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Meeting Place

Room 1200, First Floor
Annex, State Building
(Civic Center), 350
McAllister Street

A G E N D A

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

April 21-23, 1960

THURSDAY, APRIL 21 (Mr. Kagel will be present).

1. Minutes of March 1960 meeting (sent 3/30/60).
2. Administrative matters:
 - (1) Approval of contract with Mr. George Brunn for study concerning whether an award of damages made to a married person in a personal injury action should be the separate property of such married person.
 - (2) Payment of Professor Pickering for study on Additur (study sent 4/4/60).
 - (3) Partial payment to Professor Chadbourn for completed portion of study on incorporating U.R.E. into California Codes. (Portions of study sent 2/4/60 and 3/30/60; additional portions to be sent).
3. Study No. 32 - Arbitration.

See: Memorandum No. 28 (1960) (to be sent).
Study by Kagel (you have this study).
Printed Pamphlet containing Uniform Arbitration Act.
4. Study No. 37(L) - Claims Against Public Officers and Employees.

See: Memorandum No. 29 (1960) (sent 3/30/60).
Memorandum No. 37 (1960) (to be sent).
Study by Van Alstyne (you have this study).

FRIDAY, APRIL 22 (Mr. McLaurin, representative of Nibley firm, will be present).

5. Study No. 36(L) - Condemnation.

See: Memorandum No. 41 (1960) (program for 1961 session) (enclosed).
Memorandum No. 31 (1960) (evidence) (to be sent).
Memorandum No. 32 (1960) (moving expenses) (enclosed).
Memorandum No. 33 (1960) (taking possession) (to be sent).
Study on Taking Possession (you have this study).

FRIDAY, APRIL 22 -- Continued

6. Study No. 23 - Rescission of Contracts.

See: Memorandum No. 35 (1960) (to be sent).

7. Commission Bills Not Passed by Legislature.

See: Memorandum No. 30 (1960) (sent 3/30/60).

8. Study No. 38 - Inter Vivos Rights.

See: Memorandum No. 22 (1960) (sent 3/10/60).
Supplement to Memorandum No. 22 (1960) (sent 3/14/60).
Study by Marsh (you have this study).

9. Study No. 48 and 54 - Juvenile Court Proceedings.

See: Memorandum No. 27 (1960) (sent 3/12/60).

SATURDAY, APRIL 23 (Professor Chadbourn will be present).

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

(1) Hearsay Division:

See: Memorandum No. 12 (1960) (sent 2/4/60).
Memorandum No. 38 (1960) (sent 4/4/60).
Memorandum No. 39 (1960) (sent 4/4/60).
Memorandum No. 13 (1960) (sent 2/4/60).
Study on Incorporating Rules 62-66 into the California
Codes (sent 2/4/60).
Supplement to Study listed above (sent 3/21/60).

(2) Privileges Division:

See: Memorandum No. 15 (1960) (sent 2/11/60).
Study on Rules 37-40 (you have this study).
Memorandum No. 40 (1960) (sent 4/4/60).
Study on Incorporating Rule 7(b), (d) and (e) and
Rules 23-40 into California Codes (sent 3/30/60).

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Minutes of Meeting

of

April 21, 22 and 23, 1960

San Francisco

A regular meeting of the Law Revision Commission was held in San Francisco on April 21, 22 and 23, 1960.

Present: Roy A. Gustafson, Chairman (April 21 and 22)
John R. McDonough, Jr., Vice Chairman
Honorable Clark L. Bradley
Leonard J. Dieden
George G. Grover
Herman F. Selvin
Thomas E. Stanton, Jr.
Ralph N. Kleps, Ex Officio (April 21 and 22)

Absent: Honorable James A. Cobey
Charles H. Matthews

Messrs. John H. DeMouilly and Joseph B. Harvey and Miss Louisa R. Lindow, members of the Commission's staff were also present.

Mr. Sam Kagel, research consultant for Study No. 32 - Arbitration, was present during a part of the meeting on April 21.

Messrs. John McLaurin and Stanley Tobin of the law firm of Hill, Farrer & Burrill of Los Angeles, research consultant for Study No. 36(L) - Condemnation, were present during a part of the meeting on April 22.

Professor James H. Chadbourn of the School of Law, University of California at Los Angeles, research consultant

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for Study No. 34(L) - Uniform Rules of Evidence, was present during a part of the meeting on April 23.

After the following corrections were made, a motion was made, seconded and unanimously adopted to approve the minutes of the meeting held on March 18 and 19, 1960:

Pages 8, 10 and 11. The phrase "Unless the parties have otherwise agreed" should precede subparagraphs (1), (12) and (15).

