

Time

September 16 - 9:30 a.m. - 5:00 p.m.
September 17 - 9:00 a.m. - 4:00 p.m.

Place

State Bar Building
601 McAllister Street
San Francisco

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

September 16-17, 1966

1. Approval of Minutes of August Meeting (enclosed)
2. Administrative Matters

Memorandum 66-58 (enclosed)

Consideration of Comments on Tentative Recommendation

3. Study 44 - The Fictitious Name Statute

Memorandum 66-52 (to be sent)
Revised Tentative Recommendation (attached to memorandum)
First Supplement to Memorandum 66-52 (enclosed)

Special order
of business--
10:30 a.m.
September 16.

Approval of Final Recommendation for Publication

4. Study 67 - Suit By and Against Unincorporated Associations

Memorandum 66-53 (to be sent)
Tentative Recommendation (attached to memorandum)

5. Study 50 - Termination of Leases

Memorandum 66-54 (to be sent)
Revised Tentative Recommendation (attached to memorandum)
Revised Research Study (to be sent)

6. Study 42 - Good Faith Improvers

Memorandum 66-55 (enclosed)
Recommendation (attached to memorandum)

Preparation of Tentative Recommendation

7. Study 26 - Escheat

Memorandum 66-56 (enclosed)
Revised Tentative Recommendation (attached to memorandum)

Special order
of business--
9:30 a.m.
September 17

8. Study 65(L) - Inverse Condemnation

Memorandum 66-57 (to be sent)
Research Study (to be sent)

Note: This item will be considered
only if research study is received
in time to permit it to be
distributed prior to meeting)

9. Study 62(L) - Evidence Code Revisions
MEMO 66-59

MINUTES OF MEETING

of

SEPTEMBER 16 and 17

San Francisco

A meeting of the California Law Revision Commission was held at San Francisco on September 16 and 17, 1966.

Present: Richard H. Keatinge, Chairman
Sho Sato, Vice Chairman
John R. McDonough
Thomas E. Stanton, Jr.
George H. Murphy, ex officio (September 16 only)
Joseph A. Ball

Absent: Hon. James A. Cobey
Hon. Alfred H. Song
James R. Edwards
Herman F. Selvin

Messrs. John H. DeMouilly, Joseph B. Harvey, Clarence B. Taylor, and John L. Reeve (September 16 only) of the Commission's staff also were present.

Also present on September 16 were the following observers:

- Ralph Barton, Office of the Secretary of State
- Michael B. Dorf, Legislative Representative, California Newspaper Publishers' Association
- Robert B. James, Clerk of San Diego County
- J. W. Kelley, Editor, The Recorder
- Wilfred J. Kumli, President, McCord's Daily Notification Sheet
- Al Leroni, Assistant Clerk of Alameda County
- Kenneth McGilvray, Sacramento Attorney
- Ben Martin, General Manager, California Newspaper Publishers' Association
- Don Messer, Chairman, State Legislative Committee of Credit Associations
- William G. Sharp, Clerk of Los Angeles County
- Fred Weybret, Publisher, Lodi News-Sentinel

Minutes
September 16 and 17, 1966

ADMINISTRATIVE MATTERS

Minutes of August 12 and 13. The minutes of August 12 and 13 were amended to delete the last sentence in paragraph two on page 13 which read as follows:

The increased workload on the computer also will make it possible to reduce the cost of filing financial statements under the Commercial Code.

The minutes were approved as amended.

Approval of compensatory time reports. The Commission considered Memorandum 66-58 and approved the following amendment to the Commission's Manual of Practices and Procedures:

7.40. Subject to Section 7.50, the Chairman, and Vice Chairman in case of the unavailability of the Chairman, is authorized to take all actions with respect to appointment, termination, leave, merit increases, and other salary increases, ~~compensatory-time-reports~~, and similar matters for the position of Executive Secretary. The Assistant Executive Secretary, Special Condemnation Counsel, or any member of the Commission is authorized to approve compensatory time reports for the position of Executive Secretary.

Resignation of Junior Counsel. The Commission was informed that John L. Reeve was resigning his position as Junior Counsel with the Commission's staff to enter private practice. The Executive Secretary reported that the position probably would be left vacant until 1967 and would be filled by someone recruited from the present senior class of a law school.

Printing program. The Commission authorized the Executive Secretary to hire Jon D. Smock as a consultant on a part time basis for a period of 100 to 120 hours to check the Commission's recommendations prior to their being published.

Minutes
September 16 and 17, 1966

STUDY 42 - GOOD FAITH IMPROVERS

The Commission considered Memorandum 66-55 and the attached recommendation as revised August 25, 1966. The following actions were taken:

Letter of transmittal

The last sentence of the letter of transmittal was deleted. The substance of this sentence should be included as a footnote at the beginning of the study.

