

STATE OF CALIFORNIA

**REPORT OF THE
CALIFORNIA LAW
REVISION COMMISSION**

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

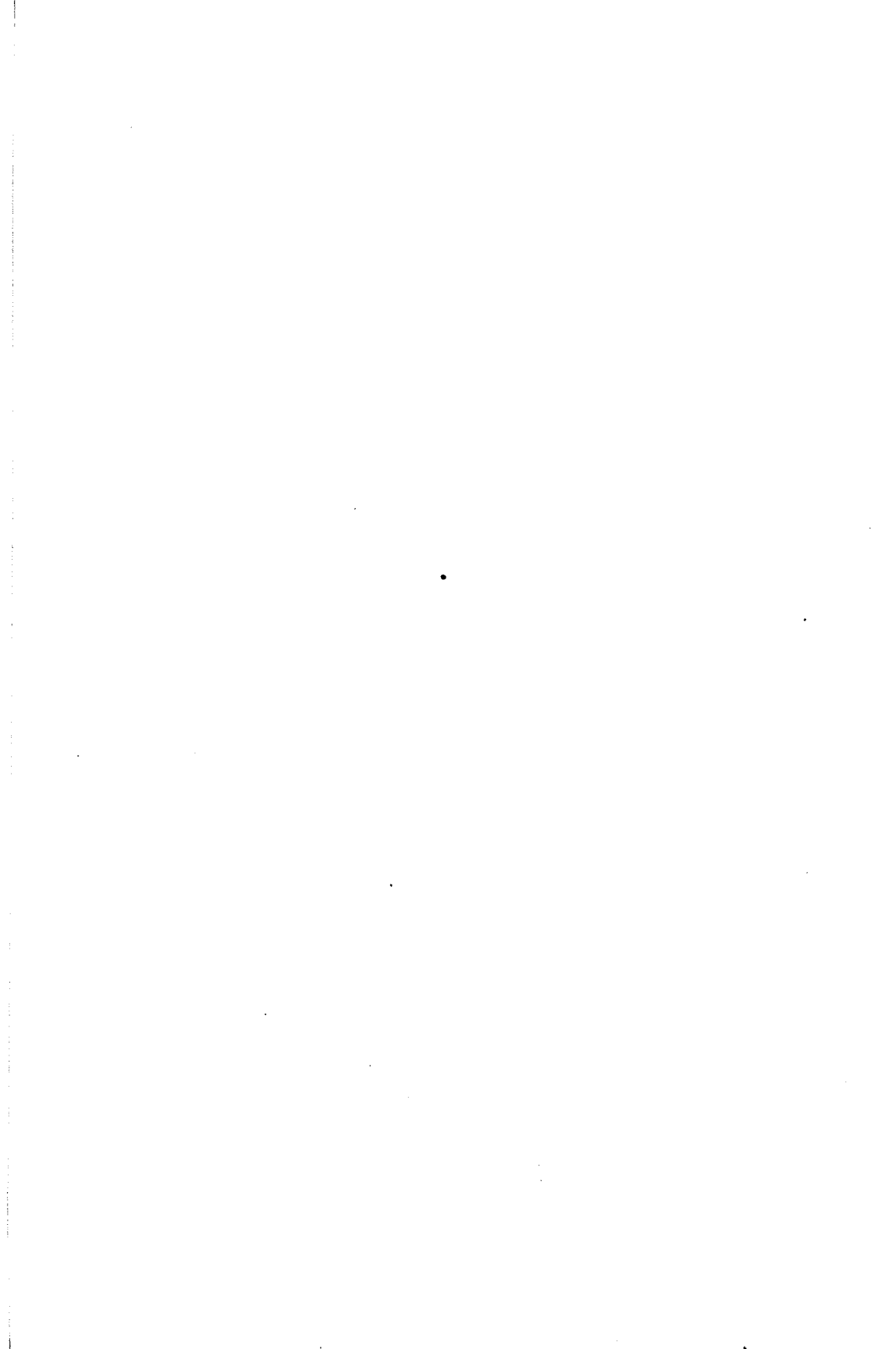
March 1, 1958

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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*

