

Place of Meeting

~~AGENDA~~ AGENDA

State Bar Building
601 McAllister St.
San Francisco

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

Friday and Saturday, October 20-21, 1961

FRIDAY, OCTOBER 20 (meeting starts at 9:30 a.m.)

1. Minutes of September 1961 meeting (to be sent)
2. Administrative Matters.

Memorandum No. 51(1961) (Sale of bound volumes)
(enclosed)

3. Study No. 52 - Sovereign Immunity

Memorandum No. 45(1961) (enclosed)

Study (Part I and Part II) (you have these)

SATURDAY, OCTOBER 21 (meeting starts at 9:00 a.m.)

4. Study No. 36(L) - Condemnation

Memorandum No. 49(1961) (Pretrial Conferences and
Discovery)(enclosed) (not
to be considered unless a
Commissioner wishes that
it be considered)

Memorandum No. 50(1961) (Senate Bill No. 203)
(moving expenses)(to be
sent)

5. Study No. 46 - Arson

Memorandum No. 46(1961) (to be sent)

Study on Arson (you have this study)

6. Study No. 53(L) - Personal Injury Damages as Separate Property

Memorandum No. 47(1961) (to be sent)

Study (enclosed)

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

Memorandum No. 48(1961) (Rules 23-27 as revised to date with comments) (to be sent)

Memorandum No. 29(1961) (Rule 27A - Psychotherapist Privilege) (sent August 4, 1961)

Memorandum No. 30(1961) (Rule 28) (sent August 14, 1961)

Memorandum No. 31(1961) (Rule 29) (sent August 14, 1961)

Memorandum No. 32(1961) (Rules 30; 31 and 32) (sent August 14, 1961)

Memorandum No. 33(1961) (Rules 33; 34 and 35) (sent August 14, 1961)

Memorandum No. 34(1961) (Rule 36) (sent August 14, 1961)

Memorandum No. 35(1961) (newsmen's privilege) (sent September 15, 1961)

Memorandum No. 40(1961) (Rule 37) (sent September 15, 1961)

MINUTES OF MEETING

of

October 20 and 21, 1961

San Francisco

A regular meeting of the Law Revision Commission was held in San Francisco on October 20 and 21, 1961.

Present: Herman F. Selvin, Chairman
Honorable James A. Cobey (October 21)
Honorable Clark L. Bradley
James R. Edwards
Sho Sato
Thomas E. Stanton, Jr.
Ralph N. Kleps, ex officio (October 20)

Absent: John R. McDonough, Jr., Vice Chairman
Joseph A. Ball
Vaino H. Spencer

Messrs. John H. DeMouilly, Joseph B. Harvey and Jon D. Smock of the Commission's staff were also present.

During the discussion of Study No. 52(L) - Sovereign Immunity, the following persons were also present:

Mr. Charles Barrett, Asst. Attorney General
Mr. John M. Traynor, Deputy Attorney General
Mr. Holloway Jones, Dept. of Public Works
Mr. Robert Carlson, Dept. of Public Works
Mr. Leslie Gillen, NACCA
Mr. Robert Barbagelata, NACCA
Mr. Jack Merelman, County Supervisors' Assn.

The Minutes of the meeting of September 25, 26 and 27 were corrected as follows:

On page 1, the following paragraph was added immediately before the paragraph approving the Minutes of the August meeting:

Minutes - Regular Meeting
October 20 and 21, 1961

"In the absence of the Chairman and the Vice Chairman, Commissioner Stanton was unanimously elected Chairman pro tem."

On page 5, the third sentence in the paragraph headed "Rule 63(3) and (3.1)" was corrected to read as follows: "The Commission rejected a staff suggestion to revise the provisions to coincide with existing language of Section 2016 of the Code of Civil Procedure. Section 2016 permits objection to be made to the form of the answer as well as to the form of the question."

The Minutes of the September meeting were approved as corrected.

ADMINISTRATIVE MATTERS

Third Bound Volume. The Executive Secretary reported that the cost of including a Cumulative Table of Cases in the Third Bound Volume would be approximately \$325. In accord with the action taken at the September meeting, the Commission approved inclusion of a Cumulative Table of Cases in the Third Bound Volume. Thus, this Volume will include a Cumulative Table of Sections Enacted, Amended or Repealed, a Cumulative Index and a Cumulative Table of Cases.

