are not covenants running with the land, nor for the benefit of the estate conveyed but to its detriment.²⁰ But such restrictive covenants may, however, under circumstances elsewhere described, run with the land.¹

§ 21. Estate to Which Annexed.—Since a covenant cannot technically run with the land unless contained in a grant of an estate in real property,² it follows that a covenant attaches to and runs with any estate or interest in land which satisfies this requirement; although it binds only those who acquire the whole estate of the covenantor in some part of the property.³ Thus, a covenant of warranty runs with and operates upon whatever estate the deed purports to convey, as where a grant deed or quitclaim purports to convey only the grantor's present interest.⁴ The same is true as to a covenant of nonclaim,⁵

1463, interpreted or given us the meaning, to an extent, of the phrase, as used in section 1462, 'direct benefit of the property.'"

18. *Newman v. Nickell*, 33 Cal. App. Dec. 610, 194 Pac. 710.

19. *Hearst v. Pujol*, 44 Cal. 230.

20. *Werner v. Graham*, 181 Cal. 174, 183 Pac. 945.

1. See supra, § 12, as to building restrictions.

2. See supra, § 12, for the rule and probable qualification.

3. Civ. Code, § 1465.

4. *Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. 356; *Barrett v. Birge*, 50 Cal. 655; *Quivey v. Baker*, 37 Cal. 465; *Morrison v. Wilson*, 30 Cal. 344; *Kimball v. Semple*, 25 Cal. 440; *Gee v. Moore*, 14 Cal. 472. See, also, *infra*, § 37.

5. *Morrison v. Wilson*, 30 Cal. 344; *Gee v. Moore*, 14 Cal. 472.

which amounts to the ordinary covenant of warranty.⁶ Likewise, the covenants implied under section 1113 of the Civil Code⁷ attach to and pass with a grant of an undivided fractional interest in land.⁸ While a mortgage on land does not vest in the mortgagee an estate or interest in the land,⁹ it affects, nevertheless, the mortgagor's title, and the benefit of a covenant therein, providing for the releasing of portions of the mortgaged premises from the lien of the mortgage, upon payment of corresponding portions of the mortgage indebtedness, passes to the grantee of the mortgagor under a trust deed.¹⁰

It seems to be doubted whether a covenant can, in any case, attach to and run with an equity, or without a legal estate in the land;¹¹ but it has been held that the promise to pay the agreed price in a contract for the purchase of real estate is not of itself a covenant accompanying the equitable interest of the purchaser into the hands of his transferee.¹² Under circumstances where a lessor came in as assignee of a reversion and not as owner of the fee, it has been held that a covenant in a lease for the erection by the lessee of improvements on the demised premises, and for the purchase thereof by the lessor at the expiration of the term, runs with the land and is binding on the assignee of the lessor, if such covenant was entered into by the parties to the lease for themselves and their assigns.¹³

6. *Gee v. Moore*, 14 Cal. 472.

7. See *infra*, § 32.

8. *Shaw v. Caldwell*, 16 Cal. App. 1, 115 Pac. 941.

9. See MORTGAGES.

10. *Newman v. Nickell*, 33 Cal. App. Dec. 610, 194 Pac. 710.

11. *Lisenby v. Newton*, 120 Cal. 571, 65 Am. St. Rep. 203, 52 Pac. 813; *Bailey v. Richardson*, 66 Cal. 416, 5 Pac. 910 (stating the rule at common law). See, also, 7 *Ruling Case Law*, p. 1117.

12. *Lisenby v. Newton*, 120 Cal.

571, 65 Am. St. Rep. 203, 52 Pac. 813.

13. *Bailey v. Richardson*, 66 Cal. 416, 5 Pac. 910, stating that the term of the lessee was a legal estate under such circumstances, and holding Civ. Code, § 1464, applicable inasmuch as that section applies to grants of any estate. Compare *Laffan v. Naglee*, 9 Cal. 662, involving similar covenant prior to code. See, generally, LANDLORD AND TENANT. See Civ. Code, § 1464.

§ 22. **Naming of "Heirs and Assigns."**—At common law, to make the heir responsible, it was essential that he be expressly named in the bond or covenant of his ancestor; and the common-law rule has been held applicable in California.¹⁴ Thus, where the breach of a covenant of warranty occurred after the death of the covenantor, it was held that the heirs were not bound on the covenant, the deceased not having expressly covenanted that they should be bound.¹⁵ But the tendency has been to give effect to the manifest intention of the parties without reference to technical words. If the covenant is otherwise one properly running with the land, and its language purports to bind the successors and assigns of the covenantor, or inure to the benefit of the successors and assigns of the covenantee, it is recognized as sufficient for that purpose.¹⁶ The mere fact that the covenant does not contain the words "or assigns" is not now entitled to any weight. The question whether or not the parties intend to bind their heirs and assigns by the covenant must be determined from the nature and subject matter of the covenant itself.¹⁷ There are, however, exceptions to the rule, as where the code designates as running with the land certain covenants which are made "by the covenantor expressly for his assigns, or to the assigns of the covenantee," as in the case of covenants coming within sections 1464 and 1468 of the Civil Code.¹⁸ But it is provided by the code that "a covenant running with the land

14. *Maynard v. Polhemus*, 74 Cal. 141, 15 Pac. 451; *McDonald v. McElroy*, 60 Cal. 484 (the court, however, "assuming the question not to be affected by any statute of this state").

15. *McDonald v. McElroy*, 60 Cal. 484.

16. *Pythian Castle Assn. v. Daroux*, 172 Cal. 510, 157 Pac. 594; *Berryman v. Hotel Savoy Co.*, 160 Cal.

559, 37 L. R. A. (N. S.) 5, 117 Pac. 677; *Weller v. Brown*, 160 Cal. 515, 117 Pac. 517; *Long v. Cramer, M. & P. Co.*, 155 Cal. 402, 101 Pac. 297; *Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 36, 68 Pac. 308.

17. *Sacramento Suburban etc. Co. v. Whaley*, 33 Cal. App. Dec. 611, 194 Pac. 1054.

18. See *supra*, § 12.

binds those only who acquire the whole estate of the covenantor in some part of the property."¹⁹ In a case involving the effect of building restrictions, it has been held that the fact also that the only expression in a deed as to who may act in case of a breach of the restrictions is that in such case the land shall revert to the covenantor, his heirs or assigns, is strongly indicative of the fact that it was intended that the covenantor, his heirs or assigns, should alone have the right to act.²⁰ But the rule is different where the deed refers to a common plan of restrictions and expresses or indicates an agreement between grantor and grantee that the lot conveyed is taken subject to such plan.¹

§ 23. Apportionment of Covenants.—With respect to the apportionment of covenants the code provides as follows:

“Where several persons, holding by several titles, are subject to the burden or entitled to the benefit of a covenant running with the land, it must be apportioned among them according to the value of the property subject to it held by them respectively, if such value can be ascertained, and if not, then according to their respective interests in point of quantity.”²

Accordingly, it has been held that where a covenant running with the land is divisible, if the entire estate in different parcels passes by assignment to different individuals, the covenant will attach upon each parcel pro tanto; and the assignee of each parcel will be answerable for a proportionate part of the common burden and will be exclusively liable for the breach of any covenant which related to his part alone.³ A distinction between real and

19. Civ. Code, § 1465.

20. *Werner v. Graham*, 181 Cal. 174, 183 Pac. 945.

1. *Alderson v. Cutting*, 163 Cal. 503, Ann. Cas. 1914A, 1, 126 Pac. 157. See *supra*, § 12.

2. Civ. Code, § 1467.

3. *Standard Oil Co. v. Slye*, 164 Cal. 435, 129 Pac. 589 (citing *Taylor on Landlord and Tenant*, § 262). As to the rule in leases generally, see *LANDLORD AND TENANT*.

personal covenants was made at common law, in the doctrine of apportionment.⁴

III. COVENANTS NOT RUNNING WITH LAND.

§ 24. **In General.**—Personal covenants possess no transitive quality and bind only the immediate parties thereto.⁵ As between themselves, in the absence of fraud or mistake, parties are conclusively bound by their personal covenants, if they be not against public policy.⁶ The mere statement in an instrument that its covenants “are to apply to and bind the heirs, executors, administrators and assigns of the respective parties,” has no force and is inoperative as against the assigns of the covenantor where the covenant is purely personal;⁷ and in such case it may be treated as surplusage.⁸ It is not competent for parties to a personal covenant to create in this manner a contract for such assigns.⁹ Thus, the expressed intention of the parties that

4. See *supra*, § 10.

5. *Werner v. Graham*, 181 Cal. 174, 183 Pac. 945; *Pythian Castle Assn. v. Daroux*, 172 Cal. 510, 157 Pac. 594; *Berryman v. Hotel Savoy Co.*, 160 Cal. 559, 37 L. R. A. (N. S.) 5, 117 Pac. 677; *Long v. Cramer M. & P. Co.*, 155 Cal. 402, 101 Pac. 297; *William Ede Co. v. Heywood*, 153 Cal. 615, 22 L. R. A. (N. S.) 562, 96 Pac. 81; *Pomona L. & W. Co. v. San Antonio Water Co.*, 152 Cal. 618, 93 Pac. 881; *Los Angeles Terminal etc. Co. v. Muir*, 136 Cal. 36, 68 Pac. 308; *McPike v. Heaton*, 131 Cal. 109, 82 Am. St. Rep. 335, 63 Pac. 179; *Lisenby v. Newton*, 120 Cal. 571, 65 Am. St. Rep. 203, 52 Pac. 813; *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542; *Lyford v. North Pac. C. R. R. Co.*, 92 Cal. 93, 28 Pac. 103; *Coburn v. Goodall*,

72 Cal. 498, 1 Am. St. Rep. 75, 14 Pac. 190; *Salmon v. Vallejo*, 41 Cal. 481; *Lawrence v. Montgomery*, 37 Cal. 183; *Womble v. Womble*, 14 Cal. App. 739, 113 Pac. 353. And see cases cited *infra*, this section, and *infra*, § 23.

6. *Los Angeles Terminal etc. Co. v. Muir*, 136 Cal. 36, 68 Pac. 308. As to contracts against public policy, see *CONTRACTS*, vol. 6, pp. 98, 109.

7. *Lisenby v. Newton*, 120 Cal. 571, 65 Am. St. Rep. 203, 52 Pac. 813; *California Packing Corp. v. Grove*, 34 Cal. App. Dec. 409, 196 Pac. 891.

8. *California Packing Corp. v. Grove*, 34 Cal. App. Dec. 409, 196 Pac. 891.

9. *Lisenby v. Newton*, 120 Cal. 571, 65 Am. St. Rep. 203, 52 Pac. 813 (citing the *Touchstone*, pp. 178, 179).

a covenant in a deed on the part of the grantee should constitute a covenant running with the land is ineffectual for that purpose, where there was no privity of estate created or existing between the parties, and the covenant was otherwise of a personal nature.¹⁰ Nor will the mere transfer of the land itself in such case carry any interest in the covenant.¹¹ But personal covenants relating to land may, under some circumstances, be enforced against grantees or assigns where they take with notice.¹²

§ 25. **Specific Examples—Covenants of title.**—Covenants of seisin,¹³ of the right to convey,¹⁴ and against encumbrances,¹⁵ are personal and do not run with the land.¹⁶ The same rule is applicable to covenants implied by "grant" under section 1113 of the Civil Code;¹⁷ and to a covenant in a deed that the tract conveyed, or that the grant under which it is held, includes a specific quantity of land,—the latter covenant standing on the same footing as the covenants of title mentioned.¹⁸

Miscellaneous personal covenants.—The following covenants have been held personal, as having no transitive

10. *Berryman v. Hotel Savoy Co.*, 160 Cal. 559, 37 L. R. A. (N. S.) 5, 117 Pac. 677.

11. *Pomona L. & W. Co. v. San Antonio Water Co.*, 152 Cal. 618, 93 Pac. 881; *Lisenby v. Newton*, 120 Cal. 571, 65 Am. St. Rep. 203, 52 Pac. 813; *Lyford v. North Pac. C. R. R. Co.*, 92 Cal. 93, 28 Pac. 103; *Coburn v. Goodall*, 72 Cal. 498, 1 Am. St. Rep. 75, 14 Pac. 190.

12. See *infra*, § 26.

13. *Platner v. Vincent*, 62 Cal. Dec. 589, 202 Pac. 655; *McCormick v. Marcy*, 165 Cal. 386, 132 Pac. 449; *McDonald v. McElroy*, 60 Cal. 484; *Lawrence v. Montgomery*, 37 Cal. 183; *Salmon v. Vallejo*, 41 Cal. 481.

14. *McAlester v. Landers*, 70 Cal. 79, 11 Pac. 505 (in lease); *Salmon v. Vallejo*, 41 Cal. 481; *Lawrence v. Montgomery*, 37 Cal. 183.

15. *McPike v. Heaton*, 131 Cal. 109, 82 Am. St. Rep. 335, 63 Pac. 179 (holding the rule to be of ancient authority); *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542; *Salmon v. Vallejo*, 41 Cal. 481; *Lawrence v. Montgomery*, 37 Cal. 183; *Wright v. Boggess*, 24 Cal. App. 533, 141 Pac. 1082.

16. See *supra*, § 12, as to the only covenants that run with the land.

17. See *infra*, § 32.

18. *Salmon v. Vallejo*, 41 Cal. 481.

quality: a covenant to pay in gross, not arising out of land and not for its benefit or protection, as purchase money agreed to be paid as the price of land;¹⁹ an agreement concerning land, in the nature of a conditional sale,²⁰ a covenant by a land owner to deliver certain fruit crops from his land;¹ a covenant by a grantee, as part consideration of the grant, to build a house on the premises conveyed, of a specified value and within a limited time;² a covenant in a deed that if the grantee should ever sell any of the land conveyed, it should be sold to the grantor at a stipulated price;³ a covenant by a railroad company, grantee of a tract, as a further consideration of the grant, to place two stations at a location to be selected by the grantor, at which all the trains should stop;⁴ a covenant by a railroad company under similar circumstances, to continue to operate the railroad after its construction, it not having been made for the direct benefit of the estate granted;⁵ a reservation of a right to use water from conveyed premises, for domestic purposes, conditioned upon payment of a certain water rental "so long as said first parties continue to use the same";⁶ a license as a mere privilege resting upon personal confidence;⁷ and a covenant in a deed that the land conveyed shall be used as a street, and not as a lot for building purposes.⁸

19. *Lisenby v. Newton*, 120 Cal. 571, 65 Am. St. Rep. 203, 52 Pac. 813.

20. *San Domingo Gold M. Co. v. Grand Pacific G. M. Co.*, 10 Cal. App. 415, 102 Pac. 548 (though binding in equity upon one purchasing with notice).

1. *California Packing Corp. v. Grove*, 34 Cal. App. Dec. 409, 196 Pac. 891.

2. *Hawley v. Kaftz*, 148 Cal. 393, 113 Am. St. Rep. 282, 3 L. R. A. (N. S.) 741, 83 Pac. 248 (holding evidence inadmissible to show that

a condition subsequent was intended).

3. *Maynard v. Polhemus*, 74 Cal. 141, 15 Pac. 451.

4. *Behlow v. Southern Pac. R. R. Co.*, 130 Cal. 16, 62 Pac. 295 (holding that a breach of the covenant would not defeat the estate).

5. *Lyford v. North Pac. C. R. R. Co.*, 92 Cal. 93, 28 Pac. 103.

6. *Peterson v. McDonald*, 13 Cal. App. 644, 110 Pac. 465.

7. *Shaw v. Caldwell*, 16 Cal. App. 1, 115 Pac. 941. See LICENSES.

8. *Weller v. Brown*, 160 Cal. 515,

Similarly, covenants on the part of a grantee to erect a hotel on the land conveyed and for certain restrictions are purely personal, there being no privity of estate between the parties and the covenant not being for the benefit of the land conveyed. The fact that such covenants benefit the land of the grantor and might be enforced by him does not make them any the less personal covenants or enforceable by a successor of the grantor.⁹ Likewise, provisions in a deed, conveying a portion of a lot, that the grantor will never himself erect any structure upon the portion not conveyed within a specified distance of the conveyed portion, and will give preference to the grantee in case of a sale of the reserved portion, where they do not purport to bind the successors of the grantor, are personal covenants which do not run with the land and do not place any sort of compulsion on the successors of the grantor.¹⁰

§ 26. Enforcement in Equity Against Persons With Notice.—Although a covenant concerning the occupation and mode of use may not fulfill the technical requirements of a covenant real running with the land, it may nevertheless be binding in equity to the extent of securing to the owner of one parcel a privilege, or, as it is sometimes called, “a right to an amenity,” in the use of an adjoining parcel, by which his own estate may be enhanced in value or rendered more agreeable as a place of residence.¹¹ The pre-

117 Pac. 517, but holding the covenant created an equitable easement. See *supra*, § 19.

9. *Berryman v. Hotel Savoy Co.*, 160 Cal. 559, 37 L. R. A. (N. S.) 5, 117 Pac. 677 (holding that a subsequent deed executed by the grantor to the covenantor quitclaiming any interest in the land conveyed released the restriction). As to covenants apparently running with land without privity of estate, where expressed to be for

the benefit of the covenantee and expressly running to the assigns of the parties, see Civ. Code, § 1468, and *supra*, § 16.

10. *Pythian Castle Assn. v. Daroux*, 172 Cal. 510, 157 Pac. 594.

11. *Berryman v. Hotel Savoy Co.*, 160 Cal. 559, 37 L. R. A. (N. S.) 5, 117 Pac. 677; *Long v. Cramer M. & P. Co.*, 155 Cal. 402, 101 Pac. 297; *Bryan v. Grosse*, 155 Cal. 132, 99 Pac. 499; *Pavkovich v. Southern Pac. R. R. Co.*, 150 Cal. 39, 87

cise form or nature of the covenant or agreement is quite immaterial, and it is not at all material that such stipulations should be binding at law, or that any privity of estate should subsist between the parties in order to render them obligatory, and to warrant equitable relief in case of their infraction.¹³ Although covenants restricting the free use of one lot or parcel of land for the benefit of another may not meet the requirements of covenants running with the land,¹³ they may, nevertheless, constitute personal covenants enforceable not only against the original covenantor¹⁴ but against subsequent holders with notice.¹⁵ The principle upon which such covenants are enforced in the last-named instance is found in the general rule of equity that a party taking with notice of an equity takes subject to that equity.¹⁶ Liability on the covenant results, not from his being the assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform.¹⁷ But, following the principles

Pac. 1097; *Hunt v. Jones*, 149 Cal. 297, 86 Pac. 686; *Los Angeles Terminal etc. Co. v. Muir*, 136 Cal. 36, 68 Pac. 308; *Strong v. Shatto*, 30 Cal. App. Dec. 903, 187 Pac. 159; *Guaranty Realty Co. v. Recreation Gun Club*, 12 Cal. App. 383, 107 Pac. 625; *San Domingo Gold Min. Co. v. Grand Pacific G. Min. Co.*, 10 Cal. App. 415, 102 Pac. 548; *Los Angeles University v. Swarth*, 107 Fed. 798, 54 L. R. A. 262, 46 C. C. A. 647.

12. *Bryan v. Grosse*, 155 Cal. 132, 99 Pac. 499; *Hunt v. Jones*, 149 Cal. 297, 86 Pac. 686; *Guaranty Realty Co. v. Recreation Gun Club*, 12 Cal. App. 383, 107 Pac. 625 (holding it to be immaterial whether such covenant be considered as running with the land or a covenant in

gross); *San Domingo etc. Co. v. Grand Pacific etc. Co.*, 10 Cal. App. 415, 102 Pac. 548; *Los Angeles University v. Swarth*, 107 Fed. 798, 46 C. C. A. 647, 54 L. R. A. 262.

13. See Civ. Code, § 1468. See *supra*, §§ 12 and 19, where this code provision is discussed.

14. See *supra*, § 24, as to the enforcement of personal covenants generally.

15. See cases cited *infra*.

16. See EQUITY.

17. *Bryan v. Brosse*, 155 Cal. 132, 99 Pac. 499; *Hunt v. Jones*, 149 Cal. 297, 86 Pac. 686; *Guaranty Realty Co. v. Recreation Gun Club*, 12 Cal. App. 383, 107 Pac. 625; *San Domingo etc. Co. v. Grand Pacific etc. Co.*, 10 Cal. App. 415, 102 Pac. 548.

governing legal easements,¹⁸ the covenants which will be so enforced are limited to those which directly concern and benefit what may be termed the dominant estate.¹⁹ Under the question of enforceability equity will consider both the effect of enforcement upon the property of the plaintiff and also upon the interest of the public.²⁰ But not every personal covenant is so enforceable, for, if it were so, it would result that all purely personal covenants in any manner relating to land would have the same effect as those which run with the land.¹

§ 27. Application of Rule to Particular Covenants—Notice.—A covenant or agreement entered into between a purchaser and the patentees of a mining claim, which is intended to qualify the title conditionally, is binding in equity upon subsequent purchasers with notice thereof, though it may be only a personal covenant not running with the land.² And where a stone quarry tract, together with the land for the use of a railroad way to the quarry tract, was conveyed upon condition subsequent, “for the purpose and with the limitation” that the rock and material taken therefrom by the grantee, or by its lessees or assigns, was for railroad purposes, and that they are “not to carry on the business for any other purpose,” such clause has been considered as a limitation upon the use of

18. See EASEMENTS.

19. *Werner v. Graham*, 181 Cal. 174, 183 Pac. 945 (where a servitude was held to be not created); See, also, *Berryman v. Hotel Savoy Co.*, 160 Cal. 559, 37 L. R. A. (N. S.) 5, 117 Pac. 677, to same effect. But compare *Nay v. Bernard*, 40 Cal. App. 364, 180 Pac. 827, and cases there cited, holding that whether an easement is in gross or appurtenant to the dominant estate may be shown by facts aliunde the deed. See DEEDS; EASEMENTS.

20. *Los Angeles Terminal etc. Co. v. Muir*, 136 Cal. 36, 68 Pac. 308.

1. *Berryman v. Hotel Savoy Co.*, 160 Cal. 559, 37 L. R. A. (N. S.) 5, 117 Pac. 677; *Long v. Cramer M. & P. Co.*, 155 Cal. 402, 101 Pac. 297; *Los Angeles Term. etc. Co. v. Muir*, 136 Cal. 36, 68 Pac. 308.

2. *San Domingo etc. Co. v. Grand Pacific etc. Co.*, 10 Cal. App. 415, 102 Pac. 548.

the estate granted, made for the purpose of feeding and protecting the grantor's contingent estate, and also as a personal covenant prohibiting the removal of rock and material for any other purpose, and is enforceable in equity against the successors in interest of the grantee.³ Where the owner of land purchased a water right from a water company under an agreement which contained a covenant not to charge more than a certain rate for water, and on the faith of such purchase and contract expended large sums of money in setting out and caring for an orchard thereon, and where, without such water his investment would become a total loss, it was held that equity would enforce the covenant against the successors of the water company with notice of the facts, and that it was immaterial whether the covenant was one running with the land, or was a personal covenant in relation to the water right affecting the land.⁴

A parol agreement entered into between persons as tenants in common of land, that they would not herd or graze sheep thereon, and not embodied in any grant of the land, cannot be considered as a covenant running with the land. Such covenant not being for the direct benefit of the property, but a restriction and limitation on its use, and not purporting to bind the assigns or grantees of the covenantor, it does not conform in its creation or in its purpose to the requirements of the law as to covenants running with the land, nor is it a covenant which equity can enforce against the grantee of the covenantor.⁵

3. *Pavkovich v. Southern Pacific R. R. Co.*, 150 Cal. 39, 87 Pac. 1097, a majority of the court saying, obiter, that the plaintiff would have been entitled to enjoin the use of rock for other purposes, even if there had been no express provision restraining the removal of the soil or other destructive use of the land, on the ground that the court was

bound to assume that there might be a breach of the condition subsequent, and to hold that the grantee in the meantime would have no right to make way with the very substance of the estate.

4. *Hunt v. Jones*, 149 Cal. 297, 86 Pac. 686. See *WATERS*.

5. *Long v. Cramer M. & P. Co.*, 155 Cal. 402, 101 Pac. 297.

Notice.—It is a familiar rule that whatever fairly puts a person on inquiry as to a fact is sufficient notice of that fact, where the means of knowledge are at hand.⁶ Hence, it has been held that a provision in the habendum clause of a deed placed of record, “that one of the conditions of this conveyance is that the use of firearms upon said premises is and shall be forever prohibited, and that the said grantees agree, for and on behalf of themselves, their heirs and assigns, and all persons claiming through or under them, to observe and enforce this provision,” was sufficiently clear to convey the requisite information, and to put a purchaser from the grantees on his guard to the extent to which such covenant affected the remaining lands of the original grantor.⁷ But where a deed contained a covenant on the part of the grantee to build a hotel as specified upon the land granted, and the covenant purported to run solely “with the land conveyed,” and no ownership of other land of the grantors was stated in the deed, or reference made thereto, a subsequent purchaser of the land conveyed was not charged from the record with knowledge that the original grantors owned other land to be benefited by the covenant, and had the right to construe the covenant as imposing no servitude running with the land, but as imposing a mere personal burden on the land conveyed which adhered exclusively to the original covenantor.⁸ Similarly, where a deed to a club contained a covenant that the land conveyed should not be used for any business purposes “other than for hotel or lodging house or club purposes,” it was held, in the absence of any words in the deed, or any reference to a plan

6. See NOTICE.

7. Guaranty Realty Co. v. Recreation Gun Club, 12 Cal. App. 383, 107 Pac. 625 (holding the covenant was not unreasonable or void as restricting the right of a citizen to bear arms).

8. Berryman v. Hotel Savoy Co., 160 Cal. 559, 37 L. R. A. (N. S.) 5, 117 Pac. 677. As to the necessity that the indication of the land to be benefited shall be found in the deed itself, the deed being the final memorial of the understandings of the parties, see *supra*, § 19.

showing a general scheme of improvement, that the grantees took their estate without notice, express or constructive, that the restriction inserted in the deed was intended for the benefit of the adjoining estate.⁹

§ 28. Changed Conditions as Affecting Equitable Remedy.—The grounds of enforcement of personal covenants restricting the use of land against the successors of the covenantor, being purely equitable, it is recognized that the circumstances might so change that a court of equity would relieve the covenantor and the property from such restriction to its use, since public policy requires that land should not be unnecessarily burdened with permanent or long-continued restrictions, depreciating the value of its use to the owner, as well as its selling value in the market.¹⁰ But the doctrine that equity will not enforce restrictions on the use of property applies only to cases where it is sought to enforce such restrictions by equitable proceedings, where the reason and justification for them have failed through changed conditions. Such change merely defeats the granting of equitable relief for the enforcement of the covenants, and does not destroy the contractual obligation or entitle the owner of the land to have his title quieted against the covenants.¹¹ Nor does the fact that the property has become more valuable for business than for residence purposes necessarily deprive the owner of the dominant tenement of the benefit of the covenant, where the restriction, notwithstanding the change of conditions, is still of substantial advantage to the dominant property.¹²

9. Los Angeles Terminal etc. Co. v. Muir, 136 Cal. 36, 68 Pac. 308.

10. Los Angeles Terminal etc. Co. v. Muir, 136 Cal. 36, 68 Pac. 308; Strong v. Shatto, 30 Cal. App. Dec. 903, 187 Pac. 159.

11. Miles v. Hollingsworth, 30 Cal. App. Dec. 689, 187 Pac. 167.

12. Strong v. Shatto, 30 Cal. App. Dec. 903, 187 Pac. 159; Miles v. Hollingsworth, 30 Cal. App. Dec. 689, 187 Pac. 167. See *supra*, §§ 12 and 19, and generally, see DEEDS.

IV. CREATING CHARGES OR LIENS, AND EASEMENTS.

§ 29. **Creating Charges or Liens.**—Although the technical requirements for a covenant running with the land¹³ are absent, the expressed intention of the parties that the covenant shall be appurtenant to the land and pass with it may nevertheless be given effect in certain cases as creating a lien or charge against the land, but without personal liability of the successor of the covenantor.¹⁴ Thus, upon the sale of a water right for the purpose of irrigating land, a covenant that the price thereof shall run with and bind the land, although not contained in a transfer or conveyance of real property, will be construed as binding the land so as to create a lien thereupon for the price of the water right,¹⁵ which can be enforced by foreclosure against a purchaser with record notice of the agreement, though no personal judgment can be properly rendered against such purchaser.¹⁶

§ 30. **Creating Easements.**—When it appears to be the true construction of the terms of a grant that it was the well understood purpose of the parties to create or reserve a right, in the nature of a servitude or easement in the property granted, for the benefit of other land owned by

13. See *supra*, §§ 11-16.

14. *California Packing Corp. v. Grove*, 34 Cal. App. Dec. 409, 196 Pac. 891 (arguendo). And see cases cited *infra*, this section.

15. *Fresno Canal etc. Co. v. Park*, 129 Cal. 437, 62 Pac. 87; *Fresno Canal etc. Co. v. Dunbar*, 80 Cal. 530, 22 Pac. 275; *Fresno Canal etc. Co. v. Rowell*, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53. See **WATERS**. Compare *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 15 L. R. A. (N. S.) 359, 93 Pac. 858, holding that a sale of such water right is a sale of real property.

16. *Fresno Canal etc. Co. v. Dunbar*, 80 Cal. 530, 22 Pac. 275 (McFarland, J., concurring says: "I concur in the judgment of reversal; but in my opinion the contract sued on is not one that can be enforced against the land in the hands of subsequent grantees. It is true that the contract is not strictly what is usually called a covenant running with the land, but it is in the nature of such covenant, and has practically the same consequences." *Fresno Canal etc. Co. v. Rowell*, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53. See **WATERS**.)

the grantor, no matter in what form such purpose may be expressed, whether it be in the form of a condition, or covenant or reservation, or exception, such right, if not against public policy, will be held to be appurtenant to the land of the grantor and binding on that conveyed to the grantee and the right and burden thus created and imposed will pass with the lands to all subsequent grantees.¹⁷ While easements are generally acquired by grant or by prescription, they may be acquired by contract, as where one of two adjoining land owners agrees to give light and air privileges over his lot, in consideration of a right of ingress and egress over the lot of the other, and such covenants will be enforced in equity against a subsequent purchaser of one of the tracts with notice thereof, notwithstanding the covenants do not in law technically run with the land.¹⁸ An easement may also be deemed to have been created, where from the nature of the subject matter it is evident that the parties intended that privileges designed for the permanent use of the property should form an incident of the principal contract. Thus, where the grantors of a strip of land were at the time of the grant the owners of the land on either side of the strip, a covenant in the deed that the strip conveyed is not to be used for building purposes, but is to be used as a public street, will be construed as a reservation in favor of the owners of the adjoining lands, of such rights as they would have in a public street, and also to reserve to them a negative easement prohibiting the erection of any building upon the strip.¹⁹ Similarly, a covenant by a corporation vendor in a contract for the sale of a water right for irrigation purposes, to furnish water through its canal and lateral ditch

17. *Weller v. Brown*, 160 Cal. 515, 117 Pac. 517 (stating the rule); *Muzio v. Erickson*, 41 Cal. App. 413, 182 Pac. 974. See EASEMENTS.

18. *Bryan v. Grosse*, 155 Cal. 132, 99 Pac. 499. See ADVERSE POSSES-

SION, vol. 1, pp. 592-610, incl., as to prescriptive title to easements.

19. *Weller v. Brown*, 160 Cal. 515, 117 Pac. 517 (same case on second appeal, 25 Cal. App. 216, 143 Pac. 251).

to the land of the vendee, creates a servitude upon the canal and ditch which is appurtenant to the land of the vendee, and is real property.²⁰ And a covenant by a grantor, in a grant of a water right, that he would "suffer the water to flow" over his intervening land, to the grantee, by a certain ditch, or by such further ditch as the grantor might construct, is in effect a grant of an easement for such purpose.¹

V. COVENANTS OF TITLE.

§ 31. **In General.**—The usual covenants of title are covenants of seizin,² quiet enjoyment,³ further assurance,⁴ general warranty,⁵ and against encumbrances.⁶ A covenant may also be in the form of a nonclaim, as where a grantor covenants that neither he, nor any person claiming from or under him, shall claim or demand any right or title to the premises conveyed.⁷ Such a covenant is said to amount to the ordinary covenant of warranty.⁸ Under the provisions of the code, the only covenants implied on the part of the grantor by a "grant" of an estate of inheritance or fee simple, are covenants against a prior conveyance by the grantor, and against encumbrances done, made or suffered by the grantor, or any person claiming under him, all others being excluded.⁹ These last-named covenants, being covenants in presenti,¹⁰

20. *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 15 L. R. A. (N. S.) 359, 93 Pac. 858.

1. *Bean v. Stoneman*, 104 Cal. 49, 37 Pac. 777, 38 Pac. 39. See **WATERS.**

2. Civ. Code, § 1733. See *infra*, § 34.

3. Civ. Code, § 1733. See *infra*, § 35.

4. Civ. Code, § 1733. See *infra*, § 36.

5. Civ. Code, § 1733. See *infra*, §§ 37-39.

6. Civ. Code, § 1733. See *infra*, § 33.

7. *Morrison v. Wilson*, 30 Cal. 344; *Gee v. Moore*, 14 Cal. 472.

8. *Gee v. Moore*, 14 Cal. 472.

9. Civ. Code, § 1113. See *infra*, § 32.

10. *McPike v. Heaton*, 131 Cal. 109, 82 Am. St. Rep. 335, 63 Pac. 179, and *Woodward v. Brown*, 119

if broken at all, are broken as soon as made, and are mere choses in action.¹¹ It being the general rule that all prior agreements and representations are merged in the deed of conveyance,¹² where the deed contains no covenants expressed or implied, the grantee takes all risk of title upon himself.¹³ Thus, where there had been a partial failure of title, but without express warranty or any breach of the covenants implied by law, the failure being through no fault of the grantor,¹⁴ such failure cannot be used as a basis of an action for the recovery of a proportionate part of the purchase price, at least without rescission and tender of reconveyance.¹⁵ Closely related to the ordinary covenants of title is the covenant that the tract conveyed, or the grant under which it is held, includes a specific quantity of land.¹⁶ The term "final adjudication" in a covenant that the title to land conveyed was valid, and in the event that the title should not be confirmed by the United States courts in which it was then pending, upon the final adjudication of the same, that the grantor should become liable for the purchase money with interest, has been construed to mean the expiration of the time within which an appeal might be taken.¹⁷

Agreement "to give the usual covenants."—The code expressly provides what must be the substance of the usual covenants in order to comply with an agreement on the part of a seller of real property "to give" such covenants.¹⁸ A seller frequently agrees to furnish a "good

Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542; Maddock v. Russell, 109 Cal. 417, 42 Pac. 139. See Lawrence v. Montgomery, 37 Cal. 183, decided under a statute similar to the provisions of section 1113 of the Civil Code. See Stats. 1855, p. 171.

11. See *infra*, § 40.

12. See DEEDS.

13. O'Sullivan v. Griffith, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323; Pea-

body v. Phelps, 9 Cal. 213; Gaffey v. Welk, 31 Cal. App. Dec. 643, 189 Pac. 300.

14. See *infra*, § 32.

15. Gaffey v. Welk, 31 Cal. App. Dec. 643, 189 Pac. 300. See, generally, *VENDOR AND PURCHASER*.

16. Salmon v. Vallejo, 41 Cal. 481.

17. Hills v. Sherwood, 33 Cal. 474.

18. Civ. Code, §§ 1733, 1734; and see *infra*, § 33 et seq., under the title of the specific covenant. For

and perfect title." Such an agreement imports a title that must not only be good in point of fact, but it must also be apparently perfect when exhibited—that is, free from reasonable objection,¹⁹ such as litigation, palpable defects and grave doubts fairly deducible of record, and unencumbered.²⁰ In the absence of an agreement to convey anything except his interest in the property, it has been held that the words "good and sufficient deed," refer only to the form of conveyance and not to the interest intended to be conveyed; in other words, the grantor in such case obligates himself to make a conveyance sufficient to pass his title, whatever it might be, to the grantee.¹ But where a covenant is made to convey a specific title the agreement is not fulfilled by conveying another and different title.²

§ 32. Implied by Law.—The code provides as follows:

"From the use of the word 'grant' in any conveyance by which an estate of inheritance of fee simple is to be passed, the following covenants, and none other, on the part of the grantor for himself and his heirs to the grantee, his heirs, and assigns, are implied, unless restrained by express terms contained in such conveyance: 1. That previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, or any right, title, or interest therein, to any person other than the grantee; 2. That such estate is at the time of the execution of such conveyance free from encumbrances

the usual covenants, see *supra*, this section. See, also, DEEDS; VENDOR AND PURCHASER.

19. *Peckman v. Stewart*, 97 Cal. 147, 31 Pac. 928.

20. *Goldstein v. Hensley*, 4 Cal. App. 444, 88 Pac. 507. See VENDOR AND PURCHASER.

1. *Green v. Covillaud*, 10 Cal. 317, 70 Am. Dec. 725 (stating, however, that a different rule would apply where the covenant is to make "title," not a deed); *Brown v.*

Covillaud, 6 Cal. 566. See *Farley v. Vaughn*, 11 Cal. 227, citing and distinguishing the *Cavillaud* cases, *supra*.

2. *Smith v. Lawrence*, 38 Cal. 24, 99 Am. Dec. 344. See *Royal v. Dennison*, 109 Cal. 558 (42 Pac. 39 (S. C., 4 Cal. Unrep. 851, 38 Pac. 39), holding that if an objection to a deed from a third person as fulfilling a vendor's contract to give title had not been specified, it will be deemed to have been

waived.

done, made, or suffered by the grantor, or any person claiming under him. Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance."³

No implied covenant, however, arises under this code provision unless the conveyance purports to pass an estate of inheritance or fee simple.⁴ Accordingly, there is no covenant against encumbrances implied by a grant deed executed pursuant to a judicial sale.⁵ Similarly, there are no implied covenants in a deed which merely grants the "right, title and interest" of the grantor. It being the well-established rule that such words do not, as a matter of law, purport to pass a fee, but merely such estate or interest as the grantor then has,⁶ they in effect restrain or negative the implication of the statute.⁷ The implication has been also denied in respect to a deed of gift,⁸ a quitclaim deed,⁹ a specific devise of land,¹⁰ and in a proceeding to take property by eminent domain. The latter proceeding being in invitum, there is no implied covenant

3. Civ. Code, § 1113. See cases cited *infra*, this section, and *infra*, § 33 et seq.

A somewhat similar statutory provision existed prior to the adoption of the code. Stats. 1855, p. 171; *Lawrence v. Montgomery*, 37 Cal. 183; *Morrison v. Wilson*, 30 Cal. 344.

The only covenant implied in a sale of land by general terms, under the system of the civil law in force in California under Mexican dominion, was a covenant of warranty that the buyer should quietly possess and enjoy, and nothing more. *Fowler v. Smith*, 2 Cal. 568.

4. *Estate of Porter*, 138 Cal. 618, 72 Pac. 173; *McPike v. Heaton*, 131 Cal. 109, 82 Am. St. Rep. 335, 63 Pac. 179; *Jeffers v. Easton*, El-

dridge & Co., 113 Cal. 345, 45 Pac. 680; *Southern Pac. Co. v. Dore*, 34 Cal. App. 521, 168 Pac. 147; *National Bank of Bakersfield v. Williams*, 31 Cal. App. 705, 161 Pac. 504; *Estate of Wells*, 7 Cal. App. 515, 94 Pac. 856.

5. *National Bank of Bakersfield v. Williams*, 31 Cal. App. 705, 161 Pac. 504.

6. See DEEDS.

7. *Southern Pac. Co. v. Dore*, 34 Cal. App. 521, 168 Pac. 147.

8. *Estate of Wells*, 7 Cal. App. 515, 94 Pac. 856.

9. *McPike v. Heaton*, 131 Cal. 109, 82 Am. St. Rep. 335, 63 Pac. 179.

10. *Estate of Porter*, 138 Cal. 618, 72 Pac. 173.

against encumbrances as in a voluntary conveyance by grant.¹¹

On the other hand, the absolute grant of real property,¹² or of an undivided yet specified interest therein,¹³ implies a covenant against a prior conveyance thereof by the grantor. Further, the covenants implied under the express wording of the statute, are against the grantors' own acts, and not against the acts of some other person; and this applies both to the implied covenant against a prior conveyance,¹⁴ and to the implied covenant against encumbrances.¹⁵ The term "suffered," as used in the phrase "suffered by the grantor," in the second subdivision of section 1113 of the Civil Code implies only reasonable control, and does not apply to an encumbrance not caused by the act of the party nor within his power to prevent.¹⁶ It is not necessary, however, in order to charge the grantor

11. *Marin etc. Water Dist. v. North Coast etc. Co.*, 40 Cal. App. 260, 180 Pac. 620. See EMINENT DOMAIN.

12. *Lyles v. Perrin*, 134 Cal. 417, 66 Pac. 472 (water right). And see generally cases cited supra.

A water right, being deemed real property (see supra, § 18, and references there given), where a conveyance is expressly granted as an appurtenance to land, it will carry with it the implication of a covenant against a previous conveyance thereof, under section 1113 of the Civil Code. *Lyles v. Perrin*, 134 Cal. 417, 66 Pac. 472. For Civ. Code, § 1113, see supra, this section; and see supra, § 16, as to covenants in grants appurtenant to estates in real property generally.

13. *Shaw v. Caldwell*, 16 Cal. App. 1, 115 Pac. 941 (grant of undivided one-half interest in mining property). See MINES AND MINERALS.

14. *Bryan v. Swain*, 56 Cal. 616; *Gaffey v. Welk*, 31 Cal. App. Dec. 643, 189 Pac. 300.

15. *Fraser v. Bentel*, 161 Cal. 390, Ann. Cas. 1913B, 1062, 119 Pac. 509; *William Ede Co. v. Heywood*, 153 Cal. 615, 22 L. B. A. (N. S.) 562, 96 Pac. 81; *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542; *West v. Masson*, 67 Cal. 169, 7 Pac. 452; *Crist v. Fife*, 41 Cal. App. 509, 183 Pac. 197; *National Bank of Bakersfield v. Williams*, 31 Cal. App. 705, 161 Pac. 504; *Wright v. Boggs*, 24 Cal. App. 533, 141 Pac. 1082. See *Waggle v. Worthy*, 74 Cal. 266, 5 Am. St. Rep. 440, 15 Pac. 831, citing Civ. Code, § 1113, as to covenant against encumbrances implied by statute from the use of the word "grant."

16. *Crist v. Fife*, 41 Cal. App. 509, 183 Pac. 197.

with implied covenants, that he should have in fact any interest in the land. His obligation arises from the execution of the deed. Thus, a mortgagee who joined in the execution of a deed to the mortgaged premises, is liable on the covenant implied, although he had assigned the mortgage to another, and had no interest in the premises at the time of the execution of the conveyance. And it has been held that the fact that the grantee knew that the mortgagee had no interest does not affect the obligation.¹⁷

§ 33. Encumbrances.—A covenant against encumbrances is merely one of indemnity;¹⁸ it cannot be construed as a contract whereby the grantor agrees to acquire and convey, or cause the owner to convey, an outstanding paramount title to the covenantee.¹⁹ Section 1114 of the Civil Code declares that “the term ‘encumbrance’ includes ‘taxes, assessments, and all liens upon real property.’” In construing this section with section 1113 of the Civil Code,²⁰ it has been held that the former does not exclude from the meaning of the word “encumbrances” every kind of limitation of a perfect title other than those described. In the absence of any statutory definition, an encumbrance has been defined as “any right to or interest in land which may subsist in third persons to the diminution of the value of the estate to the tenant, but consistently with the passing of the fee.” The word “includes,” as there used, is not a word of limitation but rather of enlargement.¹ Hence, easements, liens, restrictive covenants, and covenants creating burdens generally are held

17. *Holzheier v. Hayes*, 133 Cal. 456, 65 Pac. 968.

18. *Fraser v. Bentel*, 161 Cal. 390, Ann. Cas. 1913B, 1062, 119 Pac. 509; *Woods v. Bennett*, 40 Cal. App. 34, 180 Pac. 25; *Wright v. Boggess*, 24 Cal. App. 533, 141 Pac. 1082. See *Waggle v. Worthy*, 74 Cal. 266, 5 Am. St. Rep. 440, 15 Pac. 831 (cit-

ing Civ. Code, § 1113. See supra, § 32, for wording of this code section).

19. *Tropico Land & I. Co. v. Lambourn*, 170 Cal. 33, 148 Pac. 206.

20. See supra, § 32.

1. *Fraser v. Bentel*, 161 Cal. 390, Ann. Cas. 1913B, 1062, 119 Pac. 509.

to constitute a breach of a covenant against encumbrances.² But a covenant against encumbrances has no reference in general to existing physical and visible burdens imposed upon the land, for in such case there is a fair and reasonable presumption, in the absence of an express agreement, that both parties act with reference to such burdens; they are deemed to have covenanted with reference to the encumbrances mentioned in section 1114 of the Civil Code, and not those affecting the physical condition of the property.³ But even actual knowledge by a purchaser of land, of existing public easements thereon, does not necessarily imply, while the contract remains executory, a waiver of the substantial fulfillment of an agreement to make good title.⁴

§ 34. **Seizin.**—As pointed out elsewhere in this article a contract of seizin is a personal covenant and does not run with the land. Such a covenant may, therefore, be enforced wherever the covenantor is found.⁵ The covenant of seizin is generally defined to be an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey, and extends not only to land itself, but also to whatever is properly appurtenant to and passes by the conveyance of the land. It is to the effect that the grantor is seised in fee of an indefeasible title to the property conveyed,—that is, that he is seised of the full legal title, i. e., the title and possession united.⁶ Under the code, the “usual” covenant of seizin is, in substance, that the grantor “is now seised in fee simple of the property granted.”⁷ This covenant is not

2. See *infra*, §§ 42, 43.

3. *Jaques v. Tomb*, 179 Cal. 444, 177 Pac. 280; *Sisk v. Caswell*, 14 Cal. App. 377, 112 Pac. 185. And see *infra*, § 44.

4. *Morgan v. Dibble*, 43 Cal. App.

116, 184 Pac. 704. See, also, **VENDOR AND PURCHASER.**

5. *Platner v. Vincent*, 62 Cal. Dec. 589, 202 Pac. 655.

6. 7 *Ruling Case Law*, p. 1131.

7. *Civ. Code*, § 1734, and see *supra*,

§ 31.

implied by law from a conveyance of land;⁸ nor was it implied in a deed of conveyance at common law;⁹ nor was it so implied under the law in California while the territory was under Mexican dominion.¹⁰ It has been held that no covenant of seizin is implied by law in a sheriff's deed upon sale under execution.¹¹

§ 35. Quiet Enjoyment.—The substance of the “usual” covenant for quiet enjoyment is, that the grantee shall enjoy the land conveyed without any lawful disturbance.¹² The covenant is for quiet possession, and against a rightful eviction¹³ by a superior or paramount title;¹⁴ but it does not warrant against the acts of trespassers.¹⁵ No covenant for quiet enjoyment is implied by law in California from a conveyance of land.¹⁶ But it seems that such covenant was implied under the civil law in force in California while the territory was under the Mexican dominion.¹⁷

§ 36. Further Assurance.—The substance of the “usual” covenant for further assurance in a conveyance of real property, is that the grantor and all persons acquiring any interest in the property through or for him will on demand execute to the party of the second part at the expense of the latter any further assurance of the same that may be reasonably required.¹⁸ Where a grantor bargained and sold all of his right, title and interest in certain land, the payment of the purchase money being conditioned on the

8. See Civ. Code, § 1113; see supra, § 32.

9. O'Sullivan v. Griffith, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323.

10. Fowler v. Smith, 2 Cal. 39.

11. Kenyon v. Quinn, 41 Cal. 325.

12. Civ. Code, § 1734, and see supra, § 31.

13. McGary v. Hastings, 39 Cal. 360, 2 Am. Rep. 456.

14. See infra, § 46.

15. Branger v. Manciet, 30 Cal. 624; Playter v. Cunningham, 21 Cal. 229.

16. See supra, § 31.

17. McGary v. Hastings, 39 Cal. 360, 2 Am. Rep. 456; Fowler v. Smith, 2 Cal. 39.

18. Civ. Code, § 1734, and see supra, § 31.

confirmation of title by the United States, with an agreement that a deed should be then executed, the title was held to have passed on the delivery of the first deed, and that the agreement for the second deed was for further assurance.¹⁹ Similarly, where one executed an instrument by which he released and quitclaimed land, on which he had only a school land certificate of purchase, and by which he further agreed to perfect his title and make his grantee a good and sufficient deed therefor, the same to become operative upon the payment of certain moneys within a specified time thereafter, it was held that the instrument was a quitclaim deed and conveyed all the grantor's interest, and that the agreement for a subsequent deed was only a covenant for further assurance.²⁰ No covenant for further assurance is implied by law in California from a conveyance of land;¹ and this rule applies to a sheriff's deed upon sale under execution.²

§ 37. Warranty in General.—A general covenant of warranty is an undertaking by the warrantor that on the failure of the title which the deed purports to convey, either for the whole estate or for part only, by setting up a superior title, he will make compensation in money for the loss sustained by such failure. It cannot, however, be construed as a contract whereby the grantor agrees to acquire and convey, or cause the owner thereof to convey, an outstanding paramount title to the grantee.³ The "usual" covenant of warranty as expressed in the code is, in substance, that the seller warrants to the purchaser all the property contracted to be sold, "against every person lawfully claiming the same."⁴ Aside from the distinction between lineal and collateral warranties which has been

19. *Smith v. Brannan*, 13 Cal. 107.

20. *Wholey v. Cavanaugh*, 88 Cal. 132, 25 Pac. 1112.

1. See *supra*, § 32.

2. *Kenyon v. Quinn*, 41 Cal. 325.

3. *Tropico Land & I. Co. v. Lam-bourn*, 170 Cal. 33, 148 Pac. 206.

4. Civ. Code, § 1734, and see *supra*, § 31.

altered by statute in California,⁵ there are two kinds of warranty, namely, warranty in law or implied warranty and warranty by deed. Parties may by their deed add to or restrain the warranty in law, in which it becomes a special or limited warranty,⁶ as where one gives a covenant of warranty against his own acts;⁷ or against a specified adverse claim set up by a third party;⁸ or where he covenants to "warrant and defend the premises against all persons lawfully claiming the same by, through, or under" the grantor;⁹ or covenants against any claim or demand of the grantor and his heirs, or any person or persons claiming under him.¹⁰ And it seems that where a limited covenant is expressed, it merges all implied covenants therein.¹¹ No covenant of warranty, however, is implied by law from a conveyance of land in California, but only such covenants as are specified in section 1113 of the Civil Code.¹² There being no implied covenant from a mere recital in a deed,¹³ a covenant of warranty is ordinarily restricted in its operation to the estate or interest which the deed purports to convey.¹⁴ Moreover, it may be limited in its operation by the subject matter and the terms of the instrument. Thus, where a deed of a tract

5. See *infra*, § 38.

6. *Peabody v. Phelps*, 9 Cal. 213.

7. *Cheever v. Fair*, 5 Cal. 337.

8. *Quivey v. Baker*, 37 Cal. 465.

9. *West v. Masson*, 67 Cal. 169, 7 Pac. 452; *Kimball v. Semple*, 25 Cal. 440.

10. *Gee v. Moore*, 14 Cal. 472 (such covenant being termed a covenant of nonclaim). See *supra*, § 31; *Peabody v. Phelps*, 9 Cal. 213.

11. *Peabody v. Phelps*, 9 Cal. 213.

12. See *supra*, § 32.

13. See *supra*, § 5. *Montgomery v. De Picot*, 153 Cal. 509, 126 Am. St. Rep. 84, 96 Pac. 305 (the court holding that a covenant of warranty that certain street franchises

were valid was not implied from a recital in the instrument of transfer that they had been "duly given" by the city council, and "regularly confirmed" at a special election, and saying that the recital might constitute an estoppel against the grantor although it did not constitute an agreement). As to what constitutes "final adjudication" of title, as used in a covenant of warranty, see *supra*, § 31.

14. *Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. 356; *Barrett v. Birge*, 50 Cal. 655; *Kenyon v. Quinn*, 41 Cal. 325; *Morrison v. Wilson*, 30 Cal. 344; *Kimball v. Semple*, 25 Cal. 440; *Gee v. Moore*, 14 Cal. 472.

excepted such portion as might have been before conveyed by the grantor to other persons, and contained a covenant to also convey such excepted portion if a reconveyance could be procured, or, if not procurable, to convey other lands of equal value, it was held that a general covenant of warranty in the deed as to the land "hereby intended to be conveyed" related to the land which the deed purported to convey, and did not extend to the lands which the grantor covenanted to convey in the future.¹⁵

§ 38. Lineal and Collateral Warranties.

"Lineal and collateral warranties, with all their incidents, are abolished; but the heirs and devisees of every person who has made any covenant or agreement in reference to the title of, in, or to any real property, are answerable upon such covenant or agreement to the extent of the land descended or devised to them, in the cases and in the manner prescribed by law."¹⁶

There appears to be no provision of law which makes lands descended to the heir liable for the covenants of the ancestor, except those provisions which apply all assets to the payment of the decedent's debts, namely, through the machinery of the probate court.¹⁷ Hence, in case of the death of a warrantor of title, the only way in which the warrantee can perpetuate the right to recover damages from the estate of the warrantor for a future breach of the warranty, is by presenting a claim based upon the covenant of warranty and having it allowed and established as a contingent claim against the estate. Unless so presented no action can be maintained thereon.¹⁸

15. *Vance v. Pena*, 33 Cal. 631.

16. Civ. Code, § 1115.

17. *McDonald v. McElroy*, 60 Cal. 484.

18. *Tropico Land etc. Co. v. Lam-bourn*, 170 Cal. 33, 148 Pac. 206. See *Maddock v. Russell*, 109 Cal. 417, 42 Pac. 139, holding that a contract

of indemnity given by a decedent to his grantee agreeing to reimburse the grantee as to the title of a part of the land lost to him at a fixed price per acre, was a personal promise of reimbursement creating only a contingent liability against the decedent's estate. See EXECUTORS AND

§ 39. **Warranty Operating as Estoppel.**—While a covenant of warranty becomes a basis of legal and equitable remedies upon breach,¹⁹ it also operates by way of estoppel.²⁰ Thus, it is said that a covenant of warranty operates on an after-acquired interest, not as in fact passing such interest, but by way of estoppel upon the grantor against its assertion. He is not permitted to attack a title the validity of which he has covenanted to maintain. If he could succeed in defeating the title, he would, by his success, immediately become liable to the grantee upon his covenant; hence, to avoid circuitry of action and to enforce complete justice without delay and further litigation, the doctrine of estoppel is applied.¹ Since a covenant of non-claim is generally held to amount to the ordinary covenant of warranty, it also, operates equally by way of estoppel.² But a covenant in the habendum clause of a quitclaim deed, that an after-acquired title should vest in the grantee, does not have the effect in itself to vest such title upon its acquisition.³

ADMINISTRATORS, as to claims based on a contingent liability against decedent's estates.

19. See *infra*, § 48.

20. *Roberts v. Krafts*, 141 Cal. 20, 74 Pac. 281; *De Frieze v. Quint*, 94 Cal. 653, 28 Am. St. Rep. 151, 30 Pac. 1; *Kimball v. Semple*, 25 Cal. 440; *Dodge v. Walley*, 22 Cal. 224, 83 Am. Dec. 61; *Clark v. Baker*, 14 Cal. 612, 76 Am. Dec. 449; *Gee v. Moore*, 14 Cal. 472; *Hitchens v. Nougues*, 11 Cal. 28; *Shaw v. Caldwell*, 16 Cal. App. 1, 115 Pac. 941. As to conditions under which after-acquired title passes to grantee, see Civ. Code, §§ 1106, 2930; and see, generally, DEEDS.

1. *Clark v. Baker*, 14 Cal. 612, 76 Am. Dec. 449. As to the code provisions for conveyances carrying after-acquired title, see Civ. Code, §§ 1106, 2930; and see, generally, DEEDS. Such a provision, it is said, goes beyond the usual covenant of warranty; it provides that the new estate passes by operation of law to the grantee, or his successors. *Clark v. Baker*, 14 Cal. 612, 76 Am. Dec. 449.

2. *Gee v. Moore*, 14 Cal. 472.

3. *Anderson v. Yoakum*, 94 Cal. 227, 28 Am. St. Rep. 121, 29 Pac. 500.

VI. BREACH.

§ 40. **In General.**—Personal covenants, being in *præ-senti*, are deemed to be broken when made, if at all;⁴ but covenants running with the land, and not broken when made, are interrupted by and cease upon a breach subsequent to their creation.⁵ This first-mentioned rule applies to covenants of seizin,⁶ the right to convey,⁷ as against encumbrances,⁸ and a covenant that the tract conveyed, or that the grant under which it is held, includes a specific quantity.⁹ Where a tract had been patented to two persons, and one of the patentees thereafter conveyed a portion, excepting therefrom any portion which might theretofore have been conveyed by the patentees (naming them conjunctively) to any person, and covenanting to his grantee such excluded portion if he could procure a reconveyance of the same to himself, it was held there was no breach of the covenant if it appeared that such excepted lands had been conveyed by the covenantor alone and not by the patentees jointly.¹⁰

4. See *infra*, this section, and *infra*, § 42 et seq.

5. See *infra*, § 41.

6. *McCormick v. Marcy*, 165 Cal. 386, 132 Pac. 449 (holding statute of limitations began to run immediately upon such breach). *McDonald v. McElroy*, 60 Cal. 484 holding that the covenantee should have presented his claim resulting from the breach of the covenantor's administratrix. Compare, § 37, *supra*); *Salmon v. Vallejo*, 41 Cal. 481; *Lawrence v. Montgomery*, 37 Cal. 183.

7. *McAlester v. Landers*, 70 Cal. 79, 11 Pac. 505; *Salmon v. Vallejo*, 41 Cal. 481; *Lawrence v. Montgomery*, 37 Cal. 183. See notes, 5 A. L. R. 1084, as to unfounded outstand-

ing claims to or against real property as breach of covenants of deed; and 10 A. L. R. 441, as to outstanding title or claim in grantee as breach of covenant in deed.

8. See *infra*, § 42.

9. *Salmon v. Vallejo*, 41 Cal. 481 (the court intimating that the fact that there was no proof until long after the covenant was made by which the breach could be established might possibly prevent the statute of limitations from running; but this point was not decided). As to what constitutes a "final adjudication" of title, upon which the rights of the parties to a grant of land are made to depend, see *supra*, § 32.

10. *Vance v. Pena*, 33 Cal. 631.

§ 41. Effect on Running of Covenants—Liability.—A covenant running with the land is interrupted by and ceases upon breach, and thereby becomes a chose in action.¹¹ Accordingly, certain covenants, as covenants of seizin, of the right to convey, against encumbrances, and that the tract conveyed contains a specific quantity of land, being broken as soon as made, do not run with the land, and therefore are classed as personal covenants.¹²

With reference to liability the code provides as follows:

“No one, merely by reason of having acquired an estate subject to a covenant running with the land, is liable for a breach of the covenant before he acquired the estate, or after he has parted with it or ceased to enjoy its benefits.”¹³

Thus, a right of action for the breach of a covenant on the part of a lessor to pay the value of the improvements made by the lessee on the demised premises does not run with the land or bind the assignee of the lessor under an assignment made subsequent to the breach.¹⁴ But no covenant running with the land absolves the original covenantor from the obligation of the covenant, or where the parties have not used apt words in other respects either to relieve him or to shift the burden to another. And it does not follow from a stipulation that a covenant shall run with the land that the parties intend to relieve the original covenantor from liability.¹⁵

§ 42. Encumbrances and Restrictive Covenants in General.—Covenants against encumbrances, express or implied,

11. *Platner v. Vincent*, 62 Cal. Dec. 589, 202 Pac. 655. See *supra*, § 24 et seq., and see also under specific covenants, *infra*, §§ 42-49.

12. *Salmon v. Vallejo*, 41 Cal. 481; *Lawrence v. Montgomery*, 37 Cal. 183.

13. Civ. Code, § 1466.

14. *Gardner v. Samuels*, 116 Cal. 84, 58 Am. St. Rep. 135, 47 Pac.

935; *Bailey v. Richardson*, 66 Cal. 416, 5 Pac. 910.

15. *Pratt-Low Preserving Co. v. Evans*, 36 Cal. App. Dec. 1038, 204 Pac. 241; *California Packing Corp. v. Grove*, 34 Cal. App. Dec. 409, 196 Pac. 891. For distinction between privity of contract and privity of estate as basis of liability, see *supra*, § 13.

being personal and not running with the land,¹⁶ are broken, if at all, as soon as made.¹⁷ A breach of such a covenant has been held to result from an outstanding lease,¹⁸ restrictions as to use,¹⁹ building restrictions,²⁰ judgment liens,¹ assessment liens,²

16. See *supra*, § 24.

17. *McPike v. Heaton*, 131 Cal. 109, 82 Am. St. Rep. 335, 63 Pac. 179; *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542; *Salmon v. Vallejo*, 41 Cal. 481; *Lawrence v. Montgomery*, 37 Cal. 183; *Wright v. Boggess*, 24 Cal. App. 533, 141 Pac. 1082.

18. *Mann v. Montgomery*, 6 Cal. App. 646, 92 Pac. 875.

