

File Copy

A G E N D A

for Meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

December 12-13, 1958

1. Minutes of November, 1958 meeting (enclosed herewith).
2. Staff personnel matters:
 - (a) Executive Secretary.
 - (b) Assistant Executive Secretary
3. Study #37(L) - Claims Statute. (See Memorandum No. 1 enclosed.)
4. Study #25 - Probate Code Section 259 et seq. (See Memorandum No. 2 for the NOVEMBER meeting, sent you prior to that meeting.)
5. Study #21 - Confirmation of Partition Sales. (See Memorandum No. 6 for the JUNE meeting, sent you prior to that meeting.)
6. Study #44 - Suit in Common Name. (See Memorandum No. 5 for the JUNE meeting, sent to you prior to that meeting.)
7. Study #32 - Arbitration. (See items enclosed.)
8. Study #33 - Survival of Tort Actions. (See Memorandum No. 4 for the OCTOBER meeting sent to you prior to that meeting.)

MINUTES OF MEETING

of

December 12 and 13, 1958

SAN FRANCISCO

Pursuant to the call of the Chairman, there was a regular meeting of the Law Revision Commission on December 12 and 13, 1958, in San Francisco.

PRESENT: Mr. Thomas E. Stanton, Jr., Chairman
Honorable Clark L. Bradley
Honorable Roy A. Gustafson
Mr. Charles H. Matthews
Professor Samuel D. Thurman

ABSENT : Mr. John D. Babbage, Vice Chairman
Honorable James A. Cobey
Mr. Bert W. Levit
Mr. Stanford C. Shaw
Mr. Ralph N. Kleps, ex officio

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

The minutes of the meeting of November 7 and 8, 1958, were unanimously approved.

I. ADMINISTRATIVE MATTERS

A. Staff Personnel Developments:

(1) Executive Secretary. The Executive Secretary reported that there are several persons both in and outside of the law teaching profession who have indicated that they are interested in being considered for the position and that arrangements are now being made for Dean Spaeth and Messrs. Stanton, Thurman and McDonough to interview a number of these persons later this month at the annual meeting of the American Association of Law Schools in Chicago.

(2) Assistant Executive Secretary. The Executive Secretary reported that letters reporting the availability of this position and describing the assignments and the qualifications of the person the Commission is seeking have been sent to the deans of the California law schools, judges of the Supreme Court, various State legal offices such as that of the Attorney General, district attorneys and county counsel. He also stated that the State Personnel Board is undertaking to publicize and advertise the availability of the position and that at its request he had prepared a news story which will be sent to various legal newspapers.

The Executive Secretary also reported on the interview he had with Mr. Thomas Darling of the State

Minutes - Regular Meeting
December 12 and 13, 1958

Personnel Board, in which he was advised (a) that the examination is scheduled for January 31; (b) that the Commission could submit questions and indicate its views about the questions the State Personnel Board has prepared; and (c) the Commission is entitled to have a representative at the Personnel Board interviews which will follow the examination. After the matter was discussed, it was agreed that the Executive Secretary should, insofar as his time permits, draft questions based on statutory construction to be used in the examination and that he should report to the Personnel Board that the Commission believes that the remainder of the examination should consist largely of true and false questions based on judicial opinions, with relatively few multiple choice questions included.

It was agreed that the Executive Secretary should sit in on the interview as the Commission's representative if his time permits.

The Executive Secretary then reported that two persons have indicated an interest in being considered for an appointment on a temporary basis. After the matter was discussed, a motion was made by Mr. Thurman, seconded by Mr. Bradley and unanimously adopted to give the discretion of making a temporary appointment to the Executive Secretary.

Minutes - Regular Meeting
December 12 and 13, 1958

B. 1959 Annual Report: The Executive Secretary reported that the last draft report relating to the study of planning procedure where no planning commission which was circulated to the members has been sent to the Printer to be set in page proof and included in the 1959 Annual Report. (A copy of which is attached hereto.) After the matter was discussed, a motion was made by Mr. Gustafson and seconded by Mr. Bradley to approve the draft report. The motion carried:

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

No : None.

Not Present: Babbage, Cobey, Levit, Shaw.

Minutes - Regular Meeting
December 12 and 13, 1958

C. Introduction of Bills at 1959 Session: The Commission considered the bills which it intends to introduce in the 1959 Legislature and the allocation of these bills as between its legislative members, Senator Cobey and Mr. Bradley. After the matter was discussed, a motion was made, seconded and unanimously adopted to approve the following allocation subject to Senator Cobey's approval:

1. Senator Cobey - Senate.

Probate Code § 259 - Alien Heirs	Study No. 25
Mortgages for Future Advances	Study No. 24
Doctrine of Worthier Title	Study No. 31
Restraints on Alienation	Study No. 1
Effective Date of Order (Motion for New Trial)	Study No. 6
Cut-off Date Motion New Trial	Study No. 22

2. Mr. Bradley - Assembly.

Claims Statute	Study No. 37(L)
Grand Jury Law Codification	Study No. 58(L)
Penal and Vehicle Code Overlap	Study No. 19
Guardians for Nonresidents	Study No. 20
Corporations Code §§ 2201 & 3901	Study No. 11

II. CURRENT STUDIES

A. Study No. 21 - Confirmation of Partition Sales: The Commission considered Memorandum No. 6 dated 6/4/58 (a copy of which is attached hereto) and the research study prepared by the Staff. The Commission first discussed whether Section 775 of the Code of Civil Procedure is intended to incorporate the provisions of the Probate Code which govern confirmation of private partition sales of real property. After the matter was discussed and the conclusion reached that it is not, a motion was made by Mr. Gustafson and seconded by Mr. Bradley that the Commission, to make it clear that confirmation of private partition sales is governed by the applicable provisions of the Code of Civil Procedure, recommend that the following sentence be added to Section 775 of the Code of Civil Procedure:

The confirmation of the private sale shall
be pursuant to Section 784 of this code.

The motion carried:

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

No: None.

Not Present: Babbage, Cobey, Levit, Shaw.

