

9/25/69

Memorandum 69-119

Subject: Status of Topics on Commission's Agenda

The Commission should consider the status of the topics on its agenda with a view to planning future meetings and determining the priority to be given various topics.

The following eight topics are not being actively considered; they are retained on the agenda merely in case a defect in legislation enacted upon our recommendation is called to our attention:

- 26 - Escheat
- 42 - Rights of Good Faith Improver
- 45 - Mutuality re Specific Performance
- 53 - Personal Injury Damages
- 55 - Additur and Remittitur
- 62 - Vehicle Code Section 17150 and Related Sections
- 67 - Unincorporated Associations
- 69 - Powers of Appointment

Work on each of the following seven topics will be completed if our recommendation is submitted to the 1970 Legislature and is adopted:

- 41 - Small Claims Court Law (to be dropped)
- 44 - Fictitious Name Statute
- 50 - Real Property Leases
- 59 - Service by Publication (to be dropped)
- 60 - Representation as to Credit
- 66 - Quasi-Community Property
- 74 - Civil Code Section 715.8 (Rule Against Perpetuities)

Research studies are now being prepared on the following six topics, and they cannot be profitably considered until the study is completed:

- 47 - Oral Modification of Written Contract (Civil Code § 1698)--a law student is working on a background study under my supervision. This study should be complete by September 1, 1970.
- 70 - Arbitration--Mr. Feldman
- 71 - Counterclaims and Cross-Complaints--Professor Friedenthal
- 72 - Liquidated Damages--Professor Sweet
- 73 - Joinder of Causes of Action--Professor Friedenthal
- 75 - Right of Nonresident Aliens to Inherit--Professor Barton

The following five topics are under active study:

- 12 - Taking Instructions to Jury Room--Tentative Recommendation ready to distribute for comment.
- 36 - Condemnation--We have substantially completed work on all background studies on hand and have a number of tentative recommendations substantially completed. Mr. Taylor has been working for several years, off and on, on a study on the right to take. Mr. Horton has begun work, when time permits, on a study on compensation but has not been able to devote any significant amount of time to this study.
- 52 - Sovereign Immunity--We have completed work on a "clean up" bill for 1970. We do not have any studies that have not already been considered and do not plan to devote any time to this topic except that we will consider the study on the collateral source rule when it has been completed by our consultant.
- 63 - Evidence--We will complete work on a "clean up" bill for the 1970 session at the October meeting. Although there are problems in evidence that merit study, they are of low priority and would require preparation of a research study.
- 65 - Inverse Condemnation--We have studies on water damage and aircraft noise damage and much work is needed on these aspects of the topic. We will need a background study on any additional aspects of the topic we want to study. We could review the studies on hand to determine if we want to take up aspects of the topic previously discussed. Professor Van Alstyne plans to prepare one more study early next year.

The following four topics are authorized for study but no background study is available and no consultant has been retained:

- 23 - Confirmation, Partition Sales (see Exhibit I for description)
- 30 - Custody Jurisdiction (see Exhibit I for description)
- 39 - Attachment, Garnishment, and Exemption From Execution (see Exhibit I for description)
- 76 - Preference in Setting Matters for Trial--We are making a survey of the 58 presiding judges to determine whether this problem merits study

The foregoing demonstrates that additional new topics are needed so that a balanced program will be possible in future years. Also, it demonstrates the need to retain research consultants several years before topics are to be considered.

In part, our present situation is caused by the failure of consultants to deliver studies on schedule. A contract was made with Joe Harvey when he left the Commission's staff to prepare a study on the revisions needed to conform the Civil Code to the Evidence Code. He found he did not have time-- considering the rate of compensation for the study--to prepare it and the contract terminated on June 30, 1969. Jon Smock, also a former staff member, contracted to make two studies: (1) revisions needed to conform the Code of Civil Procedure to the Evidence Code, and (2) revisions needed to conform the Business and Professions Code to the Evidence Code. His work as the legislative representative of the Judicial Council requires more than all his time and he too failed to prepare the studies and these contracts terminated on June 30, 1969. Professor Ayer contracted to prepare a study of the procedural aspects of condemnation. He devoted a substantial amount of time to a relatively small portion of the topic, prepared a law review article

covering that portion, and requested that the contract be terminated because he estimated that it would take two years of substantially full-time work to complete the remainder of the study. The contract was terminated earlier this year. Professor Van Alstyne has produced an impressive volume of material on inverse condemnation, but he too is about one year behind schedule.

Whatever is to be considered within the next few months will have to be produced by the staff. The only study that is well along is the one on the right to take. Mr. Taylor has worked primarily on this study for several years. The other staff studies that were in progress--excess condemnation, byroads, claims statute, leases, representations as to credit, fictitious business names, governmental liability, rule against perpetuities, and others--have been completed and disposed of by the Commission.

Some staff time will necessarily be devoted to the legislative program and cleaning up work on the items on the agenda for the October meeting. Additional staff time will be required to complete work on the 1970 legislative program items (editing and publishing). However, it is apparent that the major portion of our staff resources must be devoted to the right to take study for the next several months--possibly more--if this study is ever to be completed. And this study is logically the first one in the condemnation field since it provides background knowledge essential to the development of the basic framework of the statute.

