

AGENDA FOR MEETING OF LAW

REVISION COMMISSION

July 13-14, 1956

1. Minutes of meeting of June 4 and 5 (sent to you on June 22).
2. Report by Executive Secretary on Study Topics for 1956-57, including problem of research funds.
3. Report by Executive Secretary on work at Stanford under Agenda Contract.
4. Report by Executive Secretary re State Bar: (a) action by Board of Governors on six studies and memorandum sent; (b) situation re Section 259 et seq. of Probate Code; (c) report of State Bar history on 1956-57 study topics.
5. Discussion of letter from State Bar suggesting study of attachment, garnishment and property exempt from execution (sent to you on June 16).
6. Study No. 5 - Probate Code § 201.5 (sent to you on June 19).
7. Study No. 8 - Marital Testimonial Privilege (sent to you on June 19).
8. Study No. 12 - Jury Instructions ^{R. L.} (sent to you on June 19). *Revised staff study enclosed.*
9. Study No. 15 - Attorney's fees and costs (sent to you on June 29).
10. Study No. 1 - Suspension Absolute Power of Alienation (sent to you on June 30).
11. Study No. 13 - Parties to cross-actions (sent to you on July 5).
12. Study No. 9 - Penal Code §§ 1377, 1378 (sent to you on July 5).

Amended

MINUTES OF MEETING

OF

JULY 13 AND 14, 1956

Pursuant to the call of the Chairman, the Law Revision Commission met on July 13 and 14 at Long Beach, California.

PRESENT

- Mr. Thomas E. Stanton, Jr., Chairman (July 14)
- Mr. John D. Babbage, Vice-Chairman (July 14)
- Honorable Jess R. Dorsey
- Honorable Clark L. Bradley
- Mr. Joseph A. Ball
- Mr. Stanford C. Shaw
- Mr. John Harold Swan
- Professor Samuel D. Thurman

ABSENT

- Mr. Bert W. Levit
- Mr. Ralph N. Kleps, ex officio

Mr. John R. McDonough, Jr., the Executive Secretary of the commission, and Mrs. Virginia B. Nordby, the Assistant Executive Secretary, were present on both days.

The minutes of the meeting of June 1 and 2, which had been distributed to the members of the commission prior to the meeting, were unanimously approved.

I. Administrative Matters

A. Conduct of Commission Business: The following motions were made by Senator Dorsey, seconded by Mr. Swan, and unanimously adopted:

1. Five voting members of the commission constitute a quorum and must be present before the commission may attend to any business.

2. Robert's Rules of Order govern the conduct of commission meetings except insofar as they conflict with rules adopted by the commission.

3. A roll call vote shall be taken and recorded on every motion to approve for distribution or to adopt any report or recommendation of the commission to the Legislature.

4. Five votes are required to approve for distribution or to adopt any report or recommendation of the commission to the Legislature. An absent member may be polled and his vote incorporated in the roll call on such motion only if he was present during a previous discussion of the subject matter at a meeting of the commission.

B. Report on Selection of Research Consultants for 1956-57 Study Topics:

The Executive Secretary reported that Research Consultants had been obtained for the following studies on the commission's 1956-57 program:

<u>Study No.</u>	<u>Subject</u>	<u>Research Consultant</u>	<u>Fee</u>
24	Mortgages for future advances	Prof. Merryman - Stanford	\$ 800
25	Probate Code §§ 259 et seq.	Prof. Horowitz - USC	600
27	Putative spouses	Prof. Mann - Stanford	800
30	Jurisdiction in custody proceedings	Dean Kingsley - USC	800
31	Doctrine of worthier title	Prof. Verrall - UCLA	500
35(L)	Uniform Post-conviction Procedure Act	Prof. Selvin Loyola	900
37(L)	Claims Statute	Prof. Van Alstyne UCLA	\$1,000

The Executive Secretary stated that he planned to invite an expert in the field of procedure to serve as Research Consultant on Studies No. 20 (Procedure re nonresident guardians), 21 (Procedure on partition sales), and 22 (Cut-off date on motions for new trial) for an honorarium between \$750 and \$1,000 for all three studies.