19. *Fraser v. Bentel*, 161 Cal. 390, Ann. Cas. 1913B, 1062, 119 Pac. 509 (holding that a covenant running with the land restricting the use of firearms on the premises conveyed, is a restrictive covenant as to use constituting a breach of the covenant against encumbrances). *Thurgood v. Spring*, 139 Cal. 596, 73 Pac. 456 (assumed as an "encumbrance" for the purpose of the decision).

In a case where a stone quarry tract was conveyed by deed containing a covenant on the part of the grantee, that the rock and material taken therefrom by itself, its lessees or assigns, was for railroad purposes, and that they would not carry on the business for any other purpose, it was held that such covenant was broken by the quarrying and removing of rock to be used in the construction of a harbor breakwater, and which was not for a railroad purpose. *Pavkovich v. Southern Pac. R. R. Co.*, 150 Cal. 30, 87 Pac. 1097. See note, 7 A. L. R. 817, as to period covered by covenant

or condition subsequent for maintenance of railroad.

A covenant that leased premises should be used "in good faith, continuously," for the usual and ordinary business of a ferry, and for no other purpose, is not broken by the circumstance of the libeling of the boat of the lessee and seizure thereof by the United States marshal for twenty-nine days, during which time the premises were not used for any other purpose. *Heywood v. Berkeley Land & Town etc. Assn.*, 71 Cal. 349, 12 Pac. 232.

20. *Tandy v. Waesch*, 154 Cal. 108, 97 Pac. 69; *Bertola v. Allred*, 31 Cal. App. Dec. 809, 189 Pac. 489; *Crist v. Fife*, 41 Cal. App. 509, 183 Pac. 197; *Whelan v. Rossiter*, 1 Cal. App. 701, 82 Pac. 1082. See discussion of building restrictions, *infra*, and see *supra*, § 19, as to such covenants.

1. *Waggle v. Worthy*, 74 Cal. 266, 5 Am. St. Rep. 440, 15 Pac. 831; *Woods v. Bennett*, 40 Cal. App. 34, 180 Pac. 25.

2. *Jacques v. Tomb*, 179 Cal. 444, 177 Pac. 280 (holding, however, that no breach of such covenant in a deed results from the levy of a reclamation district assessment upon the property, after the property has been conveyed); *Wright v. Boggess*, 24 Cal. App. 533, 141 Pac. 1082; *Berkeley Dev. Co. v. Marx*, 10 Cal. App. 410, 102 Pac. 278.

mortgage liens,³ tax liens,⁴ and easements and rights of way.⁵

Building restrictions are an encumbrance on title,⁶ even though the covenant is personal, if it is such a one that equity might enforce against purchasers with notice.⁷ Easements and rights of way, recognized as constituting a breach of covenant against encumbrances, are such as rights of way for water-pipes,⁸ water canals and ditches,⁹ and highways.¹⁰ And a reservation in a deed of important rights and easements for private purposes, such as the right to construct and operate street railroads, and to lay and maintain gas and water mains and conduits for electric wires and cables through, across and upon the streets adjoining the property conveyed, shows a title encumbered thereby, and does not comply with a contract for a good and sufficient title.¹¹ But it has been held that a mere privilege or license to develop and operate a mine on

3. *Thurgood v. Spring*, 139 Cal. 596, 73 Pac. 456; *Holzheier v. Hayes*, 133 Cal. 456, 65 Pac. 968.

4. *William Ede Co. v. Heywood*, 153 Cal. 615, 22 L. R. A. (N. S.) 562, 96 Pac. 81; *McPike v. Heaton*, 131 Cal. 109, 82 Am. St. Rep. 335, 63 Pac. 179; *Lawrence v. Montgomery*, 37 Cal. 183; *National Bank of Bakersfield v. Williams*, 31 Cal. App. 705, 161 Pac. 504.

5. See cases and examples, *infra*.

6. *Crist v. Fife*, 41 Cal. App. 509, 183 Pac. 197 (but not being "done, made or suffered" by the grantor, they were not a breach of the implied covenant). See DEEDS.

7. *Whelan v. Rossiter*, 1 Cal. App. 701, 82 Pac. 1082, and see *supra*, § 26 et seq.

A covenant that land conveyed to an educational institution shall be used exclusively as a campus for such institution is not substantially violated by permitting a lessee to

occupy a portion of the land for the purpose of drilling for oil thereon, where it appears that such occupation will probably be but temporary, and will not permanently injure the land for the purpose for which it was granted, and that the school is to be continued, and the revenue derived from such use of the land is to be devoted to its maintenance. *Los Angeles University v. Swarth*, 107 Fed. 798, 54 L. R. A. 262, 46 C. C. A. 647.

8. *Tandy v. Waesch*, 154 Cal. 108, 97 Pac. 69.

9. *Ferguson v. Edgar*, 178 Cal. 17, 171 Pac. 1061; *Tandy v. Waesch*, 154 Cal. 108, 97 Pac. 69; *Sisk v. Caswell*, 14 Cal. App. 377, 112 Pac. 185.

10. *Ferguson v. Edgar*, 178 Cal. 17, 171 Pac. 1061.

11. *Goldstein v. Hensley*, 4 Cal. App. 444, 88 Pac. 507.

shares is not an encumbrance of the land as against a subsequent grantee.¹²

§ 43. Breach of Implied Covenant Against Encumbrances.—To constitute a breach of the covenant against encumbrances implied under section 1113 of the Civil Code, an encumbrance must be “made, done or suffered” by the grantor, or by a person claiming under him, as distinguished from the act or sufferance of any other person.¹³ Such a breach results from an outstanding lease given by the grantor. But where it appears from the evidence in an action upon a breach of the implied covenant that at the time of the delivery of a deed, and as part of the same transaction, the grantee required and obtained the assignment of the lease, the deed and assignment must be construed as one instrument, and the deed must be held subject to the lease.¹⁴ The implied covenant is also broken by the lien of a judgment obtained against the grantor and unsatisfied at the date of the deed;¹⁵ by a street assessment levied upon the premises prior to the conveyance;¹⁶ and, likewise, a breach results where one who had taken a mortgage on property, and after assigning it to another, joined in a grant deed conveying the property subject to the mortgage.¹⁷ A building restriction incorporated in the immediate deed conveying

12. *Shaw v. Caldwell*, 16 Cal. App. 1, 115 Pac. 941.

13. See *supra*, § 32.

14. *Mann v. Montgomery*, 6 Cal. App. 646, 92 Pac. 875 (holding a finding to the contrary was against the evidence).

15. *Waggle v. Worthy*, 74 Cal. 266, 5 Am. St. Rep. 440, 15 Pac. 831.

16. *Berkeley Dev. Co. v. Marx*, 10 Cal. App. 410, 102 Pac. 278 (holding that documents which are prima facie evidence of the regularity and correctness of the as-

sessments are admissible in an action on the implied covenant against encumbrances, to show there was an encumbrance on the land conveyed by deed of “grant” to a grantee, and that the grantee, or his assignee, is entitled to recover on such implied covenant); *Wright v. Boggess*, 24 Cal. App. 533, 141 Pac. 1082 (assuming for the purpose of the decision that the assessment was “an encumbrance done, made or suffered by the grantor.”)

17. *Holzheier v. Hayes*, 133 Cal. 456, 65 Pac. 968.

the property to the grantor, is a breach of the covenant implied from the grantor's deed;¹⁸ but where such a restriction was an encumbrance upon the land before the grantor acquired title thereto, it does not constitute such breach.¹⁹ The covenant against encumbrances implied from a grant embraces taxes levied for the fiscal year succeeding the date of the grant, which, under section 3718 of the Political Code, were a lien upon the land as of the first Monday of March preceding the date of the grant.²⁰ But such covenant being a personal one, a succeeding grantee who has paid the taxes cannot maintain an action against the first grantee upon it.¹

A tax upon a mortgagee's interest, under a mortgage executed by the grantor, which is paid by the grantee, is an encumbrance "done, made or suffered" by a "person claiming under" the grantor, within the code provision.² But where a conveyance was made by a grant deed by one whose grantor was then in possession of the premises claiming that his deed, though absolute in form, was intended as a mortgage, and the second grantee was subsequently successful in defending a suit brought against him to redeem the premises from the alleged mortgage, and also in prosecuting an action of ejectment to recover possession of the premises, it was held there had been no breach of the covenants implied in the second deed.³ Where a lien has attached to property prior to the acqui-

18. *Fraser v. Bentel*, 161 Cal. 390, Ann. Cas. 1913B, 1062, 119 Pac. 509.

19. *Crist v. Fife*, 41 Cal. App. 509, 183 Pac. 197. Compare *Thurgood v. Spring*, 139 Cal. 596, in which a restrictive covenant contained in "one of the deeds under which the grantor deraigned title," was assumed to be a breach of the implied covenant for the purpose of the decision.

20. *McPike v. Heaton*, 131 Cal.

109, 82 Am. St. Rep. 225, 63 Pac. 179; *National Bank of Bakersfield v. Williams*, 31 Cal. App. 705, 161 Pac. 504.

1. *McPike v. Heaton*, 131 Cal. 109, 82 Am. St. Rep. 335, 63 Pac. 179.

2. *William Ede Co. v. Heywood*, 153 Cal. 615, 22 L. R. A. (N. S.) 562, 96 Pac. 81.

3. *West v. Masson*, 67 Cal. 169, 7 Pac. 452.

sition of title by the grantor, the fact that it could have been removed and discharged by payment does not constitute it an encumbrance "suffered" by the grantor within the implied covenant.⁴

Like the express covenant against encumbrances, the implied covenant is broken, if at all, as soon as made.⁵

§ 44. Visible Easements as Breach.—Under the exception made in respect to existing and visible easements and burdens which affect the physical condition of the land,⁶ it has been held that an agreement to convey land "free and clear of all encumbrances" is not broken by the existence of a state highway upon the property, the use of which was open and notorious;⁷ or by an easement upon which the value of the land largely depended, as, for example, by an existing and visible canal or water ditch, the purpose of which was to convey water for irrigating the land in common with other land in the vicinity, and without which, as known by the vendees, the land would be valueless.⁸ Similarly, an existing and visible levee constructed by a reclamation district consisting of a high embankment dividing a farm into two tracts inaccessible from each other except by a circuitous route across the lands of other parties, thus rendering the farming operation of the land more expensive than it would be otherwise, and greatly depreciating the value of the farm, is not a breach of a covenant against encumbrances.⁹

§ 45. Implied Against Prior Conveyance.—The covenants implied under section 1113 of the Civil Code being against the personal acts of the grantor,¹⁰ the mere fact

4. Woodward v. Brown, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542. As to the construction of the word "suffered," see § 32, supra.

5. See supra, §§ 31, 42.

6. See supra, § 33.

7. Ferguson v. Edgar, 178 Cal. 17, 171 Pac. 1061.

8. Ferguson v. Edgar, 178 Cal. 17, 171 Pac. 1061; Sisk v. Caswell, 14 Cal. App. 377, 112 Pac. 185.

9. Jaques v. Tomb, 179 Cal. 444, 177 Pac. 280.

10. See supra, § 32. See supra, § 40, as to breach of personal covenants generally.

that the title to the land, or to part of it, which a grant, bargain and sale deed purports to convey, stands in a third person, is not, under that section, a breach of the implied covenant against a prior conveyance by the grantor, where the defect or failure of title was not caused by any act of the grantor; nor is the grantor liable for such defect or failure of title in the absence of fraud.¹¹ But where a deed of grant expressly granted a water right as an appurtenance to land thereby conveyed, and such water right had been previously conveyed by the grantor to a third person, the grantor was held liable for damages on the implied covenant against a prior conveyance.¹²

A license being a mere personal privilege,¹³ the granting of a license in respect to the occupancy and use of real property is not a conveyance of any "right, title or interest" therein, within the meaning of those words as used in the first subdivision of the above code section. Thus, where the owner of a mine granted a one-half interest therein, together with a license to the grantee to work the owner's remaining interest on shares for a period of twenty years, such license was revoked by the subsequent absolute conveyance of the owner's remaining half interest to another, and the license did not constitute a breach of any covenant implied by the second grant.¹⁴

§ 46. Quiet Enjoyment.—As to the covenant for quiet enjoyment, the rule is that there can be no breach without an eviction, actual or constructive.¹⁵ The eviction must

11. *Bryan v. Swain*, 56 Cal. 616; *Gaffey v. Welk*, 31 Cal. App. Dec. 643, 189 Pac. 300.

12. *Lyles v. Perrin*, 134 Cal. 417, 66 Pac. 472.

13. See LICENSES.

14. *Shaw v. Caldwell*, 16 Cal. App. 1, 115 Pac. 941.

15. *McAlester v. Landers*, 70 Cal. 79, 11 Pac. 505; *McGary v. Hast-*

ings, 39 Cal. 360, 2 Am. Rep. 456 (holding that where title to land granted was in the United States, and a petition by the grantor for confirmation of the title was pending at the time of the grant, a subsequent rejection of the claim as invalid justified the purchase of the outstanding title by the grantee, and that his eviction, actual or

be by a superior or paramount title or right,¹⁶ or, as it has been said, by the assertion of paramount, adverse and legal right.¹⁷ And the paramount right must be asserted in such a manner that the holder, through the covenantor, is compelled to yield possession or buy the outstanding superior title.¹⁸ The eviction need not be by actual dis-possession;¹⁹ and if the assertion of the paramount title is such that the grantee cannot avoid yielding to it, or by reason of such assertion is unable to secure possession, there is an eviction as complete as would attend removal by force.²⁰ Nor is it necessary to establish the paramount title by judgment before the covenantee will be authorized to surrender possession. It is enough that the true owner asserts his title and demands possession. In such case, so far as that title is concerned, the covenantee has been evicted, and is in under the paramount title. There is no reason why a surrender without the trouble and expense of a lawsuit should deprive him of a remedy on the covenant. But in an action on the covenant it is incumbent upon him to establish that the title to which he has submitted is a paramount title.¹ The fact, however, that the

constructive, became complete at the time he entered and began to hold under the paramount title); *Levitzky v. Canning*, 33 Cal. 299; *Fowler v. Smith*, 2 Cal. 568; and see cases cited *infra*, this section.

16. *Platner v. Vincent*, 62 Cal. Dec. 589, 202 Pac. 655; *McCormick v. Marcy*, 165 Cal. 386, 132 Pac. 449; *McDonald v. McElroy*, 60 Cal. 484; *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; *Fowler v. Smith*, 2 Cal. 39.

17. *McDonald v. McElroy*, 60 Cal. 484.

18. *McCormick v. Marcy*, 165 Cal. 386, 132 Pac. 449, per *Shaw, J.*, citing to this point: *McAlester v. Landers*, 70 Cal. 79, 11 Pac. 505;

McGary v. Hastings, 39 Cal. 360, 2 Am. Rep. 456; *Levitzky v. Canning*, 33 Cal. 299; and *Playter v. Cunningham*, 21 Cal. 229. And see *Platner v. Vincent*, 62 Cal. Dec. 589, 202 Pac. 655, quoting and affirming the rule as stated by Mr. Justice Shaw, now chief justice.

19. *Platner v. Vincent*, 62 Cal. Dec. 589, 202 Pac. 655 (stating the general rule); *McCormick v. Marcy*, 165 Cal. 386, 132 Pac. 449; *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456.

20. *Platner v. Vincent*, 62 Cal. Dec. 589, 202 Pac. 655; *Playter v. Cunningham*, 21 Cal. 229.

1. *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456, the court say-

title to the land conveyed stands in a third person does not constitute a breach of the covenant, if the grantee enters and remains in the undisturbed possession of the land.³

Under the rule that one tenant in common is entitled to the possession of the whole estate against all persons except his cotenants,³ it has been held that a judgment for the possession of the entire land embraced in a deed, rendered in favor of two of the three tenants in common who held the paramount title, operates as an eviction of the entire land, and as a complete breach of the covenant for quiet enjoyment.⁴

§ 47. Warranty.—To constitute a breach of a covenant of warranty there must be an eviction of the covenantee by a superior or paramount title.⁵ The reason for the doctrine is that there can be no approximation to a correct measure of damages until eviction.⁶ While it seemed to be the rule in the earlier cases that eviction by process of law was requisite to enable action to be maintained on a covenant of warranty,⁷ that view has been repudiated, and the rule is laid down that the covenant is broken whenever there has been an involuntary loss of possession by reason of the hostile assertion of an irresistible paramount title. In warranty as upon the covenant for quiet enjoy-

ing: "To constitute a breach of this covenant, it cannot be required that the covenantee should maintain a wrongful possession, and subject himself to be treated as a trespasser. The object of a suit by the true owner would be to compel the covenantee to do that which he ought to have done without suit." Compare with *infra*, § 47.

2. *Bryan v. Swain*, 56 Cal. 616.

3. See *COTENANCY*, *ante*, p. 328.

4. *McCormick v. Marcy*, 165 Cal. 386, 132 Pac. 449 (holding the statute of limitations began to run from the time of such breach).

5. *West v. Masson*, 67 Cal. 169, 7 Pac. 452; *McDonald v. McElroy*, 60 Cal. 484; *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 156; *Norton v. Jackson*, 5 Cal. 262.

6. *Norton v. Jackson*, 5 Cal. 262.

7. *Norton v. Jackson*, 5 Cal. 262; *Fowler v. Smith*, 2 Cal. 568.

ment, it is enough that the true owner asserts his title and demands the possession.⁸

A covenant of the grantor warranting the title of the land sold as "indisputable and satisfactory" is not broken if the title is "good and valid," and so it has been held that a purchaser under such circumstances cannot, because he may have become tired of his bargain, or for any other insufficient cause, say he is dissatisfied and thus avoid his contract.⁹ And where one conveyed by a deed of warranty, the covenant of warranty is not broken by the act of the covenantor's predecessor in possession claiming that his own deed was intended merely as a mortgage, and bringing an action against the covenantor and covenantee to redeem the same, where the latter defended such action successfully.¹⁰

§ 48. Voucher to Warranty.—Where a covenantee in a deed containing a covenant to warrant and defend the quiet and peaceable possession, or one who derives title to the land from him, is sued for possession by a person claiming a paramount title, the defendant may give notice of the suit to any previous covenantor under whom he derived title and request him to come in and defend the title warranted. This proceeding is called a "voucher to warranty." The covenantor so vouched in may then appear in the action and defend the same, and whether he appears or not, he is bound by the judgment rendered in the action. It is conclusive upon the person thus vouched in, with respect to the superiority of the adverse title asserted

8. *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456, and see *supra*, § 46.

9. *Winter v. Stock*, 29 Cal. 407, 89 Am. Dec. 57.

10. *West v. Masson*, 67 Cal. 169, 7 Pac. 452; *Dodge v. Walley*, 22 Cal. 224, 83 Am. Dec. 61 (holding

that a person who conveys by warranty deed and remains in possession is not entitled to notice to quit or demand of possession from his grantee or those claiming under him before the commencement of an action to eject him). As to covenants of warranty as passing an after-acquired title, see *DEEDS*.

by the plaintiff in the action.¹¹ In the absence of legal notice to the covenantor, a judgment of eviction cannot be used as evidence to support a recovery upon the covenant. To be available, the notice must apprise the party whose rights are to be affected of what is required of him, and the consequences which may follow if he neglects to defend the action.¹² The plaintiff in such action must go further and show that he was unable to resist the title upon which he was sued.¹³

§ 49. To Convey or Reconvey.—Following the ordinary rule of contracts that where no time has been specified for performance, a performance will nevertheless be required within a reasonable time,¹⁴ it has been held that where a grantor covenanted in his deed to procure a reconveyance to himself of portions of the land described in the deed, which he had conveyed to others, or to convey other lands of equal value, but no time was specified for performance of the covenant, a delay of eight years was held to be unreasonable and to constitute a breach of the covenant.¹⁵ It is also a familiar rule of the law of contracts that while a failure to perform within a specified time gives ground for an action of damages, it will not defeat the contract where time has not been made of the essence.¹⁶ Accordingly, where a deed contained a provision that the grantee, within one year from its date, should reconvey the grantor a specified quantity of the land conveyed, to be selected by the grantor, and time was not

11. *McCormick v. Marcy*, 165 Cal. 386, 132 Pac. 449 (per Shaw, J.). See *Pezel v. Yerex*, 37 Cal. App. Dec. 256, 205 Pac. 475, applying the general principle to a warranty of title to personal property, and determining the sufficiency of a notice to the warrantor to defend.

12. *Peabody v. Phelps*, 9 Cal. 213, per Field, J. See PROCESS.

13. *Bensley v. Atwill*, 12 Cal. 231; *Peabody v. Phelps*, 9 Cal. 213.

14. See CONTRACTS, vol. 6, §§ 207-209.

15. *Vance v. Pena*, 41 Cal. 686.

16. See CONTRACTS, vol. 6, § 211, as to time as essence of contract.

made of the essence, the right to select the land to be conveyed, and to a reconveyance, was held not to be lost to the grantor by his failure to exercise the right within one year. It was also held that such conveyance and covenant created an express trust, and that a cause of action did not arise from the failure to reconvey until a repudiation of the trust and such repudiation was brought to the knowledge of the grantor.¹⁷

VII. DAMAGES.

§ 50. **In General.**—The code provides as follows:

“The detriment caused by the breach of a covenant of ‘seisin,’ of ‘right to convey,’ of ‘warranty,’ or of ‘quiet enjoyment,’ in a grant of an estate in real property, is deemed to be: (1) The price paid to the grantor; or, if the breach is partial only, such proportion of the price as the value of the property affected by the breach bore at the time of the grant to the value of the whole property; (2) Interest thereon for the time during which the grantee derived no benefit from the property, not exceeding five years; (3) Any expenses properly incurred by the covenantee in defending his possession.”¹⁸

And so, where one in good faith sold and attempted to convey to another by warranty deed the land within a certain enclosure, but did not have full title to, and the deed did not cover a portion of the land, the measure of damages was held to be such portion of the price as the value of the property affected by the breach bore at the

17. *Hearst v. Pujol*, 44 Cal. 230. For covenants to reconvey and defeasances in general, see MORTGAGES; TRUSTS.

18. Civ. Code, § 3304.

It has been said that the rule of damages in the case of a breach of covenant warranting title where there has been an actual loss of the premises is the consideration paid

and interest to the date of the judgment of eviction, and that this rule prevails in nearly all the states of the Union. *Tropico Land etc. Co. v. Lambourn*, 170 Cal. 33, 148 Pac. 206. See *infra*, § 51, as to measure of damages for breach of covenant against encumbrances; and *infra*, § 53, as to breach of covenant for quiet enjoyment.

time of the grant to the value of the whole property.¹⁹ On a question as to the detriment resulting from the breach of an implied covenant, as, for example, against the prior conveyance to a third person of a water right expressly granted in a deed as appurtenant to the land conveyed, it has been held that it is the value of the property, i. e., in such case, the water right.²⁰

It has been said that it really makes little difference, upon a question as to the measure of damages contemplated by section 3306 of the Civil Code and that prescribed in section 3304 of the same code, whether an action is regarded as founded in part on breach of the covenant of peaceable possession or upon a violation of an agreement to convey an estate in real property. "The element of bad faith would clothe a court, upon plain principles, with the power to fix damages according to the detriment shown by the existing special circumstances."²¹

§ 51. Encumbrances.—The measure of damages for the breach of a covenant against encumbrances is, ordinarily, the amount which the plaintiff has actually expended in removing the encumbrance, not exceeding the value of the property at the time of the breach. This rule, which is substantially that embodied in the code,² refers to such encumbrances as mortgages and other liens which may be satisfied by the payment of money. It is not applicable to encumbrances like easements or restrictions on the use of land which cannot be extinguished at the will of the owner by the payment of any sum. In such cases the damages are based upon the natural and proximate consequences to the plaintiff of the existence and continuance of the encumbrance, and are to be estimated by the amount which

19. *Hoffman v. Kirby*, 136 Cal. 26, 68 Pac. 321.

20. *Lyles v. Perrin*, 134 Cal. 417, 66 Pac. 472.

1. *Kline v. Guaranty Oil Co.*, 167

Cal. 476, 140 Pac. 1, per Melvin, J. See *infra*, § 52, for rule of damages for breach of covenant of quiet enjoyment. And see DAMAGES.

2. See Civ. Code, § 3305.

the existence of the encumbrance reduces the market value of the land. This is in accord with the general rule providing for the measure of damages for the breach of an obligation arising from contract.³ Applying this principle it has been held that where the grantor at the time of the sale did not know that the grantee was buying for the purpose of resale, losses resulting to the latter from his inability to complete particular sales of portions of the land on account of the existence of a restrictive covenant against the use of firearms, were too remote to be recovered as an element of damages for the breach of the covenant.⁴

Until the covenantee has been evicted or has otherwise suffered actual damage from the breach of the covenant against encumbrances, no right of action accrues to him,⁵ at least no more than nominal damages can be recovered on account of an encumbrance which has inflicted no actual injury upon the grantee.⁶ The reason is that the encumbrance may not, if left alone, ever be asserted against the covenantee, as it may be paid off or satisfied in some other way.⁷ Where, however, the covenant is in the form of an agreement to pay and discharge an encumbrance, such as a judgment lien, the liability of the covenantor is immediate upon his failure to perform it, and the covenantee, although he has not extinguished it, is entitled to recover the amount of the judgment as damages.⁸

3. *Fraser v. Bentel*, 161 Cal. 390, Ann. Cas. 1913B, 1062, 119 Pac. 509; *Thurgood v. Spring*, 139 Cal. 509. See Civ. Code, § 3300. See *Woods v. Bennett*, 40 Cal. App. 34, 180 Pac. 25; *Wright v. Boggess*, 24 Cal. App. 533, 141 Pac. 1082.

4. *Fraser v. Bentel*, 161 Cal. 390, Ann. Cas. 1913B, 1062, 119 Pac. 509.

5. *Wright v. Boggess*, 24 Cal. App. 533, 141 Pac. 1082.

6. *Fraser v. Bentel*, 161 Cal. 390, Ann. Cas. 1913B, 1062, 119 Pac. 509; *Woods v. Bennett*, 40 Cal. App. 34, 180 Pac. 25.

7. *Woods v. Bennett*, 40 Cal. App. 34, 180 Pac. 25.

8. *Woods v. Bennett*, 40 Cal. App. 34, 180 Pac. 25.

§ 52. Quiet Enjoyment.—The measure of damages for breach of a covenant for quiet enjoyment provided in section 3304 of the Civil Code⁹ was the rule of damages in California prior to the enactment of the code.¹⁰ Under this provision the price paid to the grantor constitutes one of the elements of the measure of damages for a full breach of the covenant, and it remains such, notwithstanding his covenantee had conveyed the land prior to the breach for a less consideration, and, after the breach, had settled with his grantee for a corresponding less amount. However inadequate a return of the purchase money may be in certain cases, it has been said that the code rule is, on the whole, the safest measure that can be followed.¹¹ Where the covenantee has purchased the paramount title, his detriment is the sum actually and in good faith paid therefor,¹² and also any amount expended in defending his possession,¹³ including costs and attorneys' fees;¹⁴ provided such damages shall in no case exceed the purchase money and interest.¹⁵

9. See *supra*, § 50.

10. *McCormick v. Marcy*, 165 Cal. 386, 132 Pac. 449; *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456.

11. *McCormick v. Marcy*, 165 Cal. 386, 132 Pac. 449, per Shaw, J.

12. *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456.

13. *McCormick v. Marcy*, 165 Cal. 386, 132 Pac. 449; *McAlester v. Landers*, 70 Cal. 79, 11 Pac. 505; *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; *Levitzky v. Canning*, 33 Cal. 299.

14. *McCormick v. Marcy*, 165 Cal. 386, 132 Pac. 449; *Levitzky v. Canning*, 33 Cal. 299. See *supra*, § 48.

And such attorney's fees, incurred in defending an action for possession brought by part of the tenants in common holding the paramount title, were held recoverable, notwithstanding the covenantee and his grantee failed to set up the title of the other cotenant as a defense to the action, where the covenantor had been "vouched to warranty" and failed to respond, and the judgment rendered was conclusive against him. *McCormick v. Marcy*, 165 Cal. 386, 132 Pac. 449.

15. *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; Civ. Code, § 3304 (see *supra*, § 50).

VIII. ACTIONS.

§ 53. **Remedies Generally.**—The ordinary remedy for the nonfulfillment of a covenant is that the delinquent party must respond in damages,¹⁶ but the covenantee may, in a proper case, rescind the transaction and recover the consideration parted with.¹⁷ An action on a covenant, being an action on contract,¹⁸ is to be distinguished from an action based upon false or fraudulent representations of title. And where a grantee has received a deed containing express or implied covenants, his remedy is not restricted to such covenants. He may sue independently for the fraud,¹⁹ although the contrary seems to have been held.²⁰

16. *Platner v. Vincent*, 62 Cal. Dec. 589, 202 Pac. 655; *Jaques v. Tomb*, 179 Cal. 444, 177 Pac. 280; *McCormick v. Marey*, 165 Cal. 386, 132 Pac. 449; *Fraser v. Bentel*, 161 Cal. 390, Ann. Cas. 1913B, 1062, 119 Pac. 509; *Roberts v. Krafts*, 141 Cal. 20, 74 Pac. 281; *Thurgood v. Spring*, 139 Cal. 596, 73 Pac. 456; *Hoffman v. Kirby*, 136 Cal. 26, 68 Pac. 321; *Lyles v. Perrin*, 134 Cal. 417, 66 Pac. 472; *Holzheier v. Hayes*, 133 Cal. 456, 65 Pac. 968; *McPike v. Heaton*, 131 Cal. 109, 82 Am. St. Rep. 335, 63 Pac. 179; *Bean v. Stoneman*, 104 Cal. 49, 37 Pac. 777, 38 Pac. 39; *Peckham v. Stewart*, 97 Cal. 147, 31 Pac. 928; *Lyford v. North Pac. C. R. R. Co.*, 92 Cal. 93, 28 Pac. 103; *Waggle v. Worthy*, 74 Cal. 266, 5 Am. St. Rep. 440, 15 Pac. 831; *West v. Masson*, 67 Cal. 169, 7 Pac. 452; *Salmon v. Vallejo*, 41 Cal. 481; *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; *Lawrence v. Montgomery*, 37 Cal. 183; *Woods v. Bennett*, 40 Cal. App. 34, 180 Pac. 25; *Southern Pac. Co. v. Dore*, 34 Cal.

App. 521, 168 Pac. 147; *Wright v. Boggess*, 24 Cal. App. 533, 141 Pac. 1082; *Womble v. Womble*, 14 Cal. App. 739, 113 Pac. 353; *Berkeley Dev. Co. v. Marx*, 10 Cal. App. 410, 102 Pac. 278; *Mann v. Montgomery*, 6 Cal. App. 646, 92 Pac. 875; *Holzheier v. Hayes*, 5 Cal. Unrep. 965, 52 Pac. 838; *Los Angeles University v. Swarth*, 107 Fed. 798, 46 C. C. A. 647, 54 L. R. A. 262.

17. See **VENDOR AND PURCHASER**.

18. See *supra*, § 2.

19. *Hoffman v. Kirby*, 136 Cal. 26, 68 Pac. 321; *Morris v. Courtney*, 120 Cal. 63, 52 Pac. 130; *Lawrence v. Montgomery*, 37 Cal. 183; *Wright v. Carillo*, 22 Cal. 595; *Alvarez v. Brannan*, 7 Cal. 503, 68 Am. Dec. 274 (overruled by *Peabody v. Phelps*, 9 Cal. 213).

20. *Peabody v. Phelps*, 9 Cal. 213. See *Wright v. Carillo*, 22 Cal. 595, noting the conflict existing between *Peabody v. Phelps*, *supra*, and *Alvarez v. Brannan*, 7 Cal. 503, 68 Am. Dec. 274, and leaning toward the view taken in the *Alvarez* case. However, since the point was not

Equity will, in a proper case, specifically enforce covenants, such as covenants to convey,¹ or restricting the use of property,² or creating an easement.³ But specific performance will not lie against a warrantor to compel him to purchase an outstanding title and convey it to the warrantee, notwithstanding an allegation that the owner of the outstanding title is willing and anxious to sell the same for its reasonable market value. Even if the decree were granted, non constat but that the owner would subsequently refuse to sell, and in such event the court would be powerless to enforce its decree.⁴

The injunctive remedy may be also invoked to restrain a threatened violation of covenants restricting the use of land,⁵ or affecting water rights for irrigation purposes.⁶

And the validity of covenants is often tested by actions to quiet title,⁷ or by actions of ejectment.⁸

involved in the Carillo case, no other expression than the above was given. See, generally, **VENDOR AND PURCHASER.**

1. *Vance v. Pena*, 41 Cal. 686; *Green v. Covillaud*, 10 Cal. 317, 70 Am. Dec. 725.

2. *Bryan v. Grosse*, 155 Cal. 132, 99 Pac. 499; *Los Angeles University v. Swarth*, 107 Fed. 798, 46 C. C. A. 647, 54 L. R. A. 262.

3. *McDonald v. McElroy*, 60 Cal. 484.

4. *Tropico Land etc. Co. v. Lambourn*, 170 Cal. 33, 148 Pac. 206. As to actions for enforcing building restrictions, see **DEEDS.** And see **SPECIFIC PERFORMANCE.**

5. *Long v. Cramer M. & P. Co.*, 155 Cal. 402, 101 Pac. 297; *Pavkovich v. Southern Pac. R. R. Co.*, 150 Cal. 39, 87 Pac. 1097; *Los Angeles Terminal etc. Co. v. Muir*, 136 Cal. 36, 68 Pac. 308; *Los Angeles University v. Swarth*, 107 Fed. 798, 46 C. C. A. 647, 54 L. R. A. 262.

6. *Pomona L. & W. Co. v. San Antonio Water Co.*, 152 Cal. 618, 93 Pac. 881; *Hunt v. Jones*, 149 Cal. 297, 86 Pac. 686; *Weill v. Baldwin*, 64 Cal. 476, 2 Pac. 249. As to enjoining breach of building restriction, see **DEEDS.**

7. *Weller v. Brown*, 160 Cal. 515, 117 Pac. 517; *Behlow v. Southern Pac. R. R. Co.*, 130 Cal. 16, 62 Pac. 295; *Anderson v. Yoakum*, 94 Cal. 227, 28 Am. St. Rep. 121, 29 Pac. 500; *Maynard v. Polhemus*, 74 Cal. 141, 15 Pac. 451; *Weller v. Brown*, 25 Cal. App. 216, 143 Pac. 251; *Strong v. Shatto*, 30 Cal. App. Dec. 903, 87 Pac. 159; *Sisk v. Caswell*, 14 Cal. App. 377, 112 Pac. 185; *Guaranty Realty Co. v. Recreation Gun Club*, 12 Cal. App. 383, 107 Pac. 625. For actions quieting title against building restrictions, see **DEEDS; QUIETING TITLE.**

8. *Barrett v. Birge*, 50 Cal. 655; *Kimball v. Semple*, 25 Cal. 440; *Dodge v. Walley*, 22 Cal. 224, 83

In addition to the various remedies noted above, a grantee of land in possession with covenants of warranty, when sued for possession by one holding paramount title, may, by the proceeding termed "voucher to warranty," require his warrantor to appear and defend the title warranted.⁹

§ 54. Venue.—An action for breach of covenant of title, such as of seizin and for quiet enjoyment, sounding in damages, is not one to try title in the sense that requires the suit to be brought in the jurisdiction where the land is situated. But a distinction is made between a right of action founded upon a right of contract, or, as it is termed, privity of contract, and a right founded upon privity of estate.¹⁰ The rule is laid down that when an action of covenant is founded on privity of contract between the parties, their executors or administrators, it is transitory, and may be sued as a transitory action; but when it is founded on privity of estate, the action is then local, and must be sued in the county where the land lies. Thus, where the covenant is contained in a deed, and the breach occurs while the original grantee still holds the interest conveyed to him, the claim becomes a chose in action,¹¹ is transitory and is enforceable in any jurisdiction where the grantor may be found, irrespective of whether the covenant does or does not run with the land. On the other hand, where an assignee or grantee of the original grantee seeks damages for breach of a covenant running with the land, in the absence of a contract that the covenant should inure to his benefit,¹² there is no privity of contract, and the assignee's right to enforce the covenant

Am. Dec. 61; *Gee v. Moore*, 14 Cal. 472; *Blackwell v. Atkinson*, 14 Cal. 470. See EJECTMENT.

9. See supra, § 48. As to grounds for the equitable enforcement of personal covenants restricting the use of land, see supra, §§ 19, 27.

10. *Platner v. Vincent*, 62 Cal. Dec. 589, 202 Pac. 655. See supra, §§ 13, 14.

11. See supra, § 40.

12. See supra, § 14.

rests on privity of estate, and his action must be brought in the jurisdiction where the land lies.¹³

§ 55. **Parties.**—All grantees should join as plaintiffs in an action upon either a direct or implied covenant in a deed that the grantor has not sold or encumbered or upon one that he is seised of and has a right to convey the land.¹⁴ Upon the same principle it has been held that an action upon the covenant made with a husband and wife as to certain uses to which the land must be put cannot be maintained by the husband alone, where the grant was by the wife, unless he is shown to be the assignee of his wife's interest in the covenant.¹⁵ Where one seeks to enforce a covenant restricting the use of land, he must show that he is the owner of, or has an interest in, the premises in favor of which the benefit or privilege has been created; otherwise he has no interest in the covenant and is a mere intruder.¹⁶ So where a covenant, restricting the use of lots was for the benefit of the remaining lands of the grantor, and an action was brought by one of the lot purchasers to quiet his title against the restrictions, it was held that the other lot purchasers had no such interest in the subject of the action that they would either gain or lose by the direct and legal effect of the judgment, and were not entitled to intervene to restrain the plaintiff from avoiding the covenant.¹⁷ In an action for damages for the

13. *Platner v. Vincent*, 62 Cal. Dec. 589, 202 Pac. 655 (reversing decision of district court of appeals, which drew a distinction between personal and real covenants, holding that the personal covenants are no part of a deed proper, and hence a right of action based thereon is transitory and not local. See 33 Cal. App. Dec. 407; and see CONFLICT OF LAWS, §§ 31, 32, which article was published before the decision by the supreme court was handed down).

14. *Lawrence v. Montgomery*, 37 Cal. 183.

15. *Lyford v. North Pacific Coast R. R. Co.*, 92 Cal. 93, 28 Pac. 103.

16. *Guaranty Realty Co. v. Recreation Gun Club*, 12 Cal. App. 383, 107 Pac. 625; *Los Angeles University v. Swarth*, 107 Fed. 798, 46 C. C. A. 647, 54 L. R. A. 232.

17. *Guaranty Realty Co. v. Recreation Gun Club*, 12 Cal. App. 383, 107 Pac. 625.

breach of covenants of seizin and quiet enjoyment under a grant, bargain and sale deed, where it appeared from the complaint that the grantors executed the deed as joint and several obligors, one of them may be sued alone and held severally liable.¹⁸

§ 56. Joinder of Causes.—An action which is based upon an alleged breach of the implied covenants in a deed, and also upon alleged fraudulent representations as to the title, is based upon two distinct causes which cannot be joined.¹⁹ But the rule against a misjoinder is subject to the principle that if the facts alleged and found are such as to entitle the plaintiff to relief on any ground, the complaint will be sufficient.²⁰ Accordingly, in an action by a grantee, under a warranty deed, for deceit and fraud based upon alleged false representations of the grantor as to her title, and seeking to cancel, in whole or in part, a mortgage given for the purchase price, where the facts alleged and found were insufficient to show fraud, but were such as to entitle the plaintiff to a reformation of the deed to include land intended to be conveyed and to which the grantor's title was defective, it was held not necessary that a new suit should be begun on the covenant of warranty, but that such covenant might be enforced in the same suit under a proper state of the pleadings, proofs and findings.¹

18. *Platner v. Vincent*, 62 Cal. Dec. 589, 202 Pac. 655.

The covenant against encumbrances implied in a grant of real estate, under section 1113 of the Civil Code, imposes a personal obligation on the grantor; if there are two grantors, such obligation is joint and several, and is binding on one of them, although he may have had no interest in the land at the

time of the execution of the grant; *Holzheier v. Hayes*, 133 Cal. 456, 65 Pac. 968.

19. *Lawrence v. Montgomery*, 37 Cal. 183. As to joinder of causes generally, see *ACTIONS*, vol. 1, p. 345.

20. See *PLEADING*.

1. *Hoffman v. Kirby*, 136 Cal. 26, 68 Pac. 321. (In such case the breach of warranty being available

§ 57. **Defenses.**—Under the principle of estoppel by warranty discussed in a previous section,² where a purchaser at an execution sale brought an action to recover the premises from one who, previous to the sale, had conveyed them to the execution debtor by a warranty deed, the defendant cannot avail himself by way of defense of any defects in description in the sheriff's deed to the plaintiff.³ It is under an extension of the same principle that a warrantor of title cannot impeach a judgment for possession of the premises rendered in favor of the superior title, after being requested to come in and defend the title warranted. Thus, where one who has covenanted in a deed to warrant and defend the quiet and peaceable possession has been regularly vouched to warranty in an action brought to recover possession from the grantee of his covenantee, and has failed to respond, he cannot, in a subsequent action brought against him by his covenantee for breach of the warranty, impeach the judgment of ouster by urging defenses which might have been made in the action for the possession.⁴ Under the rule that a defense will not ordinarily be considered which has no substantial or intrinsic merit, it has been held, in an action for breach of an implied covenant against encumbrances, that a defense that the plaintiff failed to perform his agreement to satisfy a deficiency judgment against one of the defendants and covenantors, until after it was barred by the statute of limitations, is immaterial, where no damage from the delay is shown.⁵

as a defense to an action on the obligation, it was equally available as an affirmative cause of action.)

2. See *supra*, § 39.

3. *Dodge v. Walley*, 22 Cal. 224, 83 Am. Dec. 61.

4. *McCormick v. Marcy*, 165 Cal. 386, 132 Pac. 449.

5. *Holzheier v. Hayes*, 133 Cal. 456, 65 Pac. 968. As to breach of covenant of warranty being available as a defense in a suit for purchase price, see *MORTGAGES; NEGOTIABLE INSTRUMENTS; VENDOR AND PURCHASER*.

§ 58. **Pleading.**—In actions on covenant breaches may be assigned by negating the words of the covenant; but when such general assignment does not amount to a breach, the breach must be specially assigned.⁶ It has been pointed out that unless a covenantee has been evicted or has suffered damage for the breach of covenant against encumbrances, no right of action accrues to him.⁷ It is clear, therefore, that a complaint in an action to recover damages for such a breach, which fails to allege the payment or discharge of the encumbrance, but affirmatively shows the continued existence thereof, does not state a cause of action.⁸ A complaint against the heirs of the warrantor for breach of a covenant of warranty must allege that the heirs were named in and bound by the covenant.⁹ And it has been held that where one has covenanted to procure the reconveyance of portions of a tract, described and identified as having been conveyed by the covenantor and another (naming them conjunctively), a complaint for breach of the covenant is insufficient which fails to allege such joint conveyance.¹⁰ It has been held also that a complaint in an action to enforce specifically a covenant of warranty by requiring the estate of the deceased warrantor to purchase an outstanding interest in the property and convey the same to the plaintiff, fails to state a cause of action, notwithstanding it is alleged that the holder of such interest is willing to sell the same at its reasonable market value.¹¹ Where a cause of action upon a covenant was defectively pleaded, but the defects were supplied in an amended complaint which added a new cause of action on a distinct covenant, the complaint was

6. 7 Ruling Case Law, p. 1194.
And see PLEADING.

7. See *supra*, § 52.

8. *Wright v. Boggess*, 24 Cal. App. 533, 141 Pac. 1082.

9. *McDonald v. McElroy*, 60 Cal. 484.

10. *Vance v. Pena*, 33 Cal. 631.

11. *Tropico Land etc. Co. v. Lam-bourn*, 170 Cal. 33, 148 Pac. 206.

held good as against a general demurrer, although the new cause of action was barred by the statute of limitations.¹²

§ 59. Findings and Judgment.—As in actions generally, a decree in an action for breach of a covenant must be supported by the findings,¹³ and findings are to be considered even though one or more of them are found among the conclusions of law.¹⁴ The findings must be supported by the evidence.¹⁵ Under the familiar principle of avoiding circuity of action,¹⁶ it has been held that where a mortgagor of two lots has conveyed one of them with a covenant of warranty against his own acts, he cannot complain that the decree of foreclosure has ordered the sale of the un conveyed lot for the payment of the mortgage debt, on the familiar principle of avoiding a circuity of action, the mortgagor being liable on his warranty.¹⁷ While a suit to quiet title against restrictions on the use of land is a suit in equity, a judgment which goes further than denying plaintiff relief and affirmatively makes his

12. *Storer v. Austin*, 136 Cal. 588, 69 Pac. 297. As to amendments generally bringing in new causes of action, see PLEADING.

13. *Holzheier v. Hayes*, 5 Cal. Unrep. 965, 52 Pac. 838.

14. *Guaranty Realty Co. v. Recreation Gun Club*, 12 Cal. App. 383, 107 Pac. 625 (holding that where the court erred in a conclusion of law that a covenant was one running with the land, the judgment will not be reversed where the covenant, though personal, is one which equity will enforce). See TELAL.

15. *Mann v. Montgomery*, 6 Cal. App. 646, 92 Pac. 875 (holding that a finding that an outstanding lease was a breach of the covenant against encumbrances implied in a deed was against the evidence, where it ap-

peared that the grantee had taken an assignment of the lease, and that the deed and assignment should be construed as one instrument).

If a grant or deed is necessary to establish that a certain covenant runs with the land, and the court has found such right to exist, the findings to support the judgment cannot be construed as declaring the creation of the right under such a written instrument, when all the evidence tending to establish the right shows that it was founded on promises and agreements resting wholly in parol, and antedating the acquisition of the title to the land; *Long v. Cramer M. & P. Co.*, 155 Cal. 402, 101 Pac. 297. See JUDGMENTS.

16. See EQUITY.

17. *Cheever v. Fair*, 5 Cal. 337.

title subject to the restrictions, cannot be justified on the ground that the action of the plaintiff in seeking to escape from the restrictions is inequitable, where such restrictions do not in fact exist.¹⁸ One who has been regularly vouched to warranty to defend the title warranted, as against one claiming under a superior title, is bound by the judgment rendered, whether or not he has appeared in the action.¹⁹

18. *Werner v. Graham*, 181 Cal. 174, 183 Pac. 945.

19. *McCormick v. Marcy*, 165 Cal. 386, 132 Pac. 449.

(H. L. D.)

COVERTURE.

See HUSBAND AND WIFE.

CREDIT INSURANCE.

See INSURANCE.

CREDITORS.

See DEBTOR AND CREDITOR, and cross-references there given.

CREDITORS' SUITS.

- I. INTRODUCTORY.
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Cases are cited in this article to and including 184 Cal., 42 Cal. App., and 203 Pac.

I. INTRODUCTORY.

§ 1. Definition and Nature.—A creditor's suit is a suit in equity, or of the nature of an equitable action, by which a creditor seeks to reach assets of his debtor which, though not legally exempt from the payment of debts, are nevertheless, either by reason of their inherent nature or their situation, beyond the scope of legal process. As the proceeding is of an equitable character, the customary rule that the plaintiff must be without adequate legal remedy applies in full force.¹ The absence of legal remedy is jurisdictional.² Said the supreme court:

“The principle as well as the policy of the law is, therefore, to subject every species of property of a judgment debtor to the payment of his debts. No species of property would seem to be exempt except such as is especially exempted by law, and any property not directly liable to execution may be reached for the satisfaction of the judgments. This was effected, under the old system of practice, by a proceeding in equity, known as the creditor's bill. After a judgment creditor had exhausted his remedy at law, by the issuance of a fieri facias, which was returned nulla bona, he had the right to invoke the jurisdiction of a court of equity to aid him, upon the principle of compelling a discovery of assets, tangible or intangible, and applying them to satisfying his execution.”³

§ 2. Scope of Article.—The remedy by creditor's suit has been so largely replaced by various statutory expedients, that it has fallen largely into disuse, except when used to set aside fraudulent conveyances, a subject which

1. *Travis Glass Co. v. Ibbetson*, 62 Cal. Dec. 251, 200 Pac. 595; *Herrlich v. Kaufmann*, 99 Cal. 271, 37 Am. St. Rep. 50, 33 Pac. 857; *Lupton v. Lupton*, 3 Cal. 120; *Watkins v. Wilhoit*, 4 Cal. Unrep. 450, 35 Pac. 646. See *infra*, §§ 5-11, as to exhaustion of legal remedies as prerequisite to suit.

2. *Pacific Bank v. Robinson*, 57 Cal. 520, 40 Am. Rep. 120; *Watkins v. Wilhoit*, 4 Cal. Unrep. 450, 35 Pac. 646. See EQUITY.

3. *Pacific Bank v. Robinson*, 57 Cal. 520, 40 Am. Rep. 120.

is treated elsewhere in this work.⁴ It is also occasionally employed to reach assets of insolvent corporations, particularly unpaid stock subscriptions, a phase of its use which is also considered in another place.⁵ Among the statutory provisions which have supplanted the older procedure, the most important are those supplementary to execution,⁶ those extending the scope of the levy of writs of attachment and execution,⁷ and those governing general assignments for the benefit of creditors.⁸ It follows that little is left for discussion in the present article beyond certain general principles relating to the propriety of the remedy by creditor's suit, the legal steps which are prerequisite to its maintenance, and some general rules of procedure.

II. APPLICABILITY OF REMEDY.

§ 3. In General.—It has been said that proceedings supplementary to execution will reach everything formerly reached by a creditor's bill.⁹ And the action brought by a judgment creditor against a third person called to answer in supplementary proceedings under the code provision authorizing the court to direct the bringing of such an action when the third person claims the property as his

4. See FRAUDULENT CONVEYANCES.

5. See CORPORATIONS, vol. 6, p. 928 et seq.

6. See EXECUTIONS. See *infra*, § 10, as to necessity of first resorting to supplementary proceedings.

7. See ATTACHMENT, vol. 3, p. 397; GARNISHMENT; EXECUTION; LEVY AND SEIZURE.

8. See ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 3, p. 312.

9. *Travis Glass Co. v. Ibbetson*, 62 Cal. Dec. 251, 200 Pac. 595 (wherein the court says: "Since,

however, the purpose of these statutory proceedings supplementary to execution is the same as that of the original creditor's bill in equity—namely, to enable the creditor to reach property which could not otherwise be made to contribute to the payment of the judgment—the statutory proceedings should be given an operation at least as broad as that of the creditor's bill"). *Staples v. May*, 87 Cal. 178, 25 Pac. 316; *Pacific Bank v. Robinson*, 57 Cal. 520, 40 Am. Rep. 120. See EXECUTIONS.

own,¹⁰ is in the nature of a creditor's suit.¹¹ Cases in which is determined the character of the property peculiarly subject to a creditor's suit are accordingly of increasing rarity. It has been held that a creditor's suit will reach choses in action arising from torts committed on the property of the judgment debtor to which the creditor would have the right to resort.¹² So it has been said that, "if a creditor of a patentee can have the patent right subjected to the satisfaction of his judgment at all, it can be done only by a court of equity, acting in personam and compelling the patentee to make an assignment."¹³ A creditor's suit for relief against fraudulent transfers and concealment of assets by a debtor presents a substantial ground of equity jurisdiction.¹⁴ And an action to subject to the payment of a judgment, the stock in trade of the judgment debtor which he has previously transferred in its entirety to a third person without recording notice of the sale required by the Civil Code,¹⁵ in order to validate such a transfer as against creditors, is in the nature of a creditor's bill.¹⁶ After holding that a seat in a stock exchange could not be sold under execution, the supreme court declined to decide whether it could be reached by a creditor's suit.¹⁷

§ 4. Assets of Partnership and Corporations.—A conflict between partnership creditors having attachment liens and

10. Code Civ. Proc., § 720.

11. *Wolters v. Rossi*, 126 Cal. 644, 59 Pac. 143.

12. *Travis Glass Co. v. Ibbetson*, 62 Cal. Dec. 251, 200 Pac. 595 (declaring that such claims may constitute the basis of a suit by a judgment creditor under section 720 of the Code of Civil Procedure); *Staples v. May*, 87 Cal. 178, 25 Pac. 316.

13. *Peterson v. Sheriff of San Francisco*, 115 Cal. 211, 46 Pac.

1060 (holding that a patent right is not subject to execution).

14. *Swift v. Arents*, 4 Cal. 390. See FRAUDULENT CONVEYANCES.

15. Civ. Code, § 3440.

16. *Henderson v. D. S. Denehy Merc. Co.*, 32 Cal. App. Dec. 459, 191 Pac. 558. See FRAUDULENT CONVEYANCES.

17. *Lowenberg v. Greenebaum*, 99 Cal. 162, 37 Am. St. Rep. 42, 21 L. R. A. 399, 33 Pac. 794.

the creditor of an individual partner who has seized the property on execution, presents a case of equitable cognizance at suit of the firm creditors.¹⁸ A suit in equity, however, for a partnership accounting and, incidentally, to cause property of a deceased partner, held by third persons, to be administered for the benefit of creditors, is not, strictly speaking, a creditor's bill.¹⁹ A creditor's suit will lie to compel subscribers to the capital stock of a debtor corporation to pay in their subscriptions so that they may be applied to the creditor's judgment.²⁰ And a creditor's suit is the appropriate remedy to reach property of an insolvent corporation which has been misappropriated by other creditors.¹ An action in the nature of a creditor's bill is the proper proceeding to effect a distribution of the fund in the hands of the state treasurer deposited for the security of policy-holders of a mutual insurance company organized under the law of 1891.²

III. EXHAUSTION OF LEGAL REMEDIES.

§ 5. **In General.**—Before a judgment creditor may invoke the aid of a court of equity to discover and apply the property of the debtor to satisfy his judgment, he must show that all legal means for obtaining satisfaction have been exhausted. The plaintiff must do all which the law enables him to do to obtain the object of his pursuit; and until he has exhausted his legal remedies, he is not entitled to the aid of a court of equity.³ The principle that to enable him to resort to a creditor's suit in equity, the creditor must be without adequate remedy at law, customarily finds expression in the formula that he must have

18. *Conroy v. Woods*, 13 Cal. 626, 73 Am. Dec. 605.

19. *Raisch v. Warren*, 18 Cal. App. 655, 124 Pac. 95. See PARTNERSHIP.

20. *Harmon v. Page*, 62 Cal. 448.

1. *Reed v. Goldstein*, 53 Cal. 296. See CORPORATIONS, vol. 6, p. 928 et seq.

2. Stats. 1891, p. 126; *Engwicht v. Pacific States etc. Co.*, 153 Cal. 183, 96 Pac. 7.

3. *Mesmer v. Jenkins*, 61 Cal. 151.

reduced his claim to judgment, and have had execution issued and returned unsatisfied,⁴ for it may be that the creditor's claim will prove to be unfounded, or that his legal remedies will prove to be adequate.⁵

A mere creditor at large cannot maintain a creditor's suit.⁶ But where the claim of the creditor and the insolvency of the debtor are admitted by the pleadings, so that obtaining a judgment, execution, and return *nulla bona* would be vain acts, and when in the meantime loss of the property which the creditor has attached and which is sought to be reached in the creditor's suit, is threatened, the circumstances are such as to take the case out of the general rule, and the creditor's suit may be instituted without the usual prerequisites of judgment and execution at law.⁷ And where a debtor corporation, pursuant to a scheme to defraud its creditors, transfers all its property to another company organized for the purpose by its officers and stockholders, the second company will be regarded in equity as a mere continuance of the first, and the rule requiring a creditor of the original company to obtain judgment and return of execution unsatisfied before going into equity, will not apply.⁸

Judgment, execution and return of *nulla bona* are, however, all that is ordinarily required. The return of an execution *nulla bona* is conclusive evidence that the credi-

4. *Old Settlers' Investment Co. v. White*, 158 Cal. 236, 110 Pac. 922; *Blanc v. Paymaster Mining Co.*, 95 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 765; *Castle v. Bader*, 23 Cal. 76; *Bickerstaff v. Doub*, 19 Cal. 109, 79 Am. Dec. 204; *Heyneman v. Dannenberg*, 6 Cal. 376, 65 Am. Dec. 519; *Henderson v. D. S. Denehy Merc. Co.*, 32 Cal. App. Dec. 459, 191 Pac. 558; *Marshall v. Wentz*, 28 Cal. App. 540, 153 Pac. 244. See, also, to similar effect, *Travis Glass Co. v. Ibbetson*, 62 Cal. Dec. 251, 200 Pac. 595 (action

brought pursuant to section 720 of the Code of Civil Procedure). See LIMITATION OF ACTIONS, as to accrual of right of action upon return of execution unsatisfied.

5. *Heyneman v. Dannenberg*, 6 Cal. 376, 65 Am. Dec. 519.

6. *McMinn v. Whelan*, 27 Cal. 300.

7. *Scales v. Scott*, 13 Cal. 76; *Heyneman v. Dannenberg*, 6 Cal. 376, 65 Am. Dec. 519.

8. *Blanc v. Paymaster Mining Co.*, 95 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 765.

tor's legal remedies have been exhausted.⁹ It is, therefore, not necessary to show a levy of execution by way of garnishment on the third person who holds the property of the debtor sought to be reached, or his denial of assets in his hands,¹⁰ or that the creditor's judgment remains unpaid at the time the suit is filed.¹¹ It has been said, perhaps somewhat loosely, that the possession of a lien by the creditor on the property involved is a satisfactory alternative to judgment, execution and return nulla bona.¹² How far an attachment lien may be a substitute for the reduction of a claim to judgment is discussed hereafter.¹³

A creditor's bill to subject the assets of an absent debtor to the payment of his claim, which discloses that he has a perfect remedy at law against a resident joint debtor, is bad on general demurrer.¹⁴ But a suit by a creditor of a corporation to reach unpaid stock subscriptions lies in equity, unaffected by any remedy the creditor may have under the provision of the constitution or statutes.¹⁵

§ 6. Necessity of Judgment.—The necessity that a creditor shall have reduced his claim to judgment before seeking the aid of equity by way of a creditor's suit, is reiterated by numerous authorities.¹⁶ So, only judgment

9. *Aigeltinger v. Einstein*, 143 Cal. 609, 101 Am. St. Rep. 131, 77 Pac. 669; *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776; *Watkins v. Wilhoit*, 4 Cal. Unrep. 450, 35 Pac. 646.

10. *Henderson v. D. S. Denehy Merc. Co.*, 32 Cal. App. Dec. 459, 191 Pac. 558.

11. *Marshall v. Wentz*, 28 Cal. App. 540, 153 Pac. 244.

12. *Old Settler's Investment Co. v. White*, 158 Cal. 236, 110 Pac. 922; *Castle v. Bader*, 23 Cal. 76. And see *Bickerstaff v. Doub*, 19 Cal. 109, 79 Am. Dec. 204 (where

the creditor sought remedy by replevin instead of by creditor's suit).

13. See *infra*, § 8.

14. *Lupton v. Lupton*, 3 Cal. 120.

15. *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776; *Harmon v. Page*, 62 Cal. 448. See *CORPORATIONS*, vol. 6, p. 935.

16. *Roberts v. Buckingham*, 172 Cal. 458, 156 Pac. 1018; *Lyden v. Spohn-Patrick Co.*, 155 Cal. 177, 100 Pac. 236; *First Nat. Bank v. Eastman*, 144 Cal. 487, 103 Am. St. Rep. 95, 1 Ann. Cas. 626, 77 Pac. 1043; *Ohm v. Superior Court*, 85 Cal. 545, 20 Am. St. Rep. 245, 26 Pac. 244;

creditors are entitled to intervene in a creditor's suit, brought by a judgment creditor. The fact that the complaint recites that the suit is brought for the benefit of all other creditors who may come in and be made parties and contribute to the costs does not affect the case, such recital being mere surplusage. Nor does the fact that certain creditors reduced their claims to judgment after the judgment in the creditor's suit was rendered entitle them then to intervene, even though the latter judgment provides that the cause shall be retained and any other judgment creditor who makes a proper showing may become a party, such provision referring only to those who were judgment creditors at the time.¹⁷

But the rule requiring judgment is not without exception. Thus, where the debtor is a nonresident and in consequence no judgment can be obtained against him, the creditor may maintain a creditor's suit without having reduced his claim to judgment.¹⁸ In such cases, however, the creditor must have obtained a lien by attachment.¹⁹ Again, where the debtor is dead, the allowance of the creditor's claim by the personal representative of the deceased is equivalent to judgment and no further definition of the claim at law is necessary as a prerequisite to a creditor's suit.²⁰ But the creditor must have either a judgment or the allowance of his claim, and this is the case even where he seeks to reach assets fraudulently held by the administrator himself.¹ And to enable an admin-

Mesmer v. Jenkins, 61 Cal. 151; Raisch v. Warren, 18 Cal. App. 655, 124 Pac. 95.

17. Baines v. West Coast Lumber Co., 104 Cal. 1, 37 Pac. 767.

18. Lyden v. Spohn-Patrick Co., 155 Cal. 177, 100 Pac. 236; First Nat. Bank v. Eastman, 144 Cal. 487, 103 Am. St. Rep. 95, 1 Ann. Cas. 626, 77 Pac. 1043.

19. Roberts v. Buckingham, 172

Cal. 458, 156 Pac. 1018; Lyden v. Spohn-Patrick Co., 155 Cal. 177, 100 Pac. 236. See *infra*, § 8, as to sufficiency in general of lien by attachment as substitute for judgment.