The Commission then discussed whether the provisions of the Code of Civil Procedure relating to confirmation of partition sales and the provisions of the Probate Code relating to confirmation of probate sales should be made uniform with respect to the several matters discussed in the Staff report as to which they are presently different. After various aspects of the matter were discussed, a motion was made by Mr. Bradley and seconded by Mr. Matthews to approve the following addition to Section 784 of the Code of Civil Procedure which would conform this section to Section 785 of the Probate Code with respect to the amount by

Minutes - Regular Meeting
December 12 and 13, 1958

which an increased bid must exceed the bid returned to the court before the court can accept it:

. . . and if it appears that it was legally made and fairly conducted and that the sum bid is not disproportionate to the value and it does not appear that a sum exceeding such bid at least 10 percent on the first ten thousand dollars bid and 5 percent on the amount of the bid in excess of ten thousand dollars, exclusive of the expenses of a new sale, may be obtained, the court shall make an order confirming the sale and directing conveyances to be executed; otherwise it shall vacate the sale and direct another to be had, of which notice must be given and the sale in all respects conducted as if no previous sale had taken place.

But if a written offer in an amount at least 10 percent more on the first ten thousand dollars bid and 5 percent more on the amount of the bid in excess of ten thousand dollars is made to the court by a responsible person, and the offer complies with all provisions of the law, the court shall accept such higher offer, confirm the sale to such person or, in its discretion order a new sale. If more than one written offer in an amount at least 10 percent more on the first ten thousand dollars bid and 5 percent more on the amount of the bid in excess of ten thousand dollars is made, the court shall accept the highest such increased bid which is made by a responsible person, and if any such increased bid complies with all the provisions of the law confirm the sale to the person making such increased bid or, in its discretion, order a new sale.

The motion carried:

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

No: None.

Not Present: Babbage, Cobey, Levit, Shaw.

After the Commission discussed further the possibility of making uniform the provisions of the Probate Code and Code of Civil Procedure

Minutes - Regular Meeting
December 12 and 13, 1958

relating to confirmation of private sales, it was agreed not to conform them insofar as the Probate Code provisions relating to appraisal, real estate agents' commissions and grounds specified as sufficient for the court's refusal to confirm the sale are concerned.

The Commission also agreed to the following:

(1) The Staff should rewrite its study in various particulars, with special reference to including therein the legislative history of the 1955 amendments to Probate Code Section 785.

(2) The Executive Secretary should then prepare a Recommendation and legislation reflecting the action taken by the Commission and send these and the revised staff study to the State Bar under cover of a letter to Mr. Hayes particularly requesting the views of the State Bar with regard to the inclusion in Section 784 of the Code of Civil Procedure of the Probate Code provisions relating to appraisals and agents' fees.

(3) If the State Bar report is received in time a bill to revise Sections 775 and 784 of the Code of Civil Procedure will be introduced in 1959.

(4) If a bill is introduced in 1959 the recommendation and study relating to confirmation of private judicial sale will not be separately printed; rather, a report on this matter will be included in the Commission's 1960 annual report.

B. Study No. 25 - Probate Code Sections 259 et seq. - Nonresident

Alien Heirs: The Commission considered Memorandum No. 2 dated 10/28/58; a revised draft of the Recommendation of the Commission; a revised draft of the legislative bill to effectuate the Commission's Recommendation; and a proposed revised draft of Section 1049 prepared by the C.A.J. of the State Bar which was distributed at the meeting. (A copy of each of these items is attached hereto.) After various matters were discussed, the following action was taken:

1. Section 1. A motion was made and seconded to approve Section 1 with the words "on or" inserted after the word "dying." The motion carried:

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

No: None.

Not Present: Babbage, Cobey, Levit, Shaw.

2. Section 1044. The Executive Secretary reported on the correspondence received from Mr. Garrett Elmore, which states the State Bar's reaffirmation of the desirability of incorporating a converse presumption that it is presumed that a nonresident alien will have substantial benefit, . . . , of his inheritance if his country is not on the list of the Secretary of the Treasury. After the matter was discussed, it was agreed to reaffirm the action taken at the October meeting, declining to go along with the State Bar for the reason that the person contending that an heir is a disqualified nonresident alien has the burden of proof on the issue.

It was agreed that the phrase "who does not reside" should be revised to read "not residing." [Approved as revised infra § 1044.4.]

3. Section 1044.5. It was agreed that (a) the word "herein"

Minutes - Regular Meeting
December 12 and 13, 1958

should be deleted and the phrase "in this article" should be inserted in its place and (b) the word "and" should be deleted from the 5th line and the word "or" should be inserted in its place. A motion was made and seconded to approve Sections 1044 and 1044.5 as revised. The motion carried:

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

No: None.

Not Present: Babbage, Cobey, Levit, Shaw.

4. Section 1045.1. It was agreed that the words "shall be" should be deleted and the word "is" should be inserted in place thereof. It was also agreed that the word "interest" should be deleted from all the sections and the word "property" should be inserted in its place except where indicated. [Approved as revised infra § 1045.2.]

5. Section 1045.2. It was agreed that the following minor changes should be made:

(a) A comma inserted after "Taxation Code."

(b) "is" inserted for "was" in line 6 of page 4.

(c) "immediately" is deleted from line 9 of page 4.

(d) "are" inserted for "were" in line 10 of page 4.

(e) "in the course of administration" inserted after "distributed" in line 10 of page 4.

(f) "estates" inserted for "property."

A motion was made and seconded to approve Sections 1045.1 and 1045.2 as revised. The motion carried:

Minutes - Regular Meeting
December 12 and 13, 1958

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

No: None.

Not Present: Babbage, Cobey, Levit, Shaw.

6. Section 1045.3. It was agreed that Section 1045.3 should be revised as follows:

1045.3. When a decedent leaves a valid will creating present and future legal estates in property passing under the will and the person entitled to a future estate is, at the time of the decedent's death, a disqualified non-resident alien but the person entitled to the present estate is not, the court, on petition filed as provided in Section 1045 shall, at the option of the owner of the present estate, either proceed as provided in Section 1045.2 or convey the property to a trustee to be appointed by the court upon security satisfactory to the court. The court shall retain jurisdiction for the settlement of the accounts of such trustee, in all matters necessary for the proper administration of such trust, and for final distribution of the trust property. The expense of administration of the trust shall be borne by the owner of the present estate and at the termination of such estate the owner or his estate shall have a lien on the trust property for the amount of such expense plus interest thereon to be fixed by the court at a rate not exceeding seven percent per annum.