The Executive Secretary reported that he had invited Judge Evelle Younger of the Los Angeles Municipal Court to be the Research Consultant on Study No. 29 (Post-conviction sanity hearings) and that Judge Younger had accepted, subject to the approval of the Los Angeles County Counsel.

The Executive Secretary also reported that he had invited Professor Allan H. McCoid of UCLA to do a report on Study No. 33 (Survivability of tort actions) but that Professor McCoid will be in Minnesota during the 1956-57 academic year, and perhaps longer, and that it would therefore be difficult to consult with him about the study. The commission expressed reluctance to engage a Research Consultant so far away unless there was no one in California who could do the kind of job required. Names of other possible consultants were suggested and the matter was left to the discretion of Mr. Thurman, who is familiar with the experts in the tort field in California, and the Executive Secretary.

The Executive Secretary reported that he had discussed with Professor James H. Chadbourn of UCLA the possibility of Professor Chadbourn's undertaking responsibility for the entire study of the Uniform Rules of Evidence for the commission and that Professor Chadbourn had indicated interest in the project. The commission discussed the amount of control it should retain over the handling of the study and decided that Professor Chadbourn should be given discretion in selecting consultants or assistants and proceeding with the work. The commission

agreed, however, that it would want to be kept informed about the progress of the study.

A motion was then made by Mr. Bradley, seconded by Mr. Shaw, and unanimously adopted that the Chairman and the Executive Secretary be authorized to commit by contract and to request from the emergency fund up to \$5,000 for the present fiscal year for the Uniform Rules study and to arrange to have all of the study, or as much of the study as can be reasonably obtained, done for this amount. It was agreed that the commission's budget for the 1957-58 fiscal year include an item for any part of the study remaining to be done.

C. Report on Work by Stanford under the Agenda Contract: The Executive Secretary reported that Stanford University had employed Mr. Gilbert Harrick, a graduate of the University of Wisconsin Law School and a prospective Teaching Fellow at Stanford, and Mr. Robert Anthony, a third year student at Stanford Law School, to work under the agenda contract to find suitable topics for future study by the commission.

D. Reference of Commission Studies and Recommendations to State Bar: The Executive Secretary reported that six research studies, together with the proposed Report and Recommendation of the commission on each of them, had been sent to the State Bar and that he was informed that the Board of Governors had referred five of the studies to the Committee on Administration of Justice and one of them to the Committee on Criminal Law and Procedure. He stated that there is considerable doubt whether these committees will report their views to the Board of Governors and the Board take a position on the commission's proposals before the end of September.

The commission discussed the general questions of whether it should refer its studies and reports to the State Bar and if so for what purpose, whether it should seek the formal endorsement of the State Bar, and whether it should defer to the views of the State Bar if they conflict with the original conclusions of the commission. The commission also discussed the immediate practical problem that if it waits this year to print its studies and reports until after it has received and considered the views of the State Bar, it will be involved in a last minute pre-Session rush with the State Printer and the Members of the Legislature.

A motion was then made by Mr. Shaw and seconded by Mr. Swan, that mimeographed copies of research consultants' reports and the reports and recommendations of the Law Revision Commission be submitted to the State Bar for their consideration as soon as both are completed and adopted; and that the Chairman, the Executive Secretary and Mr. Ball try to expedite the return of the views of the State Bar and the reasons for them. A motion was made by Mr. Bradley, seconded by Mr. Thurman, and adopted that Mr. Shaw's motion be amended by striking the material after the semicolon. (Mr. Ball and Mr. Shaw opposed this amendment.) As thus amended, Mr. Shaw's motion was adopted.

It was also agreed that the commission's studies and reports should be sent to the Judicial Council and the District Attorneys' and Peace Officers Association at the same time that they are sent to the State Bar and under cover of the same letter.

