

A G E N D A

for Meeting of

LAW REVISION COMMISSION

Los Angeles, June 13-14, 1958

1. Minutes of May 16-17 meeting (sent you on May 29, 1958).
2. Memorandum No. 1 - Personnel and Organization (sent you on May 29).
3. Study No. 56(L) - Narcotics Code (See Memorandum No. 2, sent you on May 29).
4. Study No. 22 - Cut-off Date, Motion for New Trial (This study was sent to you prior to the April meeting).
5. Study No. 34(L) - Uniform Rules of Evidence (See Memorandum No. 7, enclosed).
6. Study No. 23 - Rescission of Contracts (See Memorandum No. 4, enclosed. The study itself was sent to you several months ago).
7. Study No. 11 - Sale of Corporate Assets (This study was sent to you prior to the May meeting).
8. Study No. 16 - Planning Procedure (This study was sent to you prior to the May meeting).
9. Study No. 20 - Guardians for Nonresidents (See Memorandum No. 3, sent May 29).
10. Study No. 21 - Confirmation of Partition Sales (See Memorandum No. 6, enclosed).
11. Study No. 44 - Suit in Common Name (See Memorandum No. 5, enclosed).

MINUTES OF MEETING

OF

JUNE 13-14, 1958

Los Angeles

Pursuant to the call of the Chairman, there was a regular meeting of the Law Revision commission on June 13 and 14, 1958, at Los Angeles:

PRESENT: Mr. Thomas E. Stanton, Jr., Chairman
Mr. John D. Babbage, Vice Chairman
Honorable Clark L. Bradley
Honorable Roy A. Gustafson
Mr. Bert W. Levit (June 14)
Mr. Charles H. Matthews
Professor Samuel D. Thurman (June 13)

ABSENT: Honorable James A. Cobey
Mr. Stanford C. Shaw
Mr. Ralph N. Kleps, ex officio

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

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I. ADMINSTRATIVE MATTERS

A. Correction and Approval of Minutes of May 16-17

Meeting: The Commission considered the minutes of the May 16 and 17 meeting (a copy of which is attached hereto) and a letter from Mr. Kleps dated June 4, 1958, relating to the portion of the minutes reporting the discussion of the bail study (I. Study No. 57(L) - Law Relating to Bail, p. 18). After the matter was discussed a motion was made by Mr. Bradley, seconded by Mr. Matthews, and unanimously adopted to delete the second sentence thereof.

The portion of the minutes relating to the bail study as corrected reads as follows:

I. Study No. 57(L) - Law Relating to Bail:
The Commission considered the suggestion that it contract with a deputy in Mr. Gustafson's office to undertake this study, on the understanding that Mr. Gustafson would provide guidance as the study progresses. After the matter was discussed the Chairman and Executive Secretary were authorized to make a contract on the basis discussed, at an honorarium between \$1,200 and \$1,500.

The minutes of the May 16-17, 1958, meeting were then unanimously approved as corrected.

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B. Changes in Commission Staff and Organization: The Commission discussed the problems presented by Memorandum No. 1, (a copy of which is attached hereto). There was agreement on the following points:

1. The Commission hopes that an arrangement can be worked out whereby its offices can continue to be located at the Stanford Law School or another law school in the State.
2. The Commission is prepared to discuss the possibility of an arrangement whereby its Executive Secretary would be a 3/4 State - 1/4 law school employee.
3. The Commission desires to increase the compensation of its Executive Secretary.
4. The Commission desires to establish a new staff position to be filled by an experienced attorney at a salary of approximately \$12,000 per year. It is hoped that this position can be made exempt from civil service.

It was agreed that these points should be discussed with appropriate officials of the Department of Finance and other State agencies concerned by the Chairman and Executive Secretary as soon as possible and that arrangements should be

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made for discussion of them with representatives of Stanford at the time of the July meeting which will be held there.

It was agreed, on the basis of the Executive Secretary's report and recommendation, that Miss Lindow's appointment should be made permanent when she has completed her probationary period.

