10/9/56

Agenda for Meeting of Law

Revision Commission

October 12 and 13, 1956

1. Minutes of September meeting (enclosed).
2. Report on 1957-58 budget.
3. Study No. 36 - Condemnation Law and Procedure (See Memorandum No. 1 enclosed).
4. Study No. 5 - Probate Code Section 201.5 (a letter and attachments and a revised recommendation of the commission relating to this matter were sent to you on October 3. Please bring this material with you to the meeting).
5. Study No. 3 - Dead Man Statute (See Memorandum No. 2 enclosed; please bring with you also the recommendation of commission on this study).
6. Fish and Game Code -
   (a) Presentation by Legislative Counsel staff members of policy questions for decision by commission.
   (b) Discussion of replies to certain communications received by commission (material relating to these will be sent later or given to you at the meeting).
7. Northern and Southern Committee reports on report of State Bar Committee on Administration of Justice on commission recommendations (enclosed). Please bring with you also the CAJ report (sent to you prior to September meeting), memorandum of Executive Secretary relating thereto sent to you on October 2,

and the recommendations of the commission on Studies Nos. 2 (Judicial Notice Foreign Law), 6 (Effective Date of Order Granting New Trial), and 7 (Retention Venue for Convenience of Witnesses).

8. Agenda (See Memorandum No. 3, enclosed).

MINUTES OF MEETING

OF

OCTOBER 12 and 13, 1956

Pursuant to the call of the Chairman, the Law Revision Commission met on October 12 and 13 at San Francisco, California.

PRESENT:

Mr. Thomas E. Stanton, Jr., Chairman
Mr. John D. Babbage, Vice-Chairman
Honorable Jess R. Dorsey
Honorable Clark L. Bradley
Mr. Bert W. Levit (October 12)
Mr. Stanford C. Shaw
Mr. John Harold Swan (October 13)
Professor Samuel D. Thurman
Mr. Ralph N. Kleps, ex officio

ABSENT:

Mr. Joseph A. Ball

Mr. John R. McDonough, Jr., the Executive Secretary of the commission, and Mrs. Virginia B. Nordby, the Assistant Executive Secretary, were present on both days.

The minutes of the meeting of September 20 and 21, which had been distributed to the members of the commission prior to the meeting, were unanimously approved.

1. ADMINISTRATIVE MATTERS

A. Report on 1957-58 Budget: The Executive Secretary reported that Mr. Harkness of the Department of Finance had approved the commission's proposed budget for fiscal year 1957-58, including the $5,000 item in the research budget for studies which may be referred to the commission for study by the Legislature even though not recommended by the commission.

B. Reference of Commission Studies and Recommendations to Judicial Council: The Chairman reported that he had sent to Mr. Chief Justice Gibson, as Chairman of the Judicial Council, copies of the commission's recommendations and the reports of the commission's research consultants on all studies which had been completed, with a covering letter explaining that they were sent "for your information."

C. Arrangements with Research Consultant on Study No. 36 (Condemnation): The Executive Secretary reported that, pursuant to the direction of the commission at its last meeting, the Southern Committee had met with Mr. Stanley Burrill to discuss the condemnation study further. Mr. Burrill had brought with him a preliminary list of problems which might be included in the study. (Copies of this list were distributed to the members of the commission prior to the meeting.) Mr. Burrill had told the Southern Committee that he would not be able to begin work on the study until about January 1, 1957, that he would try to have his research report completed by March 1, 1957, and that he would be agreeable to an outside deadline of July 1, 1957. Mr. Burrill had stated that he is willing to let the commission determine his compensation on a basis commensurate with that paid to other consultants for similar work and to regard the balance of his services as a public service. The Southern Committee reached no conclusion as to the amount of compensation the commission should pay Mr. Burrill.

After the commission had discussed this matter it was decided that the preliminary list of problems Mr. Burrill submitted was not sufficiently comprehensive and integrated to give the commission a clear enough idea of the scope of this study to furnish a basis for deciding the compensation which should be paid for it. The commission therefore directed the Executive Secretary to write Mr. Burrill and request that he prepare for consideration by the Southern Committee, an outline of a proposed study showing the development of the written report which he would prepare in sufficient detail to be understandable to a group of attorneys who do not have extensive background in condemnation law and procedure. It was also decided that Mr. Burrill be requested to indicate how this study might be divided into two parts should it prove necessary to make two contracts, one executed now and charged to fiscal year 1956-57 and the other executed next year and charged to fiscal year 1957-58.

D. Cover for Study Pamphlets: The Assistant Executive Secretary stated that a question had arisen as to the type of cover which should be used on the pamphlets containing the commission's recommendations and studies. One of three types of cover could be used: (1) At no additional cost, a cover of the same color and weight as the rest of the paper in the pamphlet might be used. (2) The cover could be the same weight as the rest of the paper, but a light blue in color. This would cost an additional $22.00 for every study, or $396.00 for the entire series. (3) The cover could be a heavy weight light blue paper the same as that used for the commission's annual reports. This would cost an additional $630.00 ($35.00 for every study). After the commission had discussed the matter a motion was made by Mr. Shaw, seconded by Senator Dorsey and adopted that a light-weight, blue cover be used.

2. AGENDA

The commission considered a number of suggestions for revision of the law which had been received from members of the Bench and Bar or prepared by the staff. The following action was taken:

A. Immediate Study: The commission decided that the following items should be placed on the tentative list of Topics Selected for Immediate Study:

> A study to determine whether the law relating to the rights of a good faith improver of property belonging to another should be revised. [Suggestion No. 155(1)]
>
> A study to determine whether Civil Code Section 1698 should be repealed or revised. [Suggestion No. 178]
>
> A study to determine whether the principle of equitable estoppel should be available against governmental entities in certain cases. [Suggestion No. 176]
>
> A study to determine whether the provisions of the Penal Code relating to arson should be revised. [Suggestion No. 132(8)]
>
> A study to determine whether the law relating to the doctrine of mutuality of remedy in suits for specific performance should be revised. [Suggestion No. 177]
>
> A study to determine whether partnerships and unincorporated associations should be permitted to sue in their common names. [Suggestions No. 169(4) and 194]
>
> A study to determine whether a former wife, divorced in an action in which the court did not have personal jurisdiction over both parties, should be permitted to maintain an action for support. [Suggestion No. 198]
>
> A study to determine whether Section 7031 of the Business and Professions Code, which precludes an unlicensed contractor from bringing an action to recover for work done, should be revised. [Suggestion No. 158(2)]
>
> A study to determine whether the law respecting the rights of a lessor of property when it is abandoned by the lessee should be revised. [Suggestion No. 193]

A study to determine whether intrafamily tort immunity should be abolished. [Suggestion No. 186]

A study to determine whether a wife should have the right to recover for loss of consortium caused by injury to her husband. [Suggestion No. 191]

A study to determine whether minors should have a right to counsel in juvenile court proceedings. [Suggestion No. 182]

A study to determine whether the law relating to the right of the purchaser under a conditional sale contract to redeem property repossessed should be revised. [Suggestion No. 181]

The Chairman and the Executive Secretary were authorized to choose from these topics and the topics previously placed on the tentative immediate study list a final calendar of topics selected for study to be included in the commission's 1957 report to the Legislature.

B. Consolidate: The following items were consolidated:

Suggestion No.	Consolidated with
129(1)	1955 Topic 10 (Small Claims Court Law)
169(5)	Study No. 34 (Uniform Rules of Evidence)

C. Postponed: The commission considered but deferred final decision on Suggestions No. 172 and 188.

D. Not Accept: The commission decided that the following Suggestions should not be accepted for study:

170(2)	187
170(6)	190

The commission decided that Suggestion No. 170(2) should be referred to the State Bar.

3. CURRENT STUDIES

Study No. 2 -- Judicial Notice of the Law of Foreign Countries: The The commission considered the Report of the State Bar Committee on Administration of Justice and the Report thereon by the Northern Committee of the commission, relating to the commission's recommendation on judicial notice of the law of foreign countries. The following action was taken:

A motion was made by Mr. Thurman and seconded by Mr. Shaw that the proposed revision of Code of Civil Procedure Section 1875 be changed to read as follows:

> In all these cases the court may resort for its aid to appropriate books and documents of reference. In cases arising under subdivision 4 of this section, the court may also resort to the advice of persons learned in the subject matter, which advice, if not received in open court, shall be in writing and made a part of the record in the action or proceeding.

The motion carried:

Ayes -- Babbage, Bradley, Dorsey, Shaw, Thurman

Noes -- None

A motion was made by Mr. Thurman and seconded by Mr. Shaw that the word "facts" be deleted from Section 1875 in the commission's proposed revision. The motion carried:

Ayes -- Babbage, Bradley, Dorsey, Shaw, Thurman

Noes -- None

The commission decided to take no action on the other suggestions made by CAJ regarding this study for the reasons suggested by the Northern Committee.

Study No. 3 -- Dead Man Statute: The commission considered the report of the State Bar Committee on Administration of Justice and the report thereon by the Southern Committee of the commission relating to the commission's recommendation on the Dead Man Statute. After the matter had been discussed, a motion was made by Mr. Shaw, seconded by Mr. Babbage, and adopted, that no action be taken on the CAJ suggestion for the reasons stated in the Southern Committee report.

The commission also considered a change in proposed Section 1880.1 of the Code of Civil Procedure recommended by the Southern Committee on the suggestion of Mr. Stanton. A motion was made by Mr. Babbage and seconded by Mr. Shaw that Section 1880.1 be amended to read as follows:

> 1880.1. No written or oral statement of a person of unsound mind incapable of being a witness under subdivision 1 of Section 1880 of this code made upon his personal knowledge and at a time when he would have been a competent witness shall be excluded as hearsay in any action or proceeding by or against such person or by or against any person in his capacity as the successor in interest of such person of unsound mind.
>
> No written or oral statement of a deceased person made upon his personal knowledge shall be excluded as hearsay in any action or proceeding:
>
> (a) For the probate of the will of such deceased person;
>
> (b) By or against the beneficiary of a life or accident policy insuring such deceased person, arising out of or relating to such policy;
>
> (c) By or against any person in his capacity as representative, heir, or successor in interest of such deceased person.

