

August 30, 1955

Memorandum No. 2

Subject: Agenda to be reported to the
1956 Session of the Legislature.

The Commission's Report to the 1956 Session of the Legislature will, of course, include a Calendar of Topics proposed for study during fiscal year 1956-57. If all goes well, we will complete our work and reports on the sixteen Topics proposed by the Commission and approved by the 1955 Session by not later than October 1, 1956. We should also complete our work and report on the Fish & Game Code study by that date. Thus, only the Inheritance and Gift Tax study will be continued through fiscal year 1956-57. It will be necessary, therefore, to have a new Calendar on which to start on July 1, 1956. Since we will be heavily involved in the 1957 Session during a part of that fiscal year, we will probably want a somewhat lighter "case load" than during a non-general session year. I suggest that we propose fifteen to twenty Topics to the Legislature with the expectation either (1) that only ten to fifteen Topics will probably be approved or (2) that if all should be approved only ten to fifteen will be studied during 1956-57.

Since the 1956 Session does not begin until March 1, I take it that we will have at least the rest of this year to put our proposed Calendar in final form. However, we are required to submit our 1956-57 budget to the Department of Finance by October 1, 1955. The largest single item in that budget will probably be the item for research services. This is the item with which we had the greatest difficulty with the Department of Finance and the Legislative Auditor at the 1955 Session. I suggest, therefore, that to give us a solid basis on which to discuss our budget item for research

services with those agencies, the Commission do these things at the September meeting:

1. Decide how many Topics we will recommend to the 1956 Session for approval;
2. Consider the reports of the Agenda Committee and put as many Topics as possible on the "Recommended for Immediate Study" list.
3. Make an estimate of the cost of research services for each Topic put on the Immediate Study list.
4. Make an estimate of the probable average cost of research services for Topics which will be added to the Calendar to be recommended to the 1956 Session.
5. Make an estimate of how much should be included in the budget as a lump sum "safety factor" to cover items which the Legislature may assign to us as it did in the case of the Fish & Game Code and Inheritance and Gift Tax studies.

Reports of the Agenda Committee

Prior to the Commission meeting of June 25, I sent you a copy of the report of the recommendations of the Agenda Committee based on its consideration of fifty-three items in its meeting at Riverside on April 23. Another copy of that report is attached to this memorandum. I suggest that you study the Committee's report prior to the September meeting and that the report be considered at that time. If the procedure followed by the Commission on other occasions is adopted in the consideration of this report, the Committee's

recommendations will be accepted without discussion, save as individual members of the Commission raise questions with respect to particular items.

The Agenda Committee will probably make additional oral recommendations on agenda matters at the September meeting. Prior to the meeting we will distribute staff memoranda on a number of agenda items to the members of the Commission. We hope to be able to arrange for a meeting of the Agenda Committee earlier in the week of the Commission meeting to consider these memoranda. If this works out, the Committee will be able to make oral recommendations on these items for the Commission's consideration at the September meeting.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

REPORT OF THE AGENDA COMMITTEE

On April 23 the Agenda Committee met and considered 53 suggestions which had been received from members of the Bench and Bar and which had not been considered by the commission. Copies of most of these suggestions have been distributed to the members of the commission. Copies of those not distributed are enclosed.

The committee postponed action on 16 suggestions pending further study, further correspondence, or the disposition of certain bills by the Legislature. As to the remaining 37 suggestions, the committee makes the following recommendations:

Consolidate

The committee recommends that the following suggestions be consolidated with Topic No. 10 - A study to determine whether the Small Claims Court Law should be revised - on the commission's calendar of topics selected for immediate study:

- 21(3) Time for trial of small claims actions
- 21(4) Costs in small claims actions
- 47(1) Amendment of small claims form to provide for negligence cases
- 68 Small claims appeal by plaintiff

Not Accept

A.

The committee recommends that the following suggestions not be accepted:

- 21(5) Answers in justice courts
- 22A Commercial vehicle parking
- 38 Housing of prisoners - Penal Code Sec. 4022

45

21(2)

29(2)

- 46 Recovery of attorney's fee by prevailing party
- 47(3) Vehicle Code Sec. 480 - felony hit and run
- 47(4) Junior vehicle operator's licenses for school attendance
- 47(5) Penalties for minors violating the Vehicle Code
- 60(1) Automobile insurance
- 60(2) Insurance Code
- 67(1) }
67(2) } 67(3) Changing joint tenancy to community property
- 69(1) Justice court accounting
- 69(2) Procedure re outstanding warrants for Vehicle Code violations
- 69(3) Parents' responsibility for children's acts
- 70 → 72 California Pleading
- 73 75 Vehicle Code Sec. 591(2) - notice of illegal parking
- 84 Civil Code Sec. 138 and Probate Code Sec. 1408 - custody of children
- 85(1) Election of sanitary district assessor
- 85(2) → 86 Vehicle Code Sec. 481 - increasing penalty for hit and run while under influence of alcohol
- 89 Election of sanitary district assessor
- 90 General Building Contractor's license for termite control work
- 91 Streets & Highways Code Sec. 5640 and the Public Liability Act
- 92 Statutes differentiating between certified public accountants and public accountants

B.