The Commission unanimously approved a motion by Commissioner Sato, seconded by Commissioner Bradley, to charge the approximate actual cost to the nearest fifty cents for volumes to be sold on consignment by the State Printer. The cost is to include the cost of printing plus the administrative cost of sale. The Executive Secretary reported that the cost of printing is approximately \$6.00 per volume and that the cost of sale could run as much as \$1.00 per volume.

Stanford Contract. The Commission unanimously approved the addition of \$2,500 to the Stanford Contract. This sum is to be used piecemeal as needed and the Chairman is authorized to execute, on behalf of the Commission, the necessary contracts to effectuate this decision.

Minutes - Regular Meeting
October 20 and 21, 1961

Meeting Dates. Future meetings are scheduled as follows:

November 10-11.....Los Angeles
December 15-16.....San Francisco

STUDY NO. 34(L) - UNIFORM RULES OF EVIDENCE (HEARSAY
ARTICLE)

The staff reported that valuable information had been received from New Jersey with respect to that state's study and recommendation concerning the Uniform Rules. Because of the extremely short supply of this material and its probable value to the Commission's work, the Commission authorized the staff to use its discretion in arranging for the reproduction of the New Jersey material, particularly the Hearsay and Privileges Articles.

The Commission approved supplementing Professor Chadbourn's study on hearsay with notes reflecting New Jersey's action, provided it meets with his approval.

In this regard, the Commission also authorized the printing of a sufficient number of extra galley proofs of this study to supply each member of the Commission and the State Bar Committee with a personal copy thereof.

STUDY NO. 34(L) - UNIFORM RULES OF EVIDENCE (PRIVILEGES
ARTICLE)

The Commission considered Memorandum No. 48(1961) regarding Rules 23 through 27 of the Uniform Rules as revised to date by the Commission. The staff reported that valuable source material had been received from New Jersey which would be helpful to the Commission in considering these and the other substantive rules of the Privileges Article. Accordingly, it was determined to defer further consideration of most rules of privilege until adequate time had elapsed in which the staff can review this new material and supplement the material already presented to the Commission. In light of this decision, attention was focused on Memorandum No. 29(1961) relating to a recommended Psychotherapist Privilege and a study prepared by the staff on this subject.

Because of a serious need to protect the psychotherapist-patient relationship in a manner not sufficiently protected by the Physician-Patient Privilege, the Commission unanimously approved the policy of providing a Psychotherapist-Patient Privilege to protect confidential communications in the course of such relationship. Basically, the Commission approved the approach recommended by the staff and adopted the recommended

rule with some modifications. The following matters should be noted particularly.

It was agreed to adjust the definition of "psychotherapist" and of "confidential communication" to make it clear that the privilege attaches where a general medical practitioner is engaged in psychotherapy. Because of the shadowy line between organic and psychosomatic illness, the Commission agreed that the privilege should not be limited to communications with persons who hold themselves out as specialists in the field. Rather the privilege would include psychotherapeutic treatment given by other physicians, particularly since it is probable that disclosure in the first instance would be made to a family physician in order for him to determine the nature of the ailment requiring specialized treatment.

Other than expanding the scope of the privilege as noted above, the Commission adopted the basic format of the rule as recommended by the staff. However, certain restrictions and exceptions to the operation of the privilege were adopted. These may be summarized as follows:

It was agreed that the privilege should be operative in all cases, both civil and criminal, including commitment cases, but that the privilege would not be available with respect to psychotherapists appointed by a court. This

limits the privilege so as to exclude from privileged communications an examination for the purpose of diagnosis when such examination is conducted by a psychotherapist appointed by a court.

Similarly, it was agreed to define the rule of privilege to exclude its attaching to communications with institutional physicians in cases involving involuntary commitments in an action or proceeding brought by the patient for restoration to capacity. The purpose of this limitation is to make it clear that the testimony of institutional physicians would be available in a restoration to capacity action involving an incompetent who was involuntarily committed.

It was unanimously agreed not to except a patient's criminal conduct from the operation of the privilege. An exception of this type would seriously undermine the effectiveness of this privilege.

