12/21/64

Memorandum 65-3

Subject: Projects to be undertaken for the 1967 legislative session.

At its October 1964 meeting, the Commission discussed briefly the general nature of the projects to be undertaken for the 1967 legislative session. There seemed to be general agreement that a number of relatively small topics should be studied during the next two years, rather than one large topic.

This memorandum has been prepared to permit the staff to plan our program, both short range and long range. We outline below various policy decisions for Commission consideration. Exhibit I (pink pages) is a list of topics on our current agenda.

1. Long range program. Assuming that we plan to take up a number of relatively small topics for the 1967 legislative session, we should take into account in our planning our major recommendations to the 1969 and 1971 legislative sessions. The staff recommends that we plan to submit a comprehensive Eminent Domain Statute for enactment in 1969 and a revision of the statutes relating to attachment, garnishment, and exemptions from execution in 1971. Accordingly, we suggest that some preliminary work be carried out on Eminent Domain during the next two years so that we can submit a recommendation on this subject in 1969. Also, we suggest that we plan to have the study on attachment, garnishment, and exemptions from execution in our hands early in 1968 so that we can begin our study of this topic with a view to making a recommendation in 1971.

2. All topics relating to Criminal Law and Procedure should be dropped from our current agenda (with an indication in the 1966 Annual Report that we have dropped these topics).

Comment. As you know, Chapter 1787 of the 1963 Statutes created a joint legislative committee to revise the penal laws and procedures. The scope of the assignment of this committee will cover a number of topics already assigned to the Commission. There is no need to continue the Commission's authority to study these topics. We would not want to duplicate the work of the joint legislative committee and, to the extent we can assist the committee, the 1963 statute contains authority for us to make studies and recommendations upon request of the committee:

> (e) The Committee may request the California Law Revision Commission to prepare research studies and recommendations relating to specific portions of the committee's assignment under Section 2. To the extent that funds are available to the Commission, the commission shall prepare such research studies and recommendations and shall submit them to the committee. The committee may take such action with respect to the recommendations as it considers appropriate.

Accordingly, the staff suggests that the following topics be dropped from our agenda of topics and that our 1966 Annual Report indicate that these topics have been dropped from the agenda:

a. Whether the law relating to habeaus corpus proceedings, in the 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.

b. Whether the law relating to bail should be revised.

c. Whether the law respecting post conviction sanity hearings should be revised.

d. 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 of the other pleas.

e. Whether the provisions of the Penal Code relating to arson should be revised.

3. All previous recommendations that have not been enacted into law should be reviewed with a view to making a new recommendation to the 1967 legislative session where justified.

Comment. The Commission has made a few recommendations in the past that have not been enacted as law. The staff suggests that these recommendations be reviewed to determine whether a new recommendation on these subjects should be made to the 1967 legislative session. For example, we believe that a recommendation on moving expenses when property is acquired for a public use should be made to the 1967 Legislature. (In some cases, this might require that we obtain authority at the 1966 session to study the topic upon which we made the recommendation.) If this seems desirable to the Commission, we will prepare a memorandum concerning this matter.

4. The staff suggests that some attention be devoted during the next two years to the topic of Condemnation Law and Procedure.

Comment. As previously indicated, the staff is hopeful that the Commission will be able to recommend a comprehensive Eminent Domain Statute for enactment at the 1969 legislative session. In order to be in a position to make such a recommendation in 1969, we should make some progress on this topic during the next two years. We have a series of studies that completely cover this field, but the studies are rapidly becoming obsolete.

5. The staff suggests that the following topics be studied during the next two years with a view to making recommendations to the 1967 legislative session.

Comment. It is difficult to establish any priority on these topics because most of them require considerable staff work before we can present them for Commission consideration. We plan to present those topics upon which we have a fairly adequate research study for your consideration during the next few months. As we complete work on the background research on the other topics, we will bring them to your attention.

4. Whether an award of damages made to a married person in a personal injury action should be the separate property of such married person.

We have a research study on this topic.

5. Whether a trial court should have the power to require, as a condition of denying a motion for a 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.

We have a research study on this topic.

6. *A study to determine whether the jury should be authorized to take a written copy of the court's instructions into the jury room in civil as well as criminal cases.*

Penal Code Section 1137 authorizes a written copy of the court's instructions to be taken into the jury room in criminal cases. It has been held, however, that Sections 612 and 614 of the Code of Civil Procedure preclude permitting a jury in a civil case to take a written copy of the instructions into the jury room.[**] There seems to be no reason why the rule on this matter should not be the same in both civil and criminal cases.