20. Ohm v. Superior Court, 85 Cal. 545, 20 Am. St. Rep. 245, 26 Pac. 244; Mesmer v. Jenkins, 61 Cal. 151.

1. Mesmer v. Jenkins, 61 Cal. 151.

istrator to recover, for the benefit of creditors of the estate, property conveyed by his intestate, the creditors must be judgment creditors, or their claims must have been allowed by the administrator.² The failure, however, of a judgment creditor to present his judgment for allowance to the administrator of the deceased judgment debtor does not prevent his maintenance of an action in the nature of a creditor's suit to enforce the lien of his execution upon a debt owing to the debtor by an execution garnishee, the levy having been made before the judgment debtor's death.³

A suit in equity for a partnership accounting, and incidentally to cause property of a deceased partner, held by third persons to be administered for the benefit of creditors, is not, strictly speaking, a creditor's bill. At all events it constitutes an exception to the rule that the creditor's claim must be reduced to judgment before he can institute a creditor's suit, and especially so when the administrator is himself one of the persons holding and claiming in his own right the property in question. Nor is the allowance of the creditor's claim by the administrator necessary, the creditor having sought its allowance but having had it rejected.⁴

§ 7. Character of Judgment Required.—The judgment which will authorize the commencement of a creditor's suit must be a valid one.⁵ But the fact that the judgment has been reversed,—suggested but not made to appear of record before the supreme court,—will not prevent an affirmance of the decree in the creditor's suit; since, if the creditor's original judgment is no longer in existence, no execution can issue on it, and besides the judgment debtor

2. *Murphy v. Clayton*, 114 Cal. 81, 100 Pac. 242. See EXECUTORS AND ADMINISTRATORS.

526, 43 Pac. 613; *Field v. Andrada*,

106 Cal. 107, 39 Pac. 323. 4. *Raisch v. Warren*, 18 Cal. App.

37. *Nordstrom v. Corona City Water* 655, 124 Pac. 95.

Co., 155 Cal. 206, 132 Am. St. Rep. 5. 8 Ruling Case Law, p. 21.

might have his action in equity to restrain the creditor from taking advantage of his decree in the creditor's suit.⁶ The judgment need not have become a final one. All that is necessary is that the creditor shall be entitled to execution.⁷

Though the general rule undoubtedly is that until a judgment becomes final by affirmance on appeal, or by the lapse of time within which an appeal may be taken, it is not admissible in evidence and cannot be relied on as the foundation of rights declared in it, this rule has no application to the judgment prerequisite to the maintenance of a creditor's suit. The creditor's suit is not, strictly speaking, an action on the judgment. It is really an action for equitable relief against obstructions to execution. The fact that the time for appeal has not expired does not prevent the issuance of execution, nor is the right to have it issue affected by the taking of an appeal, unless a stay bond is given. If, then, the creditor has put himself in a position to levy execution, he has done everything necessary to enable him to bring a creditor's suit to remove obstacles which hinder his enjoyment of that right. Therefore, a creditor who has obtained a judgment may maintain a creditor's bill though the time for appeal from the judgment has not expired, and even though an appeal has actually been taken, no bond staying execution having been given.⁸

A judgment rendered in favor of the creditor in another state does not make him a judgment creditor in California, within the rule that only judgment creditors can maintain creditor's suits. While the judgment of the sister state creates an obligation in the creditor's favor, it is one which cannot be enforced here without suit, and until the creditor recovers judgment upon it here, he occupies only

6. Sewell v. Price, 164 Cal. 265, 128 Pac. 407; Jenner v. Murphy, 6 Cal. App. 434, 92 Pac. 405.

7. Sewell v. Price, 164 Cal. 265, 128 Pac. 407, per Sloss, J.
8. Sewell v. Price, 164 Cal. 265, 128 Pac. 407, per Sloss, J.

the position of a creditor at large, without any right to subject any specific property of his debtor within the state to the payment of his claim.*

§ 8. Attachment Lien as Substitute for Judgment.—Notwithstanding some early assertions to the contrary,¹⁰ it is now the settled law in California that, in the absence of special circumstances, such as the nonresidence of the debtor,¹¹ or the threatened loss of the lien or disposition or destruction of the property, the mere beginning of an action by a creditor and the issuance and levy of an attachment will not confer a status which will enable him to maintain a creditor's suit. He must have a judgment.¹² The reason is that, though the attachment is a specific lien, it is a lien of very uncertain tenure. It may be defeated by dissolution on motion or by judgment in favor of the defendants. No advantage would inure to the creditor, except in the matter of time, by allowing the equitable action. It might happen that the attention of the court would be occupied in useless litigation because the attachment might be dissolved before judgment which would end both the lien and the creditor's suit. The claim of the creditor should be certain before he is allowed to concern himself with the debtor's frauds, and it cannot be made certain except by judgment. The statutory provision that a creditor can avoid the act or obligation of his debtor for fraud only when the fraud obstructs the enforcement by legal process of his right to take the

9. *Brown v. Campbell*, 100 Cal. 635, 38 Am. St. Rep. 314, 35 Pac. 433. As to effect of foreign judgments generally, see JUDGMENTS.

10. *Bickerstaff v. Doub*, 19 Cal. 109, 79 Am. Dec. 204 (in which, however, the creditor had resorted to replevin instead of a creditor's bill); *Conroy v. Woods*, 13 Cal. 626, 73 Am. Dec. 605.

11. See supra, § 6, as to sufficiency of lien by attachment where debtor is nonresident.

12. *Lyden v. Spohn-Patrick Co.*, 155 Cal. 177, 100 Pac. 236; *Aigeltinger v. Einstein*, 143 Cal. 609, 101 Am. St. Rep. 131, 77 Pac. 669; *McMinn v. Whelan*, 27 Cal. 300.

property affected does not make a lien by attachment sufficient to sustain a creditor's suit, as the attachment lien remains secure notwithstanding any act of the debtor, and there is no obstruction to legal process until levy is sought to be made of an execution.¹³

§ 9. Necessity of Execution.—Before he can maintain a creditor's suit, the creditor must, except in certain cases, have had execution issued and returned unsatisfied.¹⁴ An action against a garnishee under levy of execution to recover the money seized, where the garnishee apparently does not claim the money as his own, is not an exception;¹⁵ nor is a suit to reach money of the judgment debtor in the hands of a third person.¹⁶ The garnishee process in California is intended as a substitute for a creditor's bill.¹⁷ "If a judgment creditor brings a bill to reach equitable assets, he must aver insolvency, or, what is equivalent to it, an execution returned nulla bona. In these cases, insolvency is per se condition of relief,—a fact, in short, without which a court of equity can have no jurisdiction to act in the given instance."¹⁸ To allege that the judgment debtor is able to pay is fatal to the proceeding.¹⁹

But it has been said that the necessity of showing insolvency, and presumably of having the execution re-

13. *Aigeltinger v. Einstein*, 143 Cal. 609, 101 Am. St. Rep. 131, 77 Pac. 669, per Chipman, C.

14. *Matteson etc. Mfg. Co. v. Conley*, 144 Cal. 483, 77 Pac. 1042; *Herrlich v. Kaufmann*, 99 Cal. 271, 37 Am. St. Rep. 50, 33 Pac. 857; *Pacific Bank v. Robinson*, 57 Cal. 520, 40 Am. Rep. 120; *Israel v. Bryan*, 34 Cal. App. Dec. 871, 197 Pac. 121 (hearing in supreme court denied, 61 Cal. Dec. 633, 197 Pac. 121). *Watkins v. Wilhoit*, 4 Cal. Unrep. 450, 35 Pac. 646.

15. *Matteson etc. Mfg. Co. v. Conley*, 144 Cal. 483, 77 Pac. 1042.

16. *Herrlich v. Kaufmann*, 99 Cal. 271, 37 Am. St. Rep. 50, 33 Pac. 857.

17. *Marshall v. Wentz*, 28 Cal. App. 540, 153 Pac. 244. See *GARNISHMENT*.

18. *Hager v. Shindler*, 29 Cal. 47.

19. *Herrlich v. Kaufmann*, 99 Cal. 271, 37 Am. St. Rep. 50, 33 Pac. 857.

turned unsatisfied, does not apply to a creditor's suit attacking a fraudulent conveyance.²⁰ So when the interest of the judgment debtor sought to be reached in a creditor's suit is subject to levy of execution, such levy must be made and a lien created, before the creditor can be said to have exhausted his legal remedies or be entitled to his bill to remove obstructions to execution sale.¹ But when the judgment debtor, on being made a defendant in a creditor's suit, confesses that he has no property in his hands whatever, there is no necessity of an execution, as it would be utterly useless, and hence it is not a prerequisite to the suit.²

Nor does the general rule apply where a judgment creditor has been substituted as defendant in an action by his debtor to recover a sum paid to a justice of the peace, the original defendant, as bail to secure the appearance of a person upon a criminal charge, and seeks to have the fund, which has been paid into court, applied in satisfaction of his judgment. Under such circumstances the creditor cannot continue upon supplementary proceedings to have the money applied in satisfaction of the execution issued upon his judgment, but, as a substituted party, his only course is by answer to set forth his right to the fund, and, as between himself and the debtor as other claimant, submit the question to the determination of the court.³

A defendant in a creditor's suit who holds property of the plaintiff's judgment debtor which he has refused to turn over to the sheriff under levy of execution against the judgment debtor, cannot complain that the creditor did not proceed to sell the property under the execution instead of resorting to the creditor's suit.⁴

20. Hager v. Shindler, 29 Cal. 47. Dec. 871, 197 Pac. 121, per Shaw, J.
See FRAUDULENT CONVEYANCES. (hearing in supreme court denied;

1. Beswick v. Dorris, 174 Fed. 61 Cal. Dec. 633, 197 Pac. 121).
502.

4. Henderson v. D. S. Denehy

2. Dana v. Stanford, 1 Lab. 182. Merc. Co., 32 Cal. App. Dec. 459,

3. Israel v. Bryan, 34 Cal. App. 191 Pac. 558.

§ 10. Necessity of Resort to Supplementary Proceedings.

The statutory proceedings supplementary to execution are designed to take the place of a creditor's bill.⁵ So that any property which was reachable by a creditor's bill may now be reached by the process of such proceedings.⁶ It was early held that statutory proceedings supplementary to execution did not impair or supersede the remedy by creditor's suit, but were merely cumulative thereto.⁷ But the rule is now firmly settled to the contrary, and the creditor must exhaust the remedy afforded by supplementary proceedings before bringing a creditor's suit, unless some special ground exists upon which to invoke the power of chancery.⁸ Where, however, supplementary proceedings do not, for any reason, afford adequate relief, the remedy in equity still lies.⁹⁻¹⁰

5. *Travis Glass Co. v. Ibbetson*, 62 Cal. Dec. 251, 200 Pac. 595; *Nordstrom v. Corona City Water Co.*, 155 Cal. 206, 132 Am. St. Rep. 81, 100 Pac. 242; *Matteson etc. Mfg. Co. v. Conley*, 144 Cal. 483, 77 Pac. 1042; *Herrlich v. Kaufmann*, 99 Cal. 271, 37 Am. St. Rep. 50, 33 Pac. 857; *Pacific Bank v. Robinson*, 57 Cal. 520, 40 Am. Rep. 120; *McCullough v. Clark*, 41 Cal. 298; *Adams v. Hackett*, 7 Cal. 187; *Bonner v. Lehfeldt*, 39 Cal. App. 649, 179 Pac. 722; *McKenzie v. Hill*, 9 Cal. App. 78, 98 Pac. 55. See, for full treatment of supplementary proceedings, EXECUTIONS.

6. *Staples v. May*, 87 Cal. 178, 25 Pac. 316; *Pacific Bank v. Robinson*, 57 Cal. 520, 40 Am. Rep. 120.

7. *Swift v. Arents*, 4 Cal. 390; *Watkins v. Wilhoit*, 4 Cal. Unrep. 450, 35 Pac. 646; *Dana v. Stanford*, 1 Lab. 182.

8. *Phillips v. Price*, 163 Cal. 146, 94 Pac. 617; *Matteson etc. Mfg. Co. v. Conley*, 144 Cal. 483, 77

Pac. 1042; *Emmons v. Barton*, 109 Cal. 662, 42 Pac. 303; *Herrlich v. Kaufmann*, 99 Cal. 271, 37 Am. St. Rep. 50, 33 Pac. 857; *Henderson v. D. S. Denehy Merc. Co.*, 32 Cal. App. Dec. 459, 191 Pac. 558.

9-10. *Phillips v. Price*, 153 Cal. 146, 94 Pac. 617; *Emmons v. Barton*, 109 Cal. 662, 42 Pac. 303; *Henderson v. D. S. Denehy Merc. Co.*, 32 Cal. App. Dec. 459, 191 Pac. 558; *Bonner v. Lehfeldt*, 39 Cal. App. 649, 179 Pac. 722.

In *Herrlich v. Kaufmann*, 99 Cal. 271, 37 Am. St. Rep. 50, 33 Pac. 857, the court said:

"Formerly assets of a judgment debtor which could not be effectively seized by the sheriff under an execution, such as a debt owing to the defendant, could be reached, upon a proper showing, through a court of equity by means of a creditor's bill or suit, but in this state, as in most of the other states, a legal remedy is afforded by statutes providing for proceedings supplementary to execu-

Proceedings supplementary to execution do not enable the creditor to reach property or funds of the debtor in the hands of third persons, when the latter deny the liability or claim title to the property, and hence do not afford the creditor an adequate legal remedy. In such a case the creditor may proceed by creditor's suit without first pursuing the statutory remedy.¹¹ Nor need he first obtain the order provided for by the code in such proceedings,¹² authorizing the creditor to sue the person alleged to have property of the debtor or to be indebted to him, where such person claims an interest in the property adverse to the debtor, or denies the debt.¹³ Suit being in any event necessary, the creditor may proceed by creditor's bill without first pursuing the statutory proceedings which could not give him anything more than a right to sue. But where it does not appear whether or not the person alleged to hold the debtor's property, or to be indebted to him, will claim the property or deny the debt, the supplementary proceedings may afford all the relief required, and they must accordingly be pursued. There is no distinction, in this regard, between tangible, real or personal property held by the third person for the debtor, and a debt claimed to be due the debtor from him.¹⁴ And, a fortiori, where the execution garnishee does not deny

tion, and the general rule is that when there are such statutory proceedings they must be pursued. . . . It is not necessary, however, to go to the length of saying that a creditor's bill could not be sustained here under any circumstances; for there might, perhaps, be cases in which the statutory proceedings would not afford adequate relief; but they must be pursued, unless in those exceptional cases in which it appears that equity must be invoked because legal remedies are unavailing."

11. Phillips v. Price, 153 Cal. 146,

94 Pac. 617; Bapp v. Whittier, 113 Cal. 429, 45 Pac. 703; Lewis v. Chamberlain, 108 Cal. 525, 41 Pac. 413; Henderson v. D. S. Denehy Merc. Co., 32 Cal. App. Dec. 459, 191 Pac. 558; Union Collection Co. v. Snell, 5 Cal. App. 130, 89 Pac. 859.

12. Code Civ. Proc., § 720.

13. Nordstrom v. Corona City Water Co., 155 Cal. 206, 132 Am. St. Rep. 81, 100 Pac. 242; Phillips v. Price, 153 Cal. 146, 94 Pac. 617.

14. Phillips v. Price, 153 Cal. 146, 94 Pac. 617.

liability or claim title in himself, supplementary proceedings must be followed out to the end, including the order of the court permitting the garnishee to be sued.¹⁵

§ 11. Necessity of Compelling Debtor's Personal Representative to Sue.—The statutory requirement that the personal representative of a deceased debtor must sue to recover property fraudulently conveyed in the debtor's lifetime, but is not bound to do so except on application of a creditor who must bear the costs,¹⁶ must ordinarily supersede the right of a creditor to institute a creditor's suit for such purpose on his own account, at least until the creditor has first attempted to pursue the statutory course.¹⁷ The creditor must first apply to the court having administration of the estate to require the personal representative to institute the suit. A mere personal demand on him is not enough.¹⁸ The creditor must exhaust all means of procuring the personal representative to act.¹⁹ An early holding under the similar provisions of the Practice Act,²⁰ to the effect that they did not preclude a suit by the creditors themselves, can no longer be regarded as authority;¹ so it has been held that the creditor of an estate of a decedent cannot maintain a suit to compel the administrator or others to convey to the estate property, the title to which they have fraudulently acquired, his proper remedy being to have the administrator removed and another appointed who will then bring the suit.² But, in

15. *Herrlich v. Kaufmann*, 99 Cal. 271, 37 Am. St. Rep. 50, 33 Pac. 857; *Water Supply Co. v. Sarnow*, 1 Cal. App. 479, 82 Pac. 689.

16. Code Civ. Proc., §§ 1589, 1590. See EXECUTORS AND ADMINISTRATORS.

17. *Emmons v. Barton*, 109 Cal. 662, 42 Pac. 303; *Beswick v. Churchill Co.*, 22 Cal. App. 404, 134 Pac. 722; *Beswick v. Dorris*, 174 Fed. 502.

18. *Beswick v. Dorris*, 174 Fed. 502.

19. *Emmons v. Barton*, 109 Cal. 662, 42 Pac. 303.

20. Practice Act, §§ 202, 203.

1. *Hills v. Sherwood*, 48 Cal. 386. And see *Ohm v. Superior Court*, 85 Cal. 545, 20 Am. St. Rep. 245, 26 Pac. 244 (where a dictum to the same effect is based on the decision in *Hills v. Sherwood*, 48 Cal. 386).

2. *Mesmer v. Jenkins*, 61 Cal. 151.

apparent contravention of this, it was held in a later case that when the executor himself was the fraudulent grantee, the creditor might sue, and do so without seeking action by the executor.³

IV. PROCEDURE.

§ 12. In General.—The superior court in which a creditor recovers judgment has also jurisdiction of an action in the nature of a creditor's bill to remove obstacles to execution created by the judgment debtor, even though the property concerned be real estate situated in another county.⁴ The constitutional provision requiring actions to enforce liens on real estate to be brought in the county where the real estate is situated, does not apply to an action in the nature of a creditor's bill.⁵ A suit to reduce a claim against the estate of a decedent to judgment can not be joined with one against the administrator and others to compel them to convey to the estate property the title to which they have fraudulently acquired.⁶ The return of an execution unsatisfied is conclusive evidence that the plaintiff in a creditor's suit has exhausted his legal remedies. Evidence that the debtor had property which might have been levied on is inadmissible.⁷

§ 13. Parties.—Two judgment creditors may join in a creditor's bill.⁸ Other judgment creditors, however, who have not instituted creditors' suits are not necessary parties to a suit by a judgment creditor to reach equitable

3. *Emmons v. Barton*, 109 Cal. 662, 42 Pac. 303. See *supra*, § 6, as to allowance of creditor's claim by administrator being equivalent to obtaining judgment. And see **EXECUTORS AND ADMINISTRATORS.**

4. *Woodbury v. Nevada etc. Ry. Co.*, 120 Cal. 463, 52 Pac. 730.

5. *Woodbury v. Nevada etc. Ry.*

Co., 120 Cal. 463, 52 Pac. 730; *Beach v. Hodgdon*, 66 Cal. 187, 5 Pac. 77.

6. *Mesmer v. Jenkins*, 61 Cal. 151.

7. *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776.

8. *Baines v. West Coast Lumber Co.*, 104 Cal. 1, 37 Pac. 767.

assets of the debtor, their presence not being necessary for the protection of the defendants in view of the equitable lien of the plaintiff created by the suit on the assets in question.⁹ A recital in a complaint that the suit is brought for the benefit of all other creditors who may come in and be made parties and contribute to the costs is mere surplusage, and will not warrant intervention by non-judgment creditors.¹⁰ To a creditor's suit to reach property of an insolvent corporation which has been misappropriated by other creditors, the corporation itself must be a party.¹¹ In proceedings under a creditor's bill it is usual to make the debtor of the judgment debtor a party. But he is not a necessary party, and whether he shall be joined seems to rest, in most cases, in the will of the plaintiff.¹²

Where it has been expressly agreed between a judgment debtor and one from whom he has negotiated a loan that the money is to be paid by the lender to a certain person on account of a special contract with the debtor, such person would be a necessary party to a creditor's suit to reach the fund.¹³ But in an action against the estate of a decedent to reduce a claim to judgment, persons who fraudulently hold assets of the estate are neither necessary nor proper parties.¹⁴

§ 14. Pleading.—In a creditor's suit it is ordinarily necessary for the plaintiff to allege the securing of a judgment against the principal debtor, the issuance of an execution, and its return unsatisfied.¹⁵ "If a judgment

9. Seymour v. McAvoy, 121 Cal. 438, 41 L. R. A. 544, 53 Pac. 946. See *infra*, § 15, as to compelling other creditors to come in as interveners in order to effect an equitable distribution.

10. Baines v. West Coast Lumber Co., 104 Cal. 1, 37 Pac. 767.

11. Reed v. Goldstein, 53 Cal. 296.

12. Adams v. Hackett, 7 Cal. 187.

13. Bonner v. Lehfeldt, 39 Cal. App. 649, 179 Pac. 722.

14. Mesmer v. Jenkins, 61 Cal. 151.

15. Herrlich v. Kaufmann, 99 Cal. 271, 37 Am. St. Rep. 50, 33 Pac.

857; Hager v. Shindler, 29 Cal. 47;

Castle v. Bader, 23 Cal. 76; Israel

creditor brings a bill to reach equitable assets, he must aver insolvency, or, what is equivalent to it, an execution returned *nulla bona*. . . . It [insolvency] is one of the ultimate facts to be proved, and hence the necessity that it should be averred." It is said, however, that the rule does not apply to a suit by a creditor to set aside a fraudulent conveyance, as the creditor has the right to have such a conveyance canceled whether the debtor is without other property or not.¹⁶ Nevertheless, if he does not allege judgment and return of execution unsatisfied, he must allege a lien on the property.¹⁷ But, in general, exhaustion of assets legally available must appear from the complaint, and an averment that the judgment debtor has always been fully able to pay the debt and has always had ample money and property to do so, is fatal to the proceeding.¹⁸ Yet, after alleging the return of execution unsatisfied, it seems not to be necessary to allege further that the judgment remains unpaid at the time suit is filed.¹⁹ Where it is sought to reach property in the hands of a third person, it is sufficient to allege the recovery of judgment and the return of execution unsatisfied, without also alleging its levy by way of garnishment on the third person and his denial of assets of the judgment debtor in his hands. But it has been said that such additional allegations do no harm, and do not constitute an improper commingling of different causes of action, their only purpose being to show the unavailing efforts made by the judgment creditor to satisfy his claim by legal process.²⁰ It is obvious that in a suit by a judgment creditor against a third party, concerning property of the judgment debtor, the defendant

v. Bryan, 34 Cal. App. Dec. 871, 197 Pac. 121 (hearing in supreme court denied, 61 Cal. Dec. 633, 197 Pac. 121); Marshall v. Wentz, 28 Cal. App. 540, 153 Pac. 244.

16. Hager v. Shindler, 29 Cal. 47. See FRAUDULENT CONVEYANCES.

17. Castle v. Bader, 23 Cal. 76.

18. Herrlich v. Kaufmann, 99 Cal. 271, 37 Am. St. Rep. 50, 33 Pac. 857.

19. Marshall v. Wentz, 28 Cal. App. 540, 153 Pac. 244.

20. Henderson v. D. S. Denehy Merc. Co., 32 Cal. App. Dec. 459, 191 Pac. 558.

may plead any defense which he may have against the judgment debtor.¹ The exhaustion of legal remedies may appear by the return of execution nulla bona, or by admission in the pleadings that the debtor has no property available on execution.² It is sufficient to allege that plaintiffs have recovered a judgment against the judgment debtor in a named sum, though, as a matter of fact, their respective interests in the judgment are disproportionate and several, and not joint. There is no material variance between allegation and proof in such a case.³

It must appear from the complaint, that the plaintiff is a creditor.⁴ An allegation that plaintiff has begun an action against his debtor and caused a writ of attachment to issue, without any direct averment of indebtedness or of facts establishing it, is insufficient to show that plaintiff is a creditor. The fact that an action is begun to recover an alleged debt does not establish the existence of the debt, either as a matter of pleading or evidence.⁵ A creditor holding a judgment by confession who seeks, as a prior lienor, to reach moneys of his debtor in the hands of junior judgment creditors, must allege directly that when his judgment was confessed the amount was due

1. *Travis Glass Co. v. Ibbetson*, 62 Cal. Dec. 251, 200 Pac. 595 (but holding that in an action by a judgment creditor, brought pursuant to section 720 of the Code of Civil Procedure against a judgment debtor's debtor for the conversion of property of the judgment debtor, it is no defense that at the time of the alleged conversion the judgment debtor was indebted to the defendant in a sum in excess of the price obtained for the converted property and such indebtedness remained wholly unpaid, since, as a general rule, the taking of property without authority or con-

sent is neither warranted nor excused by the fact that the owner is indebted to the person taking the property).

2. *Aigeltinger v. Einstein*, 143 Cal. 609, 101 Am. St. Rep. 131, 77 Pac. 669.

3. *Nordstrom v. Corona City Water Co.*, 155 Cal. 206, 132 Am. St. Rep. 81, 100 Pac. 242.

4. *Lyden v. Spohn-Patrick Co.*, 155 Cal. 177, 100 Pac. 236; *Denver v. Burton*, 28 Cal. 549. See DEBTOR AND CREDITOR.

5. *Lyden v. Spohn-Patrick Co.*, 155 Cal. 177, 100 Pac. 236.

and unpaid. An averment by intendment or recital is insufficient.⁶

A complaint by a judgment creditor in the nature of a creditor's bill, which fails to allege that the plaintiff sues for the benefit of all other creditors, is nevertheless not subject to general demurrer. If it appears on the face of the complaint that there are other creditors who should be joined, the objection must be taken by special demurrer. If it does not so appear, then the answer must allege that there are other creditors who should be joined.⁷

§ 15. Liens, Receiverships, and Distribution of Funds.—

A judgment creditor, by filing a bill in equity to subject equitable assets to the payment of his judgment, acquires an equitable lien on such assets and a priority over any other creditor who has not already filed such a bill.⁸ It has been said to have always been the rule on a creditor's bill in equity to appoint a receiver, after the execution had been returned *nulla bona*.⁹ Upon the hearing of a suit in the nature of a creditor's bill brought to effect a distribution of the fund in the hands of the state treasurer deposited for the security of policy-holders of a mutual insurance company organized under the law of 1891,¹⁰ the court may, with all the parties interested in the fund before it, make an equitable distribution, and appoint a receiver to carry that distribution into effect. But the court must ascertain the identity of all persons entitled to share in the fund and invite or compel their presence and participation as parties, by interpleader in the action. The method of appointing a receiver, with the command to all persons

6. *Denver v. Burton*, 28 Cal. 549.

7. *Tatum v. Rosenthal*, 95 Cal. 129, 29 Am. St. Rep. 97, 30 Pac. 136. See *supra*, § 13, as to allegation that suit is brought for all creditors who may join, being surplusage.

8. *Title Ins. etc. Co. v. California*

Dev. Co., 171 Cal. 173, 152 Pac. 542; *Seymour v. McAvoy*, 121 Cal. 438, 41 L. R. A. 544, 53 Pac. 946.

9. *Habenicht v. Lissak*, 78 Cal. 351, 12 Am. St. Rep. 63, 5 L. R. A. 713, 20 Pac. 874. See *RECEIVERS*.

10. *Stats. 1891*, p. 126.

claiming any interest in the fund to appear and show cause within a fixed time, is not permissible.¹¹

A creditor who institutes a suit for the benefit of all the debtor's creditors, makes himself a trustee for all, and cannot appropriate to his own exclusive benefit or to the benefit of only a portion of the creditors the fund obtained by the prosecution of the suit or through its compromise. But where he sues only for the benefit of those creditors who may join in the action, a creditor who does not join has no right to share in the fund recovered.¹²

11. *Engwicht v. Pacific States etc.*
Co., 153 Cal. 183, 96 Pac. 7.

12. *Niccolls v. Rice*, 147 Cal. 633,
82 Pac. 321.

(C. M.)

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A. INTRODUCTORY.

§ 1. Scope of Article.—Criminal law is that branch of jurisprudence which treats of crimes and their punishments. While the title is sufficiently comprehensive to include all kinds of crimes, according to the plan of this work there are here considered only such matters as are common to all crimes and criminal proceedings, leaving for separate treatment particular crimes,¹ and such dis-

1. See ABDUCTION, vol. 1, p. 87; ABORTION, vol. 1, p. 99; ARSON, vol. 3, p. 160; ASSAULT AND BATTERY, vol. 3, p. 196; BIGAMY, vol. 4, p. 336; BREACH OF THE PEACE, vol. 4, p. 471; BRIBERY, vol. 4, p. 482; BURGLARY, vol. 4, p. 715; CONSPIRACY, vol. 5, p. 493; DISORDERLY CONDUCT; DISORDERLY HOUSE; EMBEZZLEMENT; EXTORTION; FALSE PERSONATION; FALSE PRETENSES; FORGERY; GAMING; HEALTH; HOMICIDE; INCEST; INTOXICATING LIQUORS; KIDNAPING; LARCENY; LEWDNESS; LIBEL AND SLANDER; MALICIOUS MISCHIEF; MAYHEM; OBSTRUCTING JUSTICE; PANDERING AND PIMPING; PERJURY; POISONS; PROSTITUTION; RAPE; RECEIVING STOLEN GOODS; ROBBERY; SEDUCTIONS; SODOMY. See, also, those civil titles concerning subjects in relation to which penal statutes have been enacted.

tinctive branches of the subject as are appropriate for independent titles. In this article there are treated the nature and elements of crime generally, the capacity to commit crime, parties to offenses, jurisdiction and venue of criminal prosecutions, the preliminary examination of persons accused of crime, evidence in criminal actions, trial, judgment or sentence, review by appeal or writ of error, the prosecution of habitual criminals, and modes of punishment and prevention of crime.² Branches of the general subject here under consideration but reserved for separate treatment include the following: the necessity for and sufficiency of an indictment or information,³ the arrest of persons accused of crime,⁴ rewards for offenders,⁵ coroners and coroners' inquests,⁶ prosecuting attorneys,⁷ grand juries,⁸ admission to bail,⁹ pardons,¹⁰⁻¹¹ extradition,¹² the custody and treatment of persons who have been convicted,¹³ and houses of correction.¹⁴ The following matters also are treated elsewhere: the effect of the death of the defendant as an abatement of the action,¹⁵ the indorsement of the names of witnesses upon indictments or information,¹⁶ the power to convict of a lesser offense included in that charged, the effect of variance between the pleadings and proof,¹⁷ the right of an accused to compulsory process to compel the attendance of witnesses, the competency of witnesses, and the examination of the accused,¹⁸ the con-

2. See RIOT as to the suppression of riots.

3. See INDICTMENT AND INFORMATION.

4. See ARREST, vol. 4, p. 112.

5. See REWARDS.

6. See CORONERS, vol. 6, p. 541.

7. See DISTRICT AND PROSECUTING ATTORNEYS.

8. See GRAND JURY.

9. See BAIL AND RECOGNIZANCE, vol. 3, p. 1021.

10-11. See PARDON.

12. See EXTRADITION.

13. See PRISONS AND PRISONERS.

14. See HOUSES OF CORRECTION.

15. See ABATEMENT AND REVIVAL, vol. 1, p. 76.

16. See INDICTMENT AND INFORMATION. See WITNESSES, as to competency of witnesses whose names are not indorsed on the indictment or information.

17. See INDICTMENT AND INFORMATION.

18. See WITNESSES.

struction of penal statutes,¹⁹ criminal proceedings against corporations,²⁰ review by certiorari,¹ or habeas corpus,² the responsibility of infants for crimes,³ and the restoration of records, including criminal records destroyed by fire, flood, or other casualty.⁴ While election between acts is treated herein, the election between counts or offenses is elsewhere treated.⁵

§ 2. Survey of Subject.—Both at common law and in this country the rules of criminal procedure have gone through a varied stage of transition. The criminal law is fast outgrowing those technicalities which grew up when the punishment for crime was so severe in many cases as to shock the moral sense of lawyers, judges and the public generally. At a time when there were numerous offenses many of a minor nature which were punishable with death, the courts, as conservators of the natural and inalienable rights of the citizen, invoked technicalities in order to prevent the cruelty of a strict and literal enforcement of the statute. They gave the penal statutes a strict construction, and resolved every doubtful question of construction in favor of the person charged. Those times have passed, for the criminal law is no longer harsh and inhumane, and it is fortunate for the safety of life and property that technicalities have to a great extent lost their hold.⁶ The tendency of the present age is toward statutory and simpler rules,⁷ and toward a relaxation of the ancient strictness. In California, the rule requiring a strict construction of penal statutes has been repudiated

19. See STATUTES.

20. See CORPORATIONS.

1. See CERTIORARI, vol. 4, pp. 1015, 1050.

2. See HABEAS CORPUS.

3. See INFANTS.

4. See RECORDS.

5. See INDICTMENT AND INFORMATION.

6. *People v. Vaughn*, 14 Cal. App. 201, 111 Pac. 620, quoting *People v. Gilbert*, 199 N. Y. 10, 20 Ann. Cas. 769, 92 N. E. 85.

7. *People v. Stoll*, 143 Cal. 689, 77 Pac. 818, per Lorigan, J.

by express legislative enactment.⁸ While all the elements of the old system have been retained so far as they are made necessary by a due regard to the substantial rights of a defendant, those have been discarded which serve no good purpose and only tend to embarrass and defeat the administration of justice.⁹

There has been a pronounced change also in recent years in the attitude of the law towards criminals. Modern laws in relation to the administration of criminal code, such as the probation law and indeterminate sentence law, place emphasis upon the reformation of the offender. They seek to make the punishment fit the criminal rather than the crime, and endeavor to put before the offender greater incentive to well-doing in order that his will to do well should be strengthened and confirmed by the habit of well doing. Instead of trying to break the will of the offender and make him submissive, the purpose is to strengthen his will to do right and lessen his temptation to do wrong.¹⁰

B. NATURE OF AND RESPONSIBILITY FOR CRIME.

I. IN GENERAL.

§ 3. **Definition.**—"A crime or public offense" is defined, by the Penal Code to be "an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: 1. Death; 2. Imprisonment; 3. Fine; 4. Removal from office; or, 5. Disqualification to hold and enjoy any office of honor, trust, or profit in this state."¹¹

8. *People v. Fowler*, 88 Cal. 136, 25 Pac. 1110. See STATUTES.

9. *People v. Monaghan*, 102 Cal. 229, 36 Pac. 511; *People v. King*, 27 Cal. 507, 87 Am. Dec. 95.

10. *In re Lee*, 177 Cal. 690, 171 Pac. 958, per Wilbur, J.

11. Pen. Code, § 15; *Matter of Ellsworth*, 165 Cal. 677, 681, 133 Pac. 272; *Coffey v. Superior Court*, 147 Cal.

To constitute an act or omission a crime or public offense, it must be defined or described in and prohibited or commanded by law,¹² under pain of punishment to be imposed by the state in its own name. A description, definition, and denouncement of acts necessary to constitute a crime do not make the commission of such act or acts a crime, unless a punishment be annexed, for punishment is as necessary to constitute a crime as its exact definition.¹³ But the mere punishability of an act or omission is not an absolute test by which to determine its criminal character. For example, a dereliction in official duty may be made a crime punishable by forfeiture of office under a criminal proceeding, or it may be made a dereliction working a forfeiture under civil process. Prolonged absence of judicial officers from the state and the failure of a sheriff to account for fees collected are acts working forfeiture of office which may be exacted in a civil trial.¹⁴

Quasi-crimes and quasi-criminal actions.—Although elsewhere quasi-crimes are recognized, no such intermediate

525, 82 Pac. 75 (violation of Pen. Code, § 758); *People v. Holmes*, 118 Cal. 444, 460, 50 Pac. 675; *Dyer v. County of Placer*, 90 Cal. 276, 27 Pac. 197 (holding a violation of § 9 of the act of April 1, 1878, providing for punishment by fine of persons evading payment of railroad fare constitutes a crime); *People v. McNulty*, 93 Cal. 427, 439, 26 Pac. 597, 29 Pac. 61; *Union Ice Co. v. Rose*, 11 Cal. App. 357, 104 Pac. 1006 (holding a violation of § 1 of Stats. 1907, p. 984, known as the "Cartwright Law" constitutes a crime); *People v. Grinnell*, 9 Cal. App. 238, 98 Pac. 681 (quoting code section). See *ACTIONS*, vol. 1, p. 317, for definition of "Criminal Action."

12. See *infra*, § 5.

13. *Matter of Ellsworth*, 165 Cal. 677, 133 Pac. 272 (holding an initiative ordinance relating to retail liquor business of Sonoma county declared no crime). *People v. McNulty*, 93 Cal. 427, 439, 26 Pac. 597, 29 Pac. 61; *People v. Haun*, 44 Cal. 98, 98.

The punishment need not be prescribed in the code section defining the offense, but may be prescribed by a general section. *Ex parte Stephen*, 114 Cal. 278, 46 Pac. 86.

14. *Morton v. Broderick*, 118 Cal. 474, 50 Pac. 644, not deciding whether a proceeding to remove a board of supervisors from office for neglect to fix water rates is civil or criminal. See *JUDGES; SHERIFFS*.

grade between civil and criminal breaches of legal obligations is known to our law. Moreover, the code specifically provides that actions are of two kinds: civil and criminal,¹⁵ and does not recognize any intermediate action.¹⁶

Violation of municipal ordinance.—An infraction of a municipal ordinance declared to be a misdemeanor punishable by a fine or imprisonment is a crime.¹⁷

§ 4. Crimes and Torts Distinguished.—A crime or public offense is distinct from a tort. A tort is a private wrong for which a civil liability alone exists,¹⁸ whereas a crime is an act committed against the public and not against an individual merely. In the latter case the guilty party is prosecuted in the interest of the people of the state and not in the interest of the party injured.¹⁹ The same act may constitute an injury to an individual and furnish a basis for a civil action, and also an injury to the public for which a penal as well as a civil liability arises.²⁰ In this connection the Penal Code provides:

“The omission to specify or affirm in this code any liability to damages, penalty, forfeiture, or other remedy imposed by law[,] or allowed to be recovered[,] or enforced in any civil action or proceeding, for any act or omission

15. Code Civ. Proc., § 24. See ACTIONS, vol. 1, p. 317.

16. Matter of Application of Clark, 24 Cal. App. 389, 141 Pac. 831.

17. People v. Pacific Gas & Elec. Co., 168 Cal. 496, Ann. Cas. 1917A, 328, 143 Pac. 727; Santa Barbara v. Sherman, 61 Cal. 57; Matter of Application of Clark, 24 Cal. App. 389, 141 Pac. 831. See Pillsbury v. Brown, 47 Cal. 477, holding a statute referring to fees of district attorneys for convictions had for misdemeanors does not refer to con-

victions for the breach of mere local municipal ordinances, even though termed misdemeanors for convenience. See MUNICIPAL CORPORATIONS.

18. Matter of Ellsworth, 165 Cal. 677, 681, 133 Pac. 272. See TORTS.

19. People v. Martin, 102 Cal. 558, 36 Pac. 952.

20. See ACTIONS, vol. 1, p. 317; ASSAULT AND BATTERY, vol. 3, p. 179. As to compromise of offenses by leave of court where the injured party has a civil action, see *infra*, § 136.

declared punishable herein, does not affect any right to recover or enforce the same."¹

II. PROHIBITION BY LAW.

§ 5. In General.—There is no criminal common law in California. All public offenses or crimes are statutory, and unless there is in force at the time of the commission or omission of a particular act² a statute making it a crime or a public offense, no one can be adjudged to suffer punishment for its commission or omission, however heinous it may be when tested according to the ordinary criterion of public duty or public obligation.³ This is the effect of section 6 of the Penal Code, which provides as follows:

“No act or omission, commenced after twelve o'clock noon of the day on which this code takes effect as a law, is criminal or punishable, except as prescribed or authorized by this code, or by some of the statutes, which it specifies as continuing in force and as not affected by its provisions, or by some ordinance, municipal, county, or township regulation, passed or adopted, under such statutes and in force when this code takes effect. Any act or omission commenced prior to that time may be inquired of, prosecuted, and punished in the same manner as if this code had not been passed.”

This section has no reference to mere form of procedure at the trial. Persons accused of crime are to be tried in accordance with the forms of procedure in force when the trial takes place, not those in force when the crime was committed.⁴

1. Pen. Code, § 9.

2. See *infra*, § 8.

3. *Ex parte Kearny*, 55 Cal. 212, 229, per Thornton, J., specially concurring. Compare *People v. Terrill*, 133 Cal. 120, 125, 65 Pac. 303, which seems to recognize the com-

mon law as the rule of decision so far as not repugnant to or inconsistent with the constitution and laws of the state.

4. *People v. Mortimer*, 46 Cal. 115. See *infra*, § 8.

§ 6. **Legislative Powers and Exercise Thereof.**—The power to define offenses and affix penalties therefor rests entirely with the legislature,⁵ subject to the limitations upon its powers specified in the constitution.⁶ That body is the judge of the expediency of creating new crimes and of prescribing penalties for them, light or severe.⁷ Much is left to its discretion in this regard, and it is not the province of the judiciary to judge of the wisdom or policy of legislation, or to exercise a supervision over the exercise of legislative discretion.⁸ The courts can only examine the question as to whether the legislature, in any particular case, has violated the constitution by going beyond or contrary to its prohibitions or mandates.⁹ The duty of the government comprehends the moral as well as the physical welfare of the state,¹⁰ and the law-making body has not only the power to regulate, but the power to suppress particular branches of business which it considers immoral and prejudicial to the general good, for example, gambling and lotteries.¹¹

Nothing is better settled than that the legislature has no authority to delegate its power to define public offenses.¹²

5. *Ex parte Lockett*, 179 Cal. 581, 178 Pac. 134; *People v. Perini*, 94 Cal. 573, 29 Pac. 1027; *People v. Malley*, 33 Cal. App. Dec. 346, 194 Pac. 48; *In re Finley*, 1 Cal. App. 198, 201, 81 Pac. 1041. See MUNICIPAL CORPORATIONS, as to power of municipalities to define and punish crimes.

6. *People v. Holder*, 35 Cal. App. Dec. 326, 199 Pac. 832.

It is not within the police power of the legislature to enact a law punishing a physician, who has been decided competent to practice, for what is styled "unprofessional conduct" in advertising himself as a specialist in certain diseases. *Ex parte McNulty*, 77 Cal. 164, 11 Am.

St. Rep. 257, 19 Pac. 237, per Thornton, J., concurring.

7. *In re O'Shea*, 11 Cal. App. 569, 105 Pac. 776. See *infra*, § 618.

8. *Ex parte Newman*, 9 Cal. 502, 519, 520, per Field, J., dissenting. See CONSTITUTIONAL LAW, vol. 5, pp. 637, 717.

9. *In re O'Shea*, 11 Cal. App. 569, 105 Pac. 776.

10. *Ex parte Newman*, 9 Cal. 502, 520, per Field, J., dissenting.

11. *Ex parte Andrews*, 18 Cal. 678. See GAMING; LOTTERIES.

12. *Ex parte Daniels*, 183 Cal. 636, 192 Pac. 442, 451, per Shaw, J., dissenting; *Ex parte Cox*, 63 Cal. 21. See CONSTITUTIONAL LAW, vol. 5, p. 677.

It cannot, for example, delegate its power to an officer or board.¹³

§ 7. Sufficiency of Penal Statutes.—A statute creating a crime must define it so clearly and definitely that all may know in what act or omission the violation of the law consists,¹⁴ and so that the statute can be enforced.¹⁵ The statute must so define the offense that a person of ordinary understanding may know therefrom when he is violating its provisions.¹⁶ Constructive crimes, that is to say, crimes built up by courts with the aid of inference, implication and strained interpretation, have been declared to be repugnant to the spirit and letter of English and American criminal law.¹⁷ It is apparent, however, that there has been a tendency to a more liberal construction of penal statutes in the more recent decisions. This may in part be the result of more humane and liberal methods of dealing with those who are convicted of crime and in part of the wide field now covered by the criminal law. This tendency is illustrated by a recent case in the supreme court

13. *Ex parte McNulty*, 77 Cal. 166, 170, 11 Am. St. Rep. 257, 19 Pac. 237, per Paterson, J.; *Ex parte Cox*, 63 Cal. 21 (quoted in *Board of Harbor Comms. v. Excelsior Redwood Co.*, 88 Cal. 491, 22 Am. St. Rep. 321, 26 Pac. 375; *United States v. Grimaud*, 170 Fed. 205; *United States v. Blasingame*, 116 Fed. 654; *United States v. Maid*, 116 Fed. 650; *Ex parte Daniels*, 183 Cal. 636, 192 Pac. 442, 450, per Shaw, J., dissenting.

14. *Ex parte Lockett*, 179 Cal. 581, 178 Pac. 134; *Ex parte Kohler*, 74 Cal. 38, 44, 15 Pac. 436.

15. *People v. Young*, 44 Cal. App. 279, 186 Pac. 383 (construing juvenile court law); *People v. Camp*, 42 Cal. App. 411, 183 Pac. 845 (holding Pen. Code, § 288, was not

rendered uncertain by reason of a clerical error in referring to part 2 instead of part 1 of the code); *People v. De Leon*, 35 Cal. App. 467, 170 Pac. 173 (holding § 21 of the juvenile court law, Stats. 1915, p. 1246, sufficiently precise); *People v. Bradford*, 1 Cal. App. 41, 81 Pac. 712 (clerical error in Pen. Code, § 288, held not to render section uncertain).

16. *Ex parte Daniels*, 183 Cal. 636, 192 Pac. 442, 460, per Shaw, J., dissenting.

17. *Ex parte McNulty*, 77 Cal. 164, 11 Am. St. Rep. 257, 19 Pac. 237 (quoted in *Cassidy v. Cannon*, 18 Cal. App. 426, 123 Pac. 358, 359; *People v. Camp*, 42 Cal. App. 411, 183 Pac. 845, 849).

in which it was held that a motor vehicle act prohibiting an unreasonable speed is not too uncertain to be a valid criminal statute.¹⁸

The legislature may denounce an offense by name without defining its constituent elements,¹⁹ but the name must be in English or the statute will be held unconstitutional as in violation of the provision requiring all laws to be in the English language.²⁰ But mere clerical errors in a statute do not vitiate it.¹

§ 8. Ex Post Facto Laws and Bills of Attainder.—Section 16 of article I of the constitution provides that “No . . . ex post facto law . . . shall ever be passed.”² This provision relates only to statutes which operate upon subjects, criminal or penal,³ and upon offenses committed before they become effective.⁴ It embraces those laws which

18. *Ex parte Daniels*, 183 Cal. 636, 192 Pac. 442, reviewing cases from other states. See AUTOMOBILES, vol. 3, p. 1009.

19. *People v. Carroll*, 80 Cal. 153, 22 Pac. 129 (holding a statute making it an offense to play a banking game is as valid and certain as one making it a public offense to play poker); *In re McCue*, 7 Cal. App. 765, 96 Pac. 110 (holding a statute valid which provides that every lewd or dissolute person is a vagrant).

20. Former section 288a of the Penal Code prohibiting “fellatio” and “cunnilingus” is unconstitutional, as such words are clearly Latin words which have not been Anglicized. The fact that words may be found in medical dictionaries does not prove them to be part of the English language. *Ex parte Lockett*, 179 Cal. 581, 178 Pac. 134, overruling *In re Soady*, 56 Cal. Dec. 247. See *People v. Car-*

rell, 31 Cal. App. 793, 161 Pac. 995, holding an information describing the offense in the language of the statute to be insufficient.

1. *People v. Troutman*, 62 Cal. Dec. 505, 201 Pac. 928; *People v. Camp*, 42 Cal. App. 411, 183 Pac. 845; *People v. Bradford*, 1 Cal. App. 41, 81 Pac. 712.

2. See *Havemeyer v. Superior Court*, 84 Cal. 327, 377, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121, referring to the provision.

3. In the *Matter of Perkins*, 2 Cal. 424, 440, holding a statute relating to the deportation of slaves brought into the state was neither criminal nor penal and not within the constitutional inhibition.

4. The time important to be taken into consideration in determining whether a law is ex post facto or not is the time (and the state of the law) at which the alleged offense was committed. If the law complained of was passed before

make criminal and punish an action done before their passage and innocent when done,⁵ or which aggravates a crime or makes it greater than it was when committed,⁶ or which increase the punishment thereof or change it to the disadvantage of the defendant,⁷ or which alter the legal rules of evidence and lessen the amount or measure necessary to convict.⁸ The constitutional inhibition does not include any act which modifies the rigor of the law,⁹ or mitigates the punishment for a crime,¹⁰ or which changes mere forms of procedure not going to the question of the guilt or innocence of a defendant nor tending to deprive him of any substantial right theretofore secured to him in aid of a full defense.¹¹

the commission of the act with which the prisoner is charged, it cannot, as to that offense, be an *ex post facto* law. If passed afterwards, it is as to that *ex post facto*, though whether of the class forbidden by the constitution depends upon other matters. *People v. Schmidt*, 33 Cal. App. 426, 438, 165 Pac. 555, quoting *Kring v. Missouri*, 107 U. S. 221, 27 L. Ed. 506, 2 Sup. Ct. Rep. 443.

5. *People v. Stanley*, 33 Cal. App. 624, 166 Pac. 596 (holding that a statute is not *ex post facto* where the offense is continuous in nature, and the statute does not purport to punish acts and conduct prior to its enactment).

6. *People v. Schmidt*, 33 Cal. App. 426, 165 Pac. 555, quoting *Calder v. Bull*, 3 Dall. (U. S.) 386, 1 L. Ed. 648.

7. *In re Lee*, 177 Cal. 689, 171 Pac. 958; *People v. McNulty*, 3 Cal. Unrep. 441, 28 Pac. 816 (explained in *People v. Durrant*, 119 Cal. 201, 51 Pac. 185, and holding that a statute directing the execution of a sentence of death to be

had not less than sixty nor more than ninety days from judgment instead of not less than thirty nor more than sixty days under the prior law, and which directed confinement in the state penitentiary until execution is *ex post facto* as regards prisoners awaiting execution); *Ex parte Gutierrez*, 45 Cal. 429; *In re Bouchard*, 38 Cal. App. 441, 176 Pac. 692. See *People v. Vincent*, 95 Cal. 425, 30 Pac. 581, following *People v. McNulty*, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61.

8. *People v. Schmidt*, 33 Cal. App. 426, 165 Pac. 555, quoting *Calder v. Bull*, 3 Dall. (U. S.) 386, 1 L. Ed. 648.

9. *People v. Schmidt*, 33 Cal. App. 426, 436, 165 Pac. 555, quoting *Calder v. Bull*, 3 Dall. (U. S.) 386, 1 L. Ed. 648.

10. *In re Lee*, 177 Cal. 690, 171 Pac. 958.

11. *People v. Mortimer*, 46 Cal. 114; *People v. Gibson*, 39 Cal. App. 202, 178 Pac. 338 (statute authorizing trial by jury); *People v. Schmidt*, 33 Cal. App. 426, 439, 165 Pac. 555. See *supra*, § 5.

It is sometimes stated generally that laws merely working a change in procedure or remedy are not within the scope of this constitutional provision, but such statement is probably too broad unless limited to procedure in which a defendant accused of crime may not be said to have a vested right.¹² A law applicable to past offenses is not unconstitutional which establishes a new forum, or which changes the number of grand jurors to investigate criminal charges, or which authorizes the prosecution by information of offenses hitherto prosecuted by indictment only, or which takes away the ground of the bias and prejudice of grand jurors as a foundation of a motion to set aside an indictment.¹³ An indeterminate sentence law is *ex post facto*, as to crimes committed before it took effect, which does away with the system of credits for good conduct.¹⁴ But a statute imposing an increased punishment for second offenses is not *ex post facto*, even when applied to one who committed the first offense before it takes effect. The increased punishment is not regarded as a part of the penal consequences of the first offense, but applies exclusively to the last as aggravated by the repetition of the same offense. In such cases it is the second or subsequent offense that is punished, not the first.¹⁵

The constitutional provision requiring appellate courts to disregard errors not resulting in a miscarriage of justice is not obnoxious to the provision of the federal con-

12. *People v. Schmidt*, 33 Cal. App. 426, 435, 165 Pac. 555, referring to *Kring v. Missouri*, 107 U. S. 221, 27 L. Ed. 506, 2 Sup. Ct. Rep. 443.

13. *People v. Campbell*, 59 Cal. 243, 43 Am. Rep. 257, quoted in *Hallock v. United States*, 185 Fed. 417, 421, 107 C. C. A. 487.

14. *In re Lee*, 177 Cal. 690, 171

Pac. 958; *In re Bouchard*, 38 Cal. App. 441, 176 Pac. 692; *Ex parte Carrera*, 36 Cal. App. 817, 172 Pac. 979; *People v. Hill*, 36 Cal. App. 574, 172 Pac. 1114.

15. *People v. King*, 64 Cal. 338, 30 Pac. 1028; *Ex parte Gutierrez*, 45 Cal. 429; *People v. Smith*, 36 Cal. App. 88, 171 Pac. 696.

stitution against ex post facto laws as it merely alters the rules for the disposition of an appeal after trial.¹⁶

Bills of attainder.—At common law a bill of attainder was a legislative conviction for an alleged crime, followed by a prescribed punishment therefor, with judgment of death.¹⁷ The enactment of such a bill is prohibited by the constitution.¹⁸

§ 9. Equal Protection of Laws.—The fourteenth amendment of the United States constitution forbids any state from denying to any person within its jurisdiction equal protection of the laws.¹⁹ And section 11 of article I of the constitution of California declares that all laws of a general nature shall have a uniform operation. These provisions do not forbid the passage of legislation applicable to certain classes of persons if there is some natural, intrinsic, constitutional and reasonable basis for the classification.²⁰ The fourteenth amendment means simply that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons, or other classes, in the same place and under like circumstances.¹ The classification may be made according to conditions, vocations, circumstances, duties and responsibilities attending the relations of individuals toward the public and toward the government in any or all of its branches. And it must rest upon some substantial, inhe-

16. *People v. O'Bryan*, 165 Cal. 55, 67, 130 Pac. 1042.

17. *French v. Senate*, 146 Cal. 604, 2 Ann. Cas. 756, 69 L. R. A. 556, 80 Pac. 1031 (holding a resolution expelling a member of the state legislature bears no just resemblance to a bill of attainder)

18. Art. I, § 16.

19. See *infra*, § 78.

20. See CONSTITUTIONAL LAW, vol. 5, pp. 790, 816.

1. *People v. Finley*, 153 Cal. 59, 94 Pac. 248; *In re Finley*, 1 Cal. App. 198, 205, 81 Pac. 1041. See *People v. Lamattina*, 38 Cal. App. 82, 91, 175 Pac. 484, holding section 1202 of the Penal Code is not objectionable as special legislation as the class of individuals to which it applies is separated from others by a natural or inherent distinction.

rent, intrinsic difference or distinction in the relation of the particular class toward the lives, safety, property, health, happiness or convenience of the public, when contrasted with the relation, duties, responsibilities, position or situation of other persons or classes toward the same matters of public concern.² Tested by this rule, a statute is not invalid which provides that persons undergoing a life sentence who commit aggravated assaults shall be punishable with death.³ So, also, section 288 of the Penal Code making the crime of lewd and lascivious conduct with boys a felony is valid, under this rule.⁴

§ 10. Repeal of Statutes.—The repeal of a statute creating a crime bars any prosecution for its violation, and puts an end to all prosecutions pending thereunder at the time of the repeal,⁵ unless there is a special saving clause inserted in the repealing act,⁶ or unless there is a general saving clause, clothed in apt language to express the purpose.⁷ Section 329 of the Political Code constitutes a general saving clause within the rule. The section is as follows:

“The repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indict-

2. *In re Finley*, 1 Cal. App. 198, 207, 81 Pac. 1041, citing many federal cases and cases from other jurisdictions. See CONSTITUTIONAL LAW, vol. 5, p. 823 et seq.

3. *People v. Carson*, 155 Cal. 164, 99 Pac. 970; *People v. Quijada*, 154 Cal. 243, 97 Pac. 689; *People v. Finley*, 153 Cal. 59, 94 Pac. 248, affirmed in *Finley v. California*, 222 U. S. 28; *In re Finley*, 1 Cal. App. 198, 207, 81 Pac. 1041.

4. *People v. Camp*, 42 Cal. App. 411, 183 Pac. 845.

5. *Spears v. County of Modoc*, 101 Cal. 305, 35 Pac. 869 (holding the repeal of an ordinance pending an appeal to the superior court puts an end to the prosecution); *People v. McNulty*, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61, 3 Cal. Unrep. 441, 28 Pac. 816; *People v. Tisdale*, 57 Cal. 104. See generally as to effect of repeals, STATUTES.

6. *People v. Gill*, 7 Cal. 356.

7. *People v. McNulty*, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61; *People v. Quinn*, 18 Cal. 122.

ment or information and punishment is expressly declared in the repealing act."⁸

This section, however, is limited to the repeal of a "law" and does not extend to the repeal of a municipal ordinance.⁹

A statute creating a crime may be repealed expressly, or by implication by the enactment of a subsequent statute inconsistent with it.¹⁰ The inconsistency may relate merely to the punishment prescribed,¹¹ but there is no such inconsistency as to amount to an implied repeal between statutes relating to different classes of offenses.¹² When a later clause in a statute is found to be irreconcilably inconsistent with a preceding clause, the clause later in position operates as a repeal of the former clause, so far as it is inconsistent.¹³ Since punishment is an essential element, a law repealing the punishment of an offense is as much the "repeal of any law creating a criminal offense" within the meaning of the statute as a repeal of a law describing or defining the acts necessary to constitute it.¹⁴ An amendment of a statute creating a crime "so as to read as follows" repeals everything in the original statute not put into the statute as re-enacted.¹⁵

8. *People v. Bank of San Luis Obispo*, 159 Cal. 65, 76, Ann. Cas. 1912B, 1148, 37 L. R. A. (N. S.) 934, 112 Pac. 866 (citing code section); *People v. McNulty*, 93 Cal. 427, 438, 26 Pac. 597, 29 Pac. 61; *People v. Williams*, 24 Cal. App. 646, 142 Pac. 124. See *People v. Tisdale*, 57 Cal. 104, as to the effect of this enactment before it contained the word "information."

9. *Spears v. County of Modoc*, 101 Cal. 303, 307, 35 Pac. 869.

10. See STATUTES.

11. *People v. Tisdale*, 57 Cal. 105.

12. *People v. Chu Quong*, 15 Cal. 332.

13. *Matter of Roberts*, 157 Cal. 472, 108 Pac. 315. See STATUTES.

14. *People v. McNulty*, 93 Cal. 427, 438, 26 Pac. 597, 29 Pac. 61, explained in *Huffman v. Hall*, 102 Cal. 26, 35, 36 Pac. 417, per Beatty, C. J., dissenting.

15. *People v. McNulty*, 93 Cal. 427, 441, 26 Pac. 597, 29 Pac. 61, quoting with approval from *State v. Ingersoll*, 17 Wis. 634.

The provisions of the Crimes and Punishment Act of 1850 ceased to be the law in so far as they were not re-enacted in the Penal Code.¹⁶

III. MENTAL CONDITION AND CAPACITY.

In General.

§ 11. **Intent as an Element of Crime.**—It is a cardinal doctrine of criminal law, founded in natural justice, that it is the intention or criminal negligence with which an act is done which constitutes its criminality.¹⁷ This rule is expressed by the maxim, *Actus non facit reum nisi mens sit rea*,¹⁸ and it is also declared in section 20 of the Penal Code which provides that

“In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence.”¹⁹

The Criminal Practice Act contained a similar provision.²⁰ While, on the one hand, the law does not recognize a man's mere intentions as a crime, however corrupt and criminal those intentions may be,¹ neither does it, on

16. *People v. Logan*, 175 Cal. 45, 48, 164 Pac. 1121; *People v. Salvador*, 71 Cal. 16, 11 Pac. 801.

17. *People v. Welsh*, 63 Cal. 167; *People v. Pool*, 27 Cal. 572, 576; *People v. Foren*, 25 Cal. 361, 365.

18. *People v. Harris*, 29 Cal. 678.

19. *People v. Hoagland*, 138 Cal. 338, 71 Pac. 359; *People v. O'Brien*, 96 Cal. 171, 176, 31 Pac. 45; *People v. Wright*, 93 Cal. 564, 29 Pac. 240 (mayhem); *People v. Doyell*, 48 Cal. 89, 94; *People v. Harris*, 29 Cal. 678; *Ex parte Goldman*, 7 Cal. Unrep. 254, 88 Pac. 819; *People v. Fodera*, 33 Cal. App. 8,

164 Pac. 22; *People v. Bunkers*, 2 Cal. App. 197, 204, 84 Pac. 364, 370 (bribery). See the titles of particular crimes in this work.

20. *People v. White*, 34 Cal. 183 (holding possession of counterfeit-ing tools without a criminal intent is not an offense); *People v. Foren*, 25 Cal. 361, 365.

