

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 1955

January 1, 1955

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 1954.

THOMAS E. STANTON, JR., *Chairman*
JOHN D. BABBAGE, *Vice Chairman*
JESS R. DORSEY, *Member of the Senate*
STANFORD C. SHAW, *Member of the Assembly*
RICHARD C. FILDEW
BERT W. LEVIT
JOHN HAROLD SWAN
SAMUEL D. THURMAN
RALPH N. KLEPS, *Legislative Counsel,*
ex officio

JOHN R. McDONOUGH, JR.
Executive Secretary

January 1, 1955

TABLE OF CONTENTS

	Page
I. Establishment of Commission	7
II. Personnel of Commission	9
III. Work of Commission	10
IV. Preparation of First Calendar of Topics Selected for Study	11
V. Revision of Education Code	12
A. Work to Date	12
B. Future Work on Revision of Education Code	13
VI. Revision of Probate Code Sections 640 to 646	15
VII. Report on Statutes Held Unconstitutional	16
VIII. Recommendations	17

Appendices

A. Topics Selected for Study	18
1. Topics Selected for Immediate Study	18
2. Topics Intended for Future Study	33
B. A Comparative Study of the Homestead Law and Probate Code Sections 640 to 646	41
C. Report and Recommendation of the Law Revision Commission to the Legislature Relating to Summary Distribution of Small Estates under Probate Code Sections 640 to 646	50

REPORT OF THE CALIFORNIA LAW REVISION COMMISSION FOR THE YEAR 1954

I. ESTABLISHMENT 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 will be 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.

The Law Revision Commission succeeds the California Code Commission which was engaged from 1929 to 1953 in codifying the statutory law of the State. As its work drew to a close, the Code Commission recommended that "the Legislature and other interested parties consider during the next biennium the best means for carrying out a program for substantive law revision in California" (Report to the Legislature, dated December 1, 1950, p. 11). The Code Commission referred, in this connection, to the work of the New York Law Revision Commission which was established in 1934 and had operated successfully in that State for nearly 20 years.

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.

In response to the Code Commission's suggestion, H. R. 185 of the 1951 Session was adopted, directing the Assembly Interim Committee on Judiciary to study the desirability of creating a law revision agency. This study was made by the Subcommittee on Uniform Acts and Code Commission of the Assembly Interim Committee on Judiciary. The subcommittee held hearings at Los Angeles, San Bernardino, Sacramento, and San Francisco and filed a report in March, 1953, which recommended that a law revision agency be established. This report led to the enactment of Chapter 1445 of the Statutes of 1953 which abolished the Code Commission and created the California Law Revision Commission.

II. PERSONNEL OF COMMISSION

Senator Jess R. Dorsey of Bakersfield and Assemblyman Stanford C. Shaw of Ontario were appointed the legislative members of the commission. Governor Knight appointed six additional members:

		<i>Term expires</i>
John D. Babbage		
(Member of the Assembly 1948 to		
1952)	Riverside	October 1, 1955
Richard C. Fildew	Los Angeles	October 1, 1955
Bert W. Levit	San Francisco	October 1, 1957
Thomas E. Stanton, Jr.	San Francisco	October 1, 1957
John Harold Swan		
(Member of the Senate 1941 to		
1945)	Sacramento	October 1, 1957
Samuel D. Thurman	Stanford	October 1, 1955

These appointments were sent to the Senate and confirmed in March, 1954. Ralph N. Kleps, Legislative Counsel, is an ex officio, nonvoting member of the commission. At its organizational meeting the commission elected Thomas E. Stanton, Jr. as its chairman and John D. Babbage as its vice chairman.

The commission selected Stanford Law School as its headquarters and Professor John R. McDonough, Jr., of the law school faculty to serve as its executive secretary on a half-time basis. A similar arrangement has worked well in the case of the New York Law Revision Commission. This arrangement with Stanford University makes available to the commission without cost a suite of offices in the Stanford Law School, the law library and other research facilities of the school, and the counsel of its faculty. The commission has also been assured of the cooperation and assistance of the other law schools in the State, and it proposes to contract with each of them from time to time to undertake research studies.

III. WORK OF COMMISSION

Since May 1, 1954, when the office of its Executive Secretary was established the commission has been principally engaged in four tasks: (1) preparation of its first calendar of topics selected for study to be submitted to the Legislature for approval in January, 1955, pursuant to Section 10335 of the Government Code; (2) revision of the Education Code pursuant to Chapter 1682 of the Statutes of 1953; (3) a study of Probate Code Sections 640 to 646 and the homestead provisions of the Probate Code and the Civil Code, pursuant to Assembly Concurrent Resolution No. 8 adopted in the 1954 Session of the Legislature; and (4) a study, made pursuant to Section 10331 of the Government Code, of the decisions of the Supreme Court of the United States and of the Supreme Court of California since January 1, 1953, to determine whether any statutes of the State have been held to be unconstitutional or to have been impliedly repealed.

The commission has met each month since its organizational meeting in February, 1954, and there have been, in addition, a number of meetings of committees of commission members.

IV. PREPARATION OF FIRST CALENDAR OF TOPICS SELECTED FOR STUDY

Section 10335 of the Government Code provides, in part:

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.

To assist it in preparing its first calendar the commission sent a letter to each Member of the Legislature, the Attorney General, and each judge, district attorney, county counsel, city attorney, law professor, and bar association in the State announcing its organization and inviting suggestions concerning defects and anachronisms in the law. The commission also made a study of recent volumes of law reviews published by California law schools and of several of the annual reports of the New York Law Revision Commission.

On the basis of information thus obtained two categories of topics have been established:

- (1) Topics selected for immediate study.
- (2) Topics intended for future study.

The topics in both of these categories are listed in Appendix A to this report.² The legislative members of the commission will offer to the Legislature a concurrent resolution authorizing the commission to study the topics included in the first of these categories.

The commission has also considered a number of suggested topics for study not included in either of these categories. Some of these suggested topics it has deemed inappropriate for study by the commission; others are retained in the commission's files for future consideration.

² The commission has not included in the topics selected for immediate study matters which are under consideration or deemed more appropriate for consideration by interim committees of the Legislature, the State Bar, or the Judicial Council.

V. REVISION OF EDUCATION CODE

Chapter 1682 of the Statutes of 1953, entitled "An act to consolidate and revise the Education Code, and making an appropriation to carry out the provisions of this act," provides:

Section 1. The Law Revision Commission or the California Code Commission shall prepare and revise the Education Code and shall submit a report and recommendations to the Legislature on or before January 1, 1955.

Section 2. Out of any money in the State Treasury, there is hereby appropriated the sum of twelve thousand dollars (\$12,000) to be expended to carry out the purposes of this act.

California law pertaining to education was first codified in the Political Code of 1872. In 1929 these provisions of law and certain others then contained in the Civil Code, the Penal Code, and the general statutes were codified in the School Code. In 1943, the Education Code, which had been prepared by the Code Commission, was enacted to replace the School Code.

The edition of the Education Code published by the State in 1953 is 842 pages long. It regulates all aspects of public education and contains a number of provisions pertaining to private schools as well. It is generally agreed by educators and the legal officers who advise them that the Education Code contains many obsolete, ambiguous, and conflicting provisions and that it is unnecessarily complex with respect to many subjects. On the basis of its experience in working with the code, the commission shares this view. The task of revising the code is, therefore, one of very substantial proportions.

A. WORK TO DATE

To obtain the views of those persons who are most familiar with the Education Code concerning its shortcomings, the commission wrote to the Attorney General, the several district attorneys and county counsels in the State, the State Department of Education, all county, city, and district superintendents of schools, and a number of other interested persons and organizations, asking them to report to the commission provisions of the code believed to be obsolete, ambiguous, or conflicting. With the assistance of the Education Code Revision Committee of the California Association of School Administrators, the commission also organized a group of more than 40 educator-consultants, each of whom was requested to study a portion of the code relating to matters with which he is familiar and to make a similar report. In addition, the commission has, through its Education Code revision staff, made a detailed study of the code and of the Attorney General's opinions and court decisions interpreting it.

On the basis of this information a number of proposed revisions have been prepared and approved for recommendation to the Legislature, including a comprehensive revision of the provisions governing the election, appointment and recall of members of school district governing boards. While initial drafts of this proposed legislation were circu-

lated among educators and other persons interested in public education, the drafts have been extensively revised as the commission has worked on them, and time has not permitted the commission to obtain the reaction of a representative cross-section of educators and other interested persons to the final drafts. The commission believes that the proposed revisions should not be enacted into law until after such reaction has been received but it likewise believes that the reactions and responses of interested persons can best be obtained by presenting the revisions to the Legislature in bill form early in the session and giving them a wide circulation among the persons who will be most directly affected by them.

The commission has, accordingly, prepared two bills for submission to the Legislature. One bill presents the commission's proposed revisions of the parts of the code which concern the election, appointment and recall of school district governing board members. The other bill presents the commission's proposed revisions of certain other parts of the code for the purpose of repealing obsolete sections, clarifying sections which are ambiguous, and resolving conflicts between sections of the code. Both bills will be offered for consideration by the Legislature at the 1955 session and will serve to illustrate the kinds of defects which the commission has found in the Education Code and the approach which it has made to revision of the code.

At the request of the commission the legislative members of the commission have arranged for the preprinting of the bills which contain the commission's proposed revisions of the Education Code. Copies of the preprinted bills, together with mimeographed notes explaining them, will be sent to interested persons and groups during the early part of January, 1955, so that their comments and suggestions will be available to the Legislature before it acts upon the bills.

B. FUTURE WORK ON REVISION OF THE EDUCATION CODE

The revisions recommended by the commission at this time merely scratch the surface of the project of eliminating or clarifying ambiguous, conflicting, and obsolescent provisions of the Education Code. There are many other such provisions which have been noted by the commission or brought to its attention, but which have not been reported to the Legislature because they require further study, and there are doubtless other such provisions not now known to the commission which further study would bring to light.

The \$12,000 appropriated for the revision of the Education Code will carry the work only to December 31, 1954. The commission's regular budget for the Fiscal Year 1954-55 did not include any funds for the continuation of the work, and no funds for the work are included in the commission's budget for the Fiscal Year 1955-56. It will be necessary, therefore, for the Legislature to decide whether the work of revising the Education Code should be continued and, if so, under what arrangement and with what additional appropriation.

As brought out in the report of the legislative subcommittee which recommended its creation (Report of the Subcommittee on Uniform Acts and Code Commission of the Assembly Interim Committee on Judiciary, March, 1953), the commission was conceived as an agency

which would receive and study suggestions for specific revisions of the law, principally in the field of private law. The legislation which created the commission was patterned after the statute creating the New York Law Revision Commission, which had for years confined each of its studies to a specific subject narrow enough in scope to permit of assignment to a single research consultant. Operating in this way, the New York Commission has not had to assemble a large permanent staff of attorneys, and has operated successfully for over 20 years in relatively limited quarters assigned to it by the Cornell Law School.

The commission's experience to date with the Education Code revision project has demonstrated that the project cannot be handled efficiently as a part of and in conjunction with its regular agenda of topics selected for study. The scope of the project is such as to require the appointment of a director and the employment of a staff of legislative draftsmen and educational research assistants to devote full time to the project. The office of the director and staff should be located in Sacramento, where the facilities and counsel of the Department of Education would be readily available. The commission believes that the establishment and maintenance of such an office would require an appropriation of approximately \$65,000 per year.

As an alternative to continuing the project under the direction of the commission, the Legislature might wish to consider the desirability of placing it under the direction of an interim committee or interim committees. Such a committee could hold hearings to receive the views of interested persons regarding the draft revisions prepared by the staff, and the revisions which it could propose would be more comprehensive than those which the commission could properly recommend.

VI. REVISION OF PROBATE CODE SECTIONS 640 TO 646

Assembly Concurrent Resolution No. 8, adopted at the 1954 session of the Legislature, provides:

WHEREAS, The Probate Code in Sections 640 to 646, inclusive, contains provisions for the setting aside of estates not exceeding two thousand five hundred dollars (\$2,500) in value; and

WHEREAS, These provisions are at variance with the exemptions granted by the Inheritance Tax Law and the provisions of the Civil Code relating to homesteads; now, therefore, be it

Resolved by the Assembly of the State of California, the Senate thereof concurring, That the California Law Revision Commission is authorized and directed to study and analyze the provisions of the law above-referred to and to prepare a draft of a revision of the said Probate Code sections, bringing them into accord with the Inheritance Tax Law exemptions and the homestead provisions of the Civil Code; and be it further

Resolved, That the California Law Revision Commission shall submit its report and draft of proposed legislation to the Legislature not later than the tenth day of the 1955 Regular Session of the Legislature.

The commission has determined to have its research work done primarily by experts in the subjects concerned on a contract basis rather than to establish its own research staff. It is believed that this will enable the commission to do better work at lower cost and will also provide greater flexibility in its program. Accordingly, the commission retained Paul E. Basye, Esq., Professor of Law at the Hastings College of Law and a member of the Burlingame Bar, to do the research work in connection with this assignment.³ A committee of commission members was appointed to supervise the study.

A preliminary study revealed that there are a number of points of similarity between the homestead provisions of the Civil Code (Sections 1237 to 1269) and Sections 640 to 646 of the Probate Code but that the exemption provisions of the Inheritance Tax Law are quite dissimilar from either of these in their purpose and effect. The commission therefore determined that it was not practicable to bring Sections 640 to 646 of the Probate Code into accord with the Inheritance Tax Law exemptions and it directed the committee and Mr. Basye to confine the study and report to an analysis of the homestead laws and Sections 640 to 646 of the Probate Code.

Mr. Basye prepared a report under the committee's supervision which is attached as Appendix B to this report. This study and the committee's recommendations were then considered by the commission. The commission determined to recommend certain revisions of Sections 640 to 646 of the Probate Code. The commission's Report and Recommendation to the Legislature is attached as Appendix C to this report.

³ Mr. Basye received his J.D. degree in 1926 from the University of Chicago and received an LL.M. degree in 1943 and an S.J.D. degree in 1946 from the University of Michigan. He did his work for the S.J.D. degree at Michigan on the subject of dispensing with administration in the case of small estates. He also participated in the drafting of the Model Small Estates Act for the National Conference of Commissioners on Uniform Laws.

VII. REPORT ON STATUTES HELD UNCONSTITUTIONAL

Section 10331 of the Government Code provides:

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

The commission has examined the cases decided by the Supreme Court of the State and the Supreme Court of the United States since January 1, 1953, the date of the most recent report of the Legislative Counsel which included a report of statutes held unconstitutional or repealed by implication.

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 have been found:

(1) In *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc.*, 40 Cal. 2d 436, 254 P. 2d 29 (1953) the court in a four to three decision held unconstitutional, under the due process clauses of the Constitutions of the United States and of the State of California, the minimum price provisions of the Dry Cleaners' Act of 1945 (Business and Professions Code Sections 9560 to 9567 and 9591).

(2) In *People v. Building Maintenance Contractors' Assn.*, 41 Cal. 2d 719, 264 P. 2d 31 (1953) the court unanimously held unconstitutional for vagueness Section 16723 of the Business and Professions Code. Section 16723 is a part of the Cartwright Act Anti-Trust Law which prohibits certain trusts defined therein. Section 16723 provides that the prohibition does not apply to a trust "the object and purpose of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed." The court held that this section is not sufficiently clear to be given effect.

VIII. RECOMMENDATIONS

The commission respectfully recommends:

(1) That the Legislature authorize the commission to study the topics listed in Appendix A of this report as topics selected for immediate study;

(2) That the Legislature consider for enactment the proposed revisions of the Education Code prepared by the commission pursuant to Chapter 1682 of the Statutes of 1953;

(3) That the Legislature enact into law the proposed revisions of Probate Code Sections 640 to 646 prepared and recommended by the commission pursuant to Assembly Concurrent Resolution No. 8 adopted in the 1954 Session of the Legislature; and

(4) That the Legislature repeal Sections 9560 to 9567, 9591, and 16723 of the Business and Professions Code, held unconstitutional by the Supreme Court of the State.

Respectfully submitted,

THOMAS E. STANTON, JR., *Chairman*

JOHN D. BABBAGE, *Vice Chairman*

JESS R. DORSEY, *Member of the Senate*

STANFORD C. SHAW, *Member of the Assembly*

RICHARD C. FILDEW

BERT W. LEVIT

JOHN HAROLD SWAN

SAMUEL D. THURMAN

RALPH N. KLEPS, *Legislative Counsel, ex officio*

JOHN R. McDONOUGH, JR.

Executive Secretary

APPENDIX A

TOPICS SELECTED FOR STUDY

Two categories of topics are reported herein: (1) topics selected for immediate study and (2) topics intended for future study. The commission requests the Legislature to approve only the topics in the first of these categories for its study at the present time.

TOPICS SELECTED FOR IMMEDIATE STUDY

Topic No. 1: *A study to determine whether the sections of the Civil Code prohibiting the suspension of the absolute power of alienation should be repealed.*

The California rule against suspension of the absolute power of alienation¹ is designed to prevent an owner of property from controlling its future ownership for an unreasonable period of time by creating successive future interests in the property. The rule requires that within 21 years after some life in being at the time of the creation of any interest in property there be persons in being who can convey an absolute interest in possession in it. The rule makes void any future interest which does not meet this requirement. The rule is satisfied even if some of the persons who would have to join in a conveyance of an absolute interest have contingent rather than vested interests in the property because a contingent interest can be released.

The rule against suspension of the absolute power of alienation was probably made unnecessary by the enactment in 1951 of Section 715.2 of the Civil Code which made applicable in this State the common law rule against perpetuities.² The rule against perpetuities is also designed to prevent unreasonable control of the future ownership of property. It requires that every interest in property vest not later than 21 years after some life in being at the time when the interest is created.

In the case of future interests *not in trust*, the rule against perpetuities is more restrictive than the rule against suspension of the absolute power of alienation, even though the temporal limitation (lives in being plus 21 years) is the same in both cases. This is because the former rule requires that all interests be vested within the period while the latter rule does not. Any interest not in trust which would satisfy the rule against perpetuities would, therefore, necessarily also satisfy the rule against suspension of the absolute power of alienation. The latter rule is, in such cases, simply an obsolete statute the continued existence of which can only be a source of confusion to both attorneys and laymen.

¹ CAL. CIV. CODE §§ 715.1, 716, 771.

² Prior to 1948 it was not clear whether the common law rule against perpetuities existed in this State. *Estate of Sahlender*, 89 Cal. App. 2d 329, 201 P. 2d 69 (1948) held that it did. Civil Code Section 715.2 was a legislative endorsement of this view.

In the case of future interests *in trust*, however, the situation is different. In such cases the rule against suspension of the absolute power of alienation does have an area of operation which is not covered by the rule against perpetuities. This is because the California courts have held that an interest in trust which is vested within the time specified by the common law rule against perpetuities may nevertheless be void under the rule against suspension of the absolute power of alienation when there is a restriction upon the power of the beneficiary to transfer his interest, as, for example, in the case of a spendthrift trust.³

Repeal of the rule against the suspension of the absolute power of alienation may nevertheless be justified. Section 711 of the Civil Code, which embodies the common law rule against restraints on alienation, makes void a restraint upon alienation which is repugnant to the interest created. This empowers the courts of the State to refuse to enforce a restriction upon the power of a trust beneficiary to transfer his interest if the restriction is unreasonable. But in such a case the court merely refuses to give effect to the restriction and the interest to which it applies continues in effect while the rule against suspension of the absolute power of alienation makes the interest void because of the restriction on alienation—a result which seems to be unnecessarily harsh.

Topic No. 2: A study to determine whether the courts of this State should be required or authorized to take judicial notice of the law of foreign countries.

In the absence of a statute requiring or authorizing them to take judicial notice of law other than that of their own jurisdiction, common law courts have held that such law is a fact to be pleaded and proved like any other fact.⁴ It has been held in some cases that the fact is one to be decided by the jury.⁵ An appellate court must accept a finding by the trial court on the "fact" of foreign law if it is supported by substantial evidence even though the appellate court would have reached a different conclusion from the evidence.⁶ Many common law courts have held that in the absence of proof of the decisional law of another common law jurisdiction it will be presumed to be the same as that of the forum.⁷

These rules have been replaced in California in cases involving the laws of sister states by Section 1875 (3) of the Code of Civil Procedure which provides that the courts shall take judicial notice of "the laws of the several states of the United States and the interpretation thereof by the highest courts of appellate jurisdiction of such states." In such cases a party need not plead the applicable sister-state law nor introduce expert testimony concerning it.⁸ Moreover, an appellate court is not bound by the trial court's interpretation of such law.⁹

³ *Estate of Walkerly*, 108 Cal. 627, 41 Pac. 772 (1895).

⁴ *Ryan v. North Alaska Salmon Co.*, 153 Cal. 438, 95 Pac. 862 (1908).

⁵ 9 WIGMORE, EVIDENCE § 2558 (3d ed. 1940).

⁶ *Estate of Schluttig*, 36 Cal. 2d 416, 224 P. 2d 695 (1950); *Estate of Miller*, 104 Cal. App. 2d 1, 230 P. 2d 667 (1951).

⁷ 3 BEALE, CONFLICT OF LAWS 1679 *et seq.* (1935); 9 WIGMORE, EVIDENCE § 2536 (3d ed. 1940); Kales, *Presumption of the Foreign Law*, 19 HARV. L. REV. 401 (1906).

⁸ *Loranger v. Nadeau*, 215 Cal. 362, 10 P. 2d 63 (1932); *Estate of Yule*, 57 Cal. App. 2d 652, 135 P. 2d 386 (1943).

⁹ *Estate of O'Brien*, 75 Cal. App. 2d 405, 168 P. 2d 432 (1946); 4 CAL. JUR. 2d 484 (1952).

There is no similar statute with respect to the law of foreign countries. Thus, these must be both pleaded and proved,¹⁰ and the trial court's interpretation of them must be accepted if supported by substantial evidence.¹¹ In the absence of proof to the contrary, the California courts ordinarily presume the law of a foreign country to be the same as that of this State and, unlike most states, apply this rule to statutory as well as decisional law and to other than common law jurisdictions.¹² The desirability of these rules is open to considerable doubt. The Legislature of Massachusetts has enacted a statute requiring the courts of that state to take judicial notice of foreign country law¹³ and the Legislature of New York has recently enacted a statute giving the courts of that state discretion to do so.¹⁴

Topic No. 3: A study to determine whether Probate Code Sections 40 to 43, which establish limitations on testamentary gifts to charity, should be modified or repealed.

Probate Code Sections 40 to 43 establish several limitations on the amount of a person's estate which may be willed to charity, with the exception of certain charities provided for in Section 42. The limitations vary depending on when the will is drawn and by whom the testator is survived. Their general purpose is to prevent a person from disinheriting his relatives in favor of gifts to charity. The great majority of states do not have such restrictions.

In 1943, the following paragraph was added to Section 41 of the Probate Code:

Nothing herein contained is intended to, or shall be deemed or construed to vest any property devised or bequeathed to charity or in trust for a charitable use, in any person who is not a relative of the testator belonging to one of the classes mentioned herein, or in any such relative, unless and then only to the extent that such relative takes the same under a substitutional or residuary bequest or devise in the will or under the laws of succession because of the absence of other effective disposition in the will.

The effect of this amendment has been to render Sections 40 to 43 of the Probate Code nugatory. All a testator need do to immunize any gift made at any time in any amount to any charity from the limitations prescribed in these sections is to make a substitutional or residuary gift to a noncharitable donee who is not included in the designated class of heirs.¹⁵ As a result, Sections 40 to 43 have become merely a trap for the testator who draws his own will.

Topic No. 4: A study to determine whether the Dead Man Statute should be repealed or, if not, whether the rule with respect to waiver of the statute by the taking of a deposition should be clarified.

The so-called "Dead Man Statute," Section 1880 (3) of the Code of Civil Procedure, provides that when an action is brought against an executor or administrator on a claim against a decedent's estate, no

¹⁰ *Wickersham v. Johnston*, 104 Cal. 407, 38 Pac. 89 (1894); *Silveyra v. Harper*, 82 Cal. App. 2d 761, 187 P. 2d 83 (1947).

¹¹ *Estate of Schluttig*, 36 Cal. 2d 416, 224 P. 2d 695 (1950); *Hawi Mill Co. v. Finn*, 82 Cal. App. 255, 255 Pac. 543 (1927).

¹² *Christ v. Superior Court*, 211 Cal. 593, 296 Pac. 612 (1931). The rule was qualified to a degree in *Estate of Knutzen*, 31 Cal. 2d 573, 191 P. 2d 747 (1948).

¹³ MASS. ANN. LAWS c. 233, § 70 (1933).

¹⁴ N.Y. CIV. PRAC. ACT § 344a (1950).

¹⁵ *Estate of Davison*, 96 Cal. App. 2d 263, 215 P. 2d 504 (1950); *Estate of Randall*, 86 Cal. App. 2d 422, 194 P. 2d 709 (1948).

party to the action, assignor of a party, or person on whose behalf the action is brought can be a witness. This statute, which disqualifies the party-witness because of his interest in the action, was enacted as an exception to Section 1879 which provides generally that a party may testify in his own action. Its rationale would appear to be that a special rule is necessary because the decedent's version of the facts is not available.

Several authorities have taken the position that the Dead Man Statute should be repealed.¹⁶ A consideration supporting this position is that any person other than those named may testify in the action and if a party would perjure himself he might well suborn perjury by another.

If the statute is to be continued in existence, one matter should be clarified. If the estate takes the deposition of one barred from testifying by Code of Civil Procedure Section 1880 (3) and introduces it in the action, the protection of the statute is waived and the party whose deposition has been taken may testify.¹⁷ It is not clear whether the protection of the statute is waived by the taking of the deposition alone. Language in the opinions of the courts in *Moul v. McVey*¹⁸ and *Kay v. Karas*¹⁹ would indicate that it is but the question does not appear to have been squarely decided by any appellate court.

Topic No. 5: A study to determine whether California should continue to follow the rule that survival of actions arising outside California is governed by California law.

Anglo-American courts have generally held that when suit is brought in one jurisdiction on a cause of action arising in another, the court should apply the substantive law of the place where the cause of action arose and the procedural law of the forum.²⁰ The theory of applying the non-forum jurisdiction's substantive law is that the outcome of the case should not be different depending on where suit is brought; the justification for applying the forum's procedural rules is that these deal merely with the mechanics of the lawsuit and ought not to affect the result.²¹ While not a little difficulty has been encountered by the courts in determining whether particular rules are "substantive" or "procedural" for this purpose, it has been generally held that the law respecting survival of actions is substantive and that the law of the place where the cause of action arose, and not that of the forum, should be applied.²²

The Supreme Court of this State recently took the opposite view, holding in *Grant v. McAuliffe*²³ (three judges dissenting) that a cause of action arising in Arizona could be brought in California under the survival statute in this State after the tortfeasor had died even though the plaintiff could not then have maintained the action in Arizona. This decision made the rights of the parties depend upon the place

¹⁶ 2 WIGMORE, EVIDENCE § 578 (3d ed. 1940); Hale, *The California "Dead Man's Statute,"* 9 SO. CALIF. L. REV. 35 (1935).

¹⁷ *McClenahan v. Keyes*, 188 Cal. 574, 206 Pac. 454 (1922).

¹⁸ 49 Cal. App. 2d 101, 121 P. 2d 83 (1942).

¹⁹ 87 Cal. App. 2d 600, 197 P. 2d 396 (1948).

²⁰ GOODRICH, CONFLICT OF LAWS §§ 4, 80 (3d ed. 1949).

²¹ *Ibid.* See 3 BEALE, CONFLICT OF LAWS § 584.1 (1935).

²² *Ormsby v. Chase*, 290 U. S. 337 (1933); RESTATEMENT, CONFLICT OF LAWS § 390 (1934); GOODRICH, CONFLICT OF LAWS § 101 (3d ed. 1949); STUMBERG, CONFLICT OF LAWS 189 (2d ed. 1951).

²³ 41 Cal. 2d 859, 264 P. 2d 944 (1953).

where the action was brought. While there was doubtless a desire on the part of the court to give the plaintiff a remedy, the rationale of the decision would presumably work to the detriment of equally deserving plaintiffs in other cases, for it would require California courts to refuse to entertain an action which does not survive under the law of this State even though it would survive where it arose.

Topic No. 6: A study to determine whether Section 201.5 of the Probate Code should be revised.

Section 201.5 of the Probate Code provides, in effect, that upon the death of a married person both his separate personal property and that of his spouse shall be treated as though it were community property if such property was acquired during their marriage and under such circumstances that it would have been community property if the spouse acquiring it had been domiciled in California at the time. In the case of such property Section 201.5 provides that: (1) If the decedent made no will with respect thereto, the property shall go to the surviving spouse and (2) if the decedent did make a will with respect to such property one-half of it shall go as provided in the will and the other half shall go to the surviving spouse.

The effect of Section 201.5 is to deprive the decedent of the power of testamentary disposition with respect to one-half of his own separate property designated by the statute and to give him a power to transfer by will one-half of the separate property of his spouse designated by the statute. In its latter aspect, the Commission believes, the statute probably violates the Fourteenth Amendment of the Constitution of the United States. It is doubtful that the State can deprive the surviving spouse of one-half of *his* separate property during his lifetime.²⁴

Insofar as Section 201.5 treats the *decedent's* separate property in effect as community property, however, there would appear not to be any Constitutional inhibition because the power of the State over property left by a decedent is plenary.²⁵ The question has been raised whether Section 201.5, so far as it relates to the decedent's property, should be made applicable to real property acquired by the decedent in California in his lifetime with separate personal property to which Section 201.5 would have applied had he retained it until death.²⁶ This suggestion appears to be worthy of consideration.

Topic No. 7: A study to determine whether Section 660 of the Code of Civil Procedure should be amended to specify the effective date of an order granting a new trial.

The law of this State is unclear concerning the effective date of an order granting a motion for a new trial, as between the date on which the court's ruling is announced and that on which the order is filed with the clerk or entered in the minutes. The matter is one of critical importance because Section 660 of the Code of Civil Procedure provides that the power of the court to pass on a motion for a new trial shall expire 60 days after certain dates specified therein; if the court does not act within this time the motion is automatically denied. The effective

²⁴ See *Estate of Thornton*, 1 Cal. 2d 1, 33 P. 2d 1 (1934).

²⁵ See *Estate of Phillips*, 203 Cal. 106, 115, 263 Pac. 1017, 1021, *cert. denied*, 278 U. S. 599 (1928).

²⁶ Abel, *Estate Planning for the Non-Native Son*, 41 CALIF. L. REV. 230 (1953).

tive date of the order is, therefore, decisive in the situation where the court decides to grant the motion and announces its decision in open court *before* 60 days have elapsed but the order is not filed with the clerk or entered in the minutes until *after* the 60-day period has run.

In *Willis v. Superior Court*²⁷ and *Barbee v. Young*,²⁸ the courts held that an order made before, but entered after the 60th day, is effective when announced. However, several recent cases have thrown considerable doubt on these decisions.

In *Jablon v. Henneberger*,²⁹ the court held that an order denying a motion for a new trial was not effective for the purpose of starting the period within which an appeal might be perfected until entered in the minutes. The court said, "It is the general rule that an order is ineffective unless filed with the clerk or entered in the minutes."³⁰ Other recent decisions which contain general language to the same effect are *Millsap v. Hooper*,³¹ and *Pacific Home v. County of Los Angeles*.³² If the rule announced in these cases applies to an order granting a new trial, the trial judge actually has less than 60 days to decide such a motion for he must allow sufficient time after his decision is announced to permit the clerk to perform his ministerial functions in respect of the order before the 60th day. While the *Jablon*, *Millsap* and *Pacific Home* cases did not involve orders granting new trials and might, therefore, be distinguished from the earlier *Willis* and *Barbee* cases, the law appears to be uncertain at the present time as to the effective date of an order granting a new trial.

Topic No. 8: *A study to determine whether, when the defendant moves to change the place of trial of an action, the plaintiff should in all cases be permitted to oppose the motion on the ground of the convenience of witnesses.*

Title IV of Part 2 of the Code of Civil Procedure (Sections 392 to 401) fixes the place of trial of civil actions. If the plaintiff files his action in an unauthorized court, the defendant may move to have the case transferred to a proper court.³³ However, Section 396(b) provides that:

if an answer be filed, the court may consider opposition to the motions, if any, and may retain the action in the county where commenced if it appears that the convenience of the witnesses or the ends of justice will thereby be promoted (emphasis added).

The requirement that an answer be on file before the court can consider opposition to the motion on the ground of convenience of witnesses has been explained on the ground that the court cannot determine who the witnesses in the action will be or what testimony will be material until the issues are framed.³⁴ The result is that the defendant will normally file his motion to change the place of trial before answering and the action will be transferred to the proper court. After the defendant files his answer in that court the plaintiff may move, pursuant

²⁷ 214 Cal. 603, 7 P. 2d 303 (1932).

²⁸ 79 Cal. App. 119, 249 Pac. 15 (1926).

²⁹ 33 Cal. 2d 773, 205 P. 2d 1 (1949).

³⁰ *Id.* at 775, 205 P. 2d at 2.

³¹ 34 Cal. 2d 192, 208 P. 2d 982 (1949).

³² 41 Cal. 2d 855, 264 P. 2d 544 (1953).

³³ CAL. CODE CIV. PROC. § 396b.

³⁴ *Gordon v. Perkins*, 203 Cal. 183, 263 Pac. 231 (1928); *Gilman v. Nordin*, 112 Cal. App. 2d 788, 247 P. 2d 394 (1952); *Rowland v. Bruton*, 125 Cal. App. 697, 14 P. 2d 116 (1932).

to Code of Civil Procedure Section 397 (3), to transfer the action back to the original court on the ground that "the convenience of witnesses and ends of justice would be promoted by the change." If the court is persuaded, the case is transferred back to the original court.³⁵ This procedure appears to be cumbersome and wasteful and to offer the defendant an opportunity to employ purely dilatory tactics. It could be obviated either by requiring the defendant to answer before he moves to change the place of trial or permitting the plaintiff to show that the action should be retained where filed for the convenience of witnesses or to promote the ends of justice even though defendant has not answered.

Topic No. 9: A study to determine whether the law with respect to the "for and against" testimonial privilege of husband and wife should be revised in certain respects.

Generally speaking, one spouse cannot testify for or against the other in a criminal proceeding³⁶ or a civil action.³⁷ There is an exception to this rule in both civil and criminal proceedings, however, in cases involving a wrong by one spouse against the other.³⁸ There are a number of questions concerning the scope of the rule and its exceptions in California:

1. In civil actions, only the spouse who is a party to the action has the right to determine whether the other spouse shall testify.³⁹ Thus, the party spouse can prevent the other spouse from testifying against him but compel the other spouse to testify for him. In criminal proceedings, on the other hand, both spouses have the power to determine that the non-party spouse shall not testify.⁴⁰ Is this difference justifiable?

2. In a criminal proceeding involving a wrong by one spouse to property of the other, the non-party spouse may testify against the wishes of the other spouse.⁴¹ But in a civil action involving a wrong committed by one spouse against the property of the other, the latter may not testify against the wishes of the party spouse.⁴² Is this difference in the scope of the exception in criminal and civil cases justifiable?

3. In cases falling within the exception to the general rule—i.e., when one spouse has committed a wrong against the other—it is clear that the wronged spouse *may* testify, but it is not clear whether he has a privilege to refuse to testify. Neither the relevant Code sections nor the cases provide an answer. Yet the question may fairly frequently arise, as, for example, when a wronged wife has filed a criminal charge against her husband but has, by the date of the trial, become reluctant to testify in support of the charge.

³⁵ *Gordon v. Perkins*, 203 Cal. 183, 263 Pac. 231 (1928).

³⁶ CAL. PEN. CODE § 1322.

³⁷ CAL. CODE CIV. PROC. § 1881(1). This rule is to be distinguished from the rule that communications between husband and wife are privileged, also covered by CAL. CODE CIV. PROC. § 1881(1).

³⁸ CAL. CODE CIV. PROC. § 1881(1); CAL. PEN. CODE § 1322; see, generally, 8 WIGMORE, EVIDENCE §§ 2241-2245 (3d ed. 1940).

³⁹ CAL. CODE CIV. PROC. § 1881(1).

⁴⁰ See note 36 *supra*.

⁴¹ *Ibid.*

⁴² See note 39 *supra*.

Topic No. 10. A study to determine whether the Small Claims Court Law should be revised.

The commission has received communications from several judges of municipal and justice courts in various parts of the State relating to defects and gaps in the Small Claims Courts Law.⁴³ These suggestions have concerned such matters as whether the monetary jurisdiction of the small claims courts should be increased, whether fees and mileage may be charged in connection with the service of various papers, whether witnesses may be subpoenaed and are entitled to fees and mileage, whether sureties on appeal bonds should be required to justify in all cases, and whether the plaintiff should have the right to appeal from an adverse judgment. The number and variety of these communications suggests that the Small Claims Court Law is open to considerable improvement.

Topic No. 11: A study to determine whether the Juvenile Court Law should be revised.

The commission has received a communication from a judge of the superior court stating that there are a number of contradictions, ambiguities, and other defects in the Juvenile Court Law and suggesting that it be thoroughly revised. It was suggested that matters particularly deserving of consideration include: (1) whether the probation officer should be made an officer of the court; (2) whether a juvenile should be entitled to counsel; and (3) whether a juvenile should be entitled to reasonable bail when a responsible person will take custody of him.

Another superior court judge has suggested that the procedure in cases in which a defendant is charged with contributing to the delinquency of a minor⁴⁴ be revised. Section 702 of the Welfare and Institutions Code provides that the juvenile court shall have original jurisdiction over all misdemeanors defined in Section 702, and of prosecutions thereunder, and shall cause the defendant to be duly arraigned and plead to the charge made against him in the manner provided in the Penal Code upon an indictment or information. If the defendant enters a plea of guilty, the juvenile court has jurisdiction to impose sentence or in its discretion to grant probation upon such terms as it deems proper.

There is no express provision as to the procedure to be followed if a defendant pleads "not guilty." The Attorney General has ruled that a preliminary hearing may be held by the juvenile court.⁴⁵ However, he has also ruled that any magistrate of an inferior court has concurrent jurisdiction to hold such preliminary hearing, and to bind a defendant thus charged over to the juvenile court.⁴⁶ The Attorney General concedes that there is no express authority for this procedure, but states that it has been adopted as a matter of practice in cases arising under Section 702.⁴⁷

⁴³ CAL. CODE CIV. PROC. § 117.

⁴⁴ CAL. WEL. & INST. CODE § 702.

⁴⁵ 8 OPS. CAL. ATT'Y GEN. 167 (1946).

⁴⁶ 8 OPS. CAL. ATT'Y GEN. 289 (1946).

⁴⁷ *Butler v. Hastings*, 139 Cal. App. 641, 34 P. 2d 751 (1934); *People v. Superior Court*, 104 Cal. App. 276, 285 Pac. 871 (1930).

Topic No. 12: A study for the purpose of revising Sections 1377 and 1378 of the Penal Code to eliminate certain obsolete language therein.

Sections 1377 and 1378 of the Penal Code provide for compromise of misdemeanors in certain cases when the person injured by the defendant has a remedy by a civil action and acknowledges that he has received satisfaction for the injury. The language in these two sections is obsolete in two respects:

(1) Section 1377 refers to the situation "When a defendant is held to answer on a charge of misdemeanor * * *." This procedure is no longer followed. Defendants in most misdemeanor cases are not "bound over" or "held to answer" to the superior courts after preliminary hearings; a complaint is filed in an inferior court, the defendant is arrested, and trial is held in the court in which the charge against him is filed.⁴⁸ The language of Section 1377 referred to should therefore be revised.

(2) Section 1378 refers to an appearance by the injured party "before the court to which the depositions are required to be returned * * *." This refers to a procedure formerly provided for by Section 811 of the Penal Code, wherein the magistrate took the depositions of certain witnesses. Section 811 was repealed in 1951.⁴⁹ It is no longer necessary that depositions be taken.⁵⁰ The language of Section 1378 referred to should therefore be revised.

Topic No. 13: A study to determine 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.

There is, in this State, a variety of legal provisions, found both in the general law and in the charters of many cities, requiring that one who wishes to sue a public body or an officer, agent, or employee thereof, file a claim in writing within a specified time.⁵¹ The procedures required to be followed vary considerably.⁵² The State Bar has had under consideration for some time a proposal that a constitutional amendment be sought to enable the Legislature by statute to prescribe a uniform procedure for filing such claims, notwithstanding the "home rule" provisions of the Constitution⁵³ for chartered cities and counties.⁵⁴ The State Bar has also considered the question whether the requirement that a claim be filed as a condition precedent to suing a public employee individually should be modified or abolished.⁵⁵ In its Report to the Board of Governors of the State Bar dated June, 1954, the Committee on Administration of Justice recommended that

the State Bar request the newly created Law Revision Commission to study the entire subject matter of the filing and presentment of claims against public employees and public bodies, with a view to achieving reforms in this field by statutory or constitutional change, or both.⁵⁶

⁴⁸ CAL. PEN. CODE §§ 1427 *et seq.*

⁴⁹ CAL. STAT. 1951, c. 1674.

⁵⁰ *Muller v. Justice's Court*, 123 Cal. App. 2d 696, 267 P. 2d 406 (1954).

⁵¹ Supplement to Second Progress Report of the Senate Interim Judiciary Committee, 1953 Regular Session, pp. 5-6.

⁵² *Ibid.*

⁵³ CAL. CONST. Art. XI, §§ 6, 7½, 8.

⁵⁴ 28 CAL. B. J. 273 (1953).

⁵⁵ 29 CAL. B. J. 230 (1954).

⁵⁶ *Ibid.*

This request was made by the Board of Governors to the Law Revision Commission in a letter dated October 13, 1954.

Topic No. 14: *A study of the conflict between Penal Code Section 19a, which limits commitment to a county jail to one year in misdemeanor cases, and other provisions of the Penal Code providing for longer county jail sentences in misdemeanor cases.*

Section 19a of the Penal Code provides that in no case shall any person convicted of a misdemeanor and sentenced to confinement in a county or city jail or other penal detention facility be committed for a period in excess of one year.

Sections 270 and 270a of the Penal Code make failure to provide punishable by imprisonment in the county jail for not exceeding two years. Section 69 of the Penal Code makes resistance to an executive officer or any attempt to prevent his performance of duty by threat or violence punishable by imprisonment in the county jail for not exceeding five years. Section 142 of the Penal Code provides that every peace officer who wilfully refuses to receive or arrest any person charged with a criminal offense shall be punishable by imprisonment in the county jail for not exceeding five years. Section 148 of the Penal Code makes resistance to any public officer in the discharge of his duties punishable by imprisonment in the county jail for not exceeding five years. Section 149 of the Penal Code makes assault by a public officer under color of authority, without lawful necessity, punishable by imprisonment in the county jail for not exceeding five years. In all of these cases the crimes are misdemeanors and thus within Section 19a because Section 17 of the Penal Code defines every crime as a misdemeanor which is not punishable by death or by imprisonment in the state prison.

The courts have resolved the conflict between Section 19a and the other statutes listed by holding that Section 19a controls. For example, in *People v. Phair*,⁵⁷ where the offense was contributing to the delinquency of a minor, then punishable by a two-year sentence in the county jail, the court held that Section 19a controlled and that imprisonment must be limited to one year. Whether this resolution of the conflict is correct may be open to doubt. If it is, two questions are presented: (1) should Section 19a be revised or (2) should the other Penal Code sections be revised either to limit punishment to one year or to make the offenses specified in them felonies and thus punishable by confinement in the state prison.

Topic No. 15: *A study to determine whether Sections 2201 and 3901 of the Corporations Code should be made uniform with respect to notice to stockholders before all or substantially all of the assets of a corporation may be sold.*

Section 3901 of the Corporations Code provides that a corporation may sell all or substantially all of its assets with the approval of the stockholders entitled to exercise a majority of the voting power of the corporation. The code does not contain any express requirement that

⁵⁷ 137 Cal. App. 612, 31 P. 2d 421 (1934).

all of the stockholders be given notice that a sale pursuant to Section 3901 is contemplated. Yet Section 2201 of the Corporations Code requires that if a proposal to sell all or substantially all of the assets of a corporation is to be acted upon at an annual meeting of stockholders written notice thereof be given as in the case of a special meeting. This situation gives rise to two questions: (1) is a notice requirement to be implied in Section 3901 from the fact that it exists in Section 2201? (2) if not, why should there be a requirement of notice to stockholders in one of these situations and not in the other? It would seem desirable to make the provisions of Sections 2201 and 3901 of the Corporations Code uniform with respect to the requirement of notice to stockholders.

Topic No. 16: *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.⁵⁸ There seems to be no reason why the rule on this matter should not be the same in both civil and criminal cases.

Topic No. 17: *A study to resolve the inconsistency between Section 3051(a) of the Civil Code and Section 425(b) of the Vehicle Code with respect to the procedure necessary to be followed to make valid the portion of a garage keeper's lien on a motor vehicle in excess of \$100 for work done at the request of another person.*

Section 3051(a) of the Civil Code provides that the portion in excess of \$100 of a garage keeper's lien on a motor vehicle for work, service, etc., performed at the request of any person other than the holder of the legal title of the vehicle is invalid unless the garage keeper gives notice in writing to the holder of the legal title if known. Section 425(b) of the Vehicle Code is identical to Section 3051(a) of the Civil Code except in two particulars: (1) it does not limit the requirement of giving notice to cases where the holder of the legal title is known and (2) it requires that the consent of the holder of the legal title be obtained before the work is done. While the "if known" clause of Civil Code Section 3051(a) might be read into Vehicle Code Section 425(b) and the consent requirement of Vehicle Code Section 425(b) might be read into Civil Code Section 3051(a) as a matter of judicial interpretation (no cases on these questions have been found), it would appear to be desirable to make the statutes uniform on both matters.

⁵⁸ *Nelson v. Southern Pacific Co.*, 8 Cal. 2d 648, 67 P. 2d 682 (1937); *Lewis v. Southern Pacific Co.*, 98 Cal. App. 2d 358, 220 P. 2d 431 (1950); *Day v. General Petroleum Corp.*, 32 Cal. App. 2d 220, 89 P. 2d 718 (1939); *Melikian v. Independent P. S. Co.*, 8 Cal. App. 2d 166, 47 P. 2d 539 (1935); *Fererira v. Silvey*, 38 Cal. App. 346, 176 Pac. 371 (1918).

Topic No. 18: A study to determine whether the law respecting exceptions to the hearsay rule should be revised.

The so-called "hearsay rule" precludes the introduction of evidence in a judicial proceeding where there is no opportunity in that proceeding to test the evidence by the usual cross-examination. The rule is subject to a number of generally recognized exceptions. These are based for the most part on considerations of practical necessity and on the fact that there are other guarantees of reliability with respect to these particular hearsay statements.

It has been reported to the commission that the law of this State with respect to exceptions to the hearsay rule is to some extent out of line with that elsewhere and in need of revision. A preliminary study indicates that the following exceptions to the hearsay rule in this State are particularly worthy of study:

1. The rule respecting oral declarations against interest,⁵⁹ unlike that generally followed elsewhere, is limited to declarations relating to real property.
2. The rule respecting declarations of a predecessor in interest is limited to declarations relating to real property⁶⁰ or to declarations against pecuniary interest.⁶¹ Such limitations are not found in most other jurisdictions.
3. Code of Civil Procedure Section 1870 (3) which makes admissible any act or declaration in the presence and within the observation of a party, together with the party's conduct in relation thereto, is stated much more broadly than the rule in other jurisdictions and probably much more broadly than it would be construed by California appellate courts. As thus stated, it is misleading to attorneys and trial judges.
4. An apparent conflict exists between Section 1852 and Section 1870 (11) of the Code of Civil Procedure with reference to the pedigree exception to the hearsay rule. There is considerable authority allowing evidence of common or neighborhood reputation in such cases and Section 1870 (11) is apparently in accord whereas Section 1852 limits the evidence to reputation in the family.

Topic No. 19: A study to determine whether Sections 389 and 442 of the Code of Civil Procedure should be revised to permit defendants to bring into a civil action by cross-complaint persons who are not "indispensable" parties.

Section 442 of the Code of Civil Procedure authorizes the defendant to file a cross-complaint when he

seeks affirmative relief against any party, relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought, or affecting the property to which the action relates * * *.

⁵⁹ CAL. CODE CIV. PROC. §§ 1870 (4), 1946 (1).

⁶⁰ *Id.* § 1849.

⁶¹ *Id.* § 1853.

Section 389 of the Code of Civil Procedure authorizes the court to order new parties brought into an action

when a complete determination of the controversy cannot be had without [their] presence * * *.

On its face Code of Civil Procedure Section 442 would seem to be open to the construction that it authorizes a defendant to bring into an action any person against whom he has a claim reasonably closely related to the matters involved in the action. Such a rule would appear to be desirable from the point of view of avoiding two or more lawsuits to settle a number of related claims which could be litigated in a single proceeding.

The courts have held, however, that Section 389 of the Code of Civil Procedure controls with respect to bringing new parties into an action and that, within the meaning of that section a "complete determination of the controversy cannot be had without [their] presence * * *" only when a judgment could not be rendered therein without affecting their rights.⁶² It is true that Section 389 has been given a less restrictive interpretation than the language of some of the cases would suggest and that persons not technically "indispensable" have been made parties in some instances.⁶³ Nevertheless, it is arguable that a more liberal rule should be adopted with respect to bringing new parties into an action in the interest of a greater economy of litigation than can be achieved under Sections 389 and 442 as presently interpreted.

Topic No. 20: A study to determine whether a statute should be enacted to make it unnecessary to have an administrator appointed in a quiet title action involving property to which some claim was made by a person since deceased.

It is ordinarily necessary to join in a quiet title action each person whom the plaintiff wishes to be bound by the judgment in the action, however tenuous his claim to an interest in the property may be.⁶⁴ When one of the persons required to be joined has died, the question arises whether the suit can be brought against his heirs or whether it can only be brought against a representative of the decedent's estate. If the latter is the case and no such representative has been appointed, it is necessary to have an administrator specially appointed for the purpose of being made a party to the action.

The law of this State is not entirely clear on the matter. Section 573 of the Probate Code authorizes the executor or administrator to both maintain and defend quiet title actions. The heirs are expressly authorized only to maintain such actions.⁶⁵ This would suggest that a quiet title action can be brought only against the executor or administrator. But the cases suggest that such actions can probably be brought

⁶² *Reed v. Wing*, 168 Cal. 706, 144 Pac. 964 (1914); *Banks v. Housing Authority*, 120 Cal. App. 2d 1, 260 P. 2d 668 (1953).

⁶³ *Warner v. Pacific Tel. & Tel. Co.*, 121 Cal. App. 2d 497, 263 P. 2d 465 (1953); *Casaretto v. DeLucchi*, 76 Cal. App. 2d 800, 174 P. 2d 328 (1946).

⁶⁴ *Elliot v. McCombs*, 17 Cal. 2d 23, 109 P. 2d 329 (1941); *McDonald v. McCoy*, 121 Cal. 55, 53 Pac. 421 (1898).

⁶⁵ CAL. PROB. CODE § 531.

against the heirs as well. Both the representative of the estate and the heirs are proper parties, but neither appears to be a necessary party.⁶⁶

Because the appointment of a representative to defend a quiet title action is both time-consuming and expensive, a member of the bar has suggested that a statute should be enacted making it unnecessary to do so.

Topic No. 21: *A study to determine whether a procedure should be established to enable an owner of property to relieve the property from a mechanic's lien by posting a bond.*

It has been suggested that an owner of property upon which there is a disputed mechanic's lien should be able to free the property from the lien without paying it by posting a bond sufficient to assure that the lienholder will be paid if the lien is adjudged valid. Such a procedure is available to free property from an attachment lien,⁶⁷ and from a judgment lien when the case is on appeal⁶⁸ but is not presently available in the case of mechanic's liens.

Topic No. 22: *A study to determine whether, when the defendant in a divorce or annulment action has defaulted, the court should be authorized to include in a decree of annulment or an interlocutory or final decree of divorce an award of attorneys' fees and costs not exceeding the amount prayed in the complaint without requiring that an order to show cause or notice of motion be served on the defendant.*

Section 137.3 of the Civil Code provides for awarding attorneys' fees and costs in divorce and annulment actions. It provides expressly that such an award shall be made only after an order to show cause or notice of motion has been served on the defendant when the award is made either prior to or after judgment. While Section 137.3 does not expressly provide that an order to show cause or notice of motion is necessary when an award of attorneys' fees and costs is requested in connection with a decree of annulment or an interlocutory or final decree of divorce, the courts in some counties have held that such an award is improper in the absence of an order to show cause or a notice of motion.

A judge of the superior court who has had much experience in divorce and annulment cases has suggested that the law be made clear that in a default divorce or annulment case the court may include in any judgment rendered in the proceeding, an award of attorneys' fees and costs not exceeding the amount thereof prayed in the complaint without requiring that an order to show cause or notice of motion be served on the defendant. He states that this would save much time and effort by attorneys and judges without any undue prejudice to defaulting defendants.

⁶⁶ *Louvall v. Gridley*, 70 Cal. 507, 11 Pac. 777 (1886) (both are proper parties); *Tryon v. Huntoon*, 67 Cal. 325, 329, 7 Pac. 741, 744 (1885) (judgment against heirs only upheld, after voluntary dismissal of action against administrator); *Hollyfield v. Geibel*, 20 Cal. App. 2d 142, 147-48, 66 P. 2d 755, 758 (1937) (judgment against both); *Schwarz v. Bohle*, 47 Cal. App. 445, 447, 190 Pac. 819, 820 (1920) (judgment against administrator binds heirs).

⁶⁷ CAL. CODE CIV. PROC. §§ 540, 554, 555.

⁶⁸ *Id.* § 674.

Topic No. 23: *A study to determine 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.*

Chapters 3 and 4 of Title 7 of the Government Code set forth procedures to be followed by cities and counties for the adoption of master plans⁶⁹ precise plans⁷⁰ and zoning regulations.⁷¹ In general, these procedures provide that (1) the city or county planning commission shall hold a public hearing, reach a decision and make a recommendation to the legislative body of the city or county and (2) the legislative body shall then hold a public hearing and determine whether or not to accept the recommendation. No change can be made by the legislative body with respect to the recommendation until the proposed change has been referred to the planning commission for a report. (These requirements are made applicable to the initiation and adoption of zoning regulations by Section 65803 of the Government Code which adopts by reference the procedure for the adoption of a precise plan set forth in Article 11 of Chapter 3.)

A question has arisen as to the application of these provisions in a situation where there is no city or county planning commission. No provision is made for the adoption of a master plan or a precise plan in this situation. With respect to the adoption of a zoning ordinance Section 65808 provides:

If there is no city or county planning commission the legislative body of such city or county shall do all things required or authorized by this chapter of the city or county planning commission.

Literally read, this section would appear to require the legislative body to sit as a planning commission, hold a hearing, make a recommendation to itself as a legislative body and then, sitting in the latter capacity, hold another hearing and approve or reject the recommendation. Moreover, a literal interpretation of Section 65808 would require the legislative body to refer any suggestion for a change in the recommendation back to itself sitting as a planning commission for a report. This situation has caused one city attorney in the State to write to the commission as follows:

In our city, which has neither a Planning Commission nor a zoning administrator, I find the new statute very difficult to follow and therefore out of an abundance of caution we probably hold more hearings than are necessary. I believe this Statute could stand some revision.

⁶⁹ Article 8, Chapter 3.

⁷⁰ Article 11, Chapter 3.

⁷¹ Article 1, Chapter 4.

TOPICS INTENDED FOR FUTURE STUDY

Topic A: A study to determine whether the law respecting post-conviction sanity hearings for persons sentenced to death should be revised.

Section 1367 of the Penal Code provides that a person cannot be punished for a public offense while insane. Sections 3700 to 3704 of the Code provide for a hearing to determine whether a person sentenced to death is insane and thus immune from execution. The hearing procedure is initiated by the warden's certification that there is good reason to believe that the prisoner has become insane.⁷² The question of the prisoner's insanity is then tried to a jury.⁷³ If he is found to be insane he must be taken to a state hospital until his reason is restored.⁷⁴ If the superintendent of the hospital later certifies that the prisoner has recovered his sanity, this question is determined by a judge sitting without a jury.⁷⁵ If the prisoner is found to be sane he is returned to the prison and may subsequently be executed.

The commission believes that a number of important questions exist concerning the procedure provided for in Penal Code Sections 3700 to 3704. For example, why should the issue of the prisoner's sanity be determined by a jury in the initial hearing⁷⁶ but not in a later hearing to determine whether his reason has been restored?⁷⁷ Why should the statute explicitly state that the prisoner is entitled to counsel on a hearing to determine whether he has been restored to sanity⁷⁸ and make no provision on this matter in the case of the initial hearing? Does this mean that the prisoner is not entitled to counsel at the initial hearing under the rule *expressio unius est exclusio alterius*? If so, is this desirable? Who has the burden of proof as to the issue of the prisoner's sanity and does this differ as between the initial and later hearings? What standard of sanity is to be applied? Shall the court call expert witnesses and may the parties do so? Does the prisoner have the right to introduce evidence and cross-examine witnesses?

In *People v. Riley*,⁷⁹ the court held that (1) a prisoner found to be insane has no right of appeal and (2) a unanimous verdict is not necessary because the hearing is not a criminal proceeding. Are these rules desirable?

Topic B: A study to determine whether the law in respect of survivability of tort actions should be revised.

Insofar as the common law was concerned a cause of action arising out of a tort abated upon the death of either the person wronged or

⁷² CAL. PEN. CODE § 3701.

⁷³ *Ibid.*

⁷⁴ *Id.* § 3703.

⁷⁵ *Id.* § 3704.

⁷⁶ *Id.* § 3701.

⁷⁷ *Id.* § 3704.

⁷⁸ *Ibid.*

⁷⁹ 37 Cal. 2d 510, 235 P. 2d 381 (1951).

the wrongdoer.⁸⁰ This rule has been modified by statute, to varying degrees, in most American jurisdictions.⁸¹

Survival of tort actions in this State is governed in part by Probate Code Section 574 which provides (1) that a cause of action shall survive the death of the *person wronged* in any case where, during his lifetime, he has been injured by "any person who has wasted, destroyed, taken, or carried away, or converted to his own use, the property * * * or committed any trespass on the real property of the decedent * * *" and (2) that a cause of action shall survive the death of the *wrongdoer* in any case where he has, during his lifetime "wasted, destroyed, taken, or carried away, or converted to his own use * * * property * * * or committed any trespass on * * * real property * * *."

Prior to 1949, Probate Code Section 574 alone governed survival of tort actions. It is, of course, limited to cases involving wrongs to property interests. The decisions under Section 574 gave it a rather broad construction. For example, in *Hunt v. Authier*,⁸² the Supreme Court held that the wife and children of a murdered man had suffered a property loss by reason of the deprivation of the decedent's future earnings and that their cause of action therefore survived the death of the wrongdoer. In *Moffat v. Smith*,⁸³ the Supreme Court held that a cause of action on behalf of one who had been permanently injured in an automobile accident survived the death of the wrongdoer because the diminution of the plaintiff's earning capacity was an injury to property.

In 1949 the Legislature made two changes in the law respecting survival of tort actions. Section 574 of the Probate Code was amended to provide that it should not apply "to an action founded upon a wrong resulting in physical injury or death of any person." Concurrently the Legislature enacted Section 956 of the Civil Code which provides that (1) a cause of action arising out of physical injury shall survive the death of both the person injured and the wrongdoer and (2) when the person injured dies before judgment the damages in such an action shall be limited to the loss of earnings and expenses to the decedent prior to his death and shall not include damages for pain, suffering, or disfigurement, nor punitive or exemplary damages, nor prospective profits or earnings after death.

This 1949 legislation might have been taken as a legislative expression of disapproval of the judicial definition of property and injury thereto in such cases as *Hunt v. Authier*⁸⁴ and *Moffat v. Smith*.⁸⁵ Nevertheless, in *Vallindras v. Massachusetts Bonding and Ins. Co.*,⁸⁶ decided in 1953, the District Court of Appeal held that a cause of action for false imprisonment survived the death of the wrongdoer under Probate Code Section 574 because the plaintiff's counsel fees,

⁸⁰ HARPER, LAW OF TORTS § 301 (1933).

⁸¹ PROSSER, TORTS § 103 (1941); see also, HARPER, LAW OF TORTS § 301 (1933).

⁸² 28 Cal. 2d 288, 169 P. 2d 913 (1946).

⁸³ 33 Cal. 2d 905, 206 P. 2d 353 (1949).

⁸⁴ See note 82 *supra*.

⁸⁵ See note 83 *supra*.

⁸⁶ 255 P. 2d 457 (1953).

wages lost while in jail, and reduced earning power after his release were injuries to property.⁸⁷

A number of questions may be raised concerning survival of tort actions in this State:

(1) Should all tort actions be made to survive the death of both the person wronged and the wrongdoer? If not, should specific additional actions be included among those which survive?

(2) Is the limitation of damages in Civil Code Section 954 in the case of the death of the person wronged before judgment, justifiable? If so, should it be extended to all causes of action in which similar damages might arise—*e.g.*, false imprisonment, invasion of the right of privacy, etc.—assuming that such causes of action survive, either because of the enactment of legislation to that effect (see question No. 1) or under decisions similar to that of the District Court of Appeal in the *Vallindras* case?

(3) Should Probate Code Section 574 be amended to express a more limited concept of property and injuries thereto than it has been given in such decisions as *Hunt v. Authier*,⁸⁸ *Moffat v. Smith*⁸⁹ and *Vallindras v. Massachusetts Bonding and Ins. Co.*?⁹⁰

Topic C: A study to determine whether statutory jury instructions should be enacted covering general questions of law in personal injury cases.

The commission has received a communication from a judge of the district court of appeal suggesting that a study be made to determine whether statutory jury instructions should be enacted to cover the rules of law most frequently involved in personal injury cases. The author of this suggestion reports that about 25 percent of all appeals involve personal injury cases and that in many of these cases the only important questions raised concern the wording of instruction on such fundamental subjects as negligence, contributory negligence, proximate cause, last clear chance, *res ipsa loquitur*, burden of proof, etc. He points out that there is precedent for his suggestion in the statutory instruction in Sections 1096 and 1096a of the Penal Code on reasonable doubt. The judge reports that before these sections were enacted virtually every criminal appeal involved an issue as to the propriety of this instruction and that since their enactment there has been hardly an appeal in which this problem is involved.

Topic D: A study to determine whether the law respecting the commitment of mentally ill persons should be revised, with particular attention to procedures in the commitment of sexual psychopaths.