Taking Instructions to the Jury Room: Senate Bill No. 33, which was drafted by the Commission to effectuate its recommendation on this subject, was introduced by Senator Dorsey.[**] Following circulation by the Commission to interested persons throughout the State of its recommendation and study on this matter, a number of questions were raised by members of the bench and bar relating to practical problems involved in making a copy of the court's instructions available to the jury in the jury room. 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.

We will need to prepare a staff research study on this topic.

d. A study to determine whether the law relating to escheat of personal property should be revised. We have no research study on this topic.

In the recent case of *Estate of Nolan* [31] the California District Court of Appeal held that two savings bank accounts in California totaling $16,000, owned by the estate of a decedent who had died without heirs while domiciled in Montana, escheated to Montana rather than California. The Supreme Court denied the Attorney General's petition for hearing.[32]

There is little case authority as to which state, as between the domicile of the decedent and any other, is entitled to escheat personal property.[33] In some cases involving bank accounts it has been held that they escheat to the domiciliary state;[34] in others, that they escheat to the state in which the bank is located.[35] The Restatement of Conflict of Laws takes the position that personal property should escheat to the state in which the particular property is administered.[36]

In two recent cases California's claim as the domicile of the decedent to escheat personal property has been rejected by sister states where the property was being administered, both states applying rules favorable to themselves.[37] The combination of these decisions with that of the California court in *Estate of Nolan* suggests that California will lose out all around as the law now stands.

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[31] 135 A.C.A. 49 (August 15, 1956).
[32] 45 A.C. No. 12, p. 1 (Oct. 10, 1955).
[33] It seems to be well settled that real property escheats to the state of its situs. RESTATEMENT, CONFLICT OF LAWS Section 254 (1934); 2 BEALE, CONFLICT OF LAWS Section 254.1 (1935); 19 AM. JUR., *Escheat* Section 2 (1939).
[34] In re Lyons' Estate, 175 Wash. 115, 26 P. 2d 615 (1933); *cf.* In re Hull Copper Co., 46 Ariz. 270, 50 P. 2d 550 (1935) (this case involved escheat of unclaimed shares of a corporation).
[35] In re Rapoport's Estate, 317 Mich. 291, 26 N.W. 2d 777 (1947); In re Manscherfriend's Estate, 283 App. Div. 463, 128 N. Y. S. 2d 738 (1954).
[36] RESTATEMENT, CONFLICT OF LAWS Section 269 (1934).

e. A study to determine whether the law relating to the rights of a good faith improver of property belonging to another should be revised. Research study inadequate on this topic.

The common law rule, codified in Civil Code Section 1013, is that when a person affixes improvements to the land of another in the good faith belief that the land is his, the thing affixed belongs to the owner of the land in the absence of an agreement to the contrary. The common law denies the innocent improver any compensation for the improvement he has constructed [44] except that when the owner has knowingly permitted or encouraged the improver to spend money on the land without revealing his claim of title the improver can recover the value of the improvement,[45] and when the owner sues for damages for the improver's use and occupation of the land the improver can set off the value of the improvement.[46]

About three-fourths of the states have ameliorated the common law rule by the enactment of "betterment statutes" which make payment of compensation for the full value of the improvement a condition of the owner's ability to recover the land. The owner generally is given the option either to pay for the improvement and recover possession or to sell the land to the improver at its value excluding improvements.[47] Usually no independent action is given the improver in possession, although in some states he may sue directly if he first gives up the land.[48]

California, on the other hand, grants the improver only the limited relief of set-off [49] when the owner sues for damages and the right to remove the improvement when this can be done.[50] It would seem to be unjust to take a valuable improvement from one who built it in the good faith belief that the land was his and give it to the owner as a complete windfall. Provision should be made for a more equitable adjustment between the two innocent parties.

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[44] Ford v. Holton, 5 Cal. 319 (1855); Kinard v. Kaelin, 22 Cal. App. 383, 134 Pac. 370 (1913).
[45] See *Improvements*, 26 CAL. JUR. 2d 194, 199-203 (1956).
[46] See Green v. Biddle, 8 Wheat (U.S.) 1, 81-82 (1823).
[47] See Ferrier, *A Proposed California Statute Compensating Innocent Improvers of Realty*, 15 CALIF. L. REV. 189, 190-93 (1927); RESTATEMENT, RESTITUTION p. 163 (1936).
[48] See *Improvements*, 27 AM. JUR. 280-81 (1940) and discussion of cases and statutes in Jensen v. Probert, 174 Ore. 143, 148 P.2d 245 (1944).
[49] CAL. CODE CIV. PROC. § 741.
[50] CAL. CIV. CODE § 1013.5.

f. **A study to determine whether Civil Code Section 1698 should be repealed or revised.**

Section 1698 of the Civil Code, which provides that a contract in writing may be altered by a contract in writing or by an executed oral agreement and not otherwise, might be repealed. It frequently frustrates contractual intent. Moreover, two avoidance techniques have been developed by the courts which considerably limit its effectiveness.[64] One technique is to hold that a subsequent oral agreement modifying a written contract is effective because it is executed, and performance by one party only has been held sufficient to render the agreement executed.[65] The second technique is to hold that the subsequent oral agreement rescinded the original obligations[66] and substituted a new contract, that this is not an "alteration" of the written contract and, therefore, that Section 1698 is not applicable.[67] These techniques are not a satisfactory method of ameliorating the rule, however, because it is necessary to have a lawsuit to determine whether Section 1698 applies in a particular case.

