

Time

June 11 - 7:00 p.m. - 10:00 p.m.
June 12 - 9:00 a.m. - 3:30 p.m.

Place

State Bar Building
1230 W. Third Street
Los Angeles

AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles

June 11-12, 1965

1. Approval of Minutes for May 1965 Meeting (sent May 20, 1965)
2. Administrative matters, if any
3. Study No. 50 - Rights of Lessor
Memorandum 65-26 (to be sent)
4. Study No. 42 - Trespassing Improvers
Memorandum 65-27 (to be sent)
5. Study No. 55(L) - Additur
Memorandum 65-28 (to be sent)
6. Study No. 51 - Right to Support After Ex Parte Divorce
Memorandum 65-29 (to be sent)
7. Study No. 49 - Rights of Unlicensed Contractor
Research Study (enclosed)
Memorandum 65-30 (enclosed)
8. Study No. 53(L) - Personal Injury Damages as Separate Property
Memorandum 65-31 (to be sent)
9. Recommended Legislation Not Enacted by Legislature
Memorandum 65-32 (enclosed)
10. Study No. 61 - Election of Remedies
Memorandum 65-33 (enclosed)

MINUTES OF MEETING

of

JUNE 11 AND 12, 1965

Los Angeles

A regular meeting of the California Law Revision Commission was held in Los Angeles on June 11 and 12, 1965.

Present: John R. McDonough, Jr., Chairman
Richard H. Keatinge, Vice Chairman (June 12 only)
Sho Sato
Thomas E. Stanton

Absent: Hon. James A. Cobey
Hon. Alfred H. Song
Joseph A. Ball
James R. Edwards
Herman F. Selvin
George H. Murphy, ex officio

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

Because of the absence of a quorum on Friday evening, Commissioners McDonough, Sato, and Stanton operated as a subcommittee in considering Memoranda 65-26 and 65-29. The action of the subcommittee was approved as Commission action by formal motion on June 12 when a quorum was present.

Future Meetings. Future meetings are scheduled as follows:

| | |
|-----------------------------------|---------------------|
| July 16 (all day) and 17 | San Francisco |
| August | No Meeting |
| September | No Meeting |
| October 15 and 16 | Los Angeles |
| November 19 and 20 | Stanford (Big game) |
| December (to be set if necessary) | |

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ADMINISTRATIVE MATTERS

Minutes of May 1965 Meeting. The Commission approved the Minutes of the May meeting with the following changes:

Page 1, second line from bottom--change "Senta" to "Santa"

Page 7, indented statement at bottom of page--change "Corrigan" to "Witteman"

Page 8, change "Corrigan" to "Witteman"
change "Witteman" to "Corrigan"

Page 8, delete comments of Commissioner Keatinge and Mr. DeMouilly

Report on 1965 Legislative Program. The Executive Secretary reported that the Commission's 1965 legislative program will be adopted by the Legislature. The following is the status of the various items in the program:

Assembly Bill No. 333 (Evidence Code) -- Signed by Governor
Assembly Bill No. 1733 (Claims) -- Approved by Senate Committee
Assembly Bill No. 1735 (Vehicle Liability) -- Approved by Senate Committee
SCR 2 (continue existing authority) -- Adopted by Legislature
SCR 80 (new topics) -- Adopted by Legislature

In addition, it appears that a bill based on the Commission's recommendation relating to evidence in eminent domain proceedings will be enacted by the current Legislature and also a bill to provide moving expenses when property is taken by the State Department of Public Works for highway purposes.

Studies on Current Agenda. The Commission considered the topics on its current agenda and made the following decisions:

1. The Commission plans to work on condemnation law and procedure during the next three years with a view to submitting a new comprehensive statute on this subject to the 1969 legislative session.

2. All topics relating to criminal law and procedure are to be dropped from the agenda and this fact is to be reported in the 1966 Annual Report.

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Professor Sherry is to be advised that we are dropping these topics and is to be sent copies of any research studies we have relating to these topics.

3. The following are topics that will be worked on during the next two years:

| <u>Topic Number</u> | <u>Topic</u> |
|---------------------|---|
| 12 | Taking Instructions to Jury Room |
| 26 | Escheat |
| 36(L) | Condemnation Law and Procedure |
| 42 | Rights of Good Faith Improvers |
| 44 | Suit in Common Name |
| 47 | Contracts in Writing--C.C. § 1698 |
| 50(L) | Rights Upon Abandonment or Termination of Lease |
| 51 | Right of Spouse to Support After Ex Parte Divorce |
| 53(L) | Personal Injury Damages |
| 55(L) | Additur and Remittur |
| 60 | Representation as to Credit--C.C.P. § 1974 |
| 62(L) | Vehicle Code Section 17150 and related statutes |
| 63(L) | Evidence Code |

4. Topic No. 41 (Small Claims Court Law) is to be tendered to the Judicial Council.

5. Topic No. 59 (Service by Publication) is held on the agenda pending a determination of whether this matter will be taken care of by a study now being made. Professor Stolz is to be contacted and advised that we have this topic on our agenda. He should be sent a description of the topic and it should be suggested that he take care of the problems in connection with the

study he is making.

5. Topic No. 49 (Rights of Unlicensed Contractor) and Topic No. 61 (Election of Remedies) should be considered at a subsequent meeting to determine whether these topics should be dropped from our agenda.

6. The following topics should be given priority in obtaining a research consultant:

Topic No. 65(L) -- Inverse Condemnation

Topic No. 64(L) -- Pour-over Trusts and Powers of Appointment

7. Topics not listed above are to be continued on the Commission's agenda but work on them is to be deferred.

Review of Past Recommendations Not Enacted by Legislature. The Commission considered Memorandum 65-32 and made the following decisions:

1. Assembly Bills Nos. 400 and 402 (overlapping provisions of Penal and Vehicle Codes) should be called to the attention of Professor Sherry.
2. The Recommendations relating to condemnation law and procedure will be considered in connection with the study of condemnation law and procedure.
3. Assembly Bill No. 464 (Notice of Alibi in Criminal Actions) should be called to the attention of Professor Sherry.
4. The remaining matters were not considered to be of sufficient importance to justify any further consideration by the Commission.

Consultant on Study No. 36(L) - Condemnation Law and Procedure. The Commission determined that an agreement should be made with Robert Nibley of Los Angeles to serve as a research consultant to provide the Commission with expert advice at Commission meetings. It is anticipated that the staff will do the necessary research to bring the research studies up-to-date and will

do any additional research that is needed.

The Commission contemplates that the agreement will pay Mr. Nibley's travel expenses in attending Commission meetings when this subject is discussed and will provide a flat rate of compensation for each day of attendance at Commission meetings. It is anticipated that Mr. Nibley would study materials distributed prior to the meeting and provide the Commission with suggestions and criticism at the meeting.

The Executive Secretary was directed to invite Mr. Nibley to attend the July meeting so that the details of the agreement can be worked out. The Commission noted that it might not be able to pay his travel expenses in attending the July meeting.

Publication of Evidence Code with Official Comments. The staff reported that it had discussed with Continuing Education of the Bar the publication of a pamphlet containing the Evidence Code as enacted, together with the official comments to each section.

The staff suggested approval of the following arrangement with the Continuing Education of the Bar: Continuing Education of the Bar would pay \$1,000 to cover the cost of preparing the material to be published in page proof form (the actual cost of this may be more or less than this amount). In addition, Continuing Education of the Bar will pay 50 cents per copy for copies of the publication for use in the summer session at Berkeley on the Evidence Code. The Commission will also provide the Continuing Education of the Bar with five sets of reproduction proofs of the publication and agrees not to make any general free distribution of the publication. This would permit the Commission to distribute the pamphlet free of charge to persons working on the rules of evidence in other states, to lawyer members of the legislature,

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and to a few others. In addition, it is contemplated that some copies may be sold to law schools and to the Conference of California Judges.

The arrangement outlined by the staff was approved.

Article by Chairman on Evidence Code for State Bar Journal. It was suggested that the Chairman write an article for the State Bar Journal. It was suggested that the article include a statement that the Commission is continuing to study the Evidence Code and will consider any communications from interested persons as to suggested changes. Such comments should be sent to the Commission at its office at Stanford: California Law Revision Commission, 30 Crothers Hall, Stanford, California 94305.

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STUDY NO. 42 - TRESPASSING IMPROVERS

The Commission considered Memorandum 65-27 relating to the rights of a trespasser who in good faith improves property belonging to another.

The staff was directed to contact the California Land Title Association for the purpose of securing examples of cases which demonstrate the need for legislation in this area and finding out from the Association what defects exist in the present law and the nature of the legislation needed. The Commission is especially interested in being sure that the solution proposed will result in the party owning the land as improved having an insurable title.

It was suggested that both the legislative representative of the California Land Title Association and their attorney (Mr. Otis) be contacted concerning this matter. The Association should also be asked whether Section 1013.5 of the Code of Civil Procedure is satisfactory insofar as the section goes.

At the outset, it was determined that a statutory scheme should be developed to cover cases involving an improvement made by a good faith improver who believes that he owns the property upon which the improvement is made and where the owner is not guilty of bad faith. After such a statutory scheme has been developed, it can then be determined whether the scheme should be expanded to cover other cases.

The Commission suggested that, apart from specific solutions in particular fact situations, provision should be made to assure clearing record title to the property, giving notice of the pendency of any action to all persons having an interest in the property and/or the improvement, and recovery by

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a good faith owner of reasonable attorney's fees and costs in actions prosecuted or defended by him.

The Commission discussed the nature of the state of mind of the person making the improvement. It was tentatively agreed that the statute as initially drafted should cover any person who, acting in good faith and erroneously believing because of a mistake either of law or fact that he is the owner of the land, affixes improvements to the land of another. This is substantially the same standard as is now provided in Civil Code Section 1013.5 (relating to the right of removal), except that Section 1013.5 also apparently applies to lessees and licensees.

The Commission discussed the conditions under which an improver should be permitted to remove the improvement insofar as consent of lienholders is to be required. It was noted that a person constructing an improvement pursuant to directions from a person who was not the owner of the land has a lien upon the improvement, but not upon the land itself. It was suggested that consent be required of (1) lienholders on the improvement and (2) lienholders on the property as improved in reliance upon the improvement, but that consent not be required of a lienholder on the property before it was improved. In lieu of obtaining such consent, the improver should be permitted to discharge the lien and be subrogated to the rights of the lienholder. This is basically the same consent required under Code of Civil Procedure Section 1013.5.

The Commission discussed the problem of insuring that a lienholder on the land be paid when the solution to the trespassing improver situation is sale of the land to the improver. This matter should be investigated by the

staff to determine whether a specific provision should be added to the statute to make clear that the lienholder is entitled to the value of his lien in such case. At a minimum, the lienholder should be entitled to notice before the land is sold to the improver. A similar problem exists where the improvement is removed and money damages are paid by the improver in lieu of restoring the land to its former condition. Reference was made to Section 1013.5 for language that might be adapted to use in solving this problem.

The Commission discussed the basic principle that should be reflected in the proposed statute. It was concluded that the owner should never be forced to make an investment he does not desire to make and should always be made whole. To carry out this principle, it was suggested that the statute might include the following principles:

1. In every case, the owner should have the right to purchase the improvement at the value by which it enhanced the value of the land and that the improver should not be permitted to remove the improvement if the owner desires to purchase it.
2. If the owner does not desire to exercise his right to purchase the improvement, he may require the improver to remove the improvement if it is economically feasible to do so or if the improvement adds no value to the land.
3. If the owner does not elect to exercise the right to require removal or is not permitted by the statute to do so, the owner may require the improver to elect to remove the improvement or to purchase the land at its fair market value.

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The Commission also directed the staff to prepare an analysis of the various factual situations that might arise so that this analysis may be used in testing any solution that might be proposed to the problem. One analysis suggested was to divide the possible factual situations into four categories:

- a. Removal of improvement would cause no significant permanent damage to the land and is economically feasible.
- b. Removal of the improvement would cause no significant permanent damage to the land but is not economically feasible.
- c. Removal of the improvement would cause significant permanent damage to the land but is economically feasible.
- d. Removal of the improvement would cause significant permanent damage to the land and is not economically feasible.

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STUDY NO. 50(L) - LESSOR'S RIGHTS UPON ABANDONMENT BY LESSEE

The Commission considered Memorandum 65-26. The following actions were taken:

Section 3320

The reference to "then value" in Section 3320, and similar references in other sections, should be clarified to refer more specifically to the time when damages are being determined. Rentals due or overdue at the time of such determination should be taken at full value plus interest; rental installments not yet due at the time of such determination should be discounted to reflect the present value of the future obligation.

Section 3320 should be redrafted to provide a presumption that the rental obtained on reletting is the reasonable value of the remainder of the term.

Section 3321

Section 3321 should be redrafted as the basic damages provision. Section 3320 should merely prescribe the evidentiary value of the rental obtained on reletting.

In referring to termination of a lease, the phrase "by the lessor" should not be used, because the lessee's breach may in some cases automatically terminate the lease without action on the part of the lessor.

Section 3322

Subdivision (b) should also apply when the lease is terminated for breach.

Statute generally

The Commission discussed the variety of different lease contracts such as oil leases, leases that are in fact sales, leases of personal property, etc.,

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and the applicability of the proposed statute to such various leases. Whether the statute should provide that its provisions prevail over inconsistent contractual provisions was also discussed. In view of the complexity of the problems, the Commission requested that a statute be prepared stating in substance merely that abandonment of a lease should be treated as a breach and anticipatory repudiation of a contract for continuing performances, and that the rights, duties, remedies and measure of damages applicable to contracts generally are applicable to leases. In addition, a more detailed statute should be submitted for comparison. If there is time, a composite statute should also be prepared. Such a composite statute would contain a general statement of principle together with a nonexclusive listing of illustrations of its application.

STUDY NO. 51 - RIGHT TO SUPPORT AFTER EX PARTE DIVORCE

The Commission considered Memorandum 65-29. The following actions were taken:

Section 270

The definition of "ex parte divorce" was revised to read:

As used in this title, "ex parte divorce" means a judgment, recognized in this state as having terminated the marital status of the parties, which was made by a court that did not have personal jurisdiction over the defendant spouse.

Section 271

The references to the support duties of a husband and a wife were deleted and the following substituted:

The duty of one spouse to support the other . . .

Remainder of statute

The Commission discussed problems of splitting the divorce cause of action, whether the obligee's right to support should be enforceable in California if it did not survive the ex parte divorce under the law of his then domicile, whether the enforceability of the right to support should be dependent at all on whether the obligee was the divorce plaintiff, and related problems.

The Commission asked the staff to prepare materials, if possible, showing all of the possible factual situations that might arise so that any proposed scheme might be tested by application to such situations.

Another possible way to solve the problems discussed would be to draft a very general statute, leaving the choice of law problems to be worked out by the courts on a case by case basis.

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STUDY NO. 53(L) - PERSONAL INJURY DAMAGES AS SEPARATE PROPERTY

The Commission considered Memorandum 65-16. The following actions were taken:

The staff was directed to reconsider the language of the last clause in the first paragraph of Section 171c. It should be clear that the husband has a right to be reimbursed for expenditures from his separate property or the community subject to his control that are made by reason of the wife's injuries prior to the receipt of the damages for those injuries.

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STUDY NO. 55(L) - ADDITUR

The Commission considered Memorandum 65-28 and the First Supplement thereto. The following actions were taken:

The Commission discussed the desirability of a constitutional amendment to authorize additur practice and the feasibility of securing enactment of such an amendment. It was agreed that this would be the best method of solving the problem if the problems of securing enactment were disregarded.

The Commission considered an alternative statutory scheme as proposed in the First Supplement to Memorandum 65-28. It was generally agreed that any proposal permitting additur and remittitur fixed at the highest or lowest limits supported by the evidence was unsatisfactory because of the difficulty in determining these arbitrary figures. The Commission tentatively approved, as an alternative to a constitutional amendment, a statute authorizing additur at the trial level (with the defendant's consent) where the original verdict is supported by some evidence but the trial judge believes that a new trial limited to the issue of damages is proper because the verdict is against the weight of the evidence. The rationale underlying this scheme is that the plaintiff's right to a jury determination of his damages has been satisfied by the original verdict and he cannot complain because the court has decided to give him more. Dorsey v. Barba, 38 Cal.2d 350 (1952), would be distinguished in the recommendation on the ground that the plaintiff there never received a valid jury determination of his damages for pain and suffering. The only determination of those damages was made by the judge when ruling on the plaintiff's motion for a new trial.

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The Commission then directed the staff to prepare for consideration at the next meeting a letter outlining the problem involved and suggesting the alternative solutions under consideration by the Commission. The letter should also discuss the feasibility of additur at the appellate level. The letter should be designed to be sent to persons and groups likely to be interested in this problem and to elicit from them their comments and reactions to the problem and solutions under consideration by the Commission. Such groups would probably include the Judicial Council, the Conference of Judges, the State Bar Committee on the Administration of Justice, and the American Trial Lawyers Association (NACCA).