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1949 California Legislation

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as evidence can point to his previous apartment or house renting for one third or one fifth of the value of his presidential home?

Following the system proposed in this comment, it is at once apparent that the state Unemployment Insurance schedules will be of no help in the case of the university president, so reliance must be had on the state income tax valuation, if any, or upon the federal alternative of two thirds of the fair market value. If the taxpayer wishes, he may rely on this figure, but in many cases even a two thirds valuation would work a hardship. In such a case, since such a valuation is conclusive only upon the government, he has the option to assemble facts to demonstrate that the value of the dwelling to him is less than the state income tax or Federal tentative evaluation.

Since the proposed system allows such revision downward of state or federal minimum compliance schedules, is it open to the criticism that some taxpayers, to whom the benefit for maintenance is above these schedules, will receive a windfall, and that a better plan would be to tax at fair market value, subject to the same opportunity for the taxpayer to obtain a reduction? The theory of the schedules is that they will approximately represent the value to most taxpayers of their room and board, and that their acceptance will alleviate the possibly severe administrative burden which valuation would otherwise present. The loss occurring because of taxpayers who are inequitably benefited by the schedules will be minute compared to that now occurring because of the "employer's convenience" doctrine. If, under the suggested system, the Bureau of Internal Revenue is able to work out a valuation system in the cases where the taxpayers do not accept the schedules, which it is convinced could be extended to all taxpayers, it would be a simple matter (probably just a change in the regulations) to eliminate the schedules and put the new plan into action.

*Russell R. Kletzing**

1949 CALIFORNIA LEGISLATION

Five important acts of the 1949 session of the legislature have been selected for discussion in this comment: The reorganization of the inferior courts, small loan legislation, the tort survival statute, the Uniform Divorce Recognition Act, and uniform acts providing for interstate compromise and arbitration of inheritance taxes. Analysis and critique of this legislation has to some extent been subordinated to the primary objective of reporting its adoption and making available materials which explain it or aid in understanding its effect.

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INFERIOR COURT REORGANIZATION

Probably the most important achievement of the 1949 legislative session was the enactment of a comprehensive reorganization of California's inferior court system.¹ If the enabling constitutional amendment is given popular approval at the 1950 general election, the plan will gradually become operative beginning January 1, 1952. The legislation is the result of extended efforts of several organizations, notably the Judicial Council of California,² the State Bar of California, the Commonwealth Club of California and the Justices' and Constables' Association.³

The plan was formulated by the judicial council upon request from the legislature.⁴ The council undertook a comprehensive survey of the inferior court structure, finding two outstanding defects—multiplicity of tribunals and duplication of their functions.⁵ There are 768 inferior courts of seven types.⁶ Many are operated on a part-time basis, presided over by lawyers with private practices or by laymen engaged in outside businesses.⁷ Each of 294 incorporated cities in which a city court is established is also served by at least one township justices' court.⁸ Uniformity in selection of judges, qualifications, salaries, court facilities and provision for clerical assistance is completely lacking.⁹

Conflicting and uncertain jurisdiction inevitably results from this maze. Jurisdiction varies from court to court both as to territory and

¹ "Inferior courts" describes all courts exercising jurisdiction inferior to the superior courts. These courts are not "inferior" in the sense that they are less important than other courts. The average citizen comes in contact with them more often than with any other court and they form a good part of his opinion of the judicial system. JUDICIAL COUNCIL OF CALIFORNIA, TWELFTH BIENNIAL REPORT (1948) 13.

² The judicial council consists of the chief justice, one associate justice of the supreme court, three justices of district courts of appeal, four judges of superior courts, one judge of a police or municipal court, and one judge of an inferior court, assigned by the chief justice. CAL. CONST. ART. VI, § 1a.

³ JUDICIAL COUNCIL OF CALIFORNIA, *op. cit. supra* note 1, 14 and notes 2 to 6 therein, inclusive.

⁴ Cal. Stats. 1947, p. 3448.

⁵ JUDICIAL COUNCIL OF CALIFORNIA, *op. cit. supra* note 1, 15.

⁶ According to the office of the judicial council, the present breakdown is as follows:

| | |
|-------------------------------------|-----|
| Municipal courts (Art. VI, Sec. 11) | 9 |
| Municipal courts (other) | 2 |
| Township justices' courts—class A | 42 |
| Township justices' courts—class B | 423 |
| City justices' courts | 4 |
| Police courts | 45 |
| City courts | 243 |

⁷ JUDICIAL COUNCIL OF CALIFORNIA, *op. cit. supra* note 1, 15.

⁸ *Id.* at 28.

⁹ *Id.* at 15. The situation in San Mateo County is used as an example. *Id.*, Exhibit 3. San Mateo County with an estimated 207,000 population supports 17 inferior courts, only one of which operates on a full-time basis. Most of the others have but one or two sessions a week.

subject matter.¹⁰ Notice must be taken of numerous sources of jurisdiction including statutes, city charters, city boundaries, county ordinances and even local customs and agreements between judges.¹¹ The superior courts are affected since their jurisdiction is primarily residual.¹²

The council concluded from its studies that:¹³

1. Unnecessary duplication of judicial functions should be eliminated and there should be both fewer courts and fewer types of courts.
2. The court structure should take into account the varying conditions in the State, both from the standpoint of geography and population, and should be adaptable to the judicial needs of both metropolitan and rural or sparsely populated areas.
3. The system should be uniform throughout the State as far as possible and responsive to changing conditions.
4. The courts should be kept close to the people in the sense of accessibility to all communities and the retention of local election of judges.
5. Reorganization should be accomplished with a minimum of disturbance to the judicial system.

The proposals were compiled into carefully drafted legislation which was adopted with minor changes.¹⁴ The legislation includes a constitutional amendment, two new acts and eight laws affecting various codes.¹⁵ The passage of the amendment will authorize measures to organize the new courts, including those already passed. The

¹⁰ *Id.* at 28.

¹¹ *Id.* at 29. Voluntary relinquishment of jurisdiction is common practice.

¹² CAL. CONST. ART VI, § 5; *In re Application of Luna* (1927) 201 Cal. 405, 412, 257 Pac. 76, 78; *Hopkins v. Anderson* (1933) 218 Cal. 62, 66, 21 P. (2d) 560, 561. *But cf. Levee v. Harrier* (1933) 217 Cal. 523, 19 P. (2d) 981.

¹³ JUDICIAL COUNCIL OF CALIFORNIA, *op. cit. supra* note 1, 15-16.

¹⁴ *Id.* at 46-68.

¹⁵ The following are the chapters of Cal. Stats. 1949 which make up the reorganization plan:

| CHAPTER | STATUTE AFFECTED | CHANGE |
|-------------|----------------------|---|
| Res. c. 153 | CAL. CONST. ART. VI | Amends §§ 1, 11, 23; repeals §§ 11a, 13. |
| c. 1286 | CAL. CODE CIV. PROC. | Amends §§ 89, 112, 396a; repeals § 81. |
| c. 1510 | New | Municipal and Justice Court Act of 1949. |
| c. 1511 | New | Provides for new judicial districts. |
| c. 1511 | CAL. GOVT. CODE | Repeals §§ 27800, 27801, 27802, 27803. |
| c. 1512 | CAL. GOVT. CODE | Amends § 1770. |
| c. 1513 | CAL. CODE CIV. PROC. | Repeals §§ 159, 159a. |
| c. 1514 | CAL. CODE CIV. PROC. | Amends § 144. |
| c. 1515 | CAL. GOVT. CODE | Amends § 26203. |
| c. 1516 | CAL. CODE CIV. PROC. | Amends § 77a. |
| c. 1516 | CAL. PEN. CODE | Amends § 1469. |
| c. 1517 | CAL. PEN. CODE | Amends §§ 1457, 1463; repeals § 1570. |
| c. 1517 | CAL. VEH. CODE | Amends § 771. |
| c. 1518 | CAL. PEN. CODE | Amends §§ 1425, 1462; adds §§ 1462.1, 1462.2. |

new courts will commence to operate on January 1, 1952 provided that the districts have been created and the number of eligible incumbent judges is less than the number of authorized new positions. In any case, no part of the old system will remain after the first Monday after January 1, 1953.

Organization.