It was decided that the Chairman and the Executive Secretary should proceed with the printing of research consultants' studies and should investigate possible methods of preprinting and holding type on the commission's reports and recommendations to facilitate later revision.

E. Distribution of Draft Fish and Game Code: The commission discussed a letter to the Chairman from the Department of Fish and Game and the Fish and Game Commission recommending, in contradiction of their earlier recommendation, that distribution of the draft code not be delayed until the Department and the commission have completed their review of it. The Executive Secretary reported he was informed that it would cost approximately \$10 a copy to reproduce the draft code and that the Legislative Counsel thought about 500 copies would be needed for distribution. The commission decided that the Executive Secretary should explore with the Department of Fish and Game and the Fish and Game Commission the possibility of their assuming part or all of the cost of reproducing the draft code. A motion was then made by Mr. Bradley, seconded by Mr. Thurman, and unanimously adopted that the Chairman and the Executive Secretary be authorized to spend not more than \$1,000 to have copies of the draft Fish and Game Code reproduced.

F. National Association of Legislative Service Agencies: The Chairman reported that both he and the Executive Secretary had been invited to attend the annual meeting of the National Association of Legislative Service Agencies being held in Seattle at the end of August. He stated that he could not personally attend. A motion was made by Mr. Swan, seconded by Mr. Shaw, and unanimously adopted that the Executive Secretary and one member of the commission to be designated by the Chairman be authorized to attend the meeting at State expense.

G. Payment of Research Consultants: A motion was made by Mr. Swan, seconded by Mr. Ball, and unanimously adopted that Professor Stanley Howell and Professor Lowell Turrentine be paid for their research reports, having satisfactorily completed them.

2. Agenda

The commission considered a request from the Board of Governors of the State Bar that the commission consider making a complete study of the law relating to attachment and garnishment and property exempt from execution. A motion was made by Mr. Swan, seconded by Mr. Thurman, and unanimously adopted that this subject be placed on the calendar of topics selected for immediate study.

3. Current Studies

A. Study No. 5 - Probate Code § 201.5: The commission discussed a revised Report and Recommendation on this study prepared pursuant to action taken by the commission at its June meeting. It was agreed that proposed Section 201.8 of the Probate Code should be revised to contain as subparagraph (f) a specific enumeration of funds used to pay insurance premiums on a policy on the life of the acquiring spouse in favor of a person other than his spouse. A motion was made by Mr. Swan, seconded by Mr. Bradley, and unanimously adopted that, after this change had been made, the draft Report and Recommendation be approved for recommendation to the Legislature. (Note -- This action was taken prior to the decision that a roll call vote must be taken and recorded on motions to adopt a recommendation to the Legislature.)

B. Study No. 8 - Marital Testimonial Privilege: The commission considered a revised Report and Recommendation to the Legislature prepared pursuant to action taken by the commission at its June meeting.

A motion was made by Mr. Ball and seconded by Mr. Shaw that the commission recommend to the Legislature that the "for" privilege be abolished in both civil and criminal cases and that the "against" privilege be taken from the party spouse and given to the testifying spouse in both civil and criminal actions. The motion carried:

Ayes -- Babbage, Ball, Bradley, Shaw, Thurman - 5

Noes -- Dorsey, Stanton, Swan - 3

A motion was made by Mr. Shaw and seconded by Mr. Thurman that the commission also recommend to the Legislature that the present exceptions to the privilege be retained and the witness spouse be compellable in cases falling within an exception. The motion carried:

Ayes -- Babbage, Ball, Bradley, Dorsey, Shaw, Stanton,
Swan, Thurman - 8

Noes -- None

C. Study No. 9 - Penal Code §§ 1377, 1378: The commission considered a draft Report and Recommendation to the Legislature prepared pursuant to the direction of the Southern Committee.

It was decided that, in accordance with the suggestion of the Legislative Counsel, whenever the commission proposes revision of a code section having a title caption that was enacted as part of the section, the commission would, in addition to other changes recommended to the Legislature, propose repeal of the caption.

