

*Meeting*

A G E N D A

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles

February 19-20, 1960

FRIDAY, FEBRUARY 19

9:00 a.m.

1. Minutes of January 1960 meeting (sent 2/4/60).
2. Study No. 40 - Notice of Alibi.  
See Memorandum No. 14(1960) (enclosed).
3. Study No. 33 - Survival of Tort Actions.  
See Memorandum No. 16(1960) (sent 2/11/60).
4. Study No. 32 - Arbitration.  
See Memorandum No. 19(1960) (enclosed).  
Kagel's Study (enclosed).
5. Study No. 23 - Rescission of Contracts.  
See Memorandum No. 20(1960) (enclosed).

1:30 p.m. (Professor Marsh will be present).

6. Study No. 38 - Inter Vivos Rights.  
See Memorandum No. 17(1960) (sent 2/11/60).  
Marsh's Study (you have this study).

SATURDAY, FEBRUARY 20

9:00 a.m. (Mr. Nibley will be present).

7. Distribution of Unpublished Studies.  
See Memorandum No. 18(1960) (sent 2/4/60).
8. Study No. 36(L) - Condemnation.
  - (1) Evidence:  
Memorandum No. 3(1960) (sent 2/11/60).
  - (2) Moving Expenses:  
Memorandum No. 10(1960) (sent 2/12/60).

(SATURDAY, February 20 - continued)

1:30 p.m. Professor Chadbourn will be present).

9. Study No. 34(L) - Uniform Rules of Evidence.

(1) Hearsay:

Memorandum No. 12 (1960) (sent 2/4/60).

Memorandum No. 13 (1960) (sent 2/4/60).

Study on Incorporating Rules 62-66 into the California  
Codes (sent 2/4/60).

(2) Privilege:

See Memorandum No. 15(1960) (sent 2/11/60).

Study on Rules 37-40 (you have this study).

Minutes of Meeting  
of  
February 19 and 20, 1960  
Los Angeles

A regular meeting of the Law Revision Commission was held in Los Angeles on February 19 and 20, 1960.

Present: Roy A. Gustafson, Chairman  
John R. McDonough, Jr., Vice Chairman  
Honorable Clark L. Bradley  
Honorable James A. Cobey  
Leonard J. Dieden  
George G. Grover  
Charles H. Matthews  
Thomas E. Stanton, Jr.

Absent: Ralph N. Kleps, Ex Officio  
Herman F. Selvin

Messrs. John H. DeMouilly and Joseph B. Harvey and Miss Louisa R. Lindow, members of the Commission's staff, were also present.

Professor Harold Marsh, Jr., of the School of Law, University of California at Los Angeles, the research consultant for Study No. 38 - Inter Vivos Rights was present during a part of the meeting on February 19.

Mr. Robert Nibley, of the law firm of Hill, Farrer & Burrill of Los Angeles, research consultant for Study No. 36(L) - Condemnation, and his associates, Messrs. John McLaurin and Stanley Tobin, were present during a part of the meeting on February 20.

A motion was made, seconded and unanimously adopted to approve the minutes of the meeting held on January 22 and 23, 1960.

I. ADMINISTRATIVE MATTERS

A. Policy Question Regarding Open Meetings of the Commission:

The Chairman indicated that he had received a request for permission to attend the meetings of the Commission from a person interested in the condemnation study. The Chairman suggested that the Commission might desire to establish a policy concerning attendance at Commission meetings by persons requesting the privilege of attending the meetings when the Commission is considering a specific topic on its agenda. After the matter was discussed, it was agreed that persons making such requests would be permitted to attend as observers but would not be permitted to participate in the discussion. It was suggested that it should be pointed out to such persons that it would be better if they were to wait until the Commission has considered and acted on the various subject matters involved and that even though the Commission has considered and acted on a matter, any suggestions or criticisms such persons might offer would be considered by the Commission.

