

9/20/68

Memorandum 68-81

Subject: Future Activities - New Topics

You will recall that some time ago the Commission determined to request each California law review and the law faculty of each California law school to provide us with suggestions as to new topics that are relatively narrow in scope, that would be suitable for Commission study, and that have recently been written up in a law review article or note that would be an adequate background research study.

Separate memoranda have been prepared on a number of the topics suggested:

- (1) Parol Evidence Rule. See Memorandum 68-82.
- (2) Rule Against Perpetuities. See Memorandum 68-83.
- (3) Right of Nonresident Aliens to Inherit. See Memorandum 68-84.
- (4) Counterclaims and Cross-complaints. See Memorandum 68-95.
- (5) Joinder of Causes of Action. See Memorandum 68-104.
- (6) Pleadings in Civil Actions. See Memorandum 68-96.
- (7) Professional Malpractice. See Memorandum 68-97.
- (8) Contract Provisions of Insurance Code. See Memorandum 68-103.

In addition to the topics listed above, we received suggestions that the topics listed below might merit Commission study. In most cases, the suggestion merely cited a law review article or note or forwarded a copy of a law review article or note.

EXHIBIT I - SOUTHERN CALIFORNIA LAW REVIEW

(See Exhibit I, attached, for listing of topics suggested.)

- (1) California Apportionment. Reapportionment is not a suitable topic for study by the Law Revision Commission.
- (2) Taxation of National Banks. Not a suitable topic for Commission study.
- (3) Joint Powers Authority Revenue Bonds. Not a suitable topic for Commission study. In addition, there is a legislative subcommittee investigating and preparing legislation on this subject; bills have been introduced.
- (4) Effect of Expungement on a Criminal Conviction. Not recommended for study. All aspects of criminal law and procedure are being studied by the Joint Legislative Committee for Revision of the Penal Code which was created in 1963. All matters on the Commission's agenda relating to criminal law and procedure were thereafter dropped from the agenda and all background studies and other material we had assembled were forwarded to the Joint Legislative Committee. A study of any aspect of criminal law or procedure would unnecessarily duplicate the work of the Joint Legislative Committee.
- (5) California Cancer Quack Laws. Unsuitable for Commission study. The entire subject already is under intensive examination by the State Department of Public Health; law enacted in 1957 is being evaluated and revised for 1969.
- (6) Unauthorized Practice and Right of Out-of-State Attorneys. Not suitable for study by Commission; this is a matter that is better left to study by the State Bar of California.

- (7) Effect of Divorce on Wills. It is doubtful that this
topic presents problems that justify Commission study. Some
states presume that a will is revoked by divorce.

California and other states presume that a will is never
revoked by divorce; all states make the presumption conclusive
and do not permit evidence of the testator's contrary intent.

In most situations there is no problem because the parties are re-
presented by attorneys in the divorce action and can rewrite
their wills if desired. Obviously a narrow problem, possibly
suitable for study but not recommended for study by the staff.

- (8) Special Treatment of Cemeteries. Unsuitable for Commission study.
Simply the policy question of the tax exempt status of cemeteries.

UNIVERSITY OF SAN FRANCISCO LAW REVIEW

The University of San Francisco Law Review sent copies of the following
law review articles and notes as indicating possible topics for Commission
study.

- (9) The Pacific Case: Automobile Liability Coverage Under Homeowners
Policies, 2 U. San Francisco L. Rev. 120 (1967). Not recommended for
study. By a somewhat strained judicial interpretation, the California
Supreme Court in 1966 held that an insurance policy providing automo-
bile coverage on the premises of the insured or "the ways immediately
adjoining" provided full automobile liability coverage for all owned
vehicles wherever operated. See Pacific Employers Ins. Co. v. Mary-
land Casualty Co., 65 Cal.2d 318, 54 Cal. Rptr. 385, ___ P.2d ___ (1966).
Such language is included

in most homeowners and comprehensive liability (business) policies. These policies when written were not thought by anyone to provide more than very limited automobile coverage and premiums were established accordingly. The decision above has a tendency to greatly increase the scope of the risk insured against under policies already written. The topic is not, however, a suitable one for review by the Commission. The insurance industry has already taken steps to eliminate future problems by rewriting this section of their policies. Moreover, many, probably a majority of the companies have agreed not to seek indemnification or proration under policies in existence. Finally, the decision itself is subject to restrictive interpretation. In short, the problems presented by the case do not appear significantly great and will in any event be shortlived if not already cured by the industry affected.

(10) Burden, Counter-Revolutionary Changes in Construction Work Remedies,

2 U. San Francisco L. Rev. 216 (1968). Not recommended for study.

This topic is one that would require intensive study over a number of years. It is a topic that should be studied by someone and is under study by the Senate Judiciary Committee. The article concludes: "The piecemeal amendments to the existing law have made the mechanics' lien and stop notice law even more complex, unintelligible, inconsistent, and inadequate. . . . A reading of Chapter 2 of Title IV, California Code of Civil Procedure, relating to mechanics' liens and stop notices, illustrates that the task of establishing . . . [clear] guidelines can only be accomplished by a complete repeal and revision of the chapter."

