

MINUTES OF MEETING

of

March 17 and 18, 1961

Sacramento

A regular meeting of the Law Revision Commission was held in Sacramento on March 17 and 18, 1961.

Present: Herman F. Selvin, Chairman
John R. McDonough, Jr., Vice Chairman
Hon. Clark L. Bradley (March 17)
Hon. James A. Cobey (March 17)
Joseph A. Ball
James R. Edwards
Sho Sato
Vaino H. Spencer
Thomas E. Stanton, Jr.
Ralph N. Kleps, ex officio (March 17)

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

The minutes of the meeting of February 10 and 11, 1961, were approved after they were corrected to record Mr. Sato as voting against the revision of Uniform Rule 63(6) set out on pages 5 and 6.

I. ADMINISTRATIVE MATTERS

A. Table of Contents in Commission's Printed Pamphlets: The Chairman referred to a letter from the Legislative Counsel which indicated that some confusion has resulted from the form of the Table of Contents contained in the Commission's printed pamphlets containing its recommendations. Each pamphlet now contains (at the front of the pamphlet preceding the recommendation of the Commission) a detailed Table of Contents for the consultant's study. Confusion has resulted in cases where the consultant has made recommendations that differed from those of the Commission. The Commission decided that in the future the detailed Table of Contents for the research consultant's study should be located after the text of the Commission's recommendation and proposed legislation.

B. Future Meetings: The Commission meeting scheduled for April 14 and 15, 1961, was rescheduled for April 21 and 22, 1961 -- Sacramento. The May meeting is scheduled for May 19 and 20, 1961 -- Los Angeles.

II. 1961 LEGISLATIVE PROGRAM

A. EMINENT DOMAIN (S.B. NOS. 203, 204, 205, 206 and 207 and S.C.A. NO. 6):

The Commission had before it a report on the status of its 1961 Legislative Program and various memoranda suggesting possible amendments to Senate Bills Nos. 203, 205 (as amended March 15, 1961) and 206 relating to eminent domain.

Priorities of Commission's Bills:

Senator Cobey requested instructions from the Commission as to what priorities the Commission wanted to give to their eminent domain bills introduced in the Senate.

It was agreed that first priority should be S.B. No. 205 relating to evidence in eminent domain proceedings. Senate Bill No. 206 relating to the procedure for taking possession and passage of title in eminent domain proceedings should have next priority; third priority should be given to S.B. No. 203 relating to moving expenses in eminent domain proceedings. Senator Cobey, however, is authorized to use his own judgment to determine if the agreed upon priorities should be changed.

Senate Bill No. 203 - Eminent Domain (Moving Expenses):

The Executive Secretary reported that Senate Bill No. 203 might be acceptable to the Legislature if it is amended to provide for dollar limits on moving expenses. A motion was adopted that the bill not be

amended at this time to provide for dollar limits, but Senator Cobey and the Executive Secretary were authorized to amend the bill to include the provision for dollar limits should they deem it necessary. It was agreed that the bill should be enacted even if it is necessary to revise it to include dollar limits.

The following actions were taken on the amendments to S.B. No. 203 submitted by the Executive Secretary:

(1) Amendments Nos. 1 and 2. Section 1270.2 is to be retained. However, Senator Cobey and the Executive Secretary are authorized to delete this section if they deem it necessary.

(2) Amendment No. 5. If Senate Bill No. 203 is amended to provide for dollar limits, separate dollar limits should apply to Sections 1270.1 and 1270.2.

(3) Amendments Nos. 12 and 13. Senator Cobey and the Executive Secretary were authorized to make the limitations on reimbursement applicable to negotiated settlements if necessary.

(4) Amendment No. 14. A new section is to be added to follow Section 1270.6 on page 4, line 27 of the printed bill to provide:

(1) For an offset if dollar limits are not added to the bill;
or

(2) That no reimbursement be allowed under the proposed legislation where reimbursement is provided under Section 33270.1 of the Health and Safety Code, if dollar limits are added to the bill.

Senate Bill No. 204 - Eminent Domain (Tax Refund)

The Executive Secretary reported that a more comprehensive bill (S.B. No. 585) covering the same subject matter as S.B. No. 204 is presently in the Senate Revenue and Taxation Committee and that the Senate Judiciary Subcommittee on Eminent Domain is deferring action on the Commission's bill (S.B. No. 204) until action is taken on S.B. No. 585. An attempt will be made to include the substance of the Commission's bill in S.B. No. 585.

Senate Bill No. 205 (amended March 15, 1961) - Eminent Domain

(Evidence):

The following action was taken on the amended S.B. No. 205 and on the additional amendments to S.B. No. 205 submitted by the Executive Secretary:

(1) Amended Bill. The amendment made on page 1, lines 5 and 6 of the printed bill should be deleted and the substance of the deleted language inserted before the period on page 1, line 7.

The word "relevant" was deleted from Section 1248.2, line 2, page 2; and the phrase "must be relevant to the amount to be so ascertained and" is to be added to line 8, page 2, after "data". It was suggested that the Commission's Legislative History on this bill should include a statement that this change was made to clarify the bill by including therein a specific statement of the general evidence requirement that evidence be relevant and that this addition was not intended to change the substance of the bill.

(2) Amendment No. 3 - Admissibility of Offers (blue sheet). The Commission agreed to recommend the bill despite the inclusion of an amendment making offers admissible.

If the legislative committee decides to admit offers, subdivision (c) of Section 1248.3 should be amended as follows:

On line 9, page 3, "unless such" would be changed as follows:

"unless:

(1) Such"

In line 11, page 3, the phrase "but nothing in this paragraph" would be substituted for "Nothing in this subdivision".

A second paragraph to subdivision (c) would be inserted on line 14, page 3:

(2) Such offer (i) is an offer of purchase or lease which included the property or property interest to be taken, damaged or benefited, (ii) is made in a bona fide open market transaction, is not affected by the acquisition or proposed improvement and is made in writing by a person ready, willing and able to buy or lease at the time the offer was made and (iii) is the basis of the opinion of a witness for the owner of the property or property interest for which the offer to purchase or lease was made.

Mr. Stanton voted in opposition to this motion.

(3) Amendment No. 1 - (green sheet). The following subdivision was added to Section 1248.2 after line 42, page 2:

(g) The nature of the improvements on the properties in the general vicinity of the property or property interest to be taken, damaged or benefited and the character of the existing uses being made of such properties.

(4) Proposed Amendments Nos. 1, 2, 3, 5, 8 and 9 (white sheet).

The words "and circumstances" were added after "terms" where it appears

on page 2, lines 10, 16, 20, 25, 49, and page 3, line 1.

(5) Amendment No. 4 (white sheet). The following provision was added to subdivision (c) of Section 1248.2 after "valuation" on line 24, page 2:

, including but not limited to a lease providing for a rental fixed by a percentage or other measurable portion of gross sales or gross income from a business conducted on the leased property.

(6) Amendment No. 6 (white sheet). The following provision was added to subdivision (d) of Section 1248.2 after "valuation" on line 27, page 2:

, including but not limited to a lease providing for a rental fixed by a percentage or other measurable portion of gross sales or gross income from a business conducted on such property in cases where the rental is customarily so fixed.

Messrs. McDonough and Selvin voted in opposition to this motion.

(7) Amendment No. 7 (white sheet). Senator Cobey and the Executive Secretary are authorized to amend the bill, if necessary, to limit the use of the capitalization approach where hypothetical improvements are capitalized to cases where there are not sufficient comparable sales.

The latter portion of subdivision (e) of Section 1248.2, lines 30 through 36, page 2 was deleted and the substance of the following was added to subdivision (e):

, damaged or benefited as distinguished from the capitalized value of the income or profits attributable to the business conducted thereon, which may be based on a consideration of (1) the reasonable net rental value of the land and the

existing improvements thereon and (2) the reasonable net rental value of the land if it were improved by improvements that would enhance the value of the property or property interest for its highest and best use.

The following limitations are to be included in subdivision (e) of Section 1248.2:

Subdivision (e)(1) is to provide in substance that an expert, in arriving at the capitalized value of the property upon the basis of a hypothetical lease on an existing improvement, cannot use a lease based on a percentage of gross income unless such percentage leases are customarily used for the rental of such improvements.

Subdivision (e)(2) is to provide in substance that an expert, in arriving at the capitalized value of the property upon the basis of a hypothetical lease on a hypothetical improvement, cannot use a lease based on a percentage of gross income unless percentage leases are customarily used to rent such improvements.

Mr. Stanton voted in opposition to these limitations.

Mr. Selvin suggested that, to incorporate these limitations, three subdivisions may be desirable to provide for the three different situations:

- (1) Existing improvements and existing leases.
- (2) Existing improvements and hypothetical leases.
- (3) Hypothetical improvements and hypothetical leases.

Senator Cobey and the Executive Secretary are authorized to revise or delete the portion of subdivision (e) of Section 1248.2 relating to hypothetical improvements should they deem it necessary.

(8) Amendment No. 10 (white sheet): The following provision was added to subdivision (d) of Section 1248.3 on line 16, page 3:

, but nothing in this subdivision prohibits the consideration of actual or estimated taxes for the purpose of determining

the reasonable net rental value attributable to the property or property interest to be taken, damaged or benefited.

Senate Bill No. 206 - Eminent Domain (Immediate Possession and Passage of Title)

The following action was taken on the proposed amendments to S.B. No. 206:

(1) Amendment No. 1. A comma was added in Section 1243.4 after "right-of-way" on line 8, page 1.

(2) Amendment No. 2. The following was added to subdivision (b)(4) of Section 1243.5 after the word "property" on line 36, page 2:

which date, unless the plaintiff requests a later date, shall be the earliest date on which the plaintiff would be entitled to take possession of the property if service were made under subdivision (c) of this section on the day the order is made.

(3) Amendment Nos. 3 and 4. Senator Cobey and the Executive Secretary are authorized to make the following changes in subdivision (c) of Section 1243.5 if they deem it necessary:

On page 2, lines 50 and 51, delete the phrase "it appears by affidavit to the satisfaction of the court that",

On page 3, lines 4 and 5, delete the phrase "the court may order that in lieu of such personal service the plaintiff" and insert: "the plaintiff may in lieu of such personal service".

If these changes are made, the Commission believes that an affidavit should be filed in the proceeding showing the facts that establish that the plaintiff exercised due diligence in attempting to make personal

service.

(4) Amendment No. 5. The phrase "or other instruments" was added in subdivision (c) of Section 1243.5 after "deeds" in line 21, page 3.

(5) Amendment No. 6. The provisions in Section 1243.5 relating to a stay or a vacation of an order authorizing immediate possession are to be retained. However, Senator Cobey and the Executive Secretary are authorized to delete such provisions if they deem it necessary.

The following was added as another subdivision to Section 1243.5:

The amount deposited pursuant to this section is the security referred to in Section 14 of Article I of the Constitution of this State.

(6) Amendment No. 7. The proposed amendment to subdivision (f) of Section 1243.5 to provide that no reference shall be made at the trial on the issue of compensation to the amount deposited or withdrawn was disapproved.

(7) Amendments Nos. 9 and 10. Subdivision (b) of Section 1243.7 was deleted and the following new subdivision (b) was added:

(b) If the total amount sought to be withdrawn prior to judgment exceeds the amount of the original deposit or 75 percent of the amount of an increased deposit, whichever is greater, each applicant, before any of such excess is withdrawn, shall file an undertaking executed by two or more sufficient sureties approved by the court to the effect that they are bound to the plaintiff in double the amount of such excess for the return of any amount withdrawn by the applicant that exceeds the amount to which the applicant is entitled as finally determined in the eminent domain proceeding, together with legal interest from the date of its withdrawal.

If there is more than one applicant and the total amount sought to be withdrawn exceeds the amount of the original deposit or 75 percent of the amount of an increased deposit, whichever

is greater, the applicants, in lieu of filing separate undertakings, may jointly file an undertaking executed by two or more sufficient sureties approved by the court to the effect that they are bound to the plaintiff in double the amount of such excess for the return of any amount withdrawn by the applicants that exceeds the amount to which the applicants are entitled as finally determined in the eminent domain proceeding together with legal interest from the date of its withdrawal.

If the undertaking required by this subdivision is executed by an admitted surety insurer, the undertaking is sufficient in amount if the surety is bound only to the extent that the amount sought to be withdrawn exceeds the amount originally deposited.

The plaintiff may consent to an undertaking that is less than the amount required under this subdivision.

If the undertaking is executed by an admitted surety insurer, the applicant filing the undertaking is entitled to recover the premium paid for the undertaking, but not to exceed two percent of the face value of the undertaking, as a part of the recoverable costs in the eminent domain proceeding.

(8) Amendment No. 11. The following was added in subdivision (f) of Section 1243.7 after the first sentence on line 41, page 5:

If the court determines that a party is entitled to withdraw any portion of a deposit which another person claims, the court may require such party, before withdrawing such portion, to file an undertaking executed by two or more sufficient sureties approved by the court to the effect that they are bound to the adverse claimant in such amount as is fixed by the court, but not to exceed double the portion claimed by the adverse claimant, for the payment to the person entitled thereto of any amount withdrawn that exceeds the amount to which such party is entitled as finally determined in the eminent domain proceeding, together with legal interest from the date of its withdrawal.

(9) Amendment No. 12. In subdivision (h) of Section 1243.6, on line 10, page 6, strike out "returned" and insert "paid" and

on line 11, page 6, "entitled thereto" was substituted for "who deposited it."

(10) Amendment No. 13. In subdivision (c) of Section 1249.1, on lines 1 and 2, page 7, the phrase "defendant moves from the property in compliance with an order of possession" was substituted for "plaintiff is entitled to take possession of the property under an order authorizing the plaintiff to do so."

(11) Amendment No. 14. The following was added to subdivision (b) of Section 1254 after the period on line 45, page 7:

The order shall state the date after which the plaintiff is authorized to take possession of the property which date, unless the plaintiff requests a later date, shall be 10 days after the date of the order.

(12) Amendment No. 15. In subdivision (g) of Section 1254, on line 33, page 8, strike out "returned" and insert "paid" and on line 34, page 8, "entitled thereto" was substituted for "who paid it into court".

(13) Amendments Nos. 16 and 17. The first portion of subdivision (d) of Section 1255a was deleted - lines 34 to 38, page 10 - and the following was added:

(ã) If, after the plaintiff takes possession of or the defendant moves from the property sought to be condemned in compliance with an order of possession, whichever is the earlier, the plaintiff abandons the proceeding as to such property or a portion thereof or it is determined that the plaintiff does not have authority to take such property or a portion thereof by eminent domain,

The word "thereof," was deleted from subdivision (d) of Section 1255a, line 39, page 10.

(14) Amendment No. 18. The last portion of subdivision (d) of Section 1255a, lines 44 through 47, page 10, was deleted and the following was added in its stead:

loss or impairment of value suffered by the land and improvements after the time the plaintiff took possession of or the defendant moved from the property sought to be condemned in compliance with an order of possession, whichever is the earlier

(15) Amendment No. 19. Subdivision (a)(3) of Section 1255b - lines 7 through 11, page 11 - is to be revised if the provisions on stay for hardship and on vacation of the order of immediate possession are deleted.

Senate Bill No. 207 and Senate Constitution Amendment No. 6 -- Eminent Domain (Immediate Possession)

The Executive Secretary reported that these two bills have met with such opposition from the subcommittee of the Senate Judiciary Committee that there is no hope for their passage.

SENATE BILL NO. 202 -- SURVIVAL OF ACTIONS

After the Executive Secretary reported that there is considerable opposition to the provision which permits the survival of damages for pain, suffering and disfigurement, a motion was made and carried not to amend the bill at this time; however, Senator Cobey and the Executive Secretary are authorized to amend it if they deem it necessary. Mr. Sato voted against this motion.

It was agreed that the bill is a better bill if it includes provisions permitting survival of damages for pain, suffering and disfigurement, but the Commission would still like to see the bill enacted even if it should be necessary to revise the bill by deleting this provision.

SENATE BILL NO. 208 -- CLAIMS AGAINST PUBLIC OFFICERS AND EMPLOYEES

After the Executive Secretary reported that there was little hope that S.B. 208 would get out of Committee, a motion was made and carried to give the claims bill no further consideration at this session. Mr. Stanton voted in opposition to this motion.

SENATE BILL NOS. 219 and 220 -- JUVENILE COURT PROCEEDINGS

The Executive Secretary reported that the hearing on these bills is scheduled for March 22, 1961.

III. CURRENT STUDIES

Study No. 34(L) - Uniform Rules of Evidence (Hearsay):

The Commission considered a tentative recommendation submitted by the staff on the hearsay portion of the Uniform Rules of Evidence. The following actions were taken:

Page i

The word "California" was added in the third line of the first paragraph before the word "law".

The second paragraph is to be rewritten to remove the inference that the State Bar has approved the Commission's recommendation.

Page ii

The phrase "which will cover all the Uniform Rules of Evidence" was deleted from the first sentence.

Page 4

The first paragraph is to be reorganized, quoting the general rule of hearsay after the statement of the general rule and its 31 exceptions.

Page 5

The word "now" was substituted for "presently" in the last line of the first paragraph, and the words "is set forth and" were substituted for "with" in the third line from the bottom of the page and the word "are" was inserted after "Commission" in the second line from the bottom of the page.

Page 6

The words "and of the existing law" were added after "rules" in the next to last line.

Page 7

In Rule 62(3), "own" was deleted.

In Rule 63(4)(a) the words "In this State," were deleted, and the word "this" was substituted for "the" which precedes "State" in the first and third lines.

Rule 62(4)(b) was revised to read substantially as follows:

(b) An officer or employee of any other state or territory of the United States or of any public entity in any other state or territory that is substantially equivalent to the public entities included in paragraph (a) of this subdivision.

Page 8

In Rule 62(6) the word "means" was substituted for "includes".

In Rule 62(6)(d) the words "could not" were substituted for "was unable" in the second line and the words "have secured" were substituted for "to secure".

In Rule 63(6)(e) the word "reasonable" was added before "diligence" in the second line.

Pages 9 and 10

The Comment to Rule 62 is to be rewritten as follows:

The first sentence of the first paragraph in the Comment is to be rewritten making it two sentences.

The second paragraph of the Comment is to be reorganized.

A statement is to be added to the Comment giving the justification for defining "unavailable as a witness" to include situations where the declarant is unavailable because he claims a privilege and explaining that this will not make subject to disclosure statements which are themselves protected by a privilege. In this connection it should be noted in the Comment that the exceptions to the hearsay rule do not make evidence admissible - they merely provide that the hearsay rule does not make the evidence inadmissible.

A statement is also to be added giving the reason for the deletion of the last phrase of Rule 62(7)(b).

Pages 11 and 12

In the sixth line of the Comment, "does not define as" was substituted for "excludes from".

After a discussion of whether the last two sentences on page 11 are inconsistent a motion was made and carried to approve these sentences as drafted. Messrs. Sato and Selvin voted in opposition to this motion.

On page 12 the phrase "drafted by the Commissioners on Uniform State Laws" was added after "subdivisions" in the first full paragraph.

Page 13

The requirement that the accuracy of the writing is to be established is to be added to Rule 63(1)(c)(iii). Mr. Stanton voted in opposition to this motion.

Page 15

The phrase "because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy which gave rise to the litigation" was added to the last sentence in the first paragraph.

Page 16

The phrase "unless it is offered by the adverse party" was added to the end of the last paragraph.

Page 17

The suggestion was made that perhaps Rule 63A should not be codified as a separate code section but as a section in the bill. Should this finally be agreed upon, the cross-reference in the Comment on Rule 63(2) to Rule 63A should be reconsidered.

Page 18

In Rule 63(3) the words "recorded in a" were substituted for "taken by" in the sixth line from the bottom of the page.

Page 19

In Rule 63(3)(b) "adverse party" was deleted and "party against whom the testimony was offered" was substituted for

the first deletion and "party against whom the testimony is offered" was substituted for the second deletion. In paragraph (c), "present defendant" was replaced by "party against whom the testimony is offered".

The Comment on Rule 63(3) should include a statement giving the reason for the different rules for a civil action or proceeding and a criminal action or proceeding.

Page 21

In Rule 63(4)(b)(ii), the words "a nervous" were deleted.

The first sentence in the Comment was revised to read: "Paragraph (a) may go beyond existing law."

Page 22

In the second paragraph, the first sentence was revised to read: "The Commission does not recommend the enactment of URE 63(4)(c)." The second sentence of the Comment was deleted.

In the eighth line from the bottom of the page the words "for any reason," were deleted. In the fourth and fifth lines from the bottom of the page the words "it seems likely that" were deleted and in the fourth line from the bottom of the page the word "far" was deleted.

Page 23

In subdivision (5) the phrase "would be admissible if made by the declarant at the hearing and" was added to the

second line after "if the judge finds that it", and the phrase in the third line "upon the personal knowledge of the declarant" was deleted. These changes were made to conform the language to that of URE Rule 63(9) (page 29 of the recommendation).

In the Comment after the first sentence of the second paragraph a cross-reference to Rule 62(7)(a) is to be added.

Page 24

The words "'double hearsay' and" were deleted from the second and third lines from the bottom of the page.

Page 25

In subdivision (6) the words "but only if" were substituted for "unless", and the phrase "pursuant to the procedures set forth in Rule 8" were deleted.

Subdivision (6)(c) is to be revised to provide that a confession is inadmissible when made during a period while the defendant was illegally detained by a public officer or employee of this State, of the United States or of any other state or territory of the United States.

Page 26

The words "The introductory statement and" were added at the beginning of the first sentence in the first paragraph.

In the third paragraph, the first line of the first sentence, the words "states a condition" were substituted for "declares a rule".

Page 27

In subdivision (7) the words "irrespective of" were deleted.

In the second line of the second paragraph "appearing" was substituted for "sued".

In the sixth line from the bottom of the page "either a personal or" was inserted before "a representative capacity".

The fifth line from the bottom of the page was deleted and the next was revised to begin "More time might".

Page 29

In Rule 63(9)(a) the phrase "of the declarant for the party" was deleted. This phrase is not necessary.

Page 30

The Comment should include a statement that points out that the dissimilarity of subdivision (9)(a) and (9)(b) was intended.

In the third line the word "unauthorized" was deleted and in the fourth line the words "whether or not authorized" were added after "employee".

An example of a self-exculpatory statement is to be added after the sentence ending on the seventh line from the bottom of the page.

Page 31

In the first paragraph after "California law;" delete the rest of the sentence and insert "it makes admissible

not only statements that the principal has authorized the agent to make but also statements that concern matters within the scope of the agency".

The third paragraph should note that other cases would be covered by Rule 63(21).

Page 32

In Rule 63(10) the words "the risk of" were added before "civil or criminal" in the seventh line, and in the eighth line the words "tended to render" were substituted for "rendered".

Page 33

In the third line the word "Reasonable" was added before "Men" and the word "unreasonably" was deleted from the fourth line. The word "sufficient" was substituted for "personal" in the fourth line from the bottom of the page.

There is to be a statement in the Comment pointing out that the language "sufficient knowledge" in subdivision (10) is the existing statutory language.

Page 34

The Comment to subdivision (11) was revised as follows:

The Commission is not convinced that there is any pressing necessity for this exception or that there is a sufficient guarantee of the trustworthiness of the statements that would be admissible under this exception.

Pages 35 and 36

In Rule 63(12)(a) the phrase "except as provided in paragraphs (b), (c) and (d) of this subdivision" was added in the third line after "but".

In the fourth line of subdivision (12)(a) the word "a" was deleted after "when such".

The Comment on paragraph (d) of subdivision (12) should be rewritten to develop more fully the reason for this revision; it was suggested that there should also be a statement why "an issue" was used in subdivision (12)(d).

Page 40

In Rule 63(14)(b) the concept of completeness of the records was substituted for the concept of trustworthiness of the records; accordingly, the phrase "that the absence of a record of an act, condition or event warrants an inference that the act or event did not occur or the condition did not exist" ^{was} ~~were~~ substituted for "the trustworthiness of the records".

The first paragraph of the Comment was deleted and the second paragraph was revised to substitute "the courts have not clearly indicated" for "it is not clear".

Page 44

Footnotes are to be added to the Comment on subdivision (17) indicating that the Commission as yet has not considered Rules 68 or 69 and the text of Rules 68 and 69 is to be set out in the footnote.

Page 48

The word "applicable" was deleted from Rule 63(19)(b).

Page 77 - Section 2047

It was agreed not to set out a specific amendment to Code of Civil Procedure Section 2047 in this recommendation but to state in the recommendation that Section 2047 should be examined in connection with revised Rule 63(1)(c) and that the Commission will recommend what action should be taken on Section 2047 in a subsequent recommendation.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

AMENDMENTS TO SENATE BILL NO. 203

AMENDMENT NO. 1

On page 2, strike out lines 28 to 39, inclusive

AMENDMENT NO. 2

On page 3, strike out lines 1 to 9, inclusive

AMENDMENT NO. 3

On page 3, line 10, strike out "1270.3." and insert:

1270.2.

AMENDMENT NO. 4

On page 3, line 11, strike out "Section 1270.1" and insert:

this chapter

AMENDMENT NO. 5

On page 3, strike out lines 15 to 18, inclusive, and insert:

Reimbursement under this chapter may not exceed \$250 for a single family residential unit and may not exceed \$2,500 for any other type of property.

AMENDMENT NO. 6

On page 3, line 26, strike out "1270.4." and insert:

1270.3.

AMENDMENT NO. 7

On page 3, lines 26 and 27, strike out "Section 1270.1" and insert:
this chapter

AMENDMENT NO. 8

On page 3, strike out lines 43 to 52, inclusive.

AMENDMENT NO. 9

On page 4, strike out lines 1 to 4, inclusive.

AMENDMENT NO. 10

On page 4, line 5, strike out "1270.6" and insert:
1270.4.

AMENDMENT NO. 11

On page 4, line 20, strike out "1270.7." and insert:
1270.5.

AMENDMENT NO. 12

On page 4, line 24, after the period insert:
Such agreement may be based upon the estimated amount of moving and storage costs incurred or to be incurred.

AMENDMENT NO. 13

On page 4, line 25, delete "1270.3 do not" and insert:

1270.2

AMENDMENT NO. 14

On page 4, after line 26, insert:

1270.6. Any amount paid or authorized to be paid pursuant to any other state or federal law for moving and storage shall be offset against the amount which a claimant is otherwise entitled to receive under this chapter.

AMENDMENT NO. 15

On page 4, line 27, delete "1270.8." and insert:

1270.7.

AMENDMENT NO. 16

On page 4, line 44, after "Senate Bill No." insert:

205

AMENDMENT NO. 17

On page 5, line 3, delete "or injuriously affected" and insert:

, damaged or benefited

AMENDMENT NO. 18

On page 5, lines 6 and 7, delete "or injuriously affected" and insert:

, damaged or benefited

AMENDMENT NO. 19

On page 5, line 17, delete "or injuriously affected." and insert:

, damaged or benefited.

AMENDMENT NO. 20

On page 5, line 19, after "of" insert:

value,

AMENDMENT NO. 21

On page 5, lines 21 and 22, delete "or injuriously affected." and
insert:

, damaged or benefited.

AMENDMENT NO. 22

On page 5, line 28, after "Senate Bill No." insert:

205

AMENDMENT TO SENATE BILL NO. 205

AMENDMENT NO. 1

On page 2, after line 46, insert:

(g) The nature of the improvements and the character of the existing uses being made of properties in the general vicinity of the property or property interest to be taken, damaged or benefited.

3/15/61

AMENDMENTS TO SENATE BILL NO. 205

AMENDMENT NO. 1

On page 1, line 5, of the printed bill, after "of" insert:
the owner of the property or property interest sought to be taken,
damaged or benefited and other

AMENDMENT NO. 2

On page 1, line 10, strike out "The" and strike out lines 11 to
13, inclusive.

AMENDMENT NO. 3

On page 2, line 9, after "upon" insert:
relevant

AMENDMENT NO. 4

On page 2, line 14, strike out "or injuriously affected" and insert:
, damaged or benefited

AMENDMENT NO. 5

On page 2, line 16, after "terms" insert:
and circumstances

AMENDMENT NO. 6

On page 2, line 17, after "sell" insert:

and purchase

AMENDMENT NO. 7

On page 2, line 18, strike out "or injuriously affected" and insert:

, damaged or benefited

AMENDMENT NO. 8

On page 2, line 21, after "terms" insert:

and circumstances

AMENDMENT NO. 9

On page 2, line 21, after "sale" insert:

of

AMENDMENT NO. 10

On page 2, line 22, strike out "of" and insert:

and purchase

AMENDMENT NO. 11

On page 2, line 25, after "terms" insert:

and circumstances

AMENDMENT NO. 12

On page 2, lines 26 and 27, strike out "or injuriously affected" and insert:

, damaged or benefited

AMENDMENT NO. 13

On page 2, line 28, before the period, insert:

, including but not limited to a lease providing for a rental fixed by a percentage or other measurable portion of gross sales or gross income from the business conducted on the leased property

AMENDMENT NO. 14

On page 2, line 29, after "terms" insert:

and circumstances

AMENDMENT NO. 15

On page 2, line 31, before the period, insert:

, including but not limited to a lease providing for a rental fixed by a percentage or other measurable portion of gross sales or gross income from the business conducted on such property in cases where the rental is customarily so fixed

AMENDMENT NO. 16

On page 2, strike out lines 32 to 39, inclusive, and insert:

(e) The capitalized value of the reasonable net rental value attributable to the property or property interest to be taken, damaged or benefited, which may be based on a consideration of (1) the reasonable net rental value of the land and the existing improvements thereon and (2) the reasonable net rental value of the land as improved by improvements that would enhance the value of the property or property interest for its highest and best use.

AMENDMENT NO. 17

On page 2, line 41, strike out "or injuriously affected" and insert:

, damaged or benefited

AMENDMENT NO. 18

On page 3, line 1, after "terms" insert:

and circumstances

AMENDMENT NO. 19

On page 3, line 4, after "terms" insert:

and circumstances

AMENDMENT NO. 20

On page 3, line 6, strike out "or injuriously affected" and insert:

, damaged or benefited

AMENDMENT NO. 21

On page 3, lines 9 and 10, strike out "or injuriously affected" and insert:

, damaged or benefited

AMENDMENT NO. 22

On page 3, line 18, before the period, insert:

, but nothing in this paragraph prohibits the consideration of actual or estimated taxes for the purpose of determining the capitalized value of the reasonable net rental value attributable to the property or property interest to be taken, damaged or benefited

AMENDMENT NO. 23

On page 3, line 20, strike out "or injuriously affected" and insert:

, damaged or benefited

AMENDMENT NO. 24

On page 3, line 22, after "of" insert:

value,

AMENDMENT NO. 25

On page 3, lines 24 and 25, strike out "or injuriously affected" and insert:

, damaged or benefited

AMENDMENTS TO SENATE BILL NO. 206

AMENDMENT NO. 1

On page 1, line 8, of the printed bill, insert a comma at the end of the line.

AMENDMENT NO. 2

On page 2, line 36, before the period, insert:

which date, unless the plaintiff requests a later date, shall be the earliest date on which the plaintiff would be entitled to take possession of the property if service were made under subdivision (c) of this section on the day the order is made

AMENDMENT NO. 3

On page 2, lines 50 and 51, strike out "it appears by affidavit to the satisfaction of the court that".

AMENDMENT NO. 4

On page 3, lines 4 and 5, strike out "the court may order that in lieu of such personal service the plaintiff" and insert:

the plaintiff may in lieu of such personal service

AMENDMENT NO. 5

On page 3, line 21, after "deeds" insert:

or other instruments

AMENDMENT NO. 6

On page 3, strike out lines 35 to 51, inclusive, and insert:

(e) The amount deposited pursuant to this section shall be deemed to be the security referred to in Section 14 of Article I of the Constitution of this State.

AMENDMENT NO. 7

On page 4, strike out lines 1 to 11, inclusive, and insert:

(f) No reference shall be made in the trial of the issue of compensation to the amount deposited or withdrawn or to the evidence introduced in fixing the amount of such deposit or withdrawal.

AMENDMENT NO. 8

On page 4, line 8, strike out "(1)" and insert:

(g)

AMENDMENT NO. 9

On page 4, strike out lines 46 to 52 inclusive.

AMENDMENT NO. 10

On page 5, strike out lines 1 to 6, inclusive, and insert:

(b) If the total amount sought to be withdrawn prior to judgment exceeds the amount of the original deposit, each applicant, before any of such excess is withdrawn, shall file an undertaking executed by two

or more sufficient sureties approved by the court to the effect that they are bound to the plaintiff in double the amount of such excess for the return of any amount withdrawn by the applicant that exceeds the amount to which the applicant is entitled as finally determined in the eminent domain proceeding, together with legal interest from the date of its withdrawal.

If there is more than one applicant and the total amount sought to be withdrawn exceeds the amount of the original deposit, the applicants, in lieu of filing separate undertakings, may jointly file an undertaking executed by two or more sufficient sureties approved by the court to the effect that they are bound to the plaintiff in double the amount of such excess for the return of any amount withdrawn by the applicants that exceeds the amount to which the applicants are entitled as finally determined in the eminent domain proceeding together with legal interest from the date of its withdrawal.

If the undertaking required by this subdivision is executed by an admitted surety insurer, the undertaking is sufficient in amount if the surety is bound only to the extent that the amount sought to be withdrawn exceeds the amount originally deposited.

The plaintiff may consent to an undertaking that is less than the amount required under this subdivision.

If the undertaking is executed by an admitted surety insurer, the applicant filing the undertaking is entitled to recover the premium paid for the undertaking, but not to exceed two per cent of the face value of the undertaking, as a part of the recoverable costs in the eminent domain proceeding.

AMENDMENT NO. 11

On page 5, line 41, after the period, insert:

If the court determines that a party is entitled to withdraw any portion of a deposit to which another person claims an interest, the court may require such party, before withdrawing such portion, to file an undertaking executed by two or more sufficient sureties approved by the court to the effect that they are bound to the adverse claimant in such amount as is fixed by the court, but not to exceed double the amount claimed by the adverse claimant, for the return of any amount withdrawn that exceeds the amount to which such party is entitled as finally determined in the eminent domain proceeding, together with legal interest from the date of its withdrawal.

AMENDMENT NO. 12

On page 6, line 11, strike out "who deposited it" and insert:

entitled thereto

AMENDMENT NO. 13

On page 7, lines 1 and 2, strike out "plaintiff is entitled to take possession of the property under an order authorizing the plaintiff to do so." and insert:

defendant moves from the property in compliance with an order of possession.

AMENDMENT NO. 14

On page 7, line 45, after the period, insert:

The order shall state the date after which the plaintiff is authorized to take possession of the property which date, unless the plaintiff requests a later date, shall be 10 days after the date of the order.

AMENDMENT NO. 15

On page 8, line 34, strike out "who paid it into court" and insert:

entitled thereto

AMENDMENT NO. 16

On page 10, strike out lines 34 to 38, inclusive, and insert:

(d) If, after the defendant moves from the property sought to be condemned in compliance with an order of possession, the plaintiff abandons the proceeding as to such property or a portion thereof or it is determined that the plaintiff does not have authority to take such property or a portion thereof by eminent domain,

AMENDMENT NO. 17

On page 10, line 39, strike out "thereof,"



AMENDMENT NO. 18

On page 10, strike out lines 44 to 47, inclusive, and insert:
loss or impairment of value suffered by the land and improvements
after the time the risk of loss was imposed on the plaintiff under
Section 1249.1.

AMENDMENT NO. 19

On page 11, strike out lines 7 to 11, inclusive, and insert:

(3) The date after which the plaintiff may take possession of
the property as stated in an order authorizing the plaintiff to take
possession.

PERMIT INTRODUCTION OF OFFER ON SUBJECT PROPERTY

AMENDMENT NO. 1

On page 3, line 12, delete "unless such" and insert:

unless:

- (1) Such

AMENDMENT NO. 2

On page 3, line 14, delete ". Nothing in this subdivision" and insert:

but nothing in this paragraph

AMENDMENT NO. 3

On page 3, after line 16, insert:

(2) Such offer (i) is an offer to purchase or lease which included the property or property interest to be taken, damaged or benefited, (ii) is bona fide, not affected by the acquisition or proposed improvement and made in writing by a person ready, willing and able to buy or lease at the time the offer was made and the terms of the offer are such that the transaction, if the offer were accepted, would have been or would be reasonably certain of consummation and would constitute an open market transaction and (iii) is introduced by the owner of the property or property interest for which the offer to purchase or lease was made.

COUNTY OF SAN DIEGO

Office of
County Counsel

302 Civic Center
San Diego 1, California

December 28, 1960

*Meeting
Copy*

Senate Judiciary Committee
Sub Committee on Eminent Domain
Capitol Building
Sacramento, California

Attn: Senator Virgil O'Sullivan, Chairman

Re: Recommendations of the California Law Revision
Commission Relative to Eminent Domain

Honorable Sirs:

I

RECOMMENDATIONS RELATING TO EVIDENCE IN CONDEMNATION CASES.

Proposed Section 1248.1 states in substance that the owner of the property sought to be condemned is presumed to be qualified to express an opinion as to its value. We feel that such an assertion implies that the owner's testimony is entitled to greater weight than expert testimony regardless of the reasons he may give for his opinion. This inference is contrary to the law relating to the weight to be given opinion testimony (B.A.J.I. Nos. 33 and 33a). Accordingly, we recommend that Section 1248.1 be amended in part as hereinafter set forth:

. . . The owner of the property or property interest sought to be taken or injuriously affected may testify as to such opinions.

Appraisal texts, qualified appraisers and many jurisdictions recognize that sales of comparable property, if available, are the best evidence of market value. If the desired result is to codify the best appraisal practices and provide by statute for their utilization in proper cases, we recommend that Section 1248.2 be amended to allow the capitalization approach and cost of reproduction approach only after it is determined that the most reliable approach, which is the market data approach, is not available. This recommendata is incorporated in the enclosed revision of Section 1248.2.

Section 1248.2 is not clear as to whether or not certain concepts, previously established by stare decisis, are to be overruled. For example, the concepts of "fair market transaction" and "market value" (Heilbron definition) contemplate a cash transaction, rather than trades, exchanges, family transactions, plottage and face value of instruments such as subordinated purchase price trust deeds, second trust deeds and inferior trust deeds or mortgages. The enclosed revision of Section 1248.2 has been amended to clarify this distinction.

It is our opinion that comparable sales should be limited to sales otherwise comparable that occur prior to the date of valuation. The definition of market value contemplates a buyer and seller who would only have knowledge of sales on or before the valuation date. The Federal rule and the rule in many other states limits the admissibility of market data to sales on or before the valuation date. By prohibiting the use of subsequent sales, the factor of enhancement due to the particular improvement involved and the temptation to manufacture inflated data are for the most part avoided. This recommendation is also embodied in the enclosed revision of Section 1248.2.

II

RECOMMENDATIONS RELATING TO TAKING POSSESSION AND PASSAGE OF TITLE IN EMINENT DOMAIN PROCEEDINGS.

The County of San Diego has had no complaints of any kind relating to taking possession, at least within the past 15 years. The County during that time has improved many county highways at times when it has been necessary to acquire immediate possession of rights of way. Most of this period was prior to the adoption in 1957 of the notice provisions of Section 1243.5 of the Code of Civil Procedure.

Private parties receive more than ample actual notice of the intention of the public body to condemn their property. This is true because due to the expense of condemnation and the desire to save taxpayers money, negotiation is always conducted prior to institution of condemnation proceedings except in those rare cases where property owners are for one reason or another unavailable. In the usual course of negotiation representatives of the public agency try to obtain the property by purchase and in so doing it becomes quite obvious that cessation of possession by the proposed condemnees. When these negotiations are not successful, the public agency informs the persons in possession it will be necessary to condemn the property because they are unable to reach agreement. Then the necessary summons, complaint and orders of immediate possession are prepared. To require 20 days notice under these circumstances seems unjustified in view of the general lack of hardship experienced by condemnees to date under the present procedure.

Assuming, however, that a period of 20 days is desirable, it should be pointed out that it is absolutely essential that public

agencies be able to secure orders of immediate possession without being subject to the various delays proposed, such as stays, motions to vacate and the right of appeal. To require public agencies to delay construction due to one property owner's delatory tacts, thereby resulting in the frustration of millions of dollars of badly needed highways or other improvements, would be to put the right of one individual paramount to the recognized right of the public to acquire property for public purposes.

The extraordinary writ procedure of prohibition and mandamus are available to annul an erroneous order of immediate possession made contrary to the constitutional mandate. These procedures are far more expeditious than appeal and have been successfully employed in the past.

We note that in those cases where personal service of condemnees cannot be obtained the proposed legislation requires the same type of jurisdictional affidavit as is required for an order for publication of summons. This could cause unreasonable delay due to the necessary investigation required to constitute a diligent search. It is often necessary to correspond with persons all over the country in order to make such an affidavit in good faith. Various improvement acts require publication once in a newspaper, posting at stated intervals along property and a notice directed to the owner as he appeared on the last equalized assessment roll or as known to the clerk of the governmental agency. The 1911 Improvement Act is a good example. If current statutes do not provide sufficient notice it is suggested that posting plus mailing to the owner as shown on the last equalized assessment roll or as known to the condemnor would be entirely adequate.

The requirement of notice, except perhaps for posting, should be no more stringent than presently required by Section 1243.5.

The proposed legislation disallowing abandonment to the condemnor after immediate possession has been secured is unnecessary. The condemnee is adequately secured for any damages caused by immediate possession at present. The condemnee under existing law has the right to recover his expenses if the action is abandoned. For example, the condemnee may recover such items as attorney's fees that are normally not compensable. Similarly any damage to improvements or the realty in the nature of waste could be recovered under the present procedure.

It is respectfully suggested that Section 1243.5 be amended to read:

Section 1243.5. (a) In any cases in which the state, a county, a municipal corporation, a public corporation, or a district takes immediate possession of lands to be used for reservoir purposes, or a right of way, pursuant to Section 14 of Article 1 of the Constitution, of this state, the state, or such county, municipal corporation, public

corporation, or district, as the case may be, shall, at least three (3) days prior to the time possession is taken, personally serve on or mail to the record owner or owners of the property, if known, and the person or persons in possession of the property, if any, either a copy of the order of the court authorizing such possession or a notice thereof. If the order or notice is mailed it shall be sent by certified mail, and if sent to the owners, it shall be addressed to them at their last known address. A single service upon or mailing to those at the same address shall be sufficient. The latest secured assessment roll in the county where the property is located may be used to ascertain the names and addresses of the owners of the property. In addition to the personal service or notice herein provided, said condemnor shall post a notice of the taking of immediate possession along the property proposed to be condemned at least three (3) days prior to the time possession is taken. Such notice shall be conspicuously posted along the line of the property to be condemned, at not more than 300 feet in distance apart, but not less than 3 in all, and at each dwelling on property proposed to be condemned.

III

RECOMMENDATIONS RELATING TO PROPOSED LEGISLATION FOR REIMBURSEMENT FOR MOVING EXPENSES WHEN PROPERTY IS ACQUIRED FOR PUBLIC USE.

Payment for any moving expenses would be a departure from the objective standard of compensation based on market value, a standard that has been accepted down through the years as the criterion for acquisitions by public agencies. Reimbursement for moving expenses would be a significant step toward the indemnity basis of compensation, a basis which could make the cost of substantial public improvements prohibitive. If a condemnor is required to indemnify all condemnees we will soon have to pay for such things as sentimental value or attachment to certain improvements upon condemnees property regardless of their market value.

A person selling in a free market transaction realizes that he is going to have to move himself and that he will have certain expenses connected therewith, for example, advertising, moving expense, broker's fees, clean up charges, etc. Therefore, the seller usually includes in his selling price sufficient amounts to cover these foreseeable expenses. Accordingly, we feel that the market value standard reflected by sales of comparable property will reflect these items of expense. Further, a condemnee not only receives cash but avoids many of the costs of a private sale.

It is our feeling that any departure from the objective standard of market value toward the subjective theory of indemnification would be a grave mistake and result in not only fewer but far more costly public improvements.

Another fundamental objection to the proposed amendment is that it would result in the condemnee being awarded a sum equal to the cost charged by a moving company for complete packing and moving. Where commercial or manufacturing establishments are condemned, the cost of moving could be tremendous. There would be no incentive for the condemnee to keep this cost at a minimum.

The proposed legislation should limit "moving" to "packing, transporting and unpacking". The inclusion of such words as "dismantling, removing, loading, reassembling and installing" would confuse many items of business or personal expense with moving expenses.

Most leases provide that any compensation in a condemnation action received by the lessee shall be paid to the lessor. Therefore, where the lessee and lessor have contracted to pay lessor any compensation received, it is submitted that the condemnor should not pay the lessor for the lessee's moving expenses.

This office strongly opposes any payment for moving expenses. If, however, the Committee believes there should be some payment for this expense, it is suggested that the proposed legislation be modified to redefine "moving" and to impose a \$75 maximum as follows:

Section 1270.

(e) "Moving" means packing, transporting and unpacking.

Section 1270.3.

Whenever a person is entitled to reimbursement under Section 1270.1 for the cost of moving personal property such reimbursement shall not exceed the sum of \$75. Provided, however, neither the lessor nor the lessee shall receive compensation for the moving expenses of a lessee's personal property when the lessee has covenanted to pay any award of compensation or damages to the lessor.

Respectfully submitted,

HENRY A. DIETZ, County Counsel

By

ROBERT G. BERREY, Deputy

DEW/RGB/mfs
encl.

cc: Subcommittee Members
Attorney for Subcommittee

SECTION 1248.2 AS REVISED

Section 1248.2. The opinion of a witness as to the amount to be ascertained under subdivision 1, 2, 3 or 4 of Section 1248 is admissible only if the court finds that the opinion is based upon facts and data that a willing purchaser and a willing seller, dealing with each other with a full knowledge of all the uses and purposes for which the property is reasonably adaptable and available, would take into consideration in determining the cash price at which to purchase and sell the property or property interest to be taken or injuriously affected, which facts and data may include but are not limited to:

(a) The price and other terms of any sale or contract to sell which included the property or property interest to be taken or injuriously affected or any part thereof if the sale or contract was freely made in good faith within a reasonable time before the date of valuation.

(b) The price and other terms of any sale or contract to sell of comparable property if the sale or contract was freely made in good faith within a reasonable time before the date of valuation.

(c) The rent reserved and other terms of any lease which included the property or property interest to be taken or injuriously affected or any part thereof which was in effect within a reasonable time before the date of valuation.

(d) The rent reserved and other terms of any lease of comparable property if the lease was freely made in good faith within a reasonable time before the date of valuation.

(e) Sales of comparable property are the best evidences of the market value of property. If the court determines there are sufficient sales of comparable property to provide a reasonable basis for an expert witness to form an opinion of value, evidence of the matters specified in subdivisions (1) or (2) shall be inadmissible on direct examination; provided, however, on cross examination such evidence may be elicited with respect to the qualifications of the witness, the extent of his investigation, or for other similar purposes.

In the event the court determines there are insufficient sales of comparable property to provide a basis for an expert witness to form an opinion of value, evidence of the matters specified in the following subdivisions (1) or (2) may be admitted on direct examination if otherwise relevant and material:

1. The capitalized value of the reasonable net rental attributable to the land, if the property be unimproved, or to the land and improvements, if improved, as distinguished from capitalized value of the income or profits attributable to any business conducted thereon.

2. The value of the property or property interest to be taken or injuriously affected as indicated by the value of the land together with the cost of reproducing or replacing the improvements thereon, if the improvements enhance the value of the land for its highest and best use, less whatever depreciation or obsolescence the improvements have suffered.