B. Distribution of Commission's Unpublished Studies: The Commission considered Memorandum No. 18 (1960). After the matter was discussed, a motion was made, seconded and unanimously adopted to authorize the Executive Secretary to distribute at his discretion the Commission's unpublished study to those persons requesting it. It was agreed that the following paragraph should be added to the cover page of the Commission's mimeographed studies:

This study was made for the California Law Revision Commission by \_\_\_\_\_ . The study has not been acted upon by the Commission and the Commission assumes no responsibility for any statement made in this study. No part of this study is to be published without prior written consent of the Commission.

The Executive Secretary was directed to submit a report in approximately six months showing the studies distributed pursuant to this authorization during the previous six months.

II. CURRENT STUDIES

A. Study No. 23 - Rescission of Contracts: The Commission considered Memorandum No. 20 (1960) and the attached material. The Commission first agreed that the statutes providing for judicial rescission should be located in the portion of the Civil Code dealing with specific relief (commencing with Section 3406). The Commission then considered Exhibit I - the proposed draft statute. After the matter was discussed, motions were made, seconded and adopted to approve the following:

(1) Section 1689. Section 1689 of the Civil Code is amended to read:

1689. A party to a contract may rescind the same by consent of all the other parties.

(2) Section 1690. It was agreed that in view of the action taken amending Section 1689 of the Civil Code, Section 1690 of the Civil Code should be repealed.

(3) Sections 1689 and 3406 of the Civil Code are approved as amended; Sections 1690 and 1691 of the Civil Code are repealed; Section 3407 of the Civil Code is approved as drafted.

Mr. Stanton voted in opposition to these motions.

(4) Sections 3408 and 3409 as originally drafted are to be redrafted incorporating in one section the following approved principles: (1) Special notice of an intention to rescind should be given only to the party against whom relief ultimately will be sought and (2) the failure to give such notice should not bar the raising of defenses which are also grounds for rescission, i.e., the new section requiring notice should apply only to affirmative relief. It was agreed that there should not be a requirement in the new section that the reasons for rescission are to be stated in the notice.

(5) Section 3410. Approved as drafted.

(6) Section 3411. Section 3411 is approved with the following revisions:

(a) The word "such" should be added after the word "If" in the third line; the word "first" is to be inserted between the words "shall determine," and the word "separately" is to be deleted after the word "determine" in the fourth line.

(b) The clause, "and whether the party asserting the claim for which the release was given is otherwise entitled to judgment upon the claim", is to be deleted.

(c) A cross-reference to the procedural sections in this article should be added.

(7) Section 3411.5. Section 3411.5 is approved as revised by making the word "issues" in the second line singular, and by changing the words "so raised" to "of rescission".

(8) Section 1773. Section 1773 is approved as revised as follows:

(d) A right, as limited by this act, to have the rescission of the sale adjudged in accordance with the provisions of Article 5, Chapter 2, Title 3, Part 1 of Division Fourth of this code, beginning with Section 3406.

(9) Section 1781. Section 1781 is approved as revised by the deletion of the words "foreclose his lien and."

(10) Section 1785. Section 1785 is approved as drafted.

Mr. Stanton voted in opposition to the motions approving Civil Code Section 1773, 1781 and 1785.

(11) Section 1789. During the discussion of Section 1789(d) the question was raised whether a requirement should be added that the buyer to avail himself of the rights in this section must notify the seller that he does not intend to abide by the contract. No decision was reached on this matter.

During the discussion of the various sections of the Uniform Sales Act Mr. Stanton raised the question as to the desirability of changing the language in these sections. After the matter was discussed it was agreed that the staff should discuss the revisions proposed to these sections and to the sections of the Uniform Stock Transfer Act with persons informed in this field of law.

B. Study No. 33 - Survival of Tort Actions: The Commission considered Memorandum No. 16 (1960) and the attached material. The Commission first considered Exhibit II -- technical objections made by the State Bar to the Commission's proposed recommendation and draft statute. After the matter was discussed, the following action was taken:

(1) A motion was made and seconded to revise the second paragraph of proposed Section 573 of the Probate Code as follows:

In an action brought under this section against an executor or administrator all damages may be awarded which might have been recovered against the decedent had he lived except [~~penalties-ex-punitive-ex-exemplary-damages~~] damages awardable under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant.

The motion carried:

Aye: Bradley, Grover, Gustafson, Matthews, McDonough, Stanton.

