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STATE OF CALIFORNIA

## California Law Revision Commission

November 18, 1954

MINUTES OF MEETING

OF

OCTOBER 29 AND OCTOBER 30, 1954

Pursuant to the call of the Chairman, the Law Revision Commission met on October 29 and 30 at the headquarters of the State Bar in San Francisco.

**PRESENT:**

Mr. Thomas E. Stanton, Jr., Chairman

Honorable Stanford C. Shaw, Assembly

Mr. John D. Babbage

Mr. Richard C. Fildew

Mr. Bert W. Levit

Mr. John H. Swan (on October 30)

Mr. Samuel D. Thurman

Mr. Ralph N. Kleps, ex officio

**ABSENT:**

Honorable Jess R. Dorsey, Senate

Mr. John R. McDonough, Jr., Executive Secretary of the Commission was present. Mr. E. Abbott Goldberg, Deputy Attorney General, was present on October 29. Mr. George Brunn, who recently assumed responsibility for the Education Code revision

work at Stanford University, was present during a part of the meeting on October 30.

The minutes of the meeting of the Commission on September 23 and 24, 1954, which had been distributed to the members of the Commission prior to the meeting, were unanimously approved.

#### Budget for 1955-56

The Chairman reported that he and the Executive Secretary had attended a Department of Finance hearing on October 25 on the Commission's proposed budget for the fiscal year 1955-56. He stated that the Department of Finance staff had raised only two questions about the budget.

The first question related to the Commission's request for a mimeograph machine. The staff asked for more information relating to the need for such a machine, and the Chairman reported that a letter giving all available information had been sent to the Department of Finance.

The Chairman reported that the Department of Finance staff had also requested that the Commission submit research cost estimates for each of the studies which it proposes to make. After this matter was discussed, it was agreed that a literal compliance with the request would not be feasible at this time because the Commission has not had enough experience to be able to estimate such costs with any degree of accuracy. Concern was expressed that if itemized estimates were prepared and incorporated into the Commission's budget and if thereafter the estimates proved

inaccurate, the Commission might be seriously handicapped in the proper discharge of its functions.

It was suggested that the Department of Finance be referred to the practice followed in the case of the Code Commission where a lump-sum appropriation for its codification activities was made, without breakdown as to the specific codes to be worked on during the year. It was also suggested that the Commission investigate how State research activities are normally budgeted -- whether each proposed study is given a price tag or whether a department is given a lump-sum appropriation to be used for research over a period of time. It was agreed that the Department of Finance should be advised that the Commission cannot at this time estimate the approximate cost of studying each topic selected for study. It was further agreed that if, at such future time as the Commission is able to forecast specific project costs with reasonable accuracy, the Department of Finance insists upon the principle of a specific estimate for each research project, the Commission should try to limit its application to the relatively large studies and ask for a lump-sum allocation to cover miscellaneous smaller studies.

The Commission agreed that for its own information and guidance it was desirable to forecast the cost of each project as accurately as possible, and the Executive Secretary was directed to begin to prepare estimated cost figures for the several topics selected by the Commission for study.

The Chairman also reported that the Legislative Auditor, Mr. Post, raised a question whether the Commission's appropriation should be made a part of the Governor's budget, suggesting that

this would imply that the Governor would have to approve the Commission's Calendar. The Chairman reported that this question was not vigorously pressed, however, and that there seems to be little doubt that the Commission's budget will be made a part of the Governor's budget.

The Chairman reported that he had also discussed with the Department of Finance the question of the increase which the Commission requested in the appropriation for the salary of the Executive Secretary from \$6,000 to \$8,000 and that the Department is of the view that the position is properly classified at the present time. After discussion it was agreed that the Commission should request the Department of Finance to re-evaluate the position and establish it as one equivalent to that of an Assistant Attorney General on the ground that it involves supervisory duties of a substantial character.