If Section 1698 is to be retained, the question arises whether it should apply to all contracts in writing, whether or not required to be written by the statute of frauds or some other statute. It is presently held to apply to all contracts in writing[68] and is thus contrary to the common law rule and probably contrary to the rule in all other states. This interpretation has been criticized by both Williston and Corbin who suggest that the language is the result of an inaccurate attempt to codify the common law rule that contracts required to be in writing can only be modified by a writing.[69]

[64] See Note, 4 HASTINGS L.J. 59 (1952).
[65] D. L. Godbey & Sons Const. Co. v. Deane, 39 Cal.2d 429, 246 P.2d 946 (1952).
[66] Civil Code Section 1689 permits rescission of a contract by mutual assent.
[67] McClure v. Alberti, 196 Cal. 348, 212 Pac. 204 (1923) (rescission of executory written contract by oral agreement); Treadwell v. Nickel, 194 Cal. 243, 228 Pac. 25 (1924) (rescission of written contract by substituted oral contract).
[68] P. A. Smith Co. v. Muller, 201 Cal. 219, 256 Pac. 411 (1927).
[69] 2 CORBIN, CONTRACTS § 301 (1951); 6 WILLISTON, CONTRACTS § 1828 (Rev. ed. 1938).

We will need to prepare a staff research study on this topic.

& 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.

Under the older common law, a lessor was regarded as having conveyed away the entire term of years, and his only remedy upon the lessee's abandonment of the premises was to leave the property vacant and sue for the rent as it became due or to re-enter for the limited purpose of preventing waste. If the lessor repossessed the premises, the lease and the lessor's rights against the lessee thereunder were held to be terminated on the theory that the tenant had offered to surrender the premises and the lessor had accepted.

In California the landlord can leave the premises vacant upon abandonment and hold the lessee for the rent. The older rule in California was, however, that if he repossessed the premises, there was a surrender by operation of law and the landlord lost any right to rent or damages against the lessee.[95] More recently it has been held by our courts that if the lessor re-enters or re-lets, he can sue at the end of the term for damages measured by the difference between the rent due under the original lease and the amount recouped under the new lease.[96]

Should the landlord not be given, however, the right to re-enter and sue for damages at the time of abandonment? In some states this has been allowed, with certain restrictions, even in the absence of a clause in the lease.[97] And it has been held in many states that the landlord may enter as agent of the tenant and re-lease for a period not longer than the original lease at the best rent available. In this case, the courts have said, the landlord has not accepted a surrender and may therefore sue for damages. But this doctrine was repudiated in California[98] and it is doubtful that it can be made available to the lessor without legislative enactment.[99]

Civil Code Section 3308 provides that the parties to a lease may provide therein that if the lessee breaches any term of the lease,

> the lessor shall thereupon be entitled to recover from the lessee the worth at the time of such termination, of the excess, if any, of the amount of rent and charges equivalent to rent reserved in the lease for the balance of the stated term or any shorter period of time over the then reasonable rental value of the premises for the same period.
>
> The rights of the lessor under such agreement shall be cumulative to all other rights or remedies * * * .

Thus the landlord is well protected in California if the lease so provides. The question is whether he should be similarly protected by statute when the lease does not so provide.

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[95] Welcome v. Hess, 90 Cal. 507, 27 Pac. 369 (1891).
[96] De Hart v. Allen, 26 Cal.2d 829, 161 P.2d 453 (1945), 34 CALIF. L. REV. 252 (1946). This case appears to involve a partial repudiation of Welcome v. Hess, 90 Cal. 507, 27 Pac. 369 (1891).
[97] Sagamore Corp. v. Willcutt, 120 Conn. 315, 180 Atl. 464 (1935) (lease of only one year, so not a strong holding); Auer v. Penn, 99 Pa. 370 (1882).
[98] Welcome v. Hess, 90 Cal. 507, 27 Pac. 369 (1891).
[99] See Dorcich v. Time Oil Co., 103 Cal. App.2d 677, 230 P.2d 10, 39 CALIF. L. REV. 588 (1951).

