

A G E N D A

(revised 9/17/59)

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

September 24-26, 1959

THURSDAY, SEPTEMBER 24 (Board Room of State Bar)

1. Minutes of August, 1959 meeting (enclosed).
2. Budget for 1960-61 Fiscal Year. (See Memorandum No. 2, enclosed).
3. Research Contract with Stanford University (See Memorandum No. 1, enclosed).
4. Hearings by Assembly Interim Judiciary Committee - Civil (See Memorandum No. 6, enclosed).
5. Studies heretofore considered:
 - A. Study No. 32 - Arbitration. (See Memorandum No. 3, to be sent).
 - B. Study No. 48 - Right of Juveniles to Counsel. (See Memorandum No. 6, sent 8/10/59).
6. New Studies:
 - A. Study No. 40 - Notice of Alibi (You have this study).

FRIDAY, SEPTEMBER 25 (Board Room of State Bar)

Morning:

7. Studies heretofore considered:
 - A. Study No. 38 - Inter Vivos Rights (See Memorandum No. 5, enclosed)

Afternoon:

8. Study No. 34 - Uniform Rules of Evidence.

See:

- (1) Lawyer-Client Privilege. Memorandum No. 4a (enclosed) and
Memorandum sent 7/9/59 on Rule 26.

FRIDAY, SEPTEMBER 25 (Board Room of State Bar)

(continued)

Afternoon:

- (2) Physician-Patient Privilege. Memorandum No. 4b (enclosed) and Memorandum sent 7/9/59 on Rule 27.
- (3) Marital "For and Against" Testimonial Privilege. Recommendations and study of Law Revision Commission (Nov. 15, 1956) copy enclosed).
- (4) Marital Privilege for Confidential Communications. See Memorandum sent 7/23/59 on Rule 28 and also revised pages 7 and 8 and supplemental memorandum, sent 8/10/59.
- (5) Other Rules on Privilege. See Memorandum sent 7/30/59 (Rules 29, 30, 31, 32, 33, 34, 35 and 36) and Memorandum sent 8/10/59 (Rules 37, 38, 39 and 40).

SATURDAY, SEPTEMBER 26 (San Francisco Bar Association Lounge)

Continuation of Agenda Item 8.

Minutes of Meeting
of
September 24, 25 and 26, 1959
San Francisco

A regular meeting of the Law Revision Commission was held in San Francisco on September 24, 25 and 26, 1959.

Present: Thomas E. Stanton, Jr., Chairman
John D. Babbage, Vice Chairman
Honorable James A. Cobey
Frank S. Balthis
Leonard J. Dieden
Roy A. Gustafson
Charles H. Matthews
Samuel D. Thurman (September 24 and 25)
Ralph N. Kleps (September 24 and 25)

Absent: Honorable Clark L. Bradley

Messrs. John H. DeMouilly and Joseph B. Harvey and Miss Louisa R. Lindow, members of the Commission's staff, were also present.

Professor James H. Chadbourn of the School of Law, University of California at Los Angeles, the research consultant for Study No. 34(L) -- Uniform Rules of Evidence, was present during a part of the meeting on September 25 and 26, 1959.

Professor Harold Marsh, Jr. of the School of Law, University of California at Los Angeles, the research consultant for Study No. 38 -- Intervivos Rights, was present during a part of the meeting on September 25, 1959.

A motion was made by Mr. Babbage, seconded by Mr. Matthews, and unanimously adopted to approve the minutes of the meeting of August 28 and 29, 1959.

I. ADMINISTRATIVE MATTERS

A. 1960-61 Budget: The Commission considered Memorandum No. 2 (9/15/59) and budget information in summary form prepared by the Executive Secretary. (A copy of each of these items is attached hereto.) During the discussion Senator Cobey stated that, if possible, the total expenditures of the Commission for the 1960-61 fiscal year budget should not exceed the total expenditures authorized under the budget for the current 1959-60 fiscal year.

