

Place of Meeting

Oval C. Room
Ambassador Hotel
Los Angeles

A G E N D A

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles

Sept. 26-28, 1960

Monday and Tuesday, September 26 and 27

1. Minutes of August 1960 Meeting (sent 8/31/60)
2. Study No. 36(L) - Condemnation
 - See: Memorandum No. 74(1960) (letters re Commission's recommendations)
(sent 8/31/60)
 - Supplement to Memorandum No. 74(1960)(sent 9/13/60)
 - Second Supplement to Memorandum No. 74(1960)(sent 9/14/60)
 - Memorandum No. 75(1960)(evidence)(sent 9/14/60)
 - Memorandum No. 76(1960)(moving and incidental expenses)
(sent 9/15/60)
 - Memorandum No. 77(1960)(taking possession and passage of
title)(enclosed)
 - Memorandum No. 78(1960)(apportionment of award)(to be sent)
 - Memorandum No. 79(1960)(pre-trial and discovery)(to be sent)
3. Study No. 37(L) - Claims Against Public Officers and Employees
 - See: Memorandum No. 80(1960)(sent 8/25/60)
 - Supplement to Memorandum No. 80(1960)(sent 9/13/60)
4. Study No. 38 - Inter Vivos Rights
 - See: Memorandum No. 85(1960)(sent 9/16/60)
5. Study No. 23 - Rescission of Contracts
 - See: Memorandum No. 81(1960)(to be sent)
6. Study No. 48; Study No. 54 - Juvenile Court Proceedings
 - See: Memorandum No. 82(1960)(sent 9/20/60)
7. Study No. 34(L) - Uniform Rules of Evidence
 - See: Memorandum No. 83(1960)(privileges)(sent 8/31/60)
 - Supplement to Memorandum No. 83(1960)(sent 9/8/60)
 - Second Supplement to Memorandum No. 83(1960)(sent 9/16/60)
8. Publicity Regarding Commission's 1961 Legislative Program
 - See: Memorandum No. 84(1960)(sent 8/31/60)

Wednesday, September 28

Continuation of above agenda if not completed.

MINUTES OF MEETING

of

September 26, 27 and 28, 1960

Los Angeles

A regular meeting of the Law Revision Commission was held in Los Angeles on September 26, 27 and 28, 1960.

Present: Roy A. Gustafson, Chairman
John R. McDonough, Jr., Vice Chairman
Honorable Clark L. Bradley
Honorable James A. Cobey
George G. Grover
Herman F. Selvin
Vaino H. Spencer
Thomas E. Stanton, Jr.
Ralph N. Kleps, Ex Officio

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

The following members of the law firm of Hill, Farrer & Burrill of Los Angeles, research consultant for Study No. 36(L) - Condemnation, were present during a part of the meeting on September 26, 27 and 28:

Robert Nibley (September 28)
John McLaurin (September 26 and 27)
Stanley Tobin (September 26, 27 and 28)

The following persons representing the Department of Public Works were present during a part of the meeting on September 26, 27 and 28:

Robert E. Reed (September 27 and 28)
Holloway Jones (September 26, 27 and 28)
George C. Hadley (September 26 and 27)
Robert Carlson (September 26, 27 and 28)
Mr. De Martini (September 26)
Jack Howard (September 26)
Chuck Spencer (September 26, 27 and 28)

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The following past members of the Commission were present during a part of the meeting on September 26 and 27:

Hon. Frank S. Balthis (September 27)
Hon. Leonard J. Dieden (September 27)
Joseph A. Ball (September 26)
Charles H. Matthews (September 27)

After the word "claim" was added before "the privilege" in the next to last line on page 13, a motion was made and unanimously adopted to approve the minutes of the meeting held on August 18, 19 and 20, 1960.