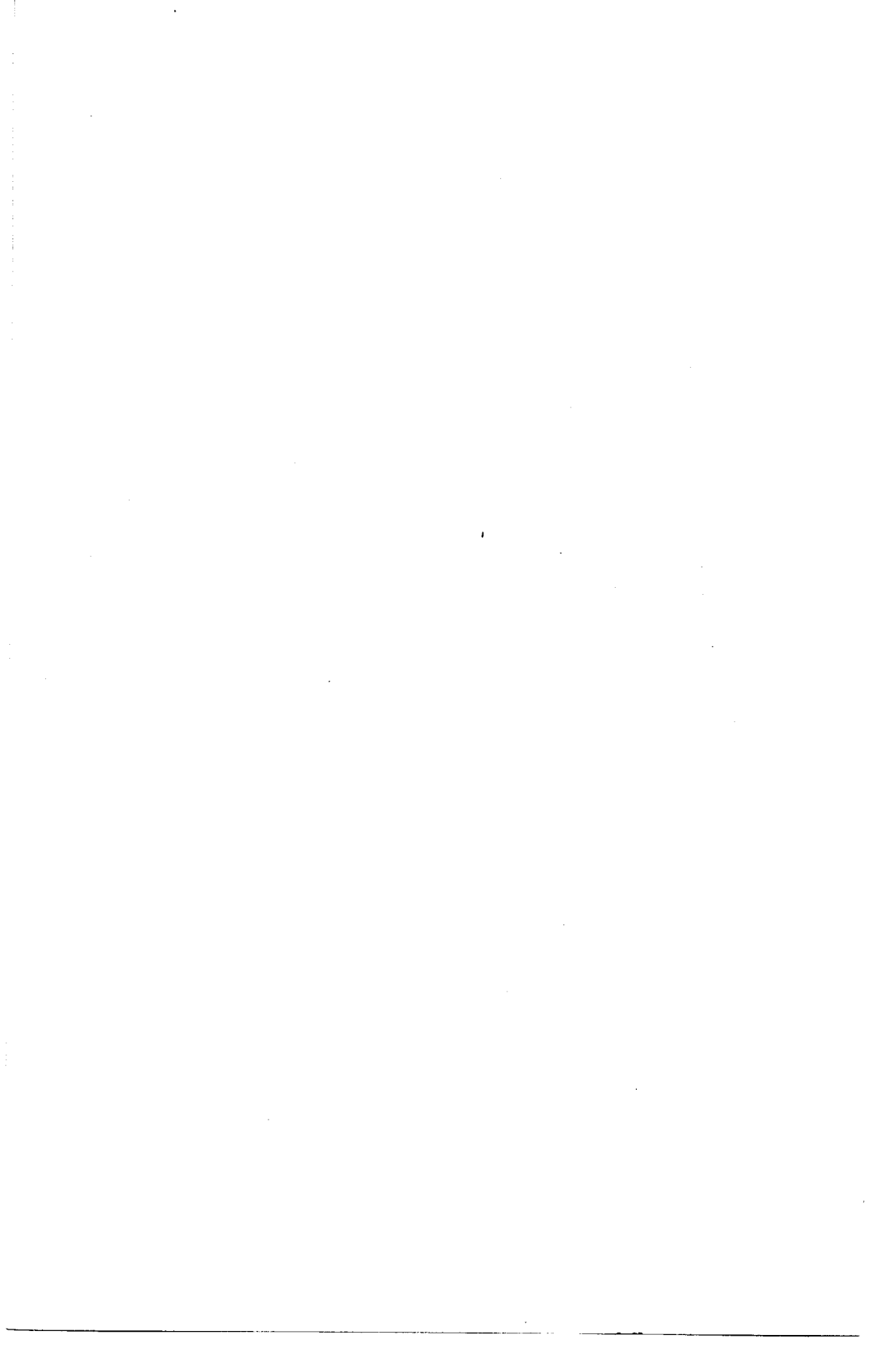
JOHN R. McDONOUGH, JR.
Executive Secretary

March 1, 1958



TABLE OF CONTENTS

	Page
I. Function and Procedure of Commission.....	7
II. Personnel of Commission.....	9
III. Summary of Work of Commission.....	11
IV. 1957 Legislative Program of Commission.....	12
A. Topics Selected for Study.....	12
B. Other Measures	12
V. Calendar of Topics Selected for Study.....	15
A. Studies in Progress	15
B. Topics Intended for Future Consideration.....	18
VI. Report on Statutes Repealed by Implication or Held Unconstitutional	24
VII. Recommendation	25



REPORT OF THE CALIFORNIA LAW REVISION COMMISSION FOR THE YEAR 1957

I. FUNCTION AND PROCEDURE 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.

Each of the Commission's recommendations is based on a research study of the subject matter concerned. Most of these studies are undertaken by specialists in the fields of law involved who are retained as research consultants to the Commission. This procedure not only provides the Commission with invaluable expert assistance but is economical as well because the attorneys and law professors who serve as research consultants have already acquired the considerable background necessary to understand the specific problems under consideration.

¹The 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.

When a study is undertaken the Commission meets with the research consultant to discuss the problem with him. The consultant subsequently submits a detailed research study which is given careful consideration by the Commission in determining what report and recommendation it will make to the Legislature. When the Commission has reached a conclusion on the matter, the research study and the Commission's proposed recommendation are referred to the State Bar for comment. After the views of the State Bar have been received and acted upon by the Commission, a printed pamphlet is published which contains the official report and recommendation of the Commission, a draft of any legislation necessary to effectuate the recommendation, and the research study upon which the recommendation is based. This pamphlet is distributed to the Governor, Members of the Legislature, heads of state departments, and a substantial number of judges, district attorneys, lawyers, law professors and law libraries throughout the State. Thus, a large and representative number of interested persons is given an opportunity to study and comment upon the Commission's work before it is submitted to the Legislature. The annual reports and the recommendations and studies of the Commission will be bound in a set of volumes which will be both a permanent record of the Commission's work and, it is believed, a valuable contribution to the legal literature of the State.

II. PERSONNEL OF COMMISSION

The Commission was greatly saddened by the untimely death of one of its original members, John Harold Swan of Sacramento, on May 30, 1957. Mr. Swan was both a member of the faculty of Sacramento Junior College and Dean of the McGeorge College of Law. He served in the California Senate from 1941 to 1945, representing Sacramento County. Mr. Swan took great interest in the work of the Commission and was, because of his extensive experience as an educator in this State, particularly helpful in connection with the Commission's first assignment, a partial revision of the Education Code.

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 of the Session. 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 Boards Association. At the end of his term in the latter office he was reappointed to the Commission by the Governor in October 1957.

Mr. Joseph A. Ball of Long Beach resigned from the Commission in November 1956 when his election as President of the State Bar required that he appear before the Legislature and advocate the passage or defeat of legislation.² 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. Ball.

Honorable Roy A. Gustafson of Ventura, District Attorney of Ventura County, was appointed to the Commission by the Governor in October 1957.

² CAL. GOVT. CODE §10308 provides that neither the members nor any employee of the Commission shall advocate the passage or defeat of any legislation by the Legislature or the approval or veto of any legislation by the Governor or appear before any committee of the Legislature unless requested to do so by the committee or its chairman.

REPORT OF LAW REVISION COMMISSION

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

	<i>Term Expires</i>
Thomas E. Stanton, Jr., San Francisco, Chairman.....	October 1, 1961
John D. Babbage, Riverside, Vice Chairman.....	October 1, 1959
Hon. James A. Cobey, Merced, Senate Member.....	*
Hon. Clark L. Bradley, San José, Assembly Member.....	*
Hon. Roy A. Gustafson, Ventura, Member.....	October 1, 1961
Bert W. Levit, San Francisco, Member.....	October 1, 1961
Charles H. Matthews, Los Angeles, Member.....	October 1, 1959
Stanford C. Shaw, Ontario, Member.....	October 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.

* 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;³
2. Work on assignments given to the Commission by the 1955, 1956 and 1957 Sessions of the Legislature;⁴
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;⁵ 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.⁶

In 1957 the Commission met on March 1 and 2 in Sacramento, on April 26 in Sacramento, on August 2 and 3 at Stanford, on October 3 and 4 at Monterey, on November 1 and 2 at San Bernardino, and on November 29 and 30 and December 27 and 28 at San Francisco. In addition, the Northern Committee of the Commission met in San Francisco on May 4, July 26, September 19 and October 21; and the Southern Committee met in Los Angeles on June 8, July 27 and September 21.

³ See Part IV of this report, p. 12 *infra*.

⁴ See Part V A of this report, p. 15 *infra*.

⁵ See Part V B of this report, p. 18 *infra*.