The reorganization provides two types of inferior courts—municipal courts and justice courts.¹⁶ The territorial basis for the inferior courts will be divisions of the county called judicial districts.¹⁷ The size of a district will determine the type of court. If the district contains more than 40,000 people, its court will be a municipal court.¹⁸ If the district population is 40,000 or less, the court will be a justice court.¹⁹

The county board of supervisors will divide the county into judicial districts.²⁰ In forming districts the board may join outlying territory to a city of over 40,000 or may group small cities or small cities and unincorporated territory to create districts of over 40,000 population.²¹ A board may not divide an incorporated city so as to make it lie in more than one district.²² No two cities, each of which has a population of over 40,000 can be included in one district.²³ Existing judicial townships as of January 1, 1951 and the cities in which municipal courts are now established will constitute the judicial districts until changed by proper authority.²⁴

A few examples will illustrate the operation of the plan. In Los Angeles County, there are ten cities with populations in excess of 40,000 which will necessarily have municipal courts.²⁵ No two can

¹⁶ Cal. Stats. 1949, Res. c. 153, amending CAL. CONST. ART. VI.

¹⁷ *Ibid.*

¹⁸ *Ibid.* The City and County of San Francisco will continue to have its municipal court. Population is deemed to be as shown by the last preceding federal census. Cal. Stats. 1949, c. 1511, § 4. Provision is also made for a special census within a county or judicial district. Cal. Stats. 1949, c. 1515, amending CAL. GOV. CODE § 26203.

¹⁹ Cal. Stats. 1949, Res. c. 153.

²⁰ Cal. Stats. 1949, c. 1511, § 1.

²¹ JUDICIAL COUNCIL OF CALIFORNIA, *op. cit. supra* note 1, 17.

²² Cal. Stats. 1949, Res. c. 153, Cal. Stats. 1949, c. 1511, § 1.

²³ *Ibid.*

²⁴ Cal. Stats. 1949, c. 1511, § 2. The judicial council is to submit recommendations for consolidation or enlargement of judicial districts with a view to creating full-time judges and improving administration. *Id.* § 3. The fact that expenses will be borne by counties will no doubt influence boards of supervisors in determining districts. Cal. Stats. 1949, c. 1510, § 25.

²⁵ Alhambra, Burbank, Compton, Glendale, Inglewood, Long Beach, Los Angeles, Pasadena, Santa Monica and South Gate. The population figures used herein are based on 1948 estimates which appear in CAL. STATE CONTROLLER, ANNUAL REPORT OF FINANCIAL TRANSACTIONS OF MUNICIPALITIES AND COUNTIES OF CALIFORNIA (1948) 10. Of these cities, Compton, Inglewood, Long Beach, Los Angeles, Pasadena and Santa Monica already have municipal courts. A municipal court is scheduled to go into operation in Glendale after November 1, 1949.

be consolidated, though unincorporated areas can be included in their judicial districts. The seven cities with populations between 20,000 and 40,000 will probably request that they be made parts of judicial districts large enough to require municipal courts.²⁶ Smaller cities might prefer a justice court to incorporation into the judicial district of a larger city.

San Francisco as a city and county will continue to have a single municipal court. Alameda County includes three cities which will require municipal courts.²⁷ San Leandro and Hayward combined with a small amount of unincorporated area could make a fourth. Elsewhere in the state are ten cities²⁸ each having over 40,000 people, making a total of at least twenty-four cities entitled to municipal courts.

In addition, there are thirty-two counties each with populations over 40,000.²⁹ Thirteen contain cities in the municipal court class; the remainder can create at least one judicial district with the requisite population. Conceivably an entire county might be a municipal court judicial district, but the size of most counties makes this unlikely.³⁰ Of the nineteen counties in the 40,000 class with no city large enough for a municipal court, six have cities larger than 20,000 which could be the basis of a municipal court district.³¹ Twenty-six counties of the state cannot possibly contain a municipal court.³²

Judges of the municipal and justice courts will be elected at general elections for terms of six years.³³ Municipal court vacancies caused by death or resignation will be filled by gubernatorial appointment, while such vacancies in justice courts will be filled by appointment of the county board of supervisors.³⁴ In this respect the legislature changed the judicial council proposal which provided for the filling of all vacancies by the governor.³⁵ All judges must be electors

²⁶ Beverly Hills, Huntington Park, Lynwood, Pomona, Redondo Beach, San Gabriel and Whittier. *Ibid.*

²⁷ Alameda, Berkeley and Oakland. *Ibid.* Cal. Stats. 1949, c. 1328, provides for the establishment of a municipal court in Oakland. Operation will begin about January 1, 1950.

²⁸ Fresno, Richmond, Riverside, Sacramento, San Bernardino, San Diego, San Jose, Santa Ana, Stockton and Vallejo. CAL. STATE CONTROLLER, *op. cit. supra* note 25. Of these cities, Sacramento and San Diego have existing municipal courts.

²⁹ *Id.* at 208.

³⁰ At the present time Alpine, Mono and Del Norte counties each are single judicial districts according to the office of the judicial council.

³¹ CAL. STATE CONTROLLER, *op. cit. supra* note 25 at 10, 208.

³² *Id.* at 208.

³³ Cal. Stats. 1949, c. 1510, § 8. Terms will run from the first Monday after the first day of January following the election. No elections are to take place until 1952.

³⁴ *Id.* § 9.

³⁵ JUDICIAL COUNCIL OF CALIFORNIA, *op. cit. supra* note 1, 49.

of the judicial district in which they are elected or appointed.³⁶ Municipal court judges must have been admitted to the practice of law for at least five years;³⁷ justice court judges must either be a member of the California bar or have passed a qualifying examination under regulations to be prescribed by the judicial council.³⁸ Salaries of municipal court judges will be established by the legislature;³⁹ salaries of justice court judges are to be determined by boards of supervisors, subject to minimums prescribed by the legislature.⁴⁰

Potential opposition from within the existing court structure resulted in compromises which derogate from a sound judicial system. Instead of itself creating the judicial districts with an eye to economy and integration, the legislature left this to the county boards of supervisors with the judicial council making "recommendations."⁴¹

Incumbent judges of municipal courts are to be blanketed in for their full terms.⁴² So far as there are jobs to go around, "qualified" incumbents of existing courts will become judges of the new municipal and justice courts until their successors are elected.⁴³ An elected judge or justice of an existing court who has served in that capacity by election or appointment for five consecutive years immediately preceding the effective date of the amendment is eligible to become a judge of a municipal court which may supersede his court without regard for the five year admission to practice requirement.⁴⁴ Practicing attorneys will certainly be alarmed at the prospect that laymen may be deciding \$2,000 controversies from the municipal bench. The requirement that a justice court judge be either admitted to the bar or have passed a qualifying examination is waived for those present in-

³⁶ Cal. Stats. 1949, c. 1510, § 13. The Judicial Council version required *only* county residence. JUDICIAL COUNCIL OF CALIFORNIA, *op. cit. supra* note 1, 51.

³⁷ Cal. Stats. 1949, Res. c. 153. This is not a new requirement. There is an exception discussed *infra* at note 44.

³⁸ Cal. Stats. 1949, c. 1510, § 13. The justice of a class A court is now required to have practiced law for two or more years. CAL. CODE CIV. PROC. § 159a.

³⁹ Cal. Stats. 1949, c. 1510, § 30.

⁴⁰ *Id.* § 36.

⁴¹ See discussion at note 24 *supra*. However, it might be argued that there is some merit to the traditional districting by supervisors, in that proper districting requires knowledge of local conditions and the body which foots the bill should have the power to fix and alter boundaries.

⁴² Cal. Stats. 1949, c. 1510, § 3.

⁴³ *Id.* § 2.

⁴⁴ Cal. Stats. 1949, Res. c. 153. The exception to the five year admission to practice requirement applies only to incumbents who are elected to the municipal court at the initial election under the new system and continue to be reelected for consecutive terms. According to the office of the judicial council there are only four or five cases in which this can happen. The exception did not appear in the judicial council draft. There is a similar exemption under existing law from the two year admission to practice law requirement for incumbents of Class A justices' courts. CAL. CODE CIV. PROC. § 159a.

cumbents who are elected at the first election of judges under the new system or seek reelection to such office.⁴⁵

Jurisdiction.

The new legislation provides that the civil jurisdiction of the new municipal courts will be state-wide in civil cases involving \$2,000 or less.⁴⁶ However, a later enactment effective October 1, 1949, has raised the maximum jurisdictional amount to \$3,000.⁴⁷ Since the reorganization plan including jurisdictional changes is not operative until January 1, 1952, the next session of the legislature will have time to clarify the ambiguity between the two sections. The civil jurisdiction of the justice courts will be that of existing class B courts with the maximum raised to \$500.⁴⁸ The jurisdiction of both courts continues to be exclusive of that of the superior court.⁴⁹ Small claims will be handled as before with jurisdiction increased from \$50 to \$100 effective October 1, 1949.⁵⁰

Venue provisions in civil cases continue unchanged. If venue is properly laid in a judicial district the court of which lacks jurisdiction, plaintiff may proceed in any court in the county having jurisdiction.⁵¹ For example, a \$600 claim, properly triable in a particular justice court district of Los Angeles County but for lack of jurisdiction, could properly be commenced in any one of a dozen municipal courts in the county. The trial judge retains the power to order a change of venue for the convenience of witnesses and to promote justice.⁵²

The criminal jurisdiction of the justice court includes misdemeanors committed within the county which are punishable by a maximum fine of \$1,000, imprisonment for six months, or both, or misdemeanors under Penal Code, Section 270.⁵³ The municipal court has county-wide jurisdiction of all misdemeanors, including concurrent jurisdic-

⁴⁵ Cal. Stats. 1949, c. 1510, § 13.