The commission has received communications from several superior court judges in widely scattered counties of the State reporting that the procedure prescribed in Sections 5500 *et seq.* of the Welfare and Institutions Code for the commitment of sexual psychopaths is in many respects unnecessarily cumbersome, time-consuming and expensive and

⁸⁷ The decision was reversed on other grounds by the Supreme Court; the question of survivability of the cause of action was expressly left open. *Vallindras v. Massachusetts Bonding and Ins. Co.*, 42 Cal. 2d 149, 265 P. 2d 907 (1954).

The case also involved a claim for damages for physical injuries which survived under Civil Code Section 956, but the "property injury" damages were attributable to the false imprisonment action rather than the action for physical injuries.

⁸⁸ See note 82 *supra*.

⁸⁹ See note 83 *supra*.

⁹⁰ See notes 86-87 *supra*.

in others ambiguous and inconsistent. The commission has also received a detailed and extensively documented communication from a member of the Los Angeles Bar, which points up a number of defects and inconsistencies in the law relating to procedures for committing mentally ill persons generally and makes a number of suggestions for their improvement.

Topic E: A study to determine whether the law governing advancement of cases for trial should be revised.

In all jurisdictions provision is made for giving precedence to some cases on the trial calendar. In California there are at least 52 separate provisions giving particular kinds of cases trial precedence.⁹¹ Some of them are found in the Code of Civil Procedure—*e.g.*, actions for injunctions⁹² and declaratory relief⁹³ and eminent domain proceedings.⁹⁴ Others are found in other codes—*e.g.*, actions involving tests of reclamation assessments⁹⁵ and actions for forfeiture of vehicles used to transport narcotics.⁹⁶ No provision is made respecting the relative priority to be given the several kinds of actions given trial preference.

A number of states do not have statutes giving particular kinds of actions priority but place the matter generally in the discretion of the trial court.⁹⁷

The commission believes that a study should be made to determine: (1) Whether a provision giving the trial court discretion to advance any case for trial on a showing of necessity therefor should be substituted for the numerous existing trial precedence provisions; (2) whether, if special precedence provisions are to be maintained, all of the present provisions are justified; (3) whether it would be desirable to provide for relative priority among the categories of cases given precedence; and (4) whether all provisions for trial precedence should be collected in one place in the law for convenient access—*e.g.*, in the Code of Civil Procedure.

Topic F: A study to determine whether the rule imputing the negligence of one spouse to the other when the judgment in the action would be community property should be abolished or modified.

In this State the negligence of one spouse is imputed to the other in any action when the judgment would be community property.⁹⁸ A judgment recovered by a spouse in a personal injury action is community property.⁹⁹ Thus, when one spouse sues for an injury caused by the combined negligence of a third party and the other spouse, the contributory negligence of the latter is imputed to the plaintiff, barring recovery.¹⁰⁰ The reason for the rule is said to be that it prevents the negligent spouse from profiting, through his community interest in the judgment, from his own wrong.¹⁰¹ It has been suggested that the result

⁹¹ 40 CALIF. L. REV. 288 (1952).

⁹² § 527.

⁹³ § 1062(a).

⁹⁴ § 1264.

⁹⁵ CAL. WATER CODE § 8833.

⁹⁶ CAL. HEALTH & SAFETY CODE § 11617.

⁹⁷ See *e.g.*, N. Y. RULES CIV. PRAC. rule 151 (1954); ILL. ANN. STAT. c. 110, § 259.23 (Smith-Hurd, 1948).

⁹⁸ *McFadden v. Santa Ana Ry. Co.*, 87 Cal. 464, 25 Pac. 681 (1891).

⁹⁹ *Kesler v. Pabst*, 43 Adv. Cal. 256, 273 P. 2d 257 (1954).

¹⁰⁰ *Ibid.*

¹⁰¹ See *Moody v. Southern Pacific Co.*, 167 Cal. 786, 790, 141 Pac. 388, 390 (1914).

would be different if there were an agreement between the spouses under which the recovery of the nonnegligent spouse would not be community property.¹⁰² But in *Kesler v. Pabst*¹⁰³ the Supreme Court refused to give this effect to an agreement made after the accident had occurred.

The State Bar has considered a number of proposals to change or modify the rule. These have included proposals that a recovery for personal injury be made separate property;¹⁰⁴ that the recovery not include damages for the loss of services by the negligent spouse nor for expenses that would ordinarily be payable out of community property;¹⁰⁵ and that the elements of damage considered personal to each spouse be made separate property.¹⁰⁶

The State Bar committees which have considered this problem have not been able to reach agreement on it. At its April, 1954, meeting the Board of Governors of the State Bar adopted a resolution requesting the Law Revision Commission to include the subject of imputed negligence between husband and wife on its agenda.

Topic G: A study to determine whether the Inheritance Tax Law exemptions should be the same with respect to transfers of property from husband to wife as from wife to husband.

The Inheritance Tax Law¹⁰⁷ provides the following exemptions from tax in the case of property passing from one spouse to the other by will or intestate succession or by an inter vivos transfer subject to the inheritance tax: (1) in the case of property going to a surviving wife, one-half of the community property goes to her free of tax,¹⁰⁸ property equal in value to one-half of the husband's separate property can be given to her free of tax,¹⁰⁹ and there is, in addition, a specific exemption of \$24,000;¹¹⁰ (2) in the case of property going to a surviving husband, all of the community property goes to him free of tax,¹¹¹ property equal in value to one-half of the wife's separate property may be given to him free of tax,¹¹² and there is, in addition, a specific exemption of \$5,000.¹¹³

Whether this difference in the Inheritance Tax Law exemptions as between husband and wife is justifiable is open to question. The discrimination in favor of the husband in respect of transfers of community property would seem to be out of line with the general development of the law of the State in the direction of giving the wife full parity of treatment with respect to such property.¹¹⁴

¹⁰² *Flores v. Brown*, 39 Cal. 2d 622, 248 P. 2d 922 (1952).

¹⁰³ See note 99 *supra*.

¹⁰⁴ 28 CAL. B. J. 256, 258 (1953).

¹⁰⁵ 27 CAL. B. J. 188 (1952); 28 *id.* at 256, 258 (1953).

¹⁰⁶ 28 *id.* at 259 (1953).

¹⁰⁷ CAL. REV. & TAX CODE §§ 13301-14901.

¹⁰⁸ *Id.* §§ 13551, 13552, 13554.

¹⁰⁹ *Id.* § 13805.

¹¹⁰ *Id.* § 13801.

¹¹¹ *Id.* §§ 13553, 13554.

¹¹² *Id.* § 13805.

¹¹³ *Id.* § 13801.

¹¹⁴ Kirkwood, *The Ownership of Community Property in California*, 7 SO. CALIF. L. REV. 1 (1933).

Topic H: A study to determine whether the doctrine of sovereign immunity should be modified.

The doctrine of governmental immunity—that a governmental entity is not liable for injuries inflicted on other persons—has long been generally accepted in this State.¹¹⁵ The constitutional provision¹¹⁶ that suits may be brought against the State “as shall be directed by law,” does not authorize suit against the State save where the Legislature has expressly so provided.¹¹⁷ Moreover, a statute permitting suit against the State merely waives immunity from suit; it will not be construed to admit liability nor waive any legal defense which the State may have unless it contains express language to that effect.¹¹⁸

The general rule in this State is that a governmental entity is liable for damages resulting from negligence in its “proprietary” activities.¹¹⁹ But such an entity is not liable for damages resulting from negligence in its “governmental” activities unless a statute assumes liability.¹²⁰ An example of a statute assuming liability for damages for “governmental” as well as “proprietary” activities is Vehicle Code Section 400, which imposes liability for negligent operation of motor vehicles on the State, counties, cities, irrigation districts, school districts, and other governmental units.

The doctrine of sovereign immunity has been widely criticized.¹²¹ The distinction between “proprietary” and “governmental” functions is uncertain as to its application in particular cases with the consequence that it is productive of much litigation.

At the 1953 Conference of State Bar Delegates a resolution was adopted favoring the abrogation of the doctrine of sovereign immunity and appointing a committee to study the problem. The committee’s report, dated August 5, 1954, presents an excellent preliminary analysis of the problem and recommends that the study be carried forward.

In view of the fact that the doctrine of sovereign immunity is now under study by the State Bar, the commission has not put this topic on its list of topics selected for immediate study. The commission has placed the matter on its list of topics selected for future study, to be undertaken if and when it appears that such a study might appropriately be undertaken by the commission with the approval of the Legislature.

¹¹⁵ *Bourn v. Hart*, 93 Cal. 321, 28 Pac. 951 (1892).

¹¹⁶ CAL. CONST. Art. XX, § 6.

¹¹⁷ *Cf. Rose v. State*, 19 Cal. 2d 713, 123 P. 2d 505 (1942).

¹¹⁸ *Denning v. State*, 123 Cal. 316, 55 Pac. 1000 (1899); *Green v. State*, 73 Cal. 29, 11 Pac. 602 (1887).

¹¹⁹ *People v. Superior Court*, 29 Cal. 2d 754, 178 P. 2d 1 (1947) (state); *Muses v. Housing Authority*, 83 Cal. App. 2d 489, 189 P. 2d 305 (1948) (state agency); *Chafor v. Long Beach*, 174 Cal. 478, 163 Pac. 670 (1917) (municipal corporation); *Yolo v. Modesto Irr. Dist.*, 216 Cal. 274, 13 P. 2d 908 (1932) (quasi-municipal corporation).

¹²⁰ *Bettencourt v. State*, 123 Cal. App. 2d 60, 266 P. 2d 201 (1954) (state); *Huffman v. San Joaquin County*, 21 Cal. 426 (1863) (county); *Kellar v. Los Angeles*, 179 Cal. 605, 178 Pac. 505 (1919) (city); *Talley v. Northern San Diego Hospital Dist.*, 41 Cal. 2d 33, 257 P. 2d 22 (1953) (quasi-municipal corporation).

¹²¹ *Madison v. San Francisco*, 106 Cal. App. 2d 232, 249-53, 234 P. 2d 995, 1007-8 (1951); Kuchel, *Should California Accept Tort Liability?* 25 CAL. B. J. 146 (1950); Shumate, *Tort Claims Against State Governments*, 9 LAW & CONTEMP. PROB. 242 (1942).

Topic I: A study to determine whether illegally obtained evidence should be made inadmissible in the courts of this State.

The federal courts have long held that illegally obtained evidence is not admissible in a judicial proceeding.¹²² Such evidence has been held to be admissible by the courts of this State.¹²³

The California rule has been challenged on the ground that it violates the due process clause of the Fourteenth Amendment of the Constitution of the United States. The challenge has been upheld by the United States Supreme Court when the illegal conduct by which the evidence was obtained involved physical assault upon the person.¹²⁴ It was not upheld, however, in a recent case which involved merely trespass to property and eavesdropping.¹²⁵

In the *Irvine* case the United States Supreme Court invited the several states to re-examine their rules on this matter:

Never until June of 1949 did this court hold the basic search-and-seizure prohibition in any way applicable to the states under the Fourteenth Amendment * * * state courts may wish further to reconsider their evidentiary rules. But to upset state convictions even before the states have had adequate opportunity to adopt or reject the rule would be an unwarranted use of federal power.¹²⁶

Topic J: A study to determine whether the rule, applied in cases involving the value of real property, that evidence relating to sales of nearby properties is not admissible on the issue of value should be revised.

In a condemnation proceeding the courts of this State will not admit evidence of sales of nearby properties to prove the value of the property condemned.¹²⁷ This rule may be applicable as well to other cases involving the value of real property.¹²⁸

It has long been the rule, on the other hand, that sales of adjacent property may be inquired into on cross-examination of expert witnesses for the purpose of testing their honesty and competence.¹²⁹ While the jury is instructed in such cases to disregard the testimony except on the issue of the trustworthiness of the expert witness, jurors may often be confused and consider it also on the issue of the value of the property.¹³⁰

In recent dissenting opinions, some members of the Supreme Court have vigorously criticised the rule excluding evidence of the sale of adjacent properties and have urged that it be abandoned.¹³¹ Professor Wigmore reported that such evidence is admitted in most jurisdictions and concluded that the matter should be left to the discretion of the trial court.¹³²

¹²² *Lustig v. United States*, 338 U. S. 74 (1949); *Byars v. United States*, 273 U. S. 28 (1927).

¹²³ *People v. Kelley*, 22 Cal. 2d 169, 137 P. 2d 1 (1943); *People v. Berger*, 127 Adv. Cal. App. 640, 274 P. 2d 514 (1954).

¹²⁴ *Rochin v. California*, 342 U. S. 165 (1952) (stomach pump used to obtain evidence).

¹²⁵ *Irvine v. California*, 347 U. S. 128 (1954).

¹²⁶ *Id.* at 134.

¹²⁷ *Los Angeles v. Cole*, 28 Cal. 2d 509, 170 P. 2d 928 (1946).

¹²⁸ *Estate of Ross*, 171 Cal. 64, 151 Pac. 1138 (1915) (inheritance tax proceeding); see discussion in *Bagdasarian v. Gragnon*, 31 Cal. 2d 744, 756-57, 192 P. 2d 935, 942-43 (1948).

¹²⁹ See note 127 *supra*; *People v. La Macchia*, 41 Cal. 2d 738, 264 P. 2d 15 (1953).

¹³⁰ Traynor, J., concurring and dissenting in *People v. La Macchia*, 41 Cal. 2d 738, 755, 264 P. 2d 15, 26 (1953).

¹³¹ *Ibid.*; *Los Angeles v. Cole*, 28 Cal. 2d 509, 519, 170 P. 2d 928, 934 (1946).

¹³² 2 WIGMORE, EVIDENCE § 463 (3d ed. 1940).

Topic K: A study to determine whether the Arbitration Statute should be revised.

The present Arbitration Statute¹³³ was enacted in 1927 and has not been amended since. It has been held to be applicable not only to commercial arbitrations but also to those arising out of collective bargaining agreements.¹³⁴

A member of the bar who has had considerable experience with arbitration under the statute has suggested that a study of the statute be made with a view to recommending such revisions of it as appear to be desirable. He has suggested that such a study ought to encompass, among other matters, the following questions:

(1) Whether the statute should be made applicable to an agreement for an informal appraisal or evaluation as distinguished from the determination of a "controversy." The statute does not now apply to such agreements.¹³⁵

(2) Whether an arbitrator should be empowered to enter a default decision upon the failure of a party to an arbitration agreement to appear and participate after notice to do so.

(3) Whether the power of an arbitrator to issue a subpoena duces tecum and the scope thereof should be clarified.

(4) Whether statutory rules respecting enforcement and judicial review of arbitration awards should be enacted.

¹³³ CAL. CODE CIV. PROC. §§ 1280-1293.

¹³⁴ *Levy v. Superior Court*, 15 Cal. 2d 692, 104 P. 2d 770 (1940).

¹³⁵ *Bewick v. Mechem*, 26 Cal. 2d 92, 156 P. 2d 757 (1945).

APPENDIX B

A COMPARATIVE STUDY OF THE HOMESTEAD LAW AND PROBATE CODE SECTIONS 640 TO 646 *

This study is intended to provide a survey and comparative analysis of (1) the provisions of the Civil and Probate Codes which provide for the continuation or creation of homestead rights in a surviving spouse and minor children in the property of a decedent and (2) Probate Code Sections 640 to 646 which provide for summarily setting aside small estates to a surviving spouse and minor children of a decedent without formal administration.