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I. Administrative Matters

A. Publicity Regarding Commission's 1961 Legislative Program: The Commission considered Memorandum No. 84(1960). A motion was adopted to approve the publication in the State Bar Journal of the list of studies on which the Commission intends to submit recommendations to the 1961 Legislature, together with a statement that the Commission has available for distribution a limited number of copies of the tentative recommendation on each study listed.

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B. Scheduled Commission Meetings: Future Commission meetings are
scheduled for:

October 20, 21 and 22 in San Francisco.

November 17 and 18 (tentatively) in San Francisco.

II CURRENT STUDIES

A. Study No. 23 - Rescission of Contracts: The Commission considered Memorandum No. 81(1960) and the attached draft recommendation and proposed statute relating to rescission of contracts. After the matter was discussed the following action was taken:

Draft Statute

Section 598 - Code of Civil Procedure - Releases.

The title of the bill was revised to read: "An act to add Section 598 to the Code of Civil Procedure, relating to releases."

In the second line the words "sitting without a jury" were added after "court." In the third line the words "and whether it" were substituted for "or" and the words "pursuant to the provisions of Chapter II (commencing with Section 1688) of Title V of Part II of Division Third of the Civil Code" were added at the end of the first sentence.

Section 598 of the Code of Civil Procedure was approved as revised.

Section 1689 - Civil Code.

Subdivision 5 was relocated at the beginning of the section and designated subdivision (a). The rest of the section was designated subdivision (b).

Section 1692 - Civil Code.

In subdivision (2) the phrase "is not subject to rescission" was changed to read "has not been rescinded." In subdivision (3) the words "is not" were substituted for "shall not be deemed."

Section 1693 - Civil Code.

In subdivision (2) the words "and may otherwise in its judgment adjust

the equities between the parties" were deleted. The staff was directed to place the language in Section 1692 after revising it so that it would apply in any rescission case.

The motion to approve the draft statute and to send it to the State Bar for its views carried:

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

No: None.

Not Present: Cobey.

Recommendation

A paragraph is to be added, in an appropriate place, explaining the inclusion in the preamble of Section 1689 of the provision relating to substantial restoration.

Page 2. The words "in appropriate cases" were added after "justice court" in the fifth line, and the word "illegal" was substituted for the word "legal" in the tenth line from the bottom of the page.

Page 3. The word "control" was substituted for "changed" in the last line.

Page 4. The first full paragraph was revised to read:

The Law Revision Commission believes that the rights of the parties should not be dependent on the form of the complaint. These rights should be dependent upon the nature of the wrong complained of and the substantive relief requested. The Commission also believes that the law relating to rescission is unnecessarily complex and confusing to both courts and attorneys, to say nothing of laymen. As it is the existence of the duality

in the procedures for obtaining rescissionary relief that has given rise to this situation, the Commission believes the problems may be solved by the elimination of this duality, together with such modifications of the existing law as are necessary to provide a simple and expeditious procedure to be followed in situations justifying rescission.

The staff was directed to add a footnote at the end of paragraph 2 to indicate that this study and recommendation are concerned with the procedure for effecting and enforcing rescission and not with the grounds upon which a contract may be rescinded.

Page 5. In paragraph 3 the words "and offer to restore" were added after "notice" in the first line and the words "and offer" were added after "notice" in the fourth line. A sentence or footnote is to be added at the end of the first sentence to indicate that the question whether the service of a pleading requesting rescissionary relief would comply with the requirement that notice be given promptly would depend upon the facts in the particular situation. The word "promptly" in the last line of paragraph 3 was moved to the end of the sentence.

In paragraph 4 the last two sentences were revised to read:

If a bare money judgment is sought, a justice court will have jurisdiction in appropriate cases and the plaintiff may not convert the action into an equity action and thus deprive the justice court of jurisdiction merely by a prayer for rescission. The statute should also make plain that the court may grant any other relief that is appropriate under the circumstances if it develops at the trial that the plaintiff has mistaken his remedy and the purported rescission was not effective.

The staff was directed to make other revisions after considering changes suggested by Commissioner McDonough.

