

<u>Time</u>	<u>Place</u>
September 4 - 9:30 a.m. - 5:00 p.m.	State Bar Building
September 5 - 9:00 a.m. - 5:00 p.m.	1230 West Third Street
September 6 - 9:00 a.m. - 3:00 p.m.	Los Angeles, Calif. 90017

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles

September 4, 5, and 6, 1969

SEPTEMBER 4

1. Approval of Minutes of June 26-28 Meeting (sent 7/1/69)
2. Administrative Matters

1969 Legislative Program Report

Oral Report at Meeting

Discussion of problems encountered in obtaining enactment of 1969
Legislative Program

Budget for 1970-71 Fiscal Year

Memorandum 69-84 (sent 8/22/69)

Annual Report for 1969 Year

Memorandum 69-83 (Printing of Recommendations)(sent 8/26/69)

Memorandum 69-85 (sent 7/30/69)

Suggested Draft of Annual Report (attached to Memorandum)

Fifth Supplement to Memorandum 69-85 (galley proof of Annual
Report)(sent 8/26/69)

First Supplement to Memorandum 69-85 (jury instructions)
(sent 8/7/69)

Second Supplement to Memorandum 69-85 (new topic - Probate
Code Sections 40-43)(sent 8/7/69)

Third Supplement to Memorandum 69-85 (new topic - Probate Code
Sections 40-43)(sent 8/22/69)

Fourth Supplement to Memorandum 69-85 (new topic - administra-
tive law)(sent 8/22/69)

Memorandum 69-95 (statutes held unconstitutional)(sent 8/22/69)

Memorandum 69-85 - 6th Supp.

3. Study 63 - Revision of the Evidence Code

Consolidated Tentative Recommendation

Memorandum 69-99 (sent 8/7/69)

Consolidated Tentative Recommendation (attached to Memorandum)

Comments on Res Ipsa Loquitur Provision

Memorandum 69-88 (enclosed)

4. Study 44 - Fictitious Business Name Statute
Memorandum 69-87 (sent 8/22/69)
Tentative Recommendation (attached to Memorandum)
Printed Research Study (attached to Memorandum)
) Special
) Order of
) Business
) at 2:00 p.m

5. Civil Code Section 715.8 (Rule Against Perpetuities)
Memorandum 69-92 (enclosed)
Revised Tentative Recommendation (attached to Memorandum)

6. Study 50 - Leases
Memorandum 69-106 (sent 8/26/69)

7. Study 76 - Trial Preference
Memorandum 69-102 (sent 8/7/69)

SEPTEMBER 5 AND 6

8. Study 36.55 - Condemnation (Arbitration)
Memorandum 69-86 (sent 7/30/69)
Recommendation as sent to printer (attached to Memorandum)
First Supplement to Memorandum 69-86 (sent 8/26/69)
Galley proof of printed recommendation (attached to Supplement)

9. Study 52 - Sovereign Immunity

Consolidated Tentative Recommendation
Memorandum 69-104 (sent 8/7/69)
Consolidated Tentative Recommendation (attached to Memorandum)

Nuisance Immunity Provision
Memorandum 69-104 (sent 8/7/69)
Background Material - Memorandum 69-103 and attachments (sent 8/7/69)

Plan or Design Immunity
Memorandum 69-89 (sent 8/22/69)

Ultrahazardous Activities Provisions
Memorandum 69-90 (sent 8/22/69)

Revised August 27, 1969

Pesticides Provisions

Memorandum 69-91 (sent 8/22/69)

Prisoners and Mental Patients Provisions

Memorandum 69-105 (sent 8/22/69)

10. Study 65.20 - Inverse Condemnation (Survey and Examination)

Memorandum 69-93 (sent 7/30/69)

Revised Tentative Recommendation (attached to Memorandum)

11. Study 36.40 - Condemnation (Excess Takings)

Memorandum 69-94 (to be sent)

Tentative Recommendation (attached to Memorandum)

12. Study 65.25 - Inverse Condemnation (Water Damage; Land Stability)

Memorandum 69-96 (sent 8/7/69)

Tentative Recommendation (attached to Memorandum)

13. Study 65.40 - Inverse Condemnation (Aircraft Noise Damage)

Memorandum 69-97 (sent 7/8/69)

Draft Statute (attached to Memorandum)

14. Study 52.40 - Sovereign Immunity (Collateral Source Rule)

Memorandum 69-101 (sent 8/7/69)

15. Study 36.60 - Condemnation (Moving Expenses)

Memorandum 69-98 (to be sent)

Continuation of consideration of any uncompleted items listed on agenda for September 4.

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

SEPTEMBER 4, 5, AND 6, 1969

Los Angeles

A meeting of the California Law Revision Commission was held in Los Angeles on September 4, 5, and 6, 1969.

Present: Sho Sato, Chairman
Alfred H. Song, Member of the Senate (September 4)
Carlos J. Moorhead, Member of the Assembly
John D. Miller
Lewis K. Uhler
Richard H. Wolford (September 4 and 5)
William A. Yale (September 5 and 6)

Absent: Roger Arnebergh
Thomas E. Stanton, Jr., Vice Chairman
George H. Murphy, ex officio

Messrs. John H. DeMouilly, Clarence B. Taylor, and Jack I. Horton, members of the Commission's staff, also were present.

The following observers were also present:

Michael B. Dorais, California Newspaper Publishers Ass'n (September 4)
Michael Smith, Los Angeles Daily Journal (September 4)
Melissa Thomas, Los Angeles Daily Journal (September 4)
Telford Work, Los Angeles Newspaper Service Bureau (September 4)

✓ Paul F. Dauer, Department of Water Resources (September 5 and 6)
✓ William C. George, San Diego County Counsel's Office (September 6)
✓ William G. Holliman, Jr., League of California Cities (September 6)
John N. Morrison, Attorney General's Office (September 5 and 6)
Kenneth Nellis, Department of Public Works (September 5 and 6)
Donald M. Pach, Department of Public Works (September 5)
Willard A. Shank, Attorney General's Office (September 5 and 6)
Terry C. Smith, Los Angeles County Counsel's Office (September 5 and 6)
Charles E. Spencer, Department of Public Works (September 5 and 6)
Gerald J. Thompson, Santa Clara County Counsel's Office (September 5 and 6)

Minutes
September 4, 5, and 6, 1969

Comments of Commissioner Stanton: With respect to various items on the agenda Commissioner Stanton submitted written comments. A copy of these comments was provided each Commissioner, and the comments were considered in connection with the matters to which they related.

Approval of Minutes of June 26-28 Meeting. The minutes of the June 26-28, 1969 meeting were approved as submitted by the staff.

Minutes
September 4, 5, and 6, 1969

ADMINISTRATIVE MATTERS

Procedure in Connection With Securing Enactment of Legislative Program

The Commission discussed the problems in connection with securing enactment of its legislative proposals. It was agreed that the Executive Secretary should be given broader authority to contact individual members of the Legislature to provide them with an opportunity to hear an explanation of the bill on which they may have questions.

Budget for 1970-71 Fiscal Year

The Commission considered Memorandum 69-84 and the attached draft of budget materials. After discussion, the Commission directed that the "Priority No. 1" addition to the amount allotted for 1970-71 should be increased by \$3,000 in the category of research. With this change, the "Priority No. 1" and "Priority No. 2" requests suggested by the staff were approved for submission to the Department of Finance.

Annual Report

The Commission considered the Fifth Supplement to Memorandum 69-85 and the attached portion of the Annual Report which had been set in type. The material submitted was approved after the following revisions were made by the Commission:

(1) The material relating to the taking of instructions to the jury room on page 19 was deleted. The Commission determined that this matter should be given further study and should not be dropped from the agenda. Accordingly, the report should be revised to reflect the fact that jury instructions will be a matter under active consideration rather than being dropped from the Commission's agenda.

Minutes
September 4, 5, and 6, 1969

(2) On page 9 under the summary of work of the Commission a new paragraph should be added after the statement of the three principal tasks of the Commission. The new paragraph should state in substance that the Commission received and considered a number of suggestions for topics that might be studied by the Commission. Although many of these topics appear to be in need of study, because of the limited resources of the Commission, the Commission has determined not to undertake the study of these topics at this time.

(3) Other changes are to be made to reflect the Commission's action on which recommendations it will submit to the 1970 Legislature and to reflect the Governor's action on the public entity claims bill.

Report on Statutes Repealed by Implication or Held Unconstitutional

The Commission considered Memorandum 69-95 and the suggested staff draft of the statement to be included in the next Annual Report on California statutes repealed by implication or declared unconstitutional. Subject to minor editorial revisions, the statement was approved for inclusion in the Annual Report.

New Topic - Pleading and Practice

The Commission considered the Sixth Supplement to Memorandum 69-85. This supplement presented a letter from Thomas L. Lord. He practiced law in another state which used the Federal Rules of Civil Procedure and expressed the view that a study should be made of the problems of practice and procedure in California in light of the federal rules. The Commission directed the staff to prepare a statement that might be included in the

Minutes
September 4, 5, and 6, 1969

Annual Report to authorize a study to determine whether the California law relating to the practice, pleading, and procedure should be revised. The statement included in the report should indicate that the Commission would be undertaking the study of some small, specific problems in this general area and also might undertake a comprehensive long-range project to ultimately revise the entire body of the law if that appears desirable and feasible. No reference should be made to the Federal Rules of Civil Procedure in the title of the topic but reference could be made to the Federal Rules of Civil Procedure in the body of the text describing the study to be undertaken.

New Topic - Probate Code Sections 40-43

The Commission considered the letter from Harold R. Boucher, San Francisco attorney, in the Second Supplement to Memorandum 69-85 and the additional letter forwarded with the Third Supplement to Memorandum 69-85. These Letters concerned a study to determine whether Probate Code Section 40-43 (relating to charitable bequests and devises) should be revised or repealed.

The Commission had been advised by Commissioner Stanton prior to the meeting that a State Bar Conference Committee had made a study of these sections and has recommended their repeal. Accordingly, the Commission determined that it would not request authority to study these sections.

Minutes
September 4, 5, and 6, 1969

New Topic - Administrative Law and Procedure

The Commission considered the Fourth Supplement to Memorandum 69-85-- a letter from presiding officer Donald R. Wagner of the Office of Administrative Procedure suggesting that the Commission undertake to make a study of the administrative procedure act. After discussion, the Commission concluded that the suggested topic would be a major, costly undertaking. The legislative members advised the Commission that they did not feel that this was a topic that the Legislature would consider one that should be given priority when the other topics that might be undertaken for a study by the Commission are taken into account. The staff was directed to advise the Office of Administrative Procedure that because of the Commission's heavy agenda it would not be possible for the Commission to undertake another substantial study at this time.

Minutes
September 4, 5, and 6, 1969

STUDY 12 - TAKING INSTRUCTIONS INTO THE JURY ROOM

The Commission considered the First Supplement to Memorandum 69-85 and determined that the study relating to taking instructions to the jury room should not be dropped from the Commission's agenda. The staff was directed to include this study on the agenda for the next meeting. Prior to the meeting, the staff should check with Ralph Kleps of the Judicial Council concerning the Council's position on the proposal and prepare materials that would be suitable for wide distribution for comment. These materials together with the staff's suggestion for distribution of the materials should be presented for Commission approval at the next meeting.

Minutes
September 4, 5, and 6, 1969

STUDY 36.40 - EXCESS CONDEMNATION (PHYSICAL AND FINANCIAL REMNANTS)

The Commission considered Memorandum 69-94 and the draft tentative recommendation attached to that memorandum.

After considerable discussion, the Commission determined to abandon the approach of specifying the ratio of damages to value that must exist to justify a "remnant-elimination" taking. Accordingly, the approach of providing a determination of the issue after the determination of values and damages, with or without options to either party, was also abandoned.

The staff is to prepare a draft that will (1) permit the taking of true "physical" remnants; (2) authorize the voluntary acquisition of remnants whenever severance of other damages will result; and (3) clarify and make generally applicable the standard and procedure contemplated in the Rodoni decision to permit the taking of "financial" remnants whenever the court determines (if the issue is raised), as a preliminary matter, that there is a "substantial risk" that the severance or other damages attributable to the "remnant" will be "substantially equivalent" to the value of that remnant.

The Commission discussed the idea that "remnant elimination" condemnation should be a matter of reciprocity between condemnor and condemnee. In other words, if the case is an appropriate one for taking the entire parcel, it seems equitable to permit the condemnee to insist that it be taken. The Commission determined not to pursue this approach, however, because (1) the property owner is protected by the law of severance damages; (2) there are procedural and practical problems in implementing

Minutes

September 4, 5, and 6, 1969

the idea; and (3) requiring condemnors to take property might unduly encroach upon their fiscal and administrative decision-making.

