

Revised May 27, 1970

<u>Time</u>	<u>Place</u>
June 5 - 10:00 a.m. - 5:00 p.m.	State Bar Building
June 6 - 9:00 a.m. - 4:00 p.m.	601 McAllister Street San Francisco

TENTATIVE AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

June 5-6, 1970

June 5

1. Minutes of May 8-9 meeting (sent 5/20/70)
2. Administrative Matters  
    Memorandum 70-64 (enclosed)
3. 1970 Legislative Program
4. New Topic - Renunciation and Disclaimer by Heir or Legatee  
    Memorandum 70-41 (sent 4/10/70)
5. New Topic - Disposal of Abandoned Property in Lease Termination Cases  
    Memorandum 70-57 (sent 5/13/70)
6. New Topic - Savings and Loan Law  
    Memorandum 70-62 (enclosed)
7. New Topic - Parol Evidence Rule  
    Memorandum 70-63 (enclosed)
8. New Topic - Appellate Review in the Area of Discovery  
    Memorandum 70-58 (sent 5/13/70)
9. Study 71 - Joinder of Causes; Counterclaims and  
    Cross-Complaints  
    Memorandum 70-50 (to be sent)  
    Draft Statute (attached to Memorandum)

[Special order of  
business--10:30 a.m.  
on June 5

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10. Study 36.20(2) - Condemnation (The Right to Take--Tentative Statute)

Memorandum 70-51 (sent 5/20/70)  
Tentative Statute (attached to Memorandum)

11. Study 36.20(1) - Condemnation (The Right to Take--Disposition of  
Section 1238(15)--Restoration of Public Records)

Memorandum 70-60 (sent 5/20/70)

12. Study 36.21 - Condemnation (The Right to Take--The Right to Take a Fee  
or Any Lesser Interest)

Memorandum 70-61 (sent 5/20/70)

13. Study 36.95 - Condemnation (Constitutional Revision)

Memorandum 70-46 (sent 4/24/70)

14. Study 36.23 - Condemnation (The Right to Take--Extraterritorial  
Condemnation)

Memorandum 70-39 (sent 4/10/70)  
Research Study (attached to Memorandum)  
Memorandum 70-40 (sent 4/17/70)

June 6

15. Study 65.40 - Inverse Condemnation (Aircraft Noise Damage)

Memorandum 70-56 (sent 5/13/70)  
First Supplement to Memorandum 70-19 (sent 2/25/70)

[Special order  
[of business--  
[9:00 a.m. on  
[June 6

16. Study 36.22 - Condemnation (The Right to Take--Public Necessity)

Memorandum 70-52 (sent 5/22/70)

17. Study 36.40 - Condemnation (The Right to Take--Excess Condemnation)

Memorandum 70-53 (enclosed)  
Research Study (attached to Memorandum)

18. Study 36.42 - Condemnation (The Right to Take--Taking for Future Use)

Memorandum 70-54 (sent 5/22/70)

19. Study 36.30 - Condemnation (The Right to Take--Substitute Condemnation)

Memorandum 70-55 (enclosed)  
Research Study (attached to Memorandum)

20. Study 36.24 - Condemnation (The Right to Take--"More Necessary" Public Use)

Memorandum 70-49 (sent 5/13/70)

MINUTES OF MEETING  
of  
CALIFORNIA LAW REVISION COMMISSION  
JUNE 5 AND 6, 1970  
SAN FRANCISCO

A meeting of the California Law Revision Commission was held in San Francisco on June 5 and 6, 1970.

Present: Thomas E. Stanton, Jr., Chairman  
John D. Miller, Vice Chairman  
G. Bruce Gourley  
Noble K. Gregory  
Marc W. Sandstrom

Absent: Alfred H. Song, Member of the Senate  
Carlos J. Moorhead, Member of the Assembly  
Joseph T. Sneed  
Lewis K. Uhler  
George H. Murphy, ex officio

Messrs. John H. DeMouilly and Jack I. Horton, ~~members~~ of the Commission's staff, also were present.