The staff believes that priority must be given to the right to take study. Accordingly, we suggest that no meeting be held in November and that tentatively a two-day meeting be set for December. We hope that a

substantial portion of the study on the right to take will be available for consideration at the January meeting. Later on during 1970, we hope we will be receiving studies from our research consultants.

Respectfully submitted,

John H. DeMouly
Executive Secretary

Descriptions of Topics on Commission Agenda

(NO ATTEMPT HAS BEEN MADE TO BRING THESE DESCRIPTIONS UP TO DATE)

Topic No. 2: A study to determine whether the law relating to attachment, garnishment, and property exempt from execution should be revised.

The commission has received several communications bringing to its attention anachronisms, ambiguities, and other defects in the law of this State relating to attachment, garnishment, and property exempt from execution. These communications have raised such questions as: (1) whether the law with respect to farmers' property exempt from execution should be modernized; (2) whether a procedure should be established to determine disputes as to whether particular earnings of judgment debtors are exempt from execution; (3) whether Code of Civil Procedure Section 690.26 should be amended to conform to the 1955 amendments of Sections 692, 688 and 690.11, thus making it clear that one-half, rather than only one-quarter, of a judgment debtor's earnings are subject to execution; (4) whether an attaching officer should

be required or empowered to release an attachment when the plaintiff appeals but does not put up a bond to continue the attachment in effect; and (5) whether a provision should be enacted empowering a defendant against whom a writ of attachment may be issued or has been issued to prevent service of the writ by depositing in court the amount demanded in the complaint plus 10% or 15% to cover possible costs.

The State Bar has had various related problems under consideration from time to time. In a report to the Board of Governors of the State Bar on 1955 Conference Resolution No. 28, the Bankruptcy Committee of the State Bar recommended that a complete study be made of attachment, garnishment, and property exempt from execution, preferably by the Law Revision Commission. In a communication to the commission dated June 4, 1956 the Board of Governors reported that it approved this recommendation and requested the commission to include this subject on its calendar of topics selected for study.

Topic No. 3:

A study of the provisions of the Code of Civil Procedure relating to the confirmation of partition sales and the provisions of the Probate Code relating to the confirmation of sales of real property of estates of deceased persons to determine (1) whether they should be made uniform and (2) if not, whether there is need for clarification as to which of them governs confirmation of private judicial partition sales.

Sections 752 to 801.15 of the Code of Civil Procedure provide for actions for partition of property. Section 784 deals with the confirmation of partition sales. Probate Code Sections 784 and 785 deal with the confirmation of private sales of real property of estates. These sections differ from Code of Civil Procedure Section 784 in three important respects. One difference is in the percentage by which an offer made in court must exceed the amount of the original bid.¹⁴ Another difference is that under the Probate Code the original bid must equal 90 percent of the appraised value of the property,¹⁵ whereas under Code

of Civil Procedure Section 784 there is no such requirement. A third difference is that the Probate Code contains detailed provisions regarding real estate brokers' commissions,¹⁶ whereas the Code of Civil Procedure is silent on this matter. It may be that there is little reason for these differences.

If it is found that some or all of these differences should be retained, the question of whether the Code of Civil Procedure or the Probate Code governs confirmation of private partition sales should be clarified. The Code of Civil Procedure provides that private partition sales shall be "conducted" in the manner required for private sales of real property of estates.¹⁷ It is not clear whether this provision makes applicable to such sales the provisions of the Probate Code regarding the confirmation of sales, or whether, on the other hand, a private partition sale should be confirmed in the manner provided by Section 784 of the Code of Civil Procedure. The latter section deals with confirmation of partition sales but is ambiguous as to whether it applies to both public and private partition sales or only to public partition sales. The question is important because, as is shown above, the provisions of the Probate Code and the Code of Civil Procedure relating to confirmation are different; it will remain important if the two sets of provisions are not made uniform.

Topic No. 12:

A study to determine whether the law respecting jurisdiction of courts in proceedings affecting the custody of children should be revised.

There are in this State various kinds of statutory proceedings relating to the custody of children. Civil Code Section 138 provides that in actions for divorce or separate maintenance the court may make an order for the custody of minor children during the proceeding or at any time thereafter and may at any time modify or vacate the order. Civil Code Section 199 provides that, without application for divorce, a husband or wife may bring an action for the exclusive control of the children; and Civil Code Section 214 provides that when a husband and wife live in a state of separation, without being divorced, either of them may apply to any court of competent jurisdiction for

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

¹⁷ There is no equivalent provision for persons sentenced to the county jail as punishment for a public offense.

