

<u>Time</u>	<u>Place</u>
February 24 - 7:00 p.m. - 10:00 p.m.	State Bar Building
February 25 - 9:00 a.m. - 5:00 p.m.	601 McAllister Street
February 26 - 9:00 a.m. - 4:00 p.m.	San Francisco

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

February 24-26, 1966

February 24

1. Approval of Minutes of December 1965 Meeting (sent 12/22/65)
2. Administrative Matters

Number of Votes Necessary for Commission Action

Memorandum 66-11 (sent 1/21/66)

New or Expanded Topics

Memorandum 66-10 (sent 1/21/66)

Memorandum 66-12 (sent 1/26/66)

Law Review Articles on Evidence

Memorandum 66-5 (sent 1/26/66)

3. Study 51 - Right to Support After Ex Part Divorce

Memorandum 66-1 (sent 1/10/66)

Tentative Recommendation (attached to Memorandum)

Research Study (sent 11/10/65)

4. Study 44 - Pictitious Names; Suit in Common Name

Pictitious Name Statute

Memorandum 66-2 (sent 1/10/66)

Tentative Recommendation (attached to Memorandum)

Revised Research Study (sent 12/12/65)

Suit in Common Name

Memorandum 66-3 (enclosed)

Revised Research Study (enclosed)

February 25

5. Study 36(L) - Condemnation Law and Procedure

Obtaining Factual Information

Memorandum 66-9 (enclosed)

The Right to Immediate Possession

Memorandum 66-4 (to be sent)

Research Study (to be sent)

6. Study 50 - Rights and Duties Upon Abandonment of Lease

Memorandum 66-7 (to be sent) *not discussed.*

Consideration of any uncompleted items on agenda for February 24

February 26

Consideration of any uncompleted items on agenda for February 24 and 25

7. Study 42 - Good Faith Improvers

Memorandum 66-8 (sent 1/21/66)

Tentative Recommendation (attached to Memorandum)

First Supplement to Memorandum 66-8 (sent 1/26/66)

8. Study 63(L) - The Evidence Code

Memorandum 66-13 (sent 2/10/66)

California Law Review Student Note (sent to you by Mr. Keatinge)

Tentative Recommendation and a Study Relating to

Burden of Producing Evidence, Burden of Proof, and

Presumptions (attached to Memorandum)

Evidence Code With Official Comments (you have a copy of this publication)

MINUTES OF MEETING
OF
FEBRUARY 24, 25, and 26, 1966
San Francisco

A regular meeting of the California Law Revision Commission was held at San Francisco on February 24, 25, and 26, 1966.

Present: Richard H. Keatinge, Chairman
Joseph A. Ball (Feb. 24 and 25)
James R. Edwards
John R. McDonough
Herman F. Selvin
Thomas E. Stanton

Absent: Hon. James A. Cobey
Hon. Alfred H. Song
Sho Sato, Vice Chairman
George H. Murphy, ex officio

Messrs. John H. DeMouilly, Clarence B. Taylor, and John L. Reeve of the Commission's staff also were present.

Present on February 25 were John McLaurin of the law firm of Hill, Farrer, and Burrill, the Commission's consultant on Eminent Domain, and the following observers:

Norval Fairman -- State Department of Public Works
David B. Walker -- Office of County Counsel, San Diego

Also present on February 26 was Edwin N. Lowe, Jr., author of a law review note on Presumptions in 53 California Law Review 1439 (1965).

ADMINISTRATIVE MATTERS

Minutes of December 1965 Meeting. The Minutes of the December 1965 meeting were approved as submitted.

Future meetings. Future meetings are scheduled as follows:

March	-- No meeting
April 3 (evening) and 4	-- Lake Tahoe
May 13 (evening) and 14	-- Los Angeles
June 17 (evening) and 18	-- San Francisco
July 21, 22, and 23 (three full days)	-- Long Beach
August 12 and 13 (two full days)	-- Los Angeles
September 16 (evening) and 17	-- San Francisco
October 20, 21, and 22 (three full days)	-- Los Angeles
November 17 (evening), 18, and 19 (morning) (if big game is scheduled for these dates)	-- Berkeley
December	-- No meeting unless needed

Revision of Commission's Handbook of Practices and Procedures. The Commission considered Memorandum 66-11 and revised its Handbook of Practices and Procedures to read:

Quorum. Four voting members of the Commission constitute a quorum and must be present before the Commission may attend to any business. Any action, ~~including a recommendation to the Legislature,~~ may be taken by a majority of those present if a quorum is present, but any final recommendation to the Legislature must be approved by with a minimum of four affirmative votes.

Topics for Commission Study. The Commission considered SCR No. 3 (1966 Session) and Memorandum 66-10 and Memorandum 66-12. The Commission determined that Senator Cobey should be requested to amend SCR No. 3 to

provide in substance as follows;

AMENDMENTS OF SCR No. 3

On page 2 of the printed resolution dated February 9, 1966, line 10, strike out "partnerships and unincorporated associa-", strike out line 11, and in line 12, strike out "and whether"

On page 3, line 43, strike out the period and insert "; and be it further"

On page 3, after line 43, insert:

"Resolved, That the Commission is authorized to study the following additional topics:

(1) Whether the law relating to suit by and against partnerships and other unincorporated associations should be revised and whether the law relating to the liability of such associations and their members should be revised.

(2) Whether the law relating to quasi-community property and property described in Section 201.5 of the Probate Code should be revised.

(3) Whether the law relating to the allocation or division of property on divorce or separate maintenance should be revised."

The new topics that the Commission would be authorized to study as a result of the addition of topics (1), (2), and (3) at the end of the resolution are topics that are related to topics now ;under study or previously studied by the Commission.

The first topic--suits by and against unincorporated associations and liability of such associations and their members--is one that expands the scope of a topic now under study by the Commission (listed as topic 10 in the resolution as introduced). The expanded topic would permit the Commission to study the law relating to suits against unincorporated associations as well as suits by such associations. In addition, it would

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authorize the Commission to study the closely related question of the liability of such associations and their members. This expanded authority will permit the Commission to consider all of the problems that exist in this area of the law.

The second topic--quasi-community property and Probate Code Section 201.5 property--is one on which the Commission submitted recommendations in 1957 and 1961. Some questions have been raised about the legislation enacted as a result of these recommendations, and the Commission seeks authorization to study the legislation that was enacted on its recommendation to determine whether any revisions are needed.

The Commission is requesting authority to study the third topic--allocation or division of property on divorce or separate maintenance--because some of the questions raised concerning the legislation described in the second topic to be added to the resolution involve the provisions of the quasi-community property legislation that relate to the allocation or division of property on divorce. In order to provide a statutory scheme that treats allocation or division of quasi-community property and community property in the same manner, it is necessary that the Commission have authority to study the entire question of the allocation or division of property on divorce or separate maintenance.

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Hastings Law Journal Issue on Evidence. The Commission considered Memorandum 66-5. None of the members of the Commission were able to undertake to write an article on evidence for the Hastings Law Journal. Moreover, it was suggested that a Commissioner would not be in a position to write the critical type of article that the journal contemplates. No suggestions were made as to persons who might write such articles. Professor McDonough indicated he would be willing to go through the directory of law teachers with the article editor of the Journal if the article editor desired such assistance.

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STUDY 36(L) - CONDEMNATION LAW AND PROCEDURE

Obtaining Factual Information

The Executive Secretary reported that Memorandum 66-9 contains the information provided in response to our effort to obtain any statistical information that is available concerning the purposes and extent that property has been and will be acquired for public use by various public agencies. It was noted that little information is available in published form or in the form of unpublished office memoranda. However, some of the persons who do not now have information available in such form indicated a willingness to attempt to acquire statistical information pertinent to particular aspects of condemnation law and procedure.

The Department of Public Works reported that efforts are being made to obtain information on the practical effect of a strict "before and after" Test to valuation in cases where only a portion of the property is being taken.

