

Time

Place

November 18 - 7:00 p.m. - 10:00 p.m.  
November 19 - 9:00 a.m. - 5:00 p.m.  
November 20 - 9:00 a.m. - 12:00 noon

Law School-Room 218  
Stanford University  
Palo Alto

FILIAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Stanford

November 18-20, 1965

November 18 and 19

1. Approval of Minutes of October 1965 Meeting (sent 10/27/65)
2. Administrative Matters
  - Election of Chairman and Vice Chairman  
Memorandum 65-67 (sent 10/20/65)
  - 1967 Annual Report  
Memorandum 65-76 (sent 11/1/65)
  - First Supplement to Memorandum 65-76 (enclosed)
3. Study No. 63(L) - Evidence Code
  - Memorandum 65-68 (to be sent)
  - Tentative Recommendation (attached to Memorandum)
4. Study No. 55(L) - Additur and Remittitur
  - Memorandum 65-69 (enclosed)
  - Tentative Recommendation (attached to Memorandum)
5. Study No. 53(L) - Personal Injury Damages as Separate Property
  - Memorandum 65-70 (to be sent)
  - Tentative Recommendation (attached to Memorandum)
6. Study No. 62(L) - Vehicle Code Section 17150 and Related Statutes
  - Memorandum 65-54 (sent 8/5/65; additional copy enclosed)
  - Tentative Recommendation (attached to Memorandum)
  - First Supplement to Memorandum 65-54 (enclosed)
7. Study No. 51 - Right to Support After Ex Parte Divorce
  - Memorandum 65-72 (to be sent)
  - Tentative Recommendation (to be sent)
  - First Supplement to Memorandum 65-72 (to be sent)
  - Second Supplement to Memorandum 65-72 (to be sent)
  - Research Study (to be sent)

*No Donough.*

8. Study No. 44 - Suit in Common Name, etc.

Memorandum 65-71 (to be sent)  
Revised Research Study (to be sent)

November 20

9. Study No. 36(L) - Condemnation Law and Procedure

General Philosophy Concerning Method and Extent of Compensation

Memorandum 65-74 (sent 10/28/65)  
First Supplement to Memorandum 65-74 (sent 11/3/65)  
Second Supplement to Memorandum 65-74 (to be sent)  
Third Supplement to Memorandum 65-74 (enclosed)  
Study Relating to Sovereign Immunity--Volume 5  
of Reports, Recommendations and Studies  
(pages 102-108, 225-230)

Study Relating to Inverse and Unofficial Condemnation  
(pages 1-11)

Fourth Supplement to Memorandum 65-74 (to be sent)

Consequential Damages

Memorandum 65-48 (sent 7/28/65)  
Research Study (attached to Memorandum)  
First Supplement to Memorandum 65-48 (sent 11/3/65)

Date of Valuation

Memorandum 65-75 (sent 11/3/65)  
Research Study -- Problems Connected With the Date of  
Valuation in Eminent Domain Cases (previously distributed)  
First Supplement to Memorandum 65-75 (to be sent)

MINUTES OF MEETING

of

NOVEMBER 18, 19, AND 20, 1965

Stanford Law School

A regular meeting of the California Law Revision Commission was held at the Stanford Law School on November 18, 19, and 20, 1965.

Present: John R. McDonough, Chairman  
Richard H. Keatinge, Vice Chairman  
Hon. James A. Cobey (November 19 and 20)  
James R. Edwards  
Sho Sato  
Herman F. Selvin  
Thomas E. Stanton

Absent: Hon. Alfred H. Song  
Joseph A. Ball  
George H. Murphy, ex officio

Messrs. John H. DeMouilly, Joseph B. Harvey, and John L. Reeve (November 19 and 20) of the Commission's staff were also present.

Also present on November 20 were Mr. John McLaurin of the law firm of Hill, Farrer, and Burrill, the Commission's consultant on Eminent Domain, Professor Arvo Van Alstyne, the Commission's consultant on Inverse Condemnation, and the following observers:

Robert F. Carlson, Department of Public Works  
Thomas H. Clayton, Departments of General Services and Finance  
Norval Fairman, Department of Public Works  
Richard D. Martland, Department of Water Resources  
Terry C. Smith, Office of County Counsel, Los Angeles

Jon Smock, representing the Judicial Council, was present as an observer on November 18 and 20.

ADMINISTRATIVE MATTERS

Minutes of October 1965 Meeting. The Commission approved the Minutes of the October 1965 Meeting.

Future Meetings. Future meetings are scheduled as follows:

December 17 (evening) and 18	San Francisco
January 20 (evening), 21, and 22	Los Angeles
February 24 (evening), 25, and 26	San Francisco
March	No meeting
April 3 (evening), 4 (all day), 5 (morning only), and 6 (morning only)	Lake Tahoe

Election of Officers: The following officers were elected to take office on December 31, 1965:

Chairman - Richard H. Keatinge

Vice Chairman - Sho Sato

Revision of Procedures Manual. The provision of the Handbook of Practices and Procedures dealing with terms of officers of the Commission was revised to read:

The officers of the Commission are the Chairman and the Vice Chairman. The term of office of the Chairman and Vice Chairman is two years, commencing on December 31 of each odd-numbered in-January-of-each-even-numbered year. [Remainder of provision unchanged.]

The provision of the Handbook of Practices and Procedures dealing with roll call votes was revised to read:

A roll call vote shall be taken on any matter at the request of any voting member of the Commission.<sup>4</sup> An absent member may be polled and his vote incorporated in the roll call on such matter only if he was present during a previous discussion of the subject matter at the meeting of the Commission.<sup>5</sup>

~~A-roll-call-vote-shall-be-taken-and-recorded-on-every-motion  
to-approve-material-for-printing-or-to-adopt-any-report-or  
recommendation-of-the-Commission--to-the-Legislature.~~

<sup>4</sup>Minutes, November 1965.

<sup>5</sup>Minutes, July 1956.

Addition of position on Commission's staff. The Executive Secretary reported on the efforts that are being made to obtain an additional Attorney IV position on the Commission's staff. The budget examiner has approved the addition of the position for the 1966-67 fiscal year, the 1967-68 fiscal year, and the first half of the 1968-69 fiscal year. He is also attempting to obtain funds for the period January 1-June 30, 1966. The Commission unanimously adopted a motion authorizing the Chairman and Executive Secretary to work out some arrangement to obtain the funds to finance this position.

1966 Annual Report. The Commission considered Memorandum 65-76 and the First Supplement thereto and made the following decisions:

1. The Commission determined to recommend that the Legislature take appropriate action to initiate amendments to the California Constitution to delete the provisions thereof that have been held to be unconstitutional by the California or United States Supreme Court.

2. The second paragraph of the "Recommendations" on page 4 of the material attached to the First Supplement was revised to read:

Pursuant to the mandate imposed by Section 10331 of the Government Code, the Commission recommends the repeal of Sections 1093 and 1127 of the Penal Code to the extent that those provisions are unconstitutional. The Commission further recommends that the

Legislature take appropriate action to submit to the people amendments to Article I, Section 13, Article IV, Sections 5 and 6, and Article VI, Section 19, of the California Constitution, to eliminate the portions thereof that are in violation of the United States Constitution.

3. In the second sentence of the discussion of the Griffin case, the words "that may be" were deleted.

4. The portion of the report dealing with legislation enacted at the special session on reapportionment should be adjusted to reflect the action to be taken by the California Supreme Court on Cal. Stats. (2d Ex. Sess.) 1965, Ch. 3 and S.B. 13 (2d Ex. Sess.) (vetoed by the Governor).

5. The staff was directed to check to determine whether the Legislature can propose a constitutional amendment to amend a section of the Constitution adopted by initiative.

With the above revisions and the further revisions to be made by the staff after the action of the Supreme Court upon reapportionment is determined, the 1966 Annual Report was approved for printing.

Resolution to Continue Commission's Authority to Study Topics Previously Authorized. The Commission considered a draft of a resolution submitted by the staff to authorize the Commission to continue to study topics previously authorized and to discontinue study of certain previously authorized topics. After discussion, the following was approved as the substance of the resolution to be submitted to the 1966 legislative session:

Senate Concurrent Resolution No.      --Relative to the  
California Law Revision Commission

WHEREAS, Section 10335 of the Government Code provides that the California Law Revision Commission shall file a report at each regular session of the Legislature which shall contain a calendar of topics selected by it for study, including a list of the studies in progress; and

WHEREAS, the Commission in its 1966 Annual Report lists the following studies, all of which the Legislature has previously authorized or directed the Commission to study, as studies in progress:

Studies Under Active Consideration

- (1) 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) Whether the law relating to additur and remittitur should be revised;
- (3) Whether the law and procedure relating to condemnation should be revised with a view to recommending a comprehensive statute that will safeguard the rights of all parties to such proceedings;
- (4) Whether the doctrine of sovereign or governmental immunity in California should be abolished or revised;
- (5) Whether the decisional, statutory, and constitutional rules governing the liability of public entities for inverse condemnation should be revised, including but not limited to the liability for inverse condemnation resulting from flood control projects;
- (6) Whether Vehicle Code Section 17150 and related statutes should be revised;
- (7) Whether the law relating to the rights and duties attendant upon termination or abandonment of a lease should be revised;
- (8) Whether the Evidence Code should be revised;

(9) Whether the law relating to the rights of a good faith improver of property belonging to another should be revised;

(10) Whether partnerships and unincorporated associations should be permitted to sue in their common names and whether the law relating to the use of fictitious names should be revised;

(11) Whether a former wife, divorced in an action in which the court did not have personal jurisdiction over both parties, should be permitted to maintain an action for support;

#### Other Studies in Progress

(12) Whether the law relating to devises and bequests to a trustee under, or in accordance with, terms of an existing inter vivos trust should be revised and whether the law relating to a power of appointment should be revised;

(13) Whether the jury should be authorized to take a written copy of the court's instructions into the jury room in civil as well as criminal cases;

(14) Whether the law relating to escheat of personal property should be revised;

(15) Whether the law relating to the rights of a putative spouse should be revised;

(16) Whether the law respecting jurisdiction of courts in proceedings affecting the custody of children should be revised;

(17) Whether the law relating to attachment, garnishment and property exempt from execution should be revised;

(18) Whether the Small Claims Court Law should be revised;

(19) Whether the law relating to the doctrine of mutuality of remedy in suits for specific performance should be revised;

(20) Whether Civil Code Section 1698 should be repealed or revised;

(21) Whether Section 7031 of the Business and Professions Code, which precludes an unlicensed contractor from bringing an action to recover for work done, should be revised;

(22) Whether California statutes relating to service of process by publication should be revised in light of recent decisions of the United States Supreme Court;

(23) Whether Section 1974 of the Code of Civil Procedure should be repealed or revised;

(24) Whether the various sections of the Code of Civil Procedure relating to partition should be revised and whether the provisions of the Code of Civil Procedure relating to the confirmation of partition sales and the provisions of the Probate Code relating to the confirmation of sales of real property of estates of deceased persons should be made uniform and, if not, whether there is need for clarification as to which of them governs confirmation of private judicial partition sales; and

WHEREAS, the Commission in its 1966 Annual Report has recommended that the following topics, previously approved for study, be removed from its agenda in order to avoid duplicating the work of the Joint Legislative Committee for the Revision of the Penal Code:

(1) Whether the law respecting habeas corpus proceedings, in the trial and appellate courts, should, for the purpose of simplification of procedure to the end of more expeditious and final determination of the legal questions presented, be revised;

(2) Whether the laws relating to bail should be revised;

(3) Whether the law respecting post conviction sanity hearings should be revised;

(4) Whether the separate trial on the issue of insanity in criminal cases should be abolished or whether, if it is retained, evidence of the defendant's mental condition should be admissible on the issue of specific intent in the trial on the other pleas;

(5) Whether the provisions of the Penal Code relating to arson should be revised; and

WHEREAS, the Commission in its 1966 Annual Report has recommended that the following topic, previously approved for study, be removed from its agenda because no legislation is necessary:

Whether the doctrine of election of remedies should be abolished in cases where relief is sought against different defendants; now, therefore, be it

Resolved by the Senate of the State of California, the Assembly thereof concurring, That the Legislature approves the topics listed above as studies in progress for continued study by the California Law Revision Commission and approves the removal from the Commission's agenda of the studies listed above that the Commission has recommended be removed from its agenda.

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

ADMINISTRATIVE MATTERS

Schedule of order of topics. During the course of its consideration of Memorandum 65-74 and the two supplements thereto, the Commission decided to defer consideration of just compensation and measure of damages until additional factual and legal information is available. The staff was directed to prepare a memorandum for the December meeting containing the staff's suggestions concerning the topics to be taken up at future meetings. It was suggested that immediate possession might be taken up first and that the right to take might be considered next.

Procedure for obtaining factual information. During the course of consideration of Memorandum 65-74 and the two supplements thereto, the Commission determined that there was a need for factual and statistical information comparable to that contained in the staff report of the Select Subcommittee. Information is needed as to the amount of condemnation now going on, the purposes for which property is being taken, and similar information that will provide a factual setting when particular proposals are being considered. Also needed is information on the anticipated trends in the future as to these matters.

The staff was directed to determine what information is available from various state agencies and from local public entities. The State Department of Public Works, Department of Water Resources, Department of General Services, Department of Education, and the City of Los Angeles were suggested as sources of such information.

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The information that the Department of Public Works has coded for data processing equipment purposes should be determined and reported to the Commission at the December meeting if possible.

The staff was also directed to check with Senator Cobey and Assemblyman Song to determine whether interim hearings might be a desirable method of obtaining the necessary information.

It was suggested that it might be possible for the Commission to contact the persons on the mailing list for condemnation law and procedure to obtain information of the type needed. This source might supplement information obtained from condemners. A letter directed to such persons should be drafted for consideration by the Commission at the next meeting.

It was suggested that the Commission might write to various persons who have had property taken by condemnation and ask to what extent actual losses were suffered that were not compensated for in the settlement or judgment in the case.

It was suggested that a sample of urban renewal agencies be contacted to determine what information they may be able to furnish.

It was also suggested that an attempt should be made to determine whether there are any organizations of persons interested in this field and whether such organizations could provide factual information of the type needed.

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

JUST COMPENSATION AND MEASURE OF DAMAGES

The Commission considered Memorandum 65-74 and the two supplements thereto. The Commission concluded that consideration of just compensation and measure of damages should be deferred until additional factual and legal information is available. Other portions of the eminent domain study should be considered before just compensation and measure of damages is taken up. The portions to be considered before just compensation and measure of damages is considered will be determined at the December meeting.

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

DATE OF VALUATION

The Commission considered Memorandum 65-75.

The Department of Public Works objected to any change in the existing rules concerning date of valuation. The Department, however, indicated that it would accept a change in the rule on date of valuation in the case of a new trial--the date of valuation would be the original date of valuation if the new trial took place within six months after the order for the new trial or, if the new trial does not take place within that time without fault on the part of the condemnee, the date of valuation would be the date of the new trial.

The Commission made no decision on whether changes should be made in the existing rules concerning date of valuation. A decision on this matter was deferred pending consideration of the research study on immediate possession which is now in preparation.

It was suggested that the solution to the problem of date of valuation is to provide a procedure whereby the property owner can require the condemnor to take immediate possession. In this connection, it was recognized that such a procedure would create problems when the cost of property acquisition is to be financed by a specific appropriation, by a bond issue, or by a special assessment. Such a procedure would also create problems in cases where the condemnor later seeks to abandon the proceeding. The staff was directed to include a discussion of these problems in the research study on immediate possession.

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

The Commission considered Memorandum 65-72 and the first and second supplements thereto. The following actions were taken:

The Commission considered whether to recommend a statute stating internal California law only, leaving conflicts problems to the courts, or whether to recommend a statute stating explicit choice of law rules.

The staff was asked to prepare a memorandum to test the recommendations made against the considerations identified in Commissioner McDonough's memorandum so that the Commission can determine whether a rational recommendation on this subject is feasible.

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

The Commission considered Memorandum 65-70 and the tentative recommendation distributed therewith. The following actions were taken:

Section 163.5

An amendment of Section 163.5 was approved that would retain the existing rule that personal injury damages are separate property in the case of interspousal torts. The amendment would read:

163.5. All money or other property paid by or on behalf of a married person to his spouse in satisfaction of a judgment for damages for personal injuries to the spouse or pursuant to an agreement for the settlement or compromise of a claim for damages for personal injuries to the spouse is the separate property of the injured spouse.

Section 164.5 was previously approved.

Section 164.7

The opening clause was revised to read:

When an injury to a married person is caused in whole or in part by the negligent or wrongful act or omission of his spouse, . . .

The section was then approved.

Section 171 was approved.

Section 171a was previously approved.

Section 171c

The staff was asked to redraft the section to delete the reference to "money". The reference to "other community property" should be revised to "community property subject to the management, control, and disposition of the husband." The husband's control over the damages received for expenses incurred but not yet paid should be limited to assure that the damages

will be used to pay for such expenses. And the damages received in reimbursement of expenses already paid by the husband from his separate property should inure to the husband's separate property.

Sections 183-185

The staff was directed to relocate these sections in the Code of Civil Procedure.

Amendment of Section 442 or 422 should also be considered so that the person may determine from looking at the general pleading sections that a cross-complaint may be used to obtain the relief provided. It should also be clear from either the comment or statute that a cross-complaint may be used even when the party seeking contribution was originally the plaintiff in the action.

These sections should also be revised to provide a right of contribution from a third party when one spouse sues the other spouse.

The staff was also asked to check the provisions of the standard liability insurance policies to make sure that contribution liability is covered. Insurance representatives should be requested to provide the Commission with their views concerning whether the contribution provisions are workable.

In Section 184, the staff is to give consideration to deletion of the reference to severance of the cross-action and to replace it with an explanation in the comment.

STUDY NO. 55(L) - ADDITUR AND REMITTITUR

The Commission considered Memorandum 65-69 and the attached Tentative Recommendation on Additur. The following actions were taken:

Recommendation

1. The recommendation should contain a policy argument in support of additur.
2. The Commission discussed a proposal that remittitur be limited to cases where the jury verdict is supported by substantial evidence. The proposal was that the existing law be changed so that remittitur could not be granted in any case where the original verdict was excessive as a matter of law. The majority of the Commission concluded that the law relating to remittitur is sound and should not be changed and that the only reason why use of additur will be limited under the proposed recommendation is the fact that a constitutional amendment probably would be required to provide additur in any case where the verdict is not supported by substantial evidence. The recommendation should contain a discussion pointing out this difference in additur as proposed and remittitur and stating the reason why the Commission has limited use of additur to cases where the verdict is supported by substantial evidence.
3. It was suggested that the recommendation be written to recognize that the present members of the California Supreme Court would perhaps overrule the Dorsey case.
4. The discussion of the "first objection" stated on page 6 of the recommendation should be deleted or put in a footnote.

5. The "due process" argument on pages 10 and 11 is to be deleted.

Proposed Legislation

The statute, revised as indicated below, was approved.

Amendment of Section 657. This section was approved as drafted.

Proposed Section 661.5. It was agreed that this section should be renumbered to locate it in a better place in the Code of Civil Procedure. Section 662.5 was suggested as a possible location for the section.

In subdivision (a), the phrase "tried by jury" should be either "tried to a jury" or "tried with a jury."

Subdivision (a) should be revised so that the first portion of the introductory clause reads substantially as follows:

(a) In any civil action tried with a jury where the only ground on which a new trial could be granted is the inadequacy of the damages and the granting of a new trial on that ground is otherwise appropriate,

Subdivision (a)(1) should be checked to determine whether "any" should be retained in the phrase "any substantial evidence."

In subdivision (b) the words "the trial" should be deleted and "a" inserted, and the word "other" should be inserted before "case."

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

(c) Nothing in this section affects the law relating to when a court may order a reduction in damages as a condition for denying a motion for new trial on the ground of excessive damages.

The paragraph discussing the meaning of "in his discretion" on page 19 was deleted.

Revised Recommendation to be Considered at December Meeting

The Commission directed the staff to revise the recommendation in accord with the instructions listed above and to submit the revised recommendation for approval at the December meeting.

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STUDY NO. 62(L) - VEHICLE CODE SECTION 17150 AND RELATED STATUTES

The Commission considered Memorandum 65-54 and the First Supplement thereto together with the tentative recommendation of 7/7/65. The following actions were taken:

Section 17150

The section was approved. The comment should be revised to support the rule stated in the section as a matter of policy. The possibility that the courts will continue to treat "willful misconduct" under Section 17158 as excluded from "negligence" in 17150 should be mentioned as an additional or collateral reason for the revision, but not the main reason.

The staff was asked to consult with the insurance industry to find whether the risks created by Section 17150 are now insured or are insurable. Inquiry should also be made concerning insurance coverage for contribution liability.

Section 17150.5

The staff was requested to consider whether the section should be revised so that it would be applicable to cars registered under the law in effect prior to the effective date of Vehicle Code Sections 4150.5 and 5600.5.

Section 17151 was approved.

Section 17152

The staff was asked to consider whether the section should be revised to require that the operator be made a defendant if personal jurisdiction over him can be obtained instead of requiring that he be made a defendant "if personal service of process can be had upon the operator within this State."

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Sections 17153-17159, 17707-17710, and 17714 were approved.

Sections 17800-17803

These sections should be moved to the Code of Civil Procedure and conformed, insofar as possible, to the contribution statute drafted for the recommendation relating to personal injury damages as separate property.

Section 17800

The section should indicate on its face that the person from whom contribution is sought must be made a party to the original damages action.

Statute generally

The staff was directed to go through all of the sections to see if the language used in reference to "imputing" liability can be modified to speak directly.

STUDY NO. 63(L) - EVIDENCE CODE

The Commission considered Memorandum 65-68 and the tentative recommendation distributed therewith. The following actions were taken:

Section 402 was approved.

Sections 403 and 405

After discussion of the admissibility standards contained in Sections 403 and 405, the Commission declined to make any change in them. Section 403(c), however, was amended to remove the requirement that an instruction be given. The amended subdivision reads in substance:

(c) If the court admits the proffered evidence under this section, the court:

(1) ~~May, -and on-request-shall,~~ instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist.

(2) ~~Shall~~ May instruct the jury to disregard the proffered evidence if the court subsequently determines that a jury could not reasonably find that the preliminary fact exists.

The staff was requested to solicit the views of Professor Chadbourn and other evidence professors on the question whether (a)(4) should remain unmodified in Section 403 or whether the matters mentioned therein should be decided under Section 405 when a hearsay question is involved.

Sections 412 and 413 were approved.

Section 414

The section was approved after revision to read:

414. Instructions and comments permissible under Section 412 or 413 are subject to any limitations imposed by the Constitution of the United States or the State of California.

Section 646

The staff was instructed to revise the section to eliminate the detailed statement of the doctrine of res ipsa loquitur. The section should read in substance:

646. The judicial doctrine commonly known as res ipsa loquitur is a presumption affecting the burden of producing evidence.

The comment should be revised to indicate that the section may change existing law. The explanation in the preliminary portion of the recommendation is the sort of explanation that should appear in the comment.

The staff was asked to consult with the Legislative Counsel to determine whether the proposed statute would violate the requirement that statutes be written in the English language.

#### Section 776

The section was approved. The staff is to consider a modification of the proposed amendment to break up the long sentence.

The comment should be revised to soften the Commission's identification with the position taken by those who suggested the revision. The comment should also indicate that the court may restrict an employer's right of cross-examination under this section where the employee-witness is actually identified in interest with the employer. The letter transmitting the tentative recommendation might suggest the possibility that the revision be extended to additional kinds of cases.

Section 1201 was previously approved.

#### Penal Code Sections 1093 and 1127

These sections are to be revised to eliminate the provisions held unconstitutional in Griffin v. California, 381 U.S. 763 (1965).