The committee also recommends that, as to suggestions 22A, 47(3), 47(4), 47(5), 69(2), 75, and 86, all of which relate to the Vehicle Code, either of the following courses of action be adopted:

- (1) The commission should send these suggestions, with the names of the originators withheld, to the Assembly Committee on Transportation and Commerce for whatever action it deems advisable, or

(2) The commission should suggest to the originators of these suggestions that they may wish to write to the Assembly Committee on Transportation and Commerce about the problems raised.

C.

The committee also recommends that, as to suggestions 85(1) and 89, which relate to elections, either of the following courses of action be adopted:

- (1) The commission should send these suggestions, with the names of the originators withheld, to the Assembly Committee on Elections and Reapportionment for whatever action it deems advisable, or
- (2) The commission should suggest to the originators of these suggestions that they may wish to write to the Committee on Elections and Reapportionment about the problems raised.

D.

The committee further recommends that it be suggested to the originators of suggestions 21(5) and 69(1), which relate to justice court matters, that they may wish to write to the Justices and Constables Association about the problems raised.

Reported Without Recommendation

The committee reports that it was unable to agree upon a recommendation in respect of suggestion 47(2) - Vehicle Code Section 476, yellow light turning red while driver is in the intersection.

Immediate Study

The committee recommends that the following suggestions be placed on the calendar of topics selected for immediate study:

Suggestion No. 76(1): A study to determine whether the law should be clarified as to whether the Code of Civil Procedure or the Probate Code governs confirmation of private partition sales.

Sections 752 to 801.15 of the Code of Civil Procedure provide for actions for partition of property. Section 775 authorizes the court to order real property to be sold at either public auction or private sale "as the referee shall judge to be most beneficial to all parties interested." Section 775 then provides:

If the sale is ordered made at either public auction or private sale, the sale at private sale shall be conducted in the manner required in private sales of real property of estates of deceased persons.

Thus, a private partition "sale" is to be conducted in the manner prescribed by the Probate Code for private sales of real property of estates. There is a question, however, whether Code of Civil Procedure §775 makes applicable to such sales the provisions of the Probate Code regarding the confirmation of sales, or whether, on the other hand, a private partition sale should be confirmed in the manner provided by Section 784 of the Code of Civil Procedure. Section 784 of the Code of Civil Procedure deals with the confirmation of partition sales, but it is ambiguous as to whether it applies to both public and private partition sales or only to public partition sales. It provides as follows:

§784. After completing a sale of property, or any part thereof ordered to be sold, the referees must report the same to the court, with a description of the different parcels of land sold to each purchaser; the name of the purchaser; the price paid or secured; the terms and conditions of the sale, and the securities, if any, taken. The report must be filed in the office of the clerk of the county in which the action is brought. Thereafter any purchaser, or any party to the action, may, upon ten days' notice to the other parties who have appeared therein, and also to the purchaser if he be not the moving party, move the court to confirm or set aside any sale or sales so reported. Upon the hearing, the court must examine the return and report and witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appears that a sum exceeding such bid at least ten per cent, exclusive of a new sale may be obtained, the court may vacate the sale and direct another to be had, of which notice must be given, and the

sale conducted in all respects as if no previous sale had taken. If an offer of ten per cent more in amount than that named in the return be made to the court, in writing, by a responsible person, it is in the discretion of the court to accept such offer and confirm the sale to such person, or to order a new sale.

The provisions of the Probate Code dealing with the confirmation of private sales of real property of estates¹ differ from Code of Civil Procedure Section 784 in two important respects. One of these differences concerns the percentage by which an offer made in court must exceed the amount of the original bid.²

The other difference is that under the Probate Code the original bid must equal ninety percent of the appraised value of the property,³ whereas under Code of Civil Procedure Section 784 there is no such requirement. Thus, the question of whether the Probate Code or the Code of Civil Procedure applies to the confirmation of a private partition sale of real property becomes important when the original bid or the bid in court meets the requirements of one Code but not those of the other.

