

Minutes

A G E N D A

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Sacramento

May 15-16, 1959

1. Minutes of April meeting (To be sent).
2. Matters relating to 1959 legislative program:
 - A. Report on status of bills.
 - B. Report on status of 1959-60 budget.
 - C. A.B. 405-410 - Claims (See Memorandum No. 1, sent May 4).
3. Further consideration of studies heretofore considered:
 - A. Study No. 21 - Confirmation of Partition Sales.
(See Memorandum No. 2 enclosed)
 - B. Study No. 33 - Survival of Tort Actions.
(See Memorandum No. 3 enclosed)
 - C. Study No. 38 - Inter Vivos Rights in Probate Code § 201.5
property (See Memorandum No. 4 to be sent)
4. New Studies:
 - A. Study No. 42 - Trespassing Improvers (Sent to you prior
to the FEBRUARY meeting).
 - B. Study No. 48 - Right of Juveniles to Counsel (Sent to
you prior to the FEBRUARY meeting).
 - C. Study No. 51 - Alimony after Divorce (Sent to you prior
to the FEBRUARY meeting).
 - D. Study No. 40 - Notice of Alibi (To be sent).

Minutes of Meeting

of

May 15 and 16, 1959

Sacramento

Pursuant to the call of the Chairman, there was a regular meeting of the Law Revision Commission on May 15 and 16, 1959, in Sacramento.

Present: Mr. Thomas E. Stanton, Jr., Chairman
Mr. John D. Babbage, Vice Chairman
Honorable Clark L. Bradley (May 15)
Mr. Frank S. Balthis
Mr. Leonard J. Dieden
Honorable Roy A. Gustafson
Mr. Charles H. Matthews
Mr. Ralph N. Kleps (May 15)

Absent: Honorable James A. Cobey
Professor Samuel D. Thurman

Messrs. John R. McDonough, Jr., Glen E. Stephens and Miss Louisa R. Lindow, members of the Commission's staff were also present.

The minutes of the meeting of April 17 and 18, 1959, were unanimously approved.

I. ADMINISTRATIVE MATTERS

A. 1959-60 Budget Augmentation-Contracts: The Commission considered a letter from the Executive Secretary to Mr. Robert Nibley of Hill, Farrer & Burrill (dated 5/11/59); a copy of Government Code Section 16304.1 and a memorandum of studies to be assigned and/or contracts to be executed prior to June 30, 1959. (A copy of each of these items is attached hereto.) During the discussion the Executive Secretary reported (1) that the Assembly Ways and Means Committee has approved the requested augmentation of the Commission's 1959-60 budget for the Condemnation Study and the Department of Finance has recommended to the Senate Finance Committee that the requested augmentation be approved (2) and that Mr. Stanley Tobin has agreed to work with the firm of Hill, Farrer and Burrill on the condemnation study commencing June 1, 1959. He recommended that the Commission now execute a contract with Hill, Farrer & Burrill in the amount of \$12,500 using the funds available in the 1958-59 budget and execute a second contract for \$5,500 after July 1, 1959. After the matter was discussed a motion was made by Mr. Babbage, seconded by Mr. Dieden and unanimously adopted that the recommendation of the Executive Secretary be accepted.

A motion was then made by Mr. Babbage, seconded by Mr. Dieden and unanimously adopted to authorize the Executive Secretary to pay Hill, Farrer & Burrill \$500 on the old contract for the Moving Expense portion of the study on condemnation.

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Later in the meeting Mr. Kleps reported that he had been informed by the Department of Finance that no augmentation of the Commission's 1959-60 budget was included in the Senate Finance Committee's approval of the Commission's 1959-60 budget. Mr. Kleps suggested that the requested augmentation would have a better chance of being approved if the Senate Finance Committee were to consider it than if the matter were to go to Conference. After the matter was discussed it was agreed that it should be suggested to Senator Cobey that he might wish to request the Senate Finance Committee to act upon the Commission's request for the augmentation of its 1959-60 budget.

The Commission then considered whether to pay Dean Kingsley the amount due for the custody jurisdiction study. During the discussion the Executive Secretary pointed out that under Section 16304.1 of the Government Code the amount due Dean Kingsley will revert if it is not paid prior to June 30, 1959. After the matter was discussed a motion was made by Mr. Dieden, seconded by Mr. Balthis and unanimously adopted to authorize the Executive Secretary to pay Dean Kingsley the amount due. It was also agreed that at the time of payment the Executive Secretary should point out to Dean Kingsley that additional work is needed on the study that he submitted.

B. Distribution of Bound Volume I: The Executive Secretary

reported that there are approximately 250 copies of the Commission's bound Volume 1 remaining after distribution pursuant to action taken at the August 1957 meeting and that various California attorneys and out of state libraries have requested copies of the bound volume. After the matter was discussed it was agreed to establish the policy that distribution of the Commission's bound volume should not include such persons and entities. It was agreed that at the time of distribution of Volume 2 the new Legislative members should be given the opportunity to request a copy of the Commission's bound volume 1.

