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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITIZENS, EX REL. HUTCHENS,	
TWO MINERS & 360 ACRES OF LAND)	
T.W. ARMAN and JOHN F. HUTCHENS,)	**PETITION FOR ADVERSE CLAIMS WRITS**
(real parties in interest), "Two Miners"	**)OF POSSESSION & EJECTMENT; FRAUD &**
Grantees, patentees, trustees	**) DECLARED DETRIMENT CONTINUING.**
v.	
UNITED STATES OF AMERICA	**)NEGLECT & FAILURE TREBLE DAMAGES**
STATE OF CALIFORNIA	**)JOINT AND SEVERAL TRESPASSERS VOID**
Grantors	**) AND VACATE, REMISSION & REVERSION.**

RIGHTS OF PRESENT POSSESSION PRESUMED ON FACTS PLEAD IN EVIDENCE

380. In an action brought by a person out of possession of real property, to determine an adverse claim of an interest or estate therein, the person making such adverse claim and persons in possession may be joined as defendants; and if the judgment be for the plaintiff, he may have a writ for the possession of the premises, as against the defendants in the action, against whom the judgment has passed.

381. 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 purpose 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. [Approved March 24; effect July 1, 1874.]

Ejectment, 426 n. Quiet title, action to, 738. Intervention, Eminent Domain 1244.

"ATTENTION: THIS MATTER IS ENTITLED TO PRIORITY AND SUBJECT TO THE EXPEDITED HEARING AND REVIEW PROCEDURES CONTAINED IN SECTION 1094.8 OF THE CODE OF CIVIL PROCEDURE."

Authorities of Sec. 2326 Perfected Title Law. 1881.

JUDICIAL DETERMINATION OF RIGHT OF POSSESSION

Sec. 2326 "verified by the oath of any duly authorized agent or attorney in fact. Cognizant of the facts stated; oath of adverse claim before the clerk of any court of record of the United States". Pursuant to provisions of the General Mining Law of 1872 and amendments thereto.

§ 26. Locators' rights of possession and enjoyment; exclusive right.

§ 29. Patents; …the affidavits required made by authorized agent conversant with the facts.

§ 30. Adverse claims; judicial determination of right of possession;

§ 31. Oath: agent or attorney in fact, title may be verified by the oath of any duly authorized agent.

§ 33. Existing rights; all the rights and privileges conferred.

§ 40. Verification of affidavits before officer authorized to administer oaths within land district

§ 51. Vested and accrued rights; by priority of possession, rights vested and accrued, …the possessors and owners of such vested rights shall be maintained and protected in the same;

LOCATORS RIGHTS OF POSSESSION AND ENJOYMENT;

§ 1988. Proceedings in vindication of civil rights

CAUSE OF ACTION: EJECTMENT

Adverse Claims …to their and their heirs and assigns use and behoof forever.

Agricultural College Patent: 360 acres of land, May 1st, 1862, President Abraham Lincoln.

United States of America State of California Patent: January 4th, 1875, Governor Newton Booth.

April 8th, 1880 Location of the "Lost Confidence" lode mining claim (Iron Mountain mine, apex of the Shasta Copper belt, Flat Creek mining district). 1895 to present: Largest mine in California. Discoveries & Junior Locations. Battery storage & hydropower pump-storage reclamation and special uses.

T.W. Arman, owner; John F. Hutchens, administrator, grantees agent and expert.

In performance of the complete development of Iron Mountain mine, remission and prosecution of same under the General Mining Law and by Patent Title.

Relocation of the Camden and Magee Agricultural College Land Patent of 1862.

Discoveries §336: Assays of diamond drill cores to 1700 ft by USGS in 1952; horizons of recoverable metals, junior locations recoverable by modern methods.

Remediation of copper, cadmium, and zinc in the Flat Creek mining district.

Relocation by amendment; the Scott & Noble lode renamed Arman & Hutchens lode, i.e. the "Arman Consolidated lode mining claim".

Relocation of the Home Stake, Homestake Fraction, and Home Stake Extension No. 1 lode mining claims.

Relocation of the Fine Gold, Oversight, Foresight, Backsight, Red Star, Gold Bar, Owl, Grey Squirrel, Crown Point, Pershing. Mountain Copper, Shasta Copper, Trinity Copper, Tehama Copper, and the Congress lode mining claims.

Date:_____Signature:_____

s/ T.W. Arman; owner - operator, Iron Mountain Mines, Inc.

Where an agent commits an active trespass on behalf of his principal, such principal is a "joint trespassers" with the agent. Williams v. Inman, 57 S.E. 1000, 1010, 1 Ca.App. 321.

Joint and Several Trespassers damages & ejectment;

coram nobis incidental and peremptory mandamus

Including an accounting of the damages. Leave for quo Warranto

administrative and judicial mandamus.

"Persons engaged in committing the same trespass are "joint and several trespassers," and not "joint trespassers," exclusively. Like persons liable on a joint and several contract, they may all be sued in one action, or one may be sued alone, and cannot plead the nonjoinder of the others in abatement; and so far is the doctrine of several liability carried that the defendants, where more than one are sued in the same action, may sever in their pleas, and the jury may find several verdicts, and on several verdicts of guilty may assess different sums as damages." The executive officer of a corporation, who is the stockholder, and full management of its affairs, who's rights were violated by defendants who instigated and controlled the joint and several trespassers in willfully infringed complainants mine, and for bringing disrepute to the corporation, and violating environmental law to spoil said property, diminish its value, and claim a lien upon said property for recompensation for unnecessary arbitrary and capricious actions under color of law .

Because of the corporeal and perpetual injuries, including the damages found due complainant, on an accounting, a suit will lie against them to recover the property and the amount of such decree from them individually, when, through their control and influence, they caused the corporation to be unable to transfer its property and to declare and pay dividends pending the suit against it, by which it was rendered substantially yet falsely insolvent. See Saxlehner v. Elsner, 140 Fed. 938, 941 adopting the definition I Lovejoy v. Murray , 3 Wall. 1, 18 L. Ed. 129.

PETITION FOR REVIEW OF ABUSE OF PROCESS AND ABUSE OF DISCRETION BY FALSE & MALICIOUS PROSECUTION FOR CRIME OF INFAMY EX POST FACTO LAW

12. 1094.5. (a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board, or officer may be filed with the petition, may be filed with respondent's points and authorities, or may be ordered to be filed by the court. Except when otherwise prescribed by statute,

the cost of preparing the record shall be borne by the petitioner. Where the petitioner has proceeded pursuant to Section 68511.3 of the Government Code and the Rules of Court implementing that section and where the transcript is necessary to a proper review of the administrative proceedings, the cost of preparing the transcript shall be borne by the respondent.

PROCEEDINGS PURSUANT TO SECTION 1088.5

13. Where the party seeking the writ has proceeded pursuant to Section 1088.5, the administrative record shall be filed as expeditiously as possible, and may be filed with the petition, or by the respondent after payment of the costs by the petitioner, where required, or as otherwise directed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, the expense shall be taxable as costs.

14. (b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

THE FINDINGS ARE NOT SUPPORTED BY THE EVIDENCE

15. (c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

16. (810.) Section Eight Hundred and Ten. When the action is brought upon the information or application of a private party, the Attorney General may require such party to enter into an undertaking, with sureties to be approved by the Attorney General, conditioned that such party or the sureties will pay any judgment for costs or damages recovered against the plaintiff, and all the costs and expenses incurred in the prosecution of the action.

§ 1985. Conspiracy to interfere with civil rights

17. (3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Where the plaintiff sued on behalf of himself and others, residents and property-holders of the city of Oakland, to set aside certain conveyances operating as a cloud upon the title to a tract of land occupied by the city, and to obtain an injunction, etc., and the court below entered a judgment declaring the conveyances fraudulent and void, and enjoining the defendants from future alienations in respect to the land of the plaintiff, the relief in this particular being confined to the plaintiff alone, the Supreme Court held that there was no such community of interest between the plaintiff and those whom he represented in the action as entitled him to an injunction in their favor. Gibbons v. Peralta, 21 Cal. 632, 633.

383. (15.) Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff.

Sureties, 1059.

384. 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.

387. (659, 660, 661.) Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds Upon which the intervention rests, filed by leave of the court, and served upon the parties to the action or proceeding who have not appeared, and upon the attorneys of the parties who have appeared, who may answer or demur to it as if it were an original complaint. [Approved March 24; effect July 1, 1874.]

Intervention. Eminent domain, 1244.

(1097.) Section Ten Hundred and Ninety-seven. When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, Board, or person, if it appear to the Court that any member of such tribunal, corporation, or Board, or such person upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the Court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the Court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ.

1107. When an application is filed for the issuance of any prerogative writ, the application shall be accompanied by proof of service of a copy thereof upon the respondent and the real party in interest named in such application. The provisions of Chapter 5

(commencing with Section 1010) of Title 14 of Part 2 shall apply to the service of the application. However, when a writ of mandate is sought pursuant to the provisions of Section 1088.5, the action may be filed and served in the same manner as an ordinary action under Part 2 (commencing with Section 307)

. Where the real party in respondent's interest is a board or commission, the service shall be made upon the presiding officer, or upon the secretary, or upon a majority of the members, of the board or commission. Within five days after service and filing of the application, the real party in interest or the respondent or both may serve upon the applicant and file with the court points and authorities in opposition to the granting of the writ.

The court in which the application is filed, in its discretion and for good cause, may grant the application ex parte, without notice or service of the application as herein provided. The provisions of this section shall not be applicable to applications for the writ of habeas corpus, or to applications for writs of review of the Industrial Accident or Public Utilities Commissions.

1108. Writs of review, mandate, and prohibition issued by the Supreme Court, a court of appeal, or a superior court, may, in the discretion of the court issuing the writ, be made returnable, and a hearing thereon be had at any time.

1138. Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any Court which would have jurisdiction if an action had been brought; but it must appear, by affidavit, that the controversy is real and the proceedings in good faith, to determine the rights of the parties. The Court must thereupon hear and determine the case, and render judgment thereon, as if an action were depending.

1139. Judgment must be entered as in other cases, but without costs for any proceeding prior to the trial. The case, the submission, and a copy of the judgment constitute the judgment roll.

1140. The judgment may be enforced in the same manner as if it had been rendered in an action of the same jurisdictional classification in the same court, and is in the same manner subject to appeal.

1159. Every person is guilty of a forcible entry who either:

2. Who, after entering peaceably upon real property, turns out by force, threats, or menacing conduct, the party in possession.

The "party in possession" means any person who hires real property and includes a boarder or lodger, except those persons whose occupancy is described in subdivision (b) of Section 1940 of the Civil Code.

1160. Every person is guilty of a forcible detainer who either:

1. By force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise; or,

2. Who, in the night-time, or during the absence of the occupant of any lands, unlawfully enters upon real property, and who, after demand made for the surrender thereof, for the period of five days, refuses to surrender the same to such former occupant.

The occupant of real property, within the meaning of this subdivision, is one who, within five days preceding such unlawful entry, was in the peaceable and undisturbed possession of such lands.

1161. A tenant of real property, for a term less than life, or the executor or administrator of his or her estate heretofore qualified and now acting or hereafter to be qualified and act, is guilty of unlawful detainer:

"It has been justly thought a matter of importance to determine from what source the United States derives its authority... The question here proposed is whether our bond of union is a compact entered into by the states, or whether the Constitution is an organic law established by the People. To this we answer: 'We the People... ordain and establish this Constitution'...

WE NEED TO KNOW THE LINE ON WHICH TO DRAW THE LIMITS OF FEDERAL POWERS; WE WILL SO DETERMINE HERE!

Therefore, to "establish certain limits not to be transcended by the government."

Given [mining's] unique political history, as well as the breadth of the authority that the [EPA] has asserted, the Court is obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the [EPA] this power.…

"Full relief and restore possession to the party entitled thereto. a general verdict for plaintiff on a complaint which alleges that the plaintiff is entitled to the possession of certain described property, which is unlawfully detained by the defendant, and the possession of which the plaintiff prays to recover, is held by the United States Supreme Court to be sufficient."

"One Co-tenant may recover the whole estate in ejectment against strangers."
King Solomon Co. v. Mary Verna Co. 22 Cal . App. 528, 127 P 129, 130

"The owner is not liable for pollution of stream incidental to placer mining, or to washing iron ore. It is classed among non-actionable injuries. Nor will such use of the stream be enjoined even if an action lies, except in willful or extreme cases. Clifton Co. v. Pye 87 Ala. 468 6So 192. Hill v. King 4 M.R. 533. 8 Cal. 337, Atchison v. Peterson 1 M.R. 583 20 Wall 501.
California Statute Sec. 1426 7/1/09

In the absence of clearly expressed legislative intent, retrospective operation will not be given to statutes, nor, in absence of such intent, will a statute be construed as impairing rights relied upon in past conduct when other legislation was in force. Union Pacific R. Co. v. Laramie Stock Yards, ante, p. 231 U. S. 190 .

.. In all applications therefore, pending at the date of the passage of the Act of 1872, although the patents were not issued till afterward, they conveyed the surface-ground embrace by the interior boundaries of the survey, and the right to follow the vein as above indicated, and also all other veins, lodes, or ledges, throughout their entire depth, the top or apex of which lay inside of such surface-lines extended downward vertically, although such other veins, lodes, or ledges, might so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of the surface-location *provided,* that their right of possession to such outside parts of such other veins, lodes, or ledges was confined to such portions thereof as lay between vertical planes drawn downward through the end-lines of their locations, so continued in their direction that such planes would intersect such exterior parts of such veins, lodes, or ledges; no right being granted, however, to the claimant of a vein or lode which extended in its downward course beyond the vertical lines of his claim, to enter upon the surface of a claim owned or possessed by another.

U.S. Supreme Court Revives Citizen Suit Standing

The U.S. Supreme Court has overturned a lower court's decision that had dismissed a Clean Water Act (CWA) citizen suit on the ground that the suit was "moot"

In the case, Laidlaw Environmental Services (TOC), Inc. (Laidlaw), began to discharge treated wastewater from a treatment plant in 1987 under authority of a National Pollutant Discharge Elimination System (NPDES) permit issued by the South Carolina Department of Health and Environmental Control (DEHC). The facility repeatedly discharged higher concentrations of mercury than the permit allowed. In 1992, Friends of the Earth and others (FOE) notified Laidlaw of their intention to file a citizen suit against it under Section 505(a) of the CWA after the expiration of the required 60-day notice period.

Before the expiration of the notice period, Laidlaw asked DEHC to file suit against it for the alleged violations. The DEHC did so, and the parties quickly entered into a settlement requiring Laidlaw to pay $100,000 in civil penalties and to make "every effort" to comply with its permit obligations (in fact, the violations continued until January 1995). On June 12, 1992, FOE filed its citizen suit, alleging noncompliance with the NPDES permit and seeking declaratory and injunctive relief and an

award of civil penalties. Laidlaw moved to dismiss the action on the ground that the citizen suit was barred under CWA Section 505(b)(1), which bars citizen suits where the U.S. or a state "has commenced and is diligently prosecuting a civil or criminal action" to require compliance. The federal district court held that DHEC's action had not been "diligently prosecuted" and, therefore, FOE's action was not barred by CWA Section

505(b)(1). Laidlaw also moved for summary judgment on the ground that FOE lacked "standing" to bring its suit because FOE's members had not suffered any "injury in fact" from the violations. The district court denied this motion also, finding that FOE had standing to bring the suit based on affidavits from FOE members alleging harm to their interests. The court then rendered its decision, imposing a civil penalty of $405,800 for the violations. Both FOE and Laidlaw appealed to the Court of Appeals for the Fourth Circuit. FOE claimed that the civil penalty was inadequate, and Laidlaw argued, among other things, that FOE lacked standing to bring the suit and that DEHC's action qualified as diligent prosecution precluding FOE's litigation. The court assumed without deciding that FOE had standing to bring the action, but then held that the case had become moot. The court stated that the elements of standing – injury, causation, and redressability – must exist at every stage of review, or else the action becomes moot. The court noted that the Supreme Court's 1998 decision in *Steel Co. v. Citizens for a Better Environment*, meant that the "redressability" element of the standing test does not exist where the only remedy available to the citizen suit plaintiff would be civil penalties payable to the government, because such penalties would not redress any injury that the citizen has suffered. Because FOE could not receive money under the CWA for its injuries, the court held, the action was moot. The court vacated the district court's order and remanded with instructions to dismiss the action.

The U.S. Supreme Court (Court) reversed the Fourth Circuit's decision. The Court first observed that, although the Fourth Circuit had assumed that FOE had standing, the Court had an obligation to assure itself that FOE had standing at the outset of the litigation. The Court noted that, to have "standing" to bring an action in federal court, a plaintiff must show that: (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or

hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Laidlaw contended that no "injury in fact" existed because there was no proof of harm to the environment from the violations – a claim that had been accepted by the district court. The Court, however, held that the relevant inquiry is not injury to the environment, but injury to the plaintiff. The Court held that "environmental plaintiffs adequately allege injury in fact when they [allege] that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." The Court found that FOE members had demonstrated sufficient injury by claiming that they lived near Laidlaw's facility and avoided recreating in or near the waters to which Laidlaw discharged and, that, in some cases, home values were lowered, because of concerns about pollution from the facility. The Court distinguished its 1990 holding in *Lujan v. National Wildlife Federation*, in which the Court had denied citizen suit standing to an environmental group that challenged a government decision that would open public lands to mining activities. The Court stated that the plaintiff in that case did not survive the government's motion for judgment before trial "merely by offering '[claims] which state only that one of [the organization's] members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action." Similarly, in *Lujan v. Defenders of Wildlife* (1992), the plaintiffs lacked standing because their claim of injury rested on "'some day' intentions" to visit endangered species in foreign countries. In the case at hand, in contrast, the Court found "nothing 'improbable' about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms." Because of the FOE members' "reasonable concerns" about the effects of Laidlaw's discharges, the Court held they had demonstrated an injury in fact.

Laidlaw next argued that, even if FOE had standing to seek injunctive relief, it lacked standing to seek civil penalties. Civil penalties offer no redress to private plaintiffs, Laidlaw argued, because they are paid to the government and, therefore, a citizen plaintiff can never have standing to seek them.

Although the Court agreed that a plaintiff must demonstrate standing separately for each form of relief sought, the Court disagreed with the argument "that citizen plaintiffs facing ongoing violations never have standing to seek civil penalties" because payment of penalties to the government cannot redress the plaintiffs' injuries. Rather, the Court stated, "[t]o the extent that [civil penalties] encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct." The Court deflected Laidlaw's argument that its 1998 *Steel Co*. decision requires a different result by limiting that case to its particular facts: *Steel Co*., the Court held, denies standing only where the citizen plaintiffs are seeking civil penalties for violations that have ended by the time of suit. The Court did allow that, in some cases, the deterrent effect of a claim for civil penalties may be so insubstantial that it cannot support citizen standing, but, it held, that was not the case here.

Having found that FOE had standing to bring its action, the Court turned to the question of mootness. Laidlaw argued that the case was moot because it had achieved substantial compliance in 1992 and later shut down the facility in question. The Court observed that "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." The Court was not satisfied with Laidlaw's claim that the closure of the facility permanently prevented future violations, noting that Laidlaw still retained its NPDES permit. Because "[t]he effect of both Laidlaw's compliance and the facility closure on the prospect of future violations is a disputed factual matter," the Court sent the case back to the district court for further consideration.

In a scathing dissent, Justice Scalia, joined by Justice Thomas, charged that the Court had created new standing law that will "place the immense power of suing to enforce the public laws in private hands." Scalia's dissent leaves no doubt that, in his view, at least, *Laidlaw* represents a significant rollback of the standing principles enunciated by the Court only a few years ago in the *Lujan* and *Steel Co*. cases discussed above. *Laidlaw* represents an ideological setback for Scalia, who authored those earlier cases. Implications: It appears that the pendulum has swung back in the direction of the Court's support of citizen standing to enforce environmental laws. If, as the Court held, citizens

may have standing without proving environmental injury, "injury in fact" may no longer be a meaningful hurdle for citizen plaintiffs. As Scalia stated in his dissent, under the Court's "lenient standard," purely "subjective apprehensions" of environmental harm now may be sufficient to demonstrate injury in fact.

Further, *Steel Co*. no longer seems to be good law. As Scalia noted, the Court, "by approving the novel theory that public penalties can redress anticipated private wrongs, . . . has come close to 'mak[ing] the redressability requirement vanish.'"

Importantly, *Laidlaw* was decided by a solid 7-2 majority of the Court. It seems clear, therefore, that the Court is re-thinking the significant limitations on citizen standing imposed by the two *Lujan* cases and *Steel Co*. Whether *Laidlaw* harkens a complete return to the easystanding days of the pre-1990s remains to be seen.

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 2000 U.S. Lexis 501, 2000 WL 16307 (Jan. 12, 2000).

RCRA Citizen Suit for Injunctive Relief

1) Introduction

The Citizen Suit provisions of the Resource Conservation and Recovery Act are important. Through it a party can obtain injunctive relief to address contamination and can recover attorney fees and expert costs.

2) RCRA Citizen Suits for Injunctive Relief

The Citizen Suit provisions are set forth in Section 7002 and 7003 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. Section 6972, where in subpart (a)(1)(B), it states that any person may commence a civil action on his own behalf or:[A]gainst any person … and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

Thus, where an entity "may" present an "imminent and substantial endangerment" to "health or the environment" as a result of the disposal of any "solid or hazardous waste," such a claim is permit-

ted. These terms have been liberally interpreted. *Maine People's Alliance v. Mallinckrodt, Inc*., 471 F. 3d 277 (1st Cir. 2006) (after first noting that at least four of its sister circuits have also construed the terms liberally, the court did so as well holding that "reasonable prospect of future harm" is adequate so long as the threat, as opposed to the harm, is near-term, and involves potentially serious harm, but not need be an emergency situation and does not require a showing an immediate threat of grave harm); *United States v. Conservation Chemical Co*., 619 F. Supp. 162 (D.C. Mo. 1985) (endangerment need not be immediate to be imminent; specific quantification of the endangerment not required, rather a consideration of all factors is proper based on the unique facts of each case; and, if an error is to be made in applying the endangerment standard, it must be made in favor of protecting the environment); *Paper Recycling, Inc. v. Amoco Oil Co*., 856 F. Supp. 671, 678 (N.D. Ga. 1993) ("imminent and substantial endangerment " to "health or the environment" requires only a showing that a risk of threatened harm is present, not that actual harm will immediately occur);[ii] *Lincoln Props., Ltd. v. Higgins*, 1993 WL 217429 (E.D. Cal. 1993) (merely need show a risk of threatened harm, not actual injury; remedy is not limited to emergency situations)[iii]. The fact that the disposal that created the endangerment happened years ago is of no matter—a claim can still be brought if the endangerment exists. *Main People's Alliance, supra.; City of Toledo v. Beazer Materials & Services, Inc.,* 833 F. Supp. 646 (N.D. Ohio 1993); *Gache v. Town of Harrison*, 813 F. Supp. 1037 (S.D.N.Y. 1993); *Nuckols v. National Heat Exchange Cleaning Corporation*, Case No. 4:00CV1698 (N.D. Ohio 2000) (case prosecuted by the author in which Judge Economus held that former tenant's contamination of leased property can be the basis of an endangerment claim).

The types of waste covered under the Citizen Suit provisions are not confined to "hazardous waste"; rather, it includes "solid waste", which is very broadly defined. 42 U.S.C. Section 6803 (5) defines "hazardous waste" to include solid hazardous waste which may cause or significantly contribute to an increase in mortality or serious irreversible or incapacitating reversible illness or pose a substantial present or potential hazard to human health or the environment. 42 U.S.C. Section 6803 (27) defines "solid waste" to include "discarded material, including solid, liquid, semi-solid, or contaminated gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities". *Connecticut Costal Fisherman's Ass'n. v. Rem-*

ington Arms Co. Inc., 989 F. 2d 1305 (2nd Cir. 1993) (discussion of hazardous and solid waste under the Citizen Suit provisions); *Zands v. Nelson*, 779 F.Supp. 1254 (S.D. Cal. 1991); *Paper Recycling*, *supra*. (gasoline included as solid waste); *Southern Fuel Co. v. Amoco Oil Co.,* 1994 U.S. Dist. LEXIS 15769 (D.Md. 8/23/94) (analysis of interplay between hazardous and solid waste provisions); *Lincoln*, *supra*.

Causation must, ultimately, be established between the endangerment and the defendant's acts. *Agricultural Excess v. ABD Tank & Pump Co*., 878 F. Supp. 1091 (N. Ill 1995) (claim against a UST manufacturer); *First San Diego Properties v. Exxon Co*., 859 F. Supp. 1313 (S.D. Cal. 1994) (no liability for mere "passive" owner of contaminated property). Liability is joint and several unless the defendant can establish that the damages are divisible and that there is a reasonable basis for an apportionment. *Maine People's Alliance, supra.*; *Waste, Inc. Cost Recovery Group v. Allis Chalmers Corp*., 51 F. Supp. 2d 936 (N.D. Ind. 1999); *United States v. Conservation Chem. Co., supra*. Liability is strict, as is true under CERCLA, though there is legislative language that can be cited to the contrary. *United States v. Northeastern Pharm. & Chem. Co*., 810 F. 2d 726 (8th Cir. 1986); *Cox v. City of Dallas*, 256 F. 3d 281 (5th Cir. 2001) (court cites case law and legislative history supportive of strict liability and cites contrary legislative history)[iv]. Jurisdiction over such action is granted to the United States District Court pursuant to that same subpart:

Any action under paragraph (a)(1) … shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. *Sauers v. Pfiffner*, 29 Env't Rep. Cas (BNA) 1716 (D. Minn. March 23, 1991) (venue proper where violation or endangerment occurs).

The grant of jurisdiction extends to all parties, regardless of the amount at issue and in controversy and regardless of the citizenship of the parties; and, the court's power is broad, including the power to grant injunctive relief: The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has

contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

The nature of the remedy, under a Citizen Suit, is injunctive in nature, which can include an order that the defendant is responsible for site investigation, monitoring and testing costs as well as an order barring further endangerment; however, such a claim cannot be brought for money damages, such as plaintiff's past cleanup costs. *Mehrig v. KFC Western, Inc*., 516 U.S. 479 (1996) (CERCLA, not RCRA, provides the framework for recovery of past cleanup costs)[v]; *Interfaith Community Organization v. Honeywell Inc.*, 399 F. 3d 248 (3rd Cir. 2005) (defendant ordered to abate the endangerment by removal of the contamination); *Tanglewood E. Homeowner v. Charles-Thomas, Inc*., 849 F. 2d 1568 (5th Cir. 1988) (the remedy package includes civil penalties, injunctive relief and attorney fees); *Walls v. Waste Resource Corp*., 761 F. 2d 311 (6th Cir. 1985) (there is no private cause of action for economic compensation or punitive damage s); *Express Car Wash Corp. v. Irinaga Brothers, Inc.*, 967 F. Supp. 1188 (D. Or. 1997) (while declining to issue an injunction requiring plaintiff to pay response costs that may be incurred in the future, the court noted that a request to require defendant to take additional action to address the contamination, including that it take over responsibility for the remediation, would be viable)[vi]; *cf. Southern Fuel Co.*, *supra*. (cannot transform a claim for damages into one for equitable relief by requesting an injunction that orders the performance of future abatement work because RCRA does not provide for the payment nt of restoration costs); *Fallowfield Dev. Corp. v. Strunk*, 1993 WL 157723 (E. D. Pa.) (order to remediate the site not permitted under RCRA, where CERCLA remedy was available). Damage claims can be asserted as separate counts with a request that the federal court exercise supplemental jurisdiction, pursuant to 28 U.S.C. Section 1367 (a) and (c), over such claims (such as state common law claims for trespass, nuisance, etc.).

Murray v. Bath Iron Works, 867 F.Supp. 33 (D.Maine 1994)(claims under state law can be filed in federal court with Citizen Suit claim, as the state claims do not "substantially predominate"); *City of*

Toledo v. Beazer, supra.; *Nuckols, supra*. (assertion of state common law claims for nuisance and trespass addressed)**;** *but see Avondale Federal Savings Bank v. Amoco Oil Company*, 997 F. Supp. 1073 (N.D. Ill., E. Div. 1998) (court declines exercise of supplemental jurisdiction after barring a RCRA Citizen Suit).

Costs, including attorney and expert fees, may be awarded to the prevailing or substantially prevailing party pursuant to 42 U.S.C. Section 6972 (e):

The court may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate.

Browder v. Moab, 2005 LEXIS 22200 (10th Cir. 10/14/05) (court, after noting the dearth of case law construing the statute, reversed the trial court's denial of attorney fees, noting, on remand, that while such award is discretionary, where a party has prevailed on at least one count, thereby changing the legal relationship between the parties, that party qualifies for consideration of an award of fees); *Environmental Defense Fund v. EPA*, 1 F. 3rd 1254 (D.C. Cir. 1993) (fees granted to "prevailing" party, with an excellent discussion of that term and how request for fees should be analyzed); *Fallowfield Dev. Corp.*, *supra*. (fee request denied, noting court's granting of such claims have done so where, unlike here, the suit was brought to benefit a community, rather than an individual property).

Before a Citizen Suit can be filed, notice to potential defendants and the government (state and US EPA) must be provided, pursuant to subpart (b). The notice must be provided 60 days before suits brought pursuant to (a)(1)(A) and 90 days for suits brought pursuant to (a)(1)(B). *Hallstrom v. Tillamook County,* 493 U.S. 20 (1988) (promotes goal of resolving disputes without court involvement by providing both potentially responsible defendants and the government an opportunity to address the problem)[vii]; *Supporters to Oppose Pollution, Inc. v. Heritage Group*, 973 F. 2d 1320 (7th Cir. 1992) (en banc); *Portsmouth Redevelopment & Housing Auth.v. BMI Apartments Assocs*., 857 F. Supp. 1427 (D. Or. 1994). Interestingly, the filing of an amended complaint after the 90 day period may cure an original violation of the 90 day requirement). *Buggsi v. Chevron*, supra. (court retains jurisdiction because amended complaint was filed after expiration of 90 day period). Specifics

about the notice (content, service of copies on the appropriate public officials, etc.) are set forth in 40 C.F.R., Part 254.

Once the notice period has expired, the United States Attorney General and Director of the EPA must be served with the Complaint, where the claim is asserted pursuant to subsection (a)(1)(B). 42 U.S.C. Section 6972 (b) (2) (F). *Murray v. Bath Iron Works Corp*., supra. (no deadline for such service); *Petropoulos v. Columbia Gas of Ohio, Inc*., 840 F. Supp. 511 (S.D. Ohio 1993).

A Citizen Suit claim cannot duplicate government action, provided such action is already commenced and is being diligently prosecuted to resolve the endangerment. 42 U.S.C. Section 6972 (b) (1) (B), (b) (2) (B) and (b) (2) (C); *Meghrig*, *supra*.; *Supporters to Oppose Pollution*, *supra*. (EPA's actions precluded private RCRA claim; despite claim that such action had not, in fact, been successful in resolving the risk; collateral attack on the agency's strategy or tactics is not permitted); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.,* 889 F. 2d 1146 (1st Cir. 00000.00000.936287.1 1989); *City of Heath v. Ashland Oil, Inc*., 834 F. Supp. 971 (S.D. Ohio 1993); *Paper Recycling*, *supra*. (no bar to RCRA Citizen Suit where neither the federal nor state government had acted to remedy the contamination).