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The motion was adopted approving the recommendation as revised and authorizing the Executive Secretary to send the recommendation and draft statute to the State Bar for its views.

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

No: None.

Not Present: Cobey, Stanton.

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B. Study No. 33 - Survival of Actions: The Commission considered Memorandum No. 86(1960). A motion was unanimously adopted to add the following paragraph at the end of the proposed amendment to Section 573 of the Probate Code:

Nothing in this section shall be construed as making assignable things in action of a nature which were not assignable prior to the enactment of this section.

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C. Study No. 34(L) - Uniform Rules of Evidence - Privilege: The Commission considered a portion of Memorandum No. 83(1960) and the Supplement to Memorandum No. 83(1960) (9/8/60) relating to Uniform Rule 40. A motion was adopted disapproving Rule 40, inasmuch as it is not a rule of evidence and merely states the existing California law which will remain in effect if Rule 40 is not adopted.

D. Study No. 36(L) - Condemnation: The Commission had before it: Memorandum No. 74(1960) and the first and second supplements to Memorandum No. 74(1960), containing copies of letters commenting on various aspects of the Commission's proposed recommendation on condemnation; Memorandum No. 75(1960) - Evidentiary Problems, Memorandum No. 76(1960) - Moving Expenses and Incidental Business Losses, and Memorandum No. 77(1960) - Taking Possession, all of which analyze the comments made upon the Commission's proposed recommendations and draft statutes and contain suggested revisions of the draft statutes; and Memorandum No. 79(1960) and the attached revised recommendation and proposed statute relating to pretrial and discovery in eminent domain proceedings. After the matter was discussed the following actions were taken:

Memorandum No. 75(1960) - Evidentiary Problems*

A motion to extend the Commission's proposed draft statute relating to evidentiary problems to all cases in which value is in issue did not carry.

Section 1248.1

Subdivision (1). A motion to revise the last sentence of Section 1248.1 to delete "presumed to be," thus making the owner a qualified witness did not carry. It was agreed that the last sentence of Section 1248.1 should be retained as drafted.

*References to Sections and subdivision are to those in the draft statute attached to Memorandum No. 75(1960).

A motion was adopted approving the sentence to be added as the last sentence of subdivision (1) after the word "and" was substituted for "or" in the last line:

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

No: None.

Pass: McDonough.

Not Present: Cobey, Spencer.

The motion was adopted approving the language proposed as subdivision (2) after the word "and" was substituted for "or" in the last line:

Aye: Bradley, Grover, Gustafson, Selvin.

No: Stanton.

Not Present: Cobey, McDonough, Spencer.

Section 1248.2.

The motion to approve the proposed changes in the first paragraph of Section 1248.2 was adopted after adding "is" after "opinion" in the third line, substituting the word "and" for "buying from" in the fifth line, adding the words "dealing with each other" after "seller" in the fifth line, adding the words "and available" after "adaptable" in the seventh line, and adding the words "and sell" after "purchase" in the eighth line.

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

No: None.

Not Present: Cobey, Spencer.

Subdivisions (1) and (2) were approved as revised by the staff.

Subdivision (3). The staff was directed to redraft the statute so that the rent reserved in leases of both the subject property and comparable property might be used to determine a fair rental on the subject property where the capitalization approach is to be used to determine value. However, the value of comparable property as indicated by the capitalized value of the income or rent therefrom was to be excluded.

Subdivision (3)(a). The principle of subdivision (3)(a) was approved after the words "which included" were substituted for "of" in the first line.

Subdivision (4). Subdivision (4) was approved after revising it to read as follows:

The capitalized value of the reasonable net rental attributable to the property or property interest sought to be condemned as distinguished from the capitalized value of the income or profits attributable to any business conducted thereon.