Provisions for court personnel, support, housing and distribution of fines and forfeitures will not be discussed. Applicable provisions are Cal. Stats. 1949, c. 1510, c. 1514, c. 1517.

⁴⁶ Cal. Stats. 1949, c. 1519, amending CAL. CODE CIV. PROC. § 89.

⁴⁷ Cal. Stats. 1949, c. 1519.

⁴⁸ Cal. Stats. 1949, c. 1286, amending CAL. CODE CIV. PROC. § 112.

⁴⁹ CAL. CONST. ART. VI, § 5 is unchanged.

⁵⁰ Cal. Stats. 1949, c. 1510, § 15; CAL. CODE CIV. PROC. § 117 as amended by Cal. Stats. 1949, c. 451. This change was not part of the judicial council plan.

⁵¹ CAL. CODE CIV. PROC. §§ 392, 393, 394, 395. However, in an action within the subject matter jurisdiction of a justice court (whether commenced in a municipal or justice court), plaintiff must state facts from which it may be determined which is the proper court for trial, and if the facts show the court in which the action was commenced was not the proper court, the court must on its own motion or that of the defendant transfer the case to the proper court. CAL. CODE CIV. PROC. § 396a as amended by Cal. Stats. 1949, c. 1286.

⁵² CAL. CODE CIV. PROC. § 397.

⁵³ Cal. Stats. 1949, c. 1518, amending CAL. PEN. CODE § 1425. The legislature also amended § 1425 in other respects, by Cal. Stats. 1949, c. 766. Chapter 766 was signed by the Governor prior to chapter 1518.

tion with the justice court in the cases mentioned above.⁵⁴ Each type of court will have exclusive jurisdiction over cases involving violation of ordinances of cities or towns within the district of the court.⁵⁵ The proper court for the trial of misdemeanors is the municipal or justice court having jurisdiction of the subject matter within the district where the offense was committed, otherwise the court having jurisdiction of the subject matter "nearest to the place where the offense was committed."⁵⁶ The reorganization plan makes no provision for the publication of information revealing the boundaries of judicial districts. Unless the legislature acts to make such information available, counsel seeking to determine the proper venue may have to consult the county ordinances.

No change has been made in the existing law providing that appeals are taken from inferior courts to the superior courts for final decision.⁵⁷ If a county has a municipal court and its superior court employs three or more judges, the county will have an appellate department of the superior court.⁵⁸ Thus superior court judges who are elected to be trial judges will continue to hear appeals from lower courts and render judgment thereon.⁵⁹

At the present time and under the new plan, the type of court to which an appeal is taken depends upon the county of trial, not upon the type or size of the claim. In most counties, a \$600 claim is sued in the superior court and is appealable to the district court of appeal and perhaps to the supreme court. But the same action, if begun in a populous county, starts in a municipal court and ends in the superior court.

The judicial council is developing a proposal allowing a permissive

⁵⁴ Cal. Stats. 1949, c. 1518, amending CAL. PEN. CODE § 1462 and new § 1462.1.

⁵⁵ *Id.* amended §§ 1425, 1462.

⁵⁶ *Id.* adding CAL. PEN. CODE § 1462.2. This is a new provision.

⁵⁷ CAL. CONST. ART. VI, §§ 4, 4a, 5; *Redlands Sch. Dist. v. Superior Court* (1942) 20 Cal. (2d) 348, 125 P. (2d) 490.

⁵⁸ Cal. Stats. 1949, c. 1516, amending CAL. CODE CIV. PROC. § 77a. At present twelve counties, each of which has over 40,000 population, have three or more superior court judges. Absent an appellate department the provisions of CAL. CODE CIV. PROC. §§ 973 to 982 inclusive govern appeals from justice courts; § 976 provides for a trial *de novo* where the appeal is on questions of fact or questions of law and fact. Appeals from municipal courts are controlled by CAL. CODE CIV. PROC. §§ 983 to 988 inclusive.

⁵⁹ Ordinarily such cases may not be appealed to the district court of appeal or the supreme court, though under certain circumstances they may be reviewed through use of extraordinary writs. Goldberg, *The Extraordinary Writs and the Review of Inferior Court Judgments* (1948) 36 CALIF. L. REV. 558; Comment (1948) 36 CALIF. L. REV. 75. Since such judgments of superior courts are "final judgments or decrees rendered by the highest court of a State in which a decision could be had," they may be reviewed in the Supreme Court of the United States, which must then proceed without any authoritative declaration of the California law. 28 U. S. C. § 1257 (1948); e.g. *Edwards v. California* (1941) 314 U. S. 160.

appeal from the superior court to the district court of appeal on questions of law, which may alleviate these unfortunate conditions.⁶⁰

PERSONAL PROPERTY BROKERS ACT

Another significant statute has closed a major loophole in the Personal Property Brokers Act.⁶¹ This Act, which regulates the making of small loans secured by personal property or wages,⁶² had previously permitted unlimited interest and charges on loans in excess of \$300.⁶³

California efforts to control commercial loans secured by personal property date from 1905 when two statutes were passed and quickly declared unconstitutional.⁶⁴ The next law, the Personal Property Brokers Act of 1909 was upheld.⁶⁵ In 1918 an initiative Usury Law was approved which purported to limit all forms of interest and brokerage charges on loans.⁶⁶ The provisions regulating brokerage charges were declared invalid,⁶⁷ and the notorious "brokerage system" developed. Loans were made only if the prospective borrower was recommended by a broker; the broker charged a heavy fee for his services, sometimes amounting to 100% per annum.⁶⁸ The 1931 revision of the Act failed to remedy the situation because its rate-fixing provisions were held to conflict with the 1918 Usury Law.⁶⁹

In 1934, to correct the rampant usury that followed, the Constitution was amended by Article XX, Section 22, which freed broad classes of lenders from any interest or charge limitations, but gave the legislature power to regulate the exempt lenders. The legislature

⁶⁰ JUDICIAL COUNCIL OF CALIFORNIA, *op. cit. supra* note 1, 20.

⁶¹ 2 CAL. GEN. LAWS (Deering's) Act 5825 (2d).

⁶² *Id.* § 2.

⁶³ *Id.* § 17. Other types of small loan laws are discussed in Stone, *Small Loans in California* (1941) 29 CALIF. L. REV. 332.

⁶⁴ Cal. Stats. 1905, pp. 422, 711; *Ex parte Sohncke* (1905) 148 Cal. 262, 82 Pac. 956. There had been earlier legislation dealing with pawnbrokers. See generally Stone, *supra* note 63; Stone and Thomas, *California's Legislature Faces the Small Loan Problem* (1939) 27 CALIF. L. REV. 286; ROBINSON AND NUGENT, *REGULATION OF THE SMALL LOAN BUSINESS* (1935).

⁶⁵ Cal. Stats. 1909, p. 969; *In re Stephan* (1915) 170 Cal. 48, 148 Pac. 196; *Eaker v. Bryant* (1914) 24 Cal. App. 87, 140 Pac. 310, *hearing denied*.

⁶⁶ Cal. Stats. 1919, p. lxxxiii.

⁶⁷ *Wallace v. Zinman* (1927) 200 Cal. 585, 254 Pac. 946.

⁶⁸ Stone *supra* note 63 at 337. Stone found one man who had borrowed \$90, repaid \$98 during the course of a year and still owed the original \$90 at the end of the year. Another borrowed \$50 paying \$5 charges in advance for two weeks. At the end of two weeks he tried to repay part of the loan, but the broker refused. The borrower renewed the loan for two weeks by paying another \$5. He never was able to repay the loan at one time. After 72 weeks he had paid \$180 in interest and still owed the original \$50. Stone, *The Need for Regulation of Consumers Credit* in PROCEEDINGS OF THE CONFERENCE ON CONSUMERS CREDIT. (1940 Univ. of Washington) 64.