⁶ See Part VI of this report, p. 24 *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.⁷ The topics authorized for study by this resolution are included in the list of studies in progress contained in this report.⁸

B. OTHER MEASURES

In 1957 the Law Revision Commission's first substantial legislative program was presented 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 Legislature. The following is a brief summary of the legislative history of these thirteen bills:⁹

Fish and Game Code: Assembly Bill No. 616, a complete revision of the Fish and Game Code prepared by the Commission pursuant to Resolution Chapter 204 of the Statutes of 1955, was introduced by Mr. Bradley and Honorable Pauline L. Davis, Member of the Assembly for the Second Assembly District. After minor amendment the bill 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, which was drafted by the Commission to effectuate its recommendation on this subject, was introduced by Senator Dorsey.¹⁰ After minor amendment the bill 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, which was drafted by the Commission to effectuate its recommendation on this subject, was introduced by Senator Dorsey.¹¹ After several amendments, primarily of a technical character, had been made to the bill it was passed by the Legislature and signed by the Governor, becoming Chapter 540 of the Statutes of 1957.

⁷ Cal. Stat. 1957, res. c. 202, p. 4589.

⁸ See Part V A of this report, p. 15 *infra*.

⁹ For a fuller statement of the legislative history of these measures, see 1 CAL. LAW REVISION COMM'N REP., REC. & STUDIES, pp. VII-XII.

¹⁰ For the Commission's study and recommendation on this subject, see 1 CAL. LAW REVISION COMM'N REP., REC. & STUDIES, p. A-1.

¹¹ See *id.*, p. B-1.

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.¹² 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.

Dead Man Statute: Assembly Bill No. 247, which was drafted by the Commission to effectuate its recommendation on this subject, was introduced by Mr. Bradley.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, which was drafted by the Commission to effectuate its recommendation on this subject, was introduced by Mr. Bradley.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, which was drafted by the Commission to effectuate its recommendation on this subject, was introduced by Mr. Bradley.¹⁵ The bill was passed by the Assembly. It was very substantially amended to meet objections raised by members of the Senate Judiciary Committee, becoming in effect primarily a bill to restate and clarify existing law. The bill failed to pass in the Senate.

Suspension of the Absolute Power of Alienation: Assembly Bill No. 249, which was drafted by the Commission to effectuate its recommendation on this subject, was introduced by Mr. Bradley.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, which was drafted by the Commission to effectuate its recommendation on this subject, was introduced by Senator Dorsey.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, which was drafted by the Commission to effectuate its recommendation on this subject, was introduced by Mr. Bradley.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.

¹² See *id.*, p. C-1.

¹³ See *id.*, p. D-1.

¹⁴ See *id.*, p. E-1.

¹⁵ See *id.*, p. F-1.

¹⁶ See *id.*, p. G-1.

¹⁷ See *id.*, p. H-1.

¹⁸ See *id.*, p. I-1.

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

Retention of Venue for Convenience of Witnesses: Assembly Bill No. 246, which was drafted by the Commission to effectuate its recommendation on this subject, was introduced by Mr. Bradley.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, which was drafted by the Commission to effectuate its recommendation on this subject, was introduced by Senator Dorsey.²¹ The bill was amended and passed by the Legislature and was signed by the Governor, becoming Chapter 1498 of the Statutes of 1957.

¹⁹ See *id.*, p. K-1.

²⁰ See *id.*, p. L-1.

²¹ See *id.*, p. M-1.

V. CALENDAR OF TOPICS SELECTED FOR STUDY

A. STUDIES IN PROGRESS

During 1957 the Commission worked on the following topics, each of which it had been authorized and directed by the Legislature to study.²² Most of these topics were recommended for study by the Commission pursuant to Government Code Section 10335; as is indicated in the footnotes, these topics are described 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 the 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 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. 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.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

²² The legislative authority for the studies on this list is as follows:

Nos. 1 and 2: Cal. Stat. 1955, res. c. 207, p. 4207.

Nos. 3 through 19: Cal. Stat. 1956, res. c. 42, p. 263.

No. 20: Cal. Stat. 1956, res. c. 35, p. 256.

Nos. 21 through 38: Cal. Stat. 1957, res. c. 202, p. 4589.

No. 39: Cal. Stat. 1957, res. c. 222, p. 4618.

No. 40: Cal. Stat. 1957, res. c. 287, p. 4744.

No. 41: Cal. Stat. 1957, res. c. 266, p. 4660.

²³ For a description of this topic, see 1955 REP. CAL. LAW REVISION COMM'N 27.

²⁴ *Id.* at 32.

²⁵ See 1956 REP. CAL. LAW REVISION COMM'N 19.

