Minutes

MINUTES OF MEETING

of

March 23 and 24, 1962

Los Angeles

A regular meeting of the Law Revision Commission was held in Los Angeles on March 23 and 24, 1962.

Present: John R. McDonough, Jr., Vice Chairman
Honorable Clark L. Bradley
Joseph A. Ball
James R. Edwards (March 23)
Richard H. Keatinge
Sho Sato
Thomas E. Stanton, Jr.

Absent: Herman F. Selvin, Chairman
Honorable James A. Cobey
Angus C. Morrison, ex officio

Messers. 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:

J. F. Brady, Department of Finance (March 23)
Robert F. Carlson, Department of Public Works
Joan D. Gross, Office of the Attorney General (March 23)
George Hadley, Department of Public Works (March 23)
Louis J. Heinzer, Department of Finance (March 23)
Robert Lynch, Office of County Counsel (Los Angeles)

Minutes of February 1962 Meeting. The Minutes of the February 1962 meeting were approved as submitted.

ADMINISTRATIVE MATTERS

Commission Bills and Measures. The Executive Secretary reported that Senator Cobey had suggested that Commission bills and other measures list both legislative members of the Commission as sponsors. The Commission indicated that any practice that was agreeable to both legislative members would be agreeable to the Commission and that hereafter the procedure suggested by Senator Cobey would be the general practice.

Stanford Research Contract. The Executive Secretary reported that the funds available under the Stanford Research Contract are almost exhausted. Upon motion by Commissioner Stanton, seconded by Professor Sato, the Commission unanimously approved the addition of a sum not exceeding $1,500 to the Stanford Research Contract, such funds to be available for expenditure under the same terms as the existing contract. The Chairman is authorized to execute, on behalf of the Commission, the necessary contracts to effectuate this decision.

Out-of-State Travel by Executive Secretary. The Executive Secretary reported that he is the Chairman of an Agenda Committee of the National Legislative Conference. The Executive Committee of the National Legislative Conference has requested the Chairmen of the several Agenda Committees to attend a planning meeting in Phoenix, Arizona, in May 1962. The Commission authorized its Executive Secretary to attend the planning meeting if it does not conflict with the May meeting of the Commission.

Meeting Dates and Places. Future meetings are tentatively scheduled as follows:

April 19, 20 and 21 (San Francisco)
May 24, 25 and 26 (San Francisco)

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

Commissioner Ball requested that the members of the Standing Committee on Federal Rules be added to the distribution list for pamphlets on the Uniform Rules of Evidence.

Study No. 53(L) - Whether Personal Injury Damages Should Be Separate Property

A motion was adopted that a research consultant be secured as soon as feasible to make a study of Vehicle Code Section 17150 (see 1962 Annual Report, pages 20-21). The Executive Secretary is to make a recommendation to the Commission as to a suitable consultant and a suitable honorarium for this study.

STUDY NO. 52(L) - SOVEREIGN IMMUNITY

Dangerous or Defective Conditions of Public Property.

The Commission considered Memorandum No. 12(1962), the Supplement thereto, and a letter of the Los Angeles County Counsel's office relating to dangerous or defective conditions of public property. The Commission first considered Exhibit I of Memorandum No. 12(1962) and the following actions were taken:

SECTION 1. The introductory clause locating the dangerous conditions statute in the Government Code was approved. This decision is, of course, tentative inasmuch as the numbering of the sections and the placement of the statute cannot be finally determined until the amount of legislation to be introduced on the subject of sovereign immunity has been fairly well settled.