The suggestion that an "excess condemnee" should have a "right of first refusal" on disposition of the remnant was deferred for consideration in connection with the proposal that any condemnee should have that or a similar privilege.

Minutes
September 4, 5, and 6, 1969

STUDY 36.55 - CONDEMNATION (ARBITRATION)

The Commission considered Memorandum 69-86, the First Supplement to that memorandum, and the galley proof of the printed recommendation. The recommendation was approved for final printing.

Minutes

September 4, 5, and 6, 1969

STUDY 36.60 - CONDEMNATION (MOVING EXPENSES)

The Commission considered Memorandum 69-98 and Assembly Bills 375 and 1191. The staff was directed to prepare a tentative recommendation for consideration at a future meeting incorporating the suggestions advanced in Memorandum 69-98. The tentative recommendation should be based on Assembly Bill 1191, but with several significant modifications. The statute is to be made applicable to all public entities and will replace all existing statutes governing the payment of relocation expenses. Further, reimbursement for the actual and reasonable moving expenses incurred is to be made mandatory and subject to judicial review. Professor Sato submitted a written statement to the staff indicating problems that he felt the staff should consider in drafting the tentative recommendation. The Commission did not consider whether the statute should define "condemnor" in a way to include all public and private condemners and make the same statute apply to all of them.

Minutes
September 4, 5, and 6, 1969

STUDY 44 - FICTITIOUS BUSINESS NAMES STATUTE

The Commission considered Memorandum 69-87, the attached tentative recommendation, and the attached printed research study.

The Commission also considered suggestions made by the representatives of the newspaper industry who indicated that a statute drawn along the following lines would be acceptable to that industry:

1. Frequency of insertion to be reduced from four to three times weekly.
2. Publication version to be same as that of certificate filed, provided however, that if jurat (notarization) is dropped from the filed certificate it shall be discontinued on the copy published.
3. Content of notice, aside from jurat, to remain substantially as at present, inclusive of names and addresses of principals and partners in firm advertised, and name and business address of the firm advertising its trade name.
4. A general direction that required publication be made in a newspaper that circulates in the area where the business is to be conducted. (Such a generalized proviso would indicate legislative policy but would not make publications subject to technical attack as might be possible if the localization principle should be made specifically jurisdictional.)
5. Strengthening sanctions to capture filings and publications from businesses which presently evade identification:
 - a) Retention of present sanction withholding court recognition from those not filing and publishing until they do file and publish.
 - b) Amending Financial Code to provide no bank account to be opened under a trade name without evidence of subject having complied with statute as to BOTH filing and publishing.
 - c) Some sort of criminal penalty for deliberate falsification in filing and publication of certificates.

6. Section 2469.1 of the present Civil Code, relating to the abandonment of fictitious names, if moved into the Commercial Code to retain its present substance except that the frequency of publication as incorporated therein be reduced from four insertions to three.
7. Section 2469.2, relating to the five year renewal requirement, if moved into the Uniform Commercial Code and amended, should retain the wording in this clause which was worked out as a compromise a number of years ago by the newspapers with the county clerks' association: "No such renewal certificate need be published unless there has been a change in the information required in the original certificate, in which event publication shall be made as provided for in the original certificate".

On Thursday, the Commission considered the following matters and made the following decisions:

(1) The Commission discussed a suggestion received from a number of persons that a central filing system be provided. It was noted that this matter has been discussed at length in the background research study prepared by the staff and has been given considerable thought and discussion by the Commission. There was no inclination by the Commission to change its previous decision not to provide central filing at this time.

(2) A real estate investment trust as defined in Corporations Code Section 23000 should be exempt from the requirements of the fictitious business names statute if it has obtained a permit under Corporations Code Section 23002 and has designated an agent for service of process under Corporations Code Section 24003. Further, the fictitious business names statute should be revised to require that in a case of a Massachusetts business trust the trustees should be listed, together with their addresses, in the statement filed by the business.

Minutes
September 4, 5, and 6, 1969

(3) The Commission considered the suggestion that the phrase "regularly doing business" be defined more precisely. After considerable discussion the Commission determined that no more detail was needed with respect to this phrase inasmuch as it would be better for the court to interpret the phrase in light of the purposes of the statute than to draw on language from other statutes designed to serve different purposes.

