

Minutes
1/15/60

A G E N D A

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

January 22+23, 1960

Friday, January 22

1. Minutes of December 1959 meeting (sent 1/6/60).
2. Election of Chairman and Vice-Chairman.
3. Approval of payment of consultant for Study No. 46 - Arson.
See study (sent 1/6/60) and Memorandum No. 6(1960)(sent 1/6/60).
4. Study No. 36 - Condemnation: Moving Expenses.
See Study on Moving Expenses (you have this study)
and Memorandum No. 6 (sent 12/8/59) and Addendum to
study (you have this).

Saturday, January 23

5. Progress Report.
See Memorandum No. 1(1960)(sent 1/6/60).
6. Annual Report.
See: Mimeographed Annual Report (distributed for December meeting).
Memorandum No. 4(1960) (enclosed).
7. Study No. 32 - Arbitration.
See: Memorandum No. 9 (sent 12/8/59).
Memorandum No. 2(1960) (sent 1/14/60).
8. Study No. 40 - Notice of Alibi.
See Memorandum No. 7(1960) (sent 1/14/60).
9. Report of Consultant on Study No. 61 - Election of Remedies.
See Memorandum No. 8(1960) (sent 1/14/60).
10. Study No. 53 - Personal Injury Damages. Employment of Consultant.
See Memorandum No. 9(1960) (enclosed).
11. Study No. 23 - Rescission of Contracts.
See Memorandum No. 5(1960) (enclosed).
Study (you have this study).

MINUTES OF MEETING

of

January 22 and 23, 1960

San Francisco

A regular meeting of the Law Revision Commission was held in San Francisco on January 22 and 23, 1960.

Present: Roy A. Gustafson, Chairman
John R. McDonough, Vice Chairman
Honorable Clark L. Bradley
Honorable James A. Cobey
Leonard J. Dieden
George G. Grover
Charles H. Matthews
Herman F. Selvin
Thomas E. Stanton, Jr.
Ralph N. Kleps, ex officio (January 22)

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

Mr. Robert Nibley of the law firm of Hill, Farrer & Burrill of Los Angeles, research consultant for Study No. 36(L) - Condemnation, was also present during a part of the meeting on January 22.

A motion was made, seconded and unanimously adopted approving the minutes of the meeting held on December 18 and 19, 1959, with the following corrections:

(1) Page 3. The word "of" should be substituted for the word "and" in the fourth line from the bottom of the page. The words "recommend the" should be inserted before

the words "technical amendments" in the second line from the bottom of the page.

(2) Page 12. The first portion of Mr. Selvin's motion should be reworded to read as follows:

. . . to direct the staff to redraft Rule 65A to provide in substance the principle that a declaration is inadmissible if the judge finds (1) that at the time of the event or fact declared the declarant did not have the capacity to perceive the event or (2) that at the time the declarant made the statement he did not have the capacity to communicate the event or fact or the capacity to understand the duty of a witness to tell the truth . . .

(3) Page 13. The word "Evidence" should be deleted from the second line from the bottom of the page.

I. ADMINISTRATIVE MATTERS

A. Election of Officers: A motion was made by Mr. Dieden and seconded by Mr. McDonough to adopt the policy that no officer (Chairman or Vice Chairman) is eligible to succeed himself in the same office. This would, for example, prevent the person elected as Chairman at this meeting from succeeding himself as Chairman. The motion carried:

Aye: Dieden, Gustafson, McDonough, Selvin, Matthews.

No: Bradley, Cobey, Grover, Stanton.

The motion was then made by Mr. Dieden and seconded by Mr. Gustafson that the term of Chairman and Vice Chairman should be for a two year period commencing in January of the even numbered years. The motion carried.

Aye: Bradley, Cobey, Dieden, Grover, Gustafson,
Matthews, McDonough, Selvin, Stanton.

No: None.

After nominations were made, Mr. Gustafson was elected Chairman of the Commission and Mr. McDonough was elected Vice Chairman of the Commission.

