

Note: This agenda is the last one, it supersedes the "Revised Final Agenda" previously sent to you.

<u>Time</u>	<u>Place</u>
October 14 - 7:00 p.m. - 10:00 p.m.	State Bar Building
October 15 - 9:00 a.m. - 5:00 p.m.	1230 W. Third Street
October 16 - 9:00 a.m. - 4:00 p.m.	Los Angeles

FINAL AGENDA

for meeting of

**CALIFORNIA LAW REVISION COMMISSION**

Los Angeles

October 14-16, 1965

October 14

1. Approval of Minutes of July 1965 Meeting (sent 7/21/65)
2. Administrative Matters

Report on 1966-67 Budget

Memorandum 65-60 (sent 9/2/65) NOT DISC.

Delegation of Authority Concerning Fiscal and Personnel Matters

First Supplement to Memorandum 65-61 (enclosed)

Memorandum 65-61 (sent 9/2/65)

Memorandum 65-62 (sent 9/2/65)

Commissioner's Compensation

Memorandum 65-65 (sent 9/27/65) ✓

First Supplement to Memorandum 65-65 (sent 10/5/65)

Inverse Condemnation

Memorandum 65-64 (sent 9/17/65) ✓

First Supplement to Memorandum 65-64 (sent 9/27/65)

Research Contract - Eminent Domain ✓

Memorandum 65-66 (sent 10/5/65)

Topics to be Included on Agenda ✓

Memorandum 65-63 (sent 9/8/65)

Future meetings--Suggested dates and places

November 18 (evening), 19, 20 (morning) -- Stanford (Big Game)

December 17 (evening) and 18 (all day) -- San Francisco  
(Cannot be held in South because Board of Governors  
of State Bar will be meeting in South in December)

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

3. Study No. 53(L) - Personal Injury Damages as Separate Property

Memorandum 65-53 (sent 8/5/65)  
Tentative Recommendation (attached to Memorandum)

4. Study No. 63(L) - Vehicle Code Section 17150 and Related Statutes

Memorandum 65-54 (sent 8/5/65)  
Tentative Recommendation (attached to Memorandum)

5. Study No. 55(L) - Additur and Remittitur

Memorandum 65-56 (sent 8/13/65)  
Tentative Recommendation (attached to Memorandum)  
First Supplement to Memorandum 65-56 (sent 9/17/65)

October 15

6. Study No. 65(L) - Evidence Code

Memorandum 65-57 (enclosed)

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

Statutory Provisions (California and Other States)

Contents (enclosed)  
California Constitutional and Statutory Provisions (enclosed)  
Pennsylvania (sent 7/19/65)  
Wisconsin (sent 7/19/65)  
Maryland (sent 7/19/65)  
Kansas (enclosed)  
Proposed New Jersey Statute (sent 9/8/65)  
Proposed Federal Legislation (sent 9/27/65)

The Jury System for Determining Just Compensation

Memorandum 65-50 (sent 10/1/65)  
Research Study (attached to Memorandum)  
First Supplement to Memorandum 65-50 (to be sent)

The Right to Immediate Possession

Memorandum 65-51 (sent 7/21/65)  
Tentative Recommendation (attached to Memorandum)  
1961 Recommendation (attached to Memorandum)  
First Supplement to Memorandum 65-51 (to be sent)

Discovery

Memorandum 65-52 (sent 7/21/65)  
1963 Recommendation (attached to Memorandum)  
First Supplement to Memorandum 65-52 (sent 10/5/65)

The Right to Take

Memorandum 65-44 (sent 7/19/65)  
Research Study (attached to Memorandum)  
First Supplement to Memorandum 65-44 (to be sent)

Just Compensation and Measure of Damages Generally

Memorandum 65-45 (sent 7/19/65)  
Research Studies (attached to Memorandum)  
First Supplement to Memorandum 65-45 (to be sent)

Moving Expenses

Memorandum 65-46 (sent 7/28/65)  
Tentative Recommendation (attached to Memorandum)  
1961 Recommendation and Study (attached to Memorandum)  
First Supplement to Memorandum 65-46 (sent 10/1/65)  
Pamphlet: "Real Property Acquisition in Federal Programs" (sent 5/1/65)

Incidental Business Losses

Memorandum 65-47 (sent 7/28/65)  
Research Study (attached to Memorandum)  
First Supplement to Memorandum 65-47 (to be sent)

Consequential Damages

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

Machinery, Equipment, and Fixtures

Memorandum 65-49 (sent 7/26/65)  
Research Study (attached to Memorandum)  
First Supplement to Memorandum 65-49 (to be sent)

October 16

Continuation of items listed for October 14

Continuation of items listed for October 15

MINUTES OF MEETING

of

OCTOBER 14, 15, AND 16, 1965

Los Angeles

A regular meeting of the California Law Revision Commission was held in Los Angeles on October 14, 15, and 16, 1965.

