Place of Meeting

Room 3189 (next to Senate Lounge)
State Capitol
Sacramento

!!!!AGENDA!!!!*

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Sacramento February 22-23, 1963

Meeting will start at 9:30 a.m. on February 22 and at 9:00 on February 23.
Meeting will not last later than 4:00 p.m. on February 23.

February 22

1. Minutes of December 1962 meeting (sent 1/8/63)

2. Consideration of Amendments to Senate Bill No. 71

   Memorandum No. 63-15 (Senate Bill No. 71)(Discovery in Eminent Domain Proceedings) (enclosed)

3. Study No. 52(L) - Sovereign Immunity

   Memorandum No. 82(1962)(sent December 10, 1962)(Adjustments and Repeals of Special Statutes)

   First Supplement to Memorandum No. 82(1962)(enclosed)

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

   Memorandum No. 63-1 (Privileges article as previously revised and approved by Commission)(sent 1/23/63)(will not discuss at meeting--for information only)

   Memorandum No. 63-2 (New Jersey Article on Privileges)(sent 1/23/63) (will not discuss at meeting--for information only)

   Memorandum No. 63-3 (Scope of Privileges Article)(sent 1/23/63)

   Memorandum No. 63-4 (Rules 23-25)(sent 1/23/63)

   Memorandum No. 63-5 (Rule 26)(sent 1/23/63)

* This is the last one. Honest.

Memorandum No. 63-6 (Rule 27)(sent 1/24/63)
Exhibit I to Memorandum No. 63-6 (sent 2/1/63)

Memorandum No. 63-7 (Rule 27a--Psychotherapist privilege)(sent 1/24/63)

Memorandum No. 63-8 (Rule 28)(sent 2/1/63)

Memorandum No. 63-9 (Rules 29-36)(sent 2/1/63)

Memorandum No. 63-10 (Rule 36a--Newsman's privilege)(sent 2/1/63)

Memorandum No. 63-11 (Rule 37)(sent 2/1/63)

Memorandum No. 63-12 (Rules 38, 39 and 40)(sent 2/1/63)

Research Study (from printed copy)(you have this)

Report of Chairman of State Bar Committee on URE (sent 2/1/63)

February 23

5. Report of Statistical Consultant to Senate Fact Finding Committee

This report will be distributed at the meeting if available. If not, a summary of the report will be presented in oral form at the meeting.

6. Consideration of Amendments to Certain Bills

Memorandum No. 63-16 (Senate Bill No. 42)(enclosed)

Memorandum No. 63-14 (Senate Bills Nos. 44, 45 and 46)(enclosed)

Memorandum No. 63-17 (Senate Bill No. 47) (enclosed)

file

MINUTES OF MEETING

of

February 22 and 23, 1963

Sacramento

A regular meeting of the Law Revision Commission was held in Sacramento on February 22 and 23, 1963.

Present: Herman F. Selvin, Chairman
John R. McDonough, Jr., Vice Chairman
Hon. James A. Cobey
James R. Edwards
Richard H. Keatinge
Sho Sato
Thomas E. Stanton, Jr. (February 23)
Angus C. Morrison, ex officio

Absent: Joseph A. Ball

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

Professor Arvo Van Alstyne, the Commission's research consultant on the subject of sovereign immunity was present on Saturday, February 23, in addition to the following persons:

Charles A. Barrett, Office of the Attorney General
Robert F. Carlson, Department of Public Works
Fred J. Engle, Jr., Department of Corrections
Louis Heinzer, Department of Finance
Willard Shank, Office of the Attorney General
George Wakefield, Office of the County Counsel, Los Angeles
Jack D. Wickware, League of California Cities

Minutes of December Meeting. The minutes of the December 1962 meeting were approved.

Future Meetings. Future meetings of the Commission are scheduled as follows:

March 15 and 16, 1963--Sacramento
April 19 and 20, 1963--Sacramento

ADMINISTRATIVE MATTERS

Study of Penal Code Revision. The Executive Secretary reported that the Commission's resolution had been amended to include an authorization to study the question of Penal Code revision. This was done after the Governor had indicated a desire to have the Commission undertake a revision of the Penal Code.

The Commission discussed possible consultants and the approach to be taken toward revision. The Commission indicated that the revision should be more than just a "clean-up job" in which inconsistencies are removed. There should be some thought concerning what should be the underlying principles of the criminal law and an effort should be made to revise the criminal law to conform to these principles. The Executive Secretary reported that the Governor had mentioned Professor Arthur Sherry of Boalt Hall as a possible chief consultant. It was generally agreed that Professor Sherry would be well qualified to be the chief consultant on the study. Not only is he qualified academically, but he has had considerable practical experience with the criminal law field as well.

As a first step, the Commission indicated that it would be desirable to obtain a preliminary report from the chief consultant indicating how the study might be undertaken. This would indicate how the study might be broken into component parts and divided among other consultants whose work would be supervised and coordinated by the chief consultant. The preliminary report might suggest qualified persons to work on various portions of the study.

It was suggested that the Executive Secretary and the Chairman

discuss the matter with Professor Sherry prior to the next meeting to obtain an expression from Professor Sherry how he would like to proceed and to obtain an estimate from Professor Sherry concerning the amount that will be needed in the Commission's budget to finance the study. The Executive Secretary and Chairman will check the suggested figure and, if it appears reasonable to them, will suggest that the Commission's budget will need to be augmented to that extent if the Commission is given the Penal Code assignment.

The Executive Secretary also reported that a bill has been introduced in the Assembly that would create a special commission to revise the Penal Code.

STUDY NO. 36(L) - CONDEMNATION (Discovery)

The Commission considered Memorandum No. 63-15 and Senate Bill No. 71. Memorandum No. 63-15 presented a proposed amendment from the Administrative Office of the Courts that would permit the Judicial Council to alter the dates on which demands and statements of valuation data must be served.

The Commission decided that it would not propose the amendment suggested, but it would not oppose a separate bill to enact the modification suggested by the Administrative Office of the Courts. The Commission believed it unwise to modify the Commission's bill as suggested for it would jeopardize the bill's chances for approval either in one of the legislative houses or before the Governor. Many of the practicing bar are opposed to discovery of expert opinion and the Commission's proposed bill is contrary in principle to the State Bar sponsored bill on discovery. If it were thought that the time for exchange of valuation data could be moved back further from the trial than 20 days, the opposition to the principles of Senate Bill No. 71 might result in its defeat.

The Chairman was asked to send a letter to the Chief Justice explaining the reason the Commission declined to recommend the proposed amendment and the reason the Commission believes the proposal should be contained in a separate bill.

STUDY NO. 34(L) - UNIFORM RULES OF EVIDENCE (Privileges Article)

The Commission considered Memoranda 63-1 (the privileges rules as revised to date), 63-2 (New Jersey materials on privileges), 63-3 (scope of rules), 63-4 (Rules 23-25), and 63-5 (Rule 26).

Status of Study of Privileges Article. The staff reported that the Commission, prior to May 1961, had worked on and revised virtually all of the URE privilege rules. In May 1961 the Commission decided to consider the substance of all of the rules again on the merits, accepting the previous actions of the Commission in regard to the rules if no other action were approved. Since that decision, Rules 23-27 have been worked on and revised in the light of the comments of the State Bar Committees. Rule 27.1 has been reviewed by the Commission, but the State Bar has not considered it.

Scope of Privileges Article. The Commission considered Memorandum 63-3 relating to the scope of the privileges article. The question presented by the memorandum was whether the privileges rules should be so drafted that they are applicable to all proceedings unless limited by specific language or whether they should be so drafted to be applicable only in judicial proceedings, and if the latter, what should be the rules of privilege applicable in nonjudicial proceedings.

The Commission did not approve a motion to make the privileges article applicable in all proceedings, except state legislative proceedings where testimony can be compelled to be given. The Commission then approved a motion to confine the URE privileges article to judicial proceedings only. The question of what to do with the existing

California statutes on privilege will be resolved at a later date. The majority of the Commission believed that a decision as to the applicability of the privileges could not be made in the absence of a study of the types of proceedings involved and a consideration of the nature of the competing interests in such proceedings. A minority of the Commission believed that nowhere is it so important to determine the facts of specific controversies as it is in judicial proceedings where the whole purpose is to determine such facts accurately and where the lives, liberties and property of citizens are dependent upon the accurate determination of those facts; hence, as a general rule the privileges fashioned for judicial proceedings should be considered applicable to all proceedings unless considerations peculiar to one type of privilege or to one type of proceeding would indicate that an exception to the general rule is desirable--as in the case of the physician-patient privilege.

Rules 23-25. The Commission considered Memorandum No. 63-4 reporting on the extent to which records required to be kept are privileged It was reported that the U.S. Supreme Court in the Shapiro case held that records validly required by law to be kept are not privileged. It is possible that the Shapiro case may be limited to a holding that such records are not privileged so far as proceedings to enforce or administer the law requiring the record to be kept are concerned; whether records kept pursuant to a lawful requirement are not privileged generally has not been determined. The Commission determined that subdivision (6) of Rule 25 should be revised so that documents required by law to be kept are not privileged only in proceedings relating to the enforcement or

administration of the law that requires the records to be kept.

The rule adopted by the Commission will apply only where the statute requiring the keeping of the records does not establish a contrary rule as to the availability of the record. It was suggested that a separate section be added, similar to that added to the hearsay article, stating that this article does not make privileged information stated by other statutes to be unprivileged and does not make unprivileged information stated by other statutes to be privileged.

Rule 26. The Commission considered Memorandum No. 63-5.

The Commission decided to conform the structure of Rule 26 to the form used in drafting Rules 27 and 27.1. The Commission accepted the draft on pages 4-7 of Memorandum 63-5 and made the following changes:

In subdivision (1) (b), the word "professional" in the third line was deleted as unnecessary. It does not appear in the comparable definition in Rule 27.

In subdivision (1)(b), the words "representing the client" were deleted and "that relationship" was inserted in lieu thereof in order to avoid any technical questions as to when a lawyer is "representing" the client.

In subdivision (1)(d), the words "the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer" were deleted. The Commission believes that the international or interstate nature of many modern legal transactions sometimes requires consultation with lawyers from various jurisdictions, and the California client should not be required to determine at his

peril that the jurisdiction licensing the particular lawyer he is consulting recognizes privilege or not. His knowledge of the existence or lack of existence of privilege in the jurisdiction where the consultation takes place might be considered, however, in determining whether the client considered the conversation to be confidential.

In the preliminary language of subdivision (2), the word "claimant" was changed to "person claiming the privilege" because it was thought that the word "claimant" might connote someone filing or pursuing a claim for relief such as damages instead of one asserting a claim of privilege.

Subdivision (2)(c) was revised to read:

> The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by the holder of the privilege or his representative.

The duty of a lawyer to claim the privilege on behalf of the client is to be stated in a separate subdivision. That subdivision should state that a lawyer has a duty to claim the privilege on behalf of his client in those situations where he is present and he is authorized to claim the privilege under the revision of subdivision (2)(c). The reason for stating this requirement in the Rules of Evidence is that judges may be influenced not to order attorneys to violate the privilege if the duty to claim the privilege is stated in the rules and is not left only in the State Bar Act (in Business and Professions Code Section 6068). The statement of the duty in the rules of evidence also avoids any implication that the attorney is authorized not to claim the privilege despite the duty imposed by the State Bar Act.

In subdivision (3)(a), the words "sufficient evidence, aside from the communication, has been introduced to warrant a finding that" were added after the words "the judge finds".

Subdivision (d) was revised to provide an attesting witness exception for communications relevant to an issue concerning the execution of an instrument to which the lawyer is an attesting witness. The exception is to make clear that when a lawyer is an attesting witness, he is not precluded by privilege from performing the functions of an attesting witness, i.e., testifying to the circumstances of the execution and to any statements of the person executing the document bearing on his intention or competence.

The staff was asked to add another subdivision creating an exception to the lawyer-client privilege for communications of a deceased client relevant to an issue concerning the intention of the deceased client with respect to a deed of conveyance or will or other writing purporting to affect an interest in property.

STUDY NO. 52(L) - SOVEREIGN IMMUNITY (1963 Legislative Program)

The Commission considered Memoranda Nos. 82(1962), 63-14, 63-16 and 63-17.

Repeals and Adjustments of Special Statutes

The Commission considered Memorandum 82(1962) and the galley proofs of the recommendation relating to this subject.

The staff was directed to revise those portions of the recommendation that state, "These sections are no longer needed to protect public employees from personal liability" or the equivalent, to provide that these sections are no longer needed to protect them from the personal liability for which they should be immune. The existing language of the recommendation is subject to the interpretation that the proposed legislation gives the employees equivalent protection, whereas the proposed legislation does not give equivalent protection but it does give as much protection as the employees involved should have.

The Commission then approved the recommendation and legislation.

Senate Bill No. 42 (General Liability Statute)

The Commission considered Memorandum No. 63-16 and Senate Bill No. 42. The Commission also considered a letter from the office of the Attorney General proposing amendments to Senate Bill No. 42. The Executive Secretary orally presented a report of the conclusions of Mr. Sifford, a consultant to the Senate Judiciary Committee who has prepared a report of the fiscal effect of the recommendations of the Law Revision Commission relating to sovereign immunity.

The Commission considered each amendment to Senate Bill No. 42 suggested by the public entities as set out in Memorandum No. 63-16 and made the following changes in the bill:

Section 810.2. In line 12, on page 2, "servant" was substituted for "agent" and "whether or not compensated," was added after the comma at the end of the line. This change was made because the word "agent" might be given too broad a construction.

Section 810.4. The words ", agency or" were deleted to conform to the change made in Section 810.2.

Section 815. In paragraph (b), after "statute", the words ", including this part," were inserted to make clear that the immunity sections of Part 2 of the proposed statute are included among the immunity statutes which will prevail over sections of the proposed statute that impose liability.

Section 815.8. This section was deleted as unnecessary. Sections 820 and 820.8 impose liability where an employee is negligent in appointing or failing to discharge a subordinate employee.

Section 816. After the word "proceeding" the following was inserted "(other than a judicial or administrative proceeding to discipline or discharge a public employee)". This language was inserted to eliminate damage claims after an unsuccessful attempt to discipline or discharge an enployee. Malicious prosecution actions by public employees against their employing public entity should not be permitted, for such actions would tend to make worse an already bad relationship between the employee and the entity.

No further change was made in the section. However, the Commission determined that a provision should be inserted in Senate Bill No. 43 that will permit the entity to require the plaintiff in an action under this section to provide an undertaking in such amount as the court determines to be reasonable to cover reasonable counsel fees and other expenses of the public entity in defending the action. And, if the plaintiff fails to recover a judgment against the public entity, the plaintiff must pay the reasonable expenses (including counsel fees) of the public entity in defending the action.

Section 818.2. The word "law" was substituted for "enactment" in line 19. It was noted that law is defined to include judicial decisions.

Section 818.4. The words ", approval, order" were inserted before "or similar authorization" in line 23.

Section 818.6. The words "its property (as defined in subdivision (c) of Section 830)" were inserted for "property of the public entity" in lines 29 and 30. This change was made to make the definition of

public property in Section 830 apply to Section 818.6.

Section 820.4. The words "or enforcement of any law" were inserted in place of the words "of any enactment" in line 50.

Section 820.6. The phrase ", exercising due care," was deleted in line 1. This deletion was made because this requirement--that the public employee exercise due care in determining whether the enactment is constitutional, valid and applicable--is not required in the existing law. The requirement that the public employee act in good faith and under the apparent authority of the enactment is sufficient to insure that the employee is entitled to immunity, even though it could be argued that he was negligent in not knowing that the enactment was, for example, unconstitutional. To permit imposition of liability for mere negligence in not knowing that the enactment was unconstitutional would be unreasonable where the employee acted in good faith and the enactment apparently authorized his act.

Section 821.2. The words ", approval, order" were inserted after "certificate" in line 18.

Section 822. A new section, numbered Section 822, was added to the bill. The new section is based on former Government Code Section 1953.5. The new section reads substantially as follows:

> 822. A public employee is not liable for money stolen from his official custody. Nothing in this section exonerates a public employee from liability if the loss was sustained as a result of his own negligent or wrongful act or omission.

The new section was considered desirable because some statutes require a public employee to account for money in his custody. The new section makes clear that these other statutes do not impose liability except in case of his own negligent or wrongful act or omission.

Section 825. This section was revised to read as set out in Exhibit I attached to Memorandum 63-16.

Section 830.5. A new section, to be numbered Section 830.5, was added to the bill to read substantially as follows:

> 830.5. (a) Except where the doctrine of res ipsa loquitur is applicable, the happening of the accident which results in an injury is not in and of itself evidence that public property was in a dangerous condition.
>
> (b) The fact that action was taken after an injury occurred to protect against a condition of public property is not evidence that the public property was in a dangerous condition at the time of the injury.

Section 831.2. The words "natural terrain, lake, stream, bay, river, beach or other unimproved property" were substituted for "natural lake, stream, river or beach" in line 22.

Section 835. In lines 21 and 22, the words "that the public entity did not take adequate measures to protect against the risk" were deleted. The deleted phrase was considered to be confusing and unnecessary.

Section 835.2. The words "subdivision (b) of" were inserted before "Section 835" in line 32 to make the reference specific. Subdivisions (b) and (c) were deleted and a new subdivision (b) (set out in Memorandum No. 63-16) was approved for inclusion in the bill.

Section 840.2. In lines 45 and 46, the words "that no adequate measures were taken to protect against that risk" were deleted as unnecessary and confusing.

Section 840.4. In line 12, the phrase "subdivision (b) of" was inserted before "Section 840.2".

In line 15, "A" was inserted for "Subject to subdivision (c), a".

In line 17, the phrase "subdivision (b) of" was inserted before "Section 840.2".

Paragraph (c), lines 30 through 40, was deleted to conform to the change made in Section 835.2.

Section 844. The following new section was added to the bill (between lines 13 and 14 on page 12):

> 844. As used in this chapter, "prisoner" includes an inmate of a prison, jail, detention or correctional facility.

Section 845.2. In line 21, page 12, before "jail", the following was added: "prison,".

Section 845.4. The words "a prisoner" were substituted for "an inmate of a jail, detention or correctional facility" in lines 25 and 26 on page 12.

Section 845.8. Before the period on line 43, page 12, the following was added: "or from determining whether to revoke his parole or release".

On page 15, after line 51, the following new section was added:

> 856.2. Except as provided in Section 815.6, neither a public entity nor a public employee acting in the scope of his employment is liable for an injury resulting from the failure to admit a person to a public medical facility.

Section 895.8. This section was revised to read substantially as follows:

895.8. Except for Section 895.6, this chapter applies to any agreement between public entities, whether entered into before or after the effective date of this chapter. Section 895.6 applies to any agreement between public entities entered into, or renewed, modified or extended, after the effective date of this chapter.

Senator Cobey and the Executive Secretary were authorized to incorporate into Section 895 an amendment to be proposed by public entities that would exclude grants in aid type agreements, so long as such agreements are not so broadly defined as to exclude from the definition such agreements as the Commission indicated should be included within the definition.

Senate Bill No. 43 (Claims, Actions and Judgments)

In the course of considering Section 816 (malicious prosecution) in Senate Bill No. 42, the Commission determined that a provision should be inserted in Senate Bill No. 43 that will permit the entity to require the plaintiff in an action under this section to provide an undertaking in such amount as the court determines to be necessary to cover the reasonable counsel fees and other expenses of the public entity in defending the action. And, if the plaintiff fails to recover a judgment against the public entity, the plaintiff must pay the reasonable expenses of the public entity in defending the action, including a reasonable counsel fee.

Senate Bill No. 44 (Insurance)

The Commission considered Memorandum No. 63-14 and Senate Bill No. 44 as amended on February 12, 1963.

The Commission approved an amendment to Section 11290 of the

Government Code to provide the Department of Finance with authority to prorate the cost of insuring against vehicle owner liability and the cost of providing insurance coverage for state "servants" among several state agencies. Senate Bill No. 44 is to be amended to add the amendment to Section 11290 and to make the necessary conforming adjustments.

The Commission approved the previous amendments made to Senate Bill No. 44 (as amended on February 12, 1963).

Senate Bill No. 45 (Defense of Actions Against Public Employees)

The Commission considered Memorandum No. 63-14 and the amendment to Section 996.2 made by the Senate Judiciary Committee on February 18, 1963. A motion was adopted that the position of the Executive Secretary at the hearing on this bill should be that the Commission has no serious objection to the deletion of Section 996.2.

Senate Bill No. 46 (Vehicle Liability)

The Commission reviewed Senate Bill No. 46 (as amended on February 12, 1963). No objection was made to the technical correction made by the amendments.

Senate Bill No. 47 (Workmen's Compensation)

The Commission considered Memorandum No. 63-17.

The Commission declined to exclude members of the Armed Forces of the United States from the provisions of Section 3365. This action was taken because the bill provides benefits that probably are better than those provided to members of the Armed Forces by the

United States Government. It was recognized that there might be double benefits (benefits from the U.S. Government and benefits under the bill). Nevertheless, the suppression of forest fires is a highly hazardous activity and persons engaged in fire suppression for the State of California should be entitled to benefits under the act even though he may have other benefits from some other source. In addition, other persons engaged in fire suppression may well have benefits from other sources as well and no justification was shown for limiting their benefits under the proposed statute.

Inmates of state penal and correctional institutions are to be entitled to the benefits of Senate Bill No. 47, but they will not be entitled to such benefits during the period they are confined. Upon discharge, they will be eligible to receive such remaining benefits as they have remaining. In other words, the period of confinement is to be deducted from the benefits.