II. LEGISLATIVE MATTERS

A. Status Report on Commission Bills: The Commission considered a status report on Commission bills introduced during the 1959 Session (a copy of which is attached hereto).

The Executive Secretary reported that S.B. 166 (Doctrine of Worthier Title) has been signed by the Governor (ch. 122) and A.B. 404 (Grand Juries) was sent to the Governor May 12.

He also reported that Senator Cobey has requested the Senate Judiciary Committee to rehear A.B. 403 (Sale of Corporate Assets) if time permits at the end of the Session.

Mr. Kleps then reported that A.C.A. 16 (constitutional amendment re claims) has been assigned to the Senate Committee on Governmental Efficiency and suggested that it would be more logical to have it in the Senate Judiciary Committee. Mr. Bradley and Senator Cobey agreed and it was arranged that Senator Cobey would take the matter up with the chairman of the respective Senate Committees.

B. Study No. 37(L) - Claim Statutes: The Commission had before it A.B. 405 as amended in Assembly May 8, 1959; Memorandum No. 1 (5/4/59); a copy of a letter from the Executive Secretary to Mr. Bradley (dated 5/4/59); a copy of a memorandum entitled Amendments Adopted by the Law Revision Commission at its April 1959 Meeting to A.B. 405 as amended in Assembly March 24, 1959; and a copy of a letter from Professor Van Alstyne to the Executive Secretary (dated 4/30/59). (A copy of each of these items is attached hereto.)

The Commission first considered the principal amendment to Government Code Section 710 in A.B. 405 as amended in Assembly May 8, 1959 which eliminates the provision that the claimant may not file suit until his claim has been rejected and the other related amendments made to the bill. During the discussion the Executive Secretary pointed out that the deletion of Section 720 and the addition of Section 719 of the Government Code, providing that the ordinary statutes of limitations are applicable to causes of action against local public entities, makes new Section 342 of the Code of Civil Procedure (Sec. 3 of A.B. 405), which refers to Section 719 for the time an action against a local public entity must be commenced, circuitous in effect - i.e., it refers the reader to the Government Code which, in effect, refers him back to the Code of Civil Procedure. After the matter was discussed a motion was made by Mr. Babbage and seconded by Mr. Balthis to delete Section 3 of A.B. 405 at the appropriate time. The motion carried:

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Aye: Babbage, Balthis, Dieden, Gustafson, Matthews, Stanton.

No: None

Not Present: Bradley, Cobey, Thurman.

[Comment: After discussing the matter with Mr. Bradley and Mr. Kleps it was agreed that any amendments to A.B. 405 should be made in the Senate rather than in the Assembly.]

Section 719. The Commission then considered the objection raised by Mr. Stanton and Mr. Babbage to the language of Section 719. After the matter was discussed a motion was made by Mr. Gustafson and seconded by Mr. Balthis to amend A.B. 405 at the appropriate time substituting the phrase "if suit were being brought against a private party" for the phrase "if the claim were being asserted against a defendant other than a local public entity" in Section 719. The motion carried:

Aye: Babbage, Balthis, Dieden, Gustafson, Matthews, Stanton.

No: None.

Not Present: Bradley, Cobey, Thurman.

After further discussion of Section 719 a motion was made and seconded to amend A.B. 405 at the appropriate time by inserting the following clause at the beginning thereof: "Except where a different statute of limitations is specifically applicable to a local public entity." The motion carried:

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Aye: Babbage, Balthis, Dieden, Gustafson, Matthews, Stanton.

No: None.

Not Present: Bradley, Cobey, Thurman.

Section 715. The Commission then considered whether the second paragraph of Section 715 should be eliminated. After the matter was discussed a motion was made by Mr. Balthis and seconded by Mr. Babbage to retain the second paragraph of Section 715 but to amend it as follows at the appropriate time:

- (a) The phrase "would be deemed to have" should be deleted.
- (b) The word "applicable" should be added before "statute of limitations."

The motion carried:

Aye: Babbage, Balthis, Dieden, Gustafson, Matthews, Stanton.

No: None.

Not Present: Bradley, Cobey, Thurman.

The Commission then considered a suggestion made by the Imperial Irrigation District that the 100 day claim filing period be made applicable to injuries to growing crops. After the matter was discussed a motion was made by Mr. Dieden and seconded by Mr. Balthis to leave the matter in the hands of the Legislature but to express no opposition to such an amendment. The motion carried:

Aye: Babbage, Balthis, Dieden, Gustafson, Matthews, Stanton.

No: None

Not Present: Bradley, Cobey, Thurman.

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Section 730. A motion was made and seconded to delete the words "and rejected" which precede the words "as a prerequisite to suit" in Section 730 of A.B. 405. The motion carried:

Aye: Babbage, Balthis, Dieden, Gustafson, Matthews, Stanton.

No: None.

Not Present: Bradley, Cobey, Thurman.