A proposed expenditure for the 1960-61 fiscal year of \$3,000 for a collateral study relating to Study No. 34(L) - Uniform Rules of Evidence was discussed. The proposed collateral study would cover the method of integrating the Uniform Rules of Evidence into the existing California laws and the necessary adjustments to existing California laws if the Uniform Rules of Evidence were to be adopted, with specific recommendations as to those California statutes which should be retained, revised, amended and repealed (including but not limited to those California statutes the substance of which is not included in the Uniform Rules of Evidence). It was agreed that such a study was necessary and should be commenced as soon as possible. A motion was made by Mr. Dieden, seconded by Mr. Gustafson, and unanimously adopted that:

(1) The Executive Secretary be authorized to request the Department of Finance to approve the transfer of \$3,000 from the printing and binding category of the Commission's current 1959-60 fiscal year budget to the category for research and contractual services to cover the collateral study

of the existing evidence laws; and

(2) If such approval was obtained, this item should not be included in the budget for the 1960-61 fiscal year and the Chairman be authorized to enter into a contract with Professor James H. Chadbourn in the amount of \$3,000 for such study.

A proposed expenditure for the 1960-61 fiscal year of \$350 for a contract with our consultant on the claims statute was discussed. It was agreed that additional work on the statute relating to claims against public officers and employees was necessary and should be commenced as soon as possible. After the matter was discussed a motion was made by Senator Cobey, seconded by Mr. Babbage, and unanimously adopted that:

(1) The Executive Secretary be authorized to request the Department of Finance to approve the expenditure of \$350 from the Commission's current budget for the purpose of making a contract relating to claims against public officers and employees; and

(2) If such approval was obtained, this item should not be included in the budget for the 1960-61 fiscal year and the Chairman be authorized to enter into a contract with Professor Arvo Van Alstyne for such study.

It was agreed that the expenditure (\$985 - printing and \$1,000 - honorarium) proposed for the study relating to escheat should be deleted from the 1960-61 budget.

It was agreed that the proposed expenditure of \$3,000 for a research contract with Stanford University is a necessary item and should be included in the 1960-61 budget.

A motion was then made by Mr. Balthis, seconded by Senator Cobey, and unanimously adopted to approve the budget with the alternatives proposed and the changes agreed upon.

B. Stanford University Research Contract: The Commission

considered Memorandum No. 1 (9/15/59) (a copy of which is attached hereto). After the matter was discussed a motion was made by Senator Cobey, seconded by Mr. Dieden, and unanimously adopted that the Executive Secretary be authorized to request the Department of Finance to approve the expenditure of \$3,000 from the Commission's current 1959-60 fiscal year budget for the purpose of entering into a contract with Stanford University and, after such approval is obtained, that the Chairman be authorized to enter into the contract with Stanford University.

II. CURRENT STUDIES

A. Study No. 32 - Arbitration: The Commission had before it Memorandum No. 3 (9/18/59) and a Memorandum re Arbitration (9/17/59) prepared by the Assistant Executive Secretary. (A copy of each of these items is attached hereto.)

The Commission reconsidered the procedure it should follow in its consideration of the arbitration study. During the discussion the Assistant Executive Secretary reported that the staff recommends that the Commission continue to follow the approach heretofore followed on the study. The Commission had previously decided to make a comprehensive study of the subject of arbitration and, after consideration of the various problems presented in the study, determine what principles it wants to adopt. At a later time, the Commission planned to consider statutory language drafted to effectuate the principles it has adopted.

Mr. Harvey also raised the question of what the Commission wanted to do with regard to its prior action taken on various principles in arbitration.

A motion was made by Mr. Dieden, seconded by Mr. Matthews, and unanimously adopted to rescind all prior action taken relating to arbitration and to approve the procedure proposed and recommended by the staff.

The Commission considered whether oral agreements to arbitrate should be (1) included within the arbitration statute, (2) left to common

law procedures as in the Uniform Act (3) expressly declared void as provided in the New York Act or (4) enforced under the arbitration statute after the award has been made. After the matter was discussed a motion was made by Mr. Babbage and seconded by Mr. Stanton to approve the principle that oral agreements to arbitrate should be enforceable in the same manner as written agreements to arbitrate. The motion did not carry:

Aye: Babbage, Matthews, Stanton.