The motion carried:

Ayes -- Babbage, Bradley, Dorsey, Levit, Shaw, Stanton, Thurman

Noes -- None

Study No. 5 -- Probate Code Section 201.5: The commission considered a revised draft of the Recommendation relating to this study which had been prepared by the Chairman, the Executive Secretary and Professor Thurman, in consultation with Mr. Harold Marsh, the Research Consultant. A motion was made by Mr. Babbage and seconded by Mr. Levit that the Recommendation be approved as revised. The motion carried:

Ayes -- Babbage, Bradley, Dorsey, Levit, Shaw, Stanton

Noes -- None

Study No. 6 - Effective Date of New Trial Orders: The commission considered the Report of the State Bar Committee on Administration of Justice relating to the commission's recommendation on this subject. The Northern Committee had recommended that the commission re-examine its Recommendation to the Legislature in the light of the views of practicing attorneys reflected in the suggestions of the State Bar. After the commission had discussed the matter, it was agreed that the sentence to be added to Code of Civil Procedure Section 660 by the commission's proposed revision should be amended to read as follows:

> "A motion for a new trial is determined within the meaning of this section when (1) an order ruling on the motion is first entered in the minutes or (2) a written order ruling on the motion is signed by the judge. Such determination shall be effective even though the order directs that a written order be prepared, signed and filed."

Ayes -- Babbage, Bradley, Dorsey, Stanton, Swan

Noes -- Shaw

Study No. 7 -- Retention of Venue: The commission considered the Report of the State Bar Committee on Administration of Justice and the Report of the Southern Committee of the commission relating to the commission's recommendation on this subject. A motion was made by Mr. Swan, seconded by Mr. Babbage, and adopted, that no action be taken on the CAJ suggestion for the reasons stated in the report of the Southern Committee.

Study No. 18(L) -- Fish and Game Code: Mr. Kent DeChambeau, Deputy Legislative Counsel, was present at that part of the meeting on October 12 during which the proposed revision of the Fish and Game Code was considered.

The Legislative Counsel stated that he had reviewed carefully the recommendations of the Department of Fish and Game and the Fish and Game Commission concerning the draft code, as well as the comments on those recommendations by his staff, the Northern Committee and the Chairman of the commission, and that he was prepared to present to the commission for its decision those matters in the draft code which either he or the Chairman or the Northern Committee recommend be considered and decided by the commission. This procedure was agreed upon and the Legislative Counsel thereupon presented a number of questions relating to the draft code. A record of the action of the commission on the matters presented was kept by the Legislative Counsel.

There being no further business the meeting was adjourned.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

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CALIFORNIA LAW REVISION COMMISSION

August 22, 1956

Mr. Thomas E. Stanton, Jr., Chairman
California Law Revision Commission
111 Sutter Street
San Francisco, California

Dear Tom:

I enclose a copy of a suggested modification of proposed Section 201.8 of the Probate Code which Sam Thurman and I have drafted pursuant to the instruction of the commission. At the July meeting the commission took its final action on Section 201.5 of the Probate Code, subject to a revision of Section 201.8 to provide for the situation where the spouse acquiring 201.5 property uses it to purchase life insurance, naming someone other than his spouse as beneficiary. The revision was left in your hands, Sam's and mine. Accordingly, we submit the draft for your consideration.

When Sam and I went over Section 201.8, we decided to suggest certain other changes in it. The draft enclosed shows in strike-out and underline the changes proposed to be made from the section as it appears in the draft recommendation of the commission dated June 16, 1956. Our comments on them are as follows:

1. The change made in the second line of Section 201.8 is self-explanatory and appears to be desirable.

2. The changes made in subsections (a), (b) and (c) bring the language of these subsections more nearly into line with that of the parallel provisions of the Revenue and Taxation Code.

3. Subsection (f) is new and is intended to cover the life insurance situation.

I have come to have some doubt as to whether any of the material in proposed Section 201.8 after the first paragraph is desirable. The several subsections of the second paragraph are, of course, intended to give the courts some indication, by way of illustration, of what we are driving at without limiting the scope of Section 201.8 to the several situations set forth. It is intended that all of the qualifications set forth in the first

paragraph of the proposed section be applicable to the illustrations set forth in the second paragraph -- e.g., that the transfer is of 201.5 property, that the transferor did not receive in exchange a consideration of substantial value, etc. -- but is this wholly clear? In the case of subsection (f) we have provided that the surviving spouse may require the beneficiary to restore one half of the insurance proceeds to the estate rather than giving the surviving spouse the right to go against the insurance company. This was done in part to forestall possible opposition to the section by the insurance lobby. It tends to illustrate some of the problems we may be getting into -- perhaps not fully appreciated in other cases -- by attempting to enumerate particular situations to which proposed Section 201.8 is intended to apply. Perhaps it would be better to merely set forth the principle involved in the first paragraph and let the courts determine its application to various situations as the cases arise.

We would appreciate it if you would look over the enclosed draft and give us your ideas on it and on the questions raised in this letter as soon as you conveniently can so that we can send this study on to the printer.

Sincerely yours,

John R. McDonough, Jr.

JRM:fp

cc: Professor Samuel D. Thurman
Mr. Harold Marsh

SUGGESTED MODIFICATION OF PROPOSED SECTION 201.8
OF THE PROBATE CODE, DRAFTED BY MESSRS. THURMAN
AND MCDONOUGH

(Material added to the draft Report and Recommendation of the Law Revision Commission dated June 16, 1956 is underlined; material deleted is shown in strike-out.)

201.8 Whenever any married person dies domiciled in this state having made a transfer to a person other than the surviving spouse, without receiving in exchange a consideration of substantial value, of property in which the surviving spouse had an expectancy under Section 201.5 of this code at the time of such transfer, the surviving spouse may require the transferee to restore to the decedent's estate one half of such property, its value, or its proceeds, if the decedent had a substantial quantum of ownership or control of the property at death. If the decedent has provided for the surviving spouse by will, however, the spouse cannot require such restoration unless the spouse has made an irrevocable election to take against the will under Section 201.5 of this code rather than to take under the will. All property restored to the decedent's estate hereunder shall go to the surviving spouse pursuant to Section 201.5 of this code as though such transfer had not been made.

Transfers to which this section is applicable include but are not limited to the following:

(a) A transfer intended to take effect in possession or enjoyment at or after the death of the transferor;

(b) A transfer under which the transferor expressly or impliedly reserves for his life the an income or interest in from the property transferred;

(c) A ~~transfer, in trust or otherwise,~~ as to which the transferor had at death a power ~~of revocation~~ to alter, amend, revoke, or terminate either alone or in conjunction with a person or persons not having a substantial interest adverse to such revocation;

(d) A transfer in joint tenancy in which the transferor was at death one of the joint tenants;

(e) A transfer to a bank or similar depository in the joint names of the transferor and one or more other persons, payable to the survivor, to the extent of the balance of the account remaining at the death of the transferor if the account was then in the joint names of the transferor and one or more other persons.

(f) A transfer made to purchase insurance on the life of the transferor if the transferor possessed at his death incidents of ownership with respect to such insurance. In such case the surviving spouse may require the insurance beneficiary to restore to the decedent's estate one-half of the insurance proceeds.

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CALIFORNIA LAW REVISION COMMISSION

September 12, 1956

John R. McDonough, Jr., Esq.
Executive Secretary
Law Revision Commission
School of Law
Stanford, California

Re: Probate Code Section 201.5 et. seq.

Dear John:

This will answer your letter to me on the above subject dated August 22, 1956 enclosing a suggested redraft of proposed Section 201.8 of the Probate Code.

I concur in the change referred to in Paragraph 1 of your letter.

I concur in the changes affecting subsections (a) and (b) referred to in Paragraph 2 of your letter. With regard to the change affecting subsection (c), I question the desirability of extending the principle of the proposed Section 201.8 to transfers in trust where the transferor has reserved the power to alter or amend the trust instrument in some inconsequential way. Since these enumerations are illustrative only, why not leave subsection (c) limited to cases where a power to revoke is reserved? One advantage of this solution would be to avoid the necessity of redrafting the word "revocation" at the end of this subsection.

It seems to me that the word "transfer" in the first line of proposed subsection (e) should be "deposit". It is not my understanding that you make a "transfer" to a bank when you deposit money in a joint bank account.

It also seems to me that subsection (f) would be more accurate if it were revised to read as follows:

> "(f) The purchase of insurance on the life of the decedent, the proceeds of which are payable to a person other than the surviving spouse, if the decedent possessed at his death incidents of ownership with respect to such insurance. In such case the surviving spouse may require the insurance beneficiary to restore to the decedent's estate one-half of the insurance proceeds."

With regard to the doubt expressed in the next to the last paragraph your letter, I favor trying to devise illustrative subsections, although I fully

appreciate the difficulties involved. Would the question you raise be met if the paragraph which immediately precedes the subsections were rephrased to read as follows:

> "Transfers in which the decedent has retained a substantial quantum of ownership or control of the property at death within the meaning of this section include but are not limited to the following:"?

Yours very truly,

/s/ Tom

THOMAS E. STANTON, JR.

TES:hk

cc: Professor Samuel D. Thurman
Harold Marsh, Esq.

COPY COPY

September 13, 1956

John R. McDonough, Jr., Esq.
California Law Revision Commission
School of Law
Stanford, California

Dear John:

I have read your letter of August 22 and Tom Stanton's reply of September 12, relating to the revised wording of proposed Section 201.8 of the Probate Code.

With respect to the change suggested in subsections (a), (b) and (c) to make the language conform to that in the Revenue and Taxation Code, I think that I was the one who originally worded those subsections the way they were and I deliberately avoided copying the language of the State and Federal tax statutes. The reason that I did so was to avoid suggesting to the courts that in interpreting this statute they were bound by the tax decisions, sometimes bordering on lunacy, which have been handed down by the Federal courts particularly in interpreting these provisions of the revenue laws.

