

Place of Meeting
State Bar Building
601 McAllister Street
San Francisco

AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

August 18-20, 1960

Thursday, August 18 (Meeting starts at 9:30 a.m.)

1. Minutes of July 1960 Meeting (sent 8/3/60)
2. Study No. 38 - Inter vivos Rights
See: Memorandum No. 65 (1960) (to be sent)
Consultant's Study (you have this study)
3. Study No. 23 - Rescission of Contracts
See: Memorandum No. 61 (1960) (sent 7/18/60)
Supplement to Memorandum No. 61 (1960) (sent 7/19/60)
Memorandum No. 66 (1960) (sent 8/4/60)
Study on Rescission of Contracts (you have this study)
4. 1961 Annual Report
See: Memorandum No. 63 (1960) (sent 7/18/60)
Supplement to Memorandum No. 63 (1960) (enclosed)

Friday, August 19 (Meeting starts at 9:00 a.m.)

5. Study No. 36(L) - Condemnation
See: Memorandum No. 67 (1960)(Apportionment of Award)(sent 8/8/60)
Study on Apportionment of Award (you have this study)
Memorandum No. 68 (1960)(Pre-Trial and Discovery)(sent 8/8/60)
Study on Pre-Trial and Discovery (you have this study)
6. Nibley Contract on Study No. 36(L) - Condemnation
See: Memorandum No. 69 (1960) (to be sent)
7. Reclassification of Position of Junior Counsel
See: Memorandum No. 70 (1960) (sent 8/3/60)

Saturday, August 20 (Meeting starts at 9:00 a.m.)

8. Final Action and Approval for Printing:
 - a. Study No. 33 - Survival of Actions
See: Memorandum No. 71 (1960) (to be sent)
 - b. Study No. 40 - Notice of Alibi
See: Memorandum No. 72 (1960) (~~to be sent~~) enclosed)
9. Study No. 34(L) - Uniform Rules of Evidence
See: Memorandum No. 73 (1960) (enclosed) and attached
Memorandum No. 15 (1960) and Memorandum No. 40 (1960)
Consultant's studies on Rules 23-25 and Rules 37-40 (you
have these studies)

Meeting

MINUTES OF MEETING

of

August 18, 19 and 20, 1960

San Francisco

A regular meeting of the Law Revision Commission was held in San Francisco on August 18, 19 and 20, 1960.

Present: John R. McDonough, Jr., Vice Chairman
Honorable Clark L. Bradley
George G. Grover
Herman F. Selvin
Vaino H. Spencer
Thomas E. Stanton, Jr. (August 20)

Absent: Roy A. Gustafson, Chairman
Honorable James A. Cobey
Ralph N. Kleps, Ex Officio

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

Mr. Robert Nibley of the law firm of Hill, Farrer & Burrill of Los Angeles, research consultant for Study No. 36(L) - Condemnation, was present during part of the meeting on August 19.

A motion was made, seconded and unanimously adopted to approve the minutes of the meeting held on July 22 and 23, 1960, after the "s" was deleted from the word "principles" in the first line of the first full paragraph on page 12. The following attached page was added to the July 22 and 23, 1960, minutes as page 4a:

Minutes - Regular Meeting
July 22 and 23, 1960

F. Resignation of Leonard J. Dieden: Prior to adjournment of its meeting, the Commission extended its congratulations to Leonard J. Dieden upon his appointment as a Superior Court Judge, and expressed its appreciation for his material contribution toward the activities of the Commission.

Minutes - Regular Meeting
August 18, 19 and 20, 1960

I. ADMINISTRATIVE MATTERS

A. Publicity and Distribution of Commission Materials; The Commission considered the question of what policy it should adopt with respect to the distribution of its tentative recommendations and draft bills.

After the matter was discussed a motion was made, seconded and unanimously adopted authorizing the Executive Secretary to distribute the tentative recommendation and draft bill on arbitration to interested persons and groups for their views and comments.