No: Balthis, Cobey, Dieden, Gustafson.

Not Present: Bradley, Thurman.

The Commission then discussed whether (1) an award based on an oral agreement to arbitrate should be included within the arbitration statute and made enforceable or (2) an oral agreement to arbitrate should be subject to the arbitration statute when the parties have selected the arbitrators. After the matter was discussed the following action was taken:

A motion was made by Mr. Dieden and seconded by Mr. Matthews to approve the principle that an oral agreement to arbitrate should be enforceable under the arbitration statute any time after the arbitrators have been appointed by both parties. The motion did not carry:

Aye: Dieden, Matthews, Stanton.

No: Babbage, Balthis, Cobey, Gustafson

Not Present: Bradley, Thurman.

A motion was made by Senator Cobey and seconded by Mr. Balthis to approve the principle that a written award based on an oral agreement to arbitrate should be subject to the arbitration statute. The motion

carried:

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

No: Babbage.

Not Present: Bradley, Thurman.

[Comment: After discussion of the nature of a writing that would satisfy the statute of frauds and whether a memorandum signed by the party to be charged would be sufficient, it was agreed that the staff should look into and report on these questions.]

The Commission then considered whether an exception to the principle adopted that oral agreements to arbitrate are not enforceable should be made in the case where the agreement is an oral or implied agreement to extend an expired written agreement and the parties continue to perform under the agreement. After the matter was discussed a motion was made by Mr. Stanton and seconded by Mr. Babbage to approve the principle that an agreement which becomes oral after the written agreement terminates should be subject to the arbitration statute. The motion did not carry:

Aye: Babbage, Stanton.

No: Balthis, Cobey, Dieden, Gustafson, Matthews.

Not Present: Bradley, Thurman.

[Comment: It was agreed that the Commission is not adequately informed on this matter and that the staff should look into and report on the law applicable to implied or oral agreements to extend an expired written agreement and the meaning of "written agreement" as used in the arbitration statutes.

Minutes - Regular Meeting
September 24, 25 and 26, 1959

The Commission then considered whether questions of law should be subject to arbitration. After the matter was discussed a motion was made by Mr. Babbage and seconded by Mr. Matthews to approve the principle that questions of law should be subject to arbitration and that the arbitration statute should not provide for a special procedure with regard to questions of law. The motion carried:

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

No: None.

Not Present: Bradley, Cobey, Dieden.

The Commission then considered whether labor contracts should be subject to the arbitration statute. After the matter was discussed a motion was made by Mr. Babbage and seconded by Mr. Balthis to approve the principle that controversies arising out of collective bargaining contracts should be subject to the arbitration statute. The motion carried:

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

No: None.

Not Present: Bradley, Cobey, Dieden.

B. Study No. 34(L) - Uniform Rules of Evidence: The Commission
had before it Memorandums No. 4a relating to Uniform Rule 26 (Lawyer-Client Privilege) and No. 4b relating to Uniform Rule 27 (Physician-Patient Privilege) prepared by the Executive Secretary; the following memorandums prepared by Professor Chadbourn: Rule 28 (Marital Privilege for Confidential Communications); supplemental memorandum on Rule 28; Rules 29-36 (relating to various privileges); supplemental memorandum relating to the foundation requirement in Rule 26(4) formerly Rule 26(2)(a) which was distributed at the meeting; and the Commission's Recommendation and Study relating to The Marital "For and Against" Testimonial Privilege. (A copy of each of these items is attached hereto.)

I. The Commission first considered Memorandum No. 4a relating to Uniform Rule 26 - the lawyer-client privilege, and the supplemental memorandum on Rule 26(4). After the matter was discussed the following action was taken:

1. A motion was made by Mr. Dieden and seconded by Mr. Gustafson to approve the addition of the phrase "or other organization (including this State and any other public entity)" in Rule 26(1)(a).

The motion carried:

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

No: None.

Not Present: Babbage, Bradley, Cobey, Thurman.