B. Assembly Concurrent Resolution - re Authorization to Continue Commission's Studies in Progress: The Executive Secretary raised the question of whether the same form used for the 1959 concurrent resolution requesting legislative approval for the Commission to continue the studies in progress should be introduced at the 1960 General Session. After the matter was discussed a motion was made, seconded and unanimously adopted to introduce at the 1960 General Session a concurrent resolution similar in form to that used in 1959. Mr. Kleps was requested to prepare the resolution in proper form and to transmit it to Mr. Bradley for introduction.

C. Progress Report: The Commission considered Memorandum No. 1 (1960) and the attached material. After the matter was discussed, a motion was made by Mr. Bradley and seconded by Mr. Stanton to disapprove the use of the committee system. The motion carried:

Aye: Bradley, Gustafson, Matthews, Selvin, Stanton.

No: Cobey, Dieden, Grover, McDonough.

A motion was then made by Mr. McDonough and seconded by Mr. Selvin that the Commission hold three day meetings (Thursday, Friday and Saturday) every other month. The motion carried:

Aye: Bradley, Grover, Gustafson, Matthews, McDonough,
Selvin.

No: Cobey, Dieden, Stanton.

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D. Scheduled Future Meetings: Future meetings of the Commission are scheduled as follows:

- (1) February 18, 19 and 20. (Los Angeles at U.C.L.A.)
- (2) March 18 and 19. (Sacramento)
- (3) April 21, 22 and 23. (San Francisco - the New State Bar Building at Franklin and McAllister Streets)

E. 1960 Annual Report: The Commission considered Memorandum No. 4 (1960), Exhibit A and the proposed 1960 Annual Report. After the matter was discussed the following action was taken:

(1) A motion was made by Mr. Grover and seconded by Mr. Bradley to approve the substance of the statement relating to the Chessman case proposed in Exhibit A. The motion carried:

Aye: Bradley, Dieden, Grover, Gustafson, Matthews,
Stanton.

No: None.

Pass: Selvin.

Not Present: Cobey, McDonough.

(2) A motion was made by Mr. Bradley and seconded by Mr. Dieden to include a report of the Vallerga case in the 1960 Annual Report. The motion carried:

Aye: Bradley, Dieden, Grover, Matthews.

No: Gustafson, Selvin, Stanton.

Not Present: Cobey, McDonough.

(3) A motion was then made by Mr. Dieden and seconded by Mr. Selvin to approve the proposed language in Memorandum No. 4 (1960) relating to the Vallerga case with the following revisions: The word "unanimously" should be deleted and a statement of what Section 24200(e) provides should be included. The motion carried:

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Aye: Bradley, Dieden, Grover, Gustafson, Matthews,
Selvin, Stanton.

No: None.

Not Present: Cobey, McDonough.

It was agreed to authorize the Chairman, the Executive Secretary and Legislative Counsel to put the proposed language in final form and send it to the printer.

A motion was then made by Mr. Dieden and seconded by Mr. Bradley to approve the sentence as set forth in Memorandum No. 4 (1960) relating to the recommendation of the Commission to the Legislature to repeal Section 24200(e). The motion carried:

Aye: Bradley, Dieden, Grover, Gustafson, Matthews,
Selvin, Stanton.

No: None.

Not Present: Cobey, McDonough.

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F. Governor Brown's Attendance at Commission Meeting:

The Chairman reported on the letter he received from Governor Brown that stated that he hoped to attend a Commission meeting in the near future. After the matter was discussed it was agreed that the Chairman should write Governor Brown, extending him an invitation to meet with the Commission at its March meeting.

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G. Certificates of Service: The Executive Secretary reported that the cost for printing certificates of service would be approximately \$8 to \$10 per certificate. After the matter was discussed a motion was made, seconded and unanimously adopted to approve the policy that the Commission would not present certificates of service to its past members.

II. CURRENT STUDIES

A. Study No. 23 - Rescission of Contracts: The Commission considered Memorandum No. 5 (1960) and the research study prepared by Professor Lawrence A. Sullivan.