I suppose that the only reason for copying exactly the language of the tax statutes would be to make the tax decisions interpreting that language binding authorities in the interpretation of this statute. But what relevance do the factors involved in a tax case (which usually boil down to the one factor of gouging the taxpayer) have in adjusting the equities between the surviving spouse and the transferee of the deceased spouse?

I would suggest that before this language out of the revenue laws is copied into this statute, a review ought to be made of all of the decisions interpreting that language, both State and Federal, and an informed judgment exercised as to whether you really want to incorporate all of those interpretations into this statute.

Sincerely yours,

/s/ Harold

Harold Marsh, Jr.

cc: Thomas E. Stanton, Jr.
Samuel D. Thurman

October 1, 1956

Memorandum to: Thomas E. Stanton, Jr., Chairman
California Law Pevision Commission

Subject: Proposed Section 201.8 of the Probate Code.

I have discussed with Sam Thurman your letter and that of Harold Marsh in reply to my letter of August 22 relating to the suggested modification of proposed Section 201.8 of the Probate Code drafted by Sam Thurman and me. We are agreed on the following:

1. We think that Harold Marsh's point, if valid, applies to all of subsections (a) through (f) and applies to them in their present form in the draft Report and Recommendation as much as to their modified form as proposed by us. Both Sam and I have some doubt that we should go into illustrations at all in Section 201.8, but if we do, we think that any language used would be so similar to that in the Revenue and Taxation Code that the problem which Harold envisages would arise. Our recommendation is to include the subsections. We would include subsections (a), (b) and (d) in the form in which they appear in our suggested modification and subsections (c), (e) and (f) in the form discussed below.

2. We have some question concerning your suggestion with respect to subsection (d). We agree that the subsection should not apply to transfers in trust where the transferor has reserved an <u>inconsequential</u> power to alter or amend the trust instrument. We think, however, that the general requirement that the decedent have retained "a substantial quantum of ownership and control of the property at death" would obviate this. Moreover, we believe that

in some cases the power to alter or amend may be so extensive as to bring the situation within the principle which we are seeking to express in Section 201.8. We suggest, then, either that subsection (c) be permitted to stand as modified by us (except that the words "substantial adverse interest" be substituted for "substantial interest adverse to such revocation", or that it be revised to read as follows:

> "(c). A transfer as to which the transferor had at death a power to revoke or terminate or to substantially alter or amend, either alone or in conjunction with a person or persons not having a substantial adverse interest."

3. We sought in drafting the several subsections to achieve parallel construction by beginning each subsection with the words "A transfer". We do not think that subsections (e) and (f) are made difficult to understand by this device but would be willing to substitute "deposit" in subsection (e) and the first clause proposed by you in subsection (f) if you think that this would be preferable.

4. We concur in your proposed redraft of subsection (f). If parallel construction is desired the words "A transfer to" could be substituted for the word "the" at the beginning of the subsection.

5. We question your suggested redraft of the first sentence in the second paragraph of Section 201.8. Would not the effect of the language which you propose be that <u>any</u> transfer falling within any subsection could be set aside even though the "string" which the decedent retained were not "a substantial quantum of ownership or control of the property at death"? In other words, your language would appear to bring every transfer falling under any

subsection within the statute as a matter of law, whereas we think the original intention was not to do so if the transferor retained only a very insubstantial hold on or connection with the property at the time of his death.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

October 5, 1956

Memorandum to Law Revision Commission

Subject: Probate Code Section 201.5: Paley v. Bank of America, No. 635070, Superior Court in and for the County of Los Angeles.

Paley v. Bank of America, recently decided by Honorable Philip H. Richards, Judge of the Superior Court in and for the County of Los Angeles, involved, inter alia, two questions of interest in connection with our study of Section 201.5 of the Probate Code: (1) whether Section 201.5 authorizes the nonacquiring spouse to dispose by will of 201.5 property of the surviving acquiring spouse and (2) if so, whether Section 201.5 is constitutional in this aspect. In a memorandum opinion dated July 17, 1956 Judge Richards answered both questions in the negative. Pertinent excerpts from the opinion are the following:

" PRELIMINARY

On January 2, 1954, Lillian Paley died in Los Angeles, and the defendant is the duly qualified executor of her last will and testament. At all times from 1906 until her death, she and the plaintiff, Jacob Paley, were wife and husband. They were residents of the State of Illinois from the time of their marriage until about January 1, 1920, when they became residents of the State of Pennsylvania. About January 1, 1936, they became residents of the State of California and continued as residents of this state until her death. The plaintiff continued to be and now is a resident of the State of California.

In her last will, the decedent Lillian Paley declared her intention to dispose of all property over which she had testamentary disposition, whether it was the separate property of herself or was the community property of her husband and herself. After certain bequests and devises, the residue of her estate was devised

and bequeathed to named beneficiaries, of whom her husband, Jacob Paley, is not one.

At the time of her death, Mrs. Paley was the owner of substantial personal property, standing in her name and appraised in her estate at approximately $1,750,000.00, including an obligation of the plaintiff in the amount of $301,970.15, which the plaintiff has paid to her executor.

At the time of Mrs. Paley's death, the plaintiff's net worth, based upon the market value of stocks and the book value of other assets standing in his name, was approximately $7,500,000.00, of which approximately $500,000.00 was real property, $320,000.00 in cash, and substantially all the rest was in stocks and bonds.

The defendant contends that, under Probate Code sec. 201.5, the plaintiff's deceased wife, Lillian Paley, had the right and her last will had the effect, of bequeathing one-half of the personal property now possessed by the plaintiff and standing in his name which was acquired after their marriage and while they were domiciled in Illinois and Pennsylvania and which would not have been the separate property of either had it been acquired while domiciled in California. The plaintiff, Jacob Paley, denies this contention on the ground that section 201.5 is not subject to such a construction and, if so construed as applied to the facts in this case, is unconstitutional."

* * *

"Probate Code sec. 201.5 was enacted in 1935 and its applicability and constitutionality as to the personal property of a surviving spouse, which property was the separate property of the surviving spouse when acquired in another state, has not been directly determined by an appellate decision in this state. Since the date of the enactment of this section, the population of California has doubled, largely due to the influx of families from states not having community property laws. Many of them have brought tangible and intangible personal property to California which was the separate property of one or the other when and where

acquired but which would have been community property had it been acquired while domiciled in California.

The potential effect of the application of section 201.5 as contended for by the defendant, and its constitutionality, if so applicable, is such that the issue should receive a final determination to guide the estate planning of many residents of this state who have come here with substantial property acquired in separate property states. "

* * *

" QUESTIONS INVOLVED.

The principal questions of law and fact presented for determination in this case are:

(1) Is Probate Code sec. 201.5 applicable to the personal property acquired by a surviving spouse while domiciled elsewhere which would not have been the separate property of such spouse if acquired while domiciled in this State?

(2) Is Probate Code sec. 201.5 constitutional if applied to such personal property held by a surviving spouse? "

* * *

" APPLICABILITY OF PROBATE CODE SECTION 201.5

TO PROPERTY OF SURVIVING SPOUSE.

Probate Code sec. 201.5, effective September 15, 1935, reads as follows:

'Upon the death of either husband or wife one-half of all personal property, wherever situated, heretofore or hereafter acquired after marriage by either husband or wife, or both, while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state,

shall belong to the surviving spouse; the other one-half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the debts of the decedent and to administration and disposal under the provisions of Division III of this code.'

An understanding of the objects and legislative intent in enacting this section can be aided by a brief history of the repeated legislative attempts to enlarge the wife's rights in separate property acquired by her husband in other states and brought with them to California. Such a history is found in In re Miller, 31 Cal. 2d 191, at page 195, as follows:

'Section 201.5 of the Probate Code represents the latest effort of the Legislature to make the marital property rights of spouses who have accumulated property while living in a common-law state, and then moved their residence here, comparable to those of the husband and wife who accumulate their property while domiciled in California. The legislative history of the section has been long and interesting. It is reflected in the successive changes in the definition of community property under section 164 of the Civil Code. Prior to 1917, it had uniformly been held that where the husband acquired property during coverture in a common-law state while domiciled there and then subsequently brought it to California at the time of establishing residence here, such marital property remained the sole and separate property of the husband, irrespective of the prevailing concept of community property in this state as including all property acquired by either spouse after marriage other than

that acquired by gift, bequest, devise or descent. (Citing cases) In 1917, the Legislature redefined community property to include 'real property situated in this state, and personal property wherever situated, acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State.' (Civil Code, sec. 164, as amended; Stats. 1917, ch. 581, p. 827). This court held that the expanded definition was not to be construed retroactively, and so did not apply to property of married persons who had become domiciled in this state and brought their property here prior to the date of the amendment. (Estate of Frees, 187 Cal. 150, 156-157 (201 P. 112).) In 1923, at the session of the Legislature next following the rendition of this decision the statute was further amended by inserting the following italicized language so as to include 'personal property wherever situated, HERETOFORE OR HEREAFTER acquired while domiciled elsewhere . . . .,' thus making it clear that retroactive application was intended. (Civ. Code, sec. 164, as amended; Stats. 1923, ch. 360, p. 746.) But power to legislate as to the character of property brought to this state prior to 1917 was again held wanting, since it would abridge vested rights of the husband. (Estate of Drishaus, 199 Cal. 369, 373 (249 P. 515).) Thereafter this court was required to determine the constitutionality of the statute where the change of domicile to California occurred after the 1917 amendment. It was held that the attempt thus to convert separate property into community property, even prospectively, was an

unconstitutional impairment of vested property rights acquired in another jurisdiction. (Estate of Thornton, 1 Cal. 2d 1, 5 (33 P. 2d 1, 92 A.L.R. 1343).) So ended the Legislature's attempt to make the acquisition of a California domicile by the husband and wife effect a reclassification, according to California categories, of property acquired by the parties while domiciled in another jurisdiction.'