Suppose could broaden to include a whether should be difference between C.C. + P.C. provisions

Suggestion No. 79: A study to determine whether the law should be revised to provide a uniform procedure for fixing bail promptly in the case of a felony arrest made without a warrant.

The commission has received a communication from a judge of the superior court in Los Angeles County stating that there is no procedure, other than

1. Cal. Prob. Code §§784, 785.

2. "But if a written offer of 10 percent more on the first ten thousand dollars (\$10,000) bid and 5 percent more on the amount of the bid in excess of ten thousand dollars (\$10,000) is made to the court by a responsible person, and the offer complies with all provisions of the law, it is in the discretion of the court to accept such offer and confirm the sale to such person or to order a new sale." Cal. Prob. Code §785.

3. Cal. Prob. Code §784.

habeas corpus, by which a person arrested without a warrant for a bailable felony can promptly have his bail fixed and be released. When a warrant is issued before an arrest, Penal Code Section 815a requires the issuing magistrate to fix the bail if the offense is bailable, and to endorse the amount of bail on the warrant. When an arrest for a felony is made without a warrant, however, bail is not fixed until the complaint is filed before a magistrate and the person is arraigned.¹

The judge estimates that in Los Angeles County delays between arrest and arraignment of from 36 to 48 hours are not unusual, particularly if the arrest was made at night. Such delays would appear to be unreasonable and probably constitute a failure to comply with the requirements of Penal Code Section 849.² And yet, except for habeas corpus, there is no procedure by which the arrested person can be released on bail prior to arraignment.

Habeas corpus proceedings have apparently been resorted to in Los Angeles County for many years to accomplish a more prompt release on bail. In Alameda County it appears that ⁱⁿ cases of persons arrested for a felony without a warrant complaints are filed with sufficient expedition so that there is no undue delay and there has been little dissatisfaction with the procedure of waiting until arraignment before a magistrate. However, in San Francisco County it appears that upon an arrest on suspicion of a felony an order fixing bail may be immediately obtained from a superior court judge upon application by an attorney, bail broker, or friend. There is no statutory provision for bail in this manner and the validity of the bail bond may be open to question.

1. Cal. Pen. Code 858.

2. Kaufman v. Brown, 93 Cal. App.2d 508 (1949); Peckham v. Warner Brothers, 36 Cal. App.2d 214 (1939); Williams v. Zelzah, 126 Cal. App.2d (1932); Vernon v. Plumas, 71 Cal. App. 112 (1925).

The judge therefore suggests that the Penal Code be revised to provide that if a person is arrested without a warrant for a bailable felony and is not taken before a magistrate "without unnecessary delay," a judge or commissioner of the Superior Court may, in his discretion, fix and accept bail and order the release of the person arrested.

Suggestion No. 80: A study to determine whether Penal Code Sections 1149 and 1191 should be revised to eliminate certain differences of procedure in pronouncing judgment in inferior and superior courts.

Penal Code Section 1191 provides for pronouncing judgment in the Superior Court, whether the case involved be a felony or a misdemeanor, and Penal Code Section 1149 provides for pronouncing judgment in inferior courts on misdemeanor offenses. These two sections require a different procedure in two respects.

Under Section 1191 the Superior Court is authorized to pronounce judgment immediately upon conviction unless the defendant is eligible for probation, in which case there must be a referral to the Probation Office. However, under Section 1149 the inferior courts must wait at least six hours after conviction before judgment can be pronounced, unless defendant waives the requirement. There appears to be no reason for a different procedure in the two courts and little, if any, reason for the six-hour wait between conviction and judgment in the inferior courts. The commission is informed that defendants in inferior courts almost always waive the requirement of a six-hour wait, which necessitates that a separate docket entry of this fact be made.

Another difference between Section 1191 and Section 1149 concerns the time within which the Probation Officer must report and judgment must be pronounced in cases which are referred to the Probation Office. Under Section 1191, in the Superior Court, the Probation Officer must report and judgment must be pronounced

within 21 days after conviction, whereas under Section 1449, in inferior courts, the Probation Officer's report and the pronouncement of judgment must be within 20 days. It would seem that the period of time should be the same for both courts.

Suggestion No. 82: A study to determine whether Section 1181 of the Penal Code should be amended to authorize the granting of a new trial in criminal cases when it becomes impossible to have the phonographic report of the trial transcribed.