(4) A clarifying revision should be made in the section requiring the filing of a fictitious business name statement to make clear that the requirement does not apply to nonprofit associations such as churches, labor unions, fraternal and charitable organizations, nonprofit hospitals, and the like.

(5) The Commission discussed the sanction and considered the comments made on the \$300 civil penalty provision. The Commission determined that the civil penalty should be one dollar for each day of violation not to exceed \$300 and that compliance with the statute before an action to collect the penalty is commenced is a defense to the action.

(6) A provision should be added to the statute permitting a person ceasing to do business as a member of a firm operating under a fictitious name to file a statement to that effect. This new type of statement should be filed and published in the same manner as a fictitious business name statement and upon the filing of such a statement the County Clerk should notify the fictitious business firm that the statement has been filed and that a new statement should be filed by the firm if the firm is to continue in business under the fictitious business name.

Minutes
September 4, 5, and 6, 1969

(7) The Commission determined by a 3 to 1 vote to accept all the suggestions of the California newspaper representatives and to have a revised recommendation prepared for consideration at the next meeting. The revised recommendation would include the suggestions of the California newspaper representatives and the other changes the Commission had determined should be made.

On Saturday the Commission again discussed this topic (since members were present Saturday who were not present when the previous decisions were made). The members of the Commission expressed great concern over the criticism of the tentative recommendation by members of the State Bar Committee and others because the recommended legislation did not provide for a central filing system and further expressed a general unwillingness to recommend a sanction that would impose on private businessmen the burden to enforce state statutory requirements-- requiring banks to refuse to open a bank account unless a person shows compliance with the statute. It was felt that this recommendation might start a dangerous and undesirable trend as to the means for enforcing statutes. Further, time will not permit obtaining the views of the bankers and the requirement might be extremely burdensome to the banks and might result in considerable controversy over the recommendation. The basic problem, however, was that the sanction was the type of sanction that the Commission was unwilling to recommend. For example, the sanction would appear to punish the bank for failing to insure compliance with the statute rather than the person who is directly required to comply with the statute.

Minutes
September 4, 5, and 6, 1969

The view was expressed that those who desire to have a sanction that would require private industry such as the banks to police a statutory requirement should be the ones who present the bill to the Legislature rather than the Commission. This burden of enforcement by private businessmen could not be justified in this case because most persons apparently do comply initially with the statute but fail to keep their statement on file current as changes take place in business because they are unaware of the requirement that they must keep it current. The requirement that the banks police the statute would be of use only where the business is first established and would be of no assistance in assuring that the records are kept up to date. The existing sanction is more effective in this respect since it applies at the time the person doing business in a fictitious name attempts to bring an action and assures that he will be in compliance with the statute at that time.

After considerable discussion, the Commission voted not to submit any recommendation on this subject and to drop the topic from its agenda. The staff, however, was directed to prepare a revised recommendation for consideration at the next meeting. The revised recommendations should make no change in the publication requirements (other than those necessary so that the statement published would be the same as the statement filed) and should retain the sanction provided under existing law. The Commission will consider the revised recommendation at its next meeting and at that time will determine what action it will take on the topic.

Minutes
September 4, 5, and 6, 1969

STUDY 52.20 - SOVEREIGN IMMUNITY (PRISONERS AND MENTAL PATIENTS)

The Commission considered Memorandum 69-105 and the portion of the consolidated sovereign immunity recommendation relating to prisoners and mental patients.

The Commission adopted the following changes in the recommendation:

(1) The staff changes were approved and Sections 844.6 and 854.8 were amended to eliminate the liability of a public entity for the wrongful death of prisoners and mental patients respectively.

(2) Section 846 was deleted from the recommendation and Section 845.8 was substituted with amendments to subdivision (b) of the latter section which will provide immunity from liability for any injuries caused by "an escaping or escaped arrested person or a person resisting arrest."

(3) The phrase "or in a similar facility" was added to the definition of "mental illness or addiction" in Section 854.4 to provide the broadest possible scope for that section.

(4) Subdivision (a) of Section 856.2 was amended to read:

856.2(a) Neither a public entity nor a public employee is liable for:

(1) An injury caused by an escaping or escaped person who has been confined for mental illness or addiction.