The Commission also discussed whether it should publish a notice in the State Bar Journal listing the topics that are included in the 1961 legislative program of the Commission. Such a notice might include a statement that the Commission has prepared tentative recommendations on each of the topics listed in the notice and has copies of its tentative recommendations available for distribution. No action was taken on this matter. It was suggested that it be included on the agenda for the September meeting of the Commission.

B. Editing of Research Consultants' Studies: The Commission considered the question as to whether it would be desirable to depart from the present policy of publishing the views of its research consultant, even where those views are directly contrary to the final recommendation of the Commission. It was noted that Professor Marsh, our consultant on inter vivos rights, states in his study that to divide property on divorce as proposed by the recommendation of the Commission is in part unconstitutional. Our consultant on the survival of actions study makes a strong argument in opposition to one portion of the Commission's final recommendation and does not present any argument in favor of the Commission's recommendation. It was also noted that in some cases our consultant on condemnation has changed his recommendation after reconsidering his study in view of the action of the Commission.

After the matter was discussed, it was agreed to continue the present policy: (1) Publish the studies without requiring the consultant to conform his views to the views of the Commission and (2) not to eliminate portions of a research study that are inconsistent with the final action of the Commission. It was considered appropriate, however, for the Commission or the Executive Secretary to ask the consultant if he would want to revise his study in view of the recommendation the Commission proposes to submit to the Legislature.

C. 1961 Annual Report: The Commission considered the proposed 1961 Annual Report attached to Memorandum No. 63(1960) (7/15/60) and a supplement to Memorandum No. 63(1960) (8/9/60). After the matter was discussed the following changes in the proposed 1961 Annual Report were made:

Page 1. The phrase "(Government Code Section 10300 to 10340)," was deleted from the Letter of Transmittal.

Page 3. The following ", created in 1953,¹" was deleted from the first line of the first paragraph.

A notecall to footnote 1 was inserted at the end of the first paragraph and the notecall to footnote 2 was deleted from the end of the first sentence of the second paragraph and inserted at the end of the last sentence of the second paragraph.

In the next to the last paragraph, the numbers "(1)" and "(2)" were deleted and the word "that" was added before the words "the topic."

Page 4. A paragraph concerning Mr. Dieden's appointment as Judge of the Superior Court and his resignation from the Commission is to be added as the second paragraph under Part II. His name is also to be deleted from the list of members.

The footnote relating to the legislative counsel was changed to read
"*** The Legislative Counsel is ex officio a nonvoting member of the Commission."

Page 5. The last sentence on the page is to be revised to reflect the number of two and three day meetings actually held.

Page 10. The word "has" was added after the word "Commission" in the first line of the first paragraph.

The last sentence of the second paragraph is to be expanded to indicate that the four reports submitted by the Commission were submitted after the Commission had made a study on these topics and had concluded legislation was not desirable or that the topic was one not suitable for study by the Commission.

In the last paragraph reference to the number of studies in progress the Commission has on its agenda should be changed to include the topics that the Commission intends to submit recommendations in 1961.

The word "still" was deleted from the first sentence of the last paragraph.

Page 11. The words "on the ground that" were substituted for the word "because" in the last paragraph.

A motion was then made, seconded and unanimously adopted to approve the 1961 Annual Report as revised.

Memorandum No. 63(1960) (7/15/60)

The Commission considered whether it should introduce, at the 1961 Session of the Legislature, a concurrent resolution requesting Legislative authorization for additional studies. It was agreed that the Commission should not request such authorization at the 1961 Session; however, no action would be taken to deter a member of the Legislature, the State Bar or any person from requesting the Legislature to assign studies to the Commission.

Supplement to Memorandum No. 63(1960) (8/9/60)

1. The statement relating to the dissents of Commission members to the various Commission recommendations which is to be added as a footnote to the second sentence of the fifth paragraph on page 3 of the 1961 Annual Report was approved to read as follows:

Occasionally one or more members of the Commission may not join in all or part of a recommendation submitted to the Legislature by the Commission. This lack of unanimity is not reported in the Commission's recommendation to the Legislature.