Subdivision (5). Subdivision (5) was approved after revising it to read:

The value of the property sought to be condemned as indicated by the value of the land together with the cost of reproducing the improvements thereon, if the improvements enhance the value of the land for its highest and best use, less whatever depreciation or obsolescence the improvements have suffered.

Section 1248.3.

The motion to add "material" before "part" in the fourth line of the first paragraph did not carry.

Subdivision (3). The clause relating to admissions is to be redrafted so that admissions may be introduced and used only against a party and

not in his behalf.

The proposal to add the phrase "but the opinion of the witness may be based upon the price and other terms of an option contract which is in substance a sale of the property" was rejected.

The proposed deletion of the sentence, "Nothing in this subdivision permits an admission to be used as direct evidence upon any matter that may be shown only by opinion evidence under Section 1248.1", was also rejected.

Subdivision (5). The proposal to add subdivision (5) was rejected.

Subdivision (6). The motion was adopted approving subdivision (6) after renumbering it subdivision 5.

Section 1248.4.

Section 1248.4 was approved without change.

Effective Date Provision. It was agreed that a section should be drafted to provide that this act is inapplicable to all cases brought to trial prior to the effective date of the act.

The staff was directed to review the statute to determine whether "or property interest" should be added whenever "property" is used.

Memorandum No. 76(1960) - Moving Expenses and Incidental Losses.*

Section 1270.

After inserting the word "installing" after "reassembling" in

*References to sections and subdivisions are to those in the draft statute attached to Memorandum No. 76 (1960).

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subdivision (5), the section was approved as revised by the staff.

Section 1270.1.

Section 1270.1 was approved as revised by the staff except that subdivision (2) was retained with the following language added to the end of the sentence: "but not in any event in excess of 30 days."

Section 1270.2.

Section 1270.2 was approved as revised by the staff.

Section 1270.3.

Subdivision (2) was approved as revised by the staff, however, the language proposed to be deleted from subdivision (2) was added as an additional subdivision, so that the limitations of this section would be inapplicable to negotiated settlements.

Proposed subdivision (3), limiting assignability of the claim for moving expenses, was not approved.

Proposed subdivision (4) was approved after it was amended to conform to Section 1270.1, relating to storage.

Section 1270.4.

Section 1270.4 was approved, but the staff was requested to modify the language of this section or the language of Section 1270.2 so that it is clear that a claim must be filed for moving off of the condemned property within a reasonable time after the move and another claim must be filed for storage expenses and for moving back onto the condemned property when the term taken for public use expires.

Section 3.

The effective date section was modified to provide that the act takes effect on July 1, 1962, and as modified, the section was approved.

Memorandum No. 77(1960) - Taking Possession

Section 1243.5*

Subdivision (1) (Pg. 7 - Memo 77). Subdivision (1) was approved as revised by the staff.

Subdivision (2). In the opening paragraph, "determined pursuant to" was substituted for "required in" at the end of the third line, and the paragraph was approved as revised.

Subdivision (2)(a) was approved as revised.

In subdivision (2)(b), the proposed language beginning "and the statutory . . ." was not approved.

Proposed subdivisions (2)(c) and (2)(d) were not approved.

Subdivisions (2)(e) and (2)(f) (on pages 7 and 8 of Memo 77) were approved as revised, but the words "by the order" were deleted from subdivision (2)(f).

Subdivision (3)(Pg. 10 - Memo 77). The proposed changes in subdivision (3) were approved after the following changes were made:

In the seventh line the words "or any interest therein" were deleted. The words "to his last known address" are to be added after "mail" in the

* Unless otherwise indicated, references are to the draft statute attached to Memorandum 77(1960).

second from bottom line if the staff determines that it is necessary.

Subdivision (5) of the Tentative Commission Draft Statute. Subdivision (5) of the Tentative Draft Statute was deleted.

Subdivision (5). In the opening paragraph, "or an interest therein" was deleted from the fourth line. Subdivision (5)(a) is to be revised to provide that the court may stay the order authorizing immediate possession upon a showing that the hardship to the condemnee clearly outweighs the hardship to the condemner.