We have a research study on this topic.

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.

After we requested authority to make a study of this topic, the Supreme Court held that a spouse did have the right to maintain an action for support after an ex parte divorce. The research study that we have on hand was prepared before the Supreme Court decision. Hence, we will need a staff research study before we can determine whether any statute is needed on this subject.

A study to determine whether Section 1974 of the Code of Civil Procedure should be repealed or revised.

Section 1974 of the Code of Civil Procedure, enacted in 1872, provides that no evidence is admissible to charge a person upon a representation as to the credit of a third person unless the representation, or some memorandum thereof, be in writing and either subscribed by or in the handwriting of the party to be charged. Section 1974 is open to the criticism commonly leveled at statutes of frauds, that they shelter more frauds than they prevent. This result has been avoided by the courts to a considerable extent with respect to the original Statute of Frauds by liberal construction of the Statute and by creating numerous exceptions to it.[63] However, Section 1974 has been applied strictly in California. For example, in *Baron* v. *Lange*[64] an action in deceit failed for want of a memorandum against a father who had deliberately misrepresented that his son was the beneficiary of a large trust and that part of the principal would be paid to him, thus inducing the plaintiff to transfer a one-third interest in his business on the son's note.

Only a few states have statutes similar to Section 1974.[65] The courts of some of these states have been more restrictive in applying the statute than has California. Thus, some courts have held or said that the statute does not apply to misrepresentations made with intention to defraud [66] but fraudulent intent will not avoid Section 1974.[67] Again, some states hold the statute inapplicable when the defendant had an interest in the action induced,[68] but this interpretation was rejected in *Bank of America* v. *Western Constructors, Inc.*[69] And in *Carr* v. *Tatum*[70] the California court failed to apply two limitations to Section 1974 which have been applied to similar statutes elsewhere: (1) construing a particular statement to be a misrepresentation concerning the value of property rather than one as to the credit of a third person;[71] (2) refusing to apply the statute where there is a confidential relationship imposing a duty of disclosure on the defendant.[72] Indeed, the only reported case in which Section 1974 has been held inapplicable was one where the defendant had made the representation about a corporation which was his alter ego, the court holding that the representation was not one concerning a third person.[73]

Section 1974 was repealed as a part of an omnibus revision of the Code of Civil Procedure in 1901 [74] but this act was held void for unconstitutional defects in form.[75]

[63] See *e.g.*, Willis, *The Statute of Frauds—A Legal Anachronism*, 2 IND. L. J. 427, 528 (1928); 2 CORBIN, CONTRACTS, *passim* (1950).
[64] 92 Cal. App.2d 718, 207 P.2d 611 (1949).
[65] 5 WILLISTON, CONTRACTS §1520A, p. 4257 (rev. ed. 1937); *Credit—Representations—Writing*, 32 A.L.R.2d 743, 744 n. 3 (1953).
[66] See *e.g.*, Clark v. Dunham Lumber Co., 86 Ala. 220, 5 So. 560 (1889); W. G. Jenkins & Co. v. Standrod, 46 Idaho 614, 269 Pac. 586 (1928) (dictum); *cf.* Bank of Commerce & Trust Co. v. Schooner, 262 Mass. 122, 160 N.E. 798 (1928).
[67] Beckjord v. Slusher, 22 Cal. App.2d 559, 567, 71 P.2d 830, 824 (1937); Carr v. Tatum, 133 Cal. App. 274, 24 P.2d 195 (1933); *cf.* Cutler v. Bowen, 10 Cal. App.2d 31, 51 P.2d 164 (1935). *Accord:* Cook v. Churchman, 104 Ind. 141, 3 N.E. 769 (1885); Knight v. Rawlings, 205 Mo. 412, 104 S.W. 38 (1907).
[68] See *e.g.*, Dinsmore v. Jacobsen, 242 Mich. 192, 218 N.W. 700 (1928).
[69] 110 Cal. App.2d 168, 242 P.2d 365 (1952).
[70] 133 Cal. App. 274, 24 P.2d 195 (1933).
[71] Walker v. Russell, 186 Mass. 69, 71 N.E. 86 (1904) (representation as to the financial credit of a corporation, made to induce the purchase of shares in the corporation, held to be a representation of fact bearing upon value of the shares and thus not within the statute).
[72] See *e.g.*, W. G. Jenkins & Co. v. Standrod, 46 Idaho 614, 269 Pac. 586 (1928) (misrepresentation made in violation of fiduciary relationship held not within statute).
[73] Grant v. United States Electronics Corp., 125 Cal. App.2d 193, 270 P.2d 64 (1954).
[74] Cal. Stat. 1901, c. 102, p. 117.
[75] Lewis v. Dunne, 134 Cal. 291, 66 Pac. 475 (1901).