- (11) Vagrancy Laws and the Right to Privacy, 2 U. San Francisco L. Rev. 337 (1968). Not suitable for Commission study. Article deals with the crime of vagrancy which is a matter for study by the Joint Legislative Committee for Revision of the Penal Code.
- (12) Levit, The Crisci Case--Something Old, Something New, 2 U. San Francisco L. Rev. 1 (1967). This article deals with the liability of a liability insurer for damages for failing to accept a settlement offer within policy limits where final judgment in the suit brought by the injured party exceeds those limits. Author concludes that this decision merits study by Legislature. Study not recommended.
- (13) A letter as a will or codicil: Testamentary intent in California, 2 U. San Francisco L. Rev. (1968). Study not recommended. The article criticizes a 1966 California Court of Appeals decision which supposedly set a new and liberal standard for assessing the requisite testamentary intent in letters offered for probate. Actually, the appellate decision probably does not relax the standard (i.e., the thrust of the article is incorrect); even if it does, judicial discretion in assessing testamentary intent is probably more controlling than any verbal formula might be.
- (14) Copyright protection for architectural structures; 2 U. San Francisco L. Rev. 320 (1968). Study not recommended. The article submits that the proposed Copyright Law Revision should be amended to include artistic architectural structures within the scope of federal copyright protection.
- (15) Making the indigent pay to obtain out-of-state witnesses, 1 U. San Francisco L. Rev. 326 (1967). Study not recommended. The article

criticizes the judicial construction of The Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings in other states and recommends the adoption of California's statutory remedy.

- (16) The failure to use seat belts as a basis for establishing contributory negligence, barring recovery for personal injuries; 1 U. San Francisco L. Rev. 277 (1967). Study not recommended. The article suggests statutory revision of the concept of contributory negligence in auto accident cases by making the failure to use seat belts (which is deemed to be contributory negligence) result in an apportionment of damages. This approach is recommended over having a possible finding of contributory negligence result in a barring of all recovery--the usual result in California negligence cases. The article does not discuss whether or not failure to use seat belts commonly results in a finding of contributory negligence so the magnitude of the problem is difficult to assess.
- (17) L.S.D. and freedom of religion, 1 U. San Francisco L. Rev. 131 (1966). Study not recommended. This article recommends remedial legislation on the penal classification of psychedelic drugs and speculates about the possibility of a successful freedom of religion defense to all such legislation.
- (18) California "model" trademark act: A comparison with federal law, 2 U. San Francisco L. Rev. 198 (1968). Study not recommended. This article discusses the 1967 California Trademark Law which is in alignment with most other state trademark law and with federal law.
- (19) Whatever happened to the small businessman? The California Unfair Practices Act, 165 (1968). Study not recommended. The article appraises the purpose and justification of the California Unfair Practices Act (Cal. Bus. & Prof. Code §§ 17000-17101) in order to persuade the courts to "face up to the necessity for interpreting

the Unfair Practices Act with reason and foresight." The author urges a more rigorous application of the act against large businesses which employ "unfair" business tactics (loss selling; price discrimination) to eliminate small competitors.

- (20) Duty to licensees in California: In support of open adoption of Restatement 2d of Torts § 342, 2 U. San Francisco L. Rev. 230 (1968). Commission may wish to study this topic. The article states that, although Section 342 (creating duty to warn licensees of concealed dangerous conditions known to landowners) has been expressly rejected by California appellate courts, an older rule imposing a duty to warn licensees of the existence of "traps" has been applied by the Supreme Court. The author urges the adoption of Section 342 so that it will be "applied openly, and not through the back door."

- (21) EXHIBIT II - Injunction of criminal prosecutions.

Exhibit II, attached, suggests this topic. Study not recommended. Broaddeu's criticisms of Civil Code Section 3423(4) (37 Cal. L. Rev. 685 (1949)) do not require a legislative remedy. Civil Code Section 3423(4) provides that an injunction cannot be granted to prevent the execution of a public statute. The major judicially developed exception to this rule is that the courts can enjoin the execution of statutes which are unconstitutional and which threaten irreparable property damage. Contrary to Broaddeu's implication, this exception is implicit in the justification for the rule, namely, the doctrine of the separation of powers. See Los Angeles v. Superior Court, 51 Cal.2d 423 (1959). The statute is not misleading on its face if its purpose is recognized. Therefore, legislative incorporation of the judicially developed exception is not necessary.

- (22) Adoption in California of § 2-302 of Uniform Commercial Code. Suggested by Ralph A. Newmann, Hastings College of Law, citing Leff, Unconscionability and the Code--the Emperor's New Clause, 115 U. Pa. L. Rev. 485 (1967). Not recommended for study. The California Commissioners on Uniform State Laws have primary responsibility for securing enactment of Uniform Acts.
- (23) Removal of obstacles to a poor person voting. Suggested by Professor James L. Blawie, University of Santa Clara Law School. Not suitable for Commission study.

Respectfully submitted,

John H. DeMouilly
Executive Secretary