Recommended legislation

Section 871.1. Subdivision (b) of this section, in a revised form, was made Section 871.2. Subdivision (a) was revised to read:

871.1. As used in this chapter, "good faith improver" means:

(a) A 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, makes an improvement to land owned by another person.

(b) A person who, acting in good faith and erroneously believing because of a mistake either of law or fact that he is entitled to possession of the land for not less than 15 years from the date that he first commences to improve the land, makes an improvement to the land

(c) A successor in interest of a person described in subdivision (a) or (b).

The phrase "makes an improvement" is to be substituted for "affixes an improvement" or "constructs an improvement" wherever these phrases appear in the statute and Comments.

The second paragraph of the Comment to Section 871.1 was deleted and the substance of the following statement is to be inserted: "The status of good faith must continue throughout the period that the improvement or improvements are being constructed. Thus, the statute does not apply to any improvement made after the improver is no longer a good faith improver."

Section 871.2. Section 871.2 contained in the recommendation was deleted and the following section was inserted:

871.2. As used in this chapter, "person" includes a natural person, a firm, association, organization, partnership, business trust, corporation, state, county, city and county, city, district, public authority, public agency, or any other political subdivision or public corporation.

Section 871.2 which was formerly contained in the recommendation was deleted because Section 871.1 limits relief to "good faith" improvers and the determination of whether the improver acted in "good faith" is a matter appropriate for the court to determine in the circumstances of the particular case.

Section 871.3. No changes.

Section 871.4. No changes.

Section 871.5. In subdivision (b), the phrase ", within its legal and equitable powers," was deleted as unnecessary.

Section 871.6. Paragraph (1) of subdivision (b) was revised to read:

(1) the sum of (i) the amount by which the improvement enhances the value of the land and (ii) the amount paid by the good faith improver and his predecessors in interest as taxes, and as special assessments, on the land as distinguished from the improvement.

Similar conforming changes are to be made in other provisions of the statute.

Minutes
September 16 and 17, 1966

STUDY 44 - THE FICTITIOUS NAME STATUTE

The Commission considered Memorandum 66-52 and the presentations of various interested persons who attended the meeting.

Presentations by interested persons

Publication. The newspaper publishers' representatives stated that the monetary value of all legal advertising is small, constituting from less than 1% (for a large paper) to about 6% (for a small, rural newspaper) of the gross revenue. The income from fictitious name advertising constitutes but a small fraction of the income from legal advertising. They stated that publication is needed to provide fictitious name information promptly, not to provide newspapers with revenue.

Some of the credit association representatives pointed out that some credit associations employ retired persons to clip all legal advertisements appearing in newspapers published in the counties served by the particular association. Information gleaned from this clipping service is made available to the members of the association. This clipping service must be conducted whether or not fictitious names are published, so the credit associations would not be able to save any money if a central registry of fictitious names were provided.

For the creditor who is not a member of a credit association, publication is of some value in some areas to provide immediate information concerning the change in the status of a debtor. In places like Los Angeles County, it provides minimal information, because all 120 newspapers published in the county must be checked to discover whether a certificate has been filed. A suggestion was made that publication be required in the judicial district where the principal place of the business using the fictitious name is located. Another suggestion was made for

Minutes
September 16 and 17, 1966

centralized publication--publication by the county clerk or the Secretary of State in one particular newspaper in the county. These suggestions did not meet with any general approval, but no one had any other suggestion to obviate the necessity for looking at all newspapers published in any particular county in order to obtain the information on fictitious names published in that county.

The County Clerks Association urged the retention of the publication requirement in order to forestall any increase in the number of inquiries that are made concerning fictitious names.

So far as cost is concerned, the bulk of the cost is in the first publication. Hence, no substantial savings can be realized by reducing the number of publications. All agreed, however, that worthless information--such as the notary's jurat--should not be published.

Compliance and sanctions. The County Clerks Association reported that an informal sanction imposed by the banks on some counties secures a high degree of initial compliance with the fictitious name statute. Banks will not open a bank account for a business operating under a fictitious name unless the business is able to show that the certificate has been filed with the county clerk. This type of sanction is used, apparently, only in some counties. Moreover, this type of sanction secures only the initial compliance with the statute by a business that is newly organized. This sanction does not ensure continued compliance when changes relating to a continuing business ought to require the filing and publication of a new certificate. That the certificates are not kept current is indicated by the report that a random sampling of certificates that are five years old showed that only 7 out of 38 were then accurate, and a random sampling of certificates that are 10 years old showed only 8 out of 38 that were then accurate.

Minutes
September 16 and 17, 1966

The County Clerks Association suggested that an effective sanction be imposed to require filing and publication of certificates reflecting any change in the information in the certificates.