A motion was made by Mr. Bradley, seconded by Mr. Swan, and unanimously adopted that the Report and Recommendation, after it is changed to strike out the captions in the proposed revisions of Sections 1377 and 1378, be adopted as the

recommendation of the commission to the Legislature. (Note - This action was taken prior to the decision that a roll call vote must be taken and recorded on motions to adopt a recommendation to the Legislature.)

D. Study No. 12 - Jury Instructions: The commission discussed a revised Report and Recommendation to the Legislature prepared pursuant to action taken by the commission at its June meeting. It was agreed that the proposed revision of Code of Civil Procedure Section 614 be changed in certain respects.

A motion was then made by Mr. Bradley, seconded by Mr. Thurman, and unanimously adopted, that the Report and Recommendation be revised to indicate that the Legislature may wish to require all jury instructions to be in writing, and that as thus changed it be approved as the final recommendation of the commission to the Legislature. (Note - This action was taken prior to the decision that a roll call vote must be taken and recorded on motions to adopt a recommendation to the Legislature.)

E. Study No. 13 - Parties to Cross-Actions: The commission discussed a draft Report and Recommendation prepared pursuant to the direction of the Southern Committee. A number of questions about the proposed revision of Code of Civil Procedure Section 389 were raised and it was decided that the staff should do further work on it along the lines indicated.

F. Study No. 15 - Attorney's Fees and Costs: The commission considered a revised Report and Recommendation prepared pursuant to action taken by the commission at its June meeting. A minor change in the proposed revision of Civil Code Section 137.3 was made and it was unanimously agreed that the Report and

Recommendation, as thus amended, be adopted for recommendation to the Legislature.
(Note - This action was taken prior to the decision that a roll call vote must be taken and recorded on motions to adopt a recommendation to the Legislature.)

The commission postponed consideration of Study No. 1, Suspension of the Absolute Power of Alienation, until its next meeting.

There being no further business, the meeting was adjourned.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

JUL 19 1956

STATUS REPORT ON CURRENT STUDIES
(FOR 1957 SESSION)

Study No.	Subject	To Start	Rsch. Study Under Way	Before Cmttee.	Before Cmssn.	Sent State Bar	Sent Frntr.	Completed	Remarks
1	Suspension Power of Alienation		x						RC report expected June 29; scheduled for July meeting
2	Judicial Notice Foreign Law					x			
3	Dead Man Statute					x			
4	Law Governing Survival					x			
5	Prob. Code Section 201.5				x				Scheduled for July meeting
6	CCP Section 660					x			
7	Retention Venue					x			
8	For and Against Privilege				x				Scheduled for July meeting
9	Penal Code §§ 1377, 1378	x							Scheduled for July meeting
10	Penal Code § 19a					x			
11	Corp. Code §§ 2201, 3901	x							Scheduled for August meeting

JUL 10 1956

JAMES A. COBEY
CALIFORNIA LEGISLATURE
SENATE

P. O. Box 1223
Merced, Calif.

July 3, 1956

John R. McDonough, Jr., Esq.
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California

Dear Professor McDonough:

This letter is written in reply to your letter of June 15th inquiring as to what particular aspects of condemnation law and procedure I would wish the Law Revision Commission study to embrace.

I am sorry that I do not have the time presently available to do the research necessary to answer your question. What I would like to suggest is that the study be a comparative one - comparing federal condemnation law and practice and the law and practice of other states with that of California to determine which jurisdiction most nearly fulfills the constitutional requirement of "just compensation" and then to recommend what changes should be made in the California statutory law to more nearly accomplish the just stated constitutional requirement.

As you may know, prior to becoming a country lawyer I was a public lawyer and my legal work in condemnation law and practice has convinced me that presently it is a very one-sided proposition. The various public bodies possessing the power of eminent domain have "loaded" condemnation law and practice, both statutory and case, heavily in their favor. Since the field is not a recognized specialty in the private practice of law, there is and has been no organized counterpressure from the other side of the fence. Certain improvements have been made, it is true, such as giving the defendant the right to open and close, but much remains to be done.

