Place of Meeting

State Bar Building
601 McAllister Street
San Francisco

FINAL

AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco — February 16 and 17, 1962

1. Minutes of January 1962 meeting (Sent February 8, 1962)

2. Administrative Matters.

3. Study No. 52(L) - Sovereign Immunity

   Memorandum No. 9(1962) (Dangerous and Defective Conditions) (sent February 12, 1962)

   Memorandum No. 10(1962) (Fiscal Administration) (sent February 10, 1962)

   Memorandum No. 11(1962) (Medical and Hospital Torts) (sent February 12, 1962)

   Memorandum No. 7(1962) (Administration of Governmental Liability) (sent January 11, 1962)

   Study: All parts sent prior to meeting

4. Study No. 34(L) - Uniform Rules of Evidence

   Memorandum No. 56(1961) (Rules 23-25 as revised to date with comments) (sent November 2, 1961)

   Memorandum No. 57(1961) (New Jersey Material on Privileges Article) (sent October 31, 1961)

Minutes

MINUTES OF MEETING

of

February 16 and 17, 1962

(San Francisco)

A regular meeting of the Law Revision Commission was held in San Francisco on February 16 and 17, 1962.

Present: Herman F. Selvin, Chairman
John R. McDonough, Jr., Vice Chairman
Honorable Clark L. Bradley
Joseph A. Ball (February 16)
Richard H. Keatinge
Sho Sato
Angus C. Morrison, ex officio (February 16)

Absent: Honorable James A. Cobey, James R. Edwards and Thomas E. Stanton, Jr.

Messrs. John H. DeMoully, Joseph B. Harvey and Jon D. Smock of the Commission's staff were also present.

Professor Arvo Van Alstyne, the Commission's research consultant on Study No. 52(L) - Sovereign Immunity, Mr. Benton A. Sifford, Assistant Secretary, Fireman's Fund Insurance Company and the following persons were also present:

Charles A. Barrett, Office of the Attorney General (February 16)
J. F. Brady, Department of Finance (February 16)
Robert F. Carlson, Department of Public Works
Louis J. Heinzer, Department of Finance (February 16)
Holloway Jones, Department of Public Works
Robert Lynch, Office of the County Counsel (Los Angeles)
Robert Reed, Department of Public Works (February 16)
Elda Sayles, Counsel for Senate Judiciary Committee (February 16)
Willard A. Shank, Office of Attorney General

Minutes of January 1962 meeting. The Minutes of the January 1962 meeting were corrected as follows:

(1) On page 7, the words "where the elements of first degree murder are not otherwise present" were added at the beginning of the second sentence of the paragraph entitled "Section 189 (felony-murder rule)."

(2) On page 13 in paragraph (9) the following sentence was added: "No sufficient reason was shown to create a special exception to the generally applicable rule that the defendant must show that the plaintiff was guilty of contributory negligence."

The Minutes of the January 1962 meeting were approved as corrected.

ADMINISTRATIVE MATTERS

Statistical Research Consultant for Sovereign Immunity Study. The Executive Secretary introduced Mr. Benton A. Sifford, Jr., Assistant Secretary, Fireman's Fund Insurance Company and Affiliated Companies, San Francisco. Mr. Sifford may be retained by the Senate Judiciary Committee as the statistical research consultant for the sovereign immunity study. Mr. Sifford is a University of California graduate. He has been with the Fireman's Fund Insurance Company for 25 years--13 years in California and 12 in Chicago. He has considerable experience in rating, approving risks and writing policies. He has had extensive experience in rating public entities for insurance purposes. He has served as a village trustee in the municipality of twelve thousand population, thus acquiring an insight into the problems of sovereign immunity from the government's standpoint. Senator Regan has indicated a willingness to request sufficient funds to hire Mr. Sifford and perhaps Mr. John Savage as statistical consultants. The Commission should find out whether the Senate Judiciary Committee has retained Mr. Sifford sometime after March 7, 1962. Mr. Sifford is going to embark on his study immediately, and the Commission will pay him for the time spent in the event that the Senate Judiciary Committee decides not to retain a consultant on the statistical problems.

Mr. Lynch of the Los Angeles County Counsel's office announced that the cities and the counties, through the League of California Cities and the County Supervisor's Association, are already collecting statistical

material on liability and such material will be made available to the consultant.

Meeting dates and places. The Commission discussed Senator Cobey's suggestion that a meeting be held in Yosemite while the off-season rates are still in effect. It was tentatively decided to hold the April meeting in Yosemite. Commissioner Ball indicated that he would have a conflict in his schedule on April 19. The Executive Secretary was instructed to circularize the Commissioners to determine whether some other date for the April meeting would be more convenient and whether the holding of the meeting in Yosemite is agreeable.