(2) An injury to, or the wrongful death of, an escaping or escaped person who has been confined for mental illness or addiction.

The Commission rejected the suggestion that public entities should be liable generally for injuries caused by the negligence of a prisoner or a mental patient acting within the course of his employment as an employee of the entity and believed that no further clarifying changes were

Minutes

September 4, 5, and 6, 1969

necessary with respect to the issue of concurrent causation or in the definition of "mental institution." Subject to the changes listed above and minor editorial revisions this portion of the recommendation was approved for printing.

Minutes
September 4, 5, and 6, 1969

STUDY 52.30 - SOVEREIGN IMMUNITY (PLAN OR DESIGN IMMUNITY)

The Commission considered Memorandum 69-89 and that portion of the consolidated sovereign immunity tentative recommendation relating to the plan or design immunity .

The Commission determined that the following changes should be made:

(1) Section 830.6 should be revised to provide in substance that on the motion of the court or any party, the issues raised under this section must be tried separately and before any other issues in the case.

The Comment to Section 830.6 should make clear that only the issues presented under this section are to be tried separately by the court; all other issues, including any defense raised under Section 835.4(b), are to be tried to the ultimate trier of fact.

(2) Paragraph (3) of subdivision (b) of Section 830.6 should be revised to read substantially as follows:

(3) The public entity or the public employee had knowledge that such other injuries had occurred a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

(3) The Comment to Section 830.6 should include the substance of the following material:

The term "injuries" includes the singular "injury." That is, in some circumstances, a single prior injury may be sufficient to demonstrate the dangerousness of a condition. Of course, one injury may not be conclusive and even a number of injuries may fail to demonstrate dangerousness. Moreover, the mere fact that prior injuries have occurred is not determinative without proof that these injuries were proximately caused by the assertedly dangerous condition.

Minutes

September 4, 5, and 6, 1969

(4) The text of the tentative recommendation should include the substance of the following material:

Moreover, all public entities are subject to liability under a theory of inverse condemnation "for actual physical injury to real property proximately caused by . . . [an] improvement as deliberately designed and constructed . . . under article I, section 14, of . . . [the California] Constitution. . . ." *Albers v. County of Los Angeles*, 62 Cal.2d 250, 263-264, 398 P.2d 129, 137, 42 Cal. Rptr. 89, 97 (1965). Such liability obviously is not subject in any way to the immunity provided by Section 830.6. See generally *Van Alstyne, Inverse Condemnation: Unintended Physical Damage*, 20 *Hastings L. J.* 431 (1969).

The Commission also considered suggestions that: (1) streets and highways should be exempted from the operation of subdivision (b); (2) the injuries demonstrating dangerousness referred to in subdivision (b) should be only those injuries occurring after the effective date of this legislation; (3) injuries occurring at identical facilities owned by other entities should not qualify for inclusion in "other injuries" under subdivision (b); (4) notice of dangerousness should not be limited to that obtained through "other injuries." The Commission did not believe that any of these latter suggestions should be adopted or that any clarifying changes were necessary to cover these points.

Subject to the changes listed above and minor editorial revisions, this portion of the recommendation was approved for printing.

Minutes
September 4, 5, and 6, 1969

STUDY 52.50 - SOVEREIGN IMMUNITY (ULTRAHAZARDOUS ACTIVITIES)

The Commission considered Memorandum 69-90 and the portion of the consolidated sovereign immunity tentative recommendation relating to ultrahazardous activities and approved this portion of the recommendation for printing subject only to editorial revisions.

Minutes
September 4, 5, and 6, 1969

STUDY 52.60 - SOVEREIGN IMMUNITY (DANGEROUS AGRICULTURAL CHEMICALS)

The Commission considered Memorandum 69-91 and the portion of the consolidated sovereign immunity tentative recommendation relating to dangerous agricultural chemicals. Subject only to editorial revisions, this portion of the recommendation was approved for printing without change.

Minutes
September 4, 5, and 6, 1969

STUDY 52.70 - SOVEREIGN IMMUNITY No. 10

The Commission considered Memoranda 69-104 (relating to the consolidated tentative recommendation generally) and 69-103 (relating to nuisance liability) and the consolidated tentative recommendation relating to sovereign immunity.