1. *People v. Martin*, 102 Cal. 558, 36 Pac. 952; *People v. Gallagher*, 100 Cal. 466, 472, 35 Pac. 80; *People v. Elliott*, 90 Cal. 586, 27 Pac. 433. See *People v. Bosquet*, 116 Cal. 75, 47 Pac. 879, holding statute against keeping of married women

the other hand, as a general rule, regard his acts as criminal, unless done with a guilty intent. The act and the intent must concur. If the intent is first conceived after the commission of the act no crime is committed.²

Applying these rules, it is clear that one who carelessly takes the property of another without the latter's consent is not guilty of larceny, even though he subsequently conceives the intent to appropriate it.³ For a similar reason, one who innocently aids in the commission of an offense is not guilty of a crime.⁴ The Penal Code specifically provides that persons who committed the act or made the omission charged through misfortune or accident, when it appears that there was no evil design, intention, or culpable negligence,⁵ and persons who committed the act without being conscious thereof are not criminally responsible therefor.⁶ The latter provision does not contemplate persons of unsound mind, such as idiots, lunatics and insane persons, but, on the contrary, contemplates persons of sound mind,—as, for example, somnambulists or persons suffering with delirium from fever or drugs. One committing a crime while insane is excused, not by reason of his unconsciousness at the time, but by reason of his insanity.⁷

§ 12. Intent in Statutory Crimes.—The rule that crime proceeds only from a guilty mind has some exceptions, especially in the case of statutory crimes. There are some acts made crimes by the very terms of the law where the fraudulent or wicked intent is conclusively presumed

in houses of prostitution does not make criminal a mere conviction of mind.

2. *People v. Morino*, 85 Cal. 515, 24 Pac. 892.

3. *People v. Devine*, 95 Cal. 227, 30 Pac. 378; *People v. Cheong Foon Ark*, 61 Cal. 527. See LARCENY.

4. *People v. Fredoni*, 12 Cal. App.

685, 108 Pac. 663. See Pen. Code, § 26, subd. 5. See *infra*, § 39.

5. Pen. Code, § 26.

6. Pen. Code, § 26; *People v. Hartman*, 130 Cal. 487, 491, 62 Pac. 823.

7. *People v. Mathever*, 132 Cal. 326, 64 Pac. 481. See *infra*, §§ 20-

23.

from the commission of the act itself, or where the act is denounced as criminal without regard to the evil intent.⁸ Indeed, some acts have been held to constitute offenses, even though the doer was guilty of no intent to violate the law, or was acting only from good motives.⁹ Whether or not a criminal intent is a necessary element of the offense is often a matter of statutory construction to ascertain the intention of the legislature.¹⁰ The holdings of the courts in the case of acts prohibited by the legislature in the exercise of police power are quite uniform to the effect that an intent is not essential.¹¹

8. Matter of Application of Ahart, 172 Cal. 762, 159 Pac. 160. "When the statute plainly forbids an act to be done, and it is done by some person, the law implies conclusively the guilty intent, although the offender was honestly mistaken as to the meaning of the law he violates. When the statute is plain and positive and the offense is not made to depend upon the positive willful intent and purpose, nothing is left to interpretation." *People v. O'Brien*, 96 Cal. 171, 31 Pac. 45, quoting *State v. McBrayer*, 98 N. C. 623, 2 S. E. 756. "When the intent is not made an affirmative element of the crime the law imputes that the act knowingly done was with criminal intent and it need not be alleged nor proven." *People v. Wolfrom*, 15 Cal. App. 735, 115 Pac. 1088; quoted in *People v. Phillips*, 27 Cal. App. 409, 150 Pac. 75 (construing Pen. Code, § 538); and in *People v. Iden*, 24 Cal. App. 626, 637, 142 Pac. 117.

9. *People v. O'Brien*, 96 Cal. 171, 31 Pac. 45, quoting approvingly from *State v. McBrayer*, 98 N. C. 623, 2 S. E. 756.

10. Matter of Application of Ahart, 172 Cal. 762, 159 Pac. 160 (construing an ordinance against transportation of liquor within a city); *People v. O'Brien*, 96 Cal. 171, 31 Pac. 45, quoting from *Halsted v. State*, 41 N. J. L. 552, 32 Am. Rep. 247. See *Triplett v. Munter*, 50 Cal. 644 (holding section 772 of the Penal Code did not intend to punish an act not knowingly and corruptly done); *People v. Harris*, 29 Cal. 678 (holding that the act of voting more than once at the same election is not a crime unless knowingly done); *People v. Fodera*, 33 Cal. App. 8, 164 Pac. 22 (construing Pen. Code, § 367c, as to duty of drivers of vehicles in collision, and holding knowledge to be an essential element of the crime). See the titles of the particular crimes. See note, 11 A. L. R. 1434, as to validity and construction of statutes or ordinances which make noncompliance with motor vehicle regulations a penal offense without reference to intent, fault or knowledge.

11. *People v. Bickerstaff*, 31 Cal. App. Dec. 970, 190 Pac. 656; *People v. Allen*, 37 Cal. App. 180, 174 Pac.

§ 13. Character of Intent.—The intention of the defendant referred to in section 20 of the Penal Code is not an intention to violate the law, for the defendant may be in fact ignorant that the act he committed was prohibited by law, or he may be honestly mistaken as to the meaning of the law he violates. Yet, as will be shown, this is no excuse.¹² Neither is it motive.¹³ The intent referred to is merely an intention to do the unlawful act.¹⁴ If one does an unlawful act voluntarily and willfully, that is to say, by design or set purpose,¹⁵ he is presumed to have intended what he did, as well as all the natural, probable and usual consequences of his act, and the intent need not be alleged or proved.¹⁶ This rule is declared by section 7 of the Penal Code, which provides that

“The word ‘willfully,’ when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.”¹⁷

Imputed intent.—While nothing short of an intent to do a forbidden thing will make a person a criminal in law, it is not necessary that the interdicted thing actually done

374; *People v. Pera*, 36 Cal. App. 292, 171 Pac. 1091.

12. *People v. Hartman*, 130 Cal. 487, 62 Pac. 823; *People v. O'Brien*, 96 Cal. 171, 31 Pac. 45. See *BIGAMY*, vol. 4, p. 340. See *infra*, § 17.

13. See *infra*, § 14.

14. *People v. Hartman*, 130 Cal. 487, 62 Pac. 823.

15. *People v. Von Tiedeman*, 120 Cal. 128, 135, 52 Pac. 155; *People v. Sheldon*, 68 Cal. 434, 9 Pac. 457 (if a thing is done with deliberation after consideration and reflection, it is willfully done).

The word “willfully” in penal statutes “means with evil intent, or

with legal malice, or with bad purpose.” *Galvin v. Gualala Milling Co.*, 98 Cal. 268, 33 Pac. 93.

16. See *infra*, § 144.

17. *People v. O'Brien*, 96 Cal. 171, 176, 31 Pac. 45. See *People v. Okomoto*, 26 Cal. App. 568, 147 Pac. 598, holding that the word includes, rather than excludes, the idea that the person doing the act was fully conscious of what he was doing and all of the circumstances connected therewith which make the doing willful, so that an information charging an act to have been willfully done was sufficient although it did not also state it was knowingly done.

should have been designed, but it must appear that such result was attained in the attempt to do an unlawful act.¹⁸ The common law measures an act which is malum in se substantially by the result produced, though not contemplated, holding the doer of the thing done in the same manner as if it were specifically intended, though not always guilty of the crime committed in the same degree. Whenever one in doing an act with the design of committing a felony takes the life of another, even accidentally, this is murder. The law in such case superadds the intent to kill to the original felonious intent and estops the criminal from denying the further intent thus imputed. The thing done, having proceeded from a corrupt mind, it is to be viewed the same whether the corruption is of one particular form or another.¹⁹

Specific intent.—A specific intent is an essential element of the commission of certain offenses.²⁰ Such intent is not presumed from the voluntary commission of the un-

18. *People v. Keefer*, 65 Cal. 233, 8 Pac. 818; *People v. Foren*, 25 Cal. 361, 365.

19. *People v. Craig*, 111 Cal. 460, 470, 44 Pac. 186; *People v. Olsen*, 80 Cal. 122, 22 Pac. 125; *People v. Keefer*, 65 Cal. 232, 3 Pac. 818 (under this rule an accessory before the fact to any of the felonies mentioned in Pen. Code, § 198, although not present when the felony is perpetrated or attempted, is guilty of a murder committed in the perpetration or attempt to perpetrate the felony); *People v. Doyell*, 48 Cal. 89, 94; *People v. Foren*, 25 Cal. 364; *People v. Keefer*, 18 Cal. 637. See HOMICIDE.

20. *People v. Mooney*, 127 Cal. 339, 59 Pac. 761 (arson); *People v. Landman*, 103 Cal. 577, 37 Pac. 518 (assault with intent to commit

murder); *People v. Fleming*, 94 Cal. 308, 29 Pac. 647 (assault with intent to commit rape); *People v. Mitchell*, 92 Cal. 590, 28 Pac. 597, 788 (forgery); *People v. Brown*, 74 Cal. 306, 16 Pac. 1 (procuring false evidence, intent to produce it for a fraudulent or deceitful purpose); *People v. Keefer*, 18 Cal. 636 (assault with intent to kill); *People v. McMakin*, 8 Cal. 547 (assault with intent to inflict a bodily injury); *People v. Murray*, 8 Cal. 519 (burglary, intent to commit "larceny or other felony"); *People v. Kafoury*, 16 Cal. App. 718, 117 Pac. 938 (assault with a deadly weapon with intent to commit murder). See ABORTION, vol. 1, p. 102, and the titles of other particular crimes.

lawful act but must be alleged¹ and proved.² The words "willfully, unlawfully, feloniously and maliciously" import only that criminal intent which is a necessary part of every felony or other crime, but do not necessarily include the specific intent which is an essential element of the offenses under consideration.³

§ 14. Motive.—Motive, as used in criminal law, implies an evil disposition and willingness to injure, and may exist without any specific intention to injure at all or to injure in any specific manner. It precedes intention and is the cause or reason upon which intent is founded.⁴ While the presence of a motive is oftentimes material as connecting a defendant with the commission of the offense charged,⁵ or as determining the character of the act perpetrated and ascertaining the intent of the accused,⁶ the motive for the commission of the crime becomes unimportant and need not be proved if the crime can otherwise be established.⁷ Proof of motive is never indispensable to a conviction,⁸ and the absence of proof thereof does not render the evidence insufficient to support the verdict as a matter of law.⁹

1. See INDICTMENT AND INFORMATION.

2. See *infra*, § 144.

3. *People v. Mooney*, 127 Cal. 339, 59 Pac. 761.

4. *People v. Durrant*, 116 Cal. 179, 48 Pac. 75 ("the moving cause"). *People v. Lane*, 100 Cal. 379, 388, 34 Pac. 856.

5. See *infra*, § 152.

6. See *infra*, § 151.

7. *People v. Tom Woo*, 181 Cal. 315, 328, 184 Pac. 389; *People v. Sainz*, 162 Cal. 242, 121 Pac. 922; *People v. Ah Lee*, 164 Cal. 350, 128 Pac. 1035; *People v. Besold*, 154 Cal. 363, 97 Pac. 871; *People v. Owens*, 132 Cal. 469, 64 Pac. 770;

People v. Verenesneckockhoff, 129 Cal. 497, 508, 58 Pac. 156, 62 Pac. 111; *People v. Durrant*, 116 Cal. 179, 208, 48 Pac. 75; *People v. Best*, 39 Cal. 690; *People v. William Yee*, 37 Cal. App. 579, 584, 174 Pac. 343; *People v. Klempke*, 19 Cal. App. 672, 127 Pac. 653; *People v. Knapp*, 16 Cal. App. 682, 117 Pac. 792; *People v. Muhley* 15 Cal. App. 416, 428, 114 Pac. 1017; *People v. Petruzo*, 13 Cal. App. 569, 578, 110 Pac. 324.

8. *People v. Durrant*, 116 Cal. 179, 208, 48 Pac. 75.

9. *People v. Tom Woo*, 181 Cal. 315, 328, 184 Pac. 389; *People v. Bauweraerts*, 164 Cal. 696, 130 Pac. 717.

§ 15. **Malice.**—Malice is a mental element required in certain crimes.¹⁰

“The words ‘malice’ and ‘maliciously’ import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law.”¹¹

In common acceptation malice has its foundation in ill will against a person and is evidenced by an attempt wrongfully to vex, injure or annoy another. This is the malice referred to in the first part of the code section just quoted. This malice may be designated malice in fact. There is another malice, described in the later portion of the same section, which is raised by the law in certain cases upon certain proofs. This is a malice of pleading and proof made necessary by the exigencies of definitions of offenses against the law.¹² The term “malice” as used in the latter sense includes the notion of intent and signifies intent to do a wrongful act.¹³ It does not simply involve premeditation or deliberation, but may be formed during a conflict.¹⁴ It may exist with malice in fact, or independent of it. In some instances, the latter malice—malice in law—is conclusively presumed against the defendant. In other instances the presumption is disputable.¹⁵

10. See ARSON, vol. 3, p. 162; HOMICIDE (“malice aforethought”); LIBEL AND SLANDER; MAYHEM; MALICIOUS MISCHIEF.

11. Pen. Code, § 7, subd. 4; Davis v. Pacific Tel. & Tel. Co., 127 Cal. 312, 319, 57 Pac. 764, 59 Pac. 698 (citing the code section); People v. Wright, 93 Cal. 564, 29 Pac. 240; People v. Kafoury, 16 Cal. App. 718, 117 Pac. 938.

12. Davis v. Hearst, 160 Cal. 143, 157, 116 Pac. 530, per Henshaw, J.

13. Ex parte Mauch, 134 Cal. 500,

66 Pac. 734; People v. Kernaghan, 72 Cal. 609, 14 Pac. 566; People v. Ah Toon, 68 Cal. 362, 9 Pac. 311; Larue v. Davis, 8 Cal. App. 750, 97 Pac. 903 (holding a malicious disturbing of the peace is sufficiently indicated by an allegation of willful and unlawful disturbing the peace by fighting in the streets).

14. People v. Wright, 93 Cal. 564, 29 Pac. 240.

15. Davis v. Hearst, 160 Cal. 143, 157, 116 Pac. 530.

The code definition of the word "malice" is applicable in all cases where the word "malicious" is used in the code as part of the definition of the offense without some qualification as to the meaning of the term or as to the proof thereof,¹⁶ but it does not include the malice essential to constitute the crime of murder.¹⁷ On the other hand, malice aforethought is not an essential element of any crime except murder.¹⁸

§ 16. Corruption, Knowledge and Criminal Negligence. Section 7 of the Penal Code provides that unless otherwise apparent from the context,

"The word 'knowingly' [as used in the code] imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission."¹⁹

And "The word 'corruptly' imports a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person."

Criminal negligence.—Criminal negligence is an expression used to designate that sort of negligence which may take the place of specific intent in a prosecution of certain crimes.²⁰ The term is defined in the Penal Code as follows:

"The words 'neglect,' 'negligence,' 'negligent,' and 'negligently' import a want of such attention to the nature or probable consequences of the act or omission as a pru-

16. *People v. Wilkinson*, 30 Cal. App. 473, 478, 158 Pac. 1067,

17. *People v. Harris*, 169 Cal. 53, 65, 145 Pac. 520; *People v. Waysman*, 1 Cal. App. 246, 81 Pac. 1087. See HOMICIDE.

18. *People v. Wright*, 93 Cal. 564, 29 Pac. 240. See HOMICIDE.

19. *People v. Burns*, 75 Cal. 627, 17 Pac. 646 (holding that the word

"knowingly" as used in the code must be construed to import only a knowledge of the facts). See *infra*, § 144.

20. *Grossetti v. Sweasey*, 176 Cal. 793, 800, 169 Pac. 687; *Ex parte Snowden*, 12 Cal. App. 521, 107 Pac. 724, referring to Pen. Code, §§ 348, 349.

dent man ordinarily bestows in acting in his own concerns.'"¹

While there are cases in which all the knowledge which a person might have acquired by due diligence is to be imputed to him, mere negligence cannot take the place of a specific intent.² One may be careless and omit to make an effort to ascertain whether certain property belongs to another, but so long as he believes it to be his own, he cannot feloniously steal it.³ So, also, negligence in failing to ascertain the competency of an affiant, however gross, cannot take the place of the specific intent necessary to constitute the crime of preparing false evidence with intent to produce it for a fraudulent or deceitful purpose.⁴

Circumstances Affecting Existence of Intent.

§ 17. Ignorance or Mistake of Law.—As already stated, one may be guilty of a crime although he has no intention to violate the law.⁵ It is an emphatic postulate of the penal law that ignorance of a law is no excuse for a violation thereof.⁶ This is based on a fiction, because no man can know all the law, but it is a maxim which the law does not permit anyone to gainsay. The rule rests on public necessity; and it has been said that the welfare of society and safety of the state depend upon its enforcement. No system of criminal justice could be sustained without such a rule. The plea of ignorance would be universally made, and would lead to interminable questions incapable of solution. Ignorance of the law may, however, be a circum-

1. Pen. Code, § 7, subd. 2; In re Chadbourne, 15 Cal. App. 363, 370, 114 Pac. 1012 (quoting statute).

2. People v. Von Tiedeman, 120 Cal. 128, 136, 52 Pac. 155; People v. Devine, 95 Cal. 227, 30 Pac. 378.

3. People v. Devine, 95 Cal. 227, 30 Pac. 378. See LARCENY.

4. People v. Brown, 74 Cal. 306, 16 Pac. 1.

5. See supra, § 13.

6. People v. O'Brien, 96 Cal. 171, 31 Pac. 45; People v. Burns, 75 Cal. 627, 17 Pac. 646; People v. Wolfrom, 15 Cal. App. 732, 115 Pac. 1088; Folsom v. Conklin, 3 Cal. App. 480, 483, 86 Pac. 724.

stance in mitigation of punishment. As stated in one case, "It is expected that the jury and the court, where it is shown that in fact the defendant was ignorant of the law, and innocent of any intention to violate the same, will give the defendant the benefit of the fact, and impose only a light penalty."⁷

Application of rule.—In accordance with this rule one may be guilty of bigamy, although mistaken as to the invalidity of the first marriage.⁸ One may be guilty of usurping an office although he believes he was truly elected, or of illegal voting, although he believes he is a qualified elector. So, also, it has been held that one who alters a record is guilty of a crime although he was innocent of any intent to violate the law and was simply seeking to rectify a wrong already done.⁹

Specific intent.—An exception to the rule just announced exists in cases where specific intent is an essential element of the crime charged. If such ignorance renders impossible the special state of mind required to constitute the offense, there is no liability.¹⁰

§ 18. Ignorance or Mistake of Fact.—While ignorance of the law does not excuse,¹¹ it is a settled rule that a person who commits the act or makes the omission charged, under an ignorance or mistake of fact which disproves any criminal intent, is not criminally liable for the act or omission charged.¹² This was a doctrine of the common law and is the rule under the code. An honest and reasonable belief in the existence of circumstances which, if true, would make the act with which a defendant is charged an

7. *People v. O'Brien*, 96 Cal. 171, 31 Pac. 45, per Paterson, J.

8. See *BIGAMY*, vol. 4, p. 340.

9. *People v. O'Brien*, 96 Pac. 171, 175, 178, 31 Pac. 45. See *ELECTIONS; RECORDS*.

10. *People v. Goodin*, 136 Cal.

455, 69 Pac. 85, applying rule to prosecution for maliciously digging up a highway.

11. See *supra*, § 17.

12. *Pen. Code*, § 26, subd. 4; *People v. Burns*, 75 Cal. 627, 17 Pac.

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innocent act stands on the same footing as the absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy.¹³ In short, the defendant lacks the intent which is requisite to constitute the offense. To relieve one from responsibility under this rule, the facts as they appeared to the accused must be such that if true no crime would have been committed. Where one, for example, intends to assault or kill a certain person and by mistake or inadvertence assaults or kills another in his stead, he nevertheless commits a crime, and the intent is transferred from the party who was intended to the other.¹⁴

This rule is as applicable to statutory crimes as to offenses which existed at common law, unless it is excluded expressly or by necessary implication. Whether it is so excluded is often a matter of statutory construction.¹⁵ In the case of the statutory crime of abduction,¹⁶ or rape,¹⁷ for example, the defendant cannot successfully plead ignorance as to the true age of the victim of his outrage. In such case "the illegal motive is present, and that illegal motive becomes a criminal intent, when the facts, at whose peril he acts, are shown to exist."¹⁸

§ 19. Duress and Coercion.—A person who commits a crime under the command of a superior cannot escape

13. *Queen v. Tolson*, L. R. 23, Q. B. Div. 168 [1889], per Cave, J., quoted in part in *Matter of Application of Ahart*, 172 Cal. 762, 159 Pac. 160.

14. *People v. Wells*, 145 Cal. 138, 78 Pac. 470; *People v. Suesser*, 142 Cal. 354, 367, 75 Pac. 1093 (approving rule laid down in *State v. McGonigle*, 14 Wash. 594, 45 Pac. 20).

15. *Matter of Ahart*, 172 Cal. 762, 159 Pac. 160, holding that a city ordinance forbidding the transportation of intoxicating liquors to certain places was to be construed as

forbidding the act where it was knowingly done. Ignorance of the character of the place to which the liquor is taken is a defense. See *supra*, § 12.

16. See *ABDUCTION*, vol. 1, p. 93.

17. *People v. Griffin*, 117 Cal. 586, 59 Am. St. Rep. 216, 49 Pac. 711; *People v. Ratz*, 115 Cal. 132, 46 Pac. 915; *People v. Sheffield*, 9 Cal. App. 131, 98 Pac. 67. See *RAPE*.

18. *People v. Griffin*, 117 Cal. 586, 59 Am. St. Rep. 216, 49 Pac. 711.

responsibility for his acts. The command of a master to his servant, or a principal to his agent, or a parent to a child, will not justify a criminal act done in pursuance of it,¹⁹ unless of the character described in subdivision 8 of section 26 of the Penal Code. This section provides that

“Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused,” are not capable of committing crimes.”

While the language of this section is not as exact as it might be, it has been held that under it one is not relieved of the responsibility for a criminal act because he acted through fear produced by threats, unless the fear was of immediate and imminent danger. Threats of future injury do not excuse any offense, as such a danger in the very nature of things can easily be avoided by innocent methods. The fact that the person claiming the deed was done under compulsion is a minor does not affect the rule, as the statute is general and applicable to persons of any age.²⁰ Married women acting under the threats, command or coercion of their husbands are, by the Penal Code, declared to be incapable of committing crimes other than felonies.¹

Insanity and Imbecility.

§ 20. In General.—The Penal Code specifically excepts from responsibility for crimes, idiots, lunatics and insane

19. *People v. Richmond*, 29 Cal. 414.

20. *People v. Martin*, 13 Cal. App. 96, 104, 108 Pac. 1034. See note, 16 A. L. R. 1470, as to criminal responsibility of parent or child for act of child done under fear of or compulsion by parent.

1. Pen. Code, § 26, subd. 7. See *People v. Worthington*, 105 Cal. 168, 38 Pac. 689, holding it is no defense to murder that a wife was told by her husband to kill the deceased.

persons.² Such persons do not have the capacity of entertaining a criminal intent and cannot therefore commit a crime or public offense.³ While the plea of insanity is frequently set up in the absence of all matter tending to show an excuse or justification for crime, and is not to be encouraged,⁴ it entitles the accused to an absolute acquittal when it is successfully established.⁵

Time of insanity.—In order that the insanity of a defendant may constitute a defense, it must exist at the very time of the commission of the crime charged against him. While evidence of prior or subsequent insanity is admissible for the limited purpose of proving insanity when the crime was committed,⁶ such prior or subsequent insanity cannot be invoked as a complete defense or properly be made the sole basis of a verdict of acquittal.⁷

§ 21. Test of Insanity and Imbecility.—While the medical authorities recognize many degrees of insanity, the law recognizes only one degree as an excuse for crime. Insanity, as a defense in a criminal prosecution, means such a diseased and deranged condition of the mental faculties as to render the person incapable of distinguishing between right and wrong, in relation to the act with which he is charged. If a defendant, at the time of committing the act with which he is charged, was laboring under such a defect of reason, from disease of the mind, temporary or otherwise, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong, he is not criminally

2. Pen. Code, § 26, subs. 2 and 3.

3. *People v. Farrell*, 31 Cal. 576.

4. *People v. De Cleer*, 60 Cal. 382.

5. *People v. Kelley*, 7 Cal. App. 554, 95 Pac. 45. See note, 10 A. L. R. 213 et seq., as to remedies of one convicted of crime while insane.

6. See *infra*, § 162.

7. *People v. Kirby*, 15 Cal. App. 265, 114 Pac. 794. See note, 3 A. L. R. 94, as to test of present insanity which will prevent trial for crime or punishment after conviction.

responsible therefor.⁸ On the other hand, if he had the capacity to appreciate the character and comprehend the possible consequences of his act, if he knew that it was a violation of the rights of another and in itself wrong, or if he knew that the act was prohibited by the laws of the land, and that its commission would entail punishment and penalties upon himself, he is responsible and is to be judged accordingly.⁹

Imbecility.—While there is a difference between insanity and imbecility, the test of responsibility for crime is the same. The law very properly declines to enter into a consideration of the degrees of imbecility. No matter how feeble may be the mental powers of a criminal, he is held responsible so long as he is capable of distinguishing and understanding the nature and consequence of the act, or of distinguishing between right and wrong in relation to the act committed.¹⁰

§ 22. Temporary and Partial Insanity.—While temporary insanity at the time of the commission of a crime,¹¹

8. *People v. Williams*, 184 Cal. 590, 194 Pac. 1019; *People v. Morisawa*, 180 Cal. 148, 179 Pac. 888; *People v. Fountain*, 170 Cal. 460, 464, 150 Pac. 341; *People v. Bundy*, 168 Cal. 777, 145 Pac. 537; *People v. Clark*, 151 Cal. 200, 90 Pac. 549; *People v. Willard*, 150 Cal. 548, 89 Pac. 124; *People v. Goldsworthy*, 130 Cal. 601, 62 Pac. 1074 (an unbalanced mind does not of itself excuse crime); *Marceau v. Travelers' Ins. Co.*, 101 Cal. 338, 35 Pac. 856, 36 Pac. 813; *People v. Kerrigan*, 73 Cal. 222, 14 Pac. 849; *People v. Hoin*, 62 Cal. 120, 45 Am. Rep. 651; *People v. Ferris*, 55 Cal. 588; *People v. M'Donnell*, 47 Cal. 134; *People v. Coffman*, 24 Cal. 230; *People v. Hobson*, 17 Cal. 424, 431; *People v. Ashland*, 20 Cal. App. 168,

181, 128 Pac. 798; *People v. Metz*, 2 Lab. (U. S. Dist.) 137.

9. *People v. Oxnam*, 170 Cal. 211, 149 Pac. 165; *People v. Bundy*, 168 Cal. 777, 145 Pac. 537; *People v. Kerrigan*, 73 Cal. 222, 14 Pac. 849; *People v. Pico*, 62 Cal. 50; *People v. Zari*, 36 Cal. App. Dec. 56, 201 Pac. 345. See note, 3 A. L. R. 94, as to test of present insanity which will prevent punishment for crime after conviction; and see note, 7 A. L. R. 576, as to admissibility on issue as to mental condition of proceedings to determine sanity of a prisoner awaiting trial.

10. *People v. Keyes*, 178 Cal. 794, 801, 175 Pac. 6; *People v. Metz*, 2 Lab. (U. S. Dist.) 137.

11. *People v. Ford*, 138 Cal. 140, 70 Pac. 1075.

other than that form of so-called insanity designated mania a potu brought on by the voluntary act of the party,¹² is as fully recognized by law as a defense to crime as is permanent insanity, partial insanity is not an excuse if the defendant understood the nature and character of his actions and could distinguish between right and wrong in reference thereto.¹³ It has never been doubted in California that a person may be held for a criminal act, if at the time of committing such act he fully knew the wrongfulness and criminality thereof, notwithstanding that he may at the time be partially insane or a monomaniac upon some subject other than that to which his criminal act related.¹⁴

Insane delusions.—One who claims that he committed a crime as a result of an insane delusion must be judged as though the facts with respect to which the delusion exist are real.¹⁵ If such facts would constitute a defense and the crime charged was the product or offspring of such delusion and not the result of some sane reasonings and natural motives, the party is not guilty of a crime. But if there is nothing in the alleged delusions which would constitute a defense, or if the crime committed was the result of other factors, he is punishable.¹⁶

§ 23. Irresistible Impulse, and Moral and Emotional Insanity.—An irresistible impulse to commit a crime which one knows is wrong or unlawful does not constitute the

12. *People v. Bremer*, 24 Cal. App. 315, 141 Pac. 222. See *infra*, § 25.

13. *People v. Fountain*, 170 Cal. 460, 150 Pac. 341; *People v. Willard*, 150 Cal. 548, 554, 89 Pac. 124; *People v. Ashland*, 20 Cal. App. 168, 181, 128 Pac. 798.

14. *People v. Stein*, 23 Cal. App. 108, 115, 137 Pac. 271.

15. *People v. Hubert*, 119 Cal. 216, 221, 63 Am. St. Rep. 72, 51 Pac. 329, citing *McNaughten's Case*, 10 Clark & F. (Eng.) 200.

16. *People v. Griffith*, 146 Cal. 339, 346, 80 Pac. 68; *People v. Hubert*, 119 Cal. 216, 225, 63 Am. St. Rep. 72, 51 Pac. 329. See *supra*, § 18.

insanity which is a legal defense to crime.¹⁷ Whatever may be the abstract truth, the law has never recognized an impulse as uncontrollable which yet leaves the reasoning powers—including the capacity to appreciate the nature and quality of the particular act—unaffected by mental disease.¹⁸ Whether the impulse is resistible or not depends upon the relative force of the impulse and the restraining force, and it has been well said that to grant immunity from punishment to one who retains sufficient intelligence to understand the consequences to him of a violation of the law, may be to make an impulse irresistible, which before was not.¹⁹

Moral insanity.—There is a distinction between a mental incapacity to understand the difference between right and wrong and a moral insensibility and indifference to the distinction. Moral insanity as distinguished from mental derangement is no excuse for crime. One who commits an offense knowing at the time that the deed is a criminal act and wrong in itself is not held to be guiltless of a crime on the ground solely of a perversion of the moral senses, however great.²⁰ Indeed, it has been argued that if great moral depravity should be taken as a test of in-

17. *People v. Morisawa*, 180 Cal. 148, 179 Pac. 888; *People v. Trebilcox*, 149 Cal. 307, 86 Pac. 684; *People v. Methewer*, 132 Cal. 326, 332, 64 Pac. 481; *People v. Owens*, 123 Cal. 482, 489, 56 Pac. 251; *People v. Barthleman*, 120 Cal. 7, 11, 52 Pac. 112; *People v. Hubert*, 119 Cal. 216, 63 Am. St. Rep. 72, 51 Pac. 329; *People v. McCarthy*, 115 Cal. 255, 262, 46 Pac. 1073; *People v. Ward*, 105 Cal. 335, 38 Pac. 945; *Marceau v. Travelers' Ins. Co.*, 101 Cal. 338, 35 Pac. 856, 36 Pac. 813; *People v. Hoin*, 62 Cal. 120, 45 Am. Rep. 651; *People*

v. Stein, 23 Cal. App. 108, 115, 137 Pac. 271.

18. *People v. Hoin*, 62 Cal. 120, 45 Am. Rep. 651; *People v. Stein*, 23 Cal. App. 108, 137 Pac. 271 ("A person having the mental capacity to know the wrongfulness and criminality of a certain act, has the capacity equal with such knowledge to restrain himself from committing it.")

19. *People v. Hubert*, 119 Cal. 216, 63 Am. St. Rep. 72, 51 Pac. 329.

20. *People v. McCarthy*, 115 Cal. 255, 46 Pac. 1073; *People v. Kerrigan*, 73 Cal. 222, 14 Pac. 849.

sanity, then the highest degree or enormity of crime would, by virtue of its own atrocity, furnish the best evidence of insanity on behalf of the one who committed the act.¹

Emotional insanity.—Emotional insanity which begins on the eve of the criminal act and ends with its consummation is not a defense to crime.² Mere moral insensibility, passion, hatred and anger is not insanity and is no legal excuse for a violation of the law or the commission of acts of personal violence. A person with ordinary will power, unimpaired by disease, is required by law to govern and control his passions.³

Intoxication.

§ 24. In General.—“No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition.”⁴ There is no injustice in holding a person responsible for acts done by him when in a state of intoxication brought on by his voluntary act. It is said to be the duty of everyone to society to preserve, so far as lies in his power, the gift of reason, and if by a voluntary act one casts off the re-

1. *People v. Kerrigan*, 73 Cal. 222, 14 Pac. 849.

2. *People v. Trebilcox*, 149 Cal. 307, 86 Pac. 684, citing dissenting opinion of Thornton, J., in *People v. Kernaghan*, 72 Cal. 609, 622, 14 Pac. 566.

3. *People v. Clark*, 151 Cal. 200, 90 Pac. 549.

4. Pen. Code, § 222; *People v. Sainz*, 162 Cal. 242, 121 Pac. 922; *People v. Marseiler*, 70 Cal. 98, 11 Pac. 503 (holding it not to be error to exclude evidence of drunkenness in a prosecution for assault with a deadly weapon); *People v. Blake*,

65 Cal. 275, 4 Pac. 1; *People v. Ferris*, 55 Cal. 588; *People v. Harris*, 29 Cal. 678; *People v. Belencia*, 21 Cal. 544. See *People v. Hartman*, 130 Cal. 487, 491, 62 Pac. 823, which refers to *People v. Harris*, 29 Cal. 678, as follows: “In that case it was held that if the defendant was so drunk . . . that he did not know what he was doing [in other words, so drunk as to be unconscious], then he was not guilty.” See 12 A. L. R. 861 as to voluntary intoxication as defense to homicide. And see, generally, HOMICIDE.

straints of reason and conscience, no wrong is done him if he is considered answerable for any injury which, in that state, he may do to others or to society.⁵ Drunkenness is not an excuse for any crime unless such drunkenness be occasioned by the fraud, contrivance or force of some person other than the defendant for the purpose of causing the perpetration of an offense.⁶ A contention that intoxication is not voluntary because the liquor which produced it was taken for medicinal purposes has been dismissed as unworthy of serious consideration.⁷

§ 25. Insanity Produced by Intoxication.—Since voluntary intoxication is no excuse for crime,⁸ it follows that a sane person who voluntarily becomes intoxicated is not relieved from responsibility because of any mental derangement, mania a potu, or insanity produced by and consequent upon his own voluntary act. He is not excused because the result of his voluntary drinking is to cloud his judgment, unbalance his reason, impair his perceptions, derange his mental faculties and lead him to the commission of an act which in his sober senses he would have avoided.⁹ A mere temporary mental derangement resulting from the voluntary use of intoxicants cannot operate to absolve one from liability for a criminal act, whether it manifests itself in the form of delirium tremens or in some milder form.¹⁰ The following instruction embracing this rule has been repeatedly approved: Insanity produced by intoxication does not destroy responsibility

5. *People v. Hower*, 151 Cal. 638, 91 Pac. 507; *People v. Blake*, 65 Cal. 275, 4 Pac. 1.

6. *People v. Nichol*, 34 Cal. 211, in which an instruction in substance the same as the text was approved.

7. *People v. Piercy*, 16 Cal. App. 13, 116 Pac. 322.

8. See *supra*, § 24.

9. *People v. Daily*, 135 Cal. 104, 67 Pac. 16; *People v. Fellows*, 122 Cal. 233, 239, 54 Pac. 830; *People v. Jones*, 63 Cal. 168; *People v. Bremer*, 24 Cal. App. 315, 141 Pac. 222.

10. *People v. Goodrum*, 31 Cal. App. 430, 438, 160 Pac. 690; *People v. Bremer*, 24 Cal. App. 315, 141 Pac. 222.

for crime when the party, when sane and responsible, voluntarily made himself intoxicated.¹¹

Settled insanity produced by drink.—When, however, settled insanity is produced by a long-continued intoxication, it affects responsibility in the same way as insanity produced by any other cause.¹² But it must be “settled insanity,” and not merely a temporary mental condition produced by the recent use of intoxicating liquor.¹³ If one, by reason of long-continued indulgence, has reached that stage of chronic alcoholism where the brain is permanently diseased, where he is rendered incapable of distinguishing right from wrong, and where permanent general insanity has resulted, then he is no more legally responsible for his acts than would be the man congenitally insane, or insane from violent injury to the brain.¹⁴

§ 26. Where Specific Intent is Essential.—While voluntary drunkenness is no excuse for any crime whatever,¹⁵ the fact of intoxication is of great importance when the nature and essence of a crime is made by law to depend upon the peculiar state or condition of the criminal’s mind at the time and with reference to the act done.¹⁶ This is

11. *People v. Keyes*, 178 Cal. 794, 175 Pac. 6; *People v. Hower*, 151 Cal. 638, 91 Pac. 507; *People v. Trebilcox*, 149 Cal. 307, 86 Pac. 684. (The phrase “when sane and responsible” is an important qualification to the rule, and should not be omitted from an instruction on the subject); *People v. Fellows*, 122 Cal. 233, 239, 54 Pac. 830; *People v. Goodrum*, 31 Cal. App. 430, 433, 438, 160 Pac. 690 (where the word “temporary” was inserted before the word insanity).

12. *People v. Hower*, 151 Cal. 638, 91 Pac. 507; *People v. Daily*, 135 Cal. 104, 67 Pac. 16; *People v.*

Travers, 88 Cal. 233, 239, 26 Pac. 88; *People v. Blake*, 65 Cal. 275, 4 Pac. 1; *People v. Ferris*, 55 Cal. 588.

13. *People v. Travers*, 88 Cal. 233, 239, 26 Pac. 88; *People v. Bremer*, 24 Cal. App. 315, 141 Pac. 222.

14. *People v. Hower*, 151 Cal. 638, 91 Pac. 507; *People v. Fellows*, 122 Cal. 233, 239, 54 Pac. 830, per *Henshaw, J.*; *People v. Bell*, 49 Cal. 485; *People v. Goodrum*, 31 Cal. App. 430, 434, 160 Pac. 690.

15. See *supra*, § 24.

16. *People v. Allen*, 166 Cal. 723, 137 Pac. 1148; *People v. Dowell*,

recognized in section 22 of the Penal Code, which provides that

“Whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act.”¹⁷

In such case the intoxication may be considered by the jury, not as the predicate for the full exoneration of the accused, but solely to enable or assist them in determining the purpose, motive or intent with which he committed the act.¹⁸ The weight to be given such evidence is a matter for the jury to determine,¹⁹ but such evidence should be received with caution and carefully considered in connection with all the circumstances of the case.²⁰ Of course, if the offense charged also includes a lesser offense, to constitute which no specific intent is necessary, the question of intoxication cannot be considered as to the latter offense.¹

Intoxication as determining degree of crime.—Where the existence of a particular intent determines the degree

141 Cal. 493, 75 Pac. 45; *People v. Phelan*, 93 Cal. 111, 28 Pac. 855; *People v. Blake*, 65 Cal. 275, 4 Pac. 1; *People v. Ferris*, 55 Cal. 588 (where the crime charged was assault with intent to kill); *People v. Harris*, 29 Cal. 678; *People v. Neetens*, 42 Cal. App. 596, 184 Pac. 27. See *People v. Gilmore*, 6 Cal. Unrep. 57, 53 Pac. 806, holding that a jury may conclude from the fact that the defendant when sober remembered the details of the crime, that he was not so drunk as to be incapable of a criminal intent.

“The question in this connection is whether he [the defendant] was intoxicated to such an extent as to

render him unconscious of or without appreciation of the nature of his act and incapable of forming” the deliberate intent necessary to the commission of the crime. *People v. Clifton*, 61 Cal. Dec. 760, 198 Pac. 1065.

17. *People v. Fellows*, 122 Cal. 233, 239, 54 Pac. 830.

18. *People v. Harris*, 29 Cal. 678; *People v. Goodrum*, 31 Cal. App. 430, 438, 160 Pac. 690.

19. *People v. Belencia*, 21 Cal. 544.

20. *People v. Harris*, 29 Cal. 678; *People v. Belencia*, 21 Cal. 544.

1. *People v. Gordon*, 103 Cal. 568, 37 Pac. 534.

of the crime committed, as in homicide cases, the fact of intoxication may be considered by the jury for the purpose of determining the state of mind of the defendant and the degree of the crime of which he is guilty.² When, however, the degree of the crime does not depend upon the state of mind of the criminal, but upon other factors, as in burglary, intoxication is irrelevant so far as a determination of the degree is concerned.³

IV. CLASSIFICATION OF CRIMES.

§ 27. **Felonies and Misdemeanors.**—"Crimes are divided into: 1. Felonies, and, 2. Misdemeanors."⁴ A felony at common law was an offense punishable by death, or to which the old English law attached the total forfeiture of lands or goods; but the essential difference between a felony and a misdemeanor is now practically lost in England since the felony act of 1870. In this country the term "felony" or "misdemeanor" simply denotes the degree or class of crimes.⁵ In California, the distinction between felonies and misdemeanors is pointed out in section 17 of the Penal Code. According to this section, "A felony is a crime which is punishable with death or by imprisonment in the state prison."⁶ Every other crime is a misde-

2. *People v. Methaver*, 132 Cal. 326, 332, 64 Pac. 481; *People v. Hill*, 123 Cal. 47, 55 Pac. 692; *People v. Soto*, 63 Cal. 165 (homicide case); *People v. Nichol*, 34 Cal. 211; *People v. King*, 27 Cal. 507, 515, 87 Am. Dec. 95; *People v. Belencia*, 21 Cal. 544; *People v. Conte*, 17 Cal. App. 771, 786, 788, 122 Pac. 450, 457. See HOMICIDE.

3. *People v. Dowell*, 141 Cal. 493, 75 Pac. 45.

4. Pen. Code, § 16; *Matter of Application of Westenberg*, 167 Cal.

809, 139 Pac. 674; *People v. Holmes*, 118 Cal. 444, 460, 50 Pac. 675; *County of Sonoma v. Santa Rosa*, 102 Cal. 426, 36 Pac. 810 (citing code section).

5. *In re O'Shea*, 11 Cal. App. 568, 574, 105 Pac. 776.

6. *People v. Smith*, 143 Cal. 597, 77 Pac. 449 (the commission of petit larceny by one who has been convicted of burglary is a felony); *People v. Holmes*, 118 Cal. 444, 50 Pac. 675 (involuntary manslaughter is a felony); *People v. Gutierrez*,

meanor.⁷ When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison."⁸ The sole test in determining whether a particular offense is a felony or misdemeanor is the nature and extent and mode of punishment prescribed,⁹ or, in case the superior court is clothed with a discretion of determining whether the sentence shall be executed by imprisonment either in a state prison or county jail, by the nature of the punishment inflicted. No material aid is necessarily afforded by the mere characterization of the

74 Cal. 81, 15 Pac. 444 (petit larceny as a second offense is a felony); *People v. Rodrigo*, 69 Cal. 601, 605, 11 Pac. 481 (robbery is a felony); *People v. King*, 64 Cal. 338, 30 Pac. 1028 (the crime of petit larceny is a felony when the accused has been previously convicted of grand larceny); *People v. Delany*, 49 Cal. 394 (petit larceny as a second offense); *People v. Murray*, 8 Cal. 519 (grand larceny is a felony); *In re Thompson*, 37 Cal. App. 344, 174 Pac. 86 (construing Pen. Code, § 17, in connection with Code Civ. Proc., § 287).

7. See *Pillsbury v. Brown*, 47 Cal. 477, holding violations of municipal ordinances do not constitute misdemeanors, at least within the meaning of a statute relating to fees of district attorneys.

8. *People v. Gray*, 137 Cal. 268, 70 Pac. 20 (seduction under promise of marriage); *People v. Perini*, 94 Cal. 573, 29 Pac. 1027 (receiving stolen goods); *People v. Aubrey*, 53 Cal. 428 (assault with deadly weapon); *People v. McGee*, 24 Cal.

App. 563, 570, 141 Pac. 1055 (assault with a deadly weapon); *People v. Sacramento Butchers' Assn.*, 12 Cal. App. 471, 489, 107 Pac. 712; *In re O'Shea*, 11 Cal. App. 568, 574, 105 Pac. 776; *In re Sullivan*, 3 Cal. App. 193, 84 Pac. 781 (assault with a deadly weapon).

Before this provision was enacted, it was held that any offense which might be or was liable to be punished by death or imprisonment in the state prison was a felony. The offense is to be deemed a felony when a judgment was rendered for the defendant. *People v. War*, 20 Cal. 117. But when the judgment was against the defendant, the nature of the punishment inflicted determined its grade. *People v. Cornell*, 16 Cal. 187, reviewed in *United States v. Watkinds*, 6 Fed. 152, 7 Sawv. 85.

9. *People v. Smith*, 143 Cal. 597, 77 Pac. 449; *People v. Sacramento Butchers' Assn.*, 12 Cal. App. 471, 489, 107 Pac. 712; *Union Ice Co. v. Rose*, 11 Cal. App. 357, 104 Pac. 1006.

prohibited act. Even though a statute should characterize an act as a felony, the act would be nothing more than a misdemeanor if the power of punishment were limited to fine or imprisonment in a county jail or both.¹⁰

Since a misdemeanor is defined to be a crime for which the penalty imposed, whatsoever it may be, is other than death or imprisonment in the state prison, it would seem clear that when a statute prescribes a fine or imprisonment as a punishment for its violation, without designating the place of punishment, the crime therein denounced is a misdemeanor.¹¹ An offense, the punishment of which is declared by statute, in the conjunctive, as both fine and imprisonment in the state prison, is a felony, as the judgment on conviction thereof must also prescribe imprisonment in the state prison.¹² If a defendant indicted for a felony is convicted of a lesser included offense which is a misdemeanor only, the offense after judgment is regarded as a misdemeanor.¹³

§ 28. High and Low Misdemeanors.—Misdemeanors at common law were divided into two classes, high and low misdemeanors, depending upon the question whether the offense charged was infamous or not. This distinction, more imaginary than real, is not applicable in California,¹⁴ although the terms are sometimes used for convenience of discussion, those misdemeanors being commonly called low misdemeanors which are punishable by a fine not exceeding five hundred dollars or imprisonment not exceeding six months, or both such fine and imprisonment, and which are generally within the jurisdiction of justices' and police

10. *People v. Sacramento Butchers' Assn.*, 12 Cal. App. 471, 489, 107 Pac. 712.

11. *Union Ice Co. v. Rose*, 11 Cal. App. 356, 360, 104 Pac. 1006.

12. *People v. Boren*, 139 Cal. 210, 72 Pac. 899.

13. *People v. Apgar*, 35 Cal. 389.

14. *Matter of Application of Westenberg*, 167 Cal. 309, 139 Pac. 674; *Green v. Superior Court*, 78 Cal. 556, 21 Pac. 307, 541.

courts, and those being designated high misdemeanors as to which a greater punishment is prescribed.¹⁵

§ 29. Infamous Crimes.—There is another class of crimes which embraces both felonies and misdemeanors, and that is infamous crimes.¹⁶ The Penal Code does not define infamous crimes, and in the absence of such definition the rule of the common law governs. Crimes are infamous either by reason of their punishment or by reason of their nature. At common law crimes which rendered the person committing them infamous were treason, felony, and the *crimen falsi*, the latter embracing not only offenses involving falsehood, but offenses injuriously affecting the administration of justice.¹⁷ The following have been determined to be such crimes: forgery, perjury, subornation of perjury, suppression of testimony by bribery or conspiracy to procure the absence of a witness, or

15. *Matter of Application of Westenberg*, 167 Cal. 309, 139 Pac. 674. See *Platz v. Marion*, 35 Cal. App. 241, 245, 169 Pac. 697, calling common barratry a simple misdemeanor in contradistinction to indictable misdemeanor.

16. This expression was used in art. I, § 8 of the constitution of 1863, providing that "no person shall be held to answer for a capital or otherwise infamous crime . . . unless on presentment or indictment of a grand jury." The present provision requires "offenses heretofore required to be prosecuted by indictment" to be prosecuted by indictment or information. See **INDICTMENT AND INFORMATION.**

17. See *Green v. Superior Court*, 78 Cal. 556, 565, 21 Pac. 307, 541, in which Paterson, J., dissenting,

quotes from *United States v. Block*, 4 Sawy. (U. S.) 214, to the effect that the term "infamous crimes" was applied to certain crimes which from their nature implied a total want of truth in the person committing them, without reference to the fact of whether they were otherwise distinguished as felonies or misdemeanors. Neither was it the punishment, but the nature of the act constituting the crime, which made it infamous. See *Ex parte McCarthy*, 53 Cal. 412 (holding that exhibiting a deadly weapon in a rude, angry and threatening manner is not an infamous crime); *Cohen v. Wright*, 22 Cal. 293, 316, where the court says that the offense of practicing law without having filed an oath of allegiance is not an infamous crime.

other conspiracy to accuse one of a crime.¹⁸ Criminal libel is not an infamous crime, however.¹⁹

C. ATTEMPTS TO COMMIT CRIME.

§ 30. **In General.**—An attempt to commit a public offense is a crime under section 664 of the Penal Code,²⁰ which, however, is not concerned with defining crimes or attempts to commit crimes, but merely with the punishment of attempts to commit them. This section provides in part that “Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof is punishable, where no provision is made by law for the punishment of such attempts, as follows”: The last clause of this provision—“where no provision is made by law for the punishment of such attempts,”—is confined to attempts designated by the statute as such, and does not refer generally to acts done in the attempt to commit one crime and which, if done without relation to the offense, might be separately punished. For instance, one who fractures a door or window in attempting to commit burglary may be punished for an attempt although such damage to property separately considered might constitute malicious mischief. Again, one who attempts to commit the crime of pandering in one of the methods prescribed by statute may be convicted of and punished for an attempt although his acts are exactly covered by another description of the offense and are also punishable as a substantial offense.¹ The converse of this proposition is covered by section 665 of the Penal Code, which is as follows:

18. *Green v. Superior Court*, 78 Cal. 556, 565, 21 Pac. 307, 541, per Paterson, J., dissenting.

19. *Matter of Application of Westenberg*, 167 Cal. 309, 320, 139 Pac. 674.

20. *People v. Burns*, 138 Cal. 160, 69 Pac. 16, 70 Pac. 1087; *People v. Erwin*, 4 Cal. App. 394, 88 Pac. 371.

1. *People v. Marks*, 24 Cal. App. 610, 142 Pac. 98, per Kerrigan, J.

“The last two sections do not protect a person who, in attempting unsuccessfully to commit a crime, accomplishes the commission of another and different crime, whether greater or less in guilt, from suffering the punishment prescribed by law for the crime committed.”

Effect of proof that crime was committed.—Under Section 663 of the Penal Code

“Any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was perpetrated by such person in pursuance of such attempt, unless the court, in its discretion, discharges the jury and directs such person to be tried for such crime.”

Attempt to commit attempt.—There can be no attempt to commit an attempt. Any attempt made is an attempt to commit a particular crime.²

§ 31. Definition and Nature.—While there is no difficulty in determining the meaning of an attempt to commit a crime, it is often difficult in particular cases to determine when the acts done constitute an attempt or preparation therefor. An attempt to commit a crime is an act done with the intention of committing a crime tending to but falling short of the thing intended. It is an endeavor carried beyond mere preparation but falling short of the execution of the ultimate design; an act immediately and directly tending to the execution of the principal crime, and committed under such circumstances that the accused had the power of carrying his intention into execution and would have done so but for some intervening cause.³ An attempt to commit a crime is com-

2. *People v. Hope*, 62 Cal. 291, disapproving an instruction in which the court used the expression, if the defendant was “prevented and anticipated in said attempt.”

3. *Ex parte Floyd*, 7 Cal. App. 588, 95 Pac. 175. See *People v.*

Petros, 25 Cal. App. 236, 143 Pac. 246 (quoting Wharton on Criminal Law, 11th ed., p. 268, to the effect that “an attempt is an intended apparent unfinished crime”). See, also, *People v. Paluma*, 18 Cal. App. 131, 122 Pac. 431, which

pounded of two elements: 1. The intent to commit it, and 2. A direct ineffectual act done toward its commission.⁴ As to the first element, to constitute an attempt, the acts must have been done with the intent to commit the particular crime attempted. This is so, even though such intent would not be necessary to constitute the crime if committed. For example, while to constitute murder, the guilty person need not intend to take life, such an intent is essential to an attempt to murder.⁵ As to the second element, a mere intention to commit a crime is not alone sufficient to constitute an attempt.⁶ There must be in addition some act done toward the ultimate accomplishment of the proposed crime.⁷

Attempts and assaults distinguished.—There is a difference between the offense of assault with intent to commit a felony and the offense of an attempt to commit the same felony.⁸ Yet the distinction is not a broad one,⁹ the only difference being that a present ability to inflict the injury is necessary in the case of an assault.¹⁰ An assault with intent to commit a crime necessarily embraces an attempt to commit such crime, but the attempt does not

quotes Bouvier. An attempt is "an endeavor to accomplish a crime carried beyond mere preparation, but falling short of execution of the ultimate design in any part of it." "An intent to do a particular criminal thing combined with an act which falls short of the thing intended." "An act immediately and directly tending to the execution of the principal crime under such circumstances that he has the power of carrying his intention, including solicitations of another."

4. In re Magidson, 32 Cal. App. 566, 163 Pac. 689; People v. Petros, 25 Cal. App. 236, 143 Pac. 246, quoting 2 Bishop on Criminal Procedure, par. 71.

5. People v. Mize, 80 Cal. 41, 22 Pac. 80; People v. Weston, 32 Cal. App. 571, 163 Pac. 691.

6. People v. Petros, 25 Cal. App. 236, 143 Pac. 246; Ex parte Floyd, 7 Cal. App. 588, 95 Pac. 175. See supra, § 11.

7. People v. Stites, 75 Cal. 570, 17 Pac. 693; Ex parte Floyd, 7 Cal. App. 588, 95 Pac. 175.

8. People v. Lee Kong, 95 Cal. 666, 29 Am. St. Rep. 165, 17 L. R. A. 626, 30 Pac. 800.

9. People v. Christian, 101 Cal. 471, 35 Pac. 1043.

10. People v. Stanton, 106 Cal. 139, 39 Pac. 525. See ASSAULT AND BATTERY, vol. 3, p. 179.

necessarily include an assault,¹¹ and evidence sufficient to prove an attempt is not necessarily sufficient to prove an assault with intent.¹²

§ 32. Character of Acts Necessary to Attempt.—There is, no doubt, a difference between the preparation antecedent to an offense and the actual attempt to commit it. Acts amounting to mere preparation for the commission of an offense, unaccompanied by some overt act toward its commission, do not amount to an attempt and are not punished,¹³ however elaborate such acts may be.¹⁴ The preparation consists in devising or arranging the means or measures necessary for the commission of the offense. The attempt is the direct movement toward the commission after the preparations are made. It must be manifested by acts which would end in the consummation of the particular offense, but for the intervention of circumstances independent of the will of the party.¹⁵ In other words, to constitute the crime of an attempt to commit a crime, the acts of the defendant must go so far that they would result in the accomplishment of the crime, unless frustrated by extraneous circumstances.¹⁶ While it is

11. *People v. Christian*, 101 Cal. 468, 35 Pac. 1043; *People v. Akens*, 25 Cal. App. 374, 143 Pac. 795 (holding an instruction was erroneous which overlooked this distinction).

12. *People v. Gardner*, 98 Cal. 127, 32 Pac. 880.

13. *People v. Compton*, 123 Cal. 403, 56 Pac. 44; *People v. Hope*, 62 Cal. 291, 297; *People v. Petros*, 25 Cal. App. 236, 143 Pac. 246 (holding the evidence showed an attempt to commit the crime of pandering); *Ex parte Floyd*, 7 Cal. App. 588, 95 Pac. 175.

14. *People v. Stites*, 75 Cal. 570, 17 Pac. 693.

15. *People v. Murray*, 14 Cal. 159, quoted in *United States v. Stephens*, 12 Fed. 52, 55, 8 Sawy. 116.

16. *People v. Mann*, 113 Cal. 76; 45 Pac. 182 (holding the facts showed an attempt to commit grand larceny by the use of the confidence game known as "bunco"); *People v. Thomas*, 63 Cal. 482; *People v. Petros*, 25 Cal. App. 236, 244, 143 Pac. 246; *People v. Gilmore*, 25 Cal. App. 332, 143 Pac. 790 (holding the facts showed an attempt to commit grand larceny by substitution of a bogus for a genuine ring); *People v. Grubb*, 24 Cal. App. 604, 141 Pac. 1051 (hold-

often difficult to determine whether certain acts amount to mere preparation or to an attempt, the proximity or remoteness of the person or thing intended to be injured is generally an important element.¹⁷

The distinction between mere acts of preparation and an attempt is pointed out by the following illustrations. The purchase and loading of a gun with the declared intention of shooting another is merely preparation, but the making of some movement to use the weapon upon the person of the intended victim is an attempt.¹⁸ The construction of a bomb with the deliberate intention of destroying lives and property is but an act of preparation. But leaving the house for the purpose of effecting the crime intended is a criminal attempt.¹⁹ Likewise, in case of an attempt to commit robbery, the pushing open of the door of a building and partial entry through the same are overt acts that go beyond mere acts of preparation.²⁰ One who agrees to take stolen goods and obtains a conveyance for the purpose of removing the goods is not guilty of an attempt to receive stolen goods but the offense is complete when he drives to the place where the goods have been concealed with that purpose.¹ So, also, it has been held that an elopement for the purpose of contracting an incestuous marriage and a request to a party to go for a magistrate to perform the ceremony shows merely preparation; but this seems to be an extreme case.²

ing evidence showed an attempt to commit the crime of pandering); *Ex parte Floyd*, 7 Cal. App. 588, 95 Pac. 175.

17. *People v. Stites*, 75 Cal. 570, 17 Pac. 693; *People v. Paluma*, 18 Cal. App. 131, 122 Pac. 431.

18. *People v. Murray*, 14 Cal. 159.

19. *People v. Stites*, 75 Cal. 570, 17 Pac. 693, holding, also, that the fact that the defendant was moving in a direction away from the place

of the intended crime when interrupted does not prevent his act from amounting to an attempt, when it appears he was going to a place deemed safest for a meeting with his confederate.

20. *People v. Moran*, 18 Cal. App. 209, 122 Pac. 969.

1. *In re Magidson*, 32 Cal. App. 566, 163 Pac. 689. See RECEIVING STOLEN GOODS.

2. *People v. Murray*, 14 Cal. 159, holding that until the officer is en-

Solicitation.—There is also a distinction between an attempt to commit a crime and merely soliciting one to commit it. The latter act is not made criminal by the Penal Code.³ The act of asking a printer to print certain orders upon a dealer of commodities amounts to mere preparation or solicitation where the printer in no way or manner began the work of printing.⁴

Presence of defendant.—If a defendant does no act to aid, assist or abet the perpetration of a crime, he is guilty of no crime or attempt to commit a crime from the mere fact that he was present.⁵

§ 33. Effect of Inability and of Abandonment.—While there are some English decisions to the contrary, it is a settled principle of law in this country that where the perpetration of the crime is legally possible, an attempt to commit a crime may be effectual, although for some reason undiscernible to the intending perpetrator, the crime, under existing circumstances, may be incapable of accomplishment.⁶ The question whether an attempt to commit a crime has been made is determined solely by the actor's mind and his conduct in the attempted consummation of

gaged, and the parties stand before him ready to take the vows appropriate to the contract of marriage, an attempt is not made. See 1 Wharton's Crim. Law, 11th ed., 283, note 3, where this case is criticised as an undue extension of the doctrine.

3. *People v. Wilson*, 119 Cal. 384, 51 Pac. 639; *Ex parte Floyd*, 7 Cal. App. 588, 95 Pac. 175. See *People v. Squires*, 99 Cal. 327, 33 Pac. 1092 (holding that to solicit a bribe is not an offense under Pen. Code, § 93). See, also, *People v. Gleason*, 99 Cal. 359, 37 Am. St.

Rep. 56, 33 Pac. 1111, where the court say there is some conflict in the authorities as to whether mere solicitation to commit incest, adultery or sodomy is an adequate overt act in the composition of a criminal attempt to commit either of those crimes.

4. *Ex parte Floyd*, 7 Cal. App. 588, 95 Pac. 175.

5. *People v. Woodward*, 45 Cal. 293, 13 Am. Rep. 176.

6. *People v. Lee Kong*, 95 Cal. 666, 29 Am. St. Rep. 165, 17 L. B. A. 626, 30 Pac. 800; *In re Magidson*, 32 Cal. App. 566, 163 Pac. 689.

his design.⁷ It is sufficient that the means was apparently adapted to the end in view, although circumstances independent of the will of the defendant left the crime uncommitted.⁸ Thus an attempt to pick one's pocket or steal from his person, when he has nothing in his pocket or on his person, constitutes the offense to the same degree as if he had money or other personal property which could be the subject of larceny.⁹ One attempting to obtain money by false pretenses is guilty of an attempt although his intended victim had no money.¹⁰ In like manner, one willfully shooting at another is guilty of an attempt to kill, although he was mistaken as to the exact location of his intended victim and on that account missed him.¹¹ So, also, one may be guilty of an attempt to receive stolen goods, although the property is discovered by the police and removed from its place of concealment before the defendant reaches it. In these cases the perpetration of the crime is legally possible, the persons in a situation to do it, the intent clear and the act adapted to the successful perpetration of it. The absence of the object is an extrinsic fact not essential to the attempt.¹²

There is a class of cases apparently similar to those just considered but clearly distinguishable where a different decision has been reached by some courts. Thus where, with intent to defraud, a writing was falsely made which could not by legal possibility defraud anyone, it was held no offense had been committed because a person could not be legally presumed to intend that which was legally impossible. Where an attempt was made to poison with an article believed to be poisonous but which was in fact in-

7. *In re Magidson*, 32 Cal. App. 566, 163 Pac. 689.