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A. Study No. 11 - Corporations Code Sections 2201

and 3901: The Commission considered the revised research study prepared by the Staff which was distributed at the meeting (a copy of which is attached hereto). After the matter was discussed it was agreed that there should be no change in the substantive law, i.e., that notice should continue to be required to be given to stockholders when the sale of all or substantially all of the assets of a corporation is to be authorized by vote of a majority of the stockholders at a stockholders meeting but that such notice should not be required when such sale is to be authorized by written consent of a majority of stockholders. The Commission discussed but did not decide whether Section 3901 should be amended to state that no notice to stockholders is required when action by the corporation is authorized by written consent. It was noted that there are other statutes which authorize corporate action to be taken alternatively by vote or written consent of a majority of stockholders and the question was raised whether amending Section 3901 would create an inference that notice is required when other corporate action is taken with the written consent of stockholders. The Staff was directed to submit a memorandum on this question.

It was agreed that the case law which makes a distinction between a sale of all or substantially all of the assets

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of a corporation made in the usual course of business and one that is not should be codified by amendments to Sections 2201 and 3901 which would make it clear that notice to and approval by a majority of stockholders is not required in respect of a sale made in the usual course of business. The Staff was directed to consider what language should be utilized for this purpose, with particular reference to whether the language in the Jeppi opinion should be codified.

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B. Study No. 22 - Cut-off Date, Motion for New Trial:

The Commission considered the research study prepared by Professor Harold G. Pickering and a draft prepared by the Staff of proposed changes to Section 660 and of a new Section 664.1 of the Code of Civil Procedure (copies of which are attached to these minutes). The Commission first considered whether Section 659 of the Code of Civil Procedure should be amended. A motion was made by Mr. Babbage and seconded by Mr. Bradley to revise Section 659 to provide that a party intending to make a motion for a new trial must file a notice of his intention to do so with the clerk within 10 days after receipt of notice of entry of judgment or 30 days after entry of judgment, whichever is earlier. The motion carried:

Aye: Babbage, Bradley, Matthews, Stanton,
Thurman.

No : Gustafson.

Not Present: Cobey, Levit, Shaw.

The Commission then considered whether Section 660 of the Code of Civil Procedure should be amended. It was agreed that the approved revision of Section 659 makes it unnecessary to revise Section 660.

The Commission then considered Section 663a of the Code

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of Civil Procedure. A motion was made by Mr. Matthews and seconded by Mr. Babbage to revise Section 663a to conform to the approved revision made in Section 659, i.e., to provide that a party intending to make a motion to set aside or vacate a judgment must file a notice of his intention to do so with the clerk within 10 days after receipt of notice of entry of judgment or 30 days after entry of judgment, whichever is earlier. The motion carried:

Aye: Babbage, Bradley, Matthews, Stanton,
Thurman.

No : Gustafson.

Not Present: Cobey, Levit, Shaw.

The Commission then considered whether the clerk should be required by statute to serve notice of the entry of judgment on each party to the action. It was agreed that no recommendation to this effect should be made.

C. Study No. 23 - Rescission of Contracts: The Commission considered Memorandum No. 4; the research study prepared by Professor Sullivan; Item A (a portion of the research study containing suggestions and comments for legislative changes); Item B (suggested modifications by the Executive Secretary of Professor Sullivan's proposals); Item C (Mr. Levit's proposals and comments); and Item D (suggested modifications by the Executive Secretary of Mr. Levit's proposals). (Copies of Memorandum 4, and of Items A, B, C, and D are attached to these minutes.) After some preliminary discussion it was agreed to proceed by considering the proposals made by Mr. Levit, as set forth in Item C.

The Commission first considered certain revisions of Civil Code Section 1689 proposed in Item C and in the course of the discussion. Ultimately a motion was made by Mr. Levit and seconded by Mr. Babbage to approve Section 1689 of the Civil Code as revised to read as follows:

1689. ~~A-party-to-a-contract-may-rescind-the-same~~
A contract may be rescinded in the following cases only:

1. If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by

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or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party;
provided that rescission cannot be had for mere mistake, unless the party against whom he rescinds can be restored to substantially the same position as if the contract had not been made;

2. If, through the fault of the party as to whom he rescinds, the consideration for his the obligation of the party rescinding fails, in whole or in part;

3. If such the consideration for the obligation of the party rescinding becomes entirely void from any cause;

4. If such the consideration for the obligation of the party rescinding before it is rendered to him, fails in a material respect, from any cause;

5. By consent of all the other parties; or

6. Under the circumstances provided for in Sections 1785 and 1789 of this code;

7. Where the contract is unlawful for causes which do not appear in its terms or conditions, and the parties were not equally in fault; or

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3. When the public interest will be prejudiced
by permitting the contract to stand.