In 1935, at the next session of the Legislature following the decision in the Thornton case, Probate Code sec. 201.5 was enacted. The purpose and effect of this section is succinctly stated in In re Miller, 31 Cal. 2d 191, at page 196, as follows:

'Unlike the earlier legislation which had been declared unconstitutional, this statute does not purport to rearrange property rights between living husbands and wives in marital property brought into this state upon their change of domicile to California. On the contrary, it is a succession statute apparently enacted in pursuance of the theory of the dissenting opinion in the Thornton case, that such legislation affecting the descent of property would not contravene constitutional guarantees since 'the rights of testamentary disposition and succession are wholly subject to statutory control.''

It is now established law that section 201.5 is a succession statute, speaking as of the time of death, and governing the rights of testamentary disposition and succession, and that this statute does not purport to affect vested property rights in marital property owned by a husband and wife which is brought into this state concomitant with a change in domicile to California.

(Logan v. Forster, 114 C.A. 2d 587: Paley v. Superior Court, 137 C.A. 2d 450)

The defendant contends that the statute does not differentiate between either husband and wife or between prior "acquirers" or "non-acquirers" of property in the state of the former residence and that, therefore, the statute, if constitutional, must be construed to apply to the property held by a surviving spouse as well as to the property held by a deceased spouse.

Section 201.5 is found in Division II of the Probate Code dealing with 'Succession', which is defined in section 200 of the Probate Code as 'the acquisition of title to the property of one who dies without disposing of it by will'.

By definition, a statute of succession is one which operates to control the devolution, on death, of property owned by the decedent. The construction of section 201.5 urged by the defendant would make the statute operate to control the devolution of the property of the survivor in which the decedent had no interest during life. So construed, the section would not be a statute of succession as it has consistently been denominated in the cases above cited, but would be a statute affecting the vesting of an interest in the heirs and devisees of the decedent in the survivor's separate property, which interest was not held by the decedent during life.

Chapter and section headings in the codes are entitled to considerable weight in interpreting the various sections and should be given effect according to their import, to the same extent as though they were included in the body of the law. The placement of section 201.5 in the Probate Code in the division dealing with 'succession' indicates a legislative intent that said section was intended only as a statute of succession.

Another means of ascertaining legislative intent is to consider the historical background of the statute under consideration. This background is set

forth in In re Miller (supra) and as the court there points out, section 201.5 was apparently enacted in accordance with Mr. Justice Langdon's suggestion that the state could constitutionally subject the separate property of its owner who had died to the same rules of testamentary disposition and succession as community property acquired in this state. Hence, this historical background is a strong indication that the legislature intended section 201.5 to act upon the property of a deceased spouse only and not upon the property of a surviving spouse.

For all of the foregoing reasons, the court is of the opinion that section 201.5 is to be construed as applicable to the separate property of a deceased spouse and is not to be construed as applicable to the separate property of a surviving spouse.

CONSTITUTIONALITY OF SECTION 201.5 AS APPLIED TO THE SEPARATE PROPERTY OF SURVIVING SPOUSE.

The issue of constitutionality is whether the State of California may provide that, upon the death of one spouse, the decedent shall have testamentary disposition over personal property acquired by the surviving spouse as separate property while domiciled elsewhere and brought into this state, which property would have been community property of the decedent and surviving spouse if it had been acquired while domiciled in this state.

The constitutionality of this section as applied to the property of a surviving spouse has not been decided. The defendant ably and earnestly contends that section 201.5, as sought to be applied in this case, is a reasonable exercise of the police power of this state, justified by the interest of the state in the marital relation, and is constitutional even though it may impair vested property rights. In support of this contention, the defendant relies mainly on Arnet v.

Reade, 220 U.S. 311. Whatever may be the effect of this decision, the California Supreme Court has declined to follow it. (Roberts v. Wehmeyer, 191 Cal. 601; Stewart v. Stewart, 199 Cal. 318) Regardless of the merits of defendant's argument that section 201.5 may be construed as a constitutional exercise of police power, this court is of the opinion that it is not at liberty to re-examine the constitutionality of a statute or a statute in pari materia the effect of which has been repeatedly declared unconstitutional by the Supreme Court of this state. Estate of Thornton, 1 Cal. 2d 1, and the line of cases preceding it clearly and decisively hold that any statute which diminishes or destroys the present and vested rights of a living spouse to this own property during his lifetime is an unconstitutional impairment of vested property rights.

If the terms of a statute will reasonably permit, it will be given a construction which will sustain it as valid rather than defeat it as unconstitutional. To construe section 201.5 as effective only on the property of a deceased spouse renders it operative and valid. To construe section 201.5 as operative on the property of a surviving spouse would result in subjecting one-half of the separate property of such survivor, brought to this state as his or her separate property, to the last will of the deceased spouse and so construed would be unconstitutional under the authorities cited."

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

COPY COPY

University of Redlands
Redlands, California

Department of Biology

September 27, 1956

Mr. John R. McDonough, Jr., Executive Sec'y
California Law Revision Commission
School of Law
Stanford, California

Dear Mr. McDonough:

The proposed Revision of the Fish and Game Code was recently sent to me and upon examining it I find that none of the suggestions or proposals made either by our committee of the Desert Protective Council or those of Dr. Storer's committee have been included.

Both the Wildlife Committee and the Desert Protective Council spent a great deal of time on drafting up these proposals and it is hoped that our efforts in this direction have not been expended entirely in vain.

For your information I am attaching a brief copy of the proposals acted on by our Council and sent on in June to Dr. Storer and his committee for action.

Sincerely yours,

/s/ John D. Goodman, chairman
Wildlife Committee of the
Desert Protective Council

COPY COPY

DESERT PROTECTIVE COUNCIL

Wildlife Committee Report

1. Predator Reclassification-

It was proposed that the following birds and mammals be removed from the predator list and become protected species -- (1) shrew, (2) wolf, (3) ringtail cat (Bassariscus), (4) wolverine, (5) all hawks and owls, (6) the white pelican, (7) shrike, and (8) pinyon jay.

2. It was proposed that the bounty be removed from mountain lions and that the section of the Code dealing with payment of bounties on mountain lions be deleted in its entirety from the Code (paragraph 37.2).

3. It was proposed that the wildlife committee go on record as opposed to the use of poison bait, the use of traps and hunting from airplanes while carrying on predator control. It is suggested that paragraph 1152 be changed so that it reads, "It is unlawful to shoot any bird or mammal, except whales, from a power boat, sailboat, motor vehicle, or airplane". This change deletes the word "game" after the word "any" and before "bird".

4. It was proposed that the wording of paragraph 1231 (concerning feral domestic cats) be changed to read as follows, "any cat is a predatory mammal unless it is in the residence of its owner or upon the grounds of the owner adjacent to such residence". The proposed revision in the Code would delete the words "found within the limits of any fish and game refuge" which at present follows the second word "cat".

5. It was proposed that it would be wise to remove weasels, skunks and raccoons from the list of predatory mammals and place them with the fur-bearing mammals to be trapped in season.

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Ernest R. Tinkham, Ph. D.
Desert Naturalist
"LIFE OF THE NORTH AMERICAN DESERTS"
P.O. Box 306 * Indio, California

September 28, 1956

John R. McDonough, Jr.,
School of Law
Stanford, California

Dear Mr. McDonough:

The opening paragraphs of the "Proposed Revision of the California Fish and Game Code" requests that all Proposals be submitted to you by October 1, 1956. As this proposed revision first came to my attention September 22, it has not given me much time to assemble my proposals.

In checking through the Proposed Revision, there seems to be little or no evidence that any cognizance has been taken of the Proposals sent by various committees and individuals and which are listed in the "Summary of Suggestions Received by Committee on Legal Classification of Birds and Animals April 18, 1956" which you undoubtedly have before you. As a member of the Wild Life Committee of the Desert Protective Council, composed of Drs. Raymond Cowles, Lyman Benson, Walter P. Taylor, John Goodman and myself there seems to be no evidence that their suggestions have been accepted nor that of the Storer Committee or of many individuals, like myself, who wrote individually on this matter. There seems to be a preponderance of favor of removing hawks, owls, pelicans, cormorants and a number of carnivors such as ringed-tail cat, badgers, bobcats, weasels, skunks, etc., from the unportected to protected species list, but the "Proposed Revision" shows no evidence that the wishes of the people have been considered.

We hope that the requested proposals sent to you will merit every consideration and be incorporated into the revision for to ignore same to the exclusion of one department is contrary to our democractic way of life where the will of the people is supposed to be paramount. That will, where the majority rules should favor those proposals or suggestions emanating from that 90% or more of our population that desire to Preserve our Wild Life Resources and not observe their extermination by the muzzles of millions of rifles and shotguns.

Attached you will find my proposals based on years of observation. You may be interested to know that I have studied White-wing and Mourning Doves for many years, professionally as a Wild Life Biologist with the Arizona Game and Fish Commission, 1941-42 and after the war I have continued with these studies in south-central Arizona in the year years, 1947, 1948, 1954, 1955, 1956. Perhaps you saw my article on the Desert Bighorn in the November, 1955 issue of Westways Magazine.

I should like to request a copy of the semirevised code when it appears this December, 1956.

Sincerely yours,

/s/ Ernest R. Tinkham

Proposals Submitted for Consideration and Incorporation into the Revision of the California Fish and Game Code

MOURNING DOVES

The present Mourning Dove Hunting Regulations need Revision on the following points:

a. Commencement of the Dove Hunting Season
b. Length of Hunting Season
c. Hours of Hunting
d. Season Bag Limit
e. Daily Bag Limit
f. Reports of Hunter Kills
g. Law Enforcement
h. Hunting near Drinking Water sources

a. COMMENCEMENT OF HUNTING SEASON: Under no circumstances should this be earlier than October 15.