8. *People v. Arberry*, 13 Cal. App. 749, 757, 114 Pac. 411.

9. *People v. Lee Kong*, 95 Cal. 666, 29 Am. St. Rep. 165, 17 L. E. A. 626, 30 Pac. 800.

10. *People v. Arberry*, 13 Cal. App. 749, 114 Pac. 411.

11. *People v. Lee Kong*, 95 Cal. 666, 29 Am. St. Rep. 165, 17 L. E. A. 626, 30 Pac. 800.

12. *In re Magidson*, 32 Cal. App. 566, 163 Pac. 689.

noxious, and where an attempt was made to shoot a person with a pistol which was not in fact loaded, it was held that no offense had been committed because no act had been done, intrinsically adapted to the then present successful perpetration of the crime.¹³

Abandonment.—When one has made overt acts toward the commission of a crime with the requisite intent, he is guilty of an attempt, although he may voluntarily abandon his purpose before the crime is consummated.¹⁴ This is so even though the abandonment may have proceeded from the pangs of a stricken conscience alone.¹⁵ The fact of abandonment may, however, furnish some evidence of a lack of the necessary intent.¹⁶

D. DEFENSES GENERALLY.

§ 34. *In General.*—Good faith or the fact that the end accomplished is rightful cannot avail one as a defense to a prosecution for crime. For example, without reference to the exercise of good faith in exacting the amount of money justly due, it is extortion to threaten a thief with prosecution unless he pays the value of property stolen where by reason of fear induced by such threat he does pay.¹⁷

While a crime may consist of an omission,

“No person is punishable for an omission to perform an act, where such act has been performed by another person

13. *In re Magidson*, 32 Cal. App. 566, 163 Pac. 689, quoting from *State v. Wilson*, 30 Conn. 500, 506.

14. *People v. Dong Pok Yip*, 164 Cal. 143, 127 Pac. 1031 (abandonment because of unexpected approach of third persons); *People v. Johnson*, 131 Cal. 511, 63 Pac. 842 (assault with intent to commit rape); *People v. Stewart*, 97 Cal. 238, 32 Pac. 8

(abandonment because of approach of third persons); *People v. Bowman*, 6 Cal. App. 749, 93 Pac. 198.

15. *People v. Stewart*, 97 Cal. 238, 32 Pac. 8.

16. *People v. Fleming*, 94 Cal. 308, 29 Pac. 647.

17. *People v. Beggs*, 178 Cal. 79, 172 Pac. 152. See EXTORTION.

acting in his behalf and competent by law to perform it."¹⁸

Alibi.—While a claim of alibi, that is to say, a contention by a defendant that he was at a place other than at the scene of the crime at the time the crime is alleged to have been committed, is sometimes spoken of as a defense, it is not a defense as a matter of fact. It merely involves the negative of an element of the case which the people must make out before they can demand a conviction. In other words, where it is claimed that a defendant personally participated in the commission of the crime charged, the prosecution must always prove he was present at the place where the crime was committed.¹⁹

Compromise, condonation and settlement.—Except in the case of misdemeanors, as to which the Penal Code authorizes the offense to be compromised, and the defendant to be discharged, upon an acknowledgment by the injured party that he has received satisfaction for the injury, it is the rule in this state that no public offense can be compromised, nor can any proceeding or prosecution thereof be stayed upon a compromise.²⁰ In the case of embezzlement, it is specifically provided that the restoration of or an offer to restore the property embezzled is no defense, though that fact may authorize the court in its discretion to mitigate punishment.¹

Wrong of injured party.—Since persons guilty of crime are prosecuted in the interest of the people of the state and not in the interest of the party injured, it follows that a defendant in a criminal prosecution cannot justify his

18. Pen. Code, § 662.

19. *People v. Winters*, 125 Cal. 325, 57 Pac. 1067; *People v. Hoosier*, 24 Cal. App. 746, 758, 142 Pac. 514; *People v. Mar Gin Suie*, 11 Cal. App. 42, 57, 103 Pac. 951. See *infra*, § 262, as to

effect of distinction upon burden of establishing it.

20. Pen. Code, § 1377. See *infra*, § 136; and see *COMPOUNDING CRIMES*, vol. 5, p. 379.

1. Pen. Code, § 513; *People v. De Lay*, 80 Cal. 52, 22 Pac. 90.

actions by showing that the injured party was also guilty of a crime and had subjected himself to a prosecution.²

§ 35. Consent of Injured Party.—Whether the consent of the party injured will relieve of criminality an otherwise criminal act depends upon whether consent is an element of the crime charged. If consent is not an element of the crime, it is well settled that consent is not a defense to a prosecution therefor, the rule in civil actions, *volenti non fit injuria*, having no application to criminal prosecutions.³ But if the crime is one which can be committed only when the injured party does not consent to the act, the consent of the party deprives the act of criminality.⁴ In cases of the latter class, while it is difficult in some instances to determine whether certain acts constitute consent as a matter of law, it is well settled that there is a decided difference in law between mere submission and actual consent. Consent, in law, means a voluntary agreement by a person in the possession and exercise of sufficient mentality to make an intelligent choice, to do something proposed by another. It implies some positive action, and always involves submission. Assent means mere possibility or submission, which does not include consent.⁵ The age and mentality of the subject of an indecent assault is important and should always be considered in determining the presence or absence of consent. The mere submission of a child of tender years or retarded mental development to an attempted outrage of its person should not, in and of itself, be construed to be such consent as would, in point of law, excuse or justify an assault.⁶ While the act of an owner in inducing another

2. *People v. Martin*, 102 Cal. 558, 36 Pac. 952.

3. See 8 R. C. L. 126.

4. *People v. Dong Pok Yip*, 164 Cal. 143, 127 Pac. 1031 (an assault implies repulsion, or at least want of consent on the part of the person

assaulted); *People v. Fick*, 89 Cal. 144, 26 Pac. 759 (kidnaping). See RAPE.

5. *People v. Dong Pok Yip*, 164 Cal. 143, 147, 127 Pac. 1031.

6. *People v. Dong Pok Yip*, 164 Cal. 143, 147, 127 Pac. 1031.

to steal his property would amount to such a consent as to preclude the commission of larceny,⁷ there is no such consent where there is a mere passive submission on the part of the owner of the goods taken and no indication that he wishes them taken, and no knowledge by the taker that the owner wishes them taken, and no preconcert whatever between the thief and the owner. For example, one who feigns a drunken stupor and offers no resistance to the taking of property from his person, does not consent in law to the taking.⁸

§ 36. Entrapment and Instigation.—There is a clear distinction, founded upon principle as well as authority, between measures used to entrap a person into crime, by making him a criminal, to aid the instigator in the accomplishment of some corrupt private purpose of his own, and an article used to detect persons suspected of being engaged in criminal purposes.⁹ Where a person is innocent of any intention to commit a crime and is inveigled into its commission by an officer of the law for the purpose of advancing his standing for efficiency, or of obtaining revenue by fine for the municipality, it might be said that to uphold such practices would be repugnant to any just conception of good morals and violative of sound public policy.¹⁰ In such case the law will not authorize a verdict of guilty.¹¹ When, however, the intention to commit an offense has its origin in the mind of the party committing it, the fact that a plan is laid to entrap the defendant is no defense, when the plan amounts to nothing more than

7. *People v. Macy*, 43 Cal. App. 479, 184 Pac. 1008.

8. *People v. Hanselman*, 76 Cal. 460, 9 Am. St. Rep. 238, 18 Pac. 425.

9. *People v. Macy*, 43 Cal. App. 479, 184 Pac. 1008; *People v. Bunkers*, 2 Cal. App. 197, 209, 84 Pac. 364, 370; *Peterson v. United*

States, 255 Fed. 433; *Woo Wai v. United States*, 223 Fed. 412, 137 C. C. A. 504. See note, 19 A. L. R. 146, on entrapment to commit crime.

10. *People v. Barkdoll*, 36 Cal. App. 25, 171 Pac. 440.

11. *Sam Yick v. United States*, 240 Fed. 60.

procuring corroborative evidence essential to conviction. Such a case is within another rule which justifies dissemination in order to procure additional and necessary evidence of guilt.¹² Yet the course pursued in such case should, it has been said, be scrutinized with care, and no rule of evidence should be relaxed that, if properly applied, might create a reasonable doubt as to the defendant's guilt.¹³

In a prosecution for unlawfully selling alcoholic liquor, it is no defense that the purchase was made by and at the instance of a person employed by the sheriff to ferret out illicit sellers of intoxicating liquors.¹⁴ The defendant is not in such case instigated to commit the crime within the rule. As stated in a recent federal case involving an unlawful sale of drugs, the officers had nothing to do with the defendant's having the drugs in his possession, or his willingness to sell them for a consideration. Nor did they offer any inducement to the defendant to sell, except that they did, through the witness, offer to buy, and proffered the amount of money that defendant fixed as the price he was willing to take.¹⁵

The acts of the person seeking to entrap another may be such that no crime is committed for want of some essential ingredient. It may amount to such consent as to relieve the acts committed of criminality.¹⁶ So when one enters a building at the request of a defendant, not

12. *People v. Macy*, 43 Cal. App. 479, 184 Pac. 1008; *People v. Emmons*, 7 Cal. App. 683, 691, 95 Pac. 1032; *People v. Bunkers*, 2 Cal. App. 197, 208, 84 Pac. 364, 370. See *People v. Greening*, 102 Cal. 384, 36 Pac. 665, holding the fact that the defendant's intention to commit the offense was known to the officers beforehand will not palliate his crime. And see *ARSON*, vol. 3, p. 173.

13. *People v. Salladay*, 22 Cal. App. 552, 135 Pac. 508.

14. *People v. Barkdoll*, 36 Cal. App. 25, 171 Pac. 440. (It seems that the fact that the money with which the liquor was purchased was furnished the witness by the county attorney or other officer is no defense.) *Fetters v. United States*, 260 Fed. 142.

15. *Fiunkin v. United States*, 265 Fed. 1.

16. See *supra*, § 35.

with intent to steal therefrom but only in pursuance of a plan between him and the sheriff to entrap the defendant, no burglary is committed as there is no felonious intent in entering the building.¹⁷

§ 37. Immunity.—The proceedings to discharge accomplices in crime for furnishing evidence for the prosecution are regulated by statute. The statute authorizes a court, on the application of the district attorney, to discharge any one of several defendants from an indictment or information, that he may be a witness for the people,¹⁸ and also authorizes it, of its own motion or upon the application of the district attorney, in furtherance of justice, to order an action or indictment to be dismissed.¹⁹ The statute must be taken to exclude cases not provided for by its terms. Therefore, since a committing magistrate and district attorney are not granted authority to promise a person under arrest immunity or a pardon for testifying against his accomplices, such a promise by them does not in point of mere law entitle the promisee to a dismissal of any subsequent proceedings taken against him in violation thereof. Neither does it furnish ground for a motion in arrest of judgment.²⁰

E. PRINCIPALS, AIDERS AND ACCESSORIES.

§ 38. Classification—Abolition of Common-law Distinctions.—The parties to crimes are classified as: 1. Prin-

17. *People v. Collins*, 53 Cal. 185. Pac. 865; *People v. Dye*, 29 Cal. App. 169, 181, 154 Pac. 875; *People v. Richman*, 28 Cal. App. 761, 764, 155 Pac. 142; *People v. Knowles*, 27 Cal. App. 498, 155 Pac. 137; *People v. Panagoit*, 25 Cal. App. 158, 163, 143 Pac. 70, decided under Pen. Code, § 1324, repealed in 1917 [Stats. 1917, p. 291].
18. See *infra*, § 137.
19. See *infra*, § 136.
20. *People v. Indian Peter*, 48 Cal. 250. See *People v. Fryer*, 175 Cal. 785, 167 Pac. 382; *People v. Cavala*, 35 Cal. App. 154, 169 Pac. 420; *People v. Kirk*, 32 Cal. App. 517, 163 Pac. 696; *People v. Valencia*, 32 Cal. App. 631, 163

cipals; and, 2. Accessories.¹ Under the common law, a principal in the commission of a felony was of two degrees, viz.: 1. One who was the actual actor or absolute perpetrator of the crime, who was a principal in the first degree;² 2. One who was present, actually or constructively, aiding and abetting the fact to be done, who was a principal in the second degree.³ One who, being absent at the time of the crime committed, procured, counseled or commanded another to commit the crime, was an accessory before the fact,⁴ and it was necessary to prosecute, try and punish him as such accessory and not as a principal, as his act was treated as constituting a substantive offense, distinct from, though growing out of, the principal fact itself.⁵

Many of the reasons for these distinctions are not germane to our system of jurisprudence. To simplify procedure and do away with the technicalities of the common law, the legislature has obliterated the distinction between principals in their different degrees and accessories before the fact, and declared them to be principals.⁶ In so doing it has substituted the more convenient rule of the common law of misdemeanors, where such distinctions had never been recognized.⁷ The Penal Code, therefore, declares:

1. Pen. Code, § 30. See *infra*, § 253, as to accomplices.

2. *People v. Ah Gee*, 37 Cal. App. 1, 174 Pac. 371.

3. *People v. Schwartz*, 32 Cal. 160, 164; *People v. Ah Gee*, 37 Cal. App. 1, 174 Pac. 371.

4. *People v. Hodges*, 27 Cal. 339 (one who incites the commission of a crime, but who is so far distant as to be unable to come to the immediate aid of his associates is an accessory before the fact); *People v. Ah Gee*, 37 Cal. App. 1, 174 Pac. 371.

5. *People v. Valencia*, 43 Cal.

552; *People v. Ah Gee*, 37 Cal. App. 1, 174 Pac. 371.

6. Pen. Code, § 971; *People v. Coffey*, 161 Cal. 433, 439, 39 L. R. A. (N. S.) 704, 119 Pac. 901; *People v. Collum*, 122 Cal. 186, 54 Pac. 589; *People v. Rozelle*, 78 Cal. 84, 20 Pac. 36; *People v. Outeveras*, 48 Cal. 19; *People v. Bearss*, 10 Cal. 68; *People v. Davidson*, 5 Cal. 133; *People v. Ah Gee*, 37 Cal. App. 1, 174 Pac. 371; *People v. Desmond*, 24 Cal. App. 409, 141 Pac. 632.

7. *People v. Outeveras*, 49 Cal. 19.

“All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics, or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed.”⁸

§ 39. Aider and Abettor—Commission of Crime by Another.—One who does not himself actually commit a criminal act but who “aids and abets” in its commission,⁹ or who, not being present, has advised and encouraged its commission,¹⁰ is a principal and punishable as such unless, by reason of his status, he is himself incapable of committing the offense.¹¹ He cannot, however, be guilty of any greater crime than the person who actually committed the crime charged.¹² The legal definition of “aid” is not

8. Pen. Code, § 31; *People v. Bunkers*, 2 Cal. App. 197, 84 Pac. 364, 370. See *People v. Weber*, 66 Cal. 391, 5 Pac. 679, holding assailants inflicting injuries resulting in death are equally liable as principals.

9. *People v. Creeks*, 170 Cal. 368, 149 Pac. 821; *People v. Ruiz*, 144 Cal. 251, 77 Pac. 907; *People v. Ah Len*, 98 Cal. 133, 32 Pac. 880 (holding it not error to modify instruction authorizing acquittal if jury had a doubt as to whether the defendant or another committed the offense, by adding a proviso, unless they find the defendant aided and abetted in the crime); *People v. Jamarillo*, 57 Cal. 111; *People v. Feliz*, 6 Cal. Unrep. 939, 69 Pac. 220; *People v. Pedde*, 25 Cal. App.

34, 43, 142 Pac. 894; *People v. Lewis*, 9 Cal. App. 279, 98 Pac. 1078. See *People v. Gallagher*, 100 Cal. 466, 472, 35 Pac. 80, holding evidence showed the defendant to be an aider and abettor in embezzlement of money. See *supra*, § 38. See note, 13 A. L. R. 1259, as to guilt of one aiding or abetting suicide.

10. *People v. Nolan*, 144 Cal. 75, 77 Pac. 774; *People v. Schaedde*, 126 Cal. 373, 58 Pac. 859; *People v. Lewis*, 9 Cal. App. 279, 98 Pac. 1078.

11. *In re Cooper*, 162 Cal. 81, 121 Pac. 318; *Ex parte Sullivan*, 17 Cal. App. 278, 119 Pac. 526, dictum. See *ADULTERY*, vol. 1, p. 469.

12. *People v. Petruzo*, 13 Cal. App. 569, 577, 110 Pac. 324; *People*

different from its meaning in common parlance. It means to assist, to supplement the efforts of another. "Abet" is a French word, compounded of two words "a" and "beter"—to bait or excite an animal.¹³ The word "aid" does not imply guilty knowledge or felonious intent, whereas the word "abet" includes knowledge of the wrongful purpose of the perpetrator, and counsel and encouragement in the crime.¹⁴

To authorize the conviction of one as an aider and abettor of a crime, it must be shown not only that he aided and assisted therein,¹⁵ but also that he abetted the act,¹⁶ that is to say, that he criminally or with guilty knowledge and intent aided the actual perpetrator in the commission of the act.¹⁷ If two or more persons conceive the intention at the same time to strike B, without previous concert, and each does strike without knowing the intention of the other, each is responsible for his own acts but is not

v. Sidelinger, 9 Cal. App. 298, 99 Pac. 390.

13. *People v. Bond*, 13 Cal. App. 170, 185, 109 Pac. 150, quoting *State v. Tally*, 102 Ala. 25, 15 South. 722, 737.

14. *People v. Morine*, 138 Cal. 626, 72 Pac. 166; *People v. Yee*, 37 Cal. App. 579, 174 Pac. 343; *People v. Bond*, 13 Cal. App. 175, 185, 109 Pac. 150; *People v. Lewis*, 9 Cal. App. 279, 98 Pac. 1078.

15. One who stands by while a crime is being committed but who does no act to aid, assist or abet it is not guilty of the crime; *People v. Woodward*, 45 Cal. 293, 13 Am. Rep. 176; *People v. Ah Ping*, 27 Cal. 489.

16. *People v. Dole*, 122 Cal. 486, 492, 68 Am. St. Rep. 50, 55 Pac. 581; *People v. William Yee*, 37 Cal. App. 579, 174 Pac. 343. See *People v. Wilson*, 135 Cal. 331, 67

Pac. 322. While the court in its opinion in this case uses the disjunctive "or" and states that the jury could convict if they believed the defendant "aided or abetted" in the commission of the offense, a reference to the transcript on appeal shows that the trial court in the instruction under consideration uses the conjunctive "and." The use of the word "or" seems, therefore, to be an inadvertence. See *infra*, § 380. And, generally, see note, 16 A. L. R. 1045, as to necessity of intent or malice to render one liable as principal in second degree or aider and abettor, in case of felonious assault.

17. *People v. William Yee*, 37 Cal. App. 579, 174 Pac. 343. See note, 5 A. L. R. 782, as to criminal responsibility of one co-operating in offense which he is incapable of committing personally.

an aider and abettor of the other.¹⁸ It is not necessary, however, to prove a conspiracy to commit the crime,¹⁹ or to prove that the actual perpetrator communicated his purpose to the defendant, to make the latter chargeable as principal, for he would be liable as such if he were present, and knew the intention of the other, and either by acts or by words or gestures, aided or encouraged the commission of the crime. But he would be guilty only to the extent of his knowledge or of the natural and reasonable consequences of the acts aided or encouraged by him.²⁰ One who did not advise and encourage the commission of an offense but who knew of it only after its commission, is not guilty as principal.¹

Commission of crime by another.—While a person procuring another to do a criminal act may be punished for the commission of the act,² the civil doctrine that a principal is bound by the acts of his agent within the scope of the agent's authority has no application to criminal law. If a principal is liable at all criminally for the acts of another, such liability must be founded upon authorized acts.³

18. *People v. Bond*, 13 Cal. App. 175, 109 Pac. 150, quoting *Wilson v. State* (Tex. Crim.), 24 S. W. 409.

19. *People v. Bond*, 13 Cal. App. 175, 184, 109 Pac. 150.

"It certainly would be a reproach to the law if it countenanced the doctrine that when A and B deliberately and unlawfully fire at C with intention to kill him, and one shot takes effect causing his death, but it is uncertain whether A or B fired it, neither can be convicted of murder unless a conspiracy should be shown between them. In any rational view, each must be considered as aiding and abetting

the other, and both responsible for the homicide." *People v. Mar Fow*, 34 Cal. App. 642, 168 Pac. 577; *People v. Petruzo*, 13 Cal. App. 569, 581, 110 Pac. 324, explaining *People v. Woody*, 45 Cal. 289.

20. *People v. Bond*, 13 Cal. App. 175, 184, 109 Pac. 150, quoting *Lyons v. State*, 30 Tex. App. 642, 18 S. W. 416.

1. *People v. Fagan*, 98 Cal. 230, 33 Pac. 60; *People v. Disperati*, 11 Cal. App. 469, 479, 105 Pac. 616.

2. Pen. Code, § 31; *Merritt v. United States*, 264 Fed. 870, 875.

3. *People v. Green*, 22 Cal. App. 45, 133 Pac. 334.

§ 40. Accessories.—"All persons who after full knowledge that a felony has been committed, conceal it from the magistrate, or harbor and protect the person charged with or convicted thereof," are declared by the Penal Code to be accessories.⁴ This provision is but a codification of the common-law rule or definition of accessories after the fact.⁵ It comprehends two situations: 1. Concealment of a felony; 2. Harboring and protecting a person charged with or convicted of a felony. With reference to the first, while the existence of knowledge that a felony has been committed is an essential ingredient of the offense of being an accessory, still the mere neglect to disclose it or inform the authorities thereof is not sufficient to render one guilty.⁶ The word "conceal" as here used necessarily includes the element of some affirmative act on the part of the person tending to or looking toward the concealment of the commission of the felony,⁷ such as the removal of the traces of the crime, for example.⁸ The mere receiving and concealing of stolen property does not constitute one an accessory to the offense of larceny, however, as this is declared by law to be an entirely different offense.⁹

With reference to the latter part of the code section, the person harbored and protected, if not convicted of a felony, must be one against whom a formal complaint, information or indictment is filed. Possibly, it has been said, an arrest without warrant might be sufficient. But mere general rumors and common talk that a party has committed a felony is wholly insufficient to fill the measure required by the word "charged."¹⁰

4. Pen. Code, § 32.

5. *People v. Hawkins*, 34 Cal. 181 (accessories after the fact defined); *Ex parte Goldman*, 7 Cal. Unrep. 254, 88 Pac. 819.

6. *Ex parte Goldman*, 7 Cal. Unrep. 254, 88 Pac. 819.

7. *People v. Garnett*, 129 Cal. 364, 61 Pac. 1114.

8. *People v. Keefer*, 65 Cal. 232, 3 Pac. 818.

9. *People v. Stakem*, 40 Cal. 599; *People v. Hawkins*, 34 Cal. 181; *Ex parte Goldman*, 7 Cal. Unrep. 254, 88 Cal. 819. See RECEIVING STOLEN GOODS.

10. *People v. Garnett*, 129 Cal. 364, 61 Pac. 1114, followed in *Peo-*

§ 41. Prosecution and Punishment of Principals and Accessories.—The common law forbade an accessory to be brought to trial until the principal had been convicted or outlawed.¹¹ The acquittal of the principal discharged the accessory no matter how conclusively the subsequently discovered proof might be of the principal's guilt.¹² This rule did much mischief, and has been abrogated in the case of persons who were accessories before the fact by the abolition of the distinction between principals and such accessories, and in the case of accessories after the fact, by express statutory provision.¹³ At common law no such rule prevailed in reference to aiders and abettors. They might be convicted though the chief actors or principals in the first degree had been acquitted.¹⁴

Pleading and punishment.—All persons concerned in the commission of felonies, whether they directly commit the act constituting the offense or aid and abet or encourage its commission, though not present, are required to be charged in the accusatory pleading as principals,¹⁵ and to be prosecuted, tried and punished as such.¹⁶ Each may properly be charged with having himself directly committed the act,¹⁷ and can be justly convicted, whether the proof show that he did acts which at common law would constitute him a principal or accessory before the

ple v. Lepori, 35 Cal. App. 60, 63, 169 Pac. 692, 694.

11. People v. Coffey, 161 Cal. 433, 439, 39 L. R. A. (N. S.) 704, 119 Pac. 901.

12. People v. Newberry, 20 Cal. 439; People v. Bearss, 10 Cal. 68.

13. "An accessory to the commission of a felony may be prosecuted, tried and punished, though the principal may be neither prosecuted nor tried and though the principal may have been acquitted." Pen. Code, § 972.

14. People v. Newberry, 20 Cal. 439; People v. Bearss, 10 Cal. 68.

15. See INDICTMENT AND INFORMATION.

16. People v. Campbell, 40 Cal. 129, 142; People v. Gassaway, 28 Cal. 404; People v. Ah Gee, 37 Cal. App. 1, 174 Pac. 371; People v. Outeveras, 48 Cal. 19 (limiting statements in People v. Campbell, 40 Cal. 129).

17. See INDICTMENT AND INFORMATION.

fact.¹⁸ The prosecution is not required to elect upon which theory it will ask a conviction, but may ask for a verdict if the evidence satisfies the jury of either alternative.¹⁹ If the proof shows a defendant to be an aider and abettor, the burden is not cast upon the people to identify someone else as having guilty connection with the crime.²⁰ A person who is an accessory after the fact should be tried as such and not as principal.¹ If charged as principal, he cannot be convicted upon proof that he is an accessory.²

The punishment of an accessory is prescribed in section 33 of the Penal Code, which is as follows:

“Except in cases where a different punishment is prescribed, an accessory is punishable by imprisonment in the state prison not exceeding five years, or in a county jail not exceeding two years, or by fine not exceeding five thousand dollars.”

F. PROSECUTION GENERALLY.

§ 42. Statutory Provisions—“Conviction” Defined.—The Penal Code provides that:

“No person can be punished for a public offense, except upon a legal conviction in a court having jurisdiction thereof.”³

18. *People v. Nolan*, 144 Cal. 75, 77 Pac. 774; *People v. Ah Fat*, 48 Cal. 61; *People v. Outeveras*, 48 Cal. 19; *People v. Liera*, 27 Cal. App. 346, 149 Pac. 1004; *People v. Burke*, 18 Cal. App. 72, 104, 122 Pac. 435. See *People v. Moran*, 18 Cal. App. 209, 122 Pac. 969, holding it immaterial that the record on appeal does not show which of two joint defendants committed the overt act constituting the attempt of which they were convicted. The former rule in this state was otherwise. *People v. Murphy*, 47 Cal. 103 (holding instruction embodying rule to be properly refused because

inapplicable to the facts); *People v. McGungill*, 41 Cal. 429; *People v. Campbell*, 40 Cal. 129, 141; *People v. Thim*, 39 Cal. 75.

19. See INDICTMENT AND INFORMATION.

20. *People v. Burke*, 18 Cal. App. 72, 104, 122 Pac. 435.

1. *People v. Valenzuela*, 2 Cal. Unrep. 87.

2. *People v. Gassaway*, 28 Cal. 405, holding defendant was entitled to an instruction embodying this rule.

3. Pen. Code, the second section numbered § 681. There are two sections so numbered.

“Every public offense must be prosecuted by indictment or information,⁴ except: 1. Where proceedings are had for the removal of civil officers of the state;⁵ 2. Offenses arising in the militia when in actual service, and in the land and naval forces in the time of war, or which the state may keep, with the consent of Congress, in time of peace,^{5a} 3. Offenses tried in justices’ and police courts;⁶ 4. All misdemeanors of which jurisdiction has been conferred upon superior courts sitting as juvenile courts.⁷”

“No person can be convicted of a public offense unless by the verdict of a jury, accepted and recorded by the court, or upon a plea of guilty, or upon judgment against him upon a demurrer in the case mentioned in section one thousand and eleven, or upon a judgment of a court, a jury having been waived in a criminal case not amounting to felony.”⁸

While a conviction may be upon plea of guilty or in any other mode mentioned in section just quoted, the word “conviction” ordinarily refers to a verdict of guilty. The word may also be used as signifying the sentence pronounced upon the verdict or the record of conviction, including, inter alia, the verdict and sentence; but such meaning ought not to be attributed to it unless the context indicates it was so used.⁹ The word “convicted,” as used in some statutes, has been held to include the accusation and trial.¹⁰

§ 43. What Actions are Criminal.—“The proceeding by which a party charged with a public offense is accused and brought to trial and punishment, is known as a criminal action.”¹¹ While there are many civil actions the result of which may be highly penal and which partake of the

4. See INDICTMENT AND INFORMATION.

5. See PUBLIC OFFICERS.

5a. See MILITARY.

6. See *infra*, § 627.

7. See INFANTS, Pen. Code, § 682.

8. Pen. Code, § 689.

9. Ex parte Brown, 68 Cal. 176,

8 Pac. 829. See *People v. Goldstein*, 32 Cal. 432, holding a plea of guilty entered of record constitutes a conviction.

10. *People v. Black*, 122 Cal. 73, 54 Pac. 385, construing Pen. Code, § 497.

11. Pen. Code, § 683.

nature of criminal prosecutions, they cannot be classed as criminal proceedings if their purpose is to redress or prevent a private injury.¹² To be criminal in character, the object of an action or proceeding must be to punish the defendant for the commission of an act declared to be a public offense, and the public, and not individuals, as such must be interested in the judgment sought. With this object in view, it matters not with what form a statute may clothe the action, it is a criminal case.¹³ If the object of an action is to punish an infraction of the criminal laws, it is a criminal action although the defendant may be cited to appear and answer without being arrested, or the evidence may be heard in a summary manner without a jury trial, or the judgment imposing a fine may go in whole or in part to the informer.¹⁴ Accordingly, it has been held that the proceedings under sections 758 et seq.¹⁵ and under 772¹⁶ of the Penal Code are criminal proceedings. And it has long been settled that actions to punish a violation of a municipal ordinance prescribing a punishment by fine and imprisonment are criminal.¹⁷

12. *Kilburn v. Law*, 111 Cal. 237, 43 Pac. 615. See *ACTIONS*, vol. 1, p. 317.

13. *Kilburn v. Law*, 111 Cal. 237, 43 Pac. 615; *Thurston v. Clark*, 107 Cal. 285, 289, 40 Pac. 437; *Matter of Application of Clark*, 24 Cal. App. 389, 141 Pac. 831.

14. *Kilburn v. Law*, 111 Cal. 237, 43 Pac. 615.

15. *Coffey v. Superior Court*, 147 Cal. 525, 533, 82 Pac. 75, 2 Cal. App. 453, 83 Pac. 580.

16. *People v. McKamy*, 168 Cal. 531, 143 Pac. 752; *Matter of Accusation of Shepard*, 161 Cal. 171, 118 Pac. 513; *Kilburn v. Law*, 111 Cal. 237, 43 Pac. 615; *Wheeler v. Donnell*, 110 Cal. 655, 43 Pac. 1;

In re Curtis, 108 Cal. 661, 41 Pac. 793; *Thurston v. Clark*, 107 Cal. 285, 40 Pac. 435. See *PUBLIC OFFICERS*.

The fact that a money judgment in favor of the informer is authorized is immaterial as affecting the character of the proceeding, as such judgment is purely incidental to the main purpose of the action. *Wheeler v. Donnell*, 110 Cal. 655, 43 Pac. 1.

17. *People v. Pacific Gas & Elec. Co.*, 168 Cal. 496, Ann. Cas. 1917A, 328, 143 Pac. 727; *City of Santa Barbara v. Sherman*, 61 Cal. 57; *Matter of Application of Clark*, 24 Cal. App. 389, 141 Pac. 831. For other illustrations of the distinction between civil and criminal actions, see *ACTIONS*, vol. 1, p. 317.

§ 44. Parties to Criminal Actions.—The parties to a criminal action are prescribed in sections 684 and 685 of the Penal Code, which provide as follows:

“A criminal action is prosecuted in the name of the people of the state of California, as a party, against the person charged with the offense.”¹⁸

“The party prosecuted in a criminal action is designated in this code as the defendant.”¹⁹

Section 20 of article VI of the constitution also provides that “The style of all process shall be ‘The People of the State of California,’ and all prosecutions shall be in their name and by their authority.” This requirement of the constitution and statute is applicable to cases arising under city ordinances as well as under state statutes where the evident purpose and ultimate effect of the proceeding is to punish the defendant for an unlawful act.²⁰ In the case of a proceeding under section 758 of the Penal Code it has been held that the failure to entitle the proceedings as required by the constitution does not go to the jurisdiction of the court,¹ yet, in case of the violation of a municipal ordinance, it has been held that a failure to do so renders the proceeding so far illegal as to authorize the discharge of the defendant upon habeas corpus.²

18. Pen. Code, § 684.

19. Pen. Code, § 685.

20. *Fitch v. Board of Supervisors*, 122 Cal. 285, 54 Pac. 901; *Kilburn v. Law*, 111 Cal. 237, 43 Pac. 615 (the proceeding under section 772 of the Penal Code ought to be brought in the name of the people); *City of Santa Barbara v. Sherman*, 61 Cal. 57 (holding a proceeding for violation of a municipal ordi-

nance should be instituted in the name of the people); *Matter of Application of Clark*, 24 Cal. App. 389, 141 Pac. 831 (applying rule to a proceeding to recover a penalty for the sale of liquor in violation of a city ordinance).

1. *Matter of Accusation of Shepard*, 161 Cal. 171, 118 Pac. 513.

2. *Matter of Application of Clark*, 24 Cal. App. 389, 141 Pac. 831.

G. JURISDICTION.

§ 45. **In General.**—It is essential to the validity of a judgment convicting one of a crime that the court which renders it shall have jurisdiction of the subject matter and of the person of the defendant.³ Jurisdiction over the subject matter of an offense is not determined by the nature of the procedure by which it is prosecuted, but by the nature of the offense itself.⁴ An unconstitutional tribunal has no jurisdiction whatever, and its judgments are void, even though the presiding judge is also a duly qualified justice of another court, and would have had jurisdiction over the offense and of the defendant in his capacity as judge of the other court.⁵ The sufficiency of the complaint, information or indictment does not go to the jurisdiction of the court. When a pleading is filed attempting to set forth an offense of which the court has jurisdiction, the court has jurisdiction to determine its sufficiency, and an erroneous determination does not deprive it of jurisdiction so as to furnish a basis for a writ of prohibition.⁶ A justice's court has power to pass upon and conclusively determine facts upon which its jurisdiction in part depends.⁷

Courts vested with criminal jurisdiction.—Original jurisdiction over criminal prosecutions is, in California, vested

3. *Ex parte Giambonini*, 117 Cal. 573, 49 Pac. 732; *People v. Hamburg*, 84 Cal. 468, 24 Pac. 298. As to the nature of jurisdiction in general, see *COURTS*, ante, p. 584.

4. *Green v. Superior Court*, 78 Cal. 556, 564, 21 Pac. 307, 541; *Ex parte Wallingford*, 60 Cal. 103; *People v. Palermo Land & Water Co.*, 4 Cal. App. 717, 89 Pac. 723, 725.

5. *Ex parte Giambonini*, 117 Cal. 573, 49 Pac. 732, overruling *Ex parte Reilly*, 85 Cal. 632, 24 Pac. 807.

6. *Cassidy v. Cannon*, 18 Cal. App. 426, 123 Pac. 358, 359; *Keith v. Recorder's Court*, 9 Cal. App. 380, 99 Pac. 416, denying writ as remedy by appeal was adequate.

7. *Ex parte Noble*, 96 Cal. 362, 31 Pac. 224.

in the superior courts⁸ and in justices⁹ and police courts.¹⁰ The term "police courts," as used in the Penal Code, "includes police judges' courts, police courts, and all courts held by mayors or recorders in incorporated cities or towns."¹¹

Presumptions.—Every intendment is in favor of the judgment of a court of general jurisdiction both on direct and collateral attack, and the want of jurisdiction must affirmatively appear.¹² This rule of presumptions does not apply to inferior courts of limited jurisdiction. The evidence of their proceedings must affirmatively show jurisdiction of the person of the defendant and over the subject matter.¹³ If, for example, the act charged does not constitute a crime under the general laws of the state, the record should manifest that the defendant is being prosecuted for the alleged violation of some city ordinance.¹⁴

Over Indians.—It has been held that the state courts have jurisdiction to try a full-blooded Indian for the killing of another full-blooded Indian where it appears that he had lived among the whites for several years prior to the homicide, and it does not appear that he was a member of any Indian tribe having its chief and tribal laws, or that the tribe of which his ancestors were members was

8. Const., art, VI, § 5.

9. See *infra*, § 47.

10. See *infra*, § 48.

11. Pen. Code, § 1461. *Graham v. Fresno*, 151 Cal. 467, 471, 91 Pac. 147 (justices of the peace are not embraced by the term "police courts"); *In re Carrillo*, 66 Cal. 3, 4 Pac. 695 (holding the mayor of San Jose is by the charter *ex officio* police justice and authorized to hold a police court); *In re Baxter*, 3 Cal. App. 716, 86 Pac. 998 (hold-

ing the terms "police court" and "recorder's court," as used in section 13 of the charter of San Bernardino, were synonymous terms). see *COURTS*, *ante*, p. 701.

12. *Ex parte Haase*, 5 Cal. App. 541, 90 Pac. 946. See *infra*, § 568, as to presumptions upon appeal. And see *COURTS*, *ante*, p. 583.

13. See *COURTS*, *ante*, p. 584.

14. *Ex parte Kearny*, 55 Cal. 212, disapproving *Ex parte Murray*, 43 Cal. 455.

ever recognized or treated with by the United States government.¹⁵

§ 46. Felonies and Misdemeanors Generally.—Section 5 of article VI of the constitution provides that “The superior court shall have original jurisdiction . . . in all criminal cases amounting to felony,¹⁶ and cases of misdemeanors not otherwise provided for.” The jurisdiction of superior courts over felonies under the provision is exclusive and cannot be conferred upon justices’ or police courts.¹⁷ Nor is it affected by the fact that in a particular case the felony charged includes within it a lesser offense amounting to a misdemeanor.¹⁸ If a verdict is returned convicting a defendant of a misdemeanor, it is competent for the superior court to pronounce the proper judgment.¹⁹

Under the section of the constitution just quoted, and sections 1 and 13, article VI thereof, the legislature has power to confer upon justices’ and police courts jurisdiction of any or all misdemeanors,²⁰ whether or not such

15. *People v. Ketchum*, 73 Cal. 634, 15 Pac. 353. See *infra*, § 50, jurisdiction over offenses against Indians. And see INDIANS.

16. *People v. Gutierrez*, 74 Cal. 81, 15 Pac. 444 (petit larceny as a second offense is within jurisdiction of the superior court); *Mauss v. Superior Court*, 25 Cal. App. 533, 144 Pac. 298 (the superior court has jurisdiction of a prosecution under Pen. Code, § 69). See *Ex parte McCarthy*, 53 Cal. 412 (holding county court had jurisdiction of misdemeanor prosecuted by indictment); *People ex rel. Terry v. Bartlett*, 14 Cal. 651, holding under the former law that dueling with a fatal result was not murder so as to deprive the court of sessions of jurisdiction.

17. *Ex parte Wallingford*, 60 Cal. 103, 104.

18. *People v. Fahey*, 64 Cal. 342, 30 Pac. 1030.

19. *Ex parte Donohue*, 65 Cal. 474, 4 Pac. 449 (followed in *Becker v. Superior Court*, 151 Cal. 313, 90 Pac. 689, holding the same rule should apply in civil actions where the jurisdiction of the superior court attaches by reason of the case being one in equity. A failure to establish the equitable claim does not defeat jurisdiction). *People v. Holland*, 59 Cal. 364; *Ex parte Bell*, 4 Cal. Unrep. 309, 34 Pac. 641.

20. *Matter of Application of Westenberg*, 167 Cal. 309, 139 Pac. 674; *Green v. Superior Court*, 78 Cal. 556, 21 Pac. 307, 541 (there is no

misdemeanors would at common law be classified as high or low.¹ When jurisdiction of any or all misdemeanors is so conferred, it is exclusive of that conferred upon the superior court, as such misdemeanors then become cases of misdemeanors "otherwise provided for," within the meaning of the constitution.² It follows that any attempt to confer concurrent jurisdiction of misdemeanor upon superior and justices' or police courts is void and without legal effect.³

§ 47. Justices' Courts.—Jurisdiction of justices' courts generally is prescribed by section 1425 of the Penal Code, which is as follows:

"The justices' courts have jurisdiction of the following public offenses committed within the respective counties in which such courts are established: 1. Petit larceny; 2. Assault or battery not charged to have been committed upon a public officer in the discharge of his duties, or to have been committed with such intent as to render the offense a felony; 3. Breaches of the peace, riots, routs, affrays, committing a willful injury to property, and all misdemeanors punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment."⁴

distinction between conferring jurisdiction upon justices' courts created by the constitution and police courts created by statute); *Gafford v. Bush*, 60 Cal. 149; *Ex parte Wallingford*, 60 Cal. 103; *People v. Budd*, 24 Cal. App. 176, 140 Pac. 714.

1. *Green v. Superior Court*, 78 Cal. 556, 562, 21 Pac. 307, 541.

2. *Green v. Superior Court*, 78 Cal. 556, 21 Pac. 307, 541; *Ex parte Wallingford*, 60 Cal. 103; *Union Ice Co. v. Rose*, 11 Cal. App. 357, 360, 104 Pac. 1006 (holding the police court of Los Angeles has jurisdiction of a prosecution for violation of the Cartwright law).

3. The provision of the charter of San Francisco [Stats. 1899, p. 241] conferring concurrent jurisdiction of misdemeanors upon superior and police courts is void; *Robert v. Police Court*, 148 Cal. 131, 82 Pac. 838; *People v. Fortch*, 13 Cal. App. 770, 110 Pac. 823.

4. *People v. Hamberg*, 84 Cal. 468, 24 Pac. 298 (holding the police court had no jurisdiction of an offense punishable by imprisonment not exceeding one year and by fine not exceeding three times the value of the property involved); *Ex parte Neustadt*, 82 Cal. 273, 23 Pac. 124; *In the Matter of Kurtz*, 68 Cal. 412, 9 Pac. 449

Section 19 of the Penal Code provides as follows:

“Except in cases where a different punishment is prescribed by this code, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding five hundred dollars, or by both.”

If then a statute declares an offense to be a misdemeanor without prescribing a punishment therefor, section 19 is applicable and jurisdiction thereof is in the police and justices' courts.⁵ It has been held, however, that section 19 has no application to a statute which declares an act to be a misdemeanor but prescribes a minimum punishment only. The punishment in such case may be greater than the jurisdictional limit of justices' and police courts; consequently jurisdiction is in the superior court.⁶ The fact that a misdemeanor ordinarily within the jurisdiction of the justice's court is committed by a corporation does not deprive it of jurisdiction.⁷

Violation of municipal ordinances.—Unless exclusive jurisdiction thereof is conferred upon other inferior courts,⁸ a justice's court has jurisdiction of prosecutions for the violation of city and county ordinances, the punishment for which does not exceed the jurisdictional limits.⁹

(holding the justices' courts have no jurisdiction of a violation of Pen. Code, § 377); *People v. Fages*, 32 Cal. App. 37, 162 Pac. 137; *Platz v. Marion*, 35 Cal. App. 241, 169 Pac. 697 (holding justices' courts have general jurisdiction of the crime of common barratry); *People v. Gibbs*, 25 Cal. App. 466, 144 Pac. 150; *Cassidy v. Cannon*, 18 Cal. App. 426, 123 Pac. 358, 359; *People v. Sacramento Butchers' Assn.*, 12 Cal. App. 471, 486, 107 Pac. 712.

5. *Mauss v. Superior Court*, 25

Cal. App. 533, 144 Pac. 298; *People v. Gibbs*, 25 Cal. App. 466, 144 Pac. 150.

6. *People v. Haagen*, 139 Cal. 115, 72 Pac. 836; *People v. Tom Nop*, 124 Cal. 150, 56 Pac. 786; *Ex parte Anear*, 114 Cal. 370, 46 Pac. 172; *People v. Anderson*, 30 Cal. App. 542, 159 Pac. 211.

7. *People v. Palermo Land & W. Co.*, 4 Cal. App. 717, 89 Pac. 823, 725.

8. See *infra*, § 49.

9. *Ex parte Noble*, 96 Cal. 362, 31 Pac. 224; *Matter of Application of*

§ 48. **Police Courts.**—The jurisdiction of police courts generally is prescribed by section 4426 of the Political Code, which confers upon them exclusive jurisdiction of substantially the same offenses enumerated in section 1425 of the Penal Code, just quoted, when committed within the city boundaries.¹⁰ The legislature is not forbidden by the constitution from conferring upon the police courts of certain classes of cities and towns greater jurisdiction in this respect than is conferred upon others.¹¹ Accordingly, it has conferred jurisdiction over all misdemeanors punishable by fine or imprisonment or both, upon the police courts of certain cities, including cities of the first and one-half class,¹² and cities of the second class¹³ and cities having more than thirty thousand and less than one hundred thousand inhabitants.¹⁴ But in the case of certain cities within these classes it has been held that such jurisdiction has not been conferred by reason of the provisions

Yee Kim Mah, 31 Cal. App. 196, 159 Pac. 1060.

10. *Ex parte Mauch*, 134 Cal. 500, 66 Pac. 734 (holding police court has jurisdiction of offense of cruelty to animals); *Ex parte Halsted*, 89 Cal. 471, 26 Pac. 961 (holding police court of Los Angeles in 1891 had jurisdiction under the Whitney Act of certain public offenses including petit larceny); *People v. Ah King*, 4 Cal. 307, holding recorder has right to punish for assault and battery.

11. *Green v. Superior Court*, 78 Cal. 556, 21 Pac. 307, 541.

12. Stats. 1913, p. 469, subd. 2, continuing Stats. 1901, p. 95; *In re Dowell*, 36 Cal. App. 587, 172 Pac. 1121; *People v. Corey*, 26 Cal. App. 735, 148 Pac. 532; *Union Ice Co. v. Rose*, 11 Cal. App. 357, 104 Pac. 1006.

13. Municipal Corporation Bill,

§ 391; Stats. 1901, p. 576; *Matter of Application of Westenberg*, 167 Cal. 309, 139 Pac. 674, holding the police court of Oakland has jurisdiction over all misdemeanors including criminal libel, its charter (Stats. 1911, p. 1551), being in the exact language of the act establishing police courts in cities of the second class.

14. "The Whitney Act," Stats. 1885, p. 213; *People v. Wong Wang*, 92 Cal. 277, 28 Pac. 270; *Ex parte Halsted*, 89 Cal. 471, 26 Pac. 961; *People v. Lawrence*, 82 Cal. 182, 22 Pac. 1120; *People v. Joselyn*, 80 Cal. 544, 22 Pac. 217; *Green v. Superior Court*, 78 Cal. 556, 21 Pac. 307, 541. This act if ever applicable to Sacramento, does not apply to it since the adoption and approval of its charter in 1911. *Matter of Yee Kim Mah*, 31 Cal. App. 196, 159 Pac. 1060.

of their charters.¹⁵ Jurisdiction of a misdemeanor committed in such a city for which the punishment is greater than that ordinarily conferred upon police courts is necessarily in the superior court.¹⁶ And this is true, regardless of whether the statute designates the offense as a felony or misdemeanor or either, or whether or not it specifies the jail or prison in which the judgment is to be executed.¹⁷

§ 49. Conflict of Jurisdiction Between Police and Justices' Courts.—Prior to 1905 the jurisdiction of justices' courts was prescribed by section 115 of the Code of Civil Procedure. In that year section 115 was repealed and section 1425 embracing such section was enacted. Section 1425 is to be regarded as a new section. It follows that it supersedes prior enactments conferring upon police courts exclusive jurisdiction of certain crimes committed within

15. *People v. Cory*, 26 Cal. App. 735, 743, 148 Pac. 532. (The charter of Pasadena, Stats. 1901, p. 922, does not confer jurisdiction of "high grade" misdemeanors upon the police courts, as it defines the jurisdiction in the same terms used to define the jurisdiction of justices' courts generally.)

A charter conferring upon a police court jurisdiction of all misdemeanors cognizable by justices' and police courts under the constitution and laws of the state does not confer jurisdiction over so-called high-grade misdemeanors. Stats. 1911, Extra Sess., p. 305; *People v. T. Wah Hing*, 32 Cal. App. Dec. 108, 190 Pac. 662 (charter of Sacramento).

Because of the invalidity of section 2 of that section of the San Francisco charter of 1899 relating to the jurisdiction of police courts, and because the charter repealed

the acts conferring a greater jurisdiction upon such courts, it follows that the police courts of San Francisco have only jurisdiction of all prosecutions for violations of ordinances of boards of supervisors, and such jurisdiction as is possessed by justices of the peace in cases of misdemeanors under the general laws; *Robert v. Police Court*, 148 Cal. 131, 82 Pac. 838; *People v. Fortch*, 13 Cal. App. 770, 110 Pac. 823. See *Ex parte Simpson*, 47 Cal. 127, holding Stats. 1871-2, p. 84, prescribing the jurisdiction of police courts of San Francisco, was not repealed by the Political Code.

16. *People v. Cory*, 26 Cal. App. 735, 743, 148 Pac. 532; *People v. Sacramento Butchers' Assn.*, 12 Cal. App. 471, 489, 107 Pac. 712.

17. *People v. Sacramento Butchers' Assn.*, 12 Cal. App. 471, 489, 107 Pac. 712.

the boundaries of cities, and that justices of the peace have concurrent jurisdiction of such crimes committed within cities unless deprived thereof by subsequent legislation.¹⁸ The rule is that the creation of a new forum or the mere grant of jurisdiction to a particular court does not oust any other court of the power which it before possessed, unless the act creating it contains words of exclusion.¹⁹ Therefore, whether a justice of the peace is deprived of his jurisdiction depends upon whether the acts creating police courts contain such words of exclusion.²⁰ It has been held, however, that the former provision of the constitution relating to freeholders' charters, did not authorize the granting of exclusive jurisdiction to police courts. The charter might fix the jurisdiction of such courts, but it could not oust any other court of jurisdiction it already had.¹

A violation of section 435 of the Penal Code forbidding the carrying on of a business without a license when "required by any law of this state" is not a violation of a city or county ordinance, though the license is required by such ordinance, and therefore a statute conferring upon a recorder's court exclusive jurisdiction of prosecutions for violations of ordinances does not defeat the jurisdiction of a justice's court.²

§ 50. Offenses Against States and United States.—A state court has no power to punish crimes against the laws of

18. Matter of Application of Yee Kim Mah, 31 Cal. App. 196, 159 Pac. 1060.

19. Ex parte Dolan, 128 Cal. 460, 60 Pac. 1094. See COURTS, ante, p. 588.

20. Matter of Application of Yee Kim Mah, 31 Cal. App. 196, 159 Pac. 1060 (holding the Sacramento charter of 1911 does not confer exclusive jurisdiction upon police courts). See Ex parte Bagshaw, 152 Cal. 701, 93 Pac. 864 (holding

recorders' courts in cities of the sixth class have concurrent jurisdiction with justices' courts of misdemeanors under the laws of the state); and In re Carrillo, 66 Cal. 1, 4 Pac. 695 (holding the San Jose charter of 1874 did not confer exclusive jurisdiction upon the police court).

1. Ex parte Dolan, 128 Cal. 460, 60 Pac. 1094.

2. Ex parte Bagshaw, 152 Cal. 701, 93 Pac. 864.

the United States, as such,³ yet in some instances the same act may constitute two offenses, one against the state and the other against the United States, and it may be punishable in each jurisdiction under its laws.⁴ A state is not inhibited from passing a law punishing an act because the federal laws denounce it as a crime. The state may punish the act also when the object is to exercise the police power belonging to it in virtue of its general sovereignty.⁵ For example, the derailment of a mail train is an offense punishable in the federal courts, and the death of a trainman caused thereby is murder punishable under the law of the state.⁶ Again, the counterfeiting of the notes of a foreign government may be punished by the federal law for the protection of foreign nations and their people and by the state law to protect its citizens from fraud.⁷ A state police officer charged with bribery in connection with the enforcement of a national law may be prosecuted in the state courts.⁸ Whether perjury punishable under the federal laws is also punishable under the state law depends upon whether or not the matters from which the charge arises occur under and in the course of the execu-

3. *People v. McDonnell*, 80 Cal. 285, 292, 13 Am. St. Rep. 159, 22 Pac. 190; *People v. Kelly*, 38 Cal. 145, 99 Am. Dec. 360. The offense of murder committed against the person of an Indian within an Indian reservation by a person not of Indian blood is within the jurisdiction of the United States courts. *Donnelly v. United States*, 228 U. S. 243, 271, 57 L. Ed. 820, 33 Sup. Ct. Rep. 449.

4. *People v. Kelly*, 38 Cal. 145, 99 Am. Dec. 360; *Sexton v. California*, 189 U. S. 319, 47 L. Ed. 833, 23 Sup. Ct. Rep. 543 (affirming *People v. Sexton*, 132 Cal. 37, 64 Pac. 107); *Crossley v. Cali-*

fornia, 168 U. S. 640, 42 L. Ed. 610, 18 Sup. Ct. Rep. 242. See COUNTERFEITING, ante, p. 373.

5. *People v. McDonnell*, 80 Cal. 285, 13 Am. St. Rep. 159, 22 Pac. 190.

6. *Crossley v. California*, 168 U. S. 640, 42 L. Ed. 610, 18 Sup. Ct. Rep. 242.

7. *People v. McDonnell*, 80 Cal. 285, 13 Am. St. Rep. 159, 22 Pac. 190.

8. *Harris v. Superior Court*, 34 Cal. App. Dec. 291, 196 Pac. 895. In this case hearing was denied in the supreme court without reference to grounds of the decision by the district court of appeal.

tion of the laws of the United States.⁹ The federal statutes defining crimes sometimes provide that they shall not be held to impair the jurisdiction of the state courts under their laws.¹⁰

§ 51. Jurisdiction of Person.—In a criminal case, a court, immediately upon the filing of a complaint, if the charge be a misdemeanor, or of an indictment or information, if the charge be an indictable offense, acquires jurisdiction over the person of the accused to the extent that it is authorized by appropriate process to compel him to appear and plead to the charge, and to stand trial thereon, if he pleads not guilty.¹¹ There is, however, no equivalent for the technical appearance by attorney of defendant in civil cases,¹² except the being in actual or constructive custody. While an indictment may be found against one not in custody, the case can proceed no further unless an arrest be effected.¹³

As dependent upon mode of acquiring jurisdiction.—The jurisdiction of a court is not impaired by the manner in which an accused is brought within its jurisdiction.¹⁴ Accordingly, it is no objection to the detention and trial of a defendant that he was forcibly abducted from another state and conveyed within the jurisdiction of the court

9. The state courts have no jurisdiction of a charge of perjury committed by swearing falsely before the register of the United States land office in a proceeding touching the public land. *People v. Kelly*, 38 Cal. 145, 99 Am. Dec. 360, cited in *Thomas v. Loney*, 134 U. S. 372, 376, 33 L. Ed. 949, 10 Sup. Ct. Rep. 584. See *PERJURY*.

10. *Sexton v. California*, 189 U. S. 319, 47 L. Ed. 833, 22 Sup. Ct. Rep. 543, holding, in view of a proviso, a state court has jurisdiction of an offense of extortion by threats

to accuse one of the violation of the internal revenue law.

11. *Ex parte MacDonald*, 31 Cal. App. Dec. 186, 187 Pac. 991.

12. See *APPEARANCE*, vol. 3, p. 1.

13. *People v. Redinger*, 55 Cal. 290, 36 Am. Rep. 32. See *ARREST*, vol. 3, p. 112.

14. *People v. Pratt*, 78 Cal. 345, 20 Pac. 731, quoting *Mahon v. Justice*, 127 U. S. 708, 32 L. Ed. 283, 8 Sup. Ct. Rep. 1204; *People v. Palermo Land & W. Co.*, 4 Cal. App. 717, 89 Pac. 723, 725.

holding him or that he was illegally extradited.¹⁵ Likewise, the jurisdiction over a convict serving a sentence in a state prison is not impaired by the fact that the order upon the warden to produce the body was illegal.¹⁶

§ 52. Territorial Jurisdiction.—Although there is authority elsewhere to the effect that the state has the power to enact criminal laws which may even follow its citizens abroad and visit upon them offenses committed out of its territory,¹⁷ it is a settled general rule that crimes are local and can be punished only in the state where they are committed either in whole or in part.¹⁸ The Penal Code provides as follows:

“Every person is liable to punishment by the laws of this state, for a public offense committed by him therein, except where it is by law cognizable exclusively in the courts of the United States.”¹⁹

“The following persons are liable to punishment under the laws of this state: 1. All persons who commit, in whole or in part, any crime within this state; 2. All who commit any offense without this state which, if committed within this state, would be larceny, robbery, or embezzlement under the laws of this state, and bring the property stolen or embezzled, or any part of it, or are found with it, or any part of it, within this state; 3. All who, being without this state, cause or aid, advise or encourage, another person to commit a crime within this state, and are afterwards found therein.”²⁰

“Every person, who, being out of this state, causes, aids, advises, or encourages any person to commit a crime within this state, and is afterwards found within this state, is punishable in the same manner as if he had been

15. *People v. Pratt*, 78 Cal. 345, 20 Pac. 731. See EXTRADITION.

16. *Ex parte Clark*, 85 Cal. 203, 24 Pac. 726.

17. *Blythe v. Ayres*, 96 Cal. 532, 19 L. R. A. 40, 31 Pac. 915 (citing the *Warrender Case*, 2 Clark & F. (Eng.) 539).

18. *People v. Webber*, 133 Cal. 623, 66 Pac. 38.

19. Pen. Code, § 777.

20. Pen. Code, § 27. See Pen. Code, §§ 779, 780, as to punishment of dueling committed in part in the state.

within this state when he caused, aided, advised, or encouraged the commission of such crime."¹

"Whenever a person, with intent to commit a crime, does any act within this state in execution or part execution of such intent, which culminates in the commission of a crime, either within or without this state[,] such person is punishable for such crime in this state in the same manner as if the same had been committed entirely within this state."²

Over land owned by United States.—Under the United States constitution the federal government has exclusive jurisdiction over "all places purchased by the consent of the legislature" for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.³ The ownership of property by the United States does not show any federal jurisdiction over crimes committed upon it, unless such ownership is acquired by purchase with the consent of the legislature, which is held to include acquisition by eminent domain when that proceeding is authorized by the legislature.⁴

§ 53. Crimes Committed in Part in State.—As has been seen, the Penal Code provides that all persons who commit in part any crime in California are liable to punishment under the laws of the state. Such a provision is not unconstitutional. It does not deprive a defendant of the right guaranteed by the federal constitution to all privileges and immunities of the citizens of the several states. Neither does it deny him equal protection of the laws or deprive him of his liberty without due process of law.⁵ As has been already stated the fourteenth amendment does not secure to all persons of the United States the benefit of the same laws and the same remedies.⁶ One who com-

1. Pen. Code, § 778b.

2. Pen. Code, § 778a.

3. U. S. Const., art. I, § 8.

4. *People v. Collins*, 105 Cal. 504,
39 Pac. 16.

5. *People v. Botkin*, 9 Cal. App.
244, 98 Pac. 861.

6. See *supra*, § 9.

mits crime in part in California is punishable under the laws of this state, exactly in the same way, in the same courts, and under the same procedure, as if the crime was committed entirely within the state.⁷ Accordingly, one who sends poisoned candy by mail with intent to take the life of a person in another state may be punished for murder in California, although the death results elsewhere.⁸ Similarly, one who mails a forged check in a foreign country to a bank in California with instructions to mail it for collection to another state is liable to punishment here.⁹

§ 54. Crimes Consummated Within the State.

“When the commission of a public offense, commenced without the state, is consummated within its boundaries, the defendant is liable to punishment therefor in this state, though he was out of the state at the time of the commission of the offense charged. If he consummated it in this state, through the intervention of an innocent or guilty agent, or any other means proceeding directly from himself, in such case the jurisdiction is in the county in which the offense is consummated.”^{10a}

Under such a provision it has been held that an agent residing out of California, of a principal who lives in the state, commits the crime of embezzlement in this state if he draws telegraphic checks, in the course of his agency, on his principal, and converts the money to his own use, with intent to embezzle the same.¹⁰

7. *People v. Botkin*, 132 Cal. 231, 84 Am. St. Rep. 39, 64 Pac. 286; 9 Cal. App. 244, 250, 98 Pac. 861; *People v. Sanson*, 37 Cal. App. 435, 173 Pac. 1107.

8. *People v. Botkin*, 132 Cal. 231, 84 Am. St. Rep. 39, 64 Pac. 286.

9. *People v. Sanson*, 37 Cal. App. 435, 173 Pac. 1107.

9a. Pen. Code, § 778.

10. *Ex parte Hedley*, 31 Cal. 109 (construing *Crim. Prac. Act, Stats.* 1851, p. 221).

H. PLACE OF TRIAL.

I. VENUE.

§ 55. **In General.**—The term “venue” is synonymous with the expression “place of trial.”¹¹ The rule of the common law that crimes are altogether local, cognizable and punishable exclusively in the jurisdiction where committed,¹² has been adopted by the Penal Code.

