

Meeting

Memorandum No. 22(1961)

Subject: Third Bound Volume of Reports, Recommendations and
Studies of Law Revision Commission.

Attached are the following portions of the third bound volume of reports, recommendations and studies of the Law Revision Commission:

(1) Table of Contents (yellow pages).

(2) Preface (green pages). The first and second paragraphs of the preface are substantially the same as the preface in the second bound volume. The balance of the proposed preface is new and should be carefully examined by the Commission.

(3) Legislative History (pink pages). The Legislative History should be carefully examined by the Commission. We have attempted to give reasons for some of the changes made during the legislative process. We will carefully check this legislative history for session law chapter numbers, etc., before publication. Would the Commission object to the staff submitting the portion of the Legislative History relating to eminent domain to the Department of Public Works for comment?

Note that we propose to include in the third bound volume the following tables:

(1) Cumulative Table of Sections Enacted, Amended or Repealed Following Study and Recommendation by Commission. As the preface indicates, an examination of this table will permit

a legal researcher to determine whether the Commission has made a study and recommendation that resulted in the enactment of legislation. This table will not, however, list statutory provisions recommended by the Commission that were not enacted as law.

(2) Cumulative Table of Statutory References. This table will list all California statute sections cited or discussed in a recommendation or research study.

At the time the indexer prepares an index for the third bound volume, she will also prepare a cumulative table of cases cited or discussed in Commission recommendations and research studies. We could publish this as a part of volume 3. If we did, we might find that we would not want to cumulate this table in each subsequent volume because the table may become very voluminous. Does the Commission wish to include a Cumulative Table of Cases in the third bound volume?

The cumulative index and tables published by the New York Law Revision Commission include the three tables outlined above.

We could also include in the third bound volume a list of all persons who served on the Commission and the dates of their service. Does the Commission wish to include such a list in the third bound volume?

The Commission should take action on these matters at its July meeting so that we may publish the third bound volume as soon as possible.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

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PREFACE

This volume contains the 1960 and 1961 annual reports of the California Law Revision Commission to the Governor and the Legislature and the recommendations made by the Commission to the 1961 Session of the Legislature. Each recommendation of the Commission is accompanied by a research study prepared by the Commission's research consultant. The Government Code sections relating to the California Law Revision Commission are included in this volume after the Preface. At the back of this volume, following the last recommendation and research study, the legislative history of the measures introduced in the 1961 Session of the Legislature to effectuate the recommendations contained in this volume is given. Then follow a cumulative table of statute sections enacted, amended or repealed following study and recommendation, a cumulative table of statutory references and a cumulative index. The tables and the index cover not only this volume but also the two previously published volumes.

The pagination in this volume is not consecutive from beginning to end because the annual reports and the recommendations and studies were originally published as separate pamphlets with independent pagination. The annual reports each begin with page one and cannot be identified by page number alone. A sheet of blue paper has been inserted between reports to help differentiate them. The recommendations and studies can be identified by reference to the letter designation preceding each page number.

The page numbers in the first recommendation and study are preceded by the letter "A," those in the second are preceded by "B," etc. The recommendations and studies also are separated by sheets of blue paper to facilitate locating them. The Preface and the Government Code sections relating to the Commission are paginated consecutively in Roman numerals at the front of this volume. The legislative history, cumulative tables and cumulative index are paginated consecutively in Arabic numerals at the back of this volume.

A wealth of background information is contained in the recommendations and research studies published by the Law Revision Commission. An examination of this material will indicate the considerations which led to the Commission's decision to make a recommendation and the research material which was before the Commission when action was taken. Strictly speaking, only the recommendations of the Commission (as distinguished from the research studies) are expressive of Commission intent, but the research studies are valuable in their own right as source material on the legal problems with which they deal.

The legislative history of Commission measures introduced in the 1961 Session not only indicates whether recommended legislation was enacted but also provides background information concerning the reasons for some of the changes made in Commission bills during the legislative process.

The two cumulative tables included in this volume will assist the legal researcher who seeks to determine whether the Commission has made a recommendation concerning a particular statute section or has referred to a particular statute section in a recommendation or research study. The Cumulative Table of Statute Sections Enacted, Amended or Repealed Following Study and Recommendation lists all statute sections enacted, amended or repealed following a study and recommendation by the Commission. The Cumulative Table of Statutory References lists every California statute section cited or discussed in a recommendation or research study and all statute sections proposed to be enacted, amended or repealed in Commission recommendations.

A description of the Cumulative Index is contained in the introductory note immediately preceding the index.

LEGISLATIVE HISTORY OF MEASURES INTRODUCED IN 1961 SESSION
ON RECOMMENDATION OF CALIFORNIA LAW REVISION COMMISSION

Calendar of Topics Selected for Study

Assembly Concurrent Resolution No. 19 was introduced by Honorable Clark L. Bradley, the Assembly Member of the Law Revision Commission. This resolution requested legislative authorization for the Commission to continue its study of topics previously approved by the Legislature.¹ The resolution was adopted by the Legislature, becoming Resolution Chapter 95 of the Statutes of 1961.

Evidence in Eminent Domain Proceedings

Senate Bill No. 205 was introduced by Senator James A. Cobey, the Senate Member of the Law Revision Commission, to effectuate the recommendation of the Commission on this subject.²

Several amendments were made while the bill was pending before the Senate. Some amendments are self-explanatory. The following, however, warrant some comment:

(1) Section 1248.1 of the Code of Civil Procedure was amended to omit the provision that the owner of the property being condemned is presumed to be qualified to express opinions as to the value of the property. This provision was omitted to allay the fear that a jury instruction phrased in the language of the statute would give undue emphasis to the opinion of the owner. In lieu of the omitted provision, language was placed in Section 1248.1 that states that opinions as to the value of the property may be expressed by the owner.

(2) Objection was made to the proposed statute on the ground that it would permit an appraiser to consider noncompensable items of value, damage or injury in forming his opinion. Two amendments were made to eliminate any possibility that such a construction would be given the statute. The preliminary language of Section 1248.2 was amended to require that the data relied upon by an appraiser be relevant to the item of value, damage or benefit concerning which the appraiser is giving his opinion. Section 1248.3 was amended to add subdivision (f), which provides that an opinion of value, damages or benefits may not be based on noncompensable factors.

(3) As originally introduced, Section 1248.2 permitted an appraiser to base an opinion of value upon, inter alia, "the capitalized value of the reasonable net rental value attributable to the property . . . , including reasonable net rentals customarily fixed by a percentage or other measurable portion of gross sales or gross income of a business which may reasonably be conducted on the premises" During the legislative session, some question was raised as to whether this language permitted an appraiser to attribute a rental value to unimproved property based upon income which would be derived from the property if it were improved. To avoid any misunderstanding as to the meaning of Section 1248.2, the Commission rearranged and revised subdivisions (c), (d) and (e) so that the original meaning might be more clearly stated.

(4) Subdivision (g) was added to Section 1248.2 to include in the statute the substance of the last sentence of Section 1845.5.

(5) As originally introduced, Section 1248.3 did not permit an expert witness to base his opinion of value upon any offers. The Commission recommended the exclusion of this type of evidence because of the difficulty of laying an adequate foundation. During the legislative session, representatives of condemnees objected to the exclusion of bona fide offers upon the property being condemned, and it became evident to the Commission that the Senate Judiciary Committee would not approve the bill without such a provision. The Commission, too, recognized that the

objection to offers generally -- that the range of collateral inquiry would be too great -- may not be valid insofar as bona fide offers to purchase the very property being valued are concerned. Hence, Section 1248.3 was amended to permit an expert to consider bona fide, written offers to purchase the property being valued in forming his opinion.

As amended, Senate Bill No. 205 was passed by the Legislature. The Governor held a hearing on the bill. The Department of Finance reported that in its opinion the enactment of Senate Bill No. 205 would result in increased costs of state property acquisition. The Department estimated that enactment of the bill would on the average lengthen condemnation trials by one day and would require the attorney to devote one additional day in preparing for the trial and would require the appraiser to devote one additional day in preparing his opinion. The Department also estimated that enactment of the bill would increase condemnation awards by five percent. A representative of the Department of Public Works, speaking for the opponents of the bill, stated that the public agencies objected to the bill because (1) it permits the appraiser to consider bona fide offers to purchase the property being condemned in forming his opinion, (2) it permits an appraiser to base an opinion on "pure speculation" because the appraiser in forming his opinion may consider the capitalized value of the reasonable net rental from unimproved land if it were improved by improvements that enhance the value of the property for its highest and best use and (3) the bill was unnecessary because

the existing law relating to evidence in eminent domain proceedings is "reasonably certain" and satisfactory.

Representatives of the Law Revision Commission, a Special Committee of the State Bar on Condemnation Law and Procedure and attorneys for condemnees stated at the hearing held by the Governor that they believed the bill would shorten trial time and would not increase the time required to prepare for trial, for the bill would provide certain and ascertainable standards for the admission of valuation evidence. They pointed out that the existing law is both uncertain and difficult to find. They also pointed out that the bill merely allows the appraiser in forming his opinion to consider those facts and data that a willing buyer and seller consider in an open market transaction. They expressed the opinion that any estimate as to whether the bill would result in increased awards was based on pure speculation.

The Governor did not approve the bill and, the adjournment of the Legislature preventing the return of the bill, the bill did not become law.

Taking Possession and Passage of Title in Eminent Domain Proceedings

Senate Bills Nos. 204, 206 and 207 and Senate Constitutional Amendment No. 6 were introduced by Senator Cobey to effectuate the recommendation of the Commission on this subject.³

Senate Bill No. 204

Senate Bill No. 204 relates to proration and refund of property taxes when property is taken by eminent domain.

The bill was amended in the Senate (1) to require that the condemner reimburse the condemnee for the condemner's pro rata share of prepaid property taxes and (2) to permit the condemner to obtain a refund of such taxes in the same manner as taxes erroneously collected if the condemner is a public agency that would be entitled to have such taxes cancelled if unpaid. The bill as introduced did not provide for reimbursement of such prepaid property taxes by the condemner in cases where the condemner is a public agency but instead permitted the condemnee to obtain a refund. The amendment was made so that the condemner rather than the condemnee would be required in such cases to comply with the procedures necessary to obtain the tax refund.

Senate Bill No. 204 was also amended in the Senate to provide that any party to an eminent domain proceeding may have the property sought to be taken separately valued for property tax purposes. Under this amendment the property owner in the case of a partial taking may obtain a determination of the property taxes allocable to the part remaining. He can then pay the precise amount of taxes due on the part remaining and is not required to expend his own funds to pay the property taxes on the entire parcel in order to avoid payment of penalties and interest on the taxes allocable to the property remaining.

As thus amended, Senate Bill No. 204 was passed by the Legislature and signed by the Governor, becoming Chapter of the Statutes of 1961.

Senate Bill No. 206

Senate Bill No. 206 relates to the procedure for taking possession and passage of title. The bill was substantially amended in the Senate. Many of the amendments were technical or clarifying amendments. The following are the principal amendments of a substantive nature:

(1) Section 1243.5 as introduced permitted the condemner, upon court order, to serve the order for immediate possession by mail in lieu of personal service. The bill was amended to permit the condemner to make such service without obtaining a prior court order and to require the condemner to file an affidavit in the proceeding setting forth the facts showing the reason personal service could not have been made. The change was made so that the condemner would not be required to incur the extra expense of making a court appearance in order to serve by mail in lieu of personal service.

(2) The definition in Section 1243.5 of "record owner or owners of the property" was revised by adding the words "or other instruments" after the word "deeds."

(3) Section 1243.5 was amended to provide that prior to judgment the amount deposited shall not be reduced to an amount less than that already withdrawn.

(4) The provision in Section 1243.5 providing for a court order delaying the effective date of immediate possession was deleted. The public agencies objecting to this provision pointed out that an order for immediate possession is not self-executing; before a person can be dispossessed under an order of immediate possession, the condemner must obtain a writ of assistance. The public agencies advised the Legislature that the deleted provision is unnecessary because, as a matter of practice, a court will issue a writ of assistance in an immediate possession case only upon a showing of necessity and with the imposition of reasonable conditions.

(5) The provision in Section 1243.5 providing for the vacation of the order of immediate possession by the trial or appellate court was deleted. The public agencies objecting to this provision pointed out that the trial court can vacate any order for immediate possession where it is shown that the condemner does not have the right to take the property or does not have the right to take immediate possession. If the trial court does not vacate its order, the intervention of an appellate court may be secured by a petition for an appropriate writ. The public agencies advised the Legislature that the writ procedure is more expeditious than an appeal because the matter can be heard and determined within a relatively short time since it is unnecessary to have the record prepared and transmitted to the appellate court.

(6) The provisions of Section 1243.7 providing for withdrawal of the deposit were amended to require that an applicant seeking to withdraw any of the deposit in excess of the amount originally deposited file an undertaking executed by two or more sufficient sureties approved by the court to the effect that they are bound to the condemner in double the amount that the total amount sought to be withdrawn exceeds the amount of the original deposit. Provisions were added to provide that the applicant filing the undertaking is entitled to recover the premium paid for the undertaking, but not to exceed 2 percent of the face value of the undertaking, as a part of the recoverable costs in the eminent domain proceeding. The changes were made to provide more adequate protection to the condemner in case of an excess withdrawal.

(7) A provision was added to Section 1243.7 giving the court authority to require the filing of an undertaking when one person seeks to withdraw any portion of a deposit which another person claims.

(8) The bill as introduced deleted the last sentence of Section 1249 and inserted the substance of that sentence in Section 1249.1. The bill was amended to restore the deleted sentence to Section 1249 so that Senate Bill No. 206 would not affect the interpretation to be given that sentence.

(9) Section 1254 was amended to incorporate a change made in that section by a bill previously enacted at the 1961 legislative session.

As thus amended, Senate Bill No. 206 was passed by the Legislature and signed by the Governor, becoming Chapter of the Statutes of 1961.

Senate Constitutional Amendment No. 6

Senate Constitutional Amendment No. 6 was introduced to effectuate the recommendation of the Commission that Section 14 of Article I of the State Constitution be revised. This constitutional amendment died in the Senate Judiciary Committee.

Senate Bill No. 207

Senate Bill No. 207 was introduced to effectuate the recommendation of the Commission that the right of immediate possession be extended to all condemners if and when the Constitution was amended as proposed by Senate Constitutional Amendment No. 6. The bill died in the Senate Judiciary Committee.

Reimbursement for Moving Expenses When Property Is
Acquired for Public Use

Senate Bill No. 203 was introduced by Senator Cobey to effectuate the recommendation of the Commission on this subject.⁴ The bill was amended in the Senate to make the following changes:

(1) Two additional limitations on reimbursement of moving expenses were added to the bill: First, reimbursement is limited to a maximum of \$250 for a single family residential unit and

\$2,500 for any other type of property. Second, reimbursement under the proposed statute is not allowed in any case where relocation payments are authorized to be made under Section 33270.1 of the Health and Safety Code in connection with a redevelopment project. The dollar limits on reimbursement for moving expenses were accepted by the Commission so that the principle of reimbursement for moving expenses could be established in California. It was obvious that the bill without dollar limits on reimbursement was not acceptable to the Senate Judiciary Committee. The Commission anticipated that if the bill were enacted with the dollar limitations on reimbursement, those limitations would be reviewed after experience had been acquired under the statute.

(2) Provisions of the proposed statute relating to reimbursement when real property is taken for a term only were deleted. The insertion of dollar limits on reimbursement would have made it necessary to include in the bill very complex provisions dealing with reimbursement when real property is taken for a term only. The introduction of such complex provisions into the bill was considered undesirable in view of the very few occasions when they would be applicable.

(3) The bill was amended to provide that negotiated settlements of the amount of reimbursement for moving expenses may be based on the estimated amount of moving and storage costs incurred or to be incurred and that negotiated settlements are subject to limitations set out in the bill on the amount of reimbursement.

The original bill provided that the limitations on reimbursement did not apply when the parties determined the amount of reimbursement by agreement. This change was made because the public agencies suggested that making these limitations applicable to negotiated settlements would facilitate administration.

(4) A provision permitting the person acquiring the property to elect to move and store the property at its own expense was deleted from the bill. Representatives of condemnees objected to this provision. None of the public agencies that appeared before the Senate Judiciary Committee on the bill believed that the provision was necessary.

(5) The above amendments made the definition of "acquisition" unnecessary and this definition was deleted.

The Senate Judiciary Committee recommended that the bill be referred to the Committee on Rules to be assigned to an appropriate interim committee. The bill was referred to the Senate Fact Finding Committee on Judiciary.

Rescission of Contracts

Assembly Bills Nos. 466 and 467 were introduced by Mr. Bradley to effectuate the recommendation of the Commission on this subject.⁵

Assembly Bill No. 467, a comprehensive rescission statute, was passed by the Assembly without amendment. A technical amendment was made to the bill in the Senate. As thus amended, the bill was passed by the Legislature and signed by the Governor, becoming Chapter 589 of the Statutes of 1961.

Assembly Bill No. 466 relates to rescission of a release. The bill was passed by the Assembly, but the Senate Judiciary Committee recommended that the bill be referred to the Committee on Rules to be referred to an appropriate interim committee. The bill was referred to the Assembly Fact Finding Committee on Judiciary.

Right to Counsel and the Separation of the Delinquent
From the Nondelinquent Minor in Juvenile Court Proceedings

Senate Bills Nos. 219 and 220 were introduced by Senator Cobey to effectuate the recommendation of the Commission on this subject.⁶ Both bills were drafted on the basis of the then existing law relating to juvenile court proceedings. However, a comprehensive revision of the juvenile court law was introduced at the 1961 Session (Senate Bill No. 332) upon recommendation of the Governor's Special Study Commission on Juvenile Justice. Accordingly, the Law Revision Commission made no effort to secure enactment of Senate Bills Nos. 219 and 220. Instead, the Law Revision Commission prepared amendments to Senate Bill No. 332 to incorporate the substance of Senate Bill No. 219 into Senate Bill No. 332 and supported the other provisions of Senate Bill No. 332 that were consistent with the recommendation of the Law Revision Commission.

Senate Bill No. 219 was introduced to effectuate the recommendation of the Law Revision Commission that the juvenile court should adjudge a juvenile to be a "ward" only if the court's

jurisdiction over the juvenile is based upon the juvenile's misconduct and that a juvenile should be adjudged a "dependent child" if he is under the jurisdiction of the juvenile court merely because he lacks proper supervision or care. Senate Bill No. 332 as introduced made no such distinction between wards and dependent children, but was amended in the Senate to provide for the designation of a juvenile as a "ward" or "dependent child" as recommended by the Law Revision Commission.

Senate Bill No. 219 also specifies the range of permissible disposition of juveniles who are adjudged to be wards or dependent children. The bill provides that the court has no power to place a dependent child on probation, to detain a dependent child in the county jail or to commit a dependent child to the Youth Authority or to a local correctional institution unless the dependent child is also adjudged to be a ward because of his misconduct. Sections 725 to 781 of the Welfare and Institutions Code as enacted by Senate Bill No. 332 provide for substantially the same range of permissible disposition of juveniles who are adjudged to be wards or dependent children and, accordingly, effectuate the recommendation of the Law Revision Commission on this matter.

Senate Bill No. 220 was introduced to effectuate the recommendation of the Law Revision Commission concerning the right to counsel in juvenile court proceedings. Sections 632 and 633 of the Welfare and Institutions Code as enacted by Senate Bill No. 332 are basically the same as the recommendation of the Law

Revision Commission contained in Senate Bill No. 220 and, accordingly, effectuate the recommendation of the Law Revision Commission on this matter.

Inasmuch as the substance of the recommendation of the Law Revision Commission contained in Senate Bills Nos. 219 and 220 was either contained in or added to Senate Bill No. 332, Senate Bills Nos. 219 and 220 were not acted upon by the Senate Judiciary Committee. After substantial amendments in the Senate and Assembly, Senate Bill No. 332 passed the Legislature and was signed by the Governor, becoming Chapter of the Statutes of 1961.

Survival of Actions

Senate Bill No. 202 was introduced by Senator Cobey to effectuate the recommendation of the Commission on this subject.⁷ The bill was amended in the Senate as follows:

(1) The proposed comprehensive survival statute -- Section 573 of the Probate Code -- was amended to provide that damages for "pain, suffering or disfigurement" cannot be recovered when a person having a cause of action dies before judgment.

(2) Section 376 of the Code of Civil Procedure was amended to provide that in an action maintained under that section after the death of the child or ward or against the executor or administrator of the person causing the injury, "the damages recoverable shall be as provided in Section 573 of the Probate Code."

As thus amended, the bill was passed by the Legislature and signed by the Governor, becoming Chapter 657 of the Statutes of 1961.

Arbitration

Assembly Bill No. 832 was introduced by Mr. Bradley to effectuate the recommendation of the Commission on this subject.⁸ The Senate Judiciary Committee recommended the bill "do pass" in reliance upon an opinion of Legislative Counsel that the bill does not affect Section 229 of the Labor Code. On motion of Senator Fisher, this opinion was entered in the Senate Journal. The bill was passed by the Legislature without amendment and was signed by the Governor, becoming Chapter 461 of the Statutes of 1961.

Presentation of Claims Against Public Officers and Employees

Senate Bill No. 208 was introduced by Senator Cobey to effectuate the recommendation of the Commission on this subject.⁹ The bill was given a do-pass recommendation by the Senate Judiciary Committee, but failed to pass the Senate. Senator Cobey moved that the Senate reconsider the vote whereby Senate Bill No. 208 was refused passage and reconsideration was granted. However, the bill was subsequently re-referred to the Senate Judiciary Committee and died in that committee.

Inter Vivos Marital Property Rights in Property
Acquired While Domiciled Elsewhere

Assembly Bill No. 465 was introduced by Mr. Bradley to effectuate the recommendation of the Commission on this subject.¹⁰ The bill was passed by the Legislature without amendment and was signed by the Governor, becoming Chapter 636 of the Statutes of 1961.

Notice of Alibi in Criminal Actions

Assembly Bill No. 464 was introduced by Mr. Bradley to effectuate the recommendation of the Commission on this subject.¹¹ The Assembly Committee on Criminal Procedure recommended that the bill be referred to the Committee on Rules to be assigned to an appropriate interim committee. The bill was referred to the Assembly Fact Finding Committee on Criminal Procedure.

Footnotes

1. Section 10335 of the Government Code provides that the Commission shall confine its studies to those topics set forth in the calendar of topics contained in its last preceding report which are thereafter approved for its study by concurrent resolution of the Legislature. The section also requires that the Commission study any topic which the Legislature, by concurrent resolution, refers to it for such study.
2. See Recommendation and Study, supra at A-1.
3. See Recommendation and Study, supra at B-1.
4. See Recommendation and Study, supra at C-1.
5. See Recommendation and Study, supra at D-1.
6. See Recommendation and Study, supra at E-1.
7. See Recommendation and Study, supra at F-1.
8. See Recommendation and Study, supra at G-1.
9. See Recommendation and Study, supra at H-1.
10. See Recommendation and Study, supra at I-1.
11. See Recommendation and Study, supra at J-1.