

MINUTES OF MEETING

of

MARCH 20-21, 1958

Sacramento

Pursuant to the call of the Chairman, there was a regular meeting of the Law Revision Commission on March 20 and 21, 1958 at Sacramento.

PRESENT: Mr. Thomas E. Stanton, Jr., Chairman
Mr. John D. Babbage, Vice Chairman
(March 21 only)
Honorable Clark L. Bradley
Honorable James A. Cobey
(March 20 only)
Honorable Roy A. Gustafson
Mr. Bert W. Levit
Mr. Charles H. Matthews
Mr. Stanford C. Shaw
Professor Samuel D. Thurman
Mr. Ralph N. Kleps, ex officio

Mr. John R. McDonough, Jr., the Executive Secretary, and Miss Louisa R. Lindow and Mr. Marshall S. Meyer, the Assistant Executive Secretaries were also present.

Professor James H. Chadbourn of the School of Law, University of California at Los Angeles, the research consultant on Study No. 34(L) was present during a part of the meeting on March 21, 1958.

The minutes of the meetings of January 18, and January 24 and 25, 1958, which had been distributed to the members of the Commission prior to the meeting, were unanimously approved.

I. ATTENDANCE AT JUDICIARY COMMITTEE HEARING.

Prior to the convening of the regular meeting, the Commission attended meetings of the standing and interim Senate Judiciary Committees. At the meeting of the standing Committee, the members of the Commission were introduced and complimented on the work of the Commission. The Executive Secretary then presented ACR No. 23, the proposed agenda of study topics, to the Committee. The Committee approved topics No. 1 (A study to determine whether California statutes relating to service of process by publication should be revised in light of recent decisions of the United States Supreme Court), No. 3 (A study to determine whether Section 1974 of the Code of Civil Procedure should be repealed or revised), and No. 4 (A study to determine whether the doctrine of election of remedies should be abolished in cases where relief is sought against different defendants). The Committee amended ACR No. 23 to delete topics No. 2 (A study to determine whether the law relating to the right of a tenant under a renewal lease to remove fixtures should be revised) and No. 5 (A study to determine whether a statute should be enacted depriving a deserting spouse of his intestate share of the other spouse's estate). This action was taken on the ground that these topics present relatively simple and clear-cut policy questions which do not require detailed research studies and that the Commission should confine its efforts to more complex problems.

The Executive Secretary then presented to the Senate Interim Judiciary Committee the following bills prepared by the Commission which

had been introduced at the 1957 session but did not become law:

- A. AB 249 - Suspension of the absolute power of alienation.
- B. SB 36 - Effective date of an order ruling on a motion for new trial.
- C. AB 246 - Retention of venue for the convenience of witnesses.

The Senate Interim Judiciary Committee took the following action:

(1) Suggested with regard to AB 249 that the Commission give further consideration to alternative methods of dealing with the problem of duration of trusts.

(2) Recommended favorable consideration by the standing Senate Judiciary Committee at the 1959 Session of the Commission's proposal for amendment of C.C.P. § 650 without hearing of additional witnesses.

(3) Recommended that AB 246 be tabled by the standing Senate Judiciary Committee without further hearing if introduced at the 1959 Session.

The Senate Interim Judiciary Committee requested that the Commission refer to the Committee's counsel suggestions for law revision which the Commission believes are worthy of consideration by the Legislature but which do not require such extensive study as to merit a place on the Commission's agenda.

II. ADMINISTRATIVE MATTERS.

A. Future Meetings. The Commission approved the following places and dates for future meetings:

1. San Francisco, April 18 and 19.
2. Ojai Valley Inn, May 16 and 17.
3. Yosemite, June 13 and 14.

B. Payment of Professor Sullivan. The Commission authorized the Executive Secretary to pay Professor Lawrence A. Sullivan for his study on Rescission of Contracts.

III. CURRENT STUDIES

A. Study No. 37(L) - Claims Statute: The Commission considered Memorandum No. 8, a copy of Section 16045 of the Government Code, and drafts of the proposed constitutional amendment on claims against public entities and the proposed bill to enact a uniform claims statute and related provisions, both as revised in accordance with action taken by the Commission at the January meeting. 3, 4, 5

1. The following sections of the proposed Claims Statute were amended as shown: (Differences from sections as approved at January meeting shown by underlining new material, showing deleted material in strike-out.)

(a) Section 7006 was amended to read:

7006. A claim shall be presented by the claimant or by a person acting on his behalf and shall show the name of the claimant and the residence or business address of the claimant or the person presenting the claim and shall contain a general statement of the following:

- a. The circumstances giving rise to the claim asserted.
- b. The nature and extent of the injury or damage incurred.
- c. The amount claimed.

