

Time

Place

April 3 - 7:00 p.m. - 10:00 p.m.
April 4 - 9:00 a.m. - 5:00 p.m.

California Alumni Center
Lake Tahoe

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Lake Tahoe

April 3 and 4, 1966

April 3

1. Approval of Minutes of February 1966 Meeting (sent 3/7/66)
2. Administrative Matters

Future meetings:

Staff suggests that May meeting be held on May 5, 6, 7 (three full days) in Los Angeles and that June meeting be held on June 9 (evening), 10, and 11 in San Francisco (The time of each meeting is advanced one week. The board room is not available on the dates previously set for the May and June meetings. We have also increased the number of meeting days in May and June. The revised schedule is necessary to accomplish the work that must be completed before July 1, 1966.)

3. Study 51 - Support After Ex Parte Divorce

Memorandum 66-6 (sent 3/7/66)

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

Fictitious Name Statute

Memorandum 66-13 (to be sent)

First Supplement to Memorandum 66-13 (sent 3/14/66)

Alternative Tentative Recommendation (attached to supplement)

Suit in Common Name

Memorandum 66-17 (enclosed)

Revised Research Study (enclosed)

April 4

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

The Right to Possession Prior to Judgment

Memorandum 66-14 (to be sent)
Research Study (you have this study)

6. Study 50 - Rights and Duties Upon Abandonment of Lease *Not discussed*

Memorandum 66-15 (sent 3/21/66)
Revised Tentative Recommendation (attached to Memorandum 66-15)
Memorandum 66-7 (sent for February meeting)
Original Tentative Recommendation (attached to Memorandum 66-7)

7. Study 42 - Good Faith Improvers *Not discussed*

Memorandum 66-16 (sent 3/14/66)
Revised Tentative Recommendation (attached to memorandum)
First Supplement to Memorandum 66-16 (sent 3/14/66)
Alternative statutory provisions (attached to supplement)

MINUTES OF MEETING

of

APRIL 3 AND 4, 1966

Lake Tahoe

A regular meeting of the California Law Revision Commission was held at Lake Tahoe on April 3 and 4, 1966.

Present: Richard H. Keatinge, Chairman ✓
James R. Edwards ✓
John H. McDonough ✓
Herman F. Selvin ✓
Thomas E. Stanton ✓

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

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

Present on April 4 were the following observers:

Richard Allen, Department of Water Resources
Robert F. Carlson, Department of Public Works
Norval Fairman, Department of Public Works
Willard A. Shank, Office of the Attorney General
Charles Spencer, Department of Public Works
David B. Walker, Office of County Counsel, San Diego

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ADMINISTRATIVE MATTERS

Minutes of February 1966 Meeting. The Minutes of the February 1966 Meeting were approved as submitted.

Future Meetings. Future meetings are scheduled as follows:

May 5 (evening), 6, and 7	Los Angeles
June 9 (evening), 10, and 11	San Francisco
July 21, 22, and 23 (three full days)	Long Beach
August 12 and 13 (two full days)	Los Angeles
September 16 (evening), and 17	San Francisco
October 20, 21, and 22 (three full days)	Los Angeles
November 17 (evening), 18, and 19 (morning) (TENTATIVE)	Berkeley
December--not yet scheduled	

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STUDY 36(L) - CONDEMNATION LAW AND PROCEDURE

The Commission considered Memorandum 66-14 (Possession Prior to Final Judgment and Related Problems) and discussed and reviewed in detail the proposed constitutional amendment and draft legislation.

THE CONSTITUTIONAL AMENDMENT

The substance of the constitutional amendment attached to Memorandum 66-14 as Exhibit II was approved. The staff was directed to prepare a tentative recommendation proposing the amendment as revised. At Professor McDonough's suggestion, the staff was directed to prepare an alternative amendment that would clarify existing law without containing an explicit grant of power to the Legislature to provide for immediate possession in condemnations other than those for rights-of-way or lands for reservoir purposes.

Subdivision (a)(Public use--just compensation--court procedure)

Subdivision (a) was approved as revised. It was determined not to change the existing language of the first sentence, even though the proscription against taking for other than public use is stated only by negative implication. The second sentence is to be revised to make clear that the qualifying phrase "as in other cases in a court of record, as shall be prescribed by law" applies to the total procedure for determining compensation, rather than merely to waiver of jury trial.

Subdivision (b)(Immediate possession in right-of-way and reservoir cases)

Subdivision (b) was approved, but no express statement of the Legislature's authority to prescribe limitations on the taking of immediate possession is to be included in the subdivision. It was noted that the

procedures and limitations established by the Legislature in 1961 in right-of-way and reservoir cases have led to no difficulties, and it was the view of the Commission that, as all of the condemnors included in the section are public entities, the Legislature probably has such authority without explicit grant.

Subdivision (c) (Immediate possession in other cases)

The subdivision was rewritten in the interest of clarity. The words "by statute" were eliminated as superfluous. The expression "possession or use" was retained after it was pointed out that the word "use" refers to the exercise of rights incident to the taking of nonpossessory interests.

Subdivision (d) (Requirement of deposit subject to full withdrawal)

Subdivision (d) was approved after it was revised in the interest of clarity. It was pointed out that the subdivision applies both to cases governed by the direct constitutional grant in subdivision (b) and to cases governed by legislation enacted pursuant to subdivision (c). The words "security for return of overpayment" were questioned in their application to cases in which recovery might be warranted by abandonment of the proceedings, rather than by overpayment. It was pointed out that the Commission is not proposing legislation which would (i) absolutely require the condemnor to take immediate possession in any case, or (ii) preclude abandonment even in cases in which immediate possession has been taken. It was further pointed out that existing law does not provide for recoupment of a withdrawn deposit in immediate possession cases subsequently abandoned. The Commission determined to rewrite the phrase simply to permit the Legislature to prescribe the "security" to be furnished on withdrawal and to specify the circumstances warranting recourse to the security.

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Subdivision (e)(Logging and lumbering railroads)

The Commission noted the letter of March 23, 1966, from the Chief Counsel, Public Utilities Commission (attached to Memorandum 66-14 as Exhibit V) indicating that this subdivision is superfluous for stated reasons. The Commission determined to propose omission of the subdivision on the basis that its content is obsolete.

THE PROPOSED LEGISLATION

In General

The Commission considered the draft of legislation attached to Memorandum 66-14 as Exhibit III. In keeping with its previous considerations and determinations, the Commission approved generally the approach of the draft in adding a new Title 7.1 to Chapter 3 of the Code of Civil Procedure to contain three chapters dealing, respectively, with deposit of just compensation, immediate possession, and possession after judgment or pending appeal. The staff was directed to revise the draft in keeping with its determinations as to particular sections, and prepare an appropriate tentative recommendation. Time did not permit consideration of the proposed amendments to Code of Civil Procedure Section 1255(a)(abandonment), Code of Civil Procedure Section 1255(b)(interest), and Code of Civil Procedure Section 1257 (new trial and appeal). The Commission directed that these amendments be included in the recommendation and revised draft, but remain subject to consideration at its next meeting.

Chapter 1 (Deposit of probable just compensation)

The Commission approved the substance of Chapter 1 (commencing with Section 1268.01) including transfer of those provisions dealing with the

Condemnation Deposits Fund to the Government Code. The Commission directed that the redraft incorporate the following changes:

(1) Omit the provisions in Section 1268.01 for separate deposits for each interest in the property. It was pointed out that this provision, in connection with the amendments to Code of Civil Procedure Section 1255(b), were intended to make appropriate the termination of interest on the making of such separate deposits by the condemnor. It was pointed out by the representatives of the public entities that condemnors invariably make a single deposit and that they considered the alternative procedure not feasible. In general, they expressed the view that retention of existing law as to payment of interest on amounts left on deposit by the condemnee would be preferable to making the entitlement to interest turn upon whether the condemnor makes an aggregate deposit or separate deposits for each interest in the property.

(2) Revise Section 1268.01 and related sections to make separate provisions for the condemnor's obtaining an order determining probable just compensation, and for deposit by the condemnor of such probable just compensation to obtain the benefits accruing from deposit. It was pointed out that existing practice involves separate orders determining probable just compensation and authorizing immediate possession after deposit has been made. The revision would clarify and continue this practice.

(3) Revise Section 1268.03, and make related changes to other sections, to require that the condemnor give notice of the making of the deposit, rather than merely making service of such notice a precondition to the termination of interest.

(4) Revise the chapter generally in the interest of clarity and precision, and delete language appropriate only when deposits were made in connection with the obtaining of an order for immediate possession.

Chapter 2 (Possession prior to judgment)

The Commission generally approved the approach and content of Chapter 2 (commencing with Section 1269.01) with the exceptions of Section 1269.05 (notice to occupants) and 1269.06 (deposit on motion of the defendant). The Commission determined to retain the three distinct procedures, set forth in Sections 1269.01, 1269.02, and 1269.03 for the obtaining of possession by the condemnor prior to judgment. The Commission directed that these and related sections be redrafted to further clarify the distinction between the separate procedures and their availability, and to restate the sections in terms of substantive law rather than in the form of motions and orders. Specifically, the Commission directed that the form of order provided in each of the three sections specify the section under which the order was obtained.

After extensive consideration of appeals and writ practice with respect to orders for possession, the Commission directed the staff to re-evaluate the relative merits of writ practice and appeals and to clarify the sections in this respect.

With respect to Section 1269.05, which would require 90 days' written notice to occupants of homes, farms, and businesses, the Commission noted that the requirement was not woven into the procedure for obtaining orders of possession, and that the notice might be given before, as well as after, the commencement of the eminent domain proceedings. However, any such requirement even in this modified form was strongly opposed by the representa-

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tives of the public agencies. The Commission determined to take no action with respect to the proposal at this time, and directed the staff to contact S.F.B.A.R.T. and possibly other agencies concerning Exhibit I to Memorandum 66-14 and other indications of the brevity of notice given to residents.

With respect to Section 1269.06, which would allow a motion to the property owner to compel the condemnor to deposit probable just compensation, the Commission determined to omit the provision at this time and to reconsider the same in a final draft in connection with the position taken with respect to payment of interest and date of valuation. Representatives of the public entities expressed strong opposition to the proposal, principally upon the grounds that withdrawal of the deposit by the condemnor would deny or, at least, complicate exercise of the condemnor's privilege to abandon the proceedings.

Chapter 3 (Possession after judgment)

The Commission considered and approved Chapter 3 (commencing with Section 1270.01) with various minor revisions made in the interest of clarity and precision. It was noted that Code of Civil Procedure Section 1254 has never provided any security for the return of an overpayment made in connection with the taking of possession under that section. The staff was directed to consider the feasibility of requiring a bond or other security for the repayment of any excessive withdrawal. It was also noted that the plaintiff is required to pay into court, in addition to the amount of the verdict, an amount to secure "further damages and costs". The staff was directed to consider the possibility of affording this assurance

to the property owner by way of bond or other security, rather than payment into court.

Code of Civil Procedure Section 1249 (Date of valuation)

The Commission considered the proposed amendments to Code of Civil Procedure Section 1249 and various alternatives. Instead of substituting date of trial for date of issuance of summons as the basic date of valuation, it was determined to provide that the basic date be six months from the issuance of summons. In this compromise proposal, the alternative date (date of trial if the issue is not tried within one year) would be retained. And, the date of trial would be the date of valuation if the cause should be tried within six months of issuance of summons. Subdivision (b) as proposed, in dealing with the date of valuation in the case of continuances of the trial date, was deleted. Subdivision (d) fixing the date of valuation as the date of notice of a deposit of probable just compensation was retained.

With respect to the date of valuation in the event of a new trial, either by reason of a motion therefor or an appeal, the Commission determined that the date of valuation should be the date of the new trial, unless the plaintiff deposits the amount of the award under proposed Section 1270.01. If such a deposit is made within 20 days after the entry of the interlocutory judgment, then the original date of valuation would be retained.

With respect to changes in market value prior to the date of valuation due to general knowledge that the public improvement was to be made, the Commission approved subdivision (f), which requires that such changes be disregarded. The qualification concerning physical deterioration within

the condemnee's control was deleted because it is an unnecessary complication of the basic principle.

Code of Civil Procedure Section 1249.1 (Risk of loss)

The Commission considered and approved the proposed amendment to Code of Civil Procedure Section 1249.1 which would shift the risk of loss to the condemnor whenever any portion of a deposit is withdrawn and the defendant moves from the property. It was noted that the amendment is appropriate in that deposits under this proposal can be made without regard to the obtaining of an order for immediate possession. The Commission further directed the staff to consider the feasibility of adding a further condition that the defendant give the condemnor notice of the vacation of the property.

STUDY 44 - FICTITIOUS NAME STATUTE

The Commission considered Memorandum 66-13A and the First Supplement to Memorandum 66-13. The following actions were taken:

(1) The Fictitious Name Statute should be revised but not repealed. Replies to an informal inquiry undertaken by the staff indicated that in some areas substantial use is made of the fictitious name registers and that there would be widespread opposition to the repeal of the Fictitious Name Statute.

(2) The publication requirement should be eliminated. This requirement serves no purpose that is not served equally as well by the fictitious name registers which the county clerks maintain. Thus, the requirement imposes an unnecessary burden on the small businessman.

(3) A person or partnership who is required to comply with the Fictitious Name Statute should be required to file a fictitious name certificate with the Secretary of State (in addition to the filing which now is required to be made with the county clerk in the county of the registrant's principal place of business). On every change in the membership of such a partnership, a new certificate should be filed with the Secretary of State in addition to the county clerk. This dual filing system would make it easier for persons living outside the county of the registrant's principal place of business to obtain the information included in the certificates and, hence, would afford more widespread protection to the public. The certificates are to be purely informational and their filing will not entitle the registrant to any property right in the name that is registered. The Secretary of State must accept and file all certificates, even if the particular fictitious name is already in use by another person. The staff was directed to obtain the Secretary of State's opinion concerning the appropriate fee to be charged for filing a fictitious name certificate with him.

(4) The existing sanction set forth in Civil Code Section 2468 (which prohibits a person or partnership from maintaining an action on a transaction had in its fictitious name until such time as it has filed a fictitious name certificate) should be eliminated. This sanction does not obtain compliance with the registration statute at a sufficiently early time to afford true protection to the public and does not aid a person in determining whom to serve or sue.

(5) A new sanction should be provided: When a plaintiff brings an action against a person or partnership which has not complied with the Fictitious Name Statute and the plaintiff is successful in his action, he should be entitled to collect, in addition to his other judgment, a penalty of \$100 plus any actual damages to himself which he can prove were a result of the defendant's failure to file a fictitious name certificate as required by the statute. This sanction would also be applicable when a defendant successfully prosecutes a cross-action against a plaintiff who has failed to comply with the filing requirements of the Fictitious Name Statute. The \$100 penalty and other damages could be collected only if the plaintiff won his original suit and a separate suit would not lie to collect the penalty and damages.

(6) Civil Code Section 2468 should be revised, if necessary, to make clear that a person or partnership could comply with the statute and consequently avoid any penalty at any time prior to the commencement of an action or cross-action against it. The Commission also instructed the staff to consider revising Civil Code Section 2466 to make it clear that corporations doing business in a fictitious name are required to comply with the Fictitious Name Statute.

(7) The Commission directed the staff to attempt to determine the reason, if any, for the exception to the statute prescribed in Civil Code Section 2467. The staff was to consider the desirability of expanding this exception to include those partnerships which are domiciled outside the State of California and which are required by Corporations Code Section 15700 to file a certificate with the Secretary of State designating an agent to receive service of process on their behalf.

(8) The amended filing requirements should be applied only prospectively; the effective date of the new statute should be deferred for a sufficient period of time to permit the public to be adequately informed of the new rules. All persons or partnerships who file a new certificate after the effective date of the amended Fictitious Name Statute will be required to make the dual filing. Until January 1, 1970, or some other date sufficiently far in the future to provide a reasonable time in which to comply with the amended statute, all fictitious name certificates which were filed prior to the effective date of the amended Fictitious Name Statute will remain in effect; on that date, these certificates will expire and all persons or partnerships who are required to file who have not complied with the dual filing requirement will be required to file new certificates.

(9) A fictitious name certificate filed in accordance with the amended statute should be valid for only ten years. After ten years the certificates would expire and new certificates would have to be filed with the Secretary of State and the appropriate county clerk. The new certificate which a partnership transacting business in this State is required to file every time there is a change in its membership also would be valid for ten years from

the date of its filing. When a fictitious name certificate expires, including a certificate which was filed prior to the effective date of the amended statute, it may be removed from the registers of the Secretary of State and the appropriate county clerk. The Secretary of State will be required to send to each person and partnership which has filed a certificate with him a notice of expiration directing him to file new certificates. However, the notice of expiration will be directory only and the failure to send such notice will not prolong the validity of a fictitious name certificate beyond its expiration date. This statutory scheme was devised in response to a suggestion from the Los Angeles County Clerk that a procedure be provided that would permit destruction of obsolete certificates.

(10) The fictitious name certificate should include the name of a person authorized to receive the notice of expiration of the certificate and an address to which the notice is to be sent. The Secretary of State should be permitted to designate what additional information should be filed with him and the manner in which it should be filed and kept current so that he could send the notice of expiration.

(11) Civil Code Sections 2470 and 2471 are to be revised to make clear that the Secretary of State and the county clerks are to maintain their fictitious name registers both by listing the fictitious names in alphabetical order and by listing the names of the persons who are named in the fictitious name certificates in alphabetical order. Section 2471 should also be revised to make clear that the certified copies of the entries of the Secretary of State and the county clerks are presumptive evidence of the facts stated in the original certificates rather than being presumptive evidence of the facts stated in the certified copies.

STUDY 51 - SUPPORT AFTER EX PARTE DIVORCE

The Commission considered Memorandum 66-6 and approved the following material to be included in the 1967 Annual Report:

STUDIES TO BE DROPPED FROM CALENDAR OF
TOPICS FOR STUDY

Study Relating to Support After an Ex Parte Divorce

In 1958, the Commission was authorized to make a study to determine whether a former wife, divorced in an action in which the court did not have personal jurisdiction over both parties, should be permitted to maintain an action for support.¹

The Commission requested authority to make this study because the California Supreme Court had held in Dimon v. Dimon,² that a former wife whose marriage had been terminated by an ex parte divorce granted by a Connecticut court could not subsequently maintain an action for support against her former husband in California.³ After the Commission had commenced its study, the California Supreme Court decided in Hudson v. Hudson,⁴ which overruled the Dimon case. The Hudson case held that an ex parte divorce obtained by the husband in another state did not prevent the wife from maintaining an action for support in California. Accordingly, the Commission recommends that this topic be dropped from its calendar of topics.

¹ Cal. Stats. 1957, Res. Ch. 202, p. 4589.

² 40 Cal.2d 516, 254 P.2d 528 (1953)(Traynor, J., dissenting).

³ See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1957 Report at 25 (1957).

⁴ 52 Cal.2d 735, 344 P.2d 295 (1959).

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STUDY 67 - SUIT IN COMMON NAME

Note: The number of this study has been changed from 44 to 67 to reflect the fact that (1) the study has been separated from the Fictitious Name Statute study (which remains Study 44) and (2) the suit in common name study has been expanded by Senate Concurrent Resolution No. 3 of the 1966 Budget Session.

The Commission considered Memorandum 66-17 and the revised research study. The following actions were taken:

(1) The policy of permitting an unincorporated association to be sued in its common name is to be retained.

(2) As a procedural matter, an unincorporated association should be permitted to sue in its common name. The decisions of the California Supreme Court suggest that it is only a matter of time before the courts will extend this procedural convenience to all unincorporated associations. Permitting unincorporated associations to sue in their common names will reduce the associations' costs and inconvenience and will afford them a method by which they will be assured of an opportunity to vindicate their rights.

(3) No provision is to be made requiring an unincorporated association to post security for costs when it brings an action in its common name. The possibility that the other party to an action would be unable to pay a judgment against him for costs is an inherent risk of litigation that should be borne by every litigant regardless of whether he is an individual or an association. The proposal that a costs provision be adopted that would apply solely to foreign unincorporated associations was rejected because of the difficulties involved in determining which unincorporated associations are to be classified as foreign unincorporated associations.

(4) Subdivisions (a) and (b) of Section 388 as set out in the proposed legislation were approved in the following form:

(a) As used in this section, "unincorporated association" means any unincorporated organization of two or more persons engaging in any activity of any nature, whether for profit or not, under a common name.

(b) An unincorporated association may sue and be sued in its common name.

(5) The comment to Section 388 is to include by way of illustration, but not by way of limitation, examples of organizations which would be considered to be "unincorporated associations" under the definition adopted by the Commission.