Present: John R. McDonough, Chairman  
Richard H. Keatinge, Vice Chairman  
Hon. James A. Cobey (October 14 and 15)  
Joseph A. Ball  
James R. Edwards (October 15 and 16)  
Sho Sato  
Thomas E. Stanton

Absent: Hon. Alfred H. Song  
Herman F. Selvin  
George H. Murphy, ex officio

Messrs. John H. DeMouilly and Joseph B. Harvey of the Commission's staff were also present.

Also present on October 15 and 16 were Mr. John McLaurin of the law firm of Hill, Farrer, and Burrill, the Commission's consultant on Eminent Domain, and the following observers:

David M. Ager, Office of County Counsel, Los Angeles (October 15)  
Robert F. Carlson, Department of Public Works  
Thomas H. Clayton, Departments of General Services and Finance  
Richard D. Martland, Department of Water Resources  
John M. Morrison, Office of Attorney General (October 15)  
Willard A. Shank, Office of Attorney General (October 15)  
Terry C. Smith, Office of County Counsel, Los Angeles (October 15)  
Charles E. Spencer, Department of Public Works  
David B. Walker, Office of County Counsel, San Diego

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Future Meetings. The following schedule for future meetings was adopted:

November 18 (evening), 19, and 20 (morning)	-- Stanford
December 17 (evening) and 18	-- San Francisco
January 20 (evening), 21, and 22	-- Los Angeles
February 24 (evening), 25, and 26	-- San Francisco
March	-- No meeting
April 3 (evening), 4 (all day), 5 (morning only), and 6 (morning only)	-- Lake Tahoe

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ADMINISTRATIVE MATTERS

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

Commissioner's Compensation. The Commission discussed the amount of compensation paid to members of the Law Revision Commission. The information contained in Memorandum 65-65 and the First Supplement thereto was reviewed. The general reaction of most of the members of the Commission was that the per diem compensation should be raised from \$20 to \$50 per day if no serious problems would be encountered in obtaining the necessary amendment to our enabling statute to accomplish this increase. Senator Cobey agreed to discuss the matter with Senator McAteer to obtain his views on this matter. No action was taken on the matter pending Senator Cobey's report of his discussion of the matter with Senator McAteer.

Delegation of Authority Concerning Fiscal and Personnel Matters. The Commission considered Memorandum 65-61, the First Supplement to Memorandum 65-61, and Memorandum 65-62. The Commission approved the statement attached to the First Supplement to Memorandum 65-61 after making the following changes:

(1) In Section 7.40, the last sentence was deleted, and the words "compensatory time reports," were inserted after "salary increases" in the remaining portion of Section 7.40.

(2) The following sentence was added to Section 7.60:

It is understood, however, that whenever feasible the Commission or as many of the individual members thereof as is feasible shall be given an opportunity to meet and interview the persons being considered for appointment to a full-time attorney position before an appointment is made.

The complete statement, as approved by the Commission, is set out below.

CHAPTER SEVEN

DELEGATION OF AUTHORITY CONCERNING PERSONNEL AND FISCAL MATTERS

1

PERSONNEL AND FISCAL MATTERS GENERALLY

7.10. Both the Chairman and the Executive Secretary are authorized to sign on behalf of the Commission the necessary documents giving one or more Commissioners and employees authority to sign personnel and financial documents. (As of October 1965, the Chairman, Executive Secretary, and Assistant Executive Secretary, are authorized to sign all such documents; the Associate Counsel and the Administrative Assistant are authorized to sign personnel documents; the Legislative Counsel is authorized to sign all such documents except personnel documents.)

7.20. The Executive Secretary is authorized to determine the particular types of documents that the Assistant Executive Secretary, Associate Counsel, other Commission employees, and the Legislative Counsel will as a matter of practice sign.

2

PERSONNEL MATTERS

7.30. Subject to Section 7.50, the Executive Secretary is authorized to take all actions with respect to appointment, promotions, terminations, leave, merit increases, other salary increases, and the like, for Commission employees other than himself. Any other person authorized to sign personnel documents has similar authority but, except in emergency circumstances, this authority should be exercised only after consulting with the Executive Secretary. It is understood that no such action shall be taken over the objection of the employee involved unless the Chairman or the Commission first indicates its approval of the action proposed to be taken by the Executive Secretary.

7.40. Subject to Section 7.50, the Chairman, and the Vice Chairman in case of the unavailability of the Chairman, is authorized to take all actions with respect to appointment, termination, leave, merit increases, and other salary increases, compensatory time reports, and similar matters for the position of Executive Secretary.

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<sup>1</sup> Minutes, October 1965.

<sup>2</sup> Minutes, October 1965.

