April 29, 1975

Time

May 8 - 7:00 p.m. - 10:00 p.m.
May 9 - 9:00 a.m. - 4:45 p.m.

Place

State Bar Building
601 McAllister Street
San Francisco 94102

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco — May 8-9, 1975

May 8

1. Minutes of March 13-15, 1975, Meeting (sent 4/11/75)
   Minutes of April 4-5, 1975, Meeting (sent 4/11/75)

2. 1975 Legislative Program

   Memorandum 75-29 (to be handed out at meeting)

3. Study 39.70 - Prejudgment Attachment

1st Supp. 75-31----- Memorandum 75-31 (sent 4/28/75)
Draft of Recommendation (attached to Memorandum)
Memorandum 75-32 (sent 4/28/75)

Bring to meeting:

Selected Legislation Relating to Creditors' Remedies (you have this)

May 9

4. Study 23 - Partition of Real and Personal Property

Special Order of Business at 9:00 a.m.

Memorandum 75-36 (enclosed)
Printed Recommendation (enclosed)
AB 1671 (to be handed out at meeting)

5. Study 36.300 - Eminent Domain (AB 11 and Related Bills)

Special Order of Business at 10:00 a.m.

Memorandum 75-37 (sent 4/15/75)
Memorandum 75-38 (sent 4/18/75)
Memorandum 75-39 (enclosed)
First Supplement to 75-39

Bring to meeting:

Recommendation Proposing the Eminent Domain Law (you have this)
Uniform Eminent Domain Code (you have this)

6. Study 63.50 - Evidence (Admissibility of Copies of Business Records in Evidence)

   Memorandum 75-35 (sent 4/28/75)

7. Study 63.60 - Evidence (Admissibility of Duplicates)

   Memorandum 75-33 (sent 4/28/75)

8. Administrative Matters

   Research Contracts

   Memorandum 75-34 (enclosed)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

MAY 8 AND 9, 1975

San Francisco

A meeting of the California Law Revision Commission was held in San Francisco on May 8 and 9, 1975.

Present: Marc Sandstrom, Chairman, May 8
John N. McLaurin, Vice Chairman
John J. Balluff
John D. Miller
Thomas E. Stanton, Jr.
Howard R. Williams

Absent: Robert S. Stevens, Member of Senate
Alister McAlister, Member of Assembly
George H. Murphy, ex officio

Members of Staff Present:

John H. DeMoully
Stan G. Ulrich
Nathaniel Sterling, May 9
Jo Anne Friedenthal

Commission Consultants Present:

Garrett H. Elmore (partition procedure), May 9
Thomas M. Dankert (condemnation), May 9

The following persons were present as observers on days indicated:

May 8

Eugene B. Bender, Continuing Education of the Bar, Berkeley
Edward P. Hill, Judicial Council, San Francisco
Carl M. Olsen, State Sheriff's Association, San Francisco

May 9

Norval Fairman, Department of Transportation, San Francisco
Edward P. Hill, Judicial Council, San Francisco
Carl M. Olsen, State Sheriff's Association, San Francisco
Roger D. Weisman, Deputy City Attorney, Los Angeles

ADMINISTRATIVE MATTERS

Minutes

The Minutes for the March 13, 14, and 15, 1975, meeting of the Law Revision Commission and the April 4 and 5, 1975, meeting of the Law Revision Commission were approved as submitted.

Change in Meeting Schedule

The Commission rescheduled its June meeting to June 19 (evening) and 20 in Los Angeles.

Research Contracts

The Commission considered Memorandum 75-34. A motion was unanimously adopted that the Executive Secretary be directed to execute on behalf of the Commission an addendum to the existing contract--Agreement 1973-74(6)--with Professor Riesenfeld reducing the compensation from $5,000 to $2,500. This revision is to be made with the consent of Professor Riesenfeld who has indicated that he will be unable to prepare as much written material as he had anticipated when the contract was originally made. He does plan, however, to attend Commission meetings and to provide consultation to the staff between meetings and to prepare various written memoranda as the need arises. The revision reflects the change in the anticipated nature of his duties during the period covered by the contract (May 9, 1974, to June 30, 1976). It was also noted that the revision will free $2,500 which is desperately needed to cover printing expenditures during 1973-74.

