

July 15, 1974

Time

July 25 - 7:00 p.m. - 10:00 p.m.
July 26 - 9:00 a.m. - 5:00 p.m.

Place

State Bar Building
601 McAllister Street
San Francisco 94102

TENTATIVE AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

July 25-26, 1974

1. Minutes of June 27-29, 1974, Meeting (to be sent)

2. Administrative Matters

3. Study 63 - Jury Views in Civil Cases

Memorandum 74-36 (enclosed)

4. Study 23 - Partition

Memorandum 74-37 (sent 7/12/74)

Draft of Statute (attached to Memorandum)

First Supplement to Memorandum 74-37 (enclosed)

5. Study 36.300 - Condemnation (Comprehensive Statute Generally)

Memorandum 74-38 (to be sent)] Special Order of Business
] July 26, 1:30 p.m.

PLEASE NOTE THAT THIS MEETING WILL BE HELD ON

JULY 25 AND 26 ONLY.

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

JULY 25 AND 26, 1974

San Francisco

A meeting of the California Law Revision Commission was held in San Francisco on July 25 and 26, 1974.

Present: Marc Sandstrom, Chairman
John J. Balluff
John D. Miller
Thomas E. Stanton
Howard R. Williams

Absent: John N. McLaurin, Vice Chairman
Robert S. Stevens, Member of Senate
Alister McAlister, Member of Assembly
Noble K. Gregory
George H. Murphy, ex officio

Messrs. John H. DeMouilly, Jack I. Horton, Nathaniel Sterling, and Stan G. Ulrich, members of the Commission's staff, also were present. Mr. Garrett H. Elmore, Commission consultant on partition sales, was present on Thursday and Friday, July 25 and 26. Mr. Jerrold A. Fadem, Commission consultant on condemnation, was present on Friday, July 26.

The following persons were present as observers on Friday, July 26.

Henry A. Babcock, American Society of Appraisers, Los Angeles.
William C. George, County of San Diego, San Diego
Steve Kronick, Department of Water Resources, Sacramento
Anthony J. Ruffolo, Department of Transportation, Los Angeles
Carlos Telleria, County of San Diego, San Diego
Roger D. Weisman, City of Los Angeles, Los Angeles

ADMINISTRATIVE MATTERS

Minutes of June 27, 28, and 29, 1974, Meeting

The Minutes of June 27, 28, and 29, 1974, Meeting were approved as submitted.

Legislative Program

The Executive Secretary reported on the 1974 legislative program, summarized below as of July 23, 1974:

MEASURES APPROVED

- Res. Ch. 45, Stats. 1974 (Continues Authority to Study Topics)
- Chapter 211, Stats. 1974 (Enforcement of Sister State Judgments)
- Chapter 227, Stats. 1974 (Erroneously Compelled Disclosure of Privileged Information)
- Chapter 331, Stats. 1974 (Disposition of Abandoned Personal Property)
- Chapter 332, Stats. 1974 (Abandonment of Leased Real Property)
- Chapter 425, Stats. 1974 (Nonresident Aliens)
- Chapter 426, Stats. 1974 (Improvement Acts)

MEASURES APPROVED BY POLICY COMMITTEE IN SECOND HOUSE

- AB 101 (Wage Garnishment)(tentatively set for hearing by Senate Finance Committee on August 15)

MEASURES PASSED BY FIRST HOUSE

- AB 2948 (Prejudgment Attachment)(set for hearing by Senate Judiciary Committee on August 20)

DEAD

- AB 102 (Discharge From Employment Because of Wage Garnishment)(died in Senate Judiciary Committee)
- SB 1532 (Liquidated Damages)(recommendation withdrawn for further study)
- SB 1534 (Physician-Patient Privilege)(recommendation withdrawn for further study)

Minutes
July 25 and 26, 1974

Thomas E. Stanton, Jr.

The Executive Secretary, on behalf of Senator Bradley, presented to Commissioner Stanton a Resolution adopted by the Legislature commending Mr. Stanton on his 20 years as a member of the Law Revision Commission and 35 years of state service as a member of the former Code Commission and Law Revision Commission. The Executive Secretary made clear that the resolution was not a retirement resolution but instead was merely an appropriate recognition of the long and outstanding service of Commissioner Stanton to the people of the State of California.