With respect to each of the following matters, a motion was made, seconded and adopted to approve the principle that:

- (1) The legal action with respect to rescission should be limited to an action to obtain a decree of rescission and the present law and procedure for unilateral out-of-court rescission should be abolished.
- (2) Prompt notice should be required before bringing an action to obtain a decree of rescission.
- (3) Failure to give notice of rescission should not defeat an action to obtain a decree of rescission where no substantial prejudice is suffered by the defendant.
- (4) The statute of limitations for rescission of a contract (written or oral) should be three years.
- (5) The statute of limitations should begin to run from the date that the acts constituting the grounds for rescission were committed, or discovered in case of fraud or mistake.
- (6) There should be no jury trial in an action to obtain a decree of rescission.
- (7) Where the relief prayed for is money, the provisional remedy of attachment should be available.

B. Studies Nos. 29 and 43 - Post-Conviction Sanity

Hearings and Separate Trial Issue Insanity: The Commission considered the proposed statute in connection with the study concerning post-conviction sanity hearings submitted by Professor Louisell. After the matter was discussed, a motion was made, seconded and unanimously adopted to authorize the Executive Secretary (1) to pay Professor Louisell the amount due him under Contract No. 13 (1957) for the study on Post-Conviction Sanity Hearings, and (2) to pay Professor Louisell the amount due him under Contract No. 14 (1957) for the study on Separate Trial Issue Insanity as soon as he submits the proposed statute on that study.

C. Study No. 32 - Arbitration:

Valuations, Appraisals and Non-Justiciable Disputes. The Commission had before it Memorandum No. 9 (12/9/59) and the staff research study - Arbitration: Valuations, Appraisals, and Non-Justiciable Disputes. Motions were made, seconded and adopted to establish the following tentative policy decisions:

(1) Agreements to arbitrate non-justiciable questions should be enforceable under the arbitration statute.

(2) Agreements to submit valuation questions to third parties for appraisal and determination in accordance with the independent judgment of such third parties should be specifically enforceable.

(3) Appraisal agreements should be enforced in the same manner as arbitration agreements.

(4) Titles to real property should be subject to arbitration.

(5) The arbitration statute should provide for the enforcement of agreements to arbitrate any question that could be made the subject of a binding contract between the parties.

Enforcement of Arbitration Agreements. The Commission had before it Memorandum No. 2 (1960) and the staff study relating to enforcement of arbitration agreements. Motions were made, seconded and adopted to establish the following tentative policy decisions:

(1) Specific performance upon motion of the aggrieved party should be retained as the method for enforcing arbitration agreements.

(2) The arbitration enforcement procedure should not include a jury trial.

(3) The application for an order directing arbitration should show (a) the agreement to arbitrate and (b) the defendant's refusal to arbitrate.

(4) The amount of notice to be given upon a motion to compel arbitration should be the same as is given upon any motion in the superior court. (Code of Civil Procedure Section 1005 - 5 and 10 days.)

(5) The application for an order directing arbitration should be served in the manner provided for service of summons in an action.

(6) Parties should be able to contract for a different method of service.

(7) The arbitration statute should provide for a proceeding to stay a pending arbitration.

(8) The arbitration statute should provide for a stay of judicial proceedings pending arbitration.

(9) The arbitration statute should provide that a stay of judicial proceedings may be granted only if an order to compel arbitration has been obtained or applied for.

(10) The staff was directed to draft a statute that provides that the defendant may raise such appropriate defenses as the staff believes the defendant should have.

(11) The arbitration statute should provide that the court shall order arbitration only if it finds an agreement to arbitrate.

(12) The court should have discretion to delay arbitration until other questions between the parties are settled.

(13) The court must find that there is an arbitration agreement and "a dispute within its terms."

(14) An order for arbitration should not be refused by the court on the ground that the claim in issue lacks merit or bona fides or because fault or grounds for the claim sought to be arbitrated have not been shown.

(15) Arbitrators should be appointed by the court if the parties cannot agree on an appointment.

(16) The court should be permitted to appoint both neutral and party arbitrators.

