AGENDA FOR MEETING

OF

LAW REVISION COMMISSION

November 1 & 2, 1957

1. Minutes of meeting of October 3 & 4, 1957 (Sent earlier).
2. Law Revision Commission 1958 Annual Report (Sent earlier).
3. Northern Committee recommendations on submitted suggestions (Minutes of meeting of Northern Committee and other material enclosed).
4. Report on status of current studies (Sent earlier).
5. Re-referred matters (See minutes of meeting of Northern Committee enclosed):
    a. Study No. 1, Suspension of Absolute Power Alienation.
    b. Study No. 6, Effective Date of Order Ruling on Motion for New Trial.
    c. Study No. 8, Marital "For and Against" Testimonial Privilege.
    d. Study No.32, Arbitration.
6. Study No. 25 - Prob. Code §259 (Memorandum No. 1 and other material enclosed).
7. Study No. 31 - Doctrine of Worthier Title (Memorandum No. 2 and draft of statutes enclosed).
8. Study No. 37(L) - Claims Statute (Research study and recommendations of Southern Committee sent earlier).

Continued...

9. Study No. 34(L) - Uniform Rules of Evidence--Rule 63 and Subdivisions 1, 4, 5, 6, 7, 8, 9 (Material sent earlier; please refer to earlier letter suggesting material to bring).

MINUTES OF MEETING

OF

NOVEMBER 1 AND 2, 1957

San Bernardino

Pursuant to the call of the Chairman, the Law Revision Commission met on November 1 and 2, 1957, at San Bernardino, California.

PRESENT:

Mr. Thomas E. Stanton, Jr., Chairman
Mr. John D. Babbage, Vice-Chairman
Honorable James A. Cobey
Honorable Clark L. Bradley
Honorable Roy A. Gustafson
Mr. Bert W. Levit
Mr. Charles H. Matthews
Mr. Stanford C. Shaw
Professor Samuel D. Thurman
Mr. Ralph N. Kleps, ex-officio

Mr. John R. McDonough, Jr., the Executive Secretary, and Miss Louisa R. Lindow, the Assistant Executive Secretary, were also present.

The minutes of the meeting of October 3 and 4, 1957, which had been distributed to the members of the Commission prior to the meeting, were unanimously approved.

I. ADMINISTRATIVE MATTERS

A. 1958 Report of the Law Revision Commission: The Commission considered a draft of the 1958 Report of the Law Revision Commission prepared by the Executive Secretary (a copy of which is attached to these minutes). In the course of the discussion a number of changes in the draft were agreed upon. Among the decisions taken were the following:

(1) The report should include a section on the 1957 legislative program of the Commission;

(2) Items in the Calendar of Topics Selected for Study should set forth in a single list rather than by year of authorization;

(3) Topics Selected for Future Consideration should be listed and described in the body of the report rather than in the appendix;

(4) Section I of the report should include a description of the Commission's procedure, including a reference to its liaison with the State Bar and the Judicial Council, and to the fact that its research consultants are attorneys at law and faculty members of the California law schools; and

(5) that the citation for the bound volume should hereafter be 1 Cal. Law Revision Comn. Rep.____.

The Commission unanimously agreed that the Chairman and the Executive Secretary be authorized to put the 1958 Report in final form

pursuant to the action taken and send it to the State printer without further review by the Commission. The Commission authorized the Executive Secretary to send a typewritten copy of the final draft of the Report to the Council of State Governments.

In discussing the 1958 Report, the Commission considered whether in the future the concurrent resolution should list studies in progress as well as those recommended for future study by the Commission. A motion was made by Senator Cobey, seconded by Mr. Gustafson, and unanimously adopted that the resolution continue to be submitted in form heretofore submitted.

B. Committee System Discontinued: The Commission discussed whether the committee system should be continued. A motion was made by Mr. Bradley and seconded by Mr. Babbage that the committee system heretofore used by the Commission be discontinued. The motion carried:

Ayes: Babbage, Bradley, Cobey, Gustafson, Levit, Matthews, Thurman.

Noes: Stanton.

Not present: Shaw.

A motion was made by Mr. Bradley and seconded by Mr. Babbage that the Chairman be authorized to call both regular and special meetings of the Commission. The motion carried:

Ayes: Babbage, Bradley, Cobey, Gustafson, Levit, Matthews, Thurman.

Noes: Stanton.

Not present: Shaw.

A motion was made by Mr. Levit and seconded by Mr. Babbage that (1) at a special meeting of the Commission no matter may be considered or acted upon except as provided in the call; and (2) at a general meeting any matter brought before the Commission may be acted upon. It was unanimously agreed to amend this motion by striking out both "considered or" and all of the motion following the semicolon. As amended, Mr. Levit's motion (that at a special meeting no matter shall be acted upon except as provided in the call) was adopted as follows:

Ayes: Babbage, Bradley, Cobey, Gustafson, Levit, Matthews, Thurman.

Noes: Stanton.

Not present: Shaw.

It was agreed that all Commission members are to receive notice of all special meetings called by the Chairman.

C. 1958-1959 Budget: The Executive Secretary reported that (1) he and Mr. Stanton had attended the Department of Finance hearing on the 1958-59 budget; (2) the new position of Intermediate Stenographer-Clerk was approved on a one-year basis; (3) additional information was requested on several matters and (4) it appears that there will be no substantial difficulty with the budget insofar as the Department of Finance is concerned.

D. Bound Volumes: The Executive Secretary reported that one-half of the Commission's bound volumes have been delivered and that it had been discovered that these volumes were incorrectly compiled as to sequence. He reported that he was negotiating with the State printer to have these volumes redone and that delivery of the other one-half of the volumes would be delayed until the errors in compilation were corrected by the State printer. The Executive Secretary reported that he will procure mailing book jackets for the purpose of distributing the bound volumes.

E. Estimated Costs re Addressing Law Revision Commission Mailing List: The Commission considered a Memorandum on Estimated Costs re Addressing Law Revision Commission Mailing List (a copy of which is attached to these Minutes). A motion was made by Mr. Babbage, seconded by Senator Cobey, and unanimously adopted that the Executive Secretary be authorized to proceed with the most advantageous method of establishing a permanent mailing list with a local firm furnishing such service.

II. AGENDA

The Commission considered a number of suggestions for revision of the law which had been received from members of the Bench and Bar, along with the Staff reports and Northern Committee recommendations relating to them. The following action was taken:

A. Immediate Study: The Commission decided that the following items should be placed on the 1958 Agenda of Topics Selected for Immediate Study:

(1) A study to determine whether statutes relating to service of process by publication should be revised in light of recent decisions of the United States Supreme Court.[Suggestion No. 226]

(2) A study to determine whether the law relating to the right of a tenant under a renewal lease to remove trade fixtures should be revised.[Suggestion No. 209]

(3) A study to determine whether the doctrine of election of remedies should be abolished in cases involving different defendants.[Suggestion No. 207]

(4) A study to determine whether Section 1974, of the Code of Civil Procedure, which precludes liability for a misrepresentation respecting the credit of a third person unless the misrepresentation is in writing should be repealed or revised. [Suggestion No. 196]

(5) A study to determine whether a statute should be enacted depriving a deserting spouse of his intestate share of the other spouse's estate.[Suggestion No. 197]

B. Hold: The Commission decided that the following items should be Accepted for Study but not to be included on the 1958 list of Topics Selected for Immediate Study.

A study to determine whether Section 1962, Subdivision 5 of the Code of Civil Procedure (conclusive presumption of paternity when spouses cohabiting) should be repealed in view of the conclusiveness of blood tests in negating paternity and the effect generally given to blood tests under 1980.6 of the Code of Civil Procedure. [Suggestion No. 13(2)]

A study to determine whether Section 108 of the Probate Code should be revised to make Probate Code Sections 228 and 229 inapplicable to the situations to which it applies.[Suggestion No. 192]

C. Postponed: The Commission postponed consideration of Suggestion No. 181 pending action by the 1959 Session of the Legislature on Article IX of the Uniform Commercial Code.

D. Not Accept: The Commission decided that Suggestion No. 9 should not be accepted for study and should be referred to the Motor Vehicle Advisory Committee.

The Commission considered and decided not to accept Suggestion No. 221, that creditors of joint tenants be given greater protection.

During the discussion of this subject it was decided that the Staff should prepare for the Commission's consideration a formal suggestion that the Commission study the problems created by the Tomaier doctrine; i.e., the rule that parol evidence is admissible to show that property taken in joint tenancy was intended to be community property.

The Commission considered the Northern Committee's recommendations relating to suggestions to "not accept", "consolidate" and "hold" as set forth in the minutes of its meeting of October 21, 1957 (a copy of which is attached to these minutes). A motion was made by Mr. Bradley, seconded by Mr. Babbage, and unanimously adopted that consideration of these recommendations be deferred to the next meeting of the Commission.

III. CURRENT STUDIES

Study No. 1 - Suspension of the Absolute Power of Alienation: The Commission considered the Northern Committee's recommendation relating to this study as set forth in the minutes of its meeting of October 21, 1957 (a copy of which is attached to these minutes). After the matter was discussed a motion was made by Mr. Gustafson, seconded by Mr. Thurman, and unanimously adopted that the Commission accept the Northern Committee's recommendation that the Commission's recommendation on this subject should be presented again to the 1959 Session of the Legislature, and that as a preliminary step it should be discussed with the Senate Interim Judiciary Committee.

Study No. 6 - Effective Date New Trial Order: The Commission considered (1) the Northern Committee's recommendation relating to this study as set forth in the minutes of its meeting of October 21, 1957 (a copy of which is attached to these minutes) and (2) a memorandum prepared by the Executive Secretary (a copy of which is attached to these minutes). After the matter was discussed, a motion was made by Mr. Levit, seconded by Mr. Shaw, and unanimously adopted that the Commission accept the Northern Committee's recommendation that the Commission recommend to the 1959 Session of the Legislature that Section 660 of the Code of Civil Procedure be revised to make the effective dates of orders ruling on motions for new trials the date of entry of an order in the permanent minutes and the date of the filing of a written order.

Study No. 8 - Marital "For and Against" Testimony Privilege:

The Commission considered the Northern Committee's recommendation relating to this study as set forth in the minutes of its meeting of October 21, 1957 (a copy of which is attached to these minutes). After the matter was discussed a motion was made by Senator Cobey, seconded by Mr. Shaw, and unanimously adopted that the Commission accept the Northern Committee's recommendation that no further action be taken on this study pending final disposition of Study No. 34(L), Uniform Rules of Evidence.

Study No. 25 - Probate Code Sections 259-259.2: The Commission considered the research study prepared by Professor Harold Horowitz, the recommendations of the Southern Committee set forth in the minutes of its meeting on September 21, 1957 (a copy of which is attached to these minutes) a draft prepared by the Staff of legislation designed to effectuate the Committee's recommendation (a copy of which is attached to these minutes) and a Memorandum by Mr. William B. Stern commenting on an earlier draft of Professor Horowitz's study and recommending certain amendments of Probate Code Section 259 (a copy of which is attached to these minutes).

The Commission discussed whether Probate Code Sections 259-259.2 should be repealed and whether an impounding statute should be enacted. A motion was made by Mr. Gustafson, seconded by Mr. Levit, and unanimously adopted that the Commission recommend the enactment of an impounding statute.

A motion was made by Mr. Gustafson and seconded by Mr. Levit, that the Commission recommend the repeal of Probate Code Sections 259, 259.1 and 259.2. The motion carried:

Ayes: Bradley, Gustafson, Levit, Matthews, Stanton, Thurman.

Noes: Cobey.

Not present: Babbage, Shaw.

The Commission then turned to a detailed discussion of the draft of an impounding statute prepared by the Staff. It first discussed subparagraph (c)(3) of Section 1; a motion was made by Senator Cobey,

seconded by Mr. Gustafson, and unanimously adopted that this sub-paragraph be deleted.

The Commission discussed whether Section 2 of the proposed impounding statute should include a provision for the payment of reasonable attorney's fees to the attorney representing the person on whose behalf the money is impounded. A motion was made by Mr. Babbage and seconded by Mr. Thurman, that there should be no reference to attorneys fees in Section 2. The motion carried:

Ayes: Babbage, Gustafson, Levit, Matthews, Thurman.

Noes: Bradley, Cobey, Stanton.

Not present: Shaw.

A motion was made by Mr. Levit and seconded that the Commission recommend that a separate section be enacted to provide for the payment out of the impounded funds, at the time when the funds are paid out thereunder, of reasonable attorney's fees to both the attorney representing the person on whose behalf the money was impounded and the attorney representing the person to whom the funds are paid. The motion carried:

Ayes: Bradley, Cobey, Gustafson, Levit, Matthews.

Noes: Babbage, Stanton, Thurman.

Not present: Shaw.

A motion was then made by Mr. Babbage and seconded by Mr. Bradley, that the statute providing for attorney's fees should be extended to provide for the payment of such fees in cases where the property escheats to the State under Section 5. The motion did not carry:

Ayes: Babbage, Bradley.

Noes: Cobey, Gustafson, Levit, Matthews, Stanton, Thurman.

Not present: Shaw.

The following changes in the impounding statute prepared by the Staff were also agreed upon:

(1) In subparagraph (c)(1) of Section 1 the word "substantial" should be inserted before "benefit".

(2) Subparagraph (c)(2) of Section 1 should be deleted and Section 1 should be revised to include a rebuttable presumption that a person will not have the substantial benefit or use or control of the money or other property due him if he is a resident of a country designated by the Secretary of the Treasury, etc.

(3) In Section 2 additional financial institutions, such as savings and loan associations, should be included in those in which impounded funds may be deposited.

(4) The petitions referred to in Sections 2 and 3 should be required to be verified.

(5) All references to Probate Code Sections 259-259.2 should be deleted.

(6) Provision should be made in Section 4 for the disposition of the funds in the event that the first person designated thereunder shall be a disqualified alien heir, and similar provision should be made for a case in which the second person designated be similarly disqualified, etc.

(7) The statute should provide that any motion made pursuant to Sections 2, 3 and 4 must be made on notice and a copy of the notice served on the Attorney General and such other persons the court shall direct.

(8) Additional minor changes should be made.

It was agreed that the Commission will consider a revised draft of the proposed impounding statute at its next meeting. The Executive Secretary was directed to present a memorandum at that time covering two points: (1) should a person for whom an impoundment is made be able to assign his right to the impounded funds and, if so, should the assignee's right to receive the funds be determined without reference to whether the assignor could then receive them; and (2) how have the New York Courts interpreted and applied the provision of their impounding statute which is similar to subparagraph (c)(1) of the proposed statute, with particular reference to whether they have, in effect, read "substantial" into it before "benefit".