We will need to prepare a staff research study on this topic.

A study to determine whether Vehicle Code Section 17150 should be revised or repealed insofar as it imputes the contributory negligence of the driver of a vehicle to its owner.

The 1957 Legislature directed the Commission to undertake 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."[50] A study of this subject involves more than a determination of the nature of property interests in damages recovered by a married person in a personal injury action; it also involves the question of the extent to which the contributory negligence of one spouse may be imputed to the other.

Prior to the enactment in 1957 of Section 163.5 of the Civil Code, damages recovered by a married person in a personal injury action were community property. Hence, the courts imputed the contributory negligence of one spouse to the other because the negligent spouse otherwise would share in the compensation paid for an injury for which he was partially responsible. The result was that a nonnegligent spouse was in many instances totally deprived of compensation for injuries negligently caused by others. Section 163.5 prevents such imputation, but it has created many other problems that need legislative solution.

The Commission's preliminary study of these problems has revealed another problem which cuts across any recommendation which the Commission might make in regard to the property nature of a married person's personal injury damages. Many, if not most, actions for the recovery of damages for personal injury in which the contributory negligence of a spouse is a factor arise out of vehicle accidents. Because contributory negligence is imputed to vehicle owners under Vehicle Code Section 17150, the potential results in terms of liability are quite varied and complex when an automobile carrying a married couple is involved in an accident with a vehicle driven by a third party and both the driver spouse and the third party are negligent. Whether the innocent spouse may recover damages from a negligent third party depends in large part upon such factors—not germane to the question of culpability—as whether the automobile was held as community property or as joint tenancy property and whether a husband or a wife was driving when the innocent spouse was injured. In many situations, it is impossible to predict with certainty what the result would be.

[50] 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.
[51] Cal. Stats. 1957, Res. Ch. 202, p. 4589.

It is clear that if a vehicle is community property registered in the name of the husband or in the names of both spouses, the contributory negligence of the husband will not be imputed to the wife, but the contributory negligence of the wife will be imputed to the husband. These results flow from the fact that the husband, as manager of the community property, is the only spouse who can consent (within the meaning of Section 17150) to the other's use of the vehicle. On the other hand, if the vehicle is community property registered in the wife's name, the contributory negligence of the wife will probably be imputed to the husband and the husband's contributory negligence may possibly be imputed to the wife, but these results are not predictable with certainty. It is also clear that if the vehicle is held in joint tenancy, the negligence of one spouse is imputed to the other in all cases because each joint owner may consent (within the meaning of Section 17150) to the use of the vehicle. However, if the vehicle is community property but is registered in the names of both spouses jointly, it is not clear whether the true nature of the property can be shown to prevent imputing the contributory negligence of the husband driver to the wife.

The problems arising out of Vehicle Code Section 17150 are not confined to cases in which married persons are involved. If, for example, an automobile owner is a passenger in his own automobile and is injured by the concurring negligence of the driver and a third person, he cannot recover damages from the third person, for the driver's contributory negligence is imputed to him. He could formerly recover from the driver on established principles but Section 17158 of the Vehicle Code, originally enacted to protect against fraudulent claims and collusive suits, was amended in 1961 to provide that the owner can no longer recover from the driver. Hence, an innocent vehicle owner, injured by the concurring negligence of his driver and another, can now recover damages from no one.

A primary purpose of Section 17150 would appear to be to protect innocent third parties from the careless use of vehicles by financially irresponsible drivers. This protection is achieved by its provision that a vehicle owner is liable to an innocent third party for its negligent operation. This policy is not, of course, furthered by depriving innocent vehicle owners of all rights of action against negligent third parties. However, another purpose of Section 17150 may be to discourage vehicle owners from lending them to careless drivers. This policy might be furthered by denying the owner the right to recover against negligent third parties.

The Commission believes that a study should be made to determine what policies Section 17150 should seek to accomplish. It may be that better ways can be found to control the lending of vehicles and to allocate the risk of injury to the owner of a vehicle by another than to impose the entire risk on the one person involved who is not negligent. Accordingly, the Commission recommends that it be authorized to study whether Vehicle Code Section 17150 should be revised or repealed insofar as it imputes the contributory negligence of the driver of a vehicle to its owner.

We have a research study on this topic.

6. Determination should be made, after a report from the staff, as to whether the following topics are suitable for a Commission recommendation.

a. 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.

(This topic may involve policy considerations not suitable for Commission determination.)

b. Whether the doctrine of election of remedies should be abolished in cases where relief is sought against different defendants.

(Our consultant reported that no legislation is needed on this topic; the courts are working out any problems that may exist.)