(17) Consideration of the method of appointing arbitrators was deferred until Mr. Kagel's study (due 2/1/60) is available.

(18) Upon application of a party the court should be authorized to order the arbitrators to act.

D. Study No. 36(L) - Condemnation Study:

Evidentiary Problems. Mr. Nibley, our consultant, stated that he and his associates recommended in their study that all evidence received in an eminent domain proceeding be treated as independent evidence of value. However, at the December meeting the Commission determined that, although as a general rule evidence introduced is to be considered as independent evidence of market value, some evidence is not to be considered as independent evidence of market value but is to be admitted only in explanation of opinion testimony. Mr. Nibley stated that he had reconsidered his original recommendation in view of the problems disclosed at the December meeting of the Commission. He stated he believes that the jury will be even more confused under the proposed policy of the Commission than under the present law and recommended that the Commission reconsider its actions taken at the December meeting on this matter and determine that either (1) all evidence admitted should be admitted as independent evidence of market value or (2) all evidence admitted should be admitted as explanation of opinion testimony. After the matter was discussed, a motion was made by Mr. McDonough and seconded by Mr. Dieden to direct the staff to draft two alternative statutes for consideration by the Commission, one statute treating all evidence as independent evidence of market value and the other statute treating

all evidence not as independent evidence but merely as evidence in support of opinion testimony. The motion carried:

Aye: Bradley, Dieden, Grover, Gustafson, Matthews, McDonough
Selvin, Stanton.

No: None.

Not Present: Cobey.

Moving Expenses. The Commission considered Memorandum No. 6 (¹⁹⁵⁹1960) and the consultant's study, both relating to moving expenses. Motions were made, seconded and adopted to establish the tentative policy decisions of the Commission as follows:

(1) A condemnee should be allowed compensation for moving expenses incurred as a result of condemnation.

(2) Condemnees should be entitled to reimbursement (subject to the limitations indicated below) "for their actual costs of removing and relocating their personal property necessarily incurred as a direct result of the taking."

(3) A condemnee should be compensated (subject to the limitations indicated below) for moving costs necessarily incurred in moving property from the larger parcel from which the part taken by condemnation is severed.

(4) A tenant at will should not be compensated for moving expenses. During the discussion, a question was raised as to whether there should be a provision in the draft statute for estoppel or a qualification or exception where certain representations are made by the owner of property to the tenant at will as a

result of which hardship is caused where the property is subsequently taken by condemnation. The research consultant was directed to consider the problem of estoppel and the feasibility of providing for an exception for the hardship case.

(5) A lessee should be reimbursed for moving expenses if the lease term is cut short by the condemnation rather than under the terms of the lease; but if the lease is terminated by the condemnor under the terms of the lease after purchase of the lessor's interest, the lessee should not be reimbursed for moving expenses.

(6) Where there is a temporary taking and the condemnee has the right to possession both before and after the term taken, the condemnee (who can be either the owner of the fee or the tenant of an unexpired term) should be compensated for the expenses of moving off the property, storage of his goods during the condemnor's occupancy and moving back onto the property. The draft statute should clearly provide that this compensation is not to be considered as part of the market value of the lease.

(7) The amount awarded for moving expenses should be the actual expenses incurred up to a reasonable amount, subject to the limitations set out below.

(8) A limitation of 25 percent of the total award should be imposed upon the right to recover moving expenses.

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(9) Recoverable transportation expense for both business and residential property should be limited to 25 miles (from the condemned property). A motion to reconsider the action taken in regard to the 25 mile limitation on the recovery of transportation expenses for business and residential property did not carry.

(10) The 25 percent limitation should not apply to negotiated settlements. A motion to approve the principle that neither of the limitations (25 per cent, 25 miles) should apply to negotiated settlements did not carry. It was pointed out that where there is more than one claimant involved the 25 percent limitation of the total amount awarded for moving expenses cannot be ascertained until all the claims have been determined. Thus, if the 25 percent limit applied to negotiated settlements, the claimant who negotiates an early settlement would suffer a hardship (for he must wait until the total amount awarded is ascertained) or the claimant who is one of the last to have his claim determined might not recover the full amount due him if the condemnor reaches the 25 percent limitation by paying the earlier claims before ascertaining the total amount to be awarded.