(b) Section 7008 was amended to read:

7008. A claim may be presented to a public entity (1) by delivering the claim personally to the clerk or secretary

thereof not later than the hundredth day after the cause of action to which the claim relates has accrued within the meaning of the statute of limitations which would have been applicable to such a cause of action if the action had been brought against a defendant other than a public entity, or (2) by sending the claim to such clerk or secretary or to the governing body at ~~its~~ the principal office of the public entity by mail postmarked not later than such hundredth day. A claim shall be deemed to have been presented in compliance with this section even though it is not delivered or mailed as provided herein if it is actually received by the clerk, secretary, or governing body within the time prescribed.

(c) Section 7009 was amended to read:

7009. Where the claimant is a minor or is mentally or physically incapacitated and by reason of such disability fails to present a claim within the time allowed, or where a person entitled to present a claim dies before the expiration of the time allowed for presentation, the superior court of the county in which the public entity has its principal office may grant leave to present the claim after the expiration of the time allowed where if the public entity against which the claim is made will not be unduly prejudiced thereby. Application for such leave must be made by petition, accompanied by an affidavit showing the reason for the delay and a copy of the proposed claim, ~~made~~. Such petition

shall be filed within a reasonable time, not to exceed one year, after the expiration of the time allowed for presentation. A copy of the petition, and the affidavit and the proposed claim shall be served on the clerk or secretary or governing body of the public entity.

(d) Section 7010 was amended to read:

7010. A public entity shall be estopped from asserting as a defense to an action the insufficiency of a claim as to form or contents or as to time, place or method of presentation of the claim if the claimant or person presenting the claim on his behalf has reasonably and in good faith relied on any representation, express or implied, made by any officer, employee or agent of the entity, that a presentation of claim was unnecessary or that his a claim had been presented in conformity with legal requirements. ~~made-by-any-responsible-officer, employee-or-agent-of-the-entity.~~

(e) Section 7011 was amended to read:

7011. If the governing body of the public entity fails or refuses to allow or reject a claim within eighty days after it has been presented, the claim shall be deemed to have been rejected on the eightieth day. ~~An-action-on-such-a-claim-must be-commenced-within-six-months-after-such-eightieth-day.~~

(f) The following action was taken with respect to Section 7012:

i. The second sentence, "An action upon a claim rejected in whole or in part must be commenced within six months after the claimant receives written notice of such rejection," was deleted.

ii. It was decided that the first sentence should be redrafted by the Chairman and the Executive Secretary to express the thought involved more clearly; in this connection the Commission considered and seemed to be favorably disposed to language along the following line: "The governing body may allow a claim in part and reject it in part and may require the claimant to accept the amount allowed in settlement of the entire claim. If no such requirement is made, the claimant may sue on the part of the claim rejected."

(g) Section 7013, "Every person who wilfully misstates or causes to be misstated any material fact in a claim presented pursuant to this chapter is guilty of a misdemeanor," was deleted.

(h) The following new Section 7013 was approved:
7013. An action on a claim must be commenced within nine months from the date of its presentation.

(i) Section 2 of the proposed bill, embodying a proposed revision of Section 2003 of the Government Code, was deleted.

(j) The Commission discussed Section 3 of the proposed bill which would provide a cross reference in the Code of Civil Procedure to the part of the Government Code dealing with presentment of claims. A question was raised as to where in the Code of Civil Procedure this cross reference should appear. Decision of this question was deferred to a later time.

2. The Commission discussed briefly the fact that the enactment of a uniform claims statute will require extensive amendment of a large number of existing code sections to delete material relating to the presentment of claims against various kinds of public entities, probably to make cross references in lieu thereof to the uniform statute, and to leave intact the existing provisions of law relating to the internal processing and auditing of claims made against various kinds of public entities. It was agreed that this general problem should be made the subject of a study by the Staff but that it will not be necessary to complete this phase of the drafting work before the uniform claims statute is referred to the State Bar and other interested persons.

3. A motion was made by Mr. Gustafson, seconded by Mr. Shaw and unanimously adopted that the Claims Statute be placed in a separate Division in Title I of the Government Code in which also might be placed the material in the Government Code dealing with claims against public officers and employees.

4. The Commission decided that the study and recommendation on the claims study should, when complete, be referred to the State Bar, the County Supervisors' Association, and the League of California Cities for their consideration.