There is no statute of limitations set forth in the Citizen Suit provisions for claims by one private party against another; however, at least two circuit courts have held the five year statute of limitations set forth in 28 U.S.C. Section 2462[viii] applies. *See Public Interest Research Group of N.J. v. Powell Duffryn Terminals, Inc*., 913 F. 2d 64 (3d Cir. 1990), *cert. denied* [ix]; *Sierra Club v. Chevron U.S.A., Inc*., 834 F. 2d 1517 (9th Cir. 1987); *But see Public Interest Research Group of New Jersey v. U.S. Metals Refining Co*., 681 F. Supp. 237 (D.N.J. 1987) (no applicable statute of limitations).

There is no right to a jury trial of the RCRA Citizen Suit claims; however, a jury can be requested for pendant and other claims. *Southern Fuel*, *supra*. (RCRA claims can be tried to judge and others to a jury).

3) Conclusion

A RCRA Citizen Suit can be an effective tool in addressing contamination of property, particularly in light of the broad nature of the injunctive relief that can be granted and the potential for recovery of attorney fees and expert costs. Due notice was given and has expired in this case.

[i] The court held that proof of a violation of an EPA standard or regulation is not required.

[ii] In *Paper Recycling*, the passage of six years of remediation efforts did not bar plaintiff's case because thousands of gallons of gasoline were still contaminating the ground.

[iii] A threat, the court noted, can be established even without proof of endangerment to human or other life forms. *Id*., fn. 30.

[iv] *Cox* also presents an excellent overview of the RCRA Citizen provisions.

[v] The court held that a RCRA Citizen Suit authorizes issuance of a mandatory injunction requiring the responsible party to "take action" by attending to the cleanup and disposal or a prohibitory injunction that restrains that party from any further violations of RCRA.

[vi] The court provides a comprehensive analysis of the limits to the injunctive relief that may be granted under the RCRA Citizen Suit provisions.

[vii] The court held that unlike a statue of limitations, RCRA's 60 day notice provision is not triggered by the violation giving rise to the action. Rather, plaintiff has full control as to when to send the notice. The court further discussed the limited exceptions to notice requirements.

[viii] The five year period in 28 U.S.C. Section 2462 utilizes an "accrual" trigger for commencement.

[ix] The court also held that the statute of limitations is tolled during the notice period.

Pollution is legally defined as the wrongful contamination of the atmosphere, water or soil to the material injury of the right of an individual. Air pollutants may be either particles or gases. They are also classified as primary, meaning they are created at a particular source, or secondary, meaning they result from tranformation and reaction in the air. Air pollution may take the form of smoke, fumes, dust, gas or vapors, mist and odors. Noise is unwanted sound that produces unwanted effects. It is generally considered a form of pollution and, due to major expansions of airport facilities, industrial activities, traffic arterials and the like, is recognized as a social problem, which may be the basis of a nuisance claim. Remedies include several generally accepted methods: (1) reducing noise at its source; (2) keeping it at a distance; and (3) absorbing it between its source and the receiver

http://definitions.uslegal.com/p/pollution/

Without healthy water for drinking, cooking, fishing, and farming, the human race would perish. Clean water is also necessary for recreational interests such as swimming, boating, and water skiing. Yet, when Congress began assessing national water quality during the early 1970s, it found that much of the country's groundwater and surface water was contaminated or severely compromised. Studies revealed that the nation's three primary sources of water pollution—industry, agriculture, and municipalities—had been regularly discharging harmful materials into water supplies throughout the country over a number of years.

These harmful materials included organic wastes, sediments, minerals, nutrients, thermal pollutants, toxic chemicals, and other hazardous substances. Organic wastes are produced by animals and humans, and include such things as fecal matter, crop debris, yard clippings, food wastes, rubber, plastic, wood, and disposable diapers. Such wastes require oxygen to decompose. When they are dumped into streams and lakes and begin to break down, they can deprive aquatic life of the oxygen it needs to survive.

Sediments may be deposited into lakes and streams through soil erosion caused by the clearing, excavating, grading, transporting, and filling of land. Minerals, such as iron, copper, chromium, platinum, nickel, zinc, and tin, can be discharged into streams and lakes as a result of various mining activities. Excessive levels of sediments and minerals in water can inhibit the penetration of sunlight, which reduces the production of photosynthetic organisms.

Nutrients, like phosphorus and nitrogen, support the growth of algae and other plants forming the lower levels of the food chain. However, excessive levels of nutrients from sources such as fertilizer can cause eutrophication, which is the overgrowth of aquatic vegetation. This overgrowth clouds the water and smothers some plants. Over time, excessive nutrient levels can accelerate the natural process by which bodies of water evolve into dry land.

Thermal pollution results from the release of heated water into lakes and streams. Most thermal pollution is generated by power plant cooling systems. Power plants use water to cool their reactors and turbines, and discharge it into lakes and tributaries after it has become heated. Higher water temperatures accelerate biological and chemical processes in rivers and streams, reducing the wa-

ter's ability to retain dissolved oxygen. This can hasten the growth of algae and disrupt the reproduction of fish.

Toxic chemicals and other hazardous materials present the most imminent threat to water quality. The Environmental Protection Agency (EPA) has identified 582 highly toxic chemicals, which are produced, manufactured, and stored in locations across the United States. Some chemical plants incinerate toxic waste, which produces dangerous by-products like furans and chlorinated dioxins, two of the most deadly carcinogens known to the human race. Other hazardous materials are produced or stored by households (motor oil, antifreeze, paints, and pesticides), dry cleaners (chlorinated solvents), farms (insecticides, fungicides, rodenticides, and herbicides), and gas stations and airports (fuel).

Water pollution regulation consists of a labyrinth of state and federal statutes, administrative rules, and common-law principles.

Statutory Law

Federal statutory regulation of water pollution has been governed primarily by three pieces of legislation: the Refuse Act, the Federal Water Pollution Control Act, and the Clean Water Act. The Rivers and Harbors Appropriations Act of 1899, 33 U.S.C.A. § 401 et seq., commonly known as the Refuse Act, was the first major piece of federal legislation regulating water pollution. The Refuse Act set effluent standards for the discharge of pollutants into bodies of water. An effluent standard limits the amount of pollutant that can be released from a specific point or source, such as a smokestack or sewage pipe. The Refuse Act flatly prohibited pollution discharged from ship and shore installations.

The Refuse Act was followed by the Federal Water Pollution Control Act of 1948 (FWPCA), 33 U.S.C.A. § 1251 et seq. Instead of focusing on sources of pollution through effluent standards, the FWPCA created water quality standards, which prescribed the levels of pollutants permitted in a given body of water. Where the Refuse Act concentrated on deterring specific types of polluters, the FWPCA concentrated on reducing specific types of pollution.

Since 1972, federal regulation of water pollution has been primarily governed by the Clean Water Act (CWA) 33 U.S.C.A. § 1251 et seq., which overhauled FWCPA. The CWA forbids any person

to discharge pollutants into U.S. waters unless the discharge conforms with certain provisions of the act. Among those provisions are several that call upon the EPA to promulgate effluent standards for particular categories of water polluters.

To implement these standards, the CWA requires each polluter to obtain a discharge permit issued by the EPA through the National Pollutant Discharge Elimination System (NPDES). Although the EPA closely monitors water pollution dischargers through the NPDES, primary responsibility for enforcement of the CWA rests with the states. Most states have also drafted permit systems similar to the NPDES. These systems are designed to protect local supplies of groundwater, surface water, and drinking water. Persons who violate either the federal or state permit system face civil fines, criminal penalties, and suspension of their discharge privileges.

The CWA also relies on modern technology to curb water pollution. It requires many polluters to implement the best practicable control technology, the best available technology economically achievable, or the best practicable waste treatment technology. The development of such technology for nontoxic polluters is based on a cost-benefit analysis in which the feasibility and expense of the technology is balanced against the expected benefits to the environment.

The CWA was amended in 1977 to address the nation's increasing concern about toxic pollutants. Pursuant to the 1977 amendments, the EPA increased the number of pollutants it deemed toxic from nine to 65, and set effluent limitations for the 21 industries that discharge them. These limitations are based on measures of the danger these pollutants pose to the public health rather than on cost-benefit analyses.

Many states have enacted their own water pollution legislation regulating the discharge of toxic and other pollutants into their streams and lakes.

The mining industry presents persistent water pollution problems for state and federal governments. It has polluted over a thousand miles of streams in Appalachia with acid drainage. In response, the affected state governments now require strip miners to obtain licenses before commencing activity. Many states also require miners to post bonds in an amount sufficient to repair potential damage to surrounding lakes and streams. Similarly, the federal government, under the Mineral Leasing Act, 30 U.S.C.A. § 201 et seq., requires each mining applicant to "submit a plan of construction,

operation and rehabilitation" for the affected area, that takes into account the need for "restoration, revegetation and curtailment of erosion."

The commercial timber industry also presents persistent water pollution problems. Tree harvesting, yarding (the collection of felled trees), and road building can all deposit soil sediments into watercourses, thereby reducing the water quality for aquatic life. State governments have offered similar responses to these problems. For instance, clear-cutting (the removal of substantially all the trees from a given area) has been prohibited by most states. Other states have created buffer zones around particularly vulnerable watercourses, and banned unusually harmful activities in certain areas. Enforcement of these water pollution measures has been frustrated by vaguely worded legislation and a scarcity of inspectors in several states.

Common Law

State and federal water pollution statutes provide one avenue of legal recourse for those harmed by water pollution. The common-law doctrines of Nuisance, Trespass, Negligence, Strict Liability, and riparian ownership provide alternative remedies.

Nuisances can be public or private. Private nuisances interfere with the rights and interests of private citizens, whereas public nuisances interfere with the common rights and interests of the people at large. Both types of nuisance must result from the "unreasonable" activities of a polluter, and inflict "substantial" harm on neighboring landowners. An injury that is minor or inconsequential will not result in liability under common-law nuisance. For example, dumping trace amounts of fertilizer into a stream abutting neighboring property will not amount to a public or private nuisance.

The oil and agricultural industries are frequently involved in state nuisance actions. Oil companies often run afoul of nuisance principles for improperly storing, transporting, and disposing of hazardous materials. Farmers represent a unique class of persons who fall prey to water pollution nuisances almost as often as they create them. Their abundant use of fungicides, herbicides, insecticides, and rodenticides makes them frequent creators of nuisances, and their use of streams, rivers, and groundwater for irrigation systems makes them frequent victims.

Nuisance actions deal primarily with continuing or repetitive injuries. Trespass actions provide relief even when an injury results from a single event. A polluter who spills oil, dumps chemicals, or

otherwise contaminates a neighboring water supply on one occasion might avoid liability under nuisance law but not under the law of trespass. Trespass does not require proof of a substantial injury. However, only nominal damages will be awarded to a landowner whose water supply suffers little harm from the trespass of a polluter.

Trespass requires proof that a polluter intentionally or knowingly contaminated a particular course of water. Yet, water contamination often results from unintentional behavior, such as industrial accidents. In such instances, the polluter may be liable under common-law principles of negligence. Negligence occurs when a polluter fails to exercise the degree of care that would be reasonable under the circumstances. Thus, a landowner whose water supply was inadvertently contaminated might bring a successful lawsuit against the polluter for common-law negligence where a lawsuit for nuisance or trespass would fail.

Even when a polluter exercises the utmost diligence to prevent water contamination, an injured landowner may still have recourse under the doctrine of strict liability. Under this doctrine, polluters who engage in "abnormally dangerous" activities are held responsible for any water contamination that results. Courts consider six factors when determining whether a particular activity is abnormally dangerous: the probability that the activity will cause harm to another, the likelihood that the harm will be great, the ability to eliminate the risk by exercising reasonable care, the extent to which the activity is uncommon or unusual, the activity's appropriateness for a particular location, and the activity's value or danger to the community.

The doctrine of strict liability arose out of a national conflict between competing values during the industrial revolution. This conflict pitted those who believed it was necessary to create an environment that promoted commerce against those who believed it was necessary to preserve a healthy and clean environment. For many years, courts were reluctant to impose strict liability on U.S. businesses, out of concern over retarding industrial growth.

Since the early 1970s, courts have placed greater emphasis on preserving a healthy and clean environment. In Cities Service Co. v. State, 312 So. 2d 799 (Fla. App. 1975), the court explained that "though many hazardous activities … are socially desirable, it now seems reasonable that they pay their own way." Cities Service involved a situation in which a dam burst during a phosphate mining

operation, releasing a billion gallons of phosphate slime into adjacent waterways, where fish and other aquatic life were killed. The court concluded that this mining activity was abnormally dangerous.

Some activities inherently create abnormally dangerous risks to abutting waterways. In such cases, courts do not employ a Balancing test to determine whether an activity is abnormally dangerous. Instead, they consider these activities to be dangerous in and of themselves. The transportation and storage of high explosives and the operation of oil and gas wells are activities courts have held to create inherent risks of abnormally dangerous proportions.

The doctrine of riparian ownership forms the final prong of common-law recovery. A riparian proprietor is the owner of land abutting a stream of water, and has the right to divert the water for any useful purpose. Some courts define the term useful purpose broadly to include almost any purpose whatsoever, whereas other courts define it more narrowly to include only purposes that are reasonable or profitable.

In any event, downstream riparian proprietors are often placed at a disadvantage because the law protects upstream owners' initial use of the water. For example, an upstream proprietor may construct a dam to appropriate a reasonable amount of water without compensating a downstream proprietor. However, cases involving thermal pollution provide an exception to this rule. For example, downstream owners who use river water to make ice can seek injunctive relief to prevent upstream owners from engaging in any activities that raise the water temperature by even one degree Fahrenheit.

Further readings

Andreen, William L. 2003. "The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789–1972." Stanford Environmental Law Journal 22 (January).

Findley, Roger W., Daniel A. Farber, and Jody Freeman. 2003. Cases and Materials on Environmental Law. 6th ed. St. Paul, Minn.: West.

Hipfel, Steven J. 2001. "Enforcement of Nonpoint Source Water Pollution Control and Abatement Measures Applicable to Federal Facilities, Activities and Land Management Practices under Federal and State Law." Environmental Lawyer 8 (September).

Houck, Oliver A. 2002. The Clean Water Act TMDL Program: Law, Policy, and Implementation. 2d ed. Washington, D.C.: Environmental Law Institute.

Ryan, Mark A., ed. 2003. The Clean Water Act Handbook. 2d ed. Chicago: Section of Environment, Energy, and Resources, American Bar Association.

Cross-references

Environmental Law; Fish and Fishing; Law of the Sea; Mine and Mineral Law; Pollution; Riparian Rights; Solid Wastes, Hazardous Substances, and Toxic Pollutants; Tort Law; Water Rights.

Water Pollution

Federal pollution definition gets court challenge

"The National Center for Conservation Science & Policy has joined five other environmental groups in filing a lawsuit against the Environmental Protection Agency over a change in the Clean Water Act."

By Paul Fattig

Medford Mail Tribune

January 01, 2007

ASHLAND — The National Center for Conservation Science & Policy has joined five other environmental groups in filing a lawsuit against the Environmental Protection Agency over a change in the Clean Water Act.

Filed earlier this month, the lawsuit in the 9th Circuit Court of Appeals in San Francisco seeks to reverse the EPA's decision made earlier this year to redefine the word "pollutant" to exclude pesticides, explained Chad Woodward, water quality project manager for the Ashland-based center.

"If the rule is not contested, the Clean Water Act will allow pesticide applications directly to our drinking water sources," Woodward said in a prepared statement. "This would create unacceptable ecological and human health risks."

The center believes the EPA's decision could result in aerial spraying and other direct applications of pesticides into wetlands, streams and rivers, Woodward said.

The EPA had concluded that pesticide applications are not covered by the act because the Federal Insecticide Fungicide & Rodenticide Act label on the pesticides provided adequate protection

But woodward countered that the warning labels on pesticides do not provide adequate regulatory safeguards.

"For the EPA to say that pesticides are not pollutants is like saying poison is good for you," said Charlie Tebbutt, an attorney for the Western Environmental Law Center and lead counsel for the petitioners. "The EPA is ignoring the requirements of the Clean Water Act and cannot go unchallenged."

If the decision is not changed, it would place fresh water, fish, wildlife and human populations at risk, according to the plaintiffs.

"This is not what the Clean Water Act intended," Tebbutt concluded.

Joining the center in the legal challenge are Oregon Wild, Californians for Alternatives to Toxics, California Sportfishing Protection Alliance, Baykeeper and Saint John's Organic Farm. The groups represent a farm in Idaho and a cross section of environmental groups from California and Oregon.

Alert: Ninth Circuit Rules Unaltered Groundwater Is a "Pollutant" Under the Clean Water Act

April 18, 2003

Last week, the Ninth Circuit Court of Appeals ruled in Northern Plains Resource Council v. Fidelity Exploration and Development Company that unaltered groundwater produced in extracting coal bed methane ("CBM") and discharged into surface waters is a "pollutant" within the meaning of the Clean Water Act (the "Act"). While the factual context of the court's ruling is narrowly confined to CBM producers, the court's emphasis on the overall goals of the Act may have far-reaching impacts

for discharge of unaltered groundwater by developers, excavation and trenching contractors, quarry operators, energy production facilities and mining companies.

Section 402 of the Act prohibits the discharge of any "pollutant" from a point source into "navigable waters of the United States" without a National Pollution Discharge Elimination System ("NPDES") permit. 33 U.S.C. §§ 1311(a); 1342. The Act includes "industrial . . . waste discharged into water" as a "pollutant" and defines "pollution" as "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(6) and (19). Unpermitted discharges of such "pollutants" may result in civil or criminal liability under the Act. 33 U.S.C. § 1319.

In Northern Plains Resource Council, an energy company, Fidelity Exploration & Development Company ("Fidelity"), extracted methane gas from coal seams located deep below the Powder River Basin in Montana. In extracting coal bed methane, Fidelity pumped groundwater to the surface and discharged itÑunalteredÑinto the Tongue River without obtaining an NPDES permit. Although unaltered, the extracted groundwater had a "salty" chemical composition different from the chemistry of the river to which it was discharged.

The Montana Department of Environmental Quality took the position that Montana's program implementing the federal Clean Water Act exempted such unaltered groundwater from the Act's permit requirements. Nevertheless, an environmental group called the Northern Plains Resource Council filed a "citizen suit," alleging that the unaltered groundwater constituted a "pollutant," and that the unpermitted discharge subjected Fidelity to liability. The district court ruled in favor of Fidelity, concluding that the water discharged from the CBM extraction did not fall with the Act's definition of "pollutant" since the water was not altered in any fashion and that Montana state law exempted the discharge of unaltered groundwater.

The Ninth Circuit reversed, addressing two issues on appeal: (1) whether the unaltered groundwater produced from the CBM extraction process was a "pollutant" within the meaning of the Act; and, if so, (2) whether Montana state law could exempt Fidelity from federal permitting requirements for discharge of a pollutant under the Act.

As to the first issue, the court concluded that the CBM water was a "pollutant" regulated by the Act. First, the court examined the plain language of the statute and reasoned that CBM water was a "pollutant" because it was an "industrial waste" even though it was unaltered groundwater with a naturally occurring salty chemical composition. The court observed that industrial waste includes "any useless byproduct derived from the commercial production and sale of goods and services." Second, the court found that the CBM water was a "pollutant" even without the addition of chemicals under EPA regulations governing "produced water" from gas extraction. The court rejected Fidelity's argument that the unaltered groundwater was within the Act's limited exception for reinjection into a well isolated from other water bodies.

Most significantly, the court went beyond the actual definition of "pollutant," and examined the Act's policy goals and the definition of "pollution" to support its conclusion that CBM water was a "pollutant." Specifically, the court focused on the effect of the discharge on the receiving water, citing the Act's "antidegradation policy" requiring state water quality standards to prevent further degradation of the nation's waters and the overall objective to "restore and maintain the chemical, physical and biological integrity of the nation's waters." The court found that Fidelity's discharge caused "pollution" under the Act because it altered the water quality of the Tongue River. In other words, a "man-induced" alteration "refers to the effect of the discharge on the receiving water; it does not require the discharged water be altered by man."

Having concluded that Fidelity's discharge of unaltered groundwater was subject to the Act, the court considered whether Montana state law provided an exemption. The court concluded that neither EPA nor the State of Montana had the authority to create exemptions to federal statutory requirements for discharge of pollutants, such as the CBM water discharge, otherwise subject to permitting under the Act.

The Ninth Circuit's ruling in Northern Plains Resource Council has potential significance for developers, excavation and trenching contractors, quarry operators, energy production facilities and mining companies with operations involving infiltrated or extracted groundwater. Unaltered groundwater with "naturally occurring" constituents may still be considered a "pollutant," requiring NPDES

permitting under the Act, if the discharge affects the chemical, physical or biological integrity of the receiving waters.

The Environmental Law Department of Farella Braun + Martel LLP is among the largest and most experienced in the nation, with attorneys specializing in Clean Water Act compliance counseling, regulatory representation and enforcement defense, including defense of "citizen suits." Please contact the attorneys listed below, or any of our environmental attorneys, for more information.

October 23, 2006

FEDERAL DISTRICT COURT CREATES THREE PRONG POLLUTION EXCLUSION TEST

Recently, a Federal District Court Judge in the Northern District of Texas, in *Evanston Insurance Company v. Adkins*, 2006 WL 2848054 (Oct. 04, 2006), enunciated a three prong test to be used in the interpretation of the ISO CGL Pollution Exclusion. In *Adkins*, TXI owned and operated a cement plant. TXI hired Adkins, a welding and fabrication company, as an independent contractor for welding services at the cement plant. TXI sued Adkins in Texas state court for allegedly causing a fire at the cement plant. Evanston, Adkins' insurer, sought declaratory relief that its CGL policy issued to Adkins precluded coverage for TXI's claims.

As the basis of its coverage position and motion for summary judgment, Evanston asserted that the underlying lawsuit and TXI's claims for damages alleged merely economic damages not covered by the policy, or, alternatively, that four exclusions precluded coverage under the policy.

First, the Court addressed Evanston's argument that TXI's claims for "economic damages in the form of a gross business interruption loss" did not comprise "property damage." Essentially, Evanston argued that business interruption losses were not property damages, but rather economic losses not covered by the policy. The Court noted that the policy's definition of "property damage" included "loss of use of tangible property that is not physically injured." The Court observed that while TXI did indeed use the term "economic damages" in its pleadings, the Court stated that it must focus its analysis on the factual allegations that show the origin of the damages, rather than on

the legal theories asserted. Finding that the underlying lawsuit alleged that Adkins' negligence caused the fire that resulted in physical damage to the plant where production of materials necessary for the manufacture of cement resulted in the loss of use of that property for 27 days constituted covered "property damage" for loss of use of that property.

Next, the Court addressed Evanston's reliance upon the Pollution Exclusion. Evanston argued that the welding slag which caused the fire was a pollutant which triggered the Pollution Exclusion. The Court first examined precedent which defines what constitutes a "pollutant." Noting that the terms "irritant" and "contaminant" are overly broad, the Court stated that, without some limiting principle, the Pollution Exclusion would extend far beyond its intended scope. The *Adkins* Court noted the Fifth and Seventh Circuits' "common sense" approach when interpreting the Pollution Exclusion. From the Fifth Circuit's opinion in *Certain Underwriters at Lloyd's London v. C.A. Turner Construction Company*, 112 F.3d 184 (1997), the *Adkins*' Court advocates a three prong test to analyze pollution claims.

 "First, the court should determine whether the substance at issue falls within the insurance policy's literal definition of pollutant. If it does not, then no pollutant exclusion would apply, and no analysis is necessary. If, however, the substance falls within the policy's literal definition of pollutant," then the analysis proceeds to the second prong; "then, the court must next determine whether it caused the damages in the underlying insurance claim."

"The clause excludes coverage for expenses 'arising out of' or 'as a result of' the 'discharge, dispersal, seepage, migration, release, escape or placement of pollutants.' . . . If the substance did not cause the damages in the underlying claim, then no pollution exclusion applies, despite the substance meeting the literal definition of pollutant. . . . If the substance at issue falls within the literal definition of pollutant, and it caused the damages in the underlying claim, the court should make a third inquiry: . . ."; and "[W]hether common sense and the 'reasonable, objective expectations of the insured' at the time of contracting make it reasonable to trigger the pollutant exclusion."

Notably, the Northern District takes the *C.A. Turner* Court's common sense analysis and boot straps the Massachusetts' "reasonable expectations" test from *Western Alliance Insurance Company v. Gill*, 686 N.E.2d 997 (Mass. 1997), a test not adopted by any other Texas court.

In reliance upon this "reasonable expectations" test, the Northern District determined that the Evanston Pollution Exclusion did not apply to the welding slag which purportedly started the fire and loss at issue.

Although the Northern District did indeed find that welding slag was a pollutant and that the welding slag/pollutant did cause the fire and loss made the basis of the claim, the Court noted that the insured's reasonable expectation when purchasing the policy should be considered.

[W]elding slag, which is present whenever one welds, or the molten metal particles produced during welding, qualifies as a "pollutant" under this policy, since such an interpretation would lead to clearly absurd results. Evanston issued a commercial general liability policy to Adkins, a welder. It would defy common sense and all reasonable expectations to interpret a welder's general liability insurance policy as negated by its pollutant exclusion any time welding slag causes damage or injury. Such an interpretation would reduce the contractual promise of coverage to a dead letter. Accordingly, this court finds that even though welding slag falls within the policy's literal definition of a pollutant, and even though the slag is the alleged cause of the damages in the underlying suit, the pollutant exclusion does not apply to bar coverage based on the presence of welding slag.

PROFESSIONAL SERVICES EXCLUSION RE-VISITED

In *Mid-Continent Casualty Company v. Davis-Ruiz Corporation*, 2006 WL 2850067 (Oct. 03, 2006), the Southern District of Texas had the opportunity to again review and construe the ISO Professional Services Exclusion. The Court noted that the Professional Services Exclusion failed to define "professional services" which are excluded under the Professional Services Exclusion. Thus, the Court examined established precedent which defined "professional services" as:

A professional must perform more than an ordinary task to perform a professional service. To qualify as a professional service, the task must arise out of acts particular to the individual's specialized vocation. We do not deem an act a professional service merely because it is performed by a professional. Rather, it must be necessary for the professional to use his specialized knowledge or training.

The Court expressly found that the term "professional services" was not ambiguous. While the term is not specifically defined in the policy, the term is not ambiguous as it has been defined by the courts of Texas and is not reasonably subject to multiple interpretations.

In applying the definition of "professional services," the Court examined the relevant pleadings. It is noteworthy that the Court examined the pleadings under which the insured had been brought into the underlying lawsuit: the insured had been third-partied in under theories of contribution and indemnity. The Court did not examine or review the claimant/plaintiff's petition against the defendant as providing the factual basis and allegations to be construed against the policy under an eight corners' analysis. The Court examined and expressly addressed the factual claims and allegations made the basis of the defendant's third-party petition against the insured. This analysis is noteworthy because of the practical implications and often used practice that many third-party claims for indemnity and contribution fail to include or assert any express or specific factual allegations – instead, common practice merely provides that a third-party plaintiff will simply assert that, in the off chance that the third-party plaintiff is found liable, that it is the fault and liability of the third party defendant and that the third-party defendant is liable for contribution and/or indemnity to the third-party plaintiff. Thus, the common practice of factually-sparse and broad allegations in a third-party petition for contribution and/or indemnity may lack the factual predicate to implicate coverage under a third-party defendant's insurance policy.

Applying the "professional services" criteria to the factual allegations of the third-party petition, the Court found that the insured's inspection of the subject tank and ladder was the performance of a professional service. The third-party plaintiff alleged that it had contracted with the insured to perform the inspection and the insured "performed the inspection in accordance" with the Master Service Agreement. The MSA required that "the Work shall be performed in a good and workmanlike manner by qualified . . . workers," and the insured warranted that it was "experienced in the Work to be undertaken on behalf of" the third-party plaintiff and that the insured "possessed the skills and resources to complete the Work." Because the insured performed the work it was paid to do and as based upon the insured's experience and qualifications and specialized skills, the third party plain-

tiff's factual allegations referring to the insured's tank and ladder inspections constituted the rendition of "professional services" which were excluded from coverage under the policy.

4. Petitioner submits that due notice was given to both the California and United States Attorney General of a citizen suit by the private attorney general in the vindication of civil rights, that the action involves civil rights that are in the interests of California and United States citizens, and on behalf of a class, but the attorney generals are moot. Prior to this enactment, two or more of several co-tenants could not join in an action of ejectment, the interest of each being separate and distinct. Df Johnson v. Sejmlbeda, 5 Cal. 149; Tkrockmorton v. Burr, 5 Cal. 401; Welch y. Sullivan, 8 Cal. 187. Nor could a tenant in common maintain an action at law to recover his share of the rents and profits from his co-tenant. Pico v. Columbet, 12 Cal. 420. But that principle had no application to the case of money received by one tenant in common from sales of water or profits derived from the business of a ditch or mine. Oooilenow v. Ewer, 16 Cal. 461; AM v. Love, 17 Cal. 237. Under this section the right of one tenant in common to recover in an action of ejectment the possession of the entire tract as against all persons but his co-tenants, has been repeatedly held by the Supreme Court. Tovchard v. Crow, 20 Cal. 150; Stark v. Barrett, 15 Cal. 371; Mahoney v. Van Winkle, 21 Cal. 58.3; Ooller v. Fett, 30 Cal. 484. And executors and administrators can maintain such jointly with the other tenants in common in all cases where their testators or intestates could have done so until the administration of the estates they represent is closed, or the property distributed under decree of the Probate Court. 1581 et seq.; Meeks v. Hahn, 20 Cal. 620; Toucliard v. Keyes, 21 CaL 208; Jie.t/noMs v. Jfottmcr, 45 Cal. 631. If an estate should be sold in lots to different persons, the purchaser could not join in exhibiting one bill against the vendor for specific performance; but where there was a contract to convey with but one person, under which the purchaser conveyed his equitable interest of a moiety to each one of two persons, it was held that "these two persons might sue the original vendor for specific performance. The general rule used to be that unconnected parties may join in bringing a bill in equity, where there is one connected interest among them all, centering in the point in issue in the cause. Owen v. Frink, 24 Cal. 177.

Parties numerous, one suing for all. In March term, 1850, it was held that a suit ought not to be dismissed for defect of parties, where, although the complaint did not expressly allege that it was filed on behalf of the plaintiffs, and all others interested, etc., its scope was to protect the rights not only of the plaintiffs, but also of a numerous class, and from the nature of the enterprise, the condition of the country, and the ever-changing locations of the people engaged in mining, it was, if not utterly impracticable, productive of manifest inconvenience and oppressive delays, to require that all parties should be brought into court. Von Schmidt v. Huntingdon, 1 Cal. 68.

But the Supreme Court have held that this section in the former Practice Act was intended to applv to suits in equity, and not to actions at law. Andrews v. Mokelumne Hill Co., 7 Cal. 333.