The Commission then considered the amendment to A.B. 405 proposed by Mr. Vern B. Thomas, District Attorney of Santa Barbara County. Mr. Gustafson reported that he was not able to convince Mr. Thomas that the amendment he proposes is not necessary. After the matter was discussed a motion was made and seconded to add a new Section 4 to A.B. 405 to take care of the matter. The motion carried:

Aye: Babbage, Balthis, Dieden, Gustafson, Matthews, Stanton.

No: None.

Not Present: Bradley, Cobey, Thurman.

The Commission then considered the proposed amendments suggested by Professor Van Alstyne in his letter to the Executive Secretary. After the matter was discussed it was agreed that no further amendments should be made at this time.

III. CURRENT STUDIES

A. Study No. 21 - Confirmation of Partition Sales: The Commission had before it Memorandum No. 2 (5/6/59); a memorandum (5/5/59) prepared by the Assistant Executive Secretary relating to whether Probate Code Section 785 applies to both private and public sales or only to private sales; a memorandum (5/6/59) of Proposed Legislation; and a copy of a letter (dated 5/8/59) from Mr. J. D. Cooper to the Assistant Executive Secretary and its enclosure of Comments and Suggestions as to Proposed Legislation re Partition Proceedings. (A copy of each of these items is attached.) The Assistant Executive Secretary stated that in view of the comments and suggestions made by Mr. Cooper the Commission might wish to consider whether it should request legislative authority to extend the scope of the presently authorized study on confirmation of partition sales to include a study of additional provisions of the Code of Civil Procedure relating to partition actions. After the matter was discussed a motion was made by Mr. Babbage, seconded by Mr. Balthis, and unanimously adopted to request authority to extend the scope of the study to determine whether the sections of the Code of Civil Procedure relating to partition actions should be revised.

It was agreed that if the Commission later decides to include a study on probate sales it can request legislative authorization to do so in 1960.

B. Study No. 33 - Survival of Tort Actions: The Commission considered Memorandum No. 3 (5/7/59); a memorandum (5/7/59) prepared by the Assistant Executive Secretary; and a memorandum of Proposed Amendments to Probate Code Section 573. (A copy of each of these items is attached hereto.) After the matter was discussed the following action was taken:

(1) A motion was made by Mr. Balthis and seconded by Mr. Matthews to substitute the following language

nor does this section create any right or cause of action, not otherwise existing, against an executor or administrator for the support, maintenance, education, aid or care of any person furnished or to be furnished after the decedent's death.

for the related provision in amended Section 573 of the Probate Code.

The motion carried:

Aye: Babbage, Balthis, Dieden, Matthews, Stanton.

No: None.

Not Present: Bradley, Cobey, Gustafson, Thurman.

(2) A motion was made by Mr. Balthis and seconded by Mr. Stanton to approve the recommendation made by the staff to delete the following provision in Probate Code Section 573:

and all actions by the State of California or any political subdivision thereof founded upon any statutory liability of any person for support, maintenance, aid, care or necessities furnished to him or to his spouse, relatives or kindred, may be maintained against executors and administrators in all cases in which the same might have been maintained against their respective testators or intestates.

The motion carried:

Aye: Babbage, Balthis, Dieden, Matthews, Stanton.

No: None.

Not Present: Bradley, Cobey, Gustafson, Thurman.

(3) A motion was made by Mr. Babbage and seconded by Mr.

Stanton to retain revised Section 573 in the Probate Code rather than to have the statutory provision relating to survival of actions in the Code of Civil Procedure. The motion carried:

Aye: Babbage, Balthis, Dieden, Matthews, Stanton.

No: None.

Not Present: Bradley, Cobey, Gustafson, Thurman.

C. Study No. 38 - Inter-Vivos Rights - "201.5 Property":

The Commission had before it Memorandum No. 4 (5/8/59) prepared by the Executive Secretary which sets forth a draft bill of necessary legislation designed to effectuate the action of the Commission and a copy of a letter (dated 5/11/59) from Professor Harold Marsh, Jr. to the Executive Secretary. (A copy of each of these items is attached.)

The Commission first considered the comments of Professor Marsh relating to the action taken by the Commission which, in his opinion, will result in legislation which may well be held unconstitutional. After the matter was discussed it was agreed not to reconsider its action of May 1958 and April 1959 on inter-vivos rights.

The Commission then considered the various provisions of the draft bill as set forth in Memorandum No. 4. During the discussion Mr. Balthis stated that there should be a section in the Civil Code defining and possibly giving a name to 201.5 property which could then be used in the other sections of the code dealing with such property to identify it rather than identifying such property by reference to Probate Code Section 201.5. After the matter was discussed it was agreed that the staff should draft such a provision and redraft the other provisions to be recommended by the Commission to refer to such property in terms of the name given it or the code section defining it.

Section 164: It was then agreed that the following language

All other real property situated in this state
and all other personal property wherever situated
acquired after marriage ...

should be substituted for the phrase "All other property acquired after marriage" in Civil Code Section 164.

Section 172b. A motion was made by Mr. Babbage and seconded by Mr. Dieden to approve in principle proposed Section 172b. The motion carried:

Aye: Babbage, Dieden, Gustafson, Matthews, Stanton.

