

<u>Time</u>	<u>Place</u>
July 21 - 9:30 a.m. - 5:00 p.m.	Commissioner Ball's office
July 22 - 9:00 a.m. - 5:00 p.m.	120 Linden Avenue
July 23 - 9:00 a.m. - 4:00 p.m.	Long Beach

REVISED TENTATIVE AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Long Beach

July 21-23, 1966

Preliminary and Administrative Matters

1. Approval of Minutes of June 1966 Meeting (enclosed)
2. Administrative Matters
 - (a) 1967-68 Budget
Memorandum 66-32 (to be sent)
 - (b) Other administrative matters, if any

Approval of Tentative Recommendation for Distribution for Comment and of Bill for Preprinting

3. Study 63(L) - Evidence Code
Revision of Agricultural Code
Memorandum 66-40 (to be sent)

] Special
] order of
] business
] 10:00 a.m.
] July 21

Consideration of Comments and Approval of Bill for Preprinting

4. Study 62(L) - Vehicle Code Section 17150 and Related Statutes
Memorandum 66-36 (to be sent)
5. Study 53 - Personal Injury Damages
Memorandum 66-37 (to be sent)
6. Study 55(L) - Additur
Memorandum 66-38 (to be sent)

Approval of Tentative Recommendations for Distribution for Comment and of Bills for Preprinting

7. Study 36(L) - Condemnation Law and Procedure
Possession Prior to Judgment and Related Problems
Memorandum 66-33 (to be sent)
Tentative Recommendation (attached to Memorandum)
Research study (to be sent)

] Special
] order of
] business
] 9:00 a.m.
] July 22

8. Study 26 - Escheat

Memorandum 66-34 (to be sent)
Tentative Recommendation (attached to Memorandum)

9. Study 63(L) - Evidence Code

Revisions of Commercial Code

Memorandum 66-35 (to be sent)
Tentative Recommendation (attached to Memorandum)

Consideration of Comments on Tentative Recommendation

10. Study 63(L) - Evidence Code

General Recommendation on Revision of Evidence Code

Memorandum 66-39 (to be sent)

Consideration of Comments on Previously Enacted Legislation

11. Study 52(L) - Sovereign Immunity

Memorandum 66-44 (to be sent)

] Special order
] of business
] 9:00 a.m.
] July 23

MINUTES OF MEETING

of

JULY 21, 22, AND 23, 1966

Long Beach

A meeting of the California Law Revision Commission was held at Long Beach on July 21, 22, and 23, 1966.

Present: Richard H. Keatinge, Chairman
Joseph A. Ball
John R. McDonough
Thomas E. Stanton

Absent: Honorable James A. Cobey
Honorable Alfred H. Song
Sho Sato, Vice Chairman
James R. Edwards
Herman F. Selvin
George H. Murphy, ex officio

Messrs. John H. DeMouilly, Joseph B. Harvey, John L. Reeve, and Clarence B. Taylor of the Commission's staff also were present. Mr. Taylor was absent on July 23.

The following members of the staff of the Southern California Law Review were present on July 23 at the invitation of the Commission for the purpose of discussing the note on governmental liability that was recently published in the Southern California Law Review:

John Gains
Jerry Whatley

Also present were the following observers:

Richard Allen, Department of Water Resources (July 22)
Robert F. Carlson, Department of Public Works (July 22)
Herb Cohen, Department of Agriculture (July 21)
Willard A. Shank, Office of the Attorney General (July 22 and 23)
Terry C. Smith, Office of County Counsel, Los Angeles (July 22)
Jon D. Smock, Judicial Council (July 21 and 22)
Charles E. Spenter, Department of Public Works (July 22)
Emil Steck, Jr., Dairy Institute of California (July 21)
David B. Walker, Office of County Counsel, San Diego (July 21
and 22)
D. A. Weinland, Department of Agriculture (July 21)

ADMINISTRATIVE MATTERS

Minutes of June 9-11 meeting. The Minutes of the June 9-11 meeting were corrected to add "Richard Kahlman, Law Department, Pacific Gas and Electric Co., San Francisco" to the list of observers present at the meeting (page 1 of the Minutes of the June meeting). As corrected, the Minutes of the meeting held on June 9-11, 1966, were approved.