At present the Mourning Dove and White-winged Dove are the only bird or animal that is hunted during its breeding season. This was proved by the McCowan Report and substantiated by many earlier or later reports as well as my observations over many years. The Mourning Dove breeds in southern California from mid-February to at least mid-September. As the eggs take two weeks to incubate and the newly hatched young two weeks before they can fly and another two or more weeks before the flying young can feed themselves, during which time they are feed "dove milk" by their parents, it is obvious that in nests commencing in early September the young birds cannot take care of themselves before the middle of October. At present doves shot in September leave the young birds to die of starvation in their nests. McCowan and others have shown this to be a considerable 19% of all dove populations nesting in the month of September and some even in October. There is nothing sportsmanlike in Dove Season commencing September 1, and this date should be abolished and the DOVE SEASON SET FOR OCTOBER 15.

b. LENGTH OF HUNTING SEASON: This should be 15 days in order to perpetuate the Morning Dove that has presently to content with an army of hunters greater than ever faced any invader. The Mourning Dove Season should be October 15-31 of any year provided population surveys domenstrate a dove population able to survive a hunting season in numbers to perpetuate the species.

c. HOURS OF HUNTING: The Hunting hours should be "SUNRISE TO SUNSET" Hunters violate the present law by shooting at dawn or at least 45 minutes before sunrise as I have much evidence to prove. Shooting in the semidark of dawn and dusk of twilight gives the Dove no chance whatever and is decidedly unsportmanlike.

d. SEASON BAG LIMIT: 50 DOVES PER HUNTING SEASON. Under the present lack of law enforcement hunters go out and kill 10 doves in the morning and another ten doves in the evening. Thus it is possible for hunters to kill 600 doves a season. Not even the Passenger Pigeon could withstand such onslaught if it existed.

e. DAILY BAG LIMIT: 10 DOVES PER DAY UNDER STRICT LAW ENFORCEMENT.

f. REPORTS OF HUNTER KILLS: ALL HUNTERS SHOULD BE MADE TO REPORT THEIR TOTAL DAILY AND SEASON KILL OF DOVES to the California Fish and Game Department.

g. LAW ENFORCEMENT: This does not appear to exist at present. In Coachella Valley for 1956 and previous years there was one local game warden for 400 square miles of territory infested with 10,000 hunters. This is horribly inadequate. If Dove Hunting is permitted by law, then the law must protect the 99% non-hunting population from an army of hunters that do not respect "No Hunting" or "No Trespassing" signs. There is much evidence to prove this statement.

h. HUNTING NEAR DRINKING WATER SOURCES: <u>As doves must drink twice daily in desert regions, the law should not permit hunters to wait and hide at or near drinking water sources, whether they be guzzlers, springs, ponds, ditches, canals, etc., where the doves become easy targets for the killers. THE SAFETY ZONE AROUND DRINKING WATER SOURCES SHOULD BE AT LEAST 300 YARDS.</u>

DESERT BIGHORN SHEET: THESE ARE IN A PRECARIOUS POSITION AND MUST BE GIVEN ABSOLUTE PROTECTION. THE SANTA ROSE BIGHORN SHEEP REFUGE SHOULD BE INCREASED BY THREE TOWNSHIPS. NO SO-CALLED "SURPLUS RAM" HUNT SHOULD BE PERMITTED. Rumors that the California Fish and Game Department plan a "controlled hunt" to remove "surplus rams" is unwarranted for the following reasons:

a. The Jones Report is three years old and is inaccurate for the following reasons: i. considerable poaching has occurred since 1953. ii. it is unscientific because much of it was based on hearsay evidence and not actual survey counts. iii. Southern California, especially the desert regions, is in the rigors of the worst drowth in years which has taken a toll of the sheep.

b. No excess "ram" population exists. Counts were made in mid-summer in "ram-herds" when these were separate from the "ewe-herds". For this reason the ram count was unreliable and higher than it really was, in relation to the ewe count.

c. The California Fish and Game Department has demonstrated their inability to enforce a "controlled hunt" in the past. Witness the recent so-called "Controlled Hunt of the Tule Elk". This hunt killed three times the number of elk designated to be killed and placed the Tule Elk herd in a precarious position of existence.

Likewise the "controlled hunt" of the New Mexico Fish and Game Department of the surplus rams of the Bighorn population of the Hachita Mountains proved exceedingly disastrous and almost destroyed the herd.

These and other so-called "controlled hunts" of Antelope in Wyoming and Arizona ably demonstrate that the holding of a "CONTROLLED HUNT OF ANY GAME ANIMAL IS NOT POSSIBLE"

BIGHORN REFUGE: It is strongly urged that the present Santa Rosa Bighorn Refuge be increased in size to comprise Townships T5S, R5E; T8S,R6E, and T8S,R7E (San Bernardino Base Line).

Under no circumstances should the Santa Rosa Bighorn Refuge be abolished. The argument that only hunters pay for surveys and improvement of water holes is not correct for this is largely accomplished by Pitman-Robertson Funds from the Federal Government and these monies represent Taxpayer's dollars rather than hunters' dollars

PREDATORS

Predators have a very useful function in maintaining a healthy equilibrium in our Wild Life populations and these should not be destroyed so that man, the greatest Predator of All, can boast or have an alibi to bolster his murdering instincts.

ALL SOARING HAWKS AND OWLS SHOULD BE GIVEN COMPLETE PROTECTION.

THE ACCIPITRINE HAWKS SUCH AS GOSHAWK, COOPERS HAWK AND SHARP-SHINNED HAWK SHOULD BE GIVEN PROTECTION WITH THE PROVISO THAT IF THESE CAUSE LOSSES, THE OWNER ON THE PROPERTY CAN APPLY FOR A PERMIT TO CONTROL THE CAUSE OF PREDATION.

MOUNTAIN LION (COUGAR, PUMA, PANTHER) BOUNTY

It is strongly urged that the bounty on this splendid carnivor be abolished.

OTHER PREDATORS:

Ringed-tail Cats, Badger, Weasel, Foxes, Bodcats, Skunks, should be removed from the "Predator List" and placed on the Protected List.

Ferral or wild domesticated cats should not be protected because these destroy large numbers of birds of all kinds.

Fish eating birds such as Osprevs, White Pelican, Cormorants and Egrets should be given complete Protection.

The Black-billed Magpie should be retained on the Predator list.

Respectfully Submitted by
/s/ Ernest R. Tinkham

9/18/56

COMMENTS OF COMMISSIONER STANTON CONCERNING RECOMMENDATIONS OF FISH AND GAME DEPARTMENT AS REVIEWED BY LEGISLATIVE COUNSEL'S STAFF

Section	
208	O.K.
210	Department recommendation re "sub-species" o.k. Substitution of word "kind" for "species or sub-species" seem inappropriate, since substituted term would broaden section to require commission to maintain the best number of fish with relation to reptiles. If 210 is satisfactory to Department, leave well enough alone.
211	O.K.
213	See comment re 210.
214	O.K. With regard to the proposed repeal of Section 16.5, why is not this section a limitation upon the exercise of the powers given in Sections 10500 to 10506? When so considered, I do not see how it conflicts with the last paragraph of section 204. It should be retained.
300	This provision should be restored to Chapter 2, and Section 19 should be retained.
301	O.K.
302	In view of the proposed return of the material in section 300 to Chapter 2, I suggest that the deleted portion of this section be retained. It is open to interpretation as a requirement that the commission specify a time limit in any order closing a stream, which could be what the Legislature desired. Addition of "at any time" o.k.
303 and 305	Why is it necessary to keep the reference to the Government Code? Isn't a statement like the first portion of Section 215 sufficient? O.K. to combine.
304	See comment on Section 302. The "time locks" should be a part of the code, just like Section 219.
306	The Department's suggestion seems inappropriate.

307 In view of the Department's comment, the term "game" in this section appears to have significance and should be retained. If the section is still ambiguous, the Department may be able to suggest clarifying language which can be placed in a "trailer" bill. The wording of the last portion of the first paragraph bears out my comments above on sections 302 and 304.

Why not combine the second paragraph with sections 303 and 305?

308 The suggestion re "gallinaceous guzzler" is o.k., provided the effect of the first phrase of this section is neutralized. Who can fathom the intent of the Legislature on this one, so as to cover satisfactorily the third query? I suggest we leave it be.

309 The suggested expansion would be a "major substantive change" -- too major, in my opinion. Recommend that this provision go back to the sardines.

325 Concur in the Department's suggestions, except as to elimination of the term "preserve". If "preserve" is synonimous with "refuge", the term should be deleted throughout the code. Suggest that any definitions of "big game" and "upland game birds" be included in a trailer bill. Use of the term "area" appears justified by wording of Section 326.

329 O.K.

330 O.K.

331 First portion of the second sentence of this section should be changed to the singular, viz.: "Only a citizen and bona fide resident of the State, possessing, etc., . . . who has not . . ." Suggest that the deletion recommended by Department be placed in a trailer bill. Consideration should be given to the effect the change in the section number will have on the use of the term "this section" in the second sentence.

332 See comments on section 331.

333 I concur in the staff comment.

355 O.K.

356 The next to the last sentence of this section might be incorporated into a general section which would also take care of the provisions of sections 303 and 305 and other similar provisions. What is the meaning of the last sentence of this section? Does it need clarification?

375 O.K.

390 Suggest deletion of second paragraph.

400 O.K.

401 O.K.

702-705 O.K.

704 Suggest deletion.

706 O.K. I do not see any need for a note, since the term "employees" in the second portion of the section would have the same meaning as the term "employees" in the first portion of the section.

707 Suggest that Department's proposed rewording of section be accepted.

708 Does the "incorporation by reference" language of this section serve any purpose? Does it create any problems?

709 Concur in the proposal that sections 709 and 1050 be combined, but suggest that the mandatory language be retained.

710 O.K.

711 Is this provision peculiar to the Fish and Game Department? If not, should not an effort be made to conform the provisions of the section to similar provisions applicable to other State Departments and Commissions? What about members of the Commission -- are they to be forgotten?

730 Recommend incorporation into section 729.

850 O.K.

851 I do not concur in the Department's suggestion.

852 I do not concur in the Department's suggestions.

853 Under this section every deputy would have to execute an official bond, regardless of the amount of his salary. Is this the legislative intent? As I read the present section 21, the bond requirement only applies to a deputy who receives less than $25.00 per month.