No: Balthis.

Not Present: Bradley, Cobey, Thurman.

It was agreed to approve in principle the following sections subject to the change in the description of 201.5 property:

Section 172(c) of the Civil Code

Sections 1238 and 1239 of the Civil Code

Section 1265 of the Civil Code

Section 146 of the Civil Code

Sections 15302 and 15303 of the Revenue and Taxation Code

During the discussion of the Revenue and Taxation Code provisions Mr. Balthis raised the question whether Section 13553 of the Revenue and Taxation Code should be amended to provide that upon the death of a wife 201.5 property should not be subject to inheritance tax, thus making it equivalent to community property in this respect. The Executive Secretary stated that in the 1957 legislation this was deliberately not done inasmuch as the wife's property is, until the date of death, her own. He stated that if the husband's rights in the wife's Probate Code Section 201.5 property are substantially increased it

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would be appropriate to re-examine the 1957 decision. A question was also raised as to whether community property and non-community property are treated differently for income tax purposes. After the matter was discussed it was agreed that the staff should look into and report on these questions.

D. Study No. 42 - Trespassing Improvers: The Commission had before it the research study prepared by Professor John Henry Merryman. The Commission first considered the adequacy of the study for the purpose of sending it to the printer. During the discussion Mr. Stanton raised the question whether the discussion of the encroachment cases in footnote 98 should be expanded. After the matter was discussed it was agreed to leave the matter to Professor Merryman.

A question was then raised as to whether the research consultant's proposed statute and the comments related thereto (commencing on page 40) should be printed at this time inasmuch as the final legislation of the Commission might differ from that proposed by the research consultant. After the matter was discussed it was agreed that this portion of the study should not be set in galley proof at this time. A motion was then made by Mr. Babbage, seconded by Mr. Matthews and unanimously adopted to authorize the Executive Secretary to send the study on trespassing improvers to the printer.

The Commission then considered what, if any, revisions should be made to the statutes relating to trespassing improvers. After the matter was discussed a motion was made by Mr. Dieden and seconded by Mr. Babbage to draft and recommend legislation to revise the law relating to trespassing improvers. The motion carried:

Aye: Babbage, Balthis, Dieden, Gustafson, Matthews, Stanton.

No: None.

Not Present: Bradley, Cobey, Thurman.

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A motion was then made by Mr. Balthis and seconded by Mr. Dieden to repeal Section 741 of the Code of Civil Procedure. The motion carried:

Aye: Eabbage, Balthis, Dieden, Gustafson, Matthews, Stanton.

No: None

Not Present: Bradley, Cobey, Thurman

The Commission then considered the rights and interests of the owner and trespassing improver in four categories: (1) both parties at fault; (2) both parties without fault; (3) owner at fault, improver not; (4) improver at fault, owner not. During the course of the discussion Mr. Stanton stated that, as he sees it, there are two possible basic approaches with regard to legislation on this subject. One approach, which he favors, is to enact legislation which specifically prescribes the rules of law relating to the rights and interests of the owner and improver under various circumstances. The second approach is to enact legislation along the line suggested by Professor Merryman which establishes quite broad and general guides for the court to follow in working out the rights and interests of the owner and improver on a case to case basis. Other members expressed a preference for the second approach. After the matter was discussed it was agreed to approve certain general principles relating to the rights and interests of the owner and trespassing improver in the four categories and to direct the staff to draft statutes both general and specific reflecting these principles for the Commission's consideration.

(1) Good Faith Improver - Owner Not at Fault. During the discussion of the rights of interests of the owner and improver where neither

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is at fault the question was raised as to whether Section 1013.5 of the Civil Code should be repealed. Mr. Stanton stated that Section 1013.5 should not be repealed if the Commission agrees with it in principle. The other members did not agree. After the matter was discussed a motion was made by Mr. Gustafson, seconded by Mr. Balthis and adopted to approve the following general principle:

Where the improver acts in good faith and the owner is not at fault the court shall grant such relief as will protect the owner against loss but avoid, insofar as possible, enriching him at the expense of the good faith improver. Where it is not possible fully to protect the owner without enriching him to some degree at the expense of the improver he shall be enriched to that degree.

Mr. Stanton voted against this motion.

(2) Good Faith Improver - Owner is at Fault. After the matter was discussed a motion was made by Mr. Babbage, seconded by Mr. Balthis and unanimously adopted to approve the following general principle:

Where the improver acted in good faith and the owner is at fault the court shall grant such relief as will protect the good faith improver against loss but avoid, insofar as possible, enriching him at the expense of the owner. Where it is not possible fully to protect the improver without enriching him to some degree at the expense of the owner he shall be enriched to that degree.

A motion to amend the above motion to delete the words "the court shall grant such relief" and to state the principle expressed in the motion in terms of proposed rules of law defining rights was made by Mr. Stanton and seconded by Mr. Babbage but not adopted. Mr. Stanton and Mr. Babbage voted in favor of the amended motion.