No: Cobey, Dieden.

Not Present: Selvin.

(2) A motion was made, seconded and adopted to add the following phrase at the end of the third paragraph of proposed Section 573 of the Probate Code:

including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had he lived.

A motion to substitute the words "and to" for the word "including" in the above added phrase did not carry.

(3) The Commission determined that Vehicle Code Section 17157 (formerly Section 402(g)) is no longer necessary since proposed Probate Code Section 573 is a general provision covering the same subject matter. A motion was made, seconded and adopted to repeal Section 17157 of the Vehicle Code.

(4) A motion was made, seconded and adopted not to amend Section 578a of the Probate Code to extend its provisions to all actions surviving under proposed Section 573.

(5) A motion was made, seconded and adopted to provide that the proposed act relating to the survival of actions is to apply only to causes and rights of action where the death occurred after its effective date.

The Commission then considered Exhibit III -- policy objections made by the State Bar to the Commission's proposed recommendation and draft statute. After the matter was discussed the following action was taken:

(1) A motion was made and seconded to reaffirm its position taken on the adopted principle that the personal representative of a decedent should be allowed to recover damages in a surviving tort action for pain, suffering, disfigurement, humiliation, anxiety, mental anguish and the like suffered by the decedent prior to his death. The motion carried:

Aye: Bradley, Cobey, Dieden, Grover, Gustafson, Matthews, McDonough.

No: Stanton.

Not Present: Selvin.

(2) A motion was made, seconded and unanimously adopted to reaffirm its position that the proposed bill should be drafted so that all actions survive with specified exceptions.

(3) A motion was made, seconded and unanimously adopted to defer consideration of the State Bar's proposed amendment to Section 707 of the Probate Code, that requires that all claims surviving under Section 573 are to be filed, until the Commission receives the formal State Bar report on

this matter.

The Executive Secretary was directed to advise the State Bar Committee on Administration of Justice of the action taken by the Commission on the various objections made to the Commission's proposed recommendation and draft statute. As far as Probate Code Section 707 is concerned, the State Bar Committee should be advised that (1) the Commission believed that it was merely making a technical amendment to this section, (2) that the Commission is concerned to find that it may have inadvertently broadened the section and (3) that the Commission will appreciate any suggestions the State Bar Committee may have on the matter.

C. Study No. 36(L) - Condemnation Study: The Commission requested Mr. Nibley to give priority to revising the evidence and moving expense studies so that the revised studies would be ready for distribution at the time the Commission distributes its tentative statutes on evidence and moving expenses.

Evidentiary Problems. Mr. Nibley reported that he and his associates have reversed their recommendation that all evidence should be admitted as independent evidence of market value and are now recommending that all evidence admitted should be admitted only in explanation of opinion testimony; for the problems created by admitting independent evidence of value outweigh the advantages that would be gained by a simplified jury instruction. Some advantages of providing that evidence is admitted only in support of opinion testimony are: (1) The jury would be limited in its findings to the opinion testimony of experts, and (2) the hearsay rule would not be violated. After the matter was discussed the motion was made by Senator Cobey and seconded by Mr. Stanton to approve the principle that any evidence concerning the value of property (other than testimony of experts) should be admitted only in explanation of opinion testimony. The motion carried:

Aye: Bradley, Cobey, Dieden, Grover, Gustafson, Matthews, Stanton.

No: None.

Pass: McDonough.

Not present: Selvin.

The Commission then considered Exhibit I of Memorandum No. 3 (1960) - the proposed draft statute providing that market value can be proven only by opinion evidence. After the matter was discussed, motions were made, seconded

and adopted to revise and approve the following sections:

(1) Section 1248.1. Section 1248.1 of the Code of Civil Procedure is revised and approved to read:

1248.1. The amounts to be ascertained under subdivisions (1), (2), (3) and (4) of Section 1248 may be shown only by the opinions of witnesses qualified to express such opinions.

(2) Section 1248.2. New Section 1248.2 of the Code of Civil Procedure is revised and approved to read:

1248.2. A witness qualified to express his opinion under Section 1248.1 may, on direct or cross-examination, state the reasons for his opinion. The testimony of the witness as to the reasons for his opinion shall not be barred by the rule against hearsay.