Study No. 31 - Doctrine of Worthier Title: The Commission considered the research study on this subject prepared by Professor Harold E. Verrall, its prior action on this matter as set forth in the Minutes of the Meeting of the Commission on August 2 and 3, 1957 (a copy of which is attached to these minutes) and a draft of proposed statutory enactments to abolish the doctrine of worthier title in both testamentary and inter vivos cases which had been prepared and distributed at the meeting (a copy of which is attached to these minutes).

The Commission discussed whether abolition of the doctrine of worthier title in wills cases should be accomplished by amendment of Probate Code Section 108 as recommended by the Staff. A motion was made by Mr. Bradley and seconded by Mr. Thurman, that the Commission recommend the enactment of a new Section of the Probate Code for this purpose. The motion carried:

Ayes: Babbage, Bradley, Cobey, Levit, Matthews, Stanton, Thurman.

Noes: Gustafson

The Commission then discussed what form the new section of the Probate Code should take. A motion was made by Senator Cobey and seconded by Mr. Thurman that the new section should utilize language contained in the Staff's revised proposal with certain specified changes and deletions. The motion carried:

Ayes: Babbage, Bradley, Cobey, Gustafson, Matthews, Stanton, Thurman.

Noes: Levit.

A motion was then made by Mr. Gustafson and seconded by Mr. Bradley that the Commission recommend enactment of a similar new section of the Civil Code to abolish the doctrine of worthier title in inter vivos cases. The motion carried:

Ayes: Babbage, Bradley, Cobey, Gustafson, Matthews, Stanton, Thurman.

Noes: Levit.

The Commission considered (1) whether the new Probate Code and Civil Code sections ought to apply in the interpretations of existing documents; (2) whether such application would be constitutional; (3) whether if nothing were said in the new sections, they would be so applied by the courts; and (4) whether the new sections should specifically state whether they are to apply to existing documents. The Staff was directed to prepare a memorandum on these questions.

The Commission authorized the Chairman and the Executive Secretary to draft new Probate Code and Civil Code Sections in the form discussed by the Commission and to send copies of the draft statutes to the State Bar with a letter stating that the Commission would welcome the views of the State Bar on the several questions raised in the preceding paragraph.

Study No. 32 - Arbitration: The Commission considered the recommendation of the Northern Committee as set forth in the minutes of its meeting of October 21, 1957 (a copy of which is attached to these minutes). After the matter was discussed, a motion was made by Mr. Levit, seconded by Mr. Shaw, and unanimously adopted that the Commission postpone consideration of this matter until the next meeting and that in the meantime the Executive Secretary furnish copies to the members of the Uniform Arbitration Act, the study prepared by Mr. Kagel of the Uniform Arbitration Act and his own memorandum on Mr. Kagel's study.

Study No. 34(L) - Uniform Rules of Evidence: The Commission deferred consideration of this study to the next meeting at which time Professor Chadbourn will be present. The Commission directed the Executive Secretary to send to the members of the State Bar Committee appointed to consider the Uniform Rules of Evidence the minutes of the Commission meeting October 3 and 4 relating to this study and all of Professor Chadbourn's material received to date, stating in his covering letter that neither the minutes nor the study reflect the final action of the Commission.

A motion was made by Mr. Stanton, seconded by Mr. Gustafson, and unanimously adopted that Professor Chadbourn should receive part payment of one-half of the amount specified in the present contract.

There being no further business the meeting was adjourned.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

Agenda Item #2

STATE OF CALIFORNIA

Report of the

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

To the Governor and the Legislature of the
State of California at the Legislative
Session of 1958

March 1, 1958

LETTER OF TRANSMITTAL

To HIS EXCELLENCY GOODWIN J. KNIGHT
Governor of California
and to the Members of the Legislature

The California Law Revision Commission, created in 1953 to examine the common law and statutes of the State and to recommend such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law and to bring the law of this State into harmony with modern conditions (Government Code, Sections 10300 to 10340), herewith submits this report of its transactions during the year 1957.

THOMAS E. STANTON, Jr., Chairman
JOHN D. BABBAGE, Vice Chairman
JAMES A. COBEY, Member of the Senate
CLARK L. BRADLEY, Member of the Assembly
ROY A. GUSTAFSON
BERT W. LEVIT
CHARLES H. MATTHEWS
STANFORD C. SHAW
SAMUEL D. THURMAN
RALPH N. KLEPS, Legislative Counsel,
Ex Officio

JOHN R. McDONOUGH, Jr.
Executive Secretary

March 1, 1958

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REPORT OF THE CALIFORNIA LAW REVISION

COMMISSION FOR THE YEAR 1957

I. FUNCTION OF COMMISSION

The California Law Revision Commission was created by Chapter 1445 of the Statutes of 1953. The Commission consists of one Member of the Senate, one Member of the Assembly, seven members appointed by the Governor with the advice and consent of the Senate, and the Legislative Counsel who is an ex officio, nonvoting member.

The principal duties of the Law Revision Commission are set forth in Section 10330 of the Government Code which provides that the Commission shall, within the limitations imposed by Section 10335 of the Government Code:

(a) Examine the common law and statutes of the State and judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms.

(b) Receive and consider proposed changes in the law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, any bar association or other learned bodies.

(c) Receive and consider suggestions from judges, justices, public officials, lawyers, and the public generally as to defects and anachronisms in the law.

(d) Recommend, from time to time, such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the

law of this State into harmony with modern conditions.[1]

The Commission's program is fixed in accordance with Section 10335 of the Government Code which provides:

> The Commission shall file a report at each regular session of the Legislature which shall contain a calendar of topics selected by it for study, including a list of the studies in progress and a list of topics intended for future consideration. After the filing of its first report the Commission shall confine its studies to those topics set forth in the calendar contained in its last preceding report which are thereafter approved for its study by concurrent resolution of the Legislature. The Commission shall also study any topic which the Legislature, by concurrent resolution, refers to it for such study.

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[1] The Commission is also directed to recommend the express repeal of all statutes repealed by implication or held unconstitutional by the Supreme Court of the State or the Supreme Court of the United States. CAL. GOVT. CODE §10331.

II. PERSONNEL OF COMMISSION

Honorable Jess R. Dorsey of Bakersfield, Member of the Senate for the Thirty-fourth Senatorial District, was reappointed as the Senate Member of the Commission at the beginning of the 1957 Session of the Legislature, and resigned from the Commission at the end thereof. Honorable James A. Cobey of Merced, Member of the Senate for the Twenty-fourth Senatorial District, was thereupon appointed as the Senate Member of the Commission.

Honorable Clark L. Bradley of San Jose, Member of the Assembly for the Twenty-eighth Assembly District, was reappointed as the Assembly Member of the Commission at the beginning of the 1957 Session of the Legislature.

Mr. Thomas E. Stanton, Jr. of San Francisco was reappointed to the Commission by Governor Knight in October, 1957 upon the expiration of his first term of office.

Mr. Bert W. Levit of San Francisco resigned from the Commission effective January 1, 1957 because of the burden of his duties as President of the California School Trustee's Association. At the end of his term in the latter office he was reappointed to the Commission by the Governor in October, 1957.

Mr. Charles H. Matthews of Los Angeles was appointed to the Commission in October, 1957 to fill the vacancy created by the resignation of Mr. Joseph A. Ball of Long Beach.

Honorable Roy A. Gustafson of Oxnard, District Attorney of

Ventura County, was appointed to the Commission by the Governor in October, 1957, to fill the vacancy created by the untimely death of John H. Swan of Sacramento.

As of the date of this report the membership of the Law Revision Commission is:

			Term Expires
Thomas E. Stanton, Jr.	San Francisco	Chairman	Oct. 1, 1961
John D. Babbage	Riverside	Vice Chairman	Oct. 1, 1959
Hon. James A. Cobey	Merced	Senate Member	*
Hon. Clark L. Bradley	San Jose	Assembly Member	*
Hon. Roy A. Gustafson	Oxnard	Member	Oct. 1, 1961
Bert W. Levit	San Francisco	Member	Oct. 1, 1961
Charles H. Matthews	Los Angeles	Member	Oct. 1, 1959
Stanford C. Shaw	Ontario	Member	Oct. 1, 1959
Samuel D. Thurman	Stanford	Member	Oct. 1, 1959
Ralph N. Kleps	Sacramento	Ex Officio Member	**

The Law Revision Commission held its third election of officers in October, 1957. Mr. Thomas E. Stanton, Jr. was re-elected chairman and Mr. John D. Babbage was re-elected vice chairman.

On September 24, 1957 Miss Louisa R. Lindow was appointed assistant executive secretary of the Commission to fill the vacancy created by the resignation of Mrs. Virginia B. Nordby.

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* The legislative members of the Commission serve at the pleasure of the appointing power.

** The Legislative Counsel is an ex officio nonvoting member of the Law Revision Commission.

III. SUMMARY OF WORK OF COMMISSION

During 1957 the Law Revision Commission was engaged in four tasks:

1. Presentation of its 1957 legislative program to the Legislature.[2]

2. Work on assignments given to the Commission by the 1955, 1956 and 1957 Sessions of the Legislature.[3]

3. Preparation of a calendar of topics selected for study to be submitted to the Legislature for its approval at the 1958 Session, pursuant to Section 10335 of the Government Code;[4] and

4. A study, made pursuant to Section 10331 of the Government Code, to determine whether any statutes of the state have been held by the Supreme Court of the United States or by the Supreme Court of California to be unconstitutional or to have been impliedly repealed.[5]

In 1957 the Commission met on March 1 and 2 in Sacramento, on April 26 in Sacramento, on August 2 and 3 at Stanford, and on October 3 and 4 at Monterey. In addition, the Northern Committee of the Commission met in San Francisco on May 4, July 26 and September 19; and the Southern Committee met in Los Angeles on June 8, July 27 and September 21.

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[2] See Part IV of this report, p. 9 infra.
[3] See Part VA of this report, p.14 infra.
[4] See Part VB of this report, p.20 infra.
[5] See Part VI of this report, p.22 infra.

IV. 1957 LEGISLATIVE PROGRAM OF COMMISSION

A. TOPICS SELECTED FOR STUDY

Pursuant to Section 10335 of the Government Code, the Law Revision Commission included in its 1957 Report to the Legislature a list of fourteen topics which it had selected for study. Honorable Clark L. Bradley, the Assembly Member of the Commission, introduced a concurrent resolution authorizing the Commission to study these topics. The resolution was amended by the Legislature to add four additional topics for study, and was adopted.[6] The topics authorized for study by this resolution are included in the list of studies in progress contained in this report.[7]

B. OTHER MEASURES

In 1957 the Law Revision Commission presented its first major legislative program to the Legislature. Thirteen bills prepared by the Commission were introduced by its legislative members. Of these, seven became law. Of the others, one was withdrawn by the Commission for further study, one was vetoed by the Governor, and four failed to pass in the Senate. The following is a brief summary of the legislative history of these thirteen bills:[8]

6 Cal. Stat. 1957, res. c. 202, p.
7 See Part VA of this report, p.14 infra.
8 For a fuller description of the legislative history of these measures, see 1 Rep., Studies and Rec. of Cal. Law Rev'n. Comm., pp. VII - XII.

Fish and Game Code: Assembly Bill No. 616, introduced by Mr. Bradley and Honorable Pauline L. Davis, Member of the Assembly for the Second Assembly District, embodied the Revised Fish and Game Code prepared by the Commission pursuant to Resolution Chapter 204 of the Statutes of 1955.[9] After a number of amendments were made to the bill, it was passed by the Legislature and signed by the Governor, becoming Chapter 456 of the Statutes of 1957.

Maximum Period of Confinement in a County Jail: Senate Bill No. 30 was introduced by Senator Dorsey to effectuate the recommendation of the Commission on this subject.[10] After minor amendments were made to the bill it was passed by the Legislature and signed by the Governor, becoming Chapter 139 of the Statutes of 1957.

Notice of Application for Attorney's Fees and Costs in Domestic Relations Actions: Senate Bill No. 29 was introduced by Senator Dorsey to effectuate the recommendation of the Commission on this subject.[11] After several amendments, primarily of a technical character, had been made in the bill, it was passed by the Legislature and signed by the Governor, becoming Chapter 540 of the Statutes of 1957.

Taking Instructions to the Jury Room: Senate Bill No. 33 was introduced by Senator Dorsey to effectuate the recommendation of the

9 See 1957 Rep. Calif. Law Rev'n. Comm'n., 13-14.
10 For the Commission's study and recommendation on this subject, see 1 Rep., Studies and Rec. Calif. Law Rev'n. Comm'n., p. A-1.
11 For the Commission's study and recommendation on this subject, see id., p. B-1.

Commission on this subject.[12] Thereafter, there came to the Commission's attention a number of practical problems involved in making a copy of the court's instructions available to the jury in the jury room, for which provision was not made in the bill. Since there would not have been an adequate opportunity to study these problems and amend the bill during the 1957 Session, the Commission determined not to seek enactment of the bill but to hold the matter for further study.

Dead Man Statute: Assembly Bill No. 247 was introduced by Mr. Bradley to effectuate the recommendation of the Commission on this subject.[13] The bill was passed by the Assembly, but was tabled by the Senate Judiciary Committee.

Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere: Assembly Bill No. 250 was introduced by Mr. Bradley to effectuate the recommendation of the Commission on this subject.[14] The bill was passed by the Legislature and signed by the Governor, becoming Chapter 490 of the Statutes of 1957.

Marital "For and Against" Testimonial Privilege: Assembly Bill No. 248 was introduced by Mr. Bradley to effectuate the recommendation of the Commission on this subject.[15] The bill was passed by the Assembly. It was very substantially amended to meet objections raised

12 For the Commission's study and recommendation on this subject, see id., p. C-1.
13 For the Commission's study and recommendation on this subject, see id., p. D-1.
14 For the Commission's study and recommendation on this subject, see id., p. E-1.
15 For the Commission's study and recommendation on this subject, see id., p. F-1.

by the Senate Judiciary Committee, becoming in effect primarily a bill to restate and clarify existing law, but failed to pass in the Senate.

Suspension of the Absolute Power of Alienation: Assembly Bill No. 249 was introduced by Mr. Bradley to effectuate the recommendation of the Commission on this subject.[16] The bill was passed by the Assembly but did not pass in the Senate.

Elimination of Obsolete Provisions in Penal Code Sections 1377 and 1378: Senate Bill No. 35 was introduced by Senator Dorsey to effectuate the recommendation of the Commission on this subject.[17] The bill was passed by the Legislature and signed by the Governor, becoming Chapter 102 of the Statutes of 1957.

Judicial Notice of the Law of Foreign Countries: Assembly Bill No. 251 was introduced by Mr. Bradley to effectuate the recommendation of the Commission on this subject.[18] After technical amendments were made to the bill, it was passed by the Legislature and signed by the Governor, becoming Chapter 249 of the Statutes of 1957.

Effective Date of an Order Ruling on a Motion for a New Trial: Senate Bill No. 36 was introduced by Senator Dorsey to effectuate the recommendation of the Commission on this subject.[19] The bill was amended and passed by the Legislature, but was vetoed by the Governor.

16 For the Commission's study and recommendation on this subject, see id., p. G-1.
17 For the Commission's study and recommendation on this subject, see id., p. H-1.
18 For the Commission's study and recommendation on this subject, see id., p. I-1.
19 For the Commission's study and recommendation on this subject, see id., p. K-1.

Retention of Venue for Convenience of Witnesses: Assembly Bill No. 246 was introduced by Mr. Bradley to effectuate the recommendation of the Commission on this subject.[20] The bill was passed by the Assembly but did not pass in the Senate.

Bringing New Parties into Civil Actions: Senate Bill No. 34 was introduced by Senator Dorsey to effectuate the recommendation of the Commission on this subject.[21] The bill was amended and passed by the Legislature and was signed by the Governor, becoming Chapter 1498 of the Statutes of 1957.

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20 For the Commission's study and recommendation on this subject, see id., p. L-1.

21 For the Commission's study and recommendation on this subject, see id., p. M-1.

V. CALENDAR OF TOPICS SELECTED FOR STUDY

A. STUDIES IN PROGRESS

During 1957 the Commission had as its current study agenda the following topics for study, each of which it had been authorized and directed by the Legislature to undertake.[22] Most of these topics were recommended for study by the Commission pursuant to Government Code Section 10335; descriptions of them are contained in the 1955, 1956 and 1957 reports of the Commission to the Legislature.

1. Whether Sections 2201 and 3901 of the Corporations Code should be made uniform with respect to notice to stockholders relating to sale of all or substantially all of the assets of a corporation.[23]

2. Whether there is need for clarification of the law respecting the duties of city and county legislative bodies in connection with planning procedures and the enactment of zoning ordinances when there is no planning commission.[24]

3. Whether the Penal Code and the Vehicle Code should be revised to eliminate certain overlapping provisions relating to the

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22 The legislative authority for the studies on this list is as follows:
Nos. 1 and 2: Cal. Stat. 1955, res. c. 207, p.
Nos. 3 through 20: Cal. Stat. 1956, res. c. 35, p.
No. 21: Cal. Stat. 1956, res. c. 42, p.
Nos. 22 through 39: Cal. Stat. 1957, res. c. 202, p.
No. 40: Cal. Stat. 1957, res. c. , p.
No. 41: Cal. Stat. 1957, res. c. , p.
No. 42: Cal. Stat. 1957, res. c. , p.

23 For a description of this topic, see 1955 Rep. Cal. Law Rev'n. Comm'n. 27.

24 Id. at 32.

unlawful taking of a motor vehicle and the driving of a motor vehicle while intoxicated.[25]

4. Whether the procedures for appointing guardians for nonresident incompetents and nonresident minors should be clarified.[26]

5. A study of the provisions of the Code of Civil Procedure relating to the confirmation of partition sales and the provisions of the Probate Code relating to the confirmation of sales of real property of estates of deceased persons to determine (a) whether they should be made uniform and (b) if not, whether there is need for clarification as to which of them governs confirmation of private judicial partition sales.[27]

6. Whether the law relating to motions for new trial in cases where notice of entry of judgment has not been given should be revised.[28]

7. Whether the provisions of the Civil Code relating to rescission of contracts should be revised to provide a single procedure for rescinding contracts and achieving the return of the consideration given.[29]

8. Whether the law respecting mortgages to secure future advances should be revised.[30]

9. Whether Probate Code Sections 259, 259.1 and 259.2, pertaining to the rights of nonresident aliens to inherit

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25 See 1956 Rep. Calif. Law Rev'n. Comm'n. 19.
26 Id. at 21.
27 Id. at 22.
28 Ibid.
29 Id. at 23.
30 Id. at 24.

property in this state, should be revised.[31]

10. Whether the law relating to escheat of personal property should be revised.[32]

11. Whether the law relating to the rights of a putative spouse should be revised.[33]

12. Whether the law respecting post-conviction sanity hearings should be revised.[34]

13. Whether the law respecting jurisdiction of courts in proceedings affecting the custody of children should be revised.[35]

14. Whether the doctrine of worthier title should be abolished in California.[36]

15. Whether the Arbitration Statute should be revised.[37]

16. Whether the law in respect of survivability of tort actions should be revised.[38]

17. Whether the law of evidence should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference.

18. Whether the law respecting habeas corpus proceedings in the

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31 Id. at 25.
32 Ibid.
33 Id. at 27.
34 Id. at 29.
35 Id. at 31.
36 Id. at 33.
37 Ibid.
38 Id. at 34.

trial and appellate courts should, for the purpose of simplification of procedure to the end of more expeditious and final determination of the legal questions presented, be revised.

19. Whether the law and procedure relating to condemnation should be revised in order to safeguard the property rights of private citizens.

20. A study of the various provisions of law relating to the filing of claims against public bodies and public employees to determine whether they should be made uniform and otherwise revised.

21. A study to determine what the inter vivos rights of one spouse should be in property acquired by the other spouse during marriage while domiciled outside California.[39]

22. A study to determine whether the law relating to attachment, garnishment, and property exempt from execution should be revised.[40]

23. A study to determine whether a defendant in a criminal action should be required to give notice to the prosecution of his intention to rely upon the defense of alibi.[41]

24. A study to determine whether the Small Claims Court Law should be revised.[42]

39 See 1957 Rep. Calif. Law Rev'n. Comm'n. 14.
40 Id. at 15.
41 Id. at 16.
42 Ibid.

25. A study to determine whether the law relating to the rights of a good faith improver of property belonging to another should be revised.[43]

26. A study to determine whether the separate trial on the issue of insanity in criminal cases should be abolished or whether, if it is retained, evidence of the defendant's mental condition should be admissible on the issue of specific intent in the trial on the other pleas.[44]

27. A study to determine whether partnerships and unincorporated associations should be permitted to sue in their common names and whether the law relating to the use of fictitious names should be revised.[45]

28. A study to determine whether the law relating to the doctrine of mutuality of remedy in suits for specific performance should be revised.[46]

29. A study to determine whether the provisions of the Penal Code relating to arson should be revised.[47]

30. A study to determine whether Civil Code Section 1698 should be repealed or revised.[48]

31. A study to determine whether minors should have a right to counsel in juvenile court proceedings.[49]

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43 Id. at 17.
44 Id. at 18.
45 Ibid.
46 Id. at 19.
47 Id. at 20.
48 Id. at 21.
49 Ibid.

32. 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.[50]

33. 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.[51]

34. 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.[52]

35. A study to determine whether the doctrine of sovereign or governmental immunity in California should be abolished or revised.

36. A study to determine whether an award of damages made to a married person in a personal injury action should be the separate property of such married person.

37. A study of the Juvenile Court Law to determine whether changes in that law or in existing procedures should be made so that the term "ward of the juvenile court" would be inapplicable to nondelinquent minors.

38. A study to determine whether a trial court should have the power to require, as a condition of denying a motion for

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50 Id. at 23.
51 Id. at 24.
52 Id. at 25.

new trial, that the party opposing the motion stipulate to the entry of judgment for damages in excess of the damages awarded by the jury.

39. A study to determine the advisability of having a separate code for all laws relating to narcotics.

40. A study to determine whether the laws relating to bail should be revised.

41. A study to determine the feasibility of codifying and clarifying, without making substantive change, provisions of law and other legal aspects relating to grand juries into one title, part, division, or chapter of one code.

B. TOPICS INTENDED FOR FUTURE CONSIDERATION

Section 10335 of the Government Code provides:

> The Commission shall file a report at each regular session of the Legislature which shall contain a calendar of topics selected by it for study, including a list of the studies in progress and a list of topics intended for future consideration. After the filing of its first report the Commission shall confine its studies to those topics set forth in the calendar contained in its last preceding report which are thereafter approved for its study by concurrent resolution of the Legislature. The Commission shall also study any topic which the Legislature, by concurrent resolution, refers to it for such study.

Pursuant to this section the Commission reported 23 topics which it had selected for study to the 1955 Session of the Legislature; 16 of these topics were approved. The Commission reported 15 additional topics which it had selected for study to the 1956 Session, all of which were approved. The 1956 Session of the Legislature also referred

four other topics to the Commission for study. The Commission reported 14 additional topics which it had selected for study to the 1957 Session, all of which were approved. The 1957 Session of the Legislature also referred seven additional topics to the Commission for study.

The Commission now has a heavy work load which will require the major portion of its energies to complete during the current fiscal year and during fiscal year 1958-59. It is anticipated, however, that the Commission will be able to undertake a limited number of additional assignments after January 1, 1959. Accordingly, the legislative members of the Commission will introduce at the 1958 session of the Legislature a concurrent resolution authorizing the Commission to study new topics. These topics are described in Appendix A of this report.

VI. REPORT ON STATUTES REPEALED BY IMPLICATION OR HELD UNCONSTITUTIONAL

Section 10331 of the Government Code provides:

> The Commission shall recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the Supreme Court of the State or the Supreme Court of the United States.

The Commission has examined the cases decided by the Supreme Court of the State and the Supreme Court of the United States since its 1957 report was prepared. No decision of either court holding any statute of the state either unconstitutional or repealed by implication has been found.[53]

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53 Our study of the reports has been carried through A.C. and S. Ct. Reports.

VII. RECOMMENDATIONS

The Law Revision Commission respectfully recommends that the Legislature authorize the Commission to study the topics listed in Part IV B of this report.

Respectfully submitted,

Thomas E. Stanton, Jr., Chairman
John D. Babbage, Vice Chairman
James A. Cobey, Member of the Senate
Clark L. Bradley, Member of the Assembly
Roy A. Gustafson
Bert W. Levit
Charles H. Matthews
Stanford C. Shaw
Samuel D. Thurman
Ralph N. Kleps

John R. McDonough, Jr.
Executive Secretary

MEMORANDUM - Estimated Costs re Addressing
Law Revision Mailing List

All costs are rough approximations based on a mailing list of 1,000 names.

1. Estimated cost to contract work out to a local firm.

Initial cost to set up plates (12¢ per plate - 5 line address)	$120.00
Cost for storage trays - 5 trays ($2.50 per tray - 200 plates per tray)	12.50
Total	$132.50

Cost to run off list, 1¢ per plate....$10.00

Subsequent cost to change address, 12¢ per plate

Equipped to handle different lists, i.e., automatic and optional; and different categories within list, i.e., attorneys, judges, with no added costs.

2. Estimated cost to contract work to Stanford

Initial cost to set up cards	$200.00

Cost to run off list ...$15.00 to $20.00

All estimated costs are based on machine and operator time, $2.70 per hour. Equipped to handle different lists and different categories within lists.

3. Estimated cost for purchase of addressograph machine with all necessary equipment.

Hand operated machine 30" x 18"	$215.00
Typewriter attachment	3.10
Moistener	11.00
Storage cabinet with 9 trays	67.00
Total	$296.10

MINUTES OF MEETING

OF

NORTHERN COMMITTEE

October 21, 1957

San Francisco

Members	Research Consultant
Mr. Thomas E. Stanton, Jr.	Mr. H. G. Pickering

Staff

Mr. John R. McDonough, Jr.
Miss Louisa R. Lindow

The Committee considered a number of suggestions for revision of the law which had been received from members of the Bench and Bar and decided upon the following recommendations to the Commission.

Approved for Study

The Committee recommends that the following suggestions be approved for study by the Commission:

Suggestion Nos.: 9

13(2) This study should not receive too high a priority.

181 Unless Article IX, Uniform Commercial Code, covers the subject matter.

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197 The community property aspect should also be included.

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226 A comprehensive study of Calif. law should be made in light of the Mullane and Walker cases.

Not Accepted

The Committee recommends that the following suggestions not be accepted for study and that various of them be disposed of in the manner indicated:

Suggestion Nos.: 29(1)

53 -Too controversial a subject.

74 -Refer to Judicial Council, attention Mr. J.D. Strauss.

97 -Acted upon by the 1957 Conference of the State Bar Delegates.

119(2) -Matter falls in area of primary concern to other State agency.

129(2)

132(21)

132(22)-A policy problem.

143 -A matter the Commission is not ready to undertake.

147 -A matter the Commission is not ready to undertake.

152 -A matter the Commission is not ready to undertake.

154 -Refer to legislative members.

157

158(1) -A legislative interim committee is studying this problem.

160 -Too controversial.

164(12)

164(13)-Matter falls in area of primary concern to other State agency.

164(14)

166(3) -Refer to State Bar.

166(4) -Refer to State Bar.

171 -Matter falls in area of primary concern to other State agency.

183 -Refer to State Bar.

184

185 -Refer to Legislative Counsel.

189 -A policy problem.

199 -Too controversial.

201

203 -Refer to Legislative Counsel.

204 -Refer to Joint Legislative Committee to Revise Education Code, Attention Mr. W. Henderson.

205

208 -Refer to Joint Legislative Committee to Revise Education Code, Attention Mr. W. Henderson.

210 -Matter falls in area of primary concern to other State agency.

213 -A policy matter.

215(1)-Refer to State Bar.

215(2)-Refer to State Bar.

218 -Matter falls in area of primary concern to other State agency.

219

220 -Matter falls in area of primary concern to other State agency.

225 -Refer to State Bar.

Consolidate

The Committee recommends that the following suggestions be consolidated with other existing studies:

Suggestion Nos.:	Recommend Consolidate with Study:
26	52(L) -Sovereign Immunity
36	53 -Personal Inj. Recovery as Separate Property
40	52(L) -Sovereign Immunity
42(2)	39 -Attachment, etc.
49	37(L) -Claims Statute
58	39 -Attachment, etc.
79	57(L) -Bail study
88	52(L) -Sovereign Immunity
101	37(L) -Claims Statute
119(1)	35(L) -Habeas Corpus
135(1)	10 -Pen. Code §19a
158(3)	35(L) -Habeas Corpus
202	39 -Attachment, etc.
211	52(L) -Sovereign Immunity
212	53 -Personal Inj. Recovery as Separate Property
214	39 -Attachment, etc.

Suggestion Nos.:	Recommend Consolidate with Study:
216	53 -Personal Inj. Recovery as Separate Property
217(2)	39 -Attachment, etc.

Hold

The Committee recommends that Suggestions No. 10, 31(1), 31(2) and 200 be held pending the final disposition of Study No. 34(L), Uniform Rules of Evidence.

SUGGESTION No. 226

(Originated by Stanford Staff
on basis of suggestion by
Professor Joseph W. Hawley)

The Commission may wish to study the effect upon California statutory provisions for notice of judicial proceedings to persons affected by them, of two recent United States Supreme Court cases, Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950) and Walker v. City of Hutchinson, 352 U.S. 115 (1956). Prior to the Mullane case it was widely assumed that in all in rem actions, notice by publication is sufficient to afford interested persons due process of law under the Fourteenth Amendment. This belief was largely attributable to the dictum in the famous case of Pennoyer v. Neff, 95 U.S. 714, 727 (1878), that constructive service by publication "may answer in all actions which are substantially proceedings in rem."

The Mullane and Walker cases, however, in effect overrule that dictum and undoubtedly require many states to review their notice requirements and to modify those statutes which now allow actions based on notice by publication to known parties in interest.

The Mullane case involved an accounting by the trustee of a common trust fund, under the procedure established by the New York Banking Law §100-c(12) providing that the petitioner for such an accounting need only publish a notice addressed to all interested parties generally without naming them. In declaring the statute unconstitutional, the Supreme Court said that due process requires notice reasonably calculated to inform interested parties

of the pendency of the action, where conditions reasonably permit -- notice which a person actually desiring to contact the missing party would use. It should quite probably inform persons affected, or if there is no reasonable method available which is likely to give actual notice, the means adopted should not be substantially less likely to give actual notice than any of the feasible substitutes. The Court held that under such a standard there was no justification for a statute authorizing the trustee to give notice in a manner less likely actually to inform the beneficiaries whose names and addresses were on file with the trustee than notice by ordinary mail. It said, however, that notice by publication would be sufficient in the case of persons whose interests or whereabouts were not known. The Court's statement that the power of a state to resort to constructive service does not rest on a classification by that state's courts of a particular action as in rem or in personam suggested that this classification is immaterial in determining whether a defendant had been accorded due process, and that notice by publication might not suffice in any in rem action.

Whether the rational of the Mullane decision would be applied by the Supreme Court to real property actions was, however, open to some doubt. The Walker case, decided six years later, settled that doubt by extending the Mullane holding to eminent domain cases. The Court held that where a Kansas landowner's name was known to a city which was proceeding to fix compensation for the condemnation of his property, newspaper publication alone of notice of the proceedings did not measure up to due process requirements.

Following the Mullane case but prior to the Walker decision, an extensive study was made by John Wilson Perry of various state statutes

likely to be affected by the Mullane doctrine, both in the field of trust accountings and in other areas. Perry, "The Mullane Doctrine - A Reappraisal of Statutory Notice Requirements," Current Trends in State Legislation (U. of Mich. Law School 1952) 32-144. The question posed was whether the Supreme Court would consider Mullane as a first step in laying down a comprehensive doctrine of actual notice wherever reasonably possible, or whether it would treat the case as a radical holding and retreat to the idea that publication, though ineffective, is a sufficient means of giving notice because of its widespread practice. Perry viewed the Supreme Court's observations as to the inefficacy of publication and the reasonableness and feasibility of notice by mail as an indication of the Court's willingness to hold publication insufficient in all actions against known parties. Perry at 125. He concluded that "the various state statutes which now allow actions based on notice by publication to known parties in interest, should be modified to require notice by mail to those parties whose names and addresses are known or can be easily discovered. Perry at 128-129. Mr. Perry's conclusion appears to be borne out in the Walker case.

California Statutes

Mr. Perry included a survey of California law in his study. The conclusion which may be drawn from his discussion is that none of the California provisions which he found appears to be an obvious violation of the Mullane doctrine but that there are a few which are questionable. All of the latter are contained in the Probate Code.

The California provision for common trust funds is completely silent as to accounting. Fin. Code §1564. In the trust field generally, there is provision requiring notice by mail to all "beneficiaries" in

accountings for testamentary trusts, whether they request notice or not. Prob. Code §1120. Another section, however, provides for notice by mail only to those parties who have requested it or given notice of appearance. Prob. Code §1200. While the language of the former section indicates that it is intended to control over the latter, Perry suggests that if the latter still has any force or is followed in practice in trust accountings, the fact that the beneficiaries are told by the statute that there may be an accounting might not be adequate since they do not known when it will be. He points out that the Mullane case did not indicate that the New York statute would have been sufficient if it had required notice by mail only to those beneficiaries who had filed a written request for it. Perry at 82-83.

With respect to accountings by executors and administrators of decedents' estates, the California theory is that the settlement of accounts is just one step in the proceeding to settle the decedent's estate. Notice of the original petition to admit the will to probate or to appoint an administrator in the case of intestacy is required to be served personally or by mail, to persons whose whereabouts are known. Prob. Code §§326-328, 441, but when the executor or administrator settles his accounts additional notice need be given only to those persons who have requested it or given notice of appearance in the proceedings. Prob. Code §1200. Notice by mail is therefore required at some stage in the settling of decedents' estates, which includes an accounting, and the Supreme Court seems to have accepted this "one proceeding" theory as affording due process to all persons who were notified of the first step. Goodrich v. Ferris, 214 U.S. 71 (1909).

Notwithstanding Perry's analysis of the Goodrich case as representing tacit acceptance of the "one proceeding" theory, he suggests that the theory

may be subject to attack by certain individuals, for example an heir whose location was unknown when the first notice was given but whose address is later learned by the executor; or a person who had no right to notice when the first steps were taken in settling the estate but who later acquired a vested interest in the estate (such as one who, during the proceedings, marries an heir who then dies). Referring to such situations, Perry states (p. 137):

> The acceptability of the "one proceeding" theory in the eyes of the Supreme Court seems to rest on the presumption that the interested party in question was given notice personally or by mail at the start of the proceeding. If the presumption fails, then, in all probability, the "one proceeding" theory will fail as an excuse for lesser notice of later steps. In that case the notice given by posting or publication only at later stages in the proceeding may fail to meet the test of the due process clause.

The foregoing observations with respect to testamentary trust accountings and the settling of decedents' estates are equally applicable in two other California proceedings pointed out by Perry. One is the petition by the administrator of a decedent's estate for permission to sell real property from the estate. The petition is treated as a later step in the action to administer the estate, the action having been commenced with notice by mail to all interested parties whose addresses were known; and notice of the petition is given by publication and by mail to those who have indicated that they want notice of later steps in the administration. Prob. Code §§755, 1200; see Perry at 105-106. The other concerns a guardian's petition for permission to settle claims against or to modify obligations to his ward's estate. Here again California provides for notice by publication and by mail only to those who have requested notice or who have appeared in the guardianship proceedings. Prob. Code §§1530a, 1200; see Perry at 110.

One instance in which California provides for notice only by publication involves the notice which an administrator must give to creditors to file their claims against his decedent's estate. Prob. Code §700. Perry believes, however, that the Supreme Court would be more reluctant to require notice by mail in this situation, because only Michigan requires notice by mail (Mich. Stat. Anno. §§27.3178 (412), 27.3178 (32) (1951), and the lack of personal notice to creditors is an "old established procedure," (although it may be noted that federal bankruptcy proceedings require notice by mail to creditors, 11 U.S.C.A. §§25, 35, 94). Perry at 106-107.

Other California statutes, some of which were mentioned by Perry and all of which appear to comply with the Mullane and Walker requirements of notice personally or by mail to known parties in interest, are as follows:

1. General notice provisions applying to all actions except those where a more limited statute specifically authorizes a different procedure - Code Civ. Proc. §§412, 413.

2. Inter vivos trust accountings - Civ. Code §2282. No specific notice provision, so the general rules as to actions apply (Code Civ. Proc. §§412, 413).

3. Appointment of guardians for minors - Prob. Code §1441.

4. Appointment of guardians for incompetents - Prob. Code §1461.

5. Adoption, when petitioner does not have written consent of parents - Civ. Code §224.

6. Divorce - (cannot be granted by default) - Civ. Code §130.

7. Garnishment - no special provision, so the general rules as to actions apply (Code Civ. Proc. §§412, 413).

8. Partition - Code Civ. Proc. §757. Requires service "as in other cases" (Code Civ. Proc. §§412, 413).

9. Actions to quiet title - Code Civ. Proc. §750.

10. Foreclosure actions - Code Civ. Proc. §726. No specific notice provision, so the general rules as to actions apply (Code Civ. Proc. §§412, 413).

11. Escheat - Code Civ. Proc. §1410.

12. Eminent domain - Code Civ. Proc. §1245.

13. Assessments - Streets and Highways Code §§5362, 5363.

14. Administration and distribution of estates of missing persons - Prob. Code §283.

Conclusion

A Law Revision Commission study of this matter may be desirable for several purposes:

1. To clarify the present ambiguity in Probate Code Sections 1120 and 1200;

2. To consider whether the "one proceeding" theory is unsound or constitutional or policy grounds in some or all of the cases to which it applies;

3. To determine whether notice by mail to creditors of a decedent's estate should be required; and

4. To see whether there are any California statutory notice provisions not discovered by Mr. Perry (whose study was confined to statutes common to many states) which would be vulnerable to attack under the Mullane-Walker doctrine.

I. Robert Harris

Suggestion No. 209

Originator: Elwood M. Rich, Judge

Chambers of
ELWOOD M. RICH
Judge of the Municipal Court

Court House Annex
Riverside, California

MUNICIPAL COURT
Riverside Judicial District
in and for
County of Riverside

18 October 1956

Professor John R. McDonough, Jr.
Executive Secretary
California Law Revision Commission
School of Law, University of Stanford
Palo Alto, California.

Dear Sir:

It is my desire to bring to your attention an existing rule of case law which I feel should be changed by statute, because this rule is grossly unjust, is contrary to what would be the normal intention of the parties, and constitutes a trap for the unwary.

Section 1019 of the Civil Code gives to tenants the right, in general, of removing trade fixtures which the tenant has affixed to the landlord's property. This is of course a salutary rule. However, under existing case laws, if at the end of the tenant's lease he enters into a new lease with his landlord and neglects to reserve in this new lease the right to remove trade fixtures, then under the law he forfeits those trade fixtures to the landlord. Thus, if a person operating a restaurant, grocery store, beauty parlor, etc., upon entering into a new lease with a landlord at the termination of the old lease --if he neglected to reserve the right to remove his trade fixtures in the new lease -- he would forfeit the trade fixtures to the landlord.

This rule, I submit, is unfair, contrary to the normal intentions and expectations of both landlord and tenant and constitutes a trap for the many tenants who enter into new leases with their landlords without the benefit of a lawyer's advice that is necessary to reserve the right to remove the trade fixtures in the new lease. In fact, I venture to say that there are many lawyers that do not know of the existence of this unsound rule of law. It seems to me that the rule is totally illogical and that there isn't a scintilla of good that can be had from it.

This rule has been announced in such cases, among others, as Wadman vs. Burke, 147 Cal 354; and Woods vs. Bank of Haywards, 10 Cal Ap 93, Page 96. The following is a quotation of the rule as set forth in this latter case:

> "If a tenant, at the close of his term, renews his lease, and acquires a fresh interest in the premises, he should take care to reserve his right to remove such fixtures as he had a right to sever under the old tenancy. For when his continuance in possession is under a new lease or agreement, his right to remove is determined, and he is in the same situation as if the landlord, being seised of the land together with the fixtures, had demised both to him."

I would very much appreciate your opinions on this matter.

Yours very truly,

/s/ Elwood M. Rich

ELWOOD M. RICH
Judge of the Municipal Court

EMR:nr

REPORT ON SUGGESTION NO. 209

Judge Rich of the Municipal Court, Riverside Judicial District, suggests that a rule of case law in the area of trade fixtures constitutes a trap for unwary tenants, whereby they may, through ignorance or oversight, suffer the forfeiture of trade chattels which they have affixed to the leased premises.

The term "fixture" has been variously defined, but it is generally used in reference to some originally personal chattel which has been actually or constructively affixed to realty. Such a chattel upon affixation is considered in law a part of the realty so that it becomes at once the property of the owner of the realty, even though originally owned by his lessee. Earle v. Kelly, 21 Cal. App. 480, 132 Pac. 262 (1913).

There are two main exceptions to this rule. One is that an agreement in the lease, permitting the lessee to remove fixtures which he has placed on the premises, is controlling. The other, referred to as the "trade fixtures" doctrine, allows a tenant to remove, even in the absence of such agreement, domestic or ornamental fixtures, or structures and appliances designed to be put to certain special uses such as for the lessee's commercial enterprise. Earle v. Kelly, 21 Cal. App. 480, 132 Pac. 262 (1913). The latter exception is codified in Civil Code section 1019:

> A tenant may remove from the demised premises, any time during the continuance of his term, anything affixed thereto for purposes of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises, unless the

> thing has, by the manner in which it is affixed, become an integral part of the premises.

The trap referred to by Judge Rich is created by cases adhering to a view that the right of removal granted by section 1019 is lost to a tenant if he takes a renewal lease which does not in terms reserve that right. Such a rule has substantial support in this country. See 110 ALR 480, 482. In California, Wadman v. Burke, 147 Cal 351, 353 81 Pac. 1012, 1013 (1905), held squarely that

> "Unless there is some understanding, express or implied, between the lessor and the lessee in the second lease, at the time it was executed, as to the fixtures, the rule of law is as contended by the respondents, that the tenant entitled to remove trade fixtures must avail himself of that right before the expiration of the term of the lease during which they are affixed."

Other California cases have unhesitatingly expressed the rule. Jungerman v. Bovee, 19 Cal 355 (1861); Merritt v. Judd, 14 Cal 59 (1859); Earle v. Kelly, 21 Cal App 480, 132 Pac. 262 (1913).

The courts sometimes avoid potential harshness by holding that where a tenant, upon expiration of his lease, remains in possession under a tenancy which is in substance an extension or continuance of the original lease, his right to remove trade fixtures continues during the extended term. Knox v. Wolfe, 73 Cal.App. 2d 494, 167 P.2d 3 (1946); Woods v. Bank of Haywards, 10 Cal. App. 93, 106 Pac. 730 (1909). Whether this technique affords effective

protection to renewing tenants, however, is doubtful, for in both the Knox and Woods cases the extension consisted not of a newly executed document, but of the lessee's holding over on a month to month basis with the oral permission of the lessor. Support was found in Civil Code Section 1945 which provides that where the lessor accepts rent from a holdover tenant, the parties are presumed to have renewed the lease on the same terms. But it is questionable whether section 1945 can be construed to apply to a situation where a term is renewed through the execution of a new written lease, rather than through a holdover. The court's observations in Earle v. Kelly, 21 Cal. App. 480, 484, 132 Pac. 262, 264 (1913) would seem to indicate that a newly executed lease cannot be merely an extension. That case, furthermore, held that even in the holdover situation a new tenancy is created. And although the court in the Knox case attempted to distinguish the Earle case on the basis of certain provisions in the original lease, it is by no means clear in just what situations a court will find an extension rather than a new tenancy. The present law in California is therefore uncertain, for while the forfeiture rule is firmly established, it is not clear under what circumstances the rule may be avoided. The trap of which Judge Rich speaks is a very real one.