²⁶ *Id.* at 21.

²⁷ *Ibid.*

²⁸ *Id.* at 22.

²⁹ *Ibid.*

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 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 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. Whether the various provisions of law relating to the filing of claims against public bodies and public employees should be made uniform and otherwise revised.
21. Whether the law relating to the inter vivos rights of one spouse in property acquired by the other spouse during marriage while domiciled outside California should be revised.³⁹
22. Whether the law relating to attachment, garnishment, and property exempt from execution should be revised.⁴⁰
23. 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

³⁰ *Id.* at 24.

³¹ *Ibid.*

³² *Id.* at 25.

³³ *Id.* at 26.

³⁴ *Id.* at 28.

³⁵ *Id.* at 29.

³⁶ *Id.* at 31.

³⁷ *Id.* at 33.

³⁸ *Ibid.*

³⁹ See 1957 REP. CAL. LAW REVISION COMM'N 14.

⁴⁰ *Id.* at 15.

⁴¹ *Id.* at 16.

24. Whether the Small Claims Court Law should be revised.⁴²
25. Whether the law relating to the rights of a good faith improver of property belonging to another should be revised.⁴³
26. Whether the separate trial on the issue of insanity in criminal cases should be abolished and 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. 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. Whether the law relating to the doctrine of mutuality of remedy in suits for specific performance should be revised.⁴⁶
29. Whether the provisions of the Penal Code relating to arson should be revised.⁴⁷
30. Whether Civil Code Section 1698 should be repealed or revised.⁴⁸
31. Whether minors should have a right to counsel in juvenile court proceedings.⁴⁹
32. 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. Whether the law respecting the rights of a lessor of property when it is abandoned by the lessee should be revised.⁵¹
34. 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. Whether the doctrine of sovereign or governmental immunity in California should be abolished or revised.
36. 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. Whether changes in the Juvenile Court Law or in existing procedures should be made so that the term "ward of the juvenile court" would be inapplicable to nondelinquent minors.
38. Whether a trial court should have the power to require, as a condition of denying a motion for 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. Whether there should be a separate code for all laws relating to narcotics.
40. Whether the laws relating to bail should be revised.

⁴² *Ibid.*

⁴³ *Id.* at 17.

⁴⁴ *Id.* at 18.

⁴⁵ *Ibid.*

⁴⁶ *Id.* at 19.

⁴⁷ *Id.* at 20.

⁴⁸ *Id.* at 21.

⁴⁹ *Ibid.*

⁵⁰ *Id.* at 23.

⁵¹ *Id.* at 24.

⁵² *Id.* at 25.

41. Whether it would be feasible to codify and clarify, without 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 the 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 the following new topics:

- Topic No. 1: A study to determine whether California statutes relating to service of process by publication should be revised in light of recent decisions of the United States Supreme Court.

Two recent decisions by the United States Supreme Court have placed new and substantial constitutional limitations on service of process by publication in judicial proceedings. Theretofore, it had generally been assumed that, at least in the case of proceedings relating to real property, service by publication meets the minimum standards of procedural due process prescribed by the Fourteenth Amendment to the United States Constitution.⁵³ However, in *Mullane v. Central*

⁵³ *Arndt v. Griggs*, 134 U.S. 316, 327 (1890); see *Pennoyer v. Neff*, 95 U.S. 714, 727, 734 (1877).

Hanover Bank & Trust Co.,⁵⁴ decided in 1950, the Supreme Court held unconstitutional a New York statute which authorized service on interested parties by publication in connection with an accounting by the trustee of a common trust fund under a procedure established by Section 100-c(12) of the New York Banking Law. The Court stated that there is no justification for a statute authorizing resort to means less likely than the mails to apprise persons whose names and addresses are known of a pending action. Any doubt whether the rationale of the *Mullane* decision would be applied by the Supreme Court to cases involving real property was settled by *Walker v. City of Hutchinson*,⁵⁵ decided in 1956, which held that notice by publication of an eminent domain proceeding to a land owner whose name was known to the condemning city was a violation of due process.

The practical consequence of the *Mullane* and *Walker* decisions is that every state must now review its statutory provisions for notice by publication to determine whether any of them fail to measure up to the requirements of the Fourteenth Amendment. A preliminary study indicates that few, if any, California statutes are questionable under these decisions, inasmuch as our statutes generally provide for notice by mail to persons whose interests and whereabouts are known.⁵⁶ However, a comprehensive and detailed study should be undertaken to be certain that all California statutory provisions which may be affected by the *Mullane* and *Walker* decisions are brought to light and that recommendations are made to the Legislature for such changes, if any, as may be necessary to bring the law of this State into conformity with the requirements of the United States Constitution.

Topic No. 2: A study to determine whether the law relating to the right of a tenant under a renewal lease to remove fixtures should be revised.

Under the law of "fixtures," personal property which is brought onto leased premises by a tenant and actually or constructively "affixed" to the premises becomes the property of the owner of the realty, unless there is an agreement in the lease to the contrary.⁵⁷ An exception to this rule permits a tenant on termination of the lease to remove fixtures which have been annexed to the land for commercial purposes ("trade fixtures") or, in the case of a dwelling, for ornamentation or convenience.⁵⁸ However, many courts hold that if a tenant takes a renewal lease without having first removed such fixtures and without reserving the right in the new lease to do so, he cannot later remove them.⁵⁹

⁵⁴ 339 U.S. 306 (1950).

⁵⁵ 352 U.S. 112 (1956).

⁵⁶ See Perry, *The Mullane Doctrine—A Reappraisal of Statutory Notice Requirements*, CURRENT TRENDS IN STATE LEGISLATION 32 (Univ. of Mich. 1952).

⁵⁷ See e.g., TIFFANY, REAL PROPERTY, §§ 416, 420 (abd. ed., Zollmann 1940); FERARD, LAW OF FIXTURES 15 (2d ed. 1855); *Fixtures*, 22 CAL. JUR.2d §§4, 10 (1955).

⁵⁸ See e.g., TIFFANY, REAL PROPERTY, §426 (abd. ed., Zollmann 1940); HILL, LAW OF FIXTURES, §§16, 29 (1867).

⁵⁹ See e.g., *Tenant's Fixtures—Right to Remove*, 110 A.L.R. 480 (1937); *Fixtures*, 22 CAL. JUR. 2d §25 (1955).

In this State the right to remove domestic, ornamental or trade fixtures is codified in Civil Code Section 1019. Our courts have held, however, that this right of removal is lost if the tenant enters into a new lease at the end of a term and fails to reserve the right to remove fixtures in the renewal lease.⁶⁰ While this construction of Section 1019 is consistent with the common law rule applied in many jurisdictions, it would seem to produce results which are harsh and contrary to the intention of the parties. Some states have repudiated the rule followed by California by judicial decision⁶¹ and at least one state has done so by statute.⁶²

Topic No. 3: 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 defraud⁶⁶ but fraudulent intent will not avoid Section 1974.⁶⁷ Again, some states hold the statute inapplicable when the defendant had an

⁶⁰ *Wadman v. Burke*, 147 Cal. 351, 81 Pac. 1012 (1905); *Earle v. Kelly*, 21 Cal. App. 480, 132 Pac. 262 (1913). In the *Wadman* case Section 1019 was not mentioned; in the *Earle* case it was said to be merely declaratory of the common law.

⁶¹ 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); *Tenant's Pictures—Right to Remove*, 110 A.L.R. 480 (1937).

⁶² See MD. ANN. CODE, art. 53, §38 (1951):

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.

⁶³ See *e.g.*, Willits, *The Statute of Frauds—A Legal Anachronism*, 3 IND. L. J. 427, 528 (1928); 2 CORBIN, CONTRACTS, *passim* (1950).

⁶⁴ 92 Cal. App.2d 713, 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*, 263 Mass. 199, 160 N.E. 790 (1928).

⁶⁷ *Beckjord v. Slusher*, 22 Cal. App.2d 559, 567, 71 P.2d 820, 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. 759 (1885); *Knight v. Rawlings*, 205 Mo. 412, 104 S.W. 38 (1907).

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

Topic No. 4: A study to determine whether the doctrine of election of remedies should be abolished in cases where relief is sought against different defendants.

Under the common law doctrine of election of remedies the choice of one among two or more inconsistent remedies bars recourse to the others.⁷⁶ The doctrine is an aspect of the principle of *res judicata*, its purpose being to effect economy of litigation and to prevent harassment of a defendant through a series of actions, based on different theories of liability, to obtain relief for a single wrong.⁷⁷ The common law doctrine has been applied in cases where the injured party seeks relief first against one person and then against another,⁷⁸ although one of its principal justifications, avoidance of successive actions against a single defendant, is inapplicable to such a situation.