7. Research consultants are needed on the following topics. We do not plan to make any recommendations to the 1967 Legislature on these topics.

a. Specific problems in governmental tort liability.

b. Whether the law relating to the rights of a putative spouse should be revised.[4]

c. Whether the law respecting jurisdiction of courts in proceedings affecting the custody of children should be revised.[6]

d. Whether the law relating to attachment, garnishment and property exempt from execution should be revised.[7]

e. Whether the Small Claims Court Law should be revised.[8]

f. 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.[11]

g. Whether the law relating to the doctrine of mutuality of remedy in suits for specific performance should be revised.[12]

h. Whether California statutes relating to service of process by publication should be revised in light of recent decisions of the United States Supreme Court.[18]

i. Whether the various sections of the Code of Civil Procedure relating to partition should be revised and whether 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 should be made uniform and, if not, whether there is need for clarification as to which of them governs confirmation of private judicial partition sales.[21]

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 65-3

EXHIBIT I

CALENDAR OF TOPICS FOR STUDY

STUDIES IN PROGRESS

During the year covered by this report, the Commission had on its agenda the topics listed below, each of which it had been authorized and directed by the Legislature to study. The Commission proposes to continue its study of these topics.

Studies Which the Legislature Has Directed the Commission To Make [1]

1. 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.
2. Whether the law respecting habeas corpus proceedings, in the 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.
3. Whether an award of damages made to a married person in a personal injury action should be the separate property of such married person.
4. Whether a trial court should have the power to require, as a condition of denying a motion for a 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.
5. Whether the laws relating to bail should be revised.
6. Whether the law and procedure relating to condemnation should be revised in order to safeguard the property rights of private citizens.[2]
7. Whether the doctrine of sovereign or governmental immunity in California should be abolished or revised.[3]

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[1] Section 10335 of the Government Code provides that the Commission shall study, in addition to those topics which it recommends and which are approved by the Legislature, any topic which the Legislature by concurrent resolution refers to it for such study.

The legislative directives to make these studies are found in the following:
Nos. 1 and 2: Cal. Stats. 1956, Res. Ch. 42, p. 263.
Nos. 3 and 4: Cal. Stats. 1957, Res. Ch. 202, p. 4589.
No. 5: Cal. Stats. 1957, Res. Ch. 237, p. 4744.
No. 6: Cal. Stats. 1956, Res. Ch. 42, p. 263.
No. 7: Cal. Stats. 1957, Res. Ch. 202, p. 4589.

[2] See *Recommendation and Study Relating to Evidence in Eminent Domain Proceedings; Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings; Recommendation and Study Relating to the Reimbursement for Moving Expenses When Property Is Acquired for Public Use*, 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendations and Studies at A-1, B-1, and C-1 (1961). For a legislative history of these recommendations, see 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1-5 (1961). See also *Recommendation and Study Relating to Condemnation Law and Procedure: Number 4—Discovery in Eminent Domain Proceedings*, 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 701 (1963). For a legislative history of this recommendation, see 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 213 (1963).

[3] See *Recommendations Relating to Sovereign Immunity: Number 1—Tort Liability of Public Entities and Public Employees; Number 2—Claims, Actions and Judgments Against Public Entities and Public Employees; Number 3—Insurance Coverage for Public Entities and Public Employees; Number 4—Defense of Public Employees; Number 5—Liability of Public Entities for Ownership and Operation of Motor Vehicles; Number 6—Workmen's Compensation Benefits for Persons Assisting Law Enforcement or Fire Control Officers; Number 7—Amendments and Repeals of Inconsistent Special Statutes*, 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 801, 1001, 1201, 1301, 1401, 1501, and 1601 (1963). For a legislative history of these recommendations, see 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 211-213 (1963). See also *A Study Relating to Sovereign Immunity*, 5 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1 (1963).

Studies Authorized by the Legislature Upon the Recommendation of the Commission [1]

1. Whether the jury should be authorized to take a written copy of the court's instructions into the jury room in civil as well as criminal cases.[2]
2. Whether the law relating to escheat of personal property should be revised.[3]
3. Whether the law relating to the rights of a putative spouse should be revised.[4]
4. Whether the law respecting post conviction sanity hearings should be revised.[5]
5. Whether the law respecting jurisdiction of courts in proceedings affecting the custody of children should be revised.[6]
6. Whether the law relating to attachment, garnishment and property exempt from execution should be revised.[7]
7. Whether the Small Claims Court Law should be revised.[8]
8. Whether the law relating to the rights of a good faith improver of property belonging to another should be revised.[9]
9. 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.[10]
10. 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.[11]
11. Whether the law relating to the doctrine of mutuality of remedy in suits for specific performance should be revised.[12]
12. Whether the provisions of the Penal Code relating to arson should be revised.[13]
13. Whether Civil Code Section 1698 should be repealed or revised.[14]
14. 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.[15]

