MINUTES OF MEETING

OF

January 19 and 20, 1962

Los Angeles

A regular meeting of the Law Revision Commission was held in Los Angeles on January 19 and 20, 1962.

Present: Herman F. Selvin, Chairman
John R. McDonough, Jr., Vice Chairman
Honorable Clark L. Bradley
Joseph A. Ball
James R. Edwards
Richard H. Keatinge
Sho Sato
Thomas E. Stanton, Jr.
Angus C. Morrison, ex officio

Absent: Honorable James A. Cobey

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

During the discussion of Study No. 52(L) - Sovereign Immunity, Professor Arvo Van Alstyne, the Commission's research consultant, and the following persons were present:

J. F. Brady, Department of Finance (January 19)
Robert F. Carlson, Department of Public Works
Mrs. Joan D. Gross, Office of the Attorney General (January 19)
George Hadley, Department of Public Works (January 19)
Louis J. Heinzer, Department of Finance (January 19)
Holloway Jones, Department of Public Works
Robert Lynch, Office of the County Counsel, Los Angeles
Robert Reed, Department of Public Works

Minutes. On page 4 of the Minutes of the December meeting, the second sentence immediately following the definition of aggravated arson was revised to read: "The Commission favored the requirement that the actor's specific mental state be shown as an element of the crime."

The Minutes of the December meeting were approved as corrected.

ADMINISTRATIVE MATTERS

Election of Officers. Upon motion by Commissioner Stanton, seconded by Commissioner Sato, the Commission unanimously adopted the following policy:

> Where a Chairman is eligibile for reelection to office, the incumbent Vice Chairman also is eligible for reelection to office even though the reelection of the Vice Chairman may result in his succeeding himself for a second full term.

The reason for adopting this policy is to allow the Vice Chairman to continue in office where the Chairman is reelected to the Chairmanship.

Upon motion by Commissioner McDonough, jointly seconded by Commissioners Stanton and Keatinge, Mr. Selvin was nominated for the office of Chairman. The Commission approved closing further nominations upon a motion by Commissioner Edwards, seconded by Commissioner Stanton. Mr. Herman F. Selvin was unanimously elected Chairman.

Upon motion by Commissioner Stanton, seconded by Commissioner Sato, Professor McDonough was nominated for the office of Vice Chairman. The Commission approved closing further nominations upon motion by Commissioner Keatinge, seconded by Commissioner Stanton. Professor John R. McDonough, Jr. was unanimously elected Vice Chairman.

Professor Chadbourn's Contract. The Commission approved payment of the remaining sums due Professor Chadbourn since his work on the study relating to the Uniform Rules of Evidence is substantially completed. However, Professor Chadbourn is to be available to supplement his study,

to attend Commission meetings and to perform other services in consultation with the Commission as required for the completion of this topic. It was suggested that the Commission may want to enter into a new contract in the future with Professor Chadbourn for consultation services. This would provide additional compensation to Professor Chadbourn and might be justified by the fact that the Commission will be considering this study for at least three more years.

Statistical Research Consultant for Sovereign Immunity Study. The Executive Secretary reported on the progress made for securing the services of a statistical research consultant, including the recent meeting with Senator Regan. The Commission authorized the Chairman in his discretion to execute a contract on behalf of the Commission with the research consultant or consultants employed by the Senate Fact Finding Committee. The contract or contracts will require that the research consultant or consultants shall attend Commission meetings (on request of the Commission) to consult with and advise the Commission. This authorization contemplates payment of $20 per diem to the research consultant for each day of attendance at Commission meetings and reimbursement for necessary travel expenses incurred in connection therewith.

Annual Report. The Commission considered the Supplement to Memorandum No. 1(1962) containing suggested changes in the Commission's 1962 Annual Report. All of the changes in this Supplement were approved with the exception of the following:

(1) The paragraphs describing personnel changes were revised by inserting a period immediately following the word "vacancy" and

deleting the remaining words beginning "created by the resignation of . . . . ."

(2) The staff's suggested revision (blue page) of the comment on the ACLU case was changed by deleting the word "because" in two places and inserting "insofar as" in both places; by the addition of the word "that" between "organization" and "the" in the eleventh line; and by deleting the last sentence.

(3) That portion of the report relating to the Commission's 1961 Legislative Program was revised by deleting detailed discussion of bills which failed to pass and by rearranging the order of presentation to describe, first, bills which became law (and defeated bills logically related by subject matter thereto) and, second, bills which did not become law.

The following additional revisions were made:

(1) The last full sentence on page 5 was revised to read:

> When the Commission has reached a conclusion on the matter, a printed pamphlet is published that contains the research study and the official report and recommendation of the Commission together with a draft of any legislation necessary to effectuate the recommendation.

(2) The last sentence in footnote 4 was deleted.

The entire report was finally approved as revised.

Meeting Dates. The following schedule of future meetings was approved by the Commission:

February 16 and 17	(San Francisco)
March 16 and 17	(Los Angeles)
April 19, 20 and 21	(San Francisco)
May 17, 18 and 19	(San Francisco)

STUDY NO. 46 - ARSON

The Commission considered Memorandum No. 2(1962) and the exhibits thereto relating to the study on arson. The following matters should be particularly noted.

Section 450 (Justifiable burning). Proposed subdivision (a) of this section defines the circumstances under which a burning of one's own property may be justified. The Commission revised this subdivision to read literally as follows:

> § 450. (a) If a person burns his own property, his conduct is justifiable if he did not consciously disregard a substantial risk that his conduct might jeopardize human life or cause damage to the property or injury to the person of another.

In adopting this language, the Commission approved deleting the requirement of showing that there was no intent to defraud another person. [Commissioner McDonough voted against this action.] This action was taken because the Commission believes that there is no reason for singling out fraud accomplished by burning for punishment under the arson statutes. Consistent with this action, the Commission approved making no change in existing Penal Code Section 548 which deals specifically with the fraud problem.

Also, to make it clear that the phrase, "might jeopardize human life," as used in this subdivision and as similarly used in Section 448, means a serious threat to life, the Commission added the provision that the actor's conduct is not justifiable if he consciously disregards a substantial risk that his conduct might cause injury (even slight

injury) to the person of another.

The Commission revised subdivision (b) to read as follows:

> (b) If a person burns the property of another, his conduct is justifiable:
>
> (1) If he acted at the direction or with the express consent of one who was actually entitled, or of one who he believed was entitled, to give such direction or consent and if the justification provided by subdivision (a) of this section exists; or
>
> (2) If he believed his conduct necessary to avoid a substantial risk of serious harm to the person or property of himself or another.

In adopting this language, the Commission approved the policy that the consent to the burning of another's property as provided in Section 450(b)(1) may be given alternatively by one who had actual authority to give such consent or by one who the actor actually believed was entitled to give such consent, whether or not the actor's belief was reasonable. The Commission disapproved a requirement of showing that the actor's belief was reasonable because the criminal law should not punish conduct which is merely unreasonable because of ignorance, stupidity, etc.

A similar requirement of reasonable belief was rejected in favor of actual belief in connection with Section 450(b)(2). In this same section, the Commission rejected the conjuctive requirement of balancing respective harms sought to be avoided against those sought to be prevented because tests of this type depart from certainty in the law.

Section 451a (Attempted arson). The Commission approved deleting the entire first paragraph of this section in favor of making the general attempt statute (Penal Code Section 664) applicable to proscribe the

felonious conduct of attempted arson. The second paragraph of this section is to be revised by the staff to state affirmatively that the conduct described therein constitutes the substantive offense of attempted arson.

Section 189 (Felony-murder rule). The Commission reaffirmed its previous decision, which was made before the elements of and punishments for arson and aggravated arson were determined, to delete all reference to arson from the list of crimes specifically identified in this section. This makes any death which occurs in the perpetration of or attempt to perpetrate arson or aggravated arson second degree murder with punishment of from 5 years to life. The reason for this action is the same as for the previous action, namely, the Commission believes that a person should not be subject to the death penalty without having a specific intent to take a life and where such intent exists other requisites for first degree murder should be proved in order to convict. Basically, the Commission disapproves of the felony-murder rule.

Section 644 (Habitual criminal statute). The Commission reaffirmed its previous decision to substitute aggravated arson for "arson as defined in Section 447a of this code" in the upper portion of subdivisions (a) and (b) of this section, and to leave simple arson among the crimes included in the lower portion of each of these subdivisions. The effect of this action is that aggravated arson is a crime for which there is an increased minimum imprisonment if the arsonist has a sufficient number of "priors," while a conviction for simple arson (and a conviction for

aggravated arson, since "arson" is an included offense) is sufficient to count as a "prior".

Section 1203 (Probation statute). The Commission approved deleting all reference to any form of arson in any part of this statute. The effect of this action is to invest the courts with the power to grant probation upon conviction for arson or for aggravated arson to the same extent that a court has the power to grant probation for any crime not specifically mentioned in this section. The practical effect of this action insofar as present law is concerned is that there would no longer be a policy against granting probation upon conviction for arson where the offender was armed with a deadly weapon at the time of the commission of the offense or at the time of his arrest.

STUDY NO. 52(L) - SOVEREIGN IMMUNITY

The Commission considered Memorandum No. 4(1962), the Supplement to Memorandum No. 4(1962) and the study prepared by Professor Van Alstyne relating to sovereign immunity.

Professor Van Alstyne stated that he would bring before the Commission at its next two meetings problems of governmental liability arising in the following areas of activity: operation of motor vehicles, health and medical services, law enforcement, fire protection and prevention, parks and recreation, and public education. The Commission suggested that priority be given to the listed areas other than operation of motor vehicles and public education, for there is existing legislation that resolves many of the problems arising out of motor vehicle operations and education while there is little legislation in the other listed areas. The unresolved problems arising out of motor vehicle operations and education will be considered after the problems in the other areas are considered.

The Commission then considered the present Public Liability Act and the problems of governmental liability for dangerous and defective conditions. The principles approved and actions taken were:

(1) The Public Liability Act should be applicable to all public entities, not merely to counties, cities and school districts.

(2) "Dangerous or defective conditions" should be defined to mean a condition of public property which unreasonably exposes persons or property to a substantial risk of injury.

The staff was asked to draft statutory language that would indicate in principle that a dangerous and defective condition of public property is a condition:

(a) That creates an unreasonable risk of injury in its authorized or intended use.

(b) That creates an unreasonable risk of injury to persons who, foreseeably, will use the property without notice that such use is unauthorized or is not a use for which the property is intended to be used.

(c) That creates an unreasonable risk of injury to persons of less than full age who foreseeably will use the property without an appreciation of the hazard.

The foregoing propositions were not approved as principles of liability. The Commission indicated that it desired to see legislation drafted as suggested so that the matter might be considered further. The underlying principle is that the public's basic duty is to provide property that is safe for the use for which the property is authorized and intended to be used. The public's duty, however, may be broader in some instances--as in (b) and (c) above.

(3) The trivial defect rule that has developed in sidewalk cases should be extended to all dangerous or defective condition cases.

The following language was not specifically approved by the Commission, but was presented to the Commission by Professor Van Alstyne and was before the Commission when the foregoing principle was approved:

The issue whether a condition of public property is "dangerous or defective" within the meaning of this act shall not be treated as a question of fact if the trial or appellate court is satisfied upon all the evidence, viewed most favorably to the plaintiff, that the condition is of such a minor, trivial or insignificant nature in view of the surrounding circumstances that a reasonable person would not conclude that it unreasonably exposes persons or property to probable injury.

(4) The plaintiff should be required to prove, as a condition of recovery under the Public Liability Act, that the use made by him of the allegedly defective public property (where injury was sustained while plaintiff was using such property) was of a kind which was reasonably foreseeable by the responsible officers of the defendant entity.

Various Commissioners indicated that an entity should not have the duty to make its property safe for the bizarre use. However, Mr. Stanton voted against the proposition because the plaintiff should not lose merely because his particular use is bizarre or unforeseeable if the defect that caused his injury created a hazard to those using the property in a normal way.

(5) The consultant's proposal that the plaintiff be required to prove, as a condition of recovery under the Public Liability Act, that he did not have notice or knowledge that his use or entry upon the allegedly defective property was wrongful or unauthorized was rejected.

(6) A public entity, to be liable for a dangerous or defective condition under the Public Liability Act, should have either actual or constructive notice of the condition. "Constructive notice" here means the notice that would be provided by a reasonable inspection system;

it does not mean the notice that would have been afforded by reasonable inspection of the defective property unless (a) such property was actually inspected or (b) a reasonable inspection system would have resulted in an actual inspection of the defective property. An entity should also be charged with notice if the defect is attributable to work done by a public employee in a negligent, careless or unworkmanlike manner.

This principle was approved to avoid the implications of certain cases that "constructive notice" exists if a reasonable inspection of the defective property itself would reveal the defect. Such a standard imposes an inspection requirement that cannot be met. A public entity should be exonerated if it is operating a reasonable inspection system unless, of course, it created the condition or actually inspected the defective property and negligently failed to discover the defect.

A suggestion that the staff draft a general definition of an adequate inspection system was discussed but not acted upon.

A proposal to require public entities to retain written notices of defective property was rejected. Present discovery procedures were deemed reasonably adequate to provide information as to whether an entity had received actual notice of the defect.

(7) The Public Liability Act should retain the principle now stated in Government Code Section 53051(b) that a public entity is not liable for injuries caused by a dangerous or defective condition unless, within a reasonable time after notice, the entity failed either to remedy the condition or to take action reasonably necessary to protect the public against the condition.

The Act should provide that evidence relating to lack of funds, insufficient numbers of employees or equipment, the type of activity involved, the magnitude of the problem and of administrative difficulties arising therefrom and the general reasonableness of the entity's conduct after receiving notice is admissible by way of defense in cases arising under the Public Liability Act. This is probably the existing law; however, a few cases have excluded such evidence as this.

(8) The proposal that a general immunity from liability for injuries caused by an accumulation of snow and ice be created was rejected. In most cases, the hazard will be apparent and the doctrine of assumption of the risk will protect the public entity. In other cases, the entity will be protected if it does all that it can reasonably be expected to do to remedy the condition or warn of the hazard. The Commission indicated that it would be undesirable, therefore, to create an immunity from liability that would be applicable in all cases.

(9) The proposal that the plaintiff should have the burden of proving that he was free from contributory negligence was rejected. The Commission indicated that, technically, the burden would not be too meaningful because the plaintiff would be entitled to the benefit of the presumption of due care. As a practical matter, placing the burden of showing freedom from negligence on the plaintiff would probably not affect the results of the cases, for a plaintiff will have to testify concerning the circumstances of the accident and will be subject to cross-examination on his version of the accident. Commissioner Bradley voted against the motion to reject this proposal.

(10) The plaintiff should not be deprived of his right of action against a public entity because of the negligence of a third party; but, the entity should enforce whatever rights it may have--to contribution, indemnity, etc.--against the negligent third party.

(11) The consultant's suggestion that no limitation be placed on the amount of recoverable damages for injuries caused by dangerous and defective conditions was approved.