⁶⁹ Cal. Stats. 1931, c. 273; *Beneficial Loan Soc. v. Haight* (1932) 215 Cal. 506, 11 P. (2d) 857; CAL. CONST. ART. IV, § 1. *But cf. In re Halck* (1932) 215 Cal. 500, 11 P. (2d) 389, which upheld the licensing requirements of the 1931 law.

was slow to act and the supreme court soon declared that "no law of this state . . . limits the rate of interest which may be charged by personal property brokers."⁷⁰

Finally a referendum in 1939 completely revised the Personal Property Brokers Act and was promptly held constitutional.⁷¹ The then attorney general, Earl Warren, promised that the new act would control the "loan sharks" whom he denounced as a "scourge upon our state."⁷² This act was a notable advance toward the control of usury, but it soon became apparent that the Act contained a flaw in that it lacked any express limit on interest or charges on loans over \$300.⁷³ The \$300 figure was taken from the model small loan law of the Russell Sage Foundation, but the draftsmen of the legislation omitted the part of the model act which prohibited any loans by licensees in excess of \$300.⁷⁴

Early hopes that the commissioner of corporations, charged with administering the Act, would revoke the licenses of lenders who made loans over \$300 to evade interest provisions were blasted by opinions of the attorney general which, with one exception,⁷⁵ advised the commissioner that he had no power to limit charges on loans over \$300.⁷⁶ In the latest opinion the attorney general ruled that the commissioner could neither fix the charges nor indirectly coerce licensees by use of his power to revoke licenses.⁷⁷ These opinions were confirmed when the supreme court, in *Carter v. Seaboard Finance Co.*, held that it was not usury under Article XX, Section 22 of the Constitution to charge more than the constitutional rate on that portion of a loan over \$300.⁷⁸

After the *Carter* case had been heard in the district court of appeal, Attorney General Houser assigned George W. Rochester, a Los Angeles attorney, to study and report on the small loan situation. The Rochester report, published in the Assembly as House Resolution

⁷⁰ *Matulich v. Marlo Inv. Co.* (1936) 7 Cal. (2d) 374, 60 P. (2d) 842; *Wolf v. Pacific Southwest Discount Corp.* (1937) 10 Cal. (2d) 183, 74 P. (2d) 263. The court made it clear that the legislature had the power to correct the situation.

⁷¹ Cal. Stats. 1939, c. 1044; *In re Fuller* (1940) 15 Cal. (2d) 425, 102 P. (2d) 321.

⁷² ASSEMBLY DAILY J. (1939) 918-919.

⁷³ Section 17 of the Act provided for charges not to exceed 2½ per cent per month (2 per cent if insured) on the balances of \$100 or less, and 2 per cent per month on the next \$200 of the balance. Cal. Stats. 1939, p. 2881.

⁷⁴ Ewart, *California Leads the Way in Small Loan Legislation* (1947) 20 So. CALIF. L. REV. 172. The Russell Sage Foundation, a social welfare research institution, published the first draft of its uniform law in 1916 and has revised it several times since. Stone and Thomas, *supra* note 4 at note 8.

⁷⁵ 1 OPS. CAL. ATTY. GEN. 279 (1943).

⁷⁶ *Carter v. Seaboard Finance Co.* (1949) 33 Cal. (2d) 564, 584, 203 P. (2d) 758, 771 states that there were frequent opinions of the Attorney General to this effect. Only two appear in the bound series of such opinions. 8 OPS. CAL. ATTY. GEN. 137 (1946); 11 *Id.* 105 (1948).

⁷⁷ *Ibid.*

⁷⁸ *Supra* note 76 at 585, 203 P. (2d) at 772.

Number 40, deplored the discrimination of a law which exempted personal property brokers from interest limitations on loans over \$300, while other lenders were limited to 10% per annum.⁷⁹ The report estimated that 75% of the loans made by personal property brokers exceeded \$300, and recommended a limit of \$750 on such loans.⁸⁰

The legislative response was to adopt a new scale of maximum charges for loans made by personal property brokers effective October 1, 1949. The charges must not exceed 2½% per month on that part of the unpaid principal balance to and including \$100;⁸¹ 2% per month on that portion between \$100 and \$500; and ½ of 1% per month on any remainder in excess of \$500.⁸² Loans in excess of \$5000 are exempt from the interest limitations of the Act.⁸³

This brief history has shown some of the many difficulties that blocked the way to the present Personal Property Brokers Act. An evaluation of the Act must take certain factors into consideration.

Freedom of contract has never produced satisfactory conditions in the small loan field.⁸⁴ Regulation is imperative, despite the difficult

⁷⁹ ASSEMBLY DAILY J. (1949) 385-387.

⁸⁰ The records of the Commissioner show that three-fourths of the total dollar value of loans made in 1947 exceeded \$300. The gradual increase in the number of loans over \$300 is shown by the following table computed from CAL. DIV. OF CORPORATIONS, ANNUAL REPORT UPON OPERATIONS OF LICENSED FINANCE COMPANIES (1947):

| Year | Percentage of all loans | | Average Loan |
|------|-------------------------|------------|--------------|
| | Under \$300 | Over \$300 | |
| 1942 | 84.90 | 15.10 | \$196 |
| 1943 | 80.77 | 19.23 | 226 |
| 1944 | 72.27 | 27.73 | 292 |
| 1945 | 65.83 | 34.17 | 345 |
| 1946 | 61.29 | 38.71 | 387 |
| 1947 | 58.94 | 41.06 | 397 |

⁸¹ Charges on the first \$100 cannot exceed 2% per month if the property securing the loan is insured. Cal. Stats. 1949, c. 1033, § 4.

⁸² *Ibid.* The \$500 change-over point was a compromise. The bill as recommended by the Assembly Committee on Finance and Insurance provided for a change-over point of \$750. A. B. 2309 as amended April 13, 1949. When it reached the floor of the assembly, an attempt to reduce the figure to \$300 was defeated by a vote of 45 to 21, but a subsequent amendment reducing the figure to \$500 carried by a vote of 46 to 27. ASSEMBLY DAILY J. (1949) 2901. Public apathy toward the interplay of hidden forces which produced the \$500 compromise was in marked contrast to the memorable crusade which led to the passage of the 1939 Act. There were journalistic mutterings about an inquiry the District Attorney of Sacramento County was making into "lobbying irregularities," because of the efforts of "certain Southern California loan company representatives" to kill the bill. The press reported that the "responsible" loan companies favored the \$750 figure, but that because of reports of skulduggery they decided to accept the compromise. Bebrens, *Bills on Small Loans* . . . S. F. Chronicle, May 29, 1949. Fears were expressed that the bill might be allowed to die, but it passed by an overwhelming vote of 66 to 2 in the assembly and 32 to 0 in the senate. ASSEMBLY DAILY J. (1949) 3280; SENATE DAILY J. (1949) 3183.

⁸³ Cal. Stats. 1949, c. 1033 § 2.2.

⁸⁴ ROBINSON AND NUGENT, *op. cit. supra* note 64 at 245. See discussion of possible rate-fixing devices at 266-270.

considerations which must be weighed in rate-fixing. Small loans are generally consumer loans, based on inadequate and unproductive security, and are often made to meet emergencies such as unemployment, illness, death or accumulated debts.⁸⁵ The maximum rate, which tends to become also the minimum, must make lending profitable and yet not be so high as to encourage loans to persons who are unjustifiable risks. If maximum rates are too low to attract legitimate lenders, bootleggers may supply the demand, charging all the traffic will bear and employing harsh methods of collection.⁸⁶

Are the maximum monthly charges of the new act high enough to keep out bootleggers? The Los Angeles Better Business Bureau reports that the "extremely few customers . . . who are coming to us these days regarding small loan companies, make it apparent that . . . usury in California is at a very low ebb." Contrast this with conditions prior to 1939 when the Bureau "was receiving a constant stream of complaints regarding small loans."⁸⁷ Since most bootlegging is in very small loans it seems unlikely that the low interest rate on loans in excess of \$500 will result in any influx of bootleggers. At the same time it seems improbable that there will be a significant decrease in the number of \$500 loans, at least while the licensees are enjoying substantial profits.

Are small loan companies making excessive profits? In 1947 the 396 licenses reported a net profit of \$2,845,000 from their lending activities, plus \$1,028,000 from other business (mainly the discounting of conditional sales contracts), or a total of \$3,873,000.⁸⁸ Individual and partnership investments plus the preferred and common stock accounts of corporations are shown at \$17,487,000;⁸⁹ so the net profits on that investment exceeded 22%. If capital surplus accounts are added to the investment there is a total of \$25,159,000 on which net profits exceed 15%.⁹⁰ Based on loans outstanding at the

⁸⁵ Watson, *Personal Finance* in PROCEEDINGS OF THE CONFERENCE ON CONSUMERS CREDIT (1940 Univ. of Washington) 52, 53.

