MINUTES OF MEETING

OF

SOUTHERN COMMITTEE

October 22, 1955
Los Angeles

PRESENT

Members

Mr. Stanford C. Shaw, Chairman
Mr. John D. Babbage
Mr. Joseph A. Ball

Research Consultants

Professor James H. Chadbourn
Professor Stanley Howell
Professor James D. Sumner

Staff

Mr. John R. McDonough, Jr.
Mrs. Virginia B. Nordby

The Committee discussed a general time schedule for all of the studies which had been assigned to it by the Chairman of the Commission and decided that its objective would be to meet the following deadlines:

June 1, 1956 - All studies and recommendations approved by Committee and Commission.

October 1, 1956 -- All studies and recommendations ready to be sent to the printer.

This would allow the summer of 1956 for distribution of the studies and recommendations to interested persons and for consideration of any suggestions which might be received.

The Committee discussed whether, as was done by the Northern Committee, it should divide the studies assigned to it among its members and have each member assume primary responsibility for two or three of the studies. It was decided that this procedure should not be followed and that the consultants should confer directly with the full Committee rather than with any individual member.

STUDY NO. 3 -- DEAD MAN STATUTE

Professor James Chadbourn distributed to the members of the Committee copies of a preliminary memorandum outlining what he thought the scope of Study No. 3 should be. This memorandum suggested that the study should first discuss the common law rule that parties and other persons having a direct pecuniary or proprietary interest in the outcome of any action were excluded from testifying. The study should then consider the nineteenth century reforms which resulted in the general abrogation of the rule, pointing out that the rule was totally abolished in England but in America was preserved to the extent of excluding parties to actions by or against the representative of a decedent or persons in whose behalf such actions are prosecuted or defended. Professor Chadbourn's memorandum suggested that the study should describe the various legislative enactments in California which have modified the common law rule of disqualification for interest and should discuss the considerations for and against the present dead man statute. Finally, the study should present and discuss the three possible alternatives to the dead man statute which have been adopted in some states. These alternatives are: (1) the discretion-of-the-court alternative, which allows the trial judge to admit the survivor's testimony when justice so requires; (2) the corroboration alternative, which allows the survivor to testify if such evidence is corroborated by some other material evidence; and (3) the hearsay exception alternative, which allows the survivor to testify and also unseals the lips of the decedent by a special statutory exception to the hearsay rule. Professor

Chadbourn's suggestion as to the general scope and form of the study was approved.

Professor Chadbourn asked the Committee whether, in addition to the matters outlined in his memorandum, he should also include an exhaustive discussion of the California cases interpreting and applying the dead man statute. The Committee decided that the study should deal with California case law insofar as it has shaped the general nature and defined the major elements of the rule - e.g., whether construction has been liberal or strict, how various aspects of the statute such as the "claim or demand" limitation and the matter of waiver have been treated, etc. -- but should not go into minutia. The Committee told Professor Chadbourn that he should use his own discretion as to how exhaustive the treatment of the cases should be.

Professor Chadbourn also inquired whether he should examine the law of all the other states or should confine his comparative analysis to those states which have adopted one of the three alternatives mentioned in his memorandum. The Committee decided that Professor Chadbourn should use his own discretion in this regard. If the law of another state is pertinent, it should be discussed, but there is no need to present the law of all forty-eight states simply for the sake of erudition.

It was agreed that Professor Chadbourn will submit his report by February 15, 1956, and that he will submit a rough draft rather than an outline prior to that date.

STUDY NO. 4 -- SURVIVAL OF ACTIONS ARISING OUTSIDE OF CALIFORNIA

Professor James Sumner distributed to the members of the Committee copies of a preliminary memorandum outlining the problems to be studied in considering the soundness of Grant v. McAuliffe. Professor Sumner pointed out that in characterizing the question of survival of a tort action arising in a sister state as "procedural" rather than "substantive" the Grant case is out of line with the generally accepted conflicts rule. He also pointed out that the suggestion of the Court in the Grant case that survival is not a torts problem but is a problem involving the administration of a decedent's estate, although supported by some authority, is not the general view and seems to be unsound as an original proposition. Moreover, he said, the indication by the Court that the California survival statute might be applied to a sister-State cause of action only when all of the parties are California residents presents a serious constitutional question under the Privileges and Immunities Clause. The Grant case also presents constitutional problems under the Due Process and Full Faith and Credit Clauses. The Committee agreed that Professor Sumner's study should examine all of these and any other problems which are implicit in the Grant decision.

