

MTg.  
Date of Meeting: August 28-29, 1959

Date of Memo: August 19, 1959

Memorandum No. 3

Subject: Request for authorization of new studies;  
studies to be suggested to Assembly Interim  
Judiciary Committee.

At the July meeting the Commission directed its Executive Secretary to submit to it a list of studies that could be suggested to the Assembly Interim Judiciary Committee. In addition, the Commission will soon be preparing its Annual Report and the question arises as to whether the Commission is going to request that additional studies be assigned by the 1960 Legislature for study by the Commission.

This memorandum contains four groups of items. They are contained in the attached appendixes, as follows:

(1) Appendix I - These suggestions have already been accepted for study by the Commission but were not reported to the Legislature for authority to study them. Should the Commission request authority to study one or more of them from the 1960 Legislature?

(2) Appendix II - These suggestions are considered by the Staff to be suitable for study by the Commission. The Commission has not yet accepted them for study. Should the Commission request authority to study one or more of them from the 1960 Legislature? Should the

Commission accept them but defer requesting authority to study them until a subsequent session?

(3) Appendix III - The Staff recommends that these suggestions be consolidated with existing studies.

(4) Appendix IV - The Staff recommends that these suggestions be rejected but that consideration be given to referring them to the Assembly Interim Judiciary Committee.

For your convenience, the staff has prepared an abbreviated statement of each of the items that should be considered in connection with determining those items to be authorized for study by the 1960 Legislature. These statements follow. In most cases, additional information concerning the item can be found on the yellow sheets in Appendix I or II.

#### SUGGESTIONS ALREADY ACCEPTED FOR STUDY

Suggestion No. 2 -- Statutory jury instructions covering general questions of law in personal injury cases. The Commission has received a communication from a judge of the district court of appeal suggesting that a study be made to determine whether statutory jury instructions should be enacted to cover the rules of law most frequently involved in personal injury cases. The author of this suggestion reports that about 25 percent of all appeals involve personal injury cases and that in many of these cases the only important questions raised concern the wording of instruction on such fundamental subjects as negligence, contributory negligence, proximate cause, last clear chance, res ipsa loquitur, burden of proof, etc. He points out that there is precedent for his

suggestion in the statutory instruction in Sections 1096 and 1096a of the Penal Code on reasonable doubt. The judge reports that before these sections were enacted virtually every criminal appeal involved an issue as to the propriety of this instruction and that since their enactment there has been hardly an appeal in which this problem is involved. This item was reported in the Commission's 1955 Report as a "Topic Intended for Future Study."

Suggestion No. 13 - Use of blood tests in negating paternity.

Section 1962, Code of Civil Procedure provides a conclusive presumption that "notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate." A judge of the Superior Court suggests that, in view of the conclusive effect given blood tests in negating paternity by the Uniform Act on Blood Tests to Determine Paternity (Section 1980.6 Code of Civil Procedure), there should be an exception to the conclusive presumption in Section 1962, Code of Civil Procedure, when a blood test conclusively demonstrates that the husband is not the child's father.

Suggestion No. 118 - Jury instructions concerning whether or not death penalty should be imposed. California statutes provide for alternative penalties - death or life imprisonment - in certain cases. A municipal court judge has pointed out that there is no standard to be applied by a jury in determining whether the death penalty should be imposed in a particular case. It has been suggested that the jury be given appropriate instructions. The municipal court judge notes that instructions requiring that the jury find "mitigating circumstances" before they decide in favor

of life imprisonment have sometimes been approved and sometimes condemned by our court. Section 190.1 of the Penal Code (enacted in 1957) provides in part:

The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict.

Suggestion No. 186 - Intrafamily tort immunity. It has been suggested that the Commission make a study to determine whether intrafamily tort immunity should be abolished in California. It has been argued that there are no good reasons to sustain this exception to the general principle that a person should be liable for a wrong committed by him.

It is not clear in California whether there is any liability for a personal tort between a husband and wife. As far as actions between parents and children are concerned, it appears that there is no right of action against the parent for a negligent tort but that there is a right of action against the parent when the parent's act is wilful and malicious.

Suggestion No. 191 - Recovery for loss of consortium. In California a wife whose husband has been injured by a third person's

negligence may not recover for loss of consortium. There is some doubt as to whether a husband can recover for loss of consortium when his wife has been injured by the negligence of a third person.