Here I refer particularly to the substantive law. As an example of my thinking I call to your attention the recent case of People v. Dunn 46 A.C. 643, in which the Supreme Court of California again held that evidence of profits derived from a business conducted on the land is too speculative and uncertain to be considered in arriving at fair market value. Such a holding is nonsense. While it is true that the variations in managerial ability will determine the relative success of businesses at the same location, the fact remains that aside from property bought for shelter and recreation, all

property is bought for but one purpose and that is to make money either by way of speculation or by way of investment. The very first thing that the prospective buyer inquires into is the gross and net income history of the business on the site when he is considering acquiring the same. The income approach is one of the three recognized basic approaches in valuation theory and the law should be kept abreast of this theory.

Similarly, it is my personal opinion that the courts, and perhaps the Legislature as well, have restricted too narrowly the recovery of a property owner in condemnation. Since the sale is forced upon him, I do not see why he should not be permitted to recover certain expenses in connection therewith, such as moving expenses, interruption expenses, relocation expenses, etc. I realize that it would be extremely difficult to put a reasonable limitation upon these expenses so as to prevent the abuse of this relief but I think the effort should be made and then only will we know whether or not it can be done.

In brief, the trouble with condemnation law at present is that it is written, by and large, pretty completely negatively for the public body. In my personal opinion it should be written the other way. "Just compensation" means that the property owner should be made whole insofar as the law possibly can do so.

Among specific items that could be considered would be the prohibition against the recovery of attorney's fees in the case of abandonment of the condemnation proceedings where the attorney's fees are contingent in nature. I think in such a case the attorney is entitled to a reasonable fee to be fixed by the court, at the very least.

My apologies to you if any of the statements in this letter are legally inaccurate. I have not tried any cases in this field for approximately four years now and my memory of the law may be in error and, likewise, the law may have changed. However, what I am interested in is changing the fundamental viewpoint of condemnation law in California and making it more responsive to constitutional mandate of "just compensation."

I would suggest that a good man for the Commission to contact would be E. Wayne Miller, the partner of my colleague, Senator Desmond, whose address is 616 I St., Sacramento, California. He has an extensive trial practice in this field and he can undoubtedly be of assistance. I would also recommend you contact John B. Anson, 458 South Spring St., Los Angeles, California, for the same reason.

In addition may I suggest that the Commission contact John Bohn, 640 First Street, Benicia, California, the consultant to the Interim Judiciary Committee of the Senate. This Committee is likewise studying this same field. I have suggested to Bohn that he contact the local bar associations throughout the state in an effort to get suggestions from the practicing lawyers who are active in this field.

John R. McDonough, Jr., Esq.

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July 3, 1956

Please do not misunderstand me. I have no objection to the Commission contacting all of the public lawyers as well and I would certainly want any suggested revisions in the statutory law subjected to their scrutiny and critical appraisal before they are presented to the Legislature. Nevertheless, I do want to make clear I believe there is a fair amount of case law that will have to be either repealed or limited by statute.

Very truly yours,

/s/James A. Cobey

JAMES A. COBEY

JAC:fm

STATE OF CALIFORNIA

COPY

FISH AND GAME COMMISSION

COPY

July 10, 1956

Mr. Thomas E. Stanton, Jr., Chairman
California Law Revision Commission
111 Sutter Street
San Francisco, California

Dear Mr. Stanton:

In response to your letter of May 25, 1956, staff members of the Fish and Game Commission and the Department of Fish and Game have reviewed a considerable portion of the first draft of the proposed revision of the Fish and Game Code, and our comments are submitted herewith.

Because of the difficulty of finding available time to work on this revision and do a detailed job comparable to what we have done so far, we now feel that your Commission should not hold up distribution pending receipt of our comments in full.