The Right to Possession Prior to Judgment

In General

The Commission considered Memorandum 66-4 with attached exhibits, First Supplement to Memorandum 66-4 with exhibits, and the staff study on "Possession Prior to Final Judgment," all dealing generally with "Immediate Possession." It was pointed out that this subject may involve a Constitutional Amendment and was therefore being considered in the Commission's efforts looking to a comprehensive revision and restatement of the California law of eminent domain. It was also pointed out that any change in Section 14 of Article I of the California Constitution should also encompass any recommendations on the subject of inverse condemnation and that, therefore, any constitutional language recommended at this time would be subject to later change to include a recommendation on inverse condemnation.

It was noted that the purpose of the consideration of the matter at this meeting was with a view to enabling the Commission to adopt a tentative recommendation at the next meeting in April. The Commission's study and recommendation on this subject in 1961 was reviewed and the legislation based upon those recommendations was restated.

Constitutional Amendment (Classification of Condemnors and Public Purposes)

It was noted that Section 14 of Article I confers the right to immediate possession upon the state, counties, cities, and certain named improvement districts, when the taking is for "rights-of-way" or "lands for reservoir purposes." It was pointed out that these distinctions are

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reflected in existing legislation, although the Commission had recommended in 1961 that the section be amended to eliminate these distinctions and that legislation make uniform provisions for the taking of immediate possession.

Mr. David B. Walker, Office of the County Counsel, County of San Diego, expressed the view that the direct authorization should be retained in the Constitution; that constitutional extension of the right to all public condemnors would be desirable but that, in all cases, the right to abandon notwithstanding the taking of immediate possession should be preserved.

Mr. Norval Fairman, State Department of Public Works, indicated that the Division of Highways now has the constitutional right to immediate possession and has advance acquisition funds to make the required deposits. He urged that the direct constitutional authorization be retained.

Mr. Thomas Clayton, State Department of General Services, expressed the view that immediate possession in cases of rights of way or lands for reservoir purposes covered the takings of most direct concern to the State, and that the Department, having a lead time of approximately two years for construction in cases of other takings, did not particularly need immediate possession in connection with takings for other purposes.

It was pointed out that the existing constitutional provisions are not altogether logical; that they prevent uniform legislation on the subject; that the existing content of the section may prevent extension of the right of immediate possession to other appropriate cases; that legislative detail, in general, should be eliminated from the Constitution; and that the procedural detail now set forth in Section 14 may prevent a sensitive

legislative treatment of the entire subject.

After extensive discussion, the Commission determined to retain the existing authorization, clarifying only its application in terms of the public agencies and entities encompassed, and specifying that the procedures and incidents of immediate possession may be specified by legislation.

The Commission also approved the approach that, if any amendment of Section 14 is to be recommended, that the section be changed to empower the Legislature to authorize immediate possession for all condemnors as to takings for all purposes, provided probable just compensation be first paid or deposited. It was made clear that this latter revision should permit legislation classifying condemnors and public purposes, and should authorize the Legislature to provide detailed procedures and incidents of immediate possession.

Supplementary Legislation (Classification of Condemnors and Public Purposes)

In considering legislation to implement either Section 14 as it exists or as that section might be changed by an amendment, the Commission, after extensive discussion and consideration, determined preliminarily that the approach should be to divide all condemnors into four general categories as follows:

- (1) That substantially existing procedure be retained for agencies and entities now having the right to immediate possession as to the purposes now warranting the taking of immediate possession.
- (2) That as to all public agencies and agencies whose resolutions as to necessity are now conclusive, immediate possession would be authorized, but a clear and convenient procedure would be provided whereby the property

owner might contest the need for immediate possession, the amount of the deposit, and the right to take generally.

(3) That all public agencies and entities be authorized to acquire immediate possession in takings for all purposes by a noticed motion procedure upon showing of the appropriateness of the taking of immediate possession in the particular instance.

(4) That the right to immediate possession be not extended beyond governmental agencies and entities and public utilities and common carriers.

The staff was directed to ascertain and report the exact consequences of classifications in terms of the conclusive effect of the resolution, ordinance, or declaration of necessity.

