

MINUTES OF MEETING
OF
OCTOBER 3 AND 4, 1957
Monterey

Pursuant to the call of the Chairman, the Law Revision Commission met on October 3 and 4, 1957, at Monterey, California.

PRESENT:

Mr. Thomas E. Stanton, Jr., Chairman
Mr. John D. Babbage, Vice-Chairman
Honorable James A. Cobey
Honorable Clark L. Bradley
Mr. Stanford C. Shaw
Professor Samuel D. Thurman
Mr. Ralph N. Kleps, ex-officio

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

The minutes of the meeting of August 2 and 3, 1957, which were distributed to the members of the Commission at the meeting, were unanimously approved.

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I. ADMINISTRATIVE MATTERS

A. Re-election of Commission Officers: A motion was made by Mr. Thurman, seconded by Mr. Shaw, and unani- mously adopted that Mr. Thomas E. Stanton, Jr. be re- elected Chairman of the Commission, and Mr. John D. Babbage be re-elected Vice-Chairman of the Commission, both for two-year terms.

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B. Changes in 1958-59 Budget: The Executive Secretary reported that the 1958-59 budget approved at the August meeting had been submitted to the Department of Finance with the following changes: (1) A new position of Intermediate Stenographer-Clerk was added; (2) The sum designated for research was reduced from \$15,000 to \$12,000; and (3) Pursuant to the Commission's action at the August, 1957 meeting, the sum designated for out-of-state travel was increased from \$500 to \$600. A motion was made by Mr. Babbage, seconded by Mr. Thurman, and unanimously adopted ratifying these changes. It was agreed, however, that the change from \$500 to \$600 for out-of-state travel should not be insisted upon if opposed by the Department of Finance.

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C. Resolution re Mrs. Virginia B. Nordby: The Commission considered a resolution drafted by the Executive Secretary pursuant to instructions given him at the August, 1957 meeting relating to the services rendered to the Commission by Mrs. Virginia Blomer Nordby, the past Assistant Executive Secretary. A motion was made by Mr. Bradley, seconded by Mr. Thurman, and unanimously passed adopting the resolution and directing the Executive Secretary to have a suitably engrossed copy thereof delivered to Mrs. Nordby. Mr. Kleps requested that he be recorded as approving the resolution, although not empowered to vote for it.

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D. Personnel: The Executive Secretary reported that one Junior Counsel position had been filled with the TAU appointment of Louisa R. Lindow of Hastings College of Law. There are still two openings on the staff: Junior Counsel and Senior Stenographer-Clerk.

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E. Solicited Suggestions: The Commission unani-
mously agreed that a letter solicitating suggestions for
study should not be sent out at this time for two reasons:
(1) The Law Revision Commission may soon have achieved
sufficient recognition so that suggestions will be sub-
mitted without solicitation; and (2) There are enough
suggestions on hand to meet present and immediately fore-
seeable needs.

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F. Request of Mr. Felix Stumpf: The Commission considered Mr. Felix Stumpf's request that the Commission's material on the study of the Uniform Rules of Evidence be made available to the Continuing Education of the Bar Program for use in connection with its projected series on the law of evidence in the fall of 1958. The Commission unanimously agreed that Mr. Stumpf should be requested by the Executive Secretary to disclose how he would propose to use this material before the Commission passes on the request.

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G. Distribution of Bound Volume: The Executive Secretary reported that to date 74 legislators have responded to the invitation extended by the Commission's legislative members to request a copy of the first volume of the Commission's reports, recommendations and studies. Of these, 27 are Members of the Senate and 47 are Members of the Assembly.

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H. Status Report on Suggestions Received: The Executive Secretary gave a report on the status of suggestions received and acted upon by the Law Revision Commission as of the 30th day of September, 1957. As of that date, 388 suggestions had been received by the Law Revision Commission (165 individuals and associations had contributed suggestions and the Stanford Staff had contributed 38 suggestions). Of this number, 262 suggestions had been acted upon by the Commission; 69 of these suggestions had been approved by the Commission for immediate study, 34 suggestions had been retained for future consideration, and 159 suggestions were not accepted. There are 126 suggestions yet to be acted upon by the Commission.

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I. Suggestions Received from Members of the Bar:

From 3 to 5 p.m., October 4, 1957, in response to the Commission's invitation, members of the California Bar attended the meeting and submitted the following suggestions for law revision for the Commission's consideration:

Mr. Marvin Levin of Los Angeles suggested that the Commission study Probate Code Section 90 relating to pre-termitted heirs. He reported that this statute has been construed by the California Supreme Court to provide that when a child is not mentioned in a will he can claim an intestate share even though provision is made for his children (i.e., the testator's grandchildren). Mr. Levin questioned this result. He also suggested that since there is some confusion as to what language should be used to avoid the application of Section 90, it might be feasible to enact a statute setting forth specific language which would have that effect if incorporated in a will.

Mr. Frank R. Davis of Hollywood suggested that there should be uniformity with respect to the power of state agencies receiving monies from the public to take cash. Mr. Davis also suggested that a statute should be enacted either providing that when a person grants property as to

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which he has a right of redemption the grantee acquires the right of redemption automatically, or making it mandatory that the grantor subsequently convey the right of redemption to the grantee on demand.

Mr. Tony Geram of Fontana suggested that a statute be enacted making it mandatory for a judge to subtract from a sentence imposed the full time which the defendant spent in jail pending disposition of his case. Presently, Mr. Geram states, this matter is within the discretion of the judge, and those defendants who cannot put up bail are unnecessarily discriminated against in cases in which the judge does not give any credit or gives credit only for a part of the time spent in jail prior to conviction. Mr. Geram also suggested that the meaning of "original contractor" as found in the Code of Civil Procedure, Section 1193.1 should be more clearly defined, since there are different time limits for an "original contractor" and "other persons" to file a claim of lien. Mr. Geram also suggested that "contractor" as it appears in the Stop Notice Section, C.C.P. 1197.1, should be clarified so as to be construed to include general contractor.

Mr. Felix Stumpf of the University of California Continuing Education of the Bar expressed his belief that his

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organization and the Commission can be of assistance to each other. Mr. Stumpf stated that work done in preparing materials for his programs discloses that Sections 386 (Interpleader) and 581a and 583 (Involuntary Dismissal) of the Civil Code of Procedure are confusing and not understood by the practicing attorney and should be revised.

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II. CURRENT STUDIES

A. General Status Report: The Executive Secretary reported that research consultants had been assigned and work commenced on many of the studies (see memorandum attached). There are still some studies that have not been assigned because no qualified research consultants have been found to undertake them. It was suggested by the Commission that inquiry be made of Mr. Elmore of the State Bar as to possible research consultants. Mr. Thurman suggested the Commission consider Professor Reisenfeld of Boalt Hall for Study No. 39 (Attachment, Garnishment and Property Exempt from Execution).

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B. Study No. 36 - Condemnation Law and Procedure:

The Commission considered the report of the Executive Secretary that at a meeting of the Southern Committee on September 21 Mr. Robert Nibley, on behalf of Hill, Farrer and Burrill, had made the following recommendation relating to this study: (1) That because the 1957 Session of the Legislature enacted several statutes relating to one of the three main topics to be covered in the initial study, Taking Possession and Passage of Title, this part of the study be postponed until there has been some experience with the new statutes; (2) That there be substituted for this portion of the initial study a study of possible innovations in pre-trial procedure in condemnation actions looking toward simplification of issues with a view to lessening the burden of preparing expert testimony; (3) That the study of the admissibility in evidence of sales of adjacent property be continued despite the fact that the long-standing California rule has recently been abrogated by both a recent Supreme Court decision (County of Los Angeles v. Faus, 48 A.C. 717) and newly enacted Code of Civil Procedure, Section 1845.5, because several important problems are not solved by these recent innovations. The Executive Secretary reported that the Southern Committee had accepted

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these recommendations; the Commission approved of the Committee's action.

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C. Study No. 42 - Rights Good Faith Improver Property: The Executive Secretary reported that Professor Merryman of Stanford Law School, whom he had invited to act as research consultant to the Commission on this study, had suggested that the scope of the study is such that a larger honorarium than originally contemplated would appear to be in order. The Commission unanimously agreed that the honorarium for the Study No. 42 should be increased to \$1,000.

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D. Study No. 56(L) - Narcotics Code: The Commission considered the invitation of Assemblyman Crawford, Chairman of a subcommittee of the Assembly Interim Judiciary Committee which is studying substantive revision of the narcotics laws, that a representative of the Commission be present at the Committee's study hearings. The Commission unanimously agreed that the Executive Secretary should, if possible, attend the first Committee meeting and indicate what the Commission intends to do under A.C.R. 75. Attendance at subsequent hearings was not deemed necessary.

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E. Study No. 34 - Uniform Rules of Evidence: The Commission considered Professor Chadbourn's memorandum on Rule 63 of the Uniform Rules of Evidence and Subdivisions 1, 2, 3 and 4 thereof, and the recommendations of the Southern Committee relating thereto as set forth in the minutes of its meetings on July 27 and September 21, 1957. The following decisions were made:

1. The Uniform Rules of Evidence study will hereafter be considered originally by the Commission without prior consideration by a Committee.

2. Professor Chadbourn should be present whenever Study No. 34 is on the Commission's agenda.

3. Professor Chadbourn's memoranda are in the proper form and are of excellent quality.

4. Professor Chadbourn should be requested to draw specific attention to those instances in which the Uniform Rules grant more discretion to the trial judge than he now has. It was agreed that this factor must be kept in mind when a rule is considered for adoption.

5. Professor Chadbourn should be asked for his opinion as to whether this study can be presented to the Legislature piecemeal; i.e., a part in 1959 and the balance

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in 1961, or whether no part of the study should be presented until all of it can be presented.

6. Professor Chadbourn should be asked whether he would like to have a payment on account for work done to date.

7. Rule 63 - Hearsay: Professor Chadbourn should clarify the extent to which the problem of opinion evidence is involved in nonassertive conduct and give the Commission his view as to whether Rule 63 should be amended, if adopted, to make it clear that it is not intended to obviate objection to evidence of nonassertive conduct or the ground that it involves opinion.

8. Rule 63, Subdivision 1 - Admissibility of Prior Statements of Person Available for Cross-examination: Professor Chadbourn should be asked whether he interprets Rule 63 (1) to permit a prior statement to be introduced even though the declarant has not taken the stand and, if so, whether Rule 63 (1) should be amended to require that the declarant be put on the stand and examined before a prior statement can be admitted into evidence.

9. Rule 63, Subdivision 2 - Affidavits: The Southern Committee's recommendation to adopt this rule was unanimously approved.

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10. Rule 63, Subdivision 3(a) - Depositions: The Executive Secretary reported that Professor Chadbourn will re-examine this part of the memorandum in view of the extensive legislative changes in the 1957 Session with respect to discovery.

11. Rule 63, Subdivision 3(b)(1) - Prior Testimony Made Admissible Against a Person Who Introduced it Before: The Southern Committee's recommendation to adopt this rule was unanimously approved.

12. Rule 63, Subdivision 3(b)(2) - Prior Testimony Made Admissible Because it Was Subject to Cross-examination in an Earlier Proceeding: The Commission first considered whether such testimony should be made admissible when the party against whom it is introduced himself was a party to the prior action and had an opportunity to cross-examine at that time. This question was divided into two parts:

(a) Civil Actions: Rule 63(b)(2) approved unanimously.

(b) Criminal Actions: Rule 63(b)(2) approved: Bradley, Stanton, Thurman. Rule 63(b)(2) disapproved: Cobey, Shaw, Babbage.

The Commission then considered whether such testimony should be made admissible when the party against whom it is introduced was not a party to the former action but another

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person was and had an opportunity to cross-examine the declarant. This question was also divided into two parts:

(a) Civil Actions: Rule 63(b)(2) approved: Bradley and Thurman.
Rule 63(b)(2) disapproved: Stanton, Cobey, Shaw, Babbage.

(b) Criminal Actions: Rule 63(b)(2) approved: Bradley and Thurman.
Rule 63(b)(2) disapproved: Stanton, Cobey, Shaw, Babbage.

13. Rule 63, Subdivision 4(c) - Statement Made by Unavailable Witness, if Judge Finds Made While Event Recent, Recollection Unimpaired, Made in Good Faith, and Prior to Filing of Action: Mr. Stanton, Senator Cobey, Mr. Bradley, and Mr. Shaw voted against adoption; Mr. Thurman voted for adoption. Mr. Babbage was not present.

14. Rule 63, Subdivision 4(b) - Excited Statements: The Southern Committee's recommendation to adopt this rule was unanimously accepted. Mr. Babbage was not present.

15. Rule 63, Subdivision 4(a) - Statement of Present Perception by Unexcited Declarant: A motion to adopt this rule was made by Mr. Shaw and seconded by Mr. Thurman. Mr. Stanton, Mr. Shaw, Mr. Thurman and Mr. Bradley voted for the motion; Senator Cobey voted against the motion. Mr. Babbage was not present.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

WHEREAS, Virginia Blomer Nordby served as Assistant Executive Secretary of the California Law Revision Commission from October 1954 to August 1957; and

WHEREAS, she discharged the numerous duties and responsibilities of that position with great distinction; and

WHEREAS, through her ability as lawyer she made innumerable contributions to the analysis and solution of difficult legal problems before the Commission; and

WHEREAS, through her capacity as an administrator she contributed much to the efficient dispatch of the Commission's business; and

WHEREAS, through her painstaking work as an editor she was chiefly responsible for the production of the Commission's publications; and

WHEREAS, through her presence she brought both grace and dignity to the meetings of the Commission,

NOW, THEREFORE, the California Law Revision Commission hereby expresses its sincere regret that Virginia Blomer Nordby has found it necessary to leave the Commission for a higher calling, its heartfelt best wishes for success and happiness in her new calling, and its fond tribute to her as a lovely lady, an able lawyer, a faithful employee, and a warm friend.

UNIVERSITY OF CALIFORNIA

University Extension
Berkeley 4, California

September 26, 1957

Mr. John R. McDonough, Jr.
Executive Secretary
California Law Revision Commission
Stanford Law School
Palo Alto, California

Dear John:

In accordance with our telephone conversation of today, I am writing to you about the proposed lecture series on the State Bar's Committee on Continuing Education of the Bar on "Evidence for the General Practitioner". This series would be given in the fall of 1958.

For this series, we would prepare a handbook on California Evidence. I understand that the California Law Revision Commission is now engaged in a study of the Uniform Rules of Evidence.

It would be of great help to us if we could obtain any studies or reports which are made to the Commission. We would use them subject to any conditions which the Commission deemed desirable. If you need any further information, please let me know.

Kindest regards.

Sincerely yours,

FFS:mf

Felix F. Stumpf, Administrator
Continuing Education of the Bar

Memorandum to Law Revision Commission

SUBJECT: Report on Current Studies

The following studies, of those on our current list, had been assigned for study prior to the August 1957 meeting:

Study No.	Subject	Consultant	Honorarium	Tentative Due Date of Report
11	Corp. Code §§ 2201, 3901	Staff		not set
16	Planning Procedure	Staff		not set
23	Rescission Contracts	Professor Sullivan	\$800.	Report received
24	Mortgages Future Advances	Professor Merryman	\$800.	Report received
25	Prob. Code § 259	Professor Horowitz	\$600.	Report received
26	Law Governing Escheat	Staff		not set
27	Rights Putative Spouse	Professor Mann	\$800.	Spring 1958
30	Custody Jurisdiction	Dean Kingsley	\$800.	Report received
31	Doctrine Worthier Title	Professor Verrall	\$500.	Report received
33	Survival Tort Actions	Mr. Killion	\$600.	July 1957
34	Uniform Rules Evid.	Professor Chadbourn	\$3,750.	July '58
36	Condemnation	Hill, Farrer & Burrill	\$1,500.	1st part of Study due 1957
37	Claims Statutes	Professor Van Alstyne	\$1,000.	Report received

The following studies have been assigned for study since the August meeting:

Study No.	Subject	Consultant	Honorarium	Tentative Due Date of Report
22	Cut-off Date Motion New Trial	Professor Pickering (Hastings)	\$300.	Dec. '57
29	Post-Conviction Sanity Hearings	Professor Louisell (Boalt)	\$800.	July '58
38	Inter-vivos Rights 201.5 Property	Harold Marsh, Jr.	\$750.	Jan. '58
43	Separate Trial on Insanity	Professor Louisell (Boalt)	\$800.	Sept. '58
44	Suit Common Name	Professor Crane (Hastings)	\$500.	
45	Mutuality Spec. Perf.	Professor Evans (USC)	\$600.	
46	Arson	Professor Packer (Stanford)	\$800.	Aug. '58
48	Juvenile's Right to Counsel	Professor Sherry (Boalt)	\$850. (covers two contracts, Studies No.48 & 54)	July '58
49	Unlicensed Contractor	Professor Sumner (UCLA)	\$600.	Dec. '57
50	Rights Lessor on Abandonment	Professor Verrall (UCLA)	\$600.	April '58
51	Right Wife to Support after Divorce	Professor Horowitz (USC)	\$800.	Sept. '58
52	Sovereign Immunity	Professor Van Alstyne (UCLA)	\$1,200.	Summer '58
54	Use term "Ward Juv. Ct."	Professor Sherry (Boalt)	\$850 (covers two contracts Studies No.48 & 54)	Fall '58

Study No.	Subject	Consultant	Honorarium	Tentative Due Date of Report
56	Narcotics Code	Legislative Counsel	\$600.	Aug.'58
58	Grand Jury law codification	Legislative Counsel	\$1,000.	Aug.'58

The following studies on our current list have not yet been assigned for study:

- 19 Penal and Vehicle Code overlap
- 20 Guardians for Nonresidents
- 21 Confirmation Partition Sales
- 32 Arbitration (if further study decided upon)
- 35 Habeas Corpus (if further study decided upon)
- 39 Attachment, Garnishment, Property Exempt Execution
- 40 Notice of Alibi
- 41 Small Claims Court Law
- 42 Rights Good Faith Improver of Property
- 47 Civil Code § 1698 (modification of contract)
- 53 Personal Injury Damages as Personal Property [suspended for time being]
- 55 Additur
- 57 Law relating to bail

Any suggestions which members of the Commission may have relating to potential consultants for items in the third category would be most welcome.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

STUDY NO. 34 - UNIFORM RULES OF EVIDENCE

The Committee discussed with Professor Chadbourn his memoranda on Rule 63 and on subdivision 1 of Rule 63. Its recommendations are as follows:

Rule 63 - Mr. Babbage would recommend that URE 63 be adopted in California. Mr. Shaw has some doubt about the Rule insofar as it would (in conjunction with Rule 62(1)) take out of the realm of hearsay - and thus make admissible whenever relevant - evidence of nonverbal conduct not intended by the action as a substitute for words in expressing himself. In other words, insofar as Rules 63 and 62(1) so define hearsay that nonassertive conduct is excluded therefrom - and thereby departs from the present law - Mr. Shaw is not convinced that the change is a desirable one.

Rule 63, subdivision (1). The Committee recommends that this part of the URE be adopted in substance in California. It was noted, however, that the meaning of the term "available for cross-examination" is not clear. The Committee agrees with Professor Chadbourn that this should mean not only that the person in question must be in the courtroom but also that he must be called by the person offering the hearsay statement, made his witness, and then offered for cross-examination. The Committee recommends that subdivision (1) of Rule 63 be amended to make this clear.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

STUDY NO. 34 - UNIFORM RULES OF EVIDENCE

The Committee discussed with Professor Chadbourn his memoranda on Subdivisions 2, 3, 4, 5 and 6 of Rule 63 of the Uniform Rules of Evidence. Its recommendations are as follows:

Subdivision (2)(Affidavits). Committee recommends adoption.

Subdivision (3)(Depositions):

3(a) Professor Chadbourn will re-examine this part of the memorandum in light of the extensive changes with respect to discovery procedure enacted by the 1957 Session of the Legislature. The Executive Secretary suggested one possible solution of this problem would be to treat the matter as affidavits are treated under Subdivision (2), i.e., to make depositions admissible "to the extent admissible by the statutes of this State".

3(b)(1)(Prior testimony used against person who introduced it before) Committee recommends adoption.

3(b)(2)(Prior testimony used basis earlier opportunity for cross-examination) The Committee recommends the adoption of this rule where the party against whom the evidence is offered was also a party to the former action with an interest and motive similar to that which he has in the action in which the testimony is offered. The Committee disagreed as to whether the rule should be adopted in the situation where the party against whom the evidence is offered was not a party to the

former action. Mr. Babbage does not favor the adoption of the rule as applied to this situation; Mr. Shaw would favor its adoption in this situation insofar as civil actions are concerned but not in the case of criminal actions.

Subdivision (4):

4(a)(Statement of present perception by unexcited declarant).

The Committee disagreed. Mr. Shaw for adoption, Mr. Babbage, against.

4(b)(Excited statements). Committee recommends adoption.

4(c)(Declarant unavailable as witness). Committee recommends not adopt.

"Boot strap" Problem. The Committee considered Professor Chadbourn's recommendation that Rule 8 be amended to provide that a Judge is not bound by rules of evidence (with specified exceptions) in determining the admissability of evidence. The Committee disagreed: Mr. Shaw for adoption; Mr. Babbage, against.

Subdivision (5) (Dying declarations). The Committee recommends adoption of Subdivision 5 with the amendment suggested by Professor Chadbourn, requiring a finding that the statement was made on the personal knowledge of the declarant.

Subdivision (6). Committee recommends adoption.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

STUDY NO. 36 - CONDEMNATION LAW AND PROCEDURE

The Committee discussed this study with Messrs. Nibley, Day and McLaurin of Hill, Farrer & Burrill. Mr. Nibley reported that statutes enacted by the 1957 Session of the Legislature have made extensive changes in the law relating to one of the three main topics to be covered in the initial study Taking of Possession and Passage of Title. He said that it would not, in the firm's opinion, be advisable to proceed with this part of the study until there has been some experience with the new statutes. He recommended that there be substituted for this portion of the initial study a study of possible innovations in pre-trial procedure in condemnation actions looking toward simplification of issues and in the preparation of expert testimony. The Committee agreed.

Mr. Nibley reported that a recent Supreme Court decision (County of Los Angeles v. Faus 48 A.C. 717) overruled the line of cases holding that evidence of sales of adjacent property may not be introduced as direct evidence of value and that the 1957 Session of the Legislature enacted new Code of Civil Procedure Section 1845.5, to the same general effect. He recommended, however, that the study of this subject be continued, in part because the Faus decision and the new statute are not entirely compatible and in part because a number of important questions are not settled by either or both of them. The Committee agreed.

Mr. Nibley stated that the Evidence part of the initial study will cover the problems on valuation which were suggested by Senator Cobey at the August meeting and elaborated in his letter of August 28 to Hill, Farrer & Burrill.

Mr. Nibley reported that the firm's study of Cost of Removal and Re-location is well under way. There was some discussion of the form which the report should take.