B. Study No. 24 - Mortgages for Future Advances: The Commission considered Memorandum No. 1, the portion of the minutes of the special meeting of the Commission held in San Francisco on January 18 containing certain recommendations relating to Commission action on this subject and presenting three questions for decision by the Commission, a proposed statute which reflected the action taken at the special meeting on January 18, a copy of Professor Merryman's study as revised in accordance with action taken at the meeting of January 18, and correspondence received by Professor Merryman from attorneys to whom he wrote soliciting suggestions on the subject. (Copies of these materials are attached to these minutes). After discussing the matter the following action was taken:

1. Mr. Levit's motion not to recommend any change in the law relating to real property mortgages, seconded by Mr. Gustafson, was unanimously approved.

2. It was agreed that the following paragraph should be added at the end of Civil Code Section 2975 as proposed to be revised:

"Future advances includes sums that may be advanced, expenditures that may be made, or indebtedness or obligations that may be incurred subsequent to the execution of the mortgage."

3. The addition of a cross reference in Section 2975 to Section 2941 of the Civil Code was approved.

4. Mr. Shaw's motion that the priority established by Section 2975 extend to principal, interest, and necessary expenditures, even when the total of these exceeds the stated maximum, was approved.

The Commission directed the Executive Secretary, working in conjunction with Professor Merryman, to redraft Section 2975 to reflect this action. The Executive Secretary was authorized to send the proposed statute and Professor Merryman's study to the State Bar.

C. Study No. 23 - Rescission of Contracts: The Commission considered Memorandum No. 2, excerpts from the minutes of the meetings of the Northern Committee of July 26 and September 19, 1957 and January 18, 1958 relating to this study, the research study on this subject prepared by Mr. Lawrence A. Sullivan, formerly Professor of Law at the University of California (Berkeley), a Staff memorandum suggesting certain changes in the statutes proposed by Professor Sullivan and a letter from Professor Sullivan. (Copies of these materials are attached to these minutes.)

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After the Executive Secretary had made a preliminary presentation outlining the analysis presented in the research study, the discussion reached an impasse on the question whether the law of this State should continue to provide for unilateral out-of-court rescission. Mr. Levit, Mr. Stanton and Mr. Bradley were of the opinion that it should, contending that such an act of rescission affects the legal rights of the parties and is important as a practical matter. Mr. Thurman, Mr. Gustafson and others contended that a unilateral out-of-court rescission does not affect the legal rights of the parties and that such rights can only be determined and vindicated by a court's adjudication of the parties' rights.

The Commission seemed to agree that however this impasse might be resolved or even if it were not, the duality shown by the research report to exist should be eliminated.

Most members of the Commission seemed to agree that prompt notice by the party desiring to put an end to the contract should be required in any proposed statute; Mr. Thurman reserved judgment as to whether failure to give such notice should necessarily cut off the would-be rescinder's rights

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even though the other party had not been prejudiced therein.

Mr. Stanton stated that he would write a letter to the members prior to the next meeting elaborating upon his view and referring to a case which substantiates it.

Mr. Levit offered to draft a statute which, while proceeding on the theory of continued existence of out-of-court rescission would eliminate the problems of duality pointed up in the research consultant's report.

D. Study No. 33 - Survival of Tort Actions: The Commission considered Memorandum No. 5 and the research study prepared by Mr. Leo Killion (copies of which are attached to these minutes).

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After the Executive Secretary's preliminary statement outlining the analysis made in the research study, the Commission members generally criticized various conclusions and statements contained in the study. It was suggested that the study should contain some analysis of the inter-relationship of the survival of tort actions and the wrongful death statute. It was also suggested that a more elaborate analysis of statutes of other jurisdictions be included. The Executive Secretary was requested to transmit these views to the consultant, Mr. Killion.

A motion was made by Mr. Thurman and seconded by Mr. Shaw that all causes of action survive the death of the defendant. The motion carried.

Aye: Gustafson, Matthews, Shaw, Stanton, Thurman.
No: Levit.
Not present: Babbage, Cobey, Bradley.

A motion made by Mr. Thurman and seconded by Mr. Matthews that all causes of action should survive the death of the plaintiff was unanimously approved.

A motion was made by Mr. Thurman and seconded by Mr. Levit that in cases where the injured party dies recovery by his estate for pain, suffering, etc., should be limited to those damages incurred from the date of injury until the date of death. The motion carried.

Aye: Gustafson, Levit, Matthews, Shaw, Thurman.
No: Babbage, Stanton.
Not present: Cobey, Bradley.