(3) Section 1248.3. The first paragraph of new Section 1248.3 of the Code of Civil Procedure is revised and approved in substance as follows:

1248.3. Subject to the provisions of Section 1248.5, the opinion of a witness qualified to express his opinion under Section 1248.1 may be based upon any facts or data which a reasonable, well-informed prospective purchaser or seller of real property would take into consideration in deciding whether to purchase or sell the property and what price to pay, including but not limited to:

(a) Subsection (1) of Section 1248.3. Subsection (1) of Section 1248.3 is revised and approved with the deletion of the words "in the vicinity thereof."

(b) Subsection (2) of Section 1248.3. Subsection (2) of Section 1248.3 is revised and approved as follows:

(2) The capitalized value of the fair income attributable to the property or property interest sought to be condemned and the basis therefor, as distinguished from capitalized value of any income or profit from business conducted thereon.

(c) Subsection (3) of Section 1248.3. Subsection (3) of Section

1248.3 is revised and approved with the deletion of the exception clause.

(4) Section 1248.4. Because new Section 1248.4 of the Code of Civil Procedure is now not necessary it is to be deleted.

(5) Section 1248.5. New Section 1248.5 of the Code of Civil Procedure is to be redrafted to incorporate the language proposed by the research consultant in his study on evidentiary problems, point 2 on page 118. That is, to provide in substance that the listed evidence is not to be admitted either on direct or cross-examination.

(a) Subsection (3) of Section 1248.5. Subsection (3) is to be redrafted to provide: (1) that offers or options to purchase or lease are inadmissible except as admissions by a condemnee, and (2) to include a statement that where such evidence is admitted as an admission such evidence does not constitute direct evidence of value.

(b) Subsection (4) of Section 1248.5. The question was raised whether subsection (4) is clear in its meaning that assessed valuation is valuation assessed for purposes of taxation only.

(6) Section 1845.5. Section 1845.5 of the Code of Civil Procedure is to be repealed.

Moving Expenses. The Commission then considered Memorandum No. 10 (1960) and the attached draft statute relating to moving expenses. After the matter was discussed, motions were made, seconded and adopted to revise and approve the following sections:

(1) Section 1249.1. After the question was raised whether "person" as used in Section 1249.1 is sufficiently broad to include a corporation or other

entity, it was agreed that the staff should check with Mr. Kleps on this matter if the word is retained. Mr. Nibley then reported that a number of states and the federal government do not differentiate between the tenant at will and the lessee with the written lease and allow the tenant at will moving expenses. After the matter was discussed, a motion was made by Senator Cobey and seconded by Mr. Dieden to reconsider its prior action approving the principle to exclude tenants at will and to direct the staff to redraft Section 1249.1 to provide in substance that compensation should be made to any person lawfully on the property and that the moving expenses incurred is a proximate result of the condemnation. The motion carried:

Aye: Cobey, Dieden, Gustafson, Matthews, McDonough, Stanton.

No: Bradley, Grover.

Not Present: Selvin.

A motion to change the 25 mile limitation to 100 miles did not carry.

The motion to reaffirm the 25 mile limitation carried.

(2) Section 1249.2. Section 1249.2 is revised as follows:

1249.2. Subject to the provisions of Section 1249.3, reimbursement for moving expenses under Section 1249.1 may not exceed 25 percent of the sum paid for the acquisition involved. For the purpose of this section, the sum paid for the acquisition of the real property shall include the amount paid for the part taken, and the damages to the property not taken but injuriously affected to the extent provided in Section 1248, but shall not include interest or other compensation paid as a result of and taking of immediate possession by the condemnor. In the event the total otherwise allowable amounts claimed for moving expenses exceed the limitation provided in this section, such distribution of the available fund as may be equitable shall be made among the claimants. . . .  
[The 4th sentence is to be redrafted to include the phrase "agreed upon by the parties concerned."]

(3) Section 1249.3. It was agreed that Section 1249.3 should be redrafted to make it clear that where there is a temporary taking and the entire term of the tenant is taken, there is no intention to exclude the lessee from being reimbursed for his moving expenses.