Section 901.1. The words "or both" were deleted from line 3 of page 2. The staff was directed to define the term "damage" or "injury" or some other similar word to include death, injury to a person and damage to property so that the repetition of the entire phrase in the statute will be unnecessary. Subject to the modifications that will be made necessary by the definition, Section 901.1 was approved. This section wipes out the governmental-proprietary distinction insofar as liability for dangerous conditions is concerned. Thus, the statute on dangerous conditions will be the exclusive source of

law governing the liability of public entities for the dangerous conditions of their property. The provisions of the dangerous conditions statute will be subject to such exceptions or extensions as exist in other statutes. Nothing in the dangerous conditions statute, for instance, will alter the statutory immunity that certain entities have for injuries occuring on bridle trails. Nor will the dangerous conditions statute limit the liability of an entity if there is another statute which creates liability for dangerous conditions in a specific instance. In the final recommendation on this subject, the Commission may want to make appropriate adjustments in other statutes creating or limiting liability for particular types of conditions such as bridle trails.

Section 901.2. The words "or both" were deleted from subdivision (a). As modified subdivision (a) was approved in the form that it appears in Exhibit I.

Proposals to define "dangerous condition" as a condition that creates an "unreasonable" risk of injury and to delete the definition of "dangerous condition" failed. It was recognized that liability will not exist for all dangerous conditions. An entity may be held liable for injuries resulting from dangerous conditions only if it has acted unreasonably in regard to discovering and remedying such conditions. The standards for entity liability are spelled out in detail in later sections. The purpose of the definition is to make clear that a condition is dangerous only if it creates an appreciable risk of injury and only if it creates a risk of injury when it is used in a manner that it is foreseeable that it will be used.

A proposal to limit the definition to property which is dangerous

when used in the manner in which it is intended and lawfully permitted to be used did not carry. Those opposing the motion did not think it desirable to define "dangerous condition" to eliminate the possibility of liability for attractive nuisances and traps and other conditions for which private occupiers of land are liable to trespassers.

A proposal to delete the word "reasonably" before "foreseeable" was also rejected.

Subdivision (b) was approved on the understanding that the definition of "public entity" may not be included in this particular article in the legislation which is finally recommended. The definition will be placed somewhere in the Government Code, though, where it will be applicable to this article.

A proposal to add a definition of "public property" to the statute was rejected. Those opposing the proposal indicated that the problem is one which is better left to the courts to work out on a case by case basis. No definitional problems have arisen in regard to the existing Public Liability Act in this regard even though that Act does not have a meaningful definition of public property.

Section 901.3. The word "determines" was moved from the third line of the section into the fourth line immediately preceding the word "that". In the fourth line from the bottom of page 2, of Exhibit I, the word "no" was substituted for "a" immediately preceding "reasonable person". In the same line the word "not" was deleted. As modified, the section was approved.

Section 901.4. Section 901.4 and the principles stated therein were disapproved. Although the section stated a principle which it might be desirable to apply in some cases, the Commission felt that the

proposed section stated a rule which would cause undesirable results in many other cases--such as those in which the plaintiff must rely on res ipsa loquitur.

Section 901.5. The words "or both" that appear in the third line of Section 901.5 were deleted. Subdivisions (b) and (e) were combined and placed at the end of the section, reading as follows:

> The dangerous condition created a reasonably foreseeable risk to the decedent or injured person or damaged property, and the public entity did not take adequate measures to protect against that risk.

The revision was made to make clear that the entity may not be held liable if the measures it took were adequate to protect the person injured against the risk even though such measures were not adequate to protect all persons foreseeably exposed to the risk.

A proposal to add a provision for liability for negligent or wrongful omissions was not approved. A fear was expressed that such an addition to Section 901.5 might bring within its scope cases which more properly are handled under Section 901.6.

As modified, Section 901.5 was approved.

Section 901.6. The words "or both" were deleted from the third line of Section 901.6. Subdivisions (b) and (f) were combined and placed at the end of the section, reading as follows:

> The dangerous condition created a reasonably foreseeable risk to the decedent or injured person or damaged property, and the public entity did not take adequate measures to protect against that risk.

Subdivision (d) was revised to read:

> The public entity had notice of the dangerous condition under Section 901.7.

Subdivision (e) was deleted. These changes were made because

the substance of subdivision (e) was incorporated into Section 901.7.

As modified, Section 901.6 was approved.

Section 901.7. The first line of Section 901.7 (on page 4) was amended to read:

> A public entity has notice of a dangerous . . .