854 Why is the full title of the Department retained?

855 If the present wording satisfies the Department, I suggest we leave it alone.

876 O.K.

877 Suggest we leave the section as is.

878 Should not the provisions of this section conform with the provisions of Section 851? Where are the "State laws relating to the protection of fish and game" to be found?

879 O.K.

882 O.K.

1001	O.K.
1004	Should not this section precede section 1001? Or at least section 1003? Should not the present conflict between section 33 and section 1179.5 be resolved? The Department should know, one way or the other, whether it can take a candor. Also, why not rephrase this section in positive, permissive terms? Should it be scientific or propagation purposes, as in this section, or scientific and propagation purposes, as in section 1001?
1005	O.K.
1006-1008	O.K.
1009	Delete "of California" in view of section 40. Otherwise O.K.
1010	O.K.
1011	O.K.
1050	I concur in the Department's suggestions, except the first one, since I think the provision should be mandatory. With regard to the comment of the staff re section 4331, I consider that there is a conflict between the second sentence of section 1050 and section 4331. The logical resolution of this conflict would seem to be to place all of these matters in the hands of the commission. Also, re the wording of section 709, the phrase "in accordance with the applicable provisions of law" in lines 5 and 6 of page 30 should be restored. It is apparent that the provisions of the code which provide for a permit or license do not necessarily prescribe all of the terms and conditions applicable to such permit or license. See, for example, section 1051.
1051	O.K., but change "must" in first line to "shall".
1052	O.K.
1053	O.K.
1054	O.K.

1055 It seems to me that the change suggested by the department would create ambiguity. The first portion of this section would then read:

"The department may issue and deliver licenses and license Tags, for sale to any person except, etc."

This suggests that the licenses would be sold to the person applying for them, whereas such person is intended to be an agent for the sale of the licenses to others.

Why not start section 1055 as follows:

"The department may authorize any person except, etc. to issue and sell licenses and license tags, and may issue and deliver licenses and license tags to persons so authorized without receiving full payment therefor, etc."?

1056 I do not concur in the department's suggestion because there is nothing for the "so" to refer to.

1057 O.K., except strike the words "of California."

1058 Same.

1059 O.K. With regard to the staff note concerning penalties, what is the general practice throughout the codes? I agree that a minor or unintentional infraction of the code should not be a misdemeanor, but is not this a problem basic to all of the codes?

1060 Why use the term "agency" where the term "agent" has appeared everywhere else?

1120 Department suggestion seems O.K.

1121 O.K. except: Is not the term "public agency" too inclusive? It would include a State department, or an agency of the Federal Government.

1123 I do not concur in the suggestion that "shall" be made "may".

1301-1347 O.K.

1301 Should not "the State of California" in the second line become "this State"?

1320 In view of the definition sections, could not this be shortened?

1500	"Fish and Game Commission" should be the "Commission". In view of staff comment, the acreages should remain. Rest of changes O.K.
1502	Suggest that the present wording be retained.
1504	If I understand the Department's suggestion, the term "public shooting grounds" would remain, but in only one place.
1525-1528	What is the department shooting at? If the term "public shooting ground" is obsolete, why not eliminate it entirely from these sections? Remainder of comments of department, O.K. With regard to query 2 under section 1525, I assume that what the Legislature means is that the authority of the department is limited to the acceptance of the donation for the purposes stated in the first phrase of section 1525. The donation shall be used for these purposes, and also, as nearly as may be, for any purpose indicated by the donor. Suggest we leave this part of the law "as is".
1526-1527	Delete "of California" in all places.
1528	The revision suggested by the department is ambiguous. E.g., the phrase "as provided in this Section" made sense in its original context, but it does not make sense in the suggested revision. I recommend keeping the present section, with the deletion of the last paragraph.
1529	I cannot understand the department's comments. I suggest that the section remain "as is".
1530	Suggest remain "as is".
1572	O.K.

2000 Should not the words "Except as otherwise provided" be retained? See, for example, section 1004.

2001 I do not understand why the Department suggests that the existing language of section 453 be retained. The existing language does not make sense. I suggest the proposed revision be approved, modified to conform to the Department's answer to the first query.

2002 Recommend that the Department's suggestions be rejected, except for restoration of the phrase "or parts thereof."

2003 Why not consider the 1956 regulations?

2005 It seems to me that the taking of depredators should be excepted. The object of permitting depredators to be shot is to get rid of them, and if artificial lights help towards this end, they should be permissible.

2006 I am baffled by all comments, other than that suggesting substitution of "firing chamber" for "barrel". This suggestion seems O.K.

2011 O.K.

2012 O.K.

2014 Recommend restoration of the phrase "protected by the laws of" in the second paragraph. Is it not possible that fish outside of the boundaries of the State are protected by the laws of the State? Delete the words "of California".

Title of Chapter 2

2116 I do not understand the reason behind the Department's suggestion.

2151 O.K.

2185 Department recommendation O.K.

2225 Department's suggestion should be placed in a trailer bill.

2250 Suggest that law be left "as is".

2251 Suggestion re "license" for "permit" O.K. Leave rest "as is".

2271 Department's suggestion O.K.

2300 O.K.

2302 O.K.

2304 O.K.

2345 Does this Section serve any purpose?

October 2, 1956

Memorandum to Law Revision Commission

Subject: Report of Committee on Administration of Justice on Six Commission Studies

The Committee on Administration of Justice of the State Bar has reported on six commission studies and recommendations referred to it by the Board of Governors. In one case (Study No. 4 - Survival of actions arising in another state), the Committee on Administration of Justice agreed with us without reservation. In another (Study No. 14 - Appointment of administrator in quiet title action), the Committee on Administration of Justice reported that its Southern Section has not completed its consideration of the matter. This memorandum is addressed to the report of the Committee on Administration of Justice on the other four items, discussing them in the order in which they appear therein.

Study No. 7 - Opposition on ground of convenience of witnesses to motion to change venue.

The Southern Section agreed with the commission. The Northern Section did not and would leave the law as it stands.

All of the arguments stated by the Northern Section for leaving the law as it stands were considered by the commission when this matter was before it. Indeed, they are the arguments which have always been stated in favor of the present rule (see discussion at pages 4-10 of staff report). Counter arguments which the commission found persuasive are stated at 25-27 of the staff report.

One point made by the Northern Section, that the defendant has a right to have the question of where the case is to be tried decided by a judge in his own county, seems questionable. The question in a particular case ought to be decided the same way by any judge in any county. It is at least doubtful that the defendant should be entitled to any "break" which might be thought to arise out of the fact that the question is tried before a local judge.

Study No. 2 - Judicial notice of the law of foreign countries.

The Committee on Administration of Justice agrees in principle with the commission but the Northern and Southern Sections have made the following suggestions for our consideration:

1. That the "advice of persons learned in the subject matter" - i.e., in the foreign law - should be received in open court or at least be made a matter of record in the proceeding.

Comment: The "open court" suggestion would seem to indicate that the Committee on Administration of Justice is thinking in terms requiring recourse to the use of the expert witness when information relating to foreign law is desired by the court. We had, I believe, wanted to avoid limiting the court to this formal method of acquiring information - e.g., to authorize the judge to consider a letter written by an official of a foreign country, a member of our own State Department, or a foreign scholar (See discussion at pp. 19-21 of staff report). It seems likely that in many cases it would be prohibitively expensive to bring the learned person to a California courtroom.

The alternative suggestion of the Southern Section that the "advice" be made a matter of record may be meritorious. This could be done by substituting

for the underlined portion of the next to last paragraph in the proposed statute the following:

> The court may also resort to the advice of persons learned in the subject matter. When such advice is received through a communication not made in open court a copy of the communication or the substance thereof shall be made a matter of record in the proceeding.

The Committee on Administration of Justice's third suggestion is also considered here - i.e., that our proposed amendment of Section 1875 authorizing the courts to resort to "the advice of persons learned in the subject matter" goes beyond the scope of our study in that it would apply to all matters of which the courts are authorized by Section 1875 to take judicial notice. The observation is accurate. My recollection is that we drafted the section as we did advisedly even though we had not made a study of judicial notice generally. If we wish to confine the proposed changes in the statute to the foreign country law problem, this could be done by amending our proposed revision of the next to last paragraph of Section 1875 to read "and, in cases arising under subdivision 4 of this section, to the advice of persons learned in the subject matter".

2(a). That the word "facts" be deleted from the opening sentence of C.C.P. § 1875 to avoid any possible ambiguity as to the effect of the amendments which we propose.

Comment: This seems to be a good suggestion.

2(b). That the proposed legislation expressly state that an issue as to the law of a foreign country is an issue of law and not of fact in all courts.

Comment: Presumably, the Committee on Administration of Justice believes that this is necessary or at least desirable to make it clear that the

question is one for the trial court rather than the jury and that the appellate court is not bound by the trial court's finding on a question of foreign law. We considered proposing statutory provisions on both of these points. It was finally decided, however, that the matter should be handled by simply asserting in the commission's recommendation (p.2) that making foreign country law a matter of judicial notice would have these effects.

Note: This also disposes of point 7 (p.5) in the Committee on Administration of Justice report.

3. This is discussed under 1 above.

4. That there be added to proposed subdivision 4 of C.C.P. § 1875 a reference to the judicial interpretation of the laws and statutes referred to therein so that the construction would be parallel to that of subdivision 3.

Comment: This might be done by adding to subdivision 4 just before "provided", the following "and the interpretation thereof by the highest courts of appellate jurisdiction of the country or political subdivision whose law is involved." But for the fact that subdivision 3 is so drafted, this language would, I should think, hardly be necessary for surely the California courts would consult relevant foreign country decisions in attempting to ascertain the foreign law. However, the Committee on Administration of Justice suggestion that if subdivisions 3 and 4 are different on this point some ambiguity may arise probably has some merit.