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A motion was made by Mr. Thurman and seconded by Mr. Stanton that in cases where the injured party dies recovery by his estate for loss of earnings and expenses incurred should be limited to those incurred from the date of injury until the date of death. There were six votes for the motion.

A motion was made by Mr. Shaw and seconded by Mr. Levit to allow the plaintiff or his estate to recover punitive damages against the defendant or his estate. The motion carried.

Aye: Levit, Matthews, Shaw, Stanton, Thurman.

No: Babbage, Gustafson.

Not present: Bradley, Cobey.

E. Study No. 34(L) - Uniform Rules of Evidence: The Commission considered Memorandum No. 9 and memoranda prepared by Professor Chadbourn on Subdivisions 20-31 of Rule 63. (Copies of these materials are attached to these minutes.)

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Mr. Gustafson's suggestion that no reconciliation of the Commission's views and those of the State Bar Committee be attempted until the subsections of the State Bar Committee have had an opportunity to meet and agree tentatively upon a report to the Board of Governors, was unanimously approved.

The Commission took the following action on subdivisions of Rule 63:

1. Subdivision 10. Unanimously approved, as amended to read:

(10) Declarations against Interest. Subject to the limitations of exception (6), a statement made by a declarant who is unavailable as a witness which the judge finds was at the time of the assertion so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true.

2. Subdivision 20. During the discussion of this subdivision a question was raised as to the effect thereon of the presumption in C.C.P. 1863 (19), that a judgment when not conclusive presumptively establishes the rights of the parties. The Commission approved sub silentio

Mr. Chadbourn's suggestion that this aspect be dealt with in connection with the Commission's consideration of presumptions under the Uniform Rules of Evidence. The action taken on subdivisions 20, 21 and 22 was on the premise that they were being considered as making the judgments involved admissible in evidence rather than as establishing of presumptions.

A motion was made by Mr. Levit and seconded by Mr. Thurman to approve (20) as drafted. The motion did not carry.

Aye: Gustafson, Levit, Thurman.
No: Matthews, Shaw, Stanton.
Not present: Babbage, Bradley, Cobey.

A motion was made by Mr. Matthews and seconded by Mr. Shaw to approve (20) as amended to read: "(20) Judgment of Previous Conviction. Evidence of a final judgment adjudging a person guilty of a felony to prove, against such person, any fact essential to sustain the judgment." The motion carried.

Aye: Bradley, Gustafson, Matthews, Shaw, Stanton, Thurman.
No: Levit.
Not present: Babbage, Cobey.

A substitute motion had been offered by Mr. Gustafson and seconded by Mr. Babbage to amend (20) to read: "A final judgment evidencing as of the time of conviction a plea, verdict or finding of guilt of a felony as against the person convicted to prove any fact essential to sustain the conviction." The motion did not carry.

Aye: Gustafson.
No: Babbage, Levit, Stanton, Thurman.
Pass: Matthews.
Not present: Bradley, Cobey, Shaw.

3. Subdivision 21. A motion was made by Mr. Thurman and seconded by Mr. Matthews to approve (21) as drafted. The motion carried.

Aye: Babbage, Gustafson, Matthews, Levit, Stanton, Thurman.
Not present: Bradley, Cobey, Shaw.

4. Subdivision 22. A motion was made by Mr. Levit and seconded by Mr. Shaw to approve subdivision (22) as drafted. The motion carried.

Aye: Levit, Matthews, Shaw, Stanton, Thurman.
Pass: Gustafson
Not present: Babbage, Bradley, Cobey.

5. Subdivision 26. A motion made by Mr. Shaw and seconded by Mr. Matthews to approve subdivision (26) as drafted was unanimously adopted.

6. Subdivision 27(c). A motion was made by Mr. Thurman and seconded by Mr. Levit to approve subdivision (27) (c) as drafted. The motion carried.

Aye: Levit, Matthews, Shaw, Stanton, Thurman.
No: Babbage, Bradley, Gustafson.
Not present: Cobey.

7. Subdivision 23. A motion made by Mr. Shaw and seconded by Mr. Levit to approve subdivision (23) as drafted was unanimously adopted.

8. Subdivision 24. A motion was made by Mr. Levit, seconded by Mr. Babbage and unanimously adopted to approve subdivision (24) as amended to make the following punctuation changes: After the word "marriage" in clause (a), a comma was inserted; the comma after the word "declared" in clause (a) was deleted. The purpose of the amendments is to make it clear that the clause beginning "and made the statement as upon" does not apply to a declarant related by blood or marriage.