Page 10. Subparagraph (8) should be revised to read:

(8) The Sapp v. Barenfeld holding (that an arbitrator is permitted to make ex parte investigations without the knowledge and consent of the parties) should not be nullified.

Page 15. Mr. Stanton's name should be substituted for that of Mr. Dieden's as voting aye to the motion to approve Section 1248.4 as revised.

Page 7. Delete all of Page 7 and substitute the following:

(Pages 7, 7a and 7b are attached as Appendix I and may be substituted for page 7 of your March 1960 minutes.)

I. ADMINISTRATIVE MATTERS

A. Commission Bills Not Passed by the Legislature: The Commission considered Memorandum No. 30(1960) relating to the various bills recommended by the Commission that were not passed by the Legislature.

Taking Instructions to the Jury Room

The Executive Secretary reported that the research on this study will be completed during the summer of 1960 using research aid available under the Stanford contract. It was agreed that the Commission will not introduce a bill on this topic at the 1961 Session.

Nonresident Aliens' Right to Inherit

The Executive Secretary reported that the State Bar Journal reported that the Board of Governors determined to sponsor a bill relating to nonresident aliens' right to inherit if the Commission does not do so. A motion was made, seconded and adopted directing the Executive Secretary to advise the State Bar that the Commission will be glad to make the information on the 1959 bill contained in the Commission files available to the State Bar but that the Commission will not introduce legislation in 1961 concerning the right of nonresident aliens to inherit.

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Overlapping Penal and Vehicle Code Sections Regarding Taking of
Vehicles

The Commission determined that it would not introduce legislation in 1961 on this subject.

Notice of Sales of Corporation Assets

The Commission determined that it would not introduce legislation in 1961 on this subject. Mr. Bradley suggested that either he or Senator Cobey could reintroduce the bill in 1961.

B. Approval of Contract with George Brunn for Study No. 53(L) - Imputed Negligence: The Commission discussed the making of a contract with Mr. George Brunn to make a study of whether an award of damages made to a married person in a personal injury action should be the separate property of such married person. After the matter was discussed, a motion was made, seconded and adopted that the contract with Mr. Brunn be approved, that the honorarium be \$1,000 and that the Chairman be authorized to execute the contract on behalf of the Commission.

II. CURRENT STUDIES

A. Study No. 32 - Arbitration: The Commission had before it Memorandum No. 28(1960) containing Mr. Kagel's proposed statute, a draft statute proposed by the staff, comments comparing the two statutes, a research study of California arbitration law prepared by research consultant, Mr. Sam Kagel, and a copy of the Uniform Arbitration Act. The Commission agreed to proceed by following the staff's draft while considering the various alternative provisions contained in Mr. Kagel's draft and the Uniform Arbitration Act. The following actions were taken:

Section 1280. (1) The first sentence of Section 1 of the Uniform Arbitration Act was approved.

(2) The second sentence of Section 1 of the Uniform Arbitration Act, except for the bracketed material, was approved.

(3) Subdivision (c) of Section 1280 as proposed by Mr. Kagel was approved as revised:

"Controversy" as used in this title includes any question arising between the parties whether such question is one of law or of fact.

(4) The substance of subdivision (d) of Section 1280 as proposed by Mr. Kagel is to be consolidated with subdivision

(c) as revised.

(5) A motion was made by Mr. Selvin and seconded by Mr. McDonough to make oral arbitration agreements enforceable. The motion did not carry:

Aye: McDonough, Selvin, Stanton.

No: Bradley, Grover, Gustafson.

Not Present: Cobey, Dieden, Matthews.

(6) Further consideration was deferred as to whether oral agreements should be enforced under the arbitration statute, and whether there should be an express provision to the effect that common law arbitration is abolished.

(7) Subdivision (2) of Section 1280 of the staff's draft statute, which defines an agreement to arbitrate, was not approved.

Section 1281. (1) The principle of subdivision (1) of the staff's draft should be included in the sections dealing with enforcement of awards.

(2) Subdivision (2) of the staff's draft was approved as revised:

An oral or implied agreement to extend the term of an expired written agreement shall be deemed to be a written agreement within the meaning of this title.

(3) Subdivisions (3) and (4) were disapproved, but it was suggested that some comment on the principle that words of

art should not be required to incorporate arbitration provisions by reference should be included in the recommendation.

Section 1282. (1) Subdivision (1) should include the following language from Mr. Kagel's draft as revised:

On petition of a party alleging the existence of a written agreement to arbitrate a controversy and that the opposing party refuses to arbitrate, the court shall order arbitration if it determines that such an agreement to arbitrate the controversy exists, unless it determines . . .