In equity the strict rule, that all persons materially interested must be parties, was always dispensed with, where it was impracticable or very inconvenient, as in case of a very numerous association in a joint concern— in effect a partnership. Cockburn v. Thompson, 16 Ves.321; Slo. &/. PI., Sec. 135. Oormanv. RusuM, 14 Cal. 540.

California Code of Civil Procedure.

5. 1085. (a) A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board, or person.

THE COURT IS COMPELLED TO ISSUE THE WRIT OF POSSESSION EX PARTE

THE COURT IS COMPELLED TO FILE THE DECLARATION FOR EX PARTE WRIT

THE COURT IS COMPELLED TO ORDER A WRIT OF EJECTMENT

THE COURT IS COMPELLED TO DIRECT THE CLERK TO ISSUE THE WRIT IMMEDIATELY

6. 1086. The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested.

7. 1087. The writ may be either alternative or peremptory. The alternative writ must command the party to whom it is directed immediately after the receipt of the writ, or at some other specified

time, to do the act required to be performed, or to show cause before the court at a time and place then or thereafter specified by court order why he has not done so. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he has not done as commanded must be omitted.

8. 1088. When the application to the court is made without notice to the adverse party, and the writ is allowed, the alternative must be first issued; but if the application is upon due notice and the writ is allowed, the peremptory may be issued in the first instance. With the alternative writ and also with any notice of an intention to apply for the writ, there must be served on each person against whom the writ is sought a copy of the petition. The notice of the application, when given, must be at least ten days. The writ cannot be granted by default. The case must be heard by the court, whether the adverse party appears or not.

9. 1088.5. In a trial court, if no alternative writ is sought, proof of service of a copy of the petition need not accompany the application for a writ at the time of filing, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court.

10. 1089. On the date for return of the alternative writ, or on which the application for the writ is noticed, or, if the Judicial Council shall adopt rules relating to the return and answer, then at the time provided by those rules, the party upon whom the writ or notice has been served may make a return by demurrer, verified answer or both. If the return is by demurrer alone, the court may allow an answer to be filed within such time as it may designate. Nothing in this section affects rules of the Judicial Council governing original writ proceedings in reviewing courts.

PETITION FOR ADJUDICATION AND JUDGMENT ON THE MERITS

11. 1094. If no return be made, the case may be heard on the papers of the applicant. If the return raises only questions of law, or puts in issue immaterial statements, not affecting the substantial rights of the parties, the court must proceed to hear or fix a day for hearing the argument of the case. If a petition for a writ of mandate filed pursuant to Section 1088.5 presents no triable issue of fact or is based solely on an administrative record, the matter may be determined by the court by noticed motion of any party for a judgment on the peremptory writ.

PETITION FOR REVIEW OF ABUSE OF PROCESS AND ABUSE OF DISCRETION

FALSE AND MALICIOUS PROSECUTION FOR CRIME OF INFAMY EX POST FACTO

12. 1094.5. (a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board, or officer may be filed with the petition, may be filed with respondent's points and authorities, or may be ordered to be filed by the court. Except when otherwise prescribed by statute, the cost of preparing the record shall be borne by the petitioner. Where the petitioner has proceeded pursuant to Section 68511.3 of the Government Code and the Rules of Court implementing that section and where the transcript is necessary to a proper review of the administrative proceedings, the cost of preparing the transcript shall be borne by the respondent.

PROCEEDINGS PURSUANT TO SECTION 1088.5

13. Where the party seeking the writ has proceeded pursuant to Section 1088.5, the administrative record shall be filed as expeditiously as possible, and may be filed with the petition, or by the respondent after payment of the costs by the petitioner, where required, or as otherwise directed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, the expense shall be taxable as costs.

14. (b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

THE FINDINGS ARE NOT SUPPORTED BY THE EVIDENCE

15. (c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the

evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

16. (810.) Section Eight Hundred and Ten. When the action is brought upon the information or application of a private party, the Attorney General may require such party to enter into an undertaking, with sureties to be approved by the Attorney General, conditioned that such party or the sureties will pay any judgment for costs or damages recovered against the plaintiff, and all the costs and expenses incurred in the prosecution of the action.

§ 1985. Conspiracy to interfere with civil rights

17. (3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Where the plaintiff sued on behalf of himself and others, residents and property-holders of the city of Oakland, to set aside certain conveyances operating as a cloud upon the title to a tract of land occupied by the city, and to obtain an injunction, etc., and the court below entered a judgment declaring the conveyances fraudulent and void, and enjoining the defendants from future alienations in

respect to the land of the plaintiff, the relief in this particular being confined to the plaintiff alone, the Supreme Court held that there was no such community of interest between the plaintiff and those whom he represented in the action as entitled him to an injunction in their favor. Gibbons v. Peralta, 21 Cal. 632, 633.

383. (15.) Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff.

Sureties, 1059.

384. 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.

387. (659, 660, 661.) Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds Upon which the intervention rests, filed by leave of the court, and served upon the parties to the action or proceeding who have not appeared, and upon the attorneys of the parties who have appeared, who may answer or demur to it as if it were an original complaint. [Approved March 24; effect July 1, 1874.]

Intervention. Eminent domain, 1244.

(1097.) Section Ten Hundred and Ninety-seven. When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, Board, or person, if it appear to the Court that any member of such tribunal, corporation, or Board, or such person upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the Court may, upon motion, impose a fine not

exceeding one thousand dollars. In case of persistence in a refusal of obedience, the Court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ.

1107. When an application is filed for the issuance of any prerogative writ, the application shall be accompanied by proof of service of a copy thereof upon the respondent and the real party in interest named in such application. The provisions of Chapter 5 (commencing with Section 1010) of Title 14 of Part 2 shall apply to the service of the application. However, when a writ of mandate is sought pursuant to the provisions of Section 1088.5, the action may be filed and served in the same manner as an ordinary action under Part 2 (commencing with Section 307)

. Where the real party in respondent's interest is a board or commission, the service shall be made upon the presiding officer, or upon the secretary, or upon a majority of the members, of the board or commission. Within five days after service and filing of the application, the real party in interest or the respondent or both may serve upon the applicant and file with the court points and authorities in opposition to the granting of the writ.

The court in which the application is filed, in its discretion and for good cause, may grant the application ex parte, without notice or service of the application as herein provided. The provisions of this section shall not be applicable to applications for the writ of habeas corpus, or to applications for writs of review of the Industrial Accident or Public Utilities Commissions.

1108. Writs of review, mandate, and prohibition issued by the Supreme Court, a court of appeal, or a superior court, may, in the discretion of the court issuing the writ, be made returnable, and a hearing thereon be had at any time.

1138. Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any Court which would have

jurisdiction if an action had been brought; but it must appear, by affidavit, that the controversy is real and the proceedings in good faith, to determine the rights of the parties. The Court must thereupon hear and determine the case, and render judgment thereon, as if an action were depending.

1139. Judgment must be entered as in other cases, but without costs for any proceeding prior to the trial. The case, the submission, and a copy of the judgment constitute the judgment roll.

1140. The judgment may be enforced in the same manner as if it had been rendered in an action of the same jurisdictional classification in the same court, and is in the same manner subject to appeal.

1159. Every person is guilty of a forcible entry who either:

2. Who, after entering peaceably upon real property, turns out by force, threats, or menacing conduct, the party in possession.

The "party in possession" means any person who hires real property and includes a boarder or lodger, except those persons whose occupancy is described in subdivision (b) of Section 1940 of the Civil Code.

1160. Every person is guilty of a forcible detainer who either:

1. By force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise; or,

2. Who, in the night-time, or during the absence of the occupant of any lands, unlawfully enters upon real property, and who, after demand made for the surrender thereof, for the period of five days, refuses to surrender the same to such former occupant.

The occupant of real property, within the meaning of this subdivision, is one who, within five days preceding such unlawful entry, was in the peaceable and undisturbed possession of such lands.

1161. A tenant of real property, for a term less than life, or the executor or administrator of his or her estate heretofore qualified and now acting or hereafter to be qualified and act, is guilty of unlawful detainer:

1. When he or she continues in possession, in person or by subtenant, of the property, or any part thereof, after the expiration of the term for which it is let to him or her; provided the expiration is of a nondefault nature however brought about without the permission of his or her landlord, or the successor in estate of his or her landlord, if applicable; including the case where the person to be removed became the occupant of the premises as a servant, employee, agent, or licensee and the relation of master and servant, or employer and employee, or principal and agent, or licensor and licensee, has been lawfully terminated or the time fixed for occupancy by the agreement between the parties has expired; but nothing in this subdivision shall be construed as preventing the removal of the occupant in any other lawful manner; but in case of a tenancy at will, it must first be terminated by notice, as prescribed in the Civil Code.

2. When he or she continues in possession, in person or by subtenant, without the permission of his or her landlord, or the successor in estate of his or her landlord, if applicable, after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and three days' notice, in writing, requiring its payment, stating the amount which is due, the name, telephone number, and address of the person to whom the rent payment shall be made, and, if payment may be made personally, the usual days and hours that person will be available to receive the payment (provided that, if the address does not allow for personal delivery, then it shall be conclusively presumed that upon the mailing of any rent or notice to the owner by the tenant to the name and address provided, the notice or rent is deemed received by the owner on the date posted, if the tenant can show proof of mailing to the name and address provided by the owner), or the number of an account in a financial institution into which the rental payment may be made, and the name and street address of the

institution (provided that the institution is located within five miles of the rental property), or if an electronic funds transfer procedure has been previously established, that payment may be made pursuant to that procedure, or possession of the property, shall have been served upon him or her and if there is a subtenant in actual occupation of the premises, also upon the subtenant.

The notice may be served at any time within one year after the rent becomes due. In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than 60 days after the expiration of the term without any demand of possession or notice to quit by the landlord or the successor in estate of his or her landlord, if applicable, he or she shall be deemed to be holding by permission of the landlord or successor in estate of his or her landlord, if applicable, and shall be entitled to hold under the terms of the lease for another full year, and shall not be guilty of an unlawful detainer during that year, and the holding over for that period shall be taken and construed as a consent on the part of a tenant to hold for another year.

3. When he or she continues in possession, in person or by subtenant, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than the one for the payment of rent, and three days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him or her, and if there is a subtenant in actual occupation of the premises, also, upon the subtenant. Within three days after the service of the notice, the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform the conditions or covenants of the lease or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture; provided, if the conditions and covenants of

the lease, violated by the lessee, cannot afterward be performed, then no notice, as last prescribed herein, need be given to the lessee or his or her subtenant, demanding the performance of the violated conditions or covenants of the lease.

A tenant may take proceedings, similar to those prescribed in this chapter, to obtain possession of the premises let to a subtenant or held by a servant, employee, agent, or licensee, in case of his or her unlawful detention of the premises underlet to him or her or held by him or her.

4. Any tenant, subtenant, or executor or administrator of his or her estate heretofore qualified and now acting, or hereafter to be qualified and act, assigning or subletting or committing waste upon the demised premises, contrary to the conditions or covenants of his or her lease, or maintaining, committing, or permitting the maintenance or commission of a nuisance upon the demised premises or using the premises for an unlawful purpose, thereby terminates the lease, and the landlord, or his or her successor in estate, shall upon service of three days' notice to quit upon the person or persons in possession, be entitled to restitution of possession of the demised premises under this chapter.

5. When he or she gives written notice as provided in Section 1946 of the Civil Code of his or her intention to terminate the hiring of the real property, or makes a written offer to surrender which is accepted in writing by the landlord, but fails to deliver possession at the time specified in that written notice, without the permission of his or her landlord, or the successor in estate of the landlord, if applicable.

As used in this section, tenant includes any person who hires real property except those persons whose occupancy is described in subdivision (b) of Section 1940 of the Civil Code. This section shall remain in effect only until January 1, 2012, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2012, deletes or extends that date.

1161. A tenant of real property, for a term less than life, or the executor or administrator of his or her estate heretofore qualified and now acting or hereafter to be qualified and act, is guilty of unlawful detainer:

1. When he or she continues in possession, in person or by subtenant, of the property, or any part thereof, after the expiration of the term for which it is let to him or her; provided the expiration is of a nondefault nature however brought about without the permission of his or her landlord, or the successor in estate of his or her landlord, if applicable; including the case where the person to be removed became the occupant of the premises as a servant, employee, agent, or licensee and the relation of master and servant, or employer and employee, or principal and agent, or licensor and licensee, has been lawfully terminated or the time fixed for occupancy by the agreement between the parties has expired; but nothing in this subdivision shall be construed as preventing the removal of the occupant in any other lawful manner; but in case of a tenancy at will, it must first be terminated by notice, as prescribed in the Civil Code.

2. When he or she continues in possession, in person or by subtenant, without the permission of his or her landlord, or the successor in estate of his or her landlord, if applicable, after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and three days' notice, in writing, requiring its payment, stating the amount which is due, the name, telephone number, and address of the person to whom the rent payment shall be made, and, if payment may be made personally, the usual days and hours that person will be available to receive the payment (provided that, if the address does not allow for personal delivery, then it shall be conclusively presumed that upon the mailing of any rent or notice to the owner by the tenant to the name and address provided, the notice or rent is deemed received by the owner on the date posted, if the tenant can show proof of mailing to the name and address provided by the owner), or the number of an account in a financial institution into which the rental payment may be made, and the name and street address of the

institution (provided that the institution is located within five miles of the rental property), or if an electronic funds transfer procedure has been previously established, that payment may be made pursuant to that procedure, or possession of the property, shall have been served upon him or her and if there is a subtenant in actual occupation of the premises, also upon the subtenant.

The notice may be served at any time within one year after the rent becomes due.

4. Any tenant, subtenant, or executor or administrator of his or her estate heretofore qualified and now acting, or hereafter to be qualified and act, assigning or subletting or committing waste upon the demised premises, contrary to the conditions or covenants of his or her lease, or maintaining, committing, or permitting the maintenance or commission of a nuisance upon the demised premises or using the premises for an unlawful purpose, thereby terminates the lease, and the landlord, or his or her successor in estate, shall upon service of three days' notice to quit upon the person or persons in possession, be entitled to restitution of possession of the demised premises under this chapter.

As used in this section, tenant includes any person who hires real property except those persons whose occupancy is described in subdivision (b) of Section 1940 of the Civil Code.

1161.1. With respect to application of Section 1161 in cases of possession of commercial real property after default in the payment of rent:

(a) If the amount stated in the notice provided to the tenant pursuant to subdivision (2) of Section 1161 is clearly identified by the notice as an estimate and the amount claimed is not in fact correct, but it is determined upon the trial or other judicial determination that rent was owing, and the amount claimed in the notice was reasonably estimated, the tenant shall be subject to judgment for possession and the actual amount of rent and other sums found to be due. However, if (1) upon receipt of such a notice claiming an amount identified by the notice as an estimate, the

tenant tenders to the landlord within the time for payment required by the notice, the amount which the tenant has reasonably estimated to be due and (2) if at trial it is determined that the amount of rent then due was the amount tendered by the tenant or a lesser amount, the tenant shall be deemed the prevailing party for all purposes. If the court determines that the amount so tendered by the tenant was less than the amount due, but was reasonably estimated, the tenant shall retain the right to possession if the tenant pays to the landlord within five days of the effective date of the judgment (1) the amount previously tendered if it had not been previously accepted, (2) the difference between the amount tendered and the amount determined by the court to be due, and (3) any other sums as ordered by the court.

(b) If the landlord accepts a partial payment of rent, including any payment pursuant to subdivision (a), after serving notice pursuant to Section 1161, the landlord, without any further notice to the tenant, may commence and pursue an action under this chapter to recover the difference between the amount demanded in that notice and the payment actually received, and this shall be specified in the complaint.

(c) If the landlord accepts a partial payment of rent after filing the complaint pursuant to Section 1166, the landlord's acceptance of the partial payment is evidence only of that payment, without waiver of any rights or defenses of any of the parties. The landlord shall be entitled to amend the complaint to reflect the partial payment without creating a necessity for the filing of an additional answer or other responsive pleading by the tenant, and without prior leave of court, and such an amendment shall not delay the matter from proceeding. However, this subdivision shall apply only if the landlord provides actual notice to the tenant that acceptance of the partial rent payment does not constitute a waiver of any rights, including any right the landlord may have to recover possession of the property.

(d) "Commercial real property" as used in this section, means all real property in this state except dwelling units made subject to Chapter 2 (commencing with Section 1940) of Title 5 of Part 4 of Division 3 of the Civil Code, mobilehomes as defined in

Section 798.3 of the Civil Code, or recreational vehicles as defined in Section 799.24 of the Civil Code.

(e) For the purposes of this section, there is a presumption affecting the burden of proof that the amount of rent claimed or tendered is reasonably estimated if, in relation to the amount determined to be due upon the trial or other judicial determination of that issue, the amount claimed or tendered was no more than 20 percent more or less than the amount determined to be due. However, if the rent due is contingent upon information primarily within the knowledge of the one party to the lease and that information has not been furnished to, or has not accurately been furnished to, the other party, the court shall consider that fact in determining the reasonableness of the amount of rent claimed or tendered pursuant to subdivision (a).

1161.2. (a) The clerk may allow access to limited civil case records filed under this chapter, including the court file, index, and register of actions, only as follows:

(1) To a party to the action, including a party's attorney.

(2) To any person who provides the clerk with the names of at least one plaintiff and one defendant and the address of the premises, including the apartment or unit number, if any.

(3) To a resident of the premises who provides the clerk with the name of one of the parties or the case number and shows proof of residency.

(4) To any person by order of the court, which may be granted ex parte, on a showing of good cause.

(5) To any other person 60 days after the complaint has been filed, unless a defendant prevails in the action within 60 days of the filing of the complaint, in which case the clerk may not allow access to any court records in the action, except as provided in paragraphs (1) to (4), inclusive.

(b) For purposes of this section, "good cause" includes, but is not limited to, the gathering of newsworthy facts by a person described in Section 1070 of the Evidence Code.

It is the intent of the Legislature that a simple procedure be established to request the ex parte order described in subdivision (a).

(c) Upon the filing of any case so restricted, the court clerk shall mail notice to each defendant named in the action. The notice shall be mailed to the address provided in the complaint. The notice shall contain a statement that an unlawful detainer complaint (eviction action) has been filed naming that party as a defendant, and that access to the court file will be delayed for 60 days except to a party, an attorney for one of the parties, or any other person who (1) provides to the clerk the names of at least one plaintiff and one defendant in the action and provides to the clerk the address, including any applicable apartment, unit, or space number, of the subject premises, or (2) provides to the clerk the name of one of the parties in the action or the case number and can establish through proper identification that he or she lives at the subject premises.

The notice shall also contain a statement that access to the court index, register of actions, or other records is not permitted until 60 days after the complaint is filed, except pursuant to an order upon a showing of good cause therefor. The notice shall contain on its face the name and telephone number of the county bar association and the name and telephone number of an office or offices funded by the federal Legal Services Corporation or qualified legal services projects that receive funds distributed pursuant to Section 6216 of the Business and Professions Code, that provide legal services to low-income persons in the county in which the action is filed. The notice shall state that these numbers may be called for legal advice regarding the case. The notice shall be issued between 24 and 48 hours of the filing of the complaint, excluding weekends and holidays. One copy of the notice shall be addressed to "all occupants" and mailed separately to the subject premises. The notice shall not constitute service of the summons and complaint.

(d) Notwithstanding any other provision of law, the court shall charge an additional fee of fifteen dollars ($15) for filing a first appearance by the plaintiff. This fee shall be added to the uniform filing fee for actions filed under this chapter.

(e) This section does not apply to a case that seeks to terminate a mobilehome park tenancy if the statement of the character of the proceeding in the caption of the complaint clearly indicates that the complaint seeks termination of a mobilehome park tenancy.

1161.5. When the notice required by Section 1161 states that the lessor or the landlord may elect to declare the forfeiture of the lease or rental agreement, that declaration shall be nullified and the lease or rental agreement shall remain in effect if the lessee or tenant performs within three days after service of the notice or if the breach is waived by the lessor or the landlord after service of the notice.

1162a. In any case in which service or exhibition of a receiver's or levying officer's deed is required, in lieu thereof service of a copy or copies of the deed may be made as provided in Section 1162.

1164. No person other than the tenant of the premises and subtenant, if there be one, in the actual occupation of the premises when the complaint is filed, need be made parties defendant in the proceeding, nor shall any proceeding abate, nor the plaintiff be nonsuited for the nonjoinder of any person who might have been made party defendant, but when it appears that any of the parties served with process, or appearing in the proceeding, are guilty of the offense charged, judgment must be rendered against him or her. In case a defendant has become a subtenant of the premises in controversy, after the service of the notice provided for by subdivision 2 of Section 1161 of this code, upon the tenant of the premises, the fact that such notice was not served on each subtenant shall constitute no defense to the action. All persons who enter the premises under the tenant, after the commencement of the suit, shall be bound by the judgment, the same as if he or they had been made party to the action.

1165. Except as provided in the preceding section, the provisions of Part II of this Code, relating to parties to civil actions, are applicable to this proceeding.

1166. (a) The complaint shall:

(1) Be verified and include the typed or printed name of the person verifying the complaint.

(2) Set forth the facts on which the plaintiff seeks to recover.

(3) Describe the premises with reasonable certainty.

(4) If the action is based on paragraph (2) of Section 1161, state the amount of rent in default.

(5) State specifically the method used to serve the defendant with the notice or notices of termination upon which the complaint is based. This requirement may be satisfied by using and completing all items relating to service of the notice or notices in an appropriate Judicial Council form complaint, or by attaching a proof of service of the notice or notices of termination served on the defendant.

(b) The complaint may set forth any circumstances of fraud, force, or violence that may have accompanied the alleged forcible entry or forcible or unlawful detainer, and claim damages therefor.

(c) (1) In an action regarding residential property, the plaintiff shall attach to the complaint the following:

(A) A copy of the notice or notices of termination served on the defendant upon which the complaint is based.

(B) A copy of any written lease or rental agreement regarding the premises. Any addenda or attachments to the lease or written agreement that form the basis of the complaint shall also be attached. The documents required by this subparagraph are not required to be attached if the complaint alleges any of the following:

(i) The lease or rental agreement is oral.

(ii) A written lease or rental agreement regarding the premises is not in the possession of the landlord or any agent or employee of the landlord.

(iii) An action based solely on subdivision (2) of Section 1161.

(2) If the plaintiff fails to attach the documents required by this subdivision, the court shall grant leave to amend the complaint for a 5-day period in order to include the required attachments.

(d) Upon filing the complaint, a summons shall be issued thereon.

1166a. (a) Upon filing the complaint, the plaintiff may, upon motion, have immediate possession of the premises by a writ of possession of a manufactured home, mobile-home, or real property issued by the court and directed to the sheriff of the county or marshal, for execution, where it appears to the satisfaction of the court, after a hearing on the motion, from the verified complaint and from any affidavits filed or oral testimony given by or on behalf of the parties, that the defendant resides out of state, has departed from the state, cannot, after due diligence, be found within the state, or has concealed himself or herself to avoid the service of summons. The motion shall indicate that the writ applies to all tenants, subtenants, if any, named claimants, if any, and any other occupants of the premises.

(b) Written notice of the hearing on the motion shall be served on the defendant by the plaintiff in accordance with the provisions of Section 1011, and shall inform the defendant as follows: "You may file affidavits on your own behalf with the court and may appear and present testimony on your own behalf. However, if you fail to appear, the plaintiff will apply to the court for a writ of possession of a manufactured home, mobilehome, or real property."

(c) The plaintiff shall file an undertaking in a sum that shall be fixed and determined by the judge, to the effect that, if the plaintiff fails to recover judgment against the defendant for the possession of the premises or if the suit is dismissed, the plaintiff will pay to the defendant those damages, not to exceed the amount fixed in the undertaking, as may be sustained by the defendant by reason of that dispossession under the writ of possession of a manufactured home, mobilehome, or real property.

(d) If, at the hearing on the motion, the findings of the court are in favor of the plaintiff and against the defendant, an order shall be entered for the immediate possession of the premises.

(e) The order for the immediate possession of the premises may be enforced as provided in Division 3 (commencing with Section 712.010) of Title 9 of Part 2.

(f) For the purposes of this section, references in Division 3 (commencing with Section 712.010) of Title 9 of Part 2 and in subdivisions (e) to (m), inclusive, of Section 1174, to the "judgment debtor" shall be deemed references to the defendant, to the "judgment creditor" shall be deemed references to the plaintiff, and to the "judgment of possession or sale of property" shall be deemed references to an order for the immediate possession of the premises.

1167. The summons shall be in the form specified in Section 412.20 except that when the defendant is served, the defendant's response shall be filed within five days, including Saturdays and Sundays but excluding all other judicial holidays, after the complaint is served upon him or her. If the last day for filing the response falls on a Saturday or Sunday, the response period shall be extended to and including the next court day.

In all other respects the summons shall be issued and served and returned in the same manner as a summons in a civil action.

1167.3. In any action under this chapter, unless otherwise ordered by the court for good cause shown, the time allowed the defendant to answer the complaint, answer the complaint, if amended, or amend the answer under paragraph (2), (3), (5), (6), or (7) of subdivision (a) of Section 586 shall not exceed five days.

1167.4. Notwithstanding any other provision of law, in any action under this chapter:

(a) Where the defendant files a notice of motion as provided for in subdivision (a) of Section 418.10, the time for making the motion shall be not less than three days nor more than seven days after the filing of the notice.

(b) The service and filing of a notice of motion under subdivision

(a) shall extend the defendant's time to plead until five days after service upon him of the written notice of entry of an order denying his motion, except that for good cause shown the court may extend the defendant's time to plead for an additional period not exceeding 15 days.

1167.5. Unless otherwise ordered by the court for good cause shown, no extension of time allowed in any action under this chapter for the causes specified in Section 1054 shall exceed 10 days without the consent of the adverse party.

1169. If, at the time appointed, any defendant served with a summons does not appear and defend, the clerk, upon written application of the plaintiff and proof of the service of summons and complaint, shall enter the default of any defendant so served, and, if requested by the plaintiff, immediately shall enter judgment for restitution of the premises and shall issue a writ of execution thereon. The application for default judgment and the default judgment shall include a place to indicate that the judgment includes tenants, subtenants, if any, named claimants, if any, and any other occupants of the premises. Thereafter, the plaintiff may apply to the court for any other relief demanded in the complaint, including the costs, against the defendant, or defendants, or against one or more of the defendants.

1170. On or before the day fixed for his appearance, the defendantmay appear and answer or demur.

1170.5. (a) If the defendant appears pursuant to Section 1170, trial of the proceeding shall be held not later than the 20th day following the date that the request to set the time of the trial is made. Judgment shall be entered thereon and, if the plaintiff prevails, a writ of execution shall be issued immediately by the court upon the request of the plaintiff.

(b) The court may extend the period for trial upon the agreement of all of the parties. No other extension of the time for trial of an action under this chapter may be granted unless the court, upon its own motion or on motion of any party, holds a hearing and renders a decision thereon as specified in subdivision (c).

(c) If trial is not held within the time specified in this section, the court, upon finding that there is a reasonable probability that the plaintiff will prevail in the action, shall determine the amount of damages, if any, to be suffered by the plaintiff by reason of the extension, and shall issue an order requiring the defendant to pay that amount into court as the rent would have otherwise become due and payable or into an escrow designated by the court for so long as the defendant remains in possession pending the termination of the action.

The determination of the amount of the payment shall be based on the plaintiff's verified statement of the contract rent for rental payment, any verified objection thereto filed by the defendant, and the oral or demonstrative evidence presented at the hearing. The court's determination of the amount of damages shall include consideration of any evidence, presented by the parties, embracing the issue of diminution of value or any set off permitted by law.

(d) If the defendant fails to make a payment ordered by the court, trial of the action shall be held within 15 days of the date payment was due.

(e) Any cost for administration of an escrow account pursuant to this section shall be recoverable by the prevailing party as part of any recoverable cost in the action.

(f) After trial of the action, the court shall determine the distribution of the payment made into court or the escrow designated by the court.

(g) Where payments into court or the escrow designated by the court are made pursuant to this section, the court may order that the payments be invested in an insured interest-bearing account.

Interest on the account shall be allocated to the parties in the same proportions as the original funds are allocated.

(h) If any provision of this section or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

(i) Nothing in this section shall be construed to abrogate or interfere with the precedence given to the trial of criminal cases over the trial of civil matters by Section 1050 of the Penal Code.

1170.7. A motion for summary judgment may be made at any time after the answer is filed upon giving five days notice.

Summary judgment shall be granted or denied on the same basis as a motion under Section 437c.

1170.8. In any action under this chapter, a discovery motion may be made at any time upon giving five days' notice.

1170.9. The Judicial Council shall adopt rules, not inconsistent with statute, prescribing the time for filing and serving opposition and reply papers, if any, relating to a motion under Section 1167.4, 1170.7, or 1170.8.

1171. Whenever an issue of fact is presented by the pleadings, it must be tried by a jury, unless such jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in an action of the same jurisdictional classification in the Court in which the action is pending.

1172. On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer. The defendant may show in his defense that he or his ancestors, or those whose interest in such premises he claims, have been in the quiet possession thereof for the space of one whole year together next before the commencement of the proceedings, and that his interest therein is not then ended or determined; and such showing is a bar to the proceedings.

1173. When, upon the trial of any proceeding under this chapter, it appears from the evidence that the defendant has been guilty of either a forcible entry or a forcible or unlawful detainer, and other than the offense charged in the complaint, the Judge

must order that such complaint be forthwith amended to conform to such proofs; such amendment must be made without any imposition of terms. No continuance shall be permitted upon account of such amendment unless the defendant, by affidavit filed, shows to the satisfaction of the Court good cause therefor.

1174. (a) If upon the trial, the verdict of the jury, or, if the case be tried without a jury, the findings of the court be in favor of the plaintiff and against the defendant, judgment shall be entered for the possession of the premises; and if the proceedings be for an unlawful detainer after neglect, or failure to perform the conditions or covenants of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of that lease or agreement if the notice required by Section 1161 states the election of the landlord to declare the forfeiture thereof, but if that notice does not so state that election, the lease or agreement shall not be forfeited.

(b) The jury or the court, if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent. If the defendant is found guilty of forcible entry, or forcible or unlawful detainer, and malice is shown, the plaintiff may be awarded statutory damages of up to six hundred dollars ($600), in addition to actual damages, including rent found due. The trier of fact shall determine whether actual damages, statutory damages, or both, shall be awarded, and judgment shall be entered accordingly.

(c) When the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, and the notice required by Section 1161 has not stated the election of the landlord to declare the forfeiture thereof, the court may, and, if the lease or agreement is in writing, is for a term of more than one year, and does not contain a forfeiture clause, shall order that a writ shall not be issued to enforce the judgment until the ex-

piration of five days after the entry of the judgment, within which time the tenant, or any subtenant, or any mortgagee of the term, or any other party interested in its continuance, may pay into the court, for the landlord, the amount found due as rent, with interest thereon, and the amount of the damages found by the jury or the court for the unlawful detainer, and the costs of the proceedings, and thereupon
the judgment shall be satisfied and the tenant be restored to the tenant's estate. If payment as provided in this subdivision is not made within five days, the judgment may be enforced for its full amount and for the possession of the premises. In all other cases the judgment may be enforced immediately.

(d) Subject to subdivision (c), the judgment for possession of the premises may be enforced as provided in Division 3 (commencing with Section 712.010) of Title 9 of Part 2.