⁸⁶ Smith, *Restating the Legal Provisions Fixing Maximum Interest and Charges on Small Loans* in A. B. A. CONFERENCE ON PERSONAL FINANCE LAW (1936) 17, 31. This was the experience in West Virginia when the rate was cut to 2% per month.

⁸⁷ Bauer, *The Better Business Bureau and Your Customer* (Jan. 1948) 32 CONSUMERS FINANCE NEWS 7.

⁸⁸ CAL. DIV. OF CORPORATIONS, *op. cit. supra* note 80 at 15.

⁸⁹ *Id.* at 11.

⁹⁰ *Ibid.* Individual reports are not available, but the following from WALKER'S MANUAL OF PACIFIC COAST SECURITIES (1948) are of interest:

| Name of Company | Stock | 1947 | % |
|--------------------------|----------------|------------|--------|
| | Capitalization | Profit | Profit |
| Budget Finance Company | \$1,009,440 | \$ 141,702 | 14 |
| Pacific Finance Corp. | 8,143,030 | 1,423,234 | 17 |
| Seaboard Finance Company | 5,735,715 | 2,170,970 | 38 |

end of 1947 totaling \$80,267,000, the licensees made a net profit of 3.54 per cent.⁹¹

Because of the 1949 Act, California compares very favorably with the thirty-one states which have small loan laws, having lower rates than twenty-six and standing about on a level with the others.⁹² Only seven states authorize loans of over \$300 under small loan legislation, five making the maximum \$500 and two \$1000.⁹³ California should be classed with the \$500 group since the maximum rate on loans beyond that amount is $\frac{5}{6}$ of 1% per month which is equivalent to the constitutional maximum of 10 % per annum.⁹⁴

A possibility for further improvement is some form of administrative rate-fixing. The commissioner of corporations could be given power to fix rates after proper hearings, using the present schedule as a maximum. Such a system would adapt itself to changing economic and social conditions,⁹⁵ but a change appears unlikely in view of the apparent power of the small loan lobby. Another method would be to authorize rate-fixing by a licensee organization subject to administrative supervision.⁹⁶

Reports conflict as to the effectiveness of the enforcement of the Act by the commissioner of corporations. According to the Los Angeles Better Business Bureau, the loan laws are good and enforcement is effective.⁹⁷ The Rochester report reaches a contrary conclusion and declares that violations are observable on cursory examination of account books, that ex-convicts are licensees, that usurious rates are being charged and that errors in calculating interest charges are frequent.⁹⁸ It further charges that licensees are accepting kickbacks from insurance companies of premiums paid to insure personal property security furnished by borrowers.⁹⁹ Most of these violations are misdemeanors under the Act, as well as grounds for revocation or suspension of license.¹⁰⁰ Rochester found an apparent uniformity of action which "constrains the inference of a possible concerted action on these violations that could sustain conspiracy complaints."¹⁰¹

⁹¹ CAL. DIV. OF CORPORATIONS, *op. cit. supra* note 80 at 9.

⁹² 32 CONSUMERS FINANCE NEWS (June 1948) 6.

⁹³ TOMPKINS, SMALL LOAN RATES (1949 Bureau of Public Administration, University of California) 2.

⁹⁴ CAL. CONST. ART. XX, § 22.

⁹⁵ See discussion in Ewart, *supra* note 74 at 188.

⁹⁶ For example, see the plan used in making insurance rates. CAL. INS. CODE, §§ 1850 *et seq.*

⁹⁷ Bauer, *supra* note 87.

⁹⁸ *Supra* note 79 at 386.

⁹⁹ *Ibid.*

¹⁰⁰ 2 CAL. GEN. LAWS (Deering's) Act 5825 (2d), §§ 13, 21.

¹⁰¹ *Supra* note 79, 386. This apparent uniformity is not surprising with 11 corporate affiliates and subsidiaries holding 248 of 396 licenses. CAL. DIV. OF CORPORATIONS, *op. cit. supra* note 80 at 1.

The primary function of the commissioner of corporations is to enforce the Corporate Securities Act, but he also enforces ten other acts, four of which are concerned with small loans.¹⁰² In this light, Rochester's proposal for a separate Industrial and Property Loan Commissioner to enforce small loan laws has merit.¹⁰³ The revenue from small loan laws, estimated at \$172,530 for the 1949-1950 fiscal year,¹⁰⁴ would amply support a loan commissioner's office, which could be made a division of the Department of Investment coordinate with the Division of Corporations. The loyalty and interest of an officer with a single function could do much to improve the enforcement of the small loan laws. A 1949 proposal along similar lines died in committee.¹⁰⁵

The commissioner reported no revocations or suspensions during the latest year for which figures have been published.¹⁰⁶ If ex-convicts are licensees and employees as reported by Rochester,¹⁰⁷ and if it is felt that such a condition is undesirable, the situation should be met by suspensions pending revocation proceedings. For necessary information the commissioner could require fingerprinting of all licensees and employees.¹⁰⁸ A firm hand in suspending and revoking licenses coupled with adequate rules and regulations should remedy the violations charged by Rochester. The success of the legislation rests with the commissioner.

SURVIVAL OF TORT ACTIONS

The legislature has passed an act providing for the survival of certain tort claims.¹⁰⁹ Prior to 1946, contract actions survived,¹¹⁰ tort

¹⁰² CAL. ADM. CODE, tit. 10, c. 3.

¹⁰³ *Supra* note 79 at 386. Rochester would provide the separate commissioner with two assistants, five investigators and ten accountants. This seems a small number properly to supervise and inspect the operations of 396 personal property brokers, not to mention licensees under other small loan laws. Yet the present budget of the Commissioner of Corporations allows him only twenty-three investigators and auditors to administer all the acts for which he is responsible. STATE OF CALIF., BUDGET FOR THE FISCAL YEAR JULY 1, 1949 TO JUNE 30, 1950, 407.

¹⁰⁴ *Id.* at 408.

¹⁰⁵ A. B. 2511.

¹⁰⁶ CAL. DIV. OF CORPORATIONS, *op. cit. supra* note 20. He excuses the delay in releasing the report as caused by the failure of licensees to fill out questionnaires which necessitated extended correspondence. *Id.* at 6. Failure to report is a violation of regulations which might be corrected by suspensions. 2 CAL. GEN. LAWS (Deering's) Act 5825 (2d) § 15.

¹⁰⁷ *Supra* note 79 at 386. Prohibition of the employment of ex-convicts should be limited to relevant categories of criminals.

¹⁰⁸ Cal. Stats. 1949, c. 1034, § 3, revising § 22 of the Personal Property Brokers Act, contains the rule-making power.

¹⁰⁹ Cal. Stats. 1949, chap. 1380. The rights created are not assignable. See generally, Livingston, *Survival of Tort Actions* (1949) 37 CALIF. L. REV. 63. This article discusses the development of the law in this field, and also proposes the legislation which was adopted.

¹¹⁰ CAL. PROB. CODE § 573; *Read v. Johnson* (1931) 213 Cal. 432, 2 P. (2d) 377.

actions involving real and personal property survived,¹¹¹ and Lord Campbell's Act,¹¹² which created a new right of action for wrongful death, had been substantially copied.¹¹³ But personal tort actions did not, under any circumstances, survive the death of either the tortfeasor or the injured party.¹¹⁴

In 1946, *Hunt v. Authier* changed this pattern.¹¹⁵ Probate Code section 574 was held to allow the heirs of a person tortiously killed to bring an action for waste and destruction of their property, property rights and estate against the estate of the deceased wrongdoer. The section was enacted in 1931, to replace Civil Code section 1584, and the word "property" was substituted for "goods and chattels." The court interpreted "property" broadly,¹¹⁶ read into the change an intention to expand the scope of the section, and allowed recovery. Great criticism ensued, the consensus being that although the result was desirable, the decision amounted to judicial legislation.¹¹⁷

The 1949 legislation, probably prompted by this decision, adds to the Civil Code section 956, which provides that a tort involving physical injury will survive the death of either the victim or the tortfeasor. If the injured party dies, the damages recoverable are limited to "loss of earnings and expenses sustained or incurred as a result of the injury by the deceased prior to his death." Neither punitive damages nor damages for pain, suffering, or disfigurement may be included. The new section is a survival statute; that is, the cause of action which the deceased had passes to his estate, although the measure of damages is restricted. The personal representative is the proper plaintiff, and the damages form part of the deceased's estate.¹¹⁸

¹¹¹ CAL. PROB. CODE § 574; *Fox v. Hale & Norcross S. M. Co.* (1895) 108 Cal. 478, 41 Pac. 328.