Subdivision (a) was revised to read:

> The public entity had actual knowledge of the existence of the condition and knew or should have known of its dangerous character.

The first line of subdivision (c) was revised to read:

> The existence of the condition and its dangerous character would have been discovered . . .

The foregoing changes were made to incorporate the substance of former subdivision (e) of Section 901.6.

Subdivision (b) was deleted as unnecessary and undesirable. Virtually all of the situations which it covers will also be covered by subdivision (c).

The last two lines of subdivision (c) were revised to read:

> . . . which the public entity used or intended others to use the property or for uses which the public entity actually knew others were making of the property or adjacent property.

Subdivision (d) was deleted. These changes were made so that the entity's duty of inspection will not be limited by the extent to which it has authorized its property to be used. If it knows unauthorized use is being made, it should have the duty to make reasonable inspections to see that the property is safe for such use. Whether an inspection is reasonably required in particular instances is determined by weighing the practicability and the cost of inspection against the likelihood and magnitude of the potential danger to which failure

to inspect would give rise. Those opposing this motion argued that the erection of "no trespassing" signs should relieve the entity of the duty of seeing whether the property is safe for trespassers--even known ones. Such persons should assume the unknown risks that are present in property to which they have not been invited. Mr. Sifford pointed out that a factor in the cost of liability and in the cost of liability insurance is the cost of defense. A broad potential liability which is later cut down by defenses eats up a lot of the liability cost in defending cases. If the liability standards are narrower, fewer actions are brought initially but a much higher percentage of the claimants recover--thus, more of the liability cost is for the payment of claims rather than for the overhead of defending.

Section 901.8. Subdivision (a)(1) was revised to read:

> The public entity did not have a reasonable period of time after it had notice of the dangerous condition within which to take action adequate to protect against the dangerous condition.

The staff was asked to define "protect" to include "remedy," "safeguard" and "warn" in regard to dangerous conditions so that the word "protect" may be used throughout the statute.

Subdivision (a)(2) was revised to read:

> The public entity took action which was reasonable under the circumstances to protect against the dangerous condition. The reasonableness of the action taken by the public entity shall be determined by taking into consideration the time and opportunity that the public entity had to take action and by weighing the probability and gravity of potential harm to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the condition.

Subdivision (a)(3) was revised to read:

> The failure of the public entity to take action adequate to protect against the dangerous condition was not unreasonable because the impracticability or cost of taking such action was disproportionate to the probability and gravity of the potential harm created by the condition.

The word "adequate" was added to subdivisions (a)(1) and (a)(3) to cover the situation where the entity had time to do something but did not have time to take action that was wholly adequate and to cover the situation where it was too impractical and costly to take action that was wholly adequate to protect against the condition but the entity had done what was reasonable under the circumstances.

Subdivision (b)(1) was revised to read:

> The plaintiff or his decedent assumed the risk of the injury or damage incurred in that he (i) knew of the dangerous condition, (ii) realized the risk of injury created thereby and (iii) in view of all the circumstances, including the alternatives available to him, acted unreasonably in exposing his person or property to the risk.

The phrase "plaintiff or his decedent" was not finally agreed upon. The staff was directed to use that term or some other term, perhaps together with a definition, in order to eliminate the repetitious use of the phrase "person who suffered the injury to his person or damage to his property." The term decided upon is to be used throughout the statute where similar references are necessary.

A proposal to substitute the common law assumption of the risk doctrine for subdivision (b)(1) was not approved. Those favoring the proposal argued that the defense in this regard ought to be the same as that applicable in similar situations with private defendants. Those opposing the proposal argued that the existing law appears to be somewhat unsatisfactory and may be uncertain, and in any event the standard stated in subdivision (b)(1) is a desirable one.

As modified, Section 901.8 was approved.

Section 901.9. Line 2 of page 8 of Exhibit I was amended to read:

. . . of Division 3.5 (commencing with Section 600) of . . .

Although it was recognized that the section is faulty in stating that a claim "shall be presented"--it should state that a cause of action is barred unless a claim is presented--the section was not amended any further as it appears in this recommendation merely to indicate that existing law is not being changed in this respect. When the final recommendation is prepared, including all recommendations on procedural matters, this section will probably be repealed.

Sections 901.10, 901.11 and 901.12. The word "proper" was substituted for "lawful" in the penultimate line of Section 901.10. In Section 901.11, "of a public entity" was inserted before "asserted" in the first line of the section. No other changes were made in these sections for the same reason that no further amendments were made to Section 901.9.

Section 901.13. The staff was directed to make changes in subdivisions (b) and (e) comparable to the changes that were made in Section 901.5. Subdivision (d) was amended to read:

> The dangerous condition was directly attributable wholly or in substantial part to a negligent or wrongful act of the officer or employee and the officer or employee had the authority and the means immediately available to take alternative action which would not have created the dangerous condition.

The words "attributable wholly or in substantial part" were added to cover the case where the condition is created by the concurring

negligence of more than one employee. The last clause, beginning "and the officer or employee had the authority . . ." was added to absolve a public employee from liability in those situations where he had no authority or power to do anything else.

As modified, Section 901.13 was approved.

Section 901.14. The staff was directed to make changes in subdivisions (b) and (f) comparable to the changes that were made in Section 901.6. The staff was directed to redraft subdivision (c) so that officers and employees are subject to constructive notice provisions comparable to those applicable to the employing entities under Section 901.7. Subdivision (g) is to be redrafted so that the officer or employee has the burden of showing that his conduct in regard to the dangerous condition was not unreasonable. These changes were made so that the standards of proof and trial procedures for determining both entity liability and employee liability will be comparable.

Subdivision (e) was revised to read:

> The public officer or employee had the authority and it was his duty to protect against the dangerous condition at the expense of the public entity and the means for doing so were immediately available to him.

"Means" was substituted for "funds" because an officer sometimes cannot protect against dangerous conditions because of a shortage of men or equipment and not merely because of a shortage of funds.

As modified, Section 901.14 was approved.

Sections 901.13 and 901.14 were approved while recognizing that there may be some cases in which the public officer or employee will be ultimately responsible for the judgments recovered under these sections. Where the employee has acted maliciously the ultimate financial responsibility should fall on the employee. If for some reason the entity cannot assume responsibility for a judgment against the employee even

where no malicious conduct is involved, the ultimate financial responsibility will fall on the employee. It is contemplated, though, that for negligent conduct and for intentionally tortious conduct which is not malicious, corrupt, etc., the ultimate financial responsibility should be placed on the employing entity to the extent that it is possible to do so.

Section 901.15. Section 901.15 was approved in recognition that the ultimate financial responsibility for most judgments against public officers and employees will fall on the employing entities; therefore, if the entity claims statute is to have any continued significance, a claim must be filed with the entity pursuant to its claims statute as a condition precedent to holding the officer or employee liable.

SECTIONS 2 through 9. The proposed repeals and amendments were approved.

The Commission next considered the draft recommendation attached to Memorandum No.12(1962) Supplement. It was agreed that individual commissioners who have changes to suggest should submit them to the staff. The staff was directed to use its discretion in accepting or rejecting suggested changes and to alter the recommendation to reflect the amendments made to the propcsed statute.

The Commission considered the questions presented by Memorandum No.7(1962). The following decisions were made:

1. Indemnity of public employees. The Commission had previously decided that as a guiding principle in considering specific problems of tort liability, public employees should be liable for both their negligent and intentional torts and public entities should also be liable, but the ultimate financial responsibility for this liability should fall upon the public entities unless the employee's conduct was malicious, corrupt, fraudulent or dishonest. (December 1961 Minutes 10-11.) The question discussed here was whether this principle should be implemented by a statute providing for indemnity. It was recognized

that such a statute would operate as a stopgap to cover the whole field of sovereign liability until each area of liability can be discovered and studied. It will be impossible as a practical matter to study all areas of liability before 1963, and such a measure would provide a method for covering the run-of-the-mill active torts during the interim while the remaining areas of liability are studied. Several commissioners expressed concern with the idea of imposing liability without study of the areas in which such liability is to be imposed. Professor Van Alstyne pointed out that there are several statutes now requiring governmental entities to assume responsibility for judgments against their employees.