“Except as herein otherwise provided, the jurisdiction of every public offense is in the county where it is committed.”¹³

It follows that the courts of another county have no jurisdiction to inquire into the case, unless authorized by law.¹⁴

§ 56. **Statutory Power to Prosecute in Other Counties.**—There is no constitutional limitation upon the legislative power to determine the venue of criminal actions, except that found in the provision that the right of trial by jury shall remain inviolate.¹⁵ By this provision a defendant accused of crime is guaranteed a trial by a common law jury, that is a jury of the vicinage or neighborhood.¹⁶ Construing this provision, the supreme court in 1891 held that the word visne or vicinage is to be interpreted as the county where the crime is alleged to have been committed. And it was therefore held beyond the power of

11. *People v. Wakao*, 33 Cal. App. 454, 165 Pac. 720; *In Matter of McDonald*, 20 Cal. App. 641, 129 Pac. 957.

12. *People v. Scott*, 74 Cal. 94, 15 Pac. 384.

13. Pen. Code, § 777.

14. *People v. Stakem*, 40 Cal. 599; *Ex parte Cook*, 4 Cal. Unrep. 969, 39 Pac. 16, applying rule to justice of the peace.

As to venue of prosecutions for particular crimes, see the particular titles, as **EMBEZZLEMENT**; **FALSE PRETENSES**; **RECEIVING STOLEN GOODS**; etc. As to venue in cases of conspiracy, see Pen. Code, § 182, as amended in 1919. And see **CONSPIRACY**, vol. 5, p. 508.

15. Const., art. I. § 7.

16. See **JURY**.

the legislature to authorize a change of venue to another county without the consent of the defendant.¹⁷ Upon the other hand, in a recent case in the district court of appeals it was held that the word "vicinage" was to be interpreted as the county where the trial is had. Under this interpretation, it was held that there was no constitutional limitation upon the power of the legislature to determine the places of trial, and that a statute authorizing a trial where the defendant was apprehended is valid.¹⁸

§ 57. Offenses Committed in Part in Different Counties, Near Boundaries or on Ships or Cars.—The right of a defendant in a criminal case to be tried by a jury of the neighborhood where the crime was committed was at common law interpreted so strictly that if an offense was committed partly in one county and partly in another, the offender was not punishable at all. This overnicety has long since been dispensed with.¹⁹ The California rule is declared in the Penal Code:

"When a public offense is committed in part in one county and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county."²⁰

Offenses on or near boundaries.—"When a public offense is committed on the boundary of two or more counties, or within five hundred yards thereof, the jurisdiction is in either county."¹

17. *People v. Powell*, 87 Cal. 348, 11 L. R. A. 75, 25 Pac. 481.

18. In *Matter of McDonald*, 20 Cal. App. 641, 129 Pac. 957.

19. *People v. Powell*, 87 Cal. 348, 358, 11 L. R. A. 75, 25 Pac. 481, quoting *Stuart v. Kimball*, 43 Mich. 448.

20. Pen. Code, § 781; *People v.*

De Martini, 25 Cal. App. 9, 142 Pac. 898; *People v. Grubb*, 24 Cal. App. 604, 141 Pac. 1051.

1. Pen. Code, § 782; *People v. Cipalla*, 155 Cal. 224, 100 Pac. 252; *People v. Salorse*, 62 Cal. 139; *People v. Velarde*, 59 Cal. 457; *People v. Wooley*, 44 Cal. 494, holding allegation of venue sufficient.

Offenses on ships or cars.—"When an offense is committed in this state, on board a vessel navigating a river, bay, slough, lake, or canal, or lying therein, in the prosecution of her voyage, the jurisdiction is in any county through which the vessel is navigated in the course of her voyage, or in the county where the voyage terminates; and when the offense is committed in this state, on a railroad train or car prosecuting its trip, the jurisdiction is in any county through which the train or car passes in the course of her trip, or in the county where the trip terminates."²

§ 58. When Property is Taken from One County to Another.

"When property taken in one county by burglary, robbery, larceny, or embezzlement, has been brought into another, the jurisdiction of the offense is in either county. But if at any time before the conviction of the defendant in the latter, he is indicted in the former county, the sheriff of the latter county must, upon demand, deliver him to the sheriff of the former."³

Larceny may be prosecuted in the county where the property was stolen or in the county into which it is brought.⁴ If the intent to steal continues, the law adjudges that a new larceny is committed in every county into which the property is taken.⁵ If it does not continue, jurisdiction in the county into which the goods are brought can only be by reason of section 786 of the Penal Code.⁶ This section of the code, however, contemplates a

2. Pen. Code, § 783; *People v. Webber*, 138 Cal. 145, 70 Pac. 1089 (citing code section); *People v. Moore*, 103 Cal. 508, 37 Pac. 510.

3. Pen. Code, § 786; *People v. Prather*, 134 Cal. 386, 66 Pac. 483, 724; *People v. Jochinsky*, 106 Cal. 638, 39 Pac. 1077; *People v. Scott*, 74 Cal. 94, 15 Pac. 384; *People v. Garcia*, 25 Cal. 531. See BURGLARY; EMBEZZLEMENT; LARCENY; ROBBERY.

4. *People v. Prather*, 134 Cal. 386, 66 Pac. 483, 724; *People v. Mellon*,

40 Cal. 648; *People v. Robles*, 29 Cal. 421; *People v. Garcia*, 25 Cal. 531; *People v. Tyree*, 21 Cal. App. 701, 132 Pac. 784. See LARCENY; and see INDICTMENT AND INFORMATION, as to allegation of venue.

5. *People v. Staples*, 91 Cal. 23, 27 Pac. 523; *People v. Sing*, 42 Cal. App. 385, 183 Pac. 865; *People v. Tyree*, 21 Cal. App. 701, 132 Pac. 784.

6. *People v. Prather*, 134 Cal. 386, 66 Pac. 483, 724, explained in *Peo-*

completed offense in the county where the property was taken.⁷ While ordinarily burglary can be tried only in the county in which it is committed, it can under this section of the code be tried in any county into which the property burglariously taken has been brought.⁸ Receiving stolen property is not one of the crimes for which the defendant may be tried in a county into which he removes the same.⁹

§ 59. Where Property is Brought into State.

“The jurisdiction of a criminal action for stealing or embezzling, in any other state, the property of another, or receiving it knowing it to have been stolen or embezzled, and bringing the same into this state, is in any county into or through which such stolen or embezzled property has been brought.”¹⁰

The word “state,” as used in this section refers to the different states of the United States, but does not include foreign countries. If the property was stolen or embezzled in a foreign country, a prosecution in this state must be brought under section 497 of the Penal Code, which is as follows:

“Every person who, in another state or country steals or embezzles the property of another, or receives such property knowing it to have been stolen or embezzled, and brings the same into this state, may be convicted and punished in the same manner as if such larceny, or embezzlement, or receiving, had been committed in this state.”

The word “convicted” here includes an accusation and trial, and as the defendant may be tried as if the offense were committed in the state, it follows that he may be tried in the county into which the property is taken.¹¹

ple v. Sing, 42 Cal. App. 385, 183 Pac. 865.

7. People v. Valenzuela, 2 Cal. Unrep. 87.

8. See BURGLARY, vol. 4, p. 736.

9. People v. Disperati, 15 Cal. App. 120, 113 Pac. 889; 11 Cal.

App. 480, 105 Pac. 617. See RECEIVING STOLEN GOODS.

10. Pen. Code, § 789; People v. Staples, 91 Cal. 23, 27 Pac. 523.

11. People v. Black, 122 Cal. 73, 54 Pac. 385.

§ 60. **Miscellaneous Crimes.**—“When the offense, either of bigamy or incest, is committed in one county and the defendant is apprehended in another, the jurisdiction is in either county.”¹² The jurisdiction of a prosecution for kidnaping or abduction “is in the county in which the offense is committed, or out of which the person upon whom the offense was committed, has, in the commission of the offense, been taken, or in which an act was done by the defendant in instigating, procuring, promoting, or aiding in the commission of the offense or in abetting the parties concerned therein.”¹³ Indictments found, or informations concerned therein.”¹³ “Indictments found, or information laid, for publications in newspapers, must be tried in the county where such newspapers have their publication office, or in the county where the party alleged to be libeled resided at the time of the alleged publication, unless the place of trial shall be changed for good cause.”¹⁴ “The jurisdiction of a criminal action for escaping from prison is in any county of the state.”¹⁵ “The jurisdiction of a criminal action for murder or manslaughter, when the injury which caused the death was inflicted in one county, and the party injured died in another county or out of the state, is in the county where the injury was inflicted.”¹⁶ “If a parent violates the provisions of section two hundred seventy of this [the Penal] code in respect to a minor child who has been declared a ward of the juvenile court of any county under the juvenile court law of this state, and by such juvenile court committed to the custody of a person, society or institution which places or keeps such child in another county, the jurisdiction is in either the county in which such commitment

12. Pen. Code, § 785. See **BIGAMY**, vol. 4, p. 343; **INCEST**.

13. Pen. Code, § 784. See **ABDUCTION**, vol. 1, p. 96; **KIDNAPING**.

14. Const., art. I, § 9. See **LIBEL AND SLANDER**.

15. Pen. Code, § 787. See **ESCAPE AND RESCUE**.

16. Pen. Code, § 790. See **HOMICIDE**.

was made, or the county within which such minor child is placed or kept by authority of such commitment."¹⁷

Prizefights.—"The jurisdiction of a violation of sections four hundred and twelve, four hundred and thirteen, and four hundred and fourteen of the Penal Code, or a conspiracy to violate either of said sections is, in any county. First. In which any act is done towards the commission of the offense; or, Second. Into, out of, or through which the offender passed to commit the offense; or, Third. Where the offender is arrested."¹⁸

The jurisdiction of a criminal action for treason, when the overt act is committed out of the state, is in any county of the state.¹⁹

§ 61. Prosecutions of Principals and Accessories.—Prior to the adoption of the Penal Code, the distinction between principals and accessories before the fact, although obliterated in the main, was retained for the purpose of venue, the accessory being punishable only where his offense was committed.²⁰ This rule was changed by the code which provides that

"The jurisdiction of a criminal action against a principal in the commission of a public offense, when such principal is not present at the commission of the principal offense, is in the same county it would be under this code if he were so present and aiding and abetting therein."¹

"In the case of an accessory in the commission of a public offense," that is, a person who at common law was an accessory after the fact, "the jurisdiction is in the county where the offense of the accessory was committed, notwithstanding the principal offense was committed in another county."²

17. Pen. Code, § 777, as amended in 1919. See PARENT AND CHILD.

18. Pen. Code, § 795.

19. Pen. Code, § 788. See TREASON.

20. People v. Stakem, 40 Cal. 599; People v. Hodges, 27 Cal. 340.

1. Pen. Code, § 792.

2. Pen. Code, § 791.

§ 62. Newly Created Counties.—A newly organized county has jurisdiction of a defendant charged with an offense committed prior to its creation, and upon territory within its boundary lines. The fact that at the date of its creation a prosecution for the offense was pending in the old county is no bar to a prosecution in the new county, after dismissal of the former prosecution, no jeopardy having attached.³ The old county, however, has jurisdiction of crime committed in the territory of the new county after the passage of the law and before the organization of the new county.⁴

II. CHANGE OF VENUE.

§ 63. In General.—The jurisdiction of the superior court with respect to the removal of criminal actions to another county for trial is special and can be exercised only in the case mentioned in section 1033 of the Penal Code.⁵ This section provides as follows:

“A criminal action may be removed from the court in which it is pending on application of the defendant, on the ground that a fair and impartial trial cannot be had in the county.”⁶

It is not sufficient, to require a court to grant a change of venue, to show that there is some excitement in the county upon the subject of the action,⁷ or that the victim of the crime was a popular official,⁸ or that a fair and impartial jury cannot be selected from a certain portion of

3. *People v. Stokes*, 103 Cal. 193, 42 Am. St. Rep. 102, 37 Pac. 207. See COUNTRIES, ante, p. 381.

4. *People v. Maguire*, 32 Cal. 140.

5. *People v. McGarvey*, 56 Cal. 327; *People v. Ebey*, 6 Cal. App. 769, 93 Pac. 379. See infra, § 631, as to change of venue in justices' and police courts.

6. The Criminal Practice Act contained a similar provision. See *People v. Judge of Twelfth District*, 17 Cal. 547, as to special law as to change of venue. And see CONSTITUTIONAL LAW, vol. 5, p. 800.

7. *People v. Bullock*, 1 Lab. (U. S. Dist.) 162.

8. *People v. Ford*, 25 Cal. App. 388, 143 Pac. 1075.

the county.⁹ Likewise, the mere fact that a number of persons upon solicitation contributed sums to employ counsel to assist the prosecution will not require the granting of a change of venue.¹⁰ Ordinarily, a highly inflamed condition of the public mind prejudicial to a defendant charged with crime finds some manifestation through the public press, or by assemblages of the people.¹¹ However, the mere fact that the press expressed the opinion that the prisoner is guilty does not afford sufficient ground for a change of venue where it does not appear that the crime has been a subject of general and universal conversation at any time or that any serious portion of the community is hostile to him.¹² And even where there was at any time great prejudice against the defendant, a change of venue will be denied if the excitement in the community has entirely subsided prior to the application therefor.¹³

The disqualification of the trial judge is not a ground for granting a change of venue,¹⁴ the remedy in such case being to secure the attendance of another judge.¹⁵ It has been said to be doubtful if bias and prejudice of the sheriff and his deputies authorize a change of venue.¹⁶

On application of state.—Formerly, the Penal Code authorized the granting of a change of venue on the application of the district attorney where from any cause no jury could be obtained in the county where the action was

9. *People v. Baker*, 1 Cal. 403.

10. *People v. Graham*, 21 Cal. 261, denying a change of venue where it was shown that thirty or forty persons contributed small sums to defray the expense of employing assistant counsel. This case questions *People v. Lee*, 5 Cal. 353, in which an application was granted on a showing that over one hundred persons so contributed.

11. *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *People v. Ford*, 25 Cal. App. 388, 143 Pac. 1075.

12. *People v. Bullock*, 1 Lab. (U. S. Dist.) 162.

13. *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161.

14. *People v. McGarvey*, 56 Cal. 327; *People v. Shuler*, 28 Cal. 490; *People v. Williams*, 24 Cal. 31; *People v. Mahoney*, 18 Cal. 180; *McDowell v. Levy*, 2 Cal. Unrep. 590, 8 Pac. 857.

15. See JUDGES.

16. *People v. Shuler*, 28 Cal. 490, not deciding point because charge was not sustained.

pending.¹⁷ But this provision was held to be unconstitutional and was repealed by the legislature in 1905.¹⁸

§ 64. Application Generally.

“The application for removal must be made in open court, and in writing, verified by the affidavit of the defendant, a copy of which application must be served upon the district attorney at least one day prior to the hearing of the application. At the hearing the district attorney may serve and file such counter-affidavits as he may deem advisable. Whenever the affidavit of the defendant shows that he cannot safely appear in person to make such application because popular prejudice is so great as to endanger his personal safety, and such statement is sustained by other testimony, such application may be made by his attorney, and must be heard and determined in the absence of the defendant, notwithstanding the charge then pending against him be a felony, and he has not at the time of such application been arrested or given bail, or been arraigned, or pleaded or demurred to the indictment or information.”¹⁹

A defendant desiring a change of venue should make application therefor in writing,²⁰ before a jury has been obtained. It is too late after a jury has been obtained to apply for time to prepare affidavits as a basis for such motion.¹

Renewal.—If the trial court defers final action upon the motion until impanelment of the jury with privilege of renewal, a failure to renew the motion is an abandonment and waiver of the whole question so that error in the ruling of the court cannot be assigned upon appeal.² And

17. Pen. Code, § 1033, as it existed prior to 1905. 295, 3 Pac. 597 (counter-affidavits may be filed).

18. *People v. Powell*, 87 Cal. 348, 11 L. R. A. 75, 25 Pac. 481. See *supra*, § 56. 20. *People v. Nolan*, 34 Cal. App. 545, 167 Pac. 642.

19. Pen. Code, § 1034. *People v. Majors*, 65 Cal. 138, 52 Am. Rep. 405, 86 Pac. 886; *People v. Fred-*

even when the motion is denied in the first instance, the defendant may renew his motion when the facts disclosed at the impanelment of the jury warrant it.³

§ 65. Affidavits.—A defendant moving for a change of venue should support his motion by affidavits⁴ of independent and disinterested persons,⁵ as the trial judge is not bound to take for granted the unsupported statement of the defendant and assign to it conclusive effect.⁶ If the defendant relies upon facts of which he is informed and believes, he should produce from the source or sources of his information, information as to their truth, when he can conveniently do so.⁷

The affidavits must state facts and circumstances from which the conclusion is deduced that a fair and impartial trial cannot be had,⁸ the mere conclusion of the defendant or his witness that he fears or believes or knows that a fair and impartial trial cannot be had being wholly insufficient.⁹ Some facts should be stated which would con-

ericks, 106 Cal. 554, 39 Pac. 944; *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *People v. Plummer*, 9 Cal. 298, 309.

3. *People v. Mabrier*, 33 Cal. App. 598, 165 Pac. 1044.

4. The court is not bound to act upon an oral statement of counsel as to what witnesses told him, and as to their refusal to give their affidavits voluntarily. And a request to the court for an order issuing subpoenas is not proper practice as subpoenas are usually issued as a matter of course on application to the clerk. *People v. Elliott*, 80 Cal. 296, 22 Pac. 207.

5. *People v. Bullock*, 1 Lab. (U. S. Dist. Ct.) 162.

6. *People v. Graham*, 21 Cal. 261; *People v. Mahoney*, 18 Cal. 180. But see *People v. Lee*, 5 Cal. 353,

holding the change of venue should have been granted upon the defendant's affidavit.

7. *People v. Shuler*, 28 Cal. 490. See *People v. Williams*, 24 Cal. 31, holding the affidavit of the defendant to be insufficient when he did not give the names of his informants or the sources of information. And see *AFFIDAVITS*, vol. 1, p. 671.

8. *People v. Yoakum*, 53 Cal. 566; *People v. McCauley*, 1 Cal. 379; *People v. Nolan*, 34 Cal. App. 545, 167 Pac. 642.

9. *People v. Congleton*, 44 Cal. 92; *People v. Shuler*, 28 Cal. 490 (defendant's affidavit upon information and belief held insufficient); *People v. McCauley*, 1 Cal. 379; *People v. Nolan*, 34 Cal. App. 545, 167 Pac. 642; *People v. Ford*, 25 Cal. App. 388, 143 Pac. 1075; *Peo-*

vince a reasonable mind that the opinion of the affiant is well founded.¹⁰ It is not sufficient merely to show that a bias or prejudice exists against a codefendant who is separately tried.¹¹ And when it is claimed that comments of the press prejudiced the public against the defendant, specific instances of persons having been or being so influenced should be furnished.¹²

§ 66. Hearing and Determination.

“If the court be satisfied that the representations of the applicant are true, an order must be made transferring the action to the proper court of some convenient county free from a like objection.”¹³

The use of the word “satisfied” in this section indicates that the application for a change of venue is addressed somewhat to the discretion of the trial court.¹⁴ Consequently, the action of the trial court will not be disturbed upon appeal in the absence of an abuse of discretion.¹⁵ Indeed, it has been said that a clear case must be made by the record or the appellate court will not interfere.¹⁶ The discretion, however, is not a mere arbitrary discretion, but one the exercise of which must be reasonable.¹⁷

ple v. Bullock, 1 Lab. (U. S. Dist. Ct.) 162 (affidavit of prisoner held insufficient).

10. People v. Ford, 25 Cal. App. 388, 143 Pac. 1075.

11. People v. Lesse, 34 Cal. App. Dec. 1011, 199 Pac. 46.

12. People v. Mabrier, 33 Cal. App. 598, 165 Pac. 1044.

13. Pen. Code, § 1035.

14. People v. Beggs, 178 Cal. 79, 92, 172 Pac. 152; People v. Kromphold, 172 Cal. 513, 157 Pac. 599; People v. Suesser, 132 Cal. 631, 64 Pac. 1095; People v. Elliott, 80 Cal. 296, 22 Pac. 207; People v. Goldenson, 76 Cal. 328, 19 Pac. 161; People v. Yoakum, 53 Cal. 566; People v. Perdue, 49 Cal. 425; Peo-

ple v. Congleton, 44 Cal. 92; People v. Mahoney, 18 Cal. 180; People v. Mabrier, 33 Cal. App. 598, 165 Pac. 1044.

15. People v. Kromphold, 172 Cal. 512, 157 Pac. 599; People v. Fisher, 6 Cal. 154; People v. MacDonald, 35 Cal. App. Dec. 626, 200 Pac. 491; People v. Fuski, 60 Cal. Dec. 349, 32 Cal. App. Dec. 1038, 192 Pac. 552.

16. People v. Elliott, 80 Cal. 296, 22 Pac. 207; People v. Goldenson, 76 Cal. 328, 19 Pac. 161; People v. Fisher, 6 Cal. 154; People v. Mabrier, 33 Cal. App. 598, 165 Pac. 1044.

17. People v. Kromphold, 172 Cal. 513, 157 Pac. 599; People v. Suesser, 132 Cal. 631, 64 Pac. 1095 (holding

The conclusion reached must be such as finds warrant in the facts disclosed by the affidavits filed and in the circumstances made to appear in the record.¹⁸

§ 67. Matters Considered on Hearing.—In passing upon application for a change of venue, the trial court may, it seems, take into consideration manifestations of prejudice in the courtroom.¹⁹ If the motion is not made until after the commencement of the trial, or if the trial court temporarily defers final action on the motion with privilege of renewal after the proceedings in the impaneling of a jury have progressed to such a point as to throw further light on the question, as it may do,²⁰ the proceedings in the impanelment may be considered in determining whether a fair and impartial trial can be had in the county.¹ Yet the mere failure to get a jury on a particular day does not show such general prejudice as to require the granting of a change of venue.² In passing upon such application, each case must be determined according to its own particular facts and circumstances, and these vary so in different cases that, it has been said, little help can be obtained from the decision of other cases.³

§ 68. Order of Removal and Proceedings Thereafter.

“The order of removal must be entered upon the minutes, and the clerk must immediately make out and transmit to the court to which the action is removed, a certified copy of the order of removal record, pleadings, and proceedings in the action, including the undertakings for the appearances of the defendant and of the witnesses.”⁴

discretion was abused); *People v. Vincent*, 95 Cal. 425, 30 Pac. 581; *People v. Yoakum*, 53 Cal. 566.

18. *People v. Kromphold*, 172 Cal. 513, 157 Pac. 599; *People v. Yoakum*, 53 Cal. 566.

19. *People v. Yoakum*, 53 Cal. 566.

20. *People v. Kromphold*, 172 Cal. 513, 157 Pac. 599; *People v. Vincent*, 95 Cal. 425, 30 Pac. 581.

513, 157 Pac. 599; *People v. Plummer*, 9 Cal. 298.

1. *People v. Kromphold*, 172 Cal. 513, 157 Pac. 599; *People v. Vincent*, 95 Cal. 425, 30 Pac. 581.

2. *People v. Mahoney*, 18 Cal. 180.

3. *People v. Kromphold*, 172 Cal. 513, 519, 157 Pac. 599.

4. Pen. Code, § 1036. See *People*

“If the defendant is in custody, the order must direct his removal, and he must be forthwith removed by the sheriff of the county where he is imprisoned, to the custody of the sheriff of the county to which the action is removed.”⁵

“The court to which the action is removed must proceed to trial and judgment therein as if the action had been commenced in such court. If it is necessary to have any of the original pleadings or other papers before such court, the court from which the action is removed must at any time, upon application of the district attorney or the defendant, order such papers or pleadings to be transmitted by the clerk, a certified copy thereof being retained.”⁶

These sections contemplate a retention of the original papers in the court from which the transfer is made, but any error in sending the originals is not jurisdictional and is waived by appearance and submission without objection.⁷

I. STATUTES OF LIMITATION.

§ 69. In General.—The Penal Code provides as follows:

“There is no limitation of time within which a prosecution for murder,⁸ the embezzlement of public moneys, and the falsification of public records must be commenced. Prosecution for murder may be commenced at any time after the death of the person killed, and for the embezzlement of public money or the falsification of public records, at any time after the discovery of the crime.”⁹

“An indictment for any other felony than murder, the embezzlement of public money, or the falsification of pub-

v. Congleton, 44 Cal. 92, under former practice, holding an entry in vacation instead of in term time was not prejudicial, if irregular.

5. Pen. Code, § 1037.

6. Pen. Code, § 1038.

7. People v. Suesser, 142 Cal. 354, 75 Pac. 1093.

8. People v. Haun, 44 Cal. 96. See HOMICIDE.

9. Pen. Code, § 799.

lic records, must be found, or an information filed, within three years after its commission."¹⁰

The statute limiting the time for commencing criminal prosecutions is imperative, and a defendant by requesting the continuance of his preliminary examination does not waive his right to have the information filed within the time limited and is not estopped from raising the objection. As has been aptly said by the court, as well might it be claimed that the bar of the statute could not be invoked if the defendant had persuaded the district attorney to delay the filing of the information until after the year had expired, or had concealed himself within the state, and thus prevented his arrest and prosecution within the year.¹¹

As against the crime of murder, there is no limitation of time, whatever the degree.¹² But a prosecution for manslaughter is barred in three years.¹³

§ 70. Prosecution of Misdemeanors.

"An indictment for any misdemeanor must be found or an information filed within one year after its commission."¹⁴

This section does not apply to misdemeanors originally triable in the police court or before a justice of the peace. Such misdemeanors are governed by section 1426a of the

10. Pen. Code, § 800. *People v. Salorse*, 62 Cal. 139 (embezzlement of a horse is a felony within the statute); *People v. Helbing*, 59 Cal. 567 (assault with a deadly weapon with intent to inflict great bodily injury); *People v. Kinnard*, 14 Cal. App. 283, 111 Pac. 504 (embezzlement); *Ex parte Vice*, 5 Cal. App. 153, 89 Pac. 983 (embezzlement).

11. *People v. Ayhens*, 85 Cal. 86, 24 Pac. 635. See note, 13 A. L. R.

1446, as to burden on state to show that crime was committed within limitation period; note, 3 A. L. R. 519, as to discharge of accused under a limitation statute as a bar to a subsequent prosecution for the same offense.

12. *People v. Haun*, 44 Cal. 96.

13. *People v. Miller*, 12 Cal. 291.

14. Pen. Code, § 801; *People v. Picetti*, 124 Cal. 361, 57 Pac. 156; *People v. Salorse*, 62 Cal. 139.

Penal Code, which was enacted in 1909.¹⁵ The latter section is as follows:

“A complaint for any misdemeanor triable in a justices’ or police court must be filed within one year after its commission.”¹⁶

Since a crime punishable either by imprisonment in the state prison or by fine or imprisonment in a county jail must be deemed a misdemeanor for all purposes if the judgment is less than imprisonment in the state prison,¹⁷ it follows that when the defendant is convicted of a misdemeanor, the statute limiting the time to prosecute misdemeanors becomes applicable.¹⁸ While by a strict construction the code provision might be limited to cases where the indictment or information upon its face charges a misdemeanor, a more liberal construction has been adopted, it being held that the code is applicable to all cases where under the indictment or information, the defendant may be, and is, convicted of a misdemeanor.¹⁹ A contrary rule would, it has been argued, authorize the destruction of the defense of the statute of limitations by the simple device of indicting a defendant for some felony under which he could be convicted of the outlawed lesser offense.²⁰

§ 71. Effect of Absence from State.

“If, when the offense is committed, the defendant is out of the state, the indictment may be found or an information filed within the term herein limited after his coming within the state, and no time during which the defendant

15. *Ex parte Blake*, 155 Cal. 586, 18 Ann. Cas. 815, 102 Pac. 269; *People v. Picetti*, 124 Cal. 361, 57 Pac. 156.

16. *Ex parte Blake*, 155 Cal. 586, 18 Ann. Cas. 815, 102 Pac. 269 (citing the code section).

17. See *supra*, § 27.

18. *People v. Gray*, 137 Cal. 267, 70 Pac. 20; *People v. Meyers*, 39 Cal. App. 244, 178 Pac. 965.

19. *People v. Picetti*, 124 Cal. 361, 57 Pac. 156.

20. *People v. Gray*, 137 Cal. 267, 70 Pac. 20.

is not an inhabitant of, or usually resident within this state, is part of the limitation."¹

This statute applies to all offenses, and includes the case of a defendant leaving the state after the commission of the crime as well as that of his absence at the time of its perpetration.² But it does not include a case in which a defendant uses an assumed name in another part of the state, as he may be an inhabitant of the state and usually resident within it, regardless of the name he assumes.³

§ 72. Computation of Time.—The general rule is that the statute of limitations commences to run from the commission or consummation of the crime. The statute commences to run against a prosecution for embezzlement on the day the money is wrongfully converted, where the defendant does not hold the funds in some official capacity such as guardian, trustee of an express trust, treasurer of a society, or corporation, or under such circumstances that he could not know to whom he could legally turn over the funds. In such case a demand is not necessary to start the running of the statute.⁴ In determining whether a prosecution for forgery is barred, the date of the alleged offense alone can be considered, and the date of the forged instrument is immaterial.⁵ When the crime charged is continuous in nature, a prosecution therefor is not barred if the crime is continued within the statutory period. The offense of omitting to provide for an illegitimate child is in the nature of a continuing offense, and each and every willful omission without legal excuse on the part of the

1. Pen. Code, § 802; *People v. Miller*, 12 Cal. 291, 295.

The Criminal Practice Act contained a similar provision. *Crim. Prac. Act*, § 99.

2. *People v. Montejo*, 18 Cal. 38.

3. *Ex parte Vice*, 5 Cal. App. 153, 89 Pac. 983.

4. *People v. Kinnard*, 14 Cal.

App. 283, 111 Pac. 504; *Ex parte Vice*, 5 Cal. App. 153, 89 Pac. 983.

See note, 3 A. L. R. 1330, as to exclusion of time of pendency of prior indictment in computation of limitation period.

5. *People v. McPherson*, 6 Cal. App. 286, 91 Pac. 1098.

parent to furnish necessary food, clothing, shelter or medical attendance to his or her child is a fresh offense, and will sustain a prosecution if committed within the statutory period.⁶

An indictment is found within the meaning of the provisions limiting the prosecution of actions when it is presented by the grand jury in open court, and there received and filed.⁷ The "information" mentioned refers to the paper required to be filed in the superior court, and not the one filed before the magistrate. If such information is not filed within the statutory period, the prosecution is barred, even though the preliminary complaint was filed in time.⁸

J. RIGHTS OF ACCUSED.

I. IN GENERAL.

§ 73. **Introductory.**—Section 13 of article I of the constitution provides in part: "In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy⁹ and public¹⁰ trial; to have the process of the court to compel the attendance of witnesses in his behalf,¹¹ and to appear and defend in person and with counsel.¹² No person shall be twice put in jeopardy for the same offense;¹³ nor be compelled, in any criminal case, to be a witness against himself;¹⁴ nor be deprived of life, liberty or property without due process of law."¹⁵ The guaranties in this section are the guaranties of the great muniments of personal liberty. They are, it has been said,

6. *People v. Stanley*, 33 Cal. App. 624, 166 Pac. 596.

7. Pen. Code, § 803. See INDICTMENT AND INFORMATION.

8. *People v. Ayhens*, 85 Cal. 86, 24 Pac. 635.

9. See *infra*, §§ 276 to 280.

10. See *infra*, § 80, 81 and 82.

11. See WITNESSES.

12. See *infra*, §§ 83, 84.

13. See *infra*, §§ 85-102.

14. See WITNESSES.

15. See *infra*, §§ 78, 79.

of too much value to be impaired by legislation or frittered away by construction or interpretation.¹⁶

§ 74. Right to Fair Trial.—One accused of crime is entitled to a fair and impartial trial before an unbiased jury.¹⁷ Criminal cases, it has been said, are too often conducted upon the preconceived theory that the defendant is guilty and that if he be given a fair trial according to the established rules of evidence, the jury may not convict him. “The purpose of a criminal trial is to discover and determine whether or not a defendant is guilty; not merely to maintain, at all hazards, a theory of guilt entertained beforehand by any one man or any community of men.”¹⁸ Trial courts and prosecuting officers should adhere closely to the settled lines of criminal procedure at every stage of the case, and thereby be assured that they are neither aiding in nor contributing to a miscarriage of justice.¹⁹ It is the sworn duty of a district attorney to prosecute fairly and impartially and to protect as well the individual rights of an accused person as those of the whole people, yet there is and must be committed to his judgment many matters of discretion in the discharge of his duties as a public official. For example, he is under no legal obligation to subpoena, and much less to introduce a witness known to him to be adverse to the prosecution.²⁰ It is a general rule, however, that the question whether or not a defendant has had a fair trial is to be determined by what

16. Willard v. Superior Court, 82 Cal. 456, 465, 22 Pac. 1120, per Thornton, J., dissenting.

17. People v. Hartman, 103 Cal. 242, 245, 42 Am. St. Rep. 108, 37 Pac. 153; People v. Emmons, 13 Cal. App. 487, 493, 110 Pac. 151; People v. Butler, 8 Cal. 435; People v. Ruef, 14 Cal. App. 576, 590, 114 Pac. 48, 54; People v. Schmitz,

7 Cal. App. 330, 346, 94 Pac. 407, 419. See *JURY*.

18. People v. Shaw, 111 Cal. 171, 43 Pac. 593.

19. People v. Ho Kim You, 24 Cal. App. 451, 469, 141* Pac. 950.

20. People v. Johnson, 13 Cal. App. 776, 110 Pac. 965. See *infra*, § 318.

takes place at the trial, and not by extraneous circumstances.¹

§ 75. Right to be Present at Trial.—A defendant in a criminal prosecution has a constitutional right “to appear and defend in person.”² “If the prosecution be for a felony, the defendant must be personally present at the trial; but if for misdemeanor, the trial may be had in the absence of the defendant;³ if, however, his presence is necessary for the purpose of identification, the court may, upon application of the district attorney, by an order or warrant, require the personal attendance of the defendant at the trial.”⁴

The presence of the defendant in a felony case is required at all stages of the trial.⁵ The re-reading of instructions or depositions to the jury after the submission of the case is as much a part of the trial within the rule as any other part, and the defendant must be present;⁶ but any violation of the rule in this respect is harmless, when the court in his presence directs the jury to disregard what was done in the defendant’s absence, and then reads the instructions or depositions again.⁷ Section 1148 of the Penal Code specifically requires that a defendant charged with a felony shall appear in person when the verdict is received.⁸ The verdict cannot legally be re-

1. *People v. Currie*, 16 Cal. 731, 117 Pac. 941.

2. Const., art. I, § 13. See INDICTMENT AND INFORMATION, as to presence at filing of indictment or information. See *infra*, § 126, as to presence at arraignment. See *infra*, § 479, as to presence at judgment. See *infra*, § 557, as to presence upon appeal.

See note, 17 A. L. R. 256, as to conduct the defense by accused in person.

3. Pen. Code, § 1043; *People v.*

Budd, 57 Cal. 349; *People v. Ebner*, 23 Cal. 158.

4. Pen. Code, § 1043.

5. *People v. Welsh*, 63 Cal. 187. (The defendant in a criminal case is entitled to have the question of the competency of a presumably incompetent witness heard and determined in his presence); *People v. Higgins*, 59 Cal. 357.

6. *People v. Kohler*, 5 Cal. 72.

7. *People v. Soto*, 65 Cal. 621, 4 Pac. 664.

8. “If charged with a felony, the defendant must, before the verdict

ceived in his absence,⁹ even though he has absconded after the submission of the case to the jury.¹⁰ But a momentary absence of the defendant while the verdict is being rendered cannot be prejudicial, when he returns immediately after and before the jury is discharged.¹¹

The absence of the defendant from the courtroom for an inappreciable length of time while counsel is preparing to address the jury cannot be prejudicial to him¹² and it has been held that the presence of the defendant is not required when his case is continued,¹³ or when the trial is formally adjourned.¹⁴

When case is set for trial.—The defendant should be present when his case is set for trial.¹⁵ But it is not prejudicial error to set the case for trial in the personal absence of the defendant, where his attorney was present, and ample time was given in which to prepare for trial, and no objection was interposed at the trial to the time or manner of the setting of the cause.¹⁶ If the case is set down for trial on a holiday, the absence of the defendant when the case is reset for trial on the following day is not prejudicial, as it is unnecessary that the case be reset.¹⁷

is received, appear in person. If for a misdemeanor, the verdict may be rendered in his absence." Pen. Code, § 1148.

9. *People v. Holmes*, 118 Cal. 444, 50 Pac. 675; *People v. Jung Qung Sing*, 70 Cal. 469, 11 Pac. 755 (holding the record sufficiently shows the presence of the defendant which recites that the "parties" were present); *People v. Higgins*, 59 Cal. 357; *People v. Beauchamp*, 49 Cal. 41.

10. *People v. Beauchamp*, 49 Cal. 41.

11. *People v. Miller*, 33 Cal. 99.

12. *People v. Bush*, 68 Cal. 623, 10 Pac. 169.

13. *People v. O'Brien*, 88 Cal. 483, 26 Pac. 362.

14. *People v. Morrell*, 28 Cal. App. 729, 153 Pac. 977, where the court adjourned the trial because of damage to the courthouse by earthquake.

15. *People v. Rader*, 136 Cal. 353, 68 Pac. 707, presuming that the defendant was present as the record was silent in respect thereto.

16. *People v. Erwin*, 4 Cal. App. 394, 88 Pac. 371.

17. *People v. Rader*, 136 Cal. 253, 68 Pac. 707.

§ 76. **Right to be Confronted With Witnesses.**—While the constitution contains no express provision guaranteeing to persons accused of crime the right to be confronted with the witnesses against them,¹⁸ and the provision of the federal constitution relating thereto is not a restraint upon the state,¹⁹ the right is guaranteed by section 686 of the Penal Code. This section provides that, with certain exceptions in case of testimony taken at a preliminary examination or at a former trial,²⁰ the defendant “in a criminal action . . . is entitled . . . to be confronted with the witnesses against him, in the presence of the court,”¹ that is, the court in which the action is being tried.² This right was fundamental at common law and can be taken from a defendant only by the provisions of some express statute.³ It protects a defendant against the peril of conviction upon *ex parte* affidavits given when he had no opportunity of cross-examination, a right of highest importance.⁴ But the rule does not apply upon a prosecution for perjury where all that is sought to be proved is the fact that certain testimony was given on the trial where the perjury was committed and the defendant is confronted with the witnesses who testify to that fact.⁵

There can be little doubt that the right of due process of law includes the common-law right of a defendant to be confronted by the witnesses in his favor.⁶ But this right is one which may be waived by a defendant if he so desires, and even when the statute prevented the prosecution

18. *People v. Sierp*, 116 Cal. 249, 48 Pac. 88.

19. *People v. Wilson*, 26 Cal. App. 336, 146 Pac. 1048.

20. See *infra*, § 214.

1. *People v. Gordon*, 99 Cal. 227, 33 Pac. 901; *People v. Gardner*, 98 Cal. 127, 32 Pac. 880. See **WITNESSES**, as to right of accused to compulsory process to compel attendance of witnesses.

2. *People v. Chung Ah Chue*, 57 Cal. 567.

3. *People v. Ward*, 105 Cal. 652, 39 Pac. 33.

4. *People v. Plyler*, 126 Cal. 379, 58 Pac. 904.

5. *People v. Lem You*, 97 Cal. 224, 32 Pac. 11. See **PERJURY**.

6. *People v. Hurtado*, 63 Cal. 288 (where the defendant introduced a deposition taken on his behalf but in his absence).

from introducing the testimony of a deceased or absent witness at a former trial, as formerly it did, it was held that the defendant might introduce such testimony,⁷ provided he laid a proper foundation therefor, by showing the death of the witness or that the witness could not after due diligence be found in the state.⁸

§ 77. Waiver of Rights.—Many of the common law, statutory and constitutional rights of a defendant may be waived by him, and some will be presumed to have been waived if they have not been asserted in a timely manner.⁹ The rights of a defendant fall naturally into two classes—those in which the state as well as the accused is interested; and those which are personal to the accused, which are in the nature of personal privileges. Those of the first class cannot generally be waived; those of the second generally may be.¹⁰ For example, a defendant is entitled to be tried by a full common-law jury on a charge of a felony before sentence, but he may waive all the incidents of the trial established for his protection and enter a plea of guilty. He is entitled to challenge jurors both for cause and peremptorily, but if he fails to do so, having had the opportunity, it is too late to complain after conviction.¹¹ So it is with having the process of the court to

7. *People v. Bird*, 132 Cal. 261, 64 Pac. 259.

8. *People v. McFarlane*, 138 Cal. 481, 488, 61 L. R. A. 245, 71 Pac. 568, 72 Pac. 48, holding the trial court did not err in sustaining an objection to the evidence where it was shown that three or four days before trial counsel was informed that a certain person could tell where the witness was.

9. See *infra*, § 514 et seq.

10. See 8 R. C. L. 69. See, also, *People v. Robinson*, 46 Cal. 94 (holding a defendant may waive a statutory right for his benefit).

See *supra*, § 76 (as to waiver of right of confrontation with witnesses); § 80 (waiver of public trial); § 83 (waiver of aid of counsel); § 90 (waiver of right to object to being placed again in jeopardy); § 280 (waiver of right to dismissal of prosecution for delay in bringing defendant to trial); § 313 (waiver of right to be present at view); § 469 (waiver of time to pronounce judgment).

11. *People v. White*, 5 Cal. App. 329, 342, 90 Pac. 471. But see *People v. March*, 1 Cal. Unrep. 6, holding a defendant can no more

secure the attendance of his witness, and his right to have only competent evidence introduced upon the trial. Failing to assert his right, he is deemed to have waived it.¹² On the other hand, the statute limiting the time for pronouncement of sentence was adopted as a matter of public policy to insure a swifter infliction of the penalty required to be imposed, and the defendant cannot consent to a postponement beyond the statutory period.¹³

II. DUE PROCESS OF LAW.

§ 78. **In General.**—The constitution of California provides that “No person shall . . . be deprived of life, liberty or property without due process of law.”¹⁴ The same provision is found in the constitution of the United States,¹⁵ as well as in the constitution of other states, and is in fact as old as Magna Carta.¹⁶ It is said to be difficult to frame a definition of “due process of law” which shall be at once perspicuous, comprehensive and satisfactory.¹⁷ However, the spirit of these provisions, as applied to criminal prosecutions, is, in brief, that no person can be made to suffer for a criminal offense unless the penalty be inflicted by “due process of law,”¹⁸ that is to say, in

consent to be tried by a jury composed of men whom the law has said are disqualified than he can submit to be tried by the court without a jury. See *JURY*.

12. *People v. White*, 5 Cal. App. 329, 342, 90 Pac. 471.

13. See *infra*, § 469.

14. Const., art. I, § 13; *People v. O'Bryan*, 165 Cal. 55, 65, 130 Pac. 1042. See *CONSTITUTIONAL LAW*, vol. 5, p. 861 et seq.

15. U. S. Const., art. XIV, § 1; art. V.

16. Chapter 39 of the Magna Carta provides that “no freeman shall be taken, or imprisoned, or

disseized, or outlawed, or in any way harmed—nor will we go upon or send upon him, save by the lawful judgment of his peers or by the law of the land.”

17. See *CONSTITUTIONAL LAW*, vol. 5, p. 861.

18. *Kalloch v. Superior Court*, 56 Cal. 229, quoting *Huber v. Reily*, 53 Pa. 112.

“No matter what may be the ostensible or real purpose in restraining a person of his liberty, whether it is to punish for an offense against the law, or to protect a person from himself, or the community from apprehended acts,

the due course of legal proceedings according to the rules and forms which have been established for the protection of private rights.¹⁹ Law in its regular course of administration through courts of justice is due process, and when secured by the law of the state, the constitutional requirement is satisfied.²⁰ A criminal prosecution based upon a law which is not in violation of the constitution, and conducted according to the settled course of judicial proceedings as established by the law of the state, so long as it includes a notice and a hearing, or an opportunity to be heard before a court of competent jurisdiction, according to established modes of procedure, is "due process" in the constitutional sense.¹

such restraint cannot be made permanent or of long continuance, unless by due process of law." *Matter of Lambert*, 134 Cal. 626, 86 Am. St. Rep. 296, 55 L. R. A. 856, 66 Pac. 851 (quoting *People v. St. Saviour's Sanitarium*, 34 Hun (N. Y. App. Div.), 363, in regard to commitment of insane persons).

19. *People v. White*, 5 Cal. App. 329, 341, 90 Pac. 471.

20. *People v. Coleman*, 145 Cal. 609, 615, 79 Pac. 283 (quoting *Leeper v. Texas*, 139 U. S. 467, 35 L. Ed. 225, 11 Sup. Ct. Rep. 577, see, also, *Rose's U. S. Notes*); *Kalloch v. Superior Court*, 56 Cal. 229, 240; *In re Finley*, 1 Cal. App. 198, 210, 81 Pac. 1041. See *People v. Bosquet*, 116 Cal. 75, 47 Pac. 879, holding a statute punishing a husband for leaving his wife in a house of prostitution does not deprive him of his liberty without due process. See CONSTITUTIONAL LAW, vol. 5, pp. 861, 862.

1. *People v. Coleman*, 145 Cal. 609, 614, 79 Pac. 283; *Kalloch v. Superior Court*, 56 Cal. 229, 240 (quoting *Walker v. Savinet*, 92

U. S. 590, 23 L. Ed. 678, see, also, *Rose's U. S. Notes*, to the effect that, "This requirement of the constitution is met, if the trial is had according to the settled course of judicial proceedings"; and also from *Huber v. Reily*, 53 Pa. 112, to the effect that "due process ordinarily implies a complaint, a defendant; and a judge, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceeding". See *Ex parte MacDonald*, 31 Cal. App. Dec. 186, 187 Pac. 991, holding that due process requires that in a proceeding under section 1588 of the Penal Code the prisoner be given notice of the charge against him.

One convicted in an illegally constituted court has had no trial under the laws of the land. *Ex parte Giambonini*, 117 Cal. 573, 49 Pac. 732.

A defendant convicted on a trial, during a part of which the judge was absent from the courtroom, is deprived of his liberty without due process of law, as there is no court in the absence of the judge. *People*

The words "due process of law" were undoubtedly intended to convey the same meaning as the words "by the law of the land" in the Magna Carta. And in the language of Mr. Webster in his familiar definition, "By 'the law of the land,' is most clearly intended the general law—a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial," so "that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."²

Punishment.—The limitation as to due process does not deprive the legislature of power to establish appropriate penalties for the commission of crime and to confer upon judicial tribunals a discretion respecting the punishment to be inflicted in particular cases, within the limits fixed by the law-making body.³

Equal protection of laws.—Due process of law has been defined in terms of the equal protection of the laws, it being held that due process is not denied where a law operates alike upon all persons in the same circumstances.⁴

§ 79. Right to Change Procedure.—The "due process" clause is not designed to confine the state to a particular mode of procedure in judicial proceedings. It does not demand that the laws existing at any point of time shall

v. Tupper, 122 Cal. 424, 55 Pac. 125; *People v. White*, 5 Cal. App. 329, 337, 90 Pac. 471. See *infra*, § 292.

2. *Kalloch v. Superior Court*, 56 Cal. 229, 238 (quoting *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 519), 4 L. Ed. 629; *Hurtado v. People of California*, 110 U. S. 516, 535, 28 L. Ed. 232, 4 Sup. Ct. Rep. 111. See CONSTITUTIONAL LAW, vol. 5, p. 865.

3. *Collins v. Johnston*, 237 U. S. 502, 59 L. Ed. 1071, 35 Sup. Ct.

Rep. 649, holding that a sentence of imprisonment for fourteen years for one convicted of perjury is not depriving the defendant of liberty without due process of law, where the sentence does not exceed the limit fixed by law.

4. *People v. Coleman*, 145 Cal. 605, 615, 79 Pac. 283; *In re Finley*, 1 Cal. App. 198, 81 Pac. 1041, quoting *Leeper v. Texas*, 139 U. S. 462, 35 L. Ed. 225, 11 Sup. Ct. Rep. 577. See *supra*, § 9. See CONSTITUTIONAL LAW, vol. 5, p. 864.

be irrepealable, or that any form of remedies shall necessarily continue, but rather refers to certain fundamental rights which that system of jurisprudence, from which ours is derived, has always recognized.⁵ Neither does the fourteenth amendment of the United States constitution profess to secure to all persons in the United States the benefits of the same laws and the same remedies.⁶ A state, therefore, has the right to establish the forms of pleadings in her own courts, if they meet the constitutional requirement of due process. Accordingly, it has been held that the state was not prohibited by this clause from authorizing a prosecution of felonies by information.⁷ Indeed, it is within the power of the legislature to abolish the proceeding by indictment and substitute therefor that by information, if it should desire to do so.⁸ Again, it is within the legislative province to make an accessory before the fact a principal and provide that he may be charged as such. One charged as principal under such a statute has sufficient notice of the accusation against him to satisfy the constitution.⁹

5. *Hurtado v. People of California*, 110 U. S. 516, 536, 537, 28 L. Ed. 232, 4 Sup. Ct. Rep. 111, quoting from *Brown v. Levee Commrs.*, 50 Miss. 468, the language of the text, and then concluding: "It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." See CONSTITUTIONAL LAW, vol. 5, p. 864.

6. *People v. Botkin*, 9 Cal. App.

244, 251, 98 Pac. 861, quoting *Misouri v. Louis*, 101 U. S. 22, 25 L. Ed. 989.

7. *People v. Flannelly*, 128 Cal. 83, 60 Pac. 670; *Kalloch v. Superior Court*, 56 Cal. 231; *McNulty v. California*, 149 U. S. 645, 37 L. Ed. 882, 13 Sup. Ct. Rep. 959; *Hurtado v. People of California*, 110 U. S. 516, 28 L. Ed. 232, 4 Sup. Ct. Rep. 111.

8. *Kalloch v. Superior Court*, 56 Cal. 229. See INDICTMENT AND INFORMATION.

9. *People v. Nolan*, 144 Cal. 75, 80, 77 Pac. 774.

III. PUBLIC TRIAL.

§ 80. **In General.**—Under the constitution the defendant in a criminal case is entitled to a public trial.¹⁰ This requirement is for the benefit of the accused that the public may see that he is fairly dealt with, and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility, and to the importance of their functions.¹¹ The word “public” as used in the constitution is used in the ordinary sense of that term,¹² in opposition to the word “secret.”¹³ The doors of the courtroom are expected to be kept open, and the public are entitled to be admitted and the trial to be public in all respects, with due regard to the size of the courtroom, the conveniences of the court, the right to exclude objectionable characters, and those of tender years, and to do other things which may facilitate the proper conduct of the trial.¹⁴

Waiver of right.—The right to a public trial, like the right to a speedy trial, is for the benefit of the defendant and may be waived by him.¹⁵ It may be waived by the defendant or his counsel requesting that the public be excluded,¹⁶ and, it seems, by a failure to object to an order of exclusion.¹⁷

10. Const., art. I, § 13; Pen. Code, § 686, subd. 1.

11. *People v. Hartman*, 103 Cal. 242, 42 Am. St. Rep. 108, 37 Pac. 153, quoting Cooley's Constitutional Limitations, p. 383.

12. *People v. Hartman*, 103 Cal. 242, 42 Am. St. Rep. 108, 37 Pac. 153.

13. *People v. Swafford*, 65 Cal. 223, 3 Pac. 809; *People v. Tugwell*, 32 Cal. App. 520, 163 Pac. 508.

14. *People v. Hartman*, 103 Cal. 242, 42 Am. St. Rep. 108, 37 Pac. 153.

15. *People v. Tugwell*, 32 Cal. App. 520, 163 Pac. 508.

16. *People v. Swafford*, 65 Cal. 223, 3 Pac. 809; *People v. Stanley*, 33 Cal. App. 624, 166 Pac. 596.

17. *People v. Tugwell*, 32 Cal. App. 520, 163 Pac. 508 (holding the defendant waived his objection to the bailiff's locking the courtroom door). See *People v. Letoile*, 31 Cal. App. 166, 150 Pac. 1157, not deciding whether a failure to object is a waiver of the objection

§ 81. **Conditions Authorizing Exclusion of Public.**—The provision of the constitution guaranteeing a public trial must be construed in a reasonable sense in view of the object to be subserved.¹⁸ It is not to be interpreted as requiring unreasonable and impossible things, as that all persons have a right to be present, regardless of the conveniences of the court, and the due and orderly conduct of the trial.¹⁹ It is settled that a trial court has the right to regulate the admission of the public to the courtroom in any appropriate manner to prevent overcrowding and disorder.²⁰ The court may exclude objectionable characters.¹ It has been held that the court may clear the courtroom of spectators unconnected with the case to preserve order, where their presence tends to excite the defendant,² or where the disturbance among the spectators interferes with the orderly conduct of the trial. Certainly a trial does not lose its character as public, where a number of persons remain in the courtroom, notwithstanding the order of the court, and no discrimination is made as to those permitted to remain.³ A defendant is not deprived of his right to a public trial where the court states that it has no power to order anyone from the courtroom but that no right-minded person would desire to hear the testimony, and where the spectators thereupon withdrew,⁴ or where the court excludes such of the jurors summoned as are not impaneled to try the case,⁵ or where the court excludes witnesses.⁶

18. *People v. Stanley*, 33 Cal. App. 624, 166 Pac. 596.

19. *People v. Hartman*, 103 Cal. 242, 42 Am. St. Rep. 108, 37 Pac. 153.

20. *People v. Letoile*, 31 Cal. App. 166, 169, 159 Pac. 1057.

1. *People v. Hartman*, 103 Cal. 242, 42 Am. St. Rep. 108, 37 Pac. 153.

2. *People v. Kerrigan*, 73 Cal. 222, 14 Pac. 849.

3. *People v. Tugwell*, 32 Cal. App. 520, 163 Pac. 508.

4. *People v. Gregory*, 8 Cal. App. 738, 742, 97 Pac. 912.

5. *People v. Sprague*, 53 Cal. 491.

6. See *infra*, § 295.

§ 82. **Where Trial Relates to Indecent Matters.**—Section 125 of the Code of Civil Procedure authorizing trials behind closed doors in cases involving indecent and immoral matters has no application to criminal prosecutions.⁷ While a trial court may exclude those of tender years where the trial relates to indecent and immoral matters,⁸ it cannot wholly exclude the general public.⁹ It cannot, for example, exclude from the courtroom all persons except officers of the court and the defendant, as the mere fact that the officers of the court are allowed to be present in no way makes the trial public.¹⁰ Neither can it exclude all persons except witnesses and persons connected with the case.¹¹ The right to a public trial, however, is not to be interpreted so that every idle or morbidly curious person may have at all times freedom of admission to the place of trial. And an order is proper if broad enough to admit the officers of the court, the witnesses, the members of the bar, and all others who have a legitimate interest of any sort in the case, including relatives or friends of the defendant and complaining witness, and only expressly excluding those who have no interest in the case.¹²

7. *People v. Hartman*, 193 Cal. 242, 42 Am. St. Rep. 108, 37 Pac. 153.

8. *People v. Hartman*, 103 Cal. 242, 42 Am. St. Rep. 108, 37 Pac. 153.

9. *People v. Letoile*, 31 Cal. App. 166, 159 Pac. 1057.

10. *People v. Hartman*, 103 Cal. 242, 42 Am. St. Rep. 108, 37 Pac. 153.

11. *People v. Hartman*, 103 Cal. 242, 245, 42 Am. St. Rep. 108, 37 Pac. 153 (disapproving *People v.*

Swafford, 65 Cal. 223, 3 Pac. 809); *People v. Letoile*, 31 Cal. App. 166, 159 Pac. 1057, quoting in part from *People v. Hartman*, 103 Cal. 242, 42 Am. St. Rep. 108, 37 Pac. 153. The *Swafford* case is referred to in *Davis v. United States*, 247 Fed. 394, 396, L. R. A. 1918C, 1164, 159 C. C. A. 448, as "an extreme case."

12. *People v. Stanley*, 33 Cal. App. 624, 166 Pac. 596, following *Reagan v. United States*, 202 Fed. 488, 120 C. C. A. 627, 44 L. R. A. (N. S.) 583.

IV. RIGHT TO BE HEARD AND TO AID OF COUNSEL.

§ 83. **In General.**—The constitution and the Penal Code guarantee to persons accused of crime the right “to appear and defend, in person and with counsel.”¹³ This right extends to every person accused of crime, who has not in some manner waived his right, whether he is imprisoned or admitted to bail, and whether or not he is himself a lawyer.¹⁴ While a defendant desiring to be represented by counsel cannot be denied the right even though he be without the necessary means to employ and compensate the attorney, he may waive the right to be so represented. And if he does not desire an attorney, the law cannot compel him to employ one or to accept the services of one assigned to him by the court,¹⁵ unless he is insane or otherwise mentally incompetent at the time of the trial.¹⁶ A defendant waives the right to have counsel appear for him by breaking jail and escaping. The former constitution guaranteed to an accused the right “to appear and defend in person and with counsel as in civil cases,” but the present instrument omits from the provision the words “as in civil cases.” The omission has been said to be suggestive and indicates that the party charged is not allowed to appear and defend *by* counsel but *with* counsel—the person acting as counsel to be present with the defendant and not without him. In other words, the right to appear and defend, at least in felony

13. Const., art. I, § 13. The Penal Code provides that a defendant in a criminal case is entitled “to be allowed counsel as in civil actions, or to appear and defend in person and with counsel.” Pen. Code, § 686, subd. 2. See *infra*, § 325. See, generally, note, 17 A. L. R. 266, as to right of defendant

in criminal case to conduct defense in person.

14. *People v. Napthaly*, 105 Cal. 641, 39 Pac. 29.

15. *People v. Rose*, 42 Cal. App. 540, 183 Pac. 874.

16. *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161.

cases, does not exist in counsel at all in the absence of the defendant, or after his escape.¹⁷

Consultation with counsel.—The right to counsel includes the right to consult with counsel not only during trial, but prior thereto, and the further right of consultation privately, without the presence of third persons.¹⁸

Substitution of attorneys.—Sections 284 and 285 of the Code of Civil Procedure, as to the substitution of attorneys in civil cases, have no application in criminal cases, and no formal substitution of attorneys is required therein.¹⁹

Right to additional counsel.—An application during trial to permit additional counsel for the defendant is addressed to the discretion of the trial court. The trial judge is allowed most liberal limits in passing upon a motion of this character, and he may deny it when made in bad faith, as where the attorney to be associated is related to the judge and his appearance is sought to disqualify the judge.²⁰

§ 84. Right of Defense—Restraint of Defendant.—It has ever been the rule at common law that a prisoner brought into the presence of a court for trial was entitled to appear free of all manner of shackles and bonds, unless there was evident danger of his escape. This rule is recognized by the Penal Code which expressly provides that a person charged with a public offense, cannot “be subjected,

17. *People v. Redinger*, 55 Cal. 290, 36 Am. Rep. 32; *In re Shortridge*, 5 Cal. App. 371, 90 Pac. 478.

18. *Ex parte Rider*, 34 Cal. App. Dec. 222, 195 Pac. 965. The Penal Code provides that after arrest “any attorney at law entitled to practice in the courts of record of California, may at the request of the prisoner or any relative of such

prisoner, visit the person so arrested,” and provides that an officer refusing to allow an attorney to visit the prisoner is guilty of a crime. Pen. Code, § 825.

19. *People v. Garnett*, 9 Cal. App. 194, 98 Pac. 247; *Ex parte Clarke*, 62 Cal. 490.

20. *People v. Gregory*, 120 Cal. 16, 52 Pac. 41.

before conviction, to any more restraint than is necessary for his detention to answer the charge."¹ Any unnecessary restraint upon the prisoner inevitably tends to embarrass his mental faculties, and thereby materially to abridge his constitutional right of defense.² In the case of defendants charged with felony who are at large upon bail, however, to prevent them from absconding, it is proper to order them into actual custody either at the commencement of the trial or at the retirement of the jury.³

Interviewing witnesses.—The law does not give the defendant a right to be conveyed to different parts of the state to enable him to interview witnesses, whose names he does not know. He can obtain a subpoena for his witnesses, and he should be able so to identify them that their attendance can be secured.⁴

K. FORMER JEOPARDY.

I. INTRODUCTORY.

§ 85. *Rule Stated.*—It is said by Blackstone that the plea of *autrefois acquit*, or former acquittal, and the plea of *autrefois convict*, or former conviction, are grounded upon the universal maxim of the common law that no man is to be brought into jeopardy of his life more than once for the same offense.⁵ This maxim is embraced in the constitution of nearly all the states, and in the constitution of the United States. The language of the constitution of California is as follows: "No person shall be twice put in jeopardy for the same offense."⁶ The rule is also declared in the Penal Code in the following provisions:

1. Pen. Code, § 688.

2. *People v. Harrington*, 42 Cal. 165, 10 Am. Rep. 296.

3. *People v. Beauchamp*, 49 Cal. 41.

4. *People v. Talman*, 26 Cal. App. 348, 146 Pac. 1063. See WITNESSES as to right to compulsory process.

5. Black. Com., 335, 336.

6. Const., art. I, § 13.

“No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted.”⁷

“When the defendant is convicted or acquitted, or has been once placed in jeopardy upon an indictment or information, the conviction, acquittal, or jeopardy is a bar to another indictment or information for the offense charged in the former, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that indictment or information.”⁸

§ 86. Nature of Right—Division of Subject.—Once in jeopardy and former acquittal are favored pleas,⁹ and may be pleaded by persons charged with any public offense whatever its grade.¹⁰ The right not to be put a second time in jeopardy for the same offense is as important and is to be as sacredly regarded as the right of trial by jury, or any other constitutional provision intended for the protection of the life, liberty or property of a citizen.¹¹ Being for the protection of the accused, the right should be liberally construed in his favor.¹² To deprive a defendant of this right when the fact of a former acquittal or conviction is made to appear to the court before which he is again put in jeopardy for the same offense is to convict him without due process of law.¹³

A discussion of this subject naturally divides itself into two heads, namely, what constitutes jeopardy, and when are the offenses the same within the meaning of the constitutional prohibition. These will be discussed separately.