¹¹² Fatal Accidents Act (1846) 9 & 10 Vict. c. 93.

¹¹³ CAL. CODE CIV. PROC. §§ 376, 377.

¹¹⁴ *Clark v. Goodwin* (1915) 170 Cal. 527, 150 Pac. 357; *De La Torre v. Johnson* (1927) 200 Cal. 754, 254 Pac. 1105; *Lapique v. Dunnigan* (1930) 210 Cal. 281, 291 Pac. 184; *Phillips v. Gonzales* (1941) 44 Cal. App. (2d) 267, 112 P. (2d) 272. See generally, Winfield, *Death as Affecting Liability in Tort* (1929) 29 COL. L. REV. 239, 249; PROSSER, *HANDBOOK OF THE LAWS OF TORTS* (1941) 950.

¹¹⁵ 28 Cal. (2d) 288, 169 P. (2d) 913.

¹¹⁶ *Id.*, at 296, 169 P. (2d) at 918: "Generally, the subjects of property comprise all valuable rights or interests protected by law. . . In modern legal systems, property includes practically all valuable rights. The term is indicative and descriptive of every possible interest which a person can have, extends to every species of valuable right or interest, and comprises a vast variety of rights. The right to be protected in a person's privileges belonging to him as an individual or secured to him as a member of the commonwealth is property, as is any valuable interest in or to any object of value that a person may lawfully acquire or hold."

¹¹⁷ Note (1946) 34 CALIF. L. REV. 613; Note (1946) 26 NEB. L. REV. 128; Note (1946) 21 ST. JOHN'S L. REV. 111; Note (1947) 20 SO. CALIF. L. REV. 239.

¹¹⁸ This should be distinguished from the damages recovered under the Wrongful Death Statute, which are not part of the estate, since a new right of action is created

Code of Civil Procedure section 376 is amended to grant to the parents or guardian of an injured minor child or ward a right of action which does not abate on the death of the wrongdoer or the minor.¹¹⁹ In case of the minor's death, the damages recoverable are the same as those allowed under Civil Code section 956.

Code of Civil Procedure section 377 is amended to provide that a cause of action for wrongful death shall not abate upon the death of the wrongdoer, but an action may be brought against the personal representatives of the tortfeasor. If a tort results in both physical injury and death, the personal representative of the victim has both the surviving cause of action of the decedent under Civil Code section 956 and the wrongful death action under Code of Civil Procedure section 377. The damages recoverable under the Wrongful Death Statute, however, must not include those recoverable under Civil Code section 956. The actions may be joined, and if pending separately they must be consolidated for trial on the motion of any interested party.¹²⁰

Under Probate Code section 574, an action for waste and destruction of property may be brought by and against executors and administrators. It has been amended as follows: "This section shall not apply to an action founded upon a wrong resulting in physical injury or death of any person." The amendment overrides the precise point decided in *Hunt v. Authier* and the new legislation makes the tenuous theory of that case unnecessary.

However, the *Hunt* case implied that Probate Code section 574, as it then existed, was a general survival statute, and that any tort action, involving injury to the estate, would survive the death of either the injured party or the tortfeasor.¹²¹ Later decisions support this position; actions for physical injury,¹²² negligent failure to act on an

to be the property of the person to whom it is granted. See generally, PROSSER, *op. cit. supra* note 114 at 956.

¹¹⁹ Livingston, *supra* note 1 at 77.

¹²⁰ Probate Code section 573, specifying the actions which may be maintained by and against administrators and executors, is amended to include actions for physical injury, death, or injury to property. This provides the authority, within the Probate Code, for the actions maintainable under Civil Code section 956 and Code of Civil Procedure sections 376 and 377.

¹²¹ *Supra* note 115 at 295, 169 P. (2d) at 917. "The change of the term 'goods and chattels' to the all-inclusive word 'property' in section 574 requires that the intent of the Legislature be given its proper effect by the recognition of every property right or interest as 'property' within the meaning of the section, and that the waste or destruction thereof need not have been the result of a direct injury. That change clearly indicates an intent to place no restrictions or limitations on the types of property for the injury to which compensation may be recovered from the estate of the wrongdoer, and to make no distinction as to the method by which such destruction or injury is effected."

¹²² *Moffat v. Smith* (1949) 33 Cal. (2d) 905, 206 P. (2d) 353.

application for insurance,¹²³ slander of title,¹²⁴ wrongful death,¹²⁵ and that granted an employer under Labor Code section 3852,¹²⁶ have survived under the Hunt doctrine.

Although the amendment has limited Probate Code section 574 so that it does not apply to torts involving physical injury or death, the section says nothing of other torts. Since in the *Hunt* case, and those following it, the courts seem inclined to accept the broadest possible interpretation of "property,"¹²⁷ it is possible to argue that torts involving physical injury and death survive under Civil Code section 956 and Code of Civil Procedure sections 376 and 377, and that other torts, e.g. false imprisonment, malicious prosecution, libel and slander, survive under Probate Code section 574 and *Hunt v. Authier*. It is more probable that by limiting survival under Civil Code section 956 to torts involving physical injury, the 1949 legislation means that all other personal tort actions should abate upon the death of either party.¹²⁸

UNIFORM DIVORCE RECOGNITION ACT

California has become one of the first states to pass the Uniform Divorce Recognition Act,¹²⁹ drafted by the Commissioners on Uniform State Laws to discourage migratory divorce.¹³⁰ The legislation has been extensively discussed by Professor Marsh of the University of Washington Law School,¹³¹ to whom acknowledgement is made for many of the ideas appearing herein.

The Act appears in the California Civil Code as sections 150 to 150.4.

¹²³ *Smith v. Minnesota Mut. Life Ins. Co.* (1948) 86 Cal. App. (2d) 581, 195 P. (2d) 457.

¹²⁴ *Smith v. Stuthman* (1947) 79 Cal. App. (2d) 708, 181 P. (2d) 123.

¹²⁵ *Nash v. Wright* (1947) 82 Cal. App. (2d) 475, 186 P. (2d) 691.

¹²⁶ *City of Los Angeles v. Howard* (1947) 80 Cal. App. (2d) 728, 182 P. (2d) 278.

¹²⁷ *Supra* note 8.

¹²⁸ *Livingston, supra* note 1 at 72.

¹²⁹ Cal. Stats. 1949, c. 1292. The act became effective October 1, 1949. See generally Ruymann, *A Nevada Lawyer Looks at California's New Uniform Divorce Recognition Act* (1949) 25 L. A. BAR BUL. 39.

¹³⁰ AMERICAN BAR ASSOCIATION, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM DIVORCE RECOGNITION ACT (1948) 2: "The act has been framed upon the theory that it is desirable to discourage . . . migration in pursuit of divorce; that specific statutory refusal to recognize extra-state divorces obtained by domiciliaries of the state enacting the statute will reduce tourist divorce-seeking, particularly as the perils of that practice become generally recognized; and that recognition to extra-state divorces obtained by domiciliaries should be refused except as specifically required by the Constitution of the United States." For a discussion of the leading cases in migratory divorce field see, Paulsen, *Migratory Divorce: Chapters III and IV* (1948) 24 IND. L. J. 25.

¹³¹ Marsh, *The Uniform Divorce Recognition Act: Sections 20 and 21 of the Divorce Act of 1949* (1949) 24 WASH. L. REV. 259.

Section 150.1

A divorce obtained in another jurisdiction shall be of no force or effect in this State, if both parties to the marriage were domiciled in this State at the time the proceeding for the divorce was commenced.

Whether a California court may, consistently with the requirements of full faith and credit, decide for itself if the plaintiff in a foreign divorce proceeding was domiciled in the foreign state depends upon what transpired in that proceeding. If husband and wife did not both "participate" in the suit, a California court, by virtue of *Williams II*,¹³² has this reexamining power. But if both "participated," *Sherrer v. Sherrer*¹³³ controls, and neither may attack the decree on the ground that there was no domicile in the forum granting the divorce. To the extent that section 150.1 purports to invalidate, at the suit of one of the parties, a decree rendered under these circumstances, the section is unconstitutional. This the Commissioners recognized;¹³⁴ and the California legislature added to the Uniform Act a section which appears as Civil Code section 150.4.¹³⁵

The application of this article is limited by the requirement of the Constitution of the United States that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state.