7. Section 1045.4. Mr. Bradley stated that the Commission should give serious consideration as to whether it should provide that the impounding procedure is applicable in those cases where a trust has been created, the beneficiary at that time being a qualified nonresident alien, but he subsequently becomes disqualified because he moves to a country on the list or the country in which he resides is put on the list. After the matter was discussed, it was agreed that Section 1045.4 should be revised to read as follows:

Minutes - Regular Meeting
December 12 and 13, 1958

1045.4. When the beneficiary under a testamentary trust or a trust established under Section 1045.3 is a disqualified nonresident alien at the time he is entitled to receive money or other property from the trust, the court shall, on petition of the trustee, any party in interest, or the Attorney General, order the property then due the beneficiary converted into cash by the trustee and deposited as provided in Section 1045. The court shall also order the trustee to make similar disposition of all other money or property which may become due the beneficiary in the future until such time as the court shall, on petition of the beneficiary, have determined that the beneficiary is no longer a disqualified nonresident alien. The provisions of this article relating to the disposition of deposited funds shall be applicable to funds deposited pursuant to this section, except that for the purpose of Sections 1046, 1046.5, 1047 and 1048 the date of entry of the court's order shall be deemed to be the date upon which the deposits were made by the trustee.

A motion was made and seconded to approve Sections 1045.3 and 1045.4 as revised.

The motion carried:

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

No: None.

Not Present; Babbage, Cobey, Levit, Shaw.

8. Sections 1046, 1046.5, 1047 and 1048. It was agreed that the word "after" should be deleted from the first line in Section 1048 and the word "from" should be inserted in its place. A motion was made and seconded to approve Sections 1046, 1046.5 and 1047 and Section 1048 as revised. The motion carried:

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

No: None.

Not Present: Babbage, Cobey, Levit, Shaw.

9. Section 1048.5. A motion was made and seconded to approve Section 1048.5 with the following revision:

Minutes - Regular Meeting
December 12 and 13, 1958

(a) The word "and" should be deleted from line 2 and the word "or" should be inserted in its place. The motion carried:

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

No: None.

Not Present: Babbage, Cobey, Levit, Shaw.

10. Section 1049. The Commission considered draft statute Section 1049 which was approved by the Committee on the Administration of Justice at its December 5-6 meeting. After the matter was discussed, a motion was made by Mr. Bradley and seconded by Mr. Gustafson to approve the following Section 1049 as proposed by the Committee on the Administration of Justice:

1049. When an order is made for the deposit of funds pursuant to Section 1045, 1045.1, 1045.2, 1045.3 or 1045.4 or for the payment or escheat of a deposit pursuant to Section 1046, 1046.5, 1047 or 1048, or at any intervening time, the court may order payment of reasonable attorney's fees out of such funds or such deposit to any attorney who represented the person on whose behalf such deposit is or was ordered. When an order is made for the payment of a deposit pursuant to Section 1046, 1046.5 or 1047, the court may order payment of reasonable attorney's fees out of such deposit to any attorney who represented the person to whom payment is ordered made.

The motion carried:

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

No: None.

Not Present: Babbage, Cobey, Levit, Shaw.

11. Sections 1049.5 and 1050. A motion was made and seconded to approve Sections 1049.5 and 1050. The motion carried:

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

No: None.

Not Present: Babbage, Cobey, Levit, Shaw.

Minutes - Regular Meeting
December 12 and 13, 1958

12. Section 1050.1. The Commission discussed the suggestion made by the Executive Secretary to make Section 1050.1 less ambiguous by drafting one provision to apply to any petition filed pursuant to Sections 1045-1045.3 and a second provision to apply to any petition filed pursuant to Section 1045.4, 1046, 1046.5 1047 or 1048. After the matter was discussed, it was agreed to authorize the Chairman and the Executive Secretary to redraft Section 1050.1 to embody the suggestion made by the Executive Secretary.

13. Section 1050.2. A motion was made and seconded to approve Section 1050.2. The motion carried:

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

No: None.

Not Present: Babbage, Cobey, Levit, Shaw.

14. Section 1050.3. It was agreed to delete "Section 1045.4" from Section 1050.3. [Approved infra § 1026]

15. Section 1026. A motion was made and seconded to approve Sections 1050.3, 1026 and Section 1050.4 as revised. The motion carried:

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

No: None.

Not Present: Babbage, Cobey, Levit, Shaw.

16. Recommendation. A motion was made by Mr. Bradley and seconded to approve the Recommendation with minor revisions and to authorize the Executive Secretary to send the Recommendation as revised to the Printer. The motion carried:

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

No: None.

Not Present: Babbage, Cobey, Levit, Shaw.

C. Study No. 32 - Arbitration: The Commission considered Memorandum No. 1 dated 10/23/58 and the proposed section of minutes for the November 1958 meeting prepared by the Executive Secretary. (A copy of each of these items is attached hereto.) The Commission discussed Mr. Kagel's study generally with a view to determining how the Commission should proceed to obtain a study sufficiently adequate to print and draft legislation for the 1959 Legislative Session. During the discussion the following proposals were considered:

1. Approve the proposed minutes and have the Chairman and Executive Secretary request Mr. Kagel to revise the study to conform to the format suggested in the proposed minutes.
2. Have the Staff prepare a study from the material submitted by Mr. Kagel.
3. Draft a Recommendation and legislation designed to effectuate the Commission's Recommendation without printing a study on this topic.
4. Schedule Mr. Kagel's study for consideration at the January meeting with a view to seeing, in detail, how adequate the study is and the extent to which the Commission can deal with the problems presented on the basis of Mr. Kagel's materials and its own general understanding of the subject. One thought expressed in this connection was that it might be possible, on the basis of such an approach, to arrive at a view that the Uniform Arbitration Act would be acceptable with relatively little modification.

No conclusions were reached and it was tacitly agreed that the Chairman and Executive Secretary should discuss the matter further and

Minutes - Regular Meeting
December 12 and 13, 1958

decide what course of action to recommend to the Commission at its
January meeting.

D. Study No. 36(L) - Condemnation: The Commission considered the correspondence dated December 5 and 10 from Mr. Robert Nibley of Hill, Farrer & Burrill, regarding progress on the portion of the condemnation study relating to moving expenses. (A copy of each of these items is attached hereto.) The Commission discussed the general tenor of Mr. Nibley's letter of December 10, that the study appears to be so substantial in scope that the firm cannot complete it within a reasonable time, particularly if Senator Cobey's suggestion that the study be oriented on the basis of economic as well as legal principles were accepted. After the matter was discussed, it was agreed that the January meeting should be held at a time and place where it is reasonably certain that both Senator Cobey and Mr. Nibley can attend and discuss how this study should be carried forward. It was also agreed that because of the scope of the problem of condemnation the amount of money which the Commission has tentatively allocated to it (\$3,000) may have to be increased substantially.

E. Study No. 37(L) - Claims Statutes: The Commission considered Memorandum No. 1 dated 12/5/58, a copy of the Memorandum prepared by the Executive Secretary dated 12/4/58 to Messrs. Stanton, Kleps and Van Alstyne, the draft Recommendation of the Law Revision Commission and the following legislation designed to effectuate the Commission's Recommendation: (1) Constitutional amendment, (2) General claims statute, and (3) various "trailer bills" relating to claims against the State, counties, cities and districts. (A copy of each of these items is attached hereto.)

The Executive Secretary reported that pursuant to authority given at the November meeting to put the Recommendation and necessary bills in final form, the Chairman, the Legislative Counsel and Executive Secretary had met December 6. At this meeting the Executive Secretary was directed to send mimeographed copies of the claims statute study and related material to Mr. Richard Carpenter, Executive Director and General Counsel of the League of California Cities and to Mr. William MacDougall of the California Supervisors Association, and to ask them if they would assist the Commission in distributing this material when it is printed. The Executive Secretary reported that Mr. Carpenter had offered to distribute 100 printed copies to various city attorneys and that Mr. MacDougall had offered to distribute 150 printed copies to district attorneys, city counsel and

Minutes - Regular Meeting
December 12 and 13, 1958

boards of supervisors. After the matter was discussed, it was agreed that these offers should be accepted and that the Executive Secretary should also send mimeographed copies of the claims statute study material to Mr. Heinzer of the Department of Finance, the Attorney General and the Controller asking them if they want additional copies to distribute when printed. It was also agreed that City Attorneys Arnbaugh of Los Angeles and Holm of San Francisco should receive mimeographed copies of these materials.

The Executive Secretary then reported that at the December 6 meeting it was agreed that the printed pamphlet should include by way of proposed legislation only the general claims statute draft and the proposed constitutional amendment because the other necessary legislative bills are both lengthy and repetitious. After the matter was discussed, Mr. Bradley instructed the Executive Secretary to send copies of the bills (the proposed constitutional amendment, the new general claims statute and the several trailer bills) to the Legislative Counsel to be preprinted together with his request that the Legislative Counsel draft the bills and have them preprinted.

The Commission then considered and agreed to the following:

- (1) That 500 additional copies of the claims statute study and recommendation should be printed if money is available.
- (2) That the bills relating to claims statutes should be introduced by Mr. Bradley in the Assembly.

The Commission then considered and discussed in detail various provisions of the draft Recommendation and draft legislation of the general claims statute and statutes relating to claims against the State, counties, cities and districts.

1. Recommendation: After the matter was discussed, a motion was made by Mr. Thurman and seconded by Mr. Matthews to approve the Recommendation as drafted. The motion carried:

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

No : None.

Not Present: Babbage, Cobey, Levit, Shaw.

2. General Claims Statute - Claims Against Local Public Entities:

Section 700. The Commission considered whether Section 700, the purpose section, was necessary. After the matter was discussed, a motion was made by Mr. Bradley and seconded by Mr. Gustafson to disapprove the inclusion of the purpose section. The motion carried:

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

No : None.

Not Present: Babbage, Cobey, Levit, Shaw.

Section 701. During the discussion of Section 701, Mr. Bradley pointed out that this section could possibly be construed to prohibit a chartered city from adopting the procedures of the general claims statute. After the matter was discussed, a motion was made by Mr. Bradley and seconded to place Section 701 after Section 702 and approve Section 701 as revised as follows:

Minutes - Regular Meeting
December 12 and 13, 1958

701. Until the adoption by the people of an amendment to the Constitution of the State of California confirming the authority of the Legislature to prescribe procedures governing the presentation, consideration and enforcement of claims against chartered counties, cities and counties and cities and against officers, agents and employees thereof, this chapter shall not apply to a chartered county or city while it has a claims procedure prescribed by charter or pursuant thereto.

The motion carried:

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

No : None.

Not Present: Babbage, Cobey, Levit, Shaw.

Section 711. The Commission considered whether a paragraph should be added to provide for the amendment of an original claim. After the matter was discussed, a motion was made by Mr. Stanton and seconded by Mr. Bradley to approve the addition of the following paragraph to Section 711.

A claim may be amended at any time before final action thereon is taken by the governing body of the local public entity. The amendment shall be considered a part of the original claim for all purposes.

The motion carried:

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

No : None.

Not Present: Babbage, Cobey, Levit, Shaw.

Section 712. It was agreed that Section 712 should be revised to eliminate the right to amend a claim since Section 711 as approved now grants a general right to amend a filed claim.

Other changes in the section were also proposed and discussed. A motion was then made and seconded to approve Section 712 as revised as follows:

712. If in the opinion of the governing body of the local public entity a claim as presented fails to comply substantially with the requirements of Section 711 the governing body may, at any time within 60 days after the claim is presented, give the person presenting the claim written notice of its insufficiency, stating with particularity the defects or omissions therein. The governing body may not take final action on the claim for a period of 10 days after such notice is given. A failure or refusal to amend the claim shall not constitute a defense to any action brought upon the cause of action for which the claim was presented if the court finds that the claim as presented complied substantially with Section 711.

The motion carried:

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

No : None.

Not Present: Babbage, Cobey, Levit, Shaw.

Section 715. It was agreed that the word "admitted" should be deleted from the last sentence.

Section 716. It was agreed that the phrase "take final action on" should be inserted in place of the word "act."

Section 718. It was agreed that the following minor changes should be made:

(1) The phrase "final action is taken thereon" inserted in place of the phrase "is acted upon."

(2) The word "body" inserted in place of the word "board."

(3) The word "claimant's" deleted from subsections (b) and (c).

(4) The phrase "If the claim is allowed in part" inserted before the words "no suit" in subsection (c).

A motion was made and seconded to approve Section 718 as revised. The motion carried:

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

No : None.

Not Present: Babbage, Cobey, Levit, Shaw.

C.C.P. Section 342. It was agreed that "as defined in Section 701 of the Government Code," should be inserted after "local public entity."

C.C.P. Section 313. It was agreed that the first line of Section 313 should be revised to read as follows:

The general procedure for the presentation of a claim as a prerequisite for commencement of actions for money or damages against the State of California, . . .

3. Bill relating to Claims Against the State and Public Officers and Employees: A motion was made by Mr. Bradley and seconded by Mr. Matthews to approve the draft bill making the provisions of the Government Code relating to claims against the State and public officers and employees a part of Division 3.5 of Title 1 of the Government Code. The motion carried:

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

No : None.

Not Present: Babbage, Cobey, Levit, Shaw.

4. Bill relating to Claims Against Counties:

Section 29700. Upon the recommendation of Messrs. Stanton, Kleps and McDonough made at the December 6 meeting, it was agreed to delete "all" and "whether chartered or not," and the proposed new second paragraph of Section 29700.

Section 29703. Upon the recommendation of Messrs. Stanton, Kleps and McDonough made at the December 6 meeting, it was agreed to delete "in cases of partial allowance."

Section 29704. It was agreed to delete "the claim in part only and. . ."

Section 29705. The Executive Secretary reported that the following views had been taken as to whether the board of supervisors should be able to adopt forms for claims covered by the general claims statute:

(1) Mr. Kleps had suggested that there should be no limitations imposed on the governing body to adopt forms for the submission and payment of claims other than that the forms adopted not be inconsistent with other applicable statutes and regulations.

(2) Professor Van Alstyne had suggested claims falling under Article 2 of Chapter 2 of Division 3.5 should be excepted from Section 29705. This would permit the forms to be prescribed for cases in which the county had agreed with the claimant upon a special procedure to govern claims presented under a specific contract pursuant to Section 705.

Minutes - Regular Meeting
December 12 and 13, 1958

The following alternatives were also considered by the Commission:

(1) Except from Section 29705 all claims to which Chapter 2 of Division 3.5 is applicable.

(2) Limit the board's power to adopt forms for only those claims specifically provided for in Section 29705.

After the matter was discussed, Mr. Klep's suggestion as to the form of Section 29705 was adopted in substance. A motion was made by Mr. Bradley and seconded by Mr. Matthews to approve the opening paragraph of Section 29705 as revised as follows:

29705. The board may adopt forms for the submission and payment of claims and may prescribe and adopt warrant forms separate from claim forms, to the end that the approved claims may be permanently retained in the auditor's office as vouchers supporting the warrants issued. The forms so adopted may not be inconsistent with the provisions of this article or of any other statutes or regulations expressly governing any such claims or the presentation thereof, and shall provide:

The motion carried:

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

No : None.

Not Present: Babbage, Cobey, Levit, Shaw.

It was then pointed out that Section 29705 as approved could result in a technical defense for the entity in the case of a claimant who had complied with the general claims statute requirement but failed to use the form adopted by the board

Minutes - Regular Meeting
December 12 and 13, 1958

pursuant to Section 29705. After the matter was discussed, a motion was made by Mr. Gustafson and seconded by Mr. Stanton, to add a new section after Section 29705 to read as follows:

Failure of a claimant to use a form prescribed by the board pursuant to Section 29705 is not a defense to a suit against the county on a claim for which Chapter 2 of Division 3.5 of Title 1 of this code requires a claim to be presented.

The motion carried:

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

No : None.

Not Present: Babbage, Cobey, Levit, Shaw.

Section 29706. It was agreed that "as other claims" should be deleted.

It was agreed to approve the draft legislation relating to claims against counties as revised.

5. Claims Against Cities:

Section 37200. It was agreed to delete Section 37200.

Section 37201. It was agreed to approve Section 37201 as revised to read substantially as follows:

(Note: This differs somewhat in terminology from the language specifically approved by the Commission.)

37201. Demands against the city for money or damages are governed by the provisions of Chapter 2 (commencing with Section 700) of Division 3.5 of Title 1 of this code or by other statutes or regulations expressly applicable thereto.

A motion was made by Mr. Stanton and seconded by Mr. Matthews to approve the draft legislation relating to claims against cities as revised. The motion carried:

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

No : None.

Not Present: Babbage, Cobey, Levit, Shaw.

6. Claims Against Districts:

Sec. 14 (Section 56117). It was agreed to approve the insertions of the bracketed material.

Sec. 26 (Section 19.1). A motion was made by Mr. Stanton, seconded by Mr. Bradley, and unanimously adopted to approve the deletion of the double bracketed material, including the last paragraph, which requires the presentation of a claim to the board of trustees as well as to the board of supervisors designated as the governing body.

Sec. 82 (Section 61628). The Commission considered the repeal of the various code sections and the enactment of a cross reference similar to that approved in the case of Section 37201 relating to claims against cities (these minutes supra). During the discussion, the construction of the phrase "pursuant to law" in Section 730 and the advisability of deleting this phrase was raised. The question was whether Section 730 is itself a grant of power to local public entities to prescribe by charter, ordinance or regulation a claims procedure applicable to the cases excepted by Section 703 from Articles 1

Minutes - Regular Meeting
December 12 and 13, 1958

and 2 of Chapter 2. Mr. Stanton took the position that it is not, reasoning that "pursuant to law" means that the authority to prescribe the claims procedure must be found in some other statute. Others present took the position that Section 730 itself grants the power and that "pursuant to law" refers only to compliance with legal requirements as to the procedure to be followed in adopting a charter provision, ordinance or regulation. They suggested to avoid ambiguity the words "pursuant to law" be eliminated from Section 730. In the course of the discussion Mr. Stanton stated that he does not favor a grant of power by Section 730 to a local public entity to prescribe a claims procedure by a regulation since regulations issued by such entities are, in his experience, difficult or impossible to find, particularly in the short periods of time which are often available to present a claim when a lawyer is consulted toward the end of the claim-filing period. He stated that he does not have the same objection to giving power to counties and cities to prescribe claims procedures by charter or ordinance. The Executive Secretary was directed to write to Mr. Kleps and Professor Van Alstyne, pointing out the two possible constructions of the phrase "pursuant to law" in Section 730 and requesting their views on this matter as to what, as its draftsmen, they had intended it to mean.

A motion was made by Mr. Stanton and seconded by Mr. Gustafson to repeal the existing sections of the various codes

Minutes - Regular Meeting
December 12 and 13, 1958

relating to claims against districts and to enact a cross-reference similar to Section 37201. The motion carried:

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

No : None.

Not Present: Babbage, Cobey, Levit, Shaw.

F. Study No. 44 - Partnerships and Unincorporated Associations:

The Commission considered Memorandum No. 5 dated 6/3/58, (a copy of which is attached hereto), and the research study prepared by Professor Judson Crane. Mr. Stanton stated that in his opinion the study should be revised before the Commission makes any recommendations relating to the filing of suit in common name or registration of a fictitious name.

After the matter was discussed, it was agreed that the following changes should be made in the study:

A. Suit in Common Name.

(1) Include an analysis of how the provision in Section 388 limiting it to persons "associated in any business" has been interpreted (has it been held applicable to partnerships and unincorporated associations that are not engaged in business, e.g., labor organizations and social clubs?) and whether it should continue to be a part of the statute.

(2) Verify the accuracy of the sentence on page two between notecalls 3 and 4.

(3) Delete the sentence on page 5, "Moreover, a filing fee must be paid for appearance in behalf of each of the named plaintiffs," or correct it to conform to Section 26826 of the Government Code.

(4) Include an analysis of whether Section 388 should contain a provision making a judgment binding on the members of a partnership or unincorporated association which sues in its common name.

Minutes - Regular Meeting
December 12 and 13, 1958

B. Registration of Fictitious Name.

(1) Broaden the study to include analysis of the use of fictitious names by individuals and corporations.

(2) Verify the accuracy of the first paragraph on page 10 and footnote 37.

(3) Broaden the study to include an analysis of the law of all or representative other states.

(4) Include an analysis of the merits of the present requirement of publication of various notices.

(5) Include an analysis of the merits of providing for the requirement of registration on a yearly basis.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

REPORT ON STUDY RELATING TO DUTIES OF CITY AND
COUNTY LEGISLATIVE BODIES WHEN THERE IS NO
PLANNING COMMISSION

The Law Revision Commission invites legislators, judges, other public officials, attorneys, law professors and other interested persons to suggest topics for study by the Commission. One City Attorney responded to this invitation by suggesting that Chapters 3 and 4 of Title 7 of the Government Code, which are concerned with the adoption and administration of master plans, precise plans and zoning ordinances, are ambiguous and in need of revision.

A preliminary study by the Commission tended to confirm the existence of the ambiguities reported,¹ particularly with respect to the procedure which cities and counties not having planning commissions must follow in connection with public planning and the adoption of zoning ordinances. Accordingly, the Commission requested and was given authority to make a study "to determine whether there is need for clarification of the law respecting the duties of city and county legislative bodies in connection with planning procedures and the enactment of zoning ordinances when there is no planning commission."²

¹ See 1955 Rep. Calif. Law Rev. Comm'n, 32.

² Cal. Stat. 1955, Res. Ch. 207.

When authority to make this study was requested the Commission believed that any legislation which might result therefrom would involve only technical revision of Chapters 3 and 4 of Title 7 of the Government Code to clarify existing law. The Commission has found, however, that it is not possible to recommend such revisions as would be necessary to clarify the statutory law in this area without deciding fundamental policy questions as to the desirability of public planning without the participation of a planning commission and as to what procedures should be required in connection with the adoption of master and precise plans and zoning ordinances, in circumstances where no planning commission exists or where such commission is not functioning.

For example, cities and counties which do not have planning commissions have no general power to adopt master and precise plans at the present time.³ It would be a relatively simple matter to draft statutory provisions which would enable such entities to adopt such plans, but before it could recommend the enactment of such provisions the Commission would have to decide the policy question whether any governmental entity should be empowered to adopt a master plan or a precise plan without the participation of a planning commission in the formulation of the plan. Similarly, it would be possible to eliminate

³ Government Code § 65055 authorizes cities and counties included in a regional planning district to contract to have other cities or counties in the district furnish planning services. Some cities and counties not having planning commissions could theoretically adopt master or precise plans through this device. However, the Commission is informed that no regional planning districts have yet been established.

the ambiguity which presently exists under Section 65808 of the Government Code as to how many meetings the legislative body of a city or county which does not have a planning commission must hold in the process of adopting a zoning ordinance -- for example, a statute could be drafted providing that such an ordinance could be adopted after holding one public meeting of which published notice is given. Before it could recommend the enactment of such a statute, however, the Commission would have to decide the policy question whether a local legislative body acting in the place of a planning commission should be required to hold one hearing at the planning stage and one at the adoption stage before a zoning ordinance could be adopted. The members of the Commission have no special training nor experience which would enable them to bring expert judgment to bear on these policy questions and to make significant recommendations concerning them to the Legislature. The Commission has decided, therefore, not to make any recommendation on the subject of this study, although it remains convinced that revision of the statutes in this field would be highly desirable.

The Commission believes that its decision not to make a recommendation on the subject of public planning provides an appropriate occasion for a brief statement of its own view of its proper sphere of activity. The subject of public planning is currently receiving careful and continuing attention from interim committees of the Legislature.⁴

⁴ See, e.g., Report of the Subcommittee on Planning and Zoning of the Assembly Interim Committee on Conservation, Planning, and Public Works, 13 Assembly Interim Committee Reports (1955-57), No. 15; Report of the Subcommittee on County and Community Planning of the Assembly Interim Committee on Conservation, Planning and Public Works, 13 Assembly Interim Committee Reports (1953-55), No. 1; Final Report of the Assembly Interim Committee on Conservation, Planning and Public Works, April 1953, pp. 43-52.

While ambiguities exist in the statutes in this field, there is no reason to conclude that the statutes are antiquated or out of harmony with modern conditions. Any substantive revision of these statutes would require public hearings and policy determinations of a type which, in the opinion of the Commission, are beyond its proper province. Accordingly, the Commission has determined that it should not, as a result of studies initiated by it, make recommendations in this field, or in other fields involving general public policy -- such as, for example, education, public welfare, labor relations, highways, water, mental hygiene or narcotics.

In selecting topics to recommend to the Legislature for its study, the Commission proposes to avoid topics of the sort indicated above, which involve general questions of public policy as to which the Commission's procedures and recommendations can be of little or no assistance to the Legislature. The Commission likewise recommends to the Legislature that before referring a topic of this general nature to the Commission for study, careful consideration be given to the question whether, in view of the composition of the Commission and the nature of its procedures, its recommendations on the topic will be of significant aid to the Legislature.

MINUTES OF MEETING
NORTHERN SECTION
COMMITTEE ON ADMINISTRATION OF JUSTICE
SEPTEMBER 11, 1958

A meeting of the Northern Section of the Committee on Administration of Justice was held on Thursday, September 11, 1958 at 4:00 p.m. in the offices of the State Bar, 2100 Central Tower, San Francisco, California.

PRESENT: Arthur H. Connolly, Jr., Chairman
Brent M. Abel
James K. Koford
John B. Lounibos
Courtney L. Moore

NOT PRESENT: Forrest A. Cobb, Sr.
Kenneth R. Malovos
Duncan Oneal
Samuel H. Wagener

ALSO PRESENT: Garrett H. Elmore
Vernon M. Smith
Karl E. Zellmann

AGENDA NO.

1 Probate Code 259 - Rights of Non resident
(Old No. 32) alien heirs and beneficiaries - Law Revision
Commission Measure.

The Section had before it the staff memorandum of September 8, 1958 (St. 58-372). This committee has heretofore favored the repeal of Section 259 et seq. and the substitution of provisions similar to those now recommended by the L. R. Commission. (See 1956 Report, July-Aug. 1956 State Bar Journal pp. 310-311. The Section approves the Commission measure in principle. Such suggestions as it has to offer deal with specific provisions. The Section is quite cognizant that some of these suggestions are directed to the Committee's own 1956 draft, but further study indicates the need for amendment.

(1) Severability. As treaty provisions may conflict and the primary interest of the Bar appears to be for impounding, it is believed highly desirable, if not imperative, that a liberal severability section be added. Otherwise, the invalidation of particular features, for example, the secondary taker or escheat provisions may give rise to difficult questions of legislative intent. Is probate Code Section 259 to be reinstated automatically? It would appear that the proponents would favor a liberal interpretation as to severability. Approve the form on page 7 of St. 58-372.

(2) Effective date. To avoid litigation involving expense and delay, it is recommended that the following section be added:

This Act shall apply to estates of decedents dying after its effective date. Nothing herein shall be construed to limit the power of a court sitting in probate to make appropriate orders in estates pending at said effective date, to protect and safeguard the interests of heirs, legatees, devisees and beneficiaries of testamentary trusts who are entitled to inherit or take under the laws of this State as they existed prior to the effective date of this Act.

The second sentence is intended to recognize the inherent power of the court to make protective orders. We understand that such orders have been made by some probate judges. As to the first sentence, it seems likely to the Section that an attempted retroactive change of law would be held invalid, as presently the right of heirship is determined as of date of decedent's death under Section 259.

(3) Probate Code 1026. If enacted, the measure will provide a means of impounding the non resident alien's share and impose a 5-year period from the date of the order within which to make claim. Should not a non resident alien whose share is so impounded, without appearance by him, be entitled to rely on these provisions? Otherwise, inadvertent escheats may occur, under Section 1026, requiring appearance within 5 years from decedent's death. The Section does not have any particular solution, but believes that Section 1026 should be amended. Reference is made to page 7 of St. 58-372 for possible solutions.

Comments on Particular Sections of the Act:

SEC. 1044. - The word "beneficiary" appears adequate.
No change is suggested.

SEC. 1044. - It is vital that the converse presumption be affirmatively stated; otherwise, certain of the objectives of remedial legislation will be lost. The 1956 C.A.J. draft while stating the matter in terms of a conclusive presumption made express provision for a foreign heir resident in a "non blocked" country. Absent a presumption in his favor (disputable or otherwise), the foreign heir will be confronted with the expense of proving matters affirmatively, if there be a petition by the Attorney General, another heir, or other contestant. The insertion of an affirmative presumption for the benefit of the foreign heir is deemed of great importance.

Form: The Section did not approve the form of an amendment to this effect but calls attention to the staff suggestion that there be added at the end of Section 1044: "There is a disputable presumption to the contrary if the person does not reside in such a country."

SEC. 1045.

(a) Provisions should be inserted to make clear that the personal representative may file a petition for impound. The theory of impound procedure is that the court is protecting the interests of the heir. Absent an express provision it might be held that the executor or administrator was not a "party in interest." Even in the case of heirship, it is now provided by amendment to Pro. Code 1080 that the personal representative may petition, changing the former case law.

(b) Upon further consideration (after the 1956 draft), the Section is most concerned as to the possibility of sacrificial sales of future interests and life estates. The only procedure provided is that the share shall be converted into cash. Further information from the L. R. Commission is desired, as to the intent of the Act, particularly the intended effect of "claim to a present interest." Is it intended that future interests be distributed, subject to a condition subsequent? Or are they to be converted into cash? The Section would oppose the latter, as destructive of the rights of foreign heirs. What is to be done with life estates? Will they bring anything upon sale? Are the words "present interest" to be interpreted by reference to right of present enjoyment and possession thereby delaying the question until such interests vest in possession?

Will the probate court have jurisdiction at some future date, if there is no trust? Hold for further information.

(c) The Section is also concerned with the gap left as to the effect of a decree of final distribution in probate. While the 1956 draft was probably inadequate, it did contemplate that the issue of impound be determined before distribution in probate. This involves questions raised under (b) above, as to intent of the Act. The Section does not approve the text of Suggestion No. 6, page 4, St. 58-372, but such draft calls attention to the need for clarification.* In principle, the Act should provide for the effect of such a decree and indicate clearly some cut off date or dates, for the filing of a petition to impound. Tentatively, it would seem that the issue should be raised before distribution is made in probate. Hold for further information.

(d) Absence of detailed provisions re conversion into cash: There are here problems of (1) who shall have the duty to sell, (2) mechanical provisions such as notice and higher bids; and (3) protection to purchaser at sale. The suggested solution (Suggestion No. 5, page 4, St. 58-372) perhaps should be discussed with title company attorneys. Hold for further information.

SEC. 1047.

(a) It is suggested the following be added "and subject to rights claimed in any pending petition pursuant to Section 1046 or Section 1046.7." This is not a major point, but otherwise the Act requires construction where a prior petition is pending.

(b) There appears to be an overlap between Section 1046.5 and Section 1047, particularly in case of children of the original owner. This again does not seem a major point.

SEC. 1048.

(a) An amendment similar to that suggested for Section

* In passing, it was noted that reference should be to trust assets "validly disposed of" in such draft, rather than "validly distributed."

1047 (to refer to pending petitions) is suggested, but with the same comment (not major).

- (b) The word "escheat" is a word of art and, if not amplified, may give rise to litigation. If the intent is for a "permanent escheat" (see C.C.P. 1410) by lapse of time, in the probate proceeding itself, the intent should be more clearly specified. If for an "escheat" under general law, more is required. The C.A.J. draft was similarly ambiguous. Note: Pro. Code 1026 uses "escheat" only. Decisions or practice thereunder might be persuasive to a court. However, C.C.P. 1300 et seq. was later enacted.