The motion carried:

Aye: Babbage, Bradley, Gustafson, Levit
Matthews.

No : Stanton.

Not Present: Cobey, Shaw, Thurman.

The Commission then considered certain revisions of Civil Code 1691 and a new Section 1692 proposed in Item C. After the matter was discussed the following was agreed upon:

- (1) The clause "Subject to the provision of Section 1692" should not be added to Section 1691;
- (2) The clause "and notwithstanding the provisions of Section 1691 of this code:" should be added at the end of the first paragraph of new Section 1692.
- (3) The last paragraph of Section 1692 relating to the right to a jury trial should be made a separate Section 1692.5.
- (4) Mr. Levit will submit a redraft subsection (2) of Section 1692 as proposed in Item C which will provide that restoration or offer to restore what

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the rescinding party received is a condition to rescission but that when there has been no restoration or offer to restore the court has the discretion to order a rescission if the party against whom rescission is sought has not been substantially prejudiced by the failure of the other party to restore or offer to restore and if the court is able to require the party seeking rescission to give the other party such compensation as justice may require.

The question was raised whether Mr. Levit's proposals contemplate that hereafter a party seeking rescission should be limited to effectuating an out-of-court rescission, having the right to a judgment enforcing such rescission if the other party declines to recognize it (i.e., the present "legal" action relating to rescission) or whether a party should continue to have, as well, the other alternative which he presently has - i.e., a right to apply to a court for a judgment of rescission (i.e., the present "equitable" action relating to rescission). Mr. Levit stated that it is his view that a party should continue to have both remedies presently available to him and that the Commission should not recommend legislation which would limit him to either of them. No dissent from this view was expressed at this point in the discussion. It was then suggested that

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the Executive Secretary draft and submit to the Commission a proposed section of the Civil Code which would embody this view, drawing upon Civil Code Sections 1692, 1693, and 1694 as proposed in Item D which he had prepared.

The Commission then considered proposed Section 1693 in Item C, relating to rescission of a release. Mr. Gustafson expressed his opinion that to cover cases in which the rescission of a contract (whether a release or any other contract) is pleaded as a defense to a claim for the enforcement of the contract (1) there should be a cross-reference in the Civil Code provisions relating to rescission to Code of Civil Procedure Section 597 which authorizes the separate trial of special defenses not going to the merits of a claim and (2) the Civil Code should provide that if there is no separate trial on the issue of rescission (of a release or any other contract) the issue of rescission should be submitted separately to the jury for a special verdict. There was no second to Mr. Gustafson's motion to this effect. Nor was there a motion to adopt Section 1693 as proposed in Item C.

The Commission then considered the revision of Code of Civil Procedure Section 112 proposed in Item C, relating to the jurisdiction of justice courts. A motion was made by Mr. Babbage and seconded by Mr. Bradley to amend Section 112

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by inserting after "except" the following "cases involving the rescission of a contract whether formally denominated legal or equitable and". The motion carried:

Aye: Babbage, Bradley, Levit, Matthews,
Stanton.

No : Gustafson.

Not Present: Cobey, Shaw, Thurman.

The Commission then considered Code of Civil Procedure Sections 337 and 339 of Item D, relating to the time within which an action respecting rescission must be commenced. A motion was made by Mr. Stanton and seconded by Mr. Babbage to approve Sections 337 and 339 of Item D as revised to read as follows:

337. Within four years....

3. An action to have the rescission of a contract in writing adjudged, whether such action would formerly have been denominated legal or equitable. When the ground relied upon is fraud or mistake the cause of action shall not be deemed to have accrued until the aggrieved party discovered the facts constituting the fraud or mistake.