#### The Probate Code Study

Mr. Levit, Chairman of the Probate Code Committee, made a report of the progress to date on the Probate Code study. He reported that Mr. Basye, the Research Consultant on this study, had made a preliminary report which the Committee discussed with him and had then prepared a first draft of his report which he will discuss with the Committee on November 2nd. Mr. Levit reported that the Committee and Mr. Basye had agreed that, of the three areas delineated for study in Assembly Concurrent Resolution No. 8, two - the homestead provisions of the Civil Code and the

Sections 640 through 646 of the Probate Code - are closely enough related to warrant an attempt to eliminate at least some of the existing differences between them. He reported that they have also agreed, on the other hand, that the Inheritance Tax Law exemptions are so wholly different from either the Civil Code homestead provisions or Sections 640 through 646 of the Probate Code that there seems to be no possibility that such differences can be eliminated. Mr. Levit summarized certain tentative conclusions set forth in Mr. Basye's report and reported that the Committee is very pleased with his work to date. After discussion, it was agreed that every effort should be made by Mr. Basye and the Committee to complete the Probate Code study in time to submit it to the Commission for consideration at its meeting on November 26 and 27.

#### Discussion of Method of Reporting to Legislature

The Commission discussed whether the reports prepared in the course of its studies should be published as the reports of the Commission or those of the Research Consultants retained to do the research work. Mr. Levit expressed the view that each report should be that of the Commission; that the situation should be that the Commission hires the Research Consultant to do the research work for it and to assist it in the preparation of its report but that the final report should be that of the Commission itself and so labeled. Messrs. Stanton and Kleps disagreed, taking

the position that the Commission should not take personal responsibility for the work done by its Research Consultants because individual commissioners will not be able to check the work carefully enough to warrant signing it. It was concluded that this matter need not be decided now but that it should be considered again when Mr. Basye's report is before the Commission. It was agreed, however, that the Research Consultants should be informed that the Commission will expect to exercise considerable control of their reports, whether or not it adopts them as its own.

#### First Report to the Legislature

The Commission considered at length the preliminary draft of its first report to the Legislature prepared by the Executive Secretary. A number of suggestions for additions to, deletions from, and corrections of the report were made, and the Executive Secretary was asked to prepare a second draft of the report to be submitted to the Commission for discussion at the meeting on November 26 and 27.

#### Discussion of Assistant Executive Secretary

The Executive Secretary reported that if the position of Assistant Executive Secretary is established as of July 1, 1955, he would recommend that Mrs. Virginia Nordby, who is now a member of the staff working on the Education Code revision project

at Stanford, be appointed to fill the position. Mr. Kleps pointed out that in view of Mrs. Nordby's lack of experience, it would not be possible to employ her unless the position is downgraded to a level equivalent to that of Junior Counsel, \$4,200 per year (the position was budgeted at \$5,000 per year in the Commission's proposed budget).

The Secretary also reported that he will need an assistant during the period January 1 - June 30, 1955 to help him carry on the regular work of the Commission (which will probably be particularly heavy because he will have to spend considerable time in Sacramento), to make various studies and reports in connection with the Agenda project, and to assist him in responding to the inquiries which will doubtless be made with respect to the various Education Code bills recommended by the Commission. He suggested that the Commission raise with the appropriate officials in the Department of Finance and the State Personnel Board the question whether an arrangement might be made whereby Mrs. Nordby could be employed by the Commission on a temporary civil service basis for the period January 1 - June 30, 1955, at \$350 per month, using a part of the \$8,000 appropriated for research in the current budget for this purpose.

After these matters were discussed, the Chairman was authorized to communicate with the Department of Finance and the Personnel Board with a view to working out an arrangement whereby Mrs. Nordby can be employed as Assistant Executive Secretary on a temporary basis prior to July 1, 1955 and on a permanent basis thereafter.

Education Code

The Commission considered several matters with respect to the Education Code revision:

1. The Executive Secretary reported that expenditures to October 15 under the Education Code contract with Stanford totalled \$5,611.14, leaving \$4,388.86 available of the \$10,000 originally committed to the contract. He reported that this balance would not be sufficient to cover expenditures under the contract to December 31, 1954 and suggested that the balance of the \$12,000 Education Code appropriation be committed to the Stanford contract. After this suggestion was fully discussed by the Commission, Mr. Swan made a motion which was seconded by Mr. Shaw and unanimously passed that the balance of the Education Code appropriation be committed to the Stanford contract.

2. The Executive Secretary was instructed to communicate with Assemblyman Geddes, the sponsor of the bill providing for revision of the Education Code, with respect to the work which the Commission has done on the Code and to send him copies of the proposed revisions of the Code prepared to date.

3. The Executive Secretary stated that he had received some inquiries whether the Commission is of the view that, since it is engaged in a revision of the Education Code, other persons and organizations should refrain from proposing legislation affecting the Code at the next session of the Legislature. After this matter was discussed it was decided (a) that the Commission will not suggest to persons who make such inquiries that they

should not introduce legislation affecting the Code but will offer to keep them informed as to its legislative program and request that they let the Commission know what bills they will propose and (b) that the Commission will inform the chairmen of the respective Education Committees of the Legislature about its program and take such other steps as may be necessary to minimize confusion and conflict between its bills and others affecting the Code.

4. The Executive Secretary reported that the CASA Committee for Revision of the Education Code had asked him to ascertain whether the Commission would sponsor, at the next session of the Legislature, a bill to establish a method of obtaining uniform interpretation of the Education Code throughout the State, thus eliminating the conflicting interpretations of the Code which are now sometimes given by different legal officers. The Commission decided that this is probably not within the scope of its Education Code assignment and would, in any event, require more study than could be devoted to it in the time remaining before January 1. The Executive Secretary was directed to report to the CASA Committee that the Commission would not attempt to deal with this matter in the next session of the Legislature.

5. The Executive Secretary reported that the CASA Committee had also requested that he ascertain whether the Commission would sponsor, at the next session of the Legislature, a bill to establish an office to act as a clearing-house for legislation affecting the Education Code in order that such legislation might be drafted to fit into the present Code structure - i.e., to see that new

sections are put in the right place in the Code and that all other parts of the Code affected are simultaneously changed to avoid conflicts and ambiguities. Mr. Kleps pointed out that this suggestion is impracticable since the several sponsors of legislation affecting the Code could not be persuaded to "clear" their bills with such an office and it would not be possible to have enacted legislation to compel them to do so. The Executive Secretary was directed to report to the CASA Committee that the Commission will not suggest that such an office be established.

6. The Executive Secretary reported that when the CASA Committee was informed that the current work on revision of the Education Code would be terminated on December 31, 1954, the Committee expressed considerable concern and suggested that the project should be continued thereafter through a deficiency appropriation. The Executive Secretary reported that Dr. Pulliam, the Chairman of the Committee, had told him that Assemblyman Doyle, the Vice-Chairman of the Assembly Committee on Education, had expressed willingness to sponsor legislation to obtain such an appropriation. This matter was thoroughly discussed and the Executive Secretary was directed to report to Dr. Pulliam that the Commission believes that a request for a deficiency appropriation for the Education Code would be unwise for the following reasons: (a) the Legislature should have an opportunity to see and pass on the Commission's work before a deficiency appropriation is requested to continue it; and (b) a deficiency appropriation could not be made available as of January 1 so that the staff would have to be discharged and there would not seem to be any great advantage

to be gained by getting the work under way again prior to September 1st when a regular appropriation for continuation of the work would become available.

7. The Executive Secretary reported that the CASA Committee had requested him to ascertain whether the Commission had changed its position with respect to a general structural reorganization of the Education Code. After this matter was discussed the Executive Secretary was directed to inform the Committee that the Commission has not changed its position - i.e., that no general reorganization of the Code for its own sake will be undertaken but that when it becomes apparent, in the course of revising the parts of the Code dealing with particular subject matter that particular articles or sections should be moved within the Code, this will be done.

8. The Commission discussed, briefly, the procedure which should be followed in handling its Education Code bills in the Legislature. Mr. Kleps suggested that the Commission should fix a cut-off date in December at which time it would have ready everything which it is going to present to the Legislature at the next session. Under this procedure, the Legislature will be presented early in the session with the Commission's entire Education Code program for the session. Mr. Kleps said that this would be quite helpful in establishing a satisfactory working relationship with the Legislature.

Agenda

The Executive Secretary reported that as of October 15 expenditures under the Agenda contract totalled \$1,626.13, leaving \$373.87 available of the original \$2,000 committed to the contract. He also reported that an agreement extending the Agenda contract from October 31, its present termination date, to July 1, 1955, and making an additional \$1,000 available to finance the contract, had been executed by Stanford and by Chairman Stanton on behalf of the Commission and submitted to the Department of Finance for approval.

The Commission considered a number of suggestions received from members of the Bench and Bar with respect to topics to be included on its Agenda. The following disposition was made of the suggestions considered.

Topics recommended for immediate study.

- No. 3 Study to determine whether C.P. § 66 should be revised to specify the effective date of its rules provisions.*
- No. 16(2) - Study to determine whether the California rule that a counter-motion to retain venue for the convenience of witnesses in the county where an action was originally filed may not be made unless an answer is on file should be revised.** *a new trial*
- No. 17 - Study to determine whether the California law with respect to the "for-against" testimonial privilege of husband and wife should be revised, with particular reference to the question whether, when one spouse has committed an offense against the other, the latter has a privilege not to testify against the defendant spouse.**
- No. 32 and No. 41(1) - Study to determine whether the Juvenile Court law is in need of a general revision to correct contradictions and ambiguities, with particular reference to three questions: (1) whether the complaint in a case involving §702 of the**

Welfare and Institutions Code (contributing to the delinquency of a minor) should be filed in the Superior Court sitting as a Juvenile Court (as at present) or in the Municipal Court; (2) whether the probation officer should be an officer of the court with the judge having authority to employ and discharge him; and (3) whether a juvenile should be entitled to counsel and have a right to reasonable bail in juvenile court proceedings.

No. 43 - Study to determine whether the law establishing the small claims court is in need of clarification.

No. 49 - Study to determine whether the various statutes relating to the filing of claims against public employees and public bodies can and should be made simpler and more uniform.

Topics recommended for future study.

No. 6(1) - Study to determine whether the Inheritance Tax Law exemptions should be the same with respect to transfers of community property when the husband dies as when the wife dies.

No. 40(1) - Study to determine whether the doctrine of governmental immunity should be further modified in the case of torts committed by public employees.

No. 40(2) - Study to determine whether California should adopt the Federal rule excluding evidence illegally obtained.

Not Accepted

Nos. 13 and 37 - Suggestion that the law be revised to provide that the order of a trial judge granting custody to a parent should not be stayed pending appeal (this matter is now under consideration by the State Bar).

- No. 28(1) - Suggestion that § 5642 of the Public Resources Code be amended to provide for the election of five rather than three trustees to conform to § 5654 of the Code changing the number of trustees from three to five (this matter will be handled by the Legislative Counsel).
- No. 28(2) - Suggestion that § 45 of the Elections Code be amended to provide that the date of signing initiative and other petitions may be indicated by ditto marks (this matter will be handled by the Legislative Counsel).
- No. 41(2) - Suggestion that the law providing for forfeiture of automobiles in which narcotics have been found be amended to give the court some latitude in hardship cases.
- No. 41(3) - Suggestion that the judge should be given greater authority in the selection of juries and should be permitted at his discretion to grant or deny counsel the right to ask additional questions.
- No. 42(1) - Suggestion that the certain provisions of the Motor Vehicle Code be changed if and when the chapter on secured transactions in the new Commercial Code is adopted.
- No. 50 - Suggestion that changes be made in certain of the Government Code sections relating to the Division of Administrative Procedure (Mr. Kleps reported that this matter will be handled by the Senate Interim Committee on Administrative Regulations).