The enumeration of the reasons for the denial of a petition to compel arbitration in subdivision (2) of the staff's draft are to be added to this language, but stated in the terms of the determination of the court.

(2) The staff was directed to determine the law on the necessity for findings, and if the cases require findings to be made, to draft language eliminating the requirement.

(3) Subdivision (4) of the staff's draft was approved, subject, however, to reconsideration after Mr. Kagel reviews the matter and reports on his findings.

(4) Subdivision (5) is to be worded in the manner of subdivision (c) as proposed by Mr. Kagel with the deletion of the word "sole."

Section 1283. (1) In subdivision (1) of the staff's draft, the word "petition" is to be substituted for the word "motion" and the word "stay" is to be substituted for the word

"delay." The subdivision was approved as revised.

(2) Subdivision (2) of the staff's draft was approved with the following modifications: The phrase "has been made or a petition therefor has been filed" is to be substituted for the phrase "or a motion therefor has been made under Section 1282".

Section 1284. (1) Subdivision (c) as contained in Section 1283 of Mr. Kagel's draft was approved and revised to read:

When a court has been requested to appoint a neutral-arbitrator the court shall nominate five persons from lists of persons supplied jointly by the parties, or obtained from a governmental agency, or from private disinterested associations concerned with arbitration. The parties may within five days of receipt of such nominees from the court jointly select a single person by agreement or lot from such list, who shall serve as the court-appointed arbitrator. If the parties fail to select an arbitrator within the five-day period, the court shall appoint the arbitrator from the nominees.

(2) Subdivision (1) of the staff's draft was approved as revised:

(1) If the arbitration agreement provides, or the parties agree upon, a method of appointing an arbitrator such method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and his successor has not been appointed, the superior court on petition of a party, shall appoint one or more arbitrators.

The last sentence of this subdivision "unless otherwise provided in the arbitration agreement, the arbitration shall be by a single arbitrator" should be relocated in Section 1285 as subdivision (1).

(3) "Fail" was substituted for "are unable" in subdivision (2) of the staff's draft. The subdivision was approved as modified, but the staff was directed to place this subdivision in a definitions section.

Section 1285. Subdivision (2) of the staff's draft was modified by striking out the last clause. As so modified, both subdivisions (1) and (2) were approved.

Section 1286. (1) The preamble of the staff's draft was modified by substituting "agreed by the parties" for "provided in the agreement."

(2) "Other" was inserted between the words "the arbitrators" in the last line on page II-4 of the staff draft. In the top line of page II-5, "or certified" was inserted between the words "registered mail", and "seven" was substituted for the word "five". In the last line of subdivision (1), "or to a later date if" was substituted for "unless", and "thereto" was substituted for "to a later date."

(3) The first sentence of subdivision (2) was approved. The last sentence was placed at the end of subdivision (3).

(4) Subdivision (3) was modified by striking out "material to the question to be decided", substituting ", but" for the period at the end of the subdivision and adding the last sentence of subdivision (2).

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(5) Subdivision (a)(4) of Section 1285 as contained in Mr. Kagel's draft was substituted for subdivision (4) as contained in the staff's draft.

B. Study No. 34(L) - Uniform Rules of Evidence: The Commission had before it Memorandum No. 12(1960) and Memorandum No. 38(1960) and Memorandum No. 39(1960), all relating to hearsay, and Professor Chadbourn's memorandum and supplemental memorandum concerning incorporating Rules 62-66 in the California Codes.

Memorandum No. 12(1960) - Rule 63(23), and (24). A motion was made, seconded and unanimously adopted not to condition Rule 63(23) and (24) upon a finding by the judge that at the time the statement was made the declarant had the mental capacity to make a meaningful statement.

A motion was then made by Mr. Selvin and seconded by Mr. Dieden to incorporate into Rule 63(23) and 63(24) the substance of the doctrine of ante litem motam, however, putting the burden of proof on the person objecting to the evidence. The motion carried:

Aye: Bradley, Dieden, Grover, Selvin.

No: McDonough.

Not Present: Cobey, Gustafson, Matthews, Stanton.

Memorandum No. 38(1960) - Rule 63(31). A motion was made by Mr. McDonough and seconded by Mr. Dieden to disapprove the adoption of Rule 63(31) and to substitute for it the language of Code of Civil Procedure Section 1936 as revised to read:

Historical works, books of science or art, and published maps or charts, when made by persons

indifferent between the parties, to prove facts of general notoriety and interest.

The motion carried:

Aye: Bradley, Dieden, McDonough, Selvin.

No: Grover.

Not Present: Cobey, Gustafson, Matthews, Stanton.