2. The paragraph relating to the California Supreme Court decision holding a statute of the State unconstitutional which is to be added to the end of page 11 of the 1961 Annual Report was approved to read as follows:

In Forster Shipbuilding Co. v. County of Los Angeles,⁴¹ the Supreme Court unanimously held the first paragraph of Section 107.1 of the Revenue and Taxation Code invalid on the ground that Section 14 of Article XIII of the California Constitution does not authorize the Legislature to declare a possessory interest arising out of a lease of exempt property to be personal property.

3. Consideration of the policy question with respect to the Commission recommending the repeal of all statutes repealed by implication or held unconstitutional by the Supreme Court of California or the Supreme Court of the United States was deferred to a later date when Mr. Kleps and a fuller representation of the Commission would be present.

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D. Reclassification of Position of Junior Counsel: The Commission considered Memorandum No. 70(1960). A motion was made, seconded and unanimously adopted directing the Executive Secretary to take the appropriate action necessary to reclassify the position of Junior Counsel to Assistant Counsel.

II. CURRENT STUDIES

A. Study No. 23 - Rescission of Contract: The Commission considered Memorandum No. 61(1960) (7/18/60), Memorandum No. 66(1960) (8/4/60) and the draft statute relating to a single procedure to rescind a contract (which was distributed at the meeting as a substitute for the statute attached to Memorandum No. 66(1960)),

After the matter was discussed the following sections of the draft statute distributed at the meeting were approved as revised:

Section 1689 - Civil Code. The phrase "if the party against whom rescission is sought can be restored to substantially the same position as if the contract had not been made" was added after the word "cases" in the second line of the preamble. The clause "provided that a contract is not subject to rescission for mere mistake, unless the party against whom rescission is sought can be restored to substantially the same position as if the contract had not been made;" was deleted from subdivision 1.

A motion to delete subdivision 6 did not carry.

The provision "If all the parties thereto consent;" was added as subdivision 5 and subdivisions 5, 6 and 7 of the proposed draft statute were renumbered accordingly.

Section 1689.5 - Civil Code. This section was deleted inasmuch as the substance of this section was included as subdivision 5 of Section 1689.

Section 1690 - Civil Code. Approved without change.

Section 1691 - Civil Code. The words "service of" were added before the words "a pleading" in the next to last line of subdivision 2.

Section 1692 - Civil Code. In subdivision (1) the words "pursuant to Section 1689.5 or Section 1691" were deleted from the second line.

In subdivision (3) the words "In an action based upon rescission" were deleted from the second sentence.

Subdivision (4) was deleted as unnecessary since Sections 427 and 537 of the Code of Civil Procedure are to be revised.

A motion to expand subdivision (4) to provide that actions based on rescission shall be equitable in nature but be based on contract in regard to joinder and attachment did not carry.

Section 1693 - Civil Code. A comma was added after the word "cross-complaint" in the third line of subdivision (2).

Section 1694 - Civil Code. The first sentence was revised to include:

Where a release is pleaded as a defense to a cause of action, the court shall first determine whether the release is valid and constitutes a defense to the cause of action or has been rescinded.

The phrase "except to the extent such benefits may have been restored" was added after the word "release" in the fourth line from the bottom of the section.

The words "or introduced" were deleted from the fourth line from the end of the section and from the last line of the section.

Consideration of whether Section 1694 should be located in the Civil Code or the Code of Civil Procedure and whether this section should be introduced as a separate bill was deferred to the September meeting.

Section 7 - Proposed Draft Bill. Section 7 of the proposed draft bill was approved without change.