9. Subdivision 25. A motion was made by Mr. Babbage to disapprove subdivision (25), but was not seconded. Mr. Thurman moved to approve subdivision (25) and Mr. Shaw seconded this motion. Mr. Levit moved to amend Mr. Thurman's motion to exclude the reference in subdivision (25) to subdivision (24). The motion was seconded by Mr. Gustafson but did not carry:

Aye: Gustafson, Levit.
No: Babbage, Bradley, Matthews, Shaw, Thurman, Stanton.
Not present: Cobey.

Mr. Thurman's motion to approve subdivision (25) as drafted carried.

Aye: Bradley, Gustafson, Levit, Matthews, Shaw, Stanton, Thurman.
No: Babbage.
Not present: Cobey.

10. Subdivision 27(a). A motion made by Mr. Levit and seconded by Mr. Babbage to approve subdivision (27) (a) as drafted was unanimously approved.

11. Subdivision 27 (b). A motion made by Mr. Levit and seconded by Mr. Babbage to approve subdivision (27) (b) as drafted was unanimously approved.

12. Subdivision 28. A motion to approve subdivision (28) as amended to read: "(28) If a person's character or a trait of a person's character at a specified time is material, evidence of his reputation with reference thereto at a relevant time in the community in which he then resided or in a group with which he then habitually associated, to prove the truth of the matter reputed" was made by Mr. Thurman and seconded by Mr. Levit. The motion carried.

Aye: Babbage, Levit, Matthews, Shaw, Stanton, Thurman.
No: Gustafson.
Not present: Bradley, Cobey.

13. Subdivision 29. A motion made by Mr. Stanton and seconded by Mr. Gustafson to approve subdivision (29) as amended (see below) was unanimously adopted.

The amended subdivision reads:

(29) Evidence of a statement relevant to a material matter:

(a) Contained in a deed of conveyance or a will or other document purporting to affect an interest in property,

offered as tending to prove the truth of the matter stated, if the judge finds that the matter stated would be relevant upon an issue as to an interest in the property, and that the dealings with the property since the statement was made have not been inconsistent with the truth of the statement; or

(b) Contained in a document or writing more than 30 years old when the statement has been since generally acted upon as true by persons having an interest in the matter provided the writer could have been properly allowed to make such statement as a witness.

The Commission deferred consideration of the problem of authentication of ancient documents, presently covered by C.C.P. § 1963(34), until Rule 67 which deals generally with authentication of documents is considered.

14. Subdivision 30. A motion made by Mr. Levit and seconded by Mr. Thurman to approve subdivision (30) as drafted was unanimously approved.

15. Subdivision 31. After extended discussion, the Commission deferred further consideration of this subdivision until the next meeting.

In the course of the discussion the following motions were made:

a. A motion was made by Mr. Babbage and seconded by Mr. Stanton to substitute the word "fact" for "matter" in the subdivision. The motion did not carry.

Aye: Babbage, Stanton.

No: Gustafson, Levit, Matthews, Shaw, Thurman.

Pass: Bradley.

Not present: Cobey.

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b. A motion was made by Mr. Shaw and seconded by Mr. Babbage to broaden the subdivision to include maps and charts and eliminate the subject matter limitation. The motion did not carry.

Aye: Gustafson, Matthews, Shaw, Thurman.
No: Bradley, Levit.
Not present: Cobey.

c. A motion was made by Mr. Levit and seconded by Mr. Stanton which embodied the same provisions as Mr. Shaw's motion but inserted the phrase "to prove the truth of facts of general notoriety and interest." The motion did not carry.

Aye: Levit, Stanton.
No: Babbage, Gustafson, Matthews, Shaw, Thurman.
Pass: Bradley.
Not present: Cobey.

The Commission requested that the Staff obtain from the State Bar any materials which it might have relevant to this matter.

16. The Commission approved Mr. Stanton's suggestion that Professor Chadbourn expand his memorandum on inconsistencies in the Rules as drafted with respect to use of the phrase "where the judge finds" to cover also inconsistencies as between the use of "to prove" and "as tending to prove."

F. Study No. 30 - Custody Proceedings: The Commission considered
Memorandum No. 4, excerpts from the minutes of the Southern Committee 26, 27
meeting on July 27, 1957 relating to the subject, and a research study 28
prepared by Dean Robert Kingsley of the School of Law at the University of
Southern. (Copies of this material are attached to these minutes.)

The Commission directed that a committee composed of Mr. Thurman,
Mr. Stanton and the Executive Secretary contact Dean Kingsley and suggest
that revisions be made in his study.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

JRM/j

MSM