Thus, as the concept of "participation" is expanded, the scope of section 150.1 is correspondingly restricted.¹³⁶ But *Sherrer* decided only that a party to the foreign proceeding cannot challenge the finding of domicile; there may be an as yet undefined area of suits by third parties in which section 150.1 constitutionally applies to vitiate foreign decrees in which both parties "participated."¹³⁷

¹³² *Williams v. North Carolina* (1945) 325 U.S. 226. *Accord*, *Esenwein v. Commonwealth* (1945) 325 U.S. 279; *Rice v. Rice* (1949) 69 S. Ct. 751.

¹³³ (1948) 334 U.S. 343.

¹³⁴ AMERICAN BAR ASSOCIATION, *op. cit. supra* note 130 at 9.

¹³⁵ *Ruymann, supra* note 1 at 51. "California alone adopted Section 150.4, which declares the obvious: the Act is subject to the limitations of the Federal Constitution. The weakness and futility of such legislation is officially declared in this section."

¹³⁶ In the *Sherrer* case, both husband and wife appeared in person in the Florida court, and the husband filed an answer contesting the wife's domicile in Florida. Recent California cases have tended to expand the concept of "participation." *Heuer v. Heuer* (1949) 33 Cal. (2d) 268, 201 P. (2d) 385, held that filing of an answer by the wife, whether or not the question of domicile was "actively litigated," compelled full faith and credit to the Nevada decree. *Accord, In re Schomaker's Estate* (1949) 93 A. C. A. 759, 209 P. (2d) 669, (appearance for wife by a Nevada attorney, who accepted summons and answered in her stead). The commissioners are hopeful that *Sherrer* will be strictly confined to its facts, and list nine situations which they feel might fall outside the *Sherrer* doctrine. AMERICAN BAR ASSOCIATION, *op. cit. supra* note 130 at 5.

¹³⁷ *Bane v. Bane* (1948) 80 N. Y. S. (2d) 641 (second wife could not attack); *De Marigny v. De Marigny* (1949)—N. Y. S. (2d)—(leaves question open). (1949) 1 STAN. L. REV. 333; (1947) 16 FORD. L. REV. 118. If the state is allowed to attack,

So far as section 150.1 gives California power to reexamine, in the "ex parte" cases, a finding of domicile made in a foreign court, it adds nothing to our law.¹³⁸ But the section affects the existing law in at least three significant ways. First, no California court can now recognize, under the doctrine of "comity," a foreign divorce rendered while both parties were domiciled here.¹³⁹ Second, a policy against migratory divorces underlies the statute. In view of this, does a California lawyer, knowing that his client has no intention of becoming a domiciliary of Nevada, violate his duty to the state by advising the client to seek a "Sherrer-type" Nevada divorce?¹⁴⁰ Third, California decisions hold that even if the divorce decree is not entitled to full faith and credit, a spouse who was active in arranging the divorce,¹⁴¹ or who relied upon the divorce and remarried,¹⁴² is estopped from challenging its validity. Does section 150.1 overturn these decisions by providing that decrees rendered while both parties are domiciled in California "shall be of no force and effect"? Decisions in other jurisdictions have given literal effect to the same words, regardless of the equities of the case,¹⁴³ and prediction of the result in California seems impossible.

persons getting "quickie" divorces open themselves to later prosecutions for bigamy, nonsupport, etc.

¹³⁸ *Crouch v. Crouch* (1946) 28 Cal. (2d) 243, 169 P. (2d) 897; Note (1946) 34 CALIF. L. REV. 756; Ruymann, *supra* note 1 at 49: "Thus, the first section of the new Act adds nothing to the present law except some unconstitutional provisions covered by its generality."

¹³⁹ Recognition of such decrees has not been the practice in California, and language abounds to the effect that such a decree is "void." See, e.g., *Crouch v. Crouch*, *supra* note 138 at 249, 169 P. (2d) at 900. If such a decree was "void" in California, it was because the court chose to call it so. The new act *compels* this choice. It is doubtful that the new act has any effect upon CAL. CODE CIV. PROC. § 1915 (effect of judgments of foreign countries), as interpreted in *Harlan v. Harlan* (1945) 70 Cal. App. (2d) 657, 161 P. (2d) 490. See generally, Note (1949) 34 CALIF. L. REV. 756, n. 4; Ruiz, *The Effect of Section 1915 of the Code of Civil Procedure on Migratory Divorces Procured in Foreign Countries* (1940) 13 So. CALIF. L. REV. 294.

¹⁴⁰ "Certainly, [the Act] will prevent any respectable lawyer from advising that [divorce seekers] invoke the jurisdiction of an extra-state court without change of domicile." AMERICAN BAR ASSOCIATION, *op. cit. supra* note 130 at 9. Counsel's action in advising a Mexican divorce can be unethical. *In re Anonymous* (1948) 80 N. Y. S. (2d) 75. On the one hand it may be argued that California has a policy against migratory divorce and that Sherrer does not subordinate this policy, but only estops participants; on the other hand, that one who counsels a device which is the "law of the land" cannot be acting unethically. See generally, Merrill, *The Utility of Divorce Recognition Statutes in Dealing With the Problem of Migratory Divorce* (1949) 27 TEX. L. REV. 291, 305.

¹⁴¹ *Harlan v. Harlan*, *supra* note 11; *Estate of Davis* (1940) 38 Cal. App. (2d) 579, 101 P. (2d) 761; Note (1948) 21 So. CALIF. L. REV. 201.

¹⁴² *Bruguiere v. Bruguiere* (1916) 172 Cal. 199, 155 Pac. 988.

¹⁴³ *Hollingshead v. Hollingshead* (1920) 91 N. J. Eq. 261, 110 A. 19; *Andrews v. Andrews* (1900) 176 Mass. 92, 57 N. E. 333.

Section 150.2

Proof that a person hereafter obtaining a divorce from the bonds of matrimony in another jurisdiction was (a) domiciled in this State within twelve months prior to the commencement of the proceeding therefor, and resumed residence in this State within eighteen months after the date of his departure therefrom, or (b) at all times after his departure from this State and until his return maintained a place of residence within this State, shall be prima facie evidence that the person was domiciled in this State when the divorce proceeding was commenced.

In the cases which have come before the United States Supreme Court after a redetermination of the question of domicile, the courts in which the decree had been attacked placed the burden of persuasion on the attacking party, and the Court specifically approved this practice.¹⁴⁴ If it be assumed that full faith and credit is given only if the attacking party has the burden of persuasion, the question of the constitutionality of section 150.2 is raised. The answer to this question depends upon the procedural consequences of the section.

The provision that proof of certain facts "shall be prima facie evidence" of California domicile is capable of at least two interpretations: (1) the party establishing the prima facie case has sustained his burden of going forward with the evidence, and is immune from a directed verdict; (2) the party establishing the prima facie case has sustained his burden of going forward with the evidence, and the other party must introduce evidence or suffer a directed verdict.¹⁴⁵ Under either interpretation, the section only determines that certain facts give rise to an inference of lack of domicile. As neither interpretation places the burden of persuasion upon the party relying on the decree, section 150.2 is constitutional on this score.¹⁴⁶

There are, however, due process limits to the conclusions which a legislature may prescribe to be drawn from evidence.¹⁴⁷ Because section 150.2 is broad enough to cover factual situations which might not warrant an inference of domicile, Professor Marsh has suggested that the validity of the section may depend upon the instructions given

¹⁴⁴ Cases cited at note 132 *supra*; *Rice v. Rice*, 69 S. Ct. at 752: ". . . we have concluded that the Connecticut courts gave proper weight to the claims of domicile by the Nevada court, that the burden of proving that the decedent had not acquired a domicile in Nevada was placed upon respondent. . . ."

¹⁴⁵ Marsh, *supra* note 131 at 261. Marsh, reasoning from the Commissioners' notes, suggests as a third possibility that the section may have the effect of "shifting" the burden of persuasion, so that upon introduction of evidence of the statutory facts the party seeking to uphold the decree would have to persuade on the issue of domicile.

¹⁴⁶ See discussion in Ruymann, *supra* note 129 at 50.

¹⁴⁷ *Western Atl. R. R. v. Henderson* (1929) 279 U.S. 639; *Morrison v. California* (1934) 291 U.S. 82; *Tot v. United States* (1943) 319 U.S. 463.

in the particular case in which the section is challenged.¹⁴⁸ In the usual case, evidence that the spouse who got the divorce spent a minimum amount of time in the foreign state or continued to maintain a California residence would of itself support a finding of domicile in this State. Until the meaning of the section is authoritatively declared, counsel may more safely protect the interests of his client by relying solely on the inference which naturally arises from such evidence.