The rule under consideration has not gone without criticism. See e.g. Bergh v. Herring - Hall - Marvin Safe Co., 136

Fed. 368 (2d Cir. 1905). It produces a result often contrary to the intention of the parties, and it is illogical to hold that the lessee has lost his removal right when he could have retained it simply by removing the fixtures at the end of the original term and then replacing them upon the commencement of the new term. Some states have repudiated the rule by judicial decision. See e.g. Ferguson v. O'Brien 76 N.H. 192, 81 Atl.479 (1911); Radey v. McCurdy, 209 Pa. 306, 58 Atl.558 (1904). In Kerr v. Kingsbury, 39 Mich. 150, 154 (1878), the Michigan court, in disapproving Merritt v. Judd, 14 Cal. 59 (1859) an early case expressing the California rule, stated:

> "What could possibly be more absurd than a rule of law which should in effect say to the tenant who is about to obtain a renewal: 'If you will be at the expense and trouble, and incur the loss, of removing your erections during the term, and of afterwards bringing them back again, they shall be yours; otherwise you will be deemed to abandon them to your landlord.'"

It might be noted that at least one state has repudiated the rule by statute. In 1898, Maryland enacted the following provision:

> The right of a tenant to remove fixtures erected by him under one demise or term shall not be lost or in any manner impaired by reason of his acceptance of a new lease of the same premises without any intermediate surrender of possession.

Md. Ann. Code, 1951, art. 53, sec. 38.

I. Robert Harris

Suggestion No. 207

Originator: Judson A. Crane

University of California
HASTINGS COLLEGE OF LAW
198 McAllister Street
San Francisco 2, California

October 17, 1956

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

Dear Mr. McDonough,

I am stimulated by a letter from the chairman of the California Law Revision Committee, and by reading of the decision of Pacific Coast Cheese, Inc. v. Security National Bank of Los Angeles to suggest consideration of the adoption in California of legislation similar to N.Y. Civ. Prac. Act 112(a), (c) which is noted in 52 Harv. Law Rev. 1372.

The citation of the case I deplore is 273 P2d 547, Dist Ct of App, 2d Dist., 1954.

Perhaps this matter of election of remedies as it involves third persons has already been brought to your attention. I have just run across it while teaching a course in Restitution.

Sincerely yours,

/s/ Judson A Crane

Judson A Crane.

REPORT ON SUGGESTION NO. 207

Professor Crane suggests consideration by the Commission of the adoption of legislation similar to sections 112-A and 112-C of the New York Civil Practice Act, which abolish the doctrine of election of remedies in cases where relief is sought against different defendants.

Under the doctrine of election of remedies, the choice of one among two or more available, but inconsistent, remedies bars recourse to the others. It might be observed at the outset that although the doctrine applies where the remedies are sought against different persons, the courts do not frequently mention the distinction between that situation and the case in which the remedies are pursued against the same defendant.

The New York Civil Practice Act reads as follows:

> § 112-A. Rights of action against several persons; no election of remedies. Where rights of action exist against several persons, the institution or maintenance of an action against one, or the recovery against one of a judgment which is unsatisfied, shall not be deemed an election of remedies which bars an action against the others.
>
> § 112-C. Actions in conversion and on contract; no election of remedies. Where rights of action exist against several persons for the conversion of property and upon an express or implied contract, the institution or maintenance of an action against one of these persons, or the recovery against one of them of a judgment which is unsatisfied, for the conversion or upon the contract, shall not be deemed an election of remedies which bars a subsequent action against the others either for conversion or upon the contract.

These sections, and others, were enacted in 1939 pursuant to a recommendation of the New York Law Revision Commission which

was based upon a study covering over 80 printed pages. N.Y. Leg. Doc. (1939) No. 65 (F). In support of its recommendation of Section 112-A, the Commission cited the opinion in Fowler v. Bowery Savings Bank, 113 N. Y. 450, 21 N.E. 172 (1889), which had held one who had sued a forger or person guilty of fraud barred from proceeding against the bank whose negligence permitted the forgery or fraud. Speaking of this decision, the Commission stated:

> No reason other than the supposed inconsistency in legal theory exists why the third party whose negligence has helped to cause the injury, should be exempted from liability because the injured person proceeds first -- but without satisfaction -- against the active wrongdoer.

N.Y. Leg. Doc. (1939) No. 65 (F), 10. As will appear later, Pacific Coast Cheese, Inc. v. Security First National Bank, 273 P.2d 547 (1954), cited in Mr. Crane's Suggestion, reached substantially the same result as did the Fowler decision.

Similarly criticized, and cited by the New York Commission as illustrating the need for section 112-C, was Terry v. Munger, 121 N.Y. 161, 24 N.E. 272 (1889), holding that one whose goods have been converted by several persons and who, waiving the tort, sues one of them on an implied contract theory, cannot sue the others for conversion even though his judgment is unsatisfied. N.Y. Leg. Doc. (1939) No. 65 (F), 10.

Almost everything written about the election of remedies doctrine seems to be criticism of it. Particularly in the situation under discussion -- where the defendants in the successive actions

are different -- there seems little reason for requiring an election, since, it has been pointed out, the chief justification for the doctrine lies in preventing double vexation of a particular defendant. Furthermore, it forces undue emphasis on the theory of pleading. See, e.g., Note, 52 Harv. L. Rev. 1372 (1939). The United States Supreme Court has said:

> At best this doctrine of election of remedies is a harsh, and now largely obsolete rule, the scope of which should not be extended,...

Friederichsen v. Renard, 247 U.S. 207, 213, 38 S. Ct. 450, 452, (1918).

California Cases

The present law in California is not clear. Many, but not all, of the decisions avoid holding that a binding election has occurred, by limiting the rule to estoppel situations. This was one of the grounds for the decision in Perkins v. Benguet Consolidated Mining Co., 55 Cal. App.2d 720, 132 P.2d 70 (1942), holding that a wife's unsatisfied judgment against her husband for dividends paid to him on stock registered in the wife's name was not a bar to her action to recover such dividends from the corporation which had made the wrongful payments.

The District Court of Appeals decision in the Pacific Coast Cheese case (supra), cited by Mr. Crane in his suggestion, is an example of cases which have not required an estoppel situation.

The court there affirmed a directed verdict for the defendant, holding, inter alia, that a bank depositor who had recovered a judgment against its employee for the amount obtained by the latter through raised checks, had elected his remedy and could not thereafter sue the bank. The California Supreme Court, however, (which Mr. Crane failed to mention), reversed the trial court on the ground that the plaintiff's recovery of judgment against its employee had placed the bank in no worse position, stating:

> The doctrine [of election of remedies] is based on estoppel and, when applicable, operates only if the party asserting it has been injured. [citing many cases]

Pacific Coast Cheese, Inc. v. Security First National Bank, 45 C.2d 75, 80, 286 P.2d 353, 356 (1955).

It should not be overlooked, however, that the District Court of Appeals decision is supported by a substantial line of authority. A similar case in 1953 held that where a defrauded bank depositor had been partially reimbursed by its surety and had accepted the latter's promise to make good the entire loss in the event of failure to recover in an action against the bank, the depositor had waived its claim against the bank for paying out money on forged indorsements. Hensley-Johnson v. Citizens National Bank, 122 C.A.2d 22, 264 P.2d 973 (1953). Cf. Sommer v. Bank of Italy, etc. Association, 109 Cal.App.370, 293 Pac.98 (1930) (reemployment of and acceptance of partial restitution from fraudulent employee, held not to preclude claim by depositor against bank for unpaid balance).

A somewhat different type of case is Foster v. Los Angeles Trust and Savings Bank, 36 Cal. App. 460, 172 Pac. 392 (1918). Ten percent of the purchase price of certain cars was deposited with the defendant bank by a purchaser to be turned over to the seller upon delivery. On the buyer's refusal to accept delivery, the seller sold the property at public auction and then recovered judgment against the buyer for the difference between the contract and sale price, (this amount being greater than the sum on deposit at the bank). Apparently unable to collect the judgment, the seller then brought suit against the bank to recover the amount on deposit. The court, indicating that the seller could have sued the bank immediately on the buyer's refusal to perform, held that the seller's actions constituted a waiver of this right, since they were inconsistent with the idea that he asserted ownership of the fund on deposit.

A case which would perhaps have been covered by Section 412-C of the New York Civil Practice Act involved an assignee of a conditional sales contract, who, on the buyer's default, brought suit on the notes and obtained a judgment. Since the buyer was insolvent, the assignee attempted to sue the conditional seller-assignor for conversion of the property, based on the fact that the latter, prior to the judgment in the first action, had taken the property from the buyer as a trade-in and thereafter sold it to another. In affirming the trial court's judgment for the defendant, the District Court of Appeal held that the commencement of the first action against the

buyer indicated an election by the plaintiff to treat the property as belonging to the buyer. Since this caused the title to pass immediately to the buyer, the seller-assignor could not be guilty of conversion in receiving and reselling the property. Ravizza v. Budd & Quinn, 111 P.2d 720 (1941). On appeal, the Supreme Court reversed the judgment, but only because a clause in the conditional sale contract provided that the procurement of judgment against the buyer was not to operate as a transfer of title. The court left no doubt that the rule would have otherwise applied. Ravizza v. Budd & Quinn, 19 C.2d 289, 120 P.2d 865 (1942).

If a plaintiff has been fraudulently induced to convey land, or to part with money which is used by the defrauder either to purchase land or to discharge an encumbrance thereon, a subsequent conveyance by the defrauder to his wife and the declaration of homestead by the latter, forces the plaintiff to make an election of remedies. If he brings an action for damages and recovers judgment against the defrauder, he is thereafter precluded from suing the wife to have the homestead set aside and the property impressed with a trust. The courts here concede that by reason of the manner in which the property was obtained the plaintiff might have brought an equitable action to impress a trust, but they maintain the view that the prior money judgment against the defrauder, although unsatisfied, precludes the later equitable action. Hanley v. Kelly, 62 Cal. 155 (1882); Gray v. Gray, 25 C.A.2d 484, 77 P.2d 908 (1938); Hilborn v.

Bonney, 28 Cal. App. 789, 154 Pac. 26 (1915).

One further category of cases should be mentioned. Under the prevailing California rule, an agent and an undisclosed principal may be joined as defendants in one action, but the plaintiff third party must elect his remedy against one of them, prior to judgment. Pursuing the claim to final judgment against either is an irrevocable election which discharges the other, even if the judgment remains unsatisifed and no elements of estoppel exist. Klinger v. Modesto Fruit Co., 107 Cal.App.97, 290 Pac.127 (1930). The rule has been criticized as placing an extra burden on the already wronged third party by forcing him not only to fight his case but also to determine which defendant is and will remain more solvent. Comment, 39 Cal. L. Rev. 409 (1951). A federal district court sitting in California has refused to apply the rule because of its unfair operation, supporting its refusal on the theory that it is merely a rule of procedure and therefore not binding on federal courts. Joseph Denunzio Fruit Co. v. Crane, 79 F. Supp. 117, 138 (S.D.Cal.1948). It might also be observed that the rule is otherwise in New York by statute. N.Y.Civ. Prac. Act. § 112-b.

It is apparent, then, that the California courts are in conflict on the question whether estoppel is a necessary element of the doctrine of election of remedies. Equally unclear is the distinction sometimes made between consistent and inconsistent remedies. It is often said that the doctrine of election bars only the latter,

as distinquished from the former. Perkins v. Benguet Consolidated Mining Co. (supra). Courts which hold that a plaintiff has made a binding election often point out that the remedies are inconsistent because the first action proceeded on the theory that plaintiff's money was in the hands of defendant X, while the second action would have to be based on the theory that the money is held by defendant Y. See, e.g., the District Court of Appeals opinion in the Pacific Coast Cheese case (supra); Foster v. Los Angeles Trust and Savings Bank (supra). If this were the true meaning of inconsistent remedies, however, that argument might well be raised against the Supreme Court decision in the Pacific Coast Cheese case, as well as against the Perkins decision (supra).

The lack of any apparent standard, with regard either to the estoppel requirement or to the test of consistency of remedies, makes it difficult to predict the outcome of any particular case in California today. Legislation may well be warranted, not only because the election of remedies doctrine is outmoded and unfair, but, if for no other reason, in order to clarify the law.

I. Robert Harris

Suggestion No. 196

(Originated by Stanford Staff)

It is suggested that the Commission make a study to determine whether Section 1974 of the Code of Civil Procedure should be revised or repealed. The section, enacted in 1872, reads as follows:

> § 1974. No evidence is admissible to charge a person upon a representation as to the credit of a third person, unless such representation, or some memorandum thereof, be in writing, and either subscribed by or in the handwriting of the party to be charged.

Dean Prosser makes this comment about Section 1974: "The statute is one not commonly found in other states, and it appears to do little to further the cause of justice." See 2 Survey of California Law 116.

This section is open to the criticism commonly levelled against Statutes of Frauds: that it shelters more frauds than it protects against. This weakness has largely been circumvented with respect to the cases where a writing was required by the original Statute by a liberal construction of the Statute and the exceptions to it. But section 1974 seems to have been applied in all its harshness in California. Thus an action in deceit failed for want of written evidence against a father-trustee who quite deliberately represented that his son was the beneficiary of a large trust and that part of the principal would be paid to him, thus inducing plaintiff to advance money on the son's note. Baron v. Lange, 92 Cal. App. 2d 718, 207 P.2d 611 (1949).

The California statute was adapted from Lord Tenterden's Act, 9 Geo. IV (1828) c. 14, § 6, which seems clearly to have been

passed to overrule a decision which allowed an action of fraud on an oral misrepresentation concerning the credit of a third person. Thus there is historical justification for the California view, and this rationale has been frequently invoked by the California courts. See, e.g., Carr v. Tatum, 133 Cal. App. 274, 24 P.2d 195 (1933), the first case to construe the statute, and a case whose consideration of the authorities in other jurisdictions has lent much weight to its own strict interpretation of the statute.