7. Pen. Code, § 687.

8. Pen. Code, § 1023.

9. *People v. Preciado*, 31 Cal. App. 519, 160 Pac. 1090.

10. *People v. Webb*, 38 Cal. 467, 479.

11. *People v. Defoor*, 100 Cal. 150,

34 Pac. 642; *People v. Preciado*, 31 Cal. App. 519, 160 Pac. 1090.

12. *People v. McDaniels*, 137 Cal. 192, 200, 92 Am. St. Rep. 81, 59 L. R. A. 578, 69 Pac. 1006.

13. *In re Bennett*, 84 Fed. 324.

II. WHAT CONSTITUTES JEOPARDY.

*In General.***§ 87. When Jeopardy Attaches—Elements of Jeopardy.**

Inasmuch as the construction of the provision against double jeopardy had been settled by numerous decisions before its adoption into the constitution, it must be presumed that the interpretation put upon the provisions was adopted also.¹⁴ Yet a solution of the question as to whether a defendant has been placed in jeopardy is in many cases a matter of considerable difficulty, especially in the light of the variance existing in the decisions of the courts upon the subject.¹⁵

The term "jeopardy" is distinct from a former conviction or acquittal, as the plea may be good without a verdict. It signifies the danger of conviction and punishment which the defendant in a criminal prosecution incurs when he is duly put upon trial before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction and a jury has been charged with his deliverance.¹⁶ A jury stands thus charged when its members have been impaneled and sworn.¹⁷ In order that one can be said to be in jeopardy

14. *People v. Webb*, 38 Cal. 467, 477. See CONSTITUTIONAL LAW, vol. 5, p. 600.

15. *People v. Ny Sam Chung*, 94 Cal. 304, 28 Am. St. Rep. 129, 29 Pac. 642.

16. *People v. Tong*, 155 Cal. 579, 585, 132 Am. St. Rep. 110, 24 L. R. A. (N. S.) 481, 102 Pac. 263, per Sloss, J., concurring; *People v. Ammerman*, 118 Cal. 23, 50 Pac. 115; *People v. Smalling*, 94 Cal. 112, 29 Pac. 421; *Ex parte Fenton*, 77 Cal. 183, 19 Pac. 267; *People v. Travers*, 77 Cal. 176, 19 Pac. 268;

People v. Horn, 70 Cal. 17, 11 Pac. 470; *People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436; *Ex parte Hartman*, 44 Cal. 32; *People v. Webb*, 38 Cal. 467; *People v. Saenz*, 33 Cal. App. Dec. 805, 195 Pac. 442. See *infra*, § 494, as to sentencing defendant as double jeopardy; and see *infra*, § 614, as to statutes imposing increased punishment upon habitual offenders as violating the rule against double jeopardy.

17. *People v. Hawkins*, 127 Cal. 372, 59 Pac. 697. See, generally, note, 12 A. L. R. 1006, as to plea

of conviction it is essential that the accusation against him be sufficient to sustain a conviction,¹⁸ and that the court in which the trial is had have jurisdiction of the offense.¹⁹ Where by fraud of a defendant a court accepts a plea of guilty when it has no jurisdiction to do so, the defendant is not in jeopardy of the offense embraced in the plea so far as the proceedings thereon are concerned.²⁰

§ 88. Effect of Dismissal of Prosecution.—An order dismissing a prosecution before the impaneling of the jury is made before the defendant has been placed in jeopardy and does not bar a further prosecution,¹ except when a statute so provides. In this connection, section 1387 of the Penal Code provides that

“An order for the dismissal of the action, as provided in this chapter, is a bar to any other prosecution for the same offense, if it is a misdemeanor, unless such order is explicitly made for the purpose of amending the complaint in such action, in which instance such order for dismissal of the action shall not act as a bar to a prosecution upon such amended complaint; but an order for the dismissal of the action is not a bar if the offense is a felony.”

This section refers to dismissal on the order of court for want of prosecution or otherwise,² and pursuant thereto it has been held that a dismissal of an action for a felony is not a bar to a further prosecution when made upon the ground that no indictment has been found or

of former jeopardy or of former conviction or acquittal where jury was not sworn.

18. See *infra*, § 91.

19. *People v. Hamberg*, 84 Cal. 468, 24 Pac. 298.

20. *People v. Woods*, 84 Cal. 441, holding after reversal of an order granting a new trial, the trial court has no jurisdiction to accept a plea of guilty of a lesser offense than that charged and sentence the de-

fendant thereon. And therefore the defendant is not thereby put in jeopardy of the higher offense so as to preclude the court from sentencing him for the higher offense.

1. *People v. Campbell*, 59 Cal. 243, 43 Am. Rep. 357; *Ex parte Clarke*, 54 Cal. 412; *People v. Saenz*, 33 Cal. App. Dec. 805, 195 Pac. 442.

2. *People v. Breen*, 130 Cal. 72, 62 Pac. 408.

information filed within thirty days after defendant has been held to answer,³ or because he was not brought to trial within the statutory period.⁴ So also a dismissal in the interests of justice made after a discharge of the jury because of legal necessity,⁵ or after a reversal because of an insufficient accusation,⁶ is not a bar to another prosecution for the same offense, unless the reasons therefor are not stated in the order.⁷ A dismissal of a charge in a justice's court for the purpose of charging the same offense as a felony is not a bar to the prosecution for a felony.⁸

§ 89. Discharge, Acquittal or Conviction of Defendant.

The discharge of a defendant by a committing magistrate does not bar a subsequent examination, as jeopardy has not attached.⁹ The habeas corpus act was made to secure persons from vexatious arrests and imprisonment, and not to protect them from prosecution for crimes actually committed. And the discharge of a prisoner upon habeas corpus is not a bar to a subsequent prosecution for the same offense.¹⁰ But an order discharging one of several de-

3. *People v. Quijada*, 154 Cal. 243, 97 Pac. 689; *Patterson v. Conlan*, 123 Cal. 453, 56 Pac. 105; *People v. Wickham*, 116 Cal. 384, 48 Pac. 329; *Ex parte Clarke*, 54 Cal. 412; *Ex parte Cahill*, 52 Cal. 463.

4. *In re Begerow*, 136 Cal. 293, 56 L. R. A. 528, 68 Pac. 773; *People v. Palassou*, 14 Cal. App. 123, 111 Pac. 109. See note, 3 A. L. R. 519, as to discharge of accused under a limitation statute as a bar to a subsequent prosecution for the same offense.

5. *People v. Kerrick*, 144 Cal. 46, 77 Pac. 711; *People v. Disperati*, 11 Cal. App. 469, 105 Pac. 617.

6. *People v. Schmidt*, 64 Cal. 260, 30 Pac. 814. See *infra*, § 91.

7. *People v. Disperati*, 11 Cal. App. 469, 105 Pac. 617, distinguished in *People v. Saenz*, 33 Cal. App. Dec. 805, 195 Pac. 442.

8. *People v. Smith*, 143 Cal. 597, 77 Pac. 449; *People v. Brown*, 42 Cal. App. 462, 183 Pac. 829; *People v. Swain*, 5 Cal. App. 421, 90 Pac. 720.

9. *Ex parte Fenton*, 77 Cal. 183, 19 Pac. 267; *Ex parte Fenton*, 77 Cal. 183, 19 Pac. 267.

10. *In re Begerow*, 136 Cal. 293, 56 L. R. A. 528, 68 Pac. 773, where a prisoner was discharged because not brought to trial within the time limited by law.

fendants that he may be a witness against the others is, under section 1101 of the Penal Code, "an acquittal of the defendant discharged and is a bar to another prosecution for the same offense."¹¹

Acquittal and conviction.—When one is tried on a valid indictment or information in a court of competent jurisdiction, and is acquitted by a verdict of a jury, jeopardy has attached so as to prevent a subsequent trial for the crime.¹² Even when improperly rendered through a misdirection of the trial judge in a matter of law, a mistake of the jury, their refusal to obey the instruction of the court, or other like cause, a verdict of acquittal can never be set aside on application of the prosecution and a new trial had.¹³ Thus, when a court directs instead of advises an acquittal, the defendant having been once in jeopardy cannot be tried again.¹⁴ On the question of former conviction there is no distinction between a plea and a verdict of guilty, for both are followed by like consequences. And it is not necessary that a judgment should have been pronounced upon the conviction to make a plea of former conviction good.¹⁵

§ 90. Reversal of Judgment.—The constitutional provision against double jeopardy was never intended to apply to cases in which a judgment of conviction was reversed

11. *Ex parte Stice*, 70 Cal. 51, 55, 11 Pac. 459.

12. *People v. Hill*, 146 Cal. 145, 79 Pac. 845; *People v. Ward*, 85 Cal. 585, 592, 24 Pac. 785.

13. *People v. Hill*, 146 Cal. 145, 79 Pac. 845; *People v. Terrill*, 132 Cal. 497, 64 Pac. 894; *People v. Horn*, 70 Cal. 17, 11 Pac. 470; *People v. Webb*, 38 Cal. 467, per Sawyer, C. J., concurring, quoting *Bishop's Crim. Law*.

14. *People v. Hill*, 146 Cal. 146,

79 Pac. 845; *People v. Terrell*, 132 Cal. 497, 64 Pac. 894; *People v. Roberts*, 114 Cal. 67, 45 Pac. 1016; *People v. Horn*, 70 Cal. 17, 11 Pac. 470; *People v. Webb*, 38 Cal. 467. See *People v. Stoll*, 143 Cal. 689, 77 Pac. 818, where the question is raised, but not decided, as to the effect of an acquittal pursuant to a direction of the court which is void. See *infra*, § 513.

15. *People v. Goldstein*, 32 Cal. 432.

in an appellate court and a new trial ordered.¹⁶ Moreover, it is the generally accepted doctrine that a defendant's successful effort to set aside a verdict and judgment by means of a motion for new trial or appeal is a waiver of his constitutional right to object to being placed again in jeopardy. In effect he assents to all the consequences legitimately following such reversal, and consents to be tried anew.¹⁷

Jeopardy as Affected by Accusation and Proceedings Thereon.

§ 91. **In General.**—It has been said that it would be a contradiction in terms to say that one was put in jeopardy by an indictment or information under which he could not be convicted.¹⁸ Consequently, one cannot be said to have been in jeopardy unless the accusation against him was sufficient in form and substance to sustain a conviction.¹⁹ And if a defendant procures a judgment of an appellate court that the accusation upon which he was tried and convicted is void, he cannot be heard to rely upon such conviction as a bar to a subsequent indictment or information.²⁰ An accusation may be insufficient to charge the offense it purports to set forth but sufficient to charge

16. *People v. Tucker*, 117 Cal. 229, 49 Pac. 134 (where there was a failure to find upon a special plea); *People v. Travers*, 73 Cal. 580, 15 Pac. 293 (where the verdict was defective); *People v. Hardison*, 61 Cal. 378; *People v. Olwell*, 28 Cal. 456; *People v. March*, 6 Cal. 543.

17. *People v. Tong*, 155 Cal. 579, 585, 132 Am. St. Rep. 110, 24 L. R. A. (N. S.) 481, 102 Pac. 263, per Sloss, J., concurring; *People v. Travers*, 77 Cal. 176, 19 Pac. 268; *People v. Horn*, 70 Cal. 17, 11 Pac. 470; *People v. Schmidt*, 64 Cal.

260, 30 Pac. 814; *People v. Helbing*, 61 Cal. 620; *People v. Olwell*, 28 Cal. 456.

18. *People v. McNealy*, 17 Cal. 333.

19. *People v. Lee Look*, 143 Cal. 216, 76 Pac. 1028; *People v. Terrill*, 133 Cal. 120, 128, 65 Pac. 303; *People v. Ammerman*, 118 Cal. 23, 50 Pac. 15; *People v. Larson*, 68 Cal. 18, 8 Pac. 517. (The rule applies to a prosecution for murder.) *People v. Schmidt*, 64 Cal. 260, 30 Pac. 814.

20. *People v. Terrill*, 133 Cal. 120, 128, 65 Pac. 303.

some other offense. If such accusation is treated on the trial as sufficient as to the former and disregarded as to the latter, the defendant not being called upon to defend against the latter offense cannot be said to have been in danger of conviction therefor and may, after reversal, be tried for the latter.¹ It is provided in section 1022 of the Penal Code, however, that

“Whenever the defendant is acquitted on the merits, he is acquitted of the same offense, notwithstanding any defect in form or substance in the indictment or information on which the trial was had.”

§ 92. Accusation Set Aside or Dismissed.—According to section 999 of the Penal Code, “An order to set aside an indictment or information, as provided in this chapter” (as, for example, where an indictment is set aside on the ground that the grand jury was not legally constituted,² or where an information is set aside on the ground that the defendant had not been legally committed by a magistrate),³ “is no bar to a future prosecution for the same offense.”⁴ This section refers to orders made on motion of the accused to set aside the indictment or information, and from it the intention of the legislature is clear that the order shall not constitute a bar to a future prosecution for the same offense, even though the court does not direct the case to be resubmitted to the same or another grand jury or that an information be filed as provided in section 997 of the Penal Code.⁵ It is not material that

1. *People v. Tong*, 155 Cal. 579, 132 Am. St. Rep. 110, 24 L. R. A. (N. S.) 481, 102 Pac. 263, overruling *People v. Ho Sing*, 6 Cal. App. 752, 93 Pac. 204. *Melvin, J., Angellotti, J., and Henshaw, J.*, seem to base their decision upon the ground that there has been no jeopardy, as the defendant was not called upon to defend against the latter offense. *Sloss, J., and Shaw, J.*, base their concurrence upon a

waiver of the defense of jeopardy by procuring a reversal.

2. *People v. Varnum*, 53 Cal. 630.

3. *Kalloch v. Superior Court*, 56 Cal. 229.

4. *People v. Cummings*, 123 Cal. 269, 55 Pac. 898; *Ex parte Foss*, 102 Cal. 347, 354, 25 L. R. A. 593, 36 Pac. 669.

5. *People v. Breen*, 130 Cal. 72, 62 Pac. 408.

the second prosecution was commenced before the first was ended.⁶

Indictment or information dismissed.—It is provided in section 1021 of the Penal Code that “If . . . the indictment or information was dismissed upon an objection to its form of [or] substance . . . it is not an acquittal of the same offense.” So also section 1387 of the same code provides that an order dismissing an indictment in furtherance of justice is not a bar to a subsequent prosecution, if a felony.⁷ It is immaterial whether the order be made before or after the impaneling and swearing of the jury. In neither cases is it a bar to a new accusation and trial.⁸ As a reversal and order for a new trial places the party in the same position as though no trial had been had, a dismissal, after a reversal, of an accusation for a felony upon the ground of insufficiency,⁹ or irregularity in the formation of the grand jury,¹⁰ does not have the effect of acquitting the defendant.

Dismissal to hold for higher offense.—Section 1021 of the Penal Code provides that

“If . . . the indictment or information was dismissed . . . in order to hold the defendant for a higher offense, without a judgment of acquittal, it is not an acquittal of the same offense.”

This section is limited to dismissals made before a jury has been impaneled and sworn, or, in other words, before jeopardy has attached.¹¹

6. *Kalloch v. Superior Court*, 56 Cal. 229, 236. See INDICTMENT AND INFORMATION, as to successive indictments or informations for the same offense.

7. *People v. Mooney*, 132 Cal. 13, 63 Pac. 1070 (holding the order in question, while perhaps not an order dismissing an action, was certainly an order dismissing an information within the meaning of

the code section); *People v. Schmidt*, 64 Cal. 260, 30 Pac. 814.

8. *People v. Ammerman*, 118 Cal. 23, 50 Pac. 15; *People v. Clark*, 67 Cal. 99, 7 Pac. 178, where dismissal was entered after a verdict of guilty.

9. *People v. Mooney*, 132 Cal. 13, 63 Pac. 1070; *People v. Schmidt*, 64 Cal. 260, 30 Pac. 814.

10. *People v. March*, 6 Cal. 543.

11. See *infra*, § 95.

§ 93. Demurrer Sustained and Judgment Arrested.—The sustaining of a demurrer to an indictment or information and discharge of a defendant does not show jeopardy, as that term was used at common law, or constitute a bar to a further prosecution upon a new pleading. But under section 1008 of the Penal Code, if the court elects not to make the direction therein mentioned or fails to do so, a bar to a further prosecution attaches by the very terms of the statute itself,¹² which may be appropriately termed a statutory bar or a statutory jeopardy in contradistinction to the common law jeopardy.¹³ The section is in part as follows:

“If a demurrer is sustained and an amendment is not allowed, or if allowed, is not made, within such reasonable time as the court may fix, the court shall give a judgment of dismissal, which shall be a bar to another prosecution for the same offense. The defendant shall thereupon be discharged, unless the court directs the case to be submitted to the same or another grand jury, or directs a new information to be filed.”¹⁴

The statute is applicable both to cases where the indictment or information is defective merely, and where it is wholly insufficient,¹⁵ and applies even though a new pleading is filed pending the determination of the demurrer.¹⁶ To avoid the bar of the statute the court must direct the filing of a new information, not merely grant leave to file an information,¹⁷ or express an opinion that

12. *Ex parte Williams*, 116 Cal. 512, 48 Pac. 499; *Ex parte Hayter*, 16 Cal. App. 211, 116 Pac. 370. See *People v. Ammerman*, 118 Cal. 23, 50 Pac. 15, holding statute is inapplicable when a demurrer is not interposed, or is disallowed.

13. *Ex parte Hayter*, 16 Cal. App. 211, 221, 116 Pac. 370.

14. *People v. Whelan*, 117 Cal. 559, 49 Pac. 583.

The direction of the court mentioned in the statute prevents the order of dismissal from operating as a bar to further prosecution. *People v. Quijada*, 154 Cal. 243, 97 Pac. 689.

15. *Ex parte Hayter*, 16 Cal. App. 211, 116 Pac. 370.

16. *People v. Jordan*, 63 Cal. 219.

17. *Ex parte Williams*, 116 Cal. 512, 48 Pac. 499.

the defect can be cured.¹⁸ But the court need not, in addition to such direction, render an opinion that the objection can be waived.¹⁹

Arrest of judgment.—Under section 1188 of the Penal Code, a verdict is not a bar to another prosecution when judgment is properly arrested and the defendant is committed because the evidence shows him to be guilty of the offense charged or another offense. It is not necessary that the evidence should be sufficient to convict him. The arrest operates as an acquittal only when “no evidence appears sufficient to charge him with any offense.”²⁰ If, however, the indictment or information is in fact sufficient, and the court should of its own motion erroneously arrest a judgment of conviction, the defendant cannot be tried for the same offense again, as jeopardy has attached.¹

Discharge of Jury as Affecting Jeopardy.

§ 94. **In General.**—As has been seen, a defendant is placed in apparent jeopardy when he is placed on trial before a competent court and a jury impaneled and sworn.² His jeopardy is real and he cannot be again subjected to jeopardy unless the jury be discharged without rendering a verdict by his consent,³ or upon some legal necessity resulting from physical causes beyond the control of the court.⁴ The constitution intends to secure to an

18. *Ex parte Hayter*, 16 Cal. App. 211, 116 Pac. 370.

19. *People v. O'Leary*, 77 Cal. 30, 18 Pac. 856, 3 Cal. Unrep. 102, 22 Pac. 24.

20. *People v. Eppinger*, 109 Cal. 294, 41 Pac. 1037. See *infra*, § 467, where the statute is quoted.

1. *Ex parte Hartman*, 44 Cal. 32.

2. *People v. Hunckeler*, 48 Cal. 334. See *supra*, § 87.

3. *People v. Curtis*, 76 Cal. 57,

17 Pac. 941; *People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436; *People v. Nash*, 15 Cal. App. 320, 114 Pac. 784.

4. *People v. Hunckeler*, 48 Cal. 334; *Ex parte McLaughlin*, 41 Cal. 211, 10 Am. Rep. 272; *People v. Webb*, 38 Cal. 467. See *infra*, § 439 (discharge of jury because of absence of a juror when the verdict is returned). See, generally, note, 4 A. L. R. 1266, as to occurrences during a view as warranting the

accused when put upon trial that he will either have a verdict rendered in his case or go free.⁵ The accused cannot be deprived of his right to a verdict by nolle prosequi entered by the prosecuting officer, or by a discharge of the jury and a continuance of the case for any cause within the control of the court.⁶ He cannot be deprived thereof even though the court is aware that by reason of an error of law committed during the progress of the trial, or by reason of insufficiency of evidence to support the charge, a mistrial would be the necessary result.⁷ A discharge for such cause is equivalent to a verdict of acquittal and is a bar to a subsequent trial.⁸

When, however, the jury is discharged by reason of some overruling necessity, the happening of the subsequent event shows that the defendant has never been in actual jeopardy.⁹ In a legal sense he has not been tried.¹⁰ This rule is recognized in section 1141 of the Penal Code, which provides as follows:

“In all cases where a jury is discharged or prevented from giving a verdict by reason of an accident or other cause, except where the defendant is discharged during the progress of the trial, or after the cause is submitted to them, the cause may be again tried.”

§ 95. Necessities Authorizing Discharge of Jury.— Among the unavoidable necessities authorizing the discharge of the jury without acquitting the defendant are the following: the death or illness of a judge or jury-

jury's discharge without letting in plea of former jeopardy upon subsequent trial.

5. *People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436.

6. *People v. Webb*, 38 Cal. 467.

7. *People v. Ny Sam Chung*, 94 Cal. 304, 28 Am. St. Rep. 129, 29 Pac. 642.

8. *People v. Tong*, 155 Cal. 579,

132 Am. St. Rep. 110, 24 L. R. A. (N. S.) 481, 102 Pac. 263, per Sloss, J., concurring; *People v. Webb*, 38 Cal. 467.

9. *People v. Hunckeler*, 48 Cal. 331.

10. *In re Bigerow*, 133 Cal. 349, 356, 85 Am. St. Rep. 178, 56 L. R. A. 513, 65 Pac. 828.

man,¹¹ the escape of the defendant,¹² inability of the jury to agree,¹³ and, under the former practice, the expiration of the term of court.¹⁴

To hold for higher crime.—The opinion of the trial judge that the evidence shows the defendant to be guilty of a higher degree of crime than that charged is not such a necessity as requires the discharge of the jury or authorizes a retrial of the defendant for the same offense, and any statute attempting to authorize a discharge and retrial in such case is unconstitutional.¹⁵

Discharge on receiving illegal verdict.—When a verdict of conviction is illegal or void, the jury should be sent out for further deliberation.¹⁶ But it does not follow that the discharge of the jury upon rendition of such a verdict operates as an acquittal; as it is a mistrial rather than a legal putting in jeopardy. Moreover, the defendant's successful effort to set aside the verdict and judgment is a waiver of his right to object to being placed again in jeopardy.¹⁷ It has been so held where a jury was discharged upon the rendition of a verdict convicting the defendant of an offense not embraced by the accusation.¹⁸

11. *People v. Ross*, 85 Cal. 383, 24 Pac. 789; *People v. Hunckeler*, 48 Cal. 334. See *infra*, § 424.

12. *People v. Higgins*, 59 Cal. 357.

13. See *infra*, § 427.

14. *People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436.

15. *People v. Ny Sam Chung*, 94 Cal. 304, 28 Am. St. Rep. 129, 29 Pac. 642; *People v. Hunckeler*, 48 Cal. 331, holding section 1112 of the Penal Code, since repealed, to be unconstitutional. See *supra*, § 92, as to dismissal of indictment or information to hold defendant for higher offense.

16. See *infra*, § 440.

17. *People v. Travers*, 73 Cal. 580, 15 Pac. 293; *People v. Bannister*, 4 Cal. Unrep. 333, 34 Pac. 710.

18. *People v. Tong*, 155 Cal. 579, 132 Am. St. Rep. 110, 24 L. R. A. (N. S.) 481, 112 Pac. 263, overruling *People v. Tilley*, 135 Cal. 61, 67 Pac. 42; *People v. Smith*, 136 Cal. 207, 68 Pac. 702; *People v. Arnett*, 129 Cal. 306, 61 Pac. 930; and *People v. Curtis*, 76 Cal. 57. See, also, *People v. Small*, 1 Cal. App. 320, 82 Pac. 87, following *People v. Tilley* (*supra*). See *supra*, § 90.

§ 96. **Disagreement of Jury.**—The discharge of a jury for failure to agree upon a verdict, except when unjustified,¹⁹ is not a bar to a subsequent prosecution. The status of the case is the same as though there had been no trial at all and no consent of the defendant is essential to authorize the discharge of the jury.²⁰ Consequently, a statute providing that after such discharge the cause may again be tried is not unconstitutional.¹ A discharge because of a disagreement is not a bar even though the jury refused to agree under a condition of the record entitling the defendant to an acquittal, and although such refusal was in the face of an instruction advising an acquittal.² So also it does not follow from the mere fact that there were irregularities in the proceedings to discharge the jury that the effect of the discharge is to acquit the defendant. The defendant may be tried again although the jury were discharged in the absence of the court pursuant to a direction to the sheriff to discharge them if they fail to agree at a specified time.³ Nor will the fact that the defendant was not present at the time the jury were discharged, his presence having been waived, affect the question of jeopardy, as his objection to the discharge at the time could not have defeated the validity of the court's action.⁴

19. *People v. Cage*, 48 Cal. 323, 17 Am. St. Rep. 436 (where there was no evidence upon which the court was authorized to act).

20. *People v. Greene*, 100 Cal. 140, 34 Pac. 630; *People v. James*, 97 Cal. 400, 32 Pac. 317; *People v. Smalling*, 94 Cal. 112, 29 Pac. 421; *People v. Soto*, 65 Cal. 621, 4 Pac. 664; *People v. Hunckeler*, 48 Cal. 334; *People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436; *Ex parte Mc-*

Laughlin, 48 Cal. 211, 10 Am. Rep. 272; *People v. Shotwell*, 27 Cal. 394; *People v. Disperati*, 11 Cal. App. 469, 105 Pac. 617.

1. *Ex parte McLaughlin*, 41 Cal. 211, 10 Am. Rep. 272.

2. *People v. James*, 97 Cal. 400, 32 Pac. 317.

3. *People v. Shotwell*, 27 Cal. 394.

4. *People v. Smalling*, 94 Cal. 112, 29 Pac. 421.

III. IDENTITY OF OFFENSES.

§ 97. **Necessity for Identity—Tests for Determining.**—Coming now to the second main subdivision of the subject it is to be noted first that it is settled by the decisions that a plea of once in jeopardy, former acquittal or former conviction, is not good unless the second prosecution is for the same offense, both in law and in fact, as that for which the first prosecution was instituted.⁵ If, therefore, a defendant is acquitted⁶ or the indictment or information is discharged,⁷ because of a material variance, such acquittal or discharge is not a bar to a prosecution for the offense shown by the proofs, for, as has been said, it would be a contradiction in terms to say that a person was put in jeopardy by an indictment under which he could not be convicted.⁸ It is otherwise, however, if the variance is immaterial. Such a variance should be disregarded, and an acquittal because thereof is a bar to a further prosecution.⁹

In attempting to apply the above rule it is often a matter of difficulty to determine when the offenses in the different prosecutions are or are not identical. The circumstances under which courts have been called upon to

5. *People v. Kerrick*, 144 Cal. 46, 77 Pac. 711; *People v. Devlin*, 143 Cal. 128, 76 Pac. 900; *People v. Defoor*, 100 Cal. 150, 34 Pac. 642; *Ex parte Hong Shen*, 98 Cal. 681, 33 Pac. 799; *People v. Stephens*, 79 Cal. 428, 4 L. R. A. 845, 21 Pac. 856; *People v. Helbing*, 61 Cal. 620; *People v. Disperati*, 11 Cal. App. 469, 483, 105 Pac. 617. See *ANIMALS*, vol. 2, p. 28, as to identity of larceny and altering brands of cattle.

6. *People v. Oreileus*, 79 Cal. 178, 21 Pac. 724; *People v. McNealy*, 17 Cal. 332; *People v. Castilla*, 28

Cal. App. 190, 151 Pac. 746. "If the defendant was formerly acquitted on the ground of variance between the indictment or information and the proof . . . it is not an acquittal of the same offense." Pen. Code, § 1021. See *infra*, § 441, as to detention to answer a new indictment or information.

7. *People v. McNealy*, 17 Cal. 332.

8. *People v. McNealy*, 17 Cal. 332.

9. *People v. Terrill*, 132 Cal. 497, 64 Pac. 894; *People v. Hughes*, 41 Cal. 234.

determine what constitute the same offenses have been so different and numerous that the authorities are seriously out of harmony, so far as the general question is concerned. The usual test by which to determine whether the former conviction or acquittal was for the same offense as that charged in the second prosecution is to inquire whether the evidence necessary to sustain the latter would have justified a conviction in the former.¹⁰ Under this test it is clear that an act of kidnaping and an act of rape subsequently committed constitute distinct offenses.¹² So also an information for fraudulent procurement of a joint note and one for the procurement of the several notes of one of the makers of the joint note are for distinct offenses.¹³ This test is not always conclusive, however, as, for example, where a single offense is split,—where the crime of larceny of several articles belonging to an individual is split and separate prosecutions for the larceny of each article are brought, it being settled that proof of the stealing of one article would not sustain a conviction of stealing another.¹³ A test, as has elsewhere been laid down, is as follows: the plea of *autrefois acquit* or *convict* is sufficient whenever the proof shows the second case to be the same transaction as the first. This test, sometimes designated as the same transaction test, is not followed in California, for, as stated in an early case, the question how far the authority of these cases agrees with kindred cases depends upon what is meant by the word “transaction.”¹⁴

§ 98. One or More Offenses Involved in Same Transaction.—There are cases when, at the same time and appar-

10. *People v. Majors*, 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597; *People v. Hughes*, 41 Cal. 234; *People v. Cuilla*, 30 Cal. App. Dec. 811, 187 Pac. 49.

11. *People v. Cuilla*, 30 Cal. App. Dec. 811, 187 Pac. 49.

12. *People v. Cummings*, 123 Cal. 269, 55 Pac. 898; *People v. Reed*, 70 Cal. 529, 11 Pac. 676.

13. See *infra*, § 102.

14. *People v. Majors*, 65 Cal. 138, 143, 52 Am. Rep. 295, 3 Pac. 597.

ently by the same act, different and entirely distinct offenses may be committed.¹⁵ Thus, although elsewhere there is authority to the contrary, it is settled in California that where by one act two persons are wounded or killed, two distinct crimes are committed and a conviction or acquittal for the wounding or killing of one will not bar a prosecution for wounding or killing the other. Applying the test of evidence, the evidence necessary to sustain a conviction in the former prosecution will not justify a conviction in the latter case.¹⁶ Perhaps distinct from this case, is that in which the defendant is first charged with breach of the peace in wounding one and then with a breach of the peace in wounding the other. Both charges in the latter case are for the same breach of the peace, and a conviction on the first prosecution bars the latter.¹⁷

It is settled, however, that a putting in jeopardy or a conviction for one act is not a bar to a prosecution for another separate and distinct one, merely because they are so closely connected in point of time that it is impossible to separate the evidence relating to them.¹⁸ For example, the killing of different persons by acts entirely separate and distinct from each other, constitutes different crimes, though the acts are done at the same moment or point of time.¹⁹ Again, in one case it was held that an attempt to commit robbery and an assault with a deadly weapon do

15. See *supra*, § 50. See, generally, 17 A. L. R. 100, as to meaning of words "similar offense" in statute as to punishment of crime.

16. *People v. Majors*, 65 Cal. 136, 52 Am. Rep. 295, 3 Pac. 597, citing *People v. Alibez*, 49 Cal. 452.

17. *People v. Majors*, 65 Cal. 136, 52 Am. Rep. 295, 3 Pac. 597, distinguishing *State v. Damon*, 2 Tyler (Vt.), 387.

18. *People v. Bentley*, 77 Cal. 7,

11 Am. St. Rep. 225, 18 Pac. 799; *People v. Majors*, 65 Cal. 136, 52 Am. Rep. 295, 3 Pac. 597, quoting *Teat v. State*, 53 Miss. 439, 24 Am. Rep. 798.

19. *People v. Majors*, 65 Cal. 136, 52 Am. Rep. 295, 3 Pac. 597. See note, 2 A. L. R. 606, as to acquittal on charge as to one as bar to charge as to the other, where one person is killed or assaulted by acts directed at another.

not possess the same elements and both may be punished, although relating to the same transaction.²⁰

§ 99. Offenses Against Different Sovereignties or States.—As has already been stated, a single act may at one and the same time, be an offense against the laws of the state and against the laws of the United States.¹ Inasmuch as the act constitutes two offenses, it cannot be truly said that the offender has been twice punished for the same offense.² And the punishment by one cannot be pleaded in bar to a conviction by the other,³ although it is said the actual practice is to punish but once.⁴ The same rule would be applicable as between different states but for statute, it being provided that

“An act or omission declared punishable by this code is not less so because it is also punishable under the laws of another state, government, or country, unless the contrary is expressly declared.”⁵

“Whenever on the trial of an accused person it appears that upon a criminal prosecution under the laws of another state, government, or country, founded upon the act or omission in respect to which he is on trial, he has been acquitted or convicted, it is a sufficient defense.”⁶

It is further provided that

“When an act charged as a public offense is within the jurisdiction of another state or country, as well as of this

20. *People v. Bentley*, 77 Cal. 7, 11 Am. St. Rep. 225, 18 Pac. 799.

This case was questioned in *People v. McDaniels*, 137 Cal. 192, 92 Am. St. Rep. 81, 59 L. R. A. 578, 69 Pac. 1006, although as pointed out by Mr. Freeman in the note to the latter case (92 Am. St. Rep. 139), it would seem that the latter case is distinguishable on the facts.

1. See *supra*, § 50.

2. *People v. McDonnell*, 80 Cal. 285, 13 Am. St. Rep. 159, 22 Pac. 190, quoting *Eells v. People*, 4 Scam. (Ill.) 498, 512, and *Moore*

v. People, 14 How. (U. S.) 19, 14 L. Ed. 309.

3. *State v. Whittemore*, 50 N. H. 245, 9 Am. Rep. 196, cited in *Harris v. Superior Court*, 34 Cal. App. Dec. 291, 196 Pac. 895.

4. *In re Sic*, 73 Cal. 142, 14 Pac. 405, per Temple, J. See note, 16 A. L. R. 1231, as to acquittal or conviction under federal statute as bar to prosecution, under state statute based on the same act or transaction and vice versa.

5. Pen. Code, § 655.

6. Pen. Code, § 656.

state, a conviction or acquittal thereof in the former is a bar to the prosecution or indictment therefor in this state."⁷

The rule as between different counties in the state is declared in section 794 of the Penal Code, as follows:

"When an offense is within the jurisdiction of two or more counties, a conviction or acquittal thereof in one county is a bar to a prosecution or indictment therefor in another."⁸

Where the offenses under a state law and a municipal ordinance are different, there is no violation of the constitutional inhibition against putting one twice in jeopardy for the same offense.⁹

Under different statutes.—Section 654 of the Penal Code provides in part as follows:

"An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either bars a prosecution for the same act or omission under any other."

§ 100. Offenses of Different Grades or Degrees.—When one offense is a necessary element in and constitutes an essential part of another offense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to the prosecution of the other.¹⁰ Wherever a statute permits a conviction of any lower offense necessarily included in a higher one with which the defendant is charged, a conviction or acquittal of such higher offense is a bar to a subsequent prosecution for any lower offense necessarily

7. Pen. Code, § 793.

8. Pen. Code, § 794.

9. *Ex parte Hong Shen*, 98 Cal. 681, 33 Pac. 799.

10. *People v. Defoor*, 100 Cal. 150, 156, 34 Pac. 642, quoting *State*

v. Smith, 43 Vt. 324; *People v. Bentley*, 77 Cal. 7, 11 Am. St. Rep. 225, 18 Pac. 799; *People v. Preciado*, 31 Cal. App. 519, 530, 160 Pac. 1090.

included in it.¹¹ And, e converso, when one is charged with a lower offense necessarily included in a higher, an acquittal or conviction, unless procured by fraud, connivance, or collusion of the defendant, is a bar to a subsequent prosecution for such higher offense,¹² since the higher cannot afterward be prosecuted without opening the door for a conviction of an offense for which the defendant has before been tried and acquitted or convicted.¹³ Although elsewhere there is authority to the contrary, this rule is equally true although the court trying the lesser offense has no jurisdiction over the higher. The state is a single entity. It may choose its forum and determine for what offense it will prosecute a citizen. Having done so it cannot complain if it made an unwise selection.¹⁴

Rule applied.—All offenses, such as battery, mayhem, rape, robbery, etc., as well as assault with intent, necessarily include an assault, and a conviction or acquittal of an assault will bar a prosecution for the higher offense included in the same transaction.¹⁵ So also a conviction of assault upon an information charging an aggravated assault is a bar to a prosecution for mayhem committed during the assault as the case stands precisely as though the first information had been for assault.¹⁶ Again, a conviction of a battery is a bar to a prosecution for aggravated assault growing out of the same transaction, because

11. *People v. McDaniels*, 137 Cal. 192, 199, 92 Am. St. Rep. 81, 59 L. R. A. 578, 69 Pac. 1006.

12. *People v. McDaniels*, 137 Cal. 192, 92 Am. St. Rep. 81, 59 L. R. A. 578, 69 Pac. 1006; *People v. Defoor*, 100 Cal. 150, 34 Pac. 642. See, also, *People v. Hunkeler*, 48 Cal. 331, where upon an indictment for manslaughter the jury was discharged to hold the defendant for murder.

13. *People v. McDaniels*, 137 Cal. 192, 92 Am. St. Rep. 58 L. R. A. 578, 69 Pac. 1006.

14. *People v. McDaniels*, 137 Cal. 192, 92 Am. St. Rep. 81, 59 L. R. A. 578, 69 Pac. 1006.

15. *People v. McDaniels*, 137 Cal. 192, 92 Am. St. Rep. 81, 59 L. R. A. 578, 69 Pac. 1006.

16. *People v. Defoor*, 100 Cal. 150, 34 Pac. 642.

it operates as a conviction of the assault included therein.¹⁷ Larceny, however, is not included in burglary and is no part of it. Consequently a conviction of larceny committed in connection with burglary is no bar to a prosecution for burglary.¹⁸

§ 101. Where Conviction of Included Offense is Had.—

It is the settled rule in California that an indictment or information for a crime is by operation of law an indictment for every less included offense just as much as though it were charged in distinct and separate counts. And a conviction of any less included offense is an acquittal of every offense of a higher grade embraced in the indictment, so that there cannot be another trial for the greater offenses. This is true although the conviction of the less offense is set aside upon the defendant's own motion. Upon a reversal of the judgment for the included offense upon the defendant's appeal he can be again tried for the less offense upon the same indictment or information, but the prosecution for the higher offense is wholly ended.¹⁹ There is no distinction in this respect between

17. *People v. McDaniels*, 137 Cal. 192, 92 Am. St. Rep. 81, 59 L. R. A. 578, 69 Pac. 1006, distinguishing *People v. Helbing*, 61 Cal. 620, on the ground that in such case battery was not necessarily included in a charge of aggravated assault and a conviction thereof did not bar a subsequent trial for the aggravated assault.

18. *People v. Devlin*, 143 Cal. 128, 76 Pac. 900.

19. *People v. McFarlane*, 138 Cal. 481, 61 L. R. A. 245, 71 Pac. 568, 72 Pac. 48; *People v. McDaniels*, 137 Cal. 192, 92 Am. St. Rep. 81, 59 L. R. A. 578, 69 Pac. 1006; *People v. Smith*, 134 Cal. 453, 66 Pac. 669; *People v. Muhlner*, 115 Cal. 303,

47 Pac. 128; *People v. Gordon*, 99 Cal. 230, 33 Pac. 901; *People v. Apgar*, 35 Cal. 389; *People v. Backus*, 5 Cal. 275; *People v. Gilmore*, 4 Cal. 380, 60 Am. Dec. 620; *People v. Kelley*, 24 Cal. App. 54, 62, 140 Pac. 302; *People v. Cyty*, 11 Cal. App. 702, 106 Pac. 257; *People v. Huntington*, 8 Cal. App. 612, 97 Pac. 760; *Huntington v. Superior Court*, 5 Cal. App. 288, 90 Pac. 141 (holding the trial court is without jurisdiction to try the defendant for the higher offense and a writ of prohibition will be issued); *In re Bennett*, 84 Fed. 324. See INDICTMENT AND INFORMATION, as to right to convict of offenses included in that charged.

those cases in which the indictment or information contains several counts and when it contains only one.²⁰ It is true that the granting of a new trial places a defendant in the same position as if no trial had been had,¹ but this is only as to the issues undisposed of, that is to say, the issue of the lesser offense.²

There is a limitation upon this rule in those cases in which the lesser and greater crimes are the same offense varying only as to degree. If, for example, a defendant charged with murder and convicted of murder in the second degree procures a reversal of the judgment, he subjects himself to a retrial on the charge of murder and may be convicted of murder in the first degree.³

The rule under discussion has no application to a murder case in which the jury returns a verdict of conviction with a penalty of life imprisonment. Such a verdict is not a bar to the infliction of the death penalty upon a retrial of the same charge. The discretion given to the jury to mitigate the punishment does not, after such a verdict, divide that degree of murder into two degrees, and operate as an acquittal of the higher degree.⁴

§ 102. Where Offense is Split.—The state cannot split up a crime and prosecute it in parts, and a prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime. While the prosecutor may carve as large an offense out of a transaction as he can, yet he is not at liberty to cut but once.⁵ Thus where one by the same act and with the same

20. *People v. Gilmore*, 4 Cal. 380, 60 Am. Dec. 620.

1. See *infra*, § 442.

2. *People v. Gordon*, 99 Cal. 230, 23 Pac. 901; *People v. Gilmore*, 4 Cal. 376, 60 Am. Dec. 620.

3. *People v. Carty*, 77 Cal. 216, 19 Pac. 490; *People v. Keefer*, 65 Cal. 232, 3 Pac. 818, distinguished

in *People v. Gordon*, 99 Cal. 227, 33 Pac. 901.

4. *People v. Grill*, 151 Cal. 592, 91 Pac. 515.

5. *People v. Daniels*, 137 Cal. 192, 92 Am. St. Rep. 81, 59 L. R. A. 578, 69 Pac. 1006; *People v. Stephens*, 79 Cal. 428, 4 L. R. A. 845, 21 Pac. 856.

intent steals several articles belonging to another, he commits one crime, and an acquittal on a trial for stealing a part is a bar to a prosecution for stealing the remainder. Again, the publication of an article containing several libelous statements against a single individual constitutes one offense, and there cannot be as many prosecutions as there are defamatory statements in such article.⁶ So also there is only one offense committed when one at the same time receives goods stolen from different persons,⁷ or where a public officer embezzles at the same time sums paid him by different persons.⁸

I. PRELIMINARY PROCEEDINGS.

I. COMPLAINT, DEPOSITIONS AND WARRANT.

§ 103. **In General.**—A preliminary complaint is defined by the Penal Code to be “the allegation in writing made to a court or magistrate that a person has been guilty of some designated offense.”⁹ The complaint is practically a deposition only.¹⁰ A complaint should state the essential elements of the crime charged to a common certainty, but it is not necessary that it should do so with all the technical nicety of an indictment or information.¹¹ It should,

6. *People v. Stephens*, 79 Cal. 428, 4 L. R. A. 845, 21 Pac. 856.

7. *People v. Willard*, 92 Cal. 482, 28 Pac. 585.

8. *People v. Preciado*, 31 Cal. App. 519, 160 Pac. 1090.

9. Pen. Code, § 806.

10. *People v. Sacramento Butchers' Assn.*, 12 Cal. App. 471, 478, 107 Pac. 712.

11. *People v. George*, 121 Cal. 492, 53 Pac. 1098 (holding an uncertainty as to the person assaulted was not fatal); *People v. Howard*, 111 Cal. 655, 44 Pac. 342 (over-

ruled in part by *People v. Lee Look*, 143 Cal. 215, 76 Pac. 1028); *People v. Sacramento Butchers' Assn.*, 12 Cal. App. 471, 479, 107 Pac. 712. See *Golden & Co. v. Justice's Court*, 23 Cal. App. 778, 791, 140 Pac. 60 (holding a statement in the language of the statute defining the offense is sufficient); and *People v. Tinnen*, 32 Cal. App. Dec. 1067, 60 Cal. Dec. 355, 192 Pac. 557, holding a complaint charging the administration of poison with intent to “kill and murder” is not changed from the

however, state the facts positively and not upon information and belief.¹²

Objections to and effect of insufficiency.—The preliminary complaint is intended only as a basis for a warrant of arrest, and objections thereto must be availed of by the defendant while he is held under the warrant of arrest. An objection made after preliminary examination and commitment comes too late, as the complaint is then *functus officio*.¹³ Indeed, it has been held that when the prisoner is before a court having jurisdiction to hold a preliminary examination, a writ of prohibition to prohibit the holding of the preliminary examination will not issue.¹⁴ A new complaint is not required as a basis for a second examination after information set aside.¹⁵

§ 104. By and Before Whom Made—Authority of Officer.
The statute does not prescribe who shall make or swear to the complaint. If he has the requisite knowledge of the facts, the district attorney may do this. And the mere fact that he afterwards conducted the trial does not necessarily indicate that the defendant could not have had a

crime specified in Pen. Code, § 216, to that of assault with intent to commit murder by reason of the unnecessary use of the word "murder."

12. See ARREST, vol. 3, p. 123.

13. *People v. Warner*, 147 Cal. 546, 82 Pac. 196; *People v. Lee Look*, 143 Cal. 215, 76 Pac. 1028 (overruling *People v. Howard*, 111 Cal. 655, 44 Pac. 342; *People v. Christian*, 101 Cal. 471, 35 Pac. 1043, in so far as they may be inconsistent); *People v. Cole*, 127 Cal. 545, 59 Pac. 984 (where the sworn complaint was made by the district attorney, who had no personal knowledge of the facts); *People v. Dolan*, 96 Cal. 315, 31

Pac. 107; *People v. Staples*, 91 Cal. 23, 27 Pac. 523; *People v. Wheeler*, 73 Cal. 252, 14 Pac. 796; *People v. Velarde*, 59 Cal. 457; *People v. Smith*, 1 Cal. 9; *People v. Storke*, 39 Cal. App. 633, 179 Pac. 527 (holding an order setting aside a commitment to be erroneous, where no objection was made before commitment); In the *Matter of Stevens*, 16 Cal. App. 424, 117 Pac. 1127; *People v. Mul-laley*, 16 Cal. App. 44, 116 Pac. 88; *People v. Gregory*, 8 Cal. App. 738, 97 Pac. 912.

14. *In re Sing*, 13 Cal. App. 737, 110 Pac. 693.

15. *Ex parte Walpole*, 85 Cal. 362, 24 Pac. 657.

fair trial.¹⁶ But when a wife is incompetent as a witness against her husband she cannot swear to a complaint against him.¹⁷

As stated in the Penal Code, the complaint is made "to a court or magistrate." And a magistrate is defined by the same code to be "an officer having power to issue a warrant for the arrest of a person charged with a public offense."¹⁸

"The following persons are magistrates: 1. The justices of the supreme court; 2. The judges of the superior court; 3. Justices of the peace; and 4. Police magistrates in towns and cities."¹⁹

The office of committing magistrate is purely a statutory one and the powers and duties of the functionary are solely those given by the statute.²⁰ When a superior judge or judge of the supreme court sits as a magistrate, he possesses no greater authority than is possessed by any justice of the peace or police judge when acting in the same capacity.¹

§ 105. Signature, Verification and Filing.— While it seems that a preliminary complaint should be signed by the complaining witness, a signature by mark is sufficient when the name of the witness is written near it by the person who writes his own name as witness.² A slight

16. *People v. Currie*, 16 Cal. App. 731, 117 Pac. 941.

17. *People v. Gregory*, 8 Cal. App. 738, 97 Pac. 912. See WITNESSES.

18. Pen. Code, § 807.

19. Pen Code, § 808. See *People v. Fallon*, 154 Cal. 743, 99 Pac. 202 (holding a police judge of San Francisco may sit as a magistrate); *Ex parte Granice*, 51 Cal. 375 (holding under the former law that district judges were magistrates); *Levy v. Brannan*, 39 Cal.

485 (holding the police court of San Francisco is a magistrate); *People v. Smith*, 1 Cal. 9 (holding under the former law that a judge of the first instance may act as a committing magistrate).

20. *People v. Cohen*, 118 Cal. 74, 50 Pac. 20.

1. *People v. Cohen*, 118 Cal. 74, 50 Pac. 20; *In re Sing*, 13 Cal. App. 736, 110 Pac. 693.

2. Pen. Code, § 7.

A mark near the name of the witness accompanied by the jurat

variance between the name of the affiant in the body of the complaint and the signature will not authorize the setting aside of an information based thereon.³

The complaint need not be verified;⁴ but if it is properly verified and it contains positive evidence of facts tending to show guilt, it may be treated as the deposition required by section 812 of the Penal Code.⁵ Since the statute does not designate any particular officer before whom the complaint must be verified, it necessarily follows that the complaint may be verified before anyone authorized to administer an oath. A complaint in a justice's court may be verified before a notary public.⁶ One before a police judge may be verified before a justice of the peace.⁷ And as section 2093 of the Code of Civil Procedure authorizes the clerk of any court to administer oaths or affirmations, the oath to a deposition taken by a police judge may be administered by the clerk of the police court.⁸ But when a judge of the superior court is sitting as magistrate, he cannot call in the county clerk to administer oaths as he when so sitting has only the powers conferred upon magistrates generally.⁹

Although the magistrate should mark the complaint filed, for the purposes of identification, if for no other reason, the code does not require it, and a failure to file the complaint does not defeat the jurisdiction of the magistrate.¹⁰

of the justice is sufficient, for the reason that it will be presumed that the name was written near the mark by the justice, and for the further reason that his signature to the jurat is a sufficient attestation of the mark. *People v. McDaniel*, 141 Cal. 113, 74 Pac. 773.

3. *People v. George*, 121 Cal. 492, 53 Pac. 1098.

4. *In re Sing*, 13 Cal. App. 736, 110 Pac. 693.

5. *Ex parte Dimmig*, 74 Cal. 164,

15 Pac. 619; *In re Sing*, 13 Cal. App. 736, 110 Pac. 693.

6. *People v. Mullaley*, 16 Cal. App. 44, 116 Pac. 88. See *AFFIDAVITS*, vol. 1, p. 659.

7. *People v. Le Roy*, 65 Cal. 613, 4 Pac. 649.

8. *People v. Burns*, 121 Cal. 529, 53 Pac. 1096; *People v. Vasalo*, 120 Cal. 168, 52 Pac. 305.

9. *In re Sing*, 13 Cal. App. 736, 110 Pac. 693.

10. *People v. Jan John*, 137

§ 106. **Depositions and Warrant.**—"When an information is laid before a magistrate of the commission of a public offense, triable within the county, he must examine on oath the informant or prosecutor, or any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them."¹¹ "The depositions must set forth the facts stated by the prosecutor and his witnesses tending to establish the commission of the offense and the guilt of the defendant."¹² "If the magistrate is satisfied therefrom that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, he must issue a warrant of arrest."¹³

II. PRELIMINARY EXAMINATION.

§ 107. **Necessity for and Waiver.**—Section 8 of article I of the constitution provides that

"Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law."

It is to be observed that while under this provision no examination is necessary before an indictment can be found,¹⁴ an offense can be prosecuted by information only after an examination and commitment by a magistrate.¹⁵ This is true whether the offense be a felony or a misde-

Cal. 220, 69 Pac. 1063 (holding the complaining witness may be guilty of perjury though the complaint is not filed); *People v. Hiltel*, 131 Cal. 577, 63 Pac. 919.

11. Pen. Code, § 811.

12. Pen. Code, § 812.

13. Pen. Code, § 813. See **ARREST**, vol. 3, p. 123.

14. *People v. Goldenson*, 76 Cal. 328, 345, 19 Pac. 161.

15. *People v. Siemsen*, 153 Cal. 387, 95 Pac. 863; *People v. Naphthaly*, 105 Cal. 641, 39 Pac. 29; *People v. McCurdy*, 68 Cal. 576, 10 Pac. 207.

meanor jurisdiction to try which is vested in the superior court.¹⁶ The law does not contemplate a total waiver of examination into the charge against a defendant.¹⁷ But a commitment without examination is not a bar to any other or further examination on the same charge by another magistrate upon proper application for that purpose.¹⁸

Objections—Waiver.—An objection that the defendant has not been legally committed by a magistrate does not go to the jurisdiction of the superior court to try the case. The objection may be made upon arraignment by motion to set aside the information.¹⁹ If not then made, the defendant is precluded from raising it.²⁰ He cannot raise it upon motion in arrest of judgment,¹ or upon motion for new trial,² nor can he raise the objection after conviction upon habeas corpus.³

§ 108. Second and Re-examination.

“If a demurrer [to an indictment or information] is sustained and an amendment is not allowed, or if allowed, is not made, within such reasonable time as the court may fix, the court shall give a judgment of dismissal, which shall be a bar to another prosecution for the same offense. The defendant shall thereupon be discharged, unless the court directs the case to be submitted to the same or another grand jury, or directs a new information to be filed; provided that after such order or resubmission, the defendant may be examined before a magistrate, and discharged or committed by him, as in other cases.”⁴

The word “may” in this code section is not to be construed as “must” but in its usual ordinary meaning, and

16. *People v. Budd*, 24 Cal. App. 176, 140 Pac. 714; *Gardner v. Superior Court*, 19 Cal. App. 548, 126 Pac. 501; *In re Sing*, 13 Cal. App. 736, 110 Pac. 693.

17. *Kalloch v. Superior Court*, 56 Cal. 229; *Ex parte Walsh*, 39 Cal. 705.

18. *Ex parte Walsh*, 39 Cal. 705.

19. See *INDICTMENT AND INFORMATION*.

20. *People v. Bawden*, 90 Cal. 195, 27 Pac. 204; *People v. Romsac*, 26 Cal. App. 100, 146 Pac. 65.

1. See *infra*, § 466.

2. See *infra*, § 443.

3. *Ex parte McConnell*, 83 Cal. 558, 23 Pac. 1119.

4. Pen. Code, § 1008, in part.

a second preliminary examination is not required as a basis for a new information.⁵ The same is true of section 997 of the Penal Code, which provides that if the court in sustaining a motion to set aside an indictment or information directs the cause to be submitted to the same or another grand jury, "the defendant may be examined before a magistrate, and discharged or committed by him, as in other cases, if before indictment or information filed he has not been examined and committed by a magistrate." Under this provision a re-examination is not required when a defendant has had a fair and full preliminary examination and the information has been set aside for some technical error or irregularity not going to the merits of the case,⁶ as where the information has been set aside because of some irregularity in the order of commitment,⁷ or because the information goes beyond the scope of the commitment.⁸ If, however, an information is set aside for causes not merely technical or susceptible of remedy without impairing the substantial rights of a defendant, a new examination is necessary. It would be idle to order another information to be filed when the same defects would necessarily be present at a future hearing.⁹ Section 1117 of the Penal Code provides that in case the jury is discharged because the facts as charged do not constitute an offense, and the court directs that a new informa-

5. *People v. Sexton*, 132 Cal. 37, 64 Pac. 107; *People v. Holmes*, 13 Cal. App. 212, 109 Pac. 489.

6. *People v. Kilvington*, 4 Cal. Unrep. 512, 36 Pac. 13, followed in *People v. Lane*, 101 Cal. 515, 36 Pac. 17.

7. *People v. Lane*, 101 Cal. 513, 36 Pac. 16 (where there was a failure to indorse the commitment upon the depositions); *People v. Thompson*, 84 Cal. 598, 24 Pac. 384 (where the commitment was de-

fective); *Ex parte Fowler*, 5 Cal. App. 549, 90 Pac. 958, where the commitment was defective because of the omission of technical words necessary to the description of the crime.

8. *People v. Kilvington*, 4 Cal. Unrep. 512, 36 Pac. 13; *People v. Clayberg*, 26 Cal. App. 614, 147 Pac. 994.

9. *Ex parte Baker*, 88 Cal. 84, 25 Pac. 966, explained in *People v. Kilvington*, 4 Cal. Unrep. 512, 36 Pac. 13.

tion be filed or the case be submitted to the grand jury, "the defendant may be examined before a magistrate and discharged or committed by him as in other cases." Section 942 of the same code relating to the resubmission to a grand jury of charges which have been ignored do not contemplate any new warrant and examination.¹⁰

The discharge of a defendant by a committing magistrate does not bar a subsequent arrest and examination, as jeopardy has not attached.¹¹ As has just been stated, a commitment without examination does not bar a second examination and commitment,¹² and it has been held that an examination and commitment for an offense included in that charged does not preclude another examination of the charge by another magistrate, as one magistrate has nothing to do with what has transpired before another.¹³

§ 109. Before What Court or Judge.—Preliminary examinations may be held by magistrates by virtue of the powers conferred upon them by the constitution, regardless of the statutes defining the jurisdiction of their respective judicial offices.¹⁴ Under section 105 of the Code of Civil Procedure, the justice of the peace before whom a complaint was filed may request another justice to hold the preliminary examination.¹⁵ The order requesting another justice to act need not set forth the reason why the request was made, and the failure of such justice to subscribe the docket, as provided in section 105, does not affect any substantial right of the defendant.¹⁶ The substituted judge cannot, however, consider the evidence introduced before and the depositions taken by his predecessor and thus predicate his order holding a defendant

10. *Ex parte Clarke*, 54 Cal. 412.

11. See *supra*, § 89.

12. See *supra*, § 107.

13. *People v. Barnes*, 66 Cal. 594,
6 Pac. 698.

14. *Elder v. McDougald*, 145

Cal. 740, 79 Pac. 429; *People v. Crespi*, 115 Cal. 50, 46 Pac. 863.

15. *People v. Sehorn*, 116 Cal. 503, 48 Pac. 495; *People v. Sansome*, 98 Cal. 235, 33 Pac. 202.

16. *People v. Sehorn*, 116 Cal. 503, 48 Pac. 495.

to answer upon something which did not occur before him.¹⁷

Since the only causes which work a disqualification of a judicial officer are those enumerated in section 170 of the Code of Civil Procedure,¹⁸ it follows that a judge or justice not disqualified from holding a preliminary examination because he has formed and expressed an opinion as to the merits of the case;¹⁹ or because he acted in another case in which some evidence touching the present case was introduced.²⁰

§ 110. Time of Examination — Postponement. — The Penal Code does not prescribe the number of days after a complaint is laid before a magistrate within which the preliminary examination must be begun, but its spirit is said to be opposed to an unreasonable delay.¹ The code does provide, however, that “The examination must be completed at one session unless the magistrate, for good cause shown by affidavit, postpone it.”²

“If the postponement is had, the magistrate must commit the defendant for examination, admit him to bail or discharge him from custody upon the deposit of money as provided in this code, as security for his appearance at the time to which the examination is postponed.”³

17. *Ex parte Williams*, 35 Cal. App. Dec. 115, 199 Pac. 347.

18. See *JUDGES*.

19. *Patterson v. Conlan*, 123 Cal. 453, 56 Pac. 105.

20. *People v. Burns*, 16 Cal. App. 416, 118 Pac. 454.

1. *Ex parte Chambers*, 32 Cal. App. 476, 163 Pac. 223.

2. Pen. Code, § 861, also providing that “The postponement cannot be for more than two days at each time, nor more than six days in all, unless by consent or on motion of the defendant.” See *infra*, § 112,

postponement to enable defendant to procure counsel.

3. Pen. Code, § 862.

“The commitment for examination is made by an indorsement, signed by the magistrate on the warrant of arrest to the following effect: ‘The within named A. B., having been brought before me under this warrant, is committed for examination to the sheriff of —.’ If the sheriff is not present, the defendant may be committed to the custody of a peace-officer.” Pen. Code, § 863. See *BAIL AND RECOGNIZANCE*, vol. 3, p. 1021.

Any error in granting a postponement beyond six days, in violation of the code, does not affect the jurisdiction of the magistrate, or furnish grounds for avoiding a verdict.⁴

§ 111. Conduct of Examination Generally.—The preliminary examinations of accused persons are usually less formal in matters of procedure than is required upon trials of the causes; yet the essential principles of procedure and of evidence may not be departed from in the conduct of such examinations.⁵ One jointly charged with another has no statutory right to demand a separate preliminary examination.⁶

Public examination—Exclusion of witnesses.—A defendant has a right to a public examination before a magistrate, but under the Penal Code he may waive that right whenever he deems it to his interest to do so.⁷

Exclusion and separation of witnesses.—“While a witness is under examination, the magistrate may exclude all witnesses who have not been examined. He may also cause the witnesses to be kept separate, and to be prevented from conversing with each other until they are all examined.”⁸

4. *People v. Von Horn*, 119 Cal. 323, quoted in *People v. Boren*, 139 Cal. 211, 51 Pac. 538.

5. *Ex parte Williams*, 35 Cal. App. Dec. 115, 199 Pac. 347.

6. *People v. Burns*, 121 Cal. 529, 53 Pac. 1096.

7. *People v. Tarbox*, 115 Cal. 57, 46 Pac. 896.