(e) Personal property remaining on the premises which the landlord reasonably believes to have been lost shall be disposed of pursuant to Article 1 (commencing with Section 2080) of Chapter 4 of Title 6 of Part 4 of Division 3 of the Civil Code. The landlord is not liable to the owner of any property which is disposed of in this manner. If the appropriate police or sheriff's department refuses to accept that property, it shall be deemed not to have been lost for the purposes of this subdivision.

(f) The landlord shall give notice pursuant to Section 1983 of the Civil Code to any person (other than the tenant) reasonably believed by the landlord to be the owner of personal property remaining on the premises unless the procedure for surrender of property under Section 1965 of the Civil Code has been initiated or completed.

(g) The landlord shall store the personal property in a place of safekeeping until it is either released pursuant to subdivision (h) or disposed of pursuant to subdivision (i).

(h) The landlord shall release the personal property pursuant to Section 1965 of the Civil Code or shall release it to the tenant or, at the landlord's option, to a person reasonably believed by the landlord to be its owner if the tenant or other person pays the costs of storage as provided in Section 1990 of the Civil Code and claims the property not later than the date specified in the writ of possession before which the tenant must

make his or her claim or the date specified in the notice before which a person other than the tenant must make his or her claim.

(i) Personal property not released pursuant to subdivision (h) shall be disposed of pursuant to Section 1988 of the Civil Code.

(j) Where the landlord releases personal property to the tenant pursuant to subdivision (h), the landlord is not liable with respect to that property to any person.

(k) Where the landlord releases personal property pursuant to subdivision (h) to a person (other than the tenant) reasonably believed by the landlord to be its owner, the landlord is not liable with respect to that property to:

(1) The tenant or to any person to whom notice was given pursuant to subdivision (f); or

(2) Any other person, unless that person proves that, prior to releasing the property, the landlord believed or reasonably should have believed that the person had an interest in the property and also that the landlord knew or should have known upon reasonable investigation the address of that person.

(l) Where personal property is disposed of pursuant to Section 1988 of the Civil Code, the landlord is not liable with respect to that property to:

(1) The tenant or to any person to whom notice was given pursuant to subdivision (f); or

(2) Any other person, unless that person proves that, prior to disposing of the property pursuant to Section 1988 of the Civil Code, the landlord believed or reasonably should have believed that the person had an interest in the property and also that the landlord knew or should have known upon reasonable investigation the address of that person.

(m) For the purposes of subdivisions (e), (f), (h), (k), and (l), the terms "owner," "premises," and "reasonable belief" have the same meaning as provided in Section 1980 of the Civil Code.

1174.2. (a) In an unlawful detainer proceeding involving residential premises after default in payment of rent and in which the tenant has raised as an affirmative defense a breach of the landlord's obligations under Section 1941 of the Civil Code or of any warranty of habitability, the court shall determine whether a substantial breach of these obligations has occurred. If the court finds that a substantial breach has occurred, the court (1) shall determine the reasonable rental value of the premises in its untenantable state to the date of trial, (2) shall deny possession to the landlord and adjudge the tenant to be the prevailing party, conditioned upon the payment by the tenant of the rent that has accrued to the date of the trial as adjusted pursuant to this subdivision within a reasonable period of time not exceeding five days, from the date of the court's judgment or, if service of the court's judgment is made by mail, the payment shall be made within the time set forth in Section 1013, (3) may order the landlord to make repairs and correct the conditions which constitute a breach of the landlord's obligations, (4) shall order that the monthly rent be limited to the reasonable rental value of the premises as determined pursuant to this subdivision until repairs are completed, and (5) except as otherwise provided in subdivision (b), shall award the tenant costs and attorneys' fees if provided by, and pursuant to, any statute or the contract of the parties. If the court orders repairs or corrections, or both, pursuant to paragraph (3), the court's jurisdiction continues over the matter for the purpose of ensuring compliance. The court shall, however, award possession of the premises to the landlord if the tenant fails to pay all rent accrued to the date of trial, as determined due in the judgment, within the period prescribed by the court pursuant to this subdivision. The tenant shall, however, retain any rights conferred by Section 1174.

(b) If the court determines that there has been no substantial breach of Section 1941 of the Civil Code or of any warranty of habitability by the landlord or if the tenant fails to pay all rent accrued to the date of trial, as required by the court pursuant to subdivision (a), then judgment shall be entered in favor of the landlord, and the land-

lord shall be the prevailing party for the purposes of awarding costs or attorneys' fees pursuant to any statute or the contract of the parties.

(c) As used in this section, "substantial breach" means the failure of the landlord to comply with applicable building and housing code standards which materially affect health and safety.

(d) Nothing in this section is intended to deny the tenant the right to a trial by jury. Nothing in this section shall limit or supersede any provision of Chapter 12.75 (commencing with Section 7060) of Division 7 of Title 1 of the Government Code.

1174.21. A landlord who institutes an unlawful detainer proceeding based upon a tenant's nonpayment of rent, and who is liable for a violation of Section 1942.4 of the Civil Code, shall be liable to the tenant or lessee for reasonable attorneys' fees and costs of the suit, in an amount to be fixed by the court.

1174.25. (a) Any occupant who is served with a prejudgment claim of right to possession in accordance with Section 415.46 may file a claim as prescribed in Section 415.46, with the court within 10 days of the date of service of the prejudgment claim to right of possession as shown on the return of service, which period shall include Saturday and Sunday but excluding all other judicial holidays. If the last day for filing the claim falls on a Saturday or Sunday, the filing period shall be extended to and including the next court day. Filing the prejudgment claim of right to possession shall constitute a general appearance for which a fee shall be collected as provided in Section 70614 of the Government Code.

Section 68511.3 of the Government Code applies to the prejudgment claim of right to possession.

(b) At the time of filing, the claimant shall be added as a defendant in the action for unlawful detainer and the clerk shall notify the plaintiff that the claimant has been added as a defendant in the action by mailing a copy of the claim filed with the court to the plaintiff with a notation so indicating. The claimant shall answer or otherwise respond to the summons and complaint within five days, including Saturdays and

Sundays but excluding all other judicial holidays, after filing the prejudgment claim of possession.Thereafter, the name of the claimant shall be added to any pleading, filing or form filed in the action for unlawful detainer.

1174.3. (a) Unless a prejudgment claim of right to possession has been served upon occupants in accordance with Section 415.46, any occupant not named in the judgment for possession who occupied the premises on the date of the filing of the action may object to enforcement of the judgment against that occupant by filing a claim of right to possession as prescribed in this section. A claim of right to possession may be filed at any time after service or posting of the writ of possession pursuant to subdivision (a) or (b) of Section 715.020, up to and including the time at which the levying officer returns to effect the eviction of those named in the judgment of possession. Filing the claim of right to possession shall constitute a general appearance for which a fee shall be collected as provided in Section 70614 of the Government Code. Section 68511.3 of the Government Code applies to the claim of right to possession. An occupant or tenant who is named in the action shall not be required to file a claim of right to possession to protect that occupant's right to possession of the premises.

(b) The court issuing the writ of possession of real property shall set a date or dates when the court will hold a hearing to determine the validity of objections to enforcement of the judgment specified in subdivision (a). An occupant of the real property for which the writ is issued may make an objection to eviction to the levying officer at the office of the levying officer or at the premises at the time of the eviction.

If a claim of right to possession is completed and presented to the sheriff, marshal, or other levying officer, the officer shall forthwith (1) stop the eviction of occupants at the premises, and (2) provide a receipt or copy of the completed claim of right of possession to the claimant indicating the date and time the completed form was received, and (3) deliver the original completed claim of right to possession to the court issuing the writ of possession of real property.

(c) A claim of right to possession is effected by any of the following:

(1) Presenting a completed claim form in person with identification to the sheriff, marshal, or other levying officer as prescribed in this section, and delivering to the court within two court days after its presentation, an amount equal to 15 days' rent together with the appropriate fee or form for proceeding in forma pauperis. Upon receipt of a claim of right to possession, the sheriff, marshal, or other levying officer shall indicate thereon the date and time of its receipt and forthwith deliver the original to the issuing court and a receipt or copy of the claim to the claimant and notify the plaintiff of that fact. Immediately upon receipt of an amount equal to 15 days' rent and the appropriate fee or form for proceeding in forma pauperis, the court shall file the claim of right to possession and serve an endorsed copy with the notice of the hearing date on the plaintiff and the claimant by first-class mail.

The court issuing the writ of possession shall set and hold a hearing on the claim not less than five nor more than 15 days after the claim is filed with the court.

(2) Presenting a completed claim form in person with identification to the sheriff, marshal, or other levying officer as prescribed in this section, and delivering to the court within two court days after its presentation, the appropriate fee or form for proceeding in forma pauperis without delivering the amount equivalent to 15 days' rent. In this case, the court shall immediately set a hearing on the claim to be held on the fifth day after the filing is completed. The court shall notify the claimant of the hearing date at the time the claimant completes the filing by delivering to the court the appropriate fee or form for proceeding in forma pauperis, and shall notify the plaintiff of the hearing date by first-class mail. Upon receipt of a claim of right to possession, the sheriff, marshal, or other levying officer shall indicate thereon the date and time of its receipt and forthwith deliver the original to the issuing court and a receipt or copy of the claim to the claimant and notify the plaintiff of that fact.

(d) At the hearing, the court shall determine whether there is a valid claim of possession by the claimant who filed the claim, and the court shall consider all evidence produced at the hearing, including, but not limited to, the information set forth in the

claim. The court may determine the claim to be valid or invalid based upon the evidence presented at the hearing. The court shall determine the claim to be invalid if the court determines that the claimant is an invitee, licensee, guest, or trespasser. If the court determines the claim is invalid, the court shall order the return to the claimant of the amount of the 15 days' rent paid by the claimant, if that amount was paid pursuant to paragraph (1) or (3) of subdivision (c), less a pro rata amount for each day that enforcement of the judgment was delayed by reason of making the claim of right to possession, which pro rata amount shall be paid to the landlord.

If the court determines the claim is valid, the amount equal to 15 days' rent paid by the claimant shall be returned immediately to the claimant.

(e) If, upon hearing, the court determines that the claim is valid, then the court shall order further proceedings as follows:

(1) If the unlawful detainer is based upon a curable breach, and the claimant was not previously served with a proper notice, if any notice is required, then the required notice may at the plaintiff's discretion be served on the claimant at the hearing or thereafter. If the claimant does not cure the breach within the required time, then a supplemental complaint may be filed and served on the claimant as defendant if the plaintiff proceeds against the claimant in the same action. For the purposes of this section only, service of the required notice, if any notice is required, and of the supplemental complaint may be made by first-class mail addressed to the claimant at the subject premises or upon his or her attorney of record and, in either case, Section 1013 shall otherwise apply. Further proceedings on the merits of the claimant's continued right to possession after service of the Summons and Supplemental Complaint as prescribed by this subdivision shall be conducted pursuant to this chapter.

(2) In all other cases, the court shall deem the unlawful detainer Summons and Complaint to be amended on their faces to include the claimant as defendant, service of the Summons and Complaint, as thus amended, may at the plaintiff's discretion be

made at the hearing or thereafter, and the claimant thus named and served as a defendant in the action shall answer or otherwise respond within five days thereafter.

(f) If a claim is made without delivery to the court of the appropriate filing fee or a form for proceeding in forma pauperis, as prescribed in this section, the claim shall be immediately deemed denied and the court shall so order. Upon the denial of the claim, the court shall immediately deliver an endorsed copy of the order to the levying officer and shall serve an endorsed copy of the order on the plaintiff and claimant by first-class mail.

(g) If the claim of right to possession is denied pursuant to subdivision (f), or if the claimant fails to appear at the hearing or, upon hearing, if the court determines that there are no valid claims, or if the claimant does not prevail at a trial on the merits of the unlawful detainer action, the court shall order the levying officer to proceed with enforcement of the original writ of possession of real property as deemed amended to include the claimant, which shall be effected within a reasonable time not to exceed five days. Upon receipt of the court's order, the levying officer shall enforce the writ of possession of real property against any occupant or occupants.

(h) The claim of right to possession shall be made on the following form:

The Claim of Right to Possession form appears in the hard-copy publication of the chaptered bill. See Sec. 43 of Chapter 75, Statutes of 2005.

1174.5. A judgment in unlawful detainer declaring the forfeiture of the lease or agreement under which real property is held shall not relieve the lessee from liability pursuant to Section 1951.2 of the Civil Code.

1176. (a) An appeal taken by the defendant shall not automatically stay proceedings upon the judgment. Petition for stay of the judgment pending appeal shall first be directed to the judge before whom it was rendered. Stay of judgment shall be granted when the court finds that the moving party will suffer extreme hardship in the absence of a stay and that the nonmoving party will not be irreparably injured by its issuance.

If the stay is denied by the trial court, the defendant may forthwith file a petition for an extraordinary writ with the appropriate appeals court. If the trial or appellate court stays enforcement of the judgment, the court may condition the stay on whatever conditions the court deems just, but in any case it shall order the payment of the reasonable monthly rental value to the court monthly in advance as rent would otherwise become due as a condition of issuing the stay of enforcement. As used in this subdivision, "reasonable rental value" means the contract rent unless the rental value has been modified by the trial court in which case that modified rental value shall be used.

(b) A new cause of action on the same agreement for the rental of real property shall not be barred because of an appeal by any party.

1177. Except as otherwise provided in this Chapter the provisions of Part II of this Code are applicable to, and constitute the rules of practice in the proceedings mentioned in this Chapter.

1178. The provisions of Part 2 of this code, relative to new trials and appeals, except insofar as they are inconsistent with the provisions of this chapter or with rules adopted by the Judicial Council, apply to the proceedings mentioned in this chapter.

1179. The court may relieve a tenant against a forfeiture of a lease or rental agreement, whether written or oral, and whether or not the tenancy has terminated, and restore him or her to his or her former estate or tenancy, in case of hardship, as provided in Section 1174. The court has the discretion to relieve any person against forfeiture on its own motion.

An application for relief against forfeiture may be made at any time prior to restoration of the premises to the landlord. The application may be made by a tenant or subtenant, or a mortgagee of the term, or any person interested in the continuance of the term. It must be made upon petition, setting forth the facts upon which the relief is sought, and be verified by the applicant. Notice of the application, with a copy of the petition, must be served at least five days prior to the hearing on the plaintiff in

the judgment, who may appear and contest the application. Alternatively, a person appearing without an attorney may make the application orally, if the plaintiff either is present and has an opportunity to contest the application, or has been given ex parte notice of the hearing and the purpose of the oral application. In no case shall the application or motion be granted except on condition that full payment of rent due, or full performance of conditions or covenants stipulated, so
far as the same is practicable, be made.

1179a. In all proceedings brought to recover the possession of real property pursuant to the provisions of this chapter all courts, wherein such actions are or may hereafter be pending, shall give such actions precedence over all other civil actions therein, except actions to which special precedence is given by law, in the matter of the setting the same for hearing or trial, and in hearing the same, to the end that all such actions shall be quickly heard and determined.

Where, in a suit to quiet title, Hager, the original defendant, filed his answer in the court below, in the nature of a disclaimer, denying that he had any interest in the property in controversy, and alleging that he had sold the same to Lent, and Lent sought to intervene and defend, which was refused by the court.from which order an appeal was brought, the Supreme Court said it would be truly hard, if in such a suit Lent, who brought pendente lite, and who would be bound by the decree, was not allowed to be heard; that the only objection was that such transfers might be "made ad infinitum, and justice entirely frustrated or delayed; but the court did not think such consequences need reasonably be apprehended; no one would willfully thrust himself into a controversy where he was sure to lie much in costs for his mendacity. Brooks v. Hayer, 5 Cal. 283. Where a suit of plaintiff had been pending for some time to foreclose a mortgage, and a creditor of defendant holding a mechanic's lien moved to intervene at the time of trial, just as the plaintiff was about asking judgment, the Supreme Court thought the application was too late, and that the court below was not bound to allow it when so interposed. Hotker v. Kellry, 14 Cal. 165. In a suit on a note or mortgage where creditors of the defendant intervene, alleging the note and mortgage to be fraudulent as against them, the interveners

cannot prevent a judgment for plaintiff against defendant. The most they can claim is protection against enforcement of the judgment to their prejudice.

The interest which entitles a person to intervene in a suit between other parties, must be in the matter in litigation, and of such a direct and immediate character, that the intervener will either gain or lose by the direct legal operation and effect of the judgment. It must be that created by a claim to the demand, or some part thereof, in suit, or a claim to or lien upon the property, or some part thereof, which is the subject of litigation. A simple contract creditor of a common debtor cannot intervene in a foreclosure suit. But judgment creditors, being as such subsequent encumbrancers, may intervene. And a court may order them to be made parties. Horn v. Volcano W. Co., 13 Cal. 62.

Where an action is brought to foreclose a mortgage upon property claimed as a homestead, the wife of a mortgagor is a necessary party to a full adjustment of the controversy, and should be allowed to intervene. Sargent v. Wilson, 5 CaL 505; McDonald v. Badger, 23 Cal. 396.

On the tenth of January, 1861, plaintiff caused an attachment to be levied upon the property of Ihmels & Co.; on the same day Eggers & Co. caused an attachment to be levied upon the same property, but subsequent to the plaintiffs levy, and in due course obtained judgment. On the day previous E. L. Goldstein had caused an attachment to be levied upon the same property, but also subsequent to the plaintiffs levy. Before a default was entered against the defendants in this action, E. L. Goldstein and Eggers & Co. severally filed interventions setting forth these facts, and also averring that the property attached was only sufficient to satisfy the plaintiffs claim, and also charging that the plaintiffs demand was not due at the time he commenced his action; and also that he had no valid demand against the defendants, and that his action was prosecuted for the purpose of hindering and defrauding creditors of the defendants. A general demurrer was interposed to these complaints of intervention; that is, that the facts set forth did not constitute a cause of intervention. The two main points presented were: 1st, whether the facts showed a case for a proceeding by intervention; and 2d, whether the onus prooandi was on the plaintiff to prove his cause of action as between him and the interveners, or on the interveners to prove their cause of action against the plaintiff. The court said that before the introduction of these provisions, and as doubtless might still be done, the

proceedings would have been by bill in chancery: see Heyneman v. Dannen- bfrg, 6 Cal. 376; or by motion to the court: see Dizey v. Pollock, 8 Id. 570. But in Davis v. Eppingfr, 18 Id. 378, where the facts were similar to the above, it was decided to be a proper case for intervention. Although the interveners had not a claim to or hen upon any property which was the direct subject of litigation, they had a lien upon property which was held subject to the results of the litigation, and which would be lost to the interveners if the original action should proceed to judgment and execution. If the case did not fall within the precise definition of the cases in which intervention takes place, as explained in the case of Horn v. Volcano Water Works, 13 Cal. 62, it was substantially within the object; and as the law was only regulating modes of procedure, and not affecting rights of property, the interpretation given to it in the case of Davin v. Eppinger, ought not to be changed. As to the second point, the interveners were interested in preventing the plaintiff recovering a judgment. They were for this purpose defendants in the action, and after they had proved the facts alleged to show their right to intervene, he was required to prove his cause of action. Although in the case of Davis v. Eppinger, and in the case of ffornv. The Volcano Water Works Co., 13 Cal. 70, it was decided that judgment might be rendered against the original defendants; it was because under our system the court by its judgment could make various depositions to meet all the exigencies of the case. Speyer v. Ihmels, 21 Cal. 286-288.

If the court finds that a portion only of the debt on which a prior attachment issued was fraudulent, the lien of the prior attachment should be postponed only as to that portion of the debt which was fraudulent. If the debt on which an attachment was issued was not due when the suit was commenced, a subsequent attaching creditor cannot by intervention postpone the lien of the first attachment to his own, unless the plaintiffs in the first action fraudulently commenced their action. Coghill <fc Co. v. Marks, 29 Cal. 673.

In a suit upon a promissory note and mortgage by the holder against the maker, a third person, who claims to be the rightful owner of the securities, has the right to intervene. The court thought that although the intervener certainly had no interest in common either with the plaintiff or the defendant, he had an interest in the matter in litigation adverse to both, within the meaning of the section. He had an interest against the pretension of the plaintiff to be owner of the note and mortgage, and

to have a decree of foreclosure for his benefit, and against, the defendant for the collection of the debt. Stick v. OoUlner, 38 Cal. 608. After having gone to trial without any objection, it was too late to raise an objection for the first time to the intervention for the first time in the appellate court. McKenty v. Gladwin, 10 Cal. 228; Smith v. Penney, 44 CaL 164. One who indemnifies the sheriff for an act done by virtue of his office, may, and should, intervene, 1055. DutU v. Pacheto, 21 Cal. 442.

An ex parte order may be made allowing an intervention to be filed. Spanagel v. Reay, 47 Cal. 608.Demurrer, 430. Answer, 437.

388. (656.) When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, in the same manner as if all had been named defendants and had been sued upon their joint liability.

Where the title of the action, as given at the head of the complaint, was Martin Walsh v. M. Walsh et al., composing the Red Star Mining Company, and in the body of the complaint it was stated that "said Red Star Company," omitting the word "Mining," was a mining association, composed of a great number of persons who were so numerous and so much scattered over the country, that plaintiff could not serve them with process without much delay and great expense, and he therefore sued them by the company name, and then the complaint proceeded and set out a cause of action for the recovery of money, and concluded with a prayer for judgment for the amount alleged to owe due and owing against the "Red Star Mining Company, and in his return to the summons, the sheriff certified that he served the same by delivering a copy thereof to M. Walsh, personally, one of the members of the "Red Star Mining Co.," defendant, etc., and the time for answering having expired without any appearance, the clerk entered the default, and immediately thereafter entered a judgment against the "Red Star Mining Co.," without naming Walsh, for the amount sued for, to be enforced against the joint property of the members of the company; the court held in a collateral proceeding that this was substantially within the section, and that there was certainly not an entire absence of averment on the subject, and nothing short of that would justify the court in holding the

judgment absolutely void in a collateral proceeding. Moreover it might be doubted whether a question whether the defendants had been sued by the proper name, was anything more than matter in abatement, and to say the least, was analogous to the case of a misnomer, which never rendered the judgment void. If the defendant does not choose to appear and plead matter in abatement, such matter is waived and cannot be assigned for error, if he has been actually served, and much less is a judgment by default against him, though by the wrong name, void. Wtlah v. Kirkpatrick, 30 Cal. 204; Ex parte Kellogg, 6 Vt. 509; Guinard \: Heyfinger, 15 111. 288; Hammond v. The People, 32 111. 446. On the ground that the statute was in derogation of the common law (as to which see 4, ante), the court held it must be strictly construed, and that the record in an action commenced not against the " Independent Tunnel Co.," but against the "Independent Co.," which was certainly a different name, and in which the summons was addressed to the Independent Tunnel Co., failed to show, in a collateral proceeding, a valid judgment against the Independent Tunnel Co. King v. Randlet, 33 Cal. 321.

(17.) The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in. And when, in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment.

Adding parties. A plaintiff who moved on 19th April to add a party defendant, and stipulated on 13th May that the answer should be filed on that day as of 19th April, could not, it was held, be heard to say that the added party was not a party on the last-named day. Lawrence v. Ballou, 50 Cal. 263. An instance where a party should be added is a case where defendants and one Brodie had a claim to a mine, and the possession of land, each holding an equal share, also some sort of an agreement to explore and develop it. A subcontract was then entered into between defendants and plaintiff, by which plaintiff was to devote his skill, time and labor to the enterprise; and in consideration thereof, they were to furnish provisions and coals, and share their interests equally. Brodie had nothing to do with this sub-contract. The court held that if Brodie still had an interest, and an

account was to be taken, the association dissolved, and the interests severed as prayed for, Brodie was a necessary party, and might be added. If, however, the plaintiff was content with a judgment establishing his right, and for a conveyance of the interest to which he was entitled, the court saw no reason why he might not waive any relief which required the presence of other parties. Settembre v. Putnam, 30 Cal. 497. Landlord, admitting to defend in ejectment, 379. Adding or striking out the names of parties, 473.

409. (27.) In an action affecting the title or the right of possession of real property, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may record in the office of the recorder of the county in which the property is situated, a notice of the pendency of the action, containing the names of the parties, and the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only, shall a purchaser or incumbrance of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency' against parties designated by their real names. [Approved March 24; effect July 1, 1874.]

Attorney-General, information by. The court considered the attorney-general had power to file an information in the name of the people, and in the nature of a bill in chancery, to annul a patent of lands granted by the State, but the suit was dismissed on other grounds, and the court said the party in interest in such cases might maintain an action in his own name, and thereby could attain to the same end in effect that could be accomplished by a proceeding in the name of the people of the State, upon his relation; and that course better accorded with the system of procedure provided in the State. People v. Straton, 25 Cal. 246-252.

As to the use of the name of the people generally, 367 n., p. 123.

Cloud on title, action to remove, 738,1050, and notes.

Waiver of tort, and action on implied contract. Plaintiff may waive a tort, and sue on the implied contract created by the facts. Perhaps the better way of stating the proposition is, that plaintiff should allege the exact facts, and if they are such that an implied contract arises upon them, he is

entitled to introduce evidence accordingly. Frattv. Clark, 12 Cal. 90; Sheldon v. " Uncle Sam," 18 Cal. 526; Mills v. Barney, 22 Cal. 246.

If plaintiff is a tenant in common with persons other than defendant, and defendant tortiously enters and ousts him, he mav recover the whole premises as against defendant, and he is not precluded from doing so by the fact that the defendant has acquired by adverse possession the title of the other tenants in common. Chipman v. Hastings, 50 Cal. 310. Landlord against Tenant, see" Lessor and Lessee," infra. Tenants in common, etc., mav unite as plaintiffs, 381; also see "Demand. A complaint by an executor in ejectment is not necessarily defective because it fails to allege any title in the testator, as neither the legal title nor the right of possession may have been in him at his death, and yet both may have been afterwards acquired by the executor as such. Where a complaint in ejectment by an executrix, after setting forth the will, its probate and issuance of letters, averred that by virtue thereof, she, as executrix, possessed herself of the real estate of the testator, and that she ever since had been and was the owner, seised in fee of an estate of inheritance therein, both as such executrix and heir at law, and was entitled to the possession thereof, it was held a sufficient averment of seisin and right of possession in her capacity of executrix. Salmon v. Wilson, 41 Cal. 595. Where the husband sold the homestead to plaintiffs, who brought ejectment, and being defeated on the ground that it was " homestead," plaintiffs contended that they were entitled to the excess of the value of the premises over 85000, the amount exempted by homestead law, the court said if the plaintiffs had any rights they must establish them in a different action. They could take nothing by a suit in ejectment. Cook v. McChristian, 4 Cal. 27. The property must be described so as to enable the officer, upon execution, to identify it, 455. In ejectment it need only be alleged that the plaintiff is seised of the premises, or some estate therein, as, in fee, or for life, or for years, and that the defendant was in possession at the commencement of the action. The seisin is the fact to be alleged. It is a pleadable and issuable fact, to be established by conveyances from a paramount source of title, or by evidence of prior possession. It is the ultimate fact upon which the claim to recover depends, and it is facts of this character which must be alleged, and not the prior or probative facts which go to establish them. It is the ultimate facts, which could not be struck out of a pleading without leaving it insufficient, and not the evidence of those facts, which must be stated. The right of the possession follows as a conclusion of law from the

seisin, and need not be alleged. The possession of the defendant is of course a pleadable and issuable fact, and the only question of difficulty arises from the supposed necessity of negativing its possible rightful character. If the defendant's holding rests upon any existing right, he should be compelled to show it affirmatively, in defense. The right of possession accompanies the ownership; and from the allegation of the fact of ownership, which is the allegation of seisin in "ordinary language," the right of present possession is presumed. Payne «£, Dewey v. Treadwell, 16 Cal. 243; Haight v. Oreen, 19 Cal. 118; Salmon v. Xymonds, 24 Cal. 266; McCarthy \. Yale, 39 Cal. 586; Keller v. Suiz de Ocana, 48 Cal. 638. Aa to allegation that plaintiff is the "owner" being sufficient. Qarwood v. Hatting*, 38 Cal. 218.

If plaintiff attempt to set forth in his complaint a specific deraignment of his title, he must aver every fact that he could be required to prove. Where one of the links of his chain of title set out in the complaint is a will, the complaint must aver that the will has been admitted to probate. Castro v. Richardson, 18 Cal. 478. If he allege his title and fails to establish it, he must fail. Talbfrt v. Hopper, 42 Cal. 402. If he allege seisin generally as above suggested he may offer to prove a documentary title; and if he rail, may rely on prior possession. Morton v. Folger, 15 Cal. 283.

Where plaintiff relied upon the adverse possession of the demanded premises by himself and his grantor for the period of five years prior to the commencement of the suit, but only averred his ownership in fee and right to the possession of the land at the date of the commencement of the suit, it was held he might prove any facts which would entitle him to possession at that time. The averment that the plaintiffs grantor had been in possession for more than five years would have been superfluous. Gillespif. v. Jones, 47 Cal. 263. If plaintiff alleges that defendant is in possession he cannot say that defendant was not in possession, if defendant relies on adverse possession as a defense. Lawrence v. Ballou, 50 Cal. 258.

An allegation in a complaint that the plaintiff "assumed to and did exercise acts of control over and possession of portions " of a tract of land, is not equivalent to an averment that the plaintiff had actual possession of the tract of land or any part of it. Brennan v. Ford, 46 Cal. 8.

The possession to be shown in the defendant in an action of ejectment need not be actual, as contradistinguished from constructive, in its character. Noe v. Card, 14 Cal. 609; Crane v. Ghirardelli, 45

Cal. 236. An action of ejectment may be brought against an officer of the army of the United States who is in possession of the demanded premises for the

Purposes of a military camp or fortification under the direction of the Secretary of War or the President of the United States. Polactv. VMansfield, 44 Cal. 36. One who, without the permission of the grantee, takes possession of land within the boundaries of a Mexican grant, whether perfect or inchoate, before the final survey is made by the United States, is guilty of an ouster, although when he entered into possession he was informed by the grantee that the possession so taken was not within the limits of the grant. Love v. Shartzrr, 31 Cal. 487. If in ejectment the defendant admits in his answer that he is in possession of a portion of the demanded premises, it is not necessary for the plaintiff to prove his possession. Salmon v. Wilson, 41 Cal. 595; McCretry v. Everdina, 44 Cal. 284. But it is indispensable that it should in some way appear that defendant was, at the commencement of the suit, in possession of some part of the tract to which the plaintiff establishes his title. Brown v. Brackett, 45 Cal. 173. Misjoinder, non-joinder, etc., 430 and note. Ejectment, order for party to make survey of property in dispute, 742-3.

Estoppel, 1908 n.

LlbeL Extrinsic facts need not he alleged, 460. If a party, in an application to the Supreme Court for an extension of time to file a transcript, goes outside of the facts material to procure the order, and states matter wholly foreign to the application, in which he charges his attorney with having entered into a collusive agreement with the attorney of the other party, this charge against his attorney is not a privileged communication, but is libel-ous par »e. WyaU v. Buell, 47 CaL 624.

Limitations, statute of, 312-363. How pleaded, 458. What is sufficient allegation of acknowledgment in writing, 360 n.