It was agreed, however, to make an exception in will cases, and in cases where a party is claiming through an inter vivos transaction where the patient is now deceased. In this connection, it was agreed to add "deceased" to modify "patient" in the statement of this exception.

With regard to the mental condition of the patient being in issue, it was agreed to limit this exception to cases where the patient himself puts such mental condition in issue as an ultimate fact (as distinguished from its being merely relevant).

Minutes - Regular Meeting
October 20 and 21, 1961

With regard to the exception respecting the purpose of the consultation being to enable or aid anyone to commit a crime or tort, it was agreed to include this exception to the operation of the privilege.

With respect to whether an exception should be operative where the conduct of the patient is such as is required to be reported by the psychotherapist, a decision in this regard was deferred pending further research by the staff as to matters which are required to be reported.

STUDY NO. 36(L) - CONDEMNATION

Pretrial Conferences and Discovery. The Commission considered Memorandum No. 49(1961) relating to the tentative recommendation of the Commission on pretrial conferences and discovery in eminent domain proceedings.

The following matters should be particularly noted. A change was made on page 2 of the tentative recommendation, substituting the word "problems" for "obstacles." Conforming changes are to be made in the balance of the tentative recommendation.

On page 6 of the tentative recommendation, it was agreed to make it clear that diligent notice is required to be given after a party determines to call a witness or discover evidence. This may be accomplished by changing the first sentence of paragraph (3) to read substantially as follows:

The court should be authorized to permit a party to call a witness or to introduce evidence not listed in his statement of valuation data upon a showing that such party made a good faith effort to comply with the statute, that he diligently gave notice to the adverse party of his intention to call such witness or to introduce such evidence, and that prior to serving the statement he (1) could not in the exercise of reasonable diligence have determined to call the witness or have discovered or listed the evidence or (2) failed to determine to call the witness or to discover or list the evidence through mistake, inadvertence, surprise or excusable neglect.

Section 1246.2 (b)(6) was removed from the numbered tabulation under subdivision (b) since some of the matters listed

therein are not things upon which an opinion would be based but rather are things which would be introduced to supplement, clarify or explain the testimony of an expert. Accordingly, it was agreed to include the substance of this provision as a separate subdivision--denominated (d) under Section 1246.2. As revised, this provision would read substantially as follows:

(d) A list of the maps; plans; documents, photographs, motion pictures, books, accounts, models, objects and other tangible things upon which the opinion of any person intended to be called as a witness by the party is based in whole or in part, or which is intended to be introduced as evidence in connection with; or to be used to explain, clarify or supplement, the testimony of any person intended to be called as a witness by the party. The statement also shall indicate the place where each is located and, if known, the times when it is available for inspection by the adverse party.

Similarly, paragraph (7) of subdivision (b) was removed from the numbered tabulation in subdivision (b) since it is clear that the opinion of an expert would not be based upon a name and address. The requirement of listing this information may be included in subdivision (a) as follows:

(a) The name and business or residence address of each person intended to be called as a witness by the party to testify to his opinion of the value of the property described in the demand or as to the amount of the damage or benefit, if any, to the larger parcel from which such property is taken and the name and business or residence address of each person upon whose statements or opinion the opinion is based in whole or in part.

In regard to the diligent notice requirement (Section 1246.4), the question regarding the content and adequacy of

such notice was again raised. The Commission directed that the provision be redrafted to make it clear that the notice required to be diligently given must include the information required to be listed as provided in Section 1246.2. This policy may be effectuated by the inclusion of a new subdivision in Section 1246.4 to read as follows:

(b) The notice required by subdivision (a) of this Section shall include the information specified in Section 1246.2, but it is not required to be in writing.

Senate Bill No. 203 - Moving Expenses. The Commission considered Memorandum No. 50(1961) relating to the previous recommendation regarding reimbursement for moving expenses embodied in Senate Bill No. 203.

At the suggestion of the State Bar Committee, the Commission agreed to revise the definition of "moving" to delete therefrom words which could have a broader meaning than anticipated or desired. The Department of Public Works favored this action. Accordingly, the Commission deleted from the definition of "moving" the words "dismantling," "reassembling" and "installing," so that the definition of "moving" now reads:

(d) "Moving" means removing, packing, loading, transporting, unloading and unpacking personal property.