The California Supreme Court suggested (50 Cal.2d 664) that "clarification by statute as to both the husband and the wife would . . . be preferable to piecemeal determination of the problems by judicial decision." Other aspects of the problem to be considered are:

(1) Should a spouse have a right to recover for loss of consortium caused by intentional injury to the other spouse.

(2) Should a relative other than a spouse have a right to recover for loss of consortium.

Suggestion No. 192. Revision of Sections 228 and 229 of Probate Code. 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 provided 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. It is suggested that in some cases the application of these sections defeats the intent of the testator. (See yellow sheet for details.)

Suggestions Nos. 5, 8, 27, 30 and 63 - Whether the law respecting the commitment of mentally ill persons should be revised, with particular attention to procedures in the commitment of sexual psychopaths. The commission has received communications from several superior court judges

in widely scattered counties of the State reporting that the procedure prescribed in Sections 5500 et seq. of the Welfare and Institutions Code for the commitment of sexual psychopaths is in many respects unnecessarily cumbersome, time-consuming and expensive and in others ambiguous and inconsistent. The commission has also received a detailed and extensively documented communication from a member of the Los Angeles Bar, which points up a number of defects and inconsistencies in the law relating to procedures for committing mentally ill persons generally and makes a number of suggestions for their improvement. This item was listed in the 1955 Report as a "Topic for Future Study."

Suggestion No. 6(1) - Whether Inheritance Tax Law exemptions should be the same with respect to transfers of property from husband to wife as from wife to husband. The Inheritance Tax Law provides the following exemptions from tax in the case of property passing from one spouse to the other by will or intestate succession or by an inter vivos transfer subject to the inheritance tax: (1) in the case of property going to a surviving wife, one-half of the community property goes to her free of tax, property equal in value to one-half of the husband's separate property can be given to her free of tax, and there is, in addition, a specific exemption of \$24,000; (2) in the case of property going to a surviving husband, all of the community property goes to him free of tax, property equal in value to one-half of the wife's separate property may be given to him free of tax, and there is, in addition, a specific exemption of \$5,000.

Whether this difference in the Inheritance Tax Law exemptions as

between husband and wife is justifiable is open to question. The discrimination in favor of the husband in respect of transfers of community property would seem to be out of line with the general development of the law of the State in the direction of giving the wife full parity of treatment with respect to such property.

This item was listed in the 1955 Report as a "Topic for Future Study."

SUGGESTIONS CONSIDERED BY STAFF TO BE SUITABLE  
FOR STUDY

Suggestion No. 145 - Formality required to transmit property held by joint tenancy into community property, etc. Present California Law does not require a writing between a husband and wife to change the character of community real property to separate, separate to community and joint tenancy property to community.

Failure to require a formal instrument has resulted in:

- (1) Considerable litigation to ascertain whether a transfer between a husband and wife has in fact been made.
- (2) Confusion as to what evidence is sufficient to rebut the presumption of the interests recited in the deed.

If this study is accepted by the Commission the Staff recommends that the request for authorization to undertake the study should be broad enough to include other types of husband-wife real property transmutations - i.e., other (non-joint tenancy) separate property into community property and community into separate property, and separate property of one spouse into separate property of the other spouse.

Suggestions Nos. 78 and 166(1) and (2) - Special and general appearances. Professor Van Alstyne suggests that the Commission might study general and special appearances in California in two particular areas:

- (1) Where relief is sought from provisional remedies.
- (2) Where relief is sought from a default judgment.

The law governing these situations now provides that a party who wishes to raise the issue of lack of personal jurisdiction cannot join any nonjurisdictional objection with it; if he does, he is deemed to have made a general appearance and thus "waived" the jurisdictional defect.

It is suggested that this puts one who wishes to challenge the jurisdiction over his person and to seek relief from a provisional remedy (e.g., attachment) in an unfair position. He can, through a special appearance, raise the jurisdictional issue alone without conferring jurisdiction upon the court, but if he loses on this issue he must then submit to the provisional remedy; or, if he wishes to seek relief from the application of the provisional remedy on nonjurisdictional grounds, he must waive the jurisdictional defect.

A similar problem exists when a person seeks to vacate a default judgment. If he moves to set the judgment aside for lack of personal jurisdiction and for other reasons, he is held to have made a general appearance at that late date which cures, retroactively, all jurisdictional defects.