Malicious prosecution. To support this action there must be both malice and want of probable cause. King v. Montgomery, 50 Cal. 115. Malice mav be inferred from want of probable cause, but want of probable cause cannot be inferred from malice, but must be affirmatively shown by plaintiff. Orant v. Moore, 29 Cal. 651. As to the question of malice, it is one solely for the jury; and to sustain the averment, the charge must be shown to have been willfully false. Levy v. Brannan, 39 CaL 488. Probable cause is a mixed question of law and fact. Whether the alleged circumstances

existed or not, is simply a question of fact; and conceding their existence, whether or not they constitute probable cause is a question of law. Where the circumstances are admitted, or clearly proved bv uncontradicted testimony, it is the province of the court to determine the question of probable cause, and the court may order a nonsuit But if there be a conflict of testimony, or the credibility of witnesses is to be estimated, the canse must go to a jury. As the question of probable cause is a mixed question of both law and fact, it is error to submit to the jury to say whether there was probable cause. The jury have solely the right to decide, in cases of reasonable doubt, whether the alleged circumstances really existed. Probable cause is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true. 2 Oreenl, Ev., Sees. 453-7; 6 Barhour S. C. K. 86, and the authorities there cited. Where defendant laid his case fully before his counsel, and before instituting proceedings the counsel demanded the return of certain notes which were the foundation of the charge of fraud on which defendant prosecuted plaintiff, from the plaintiff, and neard from him the alleged ground upon which he refused to return them; and counsel being then in possession of all the material facts 01 the case, the arrest was made under his advice, and by his professional assistance, the court held that the question, whether the defendant acted bona fcle under the advice of his counsel, was a question to be determined by the jury in all cases where there was any legitimate evidence to show a want of good faith in following professional advice, but there being no such evidence in the case, there was probable cause. Potter v. Stale, 8 Cal. 220. An action for malicious prosecution will lie against several defendants; a conspiracy need not be averred. An action lies for a conspiracy unjustly to prosecute a person, but the gist of this action is the malicious prosecution; that of the other is the combining of two or more to do an unlawful and injurious act. In the first case, the cause of action is complete before an acquittal; in the other, the acquittal or termination of the prosecution is necessary to enable the plaintiff to maintain the suit. Drtux v. Domec, 18 Cal. 88. As to necessity for acquittal, see HilMng v. Hyde, 50 Cal. 206.

Mistake. A complaint claiming relief on the ground of mistake, must not only distinctly aver the fact of the mistake, but also set forth the circumstances under which it occurred, in so far as those

circumstances may be necessary to present a case within the rule of equity, upon which relief is granted. *Wirth v. Shafler*, 48 Cal. 276; see 1856, post.

Owners of steamers who purchased stamps from the defendant, as treasurer of the city and county of San Francisco, to be placed on passage tickets, were held not entitled to recover back the money on the ground that the act of 1857, as amended by the act of 1858, declared that such tickets should not be admitted in evidence in any court unless stamped as required; and hence that the tickets could not be sold without stamps. The influence exerted by these provisions of the statute did not constitute that kind of compulsion or coercion which the law recognizes as sufficient to render the payment in a legal sense involuntary. There was no compulsion or coercion on the part of the defendant. The stamps were by the law deposited with him to be sold to applicants. The compulsion or coercion which is sufficient in law to render a payment involuntary, must come from the party to whom or by whose direction the payment is made, and arise from the exercise of some power, possessed, or supposed to be possessed, by him, over the person or property of the party making the payment. Whether the provisions of the stamp act were constitutional or not, did not affect the question of plaintiffs' right to recover. If they were constitutional, there was no basis for the action; if unconstitutional, and plaintiffs were ignorant of this at the time, the case became one when a recovery was sought, because made under a mistake of law, a ground which could not avail (but see C. C. 1578, 1712, 1713); but if the plaintiffs knew the act to be unconstitutional, as they protested it was, then the case was only an attempt to recover an illegal demand, voluntarily paid, knowing it to be illegal at the time, and was not entitled to any consideration. Garrison v. Tilinghast, 18 Cal. 404; Brummagim v. Tillinghast, 18 Cal 270. The mere fact that a party made an unjust claim, and supported it by unjust practices, is not enough to authorize the interposition of equity. Terrill v. Groves, 18 Cal. 149. It was held, in Hayes v. ffogan, 5 Cal. 243; McMillan \. Pichards, 9 Cal. 417; Falkner v. Hunt, 16 Cal. 170, and Guy y. Washbum, 23 Cal 113, that if money which in not legally due is exacted by means of duress or coercion, it may, if paid under protest, be recovered back. The court said the purpose and effect of the protest had not been satisfactorily defined in any of these cases. In most of the cases the payment was made to a public officer; and the only purpose of the protest was to give the officer notice that the money was not legally due, and thus to enable the officer to pro-

tect himself. The officer was thereby put on inquiry; and if he found that the demand was illegal, he might protect himself by refusing to receive the money; or, if he found that it was of doubtful legality, he might take the proper steps to protect himself against responsibility. If the officer has notice of the matter which renders the demand illegal, another notice in the form of a protest is useless; but if he has no knowledge of such matter, he ought not to be subjected to the costs and consequences of an action to recover the money from him—and that, too, perhaps, after he has paid over the money in the usual course of official business—without notice from the party paying the money of the grounds upon which he claims, that the demand is not legally due. Whenever a protest is essential, it is therefore necessary to state the grounds upon which the party paying the money claims that the demand ia illegal. The statement of the precise amount which is claimed to be illegal, when a part of the demand is legal, is of but little moment, for that can be readily ascertained by the official to whom the money is paid, upon being informed of the ground, upon which payment would be refused, except for the coercion or duress. Sieth v. McClare, 49 Cal. 627.

Where the complaint charges that A., being indebted to plaintiff in a sum of money, it was agreed between A., plaintiff, and defendant, that A. should pay the same to defendant, who should pay the same to plaintiff on the request of plaintiff; that thereafter A. paid to defendant said sum, in gold coin of the United States, to and for the use and benefit of plaintiff; that defendant refused to pay the same to plaintiff upon said request duly made; an action to recover said sum in said coin is an action for money had and received, and therein defendant is not charged, nor, upon said facts, chargeable as a bailee. Wendt y. Ross, 33 Cal. 650.

Money paid. A surety who pays may maintain an action for contribution, against the other sureties, and the executor of a deceased surety. Dytsol v. Bruguiere, 50 CaL 456. Money paid by husband for wife. 370 n.

Multiplicity of actions. If a claim is founded upon one entire contract, where the breaches are not recurring, or upon one single or continuous tortuous act, it cannot be divided up into distinct demands, and made the subject of separate actions; and if this is attempted, a judgment in one action will be a conclusive bar to any other action, upon the principle that if a plaintiff bring an action for a part only of an entire and indivisible demand, the verdict and judgment in that action will be a

conclusive bar to any subsequent suit for another part of the same demand. fferriter v. Porter, 23 Cal. 387; Phillips v. Berit, 16 Johns. 136; Farrington v. Payne, 15 J. K. 432; Cunningham v. Harris, 5 CaL 81.

Mortgage, 726 n.

Recognizance. In an action upon a recognizance, the complaint must aver that the recognizance was filed in court, or that it became a matter of record. A recognizance is an obligation of record. Without record, there is no recognizance; and in an action on such obligation it should be alleged that the same was a record. Mendocino Co. v. Lamar, 30 Cal. 629; People v. Ihiygins, 10 Wend. 465; Bidye. v. Ford, 4 Mass. 641; Tarbell v. Oray, 4 Gray, 445.

Right, statutory, infringement of. See "Franchise," supra. In the cases of the creation of a power or duty by statute, the statute giving the power or casting the duty is alone looked to to determine the power given or duty cast, and has provided its own exclusive remedy for the execution of the power or the enforcement of the duty. The statute is complete in itself, giving a power or imposing a duty on its own terms; the remedy to be taken in connection with and as a part of the right. But this is a matter of legal inference from the statute, and this inference may be repelled by its express language or the general scope. State v. Poulterer, 16 Cal. 531.

Slander. Extrinsic facts need not be stated, 460.

In an action by a tenant in common against his co-tenant, who is in the sole possession of the premises, to recover a share of the profits of the estate, a complaint which avers a tenancy in common between the parties; the sole and exclusive possession of the premises by the defendant; the receipt by him of the rents, issues and profits thereof; a demand bv the plaintiff of an account of the same, and the payment of his share; the defendant's refusal; and that the rents, issues, and profits amount to $84,000—is insufficient to support the action.

In such complaint the court held there were no special circumstances alleged which withdrew the case from the ordinary remedies at law, and required the interposition of equity. They said the action was a common-law action of account; and, viewed in this light, the complaint was fatally defective in not averring that the defendant occupied the premises upon any agreement with the plain-

tiff as receiver or bailiff of his share of the rents and profits; that it was essential to a recovery that this circumstance should exist, and equally essential to the complaint that it be alleged; that at common law one tenant in common had no remedy against the other who exclusively occupied the premises, and received the entire profits, unless he was ousted of possession, when ejectment might be brought, or unless the other was acting as bailiff of his interest by agreement, when the action of account would lie. The occupation by him, so long as he did not exclude his co- tenant, was but the exercise of a legal right. His cultivation and improvements were made at his own risk; if they resulted in loss, he could not call upon his co-tenant for contribution; and if they produced a profit his co- tenant was not entitled to a share of them. The co-tenant could at any moment enter into equal enjoyment of his possession; his neglect to do so might be regarded as an assent to the sole occupation of the other. There was no equity in the claim asserted by the tenant to snare in the profits resulting from the labor and money of his co-tenant, when he had expended neither and had never claimed possession, and never been liable for contribution in cases of loss. There would be no equity in giving to a tenant who would neither work himself nor subject himself to any expenditures or risks, a share in the fruits of another's labor, investments and risks. The statute of 4 and 5 Anne, 16, gave a right of action to one joint tenant in common against the other as bailiff, who received more than his proportional share of the profits; at common law the bailiff was answerable, not only for his actual receipts, but for what he might have made from the property without willful neglect: Co. Litt. 172 a; Willis, 210; but it was never adopted in this State, nor have we any similar statute. Pico v. Columbet, 12 Cal. 414. Where plaintiff was employed by special agreement as the agent of defendant and others, to render services in respect to land, the fact that he was himself an owner in the tract did not prevent his enforcing his claim for compensation under his agreement. Thompson v. Salmon, 18 Cal. 634.

If several persons are the owners, as tenants in common, of a mining claim, and one of them is also a tenant in common with several other persons in the ownership of an adjoining claim, and the first-named owners lease their claim to the second-named owners, to be mined for a given term, and the one of the lessees who is a tenant in common in both claims, and superintendent of the lessees' claim, after the term of the lease has expired, as superintendent of the lessees and a member of their

company, sells the tailings of the claim leased, and accounts to the lessees for the proceeds, the other lessors cannot maintain an action against him as a tenant in common in their company for their proportion of the proceeds. Clark v. Jones, 49 Cal. 618. Demand, when necessary, supra; Partners, supra; Replevin, supra.

Trust, enforcement of A complaint averring that defendant agreed to buy in, as agent of plaintiff, plaintiff's property, about to be sold under process, and pay for it and allow plaintiff to redeem it, and that defendant purchased the property, and in violation of his agreement and of the trust had sold the property, and that plaintiff had sustained damages, etc., was held a good complaint in equity. Wingate v. Ferris, 50 Cal. 107.

Use and occupation. No action for use and occupation will lie when possession has been adverse and tortious, for such excludes the idea of a contract, which in all cases of this action must be express or implied. The Supreme Court said this was undoubtedly the correct as well as the general rule, and was fully supported by the case of Birch v. Wright, I Term Rep.; Durnford and East, 378; Smith v. Stewart, 6 Johns. Rep. 46; Wharton v. Fitzgerald, 3 Dal I., and innumerable cases cited by these authorities. See Sampson v. Shaeffer, 3 Cal. 201, 203; followed, O'Connor v. Corbett, 3 Cal. 373.

If a lease or agreement is invalid under 1973, subd. 5, post, Stat. of Frauds, it would seem that if the tenant has been in possession, plaintiff may recover for use and occupation. folsom v. .Pen-in, 2 Cal. 603.

Verification of pleadings, 446.

Averments necessary to sustain claim. If damages are claimed, the fact that they have been sustained must be alleged, or plaintiff will not be entitled to any judgment for damages: BohaU v. Ditter, 41 Cal. 535; and it must be borne in mind, that, if there is no answer, the relief granted to plaintiff cannot exceed that claimed in the complaint. 580, post. Where plaintiffs laid their damages at $1000, and judgment was rendered in their favor for $1500, it was reversed on appeal; and though by 580, post, if an answer is put in, the court may grant any relief consistent with the case made by the complaint, the relief must be embraced within the.issue, as specified in that section, and the court cannot render a judgment, to base which the averments in the complaint are not sufficient.

Sterling v. Hanson, 1 Cal. 479. Justice requires that parties should be confined to that to which they are entitled within their pleadings. Benedict v. Bray, 2 Cal. 256. Where the judgment was for a larger sum than was claimed at the commencement of the action, but the complaint was amended by leave of the District Court, before the commencement of the trial, and the amount claimed by the amended complaint was in excess of the sum for which judgment was given, it was held that the judgment was good. Tally v. Harlot, 35 Cal 306.

There is no rule of pleading which requires a party to aver the precise amount he claims; but he may recover an amount less than that which is stated in the complaint. Meek v. McClure, 49 Cal. 627. If the complaint contains two independent counts, each complete within itself, and concluding with its own appropriate prayer for relief and separately signed by counsel, the prayer to the second count wifl not be deemed to have any reference to the first; and on a verdict on the first count only the relief granted will follow the prayer of that count. N. C. A S. C. Coy v. KM, 37 Cal. 283. The amount of the damages sustained should also be alleged, for if the allegation is not denied by the answer no issue is raised upon it. McLaughlin v. Kelly, 22 CaL 221. From this decision it would seem that in such a case the jury do not assess the damages, for there is no issue on that point; but it was said in Patterson v. Ely, 19 Cal. 28, that the allegation being deemed admitted was conclusive evidence of the extent of the damages, and authorized the jury to assess them to the extent claimed. See also 437 n., post.

Kinds of relief, etc. As a general rule compensation is the relief or remedy provided by the law of this State for the violation of private rights and the means of securing their observance; and specific and preventive relief may be given in no other cases than those specified in C. C., Div. IV, Part I (t. e., C. C. 3274-3423, for which sections see infra). C. C. 3274.

Forfeiture. Whenever by the terms of an obligation a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty. C. C. 3275 Damages, persons suffering detriment may recover reasonable. Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages. C. C.

3281. Damages must, in all cases, be reasonable; and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered. C. C. 3359.

Damages on revoking submission, 1290. Damages are exclusive of exemplary damages and interest, except where those are expressly mentioned. C. C. 3357. No person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, except in the cases specified in the articles on Exemplary Damages and Penal Damages, and in U. C., sections 3319, 3339 and 3340. C. G. 3358.

The Supreme Court approved the rule stated by Mr. Justice Wilde, in Wooster v. Proprietors of Canal Bridge, 16 Pick. 547: " In all cases where there is no rule of law regulating the assessment of damages, and the amount does not depend on computation, the judgment of the jury and not the opinion of the court is to govern, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case." Boyce v. California Stage Co., 25 Cal. 473. As to new trial for excessive damages, etc., 657, and notes. The fact that the plaintiffs claim damages beyond the just measure of their right, is not a ground for reversing the judgment. If plaintiffs at the trial offer testimony to prove damages which they had no right to claim, defendant can object to its introduction. Aitleen v. Mendenhall, 25 Cal. 213. As by Pol. C. 3274 in judgments and executions the amount thereof must be stated as near as may be, in dollars and cents, rejecting fractions, it is no doubt proper to apply the same rule to the claim for damages in the complaint.

Nominal damages. When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages. C. C. 3360.

In actions for a breach of a contract, nominal damages are presumed to follow as a conclusion of law, from proof of the breach. Browner \. Davis, 15 Cal. 11. Also from a trespass. Attwood v. Fricott, 17 Cal. 43.

Special damages. Inasmuch as the object of the rules of pleading is, to have the pleading so framed as to apprise the parties of the facts to be proved by them: Piercy v. Sabin, 10 CaL 28; the rule laid down in Cole v. Swan- ttoa, 1 Cal. 54; Stevenson v. Smith, 28 Cal. 102; Gay v. Winter, 34 Cal.

153; Lewiston, etc., Co. v. tiltasta, etc., Co., 41 Cal. 565, and Potter v. Froment, 47 Cal. 165, that where the damages are special (that is, such as do not necessarily arise or are not implied by law), the facts out of which such special damages arise must be averred, must be adhered to. In an action against a carrier of passengers for damages for detention of a passenger, an instruction to the jury that, " It being shown in evidence that the plaintiff was a good bookkeeper, and his servant an able-bodied man, the measure of damages would be the wages at the then rate in San Francisco, of a good bookkeeper and able-bodied workingman, during the period of detention of the plaintiff and his servant at New Orleans and Panama," was held to depend on too many contingencies (probability of plaintiffs procuring employment immediately on his arrival, and of such employment being continued, etc.) to admit of its being applied as an absolute and fixed criterion by which the damages could be measured, range v. P. M. S. 6'. Co., 1 Cal. 354. Where an award showed that the arbitrator had based his calculation of damages for breach of covenants of a lease on the fact that the product of twenty acres of land was worth $9000, from which he inferred that the product of two hundred acres would have been worth $96,000, it was held that the damages thus estimated were too remote and speculative, and involved too many contingencies. Muldrow v. Norrii, 2 Cal. 78, citing Sedgwick, p. 98; and Yonge v. P. M. S. S. Co., supra.

In an action against surgeons for negligence, per quod amputation became necessary, where there was no allegation as to bodily pain, suffering, etc., it was held that the court erred in directing the jury that if they believed that the defendants were guilty of negligence, etc., by which plaintiff was caused great bodily pain and suffering, the plaintiff was entitled to a verdict. The court said the defendants were not sued for causing bodily pain and suffering by their negligence or carelessness; they were sued for alleged malpractice, by which amputation became necessary. Moor v. Teed, 3 Cal. 190.

In an action for slander of a person as a clerk or tradesman, it is unnecessary to allege special damage. Butler v. Howes, 1 Cal. 89. Plaintiff sued for the balance of the agreed price of a steam engine. By the contract the engine was to be delivered by 5th April, under a penalty of $20 for every day's delay. The engine was not delivered until the 6th May. Defendants claimed damage for loss of time, services, and wages of employed at defendant's mill, and the profits which defendants would have

realized during the delay. The referee omitted to find damages for any of these, considering them too remote. But the court held that the loss of time, value of services, and wages of employee's, caused by the failure of the respondents to perform their contract, were damages by no means remote, but, on the contrary, strictly proximate and immediate, and they ought to have been considered and allowed. Kenyan v. Goodall, 3 Cal. 259.

Where a plaintiff sued in respect to the destruction by the defendants of a book of plaintiff's, and offered to prove that the book contained the names of subscribers to his newspaper, and that it cost him two dollars to obtain each subscriber, and the evidence was excluded, the Supreme Court held that the plaintiff was entitled to recover the value of his subscription book, but not the amount that the subscriptions cost him, for that he had not alleged in his complaint that he sustained, by the destruction of the book, any special damage. Nimian v. City <k Co. of S. F., 38 Cal. 690. But if the plaintiff mistake his measure of damages, his allegations are surplusage; and if a cause of action and general damages are alleged, this is sufficient on demurrer. Barber v. Cazalis, 30 Cal. 97.

General damages are the immediate and necessary loss caused by defendant's act. Special damages comprise the loss which follows as its natural and proximate consequence beyond its necessary and immediate effect; and special damages must come within this latter definition, or they will be too remote.

Where a master suffers a loss of profits in his business, owing to his servant's breach of his contract to faithfully serve, the master may recover from the servant for the loss of profits involved in the diminution of business caused hy the servant's neglect. Loss of profits as an element of damage is usually too remote, hut not in such a case as this. It is the natural and first effect of the neglect alleged. Stoddard v. Treadwell, 26 Cal. 307; Sedgicick on Dam. 72; Ma«terton\. Mayor of Brooklyn, 7 Hill, 62; Laurence v. Wardwell, 6 Barb. S. C. 423; Bracket v. McNair, 14 Johns. 170; Sedg. 337-338.

Detriment, definition of Detriment is a loss or harm suffered in person or property. C. C. 3282.

Prospective damages. Damages may he awarded in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future. C. C. 3283. In an action for waste pending an action of forcible entry and detainer, the Supreme Court held the rule to be that the

proof of damages might extend to all matters up to verdict, which were the natural result of the previous injury. Hicks v. Herring, 17 Cal. 569. But prospective damages can be allowed only when it appears that the party will be subjected to the particular loss or injury for which he demands compensation. De Costa v. Mass. M. Co., 17 CaL 613.

Peculiar value, property ot Where certain property has a peculiar value to a person recovering damages for deprivation thereof, or injury thereto, that may be deemed to be its value against one who had notice thereof before incurring a liability to damages in respect thereof, or against a willful wrongdoer. C. C. 3355.

Writing, value of. For the purpose of estimating damages, the value of an instrument in writing is presumed to be equal to that of the property to which it entitles its owner. C. C. 3356. Where a check had been lost and paid by a banker upon a forged indorsement, it was held that upon a suit for the same, after a refusal by the banker to deliver the check to the owner, in the absence of rebutting evidence, the measure of damages was the full value of the amount for which it was drawn. Survey v. Wells, Fargo «fc Co., 5 Cal. 125.

Interest in actions not ex contract!!. In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury. O. C. 3288.

Where the jury rendered a verdict for the value of the property, with "legal interest" thereon from the time of the seizure by the sheriff to the date of the verdict, and damages in the sum of $50, the court said that section 200 of the Practice Act, which was in force when the action was brought, authorized the recovery of damages for the detention of personal property. But a party was not entitled to a gross sum for such damages, and to interest upon the value of the property from the time it was taken. Interest in such case was given for damages; and if allowed in addition to a gross sum for damages, it would amount to double damages. Freeborn v. Norcross, 49 CaL 314. If the plaintiff in replevin takes possession of the property when the suit is commenced, and the jury, on the trial, find for the defendant, and assess the value of the property at a time subsequent to the taking, they cannot add to this value interest from the time of the taking, up to about the time the value was assessed. Atherton v. Fowler, 46 Cal. 323.

Exemplary Damages. In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and bv way of punishing the defendant. C. C. §294. For wrongful injuries to animals being subjects of property, committed willfully or by gross negligence, in disregard of humanity, exemplars- damages may be given. C, C. 3340. It was held that exemplary damages might be given for a wanton, malicious, and unprovoked assault upon the person, in Wade. v. Thayer, 40 Cal. 585. But in an action for taking plaintiff's goods in a former action, the judgment under which they were seized being invalid, the court held that the fact of the invalidity of the judgment was not sufficient to warrant the conclusion that the seizure was malicious, the defendants acted in the matter under the advice of counsel, and there was no reason for supposing that they cither knew or suspected that the judgment was invalid. The seizure was undoubtedly a hardship upon the plaintiff, but the court below acted properly in refusing to allow exemplar)' damages. Selden v. Caghman, 20 Cal. 67. Where in an action on a contract for conveyance of a passenger, the carrier was guilty of acts of willful oppression, the court said it would be a reproach to the law if nothing could be recovered but the mere pecuniary loss resulting from the breach of contract. Janet v. "Cortes," 17 Cal. 495. If the proprietor of a stage-coach should wantonly and maliciously overturn it, with the intent to kill or inflict bodily injury upon a passenger, in an action by the passenger the jury might give punitive damages. In like manner, if a family picture, having no appreciable market value, be delivered to a common carrier to be transported for hire, and if he wantonly destroy it, the damages would not be confined to the mere money value of the picture. But though the principal is liable for the actual damage caused by the act of his agent done in the usual course of his employment, he is not responsible for wanton and malicious damage done by the agent without the consent, approval, or subsequent ratification of the principal. Turner v. The N. B. & N. R. K. Co., 34 Cal. 594; Mendelsohn v. Anaheim Lighter Co., 40 Cal. 661.

In an action for breaking and entering the plaintiff's rooms, and injuring and destroying his property, the jury were instructed that,

in awarding exemplary damages, they might take into consideration the expenses which the plaintiff had incurred about the business in and about the litigation; that the amount had not been proved, but

that their knowledge of such matters would enable them to arrive at something like a just calculation as to what should be allowed as counsel fees, legal expenses, and other expenses. It was held that the instruction was erroneous. Falk v. Waterman, 49 Cal. 225.

An officer acting in the discharge of his official duties, is no less responsible for the consequences of a malicious act than a private person, and the effect of a different rule would be to turn loose upon every community a set of licensed wrongdoers. San Joaquin v. Jones, 18 Cal. 327; see, also, "Carriers, damages for omitting to curry," infra.

Torts, damages for. For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not. C. C. 3333; see "Exemplary Damages," ante. Where a part-owner sues ex dtlieto, and the objection of defect of parties is not get up in the answer, the damages should be apportioned at the trial. Whitney v. Stark, 8 Cal. 514. In an action by a reversioner for injury done to the freehold, the duration of the term of the tenant in possession is material in evidence as affecting the measure of damages. Uttendorffer v. Saegerg, 50 Cal. 496. In an action for nuisance, by obstructing a street opposite plaintiff's residence, defendant is liable only for damages actually sustained prior to the commencement of the action. . Hopkins v. W. P. R. R. Co., 50 Cal. 191.

If a person having a good cause of action against another, willfully sue for a much greater amount than is due, and attach the property of the other, and put him to charges, he is liable. The jury are not confined to the actual pecuniary loss sustained by the plaintiff, but may take into consideration the character and position of the parties, and all the circumstances attending the transaction. In such a case the court would not disturb a verdict, unless it clearly appeared that injustice has been done. Weaver v. Pagt, 6 Cal. 685; 16 Pick. 453. In an action for personal torts, the law does not fix any precise rule of damages, but leaves their assessment to the unbiased judgment of the jury. Wheaton v. N. B. Jc M. JR. R. Co., 36 Cal. 590.

In cases of simple negligence, the rule governing the measure of damages is to allow the . actual damages. The allowance of "smart money" in such cases is improper. Moody v. McDonald, 4 CaL 297. Proximate, or immediate and direct damages, are the ordinary and natural results of the negli-

gence. Therefore a spreading of a fire from one field to another is, in our dry season, the natural, direct, and proximate consequence of a firing by sparks from a locomotive. Henry v. 8. P. B. S., 50 Cal. 183.

In an action for trespass, where plaintiff complained of the destruction of his fences, and trampling of grain, etc., it was held that plaintiff could not recover for injury to the grain by cattle of others. Berry v. S. F. <fc N. P. R. R. Co., 50 Cal. 437.

Libel or slander, damages on. In actions for libel or slander, defendant may justify and allege mitigating circumstances, and whether he prove justification or not he may give in evidence the mitigating circumstances, 461.

Mesne profits. The detriment caused by the wrongful occupation of real property, in cases not embraced in sections 3335, 3344 and 3345 of this Code (C. C.), or section 1174 of the Code of Civil Procedure, is deemed to be the value of the use of the property for the time of such occupation, not exceeding five years next preceding the commencement of the action or proceeding to enforce the right to damages, and the costs, if any, of recovering the possession. C. C. 3334.

Ejectment, damages on, 427 and notes. Where plaintiff's right terminates during pendency of action, plaintiff may recover damages for withholding the property, 740. Defendant may set off value of improvements where made' under color of title, 741. Damages can never be recovered in the action of ejectment for use and occupation anterior to the existence of the plaintiff's right of possession. Clark v. Boyreau, 14 Cal. 637. Where the plaintiff, at the time the action was brought, was himself in possession of 180 acres, parcel of the 500 acres demanded, and the possession continued in him thereafter to the day of the trial, and defendants in their answers denied the plaintiff's title to the whole or tiny part of the 500 acres, it was held that plaintiff could not recover damages for the use of the land of which the defendants had never dispossessed him. Ellis v. Jeans, 26 Cal. 278.

In an action to recover lands, the plaintiff can recover the rents and profits only for the period prior to the commencement of the action allowed by the Statute of Limitations, if the defendant pleads the statute. A party ousted by his co-tenant can recover the dam- aces resulting from such ouster, as well as when ousted by a stranger. His injury is no less because it was done by a co-tenant. Carpentier v. Mitchell, 29 Cal. 330; Ad. on £jert., Waterman'scd.449; Ooodtitley. Tombs, 3 Wilson, 118;

Lanyendyck v. Burhans, 11 John. 461; Campy, ffometley, 11 Ircdell, 212; Hare v. Fury, 3 Yeates, 13.

Holding over real property, damages for. For willfully holding over real property, by a person who" entered upon the same, as guardian or trustee for an infant, or by right of an estate terminable with any life or lives, after the termination of the trust or particular estate, without the consent of the party immediately entitled after such termination, the measure of the damages is the value of the profits received during such holding over. C. C. 3335; see "Penal Damages," infra.

Conversion of goods, damages for. The detriment caused by the wrongful conversion of personal property is presumed to be: 1. The value of the property at the time of the conversion, with the interest from that time; and 2. A fair compensation for the time and money properlv expended in pursuit of the property. C. 6. 3336.

If plaintiff docs not exercise his option, damages may be awarded under either rule. Barraide v. Garrall, 60 Cal. 115.

The presumption declared by the last section cannot be repelled in favor of one whose possession was wrongful from the beginning, by his subsequent application of the property to the benefit of the owner, without his con- Bent. C. C. 3337. Where, in an action to recover possession of personal property, the person making any affidavit did not truly state the value, and the officer or his sureties are sued for taking the same, they may set up the true value of the same in their answer. 473, post.

Where the property is delivered and accepted pending the suit, that is, before verdict, the damages should be merely nominal; but where the goods are only delivered after verdict, it must be presumed that the delivery was in pursuance of the verdict which had already determined the rights of the parties. A referee found as part or damages the difference in value of certain iron at the time of detention and delivery, and judgment was entered on the report. The Supreme Court held that there*was no

principle of law which recognized such a measure of damages. The most liberal rule would allow the highest value of the goods at any time between the conversion and the judgment, and interest thereupon. But that where the plaintiff accepts the goods, he makes his election to take the goods in lieu of their value, and the only damage he can recover is the interest upon their highest value, ex-

cept in cases where some special damage is specifically averred in the complaint. C'cmroy v. Flint, 5 Cal. 329. The court also held that when property converted had a fixed value, the measure of damages was that value, with the legal interest from the time of its conversion. Douglass v. Kraft, 9 Cal. 562. Where the value was fluctuating, the court said the correct measure was the highest market value within a reasonable time after the property was taken, with interest from that time. Page v. Fowler, 39 Cal. 412.

Some qualification of the rule may be found necessary when there has been an unreasonable delay in bringing suit, or under special circumstances. It was held that the market value is to be ascertained at the place of the conversion, and that interest was to be allowed, as a matter of legal right, from the time at which the value is estimated. Hamer v. Hathaway, 33 Cal. 119, 120.

The Supreme Court held it error to allow proof of injury to plaintiff's business, as a criterion of damage, in an action against the sheriff for seizing plaintiffs goods under attachment, without any improper motive. Nightingale v. fieanndl, 18 CaL 315; Dexter v. Paugh, 18 Cal. 372.

In an action against a sheriff for wrongfully seizing and selling property under an execution, and where there was no wantonness or oppression on the part of such officer in the seizure, the court held the measure of damages was the value of the property at the time it was seized, and legal interest on such amount from the time of seizure up to the time of the rendition of the verdict. Phelps v. Owens, 11 CaL 22; Pelberg v. Qorham, 23 Cal. 349. Plaintiff cannot recover the value of the goods and also the profits which might have been made on their sale. Butler v. Collins, 12 Cal. 460. An instruction as follows: "In estimating the value of the property, you will take as the basis of your verdict the cash value of the articles in the market at the time they were taken out of the possession of the plaintiff by defendant. What amount of money will it take in the market to replace the articles seized by the sheriff? That sum will be the measure of damages," was held, taken altogether, to give the true standard of damages. Cattin v. Marshall, 18 Cal. 689. In an action for wrongfully taking gold from a mining claim, if defendants decline to prove the exact amount they have taken, as the evidence of the amount is necessarily exclusively confined to or under the control of the defendants, the plaintiffs must relv to a great extent upon the judgment and estimates of men who are not fully acquainted with the facts; and if more than the real amount is given as damages, the defendants

cannot complain. Antoine Co. v. Ridge Co., 23 Cal. 221. In such a case, the right of plaintiffs to recover damages which they have actually sustained is not affected by the fact that the trespass was not willful in its character. The true measure of damages is the value of the gold-bearing earth at the time it is separated from the surrounding soil, and becomes a chattel In estimating the damages, the expense of separating the earth from the gold after it is moved to the place of washing, is to be deducted from the value of the gold. Unless a demand is made for the posseasioii of the gold after it is separated from the earth, and an action is then brought for the conversion of the chattel, the measure of damages would be the value of the gold detained. Maye v. Tappan, 23 Cal. 306. The measure of damages depends, in some instances, on the way in which plaintiff puts his case. Thus, where defendant broke down and removed plaintiff's fence, the court held that if plaintiff had sued for the damage to the freehold, he might have recovered the value of the fence as it stood, if it was a part of the realty. But having elected to sue in replevin for the materials as personal property, he could only recover their value as such. Pennybecker v. 'McDougal, 48 Cal 164. One having a mere lien on personal property, cannot recover greater damages for its conversion from one having a right thereto superior to his, after his lieu is discharged, than the amount secured by the lien, and the compensation allowed by section 3336 for loss of time and expenses. C. C. 3338. It was said that in an action by the pledgee against a stranger for the conversion of goods, the plaintiff is entitled to recover the full value of the goods, because he is answerable over to the pledgor for the surplus. But if the goods be converted by the owner or by any one acting in privity with him, the pledgee can recover only the value of his special interest in the pledge. Treadmtl v. Davig, 34 Cal. 606; Story on Bail, sec. 352; Lyle v. Barker, 5 Bin. 457; Heydan tt Smith's Case, 3 Coke, 7; fngergoll v. Van Bokktkn, 7 Cow. 670; Pomeroy v. Smith, 17Pick. 85

Penal damages. Waste by guardians, tenants for life or years, joint tenants, or tenants in common, 731, post. Wasting or embezzling estate of deceased, 1458-1460. Executor fraudulently selling real property, 1572. In an action for waste, upon the authority of the rule laid down in Bacon's Abridgment, that " where treble damages are given by a statute, the demand for such damages must be expressly inserted in the declaration, which must either recite the statute, or conclude to the damage of the plaintiff against the form of a statute:" Rees v. Enteric, 6 S. and R. 288; jfetccomb v. Butterfield,

8 Johns. 342; Livingston v. Plainer, 1 Cow. 175; Benton v. Dale, Id. 160; the Supreme Court held that where treble damages were not claimed, judgment should have been entered in favor of the plaintiff for single damages only, and reversed a judgment for treble damages. Chipman v. Emeric, 5 Cal. 239. This decision never seems to have been overruled; but as to forcible entry and detainer cases, the rule is otherwise; see 1174, and notes. Forcible or unlawful entry upon, or detention of any building or cultivated real property, 735; see also as to forcible entry, or forcible or unlawful detainer, 1174. If any tenant give notice of his intention to quit the premises, and does not deliver up the possession at the time specified in the notice, he must pay to the landlord treble rent during the time he continues in possession after such notice. C. C. 3344. If any tenant, or any person in collusion with the tenant, holds over any lands or tenements after demand made and one month's notice, in writing given, requiring the possession thereof, such person holding over must pay to the landlord treble rent during the time he continues in possession after such notice. C. C. 3345.

For wrongful injuries to timber, trees, or underwood, upon the land of another, or removal thereof, the measure of damages is three times such a sum as would compensate for the actual detriment, except where the trespass was casual and involuntary, or committed under the belief that the land belonged to the trespasser, or where the wood was taken by the authority of highway officers for the purposes of a highway; in which case the damages are a sum equal to the actual detriment. C. C. 3346. For cutting down or carrying off wood, underwood, trees, or timber, or girdling or otherwise injuring trees or timber, or on the street or highway in front of any person's house, village or city lot or cultivated grounds, or on the commons or public grounds of any city or town, or on the street or highway in front thereof, 733; see note "Waste," supra. The wording of 733 more resembles the wording of 735, 1174, the sections as to forcible entry, etc., than that as to waste, 732.

The measure of damages for cutting trees, etc., is not the actual value of the trees for firewood, but the damage done to the land by reason of destroying them. This damage should be estimated by all the circumstances and the purposes for which the trees are used or designed, and not according to the speculative or fancied ideas that the jury or plaintiff may draw of their worth. Chipman v. Hibbtrd, 6 Cal. 162.

SPECIFIC AND PREVENTIVE RELIEF.

Specific or preventive relief may be given in cases specified in this title («'. e., C. C. 3366- 3423) and, in no others. C. C. 3366.

Specific relief is given: 1. By taking possession of a thing, and delivering it to a claimant; 2. By compelling a party himself to do that which ought to be done; or 3. By declaring and determining the rights of parties, otherwise than by an award of damages. C. C. 3367. Preventive relief is given by prohibiting a party from doing that which ought not to be done. C. C. 3368. Preventive relief, see 526 and notes. Neither specific nor preventive relief can be granted to enforce a penal law, except in a case of nuisance, nor to enforce a penalty or forfeiture in any case. C. C. 3369.

Possession of real property. A person entitled to specific real property, by reason either of a perfected title, or of a claim to title which ought to be perfected, may recover the same in the manner prescribed by the Code Of Civil Procedure, either by a judgment for its possession, to be executed by the sheriff, or by a judgment requiring the other party to perfect the title and to deliver possession of the property. C. C. 3375; and see below C. C. 3387.

Possession of personal property. A person entitled to the immediate possession of specific personal property may recover the same in the manner provided by the Code of Civil Procedure (509, post). C. C. 3379; and see below C. C. 3387. Any person having the possession or control of a particular article of personal property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession. C. C. 3380; and see below C. C. 3387.

Obligations, specific performance of. Except as otherwise provided in this article (C. C., Sees. 3384-3395) the specific performance of an obligation may be compelled. C. C. 3384. A court of equity is always chary of its power to decree specific performance, and will withhold the exercise of its jurisdiction in that respect, unless there is such a degree of certainty in the terms of the contract as will enable it at one view to do complete equity. Morrison v. Rossignol, 5 Cal. 64. The jurisdiction of a court of equity to decree specific performance does not turn at all upon the question whether the contract relates to real or personal property, but altogether upon the question whether the breach complained of can be adequately compensated in damages; accordingly, while it is a general rule that contracts for the sale and transfer of personal property will not be specifically enforced, yet if there are circumstances in view of which a judgment for damages would fall short of

the redress which the plaintiff's situation demands, as that the thing bargained for is a curiosity, or that by non-performance he will be greatly embarrassed and impeded in his business plans, or involved in a loss of profits which a jury cannot estimate with any degree of certainty, equity will decree specific performance. Nickerson v. Challerton, 7 Cal. 572; Dufv. Fisher, 15 Cal. 375; Treasurer v. Comrn. C, M. Co., 22 Id. 390; McLaughlin v. Piatti, 27 Id. 451; Senter v. Davis, 38 Cal. 453.

Real property, claims to recover with damages, etc. A claim for the possession of real property, with damages for its detention, cannot be joined in the same complaint with a claim for consequential damages arising from a change of a road by which a tavern-keeper may have been injured in his business. The damages in the one case arise out of the use of land claimed by the plaintiffs; the damages in the other case arise from an unauthorized diversion of a public road, by means of which the plaintiff suffered a loss of his usual business and profits. Bowles v. Sacramento Turnpike Road, 5 Cal. 225. One action may be brought to recover two separate or distinct pieces or parcels of land. Soles v. Cohen, 15 CaL 152. As to alleging the damages, an allegation of the value of the "use and occupation, rents and profits," of the premises for the period during which the defendants were in the wrongful possession and excluded the plaintiffs, was held sufficient to charge the defendants without any averment that they received such rents and profits. The whole averment was held to be in effect only that the value of the use of the premises, whilst the plaintiffs were excluded from their enjoyment, was the amount stated, which was a very proper averment as the basis of the damages claimed for the wrongful detention of the property .^Patterson v. Ely, 19 Cal. 40.

Trustees, claims against. A claim to enforce an express or implied trust may be joined in a complaint with a claim to enforce a vendor's lien, existing without any written contract. Both such claims are founded on trusts—one lying in contract, and the other arising by act and operation of law. Burt v. Wilson, 28 Cal. 632-639.

Injuries to person. Mayo filed his complaint, praying for the recovery of possession of land in the city of S., and damages for the detention of the land, and for forcible eviction and expulsion from it, and for the value of improvements erected upon it by him. The Supreme Court sustained a demurrer

to the complaint because a cause of action for an injury to property was improperly joined with one for an injury to person. Mayo v. Madden, 4 Cal 27.

Injuries to property. Plaintiff filed her complaint in the court below for trespass against defendant, and prayed a verdict for $500, the alleged value of property destroyed, and $500 damages. On demurrer the court held the complaint unobjectionable. Tendesen v. Marshall, 3 Cal. 440.

In an action for injuries to a mining claim, a claim for damages to the plaintiff by reason of the breaking away of the defendant's dam, and the consequent washing away of the pay- dirt of the plaintiff, may properly be joined with a claim for damages in the preventing plaintiff from working his claim. Fraler v. Sears Union W. Co., 12 Cal. 555.

Intervention, 387, Defenses must be separately stated, 441

In an ejectment suit it was held that the defendant need only answer the very concise allegations material to constitute a sufficient complaint in ejectment, as to which see 426, n., and that other and immaterial allegations inserted in the complaint, whether controverted or not by the answer, went for nothing. Doyle v. Franklin, 48 Cal. 539.

Conclusions of law should not be denied. If the answer merely denies the conclusions of law resulting from the facts averred in the complaint, it is insufficient to raise an issue and the facts are deemed admitted. Nelson v. Murray, 23 Cal. 338; Wormouth v. Hatch, 33 CaL 128; Lightner v. Menzel, 35 CaL 452. Thus a denial of indebtedness without a denial of any of the facts from which that indebtedness follows, as a conclusion of law raises no issue. Curtis v. Richards, 9 Cal. 38; Kinney v. Osborne, 14 Cal. 112. The Supreme Court have gone so far as to hold that even where the complaint is in mdebitatus assumpsit (which complaints they hold to be good, 426, n.; thus recognizing that indebtedness is a fact), a denial of the indebtedness is not sufficient, being a denial of a conclusion of law, and not of a fact. Wells v. McPike, 21 Cal. 215. Several other cases have been thought to be authorities for this proposition, but erroneously. For instance, Caulfield v. Sanders, 17 Cal.571; and JJiijgiat v. Wortett, 18 Cal. 330. In both these cases an answer denying indebtedness was held bad; but in the former, because the denial was as to time, amount and work, conjunctively in the very words of the complaint; in the hitter (on which indeed the decision in Wells v. McPike is expressly founded), on the ground that the denial merely denied an indebtedness in the amount

claimed. The indebitatus counts, alleging that defendant was, at the commencement of the action, indebted to plaintiff for, etc., are not really statements of facts under 426, but of conclusions of law, and ought never to have been allowed; but if for the purpose of supporting the complaint, indebtedness is held to be a fact, a denial of the indebtedness is a denial of that very fact. There is no escape from this. An averment in an answer that the plaintiffs debt is barred by a discharge in insolvency, is only a conclusion of law, and not the statement of a fact. Christy v. Dana, 42 Cal. 174.

Information and belief. A denial as follows: "And on information and belief he avers that no such deed or deeds were ever executed," was held to put the existence of the deeds in issue. Thompson v. Lynch, 29 Cal. 191.

Under a former statute, as under the Code, defendant was allowed to answer by denying "according to his information and belief." The court held that the rule was to require an answer to a verified complaint to be in a positive form in order to put in issue a material allegation of the complaint, provided the defendant was presumed to possess a knowledge respecting the fact alleged; but if he was not able to answer positively, in such a case he must by a proper statement of facts or circumstances overcome the presumption of knowledge on his part, which being done his answer on information and belief would be deemed all that the law required: Brown y. Scott, 25 Cal. 194; Humphreys v. McCaU, 9 Cal. 59; Vassault v. Austin, 32 Cal. 606; but they held that it did not follow that because the allegation in a complaint was that one B. obtained a judgment against defendant, the latter must be presumed to know whether such allegation was true or not, for judgment was sometimes obtained without any knowledge of defendant respecting it. If the defendant did not know that such a judgment had been obtained or the contrary, it was their duty to make the necessary inquiries, that they might be able to determine whether they could deny in any form the existence of the judgment described in the complaint, or whether they must admit it either in terms or by implication from their silence. The natural course to be pursued in such a case would be either to calf upon the custodian of the records of the court in which it was alleged the judgment was recovered and inquire of him if there was such a judgment, or to employ some person more learned or competent than themselves to make the proper inquiries; and whether they might be informed by the one or the other of such persons of the truth of the matter might make no particular difference.

Being informed that there was no such judgment, and believing the information, they might, predicating their respective answers upon such information and belief, deny that any such judgment was recovered. Vassaull v. Austin, 32 Cal. 606. Denials " upon his information and belief," instead of the statutory language "according to his information and belief, are sufficient. Rowsin v. Steimrt, 33 Cal. 211; Jones v. Petaluma, 36 Cal. 230; Kir- tteinv. Madden, 38 Cal. 163. Under the former law a statement that defendant had no information or belief was held bad as a denial: Ord v. " Uncle .Sam," 13 Cal. 369; and this was so even in the case of a municipal corporation, for the court said it could be informed and believed through its officers. S. F. Gas Co. v. S. P., 9 Cal. 453.

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13 Cal. 369; and this was so even in the case of a municipal corporation, for the court said it could be informed and believed through its officers. S. F. Gas Co. v. S. P., 9 Cal. 453.

In a suit on a note, an answer admitting the making of the note, but denying, "to the best of defendant's knowledge, information and belief, all and singular the other allegations in said complaint," was held not to be a specific denial of the allegations of the complaint. Stewart v. Street, la Cal. 372. A denial of an act being done "unlawfully" or "wrongfully" does not deny the act, but only the character of it. Larney v. Mooney, 50 Cal. 610; Burke.v. Table M. Co., 12 Cal. 407; Busenius v. Coffee, 14 Cal. 92; Wood-worth v. Knowlton, 22 Cal. 168; Wood v. Richardson, 35 Cal. 149; Feeley y. Shirley, 43 CaL 369.

If several material facts are stated conjunctively in a verified complaint, an answer which undertakes to deny these averments as a whole, conjunctively stated, is evasive, and an admission of the allegation thus attempted to be denied. The rules of pleading, under our system, are intended to prevent evasion, and to require a denial of every specific averment in a sworn complaint, in substance and in spirit, and not merely a denial of its literal tnitn; and whenever the defendant fails to make such denial, he admits the averment. Doll v. Good, 38 Cal. 287; Smith v. Biehmond, 15 Cal. 501; Blankman v. Vallejo, Id. 638; Castro v. Wetmore, 16 Id. 380; ffiggins v. Wor- te.ll, 18 Id. 333; Woodworth v. Knowlton, 22 Id. 169; Landers v. Bolton, 26 Id. 417; MorriU v. Morrill, Id. 292; Camden v. Mullen, 29 Id. 564; Blood v. Light, 31 Id. 115.

The following instances will serve to explain this: A complaint alleged that on a certain day the plaintiff was the owner and in possession of certain personal property, of the value of $1000; and that the defendant on the same day seized upon and converted it to his own use. The answer denied that on the day specified the plaintiff was the owner, and lawfully in possession of the property; the court said the denial was open to various objections. It raised an immaterial issue as to time; and, in reference to the possession, amounted simply to a conclusion of law. There was not even the pretense of an issue npon this allegation, except conjunctively, with the allegation of ownership. Each of these allegations was sufficient to sustain the complaint; and an issue presented by a conjunctive denial must be regarded as irrelevant and immaterial. Kuhland v. Sedgwick, 17 Cal. 126.

A denial as follows was held bad: "And this defendant further answering, on information and belief, denies that said Daniel Richards, for a valuable consideration, assigned by a written instrument the indebtedness due upon said note, or that the said assignment was stamped with United States revenue stamps of the required amount and denomination, or that any written assignment was made." If this was a denial at all, it was only a denial that the assignment was in writing, and that it was made for a valuable consideration. Randolph v. Harris, 28 Cal. 566.

Where defendants met an averment that plaintiff was the owner, and in the possession of property, by denying that he was the owner and entitled to the possession of it, the court held it neither a denial that the plaintiff was the owner of the property, nor tnat he was in possession of the property when it was taken from him. The defendants also denied that they at any time wrongfully took from the possession of the plaintiff the property and chattels mentioned in the complaint, and also denied that they wrongfully detained from him such property. This was held bad as only denying the wrongfulness, t. e., the conclusion of law. Richardson v. Smith, 29 CaL 531.

A denial that on the 4th day of February, 1865, the plaintiffs were in possession of premises, was held to amount at most to a denial that both plaintiffs were in possession, and certainly not to present the issue of the mis- joinder of either of the plaintiffs. QiUan v. Sigman, 29 CaL 641; Fosgate v. Herkimer Nov. &Hyd. Co., 12 N. Y. 582.

A denial in the conjunctive "that said plaintiff is seised and possessed, and is the owner in her own right, as her separate property, of the land, etc., was held not to amount to a denial of the allegation to which it professed to respond. Filch, v. Bunch, 30 Caf. 211. A denial that "defendant received $3000 in gold coin, parcel of the $65,000, to and for the use of the plaintiff," was held bad for two reasons: First. The count did not charge that the $3000 sued for was parcel of the $65,000, or of any other sum; but 83000 absolutely, and without clog. The traverse was therefore pregnant with an admission that $3000 had been received as charged—

that is, $3000 disconnected from the circumstance named in the denial, and spoiling its pith. Second. The denial was, that the $3000 was received in gold coin. That involved an admission that $3000 was received in either one of the two other forms of lawful money, and therein it denied

what was non- essential, and admitted all that was essential to a recovery. Leffingwdl v. Griffing, 31 CaL 232.

Plaintiffs averred in their complaint that they "now are, and for several years last past have been, the owners in fee simple absolute, and in the possession, and rightfully entitled to the possession of," etc. Defendant in his answer denied that "plaintiffs now are, and for several vears last past have been the owners in fee simple or otherwise in the possession (except as hereinafter alleged), or entitled to the possession of the land and premises described in the complaint." The pleadings were verified. It was held that the averment of the plaintiffs that they were in possession at the commencement of the action, was not effectually denied. Reed v. Calderwood, 32 CaL 109, 110.

In an action of ejectment, the complaint being verified, and setting forth facts sufficient to entitle the plaintiff to recover, the defendants answered separately. One of them admitted that he was in possession of the

Premises when the suit was brought, and denied generally the other allegations of the complaint. He, however, disclaimed any title to or interest in the premises in controversy. The other denied the allegations of the complaint in the following form: "And now comes N. T., one of the defendants, and makes his separate answer, and says, that he denies generally and specifically each and every material allegation in the complaint, the same as if each allegation were herein recapitulated." The court held that neither of the answers contained a specific denial of any material allegation in the complaint. Hensley v. Tartar, 14 Cal. 508. K. acquired the legal title to land under such a state of facts as made his purchase fraudulent, and made him the trustee of S. U. bought from K. S. commenced an action against U. to have him declared trustee, and to compel him to convey the land. In his complaint he averred the facts showing K.'s fraud, and which in law made him the plaintiff's trustee. U., in his answer, admitted these facts and his knowledge of them, but denied that he became the trustee of S., or that there was anything unfair or fraudulent in the facts alleged. It was held that the answer admitted the trust. Scott v. Umbarger, 41 Cal. 411. A general denial of the averments of the complaint, with the qualification of "except as hereinafter admitted," is clearly insufficient when the pleadings are verified. Lewnson v. Schwartz, 22 Col. 231.

Where an alleged entry and ouster were controverted by the answer, it was held that the entry being denied, it could not be said that the withholding of the possession at the commencement of the action stood admitted by the pleadings, for the withholding must have been preceded by an entry. Hawkins v. Rfichert, 28 Cal. 538. If the complaint avers a judgment, and the issuing of an execution thereon, and a sale thereunder of land, and the answer denies the validity of the judgment, and avers that it was void for want of jurisdiction, and denies that the plaintiff acquired any title by the pretended sale by the sheriff, the execution and sale thereunder are not sufficiently denied to require the execution to be put in evidence. Lee v. Figg, 37 Cal. 328.

The court will not give effect to a denial when it appears from the context and other portions of the answer that the denial was intended to be hypothetical. Alemany v. Petaluma, 38 CaL 557.

Where an answer admitted a contract with plaintiff and one Williston, and averred that this was the only contract made by defendants in relation to the matter, and denied that they made any other, this was held to be a denial in "a plain and unequivocal form of the making of any contract with plaintiff." Murphy v. Napa County, 20 Cal. 503.

Where one material allegation in the complaint was that the plaintiffs, at the time of the alleged entry of the defendants, were the owners and in possession of the mining claim sued for; and another was that the ownership and right of possession remained in the plaintiffs up to the commencement of the action, and the defendants denied these allegations in direct and positive terms, and then proceeded and amplified those denials, by alleging previous abandonment and forfeiture, which, if true, would have sustained the general denial, the court said they could not see how plaintiff was injured by having these facts fully set forth in the answer. It advised him of the character of defendants' proof upon the main point in issue, and to that extent it was a benefit to him. BeU v. Brown, 22 Cal. 681.

Where plaintiff alleged that he was the owner, and entitled to the possession of one undivided half of certain chattels, and defendant, in his answer, admitted that he was in possession of the chattels, and alleged that he was the owner thereof, the court held plaintiff's title was sufficiently put in issue. Miller v. Brighton, 50 Cal. 615.

A denial i lint plaintiff has been in possession of land adversely to the claim of defendants for longer than four months previous to filing the answer, is equivalent to a denial of an allegation in the complaint that plaintiff had been in such possession for four years, or, in fact, for a perioa exceeding three months, the complaint having been filed one month before the answer. Oarvey v. Willis, 50 Cal. 620. To determine whether an allegation has been properly denied or not, the answer to the particular allegation which it is designed to controvert must be examined. If taken by itself an issue is fairly made, and there is no admission inconsistent with the answer, the denial is sufficient Each denial must be regarded as applying to the specific allegation it purports to answer, and not as forming part of an answer to some other specific and entirely independent allegation. Racouillat v. Rene, 32 Cal. 453-455.

Any form of denial which fairly meets and traverses the allegation is admissible. Suppose it is alleged in a complaint that the defendant, at a certain time, made and delivered to the plaintiff his certain promissory note,

etc., this allegation is as directly and fairly traversed by saying, "I did not, at the time specified or at any other time, make or deliver to the plaintiff the note described in the complaint," as by saying, "I deny that on the day specified, or at any other time, I made or delivered to the plaintiff the note described in the complaint" If the denial is not evasive, but directly traverses the matter alleged, it is good, without regard to the mere form in which it is expressed. Hill v. Smilit, if] CaL 479.

The following form is sufficient: "The defendant, for answer, says, he denies," etc., dissenting from the New York cases. Espmom. v. Gregory, 40 Cal. 62. At the time when the practice required a replication, it was held that a replication under oath in response to a material averment of the answer, saying, "It is not true, "etc., did not specifically deny the averment Venan \. McGregor, 23 Cat 339.

If the complaint in an action to enjoin the diversion of water alleges that the plaintiff has appropriated and used the water for more than five years, and the answer denies that the plaintiff ever at any time used or took up, or appropriated the water, the denial is sufficient

If the complaint in such action avers that from the spring there ran and flowed irn- memorially upon the plaintiff's premises a constant and never-failing stream of pure, fresh water, and the answer denies that the water flowing from the spring ever at any time ran or flowed to or upon the plaintiff's

premises, the denial is sufficient, nilkim v. McCue, 46 Cal. 656. If the answer contains a special defense which consists of an averment of facts, which, if admissible in evidence, can be proved under denials contained in the answer, an order of the court overruling a demurrer to the special defense, if erroneously made, constitutes immaterial error. Broten v. Xentfield, 60 Cal. 129.

Damages, denial of. Where the complaint is verified, the question of damages is not in issue, if the allegation of the complaint on that point is not specifically denied by the answer. McLaughlin v. Kelly, 22 CaL 221; Jtovx v. Bradley, 12 Cal. 231.

A denial that the plaintiff has suffered damage in the exact sum claimed by him, is insufficient. Button v. T. <fc C. C. T. R. Co., 45 Cal. 553.

In an action to enforce a mechanic's lien for $76, where the answer averred that the value of the labor "was not over the sum of $15 or $20," it was held that it was a denial that the value of the labor was f 76, and that the answer should not be stricken out Way v. Ogfaby, 45 Cal. 655.

Admission, effect of on denial. The admission of the attorney of record of the correctness of the amount due for which judgment is taken, when not done in fraud of the rights of his client, must destroy the effect of a denial in the answer. Taylor v. Randall, 5 Cal 80.

In ejectment, plaintiffs asserted title under a patent of the United States. The defendants, m their answer, denied generally the allegations of the complaint, and at the same time admitted the issuance of the patent, and that it embraced the premises in controversy. The court held that the admissions in the answer negatived its general denials, and the latter in such case might be disregarded, and judgment asked upon the former, the complaint being verified. Fremont v. Seals, 18 Cat 434. But this only applies to existing pleadings, and not to defunct pleadings for which other and amended pleadings have been substituted. Mecham v. McKay, 37 Cal. 165.

New matter. New matter is where de- fendaiit seeks to introduce into the case a defense not disclosed by the pleadings—something relied on by him, but not put in issue by the plaintiff. In all cases where the pleadings are verified, every matter of defense not directly responsive to the allegations of the complaint must be set up in the answer. Terry v. Sickles, 13 Cat 430. Gavin v. Annan, 2 Cal. 494, and McLaren v. Spalding. Id. 510, were overruled by Piercy v. tiabin, 10 Id. 22, and Glazer v. Cltf, Id. 303. Whatever admits that a cause of action as stated in the complaint, once ex-

isted, but at the same time avoids it—that is, shows that it has ceased to exist—is new matter. Such are release, and accord and satisfaction. Coles v. Soulsby, 21 Cal. 50. An equitable title cannot avail a defendant in an action of ejectment, unless it be pleaded as new matter. Cadiz v. Maiors, 33 CaL 288. Where the defendant wished to raise the point, under a denial, that a steamboat company could not be incorporated under an act of the Legislature, the court held that the want of capacity in the plaintiff to sue should have been specially set up in the answer; the denial was not sufficient. """. Steam Nav. Co. v. Wright, 8 Cal. 690; 1 Mass. 1, 159; 6 N. H. 527, 197; 7 Mon. Ky. R. 484. The want of legal capacity to sue is a personal disability, and if the defendant intends to set up such a defense he should state so distinctly. Cal. Steam Nav. Co. v. Wright, 8 Cal 590. In an action by an attorney on a quantum meruit for fees, skillful or unskillful and negligent conduct of a case is an important subject of inquiry. Anything which shows the services were not of the value claimed, as the nature of the suit conducted, its little difficulty, small amount, little skill requisite, the absence of skill, and the like, is competent, under the issue of value. A trial may result successfully and yet the attorney be guilty of negligence. His want of skill, or neglect, may put the client to great expense to redeem his blunders; and, on a quantum meruit, the value of services would be reduced. fridges v. Paige, 13 CaL 640. Any objection that may be taken by answer may be taken by demurrer, 433. Whether or not the objection be apparent upon the face of the complaint the objection itself is still the same. The mode of taking advantage of the error only, is different in the two cases. It was not so in all cases, under the former system, as some matters had to be specially pleaded, though the defect was apparent upon the face of the declaration; as, for example, usury. Jfentsch v. Porter, 10 Cal. 560. In an action of ejectment to recover mining claims, an answer to the complaint which avers "that any right that plaintiffs may have ever had to the possession, etc., they forfeited by a non-compliance with the rules, customs and regulations of the miners of the diggings embracing the claims in dispute, prior to the defendants' entry," is insufficient in not setting forth the rules, customs, etc. Dutch. Flat W. Co. v. Mooney, 12 Cal. 534 Under a denial of a contract, defendant may show anything disproving the contract as averred; as, that another party, who in fact sold goods, sold them as his own and not as agent of plaintiff, or, that defendant was not to pay until

cattle sold were fattened and slaughtered. Such proof is not new matter. Hawkins v. Borland, 14 Cal. 415.

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. A party receiving such note with notice cannot recover on it Hall v. Auburn T. Co., 27 Cal, 257; Parsons on Notes and Bills, 166; Bank of Genesee v. Patchm Bank, 13 N. Y. 309; Angell A Ames on Corp., Sees. 257, 258. Where a note was given to plaintiffs for a debt due them from B., one of the directors of a corporation, the court held that an answer denying the making and delivery of the note by defendant was sufficient to a flow of the introduction of evidence of the want of authority of the directors to make the note. Hall v. Auburn Turnpike Co., 27 CaL 257, 258.

Ejectment. Defendant may set off against damages value of improvements made under color of title, 741. If defendant has a legal title, he need not go into equity to assert it. Chip/man v. Hastings, 50 Cal. 311. A disclaimer of possession or interest in real property (739) is not a proper proceeding in an action of ejectment; it is only proper in actions brought to determine estates or interests asserted against parties in possession by parties out of possession. A judgment in ejectment cannot be entered against a party unless he was in the possession, actual or constructive, of the property at the commencement of the suit. Noe v. Card, 14 Cal. 609; Gamer v. Marshall, 9 Cal. 268.

Where a complaint avers that on a particular day the plaintiffs were the owners in fee simple and in possession, etc., the defendant, under a denial, may confine himself to simply rebutting the evidence of the plaintiff. He need not show that he has any title whatever. It is sufficient if he make it appear that the plaintiff has no title or interest entitling him to the possession at the time of the trial. He may show this by proving that the title and right of possession is in some third person, except in the case of public lands, in which case this rule is qualified. Moore v. Tict, 22 Cal. 516; Adams on Ejectment, 337- 380 and notes; Coryell v. Cain, 16 Cal. 572.