Sections 337 and 339 - Code of Civil Procedure. The portions of the subdivisions numbered "3" of both Sections 337 and 339 that follow the opening clause were revised to read:

provided, that the time begins to run from the date upon which the facts that entitle the aggrieved party to rescind occurred. Where the ground for rescission is fraud or mistake, the time does not begin to run until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

Memorandum No. 61(1960) - Sections 427 and 537 - Code of Civil Procedure.

Proposed revisions to Sections 427 and 537 were approved after the words "or Section 1693" were deleted from both sections.

B. Study No. 33 - Survival of Causes of Action: The Commission considered Memorandum No. 71(1960) (8/11/60) and the attached proposed recommendation and draft bill.

After the matter was discussed action was taken on the following:

Statute

It was agreed that "or right" should be deleted from the phrase "cause or right of action" wherever it appears in both the proposed recommendation and the draft bill.

Section 573 - Probate Code. The first paragraph was revised to read:

Except as provided in this section no cause of action shall be lost by reason of the death of any person but may be maintained by or against his executor or administrator.

It was agreed that the word "as" should not be added after "therefor" in the second line of the last paragraph.

Section 707 - Probate Code. The proposed revision to this section was approved without change.

Section 8 - Effective Date Provision. Approved after deleting the words "or rights" from the first line and "or right" from the third line.

Recommendation

Page 6. Commas were added after the words "because" in the sixth line and "survive" in the seventh line.

Pages 10 and 11. Paragraph 2 was deleted.

Page 12. The first portion of the underlined section on lines 5 and 6 of paragraph 4 is revised to read: "and the cross reference to Probate Code Section 574 is eliminated"

A motion was then made, seconded and unanimously adopted that the Executive Secretary send the proposed Recommendation to the State Printer and that the Recommendation and Study be printed.

It was suggested that the Executive Secretary should advise the State Bar of the action taken by the Commission.

C. Study No. 34(L) - Uniform Rules of Evidence - (Privilege): The Commission considered Memorandum No. 73(1960) (8/8/60), attached Memorandum No. 15(1960) and the attached Uniform Rules relating to privilege which had not yet been finally acted upon by the Commission. After the matter was discussed action was taken on the following:

Rule 25(10) - Exception to Self-incrimination and portion of Rule 39 applicable to Rule 25(10). The motion to delete Rule 25(10) and the reference to Rule 25(10) from Rule 39, i.e., approving the principle that there should be no right to comment nor should an inference be drawn when the privilege of self-incrimination is exercised, did not receive a sufficient number of votes to carry. It was apparent that there were not a sufficient number of votes to approve Rule 25(10). It was agreed that this matter should be reconsidered when a fuller representation of the Commission is present.

Rule 37 - Waiver of Privilege. The following principles were approved:

(1) The privilege is deemed to be waived where the communication is subsequently disclosed by the holder of the privilege to another person and such subsequent disclosure is not itself privileged.

(2) The privilege is deemed waived where the communication is disclosed by another person acting with the consent of the holder of the privilege.

The last sentence of Rule 37(1)(b) was revised to read:

Consent to disclosure may be given by any words or conduct indicating consent to the disclosure, including but not limited to failure to claim the privilege in an action or proceeding in which the holder had legal standing to the privilege and an opportunity to claim the privilege.

Subdivision (2) was approved without change.

The first portion of the second clause of subdivision (3) was revised to read: "the privilege is not waived so far as the other spouse is concerned unless the other spouse"

The first portion of the third clause of subdivision (4) was revised to read: "the privilege is not waived so far as any other client is concerned unless such other client"

Subdivision (5) was deleted.

A contract authorizing disclosure does not constitute a waiver unless disclosure is actually made pursuant to such authorization.

It was suggested that consideration be given to adding a subdivision concerning a communication that is made between a physician and several patients who jointly consult the physician.

Rule 37 was limited in its application to Rules 26 to 29, inclusive.

Rule 39 - Reference to Exercise of Privileges. Subdivision (1) was approved without change. This action did not approve or disapprove the reference in Rule 39 to Rule 25(10).