(3) Bad Faith Improver - Owner Not at Fault. After the matter was discussed a motion was made by Mr. Dieden, seconded by Mr. Balthis, and adopted to approve the following general principle:

Where the improver does not act in good faith and the owner is not at fault the court shall grant such relief as will protect the owner against loss but avoid, insofar as possible, enriching him at the expense of the bad faith improver save that, in the discretion of the court, exemplary damages may be awarded against the bad faith improver. Where, apart from the award of exemplary damages, it is not possible fully to protect the owner without enriching him to some extent at the expense of the improver, he shall be enriched to that degree .

Mr. Gustafson voted against this motion being of the view that in such cases the court should have discretion to forfeit the improver's interest.

(4) Bad Faith Improver - Owner at Fault. The Commission was unwilling to accept Professor Merryman's proposal that where both parties are at fault the fault of the owner should be ignored. During the discussion Mr. Balthis suggested that the court should balance the equities

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between the owner and the improver. Mr. Dieden suggested treating this situation as though neither party were at fault. After the matter was discussed it was agreed that a provision should be drafted by the staff for further consideration on this matter.

E. Study No. 48 - Right of Juvenile to Counsel: The Commission considered the research study prepared by Professor Arthur H. Sherry. The Commission first discussed the adequacy of the study for the purpose of sending it to the printer. During the discussion Mr. Gustafson pointed out that the sentence on page 2 "If the plea is not guilty, a preliminary hearing is held to determine if probable cause exists to commit the accused to the superior court for trial" is not entirely accurate and should be modified. A motion was then made, seconded and unanimously adopted to authorize the Executive Secretary to send the study on the right of a juvenile to counsel to the printer with the qualification that the research consultant's proposed draft legislation should not be set in galley proof at this time.

The Commission then considered the principles relating to the right of a juvenile delinquent to counsel. During the discussion Mr. Gustafson stated that he did not believe that the Commission is sufficiently informed to determine whether legislation should be enacted to provide that counsel should be appointed at public expense for the juvenile delinquent who cannot afford to hire counsel. He stated that additional information would be necessary before the Commission would be able to determine (1) whether counsel should be provided for the juvenile delinquent in all cases or only in the case of certain listed offenses; and (2) if counsel is to be provided for certain listed offenses what criteria should be used in determining which offenses to include and exclude. After the matter was discussed it was agreed that the staff should write to Professor Sherry

for his views on these matters and also write to the probation officers of a representative group of counties explaining the problem of the Commission and ask for their views.

A motion was then made by Mr. Dieden, seconded by Mr. Balthis and unanimously adopted to approve in principle the following:

1. That the law should provide that the juvenile delinquent has the right to counsel in all cases.
2. That the law should provide that the juvenile delinquent has the right to be informed of his right to counsel.
3. That the law should provide that the parent of the juvenile delinquent has the right to be informed of the juvenile's right to counsel.

The Commission then considered the various proposed sections of the Welfare and Institutions Code.

(1) Section 732 - Juvenile a delinquent. During the discussion on the portion of proposed new Section 732 of the Welfare and Institutions Code which relates to waiver of counsel, Mr. Gustafson stated that the use of the word "waiver" is undesirable for it suggests that some formal statement of waiver would be necessary whereas the juvenile, like an adult, should be held to have waived if, having been given time to obtain counsel, he fails to do so.

After the matter was discussed a motion was made by Mr.

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Matthews and seconded by Mr. Balthis to substitute

The person named in the petition shall be asked
if he desires aid of counsel and shall be allowed
a reasonable time to send for counsel.

for the last sentence of proposed new Section 732 of the Welfare and
Institutions Code. The motion carried:

Aye: Balthis, Dieden, Gustafson, Matthews, Stanton.

No: None.

Not Present: Bobbage, Bradley, Cobey, Thurman.

It was agreed that the first sentence of proposed new Section
732 of the Welfare and Institutions Code should be revised to read:

When the person named in the petition alleged to
come within the provisions of Section 700.1 of
this chapter is brought before the court, the
court must inform him and, if present, his parents,
guardian or custodian, of the substance of the
allegations in the petition of the nature of the
proceeding and of the right of such person to the
aid of counsel.

It was agreed that considerations of the second sentence relating
to the assignment of counsel should be deferred until the Commission has
more information on this matter.

(2) Section 732.1 - Juvenile a Delinquent. After the matter
was discussed a motion was made by Mr. Gustafson, seconded by Mr. Dieden
and unanimously adopted to approve in principle that the law should provide
that where there is disagreement between the parent and the juvenile as to
whether counsel should be provided for the juvenile the decision of the
parent is to be given effect.

The Commission then considered the last clause of proposed Section 732.1 relating to whether a waiver is made intelligently, competently and voluntarily by the juvenile. After the matter was discussed it was agreed that this matter should be treated in the section dealing with appointment of counsel for juveniles at public expense.