The plaintiff must show a title or right of possession existing at the time of the commencement of the suit. Moore v. Tict, 22 Cal. 516; Yount v. Howdl, 14 Cal. 465; Stark v. Barrett, 15 Id. 361. But no necessity exists on the part of the defendant to show a title or right of possession existing in him at the time. He has a clear right to snow, by any proper evidence, that at the time of the trial he had

the title or right of possession, and this is sufficient to defeat the plaintiff's action. Moore v. Tiee, 22 Cal. 516.

Where the strict legal title is not involved, and the plaintiff relies upon a right to recover founded upon a naked possession, defendant may defeat a recovery by proving that the premises were abandoned by plaintiff before the alleged entry of defendant, and were therefore at the time of the entry publici juris, and he may do this under a simple denial of plaintiff's right to the possession. In such case the issue is, was plaintiff entitled to the possession at the date of defendant's entry? And anything which shows that he was not is but matter in rebuttal, and competent evidence for the defendant under the denial, upon the same principle that the defendant may defeat a recovery where the plaintiff relies upon strict title. Wilson \. Cleaveland, 30 Cal. 200. A defendant setting up title to only a portion of the demanded premises, must specify the part he claims, in order to apprise his adversary of it, that he may bring his proofs understandingly. Anderson v. Fisk, 36 Cal. 633.

Errors and defects to be disregarded, 475.

Estoppel, 1908.

Executor. See "Administrator," supra.

Fraud. See 426 n., p. 161.

In defense to an action on a promissory note, it is not sufficient to plead in general terms want of consideration, and that the note was obtained by fraud. The answer should set out the circumstances under which the note was given, and point out the facts which constitute the fraud. Gushee v. Leavitt, 5 Cal. 161.

Gold coin, etc., allegation as to money being payable in, should be denied, 667.

Husband and wife, 370, 371, and notes.

Judgment or other determination of a court, officer, or board, pleading, 456.

Judgment, foreign. In an action on a judgment obtained in a New York court, the answer did not allege that an appeal, which it alleged had been taken and perfected to the New York Court of Appeals from said judgment, had, by the laws or New York, the effect of suspending the judgment thus appealed from, or of staying tne execution thereof, nor was it alleged that the undertaking on such appeal was to the effect that the sureties thereon were bound in double the amount named in

the judgment; that if the judgment appealed from, or any part thereof, should be arnnned, the appellant would pay the amount directed to be paid by the judgment, or that any order was entered staying proceedings upon or execution of the judgment. The court held the presumption was that the effect of the alleged appeal by the laws of New York was the same as in this State; and in this State such appeal would not stay execution or proceedings for the collection of the amount of the judgment appealed from, pending the appeal, nor destroy or weaken the force and effect of the record of the judgment as evidence of the facts, or matters necessarily determined thereby. Whether by an appeal from a judgment in which appellant had given an undertaking on appeal, in form and amount sufficient to stay proceedings for its enforcement, the effect of the record of the judgment as evidence was thereby suspended or nullified, was not decided. Taylor v. Shew, 39 Col. 539.

Justification. An execution is sufficient justification to the sheriff for the seizure of the property of the debtor, and it is immaterial whether the property be in the actual possession of the debtor, or in the possession of parties holding it for his benefit. But if the property be in the possession of a stranger to the writ, claiming it as his own by virtue of a transfer to him of the debtor, which «>ould prevent the latter htmse{f/rom retaking the possession, the officer must plead not only the writ but the judgment. Bickerstaff \. Doub, 19 Cal. 112; Knoxv. Marshall, 19 Cal. 622; Demiek v. Chapman, 11 Johns. 131; Pool v. Chandler, 10 Wend. Ill; Elyv. Ehle, 3 Corns. 506; 1 Saund. R. 298; Van Ellfn v. Hurst <fc Gushing, 6 Hill, 311; NobU & Eastman v. Holmes, 5 Hill, 195; Thornburgh v. Hand, 1 Cal. 554; Glazer v. Clift, 10 Cal. 304.

Where, in an action against the sheriff for taking goods, he justifies under an attachment against a third person, it is not necesgary that his answer should set forth minutely every fact relating to the attachment suit. An answer which stated the time of commencement of the action, the names of parties, the court, and that the goods were taken by virtue of a writ of attachment issued therein, was held sufficient. Towdy v. Ellis, 22 Cal. 651. In trespass quart clausumfregit, where the complaint avers matter of aggravation after the entry, an answer justifying the aggravating matter, but admitting plaintiffs title and possession, does in it state facts sufficient to constitute a defense. In trespass quare claugum freait an answer justifying merely because the defendant hag an easement on the

land contains no defense. Pico v. Colimas, 32 Col. 578. Process regular on its face justifies sheriff, 262, n., p. 90, ante; Pol. C. 4187.

Leave and license must be specially pleaded. Alford v. Bctrnum, 45 Cal. 485.

Libel. Defendant may justify and allege mitigating circumstances, 461.

Limitations, statute of, see 430, n.

On demurrer to a complaint which charged that the parties each recovered a judgment in rem, against the property of the other; that defendant, by giving a bond with sureties, which he knew to be worthless, deprived plaintiffs of their lien on the property, against which he recovered judgment; that defendant, as well as the sureties on his bond, were insolvent, and that a fraudulent assignment of the judgment had been executed for the purpose of defeating plaintiffs' right to set off their decree against it, the court held tliut it became their imperative duty to interfere to prevent the consummation of a fraud. Runaell v. Comeay, 11 Cal. 101; Simson v. Hart, 14 Johns. 74; Gay \. Gay, 10 Paige 376. The claim must be such that the party pleading it might obtain a several judgment against nis adversary upon it, and this undoubtedly excludes a joint debt as a set-off against a separate debt Howard v. Shore, 20 Cal. 281. But although the parties named in the record of two judgments are not the same, and therefore a court of common-law jurisdiction could not make the set-off, a court of equity will look beyond the nominal to the real parties in interest, and adjudicate the rights of the parties accordingly. The interposition of a trustee will not prevent a court of equity from reaching the cestuis que trust, when all the parties are before it, and from compelling them and the trustee to allow a set-oft, even though such relief could not be granted by a court of common law. Walker v. Sedgwick, 8 Cal. 405; Russell v. Conway, 11 Cal. 93; Na- glee v. Palmer, 7 Cal. 543; Howard v. Shorts, 20 Cal. 277. Where some equity intervenes independent of the fact of mutual unconnected debts, equity will take jurisdiction and determine the matter upon principles of mutual equity. Jfobbs v. Duff, 23 Cal. 627; /;='.. on Set-off, 190; Lindsay v. Jackson, 2 Paige, 581. The set-off will be allowed as between the real parties in interest regardless of a nominal party. Hobbs v. Duff, 23 Cal. 627; O'Connor v. Murphy, 1 H. BL 657; see Du/v. Hobbs, 19CaL 658. Where defendant sought to avail himself of a demand by way of counter-claim, not in favor of defendant alone, nor in favor of defendant and his comaker of the note in the suit, hut a joint demand

in favor of defendant, his co-obligor, and one Taylor, a stranger to the note and suit, and there was no allegation that either the defendant or the makers of the note had acquired Taylor's interest in this demand, it was held not available as a defense, and a judgment thereon could not be rendered in favor of defendant as demanded. Hooky. White, 36 Cal. 301; and see Sterns v. Martin, 4 Cal. 229, and Gannon v. Dougherty, 41 Cal. 663. Joint and separate debts cannot be set off at each other at law, and there is no good reason for the application of a different rule to a claim for damages. Jfmgv. Wise, 43 Cal. 635. Equity will not set off the claim of an individual creditor of one joint owner of a judgment against the judgment. And it the judgment be partnership assets, the individual creditor has no claim to any part of it until adjustment of the firm accounts. Colling v. Butler, 14 CaL 223.

Subdivisions 1 and 2, what are causes of action within. In a suit for services as agent of defendant under a contract, defendant in answer set up a violation of the contract on the part of plaintiff, and also certain other matter, amounting to a tort on his part, as conspiracy to have the property of defendant sold, and bought in by him, circulating false reports that defendant was a bankrupt, its affairs a swindle, etc. It

was held that this latter portion of the answer was properly struck out on motion of plaintiff. Batesv.SierraNevada,etc.,Co.,18Cal.ni. It has been said that an unliquidated claim for damages was held not the subject of offset, either equitable or legal. Riclceison v. Richardson, 19 Cal. 354. But in a subsequent case, where the principal and cross-claim were based upon the same contract, the court held that both, might be considered in the same action, though the damages might be unliquidated; and if the jury found a balance in favor of defendant, he might have judgment and , execution therefor. Stoddard v. Treadwell, 26 I Cal. 305; Pattison v. Richards, 22 Barb. 146; I Glason v. Moen, 2 Duer, 639; Spencer v. Bab- { cock, 22 Barb. 326. The Code, by enumerating tests, excludes all others by intendment. Stoddard v. TreadweU, 26 Cal. 305.

Where a breach of a contract on the defendant's part was the foundation of the plaintiff's claim for damages, and the counter-claim for damages arose on the same contract, the court held that it could be interposed by the defendant. Dennis v. Belt, 30 Cat. 252.

In replevin, the subject-matter of the litigation necessarily consists only of the property mentioned in the complaint; and it is not competent to the defendant by his answer to introduce a newand distinct subject-matter of litigation, by claiming of the plaintiff the release and return of other and distinct personal property, even though he present such a case as would have enabled him to recover in an independent action. Lorensohn v. Ward, 45 Cal. 10.

In an action for damages for an assault and battery, a libel published by the plaintiff of and concerning the defendant, docs not constitute a counter-claim. Macdougallv. Maguire, 35 CaL 274; Pattison v. Richards, 22 Barb. 143; Murden v. Priment, 1 Hilton, 76; Barhyte v. Hughes, 33 Barb. 320; Schnaderbeck v. Worth, 8 Abb. 38. The objection is not waived by the failure to demur. The ground of demurrer is not a misjoinder of defenses; but it is that the matter is not recognized by the law as a defense to the action. The party may have an independent cause of action, but it has no relation to the pending action. As it is not recognized by the law as a defense, the objection may be taken at any time. Alacdoiujall y. Maguire, 35 Cal. 274-281. Damages for injury to the property against which the assessment was issued cannot be set up as a counterclaim in an action to recover an assessment for the improvement of a street.

The court said this doctrine was settled in Emery v. San Francisco Gas Co., 28 Cal. 345; Emery v. Bradford, 29 Cal. 75; Nolan v. Reese, 32 Cal. 484; and Himmelman v. Steiner, 38 Cal. 176, that the owners of property adjacent to a street were not in any sense parties to the contract for the improvement of a street, entered into by a contractor with the superintendent of streets; that the assessment was the " transaction " within the meaning of this section out of which the cause of action must arise, out of which the defendants are authorized to set up as a counter-claim; that such a demand did not arise out of the assessment, nor indeed out of the proceedings upon which it is based, and therefore was not available as a counter-claim. Himmelmann v. Spanagel, 39 Cal. 389, 392.

Equitable defense by way of counterclaim. Equitable defenses may be interposed to the action of ejectment, but the defendant in auch cases becomes an actor, Bruck v. Tucker, 42 Cal. 346, with respect to the matter presented by him, and his answer must contain all the essential averments of a bill in equity. The defense to an action of ejectment must meet the present claim of the plaintiff to the possession; and in order that an equitable defense may prevail, the equity presented must be of

such a character that it may be ripened by the decree of the court into a legal right to the premises, or such as will estop the plaintiff from the prosecution of the action. Such defense can only be interposed where the parties to the action are such as would be required to a bill in equity, seeking the same relief. Leatrade v. Earth, 19 Cal. 671, 673. Defendant must file an answer which in matter of allegation would be a good bill in equity under the old system. Meador v. Parson*, 19 Cal. 299. He need not, however, conclude with a prayer for affirmative relief in order to make nis defense available. An equitable cause of action in favor of .the defendant, in order to be available to him as a defense, must be one which has not been barred by the Statute of Limitations. Carpentier v. Oakland, 30 CaL 443; see McCauley v. Fulton, 44 Cal. 362.

Where the owner of land sold the same, and covenanted to execute a warranty-deed therefor on payment of the purchase-money, and the purchaser took and held actual possession and afterwards paid the purchase-money, it was held that such purchaser's or his grantee's equitable title was a sufficient defense to an action of ejectment under the legal title by the original owner, or any one holding under

439. If the defendant omit to set up a counter-claim in the cases mentioned in the first subdivision of the last section, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor. them with notice. Talbert v. Singleton, 42 Cal. 391.

§ 1982. Property rights of citizens

1. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Plaintiff's Pray for Declaratory Relief, Damages according to Proof. Breach of Implied Contract. Quo Warranto Incidental and Peremptory Administrative Mandamus filed under the Great Seal. *Picturi; Signis; Famosus libellus sine scriptis; Bursae decrementum; Quando dominus conscientiae detrimentum; Breve capitalis justiciarius noster and ad placita coram nobis tenenda* ***writ of unspeakable errors, divide et regnes!*** **RELIEF: UNCONSTITUTIONAL LAW IN VIOLATIONS OF FIRST, FOURTH, AND TENTH AMENDMENT PROTECTIONS.**

§ 3729. FALSE CLAIMS; MISTAKE! PROHIBITION! EQUITABLE ESTOPPEL!

Categorical Rules

Noxious Use of land – need not pay

Permanent Physical Occupancy – must pay

100% wipe out (of reasonable investment backed expectations) – must pay

Multi-factored test on whether they have to pay or not – Penn Central

A condition on land has to have a "rational nexus" and "rough proportionality" to what the purpose of the condition is

Temporary taking needs to be paid for

Court Cases

HHA v. Midkiff – can take land directly to a private party and compensate mkt value

Causby – Easment of flying directly overhead is a taking

Miller v. Schoene – making them cut down ceder trees wasn't a taking

Loretto v. Teleprompter – permanent physical occupation is a taking

Allerd – not a taking when outlaw sale of eagle feathers

Kaiser Aetna – taking when take away the excluendi of their private lake

Pruneyard – not a taking when made shopping center admit free speech activities

Hadacheck v. Sebastian – regulation of business operations to prevent harm to public is police power

Pennsylvania Coal Co. v. Mahon – If a regulation goes too far then it's a taking

Penn Central v. NY – keeping historical landmarks in good repair and historic good for everyone, within police power

Lucas v. SC – if regulatory action denies an owner viable use of land, it's a taking, unless it's a Common Law nuisance

Pallazzo v. Rhone Island – is not barred from a takings claim just because the title was acquired after the effective date of the state regulation

Nollan v. CA Coast – A state may not condition a property use permit for something not addressing the purpose use

Dolan v. City of Tigard – A condition of permit needs to be proportional to the impact the change will be. (First Evangelical v. LA – temporary takings need to be compensated)

QUO WARRANTO INCIDENTAL AND PEREMPTORY ADMINISTRATIVE MANDAMUS

1. The right to petition the government is the freedom of individuals (and sometimes groups and corporations) to petition their government for a correction or repair of some form of injustice without fear of punishment for the same. Although often overlooked in favour of other more famous freedoms and sometimes taken for granted, many other civil liberties are enforceable against the government only by exercising this basic right,, making it a fundamental right in both representative democracies (to protect public participation) and liberal democracies. While the prohibition of abridgment of the right to petition originally referred only to the federal legislature (the Congress) and courts, the incorporation doctrine later expanded the protection of the right to its current scope, over all state and federal courts and legislatures and the executive branches of the state and federal governments.

Boumediene v. Bush, 553 U.S. ___ (2008), was a writ of habeas corpus submission made in a civilian court of the United States on behalf of Lakhdar Boumediene, a naturalized citizen of Bosnia and Herzegovina, held in military detention by the United States at the Guantanamo Bay detention camps.[1][2][3] The case was consolidated with habeas petition Al Odah v. United States. The case challenged the legality of Boumediene's detention at the Guantanamo Bay military base as well as the constitutionality of the Military Commissions Act (MCA) of 2006. Oral arguments on the combined case were heard by the Supreme Court on December 5, 2007. On June 12, 2008, Justice Kennedy wrote the opinion for the 5-4 majority holding that the prisoners had a right to the habeas corpus under the United States Constitution and that the MCA was an unconstitutional suspension of that right.

Grantees can have no less right as a citizen than these.

2. Habeas petitioner Iron Mountain Mines, Inc. et al v. United States challenges the legitimacy of Iron Mountain Mines, Inc. invasion and occupation by the Environmental Protection Agency and particularly contests the illegitimate animus and vindictiveness of the EPA actions, the defamations, libel and slander, loss of enjoyment, value, and livelihood; injury to reputation, credit, honor, dignity

THE UNITED STATES HAS NO RIGHT TO ABROGATE PATENT TITLE! TRESPASS!

3. Grantees challenge the constitutionality of the Comprehensive Environmental Response, Cleanup, and Liability Act "CERCLA" 42 U.S.C. 9601-9659 et seq. for violation of the establishment clause.

4. Petitioners claim quo Warranto with incidental and preemptory administrative mandamus by right because they contest the Environmental Protection Agencies actions and will rectify the abuse of discretion and imbalance of government authority, and because petitioners demand equal protection and due process of law, because the EPA actions are implicitly an assertion of unquestionable and unchallengeable authority to bury the petitioners property, and by extension to bury the entire State of California and even the entire United States under unquantified and unlimited amounts of acutely toxic hazardous waste sludge, solely for the benefit of fishes, all the while claiming such authorities are scientifically justified as somehow protecting the "environment", in disregard and breach of duty to implement remedies that are fully protective of human health and the environment. Petitioners allege that EPA claims that such actions have any scientific merit are false claims, and petitioners further allege that these EPA actions are unscientific, unreasonable, unfair and unjust, and are unsupportable by scientific or economic accountability.

5. Petitioners allege that such an absurd and illogical result of executive mismanagement, facilitated by unfair and unjust Congressional legislation, and coddled in Judicial swaddling and Judicial deference, without any timely means of recourse or for redress of grievances, is an abomination of unbounded executive authority, and petitioners raise these allegations to a constitutional question with claims of unconstitutional jurisdiction by the EPA and DOJ; hence the petitioners claim by ancient writ "*Breve Soke",* and convene by right of the "Warden of the Stannaries" and the "Warden of the Forest" a "Miner's Court" for a determination of franchise jurisdiction according to the Constitutions of the United States and of the State of California, and according to the codes of California, the laws of the United States of America, and the common law of England, and petitioners motion for writ of *certiorari* to resolve these questions and the allegations of abuse of executive authority and unconstitutional jurisdiction by the EPA and DOJ. Jurisdiction is also properly reserved to the District Courts by the covenants of patent title and Federal law.

"The English practice . . . [is] more necessary to be observed here than there" *John Jay, 1793

Petitioners claim violation and usurpation of a franchise granted by patent title and mineral rights.

ABSOLUTE ORIGINAL ORDER TO CEASE, DESIST, VOID, AND VACATE!

ABSOLUTE ORDER FOR REMISSION, REVERSION, AND DETINUE SUR BAILMENT.

quo Avarranto: de Quibis Commote Alodium & Alodarii, Quia tria sequunturdefamatorem; Knowingly reckless disregard of the truth, deliberate ignorance of actual information; trespass: Praecipe quod reddat & detinue sur bailment; subpoena ad testificandum; subpoena duces tecum; impunity; miscarriage of justice; prohibition; illegitimate animus;

Differing court interpretations of a statute "is evidence that the statute is ambiguous and unclear." U.S. v. Iron Mountain Mines, Inc., 812 F. Supp. 1528, 1557 (E.D. Cal. 1993).

Courts frequently interpret an ambiguous contract term against the interests of the party who prepared the contract and created the ambiguity. This is common in cases of adhesion contracts and insurance contracts. A drafter of a document should not benefit at the expense of an innocent party because the drafter was careless in drafting the agreement.

In Constitutional Law, statutes that contain ambiguous language are void for vagueness. The language of such laws is considered so obscure and uncertain that a reasonable person cannot determine from a reading what the law purports to command or prohibit. This statutory ambiguity deprives a person of the notice requirement of Due Process of Law, and, therefore, renders the statute unconstitutional. West's Encyclopedia of American Law, edition 2.

Clearfield Doctrine

"Governments descend to the Level of a mere private corporation, and take on the characteristics of a mere private citizen...where private corporate commercial paper [Federal Reserve Notes] and securities [checks] is concerned. ... For purposes of suit, such corporations and individuals are regarded as entities entirely separate from government." - Clearfield Trust Co. v. United States 318 U.S. 363-371

What the Clearfield Doctrine is saying is that when private commercial paper is used by corporate government, then Government loses its sovereignty status and becomes no different than a mere private corporation and takes on the character of a mere private citizen. As such, government then becomes bound by the rules and laws that govern private corporations which means that if they intend to compel an individual to some specific performance based upon its corporate statutes or cor-

poration rules, then the government, like any private corporation, must be the holder in due course of a contract or other commercial agreement between it and the one upon whom demands for specific performance are made and further, the government must be willing to enter the contract or commercial agreement into evidence before trying to get to the court to enforce its demands, called statutes.

"Republic. n. A system of government in which the people hold sovereign power and elect representatives who exercise that power. It contrasts on the one hand with a pure democracy, in which the people or community as an organized whole wield the sovereign power of government, and on the other with the rule of one person (such as a king, emperor, czar, or sultan)." - Blacks Law Dictionary (seventh edition)

Disputed facts.

1. The site encompasses about 8000 acres of land. See consent decree of Dec. 2000.

4. The site encompasses one mine, Iron Mountain mine. There are about 76 mining patents.

5. The inactive mine and tailings are mostly located on 360 acres of land, an agricultural college land patent purchased with military scrip bounty land warrants and with preemption rights paid for with gold, signed by President Abraham Lincoln May 1, 1862 and granted by California Governor Booth January 4th 1875.

6. The mine is located on approximately 4400 acres, of which 2744 acres is owned by T.W. Arman since Oct. 27, 2009, T.W. Arman had an option to purchase remaining property after the initial purchase in 1976 to complete the acquisition of the entire 4400 acres offered, but was interfered with by EPA.

The property has been officially mined since April 8, 1880, when the "Lost Confidence" mine was located by William Magee; the property was mined until the EPA terminated lawful mining activities in 1986.

The "Lost Confidence Mine"

"This property, better known as the Iron Mountain Mine, is situated in the Flat Creek Mining District, seven and one half miles north from the town of Shasta. The location was made April 8, 1880.

The claim is one thousand five hundred feet by six hundred feet. Course of vein, north-east and southwest; dip, 45 degrees to the east; average width, one hundred thirty feet. The ore shoot is continuous the entire length of the claim, and can be traced as far as the Windy Camp District, a distance of eight miles—the same character of ore showing in explorations made in the latter camp." California Journal of Mines #8, 1888

9. Past mining, including the use of explosives for stope mining, mine fires, and the abandonment of mining by the cartel mine owner to maintain high metal prices resulted in the deterioration of the mine to a condition where only an open pit mine above the ore bodies was feasible to continue mining. Copper prices below $0.23/lb. caused the open pit mine to be closed in 1963. Stauffer Chemical, a long time partner of Mountain Copper Co. Ltd., purchased Mountain Copper Co. in 1967 to obtain the vast phosphorus reserves in Utah and Florida owned by Mountain Copper Co. Mountain Copper Co. was fully liquidated by 1969.

The California State geologist reported that copper cementation was being practiced almost as soon as mining began, suggesting that Acid Rock Drainage (ARD, the more appropriate term now used by experts around the world) was occurring prior to any of the man made activities that may or may not have affected the natural biological activity of organisms now known to inhabit the ore and cause the reactions that result in ARD.

10. No Acid Rock Drainage is occuring in tailings or waste rock.

11. Biological organisms such as *ferroplasma acidarmanus* create biological processes that are now known to be the cause of and the only way that the ARD is perpetuated.

18. EPA actions at the Site were mistaken and the EPA misconduct was not in accordance with the NCP.

"Each remedial action shall utilize permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable." (NCP §300.430(f)(5)(ii))

19. The EPA interfered with the lawful regulatory authorities of the State of California to impose itself at Iron Mountain mine, and there are declarations of incompetence, perjury, and false claims

against the State agent James Pedri of the Water Board, Rick Sugarek, EPA Project Manager, and Richard Anderson, EPA Judicial Officer. .

20. The EPA ignored the RI, (from the (Record of Decision) ROD 1)

"Among the remedial action alternatives that could be implemented by EPA, the total removal of the source and sediments in the receiving waters (Alternative CA-10) is considered the only remedy which is capable of meeting project cleanup objectives and the full requirements of the clean water act (CWA). This alternative would effectively eliminate discharges and restore all tributaries to pristine condition."

The EPA abused its discretion and breached its duty to implement a remedy fully protective of human health and the environment and instead embarked upon a 3000 year removal action that cannot be assured of either and is obviously an unnecessary arbitrary and capricious reckless negligent endangerment to the property, the property owner, to the miners, to the public, and to the environment.

38. The EPA ROD1 remedy was to plug the mine with LDCC concrete. Since that plan was abandoned, none of the proposed actions fall within the ambit of a CERCLA "remedy", and therefore must be denoted as a removal action. The EPA has claimed to have undertaken "time-critical removal actions" for conditions that have existed for over 80 years according to the mine records and the State, and there is ample evidence to suggest that these are geologic and biological phenomena which have been occurring for hundreds of thousands and perhaps millions or even billions of years.

The 80 year old bridge to Iron Mountain Rd. was worn out and needed to be replaced. This is not a time-critical removal action; it is a public works project.

39. The costs incurred by EPA through 1996 for removal actions were above and beyond the one year, $2 million dollar limitation on removal actions.

40. The removal actions were not to protect human health or the environment, they were contrived to make a scapegoat of mining and Iron Mountain mine in particular for the destroyed fishery and habitat of fishes from dams, ranching, farming, urbanization, untreated sewage, and other human impacts. The domesticated anadramous fish populations hatched and planted in the manmade reser-

voirs would have been fine without the completely unnecessary interference with the Iron Mountain Mines, Inc. proper remedy The 1985 final report on remedial investigation by contractor CH2MHill reported fish kills in Table 7-1 and states that the last verified report of dead fish in Keswick lake was on Jan. 14, 1969, almost 8 years before T.W. Arman purchased the property.

52. The EPA contractor PRC would have had no qualifications to perform a technical review of an *in situ* leaching mining proposal, and the ROD1 refers to a technical review by a firm calling itself the "Colorado School of Mines Research Institute" (no relation to the "Colorado School of Mines" the preeminent mine engineering college), that was operated by an individual named Gregory F. Chlumsky, who was latter sued by the college for using its name. The report indicated that the proposal was viable, but intimated that it would be difficult to find investors. The EPA referred to this confidential enforcement analysis as justifying their refusal to permit the *in situ* mining proposal to proceed. SFUND records 54084.

64. In 1986 the EPA issued ROD 1, implementing interim measures such as partial capping and filling the mine with Low Density Cellular Concrete (LDCC). Interim measures are removal actions unless they are permanent. None of the EPA actions are permanent or remedial in nature.

78. EPA did not provide a review of the business plan for *in situ* mining. EPA referred to the CSMRI review as an enforcement analysis, disregarded the substance of the report which stated that the plan was viable, disregarded the obvious fact that EPA interference had made Iron Mountain Mines, Inc. ineligible for conventional financing or that no prudent mining company would consider subjecting itself to unlimited and perpetual CERCLA liability or to association with the stigma of endangering or exterminating salmon and trout.

91. The EPA abandoned the ROD 2 remedy proposal of plugging the mine portals and connecting adits, and resigned itself to another removal action, more AMD treatment.

94. The selection of HDS over ordinary sludge resulted in a sludge that does not effectively retain the metals in the sludge matrix, and metals, particularly cadmium, leach from the sludge at unsafe levels. (Cadmium, a bio-accumulative acutely hazardous toxin, leaches in excess of 110 ppb. in violation of RCRA, EPCRA, (the community right to know act), and California health and safety codes.)

The RP (Rhone-Polenc) objected to the added expense of the HDS, for which the only justification was extending the duration of the disposal in the open pit, but was dismissed by EPA, an unreasonable, illogical, and tyrannical decision that lead to their decision to refuse to operate the facility after 2000.

96. The "treated water" discharged into Spring Creek does not meet the requirements of the CWA.

97. Burying waste piles in temporary dumps is a removal action.

99. Despite IMMI and T.W. Arman's insistence that mining was a preferred remedial approach, the EPA never investigated in any meaningful way this obvious remedy for which they had expert testimony and information in support of.

104. In the last 5 year review, the EPA acknowledged that the liner or draining system built in the Brick Flat pit had failed, that the leachate no longer enters the drain system for treatment, and that they do not know where it goes. The Brick Flat is crossed by known active Holocene faults, so the dump is in violation of CERCLA, RCRA, the California toxic pits act and California health and safety codes.

105. Arman and IMMI participation in the ROD process has been in making objections to EPA conduct.

106. Enlargement of the dam was another interim removal action, not a remedy, since the LDCC was abandoned.

149. All work performed by the EPA at Iron Mountain has been inconsistent with the NCP. As to whether the EPA can recover costs, or costs in excess of the $2 million, 12-month statutory cap on removal actions. (See 40 C.F.R. § 300.415(b)(5)) We disagree and hold that, considering the unnecessary and wasteful disposal of recyclable hazardous waste materials in an illegal dump, and that the EPA still cannot even meet Clean Water Act limits and the removal action was neither timely or in accordance with the NCP, the EPA should recover nothing.

Violations of RCRA, CERCLA, EPCRA, NCP, CWA, California Toxic Pits Act

6. Violations of the California Health and Safety Code, the California Public Resource Code, the California Water Code, and the California Toxic Pits Recovery Act, the Resource Conservation and Recovery Act, and the National Environmental Policy Act.

We begin with the language of 42 U.S.C. § 9604(c)(1):

Unless (A) [the EPA] finds that (i) continued response actions are immediately required to prevent, limit, or mitigate an emergency, (ii) there is an immediate risk to public health or welfare or the environment, and (iii) such assistance will not otherwise be provided on a timely basis, . . . obligations from the Fund . . . shall not continue after $2,000,000 has been obligated for response actions or 12 months has elapsed from the date of initial response to a release or threatened release of hazardous substances.

See also 40 C.F.R. § 300.415(b)(5) (limiting actions to $2 million and 12 months "unless the lead agency determines that" one of the exemptions applies). Despite an assertion that the decision to exceed the cap is not subject to arbitrary and capricious review, the fact that the statute allows the EPA to invoke the exemptions when it "finds" certain conditions counsels otherwise. See 5 U.S.C. § 706(2) (courts should set aside agency conclusions and findings where "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). The EPA's determinations in this case that there was an emergency, that the risk to the environment was immediate, and that the assistance would not otherwise be forthcoming are inherently fact-based. The owner had a better plan with an actual remedy, the engineering was significantly more developed than the EPA plan, and the owner was prepared to proceed without EPA financing or assistance. The EPA usurped the owners authority to implement a remedy and embarked upon a 3000 year removal plan.