The Commission determined that Section 815.8 should be added to the Government Code, providing as follows:

815.8. A public entity is not liable for damages under Part 3 (commencing with Section 3479) of Division 4 of the Civil Code.

Subject to editorial revisions, the remainder of the recommendation relating to nuisance liability and the comment to Section 815.8 previously drafted by the staff was approved for printing.

The Commission also considered a staff suggestion concerning a limitation on the liability for injury or death of employees of independent contractors of a public entity but determined that no changes should be attempted in this area at this time.

Minutes
September 4, 5, and 6, 1969

STUDY 63.20 - EVIDENCE CODE

The Commission considered Memorandum 69-99, Memorandum 69-88, and the tentative recommendation attached to Memorandum 69-99. The following actions were taken:

1. The technical corrections listed in Memorandum 69-88 were made but the first paragraph on page 3 is not to be deleted.
2. A sentence should be added to the recommendation (page 6) indicating that the psychotherapist-patient privilege permits the holder of the privilege to prevent another from disclosing a confidential communication.
3. Section 646, relating to res ipsa loquitur, was approved insofar as the section classifies res ipsa loquitur as a presumption affecting the burden of producing evidence. The second sentence of Section 646 was revised to read:

If the defendant introduces evidence which would support a finding that he was not negligent, the court may, and upon request shall, instruct the jury that it may draw the inference that the defendant was negligent if the facts that give rise to the res ipsa loquitur presumption are established. If such an instruction is given, the jury shall be instructed in substance that it should find the defendant negligent only if, after weighing the circumstantial evidence of negligence together with all of the other evidence in the case, it believes that it is more probable than not that the defendant was negligent.
4. The staff was directed to revise the recommendation and was authorized to send it to the printer as soon as possible. The recommendation should be included on the agenda for the October meeting so that the revised recommendation can be finally approved for printing at that time.

Minutes
September 4, 5, and 6, 1969

STUDY 65.20 - INVERSE CONDEMNATION (RIGHT TO ENTER, SURVEY,
AND EXAMINE PROPERTY)

The Commission considered Memorandum 69-93 and the tentative recommendation relating to inverse condemnation and the privilege to enter, survey, and examine property. Subject to clarifying changes that will insure that the property owner is given adequate prior notice of the hearing on the petition to enter under Code of Civil Procedure Section 1242.5, the Commission approved the recommendation for printing as a part of the consolidated recommendation relating to sovereign immunity.

Minutes

September 4, 5, and 6, 1969

STUDY 65.25; 65.30 - INVERSE CONDEMNATION (WATER DAMAGE;
INTERFERENCE WITH LAND STABILITY)

The Commission considered Memorandum 69-96 and the attached tentative recommendation relating to inverse condemnation liability for water damage and interference with land stability. A presentation at the meeting by the Department of Public Works indicated that the recommendation might not yet be ready for distribution. In order to permit the Department additional time to specify its objections and to allow the Commission an opportunity to carefully review each of these objections, the Commission deferred further action on this recommendation until the October, 1969 meeting.

Minutes
September 4, 5, and 6, 1969

STUDY 65.40 - INVERSE CONDEMNATION (AIRCRAFT NOISE DAMAGE)

The Commission considered Memorandum 69-97 and the attached staff draft statute relating to inverse condemnation liability for aircraft noise damage.

The Commission directed the staff to redraft the statute for presentation at the October, 1969 meeting, taking into consideration the following issues:

- (1) Should the right to compensation be personal to the owner of property or accrue to the property itself.
- (2) Should the right to compensation be assignable.
- (3) Should the operation of the statute be prospective only.
- (4) When should a cause of action accrue under the statute; what should the period of limitations be.
- (5) Should a procedure be included permitting the defendant in effect to deposit the damages in court and leave to the parties plaintiff the problem of apportionment.
- (6) Should fixed standards based on the frequency and intensity of noise be provided by statute.
- (7) Should any type of "holler if you're hurt" procedure be provided based either on existing operations or future operations.

Minutes
September 4, 5, and 6, 1969

STUDY 74 - CIVIL CODE SECTION 715.8 (RULE AGAINST PERPETUITIES)

The Commission considered Memorandum 69-92, the First Supplement to that memorandum, and the 40 letters received on this topic. The Commission determined to recommend repeal of Civil Code Section 715.8 without substitutional or additional legislation. The proposed tentative recommendation attached to Memorandum 69-92 was approved for printing with various minor editorial changes.