In the ten or twelve other states having similar statutes, however, they have been much more liberally construed. See Annot., 32 A.L.R.2d 743 (1953). Thus:

(1) Some states apply the statute only to negligent misrepresentations, saying that a statute of frauds should not be a cover for a fraud. But fraudulent intent will not avoid the statute in California: Beckjord v. Slusher, 22 Cal. App.2d 559, 71 P.2d 817 (1937).

(2) Some states avoid the statute when the defendant can be shown to have an interest in the transaction induced, so as to himself benefit by it. This interpretation was rejected in Bank of America v. Western United Constructors, Inc., 110 Cal. App.2d 166 at 169, 242 P.2d 365 (1952).

(3) Often courts will construe the statement to be a misrepresentation that the third person owns certain property, rather than an explicit representation as to credit of that person, and thus not within the statute. But this contention failed in Carr v. Tatum,

supra.

(4) In Idaho, it has been held that the statute can be overcome by showing a confidential relationship imposing a duty of disclosure on the defendant. But this was likewise rejected in Carr v. Tatum.

(5) In some jurisdictions the statute is held applicable only where the dominant purpose was that the third party obtain credit. There is no California case directly passing upon this point, but it is very doubtful that such an argument could prevail.

As to all five of the above liberal rules, the California law is contra. In only one case has a California court held a misrepresentation to be without the statute. There the defendant had made the representations about a corporation which was his alter ego, and it was held that they were therefore not about a "third person." Grant v. U.S. Electronics Corp., 125 Cal. App.2d 193, 270 P.2d 64 (1954).

The Supreme Court has never considered the statute. In all of the cases cited (which seem to be all of the cases involving Section 1974), petition for hearing was denied.

In the light of the strict construction now attaching to the statute, its repeal might well be considered. The section was in fact repealed as part of an omnibus revision of the Code of Civil Procedure in 1901, but the 1901 act was held void in toto, for unconstitutional defects in form. Lewis v. Dunne, 134 Cal. 291, 66 Pac. 478 (1901).

Suggestion No. 197

(Originated by Stanford Staff)

It is suggested that the Commission make a study to determine whether a statute should be enacted to deprive a surviving spouse of his intestate distributive share when he had deserted or abandoned the decedent before death.

In Estate of Scott, 90 Cal. App.2d 21, 202 P.2d 357 (1949), the claimant ahd left his wife and taken up an illicit relationship with another woman, whom on occasion he represented to be his wife. When his actual wife died, he claimed the whole of her estate under Probate Code 224, and the court gave it to him. The court said, "...since the state Legislature has not seen fit to deprive a spouse who is guilty of marital misconduct of being the heir of his or her deceased spouse, the courts may not place any such restriction upon inheritance. Hence in instant case respondent's marital conduct during the lifetime of his wife was absolutely immaterial ...." 90 Cal. App.2d at 23.

In six states by statute, abandonment or desertion will bar the survivor from taking the distributive share on intestacy. But absent a statute, it is almost universally held that abandonment will not bar recovery. See 139 ALR 486, 71 ALR 285. California and other states, however, have construed probate homestead statutes to deny a share to a spouse who has deserted the decedent. In re Miller, 158 Cal. 420, 111 Pac. 255 (1910); Estate of Fulton, 15 Cal. App. 2d 202, 59 P.2d 508 91936).

When the wife lives in adultery with another before the husband's death, it is universally held in states where dower exists that the will will receive no dower. Statute of Westminster II, 13 Edw. I c. 34 (1285). But adultery unaccompanied by desertion has seldom been held to defeat her distributive share on intestacy.

Chambers of
JUDGE OF SUPERIOR COURT
County of Contra Costa, State of California
MARTINEZ

August 16, 1954 Suggestion No. 13

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

Dear Tom:

This is to acknowledge receipt of your letter outlining the functions of your Commission. I have two suggested changes in California law.

1. It is my strong feeling that the order of the trial judge granting custody to a parent should not be stayed pending appeal.

I proposed this change in a letter to the Board of Governors of the State Bar last year and am informed that the State Bar Association passed a resolution on the matter in Monterey, approving the suggested change, and that it will come before the Legislature in 1955. It is my strong feeling that pending an appeal that might take a year and sometimes two years to dispose of, that the child's welfare can best be served by giving the child the benefit of the trial judge's finding.

2. Section 1962 of Subdivision 5 of the Code of Civil Procedure provides "The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate." In view of the conclusiveness of blood tests in negativing paternity and in view of the effectiveness given to blood tests under 1980.6 Code of Civil Procedure, it would seem that an exception should be made to the conclusive presumption noted above where the blood test unquestionably rules the husband out as the natural father.

I think that your Commission is doing a real service to the State in gathering these various points which are noted by the courts as they try their cases from day to day. It is the only way that we are going to correct some situations which are obviously wrong.

With kindest personal regards, I am

Sincerely yours,

s/ Wake

WAKEFIELD TAYLOR
JUDGE OF SUPERIOR COURT

WT:EJ

Report on 1954 Suggestion No. 13

Honorable Wakefield Taylor, Judge of the Superior Court, County of Contra Costa, suggests that in view of the conclusive effect given blood tests in negativing paternity by the Uniform Act on Blood Tests to Determine Paternity, §§1980.1-1980.7 of the Code of Civil Procedure, there should be an exception to the conclusive presumption in Section 1962(5) of the Code of Civil Procedure, that the issue of a wife cohabiting with her husband who is not impotent is legitimate, when a blood test conclusively demonstrates that the husband is not the child's father.

The relevant California code sections are as follows:

Section 1962, Code Civil Proc: The following presumptions, and no others, are deemed conclusive . . . . . 5. The issue of a wife cohabiting with her husband who is not impotent, is indisputably presumed to be legitimate.

Section 1980.6, Code Civil Proc: If the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the /blood/ tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly. If the experts disagree in their findings or conclusions, the question shall be submitted upon all the evidence.

Section 1963, Code Civil Proc: All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind: .....31. That a child born in lawful wedlock, there being no divorce from bed and board, is legitimate.

Section 193 Civil Code: All children born in wedlock are presumed to be legitimate.

Section 194 Civil Code: All children of a woman who has been married, born within ten months after the dissolution of the marriage, are presumed to be legitimate children of that marriage.

Section 195 Civil Code: The presumption of legitimacy can be disputed only by the husband or wife, or the descendant of one or both of them. Illegitimacy, in such case, may be proved like any other fact.

For the application of C.C.P. 1962(5) it must be shown that there was cohabitation. If this is established, Section 1962(5) and no other applies -- thus a conclusive presumption will exist. Gonsales v. Pacific Greyhound Lines, 202 P.2d 135 (D.C.A. 1949).

In construing Section 1962(5), the courts have expressed a favorable attitude toward it, although as it will be seen certain exceptions have been made which are not apparent on the face of the provision. In Estate of Mills, a very broad interpretation was given to the word "cohabitation." In this case it was alleged that Mr. and Mrs. A were living together and Mills moved into their home. An agreement was reached by the parties that Mrs. A and Mills would share the bedroom to the exclusion of Mr. A. A child was born to Mrs. A under this agreement. When Mills died the child sued his estate for support claiming to be his off-spring. The court held that the situation under the tri-partite arrangement constituted "co-habitation" of Mr. and Mrs. A and invoked the conclusive presumption that the child was theirs.

In Hill v. Johnson, 226 P.2d 655 (D.C.A. 1951), the court held that no evidence could be introduced if Section 1962(5) was applicable and stated the policy which probably explains the Mills decision: that Section 1962(5) prevents an innocent person from being found the father of a child on the collusive evidence of a husband and wife.

The court in the Hill case also held that it is error to allow evidence of a blood test where the conclusive presumption of Section 1962(5) applies. This case was decided before the enactment of the Uniform Act in 1953. No cases since 1953 have considered the effect of the Uniform Act on the conclusive presumption. The courts might hold that the Act applies only to the rebuttible presumption which is applicable where no cohabitation is found (i.e., Sections 193-195 of the Civil Code). This possibility is strengthened by the fact that

the courts have traditionally favored strict application of Section 1962(5).

But certain exceptions to Section 1962(5) have been developed by the courts. In Estate of Walker, 180 Cal. 478, the Supreme Court laid down the general rule that the conclusive presumption does not apply in a case where "it was not possible by the laws of nature for the husband to be the father." The language of the section itself which creates an exception when the husband is impotent is a recognition of this broad common sense exception. The courts have applied this general exception in cases where cohabitation of husband and wife ceased well before the normal period of gestation. The courts have also applied the general exception in cases where the child was proven to be partly of a different race than that of the cohabiting husband and wife.

Thus it seems quite possible that in a case in which blood tests conclusively negative the husband's paternity a court might decide that the "law of nature" exception applies. It would seem, however, that if there is to be a "blood test" exception to Section 1962(5), the Section should be revised to state it.

The argument for not amending Section 1962(5) would appear to be that the interest of the child in a legitimate status outweighs the interest in protecting the husband from the burden of supporting children who are not his. It should be noted, however, that only California maintains the common law conclusive presumption in statutory form. 38 Cornell L. Q. 73 (1952).

Note: A full study of the above problems may well turn up other suggestions for revision in the general area of evidentiary problems in bastardy cases.

Robert Harmon

SUGGESTION NO. 192

(Originated by Stanford Staff)

It is suggested that the Commission make a study to determine whether Sections 228 and 229 of the Probate Code, which enact the principle of descent of ancestral property, should be revised. These sections provide that when property has accrued to a surviving spouse from the predeceased spouse, and the later-dying spouse dies intestate leaving no issue, such property is distributed to the heirs of the predeceased spouse rather than to the heirs of the decedent.

These sections appear in the division of the Probate Code relating to intestate succession. However, Sections 228 and 229 may in some circumstances apply even where the decedent died testate. This is because Probate Code Section 108 provided that where a disposition by will is simply to "heirs", "relations", "nearest relations", "family", or "nearest (or next) of kin", without other words of qualification, the property passes according to the provisions of the division of the Code relating to intestate succession. Application of Sections 228 and 229 in such a case may result in defeating the intent of the testator. For although his "heirs" may, legally speaking, include relatives of a predeceased spouse who left him property, it is unlikely that he intended the property to pass to such persons.

A recent case held that Section 229 applies only in the event of intestacy. Estate of Baird, 135 Cal. App.2d ,287 P.2d 365

(1955). But this seems directly contrary to the provisions of Section 108. See In Re Pages's Estate, 181 Cal. 537, 185 Pac. 383 (1919). Moreover, the Baird case dealt with property passing under a power of appointment exercised by the later-dying spouse, who had only a life interest in it and thus is not strong authority for the case where the surviving spouse's own property (although derived from the predeceased spouse) is involved.

The student writer of a Case Note in 7 Hastings L.J. 336 suggests that Section 108 be amended to provide that unless it affirmatively appears from the will, either expressly or by necessary implication, that the testator had Sections 228 and 229 in mind when he used a word like "heirs", these sections should not be applied in determining the persons entitled to the property. This same suggestion is found in an article, Ferrier, Gifts to 'Heirs' in California, 26 Calif. L. Rev. 413 at 430-36 (1938). (Professor Ferrier makes broader criticisms and suggestions in "Rules of Descent Under Probate Code Sections 228 and 229, and Proposed Amendments", in 25 Calif. L. Rev. 261 (1937)).

This suggestion, made by Professor Lawrence Vold of Hastings College of Law, is to consider the desirability of enacting a statute giving a buyer under a conditional sales contract a right in all cases to redeem the property after repossession for default.

Professor Vold asserts that in a conditional sale situation there exist divided property interests in the chattel involved and that the "title" retained by the seller is a security interest only, reserved for the sole purpose of insuring payment of the purchase price. But recognition of this is clouded, in this State he says, by confusing dicta and some decisions harking back to the time when the buyer's interest under such a contract was a mere possessory right, with full title in the seller. As typical of this earlier approach he cites Bice v. Arnold, 75 Cal. App. 629, 243 Pac. 468 (1925).

Professor Vold cites the confusion resulting from these "throwback" dicta as the cause of what he asserts is the "highly questionable" decision in Bird v. Kenworthy, 43 Cal. 2d 656, 277 P. 2d 1 (1954). In that case the Court stated the facts as follows:

> In 1948, Bird and Kenworthy entered into a conditional sales contract and Bird took possession of the tractors described in it. The purchase price was approximately $29,500, of which $5,000 was paid at that time. Bird agreed to pay the remainder in monthly installments of $2,000.
>
> Time was made the essence of the contract. It also provided: "Should I fail to make any monthly payment above specified when the same is due,... then the entire unpaid balance of purchase price shall at your option, become immediately due and payable and shall bear interest thereafter at the highest lawful rate, and I agree to make full payment of such balance. Should I return said chattels to you or if you repossess said

chattels, then you may retain all payments previously made as compensation for use of said chattels, and you may, at your option, sell said chattels at public or private sale, with or without notice, and credit the net proceeds, after expensed, on the amounts unpaid hereunder."

During the year immediately following the execution of the contract, Bird paid eight of the installments, none of them at the time when due. Five months elapsed during which no payment was made.

Kenworthy testified that in the latter part of October, 1949, he advised Bird over the telephone that unless payment in full were made, he would repossess the equipment. He took that action about one month later. Bird then tendered the balance of the principal and interest due but Kenworthy refused to accept it. Thereupon Bird served notice of rescission and demanded return of the amounts he had paid.

Bird also asked for alternative relief from forfeiture which he contended resulted in the unjust enrichment of Kenworthy.

The trial court made the following findings: (1) Kenworthy did not waive prompt payment of future installments, or waive the right to repossess the tractors; (2) Birds failure to make prompt payments was a "grossly negligent and willful" breach; (3) The reasonable rental value of the equipment while in Bird's possession was $2,200 a month, or a total of $37,500. (Note that this amount is greater than the entire sale price.) On the basis of these findings it was held that Bird was not entitled to restitution after rescission or to relief from forfeiture. Thus Kenworthy was permitted to keep the tractors, then worth $28,000, and to retain the $29,000, which Bird had paid on the contract price. On appeal, the Supreme Court affirmed. It is settled in California that, even in the face of a provision that time is of the essence, a vendee of real property can be relieved from

forfeiture under section 3275 of the civil code which reads:

> § 3725. Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensatinn to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty. (emphasis added)

See Barkis v. Scott, 34 Cal. 2d 116, 208 P. 2d 367 (1949). But it is clear from the italicized portion of the statute that it affords no relief in the case of a willful breach, which was the nature of Bird's breach in this case. However, Freedman v. The Rector, 37 Cal. 2d 16, 230 P. 2d 629 (1951), held that even in the case of a willful breach the vendee under a land contract can recover the amount of his payments in excess of the actual damage suffered by the vendor although no relief is available under Section 3275. The basis for this relief was said to be a combination of the damage provisions of the Civil Code, the policy of the law against penalties and forfeitures, and Section 3369 of the Civil Code, which provides in part:

> Neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case. . . .