HOMESTEADS

Legislation commonly known as homestead laws has been adopted in nearly every American jurisdiction.¹ Article XVII, § 1, of the California Constitution directs the Legislature to "protect, by law, from forced sale a certain portion of the homestead and other property of all heads of families." Concerning legislation enacted under this directive the Supreme Court of California upon several occasions has said:

The object of all homestead legislation is to provide a place for the family and its surviving members, where they may reside and enjoy the comforts of a home, freed from any anxiety that it may be taken from them against their will, either by reason of their own necessity or improvidence, or from the impotency of their creditors.²

At least three distinct policies may be discerned in homestead laws: (1) immunizing the family home from the claims of creditors or certain classes of creditors; (2) restraining the alienation or encumbrance of the family home without the consent of both spouses; and (3) assuring that there will be a family home after the death of one spouse for the surviving members of the family.³ The first of these policies is operative during the lifetime of both spouses to prevent involuntary alienation of the homestead by creditors. The second policy operates to prevent its voluntary alienation by one spouse alone. The third policy operates to (a) limit the power of a deceased spouse to devise the homestead and (b) protect the home from creditors for the benefit of the surviving members of a decedent's family. This study is concerned primarily with a consideration of the legal consequences attendant upon the third of these policies.

Homestead rights are created in favor of those who satisfy certain conditions. In general, one who claims a homestead must be the head

* This study was made under the direction of the Law Revision Commission by Paul E. Basye, Esq., Research Consultant. Mr. Basye received his J.D. degree in 1926 from the University of Chicago and received an LL.M. degree in 1943 and an S.J.D. degree in 1946 from the University of Michigan. He did his work for the S.J.D. degree at Michigan on the subject of dispensing with administration in small estates. He also participated in the drafting of the Model Small Estates Act for the National Conference of Commissioners on Uniform State Laws.

¹ 5 AMER. L. PROP. § 5.75 (1952); 3 VERNIER, AMERICAN FAMILY LAWS § 228 (1935).

² *Thorsby v. Babcock*, 36 Cal. 2d 202, 204, 22 P. 2d 863, 854 (1950); *In re Kachigian's Estate*, 20 Cal. 2d 787, 791, 128 P. 2d 865, 867 (1942); *Estate of Fath*, 132 Cal. 609, 613, 64 Pac. 995, 997 (1901).

³ 5 AMER. L. PROP. § 5.114 (1952); 3 VERNIER, AMERICAN FAMILY LAWS § 228 (1935).

of a family and own property or an interest in property which he and his family occupy as a dwelling place. If these conditions exist, a homestead up to a specified value may be established with respect to such property. In most states the homestead need not be selected until an attempt is made to levy upon the property; in these states no act is required for the establishment of a homestead except occupancy or notice at the time of levy of execution, provided the necessary conditions for its existence are present.⁴ A few states, including California, require some formal act of dedication.⁵ Thus it is required by Civil Code Sections 1262 to 1264 that the owner or claimant execute, acknowledge, and record a formal declaration of homestead.⁶

A homestead established in California by a declaration during the lifetime of both spouses is commonly referred to as a "declared homestead." Except when the wife unilaterally declares a homestead on the separate property of her husband, a declared homestead vests in the surviving spouse and continues to enjoy the immunities of a "declared homestead" in his or her ownership upon the death of the other spouse.⁷ When no homestead has been declared during the lifetime of both spouses or when the surviving wife alone has selected a homestead from the separate property of her deceased husband prior to his death, the superior court has the power to assign a homestead to the family of the decedent.⁸ Property so selected and assigned by the superior court is commonly referred to as a "probate homestead."

DECLARED HOMESTEADS

Detailed legislation providing for declared homesteads is contained in Sections 1237 to 1269 of the Civil Code. Section 1237 defines a homestead as consisting of "the dwelling house in which the claimant resides, together with outbuildings and the land on which the same are situated, selected as in this title provided." Section 1238 declares what property may be the subject of the homestead:

If the claimant be married, the homestead may be selected from the community property or the separate property of the husband or, subject to the provisions of Section 1239, from the property held by the spouses as tenants in common or in joint tenancy or from the separate property of the wife.

Section 1239 forbids the establishment of a declared homestead on a wife's separate property without her consent.

⁴ 5 AMER. L. PROP. § 5.84 (1952). As examples of such statutes see FLA. STAT. § 222.02 (1953) (notice after levy); IOWA CODE § 561.1 (1954) (occupancy); MO. REV. STAT. § 513.480 (1949) (notice after levy); ORE. REV. STAT. § 23.270 (1953) (notice); WIS. STAT. §§ 272.20, 272.21 (1953) (notice).

⁵ 5 AMER. L. PROP. § 5.84 (1952). As examples of such statutes see ARIZ. CODE ANN. § 24-502 (1939); CAL. CIV. CODE §§ 1262-1264; CONN. GEN. STAT. § 7153 (1949); FLA. STAT. § 222.01 (1953); IDAHO CODE ANN. §§ 55-1203, 55-1204 (1947); LA. REV. STAT. tit. 9, § 2801 (1950); ME. REV. STAT. c. 99, § 69 (1944); MASS. ANN. LAWS c. 188, § 2 (1952); MONT. REV. CODES ANN. §§ 33-127, 33-128 (1947); NEV. COMP. LAWS § 3315 (1929); N. Y. CIV. PRAC. ACT § 672 (1954); N. D. REV. CODE § 47-1818 (1943); WASH. REV. CODE § 6.12.040 (1951); W. VA. CODE ANN. § 3912 (1949). In Connecticut, Massachusetts, and New York a homestead may also be established by reciting that fact in the deed of conveyance by which the property is acquired. CONN. GEN. STAT. § 7153 (1949); MASS. ANN. LAWS c. 188, § 2 (1952); N. Y. CIV. PRAC. ACT § 672 (1954).

⁶ Homesteads may also be declared in California by any person other than the head of a family. CAL. CIV. CODE §§ 1266-1269. But in such cases the homestead rights are limited to \$5,000 in actual cash value, over and above all liens and encumbrances. CAL. CIV. CODE § 1260.

⁷ CAL. CIV. CODE § 1265.

⁸ *Ibid.*; CAL. PROB. CODE §§ 660-61.

The declaration of a homestead exempts from execution or forced sale \$12,500 of the value, at the time of execution thereon, of the property to which it applies, over and above liens and encumbrances⁹ subject to certain exceptions.¹⁰ (Prior to 1945 this amount was \$5,000. It was increased to \$6,000 in 1945, to \$7,500 in 1947 and to \$12,500 in 1953.)

The family's need for economic protection is just as great, if not greater, after the death of one of the spouses, especially when the decedent was the husband and father. Accordingly, homestead laws commonly grant to the surviving spouse or family a continuation of the same immunities from creditors which the owner enjoyed during his lifetime, thus reflecting the third of the basic purposes of homestead laws stated above.¹¹ Thus, in this State Civil Code Section 1265 provides that if a homestead was declared

by a married person from the community property, or from the separate property of the spouse making the selection or joining therein and if the surviving spouse has not conveyed the homestead to the other spouse by a recorded conveyance which failed to expressly reserve his homestead rights as provided by Section 1242 of the Civil Code, the land so selected, on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists or has been created under the provisions of this title.

Probate Code Section 663 contains similar provisions. Thus with respect to property which is the subject matter of a "declared homestead" there are three situations in which, upon the death of one spouse, the surviving spouse is entitled to succeed to absolute ownership of the property:¹²

1. If husband and wife jointly declare a homestead on community property, then upon the death of either the property vests absolutely in the survivor.¹³

2. If either husband or wife alone declares a homestead on community property, then upon the death of either the property vests absolutely in the survivor.¹⁴

3. If the deceased spouse declares or joins in the declaration of a homestead on his or her separate property, then upon his or her death the property vests absolutely in the surviving spouse.¹⁵ This category includes property held by the spouses in joint tenancy.

⁹ CAL. CIV. CODE § 1240.

¹⁰ *Id.* § 1241.

¹¹ 5 AMER. L. PROP. § 5.114 (1952); 3 VERNIER, AMERICAN FAMILY LAWS § 630 (1935).

¹² In these instances the property passes to the surviving spouse despite an attempted testamentary disposition to the contrary by the deceased spouse. *In re McGee's Estate*, 154 Cal. 204, 97 Pac. 299 (1908); *Selinger v. Milly*, 51 Cal. App. 2d 286, 124 P. 2d 631 (1942). Furthermore, the right of the surviving spouse to succeed to the ownership of the property in such cases is not affected even though the value of the property greatly exceeds the homestead exemption. *In re Burdick's Estate*, 76 Cal. 639, 18 Pac. 805 (1888); *In re McCarthy's Estate*, 7 Cal. App. 199, 93 Pac. 1047 (1908). Of course, it is subject to the claims of creditors in the hands of the surviving spouse to the extent that its value exceeds the homestead exemption. In this event the court may appoint appraisers who must determine if the property can be divided so that a portion of the property can be set off as a homestead. CAL. PROB. CODE §§ 664-66. The remaining portion is subject to the claims of creditors. If the property is not susceptible of division for this purpose the court may order the entire premises sold. *Id.* § 665.

¹³ CAL. CIV. CODE § 1265; CAL. PROB. CODE § 663.

¹⁴ See note 13 *supra*.

¹⁵ See note 13 *supra*.

In each of the foregoing cases the immunities previously existing with respect to property subject to a "declared homestead" are continued in the surviving spouse.¹⁶

PROBATE HOMESTEADS

There remain to be considered two other situations when homesteads may be created for the benefit of the surviving members of a decedent's family: (1) when no homestead has been declared and (2) when a homestead has been unilaterally declared by the wife as to her husband's separate property pursuant to Civil Code Section 1262. In the latter case the declaration is fully effective during the lifetime of both spouses to render the homestead immune from execution, but the homestead terminates upon the husband's death.¹⁷ In these cases, where there is no declared homestead in existence after the death of one spouse, the superior court is authorized to select, designate, and set apart a homestead to the surviving family.¹⁸

In selecting and assigning a "probate homestead" for the surviving family of a decedent the court must do so out of the community property or out of property owned in common by the decedent and the person or persons entitled to have the homestead set apart, or, if there be no such property, then out of the separate property of the decedent.¹⁹ If the decedent left a surviving spouse and no minor child, the homestead is the property of such spouse; if he left also a minor child or children, one-half of the homestead belongs to the surviving spouse and the remainder to the child or children in equal shares; if there is no surviving spouse, the homestead belongs to the minor child or children.²⁰ If a homestead is assigned out of community property, it has been held that it must be assigned absolutely.²¹ On the other hand, if the homestead is assigned out of the separate property of the decedent, the court can set it apart only for a limited period, to be designated in the order, and in no case beyond the lifetime of the surviving spouse and the minority of the children.²²

If the property out of which the homestead is created is property in which the decedent had an interest as a tenant in common, the homestead would be assigned out of his undivided interest in the property.²³ Although there are no California cases on the matter, it would seem that if this interest were community property, the assignment would be made absolutely and that if it were separate property, the assignment would be made for a limited time only.

¹⁶ Of course, if the surviving spouse declared or joined in the declaration of a homestead on his or her separate property, then upon the death of the other spouse the ownership of the property remains in the survivor.

¹⁷ *Weinreich v. Hensley*, 121 Cal. 647, 54 Pac. 254 (1898).

¹⁸ CAL. CIV. CODE § 1265; CAL. PROB. CODE § 661. It is not necessary that the property set apart have been the dwelling place of the family. Its suitability for residence purposes is sufficient. *Henningsen's Estate*, 199 Cal. 103, 247 Pac. 1082 (1926); *Sharp's Estate*, 78 Cal. 483, 21 Pac. 182 (1889); *In re Bowman*, 69 Cal. 244, 10 Pac. 418 (1886).

¹⁹ CAL. PROB. CODE § 661.

²⁰ *Id.* § 667.

²¹ *Otto v. Long*, 144 Cal. 144, 77 Pac. 885 (1904); *McKinnie v. Shaffer*, 74 Cal. 614, 16 Pac. 509 (1888).

²² CAL. CIV. CODE § 1265; CAL. PROB. CODE § 661.

²³ *In re Kachigian's Estate*, 20 Cal. 2d 787, 128 P. 2d 865 (1942).

DIFFERENCES BETWEEN DECLARED AND PROBATE HOMESTEADS

While the basic policy of the homestead laws, immunity from creditors, is available to both declared and probate homesteads, there are several important differences between them:

1. Declared homesteads are limited in amount to \$12,500 during the life of both spouses²⁴ and during the lifetime of the surviving spouse.²⁵ There is no statutory limitation, however, on the amount of a probate homestead and the surviving spouse may be granted such a homestead having a value far in excess of \$12,500.²⁶

2. In the case of declared and probate homesteads in community property and of homesteads declared by the decedent in his separate property, the surviving spouse is entitled to absolute ownership of the property and this right is superior to ordinary rights of succession and of testamentary disposition.²⁷ (As has been noted, homesteads declared by a wife alone in the separate property of her husband automatically terminate on his death.) In the case of a probate homestead created in the separate property of the decedent, however, the surviving family is entitled to a homestead only for a limited period, not exceeding the lifetime of the surviving spouse and the minority of surviving children.²⁸

3. When a declared homestead continues after death, it goes to the surviving spouse alone, but when a probate homestead is created, the surviving minor children must be granted an interest in it.²⁹

4. The right of a surviving spouse entitled to have a declared homestead set off is not affected by such spouse's death or remarriage but the right to a probate homestead is lost if the surviving spouse dies or remarries or a minor child attains his or her majority before an order setting it aside is made.³⁰

5. An order setting off a declared homestead operates somewhat differently from an order setting off a probate homestead. The record title to the property does not in either case pass automatically to the surviving spouse or minor children. In the case of a declared homestead a petition must be filed to have the homestead set off as provided in the statute.³¹ If the requisites for a declared homestead entitled to be continued after death are found to exist, the court must grant the petition and set off the homestead.³² In other cases the court, acting upon a petition, must select a probate homestead from the property belonging to the estate.³³ When there has been a declared homestead, the court declares that the homestead property is not a part of the estate for the purposes of administration. Although an order setting off a declared homestead cannot be granted prior to the filing of an inventory, it determines, in effect, that the homestead was included in the inventory for this special purpose only and does not constitute a

²⁴ CAL. CIV. CODE § 1240.

²⁵ CAL. PROB. CODE §§ 664-66.

²⁶ *Estate of Levy*, 141 Cal. 646, 75 Pac. 301 (1904); *Estate of Walkerly*, 108 Cal. 627, 41 Pac. 772 (1895).

²⁷ CAL. CIV. CODE § 1265; CAL. PROB. CODE § 660.

²⁸ CAL. CIV. CODE § 1265; CAL. PROB. CODE § 661.

²⁹ CAL. PROB. CODE §§ 663-67.

³⁰ *In re Blair Estate*, 42 Cal. 2d 728, 269 P. 2d 612 (1954); *In re Heywood's Estate*, 149 Cal. 129, 84 Pac. 834 (1906).

³¹ CAL. PROB. CODE § 660.

³² *Ibid.*

³³ CAL. PROB. CODE § 661.

part or asset of the estate.³⁴ On the other hand, when a probate homestead is created, the property is considered to be a part of the general assets of the estate until it is set apart.³⁵ The order setting it apart is analogous to an order of preliminary distribution. If, in the case where a probate homestead is declared on the decedent's separate property, it is set apart for a limited period only, the remainder interest continues to be an asset of the estate to be disposed of upon final distribution of the estate.³⁶

SETTING ASIDE SMALL ESTATES WITHOUT ADMINISTRATION

Probate Code Section 300 provides that "When a person dies, the title to his property, real and personal, passes to the person to whom it is devised or bequeathed by his last will, or, in the absence of such disposition, to the persons who succeed to his estate * * * ." The statute also provides that "all of his property shall be subject to the possession of the executor or administrator and to the control of the superior court for the purposes of administration, * * * ." In other words, formal administration is contemplated for the estate of a decedent.

