

Revised April 1, 1968

Time

April 7 - 7:00 p.m. - 10:00 p.m.  
April 8 - 9:00 a.m. - 5:00 p.m.  
April 9 - 9:00 a.m. - 12:00 noon

Place

California Alumni Center  
Near Tahoe City,  
California

AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Lake Tahoe

April 7, 8, and 9, 1968

April 7

1. Approval of Minutes of March 15-16 Meeting (sent 3/21/68)
2. Administrative Matters
3. 1968 Legislative Program  
Report on 1968 Legislative Program (to be distributed at meeting)  
Memorandum 68-45 (sent 3/25/68)
4. Study 50 - Abandonment or Termination of a Lease  
Memorandum 68-38 (sent 3/28/68)
5. Study 55 - Additur  
Memorandum 68-26 (sent 3/27/68)

April 8

6. Study 52 - Sovereign Immunity  
Immunity From Tort Claims by Prisoners  
Memorandum 68-17 (sent 3/21/68)  
Plan or Design Immunity  
Memorandum 68-18 (sent 3/21/68)  
Independent Contractors  
Memorandum 68-28 (sent 3/21/68)

7. Study 65 - Inverse Condemnation

Denial Destruction

Memorandum 68-40 (sent 3/28/68)

Requisitioning in Emergencies

Memorandum 68-41 (sent 3/29/68)

Entry for Survey or Examination

Memorandum 68-42 (to be sent)

Discriminatory Enforcement of Building and Health Codes

Memorandum 68-43 (to be sent)

April 9

8. Study 69 - Powers of Appointment

Memorandum 68-37 (sent 3/28/68)

9. Study 63 - Evidence Code

Evidence Code Section 1224

Memorandum 68-29 (sent 3/5/68)

Law Review Article (and other background materials)  
(attached to Memorandum)

Psychotherapist Privilege

Memorandum 68-44 (enclosed)

Comment on Exercise of Privilege Against Self-Incrimination

Memorandum 68-39 (enclosed)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

APRIL 7, 8, AND 9, 1968

Lake Tahoe

A meeting of the California Law Revision Commission was held at the University of California Alumni Center, Lake Tahoe, on April 7, 8, and 9, 1968.

Present: Sho Sato, Chairman  
Hon. F. James Bear (April 7, 8)  
Thomas E. Stanton, Jr. (April 7, 8)  
Lewis K. Uhler  
William A. Yale  
Richard H. Wolford (April 7, 8)

Absent: Joseph A. Ball, Vice Chairman  
Hon. Alfred H. Song  
Roger Arnebergh  
George H. Murphy, ex officio

Also present were the following members of the Commission's staff:  
John H. DeMouilly, Executive Secretary; Clarence B. Taylor, Assistant Executive Secretary; Gordon E. McClintock, Junior Counsel.

Also present were the following observers:

Robert F. Carlson, State Dept. of Public Works	(April 8)
Willard Shank, Office of State Attorney General	(April 8)
Charles E. Spencer, Jr., State Dept. of Public Works	(April 8)
Gerald J. Thompson, County of Santa Clara	(April 8)

Future Meetings. Future meetings are scheduled as follows:

May 16, 17, 18	Los Angeles
June 20 (evening), 21, 22	San Francisco
July 18 (evening), 19, 20	Los Angeles
August	No meeting

ADMINISTRATIVE MATTERS

Minutes of March Meeting. The Minutes of the meeting held on March 15 and 16, 1968, were approved as presented.

Future Legislative Program. The Commission determined to put in a substantial legislative program only in odd-numbered years.

Western Center on Law and Poverty. The Executive Secretary reported that several letters had been received from the Western Center on Law and Poverty, located at U.S.C. This group requests the Commission to designate a representative to its advisory council. The Executive Secretary is to contact Commissioner Ball and to report Mr. Ball's recommendation to the Commission.

1968 LEGISLATIVE PROGRAM

The Commission considered the 1968 Legislative Program.

Escheat Recommendations

The Commission considered Memorandum 68-45 and the alternative amendments to Senate Bill No. 63 suggested by Southern California Edison Company. The Commission approved the following amendments to the bill:

AMENDMENT NO. 1

On page 4, line 14 of the printed bill as amended in the Senate on February 21, 1968, after "which" insert:  
is of a type that

AMENDMENT NO. 2

On page 4, strike out line 16.

AMENDMENT NO. 3

On page 4, line 17, after "indirectly" insert:  
takes into consideration

Personal Injury Damages Recommendation

The Commission considered an unnumbered memorandum relating to Senate Bills Nos. 19 and 71 with respect to the right of contract creditors of the husband to resort to the wife's personal injury damage recovery. The Commission determined that Section 168 of the Civil Code be amended to read:

168. The earnings of the wife and the community property personal injury damages of the wife are not liable for the debts of the husband; but, except as otherwise provided by law, such earnings and damages shall be liable for the payment of debts, heretofore or hereafter contracted by the husband or wife for the necessities of life furnished to them or either of them while they are living together. As used in this section, "community property personal injury damages" has the meaning given that term by subdivision (c) of Section 146.

The Commission also considered the question raised at the legislative hearing whether the noninjured spouse should be permitted by will to give one-half of the injured spouse's personal injury damage recovery to a third person. Various views were expressed, but the Commission took no action on the problem.

STUDY 50 - LEASES

The Commission considered Memorandum 68-38 and the attached draft statute. The following suggestions were made.

Section 1951

It was suggested that "the amount that the lesser may recover from the lessee is limited to" be substituted for "the lesser may recover the sum of the following."

The second sentence of subdivision (a)(1) was deleted.

It was suggested that subdivision (a)(2) be revised to read: "Any other damages proximately caused by the lessee's breach."

The statute of limitations provision should be incorporated into the appropriate sections of the Code of Civil Procedure dealing with this matter. The phrase "abandonment of the property or termination of the right to possession" was substituted for "breach" in subdivision (c).

It was suggested that the staff consider whether it can be made clearer in the statute that the lesser is limited to the remedies provided in the statute.

It was suggested that the statute make clear that the efforts by the lesser to mitigate the damages not amount to an acceptance of the surrender of the lease unless the lesser clearly manifests such an intent.

The question was raised as to the extent to which covenants not to compete, for example, should be enforceable after the lease is terminated and damages are recovered under Section 1951.

Section 1951.2

It was suggested that this section be revised to eliminate the \$500 or five-year limitation and to substitute a limitation that the lease must provide either that the tenant may sublease or that the lessor must use due diligence to relet when the tenant abandons.

Alternative statutory approaches for next meeting

It was suggested that several alternative approaches to the problem be presented for consideration at the next meeting.

STUDY 52 - SOVEREIGN IMMUNITY

Plan or Design Immunity. The Commission considered Memorandum 68-18 and the attached materials. The Commission discussed alternative solutions to the problem. The following suggestions were made; (1) retain the immunity as is; (2) adopt exceptions to the immunity for special circumstances; (3) adopt the dissent in the Cabell case; (4) develop adequate defenses other than complete immunity so that the public entities would not be unduly burdened but recovery could be had in cases such as the Cabell case. The Commission directed the staff to contact Professor Van Alstyne to determine when his study on plan or design immunity in connection with inverse condemnation will be ready.

Immunity From Tort Claims by Prisoners. The Commission considered Memorandum 68-17 and the attached materials. The Commission made the following determinations:

1. Section 844.6 is to be amended according to the staff suggestion. The suggested language was: "(a) Notwithstanding any other provisions of law, except as provided in Sections 845.4, 845.6 and in subdivisions (b), (c), and (d) of this section, a public entity is not liable for: . . . ."
2. An immunity for wrongful death should not be added to the section.
3. Section 844 is to be amended so that a "prisoner" is defined as a person who has been convicted.

Independent Contractors. The Commission considered Memorandum 68-28 and the attached materials. No motion was made with respect to this matter.

STUDY 55 - ADDITUR

The Commission considered Memorandum 68-26 and the attached materials. The Commission determined that a section be drafted that will provide that additur and remittitur are part of the California law. The Comment is to state that the procedure to be followed will be determined by the court.

STUDY 65 - INVERSE CONDEMNATION

Denial Destruction. The Commission considered Memorandum 68-40. The policy reflected by the suggested statute in the Memorandum was approved, but the statute should be revised to include an exception for the destruction of a building in which the fire originated.

The staff is to investigate the need for the words "or a public employee" in subdivision (a). If those words are retained, the term "in the scope of his employment" should be added. The staff is also to study the application of the suggested statute to the present immunity available to public entities for negligence in fire fighting. In addition, the possible ramifications of the use of the terms "public" and "emergency" in subdivision (a) and the word "ordered" at the end of subdivision (b) are to be investigated.

Requisitioning. The Commission considered Memorandum 68-41 and the attached materials. The Commission determined not to study the extent, manner, and other requisites for requisitioning property. The Commission determined that it will consider the problem of damages for requisitioning of property after it has dealt with the compensation aspect of eminent domain.

The representatives of the public agencies indicated that there is no pressing problem in this area. They commonly requisition in emergency road and flood cases and pay the standard rental rate for the property. If equipment is inadvertently destroyed, the public agencies replace it.

STUDY 65 - INVERSE CONDEMNATION (ENTRY FOR  
SURVEY, EXPLORATION, OR EXAMINATION)

The Commission considered Memorandum 68-42 and the attached materials dealing with the inverse condemnation problem that may arise in connection with statutory authorizations for public officials to enter upon private property to survey, explore, or investigate.

The Commission noted in particular the consultant's recommendation that Code of Civil Procedure Section 1242.5 (which authorizes entry, survey, and exploration for reservoir purposes) be used as a starting point in developing a more generalized provision for compensating property owners who may incur substantial damage from privileged official entries upon their property.

The Commission also discussed the staff's suggestion that it might be most appropriate to (1) amend the Tort Claims Act to recognize liability for "actual damage" whatever the purpose of the official entry; (2) to codify the principle stated in Code of Civil Procedure Section 1242 that any potential condemnor may enter and survey property so long as no substantial damage is done; and (3) to generalize the deposit-and-court-order system now afforded by Code of Civil Procedure Section 1242.5 to make it applicable whatever the character of the condemnor or the purpose of the contemplated acquisition.

The Commission noted at least three objections to either course: (1) it might be undesirable to confer any broader authorization to enter upon private property even though the authorization is accompanied by a deposit, compensation for actual damage, and court authorization in the particular case; (2) the extent and purport of the statutes, other than the entry-and-survey-for-purposes-of-condemnation statutes is unclear; and (3) the

representatives of various public agencies generally express the view that there is no need for a general statute based on Code of Civil Procedure Section 1242.5. The Commission noted in particular that, at the time of the adoption of Section 1242.5 in 1959, various agencies, including the Department of Public Works, declined to be included in the deposit-and-court-order system provided by that section.

The Commission determined that, as a working approach, the staff should (1) revise and codify the longstanding authorization conferred on condemnors to enter and survey provided by Section 1242; (2) codify Section 1242.5 as limited to takings by enumerated agencies and entities "for reservoir purposes" and (3) prepare, for purposes of further consideration, a statute (probably an amendment to the Tort Claims Act) that would recognize liability on the part of any entity or agency for the "actual damage" incident to a privileged entry and exploration, survey, or the like.

STUDY 65 - INVERSE CONDEMNATION (ENFORCEMENT OF  
BUILDING AND SAFETY CODES)

The Commission considered Memorandum 68-43 relating to enforcement of the State Housing Law and local building and safety codes. The Commission noted in particular the consultant's recommendation that the Housing Law be revised to ameliorate the impact upon private property of the enforcement of building and safety codes by cities and counties. The Commission also noted the consultant's discussion of the problem of alleged arbitrary or discriminatory enforcement of building codes to reduce the costs of condemning private property scheduled for acquisition.

The Commission determined to defer detailed consideration of the Housing Law and its enforcement in favor of areas of inverse condemnation law that may permit more direct legislative treatment.

With respect to the problem of discriminatory enforcement as an aid to subsequent acquisition for public use, the Commission discussed the consultant's recommendation that the result or effects of any such enforcement be taken into account in the subsequent condemnation proceeding. The Commission noted that very similar problems exist with respect to zoning, subdivision control, master planning, and possibly other exercises of the police power. The Commission approved the staff's suggestion that the particularized problem of the discriminatory enforcement of building codes be deferred until the Commission has considered the relationship between condemnation proceedings and other exercises of the police power such as zoning, subdivision control, and building regulation. It might then be possible to formulate a general provision that would require the taking into account in the condemnation proceeding of the adverse effects of any of these exercises of the police power.

STUDY 69 - POWERS OF APPOINTMENT

The Commission considered Memorandum 68-37 and Sections 752.32 to 752.81 of the attached Tentative Recommendation. The following actions were taken with regard to the Tentative Recommendation.

Section 752.32. The policy stated in paragraph (4) of Section 752.32 was approved. It was suggested that paragraph (4) be made either into separate section or into a subdivision (b) because it states a rule of law whereas the other paragraphs merely state rules of construction with respect to the donee's intent to exercise the power.

The staff is to clarify the use of the term "by will" in the first line of paragraph (4). In subparagraph (ii), the staff is to determine whether the words "all of the" and "of the kind" are necessary.

Section 752.33. No revisions in this section were suggested.

Section 752.34. The references in subdivision (a) to an "exclusive power" and in subdivision (b) to a "nonexclusive" power are to be deleted and placed in the Comment.

Section 752.35. The staff is to consider whether "illustrative" should be used in subdivision (b).

Section 752.36. The Commission determined that this section should be reworded to read:

752.36. Subject to the limitations under the term of a special power of appointment, the donee of the special power may make any of the types of appointment permissible for the donee of a general power if the persons benefited by the appointment are permissible appointees.

In addition, a reference is to be included in the Comment to the difference between permissible appointments under a general power and a special power with regard to the rule against perpetuities. The staff

is to correlate Section 752.36 with the other sections in the statute dealing with the method or requirements in appointing property under a special power.

Section 752.37. The staff is to study and report on the policy involved in choosing one of the three alternative provisions that could be employed in this section. The alternatives are: (1) that an appointment be totally invalidated if intended to benefit a nonobject; (2) that an appointment be valid to the extent it actually benefits a permissible object of a power, regardless of motive, or (3) that the appointment be invalid to the extent it was motivated by the desire to benefit a non-object even though some of the property passed to a permissible object because of the bad motive. Professor Powell is to be consulted on the policy consideration involved.

Section 752.38. The staff is to contact Professor Powell to determine what the language "more extensive" was intended to cover.

Section 752.39. The Commission deleted the language "before the effective date of the exercise" and substituted "before the appointment becomes effective." In addition, the word "appointor" was changed to "donee."

Section 752.40. Subdivision (a) was revised to read: "Where an imperative power of appointment confers on its donee a right of selection and the donee dies without having exercised the power, the persons designated as permissible appointees shall take equally."

The staff is to investigate whether the words "in whole or in part" should be inserted in subdivision (a). In addition, the staff is to determine how the property should be distributed if half of the property is appointed during the lifetime of the donee of an imperative power

and the other half passes under Section 752.40(a) because the donee failed to exercise the power with respect to the remainder of the property. Should the property already appointed be placed in a hotchpot and considered in dividing the property equally, or should the remaining property be divided equally, thereby giving the initial taker a greater than equal share?

The staff is to investigate the possibility of providing standards for the exercise of the court's discretion under subdivision (b). The Commission was concerned with the meaning of "defectively" in subdivision (b).

The staff is to redraft subdivision (c) for clarity. The staff is to investigate whether the proper exercise of the power by the court should be permissive or mandatory.

Section 752.41. The Commission accepted the staff suggestion that the concept of resulting trust be deleted from the prior version of subdivision (b). No revisions in Section 752.41 were suggested.

Section 752.42. No revisions in Section 752.42 were suggested.

Section 752.51. No revisions in Section 752.51 were suggested.

Section 752.52. No revisions in Section 752.52 were suggested.

Section 752.53. This section is to be redrafted to provide that the creditors of the donee can reach the property either before or after appointment to the same extent that it could be reached if it were his own property.

Section 752.54. It was suggested that the word "donee" be changed to "donor" throughout this section.

Section 752.61. This section is to be redrafted to deal with the application of the rule against perpetuities in the case of a postponed power.

Section 752.62. No revisions in Section 752.62 were suggested. The Comment is to contain an illustration of the operation of the section.

Section 752.71. The staff is to correlate this section to the present California statutory rule that a trust is revocable unless it is expressly made irrevocable.

Section 752.81. The staff is to report the effect of retroactivity on the donor's intent as to each section in which the law is changed by the recommendation.