2. A motion was made by Mr. Balthis and seconded by Mr. Gustafson to delete the phrase "sufficient evidence, aside from the

communication, has been introduced to warrant a finding that" from Rule 26(4). The motion carried:

Aye: Balthis, Gustafson, Matthews, Stanton.

No: Dieden.

Pass: Babbage.

Not Present: Bradley, Cobey, Thurman.

[Comment: It was agreed that Uniform Rule 8 (which provides that the judge may hear and determine matters relating to the admissibility of evidence and the existence of a privilege out of the presence of the jury) is an adequate safeguard to warrant the elimination of the requirement in Rule 26 of additional evidence aside from the communication.]

It was agreed that the technical changes made to Rule 26 as proposed by the Executive Secretary in Memorandum No. 4a and the comments indicating the reasons for the changes to Rule 26 are in acceptable form and that Rule 26 should be sent to the Bar Committee.

II. The Commission then considered Memorandum No. 4b relating to Uniform Rule 27 - the physician-patient privilege. After the matter was discussed the following action was taken:

1. A motion was made by Mr. Babbage and seconded by Mr. Matthews to approve the addition of the phrase "if the patient is living and no other person claims the privilege and the privilege has not been waived under Rule 37, the person who was the physician at the time of the confidential communication" in Rule 27(2)(d). The motion carried:

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

No: Stanton.

Not Present: Bradley, Thurman.

2. A motion was made by Mr. Gustafson and seconded by Mr. Dieden to delete the phrase "sufficient evidence, aside from the communication, has been introduced to warrant a finding that" from Rule 27(7). The motion carried:

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

No: None.

Not Present: Bradley, Thurman.

It was agreed that Rule 27(5) should be revised to read as follows:

(5) An action, including an action brought under Section 376 or Section 377 of the Code of Civil Procedure, in which the condition of the patient is an element or factor of the claim, or counter claim, cross-complaint or affirmative defense, of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party.

It was agreed that the technical changes made to Rule 27 as proposed by the Executive Secretary in Memorandum 4b and the comments giving the reasons for the changes to Rule 27 are in acceptable form after substituting the phrase "is unaware of any criticism" for the phrase "finds no evidence" on page 3 of the comments, sixth line from the bottom.

III. The Commission then considered the Memorandum on Rule 28 - the marital privilege for confidential communications, the supplemental

memorandum on Rule 28 and the Recommendation and Study relating to The Marital "For and Against" Testimonial Privilege. After the matter was discussed the following action was taken:

1. A motion was made by Senator Cobey and seconded by Mr. Balthis to revise Rule 28 to provide that the marital privilege for confidential communications vests in both parties, i.e., the privilege belongs to both the communicating spouse and the addressee spouse. The motion carried:

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

No: Gustafson, Stanton.

Not Present: Bradley, Thurman.

2. A motion was made by Mr. Gustafson and seconded by Mr. Stanton to approve that portion of Rule 28 which provides that the privilege for confidential communications made during marriage is applicable only during the marital relationship. The motion did not carry:

Aye: Gustafson, Stanton.

No: Babbage, Balthis, Cobey, Dieden, Matthews.

Not Present: Bradley, Thurman.

3. A motion was then made to revise Rule 28 to provide that the privilege for confidential communications made during marriage continues after termination of the marriage. The motion carried:

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

No: Gustafson, Stanton.

Not Present: Bradley, Thurman.

[Comment: It was agreed that the present California law which provides for post-coverture privilege should be retained. It was also agreed that both spouses must waive the marital privilege that may be claimed by either spouse and that Rule 37 should be adjusted to so provide.]

4. It was agreed that Rule 28(2)(b) which provides that there is an exception where the action is for damages for alienation of affections or for criminal conversation with the other spouse should be deleted.

5. A motion was made by Senator Cobey and seconded by Mr. Babbage to approve that portion of Rule 28 which broadens the present exception to the marital privilege respecting "family crimes." The motion carried:

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

No: None.

Not Present: Bradley, Thurman.