This Act has created many problems and solved few. The great differences in the substantive and procedural divorce laws of the several states probably preclude a solution of the migratory divorce problem until the federal government intervenes. There have been many suggestions as to the steps which should be taken.¹⁴⁹ It has been said that Congress should provide that a foreign divorce shall not be presumed valid unless one of the parties has been domiciled in the state granting the divorce for at least one year prior to the commencement of the action.¹⁵⁰ This would leave it to the States to determine the grounds for divorce, but would increase the difficulty of securing a valid foreign decree. Professor Cook has suggested that Congress provide for nationwide service of process in divorce suits and require that the plaintiff furnish funds to enable the defendant to travel to the forum to contest.¹⁵¹ Whatever solution is adopted, it seems imperative, albeit unlikely, that Congress act to dispel the confusion in this field.¹⁵²

INTERSTATE ARBITRATION AND COMPROMISE OF DEATH TAXES

Two more uniform acts have been adopted in California: the Uniform Act on Interstate Compromise of Death Taxes,¹⁵³ and the

¹⁴⁸ *Supra* note 131 at 264. For example, if *H* goes to Nevada in 1949 and gets a divorce, does not return to California until 1959, but at all times maintains an apartment in San Francisco, under section 150.2, *H* was prima facie domiciled in California when the divorce was granted. As an inference must reasonably follow from the evidence, it is doubtful that the supreme court would sustain the application of the statute to these facts. *People v. Murguía* (1936) 6 Cal. (2d) 190, 57 P. (2d) 115.

¹⁴⁹ See generally, Comment (1949) 22 So. CALIF. L. REV. 155, 162; Cook, *Is Haddock v. Haddock Overruled?* (1943) 18 IND. L. J. 165, 190; Comment (1949) 17 GEO. WASH. L. REV. 380; Herr, *The Migratory Divorce and the Full Faith and Credit Clause* (1948) 21 TEMP. L. Q. 357.

¹⁵⁰ Herr, *supra* note 149 at 365.

¹⁵¹ Cook, *supra* note 149.

¹⁵² *Sherrer v. Sherrer*, *supra* note 133. Frankfurter dissenting at 363: "Uniformity regarding divorce is not within the power of this Court to achieve so long as 'the domestic relations of husband and wife . . . were matters reserved to the States' . . . And so long as Congress has not exercised its power under the Full Faith and Credit clause to meet the special problems raised by divorce decrees, this Court cannot through its adjudications achieve the result sought to be accomplished by a long train of abortive efforts at legislative and constitutional reform."

¹⁵³ Cal. Stats. 1949, ch. 300. CAL. REV. & TAX. CODE §§ 14195-14195.4. The act applies to estates of decedents dying before and after its enactment. § 14195.4.

Uniform Act on Interstate Arbitration of Death Taxes.¹⁵⁴ Both are aimed at relieving estates and legatees from multiple taxation when each of two or more states claims that it is the state of decedent's domicile;¹⁵⁵ neither Act concerns itself with the problem of multiple taxation created by taxation of the intangibles of an admittedly non-resident decedent.¹⁵⁶ "That two or more states may each constitutionally assess death taxes on a decedent's intangibles upon a judicial determination that the decedent was domiciled within it in proceedings binding upon the representatives of the estate, but to which the other states are not parties, is an established principle of our federal jurisprudence."¹⁵⁷ As the taxpayer cannot sue a state without its consent,¹⁵⁸ there is, in the usual case, no procedure by which all the claiming states can be made parties to a single suit.¹⁵⁹

The Uniform Act on Interstate Compromise of Death Taxes provides that the State Controller and the personal representative may enter into a written compromise with the taxing authorities of other states which claim domicile. This agreement provides that a certain sum shall be accepted in full satisfaction of all death taxes imposed by California, and also specifies the amount to be accepted by the other states in satisfaction of their death taxes. Such an agreement is conclusive when filed with "the authority empowered to fix taxes in this State."¹⁶⁰

The Uniform Act on Interstate Arbitration of Death Taxes provides that the State Controller and the personal representative may enter into a written compromise with the taxing authorities of other states claiming domicile to submit the controversy to arbitration. The

¹⁵⁴ Cal. Stats. 1949, ch. 301. CAL. REV. & TAX. CODE §§ 14197-14197.13. The act applies to estates of decedents dying before and after its enactment.

¹⁵⁵ See generally, Guterman, *Avoidance of Double Death Taxation of Estates and Trusts* (1947) 95 U. OF PA. L. REV. 701; Traynor, *State Taxation and the Supreme Court, 1938 Term* (1939) 28 CALIF. L. REV. 1, 13; Tweed and Sargent, *Death and Taxes Are Certain—But What of Domicile* (1939) 53 HARV. L. REV. 68; Federa, *Multiple Domicile in Inheritance Taxation* (1939) 17 TAXES 142.

¹⁵⁶ *Curry v. McCanless* (1939) 307 U. S. 357; *Graves v. Elliot* (1939) 307 U. S. 383; *State Tax Comm'n v. Aldrich* (1942) 316 U. S. 174. See generally, Traynor, *supra* note 3; Notes, (1942) 28 CORN. L. Q. 74; (1942) 17 IND. L. J. 560; (1942) 51 YALE L. J. 1398.

¹⁵⁷ *Texas v. Florida* (1939) 306 U. S. 398, 410.

¹⁵⁸ U. S. CONST. ART. XI; *Hans v. Louisiana* (1889) 134 U. S. 1.

¹⁵⁹ *Worcester County Co. v. Riley* (1937) 302 U. S. 292. In *Texas v. Florida*, *supra* note 157, four states claimed to be the domicile of the decedent. The action was brought by one state against the other three and the amount of taxes exceeded the value of the estate. Under these circumstances, the Supreme Court entertained a bill in the nature of interpleader. However, the court declared that the rule of the Worcester case still applies in ordinary cases.

¹⁶⁰ CAL. REV. & TAX. CODE § 14195. The legislature substituted "State Controller" whenever "taxing authority" appeared in the uniform act. That "the authority empowered to fix taxes in this State" was continued verbatim allows the conclusion that this "authority" is not the State Controller. It is submitted that the agreement must be filed in the superior court. CAL. REV. & TAX. CODE §§ 14509, 14513.

board of arbitrators is selected by the parties and is empowered to hold hearings at which the parties may present evidence and cross examine witnesses. An attempt to compromise is not a statutory condition precedent to arbitration, and specific provision is made to allow the parties to compromise at any stage of the proceeding. The decedent's domicile is determined by a majority of the board. This determination is final "for purposes of imposing and collecting death taxes but for no other purpose."¹⁶¹ The last proviso is a protection and incentive to the personal representative, who otherwise might be reluctant to submit the matter to arbitration.¹⁶²

Two significant differences between the Acts should be noted. First, the result of proceeding under the Compromise Act is that each state receives an agreed sum without a decision of the issue of decedent's domicile, while under the Arbitration Act, the participating states agree that there can be only one domicile, that domicile is determined, and one state gets its full tax while the others get nothing. Second, California may compromise with any state willing to do so, but the Arbitration Act is applicable only when the other claimant state is one of the few which have adopted the Uniform Arbitration Act¹⁶³ or similar legislation.¹⁶⁴ Because of this limitation, the effectiveness of the Arbitration Act depends upon legislative action in other states.

The prior statute authorizing compromise between the Controller and personal representatives¹⁶⁵ has never been in an appellate court, and apparently the problems aimed at by the two uniform acts are not of frequent occurrence in this State. However, the new compromise act appears to formalize a procedure already known in California, while the arbitration act is an innovation.¹⁶⁶

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¹⁶¹ CAL. REV. & TAX. CODE § 14197.3.

¹⁶² 9 Uniform Laws Anno. (1948 Supp.) 174. If the determination were final for all purposes, it might have an adverse effect upon other phases of administration. *E.g.*, the validity of a will disposing of personalty is determined by the law of the domicile of the testator at the time of his death. *Estate of Barton* (1925) 196 Cal. 508, 238 Pac. 681.

¹⁶³ Maryland (1945, ch. 983); Vermont (1947, No. 23); Virginia (1948, ch. 432). 9 Uniform Laws Anno. (1948 Supp.) 174.

¹⁶⁴ Delaware (1941, ch. 5); Massachusetts (1942, ch. 423). *Guterman*, *supra* note 155, 703, n. 12.

¹⁶⁵ CAL. REV. & TAX. CODE § 14191, repealed by Cal. Stats. 1949, ch. 300.

¹⁶⁶ In the opinion of Mr. James W. Hickey, Chief Inheritance Tax Attorney for the State of California, CAL. REV. & TAX. CODE § 14191 did not authorize the tax officials of California to enter compromise negotiations with foreign officials. However, cases have arisen in which the estate made its arrangements with the foreign state, followed by a compromise with the California officials.

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