

Time

July 16 - 9:30 a.m. - 4:30 p.m.
July 17 - 9:30 a.m. - 3:30 p.m.

Place

State Bar Building
601 McAllister Street
San Francisco

AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

July 16-17, 1965

Friday, July 16

1. Approval of Minutes of June 1965 Meeting (sent 6/16/65)
2. Administrative matters
1966 Annual Report
Memorandum 65-43 (sent 6/22/65)
- ✓ 3. Study No. 55(L) - Additur and Remittitur
Memorandum 65-37 (enclosed)
- ✓ 4. Study No. 51 - Right to Support After Ex Parte Divorce
Memorandum 65-35 (enclosed)
5. ✓ Study No. 50 - Rights of Lessor
Memorandum 65-34 (to be sent)
- ✓ 6. Study No. 42 - Trespassing Improvers
Memorandum 65-36 (sent 6/22/65)

Saturday, July 17

7. Study No. 36(L) - Condemnation Law and Procedure
General Scope of Study
Memorandum 65-38 (enclosed)
Discovery in Eminent Domain Proceedings
Memorandum 65-40 (sent 6/14/65)
Right to Immediate Possession (Constitutional amendment)
Memorandum 65-39 (sent 6/14/65)
8. Study No. 53(L) - Personal Injury Damages as Separate Property
Memorandum 65-41 (to be sent)
9. Study No. 62 - Vehicle Code Section 17150
Memorandum 65-42 (to be sent) - NOT DISCUSSED

10. Study No. 49 - Rights of Unlicensed Contractor
Research Study (sent 6/1/65)
Memorandum 65-30 (sent 6/14/65)
11. Study No. 61 - Election of Remedies
Memorandum 65-33 (sent 6/14/65)

MINUTES OF MEETING

of

JULY 16 AND 17, 1965

San Francisco

A regular meeting of the California Law Revision Commission was held in San Francisco on July 16 and 17, 1965.

Present: Richard H. Keatinge, Vice Chairman
Hon. James A. Cobey (July 17 only)
Joseph A. Ball (July 16 only)
James R. Edwards
Sho Sato
Thomas E. Stanton

Absent: John R. McDonough, Chairman
Hon. Alfred H. Song
Herman F. Selvin
George H. Murphy, ex officio

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

Also present, on July 17 only, were Mr. Robert Nibley and Mr. John McLaurin of the law firm of Hill, Farrer and Burrill, and Mr. Norval Fairman of the Department of Public Works.

Future Meetings.

August	No Meeting
September	No Meeting
October 14 (evening), 15 and 16	Los Angeles
November 18 (evening), 19 and 20 (morning)	Stanford (Big Game)
December (to be set if necessary)	

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ADMINISTRATIVE MATTERS

Minutes of June 1965 Meeting. The Commission approved the Minutes of the June 1965 meeting.

1966 Annual Report. The Commission considered Memorandum 65-43 and the attached draft of the major portion of the 1966 Annual Report.

The second sentence of item 5 on yellow page 2 was deleted. Study No. 61--Election of Remedies--also is to be indicated as a study recommended to be dropped. See page 26 of these Minutes. Yellow page 6 is to be revised to indicate that the Commission "recommends" that certain topics be dropped. Senator Cobey suggested and the Commission agreed that the resolution to continue our authority to study topics contain a list of topics that we recommend be dropped.

The Commission approved the draft of the report as revised and approved sending it to the printer. It was understood that the portion of the 1966 Annual Report relating to unconstitutional and impliedly repealed statutes will be considered by the Commission at a later time.

Subcommittee on 1966-67 budget. The Executive Secretary reported that it would be necessary to submit the budget for the 1966-67 fiscal year to the Budget Division prior to the October meeting. A motion was unanimously adopted that Commissioners McDonough, Keatinge, Stanton, and Selvin constitute a subcommittee to consider and approve a budget to be submitted to the Budget Division. Such subcommittee may meet during the bar convention if necessary.

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STUDY NO. 36(L) - CONDEMNATION LAW AND PROCEDURE (GENERALLY)

General procedure to be followed on condemnation study. The Commission plans to prepare and distribute a series of tentative recommendations in mimeographed form to the persons and organizations on our mailing list on condemnation law and procedure. After the comments from these persons have been received and all pertinent statutes relating to the subject matter of a particular tentative recommendation have been considered, the tentative recommendation together with the research study will be printed and again distributed for comment. Finally, when the comments on the various printed tentative recommendations have been considered, a recommendation proposing a comprehensive eminent domain statute will be prepared for submission to the 1969 legislative session.

It was recognized that mimeographed tentative recommendations on some aspects of a particular subject of a printed tentative recommendation will be distributed while other aspects of the same portion of the subject are being investigated.

The staff plans to undertake any research necessary to supplement the research studies. The research consultants will provide expert advice to supplement the staff by reviewing the supplemental research and by providing expert advice and information at the meetings. The Department of Public Works and others will be contacted to provide additional research assistance. The staff also plans to examine the eminent domain statutes of all other states, to examine all California statutes relating to eminent domain, and to examine bills introduced at the last three general sessions of the California Legislature.

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The Commission approved the following outline as a tentative working outline of the subjects that will be considered in the study of condemnation law and procedure:

1. The Right to Condemn
2. Just Compensation and Measure of Damages

The jury system for assessing compensation
The market value concept
Enhancement or diminution prior to date of valuation
Special benefits
The "larger parcel"
Good will, loss of profits, loss from interruption
of business
Compensation for delay in taking or payment
Compensation for consequential damages
Moving expenses

3. Date of Valuation
4. Allocation of Award
5. Procedural Problems

Survey and route determination
Settlement negotiations
Pretrial and discovery
Taking possession and passage of title
Pleadings
Burden of proof and duty to go forward
Evidence
Recoverable costs

6. Inverse and Unofficial Condemnation
7. Disposition of existing statutes relating to condemnation law
and procedure

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Publication of studies in law review. The Commission approved the publication of the research studies in the Stanford Law Review (or some other law review if Stanford does not wish to publish the studies) prior to their publication in the pamphlet containing the Commission's tentative recommendations. Such publication would be made with the understanding that the Commission would have the privilege of later publishing the research studies in the pamphlet containing the printed tentative recommendations. The law review will be given appropriate credit and the pertinent pages of the law review will be printed by offset in the Commission's pamphlet.

Contract with research consultants. The Commission considered a proposed research contract with the law firm of Hill, Farrer & Burrill of Los Angeles to provide the Commission with expert advice on the subject of condemnation law and procedure. A motion was unanimously adopted that this law firm is to serve as expert consultants to the Commission on the same terms as members of the Commission serve: Travel expenses plus \$20 per day per diem compensation for each day in attendance at Commission meetings.

The Commission expressed its appreciation to the research consultants for their willingness to serve at such nominal compensation.

A motion was unanimously adopted directing the Executive Secretary to execute the contract on behalf of the Commission.

Letter to the Department of Public Works. The letter to the Department of Public Works which was attached to Memorandum 65-38 was approved as revised and the Executive Secretary was directed to send the letter to Mr. Fenton, Chief of the Division of Contracts and Rights of Way. The letter will be supplemented by a call to Mr. Robert Carlson indicating exactly the type of

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research the Commission has in mind. It was suggested that the letter be revised to include the substance of the first paragraph from the letter to the Judicial Council which also was attached to Memorandum 65-38.

Letter to Judicial Council. The letter to the Judicial Council which was attached to Memorandum 65-38 was approved and the Executive Secretary was directed to send the letter to Mr. Kleps.

Meeting with Attorney General. It was suggested that the Chairman and Senator Cobey meet with the Attorney General with a view to obtaining his cooperation on the study of condemnation law and procedure. The primary purpose of this meeting is to convince the Attorney General that a representative of his office should be present at Commission meetings when the subject of condemnation law and procedure is discussed. After this meeting, a letter should be sent to the Attorney General requesting research assistance along the lines of the letter to be sent to the Department of Public Works.

The Commission has in mind the Attorney General sending someone like Gordon Ringer to the meetings. Mr. Ringer, who attended the meetings when the rules of evidence were considered, was in a position to represent the Attorney General and to take positions on issues.

Conference with Governor. It was agreed that the Chairman and Senator Cobey should meet with the Governor to advise him that the Commission is planning to recommend a comprehensive revision of the eminent domain statutes at the 1969 legislative session. The Governor should be advised that we have requested the Department of Public Works and the office of the Attorney General to send representatives to each meeting when the Commission is discussing the subject. The Governor should be advised that the comprehensive statute that

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the Commission will prepare will be a fair statute to both the condemner and the condemnee. The Governor should be requested to send any additional representation he believes would be desirable to Commission meetings (such as a representative of the Department of Finance) so that any other advice he will consider in connection with the 1969 legislation will be fully informed.

Advising other interested persons. The press release attached as Exhibit III to Memorandum 65-40 was approved for distribution to the legal newspapers and for publication in the State Bar Journal. In addition, the League of California Cities is to be contacted with the suggestion that the League appoint a committee to work with the Commission on this project. The State Bar Committee on Condemnation Law and Procedure is to be informed of the Commission's plans with respect to this subject. The Judges on the list to be provided by Mr. McLaurin are to be requested to comment on the Commission's tentative recommendations. All other interested groups are to be informed.

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STUDY NO. 36(L) - CONDEMNATION LAW AND PROCEDURE

(JURY SYSTEM FOR DETERMINING COMPENSATION)

The Commission directed the staff to prepare a research report for consideration at the October meeting on the various alternative methods of assessing compensation. The Commission raised the question whether some type of expert body should be used to assess compensation. This body might be used in lieu of the jury system now used. The research report should indicate the systems used in the other states. It was recognized that use of a system other than the jury system would require a constitutional amendment.

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STUDY NO. 36(L) - CONDEMNATION LAW AND PROCEDURE

(DISCOVERY)

The Commission considered Memorandum 65-40 relating to discovery in eminent domain. The Commission decided not to send out this material for comments of interested persons until after the Commission has considered whether the jury system for determining compensation should be retained.

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STUDY NO. 36(L) - CONDEMNATION LAW AND PROCEDURE

(THE RIGHT TO IMMEDIATE POSSESSION)

The Commission considered Memorandum 65-39 relating to the right to immediate possession. The Commission decided not to send out this material for comments of interested persons until after the Commission has considered whether the jury system for determining compensation should be retained.

STUDY NO. 42 - GOOD FAITH IMPROVERS

The Commission considered Memorandum 65-36 and tentatively determined that the good faith improver and the good faith property owner should have the rights indicated below.

IMPROVEMENT SIGNIFICANTLY ENHANCES VALUE OF LAND

Removal economically feasible

Significant permanent damage

Owner:

1. May purchase improvement.
2. May require improver to purchase land.
3. May require removal of improvement.

Improver:

1. If owner does not otherwise elect, improver may purchase land or remove improvement.

No significant permanent damage

Owner:

1. May purchase improvement.
2. May require improver to remove improvement.

Improver:

1. If owner does not otherwise elect, improver may remove improvement.

Removal not economically feasible

Significant permanent damage

Owner:

1. May purchase improvement.
2. May require improver to purchase land.

Improver:

1. If owner does not otherwise elect, improver may purchase land.

No significant permanent damage

Owner:

1. May purchase improvement.
2. May require improver to elect to purchase land or to remove improvement.

Improver:

1. If owner does not otherwise elect, improver may elect to purchase land or remove improvement.

IMPROVEMENT DOES NOT SIGNIFICANTLY ENHANCE VALUE
OF LAND

Removal economically feasible

Significant permanent damage

Owner:

1. May purchase improvement.
2. May require removal of improvement.

Improver:

1. May require owner to elect to purchase or require removal.

No significant permanent damage

Owner:

1. May require removal of improvement.

Improver:

1. Improver may remove improvement.

Removal not economically feasible

Significant permanent damage

Owner:

1. May purchase improvement.
2. May require removal of improvement.

Improver:

1. May require owner to elect to purchase improvement or require removal.

No significant permanent damage

Owner:

1. May purchase improvement.
2. May require removal of improvement.

Improver:

1. If owner does not otherwise elect, improver may remove improvement.

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Comments of California Land Title Association. The Executive Secretary reported that Mr. Otis has retired. The Commission directed the Executive Secretary to contact the California Land Title Association and have the association refer the trespassing improver matter to an appropriate committee of the association.

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STUDY NO. 49 - RIGHTS OF UNLICENSED CONTRACTOR

The Commission considered Memorandum 65-30 in which the staff suggested that this study be dropped from our calendar of topics because the topic is not suitable for a Commission recommendation.

The Commission decided not to act on the staff suggestion at the present time. It was noted that if the topic is to be studied, it probably should be studied in a broader context: Should this type of sanction ever be used in enforcing licensing acts? If the staff again recommends that the topic be dropped, the recommendation should be accompanied by the text of the portion of the Annual Report that will contain the recommendation.

It was noted that the problem in the contractor statute is the result of the requirement of a license; it is not always clear whether a license is required and, in addition, a license may be required in some cases where it should not be. The solution to the problem may be that the licensing provisions should be revised to make it clear when a license is required but the drafting of a recommendation to accomplish this would not be appropriate for the Commission.

It was suggested that a draft of a letter be prepared for Commission consideration to determine whether interested persons (including the Contractor's Licensing Board and organizations of judges) believe that the present law results in inequity and whether any change is needed in the existing law. The letter should be phrased so the Commission may later recommend that the topic be dropped if that appears to be the desirable procedure.

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STUDY NO. 50(L) - LESSOR'S RIGHTS UPON ABANDONMENT BY LESSEE

The Commission considered Memorandum 65-34, the First Supplement thereto, and the tentative recommendations that were attached to the memo and supplement. The following actions were taken:

The Commission first considered whether to recommend a statute spelling out in some detail lessor's and lessee's rights or to recommend a statute stating merely that a lease should be treated as other contracts are treated. The Commission concluded that the detailed statute is preferable, because interested persons may then consult the statute and determine exactly what their rights and remedies are. The Commission then turned to the tentative recommendation attached to Memo 65-34 which contained the detailed statute and revised it as indicated below.

Section 3320

The Commission directed the staff to revise the language in subdivision (a) relating to the method and time of computing rental value. Language similar to that in the comment to the section should be used in order to indicate more clearly that rentals due under a lease are taken at full value plus interest, rentals not due are discounted, and these values are computed as of the time that the damages are actually being determined.

Subdivision (b), Section 3322, or Section 3324 should be revised to indicate clearly that attorney's fees are not recoverable unless the lease so provides.

The comment should make clear that the rental referred to includes all obligations of the lessee to the lessor under the lease.

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Section 3322

The staff was instructed to combine subdivisions (a) and (b) to indicate that the reasonable times involved may be the same time. The reasonable expenses incurred in caring for the property should be made a separate item of damages and should be limited to those expenses made necessary by the termination of the lease.

Subdivision (d) was deleted. The other specified items of damage in the section do not require violation of a specific lease provision. Damages for violation of specific lease provisions should not be covered by a separate subdivision of the section. The substance of subdivision (d) should be mentioned in the comment.

Section 3324

The staff was directed to revise the section to provide that the lessee may recover his attorney's fees incurred in enforcing the lease whenever the lease provides that the lessor may do so.

Section 1936

The Commission considered the short form statute attached to the supplement to Memo 65-34 and did not approve it. However, the staff was directed to add to the detailed statute the substance of the sentence prescribing the effect of an abandonment.

Tentative Recommendation

The Commission then approved the recommendation and statute as revised for distribution for comments.

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STUDY NO. 51 - RIGHT TO SUPPORT AFTER EX PARTE DIVORCE

The Commission considered Memorandum 65-35. The following actions were taken:

Section 270

The Commission asked the staff to add definitions of "obligor" and "obligee".

Section 271 was approved.

Section 272

The Commission decided that the law of the matrimonial domicile should have no bearing on the right to support following an ex parte divorce unless that domicile is also the domicile of one of the parties at the time of the divorce or at the time support is sought.

The Commission also decided that whether the wife or the husband initiated the divorce action should have no bearing on the continuance of the right to support unless the constitutional doctrine of full faith and credit requires nonrecognition of such continuance after a decree obtained by the wife in a jurisdiction that doesn't recognize a support right following an ex parte divorce.

The Commission concluded that California substantive law should be used both to determine whether the right to support survives divorce and to determine the nature of the right that survives. California law would be the applicable law in the majority of cases anyway, and to require application of California law eliminates complexities in the statute as well as the need for trial judges

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to make extensive searches to find remote legal points in the law of other states. The law of support, so far as it pertains to husbands and wives, probably does not differ sufficiently from state to state to warrant a more complex rule. The Commission recognized, however, that the full faith and credit doctrine might require the application of a different rule if the divorce decree were obtained by the wife in a state not recognizing the survival of the right to support following an ex parte divorce. Despite the decision made, the Commission requested the staff to submit a special memo on the matter at the next meeting. Commissioner McDonough should be consulted and his views on the question should also be presented.

The Commission concluded that an action for support following a divorce should not be barred because the wife might have obtained personal jurisdiction over the husband but did not actually do so. A later action for support should be precluded only if the court actually had personal jurisdiction over both parties in the divorce action and failed to award support. To bar a wife's later support action because personal jurisdiction might have been obtained would force an inquiry into the reasonableness of her conduct in failing to serve the husband personally and would place her right to support on too tenuous a basis. The second court should be able to rely on the record of the previous action to determine what issues are concluded in later litigation.

To carry out these decisions, subdivision (b) should be deleted from Section 272 and subdivision (a) should be revised to indicate that California law is the applicable law. This revision makes subdivisions (c) and (d) unnecessary (they merely make certain California defenses available), and they should also be deleted.

Section 273

Subdivision (c)--the statute of limitations provision--should be deleted. The only limitation on the right to bring an action for support should be that limitation contained in the equitable defense of laches. Laches is applicable under subdivision (b). Subdivision (b) should be redrafted to eliminate the first part of the sentence.

Section 274 was approved.

Section 275

Action on Section 275 was deferred; and the staff was directed to report on the effect of a decree that might be given under the section for purposes of full faith and credit. In view of the fact that California law only is to be applied, the question was raised whether the decree should determine merely the right to support under California law without foreclosing the right to further support under the law of some other state. Should a California court, applying only California law, purport to terminate rights of support arising under the laws of other states, particularly where the action is between nonresidents?

Section 276 was approved.

Section 277 was approved.

STUDY NO. 53 (L) - PERSONAL INJURY DAMAGES AS SEPARATE PROPERTY

The Commission considered Memorandum 65-41 and the First Supplement thereto. The following actions were taken:

Civil Code Section 163.5

The repeal of Section 163.5 was approved. This will leave Section 164 as the governing section on the nature of personal injury damages. Section 164 provides, in effect, that all property acquired during marriage is community property unless it is acquired by gift, devise, bequest, or descent. Thus, personal injury damages would be community property under Section 164.

Section 164.5

Section 164.5 was approved. The proposed section would abolish the imputation of contributory negligence from one spouse to another. The principle of contribution is substituted.

Section 164.7

The "unless" clause in subdivision (a) was moved to the end of the subdivision.

The staff was directed to revise subdivision (b) to refer to the right to indemnity provided by insurance instead of "insurance."

The Commission discussed the circuitry involved in permitting an interspousal liability to be paid into community funds from community funds with merely a shift in management and control. A suggestion was made to provide for a division of the community property sufficient to permit the guilty spouse to pay his liability to the other out of his separate property, the

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recovery to be separate property when received. The view was expressed that such a division would cause the parties unexpected tax problems and would have the other undesirable ramifications that exist whenever personal injury damages are made separate property. Shifting of the control of the community property involved from the guilty spouse to the injured spouse avoids these consequences while protecting the injured spouse's judgment from invasion by the guilty spouse's creditors.

The problem presented by Section 164.7 was not resolved, and the matter was deferred until the next meeting.

Section 171a

The staff was directed to reconsider the language of the section to determine whether the word "alone" is used in the existing version to preclude the husband's liability on agency principles or whether it is an inexact way of saying that only the wife's separate property or the community property subject to her control may be reached to satisfy a liability incurred by her. In either event, the language of the section should be revised to state more precisely what is meant.

Section 171c, which restores the wife's right to manage and control the personal injury damages awarded to her, was approved.

Section 183 was approved.

Section 184

The Commission considered whether to permit an independent action for contribution or to require that the right to contribution be asserted by

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cross-complaint in the original action.

The Commission decided that if the person from whom contribution is sought is a party to the original litigation, contribution must be sought in that original litigation or be forever barred. An independent action should be permitted only if personal jurisdiction over the spouse from whom contribution is sought could not have been secured in the original action.

To facilitate personal service of the cross-complaint in accordance with C.C.P. § 417, the statute should provide that the cause of action for contribution is deemed to have arisen at the time of the injury for purposes of applying Section 417.

If an independent action is brought, the first judgment should conclusively establish the liability of the first defendant to the plaintiff. Facts found in that action favorably to the defendant should not be binding on the spouse from whom contribution is sought. The damages should also be conclusively established against the spouse from whom contribution is sought if a cross-complaint was filed against him and he received notice of the action and an opportunity to participate therein.

Subdivision (b) of the revised version of Section 184 appearing in the First Supplement to Memo 65-41 was approved. This subdivision requires an independent action to be brought within one year after the finality of the first judgment. The independent action may be brought to have the guilty spouse adjudged a joint tortfeasor before the first judgment is satisfied; but contribution may not be obtained until the original defendant pays more than his pro rata share of the first judgment.

The staff was directed to further revise the section in accordance

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with the foregoing decisions.

Section 185 was approved.

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STUDY NO. 55(L) - ADDITUR AND REMITTITUR

The Commission considered Memorandum 65-37 together with the draft of a letter that generally outlines the additur problem and presents the alternative solutions under consideration by the Commission. After some discussion regarding the content of the letter, the Commission reconsidered its previous action directing that such a letter be sent to interested persons and groups for the purpose of soliciting their comment on the problem generally and reviewing the alternative solutions under consideration by the Commission. It was noted that, despite any disclaimer by the Commission, the persons receiving the letter probably would regard it as being equivalent to a tentative recommendation of the Commission. Also, some Commissioners particularly questioned the advisability of asking people to comment on whether or not a constitutional amendment was needed to authorize additur in California. It was generally agreed that the Commission ought to be able to study the problem and reach its own conclusions with respect to the constitutionality of a statutory scheme that authorizes a limited additur practice. After discussion along these lines, the Commission agreed that the letter should not be sent and, instead, that the exhibits outlining the alternative solutions should be considered by the Commission with a view to reaching agreement as to which course to follow. If the Commission tentatively approved the statutory scheme, a tentative recommendation embodying this approach could be distributed for comment; review of the comments received would give the Commission an opportunity at a later time to decide whether to pursue the statutory course or to seek adoption of a constitutional amendment.

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Turning its attention to the exhibits, the Commission again considered the feasibility of securing adoption of a constitutional amendment to authorize additur. Some Commissioners were of the view that, even if additur were to be authorized by constitutional amendment, the scope of permissible additur probably should not exceed that permitted under the alternative statutory scheme. The statutory alternative was considered to be logical and based upon a not unreasonable view of the court's decision in Dorsey v. Barba, 38 Cal.2d 350 (1952). After some discussion, it was agreed that the exhibit setting out the statutory scheme should be approved in principle as the proper approach to take and that the staff should prepare a tentative recommendation along these lines for Commission consideration. The tentative recommendation should include amendments to other statutes as previously suggested--e.g., Code of Civil Procedure Section 657.

The Commission discussed the draft statute and approved it as set out in the exhibit. The staff was asked to consider alternative means of phrasing the condition stated in subdivision (a) so that it would not be as apparent from its face that the judge is substituting his independent judgment for a perfectly valid jury verdict. Also, some consideration should be given the possibility of limiting the judge's discretion in fixing the amount of damages by stating a specific standard to be applied by the judge. It was noted that any such statement might result in the preservation of the defendant's right to question the amount on appeal notwithstanding his consent to pay it. In any event, these matters are to be considered by the staff in preparing the tentative recommendation for Commission consideration.

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STUDY NO. 61 - ELECTION OF REMEDIES

The Commission considered Memorandum 65-33 and decided to recommend in its 1966 Annual Report that this topic be dropped from its calendar of topics for study. This was in accord with the research consultant's preliminary report on the topic.