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[1] Section 10335 of the Government Code requires the Commission to file a report at each regular session of the Legislature containing, *inter alia*, a list of topics intended for future consideration, and authorizes the Commission to study the topics listed in the report which are thereafter approved for its study by concurrent resolution of the Legislature.
The legislative authority for the studies in this list is:
No. 1: Cal. Stats. 1965, Res. Ch. 207, p. 4207.
Nos. 2 through 7: Cal. Stats. 1956, Res. Ch. 42, p. 263.
Nos. 8 through 16: Cal. Stats. 1957, Res. Ch. 202, p. 4588.
Nos. 17 through 19: Cal. Stats. 1958, Res. Ch. 61, p. 135.
No. 20: Cal. Stats. 1959, Res. Ch. 218, p. 5782; Cal. Stats. 1956, Res. Ch. 42, p. 263.
No. 21: Cal. Stats. 1962, Res. Ch. 23, p. 94.

[2] For a description of this topic, see 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1956 Report at 29 (1957). For the legislative history, see 2 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1958 Report at 13 (1959).

[3] See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1956 Report at 25 (1957).

[4] *Id.* at 26.

[5] *Id.* at 28.

[6] *Id.* at 29.

[7] See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1957 Report at 15 (1957).

[8] *Id.* at 16.

[9] *Id.* at 17.

[10] *Id.* at 18.

[11] *Ibid.*

[12] *Id.* at 19.

[13] *Id.* at 20.

[14] *Id.* at 21.

[15] *Id.* at 23.

15. Whether the law respecting the rights of a lessor of property when it is abandoned by the lessee should be revised.[16]

16. 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.[17]

17. Whether California statutes relating to service of process by publication should be revised in light of recent decisions of the United States Supreme Court.[18]

18. Whether Section 1974 of the Code of Civil Procedure should be repealed or revised.[19]

19. Whether the doctrine of election of remedies should be abolished in cases where relief is sought against different defendants.[20]

20. Whether the various sections of the Code of Civil Procedure relating to partition should be revised and whether 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 should be made uniform and, if not, whether there is need for clarification as to which of them governs confirmation of private judicial partition sales.[21]

21. Whether Vehicle Code Section 17150 should be revised or repealed insofar as it imputes the contributory negligence of the driver of a vehicle to its owner.[22]

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[16] *Id.* at 24.
[17] *Id.* at 25.
[18] See 2 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1958 Report at 18 (1959).
[19] *Id.* at 20.
[20] *Id.* at 21.
[21] See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1956 Report at 21 (1957).
[22] See 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 20 (1963).

SEC. 56. Section 950.2 of the Government Code is amended to read:

950.2. (a) Except as provided in Section 950.4, a cause of action against a public employee or former public employee for injury resulting from an act or omission in the scope of his employment as a public employee is barred if an action against the employing public entity for such injury is barred under Section 946 ~~or is barred because of the failure (a) to present a written claim to the public entity or (b) to commence the action within the time specified in Section 945.6~~ .

(b) Except as provided in Section 950.4, a cause of action against a public employee or former public employee for injury resulting from an act or omission in the scope of his employment as a public employee is barred unless:

(1) A timely and sufficient written claim was presented to the public entity in conformity with Sections 910 to 912.2, inclusive, or such other claims procedure as may be applicable; and

(2) The action is commenced within the time specified in Section 945.5 or 945.6, as the case may be.

(c) Subdivision (b) is applicable even though the public entity is immune from liability for the injury.

Comment. Subdivision (b)(1) of the amended section makes it clear that an action against a public employee may be barred even though a claim was presented to the public entity. The claim must, in addition, be timely and sufficient. The amendment forestalls any contention that an action against an employee if barred only when no claim of any kind was presented

to the entity. The amended section reflects the original intent; but it eliminates any uncertainty concerning the matter.

Reference to "other claims procedure" in subdivision (b)(1) makes the rule provided by subdivision (b) applicable to contractual claims procedures (see Sections 930 et seq.) and local ordinance or charter claims procedures (see Section 935).

Subdivision (b)(2) has been drafted to conform Section 950.2 to Section 945.5. Thus, an action against a public employee of a public agency that has failed to comply with the Roster of Public Agencies procedure must be commenced within the one-year period allowed by Section 945.5(c), just as an action against an employee of a complying agency would have to be commenced within the six-month period allowed by Section 945.6.