Professor Sumner raised the question whether, assuming that the Grant case is wrong, a statute should be enacted to change the result of that case. He said that there has been very little legislation in the conflicts area and suggested that the Grant v. McAuliffe problem is too small a matter to pick from the great body of judge-made conflicts law and freeze into a statute. He also suggested that the courts could probably get around any statute which might be enacted at least in many cases. The Committee discussed this problem

and concluded that it was a question for the entire Commission to decide after Professor Sumner had submitted his report.

Professor Sumner said that he had completed his research on the study and would submit a draft in the very near future.

STUDY NO. 7 -- RETENTION OF VENUE FOR CONVENIENCE OF WITNESSES

The Committee considered the report on Study No. 7 which had been distributed to the members of the Committee prior to the meeting. The following recommendations regarding the study were agreed upon:

1) The study should be revised to point out that another reason why provision should be made for hearing and determination of a motion to change or retain venue for convenience of witnesses before answer is that witnesses must sometimes be called to testify in connection with temporary restraining orders, writs and other matters before defendant has answered. The convenience of these witnesses, as well as the witnesses at the trial proper, should be considered and served.

2) The Staff's final draft of Study No. 7, as thus modified, should be approved by the Commission for publication and printing.

3) The fourth alternative revision of Code of Civil Procedure Section 396b described on pages 34 and 35 of the report should be recommended by the Commission to the Legislature.

4) A change in Code of Civil Procedure Section 397(3) similar to the change in Section 396b proposed by the fourth alternative amendment should be recommended by the Commission to the Legislature.

STUDY NO. 13 -- PARTIES TO CROSS-COMPLAINTS

The Committee considered a preliminary memorandum on Study No. 13 prepared by Professor Stanley Howell which had been distributed to the members of the Committee prior to the meeting. This memorandum pointed out that the cases require an order of court under Code of Civil Procedure Section 389 before defendant may bring in new parties by cross-complaint. It is not enough that the cross-complaint complies with Section 442, since the court is limited by the provisions of Section 389 in making the order. Moreover, it is not clear from the cases how strictly Section 389 will be construed. There are cases clearly permitting an order under Section 389 where the party to be brought in was not indispensable but "merely necessary", that is, one who should be before the court for a more complete determination of the matter but who is not so essential that the court could give no relief without his being brought in. However, there have been other cases in which the courts have said that the power of the court under Section 389 is limited to a situation where the party to be ordered in is indispensable to a determination of the case already before the court.

Professor Howell stated that the California cases run counter to the current trend in England and leading American jurisdictions to liberalize the rules on joinder of parties. Although California plaintiffs have great freedom in bringing in defendants, the California courts have been inconsistently strict about defendants bringing in new parties. Professor Howell therefore suggested that his study consider the following questions:

1) Whether Section 442 should be (a) freed from the provisions of Section 389, (b) amended to allow a defendant to join parties defendant in

in his cross-complaint under the normal rules relating to joinder of defendants or in some other manner liberalized, and (c) changed to require an order of court, on notice and motion, permitting the filing of a cross-complaint bringing in a new party.

2) Whether California should adopt a statute providing for third-party practice similar to that under the Federal Rules and the statutes of some states which would permit a defendant to file a third-party complaint against a new party (a) where the third party is liable to plaintiff on all or some portion of the plaintiff's claim, instead or in addition to the defendant, or (b) where the third party will be liable over to the defendant if plaintiff secures a judgment against defendant.

3) Whether Section 389, although made inapplicable to Section 442, should nevertheless be amended to clarify its application to other situations where new parties are ordered in.

The Committee decided that, although the Commission may determine not to recommend revision on all of these points, Professor Howell's study should nevertheless include them.

It was agreed that Professor Howell would submit the first draft of his final report by February 1, 1956, and that he would submit a detailed outline before he begins the actual writing of the report.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary