Mtg.

A G E N D A

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Sacramento March 18-19, 1960

1. Minutes of February 1960 meeting (sent 3/9/60).

2. Study No. 36(L) - Condemnation.

   See: Memorandum No. 23(1960) (evidence) (sent 3/10/60).
   Memorandum No. 24(1960) (moving expenses) (sent 3/9/60).
   Memorandum No. 25(1960) (taking possession) (sent 3/11/60).
   Study on Taking Possession (sent 3/9/60).

3. Study No. 32 - Arbitration.

   See: Memorandum No. 19(1960) (distributed prior to February meeting).
   Study (you have this study).

4. Study No. 23 - Rescission of Contracts.

   See: Memorandum No. 21(1960) (sent 3/11/60).
   Memorandum No. 20(1960) (distributed prior to February meeting).

5. Study No. 48 and Study No. 54 - Juvenile Court Proceedings.

   See: Memorandum No. 27(1960) (enclosed).

6. Study No. 38 - Inter Vivos Rights.

   See: Memorandum No. 22(1960) (sent 3/10/60).
   Study (you have this study).

7. Study No. 37(1) - Claims Against Public Officers and Employees.

   See: Memorandum No. 26(1960) (sent 3/9/60).
   Study (sent 3/9/60).

8. Administrative matters (no memorandum):

   (a). Payment of Van Alstyne for his study.
   (b). Payment of Kagel for his study.
   (c). Send notice of alibi study to printer.

Minutes of Meeting

of

March 18 and 19, 1960

Sacramento

A regular meeting of the Law Revision Commission was held in Sacramento on March 18 and 19, 1960.

Present: Roy A. Gustafson, Chairman
John R. McDonough, Jr., Vice Chairman
Honorable Clark L. Bradley (March 18)
Honorable James A. Cobey (March 18)
Leonard J. Dieden
George G. Grover
Herman F. Selvin
Thomas E. Stanton, Jr.
Ralph N. Kleps, Ex Officio

Absent: Charles H. Matthews

Messrs. John H. DeMoully and Joseph B. Harvey and Miss Louisa R. Lindow, members of the Commission's staff were also present.

Mr. Robert Nibley, of the law firm of Hill, Farrer & Burrill of Los Angeles, research consultant for Study No. 36(L) - Condemnation, was present during a part of the meeting on March 18.

Mr. John A. Bohn, Counsel of the Senate Judiciary Committee was present during a part of the meeting on March 18.

After the following corrections were made, a motion was made, seconded and unanimously adopted to approve the minutes of the meeting held on February 19 and 20, 1960:

Page 3. Substitute "studies" for "study" in the fifth line from the top of the page.

Substitute the following for lines 8-13:

> This study was made for the California Law Revision Commission by _____. No part of this study may be published without prior written consent of the Commission.
>
> The Commission assumes no responsibility for any statement made in this study and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.
>
> Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons and the study should not be used for any other purpose at this time.

Page 4. Delete "affirmative relief" at the end of subsection 2 of paragraph (4) and insert in lieu thereof "affirmative relief by way of rescission."

Page 6. Change "this field" to "these fields" in the last line of the second paragraph.

Page 8. Add "previously" before "adopted" in the second line of paragraph (1) and add "objection to the" before "proposed amendment" in the second line of paragraph (3).

Page 9. Delete "that (1)" in the sixth line and insert in lieu thereof "(1) that."

Page 10. Substitute "The primary advantage of providing that evidence is admitted only in support of opinion testimony is that the jury would be limited in its findings to the opinion testimony of experts" for the second sentence in paragraph (2).

Page 13. Revise lines 9 and 10 to read "made to any person lawfully on the property if the moving expenses are incurred as a proximate result of the condemnation. The motion carried:".

I. ADMINISTRATIVE MATTERS

A. Senate Bill No. 17 - Section 10308 of the Government Code re Law Revision Commission: The Commission considered Senate Bill No. 17 which revises Section 10308 of the Government Code. After the matter was discussed, a motion was made, seconded and unanimously adopted to approve Senate Bill No. 17.

B. Sending Studies to Printer: It was agreed that the Executive Secretary should use his own judgment in determining when to send studies to the printer and that these matters should not be referred to the Commission for decision.

C. Scheduled Commission Meetings: Future Commission meetings were scheduled for:

May 20 and 21 in Los Angeles.

June 16, 17 and 18 in San Francisco.

July 15 and 16 in Los Angeles.

EXHIBIT I

This Exhibit may be substituted for page 7
in the Minutes of the March, 1960 meeting

Corrected pages for March
18-19, 1960 Minutes

II. CURRENT STUDIES

A. Study No. 23 - Rescission of Contracts: The Commission had before it Memorandum No. 21(1960) and the attached material. Mr. McDonough stated that upon giving this matter further study, particularly in connection with the proposed revision of the Uniform Sales Act, the Uniform Stock Transfer Act and the Insurance Code, he had concluded that an out-of-court rescission as provided for in the present law is of practical importance in some cases. He stated that he is still of the view that (1) if a party is not legally entitled to rescind, his out-of-court statement purporting to do so is of no effect and (2) unless both parties are willing to engage in a mutual rescission it is usually necessary for the party desiring to rescind to go to court to obtain a judicial resolution of the problem because he cannot otherwise be certain whether his purported rescission was legally effective. But, he stated, it was now apparent to him that if the party desiring to rescind has a legal right to do so, an out-of-court rescission is legally effective--a matter that will in some cases be of critical importance to the parties and even to third persons. Mr. McDonough stated that he thought that it well might be possible to

devise legislation which would enable a party to terminate a contract or other transaction out of court without continuing the concept of out-of-court rescission in our law--for example, by calling a party's manifestation of his desire to terminate the contract or transaction a cancellation or a repudiation. He stated that he was not certain, however, whether this would be merely a change in labels. He stated that the upshot of the matter was simply that he was less certain than he had been that out-of-court rescission could or should be abolished and he thought the matter would require further and careful consideration by the Commission.

Mr. McDonough suggested that if the Commission should conclude that out-of-court rescission should be continued in effect it might consider the following approaches to the problem of dealing with the duality of existing remedies which led to this study:

(1) Abolish the legal proceeding to obtain a judgment rescinding a contract and provide only for a legal action to enforce a unilateral out-of-court rescission;

(2) Provide for both an action to obtain a judgment rescinding a contract and an action to enforce a unilateral out-of-court rescission, but eliminate the existing differences between the actions, right to jury trial, etc.; or

(3) Conclude that no change in the law is practicable and submit a report of this fact to the Legislature.

Consideration of Mr. McDonough's proposals was deferred to a later date.

B. Study No. 32 - Arbitration: The Commission considered Memorandum No. 19 and a study of California arbitration law prepared by Mr. Sam Kagel. The Commission first considered the approach that should be taken in drafting a statute. After the matter was discussed it was agreed that the staff should consider and submit its recommendations at the next meeting as to whether the draft statute should be in the form of the various sections of the Uniform Act as revised, the present California statutes as revised or entirely new sections.

The Commission then considered various suggestions proposed by Mr. Kagel in his study. Motions were made, seconded and adopted approving the following principles:

(1) ~~A~~ Unless the parties have otherwise agreed, a majority of the arbitrators should be empowered to act, to meet, to hear and to decide a case, and at no stage in the proceedings may an arbitrator upset these proceedings by refusing to participate. However, unless the parties otherwise agree, an arbitrator that did not participate in the hearing may not participate in the decision.

(2) Five days notice of the arbitration hearing should be given unless the parties agree upon a different length of time for notice or agree that no notice is to be given. Appearance at the hearing should be deemed a waiver of the notice.

(3) Costs of arbitration proceedings should be shared equally by the parties unless otherwise agreed. Costs of court actions should be allocated in the same manner as Code of Civil Procedure Section 1032.

(4) The award should be in writing and signed by the arbitrator or arbitrators concurring therein. A copy of the award should be delivered to each party personally or by registered mail or as otherwise provided in their agreement. The award should include a determination of all of the matters necessary to the award that are submitted to the arbitrator or arbitrators.

(5) The court should automatically confirm an award if it denies a motion to modify, correct or vacate the award.

(6) Where persons cannot agree to the appointment of arbitrators the court should be authorized to do so.

(7) Several members indicated that reference to neutral and party arbitrators should be kept to a minimum in the arbitration statute. The staff was directed to review this matter to ascertain whether a designation of neutral and party arbitrators is necessary. If it is found that such designation is necessary, the staff is to consider the desirability of defining either "the arbitrator" or the "neutral arbitrator."

(8) ~~The Sapp v. Barenfeld holding that ex parte investiga-~~

Page 10. Subparagraph (8) should be revised to read:

(8) The Sapp v. Barenfeld holding (that an arbitrator is permitted to make ex parte investigations without the knowledge and consent of the parties) should not be nullified.

~~investigation without having to obtain ... parties.~~

(9) The power to issue subpoenas and order depositions should be extended to neutral arbitrators. If there is no neutral arbitrator this power should then be extended to the majority of arbitrators.

(10) There should be no requirement that witnesses be sworn in an arbitration proceeding. However, an arbitrator should be authorized to administer oaths.

(11) If a subpoena is disobeyed or a witness refuses to testify or be sworn when directed by the arbitrator, the arbitrator should be empowered to apply to a court for an order directing the witness to comply with the arbitrator's order. Disobedience of the court order should be punishable as a contempt.

(12) Unless the parties have otherwise agreed, the ~~The~~ fees of a witness attending an arbitration proceeding should be shared equally by the parties when the witness is called by the arbitrator to testify. However, if one of the parties calls a witness, he should be responsible for payment of that witness's fee.

(13) A party should have the right to be represented by an attorney at any stage of a proceeding or hearing. A waiver prior to a proceeding or hearing should be deemed ineffective.

(14) The court should have the power to fix time limits for the making of an award if the parties have not done so, i.e., the substance of Section 8(b) of the Uniform Act is adopted.

(15) ~~The~~ Unless the parties have otherwise agreed, the arbitration statute should provide that the arbitrator may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party who has been duly notified to appear, i.e., the substance of Section 5(a) of the Uniform Act is adopted.

(16) No decision was made as to whether an arbitrator should have no power to correct or modify his award except upon the agreement of the parties.

(17) The time limit for a motion to vacate, modify or correct the award should be 90 days.

(18) During the discussion of time limits for motions to confirm an award, Mr. Selvin stated that a desirable procedure might be to provide that the award automatically becomes a judgment upon the filing of the award with the superior court after the time for vacating, modifying or correcting an award has passed. The staff was directed to

draft a statute incorporating the suggestion made by Mr. Selvin and providing that a party has one year to file the award to reduce it to judgment. Whether the one-year time limit should begin to run from the date of the entry of the award or after expiration of the 90-day time limit for a motion to vacate, modify or correct the award was left to the discretion of the staff.

(19) The grounds for vacating an award as contained in Section 12 of the Uniform Act should be incorporated in the arbitration statute.

(20) The provision of the Uniform Act relating to the time within which the court can order a rehearing if an award is vacated should be incorporated in the arbitration statute.

(21) There should be specific provision for an appeal from an order denying a motion to compel arbitration.

(22) It is within the discretion of the staff to clarify and further define venue as provided in Section 18 of the Uniform Act.

(23) Consideration of whether the arbitration statute should provide that California courts have jurisdiction over the parties if they agree to arbitrate in this State was deferred.

A motion was made, seconded and carried to pay Mr. Kagel for the amount due him under Contract No. 18 (1958).

C. Study No. 36(L) - Condemnation Study: The Commission had before it the following: Memorandums No. 23 - Evidence in Eminent Domain Cases, No. 24 - Moving Expenses, and No. 25 - Taking Possession and Passage of Title, the three studies prepared by its research consultant relating to the above subject matter and a tentative short form of moving cost statute prepared by its research consultant.

Mr. John Bohn, Counsel of the Senate Judiciary Committee, reported that the Senate Judiciary Committee has had several bills before them relating to Condemnation and has deferred consideration of these bills pending the Commission's report. He urged that the Commission complete its study on Condemnation and submit it to the Senate Committee as soon as it is able in order to give the Senate Committee ample time to consider the Commission's recommendations.

Evidentiary Problems. The Commission first considered the draft statute relating to evidentiary problems in condemnation proceedings (Memorandum No. 23). After the matter was discussed, motions were made, seconded and adopted to approve the following:

(1) Section 1248.1. The sentence "The owner of the property interest sought to be condemned is presumed to be qualified to express such opinions" is to be added to the end of Section 1248.1.

A motion to delete the word "presumed" from the above adopted sentence did not carry.

The motion to approve Section 1248.1 as revised carried:

Aye: Cobey, Dieden, Grover, Gustafson, McDonough, Selvin, Stanton.

No: None.

Not Present: Bradley, Matthews.

(2) Section 1248.2. Mr. Selvin stated that statements by a qualified witness of the reasons upon which he based his opinion would be admitted as independent evidence as Section 1248.2 is now drafted. The motion to delete Section 1248.2 from the draft statute carried. However, the staff was asked to try to draft language that would clearly indicate that the hearsay rule is inapplicable to testimony introduced in explanation of opinion evidence.

(3) Section 1248.3. A motion was made, seconded and adopted to approve Section 1248.3 as revised as follows:

(a) The phrase "is admissible only if it is based solely upon facts" is substituted for the phrase "may be based upon any facts" in the third line of Section 1248.3.

(b) The word "lease" is to be added after the word "sale" in paragraph (1) of Section 1248.3.

(c) The phrase "and the basis therefor" is deleted from paragraph (2) of Section 1248.3.

The motion carried:

Aye: Cobey, Dieden, Grover, Gustafson, Selvin, Stanton.

No: McDonough.

Not Present: Bradley, Matthews.

(4) Section 1248.4. A motion was made, seconded and adopted to approve Section 1248.4 as revised:

> 1248.4. Notwithstanding the provisions of Section 1248.3, the opinion of a witness as to the amount to be ascertained under subdivisions 1, 2, 3 or 4 of Section 1248 is inadmissible if it is based wholly or in part, upon:

"Price or other terms" is substituted for "price and other terms" in both subdivisions (1) and (2), and "or on their behalf" is to be deleted from subdivision (2). The motion carried:

Aye: Cobey, ~~Dieden~~ Stanton, Grover, Gustafson, McDonough.

No: Selvin.

Not Present: Bradley, Dieden, Matthews.

A motion to add "by the owner thereof" to the end of the first sentence of subdivision (3) of Section 1248.4 did not carry.

The question was raised whether the statute should provide who decides whether opinion testimony is competent and whether inadmissible opinion testimony would be subject to a motion to strike. It was agreed to refer this question to the staff to draft a provision consistent with the Uniform Rules of Evidence.

The Commission then considered the proposed recommendation relating to evidentiary problems in condemnation proceedings. It was agreed that a

statement concerning pretrial discovery procedures to ameliorate the hearsay rule should be included in paragraph 3 of the recommendation. Other minor changes were agreed upon.

Moving Expenses. The Commission then considered the draft statute relating to moving expenses caused by the acquisition of property for public use (Memorandum No. 24). After the matter was discussed motions were made, seconded and adopted to approve the following:

(1) The word "Expenses" should be added to the title after the word "moving."

(2) Section 1270. The staff was directed to consider whether "for public use" should be added to the definition "acquisition," in subdivision (1).

"Eminent domain" should be substituted for "proceedings under Title 7 of Part 3 of this code" in subdivision (1).

"Includes" should be substituted for "means" in subdivision (2) of Section 1270.

Subdivision (3) should read as follows: "'Public use' means a use for which property may be taken by eminent domain."

"Personal" should be added before "property" in both subdivisions (4) and (5) of Section 1270.

(3) Section 1270.1. No changes were made to 1270.1.

(4) Section 1270.2. During the discussion of 1270.2 Mr. Selvin stated that this section is not clear as to whether a 25 percent limitation refers to one or all parcels of land. After the matter was discussed it was agreed that the staff should redraft this portion of Section 1270.2 to incorporate

the substance of the language of Section 401(b) of Public Law No. 534.

The phrase "and there are two or more claimants for reimbursement" should be added after the word "section" in subdivision (2) of Section 1270.2. The Commission then reconsidered whether a limitation of either 25 miles or 25 percent should be imposed where a claim for moving expenses is settled by agreement of the parties. After the matter was discussed the motion was carried to direct the staff to redraft Section 1270.2(3)(b) to permit a public agency to settle claims for moving expenses with person so entitled to reimbursement without regard to either the 25 miles or 25 percent limitation.

(5) Section 1270.3. The form (i.e., the tabulation) of Section 1270.3 is approved.

(6) Section 1270.4, et seq. During the discussion of the sections that provide for a claims filing procedure, the question was raised as to whether a simpler procedure would be more practicable. After the matter was discussed it was agreed that the staff should draft a statute to require the condemner to initiate proceedings within 90 days after the condemnee vacates the property. The statute should further provide that if the condemner fails to do so, the condemnee (occupant) should be authorized to file a petition in the superior court to have the court determine moving costs. The judgment for the condemnee should provide that the condemner pay court costs and attorney's fees. If this procedure is to be adopted an amendment to the general claims statute to except this procedure will be necessary. Sections 1270.4, 1270.5 and 1270.6 are not necessary except for the provisions relating to court

proceedings in Section 1270.6.

(7) The Commission then discussed whether a monetary limitation as proposed by Mr. Nibley in the tentative short form statute would be more practical than the limitations of 25 miles and 25 percent. It was agreed that to impose a monetary limitation could produce unjust results. A motion was then made, seconded and adopted not to impose a 25 percent limitation on moving costs. The motion carried:

Aye: Cobey, Dieden, Gustafson, McDonough, Selvin.

No: Grover, Stanton.

Not Present: Bradley, Matthews.

Taking Possession. The Commission then considered Memorandum No. 25 relating to policy questions to be considered in taking possession in condemnation proceedings. After the matter was discussed, motions were made, seconded and adopted to approve the following principles:

(1) All condemners should have the right to immediate possession upon a determination by the court that immediate possession is necessary.

(2) To insure the validity of the proposed extension of the right to immediate possession by all condemners a constitutional amendment should be proposed in the form of a ratification of the proposed statute.

(3) The condemner should be required to deposit an amount to be determined by the court and the condemnee should have the right to withdraw all or part of the deposit.

(4) The procedure for the right to immediate possession should include

the following:

The condemner should be permitted to have an ex parte hearing on the necessity for immediate possession and the amount of the deposit. If the right to immediate possession is granted to the condemner, notice of the court's order should be required to be given to the condemnee 20 days before the order for immediate possession is to be effective. Notice should be personally served on occupants of the property and owners within the State. Notice by mail should be given to owners out of the State. An adversary hearing on the necessity for immediate possession and the amount of the deposit may be held upon application by the persons notified. Such persons may also request a delay of the effective date of the immediate possession order.

(5) It was agreed that title to the property should pass at the time of the entry of an order for immediate possession. It was agreed, however, that the research consultant should ascertain whether condemning agencies need title as well as possession immediately in order to obtain federal aid for their projects, since an immediate passage of title could result in a question as to the validity of the statute.

(6) The condemner who has a court order for immediate possession should be unable to abandon the condemnation proceeding without the consent of the condemnee.

(7) It was agreed that when immediate possession is taken interest on the deposit is to begin on the date the condemner has the right to physical possession. Interest should abate at the time the condemnee actually receives the money so long as he diligently acts to withdraw the deposit. If the condemnee refuses to withdraw the deposit, interest should abate when the condemnee could have withdrawn the deposit.

(8) When immediate possession prior to trial is not taken:

(a) Generally, interest should begin to run from the date of the interlocutory judgment.

(b) If there is an appeal and there is an order for possession pending the appeal, interest should begin to run from the date of the interlocutory judgment if the judgment is affirmed.

(c) If an appeal is taken and the interlocutory judgment is reversed, and if possession is taken pending the appeal, interest should begin to run from the effective date of the order for possession.

D. Study No. 37(L) - Claims Against Public Officers and Employees:

The Commission considered Memorandum No. 26(1960) and the research study relating to Claims Against Public Officers and Employees prepared by Professor Arvo Van Alstyne. After the matter was discussed motions were made, seconded and adopted to approve the following principles:

(1) The existing claims statutes relating to filing claims before suit in causes of action against public officers and employees should be repealed. Mr. Stanton voted in opposition to this motion.

Mr. McDonough suggested that the Commission recommend to the 1961 Session that the statutes relating to filing claims before suit in causes of action against public officers and employees be repealed, but that the Commission also prepare legislation for the 1961 Session to provide for the enactment of a procedure consistent with the claims procedure against public entities in the event its recommendation is not adopted. This suggestion was not accepted. It was decided that the Commission will introduce legislation to repeal the statutes requiring the filing of claims against public officers and employees at the 1961 Session, and if this legislation fails to pass in 1961, the Commission will introduce legislation in 1963 to provide a claims procedure consistent with the 1959 Claims Act.

(2) A section invalidating local charters, ordinances or regulations requiring the filing of claims against public officers and employees should be included in the proposed legislation.

(3) The Commission's proposed legislation repealing the statutes

requiring the filing of claims against public officers and employees should apply to any cause of action which on the effective date of the repeal has not been barred for failure to file a claim against a public officer or employee. Mr. Stanton voted in opposition to this motion.

A motion to provide that any claim relating to a cause of action accruing prior to the effective date of this legislation is to be governed by the provisions existing prior to the 1961 legislation did not carry. Messrs. Dieden, Grover and Stanton voted in opposition to this motion.

(4) The substance of the amended version of Section 2001 of the Government Code proposed by Professor Van Alstyne is to be included in the Commission's proposed legislation.

During the discussion of Section 2001 Mr. Stanton stated that in his opinion there should be some provision of indemnification to the employee who has a judgment against him in connection with his public employment. He pointed out that such a provision applies to Community Services Districts (Section 61633 of the Government Code). A motion to include in the Commission's proposed legislation a statute comparable to Section 61633 did not carry. The staff was directed to draft a paragraph to be included in the first draft of the Commission's recommendation calling the Legislature's attention to this matter.

A motion was made, seconded and carried to pay Professor Van Alstyne for the amount due him ($350.00) under Contract No. 1959-60(3) dated November 10, 1959.

E. Study No. 40 - Notice of Alibi: The Executive Secretary raised the question as to whether the Commission's recommendation and draft statute together with the research study on Notice of Alibi should be sent to the various district attorneys and public defenders for their views and comments. After the matter was discussed, it was agreed that the Executive Secretary should contact Keith Sorenson, President of the State District Attorneys' Association suggesting that the Law and Legislation Committee of the Association might want copies for their consideration.

Respectfully submitted,

John H. DeMoully
Executive Secretary