“The magistrate must also, upon the request of the defendant, exclude from the examination every

person except his clerk, the prosecutor and his counsel, the attorney general, the district attorney of the county, the defendant and his counsel, and the officer having the defendant in custody; provided, however, that when the prosecuting witness is a female she shall be entitled at all times to the attendance of a person of her own sex.” Pen. Code, § 868.

8. Pen. Code, § 867.

§ 112. Information as to Charge—Aid of Counsel.

“When the defendant is brought before the magistrate upon an arrest, either with or without warrant, on a charge of having committed a public offense, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings.”⁹

It is a sufficient compliance with this section for the magistrate to read the charging part of the complaint, omitting the formal parts and the name of the complainant,¹⁰ or to state the nature of the charge against the defendant in a general way; at least the defendant cannot complain that the complaint was not read to him if he expressly waives such reading.¹¹

Aid of counsel.—In addition to informing the defendant of the charge against him, the Penal Code requires the magistrate to inform him “of his right to the aid of counsel in every stage of the proceedings.”¹² The magistrate should carefully follow the statute and inform the defendant “of his right to counsel in all stages of the proceedings,” and see to it that his docket entries show an exact compliance with this requirement,¹³ unless the defendant appears with counsel to represent him,¹⁴ or unless the defendant asks for a continuance to procure counsel.¹⁵ The statute does not require the magistrate to appoint counsel on the request of the defendant at the preliminary examination as is the case upon his arraignment,¹⁶ and cer-

9. Pen. Code, § 858; *People v. Breshi*, 44 Cal. App. 307, 186 Pac. 361 (substantial compliance with statute shown).

10. *People v. Miller*, 177 Cal. 404, 170 Pac. 817.

11. *People v. Stein*, 23 Cal. App. 108, 137 Pac. 271.

12. *People v. Young*, 108 Cal. 9, 41 Pac. 281 (holding record shows magistrate performed his duty and

the prisoner fully comprehended what was said).

13. *People v. White*, 17 Cal. App. 486, 120 Pac. 61.

14. *People v. Stein*, 23 Cal. App. 108, 137 Pac. 271.

15. *People v. Naphaly*, 105 Cal. 640, 39 Pac. 29.

16. *People v. Crowley*, 13 Cal. App. 322, 109 Pac. 493.

tainly a defendant cannot complain of a failure to make such appointment when he expressed no desire therefor.¹⁷

Time to send and sending for counsel.—The Penal Code provides the magistrate must allow the defendant a reasonable time to send for counsel, and postpone the examination for that purpose.¹⁸ “If the defendant requires the aid of counsel, the magistrate must, immediately after the appearance of counsel, or if, after waiting a reasonable time therefor, none appears, proceed to examine the case.”¹⁹ If the defendant desires time in which to obtain counsel, he should ask it, as a failure to do so is regarded as a waiver of the right.²⁰ A refusal of such request is error.¹ But when the magistrate continues the examination a reasonable time, a refusal on the day set for examination to grant a further continuance to enable the defendant to procure counsel is not an abuse of discretion, especially if there is no showing that such continuance would probably result in the procurement of counsel.² Nor is there an abuse of discretion when one-half an hour after the time set for hearing the magistrate determines that he has waited a reasonable time for the appearance of counsel.³ It has been held that a postponement of the examination, for six,⁴ seven,⁵

17. *People v. Elliott*, 80 Cal. 296, 22 Pac. 207.

18. He must also upon the request of the defendant, “require a peace officer to take a message to any counsel in the township or city the defendant may name. The officer must, without delay and without fee, perform that duty.” Pen. Code, § 859. In *People v. Naphthaly*, 105 Cal. 640, 39 Pac. 29, it was held that the mere fact that the defendant is a lawyer does not deprive him of his right to aid of counsel and to a reasonable time to send for one.

19. Pen. Code, § 860.

20. *People v. Crowley*, 13 Cal. App. 322, 109 Pac. 493.

1. *People v. Naphthaly*, 105 Cal. 641, 39 Pac. 29.

2. *People v. Figueroa*, 134 Cal. 159, 66 Pac. 202; *People v. Flannelly*, 128 Cal. 83, 60 Pac. 670.

3. *People v. Caballero*, 41 Cal. App. 146, 182 Pac. 321.

4. *People v. Flannelly*, 128 Cal. 83, 60 Pac. 670.

5. *People v. Figueroa*, 134 Cal. 159, 66 Pac. 202.

or nine⁶ days gives the defendant ample time to procure counsel.

§ 113. Examination of Witnesses.—According to the code, “At the examination, the magistrate must first read to the defendant the depositions of the witnesses examined on taking the information. He must also issue subpoenas, subscribed by him, for witnesses within the state, required either by the prosecution or the defense.”⁷ “The witnesses must be examined in the presence of the defendant, and may be cross-examined in his behalf.”⁸ “When the examination of witnesses on the part of the people is closed, any witnesses the defendant may produce must be sworn and examined.”⁹

Administering oaths.—While there is no express statute requiring witnesses before a magistrate to be sworn by him personally, the magistrate has no implied power to delegate that duty to another. Even a superior judge, when sitting as a magistrate, has no power to call in the county clerk to administer oaths to witnesses, since, as has been seen, he has only the powers conferred upon a committing magistrate when acting in that capacity.¹⁰

Interpreters.—Under section 1884 of the Code of Civil Procedure, a magistrate has a discretion in granting or refusing an application of an accused for an interpreter.¹¹ If an interpreter is called at the preliminary hearing, it is the duty of the magistrate to place him under oath the same as any other witness.¹²

Defendant as witness.—The Penal Code has abolished the statute authorizing an accused to make an unsworn

6. *People v. Elliott*, 80 Cal. 296,
22 Pac. 207.

7. Pen. Code, § 864.

8. Pen. Code, § 865.

9. Pen. Code, § 866.

10. *People v. Cohen*, 118 Cal. 74,
50 Pac. 20.

11. *People v. Young*, 108 Cal. 8,
41 Pac. 281.

12. *People v. Kelly*, 17 Cal. App.
447, 122 Pac. 832.

statement at a preliminary examination, and now he may, at the examination, voluntarily become a witness for or against himself.¹³

§ 114. Reducing Testimony to Writing—Reporter.—Section 869 of the Penal Code provides in part as follows:

“The testimony of each witness in cases of homicide must be reduced to writing, as a deposition, by the magistrate, or under his direction, and in other cases upon the demand of the prosecuting attorney, or the defendant, or his counsel. The magistrate before whom the examination is had may, in his discretion, order the testimony and proceedings to be taken down in shorthand in all examinations herein mentioned, and for that purpose he may appoint a shorthand reporter.”¹⁴

While the person appointed as shorthand reporter, under this provision, should be competent, it is not essential that he be an official reporter of some superior court,¹⁵ or that he should possess the qualifications of such reporters.¹⁶ Neither is it necessary that an affirmative showing of the qualifications of the reporter be made, especially where the magistrate knows the appointee to be competent, and it is not claimed that he does not possess the necessary qualifications.¹⁷ The mere fact that the reporter is an appointee of the district attorney does not disqualify him.¹⁸ It is not necessary that the official

13. *People v. Kelley*, 47 Cal. 125, distinguishing *People v. Gibbons*, 43 Cal. 557.

14. See *Elder v. McDougald*, 145 Cal. 740, 79 Pac. 429, construing the San Francisco charter and holding that it supersedes section 869 of the Penal Code, so that a police judge acting as a committing magistrate has no power to appoint a reporter.

15. *People v. Nunley*, 142 Cal. 441, 76 Pac. 45; *People v. McIntyre*, 127 Cal. 423, 59 Pac. 779.

16. *People v. McIntyre*, 127 Cal. 423, 59 Pac. 779. See *COURTS*, ante, p. 653 et seq.

17. *People v. Nunley*, 142 Cal. 441, 76 Pac. 45.

18. *People v. Nunley*, 142 Cal. 441, 76 Pac. 45.

reporter¹⁹ or other reporter appointed,²⁰ be sworn or that the fact that he was sworn appear in the deposition, as the statute does not so require.¹

§ 115. Form of Deposition or Testimony.—Section 869 of the Penal Code requires that the deposition or testimony of the witness must be authenticated in the form prescribed:

“First. It must state the name of the witness, his place of residence, and his business or profession. Second. It must contain the questions put to the witness and his answers thereto, each answer being distinctly read to him as it is taken down, and being corrected or added to until it conforms to what he declares is the truth, except in cases where the testimony is taken down in shorthand, the answer or answers of the witness need not be read to him.² Third. If a question put be objected to on either side and overruled, or the witness declines answering it, that fact, with the ground on which the question was overruled or the answer declined, must be stated. Fourth. The deposition must be signed by the witness,³ or if he refuses to sign it, his reason for refusing must be stated in writing, as he gives it, except in cases where the deposition is taken down in shorthand, it need not be signed by the witness.”⁴

These provisions should be strictly complied with, as any real departure from the course prescribed renders the deposition inadmissible in evidence upon the trial.⁵ The deposition should be so authenticated that an inspection

19. *People v. Kelly*, 17 Cal. App. 447, 120 Pac. 46; *People v. Mul-laley*, 16 Cal. App. 44, 116 Pac. 88.

20. *People v. Nunley*, 142 Cal. 441, 76 Pac. 45 (Code Civ. Proc., § 270, relative to the oath to be taken by the reporter of a superior court, is not applicable in the case of the shorthand reporter appointed by a magistrate); *People v. Riley*, 75 Cal. 98, 16 Pac. 544.

1. *People v. Kelly*, 17 Cal. App. 447, 120 Pac. 46; *People v. Riley*, 75 Cal. 98, 16 Pac. 544.

2. *People v. Mitchell*, 64 Cal. 85, 27 Pac. 862, holding that the deposition must show it was read over to the witness.

3. *People v. Mitchell*, 64 Cal. 85, 27 Pac. 862.

4. *People v. Ward*, 105 Cal. 652, 657, 39 Pac. 33.

5. See *infra*, § 214 et seq.

of it will show upon whose examination or upon what charge, or at what time it was taken.⁶ The deposition should be taken down by question and answer.⁷ The ground upon which an objection to a question is sustained is sufficiently stated where an objection specifying the ground is sustained as made. And the ground on which a witness declines to answer a question may sufficiently appear from the statement of the witness himself.⁸ A failure to state the business of a boy of sixteen does not render the deposition inadmissible in evidence,⁹ and the failure to state the business of an adult does not deprive the defendant of a substantial right so as to require setting aside of the information.¹⁰

§ 116. Transcribing and Filing.—It is made the statutory duty of the reporter, within ten days after the close of the examination, if the defendant be held to answer the charge, to transcribe his shorthand notes, and certify and file both the original and copy thereof with the county clerk of the county or city and county, in which the defendant was examined. He must also file his original notes with the clerk.¹¹ The code does not contemplate the transcribing of the shorthand notes of the reporter where the accused has been discharged.¹² And even where the accused is held to answer, a failure to make such transcript does not prevent the district attorney from filing an information or deprive the superior court of juris-

6. A deposition which has no title, and the certificate of which certifies to be a correct statement of the testimony "of the above-entitled cause," is not admissible in evidence on the trial. *People v. Ward*, 105 Cal. 652, 39 Pac. 33; *People v. Dean*, 23 Cal. App. 745, 139 Pac. 904.

7. *People v. Clark*, 151 Cal. 200, 90 Pac. 549.

8. *People v. Riley*, 75 Cal. 98, 16 Pac. 544.

9. *People v. Grundell*, 75 Cal. 301, 17 Pac. 214.

10. *People v. Rodrigo*, 69 Cal. 601, 11 Pac. 481.

11. Pen. Code, § 869, subd. 5, which with subd. 7 provides also for the reporter's compensation.

12. *Mattingly v. Nichols*, 133 Cal. 32, 65 Pac. 748.

diction to try the case.¹³ The specification as to time is directory merely, and it is sufficient if the filing be within a reasonable time.¹⁴

While the statute does not require that a reporter transcribing his notes must do the actual writing or typewriting with his own hand, it undoubtedly contemplates that the transcribing shall at least be done under his personal direction and supervision. It is a sufficient compliance with the statute if the reporter dictates from his notes to an assistant, who, under his direction and in his presence, makes the longhand transcript.¹⁵

§ 117. Certificate and Effect Thereof.—Prior to 1919, section 869 of the Penal Code required that the deposition be signed and certified by the magistrate when reduced to writing by him or under his direction.¹⁶ But this provision was omitted from the section in 1919. So also, although the present statute requires the reporter to certify the transcript of his shorthand notes, it does not as formerly prescribe the contents of the certificate. The former provision required that the certificate of the reporter to state that the transcript is a correct statement of such testimony and proceedings.¹⁷ In other words, it was

13. *People v. Riley*, 65 Cal. 107, 3 Pac. 413.

14. *People v. Buckley*, 143 Cal. 375, 381, 77 Pac. 169 (a filing a month and a half after the close of the preliminary examination and at least a half month before trial is not unreasonable); *People v. Grundell*, 75 Cal. 301, 17 Pac. 214; *People v. Mullahey*, 16 Cal. App. 41, 116 Pac. 88. See *People v. Nunley*, 142 Cal. 441, 76 Pac. 45 (holding that if the tenth day falls on Sunday, the transcript may be filed on the following day).

15. *People v. Donnolly*, 143 Cal. 394, 399, 77 Pac. 177 (where the

reporter compared the transcript with his notes); *People v. Buckley*, 143 Cal. 375, 384, 77 Pac. 169 (where the reporter did not do so); *People v. Garnett*, 9 Cal. App. 194, 98 Pac. 247 (where reporter made comparison).

16. *People v. Mitchell*, 64 Cal. 85, 27 Pac. 862; *People v. Morine*, 54 Cal. 575 (holding a jurat was not a certificate within the contemplation of the code).

17. *People v. Goodrich*, 142 Cal. 216, 221, 75 Pac. 796 (certificate held to be in compliance with code).

necessary that there be an affirmance that the notes were correct and that they were correctly transcribed.¹⁸ It was held to be a sufficient compliance with this provision to state that the transcript was "a correct transcript of the examination in the above-entitled case,"¹⁹ or that it was "a full and complete record of the proceedings had and the testimony given in the above-entitled case."²⁰ But because the testimony written out by the reporter was deemed the original testimony of the witness, it was held insufficient to certify that the transcript was a true copy of the testimony.¹

Effect of certificate.—Prior to 1919, section 869 of the Penal Code provided, in effect, that when the reporter's transcript was properly certified by him, it was deemed prima facie a correct statement of the testimony and proceedings.² Being prima facie merely, it was held to be competent for the defendant by evidence to overcome the effect of this certificate.³ But he could do so only by evidence tending to show that it was an incorrect statement, or, at least, by evidence affording fair grounds for that conclusion.⁴ The mere fact that the reporter who dictated his notes to his assistant who made the transcription did not overcome the certificate,⁵ and an inconsequential variance was not regarded as harmful.⁶

18. *People v. Carty*, 77 Cal. 213, 19 Pac. 490, holding insufficient a certificate that the deposition was a correct transcript of the shorthand notes.

19. *People v. Riley*, 75 Cal. 98, 16 Pac. 544.

20. *People v. McIntyre*, 127 Cal. 423, 59 Pac. 779.

1. *People v. Ward*, 105 Cal. 652, 38 Pac. 945 (holding deposition inadmissible in evidence because of defect).

2. *People v. Izlar*, 8 Cal. App. 600, 97 Pac. 685.

3. *People v. Pembroke*, 6 Cal. App. 588, 92 Pac. 668.

4. *People v. Buckley*, 143 Cal. 375, 385, 77 Pac. 169; *People v. Garnett*, 9 Cal. App. 194, 98 Pac. 247 (effect of transcript held not to have been overcome by words written in longhand on the notes to facilitate comparison of transcript).

5. *People v. Buckley*, 143 Cal. 375, 385, 77 Pac. 169.

6. *People v. Goodrich*, 142 Cal. 216, 221, 75 Pac. 796.

§ 118. Keeping Depositions—Transcript for Defendant.
Section 870 of the Penal Code provides as follows:

“The magistrate or his clerk must keep the depositions taken on the information or the examination, until they are returned to the proper court; and must not permit them to be examined or copied by any person except a judge of the court having jurisdiction of the offense, or authorized to issue writs of habeas corpus, the attorney general, district attorney, or other prosecuting attorney, and the defendant and his counsel; provided however, upon demand by defendant or his attorney the magistrate must order a transcript of the depositions taken on the information, or on the examination, to be immediately furnished said defendant or his attorney, after the commitment of said defendant as provided in sections eight hundred and seventy-six and eight hundred and seventy-seven of this code, . . . ”⁷

Section 869 of the Penal Code as amended in 1919 provides that

“The defendant, upon his arraignment in the superior court, shall be furnished, without cost to him, a copy of said transcription of the testimony and proceedings before the magistrate if shorthand notes thereof were taken by a reporter as provided in this section.”

III. DISCHARGE OR HOLDING TO ANSWER.

§ 119. In General.—If, after hearing the proofs, it appears either that no public offense has been committed or that there is not sufficient cause to believe the defendant guilty of a public offense, the magistrate must order the defendant to be discharged, by an indorsement on the depositions and statement signed by him.⁸ “If, however, it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the

7. This section also contains a provision fixing the amount of the compensation of the reporter.

8. Pen. Code, § 871, giving the form of the indorsement.

defendant guilty thereof, the magistrate must make or indorse on the complaint an order to that effect.⁹

“If the offense is bailable, and the defendant is admitted to bail, the following words must be added to the order, ‘and that he be admitted to bail in the sum of — dollars, and is committed to the sheriff of the county of — until he gives such bail.’ ”¹⁰

The powers of a committing magistrate are limited to those prescribed in the code provisions. Although he may be of the opinion that a misdemeanor has been committed, he has no jurisdiction in the proceeding without a formal complaint required by section 1426 of the Penal Code to order the defendant to appear before him upon a trial of such misdemeanor.¹¹

§ 120. What is “Sufficient Cause.”—The term “sufficient cause” used in section 872 of the Penal Code, means about the same as the term “reasonable and probable cause” in the habeas corpus act.¹² The term “probable” has been defined to mean “having more evidence for than against; supported by evidence which inclines the mind to believe, yet leaves room for doubt.”¹³ And the term “reasonable or probable cause” has been defined to mean such a state of facts as would lead a man of ordinary caution and prudence to believe and conscientiously entertain a strong suspicion that the person accused is guilty.¹⁴ In

9. Pen. Code, § 872, giving the form of the order to be indorsed; *Ex parte Moon*, 65 Cal. 216, 4 Pac. 545 (holding order in question to be sufficient).

“If the offense is not bailable, the following words must be added to the indorsement: ‘and he is hereby committed to the sheriff of the county of —.’ ” Pen. Code, § 873.

10. Pen. Code, § 875.

11. *People v. Swain*, 5 Cal. App. 421, 90 Pac. 720, holding that the fact that the magistrate is a justice of the peace is immaterial.

12. *People v. Coombs*, 9 Cal. App. 262, 98 Pac. 686.

13. *Ex parte Heacock*, 8 Cal. App. 420, 97 Pac. 77.

14. *Ex parte Vice*, 5 Cal. App. 153, 89 Pac. 983.

other words, to authorize a committing magistrate to hold a defendant to answer, the facts which are stated before him must induce a reasonable probability that all the acts have been done which constitute the offense charged,¹⁵ that the crime charged was committed by the accused,¹⁶ and is triable in the county where the prosecution is pending,¹⁷ and also that the crime has not become barred by the statute of limitations.¹⁸

The committing magistrate is not bound by the rule of reasonable doubt, and may hold a defendant to answer though the evidence before him would not support a verdict of guilty.¹⁹ He may commit a defendant upon his voluntary confession of guilt,²⁰ and probably upon the uncorroborated testimony of an accomplice.¹ But, on the other hand, a magistrate is not bound to believe the accused in preference to witnesses for the prosecution.² He has the same right to judge of the credibility of witnesses

15. *Ex parte Heacock*, 8 Cal. App. 420, 97 Pac. 77. See *Ex parte Sternes*, 82 Cal. 245, 23 Pac. 38, holding a commitment for kidnapping erroneous where the evidence showed the defendant to be an officer acting under a warrant of arrest; *People v. Sherman*, 3 Cal. Unrep. 851, 32 Pac. 879, holding a commitment for larceny was proper when the evidence showed the presence of the defendant at the place of the crime and presence of the property upon the person of his companion.

16. *Ex parte Heacock*, 8 Cal. App. 420, 97 Pac. 77; *Ex parte Vice*, 5 Cal. App. 153, 89 Pac. 983.

17. *Ex parte Palmer*, 86 Cal. 631, 25 Pac. 130, holding the facts were sufficient to indicate the crime of embezzlement was committed in the county.

18. *Ex parte Vice*, 5 Cal. App. 153, 89 Pac. 983.

19. *Ex parte James*, 32 Cal. App. Dec. 5, 190 Pac. 466; *Matter of Application of Hartwell*, 28 Cal. App. 627, 153 Pac. 730; *Ex parte Heacock*, 8 Cal. App. 420, 97 Pac. 77; *In re Vondweer*, 4 Cal. App. 650, 88 Pac. 993; *In re Mitchell*, 1 Cal. App. 396, 82 Pac. 347.

20. *People v. Cokahnour*, 120 Cal. 253, 52 Pac. 505. See *Ex parte Becker*, 86 Cal. 402, 25 Pac. 9, holding if there is some evidence, other than the extrajudicial admissions of the accused, tending to show the commission of the offense, the accused will not be released upon habeas corpus.

1. *In re Schwitalla*, 36 Cal. App. 511, 172 Pac. 617.

2. *Ex parte James*, 32 Cal. App. Dec. 5, 190 Pac. 466.

as a jury,³ though he would not be authorized to hold a defendant to answer when the testimony of the material witnesses for the prosecution is clearly false.⁴ He cannot act upon information received from outside sources, but must act upon the evidence before him.⁵ While a commitment based entirely upon hearsay or incompetent evidence is unauthorized, the admission of a mass of incompetent evidence will not affect the legality of a commitment if there is a sufficiency of competent evidence to sustain it.⁶ The original complaint cannot be used as evidence, as its force was spent upon the issuance of the warrant of arrest.⁷

§ 121. Requisites of Order of Commitment—Amendment.—The requirement that the magistrate make an order that the defendant be held to answer contemplates that the order referred to shall be in writing and signed by the magistrate.⁸ An oral order reduced to writing by the reporter but not signed by the judge is not a compliance with the statute.⁹ Under section 872 of the Penal Code, the magistrate has a discretion whether to designate the offense to which an accused is held to answer, by referring to “the offense in the within named complaint” or by stating its nature generally.¹⁰ It is unnecessary, as in the case of the warrant of commitment referred to in section 877 of the Penal Code, to state the nature of the

3. *In re Vandiveer*, 4 Cal. App. 653, 88 Pac. 993 (holding the magistrate may accept a part and reject a part of the testimony of a witness).

4. *In re Vandiveer*, 4 Cal. App. 650, 88 Pac. 993.

5. *Matter of Application of Hartwell*, 28 Cal. App. 627, 153 Pac. 730.

6. *In re Kawaguchi*, 12 Cal. App. 498, 107 Pac. 727.

7. *Matter of Application of*

Hartwell, 28 Cal. App. 627, 153 Pac. 730.

8. *People v. Wilson*, 93 Cal. 377, 28 Pac. 1061; *Ex parte Branigan*, 19 Cal. 133.

9. *People v. Wilson*, 93 Cal. 377, 28 Pac. 1061.

10. *People v. Lee Ah Chuck*, 66 Cal. 662, 6 Pac. 859 (holding that the words in parentheses, in section 872, are directory to the committing magistrate, and may or may not be adopted).

offense, or the time and place of its commission,¹¹ or to state the name of the victim of the crime.¹² When the order refers to the complaint, they must be construed together, and an erroneous designation in the order of the crime charged will not control or modify the words of the complaint.¹³ The use of the word "deposition" instead of "complaint" in the clause, "It appearing to me that the offense in the within complaint," etc., is not fatal, as the terms are held to be equivalent when the word "deposition" was used in the statute.¹⁴ And a neglect of the magistrate to add to the commitment an admission to bail is not such an omission of duty as to vitiate the commitment, and require the information based thereon to be set aside.¹⁵

Variance between commitment and complaint.—The commitment need not follow the complaint, as it is the duty of the magistrate to hold the defendant to answer for the offense proved, whatever may be the offense charged.¹⁶ The requirement that the order be indorsed upon the complaint is directory merely.¹⁷ And there is a sufficient

11. *People v. Arberry*, 13 Cal. App. 749, 114 Pac. 411 (where the offense was described as follows: "the offense as charged in the complaint, felony, to wit, attempt to obtain money by false pretenses"); *People v. Gregory*, 8 Cal. App. 738, 97 Pac. 912 (a description, "the offense of committing a lewd and lascivious act upon the body of a child under the age of fourteen years," is sufficient); *People v. Bianchino*, 5 Cal. App. 633, 91 Pac. 112 (where offense was described as "felony, rape, in the within complaint mentioned"). See *infra*, § 122, as to rule in case of warrant of commitment.

12. *People v. McCurdy*, 68 Cal. 576, 10 Pac. 207.

13. *People v. Tinnen*, 32 Cal. App. Dec. 1067, 192 Pac. 557.

14. *People v. White*, 17 Cal. App. 486, 120 Pac. 61; *People v. Lapique*, 10 Cal. App. 669, 103 Pac. 164.

15. *People v. Thompson*, 84 Cal. 598, 24 Pac. 384.

16. *People v. Staples*, 91 Cal. 23, 27 Pac. 523; *People v. Wheeler*, 73 Cal. 252, 14 Pac. 796.

17. *People v. Siemsen*, 153 Cal. 387, 95 Pac. 863; *People v. Tarbox*, 115 Cal. 57, 46 Pac. 896; *People v. Wilson*, 93 Cal. 377, 28 Pac. 1061; *People v. Turner*, 28 Cal. App. 767, 154 Pac. 34; *People v. Sacramento Butchers' Assn.*, 12 Cal. App. 471, 479, 107 Pac. 712.

compliance with the statute when an order is in fact made and entered upon the docket of the justice,¹⁸ or when an order filed with the clerk refers to the complaint as "the within deposition" (complaint).¹⁹ Formerly, the code directed that this indorsement be made upon the depositions,²⁰ but it was held that the complaint could be treated as a deposition for that purpose.¹

Amendment of order.—While a magistrate after once committing an accused for a certain offense may not thereafter change his order and commit him for another and distinct offense, it seems that if there is an irregularity in his order in that by reason of the omission of certain technical words necessary to the description of the offense, he may correct it upon being directed to do so by the superior court.²

§ 122. Warrant of Commitment.—"If the magistrate order the defendant to be committed, he must make out a commitment, signed by him, with his name of office, and deliver it, with the defendant, to the officer to whom he is committed, or, if that officer is not present, to a peace-officer, who must deliver the defendant into the proper custody, together with the commitment."³ The order

18. *People v. Wallace*, 94 Cal. 497, 29 Pac. 950; *Ex parte Branigan*, 19 Cal. 133, 138.

19. *People v. Dolan*, 96 Cal. 315, 31 Pac. 107.

20. *People v. Hardisson*, 61 Cal. 378 (the deposition taken at the examination, not those accompanying the information, were those referred to in the statute).

1. *People v. Price*, 143 Cal. 351, 77 Pac. 73; *People v. Sehorn*, 116 Cal. 503, 48 Pac. 495; *People v. Young*, 64 Cal. 212, 30 Pac. 628; *People v. Hope*, 62 Cal. 291; *People v. Smith*, 59 Cal. 365.

2. *Ex parte Fowler*, 5 Cal. App. 549, 90 Pac. 958.

3. Pen. Code, § 876. "The commitment must be to the following effect: county of — [as the case may be]. The People of the State of California to the Sheriff of the County of—: An order having been this day made by me, that A. B. be held to answer upon a charge of [stating briefly the nature of the offense, and giving as near as may be the time when and the place where the same was committed], you are commanded to receive him into your custody and

of commitment should set forth the crime with convenient certainty. There is some difference of opinion in the authorities generally as to what statement will be deemed a sufficient compliance with this rule. In California, it is insufficient to designate the crime by its generic name, as, for example, grand larceny or rape. The commitment must not only state the offense charged, but such facts as are essential to constitute the offense, though the precision necessary in indictments is not required.⁴ The commitment should give the name of the victim of the crime⁵ and the time and place of the commission of the crime charged.⁶ But if the place designated is such that the court will take judicial notice that it is within the state, it is unnecessary that the commitment contain a statement to that effect.⁷

Defects and amendments.—Defects in a warrant of commitment do not authorize the release of a prisoner from custody if a proper order holding the prisoner to answer has been made.⁸ In such case the warrant may be amended by the magistrate at any time, both as to form and substance, so as to make it fully and formally describe the offense, provided there be a sufficient order made at the conclusion of the examination to which reference may

detain him until he is legally discharged. Dated this — day of —, eighteen [nineteen] —." Pen. Code, § 877.

4. A commitment for larceny should state what property was stolen, to whom it belonged, its value and the time and place of the commission of the offense. A commitment for rape should state the person upon whom the offense was committed, and the use of force when essential, as well as

the time and place of the crime. Ex parte Branigan, 19 Cal. 133.

5. Ex parte Walpole, 85 Cal. 362, 24 Pac. 657; Ex parte Keil, 85 Cal. 309, 24 Pac. 742; Ex parte Bull, 42 Cal. 196.

6. Ex parte Branigan, 19 Cal. 133.

7. People v. Smith, 1 Cal. 9.

8. Ex parte Estrado, 88 Cal. 316, 26 Pac. 209; Ex parte Keil, 85 Cal. 309, 24 Pac. 742; People v. White, 17 Cal. App. 486, 120 Pac. 61.

be had.⁹ The second commitment must not go beyond the order, however.¹⁰ Surplusage in the commitment does not vitiate it.¹¹

§ 123. Security for Appearance of Witnesses—Conditional Examination.—On holding the defendant to answer, the magistrate may take from each of the material witnesses examined before him on the part of the people, a written undertaking, to the effect named in the statute.¹² When the magistrate or a judge of the court in which the action is pending is satisfied, by proof on oath, that there is reason to believe that any such witness will not appear and testify unless security is required, he may order the witness to enter into a written undertaking, with sureties.¹³ Infants and married women, who are material witnesses against the defendant, may be required to procure sureties for their appearance.¹⁴ If a witness required to enter into an undertaking to appear and testify, either with or without sureties, refuses compliance with the order for that purpose, the magistrate must commit him to prison until he complies or is legally discharged.¹⁵ When, however, it satisfactorily appears by examination, on oath of the witness or any other person, that the witness is unable to procure sureties, he may be forthwith conditionally examined on behalf of the people in the manner provided by the Penal Code.¹⁶

9. *Ex parte Keil*, 85 Cal. 309, 24 Pac. 742; *Ex parte Branigan*, 19 Cal. 133; *People v. White*, 17 Cal. App. 486, 120 Pac. 61.

10. *Ex parte Branigan*, 19 Cal. 133.

11. *People v. Smith*, 1 Cal. 9.

12. Pen. Code, § 878.

13. Pen. Code, § 879.

14. Pen. Code, § 880.

15. Pen. Code, § 881.

16. Pen. Code, § 882, providing that "Such examination must be

by question and answer, in the presence of the defendant, or after notice to him, if on bail, and conducted in the same manner as the examination before a committing magistrate is required by this code to be conducted, and the witness thereupon discharged; and such deposition may be used upon the trial of the defendant, except in cases of homicide, under the same conditions mentioned in section thirteen hundred and forty-five; but this

§ 124. **Return.**—"When a magistrate has discharged a defendant, or has held him to answer, he must return, without delay, to the clerk of the court at which the defendant is to appear, the warrant, if any, the depositions, and all undertakings of bail, or for the appearance of witnesses taken by him."¹⁷ While good practice requires that the return of the examining magistrate should be made and filed before the information is filed, an information may be filed before the papers are returned,¹⁸ as the neglect of the magistrate to return the record before the information is filed is a mere ministerial irregularity, not affecting the substantial rights of the defendant.¹⁹

M. ARRAIGNMENT.

§ 125. **Necessity for.**—Wherever the common law prevails, criminal procedures have carefully provided for the arraignment of accused persons that they shall be fully informed of the charge against them and of their right to plead.²⁰ This formality is required by section 976 of the Penal Code, which is as follows:

"When the indictment or information is filed, the defendant must be arraigned thereon before the court in which it is filed, unless the cause is transferred to some other county for trial."

§ 126. **Presence of Defendant.**—With respect to the presence of the defendant upon arraignment, the statute

section does not apply to an accomplice in the commission of the offense charged." See *People v. Mitchell*, 64 Cal. 85, 27 Pac. 862, holding that a mere statement of another person not under oath that the witness is unable to procure sureties does not authorize his conditional examination. The deposition must be authenticated as pro-

vided in section 869 of the Penal Code. And see *People v. Lee*, 49 Cal. 37.

17. Pen. Code, § 883.

18. *People v. Wickham*, 113 Cal. 283, 48 Pac. 123.

19. *People v. Tarbox*, 115 Cal. 57, 46 Pac. 896.

20. *People v. Monaghan*, 102 Cal. 227, 36 Pac. 511.

requires that "If the indictment or information be for a felony, the defendant must be personally present; but if for a misdemeanor, he may appear upon the arraignment by counsel."¹ The Penal Code prescribes how the presence of a defendant at arraignment may be secured when he is in custody,² and when he has been discharged on bail, or has deposited money instead thereof.³ The clerk, on the application of the district attorney, may, at any time after the order, whether the court is sitting or not, issue a bench-warrant to one or more counties.⁴ The code then prescribes the form of the bench-warrant,⁵ and provides that "The bench-warrant may be served in any county, in the same manner as a warrant of arrest, except that when served in another county it need not be indorsed by the magistrate of that county."⁶ The officer arresting the defendant must keep him in custody unless admitted to bail.⁷

§ 127. Right to and Assignment of Counsel.—"If the defendant appears for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel, the court must assign counsel to defend him."⁸ It is sufficient in this regard that the statute be

1. Pen. Code, § 977; *People v. Ebner*, 23 Cal. 158, followed in *People v. Budd*, 57 Cal. 349, and holding that in a misdemeanor case the court cannot enter the defendant's default and forfeit his bail if he offers to plead by attorney.

2. Pen. Code, § 978.

3. Pen. Code, § 979. See BAIL AND RECOGNIZANCE, vol. 3, p. 1067.

4. Pen. Code, § 980.

5. Pen. Code, §§ 981, 982.

6. Pen. Code, § 983. See ARREST,

vol. 3, p. 125, as to manner of serving warrant of arrest.

7. Pen. Code, § 982. See Pen. Code, § 984 (proceedings on giving bail in another county); and see Pen. Code, §§ 985, 986 (ordering defendant into custody or increasing bail when accusation is for felony).

8. Pen. Code, § 987; *People v. Miller*, 137 Cal. 642, 70 Pac. 735, holding minute entry showed that the defendant was informed of his right to counsel. See *People v.*

substantially complied with.⁹ An arraignment is not void, if the duty imposed by this section is performed during arraignment, and any irregularity in failing to perform it before the commencement of the proceedings on arraignment is waived if the defendant goes to trial without objection on the plea entered.¹⁰ A minute entry showing a statement by the defendant that he did not desire the aid of counsel raises an implication that he was informed of his right.¹¹

Compensation of attorney.—The compensation of an attorney appointed to defend a pauper prisoner is not a charge against the county, and no promise to pay for his services can be implied, as it is part of the general duty of counsel to render their professional services to persons accused of crime who are destitute of means, under appointment of the court, when not inconsistent with their obligation to others.¹²

Public defender.—In 1921 an act was passed “to create the office of public defender,” an official whose duty it is, among other things, to defend, without expense to them, all persons who are not financially able to employ counsel.^{12a}

§ 128. Proceedings on Arraignment—Answer.—The arraignment, as provided by the Penal Code “must be made by the court, or by the clerk or district attorney under its direction, and consists in reading the indictment or information to the defendant and delivering to him a true copy thereof, and of the indorsements thereon, including the list of witnesses, and asking him whether he pleads guilty or not

Moice, 15 Cal. 329, holding the court of sessions was not bound to assign counsel for the prisoner.

9. *People v. Bostic*, 167 Cal. 754, 141 Pac. 380.

10. *People v. Villarino*, 66 Cal. 228, 5 Pac. 154.

11. *People v. Miller*, 137 Cal. 642, 70 Pac. 735.

12. *Lamont v. Solano County*, 49 Cal. 158; *Rowe v. Yuba County*, 17 Cal. 61; *Gibson v. Sacramento Co.*, 37 Cal. App. 523.

12a. See PUBLIC DEFENDER.

guilty to the indictment or information."¹³ It seems that the defendant may waive a copy of the accusation by asking time to plead before a copy has been delivered.¹⁴ While a court is not bound to supply copies of the indictment or information for defendant's counsel, in addition to the copy furnished the defendant,¹⁵ a delivery of a copy to defendant's counsel is a sufficient compliance with the statute in the absence of objection. At least, any irregularity in this course is waived by a failure to object thereto.¹⁶ The requirement that the defendant be furnished a "list of the witnesses" refers to those cases in which he is proceeded against by indictment, as there is no requirement that an information be indorsed with the names of witnesses.¹⁷ Section 869 of the Penal Code requires also that the defendant be furnished a copy of the transcript of the testimony at the preliminary examination, if it was taken down by a reporter.¹⁸ It is not necessary that the record show that an interpreter was appointed.¹⁹ The Penal Code further contains particular provisions as to proceedings when the defendant is not indicted by his true name.²⁰

"If, on the arraignment, the defendant requires it, he must be allowed a reasonable time, not less than one day, in which to answer the indictment or information. He

13. Pen. Code, § 988; *People v. Miller*, 137 Cal. 642, 70 Pac. 735 (presuming on appeal that the question was asked).

14. *People v. Lightner*, 49 Cal. 228. It was so decided in this case, but in *People v. Walker*, 132 Cal. 137, 41, 64 Pac. 133, it was pointed out that there was in fact a substantial compliance with the statute as a copy was delivered after arraignment.

15. *People v. Goldenson*, 76 Cal. 328, 347, 19 Pac. 161.

16. *People v. Suesser*, 142 Cal.

355, 75 Pac. 1093. See, also, *People v. Corbett*, 28 Cal. 328, where the court says that by a plea of guilty defects in the arraignment or an omission to arraign are waived.

17. *People v. Neary*, 104 Cal. 373, 37 Pac. 943. See INDICTMENT AND INFORMATION.

18. See *supra*, § 118, where this provision is quoted.

19. *People v. Samario*, 84 Cal. 484, 24 Pac. 283.

20. Pen. Code, § 989.

may, in answer to the arraignment, move to set aside, demur, or plead to the indictment or information."¹ The proceedings upon demurrer and motion in arrest are discussed elsewhere in this work.² So we proceed at once to a consideration of the plea.

N. PLEA.

§ 129. Necessity for Plea Generally.—A trial cannot be had in a criminal case until a plea is entered, for until then there is no issue.³ A failure to secure defendant's plea renders a judgment erroneous even after verdict,⁴ notwithstanding the defendant may have been brought into court and tried without objection.⁵ Although it is sometimes held in civil cases that when all the parties have gone to trial without objection as though a certain issue were made in the pleadings, they cannot afterwards claim that there was error in that no such issue was made in the pleadings,⁶ this rule has no application to criminal prosecutions.⁷ Yet, under the constitution, an omission to plead would not be ground for reversal if, in the opinion of the appellate court from an examination of the entire case, a miscarriage of justice did not result.⁸

§ 130. After Demurrer Overruled or Amendment.—If a demurrer to an indictment or information is disallowed,

1. Pen. Code, § 990.

2. See INDICTMENT AND INFORMATION as to motions to set aside and demurrers.

3. *People v. Monaghan*, 102 Cal. 229, 36 Pac. 511; *People v. Lightner*, 49 Cal. 226; *People v. Tomsky*, 20 Cal. App. 672, 130 Pac. 184.

4. *People v. Monaghan*, 102 Cal. 229, 36 Pac. 511; *People v. Gaines*, 52 Cal. 479; *People v. Corbett*, 28

Cal. 326, holding that a want of plea is not cured by a motion by a defendant for a separate trial, or by the introduction of witnesses by him or an argument of the case.

5. *People v. Monaghan*, 102 Cal. 229, 36 Pac. 511.

6. See APPEAL AND ERROR, vol. 2, pp. 239, 246.

7. *People v. Monaghan*, 102 Cal. 229, 36 Pac. 511.

8. See *infra*, § 462.

“the court must permit the defendant, at his election to plead, which he must do forthwith, or at such time as the court may direct. If he does not plead, judgment may be pronounced against him.”⁹ This provision does not deprive the defendant of his constitutional right to a trial by jury.¹⁰ While the court may proceed as upon a conviction or plea of guilty and pronounce judgment, if, after demurrer overruled, the defendant stands mute and fails or refuses to proceed, the defendant is not prejudiced if instead thereof the court directs a plea of not guilty to be entered.¹¹ But until this is done, there is no issue to be tried, though it seems that if a plea of not guilty was withdrawn to enable the defendant to demur, the original plea may, after the ruling on demurrer, be treated as restored.¹²

After amendment.—If an indictment or information stating no offense is amended at the trial to state an offense, the defendant must be arraigned and called on to plead to the amended information, as it must be treated as an original information then for the first time presented.¹³

§ 131. Form and Sufficiency Generally.—The Penal Code contains the following provisions:

“The only pleading on the part of the defendant is either a demurrer or a plea.”¹⁴

“There are four kinds of pleas to an indictment or information. A plea of: 1. Guilty. 2. Not Guilty. 3. A former judgment of conviction or acquittal of the offense charged, which may be pleaded either with or without the plea of not guilty. 4. Once in jeopardy.”¹⁵

9. Pen. Code, § 1011. The Criminal Practice Act contained the same provision.

10. *People v. King*, 28 Cal. 265.

11. *People v. Jocelyn*, 29 Cal. 562; *People v. King*, 28 Cal. 265.

12. *People v. Monaghan*, 102 Cal. 229, 36 Pac. 511, but holding also

that when the record shows that time was given the defendant to plead, no presumption that the original plea was restored can arise.

13. *People v. Moody*, 69 Cal. 184, 10 Pac. 392.

14. Pen. Code, § 1002.

15. Pen. Code, § 1016.

“Every plea must be oral,¹⁶ and entered upon the minutes of the court in substantially the following form: 1. If the defendant plead guilty: ‘The defendant pleads that he is guilty of the offense charged.’ 2. If he plead not guilty: ‘The defendant pleads that he is not guilty of the offense charged.’ ”¹⁷

A substantial compliance with the form prescribed in the Penal Code is necessary,¹⁸ and sufficient.¹⁹ A plea is not objectionable merely because it contains more than the law demands.²⁰ An entry that the defendant interposed a plea of not guilty of the charge “as stated in the information” is not objectionable, as the defendant is not required to plead to a charge elsewhere.¹ The entry of the plea of one of several codefendants who were granted separate trials need not give the name of the defendant pleading, as the entry will be taken as referring to the defendant in whose judgment-roll it appears.²

§ 132. Once in Jeopardy—Former Conviction or Acquittal.—The defenses of once in jeopardy and former conviction or acquittal are not available under a plea of not guilty, but must be raised by special pleas,³ or they will be regarded as waived.⁴ Thus, where a new trial had been

16. *People v. Johnson*, 47 Cal. 122, holding the court may refuse to allow a defendant to file a written plea.

17. Pen. Code, § 1017. See *infra*, § 568.

The portion of the latter code section prescribing the form of pleas of once in jeopardy and of former conviction and acquittal is quoted in the next section following.

18. *People v. O'Leary*, 77 Cal. 30, 18 Pac. 856.

19. *People v. Wallace*, 101 Cal. 281, 35 Pac. 862.

20. *People v. Disperati*, 11 Cal. App. 469, 477, 105 Pac. 617.

1. *People v. Wallace*, 101 Cal. 281, 35 Pac. 862.

2. *People v. Kelly*, 120 Cal. 271, 52 Pac. 587.

3. *People v. Bennett*, 114 Cal. 56, 45 Pac. 1013; *People v. Lee Yune Chong*, 94 Cal. 386, 29 Pac. 776; *People v. Olwell*, 28 Cal. 456, 462. But see *People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436, decided before 1880 and before a plea of once in jeopardy was provided for by law.

4. *Rebstock v. Superior Court*, 148 Cal. 308, 315, 80 Pac. 65; *People v. Solani*, 6 Cal. App. 103, 91 Pac. 654.

granted after a conviction of a lesser crime included in that charged, thus acquitting the defendant of the higher crime, it is no violation of the prohibition against double jeopardy to try him for the higher offense unless he pleads former conviction.⁵ This rule seems to be equally applicable when both trials are had in the same court and before the same judge.⁶ The defense of once in jeopardy cannot be raised for the first time upon a motion for a new trial,⁷ and a trial court may, in its discretion, refuse an insufficient plea first offered while the instructions are being given, or a sufficient plea offered when the jury were about to return their verdict.⁸ But if a new juror is sworn after the discharge of a sick juror, a request of the defendant to have pleas of former acquittal or once in jeopardy entered, made before the commencement of the trial de novo, should be granted.⁹

Form of plea.—The pleas of former conviction or acquittal and once in jeopardy must be made and entered substantially in the form prescribed by the code,¹⁰ which is as follows: “The defendant pleads that he has been once in jeopardy for the offense charged, (specifying the time, place, and court).”¹¹ “The defendant pleads that he

5. *People v. McFarlane*, 138 Cal. 481, 61 L. R. A. 245, 71 Pac. 568, 72 Pac. 48; *People v. Bennett*, 114 Cal. 56, 45 Pac. 1013; S. C., 5 Cal. Unrep. 824, 50 Pac. 703; 84 Fed. 324; *People v. Solani*, 6 Cal. App. 103, 91 Pac. 654.

6. *People v. Bennett*, 114 Cal. 58, 45 Pac. 1013; *People v. Solani*, 6 Cal. App. 103, 91 Pac. 654. But in *In re Bennett*, 84 Fed. 324, it was held that when the defendant is again tried in the court in which he was first tried, the court is bound to take notice of every step shown by its own record to have taken place in the prosecution of the case before it, including the

verdict on the former trial, and the court had no jurisdiction to retry the prisoner for the offense of which he was acquitted, though no special plea was entered.

7. *People v. Bennett*, 114 Cal. 56, 45 Pac. 1013.

8. *People v. Solani*, 6 Cal. App. 103, 91 Pac. 654.

9. *People v. Stewart*, 64 Cal. 60, 28 Pac. 112.

10. Pen. Code, § 1017; *People v. O'Leary*, 77 Cal. 30, 18 Pac. 856.

11. *People v. Disperati*, 11 Cal. App. 469, 477, 105 Pac. 617, holding the plea is not objectionable because instead of specifying simply the time, place and court, it sets

has already been convicted (or acquitted) of the offense charged by the judgment of the court of — (naming it), rendered at — (naming the place), on the — day of —, '12

Separate trial of plea.—Where upon the first trial of a defendant the jury finds against a plea of former conviction or once in jeopardy, it is not necessary on a subsequent trial of the same charge that the plea should be resubmitted to the jury, as the plea is separate and apart from a plea of guilty, and there is nothing which precludes its being tried separately.¹³

§ 133. **How Plea is Put in.**—The plea on the part of the defendant “must be put in, in open court, either at the time of the arraignment or at such other time as may be allowed to the defendant for that purpose.”¹⁴ “A plea of guilty can be put in by the defendant himself only in open court, unless upon indictment or information against a corporation, in which case it may be put in by counsel.”¹⁵ “If the defendant refuses to answer the indictment or information by demurrer or plea, a plea of not guilty must be entered.”¹⁶

forth all the facts including the specific times, places and courts in any way relating to the plea.

12. *People v. Solani*, 6 Cal. App. 103, 91 Pac. 654, holding a plea of former conviction or acquittal is defective which fails to state when the judgment was rendered.

13. *People v. Majors*, 65 Cal. 138, 148, 52 Am. Rep. 295, 3 Pac. 597.

This holding does not preclude a review of any error in the trial of the special plea, since after the trial of all the issues the defendant may move for a new trial and assign the errors, if any,

occurring in the trial of any or all of the issues. *People v. Smith*, 121 Cal. 356, 53 Pac. 802.

14. Pen. Code, § 1003. See *supra*, § 128, as to reasonable time to plead.

15. Pen. Code, § 1018; *People v. McCrory*, 41 Cal. 458.

16. Pen. Code, § 1024; *People v. Coleman*, 145 Cal. 609, 79 Pac. 283; *People v. Bowman*, 81 Cal. 566, 22 Pac. 917; *People v. King*, 28 Cal. 266.

The Criminal Practice Act contained provisions to the same effect.

While by the very terms of the statute a plea of guilty must be entered by a defendant personally, it is not reversible error if a plea of not guilty be entered in the defendant's presence by his counsel, for even if it should be held that the plea is void, the defendant is in no worse position than he would be if he had stood mute and a plea was properly entered.¹⁷

§ 134. Issues Raised by Pleas—Defenses.—A plea of guilty includes an admission of every element entering into the offense charged¹⁸ and does not raise any issue of fact.¹⁹ "The plea of not guilty puts in issue every material allegation of the indictment or information";²⁰ that is to say, all the allegations of facts essential to the offense and to guilt,¹ including the allegation of *locus delicti*² and the identity of the defendant with the person who committed the crime.³

Defenses and objections available.—"All matters of fact tending to establish a defense, other than one specified in the third and fourth subdivisions of section ten hundred and sixteen [that is to say, the defenses of former con-

17. *People v. Emerson*, 130 Cal. 562, 569, 62 Pac. 1069; *People v. Samario*, 84 Cal. 484, 24 Pac. 283; *People v. Cline*, 83 Cal. 374, 23 Pac. 391; *People v. Bowman*, 81 Cal. 566, 22 Pac. 917 (in which the court said: "Conceding that the plea by counsel amounted to no plea at all," the case then stood as if the defendant remained mute); *People v. McCoy*, 71 Cal. 395, 12 Pac. 272; *People v. Thompson*, 4 Cal. 238.

18. *Ex parte Hayden*, 12 Cal. App. 145, 106 Pac. 893.

19. *People v. Tucker*, 115 Cal. 337, 47 Pac. 111.

20. Pen. Code, § 1019; *People v.*

Reed, 70 Cal. 529, 11 Pac. 676; *People v. Danford*, 14 Cal. App. 442, 112 Pac. 474 (and holding a dismissal of one count of the information did not leave the case without an issue, where the remaining counts were in no wise dependent on those dismissed).

1. *People v. Oppenheimer*, 156 Cal. 733, 106 Pac. 74.

2. *People v. Aleck*, 61 Cal. 137; *People v. Bevans*, 52 Cal. 470; *People v. Parks*, 44 Cal. 105; *People v. Meseros*, 16 Cal. App. 278, 116 Pac. 679.

3. *People v. Wong Sang Lung*, 3 Cal. App. 221, 84 Pac. 843.

viction or acquittal and once in jeopardy], may be given in evidence under the plea of not guilty."⁴

Under this plea a defendant may not only prove that he was not guilty of any connection whatever with the commission of the crime,⁵ but he may also avail himself of the defense of insanity,⁶ of the bar of the statute of limitations,⁷ of immunity from prosecution,⁸ of the insufficiency of the indictment or information,⁹ and of justification or excuse.¹⁰ He may also avail himself of objections to jurisdiction, for example, the objection that the offense was not committed in the county in which he is being tried.¹¹

§ 135. Withdrawal of Plea.—The defendant has a right, at any time before trial, to apply to the court for leave to withdraw his plea of not guilty, for the purpose of demurring or moving to set aside the indictment or information,¹² but it is discretionary with the trial court whether the application shall be granted or refused.¹³ The defendant, when so appealing to the discretion of the court,

4. Pen. Code, § 1020; *People v. Ah Lee*, 60 Cal. 85; *People v. Collis*, 30 Cal. App. 656, 661, 159 Pac. 229.

5. *People v. Collis*, 30 Cal. App. 656, 661, 159 Pac. 229.

6. *People v. Olwell*, 28 Cal. 456, 461; *People v. Collis*, 30 Cal. App. 656, 661, 159 Pac. 229.

7. *Rebstock v. Superior Court*, 146 Cal. 308, 311, 80 Pac. 65. See INDICTMENT AND INFORMATION, as to right to present the defense by demurrer.

8. Under a plea of not guilty, a defendant may present the defense of immunity from prosecution guaranteed to witnesses in election cases by section 64 of the Penal Code. *Rebstock v. Superior Court*, 146 Cal. 306, 315, 80 Pac. 65.

9. *People v. Clarke*, 2 Cal. Unrep. 110.

10. *People v. Collis*, 30 Cal. App. 656, 661, 159 Pac. 229 (self-defense).

11. *People v. More*, 68 Cal. 500, 9 Pac. 461.

12. *People v. Villarino*, 66 Cal. 228, 5 Pac. 154. See *People v. King*, 28 Cal. 265, 273, holding the motion was properly denied because a motion to set aside the accusation cannot be made after plea. See *infra*, § 613, change of plea after reversal.

13. *People v. Staples*, 149 Cal. 405, 86 Pac. 886; *People v. Shem Ah Fook*, 64 Cal. 380, 1 Pac. 347; *People v. Lee*, 17 Cal. 76; *People v. Cosgrove*, 32 Cal. App. Dec. 981, 192 Pac. 165.

should make some showing of reasonable excuse for his neglect;¹⁴ and if, for example, he wishes to make a motion to set aside the indictment or information, he should make some showing by affidavit of facts or grounds upon which the motion will be based, or at least proffer a motion for filing, should the application be granted.¹⁵ After a denial of his motion the defendant cannot renew it as a matter of right, though possibly the court may permit such renewal.¹⁶

If a defendant withdraws a plea of not guilty and enters a plea of guilty, and applies for release on probation, he cannot, after a denial of his application and judgment, claim error in passing judgment because the special pleas interposed were not expressly withdrawn.¹⁷

Withdrawal of plea of guilty.—"The court may at any time before judgment, upon a plea of guilty, permit it to be withdrawn and a plea of not guilty substituted."¹⁸ An application made after the imposition of sentence ordinarily comes too late,¹⁹ but in case a plea of guilty, void because obtained by duress, is interposed, the proper procedure is by motion, supported by documentary or oral evidence, or both, to set aside the judgment and permit a withdrawal of the plea.²⁰

Whether to allow the withdrawal of a plea of guilty, under section 1018 of the Penal Code, is a matter within the sound discretion of the trial court, and its action must

14. *People v. Ronsse*, 26 Cal. App. 100, 146 Pac. 65.

15. *People v. Staples*, 149 Cal. 405, 86 Pac. 886 (a mere showing of inexperience of counsel without more is not sufficient to move the court).

16. *People v. Staples*, 149 Cal. 405, 86 Pac. 886, holding also the motion may be denied if there is a failure to show that the grounds

for setting aside the indictment stated in the renewed motion were not known at the time the first motion was made.

17. *People v. Strickler*, 167 Cal. 627, 140 Pac. 270.

18. Pen. Code, § 1018.

19. *People v. Lennox*, 67 Cal. 113, 7 Pac. 260.

20. *People v. Perez*, 9 Cal. App. 265, 98 Pac. 870.

be upheld unless an abuse of discretion is clearly shown.¹ A court should be indulgent in permitting the substitution of a plea of not guilty where it properly appears that the plea of guilty was ignorantly induced, or was made through inadvertence or without due deliberation, or was made through motives of hope or fear unduly and improperly operating upon the defendant's volition.² But the mere fact that the defendant, knowing his rights and the consequences of his act, entered the plea under a hope of leniency presents no ground for the exercise of the discretion of the court.³ If the evidence in support of the motion raises a doubt as to the sanity of the defendant at the time the plea is interposed, it would be an abuse of discretion to deny the motion.⁴

O. DISMISSAL AND DISCHARGE.

§ 136. **Dismissal and Nolle Prosequi.**—The Penal Code designates the cases in which and the proceedings by which a prosecution may be dismissed and the accused discharged without a trial, and it must be taken to exclude all other cases in which such dismissal may be granted.⁵ The code requires a dismissal, unless good

1. *People v. Bellon*, 180 Cal. 706, 182 Pac. 420 (holding a denial of the application was proper where no good reason therefor was suggested); *People v. Bostic*, 167 Cal. 754, 141 Pac. 380; *People v. Dabner*, 153 Cal. 398, 95 Pac. 880; *People v. McCrory*, 41 Cal. 458; *People v. Cosgrove*, 32 Cal. App. Dec. 981, 192 Pac. 165; *People v. Brown*, 38 Cal. App. 46, 175 Pac. 85. See *People v. Breshi*, 44 Cal. App. 307, 186 Pac. 361 (holding there was no abuse of discretion where the defendant was permitted to withdraw three pleas, but was

not permitted to withdraw a fourth, and where there was no reasonable grounds for questioning his guilt).

2. *People v. Bostic*, 167 Cal. 754, 141 Pac. 380; *People v. Dabner*, 153 Cal. 398, 95 Pac. 880; *People v. Miller*, 114 Cal. 10, 45 Pac. 986; *People v. McCrory*, 41 Cal. 458.

3. *People v. Dabner*, 153 Cal. 398, 95 Pac. 880; *People v. Miller*, 114 Cal. 10, 45 Pac. 987; *People v. Brown*, 38 Cal. App. 46, 175 Pac. 85.

4. *People v. Scott*, 59 Cal. 341.

5. *People v. Indian Peter*, 48 Cal. 250.

cause to the contrary be shown, for delay in finding or filing an indictment or information or in bringing an accused to trial,⁶ and it further provides as follows:

“The court may, either of its own motion or upon the application of the district attorney, and in furtherance of justice, order an action or indictment to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes.”⁷

“The entry of a nolle prosequi is abolished, and neither the attorney general nor the district attorney can discontinue or abandon a prosecution for a public offense, except as provided in the last section.”⁸

The legislature has not attempted to define the expression “in furtherance of justice,” used in section 1385 of the Penal Code, and therefore it is left for judicial discretion exercised in view of the constitutional rights of the defendant and interests of society to determine what particular grounds warrant the dismissal.⁹ The court may, for example, grant a dismissal on account of defects in the indictment or information,¹⁰ or because of the refusal of a district attorney to furnish the defendant a bill of particulars.¹¹ But the mere fact that a continuation of a prosecution would deplete the county treasury will not authorize its dismissal.¹² Neither is the court required to dismiss a prosecution merely because it is requested by the district attorney to do so.¹³

The law does not confer power upon a judge to dismiss an information at chambers.¹⁴ The requirement that the

6. See *infra*, § 280.

7. Pen. Code, § 1385; *People v. More*, 71 Cal. 546, 12 Pac. 631. See *supra*, § 88, effect of order as a bar to a further prosecution.

8. Pen. Code, § 1386. There were similar provisions in the Criminal Practice Act.

9. *People v. Disperati*, 11 Cal. App. 469, 105 Pac. 617.

10. *People v. March*, 6 Cal. 543.

11. See *infra*, § 269.

12. *People v. Disperati*, 11 Cal. App. 469, 105 Pac. 617.

13. *People v. Ward*, 85 Cal. 585, 24 Pac. 785.

14. *Carpenter v. Nutter*, 127 Cal. 61, 59 Pac. 301.

reasons for the dismissal be stated in the order is mandatory and compliance is not excused because the record shows the grounds upon which a dismissal was asked.¹⁵

If by mistake of the clerk a prosecution is improperly dismissed, the court has power, and it is its duty, either at the instance of the district attorney or upon its own motion, to vacate and set aside the entry of dismissal.¹⁶

Discharge upon compromise of offense.—Under sections 1377, 1378 and 1379 of the Penal Code the trial court may, except in certain cases, stay the prosecution and discharge the defendant when he is held to answer on the charge of a misdemeanor for which the injured party has a remedy by civil action and when the latter appears before trial and acknowledges satisfaction for the injury.^{16a}

§ 137. Discharge of Codefendant That He may be Witness.—“When two or more persons are included in the same charge, the court may, at any time before the defendants have gone into their defense, on the application of the district attorney, direct any defendant to be discharged, that he may be a witness for the people.”¹⁷ Likewise, “When two or more persons are included in the same indictment or information, and the court is of opinion that in regard to a particular defendant there is not sufficient evidence to put him on his defense, it must order him to be discharged before the evidence is closed, that he may be a witness for his codefendant.”¹⁸

The first section quoted contemplates a joint indictment or information of two or more persons, a joint trial under the indictment or information and an application by the district attorney before the defendants have gone into

15. *People v. Disperati*, 11 Cal. App. 469, 105 Pac. 617.

16. *People v. Curtis*, 113 Cal. 68, 45 Pac. 180.

16a. As to the offense of com-

pounding felonies, see *COMPOUNDING CRIMES*, vol. 5, p. 379.

17. Pen. Code, § 1099.

18. Pen. Code, § 1100.

There were similar provisions in the Criminal Practice Act.

their defense. Unless all these things concur, the court has no power to direct a defendant to be discharged. An application by defendant's own counsel is not equivalent to an application by the district attorney.¹⁹ The words "when two or more persons are included in the same charge" in this section mean the same as the words "when two or more persons are included in the same indictment or information" in the latter section. They do not mean parties proceeded against for the same offense, though in different informations or indictments.²⁰

19. *People v. Bruzzo*, 24 Cal. 41.

20. *Ex parte Stice*, 70 Cal. 51, 11 Pac. 459.

J. O. T.

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