7.50. Subject to Section 7.60, appointments, promotions to higher level positions, and involuntary terminations of persons to or from positions as Executive Secretary, Assistant Executive Secretary, and other full-time attorney positions on the Commission staff shall first be approved by the Commission.

7.60. In the case of an appointment of a person to a full-time attorney position (other than Executive Secretary or Assistant Executive Secretary), the approval of the Chairman, or the Vice Chairman in case of the unavailability of the Chairman, shall be obtained before the appointment is made but Commission approval is not necessary. It is understood, however, that whenever feasible the Commission or as many of the individual members thereof as is feasible shall be given an opportunity to meet and interview the persons being considered for appointment to a full-time attorney position before an appointment is made.

3

#### OUT-OF-STATE TRAVELING

7.70. The Chairman, and the Vice Chairman in case of the unavailability of the Chairman, is authorized to approve requests for authorization by the Department of Finance of unbudgeted out-of-state travel by members of the Commission or its staff. (Requests for budgeted out-of-state travel are given blanket approval by the Department of Finance upon submission of the necessary document by the Executive Secretary.)

4

#### RESEARCH CONTRACTS AND LEASES

7.80. The Executive Secretary is authorized to sign on behalf of the Commission all leases and contracts previously approved by the Commission.

7.90. The Executive Secretary is authorized to execute contracts covering equipment maintenance, equipment rental, subscriptions, and the like.<sup>5</sup>

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<sup>3</sup> Minutes, October 1965.

<sup>4</sup> Minutes, July 1964.

<sup>5</sup> Statement of existing practice.

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Ratification of Actions taken by Chairman. The Commission approved the following actions taken by the Chairman:

(1) Across-the-board salary increase for Executive Secretary in the amount determined by the Department of Finance. (Across-the-board salary increases for other positions were automatic and did not require approval.)

(2) Approval of document submitted to Department of Finance to authorize out-of-state travel by Executive Secretary in connection with duties as member of Executive Committee of the National Legislative Conference. The requested trip was a trip to Tampa, Florida, from November 30-December 2, 1965. [We have received the approval of the Department of Finance for this trip.]

Research Contract on Study No. 65(L) - Inverse Condemnation. The Commission considered Memorandum 65-64. A motion was made by Mr. Stanton, seconded by Mr. Keatinge, that an agreement be made with Professor Van Alstyne to prepare a comprehensive research study covering all aspects of inverse condemnation; the agreement is to provide that Professor Van Alstyne will be paid \$5,000 for the study and that he may publish the research study in one or more law review articles after the Commission has given preliminary consideration to the research study and has authorized publication. The publication in a law review is to be made with the understanding that the Law Revision Commission will have the right to reprint the law review article in its report containing its recommendation on this subject.

The first portion of the research study (dealing with the power of the Legislature to enact legislation that would limit the liability that now exists for inverse condemnation) should be in the Commission's hands by September 1, 1966. The remainder of the report should be in the Commission's hands during the early part of 1967.

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The Executive Secretary was directed to execute the agreement on behalf of the Commission.

Response to Inquiry from Assemblyman Carley V. Porter. The Commission considered the First Supplement to Memorandum 65-64 which contained a letter from Carley V. Porter, Chairman of the Assembly Interim Committee on Water, requesting information concerning the nature and scope of the Commission's study on inverse condemnation. The Commission approved the letter (attached to the supplement) that the staff proposed to send to Mr. Porter after making the following changes:

The paragraph at the bottom of the first page of the letter and continuing on the top of the second page was revised to read:

Professor Van Alstyne plans to commence work early in January 1966 on a comprehensive study covering all aspects of inverse condemnation. The Commission hopes to have Professor Van Alstyne's report in its hands early in 1967.

The word "delighted" in the last paragraph of the letter was changed to "pleased."

Research Study on Study No. 36(L) - Condemnation Law and Procedure. The Commission discussed Memorandum 65-66. After some discussion, it was concluded that the staff should prepare the necessary study on "The Right to Take." The Executive Secretary reported that he is attempting to build up a staff of part-time attorneys to provide the necessary assistance to the permanent members of the staff in preparing research studies.

Topics to be Included on or Deleted From the Commission's Agenda. The Commission considered Memorandum 65-63.

The Commission concluded that the topics on taking instructions to the jury room and on revision of the small claims law should be retained on the

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agenda for the time being. At a future time, when the Commission is considering the priority to be given to topics on its agenda, the staff should present its recommendations concerning whether these topics should be dropped from the Commission's agenda.

The Commission noted that it is now working on major studies of condemnation law and procedure and inverse condemnation. These studies will take substantially all of the Commission's time until 1969. The Commission also has been authorized or directed to study other topics which will have to be considered after the major studies mentioned above have been completed. Accordingly, it will not be possible for the Commission to undertake a study of the topic suggested by the Committee on Taxation of the State Bar-- Alternate Valuation Date in California Inheritance Law. The Executive Secretary was directed to so advise the State Bar.

Resolution Recognizing Contribution of Jon Smock. A motion was made and unanimously adopted that the Chairman and the Executive Secretary are to draw up an appropriate resolution recognizing the contribution of Jon Smock to the Commission's work and such resolution is to be inserted in the Minutes of this meeting and a copy is to be presented to Jon Smock. Jon is leaving to accept a position with the Judicial Council. The resolution reads as follows:

RESOLUTION

of

California Law Revision Commission

(Unanimously adopted at the October 1965 Meeting)

WHEREAS, Jon Douglas Smock served as Counsel with the California Law Revision Commission from July 15, 1961, to October 31, 1965; and

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WHEREAS, he discharged the numerous duties and responsibilities of that position with distinction; and

WHEREAS, through his ability as a lawyer he made countless contributions to the analysis and solution of difficult legal problems before the Commission; and

WHEREAS, through his capacity as an administrator he contributed greatly to the efficient dispatch of the Commission's business; and

WHEREAS, through his painstaking work as an editor he was largely responsible for the production and high quality of the Commission's publications;

NOW, THEREFORE, the California Law Revision Commission hereby expresses its appreciation to Jon Douglas Smock for his substantial contribution to the Commission and the State of California, its sincere best wishes for success in his new position, and its tribute to him as a fine lawyer and an exceptionally capable co-worker.

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

THE JURY SYSTEM FOR DETERMINING JUST COMPENSATION

The Commission considered Memorandum 65-50 and the attached research study and also the First Supplement to Memorandum 65-50. After considering the material presented by the staff and the views expressed by persons present, the Commission concluded that the existing California jury system should be retained. The Commission directed the staff to further research and report on the feasibility and desirability of including an optional alternative arbitration provision in the comprehensive statute. Constitutional problems in making such a system applicable to public agencies should be investigated in preparing the report on this subject.

THE RIGHT OF IMMEDIATE POSSESSION

The Commission considered Memorandum 65-51 and the attached tentative recommendation which included a proposed constitutional amendment on the right to immediate possession.

The Department of Public Works expressed the view that the right of immediate possession as it now exists under the constitutional provision should be retained as a constitutional right. In other words, the proposed constitutional amendment should not take away the right given in the Constitution and leave it to legislative action. To delete the right now given in the Constitution might result in the Department of Public Works having to face proposed legislative restrictions on its right to immediate possession at each session of the Legislature.

After considerable discussion, the Commission determined not to submit the proposed constitutional amendment in 1966 when the Legislature will be reluctant to consider additional controversial legislation and would not have the entire legislative package on the right of immediate possession available for examination.

The Commission further concluded that the tentative recommendation on the proposed constitutional amendment should not be distributed until a tentative recommendation containing the tentatively proposed statutory law on the right of immediate possession also is available.

#### PRETRIAL AND DISCOVERY

The Commission considered Memorandum 65-52 and the attached material and the First Supplement to Memorandum 65-52.

The Commission approved distribution of Senate Bill No. 71 of the 1963 legislative session with the proposed letter attached to Memorandum 65-52 (which was slightly revised) to interested persons for comment, together with the Commission's 1963 Recommendation and the statutes and court rules on discovery in eminent domain recently enacted or adopted in other states.

The Commission approved sending the same material to the Judicial Council and, in addition, the material attached to the First Supplement to Memorandum 65-52. The letter of transmittal should state that the Commission wishes comments on whether Senate Bill No. 71 is a needed and a desirable statute and whether any changes are needed in Senate Bill No. 71. In addition, the letter should state that it has been brought to the Commission's attention that pretrial does not appear to be working well in eminent domain cases and

there is a lack of uniformity in the pretrial procedures used in eminent domain in various parts of the state. The Commission has not considered the problems of pretrial because this appears to be an appropriate matter for the Judicial Council to consider since pretrial procedure is now governed by court rules. The Commission would appreciate knowing whether the Judicial Council plans to provide special court rules for eminent domain cases and, if not, whether the Judicial Council would consider it appropriate for the Commission to make recommendations to the Legislature in this area.

THE RIGHT TO TAKE

The Commission considered Memorandum 65-44 and the research study attached to that memorandum. The Commission considered this material for the purpose of obtaining an understanding of the problems involved in this area of the law and did not make any policy decisions concerning these problems. The staff was directed to prepare a research study that will cover the problems identified as well as any other problems that are discovered in this area of the law. The matters that were identified as problems that might be considered under the general topic of right to take are listed below.

PUBLIC USE

Public Use Generally

Analysis of existing statutes and case law

This would include consideration of all pertinent existing statutes (not just those found in the Code of Civil Procedure) and would include specific recommendations for clarifying and substantive changes to eliminate obsolete material and to meet modern conditions.

The analysis might be organized in three parts:

- a. Takings by governmental agencies
- b. Takings by nongovernmental entities for public utility and similar purposes.
- c. Takings by private persons

Consideration should be given to the extent to which property can be purchased, but not condemned, under existing statutes and those public agencies which do not now have the power of eminent domain should be identified.

#### Analysis of form comprehensive statute might take

This would include consideration of whether the comprehensive statute should attempt to enumerate all permitted public uses (as existing statutes now attempt to do) or should instead contain a general authority to take property by eminent domain for any purpose which the particular governmental agency is authorized to engage in. Perhaps, the detailed enumeration of uses in the various codes could be eliminated with the statutes stating only those uses which might otherwise be considered private uses. Perhaps, as a part of the comprehensive scheme, some special district statutes should be amended so that such districts will not have the power of eminent domain.

Consideration should be given to the statutory schemes used in other states in preparing the analysis.

Even if it is determined that it is not necessary or desirable to list all public uses for which governmental agencies may acquire property by eminent domain, consideration should be given to the necessity for indicating in the statutes the uses for which non-governmental entities and private persons may take property by eminent domain.

#### Devoting All or Some of the Property to Another Use

##### Excess condemnation

A discussion of all pertinent statutes and case law, with recommendations for any needed clarifying or substantive changes.

##### Devoting property to another use; acquiring property for future use

A discussion of all pertinent statutes and case law, with recommendations for any needed clarifying or substantive changes. Consideration

should be given to the case where a claim is made that the property will not be devoted to the use that the condemner claims the property will be put.

Consideration should be given to AB 2462, 2882, and 3317 of the 1965 legislative session for possible limitations on devoting property to another use (sale of property no longer needed for first use) and on acquisition of property for a future use.

#### ACQUIRING PROPERTY FOR EXCHANGE, SUBSTITUTION, OR REPLACEMENT

A discussion of all pertinent statutes and case law, with recommendations for any needed clarifying or substantive changes.

#### NECESSITY

##### Analysis of existing statutes and case law

This would include consideration of all **existing** statutes (not just those found in the Code of Civil Procedure).

Analysis might be organized into following parts:

- a. Takings by governmental agencies
  1. Determination of necessity conclusive
  2. Determination of necessity presumptively correct
  3. Necessity must be established by condemner

The analysis should include consideration of the distinction between a taking within the boundaries of the public agency and a taking outside its boundaries.

- b. Takings by nongovernmental agencies for utility and similar purposes
- c. Takings by private persons

Recommendations for comprehensive statute

Can any general principle be established to determine when the question of necessity should be subject to judicial review and, if it is subject to judicial review, when the determination of the condemner should be given the status of a presumption?

What aspects of necessity should be subject to judicial review?

Should necessity in cases involving public utilities be determined by the Public Utilities Commission and be given conclusive effect?

PROCEDURE FOR RAISING ISSUE OF PUBLIC USE OR NECESSITY

Analysis of existing statutory and case law

Consideration of all pertinent statutes and cases, with recommendations for clarifying and substantive changes.

Recommendations for comprehensive statute

Should there be a requirement that an issue of public use or necessity be raised at an early stage in the proceedings and be determined by the court before the question of compensation is determined? Should the right to raise these issues be waived if not raised at an early stage of the proceeding? Consideration should be given to procedures used in other states.

Who should have the burden on public use? Should the burden be on the party opposing the taking by a governmental agency to show that the taking is for a private instead of a public use? Should the burden be on the party opposing the taking by a public utility where a governmental agency (Public Utilities Commission) has determined that the taking is necessary for utility purposes? Should a private person have the burden of showing that the proposed use is a public use and that the property is necessary for that use? What should be the degree of proof required under various circumstances.

Should there be any requirement of a public hearing before a public agency determines to take property? Should a public hearing on necessity be required in those cases where the public entity's determination of necessity is conclusive or presumptively correct?

ESTATES IN LAND SUBJECT TO CONDEMNATION

Analysis of existing statutory and case law

Consideration of CCP Section 1239 and other special statutes and case law, with recommendations for any needed clarifying or substantive changes. Consider law in other states. What interest can or must be taken under existing law and what changes in existing law are needed?

Recommendations for comprehensive statute

Except as otherwise provided by statute, Section 1239 provides that an easement only rather than a fee simple may be taken. Should this general rule be changed so that a governmental agency is permitted to take any interest, including a fee, that it determines is necessary?

Consideration should be given to problems of machinery, equipment, and fixtures, i.e., when should the condemner be required to take them?

Likewise, consideration should be given to requiring that the entire parcel be taken where taking a portion would render the property unsuitable for the purpose for which it is being used. Consideration should be given to conditioning such a requirement on the fact that the taking leaves property unsuitable for its former use as distinguished from the case where the proximity of the proposed improvement creates such unsuitability.

TYPES OF PROPERTY THAT MAY BE CONDEMNED

Consideration of CCP 1239(3), 1240, 1241, and related special statutes and case law, with recommendations for any needed clarifying or substantive changes.

Special consideration should be given to the problem of taking property already devoted to a public use, i.e., the problem of "more necessary public use" and such consideration should include all pertinent statutes and case law.

Consideration should also be given to statutes and case law relating to property exempt from condemnation and special limitations on taking of particular types of property, i.e., requirement that county board of supervisors consent to taking of the property in certain cases.

Include consideration of law of other states.

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OTHER RESTRICTIONS OR LIMITATIONS ON POWER TO CONDEMN

Consideration of such matters as prior approval by county board of supervisors or Public Utility Commission, jurisdictional offer, public hearings prior to determination to acquire property, and the like, to the extent not previously covered.

JUST COMPENSATION AND MEASURE OF DAMAGES GENERALLY

The Commission considered Memorandum 65-45 and the attached research studies. The following policy decisions were made.

General philosophy concerning just compensation. The Executive Secretary suggested that the Commission as a basic principle restrict compensation to those persons who are now entitled to obtain compensation (other than moving expenses or displacement payments which are paid to any occupant whether or not he has an interest which is being condemned) and that compensation for persons now entitled thereto be determined on an indemnity basis. This changes the basic theory of the existing law which is based on what property is being taken or damaged and ignores such additional losses to the owner as moving expenses, incidental business losses, and the like.

During the course of an extended discussion, the Commission directed the staff to prepare a memorandum presenting any recent publications which discuss the extent to which persons should be compensated for detriment or pay for benefit resulting from a public improvement, without regard to whether any property of such persons is actually taken for the public improvement. After consideration of this memorandum, the Commission will be in a better position to determine the general philosophy that it will adopt when resolving problems of just compensation and measure of damages.

Fiscal aspects of Commission's recommendations. It was suggested that at some stage in the development of the Commission's Recommendation to the Legislature, the probable increase or decrease in the costs of property acquisitions should be determined so that this information will be available to the legislative fiscal committees. The staff should keep this problem

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in mind and at an appropriate time prepare a memorandum outlining a method for determining the overall fiscal impact of the proposed comprehensive statute to the extent that this information can be determined.

The Market Value Concept. The Commission determined to accept the market value standard as the basic standard for determining the value of property taken or damaged. This rejected the concept of value to the taker or value to the owner as the basic scheme, but did not reject consideration of additional elements of compensation in addition to market value.

Definition of "market value." The Commission adopted the substance of the following as the definition of market value:

"Market value" is the highest cash price as of the date of valuation which would be agreed to by a willing purchaser and a willing seller, dealing with each other in the open market and with a full knowledge of all the uses and purposes for which the property is reasonably adaptable and available, taking into consideration the matter upon which an opinion as to the value of the property may be based under Article 2 (commencing with Section 810) of Chapter 1 of Division 7 of the Evidence Code. As used in this section, "cash price" means the price in cash to the seller even though the buyer would finance all or part of the purchase of the property through a third person; "cash price" does not mean a price acceptable to the seller where he would take part of the price for the property in the form of a purchase money mortgage or similar security arrangement.

Although the substance of this definition of "cash price" was approved, there was no agreement as to where the "cash price" concept should be stated in the comprehensive statute.

Effect of prior notice of proposed improvement on market value. The Commission adopted the substance of the following provision:

Any change in the market value prior to the date of valuation which was substantially due to the general knowledge that the improvement was likely to be made, other than that due to physical deterioration of the property within the reasonable control of the condemnee, shall be disregarded in determining market value.

Consideration should be given to the meaning of the "physical deterioration of the property within the reasonable control of the condemnee" clause and the idea attempted to be stated in that clause should be more clearly stated, perhaps in a separate section. Perhaps the concept is that the condemnee should suffer any loss due to physical deterioration of the property before the date of valuation caused by his unreasonable failure to make ordinary repairs and maintenance.

It is important that the concept expressed in the above provision be applicable when the value of the property in the before condition is being determined. However, in determining special benefits and severance damages, it may be necessary, of course, to consider the effect of the proposed improvement.

Special benefits. The staff was directed to prepare a draft of a statute based on the theory that special benefits will be offset against the entire award, including the award for the part taken. The Commission adopted this as a general principle to be reflected in the comprehensive statute.

The larger parcel. The Commission approved the substance of the following provision defining what constitutes the larger parcel:

(a) Where all or a part of several contiguous tracts owned by one owner is taken by eminent domain, damages and benefits shall be assessed as if such tracts were one parcel except that any such tract that is devoted to a separate and distinct use from the part taken shall be considered as a separate parcel.

(b) Where all or a part of several non-contiguous tracts owned by one owner which are used together for a unified purpose is taken by eminent domain, damages and benefits shall be assessed as if such tracts were one parcel except that any such tract not in the immediate vicinity of the part taken shall be considered as a separate parcel.

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(c) For the purposes of this section, "owned by one owner" means that one owner owns a possessory interest in real property in each of such tracts, but such possessory interest need not be a fee simple title.

Although the words "and benefits" were not included in the provision approved by the Commission, the discussion at the meeting indicated that the definition of the larger parcel was intended to apply in the assessment of both special benefits and severance damages.

It should be noted that where a leased parking lot is taken, the severance damage to the lessee's other property served by the parking lot is based on the length of the remaining term of the parking lot lease.

#### MOVING EXPENSES

The Commission considered Memorandum 65-46 and the First Supplement thereto. The Commission made the following policy decisions:

(1) The benefits of the existing moving expense statute should be extended to all cases where property is taken for a public use. The dollar limits in the existing statute will be reconsidered if a change is made in the federal law.

(2) Some provisions concerning regulations by condemners to implement the statute should be included. The staff is to draft suggested provisions on this matter for consideration by the Commission.

#### INCIDENTAL BUSINESS LOSSES

The Commission considered Memorandum 65-47 and the attached research studies. The Commission made the following policy decisions:

(1) Business relocation damages generally in accord with the scheme proposed by the Select Subcommittee should be paid on a fixed amount basis in lieu of providing compensation for lost profits, good will, and other incidental business losses. At the staff's suggestion, this compensation is to be in lieu of moving expenses. Good will, lost profits, and the like should not be included as an item of compensation.

(2) The Commission discussed the problem of temporary business interruption or temporary business loss caused by the construction of the public improvement. It was noted that compensation is now given when the construction is carried on in such a manner as to interfere unreasonably with the business. No decision was made on whether any change should be made in existing law.

(3) No special provision is to be included to provide compensation for plans and specifications prepared especially for the improvement of the taken property.

#### MACHINERY, EQUIPMENT, AND FIXTURES

The Commission considered Memorandum 65-49 and the related research study. It approved the substance of the following provision:

(a) The property sought to be condemned includes all improvements of such property that are a part of the realty, including machinery, equipment, and fixtures forming a part of the realty. Machinery, equipment, or fixtures designed for manufacturing, industrial, or commercial purposes and installed for use in a fixed location shall be deemed a part of the realty for the purposes of condemnation, regardless of the method of installation.

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(b) If the condemner does not require for its use machinery, equipment, or fixtures forming part of the realty, it shall so notify the condemnee. The condemnee may within 30 days of such notice elect to remove all or a portion of such machinery, equipment, or fixtures, unless the time be extended by the condemner. If the condemnee so elects, the damages shall be reduced by the market value of the machinery, equipment, and fixtures to be removed as severed from the realty. The condemner may but is not required to pay all or a portion of the cost of moving the machinery, equipment, and fixtures to a new location and the amount so paid shall not be included in the amount of relocation expense to which the condemnee is otherwise entitled to receive.

The Commission approved in principle the following provision:

For the purpose of determining the extent of the taking and the valuation of the tenant's interest in a proceeding for condemnation, no improvement or installation which would otherwise be deemed part of the realty shall be deemed personal property so as to be excluded from the taking solely because of the private right of a tenant, as against the owner of any other interest in the property sought to be condemned, to remove such improvement or installation, unless the tenant exercises his right to remove the same prior to the date when his answer is due, or elects in his answer to exercise such right.

The Commission disapproved a provision from House Bill No. 3012, 1965, which would have required the condemner to take the entire parcel on which a business is being operated where taking a portion would render the remainder unusable by the condemnee for the business purpose for which he has been using the land.

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

The Commission considered Memorandum 65-53 and the tentative recommendation distributed therewith. The following actions were taken:

Section 163.5

The repeal of Section 163.5 was previously approved.

Section 164.5

Section 164.5, which abolishes imputed contributory negligence to the extent that it is based on community property concepts, was previously approved.

Section 164.7

No agreement was reached on the form Section 164.7 should take. Those favoring the draft version of the section indicated that they believed that in most cases the actual recovery will be from a liability insurer and that the proceeds will actually be treated as a family asset. Accordingly, the proceeds should be treated like other family assets--such as the lost earnings which the damages in part represent--and should be community property subject to the injured spouse's control. Those opposing the draft argued that most insurance policies will exclude liability for interspousal torts and that in most cases where there is a tort judgment against one spouse in favor of another the spouses will actually have adverse interests in the recovery; hence, the tortfeasor spouse should not acquire a half-interest in the recovery.

A motion to provide that damages for personal injury recovered by one spouse directly from the other should be separate property, subject to the right of the community to be reimbursed for medical expenses, failed to pass.

A motion was then approved to make damages for personal injury recovered by a married person from a third party community property subject to the control

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of the injured spouse. But no agreement could be reached on whether the principle that personal injury damages should be community property should be extended to interspousal torts.

The staff was asked to report on the practices of insurance companies concerning the exclusion of interspousal torts from liability policies.

The last clause of subdivision (b) is to be reconsidered by the staff and deleted if there is no reason for the limitation expressed.

#### Section 171a

The staff was instructed to rework subdivision (b) to indicate that only a spouse's separate property or the community property subject to the spouse's control may be used to discharge a liability of that spouse for damages.

#### Section 171c

Section 171c was previously approved.

The Commission discussed the use of the word "money" in the section and the problems of interpretation that the word causes. Although the Commission concluded that the word is of uncertain meaning within the context of Section 171c, revision of the section to clarify it would involve a further study that is beyond the Commission's authorization--to study whether personal injury damages of a married person should be separate or community property.

#### Section 184

The staff was asked to consider whether a modification of the section is necessary to take care of the situation where the action is commenced by the third party, the injured spouse cross-complains, and the third party contends that the other spouse caused the injured spouse's injuries in whole or in part.

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STUDY NO. 63(L) -EVIDENCE CODE

The Commission considered Memorandum 65-57. The following actions were taken:

Section 311

The staff was instructed to write to West and Bancroft-Whitney to suggest revision of the lead line to read:

Procedure when foreign or sister-state law cannot be determined.

Section 320

The staff was instructed to write to West and Bancroft-Whitney to suggest the addition of bracketed editorial material to the Comment to clarify the references to "this recommendation" that appear there. The revision would read:

"(added in this recommendation [Chapter 299, statutes of 1965])"

Section 402

The Commission approved an amendment to subdivision (b) that, in substance, would remove the requirement that the preliminary hearing on the admissibility of a confession be held out of the presence of the jury if the defendant so requests and would substitute a requirement that the hearing be held out of the presence of the jury unless the defendant affirmatively waives his right to the out-of-court hearing. Failure to object would not be such a waiver; the defendant's waiver must appear of record.

Section 403

The Commission considered subdivisions (a)(4) and (c) and concluded that no revision in the section itself should be made. The problems are created by the rationalization given for the section in the Comment. Commissioners

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Ball and Keatinge were requested to have lunch with Justice Kaus to discuss Section 403 and Memorandum 65-57. Commissioner McDonough indicated that he would write to Justice Kaus to send the memorandum and indicate that Commissioners Ball and Keatinge would be calling on him. The staff will work with Continuing Education of the Bar to see if the matter can be clarified in its publication on the Evidence Code.

#### Sections 412 and 413

"Subject to Section 414" was added at the beginning of Sections 412 and 413. Section 414 is to be added to the Evidence Code to read:

414. Instructions given and comments made pursuant to Section 412 or 413 are subject to any limitations provided by the Constitution of the United States or the State of California.

Comment. Section 414 recognizes that the Constitution of the United States or the State of California may impose limitations on the types of instructions that may be given and the comments that may be made under Sections 412 and 413. See Griffin v. California, 14 L.Ed.2d 106 (1965) (unconstitutional to permit comment on a criminal defendant's failure or refusal to explain the evidence against him when such failure or refusal is based on the exercise of his constitutional right to refuse to testify against himself).

#### Presumptions

The staff was directed to add a new section to the Evidence Code codifying the doctrine of res ipsa loquitur. The doctrine should be classified as a presumption affecting the burden of producing evidence.

#### Section 776

Subdivision (b) was amended to provide the employer with a right to cross-examine an employee-witness who is called as an adverse witness during employer-employee litigation. The form of the amendment is in substance:

(b) A witness examined by a party under this section may be cross-examined by all other parties to the action in such order as the court directs; but the witness may be examined only as if under redirect examination by:

(1) In the case of a witness who is a party, his own counsel and counsel for a party who is not adverse to the witness.

(2) In the case of a witness who is not a party, counsel for the party with whom the witness is identified and counsel for a party who is not adverse to the party with whom the witness is identified.

This paragraph does not require counsel for the party with whom the witness is identified and counsel for a party who is not adverse to the party with whom the witness is identified to examine the witness as if under redirect examination when the party who called the witness for examination under this section is also a person identified with the same party with whom the witness is identified, or is the personal representative, heir, successor, or assignee of a person identified with the same party with whom the witness is identified.

#### Privileges

The Commission disapproved a suggestion to create a new privilege for adoption workers.

#### Section 1201

This section was amended to read:

1201. A statement within the scope of an exception to the hearsay rule is not inadmissible on the ground that the evidence of such statement is hearsay evidence if ~~the~~ such hearsay evidence ~~of such statement~~ consists of one or more statements each of which meets the requirements of an exception to the hearsay rule.

#### Amendment at 1966 session

The Commission concluded that the foregoing amendments, together with any other needed amendments that are brought to the Commission's attention, should be made at the 1967 general session instead of at the 1966 special session.