Future meetings are tentatively scheduled as follows:

March 16 and 17 (Los Angeles)
April 19, 20 and 21 (Yosemite)
May 17, 18 and 19 (San Francisco)

STUDY NO. 52(L) - SOVEREIGN IMMUNITY

Dangerous or Defective Conditions of Public Property

The Commission considered Memorandum No. 9(1962) relating to dangerous or defective conditions of public property. The following actions were taken:

Section 1. Paragraph (a) of Section 1 was revised to read:

> (a) "Dangerous condition" means a condition of public property that is likely to cause injury to person or property when the public property is used in a manner in which it is reasonably foreseeable that the public property will be used.

A motion to substitute "creates a substantial risk of" for "is likely to cause" in paragraph (a) did not carry. Both those in favor of and those opposing the motion indicated that the words used should clearly eliminate the remotely foreseeable risk, but those voting against the motion did not agree that the words "creates a substantial risk of" were better than "is likely to cause." Those objecting to "likely to cause" argued that the phrase can be construed as "may cause" while the meaning sought to be set out in the definition is more like "probably will cause."

Section 1 was approved as revised. However, the staff was directed to determine whether a better phrase can be substituted for "likely to cause" and to report to the Commission any recommendation the staff may have to improve the language.

Section 2. The staff was directed to revise proposed Section 2 to

state that in order to establish a prima facie case a plaintiff must prove:

(1) The property was in a dangerous condition.

(2) The entity had notice as that term is defined in the proposed statute.

(3) The entity failed to take action adequate to protect persons and property against the condition.

(4) The injury was proximately caused by the dangerous condition.

(5) The person or property injured was foreseeably within the risks created by the dangerous condition.

Some question was raised concerning the word "adequate" in item (3) above. The staff is to recommend appropriate language to indicate that "adequate" goes merely to adequacy of protection (i.e., the public entity has failed to take action so that it would no longer be likely that the condition would cause injury when the property is used in a manner in which it is reasonably foreseeable that the public property will be used). "Adequate" does not include questions of cost, feasibility, availability of funds, etc.

With reference to item (5) above, see discussion concerning Section 4, infra.

The phrase "failed to remedy the condition" was deleted from proposed Section 2 because the condition would not be dangerous if the entity had remedied it.

The alternative basis for liability suggested by the staff--that the condition was created by negligent workmanship by the entity--was rejected because an entity is chargeable with notice of what

it creates; the question in such a case should be whether the entity should have realized the danger of the condition it created.

Section 3. The staff was directed to revise the notice requirements of proposed Section 3 to provide that an entity has the requisite notice only if (1) it has actual or constructive notice of the condition and (2) either actual knowledge of its dangerous character or a reasonable man would have realized its dangerous character.

Subdivision (b) of proposed Section 3 was deleted because an entity is chargeable with notice of what it creates. Whether an entity knows or should know of the dangerous character of the condition should be subject to such proof as is required for any other dangerous condition.

The staff was asked to report on the extent to which notice is imputable to an entity through agency and to submit a recommendation as to whether any change in the proposed statute is required. A suggestion was made but not adopted that the statute might make imputed notice contingent upon the duty of the employee having actual notice to report the facts to his employer.

The staff was directed to revise subdivisions (c), (d) and (e) of proposed Section 3 so that the maintenance of a reasonably adequate inspection system is stated as a defense for the entity upon the question of notice. Later it was suggested that--since the plaintiff has the burden of proving notice--the plaintiff should also have the burden of proving that the entity had constructive notice in that the

entity did not maintain an adequate inspection system.

A suggestion was made to delete the detailed inspection requirements of subdivisions (c), (d) and (e) of proposed Section 3 and to substitute a general requirement that an entity maintain an inspection system reasonably adequate to discover the conditions defined as dangerous in Section 1. Under this approach, the entity would be able to show in defense that it is not feasible to maintain an inspection system, considering the factors mentioned in Section 4 as well as the purpose for which the property is maintained, which would have revealed the particular defect for which it is being sued. The staff was directed to prepare a statute based upon this approach. The staff was also directed to draft a statute containing the standards mentioned in subdivisions (d) and (e), which articulate the common law duty to inspect property only if there is an invitation to use it or if a condition dangerous to life has been created, so that statutes containing the general and specific standards for adequate inspection systems may be compared. The staff was also asked to submit hypothetical cases so that the standards might be tested by application.