SEC. 1049.

- (a) Attorney's fees. In limiting the time of payment to the ultimate distribution, the Act necessarily contemplates that services may have been performed years previously. If the services have been performed, and, as the Act recognizes, the attorney is to be paid out of the res, no logical reason appears for thus postponing the time of payment. The Section opposes present provisions. It suggests provisions giving the court authority "At any time after a proceeding is commenced pursuant to this article, ... to provide for the payment of reasonable attorney's fees out of the funds so deposited or the interest of the heir" etc. The precise form was not studied. However, there is a res which is being conserved or whose title is being determined. The court should have continuing jurisdiction to make proper and reasonable awards.

- (b) Is it intended that the office of the Attorney General be eligible for an award of attorney's fee? Is clarification desirable? (Minor)

SEC. 1049.5.

- (a) The Section believes that it understands the reasons behind these provisions, but desires to inquire as to the status of an assignee for value and in good faith. (Minor)

SEC. 1050.

- (a) Reference to "facts" should be deleted. The question may or may not be one of law. However, the word appears unnecessary. Its present may affect recent judicial notice amendments.

- (b) Reference to determining the issue as of the date of the order does not allow for the submission of cases, or other delay between the order and hearing. It is suggested that it is sufficient to provide "shall be determined as of the time of hearing on a petition pursuant to this article."

SEC. 1050.5.

- (a) The Section does not favor the requirement that a copy of the petition accompany each required notice, but approves such requirement in the case of notice to the Attorney General. The usual practice should prevail, subject to this exception.

- (b) In view of the important nature of the procedure, with property rights possibly affected, it is recommended that wording be added, to require, in all cases that notice be given by mail to the heirs of the decedent and devisees and legatees, in the same manner as upon petition for probate of a will; or to the heirs, in the same manner as upon petition for letters of administration. This, in addition to the court's power to order notice. It seems too much to assume that each probate judge, occupied with many matters, will order wide spread notice. Traditionally, this committee has favored wide "notice" provisions, as a matter of fairness, where rights are to be affected. It would be well to follow the will pattern, that failure to give notice shall not be jurisdictional.

Agenda No. 1 continued, for further information.

The meeting adjourned at 6 p.m.; the next meeting to be held at 4 p.m., Monday, September 29, 1958.

Law Offices

HILL, FARRER & BURRILL

411 West Fifth Street

Los Angeles 13 California

December 5, 1958

Professor John R. McDonough, Jr.
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California

Dear Professor McDonough:

In accordance with your request we are today delivering 12 copies of our revised moving expense study to Mr. Bohn. Two copies are likewise enclosed with this letter. The remaining copies requested by you are being forwarded under separate cover.

We will write you on Monday to comment on various aspects of the study and upon certain points raised in your letter of July 22, 1958.

Sincerely,

S/ Robert Nibley

ROBERT NIBLEY
of
HILL, FARRER & BURRILL

Law Offices

HILL, FARRER & BURRILL

411 West Fifth Street

Los Angeles 13, California

December 10, 1958

Professor John R. McDonough, Jr.
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California

Dear Professor McDonough:

We are correcting some typographical errors which we discovered in our recent study, and corrected copies will be in the mail to you shortly.

In the revised study we attempted to incorporate the suggestions contained in your letter of July 22, 1958. With respect to your paragraph No. 3 and also with respect to Senator Cobey's comments, I would like to direct your attention to the article cited in the study which appeared in the Yale Law Journal, Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses, 67 Yale Law Journal 61. This is an excellent discussion of those incidental expenses which today are usually not subject to reimbursement in condemnation proceedings.

The authors comment upon the efforts of some courts to award incidental expenses by finding that they are reflected in market value. However, it is apparent that the authors, like the member of the commission mentioned in paragraph 3 of your letter, question this concept. It seems that the selling price of property is essentially a compromise reflecting the relative bargaining strength of the buyer and seller. In many cases the seller in the open market may be unable to recover for the incidental losses he suffers because of competition from other sellers, weakness of market demand, and similar factors.

The real problem seems to be whether to compensate owners for incidental losses suffered in condemnation, whether or not these losses would be factors in a voluntary sale, merely because the condemnation taking is not voluntary. There is a difference between a loss suffered involuntarily, for the public good, and one which the owner assumes voluntarily when he sells.

Professor John R. McDonough, Jr.
December 10, 1958
Page Two

Senator Cobey's comments also relate to this problem. However, if the legislature determines to compensate the owner for such incidental losses, it becomes unnecessary to determine whether a consideration of them plays a part in bargains made upon the open market. It is probably within the power of the legislature to decide that, in determining just compensation in condemnation cases, consideration should be given to such items as moving expenses, loss of profits, inconvenience or other items, now generally excluded from consideration.

Senator Cobey's desire that the condemnation study be oriented on a basis of economic as well as legal principles is a facet of a problem which has been concerning us for some time. The scope of the condemnation problem facing the legislature is one much greater than we had at first realized in this office. I am sure our progress on even our limited field of inquiry has not been rapid enough to satisfy you. Yet it now seems to us that perhaps many more aspects of condemnation law should be scheduled for study.

The time which we have been able to devote to the study has been unexpectedly limited by various factors, and we believe that some way must be found to have substantial portions of the work done by others. Yet we feel that we can make a contribution to the study that others might be unable to supply, because we practice in the condemnation field.

We are not concerned with the matter of compensation. We are happy to contribute our services toward the Commission's objective of a just and workable condemnation law. What we are concerned with is getting the job done, certainly more rapidly than we have been doing it and preferably even more rapidly than our initial thinking contemplated.

We would appreciate any suggestions you might have in this connection, and if you are planning to be in Los Angeles soon, we would like to visit with you. Perhaps something could be worked out whereby a person or persons could be employed, under our supervision if the Commission so desired, to gather the necessary legal and economic data and get it into form for incorporation into the study. (In view of the extent of the condemnation field it would seem that one person could be kept busy full time on this project for several months.) We could participate, if desired by you, in suggesting areas for investigation, supplying sources of material, assisting in the preparation of the final study and in drafting recommended legislation.

Sincerely,
S/ Robert Nibley
ROBERT NIBLEY
of
HILL, FARRER & BURRILL