(3) Section 732.4 - Juvenile not a delinquent. After the matter was discussed a motion was made by Mr. Dieden to make it mandatory that the court advise both the neglected minor and the parent of the right to counsel. After further discussion Mr. Dieden amended his motion which was seconded by Mr. Gustafson to make it mandatory that the court advise the parent of the right of counsel. The motion did not carry.

Aye: Dieden, Gustafson, Matthews.

No: Balthis, Stanton

Not Present: Babbage, Bradley, Cobey, Thurman.

A motion was then made and seconded to approve the principle that both the neglected minor and parent have the right to counsel which should be expressed by statute. The motion carried:

Aye: Balthis, Dieden, Gustafson, Matthews, Stanton.

No: None.

Not Present: Babbage, Bradley, Cobey, Thurman.

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F. Study No. 51 - Action for Support after Divorce. The Commission considered the research study prepared by Professor Harold W. Horowitz for the purpose of determining whether it might be sent to the printer. During the discussion Mr. Stanton raised the question whether the study should be expanded to include a discussion of whether a former wife, divorced in an action in which the court did not have personal jurisdiction over both spouses, should be permitted to maintain an action against the former husband for a determination of her rights in their community property. After the matter was discussed it was agreed that the Executive Secretary should write to Professor Horowitz for his views on (1) whether the subject is sufficiently germane to the alimony study that it should be logically included in it and (2) if so, whether it would be reasonable to ask that the study be expanded to include it. A motion was then made by Mr. Balthis, seconded by Mr. Dieden and unanimously adopted to authorize the Chairman and the Executive Secretary to take whatever action is necessary for the printing of the study after receiving Professor Horowitz's reply.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

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May 11, 1959

Mr. Robert Nibley
Hill, Farrer & Burrill
411 W. 5th Street
Los Angeles, California

Dear Bob:

I was happy to learn that you have worked out an arrangement with Stanley Tobin so that he will be able to help you with the condemnation study beginning June 1, 1959. I understand that the Assembly Ways and Means Committee approved the augmentation of the Law Revision Commission's 1959-60 budget in the amount that we requested to make the condemnation study possible. However, the budget bill must still be approved by the Assembly, by the Senate Finance Committee and the Senate and by the Governor before we can be absolutely certain as to what funds we will have for the next fiscal year. All of this cannot, of course, be done prior to June 1.

The Law Revision Commission is meeting in Sacramento this week end, May 15 and 16. In view of the Ways and Means Committee's action on our augmentation request and of the fact that that request has been approved by the Department of Finance and was not opposed by the Legislative Analyst, I am going to recommend to the Commission at that time that we go ahead now and make the first of two new contracts with you utilizing funds available during the current fiscal year and planning to make a second contract drawing upon funds available during the next fiscal year as soon as those funds are available. The amount of the first contract would be approximately \$12,000.00; the amount of the second would be \$6000.00. If the Commission accepts this recommendation, we should have no difficulty in getting the first contract signed in time for Mr. Tobin to go to work on June 1. I will advise you of the action taken by the Commission early next week.

Very truly yours,

John R. McDonough, Jr.
Executive Secretary

JRM:imh

cc to Mr. Tobin

Government Code § 16304.1

Upon the expiration of two years following the last day of the period of its availability, the undisbursed balance in any appropriation shall revert to and become a part of the fund from which the appropriation was made. Subsequent to reversion any unpaid encumbrance against the appropriation may be paid, with approval of the Board of Control from any current appropriation available for the same purposes.

Status Report on Commission Bills

1959 Session

- S.B. 160 (Nonresident Heirs) - Died in Senate Judiciary Committee;
referred to Rules Committee for assignment
to interim committee
- S.B. 163 (Effective Date New Trial Order) - To Governor
- S.B. 164 (Time for Making New Trial Motion) - To Governor
- S.B. 165 (Suspension Alienation) - To Governor
- S.B. 166 (Doctrine Worthier Title) - To Governor
- S.B. 167 (Mortgages Future Advances) - To Governor
- ACA 16 (Constitutional Amendment re Claims) - In Senate
Set May 20 for hearing
- A.B. 400 (Taking of Vehicles) - Died in Assembly Committee on Criminal
Procedure
- A.B. 401 (Guardians) - To Governor
- A.B. 402 (Drunk Driving) - Given Do-Pass recommendation by Senate Judiciary
Committee May 12 (Chairman, Regan dissenting)
- A.B. 403 (Sale Corporate Assets) - Died Senate Judiciary Committee
- A.B. 404 (Grand Juries) - Passed in Senate
- A.B. 405-10 (Claims) - Set for hearing by Assembly Judiciary Committee
May 20

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J. D. COOPER
Attorney at Law
842 Bank of America Building
1212 Broadway
Oakland 12, California

May 8, 1959

California Law Revision Commission
School of Law
Stanford, California
Attn: Glen E. Stephens. Re: Proposed Legislation Re Partition Sales

Dear Mr. Stephens:

This will acknowledge receipt of your letter of May 6, 1959 and the drafts of proposed legislation therein enclosed.