Under the provisions of Civil Code of Procedure Section 953e, the court in a civil case has the power to vacate judgment and order a new trial when "it shall be impossible to have a phonographic report of the trial transcribed by a stenographic reporter as provided by law or by rule, because of the death or disability of a reporter who participated as a stenographic reporter at the trial, or because of the loss or destruction, in whole or in substantial part, of the notes of such reporter . . ." In criminal cases, however, the impossibility of having the phonographic report transcribed does not constitute grounds for granting a new trial.¹

In People v. Chessman² the Court considered an argument that the impossibility of complying with Rule 35(b) of the Rules on Appeal requiring the reporter to prepare a transcript and certify to its correctness constituted grounds for ordering a new trial in a criminal case where a judgment of death has been rendered. The Court held that literal compliance with Rule 35(b) was not necessary and that, if there is a record by which the Court can review the

1. Cal. Pen. Code §1181.

2. 35 Cal. 2d 445, 218 P.2d 769 (1950).

cause and determine whether there was error in the court below, a new trial will not be ordered. Since the Court determined that the record in that case was sufficient to review the cause, it did not pass on the question whether, assuming an inadequate record or no record at all, a new trial could in fact be ordered. In light of Section 1181's limited grounds for granting a new trial, the answer to that question is at least uncertain.

Suggestion No. 83: A study to determine whether Probate Code Section 681 should be revised to provide a uniform rule respecting the giving of notice prior to granting a family allowance.

Section 681 of the Probate Code ^{which} provides that a family allowance may be granted before the inventory is filed ^{does not provide for} ~~without~~ notice to anyone. It also provides that a family allowance may be granted after the inventory is filed, but only if notice has been given for the period and in the manner required by Section 1200 of the Probate Code.

There appears to be no reason for this difference. It would seem that either notice should always be required before the granting of a family allowance, or it should not be required at any time.

Suggestion No. 85(2): A study to determine whether Sections 714 and following of the Code of Civil Procedure should be revised to permit a judgment creditor to examine a judgment debtor in supplemental proceedings without a showing that an execution has been returned unsatisfied.

Civil Code of Procedure Sections 714 and following require that before a judgment debtor can be examined in supplemental proceedings an execution must be taken out on the judgment, given to the sheriff, constable or marshal of the county, and returned unsatisfied. It appears that in practice the sheriff, marshal or constable often does not attempt to find any property of the judgment debtor, but merely holds the execution for ten days and makes a nulla bona return.

The present procedure appears, therefore, to involve a mere formality, entailing a good bit of unnecessary work and expense. It should, perhaps, be revised to simplify the examination of judgment debtors.

Suggestion No. 94: A study to determine whether the procedure to be followed by a person seeking to be appointed guardian of a nonresident insane or incompetent person or of a nonresident minor should be clarified.

The provisions of Division 4 of the Probate Code are unclear as to the procedure to be followed by a person seeking to be appointed guardian of a nonresident insane or incompetent person or of a nonresident minor.

With regard to nonresident insane or incompetent persons, there are two sets of provisions in Division 4 of the Probate Code which would appear to be in conflict as to the procedure to be followed by the person seeking to be appointed guardian. One set of provisions is those contained in Chapter IV, covering the appointment of guardians for insane or incompetent persons generally. These provisions are not specifically limited to resident incompetents and would appear, therefore, to apply also to nonresident incompetents. In general, they require service at least five days before the date of hearing upon the alleged incompetent and his relatives within the second degree residing in the State.¹ The other provisions are contained in Chapter X, Nonresident Wards, and are clearly applicable only to nonresident incompetents. These provisions require a court order directing notification of interested persons in such manner as the court deems reasonable.² There is, therefore, at least a surface conflict between these two sets of provisions as

1. Cal. Prob. Code §1461.

2. Cal. Prob. Code §1570.

to the procedure to be followed by a person seeking to be appointed guardian over a nonresident incompetent.

With regard to nonresident minors, there are also two sets of provisions in Division 4 of the Probate Code.³ However, as to service of process, there is no conflict because the second set of provisions specifically incorporates by reference the procedure required by the first.⁴ There is, though, some ambiguity as to whether a nonresident minor who is fourteen years or older can himself petition for a guardian. Under Probate Code Section 1440 it would seem that a nonresident, fourteen-year-old minor could petition for a guardian;⁵ but Section 1570, which deals specifically with nonresident wards, contains no provision for such a petition.

Respectfully submitted,

John D. Babbage, ~~Chairman~~

Stanford C. Shaw, *Chairman*

3. Cal. Prob. Code §§1440-41, 1570.

4. "If the nonresident ward is a minor, notice shall be given to the persons and in the manner required by Section 1441 of this code. . . ." Cal. Prob. Code § 1570.

5. "The appointment may be made upon the petition of a relative or other person on behalf of the minor, or on the petition of the minor, if fourteen years of age. . . ." Cal. Prob. Code § 1440.