Letter to Governor Requesting Action on Replacement of Former Commissioner

The Commission decided that the Chairman should write a letter to the Governor requesting the appointment of a member to succeed Commissioner Gregory who has resigned.

1975 Legislative Program

The Executive Secretary made the following summary report on the 1975 legislative program of the Law Revision Commission.

ENACTED

AB 74 (Ch. 7, Statutes of 1975) - Modification of Contracts--Commercial Code Revision
AB 192 (Ch. 25, Statutes of 1975) - Escheat--Travelers Checks and Money Orders
ACR 17 (Res. Ch. 15, Statutes of 1975) - Authority to study topics

ON THIRD READING--SECOND HOUSE

AB 73 - Good Cause Exception to Physician-Patient Privilege

PASSED FIRST HOUSE

SB 294 - Out-of-Court Views by Judge or Jury - Set for hearing by Assembly Judiciary Committee on May 22
AB 90 - Wage Garnishment Exemptions
(To be set for hearing by Senate Judiciary Committee)
AB 919 - Defers attachment law for one year

SENT TO FLOOR--FIRST HOUSE

SB 607 - Payment of Judgments in Installments
ACR 39 - Authorizes Commission study of marketable title act

APPROVED BY POLICY COMMITTEE--FIRST HOUSE

AB 11 - General Eminent Domain Statute - Rereferred to Assembly Ways and Means Committee
AB 278 - Conforming changes - codified provisions - eminent domain - Rereferred to Assembly Ways and Means Committee

SET FOR HEARING--FIRST HOUSE

AB 124 - Conforming changes - eminent domain - Set for hearing on May 14
AB 125 - Conforming changes - eminent domain - Set for hearing on May 14
AB 126 - Conforming changes - eminent domain - Set for hearing on May 14
AB 127 - Conforming changes - eminent domain - Set for hearing on May 14
AB 128 - Conforming changes - eminent domain - Set for hearing on May 14
AB 129 - Conforming changes - eminent domain - Set for hearing on May 14
AB 130 - Conforming changes - eminent domain - Set for hearing on May 14
AB 131 - Conforming changes - eminent domain - Set for hearing on May 14
AB 266 - State agency condemnation - Set for hearing on May 14
AB 974 - Admissibility of Copies of Business Records in Evidence - Set for hearing on May 22

TO BE SET FOR HEARING JANUARY 1976

AB 1671 - Partition of Real and Personal Property

NOT YET INTRODUCED

Liquidated Damages
Wage Garnishment Procedure

DEAD

AB 75 - Oral Modification of Contracts--General Provisions

STUDY 23 - PARTITION OF REAL AND PERSONAL PROPERTY

The Commission considered oral comments of its consultant, Mr. Elmore, and portions of Memorandum 75-36 relating to partition. The Commission made the following determinations with respect to the matters reviewed at the meeting and determined to continue its review of the partition statute at the June 1975 meeting.

§ 872.210. Persons authorized to commence partition action

The Commission requested the staff to add to the Comment to this section the statement that the section changes existing law to permit partition by community property holders. The Comment might also note that the change implements recent changes in the community property laws to permit equal management and control by husband and wife. The Commission also directed the staff to conduct additional research to determine the possible effect of this section on a declaration of homestead.

§ 872.230. Contents of complaint

The Commission examined the concept of partition as to particular interests in property and the problems involved in sale of particular interests and requested the staff to give some thought to making clear that, in some cases, particular interests may not be sold, but the whole property must be sold.

§ 873.080. Disposition in accordance with law

The Commission determined to amend this section to make it applicable to the partition judgment and not to the action of the referee. In addition, the Commission directed the staff to draft a section to give the court continuing jurisdiction in the action to cure defects in the partition judgment for failure to comply with applicable laws.

STUDY 36.25 - EMINENT DOMAIN (BYROADS AND UTILITY EASEMENTS)

The Commission considered Memorandum 75-37 relating to private condemnation for byroads and utility connections. The Commission requested that the staff prepare for distribution for comment a recommendation to permit such condemnation as provided in Exhibit II to Memorandum 75-37, with the following changes:

(1) A requirement that the governing body of the relevant local public entity first adopt an authorizing resolution should be incorporated. The provision should make clear that there is no liability on the public entity based on the adoption of such an authorizing resolution.

(2) The sentence relating to maintenance of the easement should be deleted.

(3) The sentence providing that the easement taken must afford the most reasonable access was deleted. The staff was instructed to develop another standard, such as least private injury.

(4) The declaration of legislative policy should be deleted.

(5) The following sentence should be added: "The public shall be entitled, as of right, to use and enjoy the easement which is taken."

STUDY 36.300 - EMINENT DOMAIN (AB 11 AND RELATED BILLS)

The Commission considered Memorandum 75-38, Memorandum 75-39, and the First Supplement to Memorandum 75-39, along with a letter from Norval Fairman distributed at the meeting (a copy of which is attached) and an oral report by the staff relating to the Eminent Domain Law. The Commission made the following decisions with regard to AB 11:

§ 1235.140. Litigation expenses

The Commission directed the staff to prepare a memorandum indicating the contexts in which the phrase "litigation expenses" is used with the view to possibly changing the definition to include all expenses incurred by the property owner that are the direct and proximate result of the commencement of an eminent domain proceeding.

§ 1245.310 et seq. Resolution authorizing quasi-public entity to commence eminent domain proceeding

The Commission determined to add the substance of the following article to the Eminent Domain Law in view of the concern of the legislative committees to restrict private condemnation authority:

Article 3. Resolution Authorizing Quasi-Public Entity to Commence Eminent Domain Proceeding

1245.310. As used in this article, "legislative body" means:

(a) The legislative body of the city if the property sought to be taken by the quasi-public entity by eminent domain is located entirely within the boundaries of a city.

(b) The legislative body of the county if the property sought to be taken by the quasi-public entity by eminent domain is not located entirely within the boundaries of a city.

1245.320. As used in this article, "quasi-public entity" means:

(a) An educational institution of collegiate grade not conducted for profit that seeks to take property by eminent domain under Section 30051 of the Education Code.

(b) A nonprofit hospital that seeks to take property by eminent domain under Section 1260 of the Health and Safety Code.

(c) A cemetery authority that seeks to take property by eminent domain under Section 8501 of the Health and Safety Code.

(d) A limited dividend housing corporation that seeks to take property by eminent domain under Section 34874 of the Health and Safety Code.

(e) A land chest corporation that seeks to take property by eminent domain under Section 35167 of the Health and Safety Code.

(f) A mutual water company that seeks to take property by eminent domain under Section 2729 of the Public Utilities Code.

1245.330. A quasi-public entity may not commence an eminent domain proceeding to acquire any property until the legislative body has adopted a resolution that authorizes the quasi-public entity to acquire such property by eminent domain.

1245.340. The resolution required by this article shall contain all of the following:

(a) A general statement of the public use for which the property is to be taken and a reference to the statute that authorizes the quasi-public entity to acquire the property by eminent domain.

(b) A description of the general location and extent of the property to be taken, with sufficient detail for reasonable identification.

(c) A declaration that the legislative body has found and determined each of the following:

(1) The public interest and necessity require the proposed project.

(2) The proposed project is planned or located in the manner that will be most compatible with the greatest good and least private injury.

(3) The property described in the resolution is necessary for the proposed project.

(4) The hardship to the quasi-public entity if the acquisition of the property by eminent domain is not permitted outweighs any hardship to the owners of such property.

1245.350. The legislative body may adopt the resolution required by this article only after the legislative body has held a hearing at which persons whose property is to be acquired by eminent domain have had a reasonable opportunity to appear and be heard.