The suggestion was made, however, that the proposed penalty of \$500 is too high.

Central filing. Representatives of credit associations and organizations indicated that a centralized filing system with the Secretary of State would be advantageous; but such a system should not require a dual filing. Some questioned whether the added advantages would be worth the added cost.

The County Clerks Association stated that the present fee now covers the cost of the service they render. Centralized filing would not reduce the service and, hence, the fee should be large enough to cover the additional costs of centralized filing.

The County Clerks Association stated that considerable use of the source documents is made at the local level. Hence, any centralized filing system should provide for the retention of the source documents at the local level.

In addition, the original filing should be at the local level in order to permit new businesses to obtain immediate proof of compliance to show to banks who require such proof of compliance.

The County Clerks Association suggested that the centralized filing could be based on a print-out made on the local data-processing equipment that is forwarded to the Secretary of State together with such portion of the filing fee as is necessary to cover the cost of the central filing.

Because of the demands of the voter registration system, the large counties have the equipment to handle this function. And if a county is so small that its election problems have not forced it to use data-processing equipment,

the burden of copying fictitious name certificates will be insignificant because of the few filings involved.

Index of true names. The County Clerks Association urged the repeal of the requirement that an alphabetical index be maintained of the true names of the persons doing business in a fictitious name. There is virtually no demand for this service. Almost all inquiries start with a known fictitious name, not with a known true name. The cost of maintaining the true name index far exceeds its value.

Contents of certificate. The County Clerks Association suggested that the fictitious name certificate contain both the residence address and the signature of each member of the firm doing business under a fictitious name. Persons using the certificates make frequent use of both. When the business ceases to operate, the persons who were interested in the business can frequently be traced through their residence (or former residence) addresses. Police agencies frequently check the signatures on the fictitious name certificates.

Commission action

The Commission decided that the statute should be redrafted to eliminate the central filing of fictitious name certificates with the Secretary of State.

The Commission decided to retain the existing requirement that fictitious name notices be published once a week for four successive weeks. However, the form of the required publication should be substantially simplified in the interest of cutting costs and making the notices readable. A new publication should be required whenever a revised certificate is filed reflecting a change in firm membership or business address. Although a new certificate would be required when a firm member changes his residence address, publication would not be required in such a case.

The Commission directed the staff to prepare a new recommendation reflecting these changes.

STUDY 50(L) - RIGHTS UPON TERMINATION OF A LEASE

The Commission considered Memorandum 66-54 and the tentative recommendation distributed June 17, 1966. The following actions were taken:

Waiver of provisions

The proposed act should be modified to indicate that the parties to a lease cannot alter the legal consequences of their acts as provided in Sections 1951, 1951.5, 1952, 1953, and 1954. That Sections 3320-3323 are not subject to modification by contract is implicit from the fact that Sections 1953 and 1954 cannot be modified. Moreover, Section 3323 already provides the extent to which the parties may modify the provisions of Sections 3320 and 3321 relating to damages, and Sections 3324 and 3325 already contain provisions forbidding advance waiver. That Section 3322 is not subject to waiver is also implicit from the provisions of Sections 3323 (on liquidated damages) and 3325 (permitting the lessee's recovery of excessive payments).

Section 1951

Section 1951 was modified to read:

1951. A lease of real property is repudiated when, without justification:

(a) Either party communicates to the other party by word or act that he will not or cannot substantially perform his remaining obligations under the lease;

(b) Either party by a voluntary act or by voluntarily engaging in a course of conduct renders substantial performance of his remaining obligations under the lease impossible or apparently impossible; or

(c) The lessor actually evicts the lessee from the leased property.

Section 1951.5

Section 1951.5 was revised in substance to read:

1951.5. A lease of real property is terminated prior to the expiration of the term when:

(a) The lessor, with justification, evicts the lessee from the property;

(b) The lessee quits the property pursuant to a notice served pursuant to Sections 1161 and 1162 of the Code of Civil Procedure or pursuant to any other notice or request by the lessor to quit the property; or

(c) The lease is repudiated by either party thereto and
(1) the aggrieved party either is not entitled to or does not seek specific or preventive relief to enforce the provisions of the lease as provided in subdivision (c) of Section 1953 or
(2) the aggrieved party gives the other party written notice of his election not to seek such relief.

Section 1952 was approved without change.

Section 1953 was approved without change.

Section 1953.5

The staff was directed to revise the section to provide that the statute of limitations begins to run at the time of repudiation. This action was taken to specify a simpler and uniform rule that will be applicable to all repudiation cases and because it did not appear that the Restatement rule stated in the section had been approved in California in regard to contracts generally.

Section 1954 was approved without change.