The EPA determined that the removal action was a remedial action because of the plan to fill the mine with concrete. Although this plan was abandoned, the EPA has never acknowledged that the EPA actions no longer constitute a remedial action. We hold that the EPA "failed to articulate a rational connection between the facts found and the conclusions made." Envtl. Def. Ctr., 344 F.3d at 858 n. 36.

Given these daunting realities and the EPA's careless documentation of its reasons for invoking the emergency and consistency exemptions, we hold that the EPA's decision to exceed the statutory cap was based on the irrelevant factors, there has been a clear error of judgment, and the decision was arbitrary and capricious. See Marsh v. Or. Nat'l Res. Council, 490 U.S. 360, 378, 109 S.Ct. 1851,

104 L.Ed.2d 377 (1989); Envtl. Def. Ctr., 344 F.3d at 858 n. 36. Therefore, the EPA is not entitled to recover any costs of its removal action in Iron Mountain Mines as found by the district court. The EPA plans to put another 2 million tons of sludge in the Brick Flat Pit, and then it will need to build another 25 or more multi-million ton disposal pits somewhere else to store all the sludge it plans to make at Iron Mountain. This sludge is not legal to dispose in the manner EPA allows because it contains toxic levels of cadmium, arsenic, lead, uranium, and other toxic metals, the sludge also forms acid mine drainage itself at a pH of <2. This sludge disposal is not legal because the acid mine drainage that the EPA treats to produce the sludge was being recycled by the mine owner before the EPA declared Iron Mountain Mines a Superfund site, and the technology has always existed to recycle the metals in the acid mine drainage and not make sludge for disposal. The EPA selected remedy is not the best available technology, and the water discharged by the treatment does not meet Clean Water Act standards, which is another negligent endangerment.

DELIBERATE IGNORANCE OF ACTUAL INFORMATION!

The metals in the sludge were always known by the EPA to be recyclable at a profit, and the EPA chose to defy the protests of the property owner and the responsible parties (the previous owners), as well as interested citizens and public servants who's input was ignored by the EPA. The sludge disposal is also in violation of California health, safety, environmental, recycling, and disposal laws. The State of California has permitted these violations in deference to the EPA's "interim authority" (3000 years?), while continuously recommending that the EPA implement resource recovery technologies.

§ 6973. Imminent hazard

The EPA's engineering firm, CH2MHill, informed the EPA that all the sludge could be recycled when they started making it and could be easily worth well over $25,000 per day or over $136 million dollars so far. These same metals have been imported, primarily from China, during the EPA

treatment. The EPA has also prevented any recycling or reclamation of the millions of tons of waste rock that was left from hardrock mining. This has caused the loss of many millions more in revenue. The mine owner's proposal, known as insitu mining, would have solved the pollution problem by now, and the mine owners could have made another $350 million in recycling those wastes, thus the EPA has recklessly and negligently cost the mine owner over $500 million in lost revenues. This is the very definition of despotism and tyranny, and EPA fraud and trespass.

A HARD BARGAIN WITH FRAUD, ACCIDENT, TRUST & HARDSHIP

" for making your iron into materials good for catalyzing FTS, which can be used after methane and CO2 are converted to syngas using Ni catalysts at 900 C. We need to test to see if the iron catalysts from your waste is good for this purpose. Mixing them with carbon paste is an option. Because the reaction temperature is relatively low, we may not need to use nanotubes to anchor the catalysts."

Iron Mountain Mines, Inc. correspondence with Professor Ting Guo, U.C. Davis, November 21, 2008

169. The EPA violation of NCP caused the State of California to be burdened with 10% of the costs, which it should be reimbursed.

172. The EPA must reimburse the special account for the $6,115,609.00 expended from the special account, plus interest. Iron Mountain Mines, Inc. claims this reimbursement and the $4,201,349.96 as of June 30, 2009 in the special account.

208. Iron Mountain Mines, Inc. claims that CERCLA was violated and the $17,943,891.00 plus interest from the consent decree including the $10 million for natural resource damages (2 million to the Natural Resources Trustees and 8 million to the Dept. of Interior for Natural Resource trustees.

b. Iron Mountain Mines, Inc. claims Trust 1, said to have been funded with $141,901,277.00, plus interest.

c. Iron Mountain Mines, Inc. claims Trust 2, said to have been funded with $62,476,445.00, plus interest.

e. The trusts must be commutated and Iron Mountain Mines, Inc. made patentee as trustee.

213. Since ROD 5 is an interim removal action, no funds from the special account may be expended. The only purpose for the dredging was to increase powerhouse output.

215 After 25 years, the EPA has not completed or remedied anything, and still has no remedial action plan. Forget a ROD 6, just get out.

Orders

Full docket text for document 436:

ORDER by Magistrate Judge John F. Moulds ORDERED that the motion of Rhone-Poulenc, Inc to compel the US to produce documents previously retrieved from the National Archives [387-1] and Request for attorneys' fee is DENIED; the motion to compel the United States to produce documents stored electronically [386-1] is GRANTED; the motion of the US regarding the deposition of Mr Kent [385-1] is GRANTED; the US may have an additional 1/2 day on Tuesday, 8/20/96 to complete the deposition of Mr Kent; the court notes that the presence of Mr McDermott was required in Sacramento on 8/15/96 in order to argue the instant motions; the motion of the US regarding the deposition of Mr Sugarek is DENIED; the US has failed to demonstrate that Rhone-Poulenc Inc has engaged in abusive tactics with respect to this deposition; the motion of US for an order shortening time to hear its motion for protective order regarding Rhone-Poulenc Inc's notices of deposition pursuant to FRCP 30 (b)(6) is granted; the US shall file its opposition on 8/20/96; Rhone-Poulenc's reply to US's opposition due 8/23/96; the US's reply due 8/26/96; the 8/26/96, the motion of the US and of Rhone Poulenc for protective order shall be submitted to the court for decision (cc: all counsel) (ndd) Modified on 08/20/1996

9/27/96

ORDER by Magistrate Judge John F. Moulds ORDERED: With regard to the motion of USA to compel Rhone-Poulenc, Inc's further responses to outstanding discovery [433-1], the US shall submit to the court for in camera review all mining-related information contained in gov't files for which the US Bureau of Mines requires a letter from the information donor to the effect that it has no objection to the release of the information; the documents shall be submitted within 10 days from the date of this order; the motion to compel further answers to the US' third set of interrogatories [433-1] is DENIED; Rhone-Poulenc is reminded, however, of its duty to supplement discovery responses under appropriate circumstances; The motion of the US to compel further responses from dft Rhone-Poulenc, Inc to the US' 6th set of interrogatories [433-1] is GRANTED; further re-

sponses shall be filed within 10 days from the date of this order; Rhone-Poulenc Inc is also ordered to answer the US' request for production No 1 within 10 days; With regard to the motion of the US to compel production of withheld sampling data, production of Mountain Copper Co documents over which Rhone-Poulenc has asserted privilege, and responses to interrogatories concerning the San Francisco Chemical Co, Rhone-Poulenc, Inc shall submit to the court for in camera review all data and test results (sampling data) for which a privilege is claimed; the documents shall be submitted within 10 days from the date of this order; the motion to compel production of Mountain Copper Co documents as to which Rhone-Poulenc has asserted privilege [431-1] is GRANTED; the motion to compel respones to interrogatories concerning the SF Chemical Co is granted; Rhone-Poulenc, Inc shall produce the requested documents within 10 days from the date of this order; The motion of State of CA to compel further respones from Rhone-Poulenc to the State's Second set of interrogatories [417-1] is granted in part and denied in part; Rhone-Poulenc is ordered to provide, within 10 days, further answers to interrogatories numbered 275,276,277,278,283,284,285,286,287,289,290, and 291; the motion is denied as to interrogatories numbered 298,311,313,322,325, and 326; with respect to interrogatories numbered 280 and 297, Rhone-Poulenc shall insure that all appendices have been provided to the State of CA; The motion of State of CA to compel Rhone-Poulenc Inc to respond to requests for production of documents (set No 1) [412-1] is GRANTED; Rhone-Poulenc, Inc shall provide the documents related to the Iron Mountain Mines site, described on page 3 of the joint stipulation, at lines 16 through 19, without redaction; the documents shall be subject to a protective order that they be used only in connection with this litigation and that they not be referred to in the trial of this matter without further order of court; With regard to the motion of Rhone-Poulenc, Inc to compel the USA to provide further responses to Rhone-Poulenc's 3rd and 4th sets of interrogatories [398-1], the US states on page 19 of the joint stipulation that it has served supplemental respones to the 4th set of interrogatories and is in the process of finishing its supplemental responses to the 3rd set of interrogatories; the US is ordered to file supplemental responses to Rhone-Poulenc's 3rd and 4th sets of interrogatories, as it has agreed to do, to the extent that those supplemental responses have not already been provided by the date of this order; the supplemental responses shall be provided within 10 days from the date of

this order; The motion of Rhone-Poulenc Inc to compel the US to produce documents maintained by the Dept of Health, Education and Welfare [426-1] is DENIED; The motion of Rhone-Poulenc Inc to compel the USA to respond to interrogatories and produce documents responsive to Rhone-Poulen's 6th Request for production of documents and 2nd Set of Interrogatories regarding the US' costs documentation [423-1] is DENIED, based on the representations of the US that it has produced all requested documents in its possession, custody, or control and that it will supplement is responses as appropriate; With regard to the motion of Rhone-Poulenc, Inc to compel the US to produce documents improperly withheld as privileged [422-1], the US shall submit to the court for in camera review all documents as to which a privilege is claimed; the documents shall be submitted within 10 days from the date of this order (cc: all counsel) (ndd)

4-22-97

ORDER by Magistrate Judge John F. Moulds ORDERING that the mining documents submitted for in camera review be released to all parties in this litigation [764-1] [715-2] (cc: all counsel) (ndd)

5-01-97

ORDER by Honorable David F. Levi ORDERING that US' motion to modify the briefing schedule [806-1] [807-1] is GRANTED; the 4/97 scheduling order is hereby modified as follows: US response due 5/30/97; RP's brief due 7/11/97; US reply 8/8/97; motion for partial summary judgment to establish the US' liability based on the US' ownership and operation of certain CVP facilities, Iron Mountain Parcels and the Golinsky Mine by dft Rhone-Poulenc Basic [691-1] HEARING RESET FOR 9:00 (cc: all counsel) (ndd)

5-09-97

ORDER by Magistrate Judge John F. Moulds ORDERING the motion to extend the discovery cutoff is DENIED [715-1] ; the motion to compel compliance with the court's prior order complelling production of electronically stored documents is GRANTED in part and DEFERRED in part pending in camera review; documents from the Fish and Wildlife Service shall be submitted for in camera review no later than 5/19/97; the documents which have been withheld solely on the basis oof the beliberative process privilege shall be produced for inspection and copying no later than 6/9/97;

as to all remaining documents at issue, the US shall produce for inspection and copying no later than 6/9/97; dft State of CA's belated request to brief issues of privilege is DENIED; pursuant to FRCP 37, reasonable expenses in the amount of $3500.00 are awarded to dft Rhone-Poulenc, Inc against the United States (cc: all counsel) (ch)

5-27-97

ORDER by Honorable David F. Levi ORDERING that based on the representations by Rhone-Poulenc, and the United States, it is hereby ordered that the deadline for submitting the parties' respective reply brief on World War II issues orginally set forth in the Court's 1/24/97 Order are modified in accordance with the foregoing stipulation GRANTED; RP Reply Brief due 6/3/97; US Reply Brief due 6/30/97 (cc: all counsel) (old)

7-15-97

ORDER by Honorable David F. Levi REGARDING hearing on motions scheduled for 7/18/97 at 9:00 a.m.; the parties are advized to BE PREPARED to discuss five sets of motions pertaining to successor liability, naturally occurring substances, judicial review limitations, amendment of complaint and ruling re: waiver of privileged material (cc: all counsel) (old)

8-19-97

ORDER by Magistrate Judge John F. Moulds ORDERING that the documents submitted by the Gov't for in camera review, shall be made available for inspection and copying; the Gov't may withhold from disclosure log No 2091595.1, document #133; log No 2091949.01, document #9; log No g:shared/gen/brief docs, doucments # 106,197,354; log No 2091944.01, documents # 40,181,284,292,293,305,306,318,319,327,328,359,360,364,365, 3 67,368,413,423,424,425,437,443,444; log No 2091572.01, document #5; the couments submitted by Rhone-Poulenc, Inc need not be produced (cc: all counsel) (ch)

9-29-98

ORDER by Honorable David F. Levi ORDERING out of the several pending reconsideration motions, 2 will merit further attention if the case does not settle: government's motion for reconsideration of magistrate's ruling on the discovery of Rhone-Poulenc's sampling data and Rhone-Poulenc's motion for reconsideration of its earlier order on successor liability due to a change in 9th Circuit

law; all other pending reconsideration motions are DENIED; the court declines to address the discovery and successor liability motions because of settlement possibilities, those motions being DENIED without prejudice to their renewal at the conclusion of the settlement process (cc: all counsel) (old)

12-08-2000

ORDER by Honorable David F. Levi motion to dismiss crs-clms with prejudice by dft Aventis CropScience [1174-1] GRANTED, [289-1]; ACCORDINGLY final judgment will be entered in accordance with FRCP 54(b); dismissing w/prejudice the crs-clms of Iron Mtn Mines Inc and TW Arman against Aventis CropScience USA Inc; and dismissing w/prejudice the crs-clms of Aventis CropScience USA Inc against Iron Mtn Mines Inc and TW Arm (cc: all counsel) (ljr)

12-08-2000

CONSENT JUDGEMENT

2-21-2002

ORDER by Honorable David F Levi ORDERING lifting stay of proceedings entered in this case on 11/13/00 GRANTED; pltf's Opening Brief re Motion for Default Judgment as to deft Iron Mountain Mines due 4/5/02, Opposition if any due 4/19/02, pltf's reply if any due 5/3/02; pltf's Opening Brief re Motion for Partial Summary JUdgment on Liability as to deft T W Arman due 4/5/02, Opposition due 5/3/02, pltf's Reply due 5/10/02; pltf's Opening Brief re Motion for Partial Summary Judgment on Liability as to deft Iron Mountain due 4/5/02, Opposition due 5/3/02, pltf's Reply due 5/10/02; if deft Iron Mountain files a Motion to Confirm Credit from good faith settlement and expunge EPA's Admin Lien, Opening Brief is due 4/5/02, Opposition due 5/3/02, deft's reply due 5/10/02; hearing on all motions is scheduled for 5/17/02 at 9:00am (cc: all counsel) (mm1)

Is the consent decree fair? The answer is no. And does the consent decree fulfill the requirements of the NCP? Again the answer is no. We comment briefly upon three such facets. The first is obvious: the decree's likely efficaciousness as a vehicle for cleansing the environment is of cardinal importance. See Cannons, 720 F.Supp. at 1038; Conservation Chemical, 628 F.Supp. at 402; Seymour, 554 F.Supp. at 1339. Except in cases which involve only recoupment of cleanup costs already

spent, the reasonableness of the consent decree, for this purpose, will be basically a question of technical adequacy, primarily concerned with the probable effectiveness of proposed remedial responses. As this is only a case for recoupment, the additional scope of judicial review is applied

46. The efficaciousness of the remedial actions has not been fully protective of human health and the environment, and may be reasonably observed to have been arbitrary and capricious, and otherwise not in accordance with public law. In fact the treatment facility which reported that it was treating on average 372 lbs. of copper per day when the plant began operations in 1995, reported in 2003 that the plant was now treating approximately 650 lbs. per day, or almost twice the amount of "hazardous substance". It is therefore apparent that no remedy yet exists for the AMD, and that the problem is now much more severe. Furthermore, no provision for the minimum of 20 acres of off-site storage for the hazardous waste treatment sludge is provided by the State as required by law. No provision is made or suggested for where the 50 million tons of hazardous waste sludge will be disposed. No financial assurances are provided for this disposal.

47. A second important facet of reasonableness will depend upon whether the settlement satisfactorily compensates the public for the actual (and anticipated) costs of remedial and response measures. Like the question of technical adequacy, this aspect of the problem can be enormously complex. The actual past response costs of remedial measures were known at the time this consent decree was proposed. Since the settlement's bottom line is definite, the proportion of settlement dollars to total needed dollars is not debatable. The agency must be held to a standard of mathematical precision. If the figures relied upon do not derive in a sensible way from a plausible interpretation of the record, the court should not defer to the agency's expertise. The agency effectively waived collection of $51 million in unrecovered past response costs from the responsible party, transferred this obligation to Counterclaimants with a statutory lien, and transferred unquantified and unlimited future liability to the innocent landowners.

48. A third integer in the reasonableness equation relates to the relative strength of the parties' litigating positions. If the government's case is strong and solid, it should typically be expected to drive a harder bargain. On the other hand, if the case is less than robust, or the outcome problematic, a reasonable settlement will ordinarily mirror such factors. In a nutshell, the reasonableness of

a proposed settlement must take into account foreseeable risks of loss. See Rohm & Haas, 721 F.Supp. at 680; Kelley, 717 F.Supp. at 517; Acushnet, 712 F.Supp. at 1028; Exxon, 697 F.Supp. at 692; Hooker, 540 F.Supp. at 1072. The same variable, we suggest, has a further dimension: when the government's case is fundamentally defective because of the innocent landowner defense, and it then by definition is a takings for the public benefit claim, and it will take time and money to pay damages and pay to implement private remedial measures through the litigatory failure. So it is better for the plaintiffs to deny the named defendant in the suit the status of innocent landowner so as to delay justice while swaddled in judicial deference to the EPA. To the extent that time is not of the essence or that the perpetual transaction costs loom large, a settlement which nets less than full recovery of cleanup costs is not necessarily reasonable. See Rohm & Haas, 721 F.Supp. at 680 (interpreting "reasonableness" in light of congressional goal of expediting effective remedial action and minimizing litigation); United States v. McGraw-Edison Co., 718 F.Supp. 154, 159 (W.D.N.Y.1989) (settlement reasonable in light of prospect of protracted litigation as contrasted to expeditious reimbursement and remedy); Acushnet, 712 F.Supp. at 1030 (emphasizing that trial would likely be "complex, lengthy, expensive and uncertain"); Exxon, 697 F.Supp. at 693 (noting benefit of immediate payment to environmental cleanup effort); Seymour, 554 F.Supp. at 1340 (urgency of abating danger to public must be considered). The reality is that, all too often, litigation is a cost-ineffective alternative which can squander valuable resources, public as well as private. Nevertheless, with these allegations of conflict of interest, and the allegation of compromise and collusion of the parties to the trust funds secured by the consent decree, the settlement must be subject to judicial review.

49.In this case, the district court wrongfully found the consent decrees to be reasonable. Cannons, 720 F.Supp. at 1038-39. Counterclaimants have also seriously questioned the technological efficacy of the cleanup measures to be implemented at the Site. They also contend that the settlement was not designed to assure adequate compensation to the public for harms caused. Given the totality of the record-reflected circumstances, and the probability of fraud upon the court, the lower court's finding of reasonableness should be vacated and remanded.

50. D. Fidelity to the Statute?

51. Of necessity, consideration of the extent to which consent decrees are consistent with Congress' discerned intent involves matters implicating fairness and reasonableness. The three broad approval criteria were not meant to be mutually exclusive and cannot be viewed in majestic isolation. Recognizing the inevitable imbrication, we turn to the final criterion.

52. We describe the two major policy concerns underlying CERCLA:

53. First, Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to the problems of national magnitude resulting from hazardous waste disposal. Second, Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.

54.Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir.1986) (quoting United States v. Reilly Tar & Chemical Corp., 546 F.Supp. 1100, 1112 (D.Minn.1982)). The district court thought that these concerns were addressed, and assuaged, by the proposed settlement. Counterclaimants do not.

55. It is crystal clear that the broad settlement authority conferred upon the EPA must be exercised with deference to the statute's overarching principles: accountability, the desirability of an unsullied environment, and promptness of response activities.

56. The bases do not appear to have been touched in this instance. The questions of accountability invite a proper investigation; in this case virtually none of the damaged environment is being restored to any beneficial use or to a condition where it can safely be returned to nature; and the promptness of the response activities and the intention of the response are still open to question.

57. Judicial discretion is necessarily broad--but it is not absolute. Abuse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them.

58.Independent Oil & Chemical Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co., 864 F.2d 927, 929 (1st Cir.1988).

59. The objectors can demonstrate that the trier made a harmful error of law or has lapsed into "a meaningful error in judgment," Anderson v. Cryovac, Inc., 862 F.2d 910, 923 (1st Cir.1988), a reviewing tribunal must not stay its hand. While the doubly required deference--district court to agency and appellate court to district court--places a heavy burden on those who purpose to upset a trial judge's approval of a consent decree, an unfair and unjust verdict as a result of fraud upon the court must be overturned.

60. Even accepting substantive fairness as linked to comparative fault, an important issue still remains as to how comparative fault is to be measured. There is no universally correct approach. It appears very clear that what constitutes the best measure of comparative fault at a particular Superfund site under particular factual circumstances is usually left to the EPA's discretion. Whatever formula or scheme EPA advances for measuring comparative fault and allocating liability is upheld so long as the agency supplies a plausible explanation for it, welding some reasonable linkage between the factors it includes in its formula or scheme and the proportionate shares of the settling PRPs. See United States v. Akzo Coatings, 719 F.Supp. 571, 586-87 (E.D.Mich.1989); Acushnet, 712 F.Supp. at 1031: cf. Gardner & Greenberger, Judicial Review of Administrative Action and Responsible Government, 63 Geo.L.J. 7, 33 (1974) (courts must know why an agency has taken an action if they are to perform their review function adequately). Put in slightly different terms, the chosen measure of comparative fault should be upheld unless it is arbitrary, capricious, and devoid of a rational basis.4 See 42 U.S.C. Sec. 9613(j) (1987); Rohm & Haas, 721 F.Supp. at 681. No such formula exists in the present case. While no measure of comparative fault exists in the Consent Decree, the Memorandum in support of entry of the Consent Decree from the agencies and Aventis discusses allocation based upon years of ownership. This formula of allocation, besides for purposes of preliminary assessment, has been found invalid by the Courts. Counsel for plaintiffs acknowledge that the innocent landowner defense is the only defense available, and suggest that allegation of a lack of “due care” would deny defendants the benefit of the innocent landowner defense. The Courts have found this premise lacking in previous CERCLA cases.

61. Counterclaimants submit that by a preponderance of the evidence, the EPA selected remedies were arbitrary, capricious, and devoid of a rational basis. Counterclaimants further submit that by a

preponderance of the evidence, that deprivations of due process and equal protection were facilitated by a conspiracy of officers of the court to systematically and under color of law deprive the defendants of their civil and constitutional rights.

62. 4. Notice. The Counterclaimants also contend that the government's negotiating strategy must be fair. Congress did send the EPA into the toxic waste ring with the obligation to protect the civil rights of those it governs. The EPA may not mislead any of the parties, discriminate unfairly, or engage in deceptive practices.

63. Counterclaimants allege that by a preponderance of the evidence, the plaintiffs have deceived and misled and discriminated against the remaining Defendants in this case.

64. In this CERCLA context, the government is under an obligation to determine liability in its settlement offers, and innocent landowners must be eligible to join ensuing major party settlements or otherwise resolve their liability for pollution that they did not cause or create. Therefore, and because of the unreasonable extent of the differential, and the graduation of comparative fault unconscionably and unduly coercive in the present case, that defendants were discriminated against, misled, and deceived.

65. 5. Exclusions from Settlements. Under the SARA Amendments, the right to the protections of the innocent landowner defense, and settlement to suit, is a fundamental right. The tyranny of "divide and conquer" as was applied in the present case, and in the contravention and defiance of a congressional directive, requires denial to the EPA the use of so reprobated an axiom of tyranny. So long as it operates in good faith, the EPA is at liberty to negotiate and settle with whomever it chooses. In the present case however, the EPA did not operate in good faith, and the consent decree must be vacated, the trust funds commutated, and a decree of dismissal or acquittal and resolution of liability for the innocent landowner must be entered in this case.

This appeal stems from the environmental cleanup of Iron Mountain Mine, the largest mine in California, which is within a few miles of the Sacramento River.

The allegation of polluting the navigable waterways of the United States was brought by State Water Board officer James Pedri who was dissatisfied with State action at the site. The site was ac-

tively mined from 1895 to 1920, then kept on maintenance until WWII. Open pit mining began in the early 50's but ceased in 1963.

The United States and California brought suit principally under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq., for reimbursement of costs associated with the cleanup. You are called upon to determine whether, as a matter of law, those cleanup costs were "necessary" and whether certain of the defendants are" responsible parties" ("RPs") under CERCLA § 107(a), 42 U.S.C. § 9607(a).

The touchstone for determining the necessity of response costs is whether there is an actual threat to human health or the environment; that necessity is not obviated when a party also has a religious, moral, business, or government reason for interfering in the cleanup. Because the district court erred in ignoring the ulterior business motive that caused the pollution and because there are genuine issues of material fact regarding whether Iron Mountain Mines response costs were, in fact, "necessary," you cannot uphold even a partial summary judgment on this ground.

Even if you assume that those costs were necessary, you still must decide whether plaintiffs are liable, and the extent of the takings in this per se takings case, and if the governments are PRPs. Parsing the meaning of the term "disposal" in § 9607(a)(2) lies at the heart of this question. You concluded in Carson Harbor that the migration of contaminants on the property did not fall within the statutory definition of "disposal." Thus, on the CERCLA claim, you should reverse the district court's grant of partial summary judgment and find for T. W. Arman and Iron Mountain Mines, Inc. There is no evidence that the minerals from Iron Mountain Mine ever hurt anyone, and any further hazard to fish after 80 years (or was that 80 million years?) was insignificant in the face of the complete loss of spawning habitat from United States dams, ranching, farming, and urban runoff, and the complete reliance of the fishery on artificial reproductive techniques and human intervention. There was never any intention of trying to introduce fish for breeding into any waters above Keswick lake, so there was never an actual threat to any fisheries.

Without evidence of legally significant contamination, the government was unjustified in filing suit to gain access to private property for a response action under the Superfund law, see U.S. v. Tarkowski , No. 99 C 7308, N.D.Ill., Nov. 26, 2001]

Consequently, the victorious property owner can recoup his litigation costs.

John Tarkowski is an elderly, indigent resident of a 16-acre tract situated in Wauconda, Ill., an affluent community northwest of Chicago. Until he was disabled, he worked as a building contractor. Using surplus materials, he built his house many years ago when the area was a rural backwater. His yard is filled with what his upscale neighbors regard as junk — wooden pallets, tires, empty drums, batteries, paint cans and other construction materials.

For more than 20 years, Tarkowski's neighbors had harassed him and had complained to environmental officials. The U.S. Environmental Protection Agency (EPA) inspected his property in 1979, but concluded that it did not pose any environmental hazard. In 1995, EPA rated the property zero on its hazard rating scale. Two years later, state authorities took soil and water samples and found no noteworthy contamination.

In 1998, EPA took additional samples of soil and materials on his property, finding only trace amounts of contaminants that, in fact, were comparable to levels found in surrounding properties and did not indicate any release. Nevertheless, EPA filed suit against Tarkowski alleging an "imminent and substantial endangerment to … public health … and the environment" based on an actual or possible release of hazardous substances. EPA sought an order to gain access to the site for investigative and remedial purposes. After hearing the evidence, a federal district court dismissed EPA's suit. An appeals court upheld the ruling, castigating the agency's conduct and judgment. [248 F.3d 596 (7th Cir. 2001)]

Tarkowski petitioned the district court for an award of attorney's fees and expenses under the Equal Access to Justice Act. The law allows certain parties who prevail against the federal government in a lawsuit to recover their litigation expenses unless the government's position was reasonable. Finding EPA's stance totally unjustified, the district judge said, "There was no evidence of legally significant contamination and … the government's claim of an imminent and substantial endangerment was factually baseless." EPA cannot reasonably insist that "if a hazard was found, no matter how small, it had the right to do whatever it wanted on Tarkowski's property," he added.

"It is to protect citizens against … overreaching actions by government bureaucrats that courts are empowered to prevent arbitrary and capricious interference with property rights," said the judge,

again citing the appeals court. “The government's position … ‘would give the agency in effect an unlimited power of warrantless searches and seizures [which the Superfund law] does not contemplate and the Fourth Amendment would almost certainly forbid,'” he concluded with yet another reference to the appellate opinion.

You must also address the remaining issues. there are genuine issues of material fact regarding the necessity of EPA Iron Mountain Mine CERCLA response costs, you must reverse the grant of summary judgment.

The district court granted the United States and California’s motions on all claims, and refused to hear pro se plaintiffs intervention, exceptions, positive law claims, and state-law nuisance and trespass claims asserted by T. W. Arman, John F. Hutchens, and on behalf of Iron Mountain Mines, Inc.

. See Carson Harbor Vill., Ltd. v. Unocal Corp., 990 F. Supp. 1188, 1199 (C.D. Cal. 1997). The court first held that Carson Harbor's CERCLA claim fails because it did not show that its remedial action was "necessary" under 42 U.S.C. § 9607(a)(4)(B) because there was no evidence of an "actual and real threat" to human health or the environment. Id. at 1193-94. In so holding, the district court disregarded certain evidence to the contrary as inadmissible hearsay. See id. at 1193 n.4. In the alternative, with respect to the Partnership Defendants, the district court held that they were not PRPs within the meaning of 42 U.S.C. § 9607(a)(2) because "disposal warranting CERCLA liability requires a showing that hazardous substances were affirmatively introduced into the environment. " Id. At 1195. And, with respect to the storm water runoff, there was no direct evidence that any lead-contaminated storm water entered the property at any time prior to 1983, when Carson Harbor purchased the property. Id.

The district court granted summary judgment on the RCRA claim because the "evidence shows that there was no imminent danger" to human health or the environment--a required element for a RCRA claim. Id. at 1196 (emphasis added). On the CWA claim, the court concluded that there was no evidence that the defendants violated a National Pollutant Discharge

Elimination System ("NPDES") permit, as required for a CWA violation. Id. at 1197. With respect to the common law claims for nuisance, trespass, and injury to easement against the Government

Defendants, the district court would hold that CAL. CIV. CODE § 3482, which provides that nothing done pursuant to express statutory authorization can be deemed a nuisance, provides a complete defense. Iron Mountain Mines demonstrates that illegitimate animus, malice, and false claims are grounds for piercing the governments veil.

Because Carson Harbor failed to show that the Government Defendants violated the NPDES permits, the court concluded, any pollutants discharged into the storm water were permissible. Id. Finally, the district court rejected Carson Harbor's claim for express indemnity against the Partnership Defendants, because the Water Quality Board did not require the cleanup. See id. At 1198-99. Following the issuance of a panel opinion, you should agree to hear this case en banc.

WRIT OF EQUITABLE ESTOPPEL! WRIT OF POSSESSION & EJECTMENT!

December 22, 2009 Signature:_____

/s/ John F. Hutchens, *grantees' agent;* Tenant in-Chief, Warden of the Forests & Stannaries, expert

Verification affidavit:

I, John F. Hutchens, hereby state that the same is true of my own knowledge, except as to matters which are herein stated on my own information or belief, and as to those matters, I believe them to be true. Affirmed this day: August 19, 2009

December 22, 2009 Signature:_____

AGENT OF RECORD; Iron Mountain Mines, Inc. s/ John F. Hutchens