(b) Notice of the hearing shall be sent by first-class mail to each person whose property is to be acquired by eminent domain if the name and address of the person appears on the last equalized county assessment roll (including the roll of state-assessed property). The notice shall state the time, place, and subject of the hearing and shall be mailed at least 15 days prior to the date of the hearing.

1245.360. The resolution required by this article shall be adopted by a vote of two-thirds of all the members of the legislative body.

1245.370. The legislative body may require that the quasi-public entity pay all the costs reasonably incurred by the legislative body under this article. The legislative body may require that such costs be paid in advance of any action by the legislative body under this article.

1245.380. The requirement of this article is in addition to any other requirements imposed by law. Nothing in this article relieves the quasi-public entity from satisfying the requirements of Section 1240.030 or any other requirements imposed by law.

1245.390. The adoption of a resolution pursuant to this article does not make the city or county liable for any damages caused by the acquisition of the property or by the project for which it is acquired.

§ 1250.410. Pretrial settlement offers

The Commission determined to amend subdivision (b) of this section to read:

(b) If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the offer of the plaintiff was unreasonable and that the demand of the defendant was reasonable viewed in the light of the evidence admitted and the compensation awarded in the proceeding, the costs allowed pursuant to Section 1268.710 shall include the defendant's litigation expenses. In determining the amount of such litigation expenses, the court shall consider any written revised or superseded offers and demands filed and served prior to or during trial.

§ 1265.310. Unexercised options

The Commission determined to delete this section from AB 11 and to add to the Comment to Section 1265.010 the statement that the deletion does not affect existing law requiring compensation for options, citing the recent California Supreme Court case on this point.

STATE OF CALIFORNIA—BUSINESS AND TRANSPORTATION AGENCY RONALD REAGAN, Gover

DEPARTMENT OF TRANSPORTATION
LEGAL DIVISION
369 PINE STREET
SAN FRANCISCO 94104

May 5, 1975

John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California 94305

Re: Proposed Section 1250.410 Settlement Offers

Dear John:

After the last Commission meeting, I discussed with you a possible amendment of proposed section 1250.410 relating to recovery of attorneys' fees on the criteria of settlement offers. The proposed amendment and arguments favoring it are set forth below.

Section 1250.410 would reenact without substantive change the provisions of the present Code of Civil Procedure section 1249.3, which provisions became effective January 1, 1975. Both the provisions of present Code of Civil Procedure section 1249.3 and the proposed section 1250.410 are objectionable in that they, in practice, constitute a "one-way" street". No provision is made for recovery of costs by the condemnor in the event the court were to conclude that the landowners' demand was unreasonable and the condemnor's offer reasonable. These sections are also objectionable in that they lack sufficient standards to guide the trial judge.

A further objection to these sections stems from their failure to contain sufficient standards for fair application to each side of an eminent domain action, taking into consideration the way such cases are actually tried in the courts. If the offer of the plaintiff/condemnor is accepted, then the payment of the offer must be justified on some viable,

legal or appraisal theory. Therefore, it is expected that the offer of the plaintiff/condemnor will in most cases be the same or only a minor precentage above the testimony of value produced by plaintiff/condemnor. The property owner's attorney, however, is under no such constraint in formulating his strategy concerning what his high testimony will be in relation to his offer made pursuant to the provisions of these sections as now constituted.

The value testimony offered by or on behalf of the defendant property owner will, in many cases at least, be substantially above the defendant's demand. Under these circumstances and considering the tendency of juries to "split the difference" in complex caes, the condemning agency is at a distinct disadvantage.

As Code of Civil Procedure section 1249.3 now reads, the judge is permitted to consider only plaintiff's offer and defendant's demand in the light of the compensation awarded in the proceeding. He is not entitled to take into consideratio the testimony which was weighed by the jury in arriving at a determination of just compensation.