(11) Only the 25 mile limitation should apply when only a leasehold interest is taken. A motion to approve the principle that both the limitations (25 percent, 25 miles) should apply when only a leasehold interest is condemned did not carry.

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(12) The statute should make it clear that, in case of a taking for a term only, there is a 25 mile limitation when the personal property is moved from the condemned realty, and there is another 25 mile limitation when the condemnee moves back onto the property; i.e., a condemnee is entitled to reimbursement for moving a total of 50 miles, round trip, where there is a temporary taking.

(13) The amount to be awarded for moving expense should be determined by the court upon a claim filed after the move has been accomplished.

(14) The claim for moving expenses need not be verified.

(15) The time for filing a statement of a claim shall expire 30 days after the date on which the property is vacated by the last occupant except that the court can order an extension of time where good cause is shown.

(16) The Commission considered whether moving expenses for fixtures should be allowed if the condemnee elects to move the fixtures. The following motions were made, seconded and adopted:

a. The substance of paragraphs two and three of the proposed revision of Section 1248(b) of the Code of Civil Procedure (page 40 - moving expense study) was approved with the addition of the clause "less their salvage value" at the end of paragraph two.

b. The research consultant was requested to review the proposed revision of Code of Civil Procedure Section 1248(b) to ascertain the desirability of retaining or broadening Section 1248(b) and to submit a study and recommendation to the Commission at a later date. During the discussion of moving expenses relating to fixtures and Section 1248(b) the following questions were raised:

- (a) Whether there is any necessity for the provision if moving expenses are allowed.
- (b) Whether it is desirable to include commercial fixtures.
- (c) Whether the condemnor can object if the condemnee elects to remove the fixtures.
- (d) Whether the condemnor should have an option to buy the fixtures rather than to allow the condemnee to move them.
- (e) Whether there should be a provision giving the condemnee the election to move the fixtures only if the condemnor agrees.

Publication of Commission Reports on Eminent Domain Study.

The Commission agreed that each portion of the condemnation study together with the Commission's tentative recommendation and statute on that portion should be published separately.

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Priority of Topics. The research consultant was requested to provide a study in time so that the Commission could consider and act on it prior to the 1961 Session concerning the use of the concept of "market value" in condemnation proceedings and in connection therewith to review the British and Canadian methods of valuing property taken by eminent domain.

E. Study No. 40 - Notice of Alibi: The Commission considered Memorandum No. 7 (1960), a proposed recommendation and draft statute.

After the draft statute was considered, it was agreed that the definition of "alibi evidence" should be broadened to include evidence used to establish the presence of the defendant at a place other than the place where any act material to the crime occurred.

The Commission then acted on the following matters:

(1) A motion was made by Senator Cobey and seconded by Mr. Matthews to reconsider the basic principle previously adopted by the Commission to enact legislation that requires defendant in some circumstances to furnish a notice of alibi if defendant intends to rely on an alibi. The motion did not carry:

Aye: Cobey, Grover, Matthews.

No: Bradley, Dieden, Gustafson, McDonough, Selvin,
Stanton.

(2) A motion was made by Mr. Bradley and seconded by Mr. McDonough not to require that the demand shall include a statement as to either the "specific" time or "specific" place. The motion carried:

Aye: Bradley, Grover, Gustafson, McDonough, Stanton.

No: Cobey, Dieden, Matthews, Selvin.

(3) A motion was made by Mr. McDonough and seconded by Mr. Gustafson not to require notice to the opposing party where application is made to the court for an order to amend either the demand or notice of alibi. However, the statute should provide that the party who obtains an order authorizing or requiring an amendment shall promptly serve the order on the opposing party. The motion carried:

Aye: Bradley, Cobey, Gustafson, Matthews, McDonough,
Selvin.

No: Dieden, Grover.

Pass: Stanton.