The words "authorized by Section 1243.4" were substituted for the word "entitled" in the last line of subdivision (5)(b).

Subdivision (5) was then approved as revised.

Subdivision (6). Subdivision (6) is to be revised to provide that the condemner can appeal an order granting a stay.

Subdivision (6) was then approved after adding the words "under the provisions of subdivision (5)(b) of this section" after the word "possession" in the second line.

Subdivisions (8) and (9). Subdivisions (8) and (9) were approved after the word "nor" was changed to "or" in the third line of subdivision (8).
Sections 1248 and 1252.1 (Tentative Draft Statute)

The motion was adopted approving the principle that the condemner must reimburse the condemnee for a pro rata share of the taxes paid by the condemnee if the condemner is not entitled to have unpaid taxes canceled; but if the condemner is entitled to have its pro rata share of

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unpaid taxes canceled, the condemnee should be required to seek a refund from the taxing agency of the taxes paid that are allocable to the portion of the fiscal year following the taking of the property.

The proposed deletion of the words "special assessments" from both Section 1248 and Section 1252.1 was approved,
Section 1249.

The revisions proposed by the staff (see page 20 of Memo 77) were not approved.

Section 1249.1.

Section 1249.1 as revised by the staff was approved after the word "either" in the fourth line was relocated and placed after "before" and the words "special benefits" were added after "damages" in the last line.

Section 1253.

Section 1253 was approved as revised.

After the discussion of the consequences of an early passage of title, the motion was adopted directing the staff to draft a section designating who should bear the risk of loss prior to the passage of title where there is an immediate taking.

Section 1254.

Section 1254 as revised by the staff was approved after the words "without interest" were substituted for "together with legal interest from the date of its withdrawal" in subdivision (7).

Section 1243.6 (formerly Section 1254.5 in the Tentative Draft).

This section was renumbered as proposed.

Section 1243.7 (formerly Section 1254.7 in the Tentative Draft).

The revisions proposed by the staff in subdivisions (1) and (2) were not approved.

The motion was then adopted approving the principle that a property owner may withdraw the entire amount of the original deposit without filing a bond, but the judge should have the discretion to require a bond on the withdrawal of any amount in excess of the original deposit or 75 per cent of the final deposit, whichever is greater.

Subdivisions (1) and (2) of Section 1243.7 are to be reworded and made consistent.

Other revisions proposed by the staff, including the requirement in subdivision (8) for the payment of legal interest on excessive withdrawals, were approved.

Section 1255a.

The staff was directed to redraft the section to provide that upon abandonment by the condemner, the owner is to be reimbursed for all damages, costs, etc., and also to provide that, upon a showing by the condemnee that he has substantially changed his position in reliance to the condemnation and cannot be restored to his original position, there can be no abandonment by the condemner. This section is to be applicable to both possession and nonpossession cases.

Section 1255b.

Section 1255b as revised by the staff was approved.

Constitutional Amendment

During the discussion of the proposed constitutional amendment Mr. Reed, Chief Counsel for the Department of Public Works, raised the question of the desirability of deleting the provision for the right of immediate possession from the Constitution. He stated that the constitutional amendment might be approved even though the provisions giving the right to immediate possession are not enacted, and thus the State would have no authority for taking immediate possession. After the matter was discussed the motion was adopted to retain the provisions of the Constitution that grant the right of immediate possession, but subject to the power of the Legislature to modify them.

The language of page II-2 of the proposed amendment was revised to read as follows:

However, the Legislature may, by statute, authorize the plaintiff in a proceeding in eminent domain to take immediate possession of and title to the property sought to be condemned, whether the fee thereof or a lesser estate, interest or easement, be sought; provided that any such statute shall require (a) that the plaintiff first deposit such amount of money as the court determines to be the probable just compensation to be made for the taking and any damage incident thereto, including any damages that may be sustained by reason of an adjudication that there is no necessity for taking the property, and (b) that the money deposited shall be paid promptly to the person entitled thereto in accordance with such procedure as the Legislature may by statute prescribe.