Section 4. Subdivision (a) was deleted from Section 4. The staff was asked to redraft Section 2 so that liability is limited to those persons or property foreseeably exposed to the risk. This is a restatement of the Palsgraf doctrine and the burden properly belongs on the plaintiff to show that a duty has been violated as to him.

Subdivision (b) was revised in substance to read:

> (b) The failure of the public entity to remedy the condition or to protect persons and property against it was not unreasonable, weighing the practicability and cost to the public entity of effective precautions against the probability and gravity of harm to persons and property.

Subdivision (c). The staff was asked to draft two alternative provisions to be considered by the Commission. One alternative, which would cover both (b) and (c), would provide in substance that an entity is not liable if it shows that its action or inaction to remedy the condition or to protect persons or property against the condition was not unreasonable, in the light of the practicability and cost of remedying the condition or protecting persons or property against it, the time available to take such action, and the probability and gravity of harm. Under this proposal, one subdivision would cover the requisite showing to absolve the entity.

The alternative would set forth the showing that an entity can make to absolve itself of liability in 3 subdivisions. One subdivision would be (b), above, that the failure to take action was not unreasonable. The next subdivision would contain in substance the provisions of subdivision (d), that an entity is not liable if it had taken reasonable action, but there was insufficient time to complete reasonably adequate precautions. An additional subdivision would absolve the entity upon a showing that there was an insufficient time after receiving notice to give the entity a reasonable opportunity to take any action towards remedying the condition or protecting against it.

A motion to revise (c) to state clearly that in determining whether the public entity's action was reasonable, all the budgetary and administrative problems before a public entity should be considered was not adopted. Several commissioners indicated that the admission of this sort of evidence would unduly prolong trials. Others, however, stated that such evidence should be received so that the trier of fact could determine whether, in the light of the entire problem before the entity, the entity was guilty of fault. Those voting against the motion stated that evidence of this nature will be admitted in appropriate cases under subdivision (c) as previously revised, for such evidence will be relevant to the practicability of remedying the condition in cases, for example, where major new construction is needed to remedy the condition.

Subdivision (d) was approved in principle; however, the staff was directed to revise the subdivision to indicate more clearly that as a general rule assumption of the risk is a defense, but it will not be a defense if it is not unreasonable to expect a person to encounter the risk despite his knowledge thereof.

Subdivision (e) was approved.

Section 5. Section 5 was revised to read:

> A condition is not a dangerous condition within the meaning of this article if the trial or appellate court determines, viewing the evidence most favorably to the plaintiff, that the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that a reasonable person would not conclude that the condition was likely to cause injury to person or property when the property was used for those purposes for which it was reasonably foreseeable that the property would be used.

"Major policy decision" exception. The Commission considered but rejected a suggestion to include a "governmental" or "major policy decision" exception in the proposed statute. The question whether there should be liability for failure to make or enforce police regulations and for failure to put up stop signs will be considered in connection with the liability or immunity of governmental entities in police activities.

Fiscal Administration of Tort Liability

The Commission considered Memorandum No. 10(1962) containing the statutes relating to fiscal administration of tort liability. The following actions were taken:

(1) The title and proposed placement of the article, "Actions on Claims," in Division 3.5 of the Government Code were approved.

(2) Section 740. The staff was asked to review the language of subdivision (b) in order to define more accurately the type of judgment for which payment is being authorized. A suggestion was made that the definition might more accurately identify the types of judgments sought to be excluded from the definition rather than the types of judgments to be included.

(3) Section 741 was revised to read:

A local public entity may sue and be sued.

(4) Section 742 was revised to read:

The governing body of a local public entity shall pay to the extent funds are available any tort judgment out of

> any funds to the credit of the local public entity that are unappropriated and unencumbered for any other purpose unless the use of such funds is restricted by law or contract to other purposes.

The staff was directed to revise the reference in Section 742 to "unappropriated and unencumbered" funds to indicate that two classes of funds are involved: (a) funds that are unappropriated for any other purpose and (b) funds that are appropriated for the payment of tort judgments that are not previously encumbered.

(5) Section 743 was revised to read as follows:

> If a local public entity does not pay a tort judgment during the fiscal year in which it becomes final and if, in the opinion of the governing body, the amount of the unpaid judgment is not too great to be paid out of revenues for the ensuing fiscal year, the governing body shall pay the judgment during the ensuing fiscal year immediately upon the obtaining of sufficient funds for that purpose.

(6) No action was taken on Section 744 because there was no agreement on the underlying policy of permitting public entities to spread the payment of tort judgments over 10 years. Some sentiment was expressed for requiring the State to purchase these judgments as investments.