(4) A motion was made by Mr. Stanton and seconded by Mr. Selvin to direct the Staff to redraft the section that provides that the court, upon good cause shown, may order an amendment to either the demand or notice of alibi, deleting the words "amplification or reduction." The motion carried:

Aye: Bradley, Cobey, Dieden, Grover, Gustafson,
Matthews, Selvin, Stanton.

No: McDonough.

(5) A motion was made by Senator Cobey and seconded by Mr. Gustafson that the statute should provide that the provisions of the statute relating to exclusion of evidence do not become operative unless both the demand and the notice of alibi have been served. The motion carried:

Aye: Bradley, Cobey, Dieden, Gustafson, Stanton.

No: Grover, Matthews, McDonough, Selvin.

(6) A motion was made by Mr. Selvin and seconded by Mr. Matthews that the statute should provide that where either the demand or notice of alibi is not used, neither shall be admitted as evidence. The motion carried:

Aye: Bradley, Cobey, Dieden, Gustafson, Matthews, McDonough, Selvin, Stanton.

No: Grover.

Other following changes in the draft statute were agreed upon:

(1) The "day of the trial" should be reworded to read "day set for trial" in subsection (2) of the draft statute.

(2) The statute should provide that the demand be signed by the prosecuting attorney.

(3) The words "served and filed" should be substituted for the word "finished" in subsection (2)(d) of the draft statute.

(4) The draft statute should clearly provide that the defendant does not have to list himself as a witness as required under subsection (3)(b) of the draft statute.

(5) Subsection (2)(a), (b) and (c) should conform in style to subsection (3)(a) and (b) of the draft statute.

(6) The words "testimony of a witness" should be substituted for the word "evidence" in the first paragraph of subsection (5) of the draft statute.

(7) The section providing that the court may order an amendment to either the demand or notice of alibi should clearly provide that such request or application for such order can be done only before trial.

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The Commission then considered where the notice of alibi statute should be located. After the matter was discussed, it was agreed to designate it as a new chapter to be located somewhere between Chapter 4 (commencing with Section 1016) and Chapter 7 (commencing with Section 1041) of the Penal Code.

The Commission considered the proposed recommendation relating to notice of alibi and agreed that the recommendation should be revised to conform to the changes made in the draft statute. Other additions and changes in the recommendation were suggested.

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F. Study No. 46 - Arson, Payment of Consultant: The Commission considered Memorandum No. 6 (1960) and the research study relating to arson prepared by Professor Herbert L. Packer for the determination of whether he should be paid at this time. After the matter was discussed, a motion was made, seconded, and unanimously adopted to authorize the Executive Secretary to pay Professor Packer for his study under Contract No. 2, 1957.

G. Study No. 53(L) - Personal Injuries Damages: The Commission considered Memorandum No. 9 (1960) and the attached material. Senator Cobey stated that problems still do exist despite the 1957 legislation to Civil Code Sections 171c and 163.5. After the matter was discussed a motion was made, seconded and unanimously adopted to authorize the Executive Secretary to take steps to obtain a research consultant for this topic.

H. Study No. 61 - Election of Remedy: The Commission considered Memorandum No. 8 (1960) and a report submitted by the Research Consultant, Professor Robert A. Girard. After the matter was discussed a motion was made, seconded and unanimously adopted to direct the Executive Secretary to request Professor Girard to: (1) expand his study to deal with the doctrine of election of remedy in all cases; (2) ascertain what legislation would be necessary to clarify the case law; and (3) submit a draft statute to effectuate his recommendation. It was agreed the consideration of payment should be deferred until a study and proposed draft statute have been submitted.

Comment: During the discussion Mr. McDonough stated that although the Research Consultant recommends that the study should be abandoned, it is his opinion that this is a study on which the Commission should recommend legislation to clarify the existing law with respect to the doctrine of election of remedies generally. He believes that the average attorney is unable to devote the amount of time to research that is necessary if he is to arrive at the conclusion reached by the Research Consultant.⁷

Respectfully submitted,

**John H. DeMouilly
Executive Secretary**