The staff was directed to prepare a memorandum pointing out the extent to which public entities are now required to indemnify their employees and to draft a statute requiring indemnity. This direction did not constitute approval of the principle--the principle is to be considered when the draft statute is presented. The memorandum is to discuss the alternatives which the Commission may recommend to the Legislature in 1963 to take care of the interim until the entire subject of sovereign liability is studied. One alternative is to go back to the pre-Muskopf law, another is to adopt indemnification of employees, another is to let the Muskopf case become the law.

2. Administrative settlement of claims. It was decided not to recommend the establishment of a statewide agency to administratively handle governmental claims. There should be enabling legislation, though, to permit local agencies to establish administrative agencies (like the State Board of Control) to receive and process claims. At the present time, the attorney for the local agency acts in this capacity by passing on claims. The proposed legislation will authorize a committee or board to be set up to perform this function.

There should be no statewide court of claims to adjudicate claims against governmental entities.

3. Handling governmental claims--reduction of problems and allocating expense.

(a) There should be statutory authority for local entities to compromise disputed claims. These entities should have the authority to delegate to specified officers the authority to settle minor claims of up to $1,000. Under present practice, the cost of administrative handling of claims often exceeds the amount involved. Moreover, an excessive amount of administrative handling where the size of the claim does not warrant it makes for bad public relations. Mr. Sifford indicated that most of their insurance claims men are permitted to handle up to $1,000. The federal government settlement limits vary from $1,000 to $5,000.

(b) The Commission rejected the proposal that public officers and employees be conclusively presumed to be employed by the entity whose funds are used to pay their compensation. This would make it difficult for a plaintiff's attorney to determine the entity with which to file a claim. The question should be resolved in specific cases according to common law notions of employer-employee and master-servant. Further problems in determining the responsible employer in particular cases were deferred until a later time.

(c) The staff was directed to draft legislation to provide for the substitution of the correct entity when a claim is filed against a nonindependent entity. Many times it is difficult to determine just which is the responsible entity. Where the entity with which the claim is filed is a nonindependent entity, there is no great problem

as such an entity is always a part of the independent entity. The staff was also directed to draft legislation which, while providing assurance for notice to the correct entity, will provide that whenever a claimant acting reasonably and in good faith files his claim with the wrong independent entity, the correct entity is substituted. To ensure notice to the correct entity, the entity with which the claim is filed could be required to forward all incorrectly filed claims. This substitution will not be permitted, though, where the entity against whom the claim should have been presented originally is prejudiced by the delay in receiving notice of the claim.

(d) General authorization for entities to sue and be sued had been previously approved. (February 1962 Minutes 11.)

(e) The claims statute relating to local public entities should be revised to authorize a court upon a motion made within a reasonable time not to exceed a year to permit a claimant to present a late claim if the claimant can make the showing requisite to vacate a default under C.C.P. § 473 unless the entity can show that it would be prejudiced by the delay.

In vehicle cases arising under Vehicle Code Section 17001, the limit on claims should be one year, the same as it is for vehicle claims against the State. Vehicle claims are unique in that reports are required to be made and police customarily investigate vehicle accidents. Hence, there is less need for a short claims period in this type of case.

The claims statute applicable to the State should be modified so that the claims filing period is the same as that applicable to local public entities. It is unfair to the State to have a 2 year period

within which personal injury claims may be filed while private persons have a 1 year statute of limitations and local governmental bodies have a 100 day claims statute. This modification, though, is only as to the period for filing. The Board of Control procedure is to be retained together with the necessary procedural incidents thereof such as the tolling of the statute of limitations while the claim is before the Board.

The remaining problems presented by Memorandum No. 7(1962) were deferred as they are matters of detail that need not be solved at the present time.