If we should decide to amend subdivision 4, two questions arise:

(1) How shall we define the jurisdiction or jurisdictions whose court decisions may be consulted? It may be that in some foreign countries, as distinguished from the United States, the national courts can overrule an

interpretation of the law of a political subdivision by the subdivision's own courts. If so, perhaps we should say something like "and the interpretation thereof by the highest courts of appellate jurisdiction having power authoritatively to interpret them".

(2) Shall we confine our courts to the decisions of the highest courts of appellate jurisdiction of the foreign country? Why not include at least all courts of appellate jurisdiction, thus including foreign equivalents of our federal Courts of Appeals and our California District Court of Appeal? Why not also include the decisions of trial courts or at least those of general jurisdiction?

5. That the phrase "political subdivisions of foreign countries" may be uncertain.

Comment: I do not believe that the courts would be troubled by this.

6. That the proposed provision requiring that reasonable notice be given when a party intends to ask that judicial notice be taken of foreign country law should be "amplified."

Comment: This suggestion is not clear. Apparently the Northern Section is apprehensive that the notice required to be given under the proposed provision will not be given sufficiently in advance of trial to permit the other parties adequate time to prepare on the foreign law issue. This will, depend, of course, on how the provision is administered by the courts. The commission's view was that the matter would best be handled by giving the courts a flexible statute to work with.

If the Committee on Administration of Justice point is thought of sufficient importance to require some modification of the proposed revision of

Section 1875, this might take the form of a requirement that notice be given in all cases in the pleadings or a requirement that notice be given in all cases not less than 30 (or 60 or 90 or 120) days prior to trial. Both of these approaches would seem to be more rigid than is necessary to accomplish the desired result.

7. This is discussed under 2(a) above.

8(a). Comment: The proposed language change does not seem to be clearly superior to the language which we drafted.

8(b). That the proposed last paragraph in Section 1875 be deleted.

Comment: The Northern Section is apparently of either or both of two views: (1) that foreign country law can nearly always be ascertained; (2) that when it cannot the person whose case depends on foreign law should lose on the merits for failure to establish an element essential to his case. The commission's recommendation was, I believe, based on a different view on both of these propositions.

It is true that the reference to the federal and state constitutions is technically superfluous since this limitation exists independently of the statute and is given no additional force by it. However, the language does flag for both court and counsel, who might otherwise not be familiar with them, that there are United States Supreme Court decisions precluding the application of local law to foreign facts.

9. This point appears to be both stated and answered in the Committee on Administration of Justice report.

Study No. 6 - Effective date of order granting a new trial.

A. The Northern Section believes that the commission's recommendation - that new trial orders be effective when pronounced if oral and when signed if written - ".... is a retrogression toward looseness and indefiniteness which will breed controversy". It would prefer a statute along the lines of that proposed by Professor Barrett, our research consultant.

Comment: While I agree personally with the Northern Section, the commission considered the view which the Section has expressed and decided against that view.

B. The report states that the Southern Section agrees with the purpose of the amendments. However, the Section has suggested a statute so different from that proposed by the commission that it appears that their agreement is only that the matter should be clarified.

Comment: In my opinion the ideas suggested by the Southern Section are not particularly helpful and would leave unsolved several problems pointed up in the research consultant's report.

Study No. 3 - Dean Man Statute.

The commission's recommendation was approved by both Sections of the Committee on Administration of Justice. The Southern Section suggested that if the statute proposed by the commission is enacted a parallel revision of subsection 4 of C.C.P. § 1870 should be made.

Comment: C.C.P. § 1870 provides in relevant part:

> 1870. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:
>
> * * *

> 4. The act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person; the act or declaration of a deceased person done or made against his interest in respect to his real property; and also in criminal actions, the act or declaration of a dying person, made under a sense of impending death, respecting the cause of his death.

The point made by the Southern Section is not clear. The statute proposed by the commission would make certain hearsay statements of deceased persons admissible in certain actions. Subdivision 4 of C.C.P. § 1870 makes other hearsay statements of deceased persons admissible. Perhaps the Southern Section means to suggest expanding the categories of cases covered in subdivision 4 or perhaps the Section would go further, as have some states, and make all hearsay statements of deceased persons admissible. Whatever merit either suggestion may have, both appear to be beyond the scope of the commission's authority, which is limited to a study of the Dead Man Statute. In dealing with that matter, the commission was properly led to make a recommendation with respect to relaxing the hearsay rule to offset the disadvantage to decedents' estates involved in repealing the Dean Man Statute. The commission would not appear to be justified, however, in recommending further and unrelated changes as to hearsay. Moreover, the entire subject will be covered in our study of the Uniform Rules of Evidence.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

10/8/56

Report of the Northern Committee to the

Law Revision Commission

Re: Report of the State Bar Committee on
Administration of Justice.

The Northern Committee met on Thursday, October 4, to consider the report of the State Bar Committee on Administration of Justice on those recommendations previously sent to the State Bar which originally had been considered by the Northern Committee. The Northern Committee herewith submits its recommendations as to the action which the Commission should take on the State Bar report on these recommendations.

Study No. 2 - Judicial Notice of the Law of Foreign Countries

The Committee on Administration of Justice agrees in principle with the Commission but the Northern and Southern Sections made a number of suggestions for consideration by the Commission. The suggestions made and the recommendations of the Northern Committee relating to them are as follows:

Suggestion:

"1. In proposed new subsection (4) of Section 1875, it is suggested by the Southern Section that if the court receives 'advice' of persons learned in the law in the subject matter, such 'advice' shall either be given in open court at time of trial or at least shall be made a matter of record in the proceeding or action.

"The Northern Section, independently raised the same general question, suggesting, in effect, that 'advice' should be given when the court is in session."

"3. It is noted by the Northern Section that the amendments would permit 'advice' of an expert where the law of a sister state is in issue; and in all situations where judicial notice is involved. This seems to go

beyond the particular matter under consideration. The Northern Section raised the question whether such is the intent and whether such provisions are required."

Recommendation:

The Northern Committee agrees with the Northern Section and recommends that the authorization to receive the advice of learned persons should be limited to judicial notice of foreign country law.

The Northern Committee does not believe that the advice of learned persons should be received only in open court. It believes that in many cases where it would be impracticable to bring a learned person to California for this purpose it may be possible to obtain reliable information from such a person by correspondence. While such advice would have to be received with caution, it should not, we believe, be excluded. The Committee does agree, however, with the alternative suggestion of the Southern Section of Committee on Administration of Justice that such advice should be made a matter of record in the proceeding and recommends that Section 1875 so provide.

Accordingly, the Northern Committee recommends that the next to last paragraph of the Commission's proposed revision of Code of Civil Procedure Section 1875 be changed to read as follows:

> In all these cases the court may resort for its aid to appropriate books and documents of reference. In cases arising under subdivision 4 of this section, the court may also resort to the advice of persons learned in the subject matter, which advice, if not received in open court, shall be in writing and made a part of the record in the action or proceeding.

Suggestion:

" 2. The word 'fact', at the outset of present Section 1875 ('Courts take judicial notice of the following facts'), caused concern to both sections.

"It is suggested by the Southern Section, that word 'fact' so appearing be deleted; ..."

Recommendation:

The Northern Committee has concluded that this suggestion is well taken and recommends that in the revision of Code of Civil Procedure Section 1875 proposed by the commission the word "facts" be stricken.

Suggestion:

"2. It is suggested by the Southern Section ... that the proposed legislation expressly state that determination of foreign law (i.e., law of a foreign country) is a question of law and not an issue of fact in all courts. The Northern Section also suggests a provision of this type."

"7. The Northern Section also raises the question, as indicated, whether the measure should not provide that foreign law is a matter for the court to decide; further, that no presumption of correctness on appeal would attach to the trial court's determination. The Section noted that the second possible solution in the report of Professor Hogan was similar but did not appear to dispose of the question of presumption of correctness on appeal."

Recommendation:

While the reason for Southern Committee's suggestion is not entirely clear, it presumably arises from a concern that there be no misunderstanding on two points: (1) that in the trial court, the question of foreign country law is one for the judge and not for the jury and (2) that an appellate court is not bound by a trial court's finding as to foreign country law but may determine the matter for itself. In its recommendation, (p.2) the Commission stated its belief that both of these points are made clear by making foreign country law a subject of judicial notice. The Northern Committee has reconsidered the matter

but has not reached a different conclusion. Technically, a court takes judicial notice of all law which it applies - e.g., California law, federal law, sister-state law. It is clear that all such questions are for the trial court rather than the jury and that the appellate court is not bound by the trial court's view of the matter. The same will be true of foreign country law once it is made a subject of judicial notice. Hence, the Northern Committee recommends that no action be taken on these suggestions.

Suggestion:

"4. The Northern Section questions whether, in the reference to 'law and statutes' of foreign countries, there should not be added wording referring to 'judicial interpretations'. The latter phrase is used in present subsection 3 and its omission in new subsection (4) might give rise to ambiguity."

Recommendation:

The Northern Committee recommends that no action be taken on this suggestion because it is not clear that such a provision would be desirable as applied to all foreign countries, many of which have judicial systems quite different in many respects from our own. Some questions which have occurred to the Northern Committee in considering this proposal are the following: (1) how such a provision would apply as to countries which do not follow the rule of stare decisis; (2) whether the provision would not be unduly restrictive as applied to countries in which commentaries of learned writers are more authoritative than judicial decisions as to what the law is; and (3) whether a provision limiting recourse to the decisions of the appellate courts of highest jurisdiction would make sense as applied to foreign countries. The Northern Committee believes that the matter is sufficiently covered in the next to last paragraph of the Commission's proposed revision of Code of Civil Procedure Section 1875 which authorizes the courts in all cases to resort for aid to "appropriate books or documents of

reference"; surely books containing the judicial decision of foreign country courts would be included in these.

Suggestion:

> "5. The Northern Section also noted the phrase 'political subdivisions of foreign countries' may be uncertain. Will it be given a technical meaning?"