Accepting the reasoning of the Freedman case, the Court in Bird v. Kenworthy made it clear that this rule also applies to conditional sale contracts. Accordingly, the Court said that Bird could recover the part, if any, of his payments by which the seller, Kenworthy, had been unjustly enriched. This amount, the court said, would be the excess of the payments over the actual damage to the vendor. However, the Court affirmed the finding of the trial court that there was no unjust enrichment because the damage to the seller exceeded the amount of the payments. The vendor's

damage was held to be the rental value of the equipment for the period that Bird had possession of it.

Professor Vold contends that the measure of the seller's damage adopted by the court is erroneous and results in an actual forfeiture while lip service is being paid to the principle of relief from forfeiture in appropriate cases. This contention seems to be well founded. As Professor Vold points out, calculating the seller's damage as the reasonable rental value of the tractors during the time they were in the possession of the conditional purchaser is equivalent to charging the purchaser rent although the contract was not a rental agreement. Under a conditional sales contract the purchaser should be considered the beneficial owner; as such, he should not be charged rent for the use of his own property. By measuring the damage to the vendor as it did, the Court in effect rewrote the contract. The proper measure of the seller's damage in such a case would seem to be his loss, if any, in the value of the original bargain made by the parties-i.e., the difference between the contract price and what the seller could realize upon resale of the equipment after repossession, plus the seller's costs in repossessing and selling the equipment.

In support of the measure of the seller's damages which it selected the Court cited four California cases where the vendee under a land contract was held accountable for the reasonable rental value of the property while he was in possession. But in three of these cases there was rescission of the contract, either mutually or by the vendee, and in the fourth the

contract was declared void under the statue of frauds. (These cases are: Elrod-Oas Home Bldg. Co. v. Mensor, 120 Cal. App. 485, 8 P. 2d 171 (1932); Heintzsch v. LaFrance, 3 Cal. 2d 180, 44 P. 2d 358 (1935); Nelson v. Canavan, 11 Cal. App. 2d 156, 53 P. 2d 201 (1936); Roberts v. Lebrain, 113 Cal. App. 2d 712, 248 P. 2d 810 (1952).) These cases are all distinguishable on the ground that the contracts were, in effect, set aside ab initio; under these circumstances, each party was entitled to the return of his consideration and to compensation for the benefit which the other party actually received. Since in each of these cases the vendee had been in possession of the property for some time before the rescission, he could not equitably repudiate the contract, recover his payments, and refuse to pay a reasonable rental value for the time he was in possession of the property. He could not have the contract set aside and still retain the benefits he received under the contract.

However, in the Bird case the contract was not set aside; the Court refused to grant rescission to the purchaser. Consequently, it should not have adjusted the interests of the parties in accordance with the law of rescission.

The correct measure of the seller's damage in such a case was indicated earlier in the Freedman case and another case relied upon by the Court in the Bird opinion, Baffa v. Johnson, 35 Cal. 2d 36, 216 P. 2d 13 (1950). In the Baffa case a wilfully defaulting vendee under a land contract sought recovery of the excess of his down payment over the amount of the damage to the vendor. However, since the vendee failed to prove the value of the land

to the vendor at the time of the breach, the Court held that he had failed to show that his down payment did exceed the vendor's damage. This was so because under Civil Code Section 3307:

> The detriment caused by the breach of an agreement to purchase an estate in real property, is deemed to be the excess, if any, of the amount which would have been due to the seller, under the contract, over the value of the property to him.

The Court said this meant the difference between the contract price and the value of the property to the vendor at the time of the breach. Because the vendee had not proved the value at the time of the breach, his appeal was dismissed without a decision on the question whether he actually could have recovered any excess if there really was one. In what then amounts to dictum the Court stated:

> Under these sections [Civil Code Sections 3275, 3369] a defaulting vendee seeking restitution of part of his payments will be denied relief if his breach is wilful. On the other hand, if he is able to prove that the vendor has received more than the benefit of his bargain, the court is precluded by section 3369 from quieting the vendor's title unless he refunds the excess. (p. 39, emphasis added)

The next year the Freedman case decided the question left open in the Baffa decision and held that even a wilfully defaulting vendee could recover insofar as there would otherwise be unjust enrichment of the vendor. And although the case was remanded for determination of the amount of the unjust enrichment, the following language of the opinion seems to adopt the same measure of damages indicated in the Baffa case--that is, the amount received by the vendor in excess of the "benefit of his bargain":

> Since defendant resold the property for $2,000 more than plaintiff has agreed to pay for it, it is clear that defendant suffered no damage as a result of the plaintiff's breach. If defendant is allowed to retain the amount of the down payment in excess of its expenses in connection with the contract it will be enriched, and plaintiff will suffer a penalty in excess of any damage he caused. (pp. 19-20.)

Because the Court in Bird v. Kenworthy said it was following both the Baffa and Freedman cases, it should also have followed the method adopted to determine whether there was unjust enrichment. If it had done so, it would have awarded Bird the excess of his payments ($24,000) over the damage to Kenworthy measured by the difference between the contract sale price ($29,500) plus repossession and resale expenses minus the value of the tractors at the time of the breach ($26,000). Thus Bird would have recovered $22,500, minus whatever repossession expenses were incurred, instead of forfeiting everything to Kenworthy. The seller then would have gotten the benefit of his bargain which was all he was entitled to instead of the windfall he actually received.

A study of this subject by the Commission may be in order to determine whether the rights of the conditional buyer are adequately protected under existing law. The repetition of the result in the Bird case could be prevented by either (1) providing a clear statutory measure for unjust enrichment in such cases or (2) adopting a statutory remedy for the buyer under a conditional sale contract in the event of repossession. If the latter approach were adopted, a statute modeled on the relevant provisions of the Uniform Condition Sales Act would merit consideration. The Uniform Act requires the conditional seller to give twenty days notice of repossession (§ 17); if he does not the buyer may redeem within 10 days of repossession

(§ 18). If notice is given or if there is no redemption, the Act provides for a sale of the property at public auction if the buyer has paid at least fifty per cent of the purchase price (§19) or if the buyer so demands (§29). The auction sale proceeds are applied to pay the balance due under the contract and the seller's expenses and any balance remaining is paid to the buyer. (§21) Thus, under the Act the seller receives the benefit of his bargain and the buyer is relieved from forfeiture.

Gilbert L. Harrick

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Attorneys and Counselors
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Stockton, California

March 15, 1954

Mr. Richard W. Dickinson
Assistant County Counsel
County Court House
Stockton, California

1954 Suggestion No. 9

Dear Dick:

In our conversation on March 11, 1954, you stated that you were planning to attend a session of the Law Revision Committee in Sacramento in the near future. We would appreciate it if you would present the following problem to the Committee.

Section 3051a of the Civil Code of the State of California, referring to the lien of garage keepers for their compensation for the caring and safe-keeping of, making repairs to, for labor or furnishing and supplying of materials for automobiles, provides in part as follows:

> "That portion of any lien as provided for in the next preceding section, in excess of One Hundred Dollars ($100.00), for any work, service, care, parking or safe-keeping rendered or performed at the request of any person other than the holder of the legaltitle, is invalid, unless prior to commencing any such service, care, parking or safe-keeping, the person claiming such lien shall give actual notice, in writing, either by personal service or by registered letter addressed to the holder of the legal title of such property, if known." (Emphasis added.)

Section 425 (b) of the Vehicle Code of the State of California referring to the same type of lien provides, in part, as follows:

> "That portion of such lien in excess of One Hundred Dollars ($100.00), for any work or service rendered or performed at the request of any person other than the holder of the legal title, is invalid, unless prior to commencing any such work or service the person claiming such lien gives actual notice, in writing, either by personal service or by registered certificate, and the consent of the holder of the legal title is obtained before any such work or services are performed." (Emphasis added.)

It can be seen from the foregoing that, under the Civil Code, notice to the legal owner of an automobile is necessary, while under the Vehicle Code notice to the legal owner plus consent of the legal owner is necessary for the preservation of a garage keeper's lien in excess of $100.00. To further compound the confusion, both Section 3051a of the Civil Code and Section 425 (b) of the Vehicle Code were apparently amended by Chapter 1436 of the 1949 Statutes.

It would be greatly appreciated if you would present this conflict in the Civil Code and Vehicle Code sections above quoted to the Law Revision Committee.

Kindest personal regards,

WARMKE, ARBIOS, WOODWARD & MacKILLOP

By /s/ MALCOLM A. MacKILLOP

MALCOLM A. MacKILLOP
Attorneys at Law

MAM:mwr

SUGGESTION NO. 221

Originator: Ray Grinstead

MEMORANDUM TO COMMISSION

Some time ago Mr. Ray Grinstead, an attorney in Sonoma, suggested that the Commission make a study of creditors' position under joint tenancy. The material which he left with me is set out below.

I. NEED FOR STUDY OF CREDITORS' POSITION UNDER JOINT TENANCY

1. Tremendous amount of property both real and personal is now held in joint tenancy, and upon death of one of the joint tenants is transferred by reason of its status.

2. Legal effect of death of one joint tenant upon his property which results in his property interest being automatically transferred to the survivor, completely divests creditors of all rights against this property even to the extent of escaping from a recorded judgment lien.

3. While the movement for the use of joint tenancy holding has been under way, no attention has been given to the rights of creditors and has rarely been mentioned.

4. The reason for this lack of attention is due largely to the fact that there has evidently been no widespread failure to honor debts of deceased joint tenants. Most frequently the surviving joint tenant is the surviving spouse, hence has a liability arising from this relationship. If the surviving joint tenant is a near relative, family pride is doubtless responsible for payment. Many times debts are paid through ignorance of liability.

5. Policy of the law has always been to afford protection to creditors, as in bankruptcy, bulk sales and chattel mortages, dissolution of corporations, etc. Protection of creditors of a decedent has been an essential principle of the institution of probate and loss to the creditor of this protection arising from transfers through joint tenancy holdings is an unanticipated result.

6. Need therefore exists to extend to creditors of deceased joint tenants the same protection which is afforded creditors of a decedent under probate. A code provision which might provide protection to creditors is suggested below:

II. SUGGESTED CODE PROVISION

Property held in joint names of two or more persons with right of survivorship is hereby declared to be so held subject to the rights of the creditors of said persons.

Upon the death of any person who so holds such an interest in any property whether real or personal, the divesting of the title of said deceased person shall be void as to creditors of said decedent unless and until the following conditions are fulfilled, to wit:

1. Notice to creditors shall be published in the county in which said deceased joint tenant was a resident at date of death by the surviving joint tenant, in the manner and for the period specified in Section 700 of the Probate Code. Said notice shall direct the creditors of the deceased joint tenant to file their claims with the surviving joint tenant or with the County Clerk within _____ days from the first publication of said notice.

2. Upon filing with the County Clerk of proof of such publication, a decree shall be issued by the Superior Court establishing the fact that said notice has been duly given.

3. All claims filed by creditors of said deceased joint tenant shall be approved or disapproved by the surviving joint tenant and the court, and if approved shall be paid and vouchers in support thereof filed with the County Clerk. Claims which are disapproved by said surviving joint tenant shall be subject to the same remedies afforded creditors under Section 714.

4. A decree shall be issued by the Superior Court establishing the fact that all claims filed have been paid in full or otherwise disposed of with the Court's approval.

5. The above proceedings may be filed and included either in the proceedings provided in Section 1170 et seq. of the Probate Code, or if proceedings for administration of the decedent's estate are pending, they may be filed therein as provided in Section 1171 of the Probate Code, or by a separate proceeding for the purpose of disposing of claims of creditors of deceased joint tenants.

REPORT ON SUGGESTION NO. 221

Mr. Grinstead suggests the need of a code provision designed to extend protection to creditors of deceased joint tenants. He points out that under the present law, the death of a joint tenant divests his creditors of all rights against property jointly held.

The distinguishing feature of a joint tenancy is the right of survivorship by virtue of which the entire estate, upon the death of one joint tenant, goes to the survivors and finally to the last survivor, who takes an estate of inheritance free from all charges made by his deceased cotenants. 14 Am. Jur., Cotenancy, § 6. Since the title of each joint tenant extends to the whole estate, it is clear that the survivor secures his right not from the deceased joint tenant, but from the devise or conveyance by which the joint tenancy was first created. Estate of Gurnsey, 177 Cal. 211, 170 Pac. 402 (1918). Thus, in Zeigler v. Bonnell, 52 C.A. 2d 217, 220, 126 P. 2d 118, 119 (1942), one court said:

> "While both joint tenants are alive each has a specialized form of a life estate with what amounts to a contingent remainder in the fee, the contingency being dependent upon which joint tenant survives."

That being so, it is unquestionably the law, both in California and elsewhere, that "a creditor of a deceased joint tenant is entirely helpless and can recover nothing from the surviving joint tenant." Marshall, "Joint Tenancy, Taxwise and

Otherwise," 40 Cal. L. Rev. 501,525 (1952); 14 Am. Jur., Cotenancy, § 6. The point is illustrated by King v. King, 107 C.A.2d 257, 236 P.2d 912 (1951), which involved realty which had been acquired by a husband and wife as joint tenants. Upon the husband's death without having repaid a loan made by his sister and used by the husband to extinguish the lien of a trust deed on the property, it was held that title to the realty vested in the wife and was not part of the husband's estate, and so could not be subjected to payment of the note.

The only way for a creditor to reach his debtor's share of joint tenancy property is to sever and destroy the joint tenancy prior to his debtor's death, (unless the debtor happens to survive the other joint tenants). Clearly this is accomplished by the sale of the joint tenant's interest, on execution by a judgment creditor. Pepin v. Stricklin, 114 Cal. App.32, 299 Pac. 557 (1931). Conversely it seems to be a unanimous conclusion that a mere judgment lien against the interest of one joint tenant is not of itself sufficient to operate as a severance of the joint tenancy. Zeigler v. Bonnell, 52 C.A.2d 217, 126 P.2d 118 (1942); Van Antwerp v. Horan, 390 Ill. 449, 61 N.E.2d 358 (1945); Musa v. Segelke & Kohlhaus Co., 224 Wis. 432, 272 N.W. 657 (1937).