Personnel Matters

The Chairman, various members of the Commission, and the Executive Secretary made remarks expressing their appreciation to Jack I. Horton for his outstanding work as a member of the legal staff and as Assistant Executive Secretary of the Commission. The Commissioners also expressed their best wishes to Mr. Horton as he leaves to take his new position as Executive Secretary of the Guam Law Revision Commission.

The Commission held an executive session to discuss various personnel matters. The effect of revisions in the exempt pay schedule on the position of Executive Secretary was noted. A motion was unanimously adopted directing the Chairman to take appropriate action to have the position of Executive Secretary classified at a level at least comparable to Associate Deputy Attorney General IV and Principal Deputy Legislative Counsel II. The Executive Secretary reported that he planned to leave the position of Assistant Executive Secretary vacant until the present Staff Counsel I gains the experience necessary to qualify for Assistant Executive Secretary. The

Minutes
July 25 and 26, 1974

disappointing efforts in the past to fill this position by recruitment on an open examination basis wererecalled, and no objection was made to the plan of the Executive Secretary to fill the position by promotion. The Executive Secretary reported that he planned to fill the staff vacancy by a temporary appointment for six to eight months so that time would be available to recruit widely in an effort to fill the position at the entry level for Legal Counsel. The Executive Secretary reported that he planned to make a special effort to fill the vacancy on a permanent basis with a qualified minority candidate.

STUDY 23 - PARTITION PROCEDURE

The Commission considered Memorandum 74-37 and the First Supplement thereto along with the attached draft of the partition title. The Commission completed review of Sections 873.210 to 873.690 of the draft. The Commission made the following determinations with respect to these sections:

§ 873.210. Division by referee. The Comment to this section should indicate that the chapter deals with physical division and that provisions relating to sale, where sale is ordered, are located in a subsequent chapter.

§ 873.220. Designation of portions. This section was deleted.

§ 873.230. Division involving improvements. This section, and the other sections describing the manner of division, should be rephrased to speak in terms of substantive rules of law rather than in terms of the duties of the referee.

The phrase "for his own benefit" should be deleted from the section. The Comment should be expanded to refer to the case law involving improvements made by one cotenant.

§ 873.240. Division involving purported conveyance. This section was revised to substitute a reference to conveyance "of a portion of the property" for the reference to conveyance "in fee and in severalty of the whole title in a specific tract by metes and bounds."

§ 873.250. Division by known lot or parcel. The standard in this section of a "known" lot or parcel should be investigated. and cases under Code of Civil Procedure Section 694 researched. The staff should consider substitution of the terms "existing" or "distinct" for "known."

Minutes
July 25 and 26, 1974

§ 873.260. Ovelty. The term "owelty" should be retained in the lead-line to this section; Chairman Sandstrom and Commissioner Stanton opposed this decision. The Comment should indicate the relationship between this section and Section 872.140 (compensatory adjustment). The case law should be reviewed to determine the application of the compensatory adjustment provisions.

§ 873.320. Short-term tenancy. This section was deleted.

§ 873.330. Unknown owners. The Commission was dissatisfied with the phrase "Where the court has considered the rights of two or more unknown parties together" and directed the staff to develop an alternative version expressing the substance of the idea.

§ 873.410. Referee's report of division. This section should be amended to require the referee to file his report with the court and give notice of filing to the parties who have appeared.

Subdivision (b) should read: "A description of the property divided and of the share allotted to each party." The Comment should explain that the description must be by metes and bounds or lots and blocks or such other manner as to locate the property precisely.

Subdivision (c) should be revised so there is no reference to "compensatory adjustment."

§ 873.420. Motion to confirm report. The portion of this section relating to the form and timing of notice of motion should conform with the general rules on this subject in the Code of Civil Procedure.

This section, and the following two sections, should be combined in one section with a new lead line.

Minutes
July 25 and 26, 1974

§ 873.430. Court confirmation. This section should be preceded by the phrase "At the hearing," and should be combined with the section before and the section following.

§ 873.440. Judgment. The language in this section relating to judgment that the division "be effectual forever" should be revised to make clear that the judgment of division vests title in the parties. This should be explained in the Comment to this section or to the section relating to the effect of the judgment.

This section should be combined with the preceding two sections.

§ 873.520. Court order of public or private sale. The staff should consider reorganizing this section somewhat for clarity.

§ 873.610. Procedures agreed to by parties. The Comment should make clear that the consent of all parties is required whether or not they have appeared; hence, the section cannot be used where there are unknown parties. The Comment should also make clear that the parties to the action are those who are bound by the judgment, i.e., they have been served or have appeared in the action.

§ 873.615. Court authority in sale. A provision should be incorporated in this section permitting appointment of a referee for recommending the terms and conditions of sale with notice and opportunity for hearing prior to approval of the referee's report. In addition, the setting of terms and conditions by the court should be permitted at the time of the interlocutory judgment hearing.

Subdivision (a) should be broadened to provide for prescription of manner of sale, and the Comment should incorporate the substance of Section 873.620(b) relating to manner of sale of personal property.

Minutes
July 25 and 26, 1974

In connection with appointment of a referee, the statute should make clear that the general provisions of the Code of Civil Procedure relating to referees are inapplicable in partition actions.

§ 873.620. Sale of property separately, in lots, or as unit. Subdivision (a) of this section relating to "known lots or parcels" is to be reviewed in light of further research concerning the meaning of the phrase. Subdivision (b) should be deleted and the substance incorporated in the Comment. Subdivision (c) should be made clearly applicable to portions of real or personal property.

§ 873.630. Credit sales. The Comment to this section should indicate that, where there are minors and unknown persons, the court may direct that a trustee or other fiduciary hold the security and act on their behalf.

§ 873.640. Manner or notice of sale. The portion of this section providing that notice need not be given to the parties should be replaced by a provision that provides for notice to parties who have appeared and that permits other interested persons to request special notice. Failure to receive notice should be a ground for objection to the confirmation of sale, but a court finding at the confirmation that notice has been properly given is conclusive. The Comment should explain that this provision preserves the right of interested persons to get notice of sale without imposing the burden of giving notice to uninterested parties.

§ 873.650. Contents of notice of sale. The terms of sale listed in subdivision (a)(1)-(7) should be removed from this section and placed in the Comment to Section 873.615. The court should be authorized to permit variation in the terms of sale if to do so will be beneficial and should be required to specify the principle terms of sale that must be listed in the notice of sale.

Minutes
July 25 and 26, 1974

Subdivision (c) should provide for reference to a court order in addition to rather than in place of the principle terms of sale.

§ 873.660. Sale of perishable and other personal property. Subdivision (a)(2) should be limited to listed stock only, as in the Probate Code. The phrase "if any" should be deleted from subdivision (b).

§ 873.680. Conduct of sale at private sale. Subdivision (c) of this section should be deleted.

§ 873.690. Persons ineligible to purchase at sale. This section should be revised to preclude purchase "directly or indirectly" by the persons listed, including attorneys, and the reference to enforcement of a lien should be deleted. A provision should be added to protect bona fide purchasers.

Minutes
July 25 and 26, 1974

STUDY 36.300 - CONDEMNATION LAW AND PROCEDURE
(COMPREHENSIVE STATUTE GENERALLY)

The Commission considered Memorandum 74-38 along with letters from the City of Los Angeles and the Department of Water Resources (portions of which were read orally) containing comments on the Eminent Domain Law tentative recommendation. The Commission also received an offer to assist and review the appraisal aspects of the tentative recommendation from Mr. Henry A. Babcock on behalf of the College of Fellows of the American Society of Appraisers who presented the Commission a statement of definitions, concepts, and principles approved by a majority of the members of the college (attached as an Exhibit hereto).

The Commission made the following decisions with respect to the tentative recommendation:

Preliminary part of tentative recommendation. Footnote 2 on page 24 of the preliminary part of the tentative recommendation was revised to read:

2. The Eminent Domain Law is intended to supply rules for eminent domain proceedings. The law of inverse condemnation is left for determination by judicial development.

The preliminary part should have a section added that explains that the Eminent Domain Law does not include relocation assistance provisions because these provisions are codified in other parts of the California codes. The section should explain the relationship of the Eminent Domain Law to the elements of compensation contained in the relocation assistance provisions and should indicate the Commission's intent to preclude double recovery for the same item of loss. The section might be located at the beginning of the compensation discussion.

Under the portion of the discussion headed "Public Use and Necessity," the divisions labeled "Public Use" and "Public Necessity" should be merged, making the portion on page 35 refer to "Constitutional requirement of public use" and the portion on page 38 refer to "Statutory requirement of public necessity." The discussion in the portion referred to as "Acquisition of physical and financial remnants" should be expanded to compare the test of existing law with the test proposed by the Commission, using examples of their application.

§ 1230.020. Law governing exercise of eminent domain power. The last paragraph of the Comment was revised to read:

The provisions of the Eminent Domain Law are intended to supply rules for eminent domain proceedings. The law of inverse condemnation is left for determination by judicial development.

§ 1235.170. "Property" defined. After extensive discussion whether the detailed listing of types of property interests in this section might create unintended inverse condemnation liability, the Commission determined to leave the section unchanged. The Commission requested the staff to prepare for its consideration a section to the effect that nothing in the Eminent Domain Law creates any right to compensation in an inverse condemnation action nor precludes any compensation required in such action.

§ 1240.010. Public use limitation. The Comment to this section should be expanded by adding the substance of the second and third paragraphs of the Comment to repealed Section 1238. Cross-reference should be made to Section 1240.010 in the Comments to Government Code Sections 15853 (state), 37350.5 (cities), 25350.5 (counties), and to Education Code Section 1047 (school districts). The Comment to Government Code Section 37350.5 should also indicate that proper city functions may be determined by the charter of a charter city as well as by statute.

§ 1240.240. Acquisition for future use with consent of owner (new).

A new section should be added to the following effect:

1240.240. Notwithstanding any other provision of this article, a public entity authorized to acquire property by eminent domain may acquire the property for future use by any means (including eminent domain) expressly consented to by the owner of the property.

In connection with this section, the staff should consider problems created where there is more than one owner.

§ 1240.410. Condemnation of remnants. The Comment explaining subdivision (c) should make clear that the reasonable, practicable, and economically sound physical solution that the defendant may raise as a defense to the excess taking should not be such as might interfere with or impair the public project.

§ 1240.660. Property appropriated to the public use of cities, counties, or certain special districts. This section was deleted.

§ 1245.210. "Governing body" defined. The California Aeronautics Board should be made the governing body in the case of a taking by the Department of Transportation for aeronautics purposes, and conforming technical changes should be made in other sections.

The staff should investigate the extent to which the Los Angeles Board of Water and Power is authorized to adopt resolutions of necessity and the effect given such resolutions.

COLLEGE OF FELLOWS
of the
AMERICAN SOCIETY OF APPRAISERS

It is the objective and purpose of the College to discover, develop, and define the fundamental principles on which sound appraisal practice should be based; and to make these available to individual appraisers, appraisal societies, teachers, governmental agencies, legislators, the courts, and others concerned with the development, improvement, regulation, and control of appraisal practice.

The primary function of the College is to publish, from time to time, written expressions of its opinions, judgments, and conclusions concerning appraisal concepts, definitions, principles, methods and practices, with the intent of building an authoritative body of appraisal principles, but also recognizing that the principles thus established will, in all probability, be amenable to further refinement and development.

The following

DEFINITIONS, CONCEPTS AND PRINCIPLES

have been approved

by a majority of the members of the College

June 21, 1974

EXHIBIT I

Minutes

July 25 and 26, 1974

- A. The word "property" is used in four different senses: (1) It may be used to mean a physical object or thing, disregarding ownership, (2) it may be used to mean the legal rights encompassed in an ownership, (3) It may be used to mean the *thing* that is owned, tangible or intangible, or both, and (4) it may be used as a collective noun. An appraiser should distinguish between these four meanings and specify in what sense he is using the word.
- B. In making the kind of appraisal called a *Valuation*, the subject property should first be classified as Investment Property, Marketable Noninvestment Property, or Service Property. An Investment Property can be valued only by the Investment Analysis Method, a Marketable Noninvestment Property can be valued *only* by the Sales Analysis Method, and a Service Property (if it can be valued at all) can be valued *only* by the Cost Summation Method.
- C. The so-called "three approaches to value" -- doctrine which requires that all three methods be applied to any one property, regardless of its characteristics, and then that the three results be "correlated" to reach a conclusion as to value, is economically unsound, and produces unreliable results.
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- D-1. An Investment Property has a value as an Investment (Investment Value), which is generated by its earning expectancy. The Investment Value is its justifiable Market Value (as distinguished from the current price at which it might be sold), and it has an Owner Value which may or may not be the same as its Investment Market Value.
- D-2. A Marketable Noninvestment Property (a property without an earning expectancy but of a type commonly bought and sold) has a value generated by its expected use and/or consumption. Such a property has a Market Value and an Owner Value but this Owner Value may or may not be the same as the Market Value.
- E. In those cases in which a *whole* property is comprised of *components*, each of the components has a value, when considered as a PART of the whole which is different from its value when considered as a FRACTION, i.e., as separated from or independent of the whole.
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- F. There is a body of Appraisal Principles on which is built the entire structure of appraisal methods and techniques: (A Principle is "A fundamental truth, a primary or basic law, doctrine or the like")

APPRAISAL PRINCIPLES

1. The Causal Postulate. Quantitative appraisals are based on analysis of past experience expressed as numerical data: prices, costs, rents, expenses, sales, and other revenues, salaries, wages, lives of physical entities, changes in population, etc., etc. The Causal Postulate *assumes* that these numerical results were *caused*, even if the individual causes cannot be isolated. The causes may be some combination of supply and demand factors, managerial ability, sales ability, inventiveness, the possession of natural resources, political climate, and so forth.
2. The Continuity Postulate. In addition to assuming that the data of past experience are the effects of causes, it is further assumed that, whatever the causes were, if the same combination of causes occurs again, the effects will be the same as before. In appraisal practice, this idea is still further extended: it is *assumed* that, unless there is evidence that the interrelated causes which gave rise to the past effects have changed, the causes will continue and produce the same effects. This is the Continuity Postulate.
3. Principle of Identification. An appraisal to determine the authenticity of such a property as a painting, object of art, manuscript, or piece of antique furniture, uses the *Principle of Identification*. A *genuine* article has certain identifying characteristics, traits or marks. If the identifying characteristics of a genuine article match with the same characteristics of the subject property, the subject property is assumed to be genuine.
4. Principle of Qualitative Rating. In those appraisals which render opinions of the condition, quality, attractiveness, or artistic merit of a subject property, the conclusions are derived by comparing that quality or characteristic of the subject property with which the appraisal is concerned with the same quality or characteristic as found in some other property or properties *used as a standard of comparison*. The principle involved states that the quality or characteristic with which the appraisal is to deal can be rated, ranked, or graded on a standard (non-numerical) scale such as, for example: Excellent, Good, Average, Fair, Poor; that is, the rating of the subject property in regard to this qualitative characteristic can be placed in one of these categories.
5. Principle of Sampling. It is assumed, when a sampling technique is used in an appraisal, that the selected sample of appraisal data is sufficiently representative of the totality of the relevant appraisal data to establish the validity of the appraisal conclusions within an estimated range of probability.
6. Principle of Pricing. Buyer's cost appraisals are concerned only with those kinds of property that are sold in identical units in an open market at advertised or published prices which are the same to all purchasers; excluded are unique properties which are sold at negotiated prices. The current market value of a marketable noninvestment property of this kind is equated to buyer's cost which, in turn, is ascertained by pricing the article in the open market. This is the Principle of Pricing.

7. Principle of Generation of Property Value. The value of a property is generated by the expectancy of *future* owner benefits.
8. Principle of Cost-Forecasting. Cost-forecasting is here distinguished from Pricing; it is the method used in cost-summation appraisals. A cost-summation appraisal is an estimate of what it will cost to produce demolish, alter, or repair a tangible property. The method consists of adding together all of the estimated individual items of cost. These are of two kinds: 1) Items purchasable in the open market, -- appraised at buyer's cost by the pricing principle; 2) Items such as labor, supervision, indirect expense, financing, and so forth -- appraised on the basis of recorded data derived from past experience. These appraisals are forecasts of costs and rely on the causal and continuity postulates.
9. Principle of Comparison as Used in Sales Analysis. Marketable Noninvestment Properties which are not sold in identical units in an open market at advertised or published prices, but which are unique and sold at *negotiated* prices, are valued by the Sales Analysis Method. This method is based on an analysis of the prices at which comparable properties have sold. The market value of the subject property is the most probable price which it would bring if offered for sale. A comparable property is one which has the same value elements as the subject property (but not necessarily, or even generally, in the same proportions). The Sales Analysis Method *assumes* that the price at which a comparable property sold was the result of the particular weighted-combination of value elements comprised in that property. The existence of the value elements, in certain proportions, is *assumed* to be the *cause* which produced the sale price as an *effect*. This is an example of the Causal Postulate.

The amount which each value element contributes to the price is ascertained by analyzing a sufficient number of sales of comparable properties and correlating (mathematically) the numerical magnitudes of the value elements with the sales prices to give an equation, or "model." The numerical magnitudes of the value elements of the subject property are then inserted in the equation and its probable sale price calculated. There is another assumption here, namely, that if the value elements were the "*causes*" of the sale prices of the comparable properties, these causes will have the same *effects* on the sale price of the subject property.

10. Principle of Earnings-Forecasting. In applying the Principle of the Generation of Property Value to an Investment Property it is found that the expected future owner benefits are in the form of net monetary returns, either periodic income or capital gain or both. In order to value the property it is necessary to forecast its earning expectancy. The past earning experience of the subject property and/or of comparable properties, adjusted for such trends and circumstances as can be foreseen as of the valuation date, is projected into the future. This forecasting is based on both the Causal Postulate and the Continuity Postulate.
11. Principle of Present Worth of an Earning Expectancy. The valuation of an investment property is based on the principle that, as of the valuation date, the value is *equivalent* to the series of future net returns. The present worth calculation is based on the principle that an investor, buying the subject property, expects 1) either to *preserve* the amount of his original investment or to *recover* the consumed portion thereof out of earnings and/or any terminal sale of assets and, 2) to receive the equivalent of an annual remunerative yield on the unrecovered portion of his original investment; the yield rate being high enough to compensate him for the investment risk involved.

STUDY 39.70 - PREJUDGMENT ATTACHMENT

During a discussion of the Minutes of the June 27, 28, and 29, 1974, meeting, the concern was expressed that the Comments to relevant sections of the attachment bill might not have been revised in light of Amendment 3 (see June Minutes, page 3) to make clear that the creditor has the burden of proving that the claim is not based on "the sale or lease or a license to use property, the furnishing of services, or the loan of money and the property sold or leased, or licensed for use, the services furnished, or the money loaned was used primarily for personal, family, or household purposes." The staff was directed to review the Comments to make sure that the statements concerning the burden of proof are correct.

STUDY 63 - EVIDENCE (JURY VIEW IN CIVIL CASES)

The Commission considered Memorandum 74-36 and the attached letters of comment and staff draft of the Recommendation Relating to Jury Views in Civil Cases. The Commission directed the staff to redraft the recommendation with the following features:

1. The statute should apply to views by any trier of fact, whether judge or jury. The staff should consider a different location in the Code of Civil Procedure since Section 610 is in a chapter entitled "Trial by Jury."

2. The view should be available only on motion of a party and not on the judge's own motion.

3. The purpose for which a view may be ordered should be changed to read substantially as follows: "to view ~~ex-inspect~~ the property which is the subject of litigation, or the place where any ~~material-fact~~ relevant event occurred, or any ~~material~~ object, demonstration, or experiment, a view of which is relevant and admissible in evidence in the case ."

4. The standard for ordering a view should be changed from "where it appears proper" to "where a view would aid the trier of fact in its determination of the case."

5. Subdivision (b) should read substantially as follows:

The entire court, including the judge, jury, if any, court reporter, and any necessary officers, shall proceed in a body to the place, property, object, demonstration, or experiment to be viewed, and on such occasion the court shall be deemed to be in session from the time it leaves the courtroom until it returns. At the view, the court may hear explanations or other testimony of witnesses, examination by counsel, or other evidence relevant to the view or to the case. The proceeding at the view shall be recorded to the same extent as the proceedings in the courtroom.

6. The Comment should explain that the jury may question witnesses to the same extent as in the courtroom and call attention to the fact that it

Minutes
July 25 and 26, 1974

is in the judge's discretion whether the witnesses may testify and be cross-examined.

The Commission also requested the staff to prepare a memorandum on appellate court treatment of unrecorded evidence obtained at a view by the trial judge and on the right of the court to have a view.

APPROVED

Date

Chairman

Executive Secretary