We recommend that distribution be made generally to those groups or individuals who have requested copies, particularly officers and directors of the California Wildlife Federation, President and Secretary of the Sacramento-Sierra Sportsman's Council, the President of the State Division of the Izaak Walton League, individuals representing commercial fishing interests, and the chairmen of the Senate and Assembly Fish and Game Interim Committees. If it will be helpful to you we will be happy to supply such a mailing list.

If you feel that the recommendations we have made on the portion of the draft we have covered are acceptable, and if you incorporate those changes in the second draft when it is sent out, it would, we think, be helpful to the people who receive it.

It is our understanding that it is not the intention of this revision to make substantive changes, and our recommendations were drawn accordingly. We feel that care should be exercised to insure that the basic authority delegated to the Fish and Game Commission by the Legislature is not diminished in any way by the suggested changes.

With respect to Section 201, this draft, we recommend that the word "shall" should read "may" provided this does not diminish the authority of the Fish and Game Commission.

In addition to the comments submitted herewith, the question has been raised as to whether it would be advisable to bring together all license provisions in one chapter.

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The question of the terminology used with respect to licenses and permits is one which we cannot settle at this time. It appears that the two terms are used interchangeably. We would like to give the matter further consideration and respectfully suggest that you do likewise. On the surface it appears to us that the term "license" should be used in those cases where the fee is set by the Legislature, and the term "permit" should be used for both free permits and those permits where the fee is set by Commission regulation.

We agree that the definition of "fish" should include "mollusks and crustaceans" and in most places where these words appear in the draft they can be eliminated. We are inclined to feel, however, that "amphibia" should be deleted from the definition of "fish" and inserted in the appropriate sections throughout the code, for the following reason: "Amphibia" was added to the definition of "fish" in 1953 and this has raised a number of problems, particularly with reference to domestic fish breeders, etc.

As an alternate suggestion, after completely reviewing the code it may become apparent that it would be better to include "amphibia" in the definition of "fish" and write in the exceptions as required in various sections.

We recommend that the sections on hearings be revamped so that they are uniform, allowing sufficient opportunity for publication of notice of hearings to be held, and for holding such hearings as may be necessary. For example, this year, under the provisions of Section 16.4 there were only three days available for holding approximately five hearings in widely scattered parts of the State. These hearings must be held by members of the Commission. Such a tight schedule is not a good thing, and it would be desirable to revise this section in some manner that would permit more latitude for the scheduling of hearings.

As requested, we submit our views concerning the various questions raised in Mr. Kleps' letter of May 23 to your Commission. However, many of these are questions of legal interpretation, the resolving of which lies outside our province, although we will be glad to submit our views with respect to operating procedures if you wish.

Reference Question No. 1 - Allocation:

We believe that the procedure followed is sound and desirable.

Reference Question No. 2 - Plenary Powers:

We respectfully refer you to Attorney General's Opinion No. 56/33 on this subject and the Commission's policy-making authority. Concerning the transfer of administrative functions from the Commission to the Department, we have endeavored to present our suggestions regarding the change from the word "commission" to "department" in the appropriate places in the material attached.

Reference Question No. 4 - Fines and Penalties:

We are having a competent member of our staff check all of the

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sections enumerated in Division 9, this draft, to assist in determining that the result is consistent with existing law. We thoroughly approve the segregation of the penalty provisions.

The further we go in our review of this draft the more impressed we are with the exceptionally fine work done by the Office of the Legislative Counsel.

In view of the fact that we are diligently trying to complete our study of the first draft of the revision of the Fish and Game Code, it would be helpful if you would advise us at an early date if our approach to this problem meets with your approval.

Cordially,

DEPARTMENT OF FISH AND GAME

Director

FISH AND GAME COMMISSION

Assistant to the Commission

cc: Mr. McDonough
Mr. Kleps

P.S. As discussed with Mr. Gould of the Legislative Counsel's Office, it is hoped that the Office of the Legislative Counsel can prepare a cross-reference index of the final draft. We understand that they have men experienced in this type of work. We believe the formulation of a good index is of major importance in the code revision and will be very helpful in the printing of the new code.