6. A motion was made by Mr. Matthews and seconded by Mr. Dieden to approve the principle of Rule 28(2)(d) which provides that the privilege is inapplicable in a criminal action in which the accused offers evidence of a communication between him and his spouse. The motion carried:

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

No: None.

Not Present: Bradley, Thurman.

7. A motion was made by Mr. Balthis and seconded by Mr. Matthews to delete the phrase "sufficient evidence, aside from the

communication, has been introduced to warrant a finding that" in Rule 28(2)(e). The motion carried:

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

No: Babbage.

Not Present: Bradley, Thurman.

8. A motion was then made by Mr. Balthis and seconded by Mr. Gustafson to approve in principle Rule 28(2)(e) as revised limiting torts to fraud, i.e., substituting the word "fraud" for the word "tort."

The motion carried:

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

No: None.

Not Present: Bradley, Thurman.

9. A motion was made by Mr. Balthis and seconded by Mr. Dieden that an action to commit a spouse for mental incompetency or an action to establish mental competency should be included in Rule 28 as exceptions to the marital privilege. The motion carried:

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

No: None.

Not Present: Bradley, Thurman.

10. A motion was made by Mr. Babbage and seconded by Mr. Balthis to delete subsection (3) of Rule 28. The motion carried:

Aye: Babbage, Balthis, Cobey, Gustafson, Matthews.

No: None.

Not Present: Bradley, Dieden, Stanton, Thurman.

11. A motion was made by Senator Cobey and seconded by Mr. Babbage to delete subsection (2) of Rule 23. The motion carried:

Aye: Babbage, Balthis, Cobey, Gustafson, Matthews.

No: None.

Not Present: Bradley, Dieden, Stanton, Thurman.

[Comment: It was agreed that Rule 23(2) is not necessary inasmuch as Rule 28 has been revised to provide that the marital privilege to confidential communications can be claimed by either spouse and extends beyond the marital relationship.]

12. A motion was made by Senator Cobey and seconded by Mr. Balthis to abolish the marital competency privilege i.e., the marital "for and against" testimonial privilege, under C.C.P. § 1881(1) and under P.C. § 1332. The motion did not carry:

Aye: Balthis, Cobey, Gustafson.

No: Babbage.

Pass: Matthews.

Not Present: Bradley, Dieden, Stanton, Thurman.

During the course of the meeting Senator Cobey renewed his motion to abolish the marital competency privilege. The motion at this time carried:

Aye: Balthis, Cobey, Dieden, Gustafson.

No: Babbage, Matthews, Stanton.

Not Present: Bradley, Thurman.

IV. The Commission then considered Memorandum on Rules 29-36 - relating to various privileges. After the matter was discussed the following

action was taken:

A. Rule 29 - Priest-Penitent Privilege.

1. A motion was made by Senator Cobey and seconded by Mr. Matthews to eliminate the requirement in Rule 29 that the penitent must be a member of a church or religious denomination before the privilege can be claimed. The motion carried:

Aye: Balthis, Cobey, Matthews, Stanton.

No: Babbage, Dieden, Gustafson.

Not Present: Bradley, Thurman.

2. A motion was made by Senator Cobey and seconded by Mr. Balthis to insert the words "or deceased" after the word "absent" in Rule 29(2)(c). The motion carried:

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

No: None.

Not Present: Bradley, Thurman.

3. A motion was made by Senator Cobey and seconded by Mr. Babbage to approve the adoption of Rule 29 as revised to eliminate the requirement that the penitent must be a member of a church or religious denomination before the privilege can be claimed and to clarify subsection (2)(c) by inserting the words "or deceased" after the word "absent." The motion carried:

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

No: None.

Not Present: Bradley, Thurman.

B. Rule 30 - Religious Belief.

A motion was made by Senator Cobey and seconded by Mr. Matthews to approve the adoption of Rule 30. The motion carried:

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

No: None.

Not Present: Bradley, Thurman.

C. Rule 31 - Political Vote.

A motion was made by Senator Cobey and seconded by Mr. Balthis to approve the adoption of Rule 31. The motion carried:

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

No: None.

Not Present: Bradley, Thurman.

D. Rule 32 - Trade Secret.

A motion was made by Mr. Babbage and seconded by Mr. Balthis to approve the adoption of Rule 32. The motion carried:

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

No: None.

Not Present: Bradley, Thurman.

E. Rule 33 - Secret of State.

After the Commission discussed Rule 33 it was agreed that as presently drafted this rule is too broad and that the staff should redraft it to provide that the court must weigh the facts and that the privilege would not apply if the court determines that the national security or public security would not be endangered by such a disclosure.

F. Rule 34 - Official Information.

1. A motion was made by Mr. Babbage and seconded by

Mr. Balthis to approve the principle that the privilege of Rule 34 is applicable to all public officials in this State and to public officials of the United States. The motion carried:

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

No: None.

Not Present: Bradley, Cobey, Thurman.

2. A motion was made by Mr. Matthews and seconded by Mr. Dieden to approve Rule 34(2)(a) as revised to provide that a witness has a privilege to refuse to disclose a matter on the ground that it is official information if the judge finds that the matter is official information and the disclosure in a judicial proceeding is forbidden by an Act of the Congress or a statute of this State. The motion carried:

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

No: None.

Not Present: Bradley, Cobey, Thurman.

3. A motion was made by Mr. Dieden and seconded by Mr. Balthis that Rule 34(2)(b) be revised to provide that the communication be made in official confidence and that the court find from all the circumstances in the case that the public interest would suffer from disclosure. The motion carried:

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

No: None.

Not Present: Bradley, Cobey, Thurman.

6. Rule 35 - Communication to Grand Jury.

A motion was made by Mr. Babbage and seconded by Mr. Dieden

to disapprove the adoption of Rule 35. The motion carried:

Aye: Babbage, Dieden, Gustafson, Stanton.

No: Balthis.

Pass: Matthews.

Not Present: Bradley, Cobey, Thurman.

[Comment: It was agreed that the California law, which permits a person other than a grand juror to disclose the testimony of a witness made to a grand jury, should be retained. Mr. Gustafson then pointed out during the discussion of Rule 35(b) that in California where an indictment or information is filed by the grand jury the testimony made under oath becomes public information at the time of the filing; however, when the grand jury does not file an indictment or information there are no findings and for this reason Rule 35(b) has little meaning in California.]

C. Study No. 38 - Inter Vivos Rights: The Commission had before it a draft of the Recommendation of the Commission relating to Inter Vivos Marital Property Rights in Property Acquired While Domiciled Elsewhere (8/20/59) and a draft statute designed to effectuate the recommendation of the Commission, both prepared by Professor McDonough; a letter from Professor Marsh to the Executive Secretary (dated 9/15/59) commenting on the proposed recommendation and the draft bill relating to inter vivos rights; and a memorandum (9/24/59) prepared by Professor McDonough commenting on the points raised by Professor Marsh in his letter. (A copy of each of these items is attached hereto.)

Professor Marsh, making general comments on the Commission's proposed statute, stated that he still believes that the proposed draft statute is unconstitutional for it is an attempt to divest property rights of a person that have been vested in him. He also questioned the desirability of creating a new category of property (quasi-community property) which as such will not be covered by either separate property or community property statutory provisions. He suggests that the problem could be resolved to some extent by not using the word "becomes" in proposed Section 164.1, thus making that section merely a definition section. He stated further that, inasmuch as certain provisions of our community property system are not desirable, he believes those provisions should not be extended to "quasi-community property."

The Commission then considered the draft statute relating to inter vivos rights, the various points raised in Professor Marsh's letter

relating to the draft statute and the memorandum prepared by Professor McDonough commenting on the points raised by Professor Marsh. After the matter was discussed the following action was taken:

A motion was made by Mr. Babbage and seconded by Mr. Balthis to make the presumption in Section 172d (b) conclusive. The motion carried:

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

No: Dieden, Thurman.

Not Present: Bradley, Cobey.

A motion was made by Mr. Babbage and seconded by Mr. Balthis to delete from Section 172d the last portion of the second paragraph beginning with the words "and no action" in the sixth line. The motion carried:

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

No: None.

Not Present: Bradley, Cobey.

A motion was made by Mr. Babbage and seconded by Mr. Balthis to clarify that portion of Section 164 which refers to property acquired by the spouses "while domiciled in this State." The motion carried:

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

No: None.

Not Present: Bradley, Cobey.

A motion was made by Mr. Babbage and seconded by Mr. Balthis to make the provision in Section 164.1 (that the conflicts rule of law that

the domicile of a wife is that of her husband) applicable also to

Section 164. The motion carried:

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

No: None.

Not Present: Bradley, Cobey.

It was agreed that Section 164 should be revised by adding the phrase "Subject to the provisions of Section 164.3 of this code" before the phrase "all other real property."

The Commission then considered the policy question of what should be done where the Commission's action and recommendation greatly differs from that of the research consultant's recommendation and study. During the discussion Professor Marsh suggested two alternatives, one, to print only the Commission's recommendation and not print the research consultant's study or, two, print both the Commission's recommendation and the research consultant's study but include in the recommendation a statement that there is a divergence of opinion between the Commission's actions and the research consultant's study. Although the latter approach seemingly was favored by the Commission no final decision was reached on this matter.

D. Study No. 40 - Notice of Alibi: The Commission had before it the research study prepared by Mr. John J. Wilson. The Executive Secretary raised the question of whether the Commission was of the opinion there was a need for the requirement that the defendant in a criminal case give notice of his intention to rely on an alibi for his defense. During the discussion Mr. Gustafson stated that, although there were no statistics to support the need for legislation on this matter, he is of the opinion that there should be a requirement for notice of an alibi. After the matter was discussed a motion was made by Senator Cobey and seconded by Mr. Balthis to approve the principle of the requirement for notice of an alibi by the defendant. The motion carried:

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

No: Matthews.

Not Present: Bradley, Thurman.

The Commission then considered the various principles that should be included within a statute requiring a notice of an alibi and agreed upon the following matters:

1. Scope. It was agreed that the notice of an alibi should be required in all criminal cases.

2. Time requirement. The Commission discussed whether to require that notice of an alibi should be filed at the time of the arraignment, at a specified period of time after the plea of guilty or at a specified period of time before trial. After the matter was discussed it was agreed that the proposed statute should provide that notice of an alibi

should be filed at some specified period of time before trial.

(See item 4 below).

(3) Filing and serving of defendant's notice. It was agreed that the notice of alibi should be filed the same place as accusatory pleadings together with proof of service.

4. Contents of notice. The Commission discussed whether the notice should contain only a statement that defendant is going to rely on an alibi and the place where he claims to have been at the time the crime took place or to also require the defendant to disclose the names of his alibi witnesses. After the matter was discussed a motion was made by Mr. Babbage and seconded by Senator Cobey to approve the principle that the defendant must file a notice that he intends to use the defense of an alibi and list the names and addresses of the alibi witnesses not later than ten days before trial and that the prosecution must furnish the names and addresses of witnesses who it intends to use to refute the defendant's alibi witnesses within five days after receipt of defendant's notice of alibi; except that, upon a showing of a reasonable attempt to obtain such names within the time allowed, either the prosecution or the defense can request the court to grant, in its discretion, an extension of time for filing the notice. The motion carried:

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

No: None.

Not Present: Bradley, Thurman.

5. Exclusion of Evidence. A motion was made by Senator Cobey and seconded by Mr. Matthews, that, upon failure to give the required notice, the court may, in its discretion, exclude the evidence of the alibi of the defense or the evidence offered by the prosecution to refute the defendant's alibi witnesses, as the case may be. The motion carried:

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

No: None.

Not Present: Bradley, Thurman.

6. Filing and serving prosecution's notice. The Commission discussed where and how the prosecution should file and serve the list of names of the witnesses that it intends to use to refute defendant's alibi witnesses. After the matter was discussed a motion was made by Senator Cobey and seconded by Mr. Babbage to direct the staff to review this matter and submit its findings at a later meeting. The motion carried:

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

No: None.

Not Present: Bradley, Thurman.