It is quite common for legislation to provide that the exemptions enjoyed by the head of a family shall be transferred to and continued in the widow or minor children after his death.³⁷ Indeed, the continuance of a declared homestead after death, discussed above, is an example of this. It is also common for legislation to provide for the granting of a family allowance to provide for the maintenance of the family during the period of administration and until distribution of the estate may be made to them.³⁸ The latter provision is found in California Probate Code Sections 680 to 684. The property of the decedent, to the extent that it comprises homestead or exempt property, or is applied to the payment of a family allowance, is immune from the claims of creditors, with a few exceptions.³⁹ Upon setting off homestead or exempt property or applying property in the estate to the payment of a family allowance, there is a withdrawal of it from the estate for purposes of administration. If the estate is thereby exhausted, there is no reason why administration of the estate should not be terminated even though the period of administration has not expired. Statutes in many states expressly sanction this procedure.⁴⁰

The California Probate Act of 1851, Cal. Stat. 1851, c. 124, § 126, now Probate Code Section 642, provided that if a decedent left a surviving spouse or minor child or children, and upon the filing of the inventory it appeared that the net value of the whole estate over and above liens and encumbrances of record at the date of death did not exceed \$500, the court should assign it to the surviving wife, or if there be none, then to the minor child or children. This Act further provided that "there shall be no further proceedings in the administration, un-

³⁴ *Rocha v. Rocha*, 197 Cal. 396, 240 Pac. 1010 (1925); *Estate of Shirey*, 167 Cal. 193, 138 Pac. 994 (1914); *Estate of Orr*, 29 Cal. 101 (1865).

³⁵ *Heinreich v. Hensely*, 121 Cal. 647, 54 Pac. 254 (1898).

³⁶ *Estate of Title*, 139 Cal. 149, 72 Pac. 909 (1903); *In re Matheny's Estate*, 121 Cal. 267, 53 Pac. 800 (1898).

³⁷ 5 AMER. L. PROP. § 5.114 (1952); 3 VERNIER, AMERICAN FAMILY LAWS § 228 (1935).

³⁸ 3 VERNIER, AMERICAN FAMILY LAWS § 635 (1935).

³⁹ CAL. CIV. CODE §§ 1240-41; 3 VERNIER, AMERICAN FAMILY LAWS § 228 (1935).

⁴⁰ 3 VERNIER, AMERICAN FAMILY LAWS §§ 635-637 (1935).

less further estate be discovered." The amount was raised to \$1,500 in 1872⁴¹ and to \$2,500 in 1921.⁴²

This statute was originally placed in that part of the Code of Civil Procedure relating to the support of the decedent's family. It expressly provided that if the whole estate did not exceed \$500 in value it was to be assigned "for the use and support of the widow and minor children." It would appear, therefore, that the Legislature regarded the statute as providing a kind of lump sum payment of an amount which the widow and minor children would otherwise receive in the form of a regular family allowance. The saving of time and expense in getting small estates to the surviving family at a time when they were in the greatest need of financial assistance were other obvious objectives of this legislation.⁴³ This right to summary distribution is superior to the decedent's power of testamentary disposition.⁴⁴

In the application of this statute the question arose as to what property should be included in determining whether the value of the estate is less than the amount specified in the statute. It has been held that homestead property, whether a declared or probate homestead, is not to be included because it is not a part of the estate for this purpose.⁴⁵

California first limited the right to summary distribution to the surviving widow and minor children. The Legislature amended the statute in 1939 to extend it to include either spouse who survives.⁴⁶

The earlier legislation, while providing for an early and summary distribution of small estates nevertheless contemplated the appointment of a personal representative in all cases and some kind of limited or abbreviated administration proceedings with judicial control over the proceeding while it lasted. In 1929 additional legislation was adopted to achieve summary distribution without any administration proceedings whatever. One statute authorized the surviving spouse or minor children to file a petition to set aside such an estate to them before a personal representative is appointed by including an alternative request for this purpose in the petition for the probate of the will or the appointment of a personal representative.⁴⁷ A companion statute authorized the filing of such a petition when the original petition for probate or the appointment of a personal representative omits such a request.⁴⁸ If, in either case, the court finds that the net value of the

⁴¹ CAL. CODE CIV. PROC. § 1469 (1872).

⁴² Cal. Stat. 1921, c. 109.

⁴³ In connection with the amendment of 1872, which raised the amount to \$1,500, a note of the Code Commissioners stated:

The distinction is too great between the family of one who has invested in real property and happens to own it when he dies, and one who, not so provident, or it may be more conscientious towards his creditors than careful of his family, has provided no homestead. Again, but few estates which do not amount to more than \$1,500, could pay the expenses of administration. In any such cases, it is better that the family enjoy it than to spend it in useless administration.

CAL. CODE CIV. PROC., EXPLANATORY NOTE § 1469 (1872). The distinction to which the commissioners referred was obviously between estates which included homesteads which were then exempt up to \$5,000 and those which were made up of personal property only.

⁴⁴ *In re Miller's Estate*, 158 Cal. 420, 111 Pac. 255 (1910); *In re Walkerly's Estate*, 108 Cal. 627, 41 Pac. 772 (1895); *McMillan v. Baese*, 45 Cal. App. 2d 764, 115 P. 2d 37 (1941).

⁴⁵ *In re Adamson's Estate*, 5 Cal. Prob. Dec. 397 (Cal. 1910); cf. *In re Shirey's Estate*, 167 Cal. 193, 13 Pac. 994 (1914); *Estate of Neff*, 139 Cal. 71, 72 Pac. 632 (1903).

⁴⁶ Cal. Stat. 1939, c. 819.

⁴⁷ Cal. Stat. 1929, c. 306 (NOW CAL. PROB. CODE § 640).

⁴⁸ Cal. Stat. 1929, c. 306 (NOW CAL. PROB. CODE § 641).

estate does not exceed \$2,500, it must set the estate off to the surviving family without any administration whatever.⁴⁹

In 1929 the Legislature added a provision which severely limits the right to summary distribution.⁵⁰ This new provision, which is included as a part of Probate Code Section 645, provides that no surviving spouse or minor child having other estate of five thousand dollars in value shall be entitled to summary distribution of a decedent's estate. In such case the court is directed to act upon the petition for probate or for letters of administration in the same manner as though no petition to set aside the estate had been filed. Thereafter the estate is to be administered in the usual manner.⁵¹ This provision was further amended in 1949 so that property held in joint tenancy by the decedent and the surviving spouse or minor child is to be included in determining whether they have other estate of \$5,000.⁵² No case has yet passed, however, upon the question whether homestead property is to be included in determining whether the surviving spouse or minor child has "other estate of five thousand dollars in value." (The cases holding that the homestead is not to be included in determining the size of the *decedent's* estate were decided prior to 1929.) Presumably it is to be included since nothing is said to the contrary and homestead property would seem to be part of one's "other estate" within the ordinary meaning of that term.

Another limitation upon summary distribution is the requirement that the expenses of the last illness, funeral charges and expenses of administration shall have been paid.⁵³ The effect of this provision is to make the rights of the surviving spouse or minor children to summary distribution inferior to those of creditors having such claims.

It should be noted that Probate Code Sections 640 to 646 could be much improved from the point of view of legislative draftsmanship. They constitute a collection of statutes enacted at various times rather than an integrated statement of the principles which they embody. For example, the three somewhat different procedures for obtaining summary distribution are set forth in three separate Sections (640, 641 and 642) rather than in a single section. It is believed that Sections 640 to 646 should be redrafted to state their meaning in a more concise and easily understood manner.

COMPARATIVE ANALYSIS OF HOMESTEAD RIGHTS AND RIGHTS TO SUMMARY DISTRIBUTION OF SMALL ESTATES

Several important differences have already been noted to exist as between declared homesteads and probate homesteads. There are also several differences between the operation of the homestead law on the one hand and Probate Code Sections 640 to 646 on the other:

⁴⁹ CAL. PROB. CODE § 645.

⁵⁰ Cal. Stat. 1929, c. 109.

⁵¹ CAL. PROB. CODE § 646.

⁵² It may be noted in this connection that both Arizona and Utah have statutes which resemble California's. ARIZ. CODE ANN. § 38-905 (1939); UTAH CODE ANN. § 75-8-2 (1953). The Arizona statute provides that if the surviving spouse has separate property, exclusive of his one-half interest in the community property, equal to the portion to be set apart to him, the whole property, other than his one-half of the homestead, shall go to the minor children. The Utah statute authorizes the court in its discretion to exclude from any distribution any surviving wife, husband or minor children having either separate property or income.

⁵³ CAL. PROB. CODE § 645.

First, a striking difference in these statutes is in the dollar amount of property which passes to the surviving spouse or family of a decedent free of creditors and his power of testamentary disposition. If the decedent leaves property upon which a homestead has been declared, the surviving spouse is entitled absolutely to it, subject to claims of creditors beyond \$12,500, unless the homestead was unilaterally declared by the wife on the husband's separate property, in which case it terminates on his death. If the court selects a probate homestead, its value may exceed even this amount. On the other hand, the surviving family of one who does not leave property capable of being used as a homestead can obtain, through summary distribution, property having a value of only \$2,500.

Second, property is available to the surviving family of a decedent as a homestead notwithstanding other resources which they may have. But the right to summary distribution of an estate not exceeding \$2,500 in value is not available at all if the person entitled to it has other estate of more than \$5,000.

Third, homestead rights and the right to summary distribution may be cumulative. The homestead is not taken into account in determining the size of the decedent's estate for purposes of summary distribution. However, as discussed earlier, it may be considered "other estate" of the survivor within the meaning of the \$5,000 limitation set forth in Probate Code Section 645. If it is not to be so considered, a surviving family would be entitled to a homestead plus as much as \$2,500 of additional property.

Fourth, homestead rights are not affected if the decedent's estate exceeds \$12,500 in value, but there is no right to summary distribution when the estate exceeds \$2,500 in value.

Fifth, the surviving family is not entitled to summary distribution unless the expenses of the decedent's last illness, funeral charges and the expenses of administration have been paid, but the payment of such expenses is not a prerequisite to the right to a homestead.

Sixth, the persons who are given an interest in the decedent's property differ. If there is a surviving spouse, he or she is entitled to summary distribution; if not, the surviving children are. In the case of a declared homestead only the surviving spouse succeeds to an interest. In the case of a probate homestead both the surviving spouse and the surviving children are given an interest.

APPENDIX C

REPORT AND RECOMMENDATION OF THE LAW REVISION COMMISSION TO THE LEGISLATURE

RELATING TO SUMMARY DISTRIBUTION OF SMALL ESTATES UNDER PROBATE CODE SECTIONS 640 TO 646

Assembly Concurrent Resolution No. 8, adopted at the 1954 Session of the Legislature, directs the Law Revision Commission to make a study of existing variances among Sections 640 to 646 of the Probate Code, which provide for summary distribution of small estates without administration, the homestead provisions of the Civil Code,¹ and the exemption provisions of the Inheritance Tax Law. The commission is further directed to prepare a draft of a revision of Sections 640 to 646 of the Probate Code bringing them into accord with the other statutory provisions referred to in the concurrent resolution.

The commission has made the study required by Assembly Concurrent Resolution No. 8. Its conclusions and recommendations are set forth herein. A research study on this subject was made under the direction of the commission by Paul E. Basye, Esq., Professor of Law at the Hastings College of Law and a member of the Burlingame Bar.

SCOPE OF THE STUDY

The commission has found that the exemption provisions of the Inheritance Tax Law are quite different in their purpose and effect from both the homestead law and Probate Code Sections 640 to 646. The homestead law and Probate Code Sections 640 to 646 are concerned with assuring that a decedent's surviving family will receive specified property in his estate to the exclusion of the decedent's creditors or the persons designated in his will. The Inheritance Tax Law provides that such property is subject to tax.² The exemption provisions of the Inheritance Tax Law include provisions exempting certain property transferred to a decedent's surviving family from tax.³ But these provisions speak in terms of the value of the property transferred and have no different application to homestead property or property falling within Sections 640 to 646 of the Probate Code than to any other property.

The commission has therefore reached the following conclusions:

(1) Because of the existing differences between the homestead provisions of the Civil Code and the exemption provisions of the In-

¹ In making the present study the commission has assumed that the reference made in Assembly Concurrent Resolution No. 8 to the homestead provisions of the Civil Code is only to such provisions as are operative upon the death of a person upon whose property a homestead was declared during his lifetime. These provisions are found in Section 1265 of the Civil Code; parallel provisions are found in Sections 660 to 668 of the Probate Code.

² CAL. REV. & TAX CODE §§ 13621-22.

³ *Id.* §§ 13807, 13805, 13553.

heritance Tax Law, it is not practicable to bring Sections 640 to 646 of the Probate Code into accord with both of them.

(2) The commission should not attempt to recommend revisions of all of the statutes involved for the purpose of bringing all of them into accord with each other because (a) Assembly Concurrent Resolution No. 8 directs the commission to recommend revision only of Sections 640 to 646 of the Probate Code and (b) such recommendations could be made only on the premise, which the commission does not accept and does not believe the Legislature would accept, that nonhomestead property should be treated the same as homestead property with respect to protection from a decedent's creditors and power of testamentary disposition and that exemption from the inheritance tax should be extended only to the property to which the homestead and summary probate laws apply.

(3) There is sufficient general similarity between the homestead law and Probate Code Sections 640 to 646 that existing variances between them deserve study with a view to eliminating or modifying such of these variances as do not appear to be justified.

The commission has, therefore, limited its study to an analysis of the homestead law and Probate Code Sections 640 to 646 and its recommendations to revisions of said sections which will bring them more nearly into accord with the homestead law.

HOMESTEADS

Although Assembly Concurrent Resolution No. 8 refers only to the homestead provisions of the Civil Code, the commission found it necessary to consider also Sections 660 to 668 of the Probate Code which authorize the probate court to create a homestead in the decedent's property for the benefit of the surviving family in situations where no homestead is declared during the decedent's life or, if declared, terminates upon his death. The commission has found that there are the following differences between "declared" homesteads, created during life pursuant to the Civil Code and continued after death for the benefit of the surviving spouse, and "probate" homesteads created by the probate court for the benefit of the surviving spouse and minor children:

(1) Declared homesteads are limited in amount to \$12,500 both during the life of both spouses and during the lifetime of the surviving spouse. There is no statutory limitation, however, on the amount of a probate homestead and the surviving spouse may be granted such a homestead having a value far in excess of \$12,500.

(2) In the case of declared and probate homesteads in community property, and of homesteads declared by the decedent in his separate property, the surviving spouse is entitled to absolute ownership of the property and this right is superior to ordinary rights of succession and of testamentary disposition.⁴ In the case of a probate homestead created in the separate property of the decedent, however, the surviving family is entitled to a homestead only for a limited period, not exceeding the lifetime of the surviving spouse and the minority of surviving children.

⁴ Homesteads declared by a wife alone in the separate property of her husband automatically terminate on his death.

(3) When a declared homestead continues after death, it goes to the surviving spouse alone, but when a probate homestead is created the surviving minor children must be granted an interest in it.

(4) The right of a surviving spouse entitled to have a declared homestead set off is not affected by such spouse's death or remarriage but the right to a probate homestead is lost if the surviving spouse dies or remarries or a minor child attains his or her majority before an order setting it aside is made.

Assembly Concurrent Resolution No. 8 does not direct the commission to recommend the elimination of existing variances between declared and probate homesteads. The commission wishes to report, however, for the information of the Legislature that if it should be desired to make the homestead rights of all surviving families the same, whether or not a homestead was declared during the decedent's lifetime, this might be accomplished by making the following changes in existing law:

(1) Provide that every declared homestead shall terminate upon the death of either spouse. Thus, homestead rights for the benefit of the surviving family would be provided in all cases by setting aside a probate homestead. One result of this would be that both the surviving spouse and the surviving children would be given an interest in all posthumous homesteads.

(2) Provide that probate homestead shall be limited to the same amount permitted in the case of a declared homestead—currently, \$12,500 over and above liens and encumbrances.

(3) Provide that the interest of the surviving family in a probate homestead set off out of the decedent's separate property shall be made absolute rather than for a limited period only.