Subdivisions (b) and (c) of the amended section provide that a claim must be presented to the entity before the employee may be held liable for an act or omission in the scope of his employment even though the entity is immune from liability. It could be argued that, under Section 950.2 as enacted, the presentation of a claim to a public entity that is clearly immune would be a useless act which is impliedly excused, for the law does not require idle acts. CIVIL CODE § 3532. But see VAN ALSTYNE, CALIFORNIA TORT LIABILITY 793 (Cal. Cont. Ed. Bar 1964)(apparently claim must be presented even though entity immune). The amendment clarifies the section and, because the public entity is responsible for judgments against its employees (see Section 825), requires the presentation of a claim in all cases.

SEC. 57. Section 950.4 of the Government Code is amended to read:

950.4. A cause of action against a public employee or former public employee is not barred by Section 950.2 if the plaintiff pleads and proves that he did not know or have reason to know, within the period ~~prescribed~~ for the presentation of a claim to the employing public entity as a condition to maintaining an action for such injury against the employing public entity, as that period is prescribed by Section 911.2 or by such other claims procedure as may be applicable, that the injury was caused by an act or omission of the public entity or by an act or omission of an employee ~~thereof~~ of the public entity in the scope of his employment.

Comment. As originally enacted, it was not clear from this section whether the plaintiff was required to prove lack of notice of the public employment status of the defendant during the 100-day claim presentation period or during the entire period, up to one year in duration, during which a "late claim" application could be submitted. Construed liberally, the period prescribed for the presentation of a claim could well be deemed to include the "late claim" period as well. Yet, such interpretation would tend to frustrate what appears to have been the legislative intent to make the presentation of a claim unnecessary if the plaintiff had no notice of the public employment status of the defendant during the 100-day period.

This section also, of course, relates to claims within the one year presentation period of Section 911.2. But as to them it presents no special problems, for the late claim procedure does not apply in such cases.

The reference in subdivision (b)(1) to "such other claims procedures as may be applicable" is designed to take into account contractual procedures or procedures lawfully established by local ordinance or charter.

The section has been revised to make it clear that the plaintiff must present a claim only if he knows or has reason to know that the injury was caused by an act or omission of the employee in the scope of his employment. This states the apparent legislative intent, although it could be argued that the section as enacted requires that a claim be presented whenever the defendant is a public employee, even though he clearly was not in the scope of his employment when the act or omission resulting in the injury occurred.

SEC. 67. Section 996.4 of the Government Code is amended to read:

996.4. (a) If after written request a public entity fails or refuses to provide an employee or former employee with a defense against a civil action or proceeding brought against him and the employee retains his own counsel to defend the action or proceeding, he is entitled to recover from the public entity such reasonable attorney's fees, costs and expenses ~~as are necessarily incurred by him in~~ of defending the action or proceeding as are necessarily incurred by him from and after the 10th day following delivery of the written request to the public entity, if he establishes or the public entity concedes that the action or proceeding arose out of an act or omission in the scope of his employment as an employee of the public entity, but he is not entitled to such reimbursement if the public entity establishes:

~~(a)~~ (1) That he acted or failed to act because of actual fraud, corruption or actual malice ~~;~~ ; or

~~(b)~~ (2) That the action or proceeding is one described in Section 995.4 ; or

(3) That its ability to provide an effective defense was substantially prejudiced by the failure of the employee or former employee to request a defense at a time earlier than that on which the request was in fact made, and that the entity's failure or refusal to provide a defense was based on that ground.

(b) Nothing in this section shall be construed to deprive an employee or former employee of the right to petition for a writ of mandate to compel the public entity or the governing body or an employee thereof to perform the duties imposed by this part ~~.~~ , but the public entity

may be compelled to provide for the defense of the action only if the request for the defense meets the requirements of subdivision (a) of Section 825. Nothing in this subdivision affects the right of an employee to recover such reasonable attorney's fees, costs and expenses as he is entitled to recover under subdivision (a).

Comment. This amendment is designed to:

(1) Limit the recoverable litigation expenses to those incurred after the request for a defense was refused by the entity. As here written, the computation of recoverable expenses commences on the 11th day after the request is made--thus giving the public entity 10 days to decide whether to provide a defense or not. The employee should not be able to hold the entity liable for expenses incurred before a request was made and rejected.

(2) Provide the entity with a defense based on prejudice where a request for a defense was made unduly late, consistently with proposed amended version of Section 995.2, above.

(3) Permit an employee to recover such reasonable attorney's fees, costs and expenses as he is entitled to recover, even though the public entity cannot be compelled by mandate to provide for the defense of the action. Thus, the public entity need not defend the action unless the employee requests the defense as provided in subdivision (a) of Section 825. Otherwise, if the employing entity were required to provide for the defense of the action, the employing entity would be required to pay the judgment against the employee. Under Section 996.4, however, the entity may be required to pay the cost of the defense of the action even though it is not required to pay the judgment.