Memorandum No. 79(1960) - Pretrial and Discovery

Statute

Subdivision (iv) was relocated at the end of the enumeration in subdivision (2). The words "shall be deemed to" were deleted from the

last sentence of subdivision (2) and the word "limit" was changed to "limits." A motion to approve the statute as revised was adopted.

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

Not Present: Cobey, Stanton.

Recommendation

Page 1. The word "Conferences" was added after "Pretrial" in the title and subtitle and the word "Procedure" was deleted from the subtitle.

The first paragraph was deleted.

In the third paragraph the following was added at the end of the first sentence: "Particularly with respect to whether the deposition of an expert retained by an opposing party may be taken and, if so, what information may be obtained."

Page 2. The word "necessarily" was added before the word "privileged" in the fifth line.

Page 3. Page 3 is to be revised by the staff in the light of changes suggested by Commissioner McDonough.

The motion was adopted approving the recommendation as revised and authorizing the Executive Secretary to send the recommendation and draft statute to the State Bar for its views.

Aye: Bradley, Cobey, Grover, Gustafson, Selvin, Spencer.

No: None.

Not Present: McDonough, Stanton.

E. Study No. 37(L) - Claims Against Public Officers and Employees:

The Commission had before it Memorandum No. 80(1960) containing the proposed recommendation and draft statute and the First and Second Supplement to Memorandum No. 80(1960) containing copies of letters commenting on the Commission's tentative recommendation.

The Commission first discussed the letters contained in the First and Second Supplement to Memorandum No. 80(1960). A motion was adopted directing the staff, when time permits, to draft an alternative statute revising the existing personnel claims statutes to conform to the 1959 General Claims Statute. This statute would be available for submission to the 1961 Legislature in the event the recommended statute meets with such opposition in the Legislature that it appears that it will not be enacted.

Motions were then adopted approving the following revisions in the Recommendation as set out in Memorandum No. 80(1960):

Page 1. In paragraph 1 the second sentence was revised to read:

"The Commission believes that these statutes, insofar as they limit substantive liability, are unnecessary and unfair in some cases." The next sentence was revised to read: "They are unfair in those cases where they bar otherwise meritorious actions merely because the plaintiff fails to comply with a technical procedural requirement. The third sentence was deleted. And the word "personally" was deleted from the third line from the bottom of the page.

Page 2. In paragraph 2 the word "assures" was substituted for "gives" in the second sentence. And the words "In many cases" were substituted for

"Ordinarily" in the fifth line from the bottom of the page.

Page 3. The words "are likely to be rare and, in any event," were deleted from the third and fourth line and the word "in" was inserted before "such cases" in the third line.

Page 4. The words "rather than mandatory" were deleted from the sixth line; the word "him" was substituted for "such officer or employee" in the third line from the bottom of the page; and the words "or diminish" were added after "negate" in the second line from the bottom of the page.

The motion was adopted approving the recommendation as revised, including the suggested staff recommendations shown in Memorandum No. 80 (1960), and authorizing the Executive Secretary to proceed with the printing of the recommendation and the study.

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F. Study No. 38 - Inter Vivos Rights: The Commission considered Memorandum No. 85(1960). The word "would" was substituted for "will" in the fourth line on page 7 of the recommendation, and a motion was unanimously adopted approving the recommendation (including the draft statute) as revised and authorizing the Executive Secretary to send it to the State Bar for its views.

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G. Study Nos. 48 and 54 - Juvenile Court Proceedings: The Commission considered Memorandum No. 82(1960). A motion was unanimously adopted approving the recommendation (including the draft statute) and authorizing the Executive Secretary to proceed with the printing of the recommendation and the study.

Respectfully submitted,

John H. DeMouilly,
Executive Secretary