Subdivision (2) was approved as revised to read:

The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the trier of fact because the privilege has been exercised, shall instruct the jury that no presumption rises and no inference is to be drawn from the exercise of the privilege.

Motions to add the word "adverse" before "inference" in subdivision (2), and to delete the word "adverse" before "inference" in subdivision (1) did not carry.

Rule 40 - Effect of Error in Overrule Claim of Privilege. Approved.

D. Study No. 36(L) - Condemnation: The Commission considered Memorandum No. 69(1960) (8/15/60) relating to a new contract with the law firm of Hill, Farrer & Burrill, Memorandum No. 67(1960) (8/5/60) and the attached proposed recommendation and draft bill relating to the apportionment and allocation of an award in eminent domain proceedings and Memorandum No. 68(1960) (8/5/60) and the attached proposed recommendation and draft bill relating to pre-trial and discovery procedures in eminent domain proceedings. After the matter was discussed, the following action was taken:

APPORTIONMENT AND ALLOCATION OF AN AWARD

Statute

Section 1248a - Code of Civil Procedure. The phrase in strike-out type in lines 7 and 8 ", if the complaint contains a prayer therefor, and shows the matter hereinafter provided," is not to be deleted.

Section 1244 - Code of Civil Procedure. In subdivision 5 the "but" clause was deleted from lines 4 and 5.

A new subdivision 6 was added to read: "6. A statement of the nature or extent of the interests of the defendants in such land so far as known to the plaintiff."

Section 1246.2 - Code of Civil Procedure. The staff was directed to redraft this section to incorporate the principle that in a condemnation action either party may bring about the termination of a lease on any ground that under general contract law would amount to a material failure of consideration or frustration; i.e., the grounds for the termination of

a lease should be stated in the general terms of commercial frustration. After considering the need for this section, the Commission directed the staff to submit examples of the application of the statute both with and without such a provision. The examples are to show how the award would be affected if the lease were terminated during the condemnation proceedings or after such proceedings, taking into account the revisions that would be necessary to the severance damage and benefit sections.

Section 9 - Effective Date. The last sentence was deleted.

Recommendation

Page 1. The words "in eminent domain proceedings" were added to the title.

The words "often not true" were substituted for "false in many cases" in the next to the last line from the bottom of the page.

Page 2. In the first full paragraph; the words "in the belief that" were substituted for "because" in the eighth line; the word "achieve" was substituted for "effectuate" in line 9; the words "Commission believes that the" were deleted from line 10 and the clause "and he is not justly compensated when he is given either more or less than the value of property taken from him" was deleted from lines 12-14. The last portion of the next to last sentence in the first full paragraph was revised to read: "and no portion of this cost should be shifted to the owner of an interest in the condemned property by either a legal theory or a judicial procedure which requires him to accept less than his interest is worth."

Page 3. In the third line from the top of the page the words "procedural provisions" were substituted for "procedure." The words "are based on an erroneous" were substituted for "proceeds from a false" in the fourth line.

PRE-TRIAL AND DISCOVERY

Statute

Section 2016 - Code of Civil Procedure. Subdivision (2) is to be redrafted:

1. To be made applicable to any case where the value of the property is an issue.

2. To provide that any expert who is retained to testify at the trial is subject to having his deposition taken by any other party to the action.

Motions to provide that an expert retained by a party, but whose testimony is not to be used at the trial, (1) is subject and (2) is not subject to having his deposition taken did not carry for an insufficient number of votes.

3. To include in the enumeration of the matter subject to disclosure: (1) the identity of persons intended to be used as witnesses and (2) the proposed manner of the construction of the improvement. It was suggested that the draft bill should include another section which states that any section containing a specific cross reference to Section 2016 is deemed to incorporate the 1961 revision to Section 2016.

Recommendation.

Page 1. The words "in eminent domain proceedings" were added to the title.

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Page 2. The words "is subject to discovery" were deleted from lines 5 and 6 and the words "is subject to discovery" were added after the word "attorney" in line 7.