Recommendation:

The Northern Committee recommends that the Commission take no action on this suggestion. The language referred to is taken from the Model Judicial Notice of Law Act. The Committee feels that the Commission has chosen the broadest and most appropriate phrase to express its idea. The only way to further clarify the point would be to attempt to specify the various types of political subdivisions included which would involve the risk that certain types of governmental entities would be inadvertently omitted. The Committee is confident that the courts will apply the provision broadly and sensibly rather than technically.

Suggestion:

> "6. The Northern Section was of the view that the words 'reasonable notice' in provisions requiring a party to give such notice if he asks that judicial notice be taken, should be amplified. Frequently, considerable time is required for preparation on the issue of foreign law."

Recommendation:

The Northern Committee recommends that the Commission take no action on this suggestion. Apparently the Northern Section of CAJ is concerned that the notice will not be given in sufficient time for counsel to prepare on the foreign law issue. This will depend, of course, on how the provision is administered by the courts. The Northern Committee believes that it is sounder to give the courts a flexible statute to work with than to impose a rigid notice requirement -

e.g., by requiring the matter to be set forth in the pleadings. The language in the proposed revision is taken from the Uniform Judicial Notice of Foreign Law Act. The Committee does not believe that it is possible to draft a more specific provision which would nevertheless be sufficiently broad to encompass the many situations in which it may be desirable to take account of foreign country law in deciding a case.

Suggestion:

> "8. In regard to the proposed provisions in the last paragraph of Section 1875, i.e., that if the court is unable to determine what the foreign law is, it may, as the ends of justice require, either apply the law of this State or dismiss the action without prejudice:
>
> "(a) These provisions met with the approval of the Southern Section, which suggests a minor re-arrangement of language. The first clause would read 'If the law of a foreign country or a political subdivision of a foreign country is not determinable, the court may,' etc."

Recommendation:

The Northern Committee recommends that the Commission take no action on this suggestion. The Committee believes that the language suggested by the Southern Section may carry a different meaning, or at least a different emphasis, than the language proposed by the Commission and that the latter more precisely expresses the idea the Commission has in mind.

Suggestion:

> "8(b). The Northern Section believes that the entire paragraph should be deleted. It believes that litigants are entitled to a determination of the question of foreign law by the court and the court should make the determination. If the trial court is wrong, it is stated, appellate review is available."

Recommendation:

The Northern Committee recommends that the Commission take no action on this suggestion. It is not completely clear why the Northern

Section believes that the proposed last paragraph of Section 1875 should be deleted. Apparently, the Northern Section is of either or both of two views: (1) that foreign country law can nearly always be ascertained; or (2) that when it cannot the person whose case depends on foreign law should lose on the merits for failure to establish an element essential to his case. The Commission's proposed revision is based on a different view of both these propositions.

With regard to the first proposition, the Northern Committee believes that the research consultant's report shows that it is not always possible to ascertain the law of a foreign country on a specific point even after diligent effort. This has been the experience of the New York and Massachusetts courts and there is no reason to assume that the situation will be different in California. With regard to the second proposition, the Northern Committee believes that the Commission's proposed revision is the best solution to the problem of what a court should do when it is unable, through its own efforts and with the assistance of counsel, to determine the applicable foreign country law. The Committee believes that it is unnecessarily harsh in such a case to decide the case on the merits against the party having the burden of showing what the foreign country law is. This was the result in the recent case of Walton v. Arabian American Oil Co., 233 F.2d 541 (2d Cir. 1956) decided under the New York law, and it is an injustice which the Commission's proposed revision will avoid.

One course of action available to a court in some cases under the Commission's proposed revision is to decide the case under the applicable California law. This is what the California courts are doing at the present time in all cases by the use of a highly questionable presumption that the foreign country law is the same as California law. The second course of action authorized by the Commission's proposed revision, however, goes beyond the present practice

and gives the court power to dismiss the action without prejudice if it concludes that the case either can constitutionally be decided or should be decided only under the foreign country law. The Northern Committee believes that this broad grant of discretionary power is a better solution to the problem than either the present law or the rule applied in the Walton case.

Suggestion:

"8(b). The Northern Section also believes that the wording referring to state and federal constitutions, in this paragraph, is superfluous."

Recommendation:

The Northern Committee recommends that the Commission take no action on this suggestion. Although the reference to the federal and state constitutions is technically superfluous, it does call the attention of both court and counsel to the fact that there are United States Supreme Court decisions precluding the application of local law to facts occurring in a foreign country.

Suggestion:

"9. The Southern Section called attention to the fact that this Committee recommended the substantial revision of Probate Code Sec. 259, et seq. (July-August, 1956 Journal, p. 310). The amendment to Section 249.1 recommended by the Commission (see above), would be inconsistent with certain provisions of the revision of Section 259, et seq., recommended by this Committee. Note: The Board of Governors later determined not to sponsor the revision of Probate Code Sec. 259, et seq., at the coming session of the Legislature, as the Commission has the subject matter on an Agenda."

Recommendation:

The Northern Committee recommends that the Commission take no action on this suggestion since the facts stated in the""Note", above, eliminate the problem referred to by the Southern Section.

Study No. 6 - Effective Date of New Trial Orders

Suggestion:

"The Northern Section of this Committee is of the opinion that the present case law is preferable and, stating:

> The Section does not approve the amendment of C.C.P. 660 proposed by the California Law Revision Commission; instead it believes that the modern case law is preferable and that the new trial order to be effective should be either a written order signed and filed or an order entered in the minutes, within the 60-day period. (It may be noted that this is substantially the proposal of the Commission's research assistant. See "A study relating to effective date of new trial orders in relation to Section 660 of the Code of Civil Procedure", pp. 23 and 27.)
>
> The Section believes this alternative is preferable because it establishes a definite, orderly, and clear record. It makes for an easily identified action. It is consistent with general practice on other types of orders and with the effective date of new trial orders for the purposes of appeal. On the other hand, the Commission's proposal often will leave open the determination of when the judge made the order. It is a retrogression toward looseness and indefiniteness which will breed controversy.

"The Southern Section of this Committee approves the purpose of the amendments but suggests that the proposed amendment be limited to the purpose sought to be accomplished.

The Southern Section also suggests the following principle:

> Expiration of the 60-day period shall not automatically determine a motion for a new trial where (a) an order granting the motion in whole or in part has been entered; or (b) has been orally pronounced within the 60-day period in open court in the presence of the parties, unless, in the latter event, a written order or minute order granting the motion in whole or in part has not been entered within _____ days of the expiration of the 60-day period.

The Southern Section also suggests the following:

> In respect to an order granting the motion, it shall be deemed to have been determined on the date of the entry of the written order or minute order to that effect."

Recommendation:

The Northern Committee refers this matter to the Commission without recommendation on the merits but with a recommendation that the entire Commission re-examine its recommendation to the Legislature in the light of the views of practicing attorneys reflected by the suggestions of the State Bar.

Respectfully submitted,

Mr. Bert W. Levit, Chairman
Mr. Thomas E. Stanton, Jr.
Professor Samuel D. Thurman

Report of the Southern Committee to the

Law Revision Commission

Re: Report of the State Bar Committee on Administration of Justice

The Southern Committee met on Saturday, October 6, to consider the report of the State Bar Committee on Administration of Justice on those recommendations previously sent to the State Bar which originally had been considered by the Southern Committee. The Southern Committee herewith submits its recommendations as to the action which the Commission should take on the State Bar report on these recommendations.

Study No. 3 - Code of Civil Procedure

Section 1880 - The Dead Man Statute

Suggestion:

> "The Southern Section, in addition to approving the principle and recommendation, suggested that if proposed Section 1880.1 is enacted, subsection (4) of C.C.P. 1870 should also be amended to conform to the liberalization provided by Section 1880.1."

Recommendation:

The Southern Committee recommends that the commission take no action on this suggestion. The Southern Section's recommendation is not clear; it may be that the categories of cases covered in Code of Civil Procedure Section 1870 (4) should be expanded or that the commission should go further and recommend that all hearsay

statements of deceased persons be made admissible. Whatever merit either suggestion may have, both appear to be beyond the scope of the commission's authority, which is limited to a study of the Dead Man Statute. In dealing with that matter, the commission was properly led to make a recommendation with respect to relaxing the hearsay rule to offset the disadvantage to decedents' estates involved in repealing the Dead Man Statute. The commission would not appear to be justified, however, in recommending further and unrelated changes as to hearsay. Moreover, the entire subject will be covered in the study of the Uniform Rules of Evidence.

Study No. 7 - Retention of Venue for Convenience of Witnesses

Suggestion:

"The Northern Section opposed the proposed amendment, stating:

'The Section disagrees with the proposal and favors the present law. It believes that there is merit in the argument in support of the present rule: That an adequate and reliable determination of the convenience of witnesses issue cannot be made until the case is at issue. The proposed change would lead to an argument on the need for witnesses in support of pleadings not yet in existence. When answer is filed there is a reasonably clear situation presumably carefully developed by the pleading process. This is actual and real. The proposal would create an artificial situation at a premature state of the proceedings for the court to rule on.

'Moreover, the plaintiff has himself selected the wrong court in the first place. If there be some procedural difficulty, it is of plaintiff's choosing. The fact that he started the action in the improper county should not be used as leverage for changing an

existing practice based upon entirely sound reasons and the substitution therefor of a kind of hypothetical case upon which the court may dispose of the convenience of witnesses question.

'Finally, the amendment would, to some extent, impair the right of the defendant to his venue. That is, to have the case tried at his residence and, if not tried there, to have the question of where it is to be tried, determined by the judge in that county. Again, because the plaintiff improperly commenced the action this right should not be invaded.' "

Recommendation:

The Southern Committee recommends that the commission take no action on this suggestion. All of the arguments stated by the Northern Section for leaving the law as it standswere considered by the commission when this matter was before it. The Southern Committee believes that this is simply one of two possible ways of viewing the matter and recommends that the commission remain firm in its conclusion that the counter arguments are more persuasive than those stated by the Northern Section.

Respectfully submitted,

Stanford C. Shaw, Chairman
John D. Babbage