Minutes
September 4, 5, and 6, 1969

STUDY 76 - TRIAL PREFERENCES

Various members of the Commission suggested that further information be obtained on the need for a study of the matter of trial preference. It was suggested that the Judicial Council be contacted as to whether there is a need for revision of the law in this area. Also, the presiding judges of various superior courts should be contacted.

28 August 1969

Dear John:

My comments on the material thus far received are as follows:

1. Annual Report (69-85 + 5th Supp., 69-95)

I concur in everything submitted, except that I suddenly realized that (unless I have overlooked some obvious point) the name of our excellent and long-suffering Executive Secretary does not appear in the report. This should be corrected under "Personnel" and I see no reason why your name and title should be omitted from our letterhead.

2. Footnote 6, Memo 69-95, is incomplete.

2. Printing of Recommendations (69-83)

My only question relates to "Arbitration of Just Compensation." If this follows the pattern set by the Exchange of Appraisal recommendations, I concur. Otherwise, the separate printing of all condemnation law & procedure recommendations might be considered, with the thought that after the project is completed they might be consolidated into a separate volume.

3. Budget (69-84)

concern in Staff recommendations.

4. Condensation (Arbitration) (69-86)

Page 5 - Is footnote 15 necessary in view of footnote 12.

5. ~~Name~~ Fictitious Business Names (69-87)

a. I continue of the view that no change ^(other than streamlining the certificate) should be made in the publication requirement for the following reasons:

(1) The issue involved does not justify making the loss of the bill, and the possible adverse effects ~~are~~ upon the Commission and its the far more significant aspects of the its program.

(2) The expense of publication is small. A business that proposes to operate under a fictitious name should certainly be able to afford it without strain.

(3) As between one and four publications, the cost factor is either non-existent or nominal. Our whole position boils down to one of narrow principle, and personally, I favor expending our energies in fighting for more important principles.

b. Based on the correspondence, I favor reconsideration of central filing.

c. Massachusetts Trusts should be excluded, and where unincorporated associations are so large as to have officers and directors, perhaps they should only be required to list the names and addresses of their officers & directors.

d. I favor the amendment on page 6 of 69-87. Also, I am impressed with the arguments re the sanction, and suggest that it be supplemented by a general provision requiring ~~off~~ evidence of compliance before any business license or certificate is issued in a fictitious name. Or have we already considered and rejected this? If we have, forget it.

6. New Topics (69-85)

a. Probate Code 341 and related sections are under active consideration by the State Bar. A Conference Committee has recommended that they be repealed out right. This should be coordinated with the State Bar before we become involved.

b. Revision of the Administrative Procedure Act would be a major and a costly undertaking, and we should make certain that the legislature wants us to become

involved before we undertake it. If we do, there is another little gem waiting in the wings - a study to determine whether the Administrative Procedure Act should be extended to local agencies. A great idea, but not quite what Cardozo had in mind!

7. Leases (69-106)

seems like a good idea.

8. Increase condemnation (right to enter)

(69-93) -

a. I vote for reconsideration.

b. Recommendation, p. 9.

I go along with elimination of the provision for attorneys fees, if, in fact, no substantial damage was done by the entry. If damage was done, the condemnor should reimburse the ~~own~~ owner for the damages without further proceedings. If the condemnor & owner cannot agree on the amount of the damages, the condemnor should be required to make a final offer, and if the owner then applies to the court for an order fixing the damages, and if the damages are fixed at an amount in excess of the offer, attorneys fees should be awarded to the owner.

c. Recommendation, p. 16. The statute would be amended to carry out the suggestion in § 100

5. Foreign Immunity (69-89, 90, 91, 105)

a. 69-89. Concern in staff's comment.

b. 69-90 " "

c. 69-91 " "

d. 69-105. I do not favor staff suggestion (1).

I see no policy reasons justifying legislation which would reverse the efforts of the courts to give this immunity the limited scope it deserves.

If a prison is dilapidated, the fact that a prisoner is the person injured is normally a purely fortuitous circumstance. The public entity may bear the cost of remedying, at least partially, an injury done to a prisoner (hospitalization, medical care, etc.) but it does nothing to remedy the injury to the prisoner's heirs.

I concur with the remainder of the staff's suggestions.

Good luck.

Joe