In the second paragraph the word "from" was substituted for "than" in the second line, the word "the" which preceded the word "opinions," and the words "of experts" were deleted from the ninth line and the words "are based" were substituted for "rely" in the tenth line.

Page 3. The word "are" was substituted for "is" in the eighth line and the word "proved" was substituted for "proven" in the eleventh line.

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New Contract for Study No. 36(L) - Condemnation: After the Commission considered Memorandum No. 69(1960) a motion was made, seconded and unanimously adopted to authorize the Executive Secretary and Chairman to enter into a new contract with the law firm of Hill, Farrer & Burrill for the amount of \$6,000 to cover the topics: (1) the right to condemn and (2) recoverable costs.

E. Study No. 38 - Inter Vivos Rights: The Commission considered Memorandum No. 65(1960) (8/15/60) and the attached proposed recommendation and draft bill. After the matter was discussed action was taken on the following:

Recommendation

Page 6. In the fifth line of the first full paragraph the word "that" was added after the word "suppose."

The argument as to the constitutionality of the division of property on divorce is to be rewritten to include a statement pointing out that, since a spouse has the duty to support, a court can presently require the obligation of support be satisfied against the separate property of the spouse, i.e., sequester his separate property.

Page 7. The last sentence of the first paragraph(beginning on the eighth line from the top of the page) was deleted.

It was suggested that the last paragraph include a statement of the existing law.

Page 8. The phrase "for the same reason the Commission has recommended it" was substituted for "as it should" in the first sentence of the second paragraph.

The last two lines of the third paragraph were revised to read:

that either spouse will be able to declare a homestead in the quasi-community property of the other spouse whether or not the other spouse consents.

Page 10. The words "been raised or considered" were substituted for "even been questioned" in the third line from the top of the page.

Statute

Section 1238 of the Civil Code. In subdivision 4 the tabulations "(a)" and "(b)" were deleted and the deleted word "from" that preceded "(b)" was reinserted.

Motions were made, seconded and unanimously adopted:

- (1) to approve the recommendation as revised,
- (2) to approve the draft bill as revised, and
- (3) to direct the Executive Secretary to send the proposed recommendation and draft bill to the State Bar for its views.

It was agreed that copies of the proposed recommendation and draft bill should also be sent to the State Inheritance and Gift Tax Division for its views.

F. Study No. 40 - Notice of Alibi in Criminal Actions: The Commission considered Memorandum No. 72(1960) (8/9/60) and the attached recommendation and draft bill. After the matter was discussed action was taken on the following:

Statute

Sections 1028.1 and 1028.6 - Penal Code. Subdivision (b) of Section 1028.1 was deleted from Section 1028.1 and added as a second paragraph to Section 1028.6. The cross reference to subdivision (b) in the first line of Section 1028.6 was deleted.

Section 1028.4 - Penal Code. In subdivision (b) the words "Authorize or require" were substituted for "Order."

Recommendation

Page I-1. In the first paragraph, the fourth line and the first portion of the fifth line were revised to read: "completely by surprise and result in an unjust acquittal . . . ," and in the eighth line the word "of" was substituted for "that" and the words "will be asserted at the trial" were deleted.

Page I-2. In paragraph 1 the sentence beginning on the seventh line was deleted and the word "because" was substituted for "However" in the next sentence beginning on the ninth line.

In the eleventh line, the words "was committed. Even" were substituted for "was committed and, even."

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The last sentence of paragraph 1 was deleted.

In paragraph 2 the word "also" in the first line was deleted and added after "should" in the second line.

Page I-3. In the second line of paragraph 4 the word "in" was substituted for "at."

A motion was then made, seconded and unanimously adopted that the Executive Secretary send the Recommendation to the State Printer and that the Recommendation and Study be printed.

There being no further business the meeting was adjourned.

Respectfully submitted,

John H. DeMouilly
Executive Secretary