Section 3320

Subdivision (a) was revised to read:

(a) The present worth of the excess, if any, of the rent and charges equivalent to rent reserved in the lease for the portion of the term following such termination over the reasonable rental value of the property for the same period.

The comment should be revised to indicate that the reference to Section 3324 relates only to those attorneys' fees incurred in seeking judicial relief.

Section 3321

Subdivision (a) was revised to read:

(a) The present worth of the excess, if any, of the reasonable value of the property for the portion of the term following such termination over the rent and charges equivalent to rent reserved in the lease for the same period.

Section 3322 was approved without change.

Section 3323

Section 3323 was revised to read:

3323. Notwithstanding Sections 3320 and 3321, upon breach of a provision of a lease of real property, liquidated damages may be recovered if so provided in the lease and they meet the requirements of Sections 1670 and 1671.

Section 3324

Section 3324 was revised to read:

3324. (a) In addition to any other relief to which a lessor or lessee is entitled by reason of the breach of a lease

Minutes
September 16 and 17, 1966

of real property by the other party to the lease, he may recover reasonable attorney's fees incurred in obtaining such relief if the lease provides for the recovery of such fees.

(b) If a lease of real property provides that one party to the lease may recover attorney's fees incurred in obtaining relief for the breach of the lease, then the other party to the lease may also recover reasonable attorney's fees in obtaining relief for the breach of the lease should he prevail. The right to recover attorney's fees under this subdivision may not be waived prior to the accrual of such right.

Section 3325

Section 3325 was revised to read:

3325. Subject to the lessor's right to obtain specific enforcement of the lease, if a lease of real property is terminated because of the breach thereof by the lessee, the lessee may recover from the lessor any amount paid to the lessor in consideration for the lease (whether designated rental, bonus, consideration for execution thereof, or by any other term) that is in excess of the sum of (a) the portion of the total amount required to be paid to or for the benefit of the lessor pursuant to the lease that is fairly allocable to the portion of the term prior to the termination of the lease and (b) any damages, including liquidated damages as provided in Section 3323, to which the lessor is entitled by reason of such breach. The right of a lessee to recover under this section may not be waived prior to the accrual of such right.

Section 3308

Instead of repealing Section 3308, the Commission concluded that the section should be revised to read as follows:

3308. ~~The parties to any lease of real or personal property may agree therein that~~ If such a lease shall be of personal property is terminated by the lessor by reason of any breach thereof by the lessee, the lessor shall thereupon be entitled to recover from the lessee the worth ~~at the time of such termination,~~ of the excess, if any, of the amount of rent and charges equivalent to rent reserved in the lease for the balance of the stated term ~~or any shorter period of time~~ over the ~~then~~ reasonable rental value of the premises for the same period.

The rights of the lessor under ~~such agreement shall be~~ this section are cumulative to all other rights or remedies now or hereafter given to the lessor by law or by the terms of the lease; provided, however, that the election of the lessor to exercise the remedy hereinabove permitted shall be binding upon him and exclude recourse thereafter to any other remedy for rental or charges equivalent to rental or damages for breach of the covenant to pay such rent or charges accruing subsequent to the time of such termination. ~~The parties to such lease may further agree therein that unless the remedy provided by this section is exercised by the lessor within a specified time the right thereto shall be barred.~~

Minutes
September 16 and 17, 1966

Section 3387.5

The Commission directed the staff to redraft the section to state the principle that leases are specifically enforceable when the rental is in substance a purchase payment for some interest in the leased property. Leases with bona fide options to the lessee should not be subject to specific performance any more than other leases are.

Approval of recommendation

The staff was authorized to send the recommendation to the printer. Further necessary revision of Section 3387.5 will be made while the recommendation is in the printing process.

Minutes
September 16 and 17, 1966

STUDY 63(L) - EVIDENCE CODE (EVIDENCE CODE REVISIONS)

The Commission considered Memorandum 66-59 which set forth an altered version of Section 669 of the Evidence Code dealing with violation of statute. The Commission revised subdivision (b) of Section 669 to read substantially as follows:

(b) This presumption may be rebutted by proof that :

(1) The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law ; or

(2) The person violating the statute, ordinance, or regulation was a child and exercised the degree of care ordinarily exercised by persons of his maturity, intelligence, and capacity under similar circumstances. This paragraph does not apply if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualifications.

Minutes
September 16 and 17, 1966

STUDY 65(L) - INVERSE CONDEMNATION

The Commission considered Memorandum 66-57 and the first part of the study on Inverse Condemnation prepared by the Commission's consultant, Arvo Van Alstyne. The Commission concluded that it would not submit a constitutional amendment on this subject to the 1967 session of the Legislature. The Commission determined to continue its study of this topic. The topic will again be considered when Professor Van Alstyne has completed Part II of the study (concerning the appropriate rules governing liability for inverse condemnation).