The following observers were present on June 5:

William M. Bitting, Hill, Farrer & Burrill  
Ronald P. Denitz, Tishman Realty Co.  
W. B. Eades, State Bar Committee on the Administration of Justice  
Garrett H. Elmore, Special Counsel, State Bar of California  
Norval Fairman, Department of Public Works, San Francisco  
Eugene Golden, Buckeye Realty  
Gideon Kanner, Fadem & Kanner  
John N. McLaurin, Hill, Farrer & Burrill  
James T. Markle, Department of Water Resources  
John M. Morrison, Attorney General's Office  
Kenneth G. Nellis, Department of Public Works  
Terry C. Smith, Los Angeles County Counsel's Office  
Gerald J. Thompson, Santa Clara County Counsel's Office

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The following observers were present on June 6:

William M. Bitting, Hill, Farrer & Burrill  
Richard F. Desmond, Desmond, Miller & Desmond  
Garret H. Elmore, Special Counsel, State Bar of California  
Jerrald A. Fadem, Fadem & Kanner  
Norval Fairman, Department of Public Works, San Francisco  
Maurice A. Garbell, Aeronautical Consultant, San Francisco  
Gideon Kanner, Fadem & Kanner  
Bert J. Lockwood, Department of Airports, Los Angeles  
John N. McLaurin, Hill, Farrer & Burrill  
James T. Markle, Department of Water Resources  
Frank Reynoso, Desmond, Miller & Desmond  
Milton N. Sherman, Department of Airports, Assistant City  
Attorney, Los Angeles  
Terry C. Smith, Los Angeles County Counsel's Office  
Gerald J. Thompson, Santa Clara County Counsel's Office

Resignation of Commissioner Uhler. The Executive Secretary reported that Commissioner Uhler had advised that he had accepted an appointment to a position in the Executive Branch of the California state government and was planning to resign from his position as a member of the Law Revision Commission.

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ADMINISTRATIVE MATTERS

Approval of Minutes of May 8 and 9, 1970, Meeting. The Minutes of the May 8 and 9, 1970, meeting, including supplementary pages 5a and 5b, were approved as submitted.

1970 Legislative Program. The Commission heard the report of the Executive Secretary and discussed the progress of its 1970 legislative program. The actions taken with respect to specific bills are set out in these Minutes under the particular study.

Eminent Domain Consultant Contracts. The Commission considered Memorandum 70-64 and the Executive Secretary's report that the present contract for consulting services with the law firm of Hill, Farrer & Burrill will expire at the end of this fiscal year. The Commission authorized the Executive Secretary to negotiate a new contract with this firm to continue these services for the next two years. The contract is to include the same terms as the existing contract: reimbursement of travel expenses at the rate allowed for members of the Law Revision Commission and \$20 compensation for each day of attendance at meetings. The total compensation and travel expense reimbursement is not to exceed one thousand dollars (\$1,000). Expenses are to be paid only when the consultants attend meetings at the Commission's request and the Executive Secretary was directed to suggest that written comments submitted in advance of a meeting would be extremely helpful.

The Executive Secretary was further authorized to negotiate a similar contract with the law firm of Fadem & Kanner to provide additional assistance for two years; such contract to be limited to five hundred dollars (\$500).

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The Executive Secretary was authorized to execute both contracts on behalf of the Commission.

New Topic--Disposition of Abandoned Property Upon Termination of a Lease. The Commission considered Memorandum 70-57 and the attached exhibits and heard the comments of Messrs. Ronald P. Denitz and Eugene Golden. The Commission directed the Executive Secretary to attempt to obtain a consultant to prepare a study dealing with the disposition of abandoned property within the present authority of the Commission to study the law relating to the rights and duties attendant upon termination or abandonment of a lease.

New Topic--Renunciation and Disclaimer by Heir or Legatee. The Commission considered Memorandum 70-41 and directed the staff to prepare for the September 1970 meeting a more detailed memorandum identifying the problems arising from the renunciation and disclaimer by an heir as contrasted with a devisee or legatee, as well as a statement suitable for inclusion in the Annual Report if the Commission decides to request authority to undertake study of this topic.

New Topic--Savings and Loan Law. The Commission considered Memorandum 70-62 and decided that time and resources do not permit it to undertake study of this topic at this time.

New Topic--Parol Evidence Rule. The Commission considered Memorandum 70-63 and decided not to request authority to undertake study of the parol evidence rule.

New Topic--Appellate Review of the Area of Discovery. The Commission considered Memorandum 70-58 and decided not to request authority to undertake study of any portion of appellate writ procedure.

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STUDY 36.20(1) - CONDEMNATION (THE DECLARED PUBLIC USES--  
DISPOSITION OF SECTION 1238(15)--RESTORATION  
OF PUBLIC RECORDS)

The Commission considered Memorandum 70-60 and the attached exhibit. The Commission tentatively approved the deletion of subdivision 15 from Section 1238 of the Code of Civil Procedure and the inclusion of new Sections 14770 and 53030 to be added to the Government Code in the form submitted by the staff in the memorandum.

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STUDY 36.20(1) - CONDEMNATION (THE RIGHT TO TAKE--DISPOSITION  
OF SECTION 1238(21)--SLUM CLEARANCE AND LOW RENT HOUSING)

The Commission considered a letter dated June 3, 1970, from the Commissioner of Corporations relating to the Community Land Chest Law (attached hereto) and tentatively approved for inclusion in the Comprehensive Statute new Sections 35167 through 35171 of the Health and Safety Code as set forth in Exhibit I to the First Supplement to Memorandum 70-37 and also approved the deletion of subdivision 21. of Code of Civil Procedure Section 1238.

## DEPARTMENT OF CORPORATIONS

ANTHONY R. PIERNO  
CommissionerLos Angeles, California  
June 3, 1970

(IN REPLY REFER TO)

FILE NO. \_\_\_\_\_

Subject: Community Land  
Chest LawMr. John H. DeMouilly  
Executive Secretary  
California Law Revision Commission  
School of Law  
Stanford University  
Stanford, California 94305

Dear Mr. DeMouilly:

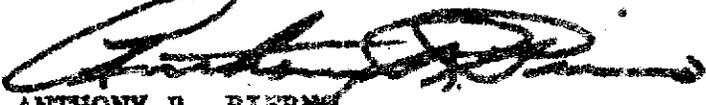
The Department of Corporations does not keep records according to the type of filing involved and it is therefore virtually impossible to be completely sure that there has not been a filing under the Community Land Chest Law. Such a check of existing records as we could conduct and inquiries to the staff, however, strongly indicate that there has not been a filing under the law.

I have reviewed briefly the eminent domain provisions in your enclosure and although it seems clear from reading the Code of Civil Procedure Section 1238(21) that Community Land Chest Corporations have the power of eminent domain, it is also evident that specifically granting the power to such corporations and more importantly setting forth how the right of eminent domain is to be specially exercised enhances the clarity of the law.

There has been some consideration given concerning the transfer of regulatory jurisdiction of Land Chest Corporations to the Department of Housing and Community Development. This would seem to be a logical step since the ultimate goal of such law is within the purview of the objectives of the Department of Housing and Community Development, and the work of approving housing projects, fixing rentals and controlling the acts of Land Chest Corporations would seem to be a function more appropriately handled by that department.

If I can be of any further assistance, please let me know.

Very truly yours,



ANTHONY R. PIERNO  
Commissioner of Corporations

ARP:JLK:mcf

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STUDY 36.20(2) - CONDEMNATION (THE RIGHT TO  
TAKE--TENTATIVE STATUTE)

The Commission considered Memorandum 70-51 and the attached tentative statute. The Commission took the following action with respect to the following provisions of the tentative statute (additional sections were considered in connection with separate memoranda and the actions taken with respect to these sections are set out in these Minutes under the particular topic):

(1) Comprehensive Statute Section 300 was tentatively approved in the form set forth in the tentative statute; however, the staff was directed to prepare a Comment to this section that makes clear that it is a constitutional requirement that property may only be condemned for a public use and that, while Section 300 provides a legislative declaration of public use that is entitled to and is accorded great weight, whether a specific use is in fact a "public use," always remains a justiciable issue.

(2) The Comment to subdivision (b) of Section 415 of the Comprehensive Statute was revised to make clear that where a condemnor will provide substitute access in the future that the plan must be specific both as to when and how such access will be furnished.

(3) Education Code Section 23151 was revised to require the resolution of necessity of the Regents of the University of California to conform to the resolution passed by local public entities.

(4) The Comment to Public Utilities Code Section 2729 was revised to make clear that the authority granted by that section is not dependent upon whether a mutual water company is or is not held to be a public utility by exercising such authority.

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(5) The Comment to Streets and Highways Code Section 4120.1 was revised to delete the phrase "to provide access" in the last sentence.

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STUDY 36.21 - CONDEMNATION (THE RIGHT TO TAKE--THE RIGHT  
TO TAKE A FEE OR ANY LESSER INTEREST)

The Commission considered Memorandum 70-61 and the attached exhibits.

The Commission revised Comprehensive Statute Section 303 to provide:

303. Except to the extent limited by statute, any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire any right or interest in property necessary for that use.

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STUDY 36.22 - CONDEMNATION (THE RIGHT TO TAKE--PUBLIC NECESSITY)

The Commission considered Memoranda 70-52 and 70-38 and the research materials attached thereto, and reviewed Sections 310 through 315 of the Comprehensive Statute (Chapter 2, Article I--Limitations on Takings by Local Public Entities, Resolution of Necessity) set forth in Exhibit I to Memorandum 70-52. The Commission continued without change its tentative approval of Sections 310, 312, and 313. The Commission decided that Section 311 should be revised substantially as follows:

311. The resolution of necessity shall expressly set forth all of the following:

- (a) A general description of the proposed project.
- (b) A description of the parcel or parcels of property to be acquired for the proposed project and the relationship of each such parcel to the proposed project.
- (c) A declaration that the legislative body of the local public entity has found and determined that the public interest and necessity require the proposed project.
- (d) A declaration that the legislative body of the local public entity has found and determined that the proposed project is planned or located in the manner which will be most compatible with the greatest public good and the least private injury.
- (e) A declaration that the legislative body of the local public entity has found and determined that the property described in the resolution is necessary for the project.
- (f) The specific statute authorizing the local public entity to exercise the power of eminent domain to acquire such property for such use.

The Commission decided that proposed Sections 314 and 315 relating to a public hearing should be deleted from the tentative statute.

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STUDY 36.23 - CONDEMNATION (THE RIGHT TO TAKE--EXTRATERRITORIAL  
CONDEMNATION)

The Commission considered Memoranda 70-39 and 70-40 and the Research Study attached to Memorandum 70-39. The Commission tentatively approved Section 320 for inclusion in the Comprehensive Statute in the form suggested by the staff in Exhibit I to Memorandum 70-39.

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STUDY 36.30 - CONDEMNATION (THE RIGHT TO TAKE--SUBSTITUTE CONDEMNATION)

The Commission considered Memorandum 70-55 and the attached background materials relating to substitute condemnation. The Commission took the following action with respect to the staff-proposed statutory provisions set forth in Exhibit I to Memorandum 70-55:

(1) Comprehensive Statute Section 410 was tentatively approved as submitted for inclusion in the Tentative Statute.

(2) Subdivision (a) of Comprehensive Statute Section 411 was revised to add a subsection (3) providing substantially as follows:

(3) The person with whom the property is to be exchanged is authorized to exercise the power of eminent domain to acquire such property for such use.

(3) Subdivision (b) of Comprehensive Statute Section 411 was deleted.

(4) Subdivision (c) of Comprehensive Statute Section 411 was tentatively approved as submitted.

(5) Subdivision (a) of Comprehensive Statute Section 412 was revised to provide as follows:

412. (a) A public entity may acquire by eminent domain property to be exchanged if:

(1) The owner of the necessary property has agreed in writing to the exchange and, under the circumstances of the particular case, it is reasonable that he be compensated in whole or in part by the property to be exchanged rather than by money;

(2) The property to be exchanged is to be exchanged for property needed for a public improvement and is adjacent to or in the immediate vicinity of the public improvement or for property which is a portion of a right-of-way; and

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(3) Taking into account the relative hardship to both owners, it is not unjust to the owner of the property to be exchanged that his property be taken so that the owner of the necessary property may be compensated by the property to be exchanged rather than by money.

(6) Subdivision (b) of Comprehensive Statute Section 412 was tentatively approved as submitted.

(7) Comprehensive Statute Section 413 was tentatively approved as submitted.

STUDY 36.40 - CONDEMNATION (THE RIGHT TO TAKE--EXCESS CONDEMNATION)

The Commission considered Memorandum 70-53, the attached background materials, and the Tentative Recommendation (Preliminary Staff Draft dated May 25, 1970) relating to excess condemnation. The Commission took the following action with respect to the statutory proposals contained in the Tentative Recommendation:

- (1) Section 420 was tentatively approved as submitted.
- (2) Subdivision (a) of Section 421 was tentatively approved as submitted.
- (3) Subdivisions (b) and (c) of Section 421 were revised to provide in substance that both the resolution and the complaint exercising the authority granted by this section must specifically refer to this section, and that upon trial of the issue of compensation, no reference shall be made to the fact that the condemnor previously has invoked this section to justify its taking. Otherwise, these subdivisions were tentatively approved as submitted.
- (4) Subdivision (d) of Section 421 was tentatively approved as submitted.
- (5) The staff was directed to add a sentence to subdivision (e) of Section 421 to clarify the meaning of "economically feasible" to ensure that the total cost of a taking including a physical solution would never exceed the total cost of the entire parcel.
- (6) Subdivision (f) of Section 421 was tentatively approved as submitted.

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(7) Section 422 was tentatively approved as submitted.

The staff was directed to revise the Tentative Recommendation according to these directions and return the recommendation for review at the July, 1970, meeting.

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STUDY 36.42 - CONDEMNATION (THE RIGHT TO TAKE--TAKING FOR FUTURE USE)

The Commission considered Memorandum 70-54 and the attached background materials relating to takings for a future use. The Commission took the following action with respect to the staff-proposed statutory provisions set forth in Exhibit I to Memorandum 70-54:

- (1) Comprehensive Statute Section 400 was tentatively approved as submitted for inclusion in the Tentative Statute.
- (2) Subdivision (a) of Comprehensive Statute Section 401 was tentatively approved substantially as submitted for inclusion in the Tentative Statute.
- (3) Subdivision (b) was revised to provide in substance:
  - (b) Where the resolution of a public entity authorizing the taking of property declares that the property taken will be devoted to the use for which it is taken within seven years, it shall be conclusively presumed that there is a reasonable probability that it will be used for such use within a reasonable time.
- (4) Subdivision (c) of Comprehensive Statute Section 401 was tentatively approved as submitted.
- (5) The staff was directed to consider the procedure for raising the future use issue in connection with work on procedural aspects of raising public use issues generally.

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STUDY 36.95 - CONDEMNATION (CONSTITUTIONAL REVISION)

The Commission reviewed Memorandum 70-46 and noted the revisions to Article I, Sections 14 and 14-1/2 suggested by the Constitution Revision Commission.

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STUDY 39 - ATTACHMENT, GARNISHMENT, EXECUTION

The Executive Secretary reported that he had received a letter from the State Bar Committee on Attachments expressing their willingness to cooperate in the review of the Commission study. The Commission directed the Executive Secretary to respond to the letter with an invitation to the State Bar Committee to attend the Commission meetings when the study relating to this topic is received and discussed, to advise the committee that we will forward them background studies and other materials as they are prepared, and to express the Commission's appreciation for their cooperation and assistance.

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STUDY 52.30 - SOVEREIGN IMMUNITY (PLAN OR DESIGN--S.B. 92)

The Commission considered the report of the Executive Secretary concerning the progress of Senate Bill 92. The Commission directed the Executive Secretary to attempt to secure passage of Senate Bill 92 as amended March 19, 1970. If this cannot be accomplished without engendering substantial opposition, the bill should be dropped.

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STUDY 65.40 - INVERSE CONDEMNATION (AIRCRAFT NOISE DAMAGE)

The Commission considered Memorandum 70-56 and the First Supplement to Memorandum 70-19 and heard comments from a number of the observers present. The Commission determined that it should discontinue active consideration of the issues of liability for aircraft noise but should consider the problems of zoning, land assembly techniques, and remedies and procedures generally in inverse condemnation cases as these topics are presented in the course of the overall study of eminent domain/inverse condemnation.

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STUDY 71 - JOINDER OF CAUSES; COUNTERCLAIMS AND CROSS-COMPLAINTS

The Commission considered Memorandum 70-50 and the attached draft and also a revised version of Section 440.70 (set-off) which was handed out at the meeting.

Scope of study

The Commission determined not to request authority to study the subject of pleading generally. Instead, the Commission determined to restrict its study to joinder of causes of action, counterclaims, cross-complaints, and related provisions (such as joinder of parties).

"Cross-complaints" to cover both counterclaims and cross-complaints

The Commission determined that the term cross-complaint should be used to describe what are now known as counterclaims and cross-complaints. Where special provisions are needed to cover any particular problem, the special provision should be made applicable to the particular type of claim involved rather than perpetuating the present dual system or a modification thereof.

Redraft of statute

In redrafting the statute for the next meeting, the staff is to attempt to eliminate the need to include revision of the provisions relating to verification, motions to strike, and summary judgments in the statute. It is recognized that it may be necessary to amend provisions relating to these matters, but the provisions should not be reorganized and generally revised; only the changes necessary to conform the sections to the substantive changes on joinder and cross-complaints should be made.

Definition of "complaint"

Consideration should be given to a general definition that "complaint" includes a "cross-complaint."

Draft statute

The Commission considered the draft statute. It was noted generally that many of the sections are obsolete and do not reflect existing practice, but the Commission decided not to attempt to generally conform the provisions to existing practice. The following actions were taken with respect to the draft statute.

Section 420.10. Approved as drafted.

Section 420.20. Concern was expressed that this section does not recognize the authority of the Judicial Council to adopt rules. The authority of the Judicial Council to prescribe rules should be recognized in the section, but it should be made clear that this recognition of the rules of the Judicial Council in the section is not itself authority for the Judicial Council to adopt rules.

Section 420.30. Rule 7a of the Federal Rules of Civil Procedure should be considered as a format for redrafting this section. The staff is to prepare a redraft of Section 420.30 merely listing the pleadings allowed. Possibly, there is no need for Section 420.30 if other provisions of the statute contain the same information listed in Section 420.30. The staff, if the staff considers it necessary, may prepare an alternative redraft which follows the general format of Section 420.30. However, the Commission took the view that this alternative probably would not be necessary since subdivisions (c) and (d) merely restate material contained in subsequent sections.

The introductory clause to Section 420.30 should read "except as provided by statute."

Section 420.40. This section was approved.

Section 421.10. This section was approved.

Section 421.20. This section was approved. The meaning of the phrase "an appropriate indication of other parties" is to be indicated in the Comment.

Sections 421.30-423.10. These sections are to be omitted.

Section 425.10. This section was approved, but in redrafting the statute consideration should be given to including a general provision that "complaint" includes cross-complaint and any reference to a "counter-claim" in the statute means a "cross-complaint." This same direction applies to subsequent sections.

Section 425.20. This section was approved.

Section 426.10. This section was approved after ", or related series of transactions or occurrences," was inserted following "occurrence" in subdivision (c) of the section. Other sections of the statute should be examined to determine whether this same addition should be made.

Section 426.20. This section was approved.

Section 426.30. This section was approved. It should be noted in the Comment to the section that the expanded rule in Section 426.30 includes some causes that formerly were not included because they were excluded by the "defeat or diminish" requirement (which is eliminated). It should also be noted that the provision applies to a cross-complaint.

Section 426.40. This section was approved. The following suggestions were made for the Comment: The meaning of the phrase "requires for its adjudication the presence of additional parties" was considered unclear; the Comment or statute should refer to the pertinent section or otherwise make clear how this phrase is to be interpreted.

State courts sometimes have concurrent jurisdiction with the federal courts to enforce a particular cause of action. For example, such concurrent jurisdiction exists by express statutory provision in actions under the Federal Employers' Liability Act. Moreover, even though the federal statute does not contain an express grant of concurrent jurisdiction, the general rule is that state courts have concurrent jurisdiction to determine rights and obligations under a federal statute creating a cause of action where nothing appears in the statute to indicate an intent to make federal jurisdiction exclusive. In these cases, where the cause of action created by the federal statute arises out of the same transaction or occurrence, Section 426.30 requires compulsory joinder or a compulsory cross-complaint in the state court proceeding. (As to removal of the case to the federal district court, see 1 Witkin, California Procedure, Jurisdiction § 39.)

In some cases, the federal courts have exclusive jurisdiction of the federal cause of action. In such case, subdivision (b) of Section 426.40, recognizing that the federal cause of action is not permitted to be brought in the state court, provides an exception to the compulsory joinder or compulsory cross-complaint requirement.

Under some circumstances, more complex situations may arise. For example, if the transaction which is the subject of a state court action

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by the plaintiff arises out of the same transaction as a claim which the defendant may have under the state and federal antitrust acts, the defendant must file cross-complaint for his cause of action under the Cartwright Act (Business and Professions Code Section 16700 et seq.) in the proceeding in the state court to avoid waiver of that cause of action under Section 426.30 and must file an action in the federal court under the Sherman Anti-trust Act if he wishes to assert his federal cause of action (since his cause of action under the Sherman Anti-trust Act is one over which the federal courts have exclusive jurisdiction). Thus, in this instance, the state action must be brought as a cross-complaint and the federal action must be brought as an independent action in the federal courts.

Section 426.50. The words "upon application" were substituted for "if he applies" and the section was then approved.

A sentence might be added to the statute to provide that nothing in the section affects the availability of any relief a party might be entitled to obtain under any other provision of law. The Comment should indicate that the section has no effect on the right, if any, a party may have under Code of Civil Procedure Section 473 (relief from judgment taken by mistake, and the like), would not limit right of party to obtain new trial, and the like.

Section 427.10. The substance of this section was approved.

Section 428.10. Section 429.10 should be consolidated with this section. Delete the phrases "alone or with codefendants" and "alone or with coparties." See Section 428.20 which covers this. Perhaps subdivisions (a) and (b) can be combined. The Comment should refer to those

cross-complaints that are compulsory. (Section 428.10 uses "may" and user of statutes should have benefit of a cross-reference to alert him to fact that some cross-complaints are compulsory.)

Section 428.20. The Comment should make clear that the section permits several parties to join as cross-complainants as well as permitting a cross-complainant to assert a cause of action against several parties. In other words, the Comment should indicate the section works both ways as far as joining parties to a cross-complaint.

Section 428.30. This section was approved.

Section 428.40. This section was revised to adopt the following policy: If the cross-complaint involves only persons already parties to the action, it may be in the same document as the answer. Otherwise--that is, if any new parties are involved--the cross-complaint must be a separate document. The word "document" was considered to be a good word to use in the section.

Section 428.50. This section was approved.

Section 428.60. This section was approved.

Section 429.10. This section is to be combined with Section 428.10.

Sections 429.20-429.60. To be combined with article containing Section 428.10 et seq.

Section 429.70. Omitted as unnecessary.

Section 429.80. In subdivision (b), insert the phrase "as a separate document" after "file."

A sentence should be added to subdivision (c) to provide that the special answer shall be served on both the original plaintiff and on the third-party plaintiff.

Sections 430.10-430.30, 435.10, 435.20. These sections were approved.

Section 435.30. In subdivision (a), "answer" is to be inserted; subdivision (c) is to be deleted.

The Comment should mention that the motion to strike is not affected. See Code of Civil Procedure Section 435.

Sections 435.40-435.80, 440.10-440.20. These sections were approved.

Section 440.30. This section was approved but the language used in the existing provision (Section 437) is to be inserted for subdivision (c).

Section 440.40. Section 440.40 was revised to delete "or counter-complaint" at the end of the section, to insert a period, and to add an additional sentence reading in substance: "Any cross-complaint shall be subject to Sections [those sections which prescribe the manner of pleading a cross-complaint]."

Sections 440.50-440.60. These sections were approved.

Section 440.70. This section was revised to read substantially as follows:

440.70. Where cross-demands for money have existed between persons under such circumstances that at any point in time each could have prevailed on his respective claim, and an action is thereafter commenced by one such person, the other person may assert such cross-demand in his answer as a defense of payment, notwithstanding that an independent action asserting his claim would at the time of filing his answer have been barred by the statute of limitations. If the cross-demand would otherwise be barred by the statute of limitations, the relief accorded shall be limited to the value of the relief granted to the other party. Neither person can be deprived of the benefits of this section by the assignment or death of the other. The failure of a person to plead the defense provided by this section in a cross-complaint amounts to a waiver of his cross-demand only to the extent provided by Section 426.30.

Section 445.10. This section should be omitted from the draft but should apply to cross-complaints as well as complaints.

Sections 446.10-446.60. These sections are to be omitted but the provision on summary judgments should be adjusted, if necessary, to reflect the statutory scheme recommended for cross-complaints.

Sections 11 to 14 of Statute Draft. These sections were not considered since they are only conforming changes and whether these changes should be made will depend on the revisions made in the statute in preparing it for the next meeting.

Section 1048.5. This section was approved.

Code of Civil Procedure Section 389. The Commission determined that the substance of Rule 19 of the Federal Rules of Civil Procedure should be substituted for Section 389. The law review articles, cases, and the Grunsky bill should be considered in connection with this provision. In addition, the Commission's recommendation that resulted in the enactment of Section 389 should be considered.

Preliminary portion of recommendation

The Commission should note in its recommendation that there is a need for an overall revision of pleading rules but that the Commission's authorization is limited and that many of the needed revisions are beyond the scope of the Commission's authority.

STUDY 77 - NONPROFIT CORPORATIONS

The Executive Secretary reported that he and Professor Sneed were unable to secure the services of Mr. Gaither as a consultant for the study relating to nonprofit corporations and that no alternate consultant appeared to be immediately available. The Commission determined that further efforts to obtain a consultant for this study should be made as time permits.