When Leonard Dieden spoke to me about proposed legislation in connection with partition sales I advised him that the real defects in connection with partition sales was not due to uncertainty as to the sale procedure, but rather to the complete lack of understanding of the partition proceeding itself.

There are not many partition actions filed and, therefore, few attorneys and fewer judges have much experience in this field. The referee in partition is usually a practicing attorney without any experience either in partition actions or as referee. The code provisions being very sketchy, the referee can find no complete procedural outline to follow.

The last partition matter sent to me appointed me referee and directed me to sell the property WITHOUT NOTICE and to deposit the proceeds with a title company with instructions to it to disburse the net proceeds of sale, after deducting my fee, to the parties in accordance with their rights. The judge made this order based on a stipulation of counsel. Obviously, such a procedure would be void. This is cited merely as an example of the confusion existing in connection with proceedings in partition. Unless this confusion is eliminated, your excellent efforts in connection with revising the mechanics of the partition sale will be of little avail.

Enclosed are my comments requested by your letter. I think you have done an excellent job. However, I have pointed out that you should, if possible, attempt to clarify the procedure leading up to and following the sale itself. Perhaps this is not within the scope of your present assignment.

I have stated my position clearly in respect to public sales in partition and I am certain most practicing attorneys will agree that public sales in probate are a thing of the past. This being so, it would simplify your

task if you eliminated them in partition. Being a creature of statute, you are free to make any reasonable provision as to the mode of holding partition sales and I do not believe you are required to blindly follow probate sale statutes in every detail.

It was a pleasure to examine your proposed legislation and a compliment to be considered important enough to be consulted. My comments are based on considerable experience as a referee in partition and as title company counsel and I hope they may be of some assistance to you and your committee.

If I can be of any further assistance please let me know.

Yours very truly,

S/ J. D. Cooper
J.C. COOPER

JDC:hs (Enc)
cc Leonard Dieden

COMMENTS AND SUGGESTIONS AS TO PROPOSED LEGISLATION
RE PARTITION PROCEEDINGS.

The sections relating to actions for the partition of real property are cumbersome and unrealistic. There is a complete lack of uniformity in interlocutory decrees of partition and, the action being rather uncommon, few attorneys appreciate the operation and effect of the action.

The first phase of a partition action is to establish the titles and interests of the parties in the same way that titles are established in a quiet title action. This phase is in rem.

Many attorneys have proceeded without benefit of a title report and, therefore, are ignorant of any outstanding interests or liens, other than those of the plaintiff and the defendant. The court, therefore, has no means of knowing whether section 753 of the Code of Civil Procedure has been complied with at the time the interlocutory judgment of partition is granted.

Section 761 provides that if the court finds there are outstanding liens or encumbrances of record at the time of the commencement of the action, amended pleadings must be filed and such persons made parties to the action.

Section 762 provides that if the amount of any such lien is an issue, the claimant must be required to appear before a referee to determine this issue.

It is suggested that the amendment of these sections be considered. Some form of current title report should be required to be filed with the complaint or any cross complaint so that the court will be apprised of the existence of all interests and liens of record and so that it will know all proper parties are before it and so that the court can, before making any decree, determine the issues of interests and liens. This will alleviate

the need for appointment of a referee prior to the making of the interlocutory decree of partition. The interlocutory decree would thereby establish the ownership of the property and all interests and liens therein and thereon so that the referee would know, at the time of his appointment, the state of the title to the property he is required to sell.

It would also appear realistic to require the appointment of a person skilled in the matter of property values to determine whether real property is subject to partition in kind. While section 763 requires the trial judge to make such a determination, the same is seldom done because of lack of evidence available at the trial. The result is that the referee appointed to make the sale is also required to determine whether the property is subject to partition in kind. It is submitted that as soon as issue is fully joined on a complaint in petition, the Court ought to be required to appoint a competent appraiser of real estate to appraise the property and to determine whether it is subject to partition in kind. The testimony of such person at the trial should be the basis for a decree either that the property be sold or that it be partitioned in kind. If the property is to be sold, the appraisal of value should be the basis for sale by the referee.

Under the present procedure, the referee has to secure the appointment of an appraiser and act at his own risk as to the reliability of the appraisement obtained.

There would appear to be no reason why three referees should ever be required and section 763 should be amended to eliminate this provision. Seldom, if ever, are three appraisers appointed except in cases of personal bitterness between the parties to the action.

Some provision should be made for fixing a bond of the referee. In most

cases a nominal sum is required while in others a large bond is required. However, there being no official appraisal of the property at the time of appointment of the referee, the court has no basis on which to fix a bond. This matter should be considered and standard bond rates fixed by statute.

There is no provision in the statutes for the referee to take an oath to the effect that he will perform his duties according to law and the orders of the Court. Such a requirement should be mandatory.

So that all procedures will be uniform, a code section should be enacted directing the referee somewhat as follows:

"Said referee is hereby directed to proceed in accordance with sections _____, _____, _____, and _____ of this Code."

Such sections would refer to the manner of sale, the furnishing of a referee's bond and the taking of an oath, and the making of his report and return of sale.