The doctrine of election of remedies has frequently been criticized.⁷⁹ In 1939 New York abolished the doctrine as applied to cases involving

⁶⁸ See *e.g.*, *Dinsmore v. Jacobsen*, 242 Mich. 192, 218 N.W. 700 (1928).

⁶⁹ 110 Cal. App.2d 166, 242 P.2d 365 (1952).

⁷⁰ 133 Cal. App. 274, 24 P.2d 195 (1933).

⁷¹ *Walker v. Russell*, 136 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. 536 (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. 478 (1901).

⁷⁶ CLARK, CODE PLEADING §77 (2d ed. 1947).

⁷⁷ See *Election of Remedies—Different Persons*, 116 A.L.R. 601 (1938); *Election of Remedies*, 28 C.J.S. § 1 p. 1060 (1941).

⁷⁸ *Fowler v. Bowers Savings Bank*, 113 N.Y. 450, 21 N.E. 172 (1889); *cf.* *Hensley-Johnson Motors v. Citizens Nat. Bank*, 122 Cal. App.2d 22, 27, 264 P.2d 973, 976 (1953).

⁷⁹ See *e.g.*, *Deinard and Deinard, Election of Remedies*, 6 MINN. L. REV. 341, 480 (1922); *Rothschild, A Remedy for Election of Remedies: A Proposed Act to Abolish Election of Remedies*, 14 CORN. L.Q. 141 (1929); *Note, Election of Remedies: A Delusion?*, 38 COL. L. REV. 292, 301 (1938); *Note, Election of Remedies, A Criticism*, 26 HARV. L. REV. 707 (1913); *Election of Remedies—Different Persons*, 116 A.L.R. 601 (1938).

different defendants,⁸⁰ on the recommendation of its Law Revision Commission.⁸¹

The law of California with respect to the application of the doctrine of election of remedies to different defendants is not clear. Our courts have tended, in general, to apply the doctrine only in estoppel situations—i.e., where the person asserting it as a defense can show that he has been prejudiced by the way in which the plaintiff has proceeded⁸²—and this limitation has been recently applied in cases involving different defendants.⁸³ In other cases, application of the doctrine has been avoided by holding that the remedies pursued against the different defendants were not inconsistent.⁸⁴ In still other cases which do not appear to be distinguishable, however, the doctrine has been applied to preclude a plaintiff from suing one person merely because he had previously sued another.⁸⁵ Since it is difficult to predict the outcome of any particular case in this State today, legislation to clarify and modernize our law on this subject would appear to be desirable.

Topic No. 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.

In *Estate of Scott*⁸⁶ a man who had left his wife and taken up an illicit relationship with another woman was permitted to claim the wife's estate upon her death intestate. The court said that since the Legislature had not seen fit to deprive a spouse who is guilty of marital misconduct of inheritance rights, it could not do so. This result is inconsistent with certain related aspects of the law of this and other states. For example, under our law a deserting spouse is deprived of any community property interest in the subsequent earnings of the deserted spouse⁸⁷ and may not claim a probate homestead upon the death of the wronged spouse.⁸⁸ Similarly, in states where dower exists it is generally

⁸⁰ See Section 112-a of the NEW YORK CIVIL PRACTICE ACT: 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.

See also NEW YORK CIVIL PRACTICE ACT, §§ 112-b and 112-c (1957).

⁸¹ *Acts, Recommendation and Study Relating to Election of Remedies*, 1939 NEW YORK LAW REVISION COMM'N REP., REC. & STUDIES 205.

⁸² See e.g., *Acme Paper Co. v. Goffstein*, 125 Cal. App.2d 175, 178, 270 P.2d 505, 508 (1954) (prejudice found); *Campanella v. Campanella*, 204 Cal. 515, 521, 269 Pac. 433, 435 (1923) (no prejudice found); *De Laval Pacific Co. v. United C. & D. Co.*, 65 Cal. App. 584, 224 Pac. 766 (1924) (no prejudice found); *Herdan v. Hanson*, 182 Cal. 533, 139 Pac. 440 (1920) (no prejudice found); *Hines v. Ward*, 121 Cal. 115, 53 Pac. 427 (1898) (no prejudice found); *Election of Remedies*, 17 CAL. JUR. 2d §3 (1954).