The staff was also directed to consider further the possibility of the legislation providing for a final, rather than preliminary, determination of the right to take in those instances in which immediate possession is obtained other than by ex parte procedure.

Requirement That Condemnors Take Immediate Possession and Deposit Funds

The Commission considered at length a proposal that in appropriate instances the condemnor be required to take possession on filing of the action and to make the deposit of probable just compensation.

It was pointed out that such an innovation would assure the property owner of sooner receipt of funds and otherwise alleviate the problems of the property owner during the pendency of the action and possible appeal.

Generally, the Commission considered the staff proposal that "immediate" possession be made more widespread as being a more business-like method

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of treating property owners in public acquisition programs.

The Commission favored furtherance of the policy of a substantially simultaneous exchange of property and funds, and disfavored any privilege on the part of condemnors of being able to "shop" for properties or to proceed to condemnation without funds assured for payment of the eventual award.

Section 407b of the Pennsylvania Eminent Domain Code was considered, and the staff was directed to make further study of the practicability of a requirement that all condemnors be required to have and deposit funds upon the filing of actions. It was noted that any such requirement would create problems in connection with abandonment, in connection with work financed by assessments, and in connection with the one-year period now provided by Code of Civil Procedure Section 1251 for raising money for property acquisition by the issuance of revenue or general obligation bonds.

The Commission determined that, for the present, the approach should be to attempt to alleviate the situation of the property owner by changes in the prescribed date of valuation, rather than by adoption of a mutually reciprocal scheme of possession prior to judgment.

Appeals, Judicial Discretion, and Legislatively Stated Standards for Immediate Possession Cases

The Commission considered Illinois legislation which provides a situational approach, with judicial discretion, in the handling of requests for immediate possession. It was pointed out that the order of immediate possession in existing California practice is a summary process exercisable solely in the discretion of the condemnors. Mr. Walker and Mr. Fairman expressed the view that immediate possession should be retained as an

exceptional prerogative of condemnors in situations in which the taking of immediate possession is now authorized by the Constitution.

The Commission determined, as a tentative approach, that existing practice be retained as to condemnors and public purposes covered by the existing language of Section 14, but that alternatives be further considered in connection with all other classes.

Period of Notice

It was pointed out that existing practice assures the property owner of 20 days' notice of an order of immediate possession, with provision for judicial reduction of this period to three days in appropriate cases.

It was further pointed out that proposed Federal legislation will require not less than 180 days' notice to the occupant of any home, farm, or business, in connection with all Federally assisted projects.

It was also noted that a more extensive period of notice to the property owner would permit time in which a motion on the part of the property owner respecting the matter of possession could be entertained and considered and would also make possible a binding, rather than preliminary, determination of those issues generally encompassed within the "right to take."

It was made clear that the proposal of a 90 day period of notice, as well as the existing Federal proposal, assumes that the notice could be given before filing of the condemnation proceeding.

After extensive consideration, the Commission determined to retain the existing notice period at least as to those agencies now authorized to take immediate possession, and that any change be reviewed in the light of Federal legislation, particularly as to the extended class of condemnors

authorized to take immediate possession.

Payment of Interest in Immediate Possession Cases

The Commission noted a directive of the Federal government that, in highway cases, the United States will no longer share any cost of interest after a deposit has been "made available" to the property owner. It was further observed that interest now ceases on the making of a deposit after entry of judgment, and that a general objective of legislation should be to eliminate any option on the part of the property owner to leave funds on deposit and draw 7% interest.

It was pointed that the principal objection to eliminating interest on deposits is the obstacle that property owners have in withdrawing the deposit in cases in which allocation of the award is necessary.

The Commission considered the practice in Illinois and in Federal condemnation, and recommended as a tentative approach that the staff attempt to devise means of overcoming obstacles to withdrawal with a view to making appropriate a requirement, in effect, that property owners withdraw deposits or forfeit any interest.

Date of Valuation

The Commission reviewed its previous considerations of the basic and alternative dates of valuation in condemnation cases generally. It was pointed out that, under existing practice, the dates have exactly the same application in immediate possession cases. It was also pointed out that the date possession is taken and the deposit made is the most appropriate date of valuation as that date is the one on which the transaction is consummated as a practical matter.

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After extensive consideration of the matter, and taking into account the uniform view of the public agencies that existing dates should be retained, the Commission recommended as a tentative approach that the date of valuation, in all cases, be the date of summons or trial, whichever is more advantageous to the property owner. A single exception would be that the date of valuation would be the date of the deposit of the probable just compensation, whether or not possession is actually taken.

It was pointed out that this would provide cogent incentive to condemnors to take possession and make deposits, and thus eliminate some of the problems of property inhering in the California condemnation calendar.

Abandonment of Proceedings

The Commission reconsidered its study and recommendation of this matter in 1961 which led to legislation reserving the privilege to abandon, except in those situations in which the property owner has so changed his position that the condemnor should be estopped from doing so.

It was pointed out that under Federal practice and the rule in many, if not most, states the condemnor may not abandon the proceedings after having taken possession.

Mr. Walker and Mr. Fairman expressed the view that abandonment should be permitted even after the taking of possession, essentially because certain changes in plans and the logic of partial abandonment overcomes any unfairness or inconvenience to most property owners.

The Commission noted that abandonment would be a problem in connection with widespread or general taking of possession prior to judgment.

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It was also noted that denial of the privilege of abandonment would create problems in those situations in which anticipated funds were not forthcoming for the particular public improvement.

After extensive discussion, the Commission approved the tentative approach of retaining the existing position on abandonment and reflecting that position in comprehensive revision of existing law.

The Commission considered the discrepancy that has arisen in judicial decisions in treatment of costs and expenses on the one hand, and attorney's fees, on the other, in cases of abandonment. It was noted that attorney's fees for services rendered at any time in the condemnation process are allowable, but that appraiser's fees and other costs of preparing for trial are not recoverable if they relate to any period more than 40 days prior to trial.

After thorough consideration of the question, it was recommended that the tentative recommendation include elimination of the proviso in Code of Civil Procedure Section 1255a that disallows expenses and costs incurred more than 40 days prior to trial.

STUDY 42 - GOOD FAITH IMPROVERS

The Commission considered Memorandum 66-8 and the attached tentative recommendation.

The Commission determined to use the tentative recommendation as a working approach to the problem and to determine, after examination of the legislation set out in the tentative recommendation, whether the approach taken in the tentative recommendation should be the basic approach adopted in its recommendation to the Legislature.

The following decisions were made in connection with the statute set out in the tentative recommendation:

Section 740.1. This definition should be revised to include as a good faith improver one who makes an improvement believing that he has a long term lease (at least 25 years).

Section 740.2. Subdivision (c) of this section was deleted. The Comment to the section should indicate that nothing in the statute affects any defense the improver may have to defeat the action to recover possession of the land or to compel removal of the improvement. Thus, the statute does not affect estoppel, laches and other defenses of a legal or equitable nature.

A question was raised concerning the standard provided in subdivision (b). The staff is to attempt to obtain a better phrasing of this standard and, in this connection, Section 376 of the Code of Civil Procedure should be considered. Consideration should be given to requiring right of removal unless requiring removal would result in an unreasonable hardship to the improver. Also consideration should be given to using "provide an adequate remedy."

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New section. A new section should be added to the statute to permit the improver to bring an action of an equitable nature to obtain relief similar to that provided in the proposed legislation the same as if an ejectment action had been brought against him.

Statutes not exclusive relief available to improver. The proposed legislation should be recommended as a limited contribution to the solution of a difficult problem, and it should make it clear that the off-set, right of removal, and additional relief to be provided by statute, are not the exclusive forms of relief available to a trespassing improver. It was noted that in Taliaferro v. Colasso, 139 Cal. App.2d 903, 294 P.2d 774 (1956) the court felt compelled to conclude that the trespassing improver could obtain no relief except the right of set-off provided by Code of Civil Procedure Section 741 because Section 741 was construed as a statement of the exclusive remedy available to the good faith improver. The proposed legislation should contain a provision making it clear that the existing statutes and the new legislation are not intended to have this effect, and that the statutory provisions are not exclusive. Nevertheless, the statutes would state rights granted to the good faith improver that would have to be recognized by the court in cases falling within the standards set out in those sections.

In discussing this general proposition, the following approach to framing the recommendation to the Legislature was suggested and generally approved:

Suppose our recommendation was something along this line: This is a very difficult problem. Anybody who's ever worked with it has realized it's difficult. Our research consultant said it's difficult. The Commission has spent a lot of time

working on it and trying to devise a comprehensive statutory scheme. We have finally decided that it is not possible to deal with all of the aspects of this matter by a comprehensive statute. We do think that some additional statutory provisions would be desirable in addition to those we now have concerning the right to remove and the right of set-off. We therefore recommend a limited additional remedy, not as being the total solution to the problem, but as being a contribution to the solution, and with the understanding that the existing remedies and the additional remedy are in no way intended to suggest that the courts are inhibited from working out additional solutions to other aspects of the problem from time to time as they go along. Just so we make it clear that we have only addressed ourselves to a part of the problem and attempted to solve part of it and that we don't suggest that what we recommend be considered a complete solution to the problem.

Code in which new legislation should be compiled. The staff is to consider the code in which the new statute should be compiled and to consider whether some reference should be included in the Civil Code to the new legislation if it is compiled in the Code of Civil Procedure.

How improver's rights should be pleaded. The question of how the improver should plead his right to relief should be considered in redrafting the statute. Also the question of which party should be required to establish what should be considered.

Section 740.3. No changes were suggested in this section.

Section 740.4. Subdivision (a)(ii) was revised to read:

(ii) The amount paid as taxes on the land (as distinguished from the improvement), and the amount paid as special assessments on improvements that benefit the land, by the defendant and his predecessors in interest which was not paid by the plaintiff or his predecessors in interest.

Section 740.5. No changes were suggested in this section.

Section 740.6. The second sentence of subdivision (e) should be revised to read: "Upon payment of such amount, judgment shall be entered that the defendant has all the interests of the plaintiff in the property."

Section 741. The amendment of this section was approved.

Section 8. This section was approved.

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STUDY 44 - THE FICTITIOUS NAME STATUTE

The Commission considered Memorandum 66-2 and the attached tentative recommendation.

The statement provided to the various licensing agencies under the proposed legislation should be under penalty of perjury rather than under oath.

The Commission determined not to distribute the tentative recommendation at this time and directed the staff to check with the various licensing agencies to determine whether the Fictitious Name Statute serves any purpose and, if it is repealed, whether the particular licensing agency wishes to maintain a roster of licensees operating under a fictitious name.

It was also suggested that the credit agencies be contacted to determine whether the statute serves any purpose.

The question was raised whether the Fictitious Name Statute may be a means of discovery when one seeks to bring an action against a person doing business under a fictitious name. The staff reported that none of the cases justifies the statute on this ground.

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STUDY 44 - SUIT IN COMMON NAME

The Commission considered Memorandum 66-3. The definition of "unincorporated association" was discussed but no action was taken. It was suggested that the definition in the federal income tax law be checked.

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STUDY 51 - SUPPORT AFTER AN EX PARTE DIVORCE

The Commission considered Memorandum 66-1 and the attached tentative recommendation and a redraft of Proposed Section 272 (green page).

A motion was defeated by a three-three vote that the proposed legislation provide only rules governing the right to support when California substantive law is determined to be applicable and leave to the courts the task of determining when the substantive law of another state would govern the right to support (thus permitting the court to apply the choice of law rule determined by the court to be appropriate under the circumstances of the particular case).

A suggestion was made that the statute provide: (1) The right of support is not cut off by an ex parte divorce unless the full faith and credit clause of the United States Constitution so requires and (2) No action for support following an ex parte divorce may be maintained in California if the court determines that under all the circumstances of the particular case it would be inequitable to grant support. This suggestion was not adopted.

A motion was adopted that this topic be dropped from our agenda and that the 1967 Annual Report so indicate. The 1967 Annual Report should state in substance that the need for legislation is eliminated by the decisions that permit an action for support after an ex parte divorce and that it appears that any problems that may arise in effectuating these decisions would be better resolved by the courts than by legislation.

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STUDY 63(L) - THE EVIDENCE CODE

The Commission considered Memorandum 66-13 and the law review note published in 53 California Law Review 1439 (1965) concerning the burden of proof and presumptions article of the new Evidence Code.

The Commission first considered the six letters concerning the change suggested by Justice Kaus in Section 403. In view of the unanimous conclusion of all the letters that no change should be made in Section 403, no action was taken to modify the section.

The Commission next considered the law review note and the following actions were taken (references to "the writer" are to the writer of the law review note):

The presumption-is-evidence doctrine. The writer approved the elimination of the presumption-is-evidence doctrine and no action was taken by the Commission to change the Code in this respect.

The writer suggested that the law relating to peremptory rulings against the party relying on a presumption should be clarified in the Evidence Code. The Commission considered this suggestion, but took no action on the matter for two reasons: First, it was considered undesirable to attempt to deal with only one aspect of the problem of peremptory rulings. Second, the general problem should not be dealt with without a comprehensive research study. It was noted that the rule under the code will be the same as for directed verdicts and nonsuits generally. The effect of a presumption affecting the burden of proof will be to shift the burden of proof to the party against whom the presumption operates. The court will then grant directed verdicts and nonsuits in the same manner as if the burden of proof

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were initially on the party against whom the presumption operates. It was suggested that this point be made clear in the article that the Assistant Executive Secretary is preparing for the book to be published by the Continuing Education of the Bar.

Are two kinds of presumptions necessary? The writer concluded that two types of presumptions are not necessary and that the division of presumptions into two classes in the Evidence Code will create serious administrative difficulties. He suggested that all presumptions be classified as presumptions affecting the burden of persuasion (Morgan presumptions) as distinguished from presumptions that only shift the burden of producing evidence.

No change was made in the Evidence Code in this respect, but the Commission determined to undertake to draft a bill (separate from the bill that will be introduced to effectuate the tentative recommendation already distributed for comment) to classify as many statutory presumptions as possible and to conform the language of the sections in other codes to the scheme of the Evidence Code. The bill would be introduced at the 1967 legislative session. Any statutory presumptions that have not been classified in that bill will be the subject of a recommendation to a subsequent legislative session.

Is the Evidence Code scheme for classifying presumptions adequate? The writer concluded that it will not be easy for the judges to classify presumptions under the test set out in the Evidence Code, especially since they must often classify a presumption in the heat of a trial. The Commission determined to review the test after it has classified a number of statutory

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presumptions and is in a better position to determine whether a better general test can be stated in the statute.

The Section 667 presumption. This presumption was discussed, but no action was taken to make any change in Section 667.

Mentioning presumptions to the jury. The writer approved the Evidence Code scheme on this and no change was made in the Code.

Clear and convincing evidence. The writer suggested a change in the rule concerning directed verdicts and nonsuits where one party must prove a fact by clear and convincing evidence. For the reasons indicated under the heading "the presumption-is-evidence doctrine," the Commission determined not to include a rule on this matter in the Evidence Code.

Conflicting presumptions. The writer suggested that the Evidence Code should contain a provision on conflicting presumptions. The Commission concluded that no such provision was needed; and that the problem of conflicting presumptions should be left to resolution by the courts on a case by case basis. Nevertheless, in the course of classifying presumptions, the problem of conflicting presumptions should be kept in mind to determine whether some general provision on this subject is needed in the statute.

Prima facie evidence. The Commission determined that its review and classification of existing statutory presumptions should include the statutes that make evidence of one fact prima facie evidence of another. Where the particular statute is designed merely to provide a hearsay exception, the statute should be revised to so indicate.

Nonstatutory presumptions. The writer approved the Code's recognition of the existence of nonstatutory presumptions and no change was made in the Code.