Minutes - Regular Meeting
October 20 and 21, 1961

The Commission reaffirmed its previous policy decision to include "lessees" as persons entitled to reimbursement for moving expenses. Senate Bill No. 203 clearly provides that reimbursement is not available to those persons who are licensees or tenants at will. Rather, compensation is provided only for those persons whose interest is actually taken by eminent domain. A lessee who is entitled to an award because a portion of his term is taken by eminent domain is also forced to move before he could otherwise be required to do so. The condemnor can avoid the reimbursement of moving expenses by taking the fee subject to the lease and permitting the lease to expire. This is the existing practice where the lease is about to expire. Accordingly, as a practical matter, reimbursement of moving expenses of lessees will not be provided lessees whose term is about to expire; such reimbursement will be limited to lessees who are required to move at a substantially earlier time than that at which they would have moved had the property not been taken.

STUDY NO. 46 - ARSON

The Commission considered Memorandum No. 46(1961) relating to arson.

After thorough consideration of the several problems involved it was agreed to abandon the present statutory scheme and establish at least two degrees of arson. Without particular regard for the specific language to be used, the basic format of proposed Section 447 as recommended by the research consultant was tentatively adopted as the standard for "simple arson," or the lesser degree of arson.

With regard to the more serious question concerning what type of culpable conduct should be considered as "aggravated arson," or the greater degree of arson, the Commission thoroughly considered at least four different views. These may be summarized as follows:

(1) The Commission rejected a mechanical approach based on enumeration of types of property concerned-- whether specifically listing types of property or using generic language to refer to such types of property. This eliminates at least one form of objective approach and departs from an unreasonable mechanical standard.

(2) An absolute approach based upon results of conduct was next considered. This would make "aggravated arson" depend upon the consequences of the actor's conduct without regard for his intent, motive or design with respect to such conduct. No final action was taken with respect to this possible approach.

Minutes - Regular Meeting
October 20 and 21, 1961

(3) A "reasonable man" or objective approach was also considered. This would make the culpable conduct of "aggravated arson" depend upon those risks of which the actor was or should have been aware, but nevertheless acted or continued to act in disregard of such risks. No final action was taken with respect to this possible approach.

(4) Another approach is a subjective one; that is, a requirement of specific intent. This would require the prosecution to prove that the defendant was actually aware of or actually knew of the risks which he was creating but nevertheless acted in disregard of such risks. The consultant recommended this approach but also recommended that a presumption of intent exist where death or injury or serious property damage resulted from the defendant's conduct. No final action was taken with regard to this possible approach.

The specific approach to be taken in regard to the definition of "aggravated arson," including the question of a possible presumption to aid the prosecution, was deferred for later consideration by the Commission as well as were miscellaneous problems relating to other matters raised by the underlined portions of the recommended statute.

STUDY NO. 52(L) - SOVEREIGN IMMUNITY

The Commission considered Memorandum No. 45(1961) relating to sovereign immunity. Part I of the Memorandum set forth certain administrative problems (types of statistical and insurance studies needed; division of work with Senate Fact Finding Committee on Judiciary) to be resolved in the light of the discussion of the problems in the field of sovereign immunity contained in Parts II and III. The Commission considered Part II of the Memorandum and the first portion of Part III dealing with the question of when governmental entities should be liable for injuries caused by their activities. The latter portions of the memorandum, discussing the problem of determining liability--by courts, administrative agencies, etc.--and the problem of payment for and cost of governmental liability--including insurance and the extent of existing liability--were not discussed. The discussion did not result in any decision as to how the assignment would be divided with the Senate Fact Finding Committee on Judiciary nor in any decisions on the types of statistical studies and insurance studies needed.

The Commission determined that it would begin its consideration of the specific legal problems involved in the field of sovereign immunity at the November meeting. The Commission decided that it would consider the various areas of governmental activity on an ad hoc basis to determine whether or not there should be liability and the conditions under which such liability should exist. Such consideration

would begin with the 15 areas of statutory liability pointed out by Professor Van Alstyne in the portions of the study already submitted. If a consistent pattern is found running through the Commission's determinations, it may be possible at a later date to draft a general statute covering all governmental liability. If the individual determinations are not susceptible of generalization, the statute to be drafted will deal with each area of liability on a piecemeal basis.