⁸³ *Pacific Coast Cheese, Inc. v. Security-First Nat. Bank*, 45 Cal.2d 75, 80, 286 P.2d 353, 356 (1955); *Perkins v. Benguet Cons. Min. Co.*, 55 Cal. App.2d 720, 753 *et seq.*, 132 P.2d 70, 90 *et seq.* (1942).

⁸⁴ *Perkins v. Benguet Cons. Min. Co.*, 55 Cal. App.2d 720, 753 *et seq.*, 132 P.2d 70, 90 *et seq.* (1942).

⁸⁵ *Hensley-Johnson v. Citizens Nat. Bank*, 122 Cal. App.2d 22, 27, 264 P.2d 973, 977 (1953); *Foster v. Los Angeles T. & S. Bank*, 36 Cal. App. 460, 172 Pac. 392 (1918).

⁸⁶ 90 Cal. App.2d 21, 202 P.2d 357 (1949).

⁸⁷ CAL. CIV. CODE §169 provides that earnings of the wife while living separate from her husband are her separate property. Section 175 provides that the earnings of the husband during a period of unjustified abandonment by the wife are his separate property.

⁸⁸ *Estate of Fulton*, 15 Cal. App.2d 202, 59 P.2d 508 (1936).

held that a wife who lives in adultery with another before the husband's death forfeits her dower rights.⁸⁹

At least six states have enacted statutes barring one or both spouses from taking a distributive share on intestacy if the survivor deserted the deceased spouse.⁹⁰

⁸⁹ See *Misconduct—Rights in Spouse's Estate*, 71 A.L.R. 277, 278 (1931); 139 A.L.R. 486 (1942).

⁹⁰ See CONN. GEN. STAT. tit. 60, c. 366, §7309 (1949) (both); IND. STAT. ANN. §6-215 (Burns 1953) (husband); PENN. STAT. ANN. tit. 20, c. 1, App. §§41, 42 (Purdon 1950) (both); W. VA. ANN. CODE art. 1, c. 43, § 4114[19] (1955) (both barred of dower). New Hampshire provides (1) that if a husband has willingly abandoned his wife or neglected to support her, or has not been heard from, in consequence of his own neglect, for the term of three years next preceding her death, he shall not be entitled to any intestate share of her estate; (2) that if at the time of the death of either husband or wife, the decedent was justifiably living apart from the survivor because such survivor was or had been guilty of conduct constituting cause for divorce, the survivor shall not be entitled to any intestate share of the decedent's estate. N. H. REV. STAT. ANN. c. 560:18-19 (1955). North Carolina provides that if any husband shall separate himself from his wife, and be living in adultery at her death, or if she has obtained a divorce a mensa et thoro, and shall not be living with her husband at her death, or if the husband has abandoned his wife, or has maliciously turned her out of doors, and shall not be living with her at her death, he shall thereby lose all his right and estate of whatever character in and to her personal property, and all right to administer on her estate. N. C. GEN. STAT. §28-12 (1950).

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.

No decision of the Supreme Court of the United States holding a statute of the State unconstitutional or repealed by implication has been found.

No decision of the Supreme Court of California holding a statute of the State repealed by implication has been found.

Two decisions of the Supreme Court of California holding statutes of the State unconstitutional in part have been found:

In *People v. McCaughan*, 49 Advance California Reports 411, 317 P.2d 974 (1957), the court unanimously held Section 361 of the Penal Code unconstitutional for vagueness insofar as it provides that "Every person guilty of any harsh . . . or unkind treatment of . . . any idiot, lunatic, or insane person, is guilty of a misdemeanor."

In *Mendoza v. Small Claims Court*, 49 Advance California Reports 677, ___ P.2d ___ (1958), the court unanimously held the 1955 amendment to Section 117 of the Code of Civil Procedure which purported to give the small claims court jurisdiction over unlawful detainer proceedings unconstitutional because a stay of proceedings on a judgment by the small claims court is discretionary with that court. The supreme court stated that since under this amendment a defendant could be dispossessed prior to trial de novo on appeal from the small claims court judgment he would be denied his right to representation by counsel, thus constituting a deprivation of due process.⁹¹

⁹¹ This study has been carried through 49 Advance California Reports 694; 78 Supreme Court Reporter 368.

VII. RECOMMENDATION

The Law Revision Commission respectfully recommends that the Legislature authorize the Commission to complete its study of the topics listed in Part V A and to study the topics listed and described in Part V B of this report.

Respectfully submitted,

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