Future meetings. The place of the August meeting was changed from Los Angeles to San Francisco. Future meetings are now scheduled as follows:

August 12 and 13 (two full days)	San Francisco
September 16 (evening) and 17	San Francisco
October 20, 21, and 22 (three full days)	Los Angeles
November 17 (evening), 18, and 19 (morning)	Berkeley
December - not yet scheduled	

Program statement. The program statement prepared by the staff was considered, revised, and then approved by the Commission.

Request that Commission members and staff comment on proposals of State Bar Committee on Administration of Justice. The Commission considered a request from the Board of Governors of the State that individual members of the Commission and staff members of the Commission comment on tentative statutes prepared by the Committee on the Administration of Justice relating to (1) Appeals in Civil Actions and (2) Provisions on Personal Jurisdiction and Service of Process Outside this State. Commissioner McDonough indicated that he had agreed to serve on a

Judicial Council committee to review these proposals. Because of the pressure of Commission work and other work, none of the other members of the Commission who were present were able to undertake to review the proposals of the State Bar committee. The staff members reported that the pressure of Commission work would not allow time for them to comment on the proposals.

Request of the Southern California Law Review that Commission suggest topics suitable for law review treatment. It was suggested that the last Annual Report be sent to the law review, indicating that the topics listed might be worthy of consideration for treatment in the law review. Commissioner McDonough suggested that the legislation on governmental liability is novel legislation that would be worthy of law review analysis. It was also suggested that the extent to which two parties can agree that certain information is confidential and not to be disclosed in a judicial proceeding between those parties would merit study. In addition, whether there should be a marriage counselor's privilege is a question that may merit law review treatment.

Continuing Education Course on Evidence Code. After discussion of the need for adequate materials for lecturers in the program on the Evidence Code, it was agreed that the Chairman would call Felix Stumpf and suggest to him that the materials so far provided lecturers are inadequate. The Chairman will indicate that the staff of the Commission is available for consultation but will not be available to prepare materials for lecturers (other than the material already prepared by the Assistant Executive Secretary). It was suggested that the lectures

should contain a brief discussion of the major changes made in prior law and then a discussion of the application of the code provisions in particular fact situations.

Budget for 1967-68 fiscal year. The Commission considered Memorandum 66-32 and approved the staff recommendations contained in that memorandum. However, it was agreed that funds for temporary help will also be used for clerical help, primarily during vacation periods, and the machine to type reports ready for printing will not be purchased. The Executive Secretary was authorized to prepare the budget in accordance with these policy decisions and to work with the budget division in reaching an agreement with that division on the final budget.

The Executive Secretary reported that he planned to prepare a budget for 1967-68 that will not exceed the amount that will be spent in 1966-67.

Letter from Newspaper Publishers Association. The Commission considered a letter from Ben D. Martin, General Manager, California Newspaper Publishers Association. The letter objected to the Tentative Recommendation on the Fictitious Name Statute and to the fact that the organization had not participated in the study since the time the Commission commenced to study the topic. The proposed reply written by the Executive Secretary was approved.

It was agreed that the Chairman would call Mr. Martin and invite him to the next meeting to discuss this matter.

STUDY 26 - ESCHEAT OF PERSONAL PROPERTY

The Commission considered Memorandum 66-34 and the draft recommendation distributed therewith. The following actions were taken:

UNCLAIMED PROPERTY ACT AND COMPACT

The Chairman was directed to communicate by letter (to be prepared by the staff) with the Chairman of the California Uniform Laws Commissioners to determine whether the Law Revision Commission's continued study of the revision of the Uniform Unclaimed Property Act would meet with the approval of the Uniform Laws Commissioners.

The Chairman is also to contact the Attorney General in order to obtain the cooperation, assistance, and advice in regard both to the revision of the unclaimed property act and to the approval of the Unclaimed Property Compact.

ESCHEAT OF DECEDENTS' ESTATES

Probate Code Section 231

The staff was directed to revise the section to express the following principles:

Real property in California escheats to California.

Tangible personal property located in California at the time of the death of the decedent escheats to California unless such property is located in the state only temporarily.

Tangible personal property temporarily located elsewhere that belonged to a California domiciliary dying without heirs escheats to California.

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Tangible personal property temporarily located in California escheats to California unless the state of the decedent's domicile establishes that, under its law, California's escheat claim to property temporarily located in that state and belonging to California domiciliaries will be honored. If California's escheat claim to the property of its domiciliaries will be honored, the property will escheat to the state of the decedent's domicile.

Intangible property owed to a California domiciliary dying without heirs escheats to California. Intangible property owed by a debtor subject to California's jurisdiction to a nondomiciliary dying without heirs escheats to California unless the state of domicile can establish that it will recognize California's escheat claim to the obligations owed its domiciliaries, in which case California will recognize the escheat claim of the state of the decedent's domicile.

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STUDY 36(L)-- CONDEMNATION LAW AND PROCEDURE (POSSESSION PRIOR TO
FINAL JUDGMENT AND ASSOCIATED PROBLEMS)

The following observers were present on July 22 when this topic
was considered:

Richard E. Allen, Department of Water Resources.
Robert F. Carlson, Department of Public Works.
Willard A. Shank, Office of the Attorney General.
Terry C. Smith, Office of the County Counsel, Los Angeles
Jon D. Smock, Judicial Council.
Charles E. Spencer., Department of Public Works.
David Walker; Office of the County Counsel, San Diego.

The Commission considered Memorandum 66-33 and the attached
drafts of a tentative recommendation, proposed legislation, and
constitutional amendment relating to this subject. The Commission
approved the proposed tentative recommendation, with certain
editorial changes, for distribution for comments, such comments
to be requested by September 1, 1966. The Commission also
approved the draft legislation and constitutional amendment, with
the changes and revisions indicated below, for inclusion in a
preprinted bill. The Commission directed that changes be made in
the draft legislation and comments as follows:

Section 1268.01(New)

The comment to this section is to be rewritten to avoid use
of prescriptive language (in the comment, rather than in the
section itself) in stating that "probable just compensation"
includes damages less special benefits, if any, as well as the
value of the property taken.

Section 1268.01(New) and Related Sections

This section, dealing with the deposit of probable just com-

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compensation "prior to entry of judgment" is to be redrafted to indicate that a deposit may be made under its terms after entry of judgment if that judgment subsequently is reversed, vacated, or set aside by an appeal or by motion in the trial court. In other words, Chapter 1 (Deposit and Withdrawal of Probable Just Compensation Prior to Judgment) and Chapter 2 (Possession Prior to Judgment) are to be made to apply to that stage in the proceeding after the judgment originally entered has been nullified and the case is waiting further proceedings. Chapter 3 (Deposits and Possession After Judgment) is to be limited to the period in which a judgment has been entered and remains in effect in the sense that it has not been reversed, vacated or set aside. This clarification requires minor changes in the text or comments of the following sections: 1268.01, 1268.02, 1268.04, 1269.01(b), 1269.02(b), 1269.03(b), 1269.05(a), and 1270.01(a).

Section 1268.05(New)

Subdivision (e), which deals with the bonding requirement in cases of conflicting claims on withdrawal of a deposit, is to be changed to state that the court may require a bond running in favor of the plaintiff in any situation in which personal service of the application for withdrawal cannot be made upon a person who might eventually be determined to have an interest in the property.

Section 1268.06(New)

Subdivision (c) of this section is to be changed to indicate

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that the plaintiff may waive the requirement of an undertaking, as well as consent to an undertaking in an amount less than that required by the section.

Section 1269.02(New)

Subdivision (d), which permits the court to stay the effective date of an order for possession, is to be changed to provide any such stay shall not exceed 90 days from the date of service of the order for possession upon the moving party. The draft had provided that the 90-day period was to be computed from the "date for possession specified in the original order." The change was made to encourage condemnors to include a more generous period of notice in the original order without thereby incurring the possibility that the date fixed in the original order could be extended for an additional 90 days.

Section 1269.04(New)

Subdivisions (b) and (e) are to be clarified by deleting the words "by affidavit" in the phrase "for good cause shown by affidavit," and inserting the words "on ex parte application." In subdivision (d), the last sentence, which requires the placing of a certain affidavit concerning service in the file, is to be deleted.

Section 1269.05(New)

Editorial changes are to be made in this section to avoid use of the expression "may, by motion, apply to the court for an order," and to specify that the property owner may reside in either the dwelling or one of its units. The comment to the section also is to

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be revised to state more fully the purpose of a motion by the defendant to determine probable compensation.

Section 1269.06(New)

This section, which deals with possession after a deposit has been made and withdrawn, is to be redrafted to provide that, after a deposit has been made and withdrawn by all the defendants entitled to possession or after the property has been vacated by all the defendants entitled to possession, the plaintiff is entitled to an order for possession and time limits on service of the order for possession under Section 1269.01 are to be made applicable.

Section 1270.02(New)

In this section, which deals with orders for possession, the sentence "If necessary, the court shall also stay any actions or proceedings against the plaintiff arising from such possession" is to be deleted. A corresponding change is to be made by amending Code of Civil Procedure Section 1247, which deals generally with the powers of the court in eminent domain proceedings. A subdivision is to be added to that section specifying that the court in which the proceeding is pending may regulate possession as between the plaintiff and the defendant, and may enforce its orders for possession.

Section 1270.05(New)

The comment to this section (which deals with the withdrawal of deposits made after judgment) is to be expanded to refer to the possibility that the amount to which a defendant is entitled

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might possibly have already been withdrawn by another person under the provisions for withdrawal of deposits made prior to judgment. The comment is to indicate that the remedy of such a defendant is to follow the procedures for recoupment of excessive withdrawals prior to judgment (Section 1268.08).

Section 1270.06(New)

This section, which deals with possession on withdrawal of a deposit made after judgment, is to be changed to conform to the changes made in Section 1269.06.

Code of Civil Procedure Section 1249(Amended)

The general comment to this section is to be clarified to state that the date of valuation specified by the section is not applicable in takings of public utility property by political subdivisions under provisions of the Public Utilities Code. The draft comment was objectionable in seeming to imply that the usual date of valuation is not applicable in any taking of property already devoted to a public use. The comment to subdivision (b) is to be changed to include the sentence, "Thus, any increase or decrease in market value (prior to the date of valuation) that is substantially due to general knowledge of the public improvement is not to be considered in arriving at the value of the property, and the amount of severance damages and special benefits, under Code of Civil Procedure Sections 1248 and 1249." The comment as drafted was objectionable in referring to "addition" of an amount to offset the decrease, if any, in market value.

Code of Civil Procedure Section 1249a(Amended)

Subdivision (b) is to be changed to eliminate the reference to deposits made after entry of judgment. This change corresponds with the change made in Section 1268.01 and other sections which provide that a deposit made after the vacation or setting aside of a judgment is a deposit made "prior to judgment" rather than one made after entry of judgment. Subdivision (g) is to be changed to provide that, to preserve the date of valuation in the original trial, the plaintiff may deposit the amount of the judgment within 10 days after disposition of a motion for new trial or to vacate or set aside the judgment. The draft was objectionable in specifying 30 days after entry of judgment and thereby not allowing for the possibility of post-judgment motions in the trial court.

Code of Civil Procedure Section 1249.1(Amended)

Subparagraph (4) of subdivision (a) which provided that the risk of loss shifts to the plaintiff when the defendants entitled to possession vacate the property after withdrawing a deposit, is to be deleted. This change conforms to corresponding changes made in Sections 1269.06 and 1270.06.

Code of Civil Procedure Section 1255a(Amended)

In subdivision (c) of this section, which deals with the recoupment of expenses on abandonment, the qualifying phrase "as a result of the plaintiff's determination to take the property" is to be added to the phrase "reasonable attorney and appraisal fees actually incurred." The purpose of the change is to make clear that, to be recoverable, attorney and appraisal fees must be incurred as a direct result of the eminent domain proceeding, even

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though they may be incurred for services rendered before the filing
of the complaint.

Constitutional Amendment

The constitutional amendment and comment were approved with
minor editorial changes in the comment.

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STUDY 52(L) - SOVEREIGN IMMUNITY

The Commission considered Memorandum 66-44, the First Supplement to Memorandum 66-44, an article appearing in 39 Southern California Law Review. 470, and a statement by the author of that article which was handed out at the meeting.

After considerable discussion, the Commission determined not to recommend any revision of the governmental liability act at the 1967 legislative session. However, when revisions of the governmental liability act are considered in the future, the material considered at the July meeting should be again brought to the attention of the Commission.

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STUDY 53(L) - PERSONAL INJURY DAMAGES AS SEPARATE PROPERTY

The Commission considered Memorandum 66-37 and the tentative recommendation that was distributed for comments on January 1, 1966. The following actions were taken:

Section 905

The staff was directed to revise the section to permit the filing of a contribution cross-complaint as a matter of right at the same time as the filing of the answer or within 100 days after the service of the plaintiff's complaint, whichever is later. The section should also permit the filing of a contribution cross-complaint after that time under the same conditions that any other cross-complaint can be filed after the time for answer under Code of Civil Procedure Section 442.

Recommendation generally

Subject to the revision of Section 905, the recommended statute was approved and the Executive Secretary was authorized to have the bill preprinted.

STUDY 55(L) - ADDITUR

The Commission considered Memorandum 66-38, the First Supplement thereto, and the tentative recommendation on the subject that was distributed for comments on January 1, 1966. The following actions were taken:

Section 657

The Commission considered a suggestion to deprive a judge of the power to grant a new trial in any case where the jury verdict is supported by substantial evidence. Inasmuch as the Legislature has fully considered the subject at recent legislative sessions, and inasmuch as the subject of the Commission's study is additur, not the grounds for a new trial, the Commission declined to make the suggested revision.

Section 662.5

The Commission considered, but rejected, a suggestion to limit the exercise of additur or remittitur to cases where a new trial is granted limited to the issue of damages. The Commission then revised the section to read as follows:

662.5. (a) In any civil action where the verdict of the jury on the issue of damages is supported by substantial evidence but an order granting a new trial limited to the issue of damages would nevertheless be proper, the trial court may grant a motion for new trial on the ground of inadequate damages and make its order subject to the condition that the motion for a new trial is denied if the party against whom the verdict has been rendered consents to an addition of so much thereto as the court in its discretion determines.

(b) Nothing in this section precludes a court from making an order of the kind described in subdivision (a) in any other case where such an order is constitutionally permissible.

(c) Nothing in this section affects the authority of the court to order a new trial on the ground of excessive damages and to make such order subject to the condition that the motion for a new trial on that ground is denied if the party recovering the damages consents to a reduction of so much therefrom as the court in its discretion determines.

Preprinted bill

The Commission authorized the Executive Secretary to have the additur bill preprinted.

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STUDY 62(L) - VEHICLE CODE § 17150
AND RELATED SECTIONS

The Commission considered Memorandum 66-36 and the tentative recommendation on the subject that was distributed for comments on January 1, 1966. The following actions were taken:

Section 905

The staff was directed to revise the section to permit the filing of a contribution cross-complaint as a matter of right at the same time as the filing of the answer or within 100 days after the service of the plaintiff's complaint, whichever is later. The section should also permit the filing of a contribution cross-complaint after that time under the same conditions that any other cross-complaint can be filed after the time for answer under Code of Civil Procedure Section 442.

Recommendation generally

Subject to the revision of Section 905, the recommended statute was approved and the Executive Secretary was authorized to have the bill pre-printed.

The staff was asked to communicate with the State Bar to determine whether it had any specific objection to the contribution statute other than the fact that it is a special contribution statute instead of a general statute.

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STUDY 63(3) - EVIDENCE CODE (GENERAL RECOMMENDATION)

The Commission considered Memorandum 66-39, the comments attached to that memorandum, and the tentative recommendations distributed on January 1, 1966. The following actions were taken:

Section 402

The Commission approved in principle the modification of subdivision (b) suggested by the joint report of the Judicial Council and Conference of Judges. The suggested revision was:

The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests unless the defendant expressly waives this requirement and his waiver is made a matter of record, in which case the court in its discretion may hear and determine the question of admissibility out of the presence or hearing of the jury.

The staff was directed to redraft the provision to simplify it. It was pointed out that the substance of the revision was contained in the Commission's tentative recommendation on Article 1 of the U.R.E. (6 CAL. L. REVIS. COMM'N REP'TS 1, 19), but the former draft was much more simple and to the point.

Section 403

After considering the comments received on the proposed revision of Section 403, the Commission decided that no revision of the section would be recommended.

Section 405

The Commission considered a revision of Section 405 suggested by the office of the District Attorney of Los Angeles County. The pro-

posed revision would specify that the burden of proof as to the facts necessary to show the admissibility of a confession is the burden of proof by a preponderance of the evidence.

The Commission concluded that no revision should be made. Under the definition of burden of proof in Section 115, the courts may specify the burden of proof required.

Sections 412, 413, and 414

The Commission concluded that it would not recommend the amendment of Sections 412 and 413 and the enactment of Section 414 as proposed in the tentative recommendation. Instead, the report should indicate that the Commission considered, but rejected, an amendment to Sections 412 and 413 because the amendment would state merely an obvious truism. The report should also state the effect of the Griffin case on the two sections. This portion of the report could be appended to the comments by the private law book publishers.

Section 646

The section was approved as proposed in the tentative recommendation. The second sentence requiring an instruction on the inferences that may be drawn was retained in order to clarify the status under the Evidence Code of the prior case law requiring a res ipsa loquitur instruction when the facts would support the res ipsa inference.

It was pointed out that the revised comment is somewhat defective in referring to the establishing of a fact by "uncontradicted evidence" and the reference should be corrected or deleted.

Section 669

The Commission considered whether to leave the elements of injury and proximate cause out of the statement of the presumption inasmuch

as these elements must be proved anyway in order to establish a cause of action for negligence. The Commission concluded that the section should be recommended as proposed in the tentative recommendation. Only after the injury and proximate cause are established does the burden shift to the defendant to prove the reasonableness of his conduct.

The comment should be revised to point out that the presumption relates to simple negligence, not gross negligence.

Section 776

Section 776 was approved as recommended in the tentative recommendation. A suggestion was made that the section might be simplified by redrafting.

Sections 952, 992, and 1012

The reference to "opinion" in Section 952 should be modified to refer to "professional opinion" or "legal opinion" in order to exclude opinions as to sanity, emotional state, etc.

Subject to the revision of Section 952, Sections 952, 992, and 1012 were approved as proposed in the tentative recommendation.

Section 1017

Section 1017 was approved as proposed in the tentative recommendation.

Marriage counselor's privilege

The Commission considered the possibility of a marriage counselor's privilege created contractually by the parties, but declined to make a recommendation on the subject.

Section 1040

The Commission reconsidered a suggestion from the San Diego

District Attorney that the public official, not the court, be given the right to determine whether official information is subject to the privilege. After consideration, the Commission declined to recommend a change in the statute.

Section 1042

It was pointed out that subdivision (c) was held unconstitutional by a district court of appeal. The Commission declined to take action on the matter until the Supreme Court has had an opportunity to rule on the matter.

Section 1152

Subdivision (a) of Section 1152 was revised to make it clear that offers to compromise prospective losses are included. The subdivision was revised as follows:

1152. (a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims to have that he has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his liability for the loss or damage or any part of it.

Section 1201

The revision of Section 1201 proposed in the tentative recommendation was approved.

Penal Code Sections 1093 and 1127

The revision of these sections was approved, but a separate recommendation relating to them should be prepared so that the Evidence Code recommendation will contain only revisions of Evidence Code sections.

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STUDY 63(L) - THE EVIDENCE CODE (AGRICULTURAL CODE REVISIONS)

The Commission considered Memorandum 66-40 and the attached tentative recommendation. Present during the consideration of this memorandum were Mr. Emil Steck, Jr., representative of the Dairy Institute of California, and Mr. D. A. Weinland and Mr. Herb Cohen from the State Department of Agriculture.

General policy on classification of presumptions. The Commission concluded that it should classify the presumptions in the Agricultural Code in such manner as to carry out the intent of the drafters of the particular sections insofar as that intent can be ascertained or appears from the text of the section. The Evidence Code provisions providing the standards to be used in classifying presumptions will not govern the classification of presumptions in other codes by the Commission but the sections in other codes will be revised to carry out what appears to have been the intent of the drafters of the particular sections. As a matter of policy, the Commission will not redraft sections in other codes to improve their substantive provisions but will limit its revision of the sections to the changes needed to classify the presumptions.

Redrafting of sections dealing with effect of official certificates.

The sections that deal with the effect of official certificates should make clear that the certificates are admissible in both civil and criminal cases and that the presumption applies only in civil cases. The sections should be revised consistent

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with the revision of Section 772 which is set out below:

772. The certificates provided for in this chapter shall be prima facie are admissible as evidence, before any court in this State and establish a rebuttable presumption, of the true average soluble solids test of all the grapes in the lot or load under consideration. This presumption is a presumption affecting the burden of proof. The presumption does not apply in a criminal action.

Sections 18, 115, 124, and 152

Approved as drafted.

Section 160.97

The second to last paragraph should be revised to read:

Proof of The failure to file the report herein required shall create a rebuttable presumption is evidence that no such loss or damage occurred.

Sections 332.3, 340.4, and 438

Approved as drafted.

Section 332.3 should be revised to eliminate the "prima facie evidence" language and to make it clear that the section establishes a rebuttable presumption.

Section 651

The Commission considered a written statement presented by Mr. Emil Steck, Jr., concerning the revision of this section.

The Commission deleted the following sentence from Section 651: "This presumption is a presumption affecting the burden of producing evidence." and inserted the following in lieu thereof:

This presumption is a presumption affecting the burden of proof. This presumption does not apply in a criminal action.

Mr. Steck indicated that the section as so revised met his

approval. The representatives of the Department of Agriculture also approved the section as revised.

Section 695

The presumption is to be changed to a presumption affecting the burden of proof.

Sections 746.4 and 751

Approved in substance; prima facie evidence language to be eliminated and appropriate language substituted.

Section 763.5

Approved as drafted.

Sections 768, 772, 782, 796, 841, 892.5, 893, 920, 1040

Approved in substance; prima facie evidence language to be eliminated and appropriate language substituted.

Section 1105

Repeal approved.

Section 1106.1

Approved in substance; prima facie evidence language to be eliminated and appropriate language substituted.

Sections 1267 and 1268.2

Approved as drafted.

Section 1272

Approved in substance; prima facie evidence language to be eliminated and appropriate language substituted.

Sections 1272.5 and 1300.3-2

Approved as drafted.

Section 1300.5

Approved in substance; prima facie evidence language to be eliminated and appropriate language substituted.

Section 4135

This section was revised by adding after the sentence classifying the presumption as one affecting the burden of proof:

"This presumption does not apply in a criminal action."

Mr. Emil Steck, Jr., and the representatives of the Department of Agriculture advised the Commission that the purpose of Section 4135 is to make an audit or survey made pursuant to "generally accepted cost accounting procedures" (defined by regulations of the Department of Agriculture) presumptive evidence that the accounting procedure so used accurately reflects the cost. If the person wishes to use a generally accepted cost accounting procedure that uses rules other than those prescribed by the department, he has the burden of proving that the cost as determined under the regulations of the department is less accurate than the cost as determined under his alternative method of determining cost. The Commission was also advised that the audits and surveys referred to in the section are "audits" of the particular person who is charged with the unfair practice and that the "surveys" come in only insofar as they prescribe, for example, that "plant loss" (based on industry survey) is a certain percentage of overhead.

It was noted that another method of rebutting the presumption is to show that costs have not remained constant. Thus, if the

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defendant claims that the cost on the date of the audit is different than the cost on the date of the offense, the defendant must establish that fact since the facts are particularly within his knowledge.

The Commission was advised that the Legislature in considering this section at various sessions considered the section only in connection with civil enforcement actions. After considerable discussion, the Commission added a provision to the amended section that the presumption does not apply in a criminal action.

Section 4148

This presumption is to be changed to a presumption affecting the burden of producing evidence.

Approved for distribution

The tentative recommendation is to be revised and distributed for comment.

Approval of bill for preprinting

When revised, the staff is authorized to have the proposed legislation set in type.

STUDY 63(L) - THE EVIDENCE CODE (COMMERCIAL CODE REVISIONS)

The Commission considered Memorandum 66-35 and the attached tentative recommendation. The following actions were taken:

Section 1209

This section was approved as drafted.

Section 1202

The substance of this section was approved; the section is to be revised to substitute appropriate language for the "prima facie evidence" language.

Section 2719

This section was approved as drafted.

Section 4103

This section was approved as drafted.

Approval for distribution

The tentative recommendation, as revised, was approved for distribution for comments.

Printing of bill

The staff is authorized to have the proposed legislation set in type after it has been revised as set out above.