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Code of Civil Procedure Section 339 as revised
reads as follows:

339. Within two years....

3. An action to have the rescission of a contract not in writing adjudged, whether such action would formerly have been denominated legal or equitable. When the ground relied upon is fraud or mistake the cause of action shall not be deemed to have accrued until the aggrieved party discovered the facts constituting the fraud or mistake.

The motion carried:

Aye: Babbage, Bradley, Gustafson, Levit,
Matthews, Stanton.

No : None.

Not Present: Cobey, Shaw, Thurman.

The Commission then considered the revisions of Code of Civil Procedure Sections 427 and 537 proposed in Item D relating, respectively, to joinder of other claims in actions respecting rescission and the availability of the provisional remedy of attachment in actions respecting rescission. After

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the matter was discussed it was agreed that the Executive Secretary should submit redrafts of the two sections incorporating language similar to that approved for incorporation in Sections 337 and 339 of the Code of Civil Procedure.

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D. Study No. 34(L) - Uniform Rules of Evidence: The Commission considered Memorandum No. 7 and the memorandum on Subdivision (6) of Rule 63 of the Uniform Rules of Evidence submitted by Mr. Gustafson (a copy of each of these items is attached to these minutes). After the matter was discussed a motion was made by Mr. Babbage and seconded by Mr. Bradley to approve the proposals made by Mr. Gustafson to omit Subdivision (6) of Rule 63 and to amend Subdivision (7). The motion carried:

Aye: Babbage, Bradley, Gustafson, Matthews,
Thurman.

No : None.

Pass: Stanton.

Not Present: Cobey, Levit, Shaw.

Subdivision (7) of Rule 63 as approved reads as follows:

Subdivision (7) - Confessions and Admissions by Parties. As against himself a statement by a person who is a party to the action in his individual or a representative capacity and if the latter, who was acting in such representative capacity in making

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the statement; provided, however, that if the statement was made by the defendant in a criminal proceeding, it shall not be admitted if the judge finds, pursuant to the procedures set forth in Rule 8, that the statement was made under circumstances likely to cause the defendant to make a false statement;

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E. Study No. 56(L) - Narcotics Study: The Commission considered Memorandum No. 2; two alternative drafts (Form A and Form B) prepared by the Staff of the recommendation of the Law Revision Commission relating to the codification of narcotics laws (a copy of each of these items is attached to these minutes); and a portion of the correspondence from Mr. Kleps dated June 4, 1958, relating to the draft recommendation of the narcotics study. After the Commission discussed Mr. Klep's suggestion it was agreed to make reference in the recommendation of the Commission to the fact that Assemblyman Crawford was the principal author of Resolution Chapter No. 222.

The Commission then discussed the two alternative drafts of the recommendation - Form A and Form B. A motion was made by Mr. Bradley, seconded by Mr. Thurman, and unanimously approved to adopt Form A as a model for the recommendation of the Commission relating to the narcotics study. It was suggested that a footnote be prepared indicating the number of miscellaneous code sections included in the Legislative Counsel's compilation.

A motion was made by Mr. Bradley, seconded by Mr. Babbage and unanimously adopted directing the Chairman to send the recommendation of the Commission to Mr. Crawford, Chairman of the Subcommittee on Police Administration and Narcotics of the Assembly Interim Judiciary Committee, for his comments. It was agreed that final approval by the Commission of the recommendation will be withheld pending Mr. Crawford's comments.

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Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

STUDY #22 - Proposed changes 6/12/58

(p. 10)

Except as otherwise provided in section 12a of this code, the power of the court to pass on motion for a new trial shall expire ~~sixty (60) days from and after the service-on-the-moving-party-of-written notice-of-the~~ entry of judgment, or if ~~such-notice-has-not-therefore-been-served then-sixty-(60)-days~~ after filing of the a timely notice of intention to move for a new trial, whichever is later. If such motion is not determined within said period of ~~sixty (60) days, or within said period as thus extended,~~ the effect shall be a denial of the motion without further order of the court.²⁶

(p. 13)

664.1. Immediately upon the entry of a judgment in a superior and or municipal court the clerk shall serve a notice thereof by mail upon every party to the action.