Professor Chadbourn's Memorandum and Supplemental Memorandum Regarding Rules 62-66 and Memorandum No. 39(1960). The Commission considered the various recommendations made by Professor Chadbourn concerning the amendments and repeals of existing statutes that would be required by the incorporation of the Uniform Rules of Evidence, hearsay division, into the present California Codes.

(1) A motion was made, seconded and adopted to approve in principle the addition of Rule 63(32) recommended by Professor Chadbourn providing:

(32) Any hearsay evidence not admissible under the foregoing provisions of this Rule but declared by other law of this State to be admissible.

(2) It was agreed to approve in principle the addition of a new Rule 63A recommended by Professor Chadbourn providing:

63A. When hearsay evidence is declared to be admissible by any of subdivisions (1) through (31) of Rule 63 and when such evidence is also declared to be admissible by some law of this State other than the subdivision, the subdivision shall not be construed to repeal such other law.

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(3) It was agreed to repeal the following sections of the Code of Civil Procedure:

Section 1848	Section 1905	Section 1921
" 1849	" 1906	" 1926
" 1850	" 1907	" 1936
" 1851	" 1918	" 1946
" 1852	" 1919	" 1947
" 1853	" 1920	" 1953e-1953h
" 1901	" 1920a	

(4) It was agreed that the following sections of the Code of Civil Procedure should be retained with modification where indicated. When the Uniform Rules are prepared in statute form, consideration should be given to incorporating some of these sections into the Uniform Rules.

Section 1855a.

Section 1870 [Delete subdivisions (2) through (8) and (11) and (13). Substance of subdivision (8) to be incorporated with subdivision (2)(c) of Rule 63 and added as another subdivision.]

Section 1893. [Delete the following: "and such copy is admissible as evidence in like cases and with like effect as the original writing"]

Sections 1919a and 1919b.

Section 1920b [Consideration was deferred on this section until Rule 72 is considered. A suggestion was made to redraft Rule 72 to incorporate the substance of Section 1920b or to substitute 1920b for Rule 73.]

Section 1925	Section 1927.5	Section 1928.1 through
" 1927	" 1928	" 1928.4
		" 1948

Section 1951 [This section should be reconsidered when the Uniform Rules relating to authentication are considered. It was agreed that Section 1951 should not go beyond Rule 63(29) and should be revised to that extent.]

Section 2009 - 2015

Section 2047 [First two sentences would be retained; last sentence would be deleted.]

(5) A motion was made, seconded and unanimously adopted not to repeal or revise Section 939.6 of the Penal Code.

(6) A motion was made, seconded and unanimously adopted to endorse the other recommendation made by Professor Chadbourn relating to the incorporation of the Uniform Rules in the California Codes. The staff was directed to review all such recommendations and to present to the Commission any matter as to which the staff has any question or doubt.

Rule 62(5). The Commission considered a recommendation by Professor Chadbourn to delete Rule 62(5). A motion was made and seconded to delete Rule 62(5). The difficulty of adjusting the various rules was pointed out. The motion did not carry.

Rule 63(9). A motion was made, seconded and unanimously adopted to add the words "or partnership" after the word "agency" in Rule 63(9)(a).

Rule 63(13)(14). During the discussion of the Uniform Business Records as Evidence Act, it was pointed out that Section 1953f.5 of the Code of Civil Procedure was added to the Uniform Act in 1959. The question was raised whether Rule 63(13) and (14) revised to contain the substance of the Uniform Business Records as Evidence Act should be revised to include the 1959 legislation. After the matter was discussed a motion was made, seconded and unanimously adopted to direct the staff to check with the sponsors of the 1959 revision to find out the purpose for such addition.

Section 2047 of the Code of Civil Procedure. Mr. Stanton pointed out that the Uniform Rules have not incorporated the principle of some of the present statutes that provide that evidence should be viewed with caution. For example, the Commission recommends the deletion of the last sentence of Section 2047 of the Code of Civil Procedure. He suggests that this fact should be made known to the State Bar when it considers the action of the Commission. Professor Chadbourn was requested to examine all statutes relating to jury instructions that go to the weight to be given to evidence and submit a report for consideration by the Commission.

During the discussion of Section 2047 of the Code of Civil Procedure Mr. Selvin raised the question of whether

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the Uniform Rules relating to the doctrine of recollection recorded should be broadened to provide that a memoranda used at any time or place during the course of the trial to refresh the memory of a witness should be produced on demand. After the matter was discussed the motion was made, seconded and unanimously adopted to direct the consultant and staff to consider the revision of the first two sentences of Section 2047 to incorporate the principle that a document should be produced on demand if referred to at any time or place during the course of the trial by a witness to refresh his memory. The location of this section is to be determined at a future date.

Approval of Payment to Professor Chadbourn. After the Commission considered the Executive Secretary's report that Professor Chadbourn had substantially completed performance under his present contract, a motion was made, seconded and unanimously adopted to approve the payment of \$2,500 to Professor Chadbourn as a partial payment under Contract No. 1959-60(2) executed as of October 28, 1959.

C. Study No. 36(L) - Condemnation Study: The Commission had before it Memorandum No. 41 (1960), Memorandum No. 31 (1960) (Evidence in Eminent Domain Cases), Memorandum No. 32 (1960) (Moving Expenses), Memorandum No. 33 (1960) (Taking Possession) and the study relating to Taking Possession and Passage of Title prepared by the research consultant of the law firm of Hill, Farrer & Burrill of Los Angeles.

Memorandum No. 31 (1960) - Evidence in Eminent Domain Cases.

The Commission considered its proposed recommendation relating to evidence in eminent domain cases. The following changes were agreed upon:

Page 1. (1) The word "evidence" is to be substituted for the words "evidentiary problems" in the title.

(2) The discussion relating to the statement that expert witnesses in eminent domain proceedings are not permitted to testify on many factors that they take into consideration in determining the market value of property should be amplified to indicate the factors referred to, i.e., income and reproduction less depreciation.

(3) The statement explaining the Faus case should be corrected to make it clear that an expert was not permitted to testify on direct examination about the sales prices of comparable property that he considered in reaching his opinion.

(4) The first sentence of the second paragraph should be made a part of the first paragraph.

(5) The second paragraph on page one should start with the second sentence in the second paragraph.

Page 2. (1) The first sentence in the first paragraph should read as follows: "1. Evidence of value in eminent domain cases should continue to be limited to the opinions of the owner and qualified experts." A footnote to this sentence should indicate that owners are presumed to be qualified to express opinions as to the value of their property and the Commission does not recommend a change in this rule; therefore, when reference is made in the recommendation to experts, it includes owners.

(2) The second paragraph should be revised to read as follows:

The value of property has long been regarded as largely a matter of expert opinion. If this rule were changed, and if the court or jury were permitted to make a determination of value upon the sole basis of testimony of nonexpert witnesses concerning comparable sales or other basic valuation data, the trial of an eminent domain case might be unduly prolonged as witness after witness is called to present such testimony. The court or jury would be permitted to make a determination of value solely upon the basis of such testimony and without the assistance of experts qualified to analyze and interpret the facts established by the testimony. Moreover, the court or jury would be permitted to enter judgment or return a verdict far above or far below what any expert or owner that has testified considers the property is worth, even though the jury may never have seen the

property being condemned or the comparable property mentioned in the testimony. To avoid these consequences, the long established rule that value is a matter to be established by opinion evidence should be reaffirmed and codified.

Page 3. (1) The word "report" should be substituted for the word "indicate."

(2) A motion was made, seconded and adopted to delete the second paragraph that begins with "However, to protect against the introduction. . . ."

(3) The last clause of the first sentence in subparagraph 4 should be revised to read as follows: ". . . well-informed man would take into consideration in determining the price at which to buy or sell the property."

Page 4. (1) The word "statutory" should be inserted between "Specific recognition" in the second line from the top of the page.

(2) The second sentence of subparagraph 5 should be revised to eliminate the colon at the end of the sentence.

(3) The third sentence of subparagraph 5a should be deleted and the following sentence inserted: "The costs, risks and delays of litigation are factors that often affect the ultimate price."

(4) The words "or benefit" should be inserted after the words "severance damage" in subparagraph 5a.

(5) The word "hindered" should be substituted for "greatly impaired" in subparagraph 5b.

Page 5. (1) The last sentence of subparagraph c should be revised to read as follows: "To the extent that an offer to sell constitutes an admission, the considerations stated above are inapplicable and there is no reason to preclude consideration of such an offer."

The Commission then considered the various provisions of the draft statute relating to evidence in eminent domain cases. Motions were made, seconded and carried on the following matters:

Section 1248.1. There were no changes made.

Section 1248.2. (1) The latter portion of the sentence of subdivision (1) is to be revised as follows:

[I]s admissible only if the court finds that the opinion is based upon facts or data that a reasonable, well-informed prospective purchaser or seller of real property would take into consideration in determining the price at which to purchase or sell the property or property interest, including but not limited to:

(2) Subdivision (1)(c) is to be revised to read as follows:

(c) The value of the land sought to be condemned, together with the cost of reproducing the improvements thereon, if the improvements enhance the value of the land for its highest and best use, less whatever depreciation improvements have suffered, functionally or otherwise.

[Comment: This revision was made to clarify and express the meaning of the phrase "adapted to the land."]

(3) The word "his" is to be substituted for the word "such" in the last sentence of subdivision (2).

A motion was then made by Mr. McDonogh and seconded by Mr. Dieden to approve Section 1248.1 and 1248.2 as revised. The motion carried.

Aye: Bradley, Dieden, Grover, Gustafson, McDonough,
Selvin, Stanton.

No: None.

Not Present: Cobey, Matthews.

Section 1248.3. (1) Subdivision (1) is revised to read as follows: "The price or other terms of an acquisition of property or a property interest if the acquisition was made for a public use for which property may be taken by eminent domain."

(2) The first portion of subdivision (3) is revised to read as follows:

(3) The price at which an offer or option to purchase or lease the property sought to be condemned or any other property was made, or the price at which such property was optioned,

A motion was made by Mr. McDonough and seconded by Mr. Dieden to approve Section 1248.3 as revised and to approve the repeal of Section 1845.5 of the Code of Civil Procedure. The

motion carried:

Aye: Bradley, Dieden, Grover, Gustafson, McDonough,
Selvin, Stanton.

No: None.

Not Present: Cobey, Matthews.

A motion was made, seconded and unanimously adopted to approve the recommendation and draft statute relating to evidence in eminent domain cases and to authorize the staff to send both the recommendation and draft statute as revised to the State Bar for its views.

Memorandum No. 32 (1960) - Moving Expenses ✓

The Commission then considered the proposed recommendation relating to moving expenses. The following changes were agreed upon:

Page 1. (1) The title is to read as follows: "Reimbursement for Moving Expenses When Property Is Acquired for Public Use."

(2) The words "and decisions" are to be added after the word "statutes" and the word "permanently" is to be inserted between the words "is taken" in the second sentence of the first paragraph. A footnote is to be added to the end of this sentence citing the United States Supreme Court cases that hold that moving expenses may be considered in certain

temporary takings and stating that the present California law is not clear in regard to temporary takings.

(3) The word "primarily" is to be substituted for the words "in part" in the last paragraph.

Page 2. (1) The words "dealing specifically" are to be substituted for the word "providing" in the first line on the top of the page.

(2) The first sentence of the first paragraph is to be revised to read as follows:

The Commission believes that, subject to reasonable limitations, the occupant of land acquired for public use should be reimbursed for the expense of moving his personal property off the land.

(3) The second sentence of the first paragraph is to be revised to conform to the first sentence of the paragraph, if necessary. A motion to delete the second sentence of the first paragraph did not carry.

(4) The word "objective" is to be substituted for the word "ideal" in the third sentence of the first paragraph.

(5) The phrase "the public will derive certain advantages" is to be deleted from the fourth sentence of the first paragraph.

(6) The fifth sentence of the first paragraph, "In such cases, the court expenses saved may exceed the additional compensation given", is to be deleted.

(7) The word "land" is to be substituted for the word "property" in the second paragraph and throughout the recommendation where appropriate.

(8) The last sentence of the second paragraph is to be deleted.

Page 3. (1) The 25 mile limitation should be discussed more fully inasmuch as there is no discussion of this limitation elsewhere in the recommendation.

(2) The word "however" is to be substituted for the words "of course" in the fourth line from the top of the page.

(3) The words "the 25 mile" should be substituted for the word "this" in the first line of the first complete paragraph.

(4) The last sentence of the first complete paragraph is to be deleted.

(5) "Occupant" is to be substituted for "person" in the second line of subparagraph 3.

(6) The phrase "necessarily incurred in" is to be inserted after the words "reasonable costs" in subparagraph 3.

Page 4. (1) The words "occupant who" are to be substituted for the words "person that" in subparagraph 5.

(2) The last sentence in subparagraph 5 is to be deleted.

(3) The words "incompetent and" are to be deleted and the word "issue" is to be substituted for the word "question" in

subparagraph 6.

The Commission then considered the draft statute relating to moving expenses. The following changes were agreed upon:

Section 1270. The word "who" is to be substituted for the word "that" in subdivision (1).

Section 1270.1. (1) The word "direct" that preceded the word "result" in the first paragraph of Section 1270.1 is to be deleted.

(2) Section 1270.1 is to be revised to conform to the style of Section 1270.2.

(3) A new subdivision (2) is to be added to Section 1270.1 to provide for the reimbursement of costs incurred for temporarily storing property pending the acquisition of a new location. It was agreed that it would not be necessary to provide for the situation where there has been a temporary taking and the condemnee elects after storage to move to a location other than back to the property that had been temporarily taken, since this situation does not often arise.

Section 1270.2. (1) The preamble, "subject to Section 1270.3", is to be inserted at the beginning of subdivision (2).

(2) the word "only" is to be inserted between the words "section if" in subdivision (1).

(3) The word "the" is to be substituted for the word "his"

in subdivision (2)(a).

(4) The word "after" is to be substituted for the word "at" and the word "expiration" is to be substituted for the word "end" in subdivisions (2)(b) and (2)(c).

(5) The word "real" is to be inserted before the word "property" in subdivision (2)(b).

Section 1270.3. (1) The phrase "most direct practical route" is to be substituted for the phrase "nearest road or roads."

(2) Subdivision (2) is to be revised to read:

(2) The limitation contained in this section does not limit the amount the acquirer may agree to pay the occupant.

Section 1270.4. (1) This section is to be revised to indicate that the acquirer is required to file the action, and if the acquirer fails to do so within 90 days, the person entitled to reimbursement may bring the action to recover the reimbursement.

(2) The phrase "agreed as to the amount" is to be substituted for the phrase "entered into a binding settlement agreement as to the extent" in subdivision (2).

(3) In subdivision (3) the word "bring" is to be substituted for the word "commence" and the phrase "in addition his reasonable expenses of maintaining the action, including"

is to be deleted.

(4) Subdivision (5) is to be deleted.

Section 1248.5. (1) The words "incompetent and" are to be deleted and the phrase "the court finds that" is to be inserted after the words "inadmissible if".

(2) The phrase "which may be reimbursed under Title 7a (beginning with Section 1270) of this Code" is to be deleted.

A motion was then made by Mr. Grover and seconded by Mr. McDonough to approve the recommendation and draft statute relating to moving expenses as revised and to authorize the staff to send both the recommendation and draft statute as revised to the State Bar for its views. The motion carried:

Aye: Dieden, Grover, McDonough, Selvin, Stanton.

No: Bradley, Gustafson.

Not Present: Cobey, Matthews.

Memorandum No. 33 (1960) - Taking Possession ✓

The Commission considered three alternative approaches it could take relating to an amendment to the California Constitution and the statutes affected thereby: (1) Recommend that all the statutes relating to taking possession and passage of title be contingent on the passage of the constitutional amendment. (2) Recommend enactment of those statutes not dependent on passage of the constitutional amendment to become effective without delay, and recommend that the statutes dependent on a constitutional amendment be contingent on the

passage of the constitutional amendment. (3) Submit a bill containing the various statutes relating to taking possession and passage of title, including a severability clause and let the courts determine the constitutionality of the various statutes. During the discussion Mr. Bradley stated that the bill would have a better chance of passing the Senate without proposing an amendment to the Constitution and suggested that the Commission introduce a bill containing all recommended statutes along with a proposal to amend the Constitution but be prepared to submit an alternative bill containing those statutes not dependent on the passage of a constitutional amendment. The staff was directed to give consideration to the various approaches and present its recommendation to the Commission.

The Commission then considered the draft statute relating to taking possession. The following changes were agreed upon:

Section 1244.5. (1) In subdivision (1) the words "ex parte" are to be inserted after the word "apply" and the word "immediate" is to be inserted before the word "possession".

(2) The phrase "during the pendency and until the final conclusion of the proceedings brought to condemn the same" is to be deleted from subdivision (1).

(3) In subdivision (2), the phrase "to be the probable

just compensation" is to be substituted for the phrase "is the probable damages", and the phrase "and any damage incident thereto" is to be deleted.

(4) The words "if known" and "or a notice thereof" are to be deleted from the first sentence of subdivision (3).

(5) There should be a provision added to Section 1244.5, as either subdivision (2) or (3), that expressly provides that a court order for immediate possession shall not authorize possession until twenty days have elapsed from the time of service.

(6) The staff was directed to add a phrase beginning "if the court determines" after the words "any interest therein" in subdivision (4) to indicate that the court must determine that the amount fixed in the original order is insufficient.

(7) The word "immediate" is to be inserted between the words "take possession" in both subdivisions (4) and (5).

A motion to delete the phrase "or of an occupant of the property" from subdivision (5) did not carry.

(8) The phrase "authorizing the plaintiff to take possession of the property" is to be deleted from both subdivisions (5)(a) and (5)(b). The phrase "for good cause shown" is to be inserted in subdivision (5)(a) for the above deleted phrase.

(9) The last sentence of subdivision (6) is revised to read:

If the court determines that the plaintiff does not have the right to acquire the property by eminent domain or that there is a triable issue of fact as to the plaintiff's right to acquire the property by eminent domain, the court shall vacate the order authorizing the plaintiff to take possession of the property.

Section 1249. The word "thereto" is to be substituted for the word "thereof" in the second line of Section 1249.

Section 1249.1. No changes were made in this section.

Section 1252.1. (1) The phrase "together with any allocable penalties and costs thereon" is to be deleted from subdivision (1).

(2) The first portion of the second sentence of subdivision (2) of this section is revised to read as follows: "If title to the property does not vest in plaintiff prior to judgment,"

Section 1253. A provision is to be added to provide that the condemner must record the order for immediate possessions in order to acquire both the title and the right to the possession of the property.

Consideration of whether the statute should provide for the right to appeal was deferred.

D. Study No. 38 - Inter Vivos Rights: The Commission considered Memorandum No. 22 (1960) containing a draft statute designed to effectuate the recommendation of the consultant. Motions were made, seconded and adopted on the following:

Section 164. (1) The first clause of the first sentence of Section 164 is revised as follows:

164. All other real property situated in this State and personal property wherever situated, acquired after marriage by either husband or wife, or both, while the acquiring spouse is domiciled in this State is community property;

Section 1237.5 (1) The words "in real property" are to be inserted between the words "estate which" in subdivision (1).

(2) The word "real" is to be inserted before the word "property" in subdivision (2).

During the discussion of subdivision (2) Mr. Bradley and Mr. Dieden pointed out that it is not clear that the phrase "so acquired" in subdivision (b) is intended to refer to subdivision (a). It was pointed out that this language is taken from Section 201.5 of the Probate Code which was drafted by the Commission. The staff was requested to submit to the Commission for its consideration a redraft of this provision to clarify the meaning of the words "so acquired."

A motion was made, seconded and unanimously adopted to

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approve the adoption of Sections 164, 1237.5, 1238 and 1265 of the Civil Code as revised. This action was taken with the understanding that the question whether these statutes are to be prospective or retrospective in effect is to be considered at a later date. Mr. Selvin stated that he questions the constitutionality of that portion of Section 1237.5(2) which defines quasi-community property to mean real property in this State heretofore acquired by either spouse while domiciled elsewhere.

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E. Study No. 55(L) - Additur

Approval of Payment to Professor Pickering: The Commission considered the research study relating to whether a trial court shall have the power to deny a new trial on the condition that damages be increased (additur) prepared by Professor Harold G. Pickering for the purpose of determining whether he should be paid for the study. A motion was made, seconded and unanimously adopted to approve payment to Professor Pickering for the entire amount payable under Contract No. 25(1958), dated as June 25, 1958.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT I

This Exhibit may be substituted for page 7
in the Minutes of the March, 1960 meeting

Corrected pages for March
18-19, 1960 Minutes

II. CURRENT STUDIES

A. Study No. 23 - Rescission of Contracts: The Commission had before it Memorandum No. 21(1960) and the attached material. Mr. McDonough stated that upon giving this matter further study, particularly in connection with the proposed revision of the Uniform Sales Act, the Uniform Stock Transfer Act and the Insurance Code, he had concluded that an out-of-court rescission as provided for in the present law is of practical importance in some cases. He stated that he is still of the view that (1) if a party is not legally entitled to rescind, his out-of-court statement purporting to do so is of no effect and (2) unless both parties are willing to engage in a mutual rescission it is usually necessary for the party desiring to rescind to go to court to obtain a judicial resolution of the problem because he cannot otherwise be certain whether his purported rescission was legally effective. But, he stated, it was now apparent to him that if the party desiring to rescind has a legal right to do so, an out-of-court rescission is legally effective-- a matter that will in some cases be of critical importance to the parties and even to third persons. Mr. McDonough stated that he thought that it well might be possible to

devise legislation which would enable a party to terminate a contract or other transaction out of court without continuing the concept of out-of-court rescission in our law--for example, by calling a party's manifestation of his desire to terminate the contract or transaction a cancellation or a repudiation. He stated that he was not certain, however, whether this would be merely a change in labels. He stated that the upshot of the matter was simply that he was less certain than he had been that out-of-court rescission could or should be abolished and he thought the matter would require further and careful consideration by the Commission.

Mr. McDonough suggested that if the Commission should conclude that out-of-court rescission should be continued in effect it might consider the following approaches to the problem of dealing with the duality of existing remedies which led to this study:

(1) Abolish the legal proceeding to obtain a judgment rescinding a contract and provide only for a legal action to enforce a unilateral out-of-court rescission;

(2) Provide for both an action to obtain a judgment rescinding a contract and an action to enforce a unilateral out-of-court rescission, but eliminate the existing differences between the actions, right to jury trial, etc.; or

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(3) Conclude that no change in the law is practicable and submit a report of this fact to the Legislature.

Consideration of Mr. McDonough's proposals was deferred to a later date.