We urge that subdivision (b) of the proposed section be amended to read as follows:

> "(b) If the court, on motion of defendant made within 30 days after entry of judgment, finds that the offer of plaintiff was unreasonable and that the demand of defendant was reasonable, viewed in the light of testimony given under Evidence Code section 613(a) and the compensation awarded in the proceeding, the costs allowed pursuant to section 1268.710 shall include the defendant's litigation expenses. In determining the amount of such litigation expenses, the court shall consider any written, revised or superceded offers and demands filed and served prior to or during the trial."

With the suggested amendment and in cases where the difference between the defendant's demand and the defendant's testimony is substantial, a judge could conclude that a verdict in an amount in excess of plaintiff's offer and perhaps even in excess of defendant's demand would not warrant an allowance of costs and litigation expenses.

While this section, even if amended as hereinabove suggested, is still objectionable, it is perhaps the only amendment that can be made short of rewriting the entire section to provide

appropriate standards for guidance of the court in arriving at a determination of whether or not to allow a defendant in a given case his litigation expenses.

Very truly yours,

NORVAL FAIRMAN
Assistant Chief Counsel

NF:la

cc: John Morrison, Deputy Attorney General
Robert F. Carlson, Assistant Chief Counsel

STUDY 39.70 - PREJUDGMENT ATTACHMENT

The Commission considered Memorandum 75-31, the attached staff draft of the Recommendation Relating to Amendments to the Attachment Law, the First Supplement to Memorandum 75-31, and Memorandum 75-32 (attached to which was a copy of the First Supplement to Memorandum 75-27). After reviewing the proposed amendments to the Attachment Law, the Commission reaffirmed its decision to recommend that the effective date of the Attachment Law be delayed for one year. The Commission made the following decisions:

§ 482.080. Turnover order. Paragraph (1) of subdivision (a) should provide for issuance of an order directing the defendant to transfer possession of property sought to be attached to the levying officer only where such property is to be levied upon by seizure. The last sentence of paragraph (2) of subdivision (a) should read substantially as follows:

> An order for the transfer of possession of documentary evidence of title issued pursuant to this paragraph may be enforced by the levying officer at the same time as the property or debt is levied upon or at any time thereafter.

§ 482.100. Postlevy claims of exemption. Subdivision (c) should provide that the exemption provided by Section 487.020(b) may be claimed at the defendant's option either under subdivision (b) of Section 482.100 or as provided in subdivision (c).

§ 483.010. Cases in which an attachment may be issued. The Commission reaffirmed its decision to permit attachment in actions based on a claim for money which is based upon a contract, express or implied, as provided in subdivision (a). The Commission decided not to limit implied contracts to those implied in fact. Hence, attachment would be permited in quasi-contract

actions where the other requirements of Section 483.010 are satisfied. The Comment to subdivision (a) should state that Section 483.010 is amended to permit attachment against a defendant that is not an individual without a showing that the defendant was engaged in a trade, business, or profession in order to avoid the complex problem of deciding if the defendant was so engaged. The Comment should also cite cases that interpret the provision in subdivision (b) that permits the issuance of an attachmenr "where the claim was originally so secured but, without any act of the plaintiff or the person to whom the security was given, such security has become valueless."

§ 484.530. Postlevy right to claim exemption. Subdivision (a) should provide that the defendant may claim exemptions by following the procedure set forth in Section 690.50 except that the defendant shall claim the exemption not later than 30 days after the levying officer serves the notice of attachment.

§ 485.230. Postlevy right to claim exemption. This section should be amended in the same manner as Section 484.530.

§ 486.060. Effect of temporary protective order on deposit accounts. Section 486.060 should apply only to checking accounts in banks. Subdivision (a), which permits the defendant to write checks of not more than $1,000 regardless of the temporary protective order even though the amount remaining on deposit is less than the plaintiff's claim, should be relocated as the last subdivision and should be stated as an exception to the provisions of subdivision (c). Another example should be added to the Comment explaining that the defendant violates the temporary protective order if he has enough in his accounts to pay for his payroll expenses, legal fees, C.O.D. charges, and taxes as well as secure the plaintiff's claim but then writes checks for the

amount in excess of the plaintiff's claim and later writes checks for payroll expenses. Fringe benefits should be added to subdivision (b)(1) since they are part of existing law. Section 538.3(a).