The Commission also considered the several suggested topics for study originated by the staff. The following action was taken with respect to these proposals (designated as S-1, S-2, etc. to differentiate from outside proposals).

Topics recommended for immediate study.

- S-1 - Study to determine whether § 201.5 of the Probate Code be revised to eliminate the existing distinction between real and personal property and to eliminate the existing provision that one

spouse, pre-deceasing the other, may dispose of one-half of the separate personal property of the surviving spouse by will, if such property would have been community property if acquired in California.

- S-2 - Study to determine whether the rule against suspension of the absolute power of alienation should be repealed inasmuch as California has recently enacted the common law rule against perpetuities.
- S-5 - Study to determine whether § 1875 of the Code of Civil Procedure should be amended to require or authorize California courts to take judicial notice of the law of foreign countries.
- S-7 - Study to determine whether §§ 40 through 43 of the Probate Code, which established restrictions on testamentary gifts to charity, should be repealed or, if not, revised to prevent existing techniques of evasion.
- S-11 - Study to determine whether § 1880(3) of the Code of Civil Procedure (the "dead man statute") should be either abolished or, conversely, made stricter by limiting the admissibility in evidence of testimony of conversations with the decedent on the ground that the estate has taken a deposition of the testimony to cases where the deposition is introduced in evidence by the estate.
- S-12 - Study to determine whether the decision in the recent case of Grant v. McAuliffe, 41 Cal. 2nd 859 (1953), which held that survivability of a tort cause of action arising outside of California is a matter of procedure and therefore governed by California law, should be either changed or codified.
- S-13 - Study to determine whether the California statutes governing advancement of cases for trial should be revised.

Recommended for future study.

- S-6 - Study to determine whether the California law on post-conviction sanity hearings for persons sentenced to death should be revised.

- S-9 - Study to determine whether the California law with respect to survivability of tort actions (§ 574 of the Probate Code and § 956 of the Civil Code) should be revised.

Topics retained for future consideration by the  
Commission.

- S-14 - Suggestion that the California statutes and constitutional provisions providing "civil death" for persons convicted of crimes should be either repealed or clarified.

Not Accepted

- S-4 - Suggestion that § 3600 of the Public Resources Code, which regulates the spacing of oil wells, should be revised to take account of the slant drilling of wells.
- S-8 - Suggestion that the California Corporations Code should be amended to permit general non-profit corporations to establish common trust funds.
- S-10 - Suggestion that the Probate Code should be revised to provide that when an estate is insolvent the creditors should have the right to designate the administrator and that any transfer made by the deceased within four months of the date of death (or some other date to be determined in the course of the study) may be set aside by the administrator.

Kirkwood v. Bank of America

Mr. Levit called the attention of the Commission to a recent decision of the Supreme Court of California, Kirkwood v. Bank of America, which involved the question of the inheritance

tax exemption in the case of an inter vivos transfer of community property made in contemplation of death. He reported that the case was decided on the basis of the language of certain California statutes and that the Court had stated that it had no alternative thereunder. Mr. Levit suggested that this might be the kind of case that the Commission could bring to the attention of the Legislature without making any extended study of the problem. Mr. Shaw agreed that this would be a good opportunity to demonstrate to the Legislature that the Commission is checking the current decisions and reporting matters which may be of interest. Mr. Thurman expressed the view, however, that such an attempt to deal with this situation might be unwise in that it would be a piecemeal approach to a larger general problem. The Executive Secretary was instructed to treat Mr. Levit's report as a suggestion to the Commission for study, have a staff report made on Kirkwood v. Bank of America, check with the State Controller as to the view of his office concerning the correctness of the decision and the desirability of leaving the law in its present state, and to report to the Commission.

Respectfully submitted,

  
John H. McDonough, Jr.  
Executive Secretary