PROBATE CODE SECTIONS 640 TO 646

The commission has found that there are the following differences between probate homesteads and declared homesteads continued after death on the one hand and distribution of small estates pursuant to Probate Code Sections 640 to 646 on the other:

(1) There is a difference in the dollar amount of property which passes to the surviving spouse or family of a decedent free of creditors and of his power of testamentary disposition. If the decedent leaves property upon which a homestead has been declared, the surviving spouse is entitled absolutely to property having a value up to \$12,500 (unless the homestead was unilaterally declared by the wife upon the husband's separate property in which case it terminates on his death). If the court selects a probate homestead, its value may exceed even this amount. On the other hand, the surviving family of one who does not leave property capable of being used as a homestead can obtain, pursuant to Probate Code Sections 640 to 646, property having a value of only \$2,500.

(2) Property is available to the surviving family of a decedent as a homestead notwithstanding other resources which they may have. But the right to distribution of an estate not exceeding \$2,500 in value, pursuant to Probate Code Sections 640 to 646, is not available at all if the persons entitled to it have other estate worth more than \$5,000.

(3) Homestead rights and the right to distribution, pursuant to Probate Code Sections 640 to 646, may be cumulative. The homestead is not taken into account in determining the size of the decedent's estate for purposes of summary distribution. However, it may be considered a part of the survivor's estate within the meaning of the \$5,000 "other property" limitation. If it is not to be so considered, a surviving family would be entitled to a homestead plus as much as \$2,500 of additional property.

(4) Homestead rights are not affected if the decedent's estate exceeds \$12,500 in value, but there is no right to distribution pursuant to Probate Code Sections 640 to 646 when the estate exceeds \$2,500 in value.

(5) The surviving family is not entitled to distribution pursuant to Probate Code Sections 640 to 646 unless the expenses of the decedent's last illness, funeral charges, and the expenses of administration have been paid but the payment of such expenses is not a prerequisite to the right to a homestead.

(6) The persons who are given an interest in the decedent's property differ. If there is a surviving spouse, he or she is entitled to distribution of a small estate pursuant to Probate Code Sections 640 to 646; if there is no surviving spouse, the surviving children are entitled to such distribution. In the case of a declared homestead only the surviving spouse succeeds to an interest. In the case of a probate homestead both the surviving spouse and the surviving children are given an interest.

RECOMMENDATIONS

The commission recommends that Sections 640 to 646 of the Probate Code be revised as follows to eliminate certain of these variances:

(1) *The maximum limit on estates which may be distributed pursuant to Probate Code Sections 640 to 646 should be increased from \$2,500 to \$5,000.* The present statute, limiting such distribution to estates not exceeding \$2,500, does not reflect the current value of the dollar. Since the amount was placed in the statute in 1921 the value of the dollar has declined considerably. According to the Consumers' Price Index contained in the Economic Almanac for 1953-1954, p. 85, the value of the dollar in 1921 was approximately 50 percent greater than it is in 1954.⁵ On that basis the amount of \$2,500 specified in the statute should be increased to \$3,500 or \$4,000. However, the expenses of last illness and funeral, which are in effect a deduction from the estate set aside, have also increased and probably often amount to almost \$1,000. Hence a figure of \$5,000 is recommended.

It might be suggested that the amount set aside under Probate Code Sections 640 to 646 should be increased from \$2,500 to \$12,500, and that homestead property should be included in determining the size of the estate so that the surviving families of all decedents would be given equality of treatment insofar as the dollar amount of benefit given is concerned, irrespective of whether the decedent's estate contains property qualifying as homestead property. This change is not recommended, however, for two reasons: (1) the history of Probate Code Sections 640 to 646 shows that the summary distribution therein provided for is intended primarily as the equivalent of a family allowance

⁵ The Economic Almanac is published by Thomas Y. Crowell Company for the National Industrial Conference Board, Inc.

and not as the equivalent of the homestead exemption; and (2) the preferred position given to the family whose decedent owned property suitable for a homestead reflects the policy of the law of encouraging ownership of such property.

(2) *The requirement that liens and encumbrances be of record to be excluded in determining the value of the decedent's estate for purposes of distribution pursuant to Probate Code Sections 640 to 646 should be abolished.* The present statute authorizes summary distribution of estates which do not exceed \$2,500 over and above "liens and encumbrances of record." A literal interpretation of this statute would include only mortgages or encumbrances on real estate and possibly judgment liens, mechanics' liens, chattel mortgages and the like which have been made a matter of public record. It may be argued that it does not cover pledges or bailment liens. It is believed that the statute ought to include any valid encumbrance, whether or not it is recorded. In this connection it should be noted that the homestead laws grant an exemption of \$12,500 over and above *all* liens and encumbrances on the property.

(3) *Homestead property should be excluded in valuing the decedent's estate for purposes of distribution pursuant to Probate Code Sections 640 to 646.* The existing statute does not expressly say whether the value of homestead property shall be taken into consideration in determining the size of the decedent's estate. The courts have held that it shall not. It is recommended that this interpretation be codified. Homestead and exempt property have separate bases for their existence and are in addition to family allowances. Distribution pursuant to Probate Code Sections 640 to 646, being in the nature of a family allowance, should not be affected because the surviving family also has a homestead.

(4) *The \$5,000 "other estate" limitation should be increased to \$12,500 and a homestead should be taken into account in determining the value of the survivor's estate.* The decline in the value of the dollar which supports an increase from \$2,500 to \$5,000 in the size of an estate which may be distributed pursuant to Probate Code Sections 640 to 646 justifies a parallel increase in the amount of other property which should disqualify the surviving family from the right to such distribution. The commission recommends that the amount be increased to \$12,500 for the following reasons:

(a) The commission believes that if the value of the survivor's estate is to be considered in determining the right to summary distribution, there is no reason why homestead as well as non-homestead property should not be included therein. The commission therefore recommends that the statute be amended to so provide.

(b) If the amount of the "other property" disqualification is increased to \$12,500 it would mean that a surviving spouse would not be precluded from applying for summary distribution of the decedent's estate merely because he or she had received a homestead interest worth not more than \$12,500.

(c) If the "other property" disqualification were set at less than \$12,500—e.g., at \$7,500 or \$10,000—the surviving spouse would in many cases be granted a family allowance which would substantially deplete an estate of \$5,000 or less. The surviving spouse's ownership

of other property does not preclude the granting of a family allowance, although it may affect the amount. The "other property" disqualification would, therefore, in these cases only compel the survivor to resort to a more cumbersome means—an application for a regular family allowance—to accomplish substantially the same result.

(d) The commission does not believe that increasing the "other property" disqualification to \$12,500 is an unfair resolution of the conflict between the surviving family's need for protection, on the one hand, and the equities of the decedent's creditors and persons named in his will on the other.

(e) The right to a homestead is not affected by the surviving spouse's ownership of other estate although the amount of a probate homestead may be affected by it.

(5) *Probate Code Sections 640 to 646 should be redrafted in form.* The commission has found that Probate Code Sections 640 to 646 do not constitute a well-drafted statute. They are, rather, a collection of provisions enacted at various times. No attempt has been made, as each new law was enacted, to integrate it with the others. For example, there are three separate sections to provide for the several procedures for initiating a proceeding for summary distribution. These can readily be integrated into a single section. The commission recommends, therefore, that if Sections 640 to 646 are revised to embody the substantive changes which it recommends, they be redrafted in form as well.

The commission has drafted proposed revisions of Probate Code Sections 640 to 646 the enactment of which will achieve the several changes of substance and form which it recommends. The following shows the changes from the present law which the enactment of these proposed revisions would involve:⁶

640. If the decedent leaves a surviving spouse or minor child or minor children, and the net value of the whole estate, over and above all liens ~~or~~ and encumbrances ~~of record~~ at the date of death *and over and above the total value of any property as to which a homestead is created or set off out of decedent's estate pursuant to the provisions of this code*, does not exceed the sum of ~~two thousand five hundred five thousand~~ dollars, ~~the person petitioning for the probate of the will or for letters of administration may add an allegation to that effect to the other allegations of the petition, with a specific description of all of the decedent's property, a list of all of the liens and encumbrances of record at the date of death, and an estimate of the value of the property, and may include, in the prayer, an alternative prayer that if the court finds that the total value of the estate, over and above all liens and encumbrances of record at the date of the death of the decedent does not exceed two thousand five hundred dollars, the same may be set aside to the surviving spouse, if there be one, and if there be none, then to the minor child or minor children of the decedent. When such allegation is included in the petition, the petition shall be verified, and the notice of hearing shall include a statement that a prayer for setting aside the estate to the surviving spouse or minor child or minor children, as the case may be, is included in the petition.~~

⁶ Matter in italics is new; matter shown in strike-out type is present law to be omitted.

641. If the person petitioning for probate of the will or for letters of administration does not include such an allegation as is provided for by the previous section, the surviving spouse, if there be one, and if there be none, the guardian of the minor child or minor children, may, at any time prior to the hearing of such petition, file a verified petition setting forth the matters mentioned in the previous section, and pray that the estate be set aside for the use of the surviving spouse or minor child or minor children. If the hearing of the original petition is set for a day more than ten days after the filing of the petition herein provided for, the latter shall be set for hearing at the same time as the former; if not, it shall be set for hearing at least ten days after the date on which it is filed, and the former petition shall be continued until such date. Allegations showing that this article is applicable, together with a prayer that the estate be set aside as provided in this article, may be included alternatively in the petition for probate of the will or for letters of administration; or such allegations and prayer may be presented by separate petition filed by the personal representative of the decedent, or the surviving spouse, or the guardian of the minor child or children, filed at any time before the hearing on the petition for probate of the will or for letters of administration or after the filing of the inventory. In all cases the petition must be verified; and the allegations shall include a specific description of all of the decedent's property, a list of all liens and encumbrances at the date of death, a designation of any property as to which a homestead is created or set off out of decedent's estate pursuant to the provisions of this code, and an estimate of the value of the property.

642. If the decedent leaves a surviving spouse or minor child or minor children, and upon the filing of the inventory of the estate it appears that the net value of the whole estate over and above all liens and encumbrances of record at the date of death does not exceed the sum of two thousand five hundred dollars, the personal representative of the decedent or the surviving spouse or guardian of the minor child or children may file a verified petition showing the value of the estate to be no greater than as aforesaid, and the clerk shall fix a day for the hearing thereof. If the allegations and prayer as provided in Section 641 are included in the petition for probate of the will or for letters of administration, the notice of hearing shall include a statement that a prayer for setting aside the estate to the surviving spouse or minor child or minor children, as the case may be, is included in the petition.

643. ~~When~~ If a separate petition is filed under the provisions of Section 641 or Section 642, the clerk shall fix a day for the hearing thereof and shall give notice of the hearing for the period and in the manner required by Section 1200 of this code. If the hearing of the original petition for probate of the will or for letters of administration is set for a day more than 10 days after the filing of such separate petition, the latter shall be set for hearing at the same time as the former; if not, the separate petition shall be set for hearing at least 10 days after the date on which it is filed, and if the original petition has not already been heard it shall be continued until such date and heard at the same time.

644. When a petition is filed which includes the allegations provided for by Section 640 or Section 641, *Upon the filing of any petition provided for by this article*, unless the whole estate consists of money, the court shall forthwith appoint one inheritance tax appraiser, who shall appraise the property described in the petition, and file his report with the clerk of the court.

645. If, upon the hearing of any petition provided for by this article, the court finds that the net value of the estate over and above all liens and encumbrances ~~of record~~ at the date of the death of the decedent *and over and above the total value of any property as to which a homestead is created or set off out of decedent's estate pursuant to the provisions of this code*, does not exceed the sum of ~~two thousand five hundred five thousand~~ dollars (~~\$2,500~~), as of the date of such death, and that the expenses of the last illness, funeral charges and expenses of administration have been paid, it shall, by decree for that purpose, assign to the surviving spouse of the decedent, if there be a surviving spouse, provided said surviving spouse shall not have theretofore remarried, or, if there be no surviving spouse, then to such child or children of the decedent as may be then minors, if any, the whole of the estate, subject to whatever mortgages, liens or encumbrances there may be upon said estate at the time of the death of the decedent. The title thereto shall vest absolutely in such surviving spouse, or if there be no such surviving spouse, the minor child or children subject to whatever mortgages, liens or encumbrances there may be upon said estate at the time of the death of the decedent, and there must be no further proceedings in the administration, unless further estate be discovered. But no surviving spouse or minor child having other estate of ~~five thousand twelve thousand five hundred~~ dollars (~~\$5,000~~) in value, inclusive of the total value of any property held by such surviving spouse or minor child in joint tenancy with the decedent, *and of the value of any property as to which a homestead is created or set off out of decedent's estate pursuant to the provisions of this code*, shall be entitled to such an assignment.

645.1. In the absence of fraud in the procurement, an order of the superior court assigning an estate pursuant to the provisions of the preceding section, when it becomes final, is a conclusive determination of the jurisdiction of the court (except when based on the erroneous assumption of death), and cannot be collaterally attacked.

646. If the court finds that the net value of the estate exceeds ~~two thousand five hundred five thousand~~ dollars, or that the surviving spouse or minor child has other estate of ~~five thousand twelve thousand five hundred~~ dollars in value, or that there is neither a surviving spouse nor minor child, it shall act upon the petition for probate or for letters of administration in the same manner as though no petition to set aside the estate had been included, and the estate shall then be administered in the usual manner.

1200. Upon the filing of the following petitions:

(1) A petition under Section 641 ~~or Section 642~~ of this code for the setting aside of an estate not exceeding ~~two thousand five hundred five thousand~~ dollars (~~\$2,500~~) (\$5,000) in value;

- (2) A petition to set apart a homestead or exempt property;
- (3) A petition relating to the family allowance filed after the return of the inventory;
- (4) A petition for leave to settle or compromise a claim against a debtor of the decedent or a claim against the estate or a suit against the executor or administrator as such;
- (5) A petition for the sale of stocks or bonds;
- (6) A petition for confirmation of a sale;
- (7) A petition for leave to enter into an agreement to sell or give an option to purchase a mining claim or real property worked as a mine;
- (8) A petition for leave to execute a promissory note or mortgage or deed of trust or give other security;
- (9) A petition for leave to lease or to exchange property, or to institute an action for the partition of property;
- (10) A petition for an order authorizing or directing the investment of money;
- (11) A report of appraisers concerning a homestead;
- (12) An account of an executor or administrator or trustee;
- (13) A petition for partial or ratable or preliminary or final distribution;
- (14) A petition for the delivery of the estate of a nonresident;
- (15) A petition for determination of heirship or interests in an estate;
- (16) A petition of a trustee for instructions;
- (17) A petition for the appointment of a trustee;
- (18) Any petition for letters of administration or for probate of will, or for letters of administration-with-will annexed, which is filed after letters of administration or letters testamentary have once been issued; and in all cases in which notice is required and no other time or method is prescribed by law or by court or judge, the clerk shall set the same for hearing by the court and shall give notice of the petition or application or report or account by causing a notice of the time and place of hearing thereof to be posted at the courthouse of the county where the proceedings are pending, at least 10 days before the day of hearing, giving the name of the estate, the name of the petitioner and the nature of the application, referring to the petition for further particulars, and stating the time at which the application will be heard.

At least 10 days before the time set for the hearing of such petition, account or report, the petitioner or person filing the account or desiring the confirmation of a report of appraisers, must cause notice of the time and place of hearing thereof to be mailed to the executor or administrator, when he is not the petitioner, to any coexecutor or coadministrator not petitioning, and to all persons (or to their attorneys, if they have appeared by attorney), who have requested notice or who have given notice of appearance in the estate in person or by attorney, as heir, devisee, legatee or creditor, or as otherwise interested, addressed to them at their respective post-office addresses given in their requests for special notice, if any, otherwise at their respective offices or places of residence, if known, and if not, at the county seat of the county where the proceedings are pending, or to be personally served upon such person.

Proof of the giving of notice must be made at the hearing; and if it appears to the satisfaction of the court that said notice has been regularly given, the court shall so find in its order, and such order, when it becomes final, shall be conclusive upon all persons.

c