§ 486.070. Persons bound by temporary protective order. Section 486.070 should be amended to provide that the temporary protective order binds only the defendant whether or not any other person has notice of or is served with a copy of the temporary protective order.

§ 487.010. Property subject to attachment. Subdivision (b) should refer to partnerships and other unincorporated associations. Paragraph (2) of subdivision (c) should permit the attachment of money, wherever located (except as provided in paragraph (7)), on the same basis as deposit accounts. Paragraph (7), providing that money on the premises where the trade, business, or profession is conducted is subject to attachment, should be retained without being subject to the $1,000 exemption provided by paragraph (2). Subdivision (d) should be deleted for the reasons stated in the First Supplement to Memorandum 75-31. The Comment to subdivision (c) should say that the account books are not subject to levy; rather it is the account receiveable--the right to payment--which is the property subject to attachment.

§ 488.010. Content of writ of attachment. The Commission approved the addition to subdivision (a) of a provision permitting the court to direct the order of levy on property where its aggregate value clearly exceeds the amount to be secured by the attachment. Subdivision (a) should also be amended to provide that the plaintiff must give the levying officer sufficient information to permit the levying officer to serve notice of attachment. For example, the plaintiff should determine the address of a third person as shown by the

records of the office of the tax assessor in the county where real property is located to the levying officer and send notice of attachment as provided by Section 488.310(c).

Subdivision (b) would read substantially as follows: "Where the defendant's interest in real property is sought to be attached, the writ of attachment shall identify any person, other than the defendant, in whose name the ~~defendant appears to own~~ real property stands upon the records of the county and shall describe the real property in which the defendant has an interest."

§ 488.080. Inventory of property attached. Subdivision (b) should require the levying officer to request the inventory as well as require the third person to give the inventory.

§ 488.350. Levy on motor vehicles and vessels. Subdivision (a) should provide that the Department of Motor Vehicles shall prescribe the form of notice which is filed to levy on motor vehicles or vessels.

§ 488.360. Levy on farm products and inventory. The amendments to subdivision (c) set out in the First Supplement to Memorandum 75-31 which clarify the procedures for levy on farm products and inventory were approved.

§ 488.500. Lien of attachment. The amendment to subdivision (a) set out in the First Supplement to Memorandum 75-31 which provides an exception to the effect of the attachment lien against subsequent transferees of attached property in the case of inventory or farm products levied upon pursuant to subdivision (c) of Section 488.360 was approved.

§ 489.230. Notice of undertaking. Subdivision (b) should be amended as follows:

> (b) A The form for the temporary protective order shall include a statement comparable to the one required by subdivision (a) ~~y the contents of which shall be prescribed by rule adopted by the Judicial Council~~.

§ 490.010. Wrongful attachment. Subdivision (d) should be amended as follows:

(d) The levy of a writ of attachment on property of a person other than the person against whom the writ was issued except that it is not a wrongful attachment if all of the following exist:

~~(1) The property levied on is required by law to be~~ registered or recorded in the name of the owner.

(2) It appeared that, at the time of the levy, the person against whom the writ was issued was such registered or record owner.

~~(3) The plaintiff made the levy in good faith and in reliance on the registered or recorded ownership.~~

ALL IN STRIKEOUT

where the plaintiff acted reasonably and in good faith in causing the levy to be made .

The Comment should say that the amendment provides an objective standard that depends upon the circumstances of the case. Whether a plaintiff acted reasonably and in good faith depends on the facts of the case, such as that the third person's property was located on the defendant's premises, or that the plaintiff relied on registered or recorded ownership or the lack thereof.

STUDY 63.50 - ADMISSIBILITY OF COPIES OF BUSINESS RECORDS

The Commission considered Memorandum 75-35. The Commission determined that, upon passage of the proposed business records statute, the Commission would call to the attention of the Judicial Council the question of whether the California Rules of Court should be amended to provide that the court question the parties at the pretrial or trial setting conference on whether they have complied with the requirements for admission of business records.

STUDY 63.60 - ADMISSIBILITY OF "DUPLICATES" IN EVIDENCE

The Commission considered Memorandum 75-33 and the revised tentative recommendation relating to admissibility of "duplicates" in evidence. The Commission discussed the question of whether the addition of a definition of "duplicate" necessitated the addition of a definition of "original" or "the writing itself" to the Evidence Code. The Commission determined that the addition to the Comment of the following paragraph was adequate to avoid any confusion which might otherwise result.

> Section 1500.5, by use of the term "duplicate," in no way alters existing practice which recognizes that more than one document can be admissibile as the writing itself, such as the case in which the parties to a contract or lease execute sufficient copies in order that each may have one for his files or when carbon copies are involved. See C. McCormick, Evidence § 235 (2d ed. 1972); B. Witkin, California Evidence § 690 (2d ed. 1966); J. Wigmore, Evidence §§ 1233, 1234 (Chadbourn ed. 1972); Recommendation Relating to Admissibility of "Duplicates" in Evidence, 13 Cal. L. Revision Comm'n Reports 0000 (1976). Section 1500.5 goes beyond existing practice to permit admission of "duplicates" where there is no danger that they might be inaccurate and subject to the limitations of subdivision (b).

The Commission discussed the use of the term "genuine question" in subdivision (b)(1). It was pointed out that this term was adopted from the new Federal Rule 1003. The Commission determined that it was beneficial to retain the same words as the new federal rule because federal case law would be an aid to interpretation, and because the Commission found no other phrase which was clearer or more descriptive.

The Commission decided to distribute the recommendation for comment.

APPROVED

_____
Date

_____
Chairman

_____
Executive Secretary

BERNARD CZESLA
CHIEF DEPUTY

OWEN K. KUNS
EDWARD K. PURCELL
RAY H. WHITAKER

KENT L. DECHAMBEAU
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THOMAS D. WHELAN
JIMMIE WING
CHRISTOPHER ZINKLE
DEPUTIES

Sacramento, California
April 16, 1975

Honorable Alister McAlister
Assembly Chamber

Eminent Domain - #8792

Dear Mr. McAlister:

QUESTION

Is Section 1243.4 of the Code of Civil Procedure constitutional and operative?

OPINION

Section 1243.4 of the Code of Civil Procedure is constitutional and operative.

ANALYSIS

Section 1243.4 of the Code of Civil Procedure contains statutory authorization for designated public entities to take immediate possession and use of any right-of-way or lands to be used for reservoir purposes in an eminent domain proceeding. Prior to its repeal at the 1974 general election, former Section 14 of Article I of the California Constitution, relating to eminent domain, contained substantially the same enabling provisions. At the same time that former Section 14 was repealed, a new Section 19 was added to Article I of the California Constitution, which presently contains the constitutional provisions relating to eminent domain. Section 19, insofar as it relates to the taking of immediate possession,

provides that the Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings on deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation. Thus, since the California Constitution no longer contains self-executing provisions providing for immediate possession, and the applicable constitutional language now authorizes the Legislature to provide by statute for such immediate possession, and since Section 1243.4 of the Code of Civil Procedure was enacted in 1961 (Ch. 1613, Stats. 1961) and prior to the constitutional revision, the question has arisen as to whether Section 1243.4 of the Code of Civil Procedure presently satisfies the provisions of Section 19 of Article I of the California Constitution as it now reads.

We have determined that it does.

Prior to its repeal in 1974, former Section 14 of Article I, insofar as it dealt with immediate possession, provided as follows:

> ". . . [I]n any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, the aforesaid State or municipality or county or public corporation or district aforesaid may take immediate possession and use of any right of way or lands to be used for reservoir purposes, required for a public use whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposited as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law."

Until the enactment of statutes implementing that provision (see Miro v. Superior Court (1970), 5 Cal. App. 3d 87, 93), it was self-executing (Young v. Superior Court (1932), 216 Cal. 512, 517; Fletcher v. District Court of Appeal (1923), 191 Cal. 711, 713-14; see Miro v. Superior Court, supra, at 93, n. 2). The first implementing statutes were enacted in 1957 (see Chs. 1508, 1851, and 2022, Stats. 1957). These statutes were revised when Section 1243.4 was added to the Code of Civil Procedure in 1961 (Ch. 1613, Stats. 1961). The 1961 revision was for the purpose of more adequately protecting the rights of persons whose property is taken (Vol. 3 Reports, Recommendations and Studies, California Law Revision Commission (1961) B-5). Thus, even though the former constitutional provision under consideration was self-executing, the Legislature implemented it by statute. "Although a constitutional provision may be self-executing, the Legislature may enact legislation to facilitate the exercise of ... [constitutional] powers ... ." (People v. Western Air Lines, Inc. (1954), 42 Cal. 2d 621, 637). The implementing statutes in question, including Section 1243.4, were expressly held to be operative prior to the 1974 general election (Miro v. Superior Court, supra, at 93).

At that election former Section 14 was repealed, and Section 19 was added to read, in pertinent part, as follows:

> " ... The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation."

Since Section 1243.4 was operative prior to the 1974 constitutional revision, the issue remaining is whether it was repealed by that revision.

It was not.

Initially, we point out that since, as we have noted, Section 1243.4 of the Code of Civil Procedure was valid and operative prior to the 1974 constitutional amendments, we are not confronted with a situation involving an impermissible validation by subsequent constitutional authorization of a previously void statute (see Porto Rico Brokerage Co. v. United States (1934), 71 F. 2d 469, 472).

With respect to rules relating to the repeal of pre-existing statutes by subsequent constitutional enactment, the leading California case is Penziner v. West American Finance Co. (1937), 10 Cal. 2d 160, which involved the effect of the adoption of a constitutional provision prohibiting usury upon preexisting statutory usury laws. The California Supreme Court held in that case that the constitutional amendment did not repeal the usury laws to the extent such laws were not repugnant to and inconsistent with the newly adopted constitutional provision, and to the extent the statutes and the constitution were capable of concurrent operation.

In that case, since the constitutional provision, unlike that in the case at hand, contained a provision expressly repealing laws in conflict therewith, it was urged that the constitutional amendment both expressly and impliedly repealed the usury laws. The court rejected the contention with the following language:

> "In so far as the provisions of the usury law and the constitutional provision are similar, or substantially so, it is obvious that they are not in conflict, and it is further clear that the repealing clause of the amendment did not expressly repeal the similar provisions of the usury law, inasmuch as that clause only supersedes laws 'in conflict therewith'. It is not at all unusual to find both a statutory provision and a constitutional provision identical in their operation, and in such event both are considered as the source of the right conferred or penalty imposed. In Kaysser v. McNaughton, 6 Cal. (2d) 248 [57 Pac. (2d) 927], an almost identical problem to the one here under discussion was presented. That case involved the question as to the effective repeal date of the stockholders' liability. This liability was first imposed by statute. Later, a substantially similar provision was inserted in the Constitution. While both were in existence, the court held the liability was imposed by both the statute and the Constitution. At a still later date the constitutional provision was repealed. It was held that the statutory provision still remained and served to impose the liability until the statute was itself repealed." (Id. at 173-74.)

". . . It must be presumed that the [L]egislature in proposing and the electorate in adopting the constitutional amendment acted with full knowledge of the existence of the prior statute relating to the same general subject." (Id. at 174.)

"The arguments based on implied repeal and appeal by revision are equally without merit.

* * *"

"The presumption is against repeals by implication, especially where the prior act has been generally understood and acted upon. To overcome the presumption the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together." (Id. at 175-76.)

In our opinion the Penziner case is controlling in the instant situation, and pursuant to the rules stated therein and the authorities cited above Section 1243.4 of the Code of Civil Procedure is both constitutional and operative.

Very truly yours,

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