The foregoing suggestions, while having no direct bearing on the proposed legislation in connection with the ultimate sale of property on partition, should be most seriously considered. The mechanics of making the sale are hardly as important as mechanics of securing a valid and realistic decree ordering the sale to be made.

COMMENTS AS TO SALE PROCEDURE.

I have suggested that an appraiser be appointed before the interlocutory decree in partition is made. This being so, there would be no reason for appointing another appraiser of the property if it is to be sold. I agree with the position that one of the inheritance tax appraisers should be selected by the Court in the first instance. I therefore agree that section 775.3 should be added but that the appraiser be appointed before the interloc-

utory decree of partition is made.

It is my opinion and impression that seldom, if ever, is real property sold at a public sale in a probate matter, and it is my further opinion that a public sale is not for the best interests of the parties either in an estate or in a partition action. I would, therefore, limit partition sales to private ones and make all of them subject to confirmation by the court. Accordingly, I would amend section 775 to eliminate all reference to public sale.

Proposed section 775.1 is proper but it should be the exclusive mode of giving notice and no reference should be made to "In the case of a private sale"

The same comment is made in connection with proposed section 775.2. I feel that the bids should all be left with the referee and that the provision that such bids may be left with the clerk of the court should be deleted.

Section 775.3 should not be enacted under the sections dealing with sales but should be enacted after section 762 and before section 763.

Section 775.4, as proposed, is proper but it should provide that no exclusive sales agreement may be entered into. The same problem exists in probate sales at this time and there would be little justification for a broker to share in the commissions merely because he secured an exclusive listing and where another broker made the sale.

Section 775.5 is proper.

Another section should be enacted which would require any bidder to submit 10% of his bid therewith by cash or cashier's check, to be forfeited if the bidder fails to complete the sale after confirmation. This would appear to be a matter which would fit into section 785.

As to the proposed amendment of section 784, I cannot see any reason why

the appraised value of the property should not be disclosed to the Court where the property is sold at public sale. I think the appraised value should be a matter of public record as in a probate matter. However, I reiterate my position that all partition sales should be private.

Section 784 should be further amended so as to require the referee to mail a copy of his report to the other parties who have appeared therein and to the purchaser. Otherwise, the interested parties might never learn of the filing of the report.

Section 784.5 should not limit private sales to the proposed 90% limitation. If public sales are to be utilized, the value of the property should still depend on the appraised value and not upon the lack of spirited bidders.

There are some practical matters which have arisen in connection with partition sales and which your committee might like to consider.

In some cases, after the referee has been appointed and before the sale of the property, the parties to the partition action have reconciled their differences. No provision is made for the disposition of the action in such cases. I think one ought to be made.

In such an instance, if the parties desire to dismiss the action, they should be permitted to do so upon payment of all costs, fees and expenses. The interlocutory decree, establishing their interests in rem in the property, should remain as a decree establishing title, but the provisions thereof relating to a sale of the property should be cancelled. No such dismissal would be available if intervening rights of purchasers, brokers or lienholders appear.

Section 786 could cause considerable difficulty in connection with

proposed sections 775.4 and 775.5 and the proposed amendment of section 784. If the bidder is one of the parties to the action and is entitled to bid in his interest in the property and does so before or after the return of sale, a real estate broker would really be bidding for his client on only a portion of the property. Perhaps some adjustment on commissions should be considered and provided in such cases.

There are also some practical matters which have arisen in connection with partition action after the confirmation of a sale.

There is no standard whatsoever for fixing the fees of the referee. Sometimes he is allowed compensation based on real estate schedules; sometimes the judge tries to fix the fees without any rule to go by. I think a code section should be added which sets up the basic standards for compensation with a provision allowing extra compensation in proper cases. I think your committee should consider this matter at this time.

While the sale of property in partition takes place under a type of interlocutory decree, the code is vague as to what is to be done after the sale is confirmed and the referee has received the proceeds of sale.

Practically, from the proceeds of sale must be paid the costs of sale, such as documentary stamps, title fees, etc., such attorney's fees as may have been allowed under section 763 and section 796, appraiser's fees, broker's commissions, liens and encumbrances entitled to payment, costs of suit, referee's fees and possibly some other items. Some of these are not known at the time of confirmation of sale and cannot be properly included in the order confirming sale. The code is silent as to procedure in this connection.

New sections should be added to the code specifying the procedure

leading up to the final decree of partition. Such sections should require the referee to file a document in the nature of an accounting as to the net proceeds of sale and to give notice thereof to the parties in interest, exclusive of the purchaser. Thereupon the referee or any interested party ought to be able to move to set the account for hearing on proper notice and the court should proceed to hear the account and make its order as to the payment of fees and expenses and the ultimate disposition of the remaining balance of the sales price.

The provision should also provide that the Court, in the settlement of the account, direct the referee to make the disbursements required and take vouchers therefor. Thereafter, a final decree of partition should be entered.

Respectfully submitted,

S/ J. D. Cooper
J. D. Cooper