Commissioner Stanton moved, and Commissioner Sato seconded:

(1) That Chairman Selvin contact the Chairman of the Senate Fact Finding Committee on Judiciary to determine if that Committee will hire a consultant to do necessary statistical research upon such problems as the cost and availability of insurance to governmental entities, the liability experience of non-immune entities, etc.; and

(2) That, if the Senate Committee will not hire such a consultant, the Chairman be authorized to enter into a contract with such a consultant to do such research for the Commission.

The motion carried unanimously.

STUDY NO. 53(L) - PERSONAL INJURY DAMAGES

The Commission considered Memorandum No. 47(1961) relating to whether personal injury damages awarded to a married person should be separate property.

Civil Code Section 163.5 provides that "all damages, special and general, awarded to a married person in a civil action for personal injuries, are the separate property of such married person." This section was enacted in 1957. Prior to 1957 the California courts held that such damages were community property and that the negligence of the other spouse was to be imputed to the injured spouse in an action by the injured spouse against a third person for personal injuries. Section 163.5 was enacted to prevent imputation of negligence in such cases.

However, Section 163.5 is not limited to cases where negligence of one spouse might be imputed to the other; the section also applies to cases where the other spouse was not contributorily negligent or had no connection with the accident that resulted in the personal injury. The result is that personal injury damages recovered by a married person are not subject to division on divorce, are not subject to the community property rules relating to disposition by will and intestate succession, etc. These consequences seem undesirable since in many of these cases a large portion of the recovery represents future earnings which would, of course, be community property.

There are two separate, but related, questions that must be decided by the Commission:

(1) To what extent should personal injury damages be separate property or community property? Three alternatives are available: (a) all community property, (b) all separate property or (c) part separate property (such as pain, suffering and disfigurement) and part community property (such as future earnings). An incidental question is: Should the underlying cause of action--as distinguished from the judgment--be treated differently than the judgment? **The consultant recommends that all damages be community property.**

(2) What should be the rule on imputed negligence? The consultant recommends that negligence should not be imputed to the other spouse in any case. Moreover, he would revise Vehicle Code Section 17150 so that negligence would not be imputed between husband and wife under that section. It was noted that our authority to make this study is not broad enough to cover revision of Vehicle Code Section 17150. The consultant does not discuss the policy considerations relating to whether negligence should be imputed.

The Commission indicated that additional research material would be helpful in making the policy decisions noted above. Additional research is needed on the following matters:

- (1) What is the status of interspousal tort immunity in California?
- (2) What is the status of the law in other states on the imputation of negligence between spouses?

(3) To what extent is community property liable for torts of husband and wife in California?

(4) What are the policy considerations to be taken into account in determining whether negligence should be imputed between spouses?

It was tentatively agreed that personal injury damages should be community property if the other spouse is not contributorily negligent.

The difficult problem is what rule should apply in the cases where the other spouse is contributorily negligent. Several possible approaches to the solution of this problem were discussed:

(1) Not allow negligence of other spouse to be imputed but reduce the judgment using comparative negligence principles. Should recovery then be separate or community property?

(2) Not allow negligence of other spouse to be imputed but reduce the judgment using principles of contribution between joint tortfeasors. Should recovery then be separate or community property?

(3) Allow full recovery for personal aspects of the injury (pain, suffering and disfigurement, etc.) but provide that the rest of recovery (loss of earnings, etc.) is not barred by imputed negligence but subject to either comparative negligence principles or contribution between joint tortfeasors principles. Some of the problems that this alternative would create in personal injury cases were mentioned.

(4) No imputation of negligence but provide that the damages recovered are community property with no reduction in amount of recovery.

(5) San Francisco Bar proposal--amend Section 163.5 to provide for reimbursement to community of amounts paid for medical expenses out of community property but make no other change in Section 163.5.

It was suggested that the research consultant should be requested to prepare additional research material concerning the matters discussed at this meeting which are not covered in his research study.