(4) After discussing new Sections 1249.4 and 1249.5, it was agreed that these sections should be redrafted as follows:

(a) To provide that the general claims statute of the Government Code is applicable, where a claim is against a public entity, and (b) applicable sections from the general claims statute should be incorporated by reference where a claim is against a private corporation or person or a special procedure should be provided if the general claims statute cannot be adapted to claims against a private corporation or person.

D. Study No. 38 - Inter Vivos Rights: The Commission considered Memorandum No. 17 (1960) and the attached material. Professor Marsh stated that he still believes that the Commission's proposed draft statute is unconstitutional. He also questioned the desirability of creating a new category of property (quasi-community property). In addition he said that it would not be likely that a court in another state would recognize the conversion of property into quasi-community property. After the matter was discussed, a motion was made and seconded to abandon the present proposed draft statute that establishes a new category of property (quasi-community property) and to direct the staff to draft a statute incorporating the recommendations made by the research consultant. The motion carried:

Aye: Bradley, Cobey, Dieden, Grover, Gustafson, Matthews,  
Stanton.

No: McDonough.

Not Present: Selvin.

E. Study No. 40 - Notice of Alibi: The Commission had before it Memorandum No. 14 (1960) and a revised recommendation (2/18/60), both relating to Notice of Alibi.

The Commission first considered the various sections of the draft statute contained in Memorandum No. 14 (1960). After the matter was discussed the following changes were approved:

(1) Section 1028.1. No change. A motion was made, seconded, but did not carry to substitute the word "testimony" for the word "evidence" and to delete the "but" clause. It was agreed that this section is sufficiently broad to include documentary evidence which tends to establish an alibi.

(2) Section 1028.2. (a) The words "and file" should be inserted after the words "or his attorney" in the first paragraph.

(b) The word "establish" should be substituted for the word "present" in two places in subsection (a).

(c) The words "at the trial" should be deleted and "shall" should be substituted for "may," in subsection (a).

(d) The following new subsection should be added:

(d) State that the defendant need not serve or file a notice of alibi if he is to rely only upon his own testimony to establish an alibi.

(3) Section 1028.3. The words "of this code" should be deleted from the first paragraph of Section 1028.3 as well as from all the other sections in the statute.

(4) Section 1028.4. Mr. Kleps should be consulted to determine whether the words "in its discretion" should be deleted from Sections 1028.4 and 1028.6.

(5) Section 1028.5. The following phrase should be deleted from Section 1028.5: "(c) The defendant does not rely upon alibi evidence at the trial."

(6) Section 1028.6: (a) The words "relating to such evidence" should be added after the word "information" in subsections (a) and (b) of Section 1028.6.

(7) Section 1028.7. The word "different" should be deleted from the first paragraph of Section 1028.7 and the word "other" should be inserted after the words "time or place."

Motions were then made, seconded, but did not carry:

- (1) to approve subsection (b) of Section 1028.7 as drafted;
- (2) to approve the principle of subsection (b) of Section 1028.7 and to direct the staff to redraft this portion of the section to incorporate the requirement that the defendant must make a showing that he has been prejudiced and that he needs a continuance to present evidence of the notice of alibi.

A motion was then made, seconded and unanimously adopted to direct the staff to redraft subsection (b) of Section 1028.7 to incorporate a cross reference to Penal Code Section 1050 relating to continuances.

(8) Section 1028.8. Section 1028.8 should be revised to read as follows:

Nothing in this chapter prevents the defendant from testifying as to an alibi or as to any other matter.

(9) Section 1028.9. The words "in the criminal action" should be added after the word "evidence" in the first sentence of the first paragraph of Section 1028.9.

A motion was then made, seconded, and unanimously adopted to approve the draft statute as revised and to authorize the Executive Secretary to send the draft statute to the State Bar for its views.

The Commission then considered the recommendation relating to Notice of Alibi. After the matter was discussed, a motion was made, seconded and unanimously adopted to authorize the Chairman and Executive Secretary to put the recommendation in final form and to send it to the State Bar with the revised statute.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary