

Time

Place

May 14 - 7:00 p.m. - 10:00 p.m.
May 15 - 9:00 a.m. - 4:30 p.m.

State Bar Building
601 McAllister Street
San Francisco

AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

May 14-15, 1965

1. Approval of Minutes for April 1965 Meeting (enclosed)
2. Administrative matters, if any
- ✓ 3. Evidence Code
Memorandum 65-22 (sent 4/19/65)
- ✓ 4. Study No. 62 - Vehicle Code Section 17150
Memorandum 65-15 (sent 4/30/65)
- ✓ 5. Study No. 53(L) - Personal Injury Damages as Separate Property
Memorandum 65-16 (sent 4/30/65)
- ✓ 6. Study No. 42 - Trespassing Improvers
Memorandum 65-17 (to be sent)
- ✓ 7. Study No. 50 - Rights of Lessor
Memorandum 65-18 (to be sent)
- ✓ 8. Study No. 55(L) - Additur
Research Study (to be sent)
Memorandum 65-19 (to be sent)
- ✓ 9. Study No. 51 - Right to Support After Ex Parte Divorce
Research Study (to be sent)
Memorandum 65-20 (to be sent)
10. Study # 24 - Memorandum 65 21
11. Study # 45 - Memorandum 65 23
12. " " 26 " 65-24
13. " " 57 " 65 25 (A.B. # 1133)

MINUTES OF MEETING

of

MAY 14 AND 15, 1965

San Francisco

A regular meeting of the California Law Revision Commission was held in San Francisco on May 14 and 15, 1965.

Present: · John R. McDonough, Jr., Chairman
· Richard H. Keatinge, Vice Chairman
Joseph A. Ball
· Sho Sato
Herman F. Selvin (May 15 only)
· Thomas E. Stanton, Jr.

Absent: · Hon. James A. Cobey
· Hon. Alfred H. Song
James R. Edwards
George H. Murphy, ex officio

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

Also present were John J. Corrigan of the Southern Pacific Company, Matthew H. Witteman of the Santa Fe Railroad (May 14 only) and Garrett Elmore of the State Bar (May 15 only).

ADMINISTRATIVE MATTERS

Minutes of April 1965 Meeting. The Commission approved the Minutes of the April 1965 meeting.

Future Meetings. Future meetings are scheduled as follows:

June 11 and 12	Los Angeles
July 16 and 17	San Francisco
August	No Meeting

Results of preliminary survey of topics on agenda. The staff reported that a preliminary survey of two topics on the Commission's current agenda indicates that studies of those topics should be made:

Study No. 45 - Mutuality of Remedy in Suits for Specific Performance (See Memorandum 65-23)

Study No. 26 - Escheat of Personal Property (See Memorandum 65-24)

The staff reported that it plans to take action when time permits to carry these studies forward, either by obtaining a research consultant or by preparing a staff study.

Publication of Evidence Code as enacted with revised comments. The Commission discussed various means by which the Evidence Code as enacted with the revised comments could be published as soon as possible so that it could be distributed to the bench and bar. This would permit all interested persons to examine the new code and to advise the Commission of any needed changes so that such changes could be made at the 1966 legislative session.

It was suggested that the staff consult with the State Bar, the Continuing Education of the Bar, West Publishing Company, or other organizations to determine whether such publication could be made without any significant cost to the state.

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The Commission indicated that it strongly desired that a separate publication be made as soon as possible of the new code and the Comments thereto. It was suggested that the Continuing Education of the Bar be approached to determine whether such a separate publication could be provided together with another publication prepared by the Continuing Education of the Bar, for persons taking the Continuing Education program.

Subject to the Chairman's approval, the staff was authorized to make arrangements for the publication of the new code and the Comments thereto.

Senate Concurrent Resolution No. 80. The Commission considered this resolution which directed the Commission to make certain additional studies and to give priority to certain studies. After discussion, the Commission determined that it would not be desirable to establish priorities for topics in Concurrent Resolutions and that Senate Concurrent Resolution No. 80 should be amended so that certain existing topics would be expanded to cover related ~~problems~~. The Commission determined that Senator Cobey should be urged to amend Senate Concurrent Resolution No. 80 in substance as follows:

AMENDMENTS TO SENATE CONCURRENT
RESOLUTION NO. 80

AMENDMENT NO. 1

On page 1, line 10, of the printed resolution, strike out "Because" and insert:

The study of this topic is necessary because

AMENDMENT NO. 2

On page 1, line 10, after "liability" insert:
for inverse condemnation

AMENDMENT NO. 3

On page 1, line 11, after "courts" insert a period and strike out "the commission" and strike out lines 12, 13, 14, and 15.

AMENDMENT NO. 4

On page 1, strike out line 20.

AMENDMENT NO. 5

On page 1, line 21, strike out "viously authorized relating to whether" and insert:

(c) Whether

AMENDMENT NO. 6

On page 1, after line 24, insert:

(d) Whether Vehicle Code Section 17150 and related statutes should be revised.

(e) Whether the law relating to the rights and duties attendant upon termination or abandonment of a lease should be revised.

(f) Whether the law relating to additur and remittitur should be revised.

Senate Bill No. 1140. The Commission discussed Senate Bill No. 1140, introduced by Senator Cobey. This bill provides for the appointment of a judge or retired judge to serve as an additional member of the Commission. The Commission was in general agreement that such an additional member was not needed and that the appointment of a member by a particular group would create an undesirable precedent. It was agreed that the Vice Chairman would convey the Commission's views on this matter to Senator Cobey.

The Commission approved an amendment to Senate Bill No. 1140 that would permit the Commission to make a recommendation for revision of any legislation enacted upon recommendation of the Commission without the necessity of listing such topic in each annual report.

REVISIONS OF GOVERNMENTAL LIABILITY ACT (A.B. NO. 1733)

The Commission considered Memorandum 65-25. The Commission determined to revise Assembly Bill No. 1733 as follows:

(1) Section 930.4 should be revised to read:

930.4. A claims procedure established by agreement made pursuant to Section 930 or Section 930.2 exclusively governs the claims to which it relates, except that :

~~(a)--The procedure so prescribed may not require a shorter time for presentation of any claim than 100 days after the accrual of the cause of action to which the claim relates.~~

~~(b)--The procedure so prescribed may not provide a longer time for the board to take action upon any claim than the time provided in Section 912.4.~~

~~(c)--The procedure so prescribed may not authorize the consideration, adjustment, settlement, allowance or payment of a claim by any claims board or commission or employee of a local public entity contrary to the provisions of Section 935.2 or 935.4 or by any state agency contrary to the provisions of Section 935.6.~~

(d)--If if the procedure so prescribed requires a claim to be presented within a period of less than one year after the accrual of the cause of action and such claim is not presented within the required time, an application may be made to the public entity for leave to present such claim. Subdivision (b) of Section 911.4, Sections 911.6 to 912.2, inclusive, and Section 946.6 are applicable to all such claims, and the time specified in the agreement shall be deemed the "time specified in Section 911.2" within the meaning of Sections 911.6 and 946.6.

(2) The following technical amendments should be made:

On page 2, line 34, of the printed bill as amended in the Assembly April 12, 1965, strike out "required to present the claim" and insert:

who sustained the alleged injury, damage or loss

On page 2, line 37, strike out "required to present the claim" and insert:

who sustained the alleged injury, damage or loss

On page 2, line 42, strike out "required to present the claim" and insert:

who sustained the alleged injury, damage or loss

On page 8, line 3, strike out "of competent".

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On page 8, strike out lines 4 and 5 and insert:
which would be a competent court for the trial of an action on the
cause of action to which the claim relates and which is located in
a county or judicial district which would be a proper place for the
trial of such action, and if the petition is filed in a court which
is not a proper court for the determination of the matter, the court,
on motion of any party, shall transfer the proceeding to a proper
court.

On page 8, line 23, strike out "required to present the
claim" and insert:
who sustained the alleged injury, damage or loss

On page 8, line 26, strike out "required to present the claim"
and insert:
who sustained the alleged injury, damage or loss

On page 8, line 31, strike out "required to present the claim"
and insert:
who sustained the alleged injury, damage or loss

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STUDY NO. 34(L) - EVIDENCE CODE

The Commission considered Memoranda 65-21 and 65-22 which contained suggestions from interested persons for revisions of the Evidence Code. The Commission decided that changes to be recommended by the Commission would be accumulated and combined in one bill that would be introduced in the 1966 budget session if the Governor is willing to put this subject on a special call. This will permit distribution of proposed changes to interested persons for comment before such changes are proposed to the Legislature in 1966.

Evidence Code Section 767. The Commission tentatively concluded that the recodification of Section 2055 of the Code of Civil Procedure in Evidence Code Section 776 may have resulted in an undesirable change in existing law in cases involving employer-employee litigation. The material contained in Memorandum 65-21 was supplemented by the following statements made by persons present at the meeting:

Statements by John J. Corrigan (Southern Pacific Company)
and Matthew H. Witteman (Santa Fe Railroad)

CORRIGAN: With regard to the question you raise about whether or not the problem may be solved by an application of Evidence Code Section 767 (the general discretionary area given the court in these matters), John and I feel strongly that it wouldn't for this simple practical reason: As the law exists now, when we take over a witness that has been torn to shreds by plaintiff's counsel in a F.E.L.A. case, we are permitted to pick up the same tempo and beat and if we pursue the matter we may completely disarm him in a direction of the truth, whereas if we have to make a showing before the court and very possibly in the presence of that witness, that he is in fact hostile, he might very well be psychologically forewarned to gird himself and fence with us and the very purpose and the ends of truth are lost. From a psychological point of view we feel this is very, very real. And with respect to your thought, sir, with regard to possibly deferring this until there is an omnibus correction, we think strongly that this is a matter of dollars and cents right here and now. I assume you gentlemen have had some contact with this F.E.L.A. litigation. If you haven't, I would just invite your perusal of the jury results here in San Francisco and

elsewhere. It's a pretty big field and recoveries are without ceiling, as some wags refer to the law, it's "Comp. without a ceiling." And we feel strongly that, at least subconsciously, the verdict of the upward side is aided and abetted by, shall we say, at least the subconscious bias of the so-called adverse witnesses in favor of the injured employee or the dead employee or his relatives. And so we feel that the discretionary aspect of Section 767 doesn't solve our problem because we would like to step right into the shoes of that cross-examiner and turn the other facet of the problem and get all of the truth. In other words, if we're going to be tearing down one side, let's tear down the other, too, and unmask both sides.

MCDONOUGH: Yes, but the immediate problem is alleviated by the fact that the bill won't go into effect until January 1, 1967.

CORRIGAN: Well, yes, in that sense of the word. However, I have been given to understand that there are some useless bills that are floating around Sacramento that could be utilized for this purpose.

KEATING: That's probably true--there usually are.

DEMOULLY: I haven't found one yet and I've been looking for one. I want to put Section 788 in one, frankly.

Witteran: The thing that impresses me here, is that amendment 2 seems to me to be in terms of sound judicial administration, one that's really interested in ascertainment of the truth. We come here as representatives of a railroad. I represent Southern Pacific in jury trials every day and Matt represents Santa Fe. But I think what we're asking for is not something beneficial to these two companies. It's more important than that. This is F.E.L.A. and Jones act and maritime cases you're bringing up here and right now--you take the superior court here in San Francisco--this is not just a little narrow field. Two out of ten civil courts are occupied with these cases every day of the week. We don't want to limit leading questions, and that's what the virtue of the second amendment proposed. It gives the plaintiff his right to lead the employee, the fellow employee as an adverse witness, supposedly. We don't want to take that away from him, even if it is an advantage. All we ask is that we have that same right and we keep the right to lead the witness. That is all we ask. Because, if, as Matt says, we have to stand up in the middle of this case and we have to convince the judge that under Section 767 we should have the same right--the right to ask leading questions--all is lost. It's all lost if we have to do that for this reason: In this type of litigation, you're dealing with a very litigious, if you will, type of people. The railroad type of employee or Jones act employee has been trained in F.E.L.A. or Jones act litigation. He is not an ordinary witness. If we can't cross-examine, and lead him, and prevent his stalling tactics when we want to get right to the meat of the problem, we are seriously hampered in the ascertainment of what the real facts are. And, we are, for this reason: He can

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sit there and appear to be not adverse in any sense of the word. And the reason for that, and therefore, if we only had Section 767 to rely on, most judges wouldn't be aware of the problem. They wouldn't grasp it because they would feel that he isn't adverse. And he wouldn't seem adverse because, being a fellow employee, he would have previously spent--prior to coming to trial--two to three days in opposing counsel's office, although he's supposed to be an adverse witness to opposing counsel. He spends two to three days in that office and he is so educated to the facts of the case that he can sit there and smile at us and not appear to be adverse and just cut our throats. And so for that reason we think that it is highly desirable that we correct this problem. And for that reason we can see that the second amendment is the better of the two.

The Commission recognized that a problem exists and determined that some action should be taken on this matter at the 1966 Budget Session unless additional study of the problem indicates that no change is desirable. It was noted that the statute suggested in Memorandum 65-21 should be broadened to cover wrongful death actions.

Privilege for social workers. The Commission considered a letter attached to Memorandum 65-22 suggesting that a special privilege be provided for social workers. The Commission determined that this matter should be considered when the 1966 bill to revise the Evidence Code is prepared.

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STUDY NO. 42 -TRESPASSING IMPROVERS

The Commission considered Memorandum 65-17 relating to trespassing improvers. Limiting its consideration to situations involving an innocent owner and an innocent trespasser-improver and without prejudice to possible rights that may be afforded an owner, the Commission tentatively approved the following general statements of principle:

(1) If an improvement is removable without undue economic loss (i.e., where removal is economically feasible), trespasser's sole remedy is removal.

(2) If an improvement is removable without permanent damage to the owner's property, trespasser has the right to remove upon payment of damages to the owner.

The Commission considered but did not act upon other statements of principle; the staff was requested to prepare a list of similar propositions with proposed remedies for Commission consideration.

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STUDY NO. 50(L) - LESSOR'S RIGHTS UPON ABANDONMENT BY LESSEE

The Commission considered Memorandum 65-18. The following actions were taken:

The Commission directed the Executive Secretary to seek an extension of the Commission's authority so that it can study the problem of lessors' and lessees' rights upon termination of a lease for breach thereof as well as upon abandonment by the lessee.

Despite the existing terminology in the Civil Code, the term "lease" should be used in the proposed statute instead of "hiring." A proposal to revise the existing sections of the Civil Code to speak in terms of "lease" instead of "hiring" was not approved.

Proposed Section 1936, providing that an abandonment of leased property is a breach and anticipatory repudiation, was not approved because it was believed to be unnecessary. If the rights of the lessor and lessee are spelled out, characterizing the event giving rise to those rights is superfluous.

The Commission approved the proposal that the statute spell out the rights of the lessor and the lessee. A statute indicating merely that contract law should be applied was not approved.

In Section 1937 as proposed, subdivision (b) was terminated after the word "inadequate" and the remainder of the section was deleted. The staff was asked to consider whether a qualification should be added to subdivision (b) indicating the specific or preventive relief is available only if it is otherwise appropriate.

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In Section 3308, subdivision (a) should refer specifically to "liquidated damages" as well as to Section 1671.

Sections 3308 and 3309 were approved; but Section 3309 should be revised to place the burden of proof on the lessee to show that a reletting was not made in good faith and in a reasonable manner. In addition, Sections 3308 and 3309 should indicate that the lessor may recover the excess of the present value of the remaining lease obligation over the present value of the remainder of the term. The staff was asked to consider the addition of a provision to Section 3308 indicating that nothing in excess of actual damages is recoverable under subdivision (c). In addition, the section should indicate that attorney's fees are recoverable if the parties are otherwise entitled to them under the terms of the lease or under other law.

Section 3310 was approved in principle. The staff was directed to revise the section to indicate clearly that the lessor is entitled to keep earned rentals--rentals that accrued prior to the lease's termination. The section should be revised, too, to indicate that the lessee may recover anything paid to the lessor in excess of the portion of the total rental reserved in the lease that is allocable to the period the property was occupied by the lessee. Thus, Section 3310 should not be avoidable by labelling advance payments in a particular manner, or by lump sum advance payment of rental, or by large rentals for the first period of the lease and small rentals for the last period of the lease.

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STUDY NO. 51 - RIGHT TO SUPPORT AFTER EX PARTE DIVORCE

The Commission considered Memorandum 65-20. The following actions were taken:

There should be specific statutory authority for an action to obtain support following an ex parte divorce. The addition of a section to the Uniform Civil Liability for Support Act might be adequate; although a separate article or chapter might be necessary.

Generally, the Commission indicated that defenses to a divorce or support action under California law should be available to a California obligor sought to be held for support after an ex parte divorce.

The statute should provide the obligor with a right to bring an action to terminate the support obligation that continues after the ex parte divorce.

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STUDY NO. 53(L) - PERSONAL INJURY DAMAGES AS SEPARATE PROPERTY

The Commission decided to defer consideration of Memorandum 65-16 pending legislative action on a bill designed to extend the right of contribution to all joint tortfeasors.

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STUDY NO. 55(L) - ADDITUR

The Commission considered Memorandum 65-19 and the consultant's research study on Additur. It was agreed in principle that courts generally should have additur authority and that, in light of the constitutional issues raised, appropriate constitutional and statutory provisions should be drafted to provide this authority. Without prejudice to the possibility of providing a different rule at the appellate level, the Commission agreed that both trial and appellate courts should exercise discretion in fixing the amount to be awarded and should not be bound by maximum or minimum amounts that may be supported by the evidence. The staff was requested to provide additional material relating to appellate review that sets forth possible situations for the exercise of additur and remittitur authority at the appellate level.

In connection with a consideration of the scope of appellate review and the extent to which appellate courts should be granted additur authority, it was recognized that remittitur practice may affect the proper disposition of the additur problem. Accordingly, the Commission agreed to seek amendment to Senate Concurrent Resolution No. 80 to include authority to make a general study of additur and remittitur in order that both problems can be properly dealt with.

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STUDY NO. 62 - IMPUTED CONTRIBUTORY NEGLIGENCE UNDER VEHICLE CODE § 17150

The Commission considered Memorandum 65-15. The following actions were taken:

The Commission approved those portions of the statute revising Sections 17150, 17154, and 17159 to eliminate imputed contributory negligence.

The deletion of imputed contributory negligence from Section 17708 was also approved; but the staff was asked to consider redrafting the section while keeping it parallel with Section 17707.

The Commission generally approved the policies reflected in the contribution portion of the statute, but deferred action pending a report on the reason the State Bar recommended contribution among joint judgment tortfeasors only and pending legislative action on a bill designed to extend the right of contribution to all joint tortfeasors.

The Commission directed the Executive Secretary to seek extension of the Commission's authority so that the Commission is authorized to study the basis for a vehicle owner's vicarious liability under Vehicle Code Section 17150 and related sections as well as imputed contributory negligence under Sections 17150, 17154, 17159, and 17708.