¹⁸ CAL. PEN. CODE Section 2656.

custody of the children. Furthermore, anyone may bring an action under Probate Code Section 1440 to be appointed guardian of a child.⁶⁵

These various provisions relating to the custody of children present a number of problems relating to the jurisdiction of courts; for example: (1) Do they grant the courts jurisdiction to afford an adequate remedy in all possible situations? (2) When a proceeding has been brought under one of the several statutes does the court thereafter have exclusive jurisdiction of all litigation relating to the custody of the child? (3) Do the several statutes conflict or are they inconsistent as to whether the court awarding custody under them has continuing jurisdiction to modify its award?

(1) There appear to be at least two situations in which the only remedy of a parent seeking custody of a child is through a guardianship proceeding under Probate Code Section 1440. One is when a party to a marriage obtains an *ex parte* divorce in California against the other party who has custody over the children and resides with them in another state. If the second party later brings the children to California and becomes a resident of a county other than the county in which the divorce was obtained, the only procedure by which the first party can raise the question of custody would seem to be a guardianship proceeding under Probate Code Section 1440 in the county where the children reside. Although the divorce action remains pending as a custody proceeding under Civil Code Section 138, the court cannot enter a custody order because the children are residents of another county.⁶⁶ A custody proceeding cannot be brought under either Section 199 or Section 214 of the Civil Code because the parents are no longer husband and wife. Another situation in which a guardianship proceeding may be the only available remedy is when a foreign divorce decree is silent as to who shall have custody of the children. If the parties later come within the jurisdiction of the California courts, it is not clear whether the courts can modify the foreign decree to provide for custody and, if so, in what type of proceeding this can be done. It would appear desirable that some type of custody proceeding other than guardianship be authorized by statute for these and any other situations in which a guardianship proceeding is now the only available remedy to a parent seeking custody of his child.

(2) The various kinds of statutory proceedings relating to custody also create the problem whether, after one of these proceedings has been brought in one court, another proceeding under the same statute or under a different statute may be brought in a different court or whether the first court's jurisdiction is exclusive. This question can be presented in various ways, such as the following: (a) If a divorce court has entered a custody order pursuant to Civil Code Section 138, may a court in another county modify that order or entertain a guardianship proceeding under Probate Code Section 1440 or—assuming the divorce was denied but jurisdiction of the action retained—entertain a custody proceeding under Civil Code Sections 199 or 214? (b) If a court has awarded custody under Civil Code Sections 199 or 214 while the parties are still married, may another court later reconsider the question in a

⁶⁵ In addition, the Juvenile Court Law provides a procedure for declaring a minor a ward of the court. CAL. WEL. & INST. CODE SECTIONS 550-511.

⁶⁶ *Titcomb v. Superior Court*, 220 Cal. 34, 23 P. 2d 294 (1934).

(3)

divorce proceeding under Civil Code Section 138 or a guardianship proceeding under Probate Code Section 1440? (c) If a guardian has been appointed under Probate Code Section 1440, may a divorce court or a court acting pursuant to Civil Code Sections 199 or 214 later award custody to the parent who is not the guardian?

A few of these matters were clarified by the decision of the California Supreme Court in *Greene v. Superior Court*,⁶⁷ holding that a divorce court which had awarded custody pursuant to Civil Code Section 138 has continuing jurisdiction and a court in another county has no jurisdiction to appoint a guardian of the children under Probate Code Section 1440. The Supreme Court stated that the general objective should be to avoid "unseemly conflict between courts"⁶⁸ and indicated that a proper procedure would be to apply to the divorce court for a change of venue to the county where the children reside.⁶⁹

It is not clear whether the exclusive jurisdiction principle of the *Greene* case either will or should be applied in all of the situations in which the question may arise. An exception should perhaps be provided at least in the case where a divorce action is brought after a custody or guardianship award has been made pursuant to Civil Code Sections 199 or 214 or Probate Code Section 1440, on the ground that it may be desirable to allow the divorce court to consider and decide all matters of domestic relations incidental to the divorce.⁷⁰

(3) There appear to be at least two additional problems of jurisdiction arising under the statutory provisions relating to custody of children. One is whether a court awarding custody under Civil Code Section 214 has continuing jurisdiction to modify its order. Although both Sections 138 and 199 provide that the court may later modify or amend a custody order made thereunder, Section 214 contains no such provisions. Another problem is the apparent conflict between Section 199 and Section 214 in cases where the parents are separated. Section 199 presumably can be used to obtain custody by any married person, whether separated or not, while Section 214 is limited to those persons living "in a state of separation." The two sections differ with respect to the power of the court to modify its order and also with respect to whether someone other than a parent may be awarded custody.

Despite California's lack of experimentation with alternative methods of determining just compensation, the difficulties inherent in the California jury-determined value system have been noted:^{6a}

In this era of the law explosion no phase of judicial administration is more ripe for reform than eminent domain valuation. Trial judges, lawyers and appraisers are willy-nilly players in a supercharged psychodrama designed to lure twelve mystified citizens into a technical decision transcending their common denominator of capacity and experience. The victor's profit is often less than the public's cost of maintaining the court during the days and weeks of trial.

6a. State v. Wherity, 275 Adv. Cal. App. 279, 290, 79 Cal. Rptr. 591, 598 (1969) (dissenting opinion).