7. Non-fatal variance in the time when or place where offense committed. Mr. Gustafson stated that he did not believe that the alibi statute should apply where several different acts covering a wide period of time are alleged. Final consideration of this matter was deferred to a later meeting.

E. Study No. 48 - Right to Counsel in Juvenile Court Proceedings:

The Commission had before it Memorandum No. 7 (7/23/59), the draft of the Recommendation of the Commission relating to the Right to Counsel in Juvenile Court Proceedings (dated 7/23/59) prepared by Professor McDonough; and the Proposed Statutes dealing with the Right to Counsel in Juvenile Court Proceedings. (A copy of each of these items is attached hereto.)

Mr. Kleps, reporting on the conversation he had with Mr. I. J. Shain (Research Director of the Special Study Commission on Juvenile Justice), stated that Mr. Shain is hopeful that the Special Study Commission and the Law Revision Commission will be able to submit consistent recommendations on related problems with regard to each Commission's respective study on juvenile court procedures. It was agreed that further consideration of this matter should be deferred until the Commission receives the Special Study Commission's final recommendations for changes in the juvenile court law.

The Commission then considered the draft recommendation relating to the right to counsel in juvenile court proceedings. During the discussion Mr. Kleps pointed out that there is a discrepancy between the Special Study Commission's recommendation and the Commission's recommendation concerning the time when notice of the right to counsel should be given. The Special Study Commission recommends that notice of the right to counsel should be given in advance of the hearing whereas the Commission recommends that notice of the right to counsel should be

given at the hearing. Mr. Gustafson stated that in his opinion advance notice of the right to counsel as proposed by the Special Study Commission is undesirable for persons receiving such notice are apt to misconstrue the meaning of the notice and believe that they must get an attorney. He pointed out that in many instances cases are dismissed without a hearing or disposed of without the need of an attorney. After the matter was discussed a motion was made by Mr. Babbage and seconded by Senator Cobey to provide that juveniles and parents present at a predetention hearing should be advised by the court of their right to counsel and also advised of their right to counsel at the hearing of the petition. The motion carried:

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

No: None.

Not Present: Bradley.

The Commission then agreed that the following changes should be made to the draft of the recommendation:

1. Page 5.

(a) Revise paragraph 2 to reflect the action of the Commission with regard to the time notice of right to counsel should be given.

(b) Revise the third sentence of paragraph 2 to make it substantively correct.

(c) Substitute the word "necessary" for the word "desirable" in the third sentence of paragraph 2.

(d) Add the phrase "under Section 700 of the Welfare and Institutions Code" after the phrase "juvenile court proceeding" in the first sentence of paragraph 3.

2. Page 6.

(a) Insert the word "physical" before the phrase "custody of the child" in the second sentence of paragraph 3.

(b) Substitute the word "juvenile" for the phrase "person named in a juvenile court petition" in the first sentence of paragraph 4.

The Commission then discussed whether its recommendation should contain a discussion on the policy problem relating to the expense involved if the Commission's statute designed to effectuate its recommendation were enacted. After the matter was discussed a motion was made by Mr. Babbage, seconded by Senator Cobey, and adopted to revise the latter portion of the draft of the recommendation relating to the furnishing of counsel at public expense as follows:

(a) The second sentence of the first paragraph under the subtitle "Furnishing Counsel at Public Expense" should read "The Commission has decided not to make such a recommendation, because the issue is primarily fiscal rather than legal in nature and hence is not an issue as to which it would be appropriate for the Commission to advise the Legislature."

(b) The third sentence of the first paragraph and the remaining portion of the draft recommendation under the subtitle "Furnishing Counsel at Public Expense" should be deleted.

Minutes - Regular Meeting
September 24, 25 and 26, 1959

(c) Appendix A, Tables 1, 2 and 3 should not be included in the draft recommendation.

Mr. Gustafson expressed opposition to the motion. He stated that inasmuch as the deleted portion discusses the reason why the Commission is not submitting a recommendation on this matter it should be included in the draft recommendation.

Respectfully submitted,

John H. DeMouilly
Executive Secretary