In Zeigler v. Bonnell, supra, the California court held that the surviving joint tenant took the entire property free and clear of the lien of a judgment against the deceased joint tenant,

the latter having died after an abstract of the judgment had been recorded but prior to a levy of execution against his interest. The court reasoned that the judgment lien of the creditor could attach only to the interest of his debtor, which interest terminated upon his death, thereby leaving nothing upon which to levy. The following statement by the court summarizes the position of a creditor who wishes to rely upon his debtor's interest in a joint tenancy for satisfaction of his claim:

> "This rule is sound in theory and fair in its operation. When a creditor has a judgment lien against the interest of one joint tenant he can immediately execute and sell the interest of his judgment debtor, and thus sever the joint tenancy, or he can keep his lien alive and wait until the joint tenancy is terminated by the death of one of the joint tenants. If the judgment debtor survives, the judgment lien immediately attaches to the entire property. If the judgment debtor is the first to die, the lien is lost. If the creditor sits back to await this contingency,... he assumes the risk of losing his lien." 52 C.A. 2d at 221, 126 P. 2d at 120-121.

In one special situation the creditor is protected - where it is shown that the property held in joint tenancy was purchased with funds which the creditor could reach. For example, a creditor may show that property taken by a husband and wife as joint tenants was actually community property. See Wilson v. United States, 100 F.2d 552, 554 (9th Cir. 1938). It is well established that spouses have the power to transform community property into joint tenancy property. Siberall v. Siberall, 214 Cal.

767, 7 P.2d 1003 (1932). The fact, however, that the transformation is asserted against a creditor may affect the result.

Thus, in Hulse v. Lawson, 212 Cal. 614, 299 Pac. 525 (1931), land had been conveyed to the defendants, husband and wife, in joint tenancy and paid for out of community funds. There was no question of the wife's survivorship rights, since the husband was alive at the time of the suit; he had, however, subsequently conveyed the entire property to the wife as her sole and separate estate. In an action brought by the husband's judgment creditor, whose claim was for the purchase price of equipment the use of which had enabled the husband to pay for the land, the creditor was allowed to subject the property to the lien of his judgment. The court held that despite the joint tenancy form of the deed the property had remained community property, and that the subsequent conveyance to the wife was fraudulent and void as against the then existing creditors of the husband. It is not unlikely that the court's refusal to sustain the joint tenancy was based primarily on the existence of creditors; for in the Siberall case, supra, a divorce action wherein the court upheld a joint tenancy deed to a husband and wife, the opinion notes that the court was not concerned "with the characteristics of the property as against the claims of judgment creditors on other third persons, as was the case in [the Hulse case]." 214 Cal. at 772, 7 P.2d at 1005.

Another situation in which creditors are protected involves disposition of the proceeds of U.S. Savings Bonds. Federal regulations and California Civil Code Section 704 preclude payment of the proceeds to anyone other than the owner or named beneficiary. However, Katz v. Driscoll, 86 C.A.2d 313, 194 P.2d 822 (1948) illustrates that these provisions do not prevent attack on a fraudulent transfer. The complaint alleged that the decedent had obtained old age security benefits and city and county indigent aid by falsely representing that he had no personal property of a value in excess of $600, when in fact he owned U.S. Savings Bonds in the amount of $2250, and payable to the defendants as beneficiaries. It further alleged that no consideration was paid by the defendants for the bonds and that the bonds were gifts in contemplation of death, and made with intent to defraud creditors. In overruling a demurrer, the court held that the complaint alleged facts sufficient under section 579 of the Probate Code to enable plaintiff, administrator of the estate, to enforce a constructive trust in the proceeds of the bonds to the extent necessary to meet expenses of administration and creditors' claims, including those by the state and the city and county. The opinion points out that although the federal regulations and California statute were intended to make the sole ownership of the survivor exclusive, so that his right to possess and to enforce payment to himself cannot be challenged on the ground of

fraud, they do not guarantee his right to retain the proceeds when, under equitable principles, a constructive trust should be imposed. This subject is treated at length in an annotation in 51 ALR 2d 163, 189 (1957). See also 37 ALR 2d 1221, 1241 (1954).

It would seem that the general rule, which prevents the creditor of a deceased joint tenant from reaching property in the hands of the survivor, is inherent in the joint tenancy form of co-ownership, and that Mr. Grinstead's suggested code provision would create a contradiction in terms. If protection of the creditor at the expense of the surviving co-owner is desirable, it should be accomplished only by a statute abolishing joint tenancy. See, e.g., Ga. Code (1933) § 85 - 1002; La. Civ. Code (Dart 1947) Art. 494; Ore. Rev. Stat. (1955) § 93.180.

I. Robert Harris

STATUS OF CURRENT STUDIES

Study No.	Subject	Topic Description Report and Number	Research Consultant	Committee to Which Assigned	Due Date of Report	Tentative Date for Commission Consideration
11	Corp. Code §§2201, 3901	'55-15	Staff	So.	Jan.'58	Feb./Mar.'58
16	Planning Proc.	'55-23	Staff	So.	Feb.'58	Mar./Apr.'58
19	Penal and Vehicle Code Overlap	'56-1				
20	Guardians for Nonresidents	'56-2				
21	Confirmation Partition Sales	'56-3				
22	Cut-off Date, Motion New Trial	'56-4	Pickering	No.	Dec.'57	Jan./Feb.'58
23	Rescission Contr.	'56-5	Sullivan	No.	Report Rec'd.	Nov. 29,30 '57
24	Mort. Fut. Adv.	'56-6	Merryman	No.	Report Rec'd.	Nov. 29,30 '57
25	Prob. Code §259	'56-7	Horowitz	So.	Report Rec'd.	Nov. 1,2 '57
26	Law Governing Escheat	'56-8	Staff	So.	Jun.'58	Jul./Aug.'58
27	Rights Putative Spouse	'56-9	Mann	No.	1958	July '58
28	Condemnation (consolidated with #36)	'56-10 '55-J				
29	Post-Conviction Sanity Hearings	'56-11 '55-A	Louisell	No.	Jul.'58	Aug./Sept.'58
30	Custody Jurisdiction	'56-12	Kingsley	So.	Report Rec'd.	Nov. 29,30 '57

Study No.	Subject	Topic Description Report and Number	Research Consultant	Committee to Which Assigned	Due Date of Report	Tentative Date for Commission Consideration
31	Doctr. Worthier Title	'56-13	Verrall	So.	Report Rec'd.	Nov. 1,2 '57
32	Arbitration	'56-14 '55-K		No.		
33	Survival Tort Actions	'56-15 '55-B	Killion	No.	Jul.'57	Dec. 27,28 '57
34(L)	Unif. Rules Evid.		Chadbourn	Comm'n.	Jul.'58	Oct. '58
35(L)	Habeas Corpus					
36(L)	Condemnation	*'56-10 '55-J	Hill, Farrer & Burrill	So.	1st part Nov.'57	Dec. 27,28 '57
37(L)	Claims Statutes	*'55-13	Van Alstyne	So.	Report Rec'd.	Nov. 1,2 '57
38	Inter-vivos Rights 201.5 Property	'57-1 '55-6	Marsh	No.	Jan.'58	Feb./Mar. '58
39	Attachment, Garnishment, Prop. Exempt Execution	'57-2				
40	Notice of Alibi	'57-3				
41	Small Claims Court Law	'57-4 '55-10				
42	Rights Good Faith Improver Property	'57-5	Merryman	No.	Aug.'58	Sept./Oct. '58
43	Separate Trial on Insanity	'57-6	Louisell	No.	Sept.'58	Oct./Nov.'58
44	Suit Common Name	'57-7	Crane	No.		
45	Mutuality Spec. Performance	'57-8	Evans	So.		

* Topic described in report as indicated but authority granted by independent concurrent resolution.

Study No.	Subject	Topic Description Report and Number	Research Consultant	Committee to Which Assigned	Due Date of Report	Tentative Date for Commission Consideration
46	Arson	'57-9	Packer	No.	Aug.'58	Sept./Oct. '58
47	Civil Code §1698 (Modification of Contract)	'57-10				
48	Juvenile's Right to Counsel	'57-11	Sherry	No.	Jul.'58	Aug./Sept. '58
49	Unlicensed Contractor	'57-12	Sumner	So.	Dec.'57	Jan./Feb. '58
50	Rights Lessor on Abandonment	'57-13	Verrall	So.	Apr.'58	May/Jun. '58
51	Right Wife to Support after Divorce	'57-14	Horowitz	So.	Sept.'58	Oct./Nov. '58
52(L)	Sovereign Immunity	*'55-H	Van Alstyne	So.	Aug.'58	Sept./Oct. '58
53(L)	Personal Injury Damages as Pers. Property	*'55-F	(Suspended for time being)			
54(L)	Use Term "Ward Juv. Court"		Sherry	No.	Jul.'58	Aug./Sept. '58
55(L)	Additur					
56(L)	Narcotics Code		Legislative Counsel	No.	Mar.'58	Apr./May '58
57(L)	Law Relating to Bail					
58(L)	Grand Jury Law Codification		Legislative Counsel	No.	Mar.'58	Apr./May '58

Agenda Item #5

Minutes of Meeting of Northern Committee October 21, 1957

RE-REFERRED MATTERS

Pursuant to the resolution passed at the Commission's August 2 and 3, 1957 meeting, the Committee considered and discussed the re-referred matters and made the following recommendations:

(a) Study No. 1 - Suspension of the Absolute Power of Alienation: This study should be presented again to the 1959 Session of the Legislature. As a preliminary step it should be discussed with the Senate Interim Judiciary Committee at its December meeting.

(b) Study No. 6 - Effective Date New Trial Order: The proposed revision of Section 660 of the Code of Civil Procedure should be revised to make the respective effective dates the date of entry of an order in the permanent minutes and the date of the filing of a written order. This proposed revision of Section 660 should be submitted to the Legislature in 1959.

(c) Study No. 8 - Marital "For and Against" Testimonial Privilege: This study should be held pending final disposition of Study No. 34(L) (Uniform Rules of Evidence).

(d) Study No. 32 - Arbitration: We should get re-started on this study as assigned (i.e., a study to determine whether the Arbitration Statute should be revised) as soon as possible, retaining Mr. Sam Kagel as research consultant. This procedure should be cleared with the Senate Interim Judiciary Committee to avoid conflict and duplication of effort.

MEMORANDUM ON REVISION OF

SECTION 660 OF THE CODE OF CIVIL PROCEDURE

One of the studies made by the Commission relates to the effective date of an order ruling on a motion for new trial. A research study on this subject was made by Professor Edward L. Barrett, Jr., of the University of California. This study showed that the law is unclear as to precisely when an order ruling on a motion for new trial becomes effective for purposes of determining whether the court's power to act on the motion expired before the order was made.

Professor Barrett recommended that the matter be clarified by adding the following sentence to Section 660 of the Code of Civil Procedure:

> A motion for a new trial is not determined within the meaning of Section 660 of this code until an order ruling on the motion (1) is entered in the permanent minutes of the court or (2) is signed by the judge and filed with the clerk. The entry of a new trial order in the permanent minutes of the court shall constitute a determination of the motion within the meaning of Section 660 even though such minute order as entered expressly directs that a written order be prepared, signed, and filed. The minute entry shall in all cases show the date on which the order actually is entered in the permanent minutes, but failure to comply with this direction shall not impair the validity or effectiveness of the order.

The Commission decided, however, that this rule did not provide sufficient flexibility and that it would sometimes result in denial of a motion by operation of law even though the court had acted within the 60 day period and there was written evidence of this fact. Accordingly, the Commission recommended to the Legislature that the

following sentence be added at the end of Section 660:

> 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.

When the matter was before the Legislature the State Bar raised objections to the Commission's proposal on the ground it introduced too much uncertainty into the matter. As a result of discussions with the Board of Governors, the Commission's bill on the subject (No. S.B. 36) was amended to add the following sentence at the end of Section 660:

> A motion for a new trial is determined within the meaning of this section when, within the applicable 60-day period, (1) an order ruling on the motion is first entered in either the temporary or the permanent minutes; provided, that if the order is first entered in the temporary minutes it is subsequently entered in the permanent minutes not later than five days after the expiration of such 60-day period or (2) a written order ruling on the motion is signed by the judge; provided, that the order is filed not later than five days after the expiration of such 60-day period. Such determination shall be effective even though the order directs that a written order be prepared, signed, and filed.

The bill was passed by the Legislature but vetoed by the Governor. When the matter was discussed by the Northern Committee, Mr. Stanton recommended, in substance, that the Commission recommend to the Legislature in 1959 that the sentence originally suggested by Professor Barrett be added at the end of Section 660.

§6. By written agreement, compliance with the provisions of this act may be waived by a public entity with respect to any or all claims arising out of an express contract between the parties to the waiver agreement.

NOTE: The Committee members disagreed re inclusion of bracketed material in this section; Shaw for, Babbage against.

§7. A claim may be presented to a public entity only by delivering the claim personally to the clerk or secretary[or to a member of the governing body] thereof not later than the ninetieth day after the cause of action to which the claim relates has accrued or by sending the claim to such clerk or secretary or to the governing body at its principal place of business by mail postmarked not later than the such ninetieth day ~~after the cause of action to which the claim relates has accrued~~. If a claim is not presented to the person designated in this section the presentation shall be deemed valid if the claim is actually received by the clerk, secretary, [governing board member,] or governing body within the time prescribed by this act.

§8. Where the claimant is an infant or is mentally or physically incapacitated and by reason of such disability fails to present a claim within the time allowed, or where a person entitled to present a claim dies before the expiration of the time allowed for presentation, any court which would have proper jurisdiction and venue of an action to enforce the cause of action to which the claim relates may grant leave to present the claim after the expiration of the time allowed, where the public entity against which the claim is made will not be unduly prejudiced thereby. Application for such leave must be made by duly

noticed motion, accompanied by affidavits showing the reasons for the delay and a copy of the proposed claim, made within a reasonable time, not to exceed one year, after the expiration of the time allowed for presentation.

§9. If the claim as presented is insufficient or inaccurate as to form or contents, or omits to give relevant and material information, the governing body of the public entity may give the person presenting the claim written notice of its insufficiency. Within ten days after receipt of the notice, the person presenting the claim may file a corrected or amended claim which shall be considered a part of the original claim for all purposes. Unless notice of insufficiency is given, any defects or omissions in the claim are waived, except ~~that no notice of insufficiency is required~~ when the claim fails to give the address of the person presenting the claim.

§10. The public entity shall be estopped from asserting failure to file a claim as a defense to an action or from asserting the insufficiency of a claim actually filed as to form or contents or as to time, place or method of presentation of the claim if the claimant or person presenting the claim in his behalf has reasonably and in good faith relied on any representation express or implied that a claim was unnecessary or that his claim had been presented in conformity with legal requirements, made by any responsible official, employee or agent of the