It is recommended that the whole subject of special appearances be undertaken as a possible study. See yellow sheets on Suggestions for



other defects.

Note the State Bar is interested in this matter. See pages 2 and 3 of report on Suggestion No. 166(1), (2).

Suggestion No. 232 - Trustee of estate of missing person. As the yellow sheet on this suggestion indicates, the law governing the appointment of a trustee of the estate of a missing person is inadequate and needs revision.

Suggestion No. 239. Inter vivos trusts. The law is not clear with respect to what statutes are applicable to successor trustees of inter vivos trusts. Judicially it has been ascertained that some of the statutes relating to the testamentary trustee are applicable to the inter vivos trustee, but there are many incidences relating to the rights and duties of the successor trustee that either differ from the provisions of the testamentary trustee or there is no provision.

If a study is to be made, the Staff recommends that the scope of the study should include all aspects of inter vivos trusts. [The State Bar is interested in this subject, see 33 Cal. B.J. 256 (1958)]

Suggestion No. 241. Waiver of trial in jurisdiction where pending indictment or information and subjecting self to jurisdiction where apprehended. or Transfer of criminal prosecution for plea and sentence. Rule 20 of the Federal Rules of Procedure provides that where a defendant is arrested he may waive trial in the district in which the indictment or information is pending against him if he states in writing that he wishes to plead guilty and subject himself to the disposition of his

case in the district in which he is arrested. It has been suggested that a study be made to determine whether California should enact a similar provision.

Suggestion No. 245 - "Pouring over" by will into trust. It has been suggested that the topic of "pouring over" by will into a pre-existing trust be studied by the Commission. The topic is one of some complexity at common law and several states have drafted legislation to clarify the legal status of a will which "pours over" into a trust.

Suggestion No. 247 - Nonprofit corporations. It has been suggested that a comprehensive statute governing nonprofit corporations should be prepared. The present law is inadequate and ambiguous.

1/11/57.

A P P E N D I X    I

These suggestions have already been accepted for study by  
the Commission but have not been authorized by the Legislature:

<u>Suggestion No.</u>	<u>Date Accepted</u>
2	1955 Report
6(1)	1955 Report
13(2)	11/1/57
118(2)(3)	9/20/56
186	10/13/56
191	10/13/56
192	11/1/57
5, 8, 27, 30, 63	1955 Report

A P P E N D I X      I I

These suggestions have not yet been considered by the Commission.  
The Staff recommends that they be reviewed for acceptance and that the  
Commission consider requesting authority to study them from the Legislature.

Suggestion No.

145

166(1)(2) (Suggestion No. 78 consolidated  
with this one.)

232

239

241

245

~~259~~ 247

A P P E N D I X    I I I

The Staff recommends that these suggestions be consolidated  
with the following existing studies:

Suggestion No. ~~32~~ Consolidate with Study No. ~~48 (Juvenile Court)~~

<del>41(1)</del>	"	"	"	<del>48 (Juvenile Court)</del>
217(1)	"	"	"	57(L) (Bail)
217(2)	"	"	"	39(L) (Attachment, etc.)
235(2)	"	"	"	39(L) (Attachment, etc.)

A P P E N D I X    I V

The Staff recommends that these suggestions be rejected,  
but that consideration be given to referring them to the Assembly  
Interim Judiciary Committee:

Suggestion No. 7 (Annexation)

19 (Annexation)

61 (Counsel for respondent in  
mental commitment cases)

80 (required 6 hr. waiting  
period between conviction  
and judgment in inferior  
court)

98 (Pretrial suppression of  
illegally obtained evidence)

Suggestion No. 228(1) (Statutory requirement  
for uniformity of govern-  
ment agencies re acceptance  
of monies)

228(2) (Statutory requirement  
to automatically give  
grantee right of redemption)

229(1) (Make mandatory credit time  
spent in jail pending dis-  
position of case)

229(2) (Clarify meaning of "original  
contractor" in § 1193.1 c.c.p.)

231 (Clarify the ambiguity between  
§ § 11000 and 11535 - defining  
subdivision)

240 (Amend § 2370ld of Rev. & Tax.  
Code to delete term "propaganda")

242 (Creditors' rights for debts of  
wife)

243 (Clarify ambiguity between  
